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THE FIFTY YEARS' DIGEST 1901-1950

(Civil, Criminal & Revenue)

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BY
D. V. CHITALEY & N. RAMARATNAM

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BOMBAY ABKARI ACT TO C. P. CODE, S. 48

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PREFACE

No apology is needed for the publication of this Digest, which is a consolidated one covering the half century from 1901 to 1950. It will be easily appreciated that the bulk of our current case-law is contained in the decisions of this period. It is not necessary to expatiate at length on the virtues of consolidation, as otherwise, one will have to refer to a large number of publications for the same point.

On the importance of case-law, the late Sir William Holdsworth wrote: "Codes are lifeless things compared with the living law evoked by the decision of cases which turn upon the actual happenings in the lives of human beings; and each individual case, which lays down living law based upon these actual happenings, can only cover a very small fraction of the field of law."

In the Preface to the Corpus Juris (American), the following passage occurs: "Often the particular application or illustration stated will precisely fit the state of facts in his (the lawyer's) own case, and the argument of reason and logic may be fortified by pointing out that in prior litigated cases the rule has been applied in the manner contended for. No lawyer is content to depend alone upon his own reason and knowledge. Few have the presumption to assume that they would, unaided by the experience of the past, present all arguments that could be made in any case as to the application of a general rule. Precedents are valuable the same as experience is valuable. Reported decisions are valuable the same as history and science are valuable. . . . There is more wisdom in the many than in the few. Lawyers should get wisdom from all sources, and in preparing a brief in an important case, should not stop until they find every case that has been decided upon the subject in question. (The Value of Precedents by J. W. McLoud in 28 Am. Law Rev. 218)."

It can be seen from the above quotations how superficial is the oft-heard criticism against the growth of case-law in our country.

The enormous growth of case-law makes a Digest an indispensable publication for the legal profession. No doubt, we have now got in the field excellent commentaries and text books in which the decisions bearing on the respective subjects are exhaustively dealt with. But in our opinion, Commentaries and Digests are complementary to each other, and neither can dispense with the other.

In the first place, commentaries dealing exhaustively with the case-law bearing on the respective subjects do not cover the entire field of law. In the next place, the point of view and the mode of treatment and dealing with the case-law in a Digest and a Commentary are entirely different. The approach, in each case, is, as it were, from opposite ends. Each system has its own special usefulness to the lawyer. If a lawyer is on the hunt for a parallel precedent, for a case on all fours, he naturally turns to a Digest. If he wants to study the principles bearing on a point, he first thinks of a Commentary or a text book. However exhaustive a

Commentary may be, in point of case-law, the emphasis is more on the underlying principles than on the facts and features of each case which are available only in a Digest. Though a Commentary may give a more correct insight into the legal position and the over-all state of case-law on any question, a Digest has to be resorted to for picking out the particular case which comes closest to the matter on hand.

Further, it has to be remembered that in a Commentary, the case-law is seen *as interpreted* by the Author. In a Digest, the reader has, as it were, a direct access to the case-law and he may bring to bear upon his study of the case-law his own point of view and may thereby be enabled to draw a conclusion which not only did not occur to the Author but was contrary to the Author's conclusion. In any case, a Digest will enable the reader to test the correctness of the conclusions set forth in the commentaries, before he proceeds to study the actual reports after he has selected the decisions for study by the above process.

As regards the special features of the present publication, the first point to be mentioned is that it is a Digest of full head-notes and not merely of short, truncated statements of the law. Separate points decided by a case are digested separately and are not jumbled up together in the same note.

Where the decisions bear upon statutory provisions they have been digested under the appropriate statutory headings. But care has been taken to give topical headings also in proper places with cross-references to the respective statutory headings.

Where the number of cases under a section or heading is very large, they are sub-divided into sub-headings. In such cases a synopsis of the headings and sub-headings also is given.

Where a decision overrules or reverses a previous ruling, this is noted under the decision.

Other features are like those of the well-known Digests published by the Madras Law Journal Office and All India Reporter hitherto, with which the Bar and Bench are already familiar and which they appreciate so much.

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UNIVERSITY OF KASHMIR
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ABBREVIATIONS.

REPORTS.

A.I.R. 1914 All., Bom., etc. .. All India Reporter, Allahabad, Bombay, etc., sections of the respective years.

A. M. L. J. .. Ajmer-Merwara Law Journal.

Agra H. C. R. .. Agra High Court Reports.

All. or I. L. R. All. .. Indian Law Reports, Allahabad Series.

All. L. Jour. .. Allahabad Law Journal.

All. W. N. .. Allahabad Weekly Notes.

All. W. R. .. Allahabad Weekly Reporter.

I. L. R. Assam .. Indian Law Reports, Assam Series.

B. R. .. Bihar Reports.

Beng. L. R. .. Bengal Law Reports.

B. L. J. R. or Bihar L. J. R. .. Bihar Law Journal Reports.

Bom. or I. L. R. Bom. .. Indian Law Reports, Bombay Series.

Bom. H. C. R. .. Bombay High Court Reports.

Bom. L. R. .. Bombay Law Reporter.

Bom. P. J. .. Bombay Printed Judgments.

Bur. L. Jour. .. Burma Law Journal.

Bur. L. R. .. Burma Law Reports.

Bur. L. Tim. .. Burma Law Times.

Cal. or I. L. R. Cal. .. Indian Law Reports, Calcutta Series.

Cal. L. Jour. .. Calcutta Law Journal.

Cal. L. R. .. Calcutta Law Reports.

Cal. W. N. .. Calcutta Weekly Notes.

Cal. W. N. (D. R.) .. Calcutta Weekly Notes (Dacca Reports).

C. P. L. R. .. Central Provinces Law Reports.

Cr. App. Rep. .. Cohen's Criminal Appeal Reports.

Cr. or Cri. L. Jour. .. Criminal Law Journal.

I. L. R. Cut. .. Indian Law Reports, Cuttack Series.

Cut. L. T. .. Cuttack Law Times.

E. P. .. East Punjab.

I. L. R. E. P. or East Pun. .. Indian Law Reports, East Punjab Series.

F. C. R. .. Federal Court Reports.

F. L. J. .. Federal Law Journal.

I. L. R. Hyd. .. Indian Law Reports, Hyderabad Series.

Ind. App. .. Law Reports, Indian Appeals.

Ind. Cas. .. Indian Cases.

I. R. or Rul. .. Indian Rulings or Ruling.

I. T. R. .. Income Tax Reports.

J. & K. .. Jammu & Kashmir.

J. & K. L. R. .. Jammmu & Kashmir Law Reports.

J. L. R. or Jaipur L. R. .. Jaipur Law Reports.

I. L. R. Kar. .. Indian Law Reports, Karachi Series.

K. B. .. (Law Reports) King's Bench Division.

(L. J.) K. B. .. Law Journal Reports, King's Bench.

K. L. T. or Ker. L.T. .. Kerala Law Times.

I. L. R. Lah. .. Indian Law Reports, Lahore Series.

Lah. L. Jour. .. Lahore Law Journal.

Lah. L. Tim. .. Lahore Law Times.

L. R. All. .. Law Reporter, Allahabad.

Low. Bur. Rul. .. Lower Burma Rulings.

Luck. or I. L. R. Luck. .. Indian Law Reports, Lucknow Series.

Madh. B. or M. B. .. Madhya Bharat.

I. L. R. Madh. B. .. Indian Law Reports, Madhya Bharat Series.

Madh. B. L. J. .. Madhya Bharat Law Journal.

Madh. B. L. R. .. Madhya Bharat Law Reporter.

Mad. or I. L. R. Mad. .. Indian Law Reports, Madras Series.

Mad. H. C. R. .. Madras High Court Reports.

Mad. L. Jour. .. Madras Law Journal.

Mad. L. Tim. .. Madras Law Times.

Mad. L. W. .. Madras Law Weekly.

Mad. W. N. .. Madras Weekly Notes.

M. L. R. or Marwar L. R. .. Marwar Law Reporter.
Moo. Ind. App. .. Moore's Indian Appeals.
Moo. P. C. C. .. Moore's Privy Council Cases.
Mys. .. Mysore.
I. L. R. Mys. .. Indian Law Reports, Mysore Series.
Mys. H. C. R. .. Mysore High Court Reports.
Mys. L. J. .. Mysore Law Journal.
I. L. R. Nag. .. Indian Law Reports, Nagpur Series.
Nag. L. Jour. .. Nagpur Law Journal.
Nag. L. R. .. Nagpur Law Reports.
N.-W. P. H. C. R. .. North-West Provinces High Court Reports.
Oudh Cas. .. Oudh Cases.
Oudh L. Jour. .. Oudh Law Journal.
Oudh L. R. .. Oudh Law Reports.
Oudh S. C. .. Oudh Select Cases.
Oudh W. N. .. Oudh Weekly Notes.
Pak. Cas. .. Pakistan Cases.
Pak. L. R., Lahore .. Pakistan Law Reports, Lahore.
Pat. or I. L. R. Pat. .. Indian Law Reports, Patna Series.
Pat L. Jour. .. Patna Law Journal.
Pat. L. Tim. .. Patna Law Times.
Pat. L. W. .. Patna Law Weekly.
Pat. W. N. .. Patna Weekly Notes.
I. L. R. Patiala .. Indian Law Reports, Patiala Series.
Pepsu L. R. .. Pepsu Law Reports.
I. L. R. Punj. .. Indian Law Reports, Punjab Series.
Pun. L. R. .. Punjab Law Reporter.
Pun. Re. .. Punjab Records.
Pun. W. R. .. Punjab Weekly Reporter.
I. L. R. Raj. .. Indian Law Reports, Rajasthan Series.
R. L. W. or Raj. L. W. .. The Rajasthan Law Weekly.
Rang. or I. L. R. Rang. .. Indian Law Reports Rangoon Series.
Rang. L. R. .. Rangoon Law Reports.
Rat. or Rat. Un. Cr. C. .. Ratanal's Unreported Criminal Cases.
R. D. .. Revenue Decisions.
Sau. .. Saurashtra.
Sau. L. R. .. Saurashtra Law Reporter.
Sind L. R. .. Sind Law Reporter.
S. C. J. .. Supreme Court Journal.
S. C. R. .. Supreme Court Reports.
Suth. W. R. .. Sutherland's Weekly Reporter.
I. L. R. Trav. Co. or T. C. .. Indian Law Reports, Travancore-Cochin Series.
T. C. L. R. or Trav. Co. L. R. .. Travancore-Cochin Law Reports.
T. L. J. or Trav. L. J. .. Travancore Law Journal.
U. P. L. R. .. United Provinces Law Reports.
Upp. Bur. Rul. .. Upper Burma Rulings.
Vind. Pra. or V. P. .. Vindhya Pradesh.
Weir. .. Weir's Criminal Rulings.

Other Abbreviations.

A.C.	..	Appellate Jurisdiction, Civil.
A. Cr.	..	Appellate Jurisdiction, Criminal.
App.	..	Appendix or Appeal.
Appr.	..	Approved.
Art.	..	Article.
B. R.	..	Board of Revenue.
C. A.	..	Court of Appeal.
Civ.	..	Civil.
Cl.	..	Clause.
Cons.	..	Considered.
Cr.	..	Criminal.
Diss.	..	Dissented.
Dist.	..	Distinguished.
D. B.	..	Division Bench.
Expl.	..	Explained.
F. A.	..	First Appeal.
F. B.	..	Full Bench.
F. C.	..	Federal Court.
Foll.	..	Followed.
Illu.	..	Illustrations.
Jour.	..	Journal.
L. P.	..	Letters Patent.
N.	..	Note.
No.	..	Number.
O.	..	Order.
O.C.	..	Original Jurisdiction, Civil
O. Cr.	..	Original Jurisdiction, Criminal.
Over.	..	Overruled.
P.	..	Page.
Pr.	..	Para.
Pt.	..	Point.
P. C.	..	Privy Council.
Pre.	..	Preamble.
R.	..	Rule.
Ref.	..	Referred or Reference.
Rel. on.	..	Relied on.
Rev.	..	Revenue.
S.	..	Section.
S. A.	..	Second Appeal.
S. B.	..	Special Bench.
S. C.	..	Supreme Court.
S. N.	..	Short Notes of cases.
V.	..	Volume Number.

THE FIFTY YEARS' DIGEST

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BOMBAY ABKARI ACT (V OF 1878).

——Object of Act.

The object of the Act in insisting upon the application for a licence was to ensure the payment of duties, and was not for any other purpose. Such licences are to be granted in accordance with the rules to enable the duties imposed to be levied. A.I.R. (Vol. 29) 1942 Bom. 1=43 Bom. L.R. 896=I.L.R. (1942) Bom. 259=198 Ind. Cas. 849.

——Abkari Officer investigating offence against the Act is a Police Officer within S. 25 of the Evidence Act. A.I.R. (Vol. 25) 1938 Sind 1=39 Cr.L.J. 239=32 S.L.R. 185=172 Ind. Cas. 968 (F.B.).

[Overrules—

(1) A.I.R. (Vol. 12) 1925 Sind 70=82 Ind. Cas. 151.
(2) A.I.R. (Vol. 14) 1927 Sind 112=99 Ind. Cas. 594.]

——There is no provision in the Act empowering Police Officers to effect searches or arrests or to send up cases for trial for offences falling under this Act and no such powers can be presumed. A.I.R. (Vol. 20) 1933 Sind 325=1933 Cr. Cas. 1077=35 Cr.L.J. 129=146 Ind. Cas. 419 (F.B.).

——Preamble.

Courts cannot read into the Bombay Abkari Act the purpose of the Legislature to permit the Executive Government for the time being to abolish altogether the possession of intoxicants. A.I.R. (Vol. 28) 1941 Sind 221=I.L.R. (1941) Kar. 431=43 Cr.L.J. 468=199 Ind. Cas. 101.

——Ss. 3 (9), 62—Intoxicating drug—Medicated article—Cocaine.

Cocaine does not fall within the term "medicated article" as used in S. 62 of the Bombay Abkari Act, 1879. It is a medicine **per se** and the term 'medicated article' applies to something which is manufactured and by that manufacture is imbued with certain medicinal properties. The word "intoxicating" as used in S. 3 (9) cannot be confined to its derivative meaning, namely, "poisonous," but must be taken in its popular sense. The term "intoxicating drug" used in the section includes cocaine. (1903) 27 Bom. 551=5 Bom. L. R. 498.

——Ss. 3 (10), 9, 43—'Import': meaning of—Sea Customs Act (VIII of 1878), S. 19.

The intention and requirement of S. 9 of the Abkari Act in the case of articles liable to duty are that the duty shall be paid. That intention and requirement can only be contravened when reasonable opportunity to pay the duty has been afforded and evaded. The mere entry into the Bombay harbour of a ship conveying dutiable goods or mere tying up of such ship against the dock-wall is not importing goods under S. 43 of the Abkari Act in contravention of the Act, that is, in contravention of the obligation to pay duty. The word "import" in the Abkari Act includes the conveying into any part of the Presidency of Bombay by sea. (1909) 33 Bom. 380=11 Bom.L.R. 221.

——S. 3-A (amendment by Sind Act XXVI of 1940)—Vendor—Person given money by customer in advance for article to be ordered for customer—Such person supplying article and returning change due.

Where a person is given money in advance for an article which he is to order for the customer and he hands back to the customer with the article which he sells or has obtained, any change that may be due, he is to all intents and purposes a vendor within S. 3-A, Bombay Abkari Act and not an agent only. A.I.R. (Vol. 31) 1944 Sind 32=45 Cr.L.J. 390=211 Ind. Cas. 410.

——S. 4—Power to grant licence.

Section 4 relates only to control in reference to establishment, and not to power to grant licences, for tapping and drawing toddy and such power is controlled only by the rules made under the Act. A.I.R. (Vol. 29) 1942 Bom. 1=43 Bom.L.R. 896=I.L.R. (1942) Bom. 259=198 Ind. Cas. 849.

——Ss. 6 and 7—Public servants (non-convenanted) of Government in Excise Department—Appointed by Commissioner—Dismissal—Provisions of S. 7 must be strictly complied with.

The plaintiff was employed as Acting Inspector in the Excise Department on a salary of Rs. 125 per mensem. He was dismissed from the service by the Commissioner of Customs, after making a formal inquiry into certain charges of misconduct brought against him. Plaintiff filed a suit against the Secretary of State for India for wrongful dismissal, as the inquiry in respect of charges of misconduct against him was not conducted according to the regulations framed by Government for dismissal of the non-covenanted servants and claimed damages for wrongful loss of service and injury to his reputation.

Held, that the plaintiff did not hold the appointment at the will and pleasure of the Government, that the plaintiff was appointed in the Excise Department by the Commissioner of Customs under S. 6 of Abkari Act, 1878, and not by the Government direct. The Legislature by statute has restricted the power of dismissal under S. 7 and that pro-

vision must be strictly complied with before an officer is dismissed. 24 Bom.L.R. 210=67 Ind. Cas. 280=A.I.R. 1922 Bom. 17.

——**Ss. 9, 13, 43**—Cocaine—Forwarding cocaine from Lucknow to Bombay through by rail without transhipment—Crossing the frontier. **See** 8 Bom.L.R. 601.

——**S. 13**—Bombay Abkari Act, Ss. 9, 13, 43—Cocaine—Forwarding cocaine from Lucknow to Bombay through by rail without transhipment—Crossing the frontier. **See** 8 Bom.L.R. 601.

——**S. 14**—Licence to tap toddy is granted under S. 14 and not under S. 30 of the Act. **See ibid.**, S. 30, **infra.** I.L.R. (1942) Bom. 259.

——**S. 14—Rules under Act, R. 4—Duty of Collector.**

The implied power conferred upon the Collector by S. 14 (1) to grant or refuse a licence is limited by the rules. He would, e.g., have power to refuse a licence if the application were not in the form required by R. 4. But if the requirements of the rules are complied with, there is, a statutory duty imposed upon the Collector to grant a licence, and this statutory duty is not affected by anything contained in S. 4. Section 4 has no application to the grant of licences for tapping toddy-producing trees and the drawing of toddy therefrom, and as there is a right of appeal from the decision of the Collector to the Commissioner the Collector should not ask the Commissioner for order, but should deal with the application himself without consulting the Commissioner. A.I.R. (Vol. 29) 1942 Bom. 1=43 Bom. L.R. 896=I.L.R. (1942) Bom. 259=198 Ind. Cas. 849.

——**S. 14—Rules under Act—Collector, whether has discretion in granting licences.**

Having regard to the use of the word "shall" in the rules made under the Act, which are to have the same force as if enacted in the Act, no question of the exercise of any discretion by the Collector in the granting of a licence arises, provided that the requirements of the rules are complied with but a statutory duty to issue a licence is imposed by S. 14 (1) of the Act, read in conjunction with the rules. A.I.R. (Vol. 29) 1942 Bom. 1=43 Bom.L.R. 896=I.L.R. (1942) Bom. 259=198 Ind. Cas. 849.

——**S. 14**—When the Collector and the Commissioner have both acted under the mistaken belief that the prohibition policy of the Government amounted to an order justifying them in refusing a licence for tapping and drawing toddy from trees, the Court will interfere under S. 45, Specific Relief Act. A.I.R. (Vol. 29) 1942 Bom. 1=43 Bom. L.R. 896=I.L.R. (1942) Bom. 259=198 Ind. Cas. 849.

——**S. 14-B—as amended by the Bombay Abkari Amendment Act (XXIX of 1947)—Validity—Government of India Act (1935), Sch. VII, List II, Entry 31.**

On a contention that the Provincial Legislature had no power under the Government of India Act, 1935, to legislate with respect to the possession of foreign liquors and that S. 14-B of the Bombay Abkari Act, as amended by the Bombay Abkari (Amendment) Act of 1947, in so far as it purported to restrict or prohibit the possession of such liquors was void and inoperative:

Held: The legislative power given to the Provinces under Item 31 of List II of the Government of India Act, 1935, is expressed in wide and unqualified terms which in their natural and ordinary sense are apt to cover such an enactment as S. 14-B in its amended form and there is nothing in the Federal List and more particularly in Item 19, to lead the Court to cut down the full meaning of the Provincial Entry by excluding foreign liquors from its purview. S. 14-B does not purport to restrict or prohibit dealings in liquor in respect of its importation or exportation across the sea or land frontiers of British India. It purports to deal with possession of intoxicating liquors which, in the absence of limiting words, must include foreign liquors. It is far-fetched to suggest that, in so far as the provision covers foreign liquors, it is legislation with respect to imports of liquors into British India by sea or land. Further, if an enacment according to its true nature, its pith and substance, clearly falls within one of the matters assigned to the Provincial Legislature, it is valid notwithstanding its incidental encroachment on a Federal subject. 1950 M.W.N. 299=1950 R.L.W. 46=A.I.R. 1950 F.C. 69=51 Cr.L.J. 1018=1 A.I.Cr.D. 278=52 Bom.L.R. 591=1950 S.C.J. 44 (F.C.).

——**S. 14-B (1), Proviso**—Repeal by Amendment Act (VI of 1940)—If **ultra vires**. See BOMBAY ABKARI (AMENDMENT) ACT (VI OF 1940), S. 6. 52 Bom. L.R. 29.

——**S. 14-B (2)—Power to prohibit possession of foreign liquor.**

The proviso to S. 14-B (1) is clearly a part of sub-S. (1), and it is competent to Government under sub-S. (2) to prohibit the possession by any person or class of persons of foreign liquor as fully as they can prohibit the possession of country liquor. **A.I.R. vol. 27) 1940 Bom. 273=42 Bom.L.R. 669=I.L.R. (1940) Bom. 587=41 Cr.L.J. 834=190 Ind. Cas. 170 (S.B.).**

——**S. 14-B (2)—"Any person", means specified person.**

The words "by any person or class of persons" in S. 14-B, Bombay Abkari Act mean, by any specified person or specified class of persons. A.I.R. (Vol. 28) 1941 Sind 221=I.L.R. (1941) Kar. 431=43 Cr.L.J. 468=199 Ind. Cas. 101.

——**S. 14-B (2)—Power of prohibition—If can be extended to public generally.**

There is nothing in the Bombay Abkari Act to suggest that the Legislature contemplated the introduction of total prohibition of intoxicants as a measure of social reform. The natural meaning of the expression "any person or class of persons" is a person designated by name or description or a class of person designated. The Legislature did not intend that the power of prohibition might be extended to the public generally. **A.I.R. (Vol. 27) 1940 Bom. 273=42 Bom.L.R. 669=I.L.R. (1940) Bom. 587=41 Cr.L.J. 834=190 Ind. Cas. 170 (S.B.).**

——**S. 14-B (2)—Notification under, declared ultra vires and invalid by High Court—Effect—Remedy.**

Notification under S. 14-B (2), declared by the High Court to be **ultra vires** is invalid according to the law in force in Bombay Presidency and everybody can act upon that view of the law. Where there is no appeal from the decision of the Court the only manner in which the law as declared by the High Court could be altered would be by an Act of the Legislature. **A.I.R. (Vol. 27) 1940 Bom. 307=42 Bom.L.R. 791=42 Cr.L.J. 774=I.L.R. (1940) Bom. 777=191 Ind. Cas. 85 (S.B.).**

——**S. 16—Collector's permission—Sale of country liquor.** See C.P.C., S. 266. **60 B. 157=10 Bom.L.R. 13.**

——**Ss. 16 and 43—License to sell country liquor—Prohibition to sell, transfer or sublet—Partnership not prohibited.**

The contract of partnership by a licensee of liquor who is prevented only from selling, transferring or subletting his right to sell is not forbidden by law or opposed to policy of the Excise Act. **37 Bom. 320=19 Ind. Cas. 442=15 Bom.L.R. 227.**

———Ss. 30, 14—Licence to tap toddy is granted under S. 14 and not under S. 30.

S. 30 is not the section under which licences to tap and draw toddy are granted. They are granted under S. 14. The meaning of S. 30 is that such licences if granted shall be granted on payment of such fees, and subject to such restrictions and conditions and shall be in such form as the Provincial Government may direct in rules and orders which are not to be inconsistent with the Act. **A.I.R. (Vol. 29) 1942 Bom. 1=43 Bom.L.R. 896=I.L.R. (1942) Bom. 259=198 Ind. Cas. 849.**

———Ss. 32 and 67—Protection of abkari officers.

If any public or private body which is entrusted with the execution of a statute, honestly intends to put the law in motion and really believes in the existence of the facts that would justify its act it will be protected. **37 Bom. 101=17 Ind. Cas. 673=14 Bom.L.R. 949.**

———S. 34—Arrears of abkari revenue—Sale of land by Government—Whether subject to any prior mortgages.

Though under S. 34, Bombay Abkari Act, arrears of abkari licence-fees are recoverable as land revenue, arrears of abkari revenue are not due upon any specific land owned by the abkari renter. Consequently, a sale by Government of the land of the renter for recovery of arrears of abkari revenue would be a sale subject to any prior mortgages on the land. **A.I.R. (Vol. 19) 1932 Sind 121=26 S.L.R. 390=139 Ind. Cas. 47.**

———S. 34—Arrears of instalments of foreign liquor license—Stock of wine already pledged—Government has priority over pledgee's rights—Bombay Land Revenue Code, S. 137.

S was indebted to the Government on account of unpaid instalments of a foreign liquor license. But the stock of wines was already pledged to P Bank.

Held, that Government had priority over P Bank as pledgee. S. 137 of the Bombay Land Revenue Code was applicable to this case although the priority of Government as stated in the section is over any claim against any land or holder thereof. **A.I.R. 1930 Sind 185.**

———S. 43.

Synopsis.

1. Scope and Applicability.
2. Importation.
3. Offences under—Distinct Offences.
4. Offences under—Separate convictions—Propriety.
5. Offence under—Proof.
6. Possession.
7. Punishment.
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10. Transportation.

1. Scope and Applicability.

———S. 43—Bombay Abkari Act, Ss. 9, 13, 43—Conaine—Forwarding cocaine from Lucknow to Bombay through by rail without transhipment—Crossing the frontier. **See** 8 Bom.L.R. 601.

———Ss. 43 (1) and 45-A—Scope and applicability.

S. 43 (1) of the Bombay Abkari Act is the penal section which provides penalties for contravention of the Act or of any rule or order made under the Act or of any licence, permit, or pass obtained under the Act, with regard to the various matters contained in the section. S. 45-A is only a residuary section and provides penalties which are not otherwise provided for. If a case therefore falls under S. 43, it is unnecessary to look at S. 45-A, because S. 45-A, cannot apply when the case falls under S. 43. **52 Bom. L.R. 29=4 A.I.Cr.D. 90=A.I.R. 1950 Bom. 221=51 Cr.L.J. 1207.**

2. Importation.

———S. 43—"Importing goods"—Meaning of. **See** Ibid., S. 3 (10). **33 B. 380.**

———S. 43—Importation of bhang into a Railway Station in Native State—Cession of jurisdiction—No cession of territory—No offence.

The applicant was charged with having imported into the Presidency of Bombay, inasmuch as a parcel containing bhang and bearing his name and address was received at Kalol a Railway station in a Native State. It appeared that the criminal jurisdiction along the line of Railway was ceded to the Government of India, but there was no cession of territory. **Held,** that no offence was committed unless the importation was into the Presidency of Bombay, that is, into territories which formed British India; and if the land upon which the offence was alleged to have been committed had not actually been ceded it could form no part of British India. **5 Bom.L.R. 873.**

———S. 43—Importation of Bhang.

Importation of 20 tolas of Bhang into Virambaon from Wadhwan Civil Station amounts to importation from foreign territory into Bombay Presidency and is punishable under S. 43. **37 Bom. 152=14 Bom.L.R. 876=17 Ind. Cas. 534=13 Cr.L.J. 790.**

3. Offences under—Distinct offences.

———Ss. 43 (1) (a) and (h)—Offences of possessing illicit liquor and of possessing apparatus for manufacturing such liquor are distinct. **30 Bom.L.R. 378=108 Ind. Cas. 512=52 Bom. 277=29 Cr.L.J. 412=10 A.I.Cr.R. 114=A.I.R. 1928 Bom. 141; 37 Bom. L.R. 191=A.I.R. (Vol. 22) 1935 Bom. 202=36 Cr. L.J. 924 (1)=1935 Cr. Cas. 589=156 Ind. Cas. 399.**

4. Offences under—Separate convictions Propriety.

———S. 43, cl. (1) (a) and (i)—Offences under—Conviction for selling and possession—Propriety.

Possession is not a necessary part or element of the sale of an excisable article and on the same facts an accused person may be convicted of possession of an excisable article and at the same time of selling such article or part of it. But the question whether a conviction should, in any particular case, be under both charges or not must depend upon the particular facts of that case. Where the possession was only for the purposes of the sale and the whole of the article in possession was sold and there was no evidence to prove that the accused or any of them had any prior possession of the excisable article:

Held, that the facts were not sufficient to base a conviction for such prior possession against either of them in addition to a conviction for selling. **A.I.R. (Vol. 20) 1933 Sind 134 (2)=34 Cr.L.J. 1151=1933 Cr. Cas. 332 (2)=146 Ind. Cas. 39.**

———S. 43, Cls. (e), (f)—Offences under—Conviction of both—Legality.

The accused was charged with manufacturing country liquor from mhowra flowers and keeping in his possession soaked some more mhowra flowers and appa-

ratus for the purpose of manufacturing liquor from them.

Held, that the accused could, under the circumstances, be convicted for the offence of manufacturing country liquor from mhowra flowers and not for each of the offences under cls. (e) and (f) of the Bombay Abkari Act. 4 Bom.L.R. 720.

5. Offence under—Proof.

——S. 43—Offence under—Proof—Police evidence —Sufficiency—Search and seizure made without panchas —Effect of.

Where the law makes it obligatory for a search to take place in the presence of panchas and a search has not taken place in the presence of panchas and the only evidence on which the prosecution ask for a conviction is police evidence, then the Court certainly should not ordinarily act on that evidence. There is a second class of cases where it is impossible to seize an article or arrest a person in presence of panchas. The police may suddenly come across incriminatory articles and offenders and they may have to seize the articles or to arrest the persons concerned. It is impossible in these cases to contend that the police should not do their duty till they found some panchas in whose presence they should seize the articles or arrest the suspected persons. In cases like these it would be open to the trial Court to accept the police evidence and convict the accused if the Court was satisfied that the evidence was satisfactory and the guilt of the accused was proved. There may be a third class of cases in which although the law does not make it obligatory for a search to take place in presence of panchas, still in view of the information already received there is sufficient time for panchas to be called and a seizure to be made in presence of panchas. It would be advisable on the part of the police in such cases to raid a place or seize incriminating articles accompanied by panchas. If in such cases the police do not avail themselves of panchas, the result would be that the police evidence must necessarily be discarded and no conviction can be based on that evidence. But the Court must very carefully scrutinise the police evidence which would be the only evidence before it on which a conviction could be based. If after careful scrutiny the Court is satisfied that the evidence is such as can be safely acted upon, it would certainly be open to the Court to act on that evidence.

The law does not require any corroboration of police evidence; and it is not the law that even in cases where a search in the presence of panchas is not obligatory the Court cannot act on the evidence of police officers. 52 Bom.L.R. 38=A.I.R. 1950 Bom. 267=51 Cr.L.J. 1297.

——S. 43—Offence under—Proof—Police Officer's evidence—Sufficiency—Search—Absence of panchnama —Effect.

Where the law requires that a search should be made in the presence of the panchas, a panchnama should usually be insisted upon and a conviction should not ordinarily be based on the uncorroborated testimony of police officers. Where it is not possible to make a search in the presence of the panchas or where property is found without a search being made or where under the law it is not obligatory to make a panchnama it would be open to the Court to convict the accused on the evidence of police officers alone, if, after examining that evidence carefully the Court feels satisfied that it is true. 52 Bom.L.R. 280.

——S. 43 (h)—Offence under—Proof—Three plants growing without being planted—Inference of cultivation not justified. 4 Bom.L.R. 98.

6. Possession.

——S. 43 (1) (a)—Possession—Burden of Proof.

The burden of proof on the prosecution in proceedings under Bombay Abkari Act, does not shift until the factum of possession is proved. A.I.R. (Vol. 25) 1938 Sind 80=39 Cr.L.J. 504=32 S.L.R. 689=174 Ind. Cas. 835.

——S. 43—Possession of mhowra flowers—Consignment through Railway.

The accused consigned certain mhowra flowers for conveyance to another place and the Railway Company took these goods in the course of the conveyance to a place in the prescribed area within which even the possession of mhowra flowers without a permit was unlawful, Held, that the accused was not guilty of the possession of the flowers, and in the absence of any evidence that he conspired with the Railway Company to carry those goods without a permit, he was not guilty even of abetment. 16 Cr.L.J 212=27 I.C. 836= 17 Bom.L.R. 72.

——S. 43 (1) (a), (h)—Possession of illicit liquor and articles for manufacturing it—Presumption—Premises owned by Joint Hindu family.

The accused lived jointly with his two brothers in a clump of huts. Of the three huts that were there the middle one was occupied by the accused with his family, the two adjoining huts by his two brothers and their families. At the back of the huts there were some fields jointly cultivated by the brothers. In each of the three huts were found articles which suggested that the inhabitants were or bad been in possession of illicit liquor and in the fields were found some bottles containing liquor and tins of jaggery was intended for preparation of illicit liquor:

Held, that the only reasonable inference which could be drawn from the possession of these articles would be that the accused or the accused and his brthers were manufacturing illicit liquor, and that the possession of these articles, which could not be explained on any other hypothesis, was for the purpose required by cl. (h), S. 43, Bombay Abkari Act:

Held also, that if the evidence as to possession is adequate in the case of the accused, it does not assist him at all to say that on the same evidence other persons might have been tried and convicted along with him. A.I.R. (Vol. 21) 1934 Bom. 16=35 Bom.L.R. 1065=35 Cr.L.J. 523=1934 Cr. Cas. 108=147 Ind. Cas. 1003.

——S. 43—Joint possession—Presumption—Bottle containing illicit liquor produced by son—Father not present at time of search.

Where on a search, the son produced the key of the box in which a bottle containing illicit liquor was found, but at the time of the search the father was not present:

Held, that before a presumption could be raised that this bottle was in the joint possession of both the son and the father it was incumbent upon the Crown to prove that both of them had either physical or constructive possession of the contraband liquor, or if the son had such possession, that he had it on behalf of himself and the father to the knowledge of the father. A.I.R. (Vol. 24) 1937 Sind 154=38 Cr.L.J. 796 (1) =169 Ind. Cas. 561.

7. Punishment.

——S. 43—Punishment—The more appropriate form of punishment for an offence under the section is imprisonment and not fine. 20 S.L.R. 1=27 Cr.L.J. 300=92 Ind. Cas. 588=A.I.R. 1926 Sind 176.

——S. 43—Punishment — Cultivation of bhang—Deterrent punishment is called for. 7 A.I.Cr.R. 290 =28 Cr.L.J. 162=99 Ind. Cas. 594=A.I.R. 1927 Sind 112.

——S. 43—Punishment—Possession and sale of cocaine.

Where cocaine is possessed and sold secretly without license, imprisonment should be awarded as a deterrent sentence. 13 Bom.L.R. 1185=12 Ind. Case. 980=12 Cr.L.J. 604.

——S. 43—Punishment—Sentence of imprisonment—Enhancement of sentence on reference—Criminal Procedure Code (Act V of 1898), S. 439.

The crime of surreptitiously importing dangerous drugs is one which must be put down with a strong hand and the proper sentence is one of imprisonment. But enhancement of sentence is a serious proceeding. A.I.R. (Vol. 21) 1934 Sind 157 (159)=1934 Cr. Cas. 1149=36 Cr.L.J. 218=152 Ind Cas. 872.

——S. 43 (1) (as amended in 1947),—Punishment——Discretion of Court—Imprisonment and fine.

The imprisonment of six months and the fine of Rs. 1,000, provided in S. 43 (1) of the Bombay Abkari Act, as amended, are not cumulative sentences, but are to be inflicted according to the discretion of the Court. It is left to the discretion of the Court to inflict imprisonment, or fine, or both. 50 Bom.L.R. 574=A.I.R. 1949 Bom. 41=50 Cr.L.J. 137 (F.B.).

8. Search.

——S. 43 (1) (a)—Search—Legality—Panchas not witnessing every detail of search—Cr.P.C. S. 103.

The mere fact that the Panchas are not present thoroughout a search under S. 43 (1) (a), and do not witness every detail of it is not sufficient in itself to vitiate the conviction, especially where the accused is himself present at the search, and it is open to the Court to find the fact of possession of an offending article proved, provided that on a consideratio of all the evidence in the case it is satisfied that the fact has been proved beyond reasonable doubt. 32 Bom.L.R. 344=A.I.R. 1930 Bom. 169.

9. Servant's liability.

——S. 43, Cl. (g)—Servant's liability.

The penalty prescribed by S. 43, Cl. (g), of the Bombay Abkari Act, 1878, attaches to the servant of a licensee who sells liquor without a permit from the Collector. (1909) 11 Bom.L.R. 746.

10. Transportation.

——S. 43 (1) (a)—Transportation—Mere passing through place in course of journey—Whether amounts to transporting to that place.

When the Act talks about transport from one place to another it means transport from the starting point to the ultimate destination. It is a question of fact for the Court to determine what the destination may be. If a man comes to a place and stays there for an appreciable time—and what amounts to an appreciable time would have to be considered in relation to the purposes of the Act—the Court might hold that that place was the destination although it appeared that the journey was to be resumed subsequently. But merely passing through a place in the course of a journey does not amount to transporting to that place. A.I.R. (Vol. 25) 1938 Bom. 43 (44)=39 Bom.L.R. 1062=39 Cr.L.J. 197=I.L.R. (1938) Bom. 49=172 Ind. Cas. 764.

——Ss. 43 (b) 47—Transportation—Illegal possession of cocaine—Removal from one place to another.

Accused No. 1, who was illegally in possession of cocaine, brought it from his room and gave it to accused No. 2, who stood opposite his house. The latter carried it to some distance and delivered it to a Purdeshi. The two accused were, under these circumstances, charged with transporting cocaine, an offence punishable under S. 43 (b) of the Bombay Abkari Act, 1878. The Magistrate, however, acquitted them of the offence and convicted them of illegal possession of cocaine under S. 47 of the Act. On appeal against this order of acquittal, **Held**, that the Magistrate was right in declining to convict the accused under S. 43 (b) of the Bombay Abkari Act, 1878, inasmuch as the accused's offence consisted not in moving the cocaine from one place to another, but in the unauthorised possession of it at any place in contravension of the Act. S. 43, Clause (b), seems to contemplate rather the case of a person who is in lawful possession of cocaine at one place, but is by law forbidden to remove it either partly or wholly to another place. 12 Bom.L.R. 124.

——S. 43-A—Joint illegal possession—Proof required.

Where three persons are charged with joint illegal possession of liquor, it is incumbent upon the Crown to prove (a) that each of the accused had either physical or constructive possession of the property in question, or (b) that one or more of them had possession thereof either physical or constructive on behalf of themselves and the other accused and to their knowledge. A.I.R. (Vol. 23) (1936) Sind 44=37 Cr.L.J. 546=1936 Cr. Cas. 316=162 Ind. Cas. 263.

——Ss. 43-A and 53—Proof of possession—Three brothers belonging to joint Hindu family charged under S. 43-A—Bottles containing liquor found in godown owned by them—If evidence of possession by any one of them.

In order to convict a person of illegal possession of contraband liquor it is necessary for the Crown to prove that he had knowledge of his possession, and a person who was unaware that it had been placed in his custody cannot be so convicted. The mere fact that three brothers belong to a joint Hindu family, and as such own the godown in which the bottles containing the liquor are found concealed does not, in a charge under S. 43-A, Bombay Abkari Act, prove that any one of them was in conscious possession of the bottles lying there, so as to bring them within the purview of S. 53. A.I.R. (Vol. 23) 1936 Sind 44=37 Cr.L.J. 546=1936 Cr. Cas. 316=162 Ind. Cas. 263.

——S. 45 (c)—Breach of condition in license—Omission to keep accounts.

The omission to keep true accounts in breach of the conditions of a license is an offence punishable under S. 45 (c) of the Bombay Abkari Act. 6 Bom.L.R. 253.

——S. 45 (c)—Breach of conditions of license—License Rule 20—Sale—Subletting of contract—Construction of rule.

The accused agreed with the complainant to allow his name to be used as a contractor from Government for two shops for the sale of country liquor. The funds for the contract proceeded from the complainant and the

accused was to be paid a certain sum by the complainant for allowing his name to be used. The contract was knocked down to the accused and licenses were issued in his name. One of the conditions of the licenses was as follows:—"The licensee shall not sell, transfer or sublet his right of sale of country spirits under this license nor enter into any agreement in connection with the exercise of the said right which, in the opinion of the Collector, is in the nature of a sub-lease." The shops remained in the complainant's possession and were managed by him. On these facts, the accused was proceeded against under S. 45 (c) of the Bombay Abkari Act, 1878, for the breach of a condition in the license. It was contended on behalf of the accused that the right of sale conferred by the license had been obtained through him as a benamidar (and not from him as a person who had acquired that right for himself) and that therefore the offence charged had not been committed:—**Held,** negativing the contention, that though by supplying the necessary funds, a person other than the licensee named in the license might acquire a beneficial interest in the proceeds or profits of sales, he could not by so supplying funds, acquire the right of sale through the licensee named. Such right being conferred by virtue of the Act only upon the person named, the person named in the license could not set up as a defence that another person had acquired the right of sale through him as an agent or benamidar instead of from him as the person who had the right in himself. **8 Bom.L.R. 990.**

——S. 45 (c)—Breach of license—Keeping for sale in forbidden bottles does not amount to selling. **29 Bom. L.R. 1012=103 Ind. Cas. 834=8 A.I.Cr.R. 442=28 Cr.L.J. 754=A.I.R. 1927 Bom. 518.**

——S. 45 (c)—Breach of license—Licence prohibiting accused from selling liquor outside his shop—Accused delivering bott'ed liquor to servants in shop for transmission to customers at their houses.

The accused who was a licensed vendor of country liquor was prohibited by a clause in his licence from selling liquor outside the shop mentioned in the licence. He took out quantity of liquor out of a big cask, bottled it and delivered it to his servants in the shop premises and the servants delivered the bottles to the custimers in their houses and recovered the price there:

Held, that the servant of the accused in the circumstances could very well be treated as a bailee for the purpose of transmission to the buyer, within the meaning of S. 23 (2), Sale of Goods Act, and delivery to such servant, which admittedly took place in the licensed place, would be effective delivery to the buyer himself. As the sale, therefore, was completed within the licensed area the fact that the price was paid at the houses of the customers was immaterial for, the completion of sale does not depend upon payment of the price of the goods sold. The accused could not, therefore, be convicted under S. 45 (c), Bombay Abkari Act. **A.I.R. (Vol. 28) 1941 Bom. 106=43 Bom.L.R. 95=42 Cr.L.J. 552=194 Ind. Cas. 302.**

——S. 45 (c)—Breach of license—Master having licence to sell liquor for consumption of premises—Servant placing unopened bottles on counter for purchaser at orders of master—If guilty of abetment.

Where the servant of a person who holds a licence to sell foreign liquor to be drunk on the premises, hands over to, or places on the counter to be taken by a purchaser bottles of liquor unopened, on being asked to do so by his master, it must be presumed that the servant knew that the unopened bottles placed on the counter were to be taken away, and he will therefore be liable to conviction under S. 45 (c) of the Bombay Abkari Act, of the offence of abetting a breach of the licence. **229 Ind. Cas. 289=48 Cr.L.J. 364.**

——S. 45-A—Scope and Applicability. See Ibid., S. 43. **52 Bom.L.R. 29.**

——S. 47—"All due and reasonable precautions", meaning of.

The phrase "all due and reasonable precautions" in S. 47, Bombay Abkari Act, does not imply "all precautions". The phrase implies precautions that are reasonable or practical and due or necessary and which a prudent and sensible person would take in endeavouring to prevent transgressions of the kind in question in carrying out the object of the licence. **A.I.R. (Vol. 25) 1938 Bom. 427=40 Bom.L.R. 820=39 Cr.L.J. 933=177 Ind. Cas. 665.**

——Ss. 47, 43 (1) (i), 45—Charge under S. 415 joined with charge under S. 43 (1) (i) read with S. 47 is legal. **A.I.R. (Vol. 20) 1933 Sind 255=1933 Cr. Cas. 811=35 Cr.L.J. 256=147 Ind. Cas. 55.**

——Ss. 47, 9, 11—Offence under—Possession of kaju liquor under the maximum limits.

The mere possession of Kaju liquor on which no duty has been paid, but which is under the quantity fixed by S. 17 of the Abkari Act, is not punishable under S. 47 of the Act. **(1908) 10 Bom.L.R. 284.**

——S. 53—'Mens rea'—Master's liability for servant's defaults.

The principle with regard to the Abkari Act, 1878, is that licenses to keep shops are only granted to persons of good personal character, and it is obvious that the object of so restricting the grant of licenses would be defeated if the licensed person could, by delegating the control and management of the house to another person who was altogether unfit to keep it, free himself from responsibility for the manner in which the shop was conducted. **Mens rea** is not required when the acts prohibited by statute are not criminal in any sense, but are prohibited in the public interest under a penalty. This principle is substantially adopted in S. 53 of the Abkari Act with this exception—that it is open to the license-holder, according to the section, to prove facts to show that he is not liable for his servant's defaults or acts. **10 Bom.L.R. 171.**

——S. 53—Scope—Liquor found in godown of joint family—Coparceners—If in possession of liquor. **See Ibid.,** Ss. 43-A and 53. **A.I.R. 1936 S. 44.**

——S. 54, Cls. (a) and (b)—Order of confiscation.

Before cl. (b) of S. 54 comes into operation, there must be an offence committed under the Act. An article must be liable to confiscation under cl. (a), and that article must be dealt with in the manner specified along with, or in addition to, the other articles sought to be confiscated.

The accused were convicted under S. 43 (1) (i), the offence charged being that they sold without a licence a bottle of beer and a bottle of rum. The Magistrate in convicting the accused, passed an order for the confiscation of liquor which was found, on the police raiding the premises in the kitchen adjacent to the place where the sale took place and a very considerable amount of

liquor found in a godown at the back of the accused's premises:

Held, that the articles in the kitchen and in the godown were never had in possession along with the bottles sold after they became liable to confiscation. Hence those articles were not liable to confiscation. **A.I.R. (Vol. 29) 1942 Bom. 154 (2)=44 Bom.L.R. 239=I.L.R. (1942) Bom. 254=43 Cr.L.J. 730=200 Ind. Cas. 879.**

——S. 54, cl. (b)—Strict construction.

Clause (b) of S. 54 being a penal clause must be construed strictly.

The only articles which are liable to confiscation under cl. (b) are articles lawfully imported, transported, manufactured, had in possession or sold along with something which had actually at the time become liable to confiscation. **A.I.R. (Vol. 29) 1942 Bom. 154 (2) =44 Bom.L.R. 239=43 Cr.L.J. 730=I.L.R. (1942) Bom 254=200 Ind. Cas. 879.**

——S. 60—Commissioner has not absolute and unfettered discretion to grant or refuse licence. **A.I.R. (Vol. 29) 1942 Bom. 1=43 Bom.L.R. 896=198 Ind. Cas. 849.**

——S. 62—Medicated article—Cocaine. **See Ibid.** S. 3 (9). **27 B. 551.**

——S. 67—Protection of abkari officers. **See Ibid.** S. 32. **37 Bom. 101.**

BOMBAY ABKARI (AMENDMENT) ACT (VI OF 1940).

——S. 6—Deletion of Proviso to S. 14-B (1) of Abkari Act (V of 1878)—Object of.

By S. 6 of the Amending Act, the proviso to sub-S. (1) of S. 14-B, Bombay Abkari Act was deleted. One object of the proviso was to facilitate import and export into and from the port of Bombay by enabling ware-house-keepers and railway companies on the docks to possess any quantity of foreign liquor, and the object of the Legislature in deleting the proviso was to destroy, or at any rate render very difficult, import and export into and from the port of Bombay. **A.I.R. (Vol. 27) 1940 Bom. 307=42 Bom.L.R. 791=42 Cr. L.J. 774=I.L.R. (1940) Bom. 777=191 Ind. Cas. 85 (S.B.).**

——S. 6—Repeal of Proviso to S. 14-B (1), Bombay Abkari Act (1878)—If ultra vires—Government of India Act (1935), Sch. VII, List I, Item 19 and List II, Item 31.

The repeal of the Proviso to S. 14-B (1) of the Act by Act VI of 1940, cannot be held to be ultra vires, to the extent that it affected a private consumer of foreign liquor. The legislative practice does not suggest that even incidentally or as an ancillary matter it is not competent to the Provincial Legislature to trespass upon Item 19 in List I of the 7th schedule to the Constitution Act of 1935. Item 31 in List II of that schedule gives power to the Provincial Legislature to legislate with regard to intoxicating liquors that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors. No distinction is made in this item between foreign liquor and country liquor. The right to deal with possession would include the right to prohibit possession, and cannot be restricted to merely regulate or control possession. In repealing S. 14-B (1), proviso, of the Abkari Act, the Provincial Legislature was only legislating with regard to a subject which clearly fell under Item 31 in List II and in substance the subject-matter dealt with falls under Item 31 of List II. The mere fact that in so legislating with regard to the subject in List II, a mere ancillary or incidental effect of that legislation is to affect a matter which falls in List I (Item 19, Import and export across customs, frontiers, etc) by itself is not sufficient to lead the Court to hold that the impugned legislation is ultra vires the Provincial Legislature. 42 Bom.L.R. 791, Not. foll. **52 Bom.L.R. 29=4 A. I.Cr.D. 90=A.I.R. 1950 Bom. 221=51 Cr.L.J. 1207 (D.B.).**

——S. 7—Retrospective operation.

The Court leans strongly against a construction which gives to an Act retrospective action because, it manifestly shocks one's sense of justice that an act legal at the time of doing it, shall be made unlawful by some new enactment. The only notifications which fall within S. 7, Bombay Abkari Amendment Act are notifications effective at the date of the passing of the Amending Act. The section was not intended to affect the construction of notifications already rescinded, still less of a Notification which had been declared invalid, and therefore had never had any effect, and was a mere nullity. Even if S. 7 applied to a notification already declared ultra vires by the High Court, S. 7 cannot have the effect of reviving the invalid notification. **A.I.R. (Vol. 27) 1940 Bom. 307=42 Bom.L. R. 791=42 Cr.L.J. 774=I.L.R. (1940) Bom. 777=191 Ind. Cas. 85 (S.B.).**

BOMBAY ACKNOWLEDGMENT OF DEBTS, INTEREST AND MORTGAGES REGULATION (V OF 1827).

——S. 14 — Applicability — Mortgage debt — Tender by mortgagor of insufficient sum —Cessation of interest.

The word "debtor" in S. 14 is certainly wide enough to cover a debtor who has given security by way of mortgage. S. 14 must be read as if the words "in the absence of a contract to the contrary" preceded the operative words of the section. When a debtor tenders to a creditor really part of his debt, not the entire debt, and asks him to take that in full satisfaction of the debt it is clear law that the creditor is entitled to refuse to accept the tender, because otherwise he would virtually preclude himself from saying that he had not been paid the full amount due. The Court would construe S. 14 if possible, so as to be consistent with that part of the common law and the same rule is in fact enacted for India by S. 38, Contract Act. S. 38 only reproduces what was the old law applicable not only in England, but in India prior to the enactment of the Contract Act. Leaving out of account S. 38 of the Contract Act, and S. 84 of the T. P. Act, if a debtor mortgagor tenders an insufficient sum in payment of the entire mortgage debt due from him and asks that the mortgagee shall accept that tender as being the full amount due to him under his mortgage then S. 14 will not operate to allow cessation of interest on the insufficient amount tendered. 25 Bom.L.R. 839=87 Ind. Cas. 129=A.I.R. 1924 Bom. 264.

——S. 15 (3) — Applicability — Mortgage whereby mortgagee not bound to enter into possession though has power to do so.

Sub-S. (3) is not limited to the case where the creditor has been placed in possession and remains in possession. The terms of S. 15 (3) are general and wide enough to cover mortgages whereby the mortgagee is not bound by the terms of the mortgage to enter into possession of the mortgage property though the mortgagee has power to to do. The mortgagee is, therefore, entitled by the institution of a

civil suit to cause the mortgage property to be applied to the liquidation of his debts by sale of the property unless it could be shown that there was a special agreement or recognized usage or law to the contrary. A.I.R. 1930 P.C. 188.

——S. 15 (3) — Sale — Mortgagee's right.

In absence of agreement to the contrary mortgagee can bring to sale the mortgaged property under Cl. 15 (3). 26 Bom.L.R. 455=80 Ind. Cas. 393=A.I.R. 1924 Bom. 387 (D.B.).

BOMBAY ADMINISTRATION OF ESTATES REGULATION (VIII OF 1827).

——Taxation—Bombay Pleaders Act (XVII of 1920), Sch. III, R. 5—Succession Act (1925), S. 390.

Proceedings under the repealed and re-enacted Succession Certificate Act must be taxed in exactly the same way after, as before, the Act of 1925, for there is no substantial difference involved in the principle of the provisions. The words in Sub-R. (e) (vi) of R. 5 of Sch. III to the Bombay Pleaders Act, viz., "any other special or local Act", clearly cover Regulation VIII of 1827. Consequently R. 5 applies to all applications or appeals under any other special or local Act. 29 Bom.L.R. 1031=103 Ind. Cas. 637=A.I.R. 1927 Bom. 499 (D.B.).

BOMBAY ADEN COURTS ACT (II OF 1864).

——Ss. 8, 15—Resident's Court at Aden — Suit for declaration and injunction — Court Fees Act (VII of 1870), S. 7, Sub-S. 4, Cls. (c) and (d) — Suits Valuation Act (VII of 1877), S. 8 — Reference to the High Court by the Resident—Revision to Bombay High Court—Civil Procedure Code (Act V of 1908), S. 115.

The plaintiff sued for a declaration and injunction with regard to certain property worth upwards of Rs. 50,000. The claim was valued at Rs. 130 and the plaint was engrossed on a stamp paper of Rs. 10 under the provisions of the Court-Fees Act, S. 7, Sub-S. (4), Cls. (c) and (d). The first Court rejected the claim on the ground that the plaint was not properly stamped. The plaintiff appealed to the Court of the Political Resident at Aden and shortly after this the plaintiff applied under S. 8 of the Aden Act (II of 1864) for reference of the following questions in the appeal for decision of the High Court of Bombay, namely: "Is the plaint sufficiently stamped, and was the order of the Court, rejecting the plaint under S. 54, Cl. (b), of the Civil Procedure Code without making an order as to what the requisite stamp should be, legal?" The Resident, however, dismissed the appeal under S. 551 of the Civil Procedure Code, 1882: **Held,** that the Resident's Court was subordinate to the High Court of Bombay which had, therefore, the power of revision, under S. 115 of the Civil Procedure Code of 1908, with regard to questions that should be submitted by the Resident under S. 8 of the Aden Act (II of 1864). **Held, further,** that as under S. 15 of the Aden Act, the Court of the Resident was to be guided by the spirit and principle of the laws and Regulations in force in the Presidency of Bombay and administered in the Courts of that presidency, not established by Royal Charter, and in the High Court in the exercise of its jurisdiction as a Court of Appeal from these Courts, the provisions of the Suits Valuation Act, S. 8, are "the law for the time being in force for the valuation of claims" as required in S. 8 of the Aden Act (II of 1864). **Held, further,** that assuming that the plaintiff's claim had been correctly valued under the Court Fees Act, her claim estimated according to the law for the time being in force would be Rs. 130, and was, therefore, a claim which did not fulfil the requirements of S. 8 of the Aden Act, so as to give the plaintiff a right to demand the statement of the case upon any question of fact or law arising in her suit. (1909) 34 Bom. 267=12 Bom.L.R. 149=5 Ind. Cas. 867.

——S. 20—Powers of Resident's Court as Court of Session—Power of Resident to transfer case—Resident's power to punish European British subject for over a year. See CR. P. CODE, S. 447. 29 Bom. 575=7 Bom.L.R. 104=2 Cr.L.J. 75.

——Ss. 29 and 30 — Review — Jurisdiction of Bombay High Court.

There is nothing in S. 29 or S. 30 of the Aden Courts Act, 1864, which can be operative, either by express words or by necessary implication, to limit the application of those sections to cases tried by the Resident as a Court of Session or to exclude appeals from their purview. S. 30 of the Act empowers and requires the High Court of Bombay to review the case or such part of it as may be necessary, with reference only to the points of law specified in the certificate of the Advocate-General, and the section does not contemplate that any decision by the Resident on a point of fact should be questioned in review, save in so far as such decision may be dependent for its validity on the determination of a point of law mentioned in the certificate. (1907) 31 Bom. 335=9 Bom.L.R. 331.

BOMBAY AGRICULTURAL DEBTORS' RELIEF ACT (XXVIII OF 1939).

——Orders of Board—Revision.

The Debt Adjustment Board set up under the Act is not a 'Court' within the meaning of S. 115, C. P. Code. No revision is maintainable against its order under S. 115, C. P. Code. A.I.R. (Vol. 33) 1946 Bom. 200=47 Bom.L.R. 852.

——S. 2 — S. 2 (6) (a) (iv)—Income, meaning of.

The word "income" in S. 2 (6) (a) (iv) means net income and not gross income. A.I.R. (Vol. 32) 1945 Bom. 383 (385)=I.L.R. (1945) Bom. 676=47 Bom.L.R. 445.

——Ss. 9 (1) and 54—Applicability—Application by debtor—Sale deed in favour of one creditor held to be sale and not mortgage—Board settling debts of other creditors and holding nothing was due to vendee-creditor — Appeal purporting to be against decision holding deed to be sale but accompanied by copy of award of Board — Competency.

A debtor who had executed a sale deed in favour of one of his creditors applied for settlement of his debts including debts due to other creditors also. The Debt Adjustment Board first decided the preliminary issues under S. 35 in favour of the debtor, holding at the same time that the deed executed by him in favour of one of his creditors was an out-and-out sale and not a mortgage under. S. 45. This was followed up later by an award comprising not only the debts of the vendee-creditor but also the debts of all the creditors and also holding that nothing was due to the vendee-creditor as the transaction was held to be an out-and-out sale. The debtor preferred an appeal which purported to be against the decision of the Board holding the transaction to be a sale but the memorandum of appeal was accompanied by the award of the Board.

Held: that the appeal in substance was an appeal against the award under S. 54 in which nothing was shown to be due to the vendee-creditor and not against the earlier decision under S. 45, holding the transaction to be a sale. 49 Bom.L.R. 158=A.I.R. 1947 Bom. 389.

——S. 37 — Material date.

Even for the purposes of S. 37, the material date is 1st January, 1939. A.I.R. (Vol. 31) 1944 Bom. 243 (2) =I.L.R. (1944) Bom. 300=46 Bom.L.R. 437=219 Ind. Cas. 110.

——S. 37 — Duty of Court — Question whether transaction is mortgage or sale to be determined before transfer.

The scheme of the Bom. Agri. 'Debtors' Relief Act is that pending suits should not be transferred under S. 37, until the Court has determined that the debtor is a debtor within the meaning of the Act, and in a suit relating to a transaction which is said by one side to be a mortgage and by the other side to be a sale, that question must be determined before the Court can say that the alleged debtor is a debtor. (1908) A.I.R. (Vol. 30) 1943 Bom. 250 =45 Bom.L.R. 445=I.L.R. (1943) Bom. 391=209 Ind. Cas. 379.

——S. 37—Jurisdiction of Court—Question if applicant is debtor.

In respect of pending suits, the jurisdiction remains in the Court to determine whether the applicant is a debtor within the meaning of the Act. If the Court so finds, it is bound to transfer the suit to the Adjustment Board. A.I.R. (Vol. 32) 1945 Bom. 58=46 Bom. L.R. 715=218 Ind. Cas. 434.

——Ss. 37, 17 and 73—Jurisdiction of Court—Application under S. 17—Question if applicant is debtor.

It cannot be said that during the pendency of a suit on an application being made by the debtors to the Debt Adjustment Board under S. 17, S. 73 comes into operation and the Court's jurisdiction is ousted. In respect of the pending suit the jurisdiction remains in the Court to determine whether the applicant under S. 17 is a debtor within the meaning of the Act and whether his debts are below the amount of Rs. 15,000

The last sentence of para. 1 of S. 37 emphasises the jurisdiction of the Court to determine the aforesaid questions by providing that its decision shall be final on these questions. A.I.R. (Vol. 30) 1943 Bom. 19= 44 Bom.L.R. 865=I.L.R. (1943) Bom. 41=204 Ind. Cas. 388.

——Ss. 37 and 73—Order transferring execution proceedings to Board—Revision.

An order passed by a Court transferring execution proceedings before it to the Debt Adjustment Board is open to revision and neither S. 37 nor S. 73 is a bar to it. A.I.R. (Vol. 32) 1945 Bom. 60=46 Bom.L.R. 711=I.L.R. (1944) Bom. 558.

——(as amended by Act VII of 1945), S. 37 (1)—Applicability—Suit for accounts under S. 15-D, Dekkhan Agriculturits' Relief Act—Suit for sale on mortgage—When transferable.

S. 37 (1) of the Bom. Agri. Debtors' Relief Act, as amended in 1945, clearly refers to suits filed by creditors for the recovery of their debts against their debtors. A suit filed by an agriculturist debtor for accounts under S. 15-D of the Dekkhan Agriculturists Relief Act is not a suit for recovery of a debt as contemplated by S. 37 (1) of the Act of 1939, as amended in 1945. It is only if the mortgagee applies for converting the suit into one for foreclosure or sale that it can be regarded as one for recovery of a debt.

A mortgage suit for sale ought not to be transferred to the Debt Adjustment Board under S. 37 (1) before the Court has found the transaction to be really in the nature of a mortgage. Even after the transaction is found to be a mortgage, it cannot be transferred to the Board unless it is duly converted into a suit for the recovery of a debt. 49 Bom.L.R. 219=A.I.R. 1947 Bom. 320=I.L.R. (1947) Bom. 60 (D.B.).

——S. 37—Scope—Suit to recover debts from several persons—Plea by one defendant that he is a debtor and his debts do not exceed Rs. 15,000—Duty of Court to transfer suit to Board.

Under the new S. 37 (1) of the Bombay Agricultural Debtors' Relief Act, as amended, as soon as the question is raised by any one of the defendants to a suit, that he is a debtor and that his debts do not exceed Rs. 15,000, then the suit has to be transferred to the Debt Adjustment Board. 48 Bom.L.R. 613=A.I.R. 1947 Bom. 88=230 Ind. Cas. 232.

——S. 37 (1) and (2)—Applicability—Suit or application by debtor—Procedure.

S. 37 (1) of the Bombay Act (XXVIII of 1939) is obviously intended to apply to suits filed by a creditor to recover his debts. It does not and cannot apply to a suit, application or proceeding started by a debtor. Such a suit, application or proceeding is governed by S. 37 (2). If a suit or other proceeding is started by the debtor, the proper remedy is for him to move the Debt Adjustment Board to give a notice in the prescribed form to the Court where any suit or application or proceeding is pending, and then the Court will transfer it to the Board. 48 Bom.L.R. 615=A.I.R. 1947 Bom. 71=230 Ind. Cas. 95.

——Ss. 54 and 9 (1)—Applicability—Application by debtor—Sale-deed in favour of one creditor held to be sale and not mortgage—Board settling debts of other creditors and holding nothing was due to vendee-creditor—Appeal purporting to be against decision holding deed to be sale but accompanied by copy of award of Board—Competency. See Ibid. Ss. 9 (1) and 54. 49 Bom.L.R. 158.

——S. 73—Application to pending proceedings.

Section 73 is not applicable to suits or applications for execution which are pending on the date on which an Adjustment Board is established for that particular area. A.I.R. (Vol. 32) 1945 Bom. 58=46 Bom.L. R. 715=218 Ind. Cas. 434.

BOMBAY AGRICULTURAL DEBTORS' RELIEF ACT (XXVIII OF 1947).

——S. 1 (2)—"City of Bombay"—If refers to Courts or to resident in City of Bombay.

The only proper interpretation of the expression "City of Bombay" in S. 1 (2) of the Bombay Act XXVIII of 1947 is not to apply it to the Courts in the City of Bombay but to the people residing in the City of Bombay. This exception only means that if there is an agriculturist ordinarily resident in the City of Bombay, then he would not be entitled to the benefits and privileges of the Act. It certainly does not mean that although an agriculturist may ordinarily reside in a part of the Province to which the Act applies, he would still not be entitled to the benefits and privileges of this Act merely because his creditor chooses to file a suit against him on the Original Side of the Bombay High Court.

The High Court has undoubted jurisdiction to entertain a suit against a debtor ordinarily resident in the moffasal, but it cannot decide the preliminary issues under S. 1. For that purpose the suit has to be transferred to the Special Court under the Act. If the defendant fails to satisfy that Court that he is a debtor within the meaning of the Act, the suit will go back to the High Court. But if he succeeds in establishing that he is a debtor under the Act, then the further proceedings will have to be taken in that Court as laid down in the Act. 51 Bom.L.R. 525=A.I.R. 1949 Bom. 348 (D.B.).

——Ss. 1 (2) and 19—Scope—"Civil or Revenue Courts"—Original side of High Court.

The words of S. 19 of Bombay Act XXVIII of 1947,

are wide enough and general enough to apply to the High Court on its original side as well as to the other Civil and Revenue Courts in the Province. S. 19 (1) expressly ousts the jurisdiction of the High Court to try those matters which involve the questions mentioned in the sub section. The words "Civil or Revenue Courts" are wide enough to cover the High Court which would have jurisdiction by virtue of Cl. 12, Letters Patent. 51 Bom.L.R. 485, diss. 51 Bom.L.R. 525=A.I.R. 1949 Bom. 348 (D.B.).

——S. 2 (5) (a) and (b)—Applicability and construction—"Debtor"—Requirements.

It is obvious that both under cl. (a) and cl. (b) of S. 2 (5) of the Bom. Agri. Debtors' Relief Act, the person claiming the status of a debtor (whether it be an individual debtor or an undivided Hindu family) must satisfy both the requirements, viz., that the non agricultural income must not exceed quantitatively and fractionally the specified maxima. The same sense could be brought about by using "and" in the place of "or" in S. 2 (5) (a) (iv) and by omitting the expression "whichever is greater". In any case the mere fact that "or" has been used in cl. (iv) of sub S. (a) in the definition of an individual debtor cannot be a ground for ignoring the plain words of the statute which require that both the conditions provided under cl. (iv) of sub-S. (a) should be fulfilled or satisfied. The conjunction "and" in cl. (iv) of sub S. (b) cannot in its context be understood to mean "or"; under S. 2 (5) (a) (iv), the Court must find out the income of the applicant from sources other than agriculture and manual labour (i.e., the non-agricultural income) and also find out the aggregate of the income from all sources. If the aggregate income from non agricultural sources exceeds Hs. 500, the applicant cannot claim that status of a debtor. He cannot also claim that status if the non-agricultural income exceeds a 33|100 fraction of the agricultural income. If the non-agricultural income does not exceed 33|100 fraction, but still exceeds Rs. 500, the applicant cannot claim the status of a debtor. Under S. 2 (5) (b) (iv), the Legislature has provided that an undivided family claiming the status of a debtor must, among other things, establish that the non-agricultural income of the family does not exceed forty per cent. of the total income of the family and the total non-agricultural income does not exceed Rs. 1,500. Both the conditions regarding the maximum limit and the percentage of the non agricultural income must be satisfied before Hindu family can claim the status of a debtor within the meaning of the Act. Where the non-agricultural income of the family exceeds 40 per cent. of the total income of the family, one of the essential conditions of the right to claim the status of a "debtor" within the meaning of the Act is not satisfied and hence the application must fail. 52 Bom.L.R. 678.

——Ss. 4 and 19—Relative scope—Suit for declaration and accounts under Dekkhan Agriculturists Relief Act filed in 1945—If transferable to "Court" under S. 19.

S. 19 of the Bombay Agricultural Debtors Act, 1947, is not controlled by S. 4 of the Act. S. 4 only deals with the applications that can be made directly to the Court, and its scope is limited, applying as it does to a limited class of debtors and creditors. S. 19 widens the scope of the proceedings under S. 4. There is no warrant for holding that the proceedings to be transferred under S. 19 (1) must satisfy the requirements of S. 4. To so hold would be to misread the two sections.

A suit filed in 1945 under the Dekkhan Agriculturists Relief Act, 1939, for a declaration that a transaction, dated 28th August, 1915, purporting to be a sale was in fact a mortgage, and for accounts, can therefore be transferred to the "Court" under the Bombay Agricultural Debtors Act, 1947, though no application to the Debt Adjustment Board could have been made at that time under the Agricultural Debtors Act, 1939, which was repealed by the Act of 1947. I.L.R. (1948) Bom. 417=A.I.R. 1949 Bom. 33=50 Bom.L.R. 449.

——Ss. 4 (1) and 19 (1)—Applicability—Suit filed after date fixed for filing applications—Transfer to Board—Legality.

The Debt Adjustment Board was established in the District of Ahmedabad (where the suit originated) on 2—1—1947, and the last date for filing applications for adjustment of debts was accordingly 31—7—1947. On 3—9—1947, a debtor filed a suit for redemption against his creditor alleging that a deed of sale passed by him in favour of the defendant was really in the nature of a mortgage, and on 8—1—1948, he applied to the Court to transfer the suit to the Debt Adjustment Board on the ground that he was an agriculturist and had evidence to prove his status as such and that he should be held an agriculturist. It was never alleged that the plaintiff was a debtor. The defendant opposed the application on the ground that the suit having been filed after the expiry of the period for filing applications before the Board, the application for transfer did not lie and that the suit should not therefore be transferred. The Court overruled the plea and made an order for transfer.

Held, that under S. 19 (1) of the Act only such suits and proceedings could be transferred which were pending at the date when an application under S. 4 could be made to the Special Court set up under the Act. Merely because a suit is filed after the expiry of that period, the pendency of such suit would not give the debtor a better or higher right than would have been available to him if no such suit had been filed. Hence the order transferring the suit to the Board was erroneous and must be set aside. 52 Bom.L.R. 408=A.I.R. 1950 Bom. 329 (D.B.).

——S. 17—Jurisdiction—Issue as to binding character of sale on debtor.

The Court established and acting under the Bombay Agricultural Debtors Act has no jurisdiction to decide a question as to whether a particular sale is binding on the debtor or not. The determination of such an issue is outside the scope of the Act. I.L.R. (1949) Bom. 75=50 Bom.L.R. 708=A.I.R. 1949 Bom. 108.

——S. 19—Applicability—Courts in City of Bombay.

The provisions of Bombay Act XXVIII of 1947, do not apply to the City of Bombay and therefore Courts in the City of Bombay are not bound to transfer suits against agriculturist debtors to the "Court" as defined in S. 2 (3) of the Act. 51 Bom.L.R. 485=A.I.R. 1949 Bom. 304.

——S. 19—Applicability—One of several defendants (debtors) alone pleading privilege—Sufficiency.

Under S. 19 (1) of Bombay Act XXVIII of 1947, the Court is bound to transfer a suit to the Special Court even in a case where the question involved is whether one of two or more defendants in the suit is a debtor under the Act and whether the total amount of

his debts did not exceed Rs. 15,000. The fact that the other defendants have not pleaded the privilege is immaterial. I.L.R. (1950) Bom. 709=A.I.R. 1950 Bom. 84=51 Bom.L.R. 781 (D.B.).

——S. 19 (1)—Applicability—Suits, etc., transferable to special Court.

Under S. 19 (1) of the Bombay Act (XXVIII of 1947), the suits, etc., which can be transferred to the special Courts set up under the Act are only such suits, appeals, applications for execution and proceedings as were pending at the date when an application under S. 4 could be made to the special Court set up under the Act. I.L.R. (1949) Bom. 229=51 Bom. L.R. 461=A.I.R. 1949 Bom. 308 (D.B.).

——S. 19 (1)—Applicability—Transfer of case to Special Court—If conditional on pendency of application in that Court.

It is open to a debtor to apply to a Civil or Revenue Court for transfer, under S. 19 (1) of Bombay Act XXVIII of 1947, of a pending matter which does not by itself involve the questions set out in S. 19, even though no application has been made to the Court under S. 4 of the Act. The questions as to whether a person from whom a debt is due, is a debtor or not and whether the total amount of his debts exceeds Rs. 15,000, or not, are questions which may be said to be involved in a suit, appeal or application for execution, etc., if they arise out of any application made in those proceedings and they need not necessarily arise out of the pleadings of the parties. The section does not in terms require that before the transfer can be ordered there must be in existence an application before the Court. I.L.R. (1950) Bom. 709=A.I.R. 1950 Bom. 84=51 Bom.L. R. 781 (D.B.).

——Ss. 19 (1) and 4 (1)—Applicability—Suit filed after date fixed for filing applications—Transfer to Board—Legality. **See** Ibid., Ss. 4 (1) and 19 (1). 52 Bom.L.R. 408.

——Ss. 19 and 4—Relative Scope—Suit for declaration and accounts under Dekkhan Agriculturists Relief Act filed in 1945—If transferable to "Court" under S. 19. **See** Ibid., Ss. 4 and 19. I.L.R. (1948) Bom. 417.

——Ss. 19 (1)—Transfer to Special Court—Requirements.

An application under S. 19 (1) of Bombay Act XXVIII of 1947 for a transfer of the proceedings would be sufficient to enable the Court to make an order of transfer, if the allegations justifying the transfer, **viz.**, that the applicant was a debtor and that the total of his debts did not exceed Rs. 15,000, were made in such application. S. 19 (1) only requires that the said questions should be involved and not that the Court should be satisfied that the questions could reasonably be said to arise. I.L.R. (1950) Bom. 709=A.I.R. 1950 Bom. 84=51 Bom.L.R. 781 (D.B.).

——S. 56, proviso (c)—Scope and effect—Application under Act of 1939—New Act coming into effect pending appeal—Proceedings if governed by new or old Act.

If proceedings under Bombay Act XXVIII of 1939 for adjustment of debts were initiated and they also terminated when that Act was in operation, and the later Act of 1947 has come into operation during the pendency of the appeal, the provisions of the new Act of 1947 must apply to and govern the proceedings. The appellate Court in such a case is not entitled to consider the status of the applicant (as to whether the applicant is "a debtor") by reference to the definition in S. 2 of the Act of 1939. 52 Bom.L.R. 678.

——S. 56, Proviso 2—Retrospective Effect—Pending appeals—Law and procedure as to.

The language used in the second proviso to S. 56 of the Bombay Agricultural Debtors Act, 1947, by which the Act of 1939 was repealed, is fairly clear and explicit and makes it retrospective in its effect. Under that proviso the appeals pending shall be continued and disposed of as if they were appeals under the new Act, and the provisions of the new Act will therefore apply to pending appeals, both as regards the substantive law and also the procedural law. 51 Bom.L.R. 744=A. I.R. 1949 Bom. 390 (D.B.).

——Ss. 85 and 86—Construction and scope—Procedure under Dekkhan Agriculturists' Relief Act—Application to suits filed before establishment of Board—"Any proceedings"—Meaning of.

The effect of S. 85 of the Bom. Agri. Debtors Relief Act is that the Dekkhan Agriculturists' Relief Act would cease to have any operation from the date on which the Debt Adjustment Board is established. S. 86, however, provides an exception by laying down that the Dekkhan Agri. Relief Act will remain in force for a period of three years from the date on which a Board is established for any local area for the purpose of institution of suits in respect of transactions about which no application can be made under S. 17 of the Agricultural Debtors Relief Act, and that it will continue in force until the suits instituted before the expiry of the period of three years from the aforesaid date and the proceedings arising in and out of the said suits terminate. "Any proceedings" in the final clause of S. 86 must be read as meaning the hearing and procedure of the suits as well as proceedings arising in and out of the suits.

There is no warrant for the contention that the Dek. Agri. Rel. Act will remain in force **only for the purposes of institution of suits,** and that the further procedure would be under the ordinary law with the result that S. 10-A of the Dek. Agri. Rel. Act will not apply to a suit for accounts in respect of a transaction of 1884 filed in 1944 before the establishment of a Board. Nor is it correct to contend that the provisions of the Dek. Agri. Rel. Act may be availed of, if at all, by persons who file suits between the date of the establishment of the Debt Adjustment Board and three years therefrom but that those provisions cannot be availed of for suits filed before the establishment of the Debt Adjustment Board. The emphasis really is on the word "before" and not on the word "from". The three years are no doubt to be calculated from the date of the establishment of the Board, and the procedure laid down in the Dek. Agri. Rel. Act will be availed of for all suits which are filed before the expiry of three years from the date of the establishment of the Board, including suits which are filed before the establishment of the Board. 51 Bom.L.R. 165=A.I.R. 1949 Bom. 170= I.L.R. (1949) Bom. 185.

——S. 86—Construction—"Any proceedings"— Meaning of—Suits filed before establishment of Debt Adjustment Board—Procedure under Dek. Agricultural Relief Act—If applicable. **See** BOMBAY AGRICULTURAL DEBTORS RELIEF ACT, Ss. 85 and 86. 51 Bom.L.R. 165.

——S. 86—Period of three years—If a period of limitation.

S. 86, Bombay Agricultural Debtors Relief Act, does

not provide any period of limitation. The section merely keeps the Dekkhan Agricultural Relief Act alive as it were, for the purposes of instituting suits up to a particular date. 51 Bom.L.R. 605=A.I.R. 1950 Bom. 16=I.L.R. (1949) Bom. 560.

——S. 86—Scope and effect of—Period of three years expiring on holiday—Suit filed on re opening day—Bar of—General Clauses Act, S. 11—Applicability. See BOMBAY GENERAL CLAUSES ACT, S. 11. 51 Bom.L.R. 605.

BOMBAY BHAGDARI AND NARWADARI TENURES ACT (V OF 1862).

——A ryotwari village declared Bhagdari village by Government for administration purpose—Bholar village —The change of tenure not to affect the ordinary rules of Hindu Law applying to the parties—Special custom regulating succession of Bhagdari lands not applicable to such change in tenure. (1907) 12 Bom.L.R. 573= 7 Ind. Cas. 659.

——S. 1—Consent decree—Court can refuse execution, if it results in contravention of section. A.I.R. (Vol. 30) (1943) Bom. 54 (54, 56)=44 Bom.L.R. 907=I.L.R. (1943) Bom. 19=205 Ind. Cas. 577.

——S. 1—Separation of a portion of narva land by proprietor—Recognition of the portion by Collector as separated sub-division—Effect of.

Where the proprietor of a recognised sub-division of a Narva separated from that land a portion for the purposes of building, and where the Collector recognised the separation of that portion for building purposes,

Held, that such separation in no way derogated from the constitution of the narva homestead, and that the separated portion must be considered as a recognised sub-division. 27 Bom.L.R. 958=88 Ind. Cas. 1034= A.I.R. 1925 Bom. 476 (D.B.).

——S. 1—Unrecognised sub-divisions of bhag—Attachment and sale—Receiver if can be appointed.

Under S. 1, Bombay Bhagdari and Narwadari Act, where the lands are unrecignized sub-divisions of a **bhag**, they are not attachable, and cannot be sold in execution. The appointment of a Receiver of the land to collect rents and profits is also prohibited by the Act, as a Receiver of possible future income of property cannot be appointed because such income is not by itself definite property of the judgment debtor at the time of the Receiver's appointment. A.I.R. (Vol. 23) 1936 Bom. 399=38 Bom.L.R. 938=165 Ind. Case. 604.

——S. 3—Adverse Possession—Bhagdari lands—If amenable to.

There is nothing in the Bhagdari Act to prevent any person from acquiring rights to bhagdari property by adverse possession against the previous proprietor of a bhag. 30 Bom.L.R. 980=114 Ind. Cas. 266=A.I.R. 1928 Bom. 377.

——S. 3—Adverse Possession—Possession under alienation made in contravention of section.

Possession acquired under an alienation made in contravention of S. 3 of the Bhagdari Act, 1862, can become adverse and bars a suit for recovery by the individual alienor or his representatives in interest. (1908) 10 Bom.L.R. 1128=33 B. 116=1 Ind. Cas. 663.

——S. 3—Adverse possession—Lease of—Unrecognised sub division—Possession of alienee is adverse.

The property in dispute formed an unrecognised subdivision of a Narva. On 28—4—1892, it was conveyed by its owners, the plaintiff's predecessors, to defendants for a long term of 500 years in consideration of a sum of money. In a suit for redemption by the plaintiffs in 1918 treating the transaction of 1892 as a mortgage, the defendants pleaded that the alienation was void in view of the Bombay Bhagdari Act and that their possession had been adverse for over 12 years. **Held**, that the transaction of 1892 was not an out and out sale but a lease for a long term and that as the alienation was void, the defendants had acquired by prescription a leasehold interest. 24 Bom.L.R. 1315=1923 Bom. 147.

——S. 3—Adverse possession—Possession under void lease.

Where a person goes into possession of an unrecognised sub division of a bhag under a void lease and remains in possession for upwards of twelve years, he acquiries title by prescription to the limited interest under the lease and cannot be evicted during the period of the lease. 30 Bom.L.R. 980, Fol. 32 Bom.L.R. 930=A.I.R. 1930 Bom. 448.

——S. 3—Adverse possession—Title acquired by—Extent.

A person who acquires land of bhagdari tenure by adverse possession holds the land subject to the incidents of that tenure and not free from those incidents. A.I.R. (Vol. 18) 1931 Bom. 511 (512)=33 Bom.L.R. 1211=135 Ind. Cas. 429.

——S. 3—Adverse possession of an unrecognised share of a Bhagdari village—Title by—Power of Collector to remove occupant from possession.

Under S. 3 of the Bhagdari Act the Collector can act at any time and the Statute of Limitation is no bar to his action. So, adverse possession, for however long a time, of an unrecognised share of a Bhagdari village is no bar to the Collector acting under S. 3 of the Bhagdari Act and removing the occupant from possession (1902) 4 Bom.L.R. 797, followed in (1904) 28 B. 399= 9 Bom.L.R. 428.

——S. 3—Alienation of fruit of the trees on land—Permanent tenant, position of.

There is nothing in the Bhagdari Act to prevent a permanent tenant of a Bhagdar from alienating the fruit of the trees on the land of which he is a tenant, in the same way as he could alienate the crops or grass upon such land. The position of a tenant of a Bhagdari land, who is presumed to be a permanent tenant under S. 83 of the Land Revenue Code, 1879, is not affected in any way by the prohibition contained in the Bhagdari Act against alienation. (1906) 9 Bom.L.R. 50=31 B. 183.

——S. 3—Alienation of lands in Bhag—Permanent tenant.

The section does not prohibit alienation by a permanent tenant of lands in a bhagdari and narwadari village, whose rights existed before the Act. The Collector's interference with the sale is wrong. 38 Bom. 679=28 Ind. Cas. 127=16 Bom.L.R. 571.

——S. 3—Alienation—Validity—Sale so as to piece together a recognised sub-division.

There is no alienation such as prohibited by S. 3 of the Bhagdari Act, where the effect of a transaction had not been to effect dismemberment of bhags or shares,

but to bring together the various served portions of a recognised sub-division into the hands of one owner. 15 Ind. Cas. 947=21 Bom.L.R. 707 (D.B.).

——S. 3—Alienation of—Unrecognized sub-division of a Bhag—Refund of consideration.

The prohibition against alienation of an unrecognised sub-division of a bhag, provided by S. 3 of the Bhagdari Act, 1862, applies to the person in possession of the bhag, though he may not be the bhagdar. Where an alienation is declared to be void under S. 3 of the Bhagdari Act, 1862, an order for refund of the consideration money which has passed under the impeached transaction may be made. (1909) 11 Bom.L.R. 693=3 Ind. Cas. 761.

——S. 3—Alienation—Transfer really of portion of bhag but ostensibly of whole—Transferor taking advantage of transfer for long period applying to avoid it—Equities.

The transfer by the owner of a bhag ostensibly of the whole, but purporting to be of a portion of it is null and void provided where the transferor has taken the advantage of transfer for a considerable period, before he can be allowed to avoid it regard must be had to the equities of the case. 31 Bom.L.R. 1422=A.I.R. 1930 Bom. 121 (D.B.).

——S. 3—Alienation of an unrecognised position of a bhag—Limitation—Starting point.

In the case of the sale of an unrecognised portion of a bhag, the alienation being void, ab initio the starting point of limitation for having the sale set aside is the date of the sale-deed whether Art. 91 or Art. 120 applies.

——Alienation—Court's duty.

The Court should look to the substance and not to the mere form of the transaction. And in any case, where the law such as S. 3 expressly declares certain transaction unlawful the Court not only may, but must, regard the reality, and not the appearance of the transaction in question. 51 I.C. 947, Foll.

Where a mortgagor sells in reality a moiety of the properties to the mortgagees for an amount due on the mortgage, and the other moiety is ostensibly sold in the name of the wife for an alleged consideration, the transaction amounts to a sale of an unrecognized portion of a bhag, and if subsequently after the death of her husband, the wife sells her moiety to the mortgagee the subsequent deed of sale cannot be upheld as in effect causing a past dismembered bhag to be reunited, and a suit by reversioner to set aside the above alienation is not governed by Arts. 125, 126 and 141. 32 Bom.L.R. 1013=A.I.R. 1930 Bom. 545.

——S. 3—Award effecting partition of recognised sub-division—Validity.

An award, the result of which will be to effect further partition in a certain recognised sub division of a Bhag is void under S. 3 of the Act. The substance and effect of the transaction is what must be looked to, for the purpose of determining whether it is within the mischief of the Act. If the transaction clearly amounts to an alienation of an unrecognised sub-division of a share in a narva, its real nature cannot be disguised by calling it a compromise. 45 Ind. Cas. 577=20 Bom.L.R. 342.

——Ss. 3, 5—Compromise—Sub-divisions of Narva—Under compromise of parties not recognised by Collector—Validity—Duty of Civil Court.

Where the parties to a suit arrive at a compromise the effect of which is that a narva is split up into two portions over one of which one party gives up his right in favour of the other and the division so effected is not a recognised sub-division, the compromise is void under Ss. 3 and 5 of the Bhagdaree and Narvadaree Act, 1862. Where a transaction is not lawful under S. 3 (1) of the Act, the Civil Court is bound to adjudicate upon it independently of the question whether the Collector interferes or not under S. 3 (2) of the Act. (1904) 6 Bom.L.R. 428=28 B. 399.

——S. 3—Lease—Lease for a long period of time (e.g.) 500 years is void. 24 Bom.L.R. 1315=77 Ind. Cas. 952=A.I.R. 1923 Bom. 146 (D.B.).

——S. 3—Mortgage of unrecognised sub-division of bhag—Right of mortgagee to compensation.

An unrecognised sub-division of a bhag namely a house was mortgaged and the mortgagors were in possession as tenants. In a suit for possession the defendant admitted the mortgage deed and rent notes. **Held**, the mortgage and the rent notes were void under S. 3 of the Act; the consideration for the mortgage failed ab initio and a suit for its recovery is barred if brought more than 3 years after 39 Bom. 358=28 Ind. Cas. 442=17 Bom.L.R. 259.

——S. 3—Mortgage or lease—Suit for rent—Prior ex-parte decree upholding transaction vaid is res judicata between parties. See C. P. CODE, S. 11, (1909) 33 B. 479=11 Bom.L.R. 345=2 Ind. Cas. 530.

——Ss. 3, 5—Recognised sub-division means sub-division recognized by Government. A.I.R. (Vol. 23) 1936 Bom. 201=38 Bom.L.R. 175=163 Ind. Cas. 632.

——S. 5—Right to succeed.

A left his property by will, the relevant portion of which ran as follows: "After my death I make my first and senior wife J as kul malik of all my properties because she is advanced in age and has good understanding and so she is not such as to waste away or cause loss to my estate unnecessarily. Hence J should take all my properties into her possession and management after my death and should do its **vahivat** in right of **khas** ownership; after J's death, I make my second wife S the heir of the properties that remain and after her death I make my widowed daughter, D, the heir of all the properties that remain. These three are the heirs of my properties one after the other and they are entitled in law to Inherit my properties. Hence I, of my free will, make them my heirs one after the other. As they go on getting inheritance they should take my properties in their possession and manage the same as they please. That is, I give all my rights to my heirs which I have in law, namely of managing in any way I please. They, when they get inheritance have, therefore, full right of management and none can raise objections. After the death of all these three heirs named by me, son of my true sister (i.e., plaintiff), should perform the funeral ceremonies of the last heir and should take the remaining properties in his possession and enjoy it in right of inheritance." So long as the three heirs, one after the other, were alive, the plaintiff was to have no right to the properties except those given to him and he would get the right after all the three were dead. S died during the lifetime of J. The property was enjoyed by J and then by D, on whose death the plaintiff claimed the property under the will:

Held, that under the will J took an absolute estate both alienable and heritable and that on D's death, the plaintiff had no right to succeed. A.I.R. (Vol. 23) 1936 Bom. 201=38 Bom.L.R. 175=163 Ind. Cas. 632.

——S. 5—Will—Validity of.

If a will of Bhagdari lands offends against the provisions of the Act, it will be inoperative, though it is valid according to the personal law of the testator. 41 Bom. 377=39 Ind. Cas. 83=19 Bom.L.R. 141=A.I.R. 1916 Bom. 127 (D.B.).

BOMBAY BORSTAL SCHOOLS ACT (XVIII OF 1929).

——S. 6—Duty of Magistrates.

The wording of the Bombay Borstal Schools Act is designed not only to reform the offender but to save him from the stigma of conviction and, therefore, Magistrates should follow the wording of S. 6 of the Act and should find the youthful offender guilty of an offence but should not convict him of an offence and should pass in lieu of a sentence of imprisonment an order for detention within the provisions of S. 6. A.I.R. (Vol. 23) 1936 Sind 78=37 Cr.L.J. 855 (2)=30 S.L.R. 98 =1936 Cr. Cas. 661=163 Ind. Cas. 373.

——S. 6—Duty of Magistrate—Offence not first—Accused above 16 but below 21 years of age—Sentence.

The mere fact that the offence committed by an adolescent is not his first offence is no ground for not sending him to a Borstal School. The very object of the Bombay Borstal Schools Act is to detain adolescents in the School who have formed criminal habits when the Court considers that their detention in the School will be conducive to their reformation. Under the Act the Magistrate should consider whether an adolescent offender who is not below the age of 16 years and not above the age of 21 years should not be sent to a Borstal School for the purpose of being reformed, and the Magistrate should apply his mind to the provisions of the Act.

Where a person above 16 and below 21 is sentenced to undergo imprisonment in jail, it will not be competent for the Magistrate to pass an order of detention in Borstal School even if he thinks fit to do so, unless the sentence passed against him is set aside. A.I.R. (Vol. 20) 1933 Sind 391=1933 Cr. Cas. 1431=35 Cr. L.J. 253=27 S.L.R. 476=146 Ind. Cas. 1076.

——S. 6—Order for detention in Borstal School in lieu of sentences of imprisonment passed—Legality.

Section 6, Borstal Schools Act, contemplates not a sentence of imprisonment passed under any one particular section or sections of the Penal Code, either concurrent or consecutive but an order of detention for the period prescribed. Where the accused who is found to be under 18 years of age, is sentenced to two years' rigorous imprisonment for one offence and for one year's rigorous imprisonment for another, the sentences to run consecutively and it is directed that in lieu of the sentences the accused should be detained in a Borstal School for three years, the sentence is contrary to the provision of S. 6. A.I.R. (Vol. 24) 1937 Sind 2=38 Cr.L.J. 320=166 Ind. Cas. 831.

——S. 6—Order for detention—When may be made.

Where the accused is found to be guilty of an offence which will render him liable to be transported or imprisoned, the Court can, under S. 6, Bombay Borstal Schools Act, pass in lieu of any such sentence of transportation or imprisonment an order for his detention in a Borstal School. A.I.R. (Vol. 19) 1932 Sind 175= 34 Cr.L.J. 11=26 S.L.R. 295=1[illegible] Cas. 732= 140 Ind. Cas. 417.

——S. 6—Proper procedure and order.

The proper procedure to be followed under S. 6, Bombay Borstal Schools Act, is that in case the Magistrate convicts the accused under S. 380, I. P. Code, in lieu of a sentence of imprisonment he should sentence the accused to be detained for a period of not less than two years and not more than five years in a Borstal School. It is wrong to sentence the accused to rigorous imprisonment and then direct him to undergo it in the Borstal School. A.I.R. (Vol. 19) 1932 Bom. 489=34 Bom.L.R. 299=33 Cr.L.J. 395=1932 Cr. Cas. 617=137 Ind. Cas. 132.

——S. 6—Proper order.

Under S. 6, Bombay Borstal Schools Act, when an offender is found guilty of an offence for which he is liable to be sentenced to transportation or imprisonment and certain conditions are satisfied, it shall be lawful for the Court to pass in lieu of a sentence of transportation or imprisonment an order that the offender be detained in the Borstal School for a certain term. The proper order under S. 6 is to convict the accused, and then, in lieu of sentence of imprisonment, sentence him to be detained for a period of not less than two years and not more than five years. A.I.R. (Vol. 20) 1933 Bom. 461=35 Bom.L.R. 1018=1933 Cr. Cas. 1420= 58 Bom. 37=146 Ind. Cas. 1 (F.B.).

——Ss. 6, 8—Previous convictions as evidence of criminal habits.

Where the evidence of criminal habits or tendencies from which it is to appear to the Court that it should tak action under S. 6, Bombay Borstal Schools Act is that of previous convictions, the Court should require these previous convictions to be properly proved before it can say that there is evidence from which it can appear to the Court that the accused is of criminal habits or tendencies within the meaning of cl. (b) of S. 6. There is no difference in the standard of proof required for previous convictions, for the purpose of S. 75, Penal Code or for the purpose of S. 6, Bombay Borstal Schools Act.

Where the only evidence of previous convictions is merely the extracts from the records of Central Bureau of Finger Prints and no certificate from Jail Officer or warrant of commitment is produced to prove it, on such evidence, the Court cannot take account of the previous convictions and cannot, consequently, take action under S. 6. A.I.R. (Vol. 26) 1939 Sind 335=I.L.R. (1940) Kar. 83=41 Cr.L.J. 143=185 Ind. Cas. 268.

——Ss. 6, 11—Reference to High Court—When may be made.

Before a case is referred to the High Court under S. 6, a reference should be first made to the Inspector-General and only when he is of the opinion that he cannot, by reason of the particular circumstances of the case or the provisions of S. 11, Borstal Schools Act, transfer a young offender to the Borstal School by his own order or with the previous sanction of Government, should any reference in such matters be made to the High Court. A.I.R. (Vol. 26) 1939 Sind 335=I.L.R. (1940) Kar. 83=41 Cr.L.J. 143=185 Ind. Cas. 268.

——Ss. 12 and 21, Proviso—Order of detention by Magistrate—Government and not High Court can interfere with such order.

Where the trial Court has substituted an order for detention for a sentence of transportation or imprisonment, the High Court cannot interfere in appeal or revi-

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sion. Only Government has power under S. 12, Bombay Borstal Schools Act, to alter the order made by the Magistrate. A.I.R. (Vol. 29) 1942 Bom. 78 =44 Bom.L.R. 48=43 Cr.L.J. 475=199 Ind. Cas. 85.

——S. 21—Scope—Appeal or Revision.

Under S. 21 of the Borstal Schools Act nothing contained in the Cr. P. Code shall be construed to authorise any Court or Magistrate to alter or reverse in appeal or revision any order passed with respect to the age of an offender or the substitution for an order for detention in a Borstal School for transportation or imprisonment. A.I.R. (Vol. 19) 1932 Sind 175=26 S. L.R. 295=1932 Cr. Cas. 732=34 Cr.L.J. 11=140 Ind. Cas. 417.

BOMBAY CHILDREN ACT (XIII OF 1924).

——Applicability—Accused in murder case below 15 years of age.

Where a person accused of murder is just below 15 years of age, he comes within the definition of "young person" in the Bombay Children Act and a sentence of transportation for life, in his case would be illegal. 49 Cr.L.J. 191=A.I.R. 1948 Sind 63 (D.B.).

——Ss. 3 (a), (c), 22—Accused, child and youthful offender—Lawful order.

Where the accused is a child within the provisions of cl. (a) of S. 3, Bombay Children Act, and is a youthful offender within the meaning of cl. (c), the Court can only lawfully commit the accused to prison under the provisions of S. 22 of the Act after it certifies that the boy is so unruly or of so depraved character that he is not a fit person to be sent to a certified school and that none of the other methods by which a case may be legally dealt with is suitable. A.I.R. (Vol. 25) 1938 Sind 224=39 Cr.L.J. 996=I.L.R. (1939) Kar. 189= 178 Ind. Cas. 126 (1).

——S. 5—Object of.

The object of S. 5 is to exclude from the exercise of powers under the Act all Courts other than those specified, and not to confer jurisdiction. A.I.R. (Vol. 29) 1942 Bom. 341=44 Bom.L.R. 804=44 Cr.L.J. 126= I.L.R. (1943) Bom. 88=203 Ind. Cas. 643.

——Ss. 5, 51, 46—Juvenile Court and Presidency Magistrate—Jurisdiction, if concurrent.

The jurisdiction of the Children's Court is not exclusive; the other Presidency Magistrates can try cases in which children are concerned. A.I.R. (Vol. 29) 1942 Bom. 341=44 Bom.L.R. 804=44 Cr.L.J. 126=I.L. R. (1943) Bom. 88=203 Ind Cas. 643.

——S. 7—Locus standi to initiate proceedings—Putative father.

Under S. 7 of the Bombay Children Act, the only persons who can move the Court are a Police Officer or other person authorized in this behalf in accordance with rules made by the Governor in Council. Those persons include Probation Officers and certain other persons, but not an alleged putative father who has no **locus standi** to start proceedings. A.I.R. (Vol. 24) 1937 Bom. 388=39 Bom.L.R. 468=38 Cr.L.J. 1053= 171 Ind. Cas. 274.

——S. 22—Child convicted for murder—Reformatory School, benefit of—Inquiry.

The conviction of a child for the offence of murder does not **per se** show that the child is of so unruly or depraved a character as to be unfit to be sent to a certified or reformatory school. In majority of cases, such a finding must be based on enquiry into the antecedents of the child in question. (1944) I.L.R. (1944) Kar. 272.

——Ss. 23, 32, 51 (3)—Power of High Court to extend period of detention—Time limit.

There is no limit of time within which an application for revision must be made, and it can be made under S. 51, Bombay Children Act, at any time before the expiration of the term of detention limited in the order. High Court has, therefore, jurisdiction at any time before the expiration of the term of detention limited in the order under S. 23 to extend the period of detention, provided the extended period does not exceed the limit specified in S. 32. A.I.R. (Vol. 26) 1939 Bom. 371= 41 Bom.L.R. 554=40 Cr.L.J. 900=184 Ind. Cas. 205.

——Ss. 23 (1) and 27 (3)—Applicability—Conviction of youthful offender for theft.

S. 27 (3) of the Bombay Children Act does not apply to the case of a youthful offender who is convicted of the offence of theft under S. 379, I. P. Code. A sentence of fine and in default detention for three years in a certified school is, besides being incongruous, wrong in law. Such an offender has to be dealt with under Ss. 23 (1) and 27 (1) (d) of the Act and not under S. 27 (3). I.L.R. (1946) Kar. 93=A.I.R. 1947 Sind 35=48 Cr. L.J. 513=230 Ind. Cas. 115 (D.B.).

——Ss. 26 and 27—Accused between 14 and 15 convicted for murder—Proper course.

Under the I. P. Code, the Sessions Judge has no power to impose on the accused (who is over 14 and below 15 years) a sentence of 7 years' imprisonment.

Hence, in convicting her of the offence of murder, he cannot do so under S. 27, Bombay Children Act by reason of the proviso which follows cl. (1) of S. 27. The proper course for the Judge is to deal with the accused in the manner provided in S. 26 of the Act. A.I.R. (Vol. 31) 1944 Sind 198=I.L.R. (1944) Kar. 260=46 Cr.L.J. 141=216 Ind. Cas. 205.

——S. 27—Murder—Sentence of imprisonment

A sentence of imprisonment cannot be imposed on a child found guilty of murder. (1944) I.L.R. (1944) Kar. 272.

——S. 27—Scope—Fresh powers on Magistrate, if conferred.

Section 27, Bombay Children Act, does not confer upon the Court powers which it does not otherwise possess. Although S. 27 does set out a list of pains and penalties which may be inflicted upon conviction of offences against the law, and gives the Magistrate the right to choose any one of them, it does not confer fresh powers upon Magistrates. The Magistrate cannot do any of the things mentioned in S. 27 unless he is authorized by some other law. Hence under S. 27, the Court cannot impose the punishment of whipping in the first instance upon a child who is found guilty of the offences under Ss. 109 and 121 of the Railways Act as those sections provide for punishment of fine only. In such a case the Court can order caning only in default of fine under S. 27 (2) of the Bombay Children Act. A.I.R. (Vol. 29) 1942 Sind 162=I.L.R. (1942) Kar. 288= 44 Cr.L.J. 127=203 Ind. Cas. 646.

——S. 27 (1)—Proviso—Scope—Fresh power on Magistrate if conferred.

The proviso to S. 27 (1), Bombay Children Act, is applicable only to sub-cl. (1) which enables the Magistrate to deal with the case "in any other manner in

which it may legally be dealt with." The sub-clause does not confer any fresh power on the Magistrate.

It would be useless to confer by a section powers which already exist under some other law, and it would be senseless to give new powers under a section and then provide at the end that the new powers are not to operate. A.I.R. (Vol. 21) 1934 Bom. 461=36 Bom. L.R. 962=36 Cr.L.J. 283 (1)=1934 Cr. Cas. 1331= 153 Ind. Cas. 33 (1).

——S. 27-B—(As amended in 1935)—Scope—Report likely to lead to child's identification at least by relations and friends of child.

The intention of the Legislature in inserting the words 'calculated to lead to the identification' in S. 27-B in the year 1935 is that the future of a child should not be marred by any report which is likely to lead to the child's identification. Thus a newspaper report does come within the wording of this section if it is likely to lead to the child's identification only by the friends and relations of the child's family, though not by a large section of public. The motive behind publishing the report, however laudable, is immaterial for the applicability of the section. I.L.R. (1946) Bom. 454=A.I. R. (Vol. 33) 1946 Bom. 115=47 Bom.L.R. 986.

——S. 27-B—Scope and effect of.

The provisions of 27-B of the Bombay Children Act are too wide and drastic and leaves no discretion to the Court; it applies to all reports connected with any offence, either by or against a child, of any proceedings in any Court. I.L.R. (1946) Bom. 454=47 Bom.L. R. 986=A.I.R. 1946 Bom. 115 (D.B.).

——S. 27-B—Sentence—Mitigation of—Publication of reports of same incident in other newspapers.

The publication of a report prohibited by S. 27-B of the Bombay Children Act in other newspapers affords no justification to the editor of a paper in which such a report is published; but it would affect the question of punishment to be awarded to the accused editor, because at the time of publication of the report in his paper the public was already aware of the incident by its publication in other papers. That is a mitigating factor in the matter of sentence. I.L.R. (1946) Bom. 454=47 Bom.L.R. 986=A.I.R. 1946 Bom. 115 (D. B.).

——S. 46—Scope and effect—If abrogates S. 340 (1), Cr. P. Code—Juvenile offender—Right of to be defended by advocate—Counsel not permitted to cross-examine complainant and witnesses—Effect on conviction—Interference in appeal. **See** CR. P. CODE, S. 340 (1). A.I.R. 1950 Sind 16.

——S. 51 (3)—Applicability—Order by Dt. Magistrate on appeal against order under S. 7—High Court's power of revision.

Sub-S. (3) of S. 51, Bombay Children Act, is in terms an enabling section and not a disabling section, and if it purports to restrict in any way the High Court's power of revision, it does so only by implication. As powers of revision are conferred by statute, it would be wrong to hold that they have been limited by implication when they have not been limited by any express words. Sub-S. (3) does not strictly speaking, apply to an order passed by a District Magistrate on appeal against the order made under S. 7 of the Act. The High Court can revise such order in revision. A. I.R. (Vol. 24) 1937 Bom. 388=39 Bom.L.R. 468=38 Cr.L.J. 1053=171 Ind. Cas. 274.

BOMBAY CHILDREN (AMENDMENT) ACT (VII of 1936).

——Man of 22 externed because of petty theft by him at the age of 14—The order is in defiance of the spirit of the Bombay Children Act. A.I.R. (Vol. 28) 1941 Bom. 367=43 Bom.L.R. 834=I.L.R. (1941) Bom. 690=43 Cr.L.J. 210=197 Ind. Cas. 577.

BOMBAY CITY CIVIL COURT ACT (XL OF 1948).

——If ultra vires.

The Bombay City Civil Court Act (XL of 1948), conferring exclusive jurisdiction upon the new City Civil Court to try suits on promissory notes up to the value of Rs. 10,000, and taking away from the Original Side of the High Court jurisdiction in respect of such suits is **intra vires** the Provincial Legislature and not **ultra vires**. It is within the legislative competence of the Provincial Legislature to invest the new Court with jurisdiction to try such suits, and also to deprive the High Court of its jurisdiction in respect of such suits. 51 Bom.L.R. 86=A.I.R. 1949 Bom. 197, followed in 52 Bom.L.R. 571 (D.B.).

——Ss. 3 and 4—Scope—If may be read together—Powers of Provincial Legislature to delegate. **See** BOMBAY CITY CIVIL COURT ACT, S. 4. 52 Bom.L.R. 571.

——S. 3—Scope—Suit to evict licensee from house of monthly letting value of Rs. 50—Valuation—Jurisdiction of High Court to try—Bombay Rents, etc., Act (1947)—Suits Valuation Act, S. 8.

A suit to recover possession of a house or part of the house, on the allegation that the defendant was in possession as a licensee, the rent payable being Rs. 50 per month, and that the licence has been withdrawn, lies in the High Court of Bombay, as the valuation of the suit for purposes of jurisdiction is more than Rs. 10,000. Neither the City Civil Court nor the Small Causes Court has jurisdiction to try such a suit and the High Court alone has jurisdiction to try such a suit. Bombay Rents, etc., Act of 1947 has no application to such a suit. S. 8, Suits Valuation Act, does not apply to such a case and court fee has to be paid under S. 7 (v) (c), Court-Fees Act. 51 Bom.L.R. 272=A.I.R. 1949 Bom. 254.

——S. 4—If ultra vires—Power of Provincial Legislature—Delegation of legislative function to Provincial Government—Government of India Act (1935), 7th Schedule, List II, Item 2 and List III, Item 15.

S. 4 of the Bombay City Civil Court Act is **ultra vires** the Provincial Legislature inasmuch it has purported to delegate to the Provincial Government the power to invest the City Civil Court with a jurisdiction exceeding Rs. 10,000 already conferred upon it by S. 3 of the Act. While under S. 3 the Legislature itself sets up a Court with a particular pecuniary jurisdiction, it does not under S. 4 invest the Court with any higher jurisdiction, but leaves it to the Provincial Legislature to exercise the function which the Government of India Act, 1935, lays down, should be exercised by the Provincial Legislature. It is not possible to read Ss. 3 and 4 together. The Provincial Legislature had no authority to divest itself of its rights and powers under the Government of India Act, 1935, to lay down the policy with regard to the jurisdiction of the Court and to delegate that power to the Provincial Government or to any other authority or agency. An absolute dis-

cretion is given to the Provincial Government under S. 4 whether or not to increase the jurisdiction of the Court from ten thousand rupees to twenty-five thousand rupees.

It is not open to a Legislature, supreme and sovereign as it may be within its own Province, to delegate to any other authority the power of legislation which has been entrusted to it under the Constitution. It is solely the privilege of the Legislature to make laws. In exercising that privilege it may entrust subordinates and agents with the power to carry out its policy and to give effect to the legislation, but the subordinates and agents must act within the policy laid down by the Legislature. It cannot create a parrallel or alternative legislative authority.

Under S. 3 the Legislature has set up a Civil Court with a limited jurisdiction in the exercise of its legislative powers. Having done so, it has given to the Provincial Government under S. 4 the power to confer upon that Court a higher jurisdiction up to twenty-five thousand rupees, which power could only have been exercised by the Provincial Government itself under the Government of India Act, 1935, in view of Item 2, List II and Item 15, List III, in the Seventh Schedule to that Act. This legislative power cannot be transferred or delegated by the Provincial Legislature to any other authority, i.e., the Provincial Government. What is left to the Provincial Government under S. 4 is not the carrying out of any details in deciding upon the territorial application of the Act nor fixing the time when the Act should come into force, but the power itself of legislation which, under the Government of India Act, the Provincial Legislature alone could exercise, viz., conferring jurisdiction upon the Courts. Hence S. 4 of Bombay Act XL of 1948 is **ultra vires**; it follows that the notification No. 2346|5, issued by the Government of Bombay on 20th January, 1950, in pursuance of S. 4 is invalid and of no effect. The City Civil Court has not, therefore, been validly invested with jurisdiction beyond the pecuniary jurisdiction of ten thousand rupees and, that being so, the jurisdiction to receive, try and dispose of suits and other proceedings of the value of over ten thousand rupees continues to remain vested in the High Court. 52 Bom.L.R. 571 (D.B.).

——S. 18—"Proceedings"—If include execution proceedings.

The expression "proceedings" in S. 18 of the Bombay City Civil Court Act (1948) includes execution proceedings also; the expression cannot be read in a limited or restricted sense, so as to include only original proceedings and to exclude execution proceedings. The High Court cannot consequently entertain proceedings in execution of a decree passed by it, for amount exceeding Rs. 2,000 and below Rs. 10,000. Such proceedings after the passing of Bombay Act (XL of 1948) lie only in the City Civil Court. 51 Bom.L.R. 276=A.I.R. 1949 Bom. 250.

BOMBAY CITY CONVEYANCES ACT (VI OF 1863).

——S. 6—License for public conveyance—Discretion how to be used by Commissioner—Specific Relief Act, S. 45.

The discretion that is to be used by the Commissioner of Police in granting licenses to public conveyances is one that is to be exercised after the Commissioner makes himself acquainted with the character of the carriage to be licensed and has considered whether it, as an individual carriage, is fit for the conveyance of the public. In the exercise of this discretion he is not to fetter himself with rules which would prevent him in each case from being free to consider the merits of each particular carriage. Where the Commissioner refused a license to a carriage owner solely on the ground that it was not according to a particular pattern which he had notified as fit for approval, their Lordships ordered him to issue the licenses under S. 45 of the Specific Relief Act on the ground that his refusal was illegal. (1903) 5 Bom.L.R. 133=27 B. 307.

BOMBAY CITY IMPROVEMENT ACT (IV OF 1898).

——"Court"—Tribunal created by Act—Provincial Legislature, power of, to confer jurisdiction on High Court.

The tribunal created by Bombay Act (IV of 1898) is not a Court, but a body free from the control and superintendence of the High Court, except so far as its intervention by way of appeal might be sanctioned by its President. Bombay Act IV of 1898 being a local Act, cannot confer on the High Court any jurisdiction to deal with appeals from a tribunal created by itself, inasmuch as the power to so confer jurisdiction is with the Imperial Parliament and the Viceroy's Council only. (1903) 5 Bom.L.R. 431=27 B. 424.

——Acquisition of property by Improvement Trust—Amount of compensation—Scheme of development—Rent capitalized at a given number of years' purchase—Allowance for the risk attendant upon the scheme of development.

In fixing the valuation of a property acquired by the City of Bombay Improvement Trust, the Tribunal of Appeal divided it into two categories, the one of which was regarded as fully developed and was valued at 16 2|3 years' purchase; while the other, that is the portion lying at the back, was taken as capable of further development and was estimated at 16 years' purchase. The scheme of development that was accepted provided for the erection of 4 blocks of channels running practically at right angles to the front premises, and according to the scheme these channels were to have 3 upper channels; and the ground floor was to be used for godowns. With regard to this, in appeal to the High Court, the parties limited their contentions to three points; (1) Whether the Tribunal ought to have allowed four upper floors to the hypothetical channels thereon; (2) whether the Tribunal was wrong in allowing 16 2|3 and 16 years' purchase; and (3) whether sufficient allowance was made by the Tribunal for the risk attendant upon a scheme of development such as that adopted by it as the basis of its award.—**Held** (1) that it could not be said that a scheme of development involving four upper floors was so obvious that it would enter into the calculations of an intending purchaser and influence his offer; and that there were no materials that would justify the High Court's upholding the contention that, contrary to the Tribunal's conclusion, four upper floors should be allowed; (2) that the amount of purchase fixed by the Tribunal was fair and reasonable; for the difference between the 16 2|3 years' purchase for the front and 16 years' purchase for the back was due to the allowance of a 2|3 year's rental as a reward for enterprise having a compensation for risks, the purchase having been treated as a 6 per cent. investment; (3) that the allowance made by the

Tribunal, a 2|3 year's rental for the risk attending upon the proposed scheme of development, was adequate. (1905) 7 Bom.L.R. 580=29 Bom. 565.

——S. 3—"Alienation"—Testamentary dispossession.

'Alienation' in S. 3 not only covers transfers inter vivos but extends to testamentary disposition also. 40 Bom. 207=33 Ind. Cas. 426=17 Bom.L.R. 1131.

——Ss. 41 and 45—Regular line—Building—Set forward—Right to the space.

Where the trustees for the improvement of the City of Bombay acting under S. 41 of Bombay Act IV of 1898, notify that an existing street is required by them under a new street scheme and constructed the new street with a building line set forward from the old building line, the strip of land between the two building lines belongs to the owner of the premises as set forward and does not vest in the trustees. The vesting in the trustees, under the notice is co-extensive with the revesting under S. 45 (2) in the Corporation. 43 Bom. 181=17 A.L.J. 1=36 M.L.J. 1=29 C.L.J. 138 =9 L.W. 171=25 M.L.T. 103=21 Bom.L.R. 114 =23 C.W.N. 441=1 U.P.L.R. 31=48 Ind. Cas. 404 =(1918) M.W.N. 321 (P.C.).

——S. 48 and Validating Act (XV of 1904)—Appellate Tribunal—Powers of to determine compensation and questions of title.

The Appellate Tribunal created by the Bombay City Improvement Act has power to decide questions relating to the apportionment of compensation money and also questions of title of the claimants inter se if that is necessary for determining the amount of compensation. 36 Bom. 203=13 Ind. Cas. 855=14 Bom.L.R. 22 (D.B.).

——S. 48 (11)—Grant of certificate—Effect—Acquisition of land with buildings thereon—Amount of compensation—Principles upon which the amount to be fixed.

S. 48 (11) of the City of Bombay Improvements Act, does not provide for leave to appeal being granted to any individual, but for a certificate that the case is a fit one for appeal, that is, the whole case and not any particular part of it. The consequence of the grant of this certificate is that there shall be an appeal to the High Court from the award or any part of the award, and this must mean that there shall be a right of appeal, or, to use the language of the Civil Procedure Code, that an appeal will lie to the High Court and respondent is entitled to object to the award in the manner provided by S. 561 of the Civil Procedure Code. In calculating the amount of compensation to be awarded upon acquisition of lands with buildings thereon, by the City of Bombay Improvements Trust, the rental should be the basis of calculation, so that after arriving at the net rental, what has to be ascertained is the rate of return the investors in this class of property accept; for that serves to determine the number of years' purchase it is proper to allow after giving due weight to any special conditions that may affect the property advantageously or otherwise. As to the contention that the property was at the date of the declaration capable of fetching a higher rental which was apparent from the fact that the rents of their property had been steadily rising for 16 years previous to 1889.—**Held**, that though for the purpose of his inquiry it was legitimate to have regard to the past history of the rental, it could not be taken for granted that enhancement would continue possibly, for ever, and still less that there was such a certainty of this as to make it a basis for fixing a higher purchase price. As to the contention that in arriving at the valuation the Tribunal of Appeal, following the Collector, had deducted 4 per cent., in respect of water-tax, whereas the water-supply to the premises was measured by meter and the average payment for water was Rs. 16 per annum.—**Held**, that the Tribunal was right in deducting 4 per cent. for water-tax from the rentals. The Collector allowed 20 years' purchase as the value of the property. On appeal the Tribunal took an average of the instances adduced before them, and allowed the claimants 21-50 years' purchase.—**Held**, that the striking of an average as done by the Tribunal might be a crude method of calculation; but it could not be said that the claimants had been awarded too little. (1905) 7 Bom.L.R. 569 =29 B. 514.

BOMBAY CITY LAND REVENUE ACT (II OF 1876).

——Object of—Statements in records as to title—Value of.

The object of Bombay Act II of 1876 is to provide for the administration and collection of the land revenue of the Government in the City of Bombay and not to establish a system of registration of title. Mere incidental statements in the records as to title are not decisive of the rights of the Government or of the individual as to anything except the liability to contribute to the revenue. 2 L.W. 701=39 Bom. 664=19 C.W.N. 1056=(1915) M.W.N. 536=29 M.L.J. 299=13 A.L.J. 1026=30 Ind. Cas. 539=42 I.A. 185 (P.C.).

——S. 8—Assessment and collection—Specific limit—Enhancement—Contract—Estoppel.

Lands rented to a school by the Government had to be sold as the school had to be removed to a healthier locality. The Government, who had a right of resumption as to part of the lands released their reversion and the lands were made subjected to the usual taxes, rates, etc. A purchaser was found and a deed of sale was executed to which the Government was also a party. Prior to purchase the purchaser asked for information as to the assessment leviable and was informed that it was 9 pies per square yard. **Held**, that the Government could not enhance the assessment of 9 pies per square yard either by contract or by estoppel and that 9 pies was a specific limit to the levy of revenue within S. 8 of Bombay Act II of 1876. (1901) 3 Bom.L.R. 603=25 B. 714.

——S. 9—Settlement of assessment—Enhancement—Notice.

The phrase 'settlement of assessment' in S. 9 of the Bombay Land Revenue Act does not imply that notice should be given to the holder of the land before the revenue is enhanced. It only means that when the assessment is fixed the fact should be communicated to the holder. (1901) 3 Bom.L.R. 910=26 B. 339.

——S. 13—Maximum period of detention—Powers of Collector—Extent and exercise of.

The maximum period of detention, viz., six months, laid down in the C. P. Code, does not apply in cases of persons arrested under S. 13, Bombay City Land Revenue Act. The maximum period for which a person can be detained under S. 13 (for default in payment of arrears of income-tax) is that laid down in the section

itself, i.e., one day for each rupee of the amount recoverable from him as an arrear of land revenue. The powers conferred upon the Collector are no doubt to be exercised reasonably and not capriciously or oppressively as it is an implied condition of the use of every discretionary power that the power will be exercised fairly and honestly. Merely because of the possibility that in some cases the powers might be abused, it will not be proper to hold that the powers do not exist, or to impose arbitrary restrictions on the exercise of the powers. The meaning of the words used in the proviso to the section are plain, and it is not the duty of the Court in such cases to busy itself with the supposed intention of the Legislature. 51 Bom.L.R. 589=1949 I.T.R. 371=A.I.R. 1950 Bom. 33=51 Cr.L.J. 306 (D.B.).

——S. 13—Power of Collector to order detention in civil prison—Condition precedent to—Defaulter adjudged insolvent—If renders condition impossible of performance.

The power of the Collector under S. 13 of the Bombay City Land Revenue Act, to cause a defaulter to be apprehended and confined in a civil jail is contingent upon the sale of the defaulter's property not realising an amount sufficient to satisfy the Government demand. The arrest and confinement are intended to secure, if possible the realization of the balance of the demand either from him or from some one interested in him. Until the amount of the balance is known, it would not be possible to determine the period for which the defaulter is to be confined. The condition precedent cannot be said to be impossible of performance merely because the defaulter (who has failed to pay arrears of income-tax) has been adjudged insolvent and his property has vested in the official assignee. The amount payable to Government for income tax is a debt which is provable in insolvency and the Collector can move the Court to sell the property of the insolvent and in the distribution of the assets all debts due to the Crown shall be paid in priority under S. 49 of the Insolvency Act. When a special procedure is prescribed by law for taking a particular action (e.g., under S. 13, Bombay City Land Revenue Act) that procedure must be followed and it is no answer to say that even if such procedure has been followed the result would not be different. When a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. The procedure prescribed must be strictly followed, particularly where the consequences affect the liberty of a subject. If therefore the condition precedent to the Collector's exercising his powers to apprehend and confine the defaulter in a civil jail has not been satisfied the order of the Collector authorizing the detention of the defaulter in prison cannot be sustained in law. 51 Bom.L.R. 589=1949 I.T.R. 371=A.I.R. 1950 Bom. 33=51 Cr.L.J. 306 (D.B.).

——S. 14—Suit contesting legality of assessment—Burden of Proof.

In a suit under S. 14 of the Bombay City Land Revenue Act, to contest the legality of the assessment, under the Act, the burden is on the assessee to show that as the superior holder of the property in question he has "a right in limitation of the right of Government in consequence of a specific limit to assessment having been established or preserved," and that that specific limit is nil:

Held, that the assessee having failed to discharge the burden of proving the existence of an "established and preserved" right on her part in limitation of the right of Government to assess her property, the Collector was entitled to fix an assessment at his discretion, subject to the control of Government. A.I.R. (Vol. 24) 1937 P.C. 271=46 L.W. 227=41 C.W.N. 1194=3 B.R. 759=1937 O.L.R. 413=(1937) 2 M.L.J. 362=39 Bom.L.R. 1046=1937 M.W.N. 939=1937 A.L.R. 647=I.L.R. (1937) Bom. 756=66 C.L.J. 43=64 I.A. 334=169 Ind. Cas. 778 (P.C.).

——S. 14—Suit brought pursuant to an undertaking given under S. 14, within thirty days from the Collector's decision—Section 80, C. P. Code, has no application to such suit. A.I.R. (Vol. 21) 1934 Bom. 162=36 Bom.L.R. 297=154 Ind. Cas. 861.

——S. 26—Encroachment—Grant and assessment—Subsequent enhancement—If allowable.

Where a person encroaches on Government land the Collector may remove the encroachment or grant the land to the person, charging price and rent subject to the maximum prescribed by the section. When the maximum rent has been imposed no further enhancement is allowable, at least where no rights were reserved at the time of the grant. (1901) 3 Bom.L.R. 621=25 Bom. 752.

——Ss. 39 and 40—Acts of Collector—Government not estopped.

The controlling authority of the Government as to general form or rules by which the Collector shall keep Registers under Ss. 39 and 40 or give inspection copies does not make the Collector's act that of Government so as to estop them. The granting of certified extract by the Collector under S. 40 is not representation to the applicant, that no other entry is to be found in the rent roll as regards the same land. 16 Ind. Cas. 714=14 Bom.L.R. 654.

——S. 40—"Extract"—Meaning of.

"Extract" is different from "copy" and the latter does not mean the copy of the whole rent roll in the case of ordinary applications. Therefore, the granting of extracts of selected entries though they might not be all the entries about the property in question is contemplated by the Legislature. 16 Ind. Cas. 714=14 Bom.L.R. 654.

BOMBAY CITY MUNICIPAL ACT (III OF 1888).

——Validity—Act affecting prerogative of Crown.

The Bombay Municipal Act of 1888 is not invalid merely by reason of the fact that it affects the prerogative of the Crown after the passing of the validating Act in 1916 amending S. 84 of the Government of India Act, 1915. A.I.R. (Vol. 22) 1935 Bom. 347=37 Bom.L.R. 499=8 R.B. 13=59 Bom. 681=158 Ind. Cas. 151.

——Offences under—S. 562 (1-A) does not apply.

Sub-S. (1-A) of S. 562, is confined to cases of an offence under the Penal Code and does not apply to an offence punishable under the City of Bombay Municipal Act. 30 Bom.L.R. 375=109 Ind. Cas. 502=52 Bom. 250=29 Cr.L.J. 566=10 A.I.Cr.R. 286=A.I.R. 1928 Bom. 152 (D.B.).

——Construction.

A construction which would facilitate the carrying out of the object of the Act ought to be adopted rather than a construction which would retard the fulfilment of the object. 30 Bom.L.R. 169=108 Ind. Cas. 488=A.I.R. 1928 Bom. 104.

——'Premises'—If mean contiguous buildings of one owner.

Definition of the word 'premises' meaning buildings

which are contiguous to each other and owned by one private person, is not supported by any of the provisions of the Municipal Act. 30 Cr.L.J. 5=11 A.I.Cr.R. 500=30 Bom. L.R. 1422=112 Ind. Cas. 773=A.I.R. 1928 Bom. 532 (D.B.).

——Private Rights—Private rights cannot be interfered with beyond limited powers conferred by statute.

The Court ought most strongly to deprecate the use of the Municipal Act for the purpose of interfering in any way with the rights of private ownership beyond those limited powers which the Corporation had obtained by statute for the necessary protection of the public and the enforcement of proper sanitation. 27 Bom.L.R. 581=87 Ind. Cas. 771=A.I.R. 1925 Bom. 458.

——Suit on contract—Suit in contract—Distinction—Bombay Municipality—Claim made—Settlement—Account stated—Suit to recover—Notice not required.

A suit on contract does not require notice; but suits in contract as distinguished from those on contract may require notice. Where a claim is made on a Municipality, and the Municipality has investigated into it and ascertained that it is liable in a certain sum, a suit to recover it is a suit on account stated and, as a suit substantially on contract, want of notice is no defence to the suit. (1901) 3 Bom.L.R. 158=25 Bom. 387.

——S. 3 (m)—The expression "Receives the Rent" in S. 3 (m) is not used in any technical sense. The Court has to see whether the person charged with an offence under the Act is one who receives rent of the premises. A.I.R. (Vol. 28) 1941 Bom. 304=43 Bom.L.R. 508=42 Cr.L.J. 811=196 Ind. Cas. 95.

——Ss. 3 (m) and 380—"Owner"—Meaning of.

There is nothing in S. 380 which renders the definition of "owner" in S. 3 (m) inapplicable either to the case of the owner of a hut or shed or to the case of the owner of the land on which such hut or shed stands. In each case the definition is one that can properly be applied without there being inconsistency with the rest of the section. 30 Bom.L.R. 339=109 Ind. Cas. 344=10 A.I. Cr.R. 176=29 Cr.L.J. 520=A.I.R. 1928 Bom. 136 (D.B.).

——Ss. 3 (u), 222, 504—Drains—Manholes—Drains above the surface of ground driven through private property—Compensation—Awards—Chief Judge of Bombay Small Cause Court.

A manhole is included in the expression "any other device for carrying off sewage, etc.," and falls within the term "drain" as defined in S. 3 (u) of the Bombay City Municipal Act of 1888. The expression "the Commissioner may carry any municipal drain . . . into, through or under any land whatsoever within the city" covers a drain which is above the surface of the ground. The words "into, through or under" are meant to include drains passing over the land. Reading Ss. 222 and 504 of the Bombay City Municipal Act of 1888 together, it is plain that the object of the Act is that if any damage is done or any portion of a man's property is taken away by the Commissioner's action under S. 222, the amount of compensation should be assessed under S. 504 of the Act, by the Chief Judge of the Small Cause Court, Bombay. (1907) 9 Bom.L.R. 1321.

——S. 3, Cl. (w)—"Street"—Meaning of.

The owner of a large piece of land divided it into several small building sites and sold them to different persons. These sites were ranged on either side of two proposed roads, which ran through the land and which touched a high road at the one end and a wall on the other. Each of the purchasers entered into a covenant with the owner whereby he agreed to prepare and keep free for passage so much of the road as lay in front of his site. Under these circumstances the question arose whether the proposed road fell within the meaning of the term 'street' as used in the City of Bombay Municipal Act, 1888. *Held*, that the proposed road would constitute a 'street' within the meaning of the City of Bombay Municipal Act. (1906) 8 Bom.L.R. 457=30 Bom. 558=4 Cr.L.J. 23.

——S. 3 (w) and (y)—"Street"—Passage which has on both sides more or less continuous and regular row of houses.

Words defined as "including" certain things are not meant to prevent the word from receiving its ordinary popular sense, but to enable the word to be applied to some things to which it would not, according to the ordinary use of language apply, especially where for the definition of other words the expression "means" or "means and includes" is used. Thus the inclusive definition of the word "street" in S. 3 (w), Bombay (City) Municipal Act is not intended to exclude the ordinary meaning of the word "street," viz., a roadway, not necessarily a highway, which has on one side or both sides a more or less continuous and regular row of houses. Questions may arise as to the nature of the roadway, and of the locality in which it is situated, how far a roadway must be made up in order to constitute a street, how many houses are necessary, and the degree of regularity in the line of houses, and so forth. But, all such questions must be dealt with as questions of fact on the evidence adduced in the particular case. A well-laid out passage (more than 200 feet in length and 30 feet in width) running between two rows of buildings and used by the tenants and occupants of those buildings and by the public generally for access to the buildings from the main public road is a street even though the public has not acquired any unobstructed right of passage or access for 20 years. This is also made clear from S. 302 (1) (d).

But it cannot be said that every open space or road which has buildings on one or both of its sides must be regarded as a street within the meaning of the Act. In that case the municipality will have power to interfere with rights of private ownership, and thereby the owners will be discouraged in leaving open spaces between their buildings for the use and benefit of their tenants. A.I.R. (Vol. 30) 1943 Bom. 435=45 Bom.L.R. 965=45 Cr.L.J. 274 =210 Ind. Cas. 629 (F.B.).

——S. 3 (x) and (v)—Whether street is private.

In order to prove that a street is a private street it must be shown that it is not a public street, that is to say, has not been levelled, paved, metalled, channelled, sewered or repaired by the corporation prior to the date when Act (III of 1888) came into operation, i.e., 14th September, 1888.

Before Act (III of 1888) came into force the work of public drainage and other matters of that kind were carried out at the expense of the corporation under Act (III of 1872) and Act (II of 1865). Therefore, it would be reasonable to say that drainage works, carried out by the responsible authorities under Act (II of 1865) as well as those carried out when Act (III of 1872) was in force, were works carried out by the corporation within the meaning of S. 3 (x) of Act (III of 1888). Out of the works carried out by the corporation before Act (III of 1888) came into force, drainage works alone came within the purview of S. (3) (x) of Act (III of 1888). Hence in order to show that a street is a private street, it must be proved that no drainage work was carried out by the corporation with regard to it under Act (II of 1865) and Act (III of 1872) before coming into force of Act (III of 1888). A.I.R. (Vol. 30) 1943 Bom. 68=45 Bom.L.R. 60=44 Cr.L.J. 384=205 Ind. Cas. 358.

——Ss. 3 (x), (y) and 305—Public street—Private street—Sewer—Meaning of.

"Sewer" in S. 3 signifies a drain or passage to convey water and filth underground and refers to the carrying of other water besides liquid filth. A street whereunder runs a corporation pipe for carrying off sullage water from certain houses but which have connection with surface of the street, cannot be said to be "sewered" by the corporation and is not a public street and notice can validly be issued under S. 305. 13 Cr.L.J. 53=18 Ind. Cas. 297=14 Bom.L.R. 116.

——Ss. 3 (x) and (y) and 305—Street—Public and private—House abutting on the street.

A street does not merely mean the actual roadway but includes the houses on either side of it. Therefore the laying down in a street of a sewage pipe which carries the sullage water of the houses abutting on it constitutes sewering of the street by Municipality though the surface water of the street is not taken away. 19 Cr.L.J. 743=43 Bom. 122=46 Ind. Cas. 519=20 Bom.L.R. 620 (D.B.).

——S. 3 (y)—According to the definition in S. 3 (y) every street which is not a public street, is a private street, whether notice of the construction is given to the Commissioner or not. A.I.R. (Vol. 30) 1943 Bom. 435=45 Bom.L.R. 965=45 Cr.L.J. 274=210 Ind. Cas. 629 (F.B.).

——S. 4—Primary education—Duty of Municipality.

The effect of S. 4, City of Bombay Municipal Act, is that the whole duty in respect of primary education is imposed upon the Municipality. The School Committees who manage schools only as nominees of Municipalities are not responsible for it. A.I.R. (Vol. 21) 1934 Bom. 277=58 Bom. 660=36 Bom.L.R. 568=152 Ind. Cas. 947.

——S. 16 (j)—Power to vote—Employee in a newspaper inserting advertisements of Corporation is not disqualified.

The clause does not mean that no councillor who happens to be an employee in the office of a newspaper in which advertisements relating to the affairs of the Corporation are inserted can vote at a meeting of the Corporation held to consider the question whether the fares charged by the Bombay Electric Company should or should not be increased. 25 Bom.L.R. 689=83 Ind. Cas. 856=47 Bom. 809=A.I.R. 1923 Bom. 305.

——S. 19 (3) and (4)—Ward lists not strictly prepared—Applicant not prevented thereby from exercising his right to vote—Cause of action—Specific Relief Act, S. 45.

Even assuming that the ward lists have not been strictly prepared according to sub-Ss. (3) and (4) of S. 19 the applicant must still satisfy the Court, before invoking its extraordinary jurisdiction under S. 45, Specific Relief Act, that the ward lists and the electoral roll based upon them would have injured his franchise or personal right. A man's franchise is his right to vote at an election and the qualifications upon which that right is based. The applicant who has the qualifications of a voter, and is in fact enrolled as such in his own ward, is not injured from exercising his right to vote or is not prevented from voting even though his name was placed among certain community and was not placed strictly according to the alphabetical order among the voters, irrespective of their communities. Hence the franchise of the applicant or his personal right is not in any way injured within the meaning of S. 45, Pro. 1, Specific Relief Act. A.I.R. (Vol. 26) 1939 Bom. 431=41 Bom.L.R. 911=186 Ind. Cas. 203.

——Ss. 19 (4), 28 (k)—Electorate remains joint even though component members are grouped according to communities. A.I.R. (Vol. 26) 1939 Bom. 431=41 Bom.L.R. 911=186 Ind. Cas. 203.

——Ss. 22, 23, 25, 33, 34—Jurisdiction—Election cases, C. P. Code, S. 11.

The Chief Judge of the Small Cause Court at Bombay is the sole tribunal indicated under the City of Bombay Municipal Act to determine questions relating to disputed elections. No other Court has jurisdiction to hear suits arising under the Act. The word 'election' in S. 33 of the City of Bombay Municipal Act is designed to express something wider than a legally valid election. The words used in this section are consistent with the view that an election, which in fact took place under conditions that made it possible that there should be a valid election, can be questioned. There is enough in S. 33 to bring it within the exception to S. 11, C. P. Code, and bar the cognizance of suits falling under the Act by any other Court. The jurisdiction of Courts can be excluded not only by express words but also by implication. (1907) 31 Bom. 604=9 Bom.L.R. 417.

——S. 24—'City', meaning of.

The word 'city' in S. 24 is not equivalent to the City of Bombay or the whole area to which the Municipal Act applies. (1905) 30 Bom. 126=7 Bom.L.R. 726.

——S. 27—Requirements.

Section 27 requires that if a ward election is a contested one a poll shall be taken 7 days after the day fixed for the election and a duty is imposed upon the Commissioner of causing the names of all persons validly nominated to be published 3 days before the day of poll in the Bombay Government Gazette and in the local newspapers. A.I.R. (Vol. 23) 1936 Bom. 46=37 Bom.L.R. 970=161 Ind. Cas. 87.

——Ss. 28 (k), 27—Objection to acceptance of nomination of candidate—Whether an objection regarding the poll—Remedy of aggrieved party.

An objection to the acceptance of the nomination of a candidate is not an objection to or regarding the poll within the meaning of S. 28 (k), City of Bombay Municipal Act. By Cl. (j), Sub-S. (2) of S. 26, the Municipal Commissioner has to decide whether the election will take the form of a contested election or not—that depending upon whether the number of valid nominations exceeds that of the vacancies. He can only make up his mind whether the election is to be a contested election or not after he has come to a decision upon the question whether the nominations or any of them are invalid, by reason of the qualifications contained in S. 16. When the Municipal Commissioner has so made up his mind, S. 27 requires that if a ward election is a contested one, a poll shall be taken seven days after the day fixed for the election, and by Sub-S. (2) a duty is imposed upon the Commissioner of causing the names of all persons validly nominated to be published three days before the day of the poll in the **Bombay Government Gazette** and in the local newspapers. Consequently, a decision by the Municipal Commissioner as to the validity of a nomination is a condition precedent to the fixing of a poll, and as the decision is given by him before the poll is held, any question as to the validity or invalidity of the nomination is not an objection within the meaning of S. 28 (k). The rights of an aggrieved person in regard to the validity of an election are amply covered by S. 33 of the Act, and the validity of an election may be challenged as therein provided before the Chief Judge of the Small Causes Court. A.I.R. (Vol. 23) 1936 Bom. 46=37 Bom.L.R. 970=161 Ind. Cas. 87.

——Ss. 28 (k), 27, 33—Objection to election involving question of law—Duty of Commissioner to decide.

There is nothing in Sub-S. (k) of S. 28, City of Bombay Municipal Act, which restricts the objections, which the Commissioner is required to hear and decide, to questions

of fact. If questions of law or mixed questions of law and fact arise, and if the Municipal Commissioner is not a lawyer himself, he must do the best he can, but he is not entitled to refuse to perform the duty imposed upon him by the Act by saying that he does not know the law and is not competent to perform the duty. A.I.R. (Vol. 23) 1936 Bom. 46=37 Bom.L.R. 970=161 Ind. Cas. 87.

——Ss. 28 (k) and 32—Municipal Commissioner, if can be restrained from acting under—Electoral roll not challenged till after election was over—Specific Relief Act, S. 45.

The jurisdiction of the High Court is limited to cases where there is a clear breach of duty to do or forbear from doing as the case may be. The words of Ss. 28 (k) and 32 are mandatory. The doing of the acts mentioned in those sections does not constitute an infringement of the applicant's personal right or franchise. The Municipal Commissioner can only forbear to do those acts if the election is declared invalid. An applicant under S. 45, Specific Relief Act, however, cannot ask for such a declaration nor can the Court make it, as a relief by way of declaration is neither contemplated by nor directed under the section. Therefore, the Municipal Commissioner cannot be restrained from that, which, until the election is set aside, is clearly incumbent upon him to do under this Act.

An applicant under S. 45, Specific Relief Act, must show that the order he has prayed for is consonant to right and justice. That expression only emphasizes the equitable jurisdiction of the Court in making the order. What is or what is not consonant to right and justice must depend on the facts and circumstances of each case. Where the applicant has not challenged the electoral roll before the election but waited, till after the election was over, and moved in the matter, just before the declaration of results was about to be completed, the jurisdiction under S. 45, Specific Relief Act cannot be exercised to restrain the Municipal Commissioner from acting under Ss. 28 (k) and 32. A.I.R. (Vol. 26) 1939 Bom. 431=41 Bom.L.R. 911=186 Ind. Cas. 203.

——S. 33—Remedy under—If excludes application under S. 45, Specific Relief Act, before declaration of result of election.

It is an elementary principle of the law that a man should not be allowed to have recourse to an extraordinary remedy of the kind contemplated by S. 45, Specific Relief Act if it is not really needed; so that it is for the applicant to show that he has no other specific and adequate legal remedy. Although S. 33 does not take away the applicant's right if any, to go to the High Court in a proper case under S. 45, Specific Relief Act even before the declaration of the result is completed, the remedy under S. 33 would certainly be the more complete remedy; and the applicant cannot say that he has no other remedy whatsoever. A.I.R. (Vol. 26) 1939 Bom. 431=41 Bom.L.R. 911=186 Ind. Cas. 203.

——S. 33—Objection to acceptance of nomination of candidate—Whether an objection regarding the poll—Remedy of aggrieved party. **See** IBID., Ss. 28 (k) and 27. 37 Bom.L.R. 970.

——Ss. 33, 34—Municipal election petition—Jurisdiction of Chief Judge of Small Causes Court at Bombay—Extent of discretion.

At a general election for Municipal Councillorship for a ward in the City of Bombay, eight out of the fifteen candidates were declared duly elected. A petition was then presented to the Chief Judge of the Bombay Court of Small Causes under S. 33 of the City of Bombay Municipal Act, 1888, praying that the election of the eight Councillors or of one or more of them might be set aside and a scrutiny held. The inquiry was held and the election of two out of the eight successful candidates was set aside. The Chief Judge then came to the conclusion that under S. 33 he was only empowered to consider the claim of the ninth candidate, who obtained the next highest number of votes to the candidates returned as elected, but, as a valid cause of objection existed to his being declared elected, he declined to direct that that candidate should be deemed to be elected. He further held that as there was no other candidate who could be deemed to be elected, proceedings for filling up the two vacancies would have to be taken under S. 34 of the Act. The applicant, who stood tenth on the list of candidates, applied to the High Court, under S. 45 of the Specific Relief Act, 1877, asking for an order that the Chief Judge do proceed to direct under S. 33 of the Bombay Municipal Act, that the applicant should be deemed to have been duly elected. **Held**, that S. 33 had been held to empower him to fill up any number of vacancies so created from the list of unsuccessful candidates subject to the provisions of this section. **Held**, further that the Chief Judge should therefore, proceed to place the unsuccessful candidates in order of valid votes. The two with the highest number of valid votes against whom no cause of objection was found should be declared to be deemed to be elected. If only one is qualified, or none is qualified, then proceedings for filling up the vacancy or vacancies would have to be taken under S. 34 of the City of Bombay Municipal Act, 1888. An application under Sub-S. (1) of S. 33 of the City of Bombay Municipal Act, 1888, should name the persons whose election is objected to. Sub-S. (2) of S. 33 enacts what the Chief Judge is to do when an application is made under Sub-S. (1). Under S. 33, Sub-S. (2), it is not the candidate with the next highest number of votes whom the Chief Judge shall declare to be deemed to be elected but the candidate with the next highest number of valid votes and against whose election no cause of objection is found. The Chief Judge is entitled to presume that all the votes in favour of a candidate as declared by the Commissioner are valid, but if a vacancy has to be filled all the unsuccessful candidates are open to attack and the last on the list may be the one with the next highest number of the valid votes. The change effected in Sub-S. (2), to S. 33, by Act (V of 1905), enables an applicant to apply to the Chief Judge for a declaration that any of the unsuccessful candidates should be deemed to be elected. (1910) 34 Bom. 659=12 Bom.L.R. 737=7 Ind. Cas. 958.

——Ss. 33, 34 (1) (2)—Privilege of franchise not exercised—Vacancy by such failure—Appointment by statute.

The principle underlying Ss. 33 and 34, Bombay City Municipal Act is that it is the right of the voters or citizens in the first instance to exercise their franchise, and if that privilege for any reason has not been taken advantage of, or if the privilege has not been exercised to the full extent and if a vacancy occurs by reason of such omission, then the statutory provision comes in to fill up the vacancy by appointment. The right of the citizen to exercise the franchise is the substance, and if the substance has not been availed of, the provision for appointment is a statutory substitution. A.I.R. (Vol. 23) 1935 Bom. 403=37 Bom.L.R. 710=60 Bom. 193=159 Ind. Cas. 300.

——S. 33—Decision under—Revision—C. P. Code, S. 115.

A Judge acting under S. 33 is not a Court within the meaning of the C. P. Code and hence no revision lies from this decision under S. 115, C. P. Code. 25 Bom.L.R. 463=73 Ind. Cas. 133=A.I.R. 1923 Bom. 421 (D.B.).

——Ss. 34 (1), (2), 33—Vacancy created by resignation not filled by bye-election—Appointment—Words

"any election"—Voter's petition for injunction restraining Corporation from filling vacancy by appointment—Injunction granted and bye-election ordered—Period of 15 days from notice not run out—Costs.

Vacancy created by resignation of a Councillor was not filled by the Corporation in view of shortly coming General Elections. The General Elections which were subsequently held, were set aside, as being invalid. Therefore in accordance with S. 34 (1), Bombay City Municipal Act, the former members were re-elected. The vacancy which remained to be filled was attempted to be filled by corporation under directions of the Municipal Commissioner who, under S. 34, sent a notice to the Corporation to fill the vacancy by appointment. The Court issued an injunction restraining the Corporation from following this procedure and it ordered a bye-election to take place on a day to be appointed by the Court. The period of 15 days contemplated by S. 34 (2) had not expired on the day of the order:

Held, that the words "any election" in S. 34 (1) must be taken to bear the meaning which they would bear in their ordinary signification, namely an election at which the voters of Bombay would have the right to cast their votes in favour of any particular candidate. Therefore it was not open to the Municipal Commissioner to treat the case as falling within Sub-S. (2), S. 34, and that the Corporation would not be entitled to act upon the notice which he sent by filling up the vacancy by appointment:

Held, also that the Judge was premature in giving the direction which he gave, seeing that at the time he gave it, 15 days had not elapsed from the receipt by the Corporation of the information given to them by the Commissioner.

Held, further that the voter who made the petition for injunction was entitled to costs of the petition and its hearing. A.I.R. (Vol. 22) 1935 Bom. 403=37 Bom. L.R. 710=60 Bom. 193=159 Ind. Cas. 300.

——S. 34 (1) and (2)—Re-election contemplated by S. 34 (1), whether amounts to election within S. 34 (2).

Re-election as contemplated by Sub-S. (1), S. 34, Bombay City Municipal Act, does not amount to an election of Councillors at the General Election. It is straining the meaning of words to treat them as having been elected at an election, within the meaning of S. 34, Sub-S. (2). A.I.R. (Vol. 22) 1935 Bom. 403=37 Bom.L.R. 710=60 Bom. 193=159 Ind. Cas. 300.

——S. 36 (p)—"Interest"—Meaning of—Trustee of a share-holder—Medallion-holders—Editor with complimentary pass—Interest of.

The interest contemplated by S. 36, Cl. (p) and by S. 16, Sub-S. (1), Cl. (f) of the Act, must not be too speculative and remote. It must not be a mere sentimental interest such as that which a father may have in the prosperity of his son. Where there is a pecuniary advantage, or a reasonable expectation of a pecuniary advantage, it must be regarded as an "interest" within the meaning of the section. The interest in a contract is pecuniary, it is immaterial that the amount involved is trifling. Even if the interest is not pecuniary, it must at least be a material interest. It is clear on the language of S. 36 (p) that a councillor, whose name stands as a share-holder on the register of the said company, and who has a beneficial interest in the shares, is disqualified from voting or taking part in discussion of any matter pertaining to the said company. It is also clear that if the shares stand, not in his name, but in the name of a nominee of his, the beneficial interest being in him, he is similarly disqualified. The shares again may stand in the name of a councillor who holds them not in his own right but as a trustee for another. Where the shares stand in the name of a person who has no beneficial interest, he cannot, it seems, vote at meetings of that company in a manner inconsistent with the interests of the beneficiaries. The reason is that he derives the position which he holds as a member of the company from the legal ownership of the shares. But if such person is also a member of the Corporation, he is entitled to vote and take part in the discussion of any matter relating to the company in which his name stands as a shareholder. He is under no obligation to vote in a manner beneficial to the interests of the **cestui que trust,** for he does not owe the membership of the Corporation having regard to the fact that he is a shareholder of that company. He commits no breach of contract if he votes in contravention of the interest of his beneficiary. It is no part of his duty as a trustee to vote at meetings of the Corporation in matters affecting the company as the beneficiary would have him to do. If no such duty is imposed upon him by law it cannot be a case of conflict between two duties. Nor can it be a case of conflict between interest and duty. In a suit to decide the validity or otherwise of the votes of **A** and **B** at a meeting of the Bombay Corporation, held to decide the question of increase in the tramway fares, it was contended that their votes were invalid as they were the holders of a medallion from the said company. The medallion on one side bears the words "Member of Tramways Committee of the Bombay Municipality," and on the other, the words "Allowed to stand on back platform of cars when there is no room inside—Bombay Electric Supply and Tramways Co., Ltd." It was admitted that the holder of a medallion even though he had to stand when there was no room inside had to pay the usual fare like any other passenger.

Held, that it is impossible to conceive what share or interest a holder of a medallion could have in the said company. It cannot also be said on principle, that a Councillor, who happens also to be editor of a newspaper and to whom as editor a complimentary pass is issued by the Tramway Company for correspondence purposes, has an interest in the company within the meaning of S. 36, Cl. (p). 25 Bom.L.R. 689=83 Ind. Cas. 856=47 Bom. 809=A.I.R. 1923 Bom. 305.

——S. 36 (p)—Councillor, to be disqualified must be interested in 'the matter before the meeting'.

In construing S. 36, Cl. (p), regard must be had to the 'matter' before the meeting. A Councillor having an interest in a lease of land within the meaning of Cl. (g) cannot be held by reason of his having that interest only to be disqualified from voting on a question relating to a loan to the Corporation contemplated by Cl. (h). 25 Bom. L.R. 689=83 Ind. Cas. 856=47 Bom. 809=A.I.R. 1923 Bom. 305.

——S. 36 (q)—'Majority' means absolute majority.

The word 'majority' in S. 36 (q) of the Act means absolute majority having regard to the fact that the words used are "a majority of votes of the councillors present and voting on that question." 29 Bom.L.R. 1430=105 Ind. Cas. 759=A.I.R. 1927 Bom. 622 (c).

——Ss. 36 (q) and 37—Meeting to elect a president—Retiring president chairman of the meeting—Candidates getting equal votes—Chairman giving casting vote by drawing lots—Validity—Regulations of 28th March, 1927, are not ultra vires.

On 1st April, 1927, a meeting of the Bombay Municipal Corporation was held to elect a president. The retiring president was elected chairman under the provisions of S. 36 (g), Bombay City Municipal Act. There were four candidates for election, but the fourth one withdrew his candidature. In the first ballot taken the three other candidates obtained votes as follows: the plaintiff, 36; the

second defendant 31, and the third one 30. In accordance with certain regulations passed by the Corporation on 28th March, 1927, the third candidate's name was then eliminated, and a second ballot was taken. In that ballot the plaintiff and defendant 2 each obtained 49 votes. The chairman did his best to decide between the two candidates, and finding himself unable to draw any distinction between them on merits he drew lots in order to enable him to give his casting-vote impartially, and gave his casting-vote to defendant 2. Plaintiff sued to set aside the election of defendant 2.

Held, that; (1) the legislature has not in S. 36 (q) of the Act in any way fettered the presiding authority as to the means by which he may make up his mind, whether by exercising his judgment, consulting a friend, spinning a coin, drawing lots, or otherwise, before intimating his preference for or choice of one candidate or another. The chairman, therefore had given a valid casting vote. The chairman did exercise his judgment in considering the respective merits of the two candidates, and by reason of their equality of merit he was entitled to assist himself in choosing between them by drawing lots. (2) S. 37 (1) of the Act does not prescribe the method of appointment or in any way fetter the decision of the members of the Corporation upon this question, and so the regulations of 28th March, 1927 are mere machinery for giving effect to the decision of the Corporation upon that question, and that the regulations are **intra vires**. 29 Bom.L.R. 1430=105 Ind. Cas. 759=A.I.R. 1927 Bom. 622.

——S. 63 (k)—Building quarters for Municipal servants—Discretion of Municipality—Interference—Jurisdiction of Court.

The building of quarters for Municipal servants should be held to be a measure likely to promote public convenience. The matter lies within the discretion of the Municipal Comissioner and Corporation and a Court of law cannot interfere with the exercise of that discretion. 27 Bom.L.R. 1130=90 Ind. Cas. 695=A.I.R. 1925 Bom. 538 (D.B.).

——S. 63 (k)—Scheme—Contemplation by Municipality for utilization of the ground-floor for shops cannot disentitle it from proceeding with the scheme.

Where the Municipality had in contemplation the utilization of the ground floor of the premises to be built upon the area in suit as shops,

Held, that there was no sufficient ground for holding that the Municipality could not proceed with the scheme. 27 Bom.L.R. 1130=90 Ind. Cas. 695=A.I.R. 1925 Bom. 538 (D.B.).

——S. 69—Primary education—Contract between President on behalf of Bombay Government—Contract not signed by Municipal Commissioner and Director of Public Instruction—Contract is not binding on the Municipality by virtue of S. 69. A.I.R. (Vol. 21) 1934 Bom. 277=36 Bom.L.R. 568=58 Bom. 660=152 Ind. Cas. 947.

——S. 69 (b)—Approval.

The approval in S. 69 (b) is to the 'purpose' referred to in that sub-section, and not to the contract. A.I.R. 1930 Bom. 414 (D.B.).

——Ss. 69 (b) and 92 (d)—Scope.

A sanction given in a 'particular case' within S. 92 cannot cover another subsequent contract, where there are variations in parties and terms between the first contract and the subsequent contract. A.I.R. 1930 Bom. 414 (D.B.).

——S. 70 (b)—'Specify the price to be paid for such work,' etc.—Price, if to be specified in exact amount.

All that S. 70 (b) of the City of Bombay Municipal Act requires is that the price has got to be specified in the contract, or in other words perusing the contract, it should be clear as to what the price is which the Municipality has to pay to the contractors for carrying out the contract. The statute does not say that the contract must state a fixed price or a price ascertainable in rupees, annas and pies at the date when the contract is entered into. Nor is there any prohibition in the statute which precludes the Municipality from fixing a price which may be ascertained at a future date or may be ascertained by some person specially nominated by the parties in the contract. Although a fixed amount may not appear in a contract, the price may nevertheless be specified which would be fixed in the manner agreed to by the parties under the contract itself. Where a price is fixed, but the parties agree that it is subject to certain variations to be determined by the Commissioner of the Municipality, under certain eventualities, it is as much a price as a fixed price in terms of rupees, annas and pies. The price must therefore be regarded as specified as required by S. 70 (b). 51 Bom.L.R. 190=A.I.R. 1949 Bom. 229 (D.B.).

——S. 83—Dismissal of servants by—Standing Committee—Review by Court—Permissibility.

Under S. 83 the Standing Committee is constituted a domestic tribunal delegating to it the right to appoint and the right to dismiss without retaining under it the ordinary law regulating the dismissal of a servant by his master. But this right is subject to certain safeguards, **viz.,** (1) that there must be evidence before the tribunal on which it can reasonably find that the ground of dismissal stated in the statute is in fact proved before it, and (2) secondly that any inquiry before it must be conducted in accordance with the principles of natural justice, and that in particular the accused must be given an opportunity of being heard in his own defence and of cross-examining the opposing witnesses and also of calling his own witnesses, and (3) thirdly, that the decision must not be based on purely capricious grounds. The matter further is not left open to be reviewed in a Court of law, nor does an appeal lie from the decision unless the servant can make out that the above safeguards have been violated. 32 Bom.L.R. 463=A.I.R. 1930 Bom. 320 (D.B.).

——S. 91—Acquisition under—Land Acquisition Act, S. 31.

Section 31 of the Land Acquisition Act does not apply in the case of acquisitions made by virtue of the provisions of S. 91 of City of Bombay Municipal Act and payment of the compensation amount by the Commissioner is enough. 45 Bom. 725=60 Ind. Cas. 571=23 Bom.L.R. 35=A.I.R. 1921 Bom. 214.

——S. 91—Property acquired under—Transfer from Government not necessary—Land Acquisition Act, S. 31, does not apply.

Section 91 **pro tanto** modifies the provisions in the Land Acquisition Act so as to vest the property in the Corporation on payment of compensation awarded, instead of in the Government and therefore no transfer from Government to the Corporation is needed. The provisions of S. 31 do not apply in the case of acquisitions made by virtue of the provisions of S. 91 of the Municipal Act and payment of the compensation amount by the Commissioner is enough. Where the Municipality retained the money as the price of the lands which they had agreed to convey to the payee, S. 91 (2) cannot be said to be infringed. 45 Bom. 725=23 Bom.L.R. 35=60 Ind. Cas. 571=A.I.R. 1921 Bom. 214.

——Ss. 92 and 69—Provisions requiring sanction are compulsory.

Provisions requiring sanction of the Municipal Corpora-

——S. 231—Notice—Waiver by subsequent negotiation between parties.

If parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced or will be kept in suspense, or held in abeyance, the person who might have otherwise enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties. The principle is applicable in a criminal case. Where the complaint is as to an offence of non-compliance with a requisition that can be kept in abeyance or cancelled by the authority making the requisition. **Held,** in the case that a notice under S. 231 of the Bombay City Municipal Act was waived by the subsequent negotiation between the parties in the case. Limitation will not run from the date of the original notice. (1904) 6 Bom. L.R. 667=29 Bom. 35.

——Ss. 231 (a), 471—Notice—Direction that drain should be made to adjoin particular wall—Legality.

There is nothing in the language of S. 231 authorizing the Commissioner to direct that the drain shall be made so as to adjoin any particular part or wall of the premises. 24 Bom. 75 foll. Notice by the Municipal Commissioner containing a direction that the drain be constructed so as to adjoin a particular wall is ultra vires and illegal. (1904) 6 Bom.L.R. 667=29 B. 35.

——S. 248—(Amended)—"Employed in any premises" means employed in private residence.

The words "persons employed in any premises" in S. 248 should be construed as referring to the servants who are employed in the private residence. 30 Cr.L.J. 5=11 A.I.Cr.R. 500=30 Bom.L.R. 1422=112 Ind. Cas. 773=A.I.R. 1928 Bom. 532 (D.B.).

——S. 248—Rent Contractor—Liability to comply with requisition.

A rent contractor falls within the definition "owner" in S. 3 Cl. (m) of the Act and as such he is the person who under S. 248 of the Act is liable to comply with the requisition of the Municipal Commissioner under S. 248. 30 Cr.L.J. 17=30 Bom.L.R. 1439=112 Ind. Cas. 849 =A.I.R. 1928 Bom. 527 (D.B.).

——S. 248 (1) (c)—Rent farmer—Municipality can proceed either against landlord or rent farmer.

The proper construction of S. 248 (1) (c) is that the Municipality may at their option proceed either against the landlord or his lessee who under the terms of his lease is entitled to sub-let the premises and receive rent from his sub-tenants. The term "owner," as defined in the Act, covers both cases. 30 Bom.L.R. 1442=112 Ind. Cas. 861=11 A.I.Cr.R. 546=30 Cr.L.J. 29=53 Bom. 131=A.I.R. 1928 Bom. 528 (D.B.).

——S. 249—Premises.

A godown in which more than 20 persons are employed as workmen or labourers, though contiguous to a residential building of the same owner, is premises within S. 249. 30 Cr.L.J. 5=11 A.I.Cr.R. 500=30 Bom.L.R. 1422=112 Ind. Cas. 773=A.I.R. 1928 Bom. 532 (D.B.).

——S. 249—Theatre—Place of public resort—Latrine accommodation.

A theatre is a place of public resort within the meaning of S. 249 of the City of Bombay Municipal Act, 1888. (1906) 8 Bom.L.R. 115=30 B. 392.

——S. 251-A (a)—"Directly over or directly under"—Meaning of.

The words 'directly over or directly under' in S. 251-A, Cl. (a), of the City of Bombay Municipal Act, 1888, mean not only in a direct line vertically above or below, but also in contact with or directly adjacent to. It is, therefore, permissible to erect a building wherein a water-closet is vertically above or below any residental quarter, provided that a bath room intervenes between them. (1909) 34 Bom. 496=11 Bom.L.R. 1167=4 Ind. Cas. 275.

——Ss. 257, 375, 3 (m)—Accused parting with right to receive rent—If owner".

The expression "receive the rent" in S. 3 (m), City of Bombay Municipal Act, is not used in any technical sense. The Court has to see whether the person charged with an offence under the Act is one who receives rent of the premises. If he is not entitled to receive the rent at all, and does in fact not receive it, he cannot be said to be an owner. Where the accused and his co-owners of the property have parted with the right to receive the rent they cannot recover it and, they are not owners within the meaning of the Act. A.I.R. (Vol. 28) 1941 Bom. 304=43 Bom.L.R. 598=42 Cr. L.J. 811=196 Ind. Cas. 95

——S. 257 (1)—Notice—Validity—Notice requiring owner to raise water to storage tank by means of hand pump.

The Commissioner can under S. 257 requisition work to bring the condition of the privy or water-closet within the previous provisions of the chapter with regard to their construction and maintenance, and nothing whatever is said throughout the chapter with regard to the water supply. The Commissioner is not entitled to give a notice under S. 257 (1) directing the landlord to maintain the water-closet in good order by pumping a sufficient quantity of water into the cistern. 26 Bom. L.R. 178=25 Cr.L.J. 968=81 Ind. Cas. 616=A.I.R. 1924 Bom. 337.

——S. 278 (2)—It is not necessary that before a person can be convicted for not complying with the provisions of S. 275 he should be served with a notice under S. 278 (2). A.I.R. (Vol. 31) 1944 Bom. 18=45 Bom.L.R. 899=45 Cr.L.J. 261=210 Ind. Cas. 412.

——S. 279—Failure of owner of premises to pay municipal bills for water-tax and **halalkhor** tax—Muncipality would be entitled to cut off water supply under S. 279. A.I.R. (Vol. 21) 1934 Bom. 462=36 Bom.L.R. 990= 154 Ind. Cas. 174.

——S. 289—Effect of.

S. 289 only vests in the Corporation such property as is necessary for the control, protection and maintenance of the street as a highway for public use. 38 Bom. 568 =23 Ind. Cas. 765=16 Bom.L.R. 104 (D.B.).

——Ss. 289 and 290—Highway—Trespass—Right to sue —Railway line.

A public street in Bombay is vested in the Municipal Corporation of Bombay and the effect of such vesting is that they have the surface and a portion of the subsoil vested in them in such a fashion as to enable them to bring an action for trespass. But where a Railway company constructs a line across the street under S. 7 of the Railways Act, there is no right of action. 40 Bom. 291=21 M.L.T. 1=38 Ind. Cas. 923=19 Bom. L.R. 48=15 A.L.J. 63=(1917) M.W.N. 83=21 C. W. N. 447=25 C. L. J. 209=43 I.A. 310 (P.C.), (Affirming 16 Bom.L.R. 104).

——S. 296—Road construction—Corporation can acquire more land than necessary so as to recoup themselves for the expenses.

The Corporation are entitled under the powers given them by Act III of 1888 to acquire more land than is necessary for the actual construction of a new road and the widening of an old road in order that by the re-sale of surplus land they may recoup themselves for the expenses of construction and widening.

Per **Macleod, C.J.**—Considering the whole of S. 296 together with Ss. 90, 91 and 92 it must be held that power has been given to the Commissioner to acquire frontages whenever it may seem expedient for the Corporation to acquire them, the only restriction on such powers being that the decision regarding the expediency must be arrived at honestly and on reasonable grounds. 23 Bom. 361=63 Ind. Cas. 581=A.I.R. 1921 Bom. 230 (D.B.).

——S. 296 (B)—Acquisition—Municipality may acquire land outside the street.

It is clear beyond all doubt, not only that the Municipality may acquire land for the purpose of making a street but that they may acquire, if it seems expedient, land outside the regular line of such street provided it is contiguous. In cases of this sort, each must be determined upon its own circumstances, and the circumstances consist first and formost of the precise terms of the Act in question and, secondly the thing which is proposed to be done. 22 A.L.J. 11=79 Ind. Cas. 948 =19 M.L.W. 1=1924 M.W.N. 77=33 M.L.T. 462= 28 C.W.N. 375=26 Bom.L.R. 193=51 I.A. 14=5 L. R.P.C. 53=48 Bom. 185=2 Pat.L.R. 108=39 C.L. J. 201=A.I.R. 1924 P.C. 3=46 M.L.J. 169 (P.C.).

——S. 297—Regular line of street—Subsequent alterations—Competency.

Under the provisions of S. 297 of the City of Bombay Municipal Act, 1888, a line can only be once prescribed as the regular line of the street, and it is not competent to the Municipal Commissioners to alter from time to time the line once prescribed. (1900) 25 B. 107=2 Bom, L.R. 810.

——S. 297—Power to prescribe regular line—Fresh line.

Under S. 297 as amended, the Municipal Commissioner has the power to prescribe a regular line on each side of the street and a fresh line in substitution for any line so prescribed or for any part thereof, though it may be to widen the street. An ambiguity in a clause of the Act should not be created or imagined for bringing in the aid of the preamble of the Act or the heading of the clause. 36 Bom. 405=12 Ind. Cas. 905=13 Bom.L.R. 1130.

——S. 297—Regular line of a public street—Building line or boundary line of street.

A consideration of the terms of S. 297 of the City of Bombay Municipal Act and of its setting in the Act, shows conclusively that it is dealing with the building line of a public street, as distinguished from the boundary line or intended boundary line of a public street. 73 I. A. 34=I.L.R. (1946) Bom. 505=I.L.R. (1946) Kar. (P.C.) 38=81 C.L.J. 350=48 Bom.L.R. 434=50 C. W.N. 912=1946 M.W.N. 191=223 Ind. Cas. 362=A. I.R. 1946 P.C. 53=(1946) 1 M.L.J. 364 (P.C.).

——Ss. 297, 299 and 301—Acquisition of land for building bridge over Railway level crossing—Compensation.

The powers given by Ss. 297 and 299 of Bom. Act III of 1888 could be exercised notwithstanding that the purpose for which the land is taken is not mainly the preservation of the line of the street but the building of a bridge over a Railway level crossing; consequently the compensation payable to the owner of the land acquired is to be calculated under S. 301 of the Act. 42 Bom. 462 =(1918) M.W.N. 840=48 Ind. Cas. 63=23 C.W.N. 110=24 M.L.T. 297=20 Bom. L.R. 937=8 L.W. 548 (P.C.).

——Ss. 300 and 301—Building line—Set forward—Compensation, right to.

Where premises are compulsorily ordered to be set forward to the building line, the Corporation is not entitled to compensation from the owner of the premises for land which prior to the order vested in the Corporation but which will be covered by the premises as ordered to be set forward. The fact that the Corporation has to pay compensation for the compulsory expropriation of an owner does not confer a right to a payment by the owner for compulsory impropriation. 43 Bom. 181=17 A.L.J. 1=36 M.L.J. 1=29 C.L.J. 138 =9 L.W. 171=25 M.L.T. 108=21 Bom.L.R. 114=23 C.W.N. 441=48 Ind. Cas. 404=1 U.P.L.R. (P.C.) 31= (1919) M.W.N. 321 (P.C.).

——S. 302—Merely by omitting to give notice under S. 302, person cannot claim exemption from operation of Act.

Normally, whoever intends to make or lay out a new private street ought to give written notice of his intention to the Commissioner But he cannot be allowed to take advantage of his omission to fulfil the operation of the Act in respect of his road, if it is really a "street" in the true sense of that term. According to the definition in S. 3 (y), every street, which is not a public street is a private street, whether notice of its construction is given to the Commissioner or not. A.I.R. (Vol. 30) 1943 Bom. 435=45 Bom.L.R. 965=45 Cr. L.J. 274=210 Ind. Cas. 629 (F.B.).

——S. 305—"Owner"—Lessees of building sites, owners. (1910) 34 Bom. 593=12 Bom.L.R. 669=7 Ind. Cas. 935.

——Ss. 305, 489, 491—Crown, if bound by these provisions.

The fact that the Crown is bound by provisions contained in the chapter relating to Municipal taxation, in the City of Bombay Municipal Act does not lead to any inference that it was intended that the Crown should be bound by provisions in another chapter dealing with the regulation of streets. Therefore, the Crown is not bound by the provisions of Ss. 305, 489 and 491 as they do not expressly or by implication refer to the Crown. The intention that the Crown should be bound or has agreed to be bound must clearly appear from the language and from the nature of the enactment. A. I.R. (Vol. 21) 1934 Bom. 379=36 Bom.L.R. 820=58 Bom. 635=153 Ind. Cas. 142.

——S. 308—Encroachment on street over which public have no right of way.

No doubt S. 308 refers to an obstruction "caused to the safe or convenient passage of the public along it," indicating thereby that the street referred to must be one over which the public have a right of way. But although the obstruction required must be in respect of such a street, the other acts referred to in that clause, viz., overhanging, jutting or projecting into or in any way encroaching upon, any street, are applicable even to streets over which the public have no right of way. A. I.R. (Vol. 30) 1943 Bom. 435=45 Bom.L.R. 965=45 Cr.L.J. 274=210 Ind Cas. 629 (F.B.).

——S. 313-A—Complaint under—Whether can be filed by the Police.

The Police can lodge a complaint in respect of an offence under S. 313-A, City of Bombay Municipal Act. A.I.R. (Vol. 21) 1934 Bom. 459=36 Bom.L.R. 965=36 Cr.L.J. 279=1934 Cr. Cas. 1330=59 Bom. 53 =153 Ind. Cas. 38.

——Ss. 337 (2), 342 and 349 (c)—"Re-erection"—Addition of storeys to ground-floor of building.

The term re-erection applies to all buildings which are not included in S. 337 (3) of the Bombay City Municipal Act, 1888. A building with a ground floor, to which, after it has been in existence for some years, the owner wants to add one or more storeys, would fall within "re-erection" provided it is not of the description mentioned in the definition of re-erection. (1907) 9 Bom.L.R. 932.

——S. 342 (d)—"Re-construction"—Meaning of.

The word "re-construction" as used in S. 342, Cl. (d), of the City of Bombay Municipal Act has some other element than that of additions, alterations or repairs. If the repair is of an ordinary and casual character, it is not re-construction, of any portion of the building. If, on the other hand, the repairs are of a more or less substantial character, affecting the stability of the building, it is re-construction, whether the repairs are done inside or outside the house. In each case it is a question of fact whether the partial works done with reference to a building are mere repairs or one of reconstruction of a portion of the building. The difference between repairs and re-construction is one of degree, and can be made out by finding whether what has been done adds to and was intended to add to the structural capacity of the building. (1904) 6 Bom.L.R. 1028.

——S. 349-A—Building—Commissioner can allow to be erected to any height.

The words "except with the written permission of the Commissioner" in S. 349-A of the Act form a general exception to the regulations in Ss. 349-A and 349-B and the Commissioner, if he thinks it proper, can allow building to be erected to any height. 61 Ind. Cas. 143=23 Bom.L.R. 158.

——Ss. 349-A and 349-B—Height of buildings—Permission of Municipal Commissioners when necessary.

Section 349-A of the City of Bombay Municipal Act governs and controls S. 349-B, of the Act. The words "except with the written permission of the Commissioners" in S. 349-A not only apply to the special case mentioned in that section but also to each of the cases provided for in S. 349-A. Both the sections on combining would mean that (a) no building shall exceed seventy feet in height; (b) in streets not exceeding twenty six feet in width no building shall exceed in height 1½ times the width of the street; (c) in streets exceeding twenty six feet but not forty feet in width no building shall exceed forty feet in height, and in all other cases no building shall exceed the width of the street in height, except with the written permission of the Commissioners. If permission is given to build, any person may, as a matter of right build to the prescribed heights relatively to the street on which the building faces without having recourse to the Municipal Commissioners at all. If, in any case in which permission is granted, it is desired to exceed those prescribed heights or the general maximum height, the Municipal Commissioners' written permission must be obtained. The opening words of S. 349-B suggest that the rules in the section are intended to be a guide to the Municipal Commissioners in the exercise of discretion rather than an imperative command. The intention of the legislature expressed in Ss. 349-A and 349-B was to confer upon the Commissioners a power to grant permission in writing in all exceptional and proper cases for the erection of buildings beyond prescribed heights. (1909) 5 Ind. Cas. 213=12 Bom.L.R. 274.

——S. 349-B—Building—Maximum height of.

The words "maximum prescribed by S. 349-A" in S. 349-B of the Act cover an alernative maximum, 70 feet or such other height as the Commissioner may authorize by written permit. 61 Ind. Cas. 143=23 Bom.L.R. 158 (D.B.).

——S. 349-B—Building—Meaning of.

A small portion of a residential room such as an outlying bath room cannot be construed to be a building within S. 349-B of the Act. Adding of such rooms is not building. 41 Bom. 741=42 Ind. Cas. 134=18 Cr. L.J. 902=19 Bom.L.R. 681 (D.B.).

——S. 349-B—Height of buildings with reference to width of street—Construction of statute—Casus omissus.

The accused erected a building which touched on either side of the public streets which are parallel to each other. The height of the house having exceeded the possible limits, the Municipality required the accused to reduce the height conformably to the provisions of S. 349-B of the City of Bombay Municipal Act, 1888. The accused disobeyed the requisition and he was convicted and sentenced for the disobedience. **Held:** (1) that the building of the kind in question must at all events fulfil the conditions prescribed in Cls. 12 and 3 of S. 349-B with reference to both the streets on which it abuts, even if it did not fall within Cl. 4 of the section; (2) that the provisions in question of the Act were intended in the interests of public health and the Court ought to so construe them as to advance that object. It is not permissible to create a **casus omissus** by interpretation save in some case of strong necessity. (1907) 9 Bom.L.R. 363.

——S. 349-B—Limit of height of buildings—Re-constructing a house burnt down—Set back of five inches—Abutting on street.

Where the owner of a house destroyed by fire pulls down its remaining walls to six feet above the plinth, and the house abuts on the street, the height to which he can raise his new building is governed by the provisions of S. 348-B of the City of Bombay Municipal Act, 1888. Where in re-constructing a house, the owner set it back by five inches from the street on which it originally abutted: **Held**—That the house should be taken as abutting on the street notwithstanding the set back. (1907) 9 Bom.L.R. 737.

——S. 349-B—Writ of mandamus against Commissioner—Right of third party to.

A writ of mandamus cannot be issued at the instance of a third party to restrain the Municipal Commissioner from granting permission to the owner of the building, to add to the height of his building, so as not to contravene the provisions of the Municipal Act. 33 Bom. L.R. 31.

——S. 354—Discretion of Commissioner—Exercise of—Commissioner guided by expert advisers—Interference by Court.

The primary object of S. 354 of the City of Bombay Municipal Act, 1888, is the safety of the public, to secure which the Commissioner must of necessity be given very wide powers, But it does not follow that those

powers must be exercised arbitrarily and without due consideration of the provisions of the section and the rights of individuals. In the first place it must appear to the Commissioner that a structure is in a ruinous condition, or likely to fall or in any way dangerous to any person occupying, resorting to or passing by such structure. He may next, by written notice, require the owner or occupier to pull down, secure or repair. The word "appears" in the section does not involve "appears to the eye." It is sufficient if it appears to the Commissioner on the representations of a competent officer whose duty it is to make such representations. But the Commissioner's action when 'it appears' is judicial so that he must exercise his discretion in determining what action should be taken. He does not satisfy this test, where he merely signs the notice which is sent to him by the Executive Engineer because it has previously been signed by that officer. It is only by aid of a fiction that it can be said that a notice signed in this way by the Commissioner complies with the section, which should be considered as a notice to shew cause. It is not invalid; at the same time it cannot deprive the person served with it of his right to object unless the legislature has clearly deprived him of such a right. Danger means peril, risk, hazard, exposure to injury from pain or other evil, and can vary in degree according as the apprehended injury is expected to occur at once or at some future time. S. 354 applying to all degrees of danger and prescribing various precautionary measures to be taken to prevent injury resulting therefrom, it follows that the degree of danger must be ascertained and then the appropriate precautionary measures prescribed. Discretion must not be arbitrary. The very term standing by itself and unsupported by circumstances, imports the exercise of judgment, wisdom and skill as contra-distinguished from unthinking folly, hardy violence or rash injustice. The legislature has vested in the Commissioner a discretion in the matter (S. 344), and the Court would not interfere in its exercise merely because the object in view might be carried out in some other way, nor would it lightly impute to him bad faith. But the Court is, in the first instance, entitled to inquire whether the discretion has been exercised first in coming to a conclusion as to the state of the structure and then in fixing upon the remedy. It is obviously impossible for the Commissioner to inspect all structures that are suspected of being dangerous. Therefore it is a sufficient exercise of his discretion in deciding what structures are dangerous if he appoints a competent person to represent to him what structures are dangerous. But if a notice is issued based on the representation of such a person, it is open to the owner to prove that that person has not exercised his discretion or has been actuated by improper motives in prescribing the steps to be taken. If the owner can prove to the satisfaction of the Court that his house was not in such a dangerous condition as to warrant an order to pull down, that would be prima facie evidence that the person appointed by the Commissioner had not exercised his discretion. When the Commissioner has perforce to act on the advice of his expert advisers it must be proved that they decided judicially what advice they should offer. If they did not, the provisions of the section have not been complied with. In other words the Commissioner can exercise his discretion through an agent; but it follows that if the agent has not exercised his discretion neither has the Commissioner. The Commissioner has the opportunity to remedy this when the owner complains. Under certain circumstances, the safety of the public must be considered in priority to the right of private individuals as in the case of imminent danger: but where there is no suggestion of imminent danger the person affected is entitled to be heard as a matter of common justice. (1908) 10 Bom.L.R. 821=33 B. 334 =3 Ind. Cas. 361.

——S. 379-A (1)—Notice to abate to whom given—Overcrowding.

A notice under S. 379-A (1) to abate the overcrowding must be given to the owner and not to the tenants to whom the building is let separately by the owner. 36 Bom. 81=11 Ind. Cas. 995=12 Cr. L. J. 459=13 Bom.L.R. 640 (D.B.).

——S. 380—"Owner"—Meaning of. See IBID., Ss. 3 (m) and 380. 30 Bom.L.R. 339.

——S. 384-A—Owner of building, when liable.

The provision contained in S. 384-A of City of Bombay Municipal Act, is a penal provision and the section must be strictly construed.

The owner of a building is only liable under the language of S. 384-A, City of Bombay Municipal Act, if he himself is using the premises but not otherwise. The language used in S. 384-A, is not appropriate to the case of the owner unless he is also the occupier and uses the premises for any prohibited purpose. A.I.R. (Vol. 26) 1939 Bom. 95=41 Bom.L.R. 82=40 Cr.L. J. 343=180 Ind. Cas. 97.

——S. 390—Offence under—Accused permitted to establish hand-loom factory, establishing flour-mill factory also worked by same power.

The accused obtained the Municipal Commissioner's permission under S. 390 (1) of the City of Bombay Municipal Act, 1888, to establish a hand-loom factory worked by an oil engine; but by means of this oil engine he also established a flour mill without any permission. The accused was, therefore, charged with the offence under S. 390 (1) of the Act:

Held—that the accused was guilty of a technical offence under S. 390 (1) of the City of Bombay Municipal Act, 1888, for although the accused had leave to establish the hand-loom factory he had no leave to establish the flour mill factory, which was not the less another and a separate factory because it happened to be worked by the same power which it was proposed to employ in the permitted factory. (1909) 12 Bom.L.R. 122=34 Bom. 344=5 Ind. Cas. 859.

——S. 390 (1)—Establishing of factory without permission—Offence arising every day on which factory is worked.

Since under S. 390, the offence consists of working a factory without permission, every day on which the factory is worked, an offence is committed. A continuing offence is not a very happy expression, because a person must be charged with committing an offence on a particular date, and he cannot be charged with committing an offence **de die in diem**. But the expression has a well-recognized meaning. It means that if an act of the accused constitutes an offence and if that act continues from day to day, then a fresh offence is committed on every day on which the act continues. If the act prohibited is that of working a factory an offence is committed on every day on which the factory is worked. It may not strictly be a continuing offence, because the owner of the factory may cease to work it for a longer or a shorter period and then re-open it; but on any day on which he is shown to have worked the factory without the requite permission, he has commit-

ted an offence, and it is immaterial to consider whether he committed an offence by working the factory on some previous occasion. Under S. 390, the establishing of a factory without permission is an offence committed once and for all when the factory is established, but the working of a factory without permission is an offence which arises on every day on which the factory is so worked. A.I.R. (Vol. 29) 1942 Bom. 326=44 Bom.L.R. 756 =44 Cr.L.J. 120=203 Ind. Cas. 592.

——S. 390 (1)—Section constitutes two independent offences.

The reference in the last part of S. 390 (1) to working "any such factory" must relate back to the description of the factory contained in the earlier part of the section, and the only description of a factory is of one in which it is intended that steam, water or other mechanical power shall be employed. The first part of the section constitutes as an offence the newly establishing of a factory, but the reference to such newly establishing does not form part of the description of the factory. The second part of the section applies generally to any person, and not merely to the person who has newly established a factory. The section constitutes two quite independent offences: one, establishing a new factory in which mechanical power is intended to be employed without permission, and the other, working such a factory, that is to say, a factory in which mechanical power is intended to be employed, without permission. The expression "such factory" is also found in Sub-Ss. (2) and (3) of S. 390 and in those sub-sections the reference is to the description of the factory contained in Sub-S. (1) as a factory in which steam, water or other mechanical power is to be employed. A.I.R. (Vol. 29) 1942 Bom. 326=44 Bom. L. R. 756=44 Cr.L.J. 120=203 Ind. Cas. 592.

——S. 390 (1)—Offence under—Form of summons.

In a summons to the accused in respect of an offence under S. 390 (1), Bombay City Municipal Act, it would be better to charge the accused in the words of the section constituting the offence, with having worked a factory in which mechanical power was used. Where, however, the accused was charged in the summons under the section with working 55 electric motors for the purpose of conducting a textile mill without permission, no serious objection can be taken to the form of the summons as it sufficiently informed the accused of the offence complained. A.I.R. (Vol. 29) 1942 Bom. 326 =44 Bom.L.R. 756=44 Cr.L.J. 120=203 Ind. Cas. 592.

——S. 394—Premises—If includes open ground.

The word 'premises' in S. 394 of the City of Bombay Municipal Act, 1888, is not limited to 'buildings' but also includes open ground. (1901) 3 Bom.L.R. 436.

——S. 394 (1) (c)—Tenant's use of premises—Liability of owner—Want of license—Knowledge of owner.

Under S. 394 (1) (c) of the Bombay City Municipal Act, the owner of a building is not liable for any user by the tenant without license, even though the owner is aware of such unauthorised user. (1902) 4 Bom.L.R. 943.

——S. 394—Bullocks kept by lessee—Liability of lessor.

The lessees and sub-lessees of certain premises used them for keeping bullocks which were meant for hire contrary to the provisions of S. 394. The use was known to the owner and the lease expressly provided against it. **Held,** the lessor, i.e., the owner of the premises was guilty under S. 394. 17 Ind. Cas. 532= 13 Cr.L.J. 788=14 Bom.L.R. 882 (D.B.).

——S. 394—Bullocks kept by tenants—Liability of owner.

Where **A** was joint owner of a place, part of which was let out to several tenants and the tenants kept bullocks on the place, some in huts and some in the open and they were plied for hire; but the place was not licensed by the Municipal Commissioner under S. 394 and **A** knowing that the bullocks were kept on the land allower their keeping. **Held,** that **A** was guilty of an offence under S. 394 whether the bullocks were kept upon leased land or not. 17 Ind. Cas. 529=13 Cr.L. J. 785=14 Bom.L.R. 885 (n) (D.B.).

——S. 394—Oil—Storing of—License.

The wording of S. 564 of the City of Bombay Municipal Act requires that the premises, in order to attract the operation of the section, should be used for the purpose of storing. The phrase 'for the purpose' indicates that it must be the intention of those using the premises to store: that storing must be the object aimed at, the final cause for which the premises are used. Actual use is by itself insufficient in the absence of proof as to the object aimed at. The sub S. 3 of S. 394 is clearly intended only to give an exemption to mills for spinning or weaving cotton, wool, silk or jute in respect of those particular articles with which those mills are concerned and is not intended to touch or in any way affect their liability in respect of any other articles mentioned in Schedule M. (1904) 29 Bom. 193=6 Bom.L.R. 735.

——S. 394—Stabling of milch-cows—Refusal of license —Power of Commissioner.

The power to grant a license, by the Municipal Commissioners of the City of Bombay for the stabling of milch-cows, under S. 294 of the City of Bombay Municipal Act, includes the power to refuse the license. (1903) 28 Bom. 253=5 Bom.L.R. 1001.

——S. 394—Owner of a building allowing, for a fee, cartmen to stable their carts and bullocks—License not taken—Liability of owner.

The owner of a premises who, without a license, allows animals to be kept therein, whether on payment of a fee or otherwise, should be considered to use the said premises for that purpose and to contravene the provisions of S. 394. (1897) 4 Bom.L.R. 945; Note.

——Ss. 394 and 471—Storing oil without license—Wrongful refusal of Commissioner to grant license—If a defence.

A wrongful refusal by Commissioner to grant license is no defence to a charge of storing oil without license. 45 Bom. 1076=61 Ind. Cas. 49=22 Cr.L.J. 321=23 Bom.L.R. 353 (D.B.).

——S. 394 (4) (b)—Discretion of Municipal Commissioner to issue licence—Imposition of conditions on licensee—If ultra vires.

Having regard to the general words of discretion contained in S. 394, Sub-S. (4), Bombay City Municipal Act, the burden of proving that the Municipal Commissioner, Bombay, is wrong in his action, is on the petitioner. Under the section he is given very wide discretion in the issue of licences, and although a resident in Bombay is allowed to use his premises for keeping any quantity of ghee or butter without any licence, and if he keeps any ghee or butter for sale, he is allowed to do so up to a maximum limit of four hundredweights without any licence, it does not mean therefore that when he applies for a licence which it is obligatory on him to obtain, the Commissioner is not entitled to impose as a condition restrictions over the liberty of the applicant

which he otherwise had. Where it is considered by the Commissioner that the carrying on of the trade of melting vegetable oil requires exclusion of ghee or butter or other substances mentioned in condition 4-A of S. 394 from the premises, and in so far as the condition imposes restrictions only with regard to the premises in respect of which the license is issued, the imposition of that condition is not contrary to the Act or **ultra vires** the Commissioner. But if the Municipal Commissioner by a general notification intimates that any one within the Municipal limits to which the Act was applicable should not keep ghee for sale at all, or not exceeding two or three hundredweights, his action would be contrary to the Act, because the Act fixes another limit.

If the Municipal Commissioner in his discretion, considers that he would not issue a licence to a party who deliberately committed a breach of the condition of the licence, it will not be a wrongful use of the discretion given to him by the Act. If the condition was unauthorized, the duty of the party holding the licence is to go to Court and ask for a decision, but not to take the law in his own hand, commit a breach of the condition and then complain that the Commissioner had no authority to impose that condition. A.I.R. (Vol. 23) 1936 Bom. 264=38 Bom.L.R. 556=60 Bom. 838=164 Ind. Cas. 101.

——Ss. 401 and 471—Applicability—"Without a licence"—Licensee holding several stalls.

S. 401 of the City of Bombay Municipal Act does not provide for a licence in respect of each or every stall. It is a personal licence. A person with a single licence may hold several stalls. A licensee who has paid a licence-fee, but fails to pay higher stallage charges imposed by the Municipality in respect of the stalls during the currency of his licence cannot be proceeded against under S. 401, read with S. 471 of the Act. 49 Bom.L.R. 811=A.I.R. 1948 Bom. 161=49 Cr.L.J. 193 (D.B.).

——S. 402 (2)—Scope—Fruits.

Fruits are articles of human food within the scope of S. 402, Cl. 2. 30 Bom.L.R. 1128=52 Bom. 780=12 A.I.Cr.R. 30=30 Cr.L.J. 168=113 Ind Cas. 506=A.I.R. 1928 Bom. 413 (D.B.).

——Ss. 402, 403 and 471—Private market—Structure consisting of shops abutting a street.

The accused with the sanction of the municipality erected a structure designed to be let as small shops abutting on a street. The shops were let to tenants. There was no inter-communication between the shops. Each tenant was independent of the other. Majority of tenants sold fruits. The shops looked like stalls or booths. The customers purchased the goods standing on the pavement of the road and had no right to enter the shops.

Held, that the structure was nothing more than a collection of shops and its user did not constitute a private market within the meaning of Ss. 402 and 403. 30 Bom.L.R. 1128=52 Bom. 780=12 A.I.Cr.R. 30=30 Cr.L.J. 168=113 Ind. Cas. 506=A.I.R. 1928 Bom. 413 (D.B.).

——S. 411—License to carry on trade of butcher—Power of Commissioner to grant or refuse.

Section 411, City of Bombay Municipal Act, in terms deprives every citizen, living within the city or to whom the Act applies, of the power to carry on the business of a butcher. The only exception to that is the grant of a licence by the Commissioner and carrying on the trade of a butcher in conformity with the terms of that licence. In the Act there is no express provision giving power to the Commissioner to grant a licence to carry on the trade of a butcher. By reason of the words used in S. 411, the power is impliedly vested in the Commissioner. If this power is deemed to exist in the Municipal Commissioner, impliedly by reason of the terms of S. 411, it follows that the power to refuse the licence must also be vested in the same authority, because a power to grant necessarily implies a right to refuse. Therefore, S. 411 can be construed to mean that the Municipal Commissioner is not under an obligation to issue a licence to a butcher. A.I.R. (Vol. 24) 1937 Bom. 395=39 Bom.L.R. 536=I.L.R. (1937) Bom. 774=171 Ind. Cas. 331.

——S. 412-A (b)—"Other milk products."—If include ghee.

The words "other milk products" appearing in S. 412-A (b) should be construed **ejusdem generis** with reference to what precedes those words and the meaning to be given to them should be less comprehensive than they would otherwise be if they stood by themselves without the words "milk, butter" preceding them. They would include such products of milk as are the direct results of milk and would be liable to speedy decay, like butter, as for example, whey, curd, or cream, and would not include ghee which is not the direct result of milk and is not liable to speedy decay. 53 Bom. 627=120 Ind. Cas. 356=31 Bom.L.R. 581=31 Cr.L.J. 103=1929 Cr. C. 41=A.I.R. 1929 Bom. 274 (D.B.).

——Ss. 429, 430—Public conveyance—Dangerous disease—Infection—Bombay Public Conveyances Act, S. 22.

The driver of a public conveyance in the City of Bombay, who carries in his conveyance a person suffering from small-pox, offends against the provisions of S. 430 (3) of the Bombay Municipal Act, 1888. **Semble:**—Therer exists an apparent antimony between S. 22 of the Public Conveyances Act, 1836, and Ss. 428, 430 of the City of Bombay Municipal Act, 1888. (1905) 7 Bom.L.R. 460.

——Ss. 461 and 418—Bye-law prohibiting use of unverified measure—if ultra vires.

The fourth bye-law prohibiting the use of unverified measure, whether correct or false, is **ultra vires** under S. 461 (o); the Corporation can prevent the use of false measures. If they are suspected to be false they should be verified. 19 Bom.L.R. 358=18 Cr.L.J. 701=40 Ind. Cas. 701=41 Bom. 580.

——S. 471—Non-compliance with S. 275 (1)—Notice under S. 278 (2), if necessary.

Section 471, Bombay City Municipal Act creates two distinct offences: (1) the offences of disobedience of any requisition to remedy a defect to which attention of the owner or occupier might have been drawn by a notice under S. 278 and (2) a separate offence (not dependent on the issue of a notice in the first instance) which consists in not keeping in efficient repair every pipe conveying water from the municipal water works to such premises. No notice is required to be given in respect of keeping such works in proper repair, and it is not necessary that before a person can be convicted for not complying with the provisions of S. 275 he should be served with a notice under S. 278 (2). A.I.R. (Vol. 31) 1944 Bom. 18=45 Bom.L.R. 899=45 Cr.L.J. 261=210 Ind. Cas. 412.

——Ss. 471, 305—Prosecution under S. 471—Burden of proof.

In a prosecution under S. 471, Bombay City Municipal Act the onus is on the Municipality to prove that the street in respect of which notice under S. 305 was served, is a private street within S. 3 (y) of the Act. A.I.R. (Vol. 30) 1943 Bom. 68=45 Bom.L.R. 60=44 Cr.L.J. 384=205 Ind. Cas. 358.

——Ss. 471 and 394—Storing oil without license—License having been wrongfully refused is no defence to charge. 45 Bom. 1076=23 Bom.L.R. 353=22 Cr. L.J. 321=61 Ind. Cas. 49=A. I. R. 1921 Bom. 445 (D.B.).

——S. 471 — Offence under — Warning — Power of Magistrate.

Warning and discharging the accused on his removing the nuisance complained of is not a form of sentence or order that the Magistrate has power to pass in the case of an offence under S. 471; the accused should either be punished or acquitted. 52 Bom. 250 30 Bom.L.R. 375=29 Cr.L.J. 566=109 Ind. Cas. 502 =10 A.I.Cr.R. 286=A.I.R. 1928 Bom. 152 (D.B.).

——Ss. 489 and 491—Crown, if bound by these provisions. See IBID., Ss. 305, 489, 491. 58 Bom. 635.

——S. 515—Interpretation—Powers of Court—Extent of—Right of resident to complain.

Purely as a matter of construction there is nothing in the terms of the section to justify the contention that the second part of cl. (a) of sub-S. (2), which relates to the direction to the Municipal Commissioner to take such measures as to such Magistrate shall seem practicable and reasonable, applies only to the exercise of the powers under any one of the sections mentioned in sub-S. (1). The scheme of the section clearly is to give the right to any person to make a complaint where there is any nuisance or where in the exercise of any of the powers conferred by the respective sections, more than the least practicable nuisance has been created. The extent of the power of the Court is indicated in sub-S. (2), and the whole of cl. (a) of sub-S. (2) applies both to the case of nuisance, as well as to the case where in the exercise of powers under certain sections of the Act more than the least practicable nuisance is created. The argument, that the Legislature could not have contemplated that a Court should control and regulate the discretion of the Municipal Commissioner as to matters, about which the Municipal Commissioner would possess special knowledge, is not acceptable. This section appears to have been enacted for the protection of persons residing in the city; and it provides a remedy which is open to any resident of the City. The extent of the power of the Court is to be found in the words of cl. (a) of sub S. (2). That provision undoubtedly implies some limitation upon the powers of the Commissioner and so some control over his acts where a proper case for giving direction to him in connection with a nuisance is made out. It is not open to a Court to consider whether the Legislature should have conferred such powers upon the Court or not. It may be that the absence of proceedings under this section has tended to create an impression as to the meaning and scope of this section which is not accurate. It is open to the Court to consider whether the existence of stables, having regard to all the facts, is or may be dangerous to life or injurious to health, even apart from the question of malaria. Whether the complainant is a paying guest or a tenant is not material. If he resides in the house that is sufficient for the purpose of enabling him to complain of the nuisance. Where a complaint was made against certain stables as a nuisance and the owner had incurred heavy costs in putting them up, and had sound grounds for expecting grant of licence through the support of the Municipal Commissioner, held that through he may have felt assured in his mind on account of the support which he had of the Municipal Commissioner, so far as the licence was concerned, he was not absolved from the obligation to see that no nuisance was caused by him to any residents in the locality. It has also to be remembered that while under the Rent Act, he may not be able to eject his present tenants, this nuisance itself, if allowed to remain, may be an effective means of enabling him to get possession. Where it was argued that the Commissioner's discretion should not be interfered with, so as to affect public convenience. **Held**, that such general considerations cannot be allowed to override the main purposes of the section in dealing with a particular nuisance.

Per **Crump, J.**—The circumstance that the wrongdoer is in some sense a public benefactor has never been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed. 48 Bom. 241=25 Bom.L.R. 1321=26 Cr.L.J. 374=84 Ind. Cas. 854=A.I.R. 1924 Bom. 241 (D.B.).

——S. 515—Nuisance—Private and public nuisances can be remedied by injunction by one or all residents affected—Court can order refusal to grant license for stables but the order does not govern all cases of license for stables.

It is necessary for the protection of the health and comfort of the inhabitants of a big city like Bombay or Calcutta that any resident, who is affected by a nuisance in the manner mentioned in S. 3 (z) of the Municipal Act, should have a right to go to a Magistrate over the head of the Commissioner or the Corporation and ask that the Commissioner should be restrained from exercising his powers so as to affect the complainant's individual right as resident by the creation of a private nuisance. If private nuisance affects two or three houses, the inhabitants of the two or three houses might either join in a complaint before the Magistrate and ask the Magistrate to decide specifically that the particular nuisance is a private nuisance affecting the residents of houses **A, B** and **C**. With regard to a public nuisance also, any resident of Bombay can ask for an order under S. 515, and if the Court finds a public nuisance proved the order of the Court would give relief to the public of the locality as against the nuisance, and vacating of any one or more houses would not mean an abatement of the nuisance in respect of the public. In the case of a public nuisance, no particular limits need be defined. The relief which the Court can grant, under S. 515 of the City of Bombay Municipal Act, in cases of public as well as private nuisance is, **inter alia**, abatement of the nuisance by ordering the Commissioner not to grant a license for stables, etc. But it does not follow from the Court's making an order on the Commissioner that he should not grant a license, that that order is to govern all circumstances and all cases at all times. Where the Court passes an order under S. 515 to abate a nuisance with reference to a particular house, and that house falls vacant subsequent to the passing of the order and is not to be used any more for purposes other than those connected with the stables, the order ceases to have any operation. 27 Bom.L.R. 581=87 Ind. Cas. 771=A.I.R. 1925 Bom. 458.

——S. 515—Parties to proceeding—Person causing nuisance.

The person who is said to have caused the nuisance, should be made a party to the proceedings, both in the inquiry which may be made by the Magistrate under S. 515 of the Act, and on the appeal in the High Court. 48 Bom. 241=25 Bom.L.R. 1321=26 Cr.L.J. 374=84 Ind. Cas. 854=A.I.R. 1924 Bom. 241 (D.B.).

——S. 517—Power of Municipal Commissioner to prefer charge against any person.

Section 517 of the Act is permissive and does not in terms provide that the Commissioner may charge a person, but only that he may take proceedings against a person who is charged. But the section means that the Commissioner may prefer a charge against any person, and there is nothing in it to show that the Commissioner alone may take proceedings. A.I.R. (Vol. 21) 1934 Bom. 459=36 Bom.L.R. 965=36 Cr.L.J. 279 =1934 Cr. Cas. 1330=59 Bom. 53=153 Ind. Cas. 38.

——S. 527—Applicability.

S. 527 of the City of Bombay Municipal Act does not apply to a suit to restrain a Municipality by injunction from doing an act which was threatened but not done. 25 B. 142, foll. (1904) 6 Bom.L.R. 1028.

——S. 527—Applicability—Act of Corporation of issuing debentures with option of renewal and giving effect to such option—Suit against corporation on conversion of debentures—Whether in tort or on contract.

The protection of the statute extends to acts done in direct execution of the powers conferred by the particular Act of the local authority, but it does not cover acts which are done in pursuance of a contract which the local authority is empowered to enter into, but is not required to enter into by its Act. This principle applies to the construction of S. 527, City of Bombay Municipal Act.

A Municipal Corporation issued debentures under power given by S. 106, Bombay City Municipal Act, They contained a condition that the debentures could be renewed at any time at the option of the holder. Debentures were issued directly or endorsed over, to the plaintiffs and one **N** on such terms that any of those three persons could deal with the debentures. **N** died and the debentures which were then in the hands of one **A** for collection of interest, were wrongfully dealt with by him. The allegation was that he forged an endorsement of the debentures by **N** in favour of himself or of a nominee for himself, and subsequently endorsed the debentures over to the Bank of India. The Bank of India lodged the debentures with the Corporation, and the Corporation cancelled those debentures, and issued fresh debentures to the Bank of India. The plaintiffs brought a suit against Corporation and contended that as **N's** endorsement was forged, the debentures remained their property, and they asked first, for a declaration that the endorsement of **N** on the debentures was a forgery, and that the plaintiffs were the owners of the debentures, and that the defendants might be ordered to transfer and hand over to the plaintiffs the said debentures, or alternatively, to pay the plaintiffs the market value thereof, together with accrued interest:

Held, (i) that the cause of action was clearly in tort and not on contract;

(ii) that the issue of debentures containing an option of renewal, and the giving effect to that option were not acts done in direct execution of any power contained in the Bombay City Municipal Act, but where acts done under a contract authorized, but not required, by the Act. The wrongful action charged against the Corporation was not an action which was directly required by the statute, and therefore S. 527 had no application to the case;

(iii) that the receipt by the Corporation of the plaintiff's debentures was not in itself wrongful. Their possession of the debentures only became wrongful when they were asked to return them to the plaintiffs and refused to do so. The plaintiff's cause of action therefore did not arise until a demand was made for the return of the property, that is, the debentures, and that demand was refused. A.I.R. (Vol. 25) 1938 Bom. 410=40 Bom.L.R. 685=I.L.R. (1938) Bom. 715=177 Ind. Cas. 636.

——S. 527—Refusal by Municipality to discharge ascertained liability—If can be justified on ground of want of notice.

A person who knowingly acts in contravention of his duties under a statute cannot justify his act as done with intent to carry out the statute. Where the liability of a Municipality to an individual is ascertained, an intentional refusal to discharge it cannot be justified on the ground of want of notice. (1901) 3 Bom.L.R. 158=25 Bom. 387.

——Sch. M, Part II—"Oil (other sorts)" includes sweet and cocoanut oil. 45 Bom. 1076=23 Bom.L.R. 353=22 Cr.L.J. 321=61 Ind. Cas. 49=A.I.R. 1921 Bom. 445 (D.B.).

——Sch. M, Part III—"Timber", if includes ply-wood.

The word "timber" in Part III, Sch. M of the Bombay City Municipal Act, does not include ply-wood. The timber in ply-wood has reached a stage in its development at which it has acquired a distinctive name of its own, so that it can no longer be properly described as timber. A.I.R. (Vol. 25) 1938 Bom. 282=40 Bom.L.R. 322=39 Cr.L.J. 575=175 Ind. Cas. 358.

BOMBAY CITY MUNICIPALITIES ACT (XVIII OF 1925).

——S. 15—Order passed by Judge—Revision—Civil Procedure Code (Act V of 1908), S. 115.

A judge acting under S. 15, Bombay City Municipalities Act, does not do so in the exercise of his ordinary civil jurisdiction but as a **persona designata** and hence an order passed by a Judge in such capacity cannot be revised by the High Court under S. 115, C. P. Code. A.I.R. (Vol. 20) 1933 Bom. 105=35 Bom.L.R. 89=142 Ind. Cas. 378.

——S. 46—Liability to pay Tax—Seventeen tenants occupying a house—Each tenement having separate number, separate connexion with drain and separate entrance—Rule framed by City Municipality making each house liable for sullage water tax—Each tenement held liable to pay tax and every tenement was "house".

A owned a house in Belgaum. It was entered as one house in the Municipal Property Register. It was divided into 17 separate tenements, and the tenements were given separate numbers in the city survey. All the tenements had separate drains which were connected with municipal gutter direct, and were separately occupied each by a different family. Lastly each tenement had a separate entrance leading through the gate into the highway. One of the Rules framed by the City Municipality of Belgaum under S. 46 was as follows:—Every house that lets out sullage water into the municipal gutters or municipal limits shall pay Rs. 5 per year.

Held, that the cess should be charged in respect of each tenement and that there was nothing inconsistent in construing the word "house" as separate tenements. 54 Bom. 14=124 Ind. Cas. 239=31 Bom.L.R. 1249=A.I.R. 1930 Bom. 68 (D.B.).

——Ss. 46, 58 (b), 81—Municipality constituted under the Act—Standing Committee not appointed—Resolution delegating powers of Standing Committee to President—If ultra vires.

Where a Municipality framed a rule under S. 58 (b) read with S. 46 by which all powers or duties or executive functions to be exercised or performed on behalf of the Municipality, were delegated to the President, and this rule was sanctioned by Government and the Municipality prepared a revised assessment list of houses to which objections were made which were disposed of by the President in the absence of the Standing Committee:

Held, that the resolution passed by the Municipality making a rule delegating the powers of the Standing Committee to the President was **ultra vires**, and did not authorise the President to dispose of the objections to the assessments. A.I.R. (Vol. 20) 1933 Bom. 175=35 Bom.L.R. 138=57 Bom. 270=144 Ind. Cas. 999.

——S. 110—Revisional orders passed on an order under S. 110—Further Revision—Criminal Procedure Code, S. 435.

There is no right conferred by the statute on any of the aggrieved parties to make a further application for revision against the order passed by the Sessions Court in revision of the order passed by the Magistrate on appeal, against a notice of demand, under S. 110, Bombay City Municipalities Act. 30 Bom.L.R. 1084=112 Ind. Cas. 585=29 Cr.L.J. 1081=A.I.R. 1928 Bom. 376 (D.B.).

——S. 123—Construction of a building—Reconstruction of a wall—If amounts to.

Any material alteration or reconstruction of any wall amounts to a construction of a building within the meaning of S. 123. 30 Bom.L.R. 1082=29 Cr.L.J. 1060=112 Ind. Cas. 564=A.I.R. 1928 Bom. 389 (D.B.).

——S. 123—Interpretation—Direct method provided by the Act—Indirect and capricious method cannot be deemed to have been contemplated by Legislature.

When the Act provides a direct, straightforward and perfectly effective method of securing the removal of a building which has been erected in contravention of the law, there is no reason why the Legislature should be supposed to have provided an alternative method which is indirect and liable to become both capricious and oppressive. 32 Bom.L.R. 768=A.I.R. 1930 Bom. 340 (D.B.).

——Ss. 123 (7) and 118 (4)—"Continuing Contravention"—Failure to remove building in respect of which person was convicted.

The failure to remove a building in respect of which a person has been convicted under S. 123 (7) or S. 118 (4) is not a continuing contravention within the meaning of those sections, as the words "continuing contravention" refer to some further construction subsequent to the first conviction and not merely failure to pull down or remove a building in respect of which a conviction has been had. 32 Bom.L.R. 768=A.I.R. 1930 Bom. 340 (D.B.).

——S. 137—Notice signed by Chief Officer—Validity.

A notice under S. 137 was issued and it was signed by the Chief Officer and not by the Chairman of the Standing Committee. In the notice there was a reference to a resolution of the Standing Committee.

Held, that, although the Chief Officer cannot sign the notice under S. 137, still the notice will not be invalid if he signs it on behalf of the Standing Committee, and the reference to the resolution of the Standing Committee makes it clear that he signed it only on behalf of the Standing Committee. The omission to write such words as "by order" or "on behalf of" is a mere defect of form which can be cured by Cl. (4), S. 192. 32 Bom.L.R. 757=A.I.R. 1930 Bom. 352 (D.B.).

——S. 198—Order of District Court under—Revision.

The District Court exercising judicial functions in accordance with the procedure laid down in the Land Acquisition Act according to Sub-Ss. (3) and (4) of S. 198 of the Bombay City Municipalities Act of 1925 is a subordinate Court under S. 107 of the Government of India Act if not under S. 115 of the C. P. Code, and the High Court can, therefore, revise an order of the District Court under S. 198, Bombay City Municipalities Act if it is **ultra vires**.

Per **Patkar, J.**—Where a Judge or the presiding officer of a Court as distinguished from the Court itself is directed to perform any function of an authority created by a Statute, such a Judge may be considered as a **persona designata** and not a Court but where a Civil Court subordinate to the High Court is constituted an authority to decide the rights between the parties and is directed to perform judicial functions, it is difficult to hold that such a Court is a **persona designata** and not a Court subordinate to the High Court. A.I.R. (Vol. 18) 1931 Bom. 582=33 Bom.L.R. 1067=55 Bom. 544=134 Ind. Cas. 1240.

——S. 198—Question not referred to Panchayat—Jurisdiction of Dt. Judge.

Under S. 198, the District Judge has no jurisdiction to decide question relating to area or apportionment of compensation which had not been referred to a **panchayat** under Cl. (1) of the said section. A.I.R. (Vol. 18) 1931 Bom. 582=33 Bom.L.R. 1067=55 Bom. 544=134 Ind. Cas. 1240.

——S. 200—Limitation—Prosecution for continuing offence.

Limitation for a prosecution for a continuing offence runs from the time when the offence was first committed, or where the offence consists in the failure to remove a building after conviction, from the date of the conviction. 32 Bom.L.R. 768=A.I.R. 1930 Bom. 340 (D.B.).

——S. 206—Right to sue—Procedure in S. 110 not followed.

There is nothing to prevent a suit being filed under S. 206 even though the assessee may not have followed in its entirety the procedure for appealing to the Magistrate laid down in S. 110. 54 Bom. 14=31 Bom.L.R. 1249=A.I.R. 1930 Bom. 68 (D.B.).

BOMBAY CITY POLICE ACT (XLVIII OF 1860).

——S. 11—Boarding-house—License.

A boarding-house within the Town of Bombay requires a license under S. 11 of Act XLVIII of 1860. (1901) 3 Bom.L.R. 765.

——S. 11—Discretion of Commissioners to grant licenses—If absolute or qualified.

The effect of the first part of S. 11 of Act XLVIII of 1860 is (1) that the Commissioner of Police shall grant licenses; (2) that he shall grant them upon the conditions indicated. The Commissioner of Police at Bombay has, therefore, no absolute discretion to refuse to grant licenses for eating-houses within the Town of Bombay under Act XLVIII of 1860. (1901) (On appeal from 3 Bom.L.R. 653) 4 Bom.L.R. 1=26 Bom. 396.

——Ss. 11, 12—License—Eating-house—Location of—Condition as to—Validity.

A mere apprehension of the residents of a locality that an eating-house would prove a nuisance is no ground for refusing to grant a license to hold it under Act XLVIII of

1860. The conditions to be imposed by the Commissioner under S. 12 refer only to prevention of bad behaviour, etc., and the Commissioner has no authority to impose any condition that an eating-house shall not be held in any particular place. The word 'shall' used in S. 12 of Act XLVIII of 1860 is imperative. (1901) (on appeal from 3 Bom.L.R. 653) 4 Bom.L.R. 1=26 Bom. 396.

BOMBAY CITY POLICE ACT (IV OF 1902).

——S. 2—"Public place"—Street.

Any street which is a public highway is a public place within the meaning of S. 2 of the City of Bombay Police Act. 49 Bom.L.R. 340=A.I.R. 1947 Bom. 438=231 Ind. Cas. 264=48 Cr.L.J. 731 (D.B.).

——Ss. 12, 16—Orders issued by Police Commissioner—Scope of.

The order which the Commissioner of Police is competent to issue under the head of discipline and general government under S. 12 of the Bombay City Police Act, 1902, must be one having reference to the conduct of the Police officers in their capacity as such officers. Over their conduct in other relations of life, his disciplinary power does not extend, so long as no element or question of their Police duty enters into those relations. If it does enter, the controlling authority of the Commissioner comes into play and it becomes a matter of Police discipline. The meaning of S. 16 of the Act is that even when a Police officer is not actually at his post discharging the duty assigned to him, he is for the purposes of the Act to be regarded as being at that post with all the rights and obligations of his office attaching to him. In construing an expression of doubtful import occurring in a statute the Court may well have regard to considerations outside the language of the Act. (1907) 9 Bom.L.R. 681=31 Bom. 480.

——S. 22 (1) (f), (i) and (g)—Rr. 4, 7 and 6—Meaning and validity of.

The second Proviso to S. 22 (1) (f), Bombay City Police Act means that the rules under S. 22 (1) (f) are not to require a licence to be obtained for the non-prohibited hours, whilst the effect of R. 6 is to insist on a person, who wants a licence to keep his premises open during the prohibited hours also obtaining a licence to keep it open during the non-prohibited hours.

Rule 6, therefore, in so far as it in effect compels the keeper of the premises to obtain a licence for hours which are not prohibited, i.e., the hours between 5-30 a.m. and 9-30 p.m. is **ultra vires** the Act under which the rules were made and therefore the licence referred to under R. 6 must be taken to cover only the prohibited hours after 9-30 p.m. According to natural construction of Rr. 4 and 7, the necessity of the keeper of a restaurant being present in the premises only applies to the period which is covered by the licence. A.I.R. (Vol. 29) 1942 Bom. 190=44 Bom.L.R. 228=43 Cr.L.J. 642=I.L.R. (1942) Bom. 231=201 Ind. Cas. 266.

——S. 22 (b), (c)—Rules under—Keeping car standing in street.

Where the offence did not consist in a accused driving the car in any part of the public street and obstructing the traffic by such driving but it occurred in his keeping the car standing near the kerb and thereby obstructing the traffic, the case would fall under the specific words of S. 22, Cl. (c), Bombay City Police Act and the rules framed thereunder rather than under any rule under S. 22 (b) of the Act.

Section 22 (c), speaks about regulating conditions under which vehicles may remain standing in streets, and R. 1 speaks of a person allowing his vehicle to be halted or kept standing at any street. Rule 12 framed under S. 22 (b) is quite general and speaks of any person occupying a portion of a street and thereby causing obstruction or inconvenience to the public. Besides the obstruction under R. 1 framed under S. 22 (c) must be wilful which is not the case under R. 12 framed under S. 22 (b) and there can be no conviction under the former rule unless that element is proved. A.I.R. (Vol. 23) 1936 Bom. 256=38 Bom. L.R. 432=37 Cr.L.J. 883=1936 Cr. Cas. 702=163 Ind. Cas. 847.

——(as amended by Act III of 1942), S. 23 (2)—Scope—Knife.

The intention of the Legislature in S. 23 (2) of the Bombay City Police Act as amended in 1942, is that all the specified articles including knives are to be regarded as weapons "capable of being used as a weapon of offence;" anything which is normally designated as a knife, the condition of which renders it capable of being used as a weapon of offence falls within the class of objects which may be prohibited. 49 Bom.L.R. 340=A.I.R. 1947 Bom. 438=231 Ind. Cas. 264=48 Cr.L.J. 731 (D.B.).

——(as amended by Act III of 1942), S. 23 (2) (a)—"Carrying"—Meaning.

"Carrying" in S. 23 (2) of the City of Bombay Police Act is of the widest import and would cover transportation of a weapon with or by the person concerned, however he may attach it to his person. It is not necessary that it should be displayed openly. 49 Bom.L.R. 340=A.I.R. 1947 Bom. 438=231 Ind. Cas. 264=48 Cr.L.J. 731 (D.B.).

——S. 23 (3)—Order under—Accused knowing that disobedience will result in conflict with police—Disobedience, if offence under S. 188, I. P. Code.

Where having regard to the circular issued by the accused and his admissions that he convened the meeting, there is adequate ground for drawing the inference that the accused knew that the disobedience of the order of the Commissioner of Police would at least result in a conflict with police and the disobedience of the order under S. 23 (3) in such a case fulfils all the conditions necessary to constitute an offence under Penal Code, S. 188. 31 Bom.L.R. 1151=1929 Cr.C. 545=A.I.R. 1929 Bom. 433 (D.B.).

——S. 23 (3) enlarges ambit of offence under Penal Code, S. 188—Disobedience of order S. 23 (3) is punishable under S. 127 and equally under Penal Code, S. 188. 31 Bom.L.R. 1151=1929 Cr.C. 545=A.I.R. 1929 Bom. 433 (D.B.).

——S. 23 (3)—Order of Commissioner—Validity of.

Power given to Police Commissioner can be used so as to interfere with rights of subjects as little as possible—Order issued by Police Commissioner prohibiting assembly to be convened even in private place is valid if necessary for public safety. 31 Bom.L.R. 1151=1929 Cr.C. 545=A.I.R. 1929 Bom. 433 (D.B.).

——S. 23 (3)—Promulgation of order—Order misdescribed as notification is not vitiated.

On 19th July, 1920, the Commissioner of Police issued an order, styling it a "notification" under S. 23 (3) prohibiting the President, the Secretary, the members of the Managing Committee and the members of the Girni Kamgar Union from holding, convening, or calling together any assembly of mill hands or employers of the textile mills of Bombay for one week from the date of the order. The notification was duly promulgated in the mill area. On 13th July, 1929, a circular was issued purporting to be signed by six persons including the accused inviting the strikers to attend the meeting. The meeting was held in the evening and in consequence the accused were placed

before a Magistrate who convicted them under I. P. Code, S. 143.

Held, that in issuing the order under S. 23 (3) the Commissioner of Police properly exercised his discretion for the preservation of the public peace and safety and that it was lawfully promulgated within the meaning of Penal Code, S. 188.

Held further, that the order in writing was not vitiated by the misdescription as a notification. 31 Bom.L.R. 1151 =1929 Cr.C. 545=A.I.R. 1929 Bom. 433 (D.B.).

——S. 23 (3)—Scope—Assembly convened in open space between chawls.

The words "any assembly or procession" in S. 23 (3) are very wide and are not restricted to an assembly or procession in a public place or street but includes an assembly convened in an open space between the chawls. 31 Bom. L.R. 1151=1929 Cr.C. 545=A.I.R. 1929 Bom. 433 (D.B.).

——S. 27—(as amended by Act XIV of 1938)—Order under—Revision—Cr. P. Code, S. 439.

Even the amendments to S. 27, Bom. City Police Act by Act XIV of 1938, have not the effect of constituting the Commissioner of Police a Court for the purposes of S. 27. When he makes an order under that section he is merely an executive officer and not a Court subordinate to the High Court whose proceedings are subject to revision.. His order can be considered by a Court only when the validity of the executive order is called in question in a prosecution for breach of the order. A.I.R. (Vol. 28) 1941 Bom. 334=43 Bom.L.R. 702=43 Cr.L.J. 25=196 Ind. Cas. 537.

——S. 27—Power of Commissioner to deport—It is clear from the language of S. 27, Bom. City Police Act, that the foundation for any order under the section is the movement or encampment of any gang or body of persons. The Commissioner of Police has no power under the section to deport any one whom he regards as a dangerous or undesirable character apart from his actions as a member of a gang or body of persons moving or encamping in the city. A.I.R. (Vol.) 25) 1938 Bom. 338=40 Bom.L.R. 483=I.L.R. (1938) Bom. 403=39 Cr.L.J. 792=176 Ind. Cas. 839 (F.B.).

——S. 27—Order of deportation—Validity—Criminal Court's power to consider.

The order of an executive officer not being an order of an inferior Criminal Court, cannot be set aside in revision but when an executive officer makes an order or issues a notification, and an attempt is made to enforce the execution of a penalty against a person committing a breach of such order or notification, it becomes the duty of the judicial authority to consider whether the order is properly made or not. Therefore, when the Commissioner of Police deports a person under S. 27, City of Bom. Police Act and arrests him for disobedience of the order, the Criminal Court has powers to consider whether the order of the Commissioner was justified on the evidence on record. A.I.R. (Vol. 18) 1931 Bom. 514=33 Bom.L.R. 1164= 1931 Cr. Cas. 946=33 Cr.L.J. 169=135 Ind. Cas. 484.

——S. 27 (2-A)—Order externing man of 22 because of petty theft by him at age of 14—Validity.

It is shocking to find an order of externment made against a man of 22 years of age from the city where he has lived for many years because at the age of 14 he committed a petty theft. To make such an order is absolutely opposed to modern views on the subject of child criminality which refuse to treat a child as a criminal and is moreover in defiance of the spirit of the Bom. Children Act of 1936. A.I.R. (Vol. 28) 1941 Bom. 367=43 Bom.L.R. 834 =I.L.R. (1941) Bom. 690=43 Cr.L.J. 210=197 Ind. Cas. 577.

——S. 27 (2-A)—Scope—More than two convictions for separate offences—Offences forming part of same transaction—Order of Commissioner—Nature of—Police Commissioner acting under S. 27 (2-A) is acting not in judicial capacity but in administrative capacity.

If in fact there are more than two convictions for separate offences, the case falls within S. 27 (2-A), Bom. City Police Act, even if all the offences have been in fact committed at one and the same time and as part of the same transaction. The Commissioner of Police, in deciding whether to make an externment order in a case falling within the sub-section, acts in an administrative capacity and not in a judicial capacity. He may know a great deal more about the persons to be externed than the Court which convicted him knew. The Commissioner is not bound only by the evidence given in Court, and may consider himself justified in making an order of externment in the public interest, although the actual offences of which the accused person has been convicted are not of a serious character. A.I.R. (Vol. 28) 1941 Bom. 310=43 Bom.L.R. 511= 42 Cr.L.J. 869=196 Ind. Cas. 442.

——S. 27 (2-A)—Offences arising out of the same transaction can be tried together under S. 235, Cr. P. Code, but the Magistrate is not bound to try them together. He might pass separate orders in separate trials, although the offences arose out of the same transaction. The convictions referred to in S. 27 (2-A), Bom. City Police Act need not be convictions arising in the course of separate transactions or convictions passed on separate dates. The Legislature did not contemplate that the practice of some Magistrates of convicting accused persons on more than one count in respect of the same transaction would involve two convictions within the meaning of S. 27 (2-A). A.I.R. (Vol. 28) 1941 Bom. 367=43 Bom.L.R. 834= I.L.R. (1941) Bom. 690=43 Cr.L.J. 210=197 Ind. Cas. 577.

——Ss. 28, 129—Notice under—When may be issued—Specific Relief Act, S. 45.

The Commissioner of Police of Bombay, acting under S. 28 of the Bombay City Police Act, 1902, issued a notice upon the applicants requiring them to vacate the premises occupied by them and intimating that "failure to comply with this notice will render you liable to punishment under S. 129 of the Act." The applicant applied to the High Court, under S. 45 of the Specific Relief Act, 1877, for a rule against the Commissioner of Police to show cause why the notice should not be cancelled and why he should not be restained from carrying the same into effect. **Held:** that the cancellation of the notice or the non-enforcing of it is an act clearly incumbent by law upon the Commissioner of Police, so as to bring it within S. 45 (b) of the Specific Relief Act, 1877. Under S. 28 of the Bombay City Police Act, 1902, the Commissioner of Police can only serve the notice upon the person who comes within the scope of the section. He is not entitled to serve it upon any person whom he merely suspects to be guilty of the conduct therein referred to. The misconduct or immoral conduct must be a matter of fact and not a mere matter of suspicion. A Magistrate would not be justified in convicting any person under S. 129 of the Bombay City Police Act, 1902, unless and until he is satisfied that the notice under S. 28 of the Act was not only duly served, but also that the woman really had conducted herself in the manner imputed to her under S. 28. (1905) 7 Bom.L.R. 161.

——S. 33—Bail.

Magistrate can grant bail to an accused who has been arrested in persuance of S. 54 (7) of the Cr. P. Code, whom, he has been asked to retain in custody, by the Dt. Magistrate of a Native State.

Per **Fawcett, J.**—As S. 54 (7) does not apply to arrests in Bombay, when the accused is arrested without warrant in Bombay, he must be deemed to have been arrested under S. 33 (g). But even in such a case under S. 23 of the Extradition Act, the Magistrate has power to grant bail. 87 Ind. Cas. 100=26 Bom.L.R. 984=26 Cr.L.J. 948=A.I.R. 1925 Bom. 104 (D.B.).

——Ss. 40 (1) and 55—Command to an unlawful assembly to disperse—Magistrate cannot give—Penal Code, Ss. 145 and 151.

Only the officer in-charge of a section can command an unlawful assembly to disperse under S. 40 (1) and under S. 55, a Police Officer of superior rank if on the scene may perform this function. The Magistrate's giving the command under the directions of a competent Police Officer, who is himself present, is not sufficient. 23 Bom.L.R. 350=60 Ind. Cas. 1008=22 Cr.L.J. 320=A.I.R. 1921 Bom. 322 (D.B.).

——S. 45—Inquiry under—Nature of—If judicial or executive act—Interference with order of Chief Presidency Magistrate — **Certiorari**—Writ of — Jurisdiction. **See** CERTIORARI. 49 Bom.L.R. 889.

——S. 45—Riot tax.

The riot tax is not a Municipal tax in the sense of a tax, the benefit of which is retained by the Municipality. A.I.R. (Vol. 28) 1941 Bom. 260=43 Bom.L.R. 543=195 Ind. Cas. 517.

——S. 45—Order dismissing application for compensation—Revision.

The special power conferred under S. 45 of the City of Bom. Police Act on the Chief Presidency Magistrate of Bombay is not as a Criminal Court, but as a **persona designata,** and no application for revision, therefore, lies to the High Court from an order of the Chief Presidency Magistrate dismissing a claim for compensation under the said section for absence and refusing to take the matter on his file. A.I.R. (Vol. 17) 1930 Bom. 486=54 Bom. 664=32 Bom. L.R. 1138=32 Cr.L.J. 397=1930 Cr. Cas. 1022=129 Ind. Cas. 590.

——S. 57—Offence committed in presence of Police Officer—First information in writing is not necessary.

Where there was no informant as such, the alleged offence having been committed in the presence of the investigating officer himself, the Inspector is not bound to take down in writing any information relating to the commission of the offence, since he has the information himself. A.I.R. (Vol. 31) 1944 Bom. 139=46 Bom.L.R. 196=213 Ind. Cas. 174.

——S. 63—Admissibility in evidence of statement made by witness to, and taken down in writing by, a Police officer. **See** CR. P. CODE, S. 162. (1907) 32 B. 111=9 Bom.L.R. 789=2 M.L.T. 414 (F.B.).

——S. 63—Evidence—Objection to admissibility.

The terms of S. 63 have remained unaffected by amendment of S. 162, Cr. P. Code, by the Amending Act of 1923 and remain identical with the corresponding section of the old Code. Therefore, any objection to the evidence being admissible must fall within the terms of S. 63, Bombay City Police Act, 1902. 32 Bom.L.R. 327=A.I.R. 1930 Bom. 158.

——S. 63—Statements by witnesses to Police—Use of by Court—Legality.

S. 63, City of Bombay Police Act, is in the form which S. 162, Cr. P. Code, stood before it was amended in 1923, and is a good deal less wide than the amended S. 162. The right to cross-examine a prosecution witness on his statements made to the Police is a privilege conferred on the defence. Where the defence does not cross-examine the witness on their Police statements, it is illegal for the Court to call for the Police statements and put to witnesses questions founded on those statements. A.I.R. (Vol. 29) 1942 Bom. 71=44 Bom.L.R. 27=43 Cr.L.J. 529=I.L.R. (1942) Bom. 384=199 Ind. Cas. 202 (F.B.).

——S. 63 (1)—Scope—Oral statements recorded in panchanama before police—Admissibility—Evidence Act (1872), S. 157.

Under S. 63 (1), Bombay City Police Act, though the documents containing statements of witnesses made before the police in the course of investigation cannot be tendered in evidence on behalf of the prosecution, yet S. 63 (1) does not exclude oral evidence of the statements, whether recorded or not. Thus, the oral statements of the witnesses recorded in the **panchanama in the presence** of the police at an identification parade in the course of investigation under S. 63 (1) are admissible to corroborate the statements of those witnesses at the trial under S. 157,. A.I.R. (Vol. 33) 1946 Bom. 189=47 Bom.L.R. 992.

——S. 63 (2)—Scope—Dying declaration—Statement at identification parade pointing out assailant—Admissibility—Evidence Act, S. 32 (1).

A statement made by the deceased person at an identification parade pointing out the person who caused him injuries (which resulted in his death) is admissible in evidence as his dying declaration under S. 32 (1) of the Evidence Act, S. 63 (2) of the Bombay City Police Act excludes such a dying declaration from the prohibition contained in sub-S. (1); such a statement is therefore admissible, though made in the presence of the police in the course of the investigation. 224 Ind. Cas. 261=47 Cr.L.J. 590=47 Bom.L.R. 992=A.I.R. 1946 Bom. 189.

——S. 66—Police can seize document for which search is made.

The Police Officer conducting the search under S. 66, Bombay City Police Act is entitled to take possession of that for which he is authorized to search. This construction is supported by the terms of S. 68. A.I.R. (Vol. 29) 1942 Bom. 289=44 Bom.L.R. 618=44 Cr.L.J. 7=I.L.R. (1942) Bom. 767=203 Ind. Cas. 365.

——S. 66—Right to search—Police—If can search Income-tax Offices and seize documents specified in S. 54, Income-tax Act.

What S. 66, Bombay City Police Act provides, is, not that something must be done voluntarily. but that the Police Officer must have reason to believe that the person, in whose possession or power such document or thing is believed to be, will not voluntarily produce the same. If the Police Officer knows that in point of fact that person cannot produce it, because by so doing he will be committing an offence, it is easy for him to conclude that the document will not be voluntarily produced. All that the section means is that the Police Officer must be satisfied that the person in possession of the thing in question will not produce it of his own accord, or under the compulsion of a summons. If he is so satisfied, then he may search. Consequently under S. 66 the Police are entitled to search Income-tax Offices and seize the document specified under S. 54, Income-tax. A.I.R. (Vol. 29) 1942 Bom. 289=44 Bom.L.R. 618=44 Cr.L.J. 7=I.L.R. (1942) Bom. 767=203 Ind. Cas. 365.

——S. 70—S. 70 must be read with S. 167 (2), Criminal Procedure Code. A.I.R. (Vol. 24) 1937 Sind 251=39 Cr.L.J. 10=31 S.L.R. 494=171 Ind. Cas. 737.

——Ss. 70, 72 and 74—Police Custody—Accused though arrested under the requisition from Magistrate are in police custody.

The mere fact that the Chief Presidency Magistrate is furnished with certain information to enable him to make the requisition does not mark the completion of police investigation and the commencement of an inquiry or trial before him. Therefore accused are when arrested not in Magistrate's custody but are in police custody. 49 Bom. 623=27 Bom.L.R. 612=26 Cr.L.J. 1181=88 I.C. 605=A.I.R. 1925 Bom. 387 (D.B.).

——Ss. 89 (3) and 134 (2)—Notice—Service on the Presidents, Secretary and Members of Committee or Union — Sufficiency—Accused's knowledge of order may be proved by circumstances.

Having regard to the provisions of S. 134 Cl. (2), S. 89 (3) and Criminal P. C., S. 69, Cl. (3). the service on the Presidents, the Secretary the Members of the Managing Committee and the Members of Union of the order issued by Commissioner of Police and duly promulgated is not irregular. Though the order was not personally served on the accused yet the knowledge of the order by the accused may be proved by circumstances which would clearly show or give rise to an inference that the accused had such knowledge. 31 Bom.L.R. 1151=1929 Cr. C. 545 =A.I.R. 1929 Bom 433 (D.B.).

——S. 112 (d)—Loitering, what is.

The word 'loitering' lingering or hanging about on a road. Hence where the facts show some quick action on the part of the accused he cannot be convicted of loitering. A.I.R. (Vol. 32) 1945 Bom 65=46 Cr.L.J. 258=46 Bom. L. R. 564=217 Ind. Cas. 235.

——S. 112 (d)—"Reputed thief".

The fact of there being two previous convictions for theft suffices to make the accused a 'reputed thief' within the meaning of Cl. (d) of S. 112. 27 Bom.L.R. 1388=27 Cr.L.J. 123=91 Ind. Cas. 699=A.I.R. 1926 Bom. 46 (D.B.).

——S. 120—"Or otherwise"—Interpretation.

The words "or otherwise" in S. 120 Cl. (a), of the Bombay City Police Act 1902, must be construed as having a limited signification following as they do words of a limitted description. They mean "in a manner similar to that of words or gestures." Therefore merely sitting at the window without any act done of the nature indicated in the section is not an offence. (1908) 10 Bom.L.R. 92.

——S. 122—Charge under—Conviction under S. 352, I. P. C.—Legality—Cr. P. C., S. 227—Magistrate can alter a charge under S. 122 of Act (1902) to one under S. 352, I. P. Code.

Where an accused is sent up on a police report for trial for an offence punishable under S. 122 of the Bombay City Police Act the trying Magistrate can alter the charge and convict him of an offence under S. 352 I.P.C. 28 Bom.L.R. 291=93 Ind. Cas. 896=27 Cr.L.J. 496=A.I.R. 1926 Bom. 255 (D.B.).

——S. 127—Trial of offence under—Procedure.

All the offences under a special law are tried in accordance with the Cr.P.C. and there is no special procedure prescribed for an offence under S. 127 for disobedience of an order under S. 23 (3). 31 Bom.L.R. 1151=1929 Cr. C. 545=A.I.R. 1929 Bom. 433 (D.B.).

——S. 128—Charge under—Burden of proof.

The burden is upon the prosecution to satisfy the Court that the order alleged to have been disobeyed was a valid one. A.I.R. (Vol. 25) 1938 Bom. 338=40 Bom.L.R. 483=I.L.R. (1938) Bom. 403=39 Cr.L.J. 702=176 Ind. Cas. 839 (F.B.).

——S. 128—Charge under—Matters for consideration by Magistrate.

In all charges before a Magistrate under S. 128 City of Bombay Police Act it is incumbent upon the Magistrate to be satisfied first that the accused was informed by the Commissioner of the charge against him with sufficient particularity to enable him to answer the charge and that he was given an opportunity of so answering; and secondly that there was material before the Commissioner of Police on which he could properly hold that the conditions of S. 27 had come into operation. A.I.R. (Vol. 25) 1938 Bom. 338=40 Bom.L.R. 483=I.L.R. (1938) Bom. 403=39 Cr.L.J. 792=176 Ind. Cas. 839 (F.B.).

——S. 128—Charge under—Validity of order under S. 27—Power of Court to consider.

If a well-established principle that where an Act confers upon an authority power to make an order in certain conditions and it is sought to impose a penalty for breach of an order made by the authority it is incumbent upon the Court hearing the charge to consider whether the order was properly made and to be satisfied on two points; first that the authority has acted reasonably and not capriciously or oppressively; and secondly that the conditions imposed by the statute have been observed. Although therefore, an order made under S. 27 is an order made by an executive officer and is not subject to appeal or revision in any Court, yet when an attempt is made to impose a penalty for breach of an order made under the section the validity of the order can be impeached by the Court. A.I.R. (Vol. 25) 1938 Bom. 338=40 Bom.L.R. 483=39 Cr.L.J. 792=I.L.R. (1938) Bom. 403=176 Ind. Cas. 839 (F.B.).

——S. 128—Enquiry under—Scope of—Sentence—Factors to be considered.

All that the Court can do in a case under S. 128 is to consider whether the order of the Commissioner of Police was legal; and if it was whether it has been broken; and if so what is the proper punishment. It is not open to the Court to consider the reasons which induced the Commissioner of Police to make the order. Therefore in awarding a sentence under S. 128 character of the conviction which brought the case under S. 27 (2-A) is irrelevant. The factors to be considered are whether the case under S. 128 is that of a first offence or whether the accused has returned more than once wrongfully. But at the same time it must be remembered that an order of externment is made in the public interest and it is a serious offence to ignore that order. The mere fact that it has only ignored once is not a good reason for imposing a light sentence. Another factor is the age of the accused but that is only relevant where the accused is very young or very old; yet another factor is the reason which may have prompted the accused to return to the place from which he was externed. If the accused proves conclusively that he had some reason unconnected with any criminal intent that is a matter which may be taken into account in imposing the sentence. If for instance, he proves that he came back to see his dying mother or something of that sort any Court would take that into consideration in mitigation of the offence. The last ground is the period of time during which the accused may have remained in custody. That no doubt is a matter to which the Court always pays some regard. A.I.R. (Vol. 28) 1941 Bom. 310=43 Bom. L. R. 511=42 Cr.L.J. 869=196 Ind. Cas. 442.

BOMBAY CITY RATIONING REGULATION (1943).

——Cl. 43—Baker's bread—Raticned bread, what is.

It is only the baker's bread as defined in Cl. 1-A (1) that can be supplied against the surrender of a bread ticket as provided in Cl. 43 of the Regulation. Every otner kind of baker's bread also is a rationed article and unless specially authorised cannot be supplied without a bread ticket. A.I.R. (Vol. 31) 1944 Bom. 318=46 Bom.L.R. 488=46 Cr.L.J. 157=I.L.R. (1944) Bom. 566=216 Ind. Cas. 268.

BOMBAY CIVIL COURTS ACT (XIV OF 1869).

——Appeal—High Court—Special Jurisdiction of the First Class Subordinate Judge—Claim reduced subsequently.

An appeal lies to the High Court from the decisions of a First Class Subordinate Judge in a suit tried by him under his special jurisdiction. where the claim was originally Rs. 10 000 although owing to subsequent realisations of sums on account of the defendants the plaintiffs gave credit to them for the same and reduced the claim to Rs. 7 861-9-0. The original claim having given rise to that jurisdiction, the jurisdiction itself continued and could not be ousted by the mere fact of the subsequent reduction. (1904) 6 Bom. L. R. 692.

——S. 8—Jurisdiction—Subordinate Judge of second class.

A suit for a declaration that a certain darga and other properties belonging to the darga are not waqf and not liable to registration under Mussalman Waqf (Bombay Amendment) Act 1935, is cognizable by a Subordinate Judge of Second Class although the property is valued over Rs. 5 000. A.I.R. (Vol. 33) 1946 Bom. 167=47 Bom. L. R. 859=224 Ind. Cas. 291.

——Ss. 8 and 26—Applicability — Administration—Suit valued at Rs. 130 for court-fee—Jurisdiction value wrongly stated as Rs. 5,000—Decree for over Rs. 25,000—Appeal—Forum—District Court or High Court.

A suit for administration is a suit for accounts governed by S. 7 (iv) (f) of the Court-Fees Act; where a suit for administration is valued for purposes of court-fee at Rs. 130 normally an appeal from the decree in that suit lies to the District Court and not to the High Court under S. 8 of the Bombay Civil Courts Act. The fact that the suit is by mistake valued at Rs. 5 500 for purposes of jurisdiction and that a decree is passed for over Rs. 25 000, would not make any difference; an appeal would still lie only to the District Court and not to the High Court. because S. 26 of the Bombay Civil Courts Act would not apply. The value of the subject-matter is the amount of Rs. 130 put by the plaintiff and under S. 8 Suits Valuation Act that is the value for purpose of jurisdiction also. I.L.R. (1946) Bom. 245=227 Ind. Cas. 515=48 Bom. L. R. 110=A.I.R. 1946 Bom. 356.

——S. 8—Suit for accounts valued at Rs. 200 before Second Class Sub-Judge—Decree passed for over Rs. 5,000—Appeal—Forum.

In a suit for accounts valued at Rs. 200 and tried by a Sub-Judge of the Second Class. the appeal lies to the District Court and not to the High Court although the decree passed is for over Rs. 5 000. A.I.R. (Vol. 25) 1938 Bom. 464=40 Bom.L.R. 1040=I.L.R. (1938) Bom. 833=178 Ind. Cas. 116.

——S. 16—(as amended by Bombay Act I of 1900)—Validity—Powers of Local Legislature.

The Probate and Administration Act, 1881 being a law made by an authority in India is subject to the powers of repeal or amendment granted to the Local Legislature by S. 5 of the India Councils Act 1892 (55 and 56 Vic., C. 14). Hence the provisions of the Bombay Civil Courts Act (Act XIV of 1869) S. 16 by which a probate matter can be tried in the first instance by the Assistant Judge and by which the appeal in cases where the amount of the subject-matter does not exceed Rs. 5 000 will lie to the District Court is one which the local Legislature was competent to make. (1908) 32 Bom. 634=10 Bom.L.R. 924.

——S. 16—Claim heard by Assistant Judge under the Land Acquisition Act—Value of the subject matter not exceeding Rs. 5,000—Appeal lies to District Court and not to High Court.

Where in a compensation case under the provisions of the Land Acquisition Act, 1894 heard by an Assistant Judge, the amount does not exceed Rs. 5,000, the appeal lies to the District Court and not to the High Court. (1909) 11 Bom.L.R. 317=33 B. 371=2 Ind. Cas. 492.

——S. 16—Suit for dissolution of marriage—District Judge, power of to refer to Assistant Judge.

A District Judge has no power under S. 16 of the Act to refer to the Assistant Judge for decision a suit under the Divorce Act for dissolution of marriage. Such suits are not capable of valuation. 39 Bom. 136=26 Ind. Cas. 599=16 Bom.L.R. 754 (F.B.).

——S. 16—Proceedings for dissolution of marriage—District Judge, if can refer to Assistant Judge.

Although S. 16 Bombay Civil Courts Act empowers the District Judge to refer to an Assistant Judge, suits where the subject-matter does not exceed a certain amount or value and applications or references under special Acts, it does not authorize him to refer to an Assistant Judge proceedings for dissolution of marriage as such proceedings are suits of which the subject-matter is incapable of valuation and cannot therefore be properly described as applications under a Special Act. A.I.R. (Vol. 21) 1934 Sind 17=148 Ind. Cas. 813 (S.B.).

——S. 17—Notification under—Power conferred on Assistant Judge is personal.

A notification under S. 17 confers power upon Assistant Judges personally and not upon their Courts so that even on transfer they have the same powers. Under S. 17 an empowered Assistant Judge can hear an appeal from a decree of an Assistant Judge. 19 Bom.L.R. 852 =42 Cal. 825.

——S. 22—See C. P. CODE, S. 16. 8 Bom.L.R. 516.

——S. 23 (5)—Powers of transfer under—Limits.

The powers of transfer conferred by S. 23 (5) Bombay Civil Courts Act, on the Court are controlled by the provisions of S. 24, Civil P. C. and are necessarily limited to administrative orders allocating business. Hence the order of transfer purporting to have been made under cl. (5) of S. 23 Bombay Civil Courts Act, after another Subordinate Judge has taken cognizance of the suit is incompetent. A.I.R. (Vol. 26) 1939 Bom. 485=I.L.R. (1939) Bom. 472=41 Bom.L.R. 892=185 Ind. Cas. 813.

——S. 23 (5)—Objection to jurisdiction—Waiver.

Where jurisdiction over the subject-matter exists requiring only to be invoked in the right way the party, who has invoked or allowed the Court to exercise it in a

wrong way, cannot afterwards turn round and challenge the legality of the proceedings.

Where therefore the defect in the jurisdiction of the Court arises due to the irregularity in the commencement of the proceedings before the transferred Court and the parties lead evidence concurring in the Court's assumption of jurisdiction under wrong order of transfer, the concurrence of the parties amounts to consent and their conduct is tantamount to a waiver of objection to jurisdiction. They cannot therefore, subsequently object to jurisdiction. A.I.R. (Vol. 26) 1939 Bom. 485=I.L.R. (1939) Bom. 472=41 Bom.L.R. 892=185 Ind. Cas. 813.

——S. 23 (5)—Order reversing a preliminary decree—Remedy.

The more appropriate form of remedy to set aside an order reversing a preliminary decree on the ground that it was passed without jurisdiction is by a civil revision application. A.I.R. (Vol. 26) 1939 Bom. 485=I.L.R. (1939) Bom. 472=41 Bom.L.R. 892=185 Ind. Cas. 813.

——S. 24—Jurisdiction—Second Class Subordinate Judge.

Under S. 24 a Second Class Subordinate Judge has jurisdiction to try suits in which the value of the subject-matter does not exceed Rs. 5,000. A.I.R. (Vol. 19) 1932 Bom. 111=34 Bom.L.R. 44=56 Bom. 23=137 Ind. Cas. 702.

——S. 24—Jurisdiction—Suit valued at more than Rs. 5,000.

A suit for a declaration that a decree for Rs. 5 366 odd is void and ineffective cannot be filed in the Court of Second Class Subordinate Judge. A.I.R. (Vol. 32) 1945 Bom. 474=47 Bom.L.R. 386.

——S. 24—Jurisdiction—Relief for declaration and injunction valued at Rs. 230—Subject-matter more than Rs. 15,000—Jurisdiction of Second Class Subordinate Judge.

Since the Suits Valuation Act like the Bombay Civil Courts Act, deals with valuation of suits for purposes of jurisdiction it must affect the construction of S. 24 of Bombay Civil Courts Act.

Where the relief sought is no more than a declaration and an injunction and the value of that relief is placed in the plaint at Rs. 230, though the property which is the subject-matter of the declaration and injunction is worth over Rs. 15,000 the former amount necessarily governs the value of the subject-matter of the suit for purposes of jurisdiction and it is competent for a Subordinate Judge with powers of second class to entertain it. A.I.R. (Vol. 24) 1937 Bom. 167=39 Bom.L.R. 138=I.L.R. (1937) Bom. 623=168 Ind. Cas. 449.

——S. 24—Jurisdiction—Sale deed—Allegation that deed really is a mortgage—Suit for accounts—Consideration more than Rs. 5,000—Jurisdiction of Civil Judge (junior division).

A suit for accounts under S. 15-D of the Dekkhan Agriculturists' Relief Act, alleging and to have it declared that an ostensible sale-deed executed by the plaintiff was really a mortgage is one which is cognizable in the Court of Civil Judge (Junior division), even though the amount of consideration for the disputed document is more than Rs. 5 000. I.L.R. (1946) Bom. 726=226 Ind. Cas. 73=48 Bom.L.R. 171=A.I.R. 1946 Bom. 319 (F.B.).

——S. 25—Jurisdiction—First Class Sub-Judge can entertain proceedings in cases arising in the whole district.

A First Class Subordinate Judge has jurisdiction to entertain proceedings under the Act in cases arising in the whole district under the special jurisdiction conferred by S. 25 and in view of the Notification by the Bombay Government giving jurisdiction to Subordinate Courts to exercise jurisdiction in all classes of cases arising within their local limits. 51 Bom. 809=29 Bom.L.R. 947=104 Ind. Cas. 780=A.I.R. 1927 Bom. 460.

——S. 25—Jurisdiction—First Class Sub-Judge.

Under S. 25 a Subordinate Judge of the First Class in addition to his ordinary jurisdiction shall exercise a special jurisdiction in respect of such suit and proceedings of a civil nature wherein the subject-matter exceeds five thousand rupees in amount or value as may arise within the local jurisdiction of the Courts in the district presided over by Sub-Judge of the Second Class. A.I.R. (Vol. 19) 1932 Bom. 160=33 Bom.L.R. 1437=56 Bom. 8=135 Ind. Cas. 467.

——S. 25—Declaratory suit—Valuation for jurisdiction.

In a declaratory suit in which no consequential relief is asked it is the real value of the property and not the notional value that should determine the valuation for jurisdiction apart from the valuation for the purposes of the court-fee. A.I.R. (Vol. 19) 1932 Bom. 160=33 Bom.L.R. 1437=56 Bom. 8=135 Ind. Cas. 467.

——S. 26—Applicability—Administration—Suit valued at Rs. 130 for Court-fee—Jurisdiction value wrongly stated as Rs. 5,000—Decree for over Rs. 25,000—Appeal—Forum—District Court or High Court. See IBID. Ss. 8 and 26. I.L.R. (1946) Bom. 245.

——S. 26—Subject-matter of suit decides forum of appeal.

Under S. 26 it is the value of the subject-matter of the suit, and not the subject-matter of the appeal that must decide the Court to which an appeal will lie. A.I.R. (Vol. 33) 1946 Bom. 356=48 Bom.L.R. 110=227 Ind. Cas. 515=I.L.R. (1946) Bom. 245.

——S. 26—Subject-matter of suit below Rs. 5,000—Appeal—Forum.

Under S. 26 Bombay Civil Courts Act, an appeal lies direct to the High Court if the amount or value of the subject-matter exceeds Rs. 5,000. The last determining factor is not whether the case is heard and decided by the Subordinate Judge of the First Class, but whether the amount or value of the subject-matter exceeds Rs. 5,000. Therefore, where the subject-matter of a suit filed against the manager encumbered estates, in the Court of Subordinate Judge, First Class; is below Rs. 5 000; an appeal lies to the District Court and not to the High Court. Jurisdiction is determined by pecuniary considerations and not by the powers of the Subordinate Judge. A.I.R. (Vol. 23) 1936 Sind 190=30 S.L.R. 335=165 Ind. Cas. 742.

——S. 32—Jurisdiction—Suit against Administrator-General.

A suit brought against the Administrator-General must be instituted in the District Court: it makes no difference if the Administrator-General is not a party to the suit in his official capacity, but is sued simply as representing the estate of a private individual. (1904) 6 Bom.L.R. 546=28 Bom. 529.

——S. 32—Suit for injunction with regard to Municipal election—Secretary of State is a necessary party—Subordinate Judge cannot try the suit.

In a suit being filed in the Court of a Subordinate Judge in Bombay for an injunction with regard to a Municipal election, the Secretary of State is both a necessary and a

proper party, and hence the suit cannot be tried in that Court. 25 Bom.L.R. 992=77 Ind. Cas. 241=46 Bom. Bom. 43=1924 Bom. 65.

——S. 32—Suit against Collector as court of wards—Forum—Bombay Court of Wards Act (1908), S. 3 (e).

A suit against Collector as Court of Wards under S. 3 (e) is one against a Government Officer in his official capacity and is triable exclusively by District Court according to S. 32, Civil Courts Act. 37 Bom. 313=17 Ind. Cas. 972= 14 Bom.L.R. 1207.

——S. 40—Plaint presented outside office hours—Whether can be accepted—Clerk receiving it and referring it to Judge.

The clerk of the Court who is a duly constituted officer of the Court with power to accept a plaint under the Bombay Civil Courts Act, can accept that plaint outside office hours and outside the Court buildings, although the clerk is not bound to accept a plaint out of Court hours. There is nothing in O. 4, R. 1, Civil P. C., to suggest that the plaint must be presented during Court hours, or within the precincts of the Court.

Where the clerk accepts the plaint only after referring the matter to the Judge, the clerk who merely receives it, cannot be said to have accepted it. A.I.R. (Vol. 24) 1937 Bom. 25=38 Bom.L.R. 1196=I.L.R. (1937) Bom. 136 =166 Ind. Cas. 896.

BOMBAY CIVIL MANUAL (1940).

——Vol. I, Ch. II, R. 95—Government—Notifications—Applicability—Status of agriculturist—Determination—Material date.

The Government Notifications referred to in R. 95 of Ch. II of Vol. I of the Bombay Civil Manual, 1940, which provide that decrees against agriculturists should be transferred to the Collector for execution will apply only if the decree itself orders the sale of property. The expression "property belonging to a person who is an agriculturist" in R. 95 would mean property belonging to a person who is an agriculturist on the date of the order for sale which is the critical date. It is not enough if the judgment-debtor is an agriculturist at the time of execution. 50 Bom.L.R. 602=A.I.R. 1949 Bom. 77=I.L.R. (1947) Bom. 479.

BOMBAY CIVIL MEDICAL CODE.

——R. 7—Word "brought", meaning of.

It would be unreasonable to suggest that R. 7 of the Bombay Civil Medical Code only applies in the case of a man who is not well enough to walk to dispensary. Having regard to the obvious purpose of the rule the word 'brought' should not be unduly stressed and it does not really mean anything other than "is admitted." A. I. R. (Vol. 25) 1938 Bom. 419=40 Bom.L.R. 825=39 Cr.L.J. 903 =I.L.R. (1938) Bom. 770=177 Ind. Cas. 589.

BOMBAY CIVIL SERVICE CONDUCT DISCIPLINE AND APPEAL RULES.

——R. 21—"Trade"—Meaning of. See PENAL CODE, S. 168. 52 Bom.L.R. 648.

——R. 49—Scope —If exhaustive—Public servant engaging in trade in breach of R. 21 of Bombay Civil Service Conduct, Discipline and Appeal Rules—Liability to prosecution under I. P. Code in addition to departmental punishment. See PENAL CODE. S. 168. 52 Bom.L.R. 648.

BOMBAY COLLECTORS OF LAND REVENUE REGULATION (XVI OF 1827).

——Ss. 19 and 20—Scope.

S. 20 must be read with the preceding S. 19. 50 Bom 128=28 Bom.L.R. 399=94 Ind. Cas. 649=A.I.R. 1926 Bom. 259.

——S. 20—Applicability—Alienation by Mutalik of Deshpande of lands held for remuneration.

An alienation by a person of lands held by him as remuneration for his services as Mutalik of the Deshpande, is not affected by S. 20, as S. 20 only covers the case of an alienation of lands by an incumbent of the hereditary office of Deshpande and not an alienation by any grantee of that incumbent. 50 Bom. 128=28 Bom.L.R. 399=94 Ind. Cas. 649=A.I.R. 1926 Bom. 259.

BOMBAY CO-OPERATIVE SOCIETIES ACT (VII OF 1925).

——An application to execute an award made under the provisions of the Bombay Co-operative Societies Act (VII of 1925) is not a suit or the execution of a decree in a suit, so that O. XLVI, R. 1, Civil P. C., can have no application and hence no reference lies. A.I.R. (Vol. 27) 1940 Sind. 111=I.L.R. (1940) Kar. 411=188 Ind. Cas. 609.

——Ss. 25 and 26—Scope—Money due to member by way of deposits—Whether attachable.

Only the share or interest of a member in the capital of the society or any provident found established under S. 41 of the Act is exempt from attachment or sale under any decree or order of a Court. Therefore, if moneys due to the member are by way of deposits made by him or otherwise and they do not answer the description mentioned in S. 26 the creditor is not prevented from attaching those amounts. A.I.R. (Vol. 32) 1945 Mad. 507= (1945) 2 M.L.J. 217=58 L.W. 416=1945 M.W.N. 534.

——Ss. 25, 26—Shares of Co-operative Bank owned by Insolvent—Value of, if may be made indirectly available for creditors.

Although shares of a co-operative bank owned by an insolvent may not vest in the Official Assignee by virtue of S. 26 of Bombay Co-operative Societies Act it is not impossible that their value may be indirectly made available for the benefit of the creditors by making it a condition to the discharge of an insolvent that he should dispose of them and pay their value to the Official Assignee. The Official Assignee is entitled to require the bank to value their security standing in the name of the insolvent and to set it off against the money due by the insolvent or in the alternative, to relinquish the security for the benefit of the insolvent although not of the Official Assignee.

Desirability of altering the provisions of S. 26 Bombay Co-operative Societies Act pointed out. A.I.R. (Vol. 20) 1933 Sind 355=27 S.L.R. 224=150 Ind. Cas. 274.

——S. 43—Rule 34 framed under—Transfer of award for execution—Civil Procedure Code, S. 39.

A Court which can execute an award under rule 34 passed under S. 43 of the Bombay Co-operative Societies Act can transfer it under the provisions of S. 39 of the Civil Procedure Code. 64 Ind. Cas. 337 (1)=23 Bom.L.R. 909.

——S. 47—Misappropriation by Liquidator—Sanction for prosecution—Need for—Cr. P. Code, S. 197.

Where an honorary organiser of Co-operative Credit Societies appointed as a liquidator under S. 47 by the Registrar commits misappropriation of money received by him as a liquidator, no sanction under S. 197; Criminal

P. C. is necessary for his prosecution. A.I.R. (Vol. 17) 1930 Bom. 487=32 Cr.L.J. 281=32 Bom.L.R. 1134=1930 Cr. Cas. 1022=129 Ind. Cas. 344.

——S. 51—Applicability—"Legal proceeding"—Darkhast—Leave—Grant of leave in appeal or second appeal—Permissibility.

A darkhast (execution petition) is undoubtedly a legal proceeding within the meaning of S. 51 of the Bombay Co-operative Societies Act and requires the leave of the Registrar before it is started or before it is proceeded with. In a proper case however, leave may be granted in appeal or in second appeal. 49 Bom.L.R. 746=A.I.R. 1948 Bom. 131.

——S. 54—Applicability—Party initiating proceedings not in employment of society.

The only two conditions which are necessary before S. 54 would apply are that the parties must be the society and the servant and that it must relate to the dispute touching the business of the society. The section does not provide that at the time of the initiation of the arbitration proceedings the party other than the society must be in its employment. A.I.R. (Vol. 30) 1943 Bom. 341=45 Bom.L.R. 676=I.L.R. (1943) Bom. 320=209 Ind. Cas. 413.

——S. 54—Agreement between member and stranger about sale of property of Society—Disputes about terms if "touching the business of the Society."

Section 54 Bombay Co-operative Societies Act can have no application unless the plaintiff and defendant are both members of the Co-operative Society and further it can have no application unless the dispute between two members of the society is a dispute "touching the business of the society." Hence where there is on the record no document showing that defendant is a member of the society S. 54 cannot apply in the matter of a dispute between the plaintiff and the defendant.

Though in a transaction of sale and purchase of property between a member of the society and a stranger the parties may agree that the transaction is to be governed by the rules and regulations of the Society a dispute between them as to the terms of the agreement is not one which touches the business of the Society. A.I.R. (Vol. 31) 1944 Sind. 107=I.L.R. (1943) Kar. 504=212 Ind. Cas. 545.

——S.54—Award against person not member of society—Validity.

Under S. 54 of the Bombay Co-operative Societies Act the Registrar is only empowered to deal with disputes between members or past members of a society or persons claiming through a member or past members or between members or past members or persons so claiming and any officer agent or servant of the society, or between the society or its committee and any officer agent, member or servant of the society. No power is given to the Registrar to settle disputes between a society and a person not a member of it. *Prima facie* therefore if an award is made dealing with some matter not covered by S. 54 for instance in a dispute between a society and a person not a member of the society the award would be *ultra vires* and a nullity and in that case the jurisdiction of the Civil Court could not be ousted by S. 57 of the Act. A.I.R. (Vol. 30) 1943 Bom 288=45 Bom.L.R. 553=I.L.R. (1943) Bom. 400=212 Ind. Cas. 205.

——S. 54—"Business"—Meaning of—Employment or dismissal of servant.

The Bombay Co-operative Societies Act 1925 sets up a Special Court with a special jurisdiction and with special powers to try matters referred to in S. 54. Both the questions of the validity of the arbitration agreement and the question of the validity of the award referred to in S. 33 Arbitration Act, are to be decided by the Special Court set up under the Bombay Co-operative Societies Act 1925, and not by the Ordinary Court as provided in S. 33 Arbitration Act. All matters relating to these arbitration proceedings are to be determined by the authorities set up by Co-operative Societies Act. It is not right to give a restricted meaning to the words "touching the business of a society" used by the Legislature in S. 54 of the Act. The word "business" is a very wide term and certainly it is not synonymous with the objects of a society. The expression "touching the business of a society" would mean affecting the business of a society or relating to the business of a society; and it cannot be said that when a company employs or dismisses a servant it does not do something which relates to its business. It is true that it is not one of the objects of the company to employ or dismiss servants; but it is something which it does in the ordinary course of its business. And whatever is done in the ordinary course of business certainly relates to or affects the business. A.I.R. (Vol. 30) 1943 Bom. 341=45 Bom. L. R. 676=I.L.R. (1943) Bom. 320=209 Ind. Cas. 413.

——S. 54—"Dispute"—Meaning of.

The word "dispute" in S. 54 Bombay Co-operative Societies Act is not the same thing as a cause of action or the mere incurring of a liability. It cannot be altogether divorced from the connotation of a claim or demand or a question at issue. "Dispute" implies some kind of disagreement between the parties concerned some reference to a claim or liability. I.L.R. (1946) Bom. 444=226 Ind. Cas. 210=48 Bom.L.R. 104=A.I.R. 1946 Bom. 346.

——S. 54—"Servant of the society"—If covers legal representatives of past servant.

The expression "servant of the society" in S. 54 of the Bombay Co-operative Societies Act does not include a past servant; the legal representatives of a past servant cannot be held to be covered by the term "servant." A dispute between a society and the legal representatives of a deceased servant of the society cannot therefore be referred under S. 54 of the Act to the Registrar. I.L.R. (1946) Bom. 444=226 Ind. Cas. 210=48 Bom.L.R. 104=A.I.R. 1946 Bom. 346.

——S. 54—Part of loan not covered by award—Jurisdiction of Civil Court, if barred.

The word "include" in para. 2. S. 54 of the Act shows that this paragraph is not meant to be an exhaustive definition of a dispute. The jurisdiction of the Civil Courts must in view of S. 9, Civil P. C., be held to be impliedly barred even as to the part of the loan not covered by the award. A.I.R. (Vol. 24) 1937 Bom. 231=39 Bom. L. R. 249=169 Ind. Cas. 439.

——S. 54—Darkhast proceedings filed within three years of certificate of Registrar—If in time.

Where an award was made under S. 54 Bombay Co-operative Societies Act and a certificate was issued by the Registrar and within three years from date of the certificate darkhast proceedings were filed:

Held that the darkhast proceedings were in time because they were filed within three years of the date of the grant of the certificate by the Registrar. It is doubtful whether the award even becomes a decree of a Civil Court within the meaning of Art. 182 Limitation Act. A.I.R. (Vol. 23) 1936 Bom. 396=38 Bom.L.R. 927=165 Ind. Cas. 512.

——Ss. 54 and 59—Society enforcing claim through Collector—Collector ordering his detention in civil prison—Debtor applying for insolvency—Insolvency Court should not refuse to grant him interim protection against detention.

A Co-operatice Credit Society having obtained an award against a debtor under S. 54, Bombay Act (VII of 1925) adopted the alternative course of recovering through the Collector as arrears of land revenue under S. 59 of the Act. The Collector ordered the detention of the debtor in civil prison who as a counter-move filed a petition for insolvency under Presidency Towns Insolvency Act.

Held, that it would be an improper exercise of discre- to refuse to grant interim protection to the debtor against arrest or detention for a debt due to the Society and to permit his being detained in prison and at the same time to take possession of his property for rateable distribution amongst his creditors, merely and solely because the Society has chosen the alternative remedy of enforcing the claim by approaching the Collector. A.I.R. 1930 Sind 263.

——Ss. 57, 59—Award—If executable as decree of Civil Court.

Obiter.—Awards made under Bombay Co-operative Societies Act which have become final are not liable to be questioned by Courts under S. 57 and are under S. 59 executable by Civil Court in the same manner as decrees of Civil Court, being effective from the date on which they are made and not only from the date when they are filed. A.I.R. (Vol. 27) 1940 Sind 147=191 Ind. Cas. 31.

——S. 57—Award—Whether can be questioned in Civil Court.

The terms of S. 57 of the Bombay Co-operative Societies Act of 1925 which correspond to rule 43 and the old Act **prima facie** show that the award of the arbitrators or a decision by the Registrar or his nominee cannot be called in question in any Civil Court. Consequently, if a question arises whether there has been undue influence or fraud in any transaction involved in the reference to the Registrar under the Act, that would be a question for the arbitrator to decide and would not, therefore, be a matter into which a Civil Court would be competent to inquire. The Civil Court cannot go behind the award. In enacting S. 57, Co-operative Societies Act, the Legislature clearly intended that where an arbitrator has passed an award under this Act, it will not be open to a Civil Court to go behind that award and to call in question any matter which might have arisen in connection with the decision of the dispute which necessitated that award. A.I.R. (Vol. 24) 1937 Bom. 231=39 Bom.L.R. 249=169 Ind. Cas. 439.

——Ss. 57, 54, 56, 64, 64-A—Section 57 is a bar to Civil Court's jurisdiction to entertain a suit to set aside an award of arbitrators or a decision by the Registrar or his nominee arrived at under the provisions of the Bombay Co-operative Societies Act. A.I.R. (Vol. 22) 1935 Bom. 91=36 Bom.L.R. 1245=154 Ind. Cas. 583.

——S. 57—Award not covered by S. 54—Jurisdiction of Civil Court.

If an award is made dealing with some matter not covered by S. 54, for instance in a dispute between a society and a person not a member of the society, the award would be **ultra vires** and in that case the jurisdiction of the Civil Court could not be ousted by S. 57 of the Act. A.I.R. (Vol. 30) 1943 Bom. 288=45 Bom. L. R. 553=I.L.R. (1943) Bom. 400=212 Ind. Cas. 205.

——S. 59—Execution of Award—Limitation.

An application to execute an award under Bombay Co-operatives Societies Act comes under S. 3 of the Limitation Act and therefore it is subject to the law of limitation. A.I.R. (Vol. 25) 1938 Bom. 424=40 Bom. L. R. 889=177 Ind. Cas. 897.

——(As amended by Act XVI of 1943), S. 59 (1) (a)—Retrospective operation — Award—Execution—Limitation—Limitation Act, Art. 182.

Both under S. 59 (1) (a) of the Bombay Co-operative Societies Act of 1925 as it stood before its amendment in 1943 and under the section after it was amended by Act XVI of 1943 the award made under S. 54 of the Act which is sought to be executed must be treated as a decree of a Civil Court within the meaning of Art. 182 Limitation Act. The amendment has not made any change in the section but has only clarified the position and is in that sense purely declaratory and must be given retrospective effect. Art. 182 and not Art. 181 applies. 49 Bom. L.R. 160=A.I.R. 1947 Bom. 370=I.L.R. (1947) Bom. 44.

——S. 59 (1) (a) and (b)—Remedies under—If alternative.

The effect of the word "or" occurring between Cls. (a) and (b) of S. 59 (1) of the Bombay Co-operative Societies Act is that the person in whose favour an award has been given under S. 54 is given two alterative remedies either of which is open to him to pursue. If he obtains satisfaction after resorting to the remedy under Cl. (a), he would thereafter be precluded from resorting to the other remedy provided under Cl. (b). But where on the darkhast filed in Court under S. 59 (1) (a) nothing has been recovered there is nothing to prevent the holder of the award from obtaining a certificate from the Registrar under S. 59 (1) (b) and to proceed to execute the award by an application to the Collector for the recovery of the amounts due as if they were arrears of land revenue.

The award does not become a decree of a civil Court on the issue of a certificate by the Registrar under S. 59 (1) (a) and the award does not become infructuous by reason of the fact that the civil Court holds that execution is barred by limitation. 49 Bom.L.R. 168=A.I.R. 1947 Bom. 375=I.L.R. (1947) Bom. 143.

——S. 59 (1) (b)—Award—Execution of—Sale proceeds in hands of Collector—Another creditor, if can attach.

Clause (b) Sub-S. (1) of S. 59, Bombay Co-operative Societies Act provides for execution of awards "according to the law and under the rules for the time being in force for the recovery of arrears of land revenue." The reference in S. 59 is obviously to the Bombay Land Revenue Code S. 183 which provides that the sale proceeds shall be applied towards payment of the arrears due by the defaulter while S. 184 provides **inter alia** that the surplus shall not, except under an order of a Civil Court be payable to any creditor of the person whose property has been sold.

Where therefore, an award under the Bombay Co-operative Societies Act, is executed under S. 59 (1) (b); by the sale of the judgment-debtor's land, the sale proceeds in the hands of the Collector cannot be attached at the instance of another creditor of the person whose land is sold. The sale proceeds are to be specifically applied to payment of the person obtaining award. The principle of S. 73 Civil Procedure Code has no application to such a case. A.I.R. (Vol. 25) 1938 Sind 157=I.L.R. (1939) Kar. 104=176 Ind. Cas. 709.

——S. 60—Applicability.

Section 60 Bombay Co-operative Societies Act, refers only to offences under the Act and not to those under the Penal Code. A.I.R. (Vol. 22) 1935 Bom. 36=36 Bom.

L.R. 1133=1935 Cr. Cas. 70=36 Cr.L.J. 532=154 Ind. Cas. 600.

——S. 64—Award obtained by Society—Proper remedy.

Plaintiffs filed a suit against the Co-operative Housing Society for a declaration that the award obtained by the Society under the Bombay Co-operative Societies Act was null and void and for a permanent injunction restraining the Society from acting on them.

Held that (i) the plaintiffs should have appealed under S. 64 in the case of first award and under S. 64-A in the case of second which was by the Registrar's nominee made under S. 54; (ii) second award was within the terms of the reference; (iii) Section 53-A, Transfer of Property Act had no application to the case. A.I.R. (Vol. 22) 1935 Bom. 91=36 Bom.L.R. 1245=154 Ind. Cas. 583.

——Ss. 70, 54—Applicability—Sale by Society, of property mortaged—Suit by member for injunction against sale.

The granting of loans to its members is the business of the Society. The proposed sale by the Society of property mortgaged to it by the member for loan advanced to him; is an act touching the business of the Society. Consequently a suit by the member for an injunction against the sale is liable to be dismissed under S. 70 Bombay Co-operative Societies Act, for want of notice. Such a suit is also barred under S. 54. A.I.R. (Vol. 27) 1940 Sind 143=189 Ind. Cas. 880.

——S. 70—Notice—Absence of—Objection not raised by defendant—Effect of.

A notice under S. 70 Bombay Co-operative Societies Act; has to be served not on the defendant Society but on a third party; the Registrar and it cannot be held that the conduct of the defendant; in not raising the objection at the proper time could deprive the Registrar of a right which the law gives him. The section requires the fact of notice to be mentioned in the plaint and it is the duty of the Court to see that the mandatory provisions of the section are complied with. Merely because the defendant has not raised any objection on the ground of want of notice; it cannot be said that the Registarr has in fact waived the notice. A.I.R. (Vol. 24) 1937 Bom. 231=39 Bom.L.R. 249=169 Ind. Cas. 439.

——S. 70—Notice under—Service of notice of an application for permission to sue as pauper—If amounts to.

Section 70; Bombay Co-operative Societies Act; is mandatory and the service of a notice of an application for permission to sue as a pauper does not amount to the notice required by the section. A.I.R. (Vol. 22) 1935 Bom. 123=37 Bom.L.R. 68=154 Ind. Cas. 735.

——S. 72-A—If retrospective—Society registered under Bombay Co-operative Societies Act, if 'company' within meaning of Land Acquisition Act (I of 1894).

Bombay Act VIII of 1933 which added S. 72-A to the Bombay Co-operative Societies Act of 1925 is a validating Act which is necessarily retrospective. Consequently co-operative society registered under the Bombay Co-operative Societies Act of 1925 is a 'company' as defined in S. 3 (*e*), Land Acquisition Act and it is competent for the Local Government to acquire land on its behalf and where the acquisition proceedings have been regular; the land vests in the Local Government. A.I.R. (Vol. 23) 1936 Bom. 37=37 Bom.L.R. 955=60 Bom. 125=161 Ind. Cas. 96.

BOMBAY COTTON CONTRACTS ACT (XIV of 1922).

——Bye-laws under—Applicability—Forward delivery contracts—Parties not members of East India Cotton Association.

The Bombay Cotton Contracts Act, and the bye-laws made thereunder do not apply to any contract in cotton of forward delivery entered into in Bombay between parties who are not members of the East India Cotton Association either expressly or impliedly; and consequently such contracts, even though entered by word of mouth, are valid. A.I.R. (Vol. 22) 1935 Bom. 135=37 Bom.L.R. 30=155 Ind. Cas. 312.

——Applicability—Person in Bombay instructing another in Bombay to effect a contract of sale or purchase in New York or Liverpool—Arbitration clause in New York or Liverpool rules—Right of suit.

Where a person in Bombay instructs another person in Bombay to effect a contract of sale or purchase of cotton in New York or Liverpool, the transaction is neither subject to nor governed by the Bombay Cotton Contracts Act of 1922 and the bye-laws made thereunder.

When a contarct of that kind is made subject to the rules of the New York Cotton Exchange or the Rules of the Liverpool Cotton Association, Limited, an arbitration and awards thereunder are not a condition precedent to the institution of a suit in a Court of Law for determination of the disputes between the parties. A.I.R. (Vol. 19) 1932 Bom. 631=34 Bom.L.R. 1378=57 Bom. 275=141 Ind. Cas. 738.

——Ss. 2, 3, 4 and 7—Bye-law 38 (A)—Art. 96 of the East India Cotton Association—Reference to arbitration—Binding nature—Jurisdiction of arbitrators.

The effect of S. 4 of the Cotton Contracts Act is to subject all transactions in cotton in Bombay to the provisions of the Articles of Association of the E.I. Cotton Association. Art. 96 provides that any difference between the members or between one or more members and others who are not members shall be referred to arbitration. The result of the section read with this article is that the arbitrators to whom a reference has been made under the Act would have jurisdiction to enter into the reference in respect of ready transactions whether the submission was in writing or not.

By-law 38 (A) framed under the Act is not confined to contracts of purchase and sale between principal and principal. In view of the definition of "Contract" contained in S. 2 (A) of the Act, it applies also to a case where an up-country constituent forwarded to Bombay bales of cotton to be sold by the respondents for and on behalf of as agents. 32 Bom.L.R. 1451.

——Ss. 4 (7), 5, 6—Bye-laws framed under Act are excepted from operation of Arbitration Act.

The bye-laws framed under the Bombay Cotton Contracts Act by virtue of S. 4 (7), read with Ss. 5 and 6 are statutory by-laws and therefore are excepted from the operation of the Arbitation Act by reason of S. 46, Arbitration Act. Therefore, under by-law 38-A, framed under the Bombay Cotton Contracts Act, the Chairman of the East India Cotton Association can extend the time for the making of an award by the umpire. A.I.R. (Vol. 30) 1943 Bom. 197=45 Bom.L.R. 392=I.L.R. (1943) Bom. 280=208 Ind. Cas. 627.

——S. 4 and Art. 96—Section 4 of the Bombay Cotton Contracts Act does not make Art. 96 of the Articles of Association of the East India Cotton Association Ltd. binding on non-members. It does no more than to declare that the constitution and administrative machi-

nery set out in the Articles are not unlawful, and does not alter the character of the Articles as a domestic contract among the members of the Association.

Where a cotton contract stated that the order was to be subject to the Rules and Regulations of the East India Cotton Association Limited:

Held, that the words 'Rules and Regulations' referred to the published bye-laws made for the regulation and control of cotton transactions, which the Act makes binding on non-members and they cannot be taken to refer also to the Articles of Association. A.I.R. (Vol. 20) 1933 P.C. 55=37 C.W.N. 350=64 M.L.J. 222=1933 M.W.N. 161=35 Bom. L.R. 303=37 M.L.W. 570=57 C.L.J. 99=57 Bom. 218=1933 A. L. J. 605 =60 I.A. 63=141 Ind. Cas. 828 (P.C.).

——S. 5 and Bye-Law 81—Bye-law 81 of the bye-laws made for the regulation of cotton contracts and its relative form are not **ultra vires** so far as they purport to apply to a contract between a commission agent and his constituents. The transaction in cotton referred to in the definition of contract covers the whole transaction in cotton, including the part which an intermediary takes in it, and the whole course of business between parties to contracts in any capacity whether they be members or not, is to be subject to regulation by bye-laws.

Bye-law 81 and its relative form do apply to contract between a commission agent and his constituents.

But the form is not stereotyped one and literal compliance with it is not essential for the validity of a contract. If identical terms and conditions, instead of being in the memorandum sent by the agent, were contained in the initial order by the constituent, there would be **pro tanto** sufficient compliance with the bye-law.

Where the initial orders were inconsistent with the terms and conditions set out in the prescribed form in at least two respects, **viz.**, (1) as regards the absence of any provision for arbitration and the substitution of provision for the particular Courts in which suits are to be instituted, and (2) a provision that, in the event of a loss on the transaction, the agent's account is to be accepted as correct and to be binding on the constituent in any legal proceeding:

Held, that the contracts did not comply with the bye-law and were void under S. 5 of the Cotton Contracts Act. A.I.R. (Vol. 20) 1933 P.C. 55=37 C.W.N. 350=64 M.L.J. 222=1933 M.W.N. 161=35 Bom.L.R. 303=37 M.L.W. 570=57 C.L.J. 99=57 Bom. 218 =60 I.A. 63=1933 A.L.J. 605=141 Ind. Cas. 828.

S. 5—Contracts not in sanctioned form—Award taking them into consideration—Indivisibility of award—Jurisdiction of Court to consider legality—Arbitration—Appearance after protest.

Under S. 5, Bombay Cotton Contracts Act, 1922, contracts which are not in the form sanctioned by the Act are void. An award which has taken such contracts into consideration is also illegal and void, and if the illegal portion of the award cannot be separated from that portion which is valid, the whole award is invalid.

If an award is illegal or invalid, it cannot be recorded as an adjustment of the suit and where the award is sought to be recorded as an adjustment of the suit, the Court has jurisdiction to consider whether the award is legal and enforceable.

Where an arbitrator enters upon a consideration of matters which are not referred to him or which he has no jurisdiction to try by the arbitration clause or submission between the parties, the appearance of a party after objection taken and protest made does neither give the arbitrator authority to make an award nor estop the party from urging that the arbitrator has exceeded his authority. The attendance of the party before the arbitrator after protest would not amount to a waiver of his right to object to the jurisdiction of the arbitrator. A.I.R. (Vol. 18) 1931 Bom. 343=33 Bom.L.R. 759=55 Bom. 503=134 Ind. Cas. 705.

——Bye-laws 80, 81—Contract between member and non-member—Bye-law applicable.

Bye-law 80 framed under Bombay Cotton Contracts Act, 1922, applies to forward contracts between members of the association as such; it does not apply in the case of a member acting as a constituent or an agent. Contracts between agents and their constituents, i.e., between a member and a non-member, fall within bye-law 81. A.I.R. (Vol. 18) 1931 Bom. 424=33 Bom. L.R. 804=133 Ind. Cas. 859.

BOMBAY COTTON CONTRACTS ACT (IV OF 1932).

——S. 8—Applicability—Contract under bye-law of East India Cotton Association bye-laws—Contract note rendered in form different from that provided by bye-law—If void.

S. 8 of the Bombay Cotton Contracts Act prescribes that any contract which is not in accordance with the bye-laws of a Cotton Association shall be void. Where a bye-law of the East India Cotton Association provides for a specific form of a contract note being rendered in respect of a contract, but the contract note actually rendered differs materially from the form so specified by the bye-law, though it be the result of oversight or accident, the contract must be held to be made "not in accordance with the bye-laws, etc.," within the meaning of S. 8, and is therefore void and of no legal effect. 49 Bom.L.R. 649=A.I.R. 1948 Bom. 94.

——S. 8—Scope and effect—Contract not in accordance with bye-laws of recognised cotton association and not in prescribed official form—Contract if rendered void—Arbitration agreement in such contract and award thereon—If also void.

S. 8 (1) of the Bombay Cotton Contracts Act, 1932, provided that any contract (whether either party thereto is a member of a recognised cotton association or not) which is entered into after the date on which the Act came into operation and which was not in accordance with the bye-laws of any recognised cotton association shall be void. The appellants (who were members of the East India Cotton Association) were employed by the respondent (who however was not a member of that Association) to effect forward contracts for the sale and or purchase of cotton according to the rules, regulations and bye-laws of that Association. The contract notes rendered by the appellants to the respondent omitted two new clauses which were in vogue in the form prescribed by the East India Cotton Association under its bye-laws. Further; the deposit payable in respect of margin by the constituent was fixed at not less than Rs. 25 per bale instead of Rs. 12½ per bale in the form prescribed by the Association. In respect of a claim by appellants against the respondent there was an arbitration and an ex parte award in pursuance of an arbitration clause in the contract. The respondent contended that the contracts were void under the provisions of the Bombay Cotton Contract Act and that being so; there was no arbitration agreement between the parties under which there could be any reference to arbition on which any award could be made.

Held: Ordinarily; when a contract between the parties is reduced to writing, the writing onlp can be looked at to

ascertain what the contract between the parties is, and if that writing is not in accordance with the bye-laws, the contract itself must be void. Even assuming that there was a pre-existing oral contract between the parties **dehors** the written contract note it has to be seen whether the so-called pre existing oral contract was in accordance with the bye-laws, for if it were not, then it would be hit by section 8 of the Bombay Cotton Contracts Act, 1932. In this case there was no suggestion that the terms of the so-called pre-existing oral contract were in any way different from the terms subsequently recorded in the contract notes actually issued. The provision for payment of deposit at Rs. 25 per bale was not in accordance with the bye laws. Further, by reason of the omission of the two new clauses prescribed in the form in the contract note actually issued by the appellants, it was not in accordance with the bye-laws. Accordingly the contracts were void and there was no arbitration agreement between the parties under which there could be any reference to arbitation on which any award could be made. 1950 S.C.R. 64=A.I.R. 1950 S.C. 7=52 Bom.L.R. 515=(1950) S.C.J. 311 (S.C.).

BOMBAY COTTON DUTIES ACT (II OF 1896).

——S. 16—Scope—Free access to godown.

Where the accused had notice to remove the lock and to give the complainant free access and he declined to do so:

Held, there was wilful obstruction on the part of the accused. 26 Bom.L.R. 721=25 Cr.L.J. 1281=82 Ind. Cas. 353=A.I.R. 1924 Bom. 492 (D.B.).

——S. 25, Cl. 9—Wilful obstruction—If requires any overt act.

The Inspector of cotton excise wanted access to the godown of the accused's mill for inspection of the goods or account books. The godown was locked. The requisition of the complainant to have it opened was not complied with. It was not suggested in the case that the accused had not the necessary control over the key and that he was not in a position to open the godown if he was minded to do so.

Held, under these circumstances if the accused refused to open the godown he undoubtedly caused an obstruction to the free access to this godown to which the complainant was entitled. It does not matter as to what the object of the complainant was in asking the accused to open the godown. Obstruction is caused no less because the purpose for which it was wanted is not established as alleged by the complainant. 26 Bom.L.R. 721=25 Cr.L.J. 1281=82 Ind. Cas. 353=A.I.R. 1924 Bom. 492 (D.B.).

——S. 28-A—Jurisdiction.

A Sub-Judge does not cease to be a Sub-Judge because he exercises some or all of the powers of a District Judge under S. 28 A. 121 Ind. Cas. 173=A.I.R. 1930 Sind 91 (D.B.).

BOMBAY COURT-FEES AMENDING ACT (III OF 1926).

——Art. 17 (5)—Scope.

Clause (5) of Art. 17 introduced by the amending Act merely provides a fixed fee in a suit to set aside a decree, but it does not provide for a fixed fee when the suit is to set aside the decree and also for consequential relief. A.I.R. (Vol. 24) 1937 Sind 241=31 S.L.R. 442=171 Ind. Cas. 420 (F.B.).

BOMBAY COURT OF WARDS ACT (I OF 1905).

——Act does not decide question of title—Property does not vest in Court of Wards—Mere management and superintendence is with Court of Wards—On death of ward, property is held subject to suit by claimant against ward's heirs.

The provisions of the Court of Wards Act, are not intended to decide questions of title. Property under the Act does not vest in the Court of Wards. There is no vesting order. The Court of Wards Act relates to the superintendence and management of estates. Where therefore **L** had mutated his property in the name of **V,** his grandson, for making the Court of Wards accept the superintendence of the estate for **V,** he could not question the right of the Court of Wards to superintend what in law was his own property, managed in the name of **V.** It could not prevent **L's** heir from challenging the possession and superintendence of the Court of Wards on the ground of title after **V's** death. After **V's** death, the Court of Wards had no legal right to possession, and even if the sanction of Government had been given, it could be properly given, only subject to any suit brought by a claimant against **V's** heirs. A.I.R. (Vol. 30) 1943 Sind 177=I.L.R. (1943) Kar. 227=210 Ind. Cas. 35.

——S. 4—Temporary custody—Conditions necessary.

Under the Bombay Court of Wards Act, taking temporary custody is not the same thing as assuming superintendence. The conditions necessary for the latter are: (1) disqualification under S. 5; (2) previous sanction of Government; (3) the actual assumption by the Court of Wards or some declaration to that effect; (4) notification in the **Government Gazette** setting out the fact of assumption and the date of the sanction. When these conditions are fulfilled, then only the property of the land-holder is deemed to be under the superintendence of the Court of Wards. A.I.R. (Vol. 24) 1937 Bom. 266=39 Bom.L.R. 189=170 Ind. Cas. 162.

——Ss. 4 and 5—Lunatic—Appointment of Manager.

A Civil Court cannot appoint a manager to a lunatic's estate when the Court of Wards can superintend it. After Civil Court's order adjudging a person to be lunatic, an application for appointing a manager lies to the Court of Wards. 16 Ind. Cas. 678=6 S.L.R. 65 (D.B.).

——S. 4—Procedure—Sanction challenged—Secretary of State is necessary party.

The sanction accorded under S. 4 of the Act by

the Governor-in-Council in the Presidency proper or by the Commissioner in Sind, under his delegated powers in this Provice, is accorded by them as agents of the Secretary of State for India, and, if that sanction is challenged, the Secretary of State for India is a necessary party to the suit. The sanction under S. 4 cannot be assailed in this suit for want of proper parties; the action of the Court of Wards which has purported to act in pursuance of that sanction cannot be successfully impugned. 22 S.L.R. 63=105 Ind. Cas. 729= A.I.R. 1928 Sind 76.

——S. 4 (1)—All that S. 4 (1) provides is, that, after the Court of Wards has taken action in pursuance of the authority conferred upon it by the order of the District Court, it has forthwith to report the matter to Government and that Government may either ask him to continue to hold temporary custody of the property or may ask him to withdraw from it. A.I.R. (Vol. 24) 1937 Bom. 266=39 Bom.L.R. 189=170 Ind. Cas. 162.

——Ss. 7 and 4—Permission under S. 7 is necessary before granting sanction under S. 4.

S. 3, Cl. (2) of the Act provides that from the date of the sanction under S. 4 the property of the ward shall be deemed to be under the superintendence of the Court of Wards, and if effect is to be given to this clause, permission under S. 7 of the Act should be obtained before a valid sanction is granted under S. 4. 105 Ind. Cas. 729=A.I.R. 1928 Sind 76.

——S. 10—The assumption of superintendence by the Court of Wards under S. 6 does not relate back to its previous custody by the Court of Wards or the order for it under S. 10 (1), but the property of the ward must be deemed to be under the superintendence of the Court of Wards from the date when the sanction of the Government was obtained. A.I.R. (Vol. 24) 1937 Bom. 266=39 Bom. L.R. 189=170 Ind. Cas. 162.

——Ss. 13 (2) and S. 4—Cause of action—Notification, if gives rise to.

Where by virtue of S. 13, Cl. (2), Court of Wards Act, read with S. 4, the Court of Wards has assumed the superintendence and is dealing with property, there is nothing to be restrained. The notification issued under S. 13 of the Act affords a cause of action. 22 S.L.R. 63=105 Ind. Cas. 729=A.I.R. 1928 Sind 76.

——S. 14—Notices—Publication in newspapers.

Notices under Ss. 13 and 14 are sufficiently published if they are printed in the Government Gazette in English and in the local newspapers in the vernacular. Some further publication is desirable. 55 Ind. Cas. 939=22 Bom. L.R. 223= A.I.R. 1920 Bom. 120 (D.B.).

——S. 16, Proviso.

The proviso to S. 16 does not prevent the claimant from using the letter as acknowledgment to start a fresh period of limitation as under S. 19. Limitation Act, though the offer made by Collector cannot be proved in a suit by the claimant if he does not accept the offer. 22 Bom.L. R. 943=58 Ind. Cas. 319=44 B. 871=A. I. R. 1920 Bom. 137 (D.B.).

——S. 17, Sub-S. (1)—Certificate.

The necessity of a certificate under S. 17, Sub-S. (1) is not qualified by any other section of the Act. 123 Ind. Cas. 703 (1) (D.B.).

——S. 20—Appointment of manager of estate—Whether clothes him with power to pass valid acknowledgment of liability.

The mere appointment of a manager of an estate of a ward does not ipso facto clothe him with the power to pass an acknowledgment of liability on behalf of his principal or the ward. The provisions of Sub S. (1) of S. 21, Limitation Act, do not imply but expressly require proof that an agent for management appointed by the lawful guardian or committee or manager is duly authorized to sign acknowledgments. It would be dangerous to assume that clerks or managers employed by Court of Wards or legal guardians should be presumed to possess plenary powers including the power to bind their principal and the latter's wards by acknowledgments of debts unless they are specially selected for the purpose. Therefore, unless the Court is satisfied that an agent or manager of an estate has been duly authorized to sign acknowledgments, it would be slow to accept every act of the manager constituting an acknowledgment as sufficient for the purpose of extending time under S. 19, Limitation Act. It is true that the manager appointed by the Court of Wards under S. 20, Bombay Court of Wards Act, furnishes security for the due management of the estate. But it is not always possible to assume that the management involves the duty to act independently of his employer in the matter of acknowledgment of debts. The Court, therefore, must determine on the evidence whether the manager possessed those powers expressly or by implication. A.I.R. (Vol. 26) 1939 Bom. 237=41 Bom. L.R. 391=183 Ind. Cas. 225.

——S. 22—Guardian—Appointment of—Competency of Court of Wards—No guardian of person can be appointed by Court of Wards unless it has assumed superintendence.

If there is a Court of Wards competent to appoint a guardian of the person of a minor, then the jurisdiction of the District Court is to that extent onsted. But the competency of the Court of Wards in Bombay Presidency depends on S. 22 of the Bombay Court of Wards Act, and that section clearly gives power to the Court of Wards to appoint a guardian of the person only in those cases where the Court of Wards has assumed superintendence of the person, otherwise the Dt. Judge has jurisdiction to appoint a guardian of the person of the minor. 25 Bom. L. R. 1232=77 Ind. Cas. 702=A.I.R. 1924 Bom. 157 (D.B.)

——Ss. 23 and 27—Arbitration—Reference to—Power of Court of Wards.

There can be no objection to the Court of Wards in the exercise of its powers under Ss. 23 and 27, referring to arbitration a dispute, affecting the rights of a minor, who is under its superintendence provided the reference to arbitration is for the benefit of the minor. 121 Ind. Cas. 164=A.I. R. 1930 Sind 195 (D.B.).

——S. 31—Applicability—Suit against Bombay Court of Wards Officer.

S. 31, Court of Wards Act, refers to a suit which is intended to be filed against or in respect of the person or property of a Government ward, and has nothing to do with a suit against the Officer himself for an unauthorized act done purporting to be done by him in an official capacity. 22 S. L.R. 63=105 Ind. Cas. 729=A.I.R. 1928 Sind 76.

——Ss. 31, 32—Application—Gujrat Talukdars.

The sections apply to a suit against a Gujrat Talukdar where estate is under Talukdari Settlement Officer constituting Court of Wards. 22 Bom.L.R. 619=58 Ind. Cas. 205=44 B. 986= A.I.R. 1920 Bom. 121.

——Ss. 31 and 32—Notice and naming of guardian —Omission of, in suit against ward under S. 92, C.P. Code—Effect.

Neither the omission to give the statutory notice required by S. 31 of the Act nor the omission to name, the Court of Wards as guardian from the commencement of the suit vitiates an otherwise properly instituted suit against a Government Ward under S. 92 of C.P. Code. 40 Bom. 541=37 Ind. Cas. 186=18 Bom.L.R. 563 =A.I.R. 1916 Bom. 150 (D.B.).

——S. 31—Expression 'the property of any Government Ward'—Interpretation.

The words 'the property of any Government Ward' in S. 31, Bombay Court of Wards Act, are used in referring to the estate of which the Court of Wards has assumed superintendence including that part of the estate which may be subject to pre-existing liabilities, a part that may consequently never become the 'property of any Government Ward' in its strict sense. Superintendence having been assumed, there is no warrant for introducing a distinction between the two parts of the estate. The assumption of the superintendence has a retrogressive effect inasmuch as the superintendence is not restricted to management after the date of its assumption, but the Court of Wards must deal with liabilities created prior to the date of assumption of superintendence.

Consequently, a suit by a promisee against a Government ward holding property of deceased promissor as his legal representative is barred under S. 31 if no notice is given. A.I.R. (Vol. 24) 1937 Bom. 113=38 Bom.L.R. 1306=167 Ind. Cas. 816.

——S. 31—Interpretation—Defendants Government wards, at the date of cause of action—Their ceasing to be wards before hearing—Time is extended by two months—Limitation Act, S. 15 (2). 81 Ind. Cas. 750=26 Bom.L.R. 364=A. I. R. 1924 Bom. 364 (D.B.).

——S. 32—Applicability to pending suits.

S. 32 of the Act was not intended to be applicable to pending suits. 38 Bom. 194=23 Ind. Cas. 123=16 Bom.L.R. 30=A.I.R. 1914 Bom. 27 (D.B.).

——S. 32—Applicability—Suit against ward brought before assumption of superintendence by Court of Wards.

S. 32 of the Bombay Court of Wards Act applies to pending suits brought against a Government ward before the superintendence of his property was assumed by the Court of Wards. The scheme of the Act suggests a broad rather than a narrow construction of S. 32 and the requirements of the section should therefore be held to apply irrespective of whether the suit is brought before or after the assumption of superintendence by the Court of Wards. I.L.R. (1946) Bom. 1023=48 Bom.L.R. 616=228 Ind. Cas. 338=A.I.R. 1947 Bom. 33 (F.B.).

——S. 37—Any pecuniary liability incurred by the disqualified landholder after temporary custody but before actual assumption of superintendence by the Court of Wards does not come within the prohibition in S. 37. A.I.R. (Vol. 24) 1937 Bom. 266=39 Bom.L.R. 189=170 Ind. Cas. 162.

——S. 40, Proviso, thirdly—Scope and effect—Sale by holder in contravention of—Death of vendor—Suit by heir against vendee to recover property—Decree and execution—Dispossession of vendee—Suit by latter for damages—Maintainability—Limitation—Starting point—Limitation Act, Art. 116—Transfer of Property Act, S. 55 (2).

The third proviso to S. 40 of the Bombay Court of Wards Act imposes a disqualification upon the rights of a person whose estate has passed under the superintendence of the Court of Wards and which has since been withdrawn. Without the previous sanction of the Collector such a person is not entitled to dispose of his property beyond his natural lifetime. The Act, however, does not impose a general incapacity upon such a person to contract with regard to his property. Nor is a contract with regard to property declared void by the Act.

If an owner of property, which is made non-transferable by statute, agrees to transfer that property in a manner intended to circumvent the provision of the statute, the agreement is void in law and unenforceable and damages cannot be awarded for breach of such an agreement. But, if a person purports to convey what he has no authority to convey and agrees to guarantee quiet enjoyment to the vendee (e.g., when in contravention of proviso 3 to S. 40, Bombay Court of Wards Act, an absolute sale is made by the transferor without the consent of the Collector, which transfer will not be good beyond his life), the vendor or the person claiming under him cannot avoid an obligation to pay damages for breach of the covenant on the ground that the vendor had either no interest or had a limited interest which has since the date of the sale ceased. The vendor cannot escape from his obligation when he guarantees to the vendee that he has title to the property which he has disposed of and ultimately it is found that either he had no title or that his interest was not as extensive as he purported to convey. In such a case the fact that the conveyance is void to the extent to which it exceeds the authority of the vendor by reason of the absence of title in him or by reason of a personal disqualification imposed upon him does not affect the liability of the vendor or persons claiming under him to compensate the vendee for breach of covenant of title and quiet enjoyment. The restrictions im-

posed by the Court of Wards Act are not a part of the tenure of the land but are imposed personally against the holder as the Act contains no general restrictions on the right to contract with regard to the estate and the covenant of quiet enjoyment cannot be regarded as an attempt to defeat the policy of the law.

Where, after the death of the vendor, the heir of the vendor sues for recovery of the property on the ground of the transfer being ineffective and inoperative beyond the lifetime of the last holder obtains a decree and dispossesses the vendee, the latter can sue for damages for breach of covenant of title and quiet enjoyment, the suit is governed by Art. 116 of the Limitation Act, the sale-deed containing the covenants being registered; and the cause of action or right to sue arises only on the date of such dispossession and not on the date of the death of the last holder, that being the date of the transfer ceasing to be valid or operative. The vendee in such a case can rely upon a covenant of title and quiet enjoyment arising by implication under S. 55 (2), Transfer of Property Act, as well as by the express words of the sale deed itself. So long as the vendee remains in peaceful possession of the property there is no breach of the covenant. The possibility of a person, who has, since the date of the sale, acquired title to the property, initiating steps to obtain possession of the property, cannot amount to a breach of the covenant. The period of limitation for a suit for damages for the breach of the covenant of quiet enjoyment commences to run from the date of actual dispossession and a suit filed within six years from the date of actual dispossession is within time and not barred. 52 Bom.L.R. 614 =A.I.R. 1950 Bom. 401 (D.B.).

——S. 44-A—Section 44-A of the Act gives the Court of Wards power to call for the production of documents for the purposes of the Act, not only for the purposes of S. 15 or S. 16 of the Act. What the purposes of the Act are, are clearly to be ascertained from S. 4 and other sections of the Act. A.I.R. (Vol. 25) 1938 Sind 217=40 Cr.L.J. 75=I.L.R. (1939) Kar. 238=178 Ind. Cas. 381.

——Ss. 44-A, 15, 16—Court of Wards party to civil suit—If deprived of power under S. 44-A.

The Court of Wards is not rendered powerless and unable to act in protection of the ward's estate only because a claimant to that estate chooses to file a suit in a Civil Court, nor can it be held that the Court of Wards is empowered to call for documents only when an enquiry under S. 15 or S. 16 of the Bombay Court of Wards Act, is pending. A.I.R. (Vol. 25) 1938 Sind 217=40 Cr.L.J. 75=I.L.R. (1939) Kar. 238=178 Ind. Cas. 381.

BOMBAY CRIMINAL PROCEDURE CODE AMENDMENT ACT (XXX OF 1946).

——S. 3—Scope—If repugnant to prevention of Corruption Act (II of 1947), S. 3—Arrest of offender and investigation of offence of corruption in Bombay City—Law applicable—India Act or Bombay Act—Sub-Inspector of Police—Arrest, detention, investigation and charge-sheet by—Legality—Trial by Presidency Maistrate on such charge—Jurisdiction—Cr. P. Code, Ss. 156 (2), 190 (1) (a) and (b). See PREVENTION OF CORRUPTION ACT, S. 3. 49 Bom.L.R. 821.

BOMBAY DECENTRALIZATION ACT (III OF 1915).

——Since the amendment of the Bombay District Municipal Act by Bombay Act (III of 1915), it could not be said of Municipal Councillors that they were public servants who were not removable without the sanction of the Governor-in-Council. A.I.R. (Vol. 19) 1932 Sind 177=1932 Cr. Cas. 792=34 Cr.L.J. 171=141 Ind. Cas. 530.

BOMBAY DISTRICT LOCAL BOARDS ACT (VI OF 1923).

——S. 42—Contract—Condition.

In a contract entered into in the manner and form required by S. 42, Bombay District Local Boards Act, mutuality is an essential condition. Hence even where a suit on a contract under S. 42 is not against the District Local Board but by the District Local Board, the formalties provided in S. 42 (2) are required, beause, otherwise it would mean that while one side would be bound, the other side would not. A.I.R. (Vol. 27) (1940) Sind 199=I.L.R. (1940) Kar. 347=191 Ind. Cas. 768.

——S. 42—Suretyship bond—Non-compliance with section—Effect.

A suretyship bond not entered into in the manner and form required by S. 42 but signed only by the persons to be charged, cannot be said to conform to the provisions of S. 42 (2) and is, therefore, void. The mere fact that the District Local Board are accepting no liability under the agreement and the persons to be charged have signed, is no ground for non-compliance with S. 42. The suretyship agreement is separate and distinct from the principal agreement and therefore, the fact that the principal agreement was in accordance with S. 42 (2) does not obviate necessity of the suretyship agreement from complying with the provisions of S. 42. Though such an agreement be void, the person who has received any advantage under it must restore the same under S. 65, Contract Act. A.I.R. (Vol. 27) 1940 Sind 199=I.L.R. (1940) Kar. 347=191 Ind. Cas. 768.

BOMBAY DISTRICT MUNICIPAL ACT (VI OF 1873).

——S. 33—Building—Sanction—Condition.

A Municipality, in granting a person permission to erect a building, can legally impose a condition that he should have a gully of a certain dimension, and this power it has under the old as well as under the amended Acts of Bombay. (1901) 3 Bom.L.R. 842.

——S. 33—Private street—Balconies—Right of Municipality to order removal.

A District Municipality can, under the provisions of S. 33 of the District Municipal Act, (Bom. Act VI of 1873), order the removal of bolconies put up by a person to his house abutting on a private street and constructed in defiance of the orders issued by the Municipality. Per Chandavarkar, J.—Reading the whole of S. 33 of the Bombay District Municipal Act by itself and having regard to its general terms, it is clear that the Legislature has given to every Municipality the power to regulate the construction of buildings, whether they abut on a public or a private street. The power may be exercised as the Municipality "think proper;" that is, it should be exercised, not capriciously or arbitrarily, but reasonably, provided the orders is "not inconsistent with the provisions" of the Act. Per Batty, J.—The orders passed by a Municipality under S. 3 of the District Municipal Act, if justifiable, must be shown to be consistent with the powers conferred by the Act; otherwise they are neither within the meaning of Cl. (1) nor are legal orders within the meaning of Cl. (3) of the section. The land affected not being a public street is not vested in the Municipality by S. 17 of the Act, and no general power to interfere with buildings on private property is conferred by any section of that enactment. Such interference would necessarily involve an encroachment on the ordinary rights of the subject; and wherever the Legislature intended to authorize such interference, it conferred the power by apt words. Per Aston, J:—The words "may in writing issue such orders not inconsistent with this Act as they think proper with reference to such building" in S. 33 of the Bombay District Municipal Act, are very wide and give elastic powers to the Municipality in the matter of regulation of new buildings as private property, and there is no reference to a street, public or private in the section. The words "not inconsistent with this Act" appear to mean not inconsistent with the aim, scope and subject of this Act as shown by its provisions. (1902) 5 Bom.L.R. 48=27 Bom. 221.

——S. 48—Notice—When necessary.

S. 48 of the Bombay District Municipal Act, 1873, requires notice only when the suit is for an act already done or purporting to have been already done under the powers conferred; but no notice is required when the suit is not for an act already done, but to prevent an act from being irremediably and irrevocably done. The Court has, for the purposes of S. 48, only to look to the real object of the suit. (1900) 2 Bom.L.R. 857=25 Bom. 142.

——S. 84—Repeal—Procedure, alteration of—Jurisdiction—Proceedings commenced before new Act. 3 Bom.L.R. 584.

BOMBAY DISTRICT MUNICIPAL ACT (II OF 1884).

——S. 17—Special General Meeting—President calling a meeting.

The special general meeting of a District Municipality to be a valid meeting under S. 17 (2) of the Bombay District Municipal Act (II of 1884) must be one called by the President. If the meeting is not so called, the defect cannot be cured by S. 17 (2) of the Act. (1901) 5 Bom. L.R. 689=28 Bom. 66.

——S. 33 (b) Bombay Act III of 1901, S. 48 (b) (iii)—By-laws—Scope of—External structures—By-laws as to—Legality of.

A by-law framed by a District Municipality provided that "every place used for drying fish or fins shall be surrounded with a wall not less than six feet in height or with a fence made of bamboo mats or double cadjan leaves." **Held**—that the by law was **ultra vires** of the powers conferred by S. 33 (b) of the Bombay District Municipal Act, 1884, and S. 48 (b) (iii) of the Bombay District Municipal Act, 1902, as both these sections extended only to the regulation of business within the place used and gave no authority to require external structures. (1909) 4 Bom.L.R. 585.

BOMBAY DISTRICT MUNICIPAL ACT (III OF 1901).

——Acquisition of Land—Power of Municipality to acquire land by agreement with owner.

There is no section of the Act under which the Municipality has power to acquire any portion of a person's land by agreement with him. They certainly have no power whatever to call upon him to surrender to them a strip of land. If they require to obtain possession of any portion of the land, they will have to show that it was required for a public purpose before they can spend Municipal funds on the acquisition. 28 Bom.L.R. 535 =95 Ind. Cas. 262=A.I.R. 1926 Bom. 347 (D.B.).

——Applicability—Electricity Act (IX of 1910), S. 14—Licensee asked to remove poles and line by licensor for latter's convenience—Licensor must bear cost of removal.

The defendants were a Corporation who had obtained a license under the Indian Electricity Act, (Act IX of 1910) and as licensees under the Act had put up an aerial line etc., on a certain street within the Municipal District of the Municipality of Karachi, the plaintiffs. The Municipality having arranged with the North Western Railway Co., that the latter should effect an overbridge, the aerial line and poles had to be shifted from their position. The plaintiff's suit was for declaration that the cost of removal should be borne by defendants.

Held, that S. 14 of the Electricity Act applied and not the Bombay District Municipal Act and that plaintiffs must bear the cost of removal. 95 Ind. Cas. 226=A.I.R. 1926 Sind 115.

——Compensation—Liability of Municipality to pay, when arises.

A Municipality is not liable to pay compensation to an householder ordered by it to leave vacant a strip of land between the front of his house and the street except when the vacant land is included in the street. 33 Ind. Cas. 675=9 S. L.R. 126=A.I.R. 1916 Sind 17 (D.B.).

——Malicious prosecution against corporation.

In an action for malicious prosecution, the cause of action arises when the plaintiff is acquitted, and to succeed in such action, the plaintiff has to prove not only that the prosecution was instituted against him without any reasonable or probable cause, but that it was instituted maliciously.

An action for malicous prosecution will lie against a corporation. It is immaterial that indivdual members of the corporation may not be shown to have any ill-will against plaintiff. A.I.R. (Vol. 19) 1932 Bom. 259=34 Bom.L.R. 143 =56 Bom. 135=137 Ind. Cas. 545.

——Object of Act—Discussion of political subjects not ultra vires.

The main object for which powers of Local Self-Government are transferred to Municipal Corporation under this Act is that the city fathers should look after the health of the city and the comfort and well-being of its residents. But it is not correct to say that for the well-being of such public subjects it may not in certain instances be necessary or in any case be not proper, for them to discuss political subjects or that the discussion of such subjects is **ultra vires**. A.I.R. 1930 Sind 287.

——Octroi Schedule—Construction—Ad valorem **duty.**

The Municipality claimed to charge on the plaintiff's goods, which were bales of cloth, an **ad valorem** rate on the value of the maunds according to their present value and not according to the value, appearing in the schedule of rates. The octroi schedule was divided into three columns; in the 1st column were the names of various articles; in the 2nd column was the rate per cent. load; in the 3rd column was the weight in maunds or price. For cloth the rate per cent. load was 12 annas per every Rs. 100 or part of it. In the 3rd column the price was to be taken at Rs. 500 per cent. load of 16 maunds. **Held,** that Rs. 500 was the limit value of a full cart load of cloth of all sorts and articles made of cotton, silk, etc., upon which the rate of 12 annas per cent. was to be levied; otherwise the amount of Rs. 500 in the third column has no meaning. If it is considered desirable in the interests of the Municipality that certain articles should be charged on their actual value **ad valorem,** it would certainly be necessary to add to the schedule, rules prescribing how the real value of these goods was to be ascertained. It would also be necessary to set up the proper machinery for arriving at such valuation. 74 Ind. Cas. 205= 1923 Bom. 413 (D.B.).

——Provisional order—Effect of.

The applicant should not be restrained from proceeding with his work simply because a provisional order expressly limited to one month is issued months of years earlier. 36 Bom. 61=12 Ind. Cas. 551=13 Bom.L.R. 914 (D.B.).

——Second meeting held to avoid deadlock is not illegal.

Where the first meeting was adjourned, **sine die,** a further meeting was necessary to avoid a deadlock, and a second meeting was convened, there is nothing in the Act, as it then stood, to show that the meeting so convened is illegal in any sense. 28 Bom. L.R. 1184=98 Ind. Cas. 454=A.I.R. 1926 Bom. 576 (D.B.).

———Surat Municipality Bye-laws, Ch. 11, Bye-law 6—Municipality has no power to cut off the water-supply of one who tenders water charges but objects to other charges.

Under R. 245, Surat Municipal Rules, the management of the Surat Municipality sent one consolidated bill for various rates, including water rate. The plaintiff refused to pay the consolidated bill. He tendered merely that part of the bill which related to the water charges and to one other item. The municipality declined to allow him to pick and choose in this way and they next proceeded to cut off his water-supply. Plaintiff sued for a mandatory injunction to connect water-supply and for damages.

Held, that the municipality cannot cut off the water-supply because charges other than water charges were not paid.

Held, further that the plaintiff should be given a mandatory injunction without prejudice to future circumstances.

Held, also, that the plaintiff is entitled to damages as the municipality were acting in excess of their legal powers. 29 Bom.L.R. 1465=106 Ind. Cas. 147=A.I.R. 1927 Bom. 640 (D.B.).

———S. 2—Rule for Assessment—Bombay District Municipal Act (II of 1884), S. 32, Cl. (h) —Rules by Ahmedabad Municipality, R. 74— Provisions not complied with—Only assessment, at rate fixed for previous year, can be levied.

R. 74 of the Ahmedabad Municipality distinctly indicates that the amount payable for the year is the amount fixed at the commencement of the year. Unless the increased amount is determined in the manner contemplated by R. 74 the only amount that could be said to be due by the owner for a particular year is the amount which was fixed for the next preceding year. R. 74 is not **ultra vires** of the Municipality. 60 Ind. Cas. 578=45 Bom. 611= 23 Bom.L.R. 48=A.I.R. 1921 Bom. 236 (D.B.).

——Ss. 3, 17, 14 and 59—Trolleys on rails in municipal street—If vehicles.

Trolleys running on rails in the streets of a Municipality pusheder pulled by hand and used by contractors for the purpose of carrying material to fill up a tank are 'vehicles'. They are subject to the wheel tax under the District Municipal Act. 27 Ind. Cas. 497=17 Bom.L.R. 63=A.I.R. 1915 Bom. 92 (D.B.).

——S. 3 (7)—Building includes a compound wall. 45 Bom. 1151=23 Bom.L.R. 831=22 Cr. L. J. 622=63 Ind. Cas. 158.

——S. 3 (7)—Building—Meaning of—Wire fence.

A wire fence is neither a "will" nor an "enclosure" and is not a building under S. 3 (7) of the Act. The word "enclosure" used in the definition of "building" must be interpreted **ejusdem generis** with the preceding words "hut" and "shed" **(i.e.)** must be taken to refer to some fabric or structure or thing built in the more popular acceptation of the word. 41 Bom. 563=19 Bom.L.R. 521=41 Ind. Cas. 656=18 Cr.L.J. 832=A.I.R. 1917 Bom. 233 (D.B.).

——S. 3 (7)—"Building"—It includes also foundation.

The definition of the word "building" in S. 3 (7) is not intended to be an exhaustive definition. The word "include" is not equivalent to the word "means." The word "building" is quite wide enough to include the foundations. 51 Bom. 818=29 Bom. L.R. 733=8 A.I.Cr.R. 418=103 Ind. Cas. 602=28 Cr.L.J. 714=A.I.R. 1927 Bom. 401 (D.B.).

——S. 3 (12)—Interpretation—Words "such space" in exception refer to "every vacant space" at beginning of para., and are not connected with previous para.—Vacant space, being in fact road, is street within meaning of S. 3 (12).

Grammatically the words "such space" in the exception refer back to the words "every vacant space" at the beginning of the paragraph, and are not connected with the previous paragraph "every vacant space" which satisfies certain requirements, is included in the definition if there is no right of way of any sort across it. Logically, too, the words cannot refer back to the first paragraph for the definition would then exclude private streets, which as Cl. (3) shows, are included in the term "street." If, therefore, a vacant space is in fact a road or footway which is accessible to the public, it is a street, and that para. 2 refers only to such vacant spaces as are neither "roads, footpaths, squares. Court-alleys or passages." 122 Ind. Cas. 385=A.I.R. 1930 Sind

——S. 3 (12)—Street—Open space accessible to others owned privately.

An open space owned by the accused but accessible to the occupiers of other houses in the same dehal is a street. "All other persons" would mean persons other than the occupier of such building, and would not mean all occupiers of all the buildings within that space. 25 Bom.L.R. 1218=25 Cr.L.J. 990=81 Ind. Cas. 638=A.I.R. 1924 Bom. 116 (D.B.).

——Ss. 3 (12) and 96—"Street"—Vacant portion between buildings.

The accused left a vacant portion for passage between two proposed buildings the site of which belonged to him. Kurla Municipal Bye-Law No. 132 provided that the height of the building should not be more than the width of the street on which it abutted.

Held, that the vacant space left by the accused between his buildings was not a street within S. 3 (12). 26 Bom.L.R. 216=25 Cr.L.J. 1188=82 Ind. Cas. 52=A.I.R. 1924 Bom. 365 (D.B.).

——S. 3 (13) (a)—From the definition of "public street" in S. 3 (13), Bombay District Municipal Act, it does not follow that the soil of every public street must necessarily be of the ownership of the Municipality. A.I.R. (Vol. 26) 1939 Bom. 501=41 Bom. L.R. 1097=187 Ind. Cas. 166.

——S. 4—When Bombay Local Boards Act in S. 4 (3) refers to a Municipal District it does not include a notified area. A.I.R. (Vol. 26) 1939 Bom. 97=41 Bom.L.R. 93=40 Cr.L.J. 522=180 Ind. Cas. 940.

——S. 10 (2)—Suit against nominated members for injunction not to attend meetings of the Municipality—Government is a necessary party—District Judge shall try the suit.

The plaintiffs claiming to be rate-payers and voters brought a suit contending that "the Commissioner of the northern Division directly nominated the defendants Nos. 1 to 9. The Commissioner has got no authority to nominate in this way. And as the appointment of such nominated members is illegal, they have got no right to sit in the Municipality as members and to work therein. In spite of this plaintiffs strongly apprehend that they taking shelter of the unlawful orders of the Commissioner are about to sit in the Municipality as members and to work therein," and prayed that it might be declared that the nomination of the defendants Nos. 1 to 9 as members of the Nadial City Municipality made by the Government was illegal, and that they might be restrained by a permanent injunction from attending the meetings of the Municipality and from doing any work on behalf of the Municipality, and that the defendant No. 10 (**i.e.,** the Municipality) might be restrained by a permanent injunction from treating them as members, their nomination being illegal.

Held, that the Secretary of State was a necessary party to the suit and the Subordinate Judge had no jurisdiction to try the suit. 48 Bom. 43=25 Bom. L.R. 992=77 Ind. Cas. 241=A.I.R. 1924 Bom. 65 (D.B.).

——Ss. 11 and 22 (4)—Rules 21 (3) and 22 (1)—Error in list of voters—If invalidates election—Paying voters carriage hire—If corrupt practice.

The scrutiny of votes are required by R. 21 (3) is to be made at the special general meeting convened for that purpose. An error in a list of voters giving the name of a voter twice by mistake does not invalidate the election unless there is evidence that the error was corruptly caused. The hiring of carriages for the convenience of the voters does not amount to corrupt practice under R. 22. 49 Ind. Cas. 394=12 S.L.R. 73=A.I.R. 1919 Sind 51.

——S. 11 (1) (c), (iv)—Appeal relating to amendment of list of voters—Orders of District Judge and Assistant Judge—Nature of Revision.

The whole scheme of the Bombay District Municipal Act (III of 1901), is that in matters of dispute relating to Municipal election, while enquiry shall be held by a Judicial Officer as distinct from a Revenue Officer, that Judicial Officer shall hold an enquiry as a **persona designata** and not as a Court. The words used in Sub-R. (5) are "District Judge" and not "District Court" and in these Municipal Acts the Judicial Officers referred to are referred to not as Courts but as persons, and the fact that in Cl. (4), Sub-S. (1) (c) of S. 11 the words "judicial authority" instead of "Judicial Officer" are used is a matter of no importance. It is clear that it was not the intention of the Legislature that the words "judicial authority" in Cl. (iv) of Sub-S. (1) (c) of S. 11 should be construed to mean a Court as such. There is no distinction between an inquiry relating to the validity of the election itself and objections regarding the lists of voters. Consequently the order of the District Judge and of the Assistant Judge in an appeal relating to the amendment of the list of voters are in the capacity of **persona designata,** and hence an application against such orders does not fall under S. 115, C. P. Code. A.I.R. (Vol. 25) 1938 Sind 153=I.L.R. (1939) Kar. 121=176 Ind. Cas. 826.

——S. 14 (3)—Water rate whether tax.

Water rate under S. 71 (1) (b) is not a tax under S. 14 but only a contractual charge. 87 Ind. Cas. 258=16 S.L.R. 98=A.I.R. 1923 Sind 1 (D.B.).

——S. 15—Applicability to disqualification before election.

Section 15, Sub-S. (3) refers to Sub-S. (2) and to the case where a councillor becomes disqualified during his term of office and not to the case where there was a disqualification before election. A.I.R. (Vol. 20) 1933 Sind 416=150 Ind. Cas. 246.

——S. 15-F—X elected member of District Municipality but subsequently held disqualified for such election—In the meanwhile but after his disqualification ceased, he was elected on the School Board—Chairman, if competent to decide question of disqualification—Bombay Primary Education Act (IV of 1923), R. 13.

A person was elected a member of a District Municipality but was subsequently held to be disqualified for election under S. 15-F, District Municipalities Act. In the meanwhile but after his disqualification for election to the District Municipality had ceased, the Municipality elected him to be a member of the School Board. When he was held to be disqualified for election to Municipality, the Chairman of the School Board refused to send him notices of the meetings of the School Board.

Held, that the decision of disqualification for the Municipality did not necessarily imply, nor was the Chairman competent to decide the question of a person's disqualification for the School Board.

Held further: that in the absence of any statutory authority to decide on the question of a person's disqualification for the School Board, the presumption would be in favour of suits in ordinary Courts of law and not of authority vested in the Chairman. 124 Ind. Cas. 815=32 Bom.L.R. 614=A.I.R. 1930 Bom. 378 (D.B.).

——S. 16—"Commissioner".

The word 'Commissioner' in S. 16, means Commissioner in Sind and cannot be read as meaning Commissioners other than commissioner in Sind. A.I.R. (Vol. 19) 1932 Sind 177=1932 Cr.Cas. 792=34 Cr.L.J. 171=141 Ind. Cas. 530.

——S. 16—The delegation of powers by the Governor in Council by virtue of Cr. P. Code, would not have the effect of repealing or annulling the statutory provision contained in S. 16. A.I.R. (Vol. 19) 1932 Sind 177=1932 Cr.Cas. 792=34 Cr.L.J. 171=141 Ind. Cas. 530.

——S. 22—Order of Dt. Judge refusing to set aside election—Revision—C. P. Code, S. 115.

The District Judge acting under S. 22 is not a Court, within the meaning of the word, in S. 115, but, is a **persona designata** so that the High Court has no jurisdiction to revise his order refusing to set aside an election. 50 Bom. 357=94 Ind. Cas. 660=28 Bom.L.R. 519=A.I.R. 1926 Bom. 344 (D.B.).

——S. 22 (1) (5)—Court's power to consider the validity of election.

It is true that S. 22, Bombay District Municipal Act refers in Sub-Ss. (2) to (5) to corrupt practices and errors committed by the officer who holds the election but there is nothing in Sub-S. (1) in derogation of the generality of the power of the Court to consider the validity of an election on any ground that may be urged. A.I.R. (Vol. 20) 1933 Sind 416=150 Ind. Cas. 246.

——S. 22 (5)—Applicability—Error not due to returning officer's failure to follow rules.

Where, although there was an error in accepting the nomination of a candidate to a Municipal Election it is not shown that the error arose because the returning officer did not follow the rules, nor is the election questioned merely because of his error or because of an irregularity or informality, S. 22 (5) does not apply. A.I.R. (Vol. 20) 1933 Sind 416=150 Ind. Cas. 246.

——Ss. 23, Sub-S. (7-A), 38—Election of new President in absence of retiring President—Validity.

The meaning of S. 23 (7-A) of Bombay District Municipal Act, is that the retiring President is an integral part, or that his presence in the chair is an integral part of the machinery for the election of a Chairman at the meeting at which the new President has to be elected. It cannot be regarded as a reasonable construction of the provision to hold that it is a mere matter of procedure which can be disregarded without affecting the validity of the proceedings. Consequently, election of a new President in the absence of a retiring President is invalid and S. 38 is not applicable to such a case. A.I.R. (Vol. 24) 1937 Bom. 114=38 Bom.L.R. 1314=I.L.R. (1937) Bom. 158=167 Ind. Cas. 548.

——Ss. 24 (2), 179, 186 (a)—Powers of Committee of Management.

A Committee of Management appointed under S. 179 is not precluded from exercising the power of the Municipality under S. 186 (a). Procedure is not "power and duty", the exercise of power and duty is the goal, procedure is the road by which we reach it. The whole of the procedure laid down in the Act need not be followed in its entirety and it is not verbally incumbent upon any persons or person appointed by Government to carry on the functions of the Municipality. It is enough that the persons who are delegated to do the duties of the Municipality carry out their functions in a reasonable and equitable manner, keeping an eye, as far as possible, on the provisions of the Municipal Act, but not being bound by them with the same strictness as the elected Municipality would be. Section 24 (2) of the Bombay District Municipal Act has no application to the Chairman of a Committee of Management appointed under S. 179. 17 S.L.R. 46=80 Ind. Cas. 951=A.I.R. 1921 Sind 125 (D.B.).

——S. 32, Cl. (h)—Rules by Ahmedabad Municipality, R. 74—Provisions not complied with—Only assessment, at rate fixed for previous year, can be levied.

R. 74 of the Ahmedabad Municipality distinctly indicates that the amount payable for the year is the amount fixed at the commencement of the year. Unless the increased amount is determined in the manner contemplated by R. 74 the only amount that could be said to be due by the owner for a particular year is the amount which was fixed for the next preceding year. R. 74 is not **ultra vires** of the Municipality. 45 Bom. 611=23 Bom.L.R. 48=60 Ind. Cas. 578=A.I.R. 1921 Bom. 236 (D.B.).

——Ss. 36 (2), and 96—New buildings—Permission from P. W. Committee—General Body can revoke the permission.

The order permitting to build a new house made by the Public Works Committee of the defendant Municipality under S. 96 could be cancelled or revoked by the General Body either of its own motion or on the application of a person injuriously affected by it, subject to the qualification that the cancellation or revocation was otherwise consistent with the provisions of S. 96. 46 Bom. 663=24 Bom.L.R. 178=69 Ind. Cas. 19=1922 Bom. 247.

——S. 38—Applicability—Election of new President in absence of retiring President is invalid and S. 38 is not applicable to such cases. A.I.R. (Vol. 24) 1937 Bom. 114=38 Bom.L.R. 1314=I.L.R. (1937) Bom. 158=167 Ind. Cas. 548.

——S. 38—Scope—Irregularity as to the Chairman continuing as such after election of President.

Under S. 38, the proceedings of a Municipality are not vitiated by reason of any disqualification of the Chairman in acting as the President or presiding authority of the General Meeting after the President is elected. It covers the case of an irregularity, if any, in continuing the Chairman as the Chairman of the General Meeting after the President is elected. 28 Bom.L.R. 1184=98 Ind. Cas. 454=A.I.R. 1926 Bom. 576 (D.B.).

——S. 40—Applicability—Water rate under S. 71 (1) (b).

S. 40 does not apply to water rate under S. 71 (1) (b), though it is a contractual charge. 87 Ind. Cas. 258=16 S.L.R. 98=A.I.R. 1921 Sind 1 (D.B.).

——S. 42—Scope.

S. 42 of the Act was not restricted to misapplication by councillor or councillors, but it applies to any misapplication made by whomsoever. 40 Bom. 166=33 Ind. Cas. 428=17 Bom.L.R. 1115=A.I.R. 1915 Bom. 197 (D.B.).

——Ss. 42, 167—Misapplication of municipal funds—Suit against members of managing committee—Government, if necessary party—Notice.

The defendants who were members of the managing committee of the plaintiff Municipality for a certain period, ordered for the Municipality certain goods and on delivery being taken, paid the price from out of the municipal funds. Subsequently, the Municipality filed a suit for the recovery of the money so paid, from the defendants on the ground that the goods were not in accordance with the contract, and that the managing committee ought not to have applied municipal funds for payment:

Held, (i) that S. 42, Bombay District Municipal Act, did not bar the suit, and that the Government need not necessarily be a party to such a suit;

(ii) that S. 167 applied to the suit and hence the notice prescribed thereunder ought to have been given, and in the absence of notice, the suit must fail. A.I.R. (Vol. 19) 1932 Bom. 562=34 Bom. L.R. 1216=56 Bom. 448=140 Ind. Cas. 213.

——Ss. 42 and 68 (a)—Order under S. 42—Dt. Magistrate—Powers of.

A Dt. Magistrate cannot, by an order under S. 42 of the Act promulgated only in the Taluka headquarters and containing no reference to any area, make punishable, acts done in a village 12 miles away, when the Dt. Magistrate was not present at the time of the proclamation of the order. Per **Batchelor, J.**—The words neighbourhood or vicinity include only suburbs or immediate surroundings. The words "having jurisdiction"...."village" and "prohibit.. village" in S. 42 refer equally to the Magistrate of the first class and to the Dt. Magistrate. S. 42 plainly limits the prohibiting powers of the Magistrate, whether of the first class or of the District. Per **Chandavarkar, J.**—The conditions essential for the exercise of jurisdiction under S. 42 are that (1) the jurisdiction is conferred on the Dt. Magistrate or the Magistrate of the First Class; (2) there must have been jurisdiction over the town or village where the jurisdiction is intended to operate and (3) they must be present in such town or village or in the neighbourhood thereof at the time the jurisdiction is set in motion. 36 Bom. 504: 14 Bom.L.R. 158=14 Ind. Cas. 974=13 Cr.L.J. 430.

——S. 42—Right of Municipality to take action.

The reason for providing in S. 42 that moneys may be recovered from a Councillor as if such moneys were the property of Government, was to give Government the power to take action in cases in which the Municipality neglects to do so, but there is nothing in the section to deprive the Municipality of the right which any owner of property would have to sue anybody who wrongfully misapplies such property. A.I.R. (Vol. 19) 1932 Bom. 562=34 Bom. L.R. 1216=56 Bom. 448=140 Ind. Cas. 213.

——Ss. 42, 54 and 58—'Misapplication'—Maintenance of schools—Rules under S. 58, R. 3.

The word 'misapplication' in S. 42 means the wrong application of funds: the use of funds for purposes outside the scope of the Act. The use of funds for the maintenance of primary schools which the Government Inspectors are not allowed to inspect is not 'misapplication'. 88 Ind. Cas. 43=27 Bom. L.R. 171=A.I.R. 1925 Bom. 278 (D.B.).

——S. 46—Rules and bye-laws—Distinction.

Rules and bye-laws differ from each other, in two salient matters: (1) rules have effect when they are approved whereas bye-laws require to be previously sanctioned; when bye-laws are proposed, their drafts have to be published and objections and suggestions received and considered; bye-laws can be made only after this procedure has been followed; (2) there is no provision in respect of rules similiar to the one in a case of bye-law permitting Municipality to prescribe fine for infringement of bye-law. A.I.R. (Vol. 24) 1937 Bom. 150=39 Bom.L.R. 89=38 Cr.L.J. 538=I.L.R. (1937) Bom. 304=168 Ind. Cas. 219.

——Ss. 46 and 48—Bye-law relating to payment of tolls or penalty for infringement of rule—Validity.

A Municipality cannot enact a bye-law under S. 48, Bombay District Municipal Act, imposing a penalty upon persons entering the limits of the Municipality with the intention of evading toll upon their conveyances as it imposes a penalty for the infringement of a rule. Matters relating to payment of tolls ought to be dealt with by rules under S. 46 and not bye-laws under S. 48. A.I.R. (Vol. 24) 1937 Bom. 150=39 Bom.L.R. 89=38 Cr.L.J. 538=I.L.R. (1937) Bom. 304=168 Ind. Cas. 219.

——Ss. 46 and 48—Rules under, Appendix D, Serial Nos. 29 and 20-A—Raw cocoanut oil—Terminal-tax payable. **See** BOMBAY DISTRICT MUNICIPAL ACT, S. 59 (b) (xi). 223 Ind. Cas. 107.

——S. 46—Ahmedabad Municipality Rules, R. 3—Water tax—Construction of "shall accrue due on 1st April," explained.

The construction, that the water tax and house and property tax in R. 2 are not leviable except on 1st April, is untenable for two reasons; firstly, it is inconsistent with the words 'in advance,' secondly because, it is difficult to imagine that the municipality, merely because a house was completed on 2nd April, or the exemption of a building ceased at any date after 1st April, would forego their entire tax payable annually in advance. By 31st May, 1923, the municipal pipes were brought within 75 ft. of the mill buildings belonging to the plaintiff company, and there were two stand pipes within 500 ft. The plaintiff company filed a suit for declaration that they were not amenable to water tax contending that under R. 3, they were not liable to pay the tax for any period prior to 1st April, 1924.

Held, that the company were liable to pay the water tax from 1st June, 1923. 54 Bom. 80=31 Bom.L.R. 1224=122 Ind. Cas. 430=A.I.R. 1930 Bom. 145.

——S. 46—Ahmedabad Municipality Rules, R. 6 (b)—Mill buildings within ambit of water pipe and stand-pipe—Liability for tax.

In view of R. 6 (b), not merely the actual physical buildings within 75 ft. of a water pipe or 500 ft. of a stand-pipe as the case may be, are liable for assessment, but if any appreciable portion of a mill building falls within these radii the whole building of the mills becomes liable. 54 Bom. 80=31 Bom. L.R. 1224=122 Ind. Cas. 430=A.I.R. 1930 Bom. 145.

——S. 46—Rules and bye-laws of Ahmedabad Municipality—R. 74 is not ultra vires.

R. 74 of the Rules of the Ahmedabad Municipality is not **ultra vires.** Under it the Municipality is entitled, for any particular year, to such amount as house and property tax as is determined at the beginning of the year and not any increase determined subsequently. In case of increase in contravention of R. 74, the assessee should pay only the amount fixed for the next preceding year. 45 Bom. 611=60 Ind. Cas. 578=23 Bom.L.R. 48 (D.B.).

——S. 46—Cl. (c) of Appendix G, Part I of the rules framed under—Construction.

In the absence of the clear expression that the market-value is to be altered from time to time, the words in Cl. (c) of Appendix G, Part I, of the rules must be taken to refer to the continued payment on the basis of the market-value fixed at the time of issuing written permission. A.I.R. (Vol. 32) 1945 Sind 116.

——Ss. 46 (1) and 70, sub-S. (1)—Municipal Rules framed under—Levying of fee under these rules is ultra vires.

The levying of the fee prescribed under Cl. (c) of Part I, Appendix G of the Municipal Rules framed under Ss. 46 (1) and 70, sub-S. (1) is **ultra vires.** A.I.R. (Vol. 32) 1945 Sind 116.

——Ss. 46 and 167—Dismissal of a Secretary comes under the Act.

As S. 46 confers power upon a Municipality to dismiss its officers and servants, dismissal of a Municipal Secretary comes under the Act according to S. 167 and hence a suit for damages by him is barred if instituted after more than 6 months from the date of dismissal. 39 Bom. 600=30 Ind. Cas. 390=17 Bom.L.R. 652=A.I.R. 1915 Bom. 121 (D.B.).

——S. 46 (e)—Per **Mehta, A.J.C.**—Where a person gets himself engaged in the service of a Municipality be must be deemed to have agreed to abide by the law under which the Municipality had to function. A.I.R. (Vol. 20) 1933 Sind 93 (2)=26 S.L.R. 469=141 Ind. Cas. 768.

——S. 46 (2)—Jurisdiction of Court—Dismissal of servant in accordance with rules and bye-laws.

In a suit for damages for wrongful dismissal brought by an officer or servant of the Karachi Municipality against the Municipality, once the Court is satisfied that the plaintiff's dismissal has been in accordance with the rules and bye-laws of the Municipality, it has no jurisdiction to probe any further into the question. If however the Court finds that the plaintiff's dismissal had been wanton and in utter disregard of the rules and bye-laws of the Municipality, the Municipality would forfeit the protection and privileges afforded to them by Statute and the plaintiff would be entitled to succeed as in an ordinary suit between master and servant for wrongful dismissal. 113 Ind. Cas. 387=A.I.R. 1929 Sind 69.

——S. 48—Bye-law to be made by passing resolution after its sanction by Commissioner.

Under S. 48, Bombay District Municipal Act the by-laws have to be made with the previous sanction of the Commissioner. The only way in which a Municipality can make a bye-law is by passing a suitable resolution, so that the resolution must be passed after the sanction of the Commissioner has been obtained. Therefore, it is wrong to say, that as soon as the sanction of the Commissioner is given, the proposed bye-law at once becomes operative. It must then be brought before the Municipality and considered. Where the Commissioner makes material alterations in the draft, the Municipality must follow the provisions of sub-S. (2) of S. 48, and invite criticism upon the altered by-law, because the fact that the public have approved of the bye-law in one form is no justification for passing it in another form. A.I.R. (Vol. 28) 1941 Bom. 66=42 Bom. L.R. 1060=42 Cr.L.J. 331=192 Ind. Cas. 816.

——S. 48—Refund of terminal tax—Bye-law framed by Municipality laying down conditions under which refund of terminal tax can be claimed is not ultra vires.

No bye-law of the Municipality can cut down an exemption allowed by the Legislature. If the Municipality has its bye-laws framed so as to cut down that exemption such a bye-law would be invalid. But in the case of a terminal tax there is no such exemption given by the statute. It is only under the bye-law that any one is entitled to the refund of the terminal tax at all. It is competent, for the authorities which out of mere grace allow an exemption, to prescribe and lay down under what conditions it will grant that exemption. 80 Ind. Cas. 990=17 S.L.R. 59=A.I.R. 1921 Sind 175 (D.B.).

——S. 48 (f)—Information about children of school going age—Bye-law 4—Not ultra vires—Bombay Primary Education Act (I of 1918), S. 18.

The accused was convicted for refusing to furnish information required by the Municipality under bye-law 4 framed under S. 48 (f) of the Bombay District Municipal Act, 1901, with regard to children of school going age.

Held, that the bye-law is in no way inconsistent with the principal Act or with the rules made by the Local Government under Act (I of 1918) (Primary Education Act). The powers of the Municipality to frame bye-laws under S. 48 of the principal Act are not in any way curtailed by the powers conferred under S. 18 of that Act. 25 Bom.L.R. 767=25 Cr.L.J. 330=77 Ind. Cas. 186=A.I.R. 1924 Bom. 47 (D.B.).

——S. 48 (j)—Dhewan Municipality Rules of 31st December, 1920, are not **ultra vires** or unreasonable. 78 Ind Cas. 432=18 S.L.R. 141=A.I.R. 1924 Sind 149 (D.B.).

——S. 50—Public street—Ownership of Municipality—Presumption.

S. 50, sub-S. (2) (f), says that all public streets, and the pavements, stones and other materials thereof and also all trees, erections, materials, implements and things provided for such streets shall be vested in and belong to the Municipality, and shall be held and applied by them as trustees. Unless it is definitely proved that the soil of any public street belongs to the Municipality, it cannot be presumed to be of the ownership of the Municipality merely on the ground that it is used as a public street. A.I.R. (Vol. 26) 1939 Bom. 501=41 Bom.L.R. 1097=187 Ind. Cas. 166.

——S. 50-A—Applicability.

Section 50-A applies to a case where any property is claimed by the Municipality or by any person as against the Municipality and then there may be an order by the Collector. Where, however, there is no such claim by or against the Municipality the section is inapplicable. 32 Bom.L.R. 900 (D.B.).

——S. 50-A—Government not a necessary party.

In a suit against Municipality which by necessary implication seeks to set aside the order passed first by the City Survey Officer, and then by a superior officer in appeal that a certain land was "street land" Government is not a necessary party. The decision of Survey Authorities that the site in question formed part of a street as defined in the Bombay District Municipal Act, does not mean that the decision was that the Government had any interest in the land. It is really a decision relating to a dispute between private owners and the Municipality, that it was part of street land, which would mean that the Municipality would have certain powers with reference to such land which had been given under the Statutes. It is not necessary formally to sue to set aside the decision of the Survey authorities. Even if there was a prayer to set aside that decision, that would not render it necessary to join Government as a party. 47 Bom. 306=79 Ind. Cas. 192=25 Bom.L.R. 58=A.I.R. 1923 Bom. 456 (D.B.).

——S. 50-A—Government not a necessary party—Rights of Government.

Even where a specific relief of setting aside an order of the City surveying officer is prayed for Government is not a necessary party. The mere fact that Government would have some interest in all public streets vested in Municipalities, is not any reason for holding that Government is a necessary party in a suit which really concerns private persons on one hand and Municipality on the other. In spite of the vesting of public streets, the Government have some interest in the sub-soil of and in the column of air above public streets. 47 Bom. 315=79 Ind. Cas. 197=25 Bom.L.R. 63=A.I.R. 1923 Bom. 459 (D.B.).

——S. 50-A—Order under—Suit to set aside—Limitation—Appeal against part of order—Suit to set aside whole order—Limitation.

Where an appeal has been filed against an order made under S. 50-A (1) of the Bombay District Municipal Act, limitation for a suit to set aside the order runs under S. 50-A (2) from the date of the order passed on appeal irrespective of whether the whole order sought to be set aside was appealed against or not.

Per **Rupchand, A. J. C.**—An order written and signed by a Settlement Officer or by the Collector under this section cannot be treated as an order within the meaning of the section unless it is pronounced and if this is not done, then it does not become an order unless it is subsequently pronounced or promulgated in a manner so as to come within the knowledge of the aggrieved party. In the latter case the date of the order is the date of its due promulgation in the manner aforesaid. The proviso was intended to refer to cases where previous notice was duly given that the order will be pronounced on a particular day but was not intended to refer to cases where no such notice was given.

Per **Wild, J. C. (Contra).**—When an order has been passed by a Collector under S. 50-A after formal enquiry of which due notice has been given, the plaintiff has had due notice of such order and must bring his suit to set aside such order within one year from the date of such order. A. I. R. (Vol. 18) 1931 Sind 146=25 S.L.R. 230=134 Ind. Cas. 369.

——S. 59—Bye-laws of Sholapur Municipality—Double house tax—Municipality cannot levy a tax on the building and land on which it stands and again another tax on the land.

Under the bye-laws passed by the Sholapur Municipality under S. 59 of the Bombay District Municipal Act (III of 1901), the Municipality may impose a rate on buildings, or lands, or both, situated within the Municipal District and under the bye-laws, a general rate on buildings and lands on the scale defined therein is recoverable in respect of all buildings and lands which are not the property of Government. The Municipality can levy a rate either on the building or on the land on which the buildings stands, or it can levy one rate for both building and land. But it cannot levy a rate which would include the rate on building and land and a second rate on the land itself. If an owner of a house has to pay ground rent, he pays that ground rent out of the rent which he receives from his tenants. That rent, therefore, is made up of the ground rent and the return on the capital expended by the owner of the house. Therefore unless it has been made clear that the Municipality were levying from the owners of these various

buildings on the plaintiff's land a rate calculated on that part of the hypothetical rental which represented merely the return on the cost of building, it would be presumed that the Municipality were already taxing these particular properties at their full amount. 46 Bom. 205=64 Ind. Cas. 177=23 Bom.L.R. 1018=A.I.R. 1922 Bom. 158 (D.B.).

——S. 59—Terminal tax—Liability.

The terminal tax is leviable on all goods entering municipal limits whether they are intended for consumption within the city or whether they are merely in transit through the city to some other place. The goods need not be actually brought before a naka. The goods are liable to pay the tax on import as soon as they are brought within municipal limits. Hence the Municipality is entitled to seize the goods as soon as they enter the municipal limits. A.I.R. (Vol. 28) 1941 Bom. 11=42 Bom.L.R. 1034=I.L.R. (1941) Bom. 97=192 Ind. Cas. 635.

——Ss. 59, Cls. (4), (11), 76—Octroi—Goods in transit and not brought within octroi limits —Liability for octroi.

An octroi is a tax levied upon articles which are brought into the gates of a city, whether or not such articles are brought into the city for consumption or use therein. Hence goods are dutiable are always liable to terminal tax or octroi even if they are in transit and not brought within octroi limits for consumption or use therein. A.I.R. (Vol. 22) 1935 Sind 245=29 S.L.R. 54=1935 Cr. Cas. 1308=37 Cr.L.J. 148=159 Ind. Cas. 665.

——S. 59 (viii) and proviso (c)—Scope and Effect.

When the Bombay District Municipal Act gives general powers to the municipality to fix the amount or rate at which it desires to make the class or classes of persons of property liable, it is not proper to suggest that because some specific instances are enumerated such as those under S. 59 (viii) and Cl. (c) of proviso to S. 59 wherein it is said that the municipality can impose rates upon certain basis, such enumeration has the effect of limiting the municipality's choice of the bases upon which the taxes can be levied. A.I.R. (Vol. 30) 1943 Bom. 21=44 Bom.L.R. 849=204 Ind. Cas. 352.

——S. 59 (x-a)—Power of Municipality to impose terminal tax.

The word 'may' used in Cl. (x-a) of S. 59, Bom. District Municipal Act means no more than 'can' or 'could be'. It does not mean 'has been'. The language of Cl. (x-a) of S. 59, shows that it was not the intention of the Legislature to provide that the Municipality should not levy any other tax which under the rules made under Cl. (a) of S. 80-A, Sub-S. (3), Government of India Act, a local authority could impose unless it had been actually authorized to impose it by a law made by the local Legislature. The clause merely described what taxes, other than those specifically mentioned, a local authority could impose, and the description was that they were to be such taxes as it was within the power of local Legislature to authorize a Municipality to impose. in other words, such taxes as were mentioned in Sch. II, Scheduled Tax Rules. Hence S. 59 (x-a), is itself sufficient authority to enable the Municipality to impose a tax without being authorized to impose the tax by Special Act of the local Legislature. A.I.R. (Vol. 28) 1941 Bom. 11=42 Bom.L.R. 1034=I.L.R. (1941) Bom. 97=192 Ind. Cas. 635.

——S. 59 (b) (ii)—Plying in Municipal limits —Liability for wheel-tax.

A vehicle kept outside the Municipal limits but plying for hire inside the Municipal area is not liable to pay wheel-tax under S. 59, Cl. (2) of the Act. 22 Bom.L.R. 1104=59 Ind. Cas. 389 (D.B.).

——S. 59 (b) (vi)—Proviso—District Municipality—Special sanitary cess—Construction of main sewer by Municipality—Connection between house and sewer at plaintiff's expense.

The Municipality constructed a main sewer along the road by the side of which the plaintiffs, had private latrines which were previously cleansed by manual labour. Later on the plaintiffs connected them to the main sewer of the Municipality at their own expense. The Municipality thereupon levied special sanitary cess for the connection from the plaintiffs, under the provisions of S. 59 (b) (vi) of the Bombay District Municipal Act, 1901. The plaintiffs, having sued to recover the amount of the cess levied from them. **Held,** dismissing the suit that the Municipality were entitled to levy a special sanitary cess from the plaintiff. 22 Bom. L. R. 747=57 Ind. Cas. 433=44 Bom. 527=A.I.R. 1920 Bom. 21 (D.B.).

——S. 59 (b) (xi)—Raw cocoanut oil—Terminal-tax payable—Rules, Appendix D, Serial Nos. 29 and 20-A.

Raw cocoanut oil is an oil within the category of oils covered by Serial No. 29 and not by Serial No. 20-A of Appendix D to Rules and Bye-laws framed under Ss. 46 and 48 relating to Terminal Tax levied under S. 59 (b) (xi) of the Bombay District Municipal Act. It is therefore chargeable to terminal-tax under Serial No. 29. An oil might or might not be a vegetable product. The fact that it happens to be of vegetable origin does not make it chargeable under Serial No. 20-A because there is a separate Serial No. 29 for all oils, including vegetable oils, prescribing a lower rate of taxation. If the Municipal corporation taxes cocoanut oil as a substitute for ghee under Serial No. 20-A, the burden is on them to prove that it is a substitute for ghee. The fact that some people use raw cocoanut oil in their cooking does not make it a substitute for ghee. A substitute for ghee must necessarily be a derivative of ghee. 223 Ind. Cas. 107=A.I.R. 1946 Sind 112.

——Ss. 60, 59—General sanitary cess—Power to impose in form of rate on building or land.

The powers conferred on the municipality by S. 60 (a) (iv), are, sufficiently wide to permit it to impose the general sanitary cess in the form of a rate on building or land described in S. 59 (vii). Hence in the rules framed by the Athni Municipality, the provision for the computation of the amount of general sanitary cess according to the rental or rate at which a building is assessed is not **ultra vires** as the tax assumes the form of rate on buildings. A.I.R. (Vol. 30) 1943 Bom. 21=44 Bom.L.R. 849=204 Ind. Cas. 352.

——Ss. 60 and 59—Terminal tax—Government according sanction omitting one item—Representation to Government to sanction the omitted item and the item sanctioned but formalities of law not observed in respect of this item —Imposition of tax on such item is illegal.

The necessary formalities under S. 60 were observed, and the sanction of Government was obtained to the imposition of terminal tax on the articles mentioned in a schedule, with the exception of item 20, which included fruits. The Municipality then published a notice under S. 62 that a tax would be levied on these articles from a certain date. The Municipality, however, were dissatisfied with the order of Government disallowing the item 20, and they moved the Government to accord their sanction to the addition of item 20 to the list of articles liable to the terminal tax. This was done without observing the formalities required by S. 60 and without giving any notice to the objector, or affording the many opportunity of raising any objections to the proposed addition. The suggestion of the Municipality was approved by Government, and item 20, including fruits, was added to the list.

Held, that the levy of tax on articles included in item 20 amounted to the imposition of a new tax and therefore for this addition made the procedure provided by Chap. VII should have been followed and the Municipality had no right to levy a new tax without complying with the formalities which are laid down by the Act. 51 Bom. 764=29 Bom.L.R. 1041=104 Ind. Cas. 666=A.I.R. 1927 Bom. 527 (D.B.).

——S. 61-D—Commissioner of.

The Commissioner of Sind is not a Local Government. A.I.R. (Vol. 19) 1932 Sind 177=34 Cr. L.J. 171=141 Ind. Cas. 530.

——Ss. 64, 65 and 67, and R. 175 of the Vengurla Municipal Rules—Scope—Levy of tax from 1st April—Legality when assessment list prepared, published and authenticated after that date.

According to the scheme of levying house tax under the Bombay District Municipal Act, there is no obligation on a Municipality to prepare the assessment list prior to the 1st of April, in order that it may be entitled to levy tax in respect of the official year commencing from 1st April. If the Municipality gets a list authenticated and follows the procedure laid down in Ss. 64, 65 and 67, then such list would govern the levy of tax throughout the official year, though that list might have been published after 1st April, and have been authenticated and become conclusive subsequent to 1st April. The mere fact that a rule framed by the Municipality fixes the date on which the liability to tax arises does not necessarily mean that the quantum of the tax has to be determined prior to that date. A.I.R. 1950 Bom. 352=52 Bom.L.R. 411.

——S. 65—Procedure must be strictly followed.

In every case of assessment the procedure laid down by the Bombay District Municipal Act must be strictly followed before it can be said that the assessment has been fixed by the Corporation or the Special Committee, as the case may be, in accordance with the statutory provisions of law and when not in conformity with statute, may be challenged in Court of law. A.I.R. (Vol. 23) 1936 Sind 114=30 S.L.R. 59=164 Ind. Cas. 170.

——S. 65 (1)—Notice—Absence of—Levy of Sanitary cess under S. 59 (vii)—Legality.

The levy of general sanitary cess by a Dt. Municipality under S. 59 (vii) of the Act is not illegal on the ground of want of notice under S. 65 (1). 89 Ind. Cas. 580=27 Bom.L.R. 447=A.I.R. 1925 Bom. 419 (D.B.).

——S. 65 (6)—List not signed by Officer—Legality of levy.

It may be that if the list is not signed it cannot be accepted as conclusive evidence as provided by sub-S. (6). But the mere fact that the office did not sign the list cannot affect the question as to whether the levy was legal or not, particularly when the amount fixed under the list is not challenged. 45 Bom. 611=23 Bom.L.R. 48=60 Ind. Cas. 578 =A.I.R. 1921 Bom. 236 (D.B.).

——Ss. 68, 87 and 59—Scope of.

Ss. 68 and 87 are not intended to deal with the tax specified in S. 59 (a) (i), that is, a rate or tax on building or lands but also cover any other tax which is imposed in the form of a rate on buildings or lands. A.I.R. (Vol. 30) 1943 Bom. 201=44 Bom.L.R. 849=204 Ind. Cas. 352.

——S. 69—Grant of refund—Responsibility on Municipality.

S. 69 throws a duty on the municipality to grant a refund and the Municipality cannot escape that duty by any act of delegation; of course it is necessary to make enquiry in such matters and power to make enquiry can be delegated. But the municipality remains responsible for the due performance of their statutory duty. 122 Ind. Cas. 398=A.I.R. 1930 Sind 93 (D.B.).

——S. 70, Sub-S. (1)—Powers of Municipality.

Sub-S. (1) of S. 70 only empowers the Municipality to levy a fee for the granting of permission to put up projections and not to levy a fee for the continued use of a projection. A.I.R. (Vol. 32) 1945 Sind 116.

——Ss. 70 (1), 46 and 113—Permission for putting up balcony—Power of Municipality to charge recurring annual fee, and to enhance amount of fee.

The words 'put up' have been used in S. 113 of the Bombay District Municipal Act as a compendious expression for 'putting up and keeping up'. The Municipality is, therefore, empowered under S. 70 (1) of that Act to charge a recurring annual fee for permission to put up a balcony. It is also at liberty to enhance the amount of that fee. As permission is granted in exercise of the powers granted by the Act, the legal effect and consequence of the permission is governed by the Act and not by the law of contract. S. 46 states that the Municipality may from time to time alter or revise rules in respect of the fees to be charged for permission granted under S. 70 (1) of the Act. A.I.R. 1949 Sind 36 (D.B.).

——Ss. 71 (1) B and 46 (1) and 60—Water charges—Validity of Levy—Preliminary publication of Rules—If necessary.

Plaintiff sued committee of management of Hyderabad for the refund of charges paid for supply of water by the Municipality to a private connection to his house on the ground that the rules were not first published under S. 60.

Held, apart from the words 'subject to the provisions of Ch. VII' rules under S. 46 (1) do not require preliminary publication for the purpose of inviting objections but merely require the sanction of the Governor in Council or the Commissioner under provision (a) to S. 46. The words 'subject to the provisions of Ch. VII' cannot in themselves make the provisions of S. 60 applicable to a case of water rate under S. 71 (1) (b) which is outside the particular one dealt with namely, the case where Municipality proposes to impose a tax. The main provision in the rules under the S. 46 (1) and S. 71 (1) is that Municipality will supply water to private persons on certain terms and this clearly makes an offer to such private persons to supply them with water on the terms laid down and the water rate revised is a contractual charge. 87 Ind. Cas. 258= 16 S.L.R. 98=A.I.R. 1923 Sind 1 (D.B.).

——S. 76—Ahmedabad Municipality R. 84—Goods brought in by post man—Octroi duty—Inspection of books.

Goods brought into the walled city of Ahmedabad through the agency of the Post Office are liable to octroi duty. The terms of S. 76 (1) (b) do not permit a Municipal Officer to claim inspection of the private account books of merchants. 28 Ind. Cas. 480=17 Bom.L.R. 182=A.I.R. 1915 Bom. 91 (D.B.).

——S. 76—Inspection of goods inside limits of Municipality or at place of exit—Right of octroi officer.

There is nothing in S. 76, Bombay District Municipal Act, to suggest that the octroi officer should ask for inspection only at the place where the goods enter the limits of the Municipality and not inside such limits or at the place of exit from such limits. It is, therefore, no argument that because the accused were not asked to show the bundle at the octroi station which was at the entrance to the local limits of the Municipality, they were entitled to refuse to give inspection when asked to do so within the local limits. A.I.R. (Vol. 22) 1935 Sind 245=29 S.L.R. 54=1935 Cr. Cas. 1308=37 Cr.L.J. 148= 159 Ind. Cas. 665.

——S. 77, Cl. 2—Defraud'—A man is defrauded if thereby he is deprived of some right or property to which he is entitled, and any act done with the intention of wrongfully depriving him of the benefit of such right would amount to an attempt to defraud him within the meaning of S. 77 (2). 50 Bom. 174=28 Bom.L.R. 115=27 Cr.L.J. 1335=98 Ind. Cas. 407=A.I.R. 1926 Bom. 231 (D.B.).

——S. 77 (2)—Offence under—Evasion of terminal tax.

What is made punishable under S. 77 (2), Bombay District Municipal Act, is the non-payment of octroi with the particular intention described in the section and not the non-payment of terminal-tax. 'Octroi' in S. 77 (2) must be given the same meaning as it has in S. 59 (1) (iv). A terminal-tax is not an 'octroi' within the meaning of S. 59 (1) (iv) or S. 77 (2). While a Municipality may be competent to levy a terminal-tax under its Rules and Bye-laws, its evasion is not punishable under S. 77 (2). 49 Cr.L.J. 91=A.I.R. 1948 Sind 57 (D.B.).

——S. 77 (2)—Offence under—Intention to defraud—Need for.

Before a person can be convicted of an offence made punishable under S. 77 (2) of the Bombay District Municipal Act, it must be proved that the person importing the goods has the intention to defraud the Municipality. In the absence of any allegation or proof of such intention, there can be no conviction under S. 77 (2). 49 Cr.L.J. 91= A.I.R. 1948 Sind 57 (D.B.).

——S. 80—The merchant who takes the benefit of the clause of 31st December, 1920, cannot complain if he is exposed to certain restrictions and obstructions in case he does not comply with the terms thereof. 78 Ind. Cas. 432=18 S.L.R. 141= A.I.R. 1924 Sind 149 (D.B.).

——S. 81-A—Levy of tax on pilgrims resorting to a shrine—Lease of—Validity.

Although a Municipality is empowered under S. 81-A, Bombay District Municipal Act, to lease the levy of any toll imposed under the Act, it is not competent to lease the levy of a tax on pilgrims resorting periodically to a shrine. Therefore, a contract entered into by a Municipality which includes the right to levy tolls on vehicles coming to a shrine and a right to levy tax on pilgrims visiting shrine is **ultra vires** of the Municipality. A.I.R. (Vol. 20) 1933 Bom. 132=35 Bom.L.R. 163=57 Bom. 278=143 Ind. Cas. 331.

——S. 81-A—Levy of fees due for temporary occupation of Municipal land—Right, if can be auctioned.

The Municipal Act does not give to a Municipality, either expressly or by necessary implication, power to lease or auction the right to levy the fees due for temporary occupation of Municipal land. 52 Bom. 414=30 Bom.L.R. 715=111 Ind. Cas. 620= A.I.R. 1928 Bom. 282 (D.B.).

——Ss. 81-A and 70—'Toll'.

The toll referred to in S. 81-A, does not include the fee authorized under S. 70. 52 Bom. 414=30 Bom. L.R. 715=111 Ind. Cas. 620=A.I.R. 1928 Bom. 282 (D.B.).

——Ss. 82, 83 and 86—Bill not in proper order—Distress warrant—Legality of.

A Bill to recover the arrears of house-tax served upon a person does not comply with S. 82 (2) (b) (ii) of the District Municipal Act, 1901, if it does not specify the time within which an appeal may be preferred under S. 86 of the Act. In such a case the issue of a distress warrant on failure to pay the arrears is illegal, the right of distress depends upon the observance of the statutory formalities is being a right conferred by the statute only upon those conditions. 27 Ind. Cas. 573=16 Bom.L.R. 749.

——S. 82 (3)—Bill of water tax—Particulars necessary.

As Cl. (3) does not expressly say that all the liabilities including the ultimate liability incurred in default of payment are to be specified in a bill of water-tax, on the ordinary canons of interpretation it is correct to hold that the municipality sufficiently complies with the law by stating in the bill the next step to which they would have recourse, viz., a notice of demand. 54 Bom. 80=31 Bom.L.R. 1224=122 Ind. Cas. 430=A.I.R. 1930 Bom. 145.

——S. 86—Decision under—Revision—Cr. P. Code. S. 435.

Under S. 86 of the Bombay District Municipal Act, 1901, a Magistrate hearing an appeal of the

kind mentioned in the section is merely an appellate authority having jurisdiction given by the Act to deal with the question of a civil liability. He is therefore not an inferior Criminal Court, to which alone the revisional jurisdiction of the High Court applies under S. 435, Cr. P. Code. (1907) 9 Bom. L.R. 1347.

——S. 86—Decision under—Revision.

Under S. 86 a Magistrate hearing an appeal is merely an appellate authority having jurisdiction given by the Act to deal with the question of a civil liability. He is, therefore, not an inferior criminal Court within S. 435, and the High Court has no power to revise his order. 21 S.L.R. 51=27 Cr. L.J. 1127=97 Ind. Cas. 647=A.I.R. 1927 Sind 23 (D.B.).

——S. 86—Decision under—Revision.

The Magistrate or Bench of Magistrates hearing appeals of the kind mentioned in S. 86, Bombay District Municipal Act, is merely an appellate authority having jurisdiction given by the Act to deal with the question of a civil liability, in other words, the Magistrate or Bench of Magistrates is a **persona designata,** and hence no application in revision would lie to the High Court against the decision of the Magistrate.

The mere fact that S. 86, Bombay District Municipal Act, contains no express provision that the decision of the Magistrate or Bench of Magistrates under that section is to be final does not mean that an appeal or application in revision lies against that decision. A.I.R. (Vol. 28) 1941 Bom. 184=43 Bom.L.R. 333=I.L.R. (1941) Bom. 427=197 Ind. Cas. 23.

——S. 86—Right of suit—Illegal assessment.

Where a Municipality imposes a tax, a person contending that it is illegally levied can at once file a suit therefor against the Municipality in a civil Court. It is not necessary that he should have first appealed to a Magistrate under S. 86 as a preliminary to the filing of the civil suit. (1902) 5 Bom.L.R. 269=27 B. 408.

——S. 86—Right of suit—Right of aggrieved party.

S. 86 is not impliedly intended to bar the right of a party aggrieved by the excessive levy of a tax to resort to a Court of law. S. 86 is only intended to give to the aggrieved party a summary remedy by way of appeal to a Magistrate against an assessment on facts which would otherwise be barred. A.I.R. (Vol. 23) 1936 Sind 114=30 S.L.R. 59=164 Ind. Cas. 170.

——S. 86—Right of suit—Money paid under protest.

Where the assessment is confirmed without giving an opportunity to the assessee to be heard, and the assessee without appealing to the Magistrate pays under protest, as one of the essential conditions of S. 65 (3), Bombay District Municipal Act, has not been complied with, a suit for recovery of amount paid under protest is maintainable. And S. 86 is no bar to such a suit. S. 86 is an enabling section which empowers an assessee who is aggrieved by an order passed with jurisdiction by the Assessing Committee to appeal to a Magistrate on facts. In the absence of this section it would not be open to an assessee to attack the decision of the Assessment Committee on the merits. But that does not mean that where the attack goes to the very root of the assessment fixed on the ground of non-compliance by the Assessment Committee with the preliminaries laid down by the Statute which they are required to comply with before they give their decision, the assessee may not resort to the ordinary tribunal:

Held, that the mere fact that the Municipality failed to comply with the provisions of the section is not by itself sufficient to enable the plaintiff to escape payment of the proper assessment. Before he can recover the excess which he had paid under protest, he must satisfy the Court that it was not payable and that the annual letting value of his property during the year in dispute was the same as that shown by him in his objections. A.I.R. (Vol. 23) 1936 Sind 114=30 S.L.R. 59=164 Ind. Cas. 170.

——S. 90—Applicability—Old public streets—Applies to old as well as new streets.

S. 90 is not confined to new public streets alone. It applies to all public streets whether old or new. 81 Ind. Cas. 134=17 S.L.R. 273=25 Cr.L.J. 646=A.I.R. 1925 Sind 90 (D.B.).

——Ss. 90, 50 and 122—Power of Municipality—Diversion of public street to purpose not authorised by statute.

A strong presumption arises that the Legislature did not intend, by the general powers it gives to the Municipality to discontinue or stop up public streets, that they should use that power for a purpose which contravenes the intention shown by S. 122. It rests upon anyone who supports the action of the Municipality to show that it had statutory authority to divert a portion of a public street for such a purpose. A Municipality has no power to authorise the use of a part of the street for the purpose of keeping logs of wood for sale. 50 Bom. 674=28 Bom. L.R. 1033=27 Cr.L.J. 1160=97 Ind. Cas. 744=A.I.R. 1926 Bom. 535 (D.B.).

——S. 90 (3)—Manner of work must be specified.

Where the manner in which the work is to be carried out is not attempted to be specified, the conviction must be set aside. 25 Bom.L.R. 1218=25 Cr. L.J. 990=81 Ind. Cas. 638=A.I.R. 1924 Bom. 116 (D.B.).

——S. 90 (5)—Declaration under—Effect of.

Sub-S. (5) contemplates a private street being declared by the Municipality as a public street, but thereby the soil of such street does not come to be of the ownership of the Municipality. The only effect of such a declaration is that the street is allowed to be used by the public, and the public can claim a right of way over it as contemplated by S. 3, Sub-S. (13) (a) of the Act. Therefore the decision of the City Survey Enquiry Officer that certain land was a public street does not declare that the Municipality was the owner of the soil of the street. On failure of a person to file a suit within one year after the decision of the City Survey Enquiry Officer, he is debarred from challenging the Municipality's claim that the land is a public street; but he is not debarred from claiming that even though it is a public street, the soil of the street belongs to him. A.I.R. (Vol. 26) 1939 Bom. 501=41 Bom.L.R. 1097=187 Ind. Cas. 166.

——S. 91-A (3)—"Permission"—Meaning of.

"Permission" in S. 91-A (3) means the permission referred to in S. 96 (2) and does not include right to proceed given in S. 96 (4). 120 Ind. Cas. 85=A.I.R. 1930 Sind 20.

——S. 92—Scope.

A portion of a building was within alignment area about two and a half feet on one side and six feet at the other end. The external masonry wall was demolished and pillars and door frames and doors were erected. Parts of the floor and parts of the side wall came within alignment area on the street side. The flooring and side wall within alignment area were renewed.

Held, that the owner of the house took down a material portion of the projecting part of his building projecting beyond the regular line of the street as determined on for the future within the meaning of S. 92. 120 Ind. Cas. 85=A.I.R. 1930 Sind 20.

——Ss. 92 and 96—Scope—Powers of Municipality.

Notice or permission is required in the case of all buildings whether on a public road or in a private **mohala**. S. 96 of the Act does not empower the Municipality to deprive the owners of the legitimate use of their lands or to refuse permission to build at all, but confers a power of regulating the buildings with a view to secure their safety and sanitation. 44 Ind. Cas. 346=19 Cr.L.J. 330=11 S.L.R. 90.

——S. 92 (1) (b)—"Demolition and Reconstruction"—What is.

There were wooden pillars facing a street; on them was a continuous gallery or balcony which formed part of a room without any wall dividing the gallery from the room and with a common roof over the two. The owner of the house removed the old wooden pillars and replaced them by pillars of masonry. He also removed the old galleries and replaced them by new galleries forming part of the room next to them and without any dividing wall. The galleries were within alignment area.

Held, that the whole portion within the alignment area was demolished and reconstructed. 120 Ind. Cas. 85=A.I.R. 1930 Sind 20.

——S. 92—Set back—When can be ordered.

Where the conditions contemplated by S. 92 of the Act do not exist, no set back can be obtained by the Municipality and an owner can rebuild in spite of the condition to set back laid down by the Municipality and can restrain the latter by injunction from pulling down the house built in contravention of such condition. 38 Bom. 597=25 Ind. Cas. 411=16 Bom.L.R. 529.

——Ss. 92, 160—Sale—Validity—Price unascertainable—Contract Act, S. 50.

To make a contract binding price is of the essence; and where it is unascertainable S. 50 of the Contract Act is inapplicable and consequently invalidates a sale. 14 S.L.R. 22=58 Ind. Cas. 591.

Synopsis.

——S. 96.

1. **Scope of.**
2. **Enquiry under—Scope.**
3. **"Building".**
4. **"Any building."**
5. "Erecting a building".
6. "Conversion of any building."
7. "Limits of proposed building."
8. Offence under.
9. Powers of Municipality.
10. Revocation of permission.
11. Time limit.
12. Privies.
13. Revision.
14. Sub-S. (1) (b)—Construction.
15. Sub-S. (2)—Scope of.
16. Sub-S. (4).
17. Sub-S. (6).

1. Scope.

——Ss. 96 and 113—Scope of.

Projections overhanging public streets and built contrary to permission of Municipality but not coming under S. 113 (3) and allowed to remain for 16 years must not be removed by the municipality by executive action. 23 Bom.L.R. 193=62 Ind. Cas. 913=A.I.R. 1921 Bom. 130 (D.B.).

——Ss. 96, 113—Scope of.

The plaintiff obtained permission from the Municipality on 4—10—1897 to erect a projection of certain size. He erected a projection of a larger size and so on 13—6—1898 the Municipality gave him notice to remove the projection and on his failure to comply, prosecuted him under S. 33 of the Act (VI of 1873) but the prosecution failed. The plaintiff asked the Municipality for cancellation of the notice but the question was left to a Sub-Committee and it did nothing; on 23—7—1914 the Municipality again served him with a notice under Ss. 113 and 96 on which he sued the Municipality for injunction restraining them from cutting the projection. **Held,** that as the projection did not come within Ss. 11, 3 (3) and there was delay of 16 years, the injunctions should be granted, that the notice of 23—7—1914 was invalid and the Municipality had no right to remove the projection by executive action. 62 Ind. Cas. 913=23 Bom.L.R. 193.

2. Enquiry under—Scope.

——S. 96—Question of title—Relevancy—Permission to build.

Per **Crump, J.**—For the purposes of S. 96, Bombay District Municipal Act, the question of title is altogether irrelevant. Therefore a flaw in the applicant's title is no ground for refusing permission and once the permission is given it cannot be cancelled. 23 Bom.L.R. 244=61 Ind. Cas. 428=45 Bom. 797.

——S. 96—Information regarding ownership—Right of Municipality to call for.

The question whether under S. 96 of the Bombay District Municipalities Act, 1901, the Municipality has jurisdiction or right to call for information regarding ownership must be decided on the circumstances of each case. Where, however, a person so produces the title deeds and furnishes the information asked for, he is bound to wait for one month from that date for the orders of the Municipality before he can proceed with the intended construction. (1904) 6 Bom.L.R. 581.

3. "Building."

——Ss. 96 and 3 (7)—"Building"—Erection of wall on old foundation—Permission is necessary.

Rebuilding of a wall from its foundation is equivalent to "Building" under the Act and Committee's permission is necessary. A.I.R. 1923 Bom. 407=76 Ind. Cas. 478 (D.B.).

——S. 96—Building—Addition of otla to existing building—Permission, if necessary.

Where a person builds an otla to his house without permission under S. 96 of the Act, he is liable to have the otla removed at the instance of the Municipality independently of the question whether the otla is built on his land or on a land forming part of the public street. 44 Bom. 198=55 Ind. Cas. 318=22 Bom.L.R. 61.

——Ss. 96 (5) and 161 (1)—"Building"—House and compound walls—Foundation begun long before 6 months—Walls begun within 6 months—Prosecution in respect of walls is in time—"Makes" means not only beginning of a building but also its continuance.

The erection of a wall of a building is a distinct stage from the stage of laying its foundations; and house-walls, as well as compound walls are covered by the word "building" in S. 96. The words "or makes" show that it is not only the mere beginning of a building that is punishable, but its continuance even to completion without the requisite permission, or in defiance of legal orders. Therefore, where the walls of a building for which no sanction has been obtained have been built within 6 months, prosecution in respect of such walls is in time although the foundation was begun long before 6 months. 51 Bom. 818=29 Bom.L.R. 733=8 A.I.Cr.R. 418=103 Ind. Cas. 602=28 Cr.L.J. 714=A.I.R. 1927 Bom. 401 (D.B.).

4. "Any building."

——S. 96—'Any building'—If covers one in a private Mahala.

The words "any building" in S. 96 are wide enough to cover a building in a private Mahala. 66 Ind. Cas. 999=15 Sind.L.R. 171=23 Cr.L.J. 343=A.I.R. 1922 Sind 22 (D.B.).

5. "Erecting a building."

——S. 96—Erecting a building—Rebuilding a wall that had fallen.

One of the walls of the house of the accused having fallen down he applied on the 19th April 1910, to the Municipality for leave to re-construct it. Without having received the leave or without waiting for it for one month from the date of his application he re-built the wall on the 11th May, 1910. On the 13th idem, the Municipality issued an order to the accused prohibiting him from marking the construction. The accused was, upon these facts, prosecuted under S. 26 of the Bombay District Municipal Act, 1901, but was acquitted by the Magistrate. The Municipality having appealed. **Held**, reversing the order of acquittal that the accused had erected a building within the meaning of S. 96 of the Bombay District Municipal Act inasmuch as in re-building the wall which had fallen there was a material re-construction or an erection of a building as defined in the explanation to the section. 35 Bom. 236=12 Bom.L.R. 1060=8 Ind. Cas. 1050.

——S. 96—"Erecting a building"—Meaning of.

The re-construction of a small wall upon its own foundation is not necessarily the "erection of a building" within S. 96. (Per **Heaton, J.**) (**contra Chandavarkar, J.**) "Building" as contemplated by S. 96 is the whole house and not a single wall of the house which is only a part of a building. It is a question of fact whether the re-construction of any particular wall or portions of a building is substantially a re-construction of the building. 35 Bom. 412=11 Ind. Cas. 610=13 Bom.L.R. 494=12 Cr. L.J. 426.

——S. 96—"Erecting a building"—Erection of stone compound wall at a distance is erecting building.

Erecting a stone compound-wall at a distance from the house is erecting a building within the meaning of S. 96. 45 Bom. 1151=23 Bom.L.R. 831=22 Cr.L.J. 622=63 Ind. Cas. 158=A.I.R. 1921 Bom. 62 (D.B.).

6. "Conversion of any building".

——S. 96 (Explanation)—Conversion of any building'—Meaning of.

The words 'conversion of any building' in Explanation to S. 96 necessarily imply some change in the building itself. The section will not apply if the building remains absolutely unchanged and the only thing that is changed is the use or occupation to which the building is put. Conversion of a shop into a dwelling house does not fall under the section. 28 Ind. Cas. 517=17 Bom.L.R. 212=16 Cr.L.J. 293.

7. "Limits of proposed building'.

——S. 96 (1)—"Limits of proposed building"—Meaning of.

The words "regarding the limits of the proposed building" in sub-S. (1) of S. 96, refer to the limits of the building apart from any question as to its location with reference to any existing or projected streets. 51 Bom. 818=29 Bom.L.R. 733=8 A.I. Cr.R. 418=103 Ind. Cas. 602=28 Cr.L.J. 714=A.I.R. 1927 Bom. 401 (D.B.).

8. Offence under.

——Ss. 96, 92 and 91-A—Offence under—Building beyond street-line.

The Rander Municipality granted permission to the accused to build, subject to the condition that the house should be built after leaving open the land within the alignment of the road in front. The accused, in spite of the condition, built up his house within the alignment.

Held, that the accused had offended against S. 96 as amended in 1914; for he was bound to ask for permission to re-construct his building within the regular line of the street and the Municipality were entitled to issue such orders as they thought proper not inconsistent with the Act and to impose in writing such conditions with reference to the location of the building in relation to any street existing or projected as they thought proper. Under S. 92 certain powers are gives to a Municipality, if any of the conditions mentioned therein exist, to require the owner by written notice to remove his building to

the regular line of the street or the front of the adjoining building on either side. 89 Ind. Cas. 1031 =26 Cr.L.J. 1463=27 Bom.L.R. 1023=A.I.R. 1925 Bom. 505 (D.B.).

——S. 96—Offence—Essentials of—Construction begun without notice—Prosecution.

To establish an offence under S. 96 (5), Bombay District Municipal Act, all that is necessary is to show that the accused had begun a construction, or started altering an existing construction or added to it or reconstructed it, without giving a notice thereof in writing to the Municipality as required by sub-S. (1); and the question whether a wrong notice was given by the Municipality or not is entirely immaterial. The Municipality is not bound to give the notice under sub-S. (3) though ordinarily it would give such notice. But whether it does or not, the offence is complete under sub-S. (5) as soon as a person begins any construction, alteration, addition or re-construction without giving the notice required under sub-S. (1).

Where a person begins to erect a new structure without giving any notice to Municipality as required by S. 96 (1) and the Committee prosecutes him, there is reasonable and probable cause for the Municipality to launch it and a suit for malicious prosecution does not lie. A.I.R. (Vol. 24) 1937 Bom. 37=38 Bom.L.R. 1098=166 Ind. Cas. 925.

——Ss. 96—Offender under—Alteration of charge into one under S. 97—Legality.

The Magistrate, when once he had come to the conclusion that the offence of the accused of erecting huts on Municipal land without permission did not come within S. 96, could not alter the charge and treat the offence as if it was punishable under S. 97 read with S. 155. 66 Ind. Cas. 323=24 Bom. L.R. 105=46 Bom. 657=23 Cr.L.J. 259=A.I.R. 1922 Bom. 97 (D.B.).

9. Powers of Municipality.

——Ss. 96, 113 and 122—Order as to manner in which doors and windows are to be opened.

It is only those departures from the plans submitted that involve also disobedience to a legal order or the infringement of a bye-law or of some provision of the Act that justify an action on the part of the Municipality. No order as to the manner in which the doors and windows are to be opened can be legally issued under S. 96 of the Act. Ss. 113 and 122 do not apply where an obstruction is merely apprehended. 20 Ind. Cas. 572=7 S.L.R. 31.

——S. 96—Order prohibiting doors to project into street, legality of.

A Municipality is under S. 96 competent to order the owner of a house to construct the doors of his house in such a way as not to project into the street. 33 Ind. Cas. 675=9 S.L.R. 126.

——S. 96—Power to prevent owner of land from building on almost one-third of land for interests of health of locality.

Where a Municipality withholds sanction from an owner to build on about one-third of his own land because the land unbuilt on forms an open lung in a congested area and further congestion on the area would create insanitary conditions which would endanger the health of the locality, such action is in excess of powers possessed by the Municipality. In such case the Municipality should properly acquire the plot in the interest of the sanitation and health of the locality. A.I.R. (Vol. 20) 1933 Sind 227 =150 Ind. Cas. 457.

——S. 96—Permission amounting to refusal—Validity.

The Municipality have no power on an application to build, to pass an order which practically amounts to a refusal. They would be entitled to direct that the proposed building should be set back to a certain distance from the street, but they would not be entitled to order that on each side of the building open spaces should be left with the object of preventing the applicant from building at all. The Municipality must acquire the land in the proper way if they wish to create open spaces. 27 Bom. L.R. 429=87 Ind. Cas. 948=A.I.R. 1925 Bom. 345 (D.B.).

10. Revocation of permission.

——S. 96—Permission to build—If can be revoked.

A permission to build once granted cannot be revoked whatever the rights of the Municipality against the party concerned, in respect of the land may be. 45 Bom. 797=23 Bom.L.R. 244=61 Ind. Cas. 428=A.I.R. 1921 Bom. 439 (D.B.).

——S. 96—Order under if revocable.

An order issued under the Act to build a house cannot be rescinded or varied from time to time. The whole tenor of the section is to consider the merits of the application and pass order once and for all. A conviction under a fresh order for non-compliance was held illegal. 19 Bom.L.R. 65=39 Ind. Cas. 298=18 Cr.L.J. 458.

——S. 96—Permission—Revocation—Injunction.

Held, that the first order made by the Municipality granting permission to build the privy was a final order under S. 96 (2) of the Act and the subsequent order which purported to be provisional in its character was therefore not legal. Consequently the plaintiff was entitled to the injunction claimed, he having commenced the work within a year under S. 96 (1) of the Act. 42 Bom. 629=47 Ind. Cas. 145=20 Bom.L.R. 756.

11. Time limit.

——S. 96—Permission for re-building—Time limit for finishing—Validity.

If the work rebuilding is begun within six months allowed by the permission under S. 96, the owner commits no offence. Although the Municipality has power to say that a work to which it gave permission under S. 96 of the District Municipalities Act should be begun within a certain time it is doubtful whether it has power to say that a work must be finished within a given time. Per Hayward, J.—The time of limitation contained in the permission for re-building was **ultra vires** and a limitation was not contemplated by the legislature in enacting S. 96 in its present form in Bombay Act II of 1904. 20 Cr.L.J. 438=51 Ind. Cas. 262=21 Bom.L.R. 255.

12. Privies.

——S. 96—By-laws 9—Does not apply to privies built without permission.

So far as R. 9 is concerned, it seems clear that the communication that is required by S. 9 to be

made after the completion of the privy relates to a privy with reference to which permission has been granted under R. 8, and not to a privy which has been constructed without the permission of the municipality. 26 Bom.L.R. 715=25 Cr.L.J. 1290 =82 Ind. Cas. 362=A.I.R. 1924 Bom. 484 (D.B.).

13. Revision.

——S. 96—Revision—High Court will interfere in revision where Municipality has acted capriciously or unreasonably—Motive of Municipality is irrelevant where it has acted in accordance with law.

No doubt High Court will interfere where it is clearly shown that a Municipality, or other public body, has acted capriciously, arbitrarily, or unreasonably to the prejudice of the applicant, in delaying the sanction. But a Court of law is not entitled to go into the question of the exact motive with which the Municipality or an officer of the Municipality has acted, provided that the action taken is in accordance with law. The question of motive then becomes irrelevant. 51 Bom. 818=29 Bom. L.R. 733=103 Ind. Cas. 602=28 Cr.L.J. 714=8 A.I.Cr.R. 418=A.I.R. 1927 Bom. 401 (D.B.).

14. S. (1) (b)—Construction.

——S. 96 (1) (b)—"All information they may require", etc.—Meaning of.

The words "all information they may require regarding the location of the building with reference to any existing or projected streets" in S. 96 (1) (b) are wide enough to include a demand for a modified plan, excluding certain land which falls within the alignment of a proposed street and proposed to be built upon. 51 Bom. 818=29 Bom.L.R. 733=8 A.I.Cr.R. 418=103 Ind. Cas. 602=28 Cr. L.J. 714=A.I.R. 1927 Bom. 401 (D.B.).

15. Sub-S. (2)—Scope of.

——S. 96 (2)—Scope of.

Sub-S. (2) of S. 96 provides three options none of which permits the Municipality to refuse in general terms permission to build. All that they permit is to impose conditions of special classes nor are these the only limitations upon the powers of the Municipality. A.I.R. (Vol. 24) 1937 Bom. 177= 39 Bom.L.R. 142=168 Ind. Cas. 705.

——S. 96 (2)—Scope of—Power of Municipalities to regulate buildings.

The powers of Municipalities as under S. 96 (2) are very wide and are subject to two restrictions, viz., (1) the orders should be reasonable; and (2) that orders should not be inconsistent with the Act. 33 Ind. Cas. 675=9 S.L.R. 125.

——Ss. 96 (2) and 91-A—Application to rebuild wall—Condition that wall should be set back to the regular line prescribed for the street—Legality of.

The petitioner applied for permission of the Municipality to rebuild a wall and the Municipality granted him permission, subject to the condition that the wall should be set back a certain specified distance from the street. The petitioner reconstructed the wall without complying with this condition and was prosecuted for doing so under S. 96 (5), Bombay District Municipal Act:

Held, that until the Municipality prescribed a line under the powers which they acquired in 1927, on the notification of Government, they were not in a position to take advantage of S. 91-A and that the condition imposed by the Municipality was not justifiable under S. 96 (2), as the set-back required in this case was not in relation to any street existing or projected, but was really in relation to some future possible widening of the existing street, and hence the petitioner did not commit any offence. A.I.R. (Vol. 21) 1934 Bom. 154=36 Bom.L.R. 217=35 Cr.L.J. 8[illegible]4=1934 Cr. Cas. 541=148 Ind. Cas. 1008.

16. Sub-S. (4).

——S. 96 (4)—Reconstruction—Right of owner.

S. 96 (4) only authorizes a person to proceed in such manner as is not inconsistent with any provisions of the Act including S. 91-A or of any bye-law. It is unreasonable to hold that under S. 96 (4) a person has a right to reconstruct a material part of his building within set back area unless in his notice or in the plans submitted under S. 96 (1) he has clearly given notice to the municipality of his intention to do so. 120 Ind. Cas. 85=A.I.R. 1930 Sind 20.

——S. 96 (4) (a)—"Provisional order"—Meaning of.

Where plaintiff applied to the Municipal Committee for permission to build a house and balconies and he was informed that the matter was referred to Managing Committee and that till then he should not build balconies. One year after, receiving no reply, plaintiff, built the balconies, reported the matter to the Municipality who asked him to demolish the balconies. Plaintiff sued for injunction. **Held**, the order prohibiting the construction of balconies was valid for one month only and that plaintiff need not demolish the building. "Any provisional order" in S. 96 (4) (a) (ii) refers only to a subsisting provisional order. 36 Bom. 61=12 Ind. Cas. 551= 13 Bom.L.R. 914.

——S. 96 (4) (b)—"Further orders"—If include demand for further particulars.

The words "further orders" in Cl. (b) of S. 96 (4) do not mean only orders of the kind referred to in Sub-S. (2) and they include any demand for further particulars. 51 Bom. 818=29 Bom.L.R. 733= 8 A.I.Cr.R. 418=103 Ind. Cas. 602=28 Cr.L.J. 714=A.I.R. 1927 Bom. 401 (D.B.).

17. Sub-S. (6).

——S. 96 (6)—Amended—Meaning.

The word 'amended' in S. 96 (6) is wide enough to cover any demolition necessary to alter a building to make it comply with the Act or the bye-law contravened. 62 Ind. Cas. 913=23 Bom.L.R. 193.

——Ss. 101 (1) and 107 (1)—Scope.

A notice served upon the Respondent by which he is called upon to repair two sinks on the first storey so as to discharge waste water into the drainage-cesspool falls under S. 101 (1) and not under S. 107. 25 Cr.L.J. 1148=81 Ind. Cas. 972=A.I.R. 1924 Bom. 70 (D.B.).

——S. 106 (3)—Discretion—Power of Municipality to order alteration in position of trap-door sanctioned by managing committee.

When a person puts in, the trap-door to the privy to the south opening on to a street with the permission of the managing committee, it is open, under the

discretionary powers given by S. 106 (3), to the Municipality if it considers it to be a nuisance to order him to alter it to the east. 31 B.L.R. 1295=124 Ind. Cas. 105=A.I.R. 1930 Bom. 43 (D.B.).

——S. 106 (c) (3)—Award of compensation by Dt. Court—Procedure—Revision.

The District Court deciding the amount of compensation under S. 160, Cl. (3) of the Bombay District Municipal Act acts as a Civil Court and its proceedings are open to revision under S. 115 of the C. P. Code. The word "procedure" in S. 160, Cl. (3) of the Act is used in a popular and not in a strictly legal sense and a District Court in awarding compensation under that section can award 15 per cent. of the market-value in addition to such value. 44 Ind. Cas. 363=11 S.L.R. 93.

——S. 107—Order to remove cesspool—Validity.

A District Municipality issued a written notice under S. 107 (2) of the Bombay District Municipal Act, 1901 to the accused stating that the cess-pool of his house was a nuisance and that therefore within seven days from the receipt of the notice the pipe and the drain of the cess-pool should be removed, and that if no steps were taken as directed within the time fixed, steps would be taken according to law. The accused disobeyed this notice for which he was prosecuted under S. 155 of the Act. **Held,** that as there was no power given under S. 107 (2) of the Act to the Municipality to lawfully direct an owner or occupier to demolish or close a cess-pool himself there was no disobedience of any lawful direction on the part of the accused under S. 155 of the District Municipal Act. (1909) 11 Bom.L.R. 1349=4 Ind. Cas. 835.

——Ss. 107 and 131—Notice cannot be served on a person as agent nor can he be prosecuted on such notice. 18 S.L.R. 90=88 Ind. Cas. 187=26 Cr. L.J. 1099=A.I.R. 1925 Sind 262 (D.B.).

——Ss. 113 and 122—Rules for projections on public streets—If ultra vires.

Under S. 113 it is open to a Municipality to prescribe rules for projections on public streets and a bye-law to that effect is not **ultra vires**. 42 Bom. 454=20 Bom.L.R. 388=45 Ind. Cas. 503=19 Cr. L.J. 599.

——Ss. 113 and 122—Applicability—Encroachment for over 12 years.

Under Ss. 113 and 122 of the Bom. Dt. Municipal Act, it is immaterial if the encroachment existed for more than 12 years. The statutory conditions for exercising power under either section must be shown to exist. 38 Bom. 15=21 Ind. Cas. 313=15 Bom.L.R. 833.

——S. 113—Applicability—House abutting private street.

S. 113 which empowers the Municipality to regulate the height of the eaves does not apply to the eaves of a house which abuts on a private street. 31 Bom.L.R. 578=120 Ind. Cas. 360=1929 Cr.C. 37=31 Cr.L.J. 108=A.I.R. 1929 Bom. 286 (D.B.).

——Ss. 113 and 70—Agreement between Municipality and grantee—If contemplated.

Sections 113 and 70 do not contemplate any agreement between the Municipality and the grantee but a written permission to be issued on the terms laid down under S. 113 and on payment of the prescribed fees. Once the fee is paid, permission issued and the balconies erected in accordance with the regulations set out under S. 48 (1) (n), the matter is at an end. A.I.R. (Vol. 32) 1945 Sind 116.

——S. 120—Private well.

The Municipality has no right to require a private individual owning well used by the public to keep up the well. 17 S.L.R. 330=79 Ind. Cas. 409=A.I.R. 1924 Sind 139 (D.B.).

——S. 122—Public street — Encroachment—Adverse possession.

The site of an encroachment on the public street existing for over thirty years, no longer forms part of the street but belongs to the party who has been in adverse possession thereof and the Municipality cannot take action under S. 122 of the Act. 22 Bom.L.R. 1028.

——S. 122—Action under—Power of Municipality—Verandah standing on part of public street for more than 30 years.

When a verandah is standing on part of a public street for more than thirty years the Municipality cannot issue notice under S. 122 for its removal as the owner of verandah gets title to the site under it by virtue of S. 28 and Art. 146-A, Limitation Act. 58 Ind. Cas. 326=22 Bom.L.R. 951.

——S. 122—Action under—Power of Municipality—Thirty years old Obstruction.

The plaintiff who encroached upon a portion of a public street by building upon it, was called upon by the defendant Municipality to remove the obstruction, after 30 years under S. 122 of the Bom. Dt. Municipal Act. In the suit by the plaintiff to restrain the Municipality from removing the obstruction. **Held,** that the defendant Municipality could take no action under S. 122 of the Act after 30 years to remove the encroachment, it having been barred from filing a suit for the possession of the site encroached upon, the site was no longer a part of the public street but belonged to the plaintiff. 46 Bom. 335=64 Ind. Cas. 202=23 Bom.L.R. 1028=A.I.R. 1922 Bom. 111 (D.B.).

——S. 122—Power to issue Notice.

Section 122 gives no power to a Municipality to issue a notice to a person alleged to have erected an encroachment to remove it. Although the Municipality may send such a notice, it is not a notice under the section. Such a notice may be sent as a matter of courtesy, preliminary to the Municipality taking action under the powers given them by the section to remove an encroachment themselves. 24 Bom.L.R. 384=66 Ind. Cas. 817=23 Cr.L.J. 321=A.I.R. 1923 Bom. 30 (D.B.).

——S. 131—Liability of Occupier.

An occupier of land cannot plead as a defence to a notice under S. 131, that none but the owner is responsible to remove a nuisance. 18 S.L.R. 104=87 Ind. Cas. 104=26 Cr.L.J. 952=A.I.R. 1925 Sind 264 (D.B.).

——Ss. 131, 135, 155—Notice by Municipality—Aloe plantation—Nuisance—Proof required.

Section 131 of the Bombay District Municipal Act renders the owner liable for non-compliance with a notice issued under it, not when the Municipality considers vegetation to be rank or noisome but only when the vegetation is actually so. To support a conviction under the section for non-compliance with

a notice, the prosecution must establish affirmatively the objectionable character of the vegetation. To support a conviction for non-compliance with a notice under S. 135 of the Act, it must be shown that there is some pool, ditch, tank, hole, water channel, receptacle of foul water, etc., of the kind mentioned in the section, the filling, cleansing, draining or removal of which the Municipality has directed by notice or with regard to which the Municipality has directed such measure to be taken as it considers necessary to abate or remove the nuisance. (1906) 9 Bom. L. R. 247.

——**S. 139**—There is no conflict between S. 139 of the above Act and S. 1, Bombay Markets and Fairs Act (IV of 1862). Where therefore a person establishes a cattle market on his private land within municipal limits, without permission from the District Magistrate as required by S. 1, Bombay Markets and Fairs Act, he is guilty under that section. A.I.R. (Vol. 27) 1940 Bom. 306=42 Bom.L.R. 584=I.L.R. (1940) Bom. 522=42 Cr. L.J. 84=191 Ind. Cas. 121.

——S. 142—Liability of commission agent.

S. 142, Bombay District Municipal Act, gives protection to mere bailees and not to agents who are not mere bailees of goods entrusted to them but may sell or otherwise dispose of the goods. A.I.R. (Vol. 18) 1931 Sind 39=32 Cr.L.J. 664=25 S.L.R. 87=1931 Cr. Cas. 199=131 Ind. Cas. 134.

——S. 142—Delegation of power to destroy articles.

Under the said section it is for the Magistrate to decide whether the article of food should be destroyed or should be disposed of he cannot delegate this function to the Health Officer of the Municipality. A.I.R. (Vol. 18) 1931 Sind 39=32 Cr.L.J. 664 =25 S.L.R. 87=1931 Cr. Cas. 199=131 Ind. Cas. 134.

——S. 142 (1)—Scope—Section does not create any offence.

No offence with reference to meat can be committed under S. 142 (1). The power which the section gives to the Municipality is the power to destroy forthwith the unwholesome article. 45 Bom. 193=A.I.R. 1921 Bom. 155=22 Bom.L.R. 889= 21 Cr.L.J. 733=58 Ind Cas. 157.

——S. 145-A—Permission to build on old wall—Pulling down the wall and rebuilding it—Municipality cannot withhold permission.

Plaintiff wanted to build another storey on his western wall, and got permission. According to a compromise in a dispute with his neighbours he agreed to pull down the old wall on which he was going to build and to build further back. The Municipal Committee objected to this. The plaintiff therefore began to follow out his old plan. The Municipality again objected.

Held, the objection was factious. The Municipality was not entitled to object to the rebuilding of the old wall where it stood with the addition to which it had given permission. A.I.R. 1922 Bom. 344 (D.B.).

——S. 151—Continuing Fine—Award of—Proof required.

Before a continuing fine is imposed for a continuing offence it must be alleged and proved that the accused had continued to use the premises for a specific number of days after his conviction, and that he had no license during those days. This charge must be the subject of a separate prosecution, and a separate inquiry. It is only on proof of the charge so laid that the Magistrate is called upon to exercise the discretion and to determine what would be the proper amount of fine per day which the accused should be made to pay and to give a finding as to the number of days for which such fine is to be levied. 23 S.L.R. 125=115 Ind. Cas. 307 =30 Cr.L.J. 442=12 A.I.Cr.R. 260=A.I.R. 1929 Sind 50 (D.B.).

——S. 151—Conviction under—Proof required.

For a conviction under the section, it should be proved (i) that a notice has been given to accused under Sub-S. (1) and (ii) that he uses the place in question or permits it to be used in the manner specified; the mere fact that notice in due form was given regarding the user of the place on a particular date cannot be conclusive evidence that there has been user of the place in such a manner as to be a nuisance after that date. 8 S.L.R. 238=28 Ind. Cas. 111=16 Cr.L.J. 255.

——S. 151 (1)—Offence under—Manufacture of Oil.

A manufactory or place of business where machinery is used for the purpose of extracting oil does involve a risk of fire. A person can, therefore, be convicted for manufacturing oil by means of machinery within the Municipal district without obtaining a license in respect thereof. 23 S.L.R. 125=115 Ind. Cas. 307=30 Cr.L.J. 442=12 A.I.Cr.R. 260 =A.I.R. 1929 Sind 50 (D.B.).

——S. 151—Notice—Conditions.

A notice under S. 151 can be issued by the Municipality if it is satisfied that the smell which issues in the ordinary course of working the factory with ordinary care is so offensive as to cause annoyance to the neighbourhood. If annoyance is caused only by reason of improper user it must be actually dangerous to life, health or property. 9 Ind. Cas. 886=5 S.L.R. 11.

——S. 151 (1)—Nuisance—Lime kiln—Order by Municipality—Interference by civil Court.

A District Municipality can under S. 151 require the owner of a lime-kiln within Municipal limits to desist from carrying out or allowing to be carried out the intention to use it as a lime-kiln if it thinks that it is or is likely to be a nuisance to the neighbourhood. The civil Court will not interfere with that power unless the Municipality is shown to have exercised it in an improper manner. It is only for the purpose of seeing whether the Municipality has exercised its power in the proper way that the Court will consider the evidence to see what steps the Municipality took before it issued the notice. The Court will not however deal with the question whether what is complained of by the Municipality is likely to be a nuisance and consider whether that particular use of land within the Municipal limits is a nuisance or is likely to become a nuisance to the neighbourhood. 57 Ind. Cas. 988=22 Bom.L.R. 838=44 B. 738.

——S. 151 (1) (n)—Scope—Keeping wood for selling comes properly within Cl. (n).

Where the accused used what is described as a

shop for selling wood, and kept wood there in order to sell it.

Held, that it is a case which properly comes within the meaning of Cl. (n) as there would be continual storing of wood for the purpose of selling it, and not a casual storage of a few days' supply for domestic use. 50 Bom. 760=28 B.L.R. 1070=27 Cr.L.J. 1179=97 Ind. Cas. 811=A.I.R. 1926 Bom. 546 (D.B.).

——S. 151 (1) (o)—Applicability of—Factory, meaning of.

In order that S. 151 (1) (o) may apply, it is necessary that an objectionable smell must arise in the usual course of the working of the manufactory. It is not sufficient if such smell may arise from negligent user. A flour mill worked by a camel is not a manufactory within the meaning of S. 151 (o). 9 Ind. Cas. 886=5 S.L.R. 11.

——S. 155—Daily fine—Award of—Conditions.

There must first be a conviction for the breach, and again a subsequent conviction for continuing the breach from the date of the first conviction, before an order can be passed inflicting a daily fine. 23 S.L.R. 222=115 Ind. Cas. 308=30 Cr.L.J. 443=12 A.I.Cr.R. 424=A.I.R. 1929 Sind 52 (D.B.).

——S. 155—Daily fine—Legality—No previous conviction.

A Court cannot sentence a person to pay a fine for a prospective offence, but can only impose a daily fine for failure or disobedience which is proved to have continued for a certain period after the date of the first conviction or after the date of such notice or requisition as may be required by the enactment. The last words in S. 155 show that there should be a conviction for a previous breach, and then a subsequent conviction for continuing the breach after the date of that first conviction, and therefore when there is no previous conviction under S. 155, a Magistrate cannot impose a continuing daily fine. 28 Bom. L.R. 1040=98 Ind. Cas. 400=27 Cr.L.J. 1328=A.I.R. 1926 Bom. 526 (D.B.).

——S. 155—Lawful order—Notice under S. 122.

Where the accused was served with a notice under S. 122 of the Act to remove an otla which he had constructed and was convicted under S. 155 for having disobeyed a lawful order; **held,** on application to the High Court that no notice need be issued under S. 122 and therefore disobedience of such a notice does not amount to disobedience of a lawful order within S. 155. 24 Bom.L.R. 384=23 Cr. L.J. 321=66 Ind. Cas. 817=A.I.R. 1923 Bom. 30 (D.B.).

——Ss. 155, 161—Prosecution by private individual—Competency.

Under the Bombay Municipal Act, a prosecution in respect of an act which is an offence only under that Act and not under any other Act can be instituted by the Municipality alone and not by a private individual.

In regard to acts which are offences under the special law as well as offences under the general law, the fact that an act is an offence under a special law cannot exclude the right of any individual aggrieved to lodge a complaint under the more general law. But where an act is not an offence under general law but under the special law, under which a certain public authority is invested with a definite duty and with definite powers to discharge it, the question is more doubtful. A.I.R. (Vol. 18) 1931 Bom. 141 =32 Bom.L.R. 1502=32 Cr.L.J. 280=55 Bom. 89 =129 Ind. Cas. 342.

——S. 159—Form of Notice.

There is nothing in S. 159 of the Bombay District Municipalities Act which authorizes a Municipality issuing a notice under that section to give any direction to the person to whom the notice is given to do anything that they may require. The notice has to be simply an intimation to an occupier of the land that the Municipality will enter for the purposes mentioned in the section at a specified hour on a specified day. If the occupant does anything to prevent the entrance, he cannot be said to disobey the notice; but his act will amount to wrongful restraint or wilful obstruction as the case may be. (1904) 6 Bom.L.R. 538.

——Ss. 160 and 92—Applicability.

Where a party is precluded from exercising power under S. 92 of the Act S. 160 is inapplicable. 58 Ind. Cas. 591=14 S.L.R. 22.

——S. 160—Award without collective deliberation—Validity.

There is no such thing as an umpire contemplated by S. 160. An award under S. 160, without collective deliberation is bad. (1907) 10 Bom.L.R. 617.

——S. 160 (3)—Contract of sale at a fair valuation—Acceptance of proposal—Difference as to price—Court's jurisdiction.

The Poona City Municipality having determined to acquire a portion of the plaintiff's house for the purpose of widening a street, the plaintiff expressed his willingness to allow the Municipality to acquire the same but they could not agree as to the price. That question was referred to arbitration as required by S. 160 of the Bombay District Municipal Act, 1901, but the proceedings before the arbitrators were not successful. The plaintiff then applied to the District Judge, under S. 160 (3) of the Act requesting him to ascertain and determine the compensation payable. The District Judge made his award. The Municipality appealed from the award contending that they no longer required the plaintiff's premises and that there never was a completed contract with the plaintiff, **Held,** (1) that there was a contract of sale at a fair valuation where the Court not only can provide but under a special statute is compelled to provide the means of ascertaining the price: and of such a contract specific performance would be awardable. (2) that therefore, there was a contract between the parties from which the Municipality could not resile. As a general rule where the agreement is that the price of the estate shall be fixed by arbitrators and they do not fix it there is no contract as the price is of the essence of the contract of sale and the Court cannot make a contract where there is none. But the applicability or otherwise of this doctrine depends upon whether the fixing of the price is of the essence of the contract of sale. Where there is a definite and a completed contract to give and take estate upon terms to be settled thereafter, and the valuation cannot be made **mode et forma,** the Court will substitute itself for the arbitrators. (1908) 10 Bom.L.R. 617.

——S. 160 (3)—Acquisition of land—Temporary boom—Fancy value.

In awarding compensation for acquisition of land under S. 160 (3) of the Act a boom in prices of lands existing owing to certain extraordinary circumstances must be taken into account in estimating the market value of the land to be acquired. Where a portion of land acquires a fancy value as being necessary for widening a street, no compensation is allowed for the severance of the same. 27 Ind. Cas. 326=8 S.L.R. 126.

——S. 160 (3)—Decision of Dt. Court—Execution—Order can be executed as decree.

An order made or a decision given by the District Court under S. 160 (3) of the Bombay District Municipal Act (Bom. Act III of 1901) can be executed and it is not necessary to make any application to the Court to pass a decree in accordance with the order on decision before execution can be taken. 25 Bom.L.R. 305=47 Bom. 654=72 Ind. Cas. 636 =A.I.R. 1923 Bom. 289 (D.B.).

——S. 160 (3)—Decision of Dt. Court—Revision.

An application for revision is not allowed from the decision of a District Court under Cl. (3) of S. 160. 40 Bom. 509=34 Ind. Cas. 21=18 Bom. L.R. 340.

——S. 160 (3)—Order under—Appeal.

The remedy suggested by a statute for the enforcement of the new rights created by it must be followed. Right of appeal cannot be assumed in every matter brought for consideration before a Judge, unless such a right is given by a statute or its equivalent authority. Hence no appeal lies from an order passed by the District Court under S. 160 (3) of the Act as it is not a decree, because it is made under a special jurisdiction created by the Act which does not call it so and not under Civil jurisdiction. 36 Bom. 47=12 Ind. Cas. 540=13 Bom.L.R. 958.

——S. 161 (2)—Order of Magistrate—Revision.

The Magistrate referred to in S. 161 (2) of the Bombay District Municipalities Act is an inferior Criminal Court, and his orders are liable to revision by the High Court. 43 Bom. 864=52 Ind. Cas. 670=20 Cr.L.J. 702=21 Bom.L.R. 775.

——S. 167—Applicability—Crown.

The provision contained in S. 167, Bombay District Municipal Act, relating to notice and the special period of limitation laid down therein for suits against the Municipalities is binding on the Crown. A.I.R. (Vol. 18) 1931 Sind 55=131 Ind. Cas. 181.

——S. 167—Applicability—Suit on contract.

S. 167 of the Bombay District Municipalities Act does not apply to an action brought on a contract. 29 Ind. Cas. 597=8 S.L.R. 294.

——S. 167—Applicability—Suit based upon contract.

A suit based upon contract is excluded from the purview of S. 167 as it may fairly be assumed that every person knows that the law expects him to act according to his contract and not to break it and where he has not acted in accordance with his contract he has thereby knowingly disregarded the provisions of the statute and cannot expect the protection given by it. No notice is, therefore, necessary nor is the rule of six months' limitation applicable to such a suit. 123 Ind. Cas. 237=A.I.R. 1930 Sind 209 (D.B.).

——S. 167—Applicability—Suit for compensation.

To a suit for compensation for land legally acquired S. 167 does not apply. The cause of action in such a case is not the entry but the refusal to pay: or at any rate time runs from the date of an award of compensation under S. 160. Were it otherwise, a municipality might avoid payment by delaying the appointment of arbitrators under the Act. 122 Ind. Cas. 385=A.I.R. 1930 Sind 30.

——S. 167—Applicability—Suit to recover deduction for non-performance of Contract.

A suit by plaintiff to recover the deduction, for non-performance of contract, made under S. 40 from the deposit made by plaintiff will come within the provision of S. 167. 46 Bom. 123=23 Bom.L.R. 881=64 Ind. Cas. 357=A.I.R. 1922 Bom. 380 (D. B.).

——S. 167—Applicability—Suit against Municipality for things done in pursuance of any other Act.

Section 167 of the District Municipal Act, does not apply to all suits against a municipality; it applies to suits against a municipality for things done or purported to be done in pursuance of the District Municipal Act, but this section does not apply in a suit against a municipality for anything done or purported to be done in pursuance of any other Act, for instance, under the Bombay Primary Education Act. Even though under R. 34 (1) there is a right of appeal to the municipality against a dismissal by the school board, nevertheless the power exercised by the municipality in the case of an appeal would be a power conferred by this rule itself made under the Bombay Primary Education Act, and S. 167, District Municipal Act would not apply. A. I. R. (Vol. 30) 1943 Sind 98=I.L.R. (1942) Kar. 553=207 Ind. Cas. 93.

——S. 167 — Applicability — Misapplication of municipal funds—Suit against members of managing committee:

Held, that S. 167 applied and hence the notice prescribed thereunder was necessary. A.I.R. (Vol. 19) 1932 Bom. 562=34 Bom.L.R. 1216=56 Bom. 448=140 Ind. Cas. 213.

——S. 167—Notice—Necessity for—Dismissal of teacher—Suit against School Board.

A suit can lie against a school board in a case of dismissal of a teacher and a notice under S. 167, District Municipal Act, is not necessary, for the suit is not against the municipality and is not under S. 167, District Municipal Act. A.I.R. (Vol. 30) 1943 Sind 98=I.L.R. (1942) Kar. 553=207 Ind. Cas. 93.

——S. 167—Notice—Necessity for—Suit for injunction.

Under S. 167 of the Act no notice is necessary before a suit for injunction is brought. 4 Ind. Cas. 1156, foll. 20 Ind. Cas. 572=7 S.L.R. 31.

——S. 167—Notice—Necessity for—Suit for injunction against Municipality.

The 'expression anything done or purporting to be done in S. 167 applies only where something has been done and not where there is mere apprehension that something will be done; therefore a suit against a Municipality to restrain an apprehended injury is

not bad merely because no notice as required by the section was given as in such a case no notice is necessary. 56 Ind. Cas. 527=14 S.L.R. 46.

——S. 167—Notice—Necessity for—Suit for injunction against Municipality.

A material part of the cause of action in every suit for an injunction is the doing of an act or the omission to do an act which raises an apprehension in the mind of the plaintiff that unless the defendant is restrained by an injunction he will do or omit to do further acts resulting in an injury to the plaintiff and therefore a suit for an injunction is primarily a suit for or arising out of something done or omitted to have been done, and if such act or omission is done or purported to have been done in pursuance of the Bombay District Municipal Act, it clearly falls within S. 167, and hence a suit for an injunction brought against a municipality without previous notice is liable to be dismissed. 54 I.A. 33, Foll. A.I.R. 1930 Sind 287.

——S. 167—Notice—Necessity for—Suit for injunction which is in effect for declaration in respect of resolution.

A suit against a Municipality for an injunction to restrain it from doing a thing which is in effect one for a declaration in respect of the resolutions which had been submitted for discussion at a special meeting of the Municipality, is maintainable only if a month's notice as required by S. 167, Bombay District Municipal Act, is given. A.I.R. (Vol. 19) 1932 Sind 104=26 S.L.R. 78=137 Ind. Cas. 348.

——S. 167—Notice, what amounts to.

A letter of the Superintendent of Police giving intimation to the Municipality that if the Municipality did not accept his view, he would have to approach the authorities who were competent to sanction legal proceedings against the Municipality, is not a notice of suit within the meaning of S. 167, Bombay District Municipal Act. A.I.R. (Vol. 18) 1931 Sind 55=131 Ind. Cas. 181.

——S. 167—Notice of suit—Requirements as to —Karachi Municipality Building Bye-law No. 233—Opposite side of the street, meaning of.

Section 167, Bombay District Municipalities Act, does not require that the notice should be one month's notice commencing on the date of the act complained of but one month's notice in writing of the intended suit.

The words 'opposite side of the street' in bye-law No. 233 framed by the Karachi Municipality under the Bombay Municipalities Act should not be construed as excluding the raised pavement or platform in front of a building but should be construed in the ordinary sense as meaning the side formed by the wall of the house on the opposite side of the street. A.I.R. (Vol. 20) 1933 Sind 258=27 S.L.R. 371=147 Ind. Cas. 345.

——S. 167—Limitation—Suit for damages.

Where injury is caused to a horse by falling into a Municipal manhole which had not been properly fenced, the cause of action for a suit for damages against the Municipality arises on the date when the injury is caused and not on the date when the Municipality refuses to pay compensation; and under S. 167, Bombay District Municipal Act, a suit against the Municipality must be instituted within 6 months of the date on which the injury was caused. A.I.R. (Vol. 18) 1931 Sind 55=131 Ind. Cas. 181.

——S. 167—Limitation—Extension of Period of Notice—Limitation Act, Ss. 15 (2) and 29.

Under S. 167, District Municipal Act, read with Ss. 29 and 15 (2), Limitation Act, a plaintiff is entitled to add the period allowed him for notice to the six months within which he has to sue. A.I.R. 1925 Sind 322, overruled. 122 Ind. Cas. 398=A.I.R. 1930 Sind 93, overruling 90 Ind. Cas. 44=A.I.R. 1925 Sind 322 (D.B.).

——S. 167—Limitation — Extension — Period of notice, if can be excluded—Limitation Act, S. 15 (2).

Section 167, Bombay District Municipalities Act, is subject to S. 15 (2), Limitation Act, and consequently, a plaintiff is entitled to exclude the period of one month of notice from the period of limitation or his suit. A.I.R. (Vol. 19) 1932 Bom. 259 (261)=34 Bom.L.R. 143=56 Bom. 135=137 Ind. Cas. 545.

——S. 167—Limitation—Extension — Application by accused under consideration.

The delay caused by the fact that petitions made by the accused were under consideration cannot extend the period of six months allowed in such cases. 23 S.L.R. 222=115 Ind. Cas. 308=30 Cr.L.J. 443=12 A.I.Cr.R. 424=A.I.R. 1929 Sind 52 (D.B.).

——S. 167—Limitation—Extension—Application for re-consideration by party does not afford a fresh cause of action.

The refusal by the Managing Committee and not its subsequent refusal to re-consider the matter is the act which affords the plaintiff his cause of action. Every application for re-consideration filed by a litigant does not afford him a fresh cause of complaint. To do so will be to render the provision of S. 167 of the Act nugatory and will enable a litigant to revive stale claims by repeating his requests. 90 Ind. Cas. 44=A.I.R. 1975 Sind. 322.

——S. 178—Scope—Default by Municipality in Duty—Power of Governor in Council.

It is within the scope of S. 178 for the Governor-in-Council to direct the commissioner to fix a period for the performance of a particular duty by the Municipality under S. 178, provided that the Municipality have made a default in performing any duty imposed on them by or under the Act. 51 Bom. 105 =100 Ind. Cas. 98=28 B.L.R. 1465=A.I.R. 1927 Bom. 55 (D.B.).

——Ss. 178 and 58—Rules by Government—Municipality is under an obligation to observe.

Under S. 178 there is an obligation on the Municipality under the Act to observe the rules framed under S. 58 by the Governor-in-Council for the purpose of prescribing the extent of the independent authority of the Municipality in respect of public education. 51 Bom. 105=28 B.L.R. 1465=100 Ind. Cas. 98=A.I.R. 1927 Bom. 55 (D.B.).

——S. 178 (1)—By or under this Act—Meaning of.

Per **Fawcett, J.**—The words 'by or under this Act' are not limited to duties imposed by some provision of the Act itself. 51 Bom. 105=28 B.L.R. 1465=100 Ind. Cas. 98=A.I.R. 1927 Bom. 55 (D.B.).

——S. 178 (3)—'Person'—Meaning of.

It is not essential under Sub-S. (3) of S. 178 that the person to whom the direction is given must be a Municipal servant. 51 Bom. 105=28 B.L.R. 1465=100 Ind. Cas. 98=A.I.R. 1927 Bom. 55 (D.B.).

——Ss. 179, 188 (a) and 24 (2)—Powers of Committee of Management.

A Committee of Management appointed under S. 179 is not precluded from exercising the power of the Municipality under S. 186 (a). Procedure is not "power and duty," the exercise of power and duty is the goal, procedure is the road by which we reach it. The whole of the procedure laid down in the Act need not be followed in its entirety and it is not verbally incumbent upon any persons or person appointed by Government to carry on the functions of the Municipality. It is enough that the persons who are delegated to do the duties of the Municipality carry out their functions in a reasonable and equitable manner, keeping an eye, as far as possible, on the provisions of the Municipal Act, but not being bound by them with the same strictness as the elected Municipality would be. S. 24 (2) of the Bombay District Municipal Act has no application to the Chairman of a Committee of Management appointed under S. 179. 17 S.L.R. 46=80 Ind. Cas. 951=A.I.R. 1921 Sind 125 (D.B.).

——S. 180—Notified area.

A notified area may be deemed to be a municipal district for the purposes of any section of the Act, which may have been applied to it. A.I.R. (Vol. 26) 1939 Bom. 97=41 Bom.L.R. 93=40 Cr.L.J. 522=180 Ind. Cas. 940.

——Ss. 184 and 46 (e)—Dismissal of servant without Notice—Karachi Municipal Rules, R. 90.

A statutory power to appoint, fine, reduce, suspend or dismiss officers and servants is vested in the Karachi Municipality by reason of Ss. 184 and 46 (e). But the provisions of R. 90 of the Rules framed by the Karachi Municipality constitute a statutory restriction or limitation to the power given by Statute to the Municipality to dismiss their servants. R. 90 is manifestly for the protection and benefit of officers and servants of the Municipality and the existence of such a rule is inconsistent with the position that a servant of the Karachi Municipality is a servant who may be dismissed at pleasure at any time without notice and without reason. 113 Ind. Cas. 387=A.I.R. 1929 Sind 69.

——Ss. 184, 46 (e)—Dismissal of servant by Municipality—Power of Court to question.

The fact that a servant of a Municipality was dismissed by the Municipality without notice given or cause shown, would not give him a cause of action. But if he alleges that the Municipality in dismissing him has not conformed, to its own rules, it is an allegation which discloses a cause of action and which the Court has jurisdiction to consider and decide. A.I.R. (Vol. 20) 1933 Sind 93 (2)=26 S.L.R. 469=141 Ind. Cas. 768.

——S. 184—Discretion of Municipality—Interference by Court.

Where the Statute vests a discretion in the Municipality the Court must be satisfied that that discretion has been exercised according to the limitation imposed by this Statute. But the Municipality is not under any obligation to satisfy the Court that their decision was reasonable and the Court is not entitled to consider whether the said decision was justified. A.I.R. (Vol. 20) 1933 Sind 93 (2)=26 S.L.R. 469=141 Ind. Cas. 768.

——S. 188—R. 18—Proviso I—Scope.

Proviso to R. 18 contemplates that the occupier from whom the taxes are leviable should be a tenant of the property. 31 Bom.L.R. 541=30 Cr.L.J. 992=1929 Cr.C. 46=119 Ind. Cas. 191=A.I.R. 1928 Bom. 273 (D.B.).

——S. 188 (1)—Scope—Rules under Rr. 27 (1), (2), (3), (4) and (5)—Permission cannot be refused for indefinite period.

An order refusing permission for an indefinite period cannot be passed. There is no justification for the conviction under R. 27 (5) if the petitioner has given notice as required by Sub-R. (1) and the Municipal Committtee have neither passed orders under Sub-R. (2) nor issued any provisional order or demand for further particulars under Sub-R. (3). 66 Ind. Cas. 331=24 Bom.L.R. 102=23 Cr.L.J. 267=A.I.R. 1922 Bom. 221 (D.B.).

——S. 181 (1)—District Municipal Act—Municipal Rules—Rr. 1, 4 (b) 3.

The words 'a family' in R. 1 are mere surplusage. 'Domestic purposes' means legitimate household purposes and user for legitimate household purposes by more than one family in the house is not waste within the definition of 'waste' in R. 1. **Held,** also there could be no breach of condition if only **bona fide** occupiers though of other families are allowed to use water. (1907) 10 Bom.L.R. 622=32 B. 460.

BOMBAY DISTRICT MUNICIPALITIES ACT (I OF 1918).

——S. 10—Conviction under—Essentials to be observed.

The two necessary conditions of a valid conviction under S. 10 are: (1) there must be an order passed by the School Committee under S. 9, **i.e.,** an order passed in strict compliance with the procedure laid down in that S. (2) the parent must be shown to have failed to comply with the provisions of S. 7 **on and after the date specified** in such order. The powers conferred under the Act on the School Committee are wide. They are in curtailment of the right of the parent to give efficient instruction to his child accordingly to his own ideas. It is therefore essential that an attendance order passed by the Committee must be shown to have been passed in strict compliance with the procedure therein prescribed, namely 'after giving the parent an opportunity of being heard' and after such enquiry as it considers necessary. The second requirement of S. 10 is that it must be shown that the parent has failed to comply with the provisions of S. 7 **on or after the date** specified in the attendance order passed by the Committee. 47 Bom. 942=25 Bom. L.R. 896.

BOMBAY DISTRICT POLICE ACT (IV OF 1890).

——S. 3 (e)—"Accessible to the public.

Street is said to include among other things any road or square, court, alley or passage accessible to the public.

"Accessible to the public" means that any member of the public as such a member has access to the land. By "access to the land" is ordinarily to be understood unimpeded entrance on the land. 13 Cr.L.J. 513=15 Ind. Cas. 785=14 Bom.L.R. 499 (D.B.).

——S. 3—"Subordinate ranks"—Inspector of Police—If included.

By reason of the definition of "subordinate ranks" added by the Government of India (Adaptation of Indian Laws) Order 1937 to S. 3, an Inspector of Police is included within that term. A.I.R. (Vol. 26) 1939 Sind 148=40 Cr. L. J. 695=I. L. R. (1939) Kar. 652=182 Ind. Cas. 513.

——S. 6—Right to confer powers on Additional Superintendent.

Section does not confer on the Provincial Government the right to confer on Additional Superintendent of Police powers arising outside the Act and the issue of warrant by Additional Superintendent under Bombay Prevention of Gambling Act is illegal. A.I.R. (Vol. 27) 1940 Bom. 127=42 Bom.L.R. 203=41 Cr.L.J. 485=187 Ind. Cas. 459.

——Ss. 11, 51 (e) and 53, Sch. B—Police Officer aiding another officer, outside his jurisdiction, but in same district where he serves, is deemed to be on duty—Penal Code, S. 353.

For the purposes of this Act Police Officers of every grade are appointed to an entire district in which they have to serve and are to be deemed to be on duty in all parts of that district. Although a Police Officer may be outside the area of his jurisdiction he is bound within the limits of the district for which he is appointed to aid another Police Officer when called on by him to do so or to keep order as required under Ss. 51 (e) and 53. Therefore any person assaulting a Police Officer while he is engaged in discharging the duty under Ss. 51 (e) and 53 is guilty of an offence under S. 353 Penal Code. 88 Ind. Cas. 15=18 S.L.R. 221=26 Cr.L.J. 1071=A.I.R. 1925 Sind 280 (D.B.).

——Ss. 25, 25-A and 79—Error in notification—Effect of.

Where the provisions of the Act are substantially complied with any errors in the notification will not invalidate the proceedings. 104 Ind. Cas. 257=51 Bom. 725=54 I.A. 338=25 A.L.J. 641=29 Bom. L. R. 1227=46 C.L.J. 76=1927 M.W.N. 561=1 L. C. 291=32 C.W.N. 61=26 M.L.W. 809=A.I.R. 1927 P.C. 176=53 M.L.J. 81 (P.C.).

——Ss. 25, 25-A and 26—Notification altering previous notification—Legality.

The Government have no power under the sections to call upon A to pay for B as an agent of B. Where plaintiffs were regarded as agents but the effect of the notification in law was clearly to impose a new tax on the plaintiffs:

Held, so long as in substance it is a tax or rate on another class of persons living within the area concerned it is within the legal authority of the Government. An obligatory provision in the statute cannot be allowed to be ignored without adequate grounds. Where the tax or rate may be legal its recovery by the Collector cannot be illegal. At least where it is partially legal for the Collector to collect, for the rest the direct reference to the Collector is in the nature of an irregularity, which cannot affect the legality of the tax. The express provision as to finality would apparently exclude the application of S. 21 of the General Clauses Act. It is difficult to reconcile this provision as to finality with the idea of the Collector being able to vary it from time to time. S. 25-A does not provide for any enquiry as to orders under S. 25-A (1) (b). The words "after such inquiry as he deems necessary" are to be found in Sub-S. (1). Cl. (a) and do not govern Cl. (b). The omission to hold an inquiry which was only departmentally arranged is not sufficient to vitiate the directions given by him under S. 25-A (1) (b). The provisions of S. 79 of the District Police Act would condone such an irregularity in procedure. With the previous sanction of the Commissioner and subject again to revision by him the District Magistrate may pass a fresh order. Per Kemp J.—In effect he thus obtains the revision of the reviewing authority. The scheme of the section is to make the Commissioner and not the Court the reviewing authority. The finality provided for an order under S. 25-A Cl. (4) of Bombay Act IV of 1890 means to give a final effect to the ultimate order under S. 25-A, Cl. (4) of Bombay Act, IV assent of the Commissioner may, subject to revision by the Commissioner or in accordance with any such revision pass. Cl. (4) is not intended to exclude the powers which by S. 21 of the Bombay Act, I of 1904 are included in a power to issue an order. S. 25-A does not require the rate for compensation to be assessed on property although the word "rate" would seem to imply the ownership of property. S. 25-A is not intended to permit the Court to enquire into the question of who were the persons really responsible for doing the objectionable acts. 48 Bom. 87=26 Bom.L.R. 1=90 Ind. Cas. 13=A.I.R. 1924 Bom. 1 (D.B.).

——Ss. 25 and 25-A—Recovery of tax—Actual complicity of persons to be taxed is immaterial.

The Act does not require proof of the active complicity of a section of the inhabitants before recovery is ordered to be made from it. 51 Bom. 725=54 I.A. 338=25 A.L.J. 641=29 Bom.L.R. 1227=46 C. L. J. 76=1927 M.W.N. 561=1 L.C. 291=104 Ind. Cas. 257=32 C.W.N. 61=26 M.L.W. 809=A. I. R. 1927 P. C. 176=53 M.L.J. 81 (P.C.).

——Ss. 25-A (1) (a) and (1) (b)—District Magistrate may act with consultation with superior officers—Taxing is not restricted to one occasion only.

The Magistrate's action under S. 25-A (1) (b) is not a judicial proceeding and there is nothing in the Act which requires that his action in this matter should be taken wholly on his own initiative or without instructions or recommendations from his superiors. Nothing prevents the Commissioner's sanction from being given from time to time or after consultation nor is there anything about it which confines it to starting the Magistrate on a course of action which he is thereafter to pursue independently and alone. Furthermore there is nothing in S. 25-A (1) (a) or 25-A (1) (b) to restrict the exercise of this taxing function to one occasion and one only. The powers which they give are not spent by a single exercise. The finality referred to in S. 25-A (4) relates exclusively to the Commissioner's function

of review and the directions of the District Magistrate are not capable of being challenged otherwise than is thereby provided. 51 Bom. 725=54 I. A. 338=25 A.L.J. 641=29 B.L.R. 1227=46 C.L.J. 76 =1927 M.W.N. 561=1 L. C. 291=104 Ind. Cas. 257=32 C.W.N. 61=26 M.L.W. 809=A.I.R. 1927 P. C. 176=53 M.L.J. 81 (P.C.).

——S. 25-A—Order directing enquiry whether persons to be charged were with Government during riots—Omission to enquire is not an illegality.

Where the District Magistrate in passing an order under S. 25-A added that to prevent injustice the Deputy Collector should hold an enquiry at which the people to be charged should be given an opportunity of furnishing proof that before, during and after the riots they were actively and publicly on the side of Government,

Held, that the District Magistrate's suggestions formed no part of the order made under S. 25-A and the omission to enquire is not an illegality. 51 Bom. 725=54 I. A. 338=25 A.L.J. 641=29 B.L.R. 1227 =46 C.L.J. 76=1927 M.W.N. 561=1 L. C. 291= 104 Ind. Cas. 257=32 C.W.N. 61=26 M.L.W. 809=A.I.R. 1927 P. C. 176=53 M.L.J. 81 (P.C.).

——S. 26 (1)—Proviso—"In default of recovery" do not mean wilful default by Municipality—If old levy is superseded by new one, S. 26 (1) must be again complied with.

The words "in default of recovery" by the Municipality in proviso to S. 26 (1) do not mean "in case of wilful default." The provision that, when Government decrees integrally a levy for the recovery of the cost of additional police its execution must be put into and left in the hands of the Municipality, when there is one, until default is made, is more than a form, and cannot be waived, nor is it a matter in which irregularity can be excused. It has a constitutional importance, which must be recognized. Where therefore an old levy is superseded by a new one to be recovered from different people and to be recovered in a different manner, there is a new exercise of the power by Government under S. 25 (2) and the mandatory provisions of S. 26 (1) would apply to such new levy. 51 Bom. 725=54 I. A. 338=25 A.L.J. 641=29 B.L.R. 1227=46 C. L. J. 76=1927 M.W.N. 561=1 L. C. 291=104 Ind. Cas. 257=32 C.W.N. 61=26 M.L.W. 809= A.I.R. 1927 P.C. 176=53 M.L.J. 81 (P.C.).

——Ss. 29 and 30—Commissioner not bound to make detailed enquiry.

It does not appear that the words in S. 30 that "a note of enquiry made in writing, under his signature in the language of the district or in English" mean that the Commissioner as officer is bound to make the detailed enquiry which is necessary in a case. Where a Commissioner as Inspector-General of Police appoints a tribunal for making enquiry into a case and report to him and passes an order dismissing a police officer after a careful consideration of the report made by the tribunal and the conclusions arrived at by them the Commissioner does not offend against the provisions of Ss. 29 and 30 even though no notice was given to the officer dismissed. A.I.R. 1930 Sind 219 (D.B.).

——S. 34—Applicability — Temporary withdrawal from duty—Punishment.

Section 34, Bombay District Police Act covers both permanent and temporary withdrawal from his duties by a Police Officer. It is a very serious offence for a man employed in the Police force to withdraw himself from his duties even for a day without the permission of his superior officers. A fine of Rs. 25 only is, therefore, too light a punishment for such an offence and much heavier penalty is necessary. A.I.R. (Vol. 31) 1944 Sind 50=I.L.R. (1943) Kar. 530=45 Cr.L.J. 400=211 Ind. Cas. 473.

——S. 36 (2) (c)—Applicability.

The scope and purpose of S. 36 (2) (c), Bombay District Police Act, is clearly limited to offences committed by Police Officers as such. It cannot apply and is not intended to apply to a case where the offence committed or rather alleged to have been committed, does not relate to any breach of duty by a Police Officer as such but which is an offence which may be committed by a member of the public. A.I.R. (Vol. 27) 1940 Sind 192=41 Cr.L.J. 955=I.L.R. (1940) Kar. 443=190 Ind. Cas. 447.

——S. 39-A and Rule 17—Order of District Magistrate under—Revision—Cr. P. Code, S. 435.

When the District Magistrate passes orders under R. 17 of the Rules for licensing and controlling places of public entertainment framed under S. 39-A, Bombay District Police Act, the District Magistrate or Magistrate of the District whichever he may be called, is not acting as an inferior Court within the meaning of S. 435, Criminal P. C. He is acting as an executive officer in the exercise of powers conferred upon him under S. 39-A, Bombay District Police Act. High Court cannot, therefore, under S. 435, Criminal P. C., interfere with this order. A.I.R. (Vol. 26) 1939 Sind 340=I.L.R. (1940) Kar. 102=41 Cr.L.J. 179=185 Ind. Cas. 392.

——S. 39-A, Rule 33—Conviction—Legality—Accused without license contracting with actors for performance but not taking part in it.

The accused who had no license contracted with strolling actors for a performance. Having taken no actual part in the performance except that he got the price of the tickets sold for seeing the performance the conviction of the accused is illegal. 18 Bom.L.R. 188=17 Cr.L.J. 162=33 Ind. Cas. 642 (D.B.).

——S. 41—Brothel—Meaning of.

A brothel is a place resorted to by persons of both sexes, who are strangers to the occupancy, for the purpose of prostitution. If a woman plies the trade of a prostitute in her own house the house is a brothel. 6 S.L.R. 224=14 Cr.L.J. 282=19 Ind. Cas. 714.

——S. 41—Order under—Nature of—Revision.

The order under any of the sections in Chapter IV (including S. 41) is an executive order and not one of an inferior Court with which a High Court can interfere. The mere fact that there is an enquiry of a judicial nature cannot suffice to give the High Court jurisdiction. (1917) 11 S.L.R. 113= (1910) 12 B.L.R. 1020 and (1911) 5 S.L.R. 54 foll.). 15 S.L.R. 126=23 Cr.L.J. 39=64 I.C. 663=1922 Sind 21 (D.B.).

——Ss. 42, 44 and 13—Scope of.

The prohibition by the Government of Bombay Resolution of 6th May, 1911, of Vyasantol processions for all time in Belgaum District is illegal and *ultra vires* and is not covered by S. 42 or S. 44 of the above Act; S. 42 limits Magistrate's power of prohibition both as regards time and as regards place; and S. 44 only provides for the maintenance of public order at unprohibited religious ceremonials. S. 13 (2) does not give any unlimited power of prohibition to the Government. 37 Ind. Cas. 363=18 Bom.L.R. 460 (D.B.).

——S. 42—Notification complying with section—Effect of.

A notification in compliance with S. 42 is a law and a legal process. A.I.R. (Vol. 18) 1931 Bom. 520=33 Bom.L.R. 1169=55 Bom. 725=33 Cr.L.J. 64=1931 Cr. Cas. 952=134 Ind. Cas. 1226.

——Ss. 42, 71—Notice forbidding playing of music—Legality—Onus—Person ringing bell in temple once—Whether playing music.

Where apprehending that playing of music in temple during certain festival would inflame religious animosity and would lead to breach of the public peace the Magistrate issues a notice under S. 42, Bombay District Police Act, forbidding the playing of music, the notice is *prima facie* legal and the onus of showing that it is unlawful is on the persons who wish to challenge it. And if in spite of such notice a person rings the temple bell once at the time of making darshan, the act does not amount to playing of music. A.I.R. (Vol. 25) 1938 Bom. 179=40 Bom.L.R. 59=39 Cr.L.J. 408=174 Ind. Cas. 478.

——S. 43—Order of Dt. Magistrate—Revision.

An order passed by a District Magistrate under S. 43 of the Act is an executive order and not an order of an inferior Criminal Court and cannot be interfered with by the High Court in revision though it is *ultra vires*. The aggrieved party has in such a case a remedy under Ss. 13 (2) and 50 of the Act by petition to the Commissioner. A District Magistrate has no jurisdiction to eject any person from property under S. 43 of the Act without first taking temporary possession himself and the order of ejectment or exclusion can only operate for the period of his temporary possession. 11 S.L.R. 113=45 Ind. Cas. 396=19 Cr.L.J. 588 (D.B.).

——S. 44—Orders by District Magistrate—Right of party to go to Court.

The Bombay District Police Act is not intended to confer any right to any individual or class of His Majesty's subjects which had not been given by the Common Law. The Act was passed in the interests of public peace. All that S. 44 of the Act contemplates is that where a District Magistrate has passed an order in the interests of peace, it is open to any party to go to a Civil Court and get an adjudication in favour of his right, if any. The legislature merely assumes that there is a right which the District Magistrate's order has opposed and which can be adjudicated in a Court of Law. (1906) 11 Bom.L.R. 372=2 Ind. Cas. 494 (D.B.).

——S. 44, Cl. (1)—Order by Dt. Magistrate—Contents.

An order passed under S. 44 of the Bombay District Police Act should indicate the person or parties who are affected by it and also the occasion to which it is intended to apply. 20 Bom.L.R. 114=44 Ind. Cas. 590=19 Cr. L.J. 366.

——S. 46—Validity. **See** CONSTITUTION OF INDIA, Arts. 13 and 19. 52 Bom.L.R. 558 (F.B.).

——S. 46 (3)—Scope—If void as dealing with subject-matter in List I of Seventh Schedule to Constitution. *See* CONSTITUTION OF INDIA. Seventh Schedule, List I, Items 17, 18 and 19 and and List II, Item I. 52 Bom.L.R. 588 (F.B.).

——S. 46-B—Scope—Powers of District Magistrate and of Provincial Government—Duration and validity of detention orders—Extension of detention order beyond two months by Government—Legality.

S. 46-B, which was newly added to the Bombay District Police Act by the Amendment Act XVI of 1946, gives the power of detention and the responsibility for making orders to the District Magistrate. The powers are circumscribed by three safeguards; *viz.*, (1) that the orders are valid only for 15 days at a time, (2) that the detention ceases—when the emergency ceases, and (3) that the total period of detention shall not exceed two months. The responsibility for making detention orders is exclusively vested in the District Magistrate, and it is no part of the function of the Government to make such orders. Government's powers are limited to enlarging the maximum period of two months. The case of a detenu has to be reconsidered every fifteen days by the District Magistrate in the light of the then existing circumstances, but his power to make orders in any particular case is limited to two months. Then the Provincial Government is given power to enlarge the time limit of two months so that the District Magistrate may make further orders, during the extended period, but each of them is valid for a maximum of 15 days. An expired detention order of the District Magistrate cannot be extended by the Government indefinitely "until further orders of Government." Such an extension is *ultra vires* and detention under such extended order is "illegal" within the meaning of S. 491, Cr. P. Code. When the total period of two months is about to expire, a new order should be passed by the District Magistrate in continuation of the last order with the sanction of the Provincial Government. That is the proper course. 49 Bom.L.R. 386=A.I.R. 1947 Bom. 362 (D.B.).

——S. 46-B (3), Proviso I—Scope—Powers of Government—Extension of period of detention of detenu under order of detention of District Magistrate—Legality.

Under the first proviso to S. 46-B (3) of the Bombay District Police Act, the power of the Government is limited to make an order enabling the District Magistrate, who is solely responsible for making detention orders, to extend the period of detention in any particular detenu beyond the period of two months, if he thought fit to do so. The Government have no power to pass an order in a mandatory form; ordering that the total period of detention of

any particular detenu under an order shall exceed two months. Such an order is *ultra vires* and illegal. 49 Bom.L.R. 397=48 Cr.L.J. 912=A.I.R. 1947 Bom. 364 (F.B.).

——S. 48 (1) (a)—Rules under, published on July 19, 1934, for Ahmedabad, R. 1—If ultra vires.

The rules under S. 48 (1) (a), Bombay District Act must be made before the processions are contemplated, since it is obvious that after the assembly or procession has actually been constituted, the Police cannot proceed to make rules. They must make the rules with reference to possible future events. But the rules as made can only regulate the conduct of persons as members of assemblies and processions. Rule 1 does deal only with the conduct of persons constituting processions. Such persons cannot go in procession along a street within the municipal limits of Ahmedabad without a pass. No doubt the rule involves that a person requiring a pass shall apply for it before the procession actually starts: but the actual prohibition under the rule is against some action by a person who is at the time a member of an assembly or procession. Therefore, there is no objection to the rule on the ground that it deals with those who have contemplated a procession and not with those who have formed a procession. The other objection that the rule prohibits a procession altogether is not tenable. There is no prohibition against the forming of an assembly and the starting of that assembly into motion which would constitute a procession provided that the procession does not proceed along streets. There must be many open places in the limits of the Ahmedabad Municipality and five miles beyond in which processions can be taken without a pass but if they are to be taken along a street, where the Police necessarily have to control traffic. a pass has to be produced. A.I.R. (Vol. 26) 1939 Bom. 364=41 Bom.L.R. 557=40 Cr.L.J. 889=184 Ind. Cas. 203.

——S. 51—Search of person in public place—Damages.

Where in a street and in a place of public resort, a person has apparent possession of letters which a Police Officer honestly and in good faith suspects to be stolen property, the Police Officer is empowered by S. 51, Cl. 3 Bombay District Police Act, to search for the same. Although it is very mortifying for him to be searched in the public street and also very mortifying for him that the Police approached his house and rumour got about that his house is going to be searched, he cannot be held to have suffered any damage or loss which will be recognized by the law if the Police Officer has acted legally and with *bona fides*. A.I.R. (Vol. 20) 1933 Sind 240=1933 Cr. Cas. 800=148 Ind. Cas. 178.

——S. 51 (1) (b)—Scope of.

Section 51 (1) (b) Bombay District Police Act, covers the recording of statements by a Police Officer under S. 162, Criminal P. C., for, the recording of statements of witnesses by a Police Officer in the course of an investigation is such a step. consistent with the law in bringing offenders to justice, as is his duty to take under Cl. (b) of Sub-S. (1) of S. 51. A.I.R. (Vol. 29) 1942 Sind 106=I.L.R. (1942) Kar. 94=43 Cr.L.J. 888=202 Ind. Cas. 681.

——Ss. 51 (1) (b) and S. 80 (1)—Applicability.

Where an investigating police officer reduces a statement of a witness to writing his act is one done under colour or in excess of a duty imposed or an authority conferred on him by S. 51 (1) (b); whether he acts *bona fide* or otherwise and even if he acts *mala fide* and in deliberate disregard of his proper duty or authority and deliberately takes down the statement of such witnesses incorrectly S. 80 (3). applies: 114 Ind. Cas. 246=30 B.L.R. 1018=52 Bom. 832=30 Cr.L.J. 278=12 A.I.Cr.R. 154=A.I.R. 1928 Bom. 352 (F.B.).

——S. 51 (1) (d)—Offence under S. 5, Bombay Prevention of Gambling Act—Magistrate giving verbal order to Police Sub-Inspector to arrest.

Where in the case of an offence under S. 5, Bom-Bay Prevention of Gambling Act the Police Sub-Inspector arrests persons in pursuance of verbal orders given by the Magistrate S. 51 (1) (a), Bombay District Police Act has no application, for, the verbal order to arrest without a warrant such as S. 6, Bombay Prevention of Gambling Act, requires, is not an order lawfully given by a competent authority, for the Magistrate has no power to give such an order. A.I.R. (Vol. 29) 1942 Sind 106=I.L.R. (1942) Kar. 94=43 Cr.L.J. 888=202 Ind. Cas. 681.

——S. 51 (1) (d), 80—Protection against illegal arrest.

Clause (d) of S. 51 (1), imposes on the Police Officers the duty to arrest offenders. It does not authorise illegal arrest. This clause read with S. 80 was intended to protect in certain cases a Police Officer against illegal arrest for otherwise the protective purpose of S. 80 would fail. A.I.R. (Vol. 29) 1942 Sind 106=I.L.R. (1942) Kar. 94=43 Cr. L. J. 888=202 Ind. Cas. 681.

——S. 51 (1) (f) —Scope.

Section 51 (1) (f) imposes a direct duty on police officer as such, and does not contemplate a case when a Police Officer is merely obeying a summons of a Magistrate. A.I.R. (Vol. 32) 1945 Sind 48=I.L.R. (1944) Kar. 197=46 Cr.L.J. 576=219 Ind. Cas. 307.

——S. 53—Failure to obey order —Hindu procession proceeding in particular authorised street—Mahomedan procession coming in opposite direction ignoring orders of police to go by another route—Accused are guilty under Penal Code, S. 153.

In ordinary circumstances undoubtedly a police constable has not the power to stop a person from proceeding along a particular street and order him to go by another. He can stop him for a certain time in order to regulate traffic so as to prevent the traffic getting mixed up and obstructing passage along the street. Where the accused Mahomedans formed themselves into a procession and proceeded along a certain route at the time when another procession of Hindus was passing in the opposite direction along the same route as settled by authorities ignoring the orders of policemen stationed there to control traffic that they should go by another route and a riot with injury to many persons was the result.

Held that the act of the accused in refusing to

comply with the orders of the police was an offence under Penal Code, S. 153, the orders of the police being valid under Bombay District Police Act, S. 53. 30 B.L.R. 367=10 A.I.Cr.R. 204=29 Cr.L.J. 489=109 Ind. Cas. 217=A.I.R. 1928 Bom. 156.

——S. 53 (1) (a)—'Control'—Meaning of.

The ordinary meaning of the verb "control" conveys an idea of hindering or checking a person in doing something; and the extent of any particular prevention must depend upon the special necessities of the occasion. 30 B.L.R. 367=109 Ind. Cas. 217=10 A.I.Cr.R. 204=29 Cr.L.J. 489=A.I.R. 1928 Bom. 156 (D.B.).

——Ss. 57 and 58 (2)—Finder of property—Right of—No claim by anybody.

Property not claimed by anybody after a proclamation is issued under S. 58 (2) should be made over to the finder. 47 Bom. 71=24 Bom.L.R. 707 =69 Ind. Cas. 96=23 Cr.L.J. 656=1922 Bom. 240.

——Ss. 57 and 58—Right of finder producing property before Magistrate upon requisition.

Where the finder hands over the property to the Police upon requisition, the Magistrate has no power under the Act to order the property to vest in Government. 14 Bom.L.R. 304=13 Cr.L.J. 503=15 Ind. Cas. 647.

——S. 61 (a)—Lawful excuse—Ignorance of law.

That the driver accused was ignorant of the requirements of law, by itself would not be a lawful excuse within S. 61 (a) for his driving a cart without a lamp. 28 Bom.L.R. 1058=97 Ind. Cas. 976=27 Cr.L.J. 1216 (D.B.).

——S. 61 (a)—Lawful excuse—Person, driving a bullock-cart unexpectedly kept out till dark.

The word "excuse" in clause (a) of S. 61 conveys the idea of an excuse that is (a) reasonable and (b) not opposed to any law or principle of law. If an owner or driver of a vehicle fails to have a lamp available in cases where he may find such a lamp required by law, is not "taking all steps reasonably practicable" to prevent the vehicle being without a lamp. There is, in such a case, an implied duty to have a lamp or lantern avilable when required and therefore the mere excuse that the accused was unexpectedly kept out till dark is not ordinarily a reasonable one except under exceptional circumstances. 28 Bom.L.R. 1061=27 Cr.L.J. 1182=97 Ind. Cas. 814=A.I.R. 1926 Bom. 530 (D.B.).

——S. 61 (a)—Lawful excuse—Question of fact.

Per *Shah, J.*—What a lawful excuse is, is a question which must be determined on the facts and circumstances of each case. 28 Bom.L.R. 1061=27 Cr.L.J. 1182=97 Ind. Cas. 814=A.I.R. 1926 Bom. 530 (D.B.).

——S. 61 (b)—Vehicle—Bicycle.

Within S. 61 (b) a bicycle is a vehicle driven by the man riding it. 40 Ind. Cas. 289=41 Bom. 464=19 Bom.L.R. 349=18 Cr.L.J. 641.

——S. 61, Cl. (o)—Offence under—Indecent exposure.

An ascetic wandering in public places in a town in a state of nudity is guilty of an offence under S. 61 (o) of the Act. 19 Bom.L.R. 907=43 Ind. Cas. 332=19 Cr.L.J. 108.

——S. 61 (o)—Failure to frame alternative charges both under S. 160, I. P. Code, and also under S. 61 (o) of this Act.

Acquittal under S. 160, Penal Code, is a bar to subsequent trial under S. 61 (o). 29 Bom.L.R. 1478=28 Cr.L.J. 1032=106 Ind. Cas. 216=A.I.R. 1927 Bom. 629 (D.B.).

——S. 61 (1) (f)—Giving of dinner to people in street.

Where a person causes an obstruction in that he gives a caste dinner in the street outside his residence, the act of the accused amounts to an obstruction prohibited by Bombay District Police Act. A.I.R. (Vol. 29) 1942 Bom. 150=44 Bom.L.R. 241=43 Cr.L.J. 701=I.L.R. (1942) Bom. 235=200 Ind. Cas. 344.

——S. 61-A—Applicability—Lands used as streets.

The mere fact that the lands used as streets, vest for the time being in the Municipality, as trustees under the Bombay District Municipal Act, does not prevent the lands being included within the limits of the town for the purposes of the Land Revenue Administration and S. 61-A will apply to such lands. 28 Bom.L.R. 1023=97 Ind. Cas. 668=27 Cr.L.J. 1148=A.I.R. 1927 Bom. 67 (D.B.).

——S. 61-D—Duty of Court.

It is particularly necessary that when there is a penal statute with sections of wide scope such as S. 61-D, Bombay District Police Act, those sections, when they are applied by a Magistrate should be carefully applied and the Magistrate should be careful that all conditions necessary for their application are satisfied before they are applied. A.I.R. (Vol. 28) 1941 Sind 16=I.L.R. (1941) Kar. 189=42 Cr. L. J. 256=192 Ind. Cas. 203.

——S. 61-D—Conviction under—Requisites for.

There is nothing in S. 61-D, Bombay District Police Act, which punishes a man for being found under suspicious circumstances. Three conditions are required to satisfy S. 61-D, (1) lying or loitering in any street or yard or other place, (2) being a reputed thief, and (3) without being able to give a satisfactory account of himself. A.I.R. (Vol. 28) 1941 Sind 208=I.L.R. (1941) Kar. 322=43 Cr. L. J. 112=197 Ind. Cas. 69.

——S. 61-D—Conviction under—Legality—Charge of being reputed thieves—Previous convictions not proved.

The previous convictions for theft or even for house-breaking, may be sufficient evidence of bad character, when such evidence is admissible, to sustain the charge that the accused are "reputed thieves." Even in summary proceedings previous convictions must be properly proved. Where it is not known for what offences the previous convictions were and the Magistrate merely refers to them but neither such convictions are proved nor are the offences specified, a conviction under S. 61-D cannot be sustained. A.I.R. (Vol. 28) 1941 Sind 16 =42 Cr.L.J. 256=I.L.R. (1941) Kar. 189=192 Ind. Cas. 203.

——S. 61-D—Reputed thief—Proof required.

In order to prove that a person is a reputed thief, he need not necessarily have convictions for theft. Witnesses may be prepared to say that an individual is known to them as constantly coming in and out of their houses or yards stealing property of little value and such evidence might be sufficient to prove that the man is a reputed thief. But it cannot be said that a man is a reputed thief merely because he has been found at night in the company of another whose reputation as a thief has been proved by previous convictions. A.I.R. (Vol. 28) 1941 Sind 208=I.L.R. (1941) Kar. 322=43 Cr.L.J. 112 =197 Ind. Cas. 69.

——S. 61-E—Burden of proof.

Under S. 61-E, Bombay District Police Act it is necessary, before the Magistrate can call upon the accused person to account for the possession of the property, that the Magistrate is satisfied that there is reason to believe that the property is stolen property. The place of residence of the applicant or his personal appearance are not matters relevant to the question whether the property was stolen property or not. Where, therefore, the burden of proof of innocence has been shifted to the accused, at the very outset of the case and the Magistrate has decided the case not on consideration whether there was reasonable ground to believe the property was stolen, but on the consideration that the accused failed to account for his possession of it, the conviction is not justified and cannot be sustained. A.I.R. (Vol. 29) 1942 Sind 50=I.L.R. (1941) Kar. 554=43 Cr.L.J. 528=199 Ind. Cas. 137.

——S. 61-F — Highway — Obstruction—Exposures of wares—Detriment to traffic—Plea of customary right—Validity.

An encroachment made by an adjacent land-owner on the space occupied by a highway cannot be legalised by possession for any length of time and the defence of customary use is of no avail as it can never ripen into a legal right.

Where the accused was charged with having exposed his wares to sale on a portion of the street in front of his shop with the consequence that a crowd collected and caused obstruction to the traffic:

Held, that the public was entitled to the free use of any portion of the highway and the fact that in spite of the crowd, the other side of the road was still free and open to traffic was no defence. A.I.R. (Vol. 18) 1931 Bom. 326=33 Bom.L.R. 663 =1931 Cr. Cas. 582=32 Cr.L.J. 1163=134 Ind. Cas. 363.

——S. 62—Extension of the Prevention of Cruelty to Animals Act, S. 1 (2)—Effect on section.

The mere extension of S. 1 (2) of the Prevention of Cruelty to Animals Act to a certain district does not repeal S. 62 of the District Police Act within that district. 45 Bom. 203=22 Cr.L.J. 696 =63 Ind. Cas. 824=22 Bom.L.R. 892=A.I.R. 1921 Bom. 249.

——Ss. 63 (b) and 80 (3)—Seizure—Meaning of Limitation.

So long as the property seized, is maintained in the custody of the Police there is seizure and a prosecution instituted within 6 months of the restoration of the property is not barred under S. 80 (3) of the Act. 19 Bom.L.R. 677=18 Cr.L.J. 914= 42 Ind. Cas. 146=41 Bom. 737.

——S. 66, Cl. (f)—Obstruction with permission of Municipality.

The mere fact that the Municipality has authorised some persons to use a portion of the public street for exposing logs of timber for sale, does not exempt those persons from being prosecuted under S. 61 (*f*) if such exposure has caused obstruction in that public street. 27 Cr.L.J. 1160=97 Ind. Cas. 744=28 Bom. L. R. 1033=50 Bom. 674=A.I.R. 1926 Bom. 535 (D.B.).

——S. 71—Mere ringing of bell in temple—Whether playing music.

The most barbarous form of music has at least rhythm, and there is none in this case. Accordingly, though a bell can be used for the production of music, the mere ringing of a temple bell does not amount to the making of music. Thus the mere ringing of bell not being an offence under S. 71, the existence of *mens rea*, is not enough for conviction. A.I.R. (Vol. 25) 2938 Bom. 179=40 Bom.L.R. 59=39 Cr.L.J. 408=174 Ind. Cas. 478

——Ss. 80 (1) and S. 51 (1) (b)—Applicability.

See IBID, Ss. 51 (1) (b) and 80 (1). 30 Bom. L.R. 1018=52 Bom. 832=30 Cr.L.J. 278=12 A.I.Cr.R. 154=114 Ind. Cas. 246=A.I.R. 1928 Bom. 352 (F.B.).

——Ss. 80 and 81—Applicability—Order directing Collector to recover particular amounts.

Where the order practically directed the Collector to recover the particular amounts from a class of persons. *Held*, that does not appear to be an order to any particular class of persons to perform any duty or act or to conduct or order themselves in a particular manner. Besides S. 81 provides an additional remedy which the party concerned may follow; but it does not bar a suit which may be otherwise open to the party to file. 48 Bom. 87=26 Bom.L.R. 1=90 Ind. Cas. 13=A.I.R. 1924 Bom. 1 (D.B.).

——S. 80—"Good faith"—Presumption.

S. 80 of the Bombay District Police Act gives statutory protection to Government servants, and a uniformed police party once assembled for duty and while on duty and returning from duty must be presumed to be acting in good faith until the contrary is proved by strong and cogent evidence. I.L.R. (1948) Bom. 103=49 Bom.L.R. 829=A.I.R. 1948 Bom. 197=49 Cr.L.J. 216 (D.B)).

——S. 80—"Under colour of office"—Meaning of.

The words "under colour of" in S. 80 of the Bombay District Police Act do not mean the same thing as "by virtue of". Any rightful act in office is "by virtue of office", and a wrongful act in office may be "under colour of office". An act may none the less be under colour of office however unreasonable it might be and although it might be done in mistaken exercise of duty or authority. 49 Bom.L.R. 829=A.I.R. 1948 Bom. 197=49 Cr.L.J. 216= I.L.R. (1948) Bom. 103 (D.B.).

——S. 80—Scope of.

S. 80 is limited in its scope. All acts done by a Police Officer as such do not necessarily fall within the scope of S. 80 (3) of the Bombay District Police Act. S. 80 (1) clearly applies only to acts done in good faith, although S. 80 (3) applies to acts done in bad faith. 229 Ind. Cas. 158=1947 Sind (Rul.) 55=48 Cr.L.J. 268 (D.B.).

——S. 80 (1)—Scope of—Illegal acts done with knowledge of illegality—If protected.

The words of S. 80 (1), Bombay District Police Act, are in some ways of limited scope. They do not extend a general protection to a Police Officer for all acts done in good faith under colour of his office, but the protection is limited to any act done in good faith in pursuance or intended pursuance of any duty imposed or any authority conferred on him by any provision of the Act or if any rule, order or direction lawfully made or given thereunder. The duty must be one imposed and the authority one conferred by or under the Act or any rule lawfully made or order given thereunder. One must, therefore, look to the provisions of the Act itself for the duty imposed or the authority conferred in the discharge or exercise of which a Police Officer has done the acts for which he claims protection. A person does not act in good faith within the meaning of S. 80 (1), when he knowingly breaks the law, and if a person does not act in good faith, S. 80 (1) does not apply. The section was not intended to apply to a case wherein a Sub-Inspector of Police with open eyes knowingly breaks the law. A person who knowingly breaks the law cannot invoke the protection of the law. Cases of this nature are not to be decided on the principle that all men are supposed to know the law; that ignorance of the law is no excuse. That principle may well apply in a case of estoppel.

Consequently, where a Police Officer arrests and confines a person for an offence under S. 5, Bombay Prevention of Gambling Act without the requisite warrant under S. 6, Bombay Prevention of Gambling Act, knowing full well that such warrant was condition precedent to his making the arrest, he cannot seek the protection of S. 80 (1), Bombay District Police Act. The fact that he could obtain warrant the following day after the arrest and not before cannot bring his case within S. 80 (1). A.I.R. (Vol. 29) 1942 Sind 106=I.L.R. (1942) Kar. 94=43 Cr. L.J. 888=202 Ind. Cas. 681.

——Protection, nature of.

It is not every act of a Police Officer which is protected but only an act done or intended to be done in pursuance of any duty imposed or any authority conferred by the provisions of the Act itself or by any rule, order or direction lawfully made or given thereunder. A police officer giving evidence on oath in a Court on having been summoned as a witness by the Court is not entitled to protection under S. 80 (3). A.I.R. (Vol. 32) 1945 Sind 48=46 Cr.L.J. 576=I.L.R. (1944) Kar. 197=219 Ind. Cas. 307.

——S. 80 (3)—The act for which protection is given by S. 80 (3) must be an act which appears to be done in the lawful discharge of a duty or in the lawful exercise of an authority conferred by the Bombay District Police Act or other law for the time being in force. This would not include acts which are obviously offences and in no manner reconcilable with the duties or functions of a Magistrate or Police Officer such as bribery or extortion. A.I.R. (Vol. 19) 1932 Sind 28=1932 Cr. Cas. 114 =25 S.L.R. 395=33 Cr.L.J. 298=136 Ind. Cas. 513.

——S. 80 (3)—Where a Police Officer is dealing with a complaint in his capacity as such his procedure would be under the colour of his duty and authority though he had made up his mind from the beginning to hold no real investigation. A.I.R. (Vol. 19) 1932 Sind 28=25 S.L.R. 395=1932 Cr. Cas. 114=38 Cr.L.J. 298=136 Ind. Cas. 513.

——S. 80 (3)—Applicability to Crown prosecutions.

Section 80 (3), Bombay District Police Act, refers to all prosecutions, and covers a prosecution instituted by the Crown. A.I.R. (Vol. 19) 1932 Sind 28=1932 Cr. Cas. 114=25 S.L.R. 395=33 Cr.L.J. 298=136 Ind. Cas. 513.

——S. 80 (3)—"Act"—The word 'act' in S. 80

The word 'act' in S. 80 (3) should be taken as including omissions also. A.I.R. (Vol. 19) 1932 Sind 28=1932 Cr. Cas. 114=25 S.L.R. 395=38 Cr.L.J. 293=136 Ind. Cas. 513.

——S. 80 (4)—Applicability—Suit for damages for assault and battery by police-officer while investigating cognizable offence.

A Sub-Inspector of Police while investigating a cognizable offence against two berads sent for the plaintiff and questioned him as to his connexion with the berads. The plaintiff disclaimed all knowledge about the berads. Then it was alleged, defendant 1, the Sub-Inspector, grew angry and abused the plaintiff and pulled him up by his moustache. It was further alleged that defendant 2 at the instance of defendant 1 beat the plaintiff. The plaintiff filed a suit to recover damages from the defendants for their alleged wrongful treatment of him. *Held*, that both the defendants were acting in the discharge of the duty imposed and the authority conferred by S. 51 (1), Cl. (b), Bombay District Police Act, when they summoned the plaintiff and questioned him in regard to the alleged offence but that the alleged assault or battery cannot be said to have been committed under colour or in excess of such duty or authority within S. 80 (1) and that the defendants are not entitled to notice either under S. 80 (4), Bombay District Police Act or Civil P. Code, S. 80; 26 All. 220, Diss. from; 30 B.L.R. 1018=52 Bom. 832=30 Cr.L.J. 278=12 A.I.Cr.R. 154=114 Ind. Cas. 246=A.I.R. 1928 Bom. 352 (F.B.).

BOMBAY (DISTRICT) TOBACCO ACT (II OF 1933).

——S. 17—Licensee for wholesale of tobacco can sell tobacco wholesale either personally or through agent in places covered by licence.

A grantee of a licence for the privilege of selling tobacco wholesale, throughout the whole of the Bombay Presidency and Sind, with the exception of the City of Bombay can sell tobacco wholesale personally

or through agents and servants at any place in Bombay Presidency and can conduct his business by means of travelling agents. It is not necessary for the agent to have a licence for hawking though his procedure would come within the definition of 'hawking,' since the licence for wholesale sale is wide enough to cover wholesale hawking.

The agent, therefore, is not liable to prosecution under S. 17, of the Bombay (District) Tobacco Act, if he sells bidis wholesale to a tobacco merchant of certain place, covered by the licence of his principal. A.I.R. (Vol. 24) 1937 Bom. 480=39 Bom·L.R. 832=39 Cr·L·J. 88=I.L.R. (1937) Bom. 931=172 Ind. Cas. 160.

BOMBAY EXEMPTIONS FROM LAND REVENUE (NO. 2) ACT (VII OF 1863).

——S. 6—Rules under—Scope of.

The rules relate only to "lands held for service" and "service lands". There is nothing in the rules to extend the meaning of these words. A.I.R. (Vol. 21) 1934 P.C. 108=1934 M·W.N. 437=66 M.L.J. 614=30 M.L.W. 748=1934 A.L.J. 438=38 C.W.N. 568=59 C.L.J. 282=36 Bom·L·R. 551=58 Bom. 306=61 I.A. 190=148 Ind. Cas. 796 (P.C.).

BOMBAY FINANCE ACT (II OF 1932).

——S. 22—Ss. 22, 24, Part 6—Urban immovable property tax, if ultra vires.

The urban immovable property tax levied by S. 22, Bom. Finance Act forming part of Part 6, Bom. Finance Act, is not a tax on income or on capital value of lands and buildings. Consequently Part 6, Bombay Finance Act, 1932, is not *ultra vires* the Provincial Government, and the urban immovable property tax is a valid tax. A.I.R. (Vol. 27) 1940 Bom. 65=42 Bom.L.R. 10=I.L.R. (1940) Bom. 58=186 Ind. Cas. 817 (F.B.).

——S. 24—"Levy"—Meaning of.

Per Kania J.—The word "levy" in S. 24 of the Bom. Finance Act must be construed as meaning "take necessary steps to collect". A.I.R. (Vol. 27) 1940 Bom. 65=42 Bom.L.R. 10=I.L.R. (1940) Bom. 58=186 Ind. Cas. 817 (F·B·).

——S. 24—Municipal Commissioner, if can be ordered to collect urban immovable property tax.

Per *Kania, J.*—It is not *ultra vires* the Provincial Legislature to order the Municipal Commissioner to collect the urban immovable property tax. If a power to impose the tax is conceded, power to collect the same is necessarily implied. The Provincial Legislature within the province being supreme, there is no reason why it should not appoint or name any person or Corporation to collect the tax. This can be done without amending the Municipal Act. A.I.R. (Vol. 27) 1940 Bom. 65=42 Bom.L·R. 10=12 R.B. 379=I.L.R. (1940) Bom. 58=186 Ind. Cas. 817 (F.B.).

——S. 24—"Municipality", meaning of.

Per *Kania J.*—Under S. 24, when applied to Bombay itself, 'Municipality' must mean and is intended to mean the appropriate Municipal authorities. A.I.R. (Vol. 27) 1940 Bom. 65=42 Bom. L. R. 10=I.L.R. (1940) Bom. 58=186 Ind. Cas. 817 (F.B.).

BOMBAY FINANCE (AMENDMENT) ACT (IV OF 1939).

——S. 26 (1)—Lessee's liability for tax.

A lessee of lands who builds upon it houses for his own use is liable to pay urban immovable property tax. A.I.R. (Vol. 32) 1945 Bom. 54=46 Bom.L.R. 693=219 Ind. Cas. 61.

BOMBAY GAMBLING ACT (III OF 1865).

——Teji Mundi transactions—Validity.

The Bombay Act (III of 1865) embraces not only every conceivable form of wagering contracts but contracts made in furtherance of wagering contracts and all contracts made by way of security or guarantee of wagering contracts and it prohibits all suits for money paid and payable in respect of wagering contracts. (1910) 12 Bom.L.R. 590=7 Ind. Cas. 665.

——S. 1—Wrestling match.

Agreement that party failing to appear should pay certain sum and winner should get gate-money is not a wagering contract and does not come under the Bombay Gambling Act. A.I.R. (Vol. 18) 1931 Bom. 264=33 Bom.L.R. 260=133 Ind. Cas. 254.

BOMBAY GENERAL CLAUSES ACT (I OF 1904).

——S. 11—Applicability—Bombay Agricultural Debtors Act, S. 85—Scope and effect—Suit under Dekkhan Agricultural Debtors Act filed more than three years after period fixed by S. 85—Suit filed on day of re-opening of Court after holiday when period expired—If in time.

S. 11, Bombay General Clauses Act, only applies to acts or proceedings which are directed or allowed to be done or taken. S. 86, Bombay Agricultural Debtors Act, does not, however, allow any suit to be filed in respect of his rights under the Dekkhan Agriculturists' Relief Act. The former Act only directs that latter Act shall cease to be in operation after a prescribed period. The Legislature has not allowed any suits to be filed after the Dekkhan Agriculturists Relief Act is repealed. It merely fixes a period when the Dekkhan Agriculturists Relief Act shall stand repealed and once that Act is repealed, the right of a plaintiff to file a suit under that Act disappears. That right is not saved by the Bombay Agriculturists Debtors Relief Act, nor, is any permission given to the plaintiff to file a suit after the Dekkhan Agriculturists Relief Act has been repealed. The fact that the period of three years fixed by S. 86 of the Bombay Agriculturists Debtors Relief Act expires on a holiday when the Court is closed, would not give a plaintiff a right to institute the suit which should have been filed within the period of three years on the day on which the Court re-opens after the holiday. When the date is passed, whether on a holiday or not the Dekkhan Agriculturists Relief Act is no longer in force, and whatever rights a litigant may have under that dis-

appear. 51 Bom.L.R. 605=A.I.R. 1950 Bom. 16=I.L.R. (1949) Bom. 560.

——S. 17—Section 17 provides that for the purpose of indicating the application of a law to every person or number of persons for the time being executing the functions of an office, it is sufficient to mention the official title of the officer at present executing the functions. A.I.R. (Vol. 27) 1940 Bom. 127=42 Bom.L.R. 203=41 Cr.L.J. 485=187 Ind. Cas. 459.

——S. 21—Applicability—Previous notification can be rescinded only subject to conditions governing those notifications.

The resolution of the Municipality which purports to rescind the prior notification of 1919 must be published in the Local Government Gazette, and must have received the previous sanction of the Local Government because under S. 21 of the Bombay General Clauses Act (I of 1904) the Municipality would have the power of rescinding the notification published in 1919 subject to the sanction and conditions to which the first notification was subject. 25 Bom.L.R. 767=25 Cr.L.J. 330=77 Ind. Cas. 186=A.I.R. 1924 Bom. 47 (D.B.).

——S. 21—Scope of.

The scheme of the Act is to distinguish between provisions which are intended to apply to all Bombay Acts and those which are intended to apply to Bombay Acts passed after 1904. The use of the words "any Bombay Act" in S. 21 indicates that the section was intended to be of general application. 48 Bom. 87=26 Bom.L.R. 1=90 Ind. Cas. 13=A.I.R. 1924 Bom. 1 (D.B.).

GUJARAT TALUQDARS ACT (BOMBAY ACT VI OF 1888).

——S. 73—Applicability of—Kasbati holding under patta.

Bombay Act VI of 1888 does not confer on a Kasbati holding under a patta in the nature of a lease any greater rights than those conferred by the terms of the patta. 39 Bom. 625=42 I.A. 229=19 C. W. N. 1087=13 A.L.J. 953=(1915) M.W.N. 563=29 M.L.J. 242=18 M.L.T. 179=2 M.L.W. 731=17 Bom.L.R. 730=30 Ind. Cas. 303=23 C.L.J. 1=A.I.R. 1915 P.C. 59 (P.C.).

——Applicability of—Kasbatis of Village Chharodi.

Bombay Acts VI of 1888 and V of 1879 apply to of the Kasbatis' village of Chharodi as they are included among Taluqdars. The right to manage the village carries with it definite obligations, failure to fulfil which, involves resumption by Government. The obligation cannot be sub-divided or surrendered by the recognised Manager to others without the consent of Government. The Government are not bound to recognise as Manager any one except a male or female Kasbati of Viramgam or the widow of such a Kasbati. It is not bound to recognise as Manager any person whatever who claims the right to manage in virtue of a transfer whether brought about privately or by process of Civil Court. 11 Ind. Cas. 948=13 Bom.L.R. 609 (D.B.).

——Suit for partition of Taluqdari estates—Competency.

Civil Courts cannot entertain suits for partition of Taluqdari estates. (1902) 4 Bom.L.R. 817.

——S. 2 (a)—Taluqdar—Purchaser from a Taluqdar.

A purchaser from a taluqdar does not become a 'taluqdar' within the meaning of S. 2 (a). (1902) 4 Bom.L.R. 550=26 B. 757.

——S. 12—Known co-sharers.

"Known co-sharers" in S. 12 covers all who are known to have an interest in the property and is not limited to those only whose names are recorded under the Act. (1903) 5 Bom.L.R. 937=28 B. 209.

——S. 21—Taluqdar's estate—Interpretation.

The expressions 'taluqdar's estate' and 'taluqdari estate' in Bombay Act VI of 1888 are used to denote different matters; the former expression means something other than taluqdari estate. The expression 'taluqdari estate' in S. 21 means an estate of taluqdari tenure. (1902) 4 Bom.L.R. 817.

——S. 29 (e)—Certificate of Managing Officr, interpretation of.

S. 29 (e) of the Gujarat Taluqdars Act, 1888, means that before execution of a decree can be proceeded with the Court must be satisfied that the decree claim has been duly submitted. If the Officer certifies that it has been duly submitted there is an end of the matter. If, however, he does not certify that it has been duly submitted, the Court must wait for one month from the date of the receipt by the officer of an application for a certificate and upon being satisfied that a claim has been duly submitted in accordance with the provisions of S. 29 (b) it may then proceed with the execution. The expression "Managing Officer" is merely a compendious term used in the Gujarat Taluqdars Act, 1888 for "the Taluqdari Settlement Officer" or any other officer who takes charge of the estate and keeps the same in his management referred to in S. 28 of the Act, and where the officer who takes charge of the estate and keeps the same in his management is the Taluqdari Settlement Officer, the "Managing Officer" is merely a synonym for "Taluqdari Settlement Officer." Where an application relating to a claim is presented to the Subordinate Judge and it is forwarded by him to the Taluqdari Settlement Officer it amounts to a submission of the claim in writing within the meaning of S. 293 of the Gujarat Taluqdars Act, if the Taluqdari Settlement Officer is also the Managing Officer. (1908) 34 Bom. 142=11 Bom.L.R. 1358=4 Ind. Cas. 839.

——S. 31—Taluqdari estate—Meaning of.

The expression "talukdar's estate" in S. 31 of the Gujarat Taluqdar's Act. 1888, means only the estate held by a taluqdar or taluqdari tenure and not property held on any ordinary tenure which is distinguishable from the former. (1907) 9 Bom.L.R. 1122 foll. (1908) 11 Bom.L.R. 763=34 Bom. 55=3 Ind. Cas. 773.

——S. 31—Taluqdar's estate—Interpretation.

The expression "Taluqdars' Estate" in S. 31 of the Talukdari Settlement Act, 1888, means the estate held by the Talukdar as Talukdar. It does not therefore include that which a Talukdar owns as assignee of a

mortgage debt by a private investment of money. (1907) 9 Bom.L.R. 1122.

——S. 31—Talukdari estate—Wanta lands.

Wanta lands are lands held by Rajputs or the representatives of Rajputs, who after the Mahomedan conquest of Gujarat received one-fourth of the land of certain villages on condition of keeping order in those villages. The lands are held either rent free or at a small quit rent. Where Wanta land is entered as alienated land under the Land Revenue Code, 1879, it cannot be regarded as land held upon Talukdari tenure in the strict sense of the word. The words "Talukdari estate" in S. 31 of the 'Gujarat Talukdars' Act are used in a technical sense limited to the Talukdari interests in the estate held by a Talukdar by reason of his status as such. 9 Bom.L.R. 1122 and 11 Bom.L.R. 736 followed. (1910) 35 Bom. 97=8 Ind. Cas. 624=12 Bom.L.R. 903.

——S. 31—Taluqdari Settlement—Officer settling a scheme in execution of decree—Action taken under the scheme—Consent of the Taluqdari Settlement Officer presumed to be given to the arrangement.

If a person holding a certain office is empowered by law in virtue of that office to give previous consent in writing to certain proceedings or acts as a condition precedent to their legality or validity, and the person as a matter of fact gives such it cannot be less a consent previously given in writing, merely because at the time of giving it he happened to be unaware of the law empowering him to consent, or being aware of it, he thought he was consenting in virtue of another office which he held. His ignorance of the law giving him the power cannot make the consent not a consent and is no legal ground or excuse for withdrawing it after he has once given it. Where a certain act requires the concurrence of an official person, there is a presumption in favour of its due execution on the ground of the legal maxim **omnia proesumuntur rite**, etc. The presumption can, however, be rebutted by proof that certain forms required by law were not complied with. The powers conferred on the Collector under S. 323 of the C. P. Code, 1882, and those conferred on the Taluqdari Settlement Officer under S. 31 of the Gujarat Taluqdars Act, 1888, are both of an enabling or discretionary nature and are not necessarily of a mutually contradictory character. Where the two offices are combined in one and the same person on grounds of public convenience or expediency, his action must be referred to the exercise of his discretionary powers under both sections, if it can be so referred. It is not that in respect of one office the action was without, and in respect of the other it was with, jurisdiction. (1908) 11 Bom.L.R. 665 =33 Bom. 443=3 Ind. Cas. 753.

BOMBAY HARIJAN (REMOVAL OF SOCIAL DISABILITIES) ACT (X OF 1947).

——If ultra vires—Government of India Act (1935), S. 104 and 7th Schedule, List III, Item I and List II, Item 28.

The Bombay Harijan (Removal of Social Disabilities) Act is not **ultra vires**; it falls in Item 1 of List III of the 7th Schedule to the Government of India Act (1935) and hence it was competent for the Provincial Legislature to pass this piece of legislation. **The Act does not fall within Item 28 of** List II of the 7th Schedule—nor can it be said that the Governor-General, by giving assent to the Act, by implication constituted this subject as a new subject on which the Provincial Legislature could legislate, though not originally included in List II and III, there having been no public notification as required by S. 104, Government of India Act. 51 Bom.L.R. 100=A.I.R. 1949 Bom. 168=50 Cr.L.J. 615=I.L.R. (1949) Bom. 25 (D.B.).

BOMBAY HEREDITARY OFFICES ACT (III OF 1874).

———Contract Act does not supersede Hereditary Offices Act.

The general provisions of the Indian Contract Act cannot supersede the provisions of a special later enactment such as Bombay Hereditary Offices Act. 30 Bom.L.R. 570=111 Ind. Cas. 278=A.I.R. 1928 Bom. 201 (D.B.).

——Suit for refund contribution under Act—Maintainability.

Land Revenue in S. 3 is defined as including "any cess or rate authorized by Government under the provision of any law for the time being then in force," and the suit for a refund of the contribution levied under Act (III of 1874) would, therefore, be barred unless exemption is claimed by virtue of an adjudication under Act (XI of 1852), which declares the particular property to be exempt. 54 I.A. 380=105 Ind. Cas. 694=51 Bom. 830=29 Bom.L.R. 1484=46 C.L.J. 393=39 M.L.T. 527= A.I.R. 1927 P.C. 217=53 M.L.J. 475 (P.C.).

——Adoption by Watandar—Validity.

An adoption by a **watandar** without the consent of the Government or of the other members of the family is good as between himself and the other members of the family. A.I.R. (Vol. 24) 1937 Bom. 465=39 Bom.L.R. 851=172 Ind. Cas. 271.

——Shet sanadi land—Whether watan property.

Shet sanadi lands are **watan** property and are governed by the provisions of the Bombay Hereditary Offices Act although Government as the result of an inquiry held in 1900, came to the conclusion that they would not treat them as **watan** property. A.I.R. (Vol. 20) 1933 Bom. 123=35 Bom.L.R. 114=144 Ind. Cas. 459.

———Hereditary Officer—Mulla.

A **Mulla** not being the hereditary officer under the Act, the Revenue Authorities have no jurisdiction to order resumption of **malanki** service lands held by a **mulla**. A.I.R. (Vol. 19) 1932 Bom. 456= 34 Bom.L.R. 944=139 Ind. Cas. 210.

——Watan lands—Non-watandar—Auction-purchaser—Rights of.

A **non-watandar** auction-purchaser gets only the right, title and interest of the original **watandar** which comes to an end on the death of the **watandar** and he is not competent to pass on to his alienee any greater title. A.I.R. (Vol. 18) 1931 Bom. 53=32 Bom.L.R. 1414=129 Ind. Cas. 894.

——S. 2—Scope of—Watan lands—Succession —Divided brothers—Death of one leaving widow and son—Death of son unmarried—Adoption by widow after son's death—Right of adopted son to succeed to watan lands in preference to divided brother—Hindu Law.

S. 2 of the Bombay Watan Act prefers male heirs to female heirs excepting the case of the widow

of the last owner, as far as succession to watan land is concerned. **M** died leaving two sons **S** and **G**, and some watan lands which devolved on his two sons. **G** died leaving his widow **P** and a son **R**, who died unmarried on 22nd July, 1921. **S** and **G** were divided in status. On 23rd April, 1928, **P** adopted **B**, to her husband. On 19th April, 1940, **S** filed a suit for a declaration that he was the reversionary heir to the watan lands and that the adopted son had no right to them.

Held: (1) that under the ordinary rule of succession under the Hindu Law, on the death of **R**, though the property would go to the next reversionary heir of **G**, namely, **S**, on the adoption of **B** by the widow **P**, he would be entitled to the property, divesting **S**;

(2) that there was nothing in S. 2 of the Watan Act which altered the line of male heirs as laid down under the ordinary Hindu Law as far as watan lands are concerned, and on the adoption therefore, the adopted son would divest the property vested in the reversioner;

(3) that the disability imposed by S. 2 was only on female heirs; there was no disability placed on the widow from adopting; **B** on his adoption became the male heir of **G** next in succession to **R**, and he being nearer in succession to **G** than **S**, was entitled to succeed to the lands divesting **S**, since he claimed not through the female heir **P**, but through **G**, and his heir;

(4) that the power of the widow of **G** to adopt was not exhausted as **R** died issueless and unmarried, without leaving a widow. 51 Bom.L.R. 162 =A.I.R. 1949 Bom. 252=I.L.R. (1949) Bom. 1.

——S. 2—Watandar granting permanent tenancy—After his death his successor receiving rent as before—Tenant must prove ratification.

The primary definition of a **watandar** is that he is a person having a hereditary interest in a **watan** i.e., not only an interest in the property but an interest in the office also.

After the death of the **watandar** who had granted **watan** lands on permanent tenancy, his successor received rent from the tenants as before. The successor also did not refuse the request of the grantee to continue the old lease. The Record of Rights showed the tenant as permanent tenant since 1904 and the successor never attempted to have the entries corrected. The successor also waited for eleven years after the issue of notices to the tenant before filing the suits in spite of the fact that the tenant was earning about Rs. 800 every year and paying only Rs. 50 as rent:

Held, that none of these circumstances necessarily involved an inference that the successor ever recognised the tenancy as permanent or that the tenants had ever asserted it as such. The evidence was altogether insufficient to establish the tenant's case. A.I.R. (Vol. 30) 1943 Bom. 348=45 Bom.L.R. 754=211 Ind. Cas. 12.

——S. 4—Office of Kazi—Act does not apply to it—Kazi can alienate service inam lands.

The office of a **Kazi** is not a hereditary office and therefore, it does not fall within the meaning of the Watan Act. Even assuming that the office of a **Kazi** is hereditary, it is not an office held for the purposes of the duties mentioned in S. 4, Watan Act. Consequently, an alienation of the lands given to the **Kazis** as service **inam** lands is permissible. A.I.R. (Vol. 32) 1945 Bom. 317=47 Bom.L.R. 112=221 Ind. Cas. 8.

——S. 4—'Vatan Family'—Succession.

A **vatan** family means the descendants of a common progenitor who was a **vatandar** and the male descendants of the brother of the grantee of the **vatan** property do not succeed in preference to the female descendants of the grantee of the **vatan** under S. 2 of the Bombay Act (V of 1886). 41 Bom. 677=42 Ind. Cas. 450=19 Bom.L.R. 730 (D.B.).

——S. 4—Vatans—Settlement—Succession.

Vatans do not cease to be vatan property in connection with hereditary offices as defined by S. 4 of Act (III of 1874) simply because settlement has been effected and the service has been abrogated and they continue to be so equally where powers of alienation have been conferred by the settlement. Succession to such property is therefore governed by S. 2 of Act (V of 1886) prescribing the devolution of vatan property. (1900) 3 Bom.L.R. 249=25 Bom. 470.

——Ss. 4 and 18—Jurisdiction of Civil Courts—Mahar vatan—Suit by villagers to restrain mahars from taking away skins from dead animals —Bombay Revenue Jurisdiction Act (X of 1876), S. 4 (A).

Plaintiffs residing in a village, sought an injunction to prevent the skins of their dead animals being taken away by the defendants who were village Mahars and claimed the right of taking away the skins as vatandars. **Held,** that the question, whether it was or was not a Mahar Vatan, as contended for, was within the jurisdiction of the Civil Courts and that the plaintiff would be entitled to an injunction unless the Mahars should succeed in showing that it was a hereditary office as alleged by them. 43 Bom. 277= 48 Ind. Cas. 224=20 Bom.L.R. 993 (D.B.).

——S. 4—'Watandar'—Holder of watan property or hereditary interest without holding office and without liability to perform service.

A person who acquires watan property or has hereditary interest in it, without acquiring the watan office and without being under any obligation to perform the service attached to the office, is a watandar within the meaning of the Bombay Watan Act of 1874. 51 Bom.L.R. 556=A.I.R. 1949 Bom. 314= I.L.R. (1949) Bom. 565 (F.B.), overruling 41 Bom.L.R. 924.

——Ss. 4 and 5—Watandar—Mortgagee or permanent lessee of vatan land.

Where a person holds vatan lands as a mortgagee or a permanent lessee from a vatandar, he cannot be said thereby himself to have become a vatandar, as he cannot be said to have legally acquired the title to property within the meaning of S. 4 and the alienation in his favour can enure only upto the lifetime of the alienor vatandar under S. 5. 28 Bom. L.R. 395=94 Ind. Cas. 651=A.I.R. 1926 Bom. 280.

——Ss 4 and 15—Kulkarni vatan—Services commuted—Cash allowance payable by treasury is exclusive property of the officiating Kulkarni.

The kulkarni cash allowance, payable by the treasury and subject to the modification or withdrawal to a representative kulkarni vatandar does not cease to be exclusive property of the officiating kulkarni

by reason of the commutation of the kulkarni service and it does not become from the date thereof the property of the joint family and descendants of the original vatandars. A.I.R. 1926 Bom. 364, Diss. from. 31 Bom.L.R. 935=53 Bom. 739=A.I.R. 1929 Bom. 368=122 Ind. Cas. 70 (D.B.).

——S. 5—Alienation sanctioned by Collector—Authority of Collector on behalf of Government—Presumption.

If the legality of an alienation for want of sanction of the Government under S. 5 of the Bombay Hereditary Offices Act is challenged several years after the Collector had sanctioned the alienation, it must be presumed that the Collector had authority on behalf of the Government so to do. 75 I.A. 259=I.L.R. (1948) Bom. 639=62 L.W. 35=A.I.R. 1949 P.C. 35=51 Bom.L.R. 173=(1949) 1 M.L.J. 172 (P.C.).

——S. 5 (1) (a)—Alienation—Power of Watandar.

Under S. 5 (1) (a) the power of alienation of a watandar is restricted to his lifetime only in case the alienation is to a stranger and not to a watandar of the same watan. Alienation to a watandar of the same watan is not prohibited. 32 Bom.L.R. 1249=A.I.R. 1930 Bom. 534.

——S. 5 (1) (a)—Alienation—Power of watandar—Commutation of service—Effect of.

Mere commutation of service does not affect the rule as to inalienability in **S.** 5 unless the right of alienation without the sanction of Government is conferred on the watandars by the terms of the settlement or has been acquired by them under the same terms. 32 Bom.L.R. 1249=A.I.R. 1930 Bom. 534.

——S. 5 (1) (a)—Alienation by Will—Validity.

Alienation by will by a watandar during his lifetime would be valid beyond the term of his natural life if it is in favour of a watandar of the same watan. 32 Bom.L.R. 1249=A.I.R. 1930 Bom. 534.

——Alienations of Inami and Mirasi rights—Validity.

Where there is no evidence to show that the **Mirasi** rights were independently acquired by the original **Vatandar** and the lands according to the record, such as it is, are treated as **Vatan** lands, the alienation of **Mirasi** rights cannot be saved when the lands are sought to be resumed on the ground that the alienation of **Inami** rights has ceased to be operative after the lifetime of the original **Vatandar**. Whether the alienations are of the **Inam** rights or of the **Mirasi** rights they are operative only during the life-time of the **Vatandars** whose right, title and interest were alienated and therefore, after their deaths, the successor is entitled to the possession of the lands in question. 46 Bom. 52=23 Bom.L.R. 799=62 Ind. Cas. 942=A.I.R. 1922 Bom. 192 (D.B.).

——S. 5—Ghadi Vatan—Mortgage by vatandar confers no right as mortgagee by adverse possession during mortgagor's life-time.

Possession by mortgagee of Ghadi Vatan lands granted by Government as service emoluments during the life-time of the mortgagor is not adverse to him and a suit brought by his widow within eight years is not time-barred. 26 Bom.L.R. 814=83 Ind. Cas. 145=A.I.R. 1924 Bom. 521 (D.B.).

——S. 5—Kulkarni Vatan—Mortgage of—Personal covenant to repay in case mortgagee is deprived of possession—Validity.

A Kulkarni Vatan was mortgaged with possession in lieu of interest. The mortgagor covenanted that he would repay the money at the stipulated time and further that if before the expiry of that period or any time thereater the land passed out of the mortgagee's possession on one cause or another, the mortgagor should be personally liable to pay the principal together with the interest at a certain rate from the date the mortgagee was deprived of possession.

Held, per **Macleod, C. J.**, that the covenant was not void under S. 5 of the Vatan Act.

Per **Shah, J.**—The applicability of the covenant to dispossession in consequence of the mortgage coming to an end on the death of the mortgagor in virtue of the provisions of the Bombay Hereditary Offices Act is doubtful. 45 Bom. 1206=23 Bom.L.R. 529=63 Ind. Cas. 234=A.I.R. 1921 Bom. 437 (D.B.).

——S. 5—Mortgage of vatan lands—Rights of mortgagee.

Under S. 5 a mortgage of Vatan lands is valid during the life-time of the mortgagor only and on his death, the mortgagee in possession, becomes a trespasser with his lien of mortgage. 22 Bom.L.R. 385=75 Ind. Cas. 76=44 Bom. 500.

——S. 5—Mortgage of Vatan lands—Mortgagee in possession after mortgagor's death—If liable to pay mesne profits.

Mortgagee from a vatandar is liable to pay the mesne profits after the original mortgagor's death for the period between the death of the mortgagor and the time when his successor to the vatan obtains possession. 49 Bom. 583=87 Ind. Cas. 723=27 Bom.L.R. 497=A.I.R. 1925 Bom. 325 (D.B.).

——S. 5—Mortgage by Vatandar void against heir of Vatandar—Decree or other arrangement thereon is also void against them.

After the death of the **Vatandar** mortgagor, the decree-holder applied against the mortgagor's heirs to recover the full amount of the decree by attachment and sale of the property in the hands of the heirs of the mortgagor. The decree on the mortgagee against the **Vatandar** mortgagor provided that the mortgage-debt was to be satisfied by payment of an annual sum out of the profits of the mortgage lands; and in the case of deficit, the mortgagor was personally liable to make good the deficiency.

Held, any decree or any arrangement based on the mortgagee's rights under a mortgage, is also void against the heirs of the **Vatandar**, if the mortgage is in its inception void against the heirs of the **Vatandar**. 46 Bom. 345=64 Ind. Cas. 208=23 Bom.L.R. 1037=A.I.R. 1922 Bom. 110.

——S. 5—Mortgage decree—Provision for payment out of profits—Application in execution for recovery of whole from other property does not lie.

Where a mortgage decree, provides satisfaction of the mortgage debt by payment of an annual amount out of the profits of the mortgaged lands it is not open to the decree-holder to apply to execute the decree, to recover the full amount by sale of other

property in the hands of the judgment-debtor. 46 Bom. 345=64 Ind. Cas. 208=23 Bom.L.R. 1037= A.I.R. 1922 Bom. 110.

——S. 5—Permanent tenancy—Proof—Continuance of lands in same family for generations.

Mere length of enjoyment or the circumstances that lands have been in practice continued in the same family for several generations is no proof of permanent tenancy. The mere continuance of an arrangement which is beneficial to both parties can hardly be made the foundation of a right to hold the land permanently. A.I.R. (Vol. 25) 1938 Bom. 492= 40 Bom.L.R. 1015=178 Ind. Cas. 854.

——S. 5—Permanent Tenancy—Proof—Khata opened in name of tenants in inamdar's book.

There are no doubt differences of treatment between the so-called **khata kuls** and the tenancies of the **sheri** or **khas kamat** lands which show that the former are privileged tenants. It by no means follows, however, that the privilege extends to permanency of tenure. The fact that a **khata** is opened in the name of the tenants in the **inamdar's** books is by no means conclusive of the fact that they are permanent tenants. A.I.R. (Vol. 25) 1938 Bom. 492 (496)=40 Bom.L.R. 1015=178 Ind. Cas. 854.

——S. 5—Permanent tenancy—Proof—Mortgage or sale by khata tenants.

Mortgages and even sales of lands by **khata** tenants is part of the privilege of these tenancies. That would not **prima facie** prove that the tenancy is in law a permanent one. A.I.R. (Vol. 25) 1938 Bom. 492=40 Bom.L.R. 1015=178 Ind. Cas. 854.

——S. 5—Permanent Tenancy—Proof—Improvement and spending money by tenant.

The spending of money on developing and improving the lands would be the natural result of the landlord's policy of non-interference. It may give rise to a claim for compensation on eviction, but it does not seem to be a very good ground for holding that the tenancy is permanent in law. A.I.R. (Vol. 25) 1938 Bom. 492=40 Bom.L.R. 1015=178 Ind. Cas. 854.

——S. 5—Permanent tenancy is inoperative beyond lifetime of watandar.

A grant of right of permanent tenancy is an alienation within the meaning of the Regulation, (XVI of 1827), and the Watan Act, and is inoperative beyond the lifetime of the **watandar.** If the law prohibits alienations and the particular transaction is an alienation within the definition, it is prohibited, and it is not for the Courts to consider the question whether it is beneficial or not to the estate. A.I.R. (Vol. 25) 1938 Bom. 492=40 Bom.L.R. 1015=178 Ind. Cas. 854.

——S. 5—Permanent tenancy—Whether ceases on death of grantor—Acceptance of rent—Position of grantee.

A permanent tenancy of **watan** lands ceases on the death of the grantor and the grantee becomes a tenant on sufferance or on acceptance of rent from him, a tenant from year to year—not a permanent tenant. A.I.R. (Vol. 25) 1938 Bom. 492 (496)= 40 Bom.L.R. 1015=178 Ind. Cas. 854.

——S. 5—Money-decree against watandar—Death of watandar—Decree, if can be executed against watan property in the hands of his son —Civil Procedure Code (Act V of 1908), S. 53.

In view of the statutory prohibition in S. 5 of the Watan Act, **watan** property owned by a **watandar** is not after his death liable for his debts in the hands of his heirs under S. 53 of the C. P. Code. Although an alienation to a **watandar** of the same **watan** is not forbidden by the statute, it would be futile to order the property to be sold subject to the condition that the purchaser should be a **watandar** of the same **watan.** A.I.R. (Vol. 21) 1934 Bom. 116 =36 Bom.L.R. 169=58 Bom. 218=151 Ind. Cas. 151.

——S. 5—Sale of vatan lands in execution against widow of vatandar—Reversioners, if bound.

The sale of the **vatan** lands in execution against the widow of a **vatandar** in respect of a decree that had been passed against him is valid and binding upon reversioner provided the auction-purchaser is a **vatandar** of the same **vatan** since the widow would be able to alienate her husband's immovable property for legal necessity under S. 5 of the Bombay Hereditary Offices Act. 24 Bom.L.R. 249=67 Ind. Cas. 209=46 Bom. 726=A.I.R. 1922 Bom. 96 (D.B.).

——S. 5—Sale of vatan lands in execution—Collector levying full assessment—Purchaser's rights.

Where in consequence of a sale of vatan lands in execution of a decree against vatandar the Collector levied the full assessment and assigned it for remuneration of service, the land does not by reason thereof lose its character as vatan property. The purchaser at Court sale of vatan land in execution of a decree against the vatandar acquires only the right title and interests of the judgment-debtor and on the death of the latter his right under the Court sale ceases. 37 Bom. 81=17 Ind. Cas. 170=14 Bom. L.R. 797.

——S. 5—Auction-purchaser of watan lands—Rights of.

If the auction-purchaser is a watandar of the same watan, the purchaser gets a valid title which survives the death of the original watandar, whereas in the case of a non-watandar his right ceases on the death of the watandar. If, therefore, a non-watandar gets a limited right under the auction-sale, he cannot convey a higher right to his purchaser even though he be a watandar of the same watan. The fact that the auction-purchaser effects the sale before the death of the original watandar is immaterial. 32 Bom.L.R. 1415=A.I.R. 1931 Bom. 53.

——Ss. 8-13—Limitation.

Sections 8-13 of the Watan Act sufficiently safeguard the rights of the State, and the Collector can assert the rights of the State at any time and set aside an unauthorised alienation irrespective of the law of limitation for suit. 32 Bom.L.R. 1398= A.I.R. 1931 Bom. 24=129 Ind. Cas. 145.

——S. 9—Conditions necessary for Collector for setting aside alienation.

Section 9, Bombay Hereditary Offices Act, lays down two conditions which have to be satisfied before the Collector can set aside an alienation. The alienation in question must have taken place both

otherwise than by virtue of a decree or order of a Court, and without the consent of the Collector. If it took place by virtue of a decree it cannot be set aside even though the Collector did not consent to it. If the Collector consented to it and ownership was transferred in the Revenue Records, it cannot be set aside even though there was no decree. The words "passed by virtue of a decree into the ownership or beneficial possession of a person not a **watandar,**" surely imply that there must have been a change of ownership or possession effected by the decree. A Revenue Officer can exercise the prescribed powers if the conditions mentioned in the statute are satisfied but has no jurisdiction to determine finally whether those conditions are in fact satisfied. If he holds after inquiry that a land is Government land and deals with it accordingly, or if he holds that there has been a breach of the conditions of an occupancy and forfeits the holding, but the Civil Court comes to the conclusion that the land was not Government land or that the conditions of the occupancy had not been broken, then the order will be treated as a nullity which does not require to be set aside. A.I.R. (Vol. 24) 1937 Bom. 307=39 Bom. L.R. 288=I.L.R. (1937) Bom. 464=170 Ind. Cas. 801.

——Ss. 9, 11—Jurisdiction of Collector—Grant of lands before British Rule—Alienation—Revenue Authorities, if can set it aside under.

The determination of the status of being a **watandar** is one of the matters from which the jurisdiction of the Collector is excluded, and no provision is made in the Watan Act, for the determination by the Collector of what persons shall be held to be **watandars,** but only what persons shall be recognized as representative **watandars**. Where there was a grant of lands to the plaintiffs' predecessor before 1827, that is before the introduction of British Rule, the Revenue Authorities have no power to set aside the alienation, under S. 9 or S. 11, Bombay Hereditary Offices Act, for in fact there is no alienation within the meaning of the Act. The orders passed setting aside these alienations are not duly authorised and Cl. (3), Revenue Jurisdiction Act, is no bar to the suit regarding such lands. A.I.R. (Vol. 24) 1937 Bom. 307=I.L.R. (1937) Bom. 464=39 Bom.L.R. 288=170 Ind. Cas. 801.

——S. 9—Alienation of **watan** property made before the Act—Collector refusing to set it aside under S. 9 of the Act—Subsequent suit in Civil Court for possession of that property is not barred under S. 4 (a), Bombay Revenue Jurisdiction Act, 1876. A.I.R. (Vol. 26) 1939 Bom. 369=I.L.R. (1939) Bom. 428=41 Bom.L.R. 578=184 Ind. Cas. 633.

——S. 9—Watan Pasaita land—Collector's Revenue Registers—Recovery of service lands—Alienation—Limitation.

Where land assigned as remuneration of officiating village servants is described in the Collector's Revenue Registers as 'Watan Pasaita', such a description is not inconsistent with the ordinary meaning of the word 'Pasaita,' nor in any way suggests that **Wanta Pasaita** land would remain 'rent-free' if it passed into the ownership of any person not a watandar and not entitled to remuneration for the performance of village service. The summary powers given by S. 9 of Act (III of 1874), to the Collector in respect of the recovery of service land alienated to an outsider or the profit thereof are not controlled by the date of the alienation. The fact that after the first alienation under which the Watan passed there was another alienation does not affect a case under S. 9 of the Act. The law of limitation does not govern the Collector's action under S. 9 of the Hereditary Offices Act, 1874. (1905) 7 Bom.L.R. 186.

——S. 9 (2)—Watan land—Alienation—Order by Collector directing alienee to be in possession and to pay rent to watandar—Finality—Power to revise and vary rent—Extent of.

The order of the Collector permitting the alienee of watan property to remain in possession and directing him to pay a fixed rent to the watandar, is final and is not open to appeal or revision, in view of S. 9 (2) of the Bombay Hereditary Offices Act. But this does not deprive the Collector of his power to revise the rent fixed from time to time having regard to the change in the value of the lands in the locality. It is therefore open to the Collector to call upon the alienee in possession of the land to pay such amount to the watandar as the Collector deems fit, even though such amount may happen to be in excess of the economic yield of the land. 49 Bom. L.R. 784=A.I.R. 1948 Bom. 176 (D.B.).

——S. 9 (2)—Order of Collector fixing rent—Finality—Power to alter rent.

Decision of the Collector as to the amount of rent leviable under S. 9 (2) is final in the sense that it cannot be questioned either by any appellate or revisional authority under the Act, or by any suit in a Civil Court, but the Collector is not precluded from altering the rent previously fixed, should circumstances justify that court. 30 Bom.L.R. 1404=112 Ind. Cas. 789=A.I.R. 1928 Bom. 534 (D.B.).

——Ss. 9 (2) and 11-A—Assessment—Resumption and levy of full rent by Collector—Rent is payable to Vatandar as profits.

Where the lands have been assessed at the full rent by Collector, the property reverts to the Vatan which means that rent must be paid by the person in possession, if eviction is not ordered, and the rent should be considered as the profits of the land which will go to the Vatandar. 23 Bom.L.R. 561=64 Ind. Cas. 7=A.I.R. 1921 Bom. 37 (D.B.).

——S. 10—Applicability—Vatandar not a party to decree.

Where the vatandar is not a party to the decree, S. 10 and the certificate purporting to be under the section have no application. 52 Bom. 213=30 Bom. L.R. 434=110 Ind. Cas. 697=A.I.R. 1928 Bom. 181 (D.B.).

——S. 10—Refusal to issue Certificate—Revision.

It is doubtful whether the High Court cannot interfere with the decision of the Collector made in the exercise of his discretion, refusing to issue a certificate under S. 10 of the Bombay Hereditary Offices Act. 28 Bom.L.R. 456=94 Ind. Cas. 760=A.I.R. 1926 Bom. 308 (D.B.).

——S. 10—Dismissal of execution application on production of certificate—Revival.

It is open to a Court to receive and proceed with an application for execution of a decree by attachment and sale of property which was dismissed on the production of a certificate of a revenue officer to the effect that the property was not liable to be attached, if it is shown that the certificate was subse-

quently cancelled by an appellate revenue authority. A.I.R. (Vol. 32) 1945 Bom. 85=46 Bom.L.R. 725=219 Ind. Cas. 192.

——S. 10—Money-decree against watandar and minor sons—Execution against watan property in the hands of minor sons—Legality of—Civil Procedure Code (Act V of 1908), S. 53.

Where the holder of a money decree against a **watandar** and his minor sons, applied after the death of the **watandar**, to execute the decree against the **watan** property in the hands of the minor sons whereupon the guardians of the minors applied for but failed to obtain a certificate from the Collector under S. 10, Bombay Hereditary Offices Act:

Held, that the interest of the minors in the **watan** property was liable to attachment and sale in execution of the decree obtained against him.

Per **Baker, J.**—The life-interest of the **watandar** terminates at his death. During his lifetime his sons in the case of a joint Hindu family acquire an interest in the **watan** property by birth. At his death his interest ceases and vests in his sons, who become full owners of the **watan** property, that is to say, they have a life-interest in it. When there is a decree against them which is to be satisfied out of the family property, their life-interest can be attached and sold, and the attachment and sale will be good during their lives, subject to any objection which might be raised by their heirs after their death and subject to any action which the Collector might take under the Watan Act on their representation.

Per **Divatia, J.**—The sons themselves being the judgment-debtors under the decree, their interest in the **watan** property which they inherit by birth would be liable and the death of one of the judgment-debtor, **viz.**, the father would not make any difference so long as the sons' liability dates from the time when the decree itself was passed. A.I.R. (Vol. 21) 1934 Bom. 119=58 Bom. 273=36 Bom.L.R. 181=151 Ind. Cas. 207.

——S. 10—Alienee of vatan lands mortgaging the same with possession—Alienation declared null and void by Government and mortgagee required to pay full rent to vatandar—Alienee obtaining possession from mortgagee through Court—Court on Collector's application ordered to deliver possession to Collector or mortgagee—Order ultra vires and alienee is entitled to retain possession on full payment of rent to vatandar.

The alienee of certain vatan lands, alienated before the passing of the Vatan Act, mortgaged with possession the same; Government declared the alienation to be null and void and required the mortgagee to pay full rent to the vatandar, on the application of the heir of the vatandar. The alienee obtained possession from the mortgagee under a decree in Civil Court, but on the application of the Collector, the alienee was ordered by the Court to deliver over possession to the Collector or the mortgagee. **Held**, that even under S. 10 the Court had no power to pass order compelling the alienee to deliver possession to the Collector or mortgagee and that the alienee, on his paying full rent to the vatandar, as the mortgagee, was entitled to remain in possession. 52 Bom. 213=30 Bom.L.R. 434=110 Ind. Cas. 697=A.I.R. 1928 Bom. 181 (D.B.).

——S. 11—Application to set aside alienation—If interrupts adverse possession.

An application under the Act to set aside an alienation does not prevent adverse possession from continuing. 37 Bom. 37=17 Ind. Cas. 148=14 Bom.L.R. 793 (D.B.).

——Ss. 11, 10—Scope—Alienation with sanction—Person claiming to be permanent tenant—Suit, if barred by S. 4, Bombay Revenue Jurisdiction Act (X of 1876).

The alienation referred to in S. 11, Bombay Hereditary Offices Act, read with S. 10, covers any case where a **watan** or any part thereof has passed without the sanction of the Government into the ownership or beneficial possession of any person other than the officiator, or if the property has not been assigned, into the ownership or beneficial possession of any person not a **watandar** of the same **watan**. It is, however, to be noticed that under S. 10, the alienation must be without the sanction of Government and indeed the only alienation of **watan** which is forbidden by S. 5 is an alienation without the sanction of Government. It is plain that where one is dealing with a claim to a permanent tenancy founded on S. 83 of the Bombay Land Revenue Code by possession from time immemorial, and where from the nature of the case the origin of the alienation is lost in obscurity, it cannot possibly be proved that that alienation was made without the sanction of Government. Hence the alienation referred to in S. 11, Watan Act, does not cover a title sought to be made under S. 83 of the Bombay Land Revenue Code, by possession from time immemorial. So a suit of the plaintiff claiming himself to be a permanent tenant is not barred by S. 4, Bombay Revenue Jurisdiction Act. A.I.R. (Vol. 24) 1937 Bom. 494=39 Bom. L. R. 920=172 Ind. Cas. 464.

——Ss. 11, 11-A—'Alienation'—Whether includes passing of watan lands into ownership of person not entitled to them.

There is no justification for placing a narrow construction on the word 'alienation' in S. 21 of the Bombay Hereditary Offices Act, by restricting its meaning to a transfer or conveyance by **watandar** himself. If a **watandar** conveys **watan** property to a stranger, there is of course an alienation by a **watandar**, but if **watan** property passes into the hands of a stranger, though without any conveyance, as for instance, by devolution or usurpation, there is equally an alienation from the **watandar** family. If a widow of a **watandar** makes a valid adoption and the property passes to the son, there is no alienation but the reason is not that there has been no conveyance, but that the person to whom the property passes is not a stranger. If the adoption is not valid, there is an alienation, so that what is meant by 'alienation' under S. 11 is only the passing of **watan** property into the ownership or beneficial possession of any person other than the officiator or a person not a **watandar** of the same **watan** as the case may be. No transfer or conveyance by a **watandar** is necessary at all.

Therefore, the Revenue Authorities are justified in annulling the alienation under S. 11 and resuming the lands under S. 11-A. A.I.R. (Vol. 24) 1937 Bom. 121=38 Bom.L.R. 1308=I.L.R. (1937) Bom. 236=168 Ind. Cas. 73.

——Ss. 11 and 11-A—'Thenceforward revert to vatan'—Meaning of.

The predecessor-in-title of defendants Nos. 2 to had in the year 1886 alienated their Vatan land to the 8 plaintiff. After the death of the alienor, the defendants applied to the Collector to take proceedings for the protection of the Vatan and the Collector on October 5, 1904, made a declaration under S. 11 that the alienation was null and void, but did not fix the assessment on that date. Later, on July 6, 1908, the Collector held further proceedings and assessed the land at a rental of Rs. 75 per annum.

Held, that the assessment levied under S. 11-A would be charged from the date of the declaration, **i.e.,** the 5th October, 1904. The words "thenceforward revert to Vatan" in S. 11-A can only mean that the Act regards the restoration of the Vatan complete after dispossession or assessment. But they do not indicate that the assessment should not be levied from the date of the order requiring such assessment to be made. 25 Bom.L.R. 785=77 Ind. Cas. 146=A.I.R. 1923 Bom. 478 (D.B.).

——Ss. 11, 11-A and 9 (2)—Jurisdiction of Civil Court.

Civil Court has no jurisdiction to set aside orders made under Ss. 11, 11-A and 9 (2). 28 Bom.L.R. 651=95 Ind. Cas. 1008=A.I.R. 1926 Bom. 417 (D.B.).

——S. 11-A—Duty of Collector.

An order by the Collector declaring an alienation void and authorising recovery of possession by the applicant is opposed to the Act as the Collector can only resume possession or assess the land. 37 Bom. 37=17 Ind. Cas. 148=14 Bom. L. R. 793.

——S. 11-A—Order of Collector—Revision—Bombay Revenue Jurisdiction Act, S. 4 (a), para. 3.

An order of a Collector under S. 11-A of the Act directing a levy of full rent is an order within S. 4 (a), para. 3 of Revenue Jurisdiction Act and therefore the High Court has no jurisdiction to interfere with the order. 64 Ind. Cas. 7=23 Bom.L.R. 561.

——S. 15—Vatan property—Distinction between grant of share of revenue and grant of soil.

In the case of Vatan property, the distinction between grants of the royal share of the revenue and the grants of the soil cannot be conveniently made without detriment to the statutory restriction on the Vatandar's power of alienation and should not be made unless it is clearly justified by the terms of the grant. 44 Bom. 237=56 Ind. Cas. 411=22 Bom. L.R. 275.

——S. 15—Agreement under—Validity—Condition.

Agreement of the kind contemplated by S. 15 are not ordinary agreements and these agreements being authorized by statute, the provisions of the enactments which authorize them as to the conditions under which such agreements can be made must be treated as conditions precedent to the exercise of the powers conferred by the statute, in accordance with the ordinary principle applicable in such cases. 30 Bom.L.R. 570=111 Ind. Cas. 278=A.I.R. 1928 Bom. 201 (D.B.).

——S. 15—"Holder"—Widow of deceased representative watandar.

The word 'holder' in S. 15, Bombay Hereditary Offices Act whether it be necessarily restricted to an owner or not, cannot, at any rate, mean anyone who happens to be in possession of the property. The widow of a deceased **watandar** whose name has been entered as representative **watandar** is not a holder of the **watan** within the meaning of S. 15, and she is not, therefore, competent to enter into an agreement for commutation of services under that section. A.I.R. (Vol. 26) 1939 Bom. 398=41 Bom.L.R. 772=I.L.R. (1939) Bom. 482=186 Ind. Cas. 324.

——Ss. 15 (1) and 45 (c)—"Holder"—Representative vatandar disqualified under S. 45 (c).

A representative vatandar disqualified from officiating as a Kulkarni under S. 45 (c) is still the holder of a vatan within the meaning of Cl. (1), S. 15 and his consent given under S. 15 (1) is binding on his son. 52 Bom. 369=30 Bom.L.R. 581=111 Ind. Cas. 268=A.I.R. 1928 Bom. 215.

——S. 15—"Holder"—Widow holding life interest in vatan property is not 'holder'.

A widow holding an interest in vatan property for the term of her life or until her marriage is not a holder within the meaning of that term in S. 15 of the Act III of 1874. 49 Bom. 554=92 Ind. Cas. 110=27 Bom.L.R. 463=A.I.R. 1925 Bom. 365.

——S. 15—Sanad to inamdar by which holder agreed to pay fixed annual judi in lieu of service—Judi arrived at after deducting assessment on shet-sanadis lands—Discontinuance of service of shet-sanadis and full assessment imposed—Inamdar, if estopped from contending that it was not kadim—Estoppel.

In 1902 a **sanad** was granted to the **inamdar** under S. 15, Bombay Hereditary Offices Act (III of 1874), by which the holders agreed to pay to Government a fixed annual **judi** in lieu of service. There were certain lands granted as **inam** in the village for **shet-sanadi** service. The **judi** was arrived at after deducting the assessment of certain lands including the **shet-sanadi** lands, which were held in **inam** by village servants. In 1920 Government ordered a discontinuance of the service of **shet-sanadi** and imposed full assessments on the lands. The respondent contended that the **sanadi inam** lands had been given by his ancestors to the **sanadis for the performance** of Police duties, that they were **jadid inams,** and that he, and not the Government was entitled to receive the full assessment which had been imposed on the lands after the continuance of service. Government contended that the **sanadi** lands were **kadim inams** and not **jadid** and that the **inamdar** was not entitled to the full assessment levied on the lands:

Held, that the agreement between the parties evidenced by the **sanad** was based upon the assumption that the **sanadi inam** lands were **kadim inam** and the assessment of **judi** was made on that assumption, and that the respondent was not entitled to the assessment. The respondent **inamdar** had by his conduct led Government to believe that he accepted this assumption. By giving Government this impression and allowing them to act upon it, he obtained the benefit of a lower **judi** in perpetuity. The fact which he led Government to believe and act upon was that he agreed to the **sanadi inam** lands being

treated as **kanim inam** and hence he could not now be allowed to contend that they are not **kadim**, A.I.R. (Vol. 22) 1935 Bom. 47=36 Bom.L.R. 1055=155 Ind. Cas. 763.

——S. 15—Settlement—Power of Government.

Muhammadan **watandar**—Application in 1862 to treat property as private—**Sanad** issued in 1890—**Held**, that it was not a case of converting **watan** property into non-**watan** one, but was a case of making a settlement and that the Government had the power to grant this right under S. 15 of Act (III of 1874). A.I.R. (Vol. 21) 1934 Bom. 145 =36 Bom.L.R. 158=150 Ind. Cas. 635.

——S. 15—Devolution—Services commuted—Collector can introduce devolution in a particular line.

Under S. 15 the Collector is competent to introduce a condition in the settlement deed laying down a particular line of devolution for the direct descendants of the person who enjoyed the allowance first. 53 Bom. 739=31 Bom.L.R. 935=A.I.R. 1929 Bom. 368 (F.B.).

——S. 15 (1)—Order of Collector—Validity—Condition.

Under Cl. (1), S. 15, in order to have a valid order, there must be an existing consent of the holder of the watan when the order of the Collector is made, and if it is shown that the consent was not in existence that would affect the validity of the order. 30 Bom.L.R. 570=111 Ind. Cas. 278= A.I.R. 1928 Bom. 201 (D.B.).

——Ss. 15 and 73—Knowledge of Mamlatdar or Chitnis is not knowledge of Collector.

In so far as S. 15 and the connected S. 73 emphasize the personal responsibility of the Collector, the knowledge of the Mamlatdar or Chitnis cannot be said to be also the knowledge of the Collector. 30 Bom.L.R. 570=111 Ind. Cas. 278=A.I.R. 1928 Bom. 201 (c).

——S. 18—Maharki watan—Suit for a share—Jurisdiction of Civil Court.

A civil Court has no jurisdiction to entertain a suit brought by **mahars** for a declaration that they are entitled to a share in the **maharki watan** and for an injunction restraining the defendants from obstructing them in the enioyment of the said share. (1900) 8 Bom.L.R. 869=25 Bom. 186.

——S. 18—Maharki Vatan—Panch not appointed by Collector but by karkun—Award by such Panch—Validity—Suit, independent of award does not lie in civil Court.

A dispute regarding a **Maharki Vatan** was referred under S. 18 to a panchayat. The parties failed to appoint the panchas, the Deputy Collector therefore directed the Mamlatdar to appoint them; the Mamlatdar ordered his Head Karkun to apoint the Panchas and appointed the Head Karkun as a Sar Panch. The Panch thus constituted made an award, which was subsequently approved by the Deputy Collector. On the validity of the award being challenged.

Held, that the procedure followed was not a substantial compliance with S. 18 and that the Panch so constituted could not make a valid award. The award being a nullity, a suit by the Mahar Vatandars to restrain the villagers of their village from delivering the carcasses of dead animals and paying **baluta** to the manes is not cognizable by a civil-Court, having regard to S. 18, 25 Bom. 186, Foll. 47 Bom. 95=68 Ind. Cas. 746=24 Bom.L.R. 917 =A.I.R. 1922 Bom. 410.

——S. 32—Cash allowance in commutation of kulkarni vatan belong to whole family.

A cash allowance granted by Government, in commutation of kulkarni vatan services cannot be claimed exclusively by the representative vatandars and members of his family, but belongs to the whole family, like the vatan. 28 Bom.L.R. 556=95 Ind. Cas. 528=A.I.R. 1926 Bom. 364.

——S. 34—Decree—Whether includes finding in judgment.

The word 'decree' in S. 34 must be deemed to include the judgment on which the decree is based. But S. 34 does not say that the name of an adopted son can only be removed when there is a decree setting aside the adoption. Where, therefore, in a judgment certain adoption is declared invalid, 'decree' is not restricted to a decree setting aside adoption but includes a finding to that effect in a judgment. A.I.R. (Vol. 24) 1937 Bom. 121=38 Bom.L.R. 1308=I.L.R. (1937) Bom. 236=168 Ind. Cas. 73.

——S. 36—Declaratory suit—Maintainability.

A suit for a declaration that the plaintiff is the nearest heir of a deceased representative watandar is maintainable in a civil Court, although the declaration is sought for the purpose of establishing a fact which will enable the plaintiff to have his name entered in the Watan register. 34 Bom. 101=(1909) 11 Bom.L.R. 1339=4 Ind. Cas. 833.

——S. 36—Declaratory suit—Maintainability.

A civil Court has jurisdiction to try a suit for declaration that the plaintiff is the nearest heir of the deceased vatandar. 40 Bom. 65=30 Ind. Cas. 925=17 Bom.L.R. 725.

——S. 36 (3)—Declaratory suit—Maintainability.

A suit to set aside an order passed by Government under S. 36, Watan Act, is barred under S. 4, Bombay Revenue Jurisdiction Act, 1876.

But a person who is dissatisfied with the order of the Collector under S. 36 may bring a suit in a competent civil Court for a declaration that he is the nearest heir of the deceased **watandar** in preference to the person whose name the Collector has ordered to be registered. Such a suit is contemplated by S. 36 (3), Watan Act, and is not barred by S. 4, Bombay Revenue Jurisdiction Act. A.I.R. (Vol. 17) 1930 Bom. 254=32 Bom.L.R. 155=54 Bom. 125=129 Ind. Cas. 391.

——S. 36—(Before amendment)—Rule of lineal primogeniture.

It was the intention of the Legislature, even prior to the amendment of 1910, that in determining who is the nearest heir for the purpose of S. 36, Bombay Hereditary Offices Act, the rule of lineal primogeniture should be applied. Therefore the amendment of 1910 did not introduce the principle of lineal primogeniture for the first time, but merely declared more explicitly what was the intention of the section as it stood prior to the amendment. A.I.R. (Vol. 26) 1939 Bom. 56=40 Bom.L.R. 1288=I.L.R. (1939) Bom. 123=179 Ind. Cas. 984.

——S. 36, Proviso 3—Death of watandar—Question regarding nearest heir—Jurisdiction of civil Court—Mode of succession—Rule of primogeniture.

A suit is maintainable for the determination of the question as to who is the nearest heir of the deceased representative **watandar.**

Under proviso 3 to S. 36 of the Bombay Hereditary Offices Act the Collector and the Court have first to determine the group of heirs who would succeed to the deceased representative **watandar** according to the personal law and in determining that question the rule of lineal primogeniture shall be presumed to prevail in the **watan** family, and for the purpose of working out that rule, resort can legitimately be had to the rules of succession to impartible estates like **zemindaris** in which the rule of lineal primogeniture prevails. A.I.R. (Vol. 18) 1931 Bom. 378=33 Bom.L.R. 580=133 Ind. Cas. 847.

——Ss. 64 and 18—Suit to declare Vatan Register void—If lies.

Where the order given by the Collector is not an order within the meaning of S. 4 (a), Para. 3, Revenue Jurisdiction Act, but merely a direction to give effect to the Vatan Register as settled in 1895 a suit to declare that a Vatan Register was void and should not be given effect to would certainly not lie. No action will be taken under S. 18 unless an application is made by an interested party. A.I.R. 1922 Bom. 155.

——S. 67 (d)—Suit for a declaration—Bar of suit.

The section bars a suit for a declaration, that plaintiff is the head of a vatandar family and is thus entitled to share in vatan and the suit is therefore not cognizable by civil Court. 36 Bom. 420=15 Ind. Cas. 840=14 Bom.L.R. 395.

——S. 73—Commutation of watan with consent of holder—Enquiry, whether necessary.

An inquiry would ordinarily be necessary when an individual holder of the **watan** wishes to effect a commutation under S. 15, Bombay Hereditary Offices Act, but where the Government have adopted a general policy of commutation of **kulkarni watans** there is no necessity of an enquiry or investigation after the consent of the holder of the **watan.** A.I.R. (Vol. 18) 1931 Bom. 212=33 Bom.L.R. 239=131 Ind. Cas. 664.

——S. 73—Commutation of vatan services—Validity of order—Procedure not complied with.

Where a Collector orders, at the instance of the widow of the last vatandar, commutation of kulkarni services and the procedure prescribed by the Bombay Hereditary Offices Act, S. 73 is not observed by the Collector while passing the order, the order is **ultra vires.** A suit in a civil Court to set aside the order is not barred by the provisions of the Bombay Revenue Jurisdiction Act (X of 1876), S. 4 (a).49 Bom. 554=27 Bom.L.R. 463=92 Ind. Cas. 110=A.I.R. 1925 Bom. 365.

——S. 73—Order of Collector—Validity—Reasons for decision not in the Collector's handwriting.

The rule of procedure that the reasons should be recorded in the Collector's handwriting, must be made subordinate to the ends of justice rather than to reverse the process and to say, that, merely because the reasons have to be implied from the actual words used, therefore, the order of the Collector must be treated as invalid. 52 Bom. 369=30 Bom.L.R. 581=111 Ind. Cas. 268=A.I.R. 1928 Bom. 215.

——S. 73—Knowledge of Mamlatdar or Chitnis is not knowledge of Collector. **See Ibid,** Ss. 15 and 73. 30 Bom.L.R. 570=111 Ind. Cas. 278=A.I.R. 1928 Bom. 201.

BOMBAY HEREDITARY OFFICES (AMENDMENT) ACT (V OF 1886).

——If retrospective.

Bombay Watan Act (V of 1886), is not retrospective and if **watan** property has once passed into another family before 1886, it is not permissible to put a forced construction on the Act so as to make it revert to the original **watan** family. A.I.R. (Vol. 17) 1930 Bom. 254=32 Bom.L.R. 155=54 Bom. 125=129 Ind. Cas. 391.

——Retrospective effect.

Patkar, J.—The disqualifying Act (V of 1886) cannot be given a retrospective effect. 52 Bom. 393=30 Bom.L.R. 591=110 I.C. 633=A.I.R. 1928 Bom. 291.

——S. 2—Applicability—Daughter succeeding to father before Act takes absolutely.

The Vatan Act (V of 1886) is not retrospective and a daughter succeeding to her father as vatandar before the operation of the Act commenced acquires an absolute interest in the property and becomes a fresh stock of descent. 54 Bom. 125=32 Bom.L.R. 155=A.I.R. 1930 Bom. 254=129 Ind. Cas. 391.

——S. 2—Daughter of vatandar inheriting vatan before the Act—Property does not cease to be vatan and her son will succeed in preference to her daughter.

On the death of the original Maharki vatandar his daughter inherited the vatan property before Act V of 1886 came into force. She was never married but bore an illegitimate son and a daughter.

Held: that the property did not cease to be vatan property and her family remained to be vatan family within the meaning of S. 2. Consequently her son was entitled to succeed in priority to her daughter. 29 Bom.L.R. 246=101 Ind. Cas. 135=A.I.R. 1927 Bom. 191.

——S. 2—Postponement of females to males—Daughter's son as heir of deceased female vatandar—Male member of original vatan family cannot succeed.

The existence of daughter's son as an heir of the deceased female vatandar would preclude a member of the original vatan family from inheriting to her, though as a blood relation he is entitled to succeed in preference to the Crown. The question of postponement of females to males can only arise where the male belongs to the same family as the females. 54 Bom. 125=32 Bom.L.R. 155=A.I.R. 1930 Bom. 254=129 Ind. Cas. 391.

——S. 2—Exclusion of female vatandar by male member of vatan family—Proof that common ancestor was the holder of the vatan lands is necessary.

The plaintiffs who were the sisters of the last holder of half-share of the patilki inam property sued to recover possession of the half share from the defendants who were the holders of the other half. The grant was an ancient one, and there had been many

degrees in the family since the date of the grant and as such no direct evidence of the precise relationship could be expected but from what evidence was brought it could be concluded that the two families descended from a common ancestor but it was not possible to say whether the common ancestor existed before or after the acquisition of the vatan.

Held, that it is not sufficient for the defendants to show that there was a common ancestor from whom these two families descended. They must also show that the common ancestor was a holder of the vatan and as the defendants failed to prove that both the plaintiffs and themselves descended from a common ancestor holding the vatan they have failed to show that the plaintiffs, are excluded from succession by the operation of S. 2, Bombay Act V of 1886: 41 Bom. 677, Foll. 52 Bom. 132=30 Bom. L.R. 38=107 Ind. Cas. 268=A.I.R. 1928 Bom. 166.

——S. 2—Succession—Daughter—Cannot claim priority over male members.

Under the Bombay Vatan Act, neither the daughters nor a brother's widow of the last male holder can claim priority over the male members. 76 Ind. Cas. 559=1923 Bom. 382 (D.B.).

——S. 2—Panch Mahals—Jivak badal grant—Daughter of vatandar.

In a settlement by the Government of a dispute regarding the tenure of hereditary office in Panch Mahals, the Government decided it was **jivak badal, i.e.,** without condition of the service. This announcement was made before the extension to the Panch Mahals of the Vatan Amendment Act (V of 1886). On the death of the last male holder his daughter claimed a fourth share of her father's property. **Held,** that the property in suit was not service inam to which alone the Vatan Act applied, and that therefore, the plaintiff's suit had been rightly decreed. 43 Bom. 323=51 Ind. Cas. 179=20 Bom.L.R. 983 =A.I.R. 1919 Bom. 88 (D.B.).

——S. 2—Vatan property—Suit by reversionary heir—Adoption by widow.

Where a Hindu widow first adopted a boy who died unmarried and on his death, adopted a second, **held,** that on the death of the first adopted boy vatan property vested in the reversioner and therefore the second adoption was declared invalid. 37 Bom. 598=21 Ind. Cas. 107=15 Bom.L.R. 783 (D.B.).

——S. 2—Adverse possession by female—Effect on tenure.

Where the Hindu female takes possession of vatan property in contravention of the Vatan Act and continues in adverse possession for more than 12 years, the property still remains vatan property and she becomes vatandar **de facto** with all the rights and subject to all the restrictions incident to that tenure. The property does not lose its character of vatan property and after the death of the female the property would go to her male heirs in preference to her maternal grand-daughter. 24 Bom. 556 (P.C.), Foll. 30 Bom.L.R. 867=114 Ind. Cas. 390=A.I.R. 1928 Bom. 333.

——S. 2—Watandar—Person merely acquiring watan property without acquiring office.

Watandar means a person having a hereditary interest in a **watan, i.e.,** the hereditary office and the property attached thereto, and includes so far as **watan** property is concerned, a person holding **watan** property acquired in the manner set out in the definition. But a person who merely acquires **watan** property without acquiring the office is not a **watandar,** and to such a person and his family, the special law of inheritance enacted by the Watan Amending Act of 1886, has no application. A.I.R. (Vol. 26) 1939 Bom. 414=I.L.R. (1939) Bom. 576=41 Bom.L.R. 924=185 Ind. Cas. 874.

——Muhammadan watandar—Application in 1862 to treat property as private—Sanad issued in 1890—Whether governed by Act (V of 1886) —Descent according to Muhammadan Law—Case, if one of conversion of watan into non-watan land—Bombay Hereditary Offices Act (III of 1874), S. 15.

In respect of a **watan** property a settlement was offered to the then Desai in 1862 but for various reasons no final arrangement was arrived at until the year 1884. In 1884, a **sanad** was offered to the then Desai, who was the same person as the Desai of 1862. He refused to accept that **sanad** for various reasons and applied to Government, and the matter was referred by Government to the Legal Remembrancer. The opinion of the Legal Remembrancer was that the terms to which the petitioner gave his consent in 1862, were that the **watan** should be regarded as subject only to the law to which he himself was subject and freed from all limitations as to descent in the male line alone and without any restrictions as regards heirs or as regards alienation. Subsequently, a settlement was arrived at that this **watan** property should be considered as his private property and that it should be subject to the ordinary Muhammadan Law of descent and inheritance. A **sanad** was issued in 1890. On the death of the **watandar** his sister claimed to be his heir under the Muhammadan Law:

Held (i) that although the **sanad** was actually granted in 1890, yet inasmuch as it ought to have been given according to the settlement which would have been effected in 1862, had the matter been disposed of there and then, the **sanad** was not governed by Act (V of 1886):

(ii) that it was not a case, therefore, of converting **watan** property into non-**watan** property, but it was a case of making a settlement with a person, of an alleged **watan** property on terms which may be agreed upon between the **watandar** and Government which terms may be inconsistent with the provisions of the Act and that the Government had the power to grant this right of descent under the Muhammadan Law to the parties under S. 15 of Act III of 1874:

(iii) that when the parties have arrived at a settlement, the terms of the settlement as embodied in the correspondence can be looked into. A.I.R. (Vol. 21) 1934 Bom. 145=36 Bom.L.R. 158=150 Ind. Cas. 635.

——S. 2, 4—Female inheriting from father—Female leaving husband and daughter—Husband's right to succeed in preference to daughter—Whether adverse to daughter's—Former suit by husband—Res judicata.

A got by inheritance from her father certain property consisting of **watan** and non-**watan** lands. She died leaving behind her husband **B** and three daughters **C, D and E. B** obtained a decree in a suit for recovery of the **watan** property, on his own behalf and on behalf of his daughters. Subsequently **C**

married and on attaining majority sued her father **B** for recovery of her one-third share of the lands which had belonged to **A**, her mother.

Held, that under the Bombay Watan Act (V of 1886), as regards inheritance to **watan** property the daughter was postponed to the father.

Held also, that as regards non-**watan** property, she was entitled to succeed and in the absence of any overt act after **C's** marriage and before her becoming a major giving her notice of adverse possession by **B**, **C** was entitled to recover the same:

Held further, that the former suit instituted by **B** for recovery of possession of **vatan** land did not operate **as res judicata** as it was not necessary in that case to decide the rights between the daughters and the father **inter se** for the purpose of granting relief against the father. A.I.R. (Vol. 20) 1933 Bom. 287=35 Bom.L.R. 418=57 Bom. 488=145 Ind. Cas. 262 (2).

——S. 2—Widow appointed Patil—Right to remain in possession of lands according to custom in the family.

Where the widow of the last male patilki watan holder was in possession of the watan lands since her husband's death and she was appointed patil by the Government and there was a custom in the family that the lands were to go to the vatandar.

Held: in the absence of any evidence to the contrary, there was no reason why, being considered fit and having to discharge the duties of a representative vatandar patil, she should not be allowed the enjoyment, as long as she is patil, of the lands, according to the custom of the family. 50 Bom. 243=95 Ind. Cas. 864=28 Bom.L.R. 740=A.I.R. 1926 Bom. 356.

——S. 2—Widow's share—Existence of daughter, effect of.

Where a Muhammadan **watandar** dies leaving behind him a widow, a daughter and a paternal uncle, the daughter who is postponed under Act (V of 1886) in the order of succession to the paternal uncle, is practically excluded from inheritance and the inheritance will have to be divided between the widow and the paternal uncle in the proportion of one-fourth and three-fourths. The rule of Muhammadan Law that if the widow has a child, her share is reduced to one-eighth does not apply in such a case. A.I.R. (Vol. 18) 1931 Bom. 266=33 Bom.L.R. 469=55 Bom. 401=131 Ind. Cas. 892.

——S. 4—'Family.'

The definition of 'family' in S. 4, Bombay Watan Act, says that the branches of the family descended from the original **watandar** are to be included in the **watan** family; it does not say that the family of the original **watandar** himself is to be excluded. A.I.R. (Vol. 20) 1933 Bom. 287=35 Bom.L.R. 418=57 Bom. 488=145 Ind. Cas. 262 (2).

——S. 4—Watan property—Lease by watandar—Rent received by his widow—Liability to attachment and sale in execution of decree against watandar.

Rent cannot be regarded as anything but a benefit to arise out of land and as such it would be immovable property within the meaning of the General Clauses Act. It thus becomes equivalent to the land which passed under the lease. Rent of watan land under a lease executed by a deceased vatandar which is received by the widow of the lessor-watandar is therefore watan property within the meaning of S. 4 of Watan Act, and cannot be attached and sold in execution of a decree against the deceased watandar. The Court has no power to issue execution against watan property in the hands of the watandar's widow. 48 Bom.L.R. 625=230 Ind. Cas. 22=A.I.R. 1947 Bom. 75=I.L.R. (1946) Bom. 896 (D.B.).

——S. 5—Consent decree sanctioning alienation of watan—Estoppel.

Two persons claimed to be the heirs of a deceased holder of a **Patilki watan.** One of them got a certificate of heirship and his name entered in the **watan** register. The other sued for declaration that he was the heir of the deceased holder. Suit was compromised and decree passed entitling the parties to the right of service in equal shares:

Held, that the consent decree operated as estoppel until set aside by a proper suit even though its effect might be to sanction the alienation of the **watan** and the **watan** rights, which is prohibited by S. 5. A.I.R. (Vol. 23) 1936 Bom. 301=38 Bom.L.R. 593=164 Ind. Cas. 703 (2).

BOMBAY HEREDITARY OFFICES (AMENDMENT) ACT (X OF 1923).

——No Retrospective Effect.

The Amending Act is not retrospective. 26 Bom. L.R. 360=81 Ind. Cas. 1018=A.I.R. 1924 Bom. 393.

BOMBAY HIGH COURT CIVIL CIRCULARS.

——R. 17—Contents of proclamation—Application to Collector to set aside sale—Collector should at once refer applicant to Court executing decree.

In every proclamation for sale carried out under the rules it should be notified that any person wishing to set aside the sale under O. 21 of the Code has to make his application to the Court, and not to the Collector to whom the decree has been sent for execution, within thirty days from the date of the sale. If in spite of that notification any applicant still makes an application to the Collector to set aside the sale he should be referred to the Court without a moment's delay. 45 Bom. 1132=23 Bom.L.R. 476 =62 Ind. Cas. 221=A.I.R. 1921 Bom. 209.

——R. 55—Pleader as witness—Subsistence allowance—Special fees cannot be allowed.

A pleader was merely called to give evidence as to what had occurred in a previous suit in which he was engaged as a pleader.

Held, that no special fees could be paid to ordinary witnesses, and if that has been the practice in the District Courts then it must be said that there is no warrant for it in law. There is no such rule either in the C. P. Code or in the Civil Circulars applicable to this case; and in the absence of any such rule, the order of the lower Court, which is based apparently upon the practice of that Court, cannot be supported. 64 Ind. Cas. 78=46 Bom. 89 =23 Bom.L.R. 398=A.I.R. 1922 Bom. 116.

——R. 69—Distinction between rules and circulars.

The circulars in the Manual of Civil Circulars issued by the High Court are not on the same footing as rules which are passed in accordance with

the prescribed procedure in Part X of the C.P. Code. Unless a particular circular is passed under some enactment, which gives it the force of law, obviously the mere fact that it is issued under the authority of the High Court is not sufficient to give it that force. Although the proclamation of sale in execution of a decree against the father may not state that the sons' interests are being put up for sale, yet the circumstances may be such as to fully justify a Court in holding that those interests were actually sold. 50 Bom. 793=28 Bom.L.R. 1082=98 Ind. Cas. 754=A.I.R. 1926 Bom. 548.

——Chap. II, R. 91 (16) (c)—Execution of decree by Collector—Leave to bid and set off decree amount—Power of Collector.

Where a decree is transferred to a Collector for execution, he has power to grant permission to the holder of the decree to bid for the property but it is the Civil Court alone that can give permission to set off the decree amount. 22 Bom.L.R. 106=55 Ind. Cas. 527=44 Bom. 346.

——Chap. VII, R. 69—Execution sale—What passes—Son's interest.

In order to pass valid interest of a minor of a joint Hindu family, to its purchaser, the rule requires the mention of such circumstances in the proclamation. Where through a mistake a certificate of sale in execution contained the property of the minor sons, of which a slip was added to the proclamation, the sons' shares did not pass to the purchaser. 58 Ind. Cas. 391=22 Bom.L.R. 970.

——Chap. XXIII, R. 16—Remuneration of—Receivers other than official receivers.

R. 16 of Chap. 23 of the Manual of Circulars issued by the Bombay High Court directs that the remuneration of receivers, other than official receivers, shall be in such proportion to the amounts of the dividends distributed as the Court may direct, provided that it does not exceed five per centum of the amount of dividends and therefore, a Court is not justified in directing payment to the receivers at the rate of five per cent. on the whole amount realised. 90 Ind. Cas. 656=27 Bom.L.R. 1116=A.I.R. 1925 Bom. 472.

BOMBAY HIGH COURT RULES.

——Admiralty Rules—Rr. 3, 4, 14, 15—Warrant of arrest of ship sufficient—No writ of summons is necessary.

The Bombay High Court, in its admiralty jurisdiction is not bound by the provisions of the C.P. Code but are governed by its own Admiralty Rules in accordance with the old Admiralty Procedure which it inherited under the old charters. Under the said Rules it is not essential to issue a writ summons in addition to issuing warrant of arrest. Not that a writ can never be issued in an admiralty suit, but it is unnecessary if a warrant is issued. 24 Bom.L.R. 1167=76 Ind. Cas. 433=A.I.R. 1923 Bom. 51.

——R. 27—Non-passing of orders does not vitiate sale of ship.

Where the caveator is himself a plaintiff and the decree is passed in his presence without protest and the evidence is that he actually attended the sale of the ship, **held** that the non-passing of an order on the caveat will not vitiate the sale. 24 Bom.L.R. 1167=76 Ind. Cas. 433=A.I.R. 1923 Bom. 51.

——R. 36—Sale of ships in conformity with—Interference by Civil Court—C. P. Code, S. 151.

When the sale of a ship has been carried out in strict conformity with R. 36 of the Admiralty Rules, the fact that the procedure was against the practice in such cases and worked great hardship, should not be grounds for exercising the powers under S. 151, C.P. Code to set aside the sale. 76 Ind. Cas. 433=24 Bom.L.R. 1167=A.I.R. 1923 Bom. 51.

BOMBAY HIGH COURT RULES (APPELLATE SIDE).

——Costs of preparation of paper book not deposited by appellant in time—Power of Court to excuse delay.

The Court has power to go into the question as to whether there was sufficient reason for not depositing the costs of the preparation of the paper book on the due date. The Bombay High Court Circular No. 1257 of 1940 does contemplate that the Court has power in proper circumstances to excuse the delay. The circular has not the effect of a rule under the C.P. Code. A.I.R. (Vol. 29) 1942 Bom. 198=44 Bom.L.R. 367=15 R.B. 103=201 Ind. Cas. 653.

——R. 1—Single Judge—Power to stay suit pending in the mufassal.

A single Judge on the Original Side of the High Court is not competent to stay the hearing of a suit pending for trial in a Subordinate Judge's Court in the mufassal unless authorised to do so by a rule. 39 Bom. 604=30 Ind. Cas. 560=17 Bom.L.R. 655 (F.B.).

——Rr. 1 (a), 2 (c)—Advocate's fees.

Where there has been no decision on the merits of the real contest between the parties even though there was a "hot contest" on the point that was actually decided, the plaintiff whose suit is dismissed ought not to be required to pay more than one-fourth of the full fees payable under the Bombay Appellate Side Rules, A.I.R. (Vol. 26) 1939 Bom. 299=41 Bom.L.R. 413=12 R.B. 117=183 Ind. Cas. 655.

——Rule 2, Heads 2 and 7—Issue of fresh notice—Single Judge can excuse delay.

Excusing delay and extending time, for issuing fresh notice under C. P. Code, O. 41, R. 14, under Heads 2 and 7 of R. 2 of the Appellate Side Rules can be done by a single Judge. 50 Bom. 815=28 Bom. L.R. 1446=100 Ind. Cas. 147=A.I.R. 1927 Bom. 68.

——Rr. 5, 10, Appendix E—Party appearing in Appellate Side by attorney instructing an Advocate on Original Side—Attorney's costs.

It is very common for parties to appear in Appellate Side matters by an attorney instructing an advocate on the Original Side, and it cannot be said that in such an event no costs are payable by the unsuccessful party either to the attorney or to the Advocate. The practice in the office is to tax the costs of the attorney on the scale allowed by

Appendix E to the Appellate Side Rules of the Bombay Court by analogy to that Appendix. A. I.R. (Vol. 28) 1941 Bom. 192=43 Bom.L.R. 336=14 R.B. 33=195 Ind. Cas. 387.

——R. 10—Whether ultra vires.

Rule 10 of the Appellate Side Rules, Bombay High Court, made under the Letters Patent, is not ultra vires. A.I.R. (Vol. 21) 1934 Bom. 70=6 R.B. 312=1934 Cr. Cas. 302=36 Bom.L.R. 1=58 Bom. 456=148 Ind. Cas. 664 (F.B.).

——R. 11 (n)—Power of Registrar—Stay of further proceedings—Power to grant. See C. P. CODE, O. 41, R. 5 (1). 52 Bom.L.R. 612.

——Rr. 17, 18, 25—Certified copies.

An appeal, if presented in time is validly presented for the purpose of the Limitation Act, if it is accompanied by copies required of the Code of Civil Procedure. The accompaniments required under R. 25 of the High Court's Rules are extraneous to the memoranda of appeals, and applications or appeals in execution, and the rule does not fix any time within which they are to accompany the memoranda, etc. (1907) 9 Bom.L.R. 1138=32 Bom. 14 (F.B.).

——R. 65—Pleader's fee—Assessment of.

For assessing the Pleader's fees, an appeal to the High Court from a preliminary decree adjudicating the status of a party as an agriculturist, is regulated neither by S. 52 of Regulation (II of 1827) nor by S. 6 but by R. 65 of the Appellate Side Rule of the Bombay High Court. 37 Bom. 303=17 Ind. Cas. 964=14 Bom.L.R. 1190.

——Appendix E—Suit for injunction—Method of computation of Advocate's fee—Allegation as to value of suit property made by party alio intuitu.

Under Appendix E to Bombay High Court (Appellate Side) Rules, the Advocate's fee should be computed on the value of the subject-matter in dispute, where that value can be ascertained by the Taxing Officer from materials on the record, subject however to this qualification, that the value of the subject-matter of the suit should never be regarded as greater than the amount necessary for ascertaining the pecuniary jurisdiction of the Court which tried the suit.

In the case of an injunction where it is quite impossible to ascertain the value of the subject-matter in dispute, for example, in a suit for an injunction to restrain interference with a right of way, the proper course is to allow the minimum fee. But if the materials on record enable the Taxing Officer to say what is the value of the subject-matter in dispute, he should base the Advocate's fee on that value. But the Taxing Officer should never base the Advocate's fee on an amount in excess of the pecuniary jurisdiction of the Court which tried the suit. A.I.R. (Vol. 28) 1941 Bom. 192 (192)=43 Bom.L.R. 336=14 R.B. 33=195 Ind. Cas. 387.

BOMBAY HIGH COURT INSOLVENCY RULES (ORIGINAL SIDE).

——R. 52-B (2)—Debtor, if can file affidavit by his constituted attorney.

There is nothing in R. 52-B (2), Bombay High Court (Original Side) Rules which makes it incumbent upon the debtor to file the affidavit personally. He can file an affidavit by his constituted attorney. A.I.R. (Vol. 28) 1941 Bom. 37=42 Bom.L.R. 948=13 R.B. 282=I.L.R. (1941) Bom. 89=192 Ind. Cas. 698.

——R. 180 (b)—Scheme sanctioned—Rate of commission subsequently increased—Official Assignee, if entitled to charge increased rate.

At the time when the scheme was sanctioned, the rate of commission payable to the Official Assignee was 3 per cent. on the amount paid in pursuance of the scheme. The rate of commission was, however, subsequently raised to 5 per cent. The amounts were paid after the increase in the rate:

Held, that the appropriate time for ascertaining the correct rate of commission on the amount to be charged was the rate of payment and not when the liability to pay the amount was declared. A. I.R. (Vol. 29) 1942 Bom. 272=44 Bom. L.R. 591=15 R.B. 170=202 Ind. Cas. 560.

BOMBAY HIGH COURT RULES (ORIGINAL SIDE).

——Commissioner and Master of Equity are judicial officers.

In Bombay, Commissioner and Master of Equity on the original side are judicial officers taking the place of a Judge. 121 Ind. Cas. 414=31 Bom. L.R. 1081=A.I.R. 1929 Bom. 478.

——Costs of Pleaders—Costs before Taxing Master are not allowed.

It is not the usual practice to allow costs of counsel attending before the Taxing Master. 87 Ind. Cas. 1043=27 Bom.L.R. 532=A.I.R. 1925 Bom. 355.

——Costs—Apportionment—Claim and counter-claim.

In the matter of apportionment of costs the practice laid down in English cases should be followed. Where the claim and counter-claim involve separate and distinct issues and both are allowed with costs, Taxing Master should not take the plaintiff's bill of costs separately from that of the defendants. He should tax both bills simultaneously and decide as to what items in the respective bills are to be attributed solely to the plaintiff's claim and what items are to be attributed solely to the defendants' counter-claim, and what items were common to both so as to be apportioned. 29 Bom.L.R. 673=105 Ind. Cas. 899=A.I.R. 1927 Bom. 449.

——Costs—Warrant to tax—Power of Taxing Master.

On the warrant to tax, the party taking the taxation must pay the costs of the proceedings on that warrant. But if the Taxing Master is of opinion that the party bringing in the bill has unnecessarily or vexatiously increased the costs he may report accordingly and the Chamber Judge, will make such order as to those costs as he thinks fit. The proper procedure in such a case is by summons. The costs of warrant to review should follow the event of such review. The Taxing Master not only has the power to award costs against the party taking out such a review but he has also the power to make him, in a proper case, pay the orther party's costs. 27 Bom.L.R. 532=87 Ind. Cas. 1043=A.I.R. 1925 Bom. 355.

——Costs—Attendance of witness or party—Discretion of Master—Interference by Court.

Question how far the attendance of a witness is necessary and material is one for master to decide and that discretion must be exercised in a fair and reasonable way according to the usual and established practice and allowance in respect of such matters, otherwise the Court or Judge will interfere and review the discretion of the master who has not so exercised it. 31 Bom.L.R. 1020=54 Bom. 62=122 Ind. Cas. 121=A.I.R. 1930 Bom. 24.

——Costs—Discretion of Taxing Master is not generally interfered with.

The Court will never interfere in taxation unless the Taxing Master is wrong in principle or very clearly wrong in detail. Where it is a question of whether the Taxing Master has exercised his discretion properly, or it is only a question as to the amount to be allowed, the Court is generally unwilling to interfere with his judgment. 45 Bom. 1234=23 Bom. L.R. 854=63 Ind. Cas. 37=A.I.R. 1921 Bom. 87.

——Taxation—Discretion of Master—Interference by Court.

Generally a Court or Judge will not interfere with the order of taxation to be reviewed on a question that depends on the discretion of the master as for instance where objection is as to the amount. But where principle is involved it will always interfere. 31 Bom.L.R. 1020=54 Bom. 62=122 Ind. Cas. 121=A.I.R. 1930 Bom. 24.

——Taxation—English practice should be followed.

Courts in India will follow the decisions of the English Courts in matters of taxation and the Taxing Officer should follow as far as it can be ascertained the practice observed in England. 50 Bom. 69=27 Bom.L.R. 1195=91 I.C. 153=A.I.R. 1926 Bom. 18.

——Originating summons—Same person cannot appear both as applicant and respondent or on one side in two capacities.

The same person cannot appear both as an applicant and as a respondent, nor can the same person appear as two persons, even on the same side in two different capacities and appear by two different sets of Counsel in an originating summons. 25 Bom.L.R. 1137=85 I.C. 504=A.I.R. 1921 Bom. 414.

——R. 23—Originating summons—Complicated questions of law should not be involved.

Per Wadia, J.—The questions on an originating summons should not, as a rule, involve difficult and complicated points of law. A.I.R. (Vol. 23) 1936 Bom. 330=38 Bom.L.R. 903=9 R.B. 108=I.L.R. (1937) Bom. 18=165 Ind. Cas. 34 (F.B.).

——Rr. 40, 45—Advocate enrolled on Original Side of High Court is not required to file authority authorizing him to appear in Mofussil Court.

An Advocate enrolled on the Original Side of the Bombay High Court is not required to file any authority authorizing him to appear in a Mofussil Court. A.I.R. (Vol. 27) 1940 Bom. 272=42 Bom.L.R. 515=13 R.B. 96=I.L.R (1940) Bom. 510=190 Ind. Cas. 95.

——R. 58—Powers of High Court Judges—Revocation of probate—Petition on testamentary side of High Court.

Every Judge of the High Court is, under R. 58 of the Bombay High Court Rules, competent to discharge all the functions connected with the High Court on its Original Side, that is, he has full powers to exercise all or any part of the jurisdiction vested in the High Court on its Original Side. The hearing and determination of testamentary and intestate matters form a part of that jurisdiction, and, therefore, any Judge may exercise it, subject only to the assignment of business under R. 60 for the sake of convenience in the due administration of justice. A.I.R. (Vol. 20) 1933 Bom. 469=35 Bom.L.R. 998=6 R.B. 193=147 Ind. Cas. 362.

——R. 58—Jurisdiction.

Although the Court of a Sub-Judge in British India cannot order the sale of property in a Native State even if the mortgage is valid, the C. P. Code not applying to such sales, yet so far as the High Court is concerned the machinery to carry out the decree which the Court might ultimately pass is provided in the High Court Rules. The High Court can, therefore, order a sale of property in a Native State because when the Commissioner in carrying out the decrees passed in mortgage suits proceeds to sell the property he does not adopt the machinery of the C. P. Code but he is doing so under the rules framed by the High Court in that respect. A.I.R. (Vol. 19) 1932 Bom. 642=34 Bom.L.R. 1384=Ind. Rul. (1933) Bom. 174=57 Bom. 234=142 Ind. Cas. 130.

——R. 62—Single Judge—Power to stay suit pending in the mufassal.

It is not competent to a single Judge of the High Court exercising the ordinary original civil jurisdiction of the High Court to stay the hearing of a suit pending trial in the mufassal in a Subordinate Court. 39 Bom. 604=30 Ind. Cas. 560=17 Bom.L.R. 655 (F.B.).

——R. 64—Reference on point of law.

There is power under R. 64 or otherwise for the Chief Justice to direct that a point of law be dealt with by a Full Bench, although the suit has only come before a single Judge. 29 Bom.L.R. 1124=103 Ind. Cas. 906=51 Bom. 971=A.I.R. 1927 Bom. 487 (F.B.).

——R. 80 (o)—Application whether should be made by way of petition for originating summons.

Rule 80, Cl. (o) of the Bombay High Court Rules applies to an application to enforce an award and such an application must be made by an originating summons. It is not necessary that a summons under the Arbitration Act should be inter partes. A.I.R. (Vol. 20) 1933 Bom. 433=35 Bom.L.R. 941=6 R.B. 213=58 Bom. 162=147 Ind. Cas. 587.

——Rule 80-A (1)—Prothonotary's decision—Application to judge in chambers.

Under R. 80-A (1) it is the right of a party dissatisfied with the prothonotary's decision to

apply to the judge to have the matter adjudged to him and the judge in chambers is bound to take up the matter and decide it for himself. (1907) 9 Bom.L.R. 475=32 B. 163.

——Rr. 81 and 321—Application for short notice.

According to the Bombay practice applications for short notice should be made to and disposed by the Prothonotary. 36 Bom. 418=16 Ind. Cas. 588=14 Bom.L.R. 629.

——R. 96—Right of Defendant to copies of plaint and exhibits.

Once a suit has been instituted the defendant or a person representing himself to be an attorney of that defendant is entitled under R. 96 to be furnished with a copy of the plaint and exhibits annexed thereto; it is not necessary that the defendant should be served or that his attorney should file an appearance in the Court. 30 Bom. L.R. 1333=A.I.R. 1930 Bom. 567.

——Rr. 105 and 106—Defendant not filing written statement—Defence.

Rules 105 and 106 of the Bombay High Court Rules (Original Side) do not preclude a defendant who has not filed his written statement, from defending the suit extempore at the hearing. 19 Ind. Cas. 95=15 Bom.L.R. 126.

——R. 107—Scope of.

Rule 107 of the Bombay High Court Rules falls under S. 27 of the General Clauses Act, (1897). If a summons sent by registered post is refused by defendant he does so at his own risk. 16 Bom.L.R. 204=24 Ind. Cas. 437.

——Rr. 111, 112—Ex parte decree—Suit set down for hearing before the date fixed in summons—C. P. Code, Ss. 68, 69, 91, 100, 101, 112, 113.

The plaintiff is not entitled to have a suit set down for an **ex parte** decree before the date fixed in the summons for the hearing of the suit even though the defendant has not filed his written statement within four weeks from the date of the service of the summons as required under Rule 111 of the High Court Rules. (1908) 10 Bom. L.R. 301=32 Bom. 534.

——R. 111—The form of personal bond provided by R. 111 or even a mortgage bond is not in all respects as effective as the deposit of cash or Government securities. A.I.R. (Vol. 18) 1931 Bom. 278=Ind. Rul. (1931) Bom. 326=33 Bom. L.R. 487=132 Ind. Cas. 438.

——R. 117—Filing appearance in Court—Effect of—If "step in proceedings" under S. 34 Arbitration Act—Practice of filing appearance under "protest"—If justified and legal. **See** ARBITRATION ACT, S. 34. 51 Bom.L.R. 1020.

——R. 118—Set-off and Counter-claim—Distinction.

A claim for damages not arising from the same transaction which is the subject-matter of the plaintiff's suit cannot be treated as equitable set-off. Counter-claim is bad if it could not form the subject-matter of a separate suit in the same Court. Grientoveen v Hamlyn & Co., (1892) 8 T.L.R. 231, Dist. A set-off can be pleaded as a defence and can only arise where the claim to be set-off, one against the other whether by the plaintiff or defendant exists in the same right. A set-off can also be the subject-matter of a separate action or a counter-claim. Every set-off can be pleaded as counter-claim if the defendants so desires, but every counter-claim cannot be pleaded as a set off. For an equitable set-off the claim for damages must arise from the same transaction which is the subject-matter of the plaintiff's suit; and it is only when the claim for damages forms the subject-matter of a counter-claim that it makes no difference whether damages are based on the subject-matter of the suit or are based on some transaction which is entirely outside the plaintiffs' claim. 24 Bom.L.R. 328=67 Ind. Cas. 326=47 Bom. 182=A.I.R. 1923 Bom. 24.

——R. 119-B — Counter-Claim—Counter-claim against plaintiff alone requires no separate title—High Court Rule override provision of C. P. Code, Sch. 1.

Per Kemp, J.—The Official Assignee is bound to adjudicate upon the proof submitted by claimant within seven days of the latest date mentioned in the notice of dividend as the latest date for lodging proofs. 31 Bom.L.R. 35=53 Bom. 290 =117 Ind. Cas. 440=A.I.R. 1929 Bom. 107.

——R. 119-B — Counter-claim—Counter claim against plaintiff alone requires no separate title—High Court Rules override provision of C. P. Code, Sch. I.

Where the defendant's counter-claim is directed against the plaintiff alone there is no provision for a separate title in the High Court Rules and these rules supersede the provisions of Sch. I. C. P. Code. 32 Bom.L.R. 212=A.I.R. 1930 Bom. 216=127 Ind. Cas. 412.

——R. 122—Contents of Notice—Latest date of proving must be given in notice—Presidency Towns Insolvency Act.

Per Kemp, J.—The notice must state the latest date within which creditors can prove. The necessity of giving such a date is important because it limits the time for proof and dates the rejection of the proof within that time as the starting point for an appeal against the Official Assignee's decision. 31 Bom.L.R. 35=117 Ind. Cas. 440=53 Bom. 290=A.I.R. 1929 Bom. 107.

——R. 122—Counter claim of more than 1,000 Rs. for wrongful arrest can be allowed—Costs—C.P. Code, S. 491.

A counter-claim of more than Rs. 1,000 by a defendant as compensation for wrongful arrest in the course of the same suit cannot be applied in the same suit. The costs of the plaintiff in opposing the counter-claim should be borne by plaintiff. (1908) 10 Bom.L.R. 1002.

——Rr. 127, 128 and 129—Third party notice—Defendant outside the jurisdiction of the Court—Leave of Courts—Letters Patent (Bom.), Cl. 12.

The Court on summons for directions in a third party notice does not decide any question of jurisdiction and from the fact that the Court gave direction it could not be assumed that the Court decided the point of jurisdiction. The order on the summons for directions merely enables the third party to come into the suit as he was an

added party defendant and then it was open to him at the trial to raise any issue which an added defendant was entitled to raise. Leave under Cl. 12 of the Letters Patent could not be presumed to have been given because, before it could be assumed that leave has been granted under Cl. 12, it must be proved that an application was made to the Judge under Cl. 12 and if the Judge made the order, it should appear clearly on the face of it that he was giving leave under Cl. 12 of the Letters Patent. A successful defendant is entitled to his costs of the suit and the third party proceedings as well. Per Macleod, C.J.—When a defendant asks the Courts to issue a third party notice in a case in which leave has to be obtained under Cl. 12 an application should be made to the Judge for such leave to be endorsed on the notice in the same way as it is endorsed on a plaint. 45 Bom. 24=59 Ind. Cas. 28=22 Bom.L.R. 863.

——R. 130—Applicability—Suit for account—Final decree for specific sum—Appeal must bear stamp on account of decree at least—Preliminary objection as to insufficiency of court-fee allowed—Appeal-memo rejected for non-payment of court-fee—**Held**, that the appellant could be ordered to pay costs of the hearing of the preliminary objection. In such a case R. 130 should be applied. A.I.R. (Vol. 28) 1941 Bom. 242=I.L.R. (1941) Bom. 477=14 R.B. 84=43 Bom.L.R. 475=195 Ind. Cas. 894.

——Rr. 130, 138 and 135—Defendant to counter-claim must put in reply to avoid application of R. 138.

The wording of R. 130 of Bombay High Court (Original Side) Rules, is not such as to warrant the view that if a defendant to the counter-claim does not put in a written statement to the counter-claim he shall not be deemed to have admitted the allegations in the counter-claim. The implication underlying R. 130 is that if the defendant to the counter-claim does not exercise the liberty reserved to him under the rule, he must be regarded as being in the same position as a defendant to a suit who does not file a written statement in answer to a plaint. Consequently, in every case in which a counter-claim is filed there is an obligation on the defendant or defendants to the counter-claim to put in a reply if they wish to avoid the application of R. 138. A.I.R. (Vol. 27) 1940 Bom. 410=I.L.R. (1940) Bom. 663=42 Bom.L.R. 919=13 R.B. 185=191 Ind. Cas. 463.

——Rr. 130 and 131—Order refusing directions—If 'Judgment'—Letters Patent (Bombay), Cl. 15.

An order by which directions under Rules 130 and 131 of the High Court Rules are refused is not a 'judgment' within Cl. 15 and no appeal lies against such order. 8 Beng.L.R. 433, Foll. 45 Bom. 428=22 Bom.L.R. 1169=59 Ind. Cas. 533=A.I.R. 1921 Bom. 320 (321).

——Rr. 130 and 131—Scope.

The only way in which a matter at issue between the parties can be held to be **res judicata** when it has not been actually decided by the Court is under S. 11, Expl. 4 of the C. P. Code. On a summons for directions under Rr. 130 and 131 of the Bombay High Court Rules (Original Side), it is not necessary to decide whether the Court which is to try the suit has jurisdiction to try the suit as between the defendant and the third party. Hence the mere fact that on such summons for directions, the liability between the third party and the defendant is directed to be tried at the trial does not necessarily make the question of the trial Court's jurisdiction **res judicata**. 45 Bom. 24=59 Ind. Cas. 28=A.I.R. 1921 Bom. 195.

——R. 131—Third party notice—Application to be before filing written statement—Practice and Procedure.

An application for a third party notice under R. 131, must be made before the written statement is filed, unless special leave has been obtained from the court. (1908) 10 Bom.L.R. 1024.

——Ch. VIII—Third party proceedings, object of—When leave should be granted—Refusal to give directions on summons amounts to a dismissal of the third party.

The object of third party proceedings is to enable the court to try once for all an issue of fact in which all parties are alike interested. The court has to see, first that nothing is done which would put a plaintiff to additional expense or difficulty, and, secondly that he is not embarrassed by the introduction of third parties in his suit. An action comes to an end as regards the third party when the court refuses to give directions on summons. Such refusal amounts to a dismissal of the third party from the action. In giving leave to serve notice of claim for contribution or indemnity on a third party the court will not consider whether the claim is a valid one but only whether the claim is bona fide and whether, if established, it would result in contribution or indemnity. (1907) 9 Bom.L.R. 374=31 Bom. 465.

——Rr. 135, 138—Applicability.

There is nothing in terms in R. 135 or R. 138 which limits their application to a case in which the original plaintiff to the suit is the sole defendant to the counter-claim. A.I.R. (Vol. 27) (1940) Bom. 410=I.L.R. (1940) Bom. 663=42 Bom.L.R. 919=13 R.B. 185=191 Ind. Cas. 463.

——R. 143—Cross-objections beyond time—Court not excusing delay—Court-fee, if can be refunded.

The cross-objections were out of time and accordingly the Registrar refused to register them under R. 9 of the Appellate Side Rules. Thereupon the applicant made an application to the Court under R. 71 to excuse the delay and that applicaton was rejected by the Court. The applicant, therefore, applied under R. 143 for the refund of the court-fee:

Held, that the registration was properly refused by the Registrar, because the cross-objections were out of time. The Court subsequently declined to excuse the delay and the effect of that was merely to uphold the refusal of the Registrar to register the cross-objections. The case, therefore, fell within the plain terms of R. 143 and a refund should be directed. A.I.R. (Vol. 29) 1942 Bom.

125 (1)=44 Bom.L.R. 137=14 R. B. 394=199 Ind. Cas. 798.

——R. 180—Discretion of Court—Affidavit by Government Officer as to exercise of discretion by him—Order for attendance for cross-examination —When to be made.

It is not usual for the High Court under R. 180 of the Original Side Rules to compel a highly placed and responsible officer of the Government to submit himself to cross-examination. Ordinarily the statements made by him in his affidavit should be accepted, and it is only in very rare cases that the Court would not accept a statement of such an officer who has made a solemn affirmance that he has exercised his discretion properly after considering the merits of the case; it is not a normal practice or procedure that the Court should make an order under R. 180, against Government Officers. If the officer concerned contents himself by stating in his affidavit that he had considered the merits of the case and exercised his discretion fairly and properly, the Court will accept it and will not pass an order for his appearance. But when such officer goes further and says that in coming to the conclusion at which he arrived he has also taken into consideration the general policy of Government contained in a confidential circular issued for the guidance of officers, it is a matter for investigation to what extent the mind of that officer was dominated by the particular circular, and whether the domination was such as to make his discretion fettered, and the Court will then have to make an order for the attendance of the officer for his cross-examination. 50 Bom. L.R. 728=A.I.R. 1949 Bom. 109.

——R. 193 (1)—Extension of time.

The discretion is vested in the Chamber Judge in a fit case to extend the period of ten days allowed under R. 193, Sub-R. (1), in cases to which O. 37 is applicable. 28 Bom. L. R. 1080=97 Ind. Cas. 766=A.I.R. 1926 Bom. 578.

——R. 199—'Trader'—Film producer or distributor.

The word 'trader' as used in the definition of 'commercial causes' in R. 199 of the Bombay High Court (O.S.) Rules, 1936, imports buying and selling of commodities and is not to be understood in the wide sense as including a manufacturer. It cannot be said that the business of a film producer which is that of a manufacturer of films or that of a distributor of films is that of buying and selling within the meaning of the word 'trader' in R. 199. 226 Ind. Cas. 329= 1946 Bom. (Rul.) 300=48 Bom.L.R. 377=A.I. R. 1946 Bom. 481.

——R. 208—Affidavit in support of summons by plaintiff—Affidavit by plaintiff himself on information and belief—If in order.

Where the affidavit in support of a summons for judgment taken out in summary suit under R. 208 of the Rules of the High Court (Original Side) is made by the plaintiff himself, he need not be in a position to swear to the facts of his own personal knowledge. He can make the affidavit on information and belief. The words 'who can swear to the facts of his own personal knowledge' in R. 208, qualify 'any other person' only. 50 Bom.L.R. 143=A.I.R. 1948 Bom. 368=2 D.L. R. 701.

——Rr. 212 to 220—Applicability—Questions to be asked on originating summons.

Plaintiffs, certain trustees under a deed of settlement, agreed by correspondence to sell certain plots of land comprised in the deed of settlement, to the defendants. The defendants then paid Rs. 40,000 to the plaintiffs as earnest money. They sent to the plaintiffs several requisitions on title and in the course of correspondence raised several objections to the plaintiffs' title. On 6th September, 1924, they wrote to the plaintiffs that unless the plaintiffs made out a marketable title and completed the sale by 21st October, 1924, they would treat the contract as at an end, time being of the essence of the contract. On 30th October, 1924, they intimated to the plaintiffs that the contract was put an end to as the plaintiffs having failed to make out a marketable title. They asked back the earnest money paid by them. Thereupon the plaintiffs took out an originating summons for the determination of the questions (1) whether the plaintiffs had failed to make out a marketable title; and (2) whether the defendants should be ordered to specificially perform the agreement. The defendants contended that the trustees had no power to sell under the deed of settlement and even if they had such power, that could according to provisions of the settlement only be exercised by a resolution passed by a majority of three-fourths of the votes of the entire number of the trustees for the time being and as no such resolution was passed, the plaintiffs had failed to make out a marketable title. On construction of the deed of settlement:

Held, that it was permissible on an originating summons to ask the following questions: (i) Whether the notice of 6th September, 1924, is valid; (ii) whether the defendants ever determined the contract, and if so, when? and (iii) whether the defendants are entitled to a refund of Rs. 40,000 with interest thereon at the rate of six per cent. per annum from 1st November, 1923, and to the costs of and incidental to the investigation of title? 51 Bom. 247=29 Bom.L.R. 19=101 I.C. 229= A.I.R. 1927 Bom. 195.

——R. 214—Declaratory decrees in originating summons.

In the matter granting declaratory relief the proper procedure to be followed is regulated by C. P. Code and High Court Rules. By High Court R. 214, which is the chapter dealing with proceedings by way of originating summons it is clear that the Court can pass a declaratory decree in originating summons provided that case falls within S. 42 of the Specific Relief Act. 47 Bom. 191=24 Bom.L.R. 449=82 Ind. Cas. 628=A.I. R. 1922 Bom. 84.

——R. 215 (Amended)—Applicability—Existence of partnership in dispute.

Although the words "when the existence of the partnership or the right to, or the fact of the dissolution thereof, is not in dispute" which occurred in the old R. 213, are omitted, and the words "and for the determination of any question arising in

such partnership whether to be dissolved or wound up or not" are added in the corresponding new R. 215, R. 215 does not apply where the existence of a partnership is in dispute. In omitting these words from R. 215, the rule has been brought into line with Rr. 212 and 214. 25 Bom.L.R. 390=73 Ind. Cas. 254=A.I.R. 1923 Bom. 394.

——Rr. 218, 219—Examination under O. 33, R. 4, C. P. Code—Proper style.

Bombay High Court Rules 218 and 219 have not introduced variation of the procedure laid down by O. 37, C.P. Code. It is true that these rules do not show at what stage an examination under O. 33, R. 4 is to take place. This may have to be after the petition has been ordered to be interpreted and declared **gratis** under R. 218, but must be before the notice to be issued under R. 219. A.I.R. (Vol. 30) 1943 Bom. 318=45 Bom. L. R. 602=I.L.R. (1943) Bom. 547=17 R.B. 5=212 Ind. Cas. 637.

——R. 223—Originating Summons—When proper.

An originating summons is not the proper procedure to be adopted where the disputed facts are of such complexity as to involve a considerable amount of oral evidence. 53 Ind. Cas. 650=21 Bom.L.R. 972.

——Rr. 242 and 243—Reasons for order.

It is not necessary on the Original Side of the High Court for a Judge in Chambers to give his reasons why he should make any particular order on a summons or petition. In an ordinary case a Judge undoubtedly should give his reasons for his decision, but a mere adjournment into Court does not necessarily involve that the Judge shcuid give his reasons for his final decision. 51 Bom. 267=29 Bom.L.R. 126=100 Ind. Cas. 941=A.I. R. 1927 Bom. 113.

——Rr. 253 and 266—Receiver—Accounts—Court can go into question of amendment of decree.

The Court can enter into questions regarding the Receiver's accounts even although the suit may not be pending, especially where the decree is preliminary with regard to the Receiver taking certain action and passing his accounts. In such cases R. 258 of the Bombay High Court Rules applies, namely, in every decree and order that is not final, liberty to apply shall be implied. It is open to the party interested to apply in regard to any question that may arise as to the Receiver's accounts, so far as they are accounts in any liability subsequent to his appointment as Receiver to take effect; and to that extent R. 266 does not bar any alteration of or addition to the terms of the preliminary decree. 25 Bom.L.R. 888=77 Ind. Cas. 171=1924 Bom. 166.

——Rr. 266 and 267—Effect of.

The true effect of the Rr. 266 and 267 is to split up the judgment into two parts. The part which relates to costs is postponed until the costs are taxed so that this part of the judgment is delivered only when the costs are taxed so that this part of the judgment is delivered only when the costs are taxed and noted. A.I.R. (Vol. 19) 1932 Bom. 378=34 Bom. L. R. 670=Ind. Rul. (1932) Bom. 445=138 Ind. Cas. 832.

——R. 288—"Any order".

The expression 'any order' in R. 288 includes an order by consent. A.I.R. (Vol. 19) 1932 Bom. 615=34 Bom.L.R. 880=Ind. Rul. (1932) Bom. 559=56 Bom. 231=139 Ind. Cas. 845.

——R. 288—Enlargement or abridgment of time—Power of Court.

Under R. 288 the Court or a Judge has power **inter alia** to enlarge or abridge the time fixed by any order enlarging time, for doing any act upon such terms as the justice of the case may require and any such enlargement may be ordered although the application for the same is not made until after the expiration of the appointed time. A.I.R. (Vol. 19) 1932 Bom. 615=34 Bom.L.R. 880=Ind. Rul. (1932) Bom. 559=56 Bom. 231=139 Ind. Cas. 845.

——R. 309—Attorneys—Engagement, ending of—Execution proceedings—Notice—Fresh authority for attorney, necessity of.

The retainer of an attorney ordinarily comes to an end when the suit is ended. After the suit is over the attorneys are **ipso facto** discharged so far as the suit is concerned and would need fresh authority from their clients to act for them in execution proceedings. They have after the suit no authority to accept a notice in execution. A.I. R. (Vol. 19) 1932 Bom. 337=34 Bom.L.R. 615 =Ind. Rul. (1932) Bom. 363=138 Ind. Cas. 320.

——R. 314—Appointment of Receiver.

It is not a condition precedent that the attachment should be subsisting for the appointment of a Receiver in execution. If a decree-holder makes out proper grounds for equitable or indirect execution, namely by the appointment of a Receiver such a Receiver can be appointed, for there is nothing in the C. P. Code or the Rules of the Bombay High Court (Original Side) which prohibits such an appointment. A.I.R. (Vol. 24) 1937 Bom. 382=39 Bom.L.R. 493=10 R.B. 140 =170 Ind. Cas. 850.

——Rr. 318, 326—The effect of an application to make an entry in the negative register kept by the Prothonotary of the Bombay High Court under Rr. 318 and 326 is the same as that of an application for execution of the decree and when it is made before sale, it entitles the applicant to share in the rateable distribution of the decree under which the property is sold. A.I.R. (Vol. 19) 1932 Bom. 622=34 Bom.L.R. 1405=Ind. Rul. (1933) Bom. 87=141 Ind. Cas. 389 (2).

——R. 321—Practice.

Applications to issue short notice are made to and disposed of, by the prothonotary, according to the established practice. It is based on the legal interpretation of the said rules. 36 Bom. 418=16 Ind. Cas. 588=14 Bom. L.R. 629.

——R. 325—Leave of Court under—Service of writ of summons—Notice of motion—Consent of parties—Waiver.

A notice of motion to restrain a party from prosecuting a suit which has been filed by him, cannot be served on him before service of writ of summons, without obtaining leave of Court under R. 325 of the Bombay High Court Rules (Original Side), 1922. The requirements of the rule

cannot be waived by consent of either party. A. I.R. (Vol. 19) 1932 Bom. 393=34 Bom.L.R. 746=Ind. Rul. (1932) Bom. 538=56 Bom. 551=139 Ind. Cas. 741.

——R. 329—Suits under ordinary original civil Jurisdiction—C. P. Code, S. 95, if applicable.

S. 95 applies to the mofussil Courts, but does not apply to suits under the ordinary original civil jurisdiction of the High Court by virtue of R. 329 and therefore the amount of damages to be awarded to the defendant is not limited to Rs. 1,000. 28 Bom. L.R. 1077=97 Ind. Cas. 763=A.I.R. 1926 Bom. 523.

——R. 348—Receiver—Application for appointment of—Commercial cause—Notice of motion.

An order for appointment of a Receiver should be made in open Court on proper materials and affidavits and not in a summary manner in which directions are given under the summons for directions in Chambers and an application for the appointment of a Receiver in a commercial cause should be made by a notice of motion as in the case of an ordinary long cause. A.I.R. (Vol. 19) 1932 Bom. 314=34 Bom.L.R. 717=Ind. Rul. (1932) Bom. 353=138 Ind. Cas. 221.

——R. 350, Form No. VII—Mandatory nature.

The requirements of Form No. VII annexed to the Bombay High Court Rules (O.S.) are mandatory and if a notice of motion does not comply with those requirements, it is bad and is liable to be dismissed. The notice must make mention of the fact that leave under R. 350 of the rules had been granted by the Court to serve the notice of motion for the particular date, when such leave has been obtained. Non-mention of the same is fatal. 49 Bom.L.R. 447=A.I.R. 1947 Bom. 436.

——R. 373—Award—Application for extension of time—Procedure.

For extending time for making an award, a substantive application should be made under R. 373 and notice of that application should be served on the other side. 32 Bom.L.R. 1650.

——R. 373—Applications under Arbitration Act—Procedure.

Rule 373 provides that all applications under the Indian Arbitration Act, other than under S. 19, shall be made by petition except as hereinafter otherwise provided. A.I.R. (Vol. 18) 1931 Bom. 125=32 Bom. L.R. 1650=55 Bom. 452=129 Ind. Cas. 886.

——R. 377—Contents of petition.

Rule 377 provides that every petition or a copy thereof shall specify the persons affected thereby and upon whom notice has to be served as therein provided. A.I.R. (Vol. 18) 1931 Bom. 125=32 Bom. L.R. 1650=55 Bom. 452=129 Ind. Cas. 886.

——R. 385—Poundage when disallowed.

Where as the result of a levy of execution certain property or moneys have come into the hands of the Sheriff the party aggrived by it may on a summons ask for a relief against the Sheriff in respect of such levy, but where the property or money has not reached the hands of the Sheriff, and the Sheriff claims his poundage in respect of the attachment from the parties personally it is a matter fit for a suit rather than for informal directions by the Chamber Judge.

Where the Sheriff's Bailiff proceeded for effecting attachment under O. 21, R. 43 but before the attachment was effected the judgment-debtor paid the decretal amount under protest:

Held, the Sheriff was not entitled to any poundage. 29 Bom.L.R. 686=103 Ind. Cas. 452=A. I.R. 1927 Bom. 420.

——Rr. 387, 386—Rules, if ultra vires—Letters Patent (Bom.), Cls. 11, 12—Bombay Supreme Court Rules, R. 55—Decree passed in Original Side—Whether can be executed by High Court anywhere within Bombay Presidency.

Held, (Beaumont, C.J., and Rangnekar, J., Mirza, J. contra).—There is nothing in the Letters Patent which deprives the Bombay High Court of the power which the Supreme Court possessed of framing rules in terms of Rr. 386 and and 387 either directly or by implication. In point of fact, the local limits of the original civil jurisdiction of the Bombay High Court are not imposed by the Letters Patent, or any order of Government made thereunder; they are imposed by practice and a long course of decisions, but limits so imposed cannot deprive the High Court of the power which the Supreme Court had, and which passed to the High Court under Cl. 11 of the Letters Patent, of framing rules relating to execution in the terms of Rr. 386 and 387 of the Bombay High Court (Original Side) Rules. Consequently the High Court has jurisdiction, in exercise of its ordinary Original Civil Jurisdiction to execute a decree passed on its original side anywhere within the Bombay Presidency.

Rules 386 and 387 of the Bombay High Court (Original Side) Rules are not **ultra vires**; but generally speaking, the power conferred by those rules should be sparingly exercised.

Per **Mirza, J.**—Rule 387 is **ultra vires** of Cl. 11 of the Letters Patent. The expression "local limits of the ordinary original jurisdiction of the High Court", is confined to the Town and Island of Bombay. A.I.R. (Vol. 21) 1934 Bom. 225=58 Bom. 729=36 Bom.L.R. 454=6 R.B. 399=149 Ind. Cas. 892 (S.B.).

——Rr. 397 and 999—Taking of accounts—Power of Commissioner to decide questions of law.

The Commissioner on the Original Side of the High Court can decide questions of law which arise while taking accounts. Parties to the reference cannot ask the Judge to give his opinion on questions of law which arise in the taking of accounts. The parties can only file exceptions to his reports. 41 Bom. 719=36 Ind. Cas. 618=18 Bom.L.R. 798.

——Rr. 435, 436—Receiver in partnership action—Commissioner, whether entitled to issue certificate—High Court's power to review Commissioner's action—Aggrieved party—Chamber summons, if can be taken out.

There is no provision in the High Court Rules which would enable the Commissioner to issue a certificate but on that ground, the certificate stat-

ing the result of a Receiver's accounts cannot be ultra vires. There is provision in the rules of the Supreme Court of England by which the Master is required to issue such a certificate. Under O. 50, R. 22, Supreme Court Rules, it is provided that a certificate of the Master stating the result of a Receiver's account shall from time to time be taken. An analogous provision in our rules would seem desirable, but its absence does not debar the Commissioner from issuing such a certificate. Under R. 436 the Commissioner is empowered, on the application of any of the parties interested to report or certify to the Court any neglect, on the part of a Receiver which may have been proved. Such omission does not take away from the High Court the inherent jurisdiction it possesses to review the action of the Commissioner. If the Receiver's accounts are passed by the Commissioner and no party challenges them within a reasonable time of their passing by the Commissioner, the accounts so passed are on the footing of an adjusted account and cannot be allowed to be reopened except for a just cause shown.

An aggrieved party should take out a chamber summons within a specified time if he wishes to challenge the Receiver's accounts after they are passed by the Commissioner. A.I.R. (Vol. 21) 1934 Bom. 57=35 Bom. L.R. 1158=6 R.B. 359 =149 Ind. Cas. 268.

——R. 444—Receiver's commission — Appointment of Receiver as guardian of minor's property —Accountant-General holding amount to credit of minor asked to pay it to guardian—Amount so paid —Receiver, if entitled to commission.

The Court Receiver was appointed guardian of the property of the minor; by another order the Accountant-General was directed to pay over to the guardian of the minor's property the sum of Rs. 3,300 held by him to the credit of the minor, and the amount was accordingly paid over to the guardian of the property who debited to the minor a sum of Rs. 165 by way of commission calculated at five per cent. on that sum under R. 444 (b) (2) of the High Court Rules;

Held, that the transaction was, between two officers of the Court and therefore such a transfer could not be said, even by stretching the meaning of the words, to be the recovery of an outstanding.

[Amendment of R. 444 of the Bombay High Court Rules (Original Side) suggested.] A. I. R. (Vol. 25) 1938 Bom. 75=39 Bom.L.R. 1175 =10 R.B. 379=173 Ind. Cas. 783.

——S. 484—Applicability.

Where a Commissioner recorded a finding on an objection, disallowed the same but afterwards issued a warrant to review his finding and a summons was taken out for an order that Commissioner's issue of the said warrant was illegal, **held**, that rule No. 484 did not apply to the case. 47 Bom. 593=25 Bom.L.R. 280=82 Ind. Cas. 593= A.I.R. 1924 Bom. 231.

——R. 491—Liability created by—Enforcement.

A liability created by R. 491 of the High Court Rules would be enforced by the Court independently of the provisions of O. 21, R. 89, C. P. Code. A.I.R. (Vol. 30) 1943 Bom. 336=45 Bom.L.R. 683=16 R.B. 177=210 Ind. Cas. 159.

——R. 505—Costs of adjourned summons.

When a summons is adjourned to be dealt with by the Judge at the hearing of the action it becomes merged in the hearing and the costs relating thereto are at the discretion of the trial Judge. 50 Bom. 69=27 Bom.L.R. 1195=91 Ind. Cas. 153=A. I.R. 1926 Bom. 18.

——R. 519—Scope of.

The words "as the taxing master shall in his discretion think proper to be settled by council" used in R. 519 only refer to special affidavits. 31 Ind. Cas. 868=17 Bom.L.R. 924.

——Rr. 521 and 522—Details of Costs—Taxation of attorney's costs.

A solicitor is entitled to charge for instructions for brief for the work which he has done in order to put himself in a position to instruct counsel properly in the matter. This is of course subject to the deduction of items for which he has already separately charged and been adequately remunerated for in the bill.

Speaking generally, solicitors must not be allowed costs for work done prior to the date of the suit. But it will be quite misleading to adopt some English dictum and say that solicitors for the defence are not entitled to charge for work done prior to the service of the writ, seeing that in India proceedings are begun by a plaint and not by a writ as is the case in England.

Instructions to counsel do not cease on the day that briefs are delivered, but the Taxing Master should consider all the work done by the solicitors up to the termination of the trial.

The charge for instructions should not be put in one lump sum, without giving any summary showing under certain leading heads what the solicitors actually claim to have done.

It is the duty of attorneys to keep a strict record of all attendances and interviews for which they propose to make a charge, whether they propose to charge for them separately, or whether they propose to put them forward under the general heading of "Instructions for Brief". The heading "Instructions for Brief" is intended to cover all work necessarily done by solicitors in order to enable them to instruct counsel from the start of the suit to the finish. 29 Bom.L.R. 109=103 Ind. Cas. 731=A.I.R. 1927 Bom. 529 (535).

——R. 522—Objection by a party—Party objecting can point out mistake of law or principle on the part of Taxing Officer.

It is open to a party objecting to show that the Taxing Officer erred on a question of principle or has omitted to take into consideration all those matters which he is required to take into consideration. The Taxing Officer is not at liberty to lay down a scale for discretionary charges which is out of all proportion to the work done. In order to enable the Taxing Officer to exercise his discretion, where large sums are charged for instructions, it is necessary that attorneys should give him all the necessary particulars so that he may be able to decide what is reasonable to be allowed. Proper attention must be paid by the

Taxing Officer to the difficulty or triviality of the points raised, and the existing means of knowledge in the hands of the defendants to meet the attack. The Taxing Officer must have some sense of proportion, and must form some idea of the actual work done and the actual time taken by the attorneys in preparing the brief, with a view to awarding them reasonable remuneration for the work done, having regard also to the other charges made in the bill for particular items of work. 50 Bom. 69=27 Bom.L.R. 1195=91 Ind. Cas. 153=A.I.R. 1926 Bom. 18.

——Rr. 531 and 529—Application for—Review of taxation—When can be entertained.

An application by a party under R. 531 to the Judge in Chambers for review of taxation as to an item or part of an item cannot be entertained unless the part applying has first carried in an objection in writing in compliance with R. 529 with respect to each such item or part of an item. 32 Bom.L.R. 1079=A.I.R. 1930 Bom. 536.

——Rr. 534, 895—Discretion of Judge to direct taxation—Dispute as to fact or terms of employment of solicitor, order of taxation, if can be refused —Client, whether can challenge his liability to pay under R. 895—Work done in mofussil—Bill can be taxed on original side—Work done on appellate side cannot be so taxed.

A Judge has discretion to direct attorney's bills to be taxed under R. 534 and where a bill is taxed, the attorney can apply by summary process for payment under R. 895. The taxation of a bill does not determine the liability of the client to pay, and he is entitled to challenge his liability on a summons under R. 895 after taxation has taken place. When an application is made **ex parte** for a common form order for taxation, the Court may direct the solicitor to issue a summons, and may hear what the client has to say in the matter. If the Court thinks that there is a serious dispute as to the fact or terms of employment of the solicitor, the Court may refuse to make an order for taxation and leave the attorney to file a suit; and in that suit the solicitor's right to recover can be first determined, and the amount to be recovered can be determined subsequently by taxation. The Taxing Master is entitled to tax the bill of costs in relation to work done in the **mofussil**, on the original side scale but costs incurred on the appellate side of the High Court cannot be so taxed. A.I.R. (Vol. 28) 1941 Bom. 99=43 Bom.L.R. 76=I.L.R. (1941) Bom. 223=13 R.B. 322=193 Ind. Cas. 449.

——Order for taxation in respect of appellate side matter—Judge or Prothonotary, who can make—Attorney claiming costs on original side scale in respect of appellate side matter must sue on his contract with his client.

It is not open either to a Judge or to the prothonotary to make an order for taxation in respect of an appellate side matter under R. 534. The only remedy open to an attorney who claims to be entitled to payment of costs on the original side scale in respect of a matter relating to the appellate side jurisdiction is to file a suit on his contract with his client. A.I.R. (Vol. 27) 1940 Bom. 412=42 Bom.L.R. 922=13 R.B. 186=191 Ind. Cas. 596.

BOMBAY HIGH COURT RULES.

——R. 544—Taxation—Bill of costs—Taxing master.

Rule 544 of the High Court Rules is not exhaustive. It gives a party chargeable with the bill power to apply to have his attorney's bill taxed but it makes no corresponding provision enabling the attorney to apply to have his bill taxed without the consent of the party chargeable therewith. Apart from the rule the Court has inherent jurisdiction to make any order that seems to the Court reasonable and necessary in the interests of justice when one of its officers applies to the Court for an order for taxation of his costs due to him by his client. (1907) 32 Bom. 428=9 Bom.L.R. 1014.

——R. 544—Taxation—Bill of costs—Practice.

Rule 544 does not empower a Judge to make an order on an attorney's application for taxation of his bill of costs for business not transacted in court, unless such order be by consent, and the court has not any inherent power on which the jurisdiction can be rested. (1908) 10 Bom.L.R. 76=32 Bom. 428; reversing 9 Bom.L.R. 1014.

——R. 548—Certifying Counsel—Duty of Court.

In certifying counsel in chamber matters under R. 548 the court has regard to the following cirumstances:—(1) Whether notice has been given by either side of the intention to employ counsel; (2) Whether the matter to be dealt with involves the considerations of complicated facts or merely of simple facts; (3) whether there arises any substantial question of law which has to be argued and discussed. (1905) 7 Bom.L.R. 753=30 Bom. 196.

——R. 548 (ii) (h)—The prayers of the plaint were for a declaration that certain Act was **ultra vires** of the Provincial Legislature, for a declaration that the tax levied by that Act was illegal and void, for a declaration that the demand made for payment of the tax was illegal and invalid, for a declaration that the notices served were invalid and for certain consequential injunctions. The plaint did not contain a statement as to any sum claimed by the plaintiff:

Held, that having regard to the prayers in the plaint the suit did not fall within R. 548 (ii) (h). A.I.R. (Vol. 29) 1942 Bom. 312=44 Bom.L.R. 687=I.L.R. (1942) Bom. 829 at p. 838=15 R.B. 258=203 Ind. Cas. 603.

——R. 549-A—Applicability—Quantification of costs refused.

Rule 549-A, Bombay High Court (Original Side) Rules has application only when the Judge trying the suit can without any difficulty fix the costs. This rule is not intended to constitute the Judge a Taxing Master. [Costs not quantified.] A.I.R. (Vol. 29) 1942 Bom. 81=44 Bom.L.R. 105=I.L.R. (1942) Bom. 163=14 R.B. 355=199 Ind. Cas. 434.

——R. 559—Under R. 559 all such just and reasonable charges and expenses as appear to have

been properly incurred in procuring evidence and the attendance of witnesses are to be allowed. A.I.R. (Vol. 25) 1938 Bom. 10=39 Bom.L.R. 820=10 R. B. 337=173 Ind. Cas. 489.

——R. 559—Bill of costs.

There is no rule in Bombay restricting the normal right of a Solicitor as a professional man to amend his bill of costs which he has once presented to his client. He is at liberty to present another and revised bill for taxation. It is within the discretion of the Taxing Master to saddle him with costs of taxation if he is of opinion that he has delivered to his client an exorbitant bill of costs. A.I.R. (Vol. 22) 1935 Bom. 150=37 Bom.L.R. 39=59 Bom. 443=7 R.B. 482=155 Ind. Cas. 945.

——R. 559—Rule should not interfere with the discretion of the Court in those cases in which the Taxing Master has specially certified or reported the circumstances of the case. A.I.R. (Vol. 20) 1933 Bom. 142=35 Bom.L.R. 101=Ind. Rul. (1933) Bom. 221=57 Bom. 583=142 Ind Cas. 363.

——R. 567—Attendance in Court.

The time taken up by the Court for mid-day adjournment cannot be included in counting the hours of attendance in the Court. A.I.R. (Vol. 29) 1942 Bom. 90=I.L.R. (1941) Bom. 606=43 Bom.L.R. 655=14 R.B. 368=199 Ind. Cas. 513.

——R. 567—Discretion of Taxing Master is not ordinarily interfered with as to quantum of costs.

The Court normally does not interfere with the discretion of the Taxing Master as to quantum, unless he has misdirected himself. If the costs are fixed merely upon the consideration of the length of time occupied by the hearing, the Taxing Master can be said to have misdirected himself. A.I.R. (Vol. 29) 1942 Bom. 90=I.L.R. (1941) Bom. 606=43 Bom. L.R. 655=14 R.B. 368=199 Ind. Cas. 513.

——R. 567—Instructions to counsel in Court whether "instructions for brief."

The words "instructions for brief," do not mean the same thing as "instructions for counsel," and, therefore, oral instructions to counsel in the course of the hearing cannot be included in 'instructions for brief.' A.I.R. (Vol. 29) 1942 Bom. 90=I.L.R. (1941) Bom. 606=43 Bom.L.R. 655=14 R.B. 368=199 Ind. Cas. 513.

——R. 571—Costs—Allocatur—Practice.

Where there are objections to a bill of costs, the Taxing Master can issue a preliminary allocatur dealing with undisputed items, and such further allocatur as may be necessary shall be issued by him after his decision upon the objections. The prevailing practice in the Taxing Master's Office not to issue the final allocatur until after the Chamber Judge has dealt with the summons to review is not wrong. The Taxing Master should not be directed to forbear from issuing the allocatur because the review of taxing is still pending before the Appellate Court. A.I.R. (Vol. 30) 1943 Bom. 184=45 Bom.L.R. 379=16 R.B. 37=207 Ind. Cas. 549.

——R. 577—Costs of third counsel in a defended long cause—Party and party costs—Attorney and client costs—Practice governing the allowing of costs—Taxing Master's decision—Review by the Chamber Judge.

As a general rule the Judge in chambers will not interfere with items of taxation which are entirely within the Taxing Master's discretion or go into details of such discretionary items, but there is nothing to prevent him from doing so if it appears to him that the interests of justice require his interference; and it would be his duty in all such cases to review and revise taxation and judge and decide for himself waht would be a just order to make under the circumstances. Where a party to a suit has already briefed two counsel for hearing and a third is instructed to make an application to transfer the case, from one Judge to another the costs shall be, in the absence of any order making the costs in the case, disallowed between party and party though they may be allowed between attorney and client. A party to a defended long cause is entitled to appear by two counsel. If both counsel attend throughout the hearing and the other party is ordered to pay costs of the suit their brief fees and full refreshers would be allowed on taxation against the losing party. If the suit is conducted by one counsel only throughout the full refreshers of the conducting counsel and a nominal refresher of the other counsel would be properly allowable against the opponent if ordered to pay costs. If the absent counsel attends for portions of the time the case when at hearing, his refresher proportionate to the time he attends would also be properly allowable in addition to the full refresher allowed to the counsel who attends and conducts the case. When a party to a defended long cause engages two counsel he has a right to the services of at least one of them. He is under no obligation whatever to engage a third counsel. If both counsel find that they would, owing to other engagements, be unable to go in and conduct the case when it is called, it is obviously the duty of one of them to return the brief. A party is at liberty at any time to employ a third counsel, but this right of employing a counsel must be allowed to work hardship on the losing opponent. If three counsel are engaged before the hearing it will be for the Taxing Master to consider the fees and refresher of which two he will allow between party and party and which counsel fees should go between attorney and client. A solicitor engaging three counsel is entitled in the event of his recovering costs from the opponent, to have his third counsel's costs taxed between attorney and client if he proves express authority from his client or if he proves that some earlier contingency arose which made it necessary for him to engage a third counsel in order to safeguard the clients' interest. If a third counsel is added after the hearing of the suit has commenced such addition must be at the cost of the party doing so 32 B. 262=9 Bom.L.R. 983.

——R. 581—Rule 581 provides that the rules which provide for sale of the property by the Commissioner are applicable to sales ordered by the Court under mortgage decree. A.I.R. (Vol. 19) 1932 Bom. 642=34 Bom.L.R. 1384=Ind. Rul. (1933) Bom. 174=57 Bom. 234=142 Ind. Cas. 130.

——R. 602—Rival will set up for same estate—Will set up by caveator must also be filed and propounded—Succession Act (1925), S. 295.

Where two wills are set up by two persons in respect to the same Estate the parties interested in op-

posing the grant of probate have to file their respective caveats in each case so that the petition becomes a suit in each case and the suits are numbered and both the suits are heard together or are consolidated. It is, therefore necessary that even the caveator must produce the will set up by him along with his petition and it must be filed and propounded before the suit can proceed. 53 Bom. 829=31 Bom. L.R. 1014=122 Ind. Cas. 126=A.I.R. 1930 Bom. 29.

——R. 767—Petition for compulsory winding up of company—Costs—Taxation.

Under R. 767 the costs of a petition for the compulsory winding up of a company in the mufassal have to be taxed in accordance with the table of fees applicable to attorneys of the High Court of Bombay in its ordinary original civil jurisdiction. A.I.R. (Vol. 25) 1938 Bom. 10=10 R.B. 337=39 Bom. L.R. 820=173 Ind. Cas 489.

——R. 767—Costs in respect of incidental order connected with main proceeding and those in respect of distinct interlocutory proceeding—Taxation of bill of costs.

In the mufassal the ordinary procedure and practice applicable to orders relating to costs are such that the Courts in the majority of cases do not give directions with reference to the costs of the proceedings leading up to each incidental order as it is made. The failure therefore by a mufassal Court to make any other with reference to the costs of an incidental proceeding which forms part of a more comprehensive legislation, may not carry with it any such implication that the Court has refused to exercise the discretion as to the scale of fees or that it is intended that the costs of that part of the proceeding should be borne by each of the parties nor is there impliedly any decision that ultimately there will be no order that one of the parties shall recover it from the other—the implication may be either that the costs of the proceedings leading up to the incidental order are to form part of the costs of the proceedings as a whole, a result similar to that when an order is made in the High Court that the costs shall be costs in the main proceeding; or the Court may not have exerciesd its powers with reference to the costs as when in the High Court costs are reserved. The case must, however, stand on a somewhat different footing where the order in question is not an incidental order arising out of a proceeding forming part of the larger proceeding, but where there is a distinct interlocutory proceeding even though it may be an offshoot of the larger proceeding. Such an interlocutory proceeding is not a necessary branch of the main litigation. It may or may not be made. It may be made quite frivolously and may be dismissed, even when the main proceeding is justified and successful. In the case of distinct interlocutory proceedings, therefore, the implication would not be the same as in the case of necessary incidental orders connected with the main proceedings. If there is no special order relating to a distinct interlocutory proceeding, it can hardly be presumed that the costs must be added to and must follow the costs of the main proceeding. A.I.R. (Vol. 25) 1938 Bom. 10=39 Bom. L. R. 820=10 R.B. 337=173 Ind. Cas. 489.

——R. 767—Instruction charges to Advocates in mufassal.

Instruction charges include the remuneration that the Solicitor is entitled to charge for collecting evidence in preparing the case for the final hearing and similar work. Though the Advocate in the mufassal does not instruct counsel, he has to instruct himself, he has to prepare himself for performing the same duties that counsel would perform in the High Court. The Advocate has to get acquainted with the law and collect the authorities on the subject. He may not be entitled to remuneration for this work on the same scale as counsel but since counsel's fees are saved, he must have fair remuneration for work done by him. The labour and work imposed upon the Advocate are in one sense less than the labour and work of the attorney instructing counsel, but such labour and work are no less necessary and important in the one instance than in the other, and there is no reason or principle why Advocates should be deprived of fair remuneration for work necessarily undertaken which would have to be done in the High Court through counsel.

The Advocate in the mufassal is competent to do the work done by counsel in the High Court, including the looking up of the law. The items of work done by the Advocate in looking up the law may consequently in proper cases be taxed in the mufassal on principles similar to those on which such items are taxed in Bombay when they are properly included in the fees paid to counsel. They are allowed in Bombay if counsel are certified by the Court as having been properly instructed to appear, though the attorney himself had the right of audience on the occasion. It is implied that such simple matters of law as can be dealt with by attorneys without employing counsel are not to be separately charged for. In the mufassal, special directions would ordinarily have to be applied for at the proper time, so as to indicate that in the opinion of the Court, the questions of law involved were of such a nature and complexity that the Advocate ought to be allowed special remuneration for it, that the services he was rendering were such that counsel may properly have been briefed to render them in the High Court. A.I.R. (Vol. 25) 1938 Bom. 10=39 Bom.L.R. 820=10 R.B. 337=173 Ind. Cas. 489.

——Rr. 767, 559—"So far as the same are applicable"—Interpretation.

The words in R. 767 of Bombay High Court (Original Side) Rules "so far as the same are applicable" govern the rule that "the fees must be allowed as set forth and referred to in Sch. II" at p. 398. It is not reasonable to apply the schedule in such a manner and for such reasons as to deprive parties of costs which they have necessarily and properly to incur. A.I.R. (Vol. 25) 1938 Bom. 10=39 Bom.L.R. 820=10 R.B. 337=173 Ind. Cas. 489.

——S. 767—The absence of such particulars as ought ordinarily to be included in the item for instructions, may be overlooked if there is other evidence on the basis of which the Taxing Officer or the Judge in Chambers can form a proper judgment as regards the amount to be allowed. A.I.R. (Vol. 25) 1938 Bom. 10=39 Bom.L.R. 820=10 R.B. 337=173 Ind. Cas. 489.

——R. 767—Additional security, if can be ordered merely on the ground that costs of appeal are likely to be heavy.

Further security cannot be ordered from an appellant under R. 767 of the Bombay High Court (Original Side) Rules, merely on the ground that the amount of the costs of the appeal is likely to be heavy. A.I.R. (Vol. 20) 1933 Bom. 120=144 Ind. Cas. 98=35 Bom.L.R. 37.

——R. 767—Additional security—When may be demanded.

Where the appellant was a Sadhu who had not paid Rs. 26,358 odd, party and party costs taxed for the respondent in the final Court, and his attorneys got themselves discharged on the ground that they were not placed in funds for prosecuting the appeal, the Court of Appeal demanded, as being an exceptional case, a security for Rs. 5 000 in addition to the usual security lodged by the appellant along with his appeal, for the costs of the respondent. 27 Bom.L.R. 1216 =94 Ind. Cas. 654=A.I.R. 1926 Bom. 42.

——R. 865—'Given in charge to the Jury'—Meaning of.

The expression "given in charge to the jury" is used in R. 865 of the Bombay High Court Rules in a technical sense. Even if the prisoners were given in charge to a common jury, R. 865 will not operate as a bar to the trial of the prisoners by a special jury upon the altered charge. Apparently R. 865 is not designed to meet such a case. The question whether the prisoners have been given in charge to a jury must be determined by reference to the form of the oath administered and the procedure followed thereafter. But, where after the Clerk of the Court calls the prisoner to the Bar and makes the following statement: "Members of the jury, the prisoner stands indicted for that he, on the (stating the substance of the offences charged in the indictment). To this indictment he has pleaded not guilty and it is your charge to say, having heard the evidence, whether he is guilty or not", the prisoner is said to have been given in charge to the jury.

But where the substance of the offence charged in the indictment has not been stated to the jury and except the fact that the jury is sworn and allowed to be challenged with a view to their trying the prisoners in due turn, nothing has been done to warrant the supposition that the prisoners have been given in charge to the jury, the trial shall take place on the altered charge with a special jury. A.I.R. (Vol. 24) 1937 Bom. 260=39 Bom.L.R. 355=10 R.B. 48= 38 Cr.L.J. 850 (2)=I.L.R. (1939) Bom. 369=170 Ind. Cas. 153.

——R. 874—Payment order—Whether can be executed as a decree—C. P. Code (Act V of 1908), S. 129.

Section 129 Civil P. C., expressly authorises the Bombay High Court to make rules to regulate its own procedure in the exercise of its original civil jurisdiction and hence a payment order under R. 874 of the rules framed by that High Court can be executed as a decree. A.I.R. (Vol. 23) 1936 Lah. 369=8 R. L. 908=38 P.L.R. 1101=162 Ind. Cas. 489.

——R. 875—Attorney of High Court—Whether can file appearance on behalf of client for limited purpose only—Attorney filing appearance in pending suit—Duty to act for client throughout proceedings.

The party who wishes an attorney to appear on his behalf and to relieve him of the necessity of filing an appearance in person cannot be allowed to make a convenience of the machinery of the High Court by authorising the attorney to act for a limited purpose only. Neither O. III, Civil P. C., nor any of the Bombay High Court Rules (Original Side), 1930, has the effect of authorizing an attorney of the High Court to file an appearance for a limited purpose only in an ordinary cause under the original civil jurisdiction of the High Court. The attorney cannot be allowed by the use of such device to obviate the necessity of obtaining under the High Court Rules a discharge from the Court or a Judge of the obligation he is under to act for the party till the termination of the proceedings. A.I.R. (Vol. 21) 1934 Bom. 450 =36 Bom.L.R. 987=7 R.B. 285=154 Ind. Cas. 159.

——R. 875—Bombay High Court Rules (Original Side), 1930, contemplates that the attorney who files his appearance on behalf of a litigant in a pending suit is to act for him throughout those proceedings unless prior to his withdrawal he has obtained a discharge by an order of the Court or a Judge. A.I.R. (Vol. 21) 1934 Bom. 450=36 Bom.L.R. 987=7 R.B. 285=154 Ind. Cas. 159.

——R. 928—If ultra virers—Divorce Act, S. 62.

R. 928 of the Bombay High Court (O.S.) Rules, 1929, in so far as it prohibits the High Court from entertaining an application for modification, etc., of an order for alimony, etc., unless the person on whose petition the decree was pronounced is, at the time of the application, resident in India is ultra vires the rule-making power of the High Court under S. 62 of the Divorce Act, and is therefore of no effect. The High Court has therefore jurisdiction to modify or discharge an order for alimony notwithstanding the fact that the wife on whose petition the decree was pronounced is resident outside India. Rules made under S. 62 of the Act must be consistent with the provisions of the Act, and any rule which deprives a person of a remedy which exists under that Act is, to that extent ultra vires. 51 Bom.L.R. 129=A.I.R. 1949 Bom. 173.

——Table of Fees—Item 14 of construction.

Per B. J. Wadia J.—Item No. 14 of the Table of Fees has not been very happily worded and should be recast.

An inappropriate word or expression in the Item No. 14 of Table of Fees ought not to override the intention and meaning of all the words taken as a whole. A.I.R. (Vol. 29) 1942 Bom. 90=I.L.R. (1941) Bom. 606=43 Bom.L.R. 655=14 R.B. 368= 199 Ind. Cas. 513.

——Item No. 14—Words "final trial" not confined to final trial of suit—Taxing Master can allow fee for "instructions for brief" on Chamber Summons adjourned in Court.

The words "final trial" in Item No. 14 of the Table of Fees in the Original Side Rules, are not confined to the final trial of a suit. The wording of the item

does not draw a distinction between Chamber matters and matters heard in Court. The essential thing is that there should be a final trial. Hence the Taxing Master can allow a fee for "instructions for brief" on a Chamber Summons, which originated in Chambers but was adjourned to be heard in Court. A.I.R. (Vol. 29) 1942 Bom. 90=I.L.R. (1941) Bom. 606=43 Bom.L.R. 655=14 R.B. 368=199 Ind. Cas. 513.

——Item No. 40.

Under Item No. 40 of the Table of Fees in the Original Side Rules of the Bombay High Court, the allowance of Rs. 15 is to be for the first hour of the first day of the hearing and Rs. 10 are to be allowed for the subsequent hours irrespective of the day. Rupees 15 are not to be allowed for the first hour on each day. A.I.R. (Vol. 29) 1942 Bom. 90=I.L.R. (1941) Bom. 606=43 Bom.L.R. 655=14 R.B. 368=199 Ind. Cas. 513.

——Item No. 56—Phrase, "unless otherwise ordered" confers complete discretion—Grounds for exercise of discretion should not be limited by Appellate Court.

The words "unless otherwise ordered" confer a complete discretion upon the Judge, and it is not desirable that the High Court should seek to limit the grounds on which that discretion should be exercised.

A person filed a short cause suit against certain Arabians residing in Arabia, the value of the subject-matter being above Rs. 5000. Service in accordance with O. V, R. 26, Civil P. C., being unsuccessful, a substituted service was effected. As the defendants were Arabians, many documents had to be translated into Arabic. An ex parte decree was passed. The out-of-pocket expenses of the solicitors were Rs. 450. In its discretion the Court allowed only Rs. 400. There was no reason to doubt the correctness of the figure given by the solicitors who had done a great deal of work in view of the fact that the defendants were Arabians:

Held, that this was a case in which either the costs should be taxed, or else a sum should be allowed which would provide reasonable remuneration for the solicitors and also cover the out-of-pocket expenses.

[Court allowed the out-of-pocket expenses in addition to Rs 200 as remuneration of the solicitors.] A.I.R. (Vol. 27) 1940 Bom. 293=42 Bom.L.R. 578=13 R.B. 131=191 Ind. Cas. 24.

——Item No. 60—Refresher, if comes within "all reasonable disbursements".

Rule 567 of the Rules of the High Court of Bombay in terms only authorises the payment of refreshers on the hearing of a suit or appeal which extends to more than one day, so that there is no express power to allow refreshers on summons adjourned into Court. Refreshers in such matters do not come within the words "all reasonable disbursements" in Item No. 60 of the Table of Fees to be taken by the attorneys.

In such cases the Taxing Master has, however a discretion to allow the additional fee if he thinks that for some reason or another the solicitor had not been able to calculate, and had not in fact correctly calculated, the length of time the case was likely to last. A.I.R. (Vol. 29) 1942 Bom. 90=I.L.R. (1941) Bom. 606=43 Bom.L.R. 655=14 R.B. 368=199 Ind. Cas. 513.

——Item No 60—Appellate Court will not remand case for asking Taxing Master to increase fee.

Where the party has not asked the Taxing Master to increase the brief fee, having regard to the unexpected length of time the case has taken, and no application is made to the Chamber Judge to send the matter down to the Taxing Master for considering whether an extra allowances should or should not be made, the Appellate Court will not itself increase the fee or ask the Taxing Master to do so by remanding the case. A.I.R. (Vol 29) 1942 Bom. 90=I.L.R. (1941) Bom. 606=43 Bom.L.R. 655=14 R.B. 368=199 Ind. Cas. 513.

——Item No. 60—Review of taxed costs.

No increase of charges can be allowed on review of taxation over those charged in the bill of costs. A.I.R. (Vol. 29) 1942 Bom. 60=I.L.R. (1941) Bom. 606=43 Bom.L.R. 655=14 R.B. 368=199 Ind. Cas. 513.

BOMBAY HIGH COURT LETTERS PATENT AMENDMENT ACT (XLI OF 1948).

——Scope—If retrospective—Suits already instituted and pending—Jurisdiction to try—If taken away. **See** LETTERS PATENT (BOM.), Cl. 12. 51 Bom.L.R. 122.

BOMBAY HINDU HEIRS RELIEF ACT (VII OF 1866).

——S. 2—Scope—Decree against Hindu father—Rents of lands inherited by agriculturist son—Liability to attachment—C. P. Code, S. 53.

The rents of the property inherited by the son as the representative of his father, though they did not come into his hands at the time of the death of the father, are liable for the satisfaction of the father's debt and can be attached in execution of a decree against the father to the extent of the property which is inherited by him and which has not been duly applied by him for the payment of the decretal amount; although the land belonging to the Hindu father is exempt from attachment in the hands of agriculturist son, under Deccan Agriculturists' Relief Act, S. 22. 53 Bom. 463=31 Bom.L.R. 442=119 Ind. Cas. 179=A.I.R. 1929 Bom. 233.

BOMBAY HOUSE RENT RESTRICTION ORDER (1942).

——Cl. 12—Construction—Collector—If bound to hear appellant.

The expression "after making such further inquiry as he thinks fit" in Cl. 12 of the Bombay Rent Restriction Order really means "after making such further inquiries, if any, as he thinks fit." The Collector is not required to hear the appellant in support of his appeal. Having read the memodandum of appeal and read the record and proceedings below he would be entitled to decide the appeal without any further communication with the appellant. 49 Bom.L.R. 414=A.I.R. 1948 Bom. 63.

BOMBAY INCREASE OF COURT-FEES ACT (XV OF 1943).

——Applicability—Process fees leviable under rules under S. 42, Bombay Civil Courts Act.

The fees that are increased by the surcharge under the Bombay Increase of Court-Fees Act (1948) are the fees leviable under the Court-Fees Act, 1870. The fees chargeable for serving and executing processes issued by the Civil Courts subordinate to the High Court, which are leviable under the rules made under S. 42 of the Bombay Civil Courts Act are not affected by the surcharge under the Bombay Increase of Court-Fees Act. I.L.R. (1946) Bom. 273=227 Ind. Cas. 236=48 Bom.L.R. 108=A.I.R. 1946 Bom. 309.

——Retrospective effect—Court-fee payable in respect of probate.

The provisions of the Bombay Increase of Court-fees Act are not retrospective in their effect. Hence the court-fee payable in respect of a probate is payable under the old scale where an application was made before January 1, 1944; even though the grant of a probate is actually made after that date. A.I.R. (Vol. 32) 1945 Bom. 1=46 Bom. L.R. 768.

BOMBAY INDUSTRIAL DISPUTES ACT (XXV OF 1938).

——Scope of Act.

The scheme of the Act is that matters in dispute should be placed before a conciliator so that Government may have an opportunity of considering his view and endeavouring to get the parties to come to a reasonable arrangement. A.I.R. (Vol. 30) 1943 Bom. 332=45 Bom.L.R. 657=16 R.B. 105=I.L.R. (1943) Bom. 734=209 Ind. Cas. 166.

——S. 3—Dismissal of workman if industrial matter.

The dismissal of a workman is an industrial matter. A.I.R. (Vol. 30) 1943 Bom. 332=45 Bom.L.R. 657=16 R.B. 105=I.L.R. (1945) Bom. 734=209 Ind. Cas. 166.

——S. 26 (1) and (8)—Standing orders—Force and effect of. **See** BOMBAY INDUSTRIAL DISPUTES ACT, S. 49-A. 52 Bom.L.R. 46.

——S. 28—Other industrial matters are not limited to those mentioned in Sch. II—Dismissal of individual employee is also covered.

Under S. 28, Sub-S. (2), the employees are given a right to give notice when they desire a change in respect of any standing order, i.e., a change generally affecting all the employees as a class, and also when they desire a change in respect of any other industrial matter which would cover a case of the dismissal of an individual employee. The other industrial matters are not restricted to matters in Sch. II. A.I.R. (Vol. 30) 1943 Bom. 332=45 Bom.L.R. 657=16 R.B. 105=I.L.R. (1943) Bom. 734=209 Ind. Cas. 166.

——S. 49-A—Jurisdiction of arbitrator—Scope of inquiry on reference.

Where standing orders have been framed under S. 26 (1) of the Bombay Industrial Disputes Act and settled, such standing orders, under S. 26 (8); are determinative of the relations between the employer and the employees and of the liability of the employer. There can be no liability on the employer outside the ambit of those standing orders. In a reference under S. 49-A of the Act, therefore, the only liability which the arbitrator has jurisdiction to determine is the liability flowing from and arising out of the standing orders which have been settled; he has no jurisdiction to determine any liability outside the standing orders, namely; questions as to what is fair and right as between the employer and the employee and to give relief on moral and humanitarian considerations. 52 Bom.L.R. 46=A.I.R. 1950 Bom. 174.

——S. 60—Scope—Order contrary to Act and without jurisdiction—Power of Civil Court to set aside.

It is perfectly clear that the order contemplated by S. 60 of the Bombay Industral Disputes Act is an order with jurisdiction. Any order passed by the Industrial Court which is without jurisdiction or which is in excess of the jurisdiction conferred upon it by statute can always be questioned in a Civil Court. S. 60 excludes jurisdiction of Civil Court and as such must be strictly construed. It also sets up a special Court of limited jurisdiction, and Courts of limited jurisdiction must be confined to the functions and powers which are conferred upon them by the statute which creates those Courts. Therefore if the Industrial Court acts contrary to the provisions of law which creates it or if it acts in excess of its statutory powers, a Civil Court can always correct the decision of the Industria lCourt. If the arbitrator imposes by his award a liability upon the employer which the law does not permit him to impose, he acts contrary to the provisions of law and in excess of his jurisdiction, and the award is therefore illegal and may be set aside by the Civil Court. 42 Bom.L.R. 767; 50 Bom.L.R. 524, foll. 52 Bom.L.R. 46=A.I.R. 1950 Bom. 174.

——S. 62—Effect of.

The effect of S. 62, Bombay Industrial Disputes Act is that a strike is illegal if started before the sanding orders have been settled, or if no notice is given under S. 28, or if the notice is given and the proceedings under S. 28 have not been completed. Where the proceedings have been completed a strike is illegal if it is commenced more than two months after the completion of such proceedings. A.I.R. (Vol. 30) 1943 Bom. 332=45 Bom.L.R. 657=16 R.B. 105=I.L.R. (1943) Bom. 734=209 Ind. Cas. 166.

——S. 66—Participation in strike prior to its being declared illegal, is punishable.

The plain meaning of S. 66, Bombay Industrial Disputes Act is that participation in a strike which is afterwards declared to be illegal is punishable. The fact that the section provides for the punishment of those who have gone on strike or who join a strike which has been held to be illegal shows that its intention was to make penal not merely the joining or taking part in a strike after it has been declared to be illegal, but also the participation in it prior to the declaration of illegality. The object of the section is to penalise those employees who go on strike without resorting to the remedies provided by Ss. 26,

27 and 28 of the Act. A·I·R. (Vol. 31) 1944 Bom. 126=I.L.R. (1944) Bom. 339=46 Bom·L·R. 104 =45 Cr·L·J. 565=16 R·B. 373=212 Ind. Cas. 259.

——S. 73—Scope—Industrial Court—Status and authority—Notification referring dispute under S. 73—If creates Court—Person challenging notification as improper—Right to apply for writ under S. 45, Specific Relief Act. See SPECIFIC RELIEF ACT, S. 45. 52 Bom.L.R. 53.

BOMBAY INVALIDATION OF HINDU CEREMONIAL EMOLUMENTS ACT (XI OF 1926).

——S. 4—Defendant agreeing to perform D's duties as priest and to share emoluments—D's death—Suit by D's widow for share of emoluments received after D's death.

In 1911, the defendant entered into a contract with one D to perform the latter's duties as priest in certain villages and to share the emoluments from those services. The agreement was to work as long as D pleased subject to a minimum period of five years. D died in 1927, and his widow sued the defendant for the half-share of emoluments received in the two years since her husband's death:

Held, that as the original contract came to an end, at the latest on D's death, the plaintiff in order to succeed must prove either that she entered into a fresh contract with the defendant that he would continue to work for her or under her directions on the terms of the original *karar* so far as applicable, that is to say, on the terms of sharing the emoluments with her, or she must prove that the services in respect of which these emoluments were earned by the defendant were in effect her property and that the defendant in receiving moneys for the performance of these services was accountable to her for those moneys as being moneys had and received to her use: but under S. 4, Bombay Invalidation of Hindu Ceremonial Emoluments Act, any right which the plaintiff had to the proceeds was taken away:

Held, also, that in the absence of any contract by the defendant not to perform services for any persons for whom he had acted on behalf of D and in the absence of any proof that the emoluments he had received belonged to the plaintiff, he was entitled to act as priest and to retain for his own benefit the sums which were paid to him. A.I.R. (Vol. 20) 1933 Bom. 347=35 Bom.L.R. 606=6 R.B. 138 =146 Ind. Cas. 168.

BOMBAY IRRIGATION ACT (VII OF 1879).

——Ss. 3, 31, 34 and 35—Suit for compensation—Jurisdiction of Civil Court.

Under S. 36, the decision of the Collector either under S. 34 or 35 as to the amount of the compensation to be awarded, shall be final unless there is an appeal to a higher authority in which case the decision of the higher authority shall be conclusive. These words show that it was intended that the jurisdiction of the Civil Courts should be ousted, so that the holder of land should not be entitled to bring a suit for compensation for loss alleged to have arisen out of interruption to the supply of water to his lands. 46 Bom. 738=24 Bom.L.R. 264=67 Ind. Cas. 43=A.I.R. 1922 Bom. 8.

——S. 5—Water cess—Rights of inamdar.

Held, on construction of the *inam samad*, that the grant did not include the full proprietary rights to the flowing water of a river passing by the side of the village; that the grantee became the owner of the village and half of the river bed adjoining it and was entitled to a reasonable use of the flowing water, that he could not, however, claim the water rate levied by the Government under S. 5. A.I.R. (Vol. 33) 1946 Bom. 204=47 Bom.L.R. 839=224 Ind. Cas. 142.

——Ss. 8, 285—Natural stream in a nala—Right of the Irrigation Department to prevent the flow —Natural rights of riparian owners.

The defendant was in possession of a piece of land, which derived water from a nala. This nala was crossed at a considerable distance from this land by a Government irrigation canal and existed long before the canal. The water flowing in the nala was derived (1) from rain water from the hills and catchment area of the nala, and (2) from percolation water or waste from the canal. Apart from abnormal periods of drought, the second of the two sources was perennial and the more important of the two. Before the Government canal was made, there was a surface flow in the portion of the nala near the defendan's land: for seven hundred yards below the point of contact the nala was normally dry and gravelly for many months, but after that point there was a spring which furnished perennial stream in the nala. And quite apart from this, the nala held, throughout the rainy months, a fair body of water. At a point little above the defendants' lands the Irrigation Department erected an earthen dam in the nala for the purpose of irrigating an adjacent filed. *Held*, (1) that apart from the Bombay Irrigation Act the defendant had the right of a riparian proprietor to the use of the water in the nala as it flowed past. (2) That he had a right to all the water which actually formed part of the stream in the nala as soon as it became a part, irrespective of the source from which it came. (3) That the nala was not a canal within the meaning of S. 3 of the Act. (4) The Irrigation department was not entitled to prevent the flow of water to defendant's land. (5) S. 8 of the Act only empowers a canal officer to enter on any land, etc. and in no way defines what he may do for the proper regulation and management of the canal. (6) S. 28 contemplates the supply of water to a watercourse and to a person. It does not deal with the supply of water to *any* person, but only with the supply of water to any person *entitled to such supply*, which means *entitled under the Act* to supply. A natural stream through in part supplied with water by percolation from a canal, is not a canal until the Governor-in-Council has applied to it the provisions of S. 5 of the Act. (1903) 5 Bom.L.R. 790=28 Bom. 105.

——S. 22 and 23—Water supply—Control over.

Ss. 22 and 23 give control over the supply of water from the water-course. The right however to regulate water from a Government or public channel or

canal is the right of Government alone. 62 Ind. Cas. 225=14 S.L.R. 53.

——S. 23—Jurisdiction under—Conditions precedent.

The service of summons and hearing of objections are conditions precedent to the exercise of jurisdiction conferred by the S. 23, and failure to comply with those conditions makes an order made under it a nullity, nor is such an order protected by the theory of inherent jurisdiction. 62 Ind. Cas. 225=14 S.L.R. 53.

——S. 23—Order of Collector—Suit to set aside order—Competency.

An order made by a Collector under S. 23 of the Act falls within the purview of S. 203 of the Bombay Land Revenue Code and is the order of the Collector though it is a confirmation of an order of a Canal Officer. An appeal from such an order lies to the Commissioner and until presentation of the appeal, a suit to set aside the order is incompetent. 19 Ind. Cas. 726=6 S.L.R. 241.

——Ss. 31 and 38—Scope of.

Sections 31 and 38 of the Bombay Irrigation Act do not bar any suit for compensation for deficiency of water due to Government Engineer's action against the Secretary of State. 58 Ind. Cas. 769 (Sind.).

BOMBAY JAIL MANUAL.

——R. 387 (c)—Conflict between rules and order of Court—Order should be sent to High Court for consideration.

The rules of the Bombay Jail Manual are administrative rules for the guidance of the Jail Officials; and it is for the Jailor to keep in safe custody a prisoner consigned to his care under the lawful order of the Court, and where any conflict occurs between an order of the Court and administrative rules, the order of the Court should be sent to the High Court through proper channels for consideration and modification if need be. A.I.R. (Vol. 23) 1936 Sind 125=9 R.S. 49=29 S.L.R. 353=1936 Cr. Cas. 802 =37 Cr.L.J. 1003=164 Ind. Cas. 576.

——R. 392—Validity.

Where a prisoner is awarded two consecutive sentences for separate offences, and while undergoing the first, the same is set aside with the result that there is no sentence on that count, the sentence on the second count which is upheld, must commence from the date of conviction, and any part of the sentence already served must be attributed to the only sentence legally existing. Rule 392 of the Jail Manual is invalid. A.I.R. (Vol. 29) 1942 Bom. 342=44 Bom.L.R. 807=I.L.R. (1944) Bom. 82=44 Cr.L.J. 130=15 R.B. 289=204 Ind. Cas. 23.

BOMBAY JURISDICTION OF JAGIRDARS, ETC., REGULATION (XIII OF 1830).

——S. 2—Ss. 2 (2), 4—"Judge" in S 2 (2)—Person alleging that District Judge had no power to transfer application under S. 2 (2), must prove it.

The "Judge" mentioned in S. 2 (2), Bombay Regulation XIII of 1830 is the District Judge.

Where a person contends that the District Judge had no power to order the transfer of an application under S. 2 (2), it is on that person to prove his contention. A.I.R. (Vol. 27) 1940 Bom. 284=I.L.R. (1940) Bom. 519=13 R.B. 127=42 Bom.L.R. 525 =190 Ind. Cas. 837.

——S. 4—Jagirdar executing decree relating to agricultural land—Decree, if can be transferred to Collector.

Section 4 of the Regulation gives authority to the *jagirdar* to execute his own decrees. That does not mean that the sale of land of an agriculturist must be done by him and no other person has a right to do so; Regulation XIII lays down no special procedure at all. Therefore, the normal rule found in the Civil P. C., under which sales of property of agriculturists are required to be transferred to the Collector, applies also to the *jagirdar's* decrees. A.I.R. (Vol. 27) 1940 Bom. 284=42 Bom.L.R. 525=13 R.B. 127=I.L.R. (1940) Bom. 519=190 Ind. Cas. 837.

BOMBAY KHOT LEASES ACT (I OF 1865).

——S. 38—Khot's demands—Power of Government to fix—Illegal attachment by Government for non-compliance —Suit by khot for damages—Principles of assessment.

Under S. 38 of the Bombay Khot Leases Act, Government have no power to override the customary right of the *khot* except by the arrangement entered into by the Superintendent of Survey at the time of the introduction of the survey.

A lease executed by the *khot* of a village to the Government provided as follows: "1. One rupee for assessment in respect of *kharip* land and eight annas for *faida* in all one rupee and eight annas. Out of this the one rupee of assessment is to be taken in cash and for the *faida* there is to be taken *payalis* 6 *i. e.*, ½ maund of paddy in kind valued at the rate of Rs. 20 per *khandi* and ten bundles of rice straw for each maund of *faida*.

"2. The whole of the assessment in respect of the *varkas* land is to be received in cash and for *faida* twelve annas for every rupee; for the same there is to be ½ (one-half) maund of grain in kind valued at the rate of Rs. 30 per *khandi*:—Out of that ½ to be *nagli*, ½ to be *vari*". "As to the *vasul* in kind which is settled to be taken as stated in Sub-Cl. 2 of the above Cl. 6 we will take the said *vasul* by the measure which may be current in the aforesaid *taluka*." The Government attached the village. The attachment was declared illegal by the Courts and the *khot* was declared entitled to damages. The question having arisen as to how the damages had to be assessed:

Held, (*i*) that under the lease while Government were to take their assessment from the *khots* in cash, the *khots* were to take the *faida* from the tenants in kind and not in cash;

(*ii*) that the *khot* was not entitled to go back to the old rates of *mamul vahivat*, *viz.*, *ardhel* and *irdhel* for the years of attachment;

(*iii*) that in regard to damages the *khots* are entitled to have the grain converted into the market rate of rice straw, *nagli* and *vari* current for the particular year for which the damage is to be assessed;

(*iv*) that the *khoti nisbat* lands are liable to *faida* though in the cases where these lands are cultivated by the *khoti* co-sharers those co-sharers may ultimately recover their portion of the *faida* due to them from the managing *khot* and such lands could not, therefore, be excepted from the assessment of damages;

(*v*) that there is no statutory authority or clause in the agreement under which the *khot* can be compelled to forgo his *faida* in case of loss by fire, and whether Government gives up the assessment or not;

(*vi*) that the Government was not liable for damages for the period during which the land was not under attachment but under the management of other *khots* who had agreed to the terms imposed by Government. A.I.R. (Vol. 18) 1931 Bom. 455= Ind. Rul. (1932) Bom. 135=33 Bom.L.R. 1039= 135 Ind. Cas. 823.

BOMBAY KHOTI SETTLEMENT ACT (I OF 1880).

See also BOMBAY LAND REVENUE CODE S. 217.

——Khoti lands—Occupancy rights—Acquisition of, by mortgagee—Consent of khot obtained—Accretion—Right of mortgagor to accretions

Where the person to whom certain *khoti* lands were mortgaged acquired occupancy rights in some of the lands without the *khot's* consent therefor:

Held, thtt the lands whether regarded as *khoti-nishat* or *khati-khasgi* were accretions to the property mortgaged and accordingly vested in the holder of the equity of redemption. A.I.R. (Vol. 19) 1932 Bom. 526=34 Bom.L.R. 855=Ind. Rul. (1932) Bom. 553=139 Ind. Cas. 812.

——Occupancy tenant—Mortgage—Khot's rights.

There is no authority for anything that an occupancy tenant, whose tenancy is not determined; forfeits his tenancy by parting temporarily with the possession of his land to another without resigning the land as completely as would be necessary in the case of privileged occupants of another sub-class, to place the land at the disposal of the Khot. And so long as his tenancy is not determined, the land is not at the disposal of the Khot. And the Khot cannot claim to treat the person in possession under a right derived from the occupancy tenant either as a trespasser of even as a yearly tenant, so long as the privileged occupant's right remains undetermined by resignation, lapse or duly certified forfeiture. (1904) 7 Bom.L.R. 941=30 Bom. 290.

——Terms of kabuliat to Government must conform to custom except as altered by Bombay Act I of 1865, Ss. 37 and 38.

A Khot's interest in the khoti village is limited, not absolute. He possesses in some measure a proprietary right. He is an occupant with all rights and liabilities affecting such a status. The Khot has to secure to Government the payment of the village revenue while the village lands which he has to manage in accordance with the restrictions mentioned in the kabuliat fall under three distinct items, *viz.*:—(1) Dharekari lands the tenants of which have a transferable and heritable right paying Dhara alone to the Khor; (2) Khot nisbat lands which are in the hands of permanent occupancy tenants or tenants with less permanent right paying Fayda to the Khot and Government assessment; and (3) Khoti Khasgi lands, private lands in the possession of the Khot of which he can make such use as he pleases. With regard to Khot nisbat lands the right of the Khot to exact rent or Fayda in addition to the assessment is limited by the kabuliat which is in accordance with the decision of the Government Officer fixing the demand of the Khot on his tenants under S. 38. Bombay Act I of 1865. Khots in the district of Kolaba are hereditary farmers of the revenue and are entitled to hold their villages as Khoti on their entering every year into the customary kabuliats. If the Government wish to impose upon the Khot a new form of kabuliat they must not infringe the customary rights of the Khots except as altered by S. 38 of Bombay Act I of 1865. A Khot of a village in the Kolaba District, at first used to pass annual kabaliats to Government in the form which was then in use, Government offered, in 1915-16, to the plaintiff a kabaliat in another form which contained several new clauses. Cl. 6 empowered a permanent tenant of Khot nisbat land to compel the Khot either to consent to a transfer or to take up the land himself. Cl. 8 required the Khot to keep the land at the disposal of a Dharakari who had deserted. Cl. 21 worded ambiguously. As the Khot objected to pass the kabuliat in the new form the Government attached the Khoti village.

Held, that the Khot was justified in refusing to sign a kabuliat which contained any one of such objectionable classes, *viz.*, 6 and 8 which were in infringement of the customary right of the Khot and that the attachment of the village for refusing such a kabuliat was, therefore; illegal and the Khot was entitled to mesne profits and damages. 48 Bom. 599=26 Bom.L.R. 754=83 Ind. Cas. 370=A.I.R. 1925 Bom. 44.

——Ss. 3, 5 (9), 10—Khot—Occupancy tenant—Sale of occupancy rights—Resignation.

An occupancy-tenant by transferring his land on sale does not resign it within the meaning of S. 10 of the Khoti Settlement Act, 1880, so as to place the land at the disposal of the Khot. (1907) 9 Bom. L.R. 320=31 B. 267.

——S. 5—Case under—Doctrine of presumitur retro, if applies.

The doctrine of *presumitur retro* might apply to a case falling under S. 83, of the Bombay Land Revenue Code, but it has no scope for application to a case falling under S. 5. Khoti Settlement Act. Section 6 requires that the occupation from or before a particular year must be proved, and the burden lies on the tenant to prove that particular fact. The fact that the tenant was proved to be on the land three years after the particular year fixed, would not entitle him to the benefit of the presumption that his tenancy began from or before 1845-46. There is no scope for applying the test of a reasonable period when the section is quite positive in its terms. In such cases it must be definitely proved by the tenant that he was on the land at least from 1845-46.

Plaintiffs were landlords and their case in substance was that defendants were their annual tenants of the suit lands which were of the khoti tenure and that the defendants' ancestors had passed rent notes or *kabuliyats* from 1855 to 1901, admitting their annual tenancy, and they brought the suit after giving notice to the defendants. The defendants' contention in their written statement was that they were permanent tenants and not annual tenants of these lands, and; therefore; the plaintiffs had no right to eject them. Defendants established their possession since 1848, but there was no evidence to prove their possession before that year.

Held, that the defendants were not entitled to the benefit of S. 5, Bombay Khoti Settlement Act. The doctrine of *presumitur retro* had no application to the case nor did illustration (*d*) to S. 114, Evidence Act, apply. A.I.R. (Vol. 25) 1938 Bom. 381 =40 Bom.L.R. 534=I.L.R. (1938) Bom. 524=11 R.B. 106=177 Ind. Cas. 614.

——Ss. 6, 8, 9—Sale of lands by occupancy tenant of khoti lands to defendants in 1896—Defendants put in possession—Heirs of vendor selling same to plaintiffs in 1927—Plaintiff's right to possession.

On May 13, 1896, an occupancy tenant of certain *khoti* lands sold or purported to sell the lands to a predecessor-in-title of the defendants and placed them in possession. After the death of the occupancy tenant, his nephew; on October 21, 1927, sold the same lands to the plaintiffs and in December, 1928, passed a *rajinama* in their favour. The plaintiffs were the *Khot* sharers of the village, owning a certain *dhad* which comprised the *khata* of the said occupany holding. The plaintics instituted a suit for recovery of the possession of the lands. The contention of the defendants was that they had become occupancy tenants having held the land adversely to the *khot* for more than 12 years:

Held, that upon the sale to the predecessors-in-title of the defendants under S. 6, Khoti Settlement Act, the latter became the tenants. No special agreement was set up in this case. It followed, therefore, that the defendants must be deemed to have held the land as yearly or annual tenants of the *khot*. Having regard to the relevant sections of the Khoti Settlement Act, a transferee under a wrong transfer could not claim to be an occupancy tenant merely because he had been in possession of the land for more than twelve years and also merely because be set up an adverse possession. The plaintiffs, therefore, were entitled to eject the defendants on giving them a notice to quit under S. 84, Bombay Land Revenue Code. A.I.R. (Vol. 25) 1938 Bom. 284=40 Bom.L.R. 390=10 R.B. 564=175 Ind. Cas. 518.

——S. 8—Applicability — Dharekaris' tenants—Bombay Land Revenue Code, S. 83.

"Tenants" in S. 8 of the Bombay Khoti Settlement Act mean only tenants of the Khot, exclusive of the tenants of dharekaris. The latter are governed not by S. 8 of the Khoti Settlement Act but by S. 83 of the Land Revenue Code. 50 Bom. L.R. 257.

——S. 8—States of Tenant.

Under the provisions of S. 8 in the absence of any specific agreement between the tenant and the Khot, the tenant must be held to be a yearly tenant liable to pay rent to the Khot at the rates prescribed and accordingly he is entitled to the notice prescribed in the case of yearly tenants under S. 84 of the Bombay Land Revenue Code. 45 Bom. 1001=23 Bom.L.R. 411=61 Ind. Cas. 594=A.I.R. 1921 Bom. 38.

——S. 8—Khoti nisbal lands—Jurisdiction of Court to settle rates of rent—Lands not held by occupancy tenants.

Where the *that* with regard to occupancy tenancies in a khoti village is determined by the Settlement Officer; and the tenants other than the occupancy tenants are not shown to hold the lands under any agreement between the khot and themselves, the Court can, under S. 8 of the Khoti Settlement Act, award rents at the same rate as those paid by the occupancy tenants. (1902) 4 Bom.L.R. 606=27 Bom. 71.

——Ss. 8, 10—Occupancy tenant—Adverse possession against—Khoti, position of.

An adverse possession of a *khoti* land of an occupancy tenant, extinguishes the right of the occupancy tenant to actual possession but not right to relinquish his occupancy right to the *khoti* who, after due notice under S. 84 of the Bombay Land Revenue Code, is entitled to eject the person in possession. 45 Bom. 1001=61 Ind. Cas. 594=23 Bom.L.R. 411.

——S. 9—Managing khot, if can give consent to sale of holding.

The managing *bhot* is entitled to give consent to a transfer by way of sale of a holding. But, for him to give a valid consent on behalf of the *khots* within the meaning of S. 9 of Bombay Khoti Settlement Act, the consent must be given by him as managing *khot* and not in his individual capacity. A.I.R. (Vol. 23) 1936 Bom. 287=38 Bom. L.R. 511=9 R. B. 59=164 Ind. Cas. 177.

——S. 9—Managing Khot can give consent.

It is within the ordinary duties of a managing Khot to consent to a transfer of a permanent tenancy. 26 Bom.L.R. 421=80 Ind. Cas. 458=A.I.R. 1924 Bom. 459.

——S. 9—Occupancy tenant—Mortgage—Right of sale—Estoppel.

In 1871 *B* mortgaged his property which was an occupancy tenancy in a Khoti village. In a suit by the mortgagee to recover the mortgage money by sale of the property *B* contended that under S. 9 of the Khoti Act the mortgage was illegal unless the mortgagee proved that there was a right of transfer at any time within 30 years next previous to the revenue year 1865-66. Held (1) That the section of the Khoti Act is not retrospective. (2) That the principle of estoppel applied to the case and the mortgagor cannot question his own right to mortgage the property in dispute. 14 B. 407, foll. (3) That according to the contract between the parties the property was liable to be brought to sale. (1902) 5 Bom.L.R. 652.

——Ss. 9 and 10—Khoti land—Tenant resigning occupancy rights for consideration—Effect of—Estoppel.

Defendant purported to resign his occupancy rights.

in a *Khoti* for consideration to the Plaintiff who was one of the *Khots*. At the same time a lease for five years was executed by the defendant. Plaintiff sued defendant on the expiry of the lease and the latter impugned plaintiff's title. *Held* that, the alleged resignation, was in effect a transfer and there was no valid transfer under S. 9 as the consent of the other *Khots* was not obtained. Both the parties being in *pari delicto* defendant was not estopped from showing the illegality of the title under S. 116, Evidence Act. There is no estoppel against an act of Parliament or in India against an Act of Legislature. 38 Bom. 709=28 Ind. Cas. 134=16 Bom. L. R. 586.

——S. 9—Occupancy right—Transferability.

A purchaser acquires no valid right of occupancy in a tenure purchased at an execution sale after the creation of the occupancy rights in a Khoti village the Khot of which consents to the transfer of the right by the tenant as the prohibition against the sale of such right is applicable both to a private sale and one in an execution of a decree. Exceptions to these are (1) where the right of transfer is created by custom under S. 9.; (2) where Khot in granting a lease has conferred upon the lessee this right at the time of creating the tenancy. The objection as to the validity of the purchase of an occupancy right in a Khoti Village can be raised even for the first time by the Appellate Court, *suo motu*. 12 Ind. Cas. 956=13 Bom.L.R. 1157.

——Ss. 9 and 10—Transfer of occupancy tenancy without consent is null and void.

Defendant Nos. 2 to 4 occupancy tenants of Khot lands having transferred without the consent of the Khot their occupancy rights to defendant No. 1 the plaintiff Khot claimed that defendants had thereby forfeited their occupancy rights and sued for recovering the possession of Khoti land: held, that the transfer having taken place before the amendment of the Khoti Settlement Act in 1912 the occupancy rights had not been forfeited owing to the transfer but that the transfer was null and void as against the Khot and defendant Nos. 2 to 4 still remained his occupancy tenants. 44 Bom 267=22 Bom.L.R. 102.

——S. 10—Strict construction.

The provision in S. 10 is of a penal nature and must be construed strictly. A.I.R. (Vol. 20) 1933 Bom. 475=35 Bom.L.R. 1015=6 R.B. 188=147 Ind. Cas. 360.

——S. 10—Khot's power over lapsed lands.

A Khot has a right to dispose of lands which have lapsed, either by taking them into his own permanent occupancy or by taking them out for short terms or by assigning them to privileged occupants. As long as a Khot's power of permanent disposal rests with him and has not been alienated to a tenant with privileged occupancy rights, the lands must be regarded for all purposes as undistinguishable from ordinary Khoti Khosgi, the right remaining with the Khot at's pleasure to recover the land on the determination of any yearly or short term tenancy. (1902) 6 Bom.L.R. 864.

——S. 10—Registration to khot.

When an occupancy tenant transfers land to another on a sale deed, he cannot according to the ordinary usage, be said to have resigned the land. Though the consent of the Khot is not necessary to a resignation, still the resignation must be made to the Khot, and it is only to the Khot that the resignation can be made. As to whether or not a particular transaction is a resignation to the Khot must depend upon the circumstances of each case. (1907) 9 Bom.L.R. 829.

——S. 10—Relinquishment or sale—Razinama for consideration of undertaking that land should be relieved from forfeiture for non payment of rent.

Where although the document of *razinama* executed by the occupant of *khoti* land expressly states that it is without consideration, still there is a real consideration for the document in an undertaking that the land should be relieved from forfeiture of non-payment of arrears of rent. It is good consideration, and it takes the transaction out of the category of relinquishments within the meaning of S. 10 of the Bombay Khoti Settlement Act, and makes it a sale. A.I.R. (Vol. 23) 1936 Bom. 287 (288)=38 Bom.L.R. 511 =9 R. B. 59=164 Ind. Cas. 177.

——Transfer—If includes simple mortgage

A simple mortgage is a transfer of the interest of the tenant within the meaning of the section. Even payment by Khatedar of the mortgage amount prior to suit by Khot does not destroy the right of Khot. 73 Ind. Cas. 880=24 Bom.L.R. 1160=1923 Bom. 33 (1).

——S. 10—Transfer—Contract to sell khoti lands by tenant without khot's consent—If amounts to.

Under S. 54, Transfer of Property Act, a contract for sale of immovable property does not of itself create any interest in the property agreed to be sold. Consequently, a mere contract to sell *khoti* lands by a tenant without consent of the *khot* will not be sufficient to amount to a transfer and will not attract the operation of S. 10, Bombay Khoti Settlement Act and place the land at the disposal of the *khot*. A.I.R. (Vol. 20) 1933 Bom. 475=6 R.B. 188=35 Bom.L.R. 1015=147 Ind. Cas. 360.

——S. 10—Transfer without Khot's consent—Khot's right of re-entry.

When a Khoti tenant transfers land without the Khot's consent it works as a forfeiture and the Khot can enter on the land as against the transferee. 37 Ind. Cas. 299=18 Bom.L.R. 446.

——Ss. 10, 6, 8—Transfer of khoti lands by permanent tenant without consent of khot—Status of transferees—Transfer of Property Act (IV of 1882), S. 91.

A tenant on sufferance or a tenant holding over is a mere trespasser. But where a tenant has a right to be in possession of the land until the tenancy is determined by a proper and sufficient notice to quit, he must be deemed to have some interest in the land itself.

Where a permanent tenant of a *khoti* land transfers lands without the consent of the *khot*, the transferees are at least ordinary tenants of the land entitled to be in possession of them until evicted by the *khots* in exercise of the right conferred upon them by S. 10, Bombay Khoti Settlement Act. Such tenants, though not in the actual possession of

the lands, are entitled to redeem the mortgage of such lands under S. 91, Transfer of Property Act, as they, as the ordinary tenants of the *khoti* lands, have some interest at least in those lands and cannot be regarded as mere trespassers. A.I.R. (Vol. 27) 1940 Bom. 15=I.L.R. (1939) Bom. 713=41 Bom.L.R. 1199=186 Ind. Cas. 643.

——S. 10—Khoti nisbat land in Mangaon taluk in Kolaba District—Mortgage by tenant—Transfer of possession without consent of khot—Khot's right of re-entry—Redemption of mortgage before re-entry.

In the case of a possessory mortgage of *khoti nisbat* lands in Mangaon *taluka* in Kolaba District, executed by a tenant, if possession is transferred to the mortgagee without the consent of the *khot*, the *khot* has a right of re-entry on the lands mortgaged although the mortgage itself may have been redeemed before the *khot* exercises the right. A.I.R. (Vol. 19) 1932 Bom. 524=34 Bom.L.R. 975=141 Ind. Cas. 481.

——S. 10—Transfer of a portion of the Khoti land by the occupant—Only such portion will be at the disposal of the Khot.

There is no indication in S. 10 of the Bombay Khoti Settlement Act that all the lands of the occupant are intended to be at the disposal of the Khot even though one of them or only a portion of one land may have been transferred by him without the consent of the Khot. 46 Bom. 470=24 Bom.L.R. 131=68 Ind. Cas. 277=A.I.R. 1922 Bom. 257.

——S. 10—Transfer by Manager of Joint family —Effect of.

Where the manager of a joint Hindu family mortgages the interest of the family in property held under Khoti tenure, the interest of the manager alone is forfeited under S. 10 and the forfeiture does not affect the interest of other co-parceners in the family property. 50 Bom. 189=28 Bom.L.R. 71 =93 Ind. Cas. 123=A.I.R. 1926 Bom. 166.

——S. 12—Delegation of powers by Collector to Mamlatdar.

A Collector can delegate certain powers to a Mamlatdar only for his own district and such powers can be exercised only in the *Talukas* of that District. 37 Bom. 542=20 Ind. Cas. 526=15 Bom. L. R. 665.

——S. 16—'Co-sharer'—Mortgagee of co-sharer.

A mortgagee of a co-sharer of a *khoti* is not a co-sharer within the meaning of S. 16 of the Khoti Settlement Act and cannot claim to have his name entered in the register, though a mortgagee of a whole *khoti* may claim to be so registered. So *held* following 24 B. 533 (with some doubt). (1901) 3 Bom.L.R. 181.

——Ss. 17, 18, 20—Entries, when can be changed.

An entry in the survey records under Ss. 16 and 17 cannot be changed unless all the parties give their written consent to it. A.I.R. (Vol. 31) 1944 Bom. 218=46 Bom.L.R. 363=I.L.R. (1944) Bom. 77=218 Ind. Cas. 417.

——S. 20—Entries of rent in Botkhat and Settlement register are final and conclusive.

Civil Court has no jurisdiction to inquire into the question whether the amount of rent recorded in a *botkhat* or settlement register in accordance with a Government resolution is correct or not. Under S. 20, such entries are final and conclusive. A.I.R. (Vol. 33) 1946 Bom. 203=47 Bom.L.R. 843=224 Ind. Cas. 148.

——S. 20—Entry in settlement register—Value of.

The rule of evidence laid down in S. 20 that the entry in the settlement register purporting to record the fact that the interest of any occupancy tenant is not transferable shall be conclusive evidence, cannot apply where according to a judgment *inter partes* the person relying on the section is not an occupancy tenant. The fact of the tenancy of the individual is not conclusively settled by the entry. 43 Bom. 565=51 Ind. Cas. 101=21 Bom.L.R. 361.

——Ss. 20, 21—Registry—Declaration of title—Co-sharers—Denial of title—Limitation—Cause of action.

The refusal of a Settlement Officer to enter the lands in the name of an individual does not furnish a new cause of action, if a cause of action existed already. In 1886 the mortgage of a co-sharer stipulated for transfer of registry in his name but could not have it owing to the denial of the mortgagor's right by another sharer. In the subsequent settlement of 1890 the Settlement Officer refused to enter his name on the opposition of the same sharer. Within six years of this refusal the present suit was instituted for a declaration of the mortgagor's title and for registry of the mortgagor's share in his name. *Held*, that the refusal of the Settlement Officer did not furnish a cause of action, and that the suit was barred having been brought more than six years after the denial of title. (1901) 3 Bom.L.R. 181.

——S. 21—"Decision"—Entry in Botkhat

The Act nowhere provides that the mere entry in the Settlement Register of the name of a particular person as the occupant of the survey number is either final and conclusive or that it is binding upon all the parties concerned, unless and until it is reversed or modified by a decree of the Civil Court. What is made binding by the provisions of S. 21 is the decision of the Recording Officer and not a mere entry of a person's name in the Settlement Register. Preceding sections make it clear that the mere entry of the name of some particular person as occupant was not intended to be included among those decisions of the Recording Officer. An entry in Botkhat is not a decision. 46 Bom. 966=24 Bom.L.R. 323=67 Ind. Cas. 322=A.I.R. 1922 Bom. 329.

——S. 21—Entry in revenue records—Not conclusive.

The mere entry of the name of some particular person as occupant is not a decision of the recording office which is final. Decisions as to the class of tenure and as to the complicated rights of the khots are conclusive. 43 Bom. 459=61 Ind. Cas. 7=21 Bom.L.R. 350.

——S. 21—Suit under—Limitation Act, Art. 120.

The suit contemplated by S. 21 of the Bombay Act I of 1880, which may be brought for the purpose of having the decision of a Settlement Officer

set aside or modified is governed by Art. 120 of the Limitation Act. 18 B. 344 foll. (1900) 3 Bom.L.R. 420.

——S. 21—Suit under — Limitation — Starting point.

The starting point of limitation for bringing a suit to have the decision of a Settlement Officer set aside or modified is the date when the decision is duly pronounced after notice to the parties and that is *prima facie* the date the decision bears. But if due notice was not given and the party affected became aware of the decision only subsequently he will have six years from such later date within which to bring his suit. (1900) 3 Bom.L.R. 420.

——S. 33—Object of.

The whole scheme of S. 33 is to prevent arrangements being made in an unauthorized way by the Khots with the tenants contrary to the terms of the Botkhat. 27 Bom.L.R. 1487=92 Ind. Cas. 542=A.I.R. 1926 Bom. 119.

——S. 33 (c)—Rent payable by—Occupancy tenant.

The liability of occupancy tenant to pay rent to khot is as laid down by S. 33 (*c*) *i.e.*, a fixed proportion of gross annual produce of land and fruit trees, if any. 37 Bom. 284=17 Ind. Cas. 943=14 Bom.L.R. 1173.

——S. 37—Expiry of settlement—New rates not fixed—Khot is entitled to fall back on "mamuli vahivat".

On the expiry of the old settlement and in the absence of a new settlement the khot is entitled to go back to the "mamuli vahivat" and recover his dues on that basis. 32 Bom.L.R. 175=A.I.R. 1930 Bom. 190.

——S. 37—Collector's powers.

The Collector can only dispose of lands which are not the property of individuals. The section cannot be construed as conferring upon the Collector the power to determine whether the land is the property of Government or not. 19 Ind. Cas. 565 =6 S.L.R. 210.

——S. 37—Collector's powers—Private land.

The Collector acts ultra vires if he interferes with private land; his powers extend only to ownerless land. 24 Ind. Cas. 813=7 S.L.R. 169.

——S. 37—Government ownership of roadways.

Government is the owner of the land forming roadways through the village site of a bhagdari village. All the lands of the village site of a bhagdari is not the property of the bhagdars. The bhagdari tenure is a particular system of collecting the Government revenue, A bhagdar can have only those village fields and the portion of the village site as are assigned to him by the Government. He cannot claim the proprietorship of such lands as he is liable to pay rent or assessment to the Government for these lands. 37 Bom. 87=17 Ind. Cas. 659=14 Bom.L.R. 934.

——S. 38—Powers under not exercised—Khot can fall back on "mamuli vahivat".

In the absence of the exercise of their powers by Government under S. 38 or in the absence of evidence of intention on their part to continue the rates of the expired settlements the Khot cannot be prevented from falling back upon his right under 'mamuli vahivat'. 32 Bom.L.R. 175=A.I.R. 1930 Bom. 190.

BOMBAY LAND CUSTOM ACT (XXIX OF 1857).

——S. 8—Applicability—Goods whose conveyance is complete.

Para. 2, S. 8 must be read as if the words "at any station established for the levy of duties and passing of goods" followed the words "passed or attempted to be passed". It is doubtful whether it would cover a case of goods whose conveyance from foreign territory had been completed so that they could not be said to be in the process of being passed or attempted to be passed. 53 Bom. 97=30 Bom.L.R. 1494=115 Ind. Cas. 409=A.I.R. 1929 Bom. 46.

——S. 14—Applicability.

S. 14 is in express terms confined to an Officer of Customs employed at a station established under the Act. It does not cover the case of the seizure by another officer, who is not so employed. 53 Bom. 97=30 Bom.L.R. 1494=115 Ind. Cas. 409=A.I.R. 1929 Bom. 46.

——S. 21—Scope—Question of good faith—Relevancy.

Question of good faith cannot be brought into the construction of S. 21. That section must be confined to cases where goods have been properly seized as liable to confiscation or properly detained as under-valued, that is to say seized or detained under circumstances at least approximating to those where the Act authorized such seizure or detention. The words "under this Act" must be given due weight. 53 Bom. 97=30 Bom.L.R. 1494=115 Ind. Cas. 409=A.I.R. 1929 Bom. 46.

BOMBAY LAND REQUISITION ACT (XXXIII OF 1948).

——Ss. 4 and 6 (4)—Order of requisition of flat—Conditions precedent—Premises once let—Landlord changing mind and wishing to occupy same—If ceases to be intended to be let.

The power of the Government to issue a requisitioning order under S. 6 (4) of Bombay Act (XXXIII of 1948), is restricted to "premises" situated in the area referred to in the Act, and which premises become vacant. Hence in order to justify an order of requisition the Government would have to satisfy the Court that there was a vacancy in a building or a part of a building which was let or which was intended to be let and that such a building was situated in an area to which the Act had been applied. The term "let" in the Act must mean that the nature of possession is such as to create in the person to whom the building is let, an interest in the property. To be in possession of building is very different from being a tenant in the building (when alone there is letting). "Intended to be let" cannot mean "capable of being let". "Intended" imports a volition on the part of the landlord. But that volition cannot be a fluctuating or

an ambulatory volition. If a volition is once expressed by the owner or landlord quae a building, then that volition becomes an incident of the building itself, and it is not open then to the landlord, by changing his intention from time to time, to say that the particular building was not intended to be let. The relevant date when it must be determined as to whether the building was "intended to be let" is the date when the vacancy occurs. It is only if a building is intended to be let that it is "premises" within the definition of S. 4 (3) of the Act and it is only that building in respect of which the Government can issue a requisitioning order. A building once it has been let, does not cease to be intended to be let merely because when the vacancy occurs the landlord expresses his intention that he does not want to let it but wants to occupy it himself. When the evidence clearly shows that the building or flat was intended to be let and in fact was let for a considerable period of time before the vacancy occurred, the building must be held to be premises; and if it was intended to be let, a different intention shown by the landlord at the date of the vacancy does not and cannot change the characteristic of the building and does not make it one not intended to be let. Such a definition falls within the definition of "premises" and Government would be within their rights in issuing an order of requisition in respect of such a building. 52 Bom.L.R. 627.

——S. 4 (3)—"Premises"—Meaning of—"Let"—"Intended to be let"—Meaning—Intention of landlord or owner—If can be changed from time to time. See BOMBAY LAND REQUISITION ACT, Ss. 4 and 6 (4). 52 Bom.L.R. 627.

——S. 5—Scope—Order under—If judicial or quasi-judicial and subject to writ of certiorari or prohibition. See CERTIORARI—WRIT OF. 51 Bom.L.R. 993.

——S. 6—Nature of Order—If quasi-judicial and subject to writ of certiorari. See CERTIORARI WRIT OF. 51 Bom.L.R. 997.

——S. 6 (4)—Scope—Declaration—Effect of—Conclusive character—If extends to matters of law.

The first proviso to S. 6 (4) of the Bombay Land Requisition Act requires the Government to hold such enquiry as it deems fit and to make a declaration that the premises were or had become vacant. It further says that such declaration shall be conclusive evidence that the premises were or had become vacant. Where a declaration has been so made, it is not open to any one to lead evidence in any Court which would lead to a contrary conclusion. But "evidence" can only relate to matters of fact and not matters of law. The declaration therefore is only conclusive of the facts determined but not of any law which may be involved in or incidental to such determination. 51 Bom.L.R. 997=A.I.R. 1950 Bom. 144.

BOMBAY LAND REQUISITION ORDINANCE (V OF 1947).

——If ultra vires.

Bombay Ordinance No. V of 1947, promulgated in pursuance of the powers conferred on the Provincial Legislature by the Governor-General by Notification No. F. 311 47-C. and O., dated 21st October, 1947, in the Ministry of Law, is valid and operative and is not **ultra vires**. 50 Bom.L.R. 614=A.I.R. 1949 Bom. 93.

——S. 3—"Public purpose"—Order depriving one refugee of premises in his possession in order to give same to another—Legality of.

The jurisdiction of the Government to requisition any land, under Ordinance V of 1947, is conditioned by the land being required for a public purpose. If Government requisitions land for a purpose which is not a public purpose it acts in excess of its jurisdiction. Although the housing of refugees may be a public purpose, if Government chooses one refugee against another without any ostensible cause, that by itself would not constitute a public purpose for which land can be requisitioned. Where the Government by its order of requisition deprives one refugee of the premises of which he is in possession in order to give them to another refugee, the order cannot be justified as being for a public purpose, unless sufficient reasons are established for the preference shown. 51 Bom.L.R. 342=A.I.R. 1949 Bom. 277 (D.B.).

——S. 3—Order under—Availability of writ of **certiorari** to quash. **See** CERTIORARI, WRIT OF. (1950) 2 M. L. J. 703=1950 S.C.J. 451 (S.C.).

——S. 3—Order of requisition—When to be made.

Under S. 3 of the Bombay Land Requisition Ordinance (1947), the Legislature has left it to the Provincial Government to decide whether it is necessary or expedient to requisition any land. The opinion of the Government on the question is conclusive. It is, however, incumbent on the Government to decide objectively that the land is required for a public purpose. The element of determination and decision indisputably enters in the order of requisition to be made under S. 3, which also circumscribes the jurisdiction of the Government to make an order under the section, i.e., it is only when land is required for a public purpose that Government is entitled to exercise its power to requisition land. 51 Bom.L.R. 342 =A.I.R. 1949 Bom. 277 (D.B.).

——Ss. 3 and 11—Order of requisition not served on person affected and not addressed to any one —Legality.

The validity of a requisition order under S. 3 of Ordinance V of 1947 does not depend upon its service upon all persons affected by that order. The utmost that can be said is that it may not be effective against a person unless it is served upon him. But merely because it is not served on a particular person it does not follow that the order is not in accordance with law. Nor can it be said that an order is bad because it is not addressed to any particular person or persons. S. 3 does not require the order of requisition should be

addressed to any person. 51 Bom.L.R. 342=A.I.R. 1949 Bom. 277 (D.B.).

——S. 4 (1) and (3)—Applicability—Premises not in existence on date of notification.

S. 4 of the Bombay Land Requisition Ordinance would not apply to premises which come into existence after the date of the notification by Government. The expression "become vacant" in S. 4 (1) only applies to such premises as were in existence at the date of the notification and not to premises which come into existence after that date. The Government have therefore no jurisdiction to requisition premises which do not exist on that date but which come into existence after such date. 51 Bom.L.R. 418=A.I.R. 1949 Bom. 303.

——S. 4 (4)—Order of requisition—If quasi-judicial—Writ of certiorari—Jurisdiction to issue.

Under S. 4 (4) of the Bombay Land Requisition Ordinance, an objective fact has got to be determined before an order of requisition can be made, and that objective fact is whether the premises are vacant or become vacant. The fact of premises being vacant or becoming vacant is not something which is capable of ascertainment by mere physical demonstration. Premises are only vacant or become vacant (1) by the landlord ceasing to occupy the premises, (2) by the termination of a tenancy, (3) by the eviction of a tenant, (4) by the release of premises from requisition, etc. An order of requisition under S. 4 is therefore a quasi-judicial act, and if Government act in excess of their jurisdiction a writ of certiorari will be rightly directed to issue against them. 51 Bom.L.R. 418=A.I.R. 1949 Bom. 303.

BOMBAY LAND REVENUE CODE (V OF 1879).

——Interpretation.

The Code is in the nature of a penal statute and, therefore, must be strictly considered in favour of the subject. 29 Bom.L.R. 1350=106 Ind. Cas. 239=A.I.R. 1927 Bom. 601 (D.B.).

——Sanad by City Survey—Ex parte grant of Sanad at City survey confers no title.

There is nothing in the Bombay Land Revenue Code justifying the conclusion that a person who gets a sanad at the City Survey on his **ex parte** application, is entitled to turn out the person in possession of the land, unless such person proves a better title. 27 Bom.L.R. 656=95 Ind. Cas. 881=A.I.R. 1925 Bom. 430 (D.B.).

——S. 3—Alienation—"Khoti" grant.

A **khoti** grant is an alienation within the meaning of S. 3. A.I.R. (Vol. 21) 1934 Bom. 434=36 Bom.L.R. 761=154 Ind. Cas. 278.

——S. 3 (ii) and S. 217—Holder of Varkas Land—Meaning of—Uses of waste by rice tenants.

A person who wants to claim the benefit of S. 217 of the Land Revenue Code must show that he was a "holder" within the meaning of S. 3 of the Code at the date of the Settlement. Mere user by rice lands tenants of adjoining waste land with the leave and permission of the **Inamdar** does not make them holders of **Varkas** land. 36 Bom. 315=14 Ind. Cas. 473=14 Bom.L.R. 124.

——Ss. 3 (11) and 217—"Holder"—Tenant under an occupant—Inamdar's name entered as Khatedar for lands in the tenant's possession—Inamdar's right to enhance rent.

The plaintiff (an Inamdar) had the royal share of revenue of a certain village, in which the defendant was a permanent tenant of certain land. At the desire of the plaintiff, the survey settlement was introduced into the village, when the plaintiff's name was entered as Khatedar or registered occupant of the land. The plaintiff next sought to recover enhancement rent from the defendant. The latter in contesting the claim relied on, among other things, S. 217 of the Bombay Land Revenue Code, 1879, and contended that he was liable to pay only the Government rate of assessment levied on the land. This contention was disallowed on the ground that the defendant was not a registered occupant of the land. On appeal, **Held**, that S. 217 of the Bombay Land Revenue Code, 1879, was not restricted in its application to registered occupants only; it invested "the holders of all lands" in alienated villages with the same rights and imposed upon them the same responsibilities in respect of the lands in their occupation that occupants in unalienated villages had. The term "holder" as defined in S. 3 Cl. (11) of the Code was wide enough to include even a tenant who had entered into possession under an occupant. (1910) 34 Bom. 686=12 Bom.L.R. 707=7 Ind. Cas. 949.

——Ss. 3 (13) and 148—Taluqdari land—Lease by Settlement Officer—Default in paying rent—Power of Settlement Officer to impose penalty—Gujarat Taluqdars Act (VI of 1888), S. 33 (2) (e).

Though a **Taluqdari** Settlement Officer who has leased the properties under his management is a 'superior holder' within S. 3, Cl. 13, Bombay Land Revenue Code, and is vested with the powers of a Collector under that Code he has no power to impose a penalty under S. 148 of the Code where default is made by the tenant under S. 148 of the Code where default is made by the tenant in paying the rent. Section 148 applies only in the case of default of payment of land revenue. A.I.R. (Vol. 18) 1931 Bom. 464=33 Bom.L.R. 815=135 Ind. Cas. 831.

——S. 3 (19)—'Alienated village'.

Where a **kowl** granted certain lands to the grantee for 99 years on condition of paying assessment on land already under cultivation and within fifty years to bring under cultivation the remainder and some occupants in the village built houses on lands comprised in the **kowl** and Government imposed extra assessment and the grantee also claimed to impose extra assessment on the ground that it was an alienated village within S. 3 (19). **Held**, that the land was not an "alienated village" for which it is not necessary that ownership of Government with respect to land Revenue must be transferred. In this particular case the **kowl** was only a lease and its object was only agriculture and as the grantee was to consider himself a farmer, the village came under the operation of the Code. 35 Bom. 462=12 Ind. Cas. 369=13 Bom.L.R. 883.

——Ss. 3 (20) and 217—Alienated village—Survey —Settlement—Holders of land.

Though the grant to the plaintiff was of the entire property in the soil, the lands in question were still "alienated" within the meaning of S. 3 (20) of the Bombay Land Revenue Code; if the other requirements of the section are satisfied, defendants (tenants) were entitled to the rights of occupants in unalienated villages by virtue of S. 217 of the Code. 43 Bom. 77=47 Ind. Cas. 745=20 Bom.L.R. 887.

——Ss. 3 (20) and 65—Alienation—Grant of a portion of the village with all rights of Government and permanent lease of the rest—Grantee, if entitled to enhanced non-agricultural assessment—Ownership of foreshore.

The plaintiff was the **khot** or lessee to whose ancestor the village of Mohul situated in Trombay in the island of Salsettee, forming part of the District of Thana had been granted by the British Government, part in **inam** and the remainder in permanent **khoti, i.e.**, lease subject to certain conditions stated in a **sanad** or a **kowl** dated 20th April, 1831. The **kowl** contained, "the above village is given to you under a **Tharav** (agreement), without the **Abkari** (revenue relating to Excise Department) from the current year 1830-31. In the said village some lands are cultivated and some trees barren and Government has rights over the said lands and trees and over the income thereof. Out of the same, Government has retained some right mentioning the same in this **kowl** (lease). Except that right the whole right has been granted to you. You should go on enjoying the same. This **kowl** (lease) will not prejudice the right of any one who may have in respect of the land or in respect of any (other) item, **"Bab"** in the said village. And it should be clearly noted that this **kowl** will not enable you to exercise rights in respect of the items **("kalams")** over which the Government has no right at present. You will be entitled to exercise rights only in respect of those items **("kalams")** over which the Government has right and which are given in writing in this **kowl** (lease)."

The plaintiff sued the Secretary of State for a declaration that he was entitled to take royalty in respect of removal of earth, stone, **murum** and cutting of teak trees in certain lands of the village in virtue of his aforesaid **sanad**, that the levy of non-agricultural assessment by the Government on certain buildings erected by the plaintiff on his land in the said village was illegal and for a refund of the same and to recover possession from the Government of a part of the lands forming the foreshore of the said village which was surrounded on three sides by the sea and for the alternative relief of compensation. The plaintiff's case in substance was that under the grant of 1831, he was entitled to collect and take all the revenues of the village from various sources except the **abkari**, subject to the payment of a fixed amount to the Government that the grant was of the village itself and carried with it all the rights which the Government had in the village, which included the aforesaid right to loyalty for minerals and teak trees, exemption from the levy of non-agricultural assessment for buildings erected by him on the land and the right to the foreshore, i.e., lands lying between high and low water-marks at spring tides. The defendant disputed this claim on the ground that the grant was not of any proprietary right but was only limited to a lease of the agricultural revenue, that Government granted only those rights which were expressly mentioned in the **kowl**, and all other rights including non-agricultural and sub-soil rights being reserved, they did not pass under the grant:

Held, that the grant was of all the revenues derivable from the village, except **abkari**, and not merely the agricultural revenue and therefore the grant was of the village itself, and consequently, the plaintiff was entitled to the royalty claimed by him.

Held, also, that the grantee was entitled to erect any structure without the payment of extra assessment to the Government irrespective of the terms of S. 65, Bombay Land Revenue Code and the Government was not entitled to levy any non-agricultural assessment on these buildings.

Held, further that though the presumption is that the Crown is entitled to the foreshore unless it can be shown from any particular grant that the foreshore is conveyed under it, that presumption was satisfactorily rebutted in this case by the terms of the grant. A.I.R. (Vol. 21) 1934 Bom. 434=36 Bom.L.R. 761=154 Ind. Cas. 278.

——S. 10—"Or any other law for the time being in force"—Interpretation.

We must give its natural effect to the language of S. 10. The words 'by any other law at the time being in force' should not be restricted. They refer also to the Mamlatdar's Courts Act. It confers upon the collector powers of revision which within his limits to the Assistant Collector was empowered to exercise. 36 Bom. 123=12 Ind. Cas. 709=13 Bom.L.R. 1031.

——S. 15—Substitute—Powers of Mamlatdar.

It is not competent to a substitute designated under S. 15 of the Bombay Land Revenue Code, 1876 to exercise the powers conferred by the Mamlatdars Courts Act, 1876, on the mamlatdars to whose office he has temporarily succeeded. (1900) 2 Bom.L.R. 1106; 25 Bom. 318 (F.B.).

——S. 26—Scope.

Section 26 of the Bombay Land Revenue Code, provides that the Collector may take steps to recover any public moneys due by a Subordinate Revenue Officer in default, in the same manner and subject to the same rules as are laid down in the Act for recovery of arrears of land revenue from defaulters. The public moneys in respect of which there is default are not made recoverable in terms as arrears of land revenue, nor is any charge in respect of those moneys given upon any property of the officer in default, but the moneys are to be recoverable in the same manner and subject to the same rules as are laid down in the Act for recovery of arrears of land revenue. A.I.R. (Vol. 22) 1935 Bom. 25=36 Bom.L.R. 1103=59 Bom. 154=154 Ind. Cas. 519.

——Ss. 31 (2), 57, 165—Revenue Officer purchasing benami, through defaulter's wife—No permission obtained—Legality of purchase.

It is clear upon the language of Cl. 2 of S. 31, Bombay Land Revenue Code, that there is nothing in the language itself which would limit the purchase prohibited to a public sale, except the words which refer to "bid.....for any property" and except the marginal notes. The section itself does not particularly refer to a purchase at a public sale or a private sale and makes no distinction of that character. It undoubtedly refers to and prohibits bidding either directly or indirectly by a Revenue Officer at a sale in regard to property ordered to be sold by a revenue authority. Merely prohibiting a bidding of this nature does not restrict the prohibition to a purchase at the public sale only having regard to the spirit and the letter of the section read as a whole. The section prohibits Revenue Officers from being directly or indirectly concerned in any of the transactions or acts set out in the section.

Consequently where certain lands are forfeited by Government for non payment of land revenue but are sold by private sale by the order of the Collector and a Revenue Officer purchases it **benami**, through the defaulter's wife without the Collector's or Government's permission, the purchase being in contravention of S. 31 (2), is illegal. A.I.R. (Vol. 24) 1937 Bom. 198=39 Bom.L.R. 203=I.L.R. (1937) Bom. 293=169 Ind. Cas. 381.

——S. 37—Rights of private person.

Section 37, Bombay Land Revenue Code saves the Common Law rights of private persons which existed at the date when it came into force. A. I.R. (Vol. 28) 1941 Bom. 161=I.L.R. (1941) Bom. 226=43 Bom.L.R. 167=195 Ind. Cas. 640.

——S. 37—Scope.

The words "which are not the property of individual" etc., in S. 37, Bombay Land Revenue Code refer not only to "all lands wherever situated" but also to all the previous expressions. The words "which are not the property of individuals" etc., would, therefore, apply to roads, bridges, beds of the sea, lakes, tanks, etc. The words "except in so far as any rights of such persons may be established" will also similarly govern all the previous expressions and not merely lands. A.I.R. (Vol. 28) 1941 Bom. 161=I.L.R. (1941) Bom. 226=43 Bom.L.R. 167=195 Ind. Cas. 640.

——S. 37—Khoti tenure—Khots have a right to cultivate land left dry in a river adjoining their land—Alluvion. See LAND TENURE—KHOTI TENURE. 9 Bom.L.R. 719=31 Bom. 456.

——S. 37—Highways—Government cannot block public road.

Government have no inherent power to block or to divert existing public highways. If they wish to obtain it, legislation is necessary. 53 Bom. 187=31 Bom.L.R. 97=117 Ind. Cas. 513=A.I. R. 1929 Bom. 94.

——S. 37—Waste lands—Title of Government.

S. 37 of the Land Revenue Code does not confer title on Government and even as to open village sites there is no presumption of title in favour of the Government. 25 Bom. 287 foll. 29 Ind. Cas. 51=8 S.L.R. 331.

——Ss. 37, 63—Alluvial lands—Grant by Collector—Suit for declaration and possession—Limitation Act, Arts. 120 and 144.

Where the Collector rejected an application of the plaintiffs for the grant of certain land which they claimed and disposed of the same in favour of the defendant under S. 37, Bombay Land Revenue Code, in 1911 and the plaintiffs instituted a suit in 1923 for a declaration that the order of the Collector disposing of the occupancy to the defendant was null and void and for possession of the land, on the ground that the plaintiffs being the owners of the adjacent land and the grant being of alluvial land, it should have been made to the plaintiffs under S. 63 of the Bombay Land Revenue Code:

Held, that the suit was governed by Art. 120 of the Limitation Act and not by Art. 144 inasmuch as, assuming the land to be alluvial, the plaintiffs could not get an order for recovery of possession but could only get a declaration that the case fell within S. 63 of the Bombay Land Revenue Act and an injunction to restrain the Collector from dealing with the land in derogation of the plaintiff's rights. A.I.R. (Vol. 18) 1931 Bom. 369=55 Bom. 447=33 Bom.L.R. 772=134 Ind. Cas. 716.

——S. 37 (3)—Limitation for civil suit—Starting point—Order passed by Revenue Commissioner in second appeal—Revision application preferred to Revenue Tribunal from his order.

Where the Revenue Commissioner has passed an order in second appeal filed under S. 203 of the Bombay Land Revenue Code, from the appellate order of the Collector, a suit in the Civil Court must be instituted within one year from the date of that order under S. 37 (3) of the Code. For the purposes of S. 37 (3), an application for revision of that order filed before the Revenue Tribunal is irrelevant. A.I.R. 1949 Sind 10 (D.B.).

——S. 40—Future growth in Forest—If Government Property.

The section does not imply that future growth in reserved forest would become Government property. 45 Bom. 110=58 Ind. Cas. 60=21 Cr.L. J. 716=22 Bom.L.R. 884.

——S. 40—Khote lands—Survey and Revised Settlement—Kabuliyats—Rights of Khots to trees on Virkas lands.

In a dispute as regards the ownership of certain trees between the Khots and the Government **held**, that the matter in dispute was concluded by the Kabuliyat passed to the Government and that the khots could not claim more than one-third of the sale proceeds of the trees. Per Shah, J.—The Khots in this case were not in permanent occupation of the lands in question nor did they have such interest in the lands as would enable them to obtain the benefit of Dunlop's proclamation. If the proclamation applied to the **Virkas**

lands in question, the Khot's rights to the trees were not affected by the kabuliyat. 44 Ind. Cas. 872=20 Bom.L.R. 141.

——S. 40 (a)—Rules under R. 8—Legality of.

Rule 8 is not ultra vires. The rules made under this section regulate the appraisement of crops which when not done according to rules must be only based on the admission of the tenant. 37 Bom. 284=17 Ind. Cas. 943=14 Bom.L.R. 1173.

——S. 43, R. 38—'Natural product'—Imposition of fees for excavated stones—Legality.

The plaintiff took a plot of land at Matheran from the Government (defendant), under a lease, the conditions of which were that he (the plaintiff) should build one bungalow and that he should not carry on any excavation on the land without the previous permission in writing of the Collector. The plaintiff then applied for "the right to dig stones for building purposes." This permission was given. Later on, while the bungalow was in the course of construction, the plaintiff was required by the Superintendent of Matheran to erect boundary pillars on his land. In constructing them he used stones which had previously been excavated under the permission already granted. Upon this defendant called upon the plaintiff to pay for the stones so used and on his declining to do so, the sum was realised by the defendant by attachment and sale of the plaintiff's moveable property. The plaintiff, thereupon, filed this suit praying inter alia, for damages (Rs. 200) for recovering the amount realized from him: **Held**—(1) That the suit was one for damages in respect of trespass to goods and that the plaintiff was entitled to recover from the defendant Rs. 2-8-0. (2) That the plaintiff was not liable under S. 43 of the Land Revenue Code, 1879, for unauthorizedly removing "any other natural product" from the land since that expression does not include excavated stones. (3) That under R. 28 of the Land Revenue Code, 1879, the Collector was not justified in recovering fees for excavated stones used by the plaintiff in erecting boundary pillars. (1903) 6 Bom.L.R. 1117.

——Ss. 45, 48—Non-agricultural assessment not previously levied on land converted to non-agricultural purposes—Crown's power to assess, if limited.

It would be opposed to principle, to imply, from the mere circumstance that the non-agricultural assessment has not been previously levied, any limitation on the prerogative of the Crown to assess the land to land revenue, and to revise the assessment periodically according to law. A.I.R. (Vol. 24) 1937 Bom. 226=39 Bom.L.R. 266=169 Ind. Cas. 542.

——S. 48—Assessment fixed at Settlement—Whether ceases at expiry of period—Change of use—Alteration of assessment—Jower of Collector.

The assessments fixed at a survey settlement do not cease to be operative at the expiry of the period of guarantee unless and until they are revised.

Where certain lands were agricultural lands when the assessment was fixed and were assessed with reference to that use and the use is subsequently changed, the assessments fixed under the Bombay Land Revenue Code by the Survey Officer is liable to be altered by the Collector. A.I.R. (Vol. 24) 1937 Bom. 226=39 Bom.L.R. 266=169 Ind. Cas. 542.

——Ss. 48 and 214—Scope—Agricultural land converted to building sites—Altered assessment goes to the grantee of the village.

S. 48 does not provide for an additional assessment, it only provides for an altered assessment to be imposed according to rules. Where, therefore, the raiyats' agricultural assessment in virtue of a grant of the village is given to the grantee the altered or building assessment also goes to him. 31 Bom.L.R. 256=114 Ind. Cas. 1=53 Bom. 230=56 I.A. 51=1929 A.L.J. 47=49 C.L.J. 179=33 C.W.N. 293=A.I.R. 1929 P.C. 34.

——S. 48—Applicability—Inam village—Survey Settlement—Salami, fixing of—Conversion of land into building sites—Alteration of assessment.

The provisions of S. 48 do not apply to kadim lands in an inam village.

Where a survey settlement is introduced into an inam village and the salami or quit rent payable to the inamdar on vechan salami lands is fixed, it is not permissible to the inamdar at a later date to demand an altered assessment on the ground that the lands have been used as building sites. A.I.R. (Vol. 32) 1945 Bom. 15=46 Bom.L.R. 607.

——S. 48—Extra assessment—Conversion of land from agricultural to non agricultural uses—Bombay Act (I of 1885), S. 35.

Plaintiff converted his land from agricultural to non-agricultural uses by establishing a brickkiln in 1872. He was called upon by the Collector to pay this time the assessment as fine for the conversion under S. 35 of Bombay Act (I of 1865). Plaintiff thereupon erected some huts on the land. At the revision of survey which took place in 1889 the land was assessed as agricultural. Sometime between 1897 and 1901 plaintiff erected a substantial building on the land. In 1912, the Collector levied building fine from the plaintiff. **Held**, that though the levy of additional assessment under S. 35 of the Bombay Act (I of 1865) might have protected the plaintiff against its enhancement before the Revision Survey of 1889, still S. 48 of the Revenue Code, (1879) rendered him liable to pay extra assessment for the conversion in use which took place, after the date of the Revision Survey of 1889. 42 Bom. 126=43 Ind. Cas. 744=20 Bom.L.R. 22.

——S. 48—"Land used for the purpose of building"—Meaning—Non-agricultural assessment in respect of four times the area covered by building—Levy of—Legality.

The terms of S. 48 of the Bombay Land Revenue Code clearly show that assessment shall be deemed to have been imposed according to the purpose for which the land is used; and in the case of land used for the purpose of construction, it cannot be said that the area actually built upon or covered by a building is alone used "for the purpose of building". The expression "land used for

the purpose of building" refers to all land covered by a structure, as well as land either necessary or required for occupation or use of the structure for the purpose for which it is intended. As it would be impossible to use a structure without using some area of land surrounding it, such surrounding land which renders the enjoyment possible or comfortable would be deemed to be included in the land which is used for the purpose of building. It would be legal for the Collector to impose non-agricultural assessment not only with reference to land actually covered by building but also to land required for using the building. An estimate of a total requirement of four times the area of land actually covered by structures, as being land used for the purpose of building and levy of non-agricultural assessment on that basis would not be erroneous or illegal or **ultra vires**. 52 Bom.L.R. 138=A.I.R. 1950 Bom. 227.

——S. 48 (1) and (2)—Scope and effect.

Section 48, Cl. (1), Bombay Land Revenue Code means that assessments are to be made in future and shall be deemed to have been made in the past with reference to the use of the land. It may also mean that whether assessments are actually fixed with reference to the use of the land or not, they shall be deemed to have been so fixed. But in any case Cl. (1) lays down the conditions for the operations of Cl. (2). It is a wrong view of the section to say that when the Collector levied a fine and did not alter the assessment, the land must be deemed to have been at that time, that is at the date of the Collector's order, assessed for building purposes so that there was no change of use after the lands were assessed. A.I.R. (Vol. 24) 1937 Bom. 226=39 Bom.L.R. 266=169 Ind. Cas. 542.

——S. 48 (b)—"Appropriated for any purpose"—Meaning of—Land appropriated for agricultural purposes—Special user of land by stocking timber in fair season—Additional assessment for special user—If can be levied.

The plaintiff was the occupant of a land used for agricultural purposes, and had been paying to Government assessment chargeable on land appropriated for those purposes under S. 48 (a) of the Bombay Land Revenue Code, 1879. During the seasons when the land was not used for agricultural purposes, the plaintiff used to let it out for stocking timber and thereby derived profit. With respect to this special user. Government levied an additional assessment under S. 48 (b) of the Code:

Held, that no additional assessment for the special user could be levied under Cl. (b) to S. 48 of the Code. The expression "appropriated for any purpose" in S. 48, Cl. (b), of the Bombay Land Revenue Code, 1879, means set apart for that purpose in exclusion of all other uses. The Bombay Land Revenue Code, 1879, is a taxing enactment, and must be construed strictly in favour of the subject. (1909) 5 Ind. Cas. 610=12 Bom. L.R. 16=34 Bom. 239.

——S. 48 (1) (b)—Land assessed for building purposes—New building erected—Assessment cannot be enhanced.

There is no section in the Land Revenue Code, and no rule, which entitles the Collector to levy enhanced assessment when, upon land already assessed for building purposes the owner proceeds to erect new buildings, though those new buildings may be of greater value. A.I.R. (Vol. 30) 1943 Bom. 138=45 Bom.L.R. 197=I.L.R. (1943) Bom. 128=206 Ind. Cas. 570.

——S. 48 (1) (c) (as amended in 1908)—Revision of assessment—Power of Government.

The underlying object of Cl. (c) to S. 48, Bombay Land Revenue Code, is to empower Government to fix and levy the altered assessment from the date of conversion, irrespective of the fact whether the period for which assessment leviable prior to its conversion had expired or not. That being so, the above clause was never intended to deprive Government of its power of revision of assessment, and in the absence of any other provision in the Code and in the rules of 1881 limiting the right of Government to revise the assessment "so fixed and levied", it could be revised at any time. A.I.R. (Vol. 23) 1936 Sind 108=29 S.L.R. 382=163 Ind. Cas. 887.

——S. 48 (2)—Introduction of non-agricultural assessment—Condition pre-requisite.

Under S. 48 (2) of the Bombay Land Revenue Code, it is only when an agricultural assessment has been fixed **"under the provisions of this Act"** that the Provincial Government can introduce non-agricultural assessment **(i.e.)**, "altered" assessment under the Act. The fixing of agricultural assessment can be proved either by direct evidence or by circumstances such as the fact that the assessment has continued for about fifty years and that an announcement was made by the Government to the grantee that a survey settlement was made in the village. 76 I.A. 85=I.L.R. (1949) Bom. 110=A.I.R. 1940 P.C. 143=53 C.W.N. 489=62 L.W. 444=1949 M.W.N. 407=51 Bom. L.R. 635=(1949) 2 M.L.J. 161 (P.C.).

——S. 48—Rules framed in 1881—R. 56—"Co-terminous", whether applies to land appropriated subsequent to settlement.

The word "co-terminous" in part 5 of R. 56, under S. 48, Bombay Land Revenue Code, aplies only to the revision settlement in the course of which the appropriation takes place and not to subsequent periods of settlement and after the expiry of the period of settlement in which the land has been appropriated, the land being non-agricultural land, becomes subject to the rules which relate to non-agricultural land. A.I.R. (Vol. 23) 1936 Sind 108=29 S.L.R. 382=163 Ind. Cas. 887.

——Ss. 52 and 217—Scope and effect.

The effect of S. 52 of the Bombay Land Revenue Code is to give the Collector the discretion to fix the assessment; and the effect of S. 217 of the Code is to render the occupants in alienated villages subject to a settlement like the occupants in unalienated villages. But neither section takes away any legal right which an occupancy tenant may have acquired independently of his bare status as an occupancy tenant liable to pay the land revenue according to survey rates. (1902) 5 Bom. L.R. 694=28 Bom. 74 (80).

——S. 53—Occupancy rights—Presumption—Assessment paid by tenants—Rent equivalent to assessment cannot be enhanced unless custom is established.

The fact that the tenants pay the amount of assessment may not be conclusive evidence in the Satara District, but it would afford strong presumption that the tenants have attained to occupany rights by virtue of their long holding. The word "Miras" should not be used in case of persons who by virtue of their long holding are presumed by reason of the provision of S. 53 to have acquired fixity of tenure. In cases where rent is equivalent to assessment it cannot be enhanced unless a right to do so is established by custom or otherwise. 77 Ind. Cas. 878=A.I.R. 1923 Bom. 449 (D.B.).

——S. 56—Retrospective effect.

S. 56 of the Code has a retrospective effect. The ordinary presumption against retrospectivity of any statute operates chiefly when it prejudicially affects vested rights. 28 Ind. Cas. 95=8 S. L.R. 23.

——Ss. 56 and 153—Applicability of.

S. 56 of the Code does not apply where their has been no forfeiture under S. 153 of the Code. 40 Bom. 483=37 Ind. Cas. 295=18 Bom.L.R. 438.

——Ss. 56, 57 and 153—Lands in possession of a holder under a mortgage—Forfeiture of lands for non-payment of assessment—Re-grant of the lands to the holder by the Government—Relations between the original mortgagor and holder.

Forfeiture ordinarily implies the loss of a legal right by reason of some breach of obligation. When arrears of assessment are levied by sale, then S. 56 of the Bombay Land Revenue Code, 1879, in pursuance of an obvious policy, empowers the Collector to sell, "freed from all tenancy incumbrances and rights created by the occupants .....or any of his predecessors-in-title or in anywise subsisting as against such occupant." Should the Collector otherwise dispose of the occupancy, the section affords no such protection, and the legal relations must be determined by reference to the ordinary law. So judged, the effect of a forfeiture and subsequent acquisition of the forfeited property are subject to the control of equities arising out of the conduct of the parties. (1905) 8 Bom. L.R. 360=30 Bom. 466.

——S. 56—Forfeiture of occupancy—Power of Collector.

When an occupancy forfeited under S. 56 has been disposed of by the Collector under Ss. 32 and 62 of the Rules under S. 214, to a person signing a **kabuliyat** in Form B, S. 63 does not empower the Collector to order the occupancy to be taken from that person and restore it to the occupant before forfeiture. 36 Bom. 91=12 Ind. Cas. 545=13 Bom.L.R. 968.

——S. 56 (as amended by Act VI of 1901)—Regrant, if free from encumbrances.

Where a land vests in the original tenure-holder under a new tenure created by S. 56 of the Code as amended by Act VI of 1901, the land vested free from all encumbrances and from all previous equities. The fact that default in the payment of revenue was made is immaterial. 37 Bom. 692=21 Ind. Cas. 310=15 Bom.L.R. 827.

——S. 56 (as amended by Act VI of 1901)—Fallow-forfeited land—Grant to one of several co-owners—If personal.

The grant of fallow-forfeited land to only one of several co-owners of joint property subsequent to 1901 is in the absence of any other circumstance a grant to him personally and this is more so in survey numbers granted on restricted tenure. 23 S. L. R. 461=118 Ind. Cas. 207=A.I.R. 1929 Sind 212 (D.B.).

——S. 56 (As amended by Act VI of 1901)—Land granted to co-owner—Joint ownership—Onus.

Where property is granted personally to a person after the amendment of S. 56, Bombay Land Revenue Code by Act (VI of 1901), in the absence of any circumstances to the contrary, it must be deemed to have been granted to him in his individual right as owner. It is incumbent on a co-owner who claims that it is joint property to prove that the grantee had by availing himself of his position as a co-owner gained an advantage in derogation of his rights. A.I.R. (Vol. 18) 1931 Sind 27 (28)=130 Ind. Cas. 552.

——S. 61—Scope—Area which has deteriorated for purposes of cultivation or for quarrying.

Occupation in the sense of the amount of area which has deteriorated for purposes of cultivation or for quarrying is the area contemplated by the Act as being occupied. 30 Bom.L.R. 431=109 Ind. Cas. 545=A.I.R. 1928 Bom. 180.

——S. 62—Section provides that occupany price shall be recoverable as an arrear of land revenue and the order of forfeiture of land for non-payment of occupancy price, made by the Assistant Collector is therefore justified. A.I.R. (Vol. 18) 1931 Bom. 238=33 Bom. L.R. 213=55 Bom. 165=132 Ind. Cas. 497.

——Ss. 63 and 64—Landlord is entitled to charge proportionate rent for alluvion sold to him by Government.

Where the Government under S. 63 granted some alluvion which had formed itself to the lands held by the lessee on Mulgani (permanent lease).

Held, that the landlord could demand proportionate rent since the alluvion is to be treated as an entirely separate piece of the land. 26 Bom.L.R. 520=80 Ind. Cas. 427=A. I. R. 1924 Bom. 449 (D.B.).

——Ss. 65, 48, 213 and 214—Class of improvements protected—Proprietor of land building godowns and using them for storing grass cut from his own land for selling it subsequently—If liable to non-agricultural assessment.

The character of the building or the amount of money spent upon its construction is immaterial in judging the purpose for which it is put eventually by the farmer.

The use of the words "farm-buildings, wells or tanks" in S. 65, Bombay Land Revenue Code does not exhaust but illustrates the kind of improvements intended by the Legislature to entitle the owner to the benefit of lesser assessment. The

phrase "make any other improvements thereon for the better cultivation of the land" in S. 65 ought not to receive a narrow construction limited to some object directly connected with agricultural operations or the act of production merely. Any improvement which conduces to profitable husbandry and facilitates the marketing of agricultural produce, would be included within the class of improvements protected by S. 65. That would include the provision for store-houses made by an agriculturist for the protection of his agricultural produce until it leaves his farm. Thus, if grass as agricultural produce is cut, pressed, baled and stored in a godown with the object of eventually fitable to sell the produce, the construction of such selling it when the market improves and it is pro- a godown which facilities the object in question would be protected. The farmer produces his crops in order to sell the same and thus to provide the means to carry on further cultivation, that is, in other words, the business of framing or cultivation. Thus the use of the land being for agricultural purpose, its proprietor is not liable to non-agricultural assessment merely because he previously intended to use it for non-agricultural purpose, as the mere intention to use the property for non-agricultural purpose without its actually being so used will not enable the Government to alter the agricultural assessment.

The expression "any holding which has been assessed" implies "legally assessed." When therefore the basis for altered assessment fails, the levy of altered assessment would be illegal. A.I.R. (Vol. 26) 1939 Bom. 505=41 Bom.L.R. 1077=185 Ind. Cas. 495.

——S. 65—Agricultural land—Permission to erect cattleshed refused without enquiry—Order to pull shed—If ultra vires.

Plaintiff applied to the Collector for permission to erect a shed in an agricultural land for his cattle. The Collecotr instead of merely sending the acknowledgment to the plaintiff that he had received the application sent a reply that the application was refused.

Held, that because the Collector refused the application without due inquiry, that did not debar the plaintiff entirely from building when he did not hear anything further in the matter with regard to the result of the inquiry within the period of three months, and if he built his shed after three months it cannot be ordered to be demolished. There having been no order after due enquiry within three months any further proceedings of the Collector were defective and must be taken to have been entirely beyond his powers. The decision of the Collector is to be a proper decision after due inquiry. 26 Bom.L.R. 371=81 Ind. Cas. 491=A.I.R. 1924 Bom. 369 (D. B.).

——S. 65—Applicability—Alienated land.

The pwers of a Collector under S. 65 would apply even to alienated land. A.I.R. (Vol. 27) 1940 Bom. 342=42 Bom.L.R. 747=191 Ind. Cas. 145.

——Ss. 65, 66—Applicability—Conversion of lands into building sites—Rights of inamdar.

The provisions of Ss. 65 and 66 do not apply to kadim lands in an inam village.

Where **vechan salami** or **pasaita nakara** lands in inam village are converted into building sites, the inamdar is entitled to levy building fines for the altered use of the lands. A.I.R. (Vol. 32) 1945 Bom. 15=46 Bom.L.R. 607.

——Ss. 65 and 66—Applicability — Graveyard—Long possession and user without assessment—Eviction.

In 1907, the District Collector ordered the mamlatdar to cause the building and the wood to be removed forthwith from a graveyard of which plaintiff had been in possession for 50 years without assessment and the order was confirmed on appeal by the Commissioner in April 1909. On the 22nd February, 1910, the plaintiffs sued the Secretary of State, for a declaration that they were the owners of the land, for a cancellation of the order and for a permanent injunction. **Held,** that as the land in dispute was not used for the purpose of agriculture neither S. 65 nor S. 66 of the Land Revenue Code applied to the case and the orders passed by the Revenue authorities to evict the plaintiffs were **ultra vires.** 39 Bom. 494 =29 Ind. Cas. 490=17 Bom.L.R. 513.

——Ss. 66 and 48—Conversion to non-agricultural purposes wihtout permission — Enhanced assessmentwith retrospective effect.

Where, out of the agricultural land, some portion is converted to non-agricultural purposes without the previous permission of the Government, the Government is entitled, under S. 66, not only to levy a fine but also the enhanced non-agricultural assessment under S. 48 for the whole of the period during which it has been so used. A.I.R. (Vol. 121)3 1945 Bom. 464=47 Bom. L.R. 361.

——S. 66—Liability of occupant—Non-agricultural user by tenant or trespasser.

In S. 66, Bombay Land Revenue Code, the words "so used" do not import user by any particular class of persons, such as those mentioned in S. 65.

The words of S. 66 of the Act are quite clear, and an occupant is liable to fine if there is any user of his land for purposes other than agriculture, whether or not the occupant has consented to or has knowledge of such user and irrespective of the fact that the conversion has been made by the occupant or his tenants or agents or trespasser. A.I.R. (Vol. 24) 1937 Bom. 456=39 Bom.L.R. 885=I.L.R. (1937) Bom. 801=172 Ind. Cas. 194.

——S. 66—Penalty recoverable—Portion only of land used for building purpose.

Where a portion of land assessed or held for purposes of agriculture is used without the permission of the Collector for any other purpose than that of agriculture, e.g., for non agricultural building purposes, the penalty leviable, under S. 66 can be levied with reference to the actual area built upon and not on the whole holding. 29

Bom.L.R. 1350=106 Ind. Cas. 239=A.I.R. 1927 Bom. 601 (D.B.).

——S. 68—Occupant—Origin of tenancy not known—Tenant is not occupant.

Where the holder of land is a tenant, the origin of whose tenancy owing to antiquity cannot be determined, he is not an occupant within the meaning of that word in S. 68. 50 Bom. 155=94 Ind. Cas. 662=28 Bom.L.R. 424=A.I.R. 1926 Bom. 257 (D.B.).

——S. 68—Occupant—Talukdari village—Resumption—Survey settlement extended to such village—Tenants do not become occupants.

At the time of the introduction of the British rule and for long after, Government treated the **talukdars** of certain **talukas** as lease holders, and in consequence leases were periodically granted to them. In 1856 Government resumed possession of this village (made it **khalsa**, either they refused to grant a new lease on the expiry of the term of a previous lease or they exercised an act of resumption) and they managed the village for a period of seven years. During this period a survey settlement was introduced, and in 1863, the village was restored to the **talukdars** as Government agreed with the **Talukdari** Settlement Officer who had reported that the quarrels of the **talukdars inter se**, which had been the reason for resumption had ceased. The villages were restored on condition that the **talukdars** should not recover more than twice **vigholi** fixed at the survey settlement:

Held, that the survey settlement and assessment of the land did not alter the tenure of the occupants. In the absence of any statutory enlargement of their rights between 1856 and 1863 they emerged from the period of the management with their status and rights unchanged. If they were tenants-at-will at the commencement of that period they were tenants-at-will when the village was restored to the **talukdars**, and the presumption is that all tenants are tenants-at-will unless they can prove the contrary somehow or other; hence they were mere tenants and not occupants. A.I.R. (Vol. 22) 1935 Bom. 219=37 Bom.L.R. 220.

——Ss. 68 and 79-A—Occupancy, grant of, subject to prohibition of alienation—Application for transfer of part of occupancy—Liability to summary eviction.

Where a grant of occupancy was made to the plaintiff subject to restrictions prohibiting alienation and a few years afterwards he made an application for transfer of the occupancy to the second defendant, **held**, that the application amounted at most to an attempt to transfer which was never carried into effect, that there was no alienation and no breach of the conditions of the grant, that the order of the District Deputy Collector for summarily evicting the plaintiff, was a nullity and that the Officer cannot be said to have acted in his official capacity. 45 Bom. 920=61 Ind. Cas. 347=23 Bom.L.R. 279=A.I.R. 1921 Bom. 381.

——Ss. 68, 217—Inam village—Survey settlement—Tenants at-will before settlement whether affected.

An **inamdar** of a village who was a grantee of land revenue and soil, let before the survey settlement of 1904, three survey numbers to tenants-at-will and after 1904, four more were similarly let. The three tenants were involved in a criminal case and on their absconding, Government forfeited the seven survey numbers. The **inamdar** claimed recovery of possession of the seven survey numbers:

Held, that the tenants let into after settlement of 1904, remained tenants-at-will and their rights were governed by the agreement between the parties, that the tenants let into before 1904, were unaffected by the settlement and the survey settlement could not affect the terms of the agreement which had been entered into between the **inamdar** and his tenants and the tenancy was not converted into permanent occupancy and as such the **inamdar** was entitled to possession of all the seven survey numbers. A.I.R. (Vol. 22) 1935 Bom. 265=37 Bom.L.R. 449=59 Bom. 479=159 Ind. Cas. 518.

——Ss. 73 and 74—Requirements—Sufficient compliance with—**See** IMPARTIBLE ESTATE. 75 I.A. 259=(1949) 1 M.L.J. 172 (P.C.).

——S. 73-A—"Land"—"Trees"—Sale of trees apart from land—Effect of.

The definition of 'land' as given in the Bombay Land Revenue Code includes trees but the Code does not say that 'land' **means** trees apart from the land itself, and a sale of trees is in essence the sale of something which is enjoyed apart from the land, though for the time being that thing is attached to the land. A.I.R. (Vol. 19) 1932 Bom. 370=34 Bom.L.R. 780=56 Bom. 278=140 Ind. Cas. 164.

——S. 73-A—Sale of trees—Sanction of Collector—Whether necessary.

As S. 73-A of the Bombay Land Revenue Code stood in 1911, it did not prohibit the sale by an occupant of trees in his land apart from the land without previous sanction of the Collector. The section only prohibited the sale of houses toether with the land on which they stood without such sanction. A.I.R. (Vol. 19) 1932 Bom. 370=34 Bom.L.R. 780=56 Bom. 278=140 Ind. Cas. 164.

——S. 73-A—Scope—Transfer of interest in restricted occupancy tenure.

The prohibition contained in S. 73-A is not confined to an absolute and out-and-out transfer of an occupancy but that it includes the transfer of an interest in the occupancy without the sanction of the Collector. A mortgage, therefore, of a share in land held on restricted tenure, without the sanction of the Collector, is void and conveys no right to the mortgagee. 121 Ind. Cas. 876=1930 Sind 75.

——S. 73-A—Transfer of—Property held on restricted tenure—Void or voidable.

If property held by a person on restricted tenure is transferred by him without the previous sanction of the Collector, though it is not so transferable, such sale is voidable and not void as the vendee has right to sell with the sanction of the Collector and it is not that he has absolutely no

right to convey the property. 118 Ind. Cas. 203 =A.I.R. 1930 Sind 12.

——S. 73-A—Agreement to sell land held on restricted tenure—Performance contingent on sanction of revenue authorities being obtained—Failure to obtain sanction—Suit for specific performance or damages is not maintainable—Contract Act, S. 32—Specific Relief Act, Ss. 9 and 27 (b).

J contracted to sell agricultural land held on a restricted tenure to plaintiff and subsequently sold the land to N with sanction of the revenue authorities under S. 73-A, Bombay Land Revenue Code and N took possession of the land. Plaintiff instituted a suit against N for recovery of possession under S. 9, Specific Relief Act, and another against J for specific performance of the contract as per contract, and in the alternative for damages for breach of contract.

Held, that the sanction given by the Collector under S. 73-A, Bombay Land Revenue Code, in favour of a particular transferee did not mean that the character of restricted tenure impressed upon the land was so completely removed as to render it transferable at will.

Held, further that the permission of the Collector not having been granted and having been impliedly refused, the contract entered by J with plaintiff was never a completed contract at any time and, therefore, it was not a contract which could be specifically enforced as against J. 22 S. L.R. 3496=105 Ind. Cas. 735=A.I.R. 1928 Sind 63.

——S. 74—Written agreement by person in whose favour relinquishment is made—What amounts to —Failure of Government to substitute his name—Effect of.

S. 74 of the Bombay Land Revenue Code does not say with whom the written agreement is to be made, but clearly it must be with Government, since the Collector has to accept it. If the person in whose favour the right of occupancy is relinquished makes a written statement to the **Mamlatdar** asking that the name of the person who has given the notice of relinquishment might be removed from the **Pali** register and his own name might be entered, it constitutes a written agreement to accept the rtlinquishment, and the transaction so far as the parties are concerned is complete. The rights of the parties cannot be affected by the failure of Government to carry out its statutory duty to substitute his name in the **Pali** register or by their action after the death of the person who gave the notice of relinquishment in entering his name in the mutation register as taking by inheritance. 27 Bom.L.R. 1253, disapproved. 75 I.A. 259=I.L.R. (1948) Bom. 639=51 Bom.L.R. 173=A.L.R. 1949 P. C. 35=62 L.W. 35=(1949) 1 M.L.J. 172 (P. C.).

——S. 74—Notice of relinquishment not in prescribed form—Validity.

A notice of relinquishment of right of occupancy, although not in the form prescribed by S. 74, is valid if it contains all the essentials required by such form. The Government is entitled to accept such notice without insisting on the prescribed form. 75 I.A. 259=I.L.R. (1948) Bom. 639=51 Bom.L.R. 173=A.I.R. 1949 (P.C.) 35=62 L.W. 35=(1949) 1 M.L.J. 172 (P.C.).

——Ss. 74 and 88—Notices of relinquishment received by Inamdar—When exempt from registration.

It is only when the Survey Settlement has been introduced, or when the powers contemplated in S. 88 have been given to the inamdar, that he is entitled to receive notices of relinquishment under S. 74 from the persons in occupation of the inam lands, and only such notices are exempt from registration under S. 90 of the Indian Registration Act. 45 Bom. 898=23 Bom.L.R. 272=61 Ind. Cas. 464=A.I.R. 1921 Bom. 371 (D.B.).

——S. 73-A—Relinquishment by Talukdar in favour of Government—Right of Government to recover assessment and local fund from him.

The plaintiffs held plots in a talukdari estate free of rent and free also of assessment and local fund. It appeared, however, that the talukdars of the estate paid assessment and local fund for the whole estate to Government in the form of **jama**. The talukdar having relinquished the said plots in favour of the Government.

Held, that the Government could recover the local fund and the assessment from the plaintiffs. 32 Bom.L.R. 907 (D.B.).

——S. 73-A—Transfer—Rajinama and kabuliyat —If constitute.

A rajinama and kabuliyat do not by any means take the place of a sale-deed. Before they really do evidence a transfer of ownership, there must be either evidence or indications furnished by lapse of time and possession and so forth, and that there was in fact an intention to transfer ownership. They only serve as documentary evidence of transfer if that transfer can properly be inferred from the totality of the facts proved. 59 Ind. Cas. 114=22 Bom.L.R. 1079 (D.B.).

——S. 74—Transfer—Rajinama and Kabuliyat—If amount to.

The execution of a rajinama and kabuliyat does not by itself amount to a transfer of property. The transfer can be rebutted by evidence regarding the manner in which the parties concerned dealt with the property. Each case however must necessarily depend upon its own facts. 55 Ind. Cas. 619=22 Bom.L.R. 140.

——S. 74—Transfer—Rajinama and Kabuliyat by mortgagor—Effect of.

A mortgagor agreed to abandon his equity of redemption and also executed a **Rajinama** in favour of the **Mamlatar** under S. 74 and the mortgagee executed a **Kabuliyat**. Held, that the **Rajinama** combined with the **Kabuliyat** did not transfer the title of the mortgagor to the mortgagee as a transfer of the equity of a redemption must be registered according to S. 54 of the T. P. Act. 38 Ind. Cas. 819=18 Bom.L.R. 980 (Note).

——Ss. 74 and 76—Rajinamahs and Kabuliyats—Registration, if necessary.

Rajinamahs and Kabuliyats though not in them-

selves documents of transfer are fairly conclusive evidenee that a transfer has in fact been made and as between the mortgagor and mortgagee extinguish the equity of redemption without the necessity of registration. 42 Bom. 359=45 Ind. Cas. 492=20 Bom.L.R. 358.

——S. 74—Rajinama by Khatedar—Registration, if necessary.

A **Rajinama** by a **Khatedar** of unalienated lands, subject to S. 74, Bombay Land Revenue Code abandoning his rights to another, subject to the payment of revenue need not be registered under S. 90, Registration Act. 41 Bom. 170=38 Ind. Cas. 838=18 Bom.L.R. 976.

——S. 79-A—Powers of Collector—When may be exercised—Jurisdiction of Civil Court.

The powers given to the Collector under S. 79-A, of the Land Revenue Code, 1879, can be exercised only in cases of wrongful possession. It does not extend ot cases where possession is obtained under the decree of a Civil Court. The Collector has, for the exercise of the power to form his opinion and decide whether in any particular case the possession is wrongful; but there is no provision in the Code which gives finality to the Collector's order of eviction so as to exclude the jurisdiction of a Civil Court to decide that the person evicted by that order was in rightful occupation. (1910) 35 Bom. 72=12 Bom.L.R. 837 =8 Ind. Cas. 165.

——S. 79-A—Scope of.

The section refers to unauthorised occupation or wrongful possession of land. The question is whether the person was in wrongful occupation of land at the date of notice. 22 Bom.L.R. 906= 58 Ind. Cas. 88=44 Bom. 832.

——Ss. 79-A and 68—Grantee of occupancy prohibited from alienation—Contract for alienation by him—If renders him liable for eviction.

Where in a grant of occupancy of certain lands made by Government the grantee is prohibited from alienating the land, a contract for alienation does not amount to a breach of the condition of the grant so as to make the grantee liable to be summarily evicted under Bombay Land Revenue Code, S. 79-A. 45 Bom. 920=23 Bom.L.R. 279 =61 Ind. Cas. 347=A.I.R. 1921 Bom. 381 (D.B.).

——S. 79-A—Notice under—Suit against Collector —Notice of suit—Necessity for—C. P. Code, S. 80.

Where a Collector issued a notice under S. 79-A on **A** asking him to vacate certain land within a certain time, which notice by implication declared that the sale and mortgage under which **A** held the land were void, a suit against Collector by **A**, must be instituted after a notice under S. 80, C. P. Code. Mere letter by **A**, to the Collector that he cannot be evicted except by a suit and that if he were evicted he would sue in his turn, is not a sufficient notice. 16 Ind. Cas. 445=14 Bom.L.R. 577.

——Summary eviction under—Conditions necessary for such eviction not present—Suit by evicted person—Limitation Act, Art. 14.

Where the conditions necessary for the exercise of the power of summary eviction conferred by S. 79-A do not in fact exist, the District Deputy Collector cannot be held to act in his official capacity if he evicts a person under that section. So, Limitation Act, Art. 14 does not apply to a suit for possession by the evicted person. 45 Bom. 920=23 Bom.L.R. 279=61 Ind. Cas. 347=A.I.R. 1921 Bom. 381 (D.B.).

——S. 81—Registered occupant failing to pay assessment—Action taken by Collector under section —Co-sharer paying up and khata transferred in his name—Registered occupant does not lose his occupancy rights.

The plaintiff, who was registered occupant of certain lands, failed to pay assessment on the land and on action being taken under S. 81 plaintiff's co-sharer paid up the arrears due and his name was put in the **khata** of the land. The plaintiff sued to recover possession of the land, from the defendants who contended that the plaintiff had no title to sue as his interest was forfeited by the action taken under S. 81.

Held, though under S. 81, plaintiff's interest as a registered occupant had ceased yet he had occupancy rights in the land and therefore he had a right to sue. 46 Bom. 221=23 Bom.L.R. 1024= 64 Ind. Cas. 201=A. I. R. 1922 Bom. 198 (D. B.).

——S. 83.

1. **Applicability.**
2. **Change in User.**
3. **Conversion of tenancy.**
4. **Custom.**
5. **Enhancement of rent.**
6. **Landlord's rights.**
7. **Origin of Tenancy.**
8. **Plea under.**
9. **Presumption under.**
10. **Rights of holders.**
11. **Tenants of Watan Land.**
12. **Tenants of Bhagdari Land.**

1. Applicability.

——S. 83—Applicability.

Where the commencement of the tenancy has been ascertained with reasonable definiteness, S. 83, Bombay Land Revenue Code, cannot in terms apply. A. I.R. (Vol. 25) 1938 Bom. 316=40 Bom.L.R. 439 =I.L.R. (1938) Bom. 465=176 Ind. Cas. 398.

——S. 83—Applicability—Origin of tenancy though old, traceable.

The provisions of S. 83 of the Bombay Land Revenue Code, 1879, do not apply to a tenancy though very old when its commencement can be traced to a specified year. 46 Bom. 687=24 Bom.L.R. 226= 66 Ind. Cas. 315=A.I.R. 1922 Bom. 25 (D.B.).

——S. 83—Applicability—Tenants of dharkaris—Khoti Settlement Act, S. 8—Application of. **See** BOMBAY KHOTI SETTLEMENT ACT, S. 8. 50 Bom.L.R. 257.

2. Change in user.

——Ss. 83, 65—Permanent tenant under presumption, if can use land for non-agricultural purposes without Collector's permission.

A permanent tenant, whose tenancy arises by reason

of the presumption in S. 83, Bombay Land Revenue Code is not entitled to change the user of the property by using it for purposes other than agricultural purposes, without obtaining the permission of the Collector under S. 65 of the Code. A.I.R. (Vol. 27) 1940 Bom. 342=42 Bom.L.R. 747=191 Ind. Cas. 145.

3. Conversion of tenancy.

——S. 83—Assertion by tenant that tenancy is of particular kind—Effect.

Where a person is given possession of land as a tenant, the mere fact that he asserts that the tenancy is of a particular kind will not by the lapse of time convert the tenancy. A.I.R. (Vol. 22) 1935 Bom. 247=37 Bom.L.R. 376=156 Ind. Cas. 1020.

4. Custom.

——S. 83—Words 'or otherwise' in saving clause are not ejusdem generis with words 'agreement or usage'—Landlord can prove current usage or prevailing rate.

The term 'usage' in S. 83, Bombay Land Revenue Code, might imply practice prevailing in a locality or business under uniform or common circumstances and conditions. It is generally qualified by antiquity, as a practice long continued or shown to have existed immemorially. It is, therefore, reasonable to expect that evidence of usage should be in relation to circumstances which are similar or common prevailing for a long time as opposed to current practice.

The words in a statute are **prima facie** to be taken in their usual sense unless the reasonable interpretation of the statute requires them to be used in a sense limited to things **ejusdem generis** with those which have been specifically mentioned before. That is not the case in the interpretation of saving clause to S. 83, Bombay Land Revenue Code, and consequently the doctrine of **ejusdem generis** has no application in the interpretation of the saving clause to S. 83. The word 'or otherwise' in the saving clause of S. 83 are not **ejusdem generis** with the words 'agreement or usage'. It is permissible, even upon the application of the rule of **ejusdem generis,** for the landlord to prove current usage or prevailing rate and the provisions of S. 83 will not exempt the tenant from yielding to the demand if it is just and reasonable having regard to the prevailing rates. The proper standard to apply under S. 83 would be the prevailing rates in the locality, particularly the rates which the landlord has levied for similar class of land let out for similar purposes. Profits obtained by a tenant is not a factor upon which a just and reasonable rate of rent can be based. A. I. R. (Vol. 26) 1939 Bom. 421=41 Bom.L.R. 951=186 Ind. Cas. 445.

——S. 83—Permanent tenancy—Claim based on local custom.

The claim to permanent tenancy may be based on local custom if it be properly proved. A.I.R. (Vol. 25) 1938 Bom. 492=40 Bom.L.R. 1015=178 Ind. Cas. 854.

5. Enhancement of rent.

——S. 83—Permanent tenant under S. 83, always paying rent equal to assessment—Landlord can enhance rent by local usage—Criterion to determine right to enhance.

In the Satara District a local custom prevails by which the landlord is entitled to enhance the rent in the case of a permanent tenancy arising by the operation of S. 83, Bombay Land Revenue Code. The custom has been judicially recognized by the Courts for many years, and it is not necessary that it should be proved in each particular case. But where the tenant has always paid rent exactly equivalent to the assessment, it must be proved that the local custom applies to the particular case. The criterion for determining whether the landlord has the right to enhance the rent in the particular case by local usage is whether there has been any and what enhancement according to the usage of the locality in respect of land of the same description held on the same tenure.

In the village of Tasgaon in the Satara Taluka of the Satara District, the landlord is by local custom entitled to enhance the rent of a permanent tenant under S. 83, who has always paid rent equivalent to the assessment. A.I.R. (Vol. 30) 1943 Bom. 301=45 Bom.L.R. 109=I.L.R. (1943) Bom. 143 =210 Ind. Cas. 474.

——S. 83—Enhancement of rent—Permanent tenancy.

When there is no satisfactory evidence of the commencement of a tenancy, it is presumed to be permanent under S. 83 but the tenant is not a Mirasi tenant. The landlord has the right by usage, agreement or otherwise to enhance the rent in the case of a permanent tenant. 44 Bom. 566=58 I.C. 289= 22 Bom.L.R. 717.

——S. 83—Enhancement of rent—Onus of proving right.

Once the permanent tenancy is proved, the concluding clause of S. 83 clearly places the onus on the landlord of proving his right to enhance the rent. 49 Bom. 902=27 Bom.L.R. 1336=91 Ind. Cas. 314=A.I.R. 1926 Bom. 52 (D.B.).

——S. 83—Onus to prove right to enhance rent.

Under the provisions of S. 83, Bombay Land Revenue Code, the right to enhance rent vests in the landlord "if he have the same either by virtue of agreement, usage, or otherwise". Those words cast the burden primarily on the landlord to establish the right which he claims. A.I.R. (Vol. 26) 1939 Bom. 421=41 Bom.L.R. 951=186 Ind. Cas. 445.

——S. 83—'Usage' has to be proved by landlord.

The usage referred to in S. 83 has to be proved by the landlord, landlord's right to enhance rent by usage in the case of **mirasi** tenures in Deccan has no application to **watan** land in Gujrat. 27 Bom. L.R. 890=91 Ind. Cas. 272=A.I.R. 1925 Bom. 390 (D.B.).

——S. 83 — Limit of enhancement — Considerations for Court.

In considering what is the limit of enhancement permissible to the landlord under S. 83 the Court is entitled to take into consideration not only the general usage of the District, but also what has been the particular usage in regard to the lands in suit. 45 Bom. 994=23 Bom.L.R. 395=61 Ind. Cas. 577=A. I.R. 1921 Bom. 78 (D.B.).

——S. 83—Permanent Tenancy—Talukdari Estates—Extent of enhancement.

A permanent tenancy under S. 83 of the Code can be held established with reference to Talukdari estates.

Under the last paragraph of the section, if a tenant proves that he has fixity of tenure, he is entitled to fixity of rent, unless the landlord can prove either by agreement, usage or otherwise that he has a right to enhance the rent. When it has been proved that he has such a right, then the question of the extent of the enhancement must be left to the court as the final arbiter. 32 Bom.L.R. 1679.

6. Landlord's Rights.

——S. 83—Permanent tenant—Landlord cannot recover more than three times the assessment.

In cases of permanent tenants under S. 83, the landlord should not recover from the tenants, in any one year more than three times the assessment. 27 Bom.L.R. 1339=91 Ind. Cas. 318=A.I.R. 1926 Bom. 49 (D.B.).

7. Origin of Tenancy.

——S. 83—Origin of Tenancy—The period of a century is too long and indefinite a period to constitute satisfactory evidence of the commencement of a tenancy within the meaning of S. 83. 29 Bom.L.R. 274=101 Ind. Cas. 340=A.I.R. 1927 Bom. 270 (D.B.).

——S. 83—Tenancy traceable to the time of foundation of village in particular year—Origin of tenancy may yet be shown to be indefinite.

Where once a definite commencement of a tenancy is found then there is no room for the presumption to be raised under S. 83. But it does not follow that because the defendants trace their origin and connection with the land back to the foundation of the village in a particular year their particular tenancy or that of their ancestors began on that particular definite date. The defendants can show by means of other evidence that they had been tenants of the lands prior to that date, from some period which cannot be definitely fixed. 27 Bom. L. R. 267=91 Ind. Cas. 265=A.I.R. 1925 Bom. 294 (D.B.).

——S. 83—Absence of miraspatras or documents creating permanent tenancy—Burden of proof—Mere long duration—Proof of antiquity.

Where there are no miraspatras or other document creating a permanent tenancy and reliance is placed on S. 83, Bombay Land Revenue Code, it is for the tenants in the first place to lay the foundation for the application of the section by showing that their tenancy is ancient. No definite rule can be laid down as to the duration required to raise a presumption of permanency. The period of 40 years or even less in some cases has been held sufficient. On the other hand mere long duration is not enough to prove permanency. It must appear that by reason of antiquity the origin of the tenancy is obscure. If the landlord can show that the tenancy commenced in a particular year or within reasonably definite limits of time, S. 83 will not come into operation. If antiquity is proved and no satisfactory evidence of commencement is forthcoming, the landlord must then produce evidence of agreement or usage to limit duration. Leases for a year or for a fixed time will usually suffice for this purpose, but not always. A.I.R. (Vol. 22) 1935 Bom. 191=37 Bom. L.R. 209=156 Ind. Cas. 760.

——S. 83—Onus of proof of antiquity.

Where the antiquity of a tenancy at a uniform rent is established, it is for the landlord to prove that there is evidence of the intended duration of the tenancy either by agreement or by usage. In absence of this, a presumption arises that the tenancy is co-extensive with the duration of the tenure of the landlord. A.I.R. (Vol. 18) 1931 Bom. 167=32 Bom.L.R. 1679=129 Ind. Cas. 881.

8. Plea under.

——S. 83 not set up as defence—It cannot be pleaded in appeal.

Where the appellant did not set up S. 83 as a defence in the trial Court:

Held, that he was estopped from pleading it in appeal. A.I.R. (Vol. 22) 1935 Bom. 219=37 Bom.L.R. 220.

9. Presumption under.

——S. 83—Presumption.

Where the tenant has been in occuation for a period of nearly a century without disturbance or enhancement of rent, the presumption that he is a permanent tenant can hardly be defeated from the simple fact that the owner is able to produce his own title-deed, which may be of years before. On the other hand, in the absence of documentary evidence, difficult to procure in the case of ancient tenancy, it is not enough if the landlord proves that the tenancy, notwithstanding its long duration, commenced at a definite date, meaning thereby not the day, month and year, but at least an approximate period when it began and not merely large periods such as 25 years or 30 years between which it began. Such an approximate point of commencement might be sufficient to defeat the presumption of a permanent tenancy which might otherwise be made. 31 Bom.L.R. 1279=123 Ind. Cas. 492=A.I.R. 1930 Bom. 39.

——S. 83—Presumption cannot be drawn when particular year is shown as beginning of tenancy.

When a particular year is indicated as that in which the tenancy began, the case is excluded from those in which a presumption can be drawn under S. 83. 27 Bom.L.R. 1258=91 Ind. Cas. 347=A.I.R. 1926 Bom. 55 (D.B.).

——S. 83—Tenancy—Absence of evidence as to commencement or duration.

In a suit for ejectment the defendants pleaded that they were permanent tenants. It was found that the defendants were in possession from 1860. The plaintiff proved that another person was the tenant in 1758 but there was no evidence as to who was in possession between 1758 and 1860:

Held, that as the plaintiffs had failed to prove the commencement of the tenancy and there was neither any evidence of the period or the intended duration of the tenancy, if any, agreed upon between the landlord and the tenant nor any evidence of any usage of the locality as to the duration of such tenancy, the presumption of permanent tenancy arose in favour of the defendants under S. 83, Bombay Land Revenue Code. A.I.R. (Vol. 18) 1931 Bom. 302=33 Bom.L.R. 551=133 Ind. Cas. 826 (2).

——S. 83—Permanent tenancy—Tenancy traced back to 1864.

The possession of the tenants was traced back up to 1864. The tenants mortgaged the holding and the

mortgagees subsequently brought the holding to sale and purchased it. The tenants were, however, never entered as permanent tenants:

Held, that inasmuch as under the law as then it stood, there was no prohibition of transfer of ordinary tenancy, the mere fact that the landlord permitted the mortgage and the sale did not lead to an inference of permanent tenancy and with regard to S. 83 of the Bombay Land Revenue Code the antiquity was not so great as to make the commencement of the tenancy difficult and obscure and to raise a presumption of permanent tenancy. A. I. R. (Vol. 18) 1931 Bom. 417=33 Bom. L. R. 613=134 Ind. Cas. 696.

——S. 83—Existence of tenancy shown for nearly 80 years—Origin not known—Tenancy should be presumed to be permanent and ancient.

Where the plaintiff-tenant put in title-deeds going as far back as 1835, in the earliest of which the land, was described as **pasaita** land meaning 'land given in charity to Brahmins, etc.,' on a quit-rent of Rs. 5 and where there was no evidence to show when the tenancy was created,

Held, that the tenant was entitled to the presumption under S. 83 of the Code, that he was a permanent tenant at a fixed quit-rent. 27 Bom.L.R. 890 =91 Ind. Cas. 272=A.I.R. 1925 Bom. 390.

——S. 83—Long occupancy—Tenant signing kabuliyat with full knowledge that landlord was denying the permanent nature of tenancy—Presumption from long occupancy is destroyed.

No doubt when it has been proved that a tenant has been in occupation of certain land so long that one cannot ascertain the commencement of the tenancy, the mere fact, that during the currency of his holding he has signed a **kabuliyat** which purports to be in terms an agreement for an annual tenancy, may not be sufficient to displace the advantage he has obtained from his long holding, if he continues in possession for many years after he had signed the **kabuliyat** on the same rent. But each case of this class must stand entirely on its facts. At first, the tenant claiming to hold as a permanent tenant must establish the facts which would entitle him to the presumption of S. 83. But that can be rebutted by the landlord by the production of acknowledgment. Again the effect of the **kabuliyat** can be destroyed by further evidence on the part of the tenant. The fact of the signing of the **kabuliyat** as, merely an isolated instance in the midst of a long holding at the same rent, will not necessarily prevent the tenant from succeeding. Where the purpose of the plaintiff in taking **kabuliyats** was perfectly clear, and the tenants must have known that the plaintiffs were asking for **kabuliyats** because plaintiff was asserting his rights against any claims of the tenants to hold as permanent tenants and that many of the tenants were signing these **kabuliyats**.

Held, the signing of the **kabuliyat** at once destroyed any presumption that might have arisen from the previous holding of the defendants of the suit lands. 25 Bom.L.R. 431=74 Ind. Cas. 292=A. I.R. 1923 Bom. 397 (D.B.).

——S. 83—Tenancy — Presumption — Commencement of the tenancy—Means commencement within a particular period of time.

In a case where the tenancy does not go back into obscurity but is bounded by a definite time or period, there is satisfactory evidence of the commencement of the tenancy within the meaning of S. 83 and the presumption in favour of the tenant that the tenancy is co-extensive in time with the tenure of the landlord does not arise. 47 Bom. 4=24 Bom. L. R. 831=76 Ind. Cas. 71=A. I. R. 1922 Bom. 402 (D.B.).

——S. 83—Commencement of tenancy proved but not terms—Presumption under S. 83 (2) does not arise.

Where it is proved that the tenancy commenced in a particular year although the actual terms of the tenancy are not proved, the presumption under S. 83 (2) does not arise.

Paragraph 2 of S. 83 says nothing whatever about the terms of the tenancy. It is the tenant, who alleges that he is a permanent tenant, who in the first instance has to prove that, and if he has got no document which gives him a right on the land as a permanent tenant, the presumption is that he is an annual tenant. But if he can show that he has been on the land so long that the commencement of his tenancy cannot be ascertained, then the presumption under para. 2 of S. 83 arises.

Paragraph 2 of S. 83 has only to do with the point of time at which the tenancy commences. There is not a word in that section with regard to the actual terms of the tenancy. The paragraph has only to do with duration. When the presumption arises, then the Court must hold that the tenancy is co-extensive with the duration of the lessor's tenure. That means that the tenant cannot be turned out as long as the landlord's tenure continues. But there is no presumption as to what the terms of the tenancy are, that is to say, with regard to rent and other matters. 23 Bom.L.R. 533=63 Ind. Cas. 935=A. I.R. 1921 Bom. 454.

——S. 83—Presumption from antiquity of tenancy—Rebuttal—Burden of proof.

It lies on the parties, who wish to rebut the presumption arising from the antiquity of a tenancy to establish, first, that there is no evidence of the period of its intended duration and secondly, that there is no usage of the locality as to the duration of such tenancy. Where a tenant and his ancestors had cultivated the land as far as memory could go and paid the same amount of rent to his landlord and were in possession all along, the mere fact that he executed a rent note for one year in 1882 does not rebut the presumption of the permanency of the tenancy which arose from its antiquity. 45 Bom. 303=59 Ind. Cas. 278=22 Bom.L.R. 1214=A.I.R. 1921 Bom. 395.

——S. 83—Ejectment suit by landlord—Presumption is, tenancy is annual—On tenant proving antiquity of tenancy landlord must prove intended duration—Otherwise tenancy will be co-extensive with landlord's tenure.

In an ejectment suit by a landlord the presumption is that the tenant is an annual tenant and the **onus** lies upon him to prove he is something more. A defendant who wishes to prove he is a permanent tenant must prove, first of all, if he has not got a document of permanent tenancy, the antiquity of his tenure. Then under the second paragraph of S. 83, the landlord has to prove that there is evidence of the intended duration of the tenancy either by agreement or by usage. If he can not do that, then it is

presumed that the tenancy is co-extensive with the duration of the tenure of the landlord. 45 Bom. 350=22 Bom.L.R. 1394=59 Ind. Cas. 751=A.I.R. 1921 Bom. 224 (D.B.).

——S. 83—Presumption of permanent tenancy in favour of tenant—Proof by landlord as to commencement of tenancy—Nature of.

Prima facie, the object of S. 83 is to protect the possession of tenants who show the antiquity of their tenancy and who are able to claim by reason of such antiquity that the commencement of their tenancy cannot be proved. Therefore, if the tenant proves the antiquity of his tenancy the landlord is expected to prove by satisfactory evidence the commencement of the tenancy which as the word 'commencement' indicates must have reference to the year—If not the date and month—in which the tenancy commenced. Merely showing that the tenancy may have commenced within a margin of any five or ten years is not such satisfactory evidence of the commencement of the tenancy. A.I.R. (Vol. 33) 1946 Bom. 365=48 Bom.L.R. 225=I.L.R. (1946) Bom. 794.

——S. 83—To claim presumption of permanent tenancy, tenant of watan lands need not trace back his possession to a time when land was alienable.

In order to claim the presumption of permanent tenancy under S. 83, a tenant of **watan** lands is not required to trace back his possession of those lands as such tenant to a time when the land was alienable. On the contrary if the tenant establishes the antiquity of his tenancy the landlord can rebut the presumption arising from such possession only by showing that the tenancy commenced at a time when the **watan** property had ceased to be alienable. A.I.R. (Vol. 33) 1946 Bom. 365=48 Bom.L.R. 225=I.L.R. (1946) Bom. 794.

——S. 83—Proof of commencement of tenancy.

For presumption of permanent tenancy under S. 83, Bombay Land Revenue Code, there must be no satisfactory evidence of the commencement of the tenancy, which means a definite date or year of its commencement. It is not sufficient to show that the tenancy commenced during period between certain years. A.I.R. (Vol. 30) 1943 Bom. 95=45 Bom. L.R. 186=206 Ind. Cas. 487.

——S. 83—Mere showing that tenancy had its origin at some date within twenty years, if satisfies first condition—'Antiquity', meaning of.

The particular presumption mentioned in second paragraph of S. 83, Bombay Land Revenue Code, is not directed to be made save upon these two conditions (among others): first, that there is no satisfactory evidence of the date of the commencement of the tenancy, and secondly, that this lack is due to the antiquity of the tenancy. The first condition is not excluded by showing that the tenancy had its origin at some date within a period of twenty years which cannot be more precisely ascertained. This is not satisfactory evidence of the date of its commencement Again, by a tenancy's antiquity the section does not intend any reference to remote ages in the past or to "time immemorial" in the sense of the English Law. It is to be given the practical meaning appropriate to its context and afforded by the limits within which living testimony to past facts is necessarily restricted. Where the lands are held under tenancies which are not proved to have been in existence before 1892 the presumption cannot properly be appied to them, notwithstanding that the evidence by no means excludes the possibility of an earlier origin. A.I.R. (Vol. 27) 1940 P.C. 192=7 B.R. 110=1940 O.L.R. 608 =45 C.W.N. 57=52 M.L.W. 966=43 Bom.L.R. 1=I.L.R. (1940) Kar. P. C. 380=(1941) 1 M. L.J. 427=I.L.R. (1941) Bom. 107=190 Ind. Cas. 342=73 C.L.J. 612 (P.C.). [Overruled A.I.R. (Vol. 9) 1922 Bom. 402=76 Ind. Cas. 71].

——S. 83—Evidence of commencement not forthcoming—Agreement or usage to limit duration—Necessity of proof—Presumption.

When there is no satisfactory evidence as to the time when a tenancy has commenced then the tenants are entitled to rely on the presumption under S. 83, Bombay Land Revenue Code. The fact that the lands are **watan** lands does not bar the operation of S. 83. A.I.R. (Vol. 22) 1935 Bom. 191=37 Bom.L.R. 209=156 Ind. Cas. 760.

——S. 83—Tenancy—Antiquity—Absence of proof—Presumption.

To claim the benefit of the presumption created by S. 83 of the Land Revenue Code, 1879, it is not sufficient that there should be no satisfactory evidence of the commencement of the tenancy, but the absence of that satisfactory evidence must be by reason of the antiquity of the tenancy. (1904) 6 Bom.L.R. 645.

——S. 83—Short interruption of tenancy, if inconsistent with permanent tenancy.

A short interruption of the tenancy is not necessarily inconsistent with permanent tenancy. A.I.R. (Vol. 22) 1935 Bom. 191=37 Bom.L.R. 209=156 Ind. Cas. 760.

——S. 83—Land belonging to temple.

Section 83, Bombay Land Revenue Code, makes no distinction between land belonging to a temple or a deity and land belonging to private owners. A presumption of permanent tenancy under S. 83 can arise even with regard to land belonging to a temple where no original grant by some manager has been proved. A.I.R. (Vol. 28) 1941 Bom. 29=42 Bom.L.R. 1031=I.L.R. (1941) Bom. 119=192 Ind. Cas. 581.

——S. 83—Watan lands—If excluded from operation of S. 83—(XVI of 1827), scope of.

The tenancy of the defendants in respect of certain **watan** lands commenced at some time between 1700 and 1850. In 1888, the defendant executed a rent-note in favour of the landlord **inamdar** by which he agreed to vacate the land at the end of any agricultural year when called upon by the **inamdar** to do so:

Held, (i) that under S. 83 of the Bombay Land Revenue Code, the onus is on the landlord to show the commencement of the tenancy, and on his failure to prove the commencement of the tenancy a presumption arises in the absence of any proof of intended duration by agreement or usage, that the tenancy is co-extensive with the duration of the tenure of the landlord or those who derive title under him;

(ii) having regard to the fact that S. 83 of the Bombay Land Revenue Code does not exclude **watan** land from its operation and also to the fact that the onus is on the landlord to show the commencement of the tenancy, it must be presumed that the tenancy of the several defendants was in existence even prior to 1827;

(iii) that it must be presumed in the absence of evidence to the contrary that the tenancy commenced at a time when the **watan** lands were alienable under the law prevailing before Regulation XVI of 1827 came into force, and that consequently the statutory presumption of permanent tenancy would arise under S. 83, Bombay Land Revenue Code. A.I.R. (Vol. 19) 1932 Bom. 577=34 Bom.L.R. 1131=140 Ind. Cas. 557.

——S. 83—Watan land in Satara District—Long possession before introduction of Regulation XVI of 1827.

Where the defendants were in occupation of certain **watan** lands in the Satara District as tenants for many years before 1863, when Regulation XVI of 1827 which rendered such lands inalienable was extended to that District:

Held, that there was a statutory presumption under S. 83, Bombay Land Revenue Code, that they were permanent tenants. A.I.R. (Vol. 18) 1931 Bom. 191=33 Bom.L.R. 210=131 Ind. Cas. 466.

——S. 83—Talukdari estate.

The presumption of a permanent tenancy under S. 83, Bombay Land Revenue Code, can be raised even in the case of **talukdari** estate. A.I.R. (Vol. 18) 1931 Bom. 167=32 Bom.L.R. 1679=129 Ind. Cas. 881.

10. Right of holder.

——S. 83—Alienated village—Right of holder.

A person holding lands in an alienated village as a permanent tenant under S. 83, Bombay Land Revenue Code, becomes, on the introduction of the survey settlement into the village, entitled to the rights and affected with the responsibilities of a holder in an unalienated village by virtue of S. 217, Bombay Land Revenue Code and he remains what he was, a tenant, and does not become an occupant and is liable, therefore, to pay enhanced rent to his landlord. Therefore, he is not entitled to the rights embodied in S. 68, Bombay Land Revenue Code, including the right to hold the land on payment of land revenue only. The introduction of the survey settlement does not confer on a tenant a right which belongs to an occupant in an unalienated village.

The contractual relations between the **inamdar** and the tenant are not in any way interfered with by the introduction of the survey settlement, and the **inamdar** is prevented from avoiding his contractual liability and demanding a higher rent according to the survey rates.

The holder of an alienated village or a group of alienated lands shall not receive relinquishments from his inferior holders as if he were a **mamlatdar** or **mahalkari** receiving relinquishments from occupants under S. 74 unless his village or lands have been surveyed and he has been specially authorized to receive such relinquishments. A.I.R. (Vol. 20) 1933 Bom. 168=35 Bom.L.R. 150=149 Ind. Cas. 293 (2).

11. Tenants of Watan Land.

——S. 83—Tenancy of watan land created after Regulation of 1827—Tenant, if can acquire permanent tenancy.

Section 83, Bombay Land Revenue Code, will not apply in the case of **watan** lands if the tenancy has been shown to have commenced after **watan** lands were rendered inalienable by the operation of Regulation XVI of 1827. Persons who, and whose predecessors-in-title have claimed to be and were, tenants of **watan** lands cannot acquire title to a permanent tenancy of the lands by adverse possession as against **watandars** from whom they hold. The principle is that the alienation of **watan** lands is prohibited by law and a permanent tenancy amounts to an alienation. This principle applies as much to the case where a permanent tenancy is claimed on the strength of S. 83 as in the case where it is claimed on the strength of adverse possession. In each case it is equally an alienation prohibited by the statute. A.I.R. (Vol. 25) 1938 Bom. 316=40 Bom. L.R. 439=I.L.R. (1938) Bom. 465=176 Ind. Cas. 398.

12. Tenants of Bhagdari Land.

——S. 83—Tenant of Bhagdari land—Position of—Permanent tenant, position of.

The position of a tenant of a Bhagdari land, who is presumed to be a permanent tenant under S. 83 of the Land Revenue Code, 1879, is not affected in any way by the prohibition contained in the Bhagdari Act against alienation. (1905) 9 Bom.L.R. 50=31 Bom. 183.

——S. 84—Annual tenancy—Determination—Notice, if necessary.

An annual tenancy to which the Land Revenue Code applies, cannot be determined without a notice in writing by the landlord or by the tenant. (1907) 9 Bom.L.R. 1332=32 B. 78.

——S. 84—Annual Tenancy—Tenant's right to Notice—Khoti Settlement Act (Bombay Act I of 1880), S. 8.

Under the provisions of S. 8 in the absence of any specific agreement between the tenant and the **Khot** the tenant must be held to be a yearly tenant liable to pay rent to the Khot at the rates prescribed and accordingly he is entitled to the notice prescribed in the case of yearly tenants under S. 84 of the Bombay Land Revenue Code. 45 Bom. 1001=23 Bom.L.R. 411=61 Ind. Cas. 594=A.I.R. 1921 Bom. 38 (D.B.).

——S. 84—Disclaimer of landlord's title—Notice to quit—Necessity for.

A disclaimer of the lessor's title by the annual tenant of a holding to which S. 84 applies, is, if made prior to suit, a sufficient cause of action to enable the lessor to recover possession without proof of notice to quit, even where the T. P. Act does not apply. 49 Bom. 842=90 Ind. Cas. 614=27 Bom. L.R. 1152=A.I.R. 1925 Bom. 524 (D.B.).

——S. 84—Disclaimer of landlord's title—Notice to quit—Necessity for.

Per **Fawcett, J.**—Even where there has been a disclaimer of the landlord's title, a notice to quit is necessary to determine an annual agricultural tenancy under Bombay Land Revenue Code, S. 84. 45 Bom. 303=59 Ind. Cas. 278=A.I.R. 1921 Bom. 395 (D.B.).

——S. 84—Service of Notice—Notice by registered post—Presumption.

A notice proved to have been properly directed and posted (especially if registered) is to be presumed to have reached the person to whom it is directed in the ordinary course of postal business, unless the contrary is proved. The same presumption would arise in the case of notice posted with reference to

S. 84, Bombay Land Revenue Code, as in the case of notice posted with reference to S. 106, T. P. Act. A.I.R. (Vol. 30) 1943 Bom. 348=45 Bom.L.R. 754=211 Ind. Cas. 12.

——S. 84—Service of Notice—Tenant refusing notice sent by registered post.

All that S. 84, Bombay Land Revenue Code, requires the landlord to do is to give to the tenant a notice in writing, and where the evidence shows that he did so, both by post and through the village officers, there is proper service of the notice though it is refused by the tenant. A.I.R. (Vol. 25) 1938 Bom. 492=40 Bom.L.R. 1015=178 Ind. Cas. 854.

——S. 84—Notice—Validity.

Where it was shown that the tenancy was to end in May and no subsequent contract to end it in October was proved,

Held, that notice dated 22nd June did not in law terminate the tenancy. 30 Bom.L.R. 1602=114 Ind. Cas. 272=A.I.R. 1929 Bom. 32 (D.B.).

——S. 84—Notice—Validity.

The words of the particular notice given by the plaintiff were:—"You are hereby given notice that within ten days from the date of receipt hereof you should pay over to us rent of the last year and you should give in writing a kabuliyat to pay rent for the lands you cultivate, failing which you should hand over to us the lands which you cultivate, and in default steps will be taken against you to take over possession from you or obtain any other remedy according to law."

Held, that it cannot be implied that the notice to quit was to quit at the termination of the cultivating season and that it did not comply with S. 84.

Held, further, that though the form of notice referred to in S. 84 was not imperative, it still indicates the class of notice which the Indian legislature had in mind, and that notice would be very much what would be required under English Law and the notice in the present case was not a valid notice to quit. 27 Bom.L.R. 267=91 Ind. Cas. 265=A.I.R. 1925 Bom. 294 (D.B.).

——Ss. 85, 86 and 87—Suit by superior holders to recover dues from inferior holders—Competency.

Section 85 restricts the liberty of the superior holders to receive payments directly from the inferior holders in an alienated village where a hereditary patel and a village accountant exist. But Ss. 86 and 87 do not prevent parties from having recourse to the Civil Courts. 42 Bom. 49=43 Ind. Cas. 995=19 Bom.L.R. 820.

——Ss. 86, 87—Rent-note by mortgagor in favour of mortgagee—Rent in arrears—Mortgagee applying under S. 86—Sale of mortgagor's equity of redemption ordered by Collector—Sale, if affected by O. 34, R. 14, Civil Procedure Code.

A mortgagee who lets the mortgagor into possession under a rent-note is a superior holder, and the mortgagor is an inferior holder, within the meaning of the Bombay Land Revenue Code. The mortgagee is therefore entitled to apply to the Collector for a sale of the property as a means of recovering the rent under the rent-note. If the Collector makes an order for sale of the property, that no doubt does deprive the mortgagor of his right to redeem, but that is done under the terms of the particular statute. O. 34, R. 14 does not apply in terms and the sale is binding on the mortgagor.

Where the revenue authorities choose to exercise the power which Ss. 86 and 87 give them, there is nothing in the Land Revenue Code which renders the exercise of those powers subject to the provisions of O. 34, R. 14, or of the principle underlying that rule. A.I.R. (Vol. 29) 1942 Bom. 278=44 Bom. L.R. 597=I.L.R. (1942) Bom. 608=202 Ind. Cas. 593.

——Ss. 86 and 87 (4)—Recovery of rent—Civil suit lies to recover money if levied in excess by superior holder but not to cancel or amend Collector' order.

The object of Ss. 86 and 87 of the Land Revenue Code is to enable superior holders to recover rent or land revenue expeditiously when their title is clear, by written application to the Collector, but the orders passed on such applications are neither decrees nor have they the force of a decree. Such an order is purely an executive order and under S. 87 (4) the party dissatisfied with it can file a suit in the Civil Court not to set aside his order but the superior holder may sue to recover such amount as may be still due to him, and the inferior holder to recover the amount 'levied' from him in excess of what was due. The latter's suit therefore becomes one 'for the recovery of moneys had and received' and his cause of action arises when a sum in excess of what he contends is due is levied from him. It is only at this stage permissible to him to have recourse to the Civil Courts not for cancelling or amending the order of the Revenue Officer but for the refund of the amount levied from him in excess of what was actually due. 17 S.L.R. 82=80 Ind. Cas. 955=A.I.R. 1924 Sind 87 (D.B.).

——Ss. 86, 87—Right of suit—Co-sharer not registered as managing inamdar, whether can bring suit directly against khatedar.

The object of the entry of the names of co-sharers in the village **khatavani** is to enable the village officers to distribute the land revenue among them. It is only the registered managing **inamdar** who has the sole right to manage the village, **i.e.,** to recover revenue, etc. If any of the village **khaterars** fail to pay the land revenue into the hands of the village officers, then it is for the managing **inamdars** to seek assistance from the **mamlatdars** under Ss. 86 and 87, Bombay Land Revenue Code, or to file a suit against them in a civil Court. But other co-sharers who are not recognized as managing **inamdars** cannot file a suit or seek assistance against the **khatedars** directly. Their remedy is to sue the managing **inamdars** for an account and to recover their share in the land revenue which may have been recovered or which may have been negligently omitted to be recovered by the managing **inamdars.** A.I.R. (Vol. 27) 1940 Bom. 12=41 Bom.L.R. 1174=185 Ind. Cas. 608.

——Ss. 86, 141 and 142—Removal of crop by lessee from guard of watchman—If offence.

The honest removal of movable property from the physical possession of another does not amount to an offence either under S. 378 or 424 of the Penal Code. But the removal of a crop by a lessee from the guard of a watchman appointed under Ss. 86 and 142 Bombay Land Revenue Code gives rise to

an offence punishable under S. 142. 12 Cr.L.J. 611=12 Ind. Cas. 987=5 S.L.R. 130.

——S. 103 (as amended in 1913)—Survey Settlement—Introduction—Validity—Conditions.

Two conditions are laid down under S. 103 to validate the introduction of the survey settlement, first, the sanction under S. 102, and second, the notice in accordance with the rules made by the Governor in Council. Where Government sanctioned the rates for the various classes of land recommended by the Commissioner on 5th July 1926 and the notification according to the rule was published by the Police Patil in the village on 26th July, 1926.

Held, the introduction of the survey settlement was in the year 1925-26 and the notification inviting objections was superfluous. 30 Bom.L.R. 1255=30 Cr. L.J. 353=114 Ind. Cas. 854=A.I.R. 1928 Bom. 497 (D.B.).

——S. 103—Survey Settlement—Introduction—Validity—Formalities required under Government Resolution not observed.

Government Resolution No. 6141 of 1903 and note No. 19 in Anderson's Manual at p. 8 to the effect that when Government raises the rates proposed by the Settlement Officer, a fresh notice must be issued and a fresh opportunity of objection must be afforded, are departmental orders and have not the force of a legislative enactment or statutory rules. If the introduction of the settlement is legal under S. 103, the mere fact that certain formalities, which are required to be observed under a Government resolution, are not so observed, does not nullify the validity of the introduction of the survey settlement under S. 103. 30 Cr.L.J. 353=114 Ind. Cas. 854=30 Bom.L.R. 1255 =A.I.R. 1928 Bom. 497 (D.B.).

——S. 109—"Oversight"—Wrong entry due to misunderstanding of order.

A wrong entry in the Revenue Register made on account of the misunderstanding of an order can be corrected, such a cause of error amounting to an 'oversight' within S. 109 of the Code. 36 Bom. 315 =14 Ind. Cas. 473=14 Bom.L.R. 124.

——Ss. 118 to 121—Applicability—Dispute as to boundary between State territory and British Indian territory.

Ss. 118 to 121 which deal with the settlement of boundary disputes cannot be applied to disputes involving a decision as to the boundary between State territory and British Indian territory. Those provisions apply only to disputes relating to boundaries wholly situated in British India. A.I.R. (Vol. 30) 1943 Bom. 427=45 Bom.L.R. 810=I.L.R. (1943) Bom. 534=213 Ind. Cas. 348.

——S. 119—Dispute—Meaning of—Dispute between Collector and owner—Jurisdiction of civil Court.

The word 'dispute' in the second part of the S. 119 means a dispute between two neighbouring owners and not a dispute between the Collector and the owner. The jurisdiction of the civil Court is not ousted in case of dispute between the Collector and the owner. It is only when a boundary dispute arises between the owners of adjoining lands and the Collector is called upon to determine the dispute, that his determination becomes final under S. 121, so as to oust the jurisdiction of the civil Court. 53 Bom. 766=31 Bom.L.R. 957=A.I.R. 1929 Bom. 391.

——S. 121—Boundary dispute—Neighbouring owners—Collector—Final determination.

S. 121 of the Bombay Land Revenue Code, 1870, must be read along with Ss. 119 and 120 of the Code. To attract the applicability of S. 121 there must be a boundary dispute between the owners of neighbouring numbers, and when there is such a dispute, the law gives a power to the Collector to make a final determination of the dispute with the help of the survey record and other evidence. (1900) 2 Bom.L.R. 1083 =25 Bom. 312.

——S. 121—Boundary dispute—Jurisdiction of Revenue Officer—Adverse possession of lands within boundary line—Jurisdiction of Civil Court.

Under S. 121, Bombay Land Revenue Code, the inquiry officer has jurisdiction to settle the boundary between the lands of adjoining owners, and the line drawn by him to indicate the boundary is determinative of the rights of land-holders on either side but he has no jurisdiction to decide the right which the owner of one number claims to exercise over the land blonging to holder of an adjoining number. He has no jurisdiction to decide whether or not a holder of one survey number has acquired by prescription title over the land of an adjoining survey number by adverse possession.

The Civil Court's jurisdiction is barred so far as determination of boundary line is concerned. The question of adverse possession arises only when a person who has no title encroaches on the land of another and the true owner does not bring a suit for possession in a Civil Court for more than twelve years. That question must be decided by the Civil Court, and is outside the jurisdiction of the Collector. A.I.R. (Vol. 20) 1933 Bom. 314=35 Bom.L.R. 583=145 Ind. Cas. 408.

——S. 121—Settlement by revenue authority subsequent to suit—Civil Court's jurisdiction to settle boundaries.

Where there has been no determination by the Collector prior to the suit the appointment of a Survey Officer as Commissioner by the Court and a subsequent determination by that Officer and by the Collector **pendente lite** cannot oust the jurisdiction of the Court to decide a dispute regarding the settlement of boundaries and its own independent consideration. 28 Bom.L.R. 1498=99 Ind. Cas. 823=A.I.R. 1927 Bom. 140 (D.B.).

——S. 121—Decision of Settlement Officer—Civil suit, if lies.

Decision of a Settlement Officer regarding the title to certain area is open to challenge in a subsequent civil suit where the dispute did not involve any question as to boundaries. 26 Bom.L.R. 1264=85 Ind. Cas. 204=A.I.R. 1925 Bom. 151 (D.B.).

——S. 121—Enquiry Officer's decision as to rights of one owner over the land of adjoining owner—Jurisdiction of Civil Court.

It would be the duty of the Enquiry Officer in making survey of land in a town to settle the boundary between the lands of adjoining house owners, which would ordinarily be by means of a line drawn on a plan, and that line, according to the provisions of S. 121 would be determinative of the rights of the landholders on either side of the boundary so fixed. But it would not be determinative of any rights which

the holder of one number should claim to exercise over the land belonging to the holder of the adjoining number. Enquiry Officer's decision on the point is without jurisdiction and it does not oust the jurisdiction of the Civil Court. 46 Bom. 390=23 Bom. L.R. 1209=64 Ind. Cas. 564=A.I.R. 1922 Bom. 293 (D.B.).

——S. 121—Settlement of boundary line by Collector—Civil Court's jurisdiction to try a suit for acquisition of portion by adverse possession.

When the settlement of a boundary is made by the Collector, it is no more than to establish where the boundary line lies and the owners of the respective survey numbers are entitled to their property according to the boundary lines fixed by the Collector, but it does not prevent one of the disputing parties filing a suit in a Civil Court on the ground that he had acquired a portion of the neighbour's survey number by adverse possession. 45 Bom. 67=59 Ind. Cas. 440=A.I.R. 1921 Bom. 63=22 Bom.L.R. 1111.

——S. 121—Fixing of boundaries by Collector—Right to sue in Civil Court to recover possession on ground of adverse possession.

The fixing of boundaries by the Collector, of survey-numbers under S. 121 of the Code merely shows what land belongs to the persons in whose names the survey numbers are registered. But it does not affect the right of any one of those persons to show in a Civil Court that he has acquired a title by adverse possession against a registered occupant. 59 Ind. Cas. 437=22 Bom.L.R. 1114 (foot note) (D.B.).

——S. 132—Survey fee—Penalty.

The survey fee is payable by the holder of a property in the city in which survey is introduced within six months from the date of the public notice given by the Collector, and if default is committed by such holder that is to say the survey-fees are not paid within six months from the date of the public notice, then the Collector is authorised to levy a penalty not exceeding Re. 1 for each **sanad.** The payment of the survey-fees and the grant of a **sanad** are **prima facie** to be concurrent conditions. On the payment by the holder of the survey-fees he is entitled to a proper **sanad.** If the **sanad** was not in the form of Sch. H annexed to the Bombay Land Revenue Code, he is not liable to pay survey-fee, nor is he liable to any penalty unless a public notice is given as provided by S. 132 of the Code. A.I.R. (Vol. 26) 1939 Bom. 234=41 Bom.L.R. 348=182 Ind. Cas. 987.

——S. 132—Burden of proof.

The burden to prove that the requirements of law were complied with is clearly on the Government. It is for them to prove that every condition precedent to the levy of the survey-fee and penalty was fully complied with. A.I.R. (Vol. 26) 1939 Bom. 234=41 Bom.L.R. 348=182 Ind. Cas. 987.

——S. 132—Correction of defects.

The addition of the correction slips which were not authenticated would not cure the defect in the **sanads.** The **sanads** are valuable documents and evidence of title and it is at least conceivable that some years hence a question as to the authenticity of the correction slips may arise. There is no reason why the title of these people should be left in this state of obscurity. A.I.R. (Vol. 26) 1939 Bom. 234=41 Bom.L.R. 348=182 Ind. Cas. 987.

——S. 133—Sanad is a document of title—Sanad holder need not prove possession within 12 years of suit.

An entry in the Collector's books that a certain person is the occupant and liable to pay revenue, does not afford much evidence of title. But when a **sanad** is given under S. 133, after due inquiry, in the form in Sch. H, the **sanad** itself is a document of title. There is a presumption in favour of the **sanad** holders that they were in possession, considering the nature of the land under the title given to them by the **sanad,** and it would lie upon anybody disputing their title to show that he had acquired a title by adverse possession. It is not incumbent upon the **sanad** holders once they prove the **sanad,** to show that they were in possession within twelve years of the date of their suit. 27 Bom.L.R. 948=89 Ind. Cas. 894=A.I.R. 1925 Bom. 477 (D.B.).

——S. 133—Sanad whether document of title—Person claiming possession against sanad-holder—If entitled to sue for possession—Limitation Act, Art. 14.

A **sanad** granted under S. 133, Bombay Land Revenue Code, is not strictly speaking in the nature of a document of title between litigating parties. It is a document affecting rights only between the Crown and the person to whom it is granted. The object of an inquiry under the Land Revenue Code is to determine the right of Government to revenue, and for that purpose to survey the land and to determine who is the holder and, therefore, liable to assessment. But an order made under the Land Revenue Code is not intended to operate, and does not operate, finally as a determination of title between subjects of Government. No doubt an order made under the Land Revenue Code is **prima facie** evidence of title, but it is not conclusive and may be overridden as other evidence may be overridden. It is not essential for a person claiming possession against other person who has been granted a **sanad** under S. 133, to obtain an order setting aside that **sanad** before he can obtain an order for recovery of possession from a Civil Court and Art. 14, Limitation Act, would not be any bar to the suit. A.I.R. (Vol. 26) 1939 Bom. 425=41 Bom.L.R. 939=I.L.R. (1939) Bom. 564=186 Ind. Cas. 164.

——Ss. 135-A to 135-L—Preparation of record-of-rights can be made in alienated villages without Inamdar's consent.

There is no exclusion of alienated villages from the application of the Ch. X-A or any of the section therein and, therefore, the Government are entitled to maintain the record-of-rights in alienated villages without the consent of the inamdar, and the provisions of Ch. 8 do not apply in any way to the maintenance of the record-of-rights. 28 Bom.L.R. 559=96 Ind. Cas. 303=A.I.R. 1926 Bom. 373 (D.B.).

——S. 135-H—Omission of filing certified copy or record-of-rights in trial Court can be cured by appellate Court.

Where the plaintiff omits to annex a certified copy of the entry in the Record-of-Rights to his plaint in a suit relating to land according to S. 135-H, and the Court passes a decree, the appellate Court should not reject the plaint merely on the ground of the omission; but should give an opportunity to the plaintiff to produce the entry within a fixed time.

45 Bom. 1339=23 Bom.L.R. 595=64 Ind. Cas. 681 =A.I.R. 1921 Bom. 64 (D.B.).

——S. 135-H—Extracts from records-of-rights not produced in the First Court—Plea abandoned in appeal—Non-production is no ground for review.

Where a certified copy of an extract from the record-of-rights relevant to the case was not produced at the trial as required under in S. 135-H of Bombay Land Revenue Code and the point was abandoned in appeal.

Held, the defect should be cured by allowing the plaintiff to put in the certified copies of the extract from the record-of-rights and that the previous non-production is no sufficient ground for reviewing the decision. The High Court has the power as the Original Court has to allow a reasonable time for the production of the extracts if it has not been produced and what is or is not reasonable time is a matter entirely within the discretion of the High Court. Though the consequence of the omission on the part of the plaintiff to put in the necessary certified copy is as let down in Sub-S. (2) of S. 135-H, it cannot be said that the consequence must necessarily be given effect to at any stage of the litigation. 46 Bom. 79=23 Bom.L.R. 745= 64 Ind. Cas. 156=A.I.R. 1922 Bom. 114.

——S. 135-J—Entries in record of rights—Presumption.

Under S. 135 (j) of the Bom. Land Rev. Code, entries in the record of rights shall be presumed to be correct and in the absence of any other evidence, a Court is obliged to be guided by any facts so entered in the record of rights. 27 Ind. Cas. 478= 17 Bom.L.R. 49.

——S. 135-J—Record-of-rights raises no presumption as to ownership.

All that the section lays down is that an entry in the record-of-rights shall be presumed to be true until the contrary is proved, but it does not raise any presumption as to the ownership of the land. 17 S.L.R. 206=76 Ind. Cas. 408=A.I.R. 1924 Sind 17 (D.B.).

——S. 135-J—Entries in record-of-rights are not conclusive but are evidence of fact—Evidence Act, S. 35.

Entries in record-of-rights are not in any way conclusive, but they are evidence of the facts recorded therein and as such are relevant under Evidence Act, S. 35. 57 I.A. 61=123 Ind. Cas. 166=32 Bom. L.R. 368=A.I.R. 1930 P.C. 93=58 M.L.J. 322 (P.C.).

——S. 135-J—Record of Rights—Entries in—Presumption—If weakened by mere fact that landlord was minor when record was made.

It is most important that proper effect should be given to a statutory presumption regarding truthfulness of an entry in the Record of Rights such as is provided for in S. 135-J, Bombay Land Revenue Code. The presumption is not materially weakened by the mere consideration that when the record was made the landlord was a minor and that his property was being managed by the Collector on his behalf. A.I.R. (Vol. 27) 1940 P.C. 192=7 B.R. 110= 1940 O.L.R. 608=45 C.W.N. 57=52 L.W. 966= 43 Bom.L.R. 1=I.L.R. (1940) Kar. P.C. 380= (1941) 1 M.L.J. 427=I.L.R. (1941) Bom. 107= 190 Ind. Cas. 342 (P.C.).

——S. 135-J—Presumption, how rebutted.

Under S. 135-J, Bombay Land Revenue Code an entry in the Record of Rights must be presumed to be true until the contrary is proved since the document to which the Revenue Officer refers as justifying this entry is proved to be a document which in law cannot affect the property and cannot be received in evidence. A.I.R. (Vol. 21) 1934 Bom. 194=36 Bom.L.R. 359=58 Bom. 419=150 Ind. Cas. 555.

——S. 137—Applicability—Immovable and Moveable property of defaulter.

S. 137, Bombay Land Revenue Code refers to immovable property and not to movable property of defaulter. The section although couched in general terms, is controlled by the provisions of the other sections in the same chapter. A.I.R. (Vol. 22) 1935 Sind. 232=151 Ind. Cas. 972.

——S. 137—Distraint and sale of movable property—Prior charge, if affected.

There is no ground for holding that the distraint and sale by the Revenue Authorities of movable property belonging to the defaulter affects the claim of a person having a prior charge over such property. A.I.R. (Vol. 22) 1935 Sind 232=159 Ind. Cas. 972.

——S. 137—Right of forfeiture and sale — If extends to lands regarding which no land revenue is due.

S. 137, Bombay Land Revenue Code, does not in any way extend the right of forfeiture and sale to lands of the defaulter regarding which land revenue is not due. A.I.R. (Vol. 19) 1932 Sind 121=26 S.L.R. 390=139 Ind. Cas. 47.

——S. 137—Pledgor indebted to Government owing to unpaid instalments of foreign liquor license—Stock of wine already pledged—Government has priority over pledgee's rights—Bombay Abkari Act, S. 34.

S was indebted to the Government on account of unpaid instalments of a foreign liquor license. But the stock of wines was already pledged to **P** Bank.

Held, that Government had priority over **P** Bank as pledgee, S. 137 was applicable to this case although the priority of Government as stated in the section is over any claim against any land or holder thereof. A.I.R. 1930 Sind 185.

——S. 137 and 151—Scope of.

Ss. 137 and 151 do not exhaust all the rights of priority. A.I.R. (Vol. 30) 1943 Sind. 30=I.L.R. 1942 Kar. 473=206 Ind. Cas. 116.

——Ss. 137 and 151—Scope and Effect.

S. 137 of the Code which confers priority upon the Crown for land revenue over other debts of the person liable for land revenue cannot be said to provide a method or be a rule for the recovery of arrears of land revenue within S. 26 of the Code. But if the provisions giving priority to Government can be said to constitute a rule for the recovery of land revenue, then one must read Ss. 137 and 151 together, and reading these two sections together, the rule giving priority is limited in this way, that it confers priority only in respect of arrears for the current year and not for arrears of past years. Consequently, where the public moneys due by an officer in default are not in respect of the current year, then they cannot get priority over other debts of the officer. The provisions of Ss. 137 and 151 giving priority in respect of Government claims for

land revenue relate to matters of title, while S. 26 makes applicable to public moneys due by a revenue officer only the machinery for the recovery of arrears of land revenue. A.I.R. (Vol. 22) 1935 Bom. 25 =36 Bom.L.R. 1103=59 Bom. 154=154 Ind. Cas. 519.

——Ss. 137, 151—Priority to Crown is restricted to demands for current years.

The priority given to the claim of Government by S. 137, Bombay Land Revenue Code, is very much more extensive than that given by the common law, since it creates on behalf of the Government a right to priority over all debts of every kind whether secured or unsecured. But S. 151 which confines the preference given or declared by S. 137 to demands for the current year, does in terms restrict what was the common law prerogative of the Crown. A.I.R. (Vol. 23) 1936 Bom. 213=38 Bom.L.R. 267=163 Ind. Cas. 357.

——S. 140—Detention of crops alone authorised.

S. 140 and other sections in the same group of the Code do not authorise the detention of anything but the crop of the land, or the seizure of the crop or any other goods after removal from the land. 37 Bom. 542=20 Ind. Cas. 526=15 Bom.L.R. 665.

——S. 142—Fine imposed under Code—Conviction.

A conviction under the Penal Code stands on a different footing from a fine imposed under the Land Revenue Code. A.I.R. (Vol. 20) 1933 Sind 276= 1933 Cr. Cas. 950=35 Cr.L.J. 26=146 Ind. Cas. 407.

——Ss. 144 and 160—Lands rent free—Attachment for non-payment of assessment—Proportional assessment from holders of rent-free lands—Recovery of.

Plaintiff held rent-free land from the Talukdar of a village, who paid the Government assessment for village in a fixed lump sum. The village was attached by the Government, for non-payment of the Jama by the taluqdar under S. 144 of the Code (1879). **Held,** that the Government had the right to levy the assessment on the lands of the plaintiff in the village; for, the grant of lands rent-free by the Talukdar did not affect the right of the Government to assess the lands. 43 Bom. 6=47 Ind. Cas. 117=20 Bom. L.R. 748.

——S. 148—Penalty.

Section 148 has no bearing whatever upon the question of a fine leviable under the provisions of S. 66. 29 Bom.L.R. 1350=106 Ind. Cas. 239=A. I. R. 1927 Bom. 601 (D.B.).

——Ss. 150 (c), 137, 187—Forfeiture of liquor license—Stock in warehouse—Right of Government to prior charge.

Where as a result of the inability of the liquor licensee firm to pay the instalments due and subsequent instalment on the licence granted for sale of liquor on its premises, the licence is forfeited, the stocks of liquor in the bonded ware-house belonging to the firm come within the scope of S. 150 (*c*), Bombay Land Revenue Code, and they are movables in respect of which Government has no prior charge and the Government cannot claim preference over secured creditors in whose favour the stock has been mortgaged. A.I.R. (Vol. 26) 1939 Sind 46=I. L.R. (1939) Kar. 393=179 Ind. Cas. 863.

——Ss. 150 and 154—Seizure of account books —Illegal.

An attachment of account books by an officer acting under Ss. 150 and 154 of the Bombay Land Revenue Code is illegal and the officer is liable to damages for doing so. 34 Ind. Cas. 198=18 Bom. L. R. 323.

——S. 151—Effect on S. 137.

Section 151 confines the preference given by S. 137 to demands for the current year and therefore restricts what was the common law prerogative of the Crown. A.I.R. (Vol. 23) 1936 Bom. 213=38 Bom. L. R. 267=163 Ind. Cas. 357.

——S. 153-J—Record of rights—Entry in—Presumption—Retrospective effect.

Section 153-J of the Bombay Land Revenue Code is not retrospective with respective to the entries for the purpose of determining the rights of the parties which were till after 1913 innocuous. 54 Ind. Cas. 667=22 Bom.L.R. 33.

——S. 154—Distraint of chattels—How effected.

A seizure for distraint of chattels may be either actual or constructive. The goods need not necessarily be touched or handled. 43 Bom. 550=21 Bom.L.R. 251=50 Ind. Cas. 999=20 Cr.L.J. 391.

——S. 154—Distraint—Cash and currency notes.

Under S. 154 cash and particularly currency notes may be distrained and sold. 83 Ind. Cas 899= 26 Cr.L.J. 195=16 S.L.R. 161=A.I.R. 1921 Sind 51 (D.B.).

——S. 154—Distraint—No warrant is necessary —Income-tax Act, S. 36.

Under the Income-tax Act no warrant is necessary at all for effecting the distraint of the defaulters' moveable property under S. 36 as arrears of income tax are to be recovered as arrears of land revenue and under S. 154 of the Land Revenue Code no warrant is necessary to enable a Tapedar or a Munshi who can read and write and who is acting under the orders of the Collector or the Mahalkari to distrain. Although the Income-tax Act provides a form of warrant, that is for the convenience and instructions for the Revenue Officers and there is nothing in the Income-tax Act which renders the form obligatory. Of course if a warrant is issued it is expedient to issue it in the form as appended to the Act. But this does not take away from the Collector the right to collect the income-tax without warrant. 16 S.L.R. 161=26 Cr.L.J. 195=83 Ind. Cas. 899=A.I.R. 1921 Sind 51 (D.B.).

——S. 154 — Defaulter's property — Onus of proof.

Section 154 will apply only if the distrained property in the moveable property of the defaulter and the onus is on the officer who effects a seizure to prove it. 37 Bom. 542=20 Ind. Cas. 526=15 Bom. L.R. 665.

——S. 154 — Collector acting under — If a Court —Limitation Act, S. 29.

Collector acting under S. 154 is not acting as a Court within the meaning of Art. 29 Limitation Act which only applies to seizure under a process issued by a Court. A.I.R. (Vol. 29) 1942 Bom. 300=44 Bom. L.R. 668=203 Ind. Cas. 611.

——S. 154—Power of Mamlatdar.

The section provides that the Collector may cause the defaulter's movable property to be distrained and sold. But the *mamlatdar* cannot destrain the same unless the authority has been delegated to him by the Collector. A.I.R. (Vol. 22) 1935 Bom. 233=37 Bom. L.R. 362=1935 Cr. Cas. 658 =36 Cr.L.J. 1263=59 Bom. 545=157 Ind. Cas. 859.

——S. 155—Sale of land of Abkari contractor in default—Reserve price not fixed—Purchase by Government for nominal sum in the absence of bidders—Validity of sale.

The plaintiff, an Abkari contractor, having failed to pay the Government dues, the Government gave notice to the defaulter on 5-8-1938, that they would recover the amount by an auction-sale of his lands under S. 153, Bombbay Land Revenue Code, on a nominal bid and that he should be present and arrange to bid at the auction-sale or to bring the money, *i.e.*, the amount due by him. A proclamation was issued on the same date stating that if the amount due to the Government was not obtained, all the property of the defaulter as a last resort shall be sold on a nominal bid of Re. 1. The auction-sale was held on 21—9—38, and as no bidders were forthcoming the lands were purchased by the Government for Re. 1. There was no reserve price fixed. The plaintiff sued for a declaration that the sale was a nullity.

Held, that the sale was a valid sale, though the procedure followed by Government was inequitable. A.I.R. 1950 Bom. 195=52 Bom. L.R. 263 (F. B.).

——S. 157—Arrest—Person arrested under order of Manager, Encumbered Estates—Insolvency Court cannot grant him interim order of protection—Sind Encumbered Estates Act, S. 10—Provincial Insolvency Act, S. 23.

Where a person is arrested under the orders of the Manager, Encumbered Estates, under the provisions of S. 10 of the Sind Encumbered Estates Act read with S. 157 of the Bombay Land Revenue Code, the Insolvency Court has no jurisdiction to grant him an interim order of protection as he is not under arrest in execution of a decree of any Court for payment of money. 28 Cr.L.J. 194=7 A. I. Cr. R. 345=99 Ind. Cas. 930=A.I.R. 1927 Sind 123 (D.B.).

——S. 160—Attachment—Khot's rights.

The temporary attachment of the village would not affect the other rights which the Khot might have independently of the right of management. Such right of management would, of course, cover acts such as letting out waste of uncultivated lands in the village, which he can do in his capacity as a Khot. 50 Bom. 306=28 Bom.L.R. 750= 98 Ind. Cas. 794=A.I.R. 1926 Bom. 410 (D.B.).

——S. 160—Alienation of Khoti-nisbat lands without Khot's consent while under attachment by Government—Khot can sue for possession.

A Watandar Khot, whose lands are under attachment by Government under S. 160, can sue for possession of the Khoti-nisbat lands which are forfeited to him on account of their alienation by the tenant without his consent. 50 Bom. 306=98 Ind. Cas. 794=28 Bom.L.R. 750=A.I.R. 1926 Bom. 410 (D.B.).

——Ss. 165, 167 and 181—Powers of Government to forfeit or foreclose defaulter's property—Sale of property to agent of Government for one rupee—Legality.

The Bombay Land Revenue Code contains no power by which the Government can either forfeit or foreclose a defaulter's property. Where the property of a defaulter is put up for sale under a proclamation reserving no right in Government to bid at it, and there being no bidders, the property is sold to an agent of the Government for the nominal value of rupee one, it must be held that the sale is a nullity and of no effect and does not give to the purchaser or to the Government (the principal) any right, estate and interest in the property sold. I.L.R. (1947) Bom. 75=49 Bom.L.R. 209=A.I.R. 1947 Bom. 403 (D.B.).

——S. 166—Notice containing wrong description of years—Validity.

Where notice was given but there was a mistake of detail as to the years for which the land revenue was in arrears.

Held, that it was a misdescription which in no way misled the plaintiff as he was aware that the rent was due from the date of the Collector's order in 1904. Nor this misdescription in any way involve a violation of the terms of S. 166 for the terms of that section do not make it obligatory upon the Collector to specify for what years the land revenue was in arrears. 25 Bom.L.R. 785=77-Ind. Cas. 146=A.I.R. 1923 Bom. 478 (D.B.).

——Ss 178 and 179—Discretion of Collector—Award under Bombay Co-operative Societies Act—Sale by Collector in execution of—Payment of amount after sale—Collector, if bound to set aside sale.

Under S. 179, Bombay Land Revenue Code, the Collector is given a discretion to refuse to confirm the sale, but if he does not exercise that discretion in favour of the debtor, his jurisdiction to confirm the sale is not lost. Even if the full amount is paid after the sale, the Collector is not bound to set aside the sale. Subsequent payment does not oust the jurisdiction of the Collector to confirm the sale. Even if the sale is not for arrears of Government Revenue as such, but for demand recoverable as arrears of revenue; *e.g.*, an award under the Bombay Co-operative Societies Act, the sale can be set aside only under S. 178. The debtor has no right to get the sale set aside by paying off the debt after the sale. 48 Bom.L.R. 610=A.I.R. 1947 Bom. 144=231 Ind. Cas. 131.

——Ss. 183, 184—Debt recoverable as arrear of land revenue—Crown's general right to priority.

It is clear, reading together Ss. 183 and 184 that payments to creditors may be made only from the surplus, if any, which remains after payments of amounts recoverable as arrears of land revenue have been made. In other words, these two sections confer a right of priority of payment of such amounts, whether those amounts represent Crown debts or other debts to which the benefit of recovery

under the provisions of Chap. XI have been given by statute, over judgment-debts. Hence all rights of priority are not exhausted by Ss. 137 and 151. A. I.R. (Vol. 30) 1943 Sind 30=I.L.R. (1942) Kar. 473=206 Ind. Cas. 116.

——S. 189—Applicability to summary and formal enquiry.

Section 189, Bombay Land Revenue Code would apply as much to an enquiry relating to the Record of Rights under Chapter 10-A as to a summary or formal enquiry within the provisions of S. 196 of the Code. A.I.R. (Vol. 27) 1940 Sind 100=41 Cr.L.J. 861=I.L.R. (1940) Kar. 435=190 Ind. Cas. 222.

——S. 197—Rectification—Absence of judicial inquiry.

A Revenue Officer, in correcting an entry so as to bring it in accordance with an order passed after hearing both the parties, can dispense with any judicial or quasi-judicial enquiry. 36 Bom. 315=14 Ind. Cas. 473=14 Bom.L.R. 124.

——Ss. 202, 68—Incorrect order of Collector resuming land—Validity.

An order of the Collector resuming a land under the Land Revenue Code may be an incorrect order liable to be set aside on appeal to the Collector. But it cannot be said that because it was incorrect, it was also invalid or illegal in law. A.I.R. (Vol. 29) 1942 Bom. 161=44 Bom.L.R. 295=I.L.R. (1942) Bom. 357=201 Ind. Cas. 420.

——Ss. 202, 79-A, 61, 66—Government and private landlord—Difference in powers of eviction.

The Government possesses larger powers than those of a private landlord. A private landlord has no power to summarily evict a tenant who is holding over. The Government have, however, the power to do so under various sections of the Land Revenue Code, such as Ss. 61, 66 and 79-A, and at the termination of the period for which a particular land might have been granted by the Government to any person; it is open to the Government to give him a notice to vacate it on the expiry of the period and if the holder still remains in possession after its expiry, he must be deemed to be holding the land in wrongful possession. That being so, the Government would be entitled to give a notice as required by S. 202, Land Revenue Code and to adopt the remedy of summary eviction under S. 61. A.I.R. (Vol. 29) 1942 Bom. 161=44 Bom.L.R. 295=I.L.R. (1942) Bom. 357=201 Ind. Cas. 420.

——Ss. 202, 79-A, 61, 66—Mere possession for long period—Government, if deprived of ownership and right of resumption.

If a person claims to remain in possession merely on the strength of his long possession in the past, though without any rightful title in him. Government have the right to assert their ownership which had not been divested by the Act of the person and the Government have a right of resumption so long as the person has not proved any acquisition of right in him by adverse possession against the Government. A.I.R. (Vol. 29) 1942 Bom. 161=44 Bom.L.R. 295=I.L.R. (1942) Bom. 357=201 Ind. Cas. 420.

——Ss. 202, 203—Person, if can be evicted by notice.

Government can pass an order for eviction of a person who is wrongfully in possession of land by giving him the notice as prescribed in S. 202, Bombay Land Revenue Code. That notice in fact amounts to a decision or order of the Government to evict the person who is in such wrongful possession. There is no provision in the Land Revenue Code that before the notice under S. 202 is given, the Government should actually pass an order and communicate that order to the party concerned before giving such notice. It is open to the Government to pass an order in the form of a notice, and as provided by this section to serve it on the party concerned and if that is done, the Government must be deemed to have complied with the provisions of the Land Revenue Code. Hence, if no appeal is filed, a suit for a declaration would be barred under S. 11, Bombay Revenue Jurisdiction Act. A.I.R. (Vol. 29) 1942 Bom. 161=44 Bom.L.R. 295=I.L.R. (1942) Bom. 357=201 Ind. Cas. 420.

——S. 202—Patelkiship—Exemption from payment of revenue granted to plaintiff's family for their lands, in return for Patelki service—Patelkiship ceasing—Possession of plaintiff's family does not become wrongful.

Lands which had been continued to plaintiff's ancestors as *Pasaita* lands by the Paishwa Government were eventually settled by the British Government as Patelki land and the land revenue was alienated to plaintiff's family under the class of alienations to village servants.

Held, that when the plaintiff's family ceased to hold the Patelkship, their claim to exemption from paying the land revenue to the lands came to an end. But their right to possession was not at an end, and they cannot be said to be in wrongful possession of the land so that an order under S. 202 of the Bombay Land Revenue Code could be made. 45 Bom. 894=23 Bom.L.R. 259=61 Ind. Cas. 267=A.I.R. 1921 Bom. 167 (D.B.).

——Ss. 203, 204—"Decision or order"—Notice of demand to pay assessment by Mamlatdar—If amounts to.

Notice of demand to pay assessment by the Mamlatdar cannot be treated as an order or decision within the meaning of Ss. 203 and 204. 24 Bom. L.R. 402=46 Bom. 811=67 Ind. Cas. 842=A.I.R. 1922 Bom. 274 (D.B.).

——S. 203—Right of appeal—Person not party to enquiry.

Under S. 203 of the Bombay Land Revenue Code, the right of appeal against an executive order of a Revenue Officer is vested in every person aggrieved by the order, irrespective of his being a a party to the enquiry wherein the order was passed. 45 Ind. Cas. 335=11 S. L. R. 124.

——S. 203—Right of suit—Order of Commissioner invalid.

Grant of land free from payment of occupancy price—Order of Commissioner directing payment of price—Non-payment—Forfeiture—No appeal—Suit for possession by grantee:

Held, that where the order of the Commissioner

and the subsequent order of forfeiture are invalid, the party aggrieved is not bound to appeal therefrom but is entitled to wait until he is dispossessed and institute a suit for recovery of possession. A.I.R. (Vol. 18) 1931 Bom. 238=33 Bom.L.R. 213=55 Bom. 165=132 Ind. Cas. 497.

——S. 211—Revisional powers of the Commissioner indicated. A.I.R. (Vol. 31) 1944 Bom. 244=46 Bom.L.R. 413=219 Ind. Cas. 50.

——Ss. 211, 65, 67—Sanad issued in Form M—Government whether can modify terms.

Section 211 does not apply to a *sanad* issued in Form M under S. 65, embodying terms and conditions agree to between the Government and the occupants. It is not, therefore, competent to the Government to modify the terms of a *sanad* if it embodies certain terms and conditions which are agreed to between the Government and the occupant before the expiry of the period specified in the *sanad*. Whether the agreement was under S. 67 or under S. 65, would make no difference as the principle is the same. A.I.R. (Vol. 29) 1942 Bom. 256=44 Bom.L.R. 405=202 Ind. Cas. 301.

——S. 211, R. 89 (old R. 19)—Grant of land by Collector for war services—Sanction of Commissioner—Commissioner's power to modify Collector's order—Failure to implement Commissioner's order—Eviction — Subsequent suit for possession.

Certain lands, which were Government lands within the meaning of S. 37, Bombay Land Revenue Code, were granted to *A* for having rendered certain war services subject to the conditions, (a) that the lands should be held free from payment of occupancy price, and (b) that the lands should be free of assessment till they were brought under cultivation. *A* duly entered into possession. Subsequently, the Commissioner for the District made an order directing that the proper occupancy price according to the full market-value of the lands on the date when the grant was originally made, should be recovered from *A* and the ordinary land revenue should be recovered from the year of grant. *A* paid the assessments but not the occupancy price and consequently an order was made forfeiting *A's* occupancy holding and he was evicted Government resuming possession. Subsequently the Collector made a fresh grant of the lands to *B*. *A* instituted a suit for recovery of possession of the lands in suit from the Government:

Held, (i) that R. 39 (old R. 19), Bombay Land Revenue Rules required as a condition of the lawfulness of a grant by the Collector, that the previous sanction of the Commissioner should be obtained provided that the assessment on the land in the grant exceeded one hundred rupees (as was the case here), and in the absence of such sanction the grant made by the Collector was an invalid grant;

(*ii*) that it could not be said that the grant was partially good and partially bad *i. e.*, bad as regards freedom from assessment but good as regards occupancy price and that the grant must be treated as a whole and if a part failed the whole was bad:

(*iii*) that the Commissioner's order modifying the grant fell within the powers conferred upon him by S. 211, Bombay Land Revenue Code, and *A* who failed to implement the Commissioner's order and who was subsequently evicted from the lands had no right to claim the possession which his plaint postulated. A.I.R. (Vol. 21) 1934 P.C. 9=66 M. L. J. 164=36 Bom.L.R. 242=38 C.W.N. 505=1934 A.L.J. 162=1934 A.L.R. 244=58 Bom. 111=61 I. A. 70=59 C.L.J. 98=147 Ind. Cas. 321 (P.C.).

——S. 211—Scope—Grant of land free from payment of occupany price—Order of Commissioner directing payment of price—Non-payment—Forfeiture.

Held, that the order was in no sense a modification of the Collector's order but was a new order imposing upon the plaintiff terms which he was never given an opportunity to refuse. Such an order was entirely outside the scope of S. 62 and was invalid and the order of forfeiture equally so. (Per Baker, J. Contra): The order was a modification of the Collector's order and was quite within the powers vested in the Commissioner under S. 211. A.I.R. (Vol. 18) 1931 Bom. 238=55 Bom. 165=33 Bom.L.R. 213=132 Ind. Cas. 497.

——S. 211—Power of Commissioner—Time limit.

Under S. 211, there is no time limit within which the Commissioner must modify annul or reverse the order of the Collector. A.I.R. (Vol. 18) 1931 Bom. 238=33 Bom.L.R. 213=55 Bom. 165=132 Ind. Cas. 497.

——S. 211—Revision—Powers of Collector.

Certain "Sheri" lands were let by Government to to *D* on a lease for thirty years expiring in 1913. In accordance with a resolution passed by the Government in October 1912, a District Deputy Collector made enquiries and directed that the lands should be given to *D* on full occupancy tenure on condition of his paying twenty times the annual assessment of the land as occupancy price and that the tenants were to be given the rights of permanent tenancy by the lessee, on the basis of a rent payable by them amounting to three times the assessment of the land they held. After three years the Collector reversed to District Deputy Collector's order and directed that the tenants should be given occupancy rights on the usual terms. *D* in 1918 filed a suit for declaration that the order of the Collector, dated 12th June 1917, being illegal and unlawful, was void and that he be put into actual possession of the land with a declaration that the right of permanent tenancy of the tenants had been extinguished by their acting contrary to *D's* right.

Held: that on the merits the Collector's order was correct and that of the District Deputy Collector was wrong and that the Collector was acting under the revisional authority conferred by S. 211 and since no period of limitation is laid down for the making of an order under the same section, he had a right to interfere.

Held also: that the agreement by the tenants to pay rent to the plaintiff at the rate of three times the assessment could not be acted upon as the lease had expired and in the absence of a final order he had no right or title left in the land. 31 Bom.L.R. 1235=54 Bom. 19=A.I.R. 1930 Bom. 95 (D.B.).

——S. 213—Printed Maps—Admissibility.

Printed maps showing different wards of a city are admissible, not only under S. 83, but also under Ss. 36 and 87, Evidence Act as well as S. 213, Land Revenue Code. A.I.R. (Vol. 29) 1942 Bom. 161=44 Bom.L.R. 295=I.L.R. (1942) Bom. 357=201 Ind. Cas. 420.

——S. 214—R. 3 (b)—Trees, cutting of—Assessed occupied survey number—Offence.

A person cutting a tree from an assessed occupied survey number cannot be punished under rule 3 (b) under S. 214 of the Bombay Land Revenue Code, 1879. (1902) 4 Bom.L.R. 625.

——S. 214—R. 63—Future growth—Right to.

The rule means that existing reserved trees belong to Government, and future growth belongs to the occupier. 45 Bom. 110=58 Ind. Cas. 60=22 Bom.L.R. 884=21 Cr.L.J. 716=A.I.R. 1921 Bom. 435.

——S. 214, R. 68—Power of Collector.

R. 68 empowers a Collector to restore forfeited occupancy to the original occupant, before it has been disposed of by grant to a new occupant. 36 Bom. 91=12 Ind. Cas. 545=13 Bom.L.R. 968.

——S. 214—R. 93—Government's right is confined to reserved trees at date of settlement.

R. 93 framed under S. 214 of the Bombay Land Revenue Code indicates that the right of the Government is confined to reserved trees existing at the date of the settlement and that all subsequent growths belong to the occupant. 45 Bom. 110=A.I.R. 1921 Bom. 435=58 Ind. Cas. 60=22 Bom.L.R. 884=21 Cr.L.J. 716 (D.B.).

——S. 216—(As amended by Act XV of 1929)—Effect of—Jama—Rate of.

The survey settlements introduced in *sharakati inam* villages without the *inamdars'* consent have become valid after the amendment (Sub-S. 4) and are binding on the *inamdars*. They are, therefore, entitled to recover the *jama* from the *khots* at the survey rates and not at the *mamul rates*. A.I.R. (Vol. 32) 1945 Bom. 364=47 Bom.L.R. 376=I.L.R. (1945) Bom. 477.

——S. 216—Construction—Stare decisis.

Per *Macleod, C. J.*—"Whether S. 216 of the Bombay Land Revenue Code was rightly construed in 18 Bom. 525 is doubtful but where in a previous suit that decision was adopted, the question will be concluded by *stare decisis* in a subsequent suit between the same parties. But the Court would not be bound to follow the principle of *stare decisis* if the question arose again between different parties."

Per *Shah, J.*—No clear case for a reconsideration of the decision in 18 Bom. 525 was made out.

Per *Fawcett, J.*—The meaning of S. 216 (*b*) of the Bombay Land Revenue Code is not so clear as to preclude the application of the principle of *stare decisis* in the case. 45 Bom. 1260=23 Bom.L.R. 749=64 Ind. Cas. 162=A.I.R. 1921 Bom. 87 (F.B.).

——S. 216—Scope.

In unalienated villages there may be many cases of grants of certain fields by Government to be held on certain terms either absolutely free from payment of revenue or merely on payment of a portion of the revenue. Such lands were not intended to be brought within the purview of S. 216.

Fawcett, J.—The ordinary case to which Cl. (*b*) of S. 216 is applicable is one where there is an Inamdar who has been granted a definite share of particular village and who is accordingly entitled to a corresponding proportion of the revenue of the village, Government having the remainder. 45 Bom. 994=23 Bom.L.R. 395=61 Ind. Cas. 577=A.I.R. 1921 Bom. 78 (D.B.).

——S. 213 (as amended in 1913)—Retrospective effect.

Section 217, Bombay Land Revenue Code as amended in 1913, is retrospective in its effect. A.I.R. (Vol. 25) 1938 Bom. 372=40 Bom.L.R. 461=177 Ind. Cas. 593.

——S. 217—Alienated village—Whole property in the soil granted to Inamdar.

The village would be an alienated village within the meaning of S. 217 notwithstanding that the whole property in the soil was granted by the Government to the Inamdar. Where the plaintiff was a Kadim Inamdar of certain lands in a village and was a grantee of the soil and not merely of the royal share of the revenue and Survey Settlement was introduced into that village with his consent; the defendant as a permanent tenant of the lands used to pay as rent the amount of assessment fixed for the land, in a suit by plaintiff to enhance the rent.

Held that the defendant was entitled to hold the lands on payment only of the amount of assessment and that the plaintiff is not entitled to enhance the rent. 45 Bom. 61=63 Ind. Cas. 671=A.I.R. 1921 Bom. 23 (D.B.).

——S. 217—Alienated village—Survey settlement—Expiration of period of settlement—Right of inamdar to enhanced assessment—Summary Settlement Act (I of 1865).

Survey Settlement was extended to an alienated village on the application of the inamdar under Bombay Act. (I of 1865). The period of the settlement expired in 1888 and the inamdar recovered from 1895 higher assessment than that allowed under the Survey Settlements. The Commissioner objected in 1910 and inamdar sued to establish his right to charge higher assessment. *Held*, that the inamdar had no such right since S. 217 applied, when a Survey Settlement had been introduced into an alienated village with the consent of the alienee under Bombay Act (I of 1865) and when the period of the Settlement had expired after the Code came into force. 44 Bom. 110=58 Ind. Cas. 198=22 Bom.L.R. 247.

——S. 217—Applicability—Watan land governed by S. 5, Watan Act (III of 1874).

Section 217 Bombay Land Revenue Code of 1879, does not apply in the case of *watan* lands governed by S. 5 Watan Act (III of 1874). Where a *watandar* alienates his land by giving a permanent lease in contravention of S. 5, Watan Act, the tenant under such a lease does not acquire any occupancy rights under S. 217, Land Revenue Code, by reason of the introduction of the survey settle-

ments in 1898, into the village. A.I.R. (Vol. 25) 1938 Bom. 372=40 Bom.L.R. 461=177 Ind. Cas. 593.

——S. 217—Applicability—Section does not affect contractual rights arising before the Survey.

With regard to an unalienated village it would be competent to Government to enter into contractual relationship with tenants or occupants. They might acquire fixity of tenure and fixity of rent. Where the village had been alienated and the alienee had entered into a contract with a person granting not only fixity of tenure but also fixity of rent, there is nothing in the provisions of S. 217 which would enable the alienees of the village to avoid their contractual liability; therefore, they could not enforce against their permanent tenants the payment of the assessment levied on occupancy land. 89 Ind. Cas. 65=27 Bom.L.R. 645=A.I.R. 1925 Bom. 435 (D.B.).

——S. 217—Applicability—Holders in alienated village.

S. 217 invites the application of the provisions applicable to the occupants in an unalienated village to the holders in an alienated village "so far as may be." The special right which a holder claims in virtue of any grant or contract between him and the Inamdar is not in the slightest degree effected by S. 217 or Ss. 64 and 66 which are rendered applicable to the holders in an alienated village. 76 Ind. Cas. 897=24 Bom.L.R. 1040=A.I.R. 1923 Bom. 79 (D.B.).

——S. 217—Applicability—Rights as between Jagirdar and Zamindar to cut and sell timber.

The application of S. 217 depends on the question whether the person who claims under it is a holder of land, as defined by S. 3 (11) of the Land Revenue Code *i.e.*, whether he is the person in whom the right to hold the land is vested. 36 Bom. 315 (Foll). S. 217 also refers mainly to the right of the occupant or holder to cultivate land included in his holding and even if it could be said to cover the case of the right of an occupant to cut trees under S. 40 of the Land Revenue Code yet this only deals with the rights of occupants as against Government. It could not affect the rights of third parties. 79 Ind. Cas. 819=16 S.L.R. 87=A.I.R. 1921 Sind 109.

——S. 217—'Holder'—Meaning of.

There is no accurate definition of holders of land in alienated villages. The meaning varies according to the context; in S. 217 the word "holder" refers to inferior holders, in S. 88 it refers to superior holders and in S. 76 it refers to superior holders. A.I.R. (Vol. 20) 1933 Bom. 168=35 Bom.L.R. 150=149 Ind. Cas. 293 (2).

——Ss. 217, 68, 83, 74—Sharkati Inam village—Mafi isatva kowl—Rights of holders in alienated villages.

An *inamdar* passed a *kowl* to two persons under an agreement known as "*mafi istava kowl*" under which the land was given for some years as exempt from payment of any revenue or rent *mafi*. After the years of exemption the land was given at any annually increasing assessment or rent, *i. e.*, *istava*. And after the period of *istava*, the tenants were to pay every year *mudas* .7½ and 4 maunds of paddy, each *muda* being of 25 maunds:

Held, that the effect of such an agreement was to create a permanent tenancy after the period of *mafi* and *istava* on payment of the sum named in the document as the full assessment. A.I.R. (Vol. 20) 1933 Bom. 168=35 Bom.L.R. 150=149 Ind. Cas. 293 (2).

——S. 217—Rights of khots—Effect on.

Though a *khot* may not be in actual possession of his holding, he is a "holder of land" as defined in S. 3 (11) of the Code and therefore, under S. 217, he gets all advantages and disadvantages resulting from the survey settlement validly introduced in his village under S. 216. Thus, under S. 33, Khoti Settlement Act, he will be thereafter entitled to recover from his *jharekaries* only the survey assessments as fixed at the survey settlement and similarly under S. 24 of the Act, he will be liable to pay *jama* to Government or to *inamdar* only at survey rates and not at *mamul* rates. This position is accepted by Government, and the *inamdars* who merely step into the shoes of Government cannot deprive the *khots* of their rights. A.I.R. (Vol. 32) 1945 Bom. 364=47 Bom.L.R. 376=I.L.R. (1945) Bom. 477.

——S. 217—Kadim inamdar—Survey settlement—Right to enhance rent.

An inamdar, to whom the Government has granted all its rights in the soil in a village as well as its other pecuniary interests is entitled even after a Survey Settlement had been introduced to raise the rents of the permanent tenants even when such permanent tenancies had commenced before the alienation. 42 Bom. 112=48 Ind. Cas. 738=20 Bom.L.R. 16.

——S. 217—Kadim inam village—Survey Settlement with consent of inamdar—Right to enhance rent.

Where with the consent of the *kadim inamdar* who is the grantee of the soil of a village, survey settlement is introduced, in the village, the *mirasidar* (or permanent tenant) can by virtue of S. 217 of the Code hold the lands on payment only of the assessment and the *kadimdar* cannot get that rent enhanced. 45 Bom. 61=63 Ind. Cas. 671=21 Bom. L. R. 665.

——Sch. H—Duty of Government.

It is the duty of Government having regard to the form of Sch. H Bombay Land Revenue Code, to issue *sanads* describing not merely the plot or building in question but also describing the property fully by its boundaries and its full dimensions, and it is difficult to see how Government can levy an extra charge of four annas without carrying out a duty which the law casts upon them. A.I R. (Vol. 26) 1939 Bom. 234 (236, 237)=41 Bom.L.R. 348=182 Ind. Cas. 987.

BOMBAY LAND REVENUE REGULATION (XVII OF 1827).

——Applicability—City of Bombay—Prescriptive right to exemption from land revenue—Bombay Regulation XIX of 1827.

Bombay Regulation, XVII of 1827 does not apply to the property situated in the City of Bombay. But Regulation XIX of 1827, which does apply, contains no provision for recognising a prescriptive right to exemption from land revenue such as is contained in Chapter IX, S. 36 of the Regulation XVII, and while adopting some of the provisions of Regulation XVII, has not adopted Chapter IX, S. 36 The assessee whose property situated in Bombay City, is assessed under Bombay City Land Revenue Act, therefore cannot rely on any statutory prescriptive title to exemption. A.I.R. (Vol. 24) 1937 P.C. 271=46 L.W. 227=41 C.W.N. 1194=3 B. R. 759=1937 O.L.R. 413=(1937) 2 M.L.J. 362 =39 Bom.L.R. 1046=1937 M.W.N. 939=1937 A.L.R. 467=I.L.R. (1937) Bom. 756=66 C.L. J. 43=64 I.A. 334=169 Ind. Cas. 778 (P.C.).

——Whether applies to lands in Bombay City.

Bombay Regulation XVII of 1827, is limited in its application to the *mofussil* districts of the Bombay Presidency and does not apply to lands in the town and island of Bombay which are governed by Regulation XIX of 1827. A.I.R. (Vol. 21) 1934 Bom. 162=36 Bom.L.R. 297=154 Ind. Cas. 861.

BOMBAY LAND REVENUE RULES (1921).

——R. 43—Building sites—Adverse possession—Essentials.

Building sites can be granted on restricted tenure, *i.e.* on an inalienable tenure.

The possession in order to be adverse must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. The classical rule is that the possession should be *nec vi nec clam nec precario*. It is not necessary that the adverse possession should be shown to have been brought to the knowledge of the owner. It is sufficient that the possession should be overt and without any attempt at concealment, so that the person against whom time is running ought, if he exercise due vigilance, to be aware of what is happening. A.I.R. (Vol. 219) 1942 Bom. 317=44 Bom. L.R. 718=203 Ind. Cas. 443.

BOMBAY LOCAL BOARDS ACT (VI OF 1923).

——Suit to set aside election of President—Appeal filed not impleading Board—Second appeal impleading Board—If competent.

A suit to set aside the election of a President of a Local Board instituted against the Board and the person elected as President and others was decreed by the trial Court and an injunction was passed against the Board from functioning on the basis of the election. The President appealed without impleading the Board. The Board submitted to the decree and held a new election in which the appellant also stood as a candidate. He filed a second appeal impleading the Board:

Held, that the second appeal against the Board was incompetent. A.I.R. (Vol. 17) 1930 Bom. 554 =32 Bom.L.R. 1252=54 Bom. 902=130 Ind. Cas. 385.

——S. 4 (3)—"Municipal district"—If includes—"Notified area" under Bombay Municipal Act (III of 1901)—Local Board, if can levy octroi on goods imported in notified area within district.

There is a distinction between a municipal district and a notified area which is made clearly in the Municipal Act. Notified areas are only constituted in cases when it is not expedient to constitute the area a municipal district, and under S. 189, Bombay District Municipal Act, a notified area may be deemed to be a municipal district, although it is not one, but only for the purposes of any section of the Municipal Act, which may have been applied to it. When however, the Bombay Local Boards Act, in S. 4 (3) refers to a municipal district, it does not include a notified area. The District Local Board can, therefore, if duly empowered by its rules and by-laws levy octroi on goods imported into a notified area within the limit of its district. A.I.R. (Vol. 26) 1939 Bom. 97=41 Bom.L.R. 93=40 Cr.L.J. 522=180 Ind. Cas. 940.

——Ss. 13 and 14—Person's status as voter—If can be challenged after final publication of voters' list.

Under S. 13, Bombay, Local Boards Act, it is the decision of the Collector that is made final, and not necessarily the name of a person appearing in the list. Even in S. 14 it is nowhere provided that the list is to be treated as conclusive in the sense that once the name of any person is put on the list, it cannot be challenged at the date of the election or at the date of the scrutiny of the nomination.

It is, therefore, open to any person ao challenge the status of other person as a voter as well as his right to stand as a candidate even though his name was on the voters' list as the list as finally published is not conclusive and does not bar the right of any person to challenge the names appearing therein. A.I.R. (Vol. 25) 1938 Bom. 377=40 Bom.L.R. 525=I.L.R. (1938) Bom. 515=177 Ind. Cas. 302.

——S. 15 (2), (a) (ii) and (4) (c)—Words 'in his own right'—Member of joint Hindu family other than manager in whose name some family property is recorded in revenue records, if qualified voter.

The words "in his own right" in S. 15 (2) (a) (ii), Bombay Local Boards Act mean that he must own the land by himself, in other words, he must be the exclusive owner of the land. The provisions of Sub-S. (2) (a) (ii) are to be read with the provisions of Sub-S. (4) (c), and both of them read together mean that in the case of a joint Hindu family no other person except the manager has the right to vote except in a case where one of the coparceners is holding some separate or self-acquired property in his own right, and in such a caes, he is entitled to be a voter if he fulfils the other requisites of the section. Therefore, a member of a joint Hindu family not being a manager is not a duly qualified voter although some family property is in his name in the revenue records, and is not

entitled to have his name on the voter's list. A.I.R. (Vol. 25) 1938 Bom. 377=40 Bom.L.R. 525=I.L.R. (1938) Bom. 515=177 Ind. Cas. 302.

——S. 19—'District Judge'—Judge of Chief Court of Sind.

A voter filed an application against the result of an election of the Local Board of Karachi District in the Chief Court of Sind under S. 19, Bombay Local Boards Act, 1923:

Held, that a Judge of the Chief Court of Sind is not a District Judge under S. 19 though for the purpose of ordinary civil jurisdiction, the Chief Court of Sind may be called a District Court. In any case, he is certainly not "the District Judge" within the meaning of S. 19 (1).

Held, also that the application should lie to the District Judge, Hyderabad, as the Revenue District of Karachi fell within his civil jurisdiction. A.I.R. (Vol. 33) 1946 Sind 86=I.L.R. (1946) Kar. 164=221 Ind. Cas. 646.

——S. 19 (1)—Candidate not voter under—If entitled to question election.

In the case of a disputed election where the local body itself is a creature of statute and the rights of voters and candidates and members are conferred by the provisions of the statutes or rules made thereunder, canons of justice and equity cannot operate. If a right is not conferred by the provisions of the statute or statutory rules, that right does not exist. Such rights are not conferred by canons of equity and justice. It is, therefore, wrong to hold that a candidate to an election, not a duly qualified voter under the provisions of S. 19 (1), Bombay Local Boards Act, has an inherent right to question the validity of an election in which he is closely interested. A.I.R. (Vol. 30) 1943 Sind 233=I.L.R. (1943) Kar. 345=210 Ind. Cas. 19.

——S. 19—Decision of Assistant Judge—Revision.

The question whether the applicant was a duly qualified voter is clearly within the competence of the Judge as a *persona designata* to decide. His decision is therefore; not that of a Court; and S. 115, Civil P.C., can have no application. On the other hand, if the Judge, as a *persona designata*, exceeds the powers conferred on him by S. 19, Bombay Local Boards Act, or acts outside it, he ceases to act as a *persona designata* and becomes a Court subordinate to the High Court under S. 115 Civil P. Code. A.I.R. (Vol. 30) 1943 Sind 233=I.L.R. (1943) Kar. 345=210 Ind. Cas. 19.

——S. 19 (3) (b)—Judge holding inquiry under—Whether persona designata—Revision.

A Judge who holds an inquiry under S. 19 (3) (*b*), Bombay Local Boards Act, is a *persona designata* appointed by Government for a particular purpose and authorised for that purpose to exercise the powers of a Civil Court. When *quasi*-judicial functions are delegated to an officer ordinarily subject to the revisional powers of a High Court, he is not with reference to the delegated power, necessarily subject to appellate or revisional authority. A.I.R. (Vol. 21) 1934 Sind 110=151 Ind. Cas. 89.

——Ss. 26 and 27—Meetings convened under—S. 35, if applies.

Meeting convened under S. 26 or S. 27, Bombay Local Boards Act, are not necessarily special meetings within the meaning of S. 35 of the Act. Therefore, those provisions of S. 35 which are inappropriate to such meetings would not apply to them on the principle *generalia specialibus non derogant*. But provisions which are appropriate, for instance, the provision about notice may reasonably be held to apply. A.I.R. (Vol. 17) 1930 Bom. 554=32 Bom.L.R. 1252=54 Bom. 902=130 Ind. Cas. 385.

——S. 27—Illegal election of Board—Temporary injunction should be granted.

Where it is clear that if the new Board is not legally constituted its acts will be *ultra vires* and that if it be restrained from functioning the duties of the Board cannot be carried on at all, the Chairman and Vice-Chairman of the old Board should continue to perform their routine duties until the new Board begins to function, and in such a case the balance of convenience is on the side of a person who has brought a suit for a declaration that the election to the Board is illegal and for an injunction to prevent the Board functioning and a temporary injunction should, therefore, be granted. A.I.R. 1929 Sind 224 (D.B.).

——Ss. 27, 35 and 36—Special meeting—Meeting for election of President—Notice allowing 12 days addressed to President—Validity.

Per *Broomfield, J.*—The meeting for the election of a new President referred to in S. 27, is a special meeting, governed by the provisions of S. 35 with respect to notice.

The word "shall" as used in S. 35 of the Act seems properly to apply to a directory rather than a mandatory provision.

Per *Broomfield, J.*—"Some of the language of S. 35 is certainly not appropriate to a meeting summoned under S. 27 or S. 26. But because S. 35 (1) (*a*) enables the President to call a special meeting whenever be thinks fit, and requires him to do so in case of a written request it does not necessarily follow that meetings summoned under S. 27 or S. 26 are not special meetings also, within the meaning of S. 35. Those provisions of S. 35 which are inappropriate to such meetings would not apply to them on the principle *generalia specialibus non derogant*. But provisions which are appropriate, for instance the provision about notice may reasonably be held to apply. * * * * On the whole the provisions of S. 35 (2) (*b*) requiring fourteen clear days notice for special meetings apply as much to meetings summoned under S. 27 or S. 26 as to any other special meetings".

The validity of a notice which allowed only twelve days instead of fourteen clear days, is a mere irregularity in a matter of internal management of the board and where no prejudice was shown to have been thereby caused to any party, the Court should nor interfere.

Where a notice is addressed to the President of the Local Board and it was intended not to be a notice to the President individually, but to the Board as represented by the President and the Board has in

fact received the said notice, the misdirection is immaterial. 32 Bom.L.R. 1252=A.I.R. 1930 Bom. 554.

——S. 35—Applicability.

Bombay Local Boards Act makes no distinction between a meeting held by the Board for electing a President or any other meeting held to transact any other business. Section 35 would equally apply to both. Nor do the regulations make any such distinction. A.I.R. (Vol. 24) 1937 Bom. 104=38 Bom. L.R. 1331=I.L.R. (1937) Bom. 225=168 Ind. Cas. 20.

——S. 35—Meeting properly convened—President cannot dissolve.

If in fact a meeting is properly convened, the president has no power to dissolve it. 29 Bom.L. R. 1325=106 Ind. Cas. 265=A.I.R. 1927 Bom. 603.

——S. 35—President illegally dissolving a meeting —Members present can go on with new chairman.

It is the duty of a chairman to preserve order, conduct proceedings regularly, and take care that the sense of the meeting is properly ascertained with regard to any question before it; but he has no power to stop or adjourn a meeting at his own will, and if he purports to do so, it is competent for the meeting to resolve to go on with the business for which it has been convened, and to appoint another chairman for that object. 29 Bom.L.R. 1325=106 Ind. Cas. 265=A.I.R. 1927 Bom. 603 (D.B.).

——S. 35 (1), (2) (k)—Regulations by Taluka Board—Regulation No. 35, whether ultra vires.

Sub-clause (*k*) of S. 35 (2) clearly confers upon the member the right to have the names of persons who voted for or against a resolution disclosed. The Board can make regulations "consistent with not only the Act and rules or orders made by Government in this behalf" but also "subject to the provisions of the following sub-sections" which would include sub-cl. (*k*). Regulation No. 35 framed by the Local Board enacts for the election of the President or Vice-President by means of ballot, which prevents the members voting for or against from being entered in the minute book as provided in S. 35 (2) (*k*) even if desired by a member. This regulation being inconsistent with S. 35 (2) (*k*) is *ultra vires* the Act.. A.I.R. (Vol. 24) 1937 Bom. 104 (106 107) =I.L.R. (1937) Bom. 225=38 Bom.L.R. 1331= 168 Ind. Cas. 20.

——S. 35 (2) (b)—Notice—Service by post is sufficient.

It is sufficient for the Board to circulate notices of a meeting by post, and it is not essential that a notice should be served personally on every member. 29 Bom.L.R. 1325=106 Ind. Cas. 265=A.I. R. 1927 Bom. 603 (D.B.).

——Ss. 35 (2) (b) and (4), and 26 and 27—Notice allowing less than prescribed period—Validity.

The provisions of S. 35 (2) (*b*) requiring fourteen clear days' notice for special meetings apply as much to meetings summoned under S. 27 or S. 26 as to any other special meetings. But under S. 35 (4) of the Act any failure to comply with the prescribed formalities in respect of notice will not affect the validity of the proceedings if the said failure can fairly be described as a mere informality, meaning thereby anything which, though contrary to the Act or rules, has not in fact occasioned any injustice or prejudice.

Where all the members except two received formal notice, which allowed them very little less than the full prescribed period, the two who did not receive such formal notice nevertheless had notice and raised no objection, and no one had been prejudiced in the least:

Held, that the case was one of a mere informality within the meaning of S. 35 (4) which did not invalidate the meeting. A.I.R. (Vol. 17) 1930 Bom. 554=32 Bom.L.R. 1252=54 Bom. 902=130 Ind. Cas. 385.

——Ss. 48 and 50—Roads repaired by Board—If vest in it.

As to the roads which were only repaired by the Local Board, there is nothing in the Bombay Local Boards Act to vest the ownership of them in the Local Board. Such power to repair a private road might be implied in S. 50, Cl. (n) of that Act. A.I.R. (Vol. 28) 1941 Bom. 161=I.L.R. (1941) Bom. 226 =43 Bom.L.R. 167=195 Ind. Cas. 640.

——S. 48—Lands belonging to Government before Act of 1869, could not vest in Local Board by virtue of Acts of 1869, 1884 and 1923—Building and Land given to Local Funds Committee before 1869 for management did not become property of Local Board.

The pre-statutory Local Funds Committees had no power to acquire lands. That power was not conferred on any local funds committee till 1869 when the Act of that year conferred it on the new statutory committees. It necessarily follows that the lands which originally belonged to the Government could not have become vested in the pre-statutory committee. Nor could they have become vested *vi statuti* in the statutory body created in 1869, 1884 and 1923, for the statute merely conferred upon the new committee a power to acquire lands and transferred no property to it. Nor can it be said that such land should be deemed to have been transferred by the Government before 1868 to the individual members of the pre-statutory committee as trustees for that committee, and that the lands had vested by force of S. 41 of the Act of 1884 in the District Local Board or the Taluka Local Board because the individual members of the local funds committee before 1869 could not be trustees for a body which was then non-existent.

Hence where a dharmashala and lands were given to a local Fund Committee before 1869 for management, and the Local Board claimed them as their property by virtue of the Acts of 1869, 1884 and 1923.

Held, that the building and the land were possessed by the Pre-statutory committee for the limited purposes of management and maintenance, and the character of that possession had remained unchanged and there was no statutory necessity and no necessity in the nature of things for any transfer of the property either of the building of of the land, for, the whole duties of the committees and Board suc-

cessively charged with the administration of the local funds for the purpose of maintaining dharmashalas could be adequately discharged without their acquiring any lands or buildings in property. A.I.R. (Vol. 25) 1938 P.C. 87=1938 O.L.R. 83=1938 A.L.R. 115=1938 O.W.N. 90=32 S.L.R. 340=4 B.R. 295=172 Ind. Cas. 981 (P.C.).

——S. 63—Applicability—Service of notice of meetings.

The service of notice for meeting of the Board being specially provided for under S. 35 (2) (b). S. 63 does not apply. 29 Bom.L.R. 1325=106 Ind. Cas. 265=A.I.R. 1927 Bom. 603 (D.B.).

——(As amended by Act XXIII of 1938), Ss. 72, 104—Suit for recovery of octroi—If maintainable.

Before the 1938 amendments became operative, no written demands or notices or bills which could ratify Sub-S. (2) of S. 104 were served, and hence the amount of octroi could not be recovered by distress under the subsequent sections of Chapter VIII, because there was no demand and no delivery of a bill under S. 104. Accordingly, the alternative procedure of suing the importer in a civil Court by virtue of S. 72 for recovery of octroi duty by obtaining a personal decree against him could not arise unless the machinery of S. 104 with regard to the giving of a bill, which is mandatory had been complied with. Even after the amendments of 1938, the alternative procedure laid down in S. 72 of suing the importer in a civil Court has no application to the case of an octroi. A.I.R. (Vol. 33) 1946 Bom. 117=47 Bom. L.R. 898.

——S. 102—Rules not covered by Act—Legal effect.

Section 102, Bombay Local Boards Act, does not say that the rules when sanctioned under S. 101 are to have the force of law, and it cannot have been the intention of the Legislature to give legal effect in this way to rules not covered by the provisions of the Act. A.I.R. (Vol. 23) 1936 Bom. 376=38 Bom.L.R. 790=1936 Cr. Cas. 921=38 Cr. L. J. 37=165 Ind. Cas. 637.

——S. 117 (3)—"Toll"—If includes "toll for public ferries" also.

The expression "any toll" in S. 117 (3) is not restricted merely to the "tolls" for roads and bridges but includes "toll for the public ferries" also. A.I.R. 1930 Sind 176.

——S. 133 (e) and Bombay Primary Education Act (1923), S. 27—Rules under—Functioning of Board.

The rules under the two Acts are so interwoven that it is difficult to separate them. If the Board is to function in any way at all, it must necessarily function under the rules made under the District Local Board Act, because it is obviously of no advantage to a person to be appointed to be a member of the School Board if he cannot perform any function as such member and if no money is allotted to the Board. A.I.R. 1930 Sind 246 (D.B.).

——S. 136—(Amendment by Act XIII of 1935) —If retrospective.

The general rule of construction is *nova constitutio futuris forman imponere debt, non proeterities.* But this rule does not apply to statutes relating to procedure and the law of limitation is a law of procedure. Such a law has retrospective effect unless there is a distinct provision to the contrary. Section 136 therefore has retrospective effect. A.I.R. (Vol. 24) 1937 Sind 129=32 Sind. L.R. 567=38 Cr.L.J. 723=169 Ind. Cas. 274 (F.B.).

——S. 136—Notice addressed to President—Validity.

Notice under S. 136, Bombay Local Boards Act, must be addressed to the Board simpliciter or to the Board through its President. But where a notice is addressed to the President of a District Board and the Board has in fact received it and treated it as a notice to itself, the suit cannot be held to be incompetent for non-compliance with the requirements of S. 136. A.I.R. (Vol. 17) 1930 Bom. 554=32 Bom. L. R. 1252=54 Bom. 902=130 Ind. Cas. 385.

——S. 136—Ferry toll—Recovery of arrears by Board—Filing of suit against it—Notice, if necessary—Act on the part of Local Board purporting to recover arrears of such toll.

The Legislative Council can authorize a local authority to impose a ferry toll under S. 117; and when such toll is imposed, any sum due to the Local Board from a lessee can be recovered as an arrear of land revenue. Hence any act purporting to recover such sum would be an act purporting to have been done in pursuance of the Act, and so a month's notice would be necessary before filing a suit. A.I.R. 1930 Sind 176.

——S. 136—Scope—Relief sought being that person should become member of School Board and perform functions of that Board.

Where the relief sought is that the particular person should become a member of the School Board and he should perform the functions of that Board and deal with money allotted to that Board, the case falls under S. 136 and notice is necessary. A.I.R. 1930 Sind 246 (D.B.).

——S. 136—Scope—Suit based on breach of contract—Limitation.

A suit for damages against a District Local Board based upon a breach of contract does not fall within the ambit of S. 136 of the Bombay Local Boards Act of 1923, and consequently the rule of limitation prescribed in that section does not govern such a suit. A.I.R. (Vol. 20) 1933 Bom. 164=35 Bom. L. R. 55=57 Bom. 67=142 Ind. Cas. 625.

——S. 136—Scope.

The protection clauses which are so commonly inserted in Acts conferring powers on public authorities or their officers are never intended to protect a dishonest rascal from the consequences of his rascality. They are only intended to protect people who from excess of zeal or negligence or other cause exceed their powers. A.I.R. (Vol. 27) 1940 Bom. 35=41 Bom.L.R. 1227=41 Cr.L.J. 256=I.L.R. (1940) Bom. 29=186 Ind. Cas. 133.

——S. 136—Charge under S. 409, Penal Code—If protected.

A person accused of offences under S. 409, I. P. C., is not protected by S. 136, Bombay Local Boards Act as the act done by him cannot be said to have been done in his official capacity. A.I.R.

(Vol. 29) 1942 Sind 45=I.L.R. (1941) Kar. 557 =43 Cr.L.J. 514=199 Ind. Cas. 198.

——S. 136—Offence under S. 420—If protected.

An officer of the Board delivering a false bill deliberately is not acting or purporting to act in pursuance of the Act. If, therefore, he is prosecuted under S. 420, Penal Code, he is not protected by S. 136, Local Boards Act. A.I.R. (Vol. 27) 1940 Bom. 35=41 Bom.L.R. 1227=41 Cr.L.J. 256=I. L. R. (1940) Bom. 29=186 Ind. Cas 133.

——S. 136—Fraudulent and dishonest representation by means of Bill and measurement sheet by sub-overseer and chairman—If protected.

A sub-overseer of the Local Board was, according to the rules of his employment, bound to supervise the works, to take measurements and to enter them in a measurement book maintained for the purpose and also to report to the District Local Board through the work committee, the progress of the works in his charge and their measurements for the purpose of making payment to the contractor. The sub-overseer was obliged to sign the bill in authentication of the measurements given in it and the charges made. The duties of the Chairman of the works committee were to take measurements and, in the absence of a completion certificate, countersign the bills of the contractor and see that the payment is made without undue delay. Accused No. 1 who was an overseer of a Local Board and accused No. 2 who was an elected member of that Board and Chairman of the works committee were prosecuted for offences of cheating and falsification of accounts on the allegation that they had dishonestly taken, false measurements of certain work of repairs on the road under their charge and fraudulently obtained from the President of the District Local Board certain amount by tendering a bill with the measurement sheet containing the false measurements attached to it duly signed by accused No. 1 and countersigned by accused No. 2:

Held, that the preferring of the bill was an official act and it did not make any difference that in the discharge of the official duty a fraudulent statement was inserted in the bill. Therefore, the act complained of, namely; the fraudulent and dishonest representation by means of the bill and the measurement sheet, was protected under S. 136, Bombay Local Boards Act. Accused No. 2, as the member was also entitled to protection under S. 197. A. I. R. (Vol. 28) 1941 Bom. 85=42 Bom.L.R. 1193 =42 Cr.L.J. 441=I.L.R. (1941) Bom. 191=193 Ind. Cas. 229.

——Ss. 136 (2), 119 and 50 (as amended by Act XIII of 1935)—Sub-overseer preparing false bills of work done and overcharging Board in course of duty—Prosecution after lapse of three months—If barred.

An overseer under a Local Board had as part of his duty, taking of measurements of repairs and other works done and preparing bills in respect thereof. He prepared false bills and overcharged the Board;

Held, that the facts which were alleged to constitute a criminal offence on the part of the accused were acts done by him, or, in any case; purported to have been done by him, in pursuance of the Local Boards Act, and whether they were *bona fide* or otherwise, he had no concern with these inaccuracies and intricacies. The plain language of S. 136 (2), Bombay Local Boards Act, afforded him immunity from prosecution after a lapse of three months from the date of the act complained of. A.I.R. (Vol. 25) 1938 Sind 116=39 Cr.L.J. 668 =32 S. L. R. 622=175 Ind. Cas. 834.

——S. 136 (2) (as amended by Act XIII of 1935) —Applicability—President and servant of Taluka Board charged with offences under S. 120-B, and S. 477-A, read with S. 109, Penal Code (Act XLV of 1860).

Per *Davis, J. C. and Mehta, A.J.C.* (*Rupchand; A.J.C.*, contra).—Section 136 (2), Bombay Local Boards Act as amended by Act XIII of 1935, applies only to acts done by protected persons in discharge of their public duties towards the public.

The president of a Taluka Local Board in his capacity as President, and a servant of the Board were charged with conspiring with a contractor to commit criminal breach of trust (S. 120-B with S. 406 or S. 409, Penal Code) and with the commission of criminal breach of trust and falsification of accounts [S. 406 or S. 409 and S. 477-A read with S. 109 (abetment) of the Penal Code]. Notice required by Sub-S. (2) of S. 136, Bombay Local Boards Act, was not served on the accused and the proceedings were commenced more than three months of the acts complained of:

Held, that the provisions of S. 136 (2), Bombay Local Boards Act, VI of 1923, as amended by Act XIII of 1935, applied to the offences with which the applicants were charged:

Held, also that the argument that Sub-S. (2) of S. 136, Bombay Local Boards Act, can apply only to acts done in good faith, could not stand in the face of the inclusion in Sub-S. (1) and the exclusion from Sub-S. (2) of these precise words. A.I.R. (Vol. 24) 1937 Sind 129 (137, 138, 144, 145)=38 Cr.L.J. 723=32 S.L.R. 567=169 Ind. Cas. 274 (F.B.).

——S. 136 (2), (as amended by Act XIII of 1935) —If contemplates distinction between public and private prosecutions.

Per *Davis, J. C.*—A distinction between public and private prosecutions cannot be found in S. 136 (2). Bombay Local Boards Act. A.I.R. (Vol. 24) 1937 Sind 129=38 Cr.L.J. 723=32 S.L.R. 567= 169 Ind. Cas. 274 (F.B.).

——S. 136 (2), Proviso—Prosecution instituted by Public Prosecutor.

The addition of the proviso to S. 136 (2), Bombay Local Boards Act now recognizes for the purpose of time and notice, distinction between public prosecution and prosecution on private complaints. The purpose of the proviso is to exclude from the protection of the section prosecutions by the Crown, prosecutions, by or under the orders of the Provincial Government. The Provincial Government acts either through the Advocate-General or its Public Prosecutors. Hence, the prosecutions instituted by the Public Prosecutor are instituted by the Provincial Government within the meaning of the proviso. A.I.R. (Vol. 29) 1942 Sind 45=I L.R. (1941) Kar. 557=43 Cr.L.J. 514=199 Ind. Cas. 198.

BOMBAY LOCAL FUND AUDIT ACT (XXV OF 1930).

——S. 13 (a)—Application under—Chief Court of Sind—If can entertain.

As the Chief Court of Sind is not a District Court, it has no jurisdiction to entertain an application under S. 13 (*a*), Bombay Local Fund Audit Act. I.L.R. (1947) Kar. 164=A.I.R. 1948 Sind 89.

BOMBAY LOCAL-GOVERNMENT RULES.

——Rr. 11 and 15—Rule 11 taken by itself would seem to transfer to the Collector the power of granting leave to the decree-holder to bid in all cases in which Court could possess such powers under O. 21, R. 72, Civil Procedure Code if the execution had not been transferred. But this sub-rule must be read with Sub-R. (15) which restricts the powers of the Collector to grant the permission unless the decree-holder satisfies him that the application is made in good faith and that the judgment-debtor is not a minor. A.I.R. (Vol. 23) 1936 Bom. 189 (190)=38 Bom.L.R. 276=60 Bom. 688=162 Ind. Cas. 806.

BOMBAY MAMLATDARS COURTS ACT (III OF 1876).

——Possessory suit against—Under-lessee—If lies.

In proceedings under Bombay Act III of 1876 an under-lessee from a tenant must be deemed to hold under a right derived from the landlord and a possessory suit lies against him. 1 Bom.L.R. 71, foll. (1901) 4 Bom.L.R. 52.

——Possessory suit against Collector—Mamlatdar's jurisdiction.

A Mamlatdar's Court, under Bombay Act III of 1876, has no jurisdiction to try a suit to which a Collector is a part. (1904) 31 B. 86=8 Bom.L.R. 904=2 M.L.T. 13.

——S. 4 and 15—Obstruction to use of customary ways to fields—Jurisdiction.

The plaintiff owned two pieces of land between which was the land of the first defendant. To pass from one piece of this land on which stood the plaintiff's house to another which was his field the plaintiff used to pass through the defendant's land. The defendant then put up a shed at the one end of the plaintiff's passage n his land and a cactus fence at the other end. The plaintiff thereupon adopted proceedings under the Bombay Mamlatdars Courts Act, 1876 asking the defendants to remove the cactus and the shed and to make the passage clear and unobstructed as before. The Mamlatdar raised the issues indicated in S. 15 (*a*) of the Act, but rejected the plaint on the ground that inasmuch as the first paragraph of S. 4 of the Act does not mention the words 'the use of roads or customary ways to fields' he had no jurisdiction to grant to the plaintiff any relief—*Held*, that the Mamlatdar had jurisdiction under S. 4 to grant an injunction in case of obstruction or disturbance to the use of roads or customary ways to fields. A deprivation of a use is a disturbance. The Mamlatdar was therefore in error in supposing that the terms in which the statutory issues are framed for a case where the plaintiff does not aver deprivation of a use, deprive the Mamlatdar of the jurisdiction to try the issues (*a*) and give such a relief as he has jurisdiction to give under the second paragraph of S. 4 of the Act. (1906) 8 Bom.L.R. 312.

——Ss. 4 and 15 (c)—Use—Obstruction—Jurisdiction.

S. 15 of the Mamlatdars' Courts Act should be read subject to S. 4 thereof, which is the section giving jurisdiction to the mamlatdar. A person is in the enjoyment of a use within S. 15 (*c*) when, but for obstruction, he would have been in use. The enjoyment mentioned therein does not refer to the enjoyment at the date of the suit. (1901) 3 Bom. L.R. 681.

——S. 4—'Water-course'—Natural water-course—Jurisdiction.

A Mamlatdar has under the Mamlatdars' Courts Act 1876, jurisdiction to enquire into a case where it is alleged that an upper riparian proprietor has unduly interfered with the flow of water in a natural water-course from which a lower riparian proprietor also has taken water, *Held* by *Candy, Ramade* and *Crowe, JJ.*, that in the Bombay Mamlatdars' Courts Act, S. 4, the word "water-course" includes a natural as well as artificial water-course. *Held by Witworth, J.*; that the word "water-course" is confined to artificial water-courses only. (1900) 26 B. 395=2 Bom.L.R. 1136 (F.B.).

——S. 17—Duty of Mamlatdar—Limitation Act (XV of 1877).

Where a Mamlatdar's decision in a possessory suit instituted under the provisions of the Mamlatdars Courts Act, 1876, awards possession, S. 17 of the Act imposes on him the duty to issue an order to the village officers to give effect thereto. That duty is in no sense conditional on an application being made to the Mamlatdar for the purpose; it is absolute and qualified. When an imperative duty of the character above set forth is imposed upon a Court, then the Limitation Act, 1877, has no application. (1901) 3 Bom.L.R. 218=30 B. 415.

——Retrospective effect.

The Mamlatdars Courts Act (Bombay Act II of 1906) being an enactment relative to procedure should be given retrospective effect. No person has a vetsed right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed, for the time being, by or for the Court in which he sues. (1906) 9 Bom.L.R. 527.

——S. 5—Jurisdiction of Mamlatdar over lands or premises in towns or cities—Possessory suit instituted under the old Act but judgment delivered after the new Act came into force.

On 24-9-06 the suit was brought in the Mamlatdar's Court at Dohad for possession of a certain house in the town. Evidence was taken on the 22nd 24th and 26th October. The judgment was delivered on 17-11-06 and possession was given under the decree on 29-11-06. In the meanwhile on 29-10-06. the Mamlatdars' Courts Act of 1906 came into force. It

repealed the whole of the former Act of 1876 without any saving as to pending proceedings. The new Act restricted the jurisdiction of the Mamlatdar to "lands or premises used for agriculture." *Held*, reversing the decree, that after 29-10-06, when the new Act received the sanction of the Governor-General, it must be held that the Mamlatdars' Court had no further jurisdiction with regard to houses in towns or cities. (1906) 9 Bom.L.R. 1028=31 B. 545.

——S. 5—Suit for possession by landlords against trespasser—Dispossession by trespasser while tenant in possession—Suit brought within six months of dispossession and tenancy relinquished at the date of suit—Mamlatdar has jurisdiction.

Where a tenant was in possession at the time of the dispossession but at the time of the suit the tenancy has ended, the tenant having relinquished the same and the landlord brings his suit for possession against the trespasser within six months of dispossession, the Mamlatdar has jurisdiction to pass an order in favour of the landlord. 52 Bom. 453=30 Bom.L.R. 683=111 Ind. Cas. 629=A.I.R. 1928 Bom. 243 (D.B.).

——S. 5—Co-sharer having sole possession dispossessed by another taking law into his hand, is entitled to the summary remedy of the Act.

A co-sharer, when he actually has sole possession, and is dispossessed by another co-sharer who has taken the law into his own hands, is entitled to the summary remedy of the Act. 112 Ind. Cas. 402=30 Bom.L.R. 889=A.I.R. 1929 Bom. 114.

——S. 5—Right to sue—Tenant of one co-sharer obstructed in possession by another co-sharer.

Possession of tenant is not possession of landlord under Mamlatdars' Courts Act and where a tenant of one co-sharer is obstructed in his possession by another co-sharer, it is not the landlord but the tenant who must sue. And the Court in such cases need not consider if the lease of the tenant would conclude by the time the Court's order would be enforced. 112 Ind. Cas. 462=30 Bom. L.R. 889=A.I.R. 1929 Bom. 114.

——S. 5 (1)—Powers conferred upon Mamlatdar.

The powers conferred upon the Mamlatdar under Sub S. (1) of S. 5, Mamlatdars' Courts Act, are to give immediate possession of any lands and so forth used for agricultural purposes to any person who has been dispossessed or deprived thereof otherwise than by due course of law, or who has become entitled to the possession or restoration thereof by reason of the determination of any tenancy or other right of any other person, not being a person who has been a former owner or part owner within a period of twelve years before the institution of the suit. A.I.R. (Vol. 20) 1933 Bom. 313=35 Bom.L.R. 576=145 Ind. Cas. 405.

——S. 5 (1)—Construction.

The words "not being a person who has been a former owner or part-owner" in Cl. (1) qualify only the words immediately preceding "of any other person," the determination of whose tenancy or other right is in question. 112 Ind. Cas. 462 =30 Bom.L.R. 889=A.I.R. 1929 Bom. 114.

——S. 5 (1), Proviso—Possessory suit brought in Mamlatdar's Court—Defendant subsequently filing suit in civil Court—Mamlatdar may refuse to exercise his power.

Where subsequent to the filing of a possessory suit in a mamlatdar's Court, the defendant brings a suit in a civil Court for a declaration that he is a permanent tenant, it is open to the mamlatdar, under S. 5, to refuse to exercise the power vested in him and to refer the matter to the Civil Court. 32 Bom.L.R. 85=A.I.R. 1930 Bom. 184 (D. B.).

——S. 5 (2)—"Subject to same provisions"—Meaning—Injunction against former owner—If can be granted.

The words 'subject to the same provisions in S. 5 (2) mean subject to the provisions of Ss. 6 and 26, those being the provisions referred in the previous sub-section. Subject to those provisions, the Court is to have power, when any person is otherwise than by due course of law disturbed or obstructed in the possession of any lands or premises used for agriculture and so forth, to issue an injunction to the person causing or who has attempted to cause any disturbance or obstruction. In respect of the person against whom an injunction can be granted, there are no qualifying words such as are contained in Sub S. (1) relating to a person having some other right requiring such person not to have been a former owner. Hence the person against whom an injuction can be granted may even be the former owner of the property. A.I.R. (Vol. 20) 1933 Bom. 313=35 Bom. L.R. 576=145 Ind. Cas. 405.

——S. 5 (Expl.)—Dispossession of joint owner by tenant of another joint owner—Jurisdiction of mamlatdar to restore possession.

A mamlatdar has jurisdiction under S. 5 to give possession to a joint owner who is dispossessed by the tenant of another joint owner. The explanation to S. 5 does not apply to such a case. A. I.R. (Vol. 19) 1932 Bom. 204=34 Bom.L.R. 109 =137 Ind. Cas. 760.

——S. 5, Expl.—Jurisdiction—Person claiming joint possession ousted by co-sharer—Court cannot decree joint possession.

A Court has no juridiction under Expl. to S. 5 to decree-joint possession in favour of one who claimed to be in joint possession but was ousted by the co-sharer **(obiter)**. 112 Ind. Cas. 462= 30 Bom.L.R. 889=A.I.R. 1929 Bom. 114.

——S. 5 (Expl.)—Possessory suit against co-sharer—Joint possession cannot be given.

In a possessory suit against co-sharer, the Mamlatdar has no jurisdiction to award joint posession under the Act. 68 Ind. Cas. 225=46 Bom. 289 =23 Bm.L.R. 1016=A.I.R. 1922 Bom. 126 (D. B.).

——S. 10—Jurisdiction to entertain—Possessory suit—Previous order as to possession under S. 145, Cr.P. Code.

The jurisdiction of the Mamlatdar to entertain a possessory suit is not taken away by the fact that a Magistrate had passed an order as to possession under S. 145, Cr. P. Code. (1901) 3 Bom.L.R. 919=26 Bom. 353.

——S. 19 (b)—Jurisdiction of Mamlatdar—Trespasser getting into possession during the tenancy —Possessory suit against trespasser at the determination of the tenancy.

The plaintiff let his lands to defendants Nos. 1 and 2 on the 5th June, 1905. In November, 1905, the defendants Nos. 1 and 2 were dispossessed by a trespasser, defendant No. 3. The tenancy ended on 6th June 1906. On 29th October, 1906, the plaintiff filed a suit in a Mamlatdar's Court to recover possession of the lands from defendants Nos. 1 and 3. It was contended by defendant No. 3 that the Mamlatdar had no jurisdiction to try the suit so far as it affected her.

Held—(1) that a trespasser like defendant No. 3 could not defeat the right of the landlord to recover immediate possession of the land on the determination of defendants Nos. 1 and 2's tenancy by resorting to the summary remedy given by the Mamlatdars Courts Act, 1906; (2) that the plaintiff's remedy having been to bring his suit under S. 19, Cl. (b), of the Act, on the expiry of the tenancy, the fact that a trespasser got into possession during the continuance of the tenancy but more than 6 months before its determination, is not sufficient to oust the Mamlatdar's jurisdiction. The Mamlatdars Act is a remedial measure and must be liberally construed so as to advance the remedy. (1901) 9 Bom.L.R. 1179=32 Bom. 46.

——S. 23—Right of revision under—Proceedings commenced under old Act.

A suit under the Mamlatdars Courts Act, 1876, was commenced on the 24th February, 1906. The new Mamlatdars Courts Act, 1906, came into operation which repeated the former Act. On the 26th January, 1907, the Mamlatdar dismissed the suit. The plaintiff presented, on the 12th March, 1907, a petition for revision to the Collector. It was under S. 23 of the new Act. The Collector held, on the 6th April, that he had no jurisdiction to entertain the application.

Held—(1) that the repealing Act could not give the right of revision in respect of proceedings commenced under the Act of 1876; (2) that on the words of the General Clauses Act, 1904, S. (7), it would be wrong to hold that the Collector had jurisdiction; because, so to hold would be to affect a legal proceeding in respect of a right which had accrued under the old Act. To disturb an existing right of appeal is not a mere alteration of procedure. (1907) 10 Bom.L.R. 330=32 Bom. 337.

——S. 23—Collector revising order by Mamlatdar under S. 5 and sending case back for trial—Mamlatdar is bound to give a decision after trial.

Where the Collector set aside in revision the Mamlatdar's order under S. 5 of the Act and ordered him to proceed with the trial, **held**, that the Mamlatdar is bound to give a decision after trial and cannot submit the evidence taken by him to the Collector for decision. 76 Ind. Cas. 442=24 Bom.L.R. 1311=A.I.R. 1923 Bom. 60 (D.B.).

——S. 23—Powers of District Deputy Collector—Revision by High Court.

A District Deputy Collector has no authority to pass an order under S. 23 of the Mamlatdar's Courts Act, of 1906. Where a District Deputy Collector has assumed to act judicially, he will be treated as a Court under the superintendence of the High Court and his proceedings can be revised under the extraordinary jurisdiction. 39 Bom. 552=29 Ind. Cas. 954=17 Bom.L.R. 579=A.I.R. 1915 Bom. 17 (D.B.).

——S. 23—Powers of Assistant Collector—Bombay Land Revenue Code, (Act V of 1879), S. 10.

An Assistant Collector in charge of the Revenue of a portion of the district under S. 10 of the Land Revenue Code, is empowered to exercise all the powers of a Collector of the District under S. 23 of the Mamlatdar's Courts Act. 36 Bom. 123=12 Ind. Cas. 709=13 Bom.L.R. 1031 (D.B.).

——S. 23—Powers of Collector—Appreciation of evidence—Reversal of decision by Collector—Jurisdiction.

Where in a decision of a Mamlatdar, there is no question of revision under S. 23 of the Act for illegality or impropriety, a Collector has no jurisdiction to reverse the decision on a different appreciation of evidence. 37 Bom. 595=20 Ind. Cas. 535=15 Bom.L.R. 680 (D.B.).

——S. 23—Powers of Collector—Findings of fact —Interference—Revision by High Court—C. P. Code, S. 115.

Where a Collector while exercising powers of revision under S. 23, Bombay Mamlatdars' Courts Act, exercises powers of an Appellate Court, by setting aside the order of mamlatdar on the ground of disagreement on the findings of fact, the High Court would interfere with his order under its powers under S. 115, Civil Procedure Code, as by such assumption the Collector assumes jurisdiction which he does not possess under the Act. A.I.R. (Vol. 25) 1938 Bom. 159=40 Bom.L.R. 104=I.L.R. (1938) Bom. 259=173 Ind. Cas. 808.

——S. 23—Collector's Powers—Finding based upon misappreciation of evidence—Interference.

When the finding of Mamlatdar is based on nothing but the unsupported allegations of the plaintiff it must be called a finding based on a total misappreciation of what evidence was. It is not based on evidence such as is necessary to establish a disputed claim and the error in the Mamlatdar's finding amounts therefore not only to an error of fact but also an error of law. In such a case therefore the Collector is perfectly justified in setting aside the finding of Mamlatdar. 16 S.L.R. 106=79 Ind. Cas. 847=A.I.R. 1922 Sind 18 (D.B.).

——S. 23—Collector's powers—Complicated questions.

An order of the Mamlatdar can be revised only if it is illegal or improper and not because complicated questions beyond the scope of that Act have been gone into since such questions can be gone into, to decide the question of possession. 48 Bom. 384=26 Bom.L.R. 265=80 Ind. Cas. 266=A.I.R. 1924 Bom. 352. (D.B.).

——S. 23—Right to be heard.

An applicant or his pleader is entitled to a hearing before the Collector. 32 Bom.L.R. 85=A.I.R. 1930 Bom. 184 (D.B.).

——S. 23—Right to be heard.

A person dissatisfied with the decision of the mamlatdar under the Mamlatdar's Courts Act, is entitled to be heard either in person or through his pleader when he applies to the Collector under S. 23 of the Act to revise the order of the Mamlatdar, before his application is rejected. 90 Ind. Cas. 654=27 Bom.L.R. 1115=A.I.R. 1925 Bom. 522 (D.B.).

——S. 23 (2)—Revision—Death of applicant—Legal representative—Limitation for bringing them on record—Civil Procedure Code, O. 22, and S. 141—Limitation Act, Art. 176.

There is no provision in the Act for bringing on record the heirs of the applicant in a revisional application in the event of the applicant dying nor is there any provision for the abatement of the revisional application on the death of the applicant.

Order 22, C.P. Code does not apply to such revisional proceedings. Section 141 of the Code refers only to original matters in the nature of suits. Revisional matters are not original matters in the nature of suits.

Article 176, Limitation Act refers to appeals and it also does not apply.

The legal representative can, therefore, be brought on record under S. 151, C. P. Code, even after the lapse of thirty days. A.I.R. (Vol. 33) 1946 Bom 201=47 Bom.L.R. 845=224 Ind. Cas. 306.

——S. 24—J.C.'s Court, has powers of revision over Collector's orders.

Under S. 24 of the Act, J.C.'s Court has the same powers as the High Court has in the presidency and that Court undoubtedly does exercise such revisional powers over the order of the Collector in its capacity as successors to the **Sadar Diwani Adalat** which exercised these powers under Regulation 11 of 1917 and which powers were vested in the High Court by the Statute, 24 and 25 Victoria, Chapter 104.

But two conditions are necessary for such revision; 1st is illegality or patent material irregularity, and 2ndly there should be no remedy except that by revision to the applicants. 79 Ind. Cas. 847=16 S.L.R. 106=A.I.R. 1922 Sind 18 (D. B.).

——S. 24—Judicial Commissioner—Powers of revision.

S. 24 of the Mamlatdar's Courts Act read with Bombay Regulation II of 1827, bestows revisional powers on the Court of the Judicial Commissioner in Sind. That Court has therefore the power to call for the proceedings of the Mamlatdar's Courts and to issue such orders thereon as the case may require. The Mamlatdar's Courts Act itself lays down its own simple and summary procedure. The provisions of the C.P. Code do not apply to the proceedings under this Act. A Mamlatdar has no power to pass an **ex parte** decision unless he is satisfied that the defendants had notice sufficient to enable them to appear on the date fixed for appearance at the place where the proceedings are held. 16 Ind. Cas. 675=6 S.L. R. 67 (D.B.).

——S. 26—Bar to suits—Jurisdiction of Mamlatdar cannot be ousted by merely filing suit in Civil Court.

S. 26 clearly shows that a defendant in a possessory suit cannot **ipso facto** by filing a suit in the Civil Court oust the jurisdiction of the Mamlatdar. It is a question for the Mamlatdar whether he should proceed to decide the possessory suit or not. 32 Bom.L.R. 85=A.I.R. 1930 Bom. 184 (D.B.).

——S. 26 (b)—Mamlatdar cannot try a possessory suit when there is civil suit pending between the parties.

Per **Patkar, J.**—S. 26, Cl. (b), bars the jurisdiction of a Mamlatdar to try a possessory suit between parties when there is a civil suit pending between them in respect of any dispossession, recovery of possession or disturbance of possession of the property in suit. 52 Bom. 203=107 Ind. Cas. 719=30 Bom.L.R. 98=A.I.R. 1928 Bom. 53 (D.B.).

——S. 26 (b)—Words "has been" are used to include pending proceedings.

The words "has been" in S. 26 (b) are used to include present proceedings, that is to say, proceedings that are pending. 52 Bom. 203=107 Ind. Cas. 719=30 Bom.L.R. 98=A.I.R. 1928 Bom. 53 (D.B.).

BOMBAY MARKETS AND FAIRS ACT (IV OF 1862).

——S. 1—Person establishing cattle market on private land within municipal limits—No permission of District Magistrate.

Where a person establishes a cattle market on his private land within the municipal limits, without permission from the District Magistrate as required by S. 1, Bombay Markets and Fairs Act, he is guilty under that section. A.I.R. (Vol. 27) 1940 Bom. 306=42 Bom.L.R. 584=I.L.R. (1940) Bom. 522=42 Cr.L.J. 84=191 Ind. Cas. 121.

——S. 1, if in conflict with S. 139, Bombay District Municipal Act (III of 1901).

There is no conflict between S. 1, Bombay Markets and Fairs Act and S. 139, Bombay District Municipal Act. A.I.R. (Vol. 27) 1940 Bom. 306=42 Bom.L.R. 584=I. L. R. (1940) Bom. 522=42 Cr.L.J. 84=191 Ind. Cas. 121.

BOMBAY MATADARS ACT (VI OF 1887).

——S. 9—Death of Matadar—Heirship—Right to.

On the death of a representative Matadar, the heir next in succession is ascertained in the first instance by reference to the personal law of the parties. 39 Bom. 478=29 Ind. Cas. 500=17 Bom.L.R. 504=A.I.R. 1915 Bom. 66.

BOMBAY MEDICAL PRACTITIONERS' ACT (XXVI OF 1938).

——S. 36 (c)—Applicability—Person registered under S. 7 of Bombay Medical Act, 1912, and removed from register under S. 9 of that Act—If entitled to registration—Exemption from application of Ss. 32 and 34—Right to.

It is clear from the structure of the Bombay Medical Practitioners' Act (1938), (as also of the Bom. Medical Act, 1912), that two classes of practitioners are envisaged, viz., persons who are "registered" and persons who are "entitled to registration," or "entitled to be registered." Every person who possesses the qualifications referred to in S. 7 (2) of the Act of 1912 is as a matter of status a person entitled to registration under the Act. The Acts (of 1912 and of 1938) give persons "registered" certain privileges which are denied to the other class, i.e., those who are entitled to registration or entitled to be registered. A person whose name has been struck off the Register under S. 9 of the Act of 1912, but who is in possession of the scholastic qualification entitling him to registration can claim the benefit of the exception contained in S. 36 (c) of the Act of 1908, as being a person "entitled to registration" under the 1912 Act, and is cannot be held that by the removal of his name from the register he has been deprived of that status. He is therefore exempt from the application of Ss. 32 and 34 of the Act of 1938. I. L. R. (1946) Bom. 1069=229 Ind. Cas. 178=1947 Bom. (Rul.) 146 =48 Cr.L.J. 305=49 Bom.L.R. 6=A.I.R. 1947 Bom. 310 (F.B.).

BOMBAY MINORS ACT (XX OF 1864).

——S. 18—Immoveable property.

The expression "immoveable property" in S. 18 of Act XX of 1864, means immoveable property of any character or kind, whether held by the minor as owner or mortgagee or in any other right. The effect of S. 18 of Act XX of 1864 is that the moment it is ascertained that a minor has some right to or interest in immoveable property, his administrator cannot sell it so far as that right or interest goes without the previous sanction of the Court. (1903) 5 Bom.L.R. 916=28 B. 181.

BOMBAY MONEY-LENDERS ACT (XXXI OF 1947).

——S. 2 (9)—"Loan"—Meaning of—"By way of credit"—If restricts true meaning.

A loan as defined in S. 2 (9) of the Bombay Money-Lenders Act covers a loan which is secured as well as a loan which is unsecured, and it is immaterial whether the lender advances the money on security which fully covers the loan advanced by him. In using the expression "by way of credit" in S. 2 (9) the Legislature has used an expression which is superfluous or unnecessary and that expression does not in any way affect or restrict the true meaning of "loan". The expression is not a restrictive expression at all in the context. 51 Bom.L.R. 991=A. I. R. 1950 Bom. 119=51 Cr.L.J. 635 (D.B.).

BOMBAY MOTOR VEHICLES ACT (II OF 1904).

——Rash driving—Offence triable under both Special and General Acts—Penal Code, Ss. 81 and 279—Sentence of disqualification after period of suspension bad—One day's simple imprisonment, effect of.

The accused was found guilty of rash motor driving and sentenced to one day's simple imprisonment and a fine of Rs. 200, with the suspension of his license for the unexpired portion, and he was further declared disqualified to hold a license in future.

Per **Jenkins, C.J.**—The purpose of one day's simple imprisonment is to exercise clemency towards an accused, and is ordinarily passed where imprisonment is the only punishment allowed by law and the Court sees in the circumstances of the case grounds for passing the lightest possible sentence. In practice the person on whom it is passed is not placed in prison, but is to all intents and purposes as free as though the sentence had not been passed. There being no such necessity in the present case, the sentence of imprisonment was set aside.

Held, also, that the sentence of disqualification after the period of suspension was bad in law. The suspension of the license was an appropriate penalty.

Per **Aston, J.**—Where there has been special legislation for a particular type of offence, the maximum punishment provided in such Special Act for that particular offence may be accepted as an appropriate maximum. A driver prosecuted under both the Special Act and the Penal Code cannot well complain that he has been convicted under the latter. (1906) 8 Bom.L.R. 414.

——S. 3—Reckless or negligent driving.

Where the accused attempted to pass a victoria on his left but at the psychological moment, the driver of the victoria turned it suddenly to the left resulting in a collision, the accused cannot be convicted of negligent driving. S. 2 requires the Court to have regard not only to the side on which one vehicle passes another but to all circumstances including the nature, conditions and use of the road and to the amount of traffic which actually is or may be expected. 13 Bom.L.R. 126=9 Ind. Cas. 945=12 Cr.L.J. 167.

——S. 12—Rules—Omission of owner to give information of the rules to the driver—If abetment.

Omission is punishable only if the omission is an illegal omission. The owner of a motor car cannot therefore be held guilty of abetment in merely omitting to give information to his employees of the rules framed under the Bombay Motor Vehicles Act, 1904. (1906) 9 Bom.L.R. 159 (161).

BOMBAY MOTOR VEHICLES ACT (VIII OF 1914).

——Ss. 10 and 11—Rules under—Sch. D——Time limit introduced in registration certificate—If ultra vires.

Rule 6 of the Bombay Motor Vehicle Rules, 1915 as amended by the rules published in 1918, framed under S. 11 of the Bombay Motor Vehicles Act, 1914, and Sch. D to those rules are ultra vires in so far as they provide for any limit of time during which the certificate should be valid. 46 Bom. 646=24 Bom.L.R. 50=65 Ind. Cas. 633=23 Cr.L.J. 169=1922 Bom. 42 (D.B.).

BOMBAY MOTOR VEHICLES RULES (1915).

——R. 19 (1)—Rule, if covers a tram-car which is stationary—'Ordinarily,' significance of.

Rule 19 (1) of the Bombay Motor Vehicles Rules, which provides that a motor vehicle shall ordinarily pass a tram-car on the left or near side whether it be going in the same or contrary direction, covers a tram-car which is stationary. The word 'ordinarily' in the rule denotes that the rule applies except in a case in which there is some impediment to passing the tram-car on the near side. The facts that there are pedestrians making it difficult for him to pass and there is plenty of room for him to pass on the right hand side, do not constitute an excuse for breaking the rule. A.I.R. (Vol. 20) 1933 Bom. 229=1933 Cr. Cas. 663=35 Bom.L.R. 483=34 Cr.L.J. 865 (1)=144 Ind. Cas. 923 (1).

BOMBAY MOTOR VEHICLES RULES, (1940).

——R. 93. See MOTOR VEHICLES ACT, 1939.

BOMBAY MOTOR VEHICLES TAX ACT (XXXXIV OF 1935).

——Bombay Motor Vehicle Tax Rules, R. 25—Mere manager of company owning car—Liability.

A mere manager of a company which owns a motor car is not liable for breach of R. 25 of Bombay Motor Vehicles Tax Rules which requires the token to be carried on the car. A.I.R. (Vol. 30) 1943 Bom. 69=45 Bom.L.R. 69=44 Cr.L.J. 363=205 Ind. Cas. 227.

BOMBAY MUNICIPAL BOROUGHS ACT (XVIII OF 1925).

——Bye-law exempting property used for religious purposes—Rooms appurtenant to temple used for secular purposes—Income spent on temple—Exemption.

Where the rooms appurtenant to a temple are used for secular purposes and let to tenants, they are not exempt from municipal taxation. The fact that the income derived from such use is devoted to religious purposes would not bring the buildings themselves within ambit of the bye-law. A.I.R. (Vol. 22) 1935 Bom. 321=37 Bom.L.R. 235=8 R.B. 179=159 Ind. Cas. 209.

——Dhulia Municipality Rules, R. 5—"Personal use", meaning of.

The expression, 'personal use' in R. 5 of the Rules framed by the Dhulia Municipality under the Bombay Municipal Boroughs Act, is equivalent to private use and a Corporation is entitled to exemption from terminal tax on goods imported by it for "personal use". A.I.R. (Vol. 22) 1935 Bom. 415=37 Bom. L.R. 703=8 R.B. 139=158 Ind. Cas. 703

——S. 3 (2)—Building—Wooden fencing screening off completely outer view.

The word "enclosure" referred to in the definition of 'building' in S. 3 (2), Bombay Municipal Boroughs Act must be interpreted as **ejusdem generis** with the preceding words **'hut'** and 'shed', that is to say, must be taken to refer to some fabric or structure or thing, built in the more popular acceptance of the word.

A fence six feet in height consisting of wooden planks attached to posts embedded in earth on the boundaries of a person's house is not a 'building' as defined in S. 3 (2) not being a 'well' or 'enclosure'. Hence the erection of such a fencing without the permission of the municipality is not an offence under S. 123 (7). Merely because the wooden fence screens off completely the outer view, it cannot be regarded as an enclosure. A.I.R. (Vol. 29) 1942 Bom. 94=199 Ind. Cas. 417.

——S. 3 (15) (e)—Provident Fund of municipal employees—Municipality can invest in its own debentures.

A borough municipality can invest provident fund of its employees in its own debentures issued under Local Authorities Loans Act, 1914, if it does not make itself a trustee with respect to the fund. A. I. R. (Vol. 33) 1946 Bom. 159=47 Bom.L.R. 867=223 Ind. Cas. 631.

——S. 3 (19)—Easement.

Section 3 (19) does not refer to any right of easement but means of access—two entirely different things. A.I.R. (Vol. 33) 1946 Sind 10=I. L.R. (1945) Kar. 301=222 Ind. Cas. 513.

——S. 3 (19)—"Street"—Vacant or open plot of land of private person.

A vacant or open plot of land owned by a private party may be a "strict" as defined by S. 3 (19) of the Bombay Municipal Boroughs Act, if houses about on such vacant space, if it is used by persons as a means of access to an adjacent thoroughfare and the occupiers of the houses which about on the plot have no right at all hours to prevent any one from using it as a means of access to the thoroughfare. I.L.R. (1945) Kar. 301=222 Ind. Cas. 513=1946 Sind (Rul.) 120= A.I.R. 1946 Sind 10.

——Ss. 3 (19) and 116—Private open space—Declaration as public street—Requirements—Irregularity of plot is immaterial.

Where vacant space is used by occupiers of several houses as a means of access to the thoroughfare and they had no right at all hours to prevent any person from using it as a means of access to the thoroughfare, all the requirements of S. 3 (19) for declaring the privately owned open space as a public street under S. 116 are present. An open plot, however irregular but satisfying the requirements of S. 3 (19), is also a street. A.I.R. Vol. 33) 1946 Sind 10=I.L.R. (1945) Kar. 301=222 Ind. Cas. 513.

——S. 3 (19)—Public street—Mixed question of law and fact.

Whether certain property has been made a public street vesting in the Municipality is a mixed issue of law and fact. A.I.R. (Vol. 33) 1946 Sind 10=I.L.R. (1945) Kar. 301=222 Ind. Cas. 513.

——S. 3 (21)—Vehicle—Hand lorry.

The hand lorry clearly falls within the definition of vehicle contained in S. 3, Sub-S. (21). A.I.R. (Vol. 27) 1940 Bom. 378=42 Bom.L.R.

785=42 Cr.L.J. 164=I.L.R. (1940) Bom. 774 =13 R.B. 149=191 Ind. Cas. 465.

——**S. 11 (1)—Omission from roll of persons qualified under—Remedy of aggrieved party.**

Rule 11 of the Bombay Municipal Election Rules, provides that when the list of voters has been prepared, and where necessary, revised as provided in accordance with any order passed in that behalf by the Municipality or by the Judge in appeal, a copy thereof signed by the Returning Officer shall be the Municipal Electoral Roll. The wording of this rule clearly implies that once a roll has been published under R. 6 the only alterations which can be made in it are those which are made under Sub-Rr. (4) and (6) of R. 10. It is not open to the Municipality to make any alterations not falling under these two sub-rules even though errors in the roll may afterwards be detected. Although the omission from the roll of persons who are duly qualified under S. 11 (1) is a hardship, yet it is one which the persons aggrieved could have remedied if they had taken proper action under R. 10, Sub-R. (1). The Municipality's own power to alter the rolls is strictly limited by R. 10 to alterations made on a reference by the Chief Officer or by persons aggrieved. A.I.R. (Vol. 23) 1936 Bom. 43=37 Bom. L. R. 1027=8 R.B. 278=160 Ind. Cas. 736.

——**S. 12**—S. 12 indicates that in every case the authority competent to decide whether a person was disqualified before his election and that the election was therefore invalid so far as he is concerned is the Collector and no one else. A.I.R. (Vol. 31) 1944 Bom. 203=46 Bom.L.R. 371=214 Ind. Cas. 111.

——**S. 15—Order of District Judge—Revision.**

District Judge acting under S. 15 acts as **persona designata** and is not a Court subordinate to High Court. High Court has no jurisdiction under S. 115, C.P. Code, to entertain revision against his orders, in order to correct any mistake committed by him. A.I.R. (Vol. 33) 1946 Bom. 64=47 Bom.L.R. 851.

——**Ss. 15 and 12—Power of Judge to unseat candidate.**

Under S. 15 the Judge has no powers other than those expressly specified in S. 15 (3). S. 15 (5) does not affect S. 15 (3) and is in fact **otiose**. The Judge under S. 15 therefore has no power to unseat a candidate and set aside his election on the ground that he was disqualified for election by reason of S. 12. A.I.R. (Vol. 31) 1944 Bom. 203=46 Bom.L.R. 371=214 Ind. Cas. 111.

——**S. 33—Combined offices of Chief Officer and Engineer—Separation by resolution—No majority as required by S. 33—Officer holding combined posts given choice to accept any one—Refusal and consequently dismissal—Right of action against Municipality for damages—Measure of damages—Cause of action—Crown servants and servants of local bodies—Rules applicable.**

Even if the employees of the local bodies were to be regarded as being on the same footing as Crown servants, the general rule that a Crown servant may be dismissed at pleasure is subject to statutory exceptions. There must be at any rate this difference between the position of servants of the Crown and other public servants that it is not necessary in the case of the latter that the exception of the general rule should be contained in the Government of India Act. It is sufficient if there is any provision in the statute governing the appointment of the officer in question which takes the case out of the rule.

The Municipality by a resolution separated the posts of the Chief Officer and Engineer in their service, till then held by the plaintiff, by a resolution. But as required by S. 33, Bombay Municipal Boroughs Act, there was not the majority of two-thirds of the whole number of Councillors. After the resolution the plaintiff was given the choice to accept any one of the separated posts but on his refusal he was dismissed. He sued the Municipality for damages for his removal from service in contravention of the procedure laid down in S. 33:

Held, (i) that the language of S. 33 is wide enough to cover a case where the removal or reduction is not by way of punishment but is the result of a separation of offices formerly combined. The effect of the Municipal resolution was that the plaintiff was removed from the office held by him and relegated to an inferior position, that is to say, if he had accepted the offer of one or other of the separated posts. There had been, therefore, a breach of the provisions of this section and this contravention of a statutory provision gave plaintiff a right of action there being **injuria** and **damnum;**

(ii) that S. 182 of the Bombay District Municipal Act of 1901, and S. 33 of the Act of 1925, took this case out of the general rule, even if it did apply to the plaintiff, and would prevent him being removed from office except in accordance with the provisions of those sections;

(iii) that it was not necessary that a right of suit should be expressly given by statute. The maxim **ubi jus ibi remedium** may fairly be applied;

(iv) that until the plaintiff was actually forced to vacate his office by the appointment of his successors, he was entitled to say that he was not actually damnified. The cause of action for the suit did not arise until he handed over the charge;

(v) that it was not a case of service during good behaviour. It was a case of service at the will of the Municipality, the only limitation being that the will of the Municipality must be expressed in the manner provided by statute and as there was nothing to prevent the plaintiff being removed from office at any time by a valid resolution under S. 33, the only damages which he could claim were wages for the period of notice. As no offer was made after the cause of action for damages had arisen, the claim for damages could not be said to be affected by the plaintiff's failure to accept the offer made to him. A.I.R. (Vol. 25) 1938 Bom. 137=39 Bom. L.R. 1269=I. L. R. (1937) Bom. 867=10 R.B. 477=174 Ind. Cas. 643.

——S. 34—Suspension of servant—Latter's right to wages.

Where the master has power of suspension which he exercises upon the supposed misconduct of the servant suspension will inevitably mean the suspension of the entire contract and therefore the obligations on both sides and therefore the servant cannot claim wages of the period of suspension. A.I.R. (Vol. 30) 1943 Bom. 9=44 Bom.L.R. 814=I.L.R. (1943) Bom. 1=15 R. B. 293=204 Ind. Cas. 216.

——S. 34 (5) (b)—Applicability—Health officer appointed on probation.

S. 4 (5) (b) of the Bombay Municipal Boroughs Act, requiring two-thirds of the whole number of Councillors for removing a health officer from service, applies only if the officer concerned has been appointed temporarily or permanently. It cannot apply to one who has been appointed on probation. An officer appointed on probation holds office until the appointing authority is able to come to a conclusion whether his work is satisfactory and whether he should be continued in service; till then he is holding his office at the pleasure of the appointing authority and his appointment can be terminated either by the efflux of time where a specified period has been fixed for probation or by the fixing or a date after probationer enters upon the office. The probation given to temporary and permanent health officers by S. 34 (5) (b) does not thereto an officer or probation. I.L.R. (1946) Bom. 1010=48 Bom. L.R. 604=A.I.R. 1947 Bom. 78=230 Ind. Cas. 77=1947 Bom. (Rul.) 228.

——Ss. 38, 58, 186 (2)—Power of Municipality to make rule delegating power or duty allotted by Act to standing committee to some other committee.

The power to delegate under S. 38, Bombay Municipal Boroughs Act is confined to the residuary powers of the Municipality exercisable by the standing committee and does not apply to special functions which are allotted to the standing committee under the Act. But under S. 58 (a) it is provided that a Municipality shall make rules not inconsistent with this Act regulating the conduct of its business and the delegation of any of its powers or duties to any committee or to the Chief Officer or the powers or duties of any committee to any other committee or to the Chief Officer. The section does in terms give power to Municipalities to make a rule delegating the powers or duties of one committee to another committee and under that section, the Municipality is competent to make a rule delegating a power or duty allotted by the Act to the standing committee to some other committee. A.I.R. (Vol. 22) 1935 Bom. 201=37 Bom.L.R. 184=7 R. 505=36 Cr.L.J. 920=1935 Cr. Cas. 588=156 Ind. Cas. 380.

——S. 48—Power of Local Legislature.

By S. 48, the local legislature is competent to alter or amend S. 70, Contract Act. A.I.R. (Vol. 24) 1937 Bom. 417=39 Bom.L.R. 835=10 R.B. 217=I.L.R. (1937) Bom. 782=171 Ind. Cas. 660.

——S. 49 and Contract Act, S. 70—Scope of.

Section 49 of the Act and S. 70 of the Contract Act are not in **pari materia**. The former lays down the requirements of a valid contract, the latter deals with the situation which arises when one of those requirements has not been fulfilled. A.I.R. (Vol. 24) 1937 Bom. 417=39 Bom.L.R. 835=10 R.B. 217=I.L.R. (1937) Bom. 782=171 Ind. Cas. 660.

——S. 63—Cessor of user of property which led to vesting—Reversion to Government—Government's share in rent realised by Municipality.

When the property of the nature described in S. 63 ceases to be used for the purpose which led to its vesting, the land does not, on the cessor of such user, revert to the Government but remains the property of the Borough Municipality.

The Government have no right to recover any part of the rent realised by the Municipality for unauthorised occupation of a public street. A.I.R. (Vol. 2) 1945 Bom. 37=46 Bom.L.R. 643.

——S. 63—Cess-pools—Right of municipality to dig cess-pools in sides of streets.

The legal effect of the statutory vesting of a street in a municipality is to transfer to the municipality the ownership of the sub-soil upon which the street rests; the street, **qua** street, vests in the municipality, that is the surface, and only so much of the soil below the surface as is necessary to enable the municipality adequately to maintain and manage the street as a street. Cess-pools dug on the sides of roads, having no direct connection whatever with drains or sewers cannot be included in the term "works" used in its context in cl. (c) of Sub-S. (2) of S. 63, Bombay Municipal Boroughs Act. Hence the municipality has no right to dig cess-pools in the sides of streets for the convenience of neighbouring householders and the profit or convenience of the municipality. A.I.R. (Vol. 30) 1943 Sind 254=I.L.R. (1943) Kar. 411=16 R.S. 151=210 Ind. Cas. 568.

——Ss. 63 and 48—"Belong"—Public well ceasing to be used for public purpose—Power of Municipality to sell it.

The word "belong" in the expression "shall be vested in and belong to" in S. 63 denotes ownership. The scheme of the Act is that property for a public purpose, as specified in S. 63 including a public well is to vest in the Municipality; and if it ceases to be used for the public purposes the Municipality can sell it, with the consent of the Commissioner under S. 48, and the proceeds will form part of the municipal fund under S. 65; but there is nothing in the Act which suggests that Government have any interest in the matter. Under S. 63, there is no question of divesting private property; all the property dealt with is property of a public nature. Moreover, the classes of property dealt with are diverse in character and the section is not confined, like S. 149, English Public Health Act, to streets alone. The only conflict which arises under the section is between the claims of the limited public of the Municipality concerned and the claims of the wider public of the Province. There is nothing inherently unjust of unreasonable legisla-

ture having provided that property once vested in the Municipality shall for all times be held for the benefit of the local public. A.I.R. (Vol. 29) 1942 Bom. 183=44 Bom.L.R. 354=I.L.R. (1942) Bom. 463=15 R.B. 66=201 Ind. Cas. 329.

——Ss. 65 and 73—Power of Municipality—Levying of licence fees from traders in charcoal and firewood with object of supplementary income for educational purposes.

The object for which a fee or tax is levied by a public body would not serve necessarily as a guide for saying whether an imposition is a "fee" or "tax". Nor would it be determinative factor in observing the formality for the levy. If the bye-laws of the Municipality require a licensee to carry on a particular trade or business and the Municipality frames a rule prescribing a fee for granting such a licence, and it is not proved that it is unreasonable, the levy in the case of the traders in firewood and charcoal would be legitimate and must be upheld notwithstanding the fact that the Municipality before making the rule had in a public notification indicated that the object of it was to supplement income for educational purposes. Further the municipality has got powers to set apart the Municipal fund, for any purpose under S. 65, Bombay Municipal Boroughs Act and S. 73 does not stand in the way of such action because S. 73 does not say that the liability for education must be met wholly out of the special education tax. A.I.R. (Vol. 28) 1941 Bom. 268=43 Bom.L.R. 533=14 R.B. 76=195 Ind. Cas. 754.

——S. 68 (1) (d)—Water supply cut off by Municipality due to shortage of water—House in municipal area catching fire and burnt down there be-in no water in mains for engine—Liability for damages.

Where due to the shortage of water a Municipality has cut off water supply during certain hours at night to prevent waste of water and a house in the municipal area catches fire and is burnt down mainly due to the fact that there being no water in mains the fire engines could not get water, the case is of non-feasance and not of misfeasance and the Municipality is not liable for damages. A.I.R. (Vol. 25) 1938 Bom. 370=40 Bom.L.R. 552=11 R.B. 66=I.L.R. (1938) Bom. 696=177 Ind. Cas. 160.

——S. 73.

Section does not say that the liability for education must be met wholly out of the special education tax. A.I.R. (Vol. 28) 1941 Bom. 268=43 Bom.L.R. 533=14 R.B. 76=195 Ind. Cas. 754.

——S. 73 (2)—Vehicle used both in Presidency and within borough—Double Taxation—Bombay Motor Vehicles Act.

The tax under the Bombay Municipal Boroughs Act is a tax levied by a Municipality on vehicles kept for use within the borough, and the tax under the Bom. Motor Vehicles Tax Act is a tax levied by the Provincial Government on vehicles used in the Presidency. A vehicle which is both used in the Presidency and is also used within the borough may be the subject of taxation by two taxing bodies. A.I.R. (Vol. 27) 1940 Bom. 41=41 Bom.L.R. 1249=12 R.B. 345=186 Ind. Cas. 518.

——Ss. 73 (2), 3—Words "kept for use within the borough"—Meaning of.

The words "kept for use within the borough" in S. 73 (2) mean kept for normal use within the borough and no doubt where a vehicle is kept for normal use outside the borough, an occasional user within the borough could be rejected on the principle of **de minimus non curat lex**. User need not be "main user" in order to fall within the section. A.I.R. (Vol. 27) 1940 Bom. 41=41 Bom.L.R. 1249=12 R.B. 345=186 Ind. Cas. 518.

——S. 73 (ii)—Bulk of work lorries done in Bombey—Whether can be taxed by Bandra Municipality.

Where the bulk of the work of lorries is done in Bombay and they only occasionally come to Bandra, the lorries cannot be taxed by Bandra Municipality. The words "kept for use" really mean "maintained with the main object of being used." A.I.R. (Vol. 25) 1938 Bom. 214=40 Bom.L.R. 111=I.L.R. (1938) Bom. 111=10 R.B. 514=174 Ind. Cas. 985.

——Ss. 73 (vii), 112—Special sanitary cess—Whether can be made a charge on property—Bandra Municipality Rules, 1920.

It is clear from S. 73, Bombay Municipal Boroughs Act that there is a distinction between a special sanitary cess and a rate on buildings and lands. The special sanitary cess imposed under S. 73 (vii) does not come under the words 'house rate' on buildings or even within the words 'a rate on lands or buildings' and cannot be made a charge of the property within the limits of Bandra Municipality. It is a house tax as such which is mentioned in Ss. 78 to 89 as a rate on building or lands. A.I.R. (Vol. 20) 1933 Bom. 353=35 Bom.L.R. 599=6 R.B. 343=149 Ind. Cas. 28.

——S. 73 (x)—"Rate"—Lump sum arbitrarily imposed on certain trades.

A lump sum, imposed arbitrarily by the Standing Committee on certain trades, and not on the distinct generally, and not depending on the value of the property assessed, is not a rate. A.I.R. (Vol. 29) 1942 Bom. 177=44 Bom.L.R. 280=15 R.B. 37=200 Ind. Cas. 847.

——S. 73 (x)—"Water supplied by the Municipality," meaning of.

The words "water supplied by the Municipality" in S. 73 (x), Bombay Municipal Boroughs Act must mean supplied for general public purposes, and not supplied to, that is connected up with, particular premises by the Municipality, in other words connected up by the Municipality with their water supply. The true construction of S. 73 (x), is that the Municipality can charge a water-rate if they supply water to the borough. A.I.R. (Vol. 27) 1940 Bom. 269=42 Bom.L.R. 587=I.L.R. (1940) Bom. 667=13 R.B. 102=190 Ind. Cas. 249.

——S. 73 (x)—Ahmedabad Municipal Rules, R. 344—Rule is ultra vires.

R. 344 of the Ahmedabad Municipal Rules

made under the Bombay Municipal Boroughs Act, is ultra vires. A.I.R. (Vol. 29) 1942 Bom. 177 =44 Bom.L.R. 280=15 R.B. 37=200 Ind. Cas. 847.

——S. 78 and 82—Scope—Assessment list—Correction—Corrected list—Retrospective effect.

The owner or occupier of a building in a borough municipality is not liable to pay tax for the years in which it was not included in the assessment list. Under S. 78 of the Bombay Municipal Boroughs Act, the preparation of the assessment list is essential to the arising of the liability to tax, and only those properties which are included in that list are liable to pay tax as set out therein. In the case of a mistaken omission of property from the assessment list, the correction including only on the first day of the current official year, if the building or property to be taxed was in existence before the beginning of that year, i.e., 1st April of that year, and it has no retrospective effect so as to entitle the municipality to levy tax for the prior years in which the property was not included in the assessment list. The corrected list must be deemed to have come into force on the 1st of April of the year in which the correction is made and not earlier. 49 Bom.L.R. 752=A.I.R. 1948 Bom. 145.

——Ss. 80 and 81—Individual notice under S. 81 proved—Presumption that notice under S. 80 was properly given.

If it is proved that individual notice was given under S. 81, Bombay Municipal Boroughs Act, the presumption as to official or legal acts under S. 114, Evidence Act, should be raised and it should be presumed that public notice was properly given of the assessment list, under S. 80, and that all formalities required for the proper assessment of the tax were followed by the Municipality. A.I.R. (Vol. 27) 1940 Sind 42=41 Cr.L.J. 401 (2) =12 R.S. 223=187 Ind. Cas. 127.

——Ss. 80, 81, 82 and 84—Scope—Revised assessment list—When become effective—Liability to tax —If arises on 1st April or after disposal of objections.

S. 84 (1) of the Bombay Municipal Boroughs Act contemplates (1) preparation of an assessment and (2) complete revision of an assessment list once in every four years. S. 84 (2) shows that the provisions of Ss. 80, 81 and 82 are to be applied every year as though a new assessment list has been completed at the commencement of the official year, i.e., 1st April, S. 84 (2) therefore applies both to an annual assessment list as well as to a revised assessment list prepared once in every four years; so that an annual assessment list or a revised assesment list becomes effective at the commencement of the official year, i.e., 1st April, S. 84 cannot be construed as meaning that the assessment list or revised assessment list becomes effective only after it is made final, that is to say, after the objections are considered and amendments made as contemplated by S. 81 (3) (c) and after the result of an appeal or revision, if any, under S. 110. The liability to pay arises on the 1st of April and not after the objections are considered and disposed of and a final assessment list is made. The liability to pay the tax arises independently of the objections or of the disposal of the objections. I.L.R. (1948) Bom. 786=A.I.R. 1949 Bom. 119=50 Bom.L.R. 701.

——Ss. 82 and 110—Arithmetical mistake in assessment—Such mistake brought before Magistrate in appeal by assessee—Magistrate, if can consider such mistake.

Section 82, Bombay Municipal Boroughs Act, covers an arithmetical as well as any other mistake. Where there is an arithmetical mistake in assessment and the Municipality instead of taking action under S. 82, brings the matter before the Magistrate in an appeal by the assessee under S. 110, it is not open to the Magistrate to take into consideration such arithmetical mistake. A.I.R. (Vol. 25) 1938 Bom. 301=40 Bom.L.R. 387=11 R.B. 6=175 Ind. Cas. 891.

——Ss. 90, 58 (g) and 186—No bye-law—Rule framed regarding amount of license-fee for trade —Omission to pay such fee, if punishable.

The question of charging licence fee must arise when a licence is granted. And a licence could only be granted if the law requires the licence to be granted. Hence in the absence of any bye-law in that respect, there would be no obligation to take out a licence. The Municipality in order to fortify its right to levy a fee from the trader has first to make a bye-law insisting upon a licence and then frame a rule prescribing a fee under S. 58 (j) of the Act. It will not be sufficient to rely upon S. 90 in the absence of a bye-law for, obviously the party need not take out a licence, and there would be no power in the Municipality to punish him for that omission. A.I.R. (Vol. 28) 1941 Bom. 268 =43 Bom.L.R. 533=14 R.B. 76=195 Ind. Cas. 754.

——S. 96—Offence under—Bona fide allegation that tax is not payable.

An intention to defraud, which no doubt generally has to be inferred from the conduct of the accused, must necessarily involve something in the nature of cheating. Section 96, Bombay Municipal Boroughs Act, and the bye-law made under it postulate that the Municipality is entitled to the tax, and anybody who seeks to deprive it of that tax by wrongful means can be charged. But a bona fide allegation that the tax is not payable, which allegation is subsequently proved to be ill-founded cannot justify a finding that there was an intention to defraud.

The applicant who was a contractor agreed to do certain work in connection with the Narbada Bridge, the bridge being just outside the limits of the Broach Municipality. Certain goods to be used in connection with the contract were consigned to the applicant at Broach Railway Station which was alleged by the prosecution to be within the terminal tax limits, and then those goods were sent on by rail to the Narbada Bridge siding which was outside the terminal tax limits. The applicant took delivery of goods at the siding without payment of terminal tax. The contention of the applicant was that he was not liable in respect of these goods for any terminal tax, since the goods were never in fact consigned to him, within the

terminal tax limits, but were really consigned to him at the Narbada Bridge siding:

Held, that there was no reason whatever for thinking that the claim of the applicant to be exempt from the tax was not **bona fide**, and no intention to defraud was proved and that he was not guilty. A.I.R. (Vol. 22) 1935 Bom. 162=37 Bom.L.R. 102=1935 Cr. Cas. 322=8 R.B. 152 =36 Cr.L.J. 1511=158 Ind. Cas. 1069.

——S. 99—Scope of.

Unless there is a current account kept under S. 99 the provisions for payment contained in Chap. VIII do not cover an **octroi** payable on demand. A.I.R. (Vol. 20) 1933 Bom. 296=35 Bom. L. R. 581=6 R.B. 91=145 Ind. Cas. 578.

——Ss. 105, 104 and 203—Suit to recover arrears of taxes barred by limitation—Distress warrant, if can be issued.

S. 105 is not subject to any period of limitation and the provisions of this section are applicable even if the period for bringing a suit to recover the arrears of taxes under S. 203 has expired. Such taxes can, therefore, be recovered by distress warrant under S. 105. A.I.R. (Vol. 28) 1941 Bom. 53=42 Bom.L.R. 960=13 R.B. 286=I. L. R. (1940) Bom. 830=192 Ind. Cas. 719.

——Ss. 105, 104 and 203—Suit to recover arrears of taxes barred by limitation—Distress warrant, if can be issued.

Once a bill is presented with "the least practicable delay" as required by S. 104, Sub-S. (1) of the Bombay Municipal Boroughs Act, the right to issue a notice of demand and then to recover the amount by a distress warrant under S. 105 accrues to the Municipality, and that right is not lost by lapse of time. S. 105 does not prescribe any period of limitation, nor does it say, like S. 104, that the distress warrant should be issued with the least practicable delay. The periods of limitation prescribed for filing a suit under the Limitation Act govern the procedure in a Court of law, and the powers of the municipality acting under the provisions of Ss. 104 and 105 are not governed by the Limitation Act. The fact that the remedy of the municipality to recover the amount by filing a suit in a Civil Court under S. 203 is time-barred cannot prevent it from exercising the special powers conferred upon it by the Bombay Municipal Boroughs Act. A.I.R. (Vol. 26) 1939 Bom. 494=41 Bom.L.R. 1002=12 R.B. 233=I.L.R. (1939) Bom. 685=185 Ind. Cas. 366.

——S. 110—Magistrate hearing appeals—Power to summon witnesses or to compel production of documents and to administer oaths.

The Magistrate acting under S. 110, Bombay Municipal Boroughs Act, is not a **persona designata** but an ordinary Court, whose decisions are subject to revision by the Court to which appeals from his decision would ordinarily lie. No such special provision was necessary under the Bombay Municipal Boroughs Act because the appellate authority under S. 110 is a Court, and it has inherent powers to summon witnesses, to compel production of documents and to administer oaths. The provisions of this section and of similar sections in the other Acts, are of a somewhat anomalous nature, and it would be difficult to regard the Magistrate's powers under this section as being strictly limited to those of an Appellate Court. The fact that the tribunals from whose decisions the appeals are provided are tribunals which could not take evidence on oath or compel evidence to be given, would itself require that somewhat wider powers than those of an ordinary Appellate Court should be exercisable by the Magistrate under S. 110. Taking into consideration the peculiar position of the Magistrate under S. 110 he must have the power of taking evidence if he considers such evidence necessary. Since he is an authority deciding a question of civil liability his position is analogous to that of a civil Court and the considerations which should govern him in deciding whether evidence should be allowed would be similar to those which would prevail with a Civil Appellate Court, though there would have to be considerably more latitude in such matters than a Civil Appellate Court could allow. A.I.R. (Vol. 28) 1941 Bom. 361=43 Bom.L.R. 816=I.L.R. (1941) Bom. 658=14 R. B. 252=197 Ind. Cas. 833.

——S. 110—Scope of appeal.

Although an appeal under S. 110 is not against the assessment but against the notice of demand, the question of the assessment can be challenged in such an appeal. A.I.R. (Vol. 28) 1941 Bom. 361=43 Bom.L.R. 816=I.L.R. (1941) Bom. 658 =14 R.B. 252=197 Ind. Cas. 833.

——S. 110—Scope of appeal—Arithmetical mistake in assessment—If can be considered.

Arithmetical mistake in assessment—Municipality not acting under S. 82—Mistake brought before Magistrate in appeal under S. 110. The Magistrate cannot consider it. A.I.R. (Vol. 25) 1938 Bom. 301=40 Bom.L.R. 387=11 R. B. 6=175 Ind. Cas. 891.

——S. 110 (2) (b) (1)—Construction—Application not made within time—Appeal to Magistrate—Competency.

Prima facie, when two different expresions are used in an Act of Parliament, the Court ought to assume that they are intended to bear distinct meanings, but, on the other hand, it may appear from the context that two expressions are used interchangeably, and are not intended to have a different meaning.

In the Bombay Municipal Boroughs Act, the expressions "a tax imposed in the form of a rate on buildings or land" and "a tax on buildings or land" do not have a different meaning; the expression "a rate on buildings or lands" in S. 110 (2) (b) (i) includes a tax in the form of a rate on buildings or lands, and in consequence an appeal to the Magistrate is not competent, where an application is not made within the time specified by S. 110 (2) (b) (i). A.I.R. (Vol. 26) 1939 Bom. 478=41 Bom.L.R. 1015=I. L. R. (1939) Bom. 701=12 R.B. 341=186 Ind. Cas. 456.

——S. 110—Order by Magistrate—Revision in High Court—Civil or Criminal—C. P. Code, S. 115—Cr. P. Code, 435.

An application in revision, made against an order of a Magistrate, under S. 110 of the Bom-

bay Municipal Boroughs Act (1925), lies to the High Court on the civil side and not on the criminal side.

A Criminal Court may be constituted as a Court designata and civil jurisdiction may be conferred upon that Court. If the Criminal Court exercises that jurisdiction, it is not necessarily an inferior criminal Court within the meaning of the Cr.P. Code, when a right of revision is given from a decision of such a Court, then that revisional application is civil in character and not criminal. The Special Jurisdiction under S. 110, Municipal Boroughs Act, is of a civil nature and therefore the revision application is one on the civil side. 9 Bom.L.R. 1347; 30 Bom.L.R. 1084; 41 Bom. L.R. 937, foll. 52 Bom.L.R. 537=125 A.I.Cr. D. 357=A.I.R. 1950 Bom. 397 (F.B.).

——Ss. 110 and 111—Order under—Jurisdiction of Civil Court, if barred—Limitation Act (IX of 1908), Art. 14.

Article 14, Limitation Act, applies only to those orders which require to be set aside in a regular suit before any relief inconsistent with the order could be obtained. But the order of the Bench Magistrate under S. 110, Bombay Municipal Boroughs Act or S. 111 being not such an order, Art. 14 can have no application to a suit for a declaration that the order is null and void. The order passed by the Bench Magistrate in appeal, though subject to revision, is a summary order which does not prevent a suit being filed even without preferring an appeal to the Magistrates against the notice of demand. Art. 14 does not apply to such an order.

Moreover, the order of the Bench Magistrates is a judicial and not a quasi-judicial or an executive order. It can be revised by the Sessions Court and the order of the Sessions Court in revision is again open to revision by the High Court. A judicial order does not fall under Art. 14. A.I.R. (Vol. 27) 1940 Bom. 188=42 Bom.L.R. 223=12 R.B. 510=188 Ind. Cas. 531.

——Ss. 111 and 110—Interlocutory order by Magistrate allowing evidence to be led—Interference in revision by Sessions Judge.

The words "decision upon any appeal" in S. 111, Bombay Municipal Boroughs Act, should not be interpreted differently from the words "case decided" in S. 115, C.P. Code. There is nothing in the language of the former section which necessarily implies that the decision of the appeal referred to in that section means the final decision. The Sessions Judge is entitled to interfere in revision with the interlocutory order made by the Magistrate allowing evidence to be led before him. A.I.R. (Vol. 28) 1941 Bom. 361=43 Bom.L.R. 816=I.L.R. (1941) Bom. 658=14 R.B. 252=197 Ind. Cas. 833.

——S. 111—Revision under—Order in—High Court has power to interfere in second revision but cases of interference should be rare. A. I. R. (Vol. 26) 1939 Bom. 478=41 Bom.L.R. 1015= I.L.R. (1939) Bom. 701=12 R.B. 341=186 Ind. Cas. 456.

——S. 111—Order under, passed by Sessions Judge—High Court has jurisdiction to interfere in second revision. A.I.R. (Vol. 26) 1939 Bom. 477=I.L.R. (199) Bom. 571=41 Bom.L.R. 937 =12 R.B. 247=185 Ind. Cas. 519.

——S. 111—Order of Sessions Judge in revision under—Revision, if lies on Civil Side of High Court.

S. 111, Bombay Municipal Boroughs Act shows that the revisional power is exercised by a Court and not by a persona designata, and the matter is one of a civil liability. The Sessions Court acting in revision under S. 111, is therefore, for the purposes of the Municipal Boroughs Act, a Court dealing judicially with a civil liability and the fact that the Sessions Judge's functions are ordinarily criminal is no more material than the fact that the Collector's functions are ordinarily executive. An application in revision on the civil side of the High Court, therefore, lies from the order of the Sessions Judge passed in revision under S. 111. At the same time, being a second application in revision, the High Court will not interfere unless it appears that there has been some grave abuse of its power by the Sessions Court or the decision is manifestly erroneous or unjust. A.I.R. (Vol. 25) 1938 Bom. 301 (302)=11 R.B. 6=40 Bom.L.R. 387=175 Ind. Cas. 891.

——S. 111 (2)—Remedy provided in—Whether incumbent on either party.

The words "any appeal shall, at the instance of either party, be subject to revision" in Cl. (2), S. 111, Bombay Municipal Boroughs Act, are not mandatory in the sense that they make it incumbent on either party to adopt the remedy provided in the section. A.I.R. (Vol. 22) 1935 Bom. 321 (322, 323)=8 R.B. 179=37 Bom.L.R. 235= 159 Ind. Cas. 209.

——S. 114—Compulsory powers—Exercise of.

S. 114 provides by Sub-S. (1) that it shall be lawful for a Municipality to lay out and make new public streets, and the sub-section goes on to provide for power "to lease or sell any such land, theretofore used or acquired by the municipality for the purposes of such streets." Sub-S. (2) enables the municipality to make acquisitions which have no continuity of plan or scheme for the construction of homes and buildings to form the new streets but these compulsory powers should be very carefully exercised. A. I. R. (Vol. 32) 1945 Bom. 302=47 Bom.L.R. 95.

——S. 114—Powers of Municipality—Scope of.

The Municipality is not the absolute owner of property which is vested in it as a statutory body; the Municipality holds property as trustees and holds it for the purposes of the Act. Hence the power conferred for the purposes of the Bombay Municipal Boroughs Act to 'stop up' streets under S. 114 of the Act cannot be extended to cover a case, where the Municipality authorizes or rather purports to authorize, certain individuals to build a wall across a public street for their own purposes. A.I.R. (Vol. 29) 1942 Sind 91=I.L. R. (1942) Kar. 90=43 Cr.L.J. 714=15 R.S. 3= 200 Ind. Cas. 741.

——S. 114—Purchase, if includes compulsory acquisition.

The word "purchase" in S. 114, Bombay Muni-

cipal Boroughs Act, includes compulsory acquisition. A.I.R. (Vol. 25) 1938 Bom. 148=10 R. B. 420=39 Bom.L.R. 1257=174 Ind. Cas. 67.

——S. 116—Object of.

S. 116 does not require the municipality to 'take over' the possession of any space. The object of the section is clearly to provide for the better sanitation, cleaning and lighting of the locality involved. A.I.R. (Vol. 33) 1946 Sind 10=I.L. R. (1945) Kar. 301=222 Ind. Cas. 513.

——S. 123—Notice—Whether can be endorsed on plan itself.

It is a proper notice to the Chief Officer as to work proposed to be constructed, to send a plan with the endorsement upon it saying that it was a plan as to the proposed drainage and septic tank. Notice need not be separate from the plan. It can be endorsed on the plan. A.I.R. (Vol. 25) 1938 Bom. 186=40 Bom.L.R. 67=39 Cr.L.J. 413 =10 R.B. 451=174 Ind. Cas. 466.

——Ss. 123 and 137—Notice of construction sent —Chief Officer not taking steps for one month—Consent, if presumed.

A building owner can proceed with the construction if even after a notice specifying the building sought to be constructed is given, the Chief Officer does not take any steps within a month in relation thereto; the consent of the Chief Officer must, in such circumstances, be implied. A.I.R. (Vol. 25) 1938 Bom. 186=40 Bom.L.R. 67=39 Cr.L.J. 413=10 R.B. 451=174 Ind. Cas. 466.

——S. 123 (5)—Accused relying on sub-section—Municipality must allege what provisions of law accused has broken—Burden then shifts on accused to prove that he has not broken alleged provision of law.

As soon as the Municipality has notice that the accused is going to rely on S. 123 (5), Bombay Municipal Act, the Municipality must allege what provisions of the Act or bye-laws they say the accused has broken, which disentitles him to rely on S. 123 (5). When that allegation is made, the burden is upon the accused to prove that he has not committed the breach of the Act or bye-law as alleged. But unless the Municipality alleges a breach of some specific provision of the Act or bye-law, there is no issue on which any question of burden of proof can arise. The Court can go into the question of the right of the accused to rely on Sub-S. (5) to S. 123, although it had no affirmative evidence that a particular provision of the Act or bye-laws had been broken. A. I. R. (Vol. 29) 1942 Bom. 28=43 Bom. L.R. 877=43 Cr.L.J. 313=14 R.B. 282=198 Ind. Cas. 120.

——S. 123 (7)—Offence under—Erecting of fencing.

A fence six feet in height consisting of wooden planks attached to posts embedded in the earth on the boundaries of a person's house is not a building as defined in S. 3 (2) not being 'well' or 'enclosure.' Consequently the erection of such a fencing without the permission of the municipality is not an offence under S. 123 (7). Merely because the wooden fence screens off completely the outer view, it cannot be regarded as an enclosure. A.I.R. (Vol. 29) 1942 Bom. 94=44 Bom.L.R. 45=43 Cr.L.J. 559=199 Ind. Cas. 417.

——S. 123 (7)—Prosecution under—Burden of proof.

In the case of a prosecution under S. 123 (7), Bombay Municipal Boroughs Act, having regard to S. 105, Evidence Act, the burden is upon the accused who relies upon the permission given to him by Sub-S. (5) of S. 123 to prove that he comes within the terms of that sub-section, and is thereby relieved of the liability which is otherwise upon him under Sub-S. (7). It is a general provision which imposes the burden of bringing himself within an exception upon the person who relies upon the exception and there is no distinction between a case in which the exception is contained in the body of the Statute imposing the prohibition and a case in which it is not so included. A.I.R. (Vol. 28) 1941 Bom. 273=43 Bom.L.R. 519=43 Cr.L.J. 783 =195 Ind. Cas. 825.

——S. 129—Notice not giving all particulars—Effect.

The house-holder is entitled to know in the first instance what he is required to do and the duty of the Chief Officer under S. 129 is to give a notice specifying the drain which he requires, stating the size, material, level and fall and a notice which does not comply with those requirements is not a good notice within S. 129. A.I.R. (Vol. 25) 1938 Bom. 303=40 Bom.L.R. 314=39 Cr.L.J. 667 175 Ind. Cas. 765.

——Ss. 129, 193—Owner, if can be required to submit plan—Notice, requiring plan and to lay drain in accordance with it—Plan not passed—Notice, if proper—Owner, if can be convicted for its breach.

There is no power under S. 129, Bombay Municipal Boroughs Act, to require the owner of a building to submit a plan. Section 129 gives power to the Chief Officer to require something to be done, and it is for him to say what he requires to be done and not for the owner of the house or buildings to submit proposals. Where in a case the only notice given is to submit a plan, and then lay a drain in accordance with the plan when passed and the plan is not passed there is no proper notice within S. 129 and therefore the owner cannot be convicted under S. 193 for the breach of S. 129. A.I.R. (Vol. 25) 1938 Bom. 303=40 Bom. L.R. 314=89 Cr.L.J. 667=175 Ind. Cas. 765.

——Ss. 137, 123—Building and drains constructed after proper notice—Drains, if can be ordered to be demolished.

Municipality cannot order the drain to be demolished under S. 137 Bombay Municipal Boroughs Act where the building including these drains has been built properly under Sub-S. (5) of S. 123, after a proper notice under S. 123. A.I.R. (Vol. 25) 1938 Bom. 186=40 Bom.L.R. 67=39 Cr.L.J. 413=174 Ind. Cas. 466.

——S. 149—House in ruinous or dangerous state —Option to take down house.

The wording of 149 Sub-S. (2), Bombay Municipal Boroughs Act is capable of the construction that the option is to rest with the Chief Officer of determining whether the house ought to be taken

down, secured, or repaired, and that construction is the one most consonant with the general purpose of the section, and the option does not rest with the owner of the property. Consequently, a notice given by the Chief Officer requiring a person to take down the house is a good notice under S 149. A.I.R. (Vol. 21) 1934 Bom. 215=36 Bom.L.R. 430=35 Cr.L.J. 1036 (2)=1934 Cr. Cas. 760=149 Ind. Cas. 1129.

——S. 152 (1) (a)—"Setting up a stall"—Introducing into street, lorry on wheels with goods for sale.

Introducing into a street a lorry on wheels with goods for sale upon it does not amount to setting up a stall with S. 152 (1) (a). That sub-section deals with making some form of addition or annex more or less permanent, to a building in the street. It is directed against the man who has a shop or house in the street, and who encroaches upon the street by making some sort of addition to his house or shop. A.I.R. (Vol. 27) 1940 Bom. 378=42 Bom. L.R. 785=42 Cr.L.J. 164=I.L.R. (1940) Bom. 774=191 Ind. Cas. 465.

——Ss. 152 (1) (b), 3 (21)—"Or any other thing" —Whether includes vehicle—Hand lorry, if falls within S. 3 (21).

The words "or any other thing" in S. 152 (1) (b) must be read *ejusdem generis* as the words "box, bale, package or merchandise." Those words do cover merchandise, and things in which merchandise can be packed, and any other thing must be of the same kind or genus and does not include a vehicle. A motor car or a motor lorry or a horse-drawn or hand-propelled vehicle though containing merchandise and left standing in a street, cannot be said to come within the section. A.I.R. (Vol. 27) 1940 Bom. 378=42 Bom.L.R. 785=I.L.R. (1940) Bom. 774 =42 Cr.L.J. 164=191 Ind. Cas. 465.

——S. 159—Applicability—Essentials.

Under S. 159, it has got to be proved, firstly, that the accused is a person who has the building or land under his control; secondly that he allowed the water to run upon any street, land or space, and thirdly, that the water was or was likely to become offensive. Waste water of the bleaching and dyeing departments of a mill would not necessarily be offensive or likely to become offensive in the absence of any proof. A.I.R. (Vol. 28) 1941 Bom. 156=43 Bom.L.R. 110=42 Cr.L.J. 571=194 Ind. Cas. 345.

——S. 159—Waste water of dyeing and bleaching department of mill—Secretary of mill—If liable to be convicted.

The secretary of a mill is not as such liable to be convicted under S. 159 as being in control of the premises. *Prima facie*, the secretary of a mill would be a person to attend to the office and clerical work but he would certainly not be a person to control the working of the mill or to see in what manner the waste water is to be discharged. That would be for the manager. If the secretary of the mill has control of the mill, there ought to be evidence to that effect. A.I.R. (Vol. 28) 1941 Bom. 156 =43 Bom.L.R. 110=42 Cr.L.J. 571=194 Ind. Cas. 345.

——S. 167—Applicability—Power to order levelling of low-lying land.

The words "cover over" in S. 167, were not intended to apply to land. The words "drain off" are the only ones which might be appropriate to Cls. (a), (b) and (c) alike. It is by no means clear, therefore, that the words "fill up" were intended to apply to the land on which water accumulates. No doubt they would properly apply to filling up holes or depressions in a plot of land. It is extremely doubtful whether they would apply or could have been intended to apply to filling up in the sense of raising the level of a large area of land which is naturally low-lying land. The power to order levelling of this kind is on the face of it so harsh and oppressive that one cannot suppose that the Legislature intended to confer this power unless the language of the section is perfectly clear. A.I.R. (Vol. 24) 1937 Bom. 165=39 Bom.L.R. 77=38 Cr.L.J. 535=168 Ind. Cas. 199.

——S. 167—"Or to take away.....shall prescribe" —Whether empowers levelling of low land.

The words "or to take such order with the same for removing or abating the nuisance as the Chief Officer shall prescribe" in S. 167, must be considered with their context. Even under this clause it cannot be supposed that the Chief Officer has power to order levelling of a low-lying land on which water accumulates. A.I.R. (Vol. 24) 1937 Bom. 165= 39 Bom.L.R. 77=88 Cr.L.J. 535=168 Ind. Cas. 199.

——S. 167—Nuisance—Opinion of Chief Officer—Production of notice signed by him—Sufficiency.

Under S. 167 of the Bombay Municipal Boroughs Act what is required is that Chief Officer should be satisfied of the existence of a nuisance, because he is given power to issue the notice there provided for if in his opinion a nuisance exists. It is not necessary, therefore, that it should be proved by evidence that a nuisance exists in fact. It is, however necessary that the opinion of the Chief Officer should be properly proved and it is not sufficiently done by the mere production of a notice signed by him. A. I. R. (Vol. 24) 1937 Bom. 165=39 Bom.L.R. 77 =38 Cr.L.J. 535=168 Ind. Cas. 199.

——S. 178—Sanction to prosecute—Power to grant—Standing Committee and Sanitary Committee—Power of.

The Standing Committee of a Municipality is competent to sanction a prosecution for a contravention of S. 178 of the Bombay Municipal Boroughs Act, in view of the power to sanction prosecutions given to it under S. 200 of the Act. The fact that under S. 58 (a) a Municipality has framed a rule by which the Sanitary Committee has been declared to be the controlling and executive committee in matters of the particular department does not take away the power of the Standing Committee. Both the Standing Committee and the Sanitary Committee would be competent in such a case to sanction the prosecution. 51 Bom.L.R. 850=A.I.R. 1950 Bom. 75=51 Cr.L.J. 404.

——S. 186 (2)—Daily penalty—When may be imposed.

A daily penalty under S. 186 (2), Bombay Municipal Boroughs Act cannot be imposed in anticipation

of a repetition of the offence. The words of cl. (2) of S. 186 of the Act are not so clear as to express a definite intention of the Legislature that an order of fine for future continuance of the nuisance must necessarily be passed in the same order as that which records the first conviction. Therefore, on the principle that a person should not be punished in anticipation of the commission of an offence, it is necessary in every case where a fine for continuance of the offence is sought to be imposed, for a fresh prosecution to be instituted. There must be a conviction for a previous breach and then a subsequent conviction for continuing the breach after the date of that first conviction before the daily penalty under S. 186 (2) can be imposed. A.I.R. (Vol. 29) 1942 Sind 78=I.L.R. (1942) Kar. 5=42 Cr. L.J. 700=200 Ind. Cas. 340.

——Ss. 198 and 204—Compromise arising out of proceedings relating to purchase of land—Sanction by resolution is necessary.

The municipality has power to compromise a claim arising from the proceedings under S. 198 by virtue of S. 204 (2). But the proviso to S. 204 (2) specifically provides that the same sanction-which is necessary in the making of a contract is necessary in the compromise of any claim arising from such contract. A compromise arising out of proceedings of this nature relating to the purchase of land requires sanction by a municipal resolution. A.I.R. (Vol. 31) 1944 Sind 150=I.L.R. (1944) Kar. 53=220 Ind. Cas. 220.

——S. 198—Compensation under—Determination of—Power of District Judge.

It is for the District Court under S. 198 (3) of the Act to determine the compensation to be paid and in determining this question of compensation the Court will have itself to consider and decide whether the award of the Chief Officer is a proper award which it can accept for the purpose of its determination under S. 198 (3) of the Act. In deciding whether the award is a proper award, the Court will have necessarily to determine whether the reference appointing the Chief Officer was a valid reference within the powers of the Municipality. A.I.R (Vol. 31) 1944 Sind 150=I.L.R. (1944) Kar. 53=220 I.C. 220.

——S. 198—Land Acquisition Act (I of 1894), Ss. 23 to 25—Compensation for compulsory acquisition of land—Principles.

Sections 23, 24 and 25 of the Land Acquisition Act constitute a code laying down the principles on which the District Court is to act in arriving at the compensation to be paid, and it is quite impossible to leave out of that code Sub-S. (2) of S. 23. The sections determine the basis on which the value of the land is to be ascertained on compulsory purchase and the allowance of the fifteen per cent. must be set off against matters disallowed under S. 24. These provisions in the Land Acquisition Act, are contained in a Chapter entitled "Reference to Court and procedure thereon," and they must be treated as applicable to proceedings in the District Court under S. 198, Bombay Municipal Boroughs Act. Therefore, the District Judge is entitled to allow the fifteen per cent. for compulsory purchase. A.I.R. (Vol. 24) 1937 Bom. 432=10 R.B. 222=39 Bom.L.R. 329=I.L.R. (1937) Bom. 632=171 I.C. 692.

——Ss. 203, 98 and 99—Octroi dues—Goods imported in municipal limits—Process under S. 98 not issued—Suit to recover dues.

The right is given under S. 203, to the municipality to see only a person liable to pay. But the liability to pay in order that Cl. (1) of S. 203 may come into operation may arise independently of S. 98 and S. 99. In the consideration of the application of Cl. (1) of S. 203 the Court has to consider whether that liability to sue has arisen under the Act. A corporation liket an individual has a right to enforce its claim by suit unless that right is expressly limited or the limitation clearly implied; Clause (1) of S. 203, is not limited to process permissible only under Chap. VIII.

The words "process" or 'such process' in Cls. (1) and (2) refer only to generally of summary remedies under the status. If no process as contemplated by S. 98 to recover the octroi duty is issued, then in lieu thereof it shall be lawful for the municipality to sue in any Court of competent jurisdiction the person liable to pay the same and hence a suit to recover octrol dues for goods brought within the municipal limits is maintainable under S. 203. A.I.R. (Vol. 30) 1943 Bom. 30=44 Bom.L.R. 890=204 Ind. Cas. 563.

——S. 203—Municipality not recovering octroi duty due to oversight—Suit, if maintainable.

Under S. 203, Bombay Municipal Boroughs Act, it is not open to the Municipality to maintain a civil suit for recovery of balance of octroi duty that remained uncollected due to oversight. A.I.R. (Vol. 20) 1933 Bom. 296=35 Bom.L.R. 581=145 Ind. Cas. 578.

——S. 204 (2)—Compromise arising out of proceedings under S. 198 relating to purchase of land—Sanction by resolution is necessary. A.I.R. (Vol. 31) 1944 Sind 150=I.L.R. (1944) Kar. 53=220 Ind. Cas. 220.

——S. 206—Applicability—Anything done or purporting to have been done in pursuance of the Act—Meaning.

There is no warrant for the view that the necessity for notice of suit under S. 206 of the Bombay Municipal Boroughs Act is limited to particular kinds of suits according to the relief claimed.

Where under an agreement with a Municipal Borough a person is allowed to occupy certain plots of municipal land for residential purposes but in pursuance of a town-planning scheme, the Municipal Borough gives notice to quit, and subsequently after an application by the applicant for a reconsideration of the matter, the Municipal Borough passes a resolution that the permit-holder (occupant) should be evicted in accordance with the notice already given, and communicate the same to the occupant, it must be held that the notice, the resolution and the subsequent communication sent to the occupant are all acts done or purporting to be done within the meaning of S. 206 of the Act. Hence a suit by the aggrieved occupant for an injunction restraining the Municipality from evicting him requires notice of suit as required by S. 206, and the omission to give

the notice bars the suit. I.L.R. (1947) Bom. 94=48 Bom.L.R. 804=A.I.R. 1947 Bom. 241.

——S. 206—Applicability—"Anything done or purporting to have been done in pursuance of this Act"—Deposit with Municipality under contract made by private party—Forfeiture by Municipality—Suit by private party for recovery—If covered by section.

When a Municipality has obtained powers under a Municipal Act to enter into a contract, the exercise of their power to enforce the contract is not an act "done in pursuance of" the Municipal Act, for purposes of S. 206 of the Bombay Municipal Boroughs Act. Such an act is done in pursuance of the contract. S. 206 has to be strictly construed, as it constitutes a restriction on the ordinary rights of litigants. The forfeiture by a Municipality of a deposit made to it under a contract with it which the Municipality is empowered to enter into, but is not under any statutory obligation to do, is not an act falling within the ambit of the section. Hence a suit by a private individual to recover the amount deposited by him under a contract and forfeited by the Municipality s not a suit to which S. 206 applies. I.L.R. (1947) Bom. 841=49 Bom.L.R. 724=A.I.R. 1948 Bom. 98 (F.B.).

——S. 206—Applicability—Suit on contract.

A deliberate breach of the contract cannot be treated as something done or purporting to have been done in pursuance of the Act. Therefore no notice of the suit is necessary under S. 206 of the Act when the suit is based on a contract. A.I.R. (Vol. 31) 1944 Bom. 97=45 Bom.L.R. 1059= I. L.R. (1943) Bom. 680=213 Ind. Cas. 375.

——Applicability—Prosecution by Municipality—Acquittal—Suit for malicious prosecution—Limitation Act (IX of 1908), Sch. I, Arts. 2, 23.

The effect of the protective words "anything done or purporting to have been done in pursuance of the Act," in S. 206, Bombay Municipal Boroughs Act, is to protect the Municipal ty or its officers in respect of anything done or purporting to have been done in pursuance of the Act. The words "purporting to have been done" must bear their natural meaning. If a prosecution 's launched for an alleged infringement of some provisions in the Act. then the prosecution purports to be in pursuance of the Act, whether the action is a *bona fide* one or not. Therefore. where a person 's prosecuted for alleged infringement of some provision but is subsequently acquitted and a suit for malicious prosecution against the Municipality is filed. the suit is governed by S. 206 of the Act and must be brought within six months of the Act complained of. It is not governed by either Art. 2 or Art. 23 Limitation Act. A.I.R. (Vol. 24) 1937 Bom. 491=39 Bom. L.R. 881=172 Ind. Cas. 430.

——S. 206—Applicability—Suit for injunction against Municipality.

Before a suit is brought against a Municipality for an injunction restraining it from giving a fresh qualification to certain persons who. according to the plaintiff had been disqualified by an order passed by the District Judge under R. 10 sub-R. (5) of the Municipal Election Rules, notice of suit to the Municipality under S. 206 is absolutely essential and when filed without such notice the suit must fail as the Act of the Municipality complained against is one which purported to have been done under Rr. 10 and 11 of the Rules under the Municipal Boroughs Act. A.I.R. (Vol. 23) 1936 Bom. 43 =37 Bom.L.R. 1027=160 Ind. Cas. 736.

——S. 219—Municipality superseded under Defence of India Rules, R. 38-B—Administrator, if can continue suit.

A civil suit filed by a Borough Municipality which is subsequently superseded under R. 38-B Defence of India Rules which corresponds with S. 219, Bombay Municipal Boroughs Act, can be continued by the Administrator appointed by the Provincial Government. To such a suit, the Government of the Province is not a necessary party. A.I.R. (Vol. 33) 1946 Bom. 154=47 Bom.L.R. 876=223 Ind. Cas. 526.

BOMBAY NATIVE SHARE AND STOCK-BROKERS' ASSOCIATION—ARTICLES OF ASSOCIATION, 12 AND 26.

——Card of membership.

The card of membership is in no sense the property of a member so as to vest in the Official Assignee, on the insolvency of the member. The benefit in the card is of course, transferable and heritable, but only with the sanction of the board and as indicated by Art. 12. It is a purely personal privilege. (1931) 33 Bom.L.R. 39.

BOMBAY NATIVE SHARE AND STOCK-BROKERS' ASSOCIATION RULES.

——Rr. 15, 17 and 19—Deed of Association—Membership card—Whether property, or gives only personal right to holder—Widow of deceased member—Income to pass on to beneficiary—Widow selling membership card—Sale proceeds—Beneficiary, whether entitled for accounts thereof.

Under Cl. 12 of the deed constituting the Bombay Native Share and Stock-Brokers' Association membership card merely gives a personal right to the holder. It does not constitute in the ordinary sense property. Where a widow of a deceased member of the Association, who under her husband's will is entitled to the income of his property, which income was to pass on to a beneficiary after her death sells the membership card, the proceeds of the sale belong to her and do not form the corpus of the estate in which the beneficiary would be interested. The widow need not account for the proceeds to the beneficiary under the will. A.I.R. (Vol. 24) 1937 Bom. 477=39 Bom.L.R. 666=172 Ind. Cas. 233.

——R. 18—Under this rule although the card cannot be sold by the insolvent himself it may be sold by the directors in the event of his making a default and the proceeds may be distributed amongst his creditors. A.I.R. (Vol. 18) 1931 Bom. 225=33 Bom.L.R. 39=Ind. Rul. (1931) Bom. 405=55 Bom. 623=133 Ind. Cas. 821.

——R. 56—The rule provides that if a member makes default in meeting his obligations to the other members his membership ceases. A.I.R. (Vol. 18) 1931 Bom. 225=33 Bom.L.R. 39=55 Bom. 623 =133 Ind. Cas. 821.

——R. 57—The rule gives a special power to the directors if they do not desire to exercise the general power under R. 62 to sell the right of the defaulting member and divide the proceeds amongst the members of the association who are creditors of the defaulter. A.I.R. (Vol. 18) 1931 Bom. 225=33 Bom.L.R. 39=55 Bom. 623=133 Ind. Cas. 821

——R. 62—Right of membership—Insolvency of member—Assignee's right to proceeds of sale of card—Condition that proceeds of sale shall not be available to general creditors—Transfer of Property Act (IV of 1882), S 12.

Under the rules of the Bombay Native Share and Stock Brokers' Association in the case of a member who has lost his membership for being a defaulter he loses all interest both in the property of the Association and his right of membership or the proceeds of sale thereof when sold by the Association, do not pass to the assignee in insolvency, if he is adjudicated an insolvent.

The provisions contained in R. 62 of the Rules of the Association that the card of a defauling member shall be sold and the amount realized on the sale thereof shall be distributed among his exchange creditors is not contrary to the general law of insolvency or to S. 12 of the T. P. Act and is not invalid. Section 12 of the T. P. Act has no application at all to the case of the card of a member of the Association as the assumption of membership does not involve at any stage the transfer of any property on any condition whatever. A.I.R. (Vol. 19) 1932 P.C. 186=55 C.L.J. 592=36 C.W.N. 909=34 Bom.L.R. 1178=59 I.A. 318=56 Bom. 374=63 M.L.J. 623=137 Ind. Cas. 776 (P.C.).

——R. 62—Under R. 62 when there is default, the card is forfeited and the directors have to sell it after six months and divide the proceeds amongst the creditors. A.I.R. (Vol. 18) 1931 Bom. 225=33 Bom.L.R. 39=55 Bom. 623=133 Ind. Cas. 821.

——Rr. 167 (a) and 46 (a)—Effect of.

The effect of R. 167 (e) is that if a contract note is rendered to a constituent by brokers in Form A, when the transactions are of the nature in respect of which the contract note should be in Form B or *vice versa*, or where the contract note is rendered in any other form different from Form A or Form B, then the contract note would not be deemed to be valid. Where the proper form for the contract note has been used namely Form A and all the particulars required to be stated in the contract note under 167 (a) are duly stated in the contract note except that the name of the one of the partners in the Broker firm is omitted, the omission does not make the note invalid. Rule 46 (a) has no bearing upon the validity of the contract notes which have to be rendered to the constituents under the provisions of R 167. It may be that the Association may be entitled to or may have to take action against the share brokers who failed to comply with the provisions of R 46 (a). But non-compliance with the provisions of R. 46 (a) would not render contract notes under R. 167 invalid because the brokers failed or negligently omitted to mention the names of the partners or some of them or one of them. The non-compliance with the provisions of R. 46 (a) would not make a contract note invalid. A.I.R. (Vol. 29) 1942 Bom. 224=44 Bom.L.R. 475=I.L.R. (1942) Bom. 655=202 Ind. Cas. 166.

——R. 297—Making-up price cannot be altered in respect of any particular broker.

Although the Board of Directors may alter, under exceptional circumstances, the making-up price, there is nothing in the Association Rules to justify them in altering the making-up price in respect of one broker's transaction, and not in respect of the transactions of other brokers. The making-up price is settled for the whole market, and if it is to be altered it must be altered for the whole market and not in respect of any particular broker. A.I.R. (Vol. 27) 1940 Bom. 291=42 Bom.L.R. 518=190 Ind. Cas. 602.

BOMBAY PLEADERS ACT (XVII OF 1920).

——Mukhtyar—Order of District Magistrate against their employment in criminal cases—Propriety—Cr. P. Code, S. 4 (1) (r).

In Bombay Presidency "Mukhtyar" is a person who can with the permission of the Court represent an accused in any proceeding within the meaning of S. 4 (1) (r). Cr. P. Code; and so a general order of a District Magistrate against employment of Mukhtyars in criminal cases in his district is improper. 113 Ind. Cas. 402=29 Bom.L.R. 1587=107 Ind. Cas. 56=29 Cr.L.J. 226=9 A. I. Cr. R. 403=A.I.R. 1928 Bom. 33.

——S. 10 (1)—Execution proceedings—Vakil appearing in suit—No separate vakalatnama is necessary.

Applications for execution of decrees are nothing but continued proceedings in suit and therefore under S. 10 (1) of the Act no separate vakalatnama is required. 64 Ind. Cas. 55=46 Bom. 125=23 Bom. L. R. 883=A.I.R. 1922 Bom. 113.

——S. 10 (3)—Vakalatnama—Section not exhaustive and no fresh Vakalatnama necessary for applying to set aside ex parte decree.

S. 10 (3) is not exhaustive, and it should not compel the Court to decide that if a party or his pleader is late in attending a Court, and his case comes on for hearing in his absence, the pleader if he appears after the case has been decided cannot be heard until he has gone back to his client and obtained a fresh Vakalatnama authorizing him to make an application to set aside the *ex parte* decree. 69 Ind. Cas. 169=24 Bom.L.R. 744=47 B. 11=A.I.R. 1922 Bom. 207.

——S. 17—Pleader's fee—Agreement with pleader by client to conduct litigation for settled fee—Client if can alter agreement by compromising his claim before trial—If client compromises his claim before trial, right of pleader to retain whole fee paid to him.

Where the agreement between a pleader and his client is that in return for a settled amount as fee, the pleader should conduct a litigation for the client and it does not lie in the client's power to alter that agreement by compromising the suit before trial.

A pleader entered into an agreement with his client to conduct certain litigation contemplated by the latter for a fee of Rs. 125. The pleader asked for more particulars before drawing up the plaint. His client instead of supplying the particulars, compromised his claim and filed a suit against the pleader to recover the fee of Rs. 125. The Subordinate Judge applied the principles of "quantum meriut" and passed a decree in favour of the client in the sum of Rs. 70 on revision.

Held, that the pleader was entitled clearly to retain the whole fee which was paid to him: 31 Bom. L. R. 1221=54 Bom. 1=122 Ind. Cas. 855=A.I.R. 1930 Bom. 22.

——S. 17—No special agreement between pleader and client—Pleader dying before final decree—Proportionate fees on basis of quantum merint only can be claimed—Legal Practitioner.

In the absence of any special agreement, a pleader shall be entitled to receive fees allowed on taxation between himself and his client for his services until the final decree or order in the proceeding is passed. If a pleader dies before such final decree or order is passed or for any reason the engagement of his service by his client is put an end to then the pleader will only be entitled to ask the Court to award him certain proportionate fee on the basis of a *quantum merint*. The Court in assessing the *quantum merint* might be guided by the percentages laid down by law for the regulation of costs between party and party, but is not bound to adopt that guide where circumstances of the case would render it unjust to do so. 27 Bom.L.R. 1156=90 Ind. Cas. 604=A.I.R. 1925 Bom. 513.

——S. 18—Pleader's fees, valuation of.

Where the real question at issue is the plaintiff's claim to the property in his own right as against defendants, the valuation for the purposes of Pleader's fees is not the notional value which the plaintiff himself puts upon the suit but the actual value of the property itself. A.I.R. (Vol. 26) 1939 Bom. 299=41 Bom.L.R. 413=183 Ind. Cas. 655.

——S. 18—Pleader's fee—Assessment—Suit for injunctions.

The valuation of a suit for the purpose of assessing pleader's fees should not depend purely upon the caprice of a plaintiff, so as to prevent the opponent recovering proper pleader's fees if the suit fails, but pleader's fee should be assessed on the value of the subject-matter even though it may be a case of injunction. Plaintiff brought a suit for injunction against a Municipality praying to restrain it from spending a certain sum for a certain purpose but the suit was withdrawn and he was ordered to pay costs of the Municipality and Secretary of State for India.

Held, that pleader's fee should be assessed on the amount valued in the resolution of the Municipality, the adoption of which the plaintiff tried to prevent: A.I.R. 1926 Bom. 369 Foll. 30 Bom.L.R. 673=111 Ind. Cas. 886=A.I.R. 1928 Bom. 247.

——S. 18—On an application to execute a decree passed in an appeal pending when the Bombay Pleaders Act came in force the pleader's fees are to be taxed as provided in that Act. 48 Bom. 355=26 Bom.L.R. 187=79 Ind. Cas. 749=A.I.R. 1924 Bom. 302.

——S. 18—Suit by landlord to eject tenant—Pleader's fee must be calculated on actual value of property and not the value for Court-fees.

In a suit to eject the defendant, plaintiff's tenant, from her house, the claim for purposes of Court-fee was valued at Rs. 1 080 (the amount rent for one year) and for purposes of jurisdiction it was valued at Rs. 15 000 the value of the house. The suit being decreed in the trial Court the defendant appealed to the High Court, valuing her claim at Rs. 1 080 both for Court-fee purposes and for pleader's fees but failed in appeal. A question having arisen how the pleader's fees should be assessed.

Held, the pleader's fees should be assessed on the value of the house. 46 Bom. 396=64 Ind. Cas. 1000=23 Bom.L.R. 1183=A.I.R. 1922 Bom. 171.

——S. 19 (3)—Scope.

S. 19 (3) merely states what are the services which the client can demand in return for the fee, and that apart from any agreement the pleader would not be allowed to say that the fee which he received was merely for a portion of the litigation before the final order or decree. The clause is for the purpose of defining what the client is entitled to in respect of professional services in return for fee. 31 Bom. L. R. 1221=54 Bom. 1=122 Ind. Cas. 855=A.I.R. 1930 Bom. 22.

——S. 20—"Appeal decided on merits," meaning of.

"In any appeal decided on the merits" in S. 20, Bombay Pleaders Act, means not a decision on the merits in the High Court, but as it says a decision in the High Court even on a preliminary point, from a decree on the merits in the lower Court. A.I.R. (Vol. 23) 1936 Bom. 272=38 Bom.L.R. 518=60 Bom. 696=164 Ind. Cas. 566.

——S. 20 (1) (a)—Fees of two Pleaders, taxation of.

Under S. 20 (a), Bombay Pleaders Act where a party has engaged two Pleaders, he is entitled to have the fees of both the Pleaders taxed in the bill of costs even though one of the two Pleaders is a junior hand. A.I.R. (Vol. 19) 1932 Bom. 15=33 Bom.L.R. 1418=136 Ind. Cas. 161.

——S. 20 (a) (b) and (c)—Court's certificate.

Unless the Court otherwise directs, the fees of two pleaders shall be taxed in the bill of costs in cases falling under Cls. (a), (b) and (c) of S. 20. 51 Bom. 492=29 Bom.L.R. 897=102 Ind. Cas. 661=A.I.R. 1927 Bom. 399.

——S. 20 (1) (c)—"First hearing", meaning of.

The term "first hearing" in S. 20 Bombay Pleaders Act is not a term of art It must mean what it says the day on which there is for the first time a hearing in Court. It does not refer to the date of the first hearing as fixed in the notice issued under O. XLI R. 12, Civil P. C.

Where parties to an appeal engage two Pleaders before the appeal is actually heard but not before the date fixed in notice for the hearing of appeal, issued under O. XLI R. 12 Civil P. C., the parties are entitled to fees of two Pleaders.

The term 'first hearing' has meaning when it applies to original suits, because in an original suit notices are issued either for settlement of issues or for final hearing. But it has no meaning with reference to an appeal. A.I.R. (Vol. 23) 1936 Bom. 272=38 Bom.L.R. 518=60 Bom. 696=164 Ind. Cas. 566.

——S. 25—Reasonable cause.

The High Court can take disciplinary action against Pleaders under the Bombay Pleaders Act (XVII of 1920). There is no substantial difference between a case dealt with under the Bombay Pleaders Act on reasonable cause and a case dealt with under the Bar Councils Act for misconduct. There cannot be a cause being considered reasonable for taking disciplinary action against a Pleader unless the Pleader had been guilty of misconduct, and if misconduct is proved that amounts to reasonable cause. A.I.R. (Vol. 22) 1935 Bom. 1=59 Bom. 57=36 Bom.L.R. 1136=154 Ind. Cas. 546 (F.B.).

——S. 25—Professional misconduct—Accepting brief on both sides.

Where a Pleader presents a *vakalatnama* on behalf of an accused and on his behalf argues an application for bail, and at the hearing he presents another *vakalatnama* on behalf of the complainant but when the facts are brought to his notice, applies for the withdrawal of the second *vakalatnama*, the Pleader is guilty of professional misconduct and should be severely reprimanded. A.I.R. (Vol. 22) 1935 Bom. 71=36 Bom.L.R. 1225=36 Cr.L.J. 507=1935 Cr. Cas. 133=154 Ind. Cas. 335.

——S. 25—Improper conduct—Extent of pleader's authority in writing a notice to a judicial officer.

It is the duty of counsel towards their clients to use their own judgment and experience and discretion and as a result, whatever be their instructions to exclude all topics and observations of which the case does not properly admit. They should be careful to express anything in a form which will not be unduly insulting or opprobrious to the officer, who has to receive the notice. Where a notice by a pleader contained the following extracts: "You should not have asked my client to attend the Court at 11 a.m., when he was not going to be examined at that time. He was not bound in law to wait indefinitely till you chose to call him for examination. A witness's time is as much valuable, if not more than the time of the Court. Obviously enough, your order was not only arbitrary and high-handed, but also spiteful and malicious . . . From what is stated above, you will clearly see the enormity of your own acts."

Held: that there was a clear excess of the privilege of the Bar, amounting to improper conduct. 30 Bom. L.R. 934=113 Ind. Cas. 519=A.I.R. 1928 Bom. 338.

——S. 25—Improper conduct—Criticism pending trial in public meeting.

While certain persons were on their trial a resolution moved by the second and supported by the third opponent was passed under the presidentship of 1st opponent a Dist. Pleader congratulating upon their sacrifice.

Held: The opponents acted improperly in being parties to a resolution of this character. Anything done or said which may amount to criticism of any proceedings pending in a Court of Justice is calculated to hinder the even and impartial administration of justice. Pleaders have privileges, but they have responsibilities also, and a pleader who acts so as to hinder and embarrass the administration of justice is guilty of "improper conduct' within the meaning of those words as used in S. 26, Bombay Pleaders Act and such conduct furnishes "reasonbble cause" for the exercise of disciplinary jurisdiction under S. 25. 24 Bom.L.R. 1049=76 Ind. Cas. 78=47 Bom. 117=A.I.R. 1922 Bom. 361.

——S. 25—Disciplinary jurisdiction—Pleader adjudicated insolvent—Power of High Court to suspend sanad.

High Court in its disciplinary jurisdiction has full power to suspend the sanad of a pleader, if he has been adjudicated an insolvent, until he obtains a discharge, if, in the circumstances of the case, it considers that the insolvency coupled with the surrounding circumstances supplies a reasonable cause for such a suspension. It is largely a matter of discretion. The Chief Justice receiving an application of this kind can well be satisfied from the circumstances that are put forward that there is no objection to grant an insolvent pleader permission to continue to practise and in doing so he would be acting on behalf of the Court, but if he considers that the case is one where there is reason to doubt the advisability of granting such permission, he can ask the Government Pleader to bring it before the Court in its disciplinary jurisdiction. 52 Bom. 559=114 Ind. Cas. 259=30 Bom.L.R. 1011=A.I.R. 1928 Bom. 385.

——S. 26—Improper conduct.

District Pleader sending circular post card giving his name, description and address would amount to advertisement and therefore is improper conduct if in addition he adds false statements in the postcard that he is High Court pleader and authorized by Court to examine wakf accounts amounts to an offence under S. 26. 53 Bom. 640=31 Bom.L.R. 625 =A.I.R. 1929 Bom. 335.

——Sch. 3, Rr. 1 and 2—Pleader's fee—Courts altering amount in plaint in defendant's favour—Notice to plaintiff is necessary.

A Court is not entitled to alter the amount for the pleader's fees stated in the plaint in favour of the defendants without giving notice to the plaintiff. 31 Bom.L.R. 471=118 Ind. Cas. 799=A.I.R. 1929 Bom. 223.

——Sch. 3 Rr. 1 and 2—Suit dismissed for default—Award of costs.

Where a suit has been dismissed for default of appearance it does not decide on the merits the real dispute between the parties within the meaning of R. 1 (*a*) and costs should therefore be awarded not under R. 1 (*a*) but under R. 2 (*c*). 31 Bom.L.R. 471=118 Ind. Cas. 799=A.I.R. 1929 Bom. 223.

——Sch. 3, R. 1 (b)—Pleader's fee—Calculation—Suit for injunction.

In a suit for injunction by a claimant in land acquisition proceedings to restrain Government from taking proceedings, on a point of procedure, plea-

der's fees are to be calculated on the value of the subject-matter of the suit. 28 Bom.L.R. 582=96 Ind. Cas. 329=A.I.R. 1926 Bom. 369.

——Sch. 3, R. 5 (vi) (e)—Applicability—Applications under special or local Acts.

Proceedings under the repealed and re-enacted Succession Certificate Act must be taxed in exactly the same way after as before the Act of 1925, for there is no substantial difference involved in the principle of the provisions. The words in Sub-R. (e) (vi), of R. 5 of Sch. 3 to the Bombay Pleaders Act, *viz.*, "any other Special or Local Act," clearly cover Regulation 8 of 1827. Consequently R. 5 applies to all applications or appeals under any other special or local Act. 29 Bom.L.R. 1031=103 Ind. Cas. 637=A.I.R. 1927 Bom. 499.

BOMBAY (PLEADERS CASTE QUESTIONS) REGULATION (II OF 1827).

——S. 5—High Court's Power.

It is competent under Bombay Regulation 2 of 1827 to the Bombay High Court to call for the proceedings of any subordinate Civil Court, and to issue such orders thereon as the case may require, although the same is repealed by Act 12 of 1873, by virtue of Ss. 106 and 130 of Government of India Act, 1915; but such a power should be exercised only in very exceptional cases. 40 Bom. 86 and A.I.R. 1924 Bom. 65 Foll. 52 Bom 37=106 Ind. Cas. 470=29 Bom.L.R. 1551=A.I.R. 1928 Bom. 5.

——S. 54—Applicability—Sind.

The provisions of S. 54 are still applicable to Sind. Where therefore the pleader for the appellant has notified to the Court his inability to proceed with the appeal on account of his illness, the appellant is entitled to an adjournment for a reasonable time to enable him to engage another pleader. 112 Ind. Cas. 539=A.I.R. 1929 Sind 40.

BOMBAY PREVENTION OF ADULTERATION ACT (V OF 1925).

——S. 4—Burden to show that article is adulterated.

It is true that the burden of proof that the article of food is adulterated lies upon the prosecution, but that burden may in effect be assisted or even completely discharged by the admissions of the accused himself. A.I.R. (Vol. 26) 1939 Sind 337=I. L. R. (1940) Kar. 91=41 Cr.L.J. 246=185 Ind. Cas. 832.

——S. 4 (1) (a)—Accused selling vinegar produced not by fermentation but by diluting acetic acid with water.

The question whether the particular article sold was not of the nature substance or quality demanded so as to contravene the provisions of S. 4 (1) (a) of the Act is a question of fact to be determined on the evidence.

The prosecution examined an analyzer who said that "vinegar" was the product of fermentation or brewing and that the substance sold by the accused was "artificial" or synthetic vinegar produced not by fermentation or brewing but merely by diluting acetic acid with water. The defence produced no evidence whatever:

Held, that the Magistrate was justified in finding the accused guilty under S. 4 (1) (a) Bombay Prevention of Adulteration Act. A.I.R. (Vol. 27) 1940 Sind 127=I.L.R. (1940) Kar. 282=41 Cr.L.J. 839 =190 Ind. Cas. 159.

——S. 4 (1) (a)—Proprietor, a sleeping partner—Liability of—Purchase by public officer as such.

A proprietor of a shop is liable for the sale of adulterated food sold in his shop even when he is a sleeping partner, for it is not only the actual salesman who is responsible and who can be convicted under the Act for sale of adulterated food.

Even when a purchaser of adulterated food is a public officer, an offence under S. 4 (1) (a) Bombay Prevention of Adulteration Act is committed in respect of adulterated food purchased by him as such public officer. A.I.R. (Vol. 25) 1938 Sind 218=40 Cr.L.J. 7=I.L.R. (1939) Kar. 191=178 Ind. Cas. 119.

——S. 4 (1) (b)—Alleged adulterated ghee taken from shop where sweetmeats were offered for sale—Presumption.

Section 4 Bombay Prevention of Adulteration Act, does not apply only to the sale of *ghee* simply as such but applies also to the sale of articles of food of which it is a necessary ingredient. The words of the section are wide enough to include articles of food which contain *ghee* mixed with other substance.

The fact that this *ghee* was taken from a shop where sweetmeats and *pakoras* were offered for sale and indeed from a frying-pan in which other sweetmeats and *pakoras* were being made makes it quite clear that the presumption apart, the admission of the accused himself apart, the sweetmeats and *pakoras* in his shop had been manufactured for sale within the meaning of S. 4 (1) (b) of the Act and that he was manufacturing and offering for sale sweetmeats and *pakoras* as containing pure *ghee* which contained the alleged impure *ghee*. A.I.R. (Vol. 26) 1939 Sind 337=I.L.R. (1940) Kar. 91=41 Cr.L.J. 246=185 Ind. Cas. 832.

——Ss. 4 (1), 3 (a), 4 (4)—Accused relying on defence of warranty—Whether entitled to adjournment for the purpose—Duty of prosecution.

Persons accused under the Bombay Prevention of Adulteration Act must realize that if they rely upon the defence of warranty they must prove it and that they must have their witnesses present at the date of hearing. They are not entitled to adjournments as of right for this purpose.

But they can be excused if they fail to state clearly their defence of warranty before the close of prosecution case if neither the summons served on them nor the evidence for the prosecution makes it clear as to what case the accused has to meet. A.I.R. (Vol. 25) 1938 Sind 70=39 Cr.L.J. 474=32 Sind L.R. 684=174 Ind. Cas. 685.

——Ss. 4 (1), 3 (a), 4 (4) (a), 13—Conviction under S. 4 (1)—Legality.

Section 4 (1) Bombay Prevention of Adulteration Act contemplates three separate and distinct offences, under Cls. (a) (b) and (c) respectively, and a conviction under S. 4 (1) generally is bad in law. A.I.R. (Vol. 25) 1938 Sind 70=39 Cr.L.J. 474=32 Sind L.R. 684=174 Ind. Cas. 685.

——Ss. 4 (4) (b), 5—Warranty, proof of.

Under S. 4 (4) (b). Bombay Prevention of Adulteration Act, it is the rule, that a warranty must be proved by the personal attendance in Court of the person by whom or on whose behalf it was given, and it may well be that this provision of S. 4 (4) (b) is to be read with S. 5, whereby provision is made for the punishment of the warrantor in case a false warranty is given. It is the rule that the warrantor must personally attend in Court, and it is only in exceptional cases that he should not do so. A.I.R. (Vol. 25) 1938 Sind 72=39 Cr.L.J. 477=32 Sind L.R. 659=174 Ind. Cas. 542.

——S. 12 (1)—Complaint addressed to Bench of Magistrates as such—Verification of complaint signed by one Magistrate only.

In Hyderabad (Sind) the Magistrates who constitute the "B" Bench are Magistrates of the Second Class only when sitting together as a Bench and when sitting singly they are Magistrates only of the Third Class.

Where the record shows that the complaint was addressed to a Bench of Magistrates as such, from the mere fact that upon the verification of the complaint itself, there is only the signature of one Magistrate it by no means follows that two Magistrates were not present sitting as a Bench on the case. A.I.R. (Vol. 25) 1938 Sind 209=40 Cr.L.J. 122 =I.L.R. (1939) Kar. 230=178 Ind. Cas. 648.

——S. 13—Particulars of offence to be stated to accused.

In giving the particulars of the offence charged, it is better to set out the title of the Act and not merely an abbreviation with which a particular accused may or may not be familiar. But in any case it is not enough merely to say that the offence has been charged under a particular section. The accused must be told what he is said to have done which he ought not to have done, *i.e.*, that he sold or offered or exposed for sale as eatable *ghee* a substance which was not eatable *ghee*. He must be told what the offence charged is and that is particularly necessary under the Bombay Prevention of Adulteration Act; because under Sub-S. (3) of S. 4 the seller may rely on a statutory defence, but he must give notice of that defence within three days of the service of the summons. If he does not know the particulars of the offence, it may be quite impossible for him to determine whether or not he can rely on the statutory defence. A.I.R. (Vol. 28) 1941 Bom 19=42 Bom.L.R. 1028=42 Cr.L.J. 271 =192 Ind. Cas. 277.

——S. 13 (1)—Summons not applied for within 30 days of granting of certificate by analyst—Irregularity, if curable.

Section 13 Bombay Prevention of Adulteration Act should be considered separately as regards its two sub-sections because Sub-S. (1) relates to a condition of time and that if it can be shown that a summons was not applied for within 30 days of the date of the grant of the certificate by the public analyst that would be fatal to the prosecution case, for time once gone is gone beyond recall. This is not a mere irregularity which can be cured. It is a fatal defect in he proceedings *in limine*. A.I.R. (Vol. 25) 1938 Sind 209=40 Cr.L.J. 122=I.L.R. (1939) Kar. 230=178 Ind. Cas. 648.

——S. 13 (2)—Omission of date from summons—Irregularity, if curable.

Although it is desirable indeed that the provisions of S. 13 (2), Bombay Prevention of Adulteration Act should be closely followed, that the name of the complainant should be given, the name and place fixed for hearing should be shown, it cannot be held that if, for instance, the date be omitted from the summons, that could be said to be a fatal flaw in the proceedings. All that can be said is that it is an irregularity which can be cured if necessary, by an issue of amended summons and by the Magistrate allowing such adjournment as the omission of any particular from the summons may seem to require so as to give the accused the notice in the summons to which he is entitled. A.I.R. (Vol. 25) 1938 Sind 209=40 Cr.L.J. 122=I.L.R. (1939) Kar. 230= 178 Ind. Cas. 648.

——Ss. 14 and 16—Accused's right to insist upon public analyst to be summoned and examined as witness when may be exercised.

Per *N. J. Wadia, J.*—There is nothing in the language of Ss. 14 and 16, Bombay Prevention of Adulteration Act, to suggest that the ordinary rule with regard to the burden of proof in a criminal trial is to be departed from. Section 14 does not deal with the procedure to be followed in a trial under the Act: it merely lays down a rule of evidence and allows a presumption to be drawn. Section 16 nowhere says that the accused's right to insist upon the public analyst being summoned and examined as a witness is to be exercised only after the accused has led evidence in his own defence challenging the correctness of the public analyst's certificate. The language of the section on the contrary appears to show clearly that it is open to the accused at the commencement of the trial, as soon as he is accused of the offence to require the Court to summon the public analyst as a witness and the section provides that if the accused deposit the requisite amount in Court, he is entitled as of right to have the public analyst called as a witness. A.I.R. (Vol. 24) 1937 Bom. 364=39 Bom.L.R. 629=38 Cr.L.J. 975=I.L.R. (1937) Bom. 751=170 Ind. Cas. 867.

——Ss. 14 and 16—Evidence of public analyst—Right of accused to cross-examine—Prior condition of deposit of fees before summoning him.

Section 14 of the Bombay Prevention of Adulteration Act has conferred upon the certificate of a public analyst a special privilege. It is provided that the production of such a certificate shall until the contrary is proved be sufficient evidence of the facts therein stated. This provision confers a privileged position on these certificates but that privilege must not be so far extended as to deprive the accused person of the ordinary right to which every person accused of any offence is always entitled. He has a right to cross-examine any witness whom the prosecution has produced against him. This right is not to be taken away because for special reasons a public analyst has been allowed to give his evidence in writing and not by word of mouth. This the Act itself expressly provides. It confers upon the accused person the right to require the Court to summon the public analyst as a witness and it lays upon the Court the duty of summoning that witness

accordingly, and this obligation cannot be defeated by imposing as a prior condition the deposit of a prohibitive fee. A.I.R. (Vol. 22) 1935 Sind 5=1935 Cr. Cas. 46=36 Cr.L.J. 571=154 Ind. Cas. 514.

——S. 14—Certificate of public analyst produced by accused—Presumption.

Per *Broomfield J.*—Section 14 (1) of the Act applies to any certificate of a public analyst and not only to a certificate on which the prosecution is based. There is no necessary connection between it and S. 16. The rebuttable presumption under S. 14 (1) will equally apply to a certificate of a public analyst produced by the accused himself. A.I.R. (Vol. 24) 1937 Bom. 364=39 Bom.L.R. 629=38 Cr.L.J. 975=I.L.R. (1937) Bom. 751=170 Ind. Cas. 867.

BOMBAY PREVENTION OF CRUELTY TO ANIMALS ACT (XI OF 1890).

——S. 3 (a)—Abandoning a horse—Starvation.

The abandonment of a horse by its owner is not prohibited by the Act. The starvation of the animal after it is abandoned is not an ill-reatment of the animal by the person who has ceased to exercise a control over it. 21 Bom.L.R. 1096=54 Ind. Cas. 481=21 Cr.L.J. 81.

BOMBAY PREVENTION OF GAMBLING ACT (IV OF 1887).

——Applicability of, to Delhi.

Bombay Prevention of Gambling Act applies to Delhi. A.I.R. (Vol. 21) 1934 Lah. 760=1934 Cr. Cas. 1121 (1)=35 P.L.R. 614=36 Cr.L.J. 418=153 Ind. Cas. 443 (1).

——Ss. 3 and 4 (a)—Applicability—"Using or keeping", meaning of.

The expression "using or keeping" in S. 3 means having a right to use or keep as in S. 4 (a) and if the accused is not a person having a right to use this passage then it would be irrelevant to prove that he is making a profit out of the gaming carried on there. To bring the case within the definition under S. 3 it is necessary to show that profit was to be made for the person owning, keeping or using the passage. A.I.R. (Vol. 27) 1940 Bom. 129=42 Bom.L.R. 161=41 Cr.L.J. 571=I.L.R. (1940) Bom. 322=188 Ind. Cas. 316.

——S. 3—Common gaming house—Passage, if can be.

A passage may be a place within the meaning of the Bombay Prevention of Gambling Act. A passage may also no doubt be a common gaming house if it otherwise satisfies the definition of such a place. A.I.R. (Vol. 27) 1940 Bom. 18=41 Bom.L.R. 1114=41 Cr.L.J. 273=186 Ind. Cas. 242.

——Ss. 3 and 4 (a)—Common gaming house—Word "using" in S. 3 and word "having the use of" in S. 4 (a), meaning of.

According to the *ejusdem generis* rule of construction the word "using" in S. 3 should connote some sort of right or some sort of possession. The words "having the use of" in S. 4 (a) imply something more than mere using even though the use may be habitual. A.I.R. (Vol. 27) 1940 Bom. 18=41 Bom.L.R. 1114=41 Cr.L.J. 273=186 Ind. Cas. 242.

——S. 3—Common gaming house—What is.

To prove that a particular house, room or place is common "gaming house" it need not be established that the owner or occupier takes a fixed commission which is irrespective of the result of gaming or that he manipulates the conditions in such a manner that he cannot possibly lose. It is sufficient if the house is one in which instruments of gaming are kept or used for the profit or gain of the person keeping or using such place *i.e.*, where the person keeping or using the house knows that profit or gain will in all probability result from the use of the instrument of gaming. The profit or gain may not actually result from such use. But if profit or gain is the probable and the expected result of the game itself and if that is the purpose of keeping or using the instruments, it would be sufficient to bring the case within the scope of the definition. 23 Cr.L.J. 196, Diss. 47 Bom. 960=25 Bom.L.R. 1089=25 Cr. L. J. 531=77 Ind. Cas. 995=A.I.R. 1924 Bom. 184.

——S. 3—Common gaming house, proof of—Expectation of profits—Effect.

The words "or in any other manner" cannot be regarded as restricting the profit or gain of the owner or occupier of the house to profit or gain in a manner *ejusdem generis* with what precedes those words. Consequently, even the hope of making a profit out of the gambling itself is sufficient to satisfy the requirements of the definition of common gaming house. It may happen that the occupier of a house may, allow it to be used by the public for gambling and he himself may take part in it in the hope of making a profit although he may not necessarily make it every time. Such a hope is sufficient to make the house a gaming house and the occupier is liable for keeping such a house. A.I.R. (Vol. 32) 1945 Bom. 305=47 Cr.L.J. 109=47 Bom.L.R. 75=221 Ind. Cas. 18.

——S. 3—Common gaming house—Probability of profit to the owner is sufficient.

To prove that a particular house, room or place is common "gaming house" it need not be established that the owner or occupier takes a fixed commission which is irrespective of the result of gaming or that he manipulates the conditions in such a manner that he cannot possibly lose. It is sufficient if the house is one in which instruments of gaming are kept or used for the profits or gain of the person keeping or using such place *i.e.* where the person keeping or using the house knows that profit or gain will in all probability result from the use of the instrument of gaming. The profit or gain may not actually result from such use. But if profit or gain is the probable and the expected result of the game itself and if that is the purpose of keeping or using the instruments it would be sufficient to bring the case within the scope of the definition. 23 Cr.L.J. 196 Diss. 47 B. 960=25 Bom.L.R. 1089=1924 Bom. 184.

——S. 3 (a)—Gaming—Persons performing operations necessary for gaming.

Persons taking part in operations to enable the game to be played such as giving instructions to those who come to participate in it etc., must be deemed to be gaming within the provisions of the Bombay Prevention of Gambling Act, as they actually assist

in the gaming. A.I.R. (Vol. 24) 1937 Sind 99=31 S.L.R. 44=38 Cr.L.J. 668=169 Ind. Cas. 35.

——S. 3—'Game'—Wagering in prices of opium chests, how far a game.

Wagering in prices of opium chests is not in any sense a game within the meaning of Bombay Act IV of 1887. (1902) 4 Bom.L.R. 271=26 B. 533.

——S. 3—Betting upon a past event.

A bet need not be as regards the issue of a future uncertain event and may be upon a past event, *e.g.*, whether a particular horse won a race in a certain year. In such a case the bet is upon the accuracy of the information belief or memory of the parties and the event is the proof that one or the other was accurate. A person may bet against what he believes the issue will be *e.g.*, a man may bet against a horse which he believes will win in order to secure himself against loss in either event. 31 Bom.L.R. 1349=1930 Cr. Cas. 113=54 Bom. 146=31 Cr.L.J. 633=A..R. 1930 Bom. 49.

——S. 3—Gaming in public place—Essentials.

When the Courts are concerned with a particular form of gaming made punishable under the Act and the charge is based on one of the ancillary acts in the definition some connection ought to be shown between that act and the particular form of gaming which is the subject of the charge. The words "intended to aid or facilitate the various acts described" must be read as ancillary to the general words of the definition. Before convicting a man of aiding or facilitating an act it must be shown that that act has taken place and that it is an offence. If it be proved that gaming has taken place in a public place, then anyone who is shown to have aided or facilitated such gaming is guilty, although he has not himself taken part in the actual gaming. But it is impossible to convict a person under the statute of aiding or facilitating an act when the act itself which he has aided or facilitated is not shown to be a criminal act. But if the charge is gaming in a public place and the only act alleged is one which facilitates the distribution of profits of some other kind of gaming, the ancillary act cannot be said to form part of the offence charged unless it is an overt act which itself amounts to gaming in public place within the intendment of the section. To put in a nutshell though the distribution of the winnings of gaming and any act facilitating the same is a gaming it is not gaming in a public place unless (*a*) the winnings are the winnings of gaming in a public place in which case the mischief aimed at has been committed somewhere or (*b*) the distribution or ancillary act is itself public. A.I.R. (Vol. 25) 1938 Bom. 484=40 Bom.L.R. 1082=40 Cr.L.J. 97=I.L.R. (1939) Bom. 53=170 Ind. Cas. 588 (F.B.).

——S. 3 (6)—"Means of gaming"—Money.

The words 'means of gaming' in S. 3 (6), are very wide and money is generally a means of gaming, though all moneys are not instruments of gaming. If a particular coin or currency note has in fact been used as means of gaming then that particular coin or currency note falls within the definition of 'instruments of gaming'. A.I.R. (Vol. 19) 1932 Bom.L.R. 278=56 Bom. 192=33 Cr.L.J. 385=137 Ind. Cas. 181.

——S. 3—Instruments of gaming—Betting slips with numbers employed in satta gambling.

Betting slips with numbers on it employed in *satta* gambling are instruments of gaming. A.I.R. (Vol. 21) 1934 Lah. 760=35 P.L.R. 614=1934 Cr. Cas. 1121 (1)=36 Cr.L.J. 418=153 Ind. Cas. 443 (1).

——S. 3—Instrument of gaming—Marked coin.

A marked coin proved to have been used for the purpose of making a bet is an instrument of gaming within the meaning of S. 3 of the Bombay Prevention of Gambling Act. A.I.R. (Vol. 19) 1932 Bom. 180=34 Bom.L. 286=56 Bom. 200=33 Cr.L.J. 404=1932 Cr. Cas. 239=137 Ind. Cas. 188.

——S. 3—Instrument of gaming—Books of record.

Books used for the purpose of registering or recording any gaming transaction would fall within the definition of "instruments of gaming." A register or record of transactions in American Futures was held to be an instrument of gaming: so also a book which contained a register or Kacha Khandi transaction and Teji Mandi transactions. 53 Bom. 367=116 Ind. Cas. 251=31 Bom.L.R. 158=30 Cr.L.J. 595=12 A.I.Cr.R. 466==A.I.R. 1929 Bom. 157.

——S. 3—Instruments of gaming—Book recording bets.

A book used for recording entries of the bets made by those frequenting a palce is an instrument of gaming within S. 3. 40 Bom. 263=31 Ind. Cas. 1003=17 Bom.L.R. 1080=16 Cr.L.J. 827.

——S. 3—Instrument of gaming—A page of paper for registering wager.

A single page of paper for registering wages is an instrument of gaming within the meaning of S. 3 of the Prevention of Gambling Act, 1887. (1904) 6 Bom.L.R. 1091=29 Bom. 264.

——Ss. 3, 5 and 7—Person caught actually taking bets over telephone—Conviction under S. 5.

Section 3 Bombay Prevention of Gambling Act makes "gaming" within the meaning of the Act the collection or soliciting of bets, and it makes no difference if these bets are brought by a messenger or person or sent by telephone or sent and received by telephone. It is gaming within the definition of S. 3, and in S. 7 the word "persons," includes "person", the plural includes the singular. Therefore, a person caught actually in the act of taking bets over the telephone can be rightly convicted of gaming under S. 5. A.I.R. (Vol. 27) 1940 Sind 28=41 Cr.L.J. 399=I.L.R. (1940) Kar. 150=187 Ind. Cas. 78.

——S. 4.

SYNOPSIS.

1. **Conviction under—Requirements.**
2. **Common gaming house—Proof.**
3. **Club and common gaming house—Distinction.**
4. **Instrument of gaming.**
5. **"Place"—Meaning of.**
6. **"Having the use of"—Meaning.**
7. **Offences under—If cognizable.**
8. **Offences under—Summary trial.**
9. **Evidence**
10. **Execution of warrant.**

11. Punishment.
12. Revision.

1. Conviction under—Requirements.

——S. 4—Conviction under —Requirements.

The thing necessary to be proved for conviction under S. 4 Bombay Prevention of Gambling Act, is that the owner or the keeper of the house was in some way or other deriving a profit from the use of the instruments of gaming or of the house. A.I.R. (Vol. 21) 1934 Sind 129=28 S.L.R. 81=1934 Cr. Cas. 1065=36 Cr.L.J. 204=152 Ind. Cas. 400.

——Ss. 4, 5 and 7—Conviction under—Requirements.

In order to establish an offence under S. 4 of keeping a common gaming-house, it is necessary to show in the first place that the person *charged with that offence* is the owner or occupier, *or a person 'having the use'* of the place alleged to be kept as a common gaining-house. It is not sufficient to show that the accused used the place in question for the purpose of gaming there. The accused were found playing for money with cards in a building ordinarily used as a *Jamatkhana* but accessible to such members of the Broach community as have no place to live in and are too poor to afford the rent of a room:—*Held*—That they cannot be convicted of an offence under S. 4. (1904) 7 Bom.L.R. 16=29 Bom. 226 =2 Cr.L.J. 26.

——S. 4—Conviction under—Joint owner of house.

Where the joint owner of house is present when gaming is presumed to be going on in his house, he can be convicted under S. 4 for having knowingly permitted the house to be used as a gaming-house. 32 Bom.L.R. 794=A.I.R. 1930 Bom. 350 (D.B.).

2. Common gaming house—Proof.

——Ss. 4 and 5—Common gaming house—Proof—Owner of house and players having cash.

The fact that each of the players had cash in his possession does not prove that any one of them was receiving remuneration for the use of the instruments of gaming. Play goes on in many private houses; and players will usually be found to have cash; but from these two things alone it is not legitimate to draw an inference that the host is deriving from his visitors profit or gain from the use of his house and his cards. A.I.R. (Vol. 22) 1935 Sind 102=1935 Cr. Cas. 520=36 Cr.L.J. 902=29 S.L.R. 19=156 Ind. Cas. 294.

——S. 4—Gaming-house—Proof—Habitual use is not necessary.

Under S. 4 it need not be shown that the house was habitually used for gaming. 20 S.L.R. 10=27 Cr.L.J. 905=96 Ind. Cas. 217=A.I.R. 1926 Sind 254 (D.B.).

——Ss. 4 and 5—Common Gaming-house—Proof—Stranger obtaining a bet on horse race—Other documentary evidence as betting books—House can be inferred to be common gaming house.

From the fact that a stranger went into the house and obtained a bet on a horse race, coupled with the discovery of documentary evidence, such as betting books, etc., found when the police searched the house very shortly afterwards, the proper inference that the house was a common gaming house can be drawn. 50 Bom. 344=28 Bom.L.R. 272=27 Cr. L. J. 503=93 Ind. Cas. 967=A.I.R. 1926 Bom. 195 (D.B.).

——S. 4—Common gaming house—Proof—Wagering books found.

A person keeping for his profit a place where brokers and others carry on jota business, i.e., wagering from day to day on the total sale of cotton bales in Liverpool, and where the wagering books are kept or used, is guilty of keeping a common gaming house and is liable to be punished under S. 4 of the Prevention of Gambling Act, 1887. (1903) 6 Bom.L.R. 249.

——S. 4 (a)—Anka Sutta book—Use of the book—Presumption—Inference.

In execution of a warrant issued under S. 6 of the Prevention of Gambling Act, an **Anka Sutta** book was found in the house of the accused. It appeared that there was betting in the house, and that those bets were recorded in the book in the handwriting of the accused. It was also shown that the accused got one per cent. on the bets; and the accused himself admitted that the book was used for betting:

Held (1)—That these circumstances put together justified the conclusion that the book was an instrument of gaming kept and used in the house for the purpose of profit by the accused within the meaning of S. 4 (a) of the Prevention of Gambling Act, 1887; (2) that direct evidence was not necessary to prove the use of the book in the house; but such use might be inferred from the facts and surrounding circumstances found to exist. (1903) 5 Bom.L.R. 1047.

——S. 4—Common gaming house—Proof—Anka Sutta book found of gaming.

During the course of a search instituted under S. 6 of the Prevention of Gambling Act, an Anka Sutta book was found in the house of the accused.

Held, that the book was an instrument of gaming and that book having been found in the house of the accused, his house was a common gambling house. (1902) 5 Bom.L.R. 129.

——Ss. 4 and 5—Common gambling-house—Proof of.

To support a conviction it must be shown that the house in which the accused were found was a common gaming house. (1902) 4 Bom.L.R. 946.

——Ss. 4 and 5—Common gaming-house—Proof.

Accused opened a shop wherein the kept a table with a cover on it. The cover was painted with numbers 6 to 36. They were not consecutive numbers. On each number was placed an article, such as a clock, watch, etc., of the values ranging from Re. 1 8-0 to Rs. 15. Any customer who paid Rs. 2 was given by accused six dice. The dice had six sides, each of which bore marks ranging from one to six. The customer was allowed one throw of the dice, and the number of points thus obtained was to entitle him to obtain the articles placed on the corresponding number on the cloths.

Held, that the shop was a common gaming-house and the persons keeping the house and playing therein were punishable under Ss. 4 and 5. (1902) 4 Bom.L.R. 297.

——S. 4—Books of accounts for registering bets —Telegrams announcing number—Instruments of gaming.

Wagering was carried on on the figures which denoted the prices in Calcutta of the auction sale of opium chests. The wagers were recorded in book, the different pages of which had the various units recorded at the top of each page, and the betters were invited to inscribe their names under the various units stating the amount of their wagers. The winning numbers were communicated by means of telegrams from Calcutta:

Held (1) that the books and telegrams were the only means used to stimulate the betting or decide the bets and the persons delaying in them were guilty under S. 4 of the Bombay Prevention of Gambling Act, 1887; (2) that the books were instruments of gaming within the meaning of S. 4. (1902) 4 Bom.L.R. 271=26 Bom. 533.

3. Club and Common Gaming House—Distinction.

——S. 4—Club and common gaming house, distinction.

In the case of a club, it is not usual for a charge to be made for the profit and benefit of the owner or occupier of the premises. In the case of a common gambling house, all those participating in the game pay certain amount for the benefit of the owner of the premises. The other point is that in the case of a club, the place is not open to any member of the public, but only to members of the club and perhaps their guests. A.I.R. (Vol. 26) 1939 Bom. 481=41 Bom.L.R. 970=I. L.R. (1939) Bom. 679=41 Cr.L.J. 157=185 Ind. Cas. 315.

4. Instrument of gaming.

——Ss. 4, 4 (a), 5—Instrument of gaming—Marked coin.

A marked coin may no doubt be an instrument of gaming. It becomes an instrument of gaming if it has in fact been used as a means of gaming. A.I.R. (Vol. 27) 1940 Bom. 18=41 Bom.L.R. 1114=41 Cr.L.J. 273=186 Ind. Cas. 242.

——S. 4—Instrument of gaming not introduced by bogus punter—Evidentiary value.

If instruments of gaming are found, which are not introduced by the bogus punter himself like marked coins, that is a very good independent corroboration of the punter's evidence that the marked coin was also an instrument of gaming. A.I.R. (Vol. 27) 1940 Bom. 18=41 Bom.L.R. 1114=41 Cr.L.J. 273=186 Ind. Cas. 242.

——Ss. 4 and 5—Instruments of gaming.

Telegrams announcing certain events and pieces of paper used by brokers for recording transactions are not instruments of gaming under the Act. 17 Bom.L.R. 600=30 Ind. Cas. 124=16 Cr. L.J. 572.

5. "Place"—Meaning of.

——Ss. 4, 7, 12—"Place"—Meaning of—Shop abutting on to a public street.

A place may be a "place" within the meaning of S. 12, Bombay Prevention of Gambling Act and still be a place within the meaning of S. 4. The word "place" in S. 4 has a wide meaning. S. 12 does not exclude the application of S. 4 in proper cases even though in certain circumstances S. 12 might apply to the same "place." Hence a place such as a shop abutting on to a public street although a 'place' within the meaning of S. 12, is still a 'place' within the meaning of S. 4, and a search warant under the Act can be issued and presumption under S. 7 can be drawn against the keeper of such a shop kept for the purposes of gaming for profit and he can be convicted under S. 4. A.I.R. (Vol. 26) 1939 Sind 184=40 Cr. L.J. 817=I.L.R. (1939) Kar. 741=183 Ind. Cas. 562.

——Ss. 4 and 6—"Place"—Passage surrounded by building appropriated for betting business.

Where the passages are surrounded by buildings and are closed at night -by doors and the accused have appropriated them for the business of betting, the business of betting is localized and this localization converts the passage into a "place", within the meaning of Ss. 3, 4 and 6. 31 Bom.L.R. 1349=1939 Cr. Cas. 113=54 Bom. 146=31 Cr.L.J. 633=A.I.R. 1930 Bom. 49 (D.B.).

——S. 4 (a)—Place—Meaning of.

A small open space surrounded by houses on all sides and accessible only by a narrow lane is a 'place' within S. 4 (a) of the Act. 37 Bom. 651 =20 Ind. Cas. 609=15 Bom.L.R. 689=14 Cr. L.J. 449.

6. "Having the use of"—Meaning

——S. 4 (a)—"Having the use of"—Meaning of.

"Having the use of" imply something more than mere using even though the use may be habitual. A.I.R. (Vol. 27) 1940 Bom. 18=41 Bom.L.R. 1114=41 Cr.L.J. 273=186 Ind. Cas. 242.

——S. 4 (a)—"Having the use of"—Mere trespasser, if can be convicted under.

The words "having the use of," in S. 4 (a), Bombay Prevention of Gambling Act must be read ejusdem generis with the previous words "owner or occupier" and mean "a person having the right to the use of under some title, e.g., a licence which is less than ownership or right of occupation. The whole of S. 4 is directed against those who enable premises to be used as a common gaming house. Therefore, in the absence of evidence from which it can be held that the accused had got anything in the nature of a licence to use the place as a common gaming house from a person entitled to give such licence, he cannot be convicted under S. 4 (a). A.I.R. (Vol. 27) 1940 Bom. 62=41 Bom.L.R. 1326 41 Cr.L.J. 253=I.L.R. (1940) Bom. 105=186 Ind. Cas. 148.

——Ss. 4 (a), 3, 5, 7—Instruments of gaming found in passage—Accused having right to use it as means of passage to his residence—Whether he has right to use it within meaning of S. 4 (a).

Where instruments of gaming are found in a passage on the ground floor used by the accused as a means of passage to his rooms on the second floor, the accused cannot be said to have a right to the use of the passage within the meaning of S. 4 (a), Bombay Prevention of Gambling Act, in the absence of evidence that the landlord or his agent knew the purposes for which the passage was being used or that the accused had any right to use it except as a means of passage. Under such circumstances the accused cannot be convicted under S. 4 (a), for in the absence of any evidence to the contrary, it cannot be inferred that the accused had any right, express or implied, to remain in the passage for the purpose of gambling or carrying on his business or for any other purpose. A.I.R. (Vol. 27) 1940 Bom. 129=42 Bom.L.R. 161=41 Cr.L.J. 571=I.L.R. (1940) Bom. 322=188 Ind. Cas. 316.

7. Offences under—If cognizable.

——S. 4—Offences under—If cognizable—Cr. P. C., S. 4 (1) (f).

The special provisions of the Bombay Prevention of Gambling Act are designed to exclude the general powers of arrest generally to be exercised by Police Officers. It is a special power of arrest to be exercised in special circumstances subject to certain conditions precedent under special authority by certain Police Officers and Magistrates. In such circumstances offences under the Act are not cognizable offences under S. 4 (1) (f), Cr. P. Code. The special provisions at the end of Sch. II, Cr. P. Code, support this view. Therefore, an offence under S. 5, Bombay Prevention of Gambling Act, is not a cognizable offence. A.I.R. (Vol. 29) 1942 Sind 106=I.L.R. (1942) Kar. 94=43 Cr.L.J. 888=202 Ind. Cas. 681.

——S. 4—Offence—If cognizable.

An offence punishable under S. 4, Bombay Prevention of Gambling Act is a non-cognizable offence. A.I.R. (Vol. 29) 1932 Bom. 610=1932 Cr. Cas. 868=34 Bom.L.R. 901=33 Cr.L.J. 733=139 Ind. Cas. 281.

——Ss. 4 and 5—Offence under—If cognizable.

As under S. 6 certain officers have power to issue warrants of search and also of arrest, and to cause search or arrest without warrant personally, the offence under S. 4 or 5 of Bombay Act 4 of 1887 is a cognizable offence under S. 4 (1) (f) Cr. P. Code. 50 Bom. 344=28 Bom.L.R. 272=27 Cr.L.J. 503=93 Ind. Cas. 967=A.I.R. 1926 Bom. 195 (D.B.).

8. Offences under—Summary trial.

——S. 4—Offence under—Summary trial—Cr. P. Code, S. 530 (q).

Magistrate trying offence under S. 4 summarily —Section 530 (q), Cr. P. Code, applies. A.I.R. (Vol. 26) 1939 Sind 341=I.L.R. (1940) Kar. 123=41 Cr.L.J. 190=185 Ind. Cas. 543.

9. Evidence.

——Ss. 4, 5, 6—Evidence—Statements of Police long after event—Value of.

The Court cannot possibly be expected to rely on the mere statements of the Police Officers long after the event without any independent corroboration. A.I.R. (Vol. 26) 1939 Bom. 465=41 Bom.L.R. 974=41 Cr.L.J. 127=185 Ind. Cas. 203.

——Ss. 4, 5, 6—Evidence—Finding of marked coins and slip of paper with figures—Value of.

The mere fact of the finding of the marked coins and the slip of paper with figures on it in the room is sufficient to justify the conviction only if the evidence makes it perfectly clear that these articles were instruments of gaming. A.I.R. (Vol. 26) 1939 Bom. 465=41 Bom.L.R. 974=41 Cr.L.J. 127=185 Ind. Cas. 203.

——Ss. 4, 5, 6—Evidence of bogus punters—Value of.

The bogus punters are usually very unsatisfactory witnessses. It does not much matter whether they are called accomplices or spies or Police agents. No doubt it is very difficult to get better evidence and the Police may have to make use of such people, and if their evidence is corroborated and fits in reasonably well with the prosecution case, the Court may be justified in relying on it. But if the punter is called as a witness and does not support the prosecution case, it is obviously worse than if he was not called at all. A.I.R. (Vol. 26) 1939 Bom. 465=41 Bom.L.R. 974=41 Cr.L.J. 127=185 Ind. Cas. 203.

——Ss. 4 and 5—Evidence—Evidence of a stranger recording a bet.

The evidence of a stranger who recorded a bet is admissible as part of the evidence to show that the house in question is a common gaming house under S. 4 or S. 5. 50 Bom. 344=28 Bom.L.R. 272=27 Cr.L.J. 503=93 Ind. Cas. 967=A.I.R. 1926 Bom. 195 (D.B.).

——S. 4—Evidence—Specific evidence that game played was one of luck and not of skill must be given in doubtful circumstances, e.g., playing cards by respectable persons.

There is no doubt a presumption from the use of instruments of gambling like cards that gambling has taken place, yet where the circumstances are ambiguous, it is more desirable that there should be some evidence that game actually being played at the moment was not a game of skill but of chance and that in view of the number and position and the income of players the game was one where loss might be the result not of lack of skill but of lack of luck which is the essence of the offence of gambling. 20 S.L.R. 66=26 Cr.L.J. 1536=89 Ind. Cas. 396=A.I.R. 1926 Sind 65 (D.B.).

——Ss. 4, 5, 6, 7—Evidence—Presumption under S. 7—Evidence of previous conviction.

By **Chandavarkar** and **Aston, JJ.** (Jacob, J., dissenting).—The presumption created by S. 7 can be applied to cases under Ss. 5 and 4 (a). A long interval between the issue of a warrant under

S. 6 and its execution will not ipso facto make S. 7 inapplicable. In a trial for an offence of keeping a common gambling house evidence that the accused had been previously convicted of the same offence is admissible to show guilty knowledge or intention. By Jacob, J. (dissenting). —That the presumption created by S. 7 is sufficient for the purpose of S. 5 and for the purpose of S. 4 (a) so far as regards the fact that the house is so used, but it is not alone sufficient for the purpose of showing that the house was so kept or used by any specified person. (2) That in the trial for an offence under S. 4 (a) the evidence that he was previously convicted of a similar offence cannot be let in either under S. 54 or S. 11 of the Evidence Act. (1903) 28 Bom. 129 =5 Bom.L.R. 805.

10. Execution of Warrant.

——Ss. 4, 5, 6—Execution of warrant—Warrant in name of Sub-Inspector—Arrest by constable, Sub Inspector being nearby—Validity.

Where a warrant is in the name of a Sub-Inspector and he is present near the room used for gambling purposes but the accused is actually arrested by his constable who had already entered the room, the irregularity is not such as would vitiate the warrant or the proceedings in any way. A.I.R. (Vol. 26) 1939 Bom. 465=41 Bom.L.R. 974=41 Cr.L.J. 127=185 Ind. Cas. 203.

11. Punishment.

——Ss. 4, 5—Punishment—Conviction of accused under Ss. 4 and 5 on same facts and acts.

Where the prosecution have relied upon the same facts and upon the same acts of the accused to prove that the offences under Ss. 4 and 5 were committed, the accused may be convicted under both sections but there should be one punishment for both. A.I.R. (Vol. 27) 1940 Sind 28=41 Cr.L.J. 399=I.L.R. (1940) Kar. 150=187 Ind. Cas. 78.

——S. 4 (a)—Punishment—Sentence of imprisonment for first offence—Accused's inability to pay fine may be treated as special reason for imposing lesser fine.

The vice of a fine as a means of punishment is that its severity necessarily depends on the financial position of the accused. A fine of Rs. 1,000 may be an inconsiderable punishment for a rich man, whilst a fine of Rs. 50 may be a very heavy punishment for a poor man. The Court has discretion under S. 4 (a) to impose a sentence of imprisonment or fine; and where the accused is shown to be gambling on a large scale, and may be presumed to be making of a good deal of money out of it, it may be that the only punishment, likely really to act as a deterrent, would be imprisonment. **Prima facie,** however, it is undesirable to impose a sentence of imprisonment for a first offence. If a Magistrate does not think that a sentence of imprisonment is called for, and comes to the conclusion that the accused is not likely to be able to pay as much as Rs. 500, and that to impose such a fine would in fact mean sending the man to prison, the Magistrate is perfectly justified in treating that as a special reason within the meaning of the proviso to S. 4 (a) for imposing a smaller fine. A.I.R. (Vol. 29) 1942 Bom. 206 (2) =44 Bom.L.R. 443=43 Cr.L.J. 759=201 Ind. Cas. 508.

——S. 4—Punishment—Inability to pay is special reason for imposing lesser fine.

It is within the meaning of the proviso of the clause relating to the imposition of punishments for offence under S. 4 Bombay Prevention of Gambling Act for the Court to put on record as a special reason for the imposition of a lesser fine, the inability of the accused to pay it. A.I.R. (Vol. 27) 1940 Sind 187=41 Cr. L. J. 959=190 Ind. Cas. 703.

——S. 4—"Offence", meaning of—For enhanced punishment convictions need not be under same clause.

In S. 4, Bombay Prevention of Gambling Act, there is not an enumeration of four distinct offences but a definition of one offence, which is generally described in the margin as "keeping common gaming house," by reference to four variations of it. According to the ordinary use of language, 'offence' as used in the penal part of the section must mean an offence under any clause of the definition, and a person who is convicted under any of the Cls. (a), (b), (c) or (d) of the definitive part of the section is liable to enhanced punishment as provided in the penal clauses if he has been previously convicted of an offence or offences under any other clause of the definition. In order to render him liable to enhanced punishment the convictions need not be under the same clause. A.I.R. (Vol. 22) 1935 Bom. 399=37 Bom.L.R. 656=1935 Cr. Cas. 1110=37 Cr. L. J. 43=159 Ind. Cas. 176.

12. Revision.

——Ss. 4, 5 and 6—Revision—Wrong conviction.

Where certain persons were convicted under Ss. 4 and 5, Bombay Prevention of Gambling Act, but the majority of them were acquitted on appeal on the ground that the warrant under S. 6 being issued by an officer not empowered to do so, the conviction was illegal. On revision by two of the accused who did not appeal, the Sessions Judge referred the matter to the High Court:

Held, that in view of S. 439 (5), Cr.P. Code, revision did not lie, but as the case was one of wrong conviction on the face of it, it was desirable to use the power of superintendence in judicial matter which vested in the High Court under S. 107, Government of India Act, to set aside the conviction. A.I.R. (Vol. 24) 1937 Bom. 153= 39 Bom.L.R. 82=I.L.R. (1937) Bom. 263=38 Cr.L.J. 606=168 Ind. Cas. 718.

——S. 5—Offence under—Wager—Date of horse race postponed—Bets entered into irrespective of adjournment.

Evidence in a case showed that the race which was to be run on 29th September was ajourned to 6th October early in the morning and still in the afternoon of that day bets were entered into with amount to an offence under S. 5. 31 Bom.L.R. regard to the meeting which had already been ad-

journed, and the bets were to remain good for the race that was to be run on 6th October. The accused did not intend either that the race should run on 29th September or that a particular horse should run that day, as the condition of the agreement.

Held, that even though the race was postponed, the agreement to bet would be a wager and would amount to an offence under S. 5. 31 Bom.L.R. 1349=1930 Cr. Cas. 113=54 Bom. 146=31 Cr.L.J. 633=A.I.R. 1930 Bom. 49 (D.B.).

——S. 5—Powers of—Honorary Magistrate.

Whatever the powers of the Honorary Magistrate may be under the Cr. P. Code, there is nothing in the Bombay Gambling Act which requires that a Magistrate issuing a warrant thereunder should be vested with any special jurisdiction. All that is reqired is that there should be a warrant by a First Class Magistrate and therefore an Honorary First Class Magistrate is entitled to issue a search warrant. 20 S.L.R. 66=26 Cr. L.J. 1356=89 Ind. Cas. 396=A.I.R. 1926 Sind 65 (D.B.).

——Ss. 5, 6 and 80 (1)—Protection of Police Officer.

Arrest and confinment of person for offence under S. 5—No warrant under S. 6—Police Officer knowing that such warrant is condition requisite for arrest: **Held** that the Police Officer could not seek protection under S. 80 (1). A.I.R. (Vol. 29) 1942 Sind 106=I.L.R. (1942) Kar. 94 =43 Cr.L.J. 888=202 Ind. Cas. 681.

——Ss. 5 and 12—Presumption under S. 5, if applies to S. 12.

The reason underlying the presumption in S. 5, of the Act does not apply to cases under S. 12. An actual taking part in gambling must be proved for a conviction under S. 12. 15 Bom.L.R. 331 =20 Ind. Cas. 143=14 Cr.L.J. 383.

——Ss. 5 and 6—Search not obligatory.

A prosecution under S. 5, Bombay Prevention of Gambling Act, need not necessarily be preceded by a search under S. 6. A prosecution under S. 4 or S. 5 might be launched on evidence quite independent of Police evidence for example, the evidence of neighbours, and it is not possible to read S. 6 as laying down a condition precedent to the launching of a prosecution under S. 4 or S. 5, Ss. 6 and 7 are enabling sections, and give powers to the Police to facilitate proof of their case, but do not make a search obligatory before any case be launched. A.I.R. (Vol. 22) 1935 Bom. 39= 36 Bom. L. R. 1113=36 Cr.L.J. 543=1935 Cr. Cas. 73=154 Ind. Cas. 634.

——Ss. 5 and 6—Jurisdiction—Magistrate issuing warrant under S. 6—Competency to try offence.

It is wrong in principle that a Magistrate who issues the warrant under S. 6 of the Bombay Gambling Act should be the same judicial authority who should try the accused who has the right to challenge the propriety of the warrant. A trial of the accused by such a Magistrate is therefore vitiated and the conviction at such trial should in consequence be set aside. 49 Bom.L.R. 618= A.I.R. 1948 Bom. 72=48 Cr.L.J. 1001=I.L.R. (1947) Bom. 559 (D.B.).

——S. 6.

SYNOPSIS.

1. Complaint.
2. "Found"—Meaning of.
3. Reason for suspicion.
4. Searches—Procedure.
5. Seizure of money found on person.
6. Arrest without warrant.
7. Warrant—Validity—Conditions.
8. Warrant—Description of Place.
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10. Second warrant.
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12. "Specially empowered".
13. Warrant—Production in Court.
14. Powers of Magistrate.
15. Powers of Commissioner of Police.
16. Powers of District Superintendent of Police.
17. Powers of Additional Superintendent of Police.
18. Powers of Deputy Superintendent of Police.

1. Complaint.

——S. 6—Complaint—Who can file.

Section 6 does not impose any limitation on the power of any person to make a complaint on oath to the Commissioner of Police. As a general rule any person, having knowledge of the commission of an offence, may set the law in motion by a complaint, even though he is not personally interested or affected by the offence. 31 Bom.L.R. 1349= 1930 Cr. C. 113=54 Bom. 146=31 Cr.L.J. 633= A.I.R. 1930 Bom. 49 (D.B.).

——S. 6—Complaint or information on oath may be oral or in writing—It need not appear in warrant.

S. 6 of the Bombay Prevention of Gambling Act does not require that information should be given in writing. All that the section requires is that there should be a complaint or information on oath, and that may either be oral or in writing. Nor is it necessary that it must appear in the warrant itself that a complaint or information was given on oath. 230 Ind. Cas. 424=48 Cr.L.J. 644=49 Bom.L.R. 150=A.I.R. 1947 Bom. 329 (D.B.).

——S. 6—Complaint on oath may be oral or in writing—It need not be recited in warrant—Issuing of warrant raises presumption that complaint was on oath.

The complaint on oath referred to in S. 6 does not appear necessarily to be a complaint in writing on the filing of which process is to issue as in ordinary criminal trials. It may be either oral or in writing. It is not necessary that it should be recited in the warrant or set out in any complaint that may be subsequently filed before the Magistrate. The fact that the warrant has been issued would raise a presumption that **omnia rite esse acta**. 53 Bom. 137=31 Bom.L.R. 63=117 Ind. Cas. 434=30 Cr.L.J. 794=A. I. R. 1929 Bom. 74 (D.B.).

——S. 6—Complaint on oath by Police Officer.

S. 6 is wide enough to include a complaint on oath made by a Police Officer. 32 Bom.L.R. 794 =A.I.R. 1930 Bom. 350 (D.B.).

——S. 6—Complaint on oath by Police Officer—Issue of warrant to him—Legality.

There is nothing illegal if the warrant is issued to the Police Officer who has sworn on the complaint before the District Superintendent of Police. 32 Bom.L.R. 794=A.I.R. 1930 Bom. 350 (D. B.).

2. "Found"—Meaning of.

——S. 6—"Found"—Arrest in neighbouring house where accused had taken shelter—Accused, if can be said to be 'found.'

There is no sufficient reason for restricting the prima facie meaning of the word 'found' in S. 6. A person may be said to be found in a place where he is actually present, and there is nothing in the section to show that the word "found" refers only to a finding by the Police. Where the accused is arrested in a house near a common gaming house, where he had taken shelter, they must be deemed to be 'found' in the common gaming house within the meaning of S. 5 and it is necessary that he should have been found there by the Police. A. I.R. (Vol. 22) 1935 Bom. 39=36 Bom.L.R. 1113 =36 Cr. L. J. 543=1935 Cr. Cas. 73=154 Ind. Cas. 634.

——S. 6—"Found in Gaming-house"—Person seen coming out of gaming-house and arrested then.

When a police-officr armed with a warrant sees a person come out of a house, and he is arrested as he comes out, he is found in the house. "Found in the house" does not mean "arrested in the house". 53 Bom. 137=117 Ind. Cas. 434=31 Bom.L.R. 53=30 Cr.L.J. 794=A.I.R. 1929 Bom. 74 (D. B.).

3. Reason for suspicion.

——Ss. 6 and 7—Reason for suspicion—If includes information given by police informant.

The reason for suspicion which is referred to in Cl. (a) of S. 6 must obviously include information given by a Police informant, for, in many cases, it is only upon such information that the Police can act at all; and so far as the seizure of all things reasonably suspected to have been used or intended for the purpose of gaming under Cl. (c) is concerned, it cannot be expected that the Police Officer must wait for a translation or interpretation of a writing, otherwise unintelligible to him, found upon slips of paper on the person of the suspected man. He must judge and be judged by all the surrounding circumstances and the information he then possessed. He may, particularly where his information is that the betting is betting in American Futures, have reason to suspect that when slips of paper with writing upon them are considered of sufficient importance by the suspected person to be kept upon his person, those slips of paper are betting slips used or intended to be used for the purpose of gaming even though the writing is to him unintelligible at the time.

Where the Sub-Inspector finds, upon the information of the Police informant that in a particular house gambling in American Futures is going on, a number of persons of different communities having no particular relationship with each other sitting at a table in a room in that house at midnight who can give no satisfactory account of their presence and who were found to possess on them considerable sums of money, while slips of paper with unintelligible writing upon them were found upon one of them, the Sub-Inspector has every reason to suspect that these slips of paper with the unintelligible writing contain the record of bets and under the circumstances the Court can raise presumption against the accused which puts upon them the burden of proof under S. 7. Upon the failure of the accused, under such circumstances, to give an account of their presence in the room on the particular night, the High Court shall not interfere in revision and acquit them. A.I.R. (Vol. 25) 1938 Sind 228=40 Cr.L.J. 271=I.L.R. (1939) Kar. 217=179 Ind. Cas. 794.

4. Searches—Procedure.

——S. 6—Searches under—Procedure—Cr. P. Code, S. 103.

It is not essential that a search made under S. 6, Bombay Prevention of Gambling Act, should necessarily conform to the provisions of S. 103, Cr.P. Code. A.I.R. (Vol. 19) 1932 Bom. 610 =34 Bom.L.R. 901=33 Cr.L.J. 733=1932 Cr. Cas. 868=139 Ind. Cas. 281.

——S. 6 and Cr. P. Code, S. 103—Searches made by Police Officers.

A search made by police officers without Mashirs is illegal under S. 103, Cr.P. Code but not under S. 6 of Bombay Prevention of Gambling Act. 10 S.L.R. 137=37 Ind. Cas. 33=18 Cr.L.J. 49.

——S. 6—Search under—Procedure—Cr.P. Code, Ss. 103 and 243.

Searches under a special or a local law need not be conducted in accordance with the Cr.P. Code. The absence of Mashirs at a search held under the Bombay Gambling Act 1887, does not make the search illegal. 8 S.L.R. 213=27 Ind. Cas. 910=16 Cr.L.J. 238.

5. Seizure of money found on person.

——S. 6—Seizure of money found on person—Legality.

The power of seizing money does not extend to that found on the person of a man found in a gaming-house. (1902) 4 Bom.L.R. 427=26 Bom. 641.

——S. 6—Direction to seize money found on person—If vitiates warrant.

A direction to seize money found on the persons of the people in a gaming house does not altogether vitiate the warrant under the above Act. 10 S.L. R. 134=37 Ind. Cas. 54=18 Cr.L.J. 70.

——Ss. 6 and 8—Money found in coat pocket of accused—Forfeiture.

It was not the intention of the Legislature that moneys should be forfeited when there is no reason to believe that these moneys were connected with the gaming. The power of forfeiture exercisable by the Magistrate under S. 8 is discretionary. Where the money seized was found in the coat pocket of the accused it cannot be said, in the absence of any satisfactory explanation by him that this money was not rightly seized under

S. 6 and was not connected with the gaming of which he has been convicted. A.I.R. (Vol. 27) 1940 Sind 28=41 Cr.L.J. 399=I. L. R. (1940) Kar. 150=187 Ind. Cas. 78.

6. Arrest without warrant.

——S. 6—Arrest without warrant—Legality.

A Police officer cannot arrest a person unless he holds a warrant under S. 6 of the Act. 4 Bom. L.R. 946.

7. Warrant—Validity—Conditions.

——S. 6, Proviso—Fulfilment of requirements of —If condition precedent to legality of search warrant.

Before a search warrant can issue under S. 6 of the Bombay Prevention of Gambling Act, the requirements of the proviso in that section must have been fulfilled, that is to say, the officer issuing the warrant must be satisfied, upon any complaint made before him on oath and upon making such inquiry as he thinks necessary, that there are good grounds to suspect that the house, room or place in question is being used as a common gaming house. That is a condition precedent, and unless it is complied with or fulfilled, the warrant would be ultra vires. 49 Bom.L.R. 798=A.I.R R. 1948 Bom. 156=49 Cr.L.J. 165 (D.B.).

——S. 6—Warrant under—Conditions of legality —Validity—If to be proved—Warrant, if should show on its face that conditions have been fulfilled —Statement in warrant to that effect—Presumption.

It is not essential that a warrant issued under S. 6 of the Bombay Prevention of Gambling Act should show on the face of it that the conditions precedent required by the statute have been complied with; where the warrant, however commences with a preamble that the conditions required had been fulfilled, it has to be presumed that the officer issuing the warrant has discharged his duty correctly, having regard to the provisions of illustration (e) to S. 114, Evidence Act; and unless that presumption is rebutted by evidence contra, the Court may act on the basis of the warrant being legal; it is not necessary that there should be evidence adduced by the prosecution to prove that the requirements of proviso to S. 6 of the Act have been fulfilled. 49 Bom.L. R. 798=A.I.R. 1948 Bom. 156=49 Cr.L.J. 165 (D.B.).

8. Warrant—Description of Place.

——S. 6—Warrant—Description of the house.

Where a warrant issued by the Commissioner of Police under S. 6 contains a sufficiently accurate description of the house or room to be searched, it is not illegal merely because it does not correctly specify the locality of the house or room to be searched. (1904) 6 Bom.L.R. 52.

——S. 6—Warrant under—Essentials of description of house to be searched—Falsa demonstratio non nocet.

Though it is usually desirable that warrant issued under a particular statute should show on its face that the conditions precedent required by the statute have been complied with, it is not essential that it should do so. Where a warrant issued under S. 6, Bombay Prevention of Gambling Act, stated that a complaint on oath had been made but did not state that the person who issued the warrant had reason to suspect that the house in question was used as a common gaming house:

Held, that the warrant was a valid one.

If such a warrant wrongly describes the property to be searched, then it is a bad warrant. But a description may be good in part and bad in part, and the Court may reject the bad part on the principle of falsa demonstratio non nocet. A. I. R. (Vol. 20) 1933 Bom. 79=34 Bom. L. R. 1447=34 Cr.L.J. 137 (2)=141 Ind. Cas. 346.

——S. 6—Warrant under—Description of place to be searched—Inaccuracy in—Effect of.

The powers given under S. 6 are very wide and are apt seriously to interfere with the liberty and property of the subject; the section therefore should be strictly construed and the conditions required for its coming into operation should be strictly complied with. Where a warrant contained somewhat inaccurate description of the place to be searched but it was clear from the rest of the description contained in the warrant that the inaccuracy was not so material or substantial as to mislead a stranger if one were to go to the locality and attempt to find the place intended to be raided, with the help of the warrant.

Held, that the inaccuracy did not amount to more than a misdescription and was not of a nature to vitiate the warrant:

Per **Baker, J.**—The absence of numbers of buildings would not vitiate the warrant if the buildings to be searched are otherwise sufficiently described. 31 Bom.L.R. 158=116 Ind. Cas 251 =53 Bom. 367=30 Cr.L.J. 595=12 A.I.Cr. R. 466=A.I.R. 1929 Bom. 157 (D.B.).

——Ss. 6 and 7—Warrant—Omission to mention sub-division of house is not material.

If the description of the warrant is such that an ordinary person can identify the spot, the Crown can take advantage of the presumption created by S. 7. An omission to mention subdivision of a building is immaterial. 20 S.L.R. 10=27 Cr.L.J. 905=96 Ind. Cas. 217=A.I.R. 1926 Sind 254 (D.B.).

9. Warrant—Description of officer.

——S. 6—Warrant obtained by Head Constable under denomination of officiating Sub-Inspector—Validity.

Where a Head Constable of Police who was appointed to hold charge of a Police Station applies and gets a warrant under S. 6 of the Bombay Prevention of Gambling Act, addressed to him under the denomination of "Officiating Sub-Inspector", the warrant is defective and the presumption which might otherwise have arisen under S. 7 cannot be drawn. A.I.R. (Vol. 21) 1934 Sind 129=1934 Cr. Cas. 1065=28 S.L.R. 81=36 Cr.L.J. 204=152 Ind. Cas. 400.

10. Second warrant.

——S. 6—Second warrant—If may be issued.

The provisions of S. 6 are somewhat exceptional and a lax administration of the law would easily convert them into an instrument of prosecution. It is left to the discretion of Officers of Police of no very exalted rank to displace the ordinary presumption of innocence and to lay on the accused the burden of proving that a place in which he is found is not a common gaming house. Such a discretion must be used with the utmost care. An Officer of Police who issues the warrant under S. 6 of the Act must be careful to confine himself exactly within the limits which the Act lays down. If he over steps the line, he leaves behind him his special prerogative and no extraordinary presumption will arise out of anything he may do.

There is no express provision in S. 6 empowering the issue of a second warrant on the strength of the sworn testimony on which a prior warrant has been issued, and assuming that there is an ambiguity on that point it muse be held that a second warrant can only issue on the strength of a fresh eworn testimony. A.I.R. (Vol. 22) 1935 Sind 102=1935 Cr. Cas. 520=36 Cr.L.J. 902=29 S.L.R. 19=156 Ind. Cas. 294.

11. Special warrant.

——S. 6—Special warrant must be directed to person by name.

A special warrant must be a warrant which is specially directed to a person by name and not one which can be endorsed over to any other police-officer of similar rank. 30 Cr.L.J. 1075=119 Ind. Cas. 535=23 S.L.R. 441=1930 Cr. C. 123 =A.I.R. 1930 Sind 59 (D.B.).

——S. 6—Special warrant cannot be endorsed to another officer.

The special warrant when issued authorizes the officer or officers named therein to do all the things that are detailed in the warrant. It cannot be endorsed over to any other police-officer of similar rank. The only person who can execute such a warrant is the officer who is named in the warrant. 31 Bom.L.R. 158=53 Bom. 367= 116 Ind. Cas. 251=30 Cr.L.J. 595=12 A.I.Cr. R. 466=A.I.R. 1929 Bom. 157 (D.B.).

——S. 6—Special warrant—Warrant comprising more than one tenement does not cease to be special.

The words "house, room or place" contained in S. 6 have no reference to a particular house, room or place, or to houses, rooms or places if they are owned by one and the same person and are used for a common purpose. The words should be taken broadly as meaning houses, rooms or places apart from the more restricted notion of a tenement. If the houses, rooms or places have substantially been utilized for the common purpose of gambling it would not matter if the houses, rooms or places comprised more than one tenement. The fact therefore that the warrant comprized more than one tenement would not make it a general warrant. The term "special warrant" has reference only to the limitation as regards the person or persons who would be competent to execute it. 53 Bom. 367=31 Bom.L.R. 158=116 Ind. Cas. 251=30 Cr.L.R. 595=12 A.I.Cr.R. 466=A.I.R. 1929 Bom. 157 (D.B.).

——S. 6—Special warrant—Extraneous evidence to prove—Admissibility.

A warrant is not a special warrant if it is not on the face of it a special warrant; and if it is not directed to a special officer, extraneous evidence cannot be admitted to prove that it was meant to executed by a Special Police Officer personally and only by him. 30 Cr.L.J. 1075= 119 Ind. Cas. 635=23 S.L.R. 441=1930 Cr.C. 123=A.I.R. 1930 Sind. 59 (D.B.).

12. "Specially empowered."

——(as amended in 1936), S. 6—"Specially empowered" — Meaning of—"Specially" empowered and "generally" empowered—Distinction.

The expression "specially empowered" in S. 6 of the Bombay Prevention of Gambling Act means empowered by name or by virtue of holding a particular office. When a class of officials is invested with powers to try certain offences or to do certain functions, they are "generally empowered," but if any persons are so empowered by name or by virtue of their offices, they are said to be "specially empowered." 49 Bom.L.R. 798=A.I.R. 1948 Bom. 156=49 Cr.L.J. 165 (D.B.).

13. Warrant—Production in Court.

——S. 6—Warrant—Production in court—Desirability.

Though it is desirable to formally produce a warrant under S. 6 still where the complainant states on oath that he searched the house under a warrant and his complaint on oath appears in the proceedings and it is not alleged that he searched the house under any other warrant or that it was not regularly issued, the irregularity may be excused. 5 S.L.R. 40=9 Ind. Cas. 895 =12 Cr.L.J. 149.

14. Powers of Magistrate.

——Ss. 6, 7 and 10—Power of Magistrate to examine prisoner—Cr. P. Code, S. 342.

A Magistrate has power to examine as witnesses persons arrested and brought before him under S. 6 (b) of the Act. The special procedure of the Gambling Act overrides the general law of procedure in S. 342, Cr. P. Code, whenever it is inconsistent with it. 31 Bom. 423 at 445 foll. 8 S.L.R. 309=29 Ind. Cas. 79=16 Cr.L.J. 447.

——Ss. 6 and 7—Search and arrest by Magistrate himself—Procedure—Presumption.

The presumption under S. 7 of the Bombay Prevention of Gambling Act, 1887, only arises where there has been an arrest and a search under S. 6 of the Act. Under S. 6 of the Act, a First Class Magistrate has power to give authority under special warrant to a Police officer of the class designated in the section to make the arrest and the search, the legislature must be pre-

sumed to have intended that the Magistrate of the First Class, should have the authority to make the arrest and the search himself if necessary. For when the legislature empowers an office. to delegate an authority to do a certain act to another person, it necessarily implies that the original authority to do such act is fully and completely in the officer himself, but that it is necessary for the exigencies of business that it should be done in the majority of cases by persons acting under authority derived from him. Where the Bombay Prevention of Gambling Act has provided for the manner of place of investigating or inquiring into any offence under it, its provisions must prevail and the Cr. P. Code must give way. Accordingly no provision of the Code as to the authority empowered to issue a warrant for arrest or search of the persons to whom and the conditions under which such warrant may be issued can apply for the purpose of S. 7 of the Gambling Act. The authority, the persons and the conditions must be respectively those specifically mentioned in S. 6 of the Act and no other. But the special provision in S. 6 would still be subject to the general provisions of Ss. 65 and 105 of the Code.

When a Magistrate of the First Class or other officer mentioned in S. 6 of the Act himself acts under its provisions, instead of acting through an officer of the particular class prescribed therein under a special warrant he must act strictly in compliance with those provisions. The first condition necessary to make an arrest and seizure under the section legal so as to bring in the operation of S. 7 is that where the Magistrate is acting on information there must be a complaint made before him on oath to set him in motion. When a Magistrate of the First Class, or other officer mentioned in S. 6 himself does the acts specified in Cls. 1-3 of the section instead of issuing a special warrant, he must give evidence because he supplies the place of the warrant and the warrant is a necessary part of the evidence for the prosecution. Where a Magistrate of the First Class himself makes an arrest and seizure under S. 6 of the Act he must himself "enter" the "house room or place" with of course the assistance of such persons as may be found necessary. S. 6 of the Act must be construed strictly, because S. 7 gives to an arrest and seizure under it an operation different from that of the general presumption of innocence in criminal cases. (1907) 31 Bom. 438=9 Bom.L.R. 695.

15. Powers of Commissioner of Police.

——Ss. 6 and 7—Powers of Commissioner.

The Commissioner of Police can himself do that which under S. 6 he can authorise a subordinate Police Officer to do. 31 B. 438, foll. 37 Bom. 402=15 Bom.L.R. 106=19 Ind. Cas. 204=14 Cr.L.J. 204.

——S. 6—Powers of Commissioner—Power to arrest without warrant.

Under S. 6 the Commissioner of Police can arrest without warrant: 31 Bom.L.R. 1349=1930 Cr. C. 113=54 Bom. 146=31 Cr.L.J. 633=A.I.R. 1930 Bom. 49 (D.B.).

——S. 6—Arrest by police-officer authorized to arrest by Commissioner of Police and in his presence but not within view—Legality.

Where the arrests by a police officer are under the express authority of the Commissioner of Police and in the presence of the Commissioner, though not within his view, the arrests by the police-officer are not illegal. 31 Bom.L.R. 1349=1930 Cr. C. 113=54 Bom. 146=31 Cr.L.J. 633=A.I.R. 1930 Bom. 49 (D.B.).

16. Powers of District Superintendent of Police.

——S. 6—Powers of District Supt. of Police—Power to administer oath to complainant.

S. 6, Gambling Act, confers the power inter alia on the District Superintendent of Police to receive a complaint on oath in cases contemplated by the section and such a power necessarily implies that the District Superintendent of Police is competent in cases contemplated by S. 6 to administer an oath to the person making the complaint before him. 53 Bom. 137=31 Bom.L.R. 53=30 Cr.L.J. 794=117 Ind. Cas. 434=A.I.R. 1929 Bom. 74 (D.B.).

17. Powers of Additional Superintendent of Police.

——S. 6—Issue of warrant—Power of Additional Superintendent of Police.

S. 6, Bombay District Police Act, does not confer on the Provincial Government the right to confer on the Additional Superintendent of Police powers arising outside the Bombay District Police Act, and the powers arising under S. 6, Bombay Prevention of Gambling Act are outside the Bombay District Police Act. The words "specially empowered by Government in this behalf" in S. 6, Bombay Prevention of Gambling Act only cover the Assistant or Deputy Superintendent of Police. So that a Magistrate of the First Class or a District Superintendent of Police can exercise the power without any special authority from Government; but there is nothing said about an Additional Superintendent of Police. Although the Additional District Superintendent of Police is carrying out all the powers under the Bombay District Police Act, of a District Superintendent of Police he is not in fact a District Superintendent of Police, and he cannot be given power to issue a warrant under S. 6. S. 17, Bombay General Clauses Act, 1904, does not apply to this case at all.

Hence the Additional Superintendent of Police, Panch Mahals District, has no power to authorize the issue of a search warrant under S. 6, and where the conviction turns upon the presumption arising under S. 7 on a search under S. 6, the conviction must be set aside, as the presumption does not arise. A.I.R. (Vol. 27) 1940 Bom. 127=42 Bom.L.R. 203=41 Cr.L.J. 485=187 Ind. Cas. 459.

18. Powers of Dy. Superintendent of Police.

——S. 6 (2)—Deputy Superintendent of Police should be empowered by name.

Sub-S. (2) of S. 6, Bombay Prevention of

Gambling Act, requires that when a Deputy Superintendent of Police is especially empowered by Government under this sub-section he should be specially empowered by name and not merely by virtue of his office. No real administrative difficulty can arise if it is remembered that once a Deputy Superintendent of Police has been especially empowered by name he carries those powers with him when he is transferred from one post of Deputy Superintendent of Police to another. A.I.R. (Vol. 30) 1943 Sind 107=I.L.R. (1943) Kar. 20=44 Cr.L.J. 502=206 Ind. Cas. 331.

——S. 7—"Persons"—If include person.

The word 'persons' includes 'person'. The plural includes the singular. A.I.R. (Vol. 27) 1940 Sind. 28=41 Cr.L.J. 399=I.L.R. (1940) Kar. 150=187 Ind. Cas. 78.

——Ss. 7 and 6—Scope and effect of—Presumption arising under—Value and weight of.

The combined effect of S. 6 (ii) (c) and S. 7 of the Bombay Prevention of Gambling Act is to create a wholly artificial method of proof, i.e., in cases in which entry is affected by an officer duly authorised, he having "reason to suspect" that the place entered is a common gaming house, and in which an instrument of gaming is found on his entry taking place; the seizure of such instrument shall be, "until the contrary is proved" evidence that the place is "used as a common gaming house and that the persons found therein were present for the purpose of gaming." Though the result is that all the persons found therein are guilty of an offence under S. 5 of the Act until the contrary is proved, yet in the absence of something more, the artificial method of proof does not extend to making any one of them or anyone else guilty of an offence or liable for the penalties imposed by S. 4. 49 Bom.L.R. 603=A.I.R. 1948 Bom. 67=48 Cr.L.J. 1002 (2) (D.B.).

——Ss. 7 and 6—Warrant to search shop abutting on public street—Presumption, if arises.

A shop abutting on to a public street although a place within the meaning of S. 12, is still a place within the meaning of S. 4 and a search warrant under the Act can be issued and a presumption under S. 7 can be drawn against the shop keeper. A.I.R. (Vol. 26) 1939 Sind 184=40 Cr.L.J. 817=I.L.R. (1939) Kar. 741=183 Ind. Cas. 562.

——S. 7—Special warrant not issued under S. 6—Presumption cannot be drawn.

No presumption under S. 7 can be drawn where the warrant is not a special warrant issued under S. 6 of the Act. 30 Cr.L.J. 1075=119 Ind. Cas. 535=23 S.L.R. 441=1930 Cr. C. 123=A.I.R. 1930 Sind 59 (D.B.).

——Ss. 7 and 6—Warrant not issued on complaint or information on oath and not in proper form—Presumption, if can be raised.

S. 6 of the Bombay Prevention of Gambling Act must be construed strictly, because S. 7 gives to an arrest and seizure under it an operation different from that of the general presumption of innocence in criminal cases. A warrant for search has to be drawn up by the magistrate in a particular form after a complaint or information was given on oath. A magistrate issuing the warrant must take care to see that a proper rom is used and if he has to use any other form (e.g., one under S. 96, Cr. P. Code), he must make the necessary corrections so as to comply with the requirements of S. 6. If this is not done, and if the warrant is not in proper form and is issued without any complaint or information on oath, the presumption under S. 7 will not arise. 230 Ind. Cas. 424=48 Cr.L.J. 644=49 Bom.L.R. 150=A.I.R. 1947 Bom. 329 (D.B.).

——S. 7—Search warrant not valid—Presumption cannot be drawn—Offence can be proved by other evidence.

If the warrant under which a search is made is bad then the presumption under S. 7 of the Act cannot be made, but the mere fact that such presumption cannot be raised does not prevent the prosecution from establishing by evidence in the ordinary way that on the facts proved the accused were guilty of the offences charged. 50 Bom. 344=28 Bom.L.R. 272=27 Cr. L. J. 503=93 Ind. Cas. 967=A.I.R. 1926 Bom. 195 (D.B.).

——S. 7—Presumption—Raising of—Facts to be proved.

Before a presumption under S. 7 of the Bombay Prevention of Gambling Act can be drawn, two things must be proved: (1) search of the premises and (2) the arrest of the persons found on the premises; these have to be proved by the evidence of the magistrate who issued the search warrant, if he has issued it in his own name and searched the place himself. I.L.R. (1946) Kar. 174=228 Ind. Cas. 170=48 Cr.L.J. 109=A.I.R. 1947 Sind 112 (D.B.).

——S. 7—Presumption under—When arises.

The presumption under S. 7, Bombay Prevention of Gambling Act, will arise only if the house has been entered under warrant issued under the provisions of S. 6. If there has not been an exact compliance with the requirements of S. 6, then the warrant is not duly issued. A.I.R. (Vol. 22) 1935 Sind 102=1935 Cr. Cas. 520=36 Cr.L.J. 902=29 S.L.R. 19=156 Ind. Cas. 294.

——S. 7—Finding of marked currency notes—Presumption—Evidence of bogus punter—Values of.

The finding of a marked coin or a marked currency note cannot lead to the presumption of the coin or note being an instrument of gaming or the place being a common gaming house under S. 7 of the Bombay Prevention of Gambling Act. If it is found as a fact that any marked note or coin has in fact been used as means of gaming, that particular coin or note can then be taken as an instrument of gaming. The evidence of a punter to the effect that the note or coin was in fact used for gaming is not of much value unless corroborated by independent evidence, he being an accomplice. The evidence of one bogus punter cannot be regarded or used as corroboration of another; nor can the finding of the marked coin or note be regarded as corroboration of the bogus punter's evidence.

What S. 7 really means is that where there was

found in a raid an instrument of gaming, or something which in the Court's opinion was reasonably suspected to be an instrument of gaming, though it could not definitely be proved to be so, then the presumption would arise, and the burden is thrown upon the accused of proving that the suspected thing was not an instrument of gaming. That is the right construction to be put upon S. 7. I.L. R. (1948) Bom. 199=50 Bom.L.R. 163=A.I. R. 1948 Bom. 250=49 Cr.L.J. 362 (D.B.).

——S. 7—Recovery of instruments of gaming on search—Presumption.

Where a house is searched on the authority of a warrant duly issued and the gambling is found going on in the house and instruments of gaming are also found therein, the presumption under S. 7 arises and dispenses with the necessity of direct evidence that the gaming was being carried on for the profit of the keeper of the house. It is then for the accused to rebut the presumption. A.I. R. (Vol. 32) 1945 Bom. 305=47 Cr.L.J. 109= 47 Bom.L.R. 75=221 Ind. Cas. 18.

——S. 7—Presumption under—When arises and how rebutted.

Section 7, Bombay Prevention of Gambling Act, as amended, provides that in certain events the house, room or place raided under S. 6 shall be presumed to be used as a common gaming house until the contrary is proved: There are two events on which that presumption arises. The first event is when any instrument of gaming has been seized in the house, room or place entered under S. 6 or about the person of anyone found therein. There is no particular difficulty in determining when that event occurs. All that the Court has to do is to see whether the documents and things found in the house raided fall within the definition of "instruments of gaming." If they do then the presumption arises. The other event is more difficult to determine. The occurrence of that even requires two things to be proved: first, that something has been seized, which is other than an instrument of gaming, and secondly, that the Police Officer had reasonable grounds for suspecting that the thing so seized was an instrument of gaming. When these two things are proved, then the Court must presume that the house, which has been entered, was used as a common gaming-house until the contrary is proved. But obviously if the only evidence of the house being used as a common gaming-house lies in the seizure in the house of something which is in fact not an instrument of gaming, although the Police Officer and reasonable grounds for suspecting that it was an instrument of gaming, then there is no evidence of such user and the presumption is rebutted. The presumption arising in the second event specified in S. 7 must always be still-born, because it is rebutted by proof of the very event which gives it birth, namely seizure of something other than an instrument of gaming. The second event can only arise, when it is poved that the thing which was found in the house raided was not an instrument of gaming; and, directly it is proved, the evidential value of the thing found is destroyed. A.I. R. (Vol. 26) 1939 Bom. 339=I. L. R. (1939) Bom. 434=41 Bom. L.R. 548=40 Cr.L.J. 891 =184 Ind. Cas. 252.

——S. 7—Presumption under—When rebutted.

There may perhaps be a **causus omissus** under the Act, **viz.**, where the place in which gaming is carried on is neither a public place, because the public have not access to it nor a common gaming house within the definition because there is no person who can be described as an owner, occupier or person using or having the use of the place for whose benefit the gaming is carried on. Under S. 7 of the Act, a presumption arises when instruments of gaming are found in a place that it is a common gaming house. But if the circumstances show that the only person who can make a profit from the gaming is not the owner, occupier or person using or having the use of the same within the meaning of Ss. 3 and 4 of the Act, the presumption must be rebutted and no conviction would be possible either under S. 4 or S. 5. A.I.R. (Vol. 27) 1940 Bom. 18=41 Bom.L.R. 1114= 41 Cr.L.J. 273=186 Ind. Cas. 242.

——S. 7—Presumption—Rebuttal—Gambling on Satam day.

A presumption which may be raised under S. 7 of the Bombay Prevention of Gambling Act must be held to be rebutted when the occasion for the gambling in question is the **Satam** day, a sacred day which the rich and poor alike celebrate by gambling with cards or dice. I. L. R. (1946) Kar. 174=228 Ind. Cas. 170=48 Cr.L.J. 109= A.I.R. 1947 Sind 112 (D.B.).

——S. 7—Presumption—Rebuttal — Hindu gambling on satam day—Local custom—Non-admission of non-Hindus.

Where certain Hindu were found gambling in a house on **satam** day on which according to a local custom Hindus used to gamble and no non-Hindus were admitted to the house:

Held, that the presumption under S. 7, Bombay Prevention of Gambling Act, was sufficiently rebutted by the fact that it was the **satam** day on which the gambling was going on and that no non-Hindus were admitted to the premises. A.I.R. (Vol. 20) 1933 Sind 42=1933 Cr. Cas. 188=34 Cr. L.J. 356=27 S.L.R. 32=142 Ind. Cas. 522 (1).

——Ss. 7 and 4 (a)—Presumption—Rebuttal—Finding of slips of paper with names of horses and sums of money—Betting books not found.

The accused, a medical practitioner, was charged with keeping a common gaming house and thereby committing an offence under S. 4 (a) of the Bombay Prevention of Gambling Act. He was convicted on the evidence that on a Police raid on his dispensary, some slips of paper with names of horses with sums of money marked against some of them were found. The Police could not find betting books of any sort:

Held, (i) that if a presumption arose from the evidence under S. 7 of the Act that the house or room was used as a common gaming house, then that presumption was rebutted by the fact that nothing was found in the house to suggest that it was being used as a common gaming house.

(ii) that the documents found in the house were

perfectly consistent with the persons who were there, that is the accused, being merely engaged in making private bets for their own entertainment and the total absence of any books relating to bookmaking showed that no business of a common gaming house was being conducted. A.I.R. (Vol. 19) 1932 Bom. 181=34 Bom.L.R. 267=33 Cr.L.J. 389=1932 Cr. Cas. 240=136 Ind. Cas. 868.

——Ss. 7, 6, 5 and 4—Presumption—Rebuttal—House occupied temporarily.

The presumption under S. 7 of the Act is rebuttable. The fact that the accused occupied the house temporarily when they were out for a picnic and were playing there for small stakes is sufficient to rebut the presumption arising under S. 7 that the house was a common gaming house. 19 Bom. L.R. 693=41 Ind. Cas. 997=18 Cr.L.J. 885.

——Ss. 7 and 5—Accused failing to rebut presumption—Conviction, if justified.

Where the prosecution proves the facts necessary to raise the presumption under S. 7 they need not prove anything further, and it becomes necessary for the accused to prove that the passage was not a common gaming house. Where he fails to rebut the presumptions under S. 7 his conviction under S. 5 is justified. A.I.R. (Vol. 27) 1940 Bom. 129=42 Bom.L.R. 161=41 Cr.L.J. 571=I.L.R. (1940) Bom. 322=188 Ind. Cas. 316

——Ss. 7 and 5—Accused failing to rebut presumption—Conviction, if justified.

The presumptions under S. 7 which arise from the finding of instruments of gaming in a place, are that the place was used as a common gaming house and that the persons found there were for the purpose of gaming. So, where the Crown has proved the finding of instruments of gaming, and the presence of the accused in the place, the burden is thrown upon the accused to show that the place was not a common gaming house. Where the accused has not discharged this burden, his conviction under S. 5 is justified. A.I.R. (Vol. 27) 1940 Bom. 62=41 Bom.L.R. 1326=41 Cr.L.J. 253=I.L.R. (1940) Bom. 105=186 Ind. Cas. 148.

——S. 8—Discretion of Magistrate.

The power of forfeiture exercisable by the Magistrate under S. 8 is discretionary. A. I. R. (Vol. 27) 1940 Sind 28=41 Cr.L.J. 399=I.L.R. (1940) Kar. 150=187 Ind. Cas. 78.

——S. 8—Money found when can be forfeited.

S. 8, Bombay Prevention of Gambling Act does not provide for the forfeiture of money found on the persons of those in the common gaming house; and it would appear that money found on the persons of those gaming or present in the common gaming house and so on can be forfeited only as instruments of gaming within the definition of S. 3. That definition is wide because it covers any article used or intended to be used as the subject or means of gaming or proceeds of gaming, so that any money or currency notes used or intended to be used as a means of gaming or the proceeds of gaming found on the person of one present in the common gaming house for the purpose of gaming and so on, can be forfeited, but the prosecution must, of course, show that any particular money to be forfeited as a means of gaming falls within the definition of "instruments of gaming" in S. 3. A.I.R. (Vol 27) 1940 Sind 22=41 Cr.L.J. 385=I.L.R. (1940) Kar. 125=186 Ind. Cas. 883.

——S. 8—Money found in coat pocket of accused—Forfeiture. See IBID., Ss. 6 & 8. **A.I.R.** 1940 Sind 28.

——S. 8—Cash and ornaments found on person of accused—Forfeiture.

A Magistrate has no power under S. 8 of the Act to order forfeiture of cash, ornaments and currency notes found on the person of the accused convicted of gambling in a common gambling house. 22 Bom.L.R. 197=55 Ind. Cas. 864=21 Cr.L.J. 384.

——Ss. 8 and 6 (c)—Scope of.

Second para. of S. 8 refers to S. 6 (c) and the articles liable to seizure and forfeiture are those used or intended to be used for gambling and found within the premises. 19 Bom.L.R. 352=40 Ind. Cas. 311=18 Cr.L.J. 663.

——S. 10—Power of Magistrate to examine accused.

Under S. 10 a trying Magistrate cannot examine any of the accused persons, while he is still an accused person and has obtained no order of discharge or acquittal. 17 Bom.L.R. 1078=32 Ind. Cas. 130=17 Cr.L.J. 2.

——S. 12—Scope.

S. 12 does not exclude the application of S. 4 in proper cases even though in certain circumstances S. 12 might apply to the same "place". A.I.R. (Vol. 26) 1939 Sind 184=40 Cr.L.J. 817=I.L.R. (1939) Kar. 741=183 Ind. Cas. 562.

——S. 12—Game—Meaning of.

Game in S. 12 does not include a wager; betting on a horse race is not covered by S. 12. 19 Bom.L.R. 830=42 Ind. Cas. 920=19 Cr.L.J. 8.

——S. 12—"Are found gaming"—Meaning of.

Section 12, Bombay Prevention of Gambling Act, does not require that the Police should apprehend persons in the actual act of gaming. The words "are found gaming" in S. 12 have a wider meaning than "seen gaming." The word 'found' is more akin to the word "discovered" in its nature and purpose, and if people are found by the Police in such circumstances that it is clear that when the Police came upon the scene they were engaged in gaming, it does not matter that dice and darts were not seen actually thrown. The transaction as a whole must be looked at, and not one particular minute or second of time. A.I.R. (Vol. 23) 1936 Sind 126=29 S.L.R. 349=1936 Cr. Cas. 803=37 Cr.L.J. 1005=164 Ind. Cas. 642.

——S. 12—Instrument of gaming—Currency notes and cash found on person.

Although currency notes and cash found on the person alleged to be a gambler cannot in themselves be regarded as "instruments of gaming" but if they are used as a subject or means of gaming they would fall within the definition of "instruments of gaming". 53 Bom. 137=117

Ind. Cas. 434=31 Bom.L.R. 53=30 Cr.L.J. 794=A.I.R. 1929 Bom. 74 (D.B.).

——S. 12—Dart game.

The law is enacted for the average man and not for a person of unusual skill, and the question whether in a game of dart, chance or skill is a deciding factor is to be decided by taking the case of an average man. A.I.R. (Vol. 23) 1936 Sind 126=29 S.L.R. 349=1936 Cr. Cas. 803=37 Cr. L.J. 1005=164 Ind. Cas. 642.

——S. 12—Dart game—Person selling tickets, person receiving wager and person holding dart to be thrown and person receiving dart from board are all gaming.

In a game of darts a person who sells the ticket and receives the wager takes just as great a part in the act of gaming as does the person who hands the dart to the individual who is to try his chance and as does the third individual who removes the dart from the board and all the three can be held to be engaged in a gaming within the provision of the Bombay Prevention of Gambling Act. A.I.R. (Vol. 23) 1936 Sind 126=29 S.L.R. 349=1936 Cr. Cas. 803=37 Cr. L. J. 1005=164 Ind. Cas. 642.

——S. 12—Offence under—Passage as place accessible to public.

Obiter.—In cases where the passage is a place to which the public have access or are permitted to have access, there might be an offence under S. 12 of the Act. A.I.R. (Vol. 27) 1940 Bom. 18=41 Bom. 1114=41 Cr.L.J. 273=186 Ind. Cas. 242.

——S. 12—Aider and abettor, whether punishable.

Under S. 12 of the Bombay Prevention of Gambling Act only those persons who are gaming are punishable and those who aid and abet are not punishable. A.I.R. (Vol. 20) 1933 Lah. 513 (1) =34 Cr.L.J. 174=34 P.L.R. 173=1933 Cr. Cas. 772 (1)=141 Ind. Cas. 543 (2).

——S. 12—Conviction under—Confiscation—Order for sale of instruments of gaming.

In S. 12, Bombay Prevention of Gambling Act, before as well as after amendment, it would appear that the forfeiture of money and the severer penalties imposed by the section relate to a person convicted of wagering or betting but not to a person convicted merely of gaming. Where there has been a conviction under S. 12, the money and the instruments of gaming will not be forfeited and will be returned to the owner of the instruments. In the section there is a direction that all instruments of gaming found in such public place shall be destroyed and not ordered to be sold. A.I.R. (Vol. 24) 1937 Sind 99=31 S.L.R. 44=38 Cr.L. J. 668=169 Ind. Cas. 35.

——S. 12—"Any place to which public have or are permitted to have access", construction—Invitation to public.

No distinction can be made, in construing the expression "any place to which the public have or are permitted to have access" in S. 12, Bombay Prevention of Gambling Act, between a right conferred on the public by a statutory provision or a resolution of a Municipality, and a right conferred on the public by a private owner, and the deciding factor is not whether the place is or is not owned by a private individual or a statutory body, but the use to which it is put. If a private owner invites either expressly or by implication the public generally to enter his garden, then so long as that invitation is extended to the public generally, so long the garden is a place to which the public have or are permitted to have access within the meaning of the section. The fact that the owner reserves to himself the right to exclude undesirable is not the deciding factor. A.I.R. (Vol. 23) 1936 Sind 90=30 S.L.R. 72=37 Cr.L.J. 876= 1936 Cr. Cas. 674=164 Ind. Cas. 58.

——S. 12—"Public street"—Person sitting in a shop readily accessible to public is liable.

A person sitting in a shop at a place where he is readily accessible to any person who wished to bet with him from the public street without having to enter the shop at all, is liable for betting or gaming in the street under S. 12. 28 Bom.L.R. 92=27 Cr.L.J. 452=93 Ind. Cas. 244=4 A.I.R. 1926 Bom. 149 (D.B.).

——S. 12—Public place, street or thoroughfare—Gambling in a second class compartment in a special express running through—Accused found gambling at the reversing station where the train stopped for engine purposes.

The word 'place' in S. 12 of the Bombay Prevention of Gambling Act, 1887, is qualified by the word 'public' and having regard to its context and its position in that context, it must mean a place of the same general character as a 'road or a thoroughfare', else it was pointless to use the words 'street or thoroughfare' as they are there used. A railway carriage forming part of a through special train is not a public place within the meaning of S. 12 of the Bombay Prevention of Gambling Act, 1887.

Per **Jenkins, C.J.**—"I would be slow to place on the section (S. 12) an interpretation that would curtail its legitimate scope; but I am unable to regard the railway carriage in which the accused were as possessing such characteristics of, or having such a general resemblance to a street or thoroughfare, as to justify us in holding that it was a public place within the meaning of S. 12."

Per **Russell, J.**—"I am of opinion that to call or describe either the railway line at the spot in question, i.e., at the reversing station where the train stopped for engine purposes only and where the public would not have any right without the permission of the Railway Company to be on the line at all or the carriage (in a special train which took no passengers between the two termini of the journey) in which the accused were playing as coming within any of the terms 'public street, place or thoroughfare' (in S. 12 of the Bombay Prevention of Gambling Act) would be to place a wrong interpretation upon the words." (1905) 8 Bom.L.R. 22=30 Bom. 348=3 Cr.L.J. 216.

——Ss. 12 and 4—Place, street or thoroughfare—Machwa—Gambling in a machwa hired by accused in the harbour.

Gambling in a **machwa** (boat) which is chartered by the accused and used by them for the purpose

in the Bombay Harbour cannot be said to be gambling in a public place, street or thoroughfare within the meaning of S. 12 of the Bombay Gambling Act. S. 12 of the Act aims at gambling in a public place or thoroughfare, and ordinarily applies to persons sitting on or near a road or public place with no intervening obstruction to the public view where there is voluntary publicity. The mischief aimed at in S. 3 of the Bombay Gambling Act is the practice of individuals making a profit by providing a spot of their own selection known as a place where gambling is to be carried on and making a livelihood by attracting people to a place which they would not otherwise frequent. In S. 12 of the Act, however, the offence is not that the individual members are making a profit at all, but simply that they are carrying on their gambling with such publicity that the ordinary passer-by cannot well avoid seeing it and being enticed—if his inclination be that way—to join in or follow the bad example openly placed in his way. In the one case, comparative privacy for profit, in the other, the bad public example and accessibility to the public, would seem to constitute the gravamen of the offence. (1905) 7 Bom.L.R. 333=29 Bom. 386 =2 Cr.L.J. 252.

——S. 12—Punishment.

There should be no disproportionate punishment in the case of very petty offences. 41 Bom. 149: 18 Bom.L.R. 940=37 Ind. Cas. 305=18 Cr.L.J. 97.

——S. 12 (a), 3—Conviction under—Reasonable suspicion of gaming in public place—Sufficiency.

It would be a remarkable departure from the accepted principles of criminal justice if the mere fact of being reasonably suspected by a Police Officer were to be held sufficient to justify a conviction of a criminal offence. A man may be arrested on a reasonable suspision of gaming in a public place but he can only be convicted of the offence at which S. 12, Bombay Prevention of Gambling Act is aimed, viz., actual gaming in public. A.I.R. (Vol. 25) 1938 Bom. 484=40 Bom.L.R. 1082=40 Cr.L.J. 97=I.L.R. (1939) Bom. 53=178 Ind. Cas. 588 (F.B.).

——S. 12 (a)—Conviction under—Accused travelling in train—Wagering chits and money representing winnings which accused intended to distribute at some other place, found in his possession.

When an accused travelling in a train is arrested he cannot be convicted under S. 12 (a) for being found in possession of wagering chits and money representing winnings which the accused intended to distribute at some other place, unless those winnings are shown to be winnings of gaming in a public place. A.I.R. (Vol. 25) 1938 Bom. 484 =40 Bom.L.R. 1082=40 Cr.L.J. 97=I. L. R. (1939) Bom. 53=178 Ind. Cas. 588 (F.B.).

——S. 12 (a)—"Any place to which public have or are permitted to have access" includes hotel.

The words in the amended S. 12, Gambling Act, "in any place to which the public have or are permitted to have access" would include a hotel. The public have a right to go to a hotel provided there is accommodation available in it, and can be said to have or to be permitted to have access to it. 32 Bom.L.R. 790=1930 Cr.C. 848=A.I.R. 1930 Bom. 369 (D.B.).

——S. 12 (a)—Public place—Mutt.

A Mutt, which is enclosed in a compound wall and is managed by the Swami, who can keep out people, if he chooses, is not a public place. 15 Bom. L. R. 101=19 Ind. Cas. 167=14 Cr.L.J. 167.

——Ss. 13, 4—Game of cards called pettin-ata.

"Mere skill" means pure skill, skill and nothing else. A game in which there is a substantial element of chance cannot be described as a game of mere skill or pure skill. As the Bombay Prevention of Gambling Act now stands, and in particular in view of the provisions of S. 13, it is clear that if a game is played for stakes, it amounts to gaming and comes within the mischief of the Act, quite irrespective of the question whether chance or skill predominates, provided of course that it is not a game of mere skill, that is to say, a game in which there is no element of chance at all. Of course, if the element of chance in a game is so small as to be negligible, it may be reasonable to ignore it. A game of cards called pettin-ata played for money stake is not a game of mere skill, and comes within the mischief of the Bombay Prevention of Gambling Act. A. I.R. (Vol. 26) 1939 Bom. 481=41 Bom.L.R. 970=I.L.R. (1939) Bom. 679=41 Cr.L.J. 157 =185 Ind. Cas. 315.

——S. 13—Game of skill—Element of chance predominating.

No game can be a game of skill alone, and in any game in which even great skill is required, chance must play a certain part. Even a skilled player in a game of mere skill may be lucky or unlucky, so that we think that even in a game of mere skill chance must play its part. But it is not necessary to decide in terms of mathematical precision the relative portion of chance to skill when deciding whether a game is a game of mere skill within the provisions of S. 13. Where the elements of chance most strongly predominate, the game is not a game of mere skill. A.I.R. (Vol. 24) 1937) Sind 99=31 S.L.R. 44=38 Cr. L.J. 668=169 Ind. Cas. 35.

BOMBAY PREVENTION OF HINDU BIGAMOUS MARRIAGES ACT (XXV OF 1946).

——Scope—If ultra vires.

The Bombay Prevention of Hindu Bigamous Marriages Act is not ultra vires the Provincial Legislature or invalid. As far as marriage and divorce are concerned, the power is given to both the Central and Provincial Legislature to legislate about those subjects, and the Provincial Legislature has the right to modify the Hindu Law to the extent that it applies to the province. I.L.R. (1948) Bom. 631=50 Cr.L.J. 147=A.I. R. 1949 Bom. 71=50 Bom.L.R. 576 (D.B.).

——S. 5—Offence under—Second marriage alleged to be bigamous—If to be void marriage—Going through form of marriage—Sufficiency.

In order to constitute an offence under S. 5 of the Bombay Prevention of Hindu Bigamous

Marriages Act (1946) of contracting a second marriage when the husband had another wife living, it is not necessary that a valid second marriage should be solemnised. It is enough if the parties accused of bigamous marriage go through a form of marriage when the first marriage is still subsisting. I.L.R. (1948) Bom. 412=50 Bom.L.R. 379=A.I.R. 1948 Bom. 374 =49 Cr.L.J. 685 (D.B.).

——S. 9—Scope—If controls, S. 198, I.P. Code —Offence of bigamy under S. 5 of Bombay Act, made offence under S. 494, I. P. Code—Cognizance of—Complaint by person aggrieved—Necessity. See CR. P. CODE, S. 198. 50 Bom.L. R. 379.

BOMBAY PREVENTION OF PROSTITUTION ACT (XI OF 1923).

——Ss. 3 and 10 (1)—Arrest without complaint —Legality—Jurisdiction of Magistrate to try the accused.

A police-officer, who is not specially authorised by the Commissioner of Police as required by S. 10 (1) cannot arrest a woman under S. 10 (1) without a complaint under S. 3 of the Act, and the Magistrate has no jurisdiction under S. 190 of the Cr. P. Code, to try the woman so wrongly arrested for the offence, unless a complaint within the meaning of S. 4 (1) (h) is made to him. 49 Bom. 212=26 Cr.L.J. 441=26 Bom.L.R. 1225 =85 Ind. Cas. 57=A.I.R. 1925 Bom. 131 (D. B.).

——S. 6—Procuration—Brothel-keeper availing herself of the supply of the procuress is guilty of abetment.

S. 6 is directed against attempts to seduce the virtue of a woman or a girl for the purpose of prostitution, whether with or without her consent or whatever her age. The section is directed against both a brothel-keeper and her procuress; the brothel-keeper who avails herself of the supply of the procuress is guilty of abetment of the offence under S. 6, Bom. Act XI, 1923. The brothel-keeper facilitates the prostitution and completes it. 52 Bom. 403=30 Bom.L.R. 613=29 Cr.L.J. 993=11 A.I.Cr.R. 221=112 Ind. Cas. 209=A.I.R. 1928 Bom. 336.

——S. 7—Prostitute—Position of mistress.

The idea underlying prostitution is that a woman should surrender her body for a monetary consideration to some one who is not in law entitled to have sexual intercourse with her. The position of a mistress is not necessarily that of a prostitute. The relationship is of a more permanent nature than the casual relationship implied in prostitution. Having a stray paramour would not constitute a woman prostitute. 31 Bom.L.R. 521=117 Ind. Cas. 336=30 Cr.L.J. 787=A.I. R. 1929 Bom. 266 (D.B.).

——S. 7—The matter whether a woman is an ordinary or common prostitute rests more on degree than on kind. 31 Bom.L.R. 521=117 Ind. Cas. 336=30 Cr.L.J. 787=A.I.R. 1929 Bom. 266 (D.B.).

BOMBAY PRIMARY EDUCATION ACT (IV OF 1923).

——S. 3, cl. (1) (as amended by Act XV of 1927) —District School Board constituted under—Whether a corporation and liable to be sued as such.

A District Board, a creation of the Bombay Primary Education Act by S. 3, cl. (1) thereof, is a corporation and liable to be sued as such. A.I.R. (Vol. 19) 1932 Bom. 651=34 Bom.L.R. 1500=57 Bom. 60=141 Ind. Cas. 874.

——S. 4—Ss. 4 (2), 8—Power of appellate authority—'May' whether means, "shall"—Teacher in School under control of District Board—Services transferred Rights and liabilities of Local Authority.

Where a teacher in the employ of a District Local Board is given a right to appeal with regard to his suspension, dismissal, etc., and a statutory rule governing such a case provides that in case the appellate authority orders for the reinstatement of such a teacher it may grant him full pay for the period during which such teacher was under suspension or dismissal, the word 'may' does not mean "shall" but merely confers upon such appellate authority a discretion in the matter and such statutory discretion if exercised according to statutory rules, cannot be interfered with.

Plaintiff was a teacher in a school under the control and management of the District Local Board whose services were transferred under S. 8, Bombay Pimary Education Act. He was made to retire compulsorily by the Board but was reinstated after some time and the period of his enforced absence was treated as a leave with full pay for half the period and half pay for the rest. He sued the Board for the remaining half pay:

Held, that under sub-S. (2) of S. 4, Bombay Primary Education Act, the rights and liabilities of the local authority with respect to transfers of teachers are not vested in or transferred to the School Board and the Legislature intended that so far as such teachers are concerned, rights as regards them, and liabilities towards them shall remain with the local authority and not with the School Board. The suit therefore lay against the District Board. A.I.R. (Vol. 26) 1939 Sind 150=I.L.R. (1939) Kar. 518=182 Ind. Cas. 669.

——S. 8 (2) and proviso (b)—Allowances payable to teachers at time of transfer of employment to local authority—Power of local authority to discontinue or abolish.

So far as the terms and conditions of the employment of the primary teachers taken over and employed by the local authorities under S. 8 (1) of the Bombay Primary Education Act are concerned, they are really meant to be absolutely safeguarded to them and not to be touched at all in spite of the general provision contained in S. 8 (2) except in the manner laid down in proviso (b) to S. 8 (2). The scale of allowances allowed to these teachers are a part of the terms on which they were employed by the Government, and the local authorities would be bound by these terms and conditions and no alteration could be

effected unless such alteration came within the provision in S. 8 (2) and proviso (b) and unless the scale of such allowances was altered by the local authorities after the sanction of the Provincial Government in that behalf.

The word "alter" in proviso (b) can never mean or include abolition, extinction or effacement; it can only mean to modify". S. 8 (2) and proviso (b) thereto should therefore be read as laying down that there is no absolute power in the local authority stepping into the shoes of the Government to discontinue the allowances which were payable to the teachers at the time of the transfer of their employment from the Government to the local authority and that the only thing open to the local authority to do is to alter or revise or change the scales of pay and allowances applicable to those teachers at the time when they were taken over and employed by them with the sanction of the Provincial Government, but not in a manner so as to involve the abolition or extinction or discontinuance thereof. I.L.R. (1949) Bom. 646=51 Bom.L.R. 746=A.I.R. 1'950 Bom. 18 (D.B.).

——S. 9 (1)—Administrative officer of School Board—If removable by Local Authority—Cr. P. Code, S. 197.

An administrative officer of a School Board appointed under S. 9 (1) can be removed by the local authority without the previous sanction of the Government when there is a clear majority of two-thirds of the whole number of councillors and no sanction under S. 197, Cr. P. Code, is necessary for his prosecution. A.I.R. (Vol. 18) 1931) Bom. 527=33 Bom.L.R. 1177=33 Cr.L. J. 78=1931 Cr. Cas. 959=134 Ind. Cas. 1240 (1).

——S. 27—Suit by dismissed teacher for reinstatement and in alternative for damages—Suit lies against Board and not against authority.

Although it is for the local authority to allow or dismiss the dismissed teacher's appeal against the order of the school board, it is the school board, in the exercise of its powers of appointment, which would re-instate or re-appoint in accordance with the decision of the local authority. Consequently, a suit by the teacher for reinstatement and in the alternative for damages lies against the Board and not against local Authority. A.I.R. (Vol. 30) 1943 Sind 98=I.L.R. (1942) Kar. 553=207 Ind. Cas. 93.

——S. 27—Rules under Local Boards Act, and Education Act are inseparable.

The rules under the two Acts are so interwoven that it is difficult to separate them. If the Board is to function in any way at all, it must necessarily function under the rules made under the District Local Board Act because it is obviously of no advantage to a person to be appointed to be a member of the School Board if he cannot perfrom any function as such member and if no money is allotted to the Board. A.I.R. 1930 Sind. 246=126 Ind. Cas. 479 (D.B.).

——S. 27 (1) and S. 4, Cl. 5, R. 21—Quorum—School Board meetings—Quorum not prescribed—Common law rule that majority of members should attend a meeting applies.

The School Board is a public corporation as opposed to a private corporation and has been created by statute. In the absence of a quorum having been prescribed either by the statute creating it or by the rules framed thereunder, there is no reason why the ordinary common law rule prevailing in England should not apply. The Common law rule provides that when a statute grants powers on any definite number of persons in respect of a public as opposed to a private trust, and contains no indication to the contrary, it is necessary that a majority of that number should act together and should attend every meeting when any corporate act is done or purported to be done. 23 S.L.R. 128=107 Ind. Cas. 446=A.I.R. 1928 Sind 126 (D.B.).

——S. 27 and R. 13—Election to Municipal Board—Disqualification — S. 15 (f), Bombay District Municipalities Act—Subsequent election to School Board — Chairman refusing to recognise him—Rights of elected member.

X elected member of Municipality but subsequently held disqualified for such election—In the meanwhile but after his disqualification ceased, he was elected on the Scool Board—But he was held disqualified by Chairman of School Board—His disqualification for Municipality did not necessarily imply disqualification for Dstrict Board—Chairman was not competent to decide question of disqualification, the presumption, in absence of statutory authority being in favour of suits in ordinary Courts. 32 Bom.L.R. 614=124 Ind. Cas. 815=A.I.R. 1930 Bom. 378 (D.B.).

——S. 27 and R. 34 (6)—Power of School Board to dismiss teachers—If can be assigned to power conferred on Government under S. 26.

The powers of the Provincial Government under S. 27, Bombay Primary Education Act, are wide, and the power to dismiss teachers under R. 34 (6) conferred on the School Board by Government can be assigned to the power conferred on Government by the Legislature under S. 26. A.I.R. (Vol. 30) 1943 Sind 98=I.L.R. (1942) Kar. 553 =207 Ind. Cas. 93.

——S. 27 and R. 34 (6)—Power of School Board to dismiss teacher—"Full inquiry"—Meaning of—Court's power to interfere with Board's discretion.

Under R. 34 (6) of the Rules made under Bombay Primary Education Act the school board has the power to dismiss a teacher for serious misconduct or gross inefficiency and after full enquiry. It is not for the Judge to substitute his own judgment and discretion for that of the school board. The phrase "after a full enquiry" may be vague and indefinite, but it clearly means that the enquiry must be conducted according to the principles of natural justice; the accused must know the charge against him, and must have full and reasonable opportunity to meet it. The Court cannot enquire into details and import into the jurisdiction of a domestic tribunal, technicalities which have no necessary place. If the accused had ample oppor-

tunity to meet the charges against him, and if these were held proved by the school board, the School Board would be justified in their conclusion that the accused was guilty of a serious misconduct. A. I.R. (Vol. 30) 1943 Sind 98=I.L.R. (1942) Kar. 553=207 Ind. Cas. 93.

——S. 27 and R. 34 (6) and (1)—Teacher dismissed by School Board—Suit by teacher against Board—Notice under S. 167 is not necessary. A. I.R. (Vol. 30) 1943 Sind 98=I.L.R. (1942) Kar. 553=207 Ind. Cas. 93.

BOMBAY PRIMARY EDUCATION ACT (XII OF 1938).

——Act is not subsidiary to Bombay District Municipal Act or Bombay District Local Boards Act—Provisions of Education Act and Rules made thereunder operate separately as a whole.

The Bombay Primary Education Act is not a subsidiary Act to the principal Act, the District Local Boards Act or the District Municipal Act, as the case may be. All are equally the creation of the Legislature, and powers can just as well be conferred on a Municipality or a District Local Board or a Local Authority by the Primary Education Act as by the District Municipal Act or the Local Boards Act. Both Acts are of the same authority, and though reference to the District Municipal Act or the District Local Boards Act may be necessary for a fuller understanding of the Primary Education Act, the provisions of the Primary Education Act and the rules made thereunder can operate separately and as a whole. A. I.R. (Vol. 30) 1943 Sind 98=I.L.R. (1942) Kar. 553=207 Ind. Cas. 93.

BOMBAY PRIMARY EDUCATION (DISTRICT MUNICIPALITIES) ACT (I OF 1918).

——Ss. 9, 10 and 8 (b)—Scope—Right of parents to give education elsewhere—Instruction, if should conform to standards in recognised schools.

The words "and after such enquiry as it considers necessary" in S. 9 are not merely permissive. That expression has a compulsory force, regard being had to the object of the enactment, to the wide powers conferred on the committee in derogation of the parents' rights and to the language of S. 9 itself. It is cleary the function of the Court when a complaint is made under S. 10 to see whether it is proved that the parent failed to send the child to a recognised school, without reasonable cause on or after the date specified in the attendance order. The Act does not inflict penalty on a parent for a mere failure to carry out an attendance order passed under S. 9. For, it is not to be supposed, unless the statute clearly said so, that once attendance order is made by the school committee under S. 9 the parent is for all time deprived of the right to give efficient instruction to his own child otherwise than in a recognised primary school. The main object of the enactment is to see that a child is not left without the benefit of education. It is sufficient if it is receiving efficient instruction elsewhere than in a recognised primary school. It is not essential that the instruction in order to be efficient within the meaning of S. 8 (b) should conform to the standard as adopted in the recognised primary schools. 47 Bom. 942=25 Bom.L.R. 896=77 Ind. Cas. 226 =25 Cr.L.J. 338=A. I. R. 1924 Bom. 105 (D. B.).

BOMBAY PRIZE COMPETITION TAX ACT (XI OF 1939).

——S. 2 (2)—"Competition"—Meaning of.

The word "competition" means the act of seeking, or endeavouring to gain, what another is endeavouring to gain at the same time. It is wrong to say that the word "competition" implies some sort of skill or at any rate some sort of striving or contention. A.I.R. (Vol. 30) 1943 Bom. 72=45 Bom.L.R. 56=44 Cr.L.J. 407=I.L.R. (1943) Bom. 96=205 Ind. Cas. 397.

——S. 2 (2)—Competition—What amounts to.

The secretary of a charitable society promoted a scheme which was described as a Novel Gift Scheme. A large number of tickets which were in the form of a receipt for a donation of two annas to the charity were issued in books of forty. The tickets or receipts were all numbered, but four had the same number and together formed what was described as a full donation receipt. In each book one full donation receipt was guaranteed a prize of two rupees, if it happened to be of the winning number. There were some other prizes including one of Rs. 2,500. All the prize winning numbers were selected beforehand and lodged with a bank:

Held, that the scheme amounted to a competition within the meaning of the Act. A.I.R. (Vol. 30) 1943 Bom. 72=45 Bom.L.R. 56=44 Cr.L.J. 407=I.L.R. (1943) Bom. 96=205 Ind. Cas. 397.

——S. 4—Discretion of Collector—Exercise of—Issue of licence—If compulsory.

S. 4 of the Bombay Prize Competition Act does not provide for the issue of any licence by the Collector; but there is implied and assumed in S. 4 a power on the part of the Collector to issue a licence. This power is discretionary, and is not coupled with a duty in the sense that the Collector is bound to exercise the power in favour of an applicant if he complies with the conditions laid down. There is no obligation on the Collector, on the face of the language used in S. 4, to issue a licence in favour of an applicant. The implied power to grant a licence also carries with it the implied power to refuse to grant a licence.

The decision to be exercised is a discretion of the Collector himself. He is the person nominated by the Legislature for the purpose. It has to be exercised properly, free from any caprice or arbitrariness. A.I.R. 1949 Bom. 109=50 Bom. L.R. 728 (D.B.).

——S. 10 (4)—"In the public interest"—Interpretation of.

The expression "in the public interest", in S. 10 (4) of the Bombay Prize Competition Act, cannot be read as **ejusdem generis** with what is contained in Sub-Cls. 1, 2 and 3 of S. 10. A.I.A. 1949 Bom. 109=50 Bom.L.R. 728 (D.B.).

BOMBAY PROHIBITION ACT (XXV OF 1949).

——S. 116—Scope—If controlled by Ss. 260, 261 and 262, Cr.P. Code—Trial of offence under S. 65 (f) of Bombay Act summarily by Magistrate not empowered under Cr. P. Code—Legality—Sentence of imprisonment exceeding three months—Legality.

S. 116 of the Bombay Prohibition Act deals only with the mode of trial of offences under the Act and does not curtail the ordinary powers of Magistrates to take cognizance of and try offences. It authorises all Magistrates to follow the summary procedure while trying offences under the Act, whether or not they are empowered under S. 260, Cr. P. Code, to try cases in a summary manner. S. 262 (2), Cr. P. Code, will not apply in such cases. An offence under S. 65 (f) of Bombay Act XXV of 1949 can therefore be tried summarily not only by Magistrates who are empowered under Ss. 260 and 261 of the Cr.P. Code, but by any Magistrate who would be competent to try them under the second schedule to the Code. The Magistrates empowered under Ss. 260 and 261 can however try summarily only the offences mentioned in those sections, but they cannot try any other offences in a summary manner; the power to try summarily offences under the Prohibition Act is given not by the Code but by the Prohibition Act itself, in S. 116. A Magistrate trying an offence under the Bombay Prohibition Act is also competent to award a sentence of imprisonment for a term exceeding three months and his power to do so is not curtailed or taken away by S. 262 (2) of the Cr.P. Code. 52 Bom. L.R. 321=A.I.R. 1950 Bom. 273=51 Cr.L.J. 1303 (D.B.).

BOMBAY PUBLIC CONVEYANCE ACT (VI OF 1863).

——S. 2—Offence under—Using a lisenced pony in a licensed tonga but numbered differently.

Using a licensed pony for a licensed tonga, though the pony does not bear the number of the tonga, is not an offence under S. 2. 17 Cr.L.J. 144=33 Ind. Cas. 320=18 Bom.L.R. 65=A.I.R. 1916 Bom. 222 (D.B.).

——S. 2—Offence under—Yoking of unlicensed pony to tonga.

The yoking of an unlicensed pony to a tonga is an offence within S. 2 of the Act. 14 Cr.L.J. 458=20 Ind. Cas. 618=15 Bom.L.R. 700 (D.B.).

——S. 34 (a)—Government Notification.

The Government Notification No. 955 of 1885 applying the provisions of the Bombay Public Conveyance Act to all vehicles kept in readiness for hiring on demand quite conforms with S. 34 (a) of the Act, and therefore is not ultra vires. 9 S.L.R. 205=17 Cr.L.J. 231=34 Ind. Cas. 647.

BOMBAY PUBLIC CONVEYANCES ACT (VII of 1920).

——Offence under—Right of Railway Police to complain—Duty of Court.

Whether the Railway Police have the powers of the ordinary Police or not, they have the right to complain of an offence punishable by the Bombay Public Conveyances Act and Magistrates on such complaints are bound to deal with the case on the evidence before them. A.I.R. (Vol. 19) 1932 Bom. 256=34 Bom.L.R. 275=1932 Cr. Cas. 296 =33 Cr.L.J. 462=137 Ind. Cas. 8.

——S. 2 (b)—Plying for hire and 'letting for hire' distinguished.

There seems to be a difference between "letting for hire" and "plying for hire". If A keeps motors at Poona in order to let them out to clients who wish to go to Mahabaleshwar the motors would not become on that account public conveyances; it would be otherwise if A kept a motor bus which plied regularly between Poona and Mahabaleshwar. 25 Bom.L.R. 95=72 Ind. Cas. 70= 24 Cr.L.J. 310=A.I.R. 1923 Bom. 248 (D.B.).

——S. 24—Conviction under—Proof required.

To convict an accused under S. 24 of the Bombay Public Conveyances Act, it is not sufficient merely to show that the accused is a licensee of a public conveyance and that he permitted it to be driven by a driver who is not licensed; it must be shown that when this unlicensed driver was driving, he was driving a public conveyance for use as such. The section does not mean that if the licensee of a public conveyance himself takes his family out for a treat or permits an unlicensed driver to take his family out for a treat, an offence is committed, for, the public conveyance is not then used for the purpose of public conveyance at all. It is used for the purpose of private conveyance. It is not being plied for hire or for carrying members of the public for hire. A.I.R. (Vol. 25) 1938 Sind 190=39 Cr. L. J. 976=I.L.R. (1939) Kar. 187=177 Ind. Cas. 783.

——S. 26—Offence under—Plying of public conveyance without licence within the railway yard —Competency of Railway Police to set the law in motion.

Where a person piled a public conveyance for which he did not hold a licence within the Railway yard of the Victoria Termius Station, Bombay, and was charged by the Railway Police for an offence under S. 26, Bombay Public Conveyances Act:

Held, (i) that the place where the conveyance was plied, though included in a general police district by the Governor-General in Council, was not outside the City of Bombay to which the Act applied and the accused committed an offence under S. 26;

(ii) that the Railway Police had all the powers of the general Police within their special district and hence were competent to set the law in motion. A.I.R. (Vol. 20) 1933) Bom. 63=34 Bom.L.R. 1662=34 Cr.L.J. 235=1933 Cr. Cas. 180=141 Ind. Cas. 790.

——Ss. 26 and 12 (2)—Offence under—Failure to produce license—License suspended by Assistant Superintendent of Police under powers orally delegated by Superintendent of Police.

Where the accused a licensed public conveyance driver was convicted under S. 26 (2) of Act VII

of 1920 for failure to produce his license and it was found that his license had been suspended by Assistant Superintendent of Police under S. 12 (2) in exercise of the powers delegated to him only orally by the Superintendent of Police. **Held,** the conviction of the accused, was illegal. The delegation of powers under the Act of 1920 can be effected but in a case where there has been an exercise of a power under alleged delegated authority it is clearly necessary that the delegation should be clearly shown. The question of such authority should not depend on a general verbal order but it should be by written orders, giving references to the various sections of the Act and specifying paticular powers and duties delegated to an Assistant or Deputy Superintendent of Police. 27 Bom.L.R. 1421=27 Cr.L.J. 150=91 Ind. Cas. 886=A.I.R. 1926 Bom. 77 (D.B.).

BOMBAY PUBLIC SECURITY MEASURES ACT (VI OF 1947).

——S. 2—"Is acting"—Acts done two months before the date of order—If can form basis of order of detention.

The expression "is acting" in S. 2 of the Bombay Public Security Measures Act refers to a period which could reasonably be regarded as present and not past, and acts done in the approximate and immediate past may be taken as legitimately forming the basis of an order of detention. A period of two months prior to the date of the order cannot be considered to be outside the scope of the expression "is acting". 50 Bom. L.R. 579=A.I.R. 1949 Bom. 86=50 Cr.L.J. 202 (D.B.).

——S. 2—Powers and duty of Police—Recourse to prosecution—Order for release on bail—Subsequent detention order under special powers—. Propriety.

It is no doubt true that the words "is acting" in S. 2 of the Bombay Public Security Measures Act have not the effect of making it incumbent on the detaining authority to prove that at the very moment the order of detention is made the detenu was acting in a manner prejudicial to the public safety, etc. But the words have to be read necessarily as meaning that within a reasonable distance of time as compared with the date of the making of the order of detention, the detenu has acted or was acting in a manner prejudicial to public safety. It is not within the scope nor is it the intention of the Act, that for acts done by the detenu in the remote past or what may be considered as remote past, having regard to the distance of time which separates the alleged acts from the date of the making of the order, the detenu shall be kept in custody under the Act. In any case where the public interest demands that the detenu shall forfeit his individual liberty in the interests of public welfare, the authority making the order should act promptly in the exercise of the special powers, the due exercise of which has been left to his sole and uncontrolled and unquestionable decision. The Act does not contemplate that there should first be a prosecution for the purpose of securing conviction and then, when after that long drawn out process was over, the Police Commissioner should have recourse to the special powers, and arrest the person concerned on those very grounds which in the first instance should have been made the ground of detention. It is not for the police to usurp the functions of the magistrate and to keep the detenu in custody when the magistrate has granted bail to the detenu, and thus to arrogate the right to review the judgment of the magistrate. 50 Bom.L.R. 210=A.I.R. 1948 Bom. 417=49 Cr.L.J. 579.

——S. 2—Order of detention regular in form—Onus on detenu to show invalidity.

Where an order of detention under the Bombay Public Security Measures Act is regular in point of form, the onus is cast on the person detained to show that it is in effect no order within the meaning of the Act neither because the mind of the detaining authority had not been applied to the matter or because the order was made mala fide; and the onus unquestionably is a heavy one. 50 Bom.L.R. 210=A.I.R. 1948 Bom. 417=49 Cr. L.J. 579=3 A.I.Cr.D. 314.

——Ss. 2 and 3—Order under—Omission of place of activities of detenu—Effect.

One thing which the authority making an order of detention under S. 2 of the Bombay Public Security Measures Act has to apply its mind to, is the question of its jurisdiction. The place where the detenu is alleged to have been acting in any of the manners mentioned in the section is thus important, and this is one of the particulars which is required to be stated in the detention order and the statement of grounds under S. 3 of the Act. Where, therefore, the place of the detenu's activities is not mentioned either in the order under S. 2 or in the statement of grounds under S. 3, or even in the affidavits filed by the authority in Court such omission is fatal, as it indicates that the question of the place was not present in the mind of the authority which made the detention order when it made the order, and the order must therefore be held to be neither valid nor justifiable in law. I.L.R. (1948) Bom. 426=50 Bom.L.R. 446=A.I.R. 1949 Bom. 84=50 Cr.L.J. 199 (D.B.).

——S. 2—Order under—Omission to state place of activities of detenu—When fatal—Place mentioned in communication under S. 3—Sufficiency.

An order under S. 2 of the Bombay Public Safety Measures Act must make it clear that the basis for taking action is the satisfaction of the District Magistrate or other authority making the order that the detenu is acting in a manner prejudicial, etc., of the Province or any part thereof. The omission to state the Province or part of it, that is, the place of the activities of the detenu, is a defect. But the defect is not fatal, if the order communicating the grounds under S. 3 specifies the place within the Province in which the detenu engages in his activities. In such a case the defect of omission of the place in the order under S. 2 is a mere technical one. 50 Bom.L.R. 175=A.I.R. 1948 Bom. 360=48 Cr. L.J. 524 (D.B.).

——Ss. 2 (1) and (3)—Grounds for detention—Requirements.

"Mawali" has a well-known connotation meaning a "bully" and a person who is a menace to the peace and tranquillity of the locality where he may happen to be in power, and is not vague or indefinite. That a person is a "known Mawaii of the locality", is a ground which would justify detention under S. 2 (1) of the Bombay Public Securities Act. That he is a trafficker in opium and that he extorts money from prostitutes or that he was responsible for a stabbing case, may not, if taken alone, necessarily lead to the conclusion that his activities are of the description mentioned in S. 2, but when taken in conjunction with other grounds such as 'he is a known Mawali' and 'that he has a number of Mawalis under him', would leave no doubt that the activities of that person would lead to a position which will be prejudicial, etc., within the meaning of S. 2. An order of detention giving the above grounds as the grounds of his detention is not therefore illegal or improper, but is one in compliance with the requirements of law. 50 Bom.L.R. 593=A.I.R. 1949 Bom. 82=50 Cr.L.J. 196.

——Ss. 2 and 3—Grounds of detention—Error in grounds showing want of care and caution—Validity of order of detention.

The detaining authority has such wide powers given to it under the Bombay Act VI of 1947, that the Court, where it is left with any discretion at all to investigate the grounds given for the detention, must do so vigilantly in order to find out whether the degree of care and caution exercised by the detaining authority is such as the law requires. The authority need give no particulars and need state no facts, taking refuge behind public interest and behind the language of Ss. 2 and 3 of the Act. But when the authority gives grounds which he is bound to give under S. 3, he must take meticulous care to see that they are stated with absolute accuracy. What matters is not so much the accuracy or the nature and extent of the error, but the state of mind of the detaining authority. If the state of mind discloses that he has been casual in his approach and that he has not applied his mind to the matter with that diligence which is necessary when the liberty of a subject is taken away, the Court will certainly interfere and will set the detenu at liberty. When there is an error which is by no means trivial and which shows want of due care and caution on the part of the detaining authority, the order of detention must be held to be illegal and the detenu set at liberty. I.L.R. (1948) Bom. 651=50 Bom. L.R. 596=A.I.R. 1949 Bom. 75=50 Cr.L.J. 173 (D.B.).

——Ss. 2 and 3—Order of detention—Court's power to go behind—Right of detenu to prove falsity of fact stated.

In the case of an order of detention under the Bombay Public Security Measures Act, the Court in suitable cases has power to go behind the order, if it is ex facie good, and enquire into the truth of the information on which the detaining authority has acted. Ordinarily, where the Court is satisfied that the facts and materials before the detaining authority were considered by him and that they were such as could lead to his satisfaction in the sense required by S. 2 of the Act, the Court will not go behind the order, but where a fact relied on, is found to be false different considerations will arise. The detenu can legitimately rely on the statement of grounds and particulars furnished to him under S. 3, in order to show that a fact alleged is false. For that purpose he is allowed to rely on his own affidavit and the affidavits of persons acquainted with the facts. 50 Bom.L.R. 579=A.I.R. 1949 Bom. 86=50 Cr. L.J. 202 (D.B.).

——S. 2—Order under — Propriety —Power of Court to consider.

So long as the authority making an order under S. 2 of the Bombay Public Security Measures Act purports to observe all the requirements of the law and applies its own mind to the facts of the case, and makes the order that it is satisfied that the person in question is acting in a manner prejudicial to the public safety, the maintenance of public order or the tranquillity of the Province or any part thereof, the Court will not sit in judgment over the propriety or wisdom of the order; and it is not open to the Court to question the decision of the authority making the order. 50 Bom. L.R. 175=A.I.R. 1948 Bom. 360=49 Cr.L.J. 524 (D.B.).

——S. 2—Grounds for detention—Sufficiency—Power of Court to consider — Duty of authority making order and of Court.

Under S. 2 of the Bombay Public Security Measures Act, the authority or person to be satisfied that a person is acting in a manner prejudicial to the public safety, etc., is the authority making the order of detention of the person who is so acting. The Court is not entitled to consider whether the grounds of the order (so far as they can be ascertained) are such as would satisfy itself. But when the order is challenged the Court is entitled to inquire whether the alleged satisfaction of the authority making the order is a real satisfaction or something else indicating an omission on the part of that authority to apply its mind to the facts of the particular case and to draw legitimate conclusions therefrom. If it is found that the authority has not applied an unbiassed mind to the facts, it must be held that it is not a case of real satisfaction. It is for the authority to justify the exercise of the power of detention, when it is challenged, by showing that it applied its mind to the material, facts and to the appropriate considerations, and the Court must scrutinize the justification thus offered with great care and anxiety. The application of the detaining authority's mind to the relevant facts and considerations being the necessary pre-requisite to its satisfaction, it is open to the detenu to contend and to show that the application of its mind was non-existent or so faulty as to render the alleged fact of its satisfaction questionable and uncertain. I.L.R. (1948) Bom. 426 =50 Bom.L.R. 446=A.I.R. 1949 Bom. 84=50 Cr.L.J. 199(D.B.).

——S. 2 (1)—Grounds for detention—Sufficiency—Power of High Court to consider.

It is well-settled that the High Court's powers to interfere with detention orders made under Bombay Public Security Measures Act are limited, and are confined to cases where it appears that the detaining authority has not properly applied its mind to the question as to whether the detention of the person is or is not justified under the Act. It is also true that it is not compulsory for the detaining authority to furnish to the detenu a statement of the ground or grounds upon which the order of detention has been made. But where the grounds are furnished, it is permissible for the High Court to consider the statement of those grounds together with the order made; and if the statement of grounds does show that the detaining authority has not properly applied its mind to the question of detention when the ground lacks precision and is bad, then the High Court has jurisdiction to interfere, as in such a case it shows that the detaining authority cannot have considered properly the facts or evidence placed before it on which such a ground is based. 50 Bom.L.R. 183, dist. 51 Bom.L.R. 1038=A.I.R. 1950 Bom. 126 =51 Cr.L.J. 665 (D.B.).

——S. 2—Validity of order—Grounds for detention at variance with grounds specified in notice under S. 3.

Where the grounds mentioned in the order of detention under S. 2 of the Bombay Public Security Measures Act, are at variance with the grounds specified in the notice served on the detenu under S. 3 of the Act, it clearly shows that the authority passing the order of detention had not applied his mind to the facts of the case at the time when he signed his order, and the order must be held to be bad. 50 Bom.L.R. 290=49 Cr.L.J. 645=A.I.R. 1949 Bom. 37=50 Cr.L.J. 129 (D.B.).

——S. 2 (1)—Detention under—Condition precedent—Arrest effected before service of order for detention—Legality—Burden of proof—Oral order—Sufficiency.

The satisfaction of the detaining authority is a pre-requisite of the detention of a person under an order under S. 2 (1) of the Bombay Public Security Measures Act, and that satisfaction must come first and the detention must come subsequently. There is no of course nothing in S. 2 (1) which prescribes that the order for detention should be in writing. It may be an oral order by the detaining authority made after taking into account all the circumstances of the case which go to satisfy him that the detenu is acting in the manner described in S. 2 (1). Where in any case it is found that the detenue was arrested before the order of detention was served on him, the burden is on the detaining authority to satisfy the Court on proper materials that in fact the satisfaction came before the actual arrest of the detenu was affected, and that the detention was in pursuance of such satisfaction on his part within the meaning of S. 2 (1), though the order might be actually served on the detenu later. 50 Bom.L.R. 593=A.I.R. 1949 Bom. 82=50 Cr.L.J. 196.

——S. 2 (1) (a)—Scope of inquiry—Powers and function of Court.

S. 2 (1) (a) of Bombay Act VI of 1947 permits and authorises an order of detention to be made if the Provincial Government, or, where the power is delegated to its subordinate officer, then the said officer, is satisfied that the person who is to be detained in acting in a manner prejudicial to the public peace and the maintenance of public order, etc., and according to the well-established principle of interpretation, the "satisfaction" is a condition precedent to the exercise of the powers under the section. What the Courts have to see, however, when subsequently an application is made challenging the existence of that satisfaction, is whether there was the subjective satisfaction of the authority which made the order and not whether there were grounds upon which a reasonable person could be satisfied that it was necessary to make the order, that is to say, an objective test of that satisfaction. The satisfaction of the mind is just as much a state of fact as, for example, the state of digestion, of the person who makes the order, and consequently if anyone challenges that on the ground that the authority which made the order had not the state of mind which could be described as a state of "satisfaction", it is open to the Court to say that it must be satisfied as to the state of mind of the authority which made the order and to take evidence as to the existence of the state of mind. But when the **bona fides** of the authority which made the order is challenged, the Court must not, when taking evidence, approach the order in question with prejudice which might arise from past experience.

The burden is upon the person who challenges the **bona fides** of the detaining authority to show as a matter of fact that the order was in fact passed without such "satisfaction", whatever the authority might state in the order with regard to its satisfaction.

The question of satisfaction being a question of fact, the Court is only concerned with the question whether the detaining authority was satisfied. In suitable cases the question may involve an investigation whether sufficient care was or was not exercised, but it is not open to the Court to sit in appeal over an order made by the authority. I.L.R. (1949) Bom. 508=51 Cr.L.J. 184=A.I.R. 1949 Bom. 319=51 Bom.L.R. 653 (F.B.).

——S. 2 (1) (a) and (4)—Order by District Magistrate for detention outside his district—Legality—If can be revalidated by fresh order by Government.

A District Magistrate passing an order under S. 2 (1) (a) of the Bombay Public Security Measures Act of 1947, has no power to order his detention outside the territorial limits of his jurisdiction. Two separate orders can be passed, one under S. 2 (1) (a) and another under S. 2 (4), but both have to be read together, and an order by the Magistrate of a District detaining a person not in his district but in a jail outside his own district is illegal and void as being **ultra vires** and beyond his jurisdiction. Such an order being illegal cannot be revalidated by a subsequent order made by the Government under S. 2 (4) of the

Act. 50 Bom.L.R. 290=49 Cr.L.J. 645=A.I.R. 1949 Bom. 37=50 Cr.L.J. 129 (D.B.).

——S. 2 (1) (b)—Validity—Constitution of India, Art. 19.

Per **Chagla, C.J. and Bavdekar, J.**—S. 2 (1) (b) of the Bombay Public Security Measures Act is void under Art. 13 (1) of the Constitution of India, in as much as it imposes restrictions on the fundamental rights of the citizen under Art. 19 (1) (d) and (e), such a restriction being an unreasonable restriction. The Legislature has no doubt been given the power to impose restrictions on the exercise of the rights conferred by Art. 19 (1) (d) and (e), under Art. 19 (5). Such restrictions however have to be reasonable. it is not for the Legislature to determine whether the restrictions are reasonable or not. It is for the Court of law to determine the reasonableness of the restrictions. "Reasonable" is an objective expression and its objectivity is to be determined judicially by the Court of law. There is no limit to the power of the Court to consider the nature of the restrictions. The Court must look upon the restrictions from every point of view and it is its duty to scrutinise the restrictions placed by the Legislature as carefully as possible. The Court has to look to the nature of the restriction, the manner in which it is imposed, the extent thereof, both territorial and temporal, in order to determine whether it is reasonable or not, and if it finds that the restriction is not justified, it cannot uphold it. The power given to the Legislature under Art. 19 (5) is to abridge or curtail the fundamental rights of the citizen, and according to the well-established canon of construction of all constitutional documents, the Court must lean in favour of fundamental rights and must place the restrictions imposed by the Legislature in as narrow an ambit as possible. The wider the power given to the Legislature, the greater is the duty of Court to see that the restrictions placed upon the liberty of the citizens are reasonable restrictions. No period is laid down in the statute for the duration of an externment order under S. 2 (1) (b) of the Bombay Act (VI of 1947); secondly, the person against whom an order of externment is made has no right whatever to be heard in his defence before he is asked to leave his home; nor is there any obligation upon the authority to hear the person against whom the order is to be made in his defence before the order is made. If under a law a man can be sent away from his district without being heard and without having the right of being heard and without knowing why he is being sent away, the restriction imposed by that law upon the fundamental right is not a reasonable restriction covered by S. 19 (5) of the Constitution and therefore S. 2 (1) (b) of Bombay Act VI of 1947 which imposes such restriction must be held to be void under Art. 13 (1) of the Constitution.

Bavdekar, J.—It is not permissible to read Art. 19 (5) of the Constitution as if it read, "any law permitting the imposition of reasonable restrictions on the exercise of the rights." Only those laws will be valid, which impose reasonable restrictions on the exercise of the rights which each citizen is declared to possess under Art. 19 (1). The right of hearing before condemnation is admittedly a component of the rights which taken together constitute rules of natural justice, and if legislation which restricts the fundamental rights has to be pronounced to be reasonable, it must give the person whose freedom is restricted an opportunity to be heard. When the restriction is abridging the rights, the matter is for the Court to determine whether the restriction is "reasonable."

Shah, J. (contra).—The provisions of S. 2 (1) (b) of the Bombay Public Security Measures Act are not inconsistent with the provisions of Part III of the Constitution and the section is therefore not void. The effect of Art. 19 (5) of the Constitution is to prevent the provision of Art. 13 having any operation so as to render invalid any pre-existing legislation in any State in so far as it sought to impose reasonable restrictions on the exercise of the rights which have been conferred under Art. 19 or to prevent the State from hereafter making any law imposing any such restrictions. The Bombay Public Security Measures Act would not be affected either by Art. 13 or by Art. 19, provided the restrictions are reasonable and imposed in the interests of the general public.

Whether the restrictions are "reasonable" as contemplated in Art. 19 (5) has to be judged with reference not to individual cases which may arise or any hardship which may arise but by reference only to two considerations: (1) whether it is a restriction on the exercise of the right conferred by Art. 19 (2) and whether the restriction itself is reasonable having regard to the interests of the general public. The Court is not entitled to enter into an inquiry either that in the enforcement or imposition of the restriction by the authority entitled to impose it, the authority may possibly act unreasonably, or that the stage which provides for the imposition of the restrictions on fundamental rights, is an unreasonable statute. The word "reasonable" does not govern the word "law", nor does it qualify the word "imposes" in Art. 19 (5); it is intended to govern and does in fact govern the expression "restrictions." Having regard to the interests of the general public, if it appears that the restriction on the fundamental rights contemplated to be imposed under Bombay Act VI of 1947 is not reasonable, the provision for the imposition of the restriction must be deemed to be void. The High Court is the tribunal which is entitled to pronounce upon that question. But the reasonableness is the reasonableness of the restriction and not of the manner in which it is imposed. It is not within the province of the Court to examine a statute and to declare it void on the ground of possibility of an abuse of authority vested in a State or public servant, which might have the effect of curtailing the fundamental right of an individual. It is not open to the Court (apart from an allegation of **mala fides**) to enter upon the question whether the enforcement or imposition of the restrictions is reasonable or otherwise. Nor is it open to the Court to go into the question whether the law which provides for the imposition of the restrictions is a

reasonable one. When the Court has to consider, when the Legislature provides for restrictions on the exercise of fundamental rights the restrictions are reasonable having regard to the interests of the general public. There is nothing in the Constitution of India which enables the High Courts to declare a piece of legislation void merely because the Legislature thought it expedient to provide that the satisfaction of an executive officer instead of a Court should be a condition precedent to the issue of an order intended to protect either the security of the State or the interest of the general public. The sole ground of absence of a provision for being heard either before or after the passing of the order of externment cannot render the provision of S. 2 (1) (b) of Bombay Act VI of 1947 void or inoperative as from January 26, 1950. Since the restriction involved in an order of externment cannot be said to be unreasonable (what is a reasonable restriction has of course to be judged by the Court by reference to the character or nature of the restriction and not by reference to the fact that it may operate in a manner which may be called harsh), the Court cannot declare S. 2 (1) (b) void or illegal. A. I.R. 1950 Bom. 363=52 Bom.L.R. 544 (F.B.).

——S. 2 (6)—Applicability—Order under S. 2 (1) (e) requiring person to give security—Failure to give security—If punishable.

The words "contravenes an order made under the section" mean only contravention of what the order in substance asks a person to do or not to do: they cannot mean or include the contravention of an order requiring the person to give security. There is no intention on the part of the Legislature to punish the mere failure to give security as a contravention; and a person cannot be visited with a conviction for failure to do what may not be in his power. A.I.R. 1950 Bom. 257 =51 Cr.L.J. 972=52 Bom.L.R. 226 (D.B.).

——S. 2 (1) (6)—Burden of proof—Duty of prosecution.

In the case of a charge under S. 2 (1) (6) of the Bombay Act VI of 1947, the burden is upon the prosecution to establish every ingredient which goes to constitute the offence charged, one of the most important ingredients being that the detaining authority was satisfied as to the matters set out in S. 2 (1) before the order was made. It is not sufficient for the prosecution to tender the order which states that the detaining authority is satisfied. The detaining authority must step into the box and make a statement on oath in order to enable the accused to challenge that statement, if so advised, in cross-examination. No presumption can be drawn that the order **ex facie** has been validly made and that the detaining authority was satisfied as required by the law.

Nor is it necessary for the accused in order to challenge the validity of the order that he should suggest that the detaining authority was actuated by **mala fides** or that extraneous considerations weighed with that authority when the order was made before the prosecution can be called on to prove the ingredients of the offence. It is sufficient for the accused to plead not guilty. 52 Bom. L.R. 223=A.I.R. 1950 Bom. 330 (D.B.).

——S. 3—Omission to inform detenu of right to make representation—If renders order illegal.

The failure on the part of the detaining authority to inform the detenu that he had a right to make a representation to the Provincial Government will not and cannot affect the validity or legality of the order. At the most it can only be an irregularity. I.L.R. (1949) Bom. 508=51 Cr. L.J. 184=A.I.R. 1949 Bom. 319=51 Bom.L.R. 653 (F.B.).

——S. 3—Contents of communication under—Nature and requisites of.

Under S. 3 of the Public Safety Measures Act, the authority making an order under S. 2 must communicate to the detenu the grounds on which the order was made. The authority need not disclose all the facts, but the communication must give sufficient indication to the detenu as to the reasons which impelled the authority to take action. The section makes a distinction between the grounds and the particulars with regard to the latter, the section makes the authority the sole judge of their sufficiency or otherwise to enable the detenu to make a representation. The grounds and the particulars should be sufficiently precise, so as to make it possible for the detenu to make a representation and if possible, to remove any misapprehension on the part of the authority making the order of detention. It is necessary that the communication must give the detenu information which must be precise and adequate, giving the detenu sufficient details, on which he could make an effective and a satisfactory representation. It is not sufficient to state vague allegations. To merely state that the detenu was an active leader of a subversive organisation or that he had been carrying on subversive propaganda among the people to prepare and use illegal and violent ways, would be wholly insufficient. An order which states only so much is defective and bad. 50 Bom.L.R. 175=A. I. R. 1948 Bom. 360=49 Cr.L.J. 524 (D.B.).

——S. 3—Duty of Government — Grounds — Disclosure to detenu.

While it is the duty of the Government under S. 3 of the Bombay Act VI of 1947 to communicate to the detenu clear, precise and accurate grounds for his detention, the Government is not bound to disclose facts which it considers against the public interest to disclose. The Government is given a discretion to furnish only such particulars as are in its opinion sufficient to enable the detenu to make a representation to the Government. Grounds which are vague and indefinite and which contain no particulars are, however, no grounds at all within the meaning of S. 8. I.L. R. (1948) Bom. 213=A.I.R. 1948 Bom. 334=49 Cr.L.J. 465=50 Bom.L.R. 183 (F.B.).

——S. 3—Notice under — Particulars — Necessity.

Where a notice under S. 3 of the Bombay Public Security Measures Act gives the ground for detention of a person under an order under S. 2, as "that you have been inciting workers to commit acts of violence and thereby acting in a manner prejudicial to the public safety and tranquillity of

Greater Bombay", it must be held that the notice is bad and invalid on the ground that it is vague and indefinite and that the particulars furnished are not such as could be said to be particulars at all, so as to enable the detenu to make a representation.

In as much as there is no mention of the class of workers or the locality in which the workers were residing or working, or of the time during which the detenu is supposed to have incited the workers, the notice must be held to bad and the detention cannot therefore be justified. 50 Bom. L.R. 590=A.I.R. 1949 Bom. 95=50 Cr.L.J. 320.

——S. 3—"Grounds and particulars"—Duty of detaining authority — Sufficiency—Power of Court to go into.

It is not a sufficient compliance with S. 3 of Bombay Act VI of 1947 that there should be in the grounds furnished to the detenu a reproduction of the words of the section. The grounds should also include particulars. The grounds must be precise and not vague. If the detaining authority gives to the detenu its conclusions of fact and such particulars as are in its opinion sufficient to enable the detenu to make a representation and it could be said from the grounds and particulars furnished to the detenu that the order for detention could reasonably be made, it must be held that there has been compliance with the mandatory provisions of S. 3, and the grounds cannot be said to be bad.

The Court cannot go into the question of the sufficiency of the particulars, as it is left to the discretion of the detaining authority to supply such particulars and grounds as are in its opinion sufficient to enable the detenu to make a representation and the Court cannot subject the particulars to any objective test of sufficiency. I.L.R. (1949) Bom. 508=51 Cr.L.J. 184=A.I.R. 1949 Bom. 319=51 Bom.L.R. 653 (F.B.).

——Ss. 3 and 4—Grounds of order—Duty of Government—Power of Court to consider sufficiency of grounds.

The Bombay Public Security Measures Act undoubtedly confers upon the Government very wide powers. The duty of the Court must always be to protect the liberty of the subject by seeing to it that the Government exercises its powers within the four corners of the statute, that the order made is within the ambit and scope of the Act, and that every formality required by the legislation is complied with before the subject is deprived of his liberty. But the Court, however anxious it may be to protect the liberty of the subject, cannot trespass upon that province which the legislature has marked out as belonging to the executive. Nor can it take upon itself the duty of considering questions of policy which are essentially for the executive and not for a judicial tribunal. The scheme of the Act is fairly clear, and it is the detaining authority that has to be satisfied that the person detained was acting in a manner prejudicial to the public safety the maintenance of public order, or the tranquillity of the province or any part thereof, and not the Court. Under S. 3, it is incumbent upon the Government to communicate to the person affected by the order the grounds on which the order was made. That is a statutory duty cast upon the executive and the section thereby provides a very important and valuable safeguard to the subject. The grounds furnished must be clear, precise and accurate; otherwise they would fail to serve the purpose for which they are intended by the legislature. I.L.R. (1948) Bom. 213=A.I.R. 1948 Bom. 334=49 Cr.L.J. 465=50 Bom.L.R. 183 (F.B.).

——S. 4—Discretion of Government—Powers of Court to go into merits or consider propriety of order.

Under S. 4 of the Bombay Act (VI of 1947), it is left to the discretion of the Government to annul or confirm the order or modify it or make any other order after considering the representation made to it by the detenu. The Court is not concerned with the merits of the representation or the propriety of the order made by the Government under the section. I.L.R. (1948) Bom. 213=A.I.R. 1948 Bom. 334=49 Cr.L.J. 465=50 Bom.L.R. 183 (F.B.).

——S. 4—Grounds for detention given by Government—Defect in some—Effect—Whole order if vitiated.

Where there are several grounds given by Government for the detention of a person and some of them are good and some bad, it cannot be said that the whole order is vitiated. If some of the grounds are not outside the scope and ambit of the Act but are merely vague and indefinite, the order is not thereby rendered invalid. If after eliminating grounds which lack precision and definiteness and which are therefore no grounds at all, there still remain any ground or grounds which are accurate and precise and which can justify the order then the order of detention must stand. If the Court comes to the conclusion that there is a ground or grounds which are within the ambit of the Act, and which the detaining authority can legitimately consider in order to be satisfied that it is necessary to detain the person concerned, the Court must uphold the order, notwithstanding that some of the grounds furnished are vague, indefinite and couched in slovenly language. It is only if a reason given for the detention is not within the scope and ambit of the Act, that the whole order would be vitiated notwithstanding the existence of other good reasons, because in that case something may have operated upon the mind of the detaining authority which is foreign and extraneous to the purpose of the Act. I.L.R. (1948) Bom. 1213=A.I.R. 1948 Bom. 334=49 Cr.L.J. 465=50 Bom.L.R. 183 (F.B.).

——S. 6—Burden of proof—Ingredients of offence—Duty of prosecution—Proceedings under S. 491, Cr. P. Code—Distinction.

S. 6 of the Bombay Act VI of 1947 speaks of contravening an order under S. 2 (1) of that Act. It is not any order made under that sub-section which requires obedience on the part of the person to whom such order is addressed. It is

only a valid order made under S. 2 (1), the contravention of which constitutes an offence. It must be an order which satisfies the conditions laid down in S. 2 (1), namely that the executive authority making the order must be satisfied in the manner contemplated by S. 2 (1) (b). S. 6 presupposes a judicial determination by the Court. The burden of proving the guilt of an accused person is upon the prosecution which must establish by evidence all the ingredients of the offence alleged and charged. When, therefore, a person charged under S. 6 of the Act with the offence of contravention of an order made under S. 2 (1) (b) and he pleads not guilty by challenging the validity of the order which is contravened, one of the most important ingredients to be proved by the prosecution is that the Provincial Government has been satisfied on materials placed before it that the accused is acting in a manner which is prejudicial to the public safety, the maintenance of public order or the tranquillity of the Province or any part thereof, and that ingredient cannot be said to have been proved by the prosecution by merely furnishing in Court an order made by the Police Commissioner. The detaining authority must step into the witness-box in order to establish the validity of the order under S. 2 (1) (b) and to refute the objections of the accused against the validity of the order by satisfying the Court that the condition precedent to the makng of the order was complied with. The position is not identical with, but is different from that in a case under S. 491, Cr. P. Code. While in proceedings under S. 491, Cr. P. Code, the petitioner has to make out and to state that the order under which he is detained is a bad order on any of the grounds on which it is open to him to attack or assail it, the Court, if it is satisfied that a **prima facie** valid order has been made by the production of the order, has to accept it as a valid order, unless challenged on some ground, that is not the position in a criminal trial on a charge of contravention of an order of detention under S. 2 (1) (b) of the Bombay Act VI of 1947. As in every criminal trial, the prosecution has got to prove the guilt of the accused and not merely make out a **prima facie** case; the accused is under no obligation to open his mouth, and the Court can only convict the accused if it is satisfied that the prosecution has succeeded in establishing that the accused has committed the offence with which he is charged. I.L.R. (1949) Bom. 363=51 Bom.L.R. 568=A.I.R. 1949 Bom. 387=51 Cr.L.J. 47 (D.B.).

——S. 6 (1)—"Inhabitants"—Meaning of.

The word "inhabitants" used in the context in S. 6 (1) of the Bombay Public Security Measures Act is not used in the sense of residents of the locality or permanent residents thereof, but in the sense of persons who, besides being permanent residents, are also the occupants in the sense of carrying on business of some nature in the locality (e.g., a pan shop.) 51 Bom.L.R. 633=A.I.R. 1949 Bom. 365=51 Cr.L.J. 7.

——S. 9-A—Power of Government and of Court.

It is perfectly true that it is left to the Provincial Government's satisfaction what action to take under S. 9-A of the Bombay Public Security Measures Act. They are constituted the sole judges of the necessity of the action and therefore it would be for Government to determine whether they should take any action, and if so, what should be the nature of the action. It should decide subjectively what action should be taken. But the Legislature did not intend that the Government should also decide subjectively as to the existence of the purpose for which action has to be taken under S. 9 A. The purpose for which action has to be taken has got to be objectively decided or determined. The purpose laid down in S. 9-A, is a condition precedent to the exercise of the power given to the Provincial Government for taking any action under the section. It would not be enough for Government to come to its own conclusion as a mental act that action was necessary for the purpose laid down in S. 9-A. The Government has to determine objectively that the purpose of taking action was present and was established. That being so the Court has got power and has jurisdiction to determine whether in fact the condition precedent was satisfied or not. The action of the Government then becomes a judicial or a quasi judicial act and not merely the performance of an executive act. In this respect if the Government decides wrongly or illegally, the High Court has jurisdiction to issue a writ of **certiorari**. 52 Bom.L.R. 62=A.I.R. 1950 Bom. 213=51 Cr.L.J. 1184 (D.B.).

——S. 21—Delegation—Powers of Provincial Government.

An order of the Provincial Government under S. 21 of the Bombay Public Security Measures Act delegating its powers need not specify the circumstances and conditions under which the power is delegated. S. 21 makes it clear that it is an absolute power which the Provincial Government has to make, and it may, but is not bound to, specify the circumstances under which the power is delegated; and it may, but is not bound to, impose and set out the conditions under which the power may be exercised. A.I.R. 1949 Bom. 73=50 Cr.L.J. 155=50 Bom.L.R. 588 (D.B.).

——S. 21—General delegation of powers—Legality.

A general delegation of the authority of the Provincial Government under S. 21 of the Bombay Public Safety Measures Act is not illegal or **ultra vires**. It is open to that Government to make an unconditional delegation. The words, if any, in the section cannot be read as qualifying the words "such conditions" only. The words "If any" govern both the clauses, "in such circumstances" and "under such conditions"; it is clear that the general delegation may, if the Provincial Government may choose, be qualified by such circumstances and conditions as may be specified. It is for the Provincial Government to decide whether the delegation is to be a general one or whether it is to be conditional or under certain specified conditions. 49 Cr.L.J. 524=A.I.R. 1948 Bom. 360=50 Bom.L.R. 175 (D.B.).

BOMBAY PUBLIC TRUSTS REGISTRATION ACT (XXV OF 1935).

——Ss. 3 (3) and 4—Applicability—**Society registered** under Societies Registration **Act—Liability** to registration.

A society which is registered under the Societies Registration Act is like a Club or a Joint Stock Company; and such a society whose object is to work for the education, maintenance and welfare of poor and deserving Hindu students, with a view mainly to make them useful public workers, is exempt from registration under the Bombay Public Trusts Registration Act, 1935. It is not a religious trust as contemplated in S. 3 (3) of the Bombay Act XXV of 1935 and cannot be treated as a public trust under the Act liable to be registered thereunder. I.L.R. (1948) Bom. 553=A.I.R. 1949 Bom. 76=50 Bom.L.R. 612.

BOMBAY RATIONING ORDER (1943).

——Validity of—Order signed by Secretary to Government by order of Governor—If irregular or ineffectual. See GOVERNMENT OF INDIA ACT, (1935) S. 59 (3). 49 Bom.L.R. 49.

——**Scheme—Unauthorised supply of rationed article.**

According to the scheme of the Bombay Rationing Order, while obtaining of a rationed article without a rationed document is prohibited by a clause in the Order itself, the prohibition of supply of a rationed article without a document is left to be dealt with by Regulations, since different considerations arise in cases of different rationed articles to be supplied. A.I.R. (Vol. 31) 1944 Bom. 318=46 Bom.L.R. 488=46 Cr.L.J. 157=I.L.R. (1944) Bom. 566=216 Ind. Cas. 268.

——**Cl. 6—Supply of bread in contravention of ticket—Offence.**

Clause 43 enjoins the wholesale or retail distributor to supply to the holder of a bread ticket, bread only upto the quantity of units printed on the bread ticket. Therefore, if he supplies any quantity either without a bread ticket or in excess of the quantity mentioned in the bread ticket, he contravenes the provisions of the Regulation and as those provisions are prescribed under the Bombay Rationing Order, he must be held to have contravened the provisions of Cl. 6 of that Order also. A.I.R. (Vol. 31) 1944 Bom. 318=46 Bom.L.R. 488=46 Cr.L.J. 157=I.L.R. (1944) Bom. 566=216 Ind. Cas. 268.

——**Cls. (6) and (7)—Unauthorised obtaining or supplying rationed article—Offence.**

Clauses (6) and (7) of Bombay Rationing Order read together make it an offence under R. 81 (4), Defence of India Rules 1939 either to obtain or to supply a rationed article except under and in accordance with the provisions prescribed by or under the Bombay Rationing Order. A.I.R. (Vol. 31) 1944 Bom. 318=46 Bom.L.R. 488=46 Cr.L.J. 157=I.L.R. (1944) Bom. 566=216 Ind. Cas. 268.

——**Cls. (7), (9)—Scope — Obtaining rationed article without ticket.**

Clauses (7) and (9) read together prohibit the obtaining of a rationed article without a ration document and that document must, at that time, be available for lawful use and must be lawfully used.

Clause (9) does not, in terms, apply to a distributor but only to the persons seeking to obtain a rationed article. A.I.R. (Vol. 31) 1944 Bom. 318=46 Bom.L.R. 488=46 Cr.L.J. 157=I.L.R. (1944) Bom. 566=216 Ind. Cas. 268.

BOMBAY REGULATION (CIVIL COURT, SURAT) (I OF 1800).

——**S. 13—Limitation for redemption of mortgage of land made prior to Act XIV of 1859.**

No period of limitation was fixed by any Act or Regulation for redemption of a mortgage made prior to the passing of Act XIV of 1859. S. 13 of Bombay Regulation I of 1800 did not apply to redemption or other mortgage suits. (1909) 11 Bom.L.R. 318=2 Ind. Cas. 469.

BOMBAY REGULATION (I OF 1808).

——**S. 41—Suti Lease by Government to defendant's predecessors in-title in 1831—Plaintiff claiming that his predecessors were in possession of land prior to lease—Fixed rent paid up to 1915 but enhanced in 1915 16—Plaintiff was held to be sutidar—Defendants are not entitled to enhanced rent—Tenure does not come to end by change in the use of land.**

Village Chincholi was leased by Government in 1831, and the defendants khots were the successors-in title of the lessee; plaintiff claimed to be the successor-in title of a person who was in possession of the land in suit prior to the abovementioned lease; plaintiff's title was traced to 1867; a considerable portion of the land was utilized for building purposes; up to 1915 only the fixed annual payment was charged but in 1915-16 enhanced assessment was levied; plaintiff claimed that lands were suti and subject only to fixed annual payment. and that the defendants were entitled to nothing more than the fixed payment.

Held, that the plaintiff was a sutidar of the lands in suit to which Regulation I of 1808 applied; that the lands in suit were subject to a perpetual fixed grain rental commuted into money payment and continued to be invariable until there had been a decennial valuation changing the commutation rate by Government that the tenure did not come to an end by reason of the change in the use of the lands, and that the rate fixed by the survey assessment did not amount to the decennial valuation contemplated in S. 41, Regulation 1 of 1808, and that the assessment in excess of the fixed annual payment levied invariably from the year 1867 could not be recovered by defendants. 30 Bom.L.R. 992=118 Ind. Cas. 244=A.I.R. 1928 Bom. 457 (D.B.).

BOMBAY REGULATION (II OF 1827).

——**S. 5—Powers of interference—High Court.**

Decision in a Municipal election case, on the

issues whether the Government is a party and whether the Court could hear the suit is a decision in a case under S. 5 of the Regulation. 25 Bom.L.R. 992=77 Ind. Cas. 241=48 Bom. 43= A.I.R. 1924 Bom. 65 (D.B.).

——S. 52—Pleader's fee—Assessment of.

For assessing the Pleader's fees, an appeal to the High Court from a preliminary decree adjudicating the status of a party as an agriculturist is regulated by the Pleader's Act neither by S. 52 of Regulation II of 1827 nor by S. 6 but by Rule 65 of the Appellate Side rules of the Bombay High Court. 37 Bom. 303=17 Ind. Cas. 964=14 Bom. L.R. 1190 (D.B.).

——S. 56—Misbehaviour of pleader.

The word "misbehaviour" in juxta-position with the case of a pleader merely accused of a criminal offence need not necessarily be restricted to professional misbehaviour. 37 Bom. 354=14 Ind. Cas. 529=14 Cr.L.J. 257=15 Bom.L.R. 231 (D.B.).

——S. 56—Misbehaviour—Disciplinary jurisdiction of High Court.

Pleaders are a privileged class enrolled for the purpose of rendering assistance to the Courts in the administration of justice. Their position, training and practice, give them influence with the public and it is directly contrary to their duty to use that influence for the purpose of bringing the administration of justice into contempt. A pleader who presides at a public meeting and procures the passing thereat of a resolution contemptuously denouncing or protesting against the conduct of a Judge of the High Court in passing sentence at a trial at the Criminal Sessions, is guilty of misbehaviour under S. 6 of the Regulation II of 1827. (1908) 10 Bom.L.R. 1169=33 Bom. 252=2 Ind. Cas. 264.

BOMBAY REGULATION (IV OF 1827).

——S. 26—Scope of.

There is no presumption in favour of a custom deviating from general or personal law being applicable to a case. Custom is made applicable only if it is proved as required by law. 45 Cal. 450=16 A.L.J. 17=4 Pat.L.W. 27=34 M.L.J. 48=22 C.W.N. 353=43 Ind. Cas. 306=23 M.L.T. 117=27 C.L.J. 240=1 Pat. L. R. 1918=20 Bom. L.R. 528=12 S.L.R. 104=45 I.A. 10=A.I.R. 1917 P.C. 181 (P.C.).

BOMBAY (ACKNOWLEDGMENT OF DEBTS, INTEREST AND MORTGAGES) REGULATION (V OF 1827).

——S. 15, Cl. 3—Usufructuary mortgage—Sale.

Regulation V of 1827, S. 15, Cl. 3, does not authorise a decree for sale in favour of a usufructuary mortgagee. (1901) 3 Bom.L.R. 156.

BOMBAY [POLICE (DUTIES AND POWERS OF MAGISTRATES)] REGULATION (XII OF 1827).

——S. 27—Notice—Criminal Procedure Code, Ch. VIII—Security.

A notice under S. 27 of the Bombay Regulation XII of 1827 can only be issued after proceedings have been taken against each person individually under Chap. VIII, Cr.P. Code; and it is only on his failure to furnish security under that chapter that the restrictions mentioned in the latter half of the section can be enforced and that too with the assent of the accused person. (1905) 7 Bom. L.R. 459.

——S. 27—Action under—Conditions.

Before any action under S. 27 of the Bombay Regulation XII of 1827 can be taken against a person (1) he must be shown in accordance with legal procedure to have been a suspected person and (2) his assent to the measures adopted should be taken. (1906) 8 Bom.L.R. 241.

——S. 27—Duty of District Magistrate—Restriction in bond.

The District Magistrate is to impose restrictions in the bond. Delegation of this duty to the Superintendent of Police is ultra vires. The restrictions in a bond taken under S. 27 of the Regulation should be imposed by the District Magistrate himself so as not to affect personal liberty or impair the means of procuring livelihood of the suspect. Conditions in bond should not unreasonably interfere with suspect's personal liberty or means of livelihood. 14 Cr. L. J. 255=19 Ind. Cas. 511=6 S.L.R. 177 (D.B.).

——S. 37—Exemption of particular hamlets—Imposing separate fines—Hindus and Muhammadans—Jurisdiction of Magistrate.

Imposing separate fines on the Muhammadan and Hindu residents is without jurisdiction. The responsibility is on the whole community residing within the village and a Magistrate cannot exempt particular hamlets or villages from his order. Nor should he impose separate fines on Muhammadans and Hindus. The exemption from responsibility of particular hamlets or individuals within the bounds of the village is without jurisdiction. Neglect must consist of acts or omissions leading to the inference that villagers were in sympathy with the robbers and obstructed the police investigation. Mere cowardice is irrelevant. 14 Cr.L. J. 249=19 Ind. Cas. 505=6 S.L.R. 124 (D.B.).

——Ss. 37 and 9—Scope—Attendance of villagers at trial, if compulsory—Conviction of individual members, whether valid.

S. 37 of the Bombay Regulation XII of 1827 empowers a Magistrate to take proceedings against the inhabitants of a village (which includes also a hamlet), but he cannot make an order affecting individual members alone as the responsibility attaches under S. 37 to the whole village; the attendance of the villagers at such proceedings is unnecessary. 12 Cr.L.J. 391=11 Ind. Cas. 255 =4 S.L.R. 269 (D.B.).

BOMBAY (COLLECTORS OF LAND REVENUE) REGULATION (XVI OF 1827).

——Ss. 19 and 20—See MORTGAGE. 12 Bom. L.R. 143=34 Bom. 175=5 Ind. Cas. 866.

BOMBAY RENT-FREE ESTATES ACT (XI OF 1852).

——Sch. B, Cl. (6)—Commissioners, powers of—Gordon sanad—Payment of fixed annual sum in lieu of service—Lands, etc., to continue in lineal succession—Watandar adopting daughters' son—No consent of Government—Breach of condition—Resumption by Government of possession of soil—Legality.

Under the Bombay Rent-free Estates Act what has to be considered are claims made to hold lands free from, or partially free from, assessment, and all that the Commissioner can do under the Act is to direct resumption by Government of the claim to exemption from assessment. The Government have never considered that under the Inam Act they were entitled to interfere with actual possession. All that they can deal with is the claim of certain persons to hold land free from the ordinary obligation to contribute to Government revenues.

In 1845 one **V**, who was the father of **B**, and was the then head of the family, claimed to be entitled to the properties, as **desgat watan** and he made an application that his name should be entered in Government records; but he died in the year 1851, and after his death Government challenged the right of his son **B** who was a minor, and his widow **S**, who was managing the properties, to the privileges claimed, and in 1852 the lands, which consisted of three villages, were attached by Government and an enquiry into the rights of **V's** heirs in respect of these properties was instituted before the Inam Commissioner. In 1858 the Inam Commissioner made three separate orders in respect of these three villages which were all in the same form. The orders were that these villages could not be properly regarded as belonging to the **desai watan** or in any light other than of Government villages during the lifetime of **V**, and as he had died since the investigation started, the Inam Commissioner recorded his decision that the three villages should be at once resumed and assessed as **khalsat**. The appeal by **B** from this decision was compromised and in 1864, the Government offered summary settlement in respect of properties pertaining to his **watan**, on certain conditions. **B** accepted the offer and the condition and a **sanad** was granted in 1872. The **sanad** was in the form known as Gordon **sanad**, the relevant portions of which were: "Persons who enjoy the said lands and cash allowances have agreed to pay the Government a fixed sum every year in lieu of service. Therefore it is (hereby) declared as follows: The said lands and cash allowances shall be continued in lineal succession from generation to generation by the British Government under the following conditions. Those conditions are: The said persons in enjoyment and their heirs shall be obedient to the British Government and act faithfully and honestly and shall go on paying to Government permanently, every year amounts as mentioned below. So long as there are male heirs, **i.e.**, direct or indirect of the **watan** or so long as there is any person adopted in the **watandar** family, the said lands and cash allowances shall be continued by Government without taking service and without demanding anything more than the abovementioned fixed amounts and without any objection or question as "to the rights of the persons in enjoyment". **B** had no son but he adopted **C**, the son of his daughter. **B** died and the Government resumed the possession of the land on the ground that **C** was not lineal descendant of **B** and was not adopted from B's family. **C** instituted a suit for declaration that the order was illegal and **ultra vires:**

Held, (i) that the only settlement arrived at between Government and **B** was as to the right to hold the lands free from full assessment, and the settlement arrived at and the action Government had taken before such settlement had no reference to the right to occupy the soil. If either of the conditions of the grant, **i.e.**, the condition of being faithful to Government and the condition of paying a fixed duty was broken, the grant would terminate, and Government would be entitled to claim full assessment on the lands, but any right of occupation which **B** possessed apart from the **sanad** would remain untouched. None of the conditions having been broken, the Government could not resume the soil even if the **sanad** concerned the right to the soil;

(ii) that the words "in lineal succession from generation to generation" should not be construed in their literal sense as meaning descent from father to son, but as equivalent to 'continued to the owner and his heirs'; because the conditions imposed were not upon lineal heirs but were imposed upon heirs generally;

(iii) that under Hindu Law, **C** had a status of a natural-born son, and that he was a lineal descendant of **B**;

(iv) that the second clause in the **sanad** was not a clause of re-entry. What was provided was that so long as there were the requisite heirs the lands and cash allowances should be continued by Government without taking service and demanding enhanced assessment. Stating the clause in its converse form, it came to no more than this: That whilst there was no requisite heir to the **watandar**, Government were entitled to insist on service or further assessment. That was the highest at which the rights of Government could be put. The plaintiff therefore was entitled to a declaration that the orders passed by the Government under which they resumed possession were illegal and **ultra vires**, and could not be enforced against the plaintiff. A.I.R. (Vol. 24) 1937 Bom. 465=39 Bom. L.R. 851=172 Ind. Cas. 271.

——**Sch. B, R.8—Powers of Government.**

The Government has power for regulating by rules the question of emoluments relating to service performed to state under Sch. B, R. 8 (5). But it has no power to frame any rules with reference to the resumption of land given as emoluments of any hereditary office. The Government have no inherent power to authorise the Collector to resume lands summarily when they appertain to the office of a village servant mentioned in R. 8. It cannot be taken as granted apart from any specific provision, that the Collector has the power to disturb the possession of third parties who may have acquired rights in respect of such lands under

the operation of law. 25 Bom. L. R. 1160=48 Bom. 61=A.I.R. 1924 Bom. 273 (D.B.).

BOMBAY RENTS, HOTEL RATES AND LODGING HOUSE RATES (CONTROL) ACT (VII OF 1944).

——Scope—Jurisdiction of Rent Controller—Extent of.

The Rent Controller, under the Bombay Act VII of 1944, has jurisdiction to decide not only whether a particular matter falls within his jurisdiction but also whether the applicant before him is a tenant or merely a licensee in occupation of the premises concerned. 49 Bom.L.R. 454=A. I.R. 1947 Bom. 413 (D.B.).

——Validity of the Act.

Part 2 of the Act is not **ultra vires** and void. A.I.R. (Vol. 32) 1945 Bom. 352=47 Bom.L.R. 294.

——Ss. 9 and 14 (1)—Certificate by Controller—Appeal to Collector.

An order by the Controller, either refusing or granting a certificate under the proviso to S. 9 (1) is appealable under S. 14 (1) to the Collector. A.I.R. (Vol. 32) 1945 Bom. 137=46 Bom.L.R. 787=I.L.R. (1944) Bom. 82.

——Ss. 9 and 10—Applicability—Tenant sub-letting in breach of agreement with landlord not to sub-let—If protected.

Where a tenant has let the premises leased to him without the previous consent of the landlord, in breach of a condition of the conditions of the tenancy that the lessee shall not sub-let or part with the possession of the demised premises or any part thereof to any other party or parties without the previous written consent of the lessor, etc., he is not protected under S. 9 or S. 10 of Bombay Act VII of 1944. 50 Bom.L.R. 718=A.I. R. 1949 Bom. 131 (D.B.).

——S. 9—Termination of tenancy—Acceptance of rent by landlord—Effect—If creates new tenancy—Burden of proof.

Under S. 116, T. P. Act, and before the Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act, came into force, acceptance of rent by the landlord from the tenant after the termination of the tenancy would lead only to one conclusion, namely that he had assented to the tenant remaining in possession. But the position in law has been altered since the Bombay Act came into force. Under the Act, unlike under S. 116, T. P. Act, the tenant becomes a statutory tenant whom the landlord cannot eject so long as the tenant carries out the conditions laid down in S. 9 of the Bombay Act VII of 1944. It cannot be said that mere acceptance of rent cannot by itself, under the Bombay Act, bring into existence a new tenancy as contemplated by S. 116, T. P. Act. Acceptance of rent is attributable either to the fact that in law the tenant has become a statutory tenant and he cannot get possession and so must accept rent from the statutory tenant, or to his agreeing to a new tenancy coming into existence and the tenant becoming his tenant under the new tenancy. It has therefore to be determined in every case whether the acceptance of rent is attributable to the statutory tenancy which came into existence on the termination of the notice to quit, or to the landlord assenting to a new tenancy coming into existence. Acceptance of rent by itself is no longer as unequivocal an act as it used to be before Bombay Act VII of 1944 came into force. The tenant has the burden on him to prove that there was a new tenancy under S. 116, T. P. Act. He must prove more than mere acceptance of rent, because mere acceptance of rent does not constitute a waiver of the notice to quit, nor does it indicate the assent of the landlord to the tenant continuing in possession as a legal tenant. 50 Bom.L.R. 233=A.I.R. 1948 Bom. 385 (D.B.).

——S. 10—Construction—If abrogates contract to the contrary.

The words "notwithstanding any law to the contrary" in S. 10 of the Bombay Rents Hotel Rates and Lodging House Rates (Control) Act, cannot be read to mean also notwithstanding any contract to the contrary. 50 Bom.L.R. 718= A.I.R. 1949 Bom. 131 (D.B.).

——S. 13 (b)—Applicability—Rent payable partly in cash and partly in form of services—Jurisdiction to fix standard rent.

S. 13 (b) of the Bombay Rents, Hotel Rates and Lodging Rates (Control) Act has no application to a case where the rent reserved is partly in cash, and partly in the form of services. The words, "or for any other reason, any difficulty arises in giving effect to this part", in cl. 13 (b) does not cover a case where the premises are let for a nominal rent or a rent in addition to services rendered by the lessee. The words are to be construed **ejusdem generis** with the words preceding. In a case, therefore, where the rent is to be paid partly in cash and partly in the form of services, the Rent Controller has no jurisdiction to fix the standard rent of the premises. I.L.R. (1948) Bom. 822=50 Bom.L.R. 115=A.I.R. 1948 Bom. 306 (D.B.).

——S. 14 (3)—Order of Controller—How far final—Appeal to Collector—Effect of.

Under S. 14 (3) of the Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act, the order of the Controller is made final, but it is subject to the decision of the Collector made on appeal. The finality of the order of the controller, therefore, disappears as soon as an appeal is preferred to the Collector, and thereafter it is only the decision of the Collector that becomes final and operative. So long as there is no appeal, the order of the controller is final; but, the moment an appeal is preferred, the matter becomes **sub judice**, and it is then the decision of the Collector which has the finalty under S. 14 (3) of the Act. I.L.R. (1948) Bom. 346=50 Bom.L.R. 203=A. I.R. 1948 Bom. 347 (D.B.).

——S. 38—Power of review—Limits to—Review on ground not permitted—Jurisdiction of High Court—Certiorari.

The power of review conferred by S. 38 of Bombay Act VII of 1944 is circumscribed by the provisions of O. 47, R. 1, C. P. Code and is

not unlimited or absolute. The power can be exercised only on the grounds specified in R. 1 of O. 47, C. P. Code. If a review is allowed on any ground not permissible under O. 47, R. 1, C. P. Code, the order allowing review must be held to be without jurisdiction. The High Court can in such a case interfere by issuing a writ of certiorari. 50 Bom.L.R. 146=A. I. R. 1948 Bom. 387.

——S. 38—If retrospective in operation.

S. 38 of Bombay Act VI of 1944 is not retrospective in operation and hence orders made prior to the date on which the Act came into operation are not subject to a power of review under S. 38. 50 Bom.L.R. 146=A.I.R. 1948 Bom. 387.

BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES (CONTROL) ACT (XLVII OF 1947).

——Applicability—Suit for possession of house from defendant who was in possession as licensee on payment of Rs. 50 per month—Jurisdiction to try—Valuation. See BOMBAY CITY CIVIL COURT ACT (1948), S. 3. 51 Bom.L.R. 272.

——S. 4 (1)—"Belonging to"—Meaning of—Lessee of land from Port Trust putting up building thereon and letting outflats—Suit in ejectment in respect of flats—Jurisdiction of High Court—Flats if belong to lessee or Port Trust.

There is no doubt that the words "belonging to" in S. 4 (1) of Bombay Act LVII of 1947 import a concept of ownership. They mean very much the same thing as "of the ownership of" though not necessarily "of the absolute ownership of."

The plaintiff's predecessor took a lease of a plot of land from the Trustees of the Bombay Port Trust for 99 years for the purpose of putting up a building thereon. He put a building thereon and he let some of the flats therein to the defendants.

Held: (1) that the flats were not premises belonging to a local authority (Port Trust) within the meaning of S. 4 (1) of Bombay Act LVII of 1947;

(2) that the plaintiff as lessee of the land was the "owner" **qua** the defendants and the premises therefore belonged to him and not to the Port Trust or to any one else so long as the lease was subsisting; and

(3) therefore the premises were not excluded from the operation of Bombay Act LVII of 1947, so as to give jurisdiction to the High Court to entertain a suit in ejectment by the plaintiff in respect of the flats in the building. 52 Bom.L.R. 688.

——S. 12—If retrospective.

S. 12 of the Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act (1947), is in terms prospective and not retrospective. The Act is retrospective only to the extent clearly provided in S. 50 of the Act. I.L.R. (1949) Bom. 265=A.I.R. 1949 Bom. 210=51 Bom.L.R. 280 (F.B.).

——S. 12 (1)—Applicability—Ejectment suit—Consent decree before Act creating monthly tenancy.

If a decree is passed in **invitum** against the defendant in an ejectment suit after the termination of his tenancy, he cannot claim to be a tenant and would have a right to claim the protection of S. 12 (1) of Bombay Act LVII of 1947, contrary to the directions of the decree. But where there is a consent decree which creates a fresh contractual relation of landlord and tenant, the defendant gets the rights and privileges of a tenant under the Act which comes into force after such decree, and unless the protection of the statute is properly and validly withdrawn, he would not be liable to deliver possession under that decree in spite of the terms of the decree. Such a tenant can obtain the benefit of S. 12 (1) of the Act. A.I.R. 1950 Bom. 252=52 Bom.L.R. 143.

——Ss. 28 and 50—Applicability—Suit under S. 9, Specific Relief Act, by dispossessed tenant against owner of premises—Jurisdiction of High Court to try.

It is not every suit for possession that is liable to be transferred to the Small Causes Court under S. 50 of Bombay Act LVII of 1947 and to try which jurisdiction is conferred on the Court of Small Causes by S. 28 of that Act. It is only those suits for possession which are filed between a landlord and tenant that are so liable to be dealt with.

A simple suit for possession under S. 9, Specific Relief Act, by a tenant who had been dispossessed against the landlord, does not fall under Ss. 28 and 50 of the Bombay Act LVII of 1947, and can be tried by the High Court, if filed therein; and it is not liable to be transferred under S. 50 of the Act. A.I.R. 1950 Bom. 343=52 Bom.L.R. 381 (D.B.).

——S. 28, 29 and 50—If ultra vires—Suits between landlord and tenant—Jurisdiction of High Court to try—If taken away—Government of India Act (1935), Ss. 224 and 225.

Ss. 28, 29 and 50 of the Bombay Rents, Hotel and Lodging House Rates (Control) Act of 1947, is not **ultra vires** the Provincial Legislature. The result of these sections is that High Court has ceased to possess ordinary original jurisdiction with regard to suits between a landlord and tenant which were cognizable by it under Cl. 12 of the Letters Patent, but its extraordinary original civil jurisdiction under Cl. 13 of the Letters Patent and its revisional powers under S. 115, C.P. Code, are continued as before and have not been affected or modified in any way. The prohibition enacted by these sections is not a total prohibition but only of a restricted character. Nor do these sections in any way affect the powers possessed by the High Court under Ss. 224 and 225 of the Government of India Act, 1935. The suits of the description mentioned in Ss. 28 and 50 pending in the High Court have, therefore, to be transferred to the Court of Small Causes, Bombay, as the jurisdiction of the High Court is taken away by the Bombay Act of 1947.

Tendolkar, J.—Under S. 224, Government of India Act, 1935, the High Court still retains the

jurisdiction of judicial superintendence and correction, but such jurisdiction is excluded only in cases of judgments against which there is no appeal or revision. Therefore, where an appeal or revision against a judgment is permissible under the law, whether or not such an appeal or revision is filed, the High Court has power under S. 224 of judicial correction of such judgment. 50 Bom.L.R. 450 =A.I.R. 1949 Bom. 42 (D.B.).

——S. 50—Applicability—Suit by tenant to recover pugree paid to landlord—Jurisdiction of High Court.

A suit by a tenant to recover money paid by him to his landlord as pugree does not fall within the purview of S. 50 of Bombay Act XLVII of 1947, and therefore the High Court has jurisdiction to try the same and is not bound to transfer it to the Small Cause Court. A.I.R. 1949 Bom. 337=51 Bom.L.R. 515 (D.B.).

BOMBAY RENT RESTRICTION ACT (XVI OF 1939).

——S. 3—Ejectment suit—Jurisdiction of Small Cause Court.

An ejectment suit to which the Rent Restriction Act applies cannot be tried by the Court of Small Causes. A.I.R. (Vol. 32) 1945 Bom. 469=47 Bom.L.R. 344=I.L.R. (1945) Bom. 437.

——S. 10—Applicability—Clerk or manager accepting pugree—Offence.

The words "any person" in S. 10 (1) of the Bombay Rent Restriction Act would include not only the landlord but also a mehta or clerk who gets the rents collected, keeps accounts and manages the property. Such a person comes within the expression "landlord". If such a clerk receives "pugree" or premium, he is liable to conviction under S. 10 (4). 50 Bom.L.R. 169=A. I. R. 1948 Bom. 239=49 Cr.L.J. 341 (D.B.).

——S. 11—Applicability—Land held for business purposes—Provision for dwelling held only subsidiary and was restricted to lessee and his family.

To determine whether the subject matter of a demise is: "let separately for the purpose of being used principally for business or trade," the lease itself must be the governing factor: but the lease can be considered and construed in conjunction with the relevant surrounding circumstances, which must be the physical nature of the premises and how they were in fact used at the date of the lease. In order to come within the expression: "let for the purpose of business or trade" there need not be an affirmative assertion of the purposes of user but the qualification can operate when looking at the covenants in the lease as a whole and with knowledge of the condition of the premises at the date of the lease and its user, it is manifest that the premises demised are business premises and let on terms which insure a continuation of that user.

Certain plots of land in a "timber market" were used for storage of timber for profit or gain and not as an adjunct to some private activity. The lease provided: "Not to use the said demised premises for any purpose other than as timber shops or sheds for the storing of timber or for making furniture and as saw mills and for the purposes incidental thereto provided nevertheless that nothing herein contained shall be deemed to prevent the lessee from occupying a part of the said demised premises as a dwelling house for himself and his family only:"

Held, that the motive of the letting was business purposes. The provision about the dwelling house did not affect the matter; it was subsidiary to the main or principal purpose; the user of the house was limited to the lessee and his family. S. 11 therefore applied to the premises. A.I.R. (Vol. 31) 1944 Bom. 181=46 Bom.L.R. 244=I.L.R. (1944) Bom. 361.

——S. 11—"Own occupation"—Occupation of persons dependent on landlord.

In S. 11, the expression "his own occupation" means occupation of the landlord and all persons who are dependent on him. A.I.R. (Vol. 33) 1946 Bom. 212=47 Bom.L.R. 825.

——S. 11—"Perform"—Obligation to abstain from doing something can be said to be performed by not doing it.

The words "and performs the other conditions of the tenancy," in S. 11 mean, fulfills all the other duties imposed by the lease on the lessee. There is no room for the application of the ejusdem generis doctrine. The word "perform" is, no doubt, inapplicable to not doing a thing, but the obligation to abstain from doing something may be said to be performed by not doing it. A.I.R. (Vol. 31) 1944 Bom. 181=46 Bom. L.R. 244= I.L.R. (1944) Bom. 361.

——S. 11—Defence under—Application under S. 41, Presidency Small Cause Courts Act—Jurisdiction of Small Cause Court, if ousted.

Where, upon an application under S. 41, Presidency Small Cause Courts Act for summons in ejectment, a defence under S. 11 is raised, the jurisdiction of the Presidency Small Cause Court is not ousted. A.I.R. (Vol. 33) 1946 Bom. 212=47 Bom.L.R. 825=224 Ind. Cas. 18.

——S. 11—Defence under—Suit, if cogniable by Small Cause Court.

Ejectment suit with a prayer for recovery of possession—Defence under S. 11—Suit is not cognizable by Small Cause Court under Art. 4, Provincial Small Cause Courts Act, as amended by Bombay Acts VI of 1930 and IX of 1932. A.I.R. (Vol. 32) 1945 Bom. 470=47 Bom.L.R. 410.

——S. 11—Ejectment suit—Court holding that landlord required three and not four blocks—Choice of selection is with landlord.

In a suit for eviction from four blocks on the second floor of a building, the judge was of the opinion that the plaintiff reasonably required the use of three blocks and not four and gave him the choice of selecting the three blocks of which he wanted possession. It was contended that it was for the Court to decide, after taking into consideration the wants, not only of the plaintiff but also of the defendants, as to which of the blocks should be given to the plaintiff and that in not so deciding the Court acted without jurisdiction and with material irregularity:

Held, that it was the plaintiff's choice and the Court could not compel him to continue the suit

against the tenant whom he did not desire to evict. A.I.R. (Vol. 33) 1946 Bom. 212=47 Bom.L.R 825=224 Ind. Cas. 18.

——S. 11—Suit for ejectment—Sub-tenant cannot intervene.

There is no statutory right or any other right which gives an under tenant a title or right to intervene in proceedings between a superior landlord and his own landlord in order to seek relief against an order of forfeiture. Hence, in an ejectment suit by landlord against a tenant, the sub-tenant has no right to be joined as a party. If the sub-tenant has any legal right to remain in occupation of the premises by virtue of the Rent Restriction Act, the time to raise that matter will be in the execution proceedings. A.I.R. (Vol. 32) 1945 Bom. 237=I.L.R. (1945) Bom. 310=47 Bom.L.R. 118=219 Ind. Cas. 72 (F.B.).

——Ss. 11, 4 (4),—"Tenant" includes sub tenant.

The definition of "tenant" does not exclude a sub tenant. The Bombay Rent Restriction Act protects, both tenants and sub-tenants. A.I.R. (Vol. 30) 1943 Bom. 141=45 Bom.L.R. 240=I.L.R. (1943) Bom. 480=207 Ind. Cas. 300.

——S. 11—Point of time is when suit is filed.

Section 11 of the Act is couched in the present tense and the relevant point of time to consider is the time when the suit is filed. A.I.R. (Vol. 31) 1944 Bom. 181=46 Bom.L.R. 244=I.L.R. (1944) Bom. 361.

——S. 11—Mere sub-letting does not justify ejectment.

Mere sub-letting of the premises or part thereof is not by itself a good cause for making an ejectment order and taking the case out of S. 11. A.I.R. (Vol. 30) 1943 Bom. 141=45 Bom.L.R. 240=I.L.R. (1943) Bom. 480=207 Ind. Cas. 300.

——S. 11—Tenant party and opposing eviction—Mere under-letting does not justify eviction.

Where the original tenant is a party and opposes eviction, the Court is not at liberty to make an eviction order merely because there has been under-letting. A.I.R. (Vol. 30) 1943 Bom. 141=45 Bom.L.R. 240=I.L.R. (1943) Bom. 480=207 Ind. Cas. 300.

BOMBAY RENT RESTRICTION ORDER (1942).

——Cls. 8, 9, 12—Whether ultra vires.

Clauses 8 and 9, and Cl. 12 so far as it relates to Cls. 8 and 9 of the Bombay Rent Restriction Order, are ultra vires being repugnant to S. 14 of the Defence of India Act, 1939, A.I.R. (Vol. 32) 1945 Bom. 88=46 Bom.L.R. 877=I.L.R. (1944) Bom. 487=218 Ind. Cas. 81 (F.B.).

BOMBAY RENT (WAR RESTRICTION) ACT (II OF 1918).

——Dwelling house—Tenant also carrying on business in the premises.

The fact that a tenant carries on business or works in the same premises, which he uses for dwelling in, cannot thereby prevent those premises coming within the category of premises used as a dwelling-house. 27 Bom.L.R. 937=89 Ind. Cas. 878=A.I.R. 1925 Bom. 398 (D.B.).

——Ejectment decree against lessee—Execution—Sub tenants cannot resist delivery of possession.

An owner of premises suing for possession may find it advantageous to join all the persons in possession of the suit premises, to avoid difficulties which may otherwise arise when he attempts to execute his decree, but the non joinder will not enable a sub-tenant to resist delivery of possession to the owner in execution of his decree for ejectment against his lessee. 46 Bom. 526=23 Bom.L.R. 1251=64 Ind. Cas. 692=A.I.R. 1922 Bom. 273.

——Notice—Notice to quit given while the Act is in force—Fresh notice is not necessary after the Act ceases to apply.

The mere fact that the tenant is entitled to retain possession while the Act remains in force is not sufficient to create any relationship of landlord and tenant between the parties as would require a fresh notice to terminate it. The right to have notice is a statutory right the limits of which are to be found in the terms of the statute; and the moment the statute ceases to extend that protection to him he ceases to have the protection as against the landlord which the statute gave him up to a certain period. Where a landlord has, during the continuance of the Act given a notice to his tenant asking him to quit certain premises which he was using as business premises, it is not necesary for the landlord to give the tenant a fresh notice to quit after the Rent Act has ceased to apply to the premises. 27 Bom.L.R. 1086=94 Ind. Cas. 564=49 Bom. 567=A.I.R. 1925 Bom. 516.

——Premises—Landlord is entitled to use the premises for his own residence if required.

An owner of premises, if he says he wishes to use them for his own purposes, is entitled to do so, and he is entitled to use any part of the premises as his residence. What the Rent Act endeavours to provide for is the case of a landlord who evicts the existing tenants in order that he may let them to another tenant at a higher rent, or exact a higher rent from the tenant on a threat of eviction. 45 Bom. 1236=23 Bom.L.R. 850=63 Ind. Cas. 41=A.I.R. 1921 Bom. 34.

——Satisfactory cause — Municipality acquiring premises—Premises necessary for scheme of large public utility.

The necessities of a scheme of large public utility undertaken by the Municipality, which has acquired the premises, are a satisfactory cause. 45 Bom. 725=23 Bom.L.R. 35=60 Ind. Cas. 571=A.I.R. 1921 Bom. 214.

——Sub-tenants — Sub-tenants have no greater right than the tenant as against landlord.

There is nothing in the Bombay Rent Act to protect sub-tenants from ejectment by the landlord of the premises, with whom there was no privity of contract. 46 Bom. 526=64 Ind. Cas. 692=23 Bom.L.R. 1251=A.I.R. 1922 Bom. 273.

——S. 1, Cl. (a), (ii), 4—Premises—Reconstruction of wall and extensive alterations make new premises.

Where a landlord reconstructs the wall which has fallen down and makes extensive alterations, he is entitled to regard them as new premises. 29 Bom.L.R. 1439=105 Ind. Cas. 764=A.I.R. 1927 Bom. 648.

——S. 2—License and lease—Distinction—T. P. Act, S. 105—Easements Act, S. 52.

It is essential to the creation of a tenancy of a corporeal hereditament that the tenant should have the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without exclusive possession operates as a license, and not as a lease. Having regard to the rights of a lessee, which are specified in S. 108 of the Transfer of Property Act, in particular the rights to growing crops and to put up structures, it seems difficult to say that there could be a valid lease not of a definite area of immoveable property but of an area the position of which varies from time to time. On the other hand, it may be said that "immoveable property" (as defined in the General Clauses Act) includes not only land but benefits to arise out of the land so that there can be a lease of the benefit of keeping chattels, such as a car and carriage, within certain special limits although the place occupied by the chattels might vary from time to time. Ordinarily the law takes it that a case of that kind is not one of a demise, but that of a license. The mere fact that a person has had the exclusive use of a particular cubicle for two years and that it was the intention of the parties that no one else should use that cubicle so long as the person kept his car on the premises is not in law sufficient to show that the agreement was a demise or a lease and not a license. 25 Bom.L.R. 84=88 Ind. Cas. 316=A.I.R. 1923 Bom. 228.

——S. 2—Owner exercising right of control over premises occupied by others—Occupier is not a tenant but a licensee.

The definition of "premises" excludes the case of lodger: it must **prima facie** also be taken to exclude the analogous case of a single cubicle reserved not for the occupation of a human being but for the occupation of a chattel, **viz.**, a motor car, provided of course that the owner of the premises does exercise a general right of control. 25 Bom.L.R. 84=88 Ind. Cas. 316=A.I.R. 1923 Bom. 228.

——S. 2—Sub-tenant—Sub-tenant let in without landlord's consent is not a "tenant" with respect to original landlord.

If a tenant sub lets premises, he becomes a landlord with regard to his own tenant. But his tenant does not come in contact with the original landlord unless there has been an assignment by which the rights and liabilities of the original tenant have been transferred to his sub-tenant, so that privity of contract arises between the landlord and the sub tenant. Consequently the sub-tenant is only a tenant under the Rent Act with regard to his own immediate landlord, and when the owner of the premises seeks to evict his own tenant, he cannot be opposed by the person who has been put in possession without his consent by his tenant. 49 Bom. 685=89 Ind. Cas. 881=27 Bom.L.R. 938=A.I.R. 1925 Bom. 415 (D.B.).

——S. 2 (a)—(i) — Standard Rent—"Standard rent" between tenant and sub-tenant is not different..

The only object of including in the definition of 'landlord' a tenant, and in the definition of 'tenant' a sub tenant is to extend the benefits of the Rent Act to sub tenants, but it was not intended that the standard rent was to be determined by different standards between the original landlord and the tenant and between the tenant and the sub tenant. Standard rent is the rent at which the premises were originally let after 1st January, 1916. The standard rent is to be fixed in relation to premises and not in relation to persons and can, therefore, be only one and not varying as between different individuals. 45 Bom. 744=23 Bom.L.R. 133=60 Ind. Cas. 960=A.I.R. 1921 Bom. 224.

——S. 2 (1) (b) (ii)—New premises—Premises changed to lose identity.

Where the whole house including the second floor is entirely changed so as to lose its identity the house becomes new premises within S. 2 (1) (b) (ii). 53 Bom. 432=31 Bom.L.R. 387=118 Ind. Cas. 545=A.I.R. 1929 Bom. 220.

——S. 2 (b) (ii) as amended by Act III of 1923—Premises let mainly and substantially for purpose of shop—Tenant will not be protected.

Where the real, main and substantial purpose for which certain premises were let, was the purpose of a shop and not of a dwelling house, the tenant cannot be protected. 22 S.L.R. 417=115 Ind. Cas. 316=A.I.R. 1929 Sind 36.

——Ss. 2 (c) and 9—Landlord—Meaning—Lessee entitled to recover rent, if a landlord—Right to exercise rights under S. 9 (2).

Plaintiffs who were lessees for a period of 20 years from 6th February, 1918 gave notice of ejectment to the tenant of the premises on 31st March, 1918 and sued for possession on the day when the Rent Act came into force. **Held**, that plaintiffs fell within the terms of the definition of 'landlord' in S. 2 (c) of the Bombay Rent Act, for they were the persons entitled to recover rent for the premises when the Act came into force. Plaintiffs were entitled to the possession of the premises as reasonably and **bona fide** required for their own occupation. 43 Bom. 795=51 Ind. Cas. 293=21 Bom.L.R. 397=A.I.R. 1919 Bom. 145 (D.B.).

——S. 3 and 12—Re-entry—Lease providing for lessor's right of re-entry on non-payment of rent—Provision operates only to the extent of standard rent.

Although the Act does not make the payment by the tenant of the stipulated rent, being in excess of the standard rent, illegal and does not purport to affect the contract between the parties contained in the lease regarding the right of the lessor to determine the lease on failure to pay the stipulated rent. The right of re-entry on failure

to pay the stipulated rent is an auxilliary provision to secure the payment of rent.

The Legislature by the Rent Act has cut down the stipulated rent and enacted that the standard rent is the only rent that the tenant is bound to pay. When, therefore, the principal obligation is thus modified by reducing the rent, this auxiliary right is, after the passing of the Rent Act, available only for the purpose of securing the payment of the rent which is payable under the law, viz., the standard rent. 45 Bom. 535=A.I.R. 1921 Bom. 307=22 Bom.L.R. 926=58 Ind. Cas. 69.

——S. 6—Liability to pay tax—City of Bombay Municipal (Bombay Act III of 1888), S. 147.

S. 6 of the Bombay Rent (War Restrictions) Act, 1918 applies to an entirely different state of facts to that which was intended to be covered by the provisions of S. 147. Under S. 147 (1), where the rent paid by the tenant is less than the rateable value, the landlord can recover from the tenant the tax which he has to pay on the difference between the rent payable by the tenant and the rateable value fixed by the Municipality. The right to claim from the tenant, under S. 147 (1), payment of a certain portion of the Municipal taxes, which are primarily leviable under S. 146 from the lessor, has nothing to do with the question of rent payable by the tenant. 27 Bom.L.R. 1092=89 Ind. Cas. 859=A.I.R. 1925 Bom. 532 (D.B.).

——S. 7 (1)—Standard rent—Additional charges for supplying electric light—No offence.

The supplying of electric light on the passages of the building was a matter of arrangement or contract between the tenant and the landlord and does not necessarily form a part of the rent and a landlord who charges a fair rent for electric supply to the tenant is not guilty of having charged excess rent under S. 7 (1). 45 Bom. 188=58 Ind. Cas. 149=21 Cr.L.J. 725=A.I.R. 1921 Bom. 162 (D.B.).

——S. 8—Applicability—Not restricted to landlord but extends to lessee who grants a sub lease.

S. 8 does not in terms refer to a landlord. Any person who enters into an agreement in consideration of grant, renewal or continuance of a tenancy of any premises to require the payment of any premium or any other like sum in addition to the rent is within the scope of S. 8.

There was an agreement between the parties by which the defendant, who was a sub tenant of certain premises for 3 years, was to procure the plaintiffs a lease for occupation of the premises and to secure the same for ten years to the plaintiffs in consideration of their paying the standard rent Rs. 225 per month and of their agreeing to pay Rs. 2,275 per month for a period of ten years making a total of Rs. 2,73,000 to the defendant for his trouble in securing the premises to the plaintiffs.

Held, the agreement was unlawful. 25 Bom. L.R. 1313=84 Ind. Cas. 953=A.I.R. 1924 Bom. 295 (D.B.).

——S. 9—Applicability—Premises acquired under the Land Acquisition Act.

The Act was not intended to apply to premises acquired under the Land Acquisition Act for public purposes. The object is to effect acquisition immediately for public purposes. The general provisions of the Act do not override or repeal the special enactments, like the Land Acquisition Act or the Municipal Act. 45 Bom. 725=60 Ind. Cas. 571=23 Bom.L.R. 35=A.I.R. 1921 Bom. 214.

——S. 9—Object of.

The first part of the section refers to the act of a tenant whose lease has terminated, and therefore the sub-letting must have occurred after the expiry of the lease. In the second part of the sub section the term of the lease must be fixed before the sub-letting. The object of the sub-section is to prevent a statutory tenancy being used as a source of profit by a tenant who does not require the premises for his own occupation. The first part refers to a tenant who holds over under S. 9 (1), and the second part to a tenant who sub lets beyond his term in expectation of a statutory tenancy. 25 Bom.L.R. 1178=48 Bom. 257=81 Ind. Cas. 843=A.I.R. 1924 Bom. 99.

——S. 9—Object of the Act—Landlord choosing to occupy the house himself.

The Act provides for the case of landlord, who objects an existing tenant in order to let the premises to another at a higher rent or exact more rent from the same tenant with the threat of eviction. Where the owner desires to occupy the premises himself, he can do so and can occupy any portion of the house he likes provided he does not occupy more space than necessary. 45 Bom. 1236 =63 Ind. Cas. 41=23 Bom.L.R. 850 (D.B.).

——S. 9—Suit for possession—Possession of whole house can be decreed though portion may be enough for landlord's occupation.

Where the whole property passed by one lease, possession of the whole of it can be decreed in a suit for ejectment of the tenant though only a portion may be enough for landlord's occupation. If the limitations created by S. 9 are removed, the landlord's previous rights again come into full operation. 15 S.L.R. 79=62 Ind. Cas. 860=A.I.R. 1921 Sind 7.

——S. 9—Compromise — Portion of premises demised required by landlord for his own use—Tenant offering to give up a part under a compromise—Court can enforce the compromise.

In a suit for ejectment by landlord of his tenant if he establishes that he requires only a portion of the premises for his own use, which portion can be severed and the tenant is willing to give up, under a compromise arrived at during the pendency of the suit the Court can order the tenant to give up such a portion only. 45 Bom. 1294=23 Bom.L.R. 559=63 Ind. Cas. 1007=A.I.R. 1921 Bom. 73 (D.B.).

——S. 9—Reasonable requirement.

A bona fide requirement of a small fraction of the premises leased does not amount to a reasonable requirement of the whole of the premises.

23 Bom.L.R. 856=68 Ind. Cas. 330=A. I. R. 1921 Bom. 54.

——S. 9—Reasonable requirement—Pulling down of old house and building new ones.

The Act does not mean that the improvement of old, ill erected, badly ventilated premises should be entirely stopped until the Act is repealed. All that the Courts have to do in construing S. 9 is to see that the landlord is acting reasonably, to determine which, the Courts should consider the condition of the premises and should not consider the existence of other buildings owned by the same landlord. 58 Ind. Cas. 27=22 Bom.L.R. 880=A.I.R. 1920 Bom. 31 (D.B.).

——S. 9—Ejectment—Landlord requiring rented premises reasonably and bona fide—Landlord and not the Court, is to decide how much space he requires.

To prevent the Landlord from occupying a space in his own premises equal to the space previously rented by him for his own business in another place would be going entirely beyond the jurisdiction of the Court in cases falling under the Rent Act. It is for the landlord and not for the Court to decide whether he should occupy as much or less space for his business in his own premises. 24 Bom.L.R. 95=66 Ind. Cas. 929=46 Bom. 632 =A.I.R. 1922 Bom. 222 (D.B.).

——S. 9—Statutory Tenant—Liability to pay standard rent if he holds over after notice of ejectment.

A tenant holding over after notice to quit, by the landlord and remaining in possession under S. 9 of the Bombay Rent (War Restriction) Act is liable to pay the standard rent to the full extent allowable by the Act. 26 Bom.L.R. 141=80 Ind. Cas. 253=A.I.R. 1924 Bom. 330 (D.B.).

——S. 9—Tenant—If includes sub-tenant.

The term "tenant" in S. 9 does not include a sub-tenant. The sub tenants hold on a precarious title and when the tenancy under the head lease terminates their right to possession terminates too. Unlike trespasser they come in by right but like trespassers they hold over without right, and they are in the same position as trespassers. 24 Bom. L.R. 154=67 Ind. Cas. 130=A.I.R. 1922 Bom. 197.

——S. 9 (1) and (2)—Condition precedent—Payment of arrears of rent before suit is condition precedent to claiming protection under Act.

S. 9 (1) does not mean that the conditions there laid down are conditions which apply at the date of the order, and that even if a tenant has made any default in paying the rent and is in arrears at the time that the suit is filed, yet he has under S. 9 (1), a **locus pœnitentiœ** and if he brings the arrears of rent into Court, the Court cannot make an order for the recovery of possession. In both the English and the Indian sections the words "continues to pay" and the word "pays" respectively, refer to the time anterior to the filing of the suit. S. 9 (2) is in the past tense because it refers to past acts of waste or conduct in the past which has been an annoyance. S. 9 (1) is in the present tense because that section merely describes the sort of tenant who is entitled to claim protection under the Act. 25 Bom.L.R. 345=70 Ind. Cas. 920=47 Bom. 756=A.I.R. 1923 Bom. 387.

——S. 9 (2)—Building by person other than landlord—Eviction of tenant.

S. 9, Cl. (2) does not require expressly or by implication that the building must be erected by the landlord, and it does not mean that if a building is erected by some person other than a landlord under some arrangement with the landlord, the landlord cannot require the tenant to leave the premises. 57 Ind. Cas. 993=22 Bom.L.R. 860 =A.I.R. 1920 Bom. 263 (D.B.).

——S. 9 (2)—Landholder must not be kept out if he wants premises for his own use.

It is not the policy of the Act that a man should be kept out of his premises, if he shows good ground that he wants them for his own use. 45 Bom. 928=23 Bom.L.R. 287=61 Ind. Cas. 273 =A.I.R. 1921 Bom. 212 (D.B.).

——S. 9 (2)—Satisfactory cause—Tenant making default in payment of rent even when demanded—Subsequent tender or payment in Court—Effect of.

A person S was in occupation of a tenement of small premises within the meaning of Bombay Rent (War Restriction) Act, 1918. Notice of ejectment was given to him by the landlord. He had made default in payment of rent for three months prior to the notice and had been very irregular in the payment of rent even before that. He failed to pay rent even when demads were made every month by the landlord's mehta on the tenant's premises. His conduct in general showed that he was bent on harassing the landlord. He subsequently tendered the overdue rent and paid the same in the Court.

Held, that the conduct of the tenant was satisfactory cause within the meaning of S. 9 (2). His subsequent tender or payment in Court was of no avail and it was not competent for any Court to condone his failure to pay rent either under S. 114, T.P. Act, or under any other Act. 23 S.L. R. 29=111 Ind. Cas. 530=A.I.R. 1929 Sind 13.

——S. 9 (2)—Satisfactory cause—Occupation of servant.

Where the staff of employees of the landlord company occupy premises under circumstances which show that their accommodation is part of their remuneration, the occupation by the staff is not the occupation of the landlord under S. 9 (2) of the Rent Act. But the accommodation of the staff is a satisfactory cause, within the meaning of the above section for the ejectment of a tenant who is not one of the staff. 24 Bom.L.R. 54=65 Ind. Cas. 677=A.I.R. 1922 Bom. 70.

——Ss. 9 (2) and 10—Ejectment, suit for—Court, duty of—Court can postpone execution of decree.

It is the duty of the Court under S. 9 (2) of the Act, to decide whether the landlord reasonably and **bona fide,** requires the premises for his own use. A Court has power under S. 10 of the Act to postpone execution of a decree for ejectment for a certain period with liberty to apply after the expiry of the period fixed. 45 Bom. 928=61 Ind. Cas. 273=23 Bom.L.R. 287=A.I.R. 1921 Bom. 212 (D.B.).

——S. 10—Decree by Presidency Small Cause Court for possession passed before coming into force of the Act—Order, staying execution till further order, is within jurisdiction.

An order staying execution, till further order, of a decree passed by the Presidency Small Causes Court prior to the coming into force of the Act, is not without jurisdiction. But before the Bombay Rent Act came into force, there was no necessity for a landlord to give any reason at all why he required the premises, so that is not a matter which a Court executing, after the coming into force of the Act, a decree for possession passed before, ought to take into consideration in the slightest degree. The only question which the Court has to consider is whether at the time the landlord seeks to execute the decree he reasonably requires the premises for his own use. 45 Bom. 928=23 Bom.L.R. 287=61 Ind. Cas. 273=A.I.R. 1921 Bom. 212 (D.B.).

——S. 10—Order for possession cannot be varied by the Small Causes Court—Presidency Small Causes Courts Act, S. 43.

The Small Causes Court has no jurisdiction to alter or amend the terms of a decree or order for possession once it has been passed under Chapter VII of the Presidency Small Causes Courts Act. There is nothing in the Rent Act (II of 1918) which gives the Small Causes Court any power to alter orders for possession made in due course. The Court may fix the time for giving possession at a considerable interval from the date of decree. But once the time is fixed, the plaintiff is entitled to the benefit of that order. 45 Bom. 1048=62 Ind. Cas. 45=23 Bom.L.R. 442=A.I.R. 1921 Bom. 201 (D.B.).

——S. 10-A—Bar to application—Date of bringing motion in Court is the date of application.

The date on which the copy of the notice of motion is lodged with the Prothonotary should not be taken as the date of the application. The date of the application is the date on which the motion is brought on in Court. 25 Bom. L. R. 13=85 Ind. Cas. 432=A.I.R. 1924 Bom. 289.

——S. 10-A—Notice of motion filed within six months—Application coming before Court after six months—Application is not barred.

When an application is to be made to the Court, it commences to be made when a notice of motion is first in the proper office of the Court. 47 Bom. 764=25 Bom.L.R. 484=86 Ind. Cas. 440=A.I.R. 1924 Bom. 36 (D.B.).

——S. 10-A—Defendant applying for restoration and becoming successful on merits—Act expiring in the meantime before order was passed in his favour—Proceedings ipso facto terminate and defendant cannot succeed.

Plaintiffs filed a suit on 14th June, 1923 to evict defendants on the ground that they had given them notice to quit as the plaintiffs wanted the premises for their own use and requirements. On the faith of this requisition the defendants agreed to vacate under a consent decree passed on 24th August, 1923, by which they agreed to give possession by 31st January, 1924. On 20th August, 1924, defendants took out a notice of motion asking the Court to pass an order not only for the restoration of the premises to the defendants, but also for damages on the ground that the requisition on which they were evicted was **mala fide**. It was found that the requisition on which the plaint proceeded was a false requisition, and the occupation of the plaintiffs was a pretence. It was not, therefore, **bona fide** and in the ordinary circumstances the defendants would have been entitled on the notice of motion to an order for restoration, and also for an order for payment of compensation. The Bombay Rent (War Restriction) Act (No. II of 1918) with reference to business premises however expired before any order was actually passed.

Held, that the defendants' right to apply to the Court for restoration, and for payment of compensation did not survive the expiration of the Act. If proceedings taken under a temporary statute are not terminated before the period of statute expires, then on the expiration of the statute the proceedings **ipso facto** are determined. 87 Ind. Cas. 793 =49 Bom. 724=27 Bom.L.R. 595=A.I.R. 1925 Bom. 378 (D.B.).

——S. 12—Applicability.

S. 12 does not apply to the premium paid by a tenant to the landlord. A.I.R. (Vol. 19) 1932 Bom. 86 (88)=33 Bom. L. R. 1563=135 Ind. Cas. 801.

——S. 13—Standard rent—Finding as to, is not judgment in rem.

The finding of a Judge as to what the standard rent of particular premises is, cannot be called a judgment **in rem**. The fixing of the standard rent is a matter to be decided between the parties. 91 Ind. Cas. 97=A.I.R. 1926 Sind 120 (D.B.).

——S. 13 (a)—House held under lease—Part of premises let out by lessee—Rent of part sub-let forms basis of standard rent.

Where a person takes on lease for a certain sum an entire building from its owner and lets out portions of it to different tenants, the "standard rent" for the portion so let out is to be fixed on the basis of the amount at which it was let and not on the basis of the amount at which the building was taken on lease. S. 13 (a) of the Act contemplates a case where there is no letting of the part at the period at which the basic rent has to be determined but the whole is let at that period and the basic rent or standard rent of the part has to be ascertained with reference to the letting of that whole. 49 Bom. 357=88 Ind. Cas. 886=27 Bom. L.R. 877=A.I.R. 1925 Bom. 400.

BOMBAY RETAIL TRADE CONTROL AND LICENSING ORDER (1942).

——Cl. (3)—Offence under—Isolated sales of articles without licence.

In order to sustain a charge of engaging in an undertaking of the nature referred to in Cl. (3) of the Bomboy Retail Trade Control and Licensing Order (1942), what is required to be proved is a regular course of business or trade in respect of the controlled articles. Isolated instances of the sale of such articles would not amount to an offence punishable under the clause, because the

offence consists not of selling without a licence or trading without a licence, but rather engaging in such an undertaking. What matters is the storage and not the selling and proof of sales is not an essential element. 230 Ind. Cas. 48=1947 Bom. (Rul.) 226=48 Cr.L.J. 492=48 Bom.L.R. 761 =A.I.R. 1947 Bom. 163 (D.B.).

——Cl. (3)—Offence under—Single transaction.

Single transaction of large quantity does not offend against S. 3. A.I.R. (Vol. 31) 1944 Bom. 247=46 Bom.L.R. 449=I.L.R. (1944) Bom. 429 =46 Cr.L.J. 354=217 Ind. Cas. 373.

BOMBAY REVENUE JURISDICTION ACT (X OF 1876).

——Jurisdiction of Revenue Authorities.

A **mulla** not being a hereditary officer under the Bombay Hereditary Offices Act, 1874, the Revenue Authorities have no jurisdiction to order resumption of **mulanki** service lands held by a **mulla.** A.I.R. (Vol. 19) 1932 Bom. 456=34 Bom.L.R. 944=139 Ind. Cas. 210.

——Validity.

The Bombay Revenue Jurisdiction Act, 1876, is not **ultra vires** of the Indian Legislature. A.I.R. (Vol. 18) 1931 Bom. 212=33 Bom.L.R. 239 =131 Ind. Cas. 664.

——S. 4.

SYNOPSIS.

1. **Validity of section.**
2. **Suit maintainable.**
3. **Suit not maintainable.**
4. **Scope of section.**
5. **Scope of Cl. (a).**
6. **Scope of Cl. (b).**
7. **Scope of Cl. (c).**
8. **Scope of Cl. (d).**
9. **Applicability of Cl. (f).**
10. **Applicability of Proviso.**

1. Validity of section.

——S. 4—Whether ultra vires—Government of India Act (1858), S. 65.

S. 4 is not **ultra vires** of the Government by virtue of S. 65, Government of India Act (1858), inasmuch as a similar suit could not have been brought against the East India Company. 54 Ind. Cas. 129=21 Bom.L.R. 1155=A.I.R. 1920 Bom. 239 (D.B.).

2. Suit maintainable.

——S. 4—Jurisdiction of Court—Saranjam tenures in respect of royal rents.

The rules made in 1898 lay down how a **saranjam** tenure shall be ordinarily regulated; and although some of them appear mandatory, they do not impeach Government's right of free determination to confer any firmer tenure than previously existed. They are the rules of convenience the avowal of which does not preclude Government from for ever changing its mind. Thus the **saranjam** may be granted in respect of the royal rent or of the soil itself; and the difference is that whereas the jurisdiction of the Court is barred in respect of claims of **saranjam** tenures of soil, it might be otherwise if the **saranjam** is of the royal rents. A.I.R. (Vol. 32) 1945 Bom. 310=47 Bom.L.R. 214.

——S. 4—Jurisdiction of Civil Court—Declaration that plaintiff is nearest heir of deceased holder.

A suit for a declaration that the defendant is not a **watandar** of a village, in which one of the reliefs sought for is that it should be declared that the plaintiff is entitled to have his name entered in the **watan** register of the village, the prayer in effect being a claim to perform the duties of **patil,** is **prima facie** barred under S. 4, Bombay Revenue Jurisdiction Act.

But there is nothing in the Bombay Revenue Jurisdiction Act to prevent Civil Courts granting a declaration that a person is the nearest heir of a deceased representative **watandar** and the Civil Court has jurisdiction to decide disputes between persons claiming to be **watandars inter se,** as to their status in the **watan** family. A.I.R. (Vol. 23) 1936 Bom. 301=38 Bom.L.R. 593=164 Ind. Cas. 703 (2).

——S. 4—Jurisdiction of Civil Court—Declaration of status of "watandar" and of nearest heirship—Bombay Hereditary Offices Act, (III of 1874), S. 36, Cl. 3.

A Civil Court has jurisdiction to try a suit for declaration that the plaintiff has a right to the status of a "vatandar" and that he is the nearest heir of the deceased "vatandar". Such a suit is not barred by S. 4, Bombay Revenue Jurisdiction Act. 54 Bom. 125=32 Bom.L.R. 155=A.I.R. 1930 Bom. 254 (D.B.).

——S. 4—Jurisdiction of Civil Court—Mulanki service lands—Suit for recovery of possession.

Section 4 of the Bombay Revenue Jurisdiction Act of 1876, does not bar a suit for recovery of possession of **mulanki** service lands. A.I.R. (Vol. 19) 1932 Bom. 456=34 Bom.L.R. 944= 139 Ind. Cas. 210.

——S. 4—Jurisdiction of Civil Court—Collector refusing to declare alienation null and void.

S. 4 which ousts the jurisdiction of the Civil Courts in particular cases, should be very strictly construed, and when the Collector on an application for a declaration that an alienation is null and void refuses to make a declaration to that effect, there is no such order against the applicant which prevents his going to a Civil Court for the determination of the question whether or not the alienation is binding on him, and therefore it is open to him to ask the Court to decide that question, and the courts would have jurisdiction to decide it. 45 Bom. 1141=61 Ind. Cas. 572=23 Bom. L.R. 376=A.I.R. 1921 Bom. 17 (F.B.).

——Ss. 4 and 5—Suit for declaration that Collector has no power to levy rent in excess of full assessment.

The British Government continued certain lands by a Sanad "as the service emoluments appertaining to the office of Jangam" to an ancestor of defendants 2 and 3. But the Swami of Hiremath at Haveri remained in possession since 1854.

Plaintiff was the successor in-title of this Swami. At the time of the issue of Sanad in 1868 the full assessment was Rs. 90. At the revision Survey in 1876 it was raised to Rs. 129 and in 1909 to Rs. 145-8 0. The Collector on the application of defendants 2 and 3 in 1915 levied full economical rent and recovered it from plaintiff, who, in 1918, sued for a declaration that he was a Jangam of Hiremath and for an injunction to restrain the Secretary of State (defendant 1) from recovering full rent from plaintiff and paying to defendants 2 and 3. **Held**, (1) that the plaintiff was entitled to an injunction restraining defendant 1 from recovering any rent in excess of the full assessment: (2) that the plaintiff's claim that he was Jangam was barred by S. 4; and (3) that the claim of the plaintiff for declaring that the order of the Collector was ultra vires even if it fell under S. 4 was saved by S. 5 (a). 48 Bom. 61=25 Bom.L.R. 1160=82 Ind. Cas. 577=A.I.R. 1924 Bom. 273 (D.B.).

——S. 4 (a)—Collector refusing to set aside alienation of watan property—Sub equent suit in Civil Court for possession of alienated property.

Where the Collector, under S. 9, Watan Act, refuses to set aside an alienation of watan property made before the Watan Act was passed, such an order can be ignored and a subsequent suit in a Civil Court for possession of the alienated watan property is not barred by S. 4 (a) of the Bombay Revenue Jurisdiction Act. A.I.R. (Vol. 26) 1939 Bom. 369=I.L.R. (1939) Bom. 428=41 Bom.L.R. 578=184 Ind. Cas. 633.

——S. 4 (a) (1)—Suit for order for delivery of possession binding on private party and not enforceable against Government.

Where a plaintiff seeks an order for delivery of possession of property which is merely to bind a private party and is not to be enforced against Government, the suit may offend against Cl. (3), but can hardly be brought within Cl. (1), S. 4 (a). A.I.R. (Vol. 24) 1937 Bom. 307=39 Bom. L.R. 288=I.L.R. (1937) Bom. 464=170 Ind. Cas. 801.

——S. 4 (a) (3)—Order under Hereditary Offices Act, not by officer "duly authorised in that behalf"

It is not necessary to set aside an order made without jurisdiction. Such an order is no bar to a suit for relief inconsistent with it. An order validly made within the powers conferred by the Watan Act (Bombay Hereditary Offices Act) will bar a suit. An order without jurisdiction will not. The order must have been made by an officer "duly authorized in that behalf" as Cl. (3) of S. 4 (a) says. A.I.R. (Vol. 24) 1937 Bom. 307=I.L.R. (1937) Bom. 464=39 Bom.L.R. 288=170 Ind. Cas. 801.

——Ss. 4 (f), 5 (a)—Suit by saranjamdar against Government for recovery of ain chillar wrongly credited by Government.

Where plaintiffs saranjamdars institute a suit in a Civil Court against Government, for recovery of ain chillar wrongly credited by Government, plaintiffs are not claiming to hold land. They are grantees of the revenue, not of the land, and these suits have nothing to do with land revenue claimed from or paid by the plaintiffs. Section 4 (f), Bombay Revenue Jurisdiction Act, itself, cannot apply and the suit is not barred under that section or S. 5 (a). The chillar fund may no doubt be said to be payable out of the land revenue, but when cl. (f) of S. 4 refers to claims against Government to receive payments payable out of the land revenue it must mean payable out of the land revenue which is itself payable to Government. The clause cannot have been intended to bar a suit by an alienee of the land revenue to recover sums wrongly deducted from the land revenue payable to him. A.I.R. (Vol. 24) 1937 Bom. 109=38 Bom.L.R. 1339=168 Ind. Cas. 357.

——S. 4 (a)—Order of commutation of vatan services passed without observing Bombay Hereditary Offices Act, S. 73—Suit to set aside the order lies.

Where a Collector orders, at the instance of the widow of the last vatandar, commutation of kulkarniki services and the procedure prescribed by the Bombay Hereditary Offices Act, S. 73 is not observed by the Collector while passing the order, the order is ultra vires. A suit in a Civil Court to set aside the order is not barred by the provisions of the Bombay Revenue Jurisdiction Act (X of 1876), S. 4 (a). 92 Ind. Cas. 110=49 Bom. 554 =27 Bom.L.R. 463=A.I.R. 1925 Bom. 365 (D.B.).

——S. 4 (a), (h), (i), (j), (k)—"Any other written grant"—"Treaty"—Specific Relief Act, S. 42 —Declaration—Injunction.

In the Revenue Jurisdiction Act, 1876, S. 4, Cl. (j) the phrase "any other written grant" means any written grant other than that which falls within clauses (h) and (i) of the same section. The clause (h), (i), (j), and (k) of the section are independent of one another. The cource of title referred to in each stands apart from the rest, and each clause is connected only with that portion of the proviso which precedes clause (k). The term "treaty" in S. 4 (a) of the Act is to be strictly construed and is to be confined to an agreement between two or more independent soverieign powers or States. The effect of the Amending Act, XVI of 1877, is to restore the jurisdiction of the Civil Courts to the extent mentioned in that Act in the Districts mentioned in the Schedule thereto, and so far to remove the bar created by S. 4 of the principal Act, X of 1876. (1904) 6 Bom.L.R. 648=29 Bom. 19.

——S. 4—Proviso (k)—Khatib inam—Resumption—Suit to set aside.

Lands assigned to a Khatib inam were enjoyed rent free by the grantee and continued to him on the same terms by the Inam Commissioner in 1856 under Act (XI of 1852). Plaintiff an alienee from a Khatib enjoyed them similarly from 1864 to 1910 and claimed to have performed the Khatib service. In 1911, the Commissioner resumed the lands by levying full assessment on them. Plaintiff sued for a declaration that he was the full owner of the lands of the Khatibgari right appertaining to them. **Held**, that the plaintiff's claim to hold the land wholly or partially free

from payment of land revenue under an adjudication order passed by a competent officer under Act (XI of 1852) was cognizable in the Civil Courts under proviso (k) to S. 4 of the Bombay Revenue Jurisdiction Act. 21 Bom.L.R. 1166=54 Ind. Cas. 105=44 Bom. 130=A.I.R. 1920 Bom. 150 (D.B.).

——S. 4—Proviso (k)—Land exempted from land revenue—Suit claiming exemption.

Lands appurtenant to Kaji Vatan were continued by the Inam Commissioner in 1852 as sarva inam to a predecessor in title of the plaintiff. Plaintiff an alienee from a Kaji, held the lands free of assessment, though the service of the Kaji continued to be performed by the descendants of the Kaji. The Collector ordered in 1914 full assessment to be levied for the lands in question and in cases of non payment lands to be forfeited. Plaintiff sued for a declaration that the Collector's order was illegal and ultra vires. **Held,** that cognizance of the suit by the Civil Court was not barred under S. 4 (a) (1) of the Bombay Revenue Jurisdiction Act, 1876, for, the suit fell within proviso (k). 21 Bom.L.R. 1159=54 Ind. Cas. 98=44 Bom. 120=A.I.R. 1920 Bom. 147 (D.B.).

3. Suit not maintainable.

——S. 4—Bar of suit—Suit for declaration against Government that suit lands continued saranjam lands.

Section 4 is a bar to any relief being granted against the Government relating to suit lands in so far as they are claimed to be granted or held as **saranjam**. Even declaratory relief cannot be granted under S. 4 (a).

There was an arrangement between the predecessors of both parties that in consideration of hereditary services to be rendered by the Kulkarni and his descendants in managing part of the **saranjam** estate, the Kulkarni and his descendants were to retain for their own use the rents and profits of a certain portion of the estate. Pursuant to this arrangement, Kulkarnis retained possession over the portion granted to them up to 1932 in which year the Government passed a resolution which purported to destroy the **saranjam** tenure and to convert the lands into **khalsa**. By a subsequent resolution, the Government treated the lands as still forming part of **saranjam** lands. The successors of grantor brought a suit against Government and the Kulkarni for declaration that the lands had not ceased to be **saranjam** lands.

Held, that S. 4 barred the suit since the claim aainst Government was based upon **saranjam** tenure. Declaratory relief also could not be granted under S. 4 (a). A.I.R. (Vol. 32) 1945 Bom. 310=47 Bom.L.R. 214.

——S. 4—Bar of suit—Person's name entered as adopted son of deceased watandar—Court setting aside adoption—Suit for title and possession in Civil Court.

Where a person's name was entered in the revenue register as heir to deceased **watandar,** as an adopted son of a deceased person but subsequently the adoption was declared invalid by Civil Court and consequently his name was removed from the register, he thus becoming a stranger to the **watan**.

Held, that a suit for title to and possession of **watan** lands in Civil Court was barred and the suit came under S. 4 (a), cl. (1), Revenue Jurisdiction Act, that is to say, it must be regarded as a claim against Government relating to property appertaining to the office of a village Patil. It also came under Cl. (4), Sub-S. (a), that is to say, it must be regarded as a claim against Government relating to land declared by Government to be held for service. It was also barred under S. 4 (a), Cl. (3), as there were no grounds to declare the orders of the Revenue Authorities to be **ultra vires**. A.I.R. (Vol. 24) 1937 Bom. 121 =38 Bom.L.R. 1308=I.L.R. (1937) Bom. 236=168 Ind. Cas. 73.

——S. 4—Bar of suit—Claim to property as "vatandar" decided by Government or its officer—Suit to set aside such order.

A suit to set aside an order passed by Government or by a duly authorised officer in its behalf, relating to a claim to a property appertaining to the office of a "vatandar" is barred by S. 4 of the Act. 54 Bom. 125=32 Bom.L.R. 155=A.I.R. 1930 Bom. 254 (D.B.).

——S. 4—Order by Revenue Officer that a person is not vatandar—Suit for declaration that the order is bad is barred even against Government.

When an order is made on a specific decision by a Revenue Officer that a person is not a vatandar a person seeking to obtain a declaration from a Civil Court that the decision is bad certainly seeks to avoid that order and so is barred by S. 4 (a) (3), and if the suit seeks relief against Government relating to vatan land it falls within the first paragraph of that clause. 28 Bom.L.R. 651=95 Ind. Cas. 1008=A.I.R. 1926 Bom. 417 (D.B.).

——S. 4—Vatan Register—Suit for cancellation.

The words of S. 4 are wide enough to preclude the Courts from entertaining any claim to the vatan offices in opposition to the claim of the hereditary officers recognized or appointed under the Act, and also any claim for the cancellation of the vatan register. 51 Bom. 830=54 I.A. 380=29 Bom.L.R. 1484=46 C.L.J. 393=39 M.L.T. 527 =105 Ind. Cas. 694=A.I.R. 1927 P.C. 217=53 M.L.J. 475 (P.C.).

——S. 4—Bar to suit—A suit for refund of contribution under Act III of 1874.

Land Revenue in S. 3 is defined as including "any cess or rate authorized by Government under the provision of any law for the time being then in force" and the suit for a refund of the contribution levied under Act III of 1874 would, therefore, be barred unless exemption is claimed by virtue of an adjudication under Act XI of 1852, which declares the particular property to be exempt. 51 Bom. 830=54 I.A. 380=29 Bom.L.R. 1484=46 C.L.J. 393=39 M.L.T. 527=105 Ind. Cas. 694 =A.I.R. 1927 P.C. 217=53 M.L.J. 475 (P.C.).

——S. 4—Bar of suit—Suit for declaration that plaintiffs are hereditary vatandar Kulkarnis.

A suit against the Secretary of State for a declaration that plaintiffs are hereditary vatandar kul-

karnis and entitled to the vahivat of the Vatan hereditarily is barred by S. 4 (a) of the Bombay Revenue Jurisdiction Act (1876). 44 Bom. 261=55 Ind. Cas. 358=22 Bom.L.R. 99=A.I.R. 1920 Bom. 357 (D.B.).

——S. 4 (a)—Suit for declaration of title to patilki watan lands—Secretary of State impleaded party—Jurisdiction of Civil Courts.

A suit for a declaration of title to **patilki watan** lands is barred under S. 4 (a), Bombay Revenue Jurisdiction Act, and is not maintainable in Civil Courts if the Secretary of State for India is a party to it, and it makes no manner of difference that the plaintiff does not seek an order against Government as to the way in which the property should be dealt with but only wants a declaration as to his title which will bind the Government. A.I.R. (Vol. 18) 1931 Bom. 47=32 Bom. L.R. 1370=130 Ind. Cas. 400.

——S. 4 (a)—Bar—Suit for declaration of title.

No suit lies in the Civil Court under S. 4 (a), 1st para in respect of a claim against the Government, where the claim relates to property appertaining to the office of an hereditary officer. It makes no difference if the plaintiff does not desire to get any order against the Government as to the way in which the property should be dealt with and only wants a declaration as to his title which would bind the Government. 28 Bom. 435, foll. 32 Bom.L.R. 1370=A.I.R. 1931 Bom. 47 (1).

——S. 4 (a)—Land held as Saranjam—Suit against Government—Jurisdiction of Civil Court—Decision of the Inam Commissioner—Finality of decision.

The Inam Commissioner decided in 1859, under the provisions of Act XI of 1858, that certain estate was Saranjam and not Sarva Inam. On the death of its holder **P**, in 1899, Government resumed the property on the ground that it was Saranjam and granted it to **V**, one of the grandsons of **P**. The plaintiff, another grandson of **P**, sued the Secretary of State for India and **V**, for a declaration of title to and for possession of the property, alleging that it was Sarva Inam and that it was not competent to Government to resume and re-grant it to any one it liked.

Held, (1) That the decision of the Inam Commissioner was by virtue of the provisions of Rule 2 of Schedule A of Act XI of 1852, final as regards the land and interests concerned in the decision. (2) That the title to and continuance of the estate must be determined, under Schedule B, R. 10, of the Act under such rules as Government might find it necessary to issue from time to time. (3) That in accordance with those rules the estate was on **P's** death resumed by Government who granted it to **V**. (4) That the suit having been one against Government relating to land held as Saranjam was excluded from the jurisdiction of the Civil Court by the provisions of Sub S. (a) of S. 4 of the Revenue Jurisdiction Act, 1876. (1909) 11 Bom. L.R. 1333=34 Bom. 232=4 Ind. Cas. 832.

——S. 4 (a)—Civil Court — Jurisdiction — Suit against Government.

S. 4 (a) of the Bombay Revenue Jurisdiction Act, 1874, bars the jurisdiction of the Civil Courts to entertain suits against Government regarding land of which the plaintiff is put into occupation by Government free from exemption of the reward of his service. The plaintiff cannot escape from the bar by contending that his claim is for the possession of land, while the property that appertains to his office is not the land but the revenue arising from the land. (1904) 6 Bom.L.R. 438 =28 Bom. 435.

4. Scope of section.

——S. 4—Scope—Order for compensation for additional police by the District Magistrate.

The section refers to cess or rate authorised by Government and not to cess or rate authorised by the District Magistrate with the previous sanction of the Commissioner. The provision cannot apply where the legality of the order of the Government is questioned. It would apply to a cess or rate which is authorised, that is legally authorised, by the Government. 26 Bom.L.R. 1=48 Bom. 87=90 Ind. Cas. 13=A.I.R. 1924 Bom. 1.

——S. 4—Scope of.

Where a person in possession of vatan lands under a miras lease or mortgage from the owner continues in adverse possession of the land after the death of the owner for the statutory period, he is still liable to be ousted under the Hereditary Offices Act and so he is at most entitled only to an injuction restraining the owners from taking proceedings other than under the Hereditary Offices Act to recover possession. An order which though purporting to be passed under the Hereditary Offices Act is not authorised by the Act, does not come under the purview of the Revenue Jurisdiction Act. 37 Bom. 37=17 Ind. Cas. 148=14 Bom.L.R. 793 (D.B.).

——S. 4—Tenure specified in.

Held, on considering all the relevant documents that the tenure was not of the kind specified in S. 4. A.I.R. (Vol. 23) 1936 P.C. 312=3 B.R. 37 =1936 O.L.R. 569=1936 A.L.R. 855=64 C.L. J. 178=38 Bom.L.R. 1265=(1937) 1 M.L.J. 367 =164 Ind. Cas. 753 (P.C.).

5. Scope of Cl. (a).

——S. 4 (a)—Scope.

S. 4 (a), Bombay Revenue Jurisdiction Act, does not affect the decision of a Civil Court on the rights of owners of land on either side of the boundary line, based on adverse possession. A.I. R. (Vol. 20) 1933 Bom. 314=35 Bom.L.R. 583 =145 Ind. Cas. 408.

——S. 4 (a) (1)—Scope—Claim against Government—Resumption of **Kazi** inam from alienee by executive action—Suit for declaration and possession—Bar of. **See** GRANT—RESUMPTION. 51 Bom.L.R. 133.

——S. 4 (a) (1), (4), (3)—S. 4 (a) distinguishes between claims and suits—Merely making Government party, whether brings case under these clauses —Government bound by decree, whether claim against Government.

In S. 4 (a) of the Bombay Revenue Jurisdiction Act, a distinction is made between claims and

suits. Clauses (1) and (4) speak of claims against Government; Cl. (2) speaks of claims to perform duties; and Cl. (3) speaks of suits to set aside or avoid orders. Under Cls. (2) and (3) it may not be necessary that Government should be a party. On the other hand, Cls. (1) and (4) will, as a rule, only apply where Government is a party, since otherwise it could hardly be said that there was any claim against Government. But the mere fact that the Government is a party will not be enough to bring the case under those clauses. The words "claim against Government relating to property or lands" may fairly be said to imply that relief of some kind is sought against Government. Government must be more than a purely formal party. Government is to be bound by the decree to make any payment or to restore any property, or if an injunction is sought against Government, the position is clear—that is a claim against Government. A.I.R. (Vol. 24) 1937 Bom. 307=39 Bom.L.R. 288=I. L. R. (1937) Bom. 464=170 Ind. Cas. 801.

——S. 4 (a) (3)—Suit whether between private parties or against Government, nullifying order of Collector made under Hereditary Offices Act.

A suit whether between private parties or against Government which would have the effect of nullifying an order by the Collector, would be barred by S. 4 (a), Cl. (3). If the relief sought does not affect the position of Government at all,, for instance if a person seeks a declaration of his status as a **watandar** simply with a view to approach the Revenue Authorities under S. 36 (3), Watan Act, as it cannot be regarded as a suit to set aside or avoid an order, in such suits, Government is neither a necessary nor a proper party. If, however, a declaration of status is sought, and a claim for possession of lands is made in flat contravention of the orders of the Revenue Authorities, the suit certainly comes within the miscief of Cl. (3) of S. 4 (a) assuming that the orders are not **ultra vires**. A. I. R. (Vol. 24) 1937 Bom. 307=39 Bom.L.R. 288=I. L. R. (1937) Bom. 464=170 Ind. Cas. 801.

——S. 4 (a) (1), (3)—Scope—Prayer for declaration of title against Government, whether claim against Government.

A prayer for a declaration of the title against Government is not a claim against Government within the meaning of Cl. (1) of S. 4 (a). It may be so under S. 4 (a) (3). A.I.R. (Vol. 24) 1937 Bom. 307=39 Bom. L. R. 288=I. L. R. (1937) Bom. 464=170 Ind. Cas. 801.

——S. 4 (a), Para 3—Scope—Order of Collector under S. 11-A of Bombay Hereditary Offices Act —Revision by High Court.

An order of a Collector under S. 11-A of the Bombay Hereditary Offices Act directing a levy of full rent is an order within S. 4 (a), para. 3 of the Act and therefore the High Court has no jurisdiction to interfere with the order. 64 Ind. Cas. 7=23 Bom.L.R. 561 (D.B.).

6. Scope of Cl. (b).

——S. 4 (b)—Scope—Jurisdiction of Court—Allegation that order under S. 211, Bombay Land Revenue Code, is ultra vires.

The Civil Courts have jurisdiction to determine a question as to the excess of the statutory powers conferred by the Bombay Land Revenue Code. Such a question is raised when a plaintiff suing for a declaration that the Government is not entitled to recover from him an assessment of land revenue in excess of an amount payable by him under an agreement with it, maintains that the cancellation of that agreement by an order of the Governor-in-Council is not within the powers conferred by S. 211 of the Code under which it is sought to be justified.

But apart from the question of **ultra vires**, the claim of the plaintiff based on the agreement constitutes objections to the amount or incidence of assessment authorised by Government within the meaning of S. 4 (b), Bombay Revenue Jurisdiction Act and the jurisdiction of the Civil Court is thereby excluded. 74 I.A. 103=A.I.R. 1947 P. C. 200=50 Bom.L.R. 524=(1948) 1 M.L.J. 134 (P.C.).

——S. 4, Cl. (b)—Scope—Suit for declaration that powers exercised by Government are ultra vires—Plaintiff, when can be non-suited—Suit in Civil Court against enhanced assessment—Limitation.

The provisions of S. 4, Cls. (b) and (d), Bombay Revenue Jurisdiction Act, apply only when the suit hits directly at the amount or incidence of land revenue or to its mode of assessment or the principle on which it is assessed or aims directly at the alteration of entries in land records and the provisions do not apply to exclude a suit which is for a declaration that the powers exercised by Government have no basis in law or that the power is exercised contrary to the provisions of law. In order that a plaintiff should be non-suited by reason of Cl. (b) to S. 4, Bombay Revenue Jurisdiction Act, the quarrel must be with the amount or incidence of a tax while admitting liability to pay.

The plaintiffs are bound to exhaust all remedies by way of appeal open to them under the Bombay Land Revenue Code before they come to the Civil Court and, therefore, limitation would start not form the date of the publication of the Notification levying enhanced assessment or notice of demand on the plaintiff of the enhanced assessment, but on the date on which his appeal to the Governor-in-Council failed. A.I.R. (Vol. 23) 1936 Sind 108=29 S.L.R. 382=163 Ind. Cas. 887.

——S. 4 (b)—Scope—Objection under must be one reaching them directly.

An objection to come within either of the two heads of clause (b) of S. 4 must be an objection which reaches them directly, i.e., an objection to them **per se** which admits the liability to pay land revenue on the part of the objector but quarrels with its amount or incidence or the validity and effect of the notification of survey settlement as by themselves objectionable, not because some other right affects them or' makes them inapplicable to this particular case. 28 Bom. 74, foll.

76 Ind. Cas. 897=24 Bom.L.R. 1040=A.I.R. 1923 Bom. 79 (D.B.).

——S. 4 (b)—Scope of.

An objection to come within either of the two heads 1 and 3 of Cl. (b) of S. 4 of the Bombay Revenue Jurisdiction Act, 1876, must be an objection which reaches them directly, i.e., an objection to them per se which admits the liability to pay land revenue on the part of the objector but quarrels with its amount or incidence or the validity and the effect of the notification of survey settlement, as by themselves objectionable, and not because some other right affects them or makes them inapplicable to his particular case. Objections under S. 4 (b) of the Act may be raised by a suit or in defence to a suit: but in whichever way they are raised, they must be of the particular nature described in Cl. (b). Where they fall outside that class, they can be raised in defence of as well as by a suit. The effect of the proviso to S. 4 of the Act is that where an occupancy tenant holding under Government is called upon to pay land revenue according to the survey rates, it is open to him to resist the claim of Government in a Civil Court on the ground that he holds under a written grant or an enactment, etc., which prevents Government from claiming more than can be recovered under the grant or enactment, etc. (1903) 5 Bom.L.R. 694=28 B. 74.

7. Scope of Cl. (c).

——S. 4 (c)—Scope—Buffalo attached in execution of decree in assistance suit—Attachment raised on pledgee's objection—Suit against pledgee for damages for fraudulently inducing mamlatdar to raise attachment and thus preventing realization of rent decree does not lie—Tort.

Mamlatdar passed a decree in R's favour in an assistance suit for rent. In the course of the execution proceedings under that decree R got attach-attached a buffalo belonging to G. On this S applied to the mamlatdar to raise the attachment on the ground that the buffalo had been pledged to him, and the mamlatdar accepting his allegation did so. R sued for damages alleging that S fraudelently put forward a claim to the buffalo and thus prevented R from realizing his decree.

Held, (per **Marten, C.J.**).—No action in tort to obtain damages for S's fraud, in inducing the mamlatdar to decide the attachment question in his favour, would lie, the result of the suit substantially being to re hear the decision of the mamlatdar on the very point as to whether the buffalo was pledged to S.

Held, (per **Murphy, J.**).—The case arose out of the execution proceedings in the assistance suit and was barred by S. 4 (c). 31 Bom.L.R. 504 =119 Ind. Cas. 798=A.I.R. 1929 Bom. 267 (D.B.).

——Ss. 4 (c) and 6—Scope of—Seizure of property.

A suit on a claim arising out of an alleged illegality of the proceedings taken for the realisation of land revenue would not be barred by S. 4 (c) of the Act, as the proceedings mentioned in that section must, in their inception, be legal. S. 6 of the Act does not protect an officer who did not believe the property seized by him to be the property of the defaulter. 37 Bom. 542=20 Ind. Cas. 526=15 Bom.L.R. 665 (D.B.).

8. Scope of Cl. (d).

——S. 4 (d)—Scope—Purchaser from inamdar claiming to be shown in village papers as person entitled to revenue—Suit against Government.

Where in a suit brought by a purchaser of a share of a village from inamdar, the plaintiff wants to be shown in the village papers as the person entitled to the revenue of the village, he really claims to be the superior holder as defined in the Bombay Land Revenue Code, and the suit is barred by S. 4 (d) against Government and the Government cannot be ordered not to pay the revenue to the inamdar but to pay it to the plaintiff direct. An injunction against Government to pay the plaintiff direct, and not to pay the superior holder, would be contrary to the spirit, if not to the express terms, of the Land Revenue Code. The relation between Government and the superior-holder is not affected by the sale of the superior holder's rights. The proper thing to do in such a case is to order the inamdar to pay it to the plaintiff as soon as he receives it from the treasury. A.I.R. (Vol. 26) 1939 Bom. 513=41 Bom.L.R. 882=185 Ind. Cas. 839.

——S. 4 (d) (i)—Scope—Khoti Sarakati inam village—Mortgagee from inamdar—Suit to declare right to have name entered in revenue records as mortgagee and for payment direct to mortgagee by Government of amount due to inamdar until discharge of mortgage—Jurisdiction of Civil Court.

S. 4 (d) (1) of the Bombay Revenue Jurisdiction Act excludes the jurisdiction of the civil court to deal with any matters where claims are made against the Crown to be entered in the revenue survey or settlement records or village papers as liable for the land revenue, or as superior-holder, inferior holder, occupant or tenant. Where a mortgagee from the inamdar of a khoti sarakati inam village brings a suit for a declaration of his right to get his name entered in the revenue records as mortgagee of the inam rights, and of his right to receive direct from the Government the amount due and payable to the inamdar in respect of the village till the mortgage debt is discharged, the jurisdiction of the civil Court is not barred in respect of the claim for receipt of the dues, though the claim for amendment of the records is not cognizable by the civil Court. I.L.R. (1948) Bom. 264=50 Bom.L.R. 21=A.I.R. 1948 Bom. 220 (F.B.).

9. Applicability of Cl. (f).

——S. 4 (f)—Applicability—Government having no interest in revenue of alienated village.

Cl. (f) of S. 4, Bombay Revenue Jurisdiction Act can have no application to the case of an alienated village where Government has ceased to have any interest in the revenue at all. A.I.R. (Vol. 26) 1939 Bom. 513=41 Bom.L.R. 882=185 Ind. Cas. 839.

10. Applicability of Proviso.

——S. 4, Proviso—Applicability.

The proviso to S. 4 does not cover the case of a claim to actual land which, as a matter of fact, is held wholly or partially exempt from payment of land revenue. All that it covers is a claim to hold land wholly or partially exempt from land revenue as distinct from a claim to hold it under a liability to pay land revenue. A.I.R. (Vol. 30) 1943 Bom. 427=45 Bom. L. R. 810=I. L. R. (1943) Bom. 534=213 Ind. Cas. 348.

——S. 4, Proviso—Applicability—Dispute as to who is entitled to be holder.

The proviso to S. 4 relates to cases where there is a dispute as to the nature of a holding, that is to say, as to whether it is exempt from the payment of land revenue or not. It does not relate to disputes as to who is entitled to be the holder. A.I.R. (Vol. 26) 1939 Bom. 513=41 Bom.L.R. 882=185 Ind. Cas. 839.

——S. 4, proviso—Applicability.

S. 4, proviso, contains no exceptions in respect of holdings unaccompanied by proprietary right in the soil and there is no saving clause which would suggest that such a claim to such holdings might fall within the purview of the Pensions Act. The right of an alienee of the revenue to sue for disturbance of his possession by a stranger or by Government is clearly recognised by the proviso and the only condition required is that the claim should be under an enactment, instrument, sanad, written grant or judgment such as is described in the proviso. (1905) 7 Bom.L.R. 497=29 B. 480.

——S. 11—Strict construction.

S. 11, Bombay Revenue Jurisdiction Act, being a section which deprives the subject of a right to litigate against the Government must be construed strictly though not unfairly. A.I.R. (Vol. 18) 1931 Bom. 238=33 Bom.L.R. 213=55 Bom. 165 =132 Ind. Cas. 497.

——S. 11—Applicability—Administrative act of revenue authorities ultra vires—Suit—If barred.

The bar imposed by S. 11 of the Bombay Revenue Jurisdiction Act applies only when there is an appealable order. An administrative act on the part of the revenue authorities, which is ultra vires, can be challenged in a suit without filing any appeal. Such a suit is not barred under S. 11. 49 Bom.L.R. 209=A.I.R. 1947 Bom. 403=I.L.R. (1947) Bom. 75 (D.B.).

——S. 11—Applicability—Order of Revenue Court nullity—Validity of order can be decided in second appeal.

Where an authority which purports to pass an order is acting without jurisdiction, the purported order is a mere nullity, and it is not necessary for anybody, who objects to that order, to apply to set it aside. He can rely on its invalidity when it is set up against him, although he has not taken steps to set it aside. Such an order cannot give rise to any right whatever, not even to a right of appeal. This principle applies not only to cases under Art. 14, Limitation Act but also to cases under S. 11, Bombay Revenue Jurisdiction Act. If once the Court holds that what on the face of it purports to be an order of a Revenue Court is in fact a nullity it can give rise to no rights and impose no obligations.

Where, therefore, a Revenue Officer purports to do an act or pass an order which is invalid his action does not operate to raise a bar under S. 11, Bombay Revenue Jurisdiction Act.

The High Court in second appeal can decide on the validity of the Commissioner's order. A.I.R. (Vol. 29) 1942 Bom. 257=44 Bom.L.R. 577= I.L.R. (1942) Bom. 717=202 Ind. Cas. 321 (F.B.).

——S. 11—Applicability.

Government can pass an order for eviction of a person who is wrongly in possession of land by giving him a notice as prescribed by S. 202, Bombay Land Revenue Code. If no appeal is filed by the person evicted, a suit for declaration could be barred under S. 11, Bombay Revenue Jurisdiction Act. A.I.R. (Vol. 29) 1942 Bom. 161=44 Bom.L.R. 295=I.L.R. (1942) Bom. 357=201 Ind. Cas. 420.

——S. 11—Applicability—Order by City Survey Officer.

Section 11, Bombay Revenue Jurisdiction Act, is applicable to an order or decision of a City Survey Officer. The word 'act' in S. 11 of the Act is wide enough to cover a judicial or a quasi-judicial act i.e., the passing of an order or decision by a Revenue Officer. A.I.R. (Vol. 18) 1931 Bom. 432=33 Bom.L.R. 361=136 Ind. Cas. 189.

——S. 11—Applicability—"All such appeals"—Meaning of.

The expression "all such appeals" in S. 11 of the Bombay Revenue Jurisdiction Act, 1876, means appeals in respect of the "act or omission." Hence, the bar created by S. 11 does not apply where the act or omission concerned is not an order or decision in respect of which there is a right of appeal under the Land Revenue Code. (1904) 6 Bom.L.R. 124=28 Bom. 332.

——S. 11—Bar of suit—Commissioner's order—Appeal to Government—Copy of order complained against not annexed.

Presentation of a second appeal to Government against the Commissioner's decision without annexing a copy of the order appealed against, as required by S. 204 read with S. 208, Bombay Land Revenue Code, is not presentation in proper form. Consequently, a suit for recovery of possession of the property involved is barred under the Revenue Jurisdiction Act, 1876. A.I.R. (Vol. 21) 1934 Bom. 489=36 Bom.L.R. 1064= 58 Bom. 573=154 Ind. Cas. 669.

——S. 11—Bar of suit—Order by City Survey Officer confirmed on appeal by Collector—Civil Suit competent.

Section 11 requires that all appeals allowed by law must be availed of before a civil suit can be filed, for the object of the section is to protect the Government from being exposed to law suits out of the orders of its subordinate officers before its superior officers have been afforded the opportunity of considering, and, it may be, of disallowing the executive orders of its subordinate officials.

Where an order by a City Survey Officer has been confirmed on appeal to the Collector, a civil suit is competent for no further appeal to Commissioner is necessary to be filed in such cases. A.I.R. (Vol. 18) 1931 Bom. 432=33 Bom.L.R. 361=136 Ind. Cas. 189.

——S. 11—Bar of suit—Grant of land free from payment of occupancy price—Order of Commissioner directing payment of price and forfeiture for non payment—Suit for possession by grantee.

In 1919, the Collector granted certain unoccupied land to the plaintiff free of payment of occupancy price and land revenue until the land was brought under cultivation. In 1921, the Commissioner being of opinion that the Collector's order was wrong directed that the proper occupancy price according to the market-value and the ordinary land revenue from 1919 should be recovered from the plaintiff. The plaintiff did not pay the occupancy price and the lands were forfeited. The plaintiff sued for a declaration that the order of forfeiture was illegal and for possession:

Held, per **Beaumont, C. J., and Blackwell, J.**, (**Baker, J.**, contra) that (i) the order of the Commissioner was not a modification of the Collector's order but was a new order imposing upon the plaintiff terms which he had no option to refuse and the Commissioner's order as well as the subsequena orders of forfeiture were illegal, (ii) the suit for declaration and possession was not, therefore, barred under S. 11, Bombay Revenue Jurisdiction Act.

Where an order of forfeiture is invalid, dispossession in pursuance of the order is merely ancillary to the order and a suit for possession is barred under S. 11, Bombay Revenue Jurisdiction Act, but where the order of the Commissioner and order of forfeiture founded upon it are invalid, the party aggrieved is not bound to appeal therefrom but is entitled to wait until he is dispossessed and institute a suit for recovery of possession. A.I.R. (Vol. 18) 1931 Bom. 238=33 Bom.L.R. 213 =55 Bom. 165=132 Ind. Cas. 497.

——S. 11—Bar to Suit—Collector's refusal to grant sanad—No appeal preferred under Land Rev. Code.

S. 11 clearly bars any suit on account of the Collector's refusal to grant the plaintiff a sanad, as the plaintiff has to prove, previously to filing the suit, that he had presented all such appeals allowed by the law for the time being in force, as within the period of limitation allowed for bringing such suit it was possible to present. 74 Ind. Cas. 196=A.I.R. 1923 Bom. 416 (D.B.).

——S. 11—Bar of suit—Notice of demand by Mamlatdar—Suit for declaration of rent-free rights is not barred by failure to appeal against the notice.

Where the plaintiffs held their land free of rent, and they were all of a sudden served by the Mamlatdar with a notice of demand to pay assessment and the plaintiffs filed a suit for declaration that they were entitled to hold their land rent-free:—

Held, the suit is not barred under S. 11. 67 Ind. Cas. 842=24 Bom.L.R. 402=46 Bom. 811 =A.I.R. 1922 Bom. 274 (D.B.).

——S. 11—Bar of suit—Order by Collector to remove encroachment—No appeal preferred—Suit to set aside is not maintainable.

A person against whom an order was passed by the Collector to remove an alleged encroachment and who preferred no appeal against the order within two months thereof is barred under S. 11 of the Act from afterwards suing in the Civil Court, to get the order set aside. 59 Ind. Cas. 122=22 Bom.L.R. 1089=A.I.R. 1920 Bom. 307 (D.B.).

——S. 11—Difference between section 11 and Limitation Act (IX of 1908), Art. 14.

The analogy of the authorities under Art. 14, Limitation Act, cannot be applied to S. 11, Bombay Revenue Jurisdiction Act. The Limitation Act deals with the limitation of the period for bringing a suit. Section 11 refers to the bar to the institution of a suit if no appeals had been preferred to the higher revenue authority. A.I.R. (Vol. 29) 1942 Bom. 161=44 Bom.L.R. 295 =I.L.R. (1942) Bom. 357=201 Ind. Cas. 420.

——S. 12—Object and scope.

Section 12 is enacted to meet a situation which arises when the bar of S. 4 prevents the different questions of law from being decided judicially in the ordinary way. A.I.R. (Vol. 32) 1945 Bom. 310=47 Bom.L.R. 214.

——Ss. 12 and 4—Reference to High Court—Claim against Government jurisdiction as to which is extended by S. 4.

A dispute arose between Shri Bala Maharaj, as claimant to the lands, the title to which was in controversy and the first respondent, Shri Jagannath Maharaj, as to which of them was the validly adopted son of the late Baba Maharaj, the original grantor. Jagannath, who was then a minor, brought a suit in the Court of the First Class Subordinate Judge of Poona against Bala, who claimed to be the properly adopted son, to establish his own title. The special purpose of the suit was to have it determined that Jagannath had been validly adopted by Baba's widow, and that it was consequently impossible for her to make, as she had endeavoured to do, a second adoption of Bala less than two months later. A point relied on by the latter in his written statement was that the approval of His Highness the Maharajah of Kolhapur was necessary to such an adoption and that such approval not having been given, the earlier adoption was void. In July, 1906, the Subordinate Judge decided in favour of Jagannath, holding that he had been validly adopted as the son of Baba. It was held, as consequence, that no title or interest in the property of Baba had passed to Bala, and he was restrained by injunction from interfering with Baba's property. The High Court at Bombay reversed this but the Privy Council, differing, restored the judgment of the Subordinate Judge. To these proceedings the Maharajah of Kolhapur, who was no party to them, finally took exception, and he and Bala made representations to the Government of Bombay to the effect that, as the adoption of Jagannath had not received the approval of His Highness, the adoption could have conferred no title to the pro-

perty of Baba, and that it must go to Bala, whose adoption the Maharajah had approved. The Bombay Government thereupon referred the point raised by this claim to the High Court under S. 12 of the Bombay Revenue Jurisdiction Act of 1876. On the contention that the Government had no power to refer the question to the High Court: **Held**, the Maharajah of Kolhapur had himself a claim coming within the language of the Act. He was seeking to have it declared that the lands in question were not subject to the Summary Settlement and should therefore go to Bala, whose adoption he had sanctioned. There was accordingly a claim against the Government, jurisdiction as to which under the Act of 1876 was excluded by S. 4, this claim being that the lands were held under treaty or as **Saranjam** or on other political tenure and as the Maharajah's position and rights on the question of adoption were not affected by the result of the proceedings which were disposed of by the decision of the Privy Council, for to these proceedings he had not been a party, the real question is whether power to answer the question referred to by the Government did not come to the High Court because the case was one of the cases excluded by S. 4. The claim in question was one of those excluded by S. 4 and was therefore referable to the High Court. 28 C.W.N. 906=1923 M.W.N. 638=48 Bom. 1=50 I.A. 308=26 Bom.L.R. 252=33 M.L.T. 378=77 Ind. Cas. 100=A.I.R. 1923 P.C. 194.

——S. 12—Reference to High Court—Matter that might not be tried by Civil Court before passing of Act.

The High Court has jurisdiction to hear the matter referred to it by the Government although the matter may be such that before the passing of the Act it could not have been tried or investigated by a Civil Court. 45 Bom. 463=23 Bom. L.R. 161=61 Ind. Cas. 146=A.I.R. 1921 Bom. 107 (F.B.).

——S. 12—Costs of Reference—Taxation—Jurisdiction of High Court.

The last paragraph of S. 12 gives the High Court the jurisdiction not only to say which of the parties should bear the costs of the reference, but also according to what rules the costs of the reference should be taxed and the words 'in each case' imply the jurisdiction of the High Court to give special directions in each case. 45 Bom. 1177=23 Bom.L.R. 189=61 Ind. Cas. 271=A.I.R. 1921 Bom. 71 (F.B.).

BOMBAY SALT ACT (II OF 1890).

——Ss. 3 (o) and 47 (a)—"Removal"—Liability of servant.

The effect of the definition of "removal" in S. 3 (o) is to provide that where it is proved that the person in possession of or removing salt is a servant or agent, then the possession or removal shall be deemed to be that of the master or principal, to the exclusion of liability of the servant or agent and the servant cannot be convicted under S. 47 (a). A.I.R. (Vol. 29) 1942 Bom. 25=43 Bom.L.R. 869=43 Cr.L.J. 369=198 Ind. Cas. 437.

——Ss. 11 and 47—Lease—Condition, not to sub-lease without written permission—Sub-lease without permission is void—Contract Act, S. 23.

The lessee, from the Government, of Salt pans on condition not to sub-let them without written permission cannot do so without such permission, and the sub-lease against the condition of the license is unenforceable at law. 24 Bom.L.R. 111=66 Ind. Cas. 393=46 Bom. 651=A.I.R. 1922 Bom. 78 (D.B.).

——S. 11—Licensee admitting partners but manufacturing salt himself—If contravenes provisions against alienating benefits of the license.

A licensee of salt manufacture cannot be said to contravene the terms of his license whereby he is prohibited from alienating the interest, simply because he admits members of his family and others as partners, who, however, do not actually take part in the manufacture, nor is there any document directly transferring the right of manufacture, to such partners. A.I.R. 1921 P.C. 137.

——S. 11—Sub lease of license—Admission of partners—If amounts to.

Licensee, prohibited from sub-letting his license, may admit has family members and others as partners in the business; such admission of partners does not mean sub lease. 40 Ind. Cas. 805 =19 Bom.L.R. 381=A.I.R. 1917 Bom. 250.

——Ss. 47, 28, 3 (o)—"Removal" meaning—If restricted to removal from salt works.

The two words "removal" and "transportation" are used in S. 47, Bombay Salt Act interchangeably. The word "removal" does not refer only to salt removed from the salt-works of Government under S. 28. A.I.R. (Vol. 29) 1942 Bom. 25=43 Bom.L.R. 869=43 Cr.L.J. 369=198 Ind. Cas. 437.

——S. 47 (a)—Liability of servant. **See** IBID, Ss. 3 (o) and 47 (a). A.I.R. 1942 Bom. 25.

——S. 47—Abetment of offence.

An abetment of an offence under the Salt Act can be punished under S. 117, Penal Code, if the offence falls within the scope of that section. A.I.R. (Vol. 18) 1931 Bom. 140=33 Bom.L.R. 56=32 Cr.L.J. 471=55 Bom. 353=1931 Cr. Cas. 188=130 Ind. Cas. 25.

——S. 47 (a)—Salt—Removal of —Dishonest intention—If necessary.

The provisions of S. 47 (a) of the Bombay Salt Act, 1890, do not in express terms or by necessary implication make intention or knowledge an essential ingredient of the offence. Hence, to support a conviction under the section, it is not necessary to prove dishonest intention on the part of the accused. (1904) 6 Bom.L.R. 93 =28 Bom. 346.

——S. 47 (c) and Criminal Law Amendment Act, S. 17 (1)—Conviction under both for same Act—Legality.

The accused were found with two boxes containing contraband salt and stamped with the name of an association declared unlawful by the Government of Bombay. They were convicted under S. 47 (c) of the Bombay Salt Act of being in possession of contraband salt and also of an offence

under S. 17 (1) of the Criminal Law Amendment Act for assisting the operations of an unlawful association:

Held, that there was only one act and the accused could not be convicted twice under two different enactments for the same Act. A.I.R. (Vol. 18) 1931 Bom. 409=33 Bom.L.R. 648=32 Cr.L.J. 1145=1931 Cr. Cas. 895=134 Ind. Cas. 345.

——Ss. 47 (c), 3 (m)—Possession and transport of contraband salt—Small quantity—Offence

It is illegal to possess, as well as to transport, contraband salt, however small in quantity. (1902) 4 Bom.L.R. 83.

——S. 52—Confiscation — District Magistrate's jurisdiction.

A District Magistrate has no jurisdiction to deal with a question of confiscation under Bombay Salt Act II of 1890. (1902) 4 Bom.L.R. 459.

BOMBAY SCHEDULED DISTRICT ACT (XI OF 1846).

——S. 3—Rules under, R. 44—Whether ultra vires—High Court's jurisdiction.

The rule is not ultra vires. The High Court has power to take cognizance of any case in the petition of a convicted party and if it thinks fit send for the proceedings and make a fresh order. The jurisdiction may be called appellate or revisional. The High Court has jurisdiction to entertain an appeal from a convicted person who has been sentenced by a Court of the Mewas agent to a term not exceeding five years imprisonment. 41 Bom. 657=19 Bom.L.R. 537=41 Ind. Cas. 641=18 Cr.L.J. 817=A.I.R. 1917 Bom. 224 (F.B.).

BOMBAY SECURITIES CONTRACTS CONTROL ACT (VIII OF 1925).

——S. 6—Contract note is not contract for purchase or sale.

Section 6 relates only to contracts for the purchase or sale of securities, and if such contracts are not in accordance with the rules framed under S. 4 of the Act for the regulation of the business of the Native Share and Stock Brokers' Association, those contracts would be void. The contract notes are not contracts of purchase or sale. They are documents giving intimation to the constituent of the contracts of purchase or sale effected by the brokers and for and on account of the constituent. The contract notes are, therefore, not contracts of purchase or sale of securities under Bombay Act VIII of 1925. A.I.R. (Vol. 29) 1942 Bom. 224 44 Bom.L.R. 475=I.L.R. (1942) Bom. 655=202 Ind. Cas. 166.

——R. 176—Applicability—Transaction between principal and broker.

Rule 176 under the Bombay Securities Contacts Control Act, does not apply to transactions between a member of the exchange and a clerk of another member where the relationship is merely that of principal and broker. The Rule only deals with contracts as between principal and principal. A.I.R. (Vol. 20) 1933 Bom. 76=34 Bom.L.R. 1639=142 Ind. Cas. 394.

BOMBAY SHOPS AND ESTABLISHMENTS ACT (XXIV OF 1939).

——S. 4 (1) (a)—Owner and manager.

The owner of a shop cannot be said to be a person occupying a position of management. He is the owner. One of the incidents of ownership is no doubt the right to manage, but one cannot say that an owner is a person occupying a position of management. A.I.R. (Vol. 29) 1942 Bom. 39=43 Bom.L.R. 952=43 Cr.L.J. 321=I.L.R. (1942) Bom. 107=198 Ind. Cas. 226.

——S. 5—"Enactment"—If includes rules framed by Government.

The word "eanctment" in S. 5, Bombay Shops and Establishments Act includes rules made under a statutory power vested in Government. A.I.R. (Vol. 29) 1942 Bom. 220=44 Bom.L.R. 446=43 Cr.L.J. 780=I.L.R. (1942) Bom. 614=201 Ind. Cas. 774.

——S. 5—Applicability—One man shop conducted by owner himself—"Employer"—Meaning of.

Undoubtedly, the word "employer", according to its ordinary meaning in the English language, signifies a person who employs somebody else. But it is competent for the Legislature to enact that in a particular Act the word shall include the owner of a business, whether or no anybody is employed therein; and this is the effect of the definition of 'employer' in S. 2 (5) of the Bombay Shops and Establishments Act, and, therefore, S. 5 of the Act applies to a one-man shop managed by the owner with no employees. A.I.R. (Vol. 29) 1942 Bom. 39=43 Cr.L.J. 321=I.L.R. (1942) Bom. 107=43 Bom.L.R. 952=198 Ind. Cas. 226.

——S. 17 and R. 12 (4)—Applicability—Persons employed by day and not by week or month.

The meaning of S. 17, Bombay Shops and Establishment Act is that all employees, whether employed by the week or more or by the day only, should be entitled to one day's holiday in every week in which they have worked for six days. The definition of "employer" in S. 2, Cl. (5), makes no exception in favour of persons employing labourers on dails terms only. Nor does the definition of "person employed" in clause (13) of S. 2 exclude from the meaning of "person employed" those persons whose employment is on daily terms. There is no exemption in S. 4 of persons employed from day to day. Consequently a person who employs people only on daily terms, is not exempted from complying with the requirements of sub-r. (4) of R. 12 of the Rules made under the Act, in his business premises. A.I.R. (Vol. 29) 1942 Bom. 79=44 Bom.L.R. 50=43 Cr.L.J. 422=198 Ind. Cas. 710.

——Rule 12 (5) and (10)—Applicability.

Sub-rule (5) of R. 12 of the rules framed under the Act does not apply, if there are no employees. Sub-rule (10) of R. 12, however, applies even though the maintenance of a visit-book is not of much consequence in the case of a shop where no persons are employed. A.I.R. (Vol. 29) 1942 Bom. 39=43 Bom.L.R. 952=43 Cr.L.J. 321=I.L.R. (1942) Bom. 107=198 Ind. Cas. 226.

BOMBAY SMALL HOLDERS' RELIEF ACT (VIII OF 1938).

——S. 9 (1)—Payment by one joint tenant—Effect of.

Where one of the joint tenants has paid the rent for the current year and has expressed his willingness to hold the land, he cannot be evicted. Other joint tenant need not express his willingness to hold the land. A.I.R. (Vol. 30) 1943 Bom. 26 =44 Bom.L.R. 847=204 Ind. Cas. 329.

——S. 9 (1)—Payment of rent for current year—Arrears still due—Tenant cannot be evicted.

Where a tenant has paid rent for the current year the omission to pay rent in previous years does not defeat his claim to protection under the Act. A.I.R. (Vol. 30) 1943 Bom. 26=44 Bom. L.R. 847=204 Ind. Cas. 329.

BOMBAY SMOKE NUISANCE ACT (VII of 1912).

——S. 3 (5)—"Owner"—Lessee—Right to plead private contract with landlord in defence to charge of contravention of rule.

There can be no doubt that the definition of the word 'owner' in S. 3 (5) of the Bombay Smoke Nuisance Act includes a lessee. The department is not directly concerned with private agreement between landlord and tenant and a lessee cannot be heard to say that his private contract with the landlord precludes him from strictly complying with the rules under the Act. A.I.R. 1949 Bom. 373=51 Bom.L.R. 573=51 Cr.L.J. 20 (D.B.).

——S. 9 (1)—Rules under, R. 26—Scope—Prosecution for non-compliance—Reasonableness or justice of notice to increase height of chimney—Relevancy of.

When R. 26 of the Smoke Nuisance Rules made under the Bombay Smoke Nuisance Act, says that no smoke shall be emitted from a furnace at a lower altitude than 100 feet from the firing-floor level; it means, strictly speaking that an offence under S. 9 (1) of the Act would be committed whenever smoke is emitted from a furnace at a lower altitude than 100 feet from the firing-floor level unless any of the exceptions apply. But it does not mean that in every case the smoke nuisance department would undertake prosecution. It is within the power of the department to permit the emission of smoke at a lower altitude than 100 feet from the firing floor level by the simple device of not taking any steps in such cases. Where, however, a prosecution is launched, such prosecution is not for non-compliance with a notice issued by the department to raise the height of the chimney to the required height or altitude, but for non-compliance with, or contravention of R. 26. No question at all arises in such a prosecution as to whether the requirements of the notice issued and served upon the accused were reasonable or unreasonable, just or unjust. A.I.R. 1949 Bom. 373=51 Bom.L.R. 573=51 Cr.L.J. 20 (D.B.).

BOMBAY SPECIAL (EMERGENCY) POWERS ACT (XVI OF 1932).

——S. 14—Offence under—Valid order under S. 4—Necessity of.

In order that there should be an offence under S. 14, Bombay Special (Emergency) Powers Act, it is necessary that there should be a valid order under S. 4. A.I.R. (Vol. 20) 1933 Bom. 409= 35 Bom.L.R. 845=57 Bom. 690=35 Cr.L.J. 230 =1933 Cr. Cas. 1173=146 Ind. Cas. 688.

——Ss. 16 and 4 (1)—District Magistrate if can be invested with powers of Governor in Council—Delegation, if can extend throughout the Presidency.

Under S. 16, Bombay Special (Emergency) Powers Act, the Governor in-Council may invest the District Magistrate with the powers of the Governor-in-Council under sub-S. (1) of S. 4 and the Governor-in Council can delegate to the District Magistrate powers extending over the whole of the Presidency. A.I.R. (Vol. 21) 1934 Bom. 464=36 Bom.L.R. 968=36 Cr.L.J. 276=1934 Cr. Cas. 1341=153 Ind. Cas. 40.

——S. 29—Person living in foreign territory—Proceedings under the Act—S. 29, if bars application to High Court to quash proceedings.

Where proceedings are taken under the Bombay Special (Emergency) Powers Act, an Act which applies only to the Bombay Presidency, it is extremely doubtful whether it can be made to apply to a person who is not a resident in Bombay Presidency and not even in British India, but resides in foreign territory.

Section 29 of the Act is no bar to the High Court entertaining a petition for quashing proceedings taken under the Act. A.I.R. (Vol. 20) 1933 Bom. 409 (411)=35 Bom.L.R. 845=57 Bom. 690=35 Cr.L.J. 230=1933 Cr. Cas. 1173 =146 Ind. Cas. 688.

BOMBAY STOCK EXCHANGE.

——Right of member—Bankruptcy of member—Membership, whether vests in Official Assignee—Presidency Towns Insolvency Act (III of 1909), S. 17—Bombay Native Share and Stock Brokers' Association Rules, Rr. 18, 56, 57, 62.

The card of membership of the Bombay Stock Exchange cannot be sold for the benefit of the creditors of the members of the Exchange, on his becoming bankrupt.

Per **Beaumont, C.J.**—A member of the Stock Exchange has got by right of membership of this association, the privilege of going to the Exchange and keeping his seat there and dealing on the Stock Exchange, and that is a privilege which most people believe to be valuable. But there is no power in the member to sell that right. If he makes default the directors of the association can cancel his membership and they can then sell, what is really the right of nomination, to the vacant seat, and they must deal with the proceeds under the rules; but the defaulting member takes no interest in such proceeds.

Obiter.—A man is not entitled to enter into a partnership transaction on terms that his share in

the business is to vest on bankruptcy in the other partners, so as to deprive his creditors of the benefit of that share. A.I.R. (Vol. 18) 1931 Bom. 225=33 Bom.L.R. 39=55 Bom. 623=133 Ind. Cas. 821.

——Rule (c) cannot be read as an express stipulation within S. 121, Contract Act.

Rule (c) of the Bombay Stock Exchange cannot be read as an express stipulation in the sense of S. 121 of the Contract Act because it does not say what S. 121 provides must be said and the rule has nothing to do with the perfection of contracts or the passing of property. It is for quite another purpose. 50 Bom. 360=53 I.A. 92=24 A.L.J. 657=30 C.W.N. 890=28 Bom.L.R. 777=43 C.L.J. 508=94 Ind. Cas. 824=1926 M.W.N. 499 =A.I.R. 1926 P.C. 38=51 M.L.J. 1 (P.C.).

BOMBAY SUIT ACT (XI OF 1890).

——Offence by number of persons exceeding ten—Abetment of—Conviction under S. 117 of the Penal Code—Legality. (1931) 33 Bom.L.R. 56.

BOMBAY SUMMARY SETTLEMENT ACT (II OF 1863).

——Dharmadaya Inam — Application of—Summary Settlement—Validity.

The British Government granted by a Sanad some villages in the Taluqs Chikodi and Manowlee as "Inam Dharmadaya" to one **B** to be enjoyed from son to grandson &c., from generation to generation. Afterwards the British Government ceded the Talukas of Chikodi and Manowlee to the Maharajah of Kolhapur. In 1821, the Maharaja granted some more villages in the said Talukas to **B**. In 1826, a treaty was concluded between the British Government and the Maharaja and one of the articles of that treaty provided that the Maharaja of Kolhapur promised to continue to **B** his lands and rights, and the British Government guaranteed enjoyment of those villages to the grantee for life. The Maharaja did not keep his promise not to molest **B** and the British Government made a further treaty in 1827 with the Maharaja, which provided that the latter should give back to the former the said Talukas in the same state in which he received them; and that as the Maharajah had never ceased to annoy and distress **B** by seizing his villages and other property, it was thought necessary to extend the guarantee of the British Government to **B**'s descendants and the Maharajah accordingly engaged never to molest them. On the introduction of the Summary Settlement in 1863 the Government was of opinion that no **prima facie** case had been made out for excluding **B**'s lands from the benefit of the Summary Settlement on the ground of their being held on political tenure, and therefore the summary settlement was applied to his lands with his consent. On the question whether the lands so granted were excepted from the provisions of the Bombay Summary Settlement Act, 1863.

Held, that the lands in question were not held under a treaty at the time of Summary Settlement and as the grant was described in the Sanad as Dharmadaya Inam, and there was nothing to show that it was a Jaghir or held under political tenure, the application of the Summary Settlement to these lands was valid and legal. 45 Bom. 463=23 Bom. L.R. 161=61 Ind. Cas. 146=A.I.R. 1921 Bom. 107 (F.B.).

——Inam lands settled under, whether subject to Vatan Act of 1874.

Settlements effected under Act II of 1863 prevent inam lands from being subject to the provisions of the Vatan Act of 1874 because holders of those settlements are no longer hereditary officers holding for service. 38 Bom. 272=23 Ind. Cas. 221=16 Bom.L.R. 164=A.I.R. 1914 Bom. 181 (D.B.).

——'Lands held under a treaty"—Meaning of.

The expression "lands held under a treaty" used in the Summary Settlement Act refers to cases in which the root of the title is a treaty. In order to hold that land is held under a treaty, it must be shown either that the original title was under a term of a treaty which remained in force or that the treaty of cession guaranteed title. A.I.R. (Vol. 19) 1932 Bom. 15=33 Bom. L. R. 1418=136 Ind. Cas. 161.

——Ss. 4 and 16-B—Sanad issued under—Division of village revenue between inamdar and Government in certain proportion—Inamdar cannot exclusively claim income from waste pasture land in the village.

The plaintiff was the Inamdar of a village held as a sharakati inam. This village comprised two survey numbers described as waste pasture land. Plaintiff sued the Secretary of State for declaration that these numbers were the properties of the plaintiff and not liable to a contribution to Government in respect of the income of these lands. There was a settlement with regard to this inam village after the decision of the Inam Commissioner. The Inam Commissioner decreed that only the jahagir ammal of the mauja calculated at Rs. 55-11-0 per cent. of the net revenue of the village, after deducting the rights of hakdars and ancient inamdars and authorized village expenses to be continued in inam, and that the remaining ammals now held by the claimant were to be resumed as khalsa. A sanad was issued under Ss. 4 and 16-B of Bombay Act II of 1863 in 1893. The first condition of the sanad was that "the said holders.....shall pay to the same a fixed sum of Rs. 22-14-0 as a nazarana in addition to any judi or other tax heretofore payable." It was not shown that these survey numbers were held by the plaintiff otherwise than as Inamdar. They were entered as "Government waste" and in the record-of-rights these lands were not entered in the name of the plaintiff but were described as forming part of kuran. According to the decision of the Inam Commissioner, the plaintiff was entitled to Rs. 55-11-0 per cent. of the revenue of the village and the Government were entitled to the remaining Rs. 44-5-0 per cent.

Held, that plaintiff's rights to the two survey numbers are restricted to his rights as Inamdar. The decision of the Inam Commissioner was final.

The sanad was issued under S. 4 of Bombay Act II of 1863, and the amount of judi mentioned as being payable to Government was not a fixed amount. The decision of the Inam Commissioner was not in any way modified by the sanad which had been granted to the plaintiff in the year 1863 and the plaintiff was not entitled to exclude Government from participation in the income of these numbers. 29 Bom.L.R. 909=103 Ind. Cas. 249=A.I.R. 1927 Bom. 462 (D.B.).

——Ss. 5 (3) and (16) (g)—Joint family owning interest in jahagir village—Partition of share and separate enjoyment of shares by co-sharers—If "transfer" by manager to others—"Notice of transfer"—Necessity.

Where a joint Hindu family consisting of brothers hold an interest in a **jahagir** village, comprising a right to receive a sum of money out of the revenues of that village, the eldest member's name being entered in the inam register as the holder of the inam village, and subsequently disputes between them as regards division of ancestral property are referred to arbitration and an award is made which is made a decree of Court, as a result of which the interest in the inam village, is also divided, all the brothers become entitled to receive a portion of the amount each as his separate share on partition, and the names of the divided brothers are also entered in the revenue records, such partition does not amount to a "transfer" of the inam village by the eldest to the youngest brothers within the meaning of S. 16 (g) of the Bombay Summary Settlement Act II of 1863. It cannot be said that by the partition effect under the award decree something was conveyed to the younger brothers who were not entitled to it before the decree. Nor is the eldest brother a "transferor" and the younger brothers transferees within the meaning of S. 5 (3) so as to impose on the former the duty of giving notice to the Collector or Chief Revenue authority as required by S. 5 (3) and render him liable to a penalty in case of failure to give notice of the "transfer". A.I.R. 1949 Bom. 248=51 Bom.L.R. 238 (D.B.).

——S. 12—Desai Inam—Summary settlement—Alienation by will—Validity.

Where a desai dying without co-parceners disposed by will of his lands which had been the subject of a summary settlement and payment of quit-rent. the alienation is valid. 43 Bom. 376=(1919) M.W.N. 254=23 C.W.N. 753=21 Bom. L.R. 1148=52 Ind. Cas. 897=45 I.A. 15=A.I.R. 1918 P.C. 135 (P.C.).

——S. 16—Government to determine whether particular grant is inam or only saranjam.

The mere use of wide expressions such as the grant of land "for ever" or "from generation to generation" does not prevent the grant being one of saranjam. Nor again is the use of the word "inam" instead of "saranjam" conclusive. It is for Government to determine in a particular case whether a grant is one of saranjam only. 53 Bom, 12=30 Bom.L.R. 1463=115 Ind. Cas. 369=A.I.R. 1929 Bom. 14 (D.B.).

——S. 16—Inam grants—Determination of the nature of tenure is one for Government.

Where the grant made was **Inam Dharmadaya** and was to be hereditary: **Held,** the signification of such a grant is that it was made on grounds of religion, and not political grounds. The mere fact that in occasional correspondence the grant is referred to as **"jagir"** or **"saranjam"**, **i.e.**, political, cannot derogate from the effect of the language of the grant itself. The question whether the tenure was political was one which was for determination by the Government under the provisions of the interpretation of S. 16 of the Summary Settlement Act (II of 1863) and that, by treating the title as one to which the Act applied, the Government must determine that the tenure was not political. 1923 M.W.N. 638=48 Bom. 1=50 I.A. 308=26 Bom. L.R. 252=33 M.L.T. 378=28 C.W.N. 906=77 Ind. Cas. 100=A.I.R. 1923 P.C. 194.

BOMBAY SUMMARY SETTLEMENT ACT (VII OF 1863).

——Sanad granting in perpetuity a percentage of Government assessment—Act of Government in substituting fixed annual sum—Whether ultra vires—Practice—Privy Council—New point, if can be raised—Limitation for suit—Limitation Act (IX of 1908), Sch. I, Arts. 14, 131.

The ancestor of the plaintiff was granted by a sanad by the Maharajah of Satara in 1704, the right in perpetuity to collect the revenue of two Divisions, **K** and **S**. In regard to **K**, the remuneration was fixed at 2 per cent. of the Government assessment. In regard to **S**, though the percentage was not expressly mentioned in the grant, the rights were treated as on the same footing as those in **K**. After the British Government acquired the territory in 1817, for many years, the plaintiff's ancestors continued in enjoyment of their hereditary offices and emoluments. In 1887, a commutation or non-service settlement was enforced compulsorily, with the result, as regards the plaintiff or his predecessor-in-title, that he only became entitled to receive 1 rupee 5 annas per cent. of the Government assessment. Subsequently, the Government proceeded to take the average amount paid to the district hereditary officers over a period of five years, 1882-87, and to fix the resulting amount (less 5½ annas per rupee) as an annual sum to be paid, irrespective of what the amount of the Government assessment might be from time to time. In the case of the plaintiff, the fixed annual sum was Rs. 642. The then Commissioner agreed with the Collector and directed that the average of five years' receipts should be taken as the basis of fixing the future payments of the district hereditary officers which should be declared permanent. The plaintiff filed a suit for a declaration of his rights, and payment of a sum calculated upon the footing that he was entitled to receive a percentage of the amount of the Government assessment for the time being:

Held, (1) that substitution of the fixed sum for the percentage payment was an act of the Government;

(2) that the defendant could not raise a defence

that irrespective of the provisions of Act VII of 1863, and the rules thereunder, the Government were entitled to dispense with the services of the hereditary officers, that with the cesser of the services, the right to any payment ceased that, therefore, the Government were not compellable to make any payment to the plaintiff, that any payments to plaintiff were **ex gratia** payments and that accordingly he had no cause of action, as they were not raised in the written statement and not urged in any of the Courts below;

(3) that the percentage rights conferred by the sanad must be calculated by reference to the Government assessment for the time being;

(4) that the rules framed under the Bombay Act VII of 1863 did not apply to shares of revenues held for service;

(5) that the case was governed by Art. 131, Limitation Act and not by Art. 14, as the plaintiff was not seeking to set aside any act or order;

(6) that the case decided only the rights and obligations of the plaintiff and the Government but no question as between the Government and any other person. A.I.R. (Vol. 21) 1934 P.C. 108 =1934 M.W.N. 437=66 M.L.J. 614=39 M.L.W. 748=1934 A.L.J. 438=38 C.W.N. 568=59 C.L.J 282=36 Bom.L.R. 551=58 Bom. 306=61 I.A. 190=3 A.W.R. 663=148 Ind. Cas. 796 (P.C.).

——Applicability—Payments to be made by Government to the subject.

The Act applies only to payments to be made by the subject to the Government and has no reference to payments to be made by Government to the subject. A.I.R. (Vol. 19) 1932 Bom. 319 =34 Bom.L.R. 129=139 Ind. Cas. 796.

——Land granted to a mosque on annual quit rent —Alienation of land to strangers—Assessment in full on land in the hands of strangers—If justified.

Certain land which was granted to a mosque was continued at the time of the Survey Settlement in 1879 on payment to Government of an annual quit rent under a sanad. Sixty years before suit, the land was alienated unlawfully by the manager of a mosque to a stranger from whom it was purchased by the plaintiff in 1900, when the Government levied the full assessment on the land. It was held, by **Shah and Hayward, JJ.—(Heaton, J. dissenting)** that the provisions of the Act and the terms of the Sanad pointed to the conclusion that the condition that the land must continue to be the property of the mosque in order that the holder for the time being might have the benefit of the exemption from assessment allowed by the Sanad could not be implied; and that the Government did not get any right under the Sanad to levy the full assessment even when the property ceased to be the endowed property otherwise than by lawful alienation. 43 Bom. 583=51 Ind. Cas. 910=21 Bom.L.R. 668=A. I. R. 1919 Bom. 17 (F.B.).

——S. 2—Sanad—Validity of—Absence of inamdar's signature on sanad.

What is contemplated under S. 2 is the issue of a sanad as the final authorization of the settlement, and where there has been such an issue, the mere fact that there are no signatures of the inamdars on the sanad does not affect the fact that sanads have been issued and have been acted upon. 50 Bom. 698=28 Bom.L.R. 1308=98 Ind. Cas. 933 =A.I.R. 1927 Bom. 40 (D.B.).

——S. 2 (3)—Saranjamdar has no absolute estate.

The Saranjamdar under a Saranjam held on terms of the nature mentioned in R. 10 of Sch. B to Act XI of 1852 or Cl. 3 (2) of S. 2 of Bombay Act VII of 1863 has not an absolute estate. 45 Bom. 694, Dissented from. 50 Bom. 195=94 Ind. Cas. 737=28 Bom.L.R. 433=A.I.R. 1926 Bom. 316 (D.B.).

——S. 3—Application and Scope.

Section 3, Summary Settlement Act, not only does not apply to a case of voluntary relinquishment but, further, it cannot be read as inferring that where the management of part (if indeed that is permissible) of a village is resumed, the legislature intended to exempt that part from payment of land revenue. A.I.R. 1930 Bom. 497.

——S. 7—Record of land as 'private' land of temple servants—Subsequent alienation by servant—Cause of action for declaratory suit—Limitation Act, Art. 120.

The temple lands in possession of the temple servants were recorded in the Sanad under Summary Settlements Act, S. 7 as their private lands (Jat-Inam) and one of the servants alienated some portion of the lands in 1903 but the vendee did not take possession till 1916. Plaintiff sued on behalf of the managing committee of Gaukars for a declaration that the lands belonged to the Devasthan. *Held* the cause of action arose within the meaning of Art. 120 only when the defendant attempted to alienate the lands and not by the mere grant of Sanad. But the article did not apply in the case as plaintiff claimed possession. 24 Bom.L.R. 902=75 Ind. Cas. 617=A.I.R. 1922 Bom. 438 (D.B.).

——S. 7—Bar to suit—Property described as private in sanad—Suit to establish it as temple property is not barred.

Where certain temple lands in the possession of the temple servants (defendants) were described as their private property (jat-Inam) in a Sanad issued by Government in 1865 under the provisions of the Summary Settlement Act, 1863.

Held that under the proviso to S. 7 of the Summary Settlement Act 1863 the Sanad granted to the defendants (the temple servants) did not negative the right of the plaintiff to establish if he could, that the lands were really Devasthanam lands and not the private property of the defendants. 24 Bom.L.R. 902=75 Ind. Cas. 617=A.I.R. 1922 Bom. 438 (D.B.).

——S. 32—It is for Government to determine whether particular grant is inam or only saranjam.

The mere use of wide expressions such as the grant of land "for ever" or "from generation to generation" does not prevent the grant being one of saranjam. Nor again is the use of the word "inam" instead of "saranjam" conclusive. It is for Government to determine in a particular case whether a grant is one of saranjam anly. 30 Bom.L.R. 1463 =53 Bom. 12=115 Ind. Cas. 369=A.I.R. 1929 Bom. 14 (D.B.).

BOMBAY SURVEY AND SETTLEMENT ACT (I OF 1865).

——Ss. 25, 28, 37 and 38—Settlement sanctioned and period fixed—Khot's position.

There is a distinction between "Fixing" a period within which a sanctioned settlement is to be continued and "sanctioning" a settlement which simply accepts the rates proposed by the Settlement Officer. So where a settlement has been sanctioned and a period fixed, the *Khot* is to levy rents at the sanctioned rate till the period comes to an end and even after it; if no new settlement is introduced, the settlement must be deemed to continue. 36 Bom. 290=14 Ind. Cas. 434=14 Bom.L.R. 77 (D.B.).

——Ss. 37 and 38—Terms of Kabuliat to Government must conform to custom.

A Khot's intetest in the khoti village is limited, not absolute. He possesses in some measure a proprietary right. He is an occupant with all rights and liabilities affecting such a status. The Khot has to secure to Government the payment of the village revenue while the village lands which he has to manage in accordance with the restrictions mentioned in the *kabuliat* fall under three distinct items *viz.*—(1) Dharekari lands the tenants of which have a transferable and heritable right paying Dhara alone to the Khot; (2) Khot nisbat lands which are in the hands of permanent occupancy tenants or tenants with less permanent right paying Fayda to the Khot and the Government assessment and (3) Khoti Khasgi lands private lands in the possession of the Khot of which he can make such use as he pleases. With regard to Khot nisbat lands the right of the Khot to exact rent or Fayda in addition to the assessment is limited by the Kabuliat which is in accordance with the decision of the Government Officer fixing the demand of the Khot on his tenants under S. 38, Bombay Act I of 1865. Khots in the district of Kolaba are hereditary farmers of the revenue and are entitled to hold their villages as Khoti on their entering every year into the cutomary Kabuliats. If the Government wish to impose upon the Khot a new form of Kabuliat they must not infringe the customary rights of the Khots except as altered by S. 38 of Bombay Act I of 1865. A Khot of a village in the Kolaba District, at first used to pass annual Kabuliats to Government in the form which was then in use. Government offered in 1915-16 to the plaintiff, a Kabuliat in another form which contained several new clauses. Clause 6 empowered a permanent tenant of Khot nisbat land to compel the Khot either to consent to a transfer or to take up the land himself. Clause 8 required the Khot to keep the land at the disposal of a Dharekari who had deserted. Clause 21 worded ambiguously. As the Khot objected to pass the Kabuliat in the new form the Government attached the Khoti village.

Held, that the Khot was justified in refusing to sign a Kabuliat which contained any one of such objectionable clauses, *viz.*, 6 and 8 which were in infringement of the customary right of the Khot and that the attachment of the village for refusing such a Kabuliat was, therefore, illegal and the Khot was entitled to mesne profits and damages. 48 Bom. 599=26 Bom.L.R. 754=83 Ind. Cas. 370=A.I.R. 1925 Bom. 44 (D.B.).

——S. 38—Kabuliyat taken by Government from managing khot—Tenants cannot resist its terms so long as they do not get the terms changed.

Once Government have taken a *kabuliyat* in a particular form from the managing *khot*, he becomes entitled to recover the *faida* in accordance with the terms of the *kabuliyat*. If any occupant is dissatisfied with the terms of the *kabuliyat*, it is for him to take such steps as he may be advised against Government or approach Government to get the *kabuliyat* changed, but until that is done, the managing *khot* cannot go beyond the terms of the *kabuliyat*, so long as it stands nor can the tenants resist the terms of the *kabuliyat*. A.I.R. (Vol. 25) 1938 Bom. 329 =40 Bom.L.R. 407=176 Ind. Cas. 245.

BOMBAY TENANCY ACT (XXIX OF 1939).

——S. 2-A (as amended in 1946)—"Lawfully"—Meaning.

The word "lawfully" has to be interpreted in its ordinary meaning and cannot be given any other interpretation. The intention of the Legislature as indicated in S. 2-A is that where the person who was in possession of the land has shown that he was in lawful possession, he is entitled to have the determination of the question as to whether he was or was not a tenant made by the Mamlatdar or the Collector or the Provincial Government and not by the Civil Courts. What the Legislature as a matter of fact intended was that once the person who claimed to be a tenant showed that he was in lawful possession of the land whether he was in possession in the character of a tenant should be determined by the Mamlatdar, a Collector or the Provincial Government, and not by the Civil Courts. There was no other intention. 52 Bom.L.R. 123=A.I.R. 1950 Bom. 236 (D.B.).

——S. 17—Retrospective operation.

S. 17 of the Bombay Tenancy Act is not retrospective in operation and does not apply to cases in which a decree has been obtained by a landlord before the Act was enacted, even if it be assumed that the word "tenant" in S. 17 may sometimes denote an ex-tenant who is given certain privileges. 52 Bom. L. R. 123=A.I.R. 1950 Bom. 236 (D.B.).

——S. 24—Revision — Jurisdiction — Order by Collector in appeal—Jurisdiction of High Court to revise. *See* C. P. Code, S. 115. 49 Bom.L.R. 658.

——S. 24 (1-A)—Retrospective operation.

S. 24 (1-A) of Bombay Act XXIX of 1939, is not retrospective; there are no clear words used in the section which show a plain intention to give the section a retrospective operation, much less such a retrospective operation as to affect rights vested not only before an action is instituted, not only while the action was pending, not even while as a result of the decree obtained an application for execution was made but as a matter of fact after an order was obtained in execution that a party shall immediately be placed in possession of the property. Strong and distinct words would be necessary to alter or affect the rights vested under such an order after decree in a suit. 52 Bom.L.R. 123=A.I.R. 1950 Bom. 236 (D.B.).

BOMBAY TITLES TO RENT-FREE ESTATES ACT (XI OF 1852).

——Neither land nor interest of de facto qazi can be sold in execution.

The land which is permanently continued as service emolument appertaining to the office of *qazi* cannot be sold in execution of a decree against a *de facto qazi* who is performing service as such. The land is the *watan* official emolument; it is to be permanently continued and the *watan* which in the context can only mean the land cannot be transferred. A.I.R. (Vol. 23) 1936 Bom. 227=38 Bom.L.R. 221 =60 Bom. 516=163 Ind. Cas. 305.

——A suit for refund of contribution under Act III of 1874 is barred unless exempted by Act XI of 1852.

Land revenue in S. 3 is defined as including "any cess or rate authorized by Government under the provision of any law for the time being then in force" and the suit for a refund of the contribution levied under Act III of 1874 would therefore be barred unless exemption is claimed by virtue of an adjudication under Act XI of 1852 which declares the particular property to be exempt. 54 I.A. 380=51 Bom. 830=29 Bom.L.R. 1484=46 C.L.J. 393 =39 M. L. T. 527=105 Ind. Cas. 694=A. I. R. 1927 P. C. 217=53 M. L. J. 475 (P. C.).

——Rules framed under—The Shet Sanadi discharged by Government without any fault on his part—The lands continued to him on payment of full survey assessment—The new Shet Sanadi remunerated—The Shet Sanadi lands converted into ryotwari holding—Resumption of lands by Government.

In 1865 a Shet Sanadi on being discharged without fault from his office by Government was under the rules then in force, allowed to remain in possession of the Shet Sanadi lands but full survey assessment was imposed therein. The defendant No. 2 who was appointed the new Shet Sanadi was remunerated from the extra assessment levied upon the Shet Sanadi lands. In 1905, the Government resumed the lands and handed them over to the defendant No. 2. *Held* (1) that the order passed and the action taken, under the rule by the Government, had in law the effect of converting the lands from a Shet Sanadi Vatan into a ryotwatri holding and investing the holder of the land with the rights of an ordinary occupant entitled to it so long as he paid the survey assessment. (2) That the defendant No. 2 had held the office of Shet Sanadi independently of the lands in dispute; and all that was done in 1865 was his remuneration for that service in a way increased and the enhanced amount was made payable not from the lands in dispute but out of the assessment payable to Government by the occupant. (3) That that was an arrangement between defendant No. 2 and Government which could not prejudice the rights of the proceedings adopted by the Collector in 1905 were on the supposition that what was done in 1865 had the effect of continuing the land in dispute as one reserved for Shet Sanadi service but that was not its effect and the proceedings in *question were ultra vires* of the Collector. (1910) 34 B. 560=12 Bom. L.R. 577=7 Ind. Cas. 661.

——Sch. B, R. 8—Power of Government.

Under proviso. 5 of rule 8 the Government can regulate by rules the question of emoluments pertaining to service performed for the State. But it cannot frame rules for resumption of grants given as emoluments of any hereditary office such as Kazis, Village Joshis etc. Unless such powers can be found in any statutory provision of a rule having the same force the Collector cannot disturb the possession of any third parties who may have acquired rights to lands appertaining to such office. 48 Bom. 51 =25 Bom.L.R. 1160=82 Ind. Cas. 577=A.I.R. 1924 Bom. 273 (*b*) (D.B.).

——Sch. B, R. 10—Saranjam—Saranjamdar has no absolute estate.

The Saranjamdar under a Saranjam held on terms of the nature mentioned in R. 10 of Sch. B to Act XI of 1852 or Cl. 3 (2) of S. 2 of Bombay Act VII of 1863 has not an absolute estate. 45 Bom. 694. Dissented from. 50 Bom. 195=28 Bom.L.R. 433= 94 Ind. Cas. 737=A.I.R. 1926 Bom. 316 (*b*) (D.B.).

BOMBAY TODA GIRAS ALLOWANCE ACT (VII OF 1887).

——"Heir"—Adopted son.

An adopted son is an "heir" within the meaning of S. 3 of the Toda Giras Allowance Act. 49 Bom. L.R. 318=A.I.R. 1947 Bom. 451 (D.B.).

——S. 3—Toda giras allowance—Mode of devolution.

Under S. 3 of the Toda Giras Allowance Act, 1887, a *toda giras* allowance is continuable to the lineal male heirs in male descent of the first recipient and on failure of such heirs to the lineal male heirs in male descent of a brother of the first recipient and not to the eldest son and the burden of proving that the family is governed by the rule of primogeniture and that the above rule is not applicable is on him who alleges it.

Where the plaintiff claims an entire allowance, if it is found on the law and facts applicable to the case that he is entitled to a share he can be given relief to this extent without referring him to another suit. A.I.R. (Vol. 18) 1931 Bom. 473=33 Bom.L.R. 783 =133 Ind. Cas. 851.

——S. 5 (1) (a)—"Alienate"—Disposition by will.

The word "alienate" in S. 5 (1) (*a*) of the Toda Giras Allowance Act does not exclude a devise by will. 49 Bom.L.R. 318=A.I.R. 1947 Bom. 451 (D.B.).

BOMBAY TOOLS ON ROADS AND BRIDGES ACT (III OF 1875).

The right of the Government to levy tolls under the Act is neither a benefit arising out of nor an incident of the ownership of Government in the soil of the road. It is therefore not immovable property. A.I.R. (Vol. 27) 1940 Bom. 369=42 Bom.L.R. 750=I.L.R. (1941) Bom. 71=191 Ind. Cas. 806.

——Motor driver evading toll by not stopping at toll though signalled by contractor—Obstruction of public servant in discharge of his duty, if committed.

Where a licensed driver of a bus drove his motor

bus through a checking toll bar on six days without stopping to pay toll, although the toll Collector signalled to him to do so:

Held, that he prevented the toll contractor or his servant from collecting the dues under the provisions of the Tolls on Roads and Bridges Act, and thus obstructed him in the discharge of his duty. A.I.R. (Vol. 22) 1935 Bom. 24=36 Bom.L.R. 1124=36 Cr.L.J. 516=1935 Cr. Cas. 25 (2)=154 Ind. Cas. 556.

BOMBAY TOWN PLANNING ACT (I OF 1915).

——S. 15—Building—Screen of corrugated iron sheets.

A screen of corrugated iron sheets is a wall and therefore, a building for purposes of S. 15. A.I.R. (Vol. 31) 1944 Bom. 290=46 Bom.L.R. 477=I.L.R. (1944) Bom. 445=46 Cr.L.J. 183=217 Ind. Cas. 34.

BOMBAY (TOWN) TOBACCO DUTY ACT (IV OF 1857).

——S. 11—(As amended by Act VI of 1938)—Rules under—Licence Form A—Words "rules framed thereunder" in Form A refer only to existing rules—Licence for particular year in form A—Government cannot alter conditions of that licence during currency of the year.

The words "and the rules framed thereunder" in Licence Form A, mean rules which have been framed, and the expression does not cover rules not at present in existence, but which may be framed at a future time. Hence, when the licence was granted for the year 1941 in Form A and was paid for, the Government is not entitled to alter the terms of that licence during the currency of the year 1941. Consequently, the alteration of the rules framed under the Act made by the Government on May 13, 1941, cannot affect the licence which was granted for the year 1941. A.I.R. (Vol. 29) 1942 Bom. 220=44 Bom.L.R. 446=43 Cr.L.J. 780=I.L.R. (1942) Bom. 614=201 Ind. Cas. 774.

——S. 18—Confiscation of vehicle—Notice to owner is necessary.

The discretion given to Court to confiscate the vehicle under S. 18 can only be properly used after hearing the owner, and ascertaining whether he had given his consent or knew the use to which the vehicle was put. The discertion has to be exercised upon discovery of the part which the owner has taken in the use of his conveyance; and the Court is given the option to mitigate the rigour of confiscation by commuting the same to fine. That is an additional reason why the owner should be heard. The order should not be passed without giving notice to the owner. From the fact that the servant has consented to the illegal use and has been convicted it does not follow that notice can be dispensed with as the act of the servant might be outside his employment. A.I.R. (Vol. 24) 1937 Bom. 10=38 Bom.L.R. 961=38 Cr.L.J. 224=166 Ind. Cas. 562.

BOMBAY TRAMWAYS ACT (I OF 1874).

——Ss. 24, 25 and 26—Bye-law No. 27—Transfer Regulation No. 10—Regulating the travelling—Magistrate, it can levy penalty.

Section 24 of the Bombay Tramways Act authorises the Tramway Company to make regulations for regulating the travelling in or upon any carriage belonging to them; S. 25 provides that any person offending against any bye-law made under the provisions of the next preceding section shall forfeit for every offence any sum not exceeding twenty-five rupees, to be imposed in such bye-laws as a penalty for such offence. Section 26 provides that all penalties under the Act or under any bye-law made in pursuance of the Act may be recovered and enforced before a Police Magistrate of Bombay by a summary proceeding, and then the section provides for the issue of a warrant by the Magistrate for recovery of the amount. Certain bye-laws are framed under the Act. Bye-law No. 27 provides that any person offending against or committing a breach of any of the bye-laws or regulations of the company shall be liable for every such offence or breach to a penalty not exceeding Rs. 25. Then certain transfer regulations are also framed. Transfer Regulation No. 10 provides that a passenger when changing cars at a transfer station shall not continue his journey from that station in a car going from such station over the same portion of line as the car from which he has transferred except when such a journey is scheduled in the section tables.

The applicant took his seat in a tram car belonging to Tramway Company and was directed by punch of his ticket to change at another station which the applicant did. It was, however, pointed out to him that he had taken a wrong car and was asked to change the car. The applicant refused to change the car and also pay for another ticket which was issued to him. Action was taken against him by the Company for breach of transfer Regulation No. 10 and the Magistrate was asked to impose such penalty he thought fit. He was convicted by the Magistrate of breach of bye-law No. 27 to pay a penalty of Rs. 10.

Held, that provisions that a passenger shall change at a particular point and shall travel, or shall not travel, by a particular car are clearly regulations as to the travelling in or upon any carriage belonging to the company. Regulation No. 10 was, therefore, within the competence of the company.

It is for the bye-laws, and not for the Magistrate to impose the fine and the duty of the Magistrate is to recover the penalty so imposed. A.I.R. (Vol. 21) 1934 Bom. 205=36 Bom.L.R. 369=1934 Cr. Cas. 656=35 Cr.L.J. 1439 (2)=151 Ind. Cas. 875.

——Ss. 24 and 25—Bye-law not sanctioned—Breach—No offence.

Where notices were issued by the Tramway Company in 1917 allowing three persons to travel on the rear platform and in 1919 forbidding the travelling on the rear platform both without the sanction of the Governor-in-Council, *held*, the notices so far as they modified the Bye-law No. 6 had no

effect in law and a breach thereof was held to be no offence. 54 Ind. Cas. 488=21 Bom.L.R. 1108=A.I.R. 1920 Bom. 211 (D.B.).

——Ss. 29 and 30—'Purchase,' meaning of—When complete.

For the purpose of ascertaining the value of the stocks, etc., the date of purchase is the date when the arbitrators and umpire declare the value of the property to be sold. (1902) 4 Bom.L.R. 384.

——S. 30—Purchase by Corporation on behalf of a third person—Validity.

The notice contemplated by S. 30 of the Bombay Tramways Act is not invalid solely by the fact that the Corporation in exercising their right of purchase are not acting for themselves but for and on behalf of a third person. There is nothing in the Tramways Act which expressly or impliedly prohibits such a transaction; nothing to show that if the Corporation exercise the power conferred upon them by S. 30 and acquire the tramways, they are bound to keep them in their own hands and to work them themselves. (1904) 6 Bom.L.R. 739=28 Bom. 502=9 C.W.N. 337=31 I.A. 169 (P.C.).

——S. 30—Right of purchase—'Similar,'—'Purchase'—Meaning of.

S. 30 of the Bombay Tramways Act, 1874, provides: "The said Municipal Corporation of the City of Bombay shall have the right of purchasing the said Tramway * * * * * after the expiration of twenty-one years, from the 12th day of March 1873, upon declaring its intention so to do within six months after the expiration of the said twenty-one years, and shall have a renewed right of purchase at the end of every seven years after the expiration of the said twenty-one years upon similar notice being given." In March 1901, one of the period of seven years expired and the Corporation gave to the Tramway Company notice of an intention to purchase. The Municipality served for this purpose three notices, the first two of which were served on the 11th and 12th idem respectively, while the third, though dated the 13th, was not served till the 14th March. Respecting these notices the Tramway Company contended that the notices on the 11th and 12th were premature, because the words "at the end of seven years" related to not only the right of purchase, but also the time at which notice was to be given: and the notice served on the 14th was too late, because it was not given in as short a time after the end of the year as was possible with exertion on the part of the Corporation: *Held*,—That the word 'similar' in S. 30 of the Bombay Tramways Act had reference not only to the terms of the notice, but also prescribed the time within which notice was to be given: thus the Corporation had six months from the expiration of the period of seven years within which to give notice of its intention, and the notice served on the 14th March was served within time. Per *Jenkins, C. J.*—"Though the words 'purchase' and 'purchaser' may technically imply an acquisition of property otherwise than by descent in relation to a sale of land, they are commonly used as appropriate to the stage prior to actual completion by conveyance or transfer." (1902) 4 Bom. L. R. 384.

——S. 30—Corporation's power to purchase—Purchase for the purpose of allowing another company to work—Agreement between the other Company and the Corporation before notice of intention to purchase—Legality of purchase.

Under the Bombay Act I of 1874 the Corporation is entitled to purchase the tramway with a view to enable another company to work it, and even though the agreement with that other company is prior to the notice to the company then working, the purchase is valid. (1902) 4 Bom.L.R. 384.

——S. 30—'Property', meaning of.

The 'word 'property' in S. 30 of the Bombay Tramways Act, 1874, has not the meaning of the right, title and interest of the Bombay Tramways Company in the subject-matter to which the section refers, but means the subject-matter itself. (1902) 4 Bom.L.R. 856.

BOMBAY VILLAGE PANCHAYATS ACT (IX OF 1920).

——S. 27—Agreement to farm out right to collect market dues, if ultra vires.

The village *Panchayat* is incompetent to farm out the right to collect ground rent tax at weekly markets and the agreement to do so is *ultra vires*. A.I.R. (Vol. 28) 1941 Bom. 378=43 Bom.L.R. 800=I.L.R. (1941) Bom. 666=197 Ind. Cas. 825.

BOMBAY VILLAGE POLICE ACT (VIII OF 1867).

——S. 3—Pagis—District Magistrate can appoint pagis nominated by Talukdar—Recovery of share in salaries can be had from Jivaidar.

Plaintiff as Talukdar owned half revenues while the defendants were entitled as *Jivaidars* to a half share of the revenues of a village. The District Magistrate called upon the defendants to appoint two *pagis* for the villages and as they failed, he appointed the *pagis* nominated by the plaintiff. The wages of the *pagis* were paid by the plaintiff alone.

Held, (1) that the *pagis* were validly appointed by the District Magistrate under S. 3; and (2) that the pay of the *pagis* was a charge on the revenues of the village and the plaintiff had a right of reimbursement under S. 69 of the Contract Act. 26 Bom.L.R. 678=83 Ind. Cas. 30=A.I.R. 1924 Bom. 471 (a) (D.B.).

——Ss. 6, 14—Police Patel—Judicial proceedings before the Police Patel—District Magistrate's power to transfer the case to another Court—High Court—Superintendence—Letters Patent, Cls. 26, 27.

Duties which are enumerated in S. 6 of the Village Police Act, 1867, are the executive duties of the Police Patel. They are duties imposed upon him quite independently of the authority given to him under S. 14 to try and punish in cases of petty assault and abuse. The authority given to him by S. 14 is a judicial and not an executive authority. S. 6, therefore, does not justify the District Magistrate in stopping the judicial proceeding which is already in progress before the Police Patel. Apart from the powers expressly conferred by the Act upon the Magistrate in that connection, the only right

of superintendence over the judicial functions of the Police Patel created by the Village Police Act, is vested in the High Court by Cls. 26 and 27 of the Letters Patent. (1908) 10 Bom.L.R. 630.

——Ss. 14 and 15—Criminal proceedings.

The proceedings before a police Patil under Ss. 14 and 15 are criminal proceedings. 45 Bom. 96=22 Bom.L.R. 898=58 Ind. Cas. 147=21 Cr.L.J. 723.

——S. 15—Police Patel—Power to inflict fine for false complaint.

A Police Patel to whom a commission under S. 15 of the Bombay Village Police Act has been issued cannot inflict a fine on a complainant for making a false complaint. 20 Bom.L.R. 600=19 Cr.L.J. 735 =46 Ind. Cas. 415.

——S. 15—Verbal order by a Police Patel—If lawful.

A verbal order sent through a messenger by a Police Patel under S. 15 of the Village Police Act, 1867, asking a person to present himself before him to answer an accusation, is not a lawful order issued by the Police Patel personally within the meaning of S. 15 (1) of the Village Police Act, 1867. (1906) 8 Bom.L.R. 118.

——S. 17—Discretion of Police Patel—Presence of accused—If can be dispensed with.

The words of S. 17, Bombay Village Police Act are mandatory. Even if the accused person does appear by a Pleader, the proceedings must be in his presence, therefore, the Police Patel has no discretion in the matter, and he cannot dispense with the presence of the accused, although the accused can engage a Pleader. A.I.R. (Vol. 29) 1942 Bom. 205 (2)=44 Bom.L.R. 442=43 Cr.L.J. 786=201 Ind. Cas. 688.

BOMBAY WAGERS ACT (III OF 1865).

——S. 1—Contracts collateral to or in respect of wagering transactions—If can be enforced.

All that S. 1, Bombay Wagers Act, means is that contracts collateral to or in respect of wagering transactions cannot be enforced. But in order to bring the case within the meaning of that section the transactions in respect of which the brokerage, commission or losses are claimed must amount to a wagering agreement. The result of this enactment is to put a contract collateral to an agreement by way of wager on the same footing as the agreement itself. Such a collateral contract is void in the Bombay Presidency, though not in other provinces. A.I.R. (Vol. 25) 1938 Bom. 44=39 Bom.L.R. 1083=173 Ind. Cas. 205.

——S. 1—Agreement to pay differences—Settlement by cross contract—Agreement is of wagering nature.

A contract for forward delivery wherein neither party intends to give or take delivery and differences only are to be paid or received according to the market rate on the due date. and which is settled by a cross-contract is a wagering contract within S. 1 of Bombay Act III of 1865 though not under S. 30 of the Contract Act. 49 Bom. 689=89 Ind. Cas. 885=27 Bom.L.R. 941=A.I.R. 1925 Bom. 511 (D.B.).

——S. 1—Pakka Adatias—Transactions entered into by Pakka Adatias on behalf of their constituents—Intention to pay differences only—Pakka Adatias cannot recover from constituents losses incurred.

If the contract between *Pakka adatias* and their constituents is a contract of employment, such a contract can never by its very nature come within the definition of a wagering contract and the *Pakka Adatia* must win unless the constituents bring the contract within the provisions of Bombay Act, III of 1865. The proper issues in the case would be (1). If the contract between the parties was one of employment for reward was it knowingly made to further or assist the entering into of agreements by way of gaming or wagering? (2). If the contract between the parties was as between principal and principal was it by way of wagering or gaming? In a suit by *Pakka adatias* against their constituents in order to win on the first issue the defendants must prove that there was an understanding between them and plaintiffs; (1) that they were not only speculating but gambling; (2) that if they ordered the plaintiffs to buy cotton, they would never call upon them to deliver it, and if they ordered them to sell, they would never themselves deliver it, (3) that, if the plaintiffs incurred losses in carrying out their orders, they could indemnify them and (4) that even if the plaintiffs did not contract with third parties in pursuance of their orders, differences would be received and paid exactly as if they had. Incidentally it might be arranged that plaintiffs should only enter into wagering contracts with third parties, and that would be sufficient to vitiate the contract of employment, though it might not be possible to prove that those third parties with whom the plaintiffs contracted were also wagering. On the second issue the defendants would have to prove that there was a common intention only to pay differences.

Per *Macleod, C. J.*—The only difference between the relationship of a *pakka adatia* and his constituent on the one hand, and that of a broker personally liable on the contracts he enters into on orders received and his client on the other, is that in the latter case the broker enters into the contract as agent for the client, he himself also being personally liable to the person with whom he contracts while the *adatia* does not make the contracts with third parties as agent, but as principal, the constituent having no right to be brought into contact with the third parties. 45 Bom. 386=62 Ind. Cas. 361=A.I.R, 1921 Bom. 238 (D.B,).

BOMBAY WEIGHTS AND MEASURES ACT (XV OF 1932).

——Ss. 16 and 37—'Delivery'—Meaning of.

The word 'delivery' in S. 16 must not be a taken to mean only the actual physical delivery. It qualifies the word 'sold' in the sense that what is meant is delivery in pursuance of sale.

Where a seller at Agra sends by railway unstamped weights to a customer at Larkana in Sind and the customer takes delivery of them on production of the railway receipt the sale is incomplete till the railway receipt is in possession of the cus-

tomer. But having passed into the possession, the weights evidently are delivered within the meaning of S. 16. The delivery is made not by the carriers but by the seller, through the carriers, at Larkana. The Magistrate at Larkana has, therefore jurisdiction to try the seller for an offence under S. 16 read with S. 37. A.I.R. (Vol. 33) 1946 Sind 115=47 Cr.L.J. 335=222 Ind. Cas. 610.

——S. 22 and Rules under Act—Power of manual assistant to inspect weights and measures.

Rules framed under Bombay Weights and Measures Act do not empower any one other than a properly appointed Inspector to inspect weights and measures.

A manual assistant is not an inspector under the Act duly authorised to perform any of the acts referred to in the Weights and Measures Act. He has no right to stop a milkman on the road and to inspect his weights and measures or to take any action with reference to them contemplated by the Act. In stopping a milkman going on a bicycle and inspecting his measures and detaining him the manual assistant acts illegally. The fact that the manual assistant or any process-server or *patewalla* in Government service, is authorised to serve a notice on behalf of his official superior does not entitle such a person to fill in and date a blank form of notice already signed. [Obstruction caused to such assistant held neither an offence under S. 352 nor under S. 353, I.P.C.] A.I.R. (Vol. 31) 1944 Sind 89=45 Cr.L.J. 550=212 Ind. Cas. 163.

BONA FIDE PURCHASER.

See (1) SPECIFIC RELIEF ACT, S. 27.
(2) T. P. ACT, SS. 41, 51, 52, 53 AND 100.

BONA FIDES.

See CR. P. CODE, SS. 133, 139.

BOND.

See CONTRACT ACT, S. 146.

See also (1) LIMITATION ACT, S. 20 AND ARTS. 66, 75, 132.
(2) STAMP ACT, S. 2 (5).

——Instalment bond—Default—Limitation for suit.

An instalment bond contained a default clause giving the creditor a right to realize the whole amount due in the event of failure of any instalment. No instalment had been paid and eleven instalments had become time-barred since the dates of their falling due, and a suit was brought to recover the remaining seven instalments under the bond:

Held, that the suit was time-barred. (1940) 187 Ind. Cas. 221 (F.B.). (Bhopal).

——Instalment bond—Default—Suit — Limitation —Acceptance of overdue instalments amounts to waiver.

In the case of an instalment bond with a default clause that on default of any one of the instalments the creditor would have a right to sue for the whole amount, mere acceptance by the creditor of payment of overdue instalment amounts to waiver of his right to recover the whole amount and in such a case the time does not begin to run from the date on which the instalment was due. (1940) 187 Ind. Cas. 809 (Bhopal).

——Nature of—If movable property.

A bond as a physical object, is movable property. A.I.R. (Vol. 22) 1935 Cal. 39=61 Cal. 711=154 Ind. Cas. 479.

——Registered bond—Recitals in endorsement—Onus of proof.

The onus of proving that the transaction recited in the endorsement on the bond which was witnessed by the Registrar was untrue is on the party who denies the truth of the statement contained in that endorsement. A.I.R. (Vol. 26) 1939 Pat. 108=5 B.R. 460=180 Ind. Cas. 619.

——What is—Entry in bahi khata—When amounts to bond.

Where the entries in *bahi khata* have to be considered as regards their nature as a bond or as a mere acknowledgment, in each case, the entry should be carefully scrutinized. Ordinarily, a balance struck by the debtor, followed by the words *baqi rahe* and signed by the debtor would be a mere "acknowledgment" on which a stamp duty of one anna will be sufficient. In such a case it will be immaterial that the entry is or is not attested by witnesses. If, however, the words used are *baqi dene* that would amount to an "agreement" and be liable to be stamped as such. If further such an entry is attested by one or more witnesses it will be a 'bond' and must be stamped accordingly. A.I.R. (Vol. 25) 1938 Lah. 503=40 P.L.R. 193=177 Ind. Cas. 270. [Overruled in A.I.R. (Vol. 29) 1942 Lah. 50=199 Ind. Cas. 161.]

BONUS.

See PAYMENT OF WAGES ACT, 1924, S. 2

BOOKS OF ACCOUNT.

See EVIDENCE ACT, S. 34.

BORSTAL INSTITUTION.

See (1) BURMA PREVENTION OF CRIME (YOUNG OFFENDERS) ACT (III OF 1930).
(2) CRIMINAL P. C., SS. 390, 391.
(3) PRISONS ACT, S. 3.

BOUNDARIES.

See also (1) DEED—CONSTRUCTION OF.
(2) OWNERSHIP.

——Area and boundaries—Conflict—Leasee admitting possession of land shown in plan—Land within well-defined boundaries—In such cases if there is a question as between boundaries and area the former should prevail. A.I.R. (Vol. 26) 1939 Cal. 129=67 C.L.J. 521=42 C.W.N. 405=179 Ind. Cas. 670.

——Deed between third parties—Boundaries stated in—If against proprietary interest of person making it.

Per *Wort J.*—As a general question it cannot be said that boundaries stated in a deed between third parties are necessarily and *prima facie* against the proprietary interest of the person making it. A.I.R. (Vol. 22) 1935 Pat. 167=16 P.L.T. 199=14 Pat. 461=155 Ind. Cas. 470 (F.B.).

——Boundaries—Dispute as to—Onus.

In a simple case of two independent proprietors who own adjoining lands with respect to which confusion of boundaries has taken place, the Courts refuse to help the plaintiff if he is not able to prove by evidence the boundaries of his estate. A.I.R. (Vol. 18) 1931 Mad. 19 (22)=32 M.L.W. 957=60 M.L.J. 85=1931 M.W.N. 155=129 Ind. Cas. 451 (2).

——Dispute as to—Onus.

The principle of proving the affirmative is applicable where the boundary line which is the subject of dispute runs through waste lands which have been the subject of definite possession. 65 Ind. Cas. 743 (Cal.) (D.B.).

——Fence—Ownership.

Adjoining owners of land, own the boundary fence up to its centre on each side, together with trees growing thereon. 2 Pat. L.W. 27=40 Ind. Cas. 987.

——Identity of land—Determination—Considerations.

In determining the question of identity of land, attention must not be limited to one or other of the boundries alone, but, as far as practicable, an attempt must be made to identify all the four boundaries in the document. 17 C.L.J. 642=16 Ind. Cas. 747.

——Inconsistency with area—Extrinsic evidence—Admissibility—Evidence of user.

Where there is a seeming inconsistency as between boundaries and the area stated in the instrument it is permissible to have recourse to extrinsic evidence, and evidence of user by acts of parties, for the purpose of gathering the real intention of the parties to the instrument. A.I.R. (Vol. 18) 1931 Cal. 596=58 Cal. 686=133 Ind. Cas. 696.

——Inconsistency with extent—Principles applicable.

In cases in which a marked divergence between the extent given and the area comprised within the boundaries given arises it is really the equitable principles which will govern a claim for rectification of the document that ought to be applied. 1934 M. W. N. 937.

——Original staking out of the plots—Value of—'Bounding grant'—Existence of such boundaries, if sufficient of itself to exclude the doctrine of accretion.

Little reliance can be placed upon the original staking out of land as indicating rigid and discernible boundary lines. Even assuming that a grant is confined by specific boundaries represented by lines drawn on plans, the existence of such boundaries is not sufficient in itself to exclude the doctrine of accretion. The general principle of accretion applies even where the former boundaries of the land on the water front were known or capable of ascertainment. A. I. R. (Vol. 21) 1934 P. C. 17=11 O. W. N. 217=1934 M.W.N. 212=66 M.L.J. 239=39 L.W. 271=36 Bom.L.R. 267=38 C.W.N. 337=59 C.L.J. 269=12 Rang. 136=16 R.D. 107=61 I.A. 18=147 Ind. Cas. 657 (P.C.).

——Miscalculation in Revenue Returns cannot defeat title.

If in fact the boundaries include an area greater than that referred to in the Revenue Returns, such a miscalculation or misrepresentation cannot defeat the title to the estate. 65 Ind. Cas. 866=34 C.L.J. 141.

——Recitals in deed—Boundary, fixing of.

In fixing the boundary the description found in the deeds of the property is to be followed. 18 C.W.N. 898=27 M.L.J. 20=26 Ind. Cas. 949=20 C.L.J. 407 (P.C.).

——Rennell's map, value of.

Rennell's map, though imperfect, can be acted upon in questions relating to boundaries of *jalkars* especially when it has been put forward before the Commissoner for the very purpose for which it has been used. A. I. R. (Vol. 24) 1937 P. C. 148=1937 O.L.R. 269=1937 A.L.R. 356=41 C.W.N. 748=3 B.R. 466=18 P.L.T. 423=31 Sind L.R. 350=168 Ind. Cas. 6 (P.C.).

BOUNDARY MARKS ACT (XXVIII OF 1860).

——Ss. 24 and 25—Order under—Res judicata.

A decision as well as its grounds if not contested, passed under S. 25 that the lands never formed part of the mitta are *res judicata* between the parties. 39 Mad. 1202=27 M.L.J. 529=26 Ind. Cas. 817=16 M.L.T. 432.

BRAHMOTTAR.

See GRANT.

BREACH OF CONTRACT.

See (1) CONTRACT ACT, S. 73.
(2) DAMAGES.
(3) WORKMAN'S BREACH OF CONTRACT ACT.

BREACH OF THE PEACE.

See CR. P. CODE SS. 106, 123 145.

BREACH OF TRUST.

See (1) C. P. CODE, S. 92.
(2) HINDU LAW, RELIGIOUS ENDOWMENT.
(3) PENAL CODE, S. 403, ETC.
(4) TRUST.
(5) TRUSTS ACT, S. 23.

BRIBE.

See PENAL CODE, S. 161, ETC.

BRITISH INDIA, ABSENCE FROM.

See LIMITATION ACT, S. 13.

BRITISH COLUMBIA ADMINISTRATION ACT (1925).

——Chap. 2, S. 127 (1)—Alberta Intestate Succession Act, 1928, Chap. 17, S. 19 (1)—"Living in adultery"—Statutory forfeiture—Burden of proof.

Section 127 (1) of the British Columbia Administration Act 1925 Chapter 2, which provides as follows:—"If a wife has left her husband and is living in adultery at the time of his death, she shall

take no part of her husband's estate," does not apply even when the wife had left the husband and had lived in adultery prior to the husband's death, if she was not living in adultery at the time of his death. It is for the party invoking forfeiture to prove the facts necessary to establish the statutory forfeiture.

Even if it be established that the wife had left the husband and had been living in adultery prior to the husband's death, the burden of proof is not shifted and it is not for the wife to prove that the adulterous life had not existed at the time of the husband's death. (1939) 181 Ind. Cas. 993=1939 M.W.N. 241 (P.C.).

BRITISH COLUMBIA COURT RULES.

——O. 58, R. 4—Cases tries with jury—New trial.

Order 58 R. 4 of the Rules of Court of British Columbia gives the Court of Appeal power (*inter alia*) to draw inferences of fact and to give any judgment and make any order which ought to have been made and to make such further or other order as the case may require as well as to receive further evidence. The rule is intended to obviate a new trial in cases where such a course can properly be avoided and applies even in cases tried with a jury. Where the jury have found that there were perils of the seas during the period while the ventilators were closed the Appellate Court is entitled to draw an inference of fact that the closing was caused by the perils of the sea. A I.R. (Vol. 28) 1941 P.C. 68 (71)=8 B.R. 212=197 Ind. Cas. 267 (P.C.).

BRITISH COLUMBIA FOREST ACT (1924).

——S. 58—Scope—If ultra vires—Tax—Legality.

The timber tax levied under S. 58 being an export tax falling within the category of duties of customs and excise, and as such, as well as by reason of its inherent nature as an indirect tax, cannot competently be imposed by the Provincial Legislature. A.I.R. 1930 P. C. 173 (D.B.).

BRITISH COLUMBIA INSURANCE ACT (1925).

See INSURANCE (MOTOR CAR).

BRITISH NORTH AMERICA ACT (1867).

——S. 24—Persons—Meaning.

"Person" includes females. Women are eligible to be summoned to become members of the Senate of Canada. 31 M.L.W. 601=126 Ind. Cas. 88= A.I.R. 1930 P. C. 120=58 M.L.J. 300 (P.C.).

——Ss. 90 and 56—Provincial Legislation—Disallowance of—Private rights completely constituted—If affected—Crown grant under Vancouver Island Settlers Rights Act (1904) read with Amending Act of 1917—Grant unregistered but grantee entitled to registration—Disallowance of Amending Act of 1917 cannot affect grantee's title —Conflict of laws.

The language of Ss. 56 and 90 of the British North America Act of 1867 itself discloses with sufficient clearness an intention that as to private rights completely constituted and founded upon transactions entirely past and closed, the disallowance of a provincial statute shall be inoperative. Under the Vancouver Island Settlers Rights Act of 1904 read with the Amending Act of 1917, a Crown grant was made in favour of *A*. The registration of the grant was stayed in consequence of a *lis pendens* having been filed in certain actions which were not well founded. At this stage the Amending Act of 1917 was disallowed by the Governor-General in Council.

Held, that the actions in which the *lis pendens* was filed being not well founded, *A* had when he applied for registration a completely constituted right to register his title and that such a right is one of the class of rights intended to be protected by S. 56 of the British North America Act. Therefore notwithstanding that at the time of the disallowance of the Amending Act of 1917, the grant was not registered, *A*'s right to the land could not be extinguished by the disallowance of the Act of 1917. A.I.R. 1921 P. C. 234 (P.C.).

——Ss. 91 (2), 91 (3), 92 (13), (16)—Pith and substance of Natural Products Marketing (British Columbia) Act of 1936)—Act intra vires of the province—Provisions regarding imposition of licence-fees not invalid—It is within powers of Provincial Legislature to delegate legislative power to Lieutenant-Governor in Council or to give him power of further delegation.

It is now well-settled that the enumeration in S. 91 of British North America Act, of "the regulation of trade and commerce" as a class of subject over which the Dominion has exclusive legislative powers does not give the power to regulate for legitimate provincial purposes particular trades or businesses so far as the trade or business is confined to the province. The pith and substance of Natural Products Marketing (British Columbia) Act is that it is an Act to regulate particular business entirely within the province, and it is therefore *intra vires* of the province.

If regulation of trade within the province has to be held valid the ordinary method of regulating trade, *i.e.*, by a system of licences, must also be admissible. A licence itself merely involves a permission to trade subject to compliance with specified conditions. It cannot be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue. The provisions in Natural Products Marketing (British Columbia) Act, giving power to impose licence-fees which may be vested in provincial boards by the Lieutenant-Governor in Council can also be supported on the ground that they are fees for services rendered by the province or by its authorised instrumentalities under the powers given by S. 92.

Within its appointed sphere, the Provincial Legislature is as supreme as any other Parliament. It is therefore within the powers of the Provincial Legislature to delegate so-called legislative powers to the Lieutenant-Governor in Council or to give him powers of further delegation. The Natural Products Marketing (British Columbia) Act which delegates such power is not therefore *ultra vires*. A I R. (Vol. 26) 1939 P.C. 36=180 Ind. Cas. 538 (P.C.).

——Ss. 91 and 92—Distribution of legislative powers between Dominion and Provinces—Basis of —Dominion acquiring international status—Further legislative competence, if obtained.

For the purposes of Ss. 91 and 92, British North America Act, *i.e.*, the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. No one can doubt that this distribution is one of the most essential conditions, probably the most essential condition in the inter-provincial compact to, which the British North America Act gives effect.

No further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions. There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive. If the new functions affect the classes of subjects enumerated in S. 92, legislation to support the new functions is in the competence of the Provincial Legislatures only. If they do not, the competence of the Dominion Legislature is declared by S. 91 and existed *ab origine*. In totality of legislative powers, Dominion and Provincial together, the Dominion is fully equipped. But the legislative powers remain distributed and if in the exercise of her new functions derived from her new international status she incurs obligations they must, so far as legislation be concerned when they deal with provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. While the ship of State now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure. A.I.R. (Vol. 24) 1937 P.C. 82=168 Ind. Cas. 117 (P.C.).

——Ss. 91 and 92—Interpretation—Board of Commerce Act (1919) and Combines and Fair Prices Act, 1919—Ultra vires—Principles discussed.

The jurisdiction attempted to be conferred on the Board of Commerce by the Board of Commerce Act (1919) and Combines and Fair Prices Act (1919), is *ultra vires*. Legislation setting up a Board of Commerce with such powers is beyond the powers conferred by S. 91. Circumstances are conceivable, such as those of war or famine when the peace order and good government of the Dominion might be imperilled under conditions so exceptional that they require legislation of a character in reality beyond anything provided for by enumerated heads in either S. 92 or S. 91 itself. But in the case of the Board of Commerce Act of 1919 and the Combines and Fair Prices Act of 1919 the standard of necessity referred to has not been reached and attainment of the end sought is not practicable, in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the Provincial Legislatures. It may well be within the powers of the Dominion Parliament to call, for example, for statistical and other information which may be valuable for guidance in questions affecting Canada as a whole. Such information may be required before any power to regulate trade and commerce can be properly exercised, but even this consideration affords no justification for interpreting the words of S. 91, sub-S. 2 in a fashion which would make them confer capacity to regulate particular trades and business. A.I.R. 1921 P.C. 205 (P.C.).

——Ss. 91 and 92—Scope—British Columbia Summary Convictions Act of 1915, not ultra vires.

Reading Ss. 91 and 92 together, the Summary Convictions Act of 1915, of British Columbia was within the competence of the Legislature of British Columbia. A.I.R. 1921 P.C. 179 (P.C.).

——Ss. 91, 92, and 132—Scope of—Dominion and Provincial legislation—Spheres of—Aerial navigation—Whether Dominion subject—Provincial subject, conversion of, into Dominion subject—Interpretation of Constitution—Rules for—Precedents—Use and value.

Transport as a subject is dealt with in certain branches both of S. 91 and S. 92, British North America Act, but neither of those sections deals specially with that branch of transport which is concerned with aeronautics. Having regard however, to the terms of S. 132 of the Act and to the terms of the convention relating to the regulation of aerial navigation drawn up by the Commission constituted by the Supreme Council of the Paris Peace Conference and to the fact that further legislative powers in relation reside in the Parliament of Canada by virtue of S. 91 (2), (5) and (7) substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion. There may be a small portion of the field which is by virtue of specific words in the British North America Act vested in the Dominion. As to such small portion, it must necessarily be deemed to belong to the Dominion under its power to make laws for the peace, order and good Government of Canada. A further reason for holding the subject of aerial navigation as a central subject is that this subject and the fulfilment of Canadian obligations under S. 32 are matters of national interest and importance and that aerial navigation is a class of subjects which has attained such dimensions as to affect the body politic of the Dominion.

There may be cases of emergency where the Dominion is empowered to act for the whole. There may also be cases where the Dominion is entitled to speak for the whole and this not because of any judicial interpretation of Ss. 91 and 92, but by reason of the plain terms of S. 132 where Canada as a whole having undertaken an obligation is given the power necessary and proper for performing such obligation.

The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in S. 91, is of paramount authority, even though it trenches upon matters assigned to the Provincial Legislature by S. 92.

The general power of legislations conferred upon the Parliament of the Dominion by S. 91 of the Act in supplement of the power to legislate upon

the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subject enumerated in S. 92 as within the scope of Provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion.

It is within the competence of the Dominion Parliament to provide for matters which though otherwise within the legislative competence of the Provincial Legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in S. 91.

There can be domain in which Provincial and Dominion legislation may overlap, in which case, neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet, the Dominion legislation must prevail.

Under the English system, decided cases effectively construe the words of an Act of Parliament and establish principles and rules whereby its scope and effect may be interpreted. But there is always a danger that in the course of this process the terms of the statute may come to be unduly extended and attention may be diverted from what has been enacted to what has been judicially said about enactment. Useful as decided cases are, it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed.

The process of interpretation as the years go on ought not to be allowed to dim or whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of Ss. 91 and 92 should impose a new and different contract upon the federating bodies. While the Courts should be jealous in upholding the Charter of the Provinces as enacted in S. 92 it must no less be borne in mind that the real object of the Act was to give the Central Government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the Provinces as members of a constituent whole. A.I.R. (Vol. 19) 1932 P.C. 36=135 Ind. Cas. 754 (P.C.).

——Ss. 91 and 92—Scope — Farmers' Creditors Arrangement Act, 1934, as amended in 1935—Constitutional validity of.

The statutory conditions of insolvency which enable a creditor or the debtor to invoke the aid of the bankruptcy laws, or the classes to which these laws applied, were not intended to be stereotyped under head 21 of S. 91 of the British North America Act so as to confine the jurisdiction of the Parliament of Canada to the legislative provisions then existing as regards these matters. It cannot be maintained that legislative provision as to compositions, by which bankruptcy is avoided, but which assumes insolvency, is not properly within the sphere of bankruptcy legislation. A.I.R. (Vol. 24) 1937 P. C. 95=168 Ind. Cas. 64 (P.C.).

——Ss. 91 and 92 (2)—Scope—If mutually exclusive—Bill No. 1 entitled "an Act respecting the Taxation of Bank"—If ultra vires of the Legislature of the Province of Alberta.

Whether a Provincial Act, which indirectly interferes in some degree with one of the powers of the Dominion, is or is not *ultra vires*, must be determined in each case as it arises, for no general test applicable to all cases can safely be laid down.

It is well established that if a given subject-matter falls within any class of subjects enumerated in S. 91, British North America Act, it cannot be treated as covered by any of those within S. 92.

It is not competent either for the Dominion or a Province under the guise or the pretence or in the form of an exercise of its own powers to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other.

Bill No. 1, entitled "an Act respecting the Taxation of Banks" enacted by the Provincial Legislature of Alberta instead of being in any true sense taxation in order to the raising of a revenue for provincial purposes, is merely part of a legislative plan to prevent the operation within the Province of those banking institutions which have been called into existence and given the necessary powers to conduct their business by the only proper authority the Parliament of Canada. This is a sufficient ground for holding that the Bill is *ultra vires*. A.I.R. (Vol. 26) 1939 P. C. 53=1941 Rang.L.R. 789=1939 M.W.N. 142=180 Ind. Cas. 807 (P.C.).

——S. 92—When the Act enacted that there should be a Legislature for a certain province, it conferred powers not in any sense to be exercised by delegation from the Imperial Parliament but authority as plenary and as ample within the limits prescribed by S. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. A. I. R. (Vol. 20) 1933 P. C. 16=1933 A. L. J. 284=37 M.L.W. 528=143 Ind. Cas. 91 (P.C.).

——S. 96—"Superior, District and County Courts"—Labour Relations Board set up under Trade Unions Act, 1944, of the Province of Saskatchewan—Whether Court analogous to such Courts—Trade Unions Act making orders of Labour Relations Board enforceable as orders of Court of King's Bench—If ultra vires.

The jurisdiction exercisable by the Labour Relations Board set up under S. 4 of the Trade Unions Act, 1944, of the Province of Saskatchewan is not such as to constitute it a Court analogous to the superior, district or county Courts mentioned in S. 96 of the British North America Act. The power vested in the Board by S. 10 (3) of the Trade Unions Act to appeal in its own name from any judgment of any Court affecting any of its orders or decisions, emphasises the dissimilarity from those Courts.

Therefore the Trade Unions Act in so far as it purports to make the orders of the Labour Relations Board enforceable as orders of the Court of King's Bench and to give to the Board the power to make any order under S. 5 (e) of the Act requiring an employer to reinstate any employee discharged contrary to the provisions of the Act and to pay such employee the monetary loss suffered by reason

of such discharge, is not *ultra vires* of the Legislature of Saskatchewan. 53 C.W.N. 389=A.I.R. 1949 P. C. 129 (P.C.).

——S. 101—Power of—Parliament of Canada to trench on provincial rights.

S. 101 of the British North America Act which enables the Parliament of Canada notwithstanding anything in the Act to provide for the establishment of any additional Courts for the better administration of the laws of Canada, cannot be read as enabling that Parliament to trench on provincial rights, such as the powers over property and Civil Rights in the Provinces exclusively conferred on the Legislatures. Full significance can be attached to the words in question without reading them as implying such capacity on the part of the Dominion Parliament. It is essential in such cases that the new judicial establishment should be a means to some end competent to the latter. A.I.R. 1921 P. C. 205 (P.C.).

——S. 132—Scope and effect—Aerial navigation —Dominion's power.

Having regard to the terms of the section, substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion. The reason for holding it a central subject is that this subject and the fulfilment of Canadian obligations under S. 132 are matters of national interest and importance. A.I.R. (Vol. 19) 1932 P.C. 36=135 Ind. Cas. 754 (P.C.).

"BRITISH PROTECTORATE "

——Interpretation.

Protected country is not British Dominion but Crown controls all its foreign relations—Protected State is semi-sovereign—Protected State in South Africa—Act of State. 30 C.W.N. 961=99 Ind. Cas. 265=A.I.R. 1926 P.C. 131.

BROACH AND KAIRA ENCUMBERED ESTATES ACT (BOM. XXI OF 1881).

——S. 82—Disability—Duration of—Estate taken under management—Disability continues even in the case of successor of the Thakur.

The disability contained in S. 28 applies not only to the Thakur during whose lifetime the estate was taken under management, but it extends to his successor also, who, however, is allowed to incur unsecured debts. 27 Bom.L.R. 88=86 Ind. Cas. 28=A.I.R. 1925 Bom. 175.

BROKER.

——Commission—Right to.

Where the remuneration of a broker is payable on the performance by him of a definite undertaking he is entitled to be paid that, as soon as he has substantially done all that he undertook to do even if the principal acquires no beneficial interest from his services, and except where there is an express agreement or special custom to the contrary, even if the transaction in respect of which the remuneration is claimed falls through, provided it does not fall through in consequence of any act or default of the broker. The contract itself will indicate the terms. 50 Cal. 878=27 C.W.N. 1007=1924 Cal. 517.

——Commission—Right to—Contract not completed.

Those who bargain to receive commission for introduction of a contractor have a right to their commission as soon as they have completed their portion of the bargain irrespective of what may take place subsequently between the parties introduced and whether or not the contract is completed. Where there was a letter giving the nature of an authority to negotiate a lease and it contained a certain term that brokerage was to be nett Rs. 2,530, and it also contained a promise on the part of the defendant to pay that amount on a future date if he succeeded in getting a lessee to agree to the terms of the lease, and the lease could not be put through as the defendant had failed to make out a title to the premises. *Held*, that the brokerage was payable. 76 Ind. Cas. 333=38 C.L.J. 139.

BROKER AND CONSTITUENT.

——Rights and liabilities of—Broker closing transaction for non-payment of margin and entering into cross-contract under rules—Cross-contract in pursuance of instructions—Distinction.

In principle there can be no difference between a case in which a broker closes an outstanding transaction because no margin has been paid to him and the rules permit him to perform the outstanding contract of entering into a cross contract and closing the outstanding contract, and a case where the broker enters into a cross-contract pursuant to instructions given to him by the constituent. 51 Bom.L.R. 499 A.I.R. 1949 Bom. 343.

BUDDHIST LAW—(BURMESE).

——See also under BURMA LAWS ACT, 1898.

SYNOPSIS.

1. **Adoption.**
2. Applicability.
3. Ateptwa Property.
4. Conversion.
5. Custom.
6. Divorce.
7. Ecclesiastical jurisdiction.
8. Ecclesiastical Law.
9. Gift.
10. Guardian.
11. Husband and wife.
12. Joint property.
13. Maintenance.
14. Marriage.
15. Minor.
16. Orosa child.
17. Partition.
18. Payin property.
19. Pre-emption.
20. Sources.
21. Succession.
22. Texts.
23. Will.
24. Widow.
25. Miscellaneous.

1. Adoption.

(a) Capacity.
(b) Christians.
(c) Consent.
(d) Effect.
(e) Forms.
(f) Guardianship.
(g) Inheritance.
(h) Keittima form.
(i) Nature of.
(j) Proof.
(k) Validity.

——Adoption—Proof—Act of shinbyuing—Relationship of parent and child.

The act of shinbyuing does not necessarily show that this work of merit is performed specifically because of the relationship of parent and child in the absence of evidence as to any declaration made by the parents either in the invitation to friends or at the ceremony that person shinbyued was their son or their *keittima* son. A.I.R. (Vol. 28) 1941 Rang. 183=196 Ind. Cas. 144.

——Adoption—Capacity to give in adoption—Adoptive parent, if can give adoptive child in adoption to another—Adopted child, minor—Consent of person on his behalf, if necessary.

Obiter.—An adoptive parent has the same right as a natural parent in regard to giving his adopted child in adoption to another. The adoptive parents step into the shoes of the natural parents, and as natural parents can give away their child in adoption, adoptive parents also may give away their *keittima* child in adoption to another person who takes the child with the intention that the child shall inherit to him and if the child is a minor no consent of any person on behalf of the child would be necessary to the validity of such a second adoption. And just as the adoption from the natural persons has the effect of severing all the ties of the child with its natural family so such a second adoption would have the effect of bringing to an end the relationship between the child and his original adoptive parents. A.I.R. (Vol. 28) 1941 Rang. 87=1940 Rang. L.R. 783 =193 Ind. Cas. 507.

——Adoption—Capacity to take in adoption—Divorced woman.

Under the Buddhist Law a woman who is divorced from her husband and has divided the joint property with him is in the same position as a single woman. An adoption is a matter of intention and may be proved even in the absence of any formal declaration. 11 Bur.L.T. 65=45 Ind. Cas. 737=9 L.B.R. 163.

——Adoption—Capacity to take—Minor—If can adopt.

To be able to adopt a person must be of age, and able to contract. Adoption is a contract under which a person takes another with certain objects and confers certain rights; and so a minor is not legally empowered to adopt any person. 4 Bur.L.J. 136=92 Ind. Cas. 719=A.I.R. 1925 Rang. 350.

——Adoption—Capacity to take—Monk.

A Buddhist monk is vowed to a life of celibacy and poverty, and has cut himself off from all worldly ties. By reason of his vows he cannot have natural children and he can own no property. The notion that a person bound by such vows, can adopt a child to take the place of natural children and inherit his non-existent estate is preposterous. Clearly a person who is precluded by his personal law from having natural children cannot adopt. A.I.R. (Vol. 28) 1941 Rang. 87=1940 Rang.L.R. 783=193 Ind. Cas. 507.

——Adoption—Capacity to take—Monk.

A Burmese Buddhist monk cannot adopt. 120 Ind. Cas. 663=A.I.R. 1929 Rang. 173.

——Adoption—Capacity to take—Person having daughter's son alive.

A Burmese Buddhist has a right to adopt *keittima* sons with a view to inheritance even though the son of his daughter is alive. A.I.R. (Vol. 22) 1935 P.C. 16=1935 O.W.N. 84=13 Rang. 69=68 M.L.J. 431=61 C.L.J. 59=62 I.A. 1=153 Ind. Cas. 679 (P.C.).

——Adoption—Capacity to take—Widower—Adoption by Burmese Buddhist whose wife is dead—Adopted sons, if can inherit share of deceased wife in common properties.

Under Burmese Buddhist Law, on the death of the wife, the husband become the absolute owner of the property which had been the common property of himself and his wife during his wife's lifetime and when he does not make a second marriage he remains the absolute owner until his death. Consequently, he can adopt *keittima* sons with a view to share in the inheritance not only of his own share of the common properties of himself and his wife, but also the share of his deceased wife therein. A.I.R. (Vol. 22) 1935 P.C. 16=1935 O.W.N. 84=13 Rang. 69=68 M.L.J. 431=61 C.L.J. 59=62 I.A. 1=153 Ind. Cas. 679 (P.C.).

——Adoption — Christians — Custom among Burman Christians to adopt.

The custom among Burman Christians to take into their household children as though they were Burman Buddhists and after their death for their relatives to accord to those children some share without making a dispute about it in the inheritance arises out of moral obligations only and the Court has nothing to do with it. A.I.R. (Vol. 28) 1941 Rang. 33=1940 Rang.L.R. 654=192 Ind. Cas. 690.

——Adoption — Consent — Acquiescence of natural mother.

Even if the natural mother has not given her express consent to the adoption if it is obvious that she acquiesced in it, it can be taken that she consented to it. A.I.R. (Vol. 23) 1936 Rang. 518=167 Ind. Cas, 362.

——Consent of one wife only—Other wives of adopter not consenting—Validity of adoption.

Once a wife has consented to her husband taking another wife she must be held to have consented also to his begetting children by that wife, and, since,

every Burmese Buddhist married couple, may adopt children, she must be held also in consenting to the marriage to have consented to all the consequences thereof, which certainly might include the adoption of child. A.I.R. (Vol. 23) 1936 Rang. 518=167 Ind. Cas. 362.

——Adoption—Effect—Father giving away child in adoption—Description of child by natural father as his son in gift deed—Gift of immovable property by him to child—If negatives severence from family of adoption.

The fact that after giving his child in *keittima* adoption the natural father described the child as his son in a deed of gift executed in favour of that child does not by itself prove that the child did not sever his naural family tie. Nor can the making of a gift of certain immovable property by the natural father to his child whom he has given in adoption to to another by itself overthrow the conclusion as to *keittima* adoption of that child to be arrived at from positive evidence. A.I.R. (Vol. 29) 1942 Rang. 68 =1941 Rang.L.R. 742.

——Adoption—Effect — Severance from natural family—Right of inheritance.

An adopted child ceases to be a member of its own family and becomes a member of the adoptive family and consequently loses right of inheritance from its natural family. A.I.R. (Vol. 18) 1931 Rang. 300 =134 Ind. Cas. 751.

——Adoption—Effect—Transfer of property—If effected—Doctrine of death-bed gifts, if can be applied to deathbed adoption.

The doctrine of death-bed gifts cannot by analogy be applied to a death-bed adoption because the effect of adoption is not to transfer property away from the family, but by creating an heir or adding to the number of heirs to keep the property within the family. A.I.R. (Vol. 21) 1934 Rang. 323=12 Rang. 634=154 Ind. Cas. 201.

——Adoption—Forms — Keittima and apatitha forms—Essentials—Distinction.

Keittima children are the children of another person adopted publicly with a promise that they shall inherit. Intention that the child shall inherit is the principal requisite for **keittima** adoption. Publicity insisted upon is the publicity of the intention of the person who takes the child of another in adoption that the child shall inherit.

A **apatitha** child may be described as one who has been adopted casually and without any intention expressed on the part of the adoptive parent that it shall inherit. An intention of either express or implied on the part of the adoptive parent that the adopted child shall or shall not inherit forms the dividing line between a **keittima** child and an **apatitha** child. In other respects the position of an **apatitha** child is the same as that of a **keittima** child:

Held, that the facts fell short of proving the girl as **keittima** adopted daughter of the widow but proved that the girl was **apatitha** child. A.I.R. (Vol. 23) 1936 Rang. 344=14 Rang. 557=164 Ind. Cas. 272.

——Adoption — Forms — Keittima adoption—Apatitha adoption—Distinction.

Among the Burmese, the keittima and the Apathitta forms of adoption are quite distinct. The former is all adoption with a view to inherit and the latter merely for bringing up the child out of pity. The Burmese expression for the English word "adopted" does not clearly give the idea of adoption as one's own child. The expression is used in connection both with the keittima form of adoption and the apathitta form. Therefore, the use of the expression by an alleged adopter without the necessary amplifying words is not a sufficient proof of a keittima adoption. The treatment of a niece by his alleged adoptive father somewhat like a daughter does not raise any presumption of an adoption with a view to inherit, especially when she is an orphan child. If the parties were strangers the fact would be very important. A plaint based on a keittima adoption cannot be amended in appeal by an alternative claim of an apathitta adoption, as the two forms of adoption are entirely different. 10 L.B.R. 376= 87 Ind. Cas. 673.

——Adoption—Forms.

Kitima and **Appotitha** are two distinct forms of adoption, to which totally different considerations apply. 41 Ind. Cas. 749=11 Bur.L.T. 246.

——Guardianship—Adopted son becoming lunatic —Guardianship—Right to.

Where a boy has been adopted and is a lunatic, in the absence of anybody better qualified, the natural mother is the proper person to administer his estate as by natural relationship she is the person most likely to look after the interests of her son. A.I.R. (Vol. 20) 1933 Rang. 128=144 Ind. Cas. 821.

——Adoption—Inheritance — Apathitha and keittima—Respective rights of—Keittima adoptee excludes apatitha adoptee—Apatitha adoption alone proved—Adoptee acquires equal interest with parent's legal representatives.

Where **apatitha** adoption alone is proved the adoptee acquires an equal interest in the estate of his adoptive parent with the legal representatives of the parent. But where adoptions both in the **keittima** and **apatitha** forms are established the **keittima** adoptee excludes the **apatitha** adoptee who acquires no interest in the estate of the adoptive parent. A.I.R. (Vol. 28) 1941 Rang. 276=1942 Rang.L.R. 445=14 Rang. 157=198 Ind. Cas. 42.

——Adoption—Inheritance—Apatitha child living apart from parents—Right of—Proof of joint living.

An **Apatitha** child who lives apart from his or her parents is not entitled on the surviving parent's death to inherit. Merely because the circumstances of the case point to a separation having been more desirable, the proof of joint living cannot be dispensed with in seeking to establish a claim to inheritance on the ground of **apatitha adoption**. A.I.R. (Vol. 28) 1941 Rang. 265=198 Ind. Cas. 37.

——Adoption—Inheritance—Appotitha child.

An **appotitha** child takes half the estate in the absence of any natural or **Kittima** children equally

with the co heirs of the adoptive parents. 50 Ind. Cas. 524=11 Bur.L.T. 221.

——Adoption—Inheritance — Exclusion from—Adoptive parent, if can disinherit keittima adoptee or on his death defeat grandchild's claim.

It is not open for an adoptive parent who repents of his choice, to disinherit a **keittima** adopted child; or when such a child has died, to defeat the grandchild's claim on his estate by conduct which shows a desire to defeat it. A.I.R. (Vol. 28) 1941 Rang. 276=1941 Rang.L.R. 445=198 Ind. Cas. 42.

——Inheritance — Exclusion from — Adoptive parent's unilateral act, if can terminate adoption.

The relationship between an adoptive parent and his adopted child cannot be terminated by the unilateral act (disclaimer) of the parent. An adoptive parent has no power to disinherit his adopted child (except perhaps by giving him away in adoption), any more than a natural parent has such power in respect of his natural and lawful children. A.I.R. (Vol. 28) 1941 Rang. 87=1940 Rang.L.R. 783=193 Ind. Cas. 507.

——Adoption — Inheritance — Exclusion from —Child can be disinherited only by giving it away in adoption.

Although under Burmese Law an adopted son can forfeit his rights by unfilial conduct in certain circumstances, in default of such forfeiture, once adopted, he must remain adopted, and the adoption cannot be cancelled at will by the adoptive paents. A.I.R. (Vol. 20) 1933 Rang. 128=144 Ind. Cas. 821.

——Adoption—Inheritance — Child can be disinherited only by giving it away in adoption.

There is no provision in the Dhammathats enabling parents to disinherit their children, except by giving them away in adoption to another. A son, who has not been disinherited by his mother; is entitled to maintain a suit for partition of his mother's property. 6 Rang. 510=113 Ind. Cas. 804=A.I.R. 1928 Rang. 289.

——Adoption — Inheritance — Keittima form—Adoptee entering priesthood — Effect — Subsequent resumption of his old position in the family —If restores right to inherit.

On entering the priesthood, a **kettima** adopted son must be held to have served himself from all rights to inherit and from all family ties. On his re entering civil life, he would not **ipso facto** be entitled to resume the position and rights he might have been possessed of before. It is open to his adoptive parents to take him back and to again adopt him as their **keittima** son but that they did so must be proved. The same degree of proof would not be necessary in all cases, and it would depend on the facts and circumstances of each case whether a re adoption had taken place or not. Where the adopted son resumes his former position in the family in its entirely and his adoptive parents mean him to do so and he agrees, the years spent by him in the monastery cannot affect his rights of inheritance. 11 L.B.R. 124=66 Ind. Cas. 573=A.I.R. 1921 L.B. 87.

——Adoption—Keittima form—Essentials of.

A **keittima** child is a child adopted publicly with the intention of that the child shall inherit. The existence of natural children is no bar to such an adoption. No formal ceremony is necessary to constitute adoption, but the adoption must be a matter of publicity and notoriety. It can either be proved by direct evidence of the taking as a **keittima** child on a specified occasion, or it may be inferred from a course of conduct inconsistent with any other application. A.I.R. (Vol. 18) 1931 P.C. 317=54 C.L.J. 425=61 M.L.J. 898=136 Ind. Cas. 393 (P.C.).

——Keittima form — Evidence — Adopted child should be brought up by adoptive parents or there should be evidence to show factum of adoption.

It is by no means essential that, in these days at least, children should live with their adoptive parents; nor is it essential that if they do not do so the proof of adoption should be deemed incomplete. But in the case of young children, it is a normal characteristic of adoption that the upbringing of the children adopted should be undertaken by the adoptive parents and that where this is not done, one must look carefully at the surrounding circumstances to see whether, when the normal characteristics have been departed from, there is still sufficient proof of the factum of adoption remaining.

Keittima adoption may be proved either by evidence of a ceremony on a particular date of giving and taking in adoption, or by evidence of a course of conduct which cannot be explained on any other basis than that the children had been adopted with a view to inherit. The acid test is that the children should leave the family of their natural parents and join the family of their adoptive parents and consequently, in a case of **keittima** adoption, it is essential that the adoptive parents should, from the date of the adoption make themselves responsible for the upbringing of the children. A.I.R. (Vol. 25) 1938 Rang. 381=178 Ind. Cas. 830.

——Keittima form — Evidence — Corroborative proof.

The corroborative evidence that although the house of the adoptee's natural father was close by, the marriage festivities in adoptee's marriage took place at her adoptive parent's house; and after the marriage the adoptee's husband came to live under the roof of the adoptive parent's house are of considerable importance in favour of **keittima** adoption. A.I.R. (Vol. 28) 1941 Rang. 276, =1941 Rang.L.R. 445=198 Ind. Cas. 42.

——Keittima form — Evidence — Facts showing adoptee was adopted with a view to inherit—Mere fact that word keittima was not used, if material.

Where the adopted child was taken by her adoptive parents who were childless when only a few months old and she lived with them, and afterwards with her widowed adoptive mother, for

something like 50 years, and in the event, did inherit all their property:

Held, that these facts showed that she was adopted with a view to inherit and the mere fact that the catchword "**keittima**" is not used in the evidence goes for nothing. After all "**keittima**" is merely a label, and if facts which would justify that label are proved there is no need for the label to appear. A.I.R. (Vol. 24) 1937 Rang. 19=167 Ind. Cas. 90.

——Keithima form—Evidence—Intention and public notoriety—Necessity of.

Under Burmese Buddhist Law, in order to constitute a valid adoption, a formal ceremony is not necessary. What is to be proved is not only the fact of adoption but also the facts of the intention to adopt in the **keittima** form and of the public notoriety which are necessary to constitute a valid adoption in this manner. A.I.R. (Vol. 24) 1937 Rang. 170=1938 Rang.L.R. 323=169 Ind. Cas. 617.

——Keittima form — Evidence — Intention that adoptee should inherit—Mere fact of child being bought up as natural daughter, if sufficient.

In order to establish an adoption on the basis of one who will inherit to the entire exclusion of relatives by blood, much more than mere bringing up is needed. The Manugye Dhammathat requires that a **keittima** son or daughter should have been adopted with the intention publicly signified, of taking the adoptee as a son or daughter who will inherit. This intention may have been expressed at the time of the taking or later; or may be inferred from a long course of conduct making such intention public. The fact that a child was brought up as a natural daughter does not necessarily indicate an intention that the child should inherit, especcially when there is a natural daughter. In such a case it requires stronger evidence than in an ordinary case, in which the alleged adoptive parents are childless, to prove such intention and such intention should be clearly shown either by direct evidence or circumstances from which it may safely be inferred. A.I.R. (Vol. 23) 1936 Rang. 459=165 Ind. Cas. 358 (2).

——Inheritance—Keittima form—Right of inheritance in estate of father of adoptive father.

A **keittima** adopted child succeeds not only to the estate of his adoptive parents but also to property left by the parents' relatives. An adoptive child is for all purposes on the footing of a natural born child except that the special rights of an **auratha** child do not and cannot appertain to him because those rights arise not only from relationship but from the special claims of the natural-born eldest child within the family of the parents by whom it has been begotten and conceived. Therefore a child adopted in the **keittima** form, according to Burmese Buddhist law, can claim a share of the estate of the father of his adoptive father where the latter having acquired the status of **auratha** son has died before the death of the former but the **keittima** adopted child cannot become **auratha** of his adoptive parent. His share is claimed by virtue not of personal representation of his adoptive father but of an independent right of inheritance given by Burmese Buddhist Customary Law. As an out of time grandchild, he shares equally with the younger brothers of his adoptive father, the latter being **auratha** according to the rules laid down in the laws of Menoo, Vol. 10, page 277, but he has no claim, by virtue of his adoptive father having been an **auratha child**, to be considered as an **auratha** child himself. A.I.R. (Vol. 26) 1939 Rang. 197=1939 Rang. L.R. 341=182 Ind. Cas. 268 (F.B.).

——Adoption—Nature of—If contract or grant.

Adoption under Buddhist Law, is not a mere contract and is not a grant or other dispositions of property. It need not be in writing and may be proved by any means other than by deed of adoption. **Kittima** adoption is intended to provide an heir to the adoptive parent. There must be a distinct occasion on which it takes place and there is very often a ceremony. 31 Ind. Cas. 94=(1915) 2 U.B.R. 74.

——Adoption—Proof—Act of Shinbyuing though prima facie evidence of adoption is not always a clear indication of it

Though the act of **Shinbyuing** is, in some cases, **prima facie** evidence that the donor of the feast regarded the novice as his son, it is by no means a clear indication in every instance that anything more than a charitable intent sometimes coupled, with a love of display, was in the donor's mind. **Where several boys are Shinbyued** at the same time, and none of them is a natural born son, no presumption in favour of adoption can properly arise in the absence of a direct and public declaration of relationship or about the time of the ceremony. 1 Rang. 102=87 Ind. Cas. 686=A. I. R. 1928 Rang. 189.

——Adoption—Proof—Adoptee allowed to enjoy adoptive parents' land and maintain them — Performance of funeral rites.

The fact that the alleged adoptee was allowed to work the land of his alleged adoptive parents and enjoyed the profits out of which he maintained the old couple is quite insufficient to show that there was relationship of parent and child between his alleged adoptive parents and him. Nor does the performance of the funeral rites of the alleged adoptive parents by the alleged adopted son necessarily show that he is the nearest heir. A.I.R. (Vol. 28) 1941 Rang. 183=196 Ind. Cas. 144.

——Adoption—Proof—Adoptee not addressing adoptive parents as father and mother—If disproves adoption.

The fact that the adoptee does not address his adoptive parents as father and mother or the fact that they do not address him as son, does not necessarily show that he is not a **keittima** adopted son if such adoption is otherwise proved. A.I.R. (Vol. 22) 1935 Rang. 524=160 Ind. Cas. 330.

——Proof—Declaration by adopter as to devolution of property—Whether relevant as conduct on question of adoption.

Amongst Burman Buddhists who are incapable of making wills a declaration as to the devolution

of property being a declaration as to some degree of relationship, is admissible under S 32 (5), Evidence Act, in a case of alleged adoption and might also be relevant as conduct by the alleged adoptive father which throws a light upon the question at issue i.e. of adoption. A.I.R. (Vol. 28) 1941 Rang. 276=1941 Rang.L.R. 445=198 Ind. Cas. 42.

——Adoption—Proof—Evidence of notoriety and publicity—Necessity.

It is only when adoption is proved by circumstantial evidence that notoriety and publicity must be proved. 33 Ind. Cas. 927=9 Bur.L.T. 154.

——Adoption—Proof—Evidence of repute—Admissibility of.

Evidence of repute of status is distinguishable from what witnesses hear others say, which ordinarily amounts to mere hearsay, which is inadmissible in evidence. Evidence of repute is evidence of the reputation which the person concerned gains among the people among whom he or she resides, reputation which is the result of the impression of the people derived from their knowledge of the conduct between the adopter or adopters and the alleged adoptee. A.I.R. (Vol. 23) 1936 Rang. 459=165 Ind. Cas. 358 (2).

——Proof—Evidence of repute—Evidence of persons with special means of knowledge.

A reputation can only be established by admissible evidence and S. 50, Evidence Act, excludes evidence of mere rumour or gossip to the effect that an adoption has taken place or that such and such a person has no adopted child. The opinion of anyone who has special means of knowledge as to the existence of the relationship of one person to another is a relevant fact, if that opinion is expressed by conduct. Evidence may, therefore, be given as to the behaviour of the parties between whom the relationship is alleged to exist towards each other and as to the treatment accorded to them by others. But further than that it cannot go unless it is admissible within Cls. (5) and (6) of S. 32 of the Evidence Act. Witnesses cannot be allowed to speak as to current gossip in the neigbourhood of the existence of a relation or of the absence of any relationship at all. A witness might be able to depose that he was intimate with the family and a frequent visitor to the house, and that the alleged adoptive parents ordinarily discussed their social and family affairs with him, and that they never mentioned the alleged adoption to him. Evidence given by such a witness of their silence would be evidence of conduct admissible under S. 50, Evidence Act, but unless it were first established that the witness was a person who in the ordinary course would be likely to be told, the fact that he was not informed would not be relevant. Other evidence admissible in proof of adoption is that falling under S. 32 (5) and (6), Evidence Act. A.I.R. (Vol. 28) 1941 Rang. 276 =1941 Rang.L.R. 445=198 Ind. Cas. 42.

——Adoption—Proof—Evidence of repute—Hearsay evidence.

Statements by witnesses that they had heard that the girl in question was adopted or that she was said by all to be the adopted daughter, are merely hearsay evidence of no value at all to prove the fact of the adoption of the girl. A. I. R. (Vol. 23) 1936 Rang. 518=167 Ind. Cas. 362.

——Adoption—Proof—Evidence of repute must satisfy requirements of Ss. 32 (5), (6) and 50, Evidence Act (I of 1872).

The evidence of repute which is allowed by the Evidence Act must satisfy the requirements of S. 32 (5) and (6) and S. 50 of the Act. Such evidence must be expressed by the conduct of the person expressing the opinion as to the relationship, who has special knowledge of the existence of the relationship. A.I.R. (Vol. 28) 1941 Rang. 183=196 Ind. Cas. 144.

——Proof—Evidence of repute—Statement as to relationship by adoptive parents' deceased sister, admissibility under S. 32 (5), Evidence Act (I [I] of 1872).

In the case of an alleged adoption any such statement as to the relationship between the adoptive parent and the adoptee, by the adoptive parent's deceased sister would be admissible under S. 32 (5), Evidence Act. A.I.R. (Vol. 28) 1941 Rang. 276=1941 Rang. L.R. 445=198 Ind. Cas. 42.

——Proof—Ceremony — Publicity and notoriety, —Nature of proof—Evidence of repute.

In the case of a **keittima** adoption a formal ceremony of adoption is not necessary. Whether there is or is not a ceremony of adoption, there must be proof of publicity; if the ceremony of adoption is public then publicity may be established by proof of that fact alone; but if it be private then there must be proof of publicity and notoriety in addition in order to establish the existence of the relationship. Where a person alleging **keittima** adoption relies for proof of the factum of adoption on the course of conduct which is said to be inconsistent with any other supposition, then adequate proof of the publicity and notoriety of the relationship must be insisted upon.

In the case of **keittima** adoption, when no specific occasion is appealed to, the evidence of isolated private conversation with a number of persons in which the adoptive parent is alleged to have made remarks indicating that she had adopted a certain child, is not enough to establish publicity or notoriety so as to establish relationship of parent and child. There must be the evidence of the opinion of those with special means of knowledge which has been expressed by conduct so as to bring it under S. 50, Evidence Act. If a person puts himself or herself outside the reach of the public so as to be unable to give the status of an adopted child by according publicity to the new relationship, the only way which is left is the method of a public ceremony. The publicity of which proof is required must be publicity of the fact that the adoptive parent intended the child to inherit his or her property. A.I.R. (Vol. 28) 1941 Rang. 265=198 Ind. Cas. 37.

——Adoption—Proof—Ceremony if necessary—Inferring adoption from conduct—Publicity or notoriety—Necessity.

According to the law of Burma, no formal cere-

mony is necessary to constitute adoption. The fact of adoption may be inferred from a course of conduct inconsistent with any other supposition, but in that case the publicity or notoriety of the relationship must be satisfactorily proved. 36 Cal. 978 (P.C.), Foll. 6 Rang. 520=28 M.L.W. 129 =48 C.L.J. 177=33 C.W.N. 70=110 Ind. Cas. 306=A.I.R. 1928 P.C. 197=55 M.L.J. 95.

——Proof—Formal ceremony.

The fact of a formal ceremony is only explicable on the ground that adoption with a view to inheriance, that is, **keittima** adoption, is taking place. In the lesser form of adoption, **apatitha,** there would be no object in any formal ceremony at all. A.I.R. (Vol. 28) 1941 Rang. 276=1941 Rang. L.R. 445=198 Ind. Cas. 42.

——Adoption — Proof — Intention to adopt—Inference from conduct.

The Manukye **Dhammathat** requires that a **keittima** son or daughter should have been adopted with the intention, publicly signified, of taking the adoptee as a son or daughter who will inherit. This intention may have been expressed at the time of the taking or later, or may be inferred from a long course of conduct making such intention public. 1 Rang. 102=87 Ind. Cas. 686=A. I.R. 1923 Rang. 189.

——Adoption — Proof — Keittima form—Burden of proof—Adoption resembling apatitha form—Natural children living—Right of adoptee to inheritance.

Where a girl claims to be adopted daughter of certain person in **keittima** form, it is essential for her to prove that there was a definite intention on the part of the adoptive parents that she should inherit from them.

Where there was some kind of an informal adoption resembling that called **apatitha,** the adoptee will have no right of inheritance in the estate of the adoptive father, if there are natural children living. A.I.R. (Vol. 23) 1936 Rang. 518=167 Ind. Cas. 362.

——Adoption — Proof — Keittima adoption—Ceremonies—Course of conduct — Publicity—Necessity.

Adoptive father having already natural son—Adoptee (plaintiff) not treated as natural children were treated—Plaintiff described as son in adoptive father's will but not given equal share with natural sons—Father giving plaintiff power-of attorney describing him as son—Power of attorney less extensive than one given to natural son—Plaintiff described as son in inscription on tablet in ordination hall built by adoptive father and in tombstone of adoptive parents—Natural son married to plaintiff's niece which would be impossible if they were brothers—Plaintiff had not status of **keittima** son but was merely fondling—Description as son in inscription and tombstone did not prove his right to inherit.

Neither ceremony nor written document is necessary to constitute a keittima adoption; and fact of adoption can be inferred from a course of conduct which is inconsistent with any other supposition, but there must be proof of the publicity given to the relationship.

Held, that under these circumstances plaintiff could not be said to have proved that he was adopted by the adoptive father with the intention that he should be an heir to his estate and that he had the status of keittima son. Description as son in the inscription and on tombstone did not prove his right to inherit. He was therefore, only a fondling and no better. 6 Rang. 623=114 Ind. Cas. 513=A.I.R. 1929 Rang. 22.

——Adoption—Proof— Keittima and apatitha forms—Dividing line between—Nature of evidence—Onus of proof.

The dividing line between **keittima** adoption and **apatitha** adoption must be the question of intention to inherit, and that intention must be given effect to in such a way as to secure a measure of public notoriety or attention.

It cannot be said that no proof of **keittima** adoption should be considered satisfactory if established upon oral evidence alone. There is no kind of requirement as to the nature of the evidence forthcoming. All that the Judge has to do is to see whether from oral, documentary or circumstantial evidence from all the different elements at his disposal, he can infer that intention and that notoriety which the law demands as being consistent with **keittima** adoption and **keittima** adoption alone.

Though the initial burden of proving facts sufficient to establish **keittima** adoption undoubtedly lies on the **keittima** claimant, nevertheless, as in every other question of fact to be proved before the Court, that burden shifts from time to time during the trial as each point is reached at which, if no more evidence were given the one party or the other as the case may be, would succeed and, in the long run when evidence is given on both sides, the Court is left with the evidence as a whole and the surrounding circumstances to judge from. A.I.R. (Vol. 25) 1938 Rang. 369=178 Ind. Cas. 700.

——Adoption—Proof—Keittima form—Essentials—Proof of relationship—Proof of time of adoption not necessary.

Neither ceremony nor a written document is required to constitute the relation of a Keitima adopted daughter in Burmese law. There must be, on the one hand the consent of the natural parents and on the other, the taking of the child by the adoptive parent with the intention and on the footing that the child shall inherit. Where it is proved that the relationship as mother and daughter existed between plaintiff and her adoptive mother:

Held, that it is a question of secondary, although doubtless considerable importance, when it began, the true question in the case, as to what was the relation, having been proved. 32 C. 219=32 I. A. 72 (P.C.).

——Adoption—Proof—Keittima — Notoriety and publicity.

Under Burmese Buddhist Law in order to prove adoption direct evidence of giving and taking is not necessary. Nor if any documentary evidence or ceremony is required. But if there is no evidence of giving and taking, it is neessary to give clear and unambiguous evidence as to the publicity and

notoriety of status as a Kittima child. 56 Ind. Cas. 954=12 Bur.L.T. 236.

——Adoption—Proof — Keittima form — Reputation evidence.

Adoption can be proved either directly by proving what took place on the occasion at which the adoption is alleged to have taken place or indirectly by proving the course of conduct which is inconsistent with any other supposition than that of adoption. In many cases both methods of proof are employed where the course of conduct plays an important part as corroborative of the evidence tending to prove the original factum of adoption. With reference to both methods of proof there should be publicity or repute of the relationship of adopter and adoptee between the claimant and the alleged adoptive parents, an in **keittima** adoption it is essential to prove that the adoption was made with the intention that the adoptee was to be the heir of the adopter and that the repute that is necessary must indicate that the claimant is the prospective heir of the alleged adopter. A.I.R. (Vol. 22) 1935 Rang. 524=160 Ind. Cas. 330.

——Adoption — Proof — Living with adoptive parents—Latter having no child—Reputation as adopted daughter—Sufficiency.

A applied for the letters of administration to the estate of **D**, claiming that she was the **keittima** adopted daughter and the sole heir of **D**. **A** was living in the house of **D** since she was four years old to the time of her marriage. **D** and her husband had no child. **A** was married to the nephew of **D**. There was evidence that **A** was adopted by **D** and also had a reputation as an adopted daughter of **D**. Even after her divorce **A** lived with **D** with her children and still had the reputation as an adopted daughter. The opposite party contended that **A** was not adopted by **D** but lived at **D's** house as a servant girl:

Held, that the evidence was sufficient to establish **A's** adoption as **keittima** daughter. It was impossible that she had a position of a servant girl owing to the fact that she was married to the **D's** nephew and lived at **D's** house even after her divorce. A.I.R. (Vol. 25) 1938 Rang. 40=174 Ind. Cas. 223.

——Adoption — Proof — Living with adoptive parents—Evidentiary value of—Giving of parents —Value of evidence.

Though an adopted child usually resides with the adoptive parents, that is not essential for a valid adoption. But although residence with the adoptive parents is not one of the legal ingredients of a valid adoption, where other evidence is lacking, residence with the adoptive parents is most valuable as evidence.

The giving of presents in most cases affords a valuable contribution to the sum-total of the evidence relied upon to prove adoption. A. I. R. (Vol. 24) 1937 Rang. 170=1938 Rang.L.R. 323=169 Ind. Cas. 617.

——Adoption — Proof — Living with adoptive parents—No special ceremonies necessary but publicity and notoriety are essential.

There is no special ceremony in Burmese adoption, but the adoption must be a matter of publicity and notoriety. It is strong evidence of such publicity and notoriety that the adoptee lived continuously in the house of adopter from her babyhood for twelve or thirteen years, and that he was entered on the register of the school as her parent, and paid the school fees. 1 Rang. 451=77 Ind. Cas. 63=2 Bur.L.J. 260=33 M.L.T. 361=29 C.W.N. 610=1923 M.W.N. 711=A.I.R. 1923 P.C. 156=46 M.L.J. 334 (P.C.).

——Adoption — Proof — Living with adoptive parents and repute—Second adoption—Validity.

Plaintiff who claimed to be the adopted daughter of a Buddhist couple, was proved to have lived with the couple from the age of three years. It was further proved that the plaintiff's mother as well as others had stated that the old couple had told them that they had adopted the plaintiff and that she was generally regarded as their daughter.

Held, that the adoption was amply proved. No inference against adoption can be drawn from the fact that an adopted daughter worked in the fields for her adoptive parents as even children of well-to-do parents often assist in cultivating the family acres. A second adoption during the life-time of the first adopted child is not prohibited by the Buddhist Law though such adoptions are unusual. 11 Ind. Cas. 776=4 Bur.L.T. 158.

——Adoption—Proof—Motive.

In cases of adoption as in other cases, although motive is not a necessary ingredient, it always forms a good index to the way in which the truth lies. A.I.R. (Vol. 23) 1936 Rang. 459=165 Ind. Cas. 358 (2).

——Adoption—Proof—Publicity—Deed of adoption duly executed and registered—Sufficiency.

According to the Burmese Customary Law, a deed of adoption duly executed and followed by registration in itself can never afford proof of adoption. Publicity of the **factum** of adoption is necessary although residence with the adoptive parents is not essential to a valid adoption.

A formal deed of adoption was drawn up and executed in the presence of a number of persons, (several of whom signed the instrument as attesting witnesses), who were called in to give publicity to the formal adoption by the execution of a deed, and at the subsequent registration of the document there were present the Sub-Registrar, the Civil Surgeon, the family **hypoongyi**, a Chinaman who carried on business in a large way as a draper, a Burmese slipper manufacturer in the same town, a hardware merchant and iron-monger and the manager of the Co-operative Bank:

Held, that under the circumstances the publicity given was sufficient to constitute the adoption a valid one. A.I.R. (Vol. 21) 1934 Rang. 323=12 Rang. 634=154 Ind. Cas. 201.

——Proof—Publicity—Formal ceremony — Inference from conduct.

It is true that publicity must be given to the relationship in the case of adoption under Burmese Buddhist Law.

But no formal ceremony is necessary to constitute adoption. The fact of adoption may be inferred from a course of conduct inconsistent with any other supposition: but in that case the publi-

city or notoriety of the relationship must be satisfactorily proved.

But where a formal ceremony of giving and taking in **keittima** adoption is shown to have taken place in the presence of credible witnesses who were summoned in order to secure publicity and notoriety to the factum of adoption, proof of adoption, is complete. Where there is a formal giving and taking, if it be done privately, publicity must afterwards be given to the fact. But where the ceremony itself is public, the fact of its having been so ensures at once and for all time the degree of notoriety requisite for the establishment of the relationship and no amount of negative evidence pointing to the lack of such relationship by reason of subsequent conduct can affect the conclusion unless, indeed, it is directed towards showing the breaking of the adoptive tie. A.I.R. (Vol. 28) 1941 Rang. 276=1941 Rang.L.R. 445=198 Ind. Cas. 42.

——Adoption—Proof of—Rights of adopted son—Forfeiture of inheritance—Intention.

Under the Burmese Bhuddhist Law there is no ceremony for an adoption, but the adoption must be a matter of publicity and notoriety. The fact of the adoption can either be proved as having taken place on a distinct and specified occasion or may be inferred from a course of conduct which is inconsistent with any other supposition. But the amount of proof of publicity required will be greater in case of the latter category when no distinct occasion can be appealed to. 32 I.A. 72; 36 I.A. 197, Ref. A **Kittima** child may forfeit his right of inheritance by separating from his adoptive parents, this being considered an act of ingratitude. It is, however a matter of intention. But where there are no other children with whom the **Kittima** child seeks to compete or share, the law allows him to inherit in whole or part notwithstanding his separation. Separation working a forfeiture is a matter of intention. If the separation of residence be with the consent of the adoptive parents, and if the child is ready and willing to discharge filial duties after it, the bond is not broken. A child adopted according to the fullest form of adoption and retaining its status as an adopted child, till the death of his adoptive parents is entitled to inherit their estate, as if he were a natural and lawful child either in the absence of other lawful children or in competition with them. Such a child is called a Kittimatha. 45 Cal. 1=49 Ind. Cas. 863=44 I.A. 251=22 M.L.T. 411=22 C.W.N. 97=27 C.L.J. 68=(1918) M.W.N. 9=20 Bom. L.R. 69=11 Bur.L.T. 28 (P.C.).

——Adoption — Validity — Death bed adoption—Validity.

Under the Buddhist Law, adoption just previous to the death of the adopter is valid. 32 Ind. Cas. 539=U.B.R. (1915) II, 87.

——Adoption—Validity—Mutual adoption.

A mutual adoption by persons who have no bond either by relationship or in any other way is impossible. 120 Ind. Cas. 663=A.I.R. 1929 Rang. 173.

2. Applicability.

——"Ayo"—Succession to law applicable.

The principles of Burmese Buddhist Law are to be applied in determining who is the nearest rightful female heir to succeed to an "Ayo" in the absence of an undisputed and ancient custom to the contrary. 8 Rang. 17=A.I.R. 1930 Rang. 148.

——Applicability—"Buddhist Burmese"—Chinese marrying Buddhist wife and performing Buddhist rites at her death—Adoption of Buddhist son and shinbyuing him—Inference.

The fact that a Chinese married a Buddhist wife and performed Buddhist rites at her death or that he adopted a Buddhist son and shinbyued him would not justify an inference that he was a Buddhist himself. A.I.R. (Vol. 28) 1941 Rang. 241=1941 Rang.L.R. 285=196 Ind. Cas. 636.

——Applicability — Chinese Buddhist following observances of Burmese Buddhist—Effect.

The fact that a Chinese Buddhist who is a Mahayanist or a Buddhist of the board school observes certain of the observances of the narrow school to which Burmese Buddhists belong, does not go far towards showing that he has abandoned his own form of Buddhism and has adopted the narrower form which is followed by the Burmese. A.I.R. 1930 Rang. 192.

——Applicability—Chinese Buddhist — Succession to estate of—Law applicable—Succession Act, S. 29—(Per Otter, J., contra.).

Per **Full Bench.**—Unless it is proved that a Chinese Buddhist born in China, who was domiciled and died in Burma, had abandoned his Chinese Buddhist religion and had adopted Burmese Buddhism, Burmese Buddhist Law does not govern the succession to his estate. The Chinese Customary Law also cannot be held to apply to it. The succession to his estate should be governed by Succession Act. Case-law discussed.

Per **Otter, J.**—Chinese Customary Law governs the succession to the estate of a Chinese Buddhist. 8 Rang. 57=A.I.R. 1930 Rang. 81 (F.B.).

——Applicability — Emigrant—Migration—Chinaman settling in Burma—Law applicable.

Where a Chinaman migrates from China and settles in Burma permanently, he brings his personal law with him and is not affected by statute enacted in China after he left China. A. I. R. (Vol. 20) 1933 Rang. 313=11 Rang. 310=148 Ind. Cas. 492.

——Applicability—Rajbansis—Law governing.

Burmese Buddhist Law is not applicable to the Rajbansis, even if they are Buddhists and the law applicable to them is the customary law prevailing amongst them in their habitat which is Chittagong. 1 Chan, Toon's L.C. 370, diss. from 2 L.B.R. 95, ref. to. 9 Bur.L.T. 248=35 Ind. Cas. 431=8 L.B.R. 301.

3. Ateptwa property.

See also (1) MARRIAGE.
(2) SUCCESSION — ATEPTWA PROPERTY.

——Alienation—Power of husband.

During the continuance of the marriage, the eindaunggyi husband can alienate his own **ateptwa** property. A.I.R. (Vol. 27) 1940 Rang. 286=1940 Rang.L.R. 534=192 Ind. Cas. 425.

——Eindaunggyi couple—Mortgage and redemption of husband's ateptwa property by couple—Character of property, if changed.

A mortgage and redemption of the husband's ateptwa property by the eindaunggyi husband and wife does not change the character of the property and it remains the ateptwa property of the husband. A.I.R. (Vol. 27) 1940 Rang. 286=1940 Rang.L.R. 534=192 Ind. Cas. 425.

4. Conversion.

——Conversion—Change of religion by one parent—Subsequently born child—Status of.

Conversion of father to Christianity after marriage according to the Burmese Buddhist custom of marriage, the mother remaining a Buddhist does not dissolve the marriage and the legitimacy of the child born after the father's change of religion is not thereby affected. 26 Ind. Cas. 700 (L.B.).

——Husband embracing Christianity—Effect on marriage tie—Subsequent marriage with another, if valid.

Where a Burmese Buddhist husband changes his religion into Christianity, there is no automatic divorce with his wife whom he had married as a Burmese Buddhist, so that his subsequent marriage with another woman is invalid. A.I.R. (Vol. 22) 1935 Rang. 37=155 Ind. Cas. 990.

5. Custom.

Adoption.
Applicability.
Atet child.
Dhammathats.
Succession.

——Custom—Adoption—Adult, if can be adopted without.

Under Burmese Customary Law, no adoption of an adult can take place without his or her consent. A. I. R. (Vol. 21) 1934 Rang. 323=12 Rang. 634=154 Ind. Cas. 201.

——Custom—Applicability—Ancient law found in Dhammathats—Applicability under modern conditions.

Per **Page, C.J.**—Much of the ancient customary law of the Burmese people to be found in the Dhammathats has become anachronnistic, and cannot intelligently be applied to the Burmans of the present day; for the facts and conditions upon which many of the rules laid down in the Dhammathats rest find no counterpart in the conditions and customs that exist in modern Burma, and under which the people now "live and move and have their being". A.I.R. (Vol. 22) 1935 Rang. 248=13 Rang. 412=158 Ind. Cas. 131 (F.B.).

——Custom—Atet child—Atet children of wife—Right to payin property of step-parent.

Authority for the proposition that in a case in which a step-parent dies with children surviving him the **atet** children of his second wife are not entitled to share in the **payin** of the step-parent is to be found in the Dhammathats and also in decided cases, and in the modern practice and views of Burmans. The Court is not only at liberty but is found to decide the case in accordance with the Burmese Customary Law as it obtains to-day, rather than to perpetuate the outworn shibboleths of bygone ages, notwithstanding that some sanction for their continuance may be found in extracts from the Manugye Dhammathat. Burmans are not to be doomed to live for ever under the rulings and customs by which they were governed in the days of King Alampra.

Per **Mya Bu, J.**—The Dhammathats do not recognize the step children's right of inheritance in the property acquired by their step-parent after the death of their own parent if the step-parent dies leaving a widow or children of his own.

The property taken by the surviving parent to to his second marriage would ordinarily be his **payin** in that marriage and so long as the corpus is unchanged it will always remain **payin** and unless there has been a merger of the **payin** into the **ateptwa** property either by being inextricably mixed up or by conversion, the **payin** property does not lose its original character. A. I. R. (Vol. 23) 1936 Rang. 31=13 Rang. 487=160 Ind. Cas. 482.

——Custom—Dhammathats—Authority of Manugye Dhammathat—Extent of.

The time has come when some Judge should be courageous enough to point out, albeit with diffidence and the utmost respect, that while great value is attached in Burma to the rulings in the Manugye, Burmese jurists do not regard this Dhammathat as sacrosanct and that from time to time some embarrassment has been created as the result of following the Manugye in the teeth of what has been laid down elsewhere in the Dhammathats. One not insignificant reason why this Dhammathat is so frequently cited is because the Manugye was the first, if it is not the only Dhammathat to be wholly translated into English, and thus it is the authority to which those unversed in in the Burmese tongue most readily, if not inevitably, turn. A.I.R. (Vol. 23) 1936 Rang. 31=13 Rang. 487=160 Ind. Cas. 482.

——Custom—Dhammathats—Written law opposed to general custom—Weight of.

Per **Page, C.J.**—The Dhammathats are not the sole repository of Burmese Customary Law, which is also to be ascertained from decided cases and the prevailing customs and practice of Burmans. Custom is often a better guide than religious law books. Much of the text of the latter is inapplicable to the present age and perhaps was never law at all. It would be dangerous to give weight to a written law where it is opposed to the general custom and unsanctioned by previous decisions of Judges. A.I.R. (Vol. 23) 1936 Rang. 31=13 Rang. 487=160 Ind. Cas. 482.

——S. 5—Custom—Succession—Children of first marriage—Rights of—Surviving father remarrying—Only child, if entitled to half the estate of his parents.

Under Burmese Customary Law where the surviving parent remarries, the children of the former marriage acquire a vested interest in the joint property of that marriage to the extent of the share of the deceased parent. In the case of an only child of a surviving father who remarries, on remarriage, the child is entitled to a half share in the estate of its parents. A.I.R. (Vol. 21) 1934 Rang. 90=12 Rang. 55=150 Ind. Cas. 667. [Overrules A.I.R. (Vol. 1) 1914 Low. Bur. 229 =8 L.B.R. 115=8 Bur.L.T. 25=27 Ind. Cas. 632.]

——Custom — Succession — Child—Unfilial conduct after re-marriage of parent.

According to Burmese Customary Law, if unfilial conduct so serious as to justify a forfeiture of the right of inheritance is proved, it matters not whether the unfilial conduct occurred before or after the remarriage of the parent. Proof of one or more isolated instances of disobedience or of occasions upon which the child indulged in abuse or even committed an assault would not necessarily or normally justify a forfeiture of the right of inheritance. It must depend upon the facts and circumstances of the particular case under consideration. A.I.R. (Vol. 20) 1933 Rang. 16=11 Rang. 39=143 Ind. Cas. 536.

——S. 6—Divorce—See also BUDDHIST LAW —(BURMESE)—Succession.

6. Divorce

Synopsis.

(a) Adultery.
(b) Burden of Proof.
(c) Cruelty.
(d) Desertion.
(e) Effect on rights of children.
(f) Essentials.
(g) Frame of suit.
(h) Grounds.
(i) Law as to.
(j) Title to property.

——Adultery, penalties for.

Burmese Buddhist Law recognizes that divorce is essentially a personal action and the penalties for adultery can be enforced only by the husband. A.I.R. (Vol. 25) 1938 Rang. 168=1938 Rang. L.R. 229=177 Ind. Cas. 492.

——Adultery by husband—If sufficient to entitle wife to divorce.

Ordinary grounds for divorce are adultery and cruelty on the part of the husband and adultery on the part of the wife; and mere adultery on the part of the husband is not by itself a sufficient ground to entitle the wife to divorce. 7 Rang. 451=120 Ind. Cas. 137=A.I.R. 1929 Rang. 307.

——Divorce—Burden of proof—Onus of proving divorce is on person alleging it—Person having several wives putting part of his propety in the name of one—No presumption that others are divorced.

Mariage even in Burma is ordinarily a permanent bond, which subsists until it is actually broken, and the burden of proving that it has been broken is obviously on the person alleging it. Where a man has a considerable amount of property and several wives, the fact that he puts part of his property into the name of one wife does not on the face of it go far towards showing that the other wives have been divorced. 2 Bur.L.J. 67 =74 Ind. Cas. 1037=A.I.R. 1923 Rang. 155.

——Cruelty—Assault — Chastisement by husband is sufficient ground.

If a husband is guilty of a single act of misconduct, the wife is not bound to give her husband another chance; she can insist on her claim to divorce at once. Whatever may have been the ancient customs of society or even the rules of Buddhist law in a former state of society the right of a husband to chastise his wife does not now exist and will not be recognised by British Courts of Justice. The wife may submit to ill-treatment and condone it, but if she chooses to come into Court and asks for protection against personal violence, she is entitled to such protection and must in every case receive it. Case law referred. 4 U.B.R. 68=64 Ind. Cas. 957=A.I.R. 1921 U.B. 2.

——Cruelty—Assault by husband.

A single assault by a husband on the wife which is provoked by the wife is not a sufficient ground for the granting of a divorce to a wife on any terms, when the character and habits of the husband are not of a nature to suggest any likelihood of a repetition of the offence. It is true that a divorce as by mutual consent may be granted for a single act of cruelty but a single act of violence without any likelihood of its being repeated is not necessarily an act of cruelty. 7 Rang. 790= 121 Ind. Cas. 809=A.I.R. 1930 Rang. 56.

——Divorce—Cruelty—Assault by husband.

Where a Burmese Buddhist man slaps his wife though once and cohabits with another woman and gets a child from her, the wife is entitled to divorce. 117 Ind. Cas. 64=A.I.R. 1929 Rang. 64.

——"Cruelty"—Essence of.

Cruelty and physical violence are quite distinct. The essence of cruelty does not consist in violence. It consists in being indifferent to, delighting in another's pain and so it really depends on the state of the mind of the person inflicting pain rather than the actual infliction of pain. 7 Rang. 790=121 Ind. Cas. 809=A.I.R. 1930 Rang. 56.

——Divorce—Cruelty—Husband accusing wife of adultery—Wife assaulted for visiting her parents —Effect.

It is perverse for a husband to persist throughout in accusing his wife of adultery which he cannot prove and it is perverse on his part to assault

his wife because she declined to give up visiting her parents' house simply to placate his unjustified suspicions. Such conduct on the part of the husband entitles the wife to insist on divorce as it constitutes cruelty in which there is an element of perversity. A.I.R. (Vol. 21) 1934 Rang. 272=152 Ind. Cas. 483.

——Divorce—Cruelty—Single act, if sufficient.

Under the Burmese Buddhist law a divorce may be allowed to a wife on proof of a single act of cruelty on the husband's part. 20 Ind. Cas. 674, rel. on. 46 Ind. Cas. 144 (L.B.).

——Desertion and failure to maintain wife for over 12 years, constitute divorce.

Per Robinson, **C.J.**, and **Maung Kin, J.**—But even if the evidence had not been sufficient to establish a divorce by deed there is the admitted fact that appellant's husband had deserted his wife for twelve years before her death, and that he had failed to maintain her during that period. This fact alone would be sufficient to constitute a divorce under the Burmese Buddhist Law. 1 Bur.L.J. 24=105 Ind. Cas. 269=A.I.R. 1922 L.B. 28.

——Desertion by husband for three years without communication—Effect.

According to Burmese Buddhist Law, the desertion of the wife by the husband for three years during which the latter does not communicate with the wife or send means of subsistence to her would automatically bring about a divorce between the husband and wife after the expiration of that period. A.I.R. (Vol. 22) 1935 Rang. 37=155 Ind. Cas. 990.

——Desertion by husband — Condonement—Husband taking lesser wife—First wife's non-objection for two and a half months does not amount to consent.

Where a husband took lesser wife did not object for two and a half months and subsequently sued for divorce,

Held, that her silence for two and a half months did not amount to consent. 6 Bur.L.J. 22=102 Ind. Cas. 473=A.I.R. 1927 Rang. 112.

——Desertion by wife—Effect—Allegation of adultery—Wife's share in hnapazon property, if lost.

When a marriage is dissolved by the desertion of the wife, she does not lose her interest in the joint property of the marriage, and, even if there is an allegation of adultery against the wife, the joint property must be divided on the footing that the marriage has become dissolved by desertion, unless the husband has proved the adultery in a suit for divorce brought by him. Consequently in such circumstances the wife does not forfeit her share in the hnapazon property. A.I.R. (Vol. 25) 1938 Rang. 168=1938 Rang. L.R. 229=177 Ind. Cas. 492.

——Desertion by wife—No maintenance for one year—Effect of.

Under Burmese Buddhist Law, after the wife has departed from the house of her husband, there is a divorce by operation of law where there has been no maintenance of the wife for the period of one year. The contribution by the husband to the maintenance of a wife who had left him will avoid the consequence that the marriage tie is dissolved by operation of law. A.I.R. (Vol. 24) 1937 Rang. 255=171 Ind. Cas. 656.

——Desertion—Party wishing to divorce—Duty to relinquish all property.

Essentially the case of a divorce by desertion is the same as the case of a divorce at the instance of one party against the wish of the other, and therefore, in the absence of an express provision to the contrary, the rule that the party wishing to divorce must relinquish all the property should be followed in the case of divorce by desertion. A.I.R. 1925 Rang. 242, Foll. 6 Rang. 1=109 Ind. Cas. 456=A.I.R. 1928 Rang. 125.

——Desertion—When justifies divorce—Repeated efforts of husband to effect re-union—Wife's right to divorce—Constructive desertion—Doctrine of.

Under Burmese Buddhist Law, desertion, in order to entitle a party to a marriage to treat the marriage as dissolved, consists of three ingredients, namely (1) the spouse; at falut leaves the other spouse; (2) he contributes nothing whatever towards her maintenance after having left her; and (3) he remains away from her for a period of three years during which time he makes no **bona fide** attempt to communicate with her or to effect a re-union. The period of three years is, in fact, a sort of **locus penitentiae** during which the spouse at fault may repent of his action in leaving his wife and show to her an honest change of mind, and if he does that, then, the desertion, so far as it entitles the wife to a divorce, comes to an end from the time of his repentance.

The husband may live in a place and make it impossible for his wife to live there, though it is she and not he that actually withdraws and that state of things may be desertion of the wife. But the question as to whether there has been such a constructive desertion of the wife must depend upon whether or not the wife was justified in her refusal to cohabit with her husband.

Where it appeared that the husband had made repeated efforts to effect a re-union after he had left his wife and it was not pleaded that those efforts were dishonest:

Held, that the wife was not entitled to claim divorce. A.I.R. (Vol. 20) 1933 Rang. 374 =150 Ind. Cas. 317.

——Desertion—When justifies divorce—Unless both desertion and failure to provide maintenance are established no right to re-marry arises.

Although there is much difference of opinion

in Burma on the question whether, when the husband or wife has left the home, the marriage is put an end to by the fact of the husband's omitting to send the wife anything for three years or one year, as the case may be, or whether there must be some further act of volition showing an intention to determine the marriage relation, such as remarriage or a suit for divorce, yet it is clear that unless both the conditions, viz., desertion on the one side or the other and failure on the part of the husband to provide the wife with any maintenance for the specified period of one or three years as the case may be, are satisfied, the text gives the wife no right to remarriage, and the marriage tie must be considered as subsisting. 55 I.A. 38=6 Rang. 79=32 C. W. N. 429=4 O.W.N. 443=108 Ind. Cas. 345=47 C.L.J. 577=27 M.L.W. 830=A.I. R. 1928 P.C. 8=54 M.L.J. 468 (P.C.).

——Divorce — Effect on rights of children — Arrangements by parents—Binding nature—Rule—Daughter is right to succeed to father—Resumption of filial relations—Effect—Test.

Burmese Buddhist Law gives full recognition to parental authority. The children are bound by the arrangements made by their parents in the event of a divorce taking place. It is for the parents to say how their property shall be divided and with whom the children shall go. The parents have an unfettered discretion in this respect.

The general rule is that on a divorce taking place the daughters go with the mother and the sons with the father. If the parents decide that the daughters shall go with the mother and the sons shall go with the father and the arrangement is carried out, it follows that so far as the daughters are concerned, they lose their right to succeed to their father's property and as far as the sons are concerned, they lose their right to succeed to their mother's property. The lost right may be regained by what is usually described as the resumption of filial relations. The right can only be regained if the parent from whom the child was separated so wills it.

A daughter who has lived with her mother since the divorce of the parents is not to be regarded as an heir of her father merely because she and her father have remained on terms of affection and she has continued to visit him.

Before a daughter can succeed in such circumstances she must satisfy the Court that the father regarded her as an heir after the divorce. In the absence of the proof of a declaration by the father that he did so regard her, she must adduce evidence from which the Court is justified in arriving at a conclusion in her favour.

Where there was a definite break in the relations between the plaintiff and her father when the latter divorced her mother and on the divorce taking place she went to live with her mother and the conduct of the daughter was such that he did not regard her as his heir:

Held, that she was not an heir of her father and was not entitled to a decree for the administration of his estate. A.I.R. (Vol. 22) 1935 Rang. 236=13 Rang. 166=157 Ind. Cas. 850.

——Divorce — Effect on rights of children — Arrangements by parents—Binding on children—Child allotted to one of the parents—Demand by him of estate of abandoning parent — Burden of proof.

Where the couple divorcing have come to an agreement as to the disposal of the children, not opposed to the principles of natural justice, the children are bound thereby; and where, therefore, a child by agreement or acquiescence of the parents at the time of the divorce is allotted to one or other of the separating parties, the child must be regarded in law as having severed filial relations with the other, and where that child sets up a subsequent claim to the estate of the parent who abandoned the child to the care of the other at the time of divorce, the onus is on the child to show that filial relations have been resumed. Case law discussed. 6 Rang. 510=113 Ind. Cas. 804=A. I. R. 1928 Rang. 289.

——Divorce — Essentials — What constitutes divorce.

Marriage subsists unless dissolved by Court or by mutual consent in presence of elders or by desertion for certain period—Dismissal of wife for adultery cannot constitute divorce—Partition following upon a divorce by mutual consent cannot be objected to on ground of misconduct. 7 Rang. 98=117 Ind. Cas. 253=A.I.R. 1929 Rang. 196.

——Divorce—Frame of suit—Procedure.

Under the Burmese Buddhist Law, suits for divorce should be framed and tried in one or other of the three kinds of divorce, or in the others in the alternative, and the question of status or existence of the properties to be partitioned, should be left to a later suit. 59 Ind. Cas. 1005=(1920) 3 U. B.R. 251.

——Divorce—Grounds—Caprice of spouse.

There is no right of divorce at the mere caprice of either party to a Burmese Buddhist marriage against the will of the other party and without proof of misconduct or default on the part of the other party. 11 L.B.R. 385; 2 U.B.R.B. 4 Div. 3; 2 U.B.R. Diss. 1 Rang. 722=79 Ind. Cas. 705=A.I.R. 1924 Rang. 182.

——Divorce—Grounds—Husband leaving wife and living with another woman.

A divorce is not permissible at the will and pleasure of one party to a Burmese Buddhist marriage without proof of a matrimonial offence. Consequently a suit for restitution of conjugal rights in respect of parties to a Burmese Buddhist marriage is competent. Two persons lived as husband and wife for about 11 years and had children. After that period the husband left the place and lived with another woman whom he had made his lesser wife.

Held, that the wife had reasonable cause for not returning to her husband and no decree for restitution of conjugal rights could be passed at the instance of the husband. A.I.R. 1924 Rang. 182; 2 U.B.R. 5 and A.I.R. 1929 Rang. 307, Rel. on. A.I.R. 1930 Rang. 291.

——Divorce—Grounds—Misconduct of husband—Right of wife—Joint property—Onus.

A Buddhist wife in Burma is entitled to a divorce

by mutual consent if the husband is guilty of a single act of misconduct. Under the law as administered in Burma by British Courts, a husband has no right to chastise his wife, though it is open to the wife to submit to ill treatment or condone it. Where in a suit for divorce by the wife, the husband claims certain property to be joint property the onus is on him to prove it. 64 Ind. Cas. 957 =(1921) 4 U.B.R. 68.

——Divorce—Grounds—Right of wife.

A divorce is given not to punish a husband for an assault, that is provided for by the Criminal Law, but to enable the wife to free herself from a bond which becomes intolerable. 7 Rang. 790=121 Ind. Cas. 809=A.I.R. 1930 Rang. 56.

——Divorce—Grounds—Right of wife—Wife is entitled to divorce on giving up claim to joint property.

The wife is entitled to a divorce on payment of the costs of the suit and foregoing all claim to the joint property of the marriage, irrespective of the fact, whether there is cruelty on the part of the husband. 11 L.B.R. 385=69 Ind. Cas. 980=1 Bur.L.J. 127=A.I.R. 1923 Rang. 86.

——Divorce—Law as to.

The Burmese Law in the case of divorce is to be determined by the Manugye or Dammathat of the Laws of Menoo, with such assistance as may be derived where necessary from the other Dammathats. 55 I.A. 38=6 Rang. 79=32 C.W.N. 429 =4 O.W.N. 443=108 Ind. Cas. 345=47 C.L.J. 577=27 M.L.W. 830=A.I.R. 1928 P.C. 8=54 M.L.J. 468.

——Divorce—Title to property—Desertion by husband having two wives—Deserted wife takes one-fourth share.

In the case of a divorce by desertion by the husband having two wives, the deserted wife is entitled to one-fourth share in the property. A.I.R. 1925 Rang. 329 (F.B.), Foll.; A.I.R. 1925 Rang. 242, Diss. from. [This last mentioned case is affirmed by A.I.R. 1927 P.C. 234—Ed.] 6 Rang. 1=109 Ind. Cas. 456=A. I. R. 1928 Rang. 125.

——Divorce — Title to property — Eindaunggyi couple—Wife's adultery—Wife, if loses her right in hnapazon property.

In the case of a divorce between an Eindaunggyi couple (previously married couple) on account of the wife's adultery, the wife loses all her right in the hnapazon property and in principle, there is no difference between the case of a Nge-lin-nge-maya (married from youth) and that of an Eindaunggyi in the matter of imposition of forfeiture on the guilty spouse. A.I.R. (Vol. 23) 1936 Rang. 274 =14 Rang. 329=163 Ind. Cas. 600.

——Divorce—Title to property—Eindaunggyis and virgin couple—Atetpwa and payin property, rights to.

At divorce eindaunggyis take back their atetpwa property entirely, while in the case of a virgin couple (persons who have not been previously married), they can only take back two-thirds of their payin property which corresponds to the Atetpwa of the eindaunggy. A.I.R. (Vol. 27) 1940 Rang. 286=1940 Rang.L.R. 534=192 Ind. Cas. 425.

——Divorce—Title to property—Payin property—Spinster marrying a widower—Wife—Divorce by mutual consent—Wife's right to share in payin property.

In the case where the wife is a spinster but the husband had been previously married, where the husband brings payin to the marriage and the wife nothing and where they separate on divorce by mutual consent without any fault on either side the rule to be applied is the rule laid down for the case where neither party had been married before and separate by mutual consent without fault, and where the relation of nissaya and nissita exists. Case-law discussed. 11 L.B.R. 52=64 Ind. Cas. 806=A.I.R. 1921 L.B. 2.

——Divorce—Title to property—Wife deserted and obtaining divorce—Right to husband's whole property.

The proposition that where the husband deserts his wife, who subsequently sues for divorce and succeeds the wife is entitled to divorce with possession of all the husband's interest in the property, is in itself a startling proposition and cannot be accepted, and there is no case known in which even a claim based on such a proposition has been made. There is no text in the Dhammathats or in Burmese Buddhist Law books to support it nor is there any case-law on the subject. 54 I.A. 403= 5 Rang. 841=46 C.L.J. 406=32 C.W.N. 173= 39 M.L.T. 492=6 Bur.L.J. 231=106 Ind. Cas. 17=A.I.R. 1927 P.C. 234=53 M.L.J. 425 (P. C.).

——Divorce—Title to property—Wife's right—Wife granted one-third of husband's property—Propriety.

Where it was found that the marriage of defendant (husband) with the plaintiff (wife) was brought about by misrepresentation, that the plaintiff was an entirely innocent party, that the facts relating to the desertion were of an aggravated nature and quite unjustifiable, and the Courts in India granted her a third share in the property given to the husband by his mother:

Held, that the decree appealed from cannot be said to be unreasonable or contrary to justice, equity and good conscience. A.I.R. 1925 Rang. 242, Affirmed. 54 I.A. 403=5 Rang. 841=46 C. L.J. 406=32 C.W.N. 173=39 M.L.T. 492=6 Bur. L.J. 231=106 Ind. Cas. 17=A.I.R. 1927 P.C. 234=53 M.L.J. 425 (P.C.).

——Divorce—Title to property—Husband marrying second wife, falsely representing he had divorced first—Deserting second wife and living with first wife—Second wife's right to divorce and partition property—Share.

A wife separated from her husband. The husband then falsely representing that he had divorced the first wife married a second wife. Afterwards he deserted the second wife and lived with the first wife.

Held, that the second wife was not a lesser wife, that she was entitled to sue for divorce and partition on the ground of desertion and that she was entitled at such partition to two-thirds of the hus-

band's property. 3 Rang. 160=4 Bur.L.J. 42=88 Ind. Cas. 402=A.I.R. 1925 Rang. 242.

7. Ecclesiastical Jurisdiction.

——Ecclesiastical Jurisdiction—Civil disputes between members of Buddhist Priesthood—Thathnabaing's jurisdiction to decide.

After the British annexation the **Thathanabaing** and|or the Burmese Buddhist hierarchy, neither retained nor possessed any jurisdiction to decide all civil disputes between the members of Burmese Buddhist priesthood. The **Thathanabaing** or the Buddhist hierachy in Upper Burma have no constitutional or legal status and are in the same position as any other religious body not established by the State. The Civil Courts as constituted by law in Burma alone are vested with jurisdiction to determine disputes respecting civil rights as Courts of law, and will remain so vested unless and until their jurisdiction is abrogated by a statutory enactment passed by an authority duly constituted in that behalf. [1892-96) 2 U.B.R. 59; (1897-1901) 2 U.B.R. 42; (1902-03) U.B.R. 1; (1907-09) U.B.R. 1; (1910-13) 1 U.B.R. 35; and A.I.R. (Vol. 16) 1929 Rang. 77=114 Ind. Cas. 540=6 Rang. 783, overruled]. A. I. R. (Vol. 22) 1935 Rang. 376=13 Rang. 648=158 Ind. Cas. 865 (F.B.).

——Ecclesiastical Jurisdiction — Dispute involving nature and extent of rights of monks in religious property—Jurisdiction of Civil Court.

In a suit, the nature and extent of the rights of the monks to use and occupy monastic lands which is religious property involve a dispute regarding ecclesiastical matter within the competence of the Buddhist ecclesiastical authorities to decide, consequently the Civil Courts in Upper Burma have no jurisdiction to entertain the dispute. (1902-03) 2 U.B.R. Buddhist Law, Ecclesiastical P. 1, Rel. on. 6 Rang. 783=114 Ind Cas. 540=A.I.R. 1929 Rang. 77.

——Ecclesiastical Jurisdiction—Dispute between monk and layman—Award by ecclesiastical authority—Binding character of.

An ecclesiastical authority to whom a dispute relating to property between a layman and an ecclesiastic is referred, is in the same position as an ordinary arbitrator and therefore his award can affect only the parties to the reference. 1 Rang. 494=76 Ind. Cas. 807=A.I.R. 1924 Rang. 141.

——Eviction by pongyi of licencee from Kyaung—Jurisdiction—Rangoon Small Cause Courts Act (VII of 1920), Ss. 12, 13 and 14.

Where a presiding pongyi has permitted another pongyi to reside in his kyaung and where the permission to reside has been determined, the former is competent to evict the latter and the suit to evict can be tried by the Rangoon Small Cause Court. (1892-1896) 2 U.B.R. 72 and (1908) 2 U.B.R. 1, Rel. on. A.I.R. 1930 Rang. 199.

——Ecclesiastical Jurisdiction — Revenue Court decision—If bar to action in Ecclesiastical Court.

A claim of the plaintiff for restoration of property dedicated to the monastery was recognized by **Thathanabaing** against the decision of the Revenue authorities. **Held,** that the plaintiff could invoke religious rules in his favour and the decision of the Revenue Officer was no bar to the decision in question. 10 Ind. Cas. 996=U.B.R. (1910) I, 78.

8. Ecclesiastical Law.

Ayanzoungs.
Construction.
Endowed property.
Monk.
Ordination.
Poggalika property.
Presiding monk.
Rahan.

——Ecclesiastical Law—Ayanzoungs.

Persons in charge of Kyaung and its precincts are called Ayanzoungs and such persons have a right to sue for possession of land forming part of Kyaung. 56 Ind. Cas. 939=12 Bur.L.T. 264.

——Ecclesiastical Law — Construction of—Duty of Court.

Buddhist Ecclesiastical Law must be interpreted with reference not only to the Canoncial text book of **Vinaya** but also with the aid of the Attagatha and other commentaries. 45 Ind. Cas. 923 (L.B.).

8. Ecclesiastical Law—Endowed Property.

——Ecclesiastical Law — Endowed property—Building on monastery ground—Nature.

A building erected on monastery ground becomes ecclesiastical. 24 Ind. Cas. 465=7 Bur. L.T. 63.

——Endowed property—Kyaung built and offered to pongyi—Effect—Extra commercium.

A kyaung cannot be regarded like an ordinary piece of immovable property which can be occupied by a layman, bought sold or otherwise treated like an ordinary commercial property. Once a kyaung has been built and offered to a pongyi it becomes extra commercium. 7 Rang. 617=121 Ind. Cas. 787=A.I.R. 1930 Rang. 29.

8. Ecclesiastical Law—Monk.

——Monk—Agreement by, to purchase property—If void—Contract Act, S. 23.

An agreement to purchase a house by a Buddhist monk for himself is void, the transaction being opened to his personal law, Vinaya and hence immoral. 2 U.B.R. 54; 9 L.B.R. 220 and 1 U.B.R. 183, Foll. 5 Rang. 626=106 Ind. Cas. 201=A.I.R. 1928 Rang. 3.

——Ecclesiastical Law — Monk—Contract by—Validity.

A Buddhist Monk is incapable of entering into a valid contract for his own personal benefit. He is prohibited by his personal law from buying, selling or mortgaging land and is debarred from suing

for redemption. 29 Ind. Cas. 613=U.B.R. 1915, II, 61.

——Monk—Duties of—Pongyi must teach or meditate.

According to Burman Buddhist ideas he who dons the yellow robe has one of two duties to perform:—(1) To practise austerities and meditation in order to work out his own salvation; or (2) to learn the sacred scriptures and to impart the knowledge to others. Those who follow the first are known as Patibatti Sangha and those who adopt the second as Pariyatti Sangha. When a Pongyi belongs neither to the pariyatti nor to the Patibatti, he is no longer entitled to live on the offering of the laity, nor to receive respect from them. He has no **raison d'etre** A Pongyi in attempting to oppose the orders of the executive not only breaks his own personal law, but sets an example to the laity. 26 Cr.L.J. 1622=3 Rang. 352=90 Ind. Cas. 918=A.I.R. 1925 Rang. 354.

——Monk—Eviction of Right of layman—Burden of Proof.

When a pongyi is installed in a kyaung and he is shown to have remained in that kyaung for a period of many years, the layman who claims the right to turn him out has got to prove that right very strictly. A kyaungtaga, when he places a pongyi in charge of a kyaung and refers to him as the presiding pongyi of that kyaung, in the vast majority of cases would have dedicated the kyaung to that pongyi, and any kyaungtaga, who asserts the contrary has got to prove it, and has got to prove that the pongyi was merely his watchman or care-taker. 7 Rang. 617=121 Ind. Cas. 787=A.I.R. 1930 Rang. 29.

——Ecclesiastical Law—Monk—Gift by—Death-bed gift—Validity—Declaration—If necessary.

Buddhist Ecclesiastical Law permits a monk to make a gift by delivering possession without declaration. He has power to make a death-bed gift. 2 Bur.L.J. 266.

——Ecclesiastical Law—Monk—Gift by—Delivery of possession—Necessity for—Gift to monk—Effect of.

There is nothing in the ecclesiastical rules to the effect that delivery of possession must actually accompany the declaration of the gift by a monk to take its full effect or that without a formal delivery of possession a gift of immoveable property does not take effect. Where such a gift is made by registered deed, it is valid in other respects also. Where the transferors transferred the land "Alyapyat" that is to say, without any reservation, or absolutely, to a monk for his proper requirements, namely, food, raiment, shelter (Kyaung) and medicine, and in the form of "navakamma" that is to say "future requirements",

Held, that this kind of gift is allowed by the ecclesiastical rules as perfectly valid and there is no right of reversion left in the transferor after the death of the monk. 2 Bur. L. J. 266=83 Ind. Cas. 329=A.I.R. 1924 Rang. 201.

——Ecclesiastical Law—Monk—Gift by—Validity.

A gift by a monk whether to a layman or to another monk, of a monastery or of a site for a monastery, whether it has been dedicated to him personally or not, is invalid. U.B.R. (1910-13) 183, Foll. 1 Rang. 494=76 Ind. Cas. 807=A.I.R. 1924 Rang. 141.

——Monk—Right to own and dispose of kyauni.

A **pongyi** may own a **kyauni** as his **poggalika** property and he can in his lifetime validly transfer it by gift. (1910-13) 1 U.B.R. 183; A.I.R. 1924 Rang. 141, Diss. 2 Rang. 131=83 Ind. Cas. 557 =A.I.R. 1924 Rang. 309.

——Ecclesiastical Law — Monk — Right to own and dispose of property—Right to appropriate fellow monk's property.

If a monk takes and appropriates the property of another monk, his act is valid and is called a **withathagaha** gift, if, (according to the **vinaya**) five conditions are present, **viz.**, (1) the monks should be intimate; (2) they must have associated together; (3) the property must have been spoken about by them; (4) the owner must be living when the property is taken; (5) the taker must be aware that the owner would be pleased at the taking. A monk can act as owner of a monastery, whether dedicated to him personally or allotted to him by other monks for 12 years at the most, but he cannot give away to another monk or layman monastery dedicated to him personally, such monastery being **sanghika** property and not **poggalika** which alone can be disposed of at pleasure. Buddhist monks may and do possess property. 7 Bur.L.T. 27=23 Ind. Cas. 157=1913 U.B.R. 183.

——Monk—Right to recover possession of kyaung —Presiding monk can be ousted only by the body of the Sangha.

Where a **kyaung** is dedicated to the plaintiff as his **poggalika** property and has been in his continuous possession for a long term of years he can recover its possession if he is ousted. Even if the **kyaung** be separate property, the plaintiff, if he has been all along the presiding **pongyi** can recover possession and can be ousted only by the body of Sangha. 3 Rang. 193=89 Ind. Cas. 589=A.I.R. 1925 Rang. 307.

——Ecclesiastical Law — Monk — Saduthanthaka property—Incidents.

Saduthanthaka property is property belonging jointly to four **pongyis** among whom the title passes by survivorship until the last survivor gets the whole property. On the death of one member, however, the survivors can admit a new member in his place in the joint ownership group. 13 Bur. L.T. 147=61 Ind. Cas. 778=10 L.B.R. 258.

——Ecclesiastical Law—Monk—Status of—Monkhood is civil death—Property lost must be reacquired.

By becoming a monk a Burmese Buddhist divests himself of all earthy ties of relationship and property and dies a civil death. His wife, even if not divorced, can after seven days marry again. II U.B.R. (1897-1901) 54; 9 L.B.R. 220 (F.B.), Foll. When he gives up the monastic life he cannot **ipso facto** recover his property, and reconciliation with his divorced wife would not affect the question. It would be necessary that the property should be returned to him in some overt

manner, either by conveyance or gift from those who would be legally in possession thereof, or by his resuming his property from them in some legal and valid fashion. 11 L.B.R. 124, Appr. 1 Rang. 430=76 Ind. Cas. 672=A.I.R. 1924 Rang. 101.

——Ecclesiastical Law—Monk—Succession to—Pongyi's property — Devolution — Jurisdiction of Civil Court.

Civil Courts in Lower Burma have jurisdiction to decide suits of a civil nature in which points of ecclesiastical law arise. Questions of ecclesiastical law are to be decided according to the **Vinaya** and the various commentaries thereon. The authority of the Dhammathats is not recognised by the ecclesiastical tribunals but they cannot be entirely excluded from consideration. A **Pongyi** cannot, after ordination inherit from his lay relatives and on the death of **pongyi** his lay relatives cannot inherit from his land which had been given to him as an outright gift. 8 L.B.R. 145 foll. 9 L.B.R. 220=49 Ind. Cas. 317=11 Bur.L.T. 161 (F.B.).

8. Ecclesiastical Law—Ordination.

——Ecclesiastical Law — Ordination — Effect on right to property.

Under the Buddhist Law, a man's interest in his property ceases when he is ordained as a monk though some texts permit his receiving gifts after ordination. There is, however, a strong presumption that he has no property over which he has rights of disposal. 8 Bur. L. T. 237=30 Ind. Cas. 112=8 L.B.R. 342.

——Ecclesiastical Law — Ordination — Layman liable to maintain child—Ordination of—Validity.

It is clear from the rules that prescribe the duties and govern the life of Buddhist **Sangha** in Burma that it would be an offence to ordain as a **hpoongyi** a layman against whom a maintenance order remains outstanding, unless and until he has made due provision for the sustenance and support of his children and such a person would be as unfit to be ordained as a member of the **Sangha** as a person would be unfit to remain a member of that body if he had illicit intercourse with a woman, or by her has become the father of a child. A.I.R. (Vol. 20) 1933 Rang. 138=1933 Cr. Cas. 728 =34 Cr.L.J. 815=11 Rang. 226=144 Ind. Cas. 187 (2) (F.B.).

——Ordination — Untruthful answer—If invalidates ordination.

The Vinaya texts expressly lay down that one of the questions to be put to a candidate for ordination is "Have you no debts?": but if an untruthful or misleading answer to such a question is given the subsequent ordination is not thereby invalidated. A.I.R. (Vol. 26) 1939 Rang. 305 =1939 Rang.L.R. 311=183 Ind. Cas. 673 (F.B.).

8. Ecclesiastical Law—Poggalika property.

——Poggalika property — Claim to possession against owner—Maintainability.

No one can claim possession of Poggalika property as against the Poggalika owner himself. A.I.R. (Vol. 26)' 1933 Rang. 21=180 Ind. Cas. 210.

——Poggalika property—Death of owner—Effect.

On the death of owner of Poggalika property the property becomes Sanghika property. A.I.R. (Vol. 28) 1941 Rang. 159=1941 Rang.L.R. 204 =194 Ind. Cas. 597.

——Poggalika property — Devolution — Owner authorising another to appoint successor—Such right not exercised—Procedure—Election of presiding monk.

The ownership of the kyaung-daik, upon the death of the original **Poggalika** owner, vests in the Sangha at large, if the original **Poggalika** owner has not himself appointed his successor, but conferred the right to appoint a successor on a third party and that party fails to exercise that right. After the death of the owner the presiding monk is then to be elected by the Sangh. The latter may elect such monk in any manner they choose provided it is a real, valid and true election. The members may nominate some of the senior members of them representing the whole body to elect the monk and the election would be valid and proper election by the Sangh as such.

Although there may be ceremonial contemplated at the time when the presiding monk is installed in his office, the question of his election by the Sangha is not analogous to ceremonial but is a plain question of fact and depends upon a consideration of the question whether the members of the Sangha were substantially in favour of his appointment. A.I.R. (Vol. 26) 1939 Rang. 385 =1940 Rang.L.R. 97=185 Ind. Cas. 483.

——Poggalika property— Gift of— Validity—Rights of donee.

Gift of Poggalika property is invalid in law and on the death of Poggalika owner of a monastery or a monastic institution the property becomes Sanghika property (that is property belonging to the Sangha in general) and Sanghika property either of the kind known as Aramika Sanghika or of the kind known as Ganika Sanghika (Aramika Sanghika meaning Sanghika property for the use of the Sangha dwelling in a particular locality, and Ganika Sangha meaning Sanghika property for the use of the Sangha of a particular sect).

Where the donee of such an invalid gift of Poggalika property appoints another monk in charge of the Kyaungdaik who having applied for freehold grant of adjoining land which formerly was only leasehood, dies subsequently, but the donee continues the proceedings and obtains the said grant, the grant is merely a graft on the prior lease of which the rights belonged to Sangha in general and it does not establish donee's claim to sole ownership of the Kyaungdaik property. A.I.R. (Vol. 24) 1937 Rang. 76=14 Rang. 566= 168 Ind. Cas. 967.

——Poggalika property—Gift of, by monk—Validity.

Under Buddhist Ecclesiastical Law, a monk may own a monastery as his poggalika property; he can in his life-time transfer it by gift and the gift will be valid. A.I.R. (Vol. 22) 1935 Rang. 1=12 Rang. 455=156 Ind. Cas. 370.

——Poggalika property—Owner—Deed by declaring property to be dwithantaka of himself and other persons—Registration—Necessity.

A deed by the owner of Poggalika property declaring the property to be dwithantaka property of himself and some other person is the creation of an interest in immovable property and, therefore, it must be registered under the provisions of S. 17 (1) (b), Registration Act. A.I.R. (Vol 28) 1941 Rang. 159=1941 Rang.L.R. 204=194 Ind. Cas. 597.

——Poggalika property — Ownership — Nature and incidents of.

A poggalika owner of religious property stands upon much the same footing as, prior to the Law of Property Act, 1926, and the Settled Land Act of 1926, an English tenant for life of property with a power or appointment over on death stood in relation to settled property and while there are present some of the incidents of beneficial ownership during his lifetime, they do not amount to full beneficial ownership. A.I.R. (Vol. 26) 1939 Rang. 76=1938 Rang.L.R. 678=179 Ind. Cas. 903.

——Poggalika property—Poggalika owner—Right to surrender power to nominate successor.

According to the Burmese Buddhist Ecclesiastical Law which is to be applied by consent of the parties, **poggalika** owner of **kyaungdike** is entitled to surrender to the original **kyaungtagas** the power to nominate his successor as **poggalika** owner of the **kyaungdika**. A.I.R. (Vol. 26) 1939 Rang. 76=1938 Rang.L.R. 678=179 Ind. Cas. 903.

——Poggalika property—Transferee of—Right to eject licensee.

Where a property is dedicated to the plaintiff as **poggalika** property and he goes into occupation of it and the defendants occupy the property as his licensees, on the transfer of the property to others, the defendants become their licensees and the transferees have a right to put an end to that licence. The licensees can therefore be ejected at the instance of the transferees. A.I.R. (Vol. 22) 1935 Rang. 194=156 Ind. Cas. 992.

8. Ecclesiastical Law—Presiding Monk.

——Presiding monk—Election of—Majority of Sangh expressing desire to elect certain monk.

Where the majority of the Sangha did desire that a monk should be elected presiding monk of Sanghika Kyaungdaik and so expressed their will at the meeting, then it must be held that he was validly elected. A.I.R. (Vol. 28) 1941 Rang. 159=1941 Rang.L.R. 204=194 Ind. Cas. 597.

——Presiding monk—Ouster of—Right of.

In the case of **sanghika** property the presiding **pongyi** in possession can only be ousted by a representative body of **sanghas**. A.I.R. (Vol. 20) 1933 Rang. 382=150 Ind. Cas. 694.

——Presiding monk—Presiding monk of "Catudissa Sanghika" monastery—Powers of.

The monk presiding over a "Catudissa Sanghika" monastery has exactly the same powers of control and management of his monastery and its precincts as the monk who presides over any other monastery. A.I.R. 1930 Rang. 160.

——Presiding monk—Right to elect—Religious property becoming sanghika property.

It is true that the **poggalika** owner who eventually succeeds become **ex-officio** the presiding monk. But, what he is appointed to be is poggalika owner and not presiding monk. Moreover, it is accepted as good Burmese Buddhist Ecclesiastical Law that where religious property has become, for whatever reason, sanghika property, then the right to appoint the presiding monk belongs, not to any individual, but to the sangha in general. A.I.R. (Vol. 26) 1939 Rang. 76=1938 Rang.L.R. 678=179 Ind. Cas. 903.

——Ecclesiastical Law—Presiding monk—Rights and powers of.

Sanghika property is property which belongs to the Sanghs in general. Aramika Sanghika property is only one kind of Sanghika property. The right of use in such property vests in the monks residing in the particular locality but for the sake of convenience, the power of control resides in a particular monk such as the presiding monk of that locality.

Where a Burmese monk who is not a presiding monk of the kyaungdaik in which he resides institutes a suit under O. 1, R. 8, C. P. Code, for the recovery of certain land on the ground that it is Aramika Sanghika property on behalf of all the Sanghas of the Kyaungdaik and not on behalf of the general body of Sanghas, the suit is misconceived. The plaintiff's claim presupposes that the Sanghas or monks residing in Kyaungdaik are entitled to control, management or possession in addition to mere use or enjoyment. Individually, none of such monks is entitled to such possession. The property is the property of the Sanghas in general; not the property of the Sanghas of that locality alone. The presiding monk alone holds the property, manages and controls the same for the benefit of those resident in the monastery, but in doing so he exercises the power of the Sanghas in general who are the owners of the property. Thus neither the plaintiff nor the Sanghas that he represents in such a suit is entitled to the possession, control or management of the lands in a suit. In such a suit the plaintiff is also not entitled to a declaration that the lands in suit constitute Aramika Sanghika property for the enjoyment and benefit of the Sanghas of the Kyaungdaik, since that would convert the suit into one of entirely a different character. A.I.R. (Vol. 26) 1939 Rang. 21=180 Ind. Cas. 210.

——Presiding monk—Right to evict resident monk—Kyaungdaik property.

A kyaungdaik is a sanghika property and not poggalika property. Such property does not belong to any particular person or group or sect; it partakes of the nature of public religious property. When a kyaung becomes vacant, there is nothing wrong in a monk who comes peaceably in, to dwell in the kyaung. The presiding monk or a sayadaw of a sanghika property, may, it is true, in certain circumstances evict a monk who is guilty of misconduct. But he is not entitled to evict a monk merely on the ground that the

latter challenges his position as a poggalika owner of the property, in absence of any proof of misconduct on such monk's part or of such behaviour as would render his eviction from the kyaungdaik desirable.

[Desirability of formulating schemes for pagodas and kyaungdaiks pointed out.] A.I.R. (Vol. 25) 1938 Rang. 396=178 Ind. Cas. 566.

——Presiding monk—Right to evict resident monk for misconduct—Sanghika property.

The Court has full power to decree ejectment of a pongyi from a kyaung or kyaungdaik when the facts justify it, irrespective or whether the **sangha** has expressed its approval or not. The presiding monk has the right to eject a monk living on his premises when such monk is guilty of misconduct without the approval or consent of the **sangha**.

The owners of the kyaungdaik land and kyaung buildings are entitled to eject the monks irrespective of their conduct. A.I.R. (Vol. 22) 1935 Rang. 1=12 Rang. 455=156 Ind. Cas. 370.

——Presiding monk—Right to evict resident monk for misconduct.

Where a monk of a **kyaung** failed to furnish the plaintiff, the presiding monk of the kyaungdaik in obedience to his order, a list of names of pupils and men and women kuppiyas who resided within his kyaung and to produce them before the plaintiff and the latter sued to eject the former from the Kyaung on the ground of misconduct:

Held, that there was no such misconduct on the part of the defendant as would render him liable to be ejected by the plaintiff:

Where it is sought to eject a monk from **Sanghika** property it must be proved to the satisfaction of the general body of monks comprising the **Sangha** that the monk is guilty of such conduct as in their opinion would render him an unfit person to remain as a member of the **Sangha** and unless the presiding monk is armed with the opinion of the **Sangha** as a whole to the effect that a monk is guilty of such misconduct as would make it desirable that he should be ejected, the presiding monk is not entitled to eject him. A.I.R. (Vol. 18) 1931 Rang. 125=9 Rang. 77=132 Ind. Cas. 715 (F.B.).

8. Ecclesiastical Law—Rahan.

——Rahan—Death bed gift of Pogglika property —Validity.

A gift of **poggalika** property by a **rahan**, even if made while he is on death-bed, is valid. A.I.R. (Vol. 22) 1935 Rang. 194=156 Ind. Cas. 992.

——Rahan—Death-bed gift—By validity.

The general rule of Burmese Buddhist Law declaring death-bed gifts to be invalid has no application to the case of a **rahan** on his death-bed disposing of his **poggalika** property. He can therefore make a gift of such property as a death-bed gift which will take effect immediately. A.I.R. (Vol. 22) 1935 Rang. 1=12 Rang. 455=156 Ind. Cas. 370.

——Rahan, if civilly dead—If can sue.

Though a Burman Buddhist when he becomes a **rahan** is automatically divested of his property, yet it would be erroneous to regard him as "civilly dead." He has, therefore, a right of suit. A.I.R. (Vol. 27) 1940 Rang. 298=1940 Rang. L.R. 668=192 Ind. Cas. 439.

——Rahan—if civilly dead.

Obiter.—It is inaccurate to describe a rahan as civilly dead. But it is nonetheless true that his legal position is changed by ordination. He becomes ineligible to receive an inheritance from his lay relatives, and he becomes so because of the religious usages affecting monkhood. A.I.R. (Vol. 26) 1939 Rang. 305=1939 Rang.L.R. 311 =183 Ind. Cas. 673 (F.B.).

——Rahan divested of property on ordination—Re-acquisition of, if contemplated by rules of Vinaya.

The rules of Vinaya do not contemplate the re-acquisition by purchase or gift of property which the **rahan** has been divested of on his ordination. If the acquisition is made, the matter is one for the notice of the ecclesiastical authorities and not of the Courts. A.I.R. (Vol. 26) 1939 Rang. 305 =1939 Rang.L.R. 311=183 Ind. Cas. 673 (F. B.).

——Rahan—Person on becoming rahan permanently—Effect—If divested of all his property.

According to the underlying principles of Vinaya, on his becoming rahan, a Burmese Buddhist renounces his wordly life and if the ordination as rahan is permanent and not temporary, he automatically becomes divested of all his property and relinquishes all title to the same. A.I.R. (Vol. 26) 1939 Rang. 305=1939 Rang.L.R. 311 =183 Ind. Cas. 673 (F.B.).

9. Gift.

——Gift—Acceptance, if necessary.

Per **Dunkley, J.**—It is nowhere stated in the Burmese Buddhist Law that a gift need not be accepted. A.I.R. (Vol. 26) 1939 Rang. 49=179 Ind. Cas. 730.

——Gift—Death-bed gift—Validity.

Death-bed gift is not within competence of Burmese Buddhist. A.I.R. 1929 Rang. 243.

——Gift—Death-bed gift—Validity of.

Under Burmese Buddhist Law a death bed gift without delivery of possession is totally invalid even though it is made through trustees for to recognise it would be a recognition of the power to make a will, which is unknown to that Law. 50 Ind. Cas. 522=11 Bur.L.T. 234.

——Gift—Death-bed gift—Validity.

A gift made in contemplation of death and intended to operate only after the donor's death is inoperative and void. 29 Ind. Cas. 888=8 Bur.L.T. 72.

——Gift—Deed directing heir to take over properties of grantor and to discharge his debts not amounting to value of properties—If gift.

When a Burmese Buddhist directs one of the heirs to discharge his liabilities which are a good deal less than the value of his properties, and take over his properties, the transaction is equivalent to a gift of the excess of the property over the

debt, or a will of that excess, it may be a death-bed gift of that excess. The principle, therefore, of part performance which applies to a purchaser of the property for consideration has no application to such a case and if such heir discharges the liabilities by selling a portion of the property, he holds the other property on behalf of other heirs. A.I.R. 1929 Rang. 272.

——Gift—Delivery of possession.

The actual parting with possession is the only true test of the completion of a gift. 34 Cal. 207; 4 B.R. (1897-01) II 390, rel. 42 Ind. Cas. 68=(1917) 3 U.B.R. 23=11 Bur.L.T. 229.

——Gift — Delivery of possession — Necessity—Gift by grand parent to grandchild.

Under Buddhist Law, an actual delivery of possession is necessary to validate a gift. But a gift by a grand-parent to a grandchild is an exception to the rule and is valid without delivery of possession. Such a gift is merely contingent and the property remains absolutely under the disposal of the donor till his death, the intention of such a gift being that grandchildren, being younger, might fare badly in competition with their elder uncles and aunts and that they shall receive such share of the inheritance as the grandparents consider fair. 59 Ind. Cas. 999=(1920) 3 U.B.R. 228.

——Gift—Delivery possession—Transfer of Property Act, S. 123—If abrogates personal law.

Burmese Buddhist law requires possession to effectuate a gift, but, it is clear that, after S. 123 of the Transfer of Property Act came into force, it is not necessary that a gift should be completed by delivery of possession. Hindu Law also requires delivery of possession, but it has been held that the rule as to possession has been abrogated by S. 123. 15 Cal. 446 and 34 Cal. 853, Foll. 1 Rang. 351=75 Ind. Cas. 166=A.I.R. 1924 Rang. 13.

——Gift—Husband—Gift by of joint property without wife's consent—Validity.

A deed of gift executed by a Burmese Buddhist husband without his wife's consent, express or implied, with reference to lands forming part of the joint property of the marriage is not valid even to the extent of his interest in the property, but is wholly void. 3 L.B.R. 66; (1893-1909) L.B.R. 403, held overruled; A.I.R. 1927 Rang. 209; A.I.R. 1927 Rang. 274, Rel. on. 7 Rang. 374=118 Ind. Cas. 409=A.I.R. 1929 Rang. 129 (F.B.).

——Gift—Kanwin — Essentials — Inheritance.

It is not necessary to constitute a gift of Kanwin that the property should be given by the bridegroom's parents; such a gift at the time of the marriage delivered to the bride, reverts by inheritance to the husband as against the parents-in-law even if the bride dies childless in her parent's house. 6 L.B.R. 16=11 Ind. Cas. 929=4 Bur. L.T. 2.

——Gift—Kovin becoming priest—Delivery of possession—Revocability.

A gift by parents to their son on his entering priesthood, is, when possession is delivered over to the donee, irrevocable. 4 Bur.L.T. 195=11 Ind. Cas. 862=6 L.B.R. 32.

——Gift—Married woman—Gift to sister without joining husband—Validity.

Whether as a release or as a gift, it is very doubtful if a Burmese woman can without being joined by her husband, transfer her interest to her sister or reliquish the same in her favour. A. I. R. 1929 Rang. 243.

——Gift not intended to take immediate effect—Validity.

Where a deed of gift is never intended to take immediate effect, it is obviously of the nature of a will and invalid under Burmese Buddhist law. A.I.R. (Vol. 21) 1934 Rang. 310 (1)

——Gift—Registration—Religious gift.

A Burmese Buddhist religious gift of a Kyaung is invalid unless registered. 45 Ind. Cas. 926=11 Bur.L.T. 259=9 L.B.R. 258.

——Gift—Shinbyu Gifts—Monu Kye Book—Delivery of possession—Necessity.

Per **Twomey, J.**—Questions as to the validity of **shinbyu** gifts concern religious usage and have therefore to be decided according to Buddhist Law under S. 13 of the Burma Laws Act of 1898. A gift of property made publicly by both parents (or by the surviving parent if one is dead) at the time of the **shinbyu** ceremony is, as between the donee and his co heirs, a valid gift although possession of the property was not given but such property remains absolutely at the disposal of the parents or the survivor of them for their life-time or his or her life-time. If the donee dies leaving either of the donors surviving, the gift has no effect and the donee's heirs cannot take benefit of the exception regarding possession obtaining in **shinbyu** gifts. 8 L.B.R. 190=30 Ind. Cas. 665=8 Bur. L. T. 149.

——Gift—Squatter land—Oral gift by Methila to a monk—Subsequent oral gift by him to another—Validity.

Where a **Methila** or female lay devotee made an oral gift of certain quarter land and private **zayat** to a monk after she had renounced her vows and married, and the donee made an oral gift of the same to another who pulled down the private **zayat** and erected a new building and lived there,

Held, that the property was not religious property and that the original transfer failed as a gift and as a private trust for want of a registered deed; but had the property been of a religious nature the question of a trust might conceivably arise. 2 Bur. L. J. 7=80 Ind. Cas. 255=A. I. R. 1924 Rang. 260.

——Gift—Unfit state of mind—Possession.

A gift while in an unfit state of mind is null and void. A gift not followed by possession is invalid and where the donee was collecting rents from the gifted property before the gift, continuing to do so after the gift does not establish possession. 6 L.B.R. 77=18 Ind. Cas. 466=5 Bur.L.T. 291 (F.B.).

——Gift—Validity—Gift affecting inheritance—If null and void.

No Burman Buddhist can, under the guise of

making a gift, be allowed in effect to make a will. He cannot set at naught the provisions of his personal law as to the inheritance of his property after his death. Where, therefore, his act in making a gift, owing to the circumstances under which it is made, or the conditions attached thereto, are such as to affect the succession to, or inheritance of, his property after his death, Buddhist Law must be resorted to, to arrive at a decision as to whether his action can be maintained or is invalid. Where the gift deed affects inheritance, it is a nullity, in spite of the fact that it was otherwise made in accordance with Ss. 122, 123, T.P. Act. A.I.R. (Vol. 25) 1938 Rang. 216=176 Ind. Cas. 799.

——Gift—Validity—Gift affecting inheritance.

It is not open to a Buman Buddhist to make a will or a gift that would have the effect of disposing of his property after his death, contrary to the terms of Buddhist Law as to inheritance. 1 Rang. 351=75 Ind. Cas. 166=A.I.R. 1924 Rang. 13.

——Gift—Validity — Gift to nuns — Essentials—Transfer of Property Act—Applicability.

The modern nuns are little more than lay devotees; they do not undergo any ordination and are not regarded as dying a civil death; they are under no disabilities with regard to money and property. A dedication to nuns cannot, therefore, possibly be made and, any gift to a nun must certainly conform to the provisions of the T.P. Act. A.I.R. (Vol. 25) 1938 Rang. 303=178 Ind. Cas. 232.

10. Guardian.

——De facto guardian—Alienation of minor's property—Validity—Suit for possession by minor—Limitation.

A **de facto** guardian has no authority under the Burmese Buddhist Law to deal with the property of the minor. A conveyance executed by him acting as guardian of the minors, is void and not merely voidable and a suit by the minor for possession of property thus conveyed is governed by Art. 144 and not by Art. 44 of the Limitation Act. A.I.R. (Vol. 18) 1931 Rang. 178=134 Ind. Cas. 214.

——Guardian—Powers of alienation.

Buddhist Law (Burmese) does not recognise guardians of the property of minors. In the case of a minor unless a guardian is appointed by the Court and gets permission from that Court to dispose of the property of its ward he cannot part with it or in any way encumber it. A.I.R. (Vol. 20) 1933 Rang. 83=11 Rang. 193=146 Ind. Cas. 922.

——De facto guardian—Power to bind ward by personal covenant to pay money.

A person by describing himself as **de facto** guardian of a minor cannot, according to the personal law of Burmese Buddhists, clothe himself with the legal power to sell or mortgage the minor's property. Much more so is a guardian debarred from binding his ward by a personal covenant to pay money. A.I.R. (Vol. 21) 1934 Rang. 365 =154 Ind. Cas. 72.

——De facto guardian—Power to dispose of or encumber the property of minor.

The Burmese Buddhist Law does not recognize guardians of the property of minor and a **de facto** or natural guardian of a Burmese Buddhist minor cannot validly dispose of, or encumber in any way the property of his ward. A.I.R. (Vol. 21) 1934 Rang. 154=152 Ind. Cas. 1079.

——De facto guardian — Power to dispose of minor's property.

A **de facto** or natural guardian of a Burmese Buddhist minor cannot validly dispose of, or encumber in any way, the property of his ward. A.I.R. (Vol. 20) 1933 Rang. 403=12 Rang. 47=149 Ind. Cas. 1076.

——De facto guardian — Power to encumber or dispose of property of ward.

Burmese Buddhist Law does not recognise guardians of the property of minors. A **de facto** or a natural guardian of a Burmese Buddhist minor cannot validly dispose of or encumber in any way the property of his ward. To be enabled to do so a person must first apply to be appointed guardian, and obtain the sanction of the Court under the provisions of the Guardians and Wards Act. A.I.R. (Vol. 21) 1934 Rang. 349=154 Ind. Cas. 131.

——De facto guardian—Power to mortgage minor's property.

Under Burmese Law a **de facto** guardian has no power to dispose of immovable property of the minor. So where he executes a mortgage of the minor's property, minors' interests in the property are not affected. A. I. R. (Vol. 25) 1938 Rang. 468=180 Ind. Cas. 489.

——Guardianship—Law as to—English Common Law principles—Applicability.

The originators of the Buddhist principles of personal law never recognized and never thought of recognizing guardianship. It was introduced only by the coming of the British and the Indian settlers, and on the introduction of the Guardians and Wards Act as an effective statute. In such a case it would not be right, to introduce a fresh and unknown principle of jurisprudence **e.g.**, the English Common Law, into the personal law of people who by their very habits and customs had never recognized such a principle in their earlier days as a nation. A.I.R. (Vol. 20) 1933 Rang. 403=12 Rang. 47=149 Ind. Cas. 1076.

11. Husband and Wife.

See also BUDDHIST LAW (BURMESE)—JOINT PROPERTY.

(a) Abandonment.
(b) Debts.
(c) Divorce.
(d) Joint property.
(e) Kanwin and payin property.
(f) Maintenance.
(g) Mortgage.
(h) Partnership.
(i) Payin property.
(j) Relationship.
(k) Miscellaneous.

(a) Abandonment.

——Husband and wife—Abandonment and re-marriage—Dissolution of marriage tie—Rights of children.

When there was mutual abandonment of each other by a husband and a wife for more than the prescribed periods and both re-married starting a new home, the marriage tie between them is dissolved. Children lose the right to inherit the property of the parent who has abandoned them, unless filial relations are resumed. 6 L.B.R. 167=19 Ind. Cas. 85=6 Bur.L.T. 75.

(b) Debts.

——Husband and wife—Debts—Liability for debts contracted during coverture—Decree against one after divorce—If binds the other.

So long as a Burmese Buddhist couple remain as husband and wife, a decree passed against the husband alone or the wife alone during the coverture may be held to be binding on both, on analogy of a partnership, but after divorce the right of the husband or the wife to represent the other in a suit has terminated and though the original debt may be binding on both, a decree against one without making the other a party cannot be binding on the person who has not been made a party. A decree passed against the husband is held to bind a wife so as to enable the decree-holder to proceed against the joint property on a presumption that the husband in effect represented the wife in the suit. Such a presumption can be made only when the husband could represent wife in the suit. If his authority to represent the wife has determined, as by divorce, no such presumption can be made and the wife can be bound by decree only when she is actually a party in a suit. A.I.R. 1929 Rang. 223.

——Husband and wife—Debts—Promissory note by husband—Liability under—Presumption.

The fact that the money borrowed on a promissory note purports to have been taken for the husband and his sister is no sufficient reason for not drawing ordinary presumption that the husband in executing the promissory note was acting on behalf of his wife as well as himself. 7 Rang. 558=120 Ind. Cas. 910=A.I.R. 1929 Rang. 310.

——Husband and wife—Desertion—What constitutes.

A single instance of ill-treatment would not entitle the wife to stay away from her husband and staying away for more than one year amounts to desertion on her part. The husband's not providing her with maintenance during that period is not equivalent to desertion by him. The wife being the offending party is not entitled to a share of the joint property. 39 Ind. Cas. 114 (L.B.).

——Husband and wife—Desertion—Imprisonment—Effect—If dissolves marriage tie and justifies taking another spouse.

Under Buddhist Law, a man sentenced to imprisonment, is not regarded as having deserted his wife, nor does mere desertion **ipso facto,** without further express act of volition dissolve the marriage tie, so that the wife of a convict with sufficient property to maintain herself and her children, cannot take another husband and if she does so, she commits desertion and adultery and the husband on return can treat the marriage at an end and demand all the property. 23 Ind. Cas. 940=7 Bur.L.T. 240.

(c) Divorce.

——Husband and wife—Divorce—Dissolution of marriage—Separate living for more than one year—Effect. of.

Where a wife left her husband for 6 years and in the meantime there were suits for divorce both by the husband and wife and 17 months after separation the husband took another wife **Held,** that it effected a dissolution of marriage. 25 Ind. Cas. 95=7 Bur.L.T. 197.

——Husband and wife—Divorce—Division of property—Property inherited by wife during marriage—Husband takes only a third share.

The rule as to equal division upon divorce applies only to property conjointly acquired after marriage. In property inherited by wife during marriage the husband takes only a third share. P.J.L.B. 403 and 11 U. B. R. (1902-03) Bud. Law. Divorce 1, Rel. on. 11 L.B.R. 48=70 Ind. Cas. 562=A.I.R. 1921 L.B. 46.

——Husband and wife—Divorce—Effect on husband's property—Adultery —Presumption.

What is joint property of husband and wife, under the Buddhist Law, becomes the sole property of the husband as soon as he validly divorces his wife. A Court may safely presume adultery if a guilty attachment is found to subsist between the parties and opportunities had occurred when a guilty intercourse might with facility have taken place. Under the Burmese Buddhist Law the husband can discard an adulterous wife and send her away with only the clothes on her body; if the wife agreees to the proposal to abandon her and leaves the conjugal house, there is a divorce from the time of abandonment. 33 Ind. Cas. 118=9 Bur.L.T. 74.

——Husband and wife—Divorce—Grounds—Desertion and cruelty if dissolve marriage.

Under Burmese Buddhist Law, mere desertion for the statutory periods, does not of itself dissolve a marriage tie without a further and expressed act of volition on the part of either party to the marriage, such as beating one's wife and charging her with adultery. An innocent party is entitled to obtain a legal divorce by a suit on the ground of desertion for the statutory period alone. 22 Ind. Cas. 945 (L.B.).

——Husband and wife—Divorce—Grounds—Second marriage by husband.

The chief wife has a right to object to second marriage of her husband and may claim divorce if he marries without her consent. But she cannot claim divorce on that ground if she is barren or has borne female children or is suffering from disease. 11 Bur.L.T. 236=45 Ind. Cas. 953=9 L.B.R. 191.

——Husband and wife—Divorce—"Legal cruelty" —What is.

The cruelty alleged in a suit for divorce was that the husband visited the petitioner, who was living apart from him on several occasions drunk; he had abused her once in the public street and once about 4 years ago he took her by the throat, threw her down and caused bruises on her body by pushing her against a chair; **Held**, no legal cruelty has been proved. 11 Ind. Cas. 784=4 Bur.L.T. 168.

——Husband and wife—Divorce—Misconduct—Connivance—Presumption — "Volunti non fit injuria".

Connivance amounts to a willing consent to conjugal offence or a culpable acquiescence in a course of conduct likely to lead to the offence being committed. It is covered by the principle **"volunti non fit injuria."** The Court will not, on presumption, impute connivance nor will it do so unless there is strong evidence to support it. 11 Ind. Cas. 779=4 Bur.L.T. 161.

——Husband and wife—Divorce—Order under S. 488, Cr.P. Code—Effect of—Child born after order—Legitimacy—Onus of proof.

There is no such thing as judicial separation in Buddhist Law, but an order under S. 488, Cr.P. Code is practically a judicial separation, and if a child is born while the order is in force, the onus is on the wife to prove access. S. 112, Evidence Act is inapplicable to the case. 46 Ind. Cas. 620 (L.B.).

——Husband and wife—Divorce—Right to cruelty —Sufficiency.

Under the Buddhist Law even when the husband has been guilty of cruelty only once, the wife can insist on a divorce and is entitled to get it, subject to the penalty that assets and liabilities of the couple are to be divided equally between them. 20 Ind. Cas. 674=6 Bur.L.T. 134=7 L.B.R. 79.

——Husband and wife—Divorce—Re-marriage—Effect on rights of parties—Pre-sumption.

In the absence of special circumstances, it is presumed that the affairs of people, divorcing and re-marrying are settled definitely at the divorce or re-marriage and the presumption is very strong where a long period has expired since the divorce and the wife has never laid claim to the property taken by her divorced husband to the second marriage. 23 Ind. Cas. 948=7 Bur.L.T. 83.

——Husband and wife—Divorce—Re-union—Effect of—Rights in property.

When the parties to a divorce re-unite after separation, they stand in the same position as if there had been no divorce. In a case of divorce between a man who had been married before and a woman who had not, the woman must be looked upon as in the same position as if her husband had not been previously married and the partition of property should be regulated accordingly. The status of the parties at the time of the first marriage is to be taken as the starting point in determining their rights on the second divorce. If at the time of the first marriage they were **nga lin ngwe maya (i.e.,** Bachelor and Maiden) they are to be regarded as such on their re-union. On a divorce by mutual consent between **eindaungyis** the rules of partition are as follows:—"Each takes his or her **payin** property. If they were equally matched as regards property at marriage, the property acquired after marriage otherwise than by inheritance is equally divided between them. If one of the parties brought the bulk of the property to the marriage and the other comparatively little, then on the principle of **nissayo and nissito,** the supporter gets two-thirds of the jointly acquired property and the other one-third. If one of the parties inherits property during the marriage, he or she, gets two-thirds of the property on the same principle. 38 Ind. Cas. 405=11 Bur.L.T. 89=(1916) 2 U.B.R. 127.

——Husband and wife—Divorce—Re-union—Essentials.

Under the Buddhist Law mere physical re-union with a divorced wife is not sufficient to revive the status of marriage. The re-union must be of such a nature that if there had been no divorce, it would have amounted to a valid marriage. 54 Ind. Cas. 575=(1919) 3 U.B.R. 182.

——Husband and wife—Divorce—Suit by husband —Wife setting up defence but withdrawing—Effect of—Decree—Subsequent suit for partition by husband—If barred by O. 2, R. 2, C. P. Code —Right of wife to plead equal status as innocent party.

A Buddhist husband first sued his wife for divorce on the ground of misconduct. The wife denied the misconduct but subsequently abandoned her defence and a decree was passed for divorce. Subsequently, the husband sued for recovery of properties alleged to be in the wrongful possession of his divorced wife and for partition of their joint property. The shares of the respective parties under the Buddhist Law depended on the grounds of divorce. The wife set up a divorce by consent and also a bar under O. 2, R. 2 of the C. P. Code, **Held,** that as the wife had abandoned her denial of matrimonial offence and had submitted to the decree as claimed, she could not be placed in the position of an innocent wife contracting for divorce on an equal footing with her husband. Ss. 42 and 43 of the C. P. Code of 1882 (O. 2, R. 2) did not bar the second suit as the cause of action was different. 38 Cal. 629=15 C.W.N. 766=11 Ind. Cas. 497=8 A.L.J. 789=13 Bom.L.R. 464=14 C.L.J. 15=(1911) 2 M.W.N. 397=4 Bur.L.T. 153=6 L.B.R. 18=10 M.L.T. 479 (P.C.).

——Husband and wife—Divorce—Suit for—Competency.

According to the Buddhist Law of divorce a suit for bare divorce does not lie. The decision of the Privy Council in Nga Pe **v.** Mi La Pon Gale, 9 L.B.R. 18 does not affect the ruling in (1910) U.B.R. 30. 28 I.C. 801=(1914) II U.B.R. 32.

(d) Joint property.

——Husband and wife—Joint Property—Agreement by husband to convey—Consent of wife not obtained—Claim for specific performance—Sustainability.

If a Burmese Buddhist agrees to convey land jointly belonging to him and his wife without ob-

taining her consent, suit for specific performance of such agreement cannot be obtained as the husband is not competent to alienate land without obtaining wie's consent. A.I.R. 1929 Rang. 285.

——Husband and wife—Joint Property—Alienation by one spouse alone.

In the case of Burmese Buddhists so long as marriage subsists the husband or wife cannot alienate their joint property without the consent of the other. (1891) S.J. 578 and A.I.R. 1927 Rang. 209, Foll. 118 Ind. Cas. 127=A.I.R. 1929 Rang. 112.

—Husband and wife—Mortgage—Joint property—Alienation—Either can mortgage with consent of other.

The position of a Burmese Buddhist husband and wife in regard to the mortgage by one of them of property belonging to both, is that either party can with the knowledge and consent, express or implied, of the other, mortgage that property. A.I.R. (Vol. 27) 1940 Rang. 126=1940 Rang.L.R. 180=189 Ind. Cas. 817.

——Husband and wife—Joint Property——Sale by wife while husband in jail for meeting expenses incurred in matters of mutual interest—If binds husband.

A sale by a Burmese Buddhist wife of family land for meeting the expenses in defending her husband involved in a criminal charge, and for payment of license fees due by the husband in respect of a fishery, while the husband is undergoing a term of imprisonment in jail, binds the husband's interest also, since the sale was brought about to meet the expenses incurred in matters of mutual interest. A.I.R. 1929 Rang. 112, Reversed: A.I.R. 1927 Rang. 209, Rel. on. A.I.R. 1930 Rang. 211.

——Husband and wife—Joint Property—Business by husband and wife—Mortgage by husband—Decree against husband—If binding on wife.

Where a Buddhist husband and wife carried on a ginning business and part of the joint property was in the name of the husband only and he mortgaged it and the mortgagee brought a suit in which the property was brought to sale without impleading the wife:

Held, that the husband was not only the managing partner, but also the benamidar of the wife in respect of any interest she may have had in the mortgaged property and that she was bound by the decree passed against the husband. 5 Bur.L.J. 218=101 Ind Cas. 354=A.I.R. 1927 Rang. 119.

——Husband and wife—Joint property—Character of.

It is the joint estate of the husband and wife that is shared equally by the relations on both sides. A.I.R. (Vol. 27) 1940 Rang. 286=1940 Rang. L.R. 534=192 Ind. Cas. 425.

——Husband and wife—Joint property—Character of—Nature of interests in—Mortgage by wife—Whether binding on interest of husband.

Under Burmese Buddhist Law the parties to a marriage must ordinarily be considered as holding the joint property of the marriage rather as tenants-in-common than as joint tenants.

Where a Burmese Buddhist wife acquired property by inheritance during continuance of her marriage and she was dealing with the property on her account, the husband allowing her to do so and not taking any steps to have his name entered in the revenue record, and the wife executed a mortgage in respect of the property:

Held, although the husband had a vested interest in a part of the property, under the circumstances he must be held to have given his consent to his wife's dealings and the mortgage must be held to be binding on the whole property. A.I.R. (Vol. 20) 1933 Rang. 102=144 Ind. Cas. 262 (2).

——Husband and wife—Joint property—Character of—Nature of interests in.

The interests of the parties to the marriage in the property of the marriage are not only impartible, but are also indeterminate. They can be determined only on divorce or on the death of one party. The shares taken by the parties on divorce vary according to the nature of the divorce. The interest of either party, whether at death or divorce, is not in any particular item of property, but is an interest in the estate as a whole, including liabilities as well as assets so that liabilities equal or exceed the assets, the interest may be nil or even a minus quantity. Such an impartible and indeterminate interest, depending on and varying according to certain contingencies, is not saleable property within the meaning of S. 60, C. P. Code. 5 Rang. 478=104 Ind. Cas. 516=A.I.R. 1927 Rang. 274.

——Husband and wife—Joint property—Decree against husband—Wife's share—If affected.

A loan was taken by the husband alone on a pronote for the benefit of himself and his wife. The suit was brought against the husband alone, and the wife was not made a party to the suit. **Held,** that the decree in the suit does not bind her share of the joint property, especially when there was nothing to show that the husband was agent of the wife. 2 U.B.R. (1892-96) 45, 11 B.L.R. 278, Foll. 1 Rang. 555=77 Ind. Cas. 402=A.I.R. 1924 Rang. 165.

——Husband and wife—Joint property—Equal rights.

The law as regards the rights of the Burmese Buddhist husband and wife in their jointly acquired property is that they have equal rights in their hnapazon or jointly acquired property. A.I.R. (Vol. 26) 1939 Rang. 287=184 Ind. Cas. 622.

——Husband and wife—Joint property by husband—Equitable mortgage—Wife subsequently dying leaving son—Mortgage decree—Mortgagor marrying second wife—Suit by son for declaration that his mother's share was not affected by mortgage decree—Competency.

After the creation of an equitable mortgage by a Burman, his wife died leaving a son. A mortgage decree was passed. The mortgagor afterwards married again. The son brought a suit for a declaration that the mortgage did not affect his mother's share in the property. The execution of the decree was stayed pending the decision of the suit;

Held, that whatever would have been the position if the marriage had taken place before the passing of the mortgage decree, it was quite clear that the second marriage did not affect the mortgagee's right to retain the full decree it having been passed before the second marriage. The mortgage had been created during the

lifetime of the first wife and assuming that she was not a consenting party to it and her interest was not affected by it, on her death, her husband, i.e., the mortgagor became the absolute owner of the property subject to the mortgage which he himself had created. His interest in the property having increased, the increase enured to the benefit of the mortgagee. A.I.R. (Vol. 25) 1938 Rang. 108=176 Ind. Cas. 929.

——Husband and wife—Joint property—Liability for joint debt.

Ordinarily a decree against either husband or wife, who are subject to the Burmese Buddhist law of marriage and are consequently partners, can be executed against any part of the partnership property, that is the property of the marriage. A.I.R. 1927 Rang. 209 (F.B.), Foll; A.I.R. 1926 Rang. 172, Reversed. 5 Rang. 443=105 Ind. Cas. 244=A.I.R. 1927 Rang. 299.

——Husband and wife—Joint property—Mortgage by husband—If binds wife—Absence of—Consent or knowledge—Effect.

If a Burmese Buddhist mortgages the joint property of himself and his wife the mortgage binds her if it is made with her full knowledge and consent, and where there is no allegation in the plaint that the mortgage was entered into with the wife's full knowledge and consent, express or implied, but contains merely an allegation that it was entered into for her benefit, the plaint is not sufficient to make it reasonably probable that the plaintiff will get a decree covering the wife's interest as well as the husband's. But a Receiver already appointed in the suit should not be entirely discharged, because if the wife gets possession of land it is practically certain that the rents and profits of the land will never find their way towards the satisfaction of any decree against the husband's estate, for she is not an officer of the Court under the Court's control, whereas the Receiver is. A.I.R. (Vol. 23) 1936 Rang. 246=163 Ind. Cas. 166.

——Husband and wife—Joint property—Mortgage by husband—Wife consenting—Suit on mortgage—Necessary parties.

Where a Burmese Buddhist mortgages the joint property of himself and his wife with her full knowledge and consent he cannot be considered to be the **benamidar** of his wife in regard to her share and therefore, in a suit on the mortgage it is necessary to join the wife as a party. Failure to join her as a party to the suit renders the mortgage decree inoperative against the wife's share. A.I.R. (Vol. 20) 1933 Rang. 92=11 Rang. 112=143 Ind. Cas. 829 (2).

——Husband and wife—Joint property—Mortgage by husband—Wife's consent—When presumed.

The question of acquiescence by the wife in a mortgage of joint property executed by her husband, depends upon the circumstances of the case. The wife's consent may be presumed, where the circumstances are such as to show that the husband is acting as the wife's agent and the husband ostensibly with the wife's assent manages the family business. 13 Bur.L.T. 129=61 Ind. Cas. 701=10 L.B.R. 267.

——Husband and wife—Joint property—Mortgage—Wife signing deed after it was read and explained—Estoppel.

Where a Burmese Buddhist wife consents to her husband mortgaging the joint property as if it were his sole property, then clearly she is holding him out to the mortgagee as her agent, not only in respect of the execution of the mortgage but also in respect of all subsequent transactions in connection with the mortgage.

In such a case the inference of fact arising from the wife's signing the mortgage-deed after it had been read and explained to her is that she consented to husband mortgaging the whole of the property as if he were the sole owner. Hence by her consent to this deed of mortgage she is estopped from denying that her husband had authority to mortgage the whole of this property as if he were the sole owner. A.I.R. (Vol. 27) 1940 Rang. 126=1940 Rang.L.R. 180=189 Ind. Cas. 817.

——Husband and wife—Joint property—Mortgage by husband—Wife's interest—If bound—Acquiescence—Effect of—Estoppel.

A Buddhist husband and, wife jointly owned properties. A business was however carried on by the husband in his own name. He alone mortgaged the joint properties but the wife knew of the mortgage created by him and acquiesced in the mortgages from the beginning. **Held,** that the husband had power to bind and did bind the wife's interest in the mortgaged properties. A wife will be estopped in pleading that a mortgage of a certain household property which stood in the name of her husband and in which he conducted a mill-business as his own, is not binding on her half share especially where she herself negotiated the mortgage. She is not a necessary party to the suit on the mortgage. 29 Ind. Cas. 881=8 Bur.L.T. 66.

——Husband and wife—Joint property—Liability for anti-nuptial debts.

The interest of the judgment-debtor in the joint property of a Burmese Buddhist husband and wife can be attached in execution of a decree obtained against one of the spouses in respect of an ante-nuptial debt contracted by such spouse alone.

In such circumstances the separate property (if any) of the judgment-debtor can also be attached. A.I.R. (Vol. 18) 1931 Rang. 262=9 Rang. 524=134 Ind. Cas. 1252 (S. B.) [Overrules A. I. R. (Vol. 14) 1927 Rang. 274=5 Rang. 478=104 Ind. Cas. 516].

——Husband and wife—Joint property—Nature of interest—Joint tenancy or tenancy in common.

In cases where it is sought to execute a decree against the joint property of the husband and wife it is not permissible to execute the decree by attachment of the interest in the joint property of a party to the marriage unless such party had duly been impleaded in the suit and was bound by the decree.

The husband and wife in a Burmese Buddhist marriage do not hold the property as joint tenants but as tenants-in-common. Therefore, during the subsistence of the marriage each of the parties thereto has a vested interest in the joint property of the marriage, and such an interest is liable to attachment and sale in execution of a decree against the party entitled to it. A.I.R. (Vol. 18) 1931 Rang. 262=9 Rang. 524=134 Ind. Cas. 1252 (S.B.).

——Husband and wife—Joint property—Partibility—Decree against husband — Execution against whole property.

The property of the marriage of a Burmese Buddhist husband and wife is not partible so long as the marriage subsists: and where the husband manages the business of the family, a decree against the husband can be executed against the whole of the property including the wife's interests in such property. 5 Rang. 478=104 Ind. Cas. 516=A.I.R. 1927 Rang. 274.

——Husband and wife—Joint property — Property inherited by wife from parents—Transfer of by wife—Binding force.

Where a person obtained possession under a contract of sale made by a Burmese wife of property inherited from her parents and she disposed of the property under such circumstances as to raise a strong presumption that she was acting on behalf of the marriage partnership, the transfer is a good transfer binding both husband and wife, though the husband may not be an active party to the transfer. A.I.R. 1927 Rang. 209, Rel. on. A.I.R. 1929 Rang. 213.

——Husband and wife—Joint property—Rights in.

According to Burmese Buddhist Law the wife is a cosharer in the joint property, but this does not mean that the husband is bound to allow her to mismanage the property. A.I.R. (Vol. 22) 1935 Rang. 359=1935 Cr. Cas. 1083=37 Cr.L.J. 6=159 Ind. Cas. 81.

——Husband and wife—Joint property—Right to alienate.

Per **Maung Ba, J.**—While the interest of a spouse in his or her **payin** and in the **lettetpwa** is definite and vested as between themselves, neither party has a right to alienate his or her interest in the **lettetpwa** without the consent, express or implied, of the other. A.I.R. (Vol. 18) 1931 Rang. 262=9 Rang. 524=134 Ind. Cas. 1252 (S.B.).

——Husband and wife—Joint property—Salary of husband—Wife's right in.

Though the salary of the husband may be the joint property of himself and wife, still wife is not entitled to any definite share of the salary. All that she is entitled to is to be maintained out of his salary. A.I.R. 1930 Rang. 147.

——Husband and wife—Joint property—Separate property—Gift of separate property—Profits of property acquired during coverture—Nissayo and Nissito.

Under Burmese Buddhist Law in deciding what is joint property all payments of money, the obligation for which was undertaken during coverture must be debited to the joint account though the actual payment was made by the survivor after the death of one of the parties to marriage. Property inherited by either of the parties to a marriage during coverture, is to be divided equally between the parties and the same rule applies to the profit of separate property brought by either party to the marriage. The rule of Nissayo and Nissito does not apply to the profits during coverture of the separate property of either of the parties. A gift of separate property of one of the parties to a marriage must be held to be made out of the separate property of the party to whom the property belonged, though the other's name also is joined as donor. 56 I.C. 972=12 Bur.L.T. 228.

——Husband and wife—Joint property—Suit for recovery by one alone.

There is no authority for the proposition that among Burmese Buddhist husband or wife cannot file a suit for moneys due to them jointly without making the other a party to the suit. A.I.R. (Vol. 17) 1930 Rang. 295=129 Ind. Cas. 508.

——Husband and wife—Joint property—Tenancy-in-common or joint tenancy—Right to alienate.

Under the Burmese Buddhist Law, property acquired by either or both of the spouses before or during marriage is held by them after marriage as tenants-in-comon and not as joint tenants and either party to the marriage is competent to alienate or otherwise deal with succh property during the marriage to the extent of his or her share in it. [A.I.R. 1927 Rang. 209=5 Rang. 296=6 Bur.L.J. 166=103 Ind. Cas. 568 (F.B.)], Overruled. A.I.R. (Vol. 19) 1932 P.C. 152=10 Rang. 261=55 C.L.J. 497=63 M.L.J. 167=59 I.A. 216=137 Ind. Cas. 1 (P.C.).

——Husband and wife—Joint property—Whole life policy on life of husband—Premia paid out of joint funds—Wife entitled to half the proceeds of the policy on death of husband.

Where a husband has taken out a whole life policy during coverture and the premia is paid out of the joint funds of the husband and the wife during coverture, what is really acquired during the coverture is not the proceeds of the policy, but the right to obtain the proceeds of the policy and hence on the death of the husband the wife is entitled to one half of the proceeds of the policy. A.I.R. (Vol. 27) 1940 Rang. 193=1940 Rang.L.R. 208=190 Ind. Cas. 278 (S.B.).

(e) Kanwin and payin property.

——Husband and wife—Kanwin and payin property.

Kanwin property, **i.e.**, property given by the bridegroom to the bride at the time of marriage for the joint purpose of the married pair is a gift and must be in writing and registered as required by S. 123 of the T. P. Act, otherwise if there is mutual divorce, the property will revert to the husband as being only **payin** property. 33 Ind. Cas. 129=9 Bur. L.T. 87.

(f) Maintenance.

——Husband and wife—Maintenance—Right of wife living apart owing to cruelty.

After a husband's suit for restitution of conjugal rights has been dismissed, he is bound to maintain his wife especially where the wife lives apart on account of the husband's cruelty. 10 Bur.L.T. 212=18 Cr.L.J. 767=41 Ind. Cas. 143=9 L.B.R. 442.

(g) Mortgage.

——Husband and wife—Mortgage by husband—Consent of wife—Acquiescence—Presumption of.

The question of acquiescence by the wife in a mortgage of joint property executed by her husband, depends upon the circumstances of the case. The wife's consent may be presumed, where the circumstances are such as to show that the husband is acting as the wife's agent and the husband ostensibly with the wife's assent manages the family business. 13 Bur.L.T. 129=61 Ind. Cas. 701=10 L.B.R. 267.

——Husband and wife—Mortgage by husband—Decree—Wife's interest—If affected.

A mortgage of joint property effected by the husband with the wife's knowledge and consent, binds the wife's interest in the property as well as the husband's interest. ((**Per Twomey, C.J., Pratt, and Maung Kin, JJ.**)—(**Ormond, J.**, contra). A husband who mortgaged the joint property of himself and his wife, with her knowledge and consent is not acting as benamidar for his wife, and a decree against him alone will not affect the wife's interest in the property. 12 Bur.L.T. 31=51 Ind. Cas. 563=10 L.B.R. 36 (F.B.).

——Husband and wife—Mortgage by husband—Wife's liability.

If a Burmese Buddhist wife acquiesces in a mortgage of property executed by her husband, it binds the wife's interest also though she does not join in the registration of the deed. 27 Ind. Cas. 788=8 Bur.L.T. 97.

(h) Partnership.

——Husband and wife—Partnership—Joint borrowing—If justifies presumption.

There is no presumption that whenever a husband and wife borrow money there is a partnership between the two and that the money is borrowed for the purposes of that partnership. 54 Ind. Cas. 513=3 U.B.R. (1919) 189.

——Husband and wife—Partnership property—Insolvency of husband—Sale of specific share by Official Receiver—Wife's right regarding remaining share.

Ordinarily when a Burman Buddhist husband acts on behalf of the marriage partnership, he can bind the whole of the partnership property. And the partnership property is liable for a debt contracted by the husband alone, if the debt can be held to have been taken in the interests of the partnership. But where a Burmese Buddhist husband is adjudicated an insolvent and the Receiver merely sells 1|3rd share of the husband, it cannot be held that the whole partnership interest of husband and wife is sold and consequently where the wife after the discharge of her husband sells her 2|3rd share in discharge of joint debts and with the consent of the husband, the sale operates to transfer title of 2|3rd share to the vendee and the latter is entitled, in a suit against the purchaser of the 1|3rd share, to partition and possession of his 2|3rd shares. A.I.R. 1930 Rang. 345.

(i) Payin property.

——Husband and wife—Payin property.

The husband brought a piece of land as the payin to the marriage. The property was situate at the place where the couple resided. After the death of his first wife, he married second wife and continued to live at the same place for a long time. Then he changed his place of residence. He retained the land for several years and then sold it and immediately purchased another land in a nearer village for convenience of enjoyment.

Held, that the land did not become lettetpwa but retained its character as payin. A.I.R. 1921 L.B. 46, Appr. 6 Bur.L.J. 219=105 Ind. Cas. 470=A.I.R. 1927 Rang. 318.

——Husband and wife—Payin property—Divorce—Division of property—Payin does not become lettetpwa simply because it has changed its form during marriage.

On a partition of property on a divorce by mutual consent Payin property will go to the party who brought it to the marriage and this rule is still to apply even though the property may have been changed in form provided it has not been merged entirely in the jointly acquired property and so changed its character. Change of form does not affect the rule so long as the **payin** can be identified, although the profits arising from such changed property may be **lettetpwa.** 11 L.B.R. 48=70 Ind. Cas. 562=A.I.R. 1921 L.B. 46.

——Husband and wife—Payin property—House built during coverture—Character of.

A house built during coverture on the **Payin** property of the husband or wife is their joint property and neither can oust the other from possession. 58 Ind. Cas. 225=12 Bur.L.T. 202.

——Husband and wife—Payin property changing character—Presumption of utetpava.

Where **payin** property changes its character during a marriage, the presumption is that it has become **utetpava** of that marriage—a presumption which may however be rebutted. 21 Ind. Cas. 227=6 Bur.L.T. 174.

——Husband and wife—Payin property—Liability under decree against husband.

In respect of the property of the marriage whether that property be the payin property of either party or lettetpwa property of the marriage, a Burmese Buddhist husband and wife are partners, and all the property of the marriage, whether payin or lettetpwa, is partnership property. In Burmese Buddhist Law the partnership between husband and wife is dissolved only by death or divorce, and neither partner is entitled to separate possession of any share of the partnership property or of the profits of the partnership until the partnership is dissolved by the death of one partner or by divorce. Either husband or wife or both may represent the partnership in dealing with their persons. There is a presumption that debts contracted by either partner bind the partnership and are recoverable out of the partnership property. There is a presumption that a suit brought against either of the partners is a suit against the partnership and that in such a suit a partner who is not joined as a party to the suit is represented by the partner who is joined as a party. A decree against either partner can ordinarily be executed against any partnership property. Therefore where property which was payin property brought by a Burmese Buddhist husband to the marriage is during the subsistence of the marriage sold in execution of a decree against him for a debt incurred by him in a business carried on by him while he was living with the wife, no question of the separate interests or shares of husband and wife in such property ordinarily arises, because payin property is property of the marriage and the whole of the property of the marriage is ordinarily available for the satisfaction of debts incurred by either husband or wife. Where the property is jointly acquired lettetpwa property no such question ordinarily arises for a similar reason. A decree against a Burmese Buddhist husband or wife can ordinarily be executed against the property of the marriage, whether payin or lettetpwa, to the extent of so much of such property as is necessary to satisfy the decree. Case-law fully discussed. 10 L.B.R. 36 (F.B.) and 3 Rang. 322=A.I.R. 1925 Rang. 329=94 Ind. Cas. 797. Overruled. 5 Rang. 296=103

Ind. Cas. 568=6 Bur.L.J. 166=A.I.R. 1927 Rang. 209 (F.B.).

(j) Relationship.

——Husband and wife—Relationship—If partners—Wife can sue in respect of partnership asset in her capacity as surviving partner.

A Burmese Buddhist husband and wife are regarded as partners and as such a Buddhist wife can maintain suit in respect of a partnership asset in her capacity as surviving partner without any reference to her succession to the interest of her husband in the asset or debt due to them jointly. A.I.R. 1927 Rang. 209 and 4 L.B.R. 99, Rel. on; 2 U.B.R. 204, not Foll. 7 Rang. 806=121 Ind. Cas. 807= A.I.R. 1929 Rang. 306.

——Husband and wife—Relationship—Nature of.

Though there are some analogies between the relationship between a Burmese husband and wife in relation to their property and a commercial partnership, there are also many differences, and it is entirely wrong to make any attempt to bring the former relationship, within the scope of the law relating to the latter.

There is no legal presumption that the act of one spouse binds the other. It may do so or it may not, and the question whether it does is a question of fact to be decided on the evidence in the case, having regard to the special nature of the relationship. A.I.R. (Vol. 18) 1931 Rang. 262=9 Rang. 524= 134 Ind. Cas. 1252 (S.B.).

——Husband and wife—Relationship—Partnership.

It is part of the Burmese Buddhist law of marriage that husband and wife are partners in practically all the business of the marriage and that the acquisitions of either or both are partnership property. Such a partnership is dissolved by divorce, and a partition of the partnership property follows as a matter of course and would have legal effect without any registered conveyance of the property from the partnership to the individual partners. But every partner is liable for all debts and obligations incurred while he is a partner in the usual course of business and the dissolution of the partnership would not affect his liability. The property of the partnership whether before or after dissolution of the partnership would be liable for the partnership debts. 5 Rang. 443=105 Ind. Cas. 244=A.I.R. 1927 Rang. 299.

——Husband and wife—Relationship—Proof—Mya-nge—If lesser wife.

The term Mya-nge does not necessarily mean a lesser wife. It is often used as an abuse. Where a claim is put forward by a lesser wife or by one claiming through her it must be proved that the relationship of husband and wife actually subsisted. 3 Bur.L.J. 108=97 Ind. Cas. 72=A.I.R. 1925 Rang. 41.

(k) Miscellaneous.

——Miscellaneous—Husband and wife—Decree against one on debt contracted before marriage—Remedy of decree-holder.

Per Carr, J.—Where a decree had been obtained against the debt contracting spouse before marriage the remedy open to the decree-holder would need further consideration. A.I.R. (Vol. 18) 1931 Rang. 262=9 Rang. 524=134 Ind. Cas. 1252 (S. B.).

——Miscellaneous—Husband and wife — Husband's payin property—Wife not making any claim to but attesting mortgage and paying interest—Estoppel.

Where the conduct of a Burmese wife in refraining from making any claim to her husband's **payin** property and in referring to it as her husband's property, in attesting the mortgage deed, and in paying interest thereon is definitely calculated to induce the mortgagee to believe that she had no interest whatsoever in the land, and for that reason, the mortgagee refrains from making her a party in the mortgage suit, she cannot subsequently come forward and claim that she has an interest in the mortgaged property and that the decree obtained by the mortgagee is inoperative against that interest. A.I.R. (Vol. 22) 1935 Rang. 17=154 Ind. Cas. 1061.

——Miscellaneous—Husband and wife—Husband's right to sue for recovery of money entrusted by him to another—Joinder of wife.

A Burmese Buddhist husband can file a suit for recovery of moneys entrusted by him to another without making the wife a party to the suit. A. I. R. 1930 Rang. 295.

——Miscellaneous—Husband and wife—Joint liability—Wife refusing to sign second deed in novation—Presumption of joint liability.

The principle that a liability incurred by a Burmese Buddhist husband for the joint purpose of himself and his wife binds the wife based upon the presuumption that the wife has consented to the incurring of such liability cannot be of avail, where the wife has expressly withheld her consent to the deed. A.I.R. (Vol. 23) 1936 Rang. 396=165 Ind. Cas. 388.

——Miscellaneous—Husband and wife—Mahomedan family—Presumption as to cash and household furniture.

As regards Muhammadan families, there is a presumption that cash and household furniture belong to the husband. A.I.R. (Vol. 20) 1933 Rang. 393 =149 Ind. Cas. 654.

——Miscellaneous—Husband and wife—Prenuptial contract—Husband's breach—Wife's claim to damages during marriage—Sustainability.

Since a Burmese Buddhist wife cannot claim separate possession of the joint estate, or a portion of it from her husband, and during the subsistence of the marriage, the ordinary property belonging to one belongs to both, a Burmese Buddhist wife cannot make a claim against her husband during the continuance of the marriage for recovery of certain money due as damages under a pre-nuptial contract owing to husband's breach of its terms. A.I.R. (Vol. 22) 1935 Rang. 497=160 Ind. Cas. 824.

——Miscellaneous—Husband and wife—Presumption of agency—Husband acting as agent of wife in the first of a series of transactions —Inference.

There are no presumptions **de facto** or **de jure**, that a Burmese Buddhist couple, living together, are agents for each other, or that the wife is deemed to consent to the acts of her husband, and it is a question of fact to be determined according to the circumstances of each case.

But where the Burmese Buddhist wife admits that her husband acted as her agent in the first of a series of transactions, it is to be presumed in respect

of the subsequent transactions that he continued to act as her agent as long as his authority has not been revoked to the knowledge of the other parties to the transaction. A.I.R. (Vol. 21) 1934 Rang. 341=7 Rang. 204=153 Ind. Cas. 331.

——Miscellaneous—Husband and wife—Property inherited during coverture—Character—Nissayo and Nissito—Lettetpwa and Hnapazone.

Property acquired by the husband or wife by inheritance during coverture is **Lettetpwa** property and not **Hnapazone** and both husband and wife have a vested interest in such property when they are living together. The rule of **Nissayo and Nissito** applies to such cases. 57 Ind. Cas. 950=13 Bur.L.T. 35.

——Miscellaneous—Husband and wife—Property mortgaged by husband before marriage—Right of wife and children.

A Burmese mortgagor can bind the entire interest in property if his children have no vested interest until he marries and there is no **orasa** child. The mortgagor's wife can have no interest in this property if it belonged to him and is mortgaged before his marriage with her. A.I.R. (Vol. 21) 1934 Rang. 243=153 Ind. Cas. 253.

——Miscellaneous—Husband and wife—Separate living—Custody of child.

In a suit by the mother of a Burmese Buddhist girl of 7 years to recover her from the custody of the father who was living separate, **held,** that as guardianship was not one of the matters mentioned in S. 13 of the Burma Laws Act, the personal law of Buddhist was not applicable. According to S. 19 (*c*) of the Guardians and Wards Act, the father was the natural guardian of the minor child under the circumstances of the case. 29 Ind. Cas. 890=8 Bur.L.T. 73.

——Miscellaneous—Husband and wife—Widow Right of disposal of joint property.

Subject to any claim by the eldest son to a certain specified property, *e.g.,* the father's elephant, pony, etc., and to a quarter share of the joint properties as **Orasa** son, a Burmese Buddhist widow has an absolute right of disposal over the whole of the joint property of herself and her husband as against their children. 8 Bur.L.T. 203=30 Ind. Cas. 588=8 L.B.R. 501.

——Miscellaneous—Husband and wife—Wife's payin property—Right of alienation.

A Buddhist wife, and **eindaungyi** may alienate her **payin** property in any way without even consulting her husband provided she does not give it to a paramour. 12 Ind. Cas. 200=4 Bur.L.T. 244.

12. Joint property.

——Ancestral property—Presumption as to Joint Property—Jointness.

Buddhist Law does not say that ancestral land must be presumed to remain undivided until the contrary is proved. There is no such presumption in Buddhist law. No general rule can be laid down as to the burden of proving jointness or separation without regard to the facts and circumstances of each particcular case. 1 Bur.L.J. 174=74 Ind. Cas. 9=A.I.R. 1923 Rang. 92.

——Joint property—Ancestral property—Presumption.

There is no such presumption that ancestral land must be presumed to remain undivided until the contrary is proved in the Buddhist Law. The ruling in such case is to the effect that the burden of proving the division of ancestral property lies upon the party asserting division. 33 Ind. Cas. 985=9 Bur.L.T. 164.

——Joint property—Delay in setting up claim.

A claim to a share in a deceased parents' estate should be promptly made after the parent's death. Unreasonable and unexplained delay would defeat the claim. 38 Ind. Cas. 147 (L.B.).

——Joint property—Family member going out since boyhood and working separately—Coming back and managing business but keeping his own banking account separate—Banking account if joint or personal property.

A family kept together in a kind of patriarchal state: all the family worked for the father and after his death for the mother. They had no separate property of their own; they just provided themselves with board and lodging, clothing and pocket money, and worked without remuneration. But one of the members did not work like this since his boyhood. He had gone out on his own account and was employed in Government office. When his father died, he came back and managed the business. But he kept his own banking accounts distinct from the family accounts:

Held, that having once been earning his living independently in this way and spending it, it was incredible that he should come back to the family-fold and reduce himself to a position worse than that of a hired servant, depending on his mother for everything, **prima facie,** banking accounts in his name would be his personal property, and unless and until the contrary was proved they must be so regarded. A.I.R. (Vol. 25) 1938 Rang. 71=176 Ind. Cas. 909.

——Joint property—Inference of—Nephew of widow brought up as family member—Properties purchaser jointly in son's and nephew's names—Pronotes from debtors taken in joint names—Nephew not paid for his services—No accounts shown—Inference.

U, a Burman, died leaving a widow **D** and a son **L. H,** a nephew of **D,** was brought up by **D** as a foster son and by **Z** as foster brother. He was educated, married and maintained at the family expense and took a prominent part in the family business. **L** carried on the family money-lending business. **H,** on attaining majority, was initiated in the business. Properties were purchased in the joint names of **L** and **H.** Some promissory notes from the debtors were also taken in the joint names. No account books were produced showing how each particular transaction was debited or credited. There were a number of memoranda in **H's** handwriting showing settlements of accounts. There was no proof that **H** was paid for his services. He merely lived with the family in a separate house provided by the family and was supported by it. After death of **H** and **L** disputes arose between their heirs.

Held. that under the circumstances the intention of **L** and **H** was to express a joint interest and joint

right. 7 Rang. 388=117 Ind. Cas. 29=50 C.L.J. 192=1929 M.W.N. 682=34 C.W.N. 117=A.I.R. 1929 P.C. 246.

——Joint property—Land transferred by mother to daughter and her husband share of inheritance.

It is not that the land transferred by a mother to a daughter and her husband as their share of inheritance at the time when the mother is the sole heir to it can only be regarded as gift simply because daughter's claim has not become due. It can still be regarded as the inheritance of the daughter which becomes the joint lettetpwa of herself and her husband. A.I.R. 1930 Rang. 176.

——Joint property—Lettetpwa property of couple.

If a husband and wife each brings a child by previous marriage and there is also a child to them both and if the wife dies, of their joint lettetpwa property eight portions should be made of which five portions should go to the husband, two should go to the son of both and one should go to the atet sons. A.I.R. 1930 Rang. 176.

——Joint property—Property brought by parents to the second marriage—Character and incidents.

So long as a Burman Buddhist husband and wife are alive, their property from whatever source derived, forms one estate, in which all members of the family have an interest but which is under the control of husband and wife. If one of the couple dies and the surviving partner marries again, the property is ordinarily treated as the property of the second marriage during the continuance of that marriage and forms one estate together with property acquired during the second marriage. It is only on the death of the surviving spouse of the first marriage that the manner in whicch the property is acquired becomes important. The rules laid down in S. 229 of Vol. I of the Ex-hinwan Mingyi's Digest provide for the partition of what is treated as one estate in such an eventuality. Similarly when, after the death of the common spouse, the surviving widow or widower retains the property still in tact and no partition takes place, the Dhammathats appear to contemplate the estate as still one estate only; it is only when claim to partition is made, the importance of the manner in which the property is acquired arises. It appears therefore that although under the rules set forth in S. 238, the children of the first marriage obtains the whole of the property of the first marriage and no share in the rest of the property, they are still suing for partition of an estate. If there is joint property of the last marriage, the children of the first marriage each takes the property brought by their parents to the subsequent marriage. 4 U. B. R. 140=1 Bur.L.J. 267 =77 Ind. Cas. 53=A.I.R. 1923 Rang. 110.

13. Maintenance.

——Maintenance—Child—Right of to sue parent.

In Burma a wife may sue her husband, but a child as such may not sue his parents, for maintenance. Where the circumstances are such that the wife is morally bound to support a child or children that fact may and should be taken into account in assessing the quantum of maintenance to be paid to the wife, but she and she alone has a cause of action. A.I.R. (Vol. 28) 1941 Rang. 81=1940 Rang.L.R. 807 =193 Ind. Cas. 836.

——Maintenance — Wife's right — Difference between English Law and Buddhist Law.

In Buddhist Law, the spouses are for no purpose one person but of their after-acquired property they are tenants-in-common. The wife's interest in that property is a vested interest in the sense that its existence is indefeasible, but as to its quantum it is highly contingent since this may be affected in various ways. It depends, for example, on whether the after-acquired property is acquired by pure good luck or by the exertions of the spouses jointly or by those of the husband alone and also on the number of subsequent wives the husband may take. The material term to be implied is in reality (unlike that implied by English Law) collateral to the main contract of marriage. It is to the effect that the husband shall be the manager of the after-acquired property and shall apply it during the subsistence of the marriage (as to income) first in maintaining his wife or wives, his children, and himself, and secondly in adding to the common capital, for which he or his estate will be accountable to each wife or her estate when her marriage terminates. The Buddhist husband is therefore under a positive legal duty to maintain his wife, but the nature of the implied term from which that duty arises makes it in one respect more onerous than the corresponding duty of an English husband. The latter when sued for maintenance has a action was brought the wife deserted him without just cause, that being a breach of the contract of marriage going to its root. But no marital offence by the wife can take away during the subsistence of the marriage her proprietary rights which, though precarious as regards amount, vested indefeasibly at the moment she married. In other words, the Buddhist husband is sued not **qua** husband but **qua** manager, and no wrong done to him in the former capacity can benefit him in the latter. A. I. R. (Vol. 28) 1941 Rang. 81=1940 Rang.L.R. 807=193 Ind. Cas. 336.

——Maintenance—Wife—Right of — Husband taking second wife—Amount of maintenance to income.

In Burmese Buddhist Law, the general rule is that wife is entitled by way of maintenance to an amount which is one-third of the income acquired by the exertions of her monogamous husband. But when the husband takes a second wife the amount of maintenance to which the first wife is entitled, is reduced to one-sixth of his income and the cost of maintaining children is first charge on the income. A.I.R. (Vol. 28) 1941 Rang. 81=1940 Rang.L.R. 807= 193 Ind. Cas. 836.

——Maintenance—Wife—Suit by — Arrears — Rigt to.

In suit by a Buddhist wife against her husband for maintenance the Court has no jurisdiction to order payment of arrears of maintenance for the period before suit commenced. A.I.R. (Vol. 28) 1941 Rang. 81=1940 Rang.L.R. 807=193 Ind. Cas. 836.

——Maintenance—Wife—Suit by—Claim for arrears.

In a suit by a Burmese Buddhist wife against her husband for maintenance, a claim for arrears of

maintenance cannot be sustained. A.I.R. (Vol. 26) 1939 Rang. 223=1939 Rang. L. R. 527=182 Ind. Cas. 799.

——Maintenance—Wife's suit—Husband subsequently taking another wife—If forms part of cause of action.

Where subsequent to the wife's suit for maintenance the husband has taken a second wife, this cannot whatever its legal effect, form part of the wife's cause of action in the suit, as a premature suit is incurable by subsequent events. A.I.R. (Vol. 28) 1941 Rang. 81=1940 Rang.L.R. 807=193 Ind. Cas. 836.

——Maintenance—Wife—Suit against husband living separately—Maintainability.

Under Buddhist Law there is a positive duty cast on the husband to maintain his wife or wives. Where by law, a person is under a duty towards another person, there is vested in that other a corresponding right to have that duty performed. Hence, a suit for maintenance by a Burmese Buddhist wife against her husband, who is living separately from her, is maintainable. A.I.R. (Vol. 26) 1939 Rang. 223=1939 Rang.L.R. 527=182 Ind. Cas. 799.

14. Marriage.

(a) Atetpwa Property.
(b) Breach of Promise.
(c) Dissolution.
(d) Law Applicable.
(e) Proof.
(f) Validity.

(a) Atetpwa Property.

——Marriage—Atetpwa property—Change in character—Whether becomes lettetpwa property.

So long as the corpus of **payin** or **atetpwa** property is unchanged, it will always remain **payin** or **atetpwa**, and the point for consideration in any case in which this question as to a change in the nature of property has to decided, must be a question of fact, as to whether there has been a change in the corpus of the property.

Atetpwa property originally brought by wife to her marriage changed its original character by being entirely rebuilt during coverture:

Held, that the property became lettetpwa property of the marriage and the husband had half interest equally with the wife in such property. A. I. R. (Vol. 26) 1939 Rang. 355=186 Ind. Cas. 286.

——Marriage—Atetpwa property—Separation of spouses by mutual consent—Right to atetpwa property.

When the husband and wife separate from each other by mutual consent, either is entitled to take his or her **atetpwa** property. A.I.R. (Vol. 24) 1937 Rang. 142=171 Ind. Cas. 702.

(b) Breach of Promise.

——Marriage—Breach of promise—Damages—Double value of bridal gift—Provision in Dhammathats obsolete—Contract Act, S. 74.

The provision in the Dhammathats by which double the value of gifts given to a girl at betrothal, had to be given back on breach of promise of marriage is archaic and obsolete, and no longer ought to be followed. In such cases, even if the parent had promised to return double the value, the Courts should apply S. 74, Contract Act, and grant reasonable compensation, and not the penalty stipulated for. A.I.R. (Vol. 20) 1933 Rang. 198 (1)=11 Rang. 143=146 Ind. Cas. 724.

——Marriage—Breach of promise—Damages—Suit for.

Suit by man for damages for breach of contract of marriage will lie in the absence of proof of a contrary rule of Burmese Buddhist Law. 23 Ind. Cas. 376=7 Bur.L.T. 14.

——Marriage—Breach of promise—Promise by parents—Breach—Damages.

A Burmese Buddhist whether male or female, adult or minor, cannot be legally married without his or her consent or against his or her will. Where the parents promise to give a boy in marriage, no damages for the breach of such promise can be recovered either against the son or against the parents. 49 Ind. Cas. 59=(1918) 3 U.B.R. 106.

(c) Dissolution.

——Marriage—Dissolution — Desertion by husband for three years—Effect.

When a Burmese Buddhist husband deserts his wife and for three years, neither contributes to her maintenance nor has any communication with her, the marriage is automatically dissolved on the expiration of three years from the date of desertion and no further and expressed act of volition on the part of one party to the marriage is necessary to effect such dissolution. 3 L.B.R. 175 (F.B.), Overruled. Caselaw reviewed). 5 Rang. 537=6 Bur.L.J. 125=105 Ind. Cas. 399=A.I.R. 1927 Rang. 294 (F.B.).

——Marriage—Dissolution — Essentials — Absence of communication.

It is essential to dissolution by desertion and a year's absence that during that year there should be absolutely no communication between the spouses. A. I.R. (Vol. 28) 1941 Rang. 81=1940 Rang.L.R. 807=193 Ind. Cas. 836.

——Marriage—Dissolution — Husband's misconduct—Right to restitution of conjugal rights.

If a Burmese Buddhist husband misconducts himself with his wife and treats her extremely badly the case is not one in which restitution of conjugal rights can be ordered to him. 7 Rang. 451=120 Ind. Cas. 137=A.I.R. 1929 Rang. 307.

——Marriage—Dissolution — Imprisonment of husband—Desertion—Right to property.

Under the Buddhist Law, a man sentenced to imprisonment is not thereby to be deemed to have deserted his wife. During the imprisonment of the husband, his wife has no right to take a second husband; if she does so, her conduct amounts to desertion and adultery and she cannot claim a divorce by pleading desertion. The marriage is not dissolved by the desertion but from the day, when the first husband on his release from jail, demands the joint property from her. Where the husband treats the marriage as at an end, on the ground of his wife's desertion and adultery he is entitled to all the joint property of the parties. 29 Ind. Cas. 863=8 L.B.R. 50.

——Marriage—Dissolution—Spouse going away —Desertion, if made out.

Merely because one spouse goes away from another it does not necessarily follow that the spouse who has gone away is guilty of desertion. It depends on the circumstances. A wife who leaves her husband because after her marriage to him he has married another woman is not guilty of the matrimonial fault of desertion.

Where, therefore, after the first wife left her husband, he married another wife and took her to his house but even after that the relation between the first wife and the husband was such that neither regarded himself or herself as having been divorced, the facts do not amount to desertion and the onus of proof of desertion is on the person alleging it. A.I.R. (Vol. 22) 1935 Rang. 247=158 Ind. Cas. 14.

——Marriage—Dissolution—Right of husband.

A husband who believes his wife to be guilty of adultery may obtain her admission of guilt and the dissolution of marriage may take place by mutual consent on the footing that the husband retains the hnapazon property. If he cannot do this and a separation ensues by reason of his own desertion, then he has three years in which to bring a suit for a decree of divorce, but if by reason of their differences his wife has deserted him, he has only one year, In the suit for a decree of divorce, he may, if he can, prove the factum of adultery, but unless he does so the dissolution of marriage becomes effective at the expiration of one or other of these periods whichever may apply. He is no longer a husband and he cannot "prove the adultery in suit for divorce brought by him." Nor can he bring a suit for a declaration that the dissolution of the marriage tie was effected in circumstances that his former wife has been guilty of adultery. And, if he cannot bring a suit of this kind, he cannot raise a defence of this kind in a suit brought against him. A. I. R. (Vol. 28) 1941 Rang. 118=1941 Rang.L.R. 14=194 Ind. Cas 482.

——Marriage—Dissolution—Wife eloping with paramour and deserting husband—Effect.

In the case of Burmese Buddhist, where the wife elopes with her paramour and deserts her husband, the marriage gets automatically dissolved after the end of one year from the date of desertion. No further expressed act of volition on the part of the deserted party is necessary to effect such dissolution. A.I.R. (Vol. 23) 1936 Rang. 274=14 Rang. 329=163 Ind. Cas. 600.

——Marriage — Dissolution of — Wife living away on account of cruelty—Effect.

The rule of Burmese Buddhist Law that a marriage is dissolved by the wife voluntarily deserting the husband for one year does not apply where the wife has been compelled to leave her husband because of his cruelty. 10 Bur.L.T. 212=41 Ind. Cas. 143=18 Cr.L.J. 767=29 L.B.R. 44.

(d) Law Applicable.

——Marriage — Law applicable — Burmese woman and half-caste Chinese—Chinese Customary Law.

Chinese Customary Law is the law to be applied in determining the question whether a Burmese woman is the wife of a Chinese half-caste who claims to be a Confucian, so that she can claim maintenance under S. 488. The Court may, in certain cases, allow the presumption of marriage from long co-habitation with habit and repute to prevail. 4 Bur.L.J. 255=94 Ind. Cas. 608=27 Cr.L.J. 656=A.I.R. 1926 Rang. 82.

——Marriage—Law applicable—Lex loci.

The law of the place where a marriage is contracted determines the validity of a marriage. 13 Bur.L.T. 105=59 Ind. Cas. 555=22 Cr.L.J. 123.

——Marriage—Law applicable—Chinese Buddhist in Burma.

As regards validity of the marriage between Chinese Buddhists contracting marriage in Burma, the Burmese Buddhist Law is applicable as the **lex loci contractus,** but as regards inheritance or succession to the estate of Chinese Buddhist dying intestate in Burma, the Chinese customary law is applicable as the customary law of the Chinese Buddhist. A.I.R. (Vol. 26) 1939 Rang. 291=184 Ind. Cas. 665.

——Marriage—Law applicable—Chino-Burman Buddhist and Burmese Buddhist woman—Validity—Essentials.

The law that is applicable to the union of a Chino-Burman Buddhist and a Burmese Buddhist woman, is the same as is applicable to the case of a Burmese Buddhist man and a Burmese Buddhist woman. All that is required, so long as they are **sui juris,** is their mutual consent to live together as husband and wife. Where such consent is proved by evidence, the spouses must be held to be legally married. A.I.R. (Vol. 26) 1939 Rang. 252=40 Cr.L.J. 796=183 Ind. Cas. 477.

——Marriage—Law applicable—Chinese Buddhist marrying Burmese Buddhist woman—Marriage ceremony, if essential—Mutual consent, sufficiency of.

The Burmese Buddhist Law regarding marriage is **prima facie** applicable to Chinese Buddhists contracting marriage in Burma as the **lex loci contractus.** No marriage ceremony is requisite to constitute a valid marriage under Burmese Buddhist Law. Mutual consent is all that is required. Under Chinese Customary Law, a ceremony is also not necessary in the case of a man taking unto himself a secondary wife. A.I.R. (Vol. 20) 1933 Rang. 313=11 Rang. 310=148 Ind. Cas. 492.

——Marriage—Law applicable—Chinaman marrying Burmese Buddhist woman—Burmese law applies—Burma Laws Act (1898), S. 13 (1).

The Burmese Buddhist law regarding marriage is **prima facie** applicable to Chinese Buddhists as the **lex loci contractus;** and to escape from the application of Burmese Buddhist law regarding marriage a Chinese Buddhist must prove that he is subject to a custom having the force of law in Burma and that that custom is opposed to the provisions of Burmese Buddhist woman. Cases considered. 5 Rang. 406 the matter in issue is the marriage of a Buddhist Chinaman with a Burmese Buddhist woman he must show that the application of the custom having the force of law will not work injustice to the Burmese Buddhist woman. Cases considered. 5 Rang. 406=6 Bur.L.J. 135=104 Ind. Cas. 478=A.I.R. 1927 Rang. 265 (F.B.).

——Marriage—Law applicable—Chinese Confucian and Burmese Buddhist woman—Law applicable.

The Burmese Buddhist Law regarding marriage is

prima facie applicable as the **lex loci contractus** to a marriage in Burma between a Chinese Confucian and a Burmese Buddhist woman. A.I.R. (Vol. 24) 1937 Rang. 245=1937 Rang.L.R. 103=38 Cr.L.J. 895=170 Ind. Cas. 355.

——Marriage—Law applicable—Chinese man and Burmese woman—Law applicable.

In questions of marriage between a Chinese Buddhist man and a Burmese Buddhist woman, the law applicable to the man is his own personal law. The law as to marriage among Chinese is very much more restricted than among the Burmese Buddhists. 24 Ind. Cas. 572=15 Cr.L.J. 484=7 Bur.L.T. 71.

——Marriage — Law applicable—Karens—Custom—Buddhist Law.

The marriage customs of Karens are very peculiar, but if they profess Buddhism they may marry according to Buddhist Law. 25 Ind. Cas. 342=15 Cr.L.J. 590.

——Marriage—Law applicable—Non-Buddhist non-Burmans.

Burmese Buddhist Law of marriage is not applicable to the marriages of non-Burmese non-Buddhists celebrated in the time of the Buddhist Kings of Burma. 12 Bur.L.T. 48=3 U.B.R. (1919) 128=51 Ind. Cas. 542=10 L.B.R. 77.

——Marriage — Law applicable—Promise of marriage by Burmese Buddhist below age of majority—Validity—Burmese Buddhist Law—Applicability.

The Burmese Buddhist Law does not form the rule of decision of the question as to the validity of a promise of marriage made by a Burmese Buddhist young man below the age of majority fixed by the Indian Majority Act. A.I.R. (Vol. 9) 1922 Low. Bur. 6=11 L.B.R. 99=65 Ind. Cas. 411 (F.B.); A.I.R. (Vol. 6) 1919 Upp.Bur. 39=3 U.B.R. 75=46 Ind. Cas. 421; A.I.R. (Vol. 6) 1919 Low. Bur. 123=10 L.B.R. 28=12 Bur.L. Tim. 219=52 Ind. Cas. 653, Overruled. A. I. R. (Vol. 23) 1936 Rang. 212=14 Rang. 215=162 Ind. Cas. 560 (F.B.).

(e) Proof.

——Proof—Absence of open marriage ceremony—Habit and repute—Value of.

Where a contention of an open ceremony has been abandoned the claim to the valid marriage can be allowed to rest on habit and repute. A.I.R. (Vol. 27) 1940 Rang. 181=1940 Rang.L.R. 562=192 Ind. Cas. 49.

——Marriage—Proof—Absence of ceremonies—Long union—Conduct—Sufficiency.

Among Burman Buddhists polygamy is undoubtedly lawful and a Burman Buddhist may have, at the same time, two or more wives who are on an equal footing. There can be no doubt that, under Burmese Buddhist law, although there may not be sufficient evidence of an actual giving and taking in marriage —since, no ceremony of any kind is essential for the purposes of lawful wedlock—the conduct of the parties, subsequent to their coming together, may raise a strong presumption of marriage, especially when the union has lasted for a long period. 1 Rang. 1=73 Ind. Cas. 1044=A.I.R. 1924 Rang. 37.

——Marriage — Proof — Ceremonies—Mutual consent—Evidence of recognition—Reputation.

In Burma no ceremony is essential for a marriage. Mutual consent is all that is required, which in the absence of direct proof, may be inferred from the conduct of the parties or established by reputation. In Burma where polygamy is lawful, it is not illegal to marry wife's sister, though it is not quite a respectable thing to do during lifetime of the wife. Eating of the same pot is a sign of social equality rather than a proof of matrimony. 39 Cal. 492=39 I.A. 57=11 M.L.T. 169=14 Ind. Cas. 475=(1912) M.W.N. 201=15 C.L.J. 276=9 A.L.J. 276=14 Bom.L.R. 204=22 M.L.J. 380=16 C.W.N. 529 =5 Bur.L.T. 65=(1912) 1 U.B.R. 111 (P.C.).

——Proof—Cohabitation accompanied by agreement to marry in future—Sufficiency for valid marriage.

A marriage between Burmese Buddhists is created by cohabitation coupled with intent to become husband and wife. In order that such a marriage should be created, no doubt the cohabitation must be accompanied by an agreement to become husband and wife **in praesenti** but such an agreefent differs **toto coelo** from a contract to marry **in futuro**, the latter agreement being antecedent to and forming no part of the proposed marriage. Cohabitation accompanied by an agreement to marry **in futuro** does not create a change of status, although in cases where the parties to the agreement are competent to bind themselves by a contract to marry and the agreement is broken, the cohabitation in certain circumstances may affect the quantum of the damages that are awarded as compensation for the breach of the contract. It follows, therefore, that entering into an agreement to marry **in futuro** is not an act in the matter of marriage within S. 2 (a), Majority Act, and that the capacity of a person to enter into such a contract is to be determined, as it is in the case of all other contracts not expressly excepted therefrom, by the general law of the land to which all persons are subject. A.I.R. (Vol. 23) 1936 Rang. 212=14 Rang. 215=162 Ind. Cas. 560 (F.B.).

——Proof—Cohabitation coupled with intention—Sufficiency.

Where a man and a woman cohabit with the intention of being husband and wife, they are husband and wife, whatever other people may have thought of them. A.I.R. (Vol. 23) 1936 Rang. 253=163 Ind. Cas. 393.

——Proof—Co-habitation—Presumption of marriage.

Co-habitation over a period of years, where there is no impediment to marriage, raises a presumption of marriage. 1 Rang. 161=2 Bur.L.J. 79=74 Ind. Cas. 933=A.I.R. 1923 Rang. 180.

——Proof—Essentials.

A marriage between Burmese Buddhist is created by co-habitation coupled with intent to become husband and wife. There must also be publicity of the relationship. A.I.R. (Vol. 26) 1939 Rang. 442.

——Proof—Essentials—Ceremony or open living together—If to be proved.

In order to establish a marriage there should be mutual agreement that the parties become man and wife coupled with consummation. Ceremony is not necessary; it is no more, if it takes place, than evidence whereby the fact of this mutual agreement can be proved. Similarly open living together is not necessary but is cogent evidence to prove the central fact, the mutual agreement. A. I.R. (Vol. 24) 1937 Rang. 245=1937 Rang. L. R. 103=38 Cr.L.J. 895=170 Ind. Cas. 355.

——Marriage — Proof — Essentials — Reputation of marriage—Evidence—S. 110, Cr. P. Code (Act V of 1898)—S. 50, Evidence Act (I of 1872)—Relative scope.

A reputation about marriage can only be established by means of evidence admissible under S. 50, Evidence Act. What people think may be expressed in words or by conduct. If there is a rumour, or gossip, to the effect that two persons are married the existence of that rumour or gossip is inadmissible in evidence. On the other hand, as pointed out in the illustration to the section, when the question is whether two persons were married the fact that they were usually received and treated by their friends as husband and wife is relevant. Hence, in these cases, the use of such phrases as "I learnt that they were living together as man and wife" or "they were man and wife" are not receivable as evidence. The witness must prove conduct on the part of the man and woman, or on the part of their friends and neighbours, from which the Court can draw this conclusion. The general reputation of a man amongst the community may no doubt be evidence in inquiries under S. 110, Cr. P. Code. The nature of the section is such as to render admissible what persons who know him think of him. But this fact in no way nullifies the provisions of S. 50, Evidence Act, which lays down a clear rule as to the limits within which opinion may be evidence when a question of relationship has to be decided. A.I.R. (Vol. 27) 1940 Rang. 181=1940 Rang. L.R. 562=192 Ind. Cas. 49.

——Proof — Essentials — Reputation — Inference from conduct.

Marriage among Burman Buddhist is a contract entered into by mutual consent of the parties; no ceremony is necessary for such marriage. In the absence of direct proof consent may be inferred from the conduct of the parties or established by reputation. Generally, in such circumstances, some open recognition of the wedded state is to be expected. Relatives and neighbours are usually asked to some form of entertainment in order to signify the occasion and where this is dispensed with, the evidence of the intention to enter into married life must be clear. Clandestine acts of sexual intercourse do not by themselves establish marital relationship, and where there is no regular co-habitation under the same roof and the couple who resort to each other for purposes of intimacy are thought by some to be engaged, and by others to be cousins or mere friends, proof of marriage has not been established by reputation. Moreover, as it takes two persons to make a contract in order to prove marriage, there must be evidence not merely of a desire by one person to be considered as having married another, but of the consent of that other, express or implied, to the joint assumption of a status consistent only with the marriage bond.

Held, on facts that the parties were not married and therefore, no maintenance order could be passed under S. 488, Cr.P. Code. A.I.R. (Vol. 25) 1938 Rang. 115=39 Cr.L.J. 571=175 Ind. Cas. 418.

——Proof—Onus—Plaintiff denying marriage with defendant and proving marriage with another—Burden.

Where in a suit against the defendant for a declaration that she was not his wife according to Burmese Buddhist Law the plaintiff denies that he had ever married the defendant and proves that he had married another wife, and calls witnesses to say that that lady was the only person whom he had ever treated or who had ever been treated as such, then unless it could be shown in cross-examination that such evidence was unworthy of belief there would be a case to answer, and it would be for the defendant to adduce such evidence in rebuttal as would clearly point to the existence of a valid marriage according to Burmese Buddhist Law, between the parties. A. I. R. (Vol. 27) 1940 Rang. 181=1940 Rang.L.R. 562=192 Ind. Cas. 49.

——Proof—Presumption—Essentials to be proved.

What must be proved to raise a prima facie presumption of marriage is that the acts of intercourse were not clandestine but that there was an open avowal of the married state as distinct from the relationship between a man and his mistress. And if the parties made no open avowal, their method of living must have been such as to induce members of the public, not to gossip about the relationship, but to show by their conduct that they were treating the pair as man and wife. A.I.R. (Vol. 27) 1940 Rang. 181=1940 Rang. L.R. 562=192 Ind. Cas. 49.

——Proof — Presumption — Shan Buddhists in Burma—Habit and repute of the parties—Value of.

The personal law of Shan Buddhists, resident in Burma, does not appear to be in any way different from that of Burman Buddhist and the ordinary Buddhist Law applies. Shan notions concerning sexual relationship are extremely lax and the term "Ma Ya" (wife) is indiscriminately applied to women kept as mere concubines as well as those properly married. The presumption of marriage arising from co-habitation must rest on habit and repute and when proof of marriage depends wholly on habit and repute, the conduct of the parties concerned is of great importance. The alleged husband must be shown to have treated the alleged wife in a way which clearly and unmistakably reveals his intention to confer on her the required status and the alleged wife must be shown to have acted all along in such a manner that it would be patent that she asserted that status. 1 Rang. 343 =76 Ind. Cas. 620=2 Bur.L.J. 114=A. I. R. 1923 Rang. 218.

(f) Validity.

——Validity—Burmese woman and a Hindu following Buddhist faith for 25 years—Validity.

Where a union was formed between a Burmese Buddhist woman and a Hindu who followed the Buddhist faith for 25 years, and there was no evidence to show that he was at any time a Hindu of the four recognized castes, the tenets of which might have rendered a valid union between them impossible.

Held, that the union is a legal marriage and the husband is entitled to the custody of the children of the union. 6 Bur.L.J. 158=104 Ind. Cas. 348 =A.I.R. 1927 Rang. 280.

——Validity—Ceremonies.

Pratt, J.—No ceremony is necessary under the Buddhist law for validating a marriage. 5 Rang. 359=105 Ind. Cas. 45=A.I.R. 1927 Rang. 250.

——Validity—Chinese marriage in Burma—Essentials.

The forms of first class Chinese marriage are not insisted on in the case of Chinese marriages in Burma and relaxation is permitted in the case of the poor. 7 Bur.L.T. 246=24 Ind. Cas. 367=8 L.B.R. 222.

——Validity—Chinese and Burmese—Conditions of validity.

Marriages between Chinese and Burmese in Burma, performed according to Burmese customs, would not be binding unless supplemented by ceremonies peculiar to Chinese customs. The number and character of the ceremonies depend upon the wealth and position in life of the parties. A Burmese Buddhist woman, whether a minor or not cannot legally be married without her consent or against her will. Co-habitation with a Burmese woman for three or four months in quite insufficient to raise the presumption of a valid marriage. 4 L.B.R. 155; 1 Bur.L.T. 125, Foll. 12 Ind. Cas. 801=4 Bur.L.T. 124.

——Validity — Consent obtained by pressure — Effect.

There must be free consent of the parties for valid marriage under the Buddhist Law, and a consent reluctantly given under pressure is not such free consent as is required by that law. 13 Bur.L.T. 105=59 Ind. Cas. 555=22 Cr.L.J. 123.

——Validity—Determination—Principles.

Where there is divergence between the personal laws applicable to the parties to a marriage, the proper principles to act on, are that the **lex loci contractus quoad solemnitates** determines the validity of a marriage, and the **lex domicillii** the question of the capacity of the parties to marry. 62 L.T. 911=37 L.T. 415, A Marriage between a Chinese Buddhist male and a Burmese Buddhist female in which some of the preliminaries of Chinese Customary Law has been observed is invalid. 9 Bur.L.T. 179=34 Ind. Cas. 189=8 L.B.R. 399.

——Validity—Elopment without intention to live as man and wife—Sufficiency.

Elopement by itself without mutual consent and desire to marry and live as man and wife in future. does not constitute valid marriage under the Burmese Buddhist Law. A.I.R. (Vol. 18) 1931 Rang. 177=133 Ind. Cas. 95.

——Validity—Elopement and intention to marry—Sufficiency.

To constitute a valid marriage elopement with the intention of marrying and consummation of the marriage is sufficient. 4 Bur.L.J. 258=27 Cr.L.J. 725=95 Ind. Cas. 53=A.I.R. 1926 Rang. 88.

——Validity—Essentials.

A marriage between Burmese Buddhists is created by co-habitation coupled with intent to become husband and wife. The ceremony is merely a way of publishing to all the world that the co-habitation, which is intended to follow it, is with the intention of creating a marriage tie between the couple. In other words the ceremony is merely evidence of the intent of the parties and is not a means of creating the tie in itself. 8 Rang. 425.

——Validity—Essentials—Consent of parties.

To constitute a marriage under the Burmese Buddhist Law no special ceremony is necessary. But the essential requirement is the consent of parties. **P** in a suit for restitution of conjugal rights against **T** brought evidence to the effect that his parents negotiated with the parents of **T** for the marriage and had given them certain presents. A marriage ceremony took place without the presence of **P** and **T** according to the custom of the locality. **T** never received **P** afterwards and repudiated the marriage on the same day.

Held, that in the circumstances of the case no consent could be presumed and the marriage could not be regarded as legally binding. A.I.R. 1930 Rang. 210.

——Validity — Hindu becomes Buddhist—Marriage according to Burmese Buddhist Law—Legality.

Hindu permanently residing in Burma, cutting himself off from his relatives in India—Such person building Kyaung, selecting Koyin, and accepting him as chaplain.

A Hindu not only recited the five recepts after a Pongyi but built and endowed a Kyaung and after sellecting a Koyin and getting him raised to the position of Upazin accepted him as a private chaplain. He had completely cut himself off from his relatives in India and settled down permanently in Burma in the Burmese Buddhist way:

Held that the only possible inference was that he had become a Buddhist.

Held further, that his marriage conforming with the customs of Buddhist in Burma must be regarded as a legal marriage on the principle of **lex loci contractus**. A.I.R. (Vol. 25) 1938 Rang. 51= 174 Ind. Cas. 558.

——Validity—Minor—Consent of guardian.

Under Burmese Buddhist law, no minor girl under the age twenty can contract a valid marriage without the consent or against the will of her parents or guardian, or the relations under whose protection she is living. 26 Cr.L.J. 1613=4 Bur. L.J. 123=3 Rang. 455=90 Ind. Cas. 717=A.I. R. 1925 Rang. 280 (F.B.).

——Validity — Minor — Consent of guardian—Necessity.

The marriage of a minor girl does not require the consent of her guardian for its validity and on her death the husband will be entitled to succeed to her share. 1 L.B.R. 297, Foll. 1 Bur. L.J. 144=81 Ind. Cas. 32=A.I.R. 1923 Rang. 76.

——Validity — Minor — Consent of guardian—Necessity.

The Burmese Buddhist Law must determine the competency of a Burmese Buddhist youth under 18 years of age, to make a contract of marriage, and under that law a promise of marriage by a minor is voidable and the marriage of the minor youth or of a girl under 20 years of age requires the consent of the parents, unless the parties are steadfastly determined to marry. If a young man and a young woman have clandestine intercourse, the parents of the former cannot withhold their consent to the marriage and if the young man divorces the young woman, he must pay her his kobo. 10 L.B.R. 28=52 Ind. Cas. 653=12 Bur.L.T. 219.

——Validity — Minor — Consent of guardian—Necessity.

Under Burmese Buddhist Law consent of the guardian is necessary to the marriage of a minor girl except perhaps when the girl is steadfastly determined to marry against the wishes of the guardian. 12 Bur.L.T. 136=34 Ind. Cas. 81=10 L.B.R. 50.

——Validity — Minor — Father's consent—Necessity.

Under Buddhist Law the marriage of a minor is not valid without the consent of her father. 45 Ind. Cas. 831 (L.B.).

——Validity — Minor — Youth below sixteen years.

There is nothing in Burmese Buddhist law which prevents a youth from contracting a valid marriage at any time after he is physically competent for marriage. 3 U.B.R. 75 and A.I.R. 1925 Rang. 280, Foll.

A Buddhist wife sued her husband for divorce on the ground that he had deserted her and had married another wife, and for partition of property on the basis of a divorce as by mutual consent. The husband contended that there was no valid marriage between him and the wife because he was only about 16 years of age when he went through the ceremony of marriage with her. He admitted that there was co-habitation and a child of the union.

Held, that the marriage was valid and there was no basis for the suggestion that the marriage was invalid because the husband was too young to contract a valid marriage. 6 Rang. 340=111 Ind. Cas. 474=A.I.R. 1928 Rang. 209.

——Validity—Minor—Youth of 16 years.

A Burmese youth of over 16 years of age can contract a valid marriage. 4 Bur.L.J. 258=27 Cr.L.J. 725=95 Ind. Cas. 53=A.I.R. 1926 Rang. 88.

——Validity—Minor's marriage without parent's consent.

There is nothing in Burmese Buddhist Law to prevent a minor from contradicting a valid marriage without his parent's consent at any time after he is physically competent for marriage. 46 Ind. Cas. 421=(1918) 3 U.B.R. 75.

——Validity—Second marriage—Essentials.

No formal demand in marriage and no ceremony by a person married once before are necessary or usual; nor the consent of the chief wife for second contemporaneous marriage to enable the co-wife to inherit. The woman marrying a married man, with knowledge, cannot be presumed to be the mistress and not a wife under the Burmese Buddhist Law. A man under Burmese Buddhist Law can marry two sisters. Where the acceptance of the relation of the husband and the lesser wife by the head wife is satisfactorily proved, the former is entitled to inherit on an equal footing with the latter. 12 Ind. Cas. 191 =4 Bur.L.T. 235.

15. Minor.

——Guardianship—Right to.

No near relative of a Buddhist minor is entitled to the guardianship of the person or property of the minor except his father, mother and their appointees. 13 Ind. Cas. 373=4 Bur.L.T. 272.

——Guardianship—Right to—Mother—Power of alienation as de facto guardian.

Under Burmese Customary Law a mother is not recognised as the lawful guardian of the property of her minor children and unless appointed under the Guardians and Wards Act she is not the **de jure** guardian of their property and under Burmese Customary Law no power is given to a **de facto** guardian of a minor to dispose of the immovable property of the minor. A.I.R. (Vol. 21) 1934 Rang. 335=12 Rang. 656=153 Ind. Cas. 627 (2).

——Guardianship—Right to—Mother's sister.

A mother's sister is a preferential guardian to a putative father or step-father when the estate belonged to the minor's deceased father. A.I.R. 1929 Rang. 284.

——Guardian appointed by Court—Natural guardian's power to alienate.

It cannot be said that in no circumstances can a Burman Buddhist, being a natural guardian, validly dispose of the immovable property of his children for whom the guardian has been appointed by the Court. Circumstances may exist which make it so clear that he is acting in the interests of the minor that a transfer by him may be upheld. 6 Rang. 329=111 Ind. Cas. 469=A.I.R. 1928 Rang. 199.

16. Orasa Child.

——Daughter—Right to one-fourth share in father's estate—Conditions of.

Under the Buddhist Law, of inheritance an eldest born daughter having all the qualities of an orasa child, has no right whatever of claiming a

quarter share from her father when her mother had predeceased her. She can have such a right against her mother if her father dies before her mother. The only circumstance under which she as the **orasa** daughter might acquire a vested interest in the parental estate would be if her father remarries before her death. A.I.R. (Vol. 27) 1940 Rang. 139=189 Ind. Cas. 674.

——Meaning of.

The **"gauratha"** or orasa child literally means "child of the body" and is used in Burmese Buddhist Law as meaning also "eldest born child". A.I.R. (Vol. 26) 1939 Rang. 197=1939 Rang.L.R. 341=182 Ind. Cas. 268 (F.B.).

——Remarriage of parent—Claim to one-fourth share—Nature of.

The claim which an eldest son has to one-quarter share on the re-marriage of his father is not a claim as **orasa** son arising on the death of a parent; but it is an entirely different claim of the eldest son to a quarter share on the re-marriage of the surviving parent. (Case-law discussed.) 3 Rang. 281=90 Ind. Cas. 958=A.I.R. 1926 Rang. 65.

——Right to one-fourth share—Basis of.

Helping parents in the acquisition of properties is not one of the requisites for the status of an orasa child, but what is essential is that the eldest born child should be competent to shoulder the burdens and responsibilities of the parent of the same sex on the death of the said parent and one-fourth share is given to the orasa child so that he or she, as the case may be, may be able to discharge his or her special responsibilities. To prove competence to undertake responsibility, proof of effectual help in the acquisition of family property is not necessary. A.I.R. (Vol. 29) 1942 Rang. 1=1941 Rang.L.R. 665=198 Ind. Cas. 139.

——Right to one fourth share—Re-marriage of father.

Though an **orasa** son cannot claim a one-fourth share of the property jointly acquired by his parents merely by reason of his mother's death, the re-marriage of his father gives him a right to claim the one-fourth share which he would not have if his father did not re-marry. 1 L.B.R. 23; 11 L.B.R. 199, Foll. 3 Rang. 281=90 Ind. Cas. 958=A.I.R. 1926 Rang. 65.

——Second born child—Status of—Eldest born daughter dying in infancy—Second child son living separately from parents with consent—Right to status of Orasa.

Where an eldest born daughter dies in infancy and the second child who is a son dies at the age of 40 and where he lives separately from his parents in accordance with their wishes and never fails them in any way in any family crisis, the mere fact of his not living with his parents and not having actively assisted in their business is no sufficient reason for depriving him of the status of Orasa. 2 L.B.R. 292 and A.I.R. 1923 Rang. 271, Rel. on; 6 L.B.R. 77, Not Foll. 7 Rang. 569=121 Ind. Cas. 778=A.I.R. 1929 Rang. 365.

17. Partition.

(a) Ancestral property.
(b) Right to.
(c) Shares.
(d) Suit for.

(a) Ancestral property.

——Ancestral property — Presumption—Burden of Proof.

Buddhist law does not say that ancestral land must be presumed to remain undivided until the contrary is proved. There is no such presumption in Buddhist Law. No general rule can be laid down as to the burden of proving jointness or separation without regard to the facts and circumstances of each particular case. 74 Ind. Cas. 9=1923 Rang. 92.

——Ancestral property—Presumption of undivided character.

There is no presumption in Burmese Buddhist Law that ancestral property remains undivided. A.I.R. (Vol. 27) 1940 Rang. 141=189 Ind. Cas. 455.

——Ancestral property—Rule of partition.

Under the Burmese Buddhists Law the interest of an heir in ancestral property, by the mere accident of non-partition during his or her lifetime, should not on his or her death, revert to his or her co-heirs but should go to his or her own family, namely, wife (or husband) and their children. Such undivided ancestral property does not stand on a different footing from divided ancestral property and the **dhammathats** do not provide a special rule of partition different from the general rules. A.I.R. (Vol. 18) 1931 Rang. 32=8 Rang. 524=129 Ind. Cas. 503.

(b) Right to.

——Right to — Buddhist having several wives — Death of one—Children of deceased—Shares of.

Under the Burmese Buddhist Law in a case where there are more than one wives of equal status, on the death of one of them a child or children by that wife acquire a right to claim partition from their father as on the basis of re-marriage.

The share of the wife in her undivided ancestral property is in such a case two-thirds and an only son will be entitled to that share on partition. A.I.R. (Vol. 18) 1931 Rang. 32=8 Rang. 524=129 Ind. Cas. 503.

——Right to—Children of—Auratha son.

Courts cannot recognise a preferential treatment in partition on the ground of service to the deceased. A first born child is not the **auratha** son until he attains majority. The children of a predeceaed **auratha** child are entitled one-fourth of the share that their parent would have got and cannot be allowed to receive more than what their father would have obtained himself. The children of an **auratha** son take the same share as the younger brother of their father. When the position of an **auratha** child is filled up once, no one else can claim it. 6 L.B.R. 77=18 Ind. Cas. 466=5 Bur.L.T. 291 (F.B.).

——Right to claim by step-children during step-father's life time.

A partition can be claimed during the step-father's lifetime. 31 Ind. Cas. 875=9 Bur.L.T. 53.

——Right to—Father re-marrying—Auratha son—Right of.

On the death of the mother and the re-marriage of the father, the **auratha** son is entitled to get from the father one-fourth of the estate jointly acquired by him and his mother. At the same time the **auratha** son cannot make that claim against his father merely by reason of his mother's death and its is only the re-marriage of his father that gives him a right to the one-fourth. 66 Ind. Cas. 538 =11 L.B.R. 199.

——Right to — Father re-marrying — Children's right.

Where a widower re-marries his children by the first wife at once acquire a right to partition of the estate, and the share of the children collectively is one half, while the father takes one half. A.I.R. 1926 Rang. 211, Foll. 7 Rang. 240=118 Ind. Cas. 630=A.I.R. 1929 Rang. 155.

——Right to — Father re-marrying — Children's right.

Amongst Burmese Buddhist when the mother dies and the father marries again, it is usual to make a family partition and settle the children of the first marriage. It is most unusual for a father, when he re-marries merely to make gifts, and still more unusual to include in those gifts of the bulk of his landed property. 1 Bur.L.J. 111=74 Ind. Cas. 47=A.I.R. 1923 Rang. 57.

——Right to — Grand-children — Orasa—Rights.

After the re-marriage of their grand-father on the death of grand-mother, out-of-time grand-children by the orasa child are not entitled to claim a partition against their grand-father. 5 Bur.L. J. 203=100 Ind. Cas. 323=A.I.R. 1927 Rang. 111.

——Right to—Kanitha children—Right of.

Kanitha children can sue for partition after the death of one parent on the re-marriage of the surviving parent. A.I.R. 1926 Rang. 211 and 2 L. B.R. 255, Rel. on; A.I.R. 1921 L.B. 68, Cons.; 2 U.B.R. 46, not Foll. 7 Rang. 193=118 Ind. Cas. 124=A.I.R. 1929 Rang. 218.

——Right to—Keiktima child—Right of.

A keiktima child is in all ordinary circumstances entitled to equal partition of inheritance with the natural children. That being so, the right of kanitha child to claim partition after the death of one parent on the re-marriage of the survivor can be claimed by a keiktima child. A.I.R. 1926 Rang. 148, Rel. on. 7 Rang. 193=118 Ind. Cas. 124= A.I.R. 1929 Rang. 218.

——Right to—Minors—Right of election—De facto guardian—Power of.

No partition can be effected when children are minors and they have no guardian appointed in accordance with law. A partition in such circumstances implies an agreement between the parties concerned. It is in effect a contract whereby one party abandons his claims in consideration of receiving certain definite property. In any such case of partition, it is for the children to decide whether it is to their interests to demand the partition of the estate at once on their surviving parent's re-marriage, or to leave the estate in the parent's hands and take their share on the parent's death. Minor children are incapable of making such a decision. A **de facto** or a natural guardian of a Burmese Buddhist **minor cannot validly** dispose of or encumber in any way the property of his ward. To be enabled to do so a person must first apply to be appointed guardian, and must obtain the sanction of the Court under the provisions of the Guardians and Wards Act. In the same way **de facto** guardian of a Burmese Buddhist minor cannot make any election on behalf of a minor in regard to the partition of an estate in which the minor has a vested interest. A.I.R. (Vol. 21) 1934 Rang. 352=154 Ind. Cas. 876.

——Right to—Orasa son—Right of, on re-marriage of father.

A Burmese Buddhist executed a mortgage. After the death of his wife and on his re-marriage his **orasa** son by the first wife filed a partition suit. Subsequently the mortgagee instituted a suit against his mortgagor got a decree and purchased the property himself. Meanwhile the son got a decree in his partition suit and applied for execution. When the Commissioner went on to make the decision the mortgagee objected on the ground that he had purchased the property. The Court disallowed the objection by asking the mortgagee to file another suit:

Held, that the **orasa** son was entitled to his share in the estate as it existed at the time of re-marriage of his father.

Held, also that by buying the right, title and interest of the mortgagor through the execution proceedings arising under the mortgage suit, the mortgagee stepped into his shoes and therefore, became his representative. The question arose as between the mortgagee and the son as to whether the partition decree left anything at all to partition as between the father and the son. The mortgagee as the representative of the mortgagor was entitled to come in for settlement of this question under S. 47, C.P. Code, and the executing Court should have dealt with the matter in its execution proceedings and not have referred the mortgagee to a separate suit. A.I.R. (Vol. 25) 1938 Rang. 250=1938 Rang.L.R. 583=177 Ind. Cas. 435.

——Right to — Parent re-marrying — Children's right.

When, after the death of one parent, the surviving parent re-marries the children of the first marriage are entitled to partition of the estate held by surviving parent at the time of re-marriage, unless of course there has already been a partition beween the surviving parent and the children. 7 Rang. 240=118 Ind. Cas. 630=A.I.R. 1929 Rang. 155.

——Right to—Parent re-marrying—Children and step-children—Right of.

The first right that the children have after the death of one parent, when the surviving parent

re-marries, is to claim a partition immediately. Where there has been such a partition on marriage, the children of the first marriage have no further claim to inherit against their step-parent or, after the death of their step-parent, against the direct descendants of that step-parent; secondly, if the children of the first marriage have not made a claim on the re-marriage of their parent they have a right to claim a share on the death of their parent from the surviving step-parent, whether there are or are not children by the second marriage; and thirdly, if the children of the first marriage have not made any claim on either of the two occasions above mentioned, they have a further right to partition on the death of the step-parent. In view of the fact that there are three different rules for partition: first on the marriage of the surviving parent; secondly, on the death of the surviving parent after re-marriage; and thirdly, after the death of the step-parent, it must be held that in each of these cases there is a fresh cause of action arising either from the re-marriage or from the death in question. A.I.R. 1926 Rang. 211; A. I.R. 1924 Rang. 71; A.I.R. 1925 Rang. 184; A. I.R. 1924 P.C. 88 and A.I.R. 1925 Rang. 340 (F.B.), Rel. on; 9 L.B.R. 176, Diss. from. 6 Rang. 355=113 Ind. Cas. 142=A. I. R. 1928 Rang. 139.

——Right to—Persons entitled to claim.

What the Burmese Buddhist Law regards in its rules for partition is the family rather than the individual and so long as the family subsists, all who are members of it are regarded as being entitled to partition of its property on its dissolution. 3 Rang. 438=91 Ind. Cas. 653=A.I.R. 1926 Rang. 23.

(c) Shares.

——Shares—Children of two marriages and step-mother—Mode of division.

Whether between children of two marriages, or between children of the first marriage and their step-mother, the division is always **per stirpes**, not **per capita**, during the life-time of their mother. Children are not entitled to a share but only succeed as representing her. 4 L.B.R. 110, followed. 35 Ind. Cas. 423=10 Bur.L.T. 41.

——Shares—Father and daughter—Daughter given a larger share—If invalidates partition.

A partition between a father and daughter is not invalid merely because the father assigns to the daughter a larger share than she could ordinarily claim under the Law of Inheritance, even if the whole of the joint property is given over to her. 11 Ind. Cas. 855=4 Bur.L.T. 186.

——Shares—Grand-children—Share of.

The grand-children take one-fourth of the share of their deceased parent. As an example of the application of this rule, in the case of two children one of whom has predeceased the parents, his share would have been one-half had he been alive. His children therefore take one-eighth and the remaining seven-eighths go to the surviving child. 3 Rang. 464=91 Ind. Cas. 684=A.I.R. 1926 Rang. 4.

(d) Suit for.

——Suit for—Divisible property.

Where a person sues for partition of the estate of the parents on re-marriage by his surviving parent, the estate which is subject to partition is the estate held by the surviving parent at the time of the re-marriage. It does not include such estate to which the surviving parent might be legally entitled. A.I.R. (Vol. 23) 1936 Rang. 107=161 Ind. Cas. 584.

——Suit for—Frame of—Entire estate must be included.

Obiter.—Under Burmese Buddhist Law when it is desired to partition an estate, the whole of that estate ought to be included in the prayer of partition in whosoever hands it may be. The fact that the property belonged originally to their parents does not in itself prove that the children hold it as co-owners. But such may be presumed from the fact that after the death of the parents there was no partition of the estate but the brothers continued to live together in the same house. A.I.R. (Vol. 28) 1941 Rang. 111=195 Ind. Cas. 234.

——Suit for—Frame of—Separate suits for separate kinds of property.

There can be separate suits for a claim of a share in **hnapazon** property and separate property as the claims are distinct. 4 Bur.L.J. 206.

——Suit for—Remedy of heirs or sharers—Suit for administration—Partition suit—If lies.

Per **Dunkley, J.**—Strictly, there is no such thing as a suit for partition among Burmese Buddhist heirs, because they are tenants-in-common and not joint tenants of the inheritance. The only way in which one heir can obtain his share of inheritance from another heir or heirs who are in possession thereof is by an administration suit, and the whole of the property belonging to the estate must be brought to account. Consequently, if an heir is to get a share of an inheritance, then a suit for a share of one property out of the inheritance will not lie. A.I.R. (Vol. 24) 1937 Rang. 324=170 Ind. Cas. 946.

18. Payin property.

See also BUDDHIST LAW (BURMESE)—SUCCESSION.

——Accretions and alterations in—If change character of property.

So long as the corpus of a property is unchanged it will always retain its original character. Where the corpus is unchanged, in spite of extensions and alterations made thereto, it still retains its character as **payin** property. A.I.R. (Vol. 22) 1935 Rang. 129=158 Ind. Cas. 1092.

——Interest of spouses.

The interest between husband and wife in **payin** property is two-thirds for the party bringing the **payin** and one-third for the party who did not bring it. A.I.R. (Vol. 21) 1934 Rang. 200=152 Ind. Cas. 506.

——Liability to attachment for ante-nuptial debt.

The **payin** property belonging to the wife is liable to attachment in execution of a decree which is obtained against her for a debt which she had contracted before the marriage. A.I.R. (Vol. 21) 1934 Rang. 200=152 Ind. Cas. 506.

——Meaning of.

The **payin** property which a party brings to her marriage means the property she brings less her antenuptial debts and the whole of such property is liable to be attached in execution of a decree against her. A.I.R. (Vol. 22) 1935 Rang. 399 =159 Ind. Cas. 465.

——Succession — Payin property of husband — Wife's vested interest in—Share.

All property acquired by either or both the spouses before or during marriage passes into common enjoyment and both spouses have a vested interest in all such property; that is, "passing into common enjoyment" is a consequence of marriage and not a test of the vesting of property. The interest of the wife in the **payin** property of her husband is one-third. A.I.R. (Vol. 28) 1941 Rang. 99=1940 Rang.L.R. 831=194 Ind. Cas. 313.

——Property acquired during marriage — Interest of wife.

Property acquired by the husband during the marriage becomes the joint property of the husband and wife unless their earnings are kept separate and distinct and their respective interest in such property are attachable in execution of a decree against one of them. 41 Ind. Cas. 410 (L. B.).

——Payin property of husband, if liable for wife's ante-nuptial debts.

Quare—Whether the **payin** property of the husband is liable to attachment in execution of a decree obtained against the wife for a debt she had contracted before the marriage. A.I.R. (Vol. 21) 1934 Rang. 200=152 Ind. Cas. 506.

——What is—Manukya—Rule in.

According to Manukya **payin** is not restricted to the property acquired during the first marriage but also includes the property during the two marriages. 7 Rang. 578=121 Ind. Cas. 774=A. I. R. 1929 Rang. 253.

19. Pre-emption.

——Co-heirs—Right of—Who can exercise.

A Burmese Buddhist co-heir has a right of pre-emption in respect of the unseparated interest of any particular co-heir in undivided inherited property, and the whole body of co-heirs, excepting those in respect of whose interest the exercise of the right is claimed, are entitled to settle among themselves which of them shall exercise it in any particular case. In case therefore conflicting claims among the co-heirs and they fail to come to any agreement, any of them may institute a suit to establish his claim as against the others and also against any purchaser who may have bought or be proposing to buy the property in disregard of their rights. 53 Ind. Cas. 468=(1919) 3 U. B.R. 154.

——Delay in assertion of right—Effect.

The right of pre-emption, must under the Buddhist Law be asserted promptly and it would be inequitable to allow a claim after a long period. The law makes no allowance for the fact that the claimant did not know of the sale at or about the time it took place. S.D.J.B. 39, fol. 20 Ind. Cas. 343=6 Bur.L.T. 115.

——Offer to co-heir—When to be made—Second offer—Necessity.

The offer to the co-heirs may precede that to a stranger, but must all form part of one and the same transaction and be of the same or a smaller price than that at which it is offered to the stranger, and if these conditions are carried out there is no necessity for a second offer to the heirs when they have once refused to buy. 2 Rang. 678=85 Ind. Cas. 295=A.I.R. 1925 Rang. 194.

——Right of—For whom and against whom available.

The right of pre-emption can be enforced only against the person inheriting jointly with him, and is not available against his heirs after the co-inheritor's death; surviving joint inheritors and the heirs of any who have died are entitled to pre-emption. There is no right of pre-emption among co-sharers who took part in the partition of ancestral immoveable property, after the partition of such property. The right of a co-heir to demand from another co-heir that he should sell his share to him in preference to a stranger is a part of his inherited right. Authorities reviewed. 8 Bur. L.T. 167=31 Ind. Cas. 512=8 L.B.R. 466.

——Right of—Property jointly acquired by husband and wife—Sale by husband after wife's death —Wife's sons by first husband—Right to pre-empt along with sons of marriage.

Where a widow with two sons by first husband married a second husband by whom she got two sons and during coverture the husband and wife acquire land jointly and where on the wife's death, the husband married again and thereafter sold the land. **Held**, the four sons of the deceased are entitled to pre-emption. 3 Bur.L.J. 240=2 Rang. 529=84 Ind. Cas. 465=A.I.R. 1925 Rang. 85.

——Right of—Sale of ancestral undivided property.

Under Burmese Buddhist Law the sale of an undivided ancestral estate by one co-heir without the consent of other heir is good only to the extent of his share in the estate. The other co-heirs have a right to pre-empt his share when sold, but they must exercise the right promptly. The proper remedy open to a purchaser or mortgagee of such share is a suit for partition of the property and possession of that share. 10 Bur.L.T. 1=39 Ind. Cas. 257=8 L.B.R. 497.

——Right of—Sale of undivided ancestral estate—Property before partition.

Among Buddhists the law of Pre-emption applies to a sale by a co-heir of his share in undivided ancestral estate. The decision in 8 L.B. R. 468 does not alter the rule laid down in 4 L. B.R. 128 to that effect. 2 Bur.L.J. 21=80 Ind. Cas. 259=A.I.R. 1924 Rang. 266.

——Right to—Younger son—Property left by deceased father.

A younger son is not a co-heir, with his mother, to his deceased father's estate. So he has no right of pre-emption in respect of property left by his father. 2 Rang. 659=85 Ind. Cas. 284=A.I.R. 1925 Rang. 192.

——Right to—Younger son—Property left by deceased father.

The right of pre-emption can be enforced only against the persons or the person who inherited the land jointly with the claimants. It is only amongst the co-heirs (amwesaing or amwesabet) that the right can exist, that is to say, persons on whom an estate has devolved. The term includes only those who have inherited the property jointly from a common ancestor, as for instance, the children of a deceased person. Where the properties originally belonged to a husband and wife and the husband died leaving his wife and children, and the wife sold some of the properties:

Held, that the younger son could not pre-empt the sale as the wife had absolute right subject to certain claims by the eldest son and the eldest daughter, to the property and as she and her children were not co-heirs. 2 Rang. 437=84 Ind. Cas. 287=A.I.R. 1925 Rang. 63.

20. Sources.

——Dhammathats—Collection of rules —Custom and usages of Burmese.

Burmese Buddhist law is stated to be contained in a series of books entitled Dhammathats, which have been composed from time to time by the expounders of that law ever since the thirteenth century, if not before. According to a distinguished Burmese jurist of the name of U. Gaung, it is a collection of rules which are in accordance with the custom and usage of the Burmese people. 30 C.W.N. 529=89 Ind. Cas. 773=5 Rang. 186=52 I.A. 265=6 L.R.P.C. 160=A.I.R. 1925 P.C. 216 (P.C.).

——Dhammathats—Duty of Courts.

The task of the Courts to British Burma has been, and still is to deduce from the **ad hoc** decisions complied in the Dhammathats general principles of the Common Law of Burma which are in accordance with the habits and customs of the Burman of to-day. A.I.R. (Vol. 25) 1938 Rang. 449=1939 Rang. 160=178 Ind. Cas. 883 (S.B.).

——Sources—Dhammadats.

Of the various **dhammadats** usually reckoned as 36 in number and considered more or less authoritative sources of law amongst the Burmese, that of the Mangya or Manu Kauv Dhammadhat (Alomprai Code of 1756) is and has been accepted by the British Courts as the most authoritative. 41 Cal. 887=41 I.A. 121=1 L.W. 914=7 Bur. L.T. 105=16 Bom.L.R. 377=27 M.L.J. 41=18 C.W.N. 1121=16 M.L.T. 142=20 C.L.J. 264=8 L.B.R. 1=23 Ind. Cas. 433=(1914) M.W.N. 449 (P.C.).

[Reversing 4 Bur.L.T. 1=9 Ind. Cas. 442=5 L.B.R. 231.]

21. Succession.

(a) Apatitha child.
(b) Brother.
(c) Children.
(d) Daughter.
(e) Division—per capita or per stripes.
(f) Exclusion from.
(g) Filial relationship.
(h) Grandchild.
(i) Kanitha child.
(j) Keittima child.
(k) Law applicable.
(l) Lettetpwa property.
(m) Orasa child.
(n) Parents.
(o) Payin property.
(p) Preferential right.
(q) Shares.
(r) Step-child.
(s) Widow.
(t) Wife.
(u) Miscellaneous.

(a) Apatitha Child.

——If can inherit when one of parents is living.

In the absence of keittima or natural children, the apatitha child is entitled to inherit in the estate of his adoptive parents when both parents are dead; it has no right to share in the estate of the deceased parent when the other parent is living. A.I.R. (Vol. 25) 1938 Rang. 451=1939 Rang. L.R. 378=179 Ind. Cas. 43.

——Apatitha child living apart—If can inherit—Keittima—Distinction.

A keittima child gets his right of inheritance from intention of the adoptive parents that he shall inherit. On the other hand an apatitha child does not get any right to inherit from the intention of the person who adopts, because the person who adopts has no intention to give him, any such right, and where he lives apart from his parents, is not entitled to inherit from them. A.I.R. (Vol. 24) 1937 Rang. 455=1937 Rang. L.R. 426=173 Ind. Cas. 238.

——Apathitha child.

An **apathitha** child takes half the estate of the adoptive parents (in the absence of any natural of keittima children) equally with the co-heirs of the adoptive parents. 50 Ind. Cas. 524=11 Bur.L.T. 221.

(b) Brother.

——If can inherit estate to pre-deceased sister.

A, a Burmese Buddhist accepted a sum of money from his mother in full satisfaction of his claim in the estate of his deceased father. His sister had predeceased him and **A** died and later on his mother died. **A** and his mother were living separately. After **A's** death his widow claimed his share of the inheritance in the estate of his predeceased sister:

Held, (i) that Art. 123, Limitation Act, did not apply as that Article applies only in the case of

a suit against an executor or administrator or some person legally charged with the duty of distributing the estate;

(ii) that S. 28, Book X of the Manukye did not apply as **A** was living separately from his mother;

(iii) that **A** having been an heir of his predeceased sister his widow was entitled to inherit his share. A.I.R. (Vol. 21) 1934 Rang. 318=12 Rang. 409=152 Ind. Cas. 768.

——Brother and sister—Death of unmarried child before division of father's estate—Right of surviving brother and sister.

Where, a Burman Buddhist whose wife had predeceased him died leaving two sons and two daughters and subsequently one son and daughter, both unmarried, died:

Held, that the surviving brother and sister would take the property in equal shares. A.I.R. (Vol. 19) 1932 Rang. 187=10 Rang. 162=137 Ind. Cas. 650.

——Brother and sister—Preference over parent—Sister or parent living apart—Texts

Under the Burmese Buddhist Law, where the daughters are living apart from their father and one of the daughters dies, the surviving sister inherits her estate in preference to her father. The succession of brothers and sisters in preference to the parents of a deceased childless person being established by the Manu Kyag, no reference to the other Dhammathats was necessary to clear up an ambiguity. **Held** also upon a review of the other Dhammathats that the balance of authority was in favour of the sisters and brothers being preferred to the parent. 41 Cal. 887=1 L.W. 914 =41 I.A. 121=7 Bur.L.T. 105=16 Bom.L.R. 377=27 M.L.J. 41=18 C.W.N. 1121=16 M.L.T. 142=20 C.L.J. 264=8 L.B.R. 1=23 Ind. Cas. 433=(1914) M.W.N. 449 (P.C.).

(c) Children.

——Children by first marriage—Partition with parent—Right to property of second marriage.

If after the death of the husband, the wife partitions the property with her children and marries again taking her share with her, on her death the children of her former marriage cannot claim from their stepfather any property which she took to the second marriage; because they have already obtained their shares.

The same rule applies when, after the death of the wife, the husband marries again after having given the children their respective shares. 51 I.A. 1=80 Ind. Cas. 1031=19 M.L.W. 477=51 Cal. 374=1924 M.W.N. 662=3 Bur.L.J. 333=29 C.W.N. 559=5 Rang. 175=A.I.R. 1924 P.C. 88=46 M.L.J. 618 (P.C.).

——Children by former marriage—Share in property acquired during second marriage.

Where a Burmese husband who had a son and an adopted daughter by his former wife married a woman who had three children by her former husband:

Held, that the husband's son by his former marriage was entitled only to a one-tenth share in the property acquired during the subsequent marriage. A.I.R. (Vol. 18) 1931 Rang. 192=133 Ind. Cas. 494 (1).

——Children by one wife—Right to succeed to property of other wives of father—Property inherited by one of many wives during marriage descends to children of that wife only.

Where a husband has had more wives than one, property inherited by one of those wives during marriage, if still in existence at the death of the husband and the wife, descends to the children by that wife, and the children by other wives can lay no claim to succeed to it. 4 U.B.R. 11=63 Ind. Cas. 814=A.I.R. 1921 U.B. 23.

——Children of first marriage taking share of inheritance on second marriage—Right to father's property inherited after mother's death.

The children of the first marriage who have already taken their share of inheritance on the occasion of the second marriage have no claim to inheritance in respect of property inherited by their father after the death of their mother and before the second marriage; nor can they have any share in respect of the property inherited by their father after the second marriage which becomes the lettetpwa poperty of that marriage. A.I.R. 1924 P.C. 88, Rel. on. 7 Rang. 398=120 Ind. Cas. 666=A.I.R. 1929 Rang. 265.

——Chiidren of first marriage—Right to inherit property of second marriage.

S. 237 of Vol. I of the Kinwun Mingyi's Digest which deals with partition between half-brothers and half-sisters is applicable to all cases and it is immaterial which parent dies first, and a step-child has a right to elect whether he would claim his share at once on the death of his own parent or whether he would defer his claim till the death of his step-parent also and claim the benefit of S. 237.

A Burman Buddhist died leaving surviving him children by his first wife and also the second wife and children by her. The second wife died subsequently and since her death one of the children of the first marriage put forward a claim for partition of the inheritance. The other child had already obtained a decree for its share under the rule applicable to a case when the step-parent was still living. There was no property brought by either the husband or the wife, but there was only jointly acquired property to be divided.

Held, that the children of the first marriage were entitled to one-third of the property acquired during the second marriage, and as one of the two children had already obtained a decree for its share when the step-parent was still living, the share of the other child would be one-half or one-third, i.e., one-sixth. A.I.R. 1926 Rang. 65, Diss. from. 6 Rang. 427=112 Ind. Cas. 413= A.I.R. 1928 Rang. 225 (F.B.).

——Children of the marriage during which property was acquired—Right of—Forfeiture of inheritance—Grounds.

The Buddhist Law does not give the father the right to disinherit an heir. The children of the marriage during which the property is acquired take double the share taken by the children of the other marriages and the out of time grand-children —not being the children of an **orasa** child—to-

gether take a quarter of what their parents would have taken had they survived the deceased. The law only declares that the right to share father's estate is forfeited by the child for his unfilial conduct which must be clearly proved. The rule of forfeiture operates on proof of unfilial conduct independently of the father's wish. 55 Ind. Cas. 258=12 Bur.L.T. 207.

——Children of marriages—Right of.

In the case of three marriages, children of the marriage subsisting at the acquisition of property get half of it and children of other marriages divided the rest among them. 42 Ind. Cas. 950=11 Bur.L.T. 252.

——Children of—Re-married mother—Right of.

If the property is partitioned upon the re-marriage of their mother, the children have no rights to the property taken by her. It goes to her second husband exclusively. The children of the marriage take three-fourth of the unpartitioned property and the second husband takes one-fourth. 35 Ind. Cas. 731=9 Bur.L.T. 97.

——Illegitimate son—Right of.

Per **Fox, C. J., Ormond** and **Twomey, JJ.**—(Contra **Parlett, J**)—A child begotten in pleasure whose parents do not live openly together is not entitled to share the father's estate with his widow. 9 Bur.L.T. 15=33 Ind. Cas. 171=9 L.B.R. 1.

——Son of second marriage—Right to property of first marriage.

A son from second marriage is entitled to one-eighth share in the **hnapazon** property of the first marriage. His share is independent of the share of his mother and can be sued for in her lifetime. 68 Ind. Cas. 28=(1920) 3 U.B.R. 272.

(d) Daughter.

——Right to father's property—Extent of.

It is only in respect of property acquired during the course of the marriage between her mother and the father, that a daughter can acquire interest in her father's property according to Burmese Buddhist Law. 5 Rang. 125=6 Bur.L.J. 55=101 Ind. Cas. 634=A.I.R. 1927 Rang. 143.

——Right to father's property.

A daughter taken away by her mother on divorce loses her rights of inheritance in her natural father's family. 13 Bur.L.T. 3=56 Ind. Cas. 681=10 L.B.R. 107.

(e) Division.

——Per capita or per stirpes—Grand-children whose parents have predeceased grand parents.

On the death of a Burmese Buddhist couple leaving grand-children born of different children who predeceased the couple, the grand children inherit **per capita** and not **per stirpes**. 1 Rang. 316=83 Ind. Cas. 10=A.I.R. 1924 Rang. 73 (F.B.).

——Per capita or per stirpes—Heirs claiming through husband and wife per capita and not per stirpes.

It is in accordance with justice, equity and good conscience that where a married couple die under circumstances in which the relatives of both inherit the estate, the relatives of each should be regarded as inheriting half the estate and the mode of distribution is **per capita** and not **per stirpes**. 84 Ind. Cas. 279=3 Bur.L.T. 137=A.I.R. 1924 Rang. 367.

——Per capita or per stirpes—Heirs of same degree—Children of paternal and maternal aunt—Per capita.

When the heirs are all related in the same degree to the propositus they inherit each in his own right and not by representation and therefore each shares equally with all the others. Where the deceased, a Burman Buddhist, left surviving him as his heirs the son of deceased paternal aunt, two children of a deceased maternal uncle and six children of another deceased maternal uncle.

Held, that the estate of the deceased must be divided among these nine persons **per capita** and that each of them is entitled to a one-ninth share; A.I.R. 1924 Rang. 73 (F.B.), Foll. 5 Rang. 747=107 Ind. Cas. 167=A.I.R. 1928 Rang. 67.

——Per capita or per stirpes—Nephews and nieces.

The division of the deceased's estate between his nephews and nieces is to be **per capita** and not **per stirpes**. A. I. R. 1924 Rang. 73, A.I.R. 1928 Rang. 67 and A.I.R. 1930 Rang. 59, Rel. on. A.I.R. 1930 Rang. 237.

——Per capita or per stirpes—Paternal and maternal aunts—Shares capital or stirpital—Equality of division.

Under the Burmese Buddhist Law of Succession the paternal and maternal aunts succeed to their nephew's estate **per capita** and not **per stirpes**. Equality of division is the rule followed in the division of property among persons of the same degrees. 30 Ind. Cas. 63=8 Bur.L.T. 141.

(f) Exclusion from.

——Adopted son living apart—If excluded—Adopted son living apart does not lose right to succession unless filial relationship is severed.

An adopted son will not lose his right to inheritance merely by living apart from his parents unless severance of filial relationship is proved. 6 Bur.L.J. 10=100 Ind. Cas. 1007=A.I.R. 1927 Rang. 195.

——Breach of filial relation—Separate residence—Effect.

Mere separate residence does not by itself now-a-days prove or even set up an inference of a breach of filial relations such as would deprive a child of his rights of inheritance. 1 Bur.L.J. 56=70 Ind. Cas. 855=A.I.R. 1922 L.B. 29.

——Child quarrelling with father and not having filial relationship—Right to father's property.

Where a serious quarrel takes place between a child and father a few years before latter's death in which the former behaves in such a way as if he was going to use weapons against the father and abuses him in the manner most unbecoming to a child and where afterwards there is a total absence of filial relationship, the child loses the right to inherit to its father. A.I.R. 1930 Rang. 146.

——Child taken away on divorce by one spouses—If excluded from inheriting to other—Resumption of filial relation—Effect.

A child taken away by one of its parents on divorce

loses the rights of inheritance as a member of the family of the other parent unless there has been maintenance or revival of filial relationship between it and the latter: (1872-92) S.J. 184; 2 U.B.R. 194; 2 U.B.R. 159 and 2 U.B.R. 116 and 10 L.B.R. 107, Foll.

A child who goes away or remains behind with one of parents on their divorce must necessarily show that, in spite of severance, filial relations between it and the other parent have not been broken off or have been resumed so as to be entitled to inherit in the latter's estate: 4 L.B.R. 272; 5 L.B.R. 133 and 6 L.B.R. 167, Rel. on. 4 Rang. 412=5 Bur.L.J. 193=99 Ind. Cas. 387=A.I.R. 1927 Rang. 41.

——Children—When forfeit right—Filial neglect.

Where no divorce is proved, and the separation is entirely the act of the father, the children cannot be deprived of their right to inherit, which they lose only by proof of some filial neglect. 23 Ind. Cas. 915=7 Bur.L.T. 80.

——Congenital idiots—If excluded.

A child who is physically of mentally incompetent or defective, for instance a congenital idiot, is entitled to his full share of inheritance from its parents. 6 Rang. 128=110 Ind. Cas. 729=A.I.R. 1928 Rang. 130.

——Daughter living with father after divorce of parents and then with mother—If excluded from father's inheritance.

There is no provision in the Dhammathats enabling a father to disinherit his child except by giving him away in adoption to another, though a child who behaves as an enemy towards his parents is debarred from inheriting. A child who merely at his father's request lives separately from him is not included amongst the six classes of children who are not entitled to inherit. The Buddhist Code does not give any meritorious value to mere living together or make the opposite state of things a reason for exclusion, and there must be filial neglect to exclude. But if a child on the divorce of his mother accompanied by partition of property goes to live with her and ceases to be a member of his father's household he is debarred from inheriting from his father.

The plaintiff after her mother's divorce lived for a short time with her father and then went and lived with her sister. Later she returned and lived with her father and was doing so when he married his last wife. She continued to live with her father and her step-mother for sometime and then was sent by her father to live with her mother and she continued to live with her mother until her father's death, but during that time she paid two or three visits to her father.

Held, she was entitled to inherit. 1 Rang. 42=74 Ind. Cas. 100=A.I.R. 1923 Rang. 206.

——Daughter of divorced parent—Non-resumption of filial relations—Effect.

If a daughter of parents who are divorced does not resume filial relations with her father who marries a second time but dies without having any issue from the second wife, the daughter is finally excluded from inheritance and the second wife succeeds to the estate which on her death would pass to her heirs. 6 Bur.L.T. 117=20 Ind. Cas. 354=7 L.B.R. 31.

——Daughter of separated couple—Right of inheritance to father.

The daughter of a separated couple who does not maintain filial relationship with her father is not excluded from inheritance in the absence of any widow or other children entitled to inherit. In such a case where the father has been living with her brother till his death the daughter is entitled to one-half share and the brother to the other half in the estate of the deceased. 2 U.B.R. 15, Rel. on. A.I.R. 1930 Rang. 161.

——Difference in nationality or religion—If a ground for.

Burmese Buddhist Law applies even though the parties on one side are not Burmese Buddhist, and the mere fact that an heir or heirs is not of exactly the same religion or nationality is therefore immaterial. There is no provision, which excludes the descendants or others who would ordinarily be entitled to rank as heirs of a Burmese Buddhist from inheritance on the ground of difference in nationality or religion. 1 Bur.L.J. 56=70 Ind. Cas. 855=A.I.R. 1922 L.B. 29.

——Divorce of parents—Effect of—Test—Continuance or discontinuance of filial relations.

Where there is a divorce the children ordinarily go with one or other of the parents and lose the right to inherit from the parent with whom they cease to live unless they maintain or resume filial relations with that parent.

A divorce of the parents does not **per se** extinguish the rights of inheritance of their children. It is a question of continuance or discontinuance of filial relations after the divorce which is the deciding factor in all such cases. (Case-law considered). 5 Rang. 359=105 Ind. Cas. 45=A.I.R. 1927 Rang. 250.

——Grounds—Dogchildren rule—Applicability to grandchildren — Administration — Compromise between heirs—If binding.

Under Burmese Customary Law, in order that an heir may lose his rights of inheritance and the law relating to dogchildren may apply, conduct sufficiently serious to deprive an heir of his inheritance must be strictly proved, and the Courts will not hold that by reason of filial misconduct, an heir has lost the share in his parent's estate to which otherwise he would have succeeded unless the circumstances are such that a decision in that sense is inevitable. The rules relating to the disinheritance of a dogchild will not apply to grandchildren.

Where an agreement of compromise is entered into only by some of the heirs, such agreement, in the absence of consent of all heirs, is not binding on the administration of the deceased's estate. A.I.R. (Vol. 20) 1933 Rang. 50=11 Rang. 158=144 Ind. Cas. 306 (2).

——Grounds.

Mere non-attendance on a deceased during illness is not sufficient to exclude the heir from inheritance. The conduct must be such as to indicate an intention to destroy the natural tie between the heir and the deceased. 44 Ind. Cas. 239 (L.B.).

——Desertion—Neglect of filiar duties—Effect—Forfeiture of right.

Proved desertion and deliberate neglect of the ordinary duties of affection effect forfeiture of the

right of inheritance. 11 Bur.L.R. 228, foll.; 4 Bur. L.T. 1=9 Ind. Cas. 442=5 L.B.R. 331.

——Unfilial conduct—What amounts to.

The plaintiff S was the adopted grandson of a Burmese lady K. In 1911 S went to live with his wife's parents with the consent and approval of K. In 1912 K and S's father P quarrelled and criminal proceedings against K were taken by P. S did not take part in the proceedings beyond attending Court. Subsequently K filed a civil suit against P and S. Here too S took do part except that he filed a written statement probably at P's instructions. K entertained no ill-feelings against S though S was dragged into litigation on legal advice, K who was living with her sister, fell ill, S occasionally visiting her. S went and actually stayed with K for the night before K died and S did take a part, not unimportant, in K's funeral ceremonies,

Held, that S was not guilty of any unfilial or inimical conduct which would deprive him of his right of inheriting K. 6 Rang. 520=28 M.L.W. 129=48 C.L.J. 177=33 C.W.N. 70=110 Ind. Cas. 306=A.I.R. 1928 P.C. 197=55 M.L.J. 95 (P.C.).

——Unfiilial conduct—What is—Disobedience to mother's Whim—Effect.

The plaintiff entered into a second marriage with a servant of her mother's household. On her mother's death she sued for her mother's estate and was opposed by her own children. It was contended that, her second marriage being in defiance of her mother's wishes, in consequence of which there had been a complete breach, which had never been healed between her and her mother, she was debarred from inheritance,

Held, the texts which debar an incorrigibly disobedient child from inheriting refer to a child living with his parents and still subject to their authority and not to an adult child like the plaintiff respondent who had been married and had children of her own. Though by marrying plaintiff defied her mother's wishes, her marriage cannot be regarded as an act of disobedience, as she was under no obligation to obey.

A single act of disobedience, however gross, does not disqualify from inheritance, unless the act is an act of positive enmity. Both the child who behaves like an enemy by abusing and assaulting his parents or otherwise, and the child who, without behaving like an enemy is incorrigibly disobedient, are debarred from inheriting. (2 U.B.R. 1897-01, p. 169, ref.). 4 L.B.R. 104=1 Bur.L.J. 78=70 Ind. Cas. 904=A.I.R. 1922 U.B. 12.

(g) Filial Relationship—Proof of.

——Daughter born after divorce taken back by father at age of five—Right to inherit.

Where a daughter is born, after her mother and father divorced, but where the father takes back his daughter at the age of five, when her mother remarried, it is strong evidence that filial relationship had never been severed and the daughter is not disqualified from inheriting. A.I.R. 1928 Rang. 289, Rel. on. A.I.R. 1930 Rang. 264.

——Daughter living apart from father but visiting him on occations and getting presents—Right of inheritance.

Plaintiff's mother left her husband voluntarily taking her infant child with her. There was no formal divorce. At the time of contracting a second marriage, she did not take her daughter, the plaintiff, with her into her second husband's house. Plaintiff lived with her maternal grand-mother who was plaintiff's father's mother's cousin. Plaintiff used occasionally to visit her father who used to give her small monetary presents.

Held, that mere living apart under the circumstances cannot be considered unfilial conduct on the part of the minor plaintiff and that plaintiff did maintain filial relations with her father and was entitled to inherit his estate. 5 Rang. 359=105 Ind. Cas. 45=A.I.R. 1927 Rang. 250.

——Necessity.

It is not necessary for the establishment of a person's right to inherit for him to prove that he maintained filial relationship with the deceased. A.I.R. (Vol. 21) 1934 Rang. 219=150 Ind. Cas. 1128.

——Necessity—Shares of heirs—Daughter of divorced wife continuing in filial relation and adopted daughter of second wife.

In Burmese Buddhist Law the share of auratha as regards vesting is not considered differently from other shares of inheritance and the shares to which heirs become entitled by reason of an event giving them a right to partition become vested in those heirs from the date on which the right to partition arises.

Consequently, where a person divorces his wife from whom he has a daughter, the daughter is an heir so long as she continues to be in filial relationship with him, and his marriage will not give her any right to partition so long as he is alive and her rights as the heir of her mother remain unaffected by the marriage.

The rule for division between children of two earlier marriages in the ratio of two to the children of the marriage during which property is acquired, to one to the children of the other marriage, does not apply where the children of the marriage during which the property was acquired have already received the whole of the deceased parent's interest in the jointly acquired property of that marriage and where all that remains for the partition between the children of the two marriages is father's separate estate in which as being on the same footing they would **prima facie** be entitled to share equally.

Where a person died leaving behind him a daughter of a first wife who was divorced and who continued to be in filial relation with him, and an adopted daughter of the second wife who predeceased him, and his third wife died after him:

Held, that the adopted daughter was entitled to half the share in property jointly acquired by her father and mother, and on his death, the daughters became entitled to equal shares as against the third wife to three quarters of the property which their father took to his marriage with the last wife, and on the event of the death of the latter they again became entitled to share equally in the one quarter share in the half share which was the estate of the last wife. A.I.R. (Vol. 18) 1931 Rang. 302=135 Ind. Cas. 321.

——Necessity to entitle daughters by deceased wife to share in father's property.

Under the Burmese Buddhist Law the children of a divorced wife living with the mother and not maintaining filial relations with the father are not entitled to share in his estate when there has been a

division of property at the time of divorce. (1897-01) II U.B.R. 116: 4 L.B.R. 272; 6 L.B.R. 167, foll. Filial relations imply living and working and planning with parent and not merely paying visits to the parent and receiving presents from him. S.J. L.B. 296, foll. (1917) 3 U.B.R. 23=42 Ind. Cas. 68=11 Bur.L.T. 229.

——Necessity.

On the death of a Burman Buddhist leaving no heir, his younger brother's children sued the defendant, a stranger, who had attended the deceased and who admittedly lived with him in his last illness and also paid the expenses of the funeral with the evident intention of recouping himself from the estate, the whole of which was in his possession. **Held,** the defendant, should be preferred to the plaintiffs, who failed to attend or visit the deceased in his last illness and whose neglect was not cured by their attempt to borrow money for the funeral. 11 Ind. Cas. 777=4 Bur.L.T. 160.

(h) Grand-child.

——Under Burmese Buddhist Law a grand-child's right to inheritance is not conditioned by the performance of any moral obligation which he or she may owe to a grandparent. A.I.R. (Vol. 28) 1941 Rang. 276=1941 Rang.L.R. 445=198 Ind. Cas. 42.

——Out of time grandchildren—Child's parent eldest child of grandparent—No necessity of predeceased parent being **orasa**. 1940 Rang. L. R. 32.

——Out-of-time grandson—If entitled to equal share with uncle in estate of his grandparents.

The claim of an out-of-time grandson to inheritance does not arise through his acquisition of the interest of an **orasa** at all; it is an independent right of inheritance.

Under the Burmese Buddhist Law an out-of-time grandchild or out-of-time grandchildren who are entitled to an equal share with an uncle or aunt in the division of the estate of the grandparents are the child or children of the eldest child of the grandparents. It is not essential to the success of their claim to such a share that their parent who predeceased either one or both of the grandparents was the **orasa** child, and all that is necessary to show is that their parent was the eldest child of the grandparents. Where the eldest child was a son and died in infancy being survived by two brothers, the elder of the two is eldest for the purpose and his son is entitled to equal share with his uncle in the estate of his grand-mother. A.I.R. (Vol. 26) 1939 Rang. 335=1940 Rang.L.R. 28=184 Ind. Cas. 561.

——Right of—Residence with grand-parent—If a condition.

The requirement that the grand-children should live with the grand parents in order that they should be entitled to inherit at all is now obsolete. 2 Rang. 514=84 Ind. Cas. 918=A.I.R. 1925 Rang. 80.

——Younger son predeceasing mother—Right of his children.

Where a younger son of a Burmese Buddhist predeceases his mother, his widow is not entitled to a share out of the estate, on the death of the mother. His children are the only persons who can claim a share out of the estate of his parents as against their uncles and aunts. A.I.R. (Vol. 20) 1933 Rang. 249=145 Ind. Cas. 833.

——Grand-children—Right of when children are and are not alive.

Out of time "grand-children" rule comes in when children and grand-children of the deceased male owner are in existence, when a distinction is made between different classes of heirs but in the absence of children, grand-children have the same rights as children. 8 Bur.L.T. 283=31 Ind. Cas. 332=8 L.B.R. 302.

——Grand-children—Shares—Capital or stirpital.

Grand-children whose parents are dead inherit the property of their grand-parents of their own right and not as representing their parents. The division is **per stirpes** but not **per capita**. 1 Rang. 316=1924 Rang. 78.

(i) Kanitha child.

——Kanitha child—Re-marriage of surviving parent—Kanitha children, rights of.

The kanitha children, on the re-marriage of their father, become entitled to a quarter share of the estate in the hands of their father at the time of the re-marriage, and the **quantum** of this share is not effected by there being 2 or 3 to share therein. It is also immaterial how the estate was acquired. When the surviving parent re-marries, the children of the first marriage are entitled to claim partition, and this right is a vested right. A.I.R. (Vol. 21) 1934 Rang. 349=154 Ind. Cas. 131.

(j) Keittima child.

——Keittima child—Adoptive parents indicating by acts, desire to sever relation—Keittima child acquiescing—Right of.

If the adoptive parents show by their acts that they desire to sever the relationship with their keittima child, and if the conduct of the child shows that he acquiesces in their wishes, as expressed by their acts, by living separately from them and not attempting to discharge filial duties, and by not asserting his rights as keittima child, even when it is in his own interests to do so, the presumption arises that he intends to break off the tie with his adoptive parents, and under such circumstances he forfeits his rights of inheritance. A.I.R. (Vol. 28) 1941 Rang. 87=1940 Rang.L.R. 783=193 Ind. Cas. 507.

——Eldest keittima—Right to claim partition of one-fourth share at once.

In the absence of natural children, a keittima child, if it be the eldest of adopted ones, has a right to claim immediate partition with its adoptive mother in respect of a fourth share in the joint estate of her adoptive parents: A.I.R. 1924 P.C. 238=2 Rang. 693, Foll. 5 Bur.L.J. 70=98 Ind. Cas. 565=A.I.R. 1926 Rang. 146.

——Right of keittima adopted sons.

Apart from the question relating to any rights of the eldest child, keittima adopted sons are entitled to share equally with the natural sons of the adopter. A.I.R. (Vol. 22) 1935 P.C. 16=13 Rang. 69=1935 O.W.N. 84=68 M.L.J. 431=61 C.L.J. 59=62 I.A. 1=153 Ind. Cas. 679 (P.C.).

——Keittima son—Right to claim one-fourth share from adoptive mother on death of father.

A keittima adopted son is not entitled to claim from

an adoptive mother on the death of the adoptive father the auratha son's quarter share of the estate of the adoptive parents. 4 Rang. 184=5 Bur.L.J. 122=98 Ind. Cas. 621=A.I.R. 1926 Rang. 148 (F.B.).

——Two keittima adopted sons and daughter's son—Shares.

Where two **keittima** adopted sons and daughter's son survive a Burmese Buddhist, the daughter's son is entitled to one-quarter of the share which would have fallen to his mother, **i.e.**, one-quarter of one-third, **i.e.**, one-twelfth. A.I.R. (Vol. 22) 1935 P.C. 16=1935 O.W.N. 84=1 B.R. 258=13 Rang. 69=68 M.L.J. 431=61 C.L.J. 59=62 I.A. 1=153 Ind. Cas. 679 (P.C.).

——Keittima child living apart—Right of—Severance of family—If effected.

The children of first marriage including the keittima child adopted to first marriage, are entitled to three-fourth of property brought to second marriage on the death of their father and one-eighth of the lettetpwa of the 1st marriage. In the case of keittima child living apart from his adoptive parents; the real question for determination is with the surrounding circumstances proved to exist establish an intentional severance of the family or not. The requirement of joint residence can be safely released in the case of an adopted child who is also a blood relation. 31 Ind. Cas. 94=(1915) 2 U.B.R. 74.

(k) Law applicable.

——Burma Laws Act.

There is no written law of inheritance among Burmese Buddhists. Under S. 13 of Burma Laws Act, Buddhist Law should be applied to them. 2 L.B.R. 95, Foll. 7 Bur.L.T. 246=24 Ind. Cas. 367=8 L.B.R. 222.

——Chinese Buddhist domiciled in Burma.

A Chinese Buddhist domiciled in Burma is governed, in the matter of succession, by Burmese Buddhist Law unless it is shown that the law applicable is Chinese Customary Law. A.I.R. (Vol. 26) 1939 P.C. 228=1939 O.L.R. 491=5 B.R. 908=1939 Rang.L.R. 548=(1939) 2 M.L.J. 731=70 C.L.J. 341=182 Ind. Cas. 993 (P.C.).

——Chinese Buddhist domiciled in Burma—Chinese Customary Law.

Chinese Customary Law applies to the succession to the estate of Chinese Buddhist domiciled in Burma. In the case, therefore, of a marriage of a Burmese Buddhist wife to a Chinese Buddhist husband, the wife does not own half the husband's property during the continuance of the coverture. A. I. R. (Vol. 24) 1937 Rang. 543=174 Ind. Cas. 390.

(l) Lettetpwa property.

——House built with lettetpwa funds on payin property—Character of.

A house built on **payin** land with lettetpwa funds becomes **payin.** A.I.R. (Vol. 23) 1936 Rang. 417 =14 Rang. 697=164 Ind. Cas. 1023.

——Lettetpwa property of wife—Husband's share in.

Property inherited by the wife from her father after her marriage is **lettetpwa** and not **Hnapason.** The husband, as the party through whom the inheritance did not come, is entitled to ¾ share of such property. 15 Ind. Cas. 880=5 Bur.L.T. 98.

——No children of second marriage—Children of first marriage—Right of.

The children of the first marriage, in the absence of children of the second marriage, are entitled to a one-sixth share not only in the hnapazon property of their parents acquired by the joint exertions of the couple but also in property acquired during coverture by either of them by inheritance from their parents or relations. A.I.R. (Vol. 28) 1941 Rang. 229=1941 Rang.L.R. 440=198 Ind. Cas. 149.

——Property of first marriage brought by husband to second marriage—Share of second wife.

Where lettetpwa property of the first marriage of Burmese Buddhist is brought by him to the second marriage, the share of the wife by the second marriage in such property is one-sixth. A.I.R. (Vol. 23) 1936 Rang. 417=14 Rang. 697=164 Ind. Cas. 1023.

——Right of children on re-marriage of mother.

Where Burmese Buddhist mother gets and from her father on his second marriage as being her share of joint property of the first marriage, it becomes the lettetpwa property of the mother's first marriage and as such her children by the first marriage obtain vested interest upon the second marriage of the mother. A.I.R. (Vol. 23) 1936 Rang. 336=164 Ind. Cas. 392.

——Lettetpwa property of second marriage—Right of children of first marriage—On partition at father's re-marriage, children cease to have claim on share of father at partition or to lettetpwa of his marriage with their step-mother.

After a partition by a parent on second marriage, the children of the first marriage have no further claim on the property taken to the second marriage by that parent, any how in regard to such property as was made the subject of that partition. The children of the first marriage are debarred, by the fact of the partition, from sharing, after the decease of their father, in the lettetpwa of his marriage with the step-mother. 9 B.L.T. 97, Foll. 1 Rang. 487 =76 Ind. Cas. 838=A.I.R. 1924 Rang. 71.

——Step-grandchildren—Share of.

The step-grandchildren are jointly entitled to their parent's interest (which is one-fifth) in the jointly acquired lettetpwa property of their grandfather and step-grandmother, where their mother had predeceased the step-grandmother. Rang.C.R. 9 of 1927 and A.I.R. 1925 Rang. 80, Rel. on. 6 Rang. 355 =113 Ind. Cas. 142=A.I.R. 1928 Rang. 139.

——Step-mother's share.

Of the inherited lettetpwa property of the marriage of the father and step-mother, the step-mother is entitled to one-half share as against the children of the father's former marriage. A.I.R. (Vol. 18) 1931 Rang. 330=133 Ind. Cas. 481.

——Widower having children marrying widow having children share of one of her two sons in her atetpa property taken by his widow—Other son's representatives—Right to half share in lettetpwa or hnapazon property acquired after remarriage.

Per **Division Bench.**—Under the Burmese Buddhist Law, a child who takes his share in the estate of his parents after the death of one parent and

upon the remarriage of the surviving parent, ceases to have any further claim in the remainder of such estate and in the property acquired subsequent to the remarriage of the surviving parent except probably in the event of the surviving parent dying without leaving a widow or widower or descendants.

One U a widower, married D a widow. They had children of their respective previous marriages and also some payin property, D's children were her two sons S and M. Shortly after the marriage of D and U, S died leaving a widow who demanded and received the share to which her husband was entitled in D's atetpwa property (i.e., property which D brought from her previous marriage) on account of her marriage with U, S's share was one-half of the half share to which the two sons, S and M, were entitled in the estate of their parents on account of D's remarriage after the death of their father. On the death of D the representatives of M filed a suit for half of the lettetpwa or hnapazon property of U and D:

Held, that it was not logical that, because S or his representatives had taken away his share in the property of D's previous marriage and S thus dropped out of the new family, the share to which M or his representatives were entitled in the property acquired subsequent to D's marriage with U should be reduced by the share which S would have had in it, if he or his representatives had not taken away the share in the atetpwa property upon the remarriage of D. M's representatives were, therefore, entitled to the entire half share in the lettetpwa or hnapazon property of U and D. A.I.R. (Vol. 25) 1938 Rang. 376=1939 Rang.L.R. 83=179 Ind. Cas. 6.

(m) Orasa Child.

——Auratha son—Claim to share of one fourth—When arises—Property jointly acquired by his parents—Mother dying—Auratha son can claim one-fourth share in the property if the father re-married.

Under the Burmese Buddhist Law, an **auratha** son can on his father's re-marriage after his mother's death, claim a one-fourth share of the property jointly acquired by his parents. But an **auratha** son cannot make that claim against his father merely by reason of his mother's death. 66 Ind. Cas. 538=11 L.B.R. 199=A.I.R. 1921 L.B. 68.

——Eldest son—Right of father surviving and not remarrying.

There is no authority for the view that under the Burmese Buddhist Law, an eldest son can claim the usual one-fourth share of the joint property of his parents where his father survives and does not remarry. 64 Ind. Cas. 23=13 Bur.L.T. 207.

——Right of on father's death—Mesne profits—Right to—On father's death Orasa son becomes entitled to one-fourth share.

The **Orasa** son becomes entitled on the death of his father to a definite one-fourth part of the estate. The estate comes into existence at his father's death and he is entitled to **mesne profits** on it. 67 Ind. Cas. 769=11 L.B.R. 292=A.I.R. 1921 L.B. 49.

——Children of—Right of.

When the **Orasa** son or daughter predeceases his or her parents, his or her eldest son or his or her children together receive the same share at the death of their grandparents as their youngest uncle or aunt. The children of the same parents will share the share received by them together equally. 33 Ind. Cas. 127=9 Bur.L.T. 95.

——Claim by eldest child—When to be made.

A claim by eldest child for a one-fourth share of the joint estate of his or her parents on the death of one of them must be made as soon as possible after that event. 33 Ind. Cas. 927=9 Bur.L.T. 154 =Cf. 38 Ind. Cas. 809=44 Cal. 379 (P.C.).

——Daughter—Position of.

Under the Buddhist Law, a daughter no less than a son may be an **orasa** child but there cannot be an **orasa** daughter as well as an **orasa** son in the same family. An **orasa** daughter's position is merely presumptive and is liable to be displaced by an **orasa** son of competent age. 8 Bur.L.T. 140=29 Ind. Cas. 756=8 L.B.R. 113.

——Daughter—Right of on death of elder son as infant—Daughter, second born child, eldest son having died in infancy can, on father's death and mother's re-marriage, claim quarter-share in joint property of her parents.

An eldest daughter becomes entitled to a quarter-share in the joint property of her parent's marriage upon the remarriage of the mother. The fact that there was an elder child (a son), who predeceased his father and died in infancy, does not prevent the next born child, even if a daughter, from attaining the status of technical orasa. Therefore, under the Burmese Buddhist law, a daughter, a second born child, the eldest having died in infancy, can on her father's death, and on her mother's remarriage, claim a quarter-share in the property; and the fact that she was a minor at the time of her father's death does not affect her claim. If she was a major when the mother remarried, the requiremments of the law are fulfilled. A.I.R. 1926 Rang. 211 and A.I.R. 1929 Rang. 65 and 2 L.B.R. 292, Rel. on; 2 U.B.R. 46, not foll. A.I.R. 1930 Rang. 319.

——Death of one parent leaving only one child—Surviving parent remarrying—Child of first marriage as orasa child—Share of.

It is quite contrary to the ordinary notions current amongst the Burmese to hold that an **orasa** child, who does not claim his share on the death of his parent nevertheless must be regarded as having taken it, with the further consequence that he falls out of the family. By Burmese Law, when after the death of one parent the surviving parent remarries, the only child of the first marriage is entitled to claim partition. The child's claim to a one-quarter share as **orasa** child must be deemed to have received a fresh period of limitation beginning from the remarriage of its father and it is entitled to one-half of the estate brought to the remarriage by its father. A.I.R. (Vol. 26) 1939 Rang. 167=1939 Rang.L.R. 217=182 Ind. Cas. 403.

——Orasa child—Eldest daughter living separately from father—If bar to claim as orasa in father's property.

The appellant, the eldest daughter, at the time of her mother's death, had been married for 27 years. During the first two years of her married life she continued to live with her parents; she then moved to a house near by and lived there for 20 years; finally she went to reside at another village, and a year later her mother died.

Held, that the appellant was not disentitled to her share as **orasa** by reason only of the facts that she lived separately from her father and that she never assumed the duties of her deceased mother in the family. A.I.R. 1921 L.B. 95 (F.B.). 1 Rang. 370=76 Ind. Cas. 814=2 Bur.L.J. 138=A.I.R. 1923 Rang. 271.

——Eldest daughter—Right of during mother's lifetime.

Under the Buddhist Law during the lifetime of her mother the eldest daughter has not such an interest in the estate of her deceased father as is contemplated in S. 91 of the T. P. Act. The eldest daughter can only claim one-fourth of the bulk of the estate if her mother dies first and she is capable of replacing her mother in the household. Sometimes the eldest daughter on marrying and leaving the parental roof is given her share in the estate during the life-time of both parents. In that case she has no further claim on the estate. If this has not happened, the eldest daughter on the death of the father, is entitled to certain specified property and her mother gets the bulk of the estate and if on the death of her father, the mother marries again, the eldest daughter is further entitled to one-fourth of her father's wearing apparel and ornament but her mother still retains the bulk of the estate. 28 Ind. Cas. 821=(1914) 11 U.B.R. 46.

——Eldest daughter—Rights of.

The texts giving the **orasa** daughter the right to claim a quarter share after her father's death do not authorise her to claim one-fourth from her mother at least where her mother has not married again. 28 Ind. Cas. 806=(1914) 11 U.B.R. 40.

——Eldest son—Right lapses if not asserted—Diligently.

The right given to the eldest son to claim ¼ share of the joint estate on his father's death, should be promptly exercised and if the option is not exercised without unreasonable delay it should be regarded as having lapsed altogether. 30 Ind. Cas. 638=8 Bur.L.T. 138.

——Eldest son—Widow with orasa son—Right of.

The Dhammathats that give the eldest son a right to a quarter as against the mother on the death of the father refer to the **orasa** son or in other words eldest capable son. When all the sons are minors, there is no **orasa** son and the right in question does not accrue. The widow with an **orasa** son would have full power to dispose of the remaining three quarters and on her death without alienating that share, it would pass to her heirs. But her creditors proceeding against her estate would be at liberty to attach and sell it. 28 Ind. Cas. 804=(1914) 11 U.B.R. 37.

——Eldest surviving son—Right of.

Under the Burmese Buddhist Law, an eldest son on the death of his father leaving the mother behind, has a definite right to a quarter share of the estate and not merely a right to elect within a reasonable time if he will take that share. He can assert his right at any time within the period prescribed by Art. 123. 44 Cal. 379=19 Bom.L.R. 291=15 A.L.J. 96=32 M.L.J. 71=21 M.L.T. 97=21 C.W.N. 527=26 C.L.J. 169=9 L.B.R. 56=10 Bur. L.T. 138=38 Ind. Cas. 809=44 I.A. 42 (P.C).

——Family with sons and daughters—Right as orasa children if orasa—Right.

Per **Robinson, C.J., Maung Kin, Heald and Duckworth, JJ.**—In a family consisting of both sons and daughters, any child can acquire the full status of Orasa prior to the death of either parent. If in such a family where the eldest child is a daughter, no son can become Orasa. In such a family the question which child is the Orasa, can be decided before the death of either parent. There cannot be in such family two Orasas. Sons are always to be preferred to daughters as Orasas unless the son is not the eldest born. The eldest born son is the Orasa. If he predeceased his parents, his children will have a right to preferential treatment. If the eldest born son dies before he became competent to take his father's place, a younger son, being fully qualified, may become **Orasa,** and, if that son predeceases his parents, his children will have a right to the same preferential treatment. But, if the eldest-born child is a daughter and predeceases her parents after she becomes competent to take her mother's place, her children will have a right to the same preferential treatment. It is doubtful whether another daughter younger than a son can ever take the place of the eldest-born daughter who is not competent, or dies before she became able to take her mother's place. The eldest child being a daughter can claim on the death of her mother a quarter share as **Orasa,** and, if she then dies before her father without having got the share, her children will have a right to preferential treatment contemplated and, if she dies after her father but before she has claimed her distributive share in the estate, her right of inheritance will devolve upon her children. The same would be the case of the issuee of any other child who dies after its right of inheritance became vested in it. If the eldest born, though it might have claimed the quarter share from the surviving parent, did not and survived that parent, then the child will no longer be entitled to claim the quarter share but will have to share with the other children and may in that case get more or less than the quarter share it might have claimed.

Per **Pratt, J.**—In a family consisting of both sons and daughters a child can attain the full status of **Orasa** prior to the death of its parents, in so far that, if he or she predeceases his parents, his or her children may be entitled to the preferential treatment. In such a family where the eldest child is a daughter, no son can become **Orasa** until his father dies, subject to the proviso that the eldest daughter attained her majority before her death. The question as to which is the **Orasa** can be decided, so far only as the right of representation is concerned. In such a family there cannot be two **Orasa** children in the sense of children whose offspring would, in the event of their parent's death, be entitled to claim an equal share with their younger uncles and aunts. But it is conceivable that where the **Orasa** eldest child was a daughter and the eldest son attained his majority before his father's death, he would on his father's death be entitled to rank as **Orasa** for the purpose of claiming one-fourth of the estate from his mother. It is to be noted that **Orasa** is here used in two distinct senses. Sons are not always preferred to daughters as **Orasa.** In such a family when the eldest child is a daughter there cannot be an **Orasa** son, who predeceasing his parents can transmit to his children

a right of preferential treatment in the division of the estate, assuming that the eldest child attained majority and did not forfeit her status as **Orasa.** The eldest child, being a daughter, can transmit to her children a right to preferential treatment in the division of the estate, and on her mother predeceasing her father she can claim a quarter share as **Orasa.** Maung San Dwa v. Ma Min Tha. (2) Cha Toon's L. C., Vol. 2, p. 207; 8 L.B.R. 113; 7 L.B.R. 27; 2 L.B.R. 292; 23 Bur.L.T. 6; 1 L.B.R. 198, Overruled. (1897-01) U.B.R. 66; Buddhist Law Inheritance, II; 5 Bur.L.T. 73; (1893-1900) L.B.R. 48 and (1893-1900) L.B.R. 585, Diss. from. Case-Law and Texts fully discussed. 68 Ind. Cas. 49=11 L.B.R. 220=A.I.R. 1921 L.B. 95 (F.B.).

——First born son dying infant—Second born daughter—Position of—If eldest daughter—Issue of—Right of inheritance along with aunts.

First son died infant, second and third were daughters. **Held,** that second was the eldest daughter, within the meaning of the S. 163 of the Digest. Even in case the eldest child dying infant would have been daughter, the inheritance would have devolved on the second as the next eldest daughter; in the absence of another son born after the first deceased son, who would have filled the place of the deceased that circummstance did not make any substantial change. Texts of S. 163 of the Digest allow the issue of the eldest daughter an equal share as that of the youngest of his aunts. There is no warrant to hold that they apply only to the families consisting of daughters only; but they apply to the families having two daughters arriving at maturity, the only third child, a son, dying infant. 15 Ind. Cas. 360=5 Bur.L.T. 73.

——Orasa son, by first wife, if entitled to share in property jointly acquired by his father and the second wife.

Per **Full Bench (Mya Bu, J.,** contra.)—Where a Burmese Buddhist who has two wives and children by the first wife but none by the second wife, lives with the second wife and works with her, on his death the **orasa** son, a child by the first wife, is not entitled to any share in any of the property jointly acquired by his father and second wife.

Per **Mya Bu, J.**—By a man marrying two or more wives at te samhe time only one family is constituted irrespective of whether all the wives live together with the husband or not. The wives have the right of inheriting the husband's estate upon his death even though they were not living with the husband at the time of the acquisition of the property forming the estate. The children of the wives who pre-deceased the husband also have the right of inheriting such estate, though their mother was not living with their father at the time of the acquisition of the property forming such estate. The **orasa** son of a polygamous husband and his earliest married wife is the **orasa** son not only of himself and that wife but of himself and all the wives. In a monogamous family the orasa son has the right to claim a quarter share from the mother on the death of the father; and for him to qualify for his special rights, joint living with the widowed mother or active assistance in her duties is unnecessary; and with the exception of the separate properties of the wives of a polygamous husband other than the **orasa** son's own mother the **orasa** son of a polygamous husband and his wives is entitled to the same right as the **orasa** son of a monogamous family upon his father's death. Applying these principles the **orasa** son in this case is entitled to share in the property jointly acquired by his father and the father's second wife. A.I.R. (Vol. 22) 1935 Rang. 248=13 Rang. 412=158 Ind. Cas. 131 (F.B.).

——Orasa son taking share on father's death—Right to inherit in remainder on death of surviving parent.

Where there is a child of the family surviving the last dying spouse, the orasa who has taken a quarter share of the parental estate from the surviving parent on the death of the parent of the same sex does not retain any right to a further share in the partition of the remainder of the estate on the death of the surviving parent; 1 L.B.R. 50, Affirmed. 7 Rang. 409=120 Ind. Cas. 670=A.I.R. 1929 Rang. 282.

——Partition on death of father—Right to demand.

On the death of the father one-fourth of the joint estate vests immediately in the **Orasa** son. He is not bound to demand partition but may do so at any time within the statutory period of limitation and within that period the mother has no power of disposal of this one-fourth share. Within the period that share is not liable to attachment under a decree against the mother. 83 Ind. Cas. 550=2 Rang. 168 =A.I.R. 1924 Rang. 323.

——Right of—If vested—Right of Kanittha—Nature of—Right of election—Failure to exercise—Effect.

The right of the eldest son (**orasa** child) to claim a quarter share from his father on the latter's remarriage after the mother's death is not a vested one. The same view would apply to the claim, if any, of the **Kanittha** children. There is nothing in the **Dhammathats** to justify the assumption that the children in such a case are bound to be content with a portion only of their parent's joint estate, as would be the case if their right were a vested one. They may elect to throw in their lot with the new benefit of any possible increase in the family fortune. Should they do so they would in any case be entitled to three-fourths of their own parent's **payin** as against the step parent and would also share in the after-acquired property. Their right being, however, not a vested one if they fail to exercise it before the death of that parent, the right lapses. 76 Ind. Cas. 612=1 Rang. 363=2 Bur.L.J. 109=A.I.R. 1923 Rang. 239.

——Right of—Joint residence not necessary.

The appellant, the eldest daughter at the time of her mother's death, had been married for 27 years. During the first two years of her married life she continued to live with her parents she then moved to a house near by and lived there for 20 years; finally she went to reside at another village, and a year later her mother died. **Held,** that the appellant was not disentitled to her share as Orasa by reason only of the facts that she lived separately from her father and that she never assumed the duties of her deceased mother in the family. 2 Bur.L.J. 138=1923 Rang. 271=1 Rang. 370.

——Right of.

Whether the mother re-marries after the death of the father or not, the orasa son is entitled to get one-fourth share and the mother and the younger chil-

dren three-fourth. 8 L.B.R. 189=30 Ind. Cas. 640=8 Bur.L.T. 154.

——Right of—If affected by death of surviving parents.

The right of an orasa son to a one-fourth share in the property of his parents is not affected even by the death of the surviving parents. A.I.R. 1924 Rang. 323, Relied on. 6 Rang. 318=112 Ind. Cas. 233=A.I.R. 1928 Rang. 258.

——Right of—Mesne profits.

The **orasa** son becomes entitled on the death of his father to a definite one-fourth part of the estate and he can recover it with mesne profits at any subsequent date. 67 Ind. Cas. 769=11 L.B.R. 292.

——Orasa son—Right of—Devolution on death.

If the orasa son dies without having claimed his one-fourth share, such share devolves on his heirs and legal representatives:: A.I.R. 1926 Rang. 65, Foll. 6 Rang. 318=112 Ind. Cas. 233=A.I.R. 1928 Rang. 258.

——Right of on re-marriage of father—Devolution of.

The claim which an eldest son has on the re-marriage of his father to one-quarter share is a vested interest and right and therefore such vested interest and right must devolve on the heirs and legal representatives of the holder of the vested interest or definite right to the one-fourth share. 3 Rang. 281=90 Ind. Cas. 958=A.I.R. 1926 Rang. 65.

——Right of—If vested right.

The right of the eldest son (orasa child) to claim a quarter share from his father on the latter's re-marriage after the mother's death is not a vested one. The same view would apply to the claim, if any, of the Kanittha Children. There is nothing in the Dhammathats to justify the assumption that the children in such a case are bound to be content with a portion only of their parent's joint estate, as would be the case if their right were a vested, one. They may elect to throw in their lot with the new benefit of any possible increase in the family fortune. Should they do so they would in any sale be entitled to three-fourths of their own parent's **payin** as against the step parent and would also share in the after acquired property. Assuming that the Kanittha children are entitled to claim partition from their surviving parent on the latter's re-marriage, their right is not a vested one and, that, if they fail to exercise it before the death of that parent the right lapses. The same rule applies to the right of the eldest son. 1 Rang. 363=2 Bur.L.J. 109=1923 Rang. 23.

——Right of second son on death of first in infancy.

If a first-born son dies in infancy, the next eldest son can be **orasa** provided he is unaffected by any of the disabilities mentioned in the texts on the subject. He can transmit the superior right of inheritance to his own issue in the same way as an **orasa**, (who is actually the first born of the family) can do. 2 L.B.R. 292, Foll. 10 Ind. Cas. 778=4 Bur.L.T. 74.

——Rights of sons and daughters and their children.

Held. by the Full Bench (Pratt, J., not fully concurring). (1) In a family consisting of both sons and daughters a child can attain the full status of **orasa** prior to the death of its parents. (2) In such a family where the eldest child is a daughter no son can become **orasa**. (3) In such a family the question as to which is the **orasa** can be decided before the death of either parent. (4) There cannot be two **orasa** children. (5) Sons are not always preferred to daughters as **orasa**, unless the son is eldest born. (6) The eldest born son is the **orasa**. If he predeceased his parents, his children will have a right to preferential treatment. If the eldest son died before he became competent to take his father's place, a younger son, being fully qualified may become **orasa**, and if that son had predeceased his parents, his children will have a right to the same preferential treatment. (7) The eldest child being a daughter can claim on the death of her mother a quarter share as **orasa** and if she then died before her father without having got the share, her children will have a preferential treatment. And if she then died after her father but before she had claimed her distributive share in the estate, her right of maintenance will devolve upon her children. 68 Ind. Cas. 49=11 L.B.R. 220.

——Right of—When father does not re-marry.

There is no authority for the view that under the Burmese Buddhist law an eldest son can claim the usual one-fourth share of the joint property of his parents where his father survives and does not re-marry. 64 Ind. Cas. 23=13 Bur.L.T. 297.

——Right to claim half share against step-mother on death of surviving parent.

Where the **auratha** son has not taken a share either on the re-marriage or on the death of the surviving parent he is regarded by Burmese Buddhist Law as being entitled to share in the estate of the step-parent, and in such part of that estate as can be regarded as jointly acquired property of the marriage of the parent and step-parent; his share as against his parent's step-children is one-half. 3 Rang. 438=91 Ind. Cas. 653=A.I.R. 1926 Rang. 23.

——Share of orasa son—Failure to claim promptly—Effect—Abandonments.

Under the Burmese Buddhist Law, if the eldest son attains his majority and fulfils the prescribed conditions and then dies before his parents, his position as **orasa** remains unfilled and the next younger brother does not succeed to it. If the eldest son reaches the age of manhood, the presumption is that he fulfils the prescribed conditions as **orasa.** The **orasa** son must exercise his option of claiming a share promptly; if he fails to do so, he must be held to have abandoned the right. 29 Ind. Cas. 706=8 Bur.L.T. 196.

——Share taken on death of parent—Right to share on death of surviving parent.

Even if the **auratha** has taken his share on the death of a parent or on the re-marriage of the surviving parent, he is still entitled to claim a share on the death of the surviving parent or on the death of the step-parent unless separation is proved or is to be presumed. 3 Rang. 438=91 Ind. Cas. 653=A.I.R. 1926 Rang. 23.

——Status of—How and when attained—Doctrine of Orasa.

The eldest son if competent, is the representative of his father and in that capacity is entitled to one-fourth of the inheritance on the death of his father. By "competent" is implied, of an age to take his father's place. The whole doctrine of the **Orasa**

son is based on his being in a position to take his father's place. A minor son of 11 years of age cannot be said to have attained the status of an **Orasa** son. 94 Ind. Cas. 531=4 Bur.L.J. 67=A.I.R. 1925 Rang. 245.

——Status—Right of younger child to.

A younger child, although the eldest son, does not acquire the status of **Orasa** and does not become entitled to the privileged position allotted to the eldest or not born son. 84 Ind. Cas. 567=2 Rang. 693=51 I.A. 334=3 Bur.L.J. 304=29 C.W.N. 653=A.I.R. 1924 P.C. 238=48 M.L.J. 1 (P.C.).

(n) Parents.

——Death of man and wife without issue simultaneously—Succession to property.

Where husband and wife die cbildless simultaneously or within a short interval of one another, their property is to be considered as retaining its joint character and is to be divided accordingly, **i.e.**, the respective party's parents could take the separate or ancestral property of husband or wife and would sare equally the jointly acquired property of the husband and wife. 8 L.B.R. 197=30 Ind. Cas. 594=8 Bur.L.T. 145.

——Husband and wife dying within short interval—Right of parents of both.

Under the Burmese Buddhist Law, where a husband and wife die within a short interval, the surviving parents of both, share the joint acquired property of the former. "Short interval" for this purpose is a period not exceeding one month. 10 L.B.R. 288=63 Ind. Cas. 715=13 Bur.L.T. 194.

——Property inherited during marriage—Interest in—Right of alienation.

Property inherited by a parent during marriage, becomes his or her separate property. On his or her death the surviving parent has merely a life-interest in it with power to sell in case of necessity. Any of the property not sold under such necessity passes to the children of the parent who inherited it. Where half the sum got by an alienation of property is lent out to a third party, the necessity for the alienation is disproved. 20 Ind. Cas. 346=6 Bur.L.T. 119.

——Right of—Preference over other relations.

In the absence of direct descendants and husband or wife, the parents are preferential heirs to all other relatives. U.B.R. (1892-96) Vol. II, p. 184, U.B.R. 1897=1901, Vol. II, p. 167, foll. 4 Bur.L.T. 1=9 Ind. Cas. 442=5 L.B.R. 231.

(o) Payin Property.

——Husband and wife dying within short time of one another—Property inherited by one during marriage from collaterals—Nature and devolution of.

Where property is inherited during marriage from collaterals by one party only, it should be treated not like property inherited from parents nor as jointly acquired property, but on the same footing as **payin** property or as inherited lettetpwa in cases of divorce by mutual consent, and should go to the extent of two-thirds to the relatives of the party who inherited it and to the extent of one-third to the relatives of the other party in case death of both parties within a short time of one another. A.I.R. (Vol. 28) 1941 Rang. 106=1940 Rang.L.R. 753=194 Ind. Cas. 201.

——Husband surrendering interest on taking second wife—Effects.

Where deeds are amended by the husband for and on behalf of the wife, who was illiterate, and who was for some time of unsound mind and during that period the husband took another wife and surrendered all claim to the **payin** property of the former marriage: **Held**, that the onus of proving that the husband had any right in the property is on the plff. who sets it up the plea. A second husband of a woman is not entitled to more than one-fourth of the **payin** property. 20 Ind. Cas. 288=6 Bur.L.T. 91.

——Share of children of first marriage, in payin property brought to second marriage, as against second wife.

Where a Burman Buddhist leaves surviving him his children by a former marriage and also his second wife and his children by her, the children of the first marriage are entitled to three-fourths of the **payin** property brought by their parent to the second marriage, as against their step-mother, on their father's death. A.I.R. (Vol. 25) 1938 Rang. 293=178 Ind. Cas. 200.

(p) Preferential right.

——Basic rule—Nearer excludes more remote—Doctrine of representation—Application of.

Representation is not a principle of Buddhist Law. The basic rule is that the nearer heir excludes the more remote, and that the partial representation allowed to grandchildren in competition with children is merely an exception to that general rule, and is the only exception to it. (A.I.R. 1924 Rang. 73, Discussed.) 3 Rang. 464=91 Ind. Cas. 684=A.I.R. 1926 Rang. 4.

——Brothers and sisters, whether exclude parents.

Under the Burmese Buddhist Law, on the death of a son or daughter unmarried and without issue, his or her property devolves on his or her brothers or sisters in preference to his or her father or mother in spite of the fact that he or she has not been separated from the father or mother.

The rule of construction to be applied for determining whether the parents or the brothers and sisters in such a case are the heirs of the deceased, is under the Burmese Customary Law that the right of succession whenever possible is not to ascend, and that rule is to prevail rather than the rule that the nearer relation excludes the more remote. A.I.R. (Vol. 2) 1915 Low. Bur. 113=8 L.B.R. 197=30 Ind. Cas. 594; A.I.R. (Vol. 16) 1929 Rang. 148=117 Ind. Cas. 589; 1894 Bom.P.J. 116, overruled. A.I.R. (Vol. 18) 1931 Rang. 113=9 Rang. 217=133 Ind. Cas. 234.

——Brothers and sisters of husband and nephews and nieces of wife—Former whether exclude latter—Distribution between nephews and nieces, per capita or per stirpes.

Under the Burmese Buddhist Law of inheritance when a Burmese couple die leaving no nearer heirs than the brothers and sisters of the husband and the nephews and nieces of the wife, the rule

laid down in S 308 of Mingi's Digest may be applied by analogy.

But in applying this rule the relatives of both the husband and of the wife should be regarded as succeeding to the half interest which each of them possesses, in the estate irrespective of the nearness of the relatives on one side as against those on the other, inasmuch as the conception of the husband and wife as one person is a somewhat artificial one and is opposed to the general spirit of the Burmese Buddhist Law. The estate, therefore, does not devolve on the sister and brothers of the husband to the exclusion of the nephews and nieces of the wife.

The division between nephews and nieces of their half-share should, in such a case, be **per capita** and not **per stirpes**. A.I.R. (Vol. 17) 1930 Rang. 237=8 Rang. 480=129 Ind. Cas. 524.

——Brothers and sisters—Preference of younger to elder.

In matters of inheritance among elder or younger brothers and sisters the youngers are preferred to elders. The principle of propinquity in inheritance is limited to full blood relations, who even in remoter degree can exclude half blood relations among themselves. '58 Ind. Cas. 488=12 Bur.L.T. 103.

——Child's property in possession of parent—Parent and surviving spouse of child—Prefe-ence.

As between the parent and the surviving spouse of a child who dies leaving no issue but who lived with his or her parent and whose property is in the possession or keeping of the parent, the parent is entitled to inherit such property under the Burmese Buddhist Law.

The rule, however, will not affect the vested interest of the son-in-law or daughter-in-law in the **payin** property brought to the marriage by the daughter and son. A.I.R. (Vol. 27) 1940 Rang. 120=1940 Rang.L.R. 572=188 Ind. Cas. 683 (F.B.).

——Childless widow and mother—Preference.

Where a Burman Buddhist lives with his mother who is in possession of the family property which she has inherited from her deceased husband, on his death leaving only a childless widow, the mother and not his widow succeeds to the property. That the son had or had not a vested interest in the property is not material. A.I.R. (Vol. 19) 1932 Rang. 98=10 Rang. 124=137 Ind. Cas. 431.

——Step-Children — If exclude step-grandchildren.

Under Burmese Buddhist Law the nearer always excludes the more remote. Consequently, step-children exclude step-grandchildren. A. I.R. (Vol. 21), 1934 Rang. 259=152 Ind. Cas. 71.

——Daughter of paternal uncle—Preference to sister of Maternal Grandmother.

Under Burmese Buddhist Law, the first cousin of a deceased woman, being the daughter of her paternal uncle is to be preferred to her great aunt who is the sister of her maternal grandmother. A.I.R. (Vol. 22) 1935 Rang. 321=158 Ind. Cas. 1028.

——Descendants and Ascendants—Half-brother or sister—Preference over grand-parents.

Half-brothers and sisters succeed in preference to grand parents on the principle that inheritance shall not ascend. 11 L.B.R. 460=72 Ind. Cas. 4=1 Bur.L.J. 263=A.I.R. 1923 Rang. 124.

——Descendants and ascendants—Nephews and nieces, if exclude uncles and aunts.

When a Burman Buddhist has died leaving as his nearest relatives (1) nephews and nieces, the children of his brother; and (2) uncles and aunts, the brothers and sisters of his mother, the former class of relatives is entitled to inherit his estate to the exclusion of the latter. 4 Rang. 27=5 Bur. L.J. 51=95 Ind. Cas. 918=A.I.R. 1926 Rang. 113 (F.B.).

——Father's younger sister excludes mother's sister's son.

The younger sister of the father of the propositus excludes the son of the sister of the mother of the propositus. 88 Ind. Cas. 657=4 Bur.L.J. 88=3 Rang. 271=A.I.R. 1925 Rang. 235.

——Full blood and half-blood—Preference—Half-sister and daughter of full brother—Priority.

When a person dies leaving a full brother or sister, and a half brother or sister, the former is entitled to peference in matter of succession in view of the fact that former relationship is closer at least when the half blood have divided. Where the last female holder of an Ayo dies leaving a half-sister and a daughter of a full brother, the latter is entitled to succeed to the Ayo in preference to the former. S.A. No. 123 of 1916, held too wide; 10 B.L.R. 107 Rel. on. 8 Rang. 17=A.I.R. 1930 Rang. 148.

——Half-blood brother or sister and full blood nephew or niece—Rights of—If equal.

Half-blood brother or sister and full nephew or nieces are to be considered equally related in blood. Thus where a person dies leaving behind a half-blood younger sister and brother as well as nephews and nieces, also of the person's full younger brother, each is entitled to equal share. 12 Bur.L.T. 103, held too wide. 8 Rang. 23=A.I.R. 1930 Rang. 75.

——Husband and son by first marriage—Preference over daughter of second marriage.

A Burmese Buddhist woman left a son by her first marriage and the husband and a daughter of the second marriage and **lettetpwa** property.

Held, that the daughter had no right in presence of her father who along with the son of the first marriage was entitled to divide the property equally. 86 Ind. Cas. 496=3 Bur.L.J. 225=2 Rang 521=A.I.R. 1925 Rang. 120.

——Husband and wife dying within short interval —Nearness of blood—If ground for preference.

Where the interval between the deaths of the wife and of the husband is small the relatives of the husband and wife should be regarded as succeeding to the half interest which each of them possesses irrespective of the nearness of the relatives on one side as against those on the other. 8 Rang. 480.

——Mother and sister—Preferential right of former to minor son's property.

On the death of a minor Burmese Buddhist, living jointly with his parent (mother) and sister, a parent (mother) is not debarred from inheriting his son's property by the fact that his sister (and her daughter) is alive. The rights of his mother in respect of any property belonging to him would have stood upon a different footing from any such rights had he attained his majority and separated himself from the parental roof. 8 L.B.R. 197, Rel. on. 7 Rang.75=117 Ind. Cas. 589=A.I.R. 1929 Rang. 148 (2).

——Mother's half-sister and father's cousin—Former—If excludes latter.

Mother's half-sisters exclude the father's cousin, i.e., daughter of a sister of the grandfather, in the matter of succession under Burmese Buddhist Law. 89 Ind. Cas. 447=3 Rang. 86=A.I.R. 1925 Rang. 231.

——Nearer and more remote—Children or grand-children—If exclude great-grand-children.

Great-grand-children cannot inherit in competition with children or grand-children. (2 Chan Toon's L. C. 226 and 8 B.L.T. 51, Foll.) 3 Rang. 464=91 Ind. Cas. 684=A.I.R. 1926 Rang. 4.

——Nearer excluding more remote—Children and grand-children—If exclude great-grand-children.

Great-great-children are entirely excluded by children or grand-children from inheritance. A.I.R. 1926 Rang. 4, Rel. on. 6 Rang. 355=113 Ind. Cas. 142=A.I.R. 1928 Rang. 139.

——Nearer exclude more remote.

In Buddhist Law, the nearer relatives exclude the more remote even in case of inheritance by direct descendants. An out-of-time grand-daughter of a predeceased son cannot inherit in preference to the daughter. A widow has no claim to inherit, when her husband dies without acquiring any vested rights in the property. A great-grand-daughter is not entitled to inherit in the presence of her grand-aunts. 29 Ind. Cas. 741=8 Bur.L.T. 51.

——Paternal and maternal uncle and aunt—Shares —Preference.

The paternal and maternal uncles and aunts of a deceased nephew or niece should, in the absence of any nearer relatives and in spite of the father of such nephew or niece having pre-deceased the mother, share equally in the estate, and there is no preference of the paternal over the maternal side. 5 Bur. L.T. 283=18 Ind. Cas. 497=6 L.B.R. 164.

——Relations of same degree—Preference of full blood to half-blood—Preference of brothers and sisters to father—Rule of exclusion of remote by nearer relation.

Among relations of the same degree of relationship to the deceased, the full-blood relations should be preferred to the half-blood relations. There is no sufficient authority to warrant the view that the rule that inheritance should not ascend when it can descend still operates in a competition between relations of the full-blood and those of the half-blood of the same degree of relationship to the deceased.

The method of calculating relationship by counting the number of degrees from the propositus upwards to the common ancestor and then downwards to the claimant is obviously fallacious when calculating the degree of relationship between two children of the same parents. There can be no closer relationship than exists between such persons as they are of identical blood. In fact so far as blood relationship goes, it is clear that such children are more closely related to one another than they are to their father or to their mother, and, therefore, if in the case of competition between parents and brothers and sisters, the latter are preferred, this is no abrogation of the rule that the nearer relation excludes the more remote. A I.R. (Vol. 25) 1938 Rang. 74=174 Ind. Cas. 603.

——Relations of same degree—Full-blood excludes half-blood.

Under the Burmese Buddhist Law of inheritance amonght relations of the same degree of propinquity the full-blood excludes the half-blood. A.I.R. (Vol. 20) 1933 Rang. 317=147 Ind. Cas. 1093.

——Relatives of husband and wife—Nearness of blood—Relevancy —Rule in Kinwun Mingyi's Digest, S. 308.

The conception of the husband and wife as one person is a somewhat artificial one and is opposed to the general spirit of the Burmese Buddhist Law and the relatives of both the husband and of the wife to whom the rule given in S. 308 of Kinwun Mingyi's Digest is applicable should be regarded as succeeding to the half interest which each of them possesses in the estate irrespective of the nearness of the relatives on one side as against those on the other. A.I.R. 1930 Rang. 237.

——Step-brothers, if preferred to mother's sister.

Where a woman marries two persons, sons of her subsequet husband by a previous wife are entitled to inherit the estate of her deceased son by her previous husband in preference to her sister, even though they are not connected by blood with the deceased. 63 Ind. Cas. 841=4 U.B.R. 20 =A.I.R. 1921 U.B. 21 .

——Step-children exclude collaterals.

Once it is determined that step-children are descendants they necessarily ousts collaterals, for, by

Buddhist Law the property never ascends as long as it can descend. The point of view of the Buddhist Law is based on the community of interest between husband and wife. So strong is the bond between them that in the absence of natural children the husband's or wife's children, as the case may be, rank as the children of the step-parent in the matter of inheritance to the exclusion of collateral blood relations. Conduct can indeed operate as a disqualification of the right, but it is in no sense a necessary qualification to obtain the right. A man who has proved that he is an heir has not further to prove that he has not broken off filial relations. Mere separate residence or non-conducting of funeral ceremonies does not nowadays and by itself prove or even set up an inference of a breach of filial relations such as would deprive a child of his rights. 10 L.B.R. 396, Appl. 84 Ind. Cas. 899=3 Rang. 29=52 I. A. 73=29 C.W.N. 824=1925 M.W.N. 23=3 Bur.L.J. 340=A.I.R. 1925 P.C. 29=47 M.L. J. 853 (P.C.).

——Step-daughter and sister—Sister tending deceased during illness and making arrangement for funeral—Preferential heir.

Upon a construction of S. 62 of Book X of the Manukye, the claim of the relative, who tends the deceased during his life and buries him, to succeed to the property "animate and inanimate in the possession of the deceased", will not prevail in cases where the deceased left a parent surviving him or an heir who stood higher than parents in the scale of succession. Among such heirs a step-daughter is included. Consequently, a sister cannot claim in preference to a step-daughter although the former tended the deceased during his illness and carried out the arrangements for the funeral. A. I.R. (Vol. 22) 1935 Rang. 58 (2)=12 Rang. 703 =156 Ind. Cas. 332.

——Step-son—Preference over parents and other collaterals of step-mother.

A step-son governed by the Burmese Buddhist Law can succeed as an heir to the separate property of his step-mother and excludes the parents of his step-mother as well as other collaterals. 10 L.B.R. 396=64 Ind. Cas. 415=13 Bur.L.T. 216.

——Step-grand-children — Preference over nephew.

Under the Burmese Buddhist Law a step-grandchild excludes a nephew from inheritance in respect of the estate of the step-grandmother and the fact that he had received from his step-grandmother the share of inheritance to which he became entitled on his grand-father's death does not debar him from being his step-grandmother's heir: 2 U.B.R. 66; A.I.R. 1925 P.C. 29; Rang. F. A. No. 106 of of 1925, Rel. on; 7 Rang. 459= 118 Ind. Cas. 404=A.I.R. 1929 Rang. 137.

——Step-grand-children and collaterals — Preference—Difference in Nationality or religion—Effect of.

Step-grand-children in the absence of real ones or heirs in the direct line exclude collaterals, except in regard to a share in undivided ancestral property which they share equally with collaterals. Step-grand-children cannot be held to have forfeited their right to inherit their step-grandmother's estate because they have already received their grandfather's estate. The real point of view of Buddhist Law is undoubtedly based on community of interest between husband and wife. So strong is the bond between them, that in the absence of natural children husband's or wife's children as the case may be, rank as children of the step-parent in the matter of inheritance to the exclusion of collateral blood relations. 10 L. B. R. 396, followed. Mere separate residence does not by itself now-a-days prove or even set up an inference of a breach of filial relations such as would deprive a child of his rights of inheritance. Burmese Buddhist Law applies even though the parties on one side are not Burmese Buddhist, and the mere fact that an heir or heirs is not of exactly the same religion or nationality is therefore immaterial. There is no provision, which excludes the descendants or others who would ordinarily be entitled to rank as heirs of a Burmese Buddhist from inheritance on the ground of difference in nationality or religion. 70 Ind. Cas. 855=(1922) L.B. 29.

——Widow—Exclusive right of as against children—Rules.

The ordinary rule of Burmese Buddhist Law is that the widow succeeds to her husband's estate to the exclusion of all her children (except the auratha if there is an auratha) and that so long as mother is alive and remains unmarried no child of hers (except the auratha) can claim any share of the property left by their father. Where a Burman Buddhist leaves him surviving his children by a former marriage and also his second wife and his children by her, the children of the second marriage do not upon his death become his heirs. 10 L.B.R. 10; 3 U.B.R. 272, Diss. 2 Rang., 123=83 Ind. Cas. 426=A.I.R. 1924 Rang. 298.

——Widow—Preference over son.

Where a Burman dies leaving a widow and a son, all the property of the deceased devolves on the widow and the son takes no share during the widow's lifetime. 117 Ind. Cas. 29=7 Rang. 388 =50 C.L.J. 192=1929 M.W.N. 682=34 C.W. N. 117=A.I.R. 1929 P.C. 246.

——Younger brother or sister—If excludes elder —Rule, if extends to children of brother and sister.

A younger brother or sister of the deceased would exclude an elder brother or sister. But where no brother or sister of the deceased survives him, the children by the elder brother are not excluded by the children of the younger brother but each is entitled to equal share. A.I.R. 1928 Rang. 67 and A.I.R. 1924 Rang. 73 (F.B.), Rel. on.; (1892-96) 2 U.B.R. 189, held not good law. 121 Ind. Cas. 808=7 Rang. 811=A.I.R. 1930 Rang. 59.

——Younger brother or sister—If excludes elder.

Younger brothers and sisters exclude the elder

brothers and sisters as heirs to a deceased brother or sister. S.J.L.B. 37; A.I.R. 1925 R. 231; 41 Cal. 887, Rel. on. 4 Rang. 62=96 Ind. Cas. 370=A.I.R. 1926 Rang. 142.

——Younger half brother and elder brother's son—Preference.

A younger half-brother's or half sister excludes deceased's elder brother's son. (Civil S.A. No. 123 of 1916 of the Chief Court, Diss.) 84 Ind. Cas. 279=3 Bur.L.J. 137=A.I.R. 1924 Rang. 367.

(q) Shares.

——Appathitta child and collaterals of parents—Shares of.

Where there is no natural or **kittima** child the **appathitta** child takes half of the estate of the adoptive parent, and the other half goes to the relatives of the adoptive parent. 2 Rang. 661=85 Ind. Cas. 286=A.I.R. 1925 Rang. 178.

——Auratha son and widower father—Rights of.

A Burmese Buddhist and his wife jointly acquired certain property. The wife died leaving a son. The husband married again and there was no prior partition with his son by the first wife. **Held**, that the son was entitled to a fourth share of the property and the father has an absolute right to sell three-fourth of the property. 8 Bur. L.T. 25=27 Ind. Cas. 632=8 L.B.R. 115.

——Children and grandchildren, progeny of different marriage—Shares of—Rule.

The general rule that in a division between children and grandchildren the latter take only one-fourth of the share to which their parent would have been entitled if alive, is not applicable when the children on the one hand and the grandchildren on the other are the offsprings of different marriages. 2 Rang. 514=84 Ind. Cas. 918=A.I.R. 1925 Rang. 80.

——Grandchild—Share of as against grandmother in payin and Lettetpwa.

In the estate of her deceased grandfather a grandchild gets, as against the step-grandmother, in the absence of issue of the second marriage, one-half of the "payin" and one-eighth of the "lettet-pwa." 1 Rang. 34=74 Ind. Cas. 104=A.I.R. 1923 Rang. 171.

——Property taken by husband to second marriage and property jointly acquired during second marriage—Child of first marriage and widow of second marriage—Shares of.

In the property taken to the later marriage, the child of the earlier marriage as an heir to his father is entitled to three-quarters and the widow of the later marriage to a quarter and in the jointly acquired property of the later marriage the child of the earlier marriage takes a one-eighth share, and the widow of the later marriage a seven-eighth share. A.I.R. 1929 Rang. 253, foll. A.I.R. 1930 Rang. 190.

——Payin property—Child of first marriage and step-mother—Shares of.

Where a person after the death of his first wife inherits property and the property constitutes payin of the person when he marries second time, the child of the first marriage is entitled to three-fourths and the step mother to one fourth in such property. 7 Rang. 578=121 Ind. Cas. 774=A.I.R. 1929 Rang. 253.

——Remarriage of father—Hnapazon property—Step-children and Step-mothers—Shares of.

Where a Burman Buddhist who was married more than once dies leaving **hnapazon** property of the last marriage the law of partition of that property between the pubbaka children and their step-parent is as follows: In a case where there is an issue of the last marriage the step child or children collectively take one-eighth and the step-parent seven-eighths and that in a case where there is no issue of the last marriage the former take one-sixth and the latter five-sixth. S. J. 177 and 2 L.B.R. 174, Overruled. 3 Rang. 549=90 Ind. Cas. 341=4 Bur.L.J. 189=A.I.R 1925 Rang. 340 (F.B.).

——Remarriage of surviving parent—Shares of Auratha child and other children.

It should be taken as the rule of Burmese Buddhist Law not only that the eldest child, if he or she has not already taken a quarter share of the joint estate as **auratha** becomes entitled to a quarter share of that estate on the remarriage of the surviving parent, but also that the children, other than the eldest child, similarly become entitled to a quarter share in the joint estate on the remarriage of the surviving parent. 4 Rang. 207=98 Ind. Cas. 4=A.I.R. 1926 Rang. 211.

——Second marriage — Lettetpwa property—Children of first marriage—Shares of.

A husband during the existence of the second marriage obtained a lease of land from Government and he was holding land under that lease until his death. Formerly he had a house on this land and he was living in it, but his house was burnt down. It was contended that although the lease was taken out by the husband during his coverture with the second wife, the property which he then obtained in the land was in fact the same as the property he had beforehand in the land although in another form and therefore it must be treated as his payin property.

Held, that the rights subsisting in the land at the time of the husband's death must be held to have been the lettetpwa property and it must be presumed in the circumstances that the lease was obtained by the joint skill and industry of the husband and the second wife. The chilren by the first marriage were therefore entitled to one-eighth only of the site and not three-fourths. 2 L.B.R. 174, Rel. on. 6 Rang. 234=111 Ind. Cas. 17=A.I.R. 1928 Rang. 236.

——Several marriages by man in succession—Children by several wives—Shares of—Rule that chidren by one wife are not entitled to property inherited by another—Application of.

If a person has more wives than one, property

inherited by one of the wives during marriage, if still in existence at the death of the husband and wife, descends to the children by that wife and the children by the other wives can lay no claim to succeed to it. But this rule does not apply where a person marries wives in succession after death or divorce of his former wife. On the death of his first wife a person married a second wife. He divorced his second wife and married third. He had children by his first and third wives and no children by his second wife. He diverced the third wife also but her children lived with him. After the persons' death the children by third wife sued children by first wife for a share in the inherited property of the first wife.

Held, that the rule of partition to be applied was the ordinary rule applicable to partition between children of different wives and that the children by the first wife were entitled to three fourth share and the children by third wife to one-fourth share. 7 Rang. 526=120 Ind. Cas. 901=A.I.R. 1929 Rang. 343.

——Son of second marriage—Share of in Hnapazon property of first marriage.

A son from second marriage is entitled to one-eighth share in the **hnapazon** property of the first marriage. His share is independent of the share of his mother and can be sued for in her life-time. 63 Ind. Cas. 28=(1920) 3 U.B.R. 272.

(r) Step-child.

——Joint acquisition of mother and step-father—Right in.

A step-child gets one-fourth in the property jointly acquired by his mother and step-father where there are no children of that marriage, nor any other children of the father by any other marriage, though the property is acquired during the continuance of the marriage or the step-father has married another wife. The step-child has no share in the property jointly acquired by the step-father along with another wife. 60 Ind. Cas. 7 =(1920) 3 U.B.R. 237.

——Step-child of inferior wife—Right to succeed to step-parent.

The provisions of the Burmese Buddhist Law as to step-children's inheriting from step-parents do not apply where the so-called step-child is the child of an inferior wife with whom the husband lived while still married to the superior wife, and where the step-child could not possibly be regarded as having belonged to the family of the so-called step-parent. 3 Rang. 521=93 Ind. Cas. 87=A.I.R. 1926 Rang. 69.

——Right to inherit Step-mother's property

Under the Burmese Buddhist Law when a husband has two wives living at the same time in two entirely separate establishments, the children by the one wife are not entitled to share in the property of the other wife. A.I.R. (Vol. 18) 1931 Rang. 67=8 Rang. 590=131 Ind. Cas. 50.

——Right to inherit to step parent.

Where a Burmese Buddhist who had children by a former wife marries a Burmese Buddhist woman having children by a former husband and there is no issue of the marriage and no property is acquired during coverture then the children of each of the former marriages shall divide the property brought by their respective parents into four shares each and shall give one share thereof to the children of the other marriage.

Where the estate which is to be administered is the estate of a Talaing Buddhist it has to be administered in accordance with Burmese Buddhist Law. The fact that some of the heirs do not happen to practise the same religion as their deceased mother and step-father cannot effect their rights and is entirtly immaterial. A.I.R. (Vol. 21) 1934 Rang. 219=150 Ind. Cas. 1128.

——Right to property of step-mother—Property inherited by one wife during marriage—Suit by other wife—Right of.

Under Burmese Buddhist Law, where a person had more than one wife, the property inherited by one wife during marriage and existing after her and her husband's death, descends only to her children, and the children of the other wife or wives have no claim to it. 63 Ind. Cas. 814= (1921) 4 U.B.R. 11.

——Right to separate property of step-mother.

Two contemporaneous or overlapping marriages may be described as former and latter, the former being that which was contracted earlier and the latter being that which was contracted later, where the two marriages subsist for some time side by side.

When a Burmese Buddhist male has contracted two marriages and both wives have been alive at the same time, the children of the first marriage in point of time, whose parents both predeceased their step-mother, are heirs of their step-mother in respect of her separate property, when there are no children or direct descendants of the step-mother. A.I.R. (Vol. 25) 1938 Rang. 449=1939 Rang.L.R. 160=178 Ind. Cas. 883 (S.B.).

——Succession—Share in property of step-father—Thinthi property.

It is only when a step-father dies leaving no natural lissue and no widow surviving, that the children of his deceased wife by a former husband are entitled to his property under Ss. 294 and 295 of the Digest. The step-children can immediately on their mother's death, claim a share of the property acquired jointly by their mother and step-father during their marriage. Such a claim, if not made within twelve years of their mother's death, would be barred under Art. 123 of the Limitation Act. In respect of their mother's **Thinthi** property, however, the claim can be made by the step-children even on the subsequent happening of their step-father's death. 12 Bur. L.T. 44=47 Ind. Cas. 139=6 L.B.R. 176.

——Step-son—Right to succeed to step-mother—Exclude parents and collaterals.

A step-son governed by the Burmese Buddhist Law can suceed as an heir to the separate property of his step-mother and excludes the parents of his

step-mother as well as other collaterals. 10 L.B.R. 396=64 Ind. Cas. 415=13 Bur.L.T. 216.

(s) Widow.

——Childless widow—Right to husband's ancestral property.

A childless widow of a man who had died after his parent's death succeeds to his share of the ancestral property in question provided the property in question is not held on some feudal tenure or is not appurtenant to some hereditary office. When two brothers were in joint possession of immovable property the sale by surviving brother of the whole property was invalid and having regard to the law of pre-emption was also invalid even in regard to his own share. 30 Ind. Cas. 601=8 Bur.L.T. 155.

——Children of different marriages—Shares.

Where two wives are married by a Burmese Buddhist successively and he dies leaving a widow, children by her and children by his earlier wife, the widow is entitled to a one-fourth share of the deceased's property, her children to one-eighth and the children of the former wife to fiive-eighth. 12 Bur.L.T. 75=51 Ind. Cas. 588=10 L.B.R. 10.

——Right of—Eldest son and Eldest daughter—Shares of widow's power to alienate.

Where there has been a complete divorce, a daughter who goes to live with her mother and does not maintain filial relations with her father, is not entitled to inherit the latter's estate on his death. The heir of a deceased husband, under Buddhist Law, is his widow and not any of his children except the eldest son in respect of a fourth of the estate until the death of his widow. The three-fourth's share which goes to the widow is her absolute property, to do what she will wish. But she has no right to dispose of the one-fourth share of the eldest son, even in case of necessity. To the eldest daughter also, certain specified property is allotted and the remainder goes to the widow as her absolute property. But in the case of necessity such as for the maintenance of younger children, the widow is entitled to dispose of the special property reserved for the eldest daughter. 15 Ind. Cas. 919=(1912) 1 U.B.R. 125.

——Right of inheritance.

Widow owning half the joint property during her husband's lifetime, inherits this half as her own when he dies. 50 Ind. Cas. 545=11 Bur.L.T. 258.

——Right of—Legal representative.

The legal representative (i.e., the person who in law represents the estate of the deceased) of a deceased Burmese Buddhist male is his widow. A.I.R. (Vol. 21) 1934 Rang. 196=153 Ind. Cas. 56.

(t) Wife.

——Co-wives—Senior wife inheriting—Junior gets no interest.

When a husband, who has a senior and a junior wife, dies, the junior wife will not be entitled to inherit a portion of the property inherited after marriage by the senior wife from her parents: 5 Rang. 448=105 Ind. Cas. 247=A.I.R. 1927 Rang. 277.

——Seccession Co-wives—Shares.

Under Burmese Buddhist Law, before a second wife can succeed to her husband's estate she must show that her connection with the deceased was such that she may be said to have been endowed with proprietary as well as personal rights.

Although it is quite lawful for a Burman Buddhist to have two wives of equal status, who are entitled to share equally in his estate, for the wives to share equally, it must be shown that they are of equal status. A.I.R. (Vol. 21) 1934 Rang. 224 =154 Ind. Cas. 265.

——Inferior wife—Living apart—Right of.

A wife of inferior status or ordinary concubine is entitled to three shares out of seven shares and a half, that is, to two-fifths, of the husband's estate but this applies to the case of wives living together with the husband. Where the wife of an inferior status lives apart, she is allowed to retain only such property as was in her actual possession but has no right of inheritance. 2 Bur.L.J. 292=2 Rang. 62=79 Ind. Cas. 501=A.I.R. 1924 Rang. 105.

——Inferior wife—Right of—Burden of Proof.

A husband may enter into and maintain conjugal relations with a person whose position falls short of that of his first or chief wife. But such second wife must, before she can succeed to her husband's estate, show that her connection with the deceased was such that she may be said to have been endowed with proprietary, as well as personal rights; and the proof required of her is more strict where she had prior knowledge of the existence of the first wife and lived separately from, and unknown to her. 1 Rang. 1=73 Ind. Cas. 1044=A.I.R. 1924 Rang. 37.

——Second wife—Share in jointly acquired property of first marriage.

Under Burmese Buddhist Law, the share of a second wife in the jointly acquired property of the first marriage is one-sixth. A.I.R. (Vol. 24) 1937 Rang. 138=169 Ind. Cas. 693.

——Co-wives—Share in lettetpwa property of both marriages—Extent of.

The Share of two wives jointly in lettetpwa property of both marriages is the same as the share of one wife where there is a single wife. The share of the wife by the second marriage is one-quarter. A.I.R. (Vol. 23) 1936 Rang. 417=14 Rang. 697 =164 Ind. Cas. 1023.

——Co-wives—Share in lettepwa property—Eindounggyi with two wives—Property inherited by husband after second marriage is lettetpwa—Share of each of two wives in such property is one-sixth—Such share is not liable for husband's debts —Rule for couples previously unmarried applies to marriage between an eindounggyi and previously married husband or wife.

Where a Burman Buddhist eindounggyi having two wives, inherits after the second marriage immovable property from his father, the property is

lettetpwa of the marriages and is joint property of the husband and wives and not **thinthi** or the separate property of the husband. The share of the two wives jointly is one-third and since they are of equal status the share of each is one-sixth. Each wife acquires a vested interest in one-sixth of the property from the date on which it is inherited and such interest is not liable for all or any part of the debts incurred by the deceased husband alone. [Maung Shwe Ngon v. Ma Mi Dwe, S.J. 110 Dissented from.] The rule for partition on divorce by mutual consent where neither party was at fault between an **eindounggyi** and a husband or wife who had not been previously married is the rule which applies where neither party had been married before. (Text and Case-law discussed.) 3 Rang. 322=94 Ind. Cas. 797=A.I.R. 1925 Rang. 329 (F.B.).

——Second wife—Share in property inherited by husband from first wife.

A second wife is entitled to a one-third share in the property inherited by the husband from his first wife. A.I.R. (Vol. 23) 1936 Rang. 417=14 Rang. 697=164 Ind. Cas. 1023.

——Divorced wives—Shares—Rule.

Upon a divorce between a husband and his two wives, the second wife gets one-sixth of the property jointly acquired in the first coverture and one-third of the property acquired in the second or double coverture. The husband gets two-sixths of the property jointly acquired in the first coverture and one-third of that acquired in the second coverture, so that on this calculation, if the rule be extended to inheritance on the death of the husband, the second wife being an equal heir with the first wife to the husband, gets one-third of the property jointly acquired in the first coverture and half of that jointly acquired in the second coverture. The rule as to division of joint property on divorce can be extended to partition of it on inheritance. A.I.R. (Vol. 24) 1937 Rang. 453=1937 Rang.L.R. 410=172 Ind. Cas. 734.

——Second wife—Right of.

To claim a share in inheritance with the chief wife, the onus of successfully establishing superiority of the second wife over the lesser wife falls upon the second wife, who cannot necessarily be so if she happens to be a contemporaneous wife. The presumption of having no status required by law to share in the inheritance arising out of separate residence is rebutted by the proof of having higher status. 12 Ind. Cas. 191=4 Bur. L.T. 235.

——Second wife—Share of.

Where a Burmese wife asserts that any property was acquired during her coverture the burden must lie upon her of establishing satisfactorily that it was acquired after her marriage. Under Burmese Buddhist Law, the second wife must acquire by marriage a one third interest in the property brought by her husband to the marriage. Where his share before second marriage in the lettetpwa property of his first marriage was one-half, on marriage his second wife acquires a one-sixth interest in this property. A.I.R. (Vol. 23) 1936 Rang. 262=163 Ind. Cas. 604.

——Second wife—Second wife living separately and more a burden than an asset—Right of.

The deceased **A** had married **B** as his first wife; it was with her that he lived as a rule: it was with her that he worked jointly and carried on his business transactions. **M** was merely a woman whom he kept in a separate house and with whom he frequently stayed but who took no part in his business affairs, who contributed in no way towards acquisition of his property and who was from the material point of view a liability rather than an asset:

Held, that the presumption was against **M** being a wife of equal status with the chief wife **B** and that as **M** was the junior wife and as she lived separately from her husband and his chief wife and contributed nothing whatever to the common property, she was not entitled to share in the estate of her deceased husband. A.I.R. (Vol. 21) 1934 Rang. 224=154 Ind. Cas. 265.

——Wife living apart but not guilty of any misconduct—Right to husband's property.

It is obvious that the broad propositions laid down in the Dhammathats can only be received with considerable qualifications and with due regard to modern customs and modes of thought. They cannot be argued as laying down strict rules of law without regard to particular circumstances. Where the wife left her husband's house, not of her own free will and lived in a house opposite that of husband's but continued to be dutiful towards her husband and there was no misconduct on her part entitling the husband to a divorce.

Held, it is quite impossible to say the wife had been guilty of any misconduct of such a nature as to disqualify her from inheriting her husband's estate. As the widow of the deceased, she had a better claim than the grand-son to Letters of Administration. 2 Bur.L.J. 58=75 Ind. Cas. 200=A.I.R. 1923 Rang. 150.

——Who is—Claim as wife — Proof—Mistress—Right of.

The term 'wife' may be very loosely used among the Burmese Buddhists. Where a woman other than the undisputed wife claims a share in his estate as wife, there should be a clear and unequivocal recognition of status to establish wifehood in the legal sense of the term. When the evidence goes to show that her status as wife was not accepted universally in the neighbourhood, and she was only a mistress, her claim cannot succeed. A.I.R. (Vol. 23) 1936 Rang. 464=166 Ind. Cas. 413.

(u) Miscellaneous.

——Agreement by father and son to enjoy property equally—Survivor to succeed excluding heirs—Validity—Son's widow challenging agreement—Estoppel.

It is settled law that a Burman Buddhist cannot make a transfer of his property, which is intended to be operative only after his death. An agreement entered into by a father with his son

that they would enjoy certain house and land equally and that the survivor was to succeed to the whole, to the entire exclusion of the heirs, is invalid as defeating the law of inheritance, but is valid as a disposition **inter vivos**, and upon the son's death his widow is entitled to the son's half-share. In such a case the son's widow is not estopped from questioning the validity of the agreement because of her acquiescence in that she did not claim during the father's life-time. 5 Bur.L.J. 56=95 Ind. Cas. 879=A.I.R. 1926 Rang. 131.

——Attetpwa property — Eindaunggyi couple—Rights inter se.

When two eindaunggyis marry, neither of them thereby acquires any interest in the attetpwa property of the other. The rules which govern the **payin** property of a virgin couple do not apply to the attetpwa property of an eindaunggyi couple nor has the doctrine of common disaster any application. A.I.R. (Vol. 27) 1940 Rang. 286=1940 Rang.L.R. 534=192 Ind. Cas. 425.

——Claim based on relationship—Evidence of general repute—Admissibility and value of.

Plaintiff claimed to be the grand-daughter of the deceased. Her father had predeceased her grandfather and there were no other blood relations competent to give evidence as to her relation with the deceased.

Held, this is a case in which evidence of general repute is of considerable importance provided it is cogent. 1 Rang. 34=74 Ind. Cas. 104=A.I R. 1923 Rang. 171.

——Co-heirs—Rights of, in property inherited—If joint tenants—Right to sue for partition.

The estate of a deceased Burman Buddhist vests in the heirs on the death of the ancestor. Their position resembles that of the heirs of a deceased Mahomedan under Mahomedan Law, and there is no analogy between their position and that of the co parceners of a joint Hindu family under the Hindu Law. The estate of the ancestor in the case of a Burman Buddhist vests in the heirs immediately on the death of the ancestor, but not collectively or jointly, and under Buddhist Law each heir gets a definite fraction in every portion of the estate of the deceased ancestor. He cannot be deemed to be, with his co heirs, a joint owner or joint tenant of the property nor is he entitled to joint possession of the property with them. Therefore, a Burmese Buddhist heir is not entitled to maintain a partition suit, in the strict sense of the word, and his suit must be one for division of inheritance, that is, a suit for the due administration of the estate of his ancestor. 5 Rang. 785=108 Ind. Cas. 809=A.I.R. 1928 Rang. 73.

——Diseased married person — Estate of—Devolution.

The share of a married person who was severely diseased devolves upon his or her death, on the relation who was maintaining the person during his or her life-time. 2 Rang. 328=84 Ind. Cas. 966=A.I.R. 1925 Rang. 34.

——Heir—Liability for debts of ancestor.

The Burmese heir to an estate takes the property of his ancestor subject to the ancestor's debts. A.I.R. (Vol. 23) 1936 Rang. 262=163 Ind. Cas. 604.

——Husband and wife dying within a short interval—Relatives of both—Right of—"Short interval"—Meaning of.

Two months and fourteen days is too long a period to constitute a "short" interval so as to make the exceptional rule aply, namely, that relatives of both should succeed if it is uncertain whether the husband or wife died first or the interval between the deaths of both is short. 1 Bur.L.J. 253=11 L.B.R. 376=A.I.R. 1923 Rang. 136.

——Lunatic's estate—Devolution of—Right of co-heirs.

The share of a person who is insane and incapable of taking care of himself or his affairs should go on his death to the co-heir who maintained and looked after him during his life time. The same principle applies to a person who is not strictly a co-heir of the lunatic if all the co-heirs of the lunatic refused to undertake his custody. In an extreme case, these rules are neither inequitable nor opposed to the present day ideas of the Burmans. (1935) 155 Ind. Cas. 115.

——Lunatic's estate—Devolution—Rule.

The rule that relatives who supported a lunatic child shall take its share, after its death does not apply where the share of the deceased child was not set aside on the death of the parents but was inherited by it. The principle laid down in the Manugye 10, 36, cannot be extended to cover all cases in which relatives take care of lunatics. 6 Rang. 485=113 Ind. Cas. 808=A.I.R. 1928 Rang. 300.

——Lunatic's property—Devolution.

According to the Buddhist Law, the share of a person who is insane or otherwise incapable of managing his affairs should go on his death to the co-heir who had maintained and looked after him during his lifetime. 14 Ind. Cas. 843=5 Bur.L.T. 61.

——Mahomedan father of Buddhist—Right to succession certificate in respect of son's property.

The deceased was living in Burmese style among people, a large majority of whom were Burmese Buddhists. His mother was clearly of Burmese Buddhist birth and had a near connexion who was not merely a Burmese Buddhist but also a senior rahan. The deceased participated in acts of worship of such a Buddhist religious nature as would amount to apostacy.

Held, that until some process of reconversion was undergone he could not be considered a Mussalman, and therefore his father who was a Mahomedan was not entitled to obtain a succession certificate in respect of the property of the deceased. 5 Bur.L.J. 111=98 Ind. Cas. 155=A.I.R. 1927 Rang. 31.

——Pongyi renouncing religious vows—Right to property of lay relative.

A **Pongyi** or a **rahan** at the time of the death of any of his relations cannot inherit from any of the relations even if he subsequently renounces his religious vows. This rule is founded on the

assumption that by becoming a **pongyi** or **rahan** the person is (completely severed from his family as is quite unconnected with them) as if he were dead or adopted into another family.

Thus a person succeeding at the death of another person cannot be divested of the estate by a nearer person who was a **pongyi** or **rahan** renouncing his religious vows, sometime after the death of the person. 4 U.B.R. 159=76 Ind. Cas. 161=A.I.R. 1925 Rang. 150.

——Pongyi—Right to property of lay relative.

A **pongyi** or **rahan** divests himself or all wordly possessions at the time of his ordination and thereafter is incapable of inheriting any property from his lay relatives. 47 Ind. Cas. 681=(1918) 3 U.B.R. 91.

——Suit for share—Limitation—Starting point.

Where the plaintiffs who are Burmans sue for their share in the estate left by their grand-father, the fact that the amount of their share may depend on the joint ownership of their grandmother does not affect the question of limitation and time runs only from the propositus' death though the grandmother has predeceased him. 2 Rang. 514 =84 Ind. Cas. 918=A.I.R. 1925 Rang. 80.

——Surviving daughter—Husband of—Right to succeed to wife's father.

Under the Burmese Law the surviving husband of a person who ex-hypothesi is the then surviving daughter is treated as one of the heirs of the father. 4 Rang. 513=1926 M.W.N. 489=94 Ind. Cas. 916 =3 O.W.N. 735=A.I.R. 1926 P.C. 29 (P.C.).

——Surviving spouse—Right of.

According to Burmese Buddhist Law, on the death of a husband or wife without children the survivor succeeds to the whole of the deceased's estate, including right of the deceased to share in undivided ancestral property. 52 Ind. Cas. 929= 12 Bur.L.T. 79.

——Woman's property—Devolution of.

Where a Burmese Buddhist woman contracts a second marriage on the death of her first husband the property falling to her share on division between her and her issue by the first marriage, goes, on her death, entirely to her children by the second marriage equally between them. The children of the first marriage have no claim to this property. Property acquired by a widow by purchase after the death of her second husband passes to the children of both marriages. They take it **per stirpes** and not **per capita**. 6 L. B. R. 28=12 Ind. Cas. 797=6 Bur.L.T. 1.

22. Texts.

——Dhammathats—Authority of.

The provision in the Dhammathats by which double the value of gifts given to a girl at betrothal had to be given back on breach of promise of marriage is archaic and obsolete and no longer ought to be followed. A.I.R. (Vol. 20) 1933 Rang. 198=11 Rang. 143=146 Ind. Cas. 724.

——Dhammathats—Authority of.

Though the Dhammathats are of supreme authority where questions of succession are concerned, when commercial relations or execution for debt come into question they cannot always be followed. A.I.R. (Vol. 19) 1932 P.C. 152= 10 Rang. 261=55 C.L.J. 497=63 M.L.J. 167=59 I.A. 216=137 Ind. Cas. 1 (P.C.).

——Dhammathats—Authority of.

Per **Otter, J.**—The Dhammathats can only be regarded as directory and not as statements of the law which are necessarily binding in law. 7 Rang. 451=120 Ind. Cas. 137=A.I.R. 1929 Rang. 307.

——Dhammathats—Interpretation.

In interpreting the passages in the various Dhammathats, it is dangerous to lay down any general principle as being deduced therefrom and to apply that principle to circumstances entirely different from the circumstances to which the passages refer. 4 U.B.R. 11=63 Ind. Cas. 814=A.I.R. 1921 U.B. 23.

——Dhammathats—Manugye.

Where Manugye is not ambiguous, other Dhammathats need not be referred to. A.I.R. 1914 P.C. 97, Foll. 7 Rang. 409=120 Ind. Cas. 670= A.I.R. 1929 Rang. 282.

——Kinwun Mingyi's Digest, S. 163—Applicability —Existence of Orasa son—If bar to.

The texts collected in S. 163 of Kinwun Mingyi's Digest are not intended to be applied where there is or has been an 'orasa' son. 7 L.B.R. 27=29 Ind. Cas. 327=6 Bur.L.T. 105.

——Kinwun Mingyi's Digest, S. 308—Rule in—Applicability—Brothers and sisters of husband and nephews and nieces of wife.

The rule in S. 308 of the Kinwun Mingyi's Digest contemplates in the absence of other nearer relatives a division between the brothers of the parents of the deceased couple. But the rule should be applied on analogy to a case where the division is to be between brothers and sisters of the husband and nephews and nieces of the wife. 8 L.B.R. 197, Foll. A.I.R. 1930 Rang. 237.

——Manukye—Authority of.

Where the provisions of the Manukye are clear they must be applied. A.I.R. (Vol. 28) 1941 Rang. 229=1941 Rang. L.R. 440=198 Ind. Cas. 149.

——Manugye—Authority of.

Maung Ba, J.—The Manugye holds a commanding position and where it is not ambiguous it should be followed. A.I.R. 1914 P.C. 97 Foll. 6 Rang 427= 112 Ind. Cas. 413=A.I.R. 1928 Rang. 225 (F.B.).

——"The Manukye"—Authority of.

The "Manukye" is now a safe and proper guide when not in conflict with justice or equity and the present feelings of the Burmans. 2 Rang. 328=84 Ind. Cas. 966=A.I.R. 1925 Rang. 34.

——Manukye, Book X S. 17—Authority of—Duty of Court to follow.

According to S. 17 of Book X of the Manukye if after the death of the parents and before the division of the property an unmarried child dies the brothers and sisters of the deceased child shall share in equal proportions. The High Court is bound to give effect to S. 17 in cases which fall within its ambit. A.I.R. (Vol. 19) 1932 Rang. 187=10 Rang. 162=137 Ind. Cas. 650.

——Maunkye Book X, S. 28—Rule in—Applicability.

The wording of S. 28 of the Book X of the Manukye does not restrict its operation to the vested interest of the deceased in the undivided family property only but appears to extend its operation to the property of the deceased generally which is in the possession of the parent. The rule applies whether the parent is natural or adoptive as adoptive parents stand in the same position as the natural parents and have the same rights so long as the relationship constituted by adoption subsists. A.I.R. (Vol. 28) 1941 Rang. 99=1940 Rang.L.R. 831=194 Ind. Cas. 313.

——Manukye Book X, S. 28—Rule in—Authority of.

All property acquired by either or both the spouses before or during marriage passes into common enjoyment and both spouses have a vested interest in all such property; that is "passing into common enjoyment" is a consequence of marriage and not a test of vesting of property. The interest of the wife in the *payin* property of her husband is one-third and she cannot be deprived of such a vested interest in the property of her husband by the rule in Manukye Book X S. 28 to which vested interest the law of inheritance can have no application. A.I.R. (Vol. 28) 1941 Rang. 99=1940 Rang.L.R. 831=194 Ind. Cas. 313.

——Manukye Book X, S. 28—Scope of.

The provisions contained in S. 28. Book X of the Manukye are not to be extended by analogy or otherwise to cases which are not brought within the ambit of the section. A.I.R. (Vol. 21) 1934 Rang. 318=12 Rang. 409=152 Ind. Cas. 768.

——Vinaya—Authority of.

What is contained in the Vinaya is the law laid down by Lord Buddha for the guidance of the members of the Sangha inasmuch as the breach of any of the rules is visited with punishment Looking from another point of view the rules contained in the Vinaya have the force of Customary Law inasmuch as they have become hallowed by practice and usage for over 2 000 years. Hence the Vinaya may be termed the ecclesiastical Code of the Budhist monks of Burma. A.I R. (Vol. 26) 1939 Rang. 305=1939 Rang.L.R. 311=183 Ind. Cas. 673 (F.B.).

23. Widow.

——Administration—Right of.

It may be laid down as a general rule that the widow or widower is the proper person to administer the estate. The widow or widower usually has possession of the whole of the estate at the time of the death of the other spouse and is in most cases entitled to the whole or a large part of it. Though it would be rash to lay down an absolute rule that in no circumstances should letters of administration be granted to any other person, it would require very special reasons to justify such a grant. A.I.R. (Vol. 28) 1941 Rang. 133=194 Ind. Cas. 439.

——Alienation—Powers of.

A widow's interest in *hnapazon* property is one half with a life-interest in the remainder. A mortgage by a widow of more than half of such property is not valid unless it is shown that the mortgage was for the necessities of the family and the burden of proof of such necessity lies on the mortgagee. 17 Ind. Cas. 956=5 Bur.L.T. 170.

24. Will.

——Capacity to make.

A Burman Buddhist has no power to make a will. 2 Rang. 388=84 Ind. Cas. 385=A.I.R. 1925 Rang. 8.

——Capacity to make—Chinese Buddhist.

A Chinese Buddhist is entitled to make a will. A.I.R. 1925 P.C. 29, Foll. A.I.R. 1930 Rang. 192.

——Testamentary disposition in guise of gift—Validity.

It is not only a death-bed gift which is void under the Burmese Buddhist Law but a gift in the nature of testamentary disposition or, in other words, a testamentary disposition in the guise of a gift is also void as contravening the fundamental principles of the Burmese Buddhist Law which recognizes no form of succession other than intestate succession. A.I.R (Vol. 26) 1939 Rang. 59=179 Ind. Cas. 946.

——Testamentary disposition — Death-bed gifts—Validity—Transfer during life to take effect after death—Legality.

It is contrary to the principles of Burmese Buddhist Law, to be collected from the texts and authorities, that a Burman Buddhist by means of what is, or is in effect, a testamentary disposition, should attempt to evade the rules of succession and inheritance prescribed under the personal law to which he is subject. If a Burman Buddhist by a voluntary transfer *inter vivos* assigns property to a person who is, or is deemed to be, a stranger, with the intention that such transfer should become operative after his death, the transfer is null and void. Whether having regard to this rule of law, a transfer is void or not depends upon the facts of the particular case. When such a transfer is made by a Burman Buddhist whose death is imminent, and who is under an apprehension that his dissolution is at hand, it is commonly called a "death-bed" gift, and a *presumptio juris et de jure* arises that the transferor intended the transfer to become operative after his death.

Per *Mya Bu, J.*—As the Burmese Buddhist Law does not recognise any form of succession other than intestate succession, no Burman Buddhist can, under the guise of making a gift be allowed in effect to make a will. A.I.R. (Vol. 19) 1932 Rang. 104=10 Rang. 224=139 Ind. Cas. 278.

——What amounts to—Document executed as gift or trust—Attempt to evade ordinary law of inheritance—Will.

Where a document by which certain property was transferred under the guise of a deed of gift or trust, but it was really an attempt to dispose of the owner's property after death in order to defeat the operation of the ordinary laws of inheritance:

Held, that the deed was invalid as being a will. A.I.R. 1924 Rang. 13, Foll. 5 Rang. 371=105 Ind. Cas. 51=A.I.R. 1927 Rang. 271.

——Testamentary disposition—Legality.

There is nothing illegal in a Buddhist making a testamentary disposition of his property. Such a disposi-

tion may be of no effect in law, but that does not render it illegal. A.I.R. (Vol. 24) 1937 Rang. 142=171 Ind. Cas. 702.

25. Miscellaneous.

——Benami — Presumption — Person purchasing property in wife's or son's name—Plea of benami —Onus.

A Burman husband or father purchasing property in the name of his wife or child does not stand in the position of a Hindu or Mahomedan in whose cases the law raises a presumption of benami. He has to show further with what particular object or motive he purchased the land before the Court can decide whether the property purchased was a benami transaction or not; Rang. First App. No. 36 of 1925 and A.I.R. 1926 P.C. 77, Rel. on. 7 Rang. 751=A.I.R. 1929 Rang. 257.

——Lettetpwa property—Alienation by husband—When binding on a wife—Estoppel.

A husband under the Burmese Law, cannot sell the *Lettetpwa* properties belonging to himself and his wife except under circumstances in which it can be said that he was acting as her agent; where such circumstances are established, the wife will be estopped from denying that the husband was authorised to act on her behalf. 20 Ind. Cas. 341=6 Bur.L.T. 113.

——Religious .Endowment — Dedication — Religious offering—Essentials.

A verbal declaration or delivery of possession is enough to render a Buddhist religious offering irrevocable even without a formal dedication ceremony. 24 Ind. Cas. 465=7 Bur.L.T. 63.

——Religious Endowment—Scheme giving power to trustees to settle or decide disputes—Power to appoint successor to head of kyaung.

Where a scheme regarding land granted by Government for religious purposes is settled, giving to the trustees all powers of control to settle disputes relating to the possession of kyaungs and to decide who should be in possession of the same, then on the death of a monk holding the kyaungs, the trustees and trustees alone have the power to appoint his successor and that though ordinarily in making such appointment, they should consider whether the deceased occupant has nominated a successor who was his senior pupil and well qualified to teach the Buddhist scriptures, the trustees' choice is not narrowed down to such an individual, and they are justified in asking him to acknowledge the scheme settled for the management of the kyaungdaik and on his refusal to acknowledge it, are justified in appointing other monks to take possession of kyaung. 7 Rang. 245=118 Ind. Cas. 609=A.I.R. 1929 Rang. 372.

——Thinghika property dedicated to rahans of Kyaungdaik—Vesting of—Trustees.

Where thinghika property is dedicated to the rahans of kyaungdaik and not to the whole monkhood throughout the world, the property is vested in the head or heads of the monastery as trustees. 7 Rang. 245=118 Ind. Cas. 609=A.I.R. 1929 Rang. 372.

——Tort — Damages—Seduction — Burma Laws Act, S. 13.

In an action for damages for breach of promise of marriage the fact that there was seduction must be taken into account in measuring damages. Under Burmese Buddhist Law an action lies for damages for seduction. The ancient law on this point is approved by public opinion and is in accordance with present customs and practice but as seduction is not a question relating to marriage suits relating to seduction cannot under S. 13 of the Burma Laws Act be decided according to the Buddhist Law. 57 Ind. Cas. 815 =13 Bur.L.T. 6.

——Tort — Damages — Seduction — Cause of action.

In the absence of promise of marriage seduction does not give any cause of action. 42 Ind. Cas. 539 (L.B.).

——Words and Phrases — "Custodian"—"Partition."—Meaning of.

The Burmese word translated: "custodian" literally means the person in whose hands the estate was left, and that which is translated "partition" connotes merely the idea of division or separation. 5 Rang. 785=108 Ind. Cas. 809=A.I.R. 1928 Rang. 73.

BUDDHIST LAW (CHINESE).

Synopsis.

1. Adoption.
2. Advancement.
3. Alienation.
4. Applicability.
5. Divorce.
6. Family.
7. Marriage.
8. Succession.
9. Widow.
10. Will.

1. Adoption.

——"Agnate"—Meaning of.

Among Chinese Buddhists a person belonging to the same clan as the deceased and with the same surname may be regarded as an agnate. As the applicant belonged to the same clan, and his father had the same surname as the deceased *prima facie* he fell within the clan of the deceased; and so far as the question of Letters of Administration was concerned, the applicant is entitled to Letters of Administration. 12 Bur.L.T. 69=51 Ind. Cas. 608=10 L.B.R. 23.

——Proof of—Requirements.

Amongst the Chinese there is nothing which corresponds to appatitha adoption as known amongst Burmese Buddhists and therefore, if a child had been adopted at all it would be, either adoption with a view to inherit or no adoption at all, that is to say, proof of adoption amongst the Chinese would connote the right to inherit. Hence there must be proof not only that the child was brought up in the family but that it was brought up with a view to inherit. A.I.R. (Vol. 28) 1941 Rang. 334=198 Ind. Cas. 777.

——Validity—Adoption of Burmese girl—Validity —Rights of adoptee.

A Chinese Buddist can adopt a Burmese girl and the latter will succeed to his properties in the absence of natural children or adopted son. But where she is a stranger she will be excluded by the agnates of the deceased. 61 Ind. Cas. 684=13 Bur.L.T. 132.

——Widow—Power of—Consent of husband's relatives—Necessity.

A Chinese Buddhist widow can adopt a son to her husband with the consent of her husband's nearest made relatives. 9 Bur.L.T. 187=34 Ind. Cas. 99=8 L.B.R. 404.

2. Advancement.

The presumption of advancement for the benefit of the children arising in the case of a purchase by a Burman Buddhist of property in the name of his children applies to the case of Chinese Buddhists. A.I.R. (Vol. 23) 1936 Rang. 121=161 Ind. Cas. 665.

3. Alienation.

——Alienation by guardian—Minor's liability.

A Chinese Buddhist mother acting as guardian of her minor children's estate has a right to alienate that property even for necessity, only to the extent of her interest in the estate in general, apart from Hindus and Mahomedans, none but the guardian appointed by Court can alienate minor's property. 57 Ind. Cas. 888=13 Bur.L.T. 9.

4. Applicability.

——Burmese wife of Chinese Buddhist—If governed by Chinese Law.

Where a Burmese woman, married to a Chinese Buddhist, regarded herself throughout her life as a Chinese Buddhist and attached herself to the Chinese community even after her husband's death and the community also regarded her as one of them.

Held, succession to her estate would be governed by the Chinese Buddhist customary law. 2 Rang. 94 =80 Ind. Cas. 749=A.I.R. 1924 Rang. 219.

——Father Chinese, and mother Burmese—If subject to Chinese Law—Allegation of Buddhist—Onus.

Where a person's father is of a pure Chinese blood and his mother a Burmese woman and he makes offerings of rice to images of Buddha in his own house, in view of the admitted nationality of the father of such person party alleging that he was Burmese Buddhist must establish his contention. A.I.R. 1930 Rang. 218.

——Son of Chinaman from Burmese woman becoming Burmese in dress and habits—Chinese worship and funeral rites retained—Law applicable—Chinese customs.

A person who was the son of a Chinese father but of a Burmese mother became to some extent Burmese in his dress and habits but as to his worship and funeral rites at all material times he was a Chinese Buddhist. He never included his wife's name in conveyances.

Held, the Chinese customs were retained. A.I.R. 1930 Rang. 218.

5. Divorce.

——Wife's right to jewellery and wearing apparel.

Under the Chinese Customary Law the wife upon divorce is entitled to take her jewellery and her wearing apparel away with her. A.I.R. (Vol. 26) 1939 Rang. 291=184 Ind. Cas. 665.

6. Family.

——"Family house"—Meaning of.

By "family house" the Chinese Buddhist ideas mean a house which has belonged to the paternal ancestors of a person or one which a man has started for his family and their male descendants and which has been occupied by the family continuously from father to son. 9 Bur.L.T. 187=34 Ind. Cas. 99=8 L.B.R. 404.

7. Marriage.

——Essentials of validity—Ceremonies.

No particular ceremony is essential for a valid marriage under the Chinese Law. 9 Bur.L.T. 81=8 L.B.R. 22=32 Ind. Cas. 848=17 Cr.L.J. 112.

——Essentials of validity—Consent of parties to live together and publicity of relationship—Sufficiency of.

Marriage is, in China, concluded according to the will of the contracting parties, and has in some way or other to be made public. Where the question of the status of a chief or first wife is not involved, in the case of marriage among Chinese Buddhists, what really constitutes a valid marriage is the consent of the parties concerned to live together as husband and wife. They must, however, give sufficient publicity to their relationship. The result is the same whether the Burmese Buddhist Law or Chinese Customary Law applies to a marriage between a Chinese Buddhist man and a Chinse Buddhist woman.

Consequently, where it is shown by the evidence that the parties lived together as husband and wife, for some time and they were accepted as such by their relations and friends and there is no evidence to prove that the wife refused to live with her husband she is entitled to maintenance. A.I.R. (Vol. 24) 1937 Rang. 29=38 Cr.L.J. 274=1937 Rang.L.R. 90=166 Ind. Cas. 577.

——Essentials of validity—Elopement followed by consent of parents—Sufficiency.

Even in the absence of any ceremonies which usually accompany a first-class marriage among Chinese Buddhists an elopement of the girl followed by the subsequent consent of the parents renders the union legal and valid. In such cases, the consent of the bride-groom's father is not necessary. 8 Bur.L.T. 198=30 Ind. Cas. 715=8 L.B.R. 208.

——Essentials of validity—Formalities — Written contract—Necessity—Presumption from co-habitation.

Per *Godfrey J.*—Whether a written contract is really one of the essentials of a valid marriage in addition to the six preliminary steps is doubtful. But in a case of repute and long cohabitation where the six preliminary steps are proved, the written contract may be presumed.

Per *Doyle, J.*—Six preliminary steps are necessary to a first class marriage, which in ordinary practice are amalgamated into two. *Usus* is undoubtedly the commonest form amongst many of the lower classes and receives the sanction of the law when the *usus* can be proved by the litigants. The strictly ritualistic marriage is only performed in its complete integrity amongst the wealthier classes though fragments of it are frequently introduced into the lower marriage ceremonies. Though in all respectable families all these formalities are strictly observed, only two or at most three are really essential *viz.*, betrothal as evidenced by the go-betweens or by written contract, the receipt by the bride's family of the presents which is the consideration and the handing over of the woman as wife. The only question in any subsequent dispute would be: Was it the intention of the parties to constitute the relationship of husband and wife, and was the woman given and accepted as wife? The six steps would appear to be formalities which, if entered into would be binding on any party who wished subsequently to repudiate marriage but where consent and publicity are established, their absence could not be pleaded by third parties as invalidating the marriage. 5 Bur.L.J. 17=96 Ind. Cas. 762= A.I.R. 1926 Rang. 90.

——Law applicable—Burmese Law is prima facie applicable to Chinese Buddhists living in Burma, as being lex loci contractus.

The Burmese Buddhist law regarding marriage is *prima facie* applicable to Chinese Buddhists as being the *lex loci contractus* and that in order to escape from the application of the Burmese Buddhist Law regarding marriage a Chinese Buddhist must prove that he is subject to a custom having the force of law in Burma and that that custom is opposed to the provisions of Burmese Buddhist law applicable to the case and if the wife is a Burmese Buddhist woman, the Chinese husband must show further that the application of that custom will not work in justice to her. A.I.R. 1927 Rang. 265 (F.B.). Foll. 5 Rang. 443 =105 Ind. Cas. 244=A.I.R. 1927 Rang. 299.

——Minor — Consent of — Contract by parents against will of minor—Validity.

Under Burmese Buddhist Law a male (adult or minor) cannot be married without his consent and the Court cannot enforce a contract of marriage entered into by the parents against his will. 9 Bur.L.T. 77 =32 Ind. Cas. 507=8 L.B.R. 347.

——Polygamy—If permitted—Secondary wife—Status of.

By the Chiese Customary Law a Chinaman can have only one wife, though he may have concubines or secondary wives in addition, who also enjoy a recognized legal status so that it would follow that whoever of the two was not the chief wife would be in the position of secondary wife or concubine. Though secondary wife would not be a member of his own family in the way that a principal wife would, still she has a recognized legal status her sons inheriting the estate on failure of sons by the principal wife. 5 Bur.L.J. 17=96 Ind. Cas. 762=A.I.R. 1926 Rang. 90.

8. Succession.

——Absence of adoption—Widow's right to control and possession of estate.

According to Chinese Law, failing sons, a legitimate heir is adopted because it is of paramount importance that the line should not be allowed to die out. If a sonless father fails to adopt the elders of the house, that is the senior agnates will adopt one for him. On the failure of the elders the Chinese Customary Law contemplates no other form of succession save that of an agnate in the next generation, a brother's son, where one is available; and among brothers if the eldest son has no son the eldest son of the second brother succeeds. The widow of the deceased has practical control of the inheritance during the lifetime of her sons and the same rule would apply in the case of a nephew who ought to be adopted in default of direct issue. Since the estate is deliverable to the nephew during widow's lifetime time does not begin to run under Art. 123, Limitation Act, against the nephew till the death of the widow. A.I.R. (Vol. 24) 1937 Rang. 354=172 Ind. Cas. 550.

——Chinaman dying leaving two sons and two daughters and their mother, Burmese lady—Mother dying after 16 years—Rights of sons and daughters —Shares.

One *C* a Chinaman died in 1902 leaving behind him two sons *P* and *D*, two daughters *S* and *N* and their mother *M*, a Burmese lady. *M* died in 1918. *S* then sued in 1919 to recover her share of *M's* estate. But her suit was dismissed as *M's* estate was held to have been governed by Chinese Customary Law. *N* subsequently brought a suit like that of *S* in 1927 for her share in *M's* estate. It was contended that *M* died as a Chinese Buddhist and hence did not inherit anything from her husband and that *M* was in possession from 1902 to 1918 on behalf of her two sons and hence *N* was not entitled to any share.

Held, (1) whether *M* was a Burmese Buddhist or a Chinese Buddhist or Confucian *N's* share under Burmese Buddhist Law was the same, that is one-fourth; (2) the argument that *M* was not entitled to inherit and was in possession on behalf of the two sons was based on the supposition that the Chinese Customary Law applied to *C's* estate but in fact the Succession Act applied, and, therefore even if the estate were *C's* estate the four children would still share equally in the property. A.I.R. 1930 Rang. 81 (F.B.), Considered and Applied. A.I.R. 1930 Rang. 222.

——Illegitimate son—Father recognizing paternity —Effect of.

An illegitimate son of a husband would be entitled to inherit only if the latter dies without leaving any other heir, but an illegitimate son is entitled to a half-share or to an equal share with a legitimate son only if the deceased father had recognized his paternity and had also made himself responsible for his upbringing. A casual contribution towards the expenses of a religious ceremony of the child cannot be deemed to be in the discharge of responsibilities for his upbringing. Responsibilities for the up-bringing must be something analogous to the responsibilities that a man would assume for his own legitimate children, and

mere compliance with statutory obligation for the maintenance of a child, cannot be regarded as denoting the assumption of responsibilities by the father for his illegitimate son's up-bringing. A.I.R. (Vol. 26) 1939 Rang. 154=1939 Rang.L.R. 258=180 Ind. Cas. 943.

——Order—Son—If excludes daughter.

The succession to the estate of a Chinese Buddhist is governed by the Chinese Customary Law. Under this law the son is entitled to the whole of the deceased's estate to the exclusion of his sister. A.I.R. (Vol. 25) 1938 Rang. 254=177 Ind. Cas. 501.

——Order of—Sons—If exclude daughters—Right of unmarried daughters.

According to the Customary Law of Chinese Buddhists, sons exclude daughters in succession to the property of the parents. Under the Chinese Buddhist Law unmarried daughters have a right of maintenance. 50 Ind. Cas. 543=11 Bur.L.T. 224.

——Right of heirs—Letters of administration—Necessity—Succession Act (1925), S. 212.

Where the deceased is a Chinese Buddhist and not a Burmese Buddhist, the heirs of such a person must obtain letters of administration before a final decree in their favour can be given. A.I.R. 1930. Rang. 81, Rel. on. A.I.R. 1930 Rang. 218.

——Rule—Chinese Buddhist having chief wife and secondary wives, sons and daughters—Succession.

Under Chinese Customary Law a Chinaman may only have one chief wife but he may have a number of secondary wives or concubines. A concubine in Chinese Customary Law is not a casual mistress but has a recognised legal status. She is entitled to maintenance out of the estate of the person with whom she has contracted such a union.

Under Chinese Customary Law the estate of a deceased person is divided amongst the sons. Daughters only succeed when there are no sons and the widow only succeeds when there are neither sons nor daughters. If there are sons or daughters the widow has only a right to maintenance and a claim for a provision for her funeral.

The secondary wife of a deceased Chinaman settled in Burma will be entitled to be maintained out of the estate and to have a provision made for her funeral, but will have no further interest in the estate. A legitimate daughter of the deceased will be entitled to maintenance until she marries. She will also be entitled to have a sum set apart for the expenses of her marriage. A.I.R. (Vol. 20) 1933 Rang. 313=11 Rang. 310=148 Ind. Cas. 492.

——Rule—Property acquired by woman after death of first husband goes to second husband—Estate of first husband goes to son by first husband in preference to daughter by second husband.

According to the Chinese customary law, the rule of inheritance is that when a man dies his property, real and personal, is equally divided among all his sons, that daughters succeed only when there are no sons and that the widow succeeds only where there are neither sons nor daughters. If there are sons or daughters, the widow has only a right to administer the estate and to be maintained out of it and a claim on the estate for provision for her funeral, but the property vests not in her, but in the children. But the rule that the widow does not inherit has not hitherto been adopted in the Courts in this country. Where the Chinese widow marries a Burman husband, the property acquired by her, after her Chinese husband's death and before her second marriage goes, according to the customary law of Chinese Buddhists, to her second husband. 1 Rang. 161=74 Ind. Cas. 933=2 Bur.L.J. 79=A.I.R. 1923 Rang. 180.

——Widow—Rights of.

Under Chinese customary law, in cases where there are children, the widow takes no share in the deceased husband's estate. She has a claim for maintenance against the estate and possibly in certain cases certain other claims, but the estate belongs to the children. A.I.R. 1923 Rang. 180. 2 Bur.L.J. 102=79 Ind. Cas. 244=A.I.R. 1923 Rang. 236.

——Wife—Rights in property acquired with joint funds.

It is doubtful whether wife gets no rights in the property acquired with joint funds of the husband and wife after the marriage. 4 Rang. 110=97 Ind. Cas. 876=A.I.R. 1926 Rang. 172.

9. Widow.

——Remarriage with Burman—Effect on nationality.

There is no authority for the suggestion that the mere fact of the marriage of a Chinese Buddhist widow with a Burman alters her nationality from Chinese to Burmese. 1 Rang. 161=74 Ind. Cas. 933=2 Bur.L.J. 79=A.I,R. 1923 Rang. 180.

——Right of as against children of deceased—Right to grant of administration.

Under the Chinese Customary Law, the widow's sole right in the estate in the presence of children, is the right to maintenance and ultimately to funeral expenses. A right to maintenance out of the estate of the deceased is not a right to any share of the estate; it is not even a charge on the estate. The widow, therefore, does not fall within the provisions of S. 218 (1), Succession Act, 1925; and consequently the widow of an intestate Chinese Buddhist, deceased in Burma, succession to whose estate is governed by the Chinese Customary Law, is not entitled to the grant of letters of administration to that estate as against the son of the deceased. A.I.R. (Vol. 26) 1939 Rang. 74=1939 Rang.L.R. 170=179 Ind. Cas. 599 (F.B.).

[Overrules A.I.R. (Vol. 25) 1938 Rang. 321=177 Ind. Cas. 628=1938 Rang.L.R. 249.]

——Right of—Maintenance.

A rule that deprives a widow of her right to maintenance for her refusal to live in the family house, should not be enforced where the other members of the family have made themselves objectionable to her or rendered it impossible for her to live with them. 9 Bur.L.T. 187=34 Ind. Cas. 99=8 L,B.R. 404.

——Rights of—Powers of alienation—Chinaman dying leaving children by Chinese wife and Burman widow—Widow administering estate for herself and the children—Mortgage by her for necessity is valid and binding on the estate.

Where a Chinese Buddhist dies leaving behind children by Chinese wife and Burmese widow and the latter administers the estate of her deceased husband for herself and her children from the date of her husband's death and while so administering it executes a mortgage for necessity and the money is expended for the benefit of the estate, the mortgage is valid mortgage and is binding on the property comprised therein irrespective of the fact whether the widow has a right to share in the estate of her husband or whether her right is limited to maintenance of such estate and whether the Chinese customary law or ordinary law is applicable. 1930 M.W.N. 149=31 M.L.W. 576=57 I.A. 38=8 Rang. 172=121 Ind. Cas. 233=A.I.R. 1930 P.C. 26=58 M.L.J. 178 (P.C.).

10. Will.

——Power to make.

A Chinese Buddhist domiciled in Burma, though governed by the Burmese Buddhist Law which does not recognize a will, is competent to make a will under a custom having the force of law. A.I.R. (Vol. 28) 1941 Rang. 241=1941 Rang.L.R. 285=196 Ind. Cas. 636.

——Testamentary power.

A custom having the force of law is prevalent among Chinaman in Burma whereby they dispose of their property by will—a custom which is opposed to the provisions of the Burmese Buddhist Law. They also have customary rules of inheritance which are in conflict with these to be found in the Burmese Buddhists. It is these customs which should govern Chinese Buddhists in Burma. A.I.R. 1925 Rang. 29; 24 Mad. 650; Mr. Anwaruddin's case, (1917) 1 K.B. 649; *Chetti* v. *Chetti*, (1909) P.D. 87 and A.I.R. 1915 P.C. 86. Rel. on. 6 Rang. 623=114 Ind. Cas. 513=A.I.R. 1929 Rang. 22.

——Testamentary power.

The Law of Succession amongst Chinese Buddhists is the Customary Law which allows disposition of property by will. 2 L.B.R. 95. foll. 13 Bur.L.T. 18 =57 Ind. Cas. 900=10 L.B.R. 159.

BUILDING.

See (1) CO-SHARER.
(2) LANDLORD AND TENANT.
(3) T. P. ACT, S. 51.

——Lease. See LEASE.

——Sites. See MUNICIPAL ACTS.

BUILDING AND IMPROVING ON ANOTHER'S LAND.

See ACQUISCENCE.

BUND

See (1)ALLUVION AND DILUVION.
(2) RIPARIAN OWNERS.

BUNDELKHAND ALIENATION OF LAND ACT (II OF 1903).

——Scope—Act does not deal with alienations between members of same tribe.

Per *Boys, J.*—There is good ground in the Act itself to justify a finding that the Act in no way deals with alienations, whether permanent or otherwise, between members of the same tribe. 49 All. 8=24 A.L.J. 945=97 Ind. Cas. 455=A.I.R. 1926 All. 617 (F.B.).

——Scope—Plea of bar to sale—Plea raised at later stage—Competency.

Where a decree-holder obtained a declaration against judgment-debtor after objection by the latter that the property belonged to the latter and was thus liable to attachment and sale in execution an objection by the judgment-debtor that the property is not liable to be sold under the Bundelkhand Land Alienation Act is not barred. L.R. 4 A. 607=21 A.L.J. 917=1924 A. 261.

——S. 2—Trees—Trees apart from land are not "land" within S. 2. 6 L.R.A. (Civ.) 277=87 Ind. Cas. 262=A.I.R. 1925 All. 587.

——S. 3—Agriculturist holding property for non-agriculturist—Resultant trust cannot accrue.

If the ostensible alienee is an agriculturist but he holds the property for a third party who is a non-agriculturist, no resultant trust can accrue in favour of the beneficial owner in definance of the provisions of S. 3 (2) of the Act No party can be allowed to circumvent or defeat the provisions of law. A.I.R. (Vol. 32) 1945 All. 141=1945 A.L.J. 83=1945 O.W.N. (H.C.) 82=1945 A.W.R. (H.C.) 13=I.L.R. (1945) All. 261.

——S. 3—Decree obtained prior to Act—Effect of Act.

The right of a non-agriculturist mortgagee to foreclose the property covered by his mortgage prior to the passing of Act cannot subsist after the passing of the Act if the foreclosure sought is against an agriculturist transferee. Section 3 makes no exception of any kind in favour of a mortgagee who had obtained his mortgage entitling him to foreclose the property prior to the passing of Act. A.I.R. (Vol. 32) 1945 All. 141=1945 A.L.J. 83=1945 O.W.N. (H.C.) 82=1945 A.W.R. (H.C.) 13=I.L.R. (1945) All. 261.

——S. 3—Non-agriculturist mortgagee cannot obtain property by means of private sale.

Even if the right of a non-agriculturist mortgagee to foreclose the property prior to the passing of the Act is left undisturbed he cannot obtain the property by means of private sale as that would offend the provisions of the Act. A.I.R. (Vol. 32) 1945 All. 141=1945 A.L.J. 83=1945 O.W.N. (H.C.) 82=1945 A.W.R. (H.C.) 13=I.L.R. (1945) All. 261.

——S. 3—Pre-emption, suit for—Sanction of Collector.

The sanction contemplated in S. 3 of the Land Alienation Act applies to a voluntary transfer and there is nothing in the Act which provides for sanction to be given to an intending pre-emptor to bring his suit. A Court is not entitled to grant a decree for pre-emption where the pre-emptor is a person who cannot purchase the property in question as not being the member of the agricultural tribe within S. 3 of the Land Alienation Act. 37 All. 662=30 Ind. Cas. 949=13 A.L.J. 949.

——S. 3—A non agricultural benami purchaser acquires no title to the property.

The person in whose favour a deed of sale has been executed so long as he is an agriculturist, is the absolute owner of the property and no non-agriculturist benami purchaser acquires any title to such property. 26 A.L.J. 673=9 L.R.A. (Rev.) 200 =115 Ind. Cas. 650=A.I.R. 1928 All. 511.

——S. 3, Cl. 1 (a)—Ostensible alienee a member of agricultural tribe—No sanction of Collector necessary—Collector not entitled to enquire into propriety of alienation.

Where apparently the alienee is a member of the agricultural tribe as the alienor, or is a member of an agricultural tribe and is a resident of the district in which the land is situated no sanction of the Collector is necessary and the Collector has no power to enquire into the legality or propriety of the alienation. 26 A.L.J. 673=9 L.R.A. (Rev.) 200=115 Ind. Cas. 650=A.I.R. 1928 All. 511.

——Ss. 3 and 14—Sale—Pre-emption.

The policy of Bundelkhand Land Alienation Act is to prevent persons who are not members of agricultural tribe from acquiring properties. S. 3 applies to all permanent alienations even though they are brought about by the exercise of the right of pre-emption. 77 All. 467=30 Ind. Cas. 404=13 A.L.J. 662.

——Ss. 3 and 16 (a)—Pre-emption—Suit for pre-emption—Pre-emptor not member of same agriculutural tribe as vendor but co sharer in village—Vendee, member of same agricultural tribe as vendor but not co-sharer in village—Right to pre-empt—Agra Pre-emption Act (XI of 1922), S. 7.

Certain persons claimed a right of pre-emption, of a property situated in a district of Bundelkhand, which was sold on the 22nd December, 1923, and the vendor and vendees were members of the same agricultural tribe but the vendees were not co-sharers in the village at all. The pre-emptors, on the other hand, were not members of the same agricultural tribe as the vendor but were co-sharers not only in the mahal but in the very khata in which the share sold was situated. Before bringing their suit for pre-emption the pre-emptors did obtain the sanction of the Collector under the Bandelkhand Alienation of Land Act, S. 16 (A) as amended by Act IV of 1915. The pre-emptors based their claim mainly on the custom recorded in the wajib-ul-arz of the village and the vendees contested the suit on the ground that the pre-emptors had no right to maintain the suit and that they had no preferential right as against them.

Held, that a right of pre-emption is not the same thing as a right of purchase. It therefore, follows that the sanction obtained by the pre-emptors to pre-empt the property cannot strictly be taken to be a sanction to purchase it. Moreover as the pre-emptors are not of such a class as by right to be entitled to purchase the property, but they might, if they obtain the sanction of the Collector become so entitled to purchase their right is conditional, and so they are not absolutely entitled to purchase; their right is conditional and so they are not entitled to purchase the property under the Bandelkhand Act within the meaning of S. 7, Agra Pre-emption Act.

Per *Sulaiman, J.*—It was obviously intended that in areas where the Agra Pre-emption Act applies, there can be no right of pre-emption except in accordance with the Act. The Pre-emption Act undoubtedly applies to Bundelkhand, and whatever right the present plaintiffs might have had independently of the Act, cannot now be enforced. They can only succeed if they are entitled under the Pre-emption Act to pre-empt. Although the Act applies to them, and they would come within the classes of persons mentioned in S. 12, they are debarred from taking advantage of these provisions because S. 7 expressly prevents the Act from conferring any benefit on them. The result is that S. 3 takes away any right that they might have had independently of the Act, and S. 7 prevents the conferring on them of any right under the Act. Thus they have lost all right of pre-emption. 50 All. 430=107 Ind. Cas. 570=26 A.L.J. 142=A.I.R. 1928 All. 186.

——S. 4—Amendment of notification—Power of.

The power to determine by notification in the Gazette what bodies of persons in any district are to be deemed agricultural tribes for the purposes of the Act comprehends power to amend, vary or rescind any notification whatsoever. A.I.R. 1930 All. 856.

——S. 4—Brahman.

Brahmo Bhats are included in the term "Brahman." 49 All. 887=25 A.L.J. 678=8 L.R.A. (Rev.) 187=101 Ind. Cas. 844 (1)=A.I.R. 1927 All. 486.

——S. 4—Scope.

Per *Ashworth, J.*—An order under S. 4 allowing Local Government to determine what persons are to be deemed be agriculturist must be deemed to have retrospective effect. 51 All. 780 =1929 A.L.J. 448=121 Ind. Cas. 211=A.I.R. 1929 All. 421.

——S. 4, 6 and 9—Hindu Ghosis—Agricultural tribe—Duty of Court.

Hindu Ghosis of Jalaun District are sub-caste of Ahirs and are members of agricultural tribes within the meaning of the above Act. The provisions of the Act are mandatory on Civil Courts and a Civil Court will refuse to pass a final decree on a mortgage in contravention of S. 6 of the Act, independently of any objection raised by the defendant. 41 All. 294=50 Ind. Cas. 424=17 A.L.J. 294.

——Ss. 6, 9, 16—Mortgage by agricultural to agrculturist —Suit — Reference — Suit consigned to record room—Subsequent enactment of Amending Act—If retrospective.

Where in a suit by an agriculturist to enforce a mortgage which had been executed in his favour by another member of an agricultural tribe, the Subordinate Judge, being of opinion that no decree for sale could be passed in view of S. 16 of the Bundelkhand Land Alienation Act, made a reference to the Collector with the view to the latter substituting a mortgage in the form prescribed by S. 6 of the said Act, but the Collector ruled that S. 9 was not applicable to the case as both the mortgagor and the mortgagee were members of an agricultural tribe and returned the reference and the Subordinate Judge thereafter 'consigned the case to the record room', and the Bundelkhand Land Alienation Amendment Act of 1929 having come into force, the mortgagee again applied for a decree for sale:

Held, that the order of the Subordinate Judge consigning the case to the record room operated as a final adjudication of the rights of the parties and the mortgagee was not entitled to apply for sale under the Amendment Act as the suit must be deemed to have terminated before the Act was passed. A.I.R. (Vol. 19) 1932 All. 614=1932 A.L.J. 584=54 All. 482=139 Ind. Cas. 170.

——Ss. 6, 16—Applicability—Simple mortgage by agriculturist in favour of agriculturist.

Section 16, Bundelkhand Land Alienation Act, which bars the remedy by sale in execution in the case of simple mortgages executed by an agriculturist is not confined in its operation to simple mortgages executed in favour of non-agriculturists. It is applicable also to simple mortgages executed in favour of agriculturists. A.I.R. (Vol. 18) 1931 All. 739 =1930 A.L.J. 1558=53 All. 137=130 Ind. Cas. 637.

——S. 6, 17 and 22—Collector making partition behind back of co-sharers, acts ultra vires—Civil Court's jurisdiction.

If the Collector in granting a lease under Section 6 acts illegally and in excess of his powers. Section 22 will not have the effect of ousting the Civil Court's jurisdiction to entertain a suit for declaration that the lease granted by the Collector was *ultra vires*. It is perfectly open to the Collector to transfer to the mortgagees the possession of the land actually in possession of the mortgagor. When the Collector makes in effect a partition of a *patti* behind the back of the other co-sharers for the benefit of mortgagees of one co-sharer, he acts in excess of his powers. 45 All. 450=21 A.L.J. 335=74 Ind. Cas. 666=4 L.R.A. (Civ.) 197=A.I.R. 1923 All. 458.

——S. 9—Reference—Effect.

Quare.—Whether the suit does not terminate on a reference being made by the Civil Court under S. 9 of the Bundelkhand Land Alienation Act.

There is no provision in the Act requiring the Collector to return a reference. If he cannot take action the proceedings terminate. A.I.R. (Vol. 19) 1932 All. 614=1932 A.L.J. 584=54 All. 482=139 Ind. Cas. 170.

——S. 9—Mortgage by conditional sale—Clause struck out on reference to Collector—Jurisdiction of Civil Court.

A suit was brought in a civil court for foreclosure of a mortgage by conditional sale to which S. 9 of the Bundelkhand Alienation of Land Act 1903 applied. The civil court made a reference to the Collector under Cl. (3) of S. 9 who, with the concurrence of the mortgagees struck out the conditional sale clause from the mortgage in suit.

Held, that the civil court was not *functus officio* when it had made a reference to the Collector; but after the Collector had struck out the clause in the plaintiff's deed providing for conditional sale it then became the duty of the civil court to pass a decree for the only relief which it could then grant namely, a simple money decree for repayment of the defendant's debt. 1906 A.W.N. 14=3 A.L.J. 740.

——S. 9—Applicable after a decree is passed.

There is nothing in the wording of the section to support the contention that the provisions of S. 9 have effect only before a decree is passed and not afterwards. S. A. No. 1457 of 1920, dated 18th July, 1922 Foll.

Obiter.—It is advisable that Original Courts, when they find that a mortgage has been made which is ordinarily enforceable but which covers property situated within Bundelkhand which cannot be sold, should take action under S. 9 (3) before passing the decree and not wait till the decree has been passed. 48 All. 67=23 A.L.J. 927=6 L.R.A. (Civ.) 453=88 Ind. Cas. 484=A.I.R. 1926 All. 136.

——S. 9—Applicability—Mortgage between members of same tribe.

Section 9 does not apply to a simple mortgage between members of the same agricultural tribe: A.I.R. 1925 All. 253 and A.I.R. 1926 All. 136 Considered. 49 All. 8=24 A.L.J. 945=97 Ind. Cas. 455 =A.I.R. 1926 All. 617 (b) (F.B.).

——S. 9 (1)—Reference after a decree is made absolute—Competency.

A reference can be made under Section 9, Sub-Section (3) even after a decree has been made absolute. 6 L.R.A. (Civ.) 101=82 Ind. Cas. 1037= A.I.R. 1925 All. 171.

——S. 9 (1), 10 and 16—Applicability—Simple mortgage between members of same tribe—If affected.

Simple mortgage executed between members of the same tribe does not come within the scope of S. 9 (1) and as Ss. 10 and 16 of the Act cover only those mortgages which come within the general scope of the Act they cannot affect such a simple mortgage. A.I.R. 1926 All. 617 (F.B.). Not Appr., but Foll. 51 All. 780=1929 A.L.J. 448=121 Ind. Cas. 211 =A.I.R. 1929 All. 421.

——S. 16—"Agriculturist".

The character of an agriculturist under the Bundelkhand Land Alienation Act is a creation of the notification of the Local Government under S. 4, and that character does not exist outside the notification. A.I.R. 1930 All. 856.

——S. 16—"Agriculturist" — Notification after preliminary mortgage decree—Effect.

During the period when a particular tribe was deemed to be a non-agriculturist tribe two brothers with their sons constituting a joint Hindu family, executed a mortgage and subsequently a preliminary decree for sale was passed on the same. Before final decree for sale could be made, by notification the Government modified the previous notification by taking the brothers out of previous notification and declaring them as agriculturists. On the foot of this notification when the decree was being executed the brothers preferred an objection to the executing Court claiming that their property could not be sold. *Held*, that the preliminary decree did not give the decree-holders a right to sell the property till the final decree was made and the final decree made after the notification came within the purview of S. 16; and that the shares of two brothers only in the joint property could not be sold but also the shares of their sons could be sold under the final decree. A.I.R. 1930 All. 856.

——S. 16—Applicability — Mortgage between members of same tribe.

(*Boys, J.*) S. 16 has no bearing on temporary

alienations between members of the same tribe, not on the ground that the Legislature did not mean to include such alienations, but because the Act taken as a whole indicates that such alienations are not within its scope and the Act must be given effect to as a whole. 49 All. 8=24 A.L.J. 945=97 Ind. Cas. 455=A.I.R. 1926 All. 617 (F.B.).

——S. 16—Applicability—Property of agricultural tribe—If vests in Receiver in insolvency.

Where a sale of the property of a member of an agricultural tribe who became insolvent was sought to be made on the ground that that property being vested in the Receiver. S. 16 did not apply in the case, held, that inasmuch as S. 16, Sub-Section. (2) Cl. (a) of the Provincial Insolvency Act forbids the vesting in the Receiver of property exempted from liability to attachment by virtue of any law for the time being in force, as in the present case by S. 16, the property vested in the owner and not the Receiver and as such the case was governed by S. 16. 1 U.B.L.R. (A.) 192=58 Ind. Cas. 551=18 A.L.J. 59=42 All. 142.

——S. 16—Scope.

S. 16 bars any remedy by sale in execution of a simple mortgage whether the mortgagees are agriculturists or non-agriculturists. 1930 All. L. J. 1558.

——S. 16—Scope—Bar under—S. 29—Effect of.

S. 29 does not refer to a case where an agriculturist's debt has been settled by a loan from Government, but to a case where the property of an agriculturist is sold by public auction under the Bundelkhand Encumbered Estates Act and bought in by the Government. Under S. 16 no land belonging to an agriculturist shall be sold in execution of any decree of a Civil or Revenue Court. 9 L.R.A. (Rev.) 130 =116 Ind. Cas. 20=A.I.R. 1928 All. 211.

——S. 16—Trees apart from land can be sold.

S. 16 of the Bundelkhand Land Alienation Act is no bar to the selling by the decree-holder, of the trees appertaining or belonging to the groves held by the grove-holder judgment-debtor. 6 L.R.A. (Civ.) 277=87 Ind. Cas. 262=A.I.R. 1925 All. 587.

——S. 16—Scope—Mortgage between members of same tribe—Mortgagee's right—Foreclosure.

Per *F. B. (Boys, J. differing.)*—The plan of the Act is to control contracts of attempted alienation, which would have the effect of placing immoveable property permanently in the hands of persons not members of the agricultural tribe and, therefore, where the mortgagee is also a member of the same tribe though he cannot bring the property to sale in execution a remedy can be given to the mortgagee by providing for foreclosure.

Per *Boys. J.*—The mortgagee can be given a decree for sale. 49 All. 8=24 A.L.J. 945=97 Ind. Cas. 455=A.I.R. 1926 All. 617 (A) (F.B.).

——S. 16—Scope—If retrospective.

Per *Boys. J.*—S. 16 is of retrospective effect. 51 All. 780=1929 A.L.J. 448=121 Ind. Cas. 211= A.I.R. 1929 All. 421.

——S. 16—Scope—Plea of bar—When to be raised.

So long as the property is not sold the judgment-debtors are entitled to claim the privilege to which they are entitled under the Act. 49 All. 887=25 A.L.J. 678=101 Ind. Cas. 844 (1)=8 L.R.A. (Rev.) 187 =A.I.R. 1927 All. 486 (b).

——S. 16—Scope—Transfer of—Decree to Collector for realizing decretal amount—Permissibility.

Land belonging to a member of an agricultural tribe cannot be attached and sold in execution of a decree and therefore a decree cannot also be transferred to the Collector for realizing the decretal amount from such land otherwise than by sale. 48 All. 392=24 A.L.J. 397=93 Ind. Cas. 1020=A.I.R. 1926 All. 339.

——Ss. 16, 11—Execution of decree by leasing property—Legality.

Where a decree-holder was debarred from putting the judgment-debtor's property to sale by S. 16, Bundelkhand Land Alienation Act:

Held, that as the debtor could give a lease in accordance with the terms of S. 11 of the Act, there was no reason why the decree should not be executed by the giving of such a lease. A.I.R. (Vol. 19) 1932 All. 571=1932 A.L.J. 562=140 Ind. Cas. 292 [Overruled in A.I.R. (Vol. 25) 1938 All. 290=175 Ind. Cas. 238 (F.B.)].

——S. 16-A—Right under.

Section 16-A recognised a right in a non-agriculturist to pre-empt. This right has been preserved by S. 7, Agra Pre-emption Act. A.I.R. (Vol. 27) 1940 All. 371=1940 A.L.J. 434=1940 O.W.N. (H.C.) 929=1940 R.D. 404=I.L.R. (1940) All. 522=189 Ind. Cas. 841 (S.B.).

——S. 16-A—Right of pre-emption is wider than right of purchase.

The right of pre-emption is something far wider than the right of purchase. If the Collector grants to a non-agriculturist permission to institute a suit for pre-emption, it must be taken that he has no objection to that person as a purchaser. By implication therefore, he grants his sanction to purchase. The Collector would not grant sanction to institute a suit for pre-emption to a person to whom he would refuse sanction to purchase. A.I.R. (Vol. 27) 1940 All. 371=1940 A.L.J. 434=1940 O.W.N. (H.C.) 929=1940 R.D. 404=I.L.R. (1940) All. 522=189 Ind. Cas. 841 (S.B.).

——S. 16-A—Right under—Conditions of.

Under S. 16-A no person can sue for pre-emption unless the transferor is not a member of an agricultural tribe or unless the pre-emptor belongs to the same agricultural tribe as the vendor. Where this is not the case previous sanction of the Collector is an indispensable requisite. 118 Ind. Cas. 233.

——S. 16-A—Sanction — Sanction of Collector—Sanction does not create substantive right but is applicable only where previous right of pre-emption exists.

Ashworth, J.—S. 16-A, only enables a Collector to sanction a suit for pre-emption where, but for the provisions contained in the earlier part of the section, the applicant for sanction has a right to pre-empt based on custom or contract. The sanction of the Collector does not create a substantive right, but is merely necessary for the otherwise existing substantive

right to be exercised. 50 All. 430=107 Ind. Cas. 570=26 A.L.J. 142=A.I.R. 1928 All. 186.

——S. 17—Applicability—Mortgage decree before Act.

S. 17 of the Bundelkhand Alienation of Land is inapplicable to a decree passed on the mortgage made before the commencement of the Act. 1 U.B.L.R. (A.) 192=18 A.L.J. 59=58 Ind. Cas. 551=42 All. 142.

——S. 17—Mortgage by Collector—Stamp duty.

A mortgage-deed which is executed by a Collector under the provisions of S. 17 of the Bundelkhand Alienation of Land Act on behalf of the mortgagor is not exempt from stamp duty which can be charged under Act (III of 1899). 38 A. 351=34 Ind. Cas. 40=14 A.L.J. 422.

BUNDELKHAND ENCUMBERED ESTATES ACT (I OF 1903), (U.P. I OF 1903).

——Some mortgagors obtaining benefit of Act—Mortgagee not proceeding against them—Effect—Integrity of mortgage broken.

The failure of the mortgagee to make any claim against some of the mortgagors, who had obtained the benefits of the Bundelkhand Encumbered Estates Act, cannot put the mortgagee in a worse position than he would have occupied if he had allowed the integrity of the mortgage to be broken up by permitting the holder of a share in the equity of redemption to redeem that share on payment of a proportionate amount of the debt. In such a case, the mortgagee is entitled to proceed against the share of the mortgagors, who have not obtained the benefit of the Act, for a proportionate share of the mortgage money. 30 All. 141, rel. A mortgagee can obtain relief against some of the mortgagors who did not get the benefit of the Act, for their proportionate liability; because of his failure to claim against others who did get the benefit, he should not be put in a worse position or lose what he would have got had he broken the integrity of the mortgage and allowed the mortgagors to redeem their separate shares. 15 Ind. Cas. 849=10 A.L.J. 171.

——Ss. 2 and 12—Joint decree—Execution—Effect of some of several joint judgment-debtors taking advantage of the Act.

Five out of six joint judgment-debtors took the benefit of the Encumbered Estates Act. A notification was issued under the Act, but the decree holders did not make any claim within the time prescribed. *Held*, that the decree-holders could not recover from the judgment-debtor who had taken advantage of the Act anything more than his proportionate share of the judgment-debt. 1908 A.W.N. 43=5 A.L.J. 132=30 All. 141.

——S. 2—Decree before passing of Land Alienation Act—Effect of.

Where a mortgagee in Bundelkhand had obtained a decree for foreclosure before the passing of Act II of 1903 (Local) but had not obtained an order absolute when the Act was passed: *Held*, that he was only entitled to a simple money decree and not an order absolute for foreclosure. 1906 A.W.N. 271=3 A.L.J. 738.

——S. 10 (2)—Interpretation — "Give" includes creating wakf.

The word "give" in S. 10 (2), Encumbered Estates Act (Bundelkhand) 1 of 1903 is wide enough to cover a case of giving away property by way of wakf so far as property lies in the area, to which the Encumbered Estates Act applies. 51 All. 40=26 A.L.J. 1180=111 Ind. Cas. 583=A.I.R. 1928 All. 516.

——S. 12—Some of several co-mortgagors released from liability—Effect—Integrity of the mortgage—If broken.

Where only some of several co-mortgagors apply and the provisions of the Act are applied to them, it is only the claim against the proprietors who have applied that is duly discharged, and not also the claim against those who have not applied. But the mortgagees also cannot claim the whole of the debt from those who have not applied, on the ground that they were jointly liable for the whole. The legal effect of the proceedings is that the integrity of the mortgage must be deemed to have been broken up by operation of law so far as the share in the joint debt of those who applied was concerned. The failure of the mortgagees to make any claim under the Act as against some of the mortgagors has the same effect in law as if they have accepted from these mortgagors their proportionate share of the mortgage-debt and freed their share from incumbrance, *i.e.*, it has the effect of partially breaking up the integrity of the mortgage debt. 16 A.L.J. 171 and 30 All. 141, Foll. But any one or some of the remaining mortgagors can redeem the whole of the unredeemed property. 6 L.R.A. (Civ.) 496=89 Ind. Cas. 574=A.I.R. 1926 All. 136.

——S. 12—Same person acting for both parties—Validity of proceedings.

Where the person who was acting for plaintiff (a minor) as his next friend was also acting in the same proceedings as the agent of the opposite parties. *Held*, that the proceedings were not regularly taken. 21 A.L.J. 793=77 Ind. Cas. 753=5 L.R.A. (Civ.) 55=A.I.R. 1924 All. 294.

——Ss. 12 and 18—Right of mortgagor—Power of Special Judge under S. 18.

After discharge of debt, mortgagor is entitled to recover the mortgaged property from the mortgagee under S. 12 of the Act. A Special Judge is empowered to eject a person whose debt is discharged under S. 18 of the Act but it does not debar the mortgagor from resorting to Civil Courts to recover his property. 39 Ind. Cas. 582 (All.)

——S. 13—Scope—Contravention—Effect.

Transaction in contravention of section. Is void and cannot be enforced. 19 A.L.J. 645=63 Ind. Cas. 542=3 U.B.L.R. (All.) 112.

——S. 13—Bond for unauthorised mode of paying sum awarded by Special Judge is void.

A bond by a disabled proprietor arranging an unauthorised mode of payment of the sum awarded by the Special Judge is void. 19 A.L.J. 645=63 Ind. Cas. 542=A.I.R. 1921 All. 406.

——S. 18—Scope—If exhaustive—Possession can also be obtained otherwise than under S. 18.

The remedy provided by S. 18 of the Act is not

the exclusive remedy which a proprietor is entitled to have recourse to. That is a summary remedy provided and it does not in any way take away the right of the proprietor to obtain possession in any other way allowed by law. 6 L.R.A. (Civ.) 495 =89 Ind. Cas. 574=A.I.R. 1926 All. 136.

BURDEN OF PROOF.

See (1) CRIMINAL PROCEDURE CODE (1908), O. 21; RR. 58, 63.
(2) CRIMINAL TRIAL—BURDEN OF PROOF.
(3) EVIDENCE—BURDEN OF PROOF.
(4) EVIDENCE ACT, SS. 101 TO 114.
(5) HINDU LAW.
(6) PRACTICE—BURDEN OF PROOF.

BURIAL GROUND.

See also (1) CUSTOM (GENERAL).
(2) EASEMENTS ACT.
(3) LOCAL MUNICIPAL ACTS.

——Lands not dedicated but covered by graves—Alienability and partibility.

A cemetery or grave-yard even including the lands which are not expressly dedicated but are covered by graves are consecrated grounds and cannot be sold or partitioned. A.I.R. (Vol. 18) 1931 Oudh 45= 7 O.W.N. 1159=130 Ind. Cas. 117=6 Luck. 452.

——Village grave-yard—Trespass—Cause of action —Right to sue for injunction.

In the case of a village grave-yard reserved for the use of the inhabitants of a particular community in that village there is strictly speaking no trust whether express or constructive on behalf of anybody. Where the grave-yard belongs to the members of a village community, any member of the community is entitled to sue for an injunction against another member who prevents the use of the common property.

Even if it be held that there is a public trust of some kind or other, a trespass on a burial ground may amount to a trespass on the person in the sense that feelings and sentiments of persons might be outraged by seeing the graves of their ancestors desecrated. A.I.R. (Vol. 19) 1932 Lah. 423=33 P. L. R. 768=138 Ind. Cas. 691.

BURMA ACTS, ORDERS, RULES, REGULATION, ETC.

1. Burma Adaptation of Laws Order, 1937.
2. Burma Anti-Boycott Act (V of 1922).
3. Buma Boundaries Act (V of 1880).
4. Burma Cigarettes Duty Act (II of 1931).
5. Burma Co-operative Societies Act (VI of 1927).
6. Burma Courts Act (XI of 1922).
7. Burma Courts Manual.
8. Burma Criminal Law Amendment (Conditionally Released Prisoners) Act (III of 1928).
9. Burma Electoral Rules.
10. Burma Excise Act (V of 1917).
11. Burma Expulsion of Offenders Act (I of 1926).
12. Burma Ferries Act (II of 1898).
13. Burma Ferries (Amendment) Act (II of 1916).
14. Burma Fisheries Act (III of 1905).
15. Burma Forest Act (IV of 1902).
16. Burma Frontier Districts Regulation (I of 1925).
17. Burma Gambling Act (I of 1899).
18. Burma General Clauses Act (I of 1898).
19. Burma Ghee Adulteration Act (VI of 1927).
20. Burma Habitual Offenders Restriction Act (II of 1919).
21. Burma Income Tax Act (XI of 1922).
22. Burma Land and Revenue Act (II of 1876).
23. Burma Laws Act (XIII of 1898).
24. Burma Legislative Council Rules.
25. Burma (Lower) Courts Act (VI of 1900).
26. Burma (Lower) Town and Village Lands Act (IV of 1898).
27. Burma (Lower) Village Act (III of 1889).
28. Burma Military Police Act (XV of 1887).
29. Burma Motor Vehicles Rules.
30. Burma Municipal Act (III of 1898).
31. Burma Municipal Rules.
32. Burma Oil Fields Act (I of 1918).
33. Burma Oil Subsidiary Provident Fund Rules.
34. Burma Opium Law Amendment Act (VII of 1909).
35. Burma Opium Rules (1910).
36. Burma Prevention of Crime (Young) Offenders) Act (III of 1930).
37. Burma Process Fees Act (I of 1910).
38. Burma Registration Manual.
39. Burma Registration of Burmese Names Act (VIII of 1920).
40. Burma Rural Self-Government Act (IV of 1921).
41. Burma Salt Act (II of 1917).
42. Burma Suppression of Brothels Act (II of 1921).
43. Burma Tenancy Act (X of 1939).
44. Burma Tenancy Ordinance (1940).
45. Burma Towns Act (III of 1907).
46. Burma Vaccination Law (Amendment) Act (I of 1909).
47. Burma Village Act (VI of 1907).
48. Burma Waste Land Grant Rules.

Upper Burma.

49. Burma (Upper) Criminal Trustee Regulation (V of 1892).
50. Burma (Upper) Land and Revenue Regulation (III of 1899).
51. Burma (Upper) Oil Fields Regulation (VI of 1910).
52. Burma (Upper) Registration Regulation (II of 1897).
53. Burma (Upper) Ruby Regulation (XII of 1887).

BURMA ADAPTATION OF LAWS ORDER (1937).

——Cl. 10—Scope and effect of.

Clause 10 says that a right which has already accrued prior to the Government of Burma Act com-

ing into force is not affected by any amendment made by the Adaptation of Laws Order. A.I.R. (Vol. 27) 1940 Rang. 123=1940 Rang.L.R. 435=188 Ind. Cas. 614 (S.B.)

BURMA ANTI-BOYCOTT ACT (V OF 1922).

——Ss. 3 and 9—Sanction—Contents of—Social Boycott for political reasons—Offence.

Before launching a prosecution under the Burma Boycott Act, S. 9 requires the sanction of the Government as under S. 196, Cr. P. Code. All the facts need not be stated in the sanction order. *Quaere*: whether it is not enough to state that the accused had committed an offence under a certain section? The boycotting of a person by failing to invite him to a social function if due to political differences, is an offence under the Act. 2 Bur.L.J. 196=76 Ind. Cas. 561=25 Cr.L.J. 193=1924 Rang. 65.

——S. 4—Essentials—Hanging out notice-boards that certain non-members of Thanga Thama Gyi Society are not recognised is an offence under S. 4 (a). 3 Bur.L.J. 186=84 Ind. Cas. 450=26 Cr.L.J. 306=A.I.R. 1924 Rang. 379.

——S. 4 (a)—Joint trial—Promoting commission of offence — Joint trial of promoter with person committing offence—Legality.

Promoting by *A* and *B* of the commission of offence *viz.* the boycotting of the headman in pursuance of *C's* resolution at a meeting justifies joint trial. Even if the proposal by *A* was not proved, but the promotion of the boycott of which he was the alleged proposer, was proved against *A* and *B* the fact that all the three were tried together would not render the trial illegal or be a valid reason for acquitting *A* and *B* against whom a charge under S. 4 (*c*) was brought home. 1 Rang. 604=2 Bur.L.J. 224=76 Ind. Cas. 830=25 Cr.L.J. 270=1924 Rang. 98.

——S. 6 (a)—Ex-communication—Spurious ceremony not conducted in Thein—Ex-communication for partly political purpose—Offence if exempted under S. 7 (a).

Where a village headman used abusive language towards certain monks who were preaching on Home Rule and kindred matters and had thereby run the risk of being ex-communicated and the first petitioner who was among the abused proposed a boycott of the headman and called a meeting of monks and laymen together and purported to perform the rite of ex-communication;

Held, (1) The ex-communication was a spurious ceremony and not having been proclaimed in a Sima or Thein by a properly convened chapter and the procedure laid down in the Vinaya not having been strictly followed the benefit of S. 7 (*a*) could not be claimed. (2) It was necessary to prove that the boycott was proposed for *bona fide* religious purposes; where a motive other than religious is present the burden of establishing good faith lies heavily on the proposer. (3) The mere fact that the second petitioner allowed the use of his compound does not amount to abetment but having become cognizant of the proposal to boycott on the first day, and having continued to lend his house for the ceremony on the second day, he facilitated the commission of the offence and had intentionally aided the boycott under S. 107, Expl. 2, I.P.C. (4) That the sentence was rightly reduced from one year to three months by the Sessions Judge, as the complainant was shown to have been a tactless, irreverent and foul-mouthed individual but no further reduction of sentence was granted in view of the fact that the petitioner had tried to give effect to his proposal by a spurious ceremony. 1 Rang. 629=2 Bur.L.J. 221=76 Ind. Cas. 719=25 Cr.L.J. 255=A.I.R. 1924 Rang. 169.

——S. 9—Sanction—Validity — Facts incorrectly set—Effect—Cr. P. Code, Ss. 195 and 196.

The provisions in the Anti-Boycott Act requiring the authority of the Government for a prosecution under the Act correspond to those in S. 196 of the Code of Criminal Procedure, which is less stringent than S. 195. Strictly the "order" or "authority" required by S. 196 is not the same as the "sanction" referred to in S. 195 and the classes of the offences dealt with by the two sections are quite distinct. Moreover, in the latter section, there is no provision corresponding to sub-section (4) of the earlier section. The intention of the legislature was to ensure that no prosecution for an offence falling within S. 196 or under the Anti-Boycott Act should be launched except on a complaint authorised by the Government and where this intention is given effect to, it is immaterial whether or not all the facts on which the complaint was to be based were stated in the "authority" with meticulous precision; indeed, it is doubtful if it is even necessary to set out any fact other than the alleged fact that the accused had committed an offence under a certain section of the Act. 2 Bur.L.J. 196=25 Cr.L.J. 193=76 Ind. Cas. 561 =1924 Rang. 65.

BURMA BOUNDARIES ACT (V OF 1880).

——Ss. 5, 6, 11 and 12—Determination of boundaries by Boundary officer—Effect—Bar to subsequent claim.

The decision of a boundary officer under Burma Act (V of 1880) determining the boundaries of two plots in conclusion as to the boundaries of those lands as well as that of Government and bars a subsequent claim relating to the same. 4 Bur.L.T. 201=11 Ind. Cas. 915.

BURMA CIGARETTES DUTY ACT (II OF 1931).

——S. 3 (3)—"Burma"—Federated—Shan States prior to 12th March, 1932—If included.

The term 'Burma' in S. 3, Sub-S. (3), Act II of 1931, and in the preamble has the same meaning, and prior to March 12 1932 the term cannot be construed as including the Federated Shan States. A.I.R. (Vol. 20) 1933 Rang. 287=145 Ind. Cas. 832.

BURMA CO-OPERATIVE SOCIETIES ACT (VI OF 1927).

——Arbitrator—Power to pass mortgage decree.

A co-operative arbitrator under Burma Co-operative Societies Act, has no power to pass a mortgage de-

cree. A.I.R. (Vol. 20) 1933 Rang. 81=146 Ind. Cas. 674.

——S. 47—Mortgage in favour of Co-operative Society—Mortgage suit on mortgage of same property by another—Decree—Society not made party—Society getting award—Property attached and sold—Application of other mortgage to set aside award—Dismissal—Subsequent execution application for sale—Competency—Rules, R. 23.

The petitioner was a simple mortgagee and in a suit on the mortgage a Co-operative Society by its liquidator filed an application praying that he may be joined as a co-defendant on the ground that the mortgaged properties were mortgaged to the society. This society really claimed to be the first mortgagee The Co-operative Society was not joined as a party to the suit and the suit proceeded against the mortgagors alone and a preliminary mortgage decree was passed. During the pendency of the petitioner's suit, the Co-operative Society obtained an award by its liquidator against the mortgagors in respect of the mortgage debt due to the Society. In execution of the award by the liquidator in favour of the Co-operative Society, the mortgaged properties were attached and sold and the petitioner and the original mortgagors applied to set aside this sale by the liquidator in favour of the Co-operative Society, but the application was unsuccessful. The petitioner did not appeal against the order refusing the application to set aside the sale. Ultimately after obtaining a final decree the petitioner filed a separate application for sale of the mortgaged properties in execution of his mortgage decree:

Held, that these properties were sold at the instance of the Co-operative Society in execution of a prior mortgage debt and the petitioner applied to have the sale set aside but was unsuccessful and the application was merely another attempt to challenge the sale that had taken place in execution of the award of the liquidator in favour of the Co-operative Society and therefore it should be dismissed. A.I.R. (Vol. 22) 1935 Rang. 394=159 Ind. Cas. 1046.

——S. 47 (2) (b)—Appeal — Necessity for — Amendment suggested.

Suggestion is made to the Local Government to provide for an appeal from the liquidator's order under S. 47 (2) (*b*) either to the Civil Court or if that is not expedient to the Registrar of the Co-operative Societies. 118 Ind. Cas. 403=A.I.R. 1929 Rang. 113.

——S. 47 (2) (b)—Revision.

An order passed by a Civil Court, enforcing on application the order made by a liquidator under S. 47 (2) (*b*) is not revisable. 118 Ind. Cas. 403= A.I.R. 1929 Rang. 113.

——Ss. 47 and 49—Claims against Society in liquidation—Jurisdiction of Civil Court.

Under Ss. 47 and 49 of the Burma Co-operative Societies Act in respect of claims against a Society which is in liquidation the jurisdiction of the Civil Courts is barred and the matter is left to the decision of the Liquidator so that persons desiring to to enforce claims against the Society must apply to the liquidator and not to the Civil Court. A.I.R. (Vol. 18) 1931 Rang. 65 (2)=8 Rang. 585=130 Ind. Cas. 368.

——Ss. 47 and 49—Liquidator's order — Jurisdiction of Civil Courts.

Under the Burma Co-operative Societies Act, 1927, (before the enactment of R. 23 of the Burma Co-operative Societies Rules, 1931) the Court had no jurisdiction, save as provided under the Act, to entertain any proceedings by way of appeal or revision or otherwise for the purpose of impugning the correctness or the validity of an order of a liquidator passed under Section 47.

A member of a co-operaitve society instituted a suit for a declaration that an order of the liquidator demanding payment of Rs. 766 from him was illegal. The suit was dismissed on the ground that the Civil Court had no jurisdiction and the member was ordered to pay Rs. 70 as costs. Subsequently the liquidator demanded another sum Rs. 591, claiming that the actual costs incurred by him in defending the previous suit amounted to Rs. 661. The member again made an application in the same suit complaining that the liquidator's order enhancing the costs awarded by the Court was illegal:

Held; that the Court had no jurisdiction to entertain the application. A.I.R. (Vol. 18) 1931 Rang. 202=9 Rang. 207=134 Ind. Cas. 497.

——Ss. 47 and 49—Order of liquidator in respect of time-barred debt — Suit to set aside—Maintainability of.

So long as the liquidator acted or purported to act, under S. 47 of the Burma Co-operative Societies Act, his acts cannot be challenged in a Court of law merely on the ground that he ignored the law of limitation.

Section 47, cl. 2 (*b*) of the Burma Co-operative Societies Act, confines the powers of the liquidator to a determination of debts payable or contributions to be made or remaining to be made by the members or past members only, so that, unless the debtor is also a member, the liquidator will have no jurisdiction whatever to act under S. 47, and, if he is a member, he certainly has jurisdiction to act under S. 47. A.I.R. (Vol. 18) 1931 Rang. 72=8 Rang. 581 =131 Ind. Cas. 55.

——Ss. 47 (2) (5), 42 and 49—Application by liquidator to enforce order—Powers of Civil Court—Power to consider legality of order.

Where the liquidator of a Co-operative Society applies to the Civil Court under S. 47, Co-operative Societies Act, for the execution of an order made by him, the Court is entitled to look into the order to the extent of ascertaining whether the order is one that has been passed under S. 47 (2) and further, that it is one that could be passed legally under that section as opposed to one that has in fact been rightly passed. A.I.R. (Vol. 20) 1933 Rang. 124 =11 Rang. 125=149 Ind. Cas. 120.

——Ss. 47 (4) and 49 — Orders of Liquidator — Finality—Legality of orders—Jurisdiction of Civil Court.

In the absence of rules made under S. 50 (2) (*s*), orders of a Liquidator under S. 49 are final and no appeal lies to the District Judge.

Where a certain Co-operative Society had been

ordered to be wound up and a Liquidator appointed, purporting to act under S. 47, issued orders to pay certain sums and it was alleged in some cases that the debts were time-barred and in one that much less sum was due, Civil Court has no jurisdiction, orders of the Liquidator being within the powers conferred upon him by the Act. 44 Bom. 582; 40 All. 89, Rel. on. 120 Ind. Cas. 130=A.I.R. 1929 Rang. 192.

——S. 49—Society in liquidation—Persons entitled to prosecute claims against society.

Persons other than members or past members are not entitled to prosecute claims against a Co-operative Society in liquidation in the Civil Courts. Claims of strangers and members against a Co-operative Society in liquidation are alike subject to the 'uncovenated mercies' of the liquidator. A.I.R. (Vol. 20) 1933 Rang. 243=11 Rang. 442=146 Ind. Cas. 738.

——S. 50—Rules under, R. 15—Arbitrator—Award ignoring law of limitation—If can be set aside by Civil Court.

A statutory arbitration is not unlike a reference by consent out of Court. Even in cases in which arbitrators are appointed by statutory rule the arbitrator should not be permitted to ignore the operation of the laws applicable in matters which come before him, and should not be permitted to give his decision according to his mere caprice. Where, therefore, an arbitrator appointed under R. 15 of the Burma Co-operative Societies Rules has ignored the law of limitation, in making the award a Civil Court has jurisdiction to set aside such an award. A.I.R (Vol. 27) 1940 Rang. 157=189 Ind. Cas. 181.

——S. 50—Rules under, (1931), R. 15—Jurisdiction of Civil Court in relation to proceedings of Registrar or arbitrators, R. 15 (4)—Award ignoring law of limitation—If can be attached in execution.

There is no provision in R. 15 framed under S. 50, Burma Co-operative Societies Act, expressly barring the jurisdiction of Civil Courts in relation to proceedings of the Registrar or of arbitrators in the same way as the jurisdiction of Civil Courts is barred with respect to matters connected with the liquidation of a society.

It is clearly not the intention of the Legislature that the arbitrator should arbitrarily arrogate to himself the right to ignore the law of limitation. But an award under R. 15 (4), which is to be executed as a decree, cannot be attacked in execution proceedings merely on the ground that it has ignored the law of limitation. The arbitrator has jurisdiction to commit errors of law. The executing Court cannot go behind the decree in executing the award which is to be executed as a decree of the Court. A.I.R. (Vol. 24) 1937 Rang. 363=1937 Rang.L.R. 399=173 Ind. Cas. 377.

——Ss. 50 and 49—Rules, R. 22 (g)—Muhammadan member mortgaging property to society for loan—Eldest son nominated to receive interest in society after his death — Member dying—Society wound up—Son, if can transfer property to liquidator—Property sold by liquidator to person having no connection with society—Purchaser's suit for possession — Validity of transfer — Power of Civil Court to question.

One *M*, a Muhammadan member of a Co-operative Credit Society, mortgaged to the Society a house and a pony to secure a loan obtained by him from the Society. In accordance with the rules, *M* nominated his eldest son *B*, as the person entitled to receive his share or interest in the Society after his death. *M* died and *B* purported to transfer the house and the pony to the liquidator of the Society (which was then being wound up) in full satisfaction of the indebtedness of *M's* estate to the Society. *M* was survived by seven sons and one daughter:

Held, that *B* had no authority to transfer to the liquidator the interests of his brothers and sister in the equity of redemption of the mortgaged property. The fact that *M* had nominated *B* as the person who should receive his interests in the Society after his death did not, and could not, operate to transfer to him the rights of his brothers and sister in the property. The object of this rule was to facilitate the granting of a valid receipt to the Society.

And where the liquidator purported to sell the property conveyed to it to a person having to do nothing with the society and the purchaser brought a suit for possession:

Held, that the matter not being connected wih the dissolution or winding up of the co-operative society, the question which the Court had to decide was, whether the plaintiffs acquired from the liquidator a good title to the property.

Held, also, that all that the liquidator could do was to transfer the benefit of the mortgage to the plaintiffs and the Court was not precluded from questioning the validity of the transfer by S. 49. Burma Co-operative Societies Act. A.I.R. (Vol. 24) 1937 Rang. 98=168 Ind. Cas. 910.

——S. 50 (2) (f)—Rules, R. 15—Jurisdiction of Civil Courts—Bar of.

Rules made by the Local Government under power conferred by S. 50 (2) (*f*), Burma Co-operative Societies Act, take away the jurisdiction of the Civil Courts in respect of disputes contemplated under R. 15. A.I.R. (Vol. 25) 1938 Rang. 392=1939 Rangl.L.R. 50=178 Ind. Cas. 674 (F.B.).

——S. 50 (2) (1)—Rules, R. 15—Suit by society against member for recovery of loan—Civil Court's jurisdiction.

There is no section in the Burma Co-operative Societies Act or any rule in the rules framed under that Act, which clearly indicates that the jurisdiction of the Civil Court is barred to try a suit by the society for the recovery of a loan advanced to one of its members. Such a suit is not barred under R. 15, Burma Co-operative Credit Societies Rules of 1931. That rule does not show what is to happen if a dispute is not referred to the Registrar. A.I.R. (Vol. 27) 1940 Rang. 145=1940 Rang.L.R. 77=188 Ind. Cas. 768.

——S. 51—Requisition not for amount due on account of land sought to be sold—S. 46, Burma Land and Revenue Act (II of 1876), does not apply.

According to the strict meaning of the words employed in S. 51, Burma Co-operative Societies Act, i.e., "in the same manner as arrears of land revenue," it is impossible for the revenue officer to proceed under S. 46 and following of the Burma Land and Revenue Act, in selling any land belonging to the defaulter unless the amount due from him is due on account of the land against which he is proceeding in a manner analogous to the manner in which land revenue might have been due on that account. Hence, where the amount due is not on account of the land sold the sale is entirely without authority and cannot be deemed to have been carried out in pursuance of those sections. A.I.R. (Vol. 27) 1940 Rang. 240 =1940 Rang.L.R. 230=191 Ind. Cas. 176.

BURMA CO-OPERATIVE SOCIETIES RULES (1931).

——R. 15—Arbitrator—Award passed by—Execution by Civil Court as decree of Court—Order conclusive and binding on property.

An arbitrator was appointed under R. 15, Burma Co-operative Societies Rules, 1931, and gave a decisions or award to the effect that the debtors were to pay a certain sum within three days, failing which the mortgaged property was to be sold and the sale proceeds applied towards the debts:

Held, that such a decision or award could on application to the Civil Court be enforceable as a decree of such Court. It was not an order which could not legally be passed and of which execution should be refused. The order to be executed as if it was a mortgage decree did not bind other persons claiming to have a mortgage of the same property any more than a mortgage decree of the Court would bind them, but the order was conclusive and binding on the property until it was attacked by way of a regular suit. A stranger to the proceedings by the Society could not dispute the order in execution but must do so by way of a suit. If he sues he can attack the order on exactly the same grounds as if it were a mortgage decree by a Court that is to say, on the grounds of fraud or collusion or that the mortgage was not properly registered and so on. A.I.R. (Vol. 22) 1935 Rang. 229=13 Rang. 343=159 Ind. Cas. 755.

BURMA COURTS ACT (BURMA XI OF 1922).

——Ss. 2 and 11—Appeal—Suit for rent is not 'land suit'—No second appeal lies if value does not exceed Rs. 500—C. P. Code, S. 102.

A suit for rent of land is not a "land suit" within the meaning of S. 2 and therefore if the value does not exceed Rs. 500 no second appeal lies under S. 11. 3 L.B.R. 90; 42 Cal. 638 Diss. and 23 Mad. 547 Foll. 3 Rang. 390=91 Ind. Cas. 639=A.I.R. 1926 Rang. 19.

——(As amended in 1932), S. 7 (c)—Creation of Assistant District Court—Jurisdiction of District Court to execute its own decree—If ousted.

Just because an inferior Court, (Assistant District Court) has been constituted under Burma Courts Amending Act, 1932 for the same local area after the passing of the decree, with jurisdiction to hear and determine suits or original proceedings of a certain value the Court of a higher pecuniary jurisdiction (District Court) which passed the decree is not only not deprived of its jurisdiction to execute its decree which may not exceed the pecuniary limit of the new Court's (Assistant District Court) jurisdiction but is the proper Court which should execute the decree. A.I.R. (Vol. 28) 1941 Rang. 56=1940 Rang. L.R. 725=193 Ind. Cas. 318.

——S. 7 (c)—"Original proceedings"—Meaning of.

The words "original proceedings" in S. 7 (*c*), Burma Courts Act are not used in contradistinction to "proceeding in appeal," and can only mean proceedings which initiate something, such as for example, pauper applications. These words at all events cannot refer to execution proceedings which are merely a continuation of the proceedings in the suit which gave rise to them. A.I.R. (Vol. 28) 1941 Rang. 56=1940 Rang.L.R. 725=193 Ind. Cas. 318.

——S. 9 (1) (b)—Jurisdiction—Increase of claim in appeal—Effect on jurisdiction.

Where the plaintiff had tentatively valued his suit for Rs. 3 100 and the Sub-divisional Court passed a decree for Rs. 2 128-2-9 and when the plaintiff appealed from the decree, claiming Rs. 11 000:

Held, that because the plaintiff chose in appeal to increase his claim, that did not alter the course of appeal and that the appeal lay to the District Court only and not to the High Court. 2 Rang. 408=86 Ind. Cas. 568=3 Bur.L.J. 207=A.I.R. 1924 Rang. 354.

——S. 11—Concurrent findings of facts on remanded issue—Interference—Powers of High Court.

It would be anomalous to hold that, whereas the Court could consider any finding of fact, whether concurrent or not, by the lower Courts, occurring in their original judgments it is precluded from considering their findings on questions of facts which it has itself found necessary to raise because the lower Courts have failed to frame an issue which was necessary for the right decision of the case. More especially is this so because the findings of the lower Courts are not decisions; it is the High Court which has to come to the final decision. The High Court acting under S. 11, Burma Courts Act can; therefore, interfere with the concurrent findings of fact on a remanded issue. It would not, however, be proper where the Courts have come to a concurrent finding to dissent from this finding without very strong reasons. A.I.R. (Vol. 27) 1940 Rang. 177 =190 Ind. Cas. 113.

——S. 11—Finding of fact—Concurrent findings when can be interfered with.

The High Court in second appeal is entitled to interfere on a finding of fact concurrent or otherwise. A concurrent finding of fact, however, should not be upset unless it is very clearly wrong. A.I.R. (Vol 26) 1939 Rang. 139=1939 Rang.L.R. 622=181 Ind. Cas. 846.

——S. 11—Right of second appeal.

Under S. 11, there is no special right of second appeal. A.I.R. (Vol. 22) 1935 Rang. 355=159 Ind. Cas. 798.

Trial Court recording evidence but deciding case without considering some evidence as inadmissible—Appellate Court holding evidence admissible and affirming decree—Second appeal:

Held, that there was no ground for second appeal either under S. 11, Burma Courts Act or under S. 100, Civil P. C. A.I.R. (Vol. 20) 1933 Rang. 35=142 Ind. Cas. 829 (2).

——S. 11—Scope—C. P. Code, O. 21, R. 92—Order under—Second appeal lies—C. P. Code, S. 104.

The provisions of S. 11, Burma Courts Act, do not affect those of S. 104, C. P. Code, and no second appeal lies from an order setting aside sale under O. 21, R. 92. 7 Rang. 37=117 Ind. Cas. 253=A.I.R. 1929 Rang. 148.

——S. 11—Scope—If exhaustive.

All appeals which can be brought under S. 11, Burma Courts Act are in addition to appeals which will be under S. 100, C. P. Code. 8 Rang. 485.

——Scope—If modifies, O. 21, R. 100, C. P. Code—Application under O. 21, R. 89, C. P. Code, dismissed—Order of Appellate Court on appeal—Second appeal.

Section 11, Burma Courts Act may be regarded as modifying S. 100, Civil P. C. There is no section of the Burma Courts Act which modifies S. 104, Sub-S. (2) and therefore, no second appeal lies from the order of the Appellate Court from the dismissal of an application to set aside a sale under O. 21, R. 89 Civil. A.I.R. (Vol. 24) 1937 Rang. 537=174 Ind. Cas. 691.

——S. 26—Scope and object — Decree of Chief Court — Execution by High Court—Limitation—Limitation Act, Arts. 182 and 183.

The object of S. 26 is simply and solely to provide for the execution of decrees of the Chief Court by the High Court, which succeeded it. It was not intended that a decree of the Chief Court should come under a different law of limitation simply because it was executed by the High Court. The article applicable therefore to such decrees is Art. 182 and not Art. 183. 6 Rang. 566=114 Ind. Cas. 674=A.I.R. 1928 Rang. 317.

——S. 27—Jurisdiction—Orders of Rangoon Magistrate—Revision—Jurisdiction of Sessions Judge of Hanthawaddy—Judicial Notification No. 39 of 1931.

Though under S. 27, Burma Courts Act, appeals from sentences and orders of Magistrates exercising their jurisdictional powers in Rangoon, lie to the Rangoon High Court under Notification No. 39 of February 2, of the Burma Government and S. 435 of the Criminal P. C. *prima facie* the Sessions Judge of Hanthawaddy, Rangoon, is invested with revisional jurisdiction in connection with applications for revision from the Courts of Magistrates in Rangoon. A.I.R. (Vol. 19) 1932 Rang. 192 (2) =1932 Cr. Cas. 934=34 Cr.L.J. 189=10 Rang. 488 =141 Ind. Cas. 259.

BURMA COURTS MANUAL.

——Para. 102—Applicability—Discretion of District Magistrate.

The instruction in para. 102 is based on the provisions of S. 17 (1), Criminal P. C. It no doubt applies to pending as well as to completed proceedings; but the discretion which has to be exercised is the discretion of the District Magistrate, unfettered by influences and pressure which may weigh with the Deputy Commissioner. A.I.R. (Vol. 28) 1941 Rang. 114=1941 Rang.L.R. 82=42 Cr.L.J. 573 =194 Ind. Cas. 370.

——Para. 104-A—New plea in appeal.

A party who does not challenge the translation submitted by the other party in the trial Court cannot challenge it in appeal.

Nor can the Appellate Court *suo motu* take the point as to the invalidity of the translation by reason of Para. 104-A, where the appellant has himself by his conduct waived it inasmuch as the point involves only a procedural error. A.I.R. (Vol. 28) 1941 Rang. 244=198 Ind. Cas. 516.

——Para. 104-A—Scope — If mandatory — Non-compliance—Effect.

The Burma Courts Manual has not the force of law but is a mere collection of directions given by the High Court to its subordinates. A departure by a Court from a course it prescribes, does not of itself give an unsuccessful litigant a right of appeal. Para. 104-A only applies to documents the translation of which is disputed. It has no application where parties agree to a translation or if the Court were willing to shoulder the resulting burden, dispense with one altogether. A.I.R. (Vol. 28) 1941 Rang. 244=198 Ind. Cas. 516.

——Para. 307 (A) I—Receiver—Right to commission on realization by sale of mortgage money—Provincial Insolvency Act (1920), S. 56 (2).

In Burma the receiver is not entitled to commission on the amount of the mortgage money realized by the sale of the mortgaged property. A.I.R. 1928 Rang. 23. Foll. 7 Rang. 126=117 Ind. Cas. 582=A.I.R. 1929 Rang. 168.

——Para. 664-A—Applicability—Warrant case.

Paragraph 664-A, Burma Courts Manual, relating to the deposit of witness expenses relates to orders under Ss. 244 and 245, Criminal P. C., which relate to the trial of summons case and does not apply to a cognizable warrant case. It is only from the defence, that the Magistrate can under certain circumstances require the deposit of witness expenses: *vide* S. 257 (2), Criminal P. C. A.I.R. (Vol. 24) 1937 Rang. 35.

——Para. 791—Discretion of Court—Magistrate, if can fix date other than 1st January.

Under para. 791, Burma Courts Manual, if there is evidence only of the year of birth, the birthday may be fixed as January 1. It is, therefore, at the option of the Court to fix a date other than January 1. A.I.R. (Vol. 25) 1938 Rang. 228=39 Cr.L.J. 697=176 Ind. Cas. 217.

BURMA CRIMINAL LAW AMENDMENT (CONDITIONALLY RELEASED PRISONERS) ACT (III OF 1928).

——S. 2—Scope—Retrospective effect—Interpretation of statutes.

Section 2 has no retrospective effect. On the ordinary principles of penal legislation a penal provision does not have retrospective effect. 7 Rang. 355=120 Ind. Cas. 692=1929 Cr. Cas. 446=31 Cr. L. J. 174=A.I.R. 1929 Rang. 278.

——S. 2—Sentence—Legality of—Magistrate sentencing person, convicted under S. 227, Penal Code, and S. 2, Burma Act, for period in excess of powers—Sentence is illegal.

There is nothing in either S. 227, Penal Code or S. 2, Burma Act to empower any Magistrate to pass a sentence in excess of that which he is empowered under the Cr. P. Code, to pass. Thus if a Magistrate sentences a person, convicted under S. 227 of the Code, and under S. 2, Burma Act, for a period which is in excess of his power, the sentence is illegal. 7 Rang. 358=120 Ind. Cas. 693=1929 Cr. Cas. 464=31 Cr.L.J. 175=A.I.R. 1929 Rang. 279.

BURMA ELECTORAL RULES.

——Rr. 36 and 48—Election Commissioners—If public officers subordinate to High Court—Specific Relief Act, S. 45—High Court's jurisdiction to direct commissioners to do certain act.

The Commissioners appointed to decide election petitions with their place of sitting in Rangoon are persons holding a public office of a temporary nature and therefore the High Court, has jurisdiction to enforce them to do a certain act, if it affects property, franchise or personal right of any person, and if it is clearly incumbent on the Commissioners. Under the rules the Commissioners are the sole authority to interpret any question arising on the construction of the rules and these rules do not give any other authority, the power to question that decision. Neither do the rules nor any general provision of law give the High Court, either by way of revision or appeal, any power to review that decision. It is not for the High Court to decide whether the Commissioners' ruling on a particular question was right or wrong, unless it is so wrong and so perverse as to amount to a refusal to exercise a jurisdiction clearly given by the rules.

Where therefore the Commissioners decided that a party substituted in place of a returned candidate whose election was challenged by an unsuccessful candidate cannot show that he himself used corrupt practices.

Held, that the High Court could not interfere. A.I.R. 1924 Cal. 761, Appr. 5 Rang. 504=105 Ind. Cas. 428=6 Bur.L.J. 240=A.I.R. 1927 Rang. 324.

——R. 45—Commissioners recommending candidate's election void and also costs against him—Governor by notification setting aside election but making no order as to costs—Omission as to costs subsequently supplied by another notification—If ultra vires.

The Special Tribunal constituted to hear a petition recommended that the election of *G* be declared void. They also recommended costs against him. On receipt of that report, the Governor set aside the election but made no direction as regards costs. The Governor subsequently supplied the omission by issuing a fresh notification directing that *G* should pay the costs as recommended by the Commissioners in the original report.

Held, that the omission in the first notification regarding costs was due to an oversight. The subsequent notification is in effect a continuation of the first and the two should be considered as constituting one order passed in accordance with the report. The second notification was therefore *intra vires*. 117 Ind. Cas. 57=A.I.R. 1928 Rang. 293.

BURMA EXCISE ACT (BURMA ACT V OF 1917).

——Several accused caught in the same sampan—Finding of 9 bundles of liquor—Conviction of all—Legality.

The accused were all caught in one sampan, and in the sampan were found thirty-six quarts of *kazaw ye* in nine bundles of four bottles each. Conviction of them all, on the ground that they were in joint possession of thirty-six quarts was, held bad. 26 Cr.L.J. 327=84 Ind. Cas. 551=3 Bur.L.J. 255=2 Rang. 657=A.I.R. 1925 Rang. 135.

——S. 12—Manufacture of Vinegar—Possession or export—Offence.

Vinegar is an alcoholic liquor only for the purposes of S. 12 of Burma Excise Act. Export, import or possession of vinegar in any quantity is not an offence. 11 Bur.L.T. 268=20 Cr.L.J. 321=50 Ind. Cas. 657=9 L.B.R. 277.

——Ss. 12 (c) and 30 (d)—Possession of yeast balls is punishable—Offence.

Yeast balls are not excisable articles but as they are materials for the manufacture of an excisable article, namely, liquor, the possession of them is prohibited by S. 12 (*c*) and made punishable under S. 30 (*d*) of the Act. 11 L.B.R. 136=66 Ind Cas. 665=A.I.R. 1921 L.B. 81=23 Cr.L.J. 318.

——S. 16—Finance Department Notification, No. 77—Possession of excisable articles—Limits for—Different kinds of articles seized together—More than one punishment, if can be inflicted.

Finance Department Notification No. 77, as subsequently amended, prescribes the limits for possession of excisable articles under S. 16, Burma Excise Act. In considering the limit, each kind of excisable article should be considered separately and there is nothing to prevent the possession of each kind of article up to the limit prescribed, though the total of all the articles possessed may exceed the limit prescribed for each of them. When different kinds of liquor are seized together, it is undesirable that more than one punishment should be inflicted. A.I.R. (Vol. 19) 1932 Rang. 184=10 Rang. 396=34 Cr.L.J. 8 (1)=1932 Cr. Cas. 819=140 Ind. Cas. 302.

——S. 30—Proof of possession—Necessity.

In prosecutions under S. 30 (*a*) it is necessary to prove possession of a large quantity of an exci-

sable article and there is no room or need for any presumption. A.I.R. (Vol. 27) 1940 Rang. 109=41 Cr.L.J. 541=1940 Rang.L.R. 219=188 Ind. Cas. 72.

——Ss. 30 and 5—Burden of proof.

To prove an offence under the Act it is necessary to show that the place of possession or sale of tari is within five miles of a licensed tari shop. 7 Rang. 3=117 Ind. Cas. 254=30 Cr.L.J. 752=A.I.R. 1929 Rang. 120.

——S. 30 (a)—Conviction—Conditions of—Possession of less than one quart of country spirit or country alcoholic liquor other than spirit—Sufficiency.

A person cannot be convictetd under S. 30 (*a*) for mere possession of less than one quart of country spirit or country alcoholic liquor other than spirit, the quantity being within the limits for possession prescribed for either of the kinds of liquor in the Excise Department Notification No. 61 of 14th June, 1928. 7 Rang. 316=30 Cr.L.J. 990=119 Ind. Cas. 223=1929 Cr. Cas. 451=A.I.R. 1929 Rang. 256.

——S. 30 (a)—"Country liquor"—Particular kind must be specified.

"Country liquor" is a generic term which can be equally applied to tari, country spirit; and country alcobolic liquor other than spirit, *i.e.*, country fermented liquor. In excise cases, it is always necessary to distinguish between these different kinds of country liquor and specify which particular kind is involved in the case, as the quantities of each of these different kinds of alcobolic liquor which may be possessed without a license differ. 7 Rang. 316=30 Cr.L.J. 990=119 Ind. Cas. 223=1929 Cr. C. 451=A.I.R. 1929 Rang. 256.

——Ss. 30 (a) and 16 (3)—Offence under—Bona-fide private consumption—Liability to conviction.

Applicant was manager of a Chinese store; the firm employed 25 or 30 men; and the 3 cases of Chinese wine were sent quite openly as such from Rangoon just before the New Year. Kin Woon, one of the proprietors of the firm, was a Roman Catholic and observed the New Year and the anniversary of the election of Dr. Sun Yet Sen as President.

Held, in these circumstances the liquor, 48 quarts which does not seem excessive, was intended for the *bona fide* private consumption of the firm and its employees at the New Year.

Held, further; the evidenec ought to have been recorded in manner provided for summary trials with appealable sentence. 1 Bur.L.J. 105=83 Ind. Cas. 522=26 Cr.L.J. 42=A.I.R. 1923 Rang. 41.

——Ss. 30 (a) and 37—Alteration of offence under S. 30 (a) to one under S. 37—Cr. P. Code, S. 227.

An illegal conviction under S. 30 (*a*) cannot be altered to a conviction under S. 37 if the accused is not called upon to answer a charge under the latter section. 7 Rang. 316=30 Cr.L.J. 990=119 Ind. Cas. 223=1929 Cr. C. 451=A.I.R. 1929 Rang. 256.

——S. 30 (b)—Applicability.

It is no offence for a restaurant keeper to procure liquor from a licensed shop on the order of customer and supply it to him at the cost price without a license. 12 Bur. L.T. 54=51 Ind. Cas. 769=20 Cr.L.J. 529.

——S. 37—Excisable article—Possession of small quantity—Onus of proving that it is not illicit.

S. 37 of the Burma Excise Act is directed against the illicit manufacture, importation, etc., of any quantity of excisable article and it is in the nature of things necessary to provide for a presumption against a person in possession of an excisable article and throw on him the onus of proving that his possession is not illicit, as the matter would naturally be within his special knowledge. Possession of an exisable article even within the limit allowed is an offence unless such possession is accounted for. 66 Ind. Cas. 514=23 Cr.L.J. 290.

——S. 37—Mens rea—Proof of.

In prosecutions for possession of an excisable article under this section it is necessary either to prove that the accused knew or had reason to believe that the excisable article was unlawfully manufactured or to set up circumstances for which a persuption of such knowledge or belief may be presumed. A.I.R. (Vol 27) 1940 Rang. 109=41 Cr.L.J. 541=1940 Rang. L.R. 219=188 Ind. Cas. 72.

——S. 37—Mens rea—Proof of—Guilty knowledge must be proved.

In order to establish an offence under S. 37 it is necessary that the guilty knowledge or belief, which is an essential ingredient of the offence should be included in the particulars of the offence stated to the accused and proved at the trial. 7 Rang. 316=30 Cr. L.J. 990=119 Ind. Cas. 223=1929 Cr.C. 451=A.I. R. 1929 Rang. 256.

——S. 37—Tari—Possession of—When an offence.

Where the tree tax system is not in force the manufacture and possession of Tari is not an offence under S. 37 of the Burma Excise Act. (1918) 3 U. B. R. 86=47 Ind. Cas. 870=19 Cr.L.J. 970.

——Ss. 37 and 44—Scope—Possession not satisfactorily accounted for—Quantity within limit allowed—Offence—Accused is guilty.

Any person who is unable to account satisfactorily for his possession of an excisable article is liable to punishment under S. 37 although the quantity in his possession may be within the limit allowed for possession. 11 L.B.R. 134=66 Ind. Cas. 514=A.I. R. 1921 L.B. 94.

——Ss. 41 (c) and 63 (1) (a)—Sanction—Form and contents.

A mere order by the Collector sanctioning the prosecution of a person under S. 41 (*c*) of the Burma Excise Act on the report of the district superintendent of police is not a sufficient compliance with the provisions of S. 63 (1) (*a*) of the Act. The Collector must authorise some particular excise officer to make the report or complaint. 21 Cr.L.J. 452=56 Ind. Cas. 436=(1919) 3 U.B.R. 197.

——S. 44—Applicability—Case under S. 30 (a).

Section 44, Burma Excise Act; has no application to the common case under S. 30 (*a*) where the charge is one of possession of a lasger quantity of an excisable article than is allowed under the Act. In prosecution under S. 30 (*a*) it is necessary to prove such possession; and there is no room or need for any presumption. In prosecution for possession of an excisable arti-

cle under S. 37 it is necessary either to prove that the accused person knew or had reason to believe that the excisable article was unlawfully manufactured, or to set up circumstances from which a presumption of such knowledge or belief may be presumed, such as the simultaneous finding of a part of still in the possession of the accused person or the impossibility of obtaining the Article from a licit source. Such a presumption could ordinarily be drawn under the general provisions of S. 114. Evidence Act, but S. 44, Excise Act; may be of useful application and allow the presumption to be drawn in rarer cases such as where the still was not seized at the same time as the liquor, or had not been used for some time, or was found at some little distance from the premises where the liquor was found. A.I.R. (Vol. 27) 1940 Rang. 109=41 Cr.L.J. 541=1940 Rang.L.R. 219=188 Ind. Cas. 72.

——Ss. 53, 54, 55 and 56—Admission to Excise Officer—Admissibility—Evidence Act, S. 25.

Although under Burma Excise Act (V of 1917) an Excise Officer has power of arrest, search and granting bail, he is not a police-officer and an admission made to him is admissible in evidence. (1907, 1909) U.B.R. 1. *Held* no longer good law. 7 Rang. 771=121 Ind. Cas 715=31 Cr.L.J. 303=A.I.R. 1930 Rang. 49.

——S. 63—Compliance—Acting on police report.

The applicant was originally prosecuted by the Police under S. 304-A, I.P.C. The charge-sheet set out that the applicant, an unregistered medical practitioner gave an intravenous injection to the deceased prior to his death, and that death followed this injection. The Magistrate found on inquiry that there was not sufficient evidence to charge applicant under S. 304-A. I.P.C., but charged him under S. 33 (*a*), Excise Act:

Held, that the Police report, in effect, clearly contained a reference as to the use of an hypodermic syringe by an unlicensed practitioner and this was a sufficient compliance with the provisions of S. 63 (1) (*b*), Excise Act and the Magistrate in charging appellant under S. 33 of the Act was acting on a Police report. A.I.R. (Vol. 22) 1935 Rang. 198=1935 Cr. Cas. 686 (1).

——S. 64-A—Scope—Burma Habitual Offenders' Restriction Act (Burma Act II of 1919)—Applicability.

The Habitual Offenders' Restriction Act should not be applied to persons against whom action is taken under S. 64-A of the Excise Act. A.I.R. 1926 Rang. 182 Foll. 4 Rang. 455=99 Ind. Cas. 349=28 Cr.L.J. 141=A.I.R. 1927 Rang. 98.

BURMA EXPULSION OF OFFENDERS ACT (I OF 1926).

——S. 2, Cl. (a), S. 4, Sub-S. (4)—Non-Burman — 'Domicile' — Intention of residing permanently coupled with actual residence, necessity of—Domicile of choice.

Domicile connotes the place in which a man has voluntarily fixed the habitation of himself and his family, not for a special or temporary purpose, but with the intention of making a permanent home until some unexpected event shall occur to induce him to adopt some other permanent home. Every person at birth acquires a domicile of origin. A person may change his domicile by choice. The domicile of origin is retained until one of choice is acquired by a combination of residence and intention. Two things are essential to constitute a domicile of choice in a new country, *viz.*, residence in that country without any *animus revertendi* to the country of origin and the intention of making a permanent home in a new country. Domicile of choice is, in fact, a mixed question of intention and act. There must be an intention of residing permanently in a particular country, coupled with actual residence. Where the the intention is acquired the length of residence is immarried, but where there is no direct evidence of intention, length of residence is material as showing what the intention was. A.I.R. (Vol. 20) 1933 Rang. 193=1933 Cr. Cas. 813=34 Cr.L.J. 1184=146 Ind. Cas. 193.

——S. 2-B (3) and (4)—Scope—Offender.

Under S. 2-B (3) and (4) a person may become an offender not by reason of conviction of an offence, for it is well recognised alw that orders under S. 118, Cr. P. Code; or under S. 7; Burma Habitual Offenders Restriction Act are not convictions of offences. 7 Rang. 266=119 Ind. Cas. 213 =30 Cr.L.J. 990=1929 Cr.C. 450=A.I.R. 1929 Rang. 254.

——Ss. 3, 2 (A), (B)—Applicability—Non-Burman —Accused brought by parents to Burma from India when very young—No intention to acquire domicile—No intention of not returning to India.

The accused was brought to Burma from India by his parents when he was a few years old. There were no circumstances showing that he acquired a domicile in Burma or that he did not intend to return to India:

Held, that the accused was a non-Burman within the meaning of S. 2 (*A*) of Burma Expulsion of Offenders Act and an offender within the meaning of S. 2 (*B*) and ionsequently liable to expulsion under S. 3. A.I.R. (Vol. 24) 1937 Rang. 54=38 Cr.L.J. 432 (2)=167 Ind. Cas. 589.

——S. 4 — Jurisdiction — Person against whom order of restriction is passed under Burma Habitual Offenders Restriction Act, S. 7—Liability to be proceeded against.

Although a person against whom an order of restriction is passed under S. 7 is an offender and is liable under S. 3 to be expelled the Act provides no machinery for the enforcement of the liability and so neither the District Magistrate nor the High Court has any jurisdiction to deal with the matter under S. 4. 7 Rang. 266=30 Cr.L.J. 990=119 Ind. Cas. 213=1929 Cr. C. 450=A.I.R. 1929 Rang. 254.

——S. 4 (1)—Applicability.

Wording of S. 4 (1) restricts the application of section to persons who are offenders under S. 2-B (1) and (2) and the section can have no application to a person who is an offender under S. 2-B (3) and (4). 7 Rang. 266=30 Cr.L.J. 990=119 Ind. Cas. 213=1929 Cr. Cas. 450=A.I.R. 1929 Rang. 254.

BURMA FERRIES ACT (II OF 1898).

——S. 12—Rules, R. 4—'Plying for hire', meaning of—Person crossing river with parcels once each way—Whether 'plying for hire'.

It is necessary, before a person can be said to be plying that he waits or attends at a certain place for hire by anybody who chooses to employ him or requires his services. To cross the river with parcels once each way on the arrival and departure of the trains at and from a place cannot be property described as "plying for hire". A.I.R. (Vol. 24) 1937 Rang. 275=38 Cr.L.J. 872=170 Ind. Cas. 236.

——S. 12—R. 4-A—If ultra vires.

Rule 4-A of the rules framed under S. 12, Burma Ferries Act is *ultra vires*. A.I.R. (Vol. 25) 1938 Rang. 384=1938 Rang.L.R. 573=40 Cr.L.J. 77 =178 Ind. Cas. 445.

——S. 12—R. 4-A—"Plying for hire," meaning of —Person waiting on bank or in stream regularly for hire by public.

A person is said to ply for hire a ferry when he waits or attends on the bank or in the stream regularly (that is to say, not uninterruptedly, for it might be done periodically, but regularly in the sense of repeatedly, making a business of it), for hire by the public or by anybody who chooses to employ him to cross the river or convey goods across the river. A.I.R. (Vol. 25) 1938 Rang. 384=1938 Rang.L.R. 573=40 Cr.L.J. 77=178 Ind. Cas. 445.

——(As amended by Act II of 1916), S. 15—Applicability—Both points must be within limits.

Accused conveyed paddy from Taungmintbyang, a point *outside* the ferry limits, to kamyawgin a point within the ferry limits.

Held: that on a proper construction of S. 15, if one of the two points, either departure or arrival is outside two miles from the limits of a ferry, there can be no offence either under S. 25 or S. 27. In other words both these points must be within the two miles limit. 1 Rang. 313=2 Bur.L.J. 125= 1923 Rang. 161=76 Ind. Cas. 646=25 Cr.L.J. 214.

——S. 15—"Point"—Launch halting in stream for setting down or picking up passengers—Whether 'point' within S. 15.

When a launch halts in the stream for the purpose of setting down or picking up passengers, it becomes to all intents and purposes such "an island," and is without doubt "a point" for the purpose of S. 15, Ferries Act. A.I.R. (Vol. 22) 1935 Rang. 464= 13 Rang. 619=1935 Cr. Cas. 1270=37 Cr.L.J. 146 =159 Ind. Cas. 472.

——S. 27—Applicability — Conveying passengers without sanction—Offence.

The accused had never obtained the sanction of the District Council or of the lessee of the ferry, to his conveying passengers for hire between the landing stage and the launches waiting in midstream. Nor had the Local Government issued any notification under S. 15 of the Ferries Act, exempting any person or clauses of persons from the operation of the section:

Held, that the accused by so conveying persons between the launches and the landing stage, had committed an offence under S. 27 of the Act. A.I.R. (Vol. 22) 1935 Rang. 464=13 Rang. 619=1935 Cr. Cas. 1270=37 Cr.L.J. 146=159 Ind. Cas. 472.

BURMA FISHERIES ACT (III OF 1905).

——Preamble—Lessee of fishery—Rights of—Lessee putting dams to fishery—Members of public, if can fish.

Under the Preamble to the Burma Fisheries Act, 1905, the Government merely claims to dispose of the right to fish. When a person takes the lease of a fishery, he does not thereby buy the fish to be found therein from Government; nor does Government transfer the property in the fish to him. The fish come into his possession only when he catches them. It matters not that for his own convenience of catching them he dams up the pond so that the fish cannot escape out of it. This operation is merely preliminary to catching the fish. Even after that has been done any member of the public may come to the fishery and, provided that he uses not more than four rods and lines, may catch fish therefrom and he does not thereby commit any offence of criminal trespass or theft. A.I.R. (Vol 25) 1938 Rang. 220=39 Cr.L.J. 692=176 Ind. Cas. 150.

——S. 3—Tank—If "fishery".

Under S. 3 (2), Burma Fisheries Act, a fishery means any collection of water which is of itself of a permanent nature or is or has recently been connected with any waters of a permanent nature, in which fish may be found. A tank ordinarily is a collection of water which is of itself of a permanent nature. The fact that a tank dries up during a certain period of the year does not mean that it is not a fishery. A.I.R. (Vol. 20) 1933 Rang. 311=1933 Cr. Cas. 1138=35 Cr.L.J. 120=146 Ind. Cas. 644.

——S. 21 (a)—Fishing by using engine for baling out water without permission—Offence.

Where a person fishes in a fishery by using an engine for pumping up and baling out water, the use of such engine must be deemed, in all cases, to be an offence except where the person against whom proof is given of having used such an engine is able to show the express permission which is indicated by the Proviso to R. 45 framed under the Act. A.I.R. (Vol. 25) 1938 Rang. 164=39 Cr.L.J. 499 =174 Ind. Cas. 931.

——S. 21 (b)—Abetment—Essentials of.

S. 21 (b)—Where **A** leased a tank to **B** for fishing and **B** was convicted under **S.** 21 (b), Burma Fisheries Act and **A** for abetment on the ground of his having leased the tank:

Held, that in the absence of proof of any instigation, conspiracy or aid by **A** in **B's** use of the unauthorized fishing implement, the charge of abetment against **A** must fail. A.I.R. (Vol. 20) 1933 Rang. 311=1933 Cr. Cas. 1138=35 Cr.L.J. 120= 146 Ind. Cas. 644.

——S. 21 (b)—Applicability—Collection of water on private land—Use of yin or screen —Offence.

The fact that a collection of water happens to be on private land does not take it out of the purview of fisheries governed by the provisions of the Act and the rules. In the case of fisheries constituted by collections of water on land in private occupation, the owner or occupier or a person authorised by such owner or occupier is in a position to get permission to fish in such collection of water free of charge, but subject to restrictions as regards the use of

certain fishing implements. The use of a **yin** or a bamboo screen fixed as an obstruction to the passage of fish without permission of the authorities concerned falls within the mischief of S. 21 (b). A.I.R. (Vol. 20) 1933 Rang. 311=1933 Cr. Cas. 1138=35 Cr.L.J. 120=146 Ind. Cas. 644.

——R. 45—Interpretation of.

The meaning of R. 45 of Rules framed under Burma Fisheries Act, is quite clear that baling is not allowed. The ban placed by the Rule upon baling may be lifted at any moment by the Deputy Commissioner with the Commissioner's sanction and baling thereafter, so long as it has been continuously permitted, can be practised without infringement of the law until the Deputy Commissioner again prohibits it. A.I.R. (Vol. 25) 1938 Rang. 104=39 Cr.L.J. 499=174 Ind. Cas. 931.

BURMA FOREST ACT (IV OF 1902).

——S. 25—"Selling timber"—Selling house built with timber—Offence.

The accused had some timber made over to him by one **P.** He also had some round logs of unreserved kinds, made over to him and in 1920 he got a saw pit license to enable him to cut up these logs. With the timber so obtained he built a house in 1920. In 1922 he sold that house to one **T**, whereupon the Forest authorities came down upon him, and after he had refused to pay the fine asked for by them, he was prosecuted and convicted.

Held, that no offence was committed. 2 Bur.L.J. 12=81 Ind. Cas. 75=25 Cr.L.J. 587=A.I.R. 1923 Rang. 143.

——Ss. 33 and 77—Licensee—Liability—Illegal acts of servant.

A licensee of timber responsible for illegal acts done by himself or his servant, under cover of license. (1918) 3 U.B.R. 114=50 Ind. Cas. 668=20 Cr.L.J. 322.

——Ss. 55 (d), 58 (a)—Offences under—Nature of—Master and servant—Criminal liability.

The appellant obtained from Government a grant of 500 acres of land (which was taken out of a forest reserve) for the ostensible purpose of cultivation of kapok. He paid the royalty due for the teak standing on the land and was allowed to fell trees on certain conditions. He was also allowed the use of a property hammer for this purpose. He entrusted the hammer to his servant who supervised the felling of the trees. The servant was subsequently convicted and sentenced on three separate charges namely, (1) unlawfully felling teak trees in a reserved forest, under S. 55 (d) of the Forest Act, (2) unlawfully felling teak trees on public forest land, under S. 58 (a), and (3) impressing a property hammer mark on green teak timber and on timber which had been unlawfully felled under R. 87 (b) (vi) read with R. 98. The appellant was subsequently convicted under R. 87 (b) (vi) and R. 98 of the Rules made under the Forest Act. His defence was that the offences were committed by the servant without his knowledge or connivance and that he was not liable:

Held, that although a master would not be criminally liable for every act of his servant amounting to an offence under the Forest Act, yet it was plain from the language, scope and object of the Forest Act, that the Legislature intended to fix criminal responsibility upon the master, who in accordance with a licence, contract, or other agreement issued under Rules framed under the Act, is permitted to extract forest produce, for acts in contravention of such Rules, or the terms of the licence or agreement, done by his servant in the course of his employment and under cover of the licence or agreement, although such acts were not authorised by and were done without the knowledge of the master. The Forest Act provides **inter alia** that no right shall be acquired in or over a reserved forest except under a grant or contract made by or with the Government and that no person shall fell or mark any reserved trees growing on public forest land except under an agreement with or licence issued by Government. The duty is an absolute duty cast upon the lessee or licensee or person permitted to fell or mark timber, namely to do so only in accordance with the terms under which his licence or agreement was issued—but such a person would not ordinarily fell or mark the timber himself; in ordinary circumstances these acts would be performed by his servants. The object of the Forest Act, would therefore, manifestly be defeated if a lessee or licensee, when charged with an infringement of the conditions of his agreement or licence, were allowed to plead in defence that the infringement was committed by his servants without his knowledge or connivance. A.I.R. (Vol. 21) 1934 Rang. 245=1934 Cr. Cas. 1077=12 Rang. 300=36 Cr.L.J. 450=154 Ind. Cas. 57.

——S. 64 (1)—Applicability.

S. 64 only applies to cases in which any person is convicted of a forest offence. 26 Cr.L.J. 322=84 Ind. Cas. 546=3 Bur.L.J. 257=A.I.R. 1925 Rang. 100.

——Ss. 71 and 72—Scope—Re-sale—Recovery of deficiency in price from first purchaser—Land Revenue Act, S. 45 (Burma).

The respondents bought certain logs from the Government Forest auction sale but did not pay the price. The logs were re-sold and in proceedings to recover the difference, certain property of the respondents was attached. They filed a suit for a declaration that the property was not liable to be attached. **Held,** that the claim of the Forest Department was clearly within S. 71. 16 Ind. Cas. 90=5 Bur.L.T. 140.

——Rules under—R. 22—Liability of master for acts of servant—Test of.

If a particular intent or state of mind is not of the essence of an offence punishable under the law the master is criminally liable for the act of his servant if that act is committed by the servant in the course of his employment even without his master's knowledge or consent but for his master's benefit.

Under R. 22 of the Rules framed under the Burma Forest Act prohibiting the cutting or felling of the trees mentioned therein except under special agreement with or a licence from Government the particular intent or state of mind of the servant is not of the essence of the offence and if the offence is found to be committed by the servant in the course of the employment for his master's benefit even without his master's knowledge or consent, the master would be criminally liable. A.I.R. (Vol.

21) 1934 Rang. 182=1934 Cr. Cas. 817=35 Cr. L.J. 1404=151 Ind. Cas. 676.

——R. 65—Applicability.

A contractor who removes fire-wood without paying royalty to the licensee commits an offence under R. 65, notwithstanding the fact that there is a dispute about the amount of royalty. 3 Bur.L.J. 198 =84 Ind. Cas. 352=26 Cr.L.J. 288=A.I.R. 1924 Rang. 382.

——R. 88 (2) (iii)—Liability of Master for act of servant—Use of hammer mark by servant of licensee—Liability of master.

Any use of the marking hammer by a licensee or by his servant in contravention of any rule under the Forest Act, renders the licensee liable to punishment either under the terms of the old license form No. 20 or new form No. 26, between which there is no difference in this respect. Impressing the property mark on timber other than in accordance with the rules and the license and any illegitimate use of the hammer mark is punishable. Licensee can be held criminally liable for his servant's breaches of the forest rules though it is not established that he had in some way authoried those breaches. (9 L.B.R. 112, Foll. 2 Bur.L.J. 214=76 Ind. Cas. 867=25 Cr.L.J. 275=A.I.R. 1924 Rang. 171.

BURMA (FRONTIER DISTRICTS) REGULATION (I OF 1925).

——Schedule Modification No. II, Proviso 3—Scope—High Court's power to transfer cases—If affected.

Proviso 3 to Modification No. 11 in the schedule to the regulation does not take away the power of High Court to transfer cases under S. 526, Criminal P. C. A.I.R. (Vol. 28) 1941 Rang 31=1939 Rang.L.R. 614=42 Cr.L.J. 261=192 Ind. Cas. 250.

BURMA GAMBLING ACT (I OF 1899).

——S. 3—Applicability—Private house.

The term 'common gaming house' applies to private and public houses. 4 Bur.L.T. 11=9 Ind. Cas. 450=12 Cr.L.J. 80.

——S. 3 (1)—"Common gaming house".

A house where instruments of gaming are kept for the profit of the owner of that house, is a common gaming-house. 5 Bur.L.J. 230=101 Ind. Cas. 659 =8 A.I.Cr.R. 142=28 Cr.L.J. 483.

——S. 3, Sub-S. (2)—Machauk, game of, is excepted under S. 3 (2).

The game of 'Machauk' or 'Sparrow' is one of those excepted under Sub-S. (2) of S. 3. 1 Rang. 303=76 Ind. Cas. 396=25 Cr.L.J. 172=A.I.R. 1923 Rang. 214.

——S. 3 (3)—Money except coins actually used for gaming is not included in the definition of "instruments of gaming" in S. 3 (3) of the Act. A.I.R. (Vol. 21) 1934 Rang. 240=1924 Cr. Cas. 1041=36 Cr. L.J. 72=152 Ind. Cas. 242.

——Ss. 3, 6 and 7—Instruments of gaming—Meaning of—Presumption of common gaming house.

White beans, cigarettes and cups are not instruments of gaming. Coins found on the persons of gamblers are not necessarily instruments of gambling and are not liable to seizure and forfeiture unless proved to have been intended for gaming. Unless articles found in a house are proved to be instruments of gaming, the house cannot be presumed to be a gaming house. 9 L.B.R. 205=11 Bur.L.T. 263= 50 Ind. Cas. 659=20 Cr.L.J. 323.

——Ss. 3, 10, 11 and 12—Cock-fighting—Gaming house—Instruments of gaming.

Cock-fight even together with wagering in a private place does not make it a gaming house. Fighting cocks are not instruments of gaming. 9 L.B.R. 219=11 Bur.L.T. 266=50 Ind. Cas. 671=20 Cr. L.J. 335.

——Ss. 3, 10 and 11—Instruments of gaming—Meaning—Enclosure—Cock-fight.

Fighting birds are not instruments of gaming. A private enclosure for betting and cock-fighting is not a common gaming house. 9 L.B.R. 185=11 Bur. L.T. 265=50 Ind. Cas. 666=20 Cr.L.J. 330.

——Ss. 3 (2), 11 and 12—'Gonnyin'.

'Gonnyin' is a game of pure skill. The fact that the ground was somewhat sloping cannot appreciably alter the nature of the game. 3 Bur.L.J. 166=86 Ind. Cas. 961=26 Cr.L.J. 897=A.I.R. 1924 Rang. 378.

——S. 4—Game of skill—'Ket'.

The Burmese game of **'ket'**, is not a game of mere human skill within S. 4 of the Burma Gambling Act. 8 L.B.R. 529=41 Ind. Cas. 132=18 Cr.L.J. 756.

——S. 5—Money seized from the spectators at cock-fight—Legality of.

The Police have no power under S. 5 of the Act to seize, or the Magistrate to confiscate the money seized on the spectators of the cock-fight or even on a person alleged to have taken an active part. The only provision for this is in the case of a common gambling house entered in accordance with the provisions of S. 6 of the Act. A.I.R. (Vol. 21) 1934 Rang. 240=36 Cr.L.J. 72=1934 Cr.Cas. 1041=152 Ind. Cas. 242.

——S. 6—Money found in longyi of Burma gambler—Presumption.

Held, that as it is the usual way for Burmans of the class to which the accused belonged to carry their money wrapped up in their **longyis**, no presumption could be safely drawn that money found in the **longyi** of the accused was intended to be used for the purpose of gaming. A.I.R. (Vol. 24) 1937 Rang. 317=38 Cr.L.J. 976=170 Ind. Cas. 818.

——S. 6—Scope—If exhaustive.

The only provision where, Police have power to seize money or where Magistrates have power to confiscate the money seized is under S. 6. A. I. R. (Vol. 21) 1934 Rang. 240=1934 Cr. Cas. 1041=36 Cr.L.J. 72=152 Ind. Cas. 242.

——Ss. 6 and 7—Common gaming house.

Where it is not proved that the gambling in the Club was confined to its members, the place might be called a common gaming house though the profits of the game are devoted to feasting and the general purpose of the Club. 7 Bur.L.T. 163=7 L.B.R. 275=24 Ind. Cas. 835=15 Cr.L.J. 523.

——Ss. 6 and 7—Cr. P. Code, Ss. 79 and 101—Endorsement of warrant—Irregular search.

A Police Officer to whom a warrant under S. 6 of the Act has been directed has no power to endorse the warrant to any other Officer. S. 101 of the

Cr. P. Code does not apply to warrants under the Burma Gambling Act. If a place is searched under a warrant wrongly endorsed by the Police Officer, the search is irregular and the presumption under S. 7 of the Act does not arise as the search was not a search under S. 6 of the Act. 12 Bur.L.T. 165=54 Ind. Cas. 57=21 Cr.L.J. 9.

——Ss. 6 (1), 7—Scope—Warrant issued after recording information that gambling is going on at certain place—Presumption under S. 7, if can be made.

The provisions of Sub-S. (1), S. 6, Burma Gambling Act, are all important and unless those provisions are strictly carried out, a house or place cannot be said to have been entered under the provisions of that section and consequently the presumption specified in S. 7 cannot be made. A mere record made of the information that illegal gambling is going on at a certain place and leaving no stamp of credibility in issuing the warrant is not sufficient to meet the requirements of the law. Consequently the result of the raid or the search made under that warrant does not constitute a legal basis of the presumption under S. 7. A.I.R. (Vol. 26) 1939 Rang. 120=40 Cr.L.J. 529=1939 Rang.L.R. 447=181 Ind. Cas. 112.

——S. 7—Presumption against person found in gaming house—Rebuttal.

When it is presumed that the house was a common gaming house it should be opposed by argument that the persons were inmates and they pursued their lawful business. 13 Bur.L.T. 103.

——S. 7—Presumption—Finding of—Instruments of gaming—Sufficiency.

When instruments of gaming are found in a place, there arises a presumption that the place is a common gaming house. It is unsafe to base a conviction on the bare presumption unless there is some evidence that the place was a common resort of outside gamblers. The presumption may be rebutted by showing that the players were all inmates of the house. 12 Bur.L.T. 163=54 Ind. Cas. 52=21 Cr. L.J. 4.

——S. 7—Presumption, when arises.

Where a house is entered and searched under S. 6 the presumption mentioned in S. 7 arises though there is no proof of payment of commission by the players to the keeper. 4 Bur.L.T. 11=9 Ind. Cas. 450=12 Cr.L.J. 80.

——Ss. 7, 11, 12, 13 (c)—Presumption arising under S. 7—Conviction cannot be under S. 13 (c) but under S. 11 or S. 12—Persons found around table, writing.

The presumption arising under S. 7, Burma Gambling Act, is that the place entered is used as a common gaming house and the persons found therein were present for the purpose of gaming. Consequently on this presumption the only offences of which the persons found in the place can be convicted are offences under S. 11 or S. 12 of the Act, and not under S. 13 (c),

Where the persons were found seated round a table inside a Chinese temple, which was raided and all that they were doing was writing:

Held, that any presumption which might arise under S. 7, Burma Gambling Act, was rebutted. A.I.R. (Vol. 22) 1935 Rang. 298=1935 Cr. Cas. 994=36 Cr.L.J. 1295=158 Ind. Cas. 87.

——Ss. 8 and 9—Evidence of accused.

The evidence given by an accused person under S. 8 of the above Act might be true and favourable to all or some of the accused but it is not defence evidence and does not justify the examination of the accused except on the requisition of the trying Magistrate. (1918) 3 U.B.R. 115=50 Ind. Cas. 821=20 Cr.L.J. 341.

——S. 10—Applicability—Mere spectators of bull-fight in public place—Liability to conviction.

Mere spectators of a bull-fight taking place in a paddy field after reaping of the crops, a place to which the public have access, are not guilty of any offence under S. 10, Burma Gambling Act. A.I.R. (Vol. 21) 1934 Rang. 222=1934 Cr. Cas. 950=35 Cr.L.J. 1321=12 Rang. 453=151 Ind. Cas. 418.

——S. 10—'Public place'—Fenced garden, if.

The place to which the public have access must be a place akin or similar to a street or thoroughfare. A fenced garden which is private property does not come under that category. 4 Bur.L.T. 71=10 Ind. Cas. 775=12 Cr.L.J. 245.

——S. 10—Unoccupied hut—'Place'.

A hut which the owner has left after completion of the field work is not a place to which the public have access and the word 'place' in S. 10 of the Act means a place **ejusdem generis** with street and thoroughfare to which the public can resort as of right. 12 Bur.L.T. 164=54 Ind. Cas. 50=21 Cr. L.J. 2.

——S. 10—Witness assaulted on way home after bull-fight—Whether — Inference that he encouraged fight—If justified.

The mere fact that a person assaulted another on way home after a bull-fight, accusing him of being a spy does not lead to the inference that he had taken an active part in encouraging the fight. A.I. R. (Vol. 21) 1934 Rang. 222=1934 Cr. Cas. 950=35 Cr.L.J. 1321=12 Rang. 453=151 Ind. Cas. 418.

——S. 10 (c)—Presence at cock-fight—Offence.

Mere presence at a cock-fight without aiding and abetting it by gestures, words or other form of active encouragement of the fight is not punishable under S. 10 (c), Burma Gambling Act. A.I.R. (Vol. 21) 1934 Rang. 240=1934 Cr. Cas. 1041=36 Cr.L.J. 72=152 Ind. Cas. 242.

——S. 11—Applicability.

Persons found seated round a table inside a Chinese temple—All that they were doing was writing—Persons can be convicted for offences under S. 11 or S. 12 of the Act. A.I.R. (Vol. 22) 1935 Rang. 298=1935 Cr. Cas. 994=36 Cr.L.J. 1295=158 Ind Cas. 87.

——Ss. 11, 12—Offences under—Whether cognizable—Order asking accused to pay process fee—Legality of.

Cases under Ss. 11 and 12, Burma Gambling Act, are not cognizable offences, and hence an order by a Magistrate asking for the payment of process fees to summon witnesses is correct. A.I.R. (Vol. 22) 1935 Rang. 181=13 Rang. 130=1935 Cr. Cas. 623=36 Cr.L.J. 998=156 Ind. Cas. 719.

——Ss. 11 and 12—Sentence—Daing should be punished much more heavily than ordinary gambler.

A comparison of the maximum fines and the maxi-

mum sentences of imprisonment under Ss. 11 and 12 clearly shows that the daing under ordinary circumstances should be punished very much more heavily than the ordinary gambler. It is the Daing who makes opportunities for other people to commit offences under S. 11 and not **vice versa**. 6 Rang. 655=117 Ind. Cas. 60=30 Cr.L.J. 709=A.I.R. 1929 Rang. 30.

——S. 12—Knowledge—Proof—Evidence necessary—Presumption—Permissibility.

In order to justify a conviction under S. 12 there must be actual evidence of knowledge on the part of the accused and this knowledge cannot be presumed from the mere fact that the place had been kept as a common gaming house for a month. 2 Bur.L.J. 5=24 Cr.L.J. 871=75 Ind. Cas. 71=1923 Rang. 141.

——S. 12—Proof—Evidence—Mere receipt of money from player—Sufficiency.

The mere receipt of a sum of money from one of the players or from the winner on a single occasion would not be sufficient to prove an offence under S. 12 without evidence of other incriminating circumstances. 2 Bur.L.J. 8=75 Ind. Cas. 357=24 Cr. L.J. 933=1923 Rang. 144.

——Ss. 13 and 3 (1) (b)—Raffle, whether offence.

A raffle is a game or pretended game covered by S. 3 (1) (b) and a person conducting or promulgating a raffle is punishable under S. 13 of the Act. (U. B. R. 1892—1896) 1, 112, foll. (1916) 11 U. B.R. 137=10 Bur.L.T. 268=39 Ind. Cas. 329=18 Cr.L.J. 489.

——S. 17—Scope—Burma Habitual Offender's Restriction Act, S. 18 (1).

The Habitual Offenders' Restriction Act does not apply to persons proceeded against under S. 17, Gambling Act. A.I.R. 1926 Rang. 182 and A. I. R. 1927 Rang. 98, Rel. on. 7 Rang. 1=117 Ind. Cas. 255=30 Cr.L.J. 755=1929 Cr. Cas. 60=A.I.R. 1929 Rang. 147.

——S. 17—Scope—Burma Habitual Offenders Restriction Act, S. 3 (1).

Section 3 (1) of the Habitual Offenders' Restriction Act does not apply to a case arising under S. 17 of the Burma Gambling Act: A.I.R. 1926 Rang. 182, Rel. on. 5 Bur.L.J. 228=101 Ind. Cas. 666=28 Cr.L.J. 490=8 A.I.Cr.R. 138=A.I.R. 1927 Rang. 122.

BURMA GENERAL CLAUSES ACT (I OF 1898).

——Immovable property—Growing palm tree—Provincial Small Cause Courts Act, Art. 4.

The definition of immovable property given in the Burma General Clauses Act applies to the Provincial Small Cause Courts Act and as growing palm tree is immovable property for the purposes of the former Act, it is also immovable property for the purposes of the latter Act. 7 Rang. 706=120 Ind. Cas. 689=A.I.R. 1929 Rang. 200.

——S. 2 (44)—'Association'—Bishop Strachan's Home for Girls, Rangoon.

The Bishop Strachan's Home for Girls, Rangoon, had a committee of management which kept a banking account with the National Bank of India in Rangoon. The committee had a chairman who was the Bishop of Rangoon. The banking account was operated upon by a treasurer appointed by the committee.

Held, that the Bishop Strachan's Home was an association or body of persons such as was contemplated by S. 2 (44). A.I.R. (Vol. 29) 1942 Rang. 64=1941 Rang.L.R. 712.

——S. 5 (c) and (e)—Restriction order under S. 18, Burma Habitual Offenders' Restriction Act, 1919 passed against offender in 1933 for three years—Offender so repeatedly violating order that period not expiring on May 19, 1939—Act repealed in 1936—On May, 1939, offender again violating order and convicted under S. 18 of the Act—Conviction, held legal by reason of S. 5 (c) and (e), General Clauses Act (Burma) (X of 1897). A.I.R. (Vol. 28) 1941 Rang. 206=1941 Rang.L.R. 239=42 Cr. L.J. 739=195 Ind. Cas. 437.

——S. 24—Ordinance, if enactment.

An ordinance is not an enactment; supposing an ordinance is an enactment, it cannot be said that an ordinance which has expired is an enactment which is repealed. A.I.R. (Vol. 28) 1941 Rang. 1=1941 Rang.L.R. 26=42 Cr.L.J. 335=192 Ind. Cas. 770.

——S. 24—Scope.

Section 142, Cl. (r), Burma Municipal Act was deleted by S. 10 of Act I of 1931 but S. 124 (a), Burma Municipal Act which was inserted in the Burma Municipal Act by S. 9 of Act I of 1931, contains identical provisions. By S. 24, General Clauses Act (Burma), bye-laws framed under the repealed section continue in force unless and until superseded by bye-laws made under the new section. A.I.R. (Vol. 21) 1934 Rang. 12=11 Rang. 532=35 Cr.L.J. 735=148 Ind. Cas. 616.

BURMA GHEE ADULTERATION ACT (VI OF 1927).

——S. 10 (5)—Adulteration—Question of law—Chemical Examiner is function—Duty of Court.

Whether the ghee is to be deemed adulterated or not is question of law and it is not a matter on which the chemical examiner should be required to express an opinion. What he has to do is to state the results of his analysis and leave the Court to determine whether on those results the offence charged is proved or not. A.I.R. 1930 Rang. 51.

——S. 11—Scope—Complaint charging two people in alternative—Sanction to prosecute such people—Legality—Cr. P. Code, S. 190.

It is wrong that any Court should accept a complaint which charges two people in the alternative and it is also wrong that an order sanctioning such a prosecution in the alternative should be passed. A.I.R. 1930 Rang. 51.

BURMA HABITUAL OFFENDERS' RESTRICTION ACT (BUR. ACT (II OF 1919)).

——Applicability—Persons proceeded against under Burma Excise Act (V of 1917), S. 64-A.

The Habitual Offenders' Restriction Act should not be applied to persons against whom action is taken under S. 64-A of the Excise Act. A.I.R. 1926 Rang. 182, Foll. 4 Rang. 455=28 Cr.L.J. 141=99 Ind. Cas. 349=A.I.R. 1927 Rang. 98.

——Applicability and Scope—Restriction of person to a particular local area for preventing him from going to his place of residence and business where he worries some residents of that place—If justified.

Where the accused does not go out of the local area in which he lives for the purpose of committing breaches of the peace in other local areas, but merely he worries certain people in the local area in which he lives, because he is a bully and where the only possible object in the order restricting the accused to a particular area seems to be to deport him from a certain other place which is his place of residence and business because he has made himself objectionable to certain residents of that place, and where no useful public purpose would be served by an order expressly prohibiting him from moving into other areas where he would not be likely to do any harm, or by such operation of such an order in presumably curtailing his means of livelihood it is open to question whether this is the class of cases to which the Burma Habitual Offenders' Restriction Act, 1919, is intended to apply. 26 Cr.L.J. 417=85 Ind. Cas. 33=2 Rang. 524=A.I.R. 1925 Rang. 69.

——Procedure—Usual rules of procedure and evidence—Applicability.

The idea that in cases under this Act the ordinary rules of Criminal Procedure and of evidence are abrogated, is entirely erroneous. In proceedings under the Act it is not everything that may be proved by evidence of general repute. The ordinary rules of evidence apply with such modification only as is made by S. 117 (4) of the Code of Criminal Procedure which is made applicable to the Habitual Offenders' Restriction Act by S. 4 of that Act. 26 Cr.L.J. 395=84 Ind Cas. 939=2 Rang. 641=A.I.R. 1925 Rang. 112.

——Ss. 3, 7 and 18—Order of restriction—When may be passed.

The Act makes no provision for taking a bond and for demanding sureties. It merely provides for an order of restriction. The order cannot be passed except in those cases in which the Magistrate could have acted under S. 110 of the Cr. P. Code and unless the person restricted has adequate means of earning his livelihood in that area. Violation of such an order is punishable under S. 18 of the Act. 13 Bur.L.T. 155=10 L.B.R. 274=61 Ind. Cas. 1005 =22 Cr.L.J. 477.

——S. 3 (1)—Applicability case under—Burma Gambling Act, S. 17.

S. 3 (1) of the Habitual Offenders' Restriction Act does not apply to a case arising under S. 17 of the Burma Gambling Act. A.I.R. 1926 Rang. 182. Rel. on. 5 Bur.L.J. 228=101 Ind. Cas. 666=28 Cr.L.J. 490=8 I.A.Cr.R. 138=A.I.R. 1927 Rang. 122.

——S. 4. Proviso (a)—Term of proposed restriction—Non-Specification—Effect.

Proviso (a) to S. 4 makes it essential that the preliminary order required under S. 112 of the Code of Criminal Procedure shall set forth the substance of the information received and shall state the term during which the order of restriction shall be in force. If the additional requirement as to the term during which a proposed restriction is intended to be in force, is not specified in such preliminary order, no order under S. 7 of the Act should be passed. 26 Cr.L.J. 417=85 Ind. Cas. 33=2 Rang. 524=A.I.R. 1925 Rang. 69.

——S. 7—Evidence—General repute—Evidence of policemen and head man—Sufficiency—Cr. P. Code, S. 110.

The rule, that in order to satisfy himself that an accused's general repute is that of an habitual offender of one of the types mentioned, a Magistrate should require more evidence than that of policemen and village authorities, is not a rule of law and a Magistrate must, in each case, weigh the evidence and decide as to its sufficiency. 1 Rang. 447=2 Bur.L.J. 153=76 Ind. Cas. 709=25 Cr.L.J. 245 =A.I.R. 1924 Rang. 22.

——S. 7—Irregularity—Omission to state period of restriction in preliminary order—Effect—S. 537, Cr. P. Code.

Omission to state the period of restriction in the preliminary order does not render the whole proceeding void. It is only an irregularity curable by Upper Burma Criminal Justice Reg., Chap. XV. 26 Cr. L.J. 1391=89 Ind. Cas. 527=3 Rang. 74=A.I.R. 1925 Rang. 214.

——S. 7—Jurisdiction—High Court and District Magistrate—Jurisdiction to deal with person against whom order of restriction is passed.

Although a person against whom an order of restriction is passed under S. 7 is an offender and is liable under S. 3 to be expelled, the Act provides no machinery for the enforcement of the liability and so neither the District Magistrate nor the High Court has any jurisdiction to deal with the matter under S. 4. 7 Rang. 266=119 Ind. Cas. 213=30 Cr.L.J. 990=1929 Cr. Cas. 450=A.I.R. 1929 Rang. 254.

——S. 7—Procedure—Procedure laid down in Cr. P. Code, S. 117—Applicability.

The same procedure as is laid down in the Cr. P. Code, S. 117, with necessary modifications and additions, must be followed where it is intended to take preventive action under S. 7 of the Burma Habitual Offenders' Restriction Act (1919). 2 Rang. 524= 26 Cr.L.J. 417=85 Ind. Cas. 33=A.I.R. 1925 Rang. 69.

——S. 7—Restriction—Grounds.

A person who earns his living in whole or in part by unlawful sale of opium, can be placed on security under S. 3, but an order of restriction cannot be passed under S. 7 on those grounds. 2 Rang. 61, Dissented from. 4 Rang. 123=98 Ind. Cas. 714=5 Bur.L.J. 78=27 Cr.L.J. 1402=A.I.R. 1926 Rang. 182.

——S. 7—Security—Order for—Legality—Two reports to Police and to village headman—Power to direct.

There is no provision for ordering execution of a security bond under the Act. Where such offender is restricted to another village than his own, it must be proved that he will be able to earn his livelihood at that village. A double report both to the Headman and the Police is not called for under the Act. 10 L.B.R. 274, Foll. 1 Bur.L.J. 36=73 Ind. Cas. 157=24 Cr.L.J. 541=A.I.R. 1923 Rang. 68.

——S 7 (a)—Illegality—Surety bond under S. 118, Cr. P. Code, taken from party—Order under Act—Legality.

Where a bond has been executed by an offender, with sureties under S. 118, Cr. P. Code, it is illegal

to pass an order against him under the Habitual Offenders' Restriction Act. 1 Bur.L.J. 257=73 Ind. Cas. 975=24 Cr.L.J. 735=A.I.R. 1923 Rang. 134.

——S. 9—Conviction—Grounds—Old offender—Liability.

The mere fact that the accused is "an old offender" is not a ground on which a restriction order can be passed under S. 9. 26 Cr.L.J. 1344=89 Ind. Cas. 320=3 Rang. 156=A.I.R. 1925 Rang. 277.

——S. 9—Scope—Sentence under S. 18—Addition of term of restriction—Legality.

S. 9 does not authorize the addition of a term of restriction to the sentence in the case of a conviction under S. 18. 26 Cr.L.J. 1359=89 Ind. Cas. 399=3 Rang. 167=A.I.R. 1925 Rang. 279.

——Ss. 10 and 2—Duty of Court—Order confining a person to his own house—Legality.

An order confining a man to the four corners of his own house at night is not a proper order under the provisions of the Act. The narrowest limits of restriction should be the village of the man concerned or the limits of the village to which he is restricted, as the case may be. If in order to obtain leave from the Police Station Office the person would have to leave his village tract, and thereby offend against the order, this is contrary to the spirit of R. 5 of the Notification. The Magistrate must satisfy himself that the accused is able to earn his livelihood within the area of restriction. 1 Bur.L.J. 177=11 L.B.R. 383=73 Ind. Cas. 175=24 Cr.L.J. 559=1923 Rang. 102 (2).

——Ss. 12, 18—Restriction order under against offender in 1933 for three years—Offender repeatedly violating order period not expiring—On 19th May, 1939, offender again violating order—Conviction—Legality—Effect of Repeal of Act in 1936—S. 5 (c) and (e), General Clauses Act (Burma) (X of 1897)—Offenders' right of appeal.

An order was passed in 1933 against an offender under the Burma Habitual Offenders' Restriction Act, 1919, restricting him to a certain place for three years but he so repeatedly violated the restriction order that by S. 18 (2), the period of three years had not expired on 19th May, 1939. In fact, however, the Habitual Offenders Restriction Act was wholly repealed by Burma Act (I of 1936) as from midnight of 24th, 25th, April, 1936. The last mentioned Act contained no saving or explanatory clause. On 19th May, 1939, the offender again absented himself from the restricted place without a pass, as a result of which on 5th August, 1940, he was charged with an offence under S. 18 and convicted:

Held, that the conviction was legal by reason of S. 5 (c) and (e), Burma General Clauses Act.

Held, further, that as restriction was an "obligation" which survived the repeal, so did the "right" of the restricted person to invite the District Magistrate to exercise his powers under S. 12 and the case was fit one for the exercise of powers under S. 12. A.I.R. (Vol. 28) 1941 Rang. 206=1941 Rang.L.R. 239=42 Cr.L.J. 739=195 Ind. Cas. 437.

——S. 13—Scope—Powers of—Sub-Divisional Magistrate—Special Procedure Grounds.

Where a Sub-Divisional Magistrate takes preventive action against a person under S. 7 of the Act without complying with the provisions of S. 4, Pro. (a). S. 12 of the Act, 1919, cannot be relied on as justifying the special procedure of the case, because the District Magistrate is the only Magistrate empowered under that section and even the District Magistrate cannot intervene in a case unless there has been a proper preliminary order and unless the Sub-Divisional Magistrate has also previously passed his order under S. 118 of the Cr. P. Code. In such a case, it would be the duty of the District Magistrate to have some good reason for the change over to the Burma Habitual Offenders' Restriction Act, 1919; and R. 12 of the Rules framed under that Act indicates the class of reasons which would justify such a change. 26 Cr.L.J. 417=85 Ind. Cas. 33=2 Rang. 524=A.I.R. 1925 Rang. 69.

——S. 18 (1)—Applicability.

The Habitual Offenders' Restriction Act does not apply to persons proceeded against under S. 17, Gambling Act. A.I.R. 1926 Rang. 182 and A.I.R. 1927 Rang. 98. Rel. on. 7 Rang. 1=117 Ind. Cas. 255=30 Cr.L.J. 755=1929 Cr.C. 60=A.I.R. 1929 Rang. 147.

——S. 18 (2)—Interpretation—Accused absent from the tract—Exclusion of period.

S. 18 (2) provides only that a period of imprisonment under S. 18 (1) is to be excluded in computing the period for which the order of restriction shall remain in force. It does not allow of the exclusion of any period during which the accused has been absent from his tract in contravention of the order or of any period during which he has been under trial. 26 Cr.L.J. 1359=89 Ind. Cas. 399=3 Rang. 167=A.I.R. 1925 Rang. 279.

BURMA INCOME-TAX ACT (XI OF 1922).

——S. 23 (3) and (4)—Relative scope and distinction—Assessment to the "best of his judgment"—Statement of same in order of assessment—Effect.

The only difference between S. 23 (3) and S. 23 (4) is that in cases falling under sub-S. (3), the Income-tax Officer is to arrive at an assessment to the best of his judgment on the evidence before him, whereas under sub-S. (4) he is to arrive at an assessment to the best of his judgment in the absence of such evidence.

An assessment under S. 23 (3) is not consequently had in law because it is made to the best of the Income-tax Officer's judgment and this fact is stated in the assessment order. (1947) I.T.R. 290.

BURMA LAND AND REVENUE ACT (II OF 1876).

——Alienation by Lessee—Validity.

Where land is leased from the Government, in the absence of any provisions or forfeiture and re-entry, the transfer or legacy of the grant is not void. The transferee or legatee may perhaps be ejected by the Government; but it does not follow that the transferee or legatee acquires no title to the land. 5 P.L.T. (Sup.) 1=93 Ind. Cas. 454=A.I.R. 1925 Pat. 68 (F.B.).

——Jurisdiction of Civil Courts.

The prohibition to the jurisdiction of the Civil

Courts extends to disputes to which Government is a party and not to disputes regarding the right to occupy land between private individuals. A.I.R. (Vol. 26) 1939 Rang. 30=1938 Rang.L.R. 603=180 Ind. Cas. 234.

——S. 6—Scope—Rights of accretions and alluvion, if excluded.

The principle that gradual accretion enures to the land is based on a rule of 'general convenience and security' and applies to Burma also. The words of S. 6, Burma Land and Revenue Act, cannot be stretched to exclude rights of accretion and alluvion. It cannot be held that gradual additions to the land of a grantee by the action of a river are within the prohibition of the section. It will require much more precise words than those appearing in the section to exclude the application of a doctrine so well established founded upon such broad consideration. A.I.R. (Vol. 21) 1934 P.C. 17=11 O.W.N. 217=1934 M.W.N. 212=66 M.L.J. 239=39 L.W. 271=38 C.W.N. 337=12 Rang. 136=16 R.D. 107=59 C.L.J. 269=147 Ind. Cas. 657 (P.C.).

——S. 8—Rules under—R. 52—Applicability—"Occupying" available land, whether same as "entering" upon available land—Persons so entering—Land made subject of grant—Notice under R. 52 (1)—Failure to comply with—Effect.

It is not persons who enter upon available land who are subject to eviction, but persons who are actually occupying available land. Rule 52 of rules framed under S. 8 of Burma (Lower) Land and Revenue Act, applies to a person to whom a grant had been made but whose grant had been cancelled and who remains in occupation even after such cancellation. Such a person is a person who entered upon land which was not available. The rule refers to present occupation and the present status of the land.

Certain persons entered upon land which was available. Subsequently such land was made the subject of a grant and a notice under R. 52 (1) was issued but the persons failed to comply with it:

Held, that the persons could not be deemed to have occupied available land and, therefore, could not be proceeded against under R. 52 (2). A.I.R. (Vol. 24) 1937 Rang. 452=39 Cr.L.J. 140=172 Ind. Cas. 413.

——S. 18—Rules under—Grant by Deputy Commissioner—Transfer of interest of grantee, how to be effected—Transfer of Property Act (IV of 1882 as amended), S. 53-A—Applicability.

Where **A** who had a grant of land issued by the Deputy Commissioner applied to the Deputy Commissioner for permission to transfer the land to **B** to whom he was indebted and the Headquarters Assistant sanctioned the transfer of the land and on the face of the original grant an endorsement was made of the transfer:

Held, that there was no valid transfer inasmuch as **A's** interest would be lost only by a transfer by a registered deed or by getting the grant cancelled and that S. 53-A, T. P. Act, did not apply to the case, that section not being applicable to any case in which there is no contract in writing. A.I.R. (Vol. 20) 1933 Rang. 136=144 Ind. Cas. 825.

——S. 19—Possession—Suit for—Basis of.

A suit for possession may be founded upon the mere fact of possession without any actual title. Possession alone is sufficient to support a suit. A.I.R. (Vol. 26) 1939 Rang. 275=1939 Rang.L.R. 185=183 Ind. Cas. 533.

——S. 19—Right to sue—Squatter suit for ejectment—If ties.

A person who has been in possession of land as a squatter cannot file a suit for ejectment with regard to that land after he has received a notice from the revenue authorities duly empowered under S. 19 to quit. 6 Rang. 214=110 Ind. Cas. 636=A. I. R. 1928 Rang. 188.

——S. 19—Rules under, R. 51 (1)—Scope—Waste land—Suit for possession—Meaning of 'landholder' and 'eviction'—Constructive eviction.

Under R. 51 (1) of the rules framed under S. 19, Burma Land and Revenue Act, until he has been in occupation for twelve years, the possession of an occupier of available land, who has not yet become a "landholder", is purely permissive: he holds at the pleasure of the Government for so long as, and no longer than, the Government is pleased to leave him in possession and any moment the Government may dispossess him. If follows that the Government may install, instead of the original occupant, some one else, or may recognize the **de facto** occupation of some one else, who has come to occupy the land instead of the original owner. It is clear that as between the occupier and Government at any rate the occupier has no right or interest in the land: he has a merely permissive foothold from which, he is liable to be evicted at any time before he has become a landholder.

The word "eviction" need not necessarily have a limited sense. Eviction in a narrow sense may mean the physical turning of a person out of possession of property. But as used in R. 51, it does not refer merely to a purely physical eviction but really means the termination by the Government of permissive relationship arising under R. 51. If the Government does anything which unequivocally points to its intention no longer to recognize the permissive occupation of any particular occupier, then it has "evicted" that particular occupier within the meaning of R. 51. If the occupier is already **de facto** out of physical possession, then no eviction in that sense is either necessary or possible. The first occupier thus constructively evicted has no right of possession and has, therefore, no **locus standi** to file a suit for possession against the other person who is subsequently recognized by the Government as its permissive occupant. A.I.R. (Vol. 26) 1939 Rang. 275=1939 Rang.L.R. 185=183 Ind. Cas. 533.

——S. 19, Rr. 51 and 52—Jurisdiction of Civil Court—Squatter tenure—Civil Courts can determine possessory title.

Certain persons were deprived by mistake by the Government, of the possession of a certain land for non-payment of revenue. The land remained vacant for some years. It was then occupied by some others. The previous occupants applied to the revenue authorities for the return of the land and under orders received in response to their application entered the land. The dispossessed parties did not resist but gave up possession peacefully. Then they appealed to the Civil Court.

Held, that they had a possessory title but that possessory title ceased on their acquiescing in the orders

of the Revenue authorities and had no title of any sort and that therefore though the Civil Courts have jurisdiction to entertain disputes between private persons as to the right to occupy land over which no landlord's rights have been acquired, yet they could not interfere in this case. 4 Bur.L.J. 15=86 Ind. Cas. 531=3 Rang. 171=A.I.R. 1925 Rang. 203.

——S. 19—Rules under, Ch. IX, R. 52 (1)—Person ejected from State waste land has—Right to sue in Civil Court for declaration of title.

A person who has been ejected from State waste land by a Revenue member under R. 52 has no title to the land so as to base a claim in a Civil Court. 6 Bur.L.J. 100=104 Ind. Cas. 365=A.I.R. 1927 Rang. 236.

——Ss. 19 and 56—Scope—Civil Court's jurisdiction.

An occupier who has not acquired the status of landholder comes under S. 19 or under S. 56 of the Act. In the absence of a grant made by, or on behalf of, Government, Revenue authorities alone can decide questions as to who are to occupy lands under S. 19 and no Civil Court can grant a declaration of title. 12 Ind. Cas. 22=4 Bur.L.T. 215.

——S. 37—Joint owners—Nature of liability.

Where two persons own a land jointly in equal shares, they are jointly and severally liable for the revenue due on it. Hence, by whomsoever half the revenue due on the land is paid it is paid not in respect of the share of the payer but it respect of the whole land. What, therefore, is sold by the Revenue Authorities in default of half the land revenue due is the half of the joint holding, so that each has a half share in that portion which is sold and each has a half share in that portion which remains unsold. The nature of the tenure cannot be changed by the revenue sale. A.I.R. (Vol. 23) 1936 Rang. 308=164 Ind. Cas. 468.

——S. 37—'Mortgagee', 'possession', significance of.

The reference to mortgagee in S. 37, Lower Burma Land and Revenue Act, is to a mortgagee in possession and not merely to a registered mortgagee and possession of the land referred to therein is to be regarded as possession by the owner. A.I.R. (Vol. 20) 1933 Rang. 112=144 Ind. Cas. 392.

——S. 45—Sale under—What passes — Only right, title and interest of owner.

Where the attachment for sale was under S. 45, Burma Land and Revenue Act and the sale proclamation was also under S. 45, the sale must have been under that section, and it would transfer only the right, title and interest of the original mortgagor. The mere fact that after some months the Revenue Officer signed the sale certificate in the wrong form cannot alter what was actually sold. A.I.R. (Vol. 25) 1938 Rang. 55=174 Ind. Cas. 260.

——S. 45—Sale certificate by Revenue Officer in wrong form—Effect—Sale certificate, if document of title.

It is not the owner that signs a sale certificate: a Revenue Officer signs it and he signs it to give effect to the sale that has taken place; and the power of selling property belonging to other people is strictly limited by law. The sale certificate, therefore, is not a document of title. A.I.R. (Vol. 25) 1938 Rang. 55=174 Ind. Cas. 260.

——S. 45—Priority of Crown debts.

The Crown has priority over unsecured creditors in the payment of debts. A.I.R. (Vol. 24) 1937 Rang. 380=1937 Rang.L.R. 344=172 Ind. Cas. 422.

——S. 45—Proceedings against non-defaulters—Validity of.

Proceedings under S. 45, Burma Land and Revenue Act can be initiated against defaulters but where such proceedings are instituted against persons who are not liable to pay the tax and who are, hence, no defaulters, the proceedings are wholly null and void. A.I.R. (Vol. 19) 1932 Rang. 123=10 Rang. 412=139 Ind. Cas. 566 (F.B.).

——S. 45—Protection order—Effect of—Person under arrest by order under S. 45—Protection order under S. 31, Provincial Insolvency Act—If entitles him to release.

Though S. 31 applies to debts due to the Crown, nevertheless in view of the fact that even an order of discharge does not release the Insolvency from such debts, it would be improper for the Insolvency Court, which under S. 31 has a discretion, to make a protection order which would apply to such debts. A person under arrest by order under S. 45, Burma Land and Revenue Act, but illegally released by an Insolvency Court, gets no advantage of protection order. 5 Rang. 806=109 Ind. Cas. 145=A.I.R. 1928 Rang. 81.

——Ss. 45, 46, 47 (as amended)—Appointment at Akunwun for realising revenue and exercising powers under—Akunwun is not a servant of corporation. A.I.R. (Vol. 23) 1936 Rang. 354=14 Rang. 160=164 Ind. Cas. 448.

——S. 45—Revenue Officer—If acts as agent to Corporation—Disposal of surplus sale proceeds.

In the realization of decree for arrears of land revenue, the Revenue Officer is not acting as a mere collecting agent of a principal, **viz.**, the Corporation, but is acting on his own behalf by virtue of his personal interest as Revenue Officer in the decree with which he is endowed by the statute. A.I.R. (Vol. 22) 1935 Rang. 439=160 Ind. Cas. 90.

——S. 46—Applicability—Sale for arrears of municipal taxes.

Chari, J.—A purchaser at a sale for arrears of municipal taxes payable to the Corporation of Rangoon does not take the property free of encumbrances in all cases. S. 46, Burma Land and Revenue Act, can only apply where the dues to the municipality are in the nature of the land revenue or land rate in lieu of capitation tax. 5 Rang. 458=105 Ind. Cas. 258=A.I.R. 1927 Rang. 289.

——S. 46—Power to proceed under.

Revenue Officer cannot proceed under S. 46 in selling any land belonging to the defaulter unless the amount due from him is due on account of the land against which he is proceeding in a manner analogous to the manner in which land revenue might have been due on that account. A.I.R. (Vol. 27) 1940 Rang. 240=1940 Rang.L.R. 230=191 Ind. Cas. 176.

——Ss. 46, 47 and 48—Applicability—'Property taxes'—Recovery of.

Chari, J.—So far as "property-taxes" as defined in S. 80, City of Rangoon Municipal Act, are concerned, it is open to the properly authorized officer of the municipality to direct the recovery of arrears in

the manner prescribed by Ss. 46 and 47, Burma Land and Revenue Act, and to a sale held under these sections the provisions of S. 48 of the Act will apply unless the purchaser and the defaulter collude. 5 Rang. 458=105 Ind. Cas. 258=A.I.R. 1927 Rang. 289.

——S. 47—Corporation's power to control—Revenue Officer—Surplus sale proceeds.

Under S. 47, the Corporation has no right in any way to control the Revenue Officer in his disposal of the surplus of the proceeds of sale. A.I.R. (Vol. 22) 1935 Rang. 439=160 Ind. Cas. 90.

——S. 47—Effect of sale—Mortgage not notified to corporation—Property sold for default in payment of property tax—Purchaser's title—If free of mortgage.

A mortgagee who had given no notice of his mortgage to the municipal corporation filed a suit on his mortgage. In the meanwhile the property was sold under Burma Land and Revenue Act, S. 47, by the corporation after due notice to the mortgagor, for non-payment of property taxes. Mortgagee joined the auction-purchaser as defendant.

Held, that the property was sold free from the mortgage because the tax in respect of which the default was made was a property tax and the corporation were entitled to put into force the summary method given in the Lower Burma Land and Revenue Act against the immovable property itself, which was quite independent of any remedy against the defaulter personally. A.I.R. 1927 Rang. 289, Appr.

Held, further, that the doctrine of **lis pendens** does not apply to this case at all, as it would indeed be a dangerous extension of the doctrine to hold that neither Government nor a local body could recover its taxes or rates from a defaulter so long as a law suit was pending between the defaulter and some of his other creditors. 7 Rang. 113=117 Ind. Cas. 575=A.I.R. 1929 Rang. 175.

——S. 48—Property sold by mortgagor's fraud—Auction-purchaser's title.

Property mortgaged to plaintiff was in the occupation of the mortgagors, who did not pay the Municipal taxes and consequently the property was sold under S. 206, Municipal Act for arrears of revenue. The auction-purchaser who had acted in collusion with the mortgagors, was, in the plaintiff's suit for a mortgage-decree, made a co-defendant. **Held,** that the auction-purchaser had not acquired a good title free from the plaintiff's incumbrance and S. 48 of the Land Revenue Act was no reply to plaintiff's action. The plaintiff was entitled to show that the Revenue Officer was misled by the fraud of the mortgagor and the purchaser acting in collusion, which induced him to confer a title free from incumbrance. 10 M.I.A. 540, foll. 15 Ind. Cas. 433=5 Bur.L.T. 108.

——Ss. 55, 56—Question as to arrears or defaulter or both—Jurisdiction of Civil Court.

With regard to the assessment and collection of land revenue, the (Lower) Burma Land and Revenue Act, 1876, specifically applies. It is not necessary to make any enquiry to see whether it does so or not. There is no preliminary question of whether arrears exist before the case is taken up by the Revenue Officer, and accordingly this question is one for him to determine. The Civil Court has no jurisdiction in view of Ss. 55 and 56, Lower Burma Land and Revenue Act, to decide the question as to arrears of land revenue or defaulter or both and, therefore, it cannot entertain suit to set aside a sale held by Township Officer for land revenue arrears. A.I.R. (Vol. 28) 1941 Rang. 97=1941 Rang.L.R. 7=193 Ind. Cas. 372 (F.B.).

——S. 56—Government purchasing land at revenue sale and settling holder as licensee—Suit to set aside sale—Government, if necessary party.

Per **Dunkley, J.**—Government is a necessary and proper party to a suit to set aside a revenue sale, where the purchaser is the Government who settles the holder of the land as a licensee. To such a case S. 56 would apply. A.I.R. (Vol. 28) 1941 Rang. 97=1941 Rang. L.R. 7=193 Ind. Cas. 372 (F.B.).

——S. 56—Jurisdiction—Claims between rival proprietors or cultivators by Civil Court's jurisdiction.

The claims and disputes referred to in the Lower Burma Land and Revenue Act (II of 1876), over which the Civil Courts have no jurisdiction but which are under the sole jurisdiction of the Revenue Courts, relate only to claims against Government and not to disputes between rival proprietors or cultivators. 5 P.L.T. (Supp.) 1=93 Ind. Cas. 454=A.I.R. 1925 Pat. 68 (F.B.).

——S. 56—Sale—Fraud—Civil Court has jurisdiction to declare sale fraudulent and not binding on plaintiff.

A Civil Court has jurisdiction to make a declaration that a revenue sale is fraudulent and did not convey plaintiff's interest in the property. The sale has the appearance of a sale for arrears of revenue but is, in its essence, a private alienation. A co-owner of land cannot be allowed to use the machinery of the Revenue Sale Law to defraud other co-owners and if he does so the Civil Courts are competent to declare that the result of his conduct is not to place a fraudulent purchaser in a better position than a buyer at a private sale. 11 L. B. R. 313=67 Ind. Cas. 636=A.I.R. 1923 Rang. 17.

——Ss. 56 and 18—Claim by grantee against Government—Jurisdiction of Civil Courts.

The plaintiff company filed a suit against the Government and others with respect to an island in the Pegu River, formed by gradual silting up in the river. Various grants of portions which had been silted up were made by the Government under the Burma Land and Revenue Act in 1894 and subsequent years to various persons, and by various assignments these grants passed into the hands of the plaintiff company. Since then, erosions took place in some parts and fresh land was added in other parts and certain portions that were eroded got re-formed. The company sued to recover the whole island with accretions and re-formations. Government contended among other things that the Civil Courts had no jurisdiction to entertain the suit and that the company had no claim to the accretions, the English Law of accretions not being applicable to Burma:

Held, that S. 56, Burma Land and Revenue Act, did not bar the Civil Courts from entertaining and deciding claims against Government with respect to

lands title to which was based on grants issued under rules framed under S. 18 of the Act, and where accretions are claimed under the general law. A.I.R. (Vol. 19) 1932 Rang. 27=10 Rang. 1=137 Ind. Cas. 402.

——Ss. 56 and 44—Notice served on agent of owner after death of owner—Validity—Sale—If void.

An owner of certain property fell ill and went to another place, leaving one **M** as a kind of caretaker with authority to collect the rents on his behalf. Shortly afterwards the owner died and this fact was not known to the Revenue Authorities who sent a notice addressed to the owner, under S. 44, Burma Land Revenue Act, for municipal and other taxes. When the bailiff went to serve the notice the owner not being there, having been dead, he handed over the notice to **M**:

Held, that as the owner was dead, **M** was not his agent and, therefore the notice was not validly served upon the person liable to pay taxes and so there was no default made by anybody. The sale which was held consequent on the default, was, therefore, invalid and a nullity. A.I.R. (Vol. 26) 1939 Rang. 30=1938 Rang. L. R. 603=180 Ind. Cas. 234.

——R. 69—Applicability—Planting of rubber trees on waste land—Subsequent notification as grazing ground—Order for removal of trees—Conviction—Legality.

The petitioner planted rubber trees on State waste land pending his application for a grant in anticipation and paid assessment thereon. The grant was refused and the land notified as a grazing ground whereupon petitioner applied for refund of the revenue paid by him. The Deputy Commissioner passed an order that the petitioner do vacate the land and remove the rubber trees and the revenue paid would be refunded when petitioner vacated. Petitioner failed to remove the trees and was prosecuted under R. 69 and fined for occupying a finally demarcated grazing ground and convicted on his admission that the rubber trees planted by him were still on the land.

Held, that R. 69 did not empower the revenue authorities to order petitioner to remove the trees he had planted and the mere fact that the trees remained on the ground did not constitute occupation of the grazing ground, and that the Magistrate's order that the rubber trees must be cut down, root and branch, within a month was without jurisdiction and must be set aside. 3 Bur. L.J. 73=25 Cr.L.J. 1264=82 Ind. Cas. 272=A. I.R. 1924 Rang. 289.

——R. 69—Prosecution under—Burden proof—Duty of Revenue Authorities.

It is essential in all prosecutions under R. 69, that there should be evidence not only that the grazing ground has been allotted but also that it has been finally demarcated; that is that the boundaries have been clearly marked with permanent posts or visible marks of some kind, so that there is no room for mistake as to the limits of the grazing ground.

The proper procedure in such cases is for the Land Records Officer to file in each case along with his complaint or report a map showing the relevant boundaries of the grazing ground with the demarcation marks and the area alleged to be occupied by the accused within the grazing ground, and for the Court to take evidence that the grazing ground has been allotted and demarcated and that the alleged trespass has been committed. The evidence of the Land Records Officer on all these points is of course important, as would be also that of the village headman. 5 Bur.L.J. 177=99 Ind. Cas. 595=28 Cr.L.J. 163=7 A.I.Cr.R. 264 =A.I.R. 1927 Rang. 59.

——R. 107-G—Liability under — Brickmaking — Digging clay without license—Owner of land—Liability of.

The accused contracted to dig clay and supply labour to another person for the purpose of making bricks without a license. Bricks were actually made without a license. **Held,** that the owner of the field who engaged the contractors was liable but that the accused were not guilty under R. 107-G of the Lower Burma Land and Revenue Act. 3 Bur.L.J. 145=84 Ind. Cas. 329 (1)=26 Cr.L.J. 265 (Rang.).

BURMA LAWS ACT (XIII OF 1898).

——S. 11—Applicability—Suit for rent of agricultural land of value more than Rs. 500 not falling under S. 13 (1)—Second appeal—If under S. 100, C.P. Code, or under S. 11, Burma Laws Act. A. I.R. (Vol. 26) 1939 Rang. 350=1939 Rang.L.R. 472=184 Ind. Cas. 492.

——S. 12—Shan States—Civil Justice Order, 1900, and Civil Justice (Subsidiary) Order, 1906—Procedure of costs—Power of Shan Court to carry out orders of other Courts—Mandalay Court's power to issue order to Shan Court.

The mere fact that a simplified procedure has been prescribed for a backward area like the Shan States does not affect the power of the Court there to carry out the orders of other Courts in other places. That is a matter of the comity of Courts. Similarly, there is nothing to prevent the Court at Mandalay from issuing orders to a Court in the Shan States, provided that the order will be carried out; for Courts will not issue orders that cannot be carried out any more than the Courts will entertain actions to try matters where they have no power to enforce their decisions. A.I.R. (Vol. 24) 1937 Rang. 367=1937 Rang. L.R. 249=171 Ind. Cas. 806.

——S. 13—Applicability of, to Indian or Burmese Christians—Adopted child of Burmese Christian dying intestate, whether his heir—Succession Act (XXXIX of 1925), S. 37.

Section 13, Burma Laws Act, does not apply to Indian or Burmese Christians and an adopted child is not an heir entitled, under S. 37, Succession Act on an intestacy, to inherit the estate of his deceased adoptive parent, such parent dying a Christian. No acceptance can be given to the view that a deceased person even though a Christian, had by his acts made such an indication as the law would respect; to the effect that his succession is not to be governed by the Succession Act. Illegitimate children are never included in

S. 57, Succession Act, and there is no rule in English Law or among Christians that a person dying without a will confers any rights of succession upon children whom he may have had living with him in his household and treated in the kind of way which would suggest in a Burmese Buddhist household either an **apatitha** or possibly even a **keittima** adoption. A. I. R. (Vol. 28) 1941 Rang. 33=1940 Rang.L.R. 654=192 Ind. Cas. 690.

——S. 13—Applicability—Chinese Buddhist husband and Burmese Buddhist wife—Divorce between—Partition of property—Law applicable.

Where Burmese Buddhist wife demands a partition of property on divorce from her Chinese Buddhist husband, there is no **prima facie** ground for applying the personal law of the man and disregarding the personal law of the woman. It is the community or religious denomination to which the parties belong by which the personal law which forms the rule of decision in the case has to be ascertained. But the personal law of the husband is not **ad idem** with the personal law of the wife. In the absence of any sufficient authority either judicial or legislative to show that either the Chinese customary law or the Burmese Buddhist law should govern the question as to the respective interest of the Chinese Buddhist husband and the Burmese Buddhist wife in the property held by either or both, the question as to the division of property between the parties upon divorce is to be decided according to justice, equity and good conscience under S. 13 (3), Burma Laws Act. A. I.R. (Vol. 26) 1939 Rang. 291=184 Ind. Cas. 665.

——S. 13—"Buddhist"—Chinese Buddhist.

A Chinese Buddhist is a Buddhist within the meaning of that term both in S. 13, Burma Laws Act, and in the Succession Act. A.I.R. (Vol. 26) 1939 Rang. 291=184 Ind. Cas. 665.

——S. 13 — "Buddhist Law" — Applicability to Chinaman.

Under Burma Laws Act, S. 13, "Buddhist Law" should be applied to the inheritance of a Chinaman. **7 Bur.L.T. 246=24 Ind. Cas. 367=8 L.** B.R. 222.

——S. 13 — Chinaman professing Buddhism — Adoption—Law applicable to.

It is open to a Chinaman to profess Buddhism and such a person is a Buddhist within S. 13 of the Act. For a person to be governed by S. 13, it is not necessary that he should have been born a Hindu Buddhist or a Mussalman. Where on the death of a Chinaman professing Buddhism a person claims to be his adopted son, the question of the validity of the adoption must be determined in accordance with the Chinese Customary Law. 12 Bur. L. T. 21=47 Ind. Cas. 148=9 L.B.R. 179.

——S. 13 — Construction — Question whether a Chinese is a Buddhist or not—Question of fact—Law applicable.

A Chinese Buddhist is a Buddhist within the meaning of that term both in S. 13, Burma Laws Act and in the Succession Act. S. 13 (1) has to be construed as laying down that in any question regarding succession, inheritance, marriage or caste or any religious usage or institution, where the parties profess the Buddhist or Muhammadan or Hindu religion, the rule of decision shall be the personal law that governs the community or religious denomination to which the parties belong, except in so far as their personal law in Burma has by enactment been altered or abolished, or is opposed to any custom having the force of law.

Whether a Chinese is a Buddhist or not is a question of fact.

The personal law regulating the succession, etc., of a Chinese Buddhist in Burma is the Chinese customary law, and consequently that law governs a will executed by a Chinese Buddhist. A.I.R. (Vol. 19) 1932 Rang. 59=10 Rang. 97=137 Ind. Cas. 211.

——S. 13—"Hindus"—Kalais sect in Burma—Status of Hindu from India migrating to Burma and marrying Burmese lady—Settling down in Burma with descendants by Burmese wife—Law applicable—Migration to a different country—Presumption is that the Law of that country is accepted.

In the case of a sect at a distance from Hindu centres, such as **'Kalais'** in Burma, to which the deceased belonged, where the surroundings are Burman and Buddhist and the mode of life is different from that of the Hindu communities in India proper, popularly known as such, it is easier to determine it as being outside Hinduism than it is in the case of an isolated individual who has merely lapsed into unorthodox practices. It is obvious that few influences can be more patent in producing new communities of this separate kind than the combined operation of migration, inter-marriage and new occupations. When these influences have operated for sufficiently long, a different community, with its peculiar religion and usages, may well result and be so outside Hinduism in the proper meaning of the word. To the members of such a community the expression "Hindu" in the Indian Succession Act and the Burma Laws Act would be not applicable. In a case of migration of a sect from India to East Africa, their Lordships laid down that where a Hindu family migrates from one part of India to another, **prima facie** they carry with them their personal law, and if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted; but where such a family emigrate to another country and having earlier become themselves Muhammadans, settle among Muhammadans, the presumption that they have accepted the law of the people whom they have joined, should be made. All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environment. It was observed that the analogy is that of a change of domicile on settling in a new country, rather than the analogy of a change of custom on migration within India. If a twice born Hindu migrates across the sea to Burma and marries a Burmese woman, that in itself may not necessarily deprive him of his Hindu status in the eye of the law. But, if he has descendants who have been born and have always lived in Burma, and who have intermarried with its people,

then, even though they may form a community of their own which inherits many traces of Hindu usage, if the usages and religion are of a character so divergent from Hinduism as those of this community are, the community cannot be regarded as Hindu, Kalais acquired a non-Hindu status of their own of this kind. 48 I.A. 553=30 M.L.T. (P.C.) 126=66 Ind. Cas. 609=46 Cal. 310=1 Bur.L.J. 15=11 L.B.R. 155=A.I.R. 1922 P.C. 197=42 M.L.J. 193.

——S. 12—"Hindu"—Meaning of.

"Hindu" in S. 13 of the above Act means the same thing as in S. 331 of the Succession Act and S. 2 of the Probate and Administration Act, and not necessarily an orthodox Hindu or one belonging to one or another of the four castes. Per **Ormond, J.**—The term includes all who are Hindus in common parlance. 37 Ind. Cas. 780=10 Bur.L.T. 194.

——S. 13—Scope — Buddhist Law — "Laws" — Rules of conduct in Vinaya—If "law"—Sale—If a question regarding any religious usage—Buddhist monk—If disqualified from contracting within Contract Act, S. 11.

Per **Full Bench.**—The definition of the word "laws" in its juridical sense is that "laws" are rules of civil conduct enforced by the State. From this it follows that the rules of conduct as laid in Vinaya for the guidance of Buddhist monks cannot be deemed to be "laws" unless they are enforced by the State. According to S. 13 (1), Burma Laws Act, they are not enforced by the State except in cases in which questions regarding any religious usage or institution arise. A sale being a pure matter of contract is not "a question regarding any religious usage or institution." A Buddhist monk, therefore, is not disqualified from contracting by law within the meaning of S. 11, Contract Act. (1915) 2 U.B.R. 61; 29 Ind. Cas. 613 and 5 Rang. 626=A.I.R. 1928 Rang. 3=106 Ind. Cas. 201, Overruled. 7 Rang. 677=121 Ind. Cas. 705 =A.I.R. 1929 Rang. 354 (a) (F.B.).

——S. 13—Scope—"Buddhist Law"—Meaning of —Law applicable to Buddhist parties—Chinaman residing in Burma—Power to dispose of property by will.

The Dhammathat is not an exclusive **lex loci** and the expression "Buddhist Law" is not limited to the Buddhist Law prevalent in Burma. The expression "Buddhist Law" in S. 13 (1) means the law applicable to the Buddhist parties in the case. And although it has been held with regard to the law of marriage, that Buddhist Law means Buddhist Law prevailing in Burma, and the ruling is binding, yet it cannot be extended to the Law of Inheritance. A Chinaman domiciled in Burma, therefore, can dispose of his property by will, although such disposition is contrary to Burmese Buddhist Law, because it is the Chinese Customary Law which governs the succession to the estate of a Chinaman domiciled in Burma. (1881) L.B.R. 135;2 L.B.R. 95; 10 L.B.R. 159; A.I.R. 1923 Rang. 180; A.I.R. 1924 Rang. 219 and A.I.R. 1926 Rang. 172, Appr. 6 Rang. 623=114 Ind. Cas. 513=A.I.R. 1929 Rang. 22.

——S. 13—Scope—Issue, whether cause of action survives or not—If fals under S. 131—Law applicable.

An issue whether a cause of action survives or not on the death of a party is not a question that falls within S. 13, Burma Laws Act (XIII of 1908); such an issue is to be determined not by the personal law of the deceased, but under the general law, which for the purpose is the rule actio personalis moritur cum persona. A.I.R. (Vol. 23) 1936 Rang. 17=13 Rang. 385=160 Ind. Cas. 715.

——S. 13—Scope—"Question regarding religious usage or institution"—Ordination of Burmese Buddhist as rahan—Effect on properties in his owner ship—Rule of decision.

The question whether a Burmese Buddhist by reason of his having become a **rahan** had renounced his worldly life and became automatically divested of all his property and relinquished all title to the same, or in other words, what is the effect produced by the ordination or admission as a **rahan** of a Burmese Buddhist upon properties in his ownership or possession at the time, is a question regarding a religious usage or institution and Buddhist Law will therefore form the rule of decision. A.I.R. (Vol. 26) 1939 Rang. 305=1939 Rang.L.R. 311=183 Ind. Cas. 673 (F.B.).

——S. 13—Scope—Question of paternity of a child —If falls within section.

The question of paternity of a child is not one of succession, inheritance, marriage, caste or any religious institution or usage within the meaning of S. 13 of the Act. 16 Cr.L.J. 84=26 Ind. Cas. 996=(1914) 11 U.B.R. 23.

——S. 13 (1)—"Buddhist"—Chinese Buddhist domiciled in Burma—Law applicable—Burmese Buddhist Law or Chinese Customary Law.

A Chinaman who is a Buddhist comes within the term "Buddhist" in cl. (a) of sub-S. (1) of S. 13, Burma Laws Act and cannot be excluded therefrom either on the ground that he is not a Burmese Buddhist or because the law which governs him in China is not a specifically Buddhist or even a religious law. The same is true of the word "Buddhist" in the Succession Act, 1865, and in the present Act of 1925. A.I.R. (Vol. 26) 1939 P.C. 228=1939 O.L.R. 491=5 B.R. 908=1939 Rang.L.R. 548=(1939) 2 M.L.J. 731=70 C.L.J. 341=182 Ind. Cas. 993 (P.C.).

——S. 13 (1)—Chinaman marrying Burmese Buddhist woman — Burmese Law — Applicability.

The Burmese Buddhist Law regarding marriage is **prima facie** applicable to Chinese Buddhists as the **lex loci contractu**; and to escape from the application of Burmese Buddhist Law regarding marriage a Chinese Buddhist must prove that he is subject to a custom having the force of law in Burma and that that custom is opposed to the provisions of Burmese Buddhist Law applicable to the case; and in case the matter in issue is the marriage of Buddhist Chinaman with a Burmese Buddhist woman he must show that the application of the custom having the force of law will not work injustice to the Burmese Buddhist woman.

Cases considered. 6 Bur.L.J. 135=104 Ind. Cas. 478=5 Rang. 406=A.I.R. 1927 Rang. 265 (F.B.).

——S. 13 (1) — Construction — "Buddhists"—Chinese Buddhists.

Per Full Bench.—Chinese Buddhists are not Buddhists within the meaning of S. 13 (1) of Burma Laws Act, and of the exceptions to S. 29, Succession Act. 8 Rang. 57=A.I.R. 1930 Rang. 81 (F.B.).

——S. 13 (1)—Pre-emption—Muhammadan Law of—Applicability.

The right of pre emption in Muhammadan Law between co sharers exists in Burman under S. 13 (1). 4 Rang. 13=4 Bur.L.J. 267=95 Ind. Cas. 83=A.I.R. 1926 Rang. 79.

——S. 13 (1)—Pre emption—Mahomedan Law of —Applicability—Justice and equity.

Right of pre emption is generally adverse to public interest and the administration of justice and equity does not require its introduction in Burma. 32 Ind. Cas. 488=8 Bur.L.T. 239.

——S. 13 (2)—Justice, equity and good conscience—Law of Calcutta High Court.

Under Sub S. (2), section 13 all questions in civil cases instituted in the Courts of Rangoon were determined according to the law as then administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary Civil Jurisdiction. 5 Bur.L.T. 169=17 Ind. Cas. 954=6 L.B.R. 98.

——S. 13 (3) — Chinese Buddhist—Chinese Customary Law—Applicability.

Chinese Customary Law in the case of Chinese Buddhists cannot be considered to be according to justice, equity and good conscience. 4 Rang. 110=97 Ind. Cas. 876=A.I.R. 1926 Rang. 172.

——S. 13 (3)—Construction—"according to justice equity and good conscience", meaning of.

The phrase "according to justice, equity and good conscience" generally speaking, means English Law if applicable to the society and circumstances of Burma. A.I.R. (Vol. 28) 1941 Rang. 81=1940 Rang.L.R. 807=193 Ind. Cas. 836.

——S. 13 (3)—Scope and Effect of—Muhammadans—Gifts — Law applicable—Parties outside Rangoon—Delivery of possession—Necessity.

Section 13, Sub S. (1), Burma Laws Act, specifically requires Muhammadan Law to be applied in cases where the parties are Muhammadans and the question at issue affects succession, inheritance, marriage or caste, or any religious usage or institution. No reference is made to gifts, and the Muhammadan Law on this subject is, therefore, not made applicable by this sub-section. Subject to the provisions of sub S. (1) and of any other enactment for the time being in force, the law to be administered in civil cases in Rangoon is to be the law administered by the Calcutta High Court in the exercise of its ordinary original civil jurisdiction. Sub-S. (3) provides that in cases not within either sub-S. (1) or sub S. (2), or governed by any other enactment, the decision shall be in accordance with justice, equity and good conscience, which leaves it open to the Court to apply the Muhammadan Law of gifts on the grounds of justice, equity and good conscience in cases arising in Burma, outside Rangoon. Consequently in the case of Muhammadans a gift without delivery of possession is invalid even if the donor has executed and got registered a written statement. A.I.R. (Vol. 24) 1937 Rang. 240=171 Ind. Cas. 752.

——Ss. 13 and 30—Contract of marriage—Breach of—Law applicable—Suit—Appeal.

Suits for breach of promise of marriage between Burmese Buddhists are suits involving questions regarding marriage and appeals in such suits would lie under S. 30 of the Lower Burma Courts Act. and not merely under S. 100, C. P. Code. 11 L.B.R. 99=65 Ind. Cas. 411=A.I.R. 1922 L.B. 6 (F.B.).

BURMA LEGISLATIVE COUNCIL RULES.

——R. 8—Privilege of member.

When a member of the Council asks a question under R. 8 he is entitled to the absolute privilege in respect thereof in the sense that no proceedings can be taken against him in respect of any statement made in the question. A.I.R. (Vol. 23) 1936 Rang. 425=37 Cr.L.J. 1013=14 Rang. 420 =1936 Cr. Cas. 840=164 Ind. Cas. 960 (F.B.).

BURMA (LOWER) COURTS ACT (IMPERIAL ACT VI OF 1900).

——Jurisdiction of Chief Court—Offence under Burma Military Police Act, S. 6 (b), in Rangoon —Chief Court's jurisdiction.

A sepoy of the Rangoon Military Police Battalion was tried for assaulting a senior officer with a "Kukri" before the Adjutant of that Battalion and convicted and sentenced to two years under S. 6 (b) of Burma Military Police Act.

Held, that under the provisions of the Lower Burma Courts Act of 1900 such offences would be triable by the Chief Court. Therefore the Adjutant in trying the case to the finish did so without jurisdiction and his proceedings were void. 25 Cr.L.J. 623=2 Bur.L.J. 21=81 Ind. Cas. 111=A.I.R. 1923 Rang. 139.

——S. 30—Appeal—Scope of—Concurrent findings of fact—Interference.

If the decree is varied or reversed, the appeal will lie, and to that extent the whole case is reopened, but the Court will not interfere with concurrent findings of pure matters of fact, unless very good grounds for that interference are made out. 11 L.B.R. 1178=66 Ind. Cas. 500=A.I.R. 1921 L.B. 60.

——S. 30—Applicability—Suits for breach of contract of marriage—Appeal.

Suits for breach of promise of marriage between Burmese Buddhists are suits involving questions regarding marriage and appeals in such suits would lie under S. 30 of the Lower Burma Courts Act, and not merely under S. 100, C. P. Code. 11 L.B.R. 99=65 Ind. Cas. 411=A.I.R. 1922 L.B. 6.

BURMA (LOWER) TOWN AND VILLAGE LANDS ACT (BUR. ACT IV OF 1898).

——Ss. 29 and 34—Transfer.

Transfer of Property Act, S. 41—**K**, lessee of Government land, transferring lease to **N** by registered deed—**N** not getting his name entered in rolls as transferee and not taking steps to obtain possession and further allowing document of lease to remain in **K's** possession—**N** acts negligently and **K's** position as ostensible owner must be implied from his neglect and it being **N's** duty to see to mutation of names he cannot throw blame on registering or revenue officers—**K** then surrendering lease of land to Government and instead receiving new leases of house sites into which part of land covered by original lease was divided and transferring lease of one house site to **M**—In suit brought by **N** on the strength of transfer of original lease for possession of house site, if **M** looks merely at lease issued by Government and at his transferer's possession of land, he is entitled to rights under S. 41. 7 Rang. 276=119 Ind. Cas. 217=A.I.R. 1929 Rang. 333.

BURMA (LOWER) VILLAGE ACT (IMPERIAL ACT III OF 1889).

——Village headman—If a "Police Officer"—Confession to—Admissibility.

The mere bestowal on a village headman of some powers of arrest as are given to a police officer dies not make him a police officer any more than it makes a Magistrate a police officer. A confession, therefore, made to him is not inadmissible in evidence, but the weight to be attached to such confession will depend on the circumstances of the case and the part he has taken in the elucidation of the crime. 1 L.B.R. 65, Affirmed. 2 Rang. 31=81 Ind. Cas. 540=3 Bur.L.J. 11=25 Cr.L.J. 924=A.I.R. 1924 Rang. 245 (F.B.).

BURMA MOTOR VEHICLES RULES, R. 16.

——Negligence—To pass tram-car on right hand side is prima facie negligent.

Except for reasonable cause a tram-car must be passed on the left side: the proviso in R. 16 merely allows a special exception to the general rule. To pass it, therefore, on the right side is **prima facie** negligent since the sudden appearance of a vehicle from behind a tram-car on the unexpected side is a fruitful source of accidents. 6 Bur.L.J. 76=101 Ind. Cas. 660=28 Cr.L.J. 484 =A.I.R. 1927 Rang. 149.

——R. 26 (3)—Negligence of driver—Liability of owner.

Owner of a motor-car is not criminally liable for negligence of the driver in driving the car without properly illuminated rear light, if the owner has made provision for such illumination. 1 Rang. 600=76 Ind. Cas. 564=2 Bur.L.J. 201=25 Cr. L.J. 196=A.I.R. 1924 Rang. 63.

BURMA MUNICIPAL ACT (III OF 1898).

——S. 2 (6)—Construction—"Lodging House"—Bye-laws under S. 142—Application of.

If a building is divided into separate and independent dwellings or tenements and those dwellings or tenemtnts are such that the occupants of them do not to any extent use or occupy the building as a whole in common then even if separate tenements or some of them are actuaully used as lodging house the building as a whole does not thereby become a lodging house and only those separate and independent tenements which are used as lodging houses need to be registered and licensed. Note to S. 2 says that the buildings commonly called "tenement lodging houses" should be brought within the operation of the lodging house rules if they have kitchens, privies or other conveniences in common, that is, if the building as a whole is occupied to any extent in common by the tenants of the separate tenement, but that they do not come within the operation of the lodging house rules if each tenement is entirely independent and provided with its own kitchen and privy, that is, if the building as a whole is not occupied to any extent in common by the tenants of the separate tenements. If a building as a whole is let in lodgings or otherwise occupied to any extent in common by members of more than one family then it is a lodging house and is subject to the bye laws. If there is no such common occupation of the building as a whole but there is such common occupation of a particular part of it then that particular part is a lodging house but the building as a whole is not a lodging house. If neither the building as a whole nor any part of it separately is occupied to any extent in common by members of more than one family, neither the building nor any part of it is a lodging house. 2 Bur.L.J. 298 =25 Cr.L.J. 1136=81 Ind. Cas. 960=A.I.R. 1924 Rang. 109.

——S. 2 (6) and 142 (d)—"Lodging house" What is.

A lodging house need not be let in lodging. It is enough if it is occupied in common by members of more than one family. Persons living in the lodging houses are lodgers whether they pay rent or not and the owner of the lodging house receives them when he allows them to occupy the building. 19 Cr.L.J. 370=44 Ind. Cas. 674=(1917) 3 U.B.R. 52.

——S. 8—Rules under, Rr. 26, 27, 53—Election—Disqualification for nomination—Omission to object—Objection under S. 53—Power to issue mandamus against hearing objection—Specific Relief Act (I of 1877), S. 45.

Rule 27 of the rules framed under S. 8, Burma Municipal Act, contemplates disqualification for nomination as well as election and consequently if an objection as to the validity of nomination upon the ground of disqualification is not brought under R. 27, it is not open to the objector to bring it under R. 53, and if such objection is brought under R. 53, the High Court can, in a suitable case, issue a **mandamus** on the officer before whom the objection is filed to forbear from entertaining the objection.

Further the words "irregularity in election proceedings" in R. 53 of the said rules do not cover the election of a disqualified candidate. A.I.R. (Vol. 18) 1931 Rang. 326=135 Ind. Cas. 859.

——S. 8, R. 62—Petition under R. 62 (1), made by an unsuccessful candidate at an election, to the District Judge is one made to **persona designata** —Petition transferred to Additional District Judge:

Held, that the District Judge had no power to transfer the petition and the High Court can interfere in revision. A.I.R. (Vol. 26) 1939 Rang. 143=180 Ind. Cas. 931.

——S. 8, R. 68 A—Government coming to conclusion that no proper election took place and ordering new election—Validity—Candidates elected in original election—Right to declaration of having been duly elected.

Shortly after a Municipal Election a candidate brought a petition against those who were thought to have been the successful candidates and to have been elected upon the Municipal Committee, alleging many acts of irregularities. The consequence of this petition was that the irregularities came to the notice of the Government which held that the proceedings of the election were a farce and a fiasco. Consequently they proceeded under R. 68 made under S. 8, Burma Municipal Act, for the preparation and publication of the electoral roll for holding a proper election. The Judge who decided the petition held, reviewing all the matter, that the objections raised in the petition were valid, and he pointed out that all the criticisms made in regard to the electoral roll were correct. Upon that it was thought that the next four persons who were on the list in having received votes during these proceedings ought to be elected. The person declared elected sued for a declaration that the orders of the Government and the electoral authority were **ultra vires** and that they were duly elected members of the Municipal Committee:

Held, that once an election had taken place the Government could not declare it to be void and hold a new one. But the authorities must make a decision upon the facts as represented to them and must make their decision in good faith. When they were apprised of the existence of facts as to the result of an inquiry, in which evidence as to those facts was relevant, they might be assisted by the examination of the tribunal's opinion and the record of the evidence before it. No proper election having taken place, the candidates could not be declared elected and that the orders of the Government and the Electoral Authority were within powers. A.I.R. (Vol. 26) 1939 Rang. 408=185 Ind. Cas. 526.

——S. 42-A—Scope——Committee's power to withhold permit — Failure of licensee to produce stamps for lease.

In considering the operation of S. 42-A the question of price of work is relevant. Where the municipality called upon the plaintiff to produce stamp paper to execute the lease of license, and the plaintiff did not take any notice of it, his reason being that he had already acquired the right of the license or lease for five or four months before that: **held**, that no bye law or other authority can be shown which empowers the defendant Municipal Committee to cancel the license simply because the licensee commits default in producing stamp paper, or to issue a notice to the licensee the effect of which was stopping the exercise of the right for two days. 2 Bur.L.J. 231=77 Ind. Cas. 864= A.I.R. 1924 Rang. 132.

——S. 43—Misconduct—Contract for unnecessary work given to favour near relative of Vice-President—Liability for loss—All members, if responsible—Passing of bills of payment for work already done—If waste or misapplication.

In a suit by the Secretary of State for India against the former President, Vice-President and members of a Municipal Committee, it was alleged that these members were responsible for the fact that 23 perfectly good brick culverts on roads within the Municipal area were practically destroyed by the order of the Committee and new wooden structures erected on the old foundations for no reason whatever save that the contracts for the works were all given to a man who was closely related to the Vice-President:

Held, that giving out entirely unnecessary work in this way caused a loss or waste of public money and that all the members who took part in this series of transactions resulting in this loss and waste must be held liable under S. 43, Burma Municipal Act, for the initiating of this improper series of transactions was misconduct which had entailed loss to the Municipal Committee and all the members were responsible for the series of transactions as a whole.

The passing of the bills of payment by committee, for works which had already been carried out and which work was unnecessary, does not amount to causing loss, waste or misapplication of money because the liability to make the payment to the contractor arises when the contractor is given the contract. A.I.R. (Vol. 21) 1934 Rang. 85=12 Rang. 99=156 Ind. Cas. 275.

——S. 43—Municipal councillor, position of—Liability for loss by his own acts or by acts of agents.

The position of councillors with regard to the Municipal fund is in law that of trustees. As trustees they would be bound to exercise over trust properties the same degree of caution and care as a man of ordinary prudence would exercise in the case of his own property. They would be liable for any loss of the trust fund which was facilitated by the gross neglect of their duties as trustees by their own acts or by the acts of their agents:

Held, on facts, that the President of the Municipal Committee was guilty of acts of malfeasance, on account of loss caused by the embezzlement of the tax collector whom he had appointed without taking security, though he had no power to do so and consequently he was liable to make good the loss under S. 43, Burma Municipal Act. A.I.R. (Vol. 27) 1940 Rang. 8=1940 Rang.L.R. 172= 187 Ind. Cas. 212.

——S. 46—Scheme of—Principle of assessment —Contractor's test and revenue test—Value of—Occupation of brewery and distillery carried on premises, only of its kind in District—Contractor's test may be taken as rough test.

It is not a tenant's trade which is to be rated, under S. 46, Burma Municipal Act, but the premises in which he carries on his trade or business;

and it is necessary to look at all the circumstances of the particular occupation, including therein the business that has been done on the premises. Neither the contractor's test, not the revenue principle, is a principle of assessment. Each, or either, according as circumstances demand may in particular cases of assessment of lands or buildings, be used as a method of finding out what the hypothetical rent may be when no direct evidence on this point is available. In order to see what rent a hypothetical tenant would pay, the whole of the circumstances in each particular case must be examined.

A test based upon the actual figures of profits can only be applied where a hereditament itself has an exclusive profit making characteristic so as to single it out from other classes of hereditaments and to make it safe to arrive at the rent which the tenant might reasonably be excepted to pay from this consideration alone. Where an occupation such as that of brewery and distillery carried on by the assessees on the premises is the only of its kind in the country and there is thus no standard of comparison with other hereditament of a similar character, the contractor's test may be taken as a rough test, to arrive at the rent which a hypothetical tenant would pay. Careful regard must be had both to the outlay which would have to be made and to the return which the contractor would except for such outlay. Hence it is legitimate to inquire whether the business of the occupant of the premises is good, bad or indifferent; or whether it is a business which is specially fortunate by reason of the comparative absence of competition. The better the business is, the higher the rent which a hypothetical tenant might reasonably be expected to pay for the premises. But this does not mean that the hypothetical rent should be calculated by an investigation into the present profits and a conclusion drawn from them that the hypothetical tenant would pay so much per cent. of the profits which the present occupants are making. The examination of the profits made by the occupant and a direct calculation from them is, in such circumstances, a dangerous and unsafe method of discovering the rent which a hypothetical tenant would pay. A.I.R. (Vol. 25) 1938 Rang. 345= 1938 Rang.L.R. 336=177 Ind. Cas. 803 (S.B.).

——S. 46—Taxation on building — Machinery — Tax on.

Though machinery placed for use in a building is not liable, as such, to taxation under S. 46 of the Act, machinery on the premises, and for the purpose of making and which makes the premises fit as premises for the particular purpose, is to be taken into account in finding out the rateable value of such premises. 7 Bur.L.T. 44=24 Ind. Cas. 395=7 L.B.R. 119.

——S. 51 (8)—Jurisdiction—Notification of levy of tax published—Civil Court's power to consider—Legality.

A public notification under the Burma Municipal Act that a tax has been imposed is conclusive evidence that it has been imposed in accordance with law and a Civil Court is debarred from enquiring whether the tax has been legally imposed. 1 Bur. L.J. 145=74 Ind. Cas. 34=A.I.R. 1923 Rang. 75.

——S. 59 — Scope — Non feasance of President — Suit based on—Limitation—Liability of President when act of loss is not the direct result of his inaction.

The ward headmen of a Municipality had executed a mutual security bond for the collection and credit by them of Municipal revenues. The effect of this mutual security bond was that all the others of them guaranteed the due collection and credit of revenue by each. Later on the other ward headmen presented a petition to the President of the Municipal Committee to the effect that they did not any longer desire to stand guarantee for one of their number named **M**, as they had had to make good a deficiency in his collections. No inquiry was made into this allegation, and no action whatever was taken on the petition of the ward headmen. Subsequently it was discovered that **M** had embezzled a sum of Rs. 735 out of that year's revenue, and the Municipal Committee thereupon called upon the other headmen to show cause why they should not make good this amount under the terms of their mutual security bond, and in reply these headmen relied upon their petition asking to be discharged from their bond. The Committee, however, held that the headmen were not released from their bond by the mere act of presenting this petition and ordered that the other headmen must under the terms of their guarantee make good the defalcation of **M**. The headmen appealed against this order to the Commissioner who held that their petition discharged them from all liability on their bond, and decided that the responsibility for the loss fell upon the President for not taking any action on the headmen's petition. In consequence of this order of the Divisional commissioner, the Municipal Committee filed a suit against the President for the recovery of the amount defalcated:

Held, (i) that the act of the President in taking no action on the petition was a non feasance only and there could be no right of action at common law against a member of an elected Committee arising out of the results of an act amounting to a mere non-feasance. If the Committee had a remedy against him, that remedy must be the creation of statute and it is to be found in the provisions of S. 59, Burma Municipal Act. Consequently a member of the Committee can only be made liable for loss which is a direct consequence of his neglect or misconduct. But the present embezzlement could not be held to be the direct consequence of failure to take action on a petition of the headmen for the mutual security bond of the headmen was not rendered automatically void and of no effect by the presentation of that petition:

(ii) the loss to the Municipal Committee was the direct result of the order of the Commissioner, and not of the non feasance of the President:

(iii) the article of the Limitation Act applicable was Art. 36 and not Art. 120 or 90. The time began to run from the date of non-feasance by the President, and the suit therefore was barred, not having been filed within two years of the non-feasance.

A.I.R. (Vol. 23) 1936 Rang. 310=164 Ind. Cas. 410.

——S. 62 (1) (a) (b), (as amended)—Object and Scope—Assessment—Basis of—Plinth area or eaves measurement.

The land to be assessed must be ascertained according to the plinth and not the eaves measurement of the building. The object and effect of S. 62 (1) (A) (b), Burma Municipal Act, is that the surveyor in ascertaining the assessable area should look down and not up, and should measure the extent of the space occupied by the building that stands upon it and not the area which, though not occupied by the building, by reason of the building that has been erected, may be afforded protection against the elements. A.I.R. (Vol. 22) 1935 Rang. 390=13 Rang. 758=158 Ind. Cas. 813 (F. B.).

——S. 63—Injunction to restrain levy of tax—Suit for—If lies.

A suit for injunction to restrain the Municipality from imposing and collecting a tax is not maintainable. But the assessee has the right to object to the assessment before a sub-committee and an appeal from its decision to the proper authority. He may also claim a reference to the Chief Court. 1 Bur.L.J. 145=74 Ind. Cas. 34=A.I.R. 1923 Rang. 75.

——S. 79 (5), (as amended by Act V of 1933)—Scope—Question whether municipal sub-committee's decision was duly communicated to assessee.

The question whether the municipal sub-committee's decision was duly communicated to the assessee or not is a question of fact which may affect the maintainability of the appeal but does not affect the liability to or the principle of assessment, and consequently does not fall within the purview of S. 79 (5). A.I.R. (Vol. 28) 1941 Rang. 339=198 Ind. Cas. 180 (S.B.).

——Ss. 84, 93—Overhead mains are not assessable.

Overhead mains are not assessable under the Burma Municipal Act:

Held, that the assessment of the premises and hereditaments belonging to the Electric Supply Co., should be made without taking into account any value, in respect of the overhead mains, cables or wires. A.I.R. (Vol. 24) 1937 Rang. 1=14 Rang. 649=166 Ind. Cas. 512 (S.B.).

——Ss. 92 (4) and 180—"Building"—Wall—If building—Erection of fence or boundary wall—Offence.

There is no definition of the word "building" in the Act or the bye-laws thereunder and the question must therefore be decided with reference to the mischief aimed at by the Act. The erection of a mere fence or boundary wall is not an offence under the Burma Municipal Act. But where such a wall is built so as to enable the occupier of the main house to use the enclosed area as part of his habitation and not merely as a boundary or fence it comes within the definition of a "building" and disobedience to an order or direction to dismantle the same is an offence under the Act. 1 Bur.L.J. 102=24 Cr.L.J. 732=73 Ind. Cas. 972=A.I.R. 1923 Rang. 65.

——S. 98—'Night soil'—Duty of Municipal Committee.

The words night-soil, refuse, rubbish and offensive matter in S. 98 (2) of the Burma Municipal Act include night-soil. S. 98 (2) of the Act imposes on the Municipal Committee an imperative duty of providing sites and places for the deposit of night-soil. 13 Bur.L.T. 62 and 136=59 Ind. Cas. 823=10 L.B.R. 203 (Rang.).

——S. 98—Night soil—Duty of municipality to remove—If imperative—Nuisance by Municipality can be restrained by injunction.

Per **Twomey, C.J. and Young, J.**, contra.—S. 98 of the Act does not impose an imperative duty on the Municipality to remove and dispose of night-soil.

Per **Curiam**.—If a nuisance is committed by the Municipality in the act of removing or disposing of night-soil it can be restrained by injunction from doing so. 10 L.B.R. 203=59 Ind. Cas. 823=13 Bur.L.T. 62 and 136 (Rang.).

——S. 114 (1)—Applicability—New private markets—Necessity of licence.

The provisions of S. 114 (1) of the Burma Municipal Act as amended in 1931 do not prohibit the newly establishing of a private market which was not in existence at the commencement of the Act, i.e., 1st July, 1898, without a licence from the Municipal Committee within whose area the market is established. The prohibition is only in respect of such private markets as were 'lawfully in existence at the commencement of the Act.'

[Bad drafting of the section pointed out.] A.I.R. (Vol. 20) 1933 Rang. 1=10 Rang. 505=1932 Cr. Cas. 942=34 Cr.L.J. 158=141 Ind. Cas. 81 (F.B.).

——(As amended by Act I of 1931), S. 124 (a)—Scope—Offence under bye-law made under S. 142 (v)—Liability to punishment after repeal of S. 142 (v) — Absence of bye-law under S. 124 (a) — Effect—General Clauses Act, 1898, S. 2.

S. 142, Cl. (v), Burma Municipal Act, was deleted by S. 10 of Act I of 1931, but S. 124 (a). Burma Municipal Act which was inserted in the Burma Municipal Act by S. 9 of Act I of 1931 contains identical provisions.

Where fresh bye-laws have not been made under S. 124 (a), a conviction for an offence made punishable by a bye-law made under S. 142 (v) is maintainable. A.I.R. (Vol. 21) 1934 Rang. 12=11 Rang. 532=1934 Cr. Cas. 78=35 Cr.L.J. 735=148 Ind. Cas. 616.

——S. 142—Bye-law—Condition restricting rate of interest chargeable by pawnbroker—Legality—If ultra vires.

S. 142 empowers a Municipal Committee to make bye-laws for rendering license necessary for pawnbrokers and determining the conditions subject to which they shall be granted. A condition in pawnbroker's license issued under S. 142 limiting the rate of interest chargeable by pawnbrokers does modify and restrict the law which allows the freedom of contract but it is not on that account ultra

vires. 18 Cr.L.J. 1012=42 Ind. Cas. 756=11 Bur.L.T. 208.

——S. 142 (d)—Scope—Bye-laws for lodging houses are not ultra vires.

A bye-law of a municipality requiring lodging house keepers to pay a licence fee reckoned on the maximum number of lodgers authorised is neither illegal nor ultra vires. 13 Bur.L.T. 107=59 Ind. Cas. 545=22 Cr.L.J. 113.

——S. 142 (d)—Scope—Bye-law 19 (c)—If ultra vires—Notice—Validity.

Bye-law 19 (c) framed by the Rangoon Municipality is not ultra vires as the framing of such a clause is authorised by S. 142 (d) of the Act. A notice, to be valid must be reasonable and possible to comply with. 14 Cr.L.J. 484=20 Ind. Cas. 740=6 Bur.L.T. 138.

——S. 142 (r)—Bye-law—'Keep', meaning of.

The word 'keep' in the bye-law made by the Rangoon Municipal Committee under S. 142 (r) of the Act means the keeping for some long period of time. Therefore tying a goat meant for sacrifice in the temple awaiting the sacrifice ceremony for about two hours does not amount to a breach of the bye-law. 10 Bur.L.T. 24=17 Cr.L.J. 342 =35 Ind. Cas. 518=8 L.B.R. 328.

——S. 146—Scope—Injunction—Right to.

General provisions do not take away right to injunctions. 13 Bur.L.T. 62 and 136=59 Ind. Cas. 823=10 L.B.R. 203.

——S. 148—Bye-law under S. 142 (c)—Punishment for breach.

Section 148, Burma Municipal Act, specifically provides for the punishment of offences relating to breaches of "any of the sections, sub-sections or clauses of the Act mentioned in column 1 of the following table of any rule or bye law made thereunder", and the omission of S. 142 from colum 1 of the following table shows that a breach of a bye-law duly passed under S. 142 (e) is not an offence punishable under S. 148.

This is a casus omissus, and in the public interest the matter should be set right by the legislature. A.I.R. (Vol. 20) 1933 Rang. 68=11 Rang. 182=34 Cr.L.J. 700=1933 Cr. Cas. 486= 144 Ind. Cas. 159.

——S. 148 — Pawn-broker — Who is — Isolated transaction does not make person pawn-broker.

A 'pawn-broker' is a person who "carries on the business of pawn-broking". It implies one who systematically lends money upon the security of pawns, and "carrying on business" implies, "a series or repetition of acts". It is a question of fact in each case whether a "business" is being carried on, and each case must be determined by its own special circumstances unless there can be found some systematic course of lending upon pawns or such repetition as to amount to a reasonable inference that it forms part of the particular Chettyar's money-lending business to lend on pawns. His status as pawn-broker within the Burma Municipal Act, 1898, and the rules thereunder cannot be held to be established.

A Chettyar whose business is to lend money on promissory notes and upon security of land cannot be said to be pawn-broker where he advances an isolated loan to another on security of a chattel. A.I.R. (Vol. 22) 1935 Rang. 104=13 Rang. 32 =1935 Car. Cas. 313=36 Cr.L.J. 853=155 Ind. Cas. 889.

——S. 162-B—"Vehicle"—Bicycle.

A bicycle driven by humaan energy comes under the section "vehicle driving", includes the application of human energy, to the pedals of a bicycle. A man riding a bicycle may be said to drive a vehicle under S. 162 and he commits the offence of driving a vehicle after dark without lamps, if found riding his bicycle without light after dark. 12 Cr.L.J. 573=12 Ind. Cas. 837=4 Bur.L.T. 134.

——S. 180 (1)—Disposal of surface water—Order —Disobedience.

Under Chap. VI of the Burma Municipal Act, a Town Committee cannot pass general orders or directions regarding the disposal of surface water. The neglect to comply with such an order therefore is not an offence under S. 180 (1) of the Act. 21 Cr. L. J. 94=54 Ind. Cas. 494=3 U.B.R. (1919) 188.

——S. 229 (g)—Rules under—Burma Municipal Rules, (1934), Chap. VI, R. 24—Breach of the rule, if makes contract void.

Per **Roberts, C.J.**—Rule 24 of Chap. VI of the Burma Municipal Rules framed under S. 229 (g), of the Burma Municipal Act, was made generally, for the guidance of committees and public officers in all matters connected with the carrying out of the Act; and that means that it has a directory and not a mandatory significance and, therefore, a breach of this rule does not make the contract void.

Per **Sharpe, J.**—The rule was either under S. 71, and beyond the powers of the Local Government to make, or, at least it was only directory, if made under S. 229 (g), and the breach of the rule does not make the contract void and the parties cannot escape liagility under it. A.I.R. (Vol. 25) 1938 Rang. 404=1938 Rang. L.R. 704=178 Ind. Cas. 817.

BURMA OIL FIELDS ACT (I OF 1918).

——S. 2—Oil—"Oil" does not include "gas" — Grant—Construction.

Where by a grant by Government, dated 25th April, 1912, the Secretary of State for India in Council granted to the respondents the right to win and get earth-oil from a certain well site and to dispose of all earth-oil to be gotten therefrom on certain conditions.

Held, that the grantee did not by his grant obtain any right to win, get or dispose of gas.

Held, further, that the ownership of natural gases, so far as they are capable of ownership, remained with Government and did not pass either in 1912 or in 1919 by the rules under Burma Oil Fields Act (1918) to the grantee. 5 Rang. 133=102 Ind. Cas. 830=A.I.R. 1927 Rang. 201.

——S. 13—Mortgagee not holding certificate on date of mortgage—Mortgage is not void ab initio.

There is no legal basis for the suggestion that a mortgage made in favour of a mortgagee who did

not hold a certificate of approval, as required by rules in respect of grant to win earth oil, at the time when the mortgage was made, is void ab initio. 6 Rang. 423=111 Ind. Cas. 105=A.I.R. 1928 Rang. 136.

BURMA OIL SUBSIDIARY PROVIDENT FUND RULES.

——R. 9—Interest of Member—Attachability—Trustee and member—Agreement between—Effect.

Under the Burma Oil Subsidiary Provident Fund Rules, the member's money is handed over to the trustees to be dealt with by them in accordance with these rules. A subscribed relinquishes his right of complete control but nowhere it is suggested that the money ceases to be his property. In view of S. 19, T.P. Act, a member has a vested interest in the deposits made by himself. It may be that that interest is liable to be divested by a condition subsequent, for instance, on the member's becoming insane.

Two parties cannot by a mutual agreement do away with the existing rights of independent third parties. The member and the trustees cannot agree between themselves that when a third party obtains an order of the Court to attach the interest of the member in the fund held by the trustees, that interest should cease to exist. When the attachment is received, it is in existence and no understanding between the member and the trustees can ensure that it shall be deemed to have disappeared. On an attachment being made, the only effect of R. 9 is that that portion of the interest of the member which is not covered by the attachment, or which exceeds the amount mentioned in the prohibitory order, is forfeited to the trustees. Nothing in R. 9, however, can render an attachment order ineffective so far as regards the amount referred to therein, and when the money becomes payable to the subscriber it must not be paid otherwise than under the orders of the Court. A. I. R. (Vol. 28) 1941 Rang. 239=198 Ind. Cas. 737.

BURMA OPIUM LAW AMENDMENT ACT (BURMA ACT VII OF 1909).

——S. 3—Effect of—Cr. P. Code, S. 110.

The effect of S. 3, Burma Opium Law Amendment Act, is to introduce an additional ground on which S. 110 of the Code can be applied. 2 Rang. 61=81 Ind. Cas. 546=3 Bur.L.J. 17=25 Cr.L. J. 930=A.I.R. 1924 Rang. 244.

——S. 3—Procedure—Duty of Magistrate—Order—Appeal.

Information received under S. 3 of Burma Opium Act should be treated in the same manner as under S. 110, Cr.P. Code (i.e.), the Magistrate must record an order under S. 112 and proceed in accordance with the subsequent sections of the Code. Against an order made by a Magistrate under S. 3 of the Act an appeal lies to the Dt. Magistrate under S. 406, Cr.P. Code. (1918) 3 U.B.R.I. 7=50 Ind. Cas. 657=20 Cr.L.J. 321.

——S. 3—Scope—Liability under—Nature of order to be passed.

A person who earns his living in whole or in part by unlawful sale of opium, can be placed on security under S. 3, but an order of restriction cannot be passed under S. 7 on those grounds. 2 Rang. 61, Diss. from. 4 Rang. 123=5 Bur.L. J. 78=27 Cr.L.J. 1402=98 Ind. Cas. 714=A.I. R. 1926 Rang. 182.

BURMA OPIUM RULES (1910).

——R. 11—Beinchi—Possession by non-Burman—Offence.

The possession of **Beinchi** up to three tolas by a non-Burman is not illegal if he obtained it from a licensed vendor. Beinchi otherwise called 'defined opium' is included in the definition of opium. 1914 U.B.R. II 1=24 Ind. Cas. 844=15 Cr.L. J. 532.

BURMA PREVENTION OF CRIME (YOUNG OFFENDERS) ACT (III OF 1930).

See also PENAL CODE, S. 366-A.

——S. 2 (d)—Junior School.

The Local Government has no authority under the Act to recognize as a Junior School any place which is not a "training school" within the definition in Cl. (d), S. 2 of the Act. The Act does not anywhere recognize the issue of a "custody order" committing a young person to the custody of a Home or similar institution; it only recognizes order committing them to the custody of some individual or other. A.I.R. (Vol. 20) 1933 Rang. 275=1933 Cr. Cas. 1019=35 Cr. L. J. 599=147 Ind. Cas. 1152.

——S. 10—Sessions Judge—Power to order detention in appeal—"Enhancement of sentence".

Under S. 10 of the Burma Prevention of Crime (Young Offenders) Act, a Court of Session on appeal has jurisdiction to order detention in a Borstal School for any period which is legal under the provisions of Sub-S. (25) irrespective of the length of the sentence of imprisonment which has been passed by the Magistrate from whose judgment the appeal is brought; and in ordering such detention there can be no question of an enhancement of sentence having been made. A.I.R. (Vol. 23) 1936 Rang. 227=14 Rang. 119=37 Cr.L.J. 790 =1936 Cr. Cas. 527=163 Ind. Cas. 74.

——S. 13—Interpretation of—Right of appeal under—Nature of.

Section 13, Burma Prevention of Crime (Young Offenders) Act, should not be construed as saying firstly that the accused shall have all the rights of appeal provided by the Criminal P. C., and then secondly that no appeal shall lie from the decision of a Magistrate empowered under this Part II merely because the proceedings have been forwarded to him with his opinion by another Magistrate. The section must mean that in addition to the right of appeal against an order amounting to a sentence under the Cr. P. Code, the accused shall have the right of appeal against any order affecting him except non-final orders as to age, or directing the submission of the case to a Magistrate empowered. A.I.R. (Vol. 24) 1937 Rang. 80=14 Rang. 78= 38 Cr.L.J. 483=167 Ind. Cas. 892.

——Ss. 14 and 15—Finding of trial Court as to age of accused—High Court, if can consider it for purposes of S. 15.

According to S. 14, Burma Prevention of Crime (Young Offenders) Act, it is not open to the High Court to reconsider the finding arrived at by the trial Court which is a Court of Session as to the age of the appellant so far as the question as to the applicability of S. 15 is concerned. A.I.R. (Vol. 24) 1937 Rang. 121=38 Cr.L.J. 1022=171 Ind. Cas. 125.

——S. 15—Age—Material time.

While for the purpose of S. 15, the age must be ascertained with reference to the time when the sentence is to be passed, the age with reference to the general question as to the capacity to exercise reason and self control must be with reference to the time of the commission of the offence. A. I.R. (Vol. 24) 1937 Rang. 121=38 Cr.L.J. 1022 =171 Ind. Cas. 125.

——S. 15—Discretion of High Court—Age—Consideration for purposes of sentence.

For the purpose of considering whether the provisions of S. 15 of the Act can be extended to the accused or not, there is nothing to fetter the discretion of the High Court in considering whether he has been really proved to have completed sixteen years of age or not for the purpose of determining the general question as to what is the appropriate sentence to be passed on him. A.I.R. (Vol. 24) 1937 Rang. 121=38 Cr.L.J. 1022=171 Ind. Cas. 125.

——S. 16 (d)—Order under—No appeal filed—Revision, if lies.

A boy of ten years was convicted of an attempt to commit rape and an order was passed under S. 16 (d), Burma Prevention of Cime (Young Offenders) Act, committing the boy to the custody of his father on his father executing a bond to be responsible for the good behaviour of the boy. This order was an appealable order, and the boy did not file any appeal:

Held, that the High Court should not interfere in revision. A.I.R. (Vol. 22) 1935 Rang. 393= 1935 Cr. Cas. 1116=37 Cr.L.J. 94=159 Ind. Cas. 450.

——S. 16 (e)—Applicability—Crime by juvenile an isolated one—Order of detention.

Where it appears that the crime which the juvenile has committed is an isolated one due to his losing self control in a set of special circumstances, and where the juvenile is not shown to be subjected in his normal life to undesirable influences, it is not necessary that he should be detained in a Borstal School. These schools are introduced for the training and care of young persons who are by their circumstances, likely to enter upon a life of crime. A.I.R. (Vol. 26) 1939 Rang. 383=41 Cr.L.J. 22=184 Ind. Cas. 464.

——S. 16 (e) — Applicability — Offender between age of 15 and 16 years—If can be ordered to be detained in Training School for 4 years.

Where an offender, ordered to be detained in the Training School under S. 16 (e), Burma Prevention of Crime (Young Offenders) Act, for a period of 4 years, is of age between 15 and 16 years, the order is illegal, since he will have passed his 19th birthday by the time the 4 years' period of detention expires. In such cases the proper order is to detain him in the Training School till he attains his 19th birthday. A.I.R. (Vol. 25) 1938 Rang. 228=39 Cr.L.J. 697=176 Ind. Cas. 217.

——S. 17—Scope—Effect of Act XVIII of 1939—Offence under S. 112, Railways Act by juvenile below 16 years.

The section must be taken as having been modified by Burma Act XVIII of 1939, and can no longer affect the punishment to be awarded for offences by juveniles under 16 years against S. 112, Railways Act. A.I.R. (Vol. 28) 1941 Rang. 181=1941 Rang. L.R. 234=42 Cr.L.J. 641=195 Ind. Cas. 4.

——S. 20—Custody order—Youth convicted and youth not convicted—Distinction.

The Burma Act does not make any distinction between an order committing to suitable custody a young person who has not been convicted of an offence and an order committing a youthful offender to such custody, and in both cases the young person, whether convicted or not, is committed to the care of a custodian under a "custody order", and if, in the case of S. 20 no bond were to be attached to the "custody order", there would be no conditions whatever attached to that order. A. I.R. (Vol. 20) 1933 Rang. 275=1933 Cr. Cas. 1019=35 Cr.L.J. 599=147 Ind. Cas. 1152.

——S. 20 (3)—Nature of custody order.

Under the provisions of S. 20, Sub-S. (3), Burma Prevention of Crime (Young Offenders) Act, the only order which a Magistrate is entitled to pass is either an order sending the offenders to a Junior School or a custody order for the offenders to be detained in custody, for any period up to the age of 16. Where, however, a Junior School under the Act has not been established, the only course which a Magistrate, acting under S. 20, Sub-S. (3), can adopt is to "make a custody order for him to be detained in custody for ony period up to the age of 16". A.I.R. (Vol. 20) 1933 Rang. 275=1933 Cr. Cas. 1019=35 Cr. L. J. 599=147 Ind. Cas. 1152.

——S. 24—"Beyond age of 18" meaning of—Accused person between 15 and 16—Order of detention—Nature of order to be passed.

The expression "beyond the age of 18" in Burma Prevention of Crime (Young Offenders) Act must mean and include the period up to the 19th birthday of the person concerned. The duty of the Magistrate in such a case is to fix the age of the accused person as nearly as he can from the evidence. Where the accused is between 15 and 16 yeas of age and the Magistrate directs him to be detained in a Senior Training School for four years, the proper course is to fix his 15th birthday as a particular date and direct him to be detained till his 19th birthday. The order should be accompanied by a reference to the date upon which the 19th birthday occurs in order that the School Authorities may with certitude carry out the duties entrusted to them. A.I.R. (Vol. 23) 1936 Rang.

485=1936 Cr. Cas. 976=38 Cr.L.J. 33=14 Rang. 625=165 Ind. Cas. 575 (F.B.).

——S. 24, Cl. (b)—"Beyond age of 18" includes period up to 19th birthday — Order of detention must fix exact age of accused.

The expression "beyond the age of 18" must mean and include the period up to the nineteenth birthday of the person, under Cl. (b), S. 24, Prevention of Crime (Young Offenders) Act. A person ordered to be detained at a Senior Training School cannot be detained there beyond the age of 18. The Magistrate passing the order under the Act must fix the exact age of the accused. Consequently a person who is just under 16 years of age at the time of passing of the order can be ordered to be detained for a period of three years under S. 24 (b). A.I.R. (Vol. 23) 1936 Rang. 297=14 Rang. 327=37 Cr. L. J. 869=163 Ind. Cas. 1008.

——S. 25—Order under—Nature of.

Per Ba U, J.—(In order of reference) the order passed under S. 25, Prevention of Crime (Young Offenders) Act, has not the same legal effect as an order passed under S. 562, Cr. P. Code, as it affects the offender directly on his person and deprives him of his liberty unlike an order under S. 562. Cr.P. Code. It is, therefore, a punishment within the meaning of S. 3, Whipping Act, and S. 53, I.P.C. A.I.R. (Vol. 27) 1940 Rang. 81 =1939 Rang.L.R. 744=41 Cr.L.J. 455=187 Ind. Cas. 405.

——S. 25—Separate punishments.

Accused convicted of offences under Ss. 324 and 326, I.P.C.—Sentence of detention in Borstal School and whipping for these separate offences:

Held, that the infliction of these separate punishments was legal, just and sensible. A. I. R. (Vol. 21) 1934 Rang. 125=1934 Cr. Cas. 718= 12 Rang. 344=35 Cr. L. J. 959=149 Ind. Cas. 107.

——S. 25 (1)—Appeal—Form—Detention for 5 years.

When under the provisions of S. 25 (1) the accused have been directed to be detained in Borstal School for a period of 5 years by the Second Additional Special Power Magistrate their appeal lies to the Court of Session of the district. A.I.R. (Vol. 23) 1936 Rang. 229=14 Rang. 143=37 Cr. L.J. 793=1936 Cr. Cas. 513=163 Ind. Cas. 144.

——S. 25 (1)—Applicability—Accused 16 years of age found guilty under Ss. 302 and 307, Penal Code, whether can be sent to Borastal School.

Section 25 (1), Burma Prevention of Crime (Young Offenders) Act, only allows an order directing the accused to be sent to Borstal School in a trial against a person between 16 and 19 where a sentence of imprisonment would ordinarily be passed, and since an offence under S. 302, I. P. C., is not punishable with imprisonment, but with death or transportation for life, an order directing the accused aged 16 found guilty under Ss. 302, 337, I. P. C., to be sent to a Borstal School for seven years till he reaches the age of 23, is illegal. A.I.R. (Vol. 23) 1936 Rang. 234=37 Cr.L.J. 791=1936 Cr. Cas. 518=163 Ind. Cas. 118.

——S. 25 (1) — Order of detention — Whether amounts to enhancement of sentence—Cr. P. Code (V of 1898), S. 423 (1), Cl. (b) (3).

An order for detention in a Borstal School for any period permitted by the provisions of the Burma Prevention of Crimes (Young Offenders) Act, can never amount to an enhancement of sentence within Cl. (b) (3), S. 423 (1), Cr. P. C. It is clear from S. 25, Burma Prevention of Crime (Young Offenders) Act, that an order of detention in a Borstal Scool is not a sentence of imprisonment; in fact, it is something which is substituted for a sentence of imprisonment. It is also plain, from the scheme of the Act and the rules which have been made thereunder, that the period of detention ordered under this section on a juvenile accused bears no relation whatever to the sentence of imprisonment which would be passed on an adult accused for a similar offence. In considering the proper period of detention in a Borstal School entirely different and, in fact, almost opposite considerations arise to those which arise in considering the sentence of imprisonment to be passed on an adult. A.I.R. (Vol. 23) 1936 Rang. 227=14 Rang. 119=37 C.L.J. 790=1936 Cr. Cas. 527=163 Ind. Cas. 74.

——S. 25 (1)—Whipping in addition to detention —Legality.

Where the accused was convicted for an offence under S. 366-A, I. P. C., and sentenced both to detention at the Borstal School and also to receive 20 lashes:

Held, that the sentence of whipping in addition to punishment to which he was liable, not under the I.P.C., but under S. 25 (1), Burma Prevention of Crime (Young Offenders) Act, 1930, was illegal. A.I.R. (Vol. 21) 1934 Rang. 123=35 Cr. L.J. 903=12 Rang. 349=149 Ind. Cas. 139 (1).

——S. 29—Applicability—Causing death—Transportation—Detention.

Injury on head causing substance of brain to protrude from head—Accused pleading that he did not intend injury to be fatal—Circumstances justified not only awarding of lesser sentence of transportation for life but recommendation of the case as first one to be dealt with under S. 29. A.I.R. (Vol. 28) 1941 Rang. 319=43 Cr.L.J. 266=197 Ind. Cas. 786.

BURMA PROCESS FEES ACT (I OF 1910).

——Rules under Rr. 17 and 18—Non-cognizable warrant case—Process-fees not paid—Court if bound to summon witnesses—Cr. P. Code, Ss. 252, 256 and 257—Scope of.

In a non-cognizable warrant case the Court is not bound to summon witnesses for the prosecution or the defence under Ss. 252 and 257 if the party at whose instance or in whose interest the process is issued does not pay process fees as required by Rr. 17 and 18 of the Process Fees Rules made under the Burma Process Fees Act, 1910. Ss. 252 256 and 257 of the Code must be read as subject to the rules made under the Burma Process Fees Act 1910. A.I.R. 1926 Rang. 13 Overruled. 4 Rang. 146= 98 Ind. Cas. 708=5 Bur.L.J. 90=27 Cr.L.J. 1396 =A.I.R. 1926 Rang. 164 (F.B.).

BURMA REGISTRATION MANUAL.

——R. 46 (d) (i)—Applicability—Lease.

Direction 46 (*d*) (*i*) of the Registration Directions does not apply in respect of a document which is not strictly speaking a lease at all, but is a lease within the wider definition in the Registration Act. 4 Bur. L. J. 99=90 Ind. Cas. 693=3 Rang. 379=A.I.R. 1925 Rang. 273.

BURMA REGISTRATION OF BUSINESS NAMES ACT (VIII OF 1920).

——S. 3 (b) and S. 5 (1)—Applicability.

One Maung Tha was carrying on money-lending business in his own name—After his death his widow carried on same business under old name with "and Co." added—A mortgage was entered in business name —Registration was effected but widow's children shown as partners when they were not—Suit on mortgage by widow—Case falls under S. 3 (*b*) and as plaintiff widow was under disability provided in S. 5 (1) her suit must fail. *Held also*, that she might bring fresh suit after registering in accordance with the Act. 7 Rang. 296=119 Ind. Cas. 742=A.I.R. 1929 Rang. 260.

——S. 3, Proviso—Interpretation.

The proviso refers back to S. 3 (*c*) for in it is found the only reference to a change or addition to a name. 7 Rang. 296=119 Ind. Cas. 742=A.I.R. 1929 Rang. 260.

BURMA RURAL SELF-GOVERNMENT ACT (IV OF 1921).

——S. 2 (h) (ii)—"Public market"—Whether includes land not vested in District Council.

Under S. 2, Cl. (*h*), Sub Cl. (*ii*), Burma Rural Self Government Act, a "public market" means any market belonging to a District Council, or constructed, repaired, or maintained out of a District Fund. It cannot, therefore, include any land not vested in the District Council or any building not belonging to the District Council or not constructed, repaired or maintained out of the District Fund. A.I.R. (Vol. 23) 1936 Rang. 331=14 Rang. 701=164 Ind. Cas. 141.

——S. 2 (h) (ii)—"Public market", what is—Building—If essential.

Public market means any place belonging to a District Council or constructed, repaired or maintained out of a District Fund, where persons periodically assemble for the sale of goods, live stock or articles of food. To be a public market, a market need not necessarily be a building constructed, repaired or maintained out of a District Fund. It is sufficient if the place where persons periodically assemble for the sale of goods, live stock or articles of food belongs to a District Council. A.I.R. (Vol. 26) 1939 Rang. 162=181 Ind. Cas. 986.

——S. 12—Bye-laws—Abetment of breach of bye-laws is not offence under Penal Code, S. 109.

The abetment of a breach of the bye-laws framed by a District Council under the authority of the Burma Rural Self-Government Act is not punishable under S. 109, I. P. C.; as it is not an abetment of an offence within the meaning of that section. 23 P. R. 1894 Cr., Rel. on. 6 Rang. 791=30 Cr.L.J. 509=115 Ind Cas. 664=12 A.I.Cr.R. 307=A.I.R. 1929 Rang. 75.

——S. 28 (1) (a)—Fee under—Purpose of.

The fee leviable under S. 28 (1) (*a*), Burma Rural Self-Government Act, is not the rent charged for the use or occupation of a place or a building or a stall in a public market. The fee is levied for the right to expose goods or live-stock in the public market for sale. A.I.R. (Vol. 26) 1939 Rang. 162 =181 Ind. Cas. 986.

——S. 28 (1) (c)—Scope—Power of District Council.

The District Council has no power to give authority to a lessee to collect fees which are not authorised by legislative authority. 120 Ind. Cas. 698= A.I.R. 1929 Rang. 210.

——S. 28 (1) (c)—Shops in buildings built on private property.

Only temporary stalls established on a road or street itself come within purview of S. 28 (1) (*c*), Burma Bural Self-Government Act, and shops established in buildings built on private property, but abutting on to a road or street, do not come within the clause. A.I.R. (Vol. 23) 1936 Rang. 331= 14 Rang. 701=164 Ind. Cas. 141.

——Ss. 28 (1) (c) and 52—Revision—Wrong interpretation of words—If ground for interference by High Court—C. P. Code, S. 115.

Where the Court interpreted the words "on roads or streets within half a mile of a public or private market" in Ss. 28 and 52 as not necessarily meaning the edge of either side of, or part of roads or streets, the error of the Court is more than an error in law for he has overlooked the canon of interpretation that any statutory provision in the nature of a taxation clause should be interpreted literally in favour of the subject and so the High Court will interfere in revision. 120 Ind. Cas. 698=A.I.R. 1929 Rang. 210.

——S. 56—Contract Act—Powers of Chairman.

Under S. 56 the chairman is competent to execute the contract but under R. 3, Chapter VIII framed under the Act if the contract is for over Rs. 100 it is bound to be in writing. A.I.R. (Vol. 19) 1932 Rang. 176=10 Rang. 522=140 Ind. Cas. 737.

——S. 77—Scope and effect of—Clerk of Circle Board letting out his house to Board—No permission of Commissioner taken—Effect—Offence.

Section 77 Burma Rural Self Government Act does not limit contracts intended to be covered by its penal provision only to such contracts as may be related to the matters mentioned in Ss. 48, 50 and 56 of the Act.

Where a Clerk of a Circle Board rents his house to the Board for using it as an office, without the permission from the Commissioner in writing as required by S. 77, Burma Rural Self-Government Act he commits an offence under S. 168, Penal Code, read with S. 77, Burma Rural Self-Government Act as he is interested in the contract made by the Board. A.I.R. (Vol. 26) 1939 Rang. 69 =40 Cr.L.J. 248=179 Ind. Cas. 716.

——S. 79—Rules, Ch. I, R. 34—Application for declaring election of Chairman void—Competency.

The rules framed for the election of the Chairman of the District Council are framed under S. 79 (1) (*c*) of the Burma Rural Self-Government Act, and are in a different chapter, Chap. IV, p. 191 of the Hand-Book. They do not provide for any questioning of the election of a Chairman by petition to Court. Consequently, an applicaion purporting to be made under R. 34 of Chap. I of the rules framed under the Act for declaring the election of a person as Chairman of a District Council void is not competent. A.I.R. (Vol. 23) 1936 Rang. 110=161 Ind. Cas. 335.

——R. 34—Revision—District Judge acting under or Assistant Judge nominated by him—If Court or persona designata—Revision from order—If open.

The provisions of R. 36 which enables the District Judge to delegate his power to an Assistant Judge and the direction that petition challenging an election shall be tried in open Court do not show that the District Court through the District Judge functions in the disposal of the application. The words "in open Court" in R. 34 mean only that the matter should not be disposed of in comera. Therefore the District Judge functioning under R. 34 is a *persona designata* and an Assistant Judge who is directed by him to dispose of the petition is also a *persona designata* and so no revision lies to the High Court against their order. A.I.R. 1926 Rang. 25 (F.B.) and A.I.R. 1927 Mad. 95. Rel. on. A.I.R 1929 Rang. 352.

——Rules under, Rr. 34, 36—Petition questioning validity of election—District Judge transferring to Additional District Judge—Legality—Order by Additional District Judge—Appeal to District Judge if lies—Remedy.

A petition filed in order to question the validity of an election of members of a Circle Bord; under Rr. 34 to 41 of the Burma Rural Self-Government Rules made under S. 79, Burma Self-Government Act is to be tried either by the District Judge or such Assistant Judge as he may appoint.

When such a petition is filed in the District Court and "is transferred to the Additional District Judge for disposal", the order so transferring is one passed without jurisdiction as the petition can only be tried by the District Judge himself or "such Assistant Judge as he might appoint", and the Additional District Judge as such is not competent to try them. No appeal lies to the District Judge from the order of the Additional District Judge so passed but only revision in the High Court. A.I.R. (Vol. 20) 1933 Rang. 185=11 Rang. 337=144 Ind. Cas. 849 (F.B.).

——Rules under, R. 39—District Judge's order—Revision—High Court's powers of interference—C. P. Code, S. 115.

Where under rules made in accordance with the provisions of the Burma Rural Self-Government Act the District Judge pased orders regarding the validity of the election of certain persons as members of a District Council and applications were made to the High Court for revising the orders:

Held, that having regard to R. 39, which provides that the order of the District Judge whether passed on trial of the petition or on appeal from the finding or order of an Assistant Judge, shall be final, the High Court ought not to exercise any revisional powers which it may possess under S. 115, Civil Procedure Code, or otherwise in respect of such orders of the District Judge unless it is satisfied that the orders were made without jurisdiction and as the District Judge had jurisdiction to pass the orders the High Court not interfere. A.I.R. (Vol. 20) 1933 Rang. 2=10 Rang. 517=140 Ind. Cas. 782 (F.B.).

——Rules under, R. 55—District Judge—If Court or persona designation—Appeal or revision to High Court, if lies.

In performing the functions laid upon him by the rules made under the Rural Self-Government Act the District Judge does not act as a Court and his proceedings are not subject to appeal or to revision by the High Court because he acts as a *persona designata*. A.I.R. (Vol. 27) 1940 Rang. 148=41 Cr.L.J. 678=188 Ind. Cas. 795.

——Sch. II—O. I, Cl. 1, sub-Cl. (1) (b)—'Have been assessed', meaning of—Person's name should actually appear in assessment roll as assessee—Proof—Extract from assessment rolls.

The words "have been assessed" in Sch. II, O. 1 Cl. 1 sub-Cl. (1) (*b*), Burma Rural Self-Government Act do not merely mean "have paid" land revenue but that the person's name actually appears in the assessment rolls as assessee. To prove that an elector had been assessed to land revenue on not less than ten acres of land for a continuous period of not less than 6 years preceding the financial year, etc., the only method is to produce extracts from relevant assessment rolls. A.I.R. (Vol. 24) 1937 Rang. 318=38 Cr.L.J. 1015=171 Ind. Cas. 86.

BURMA SALT ACT (II OF 1917).

——Ss. 9 (c) and 14—Rules under Rr. 41 and 42—Effect of.

Rules 41 and 42 under the Salt Act by implication make the removal of salt without a pass illegal. 5 Bur.L.J. 220=101 Ind. Cas. 496=28 Cr.L.J. 464 =A.I.R. 1927 Rang. 120.

BURMA SUPPRESSION OF BROTHELS ACT (II OF 1921).

——S. 11 (a)—Offence under—Proper sentence.

The proper penalty for the offence of managing a brothel under S. 11 (*a*), Burma Suppression of Brothels Act, is that the offender should be sent to prison and a sentence of fine and in default imprisonment is entirely inadequate for such an offence. The offences of this kind will only be stamped out when a sentence of imprisonment is passed. A.I.R. (Vol. 25) 1938 Rang. 107=39 Cr. L.J. 494=174 Ind. Cas. 885.

BURMA TENANCY ACT (X OF 1939).

——S. 14—Rent Settlement Officer, whether must strike an average.

The Burma Tenancy Act does not say that the

Rent Settlement Officer must strike an average and then if it is permissible to use the term, tinker with the results lest they appear ridiculous; it enjoins an enquiry into each tenancy and the determination of a proper figure by certain specified means. A.I.R. (Vol. 27) 1940 Rang. 84=1940 Rang.L.R. 325=188 Ind. Cas. 422 (S.B.).

——S. 15—Considerations in determining fair rent.

The situation of the land nearness to or remoteness from a village a railway station, a waterway, a mill, or a road, accessibility of the land are clearly necessary considerations in determining a fair rent as falling within the phrase "such other factors as may seem relevant" in S. 15 Burma Tenancy Act. A.I.R. (Vol. 27) 1940 Rang. 84=1940 Rang.L.R. 325=188 Ind. Cas. 422 (S.B.).

——S. 25—Application presented beyond limitation—It must be received and dismissed.

An application under S. 25, Burma Tenancy Act, is no less an application because it is presented to the Court after the time allowed by law. In such a case the Court must receive it and dismiss it on the ground that it is barred by time. A.I.R. (Vol. 28) 1941 Rang. 199=195 Ind. Cas. 551.

——S. 40—Jurisdiction of Civil Court—Question of compensation between tenants

The jurisdiction of a Civil Court is not barred from trying a dispute relating to compensation between two tenants. A.I.R. (Vol. 28) 1941 Rang. 268=1941 Rang. L.R. 385=198 Ind. Cas. 99.

——S. 40—Certiorari—Writ of—Power of High Court.

Rangoon High Court has power to issue a writ of *certiorari*. Rent Settlement Officers appointed under Act are amenable to that jurisdiction. A.I.R. (Vol. 27) 1940 Rang. 84=1940 Rang.L.R. 325=188 Ind. Cas. 422 (S.B.).

——S. 40—Scope—If affects High Court's power.

Obiter.—The provisions of S. 40, Burma Tenancy Act, do not in any way affect the power of the High Court to bring into that Court the proceedings of Revenue Officers in order to ascertain whether they have been conducted in due compliance with the statute both in letter and in spirit. A.I.R. (Vol. 27) 1940 Rang. 84=1940 Rang.L.R. 325=188 Ind. Cas. 422 (S.B.).

BURMA TENANCY ORDINANCE (1940).

——Ss. 6 (3), 9—Final order under S. 6 (3)—No appeal under S. 9—Application for writ of certiorari does not lie.

It is settled law that if a petitioner for a writ of *certiorari* has another certain and sufficient remedy open to him, he is not entitled to the benefit of the extraordinary remedy by writ. Hence, where the right of appeal provided by S. 9 Burma Tenancy Ordinance is not exercised after the passing of the final order under S. 6 (3), no application lies to the High Court for a writ of *certiorari*. A.I.R. (Vol. 28) 1941 Rang. 199=195 Ind. Cas. 551.

BURMA TOWNS ACT (III OF 1907).

——S. 7—General duties of headman.

To provide coolies to take out a Deputy Commissioner's letters from his head-quarters does not form a part of the ordinary duty of a ward headman. 60 Ind. Cas. 63=22 Cr.L.J. 207=(1920) 3 U.B.R. 234.

——S. 9 (2)—Refusal to execute headman's orders—Ordinary duties of headman.

If a person residing within a ward is requested by the headman to convey letters to the Deputy Commissioner's camp and he fails, he is not guilty under S. 9 (2) as to provide coolies to convey such letters is not a part of the ordinary duty of the headman. 60 Ind. Cas. 63=22 Cr.L.J. 207=(1920) 3 U.B.R. 234.

BURMA VACCINATION LAW (AMENDMENT) ACT (I OF 1909).

——S. 4—Scope of.

Section 4 of the Act applies only when the child to be vaccinated is under six months and has been exposed to certain possibilities of infection. If the section is to be used, the second paragraph must be complied with and no summary procedure is possible. 20 Ind. Cas. 404=14 Cr.L.J. 420=(1913) 1 U. B. R. 162.

——S. 4 and S. 13—Scope of—Child above six months—Parent refusing to allow child to be vaccinated—Procedure—Conviction under S. 13—Legality.

In Burma Act I of 1909, S. 4 is the only provision under which vaccination of a child can be ordered and that section applies only if the child is under six months of age and had been exposed to infection. There is nothing in Burma Act I of 1909 to authorize any officer to require the parent of a child over six months of age to have it vaccinated. In such cases S. 9, Vaccination Act (XIII of 1880), would apply and then the procedure prescribed in Ss. 17, 18 and 22 must be followed. Conviction of a person under S. 13 (1), Burma Vaccination Act, for refusing to allow his child to be vaccinated cannot be sustained. 7 Rang. 14=117 Ind. Cas. 246=30 Cr.L.J. 750=1929 Cr. Cas. 58=A.I.R. 1929 Rang. 150.

——S. 7—Applicability of.

Section 7 of the Act refers to inmates of lodging houses and persons living under other special conditions. 20 Ind. Cas. 404=14 Cr.L.J. 420=(1913) 1 U.B.R. 162.

——S. 19 (1)—Conviction—When sustainable.

To justify a conviction under S. 19 (1) the accused should be shown to have built his house without the permission of the Deputy Commissioner and later than 1908. 23 Ind. Cas. 202=15 Cr.L.J. 250=(1913) 1 U.B.R. 180.

——S. 21 (3)—Pwe, what is—Anyein is not Pwe.

The object of the Act is not to control all the amusements of the villagers. An ordinary *anyein* cannot be considered to be a *pwe* within S. 21 (3), unless it is performed for profit or by travelling troupes. 63 Ind. Cas. 865=22 Cr.L.J. 705=13 Bur.L.T. 243.

BURMA VILLAGE ACT (VI OF 1907).

——Village headman—If police officer—Confession to—Admissibility—Evidence Act, S. 25.

The mere bestowal on a village headman of some powers of arrest as are given to a police officer, does not make him a police officer any more than it makes a Magistrate a police officer. A confession therefore made to him is not inadmissible in evidence but the weight to be attached to such confession will depend on the circumstances of the case and the part he has taken in the elucidation of the crime. 1 L.B.R. 65. Affirmed. 2 Rang. 31=81 Ind. Cas. 540=3 Bur.L.J. 11=25 Cr.L.J. 924=A.I.R. 1924 Rang. 245 (F.B.).

——Ss. 8, 11 (d), 12 (ii)—Headman, duties of—Refusal of villager to help headman to carry injured person to hospital—Offence—Injured person—Government Officer—Effect.

The public duties of a headman are enumerated in S. 8, Burma Village Act; and it is not the public duty of a headman to despatch an injured person to hospital. Consequently, refusal of a villager to help the headman to carry an injured person to the hospital does not constitute an offence within the meaning of S. 12 (*ii*) read with S. 11 (*d*) even if the injured person is a Government Officer, which fact does not impose any duty on villagers not prescribed by the Burma Village Act itself. A.I.R. (Vol. 23) 1936 Rang. 120=1936 Cr. Cas. 195=37 Cr.L.J. 468 (1)=161 Ind. Cas. 604.

——S. 10—Applicability—Complaint against headman—Act complained, punishable departmentally—Previous sanction of Deputy Commissioner, necessity of.

Where the act of which the person is complaining is also punishable departmentally by the Deputy Commissioner under S. 10 of the Burma Village Act, then the sanction of the Deputy Commissioner to the prosecution is necessary. A.I.R. (Vol. 23) 1936 Rang. 11=1936 Cr. Cas. 4=37 Cr.L.J. 295=160 Ind. Cas. 477.

——S. 10—"Abuse of power" meaning of.

An abuse of a power means that when a person has power to do a certain thing, he exercises that power in a manner in which authority is not given to him to exercise it. A.I.R. (Vol. 23) 1936 Rang. 11=1936 Cr. Cas. 4=37 Cr.L.J. 295=160 Ind. Cas. 477.

——Ss. 10, 28—Meaning and effect of—Complaint without sanction—Maintainability.

The meaning and effect of Ss. 10 and 28, Burma Village Act is that no Court can entertain a complaint against a headman in respect of any act or omission punishable under S. 10 unless the prosecution has been instituted with the sanction of the Deputy Commissioner, notwithstanding that the complaint may also disclose offences punishable under some other law. A.I.R. (Vol. 22) 1935 Rang. 137 =1935 Cr. Cas. 540=36 Cr.L.J. 875=13 Rang. 336 =156 Ind. Cas. 149.

——S. 12—"Public duty"—Disobedience of Thugy's order to reap for revenue purposes—Offence.

The reaping and measuring of paddy for the purpose of revenue assessment, is a public duty within the meaning of S. 12, and it is an offence under the Act for a villager to refuse to comply with a requisition of the Headman to assist him in such work. 11 L.B.R. 412=77 Ind. Cas. 419=1 Bur.L.J. 150 =25 Cr.L.J. 371=A.I.R. 1923 Rang. 81.

——S. 12—"Public duty"—Person who did not pay thathameda tax directed by village headman to appear at Township Office—Failure to appear—Offence.

The payment of *thathameda* tax is not a public duty imposed upon a villager by the Village Act, nor is it any part of his public duties to betake himself to any spot which the headman chooses to order him to visit. If therefore a person who has not paid his *thathameda* tax is directed by his headman to appear at a Township Office but fails to do so, he does not commit any offence punishable under S. 12 of the Village Act. A.I.R. (Vol. 25) 1938 Rang. 180=39 Cr. L. J. 626=1938 Rang.L.R. 119=175 Ind. Cas. 512.

——S. 12—Scope—Failure to help village Headman—Offence.

Refusal of a villager to help headman to carry injured person to hospital does not constitute an offence within the meaning of S. 12 (*ii*) read with S. 11 (d) even if the injured person is a Government Officer. A.I.R. (Vol. 23) 1936 Rang. 120=1936 Cr. Cas. 195=37 Cr.L.J. 468 (1)=161 Ind. Cas. 604.

——S. 19—Scope—Disobedience of order to remove to another site—Offence.

Refusing to obey an order given to the accused by the headman to remove to another site, which had been provided for them is not an offence under S. 19. 4 U.B.R. 127=76 Ind. Cas. 1039=25 Cr.L.J. 319=A.I.R. 1923 Rang. 132.

——S. 20-A—Applicability—Rules under—Receiving an article in pawn without a license is not offence.

S. 20-A and the rules under it do not create any such offence as that of receiving an article in pawn without a license. What they do make punishable is the carrying on of the business of a pawn broker. 6 Rang. 108=10 A.I.Cr.R. 400=110 Ind. Cas. 102 =29 Cr.L.J. 646=A.I.R. 1928 Rang. 158.

——S. 21 (1) (a)—"Pwe"—Meaning.

The word "*Pwe*" as used in the Burma Village Act means only "*anyein pwes*" performed for profit, or by travelling troupes who tour for the purpose of performing such *pwes*, and does not include the other performances to which the term is loosely applied in the Burmese language. 13 Bur.L.T. 243 =63 Ind. Cas. 865=22 Cr.L.J. 705.

——S. 21-A—Pwe—Meaning of—Entertainment at an Ahlu, holding Ahlu without permit—Offence.

Pwe ordinarily includes a theatrical or dramatic performance held for public entertainment whether on public or private property. The object of requiring a permit is to ensure that the authories get timely notice to arrange for precautionary measures. Where performance was for public entertainment at an *ahlu* and the authorities had not been given any notice and a robbery took place:

Held that though the troupe was composed of local amateurs the offence was committed under the section.

27 Cr.L.J. 342=92 Ind. Cas. 854=4 Bur.L.J. 145=3 Rang. 514=A.I.R. 1925 Rang. 375.

——S. 23—Revision—Powers of Deputy Commissioner.

The conviction and sentence of a person for an offence made punishable by the Act or rules made under it is not "an order made under this Act." Nor is a Magistrate, when exercising his jurisdiction as such, "an authority subordinate to the Deputy Commissioner" and therefore an order of conviction for such an offence cannot be revised by the Deputy Commissioner as such. 6 Rang. 108=10 A.I.Cr.R. 400 =110 Ind. Cas. 102=29 Cr.L.J. 646=A.I.R. 1928 Rang. 158.

——Oder of Deputy Commissioner—Powers of High Court.

It is the duty of the High Court, and within its powers, on the matter being brought to its notice, to declare that an order of the Deputy Commissioner, even though he is not a criminal Court, is of no effect, if it is wrong. 6 Rang. 108=10 A.I.Cr.R. 400=110 Ind. Cas. 102=29 Cr.L.J. 646=A.I.R. 1928 Rang. 158.

——S. 28—Applicability—Cognizance of offence suo motu by Magistrate—Sanction.

The terms of S. 28. Burma Village Act, must be strictly construed. The section applies only to the entertainment of a complaint and does not impose any restriction upon the prosecution of a headman if the prosecution is instituted otherwise than on complaint. It does not, therefore; apply to a case in which a Magistrate of his own motion takes cognizance of an offence under the provisions of S. 190 (1) (*c*), Cr. P. Code. 8 Rang. 246=125 Ind. Cas. 360=A.I.R. 1930 Rang. 253.

——S. 28—Applicability—Offence not under Act —Sanction.

A village headman is protected by S. 28 of the Village Act to this extent that he cannot be prosecuted for an act or omission punishable under S. 10 of the Act or for an abuse of his power similarly punishable, even though such act or omission or such abuse of power is punishable under the Indian Penal Code or some other law, unless the prosecution is instituted by order of or under authority from, the Deputy Commissioner. The village headman has no power to cause hurt to or insult another person and there appears to be no reason why a Magistrate should not enquire into the charges brought against the headman under Ss. 323 and 504 of the Indian Penal Code. 1 L.B.R. 336 Foll. 4 U.B.R. 101= 73 Ind. Cas. 325=1 Bur.L.J. 245=24 Cr.L.J. 581 =A.I.R. 1923 Rang. 27.

——S. 28—Construction.

Section 28, Burma Village Act, refers to a complaint of an act which constitutes an offence under the I.P.C. or any other law if such act is also punishable departmentally under S. 10 of the Act. A.I.R. (Vol. 23) 1936 Rang. 11=1936 Cr. Cas. 4 =37 Cr.L.J. 295=160 Ind. Cas. 477.

——S. 28—Grant of sanction—Scope of inquiry.

In granting seanction the Deputy Commissioner should not prejudge the case by limiting his sanction to a particular offence. A.I.R. (Vol. 18) 1931 Rang. 87=8 Rang. 654=32 Cr.L.J. 938=1931 Cr. Cas. 375=132 Ind. Cas. 556.

——S. 28—Scope—Absence of sanction—Effect.

Complaint against headman without sanction—Duty of Magistrate is to reject it and inform the complainant to apply for Deputy Commissioner's sanction. A.I.R. (Vol. 18) 1931 Rang. 87=8 Rang. 654=32 Cr.L.J. 938=1931 Cr. Cas. 375=132 Ind. Cas. 556.

BURMA WASTE LAND GRANT RULES.

——R. 22—Ejectment suit—Plea of permanent tenancy—Duty of Courts.

Where in a suit in ejectment brought after issue of notice under S. 12 the defendant sets up a plea of permanent tenancy, the Court is bound to enquire into its truth and record a finding thereon. 9 Bur.L.T. 152=33 Ind. Cas. 888=9 L.B.R. 27.

BURMA (UPPER) CRIMINAL JUSTICE REGULATION (V OF 1892).

——S. 15—Interference by the Judicial Commissioner—Grounds.

Under S. 15, the Judicial Commissioner will not interfere with the order of a District Magistrate though procedure is irregular unless it has caused failure of justice. 22 Cr.L.J. 309=60 Ind. Cas. 997 =(1920) 3 U.B.R. 270.

BURMA (UPPER) LAND AND REVENUE REGULATION (III OF 1889).

Mere allotment of waste land does not confer title.

The mere "allotment" of State waste land without actual possession ten years ago gives no right which can be enforced in a Civil Court against the persons actually in possession. 4 U.B.R. 128=84 Ind. Cas. 533=A.I.R. 1923 Rang. 117.

——S. 25 (d)—Jurisdiction of Collector—Dispute relating to State land between rival claimants.

The Revenue Regulation does not authorise Revenue Officers to decide a dispute between rival claimants to State land, except within one year of a declaration that a land is State land. (1916) 2 U.B.R. 151, Rel 3 Rang. 147=89 Ind. Cas. 303=A.I.R. 1925 Rang. 263 (*b*).

BURMA (UPPER) OIL FIELDS REGULATION (VI OF 1910).

——S. 2—Construction—"Oil" does not include "gas"—Grant—Construction.

Where by a grant by Government, dated 25th April, 1912, the Secretary of State for India in Council granted to the respondents the right to win and get earth-oil from a certain well side and to dispose of all earth-oil to be gotten therefrom on certain conditions:

Held, that the grantee did not by his grant obtain any right to win, get or dispose of gas.

Held, further, that the ownership of natural gases, so far as they are capable of ownership, remained with Government and did not pass either

in 1912 or in 1919 by the rules under Burma Oil Fields Act (1918) to the grantee. 5 Rang. 133=102 Ind. Cas. 830=A.I.R. 1927 Rang. 201.

BURMA (UPPER) REGISTRATION REGULATION (II OF 1897).

——S. 4—"Executed"—Meaning.

Documents which are complete without signature according to Burmese custom are "executed" within S. 4 and must be registered if they fall within that section. Without registration they are not admissible in evidence according to S. 6. (1920) 3 U.B.R. 258=60 Ind. Cas. 16.

——R. 5—Scope—Non-compliance — Effect on validity of registrations.

Where the writing at the foot of the document showed that the person who presented the document was only an agent and was directly opposed to the official statement signed by the Registering Officer that the document was presented for registration by the mortgagee:

Held, there is no provision in the Regulation or the Rules that requires the signature of the person presenting the document for registration. The correctness of this official endorsement is to be presumed and the signature for which there was no legal sanction, cannot operate to contradict it.

Where any party to a document is unable or refuses to appear, rule 5 requires a note of the circumstances to be made, but the omission is one for which the person presenting the document cannot be held responsible: it is at most a defect in procedure which did not vitiate the registration made as it was on a proper presentation. 51 I.A. 18=22 A.L.J. 42=79 Ind. Cas. 940=19 M.L.W. 345=1924 M.W.N. 196=34 M.L.T. 50=51 Cal. 354=2 Rang. 99=5 L.R.P.C. 73=28 C.W.N. 1029=A.I.R. 1924 P.C. 48.

BURMA (UPPER) RUBY REGULATION (XII OF 1887).

——S. 8—Applicability — Offence committed—Bona fides of purchaser—Relevancy.

When an offence under S. 6 has been committed, S. 8 should be applied even though the purchaser of the stone might have acted *bona fide*. 26 Cr.L.J. 289=84 Ind. Cas. 433=3 Bur.L.J. 168=2 Rang. 321 =A.I.R. 1925 Rang. 12.

BURMESE BUDDHIST LAW.

See BUDDHIST LAW (BURMESE).

BURNING GHAT.

See RELIGIOUS ENDOWMENT.

BUTTWARA PROCEEDINGS.

See EVIDENCE ACT, S. 35.

BAI-BIL-WAFA.

See (1) MORTGAGE.
(2) T. P. ACT, S. 58 (c).

CALCUTTA CORPORATION PROVIDENT FUNDS RULES.

——R. 19—Construction and Scope—Payment to uncle as de facto guardian—If valid discharge—Provident Funds Act (IX of 1897), S. 3 (b)—Object and scope of.

The provision in Cl. (*b*) that the manager may pay the money to any person entitled to receive it, is intended not to defeat the rules of any Fund; but to take effect only in those cases where the rules of a particular Fund do not tell the manager what person is the proper person to be paid. The intention of the Act was that particular funds might make simple and clear rules which they could easily administer and if the rules did not apply to any particular case, the officer or the manager should not necessarily at his peril find out the proper legal representative. But the intention of the Act has been defeated by the character of R. 19 itself which assumes the duty of finding out the proper legal representative. Where the manager of the Provident Fund paid the deposit money in the credit of the deceased to his brother as a guardian of the deceased's son producing a certificate from an Honorary Magistrate that he was his nephew's guardian:

Held that the payment to the uncle is not a good discharge and the claim of the nephew should be decreed. A.I.R. 1928 Cal. 542. Affirmed. 32 C.W.N. 515=113 Ind. Cas. 166=55 Cal. 1231=A.I.R. 1928 Cal. 743.

——R. 19—Duty of Manager.

The manager should pay the deposit money to the person entitled to receive it as matter of testate or intestate succession. A.I.R. 1928 Cal. 542. Affirmed. 55 Cal. 1231=32 C.W.N. 515=113 Ind. Cas. 166=A.I.R. 1928 Cal. 743.

CALCUTTA COTTON CLOTH AND YARN EMERGENCY SEARCH ORDER (1945).

——Notice to dealer not necessary before his premises are sealed.

The Calcutta Cotton Cloth and Yarn Emergency Search Order which falls within the powers conferred by R. 81 (2) (f) of the Defence of India Rules does not require notice to be given before the premises are searched or sealed. Therefore the action taken by the Police Officers acting under this Order, in sealing certain premises of a dealer cannot be questioned on the ground of absence of notice. A.I.R. (Vol. 33) 1946 Cal. 197=49 C.W.N. 595=1945 F.L.J. 205.

CALCUTTA HACKNEY CARRIAGE ACT (I OF 1919).

——S. 60—Authority to appoint stands for hackney carriages—Absolute nature of.

The authority to appoint stands for hackney carriages is absolute. The statute does not merely permit the appointment of such reserved places for hackney carriages but directs the person or body authorised to do so:

Held that since 1919 and *a fortiori* in July, 1933, the Commissioners of the Pabna Municipality had no statutory authority to appoint or reserve any place

as a hackney carrage stand, and hence there is no statutory indemnity from actions for nuisance. A.I.R. (Vol. 23) 1936 Cal. 707=40 C.W.N. 1353 =I.L.R. (1937) 1 Cal. 407=167 Ind. Cas. 254.

CALCUTTA HIGH COURT.

——Chief Justice—Powers of review.

The Chief Justice can only hear a review application when it is impossible for the Court, which passed the judgment, to hear it or if at all events one of the Judges who decided the appeal is not available to hear it. 20 C.W.N. 967=24 C.L.J. 235=35 Ind. Cas. 348.

CALCUTA HIGH COURT GENERAL RULES AND ORDERS (CIVIL)

——Poundage fees.

Poundage fees are costs in execution and are to be recovered from the judgment debtor, and are to be included in the expenses of sale. 5 Ind. Cas. 139 (Cal.).

——Vol. 1, Note 2.

Attachment of bicycle—Custody of Court till auction—Decree-holder must pay one day's fee as custody fee and not for 113 days for which bicycle was kept in custody. (1935) 62 C.L.J. 354.

——Vol. I, R. 122—Commissioner's remuneration fixed by trial Court.

The powers of District Judge under the Calcutta High Court General Rules and Circular Orders Vol. I do not authorise him to set aside any orders made by Subordinate Court in respect of the remuneration of a commissioner for local investigation pending a suit. These powers are given to the District Judge for maintaining a particular standard of efficiency among pleaders who undertake commissions. 34 Ind. Cas. 855 (Cal.).

——General Letter No. 16—Application for copy —Date of notifying requisite stamps—Holiday following—Deduction—Limitation Act, S. 12.

Under Cl. (2) (*ii*) of the Calcutta High Court General Letter No. 16 whenever there is any holiday or holidays immediately following the day of notification of the requisite number of stamps and folios, such holiday or holidays must always be excluded in computing the period of limitation for appeal. This exclusion is not restricted to the cases where the stamps and folios are supplied on the re-opening day. A.I.R. (Vol. 18) 1931 Cal. 731=35 C.W.N. 451 =58 Cal. 969=134 Ind. Cas. 895.

——Registrar's sale under—Deficiency in area sold—Purchaser's right to withdraw—Compensation—Annulment of sale—Terms.

Where there is a substantial deficiency in area of a property sold at a Registrar's sale, so that the purchaser would not have offered the price that he did if he had been aware of such deficiency, the court will not compel the purchaser to take the property with compensation but will discharge him from the sale. The purchaser so discharged from his sale is entitled to repayment of the purchase money with interest from the date of payment into court and the costs, charges and expenses incurred by reason of his bidding for and being declared the purchaser of the property and incidental to the application to be discharged from his purchase. *Quaere*: Whether he is entitled to the costs of a survey made by him to ascertain the area of the property. (1901) 6 C.W.N. 365.

——Rr. 37 and 38—Application ex parte.

A certificate from the Registrar must be attached to an application for payment out and unless the certificate shows blank no application for payment out *ex parte* can be made under R. 37. Where it is not blank, the applicant must apply for rateable distribution under R. 38. In such a case notice, unless dispensed with by the Court must be given to all persons whose names appear in Registrar's certificate. Registrar's certificate is intended to show subsisting attachment. A.I.R. (Vol. 26) 1939 Cal. 485= I.L.R. (1939) 1 Cal. 40=43 C.W.N. 169=183 Ind. Cas. 444.

——R. 37—Rateable distribution.

Application for payment out—Certificate of Registrar must be attached—Certificate showing blank—No application for payment out *ex parte* can be made under R. 37—Where it is not blank, applicant must apply for rateable distribution made under R. 38—Notice unless dispensed with by Court, must be given to all persons whose names appear in certificate—Only when this is done the applications for attachment made by those persons can be challenged. The certificate is intended to show subsisting attachment. A.I.R. (Vol. 26) 1939 Cal. 485=I.L.R. (1939) 1 Cal. 40=43 C.W.N. 169=183 Ind. Cas. 444.

——R. 45—Interpretation of—Endorsement, if must be made in all cases before vakalatnamah is filed—Vakalatnamah, acceptance of, by pleader.

An acceptance by a Pleader named in a *vakalatnamah* and allowed by Court expressly or by implication is valid and operative even without an endorsement in writing on the *vakalatnamah* by the Pleader, but R. 45 (e) requiring acceptance as a *vakalatnamah* by endorsement in writing ought to be complied with. *Beachcroft, J.*—Courts should insist on the rule being observed by pleaders practising before them and the pleader who does not conform to it, ought not to be heard. 43 Cal. 884=20 C.W.N. 287=23 C.L.J. 297=32 Ind. Cas. 395.

——R. 234.

Nazir conducting sale disturbing list of properties to be sold in course of monthly sales prepared under R. 233. It is only a breach of the rule—It may be an irregularity—Sale would not be void but voidable if the irregularity had resulted in loss to the judgment debtor or the decree-holder A.I.R. (Vol. 26) 1939 Cal. 369=I.L.R. (1939) 1 Cal. 530=43 C.W.N. 539=70 C.L.J. 97=186 Ind. Cas. 174.

——(Part I), R. 264—Notice of non-satisfaction under S. 41, C. P. Code—Absence of covering letter—Effect of.

A notice of non-satisfaction under S. 41, C. P. Code, would be such a notice; whether or not it is accompanied by a covering letter, as is required

by R. 264 of the Civil Rules and Orders (Part I) of the Calcutta High Court. A.I.R. 1950 Cal. 287.

——R. 515-A (10)—Scope—Registrar's power to dismiss suit for want of prosecution.

In a case where a Registrar had made a peremptory order that the plaintiff should file her affidavit of documents within a certain time and in default the suit stand dismissed for want of prosecution:

Held—That the effect of the Registrar's order was to fix a date peremptorily within which the affidavit must be filed and that in default the suit is liable to be dismissed on an application made to the court. If by the new Rule 515—A (10) it is intended to give the Registrar power to pass a decree, the Rule is *ultra vires*. The court alone can pass an order dismissing a suit and an appeal lies from such an order. 19 B. 307, foll. (1907) 6 C.L.J. 374.

——R. 704—Levy of fee on affidavits—Legality. See GOVERNMENT OF INDIA ACT, S. 224, 222 Ind. Cas 59.

——R. 760—Sale held in execution of a decree—Judgment debtor depositing decretal amount in Court—Deposit found less by one rupee and judgment-debtor paying when mistake discovered—*Held*, short deposit being error on part of the Court, the sale should be set aside. (1938) 68 Cal.L. Jour. 273.

——S. 782—Failure to comply with—Order of attachment.

Rule 782 Calcutta High Court Civil Rules and Orders certainly tends to prevent orders of attachment from being mislaid overlooked or suppressed. But failure to comply with it does not render the order of attachment invalid so as to entitle the Court to pay money out in defiance of the order of attachment. A.I.R. (Vol. 29) 1942 Cal. 521=46 C.W.N. 861=76 C.L.J. 472=202 Ind. Cas. 614.

——R. 953—Scope—Provision as to fine, if ultra vires.

Per *G. K. Ghose, J.*—The imposition of a fine cannot be administrative and the fine prescribed by R. 953 cannot be realised as a fine imposed by the Court in a judicial proceeding. By that rule it was apparently intended that the fine would be imposed by the Court acting administratively, and further that it should provide an alternative to the more rigorous penalty of suspension or dismissal. There is, however, no process by which the fine can be realised, except as a voluntary payment. But an alternative to suspension and dismissal by way of penalty is not provided for in the Act and would not be consistent with its provisions. In fact R. 953 as it stands, speaks of the fine as a liability in addition to the liability to suspension or dismissal. Both liabilities would have to be enforced by the same authority, *viz.*, by the Court in a judicial proceeding. Since the fine cannot be imposed as a judicial fine, the provision relating to it is *ultra vires*. A.I.R. (Vol. 23) 1936 Cal. 205=40 C.W.N. 377=37 Cr.L.J. 590=63 C.L.J. 127=1936 Cr. Cas. 350=63 Cal. 855=162 Ind. Cas. 517 (S.B.)

——R. 978 (2), (3)—Legal Practitioners' Act, S. 13 (f).

Under R. 978 (2), (3) the statement made on the application undertaking not to employ an unregistered clerk means that he undertakes not to employ an unregistered clerk to do the business of a registered clerk that is to say, that he undertakes not to employ any clerk who will require for the performance of his work access to the Court or to the ministerial officers. A.I.R. (Vol. 24) 1937 Cal. 408=41 C.W.N. 929=170 Ind. Cas. 251.

——Ch. 1, R. 2—Holiday fixed by consent of parties for examining defendant's witnesses—Plaintiff's pleader absent—Case adjourned to next day, also holiday—Plaintiff's pleader absent—Witnesses not cross-examined — Suit dismissed—Legality.

With the consent of both the parties a civil Court holiday was fixed for the examination of the witnesses to be produced by the defendant. On that date, the plaintiff could not bring any pleader to cross-examine the witnesses. The Court thereupon adjourned the suit till the next day, which was also a close holiday. The plaintiff, however, could not bring any pleader on that day also and two witnesses were examined on that day but were not cross-examined by the pleader for the plaintiff nor by the plaintiff himself. In these circumstances, the suit was ultimately dismissed.

Held, that there was no consent by either party to the adjournment of the case till the next day which also was a close holiday. The proceedings of the trial Court were irregular and this irregularity has prejudiced the plaintiff and the case should be remitted to the Court of first instance to be re-tried. 25 C.W.N. 330=61 Ind. Cas. 775=A.I.R. 1921 Cal. 184.

——Ch. 1, R. 93—Nature of rule.

R. 93, P. 31. Chapter 1 of the Calcutta High Court's General Rules and Circular Orders, as amended has the force of law. 56 Cal. 460=113 Ind. Cas. 572=30 Cr.L.J. 199=12 A.I.Cr.R. 58=48 C.L.J. 288=33 C.W.N. 174=A.I.R. 1928 Cal. 815.

——Ch. 1—Removal of property—C. P. Code, O. 21, R. 43—Removal of property is illegal.

Removal by attaching officer of property attached is illegal. 48 C.L.J. 288=113 Ind. Cas. 572=33 C.W.N. 174=56 Cal. 460=30 Cr.L.J. 199=12 A.I.Cr. 58=A.I.R. 1928 Cal. 815.

——Ch. 2—Uncontested proceedings—Guardians and Wards Act.

In uncontested proceedings an order appointing a guardian under the Guardians and Wards Act on the affidavits of the parties is not *ultra vires*. 44 C.L.J. 40=97 Ind. Cas. 692=A.I.R. 1926 Cal. 1193.

——Chap. 2, R. 1—Revision.

A judge sitting singly has no jurisdiction to deal in revision with orders passed in suits of the value of more than Rs. 1,000 although the order itself is concerned with a sum less than Rs. 1,000. A.I.R. 1930 Cal. 744.

——Chapter 2—Effect—Jurisdiction.

The effect of Cl. (3) of Schedule to R. 1, Chapter II of the Calcutta High Court Rules, Appellate Side, is that the original value of the suit out of which the application arises must not be above Rs. 1,000. Execution proceedings are clearly pro-

ceedings arising out of a suit and a single judge of the High Court cannot issue a rule where the valuation in the suit is more than Rs. 1,000. 34 C.W.N. 876.

——Chapter 2—Scope.

The effect of Cl. (3) of Schedule to R. 1, Chapter II of the Calcutta High Court, Appellate Sides Rules is to prohibit a single judge of the High Court from issuing a rule in a suit which is of the value of above Rs. 1,000. For this purpose execution proceedings are proceedings arising out of a suit. 34 C.W.N. 876.

——Chap. 8—Para. 153—Decision depending upon documentary evidence—No application under O. 11, R. 12, by either party—Judge should himself make order to that effect under S. 30, C. P. Code.

Where it is obvious that a decision of a particular matter would depend to a very large extent upon documentary evidence, the case is essentially one in which recourse should be taken to the provisions of O. 11, Civil P. C., and in absence of any application under O. 11, R. 12 Civil P. C. from either party, the Judge should himself record the requisite orders under S. 30 Civil P. C. as enjoined by para. 153 of Calcutta High Court's Civil Rules and Orders, Chapter VIII. A.I.R. (Vol. 27) 1940 Cal. 331= I.L.R. (1940) 1 Cal. 504=190 Ind. Cas. 507.

CALCUTTA HIGH COURT RULES (APPELLATE SIDE).

——Appeal presented out of time—Admission of—Registrar's powers.

Under the rules and the custom of the Court the Registrar has the power to admit an appeal out of time, even though full Court-fees are not put in within the period of limitation. 44 C.L.J. 557=99 Ind. Cas. 901=A.I.R. 1927 Cal. 238.

——R. 17—Privy Council appeal—Printing of record.

In an appeal against a judgment of the High Court refusing to entertain an appeal as incompetent, the papers relating to the merits of the case should not be included in the paper book. 18 C.L.J. 122=21 Ind. Cas. 425.

——Chap. II, R. 1—Application for revision of order made in suit exceeding Rs. 1000 in value—Jurisdiction.

Under the Appellate Side Rules of the Calcutta High Court, a Judge sitting singly has no jurisdiction to deal with an application for revision of an order made in a suit of the value of more than Rs. 1,000 even if the matter involved in the application is less than Rs. 1,000. A.I.R. (Vol. 17) 1930 Cal. 744=34 C.W.N. 730=129 Ind. Cas. 367.

——Chap. II, R. 1, Cl. (3)—A Single Judge of the High Court has no power to hear an application for revision where the value of the original suit is above Rs. 1,000. A.I.R. (Vol. 18) 1931 Cal. 92=34 C.W.N. 876=129 Ind. Cas. 880.

——Ch. II, Sch., Para. 3—Issuing of rule—Value of subject-matter exceeding Rs. 2,000—Jurisdiction of single Judge.

A Judge sitting singly has no jurisdiction to issue a rule against an order of a Judge relating to a subject-matter of which the value exceeds Rs. 2,000. 53 C.W.N. 648.

——Ch. III, R. 11—Presidency Small Cause Court—Decree of—Jurisdiction to set aside.

The Bench dealing with cases of the Presidency Group has no jurisdiction to set aside the decree of the Presidency Small Cause Court at Calcutta. (1902) 29 Cal. 498.

——Chap. IV, R. 1 (5)—Verified application—Court-fee.

Where an application on a Court-fee stamp of Rs. 2 alone bore a verification in these words "I do hereby verify that the statements made above are true to my knowledge".

Held, that the verification was one solemn affirmation under Chap. IV, R. 1 (5), Appellate Side Rules, and had to be stamped with a further court-fee of Rs. 2. A.I.R. (Vol. 19) 1932 Cal. 160= 58 Cal. 1389=135 Ind. Cas. 798.

——Chap. IV, R. 1 (5)—Affidavit and solemn affirmation—Difference.

The words "to be annexed to the application" in Chap. IV, R. 1 (5) must be read both with "solemn affirmation" and "affidavit", and the real difference between "solemn affirmation" and "affidavit" is that the applicant is to solemnly affirm that the statements made in the petition are true to his knowledge, whereas in the case of an affidavit it may be sworn by any person acquainted with the facts of the case.

There is some difference between 'swearing and affirming' and a solemn affirmation may take the form of an affidavit. A.I.R. (Vol. 19) 1932 Cal. 160=58 Cal. 1389=135 Ind. Cas. 798.

——(Part II), Chap. IV, R. 20—Appeal—Security for costs—Government Promissory Note—High Court Rules, Appellate Side, Part II, Chap. IV, Rule 20.

The market-value of Government securities given as security for respondent's costs in an appeal to the Privy Council must be Rs. 4,000 on the date of their deposit. (1905) 9 C.L.J. 559=4 Ind. Cas. 64.

——Chap. V, Rr. 12-14—Scope of.

Rules 12 to 14 of Chap. V were the rules of office routine and cannot and do not oust the provisions of Civil Procedure Code. (1937) 65 C.L.J. 127=41 C. W.N. 374.

——Chap. VI, Rr. 37 (b) and 46 (b)—Scope—Land acquisition case—Dismissal—Withdrawal—Costs.

Full costs can be allowed in a land acquisition case only if the suit has been dismissed on the merits. Where the claim is withdrawn not more than half the full fees can be awarded. (1909) 11 C.L.J. 217= 5 Ind Cas. 770.

——Chap. VII—Applicability—Insolvency—Appeal.

——Rule 1, and not Rr. 2 and 3, applies to appeals from orders is appeal under Presidency Towns Insolvency Act, S. 8. 56 Cal. 667=115 Ind. Cas. 39=33 C.W.N. 21=A.I.R. 1928 Cal. 786.

——Chap. IX, R. 2—Applicability — Appeal against order under S. 244, C. P. Code—Separate order, filing of.

Rule 2 of Chapter IX of the Rules of the Calcutta High Court relating to appeals does not apply to appeals against orders under S. 244 of the Civil Procedure Code (1882) and in such an appeal no order separate from the judgment need be filed with the memorandum of appeal. The case of order in probate and administration suits is different. (1901) 6 C.W.N. 283.

——Chap. IX, R. 12—Meaning and effect of.

Rule 12, Chap. IX, Calcutta High Court, Appellate Side Rules does not mean that depositions of witnesses may be omitted unless with the consent of the opposite party, or by a special order obtained from the Court. All that this Rule means is that in the list which is to be put in, it is not necessary to include those items which are marked with asterisks, because they will would go in as a matter of course. When, therefore, it is intended to omit any deposition taken in the course of trial, either the consent of opposite party will have to be obtained or at any rate, a special order will have to be obtained from the Court. (1936) 164 Ind. Cas. 787=40 C.W.N. 42.

——Chap. IX, R. 50 and Note 1 to R. 50—Applicability—R. 52—Effect of.

Note 1 of R. 50 of Chap. IX of the Appellate Side Rules of the Calcutta High Court and R. 50 apply to all appeals from appellate decrees whether or not exceeding Rs. 50 in value. Rule 52 does not make any alteration as to the contents of the paper-book to which R. 50 relates. It only modifies the previous R. 51 which requires printed copies of the paper-book to be prepared by the Registrar at the cost of the appellant. In the case of appeals referred to in R. 52 no printed paper-book is prepared, but instead of that, typed copies of the paper-book are prepared without any charge being levied from the parties, but the contents of the paper-book remain the same in both classes of appeals. 85 Ind. Cas. 770=A.I.R. 1925 Cal. 1116.

——Chap. XI, R. 4—Scope—Review application.

Chapter XI, R. 4 of the Calcutta High Court Appellate Side Rules being applicable only to a case where the Deputy Registrar gives a certificate that all proceedings on an application for review of judgment are in order, no application for review of judgment can be moved in Court where his certificate is to the effect that the review proceedings are not in order. 20 C.W.N. 967=24 C.L.J. 235=35 Ind. Cas. 348.

CALCUTTA HIGH COURT RULES (CRIMINAL).

——Vol. I, Chap. I, R. 74.

The proper way to question the jury for the purpose of finding out under which part of S. 304, Penal Code the prisoner was guilty is to put to them the elements enumerated in R. 74 (b), either one by one or as a whole and to get their special verdict thereon. A.I.R. (Vol. 21) 1934 Cal. 173=35 Cr. L.J. 496=38 C.W.N. 254=1934 Cr. Cas. 295=61 Cal. 256=147 Ind. Cas. 860 (F.B.).

——Chap. II—Criminal appeal from original side—Question whether a vakil can act is not concluded by Cr. P. Code, but by the rules of the High Court—Cr. P. Code, Ss. 340 and 449.

The question whether a vakil can act for a party in a criminal appeal from the Original Side of a High Court depends upon the rules of that Court and is not concluded by anything in the Cr. P. Code. 55 Cal. 858=32 C.W.N. 319=29 Cr.L.J. 1022=112 Ind. Cas. 350=A.I.R. 1928 Cal. 675.

——Criminal appeal from original side—A vakil cannot act unless a question of Hindu or Mahomedan Law is involved.

A vakil cannot act in an appeal from a trial held on the original side before a Judge and a jury at the High Court Sessions, unless in such appeal a question of Hindu or Mahomedan Law or usage should arise. 55 Cal. 858=32 C.W.N. 319=29 Cr. L.J. 1022=112 Ind. Cas. 350=A.I.R. 1928 Cal. 675.

——Chap. IV—Public Officer—Right to inspect and take notes of depositions made by person under Companies Act, S. 195.

In the interests of the administration of criminal justice, Courts should allow a public officer charged with the investigation of criminal offences, such as the Deputy Superintendent of Police, to inspect the depositions of a person, who is believed to be involved in a criminal offence, made under S. 195, Companies Act, and to inform himself of anything that may come to light on such inspection. He cannot, however, take copies of the depositions but only notes of them. 57 Cal. 424=A.I.R. 1930 Cal. 521.

CALCUTTA HIGH COURT RULES (INSOLVENCY).

——R. 17—Ex-parte order—Presidency Towns Insolvency Act, S. 36 (1)—Order for examination can be ex-parte.

An order under S. 36 (1) for examination of persons thereunder can be made **ex parte**. 44 Cal. 286, Foll. 48 Cal. 1089=66 Ind. Cas. 715=25 C. W.N. 750=A.I.R. 1921 Cal. 58.

——R. 74—Interpretation—Order of adjudication—Discretion.

R. 74 of the Rules of High Court appears to contemplate that if the petition is in form in the sense that the Court has jurisdiction and the conditions prescribed by the Act have been fulfilled the order shall go as a matter of course. 30 C.W.N. 173=94 Ind. Cas. 793=A.I.R. 1926 Cal. 640.

——R. 128—Admission of debt—Admission of a debt in the composition deed is not sufficient proof.

The mere fact that the sum is payable under the composition and is stated therein to be payable does not of itself forego the need for proof of debt required by R. 128. 53 Cal. 448=29 C.W.N. 1019=90 Ind. Cas. 449=A.I.R. 1926 Cal. 176.

——R. 79—Affidavit filed beyond time fixed by R. 79—Discretion of Court—Failure to give notice but affidavit filed—Rejection of affidavit—Debtor, if can give evidence to rebut petitioning creditor's case.

The question whether or not the affidavit should be accepted and taken into account after the date on

which it ought to have been filed under the provisions of R. 79 of the Calcutta Insolvency Rules is entirely a matter in the discretion of the Judge who is dealing with the case.

The R. 79, Calcutta Insolvency Rules, only requires that "a notice" should be given in order that the petitioning creditor may know whether the debtor is intending to deny or dispute the petitioning creditor's case and to what extent. If instead of notice an affidavit is filed, the rejection of the "affidavit" does not amount to the shutting out of evidence or the preventing of the debtor from giving any further evidence. He can still give evidence at the hearing, even though the notice had not been filed. A. I.R. (Vol. 26) 1939 Cal. 35=I.L.R. (1938) 1 Cal. 13=181 Ind. Cas. 251.

——R. 178—Sale of charged property—Right to commission.

Sale by assignee of charged property—Assignee is not entitled for commission on sale proceeds. 54 Cal. 317=102 Ind. Cas. 539=A.I.R. 1927 Cal. 529.

——R. 178—Applicability—Commission on sale for which provisions of Sch. II are not availed of, cannot be allowed to Official Assignee.

R instituted a suit against one D for the purpose of enforcing a deed of hypothecation executed by him in favour of the plaintiff. As at the time of the institution of the suit it was not known that D had been adjudicated an insolvent, an application was made for the Official Assignee to be brought on the record and the Official Assignee was brought on the record. Thereafter a question of priority was raised between R and one N and ultimately it was agreed between them that whatever moneys were realized by sale of the stock-in-trade of D would be divided between R and N in the proportion of 1 and 2. Thereafter an arrangement was arrived at by which the Official Assignee was to sell the stock-in-trade through one M. The Official Assignee claimed his commission.

Held, that as the parties did not avail themselves of the provisions of the 2nd schedule of the Insolvency Act for the purpose of realizing their security, they not having availed themselves of the machinery provided by the Insolvency Act, cannot be charged with the commission. 43 C.L.J. 580=97 Ind. Cas. 294 =A.I.R. 1926 Cal. 1033.

CALCUTTA HIGH COURT RULES (ORIGINAL SIDE).

——Applicability of, to Mofussil.

Rules framed by the Calcutta High Court under S. 104 of the T. P. Act for the Original Side fixing 6 per cent. interest on mortgage decree do not apply of their own force to the mofussil. The Court can reduce to interest to three per cent. on the decree amount, in a proper case. 10 C.L.J. 203=3 Ind. Cas. 289.

——Costs—Conflict between defendants inter se—Affidavits of co-defendants—Charges.

Charges are allowed for perusing affidavits of co-defendants on an originating summons where there is conflict between the co-defendants because the conflict of interest alone determines who are the real opposite parties irrespective of the superficial alignment of parties in the cause title. A.I.R. (Vol. 31) 1944 Cal. 364=I.L.R. (1943) 2 Cal. 443=218 Ind. Cas. 248.

——Costs—Taxation—Fees of junior Counsel—Scale.

It is a most undesirable practice for the Taxing Officer to assess the fees allowed to junior Counsel on the basis of the market value of such Counsel. It is much safer that some sort of recognised scale should be adopted and the most practical rule is the one prevalent in English and Irish Courts, namely to fix the fees of the junior Counsel according to the two-thirds scale. A.I.R. (Vol. 18) 1931 Cal. 523=58 Cal. 505=1931 Cr. Cas. 675=133 Ind. Cas. 572.

——Jurisdiction—Non-resident—Order directing inquisition or appointing guardian of person or property.

The Original Side of the Calcutta High Court has no jurisdiction to direct an inquisition or appoint a guardian of person or property in the case of an Indian not resident in Calcutta. A.I.R. (Vol. 19) 1932 Cal. 91=58 Cal. 919=35 C.W.N. 1045=133 Ind. Cas. 188.

——Taxation of costs—Interference — Question only of amount or of exercise of discretion —Rule.

The Court entertains a review of taxation and interferes only where a question of principle is involved. The Court is generally unwilling to interfere where it is a question whether the Taxing Officer exercised his discretion properly or if it is only a question of the amount to be allowed. A.I.R. (Vol. 31) 1944 Cal. 364=I.L.R. (1943) 2, Cal. 443=218 Ind. Cas. 248.

——Ex parte decree—Setting aside—C. P. Code, O. 9, R. 13—Applicability.

O. 9, R. 13, C. P. Code, is applied by analogy. But R. 13, does not prevent Court in case of negligence from restoring suit on property terms. A.I. R. 1928 Cal. 772, Appl. 32 C.W.N. 411=116 Ind. Cas. 633=A.I.R. 1928 Cal. 864.

——Registrar's Notification, Condition 12—Compensation—Right to compensation when lost—Making a bargain out of the misstatement—No bar to compensation.

The notification by the Registrar on the original side contained condition 12 which was to the following effect. "Where any error or misstatement shall appear to have been made in the particulars or description of the property, all such errors or misstatements, where capable of compensation, shall not annul the sale nor entitle the purchaser to be discharged from the purchase but compensation shall be made to or by the purchaser as the case may be, and the amount of such compensation shall be settled by a Judge in chambers:

Held, on a construction of the condition, that the purchaser was entitled to assume that the dimensions appearing in the notification were correct, and the discrepancy between the title-deeds and the notification was not sufficient to put them on enquiry in this respect, and that the right to compensation was not lost merely because, in spite of the misdescription the purchaser has made an advantageous bargain; and if at all the decree-holder sought to disentitle the purchaser he must prove waiver of the right or something analogous to it on the part of the purchaser. **Turner and Skelton,** In re (1879) 13

Ch. D. 130; Palmer v. Johnson, (1883) 12 Q.B. D. 32, Foll. 57 Cal. 783=A.I.R. 1930 Cal. 821.

——Variation of orders—Practice and procedure indicated.

When a draft form of an order is settled, it is the settled, it is the duty of the Registrar at once to pass and enter the order in the register. Any party who desires to object to the terms of it as settled, should intimate to the Registrar that he intends to give a notice of motion to vary the order. He must state what variation he desires and then he must move the Court to have the variation made. 32 C.W.N. 854 =A.I.R. 1928 Cal. 756.

——Court may vary its own order settled, passed and entered by the Registrar.

The Court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the Court in fact has never adjudicated upon, it has jurisdiction which it will in a proper case exercise to correct its records in accordance with the order really pronounced. **In re** Swire: **Mellor v. Swire, (1885)** 30 Ch. D. 239, Foll. 32 C.W.N. 854=A.I.R. 1928 Cal. 756.

——R. 32—Judge's discretion—Extent of.

A Judge of the High Court has jurisdiction to hear an application under R. 32 as to Taxation of Counsel's fees. The proviso in R. 32 does not control the jurisdiction and discretion of the Court or a Judge. Even assuming that R. 6 must be taken to refer to Counsel's fees, although such fees are not specifically mentioned therein, the rule is a direction to the Taxing Officer only and does not limit or control the jurisdiction of the Court or a Judge, given by R. 32. 26 C.W.N. 870=69 Ind. Cas. 823=49 Cal. 618= A.I.R. 1922 Cal. 402.

——Rr. 70, 71 and 72—Barristers—Exclusive right of audience in cases under the Criminal Law Amendment Act XIV of 1908.

Barristers have the right of exclusive audience before the special tribunal formed to the cases sent up for trial to the High Court under the provisions of the Criminal Law Amendment Act of 1908. (1909) 13 C.W.N. 605=4 Ind. Cas. 297 (S.B.).

——R. 98—Articled Clerk—Holding other office during his clerkship.

An articled clerk cannot hold any employment during the time of his articled clerkship. The rule should be construed stringently. 19 Ind. Cas. 578 (Cal.).

——R. 370—Registrar—Jurisdiction to decide question of executability of decree.

R. 370—The Registrar of a High Court has no jurisdiction to determine a question whether a decree is capable of execution. The rule was inconsistent with the Code of 1882. 43 Cal. 903=23 C. L. J. 645=20 C.W.N. 889=36 Ind. Cas. 602 (F.B.).

——R. 426—Sale by Commissioner for partition—Inquiry into vendor's title—Direction to Registrar—If can be made.

The High Court cannot direct the Registrar to inquire under R. 426 as to whether the vendor could make a title to the property sold by the Commissioner of partition under the authority of the Court. 40 Cal. 140=18 Ind. Cas. 954.

——Chap. V, R. 3—Report as to question of interpretation of Government of India Act—Jurisdiction to make—Power of Appellate Court.

It is for the Judge who deals with the case to decide whether any question of interpretation of Government of India Act is involved which requires a report to the Chief Justice. When the Judge himself disposed of the case, the appellate Court can only assume that he was satisfied that there was no such question before him. A.I.R. (Vol. 33) 1946 Cal. 121=49 C.W.N. 405=223 Ind. Cas. 576 (F.B.).

——Chap. V, R. 15—Petition for revision—Presentation to single Judge when only one Judge is functioning—Validity.

Under R. 15 of Chap. V of the Calcutta High Court Rules, a petition for revision can, no doubt, be presented only to a Division Bench. But if at the time the petition is put in, there is only one Judge of the High Court functioning and no Division Bench could be constituted, the presentation of the petition to a single Judge and the issue of a Rule by him, cannot be fatal to the petition which is subsequently before a Division Bench for hearing and disposal. 54 C.W.N. 92=A.I.R. 1950 Assam 6.

——Chap. VI, R. 5—Summons taken out on 14th made returnable on 17th of the same month —If a proper one.

Summons taken out on the 14th and made returnable on the 17th of the same month, allows 2 clear days as is required by R. 5 of Chap. VI of the Original Side Rules (Calcutta). 52 C.W.N. 502.

——Chap. VI, R. 15—Company—Winding-up petition—Order to take petition off file if security to satisfaction of Registrar is furnished—Registrar accepting security—Order, if can be reviewed.

Where on objection being filed for the compulsory winding-up of a Company, the Court ordered that the winding-up petition should be taken off the file on the Company furnishing security to the satisfaction of the Registrar, and the Registrar being satisfied with the security accepted it:

Held, that the order could not be reviewed. A. I.R. (Vol. 21) 1934 Cal. 603=38 C.W.N. 433= 61 Cal. 429=151 Ind. Cas. 126.

——Chap. VII, R. 1—Privy Council matters—Reference to Full Bench—If competent.

Chap. VII, R. 1 is wide enough to cover a reference to a Full Bench in Privy Council matters. A. I.R. 1949 Cal. 430=53 C.W.N. 533 (F.B.).

——Chap. VII, R. 11—Leave to sue—Contents of application.

Where leave to sue is craved, particulars of the grounds upon which the application is made must be set out with sufficient clearness in the plaint to enable the Court to ascertain whether leave is necessary or not and the attorney must ask for such leave when he presents his plaint for admission. A.I.R. (Vol. 18) 1931 Cal. 458=58 Cal. 418=134 Ind. Cas. 538.

——Chap. VII—Suit by corporation—Signing of plaint.

It is necessary in the case of a pleading filed on behalf of a corporation to establish by an affidavit that the person signing it is duly authorized to do so. 31 C.W.N. 1030=105 Ind. Cas. 568=A.I.R. 1927 Cal. 780.

——Chap. VII—Verification of Plaint—Plaint verified by a person other than the plaintiff or his agent—Authority to verify—Proof of.

Where a plaint is signed by constituted Attorney of the plaintiff, which mentions the name of another person as being able to depose to the fact of the case and is verified in the usual form by that person, it must be proved by an affidavit that he is so authorised to verify. 31 C.W.N. 1031 (n)=105 Ind. Cas. 564=A.I.R. 1927 Cal. 773.

——Chap. VIII, R. 6 and Chap. IX, R. 2—Defendant not entering appearance—If can defend suit.

Rules of the Original Side do not say that a defendant who has not "entered appearance" cannot in any way defend the suit. Under Chap. VIII, R. 6 and Chap. IX, R. 2, there are two consequences of not entering appearance. One is that the suit is liable to be heard **ex parte** and the other is that no written statement can be filed. A party subject to these handicaps imposed by the Rules can still appear under the C. P. Code when the suit is called on for hearing from the undefended list, not only to cross-examine the witnesses of the plaintiff and demolish in such manner the plaintiff's case on evidence that the Court will not pass any decree in the plaintiff's favour but also to make such arguments and submissions on law and on such evidence as the plaintiff may have brought to the Court. These are valuable rights under the Code which are not taken away by any rules of the original side. 54 C.W.N. 110=A.I.R. 1950 Cal. 217.

——Chap. VIII, R. 11—Applicability—C. P. Code, O. 30, Rr. 3 and 5—Service by registered post—Mode of effecting.

Under O. 30, R. 3, the only way in which such writ can be served is by serving it either upon a partner or by serving it at the principal place at which the partnership business is carried on in British India on a person having at the time of service the control or management of the partnership business. If Rule 11 of Chap. VIII of the High Court Rules is applied, and the notice sent by registered post it is necessary that it should be so applied as to comply with O. 30, R. 3, that is to say, the registered letter should be addressed to some particular person alleged to be a partner or to have control over the partnership business. 49 Cal. 394=69 Ind. Cas. 236=A.I.R. 1922 Cal. 390.

——Chap. VIII, R. 25—Leaving summons on the table of attorney's office—If proper service.

R. 25 of Chap. VIII of the Original Side Rules of the Calcutta High Court merely prescribes the mode of service of the Attorney when such service is provided by statute or rules. Even in such a case, leaving the summons on the table of the Attorney on the refusal of his clerk to receive it, would not amount to sufficient service of the summons under R. 25. 52 C.W.N. 502.

——Chap. IX, Rr. 6, 7 and 8—Relative Scope and operation of.

Rule 8 is complementary to Rr. 6 and 7 and should be read along with those preceding rules. The words "whether filed spontaneously or in compliance with an order" in R. 8 indicate that the copy which is referred to in R. 8 is copy which is taken from Court where the statement has been filed spontaneously or in compliance with an order. The operation of R. 8 should be regarded as limited to cases of obtaining office copy under the preceding Rr. 6 and 7. A.I.R. (Vol. 31) 1944 Cal. 364=218 Ind. Cas. 248=I.L.R. (1943) 2 Cal. 443.

——Chap. X, Rr. 7 and 36—Scope—Right of litigant to have his case heard.

Rule 36 is mainly conceived in the public interest, as the defendants will usually be able to force progress under R. 7. Every litigant has the right to have his case heard and disposed of, but that right must not be abused, even though the defendant, for reasons of his own, is not anxious to complain of the plaintiff's delay. But the Court is not entitled to deprive the litigant of his right, except on clearly ascertained grounds, and to the exclusion of grounds which rest only on suspicion:

Held, that the conclusion of the Judge that the suit appeared to be one, the main object of which was to harass the defendants and as no steps had been taken since a certain date, the suit must be dismissed with costs, was an unjustifiable and improper consideration to take into account in the judicial exercise of the discretionary power of dismissal under R. 36. A.I.R. (Vol. 23) 1936 P. C. 9=63 I.A. 12=63 Cal. 662=70 M.L.J. 94=1935 O.L.R. 721=1936 A.L.R. 6=2 B.R. 144=40 C.W.N. 321=43 L.W. 228=1936 A.L.J. 101=38 Bom.L.R. 146=1936 M.W.N. 327=159 Ind. Cas. 549 (P.C.).

——Chap. X, R. 35—Applicability—Suit on special list after appearing in prospective list—Power of Court to dismiss for non-prosecution.

R. 35 of Chap. X of the rules of the High Court, Original Side, applies only to cases which are not in the prospective list and which never were in that list. When a suit has once appeared in that list this rule is no longer applicable to it. The Court has therefore no jurisdiction to dismiss a suit on the special list for non-prosecution after it has once appeared in the prospective list or the warning list. The inherent power of the Court cannot be invoked in such a case. 58 C. 736, 46 C.W.N. 653, Foll. 44 C. 929 (F.B.) and 63 I.A. 12, rel. on. A.I.R. 1949 Cal. 377=53 C.W.N. 786.

——Chap. X, R. 36 — Applicability — Case reaching Prospective List.

Under the Calcutta High Court Rules (Original Side) the moment a case reaches the Prospective List, the provision contained in R. 36, no longer applies. There is nothing in that rule which prevents a party from taking out summons to have a suit dismissed for want of prosecution in a proper case.

[Object and history of the rule traced.] A.I.R. (Vol. 18) 1931 Cal. 671=58 Cal. 736=133 Ind. Cas. 209.

——Chap. X, R. 36—Applicability—Suit entered in prospective list before it is ready for hearing.

If a suit has been properly placed in the prospective list, R. 36 of Chap. X of the Calcutta High Court Original Side Rules will not apply, but it will continue to apply if the requisition was made improperly when the suit was not ready for hearing. A.I.R. (Vol. 20) 1933 Cal. 727=60 Cal. 847=147 Ind. Cas. 204.

——Chap. X, R. 36—Discretion under—Interference in appeal before Privy Council.

When the appellant before the Board of the Judicial Committee raises the delicate question of the proper exercise of judicial discretion then he must satisfy the Board that both the Courts below have failed to exercise their discretion properly. Unless the appellant succeeds in that task, their Lordships will not be willing to disturb the conclusions of the Courts below. A.I.R. (Vol. 23) 1936 P.C. 9=63 I.A. 12=63 Cal. 662=70 M.L.J. 94=1935 O.L.R. 721=1936 A.L.R. 6=2 B.R. 144=40 C.W.N. 321=43 L.W. 228=1936 A.L.J. 101=38 Bom.L.R. 146=1936 M.W.N. 327=159 Ind. Cas. 549 (P.C.).

——Chap. X, R. 36—Order of dismissal—Effect of—Second suit—If barred.

Where a suit is dismissed under R. 36, the plaintiff is at liberty to bring a fresh suit if he be so minded. A.I.R. (Vol. 22) 1935 Cal. 212=38 C.W.N. 1132=60 C.L.J. 158=62 Cal. 15=155 Ind. Cas. 158.

——Chap. X, R. 36—Power of dismissal under R. 36.

Under the Rules of the Calcutta High Court, Original Side, 1914, the material time at which the failure to appear in the Prospective List is to be looked for is when the suit is placed before the Judge in Chambers. The six months provide a minimum period, on the lapse of which, action may be taken under R. 36 of the rules. The failure to appear in the Prospective List must be still continuing at the date of such action and the default in respect of which the suit is liable to dismissal, is such continuing failure, and the conduct of the suit as from its institution up to the date of the action under the rule, is proper matter for the consideration of the Judge. The words "to be dismissed for default" in R. 36 cannot be read as if the default related solely to the failure to appear in the Prospective List within six months from the date of institution. A.I.R. (Vol. 23) 1936 P.C. 9=63 I.A. 12=63 Cal. 662=70 M.L.J. 94=1935 O.L.R. 721=1936 A.L.R. 6=2 B.R. 144=40 C.W.N. 321=43 L.W. 228=1936 A.L.J. 101=38 Bom.L.R. 146=1936 M.W.N. 327=159 Ind. Cas. 549 (P.C.).

——Chap. X, R. 36—Special leave to appeal—When granted.

Special leave to appeal may be granted when an important question of law (the proper construction of R. 36, Chap. X of the Rules of the Calcutta High Court (Original Side) is involved. (1933) 57 C.L.J. 335 (P.C.).

——Chap. X—Absence of Notice.

Absence of notice justifies setting aside the **ex parte** decree. 32 C.W.N. 684=55 Cal. 1292=115 Ind. Cas. 85=A.I.R. 1929 Cal. 63.

——Chap. X, R. 36—Review—Powers of Judge.

Jurisdiction comes to an end once the order is completed. The principle that where an order has not been perfected the Judge has power to reconsider the matter applies to an order of dismissal for default under R. 36. 28 C.W.N. 755=83 Ind. Cas. 128=A.I.R. 1925 Cal. 83.

——Chap. X, R. 36—Scope—If ultra vires.

R. 36, Chap. X of the Original Side Rules is not **ultra vires** and Court has jurisdiction to dismiss the suit for default, when it appears in the "special" list under that Rule. 51 Cal. 905=28 C.W.N. 916=81 Ind. Cas. 1048=A.I.R. 1924 Cal. 1025.

——Chap. XII, R. 2-D and Chap. X, R. 7—Commercial suit—Entry in prospective list—Requisition to Registrar by plaintiff's attorney—Necessity for.

In the case of a commercial suit in which directions have been given under R. 2-D of Chap. XII of the Original Side Rules by a commercial Judge that the suit shall be placed under Prospective List on a particular date, it is no longer necessary or incumbent on the plaintiff's attorney to submit a requisition to the Registrar for entering the suit in the Prospective List as prescribed by R. 7 of Chap. X. 53 C.W.N. 788.

——Chap. XIII — Applicability—Originating summons—Jurisdiction of High Court—Extent of—Matters included in S. 302, Succession Act.

Chap. XIII of the Calcutta High Court O.S. Rules is not, in terms, limited to matters which can only be dealt with by the High Court in exercise of its ordinary original civil jurisdiction prescribed by Cl. 12 of the Letters Patent. By its terms, it covers matters relating to or arising out of wills, trusts, etc. The language used in the Rules in this Chapter is wide enough to cover matters included in S. 302 of the Succession Act. The "jurisdiction" conferred by the section is a new and special jurisdiction which is an original jurisdiction as opposed to appellate jurisdiction and may be brought before the Court by way of an originating summons. I.L.R. (1947) 1 Cal. 184.

——Chap. XIII—Applicability—Probate of will—Procedure—Originating summons.

The question whether a certain document should be admitted to probate cannot be decided upon an originating summons. It is not until the probate Court has decided the matter finally that it is given to anyone to know what the dispositions made by the testator are. 52 C.L.J. 475.

——Chap. XIII—Applicability—Question whether upon true construction of lease plaintiff can assign remainder of term to a certain limited company without defendant's consent and whether defendant should not pay the costs of the proceedings—Originating summons is correct procedure.

An originating summons was taken out by the plaintiff for the determination of the question whether upon the true construction of the Indenture of lease mentioned in the plaint and in the circumstances mentioned in the plaint, the plaintiff is entitled to assign the remainder of the term under the said lease, without the consent of the defendant, and whether the defendant should not pay the costs of and incidental to these proceedings.

Held, that the procedure adopted by the plaintiff was entirely correct, R. S. C. of England Order 50 IV. a, R. 1 and the cases thereunder referred to. 48 Cal. 176=60 Ind. Cas. 105=A.I.R. 1921 Cal. 99.

——Chap. XIII — Applicability—Will—Relief by originating summons.

Chap. XIII of the Rules and Orders of the Original Side (Cal.), which govern the procedure with regard to originating summons, must be read subject to the provisions of Cl. 12, Letters Patent, and it follows that the Court has no jurisdiction to enter-

tain an originating summons unless it would have jurisdiction to make an administration decree with regard to the estate in respect of which relief by originating summons is sought. Accordingly, unless either the cause of action in the hypothetical administration suit can be said to arise wholly within the local limits of the jurisdiction, or in the alternative, unless part of the cause of action arises therein and leave of the Court is obtained, the originating summons must be dismissed and where it is sought to have the estate of a deceased person administered by the Court in terms of that person's will, the execution of the will and the grant of probate both are essential constituents of the cause of action. A.I.R. (Vol. 27) 1940 Cal. 354=I.L.R. (1940) 1 Cal. 102=189 Ind. Cas. 238.

——Chap. XIII—Applicability—Will—Testator's managing agents continuing to manage estate after his death—Originating summons against agent—Competency.

Where the managing agent of the testator continues to manage his estate even after his death and there is no managing agency agreement in writing, a person appointed as one of the trustees as well as a beneficiary in his will by the testator in respect of the aforesaid estate can have no claim against the agent as a trustee or as a beneficiary. As he is one of the trustees his position as regards them is that of a principal to an agent, not of a trustee to a **cestui que trust,** or of a **cestui que trust** to a trustee. An originating summons, therefore, is not maintainable against the managing agent. A.I.R. (Vol. 27) 1940 Cal. 354=I.L.R. (1940) 1 Cal. 102=189 Ind. Cas. 238.

——Chap. XIII—Applicability—Claim by creditor of estate of deceased—Procedure.

The procedure by originating summons is not applicable to a contentions matter of the nature of a claim by a creditor to recover from the estate of the deceased whose estate is under administration. The procedure would be by suit. 31 C.W.N. 630=103 Ind. Cas. 120 (2)=A.I.R. 1927 Cal. 518.

——Chap. XIII—Applicability—Leave to cross-examine deponents.

An order was taken out in originating summons upon the executrix under a will calling upon her to treat the plaintiff as secured creditor. The objection was that a suit is necessary for the purpose. It was agreed that the matter should be set down for deponent's cross-examination.

Held, that the case should be set down for cross-examination 54 Cal. 1075=109 Ind. Cas. 380=A.I.R. 1928 Cal. 177 (1).

——Chap. XIII—Period of 10 days—Computation of.

Where defendant's attorney gave the plaintiff another opportunity by again entering appearance after defendant had already appeared in person, the period of 10 days runs from the date of the later appearance. 30 C.W.N. 298=96 Ind. Cas. 839=A.I.R. 1926 Cal. 668.

——Chap. XIII, R. 1—Applicability—Wakfnama.

Paragraph 1 of Chap. XIII of the Original Side Rules is wide enough to embrace a **wakfnama,** and a question whether it creates a Wakf-al-al-aulad or not is a question which falls within the scope of that paragraph and the High Court in its Original Side is competent to decide that question on an originating summons. 51 C.W.N. 267.

——Chap. XIII, Rr. 3, 5, 7 and 11—Service of originating summons.

There is a marked distinction between the language of R. 3 and Rr. 5, 7 and 11 of Chap. XIII of the High Court Original Side Rules. The three last-mentioned rules requires service of originating summons on all persons who would be proper defendants if proceedings were taken by way of an ordinary suit, whereas R. 3 requires service on any one of the persons whose rights are sought to be affected. I.L.R. (1947) 1 Cal. 184.

——Chap. XIII, R. 9—Lease—Covenant not to assign without consent of landlord—Consent unreasonably withheld—Assignee a Limited Company—Originating summons.

The plaintiff applied on an originating summons for the determination of the question whether he was entitled to assign his lease without the consent of the lessor defendant, the latter having unreasonably withheld such consent. **Held,** that the Court was competent to decide the question on an originating summons. In the circumstances of the case, the consent was unreasonably withheld and the lessee was entitled to assign without the consent of the lessor. 24 C.W.N. 1007.

——Chap. XIII-A—Form of affidavits—Mere reference to plaint is not sufficient.

The affidavits in relation to summons under Chap. XIII-A should be sufficient and in proper form. It does not suffice to refer to the plaint and say that the statements contained in it are true. 53 Cal. 776 =30 C.W.N. 706=96 Ind. Cas. 182=A.I.R. 1926 Cal. 842.

——Chap. XIII-A—Unconditional leave to defend—Security.

Where there is a specific denial with respect to plaintiff's claim, the proper order is to give an unconditional leave to defend. It is entirely a wrong practice under Chap. XIII-A for a Judge to order security merely because looking at the statement on either side he rather thinks that the plaintiff has a better prospect of success than the defendant. An order for the sale of the securities is entirely without jurisdiction under Chap. XIII-A. 53 Cal. 412 =30 C.W.N. 228=93 Ind. Cas. 60=A.I.R. 1926 Cal. 713.

——Chap. XIII-A, Rr. 6, 7 and 9—Leave to defend—When may be given unconditionally. I.L.R. (1945) 2 Cal. 145=A.I.R. 1949 Cal. 479.

——Chap. XIV—Contempt case—Right of defendant—Extent of—Discretion of Court.

A defendant in contempt cannot claim as of right the benefit of the procedure of the Court except for the sole purpose of defending himself and how far these rights extend is a matter for the discretion of the Court. Though the party cannot himself come into Court to take any advantage of the proceedings in the cause, yet he is entitled to appear and resist any proceedings against him. 55 Cal. 1110=115 Ind. Cas. 189=A.I.R. 1929 Cal. 117.

——Chap. XIV, R. 1—Applicability—Partition suit—Special Reference in pursuance of settlement—Proceedings before—Procedure.

In pursuance of a settlement arrived at between the parties to a family partition suit, an order was made that **A** should be appointed a Special Referee to take

accounts and that he should also be appointed Commissioner of Partition:

Held, that neither R. 1, Chap. XIV, of the Rules and Orders of Calcutta High Court (Original Side) which deal with proceedings at the hearing of suits nor R. 3, Chap. XXII, dealing solely with proceedure upon commissions to take evidence, issued under O. XXVI, Rr. 1 and 4, Civil P. C., was applicable to proceedings before **A.** A.I.R. (Vol. 21) 1934 Cal. 737=38 C.W.N. 624=61 Cal. 488=152 Ind. Cas. 73.

——Chap. XVI, Rr. 4 and 8—Applicability—P obtaining decree against D in 1920 for certain sum—Suit referred to Registrar for taking accounts—Appeal—Suit remanded—P doing nothing for 9 years till 1929—P's appeal coming for hearing in 1929 dismissed for default—P again doing nothing for five years till 1934.

P obtained a decree in 1920 for a certain amount less one definite sum and less an unascertained amount. The suit was referred to Assistant Referee to take the accounts and the further hearing of the suit was adjourned until after the reference. **P** appealed from the decree. The suit was remanded to the trial Court for a finding on certain facts and there was a finding by the Court. Nothing, however, was done for about nine years. When **P's** appeal appeared in the pre-emptory list, **P** did not appear and his appeal was dismissed as also an application by him for restoration of his appeal. The reference was never in fact proceeded with and nothing of any consequence was done by **P** for a space of five years. After five years, in 1934, a summons was taken out by the defendant **D** asking for an order that the suit be dismissed with costs for want of prosecution. **P** secured an adjournment and was directed to file an affidavit. Nothing was done by **P**. He again sought an adjournment on the next date. It was refused and **P's** suit was dismissed for want of prosecution:

Held, that the matter was governed by the provisions of Rr. 4, 8, Chap. XXVI, Reference Rules. It was **P's** duty and not that of the defendant **D** to file the decree in the Accounts Department of the Registrar's Office and that was not done and therefore the lower Court was justified in coming to the conclusion that **D** could apply under R. 8 for dismissal of the suit for want of prosecution; even if **D** were held to be the party having the carriage of reference, it was open to **P** and **D** not having taken any steps within 30 days, to ask under second part of R. 8 to have all proceedings under the reference stayed and to obtain a final decree in the suit which he could execute. After the lapse of 30 days, **P** had a present right to enforce the decree as he could have the reference stayed and a final decree made. **P's** position was analogous to that of a mortgagee who obtained a preliminary decree and then did nothing towards putting himself into the position of being able to obtain a final decree before the lapse of 12 years from the date of the preliminary decree. A.I.R. (Vol. 23) 1936 Cal. 53=63 Cal. 612.

——Chap. XVI, R. 26—Withdrawal of suit for want of jurisdiction—Order for payment of costs before suit—Legality of.

Where the High Court has not jurisdiction and the case is withdrawn on that ground, unless there are other special reasons for applying R. 26 of the Original Side Rules, the payment of costs should not be made a condition precedent to the filing of a fresh suit. A.I.R. (Vol. 18) 1931 Cal. 791=35 C.W.N. 434=135 Ind. Cas. 278.

——Chap. XVI, R. 27—Applicability—Requisition to draw up decree.

The principle enunciated in 49 I.A. 307: A.I.R. 1922 P.C. 352: 43 M.L.J. 765 is equally applicable to the finding of a requisition to draw up a decree or order under R. 27, Chap. XVI of the High Court Rules. 29 C.W.N. 163=92 Ind. Cas. 563=A.I.R. 1925 Cal. 291.

——Chap. XIX, R. 1—Absence of affidavit—Effect.

The absence of an affidavit of competency required under R. 1 of Chap. XIX of the High Court Rules (Original Side) does not impair the authority of a certified guardian to institute a suit on behalf of a person of unsound mind. I.L.R. (1938) 1 Cal. 531=42 C.W.N. 422.

——Chap. XX, Rr. 3 and 4—Scope—Mandatory—Application to vary official referee's report—Procedure for—Notice.

The rules under Chap. XX and for the matter of that Rr. 3 and 4 of that Chapter are mandatory. An application to vary the report made by the official referee in a suit by a creditor must be made by motion and parties who will be affected by the application including the other creditors besides plaintiff where claims have been allowed or disallowed must be served. The fact that the defendants did not take any part in the reference does not absolve the applicant from the necessity of abiding by the rules under Chap. XX. A.I.R. (Vol. 28) 1941 Cal. 118=I.L.R. (1940) 2 Cal. 511=200 Ind. Cas. 92.

——Chap. XX, R. 9—Notice of motion—Contents.

Notice of motion should apprise the opposite party of the materials which the applicant intends to use. I.L.R. (1937) 1 Cal. 293=41 C.W.N. 425.

——Chap. XXII, R. 3—Applicability—Proceedings before Special Referee.

Neither R. 1, Chap. XIV nor R. 3, Chap. XXII apply to proceedings before the Special Referee appointed in a partition suit in pursuance of settlement between parties. A.I.R. (Vol. 21) 1934 Cal. 737 =38 C.W.N. 624=61 Cal. 488=152 Ind. Cas. 73.

——Chap. XXIII, R. 12—Filing of award by one of arbitrators—Validity.

Under Chap. XXIII, R. 12 of the Original Side Rules of the Calcutta High Court in causing an award to be filed the arbitrators do not perform a judicial act but one of a ministerial nature, and the ministerial act of filing can properly be carried out by one of their number. [1914 Sind 90, appr.] I.L.R. (1945) 2 Cal. 526=A.I.R. 1949 Cal. 549.

——Chap. XXV, R. 34—Applicability—Part-heard suit—Adjournment—Withdrawal of brief—Counsel's right to fees.

R. 34 of Chap. 25 of the Original Side Rules does not apply when the case is not one of simple adjournment but where the suit was actually part-heard and adjourned for a fortnight.

If client has engaged a counsel and if the attorney of the client has in fact delivered the brief to the counsel, the counsel is entitled to his fees, if the attorney withdraws the brief from the counsel on the

instruction of his client provided of course the counsel was agreeable to appear or work on the brief. Delivery of the brief to the counsel entitles the counsel to the fees marked on the brief so long as the counsel is prepared to discharge his obligations in respect of the brief. The fact that the brief was withdrawn by the attorney on the instruction of the client and the counsel had not to work out the brief cannot in such circumstances deprive the counsel of his right to the fees. 84 C.L.J. 9.

——Chap. XXVI—Appeal.

The opinion of a Judge taken under by way of a special report in a pending case is not a judgment. From it no appeal lies under Cl. (15), Letters Patent. I.L.R. (1937) 1 Cal. 149=40 C.W.N. 1264.

——Chap. XXVI—Registrar making report regarding matter not referred—Competency of.

Where the Registrar has, in making his report regarding the payment of alimony **pendente lite**, made certain suggestions regarding the amount of maintenance which should be paid for the children, the latter part of his report cannot be confirmed when there was no reference to him upon that point. A.I.R. (Vol. 26) 1939 Cal. 753=187 Ind. Cas. 252.

——Chap. XXVI, R. 89—Power of Court—Fourteen days already expired—Enlargement of time—Power to grant.

Chap. XXVI, R. 89, Calcutta High Court (Original Side) Rules and Orders undoubtedly contemplates that further time may be obtained, and there is nothing to show that the application for further time may not be made after the fourteen days have elapsed. A.I.R. (Vol. 28) 1941 Cal. 118=I.L.R. (1940) 2 Cal. 511=200 Ind. Cas. 92.

——Chap. XXVI, R. 89—Procedure—Applicability of Chap. XX.

The procedure prescribed by Chap. XX applies to applications to vary or discharge reports by reasons of provisions of R. 89 of Chap. XXVI. I.L.R. (1937) 1 Cal. 293=41 C.W.N. 425.

——R. 89—Scope—Compliance.

An application to discharge or vary a report of the Commissioner of Partition must be brought within the time prescribed by R. 89 of Chap. XXVI, of the Calcutta High Court (Original Side) Rules. It is not enough merely to serve the notice of the motion within that time. It is also necessary that the notice should be accompanied with the grounds of exceptions relied on by the party objecting to the report. (1936) 164 Ind. Cas. 218=62 Cal. 369.

——Chap. XXVII—Applicability.

Partition suit—Consent decree—Parties agreeing to sale by Commissioner at his discretion—Commissioner is not bound to follow rules in Chap. XVII. A.I.R. (Vol. 24) 1937 Cal. 384=172 Ind. Cas. 482.

——Chap. XXVII—Conditions in sale—Decree-holder choosing to rescind contract on failure by purchaser to pay balance—Forfeiture of deposit.

The conditions in a Registrar's sale with regard to deposit and re-sale are conditions which are usually found in an ordinary vendor and purchaser's contract for sale of land and in such case ordinary rules of English Law followed in India should be applied. If the vendor on default by the purchaser chooses to treat the contract as rescinded, the deposit is forfeited. If he chooses to treat it as subsisting he must give credit for the deposit in case of deficiency in re-sale. A decree was passed in a suit for recovery of money in a deed of charge and the property was put to sale by the Registrar. The highest bidder deposited a sum in terms of the conditions of the sale but subsequently failed to pay the balance of the purchase money. Tre decree-holder made an application for an order that the deposit be forfeited stating that he had decided to rescind the contract.

Held, that the decree-holder having decided to treat the contract as rescinded was entitled to forfeit the deposit. 57 Cal. 106=A.I.R. 1930 Cal. 324.

——Chap. XXVII—Duty of High Court—C. P. Code, O. 21, R. 89—Application of.

In an application to set aside sale by the Registrar held under a decree on the Original Side of the Calcutta High Court the duty of the High Court is to apply the provisions of O. 21, R. 89, C. P. Code so far as the rules in Chap. XXVII, Original Side Rules and Orders will permit. A.I.R. (Vol. 28) 1941 Cal. 159=I.L.R. (1941) 1 Cal. 147=45 C.W.N. 873=196 Ind. Cas. 523.

——Chap. XXVII—Rights of purchaser—Attachment subsisting prior to mortgage suit—Purchaser in execution of mortgage decree knowing of such attachment only after purchase—Right to have sale set aside.

Where a sale is held under Chap. 27 and not under C. P. Code if there is an attachment subsisting from before a mortgage suit, the purchaser in execution of decree obtained in such suit is entitled to reject the title, have the sale set aside and have his deposit returned if the fact of attachment is disclosed to him only after purchase. 33 C.W.N. 177=118 Ind. Cas. 887=A.I.R. 1929 Cal. 207.

——Chap. XXVII—Scope—Applicability of C. P. Code, O. 34, R. 5.

In sales by the Registrar under Chap. XXVII of the Calcutta High Court Original Side Rules and Orders, the judgment-debtors seeking relief should, as far as possible, observe the provisions of the C. P. Code. The provisions of O. 34, R. 5, apply to sales by the Registrar. It is not necessary to deposit costs with the application by the mortgagor under O. 34, R. 5, but it is desirable that O. 34, R. 5, should be complied with as far as possible, and in most cases, the mortgagee can furnish an estimate of his costs and that estimate can be accepted or modified by the Court and the Court may direct that a sufficient sum should be deposited when the application is made, or before the order is made on the application, provided the attorney for the mortgagee gives the usual undertaking to refund any balance that may ultimately be found due. But this course is necessary where, in an application under O. 34, R. 5, both the mortgagor and mortgagee agree that the mortgagee should retain the title deeds which were deposited as security until the costs have been taxed and the amount of the taxed costs have been paid to him. In such a case, the provisions, both of the C. P. Code, and Original Side Rules and Orders must be taken to have been observed. A.I.R. (Vol. 29) 1942 Cal. 44=201 Ind. Cas. 464.

——Chap. XXVII—Scope—C. P. Code, O. 21, R. 86—Application of.

The provisions of O. 21, R. 86 do not apply where a High Court has made rules regulating its own procedure in the exercise of its original civil jurisdiction which are not inconsistent with the Letters Patent. Rules for the conduct of sales by Registrar are contained in Chap. 27, Calcutta High Court Rules. O. 21, R. 86, does not therefore apply to such sales. A.I.R. 1921 Cal. 169, Dist. 57 Cal. 106=A.I.R. 1930 Cal. 324.

——Chap. XXVII—Scope—Need for amendment.

The rules, conditions and forms provided in Chap. XXVII of the Rules of the Calcutta High Court for sales by the Registrar are not sufficiently clear or explicit and these rules and forms of conditions of sale ought to be amended, in order to remove any doubt about such matters and similar doubts which may arise upon sales by the Registrar. A. I. R. (Vol. 21) 1934 Cal. 842=61 Cal. 956=38 C.W.N. 971=153 Ind. Cas. 247.

——Chap. XXVII, R. 21—Object and Scope—Sale of mortgaged properties—Reserved if may be dispensed with.

The primary object of rules of the Original Side of the Calcutta High Court dealing with sale of mortgaged properties is to see that the decree-holder is enabled to enjoy the fruits of his decree and that he should do so as early as possible. The necessity for adhering to the reserved price may be dispensed with. It is not necessary that the Judge should look into into the surveyor's report or hear the Registrar before coming to a decision of his own. What is done by the Registrar subsequent to the final decree is done by him as a ministerial officer of the Court charged with the duty of carrying out the orders of the Court. The Registrar is not then exercising judicial powers, not even sitting in a quasi-judicial capacity. A.I. R. (Vol. 20) 1933 Cal. 504=60 Cal. 506=145 Ind. Cas. 318.

——Chap. XXVII, R. 36—Discretion—Terms as to payment of interest or waiving right to rent up to determination of interest.

Rules 36, Chap. XXVII of Calcutta High Court Rules and Circular Orders, deals only with costs of inquiry and cannot, by implication, deprive the purchaser of any rights that he may have aliunde.

The latter part of the rule seems to leave the Judge an ample discretion as to the terms which may be imposed on the purchaser as to the payment of interest or waiving his right to the rent up to the time when the question of title is determined.

In an auction-sale, there was a dispute as to the title to the property. On an enquiry held subsequently the time for the purchaser to complete the purchase was extended by one month from the date of the completion of the enquiry. During the enquiry it was shown that the purchaser was justified in objecting to the title. He also waived his rights to the rents:

Held, that in these circumstances it would be inequitable to order the purchaser to pay interest. A. I.R. (Vol. 24) 1937 Cal. 417=173 Ind. Cas. 404.

——Chap. XXVII, R. 37—Scope—Mortgage sale—Setting aside of—Deposit—Civil Procedure Code (Act V of 1908), O. XXI, Rr. 89, 93—Application of.

Where a mortgagor applies to set aside a mortgage-sale held in pursuance of a decree passed by the High Court on its Original Side, the applicant should deposit 5 per cent. of the purchase-money under O. XXI, R. 89, Civil P. C., and nothing more. To such a case the provisions of O. XXI, R. 93, Civil P. C., or R. 37, Chap. XXVII, of the Calcutta High Court Rules and Orders do not apply. A.I. R. (Vol. 18) 1931 Cal. 688=58 Cal. 510=133 Ind. Cas. 587.

——Chap. XXVII, R. 37—Sale by Registrar set aside on ground of want of good title—Purchaser's right to interest on purchase-money deposited in Court.

Where a sale held by the Registrar under Chap. XXVII of the Original Side Rules is set aside on the ground that a good title could not be made out, the purchaser, in addition to the refund of the purchase-money paid by him and kept in deposit in Court is entitled under R. 37 of that chapter only to "his costs, charges and expenses occasioned by his bidding" and not to any interest on such deposit.

A sale held by the Court through its officer, the Registrar cannot be treated on the same footing as a sale by private treaty. Further, the case is not of such a description where the purchaser for getting release from his bid has to allege or rely upon circumstances which would attract the equitable jurisdiction of Equity Courts of England, for the jurisdiction is exercised only in cases of fraud, accident or breach of confidence or where the remedy at law is inadequate.

The fact that there has grown up a practice in the Calcutta High Court to allow the purchaser interest in such cases is of no value. O. 40, R. 3 of the O. S. Rules has in contemplation the procedural or adjective law. Its meaning is that where there are no specific rules regulating procedure the procedure sanctioned by practice is to be followed. The question as to whether a purchaser would be entitled to get interest on the purchase-money deposited by him on the reversal of the sale is one which concerns substantive law, and his claim can only be sustained either on the basis of contract or on the basis of statutory law or rules having the force of law or on general principles of substantive law. 51 C.W.N. 788.

——Ch. 31—Scope—Case under Bengal Money Lenders Act—Review.

Chap. XXXI does not contemplate applications for review of decrees filed under the provisions of the Bengal Money-lenders' Act 1940. A.I.R. (Vol. 29) 1942 Cal. 121=I.L.R. (1941) 2 Cal. 184=45 C.W.N. 859=199 Ind. Cas. 825.

——Chap. XXXII, R. 34—Review application—when made.

Having regard to the language of the Rules and Orders of the Original Side of the Calcutta High Court an application for review must be held to be made when the memo of review is filed. The person filing a memo takes a step which initiates proceedings for review and by doing so applies for a review of judgment within the meaning of

O. XLVII, R. 1, C. P. Code. 170 I.C. 653=41 C.W.N. 129.

——Chap. XXXV, R. 29—Scope—Caveator besides asking executor to prove will also alleging undue influence and forgery—Liability for costs.

If a caveator merely intends to require the executor to prove the will in solemn form he must not at the same time set up a defence of undue influence or fraud or any matter of that character. The widow applied for probate of the will. The caveator besides entering a caveat filed an affidavit alleging that the deceased at the time he made the will and up to the time of his death was a man of weak intellect with very imperfect knowledge of English, that the will was procured by the widow by undue influence and that the will was not genuine but was in effect a forgery. In the last paragraph of his affidavit the caveator prayed that the will should be proved in solemn form and for liberty to cross-examine the witnesses produced in support of the will.

Held, that as R. 29 contained the word 'merely' the last paragraph of the affidavit was not sufficient to bring the matter within the terms of R. 29. The caveator pleading undue influence was liable for costs. Calcutta Suit No. 4 of 1928, Foll.; Ireland v. Rendall, (1866) 1 P. and D. 194; Cleare v. Cleare, (1869) 1 P. and D. 655 Rel. on. 56 Cal. 55=A.I.R. 1929 Cal. 290.

——Chap. XXXV-A, R. 44—Applicability—Divorce case—Transfer.

R. 44, Chap. XXXV-A, framed under S. 62, Divorce Act, governs removal of a divorce suit or proceeding under both parts of S. 8 of the Divorce Act. It is therefore the Judge on the original side empowered in that behalf who has jurisdiction to transfer a divorce suit from one District Court to himself or to another District Court. He can also issue writ of commission for examination of witnesses by the court before which the suit was pending. A.I.R. (Vol. 29) 1942 Cal. 546=46 C.W.N. 790=I.L.R. (1942) 2 Cal. 461=201 Ind. Cas. 446.

——Chap. 35-A, R. 44—Single Judge on Original Side exercising matrimonial jurisdiction—Power, if co-ordinate with other District Judges,—Application for transfer under S. 8, Para. II, Divorce Act (IV of 1869), if covered by R. 44—Divorce suit, if can be transferred from one District Court to another.

A Judge sitting singly in the original side of the High Court and exercising motrimonial jurisdiction cannot be said to have only co-ordinate powers with other District Judges. Sections 13 and 17 of the Divorce Act as well as the power of removal which can undoubtedly be exercised by a single Judge under R. 44, Chap. XXXV-A do indicate that in exercise of its matrimonial jurisdiction a Single Judge of the Calcutta High Court has powers which are somewhat akin to those exercisable by an appellate tribunal. An application for transfer made under para. 2 of S. 8, Divorce Act, is covered by R. 44 and hence a single Judge sitting on the original side of the Calcutta High Court is competent to transfer a divorce suit from one District Court to another.

Where such a transfer was made by the Single Judge and no question of jurisdiction was raised before him on an application under S. 115, C. P. Code, against the order of the transferee District Court holding that it had jurisdiction to try the suit:

Held, that if this question of jurisdiction had been expressly raised before the Single Judge and the Judge had decided that he had jurisdiction, the decision would have been conclusive and could be set aside only by an appropriate proceeding:

Held, however, that even though it was not expressly decided, in these doubtful cases where the rules themselves are ambiguous, it would not be just or proper for the High Court to exercise its powers of revision under S. 115, C. P. Code, and treat the proceedings before the District Judge as being initiated without jurisdiction. It was not a case of a lack of inherent jurisdiction. The utmost that could be said was that the jurisdiction was not invoked or exercised in the right way. A.I.R. (Vol. 29) 1942 Cal. 32=I.L.R. (1941) 2 Cal. 373=45 C.W.N. 916=199 Ind. Cas. 621.

——Chap. XXXVI—"Review."

An application for setting aside the order of dismissal of a suit on the original side is not an application or review. (1935) 62 C.L.J. 377=39 C.W.N. 1196.

——Chap. XXXVI, Rr. 2 and 3—Solicitor and client—Implied retainer—Permissibility.

The act of authorising or employing a solicitor to act on behalf of clients constitutes the solicitor's retainer by that client. A retainer need not be in writing although it is always advisable to have a writing. Where there has been no written retainer the Court may imply the existence of a retainer from the acts of the parties in a particular case. None of the Rules of the original side of the Calcutta High Court makes it obligatory that a retainer must be in writing. There is nothing in R. 66 or R. 69 of Chap. 2 of Rules to exclude an implied retainer. That being so English Rules and Practice which permit and recognise implied retainers must be followed as provided by Rr. 2 and 3 of Chap. 36. 84 C.L.J. 9.

——Chap. XXXVI, R. 4—Attorney's bill of costs—Contents.

Attorney's bill of costs referred to in Chap. XXXVI, R. 4 of the Rules and Orders of the Original Side means a proper and complete bill which will include all the fees, charges and disbursements of the attorney in respect of the particular business done. If the costs allowed by the Court against the opposite party as between the attorney and the client have been paid to the attorney by such party, they should also be included in the bill submitted for taxation. A.I.R. (Vol. 32) 1945 Cal. 34=I.L.R. (1944) 1 Cal. 18.

——Chap. XXVI, Rr. 6 and 32—Scope and effect of.

The matter of "warning" is the very gist and substance of R. 32 (iv) of Chap. XXXVI. No

inference is to be drawn from the difference in language between R. 6 and R. 32 (iv). These two rules based on the English principles are specific and allow no room for discretion. Nor does R. 9 provide for overriding discretion. Court should use such discretion in rarest cases. A.I.R. (Vol. 29) 1942 Cal. 468=I.L.R. (1942) 1 Cal. 273=202 Ind. Cas. 200.

——Chap. XXXVI, R. 20—Costs of interlocutory proceedings—Option—Execution after final determination of suit—Practice.

Under the rules of the Calcutta High Court (Original Side) a person to whom costs are awarded by the trial Court in interlocutory matters has a choice between proceeding with taxation and execution at once and leaving both taxation and execution until after the final determination of the suit. As the latter course is more equitable, it should be followed where there are no directions to the contrary. A.I.R. (Vol. 20) 1933 Cal. 19 =59 Cal. 1358=142 Ind. Cas. 76.

——Chap. XXXVI, R. 32—Taxation of costs—Power to allow more than maximum prescribed—Written consent, whether necessary.

Under Chap. XXXVI, R. 3 of the Calcutta High Court, Original Side Rules, the Taxing Officer has power to allow fees in excess of the maximum on production of a written consent of the client and just as the taxing officer has jurisdiction to allow fees in excess when a written consent is produced, the Court has jurisdiction to allow fees in excess where consent is proved although it is not proved in every instance by a consent in writing. A.I.R. (Vol. 19) 1932 Cal. 233 =58 Cal. 1439=35 C.W.N. 993=136 Ind. Cas. 539.

——Chap. XXXVI, R. 32 (4)—Fees in excess of prescribed maximum—Power of Court to allow—Consent of client not in writing.

While R. 32 in Chap. 36 of the Original Side Rules of the Calcutta High Court defines the powers of the Taxing Officer, it is not intended to take away the power of the Court in a proper case to allow fees greater than the maximum authorised by the Rules. The Court has always jurisdiction to allow fees paid to counsel in excess of the maximum laid down in the Rules when the consent of the client to such payment is proved although such consent is not in writing. 35 C.W.N. 993; 51 C. 829 and 49 C. 618, Rel. on. 84 C.L.J. 9.

——Chap. XXXVI, Rr. 32, 6 and 9—Scope—"Warning" is gist of R. 32 (iv)—Consent to payment of "unusual" expenses is no consent unless client is aware that they are unusual—Rr. 32 (iv), 6 and 9 allow no room for discretion—Overriding discretion to be used in rarest cases.

The matter of "warning" is the very gist and substance of R. 32 (iv) of Chap. XXXVI. No inference is to be drawn from the difference in language between R. 6 and R. 32 (iv). R. 32 (iv) means consent to the client, and consent to the payment of "unusual" expenses is no consent unless the client is aware that they are "unusual" R. 32 (iv), and R. 6, though based on the English principle are specific and would seem to allow no room for discretion. Nor does R. 9 provide for overriding discretion. The Court should use such discretion only in rarest cases. A.I.R. (Vol. 29) 1942 Cal. 468=I.L.R. (1942) 1 Cal. 273=202 Ind. Cas. 200.

——Chap. XXXVI, R. 33—Hearing of originating summons on three different dates—Party and party costs—Brief-fee and refresher.

Originating summons was heard on three different dates. In all, the case took more than nine hours. After the first hearing of three and a half hours, the case was adjourned for a week. The second hearing, however began after a year and took about three hours. The third hearing was for about three and a half hours and the judgment was then reserved:

Held, that in a taxation between party and party a brief fee for first day and a refresher under Chap. XXXVI, R. 33 should be computed according to the time taken. A refresher for adjourned hearing should also be allowed under Chap. XXXVI, R. 34 which is to be decided by the Taxing Officer. The brief-fee was not worked off on the first day of hearing on the case being adjourned for over a month. The computation of time did not begin anew on the second day of hearing. A.I.R. (Vol. 31) 1944 Cal. 364=I.L.R. (1943) 2 Cal. 443=218 Ind. Cas. 248.

——Chap. XXXVI, R. 57 — Scope—Fees—Refresher—Appeal from dismissal of revision—No refresher should be allowed.

Having regard to the provisions of Chap. 36, R. 57 (a) if an appeal were to lie, only fees of one Counsel would be allowable on taxation unless the Court orders otherwise. Similarly, no refresher should be allowed. 25 C.W.N. 826=68 Ind. Cas. 451=A.I.R. 1921 Cal. 77.

——Chap. XXXVI, R. 69—Applicability—Attorney promising to give time to client—No dispute as to bargain.

Unless the special bargain, under which, at the client's request, the attorney gives him time for payment, is a matter of dispute, the rule is in no way inapplicable. The test is whether there are in the end any questions requiring to be elucidated in a suit. If not, the only other condition is that the application shall be one for payment of the amount of a taxed bill of costs. 48 Cal. 817=25 C.W.N. 800=66 Ind. Cas. 209=A.I.R. 1921 Cal. 67.

——Chap. XXXVI, R. 69—Discretion of Court—Exercise of.

On the question of time, Court has discretion to be exercised upon the well known lines and in the well-established manner on the particular facts of each case. In exercising the discretion Courts are not bound by the analogy of Art. 84. 48 Cal. 817=25 C.W.N. 800=66 Ind. Cas. 209=A.I.R. 1921 Cal. 67.

——Chap. XXXVI, Rr. 71, 72 and 73—Procedure for Revision.

Although as a rule the proper procedure to apply for a revision of taxation is to wait till the completion of the taxation and then apply for a review under Rr. 71 to 73 of Ch. XXXVI, where the discretion is not vested in the Taxing Officer at all, there is no objection, whatever, and it is

more convenient to approach the Court at a stage before the taxation is finally concluded. A.I.R. (Vol. 19) 1932 Cal. 233=58 Cal. 1439=35 C.W.N. 993=136 Ind. Cas. 539.

——Chap. XXXVI, R. 77—Scope—Attachment before judgment—Suit claim settled before decree—Sheriff's right to poundage.

A claim to poundage by a Sheriff must be made under the express terms of a statute rule or order. He has no common law right to reward for executing a writ. [Woodgate v. Knatchbull, (1787) 2 T.R. 148 at page 1541 and Graham v. Grill, (1814) 2 M. & S. 294, Foll.] In the Calcutta High Court poundage is a charge authorised by the 22nd item of Rule 77 of Chap. 36 of the Rules of Court. The words in the second part of this provision refer to that claim which, but for the satisfaction, compromise or settlement, would presumably, have resulted in a sum of money being levied by the Sheriff in execution. The rule does not give the Sheriff a commission upon the settlement of every man's claim made in a suit.

Where there is no decree and no execution of a decree the fact that the defendant has been compelled in effect to give security in case the plaintiff claim turns out to be well founded, does not necessarily mean that virtually or in truth the Sheriff has collected whatsoever the plaintiff may get on a settlement. The terms of R. 77 of Chap. 36 do not mean that in such a case the Sheriff is in the same position as if execution of a decree had been in progress. Hence where there is an attachment before judgment and subsequently before a decree is passed, the plaintiff's claim is settled, the Sheriff is not entitled to any poundage. 26 C.W.N. 673=70 Ind. Cas. 488=A.I.R. 1921 Cal. 763.

——Chap. XXXV, R. 77, Item 22—Applicability Benares Court passing decree and issuing precept to Calcutta High Court to attach property of judgment-debtor—Property attached by Sheriff—Subsequent compromise between parties—Sheriff, if entitled to poundage.

Part 2 of item No. 22 does not apply to any claim but only to a claim "in execution."

A decree was passed by a Court at Benares which then issued a precept to the Calcutta High Court directing it to attach immovable property of the judgment-debtor within its jurisdiction. Consequent upon that precept, the Sheriff attached the property mentioned. In the meantime, the judgment-debtor came to terms with the decree-holder and a compromise was arrived at:

Held, that as the claim was compromised during execution proceedings, part 2 of item No. 22 applied and the Sheriff was entitled to the poundage. A.I.R. (Vol. 27) 1940 Cal. 26=I.L.R. (1939) 2 Cal. 370=185 Ind. Cas. 811, reversed, A.I.R. (Vol. 27) 1940 Cal. 369=I.L.R. (1940) 1 Cal. 309=44 C.W.N. 273=189 Ind. Cas. 742.

——Chap. XXXVI, R. 77, Item 22—Amount realised by decree-holder as result of compromise—Sheriff's right to poundage.

A sheriff is not entitled to poundage on an amount realised by the decree-holder without the direct or indirect intervention of the sheriff. Where a notice of attachment in respect of a sum of money alleged to be due to the judgment-debtor from a third person was issued through the sheriff on an application by the decree-holder, and later a certain sum of money was realised by the decree-holder as a result of a compromise in full settlement of his claim against the judgment-debtor and the costs of the execution proceedings, the sheriff is entitled to recover from the decree-holder poundage on the sum realised by him in pursuance of the compromise. I.L.R. (1947) 1 Cal. 238.

——R. 77, Item No. 22—Sale of property attached by Sheriff—Poundage — Deduction for arrears of municipal taxes.

Where the sale of properties attached in execution of a decree is effected by the Sheriff, he is entitled to poundage, not on the amount realised by sale but upon the sum payable to or received by the execution creditor as the result of the levy.

The Sheriff is, however, entitled to make deduction of the municipal taxes. Arrears of taxes should be mentioned in the sale proclamation. The arrears of rates are under the Calcutta Municipal Act, a statutory charge on the premises and it is a duty of the party having carriage of the proceedings to find out any arrears and to have them mentioned in the proclamation. (1936) 164 Ind. Cas. 461=40 C.W.N. 41=63 Cal. 621.

——Ch. XXXVIII, R. 33—Consent order—Enlargement of time without consent of parties.

Quaere.—Whether R. 33, Chap. XXXVIII of the Calcutta High Court Rules (Original Side) gives the Court power to enlarge or abridge time with regard to a consent order without the consent of the parties. A.I.R. (Vol. 25) 1938 Cal. 353=I.L.R. (1938) 2 Cal. 14=42 C.W.N. 457=178 Ind. Cas. 734.

——Ch. XXXVIII, R. 43—Scope of.

R. 43 of Ch. XXXVIII of the High Court Original Side Rules does not give the meaning of the word 'last day' as used in R. 44. It merely lays down the rule for reckoning the number of days when the last day is a Sunday or when the Court remains closed and the last day obviously means the day when the summons or notice is made returnable. 52 C.W.N. 502.

——Chap. XXXVIII, R. 46—Enlargement of time.

The intention of Chap. XXXVIII, R. 46 is that although the time may have expired, an applicant may yet come before the Court or a Judge, and if the justice of the case requires, he may obtain further time in order to make his application, although the time appointed or allowed has already expired. Chap. XXXVIII, R. 46 gives the applicant an opportunity of coming to the Court for enlargement of the time even though the fourteen days contemplated by R. 89 of the Chap. XXVI had already expired. No application for extension of time, however, lies under Chap. XXVI. R. 92. A.I.R. (Vol. 28) 1941 Cal. 118=I.L.R. (1940) 2 Cal. 511=200 Ind. Cas 92.

——Chap. XXXVIII, R. 59—Application by attorney for costs — Summary procedure—Necessity of enquiry—Suit.

When an application by an attorney for realisation of his costs under R. 59 of Chap. XXXVIII of the Calcutta High Court Original Side Rules, entail an enquiry it should not ordinarily be dealt with in a summary manner.

Held, on the facts, per **Rankin, C. J.** and **Lort-Williams, J., (Ghose J.,** dissenting) that the case was not a fit one to be dealt with in a summary manner.

Per **Ghose, J.**—That there were no matters which called for enquiry and the case was one in which the Court ought to exercise its discretion in favour of the attorney.

Where an attorney engages a Counsel under the authority given to him by the plaintiffs in the retainer filed in Court, he is bound to pay the Counsel, and the client would be bound to pay the fees paid to Counsel, on taxation. It is only when the client has instructed the attorney not to brief a particular Counsel that the client would be under no obligation to pay fees paid to that particular Counsel, should he have been employed by the attorney. A.I.R. (Vol. 17) 1930 Cal. 651 =52 C.L.J. 197=129 Ind. Cas. 787 (F.B.).

——Ch. XXXVIII, R. 60—Order directing security to be furnished to satisfaction of Registrar—Court's power to review.

When a Court has directed security to be furnished by a party to the satisfaction of the Registrar, the decision of such authority on the sufficiency of the security cannot be questioned. But the Court has jurisdiction to review its orders when such authority designated in accepting such security has not acted in accordance with the order or has otherwise acted improperly. There is no reason why a Court should accept or allow a bond to be accepted by its officers pursuant to its order which may create any difficulty in its enforcement by reason of the absence of appropriate language or absence of strict compliance with the rules of the Court. 50 C.W.N. 876.

——Chap. XXXVIII, R. 59—Set off and damages.

Per **Panckridge, J.**—It is not open to a Court to entertain, far less to decide, questions such sets-off and damages on an application for costs by an attorney under Chap. XXXVIII, R. 59. If such question is agitated at all, it must be agitated in an ordinary suit. 52 C.L.J. 197=A.I.R. 1930 Cal. 651 (F.B.).

——Chap. XXXVIII, R. 59—Scope of—Original side—Application by attorney entailing enquiry should not be dealt with under R. 59.

When an application by an attorney for realization of his costs under R. 59 entails an enquiry it should not ordinarily be dealt with in a summary manner. Where an application by an attorney for realization of costs due to him under allocatur of taxed costs, evinced feature which could only be disentangled by oral evidence, although there were no merits in the attempts on the part of the clients to pay nothing to their attorney who was out of pocket for a large sum with respect to counsel's fees and other matters.

Held, (**Rankin, C J. and Buckland, J.**) that the court could not grant relief claimed upon a mere summons in chamber.

Per **C. C. Ghose, J.**—That as there was no shade of reality, and as the rule would work great hardship, the attorney could get the relief asked for, it being a special case. 52 C.L.J. 197=A.I.R. 1930 Cal. 651 (F.B.).

——Chap. XXXVIII, R. 59—Taxation—Limitation.

Per **Panckridge, J.**—The period of limitation in an attorney's suit for taxed costs does not begin to run until, at the earliest the issue of the allocatur. 36 Cal. 609, Foll. A.I.R. 1921 Cal. 67 and 46 Cal. 249. Ref. 52 C.L.J. 197=A.I.R. 1930 Cal. 651 (F.B.).

——Ch. XXXVIII, Rr. 67 and 79—Applicability—Attorney's application for recovery of costs against client—Limitation Act, Arts. 84 and 181—Plea of novation.

The bill of costs of an attorney against the client was taxed on 4-9-1913. Summons for the payment of the same under R. 67, Chap. XXXVIII of the Calcutta High Court Rules and Orders was taken out on 10th May, 1918. The attorney pleaded novation of the contract. **Held,** that Art. 181 of the Limitation Act did not apply to the case and that the summary procedure provided by R. 79 Chap. XXXVIII. Calcutta High Court Rules Original side applied to applications for payment of attorney's costs where there is no contest or doubt that the parties applying are capable of giving full discharge for the amount claimed. A question of novation cannot be gone into a summary application of this kind. The proper course for the applicant is to bring a suit within the period prescribed by Art. 84. 46 Cal. 249=23 C.W.N. 473=51 Ind. Cas. 941.

——Appendix J—Sale by Registrar—Deposit of 25 per cent. of purchase money by purchaser—Default in paying balance—No re-sale—Purchaser's right to recover deposit.

In a case of sale by Registrar on conditions set out in Appendix J to the Rules of the Calcutta High Court pursuant to a mortgage decree, the purchaser who had deposited 25 per cent. failed to pay the balance of the purchase money. There was no resale of the properties. On the application by the purchaser for the return of the deposit money to him.

Held, that the purchaser upon default lost his right to recover the deposit money in the absence of special circumstances. To be of any assistance to the purchaser any special circumstances which he relied upon must be such as amounted to an agreement binding on the mortgagee to forego his right with regard to the deposit; that is to say something which amounted to an agreement by the mortgagee to return the deposit which had already been made and which he had become entitled to either as a sum which he might forfeit or as an amount which though it would be taken into consideration in calculating any deficit upon a re-sale, would not otherwise be repay-

able to the person who made the deposit. The fact that the properties were not resold at an early date or within a reasonable time might disentitle the mortgagee to recover from the purchaser the deficiency that might arise, if and when the properties were eventually resold. But that fact could not operate so as to give the purchaser a title to the deposit which was lost by him when he defaulted. A.I.R. 1948 Cal. 208.

——Para. 790, Note (3).

The provision in para. 790, note 3 is not framed under S. 20, Court Fees Act. It comes under the heading of "payment of money" and simply lays down the procedure for quick realization of these deposits if lying unspent. This paragraph does not create the right to get refund but presupposes it to be already existing. A.I.R. (Vol. 24) 1937 Cal. 86=64 C.L.J. 492=41 C.W.N. 155=I.L.R. (1937) 1 Cal. 624=168 Ind. Cas. 678.

CALCUTTA HOUSE RENT CONTROL ORDER (1943).

——Scope of—If furnishes additional grounds of ejectment—T. P. Act, S. 111.

The grounds for passing a decree for ejectment are detailed in S. 111 of the T. P. Act. The Calcutta House Rent Control Order does not furnish any additional grounds for ejectment. It rather places limitations on the right of the landlord seeking to eject a tenant: in other words, it furnishes additional grounds of defence. 53 C.W.N. 859.

——Para. 9—Applicability—Lessee of land erecting buildings thereon and letting them—If protected.

A lessee of land who has erected buildings thereon contracting with the lessor that he would convey them to him on the expiration of the lease, is not entitled to the protection of para. 9 of the Calcutta House Rent Control Order against ejectment after the expiration of the lease.

The language of para. 9 of the order read with the definition of "landlord" and "tenant" in para. 2, clearly indicates that there must be a direct relationship of landlord and tenant in respect of a house between the person who seeks to recover possession and the person who resists such claim. The definition of "landlord" shows that he must be entitled to receive rent in respect of the house or building.

The expression "the tenant" in para. 9 refers not to any tenant who may be in occupation of the house, but to the tenant to whom the house or building has been let by the landlord. This seems to follow from the definition of "house" in para. 2 (3) of the Order, from the reference to S. 108 of the T. P. Act in proviso (a) to para. 9, and from the reference to the contract with the landlord in Cl. (4) of para. 9. This being the case, the mere fact that the lessee has let the building to certain persons who hold under him as occupying tenants, is immaterial in a suit for recovery of possession of the demised land on the expiration of the lease from the lessee. I.L.R. (1946) 2 Cal. 326.

——Para. 9—Finding of fact—Finding by Courts below that landlord bona fide required premises for own occupation—If conclusive in second appeal.

A finding of fact by the Courts below that the landlord bona fide required the premises for his own occupation, is conclusive in second appeal, and the appellant is not entitled to adduce evidence of subsequent events in order to have a fresh adjudication on that point. A.I.R. 1947 Cal. 351.

——Para. 9—Scope—Protection from eviction, when can be claimed—Default during pendency of ejectment suit—Mere willingness to pay, if sufficient.

In order to claim protection from eviction under para. 9, so far as payment of rent is concerned, the tenant must have paid all arrears of rent accrued due before the order came into force within three months of the date on which the order came into force. The tenant must continue payment of rent accruing thereafter within the time stipulated under the agreement or, in the absence of any agreement, month by month, by the 15th day of the month following that for which the rent was payable up to the date of the final hearing of the suit for ejectment. Where the landlord refuses to accept rent, the tenant has to deposit the same with the Rent Controller. Payment of a lump sum in the Court for all the defaulted months previous to and during the suit is not a payment contemplated by para. 9 (4) of the order.

Mere readiness or willingness of the tenant to pay arrears of rent or current rent as it accrues due is not enough to protect a tenant from ejectment because the conditions which give the tenant protection from eviction under the general law are defined, not by sub-para. (2), but by sub paras. (1) and (4). He must actually pay or deposit with the Controller of Rent where the landlord has refused to accept his tender. A.I.R. (Vol. 33) 1946 Cal. 81=49 C.W.N. 728.

——Para. 9—Scope—Protection of tenant—Facts subsequent to suit—If relevant. I.L.R. (1945) 2 Cal. 585=A.I.R. 1949 Cal. 576.

——Para. 9 (1)—Proviso—Suit for ejectment—Amendment of plaint raising case under proviso to para. 9 (1) before defendant has invoked para. 9 (1).

The Calcutta House Rent Control Order, 1943, has been made for the protection of tenants. It is not correct to say that the proviso gives the landlord a new cause of action and that, even though the plaintiff landlord fails on his original case, he may obtain a decree for ejectment by making out a case within the proviso. The proviso to para. 9 (1) does not come into play until the sub section to which it is a proviso has been invoked by the defendant. Hence in a suit for ejectment of the tenant an application by the plaintiff landlord seeking to amend the plaint by raising a case under para. 9 (1) proviso, before the defendant has invoked para. 9 (1) is misconceived. A. I. R. (Vol. 31) 1944 Cal. 72=I.L.R. (1944) 1 Cal. 690 =48 C.W.N. 48=211 C. 445.

——Para. 9 (1) (b)—Order of Commissioner of Police directing discontinuance of house as disorderly house—If deprives tenant of protection—Bengal Suppression of Immoral Traffic Act, S. 6 (2).

A tenant of a house cannot be deprived of the protection afforded by para. 9 (1) of the Calcutta House Rent Control Order by reason of an order made by the Commissioner of Police under S. 6 (2) of the Bengal Suppression of Immoral Traffic Act directing the discontinuance of the use of that house as a disorderly house or brothel or a place of common assignation. If after the said order of the Commissioner of Police, the landlord determines the tenancy and institutes a suit for ejectmet against the tenant, he cannot succeed unless he establishes that the tenant has been guilty of a conduct described in para. 9 (1) (b) of the Calcutta House Rent Control Order. The decision of the Commissioner of Police does not constitute a finding of or relate to any such conduct of the tenant. It only amounts to a finding that the house is used as a brothel or disorderly house and for the purposes of prostitution, etc. I. L. R. (1946) 2 Cal. 615=50 C.W.N. 756.

——Para. 9 (1), proviso (c)—Tenant agreeing to decree for possession—If satisfactory cause.

If the landlord can show that the tenant has agreed to a decree for possession being passed against him and is still agreeing, it would be a cause which the Court is bound to consider as satisfactory within the meaning of proviso (c) to para. 9 (1) of the Calcutta House Rent Control Order. I.L.R. (1946) 1 Cal. 462=50 C.W.N. 245.

——Para. 9 (b)—Order setting aside decree for possession granting time to landlord to take proper steps—Effect of—Suit if kept pending—Permission to prosecute suit on ground that tenant is defaulter—If can be granted.

A Small Cause Court setting aside under para. 9 (b) of the Calcutta House Rent Control Order its decree for delivery of possession, is not also bound at the same time to dismiss the suit entirely. It may do so, but for sufficient reasons it may also decide, while setting aside the decree to keep the matter alive. If by the order setting aside the decree the Court allows the landlord two months' time to take proper steps, it keeps the suit alive, and permission can, therefore, be validly granted in such a case to prosecute the suit on the ground that the tenant was a defaulter. 53 C.W.N. 462.

——Para. 9 (b) (1)—"Proceeding"—If includes appeal. See CALCUTTA HOUSE RENT CONTROL ORDER, Para 9 (b) (3). A.I.R. 1948 Cal. 226.

——Paras. 9 (4) and 2—Default by tenant in payment of rent in time—Landlord accepting rent subsequently—Tenants, if entitled to protection—Person becoming landlord subsequent to such default—If can avail himself of such default. I.L.R. (1945) 2 Cal. 591=A.I.R. 1949 Cal. 571.

——Para. 9 (4)—Tenant paying up arrears of rent due before ejectment suit but not rent due during suit—If protected. I.L.R. (1946) 1 Cal. 176=224 Ind. Cas. 364=A.I.R. 1946 Cal. 81.

CALCUTTA HOUSE RENT CONTROL ORDER (1946).

——Para. 9-A—Pending suit—Dismissal for failure to obtain Rent Controller's permission—Legality—Para. 9-A superseded before disposal of suit in appeal—Suit, if can be tried on merits.

A suit for ejectment filed by a landlord on the ground that he required the premises for his own use and occupation was pending when paragraph 9-A of the Calcutta House Rent Control Order, 1943, was added precluding the Court from passing a decree in such suit unless the permission of the Rent Controller was obtained for prosecuting the suit. The plaintiff-landlord failed to obtain the requisite permission and both the trial Court and the lower appellate Court dismissed the suit. The plaintiff filed an appeal to the High Court and before the disposal of that appeal, para. 9-A was superseded by other pieces of legislation.

Held, that there was no provision giving jurisdiction to the Court to dismiss the pending suit on the ground of want of permission of the Rent Controller and that the plaintiff should have an opportunity, because of the altered circumstances, to have the suit tried on the merits as there was then no bar as he had originally been provided in paragraph 9-A. If during the pendency of a suit certain temporary legislation was enforced which did not directly authorise the Court to dismiss a suit for the non-fulfilment of certain conditions and if before that suit was finally disposed of by the Appellate Court that bar was removed, the plaintiff should not be denied the privilege of having the suit tried out which was said to have been in order on the date it had been filed. 54 C.W.N. 813.

——Para. 9-A—Permission to sue tenant given to two persons — Suit by three plaintiffs — Maintainability.

On a reading of Para. 9-A of the Calcutta House Rent Control Order it is clear that there must be an identity between the person who wishes to institute a suit for ejectment, the person who applies to the Controller for permission, the person to whom the Controller gives permission and the person who ultimately brings the suit. Hence where only two of the landlords have been given the necessary permission by the Rent Controller under para. 9-A of the Order, a suit by three plaintiff as landlords to eject the tenant could not be entertained. 52 C.W.N. 461.

——Para. 9-A (1)—Suit for ejectment on several grounds—One ground requiring Controller's permission—Suit, if may proceed on other grounds.

If a suit for ejectment by a landlord against his tenant is brought on several grounds and one of them is "a ground" which requires the permission of the Controller and such permission has not been obtained, then the whole suit cannot be entertained under Para. 9-A (1) of the Calcutta House Rent Control Order. In such a case, the suit cannot proceed on the grounds for which no permission is necessary. 54 C.W.N. 624=A.I.R. 1950 Cal. 544.

——Paras. 9-A and 9-B — Validity — Defence of India Act, S. 14—Defence of India Rules, R. 81 (2) (bb).

The provisions of Paras. 9-A and 9-B of the Calcutta House Rent Control Order relating to the necessity of the permission of the Rent Controller to institute a suit or to prosecute a pending suit, are not rendered invalid by reason of the provisions of S. 14 of the Defence of India Act. Nor are they **ultra vires** the powers conferred by Cl. (bb) of sub-R. (2) of R. 81 of the Defence India Rules. I.L.R. (1946) 2 Cal. 198.

——Para. 9-B—Proceedings started before expiry of order—Continuation thereafter—Jurisdiction of Small Cause Court—Government of India Act, S. 102.

On 12th July, 1946, a tenant filed an application for relief in a Small Cause Court under Para. 9-B of the Calcutta House Rent Control Order, 1945, as amended on 16th June, 1946, in respect of a consent decree for ejectment. Before this application was finally decided the control order expired on 30th September, 1946, and was replaced by the Calcutta Rent Ordinance, 1946. In spite of that, the Court proceeded to decide the application and set aside the consent decree on 6th December, 1946, in exercise of the powers conferred by para. 9-B (3) of the Control Order.

Held, that in spite of the expiry of the control order on 30th September, 1946, the Small Cause Court had jurisdiction to decide the application filed on 12th July, 1946, and that para. 9-B of the control order remained alive for the purposes of a proceeding commenced under it before the date of expiry although it was dead for all other purposes. The control order was passed by the Governor of Bengal under R. 81 (2) (bb) of the Defence of India Rules which again were framed under S. 2 of the Defence of India Act. The Defence o India Act itself was enacted under S. 102, Government of India Act under which the central legislature was given power to legislate on Provincial subject after a Proclamation of Emergency had been made. By sub-S. (2) of S. 102, as amended by S. 5, India (Central Government and Legislative) Act, 1946, it was provided that an emergency legislation on a provincial subject by the central legislature shall to the extent of the incompetency, cease to have effect on the expiration of six months after the proclamation of emergency has ceased to operate, 'except as respects things done or omitted to be done before the expiration of the said period". If the control order is read, as it must be, as a part of the Defence of India Act, it must be held that on 30th September, 1946, the control order ceased to have effect except as respect things done or omitted to be done before the said date. 52 C.W.N. 25 (F.R.), rel. on; 51 C.W.N. 148, Diss. from. 84 C.L.J. 1=54 C.W.N. 12=A. I.R. 1950 Cal. 214.

——Para. 9-B—Suit instituted before order—Absence of permission of Rent Controller—Maintaiability of suit.

A suit for ejecttment of a tenant for non-payment of rent is maintainable in the absence of permission of the Rent Cotroller under para. 9-B of the Calcutta House Rent Control Order, 1943, where such suit was instituted before that order came into operation and the Court does not make any order or decree for possession while it is in force. 83 C.L.J. 278.

——Para. 9-B (3) — Applicability — Consent decrees.

Sub-para. (3) of para. 9-B of the Calcutta House Rent Control Order applies to and includes decrees passed on consent where either the decrees or the proceedings in the suits show that the real ground on which the landlord seeks eviction is non-payment of rent by the tenant. [50 C.W.N. 242 and 245, Diss.] 53 C.W.N. 859.

——Para. 9-B (3) — Applicability—Consent. decree.

Assuming that a consent decree for ejectment comes within the purview of para. 9-B (3) of the Calcutta House Rennt Control Order, a consent decree which does not itself show that there was default on the part of the tenant in regard to payment or deposit of rent which disentitled him to any protection under para. 9 and it was on account of that fact that he consented to a decree for eviction does not attract the operation of para. 9-B (3) of the order. 52 C.W.N. 230=A.I.R. 1949 Cal. 151.

——Para. 9-B (3) — Applicability — Consent decree.

The provisions of paragraph 9-B (3) of the Calcutta House Rent Control Order introduced by notification dated 28th August, 1945, relate to a decree for recovery of possession passed by a Court after adjudication on the ground of non-compliance by tenant, with regard to payment or deposit of rent, and not to a decree obtained by consent. 50 C.W.N. 242.

——Para. 9-B (3) — Applicability — Consent decree.

The provisions of para. 9-B (3) of the Calcutta House Rent Control Order, relate to a decree passed by the Court after adjudication upon the grounds specified in the order, and do not relate to a decree by consent. 50 C.W.N. 242, foll. 50 C.W.N. 245.

——Para 9-B (3)—Application by tenant for vacating decree for ejectment—Forum—Trial or appellate Court—Appeal pending against decree—Jurisdiction of appellate Court to proceed with appeal.

An application by the tenant under Para. 9-B (3) of the Calcutta House Rent Control Order for vacating a decree for ejectment made before 20th August, 1945, must be made only to the Court which had passed the decree and not to the appellate Court, although an appeal filed by the tenant against the decree for ejectment is pending on the date of his application or on 29th September, 1945, that being last date for making such an application under that paragraph. The jurisdiction of the Court that had passed the decree to entertain the application does not cease even after the appellate Court passes its decree, as the principle of the merger of the decree of a lower Court in the decree of the appellate Court is not applicable to a proceeding coming under Para. 9-B (3), there being

in the enactment itself an indication to the contrary.

Further in view of Para. 9-B (1) of the order the appellate Court itself has no jurisdiction to proceed with the appeal and any decree that it may pass is void. The word 'proceeding" occurring in the first part of Cl. (1) of Para. 9 B would include an appeal arising in a suit for ejectment of a tenant and would necessarily include an "appeal" also as far as the second part is concerned, for the word "proceeding" must have the same meaning in both the parts. I.L.R. (1948) 2 Cal. 334=A. I.R. 1948 Cal. 226.

——Para. 9 B(3) — Costs — Power to disallow court fees paid on amount decreed for mesne profits.

The Court in making an order in favour of the tenant under Para. 9 B (3) o the Calcutta House Rent Control Order, can reduce the costs decreed in the suit itself but cannot in the exercise of its discretion disallow a portion of the court-fees which the plaintiff had paid under the orders of Court for getting a decree for the amount decreed for mesne profits. I.L.R. (1948) 2 Cal. 334=A.I. R. 1948 Cal. 226.

——Para. 11—Appeal—Application to vary decree refused—No appeal lies. A.I.R. (Vol. 31) 1944 Cal. 321=48 C.W.N. 603=219 Ind. Cas. 51.

——Para. 11—Scope and applicability.

Para. 11 of the Calcutta House Rent Control Order proceeds on the well-known principle that an executing Court must execute the decree as it stands. That section gives the power, not to the executing Court, but to the Court which passed the decree to rescind or modify the decree if the decree could not have been passed in that form or could not have been passed at all at the date when it was passed if the control order had been in force on the date of the decree. A.I.R. 1948 Cal. 172.

——S. 13—Scope — Permission obtained under House Rent Control Order, 1943—Sufficiency for suit for eviction under Order of 1946.

On an application under S. 9 A of the Calcutta House Rent Control Order, 1943, permission was granted to the applicant, subject to the condition that the suit for eviction of the tenant should not be instituted prior to 1st February, 1947. The Rent Control Order, 1943, having expired on 30th September, 1946, the new Order of 1946 was promulgated by the Governor, and it came into operation on 1st October, 1946. A suit for eviction was instituted on 5th February 1947 on the permission granted under the old Order and the defendant pleaded that no permission having been obtained afresh under S. 13 (3) of the new Order, the suit filed on the strength of the permission granted under the old Control Order was not maintainable.

Held, that a fresh permission under S. 13 (3) of the House Rent Control Order, 1946, was necessary, as it is a condition precedent, and the suit instituted on the permission granted under the old Control Order was not maintainable, there being no provision to the effect that a permission for filing a suit obtained under the old Control Order would be deemed to be a valid permission under the new Control Order, 1946. 52 C.W.N. 669= A.I.R. 1949 Cal. 67.

CALCUTTA IMPROVEMENT TRUST ACT (V OF 1911).

——See also LAND ACQUISITION ACT.

——Award by Improvement Tribunal — Appeal, Court-fees.

Appeal from award of Calcutta Improvement Tribunal—Dispute only as to apportionment—No excess compensation claimed—Article 1, Sch. I of the Court Fees Act applies and ad valorem fee is chargeable. A.I.R. (Vol. 19) 1932 Cal. 346=35 C.W.N. 1103=59 Cal. 528= 137 Ind. Cas. 469.

——Scope—Land Acquisition Act, S. 26 (2)—If to be read as part of Act.

Sub S. (2) of S. 26, Land Acqusition Act, which was introduced by the Amending Act of 1921 cannot be taken as part of the Calcutta Improvement Act of 1911. A.I.R. (Vol. 29) 1942 Cal. 569=46 C.W.N. 927=I.L.R. (1942) 2 Cal. 528 =203 Ind. Cas. 429.

——S. 11—Procedure—Acquisition of tenement subject to easement right—Reference under Land Acquisition Act—Notice to Collector—Procedure —Trial as valuation case.

Where a survient tenement is acquired under the Land Acquisition Act, the Collector ought to be given a notice under S. 20, Land Acquisition Act, and the reference at the instance of the owner of the easement should be tried, not as an apportionment case, but as a valuation case which, under the provisions of the Calcutta Improvement Act, can be tried only by the Tribunal composed by the President and the two assessors. A.I.R. (Vol. 32) 1945 Cal. 142=79 C.L.J. 105=49 C. W.N. 203=221 Ind. Cas. 373.

——S. 11—Tribunal's power to call for records.

The power to call for records from another Cout is a power which is inherent in the Judge of a Land Acquisition Court, and, consequently, in the special Tribunal constituted under the Land Acquisition Act (I of 1894), to hear cases from the orders of the Calcutta Improvement Trust. 43 Cal. 239=20 C.W.N. 360=34 Ind. Cas. 263.

——S. 24—Board—If can abandon any portion of land intended to be acquired.

Even apart from S. 78, Land Acquisition Act, there is nothing in the Land Acquisition Act or the Calcutta Improvement Act which prevents the acquiring authority from abandoning a portion of the land in respect of which proceedings under the Act have been taken. Under S. 24, Calcutta Improvement Act, very comprehensive powers are given to the Board of Trustees and they can enter into and perform any contract which they might consider necessary for carrying out the purposes of the agreement. There is nothing in law therefore which prevents the Board from abandoning any portion of the land intended to be acquired in pursuance of a contract entered into under the provisions of S. 24, Calcutta Improvement Act. A.I.R. (Vol. 26) 1939 Cal. 733=70 C.L.J. 81= I.L.R. (1939) 2 Cal. 349=187 Ind. Cas. 872.

——S. 31 (b)—Rules under—R. 42 (a)—Force of —If affected by Rules in Trust Accounts Manual.

Rules made under Calcutta Improvement Trust Accounts Manual (1933) would not be operative where they are in conflict with fundamental rules framed under S. 31 (b) of the Calcutta Improvement Trust Act. The former rules are only in the nature of directions. A.I.R. (Vol. 25) 1938 Cal. 43=174 Ind. Cas. 756.

——S. 35—Chairman's power to delegate—Extent of.

Although the Chairman is empowered under S. 35 to delegate certain of his powers, the functions vested in the chairman under S. 154 cannot be delegated. A.I.R. (Vol. 25) 1938 Cal. 692 =42 C.W.N. 894=39 Cr.L.J. 962=I.L.R. (1938) 2 Cal. 546=177 Ind. Cas. 885.

——Ss. 39 and 78—Street Scheme—Government sanction—If condition precedent.

The trust need not delineate the building sites on the street scheme before submitting it to Government for sanction. Where land is not shown to be required for a scheme under S. 39, an application for exemption under S. 78 is unnecessary. The trustees may reject an application as one not coming under S. 78 (1), though they have made enquiries under S. 78 (2). 47 Cal. 604=31 C.L.J. 334=57 Ind. Cas. 37.

——S. 42 (a)—Acquisition not justified—Power to notify.

If an acquisition of certain premises is not justified by the provisions of the Act, the trustees a statutory body cannot notify their intention to make the acquisition and under colour of proceedings taken under the Act enter into transaction either for their benefit or to their prejudice.

Where a portion of the entire plot is acquired for the street that is to be driven through it, the remainder is obviously affected by the execution of the scheme, having regard to the meaning of the word "affected" which appears in S. 42 (a) of the Act. A.I.R. (Vol. 19) 1932 Cal. 178= 59 Cal. 240=35 C.W.N. 889=137 Ind. Cas. 628.

——S. 42 (a)—Power of Board—"Land affected" —Power to acquire.

S. 42 (a) of the Bengal Act V of 1911 authorises the Board of Trustees, in carrying out a scheme under that Act, to acquire compulsorily, for the purposes of recoupment, land which is not required for the execution of the scheme but which according to the opinion of the trustees will thereby be increased in value. 47 Cal. 500=11 L.W. 566=38 M.L.J. 511=18 A.L.J. 521=22 Bom.L. R. 586=32 C.L.J. 65=24 C.W.N. 881=2 U.P. L.R. (P.C.) (98)=56 Ind. Cas. 32 (P.C.). (Reversing 44 Cal. 219=21 C.W.N. 8=24 C.L.J. 246=36 Ind. Cas. 749.)

——Ss. 42 (a), 78 and 81—Power of Board to acquire land for recoupmeht—"Affected".

(Per Full Bench, **Chatterjee, J. dissenting.**) The Calcutta Improvement Act authorises the Board of Trustees to acquire lands compulsorily for purposes of recoupment, **i.e.**, by selling of otherwise dealing with the lands, under S. 81 or by abandoning the land in consideration of the payment of a sum under S. 78. 44 Cal. 219 overruled. The word "affected" in S. 42 (a) means affected in any way and not merely adversely affected. The words "by the execution of the scheme" in S. 42 (a) simply mean through or owing to the execution of the scheme. S. 78 does not apply to land which was originally acquired for the execution of the scheme but was subsequently found to be unnecessary. (44 Cal. 219=21 C.W.N. 8=24 C.L.J. 246=36 Ind. Cas. 749, overruled.) 45 Cal. 343= 22 C.W.N. 1=27 C.L.J. 1=44 Ind. Cas. 770 (F.B.).

——S. 54 (1)—Applicability — Land affected by scheme but included for recoupment only.

The povisions of S. 54 (1) do not apply to land which is affected by the execution of scheme and which is included for the purpose of recoupment only. The Court ought to give the material words in S. 54 (1) their natural meaning; and if their natural meaning is applied to these words, they do not comprise lands which have been included by the Improvement Trust in the scheme, not because they are required for the execution of the scheme but because in their opinion they are 'affected by execution of the scheme' and are included for the purpose of recoupment only. The provisions of S. 62 (5) are not inconsistent with this construction. 50 Cal. 531=75 Ind. Cas. 346 =A.I.R. 1924 Cal. 85.

——Ss. 70 and 72—Restitution—Award modified on appeal—Inherent power to grant restitution. I. L.R. (1945) 1 Cal. 40=A.I.R. 1949 Cal. 124.

——S. 71—Appeal—Award—Decision of High Court on appeal—Appeal to Privy Council—Calcutta Improvement Trust (Appeals) Act.

No appeal lies to His Majesty in Council from a judgment and decree of the High Court, Calcutta on appeal from an award of the Calcutta Improvement Tribunal in respect of land compulsorily acquired under the Calcutta Improvement Trust Act. A.I.R. (Vol. 18) 1931 P.C. 149=33 Bom.L.R. 1106=1931 A.L.J. 475=35 C. W. N. 794=1931 M.W.N. 695=58 I.A. 259=54 C. L. J. 14=59 Cal. 55=61 M.L.J. 864=132 Ind. Cas. 748 (P. C.).

——S. 71—Practice and Procedure—Hearing of valuation reference—Document in possession of acquiring authority filed during argument—Admissibility—C. P. Code, O. 13, R. 2.

Provisions to be found in the Code of Civil Procedure relatng to the examination of witnesses and the production of documents in Court are applicable during the hearing of a reference under the Calcutta Improvement Act. But a practice has grown in the Calcutta Improvement Tribunal, whereby the parties are not required to file in Court documents under their control or to file a list of witnesses as may be required necessary by the parties. Where a valuation reference is actually taken up for hearing at the opening stage the claimants indicate the detailed grounds for contesting the Collector's award and also the nature of evidence on which reliance will be placed. The Province from this stage takes steps for getting the evidence before Court in support of the Collector's award and to controvert the points as are to be urged by the claimants. The claimant ad-

duces evidence as he is regarded as the plaintiff in the suit. The burden of proof is on the claimant to show that the award as made by the Collector is inadequate. The extent of this burden varies according to the nature of the enquiry made by the Collector under S. 11 of the Land Acquisition Act. Where the Collector gives no dtailed reasons, the burden which is to be discharged by the claimant is very light. The claimant has to begin his evidence first ond it is only after he has completed his evidence that the Government is to rebut it and support the award made by the Collector by positive evidence.

The trbunal is not justified in allowing a document which is in the possession of the acquiring authority to be filed late during the argument for practically no reason whotsoever. Where the order as recorded does not indicate any sufficient consideration, the provisions contained in O. 13, R. 2, C. P. Code, or attracted in such a case and must be applied. 85 C.L.J. 379.

——S. 71 (b) and Sch. Art. 9—Cmpulsory acquisition of land—Method of valuation.

In cases of compulsory acquisition of land for the Board of Trustees for the improvement of Calcutta, the "development method" is not permissible. The land has to be valued according to its disposition at the date of the declaration. It cannot be imagined to be in a different state than what it actually was that that point of time, nor can it be valued with reference to its possible future user by proposing a physical change. 56 C. 989, 11 C.W.N. 875 and 41 C. 967, referred to. 54 C.W.N. 297=A.I.R. 1950 Cal. 356.

——S. 72—President, if Tribunal by itself.

The President of the Improvement Tribunal constituted under S. 72, Calcutta Improvement Act, is a Tribunal by itself. A.I.R. (Vol. 2) 1939 Cal. 183=68 C.L.J. 28=180 Ind. Cas. 654.

——S. 77 (1) (b)—Property sold by widow acquired compulsorily—Claim to compensation by reversioners and purchasers—President's decision—Appeal—Court-fees—Court-fees Act, S. 7, (iv) (c)—Applicability.

Where a property which had been sold by a widow was compulsorily acquired and the reversioners and the purchaser claimed to take compensation of money and the President of Calcutta Improvement Tribunal decided under S. 77 (1) (b) of the Calcutta Improvement Act:

Held, that the appeal from his order was not an appeal against an order relating to compensation and S. 8, Court-fees Act, was not applicable. The claimants were really asking for a declaration and some consequential relief, namely, that the money should be invested instead of being handed over to the purchaser and the case fell under Ss. 8, 7 (iv) (c). A.I.R. (Vol. 22) 1935 Cal. 243=60 C.L.J. 216=39 C.W.N. 110=62 Cal. 331=155 Ind. Cas. 817.

——S. 77 (2), Small Cause Court, if a transferee Court within S. 38, C. P. Code—Procedure for execution.

Under S. 77, Cl. (2), Calcutta Improvement Act, the award of the Tribunal is to be executed by the Small Cause Court as if it were a decree made by that Court. This clearly shows that the Small Cause Court is not to be deemed to be a transferee Court within the meaning of S. 38, C. P. Code, and the procedure laid down in O. XXI, R. 6 of the Code would have no application to such cases hence no application for transmission of a certificate of a non-satisfaction can be made and the award had to be enforced as if it were a decree made by the Calcutta Small Causes Court itself. A. I. R. (Vol. 29) 1942 Cal. 569=46 C.W.N. 927=I.L.R. (1942) 2 Cal. 528=203 Ind. Cas. 429.

——S. 78 (1) and (2)—Powers of trustees to reject application.

Though the Trustees make enquiries under sub-sec. (2) of S. 78 of the Act they are not prevented from rejecting the application on the ground that it does not come within sub-S. (1) of that section. 31 C.L.J. 334=57 Ind. Cas. 37.

——S. 79—Applicability — Notification of acquisition—Application for exemption of portion—Agreement to execute rent charge of other premises and giving right to trustees to take possession—Mode of enforcement—Procedure.

The defendant's premises were notified for acquisition. The defendant applied for exemption of a portion but his application was rejected. The trustees then entered into an agreement with the defendant that the said portion may be exempted on condition that the defendant executed a yearly ent charge for a certain amount charged on and payable out of certain premises agreeing that on defalut by the defendant, the trustee can recover the same by getting into possession and selling those premises:

Held, that such agreement did not come under S. 78 and, therefore, the procedure under S. 79 was not the procedure for its enforcement. A.I.R. (Vol. 19) 1932 Cal. 178=59 Cal. 240=35 C.W.N. 889=137 Ind. Cas. 628.

——S. 81—Lands vested in Board for providing open space for ventilation and recreation—Power of Board to sell, lease or let for hire.

The right conferred on the Board in general terms by S. 81 of the Calcutta Improvement Act to sell, lease or let for hire the lands vested in it, has been taken away by necessary implication in respect of lands acquired by the Government for the Board for the express purpose of providing an open space for ventilation and recreation for the exercise of the power of sale, lease, etc., would defeat the purpose for which the said lands had been acquired. I.L.R. (1946) 1 Cal. 583=221 Ind. Cas. 117=81 C.L.J. 185=50 C.W.N. 825 =A.I.R. 1946 Cal. 416.

——Ss. 154 and 160 (e)—Powers of Chairman—Delegation—Whether barred by S. 35—Delegation, if can be condoned.

Under S. 154, Calcutta Improvement Act, the right to set the law in motion is vested in the Chairman subject to the control of the Board. Although the Chairman is empowered under S. 35 of the Act to delegate certain of his powers, the functions vested in the Chairman under S. 154 can-

not be delegated. If he delegates his authority under S. 154, to institute legal proceedings, such a defect cannot be condoned under S. 160 (e) as direct contravention of the provisions of the Act itself cannot be treated as a mere omission, defect or irregularity. A.I.R. (Vol. 25) 1938 Cal. 692 =42 C. W. N. 894=39 Cr.L.J. 962=I. L. R. (1938) 2 Cal. 546=177 Ind. Cas. 885.

——S. 171—Construction—"Re-erect", meaning of.

Had the intention of the legislature been to give any special meaning to the word "re-erect", it would have been mentioned amongst the definitions in S. 2, Calcutta Improvement Act. In the absence of any definition, the word should be interpreted in its ordinary meaning. A.I.R. (Vol. 23) 1936 Cal. 373=40 C.W.N. 799=1936 Cr. Cas. 646=63 C. L. J. 582=38 Cr.L.J. 219=166 Ind. Cas. 457.

——S. 171—Limit of fine—Several persons jointly erecting building—Total fine exceeding Rs. 500—Legality.

Under S. 171, any person who erects a building without sanction is liable to a fine of Rs. 500. So that where more than one person join in erecting a building, they are each liable to a fine extending to Rs. 500 and there is, therefore, nothing illegal if the fine imposed on all amounts in all to an amount exceeding Rs. 500. A.I.R. (Vol. 23) 1936 Cal. 373=40 C.W.N. 799=1936 Cr. Cas. 646 =63 C.L.J. 582=38 Cr.L.J. 219=166 Ind. Cas. 457.

CALCUTTA IMPROVEMENT TRUST (APPEALS) ACT (XVIII OF 1911).

——Appeal to Privy Council.

No appeal lies to His Majesty in Council from a judgment and decree of the Calcutta High Court, on appeal from an award of the Calcutta Improvement Tribunal in respect of land compulsorily acquired under the Calcutta Improvement Act. A. I.R. (Vol. 18) 1931 P.C. 149=1931 A.L.J. 475 =33 Bom.L.R. 1006=35 C.W.N. 794=1931 M. W.N. 695=59 Cal. 55=54 C.L.J. 14=58 I.A. 259=61 M.L.J. 864=132 Ind. Cas. 748 (P.C.).

——Further appeal from the decision of the High Court—Competency.

The question whether under the provisions of the Calcutta Improvement (Appeals) Act a further appeal against the decision of the High Court would lie or not left open. 1949 F.C.R. 36=1949 F.L.J. 125=A. I. R. 1949 F.C. 106=(1949) 2 M.L.J. 20 (F.C.).

——S. 3—Appeal against decision of President of Tribunal—Power of High Court.

Per Das, J.—The grounds which are open to the appellant on an appeal filed to the High Court against the decision of the President of the Calcutta Improvement Tribunal under S. 3 of the Calcutta Improvement (Appeals) Act, are akin to those to be found in S. 100, C.P. Code. Where the judgment of the Tribunal suffers from the defect that it does not consider an important piece of evidence on the question of valution and it is also open to attack on the ground that it is difficult to discover from the judgment of the President as to the basis on which he arrived at his valuation, the judgment is not conclusive on the question of valuation and it is open to the High Court in appeal either to remit the case to the Tribunal for a fresh adjudication, or to decide the case for itself on the evidence which is on the record.

Per **Chatterjee, J.**—Where the judgment of the President of the Tribunal shows that the Tribunal failed to consider one very important piece of evidence, **viz.**, the valuation of a contiguous property, the decision of the Tribunal is contrary to law and can be interfered with by the High Court. A finding based on no evidence or in disregard of evidence or on inamissible evidence, is an error of law. I.L.R. (1949) 1 Cal. 444.

——S. 3—Appeal to High Court—If lies—Appeal lies against decision determining the principal of compensation.

Where the matter in dispute related to the determination of the exact principle upon which prospects and possibilities of future development should be taken into account in determining the compensation to be paid for property compulsorily acquired, **held**, appeal lay to High Court. 28 C.W. N. 461=83 Ind. Cas. 442=A.I.R. 1924 Cal. 574.

——S. 3—Scope of appeal.

If the Tribunal determines the basic rate per cottah on the private sales proved in the case and not on the accepted awards, it is a matter of appreciation of evidence and of the weight to be attached to it and not a matter of principle of law or procedure which can be urged in an appeal. 228 Ind. Cas. 523=82 C.L.J. 18=A.I.R. 1947 Cal. 25.

——S. 5—Scope—Pecuniary jurisdiction of Chief Judge of Small Cause Court.

S. 5 does not in any way limit the pecuniary jurisdiction of the Chief Judge of the Small Cause Court of Calcutta and his jurisdiction to execute any order of the Court is not limited to an order which may come within his pecuniary jurisdiction. 31 C.W.N. 142=94 Ind. Cas. 170=A.I.R. 1926 Cal. 853.

——Ss. 6 and 3 (1) (b) (i)—Appeal against decision of Tribunal—Limatition—Exclusion of time during which application for President's certificate was pending—Limitation Act, Ss. 5 and 12.

Appeals against the decision of the Calcutta Improvement Tribunal are governed by Art. 156 of the Limitation Act. The time during which the application for the certificate asked for under S. 3 (1) (b) (i) of the Calcutta Improvement (Appeals) Act was pending before the President cannot automatically be excluded in computing limitation under the provisions of S. 12 or any other section of the Limitation Act and there is no provision in the Calcutta Improvement (Appeals) Act for excluding this period of time in making the computation. This period of time can, however, be excluded under the provisions of S. 5 of the Limitation Act, and the appellant is entitled to the exclusion of the period of time during which his application for certificate was kept pending before the Pesident through no fault of his. 54 C.W.N. 297=A.I.R. 1950 Cal. 356.

CALCUTTA IMPROVEMENT TRIBUNAL.

——President's powers—President can make an order as to costs and to execute the same.

The Pesident of the Calcutta Improvement Tribunal is a Civil Court having power to make an order for costs and an inherent power to execute such order for costs made by him. 26 C.W.N. 30=65 Ind. Cas. 177=A.I.R. 1921 Cal. 413.

CALCUTTA MUNICIPAL ACT (III OF 1899).

——Acquisitions for others—Permissibility.

It was never the policy of the Calcutta Municipal Act that the special powers given to the Corporation for acquiring land for certain purposes named in the Act were to be used to enable another body to acquire land through the medium of the Corporation, however estimable the purpose. 48 Cal. 916=A.I.R. 1921 Cal. 159.

CALCUTTA MUNICIPAL ACT (III B. C. OF 1899).

——Scope—Imprisonment in default of fine—Power to impose.

There is no power under the Calcutta Municipal Act to impose imprisonment in default of payment of fine, at any rate for offences to which a daily penalty is assigned in addition to the substantive fine. 15 C.W.N. 906=12 Cr.L.J. 375=11 Ind. Cas. 143.

CALCUTTA MUNICIPAL ACT (IV B. C. OF 1899).

——S. 3, Cl. (29)—Nuisance — What constitutes —Making cleaning of streets more expensive.

Where the power of **bustee** in which there were certain private streets put up certain posts on his property which had the effect of preventing the wheel traffic passing through the **bustee** in certain directions with the result that thereby the cleaning of the **bustee** became more expensive to the Municipality and more inconvenient to its officers:

Held—that the owner did not thereby cause a nuisance under the Calcutta Municipal Act, so long as he did not interfere with the effective cleaning of the **bustee**. (1910) 15 C.W.N. 100=11 Cr.L.J. 556=8 Ind. Cas. 17.

——S. 3 (29) and S. 632—Nuisance—Building is high wall—Abetment.

Building a wall, however, high by a man for preventing his neighbour from acquiring easement is not a nuisance. It may amount to a nuisance, if by such action filth is accumulated and no space is left for proper drainage. The Court should see if the nuisance can be abated by cleaning the space. The wall should not be pulled down to a lesser height. 15 C.W.N. 316=11 Cr.L.J. 665=8 Ind. Cas. 530.

——Ss. 3 (30), 408, 575 and 622 (3)—"Occupier".

"Occupier" in S. 622 of the Act does not mean only the person in actual occupation of the land, but would include also a lessee who had sub leased the lands to others who are in actual occupation. 41 Cal. 164=14 Cr.L.J. 490=20 Ind. Cas. 746.

——Ss. 3 (32) and 408—Owner—Shebait of endowned property — Liability for non compliance with directions to improve bustee.

In the case of *shebait* of a deity managing the *debutter* properties in turn, one of them not in turn is no owner under S. 3 (32) of the Calcutta Municipal Act and is consequently not liable for non compliance with a notice under S. 408 for carrying out improvements in the *bustee*. 41 Cal. 104=17 C.W.N. 1084=14 Cr.L.J. 569=21 Ind. Cas. 169.

——S. 3 (35) and (37) and Sch. XVII, R. 2—Applicability—Private Street—Pathway made by owner.

If there are four buildings owned by four different persons bearing four different assessment members abetting on a passage which is not a public street, it is a pathway made by the owner of a building on his own land to secure access to such building, and R. 2, Schedule XVII of the Calcutta Municipal Act does not apply. 13 C.L.J. 219=11 Cr.L.J. 728=8 Ind. Cas. 891.

——S. 3, Cls. (39) (a) and 351—"Re-erection"—"Building".

Where before the building line was laid down, a shed consisting of four posts and a tin roof stood on the same spot as they did subsequently and after the building line was laid down, the owner took the roof, and eventually put up a roof either of new tin or repaired:

Held, that this was not a re erection within S. 3 (39) (a) that the roof with four posts was not a building and that the replacing of the roof upon the same posts did not infringe S. 351 as no portion of any building or wall abutting on any street was constructed within the building line. 39 Cal. 84=16 C.W.N. 23=12 Cr.L.J. 461=11 Ind. Cas. 997.

——S. 3 (46)—"Street".

Street in S. 3 (46) of the Act includes a passage less than 20 feet wide. 17 C.W.N. 1250=14 Cr.L.J. 611=20 Ind. Cas. 991.

——S. 14—Acquisition of land for Dharmashala—Municipality's discretion—Considerations in exercising.

The Act, by section 14 and section 556 has expressly placed the discretion not with the Board or with a Court of Law, but with the Municipality itself. Where the Municipality wanted to acquire land for *Dharmashala* near Kali's temple as well as for widening the road:

Held, that what Municipality had to consider was not the religious beliefs and purposes of those assembling in large numbers but what was the situation of the City in respect to this assemblage and to the citizens at large in view of the general questions of public convenience, proper sanitation and the prevention of danger and disease. Any enlightened Municipality would carefully attend to these questions and endeavour to avoid the evils referred to. This is not to be ruled out by a consideration as to the particular form of belief or practice of those who would primarily benefit by the improvements made. 69 Ind. Cas. 114=16 Mad. L.W. 673=31 Mad.L.T. 155=49 I. A. 255=49 Cal. 838=27 C.W.N. 125=21 A.L.J. 27=37 C.L.J. 67=A.I.R. 1922 P.C. 333=43 M.L.J. 634.

——Ss. 14, 5, 9, 370, 371, 375 and Sch. 17—Plans —Powers of Chairman—Appeal to corporation.

The Calcutta Municipal Act confers on its chairman the right to approve or reject plans of proposed buildings. Appeal from his decisions lies to the General Committee whose decision is final and no appeal lies to the Corporation to compel them to approve of the plans. 36 Cal. 671=13 C.W.N. 740 =6 M.L.T. 251=3 Ind. Cas. 341.

——Ss. 15, 63 and 65—Chairman's powers—Officers drawing less than Rs. 200—Appointment for more than a year—If ultra vires.

S. 15 of the Calcutta Municipal Act does not apply to the appointment of Municipal officers and servants whose appointments are expressly provided for under Chapter VI of the Act. The power of appointing officers under S. 65 of the Act is vested in the Chairman, but such power is only co extensive with the sanction of the General Committee and such sanction must be given annually, and any appointment which exceeds this sanction is *ultra vires*. (1906) 11 C.W.N. 801=34 C. 863.

——S. 37—Occupier—Meaning of—Association of individuals—Rules 8, 9, 11 of Sch. IV.

The word "occupier" in S. 37 (2) (1) (c) of the Calcutta Municipal Act means an occupier in the ordinary sense and not as defined in S. 3 sub section 30 of the Act. The only person who falls within that sub section is a person who occupies a building separately numbered and valued for assessment. Associations of individuals unless associated for a common object do not become such by the mere fact they occupy portions of a house sub-divided into flats. Rule 2 (b) of the Act applies only to persons actually liable for the rates in respect of the two quarters specified. A notice under rule 8 need not be signed by the person giving it. 45 Cal. 950=49 Ind. Cas. 454.

——S. 37—Persons living in flats—Right to be enrolled electors.

Persons living in flats, cannot be enrolled as voters in the Municipal Election roll. 46 Cal. 132=50 Ind. Cas. 307.

——S. 38, Sch. IV, Rr. 3 (4), 9 and 10 (9)—Representation of body corporate — Non member of association—If can be entered on list of voters.

Rules 9 and 10 Cl. (9) of Schedule IV of the Calcutta Municipal Act taken together merely authorise a person, who is a member of an association, etc., to be entered on the list of voters. Therefore a person foreign to the body corporate, *e.g.* joint Hindu family or firm as the case may be, cannot be authorised by such body corporate to represent them. 39 Cal. 754=15 C.L.J. 488=15 Ind. Cas. 441.

——S. 39—Application for addition to an already sanctioned plan—Sanction.

An application for addition to an already sanctioned plan need not be sanctioned by General Committee and by District Surveyor. 37 Cal. 585=12 C.L.J. 24=11 Cr.L.J. 255=6 Ind. Cas. 172.

——S. 56—Scope—Election petition—If suit—Corrupt practices—Effect.

The matter of corrupt practices in elections has not been provided for in the Act except by the expression 'for any other cause' in S. 56 of the Act. *Mens rea* is essential to constitute impersonation. If no fraud is shown against the candidate or his agents the election will not be set aside. A petition to set aside an election cannot be treated as a suit. Influencing individual voters avoids an election only if it is done by the candidate or his agents. To avoid an election on the ground of intimidation or undue influence it must be shown that the candidate or his agents instigated it, or that it prevailed o such an extent as to prevent the election from being free. 22 C.W.N. 678=46 Ind. Cas. 729.

——Ss. 88 and 556—Tenders—Agreement for lease —Calling for tenders not obligatory—"Contract"—Meaning of.

Under S. 556 of the Calcutta Municipal Act, 1899 the Corporation of Calcutta has the power to lease any property vested in them on any terms they think fit without calling for any tenders in that behalf. Although a covenant in or in respect of a lease is a contract, yet, if the same relate to the demised premises and be not independent of them, then in the case, the contract in the covenant does not come within the meaning of S. 88 of the Calcutta Municipal Act so as to make it obligatory upon the Corporation to call for tenders. 36 Cal. 271=(1908) 13 C.W.N. 129=1 Ind. Cas. 968.

——S. 102 (1) (C)—Scope—Absence of valid sanction.

S. 102 (1) (*c*) covers a defect or irregularity caused by a person erecting a building without a valid sanction though the common secretary of the corporation and General Committee cannot apply against him. 37 Cal. 585=12 C.L.J. 24=11 Cr. L. J. 255=6 Ind. Cas. 172.

——S. 127—Functions of executive officer—Nature of—Adminiserative or judicial.

In performing the functions prescribed under Ss. 127 to 140, the executive officer is acting in an administrative and not in a judicial capacity. 55 Cal. 228=46 C.L.J. 260=31 C.W.N. 1040=103 Ind. Cas. 533=A.I.R. 1927 Cal. 802.

——S. 141—Burden of proof—Appeal to Small Cause Court—Onus.

In an appeal under S. 141 from the decision of the executive officer to the Small Cause Court the assessee has to satisfy the Court that the valuation at which the executive officer has arrived was either excessive or wrong. 55 Cal. 228=46 C.L.J. 260 =31 C.W.N. 1040=103 Ind. Cas. 533=A.I.R. 1927 Cal. 802.

——S. 142—Powers of High Court—Appeal under S. 142—Finding of fact — Interference — C. P. Code, S. 100.

An appeal to the High Court under S. 142 (3), Calcutta Municipal Act is not a second appeal within the ambit of S. 100. C.P. Code and in such an appeal it is open to the High Court to reconsider the findings of fact arrived at by the Court of Small Causes.

Page, J.—The appeal to the High Court under S. 142 is not preferred under the Code of Civil Procedure but pursuant to the special jurisdiction conferred upon the Court of Small Causes and the High Court under the Calcutta Municipal Act. 55 Cal.

228=31 C.W.N. 1040=46 C.L.J. 260=103 Ind. Cas. 533=A.I.R. 1927 Cal. 802.

——S. 151, Cl. (b)—Building, meaning of—Compound or boundary wall.

A compound or a boundary wall is not a building under S. 151 Cl. (*b*) of the Calcutta Municipal Act and is not liable as such to assessment for municipal rates. 8 C.W.N. 487. Rel. 15 C.W.N. 84=12 C.L.J. 476=7 Ind. Cas. 890.

——Ss. 153, 159, 175 and 225—Distress—No presentation of bill or notice of demand—Irregularity—Special damages.

It is not in the power of the Corporation or of its officers to override the clear provisions of the Act. The non-presentation of bill or notice of demand prior to distress is a mere irregularity and the distress is not on that account illegal; and all that the aggrieved party would be entitled to by reason of that irregularity would be such special damage as he can show he has actually sustained. (1904) 31 C. 452.

——Ss. 158-160—Notice for re-valuation—Fresh Notice after hearing the objections for altering valuation—Necessity.

Where a notice is issued under Section 158 for re-valuation, no fresh notice is necessary to be issued when after hearing the objections under Section 160, changes in the valuation are made by the chairman. 37 Ind. Cas. 932 (Cal.).

——S. 162—Jurisdiction of Small Cause Court—Assessment.

In appeals under S. 162 of the Calcutta Municipal Act, a Small Cause Court Judge can deal with the question of valuation and that question alone. 26 C. 74 rel. As to the manner in which land is to be assessed after the valuation has been settled, whether it is or is not to be assessed as vacant land, is a question entirely beyond the jurisdiction of the Small Cause Court Judge. 15 C.L.J. 500=15 Ind. Cas. 452.

——S. 198 — Applicability — Person in Calcutta tendering for goods to be supplied to Howrah Municipality—Sale of goods to Municipality in pursuance of tender—Such person, if carrying on business in Howrah.

A person who carried on business in Calcutta tendered for certain goods to be supplied to the Municipality of Howrah. His tender was accepted and, in pursuance of the contract between the parties, the person sold goods from time to time to the Howrah Municipality. The Howrah Municipality asked him to take out a license and prosecuted him for his failure to do so.

Held, that the person could not be said by any stretch of language to be one who carried on business in Howrah and, therefore the prosecution could not stand. 48 C.L.J. 54=10 A.I.Cr.R. 565=29 Cr. L. J. 786=111 Ind. Cas. 114=A.I.R. 1928 Cal. 531.

——Ss. 198, 199, 466, 466 (1) and 574—Sch. II and R. 7—Trade license and license for storing lime—Liability to take out both—Licenses under Ss. 193 and 446—Distinction.

The purposes for which the licenses under Ss. 198 and 466 of the Calcutta Municipal Act are necessary are widely different, and there is no connection between the two licenses. The taking out of a license under S. 198 of the Act is no excuse for not taking out another license under S. 466. The schedule rules that apply to the one have no application to the other. Where a person carried on the business of a lime trader and used a certain premises for storing lime:

Held—He was bound to take out a trade license under S. 198 of the Calcutta Municipal Act as well as a license under S. 466 for storing lime, and his omission to take out a license under the latter section is punishable under Ss. 466 (1) and 574 of the Act. (1907) 11 C.W.N. 885=34 C. 913=6 C. L. J. 183.

——Ss. 223 and 228—Relative scope—Former if controls latter.

S. 223 deals with liability *in personam* for unsatisfied arrears. S. 228 deals with liability *in rem* for rents due and makes the consolidated rent a first charge on the property (subject to arrears of land revenue). S. 228 cannot be controlled by S. 223. 42 Cal. 625=19 C.W.N. 37=21 C.L.J. 177=27 Ind. Cas. 261.

——S. 228—Interpretation—"Building or land"—Meaning—Rate assessed on building and land.

The expression building or land in S. 228 includes the case of a rate assessed on a building *and* land and such an arrear of rate becomes a charge on the land and house. 87 Ind. Cas. 229=A.I.R. 1925 Cal. 1067.

——S. 286—House drain—Extent of corporation's ownership.

Though the drain is a house drain made by the owner of the adjoining premises for the outlet of water therefrom, it is covered by S. 286 of the Calcutta Municipal Act. The effect of the vesting of a road or a drain in a Municipality, is not to confer the full proprietary right in the soil itself covered by the road or the drain on the Commissioners. The property of the Local Authority concerned does not extend to more soil and air than is necessary for the maintenance and user of the highways; subject to this qualification the original owner's rights in property remain and therefore if the way ceases to be so, the owner becomes entitled to full rights of ownership in the property. 44 Cal. 689=24 C.L.J. 358=21 C.W.N. 234=37 Ind. Cas. 96.

——S. 299—"Lawfully set apart"—Meaning of.

A place lawfully set apart must be a place over which the Corporation have acquired by some procedure under the statute a right to make use of private property as a public drain. 38 Cal. 268=13 C.L.J. 327=15 C.W.N. 412=11 Cr.L.J. 701=8 Ind. Cas. 706.

——Ss. 299 and 575—Effect of delay—Conviction, if bad.

Under S. 575 proceedings were instituted on the petitioner on 15 8-16 which were stayed at his request for negotiations between himself and the Municipality. On an application to revive the proceedings made on 28-2-17, the petitioner was ordered to pay daily fine of Rs. 30 from 16 5-16. *Held*, that delay vitiated the proceedings and so the conviction was invalid. 24 C.W.N. 467=31 C.L.J. 342=56 Ind. Cas. 862.

——Ss. 299 and 593—Service of notice on one co-owner, if good.

Service of a notice under S. 299 of the Calcutta Municipal Act upon one of the co owners of the property in the manner provided in S. 593 is effectual against the other co-owners. 44 Ind. Cas. 413 (Cal.).

——S. 341—Applicability—Fixture attached to a building—Removal—Burden of proof.

A Magistrate directed the removal of a masonry platform extending in front of the petitioner's building and over a drain in the public street. There was no evidence as to when the platform was erected. *Held*, the words "when fixture has been attached" mean that the building must be first in existence and the attachment of the fixture must be subsequent to the erection of the building. In the absence of proof that the platform in question was constructed after the erection of the building, the Magistrate's order must be set aside. To make the section applicable the prosecution must prove facts showing that the section applies. 23 C.W.N. 752 =29 C.L.J. 605=58 Ind. Cas. 352.

——S. 341—Fixture—Meaning of—Veranda.

A *veranda* standing for 60 years is not a fixture within S. 341. 13 C.L.J. 611=15 C.W.N. 730 =10 Ind. Cas. 310.

——S. 341—Platform—If fixture.

A *rowak* or platform built by an owner as an integral part of his building over a portion of the street is not a fixture within S. 341 of the Act. 28 C.L.J. 494=49 Ind. Cas. 93.

——S. 341—Sheets of tin—If fixture.

Sheets of tin attached by their side to the shop by hinges and supported at the other end by props thus forming a verandah over the street and when the props are taken away the sheets hang down straight, cannot be considered as fixtures and therefore notice under S. 341 is not necessary. 48 Cal. 602=33 C. L. J. 377=22 Cr.L.J. 619=63 Ind. Cas. 155= A.I.R. 1921 Cal. 385.

——Ss. 341, 450 (3) and 617—Removal of superstructure—Payment of compensation—If condition precedent—Suit for declaration—Specific Relief Act, S. 42.

Where the Corporation of the City of Calcutta gives notice to the owner of a building encroaching on a public street to remove it, the payment of compensation, provided in case of buildings erected before 1863, is not a condition precedent to its removal or demolition under S. 450 sub section 3. It may be paid afterwards. The compensation to be paid to the owner, is assessable by the Court of Small Causes under S. 617 and no suit for the purpose will lie in the ordinary Civil Courts. If, however, the Corporation refuses to admit the owner's right to compensation on the ground that the building was erected after 1863, and proceeds to demolish it, the Civil Court has a discretionary power, in a suit by the owner, to make a declaration that the building was erected before 1863 and that the owner was entitled to compensation. 20 M.L.T. 383= 18 Bom.L.R. 878=24 C L.J. 498=(1916) 2 M. W. N. 544=21 C.W.N. 194=5 L.W. 199=22 M. L. J. 631=43 I. A. 243=36 Ind. Cas. 912 (P.C.).

——Ss. 341, 450 and 631—Limitation—Demolition of fixture at owner's expense—Legality.

If a Municipal Magistrate applies the special remedy laid down in Section 450, the limitation in Section 631 does not apply. The order of the Magistrate that a fixture found to be an encroachment should be demolished at the expense of the petitioner was not illegal. 37 Cal. 384=14 C.W.N. 591=11 Cr.L.J. 183=5 Ind. Cas. 644.

——Ss. 343 and 442—Scope—Latter if controls former—Dilapidated hut of tenant—Notice for removal on landlord—If justified.

The definition of owner as given in S. 4, Sub-Sec. (32) includes both the landlord and tenant. A notice under S. 343 for the removal of a hut belonging to the tenant can be served upon the person who is the owner of the land and such person is liable to comply with the terms thereof. S. 442 of the Act which contemplates a different set of circumstances, *i.e.*, cases of urgency does not in any manner abridge the power conferred by S. 343. 19 C.W.N. 391=21 C.L.J. 497=28 Ind. Cas. 653.

——Ss. 370 to 375—Plans for building—Disapproval by chairman and General Committee—Suit to compel approval—If lies — Mandamus — Specific Relief Act, S. 45.

The Chairman of the Calcutta Corporation disapproved of certain building plans submitted and the General Committee dismissed an appeal therefrom as being out of time; *held*, there is no cause of action for a suit for sanction of the approval of the plan. Under Ss. 370 to 375 the Chairman and the General Committee are special tribunals to decide about the plans for buildings and so long as they act *bona fide* within their rights, their decision cannot be reviewed by a Court of Law and if they act *mala fide*, the only remedy is by an application under S. 45 of the specific Relief Act. 40 Cal. 836=17 C.W.N. 929 =22 Ind. Cas. 388.

——Ss. 407, 408 and 574—"Owner"—Meaning of —Owner of hut.

The word "owner" in S. 407 does not include "owner of huts." Consequently, the General Committee are not bound to hear the objections of "owners of huts", under S. 407 before the standard plan is approved. 11 Cr.L.J. 558=3 Ind. Cas. 53.

——S. 408—Estate vested in Receiver—Notice to owner to improve—Procedure—Duty of owner.

A receiver of an estate is neither an owner nor agent of trustee in respect of the same. Where notice under section 408 of the Act is served on a person whose estate has already been vested in a Receiver, it is the duty of the former to transmit the same to the Receiver requesting him to take the necessary directions from the Court; on the receiver's failing to comply with the same the owner may apply to the Court making the Receiver a party to his application. 38 Cal. 714=12 Cr.L.J. 361=15 C W.N. 1002=11 Ind. Cas. 129.

——S. 408—Non-compliance with notice—Effect.

Non compliance with a requisition under S. 408 imposes a liability on the owner if the requisite improvements are carried out by the General Committee under S. 409, the default on the part of the owner vanishes; but till the work has been completed, the

default remains entire or partial and the liability of the owner to be prosecuted still continues in operation. 77 Ind. Cas. 529=50 Cal. 813=27 C.W.N. 787=38 C.L.J. 360=A.I.R. 1924 Cal. 334.

——Ss. 408, 409 and 574—Scope and effect—Duty of Municipality.

The Municipality under S. 408 issues notices in three different kinds of cases. If huts belonging to the occupiers have to be removed, the Municipality issue a notice which if disobeyed makes them liable to prosecution under S. 574. If improvements are to be done exclusively by the owners of lands, the same rule applies. If the standard plan includes work to be done partly by the owners of the huts and partly by the owner of the land, a notice is issued under S. 408 on either or both, and if it is disobeyed the party in default is still liable to be prosecuted under S. 574. If, on the other hand the Municipality have cancelled the notice on the owners of the *Busti* land but still require him to carry out any portion of the work, they must serve fresh notice on the owner of the *Busti* before they get any jurisdiction under S. 409. 11 Cr.L.J. 558=8 Ind. Cas. 53.

——Ss. 408, 419, 574 and 598—Scope and effect of —Notice—Waiver—Negotiations—Effect of.

A petitioner was served with a notice under S. 408 on 3—1—16, to construct certain structures in 3 months. On 10th March the petitioner gave a notice under S. 419 to the Corporation intimating that he proposed to remove the land from the category of *bustee* and on the 20th March he took certain objections under S. 598, at the hearing of which the period was extended to 6 months. The petitioner having done nothing the Corporation applied for summons but the Magistrate refused to take action upon it as the period of the notice was stated by mistake to be 3 months. A second application was then made on 31st July and the petitioner was prosecuted and convicted. *Held* that the Magistrate's action on the previous application did not bar the prosecution: that the extended period of six months ran from 3 1-1916, not from 20th March when the objections were taken and that the negotiations and arrangements about the requirements of notice between the petitioner and the Corporation that were going on after the notice did not render the requirements of notice unenforceable. 18 Cr.L.J. 400=38 Ind. Cas. 960.

——Ss. 408, 419 and 575—Applicability — Bustee ceasing to be so.

After huts have been removed from a bustee land, the land ceases to be a bustee land and the provisions of S. 408 of the Calcutta Municipal Act can then no longer have any operation on the owner. (1907) 12 C.W.N. 72.

——Ss. 408, 419, 575 and 681—Limitation for starting prosecution under Ss. 408 and 574—S. 419, effect of, in enlarging time after commission of offence.

A conviction and sentence is bad in law and must be set aside where the prosecution has been started more than 3 months after the expiry of the notice under 408 of the Act; where the notice under S. 419 of the Act, has been served after the offence under Ss. 408 and 474 had been committed it cannot have the effect of enlarging the time by six months. A notice under S. 419 of the Act, in order to be effectual must be served before the offence is committed. (1907) 11 C.W.N. 1097=34 C. 909.

——Ss. 408, 574—Notice—Direction to carry out improvements pending litigation—Legality.

During the pending of a litigation regarding property, during which it was not open to the owners either individually or collectively to alter the property by carrying out the improvements they are called upon to make any notice issued to them for the purpose is not a lawful notice and no offence can be said to be committed by the disobedience of the notice. (1905) 33 C. 699.

——Ss. 408, 574 and 646—Discretion of the General Committee under S. 645—High Court's power to interfere.

In cases where there is a gradation of owners or persons who may be regarded as owners of any premises or where there is a doubt as to the owner who is bound to carry out an improvement the General Committee are vested under S. 645 of the Calcutta Municipal Act with the discretion of determining which of such owners shall be required to carry out an improvement and the High Court, in the exercise of its Revisional Criminal Jurisdiction, has no power to set aside or question their acts done in the exercise of that direction when those acts have otherwise been in accordance with the provisions of law. (1906) 11 C.W.N. 671=34 C. 30.

——Ss. 416 (1), 419, 361—Private street—Public way—Dedication—Consent of power.

A roadway made originally as part of a bustee and in accordance with the plan approved by the Corporation remains a private street until the General Committee of the Corporation and the owner otherwise agree or until the owner initiates a proceeding under S. 419 of the Act. To create a public right of way there must be a dedication by the owner. The effect of S. 416 (1) is that the owner cannot dedicate without the consent of the General Committee of the Corporation. 17 C.W.N. 1250=14 Cr.L.J. 511=20 Ind. Cas. 991.

——Ss. 444 and 574—Prosecution of several persons for disobedience of order—Joint trial—Legality.

Where a certain plot was declared as unfit for human habitation and an order prohibiting persons from using it was issued, a joint trial and joint conviction for disobedience of the owner and occupier was held illegal, as in respect of the two the act of disobedience was a separate offence. 37 Cal. 895=14 C.W.N. 911=11 Cr.L.J. 412=6 Ind. Cas. 894.

——S. 449—Applicability—Building without sanction before the new Calcutta Municipal Act, 1923 —Sanction by General Committee to proceed under S. 449 of the old Act re affirmed by the new Corporation—Demolition order—Validity—Bengal General Clauses Act (1899), S. 8—Effect of.

A prosecution had been sanctioned by the General Committee under S. 449 of the old Act (III B. C. of 1899), but the case was actually started under

the new Act (III B. C. of 1923) by the new Corporation and notice upon the party was issued and an order of demolition was passed.

Held, that whether the proceedings were under S. 363 or 364 of Act III, B. C. of 1923 they were irregular and the order of the Municipal Magistrate was not justified as the party had not been heard by the Corporation before sanction for prosecution was given.

Held, further that the proceedings under S. 449 of the Calcutta Municipal Act (III B.C. of 1899) could only be started by the General Committee and, therefore, in respect of unauthorized structures which existed before 1st April, 1924 when the Calcutta Municipal Act of 1923 came into force there was, after the passing of the latter Act, nobody competent to take proceedings under S. 449 of the Act of 1899. 52 Cal. 962=90 Ind. Cas. 317=26 Cr.L.J. 1533=29 C.W.N. 898=A.I.R. 1925 Cal. 1251.

——S. 449—Offence — Conviction — Subsequent acceptance of rates—Effect.

Even if the Municipality accepts rates in respect of the very building, from a person after his conviction for disobedience of order under S. 449, the acceptance does not amount to acquiescence in disobedience of the petitioner to the order, and the conviction is good. 6 Ind. Cas. 800 (Cal.).

——S. 449—Scope—Procedure under new Act, S. 363—Applicability.

Procedure under S. 363 of the Act of 1923 cannot be applied to provisions of S. 449 of the old Act. It is quite impossible to carry out the provisions of S. 449 of the old Act by means of the procedure set forth in S. 363 of the new Act. 53 Cal. 974=44 C.L.J. 37=27 Cr.L.J. 1146=97 Ind. Cas. 666=A.I.R. 1926 Cal. 1138.

——Ss. 449 (1), 451 and 574—Rule No. 2 of Part II, Sch. 17—Interpretation—Height, limit of, of building facing a street and an open platform—Angle of 45 degrees whence to be drawn.

On one side of a street was a bathing platform open to the sky. On the opposite side a building was erected facing the street and the platform.

Held—In determining the height limit of the building in accordance with rule No. 2 of Part II, Sch. 17, of the Calcutta Municipal Act (III B. C. of 1899), the angle of 45 degrees must be drawn from the street alignment on the side of the street and not from the side of the platform farthest from the street. (1908) 13 C.W.N. 74=1 Ind. Cas. 415.

——Ss. 449, 452, 572, 383, Sub-S. 2 of 449—Scope—Retrospective effect—Sanction of building under old Act—Deviation from plan sanctioned under old Act—Liability of owner for building in contravention of rules laid down by the new Act—Penalty—Notice under new Act—If condition precedent.

If a building is constructed in deviation from its plan as sanctioned under the old Municipal Act of 1888 so as to render the owner liable to a penalty under the old Act, before the new Act came into operation a right entitling him to build in contravention of the provisions and rules laid down by the new Act so as to bring himself within Cl. (*c*) of S. 8 of Act I (B.C.) of 1899, he will be liable to prosecution under the new Act. The question what penalty should be enforced under S. 449 of Act III of 1899 is in the discretion of the Magistrate and is not a question of law which the High Court, on reference will answer. There is nothing in the Act making a notice under S. 383 of the present Municipal Act a condition precedent to a proceeding under Sub Sec. 1 of S. 449 of that Act. (1903) 7 C.W.N. 554.

——Ss. 449 and 575—Powers of Magistrate—Acquittal under S. 575—Refusal to return a plan obtained by misrepresentation and fraud—Order precluding the petitioner from building according to such plan—Legality.

Where in a prosecution under S. 449 of the Calcutta Municipal Act the Magistrate acquitted the accused under S. 579 of the Act, but found that the sanction to the plan had been obtained by misrepresentation and fraud and made an order prohibiting the petitioner from building the second storey on the basis of such plan and directing that the sanctioned plan filed by him be not returned to him:

Held that the Magistrate was not competent to make an order of that description. (1905) 3 C.L.J. 138.

——Ss. 449 and 632—Scope of—Nuisance to general public—Procedure for abatement.

The application of S. 632 is restricted to cases of nuisance to private individuals, and not to general public. A person affected by the nuisance created by the *bona fide* erection of a building without sanction, can move the Magistrate to abate it, if he is so satisfied. A partition decree cannot override the Act by embodying in it certain specified easements reserved to the allotted portions, as the Act contemplates the general sanitation within the area of the Municipal jurisdiction. The Municipal Committee is authorised to proceed against a person erecting a building contrary to building regulations. 14 C.W.N. 637=6 Ind. Cas. 595.

——S. 466—License—Carrier—Duty of.

A carrier must obtain the trade license as well as those for keeping the animals and for the premises wherein he keeps them, under S. 466 of the Act. 24 C.W.N. 744=58 Ind. Cas. 924.

——Ss. 466, 574 and Sch. XVIII (8)—"Iron"——Meaning of—If includes, "steel".

The term "iron" as used in Schedule XVIII (8) of the Calcutta Municipal Act includes "steel". 10 C.L.J. 486=11 Cr.L.J. 277=4 Ind. Cas. 438.

——S. 495—Article of human food or drink—Tea-dust.

Tea dust is an "article of human food or drink" within S. 495 of the Calcutta Municipal Act. "Food" includes any article which ordinarily enters into or is used in the composition or preparation of food and includes flavouring matters and condiments. 47 Cal. 53=23 C.W.N. 911=30 C.L.J. 130=20 Cr.L.J. 607=52 Ind. Cas. 223.

——(As amended by the Calcutta Municipal Act 1917), S. 495-A—Adulteration—Proof.

In a prosecution for adulteration of Ghee, it is not safe to rely on technical treatises alone without the aid of an expert to whom their alleged effect may be put. 22 C.W.N. 745=28 C.L.J. 32=19 Cr.L.J. 753=46 Ind. Cas. 593.

——Ss. 495 and 574—Adulteration of ghee by servant—Master responsible.

S. 495 of the Act makes all persons liable who are responsible for the sale of adulterated articles so that a master is not exempt, if the servant commits the offence, though the former is not guilty of any connivance. Non-connivance may be a ground for mitigation of the penalty. 39 Cal. 682=16 C. W. N. 455=13 Cr.L.J. 205=14 Ind. Cas. 205.

——S. 495 (a), Sub-Cl. 1—Bengal Ghee Adulteration Act (I of 1917), S. 2 (2)—Standard of purity—Chemical tests—Value of.

There is no standard of purity of ghee fixed by Legislature; Courts of Law have, therefore, to decide the question of adulteration upon such evidence as is available in each case. As there is no statutory presumption, every case must depend on its own evidence. A statutory standard should be laid down as raising a presumption of adulteration and such cases should not be made to depend on evidence forthcoming in each case to test the value of the Corporation standard. The Court should determine whether the Corporation standard ought to be acted upon or not, but the Court ought not to fix a standard of its own. 47 Cal. 633=24 C.W.N. 388 =21 Cr.L.J. 490=56 Ind Cas. 586.

——S. 556—Power to lease.

S. 556 of the Calcutta Municipal Act authorises the Corporation to lease any part of Municipal property on any terms they think fit, without calling for tenders. 36 Cal. 271=13 C.W.N. 129=1 Ind. Cas. 968.

——S. 556—Scope—Acquisition of land for Dharmashala—Municipality's discretion.

The Act, by S. 14 and S. 556, has expressly placed the discretion not with the Board or with a Court of Law, but with the Municipality itself. Where the Municipality wanted to acquire land for *Dharmashala* near Kali's temple as well as for widening the road. *Held*, that what Municipality had to consider was not the religious beliefs and purposes of those assembling in large numbers but what was the situation of the City in respect to this assemblage and to the citizens at large in view of the general questions of public convenience, proper sanitation and the prevention of danger and disease. Any enlightened Municipality would carefully attend to these questions and endeavour to avoid the evils referred to. This is not to be ruled out by a consideration as to the particular form of belief or practice of those who would primarily benefit by the improvements made. 69 Ind. Cas. 114=16 M.L.W. 673=31 M.L.T. 155 =49 I. A. 255=49 Cad. 838=27 C.W.N. 125 =21 A.L.J. 27=37 C.L.J. 67=A.I.R. 1922 P. C. 333=43 M.L.J. 634.

——S. 557—Applicability—Presumption under—Acquisition of entire holding—Assessment of value.

The presumption under S. 557, Cl. (*d*) applies only when the entire holding is acquired and not when a small portion is acquired and the rent is re-valued for the purposes of assessment. However, in view of S. 151 and the presumption that official acts are properly performed the annual value of the property acquired is the difference between the two annual values assessed by the Municipality. But where the presumption under S. 557 does not apply the value to be assessed is at 18 times the annual value in view of the same number of year's purchase being allowed in a similar case. 81 Ind. Cas. 1004=28 C.W.N. 779=A.I.R. 1925 Cal. 65.

——S. 557 (c)—Measure of "market value".

The "market value" of a certain bustee land compulsorily acquired by the Calcutta Municipality shall be determined according to the market value then existing of the land as matters then stood and not by any use to which the land may be put in future, nor by any valuation based on the most advantageous disposition of the land. 41 Cal. 967= 18 C.W.N. 884=23 Ind. Cas. 412.

——S. 557 (d)—Presumption under—Evasion of —Estoppel.

The Calcutta Corporation are not estopped by their having assessed two plots as one from proceeding to acquire the land in two separate proceedings though the owners are deprived of the presumption under S. 557 (d) in their favour by the action of the Corporation. 22 C.W.N. 538=28 C.L.J. 144=46 Ind. Cas. 138.

——S. 559—Applicability—Bye-law No. 10 framed under Cl. (18)—If superseded by R. 24 framed under S. 11 (2), Cls. (f) and (i) of Motor Vehicles Act, 1914.

Bye law No. 10 framed under Cl. (18) of S. 559 of the Calcutta Municipal Act was not superseded by implication when R. 24 was framed by the Local Government under S. 11, Sub-S. (2), Cls. (*f*) and (*i*) of the Indian Motor Vehicles Act, 1914. 33 C.L.J. 19=25 C.W.N. 21=22 Cr.L.J. 401=61 Ind. Cas. 641=A.I.R. 1921 Cal. 107.

——S. 559—Interpretation—"Carriage".

The term "carriage" includes a motor car. 33 C.L.J. 19=25 C.W.N. 21=22 Cr.L.J. 401=61 Ind. Cas. 641=A.I.R. 1921 Cal. 107.

——S. 559 (52)—Bye-law No. 13 framed under—Validity—Bengal General Clauses Act (1899), Ss. 8 and 25.

A bye law to be valid must be (1) *intra vires* the authority who makes it, (2) certain in its terms and positive, (3) not repugnant to the general law, and lastly (4) reasonable.

Section 559 (52), Calcutta Municipal Act (III of 1899), does not give the Corporation the power to make bye laws for regulation of public parks vested in the corporation or of the tanks and bathing places situated therein. Therefore, the bye-law No. 13 and the rest of the bye-laws which purported to have been made under S. 559 (52) of the Act of 1899 are void and inoperative. Such a bye-law being void and inoperative since the time it was framed, S. 25, Bengal General Clauses Act has no application. Such a bye law is not made operative by the repeal of Act (III of 1899), by the new Calcutta Municipal Act (III of 1923).

The Calcutta Municipal Act, 1899, by virtue of the provisions contained in S. 461, operated to take away the "right to swim." Section 8 of Bengal General Clauses Act, 1899, has this effect that the repeal of the Calcutta Municipal Act of 1899 does not occasion a revival of a right which had been taken away by that Act. A.I.R. (Vol. 24) 1937

Cal. 603=I.L.R. (1937) 2 Cal. 397=174 Ind. Cas. 91.

——Ss. 559 (52) and 561—Bye-law 45—Limitation of hours of theatrical performance.

Bye-law, 45 framed by the General Committee of the Corporation of Calcutta regulating the hours of theatrical performance is not *ultra vires*. Statute 24 and 25 Vict. Chap. 67 gives ample authority to the Bengal Lgislature to pass such an act as the Calcutta Municipal Act and to empower the General Committee of the Municipality to frame bye laws and the General Committee has clear authority to make breaches of the bye laws punishable. 24 C.W.N. 196=54 Ind. Cas. 781.

——S. 561—Bye-laws Nos. 83 and 85—Liability—Breach.

Bye law No. 85 under the Act is not *ultra vires* and each of the persons jointly committing a breach of bye-law 83 is liable to be fined to the extent of Rs. 20 and each of the persons who have jointly committed a breach of Bye law 85 is liable to be punished with the maximum amount of the prescribed fine. 26 C.L.J. 29=21 C.W.N. 1009=18 Cr. L. J. 674=40 Ind. Cas. 322. Overruled. 44 Cal. 1025=21 C.W.N. 1016=26 C.L.J. 215=18 Cr.L.J. 945=42 Ind. Cas. 305.

——S. 567 and Sch. IV, R. 10—Rules under—Revision of—Election roll—Omission to give notice.

Rules framed under S. 567 and contained in Sch. 4 have the effect of law and failure to give 3 days' notice required by R. 10 amounts to a very grave irregularity. Persons objecting to the final publication of the election roll, should take steps to prevent publication before the election roll is finally published according to rules. 46 Cal. 132=50 Ind. Cas. 307.

——Ss. 574 and 575—Consolidation of cases based on different facts—Legality—Liability of plumber to prosecution for defect in work—If absolved by subsequent sanction.

Where two separate prosecutions were started by the Corporation against a licensed plumber for defect in his works in connection with two different premises and the Municipal Magistrate consolidated the two cases together:

Held, that such a procedure was irregular. Where the work of a licensed plumber was found on inspection after submission of the completion report, to be defective and in contravention of Rule 4 of Schedule XV of the Calcutta Municipal Act:

Held, also that the plumber was liable to prosecution notwithstanding that the defects were subsequently remedied and the officers of the Corporation subsequently sanctioned the requisite connections.

Laxity in the administration of the Rules and Bye-laws of the Municipality by the officers thereof condemned. (1906) 4 C.L.J. 411.

——Ss. 578 and 631—Pleader practising without license—Offence.

Where a pleader practised in a Court in 1917-1918 without taking a license, *held*, he was guilty of an offence under S. 578 of the Calcutta Municipal Act on the last date of 1917-1918, that is on the 31st March 1918 and a complaint lodged within three months of that date was not barred under S. 631 (1). *Per Richardson, J.*—The offence under S. 578 of the Act lies in the person exercising a profession after the first of July in any year without having the prescribed license. If the profession is so exercised on subsequent days, whether a separate offence is committed on each day or whether it is all one continuing offence is doubtful. If the profession is exercised on one day only, the profession must be commenced within the following three months. If it is exercised on a number of days, whether the offence is a continuing one or not, the prosecution must be commenced within three months of the last of such days. *Per Shamsul Huda, J.*:—For the purposes of carrying on a pleader's profession he need not daily conduct a case or attend or address the Court. The facts of keeping an office for the purpose of receiving his clients giving them advice or being generally open to engagement as a pleader will constitute the carrying on of a pleader's profession. 24 C.W.N. 415=31 C.L.J. 127=21 Cr.L.J. 363=55 Ind. Cas. 731.

——S. 580—Order of demolition—Acceptance of rates in respect of erection pending negotiations for compromise — If acquiescence in disobedience of order.

The accused built a house not in accordance with the plan sanctioned by the the commissioners. An order of demolition was passed, and while negotiations were going on between the accused and the Corporation, the latter received the rates and taxes on a re-assessment of the whole premises including the house. *Held*, that the mere acceptance of rates pending the negotiations did not constitute acquiescence by the Municipality in continuous disobedience of the demolition order. 37 Cal. 837 (note)=11 Cr.L.J. 695=8 Ind. Cas. 654.

——Ss. 589, 341, 102 and 63 (3)—Scope—Proceedings of committee—Absence of Chairman's signature—Effect on legality.

S. 589 of the Act is no bar to the Secretary of the Corporation, who is also the Secretary of the General Committee, signing notices under the Act, but unless a notice purports to have been signed by the Chairman, the special rule of evidence contained in S. 589 cannot apply and the proceedings of the General Committee can be proved only under the general law of evidence. Printed proceedings themselves would not be sufficient legal proof unless the provisions of S. 78 of the Evidence Act are complied with. The mere fact that the Secretary had signed the notice under S. 589, instead of the Chairman, does not in any way affect the merits and is a mere irregularity within S. 102 of the Calcutta Municipal Act. 16 Cr.L.J. 659=30 Ind. Cas. 643.

——S. 622—Scope—Non-compliance with requisition for carrying out improvements—Obstruction by some tenants—Onus not completely absolved.

It would be unreasonable to construe S. 622 (3) in the sense that an owner, who has not complied with a requisition at all is discharged from liability, merely because the occupier of a portion of the land has rendered compliance impracticable only in part. Upon a fair interpretation of S. 622, it appears that the owner is discharged from liability only to the extent that compliance is rendered impossible by the conduct of the occupier. 50 Cal. 813=77 Ind. Cas.

529=38 C.L.J. 360=27 C.W.N. 787=A.I.R. 1924 Cal. 534.

——S. 631—Limitation.

The applicant was prosecuted on a complaint, dated 11—5—1920; the complaint alleged that the accused had about 5—9—1919 committed an offence under Ss. 574 and 466 of the Calcutta Municipal Act by keeping and using an unlicensed workship for manufacturing articles of iron for purposes of trade. *Held*, that the complaint was time barred under S. 631. 22 Cr.L.J. 559=62 Ind. Cas. 575 (C).

——S. 631—Limitation.

A prosecution for non-removal of an obstruction started more than 3 months from the date of notice served upon the accused is barred under S. 631 of the Calcutta Municipal Act. 37 Cal. 545=10 C.L.J. 623=10 Cr.L.J. 522=14 C.W.N. 614=4 Ind. Cas. 259.

——S. 631—Limitation—Starting point.

The period of Limitation under S. 631 begins to run from the date of the first commission of the offence, the date when the obstruction or projection was first placed over the street. 48 Cal. 602=33 C.L.J. 377=22 Cr.L.J. 619=63 Ind. Cas. 155=A.I.R. 1921 Cal. 385.

——S. 632—"Nuisance"—If must be public.

The term "nuisance" in S. 632 of the Calcutta Municipal Act does not refer only to nuisance affecting the public generally. It applies as well to nuisances affecting an individual. The mere fact that the Municipality could have proceeded against a building erected contrary to the building regulations under S. 449 of the Act does not preclude the Municipal Magistrate from interfering with it under S. 632 at the instance of the person whose house has been deprived of light and air by the building. If a building is a nuisance, it is no answer in a proceeding under S. 632 to say that the Corporation had sanctioned it. Whether erected with or without sanction, or in contravention of the building regulations or not, any person residing in Calcutta affected by it can move the Magistrate and it is within the jurisdiction of the Magistrate to pass an order under S. 632, if in his discretion he is so advised. A partition decree previously passed which purported to specify the easements reserved to the portion which fell to the complainant, cannot be held to override the provisions of the Calcutta Municipal Act, which is directed to provide for public sanitation among other public considerations. (1909) 14 C.W.N. 637=6 Ind. Cas. 595.

——S. 634, Cl. 2—"Accrual of the right to sue"—Meaning of.

The words "accrual of the right to sue" in Cl. 2, S. 634, do not mean accrual of the cause of action, but have reference to the expiry of the month's notice under Cl. 1 of that section, and the plaintiff will not be barred if he brings his action within three months from the date when the month's notice has expired. (1904) 9 C.W.N. 217=32 C. 277.

——S. 637—Applicability—Area in Calcutta town.

Mallik, J.—S. 637 provided for the inclusion of areas within the limits of the Calcutta Municipality. It could not, taken by itself, include any area within the town of Calcutta. Such an inclusion could be made only under Act I of 1907. 31 C.W.N. 1007=103 Ind. Cas. 674=A.I.R. 1927 Cal. 748.

——Sch. V, R. 2—Election of Commissioner—Nomination paper—Description of candidate in letter — "Sufficiency" — Proposer, seconder and approver—Approver being a firm.

A nomination paper is invalid in law if it did not contain the description of the candidate. Sch. V, R. 2 of the Calcutta Municipal Act contemplates that a nomination paper should be self contained and complete in itself and a letter could not be taken as part of the nomination paper. The 2nd and 3rd forms could not be taken as part of the nomination paper inasmuch as they did not contain the name of the candidate. The nomination paper was bad in law inasmuch as it did not contain the signature of 18 approvers in addition to those of the proposer and seconder. It is clear from Sch. V, R. 2 that if a person signs a nomination paper of a candidate, either as a proposer or seconder, he cannot also sign it as an approver. Signature of approver No. 15 not being that of an individual but of a firm name, was bad in law and should be rejected. *Per Woodroffe, J.*:—Alternative nomination papers may be sent to the Chairman, so that if one is held either in whole or in part, to be invalid, the other may be used. In such a case, however, each nomination paper should be complete in itself. A candidate may also send in a nomination paper with names of more than 18 voters as mentioned in the rule, in order to meet the case of possible objections to any of the voters whose names appear upon the paper. In such a case more than one nomination paper may be used, but the papers must be connected by placing on each paper, the name, description and address of the candidate as appearing on the first paper. 46 Cal. 119=22 C.W.N. 943=28 C.L.J. 289=48 Ind. Cas. 314.

CALCUTTA MUNICIPAL ACT (III OF 1923).

——Municipal Magistrates — Jurisdiction and powers of.

The Act has invested Municipal Magistrates with power to deal with certain proceedings under the Act which are not criminal proceedings. One of such powers is to order demolition of unauthorised structures. 54 Cal. 532=31 C.W.N. 506=101 Ind. Cas. 183=45 C.L.J. 469=28 Cr.L.J. 407=8 A.I.Cr.R. 35=A.I.R. 1927 Cal. 509.

——Scope—Contravention of—Effect.

Infringements of Municipal Act are not to be treated lightly. Municipal Acts are intended for the well being and health of the community. A.I.R. (Vol. 28) 1941 Cal. 550=45 C.W.N. 925=43 Cr. L. J. 33=196 Ind. Cas. 559.

——Vendor and purchaser—Rights and liabilities—Effect of—Street alignment.

The existence of a street alignment prevents the purchaser at a Registrar's sale from making a good title to the property; and the purchaser cannot be compelled to take the property with a compensation where the alignment has not been disclosed by the vendor. Such a sale is void and the purchaser is entitled to the return of the purchase money with interest thereon. (1936) 63 Cal. 124=39 C.W.N. 897.

——S. 3—'New Building'—Test.

The test whether a building is new or not within the meaning of the Act has reference to the date of commencement of the Act. 53 Cal. 974=44 C.L.J. 37=27 Cr.L.J. 1146=97 Ind. Cas. 666=A.I.R. 1926 Cal. 1138.

——S. 3—"Occupier"—Owner using land to limited extent—If occupier.

There may be cases where land must be regarded as "vacant" for purposes of valuation but is none the less "used" by its owner to an extent which, though limited, will bring him within the definition of "occupier" in S. 3 of the Calcutta Municipal Act. 74 I.A. 1=I.L.R. (1947) Nag. 172=228 Ind. Cas. 596=(1947) P.W.N. 46=1947 A.W.R. (P.C.) 14=1947 O.A. (P.C.) 14=51 C.W.N. 336=13 B.R. 291=A.I.R. 1947 P.C. 50=I.L.R. (1947) Kar. 72=27 P.L.T. 491=(1947) 2 M.L.J. 106 (P.C.).

——S. 3 (5)—"Shop"—Place where commodities are sold once a week—Bazaar.

The real meaning of the word "shop" as used in the Calcutta Municipal Act must be ascertained according to the meaning which the word has acquired in the country of the locality where the statute is applicable, and that must be taken to be the ordinary meaning of the word. That the sellers of commodities assemble only on one day at a bazaar, and have no sort of right of occupying any particular place for the sale of their commodities cannot have the effect of taking the place occupied by them, out of the category of shops.

A bazaar which is known as a *hat* will not cease to be a bazaar for the reason that it is held on a particular day or days in the week. A.I.R. (Vol. 20) 1933 Cal. 322=36 C.W.N. 1085=60 Cal. 296=143 Ind. Cas. 304.

——S. 3 (24)—"Domestic purposes"—Test.

In deciding whether water is used for "domestic purposes", the test is not whether the water is consumed or used in the course of a trade or business but whether its user is in its nature domestic. 54 C.W.N. 42.

——S. 4—Assessment of area as bustee—Decision of Commissioners—If sine qua non.

All that S. 4 of the Calcutta Municipal Act means is this. If there is any dispute or doubt as to whether an area is a *bustee* or not, the Corporation is empowered to decide that dispute or resolve that doubt and its decision on the question shall be final. It does not make the decision of the Commissioners at a meeting a *sine qua non* for the assessment of an area as a *bustee*. A.I.R. 1950 Cal. 201.

——S. 12 (3)—Delegation to whom to be made.

The delegation under S. 12 (3) must be to a Municipal Officer and not to any Standing Committee. A.I.R. (Vol. 27) 1940 Cal. 11=70 C.L.J. 311.

——S. 18—Scope—Right under—If bar to right to apply for mandamus.

The right given to Government to interfere under S. 18 Calcutta Municipal Act, and the implied right of the public or the individual to move the Government in some way or another is not such an alternative remedy as will deprive the individual of the right to apply for mandamus. A.I.R. (Vol. 28) 1941 Cal. 391=I.L.R. (1941) 1 Cal. 16=45 C.W.N. 401=196 Ind. Cas. 452.

——S. 19—Power of corporation to rescind previous resolution.

The corporation need not invoke the powers of the Local Government under S. 19 to rescind its previous resolution, which they themselves can do by a resolution of their own. A.I.R. (Vol. 32) 1945 Cal. 249=49 C.W.N. 658.

——S. 19—Powers of Provincial Government to annul proceedings—Grounds for exercise of.

Under S. 19, without any request by the corporation the Provincial Government can annul any proceedings of the corporation on their own initiative.

After consideration of any representation made by the corporation, the only thing necessary for the Government to annul the proceeding is to consider it as not to be in conformity with law. A.I.R. (Vol. 32) 1945 Cal. 249=49 C.W.N. 658.

——S. 24—Right to inclusion of name in electoral roll—Conditions and qualifications of.

Under S. 24, Calcutta Municipal Act, a person is not entitled to have his name entered in the electoral roll if he does not possess the necessary qualifications of an elector under S. 20. One of the necessary qualifications under S. 20 (1) (b) is that his name must be in the register maintained under that section. A person who wants to be entered as an elector must see that his name is inserted in the register and if necessary to take appropriate action to bring about that result. If his name does not appear in the register and consequently in the preliminary roll he cannot subsequently, in a claim preferred by him under S. 25, contend that his name was wrongly omitted. The Revising Authority has no power to go behind the register. His only duty is to enquire whether a persons's name not included in the preliminary roll should be included therein. A.I.R. (Vol. 33) 1946 Cal. 206=I.L.R. (1944) 2 Cal. 464=48 C.W.N. 662.

——S. 25—Scope—Jurisriction of Revising Authority—Application for inclusion of names omitted from preliminary roll—Persons claiming to be qualified as electors—Application also referring to previous application for registration in Form A—Rejection of claim on ground that it was not in proper form—Propriety—Rules under S. 25—R. 17.

Certain persons preferred a claim under S. 25 (1) Calcutta Municipal Act to the Revising Authority that their names were not included in the preliminary roll. The application for inclusion of their names stated that the persons were qualified to be electors under S. 20 (1) (b) of the Act and reference was also made to the application for registration in Form A which had been made to the Registering Authority. The Revising Authority without going into the merits of the claim and without taking any evdience as required by Rr. 18 to 23 rejected the claim on the ground that the claim was not in proper form as the grounds of claim required by R. 17 were not stated in it:

Held, that the grounds of claim were sufficiently stated as required by R. 17 and, therefore, the decision of the Revising Authority was erroneous.

Held also that in declining to hear the evidence and to enquire into the claim on the merits the Revising

Authority acted outside and in derogation of his jurisdiction. It was not merely an erroneous judgment but a failure to exercise jurisdiction conferred on him by the Act and the High Court could interfere. A.I.R. (Vol. 33) 1946 Cal. 206=I.L.R. (1944) 2 Cal. 464=48 C.W.N. 662.

——S.25 (2)—Revising authority—Writ of mandamus or certiorari—Powers of High Court.

Section 25 (3) has not taken away the jurisdiction of the High Court to issue a writ in the nature of *mandamus* under S. 45, Specific Relief Act, or the prerogative *writ of certorari* upon the Revising authority constituted under S. 25. A.I.R. (Vol. 33) 1946 Cal. 206=I.L.R. (1944) 2 Cal. 464=48 C. W. N. 662.

——S. 25 (2)—R. 17—Grounds of claim not specifically stated—Reference made to application in Form A for registration as voter and to S. 20 (1) (*b*)—If sufficient—Rejection of claim by Revising Authority—Interference by High Court. I.L.R. (1944) 2 Cal. 464=A.I.R. 1946 Cal. 206.

——S. 25 (3)—Jurisdiction of High Court—Writs of *mandamus* and *certiorari*—Power of High Court to issue on Revising Authority—Specific Relief Act, S. 45. I.L.R. (1944) 2 Cal. 464=A.I.R. 1946 Cal. 206.

——Ss. 25 and 20 (1) (b)—Scope of inquiry—Claim to be enrolled as voter—Revising Authority, if can go behind register of occupiers. I.L.R. (1944) 2 Cal. 464=A.I.R. 1946 Cal. 206.

——S. 26—Elector entered more than once in electoral roll under different numbers—Offence.

If an elector has been entered more than once in the electoral roll under different numbers, it is impossible to say that he is committing an offence in exercising the right to which he has become entitled under S. 26. (1936) 165 I.C. 489=63 Cal. 825=40 C.W.N. 741.

——S. 27—Improper acceptance—Effect of.

Because the improper rejection of a nomination at the scrutiny for any of the reasons contained in R. 15, is made a ground for disputing the election, it is not the reasonable and correct inference to be drawn from the words of the section that the improper acceptance of a nomination which had been rendered void is not an admissible ground for the purposes of S. 46. 55 Cal. 173=32 C.W.N, 264=109 Ind. Cas. 739=A.I.R. 1928 Cal. 209.

——S. 27—Scope — Non compliance — Time to receive deposit money extended by corporation—Candidate paying deposit money after three days but within extended time—Validity of nominations.

S 27 is mandatory and its plain sense is that within three days of the nomination the candidate must pay the deposit money, otherwise his nomination is rendered void. The last date fixed for the filing of the nomination papers was 27th February, 1927. As 27th February was a Sunday, the Chief Executive Officer of the Corporation published a notice in the "Statesman" to the effect that 27th Feb. being Sunday the deposit money of the candidates, ordinarily due on 1st March under S. 27 (3) of the Act, would be received up to 5 p.m. of 2nd March. *A*, a candidate for election, paid the deposit money on 2nd March. The scrutiny of the nominations was held on 3rd March. *A's* nomination was accepted as a valid one and he was duly elected as Councillor for the Corporation.

Held, that his nomination was void. 55 Cal. 173=32 C.W.N. 264=109 Ind. Cas. 739=A.I.R. 1928 Cal. 209.

——S. 29 (8)—Applicability — Uncontested elections—Publication purporting to be made under R. 16 (2) of Rules framed under S. 30—Effect of I.L.R. (1945) 1 Cal. 240.

——S. 30—Rules under R. 14—Election Agency—Doctrine of.

The doctrines of election agency are much wider than those of Common Law agency and evidence which would be inadequate to establish agency at Common Law has often been held sufficient in election cases to make a candidate responsible for acts committed by other persons. (1936) 165 Ind. Cas. 489=40 C.W.N. 741=63 Cal. 825.

——S. 30—R. 14—Scope of.

Nomination paper, when can be rejected under S. 14 (1) (iv) indicated. A.I.R. (Vol. 31) 1944 Cal. 395=48 C.W.N. 655=217 Ind. Cas. 288.

——S. 30—Rules under, R. 14—Several nomination papers delivered in bundle—"First received."

Where all the nomination papers are delivered in a bundle, it is just and reasonable to hold that the paper which bears the earliest serial number is the paper which was first received for the purposes of R. 14 (2) (*b*) and it is entitled to the benefit of that rule and must be deemed to be valid in spite of the fact that the proposer named therein had subscribed his name as proposer in the other nomination papers received later. A.I.R. (Vol. 31) 1944 Cal. 395=48 C.W.N. 655=217 Ind. Cas. 288.

——S. 30, (as amended in 1939)—Rules under R. 14 (1) (iii)—More than one election agent—Previous appointment not revoked—Rejection of all nomination papers.

The Calcutta Municipal Act contemplates a single election agetnt. More than one election agent is not permissible.

The candidate delivered to the returning officer two nomination papers each accompanied by a declaration in writing stating that he had appointed *F* as his election agent. On a subsequent date he delivered to the returning officer six more nominations papers each accompanied by a declaration in which he appointed himself as his election agent without making any attempt to revoke the previous nomination of *F* as his election agent. There was a scrutiny by the returning officer and he then rejected all the nomination papers on the ground that they contained declarations of more than one election agent. On the construction of R. 14, it was argued that the nomination papers or each of them were valid and that there was no justification for rejecting a valid nomination paper because on comparison with another nomination paper the returning officer discovered that more than one election agent had been appointed. It was argued that the returning officer was bound to take each nomination paper as a separate entity and come to his decision on that paper:

Held, that the returning officer had no power to decide which was the election agent whom the candidate wanted to appoint, but the candidate had

power under S. 33 to revoke either of the appointments and had he done so no fault would apparently have been found with the nomination. But the nomination and the declaration are both contained in Form I and they are considered as a single unit and if the returning officer was of opinion that the candidate had in his nomination papers failed to comply with the provision of the Act which provides that only one election agent shall be appointed he was justified in rejecting the nomination papers. A.I.R. (Vol. 28) 1941 Cal. 130=I.L.R. (1940) 2 Cal. 230=193 Ind. Cas. 833.

——S. 30—Rules under, R. 14—Responsibility of candidate for agent's misdeeds—Extent of.

A candidate is responsible for all the misdeeds of his agent committed within the scope of his authority. But a man may become the agent of another either by actual employment or by recognition and acceptance, and to establish agency it is not necessary to show that the candidate himself knew of and accepted voluntary services, knowledge and acceptance by other persons in control is sufficient.

It must be made out that a party, before he is chargeable as an agent, has been entrusted in some way or other by the candidate with some material part of the business of the election which ordinarily is performed or is supposed to be performed by the candidate himself. The entrustment may be by implication but that implication ordinarily must arise from the knowledge which it appears that the candidate has of the part which the person is taking in the election. (1936) 165 Ind. Cas. 489=40 C.W.N. 741 =63 Cal. 825.

——S. 46—Election petition—Challenge on ground that candidate is not qualified—Publication of his name under S. 29 (8)—If prerequisite. I.L.R. (1945) 1 Cal. 240.

——S. 46—Petition to set aside election of person elected uncontested—His name published in gazette—Subsequent publication in gazette of names of persons elected at contested elections—Petition filed more than eight days after first publication—If time barred. I.L.R. (1945) 1 Cal. 240.

——S. 46—Provision giving eight days' time—Scope of.

All that is intended by S. 46 of the Calcutta Municipal Act is that the application should be filed at an early date (*i.e.*, within eight days), so that the person charged should be in a position to meet the charge at once and to enable the matter to be enquired into so that if the charges are upheld, there may be a fresh election without delay. The application should set out the grounds on which the validity of the election is challenged but there is nothing in the words of the section to prevent the applicant after eight days from giving further particulars. The guiding principle in ordinary particulars is to prevent the defence from being embarrassed and to insure a fair and effectual trial and there is nothing in the Calcutta Municipal Act to show a departure from that principle. (1936) 165 Ind. Cas. 489=40 C.W.N. 741=63 Cal. 825.

——S. 46—Scope—Calcutta High Court (O. S.) Rules, Chap. III, R. 2—Period expiring on holiday—Saturday intervening—Petition made on Monday — Petition deliberately withholding particulars—Adjournment for inspection.

Held, that since S. 46, Calcutta Municipal Act, provides for an application to the Court, that application must be made to a Judge in open Court and if the period expires on a holiday and the Judges of the Court are not sitting in open Court on the Saturday immediately after the vacation, the application may legally be made on the first day on which the Judges are so sitting.

Held, also that where certain particulars have been deliberately withheld in the petition which however sets forth in general terms most of the corrupt practices and other materials which, it is alleged, justify interference, when such particulars are disclosed in an affidavit in reply, the respondents are entitled to an adjournment to enable them to have inspection of all the documents and other material on which the petitioner relies in support of the charges. (1937) 169 Ind. Cas. 921=41 C.W.N. 492.

——S. 46 (1) —Parties—Two candidates to be elected—Election of either challenged—Failure to implead one—Effect.

Section 46 (1) must contemplate the challenge of the validity of an election whether it is an election of one person or of two persons, and where there are two candidates who would be elected to the constituency, if the challenge is made to either of the candidates, the result would be that the entire election in that constituency would have to be held afresh. If that is so it is obvious that both the candidates who may be affected by an election petition should be parties to it. Failure to implead one of them is a fatal omission. A.I.R. (Vol. 28) 1941 Cal. 133 =I.L.R. (1940) 2 Cal. 242=45 C.W.N. 188=193 Ind. Cas. 752.

——S. 46 —Proviso (b)—Exercise of second vote, if justified.

It cannot be said that proviso (*b*) to S. 46 Calcutta Municipal Act, does not justify the exercise of a second vote even though it is wrongly recorded in the electoral roll. (1936) 165 Ind. Cas. 489 =40 C.W.N. 741=63 Cal. 825.

——Ss. 46, 47—High Court's special jurisdiction —Right of parties.

High Court, sitting as an Election Court, exercises a special jurisdiction which is the creature of statute, and the rights of the parties must be found within the four corners of the statute and no right which is not so found can be imported. A.I.R. (Vol. 28) 1941 Cal. 147=I.L.R. (1940) 2 Cal. 373 =193 Ind. Cas. 773.

——Ss .46, 47 (as amended in 1939)—Parties—Returning Officer, if necessary party to election petition.

The returning officer need not be made a party to an application under Ss. 46 and 47 for getting an election declared void. A.I.R. (Vol. 28) 1941 Cal. 130 =I.L.R. (1940) 2 Cal. 230=193 Ind. Cas. 833.

——Ss. 46, 47—Right to recount—Conditions of.

There is no doubt that the Calcutta Municipal Act does not contain any provision which enables an un-

successful candidate to claim the seat. The procedure of scrutiny and recount is inseparably linked to the claim to the seat. It enables a Court to review the decision of the revising officer as to the admissibility of the ballot papers with the object of further enabling the Court, (as for instance under the provisions of S. 39, Bengal Municipal Act) to declare the candidate who is found to have the greatest number of valid votes in his favour, to have been duly elected. Hence when the Legislature excluded from Calcutta Municipal Act the right to claim the seat, it also excluded the right to a recount.

A recount, however, can only be granted in cases which are substantiated by specific instances and by reliable *prima facie* evidence and must be disallowed where it is claimed merely as a method of obtaining evidence in support of a number of serious charges of which no particulars have been given. A.I.R. (Vol. 28) 1941 Cal. 147=I.L.R. (1940) 2 Cal. 373=193 Ind. Cas. 773.

——S. 47 — Construction — Corrupt practice—Connivance of candidate or agent—Proof—Connivance—Meaning of.

A candidate and his agent had no reason to believe that there was any imposture at the time when voters came forward to apply for voting papers in the name of persons who were afterwards proved to be dead. When the rival candidate challenged their identity, the candidate merely stood by and the agent identified the voters.

Held that there was no corrupt practice by either the candidate or his agent, whose connivance in procuring the application is material, and some degree of knowledge of the truth on their part must be proved in order to establish connivance. The section need not be construed strictly. 32 C.W.N. 1155=116 Ind. Cas. 145=A.I.R. 1929 Cal. 137.

——S. 47 (as amended in 1939)—Grounds set up not proved—Court, if can declare election void.

Section 46 sets out the grounds on which an application may be made to the Court and S. 47 sets out the grounds on which the election of the returned candidate may be declared void, and unless the grounds set out in S. 47 are established the Court is not empowered to declare the election void. A.I.R. (Vol. 28) 1941 Cal. 130=I.L.R. (1940) 2 Cal. 230=193 Ind. Cas. 833.

——S. 47—"Result of election"—Bona fides of Returning Officer challenged—Election Officer, if necessary party.

Though the return of a candidate is one of the most important elements in the result of an election, it does not constitute the whole result. [The term "result of election" explained]. Where the candidate is illegally excluded from contesting election the result of the election is affected and the election must be set aside. It need not be proved that successful candidate would not have been returned. Where the *bona fides* of the Returning Officer are challenged, he is a necessary party to election proceedings. A. I. R. (Vol. 31) 1944 Cal. 395=48 C.W.N. 655=217 Ind. Cas. 188.

——S. 51 (1) and (2)—Relative Scope—Misuse of powers—Quo warranto—Issue of.

Appointment of officers under S. 51 (1) is subject to the approval by the Provincial Government but the appointment of officers under sub-S. (2) of S. 51 is not subject to such approval. Power of appointment under sub-S. (2) is a limited one and is confined to officers other than those mentioned under sub-S. (1). Appointment of chief engineer comes under sub-S. (1), and hence requires approval of the Local Government. Where the corporation, purporting to act under sub-S. (2) appoints a person under another designation to do the duties of the chief engineer appointed under sub-S. (1) it is an abuse of power and the Courts of law would interfere and restrain the public officer usurping the office from performing the functions of that office. Where it is shown that the usurpation will continue unless restrained, delay in applying for a writ of *quo warranto* will not be a ground for refusing to issue the writ. Absence of corporation and the Government as parties cannot prevent the relief being granted to a voter whose right to bring the *quo warranto* proceedings is not disputed. A.I.R. (Vol. 32) 1945 Cal. 249=49 C.W.N. 658.

——Ss. 71, 72—Scope—Resolution by District Committee with regard to matters not delegated—Validity.

From the provisions of S. 71 read with S. 72, Calcutta Municipal Act of 1923, it follows that a District Committee is a Standing Committee, a particlar kind of Standing Committee of the Corporation and therefore can only deal with such matters as have been each year, that is to say year by year, delegated to them by the Corporation. The District Committee can only deal with such matters as are delegated to them under the provisions of S. 72. Consequently where the resolutions regarding matters not delegated to the District Committee by the Corporation, are passed by the District Committee and by its Sub-Committee and confirmed by the District Committee, the resolutions are void and inoperative. A. I.R. (Vol. 24) 1937 Cal. 603=I.L.R. (1937) 2 Cal. 397=174 Ind. Cas. 91.

——S. 127 — Applicability — "Tenant"—Government servant occupying house under internal regulations for guidance of Financial Department—Assessment—Test.

The mere fact that it is convenient to both parties (*i.e.*, master and servant) that the servant should occupy a particular house and that he is put in possession of it for that reason does not prevent him from being a tenant; his possession is that of a tenant unless he is required to occupy the premises for the better performance of his duties though his residence is not necessary for that purpose or if his residence there be necessary for the performance of his duties though not specifically required.

The position is unaffected by the circumstance that the servant is entitled to occupy the house only so long as he retains his position as servant or the particular office in virtue of which the house is provided. The same principles apply though he may be a tenant-at-will.

Where a house is put at the disposal of a Government servant occupied by him under the terms of the internal regulations for the guidance of the Financial Department of the Government of Bengal,

the building is ordinarily let within the meaning of the Act and is rightly rated under S. 127 (*a*). A.I.R. (Vol. 31) 1944 P.C. 42=10 B.R. 609=1944 M.W.N. 459=71 Ind. App. 31=I.L.R. (1944) 2 Cal. 150=I.L.R. (1944) Kar. (P.C.) 206=48 C.W.N. 410=213 Ind. Cas. 257 (P.C.).

——S. 127—Construction—"At the time of the assessment"—Effect of—Owner of vacant land—Liability of.

It is impossible to construe S. 127 of the Calcutta Municipal Act as meaning that when land is unoccupied, its annual letting value must be taken to be the rent at which it might be expected to be let to a tenant who was precluded from occupying it. Full effect must be given to the words "at the time of the assessment" in the section; but there is no justification for holding that an owner, by making or permitting some trifling use of what is essentially vacant land, will escape all but a nominal charge as a ratepayer. 74 I.A. 1=I.L.R. (1947) Nag. 172 =(1947) P.W.N. 46=228 Ind. Cas. 596=1947 A.W.R. (P.C.) 14=1947 O.A. (P.C.) 14=51 C.W.N. 336=13 B.R. 291=A.I.R. 1947 P.C. 50=I.L.R. (1947) Kar. (P.C.) 72=27 P.L.T. 491=(1947) 2 M.L.J. 106 (P.C.).

——S. 127—Construction—Annual value—Method of determination—"Reasonably expected to let"—Meaning.

Per *Mukerji and Roy, JJ.*—For purposes of determining the annual value under S. 127, the standard value upon which the rates have to be calculated is the value of the property to the owner which is to be measured, whether he occupies the property himself or lets it to a tenant, by the amount of rent per annum it would be worth to a hypothetical tenant. And to find out what a hypothetical tenant will give, such a tenant must not be taken who does not want the premises for the use for which they are built, but wants to use them for some other purpose, unless it can first be shown that they cannot be let for the purpose for which they are built. (1874) 9 Q. B. 134; (1886) 17 Q. B. D. 738 and 10 Mad. 38, Rel. on. 31 C.W.N. 864=103 Ind. Cas. 683=46 C.L.J. 535=A.I.R. 1927 Cal. 659.

——S. 127—"Ordinarily let"—Part of building falling under description in para. (a) and other bart falling under para. (b)—Mode of valuation.

Section 127, Calcutta Municipal Act, is intended to classify all buildings as falling within one or other of two mutually exclusive categories. Each building is treated as a unit of valuation and its value must be ascertained in conformity with one or other of the two prescribed methods; it cannot be valued as to one part by one method and as to another part by another method, for, in that case the building as a unit could not be said to have been valued by either method, having been valued by both methods. No provision is made in S. 127. for the case of a hybrid building, part of which answers the description in para. (a) and part of which answers the description in para. (b). The only provision for the dividing of a building is in S. 135 and where a course under this section is not adopted the entire building must be treated as a single building forming a unit of assessment.

Where in a case roughly half the premises was in actual occupation of the owner and half utilized for letting purposes and the whole building was valued by the Executive Officer in conformity with the method prescribed in para. (b) of S. 127, Calcutta Municipal Act.

Held, that the building was rightly valued. A.I.R. (Vol. 26) 1939 P.C. 20=(1939) 1 M.L.J. 396=43 C.W.N. 314=69 C.L.J. 249=I.L.R. (1939) 1 Cal. 277=I.L.R. (1939) Kar. (P.C.) 73=66 Ind. App. 42=179 Ind. Cas. 324 (P.C.).

——S. 127—Scope—Tenant—Servants occupying house of master—Deductions made from pay for occupying house—Tenancy—If created.

The mere fact that a servant is paid less wages or some deductions are made from his pay for the benefit of being allowed to occupy a house of his master would not make him a tenant. In such a case the master would in law be taken to have possession. The relationship of master and servant is not however inconsistent with that of landlord and tenant. If the servant's occupation of his master's house be ancillary to the performance of the duties which as servant he has engaged to perform, then his occupation would be considered as that of a servant, but if his occupation is not connected with his employment, he would be considered a tenant.

In deciding whether a person's occupation of certain premises is as a tenant or as a servant, the material points for consideration are (a) whether a person is required to occupy the house in question for the performance of his services or (b) did occupy it in order to their performance or (c) that it was conducive to that purpose more than any other house which he might have himself rented.

In order that the case may fall within the propositions (b) and (c), the advantage must be shown to be a decisive one and not merely slight. A.I.R. (Vol. 28) 1941 Cal. 60=44 C.W.N. 1128=193 Ind. Cas. 457.

——S. 127 (a)—Annual value—Deduction or allowance under S. 150 or S. 151.

While determining the annual value of premises under S. 127 (a), Calcutta Municipal Act any deduction or allowance under S. 150 or S. 151 cannot be taken into account. A.I.R. (Vol. 30) 1943 Cal. 166=47 C.W.N. 119=76 C.L.J. 396=I.L.R. (1943) 1 Cal. 92=205 Ind. Cas. 212.

——S. 127 (a)—Basis of rating—English law—Vacant land not used in any particular way—Standard of valuation.

The fundamental basis of rating in English Law in respect of all classes of property is the yearly rent which a hypothetical tenant would reasonably pay for the hereditament. The property to be valued must be assumed to be let, and the gross annual rent is the rent which a tenant might be reasonably expected to pay for a hereditament, if the landlord undertook to bear the expenses necessary to maintain the hereditament in a state to command the rent. The tenant is assumed to take the hereditament from year to year, though he is supposed to have a reasonable expectation of continuing in occupation. Barring certain matters of detail the principle embodied in S. 127 (a) is substantially the same. In case of land which is not covered by any building and in case of building erected for letting purposes the annual value is the rent, which would be worth to a hypothetical

tenant who takes it from year to year. It is a well established principle of English Law which applies to cases under S. 127 (a) that for purposes of rating, a property must be valued as it stands; in other words only the present circumstances must be looked at and neither the past condition nor the future possibilities are to be taken into account.

The words 'at the time of assessment' in S. 127 (a) clearly indicate that in determining the value regard must be had to the conditions existing at the time when the assessment is made. The land cannot be valued on the basis of a different kind of user than that to which it is put at the time of assessment. Under S. 127 (a) an owner who keeps his land vacant is bound to pay rates. In determining the value of such land it cannot be said that the standard would be the amount of rent payable by a tenant who would keep it fallow and unoccupied. When the owner is not using it in any particular way, there is no presumption in favour of the continuance of any kind of user. The standard in such cases must be the rent which could be expected from a tenant, who would take the land as it is, and put it to such use, as is possible for a yearly tenant to do. A.I.R. (Vol. 29) 1942 Cal. 455=46 C.W.N. 637=I.L.R. (1942) 2 Cal. 152.

——S. 127 (a)—House of structures built or equipped in certain manner to be used for particular purpose—Presumption.

According to English decisions when the house or structures are built or equipped in a certain manner and intended to be used for any particular purpose, an employment of them for which they are suited or readily capable of being suited in their actual condition is to be presumed. But if they cannot be let for the purpose for which they were built then, it would be quite within the competence of the rating authority to find out whether they could be let for any other or subsidiary purpose. A.I.R. (Vol. 29) 1942 Cal. 455=46 C.W.N. 637=I.L.R. (1942) 2 Cal. 152.

——S. 127 (a)—Liability to pay rates—English Law—Distinction.

Under the English Law the liability to pay rates is dependent on beneficial occupation. The owner of land or building who does not use it in any way is not rateable because he is not in occupation although he may have legal possession in the sense that he can exclude other persons from it. What constitutes "occupation" for purposes of rating depends on various considerations and no exhaustive or accurate definition has yet been formulated. But "occupation" includes possession and something more. Bare possession without the taking of profit or advantage is not sufficient to constitute rateable occupation. There must be use and enjoyment which is capable of being beneficial.

The law as laid down in the Calcutta Municipal Act differs in this respect from English Law that an owner under the Municipal Act even if he does not occupy or enjoy a land or building will be bound to pay rates. The owner is even rateable, if he keeps the land vacant and unoccupied though he gets certain vacancy remissions as are provided in S. 151 of the Act. A.I.R. (Vol. 29) 1942 Cal. 455=46 C.W.N. 637=I.L.R. (1942) 2 Cal. 152.

——S. 127 (a)—Valuation of premises by sub-dividing unit—Legality.

Under S. 127 (a) of the Calcutta Municipal Act, the entire premises consisting of land and buildings should be assessed as one unit, when there is no application for sub-division of the unit and no proceedings are taken for that purpose. A valuation of the premises by sub-dividing the same into two parts, *viz.*, the buildings and land appurtenant thereto, and land not so appurtenant is wrong. 53 C.W.N. 620 =A.I.R. 1950 Cal. 121.

——S. 127 (a) and (b)—Applicability—Premises owned by Bank and occupied by General Manager for the time being as a perquisite of his post—Non-payment of rent—Assessment—Procedure.

Where certain premises owned by a bank are occupied by the General Manager of that Bank as a perquisite of his post, without payment of any rent or of any deduction by way of rent out of his salary, it must be held that the General Manager of the Bank is allowed to occupy the premises by the bank as a lien *i.e.*, as long as he happens to be the General Manager. He is not a tenant at all. Hence the assessment should be under S. 127 (b) and not under S. 127 (a) of the Calcutta Municipal Act. I.L.R. (1949) 1 Cal. 293.

——S. 127 (a), (b)—Consolidated rate—Assessment on basis of.

Annual value may be assessed according to consolidated rate notwithstanding any rule in "Assessment and Collection Manual" of Calcutta Corporation. (1936) 63 Cal. 1215=40 C.W.N. 818.

——S. 127 (a), (b)—Letting value—Return or assessment of neighbouring premises—Relevancy—Evidence Act (I of 1872), S. 9.

Evidence afforded by the return or by accepted assessment of the neighbouring premises is admissible in evidence in arriving at the letting value of a building. These are relevant facts and are admissible under S. 9 Evidence Act. A.I.R. (Vol. 27) 1940 Cal. 47=I.L.R. (1940) 1 Cal. 168=44 C.W.N. 165 =189 Ind. Cas. 717.

——S. 127 (a) and (b)—Scheme of—Land and Building—Procedure for—Valuation

The scheme of S. 127 of the Calcutta Municipal Act is that if the land be bare land, it is to be valued under S. 127 (*a*); if there be a building upon it, the case would be governed by S. 127 (*a*) if the building was erected for letting purposes or was ordinarily let; or by S. 127 (*b*) *if the building was not* erected for letting purposes or was not ordinarily let. In either case the building must be taken along with the land and the two assessed together as one unit. The assessment of one unit of assessment partly under S. 127 (*a*) and partly under S. 127 (*b*) is not permissible. 66 I.A. 42 and 52 C.W.N. 173. rel. on.

As regards bare land, the actual user is not considered a hypothetical letting value is taken. The annual value is determined by the hypothetical rent which a hypothetical tenant who is free to use the land would pay in respect of the land.

In regard to buildings, S. 127 makes the annual value dependant on user, actual or intended. It is more logical to hold that where a building with land has to be rated the user of the building ought to

determine the basis on which the building and the land which forms with it one unit of assessment, should be valued. The fiction of English Law that buildings erected on land become, by the mere accident of their attachment to the soil, the property of the owner, is not in consonance with the usages and customs of this country. If the land is covered by buildings erected by the owner of the land or a lessee of the land, the entire land and the building has to be assessed as one unit of assessment, the annual value being determined by the user of the building *viz.*, the building if held for letting purposes under S. 127 (*a*) but if for personal use, under S. 127 (*b*). An assumption that because the land is used for letting purposes, the building though used by the lessee himself should be regarded as held for letting purposes, is unwarranted. S. 127 does not speak of hypothetical user but of actual or intended user. 53 C.W.N. 620=A.I.R. 1950 Cal, 121.

——S. 127 (a) and (b)—Servant living in house owned by master—Occupation, whether as servant or tenant.

If it is a requirement of the contract of service that a servant should live in a house owned by the master whether it is suitable to him or not or if the occupation is necessary and subservient to the service it should be deemed to be the occupation of servant and not of a tenant. On the other hand, if residence is merely optional or is a matter of convenience to the employee and is not required for the better or more efficient performance of his service the occupation will be deemed to be that of a tenant and not of a servant.

Actual payment of rent is not essential for the purpose of creating a tenancy. The law is well settled that if a servant is allowed to reside in a house belonging to the master as a part of the remuneration for his service, his occupation would be that of a tenant aid not of a servant. 51 C.W.N. 517 =229 Ind. Cas. 495=A.I.R. 1948 Cal. 8.

——S. 127 (a) and (b)—Small portion of building let out and rest in occupation of owner.

Where a small portion of a building is let out to tenants and the rest is in direct occupation of the owner himself, the assessment cannot be made partly under S. 127 (*a*) and partly under S. 127 (*b*), but must be made under S. 127 (*b*) Calcutta Municipal Act only. A.I.R (Vol. 27) 1940 Cal. 47=I.L.R. (1940) 1 Cal. 168=44 C.W.N. 165=189 Ind. Cas. 717.

——S. 127 (b)—Construction—"Building not erected for letting purposes and not ordinary let" —Meaning of—"Depreciation."

The consideration that the area in which a building is situated is not a fully developed one has no place where the valuation of a building has to be determined under S. 127 (b), Calcutta Municipal Act, on the footing of its being a "building not erected for letting purposes and not ordinarily let".

The depreciation contemplated by S. 127 (*b*). Calcutta Municipal Act, is the depreciation due to the age of the building, and the consequent wear and tear and like cause. A.I.R. (Vol. 18) 1931 Cal. 506 =35 C.W.N. 283=58 Cal. 793=54 C.L.J. 475 =133 Ind. Cas. 332.

——S. 127 (b)—Determination of value—English method of rating—Method starting with annual rent.

No method of determining the "value" of the land under Cl. (*b*) of S. 127 can be legitimate which starts with annual rent. For the same reason the methods applied under the English system of rating and known by various names which all lead to the determination of a hypothetical annual rent cannot be appropriate. A.I.R. (Vol. 29) 1942 Cal. 418 =46 C.W.N. 496=201 Ind. Cas. 42.

——S. 127 (b)—Land appertaining to premises—Valuation of.

For the purpose of meeting the requirements of S. 127 (*b*), Calcutta Municipal Act, the value of the land appertaining to the premises to be assessed has to be separated and kept distinct from the value of the building standing on the land; the law requires that the valuation is to be on a basis other than the rental basis as indicated in S. 127 (*a*), and the rough and ready method of taking value of the land and building together on a rental basis, and then giving a deduction of the value of the building, is not a method contemplated by law in view of the definite provisions laying down rules for determining the value of different classes of property for the purposes of assessment to rates and taxes as stated in the different and separate Cls. (*a*) and (*b*), S. 127, Calcutta Municipal Act. A.I.R. (Vol. 24) 1937 Cal. 14=41 C.W.N. 200=I.L.R. (1937) 1 Cal. 576=169 Ind. Cas. 811.

——S. 127 (b)—Principle of Beneficial occupation —If sole consideration.

The Calcutta Municipal Act provides in S. 127 (*b*) an independent method, a method independent of the method prescribed in Cl. (*a*) of that section, for, if the Legislature had intended beneficial occupation determined in terms of letting value to be the sole criterion for determining the annual value, no distinction would have been made by it between classes of rateable properties based on user by the owner and user by a tenant. It would, therefore, be not right to say that beneficial occupation is the sole consideration and that it is the beneficial occupier and the value of his occupation that has to be considered in all cases of assessment under the Calcutta Municipal Act. In cases coming under Cl. (*b*) it would not be legitimate to hold that the word "value" in that clause does not mean "sale value" and exclude the same for finding the "estimated present value of land." The assessor is not bound to find out the reasonable hypothetical rent of the whole premises.

It is a well-established principle in rating that property must be valued as it exists at the time when the rate is made, with all the existing circumstances *rebus sic stantibus*. Prospective appreciation or depreciation cannot be taken into account by the rating authority, nor can a hypothetical state of things be assumed. The Legislature intended to give effect to this principle only when it used the phrase "land valued with the building" in S. 127 (*b*). The land is not to be regarded as bare land. It is to be taken

in its present disposition and value. A.I.R. (Vol. 27) 1940 Cal. 47=I.L.R. (1940) 1 Cal. 168=44 C.W.N. 165=189 Ind. Cas. 717.

——S. 127 (b)—"Value of land"—Meaning.

The word 'value' ordinarily means "the amount of money for which the thing can be exchanged in open market"; it means 'the selling price.' This meaning should be given to the word 'value' in S. 127 (*b*), Calcutta Municipal Act. The value must be the selling price and it must be the selling price between a willing seller and a willing purchaser of the property in question, subject to the advantages or disadvantages involved in its present condition. There always remains the difficulty in estimating this price. But this difficulty is to be solved by an expert valuer. No statutory method is laid down by the Legislature and no hard and fast rule can be laid down. If the matter is carried to the Court, the Court must consider as best as it can whether in the circumstances of the case the method followed was right. A.I.R. (Vol. 29) 1942 Cal. 418=46 C.W.N. 496=201 Ind. Cas. 42.

——Ss. 127, 131 and 134—Scope — Amalgamated premises—Valuation — Re-valuation after amalgamation.

Section 127 of the Calcutta Municipal Act cannot come into operation in its entirety, in making a re-valution on amalgamation, and in fixing the annual value of amalgamated premises, so as to control the provisions contained in Ss. 131 and 134, during the currency of the assessment that was in force at the time of amalgamation.

Therefore, the assessment on re-valuation of premises after their amalgamation cannot be higher than the assessment on separate valuation of the amalgamated premises during the currency of the assessment that was in force at the time of amalgamation. A.I.R. (Vol. 20) 1933 Cal. 128=36 C.W.N. 1032=141 Ind. Cas. 32.

——S. 131—Appeal.

Both Cls. (*a*) and (*e*), sub-S. (2) of S. 131, give a right to the subject to call for a new valuation with a view of reduction in the assessment and the mere fact that by Cl. (*b*), S. 146, the Executive Officer has the power to reduce the amount of any valuation in the assessment book (a power from the exercise of which there is no appeal) in no way shows that there is no appeal from a valuation which under S. 131 the owner or occupier has a right to require. A.I.R. (Vol. 17) 1930 Cal. 770=34 C.W.N. 1054=52 C.L.J. 100=58 Cal. 521=130 Ind. Cas. 283.

——S. 131—Burden of proof—Increase in value of land—Onus.

The onus is not on the Corporation, where the Corporation seek to increase the assessee's assessment to show that the value of the land has increased; it is for the assessee to show that it has not increased. 47 C.L.J. 315=32 C.W.N. 378=109 Ind. Cas. 618=A.I.R. 1928 Cal. 450.

——S. 131—Limit of increase—Standard rent under Calcutta Rent Act (1920), S. 26.

Per *Rankin C. J., Buckland and Cammiade, JJ., agreeing with Mukerji, J., Roy, J., dissenting.*—The Corporation of Calcutta, in assessing certain premises under S. 131, sub-S. (1) of the Calcutta Municipal Act, while the Calcutta Rent Act, 1920, is in force, are not competent to increase the assessment above the standard rent under S. 2, sub-S. (*f*), Cl. (*i*) of the Calcutta Rent Act, 1920. 31 C.W.N. 864=46 C.L.J. 535=103 Ind. Cas. 683=A.I.R. 1927 Cal. 659.

——S. 131 (2) (d) —Power of Corporation—New structures erected after assessment of bare land—Revised assessment of both land and structures before expiry of six years—Legality.

If after the assessment of bare land under S. 127 (*a*) of the Calcutta Municipal Act, new structures are erected on that land, it is not permissible for the corporation to re-value the entire premises (*i.e*) the structures and the surrounding land anew under S. 131 (2) (*d*) during the currency of the period of six years prescribed by S. 131 (1) of the Act. The Corporation can only value the new structures. 53 C.W.N. 620=A.I.R. 1950 Cal. 121.

——S. 133 (1)—Applicability—Testator bequeathing portion of premises to deity and rest to his sons—Portion neither structurally separate nor capable of separate enjoyment.

Although generally speaking, the provisions of S. 133 (1), Calcutta Municipal Act, seem to be directed to apply more particularly to property of a joint Hindu family, yet the section was intended to have and has a wider application.

Where a testator has bequeathed a portion of certain premises to a certain deity and the rest of the portion to his sons, but the two portions are not structurally separate and entirely independent nor capable of separate enjoyment and there is only one assessment of the whole premises, the case is covered by S. 133 (1), Calcutta Municipal Act, and the whole premises remain subject to the statutory charge for rates. A.I.R. (Vol. 25) 1938 Cal. 581=I.L.R. (1938) 2 Cal. 209=42 C.W.N. 582=178 Ind. Cas. 99.

——S. 135—Application by assessee under S. 135—Duty of executive officer.

The plaintiff corporation claimed Rs. 1,581-0-9, on account of consolidated rates payable in respect of certain premises owned by the defendant from the fourth quarter of the year 1931 up to the fourth quarter of the year 1937 and a declaration of first charge on the premises for that sum and a decree under O. XXXIV, R. 4 according to Form No. 5-A, Appx. D of Sch. I, Civil P. C. The premises consisted of an old residential house with some godowns or out-houses which had been turned into shops on the road side. The defendant alleged that the house had been vacant at all material times but the shops had been let for part of the time. The defendant wrote to the corporation on December 16, 1931 with an application under S. 135, Calcutta Municipal Act, requesting that the two shops on either side of the gateway on the main road should be separately numbered and assessed. No answer was received to that letter but a demand for rates was received in May 1932. In April 1931 the defendant wrote again but no answer was received to that letter, but in January 1936 a further demand for rates was made. He made many other oral requests,

without result. On May 5, 1936, for the first time, the assessor replied to the defendant's repeated requests stating that his case could not be dealt with unless and until all the arrear rate bills were paid in full:

Held, (i) that on application under S. 135 it was the executive officer's duty to consider the application, to apply his mind to it, and to decide whether, in his discretion, the building could be separately assessed and treated as a separate building;

(ii) that the executive officer was not entitled to impose the condition which he did, inasmuch as S. 135 was not subject to any such condition;

(iii) under the provisions of the law, however, the corporation was entitled to a decree for Rs. 1,556-12-6 and to a declaration as indicated in the prayer of the plaint. A.I.R. (Vol. 28) 1941 Cal. 719= I.L.R. (1941) 2 Cal. 30=200 Ind. Cas. 89.

——S. 135—Scope—Suit by Corporation against owner of premises for consolidated rates and a declaration of first charge—Maintainability.

The premises consisting of a two storeyed house and a number of out-houses were at one time let out on lease, with its out-houses at Rs. 500 a month, but the tenant left the premises so far back as the year 1928, after giving notice to the Corporation, and since then, no part of the house was occupied, though from time to time two of the out-houses used as garages were occupied. The tenant, after waiting for over a year in the hope of getting a sub-tenant for the main building, gave up his tenancy in March 1929, and obtained a considerable remission of rent from the owner of the premises. In spite of this state of affairs, demands for the full owner's and occupier's rates were made by the Corporation upon the owner of the premises. Correspondence passed between the owner and the Corporation till 1937, in which the owner repeately requested the Corporation to assess the out-houses separately from the main building but at every time the Corporation ignored the provisions of S. 135 and refused to consider the owner's case on the ground that the case was not one of sale or partition and as there was no cause for revaluation, the separation asked for could not be allowed. In 1937, the Corporation brought a suit against the owner of the premises claiming Rs. 2092-14-3 on account of consolidated rates due in respect of premises and a declaration of first charge on the premises and a decree according to Form No. 5-A of Appendix D to Sch. I, Civil P. C.:

Held, that strictly, under the provisions of the law, the Corporation was entitled to a decree for the amount claimed and to a declaration of first charge and a decree in Form No. 5-A. A.I.R. (Vol. 28) 1941 Cal. 602=198 Ind. Cas. 632.

——S. 137—Notice—Contents and nature of.

The notice contemplated by S. 137 is not drafted by the Act, but it is clear enough, what it is to contain. It is a notice to say, that the rate payers are informed that the valuation list has been posted at such and such place, and that if they go to the office of Mr. *X*, at such and such address, they are at liberty to see it. It cannot be intended that every few days throughout the whole year, public notices of that sort are to be published in the newspapers and on placards. It is also clear that the notice under the section is to be consequent upon the completion of a general valuation of the whole of the ward. 52 C.L.J. 100=34 C.W.N. 1054=A.I.R. 1930 Cal. 770.

——S. 138—Applicability—Increase of valuation under S. 131 (2).

Section 138 applies to all cases of an increase in valuation and not merely to a case where general assessment of valuation has put a higher figure than previously. It applies to an increase of valuation made under any of the headings of S. 131 (2). 58 Cal. 521=130 Ind. Cas. 283=52 C.L.J. 100=34 C.W.N. 1054=A.I.R. 1930 Cal. 770.

——S. 138—Scope—Notice not served on owner —Assessment, if nullity.

The fact that no special notice under S. 138 had been served on the owners of the premises does not render the assessment of consolidated rate a nullity if the names of the owners were not entered in the assessment books maintained under S. 143, inasmuch as such owners are precluded from objecting to the assessment under S. 144, Cl. (3). A.I.R. (Vol. 32) 1945 Cal. 496=49 C.W.N. 736.

——S. 139 — "Valuation" — Meaning of—Liability to assessment—Jurisdiction of Small Cause Court.

The word "valuation" in S. 139, Calcutta Municipal Act, may mean: (1) the estimated value; (2) the act of process of valuing. There is nothing in this section to limit the meaning of the word "valuation" to the quantum of valuation only. It includes the whole process of valuing as well. Consequently, objections not merely as to quantum of assessment but as to liability to assessment also can be heard by Small Cause Court Judge. A.I.R. (Vol. 26) 1939 Cal. 706=I.L.R. (1939) 2 Cal. 23=43 C.W.N. 789=185 Ind. Cas. 546.

——S. 139 (1) and (2)—Relative scope—Latter if restricts or cuts down former.

Sub-Section (1) of S. 139 is wide enough to cover the valuation which the Executive Officer is required to make either under Cl. (a) or Cl. (e) of Sub-S. (2) of S. 231.

Sub-section (2) of S. 139 does not cut down the general language of Sub-S. (1) so as to restrict the right of appeal to valuation on the occasion of the general assessment or any valuation the result of which has been to bring into assessment lands not previously assessed or to cause an increase of assessment. The effect of Sub-S. (2) is only this that in those cases where under the Act the owner is given the benefit of a notice, the time within which the objection is to be taken is limited to a certain period after receipt of the notice and in cases where there is no provision for a notice the effect of Sub-S. (2) is not to take away his right to object but merely that there is no limit or no effective limit upon his right. A.I.R. (Vol. 17) 1930 Cal. 770=34 C.W.N. 1054=52 C.L.J. 100=58 Cal. 521=130 Ind. Cas. 283.

——S. 140—Order of Executive officer—If award. —Land Acquisition Act (1894), S. 12.

Cuming, J.—There is no analogy between the Land Acquisition Collector making an award and an executive officer of the Municipality passing orders

under S. 140 as to assessment. 47 C.L.J. 315=32 C.W.N. 378=109 Ind. Cas. 618=A.I.R. 1928 Cal. 450.

——Ss. 140 and 141—Applicability—Omission to lodge objection—Right to appeal—Want of sufficient notice—Remedy of rate payer—Mandamus.

Where an owner or occupier upon whom a notice has been served under S. 138 Calcutta Municipal Act, does not prefer an objection under S. 139 there can be no determination of an objection within the meaning of S. 140 and the owner or occupier is not entitled to avail himself of the provisions of S. 141 and appeal to the Small Cause Court Judge.

Obiter.—If the rate-payer had a grievance that he had not been afforded an opportunity of being heard in support of any objection he might have against the increased assessment, his obvious course is to apply to the Judge exercising the ordinary jurisdiction of the High Court and apply for an order in the nature of *mandamus*. A.I.R. (Vol. 19) 1932 Cal. 218 =58 Cal. 1267=53 C. L. J. 581=35 C.W.N. 683 =135 Ind. Cas. 302.

——S. 141—Recording of Evidence—Duty of Small Cause Judge.

As the law provides for an appeal from the decision of Small Cause Court Judge revising the valuation by the corporation for assessment of rent and taxes, it is incumbent upon the trial Judge in such a case to record the evidence in such way as to enable the appellate Court to come to its own decision whether the decision of the trial Judge is right or wrong. A.I.R. 1927 Cal. 659, Ref. 33 C.W.N. 1173= A.I.R. 1930 Cal. 306.

——S. 141—Recording of evidence—Duty of Small Cause Judge.

Per *Mukerji, J.*—The law having provided for an appeal from the decision of the Small Cause Court Judge, it is desirable that the evidence should in such cases be recorded in full. 31 C.W.N. 864=103 Ind. Cas. 683=46 C.L.J. 535=A.I.R. 1927 Cal. 659.

——S. 141—Scope of appeal—Assessee not adducing evidence against assessment—Effect.

The appeal which is given to the Court of Small Causes by the Calcutta Municipal Act is really a proceeding by which an administrative act is challenged before a judicial tribunal. It is intended that it should not be treated as an ordinary appeal from civil Court but is an occasion on which the party complaining must have an opportunity of adducing evidence if he wants, to show that the decision of which he complains is wrong. If therefore, no evidence at all is adduced to show that the Chief Executive Officer's determination is wrong, it is the Judge's duty to dismiss the appeal and confirm the assessment. 47 C.L.J. 315=32 C.W.N. 378=109 Ind. 618=A.I.R. 1928 Cal. 450.

——S. 142—Scope of appeal—Question of fact—If open.

An appeal to the High Court under S. 142 (3) is not a second appeal as contemplated by S. 100. C. P. Code, and the appeal is not restricted to questions of law only 47 C.L.J. 315=32 C.W.N. 378=109 Ind. Cas. 618=A.I.R. 1928 Cal. 450.

——S. 146—Scope—If bar to appeal from valuation under S. 131.

The mere fact that by Cl. (*b*), S. 146 the Executive Officer has the power to reduce the amount of any valuation in the assessment book, in no way shows that there is no appeal from a valuation which under S. 131 the owner or occupier has a right to require. A.I.R. (Vol. 17) 1930 Cal. 770 =52 C.L.J. 100=34 C.W.N. 1054=58 Cal. 521 =130 Ind. Cas. 283.

——S. 146 (b)—Scope—If controls, S. 139.

The construction of S. 139 is not to be controlled or governed in any way by a contemplation of the concluding words of Cl. (*b*) of S. 146. 52 C.L.J. 100=34 C.W.N. 1054=A.I.R. 1930 Cal. 770.

——S. 149—Applicability—Bustees.

S. 149 in so far as it specifies dates for the payment of consolidated rate, applies to *bustees* also. A.I.R. (Vol. 32) 1945 Cal. 470=I.L.R. (1944) 2 Cal. 253=48 C.W.N. 336.

——S. 149—Tax under—Deduction of for Income-tax purposes.

In calculating the annual value of property under S. 9 of the Income Tax Act no deduction can be made on account of the municipal tax payable under S. 149, as this is not authorised by the Act. A.I.R. (Vol. 19) 1932 Cal. 886=36 C.W.N. 1144= 60 Cal. 357=140 Ind. Cas. 1 (S.B.).

——S. 149—Tax under—Nature of.

The owner's share of the municipal tax payable under S. 149 is a liability of the owner and discharge thereof is a benefit to the owner. It is not a tenant's tax. A.I.R. (Vol. 19) 1932 Cal. 886=36 C.W.N. 1144=60 Cal. 357=140 Ind. Cas. 1 (S.B.).

——S. 149—Vacant land—Liability of owner to pay rates.

Under the Calcutta Municipal Act, mere ownership carries with it a liability to pay one-half of the rate assessed on the annual value of the land, though he allows it to lie vacant and unoccupied. 74 I.A. 1=I.L.R. (1947) Nag. 172=228 Ind. Cas. 596 =(1947) P.W.N. 46=1947 A.W.R. (P.C.) 14= 1947 O.A. (P.C.) 14=51 C.W.N. 336=13 B.R. 291=A.I.R. 1947 P.C. 50=I.L.R. (1947) Kar. (P.C.) 72=27 P.L.T. 491=(1947) 2 M.L.J. 106 (P.C.).

——Ss. 149, 205 and 213—Liability for consolidated rates—Corporation mentioning by mistake smaller amount as due from owner of premises—Whether estopped from recovering actual amount due—Purchaser of premises—Position of. *See* EVIDENCE ACT, S. 115. 50 C.W.N. 263.

——Ss. 150 and 151—Deduction or allowance under—Relevancy in fixing annual value.

Any deduction or allowance under S. 150 or S. 151, cannot be taken into account in determining the annual value of premises under S. 127 (*a*). A.I.R. (Vol. 30) 1943 Cal. 166=47 C.W.N. 119=76 C.L.J. 396=I.L.R. (1943) 1 Cal. 92=205 Ind. Cas. 212.

——S. 157—Applicability—Proof that premises are ordinarily occupied by more than one person holding in severalty —Necessity—Evidence of occupation by more than one person holding in severalty—Sufficiency.

The only section of the Calcutta Municipal Act, under which the entire consolidated rate can be levied from the owner of the premises is S. 157, but in order to bring that section into operation it is necessary that the plaintiff should show that the premises in question are ordinarily occupied by more than one person holding in severalty:

Held, that where the plaint contained no such allegations nor any reference is made to S. 157, the fact that some evidence bearing on the question of occupation by more than one person holding in severalty was adduced at the trial, was not sufficient to remedy this initial defect more especially as some at least of the persons in occupation of the premises were persons holding not in severalty but jointly, and were moreover, the persons who had set up a title adverse to that claimed by the defendant, and against whom the defendant ultimately obtained a decree. A.I.R. (Vol. 24) 1937 Cal. 363=41 C.W.N. 701=I.L.R. (1937) 2 Cal. 353=170 Ind. Cas. 373.

——S. 159 (2)—Owner of bustee lands—Assessability of—Existence of middle man between owner of bustee and owner of huts in the bustee—Effect.

The owner of certain *bustee* lands on being assessed under the Calcutta Municipal Act contended that he was not the owner of the *bustee* but that the real owners were certain tenants to whom he sublet the premises in question and while they paid small rents to him he had to pay more to the Corporation by way of assessment than he got from his tenants:

Held, that in view of the provisions of S. 159 (*2*) of the Act there was no case of hardship or prejudice.

The Calcutta Municipal Act does not really recognize the existence of a middleman between the owner of the lands in which the *bustee* is situated and the owners of huts in the *bustee*. A.I.R. (Vol. 20) 1933 Cal. 183=144 Ind. Cas. 929 (1).

——S. 175—Applicability—Rr. 12 to 14 need not be resorted to where application for cancellation of notice is not disposed of—Duty of Magistrate.

Where the accused was informed that his representation for the cancellation of the notice was receiving attention:

Held, that the accused was under no obligation whatsoever to avail himself of the provisions of Rr. 13 and 14 of Sch. 6.

Held, further that the Magistrate, apart from the question of the accused's availing himself or not of the provisions of Rr. 13 and 14 of Sch. 6, was bound to find if it was necessary for him to take out a license. 43 C.L.J. 231=27 Cr.L.J, 549=93 Ind. Cas. 1045=A.I.R. 1926 Cal. 614.

——S. 175—"Carrier"—Meaning of—Even if person carries only passengers yet he is carrier within Sch. 6, item 18.

Even if a person carries only passengers for hire yet he is a carrier within the meaning of Sch. 6, item 18 for any person who carries goods or passengers for hire or gratuitously by land or water is a carrier. 34 C.W.N. 452=A.I.R. 1930 Cal. 368.

——S. 175—Grant of licence—Effect.

The granting of a licence under the taxing sections such as Ss. 175 and 179 does not preclude the Corporation from refusing to grant a further licence under S. 386. A.I.R. (Vol. 19) 1932 Cal. 269=35 C.W.N. 831=136 Ind. Cas. 638.

——S. 175—Liability of Railway company—Notification under S. 135, Railways Act (IX of 1890)—Effect of.

The tax under S. 175, Calcutta Municipal Act, is imposed not by the Railways Act but by the Calcutta Municipal Act. If, therefore, a Railway Company is not liable to pay such a tax, a mere notification by the Governor-General under S. 135, Railways Act, cannot possibly impose any such liability. The object of the notification is really exactly the opposite. In the absence of such a notification the Railway Company will be relieved from paying a tax which is imposed by the taxing statute. A.I.R. (Vol. 27) 1940 Cal. 531=I.L.R. (1940) 1 Cal, 585=44 C.W.N. 648=42 Cr.L.J. 100=191 Ind. Cas. 184.

——S. 175—Scope—Tax under—Nature of—S. 391—Distinction.

Section 175 of the Act deals with a very different class of licence from that contemplated by S. 391. The object of the two sections and the nature of the licences required by them are different. Section 175 occurs in Chap. XII which deals with tax on professions whereas S. 391 occurs in Chap. XXVI, dealing with regulation and inspection of places of public resort. A.I.R. (Vol. 20) 1933 Cal 243=37 C.W.N. 344=1933 Cr. Cas. 322=34 Cr.L.J. 693=60 Cal. 689=144 Ind. Cas. 198.

——S. 175 (as extended to Howrah).

Company trading in oil—Store in Howrah—Orders negotiated in Calcutta—Oil distributed from Howrah. Licence should be obtained from both Municipalities. A.I.R. (Vol. 23) 1936 Cal. 477=40 C.W.N 766=1936 Cr. Cas. 699 (2)=38 Cr.L.J. 203=63 Cal. 1203=166 Ind. Cas. 402

——S. 175 (as extended to Howrah)—"Trade", meaning of.

The words of S. 175, Calcutta Municipal Act should be taken in their ordinary meaning instead of putting an unusual construction on them in accordance with a special meaning given to the word "trade" in reference to income-tax charges on firms having international business. That word is used in the section in its ordinary meaning, *i.e.*, to mean an exchange of goods for money or for goods with the object of making profits. A.I.R. (Vol. 23) 1936 Cal. 477=40 C.W.N. 766=1936 Cr. Cas. 699 (2)=38 Cr.L.J. 203=63 Cal. 1203=166 Ind. Cas. 402.

——S. 179—Conviction—Proof—Necessity.

In absence of any proof that the Commissioner or the authority with his powers had determined the average amount of rubbish removed daily from the market, conviction under S. 179, is illegal. I.L.R. (1941) 2 Cal. 385.

——S. 179—Duty of Corporation—Delegation of power to District Engineer—Legality.

According to S. 179 (b), it is the Corporation which has to determine the average quantity of offensive matter and rubbish removed daily. The delegation of the power to the District Engineer to determine the same and even to decide disputes relating thereto is not in conformity with the provisions of S. 179 (b). A.I.R. (Vol. 28) 1941 Cal. 560

=I.L.R. (1941) 1 Cal. 322=45 C.W.N. 306=43 Cr.L.J. 28=196 Ind. Cas. 539.

——S. 204—Presentation of bill—If condition precedent to suit.

Per *Chakravartti, J.*—The presentation of a bill under S. 189 is a condition precedent to the institution of a suit under S. 204 of the Calcutta Municipal Act. 51 C.W.N. 326=A.I.R. 1947 Cal. 369 =I.L.R. (1947) 2 Cal. 173.

——Ss. 204 and 205—Relative—Scope—Occupier's share of consolidated rate—Whether a charge on property—Suit for arrears of occupier's share against owner alone if lies.

S. 205 of the Calcutta Municipal Act creates a charge on the land or building for arrears of the occupier's share of the consolidated rate as well and itself authorises a suit for enforcement of the charge, which need only satisfy its own requirements and not also the requirements of S. 204. Such a suit may be against the owner alone who, though not liable to pay the occupier's share personally, is in the position of a surety whose immovable property stands charged for the debt of another, *viz.*, the occupier. S. 204 does not authorise a suit against the owner for the occupier's share of the rate, except in cases covered by S. 157 and questions arising under it have no relevance to a suit brought against the owner for enforcement of the charge under S. 205 in respect of the occupier's share. I.L.R. (1947) 2 Cal. 173=51 C.W.N. 326=A.I.R. 1947 Cal. 369.

——S. 205—Applicability to Howrah—Bengal General Clauses Act (I of 1899), S. 25 — Howrah municipality — Decree declaring tax a charge on holding, legality of.

Section 205, Calcutta Municipal Act, does not apply to Howrah inasmuch as there has been no notification extending the same to Howrah. Although the notification under the Act of 1899, extended the corresponding S. 228 to Howrah, and was kept alive by S. 25 of the Bengal General Clauses Act, it has been rendered nugatory by the repeal of S. 228, itself, and the notification cannot be deemed to have been issued under the provisions re-enacted in the Act of 1923.

There is no provision in the Bengal Municipal Act, under which the Municipal rates and taxes would operate as a charge on any holding. Hence, a decree declaring taxes due to be a charge on the holding and providing for its enforcement by sale of the holding is not legal. A.I.R. (Vol. 19) 1932 Cal. 315=59 Cal. 1007=36 C.W.N. 11=138 Ind. Cas. 28.

——S. 205—Applicability to Howrah.

Section 205 of the Calcutta Municipal Act does not apply to Howrah. A.I.R. (Vol. 18) 1931 Cal. 481=131 Ind. Cas. 861.

——S. 205—Charge under—Enforcement—Procedure—T. P. Act, S. 67-A—Applicability.

Statutory charges created under the provisions of S. 205 are not governed by S. 67-A of the T. P. Act. A.I.R. (Vol. 21) 1934 Cal. 862=60 C.L.J. 312=38 C.W.N. 917=61 Cal. 1047=153 Ind. Cas. 972.

——S. 205—Charge under—Enforceability against purchaser at sale in execution of mortgage decree.

Sale of house property in execution of mortgage decree—Absence of condition in conditions of sale that purchaser to pay arrears of outstanding rates and taxes—Purchaser not liable. A.I.R. (Vol. 21) 1934 Cal. 842=61 Cal. 956=38 C.W.N. 971=163 Ind. Cas. 247.

——S. 205 — Construction — Consolidated rate — When a first charge—'Belonging to the said person'—Meaning of.

The consolidated rate, whether payable by the owner or occupier in respect of any land or building, is a first charge on such land or building and hence can be declared as a charge when only the occupiers' share of the tax is in arrears. The words "and belonging to the said person" can have reference only to the words immediately preceding, *viz.*, "movable property found within or upon such land or buildings".

Section 205 as it stands is out of harmony with the scheme of the Act and should be amended. (1937) 169 Ind. Cas. 474=41 C.W.N. 353.

——S. 205—Scope and effect of—Charge.

It is provided by S. 205 that the consolidated rates shall, subject to certain conditions be a first charge upon the premises. A.I.R. (Vol. 21) 1934 Cal. 842=61 Cal. 956=38 C.W.N. 971=153 Ind. Cas. 247.

——S. 205—Scope and effect of—First charge—Arrears accruing during Hindu widow's lifetime—Enforceability of charge against reversioners.

Under S. 205, Calcutta Municipal Act, the rates and taxes which become due during the lifetime of a Hindu widow in possession become a first charge upon the properties and that charge remains enforceable against the properties, in the hands of her daughter even though the latter succeeds not as the heiress of her mother but as the heiress of her father. A.I.R. (Vol. 18) 1931 Cal. 557=35 C.W.N. 341=133 Ind. Cas. 699.

——S. 250—Scope—Damage caused by defendant's negligence—Plaintiffs not bound to anticipate and take precautions against possible negligence. (1936) 63 Cal. 592. [Reversed in A.I.R. (Vol. 24) 1937 P.C. 306=170 Ind. Cas. 332 (P.C.)]

——S. 271—Pendency of Suit for ejectment—Effect on liability.

The pendency of a suit in ejectment against the tenant or the existence of an injunction against the owner of the premises restraining him from taking possession of the premises or even the mere filing of an application under S. 527 would not be sufficient to relieve the owner from a liability for a conviction for non-compliance with a notice under S. 271 requiring him to erect privies connected with the premises. One cannot entirely overlook, however, the existence of such proceedings in considering the gravity of the offence and in determining the proper sentence. 30 Cr.L.J. 1026=119 Ind. Cas. 369=1929 Cr. Cas. 172=A.I.R. 1929 Cal. 490.

——S. 271—'Premises'—Building or land.

The word 'premises' in S. 271, Calcutta Municipal Act, means the building and not the land. (1937) 165 Ind. Cas. 130=40 C.W.N. 797=37 Cr.L.J. 1087.

——S. 271—Requisition under S. 271, on whom to be served—Service of requisition only on owner of land—Effect.

Where the owner of the land is not the owner of the structures standing thereon, the requisition under S. 271 should be served in the first instance upon the owner of the structures built upon the land and not upon the owner of the land. Hence when the requisition is served only on the owner of the land, he cannot be convicted for non-compliance with it. (1937) 165 Ind. Cas. 130=40 C.W.N. 797=37 Cr.L.J. 1087.

——Ss. 271 and 278 (1) (b)—Scope of—Whether there is proper access to privy—Duty of Corporation—"Take such other order"—Meaning of.

The words "take such other order" must be construed *ejusdem generis* with the words preceding. Whether proper access is available to a privy by people living in a particular portion of a house is a question in which the corporation is not *prima facie* interested. The tenants having just grievance can take such steps for securing proper access as the law provides but the corporation is only entitled under the Municipal Act to see that privy is in a sanitary condition, and the privy accommodation is sufficient. A requisition by the corporation that proper access should be provided to a privy is not, therefore, covered by S. 278 (1) (b). 51 C.L.J. 469=A.I.R. 1930 Cal. 285.

——S. 291 (2)—Prosecution under—Burden of proof. *See* EVIDENCE ACT, S. 106. A.I.R. 1948 Cal. 58.

——S. 299—Interpretation and scope of—Inapplicability of corresponding provisions of the Act of 1899.

According to S. 299 of the Act a person may be served with notice for any alleged unlawful encroachment. The words "fixture attached to a building" should be construed as they stand and the structure complained of whether constructed either before or after the "buiding" is within the section. The corresponding provision of the Act of 1899 which required the building to be erected before the fixture does not govern the interpretation of the present Act. 1929 Cr. C. 72=A.I.R. 1929 Cal. 440.

——S. 300—(As applied to Howrah)—Managing agents of company—Notice served on—Regularity of.

The company which owns the property cannot evade responsibility for acts in relation to their fixed property by transferring their management to the managing agents. The managing agents cannot be said to be either the owners or the occupiers of the premises. The persons who own and occupy the premises are the company. Consequently a notice under S. 300, Calcutta Municipal Act in respect of the property of the company served on the managing agents cannot be said to be addressed to the proper persons. A.I.R. (Vol. 28) 1941 Cal. 550 =45 C.W.N. 925=43 Cr.L.J. 33=196 Ind. Cas. 559.

——Ss. 300, 534, 488 (as applied to Howrah)—Construction of wall by company obstructing public road—Notice to remove within fifteen days—Obstruction not removed—Complaint by Municipality—Duty of Courts.

A company built a wall which the Municipality alleged, obstructed a public road. The Municipality sent a requisition for the removal of the wall to the company on August 9, 1939. Fifteen days were allowed in the notice to remove the obstruction. The company did not remove it either within 15 days or at all. The Municipality filed a complaint under Ss. 488 and 300, Calcutta Municipal Act:

Held, that the offence was one for not complying with the notice to remove the obstruction and not one for constructing the wall and period of three months under S. 534, therefore, began to run from August 24, 1939.

Held, further that the Magistrate in coming to the conclusion that the complaint was time-barred and, therefore, the question whether the road was a public road did not arise, was in error. The correct way for the Magistrate to deal with it was first to ascertain whether the road in question was a street within the Municipal limits. If it was not, no further questions arose and the complaint would stand dismissed. If, on the other hand, he came to the conclusion that the road in question was a public street within the meaning of S. 300, Cacutta Municipal Act, it was for him to determine whether an obstruction was caused which ought to have been removed and whether there was a failure to remove it. If so and proceedings were brought within a period of three months from the failure, then it was his duty to convict the accused of the offence which was alleged against him under Ss. 488|300 of the Act. A.I.R. (Vol. 28) 1941 Cal. 550=45 C.W.N. 925 =43 Cr.L.J. 33=196 Ind. Cas. 559.

——S. 303—Applicability—Erection of entirely separate building.

The object of S. 303, Calcutta Municipal Act, is to prevent erection of structures which will seriously add to an obstruction already existing on land which falls within a projected street alignment and which the Corporation can sanction if they choose. The section has no application to the erection of an entirely separate building. A.I.R. (Vol. 21) 1934 Cal. 506=38 C.W.N. 357=59 C.L.J. 79=61 Cal. 326=151 Ind. Cas. 733.

——S. 346—Scope of—Right of—Duty of Corporation to accept notice.

It is obligatory on the Corporation to accept notice given to them under S. 359 and it is not open to them under the section to refuse to accept such a notice and the owner of the bustee giving the notice is entitled to six months' time, allowed by the section within which he is to effect the removal of all the huts standing on the land. It is immaterial whether the bustee owner had already been prosecuted and fined for neglect to carry out a requisition under S. 346, he is entitled to serve a notice uunder S. 359 on the Corporation and to get six months' time allowed under that section for the removal of all the huts on the land, but it is open to the Corporation if, on the expiry of the six months from the date of the notice, the huts had not been removed to revive once more the former proceedings under S. 346. The Corporation are clearly not entitled to prosecute the bustee owner within six months from the date of notice. 44 C.L.J. 579=99 Ind. Cas. 933= 28 Cr.L.J. 197=7 A.I.Cr.R. 330=A.I.R. 1927 Cal. 218.

——S. 359 (6) and (7)—Particular portion of bustee land declared non-bustee—Bustee standard plan not nullity.

Although a particcular portion of the **bustee** may be declared non-**bustee**, the **bustee** standard plan with regard to that land is not a nullity; it is for the Corporation then to determine how much, if anything of the standard plan, should be cancelled or varied. The same view applies to streets. Sub-S. (6) of S. 359 applies to such a case. So also, Sub-S. (7) has been specifically inserted to meet the case of a street, projected but not actually made, the alignment of which affects the land which under the earlier sub-section is declared to be non-**bustee.** When the land is 'debustified', **i.e.**, declared a non-**bustee** land under the earlier sub-sections of S. 359, the practical question arises as to how far, if at all, the alignment of the projected street should be varied A.I.R. (Vol. 25) 1938 Cal. 870.

——S. 363—Applicability—Building built without sanction before the new Calcutta Municipal Act, 1923—Sanction by General Committee to proceed under S. 449 of old Municipal Act, reaffirmed by new Corporation—Demolition order—Validity—Bengal General Clauses Act (I of 1899), S. 8.

A prosecution had been sanctioned by the General Committee under S. 449 of the old Act (III B.C. of 1899) but the case was actually started under the new Act (III B.C. of 1923) by the new Corporation and notice upon the party was issued and an order of demolition was passed.

Held, that whether the proceedings were under S. 363 or 364 of Act (III B.C. of 1923), they were irregular and the order of the Municipal Magistrate was not justified as the party had not been heard by the Corporation before sanction for prosecution was given.

Held, further that the proceedings under S. 449 of the Calcutta Municipal Act (III B.C. of 1899) could only be started by the General Committee and, therefore, in respect of unauthorized structures which existed before 1st April, 1924, when the Calcutta Municipal Act of 1923, came into force, there was, after the passing of the latter Act, nobody competent to take proceedings under S. 449 of the Act of 1899. 29 C.W.N. 898=90 Ind. Cas. 317=52 Cal. 962=26 Cr.L.J. 1533=A.I.R. 1925 Cal. 1251.

——S. 363—Discretion—Exercise of—Principles.

Suhrawardy, J.—S. 363 is not imperative inasmuch as it says that the Magistrate may make an order directing that such erection, etc., or so much thereof as has been executed unlawfully be demolished or altered. One of the grounds on which such an order can be passed is that the erection has not been commenced after obtaining the permission of the Corporation, but the section makes it discretionary with the Magistrate to make such an order and it has been interpreted by the Court that the discretion vested in the Magistrate under this section should be exercised on equitable ground. 33 Cal. 287; 34 Cal. 341, Foll. 1929 Cr.C. 525=33 C.W.N. 777=A.I.R. 1929 Cal. 781.

——S. 363—Jurisdiction—Fine—If can be inflicted.

In a proceeding under S. 363 of the Calcutta Municipal Act, no fine can be inflicted under the provisions of S. 493 of the Act. A.I.R. 1950 Cal. 140=51 Cr.L.J. 645.

——S. 363—Jurisdiction to order demolition—"Construction"—Meaning of.

It is essential that the provisions of the Municipal Act should be enforced in the interest of public health. At the same time it is necessary that they should be enforced according to law. Alterations in a building suggest change of its character or position. The mere fact that there has been a reconstruction does not give the Magistrate a right to order demolition unless there has been erection of a new building or alteration of or addition to the existing building and the case clearly falls under S. 363, Calcutta Municipal Act, because the word 'reconstruction' may mean any one of a number of things. A.I.R. (Vol. 26) 1939 Cal. 289=68 C.L.J. 478=180 Ind. Cas. 824=40 Cr.L.J. 528.

——S. 363—Proceeding under—Conversion to one under S. 493—Power of Magistrate.

It is not open to a Magistrate to convert a proceeding instituted under S. 363 of the Calcutta Municipal Act to one under S. 493 of the Act. A.I.R. 1950 Cal. 140=51 Cr.L.J. 645.

——S. 363—Retrospective application—Proceedings under S. 449, Old Act.

It is quite impossible to carry out the provisions of S. 449 of the old Act by means of the procedure set forth in S. 363 of the new Act. 53 Cal. 974=44 C.L.J. 37=27 Cr.L.J. 1146=97 Ind. Cas. 666=A.I.R. 1926 Cal. 1138.

——S. 363—Burden of proof—Scope of inquiry.

Under S. 363 (2), the question before the Magistrate is not whether the Corporation has shown the date of the work being done or that the date was within five years of the institution of the proceedings but whether the owner has established to his satisfaction that the work has been done more than five years previously. 50 C.L.J. 527=1930 Cr.C. 222=A.I.R. 1930 Cal. 222.

——S. 363—Demolition—Discretion of Magistrate—Power of High Court on revision.

In a proceeding under S. 363 of the Calcutta Muunicipal Act, a Magistrate is not bound to order a demolition even if he found that a building is unauthorised or that it infringed the building rules. The magistrate has a discretion in the matter and can refuse demolition if he thinks it would be against equity and justice.

The High Court on revision has the power to exercise all the powers which the Magistrate has and it is open to it either to order demolition or to prohibit demolition if such demolition has been ordered by the Magistrate.

Where a party is allowed to be in possession of an unauthorised building for a period of over three years with full knowledge of the corporation, it is unfair and injust to direct him to demolish the building especially when it has not infringed any of the building bye-laws of the corporation and has not affected adversely any rights of the neighbours. A.I.R. 1950 Cal. 140=51 Cr.L.J. 645.

——S. 363—Demolition not punishment.

The demolition of unlawfully erected work is not a punishment within the meaning of S. 363, 8 C.W.N. 142, Foll. 54 Cal. 532=31 C.W.N. 506=

101 Ind. Cas. 183=45 C.L.J. 469=28 Cr.L.J. 407 =8 A.I.Cr.R. 35=A.I.R. 1927 Cal. 509.

——S. 363—Nature of proceedings—Party—If accused—Administration of Oath.

A party to a proceeding under S. 363 of the Calcutta Municipal Act relating to demolition of an unauthorised structure is not an accused person and as such is not exempted from administration of oath under S. 342 of the Cr. P. Code. 54 Cal. 532=31 C.W.N. 506=101 Ind. Cas. 183=45 C.L.J. 469=28 Cr.L.J. 407=8 A.I.Cr.R. 35=A.I.R. 1927 Cal. 509.

——S. 363—Necessity for privacy—If sufficient excuse for contravention of section.

A person without sanction and in defiance of the Calcutta Municipal Act and rules of the Corporation erected a boundary wall 18 feet high though under law he was limited to a height of 10 feet and the Magistrate ordered demolition. It was admitted that the walls were necessary for securing privacy of the premises.

Held (Per **Buckland** and **Graham, JJ.**), that there was breach of S. 363 read with S. 3 (7) and the order of demolition by the Magistrate was valid and legal and the discretion was rightly exercised. (Per **Suhrawardy, J.**, contra). That Magistrate should not as a Court of equity order demolition and that Magistrate did not exercise proper discretion when he took into account simply the fact that the structure was put up without the sanction of the Corporation. 1929 Cr.C. 525=33 C.W.N. 777=A.I.R. 1929 Cal. 781.

——S. 363—Scope—Notice but no actual order for demolition—Suit for declaration and for injunction—Competency.

Where a person has been served by the Corporation with a notice to show cause why the Corporation should not apply to the Magistrate for a demolition order under S. 363 but there has not yet been any actual order for demolition, a suit for declaration that order of demolition is **ultra vires** and for an injunction against demolition is premature. A.I.R. (Vol. 27) 1940 Cal. 11=70 C.L.J. 311.

——S. 363—Scope of inquiry—Whether sanction was rightly withheld—If can be gone into.

Under the provisions of S. 363, Calcutta Municipal Act, if the Corporation are satisfied that the erection of any new building has been commenced without obtaining the written permission of the Corporation, they may apply to a Magistrate and such Magistrate may make an order directing that such erection or so much thereof as has been executed unlawfully be demolished. The section does not give the Magistrate any power to enquire as to whether the sanction was rightly withheld or not. If the sanction was withheld, for whatever reasons, the Magistrate is entitled to order the demolition of the building and the High Court is not entitled to interfere with the order in second appeal. A. I. R. (Vol. 26) 1939 Cal. 285=68 C.L.J. 476=43 C.W.N. 186=180 Ind. Cas. 907.

——S. 363 (2)—Applicability of case under S. 364—'Proceedings'—meaning of — Highway—Proof of dedication—User by public, effect of—Cul de sac whether public highway—'Sadharaner' meaning of.

Under the provisions of S. 363 of the Calcutta Municipal Act, the work is unlawful from the beginning, and proceedings must be taken within five years of erection. But under S. 364, the illegality begins only upon the expiry of the notices mentioned therein and proceedings must be taken within five years of such expiry. Section 363 (2), therefore, is applicable to S. 364, **mutatis mutandis**, namely, by substituting for "any work which has been done," the words "any non-compliance with a notice which expired."

The word 'proceedings' means proceedings before a Magistrate and does not contemplate proceedings before a Committee of the Corporation, which precede the application to the Magistrate.

'Sadharaner' means that which is common as a common property, and does not mean 'public' or anything approximating to it.

Before private land can become a public street or passage, it must be made so by Statute or be dedicated specifically by the owner to the use of the public or there must be circumstances from which such dedication can be presumed.

A public highway must **prima facie** lead from one public place to another. A **cul de sac** may be a public highway, but its dedication will not be presumed from mere public user without evidence of expenditure on the place in dispute for repairs, lighting or other matters by the public authority. A.I.R. (Vol. 18) 1931 Cal. 433=58 Cal. 1124=1931 Cr. Cas. 585=35 C.W.N. 397=32 Cr.L.J. 590=130 Ind. Cas. 870.

——S. 363, Proviso—Notice—If mandatory—'Occupier'—Meaning—'Sub-tenant'.

Under S. 363, proviso, Calcutta Municipal Act, both the owner and occupier are entitled to notice of an application for demolition and must be given an opportunity of adducing evidence and of being heard in their defence. A tenant and indeed even a sub-tenant is an "occupier" as defined in S. 3 of the Act. An order of demolition passed without notice to a tenant in possession and without his knowledge is, therefore, liable to be set aside. 48 C. W. N. 170, rel. on. 53 C.W.N. 813.

——Ss. 363, 364, 493—Jurisdiction of Magistrate—Building rules, infringement of—Right of Corporation—Application for demolition order and fine—Competency—Power of Magistrate to impose fine.

Where there is an infringement of the Building Rules, the Corporation may make an application either under S. 363 (or S. 364) or under S. 493, Calcutta Municipal Act but not under both; in other words, it may ask either for demolition or for a fine, and not for both. This does not and cannot, however, affect the Magistrate's jurisdiction. Merely because the Corporation, if it proceeds under S. 363, may not make an application under S. 493, it does not follow that if in a proceeding under S. 363 the Magistrate is satisfied on the facts that a case exists for imposing a fine under S. 493, he may not make such a penal order, either in lieu of or in addition to an order for demolition. The Magistrate, however, should not do so without giving the party affected reasonable opportunity of showing cause against the proposed order. A.I.R. (Vol. 25) 1938 Cal. 36=41 C.W.N. 1373=173 Ind. Cas. 303.

——S. 363, Sch. XVII, R. 65—Power of Corporation to revoke permission—Discretion of Court—Opportunity to be given to party before revoking sanction—Delay in confirming revocation—Effect on right to demolition.

Although under R. 65 of Sch. XVII, Calcutta Municipal Act, the power of the Corporation to cancel a permission on the ground of material alteration is absolute, it is so only in the sense that no other authority can revise the order of revocation or restore the permission so cancelled. In the Court which has to make the order of demolition there is a discretion which the word 'may' used in S. 663 of the Act in reference to this matter, plainly indicates. For a proper exercise of that discretion, it is absolutely necessary for the Court to go into the question as to what the exact circumstances were under which the revocation was made or the extent to which the misrepresentation or fraudulent statemment, if any, could have affected in granting of the permission.

When a party has acquired a valuable right in the shape of a permission to build, that permission cannot be withdrawn behind his back on a charge that he has been guilty of fraud or misrepresentation and without an opportunity being allowed to him to say what he may have to say in his defence. To determine whether the discretion which the law vests in the Court should be exercised in favour of the Corporation one of the matters that must be taken into consideration is the length of time that has elapsed since the completion of the structures, which on account of the revocation must be deemed to be unauthorized.

Where the sanction for erection of a building was revoked on February 27, 1928, but the revocation was not confirmed till August 6, 1930, the matter not being considered of sufficient importance for any decisive action being taken:

Held, that under such circumstances, it would be quite wrong to make an order for demolition. A.I.R. (Vol. 21) 1934 Cal. 389=38 C.W.N. 280=1934 Cr. Cas. 530=61 Cal. 356=149 Ind. Cas. 1193.

——S. 364—Applicability—If confined to case of emergency.

The applicability of S. 364, Calcutta Municipal Act, is not confined to cases of emergency where there is danger to the public. Under S. 364, the Magistrate has a discretion to make an order directing the removal of a structure or not. A. I. R. (Vol. 20) 1933 Cal. 341=56 C.L.J. 578=1933 Cr. Cas. 414=34 Cr.L.J. 521=143 Ind. Cas. 122 (2).

——S. 364—Limitation—Limitation Act, Art. 146-A.

An application under S. 364 (1) not being a suit, Art. 146-A, Limitation Act does not apply. A.I.R. (Vol. 26) 1939 Cal. 470=40 Cr.L.J. 870=184 Ind. Cas. 189 (1).

——S. 365 (1)—Applicability—Order under—When can be issued.

An order to stop the progress of work under S. 365 (1), Calcutta Municipal Act can only be issued in cases in which work is proceeding unlawfully in the manner indicated in S. 363 of the Act. A.I.R. (Vol. 27) 1940 Cal. 292=44 C.W.N. 561=41 Cr. L.J. 689=I.L.R. (1940) 2 Cal. 69=188 Ind. Cas. 865.

——S. 371—Applicability—'Public' — Meaning of.

Under S. 371, Calcutta Municipal Act, it is not necessary that the place of dumping must be the property of the Corporation itself. The Corporation may hold the land in some other inferior right, or it might dump the refuse on any private land with the consent of its owner, whose lease and license would legalize what otherwise would be an act of trespass. The word "public" occurring before "receptacle" in S. 371 only means that the receptacle must be one which can be availed of or used by the public in general. It is in that sense that the word 'public' has been used. The depots or places need not necessarily be public in this sense. So far as depots are concerned, there is no specific provision in the Act that they should be open to the public. Places of temporary deposit may be both private and public as indicated in S. 372 but as regards final disposal of refuse matters, the thing is entirely under the control of the Corporation officers as laid down in S. 374 and the public have absolutely nothing to do with it. A.I.R. (Vol. 27) 1940 Cal. 67=44 C.W.N. 194=186 Ind. Cas. 776.

——S. 371—Duty of Corporation—Decision of Corporation not mala fide—Interference by Court.

Section 371 does not merely give a permissive right to the Corporation to do certain things; it enjoins the performance of certain obligatory duties. It cannot be said, therefore, that as there is no element of compulsion nor an intention to interfere with private rights the powers must be exercised without creating a nuisance. As this is an obligatory duty, it must be performed, but both in the selection of the site as well as in the method of doing its work, the Corporation is bound to see that the least practicable nuisance is created. The intention was that the powers should be exercised, if possible, without committing any nuisance, but, if that was not possible steps sould be taken to see that the least practicable nuisance was created. The Corporation has got to approach the question from this standpoint, and if after considering these matters, it comes to a particular decision as to the site for disposal of its rubbish the decision in the absence of any **mala fides** on its part should not be interfered with by Civil Courts. A.I.R. (Vol. 27) 1940 Cal. 67=44 C.W.N. 194=186 Ind. Cas. 776.

——S. 371—Liability of persons consenting to dumping by Corporation.

Where dumping of refuse on private land is the act of the Corporation, and is privileged as coming within the protection afforded by S. 371, the other persons by consenting to the act, cannot be made liable for nuisance in law. A.I.R (Vol. 27) 1940 Cal. 67=44 C.W.N. 194=186 Ind. Cas. 776.

——S. 371—Scope—Sanction—Defect in form of—Effect.

Where the Corporation has delegated powers under S. 371 to the Chief Executive Officer and he has given an implied sanction or approval to the scheme of dumping of refuse on certain land, the defect so far as the sanction is concerned, is in form not in

substance; and no Court would on that ground alone stay the hands of the Corporation. A.I.R. (Vol. 27) 1940 Cal. 67=44 C.W.N. 194=186 Ind. Cas. 776.

——S. 385—Second prosecution and conviction —Legality.

The accused set up a flour mill intending to work it by electricity without the previous written permission of the Corporation and was convicted under S. 385, Cl. (1) read with S. 488, Cl. (1), and was sentenced to pay a fine on 30th March, 1927. After the said conviction, he worked the mill from 1st April, onwards. For this he was prosecuted for having committed an offence under S. 385, Cl. (1) read with S. 488, Cl. (2), and was sentenced to pay a daily fine of Rs. 10.

Held, that once the mill has begun to work with electricity, etc., the thing passes beyond the range of intention and it cannot be said to be a continuance of the same offence, but must be regarded as a new offence altogether and the conviction is bad in law and must be set aside. 32 C.W.N. 591=108 Ind. Cas. 241=29 Cr.L.J. 361=10 A.I.Cr.R. 7=A.I.R. 1928 Cal. 387.

——S. 386—Allowing or permitting the carrying on—What amounts to—Intention—Landlord' liability for tenants' act.

A person cannot be said to have allowed a thing to be done which is not in his power to prevent.

The accused who was the landlord of certain premises let them out to one **A,** who had for sometime been carrying on a business of building bodies for omnibuses. **A** had failed to obtain a licence for the said business. The corporation wrote to the accused informing him that the licence for the "bus body building workshop" at the premises had been refused and that unless he took steps for the removal thereof within one month he would be liable for prosecution under S. 386 (1) (b) of the Calcutta Municipal Act. In reply the accused wrote a letter protesting that the refusal of the licence was unwarranted urging that no licence was required and that no nuisance was created by the business and that, therefore, he did not feel himself called upon to comply with an illegal requisition. There was no suggestion and no evidence that he intended that the letting should be for the purpose of carrying on the business without a licence, if a licence was necessary and could not be obtained:

Held, that the accused was not liable under S. 386. As it was not shown as to how the accused landlord could prevent the business of building bodies for omnibuses being carried on he could not be said to have allowed or permitted the carrying on of the business within S. 386. A.I.R. (Vol. 30) 1943 Cal. 39=I.L.R. (1942) 2 Cal. 165=46 C.W.N. 418=44 Cr.L.J. 204=204 Ind. Cas. 336.

——S. 386—Allowing or permitting the carrying on—What is—Use of land by sub-tenant without permission of landlord for purposes requiring license—Landlord's liability.

Where a landlord lets out premises to a tenant on a monthly rent and such tenant in turn lets it out to a sub-tenant, and it is not proved that the landlord, when letting out, permitted the tenant to use it for certain purposes which require a license, nor is it shown that the landlord could have prevented such use of the premises, the landlord cannot be held liable for the use of the premises without any license within the meaning of S. 386 (1). 1931 Cr.C. 57 =34 C.W.N. 930 (Cal.)=A.I.R. 1931 Cal. 5.

——S. 386—Applicability—If limited to factories, trades and places of public resort—Storing of grains by Government Department for benefit of employees—Need for licence—Crown, if bound by section.

S. 386, Calcutta Municipal Act, will be attracted not with reference to storing in every premises, but only in those which are limited bp the description given by the sub-heading, "Factories, trades and places of public resort".

S. 386 of the Act provides for a licence being taken out for storing grains for purposes of trade. The word "trade" is one of a very general application and must always be considered along with the context in which it is used. The intendment of the Legislature in enacting S. 386 was to regulate and restrict, for the sake of health and convenience of the public, storing of particular articles meant to be utilised for trade. So far as the provisions of this section are concerned, it is immaterial whether the persons storing intend to or actually derive profit or not. In this view it must be held that where grains are stored in a premises for the purpose of distribution among the employees of a particular Government department at concession rates they are stored for trade, and S. 386 is attracted unless its application is otherwise barred.

Where such storing and sale are by and on behalf of the Central Government, the provisions of S. 386 of the Act are inapplicable, the Crown not being bound by those provisions either expressly or by necessary implication, and no licence, therefore, need be taken out in such a case. 73 I.A. 271, foll. 54 C.W.N. 429=A.I.R. 1950 Cal. 417=51 Cr.L.J. 1532.

——S. 386—Refusal of licence—Power of Corporation.

Under S. 386, Calcutta Municipal Act, the Corporation has absolute power to refuse a licence to any particular premises within a particular area even though the Corporation has not excluded generally that area under S. 387. A.I.R. (Vol. 19) 1932 Cal. 269=35 C.W.N. 831=136 Ind. Cas. 638.

——S. 386—Summons—Contents of—Omission to mention place of occurrence—Validity of trial.

Where in a summons to answer a charge under S. 386 (1) (*a*) of the Calcutta Municipal Act, the place of occurrence is not mentioned, such omission in itself is a material irregularity which would seriously mislead the accused. A.I.R. (Vol. 20) 1933 Cal. 117=36 C.W.N. 132=34 Cr.L.J. 250 (2)= 1933 Cr. Cas. 144=141 Ind. Cas. 864.

——S. 386 (1) (a)—'Grain', meaning of—Storing dal without licence, offence.

The expression 'grain' is confined to seeds of cereal plants such as barley, oats, etc., and dues not include **dal**; and storing **dal** without taking out a licence is not an offence under S. 386 (1) (a) of the Calcutta Municipal Act, 1923. A.I.R. (Vol. 18) 1931 Cal. 705=58 Cal. 955=32 Cr.L.J. 1235=1931 Cr. Cas. 985=134 Ind. Cas. 914 (1).

——S. 386 (1) (b)—Charge under—Duty of prosecution—Essentials to be proved.

For the purpose of S. 386 (1) (b), Calcutta Muni-

cipal Act the Corporation means the Chief Executive Officer. The first thing, therefore, in a charge under S. 386 (1) (b), the prosecution has to prove, is that the Chief Executive Officer had formed the opinion that the use of the premises without a licence was dangerous to life, health or property or likely to create nuisance. It is not the duty of the prosecution to convince the Magistrate that the use of the premises was dangerous to health and a nuisance to the neighbours. A.I.R. (Vol. 29) 1942 Cal. 142=I.L.R. (1941) 2 Cal. 308=43 Cr. L.J. 513=199 Ind. Cas. 179.

——S. 386 (1) (b)—Offence under—If continuing offence.

The offence under S. 386 (1) (b) is a continuing offence but under the specific provision of S. 534 (2), Calcutta Municipal Act, the offence comes to an end on the expiry of the year for which the licence is required to be taken out. Therefore, under S. 534 (1) the complaint in respect of the offence under S. 386 (1) (b) must be made within 3 months of the date on which the existence of the offence is first brought to the notice of the Chief Executive Officer. A.I.R. (Vol. 29) 1942 Cal. 142 =I.L.R. (1941) 2 Cal. 308=43 Cr.L.J. 513=199 Ind. Cas. 179.

——S. 386 (1) (c)—Applicability—Vacant land —Use by sub-tenants for purpose requiring licence—Landlord's liability—'Permiting' meaning of.

A let out certain vacant land within the Calcutta Municipality to **B**. **B** sublet a portion thereof to certain person who used the same for keeping horses and cattle without taking out a licence. **A** and **B** were convicted under S. 386 (1) (c) of the Calcutta Municipal Act for having permitted the premises to be used for such purposes without licence:

Held, that **A** could not be held under the circumstances to have permitted the premises to be used for the purposes alleged by the prosecution, and his conviction was illegal. A.I.R. (Vol. 18) 1931 Cal. 5=32 Cr.L.J. 326=58 Cal. 204=53 C.L.J. 65= 34 C.W.N. 930=129 Ind. Cas. 320.

——Ss. 386, 387, 488—Publication of declaration prohibiting user of premises for certain purposes—User of premises for purposes long before declaration — Prosecution—Sustainability.

Where a declaration under S. 387, Calcutta Municipal Act, has been published, the corporation has the right to prohibit the use of premises irrespective of the fact that the premises were being used for such purposes long before the declaration by the Corporation was made.

When a person continues to so use such premises after publication of the notification, he is liable under S. 488. A.I.R. (Vol. 20) 1933 Cal. 732=37 C.W.N. 737=60 Cal. 892=34 Cr.L.J. 1228=1933 Cr. Cas. 1300=146 Ind. Cas. 177.

——S. 386 (1) (a) and Sch. XIX—Business of electroplating—Need for licence.

The business of electroplating cannot fall within any of the items in Sch. XIX of the Calcutta Municipal Act. Electroplating is not the manufacture of chemical preparations and therefore does not fall within Item 8. It is merely covering copper or some such metal with a thin film of silver or nickel and this is done by electrolysis. It is therefore not an offence to carry on the business of electroplating without a licence. A.I.R. 1950 Cal. 147=51 Cr. L.J. 663.

——S. 388—Jurisdiction to pass order restricting use of premises.

Under S. 388, Calcutta Municipal Act, the Magistrate who imposed the fine is alone authorized to pass an order directing that the premises be no longer used for the said purpose. No other Magistrate has jurisdiction to do so. A.I.R. (Vol. 29) 1942 Cal. 529=I.L.R. (1942) 1 Cal. 527=43 Cr.L.J. 870= 202 Ind. Cas. 592.

——S. 391—Discretion of Corporation to refuse licence.

Under the implications of S. 391 of the Calcutta Municipal Act it is open to the Corporation to refuse a licence if in their discretion they think it necessary to do so, but this discretion must be exercised in a judicial spirit and in a reasonable manner.

The question as to whether the refusal to issue a licence was in excess of the authority of the Corporation, may be raised by way of defence in a Criminal Court though it may be more appropriate to do so by a civil declaratory action or by a **writ of mandamus**. A.I.R. (Vol. 20) 1933 Cal. 243=37 C.W.N. 344=1933 Cr. Cas. 322=34 Cr.L.J. 693 =60 Cal. 689=144 Ind. Cas. 198.

——S. 391—Power under—If taken away by Cinematograph Act.

Cinematograph Act (II of 1918) does not take away Corporation's power under S. 891, Calcutta Municipal Act. A.I.R. (Vol. 23) 1936 Cal. 145= 40 C.W.N. 497=63 C.L.J. 1=162 Ind. Cas. 666.

——S. 391—Scope—Cinematograph show—Opening of show without previous licence—Corporation—Powers of.

The term 'theatre' or 'circus' or other similar place of public amusement cannot possibly omit a cinematograph show. A cinematograph show is one of the most widely spread popular forms of public amusement. It is held in a building similar to a threatre and it cannot possibly escape the words of S. 391, Calcutta Municipal Act. If the Legislature which enacted the section intended to omit the cinema in view of the Cinematograph Act of 1918 they should have specially stated it in a proviso to S. 391. As they have not done so and the words of the section are quite clear, it must be held that it includes cinematograph show.

It is the duly of the owner of the place of amusement to take a licence in proper time before he opens the place of public amusement. It may be that the owners of a place which had a licence may be allowed some time of grace to renew the liccence, but for a new show they must, according to the law, take a licence before they open their show. The mere fact that the Corporation chose to give a notice would not make it legal on the part of the proprietor to open a show without a previous licence.

The Corporation can suppress a cinema show which is opened without revious licence of the Corporation. And it is not bound to make a case against the proprietor in Criminal Court and got him fined. A.I.R. (Vol. 23) 1936 Cal. 145=40 C.W.N. 497=63 C. L.J. 1=162 Ind. Cas. 666.

——S. 391—Summons not duly served—Effect on conviction.

A conviction under S. 391 cannot be upheld where the summons has not been properly served on the

accused. A.I.R. (Vol. 19) 1932 Cal. 62=35 C. W.N. 868=33 Cr.L.J. 264=1932 Cr. Cas. 10=136 Ind. Cas. 135.

——Ss. 391, 498 (2)—Lease of theatre—Lessee's liability to take out licence—Power of Corporation to charge fees—Sentence of imprisonment in default of fine, legality of—Bengal General Clauses Act (I of 1899), S. 26.

Where a theatre has been leased by its owner, the lessee is the person who 'keeps it open' and who is, therefore, liable to take out a licence under S. 391, Calcutta Municipal Act.

Under S. 498 (2) of the said Act, the Corporation may charge a fee for such licence, though S. 391 is silent about fees.

Where a person is convicted under S. 391, it is open to the Court to impose a sentence of imprisonment in default of payment of the under the provisions of S. 64, Penal Code, and S. 26, Bengal General Clauses Act. A.I.R. (Vol. 19) 1932 Cal. 63=58 Cal. 1293=35 C.W.N. 865=1932 Cr. Cas. 11=33 Cr.L.J. 303=136 Ind. Cas. 465.

——S. 400—Power of Corporation to extend limits of a bazaar.

The power to define the limits of any bazaar given to the Calcutta Corporation by S. 400 of the Calcutta Municipal Act, includes the power to extend the limits thereof according to the facts and circumstances of a particular case. A.I.R. (Vol. 20) 1932 Cal. 322=36 C.W.N. 1085=60 Cal. 296=143 Ind. Cas. 304.

——S. 406—Applicability—Accused having sweet-stall found frying luchis in ghee—Sample of ghee found grossly adulterated—Offence—Burden of proof.

The accused had a sweet-stall. One of the accused who was in charge of the stall, was frying some **luchis** in **ghee.** The Sanitary Inspector took a sample of the **ghee.** The sample was found grossly adulterated and not containing any butter fat. The accused were prosecuted with respect to the **luchis:**

Held, that the conviction of the accused under S. 406 could not be sustained. It was not the prosecution case that the **ghee** formed one of the constituents of the **luchis** and since their case was that the **luchis** were fried in it, and the **luchis** were not seized or analysed, there was nothing to show that any of the **ghee** was in the **luchis.** Further the prosecution ought to have shown that the **luchis** fried in the adulterated **ghee** would be of an inferior quality to those fried in **ghee** which the public analyst would describe as unadulterated. A.I.R. (Vol. 30) 1943 Cal. 88=43 Cr.L.J. 896=202 Ind. Cas. 679.

——S. 406—Applicability—Accused found taking delivery of consignment of ghee discovered to be adulterated offence.

An accused was found by a Food Inspector unloading a consignment at a railway station. One of the tins which the accused said, contained ghee, appeared to the Food Inspector to contain something else. He accordingly seized the consignment and took it to the Municipal Office. Thereafter he purchased for a sum of four annas a sample of one of the tins for analysis and the analysis, when made, disclosed the fact that the ghee was grossly adulterated. Upon these facts, the accused was convicted.

Held, that he could not be convicted of an offence under S. 406. 32 C.W.N. 842=A.I.R. 1928 Cal. 320.

——S. 406—Compulsory sale—If 'sale'.—Compulsory sale is not sale within S. 406.

A compulsory sale made under the provisions of S. 424, Cl. (1) cannot make any person amenable to the punishment provided for under S. 488 of the Act. 32 C.W.N. 842=A.I.R. 1928 Cal. 320.

——Ss. 406 and 407—Scope—Person storing oil in transit as broker—Liability of.

Even if the accused was storing the oil in transit as a broker, that would not take him out of the provisions of Ss. 406 and 407. Sub-section (1) of these two sections is wide enough to cover such a case. A.I.R. (Vol. 27) 1940 Cal. 76=41 Cr.L.J. 460=187 Ind. Cas. 425.

——Ss. 406, 488—Sentence—Sale by ignorant menial servant—Whether an extenuating circumstance—Amendment of charge—Permissibility.

In the case of a conviction under S. 406, Calcutta Municipal Act, read with S. 488, the fact that the sale was not by the proprietor who was ill and bedridden but by a menial servant who did not know what he was doing and what he was selling, is not an extenuating circumstance.

At the instance of the complainant praying that a case might be treated as one undeer a section different from that mentioned in the charge, the Magistrate can make the necessary correction if the accused will not in any way be prejudiced by reason of the correction being allowed. Correction over the signature of the Magistrate is sufficient. A seal is not required to give vailditp to the correction. A.I.R. (Vol. 20) 1933 Cal. 598=34 Cr.L.J. 836 =1933 Cr. Cas. 962=144 Ind. Cas. 877.

——S. 407—Applicability—Person selling singara fried in ghee—Liability for selling ghee.

Where a person is found to have sold **singara** fried in **ghee** he cannot be said to have sold **ghee** and hence he cannot be convicted under S. 407. A.I.R. (Vol. 27) 1940 Cal. 577=42 Cr.L.J. 322 =192 Ind. Cas. 777.

——S. 407 (1) (ii)—Power to prescribe conditions in respect of butter—Notification dated 28th March, 1928, that butter shall not contain more than 20 per cent. of water—If ultra vires.

There is no limit on the power given to the Local Government to prescribe conditions in respect of butter although S. 407 (1) (ii), Calcutta Municipal Act, does itself lay down certain conditions. The fact that the Provincial Government might abuse the wide powers to prescribe conditions given under this sub-clauses is no reason to interpret the clause as in any way limiting the powers. The condition in the Notification dated. 28th March, 1928, issued by Local Government under S. 407 that butter shall not contain more than 20 per cent. of water is not in any way an unreasonable abuse of the power given by S. 407. The Notification therefore is not **ultra vires** the Provincial Government. A.I.R. (Vol. 30) 1943 Cal. 30=203 Ind. Cas. 89.

——S. 407 (3)—Plea in defence—Ignorance of nature of article sold—Fact that seller was merely temporarily minding shop while manager was away—If valid defence.

S. 407 (3) is of a very drastic character and precludes a defence of mere ignorance on behalf of the seller. The fact that the seller was merely temporarily minding the shop while the actual manager was away cannot relieve him of his technical liability. A.I.R. (Vol. 30) 1943 Cal. 30=203 Ind. Cas. 89.

——S. 418—Applicability—Proof of sale of "food"—Onus—S. 412—Prosecution under—If justified—Presumption of sale of "food".

Before S. 418, Calcutta Municipal Act, can be invoked, it is necessary for the prosecution to prove that what was charged as unwholesome food was "food." Unless this is established, S. 412 cannot, in fact be infringed at all. What this section prohibits is the sale of an articlee of human "food" and obviously in a prosecution for an offence under this section, the burden of proving that what was being sold is "food" intended for human consumption must rest on the prosecuting authority. Once it is shown that the article is an article of human food, it is then, if the party charged says it was not intended for human consumption, that the onus of proving this will be on him. Merely because the Corporation decide to commence a prosecution under S. 419, the law will not and cannot raise a presumption in their favour that it must necessarily be in respect of an article mentioned in the section. A.I.R. (Vol. 25) 1938 Cal. 15=41 C.W.N. 1344=39 Cr.L.J. 259 =I.L.R. (1938) 1 Cal. 558=172 Ind. Cas. 954.

——S. 418—Interpretation—'Article of human food'—Tea-stalks and fluff, whether article of human food.

Tea or tea-dust, is an article of human food, but tea stalks and fluff, obviously is something very different. Merely because tea leaves yield an article of human food, it does not follow that every part of a tea shrub may be put to similar use. A.I.R. (Vol. 25) 1938 Cal. 15=41 C.W.N. 1344=39 Cr.L.J. 259=I.L.R. (1938) 1 Cal. 558=172 Ind. Cas. 954.

——S. 418—Interpretation — "Prosecution" — Proceedings under S. 421.

Graham, J.—The word "prosecution" used in S. 418, Sub-S. (2) does not necessarily cannote prosecution for an offence, and where it is intended to be so used it is usual to state so in plain terms. Prosecution in its wider or more general sense means a proceeding by way of indictment, or information, and as used in S. 418 (2) it may include such proceedings as those taken under S. 421 of the Act. 49 C.L.J. 502=A.I.R. 1929 Cal. 283.

——S. 421—Applicability—Crown.

Although the Crown has not been expressly made bound by the provisions of S. 421 of the Calcutta Municipal Act, relating to public health, it is by necessary implication to be considered as bound by them. The Crown cannot evade its own responsibility to obey such laws of health which are fundamental if a municipality is to function properly and if the Crown violates the same, it has to be made to observe such laws by means of magisterial action. 54 C.W.N. 438=A.I.R. 1950 Cal. 421.

——S. 421—Burden of proof—Article ordered to be destroyed—Onus of proving that it was intended for human consumption.

It cannot be contended that because S. 418, Cl. (2) puts the burden upon the accused to prove that the article is not intended for human consumption in a case of prosecution under the chapter, it indicates that in all other cases, e.g., in a case where the article is ordered to be destroyed under S. 421, the onus will be upon the Corporation to prove that it is intended for human consumption. 49 C.L.J. 502=A.I.R. 1929 Cal. 283.

——S. 421—Nature of proceeding—Order of Municipal Magistrate—Revision—If lies—Cr. P. Code, Ss. 435 and 439.

A proceeding under S. 421, Calcutta Municipal Act, is a proceeding before a Criminal Court within the meaning of S. 435, Cr. P. Code and the High Court has, therefore, jurisdiction under S. 439, Cr. P. Code, to revise an order under S. 421 or the cognate sections of the Calcutta Municipal Act by the Municipal Magistrate of Calcutta. 54 C.W.N. 438= A.I.R. 1950 Cal. 421.

——S. 421—Order under—Revision—Cr. P. Code, S. 439.

The High Court has power to revise an order passed by a Municipal Magistrate under S. 421 of the Calcutta Municipal Act. 54 C.W.N. 480=A. I.R. 1950 Cal. 423.

——S. 421—Right to be heard—Purchaser in possession applying for order of destruction—Seller, if entitled to be heard.

The provisions of S. 421 and of the proceeding sections of the Calcutta Municipal Act are very vague on the question of what procedure is to be followed by the Magistrate and who is to be heard. Where a person in possession of adulterated food purchased by him aplies for an order under S. 421 of the Act for its destruction, the only fair procedure for the Magistrate to follow is to hear the seller who is really interested in the matter and give him an opportunity to present such evidence as he may have on the quality of the article in question. 54 C.W.N. 480=A.I.R. 1950 Cal. 423.

——S. 421 (2)—Order of Magistrate—Nature of—Revision—Cr. P. Code, S. 435.

Per **Mookerjee, J.**—On a reading of the provisions contained in S. 421 of the Calcutta Municipal Act and interpreting the section as a whole and the context in which it appears, there is no escape from the conclusion that the order of a Municipal Magistrate under S. 421 (2) of the Act is a judicial order and not merely a ministerial or executive order. There is also no doubt that the Municipal Magistrate, if he is acting in a judicial capacity, is a Court subordinate to the High Court. Accordingly, the High Court has jurisdiction to exercise reversionary powers under S. 435, Cr. P. Code, in respect of an order passed by a Municipal Magistrate under S. 421 (2) of the Act.

Per **Das Gupta, J.**, contra.—The facts that the Magistrate acting under S. 421 (2) of the Calcutta Municipal Act is just an alternative to the several corporation officers or a Councillor or an Alderman acting under S. 420 of the Act and that the law does not require the Magistrate to issue any notice, take any evidence, or hear any party before passing any order under S. 421 (2) make inevitable the

conclusion that the Magistrate acting under S. 421 (2) is an executive officer and not a Court, and his order for destruction is an administrative, and not a judicial order. The High Court has, therefore, no jurisdiction to revise an order passed by a Magistrate under S. 421 (2) of the Act. A.I.R. 1950 Cal. 36 =51 Cr.L.J. 346.

——S. 421 (2)—Tinned food stuff—Question if it is injurious to public health—Examination by Magistrate of every tin—If necessary.

Per **Mookerjee, J.**—The question whether a particular tinned food stuff is or is not deleterious and injurious to public health is a question of fact which must be determined on the evidence adduced in the case. The Magistrate is not bound to examine each and every particle of the food stuffs or each and every one of the tins. How many tins have to be examined in any particular case must depend on the facts in each case. 44 C.W.N. 173, referred to. A.I.R. 1950 Cal. 36=51 Cr.L.J. 346.

——S. 421 (2) and (3)—Notice to party affected—If necessary.

Per **Mookerjee, J.**—Even though there is no direct provision that a formal notice is to be given to the party before any action is taken either under Sub-S. (2) or Sub-S. (3) of S. 421, Calcutta Municipal Act, the Magistrate is bound to give notice before he arrives at a decision. A.I.R. 1950 Cal. 36=51 Cr.L.J. 346.

——S. 424—Scope—Non-compliance—Effect on conviction.

Where the procedure prescribed by S. 424 of the Act was not followed, conviction under S. 412 was set aside. A.I.R. 1928 Cal. 243.

——S. 424 and 488—Applicability—Refusal by dealer to sell sample of rationed food article to Food Inspector—Offence—Defence of India Rules, Rr. 4 and 81.

Food Inspector of the Calcutta Corporation is a public servant under S. 424 of the Calcutta Municipal Act and will be acting in the course of his duty within the meaning of R. 4, Defence of India Rules, which is an exception to the provision of the Bengal Rationing Order, 1943, promulgated under R. 81 of Defence of India Rules, in asking for a sale to him of a sample of rationed food article under S. 424 of the Municipal Act and the dealer is bound to sell him the sample of the article in spite of Cls. (6), (7) and (9) of the Bengal Rationing Order, which prohibit the sale of any rationed article without a ration card. Refusal by the dealer to sell would amount to an offence under S. 488 read with S. 424 of the Calcutta Municipal Act. A.I.R. (Vol. 33) 1946 Cal. 71.

——S. 478 (17)—Scope—Bye-laws made under S. 559 (18) of old Act—Applicability of.

Bye-laws of the Corporation were made under the powers conferred by S. 559 (18) of Calcutta Municipal Act (III of 1899). That Act was then repealed and replaced by Act III of 1923. Section 478 (17) of the new Act corresponded to S. 559 (18) of the old Act. No bye-laws were made under the new Act of 1923:

Held, that the bye-laws made under the old Act of 1899 were still in force. A.I.R. (Vol. 32) 1945 Cal. 103=46 Cr.L.J. 480=218 Ind. Cas. 408=48 C.W.N. 630=I.L.R. (1945) 1 Cal. 199.

——S. 478 (29)—Bye-law (5)—'Allow'—Meaning of—Tenant allowing offensive matter to accumulate—Landlord's liability.

A person cannot be said to have 'allowed' a thing to be done which it is not in his power to prevent. Therefore where land is let to a tenant and such tenant allows offensive matter to accumulate on the land, the landlord cannot be convicted under S. 478 (29), Bye-law (5) of the Calcutta Municipal Act. A.I.R. (Vol. 18) 1931 Cal. 337=34 C.W.N. 931 =58 Cal. 204=53 C.L.J. 65=32 Cr.L.J. 680=1931 Cr. Cas. 401=131 Ind. Cas. 272.

——S. 488—Conviction on alleged plea of guilty at previous trial—Legality.

The Magistrate is in error in referring to an alleged plea of guilty at the previous trial. A conviction cannot be based on such an alleged plea of guilty. A.I.R. (Vol. 27) 1940 Cal. 76=41 Cr.L.J. 460= 187 Ind. Cas. 425.

——S. 488—Continuing offence—Re-thatching of roof with leaves and allowing it to remain in contravention of R. 7.

Where the owner of a hut put new golpatta leaves upon the old framework of the roof of his hut and the charge against him on that occasion was that he had entirely re-thatched the roof of the hut with new golpatta, and thereafter another prosecution was instituted and it was contended on behalf of the Corporation that because the accused had not pulled down the golpatta roof or altered it in accordance with the requirements of R. 7, Sch. XVII, he was guilty of a continuing offence.

Held, that he was not guilty of continuation of the offence within S. 488 (2), as allowing the roof to remain is not continuation of the offence of making the roof. 56 Cal. 126=114 Ind. Cas. 402=30 Cr.L.J. 296=12 A.I.Cr.R. 147=32 C.W.N. 696 =A.I.R. 1928 Cal. 336.

——S. 488—Offence—When committed.

So long as there is no disobedience by a party to the order of demolition of an unauthorised structure passed by the Magistrate, he commits no offence. 54 Cal. 532=31 C.W.N. 506=101 Ind. Cas. 183=8 A.I.Cr.R. 35=45 C.L.J. 469=28 Cr.L.J. 407= A.I.R. 1927 Cal. 509.

——S. 488 (2)—Applicability—Accused wrongly convicted—Second conviction for continuing to do that act—Legality.

Section 488 (2), Calcutta Municipal Act, provides "Whoever, after having been convicted of any offence continues to commit such offence". That obviously must mean being rightly convicted. A man who has been wrongly convicted cannot be convicted thereafter for merely continuing to do that for which he was wrongly convicted. A.I.R. 1950 Cal. 147=51 Cr.L.J. 663.

——S. 492—Applicability—Scavenging tax not determined—Conviction—Legality.

A person cannot be tried for an offence punishable under S. 492, Calcutta Municipal Act, unless there has been a determination of scavenging tax by the corporation. If the corporation does not determine the fee, it cannot be permitted to prosecute any one for not taking out a licence. A.I.R. (Vol. 28) 1941 Cal. 560=I.L.R. (1941) 1 Cal. 322=45 C.W.N. 306=43 Cr.L.J. 28=196 Ind. Cas. 539.

——Ss. 492, 175, as extended to Howrah—Company trading in oil—Store in Howrah—Order negotiated in Calcutta—Oil distributed from Howrah—Licences if to be taken from both Municipalities.

Where a company which is a trader in oil received oil from various places and stored it in their Howrah premises and distributed it to their customers from there, the transactions being negotiated in Calcutta, undoubtedly in the ordinary sense of the term, they must be said to be carrying on their trade both in Howrah and in Calcutta within the meaning of S. 175 and although their Headquarters are in Calcutta and although it is in Calcutta that the business is arranged, the evidence being that deliveries are made from Howrah on delivery orders which are sent from the Calcutta office. The trade being carried on partly within one and partly within another Municipality, they are liable to take a separate license in each, and on failure to do so, they are liable under S. 492, Calcutta Municipal Act. A.I.R. (Vol. 23) 1936 Cal. 477=40 C.W.N. 766=1933 Cr. Cas. 699 =38 Cr.L.J. 203=63 Cal. 120=166 Ind. Cas. 402.

——S. 493—Scope.

Infringement of building rules—Corporation cannot apply for demolition under S. 63 or S. 364 and also for fine under S. 493. A.I.R. (Vol. 25) 1938 Cal. 36=41 C.W.N. 1373=173 Ind. Cas. 303.

——S. 498 (3)—Scope—Standing Committee confirming sanction for building—Subsequent discovery that confirmation was in breach of Act—Power to revoke sanction.

A written permission to erect a new building is not in itself conclusive proof that all the requirements of the Act have been complied with in respect of that building. If in fact the building in question infringes any of the requirements of the Act, the permission would appear to be a nullity in face of S. 319. Section 498 (3) which provides that a written permission may be revoked if the grantee is convicted of a breach of any of the provisions of the Act in any matter to which the permission relates, clearly implies that there can be no valid permission to erect a building in breach of the Act. To revoke a nullity can hardly be declared **ultra vires.** There can be no question of estoppel against the statute. Hence if the Building Standing Committee discovered, after it had confirmed the sanction for building but before a written permission had actually issued over the signature of the proper officer, that the confirmation was in breach of the Act, there would appear to be nothing in the Act to prevent the committee undoing the mistake and revoking the confirmation. A resolution which has not yet resulted in a written permission is not irrevocable. A.I.R. (Vol. 27) 1940 Cal. 11=70 C.L.J. 311.

——S. 498 (3)—Scope of inquiry—Order cancelling licence—Validity—Jurisdiction of Criminal Court to consider.

A Criminal Court has jurisdiction only to consider whether an order cancelling a licence made by the municipal authorities under S. 498 (3), Calcutta Municipal Act, was made entirely without jurisdiction but not whether the municipal authorities ought not to have cancelled the licence on the merits.

An order cancelling a licence is without jurisdiction if the cancellation is not one which could be justified under S. 498 (3) of the Act. Where the licence provides that undue nuisance should not be created, the municipal authorities can only cancel the licence if they consider that the use of the premises is creating an undue nuisance, that is to say, presumably a nuisance greater than was inticipated when the licence was given—greater than reasonably necessary for carrying on the purposes for which the premises are being used. 54 C.W.N. 909.

——S. 523—Applicability—If limited to disputes arising before payment.

The meaning of S. 523, Calcutta Municipal Act is merely that a dispute as to the extent of the liability of the person required to make payment, or as to the appointment thereof is to be decided according to the procedure laid down in the section. S. 5.3 is not limited to disputes arising before payment. A. I.R. (Vol.) 28) 1941 Cal. 326=(1941) 1 Cal. 182 =45 C.W.N. 79=195 Ind. Cas. 677.

——S. 523—Construction—"Apportionment"—Suit claiming exclusive right to compensation—Bar of.

The word apportionment in S. 523, Calcutta Municipal Act, can properly be applied to cases where one of two parties claims a share in the amount and the other party claims the whole. The ordinary Civil Court has therefore no jurisdiction to entertain a suit where a party claims that he alone is entitled to the whole of the compensation awarded. A.I.R. (Vol. 28) 1941 Cal. 326=I.L.R. (1941) 1 Cal. 182=45 C.W.N. 79=195 Ind. Cas. 677.

——S. 523—Scope—If exhaustive—Right of suit.

There is no rights of suit independent of S. 523 for the amount of compensation awarded by the corporation. A.I.R. (Vol. 28) 1941 Cal. 326=I.L.R. (1941) 1 Cal. 182=45 C.W.N. 79=195 Ind. Cas. 677.

——S. 525—Scope and applicability.

S. 525 permits the institution of a suit to recover sums whose amount has already been ascertained from persons whose liability for the same has been determined. It has no application to disputes as to the total amount to be paid nor to disputes as to apportionment of that amount. It must apply to cases not governed by S. 523. A.I.R. (Vol. 28) 1941 Cal. 326=I.L.R. (1941) 1 Cal. 182=45 C.W.N. 79=193 Ind. Cas. 677.

——S. 531—Appointment of Municipal Magistrate—Purpose of.

Under S. 531, Calcutta Municipal Act, a Municipal Magistrate can only be appointed for one purpose and one purpose alone, namely, trial of offences. There is no provisions for appointment of a Municipal Magistrate as executive officer. 54 C.W.N. 438 =A.I.R. 1950 Cal. 421.

——S. 531—Revision—Order of Magistrate—High Court's power to revise.

The Municipal Magistrate appointed under S. 531 is a Court of inferior criminal jurisdiction within the meaning of S. 6, Cr. P. Code, and orders for demolition passed by such a Magistrate are subject to revision by the High Court under Ss. 435 and 439, Cr. P. Code. Further, an order for demolition is a judicial order and whether made in the exercise of the Magistrate's civil or criminal jurisdiction is open to revision by the High Court. 43 Mad. 146 (P.C.), Foll. 29 C.W.N. 898=90 Ind. Cas. 317=52 Cal. 962=26 Cr.L.J. 1533=A.I.R. 1925 Cal. 1251.

——S. 533—Applicability—Accused failing to appear on adjourned hearing—Conviction in his absence—Legality.

It is quite clear from S. 533, Calcutta Municipal Act, that if the accused fails to appear at the first hearing, that is, at the time and place mentioned in the summons the Magistrate may proceed in his absence. But if the accused fails to appear at some subsequent hearing then the case does not fall within the words of that section, because he does not fail to appear at the time and place mentioned in the summons. Where an accused person fails to appear at an adjourned hearing of a case and the Magistrate proceeds in his absence and convicts him, the conviction is liable to be set aside. 53 C.W.N. 847, foll. A.I.R. 1950 Cal. 147=51 Cr.L.J. 663.

——S. 533—Applicability—Failure of accused to appear at adjourned hearing—Power of Magistrate to proceed ex parte.

S. 533 of the Calcuttta Municipal Act applies only if the accused fails to appear at the initial hearing, that is, at the hearing on the date and time and at place fixed in the summons. It cannot apply where an accused person fails to appear at an adjourned hearing because if he fails to appear at such hearing it is not a failure to appear at the time and place fixed in the summons. The Magistrate cannot, therefore, under the section, hear and determine the case **ex parte** on some subsequent date to which the trial is adjourned. 53 C.W.N. 847=A.I.R. 1949 Cal. 589=51 Cr.L.J. 123.

——S. 533—Applicability—Adjournment of case though accused present—Failure of accused to appear on adjourned date—Magistrate, if can hear case in absence of accused.

The terms of S. 533, Calcutta Municipal Act, cannot be so extended as to entitle the Magistrate to hear the accused (who had appeared on date in the summons) in their absence on the ground that they failed to appear on the date to which the case was adjourned. In the absence of any provision to the contrary in the Calcutta Municipal Act, the provisions of the Criminal P.C., will apply, and, therefore, the Magistrate is not entitled to hear and determine the case in their absence on the subsequent date. A.I.R. (Vol. 24) 1937 Cal. 218=38 Cr.L.J. 632=168 Ind. Cas. 698.

——S. 533—Applicability—Accused present but case adjourned—Whether case can be heard ex parte on adjourned date.

Where the accused has appeared in compliance with the summons but is absent on an adjourned date, the Magistrate cannot proceed **ex parte** against the accused. A.I.R. (Vol. 32) 1945 Cal. 103=48 C.W.N. 630=46 Cr.L.J. 480=218 I.C. 408=I.L.R. (1945) 1 Cal. 199.

——S. 533—Scope—If subject to S. 200 (b), Cr. P. Code—Duty of Magistrate.

The provisions of S. 533, Calcutta Municipal Act, must be taken to be subject to the provisions of S. 200 (b), Cr. P. Code, and a Municipal Magistrate is bound to examine the complainant before recording conviction of a person under S. 291 (2), Calcutta Municipal Act. 48 C.L.J. 190=114 Ind. Cas. 82=32 C.W.N. 1091=30 Cr.L.J. 231=12 A.I.Cr.R. 204=A.I.R. 1928 Cal. 483.

——S. 534—Applicability—Proceedings under S. 363.

S. 534, Calcutta Municipal Act, does not relate to proceedings under S. 363 but to proceedings under S. 493 of the Act. A.I.R. 1950 Cal. 140=51 Cr. L.J. 645.

——S. 534—Burden of proof—Delay—Proof that prosecution is within time—Onus.

The provisions of S. 534 indicate the necessity for prompt action and delay in prosecuting an offence under the Act is as little to the interest of the corporation as to that of the rate payers.

Where therefore corporation seeks to prosecute certain persons under S. 488 of the Act and there is no evidence whatever on the record to show when the offence was first brought to its notice, it is the duty of the corporation to establish that the proceedings although began at a late stage are still within the period prescribed by the law. A.I.R. (Vol. 23) 1936 Cal. 20=1936 Cr. Cas. 111.

——S. 534—Limitation—Starting point—"Date of receipt of notice"—What is.

Under S. 534 of the Calcutta Municipal Act, a prosecution for an offence under S. 395 (2) of the Act must be launched within three months of the date upon which the Corporation first had notice of the offence. S. 395 (2) clearly contemplates that notice can be given to the Corporation other than by notice to the Executive Officer. A body corporate can only receive and read a notice through its agents and if an agent is authorised to receive a complaint and that officer has received it, the corporation has received it. A.I.R. 1949 Cal. 664=51 Cr.L.J. 1=54 C.W.N. 160.

——S. 534—Limitation—Starting omit.

Construction of wall by Company obstructing public road—Notice to remove obstruction within 15 days served on Company on 9th August, 1939—Obstruction not removed—Complaint by Municipality under Ss. 488 and 300:

Held, that the offence was one for not complying with the notice and the period of three months under S. 534 began to run from 24th August, 1939. A.I.R. (Vol. 28) 1941 Cal. 550=45 C.W.N. 925=43 Cr.L.J. 33=196 Ind. Cas. 559.

——S. 534—Limitation.

Under S. 534 (1) the complaint in respect of the offence under S. 386 (1) (b) must be made within 3 months of the date on which the existence of the offence is first brought to the notice of the Chief Executive Officer. A.I.R. (Vol. 29) 1942 Cal. 142=I.L.R. (1941) 2 Cal. 308=43 Cr.L.J. 513=199 Ind. Cas. 179.

——S. 535 — Applicability—Nuisance—Complaint against corporation—Jurisdiction of Civil Court to grant injunction.

Per **Mukherjea, J.**—S. 535 is not intended to be applicable to a case where the complaint was against the Corporation itself. Even if it is held that S. 535 allows a proceeding against the Corporation and the Magistrate can pass a suitable order for removing or abating the nuisance, the Civil Court is not in any way prevented from granting injunction in a proper case of actual or an apprehended nuisance under S. 56 (i), Specific Relied Act. In order to attract the operation of S. 56 (i) the alternative remedy must be certain and equally effi-

cacious. The redress if any provided for by S. 535 does not fulfil either of these conditions.

Per Roxburgh, J.—S. 535 would certainly cover cases of nuisance not attributable to the act or neglect of any particular private individual. The definition of 'nuisance' in S. 3 (47) is wide. The section clearly gives power to the Magistrate on a complaint by a resident or owner of property to direct the Corporation itself to take such measures as to such Magistrate may seem practicable and reasonable for preventing, abating, diminishing or remedying such nuisance. A.I.R. (Vol. 27) 1940 Cal. 67=44 C.W.N. 194=186 Ind. Cas. 776.

——S. 535—Jurisdiction—Complaint by sanitary Inspector in personal capacity—If can be taken cognizance of.

A Magistrate is not entitled to act under S. 535 (2), Calcutta Municipal Act, upon a complaint filed by the Sanitary Inspector in his personal capacity in the absence of anything to show that he was authorised by the Chairman of the Municipality or was complaining on behalf of the Municipality or resided or owned property in Calcutta. A.I.R. (Vol. 30) 1943 Cal. 31=43 Cr.L.J. 900=202 Ind. Cas. 753.

——S. 535—Jurisdiction of Court—Application for costs after order is made—Competency.

There is nothing in the terms of S. 535 or in any other section, which prevents the Magistrate from taking into his consideration on a date subsequent to the date of order under S. 535 (2) (a) the question of costs raised by an application by the person in whose favour that order was passed. 57 Cal. 497 =A.I.R. 1930 Cal. 487.

——S. 535—Scope — Notice to corporation—. Necessity for—Order without notice—Legality.

An order awarding costs against the corporation and directing the corporation to pay compensation to the complainant passed behind its back without service of notice on it, in proceedings under S. 535, Calcutta Municipal Act, is bad and is liable to be set aside. It is true that the section does not provide for any notice being served, but it would be entirely unfair and unjust and against all principles of law to pass an order penalising a party without giving the party an opportunity of being heard. The principle **audi alteram partem** is applicable to a case of this description. 54 C.W.N. 220=A.I.R. 1950 Cal. 314=51 Cr.L.J. 1234.

——S. 536—"Unlawful work"—Wall liable to be demolished under S. 300—Power of Magistrate to order demolition.

A wall which is liable to be demolished under S. 300 of the Calcutta Municipal Act is undoubtedly an unlawful wall and constitutes an "unlawful work" within the meaning of S. 536 of that Act, and the Magistrate has therefore power to order its demolition under that section. S. 488 of the Act does not circumscribe the powers of the Magistrate regarding the various orders which he may make in a case of this description. It merely states the maximum limit of the fine which he may inflict and it does not lay down that the Magistrate may not inflict any other punishment except the levying of a fine. A.I.R. 1949 Cal. 88=50 Cr.L.J. 146.

——S. 537—Scope—If abrogates S. 248, Cr. P. Code—Exercise of powers—Applicability of Cr. P. Code.

The provisions of S. 248, Cr. P. Code, have not been affected or abrogated in cases or proceedings by the Corporation by the provisions of S. 537 of the Calcutta Municipal Act. S. 537 of the Municipal Act is merely an enabling section and the powers given thereunder to do the various acts specified therein can only be exercised in accordance with the provisions of the Cr. P. Code. 53 Cal. 631=96 Ind. Cas. 648=43 C.L.J. 369=30 C.W.N. 598=27 Cr.L.J. 984=A.I.R. 1926 Cal. 786.

——S. 538 — Applicability — Suit for Provident Fund, etc.—Necessity of notice.

It is not necessary to serve the Corporation of Calcutta with a notice before instituting a suit against it for the amount standing to the credit of the plaintiff in the Provident Fund of the Corporation or for arrears of his salary or for damages for wrongful dismissal from service. A.I.R. (Vol. 32) 1945 Cal. 144=I.L.R. (1944) 1 Cal. 463.

——S. 538—Applicability—Depot of refuse constituting nuisance—Suit for damages—Limitation —Liability of Corporation—C. P. Code, S. 151—Application of.

The Corporation is protected notwithstanding that a nuisance may have been committed by the erection of a refuse depot provided they have done whatever is practicable to minimize the inconvenience.

The Calcutta Corporation in 1933, erected a refuse depot for the temporary deposit of the refuse of a market owned by it for its clearance therefrom by lorries. The plaintiff, the owner of the adjoining premises complained of a nuisance caused by the smell from the refuse and the inconvenience and discomfort consequent on the vermin which were attracted to the clearance lorries and to the refuse yard and brought an action in 1938, for injunction and damages for the capitalized loss or injury to the building in letting value and in depreciation of sale value. The proximity of the nuisance was one of the main reasons though not the whole reason for the house becoming unlettable:

Held, that the plaintiff was entitled to damages and injunction restraining the Corporation from creating any nuisance except such as was unavoidable after using the best known methods within reason.

Held also, that the claim to damages for capital loss for the specific injury was barred by limitation. But the plaintiff was entitled to damages for the loss in rental value of the house for only four months prior to the institution of the suit under S. 538, Calcutta Municipal Act inasmuch as the injuria complained of was a continuing one and the cause of action arose from day to day.

Held further, that under S. 151, C. P. Code. the Court had power to grant damages at the aforementioned monthly rate pending the suit and also until the removal of injunction. A.I.R. (Vol. 28) 1941 Cal. 207=I.L.R. (1940) 2 Cal. 131=71

C.L.J. 403=45 C.W.N. 1008=195 Ind. Cas. 306.

——S. 538—Applicability—Suit for money payable under contract done and material supplied and for compensation for breaches thereof — Notice—Necessity.

Each issue arising out of the construction and application of S. 538, or of similar sections in statutes relating to the powers and obligations of public authorities, must be decided upon the facts and the wording of the section in each particular case. Generally speaking such or similar provisions in statutes relating to the powers and obligations of public authorities do not apply to suits arising **ex contractu**.

Consequently where the suit against the Corporation is for money alleged to be payable under contract done and materials supplied and for compensation for breaches of those contracts, the suit is not one "in respect of acts purporting to be done" by the Corporation under the Act and is as such maintainable with previous notice to the Corporation. A.I.R. (Vol. 26) 1939 Cal. 614=43 C.W.N. 1173=184 Ind. Cas. 562.

——S. 538—Applicability—Suit for payment of money in Provident Fund—Provident Funds Act (IX of 1897), S. 5.

A suit against the Calcutta Corporation for payment of money in the account of the Provident Fund of the deceased by his legal representative is not one in respect of any act purporting to be done by the Corporation under the Calcutta Municipal Act, and so the provisions of S. 538 as to limitation do not apply to such a suit. 55 Cal. 1231=32 C.W.N. 515=113 Ind. Cas. 166=A.I.R. 1928 Cal. 743.

——S. 538—Applicability — Suit for recovery of Provident Fund of employee of Corporation by son and heir—Limitation.

Special period of limitation prescribed in S. 538 cannot apply to a suit, against the Corporation of Calcutta, in which the plaintiff claims as the only son and sole heir of his deceased father to recover from the Corporation a certain sum on account of his father's Provident Fund, unpaid salary and contributions for the purchase of a war bond. 115 Ind. Cas. 271=A.I.R. 1928 Cal. 542.

——S. 538—Construction—"In respect of any act purporting to be done under this Act"—Interpretation of.

Upon proper construction of S. 538, Calcutta Municipal Act, the limitation or qualification "in respect of any act purporting to be done under this Act" occurring in it, apply also to the Corporation or any Municipal Officer or servant and not only to persons, acting under the direction of the Corporation or any Municipal Officer or servant. Consequently, for a suit against the Corporation, notice contemplated by S. 538, is only required, if the suiut is in respect of acts purporting to be done under the Act. Any enactment which purports to limit the rights of the subject must be strictly construed. If the Legislature had desired to provide that no suit of any kind should be instituted against the Corporation without notice, it could have so provided clearly and unambiguously. A.I.R. (Vol. 26) 1939 Cal. 614=43 C.W.N. 1173=184 Ind. Cas. 562.

——S. 557—Applicability — Contravention of Act of 1899—Proceedings in respect of—New procedure—Application of.

By Act V of 1926 provision has been made whereby proceedings relating to a contravention of the provisions of the Calcutta Municipal Act, 1899, are to be taken in the manner prescribed by the Act of 1923; in other words, the new procedure is to be applied to contravention of the old Act as well as to contravention of the new Act. 55 Cal. 964=47 C.L.J. 208=32 C.W.N. 454=10 A.I.Cr.R. 174=29 Cr.L.J. 509=109 Ind. Cas. 237=A.I.R. 1928 Cal. 207.

——S. 557—Scope and effect of.

The effect of Cl. (4), S. 557-A is this that between August 1926 and August 1927, in a proceeding for demolition of structure under S. 363 even although five years may have expired, a legal proceeding would have been competent because the clause was intended as an extension of limit in view of the fact that legal proceedings had not been possible effectively for some considerable period prior to the amending Act. The clause does not say and it does not mean that no legal proceeding under S. 557-A is ever to be taken after the expiry of one year from August 1926. What it says is that if in the Act or any other law a legal proceeding between August 1926 and August 1927 would have been barred it is not to be barred until August 1927. Such a clause at no time was of any use to anyone except to the Corporation, and that in a case in which it was desired to get an extension of some restrictive period of limitation imposed by some other section of the Act or some other law. 50 C.L.J. 527=1930 Cr.C. 222=A.I.R. 1930 Cal. 222.

——Sch. II—Part 1—Applicability—Ballot paper already delivered to elector—Candidate absent at time—Offence.

When the candidate charged with offence under Sch. II, para. 1, was absent when the elector applied for the ballot paper, and when the ballot paper had already been delivered to the elector under Para. 31 of the Government order, his right to vote was challenged on the ground of his being an imposter:

Held, that the candidate could not be said to have abetted the procuring of the ballot paper and hence no offence under Sch. II, Para. 1, was committed in the absence of proof that the candidate was aware that the alleged imposter was not the real person. A.I.R. (Vol. 28) 1941 Cal. 133=I.L.R. (1940) 2 Cal. 242=45 C.W.N. 188=193 Ind. Cas. 752.

——Sch. II, Part I—Essentials of offence—Personation—What amounts to.

Schedule II, Part I, para. 3, Calcutta Municipal Act makes the offence of impersonation the procuring of the application by a person for a voting paper, in the name of some other person. The offence of personation is complete when the person applies for a ballot paper. It must be established that the candidate knowingly persuaded the impos-

tor to obtain a voting paper, that is the knowledge of the candidate is essential in order that a corrupt practice be proved against him. A.I.R. (Vol. 28) 1941 Cal. 133=I.L.R. (1940) 2 Cal. 242=45 C.W.N. 188=193 Ind. Cas. 752.

——Sch. II, Part I—Scope—Corrupt practices—"Connivance"—Meaning of.

Every one of the corrupt practices refered to in Sch. II, Part I of the Act is specifically made an offence if done by a candidate or his agent or by any other person with the connivance of a candidate or his agent, and "connivance" involves some degree of knowledge on the part of the candidate or his agent. (1936) 165 Ind. Cas. 489=63 Cal. 825=40 C.W.N. 741.

——Sch. VI, R. 10—Applicability — Corporation proving that person paid tax in preceding year—Presumption.

Where a corporation proves that the tax was paid by a certain person in the preceding year, the presumption under Sch. VI, R. 10, whatever its nature may be applies to the case of such a person. A.I.R. (Vol. 27) 1940 Cal. 531=I.L.R. (1940) 1 Cal. 585=44 C.W.N. 648=42 Cr.L.J. 100=191 Ind. Cas. 184.

——Sch. XVI, R. 2 (6)—Scope—Road not vested in Corporation—Right to demand encroachment fees.

Under Sch. XVI, R. 2 (6), Calcutta Municipal Act, the Corporation is not entitled to demand fees where a road has not vested in the Corporation. But where there is nothing unjust or unreasonable in the demand of the Corporation for the fees, if it is sought to take advantage of any technicality in endeavouring to avoid it, the Corporation is entitled to take any legal steps open to it to enforce payment. A.I.R. (Vol. 20) 1933 Cal. 341=56 C.L.J. 578=34 Cr.L.J. 521=1933 Cr. Cas. 414=143 Ind. Cas. 122 (2).

——Sch. XXVII—Rr. 3 and 30, applicability of.

Rule 3 only applies in the case of that portion of a building situated at the side of a street, and R. 30 relates only to the space at the back of a domestic building. Rules 3 and 30 have no application with regard to the height of buildings erected at the side of a space such as that which separates the houses of the parties except in so far as buildings abutting on the side-space may overlap the plane of the angles mentioned in Rr. 3 and 30. A.I.R. (Vol. 28) 1941 Cal. 386=I.L.R. (1941) 1 Cal. 435=45 C.W.N. 413=196 Ind. Cas. 832.

——Sch. XVII, Rr. 30 and 32 — Applicability — Buildings under old Act.

Rules 30 and 32 are intended to affect buildings and structures dealt with by the Act of 1899 and were never intended to apply to boundary walls which are included in the term "building" by the Act of 1923. 1929 Cr. C. 525=33 C.W.N. 777 =A.I.R. 1929 Cal. 781.

——Sch. XVII, Rr. 30 and 32 — Applicability — Demolition of structure created before coming into operation of rules.

Rules 30 and 32 do not operate for the purpose of compelling the demolition of any masonry structure which was erected before these rules came into operation, and their general intention is to ensure compliance with them as regards alterations of and additions to an existing building, while the original structure of such building may be left intact. This is clearly the intention of R. 91 in respect of the space at the back of buildings, and the same intention underlies R. 94. A.I.R. (Vol. 28) 1941 Cal. 386=I.L.R. (1941) 1 Cal. 435=45 C.W.N. 413=196 Ind. Cas. 832.

——Sch. XVII, R. 32—Compliance—Provision as to written permission if satisfied by passing of resolution.

The provisions as to written permission in the Calcutta Municipal Act and Rules of Sch. XVII is not satisfied by the passing of the resolution itself with or without the support of unfiltered water. A.I.R. (Vol. 28) 1941 Cal. 391=I.L.R. (1941) 1 Cal. 16=45 C.W.N. 401=196 Ind. Cas. 452.

——Sch. XVII, Rr. 30 and 32—Object explained.

It must be assumed that in framing the statutory rules relating to the space to be left between buildings and their height, the Legislature had in view the general convenience of all residents in the municipal area in order to ensure proper ventilation and sanitation for the rate payers, and possibly adequate means of preventing the spread of fires from one building to another. A.I.R. (Vol. 28) 1941 Cal. 386=I.L.R. (1941) 1 Cal. 435=45 C.W.N. 413=196 Ind. Cas. 832.

——Sch. XVII, R. 32—Scope and effect of.

The effect of R. 32, Sch. XVII, Calcutta Municipal Act, is as follows: First of all the boundary line should be accurately ascertained. Without this the Corporation cannot fulfil its functions in respect of this rule. Then what is done or should be done is to see that there is a space between the two buildings, that is to say, the two main buildings for the entire length irrespective of the actual boundary. If the one building, say **X** is within 2 ft. of the boundary, the other building **Y** must stand back for 6 ft. If the building **X** is more than 2 ft. from the boundary, the other building **Y** need only stand back 4 ft. A.I.R. (Vol. 28) 1941 Cal. 391=I.L.R. (1941) 1 Cal. 16=45 C.W.N. 401=196 Ind. Cas. 452.

——Sch. XVII, R. 32—Scope of—Plans passed and permission given contrary to building restrictions—Injury to adjacent owner—Application for mandamus.

Where the Provision is primarily in favour of the general public but in the nature of things the breach of it must injure the specific individual to quite a different degree, such a right can be assumed in the specific individual. Consequently where building plans are passed and permission to build is given contrary to building restrictions contained in bye-laws whereby the premises of adjacent owners are injured as to light, air, health and amenities the Corporation was such a duty to the adjacent owner and there is in the adjacent owner such a legal right as to found an application for **mandamus**. A.I.R. (Vol. 28) 1941 Cal. 391=I.L.R. (1941) 1 Cal. 16=45 C.W.N. 401=196 Ind. Cas. 452.

——Sch. XVII, Rr. 30 and 32—Scope of—Illegal sanction for infringing plans—Mandamus—Issue of.

Where the Buildings Committee has acted illegally in sanctioning the plans which clearly infringed Rr. 30 and 32 of Sch. XVII, Calcutta Municipal Act, the aggrieved party can apply under S. 45, Specific Relief Act for the mandatory order on the Corporation requiring the Corporation to rescind an illegal sanction. Ss. 19 and 17, Calcutta Municipal Act would not provide the aggrieved party with an adequate remedy. A. I. R. (Vol. 28) 1941 Cal. 386=I.L.R. (1941) 1 Cal. 435=45 C.W.N. 413=196 Ind. Cas. 832.

——Sch. XVII, R. 32 (1)—Applicability—Erection of building attached to adjacent premises—Approval of plan by Corporation.

The words in Sub-R. (1) of R. 32 of Sch. XVII of the Calcutta Municipal Act, "if either side of a domestic building is not attached" relate to the proposed new building and if, according to the plan, that new building will not be attached to the adjacent building, then the Corporation must see that the plan provides for an open space between the new building and the next adjacent building, the distance of the space being as provided in Sub-R. (2). Sub-R. (3) is clearly an exception to the earlier provisions of the Rule. This sub-rule is to apply when the site, adjacent to the site upon which the proposed building will be erected, is not occupied by a masonry building situated within ten feet of the boundary line between the two sites and within twenty-four feet from the frontage of the street on which the two sites abut. The sub-rule does not apply when the adjacent site is occupied by a masonry building within ten feet of the boundary line and within twenty-four feet from the frontage of the street. The rule applies when there is a vacant space of the dimensions set out in the sub-section. There is nothing in R. 32 which prevents the Corporation from approving plans for the erection of buildings which will, on either one or both sides, be attached to adjacent premises. I.L.R. (1946) 2 Cal. 484.

——Sch. XVII, R. 32 (1)—Construction—"Private street"—Meaning of.

The expression 'a partition passage', contemplates a passage provided during the course of partition proceedings of the kind expressly mentioned in the last portion of S. 3 (54), Calcutta Municipal Act.

The expression "private street" refers to some space between neighbouring buildings, which has been left not merely for the purpose of detaching one set of premises from another, but for securing access to the premises situated thereon not to the public at large, but to a limited section of the public who may have occasion to go to the premises situated on the space in question. It includes any passage securing access to four or more premises, and by implication it may be taken that it would not include a passage which secures access to a smaller number of premises. A.I.R. (Vol. 28) 1941 Cal. 386=I.L.R. (1941) 1 Cal. 435=45 C. W.N. 413=196 Ind. Cas. 832.

——Sch. XVII, R. 32 (1)—Proviso—Scope of.

The proviso in R. 32 (1), Sch. XVII does not give any power to allow attachment. It is in fact, an additional restriction to the effect that even if the space is left, one may not without the permission of the Corporation attach to any wall or building other than the main building. A.I.R. (Vol. 28) 1941 Cal. 391=I.L.R. (1941) 1 Cal. 16=45 C.W.N. 401=196 Ind. Cas. 452.

——Sch. XVII, R. 32 (2)—"Space"—Meaning of, explined.

The language in R. 32 (2) shows that the required space is not merely the space between two buildings at the ground level but is the space "between every part of the said domestic building to the boundary line of the land or building immediately opposite such part." A.I.R. (Vol. 28) 1941 Cal. 386=I.L.R. (1941) 1 Cal. 435=45 C. W.N. 413=196 Ind. Cas. 832.

——Sch. XVII, R. 33 — Scope — Projection of beams and eaves on passage—If infringement of rule—Maxim de minimis non curat lex.

Where a passage is about eighty feet in length, projection at intervals of seven beams in that length, does not, in substance, prevent the passage being open to the sky, and therefore not an infringement of R. 33 of Sch. XVII of the Calcutta Municipal Act. The projection of eaves over the passage does not also amount to an infringement of that rule. The matter is covered by the maxim de minimis non curat lex. I.L.R. (1946) 2 Cal. 484.

——Sch. XVII, S. 56 (1)—Scope—If to be read with other sub-rules.

Sub R. (1) of R. 56 is clearly intended to be read with the remaining sub-rules of R. 56 for the purpose of prescribing certain general conditions which must govern all requisitions and objections which it may be found necessary to make in connection with applications for the erection of new buildings. It cannot be read separately from the remaining sub-rules of R. 56 for the purpose of conferring upon the Commissioners general residuary power to issue requisitions at any time when they may require further information to enable them to reach a decision. A.I.R. (Vol. 27) 1940 Cal. 292=44 C.W.N. 561=41 Cr.L.J. 689=I. L.R. (1940) 2 Cal. 69=188 Ind. Cas. 865.

——Sch. XVII, Rr. 56 and 57—Applicability—Requisition to person to expose foundations.

To expose his foundations sought to be erected by him, is a requisition for information with regard to the nature of the building and cannot be regarded as relating to an objection raised by the Commissioners with reference to the building application. A.I. R. (Vol. 21) 1940 Cal. 292=44 C.W.N. 561=41 Cr.L.J. 689=I.L.R. (1940) 2 Cal. 69=188 Ind. Cas. 865.

——Sch. XVII, Ss. 56 and 57—Scope—If mandatory.

The obvious intention of the Legislature in enacting Rs. 56 and 57 was to ensure that all business connected with applications for the erection of new buildings should be transacted expeditiously and it is necessary that these rules should be

strictly interpreted. In this view of the law, it could not have been intended, merely by holding an inspection before the expiry of the statutory period of fifteen working days without the issue of any requisition for further information, that the Commissioners should acquire a right to an extension of the time within which they must issue the prescribed written order under the latter part of R. 57 (1). The intention of the Legislature is that the Municipality should follow strictly the mandatory procedure laid down in Rr. 56 and 57. A.I.R. (Vol. 27) 1940 Cal. 292=44 C.W.N. 561 =41 Cr.L.J. 689=I.L.R. (1940) 2 Cal. 69=188 Ind. Cas. 865.

——Sch. XVII, R. 57—Construction—"Fifteen days"—Meaning of.

The period of fifteen days mentiooed in R. 57 must be used as meaning "working days" in the same sense in which this expression has been used in R. 56. A.I.R. (Vol. 27) 1940 Cal. 292=44 C.W.N. 561=41 Cr.L.J. 689=I.L.R. (1940) 2 Cal. 69=188 Ind. Cas. 865.

——Sch. XVII, R. 58—Scope and effect—Implied permission—Conditions.

Under R. 58 of the Sch. XVII of the Calcutta Municipal Act the Corporation must be deemed to have granted permission to execute a work if within the time prescribed by R. 57 it has neither granted nor refused permission to execute it. The permission which the Corporation is deemed to give is a permission to execute the work in accordance with the plan in so far as the plan complies with the Act and by-laws made thereunder. The fact that permission is deemed to be granted does not mean that the plan must be deemed to be in accordance with the Act and the by-laws. If it transpires that the plan is contrary to the Act or to the by-laws, the implied permission will not save the person building according to the plan. 52 C.W.N. 321=A.I.R. 1948 Cal. 109.

——Sch. XVII, R. 65—Scope—Notice—Necessity of.

Notice of revocation proceedings under R. 65, Sch. XVII, must be given to the applicant though the rule does not expressly mention it. A.I.R. (Vol. 21) 1934 Cal. 389=1934 Cr. Cas. 530=38 C.W.N. 280=61 Cal. 356=149 Ind. Cas. 1193.

——Sch. XVII, R. 94—Object and Scope—Power of relaxation.

The power of relaxation under R. 94 is severely restricted, and, in any case, special reason for relaxation must be recorded in writing. The main intention of R. 94 is to ensure that any new buildings, which may be constructed as additions to existing buildings which did not leave the required space, should comply, as far as possible, with the rules contained in the schedule as regards the provision of ventilation and sanitation, and at the same time to prevent any inconvenience which would result by insisting upon the demolition of buildings which had already been erected on the space required to be left open under the existing rules. R. 94 certainly was not framed with the object of allowing additional encroachments on the minimum space which the Legislature considered necessary for the purpose of providing ventilation and sanitation. A.I.R. (Vol. 28) 1941 Cal. 386 =I.L.R. (1941) 1 Cal. 435=45 C.W.N. 413=196 Ind. Cas. 832.

——Sch. XVII, R. 94—Power to relax—Extent and scope.

The power to relax in R. 94, Sch. XVII is severely circumscribed, not only by the condition as to the health and amenities of the adjacent building which appears in S. 331 but in the rule itself. A. I. R. (Vol. 28) 1941 Cal. 391=I.L.R. (1941) 1 Cal. 16=45 C.W.N. 401=196 Ind. Cas. 452.

——Sch. XVIII, R. 4 (2) and S. 511—Scope of inquiry—Disobedience of notice to vacate—Prosecution—Question if building is in dangerous condition—If can be gone into.

A Municipal Magistrate trying a person for disobedience of a notice issued under R. 4 (2) of Sch. XVIII, Calcutta Municipal Act, directing him to vacate the premises on the ground that it was in a ruinous or dangerous condition, cannot investigate the question whether the building was in a ruinous or dangerous condition. It is clear from the words of the rule that the corporation alone is the authority to decide this question. Further, S. 511 of the Act makes it additionally clear that this question is one which is to be decided exclusively by the corporation. 11 C.W.N. 671, 3 C.W.N. 508 and I.L.R. (1941) 2 Cal. 308, rel. on. 4 A.I.Cr.D. 109=A.I.R. 1950 Cal. 188=51 Cr.L.J. 861.

CALCUTTA OFFICIAL RECEIVER'S ACT (VII OF 1938).

——Commission in respect of purchase of Government bonds—Discretion to official receiver not to charge—Power of Court to give.

The Court can in a fit case direct the Official Receiver not to charge the commission in respect of the purchase of Government bonds which are to be retained by him on behalf of a minor. 52 C.W.N. 459.

CALCUTTA POLICE ACT (IV OF 1866).

——Detention for unlimited period — Powers of Deputy Commissioner.

There is no power of detention for an unlimited period in the Deputy Commissioner, Calcutta by virtue of his being a Justice of Peace. 52 Cal. 67 =86 Ind. Cas. 414=29 C.W.N. 300=26 Cr.L.J. 782=A.I.R. 1925 Cal. 587.

——S. 3—"Betting"—Meaning of.

A person can be held guilty of "betting" under S. 3 of the Calcutta Police Act only when he is found in a common gambling house for the purpose of betting. (1937) 66 C.L.J. 165=41 C.W.N. 1346.

——S. 3—"Common gaming house"—Essentials—Proof of profits having been made actually—If necessary.

The phrase "kept or used for the profit or gain of the person" in the definition of "common gaming house" in S. 3 of the Calcutta Police Act simply implies that the person running the premises hopes

to make a profit or gain by keeping or using the instruments of gaming; it does not mean that there must be proof that such profit has been made or must inevitably be made.

The phrase "whether by way of charge for the use of such house, etc., or instruments or otherwise" in the section does not mean that the profit to the person concerned must accrue by way of charge for the use of the house, etc., or instruments. It is sufficient if he excepts to make a profit or gain from the actual gambling. I.L.R. (1937) 1 Cal. 611, overruled. 51 C.W.N. 804=A.I.R. 1947 Cal. 429=82 C.L.J. 248 (F.B.).

——S. 3—"Common gaming house"—Essence of.

"Profit or gain" is the cardinal constituent of the definition of a "common gaming house". 33 C.W.N. 668=1929 Cr. C. 325=A. I. R. 1929 Cal. 644.

——S. 3—"Common gaming house"—Meaning of.

A common gaming house as defined in S. 3, Calcutta Police Act, is a house in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying or using such house.

Where an accused who is proved to have accepted a marked five rupee note, is found with two others and no incriminating articles except a racing book is discovered, the evidence is totally insufficient to show that the accused are found gaming in a common gaming house or present during any gaming or playing therein or are found present in the gaming house for the purpose of gaming within the meaning of S. 3, Calcutta Police Act. A. I.R. (Vol. 23) 1936 Cal. 355=1936 Cr. Cas. 582 =37 Cr.L.J. 851=163 Ind. Cas. 152.

——S. 3—"Common gaming house"—Necessary requisites.

Common gaming house is defined in S. 3, Calcutta Police Act. To make a house, room, place, etc., a common gaming house, two things are necessary, namely; (i) instruments of gaming must be kept or used there, and (ii) such instruments must be kept or used for the purpose of gain of the person owning, occupying, using or keeping such house, room; place; etc. Slips of paper used for the purpose of facilitating betting operations, e.g., papers on which bets had been recorded are to be instruments of gaming. To satisfy the second element, the intended gain must result to the person owning, occupying, using or keeping the place otherwise than as a result of betting by him. The chance of profit of, or the actual profit made by the successful gambler, is not such gain as the section contemplates. An entrance fee charged by a person owning, occupying or using the place would be gain within the meaning of the section. A commission charged by such a person from persons winning wagers as a result of betting in that place is such gain. A person running a proprietary club where he allows gaming or betting would be the keeper of a common gaming house, whether he himself takes part in betting or not. Such a person makes profit or intends to make profit from his establishment which profit is not the direct result of betting in which he himself may have taken part. The chance of winning wagers is not the gain which the section contemplates. A. I. R. (Vol. 23) 1936 Cal. 788=41 C.W.N. 123=1936 Cr. Cas. 1124=38 Cr.L.J. 449=I.L.R. (1937) 1 Cal. 610=167 Ind. Cas. 771.

——S. 3—"Common gaming house", what is.

Premises occupied and kept by a person are not strictly "common gaming house" within the meaning of the language of the Calcutta Police Act, unless some fixed charge or profit accrues regularly to the person who is occupying or keeping the premises quite apart from any fluctuating profit which may occur from time to time between the gamblers themselves as a result of the gambling. A.I.R. (Vol. 24) 1937 Cal. 84=38 Cr.L.J. 706=169 Ind. Cas. 87.

——S. 3—"Instruments of gaming"—Slips used for facilitating betting.

As gaming includes wagering or betting, the slips if they are used for the express purpose of facilitating betting operations, would certainly come within the mischief of the definition of "instrument of gaming" under S. 3, Calcutta Police Act. A. I.R. (Vol. 25) 1938 Cal. 237=39 Cr.L.J. 500=67 C.L.J. 82=I.L.R. (1938) 1 Cal. 672=174 Ind. Cas. 974.

——S. 13—Detention of suspended police officer—Legality.

The Commissioner of Police has no authority in law to order the detention of a police officer on suspension, as he ceases to be a police officer thereafter. The police Circular Order No. 1159 empowering him to do so, is illegal. 46 Cal. 581=21 Cr.L.J. 15=54 Ind. Cas. 63.

——S. 39—Licence—Condition violating S. 40—Power of Government to sanction.

S. 39 of the Police Act empowers the Government to sanction the conditions upon which a license is granted. Nevertheless, the Government cannot give effective sanction to a condition which conflicts with the provisions of the Act, contained in S. 40, requiring a conviction to be obtained before the question of forfeiture of a license can arise. A note in a license, according to which the Commissioner can forfeit a license upon breach of a condition even in the absence of a conviction, violates S. 40 and is beyond the powers of the Government to sanction. I.L.R. (1946) 2 Cal. 399=51 C.W.N. 833.

——S. 40—Discretion under—Nature of—Wrongful exercise by Commissioner—Remedy—Certiorari—Specific Relief Act, S. 45.

Under S. 40 of the Calcutta Police Act, the Commissioner exercises an executive discretion in deciding whether to forfeit a license and not judicial discretion. He is not a Court nor a person or entity exercising judicial or quasi-judicial functions. That being the position, proceedings by way of prohibition and certiorari do not lie to correct any error committed by him with regard to forfeiture; but if a wrongful exercise of the discretion takes place, that wrong can be corrected only by the procedure under S. 45 of the Specific Relief Act. I.L.R. (1946) 2 Cal. 399=51 C.W.N. 833.

——S. 40—Forfeiture of license—Power of Commissioner.

S. 40 of the Calcutta Police Act negatives any power in the Commissioner of Police to cancel or forfeit a license granted by him under S. 39, in the absence of a conviction for breach of condition of the license. Further under S. 40, the Commissioner's power to forfeit is not an absolute power, but it is subject to the direction and control of the Government; this negatives a power in the Commissioner to forfeit at his will and pleasure. I.L.R. (1946) 2 Cal. 399=51 C.W.N. 833.

——S. 44—Applicability—Trading in futures—Association carrying on business of purchase and sale of jute for future delivery—No delivery intended—Offence.

Certain persons were members of an association called the Bengal Jute Association which carried on business at particular premises in respect of transactions for purchase and sale of jute for future delivery. It was found that there was no intention on the part of the parties either to take or give delivery.

Held, that the accused were guilty under S. 44, their intention being to gamble and not to deal in jute. A.I.R. 1930 Cal. 637.

——S. 44—Betting—Offence.

Mere betting which cannot be gaming, i.e., loss or gain on pure chance or mixed skill and chance, is not penal and no offence in such a case is committed under S. 44. 39 Cal. 968=16 C.W.N. 858=16 C.L.J. 250=13 Cr. L. J. 603=16 Ind. Cas. 171.

——S. 44—"Betting"—Dart game—Offence.

In the game of throwing of darts, no question of skill of any kind is involved so far as the person staking money is concerned. But where a person stakes money or something valuable on some future contingency or the happening of a certain event, he is said to "bet" and where certain persons by purchasing their tickets stake their money on the happening of a certain event, viz., the thrower hitting not his own number but their number on the board, there is betting and S. 44, Calcutta Police Act applies A.I.R. (Vol. 21) 1934 Cal. 271=1934 Cr. Cas. 407=38 C.W.N. 82=35 Cr.L.J. 1021=149 Ind. Cas. 827.

——S. 44—Essence of offence—Profit or gain.

For conviction under S. 44 it is necessary to have sufficient evidence of the element of "profit or gain." 33 C.W.N. 668=1929 Cr.C. 325=A.I.R. 1929 Cal. 644.

——Ss. 44 and 45—"Common gaming house"—Essence of.

The essence of the definition of a "common gaming house," is a place in which instruments of gaming are kept or used. No place can be a common gaming house unless instruments of gaming are kept or used in it, and kept or used for the profit or gain of the person or persons owning or occupying the place. A. I. R. (Vol. 22) 1935 Cal. 466=1935 Cr. Cas. 858=39 C.W.N. 1114=36 Cr.L.J. 1513=62 Cal. 1093=158 Ind. Cas. 1095.

——Ss. 44 and 45—"Instruments of gaming"—Slips of paper used for betting.

Where slips of paper found in entrace hall and in the inner rooms, are used for purpose of facilitating betting operations, they are, as such, instruments of gaming. A.I.R. (Vol. 22) 1935 Cal. 466=1935 Cr. Cas. 858=39 C.W.N. 1114=36 Cr. L.J. 1513=62 Cal. 1093=158 Ind. Cas. 1095.

——Ss. 44 and 47—Applicability—Accused not present at search—No evidence that he was owner of room or took commission for use thereof—Finding of betting material only—Sufficiency for conviction.

Where a person is charged for keeping a common gaming house and also for permitting his room to be used as a common gaming house and he is not present in the room at the time of the search, the provisions of S. 47 of the Calcutta Police Act, do not apply to him personally and when there is no evidence at all to show that the person is the owner or occupier of the room or that he realizes commission for allowing other persons to use the room for the purpose of carrying on the business of betting, the mere fact that some betting slips and racing literature was found in the room is not sufficient to convict the person under S. 44. A.I.R. (Vol. 25) 1938 Cal. 273=39 Cr. L.J. 493=174 Ind. Cas. 845.

——Ss. 44 and 50-A—Game of mere skill, what constitutes—Burden of proof—Dart game, if a game of skill.

In order to escape conviction under S. 44, Calcutta Police Act, it must be shown by the defence that to all intents and purposes on a broad and reasonable view of the matter the game was one of skill and nothing else. The question of whether or not the game is one of mere skill for the purpose of invoking the protection of S. 50-A is a question of fact.

A reasonable construction should be given to the words 'mere skill' and the qualifying adjective 'mere' should not be isterpreted as meaning 'pure' in the sense in which that word might be used in a scientific experiment.

A game of "mere" skill should be taken to mean one in which a person playing it, as far as possible, in any human affairs, has complete control over the result which he sets out to attain, provided he is sufficiently expert in performance.

(The dart game as played by the accused was held to be a game of skill). A.I.R. (Vol. 20) 1933 Cal. 8=37 C.W.N. 24=34 Cr.L.J. 168=1933 Cr. Cas. 28=141 Ind. Cas. 593.

——S. 45—Burden of proof.

In the case under S. 45, Calcutta Police Act, the onus lies upon the prosecution to show that the house in which the accused was found was a common gaming house as defined is S. 3 of the Act. In order to satisfy the requirements of this section, it would be for the prosecution to show that instruments of gaming were kept or used in that house for the profit or gain of the person owning, occupying, using or keeping such house. A.I.R. (Vol. 26) 1939 Cal. 326=40 Cr. L. J. 724=182 Ind. Cas. 986.

——S. 45—Accused accepting marked currency note—Offence.

The mere acceptance of the marked currency note is not sufficient to find the accused guilty under S. 45 of the Act. A.I.R. (Vol. 23) 1936 Cal. 355=1936 Cr. Cas. 582=37 Cr.L.J. 851=163 Ind. Cas. 152.

——S. 45—Presumption of common gaming house —Conditions for raising.

Under S. 47, Police Act, if gaming instruments are found in a house, the presumption is that it is a common gaming house, provided the finding of the instrument is in conformity with S. 46. The search in consequence of which the find takes place must, therefore, be of a place of which a search warrant is issued and no such presumption can be drawn from such finding resulting from search of a place which is not ordered to be searched. A. I.R. 1930 Cal. 369.

——S. 45—Scope—If to be read with S. 2 of Bengal Act IV of 1919.

S. 45, Calcutta Police Act, must be read having regard to definition of gaming in S. 2 of Bengal Act IV of 1913. A petition began with the statement that "at No. 160, Harrison Road, cotton figure gambling has been carried on;" it went on with the statement that "all that happens is that a person who wants to take money will go to a stall-keeper as Modi; a number of them infest the place; every one of them has a book in which entries are made of the stake made by gamblers."

Held, that on these statements it is not possible to say that that does not disclose an offence under S. 45. 33 C.L.J. 287=25 C.W.N. 428=22 Cr. L. J. 599=62 Ind. Cas. 871=A.I.R. 1921 Cal. 719.

——S. 46—Defect in warrant for search—Effect on raising of presumption.

Where a search warrant purported to have been issued under S. 46 of the Act was defective.

Held, that no presumption under S. 47 that the house in question was a common gaming house should be raised: A.I.R. 1926 Cal. 966, Appl. 46 C.L.J. 186=9 A.I.Cr.R. 25=28 Cr.L.J. 871 =104 Ind. Cas. 711=A.I.R. 1927 Cal. 801.

——S. 46—Interpretation—"Reason to believe"— —Meaning of.

The expression "reason to believe" is entirely different from the expression "cause to suspect". The police may have cause to suspect that a certain house or place is used as a common gaming house, but the officer who issues the warrant has to bring his judicial mind to bear upon the question and he can only issue the warrant contemplated under S. 46 of the Act, if in his opinion there is reason to believe that a certain house or place is used as a common gaming house. 53 Cal. 718=30 C.W.N. 713=27 Cr.L.J. 920=96 Ind. Cas. 264=A.I.R. 1926 Cal. 966.

——S. 46—Warrant—If public record—Proof of contents—Necessity.

A warrant issued under the provisions of S. 46 of the Calcutta Police Act is not a public record and there is no presumption of any kind attaching to it; therefore, the contents thereof must be proved in the popular way and, therefore, it is incumbent upon the prosecution to prove that a warrant of this description was in strict compliance with the provisions of S. 46 of the Act and that it was issued after information upon oath had been brought before the issuing officer and after such enquiry as he thought it necessary to make had been made. 53 Cal. 718=30 C.W.N. 713=27 Cr.L.J. 920=96 Ind. Cas. 264=A.I.R. 1926 Cal. 966.

——S. 46—Warrant — Regularity of—Presumption—Evidence Act, S. 114 (e).

S. 114, Ill. (e) of the Indian Evidence Act cannot be relied upon in order to presume the regularity of warrants under S. 46, Calcutta Police Act, and unless the law expressly says that proof shall be required, evidence ought to be required in every case of this description that the essential preliminaries precedent to the issue of such a warrant have been complied with. 53 Cal. 718= 30 C.W.N. 713=27 Cr.L.J. 920=96 Ind. Cas. 264=A.I.R. 1926 Cal. 966.

——S. 47—Applicability—Conditions.

Per **Henderson, J.**—In order to determine whether S. 47 of the Calcutta Police Act applies, it is necessary to see whether there was a proper search within the provisions of S. 46. Unless the provisions of these sections are strictly interpreted and complied with, there can be no doubt that persons will be improperly convicted. A.I.R. (Vol. 23) 1936 Cal. 788=41 C.W.N. 123=1936 Cr. Cas. 1124=38 Cr.L.J. 449=I.L.R. (1937) 1 Cal. 610=167 Ind. Cas. 771.

——S. 47—Applicability and construction—"It shall be evidence, until contrary is made to appear" —Meaning of.

The words "it shall be evidence, until the contrary is made to appear" in S. 47, Calcutta Police Act; does not create a presumption in the technical sense in which that term is used in the Evidence Act. In that case the Magistrate would be bound to convict unless the defence gives rebutting evidence of a negative character. But in nearly every case it would be difficult if not impossible for them to do so. The natural meaning of the words is that the finding of certain things shall be evidence that the place is a common gaming house. Packs of cards may be found in hundreds of places which are not common gaming houses and it would be transparently absurd to say that the finding of a pack of cards in a house would be evidence that that house is a common gaming house. The section was intended to create a special rule of evidence, because in view of the preliminary provisions there is not this absurdity in a case when there had been a proper search under S. 46. The section only raises a presumption of fact, and so a rebuttable presumption. If a search warrant is issued under S. 46 and if on a search made on the basis of the said warrant instruments of gaming are found at the place or on the person of men found there at the time of the search, the fact that such instruments of gaming are found would be evidence of the further fact that the place is a common gaming house. The effect of such evidence may be nullified by other evidence on the record. A.I.R. (Vol. 23) 1936

Cal. 788=41 C.W.N. 123=1936 Cr. Cas. 1124=38 Cr.L.J. 449=I.L.R. (1937) Cal. 610.

——S. 47—Effect of search—Sufficiency to prove guilt of person under S. 44.

The result of a search under S. 47, Calcutta Police Act, is that there is evidence before the Magistrate which would entitle him as a Court of fact to find that these premises were in fact a common gaming house; but it would not entitle him to presume anything whatsoever with regard to the guilt of a person charged with a specific offence under S. 44. A.I.R. (Vol. 24) 1937 Cal. 84=38 Cr.L.J. 706=169 Ind. Cas. 87.

——S. 47—Finding of slips in room—Effect—Sufficiency as evidence of common gaming house.

Where slips of paper were seized at a time when betting operations were not going on, but it was clear from these documents that they were written records of illegal betting and it did not appear that these documents were written for facilitating betting operations in any place other than the room where they were seized.

Held, that they were evidence under S. 47 of the Calcutta Police Act, to show that the room in question was being used as a common gaming house and that the slips were the instruments of betting. A.I.R. (Vol. 24) 1937 Cal. 637=39 Cr. L.J. 89=I.L.R. (1937) 1 Cal. 471=172 Ind. Cas. 146.

——S. 47—Scope—Finding of instruments of gaming—Presumption—Discretion and duty of Courts.

Though the words "until the contrary" is made to appear" are rather appropriate to a presumption in the technical sense of the word, the absence of any word like "may presume" or "shall presuume" in the section is very much significant, and the discovery of the instruments of gaming in the place on a proper search which is contemplated by the Act, would be evidence not only to prove the existence of these instruments in that place, as an element to constitute a common gaming house, but also be evidence on the other point, as regards the making of profit or gain by the owner or occupier, etc., of the place, although according to the ordinary law, it cannot be treated as an evidence of the other fact. When the prosecution relies upon S. 47, Calcutta Police Act, the accused can certainly explain away the whole circumstances and "show the contrary" as the section lays down. If the explanation is sufficient, the evidence practically loses its force; if, on the other hand, no explanation or evidence to the contrary is coming from the side of the accused, a duty is cast upon the Court, to weigh and appraise the evidence in the best manner possible, and he may, if he thinks proper, convict the accused on this evidence, though he is not bound to do so. A.I.R. (Vol. 25) 1938 Cal. 237=39 Cr.L.J. 500=67 C.L.J. 82=I.L.R. (1938) Cal. 672=174 Ind. Cas. 974.

——S. 47—Scope —Search warrant—Presumption —Extent of.

Where a warrant under S. 47 issued by a competent authority recites the fact that an information on oath had been received and that an enquiry had been made, and then states that that authority had reason to believe that the place sought to be searched is a common gaming house, the presumption attaching to the regularity of official acts would be attracted, and it would not be incumbent on the Crown to lead evidence on the point indicated above. A.I.R. (Vol. 23) 1936 Cal. 788=41 C.W.N. 123=1936 Cr. Cas. 1124=38 Cr.L.J. 449=I.L.R. (1937) 1 Cal. 610=167 Ind. Cas. 771.

——S. 48—Money found on person arrested in common gaming house — Confiscation of—Legality.

Section 48, Calcutta Police Act, provides that on conviction under S. 44 or S. 45, all the instruments of gaming found in the house shall be destroyed by order of the Magistrate, who may also order all or any of the securities for money and other articles seized, not being instruments of gaming to be sold and converted into money, and the proceeds thereof, with all money seized therein, to be forfeited or in his discretion, may order any part thereof to be returned to the persons appearing to have been severally thereunto entitled. But it does not in terms, at any rate, provide for the forfeiture of the money found upon the persons in a common gaming house. A.I.R. (Vol. 22) 1935 Cal. 466=1935 Cr. Cas. 858=39 C.W.N. 1114=36 Cr.L.J. 1513=62 Cal. 1093=158 Ind. Cas. 1095.

——S. 50-A—Game of skill—Question of fact.

The question of whether or not the game is one of mere skill for the purpose of invoking the protection of S. 50-A is a question of fact. A.I.R. (Vol. 20) 1933 Cal. 8=37 C.W.N. 24=34 Cr.L.J. 168=1933 Cr. Cas. 28=141 Ind. Cas. 593.

——S. 54-A—Applicability—Conditions.

There must be reason to believe that the property found in the accused's possession was stolen property as a preliminary condition before the accused can be called on to account for that possession. 72 Ind. Cas. 372=24 Cr.L.J. 372=50 Cal. 564=A.I.R. 1923 Cal. 596.

——S. 54-A — Applicability — Essentials—Duty of prosecution.

For the purposes of S. 54-A of the Police Act, it is obligatory on the prosecution to show that there is reason to believe that the goods had been stolen or fraudulently obtained. The mere evidence of the Police that second-hand articles of clothing were recovered from the house of the accused would hardly warrant one in saying that the articles had been stolen or fraudulently obtained. 71 Ind. Cas. 503=26 C.W.N. 712=24 Cr.L.J. 151=A.I.R. 1922 Cal. 492.

——S. 54-A—Applicability — Manager of shop—Presumption against—When to be raised.

If stolen goods are found in a shop, **prima facie** the person in possession is the owner of the shop. It cannot be presumed that the manager of the shop is in possession, merely because he is in the shop. Unless there is some evidence connecting the manager with the acquisition of these goods or with the fact of bringing them on to the premises, he cannot be said to be in possession of them

so as to be convicted under S. 54-A of the Calcutta Police Act. 52 C.W.N. 258=A.I.R. 1948 Cal. 184=49 Cr.L.J. 240=83 C.L.J. 243.

——S. 54-A—Basis of conviction.

To justify a conviction under S. 54-A of the Calcutta Police Act, there must be reason to believe that the article has been stolen or fraudulently obtained. No conviction can be had in the absence of a reasonable ground for suspicion. 23 C.W.N. 1053=59 Ind. Cas. 554 (1)=22 Cr.L.J. 122.

——S. 54-A—Basis of conviction.

In the absence of reasonable ground for suspicion against the accused, no conviction under S. 54-A can be sustained. The Court must have reason to believe that the article has been stolen or fraudulently obtained. 22 C.W.N. 936=28 C.L.J. 262=19 Cr.L.J. 933=17 Ind. Cas. 657.

——S. 54-A—Burden of proof.

The provision contained in S. 54-A is revolutionary in its character, as it relieves the prosecution of its ordinary burden of proof in a criminal case, beyond what is necessary to create a reasonable suspicion, and throw the entire **onus** on the accused of removing that suspicion. A penal provision of this character should be strictly construed. 33 C.W.N. 477=49 C.L.J. 506=31 Cr.L.J. 59=120 Ind. Cas. 250=1929 Cr.Cas. 31=A.I.R. 1929 Cal. 401.

——S. 54 — Construction — "Possession"—"Thing"—Meaning of.

Per **Mukerji, J.**—The word 'possession' should be understood in a sense **ejusdem generis** with the words 'conveys' and 'offers and etc.' and in the sense of actual physical possession. The word 'thing' appears in the section, in Sub-S. (1) as "anything" and in Sub-S. (2) as "the thing" and must necessarily mean tangible moveable property having a corporeal existence and capable of being handled. It is the suspected thing itself in some shape or form that can form the subject-matter of a case under S. 54. If a man was in possession of stolen gold ornaments and had got it melted or converted into gold, the gold is still the thing itself in a different shape or form. If instead of having the gold in his hand he keeps it in his house or with a friend or goldsmith, the gold is still in his possession. To such a case the section will apply. If a man deposits money in a bank, or purchases a cash certificate with it, the money loses all its identity and it cannot be said that he is still in actual physical possession of the money as a tangible piece of moveable property. The cash certificate or the fixed deposit receipt may represent the money for certain purposes but it is not the money itself as a 'thing' in another shape or form of such thing. 33 C.W.N. 477=49 C.L.J. 506=31 Cr.L.J. 59=120 Ind. Cas. 250=1929 Cr. Cas. 31=A.I.R. 1929 Cal. 401.

——S. 54-A—Conviction without specific charge—Legality—Trial under Ss. 381 and 411, I. P. Code—Sufficiency for conviction under S. 54-A.

When an accused has been tried under Ss. 381 and 411, I. P. Code, he may be convicted of an offence under S. 54-A, Calcutta Police Act, though not separately charged with it. A.I.R. 1923 Cal. 596, Foll. 120 Ind. Cas. 250=33 C.W.N. 477=49 C.L.J. 506=31 Cr.L.J. 59=1929 Cr. Cas. 31=A.I.R. 1929 Cal. 401.

——S. 54-A—Procedure—Accused, when to be called upon to account or possession.

Section 54-A, Calcutta Police Act, requires that facts must be shown and findings arrived at that there 'is reason to believe' that anything found in a person's possession has been stolen or obtained by fraud.

Once that has been done then under the latter part of the section the accused may be called upon to account for his pssession. A.I.R. (Vol. 19) 1932 Cal. 489=55 C.L.J. 96=36 C.W.N. 512=33 Cr.L.J. 643=1932 Cr. Cas. 481=138 Ind. Cas. 636.

——Ss. 62, 62-A, 62-B—Powers of Commissioner—Order by Police Commissioner prohibiting all processions until further order—Legality—Powers to license or permit meetings.

The Calcutta Police Act contemplates that an order prohibiting a procession or assembly may be made by the Commissioner of Police which will subsist for seven days, and that at or before the end of the seven days the Governor-General may by his action extend the period, if necessary, until further order. But the mere fact that action by the Governor-in-Council was taken contemporaneously with the making of the order would not make that order bad.

The phrase "the Commissioner of Police may by order in writing prohibit any procession or public assembly" in S. 62-A, Calcutta Police Act, 1866, has reference to some particular procession or processions upon a particular occasion or having a particular character or object which is necessary to prohibit for the preservation of the public peace or public safety. The Commissioner has no power under that section to issue an order in writing holding good for seven days prohibiting all public processions in the city and suburb of Calcutta.

Sub-S. (4) of S. 62-A, Calcutta Police Act cannot be construed as giving powers to the Commissioner of Police to license or permit processions or public assemblies. A.I.R. (Vol. 18) 1931 Cal. 122=32 Cr.L.J. 511=35 C.W.N. 257=53 C.L.J. 461=58 Cal. 971=1931 Cr. Cas. 154=130 Ind. Cas. 241.

——S. 62-A—Carrying kirpans, exceeding nine inches in length—Offence.

The carrying of a sword by calling it a kirpan, exceeding nine inches in length, in the town of Calcutta, is an offence under S. 62-A read with notification of Commissioner of Police dated 21st October, 1922. 81 Ind. Cas. 940=25 Cr.L.J. 1116=50 Cal. 912=A.I.R. 1924 Cal. 231.

——S. 62-A (1)—Applicability—Public meeting—Member of audience sounding bugle—Order by Police to stop—Disobedience—Omission by President to order stopping of bugle—No evidence of conspiracy—Charge of abetment against President—Maintainability—Illegal omission—Meaning of.

A Police Officer issuing an order under S. 62-A

(1) of the Calcutta Police Act need not be armed with a previous sanction of the Commissioner of Police. The words "subject to the orders of the Commissioner of Police" used in the section only mean that if the Commissioner of Police so chooses he may by his direction supersede or alter the order issued by the Police Officer.

The words "illegal omission" in connection with the definition of abetment have reference to an intention of "aiding the doing of a thing."

At a public meeting, amongst the audience there were some "volunteers" and one of them from time to time sounded a bugle. A Police Officer requested the bugler not to sound the bugle, but he did not listen. The President of the meeting took no steps to stop the sounding of the bugle, though the direction was given by the Police Officer within his hearing and he refused to give the name and the address of the bugler. He was, therefore, charged with abetment of an offence under S. 62-A (1) (e), Calcutta Police Act. The accused was elected President just before the proceedings of the meeting began; and he had no knowledge that in the course of the meeting a bugle was going to be blown in that way:

Held, that in a case of this nature to prove abetment something more should be established than the mere fact that the Chairman of the meeting took no steps to prevent an objectionable or unlawful action on the part of some person at the meeting and as no guilty knowledge or conspiracy was proved against the accused the charge of abetting was not substantiated. A.I.R. (Vol. 20) 1933 Cal. 36=36 C.W.N. 722=56 C.L.J. 241=34 Cr.L.J. 36=1933 Cr. Cas. 71=140 Ind. Cas. 550.

——S. 62-A (4)—Discretion—Necessity or expediency of order—Decision of Commissioner—Finality.

Whether a particular order under S. 62-A (4) prohibiting in the town any procession or assembly on a particular day within a particular place is or is not necessary is a matter entirely for the Commissioner of Police to decide. A.I.R. (Vol. 18) 1931 Cal. 410=35 C.W.N. 716=32 Cr.L.J. 844=1931 Cr. Cas. 506=58 Cal. 1303=132 Ind. Cas. 174.

——Ss. 62-A (4) and 102-A—(Amended)—Scope—Procession not prohibited—Order prohibiting a person to take part in it, if legal—Public notice.

S. 62-A (4) of the Act only enables the Commissioner of Police to prohibit a procession but not to prohibit a person from taking part in such procession and therefore, when the procession is itself not prohibited, it would be illegal to prohibit a person from taking part in it. S. 62-A (4) does not require that a public notice should be given of the order passed thereunder and S. 102-A does not lay down anything to the contrary. 40 Cal. 470=17 C.W.N. 505=14 Cr.L.J. 125=18 Ind. Cas. 685.

——S. 66 (4) (a)—Scope—If overrides S. 559 (18), Calcutta Municipal Act — Bye-laws under latter—Force of.

The petitioner had a license under bye-law 2 of the laws framed under S. 559 (18) of the Act authorizing him to make an enclosure on a portion of a public street for depositing mortar, brick, etc., and to fence it off. He was charged with having omitted to fence and thereby caused obstruction in the footpath for about six hours. The petitioner not only committed a breach of the license but also committed an offence under S. 66 (4) (a) of the Police Act. **Quaere.** Whether Sub-S. (4) (a) introduced in S. 66 of the Calcutta Police Act overrides or repeats the provisions regarding the regulations of obstructions to be found in the Calcutta Municipal Act. 18 Cr.L.J. 753=26 C.L.J. 610=22 C.W.N. 455=41 Ind. Cas. 129.

——S. 68—Scope—Conviction under—Trial under Merchant Shipping Act, S. 103 (4) on the same facts—Bar of—Cr.P. Code, S. 403.

Where the accused, an officer of a steamship, was convicted under S. 68 of the Calcutta Police Act on a charge of drinking and disorderly conduct creating a disturbance by assaulting the Captain of the vessel and sentenced to pay a fine, and the Captain subsequently filed a complaint on the same facts under S. 103 (4) of the Merchants Shipping Act charging the accused with having assaulted him and he was convicted under the said section and sentenced:

Held, that the substantial charge under the Police Act being "assault," Cr. P. Code, S. 403 (1), 2nd part is a bar to a second conviction upon the same facts under a different enactment, namely, the Merchants Shipping Act. 99 Ind. Cas. 1033=31 C.W.N. 195=28 Cr.L.J. 233=7 A.I.Cr. R. 386=A.I.R. 1927 Cal. 224.

——S. 76—Duty of Deputy Commissioner.

It is not the duty of the Deputy Commissioner of Police, a Justice of the Peace, to place an offender forthwith before a Magistrate, for in the first instance there is no period mentioned in the Calcutta Police Act within which this must be done, and in the second place as a Justice of the Peace, the Deputy Commissioner is entitled to take such steps as may be necessary to complete an investigation before placing the matter before a Magistrate. A.I.R. 1925 Cal. 587, Rel. on. It is also proper that if the officer does not see his way to release the petitioners on bail, he should produce them before a Magistrate with as little delay as possible, so that the Magistrate may determine whether in the circumstances of the case the persons arrested are entitled to be enlarged on bail, and if there is any improper exercise of such power, that can be corrected by the High Court under suitable provisions of the law, such as S. 491, Cr. P. Code. 44 C.L.J. 134=97 Ind. Cas. 945=27 Cr. L.J. 1185.

——S. 76—Period of detention—Power of Deputy Commissioner.

A Deputy Commissioner of Police by virtue of his powers as a Justice of the Peace or otherwise, cannot lawfully order the detention in police custody of a person arrested without warrant, for any longer time than is necessary to enable such person to be brought before a Presidency Magistrate, nor can he lawfully order that the detention of any such person as aforesaid at a police station or in police custody shall continue until the police in-

vestigation shall have been (a) further advanced, or (b) completed, notwithstanding that the time within which such person might have been brought before a Presidency Magistrate has elapsed. Cr. Mis. Case 51 of 1926, Overruled. 54 Cal. 218=44 C.L.J. 138=30 C.W.N. 985=27 Cr.L.J. 1201=7 A.I.Cr.R. 298=97 Ind. Cas. 961=A. I. R. 1926 Cal. 1121 (F.B.).

——S. 78-A—Complainant's Statement—Use of as evidence.

A statement by the complainant during investigation to a Police Inspector reduced into writing and entered in a diary must be produced before the Court and allowed to be proved by the dedence. 33 C.W.N. 203=116 Ind. Cas. 160=30 Cr. L. J. 577=12 A.I.Cr.R. 448=A.I.R. 1929 Cal. 257.

——S. 78-A—Powers of police—Power to take statements during investigation.

There are no powers inherent in the Police which are not expressly set out in the four corners of the Calcutta Police Act. All investigations by the Police must be controlled, in the mofussil, by the Cr.P. Code and in Calcutta by the Police Act itself or by any circular Orders issued. Taking of statements generally by the Police apart from the provisions of any Act and then putting the statements so taken in evidence against the person by whom they were made is not permissible. 53 Cal. 650=30 C.W.N. 427=45 C.L.J. 15=27 Cr. L.J. 602=94 Ind. Cas. 266=A.I.R. 1926 Cal. 586.

——S. 78-A—Notice after charge—Legality—Cr. P. Code—Applicability to investigation.

Provisions of Criminal Procedure Code regarding investigation by the Bengal Police, do not apply to investigations by Calcutta Police. The Calcutta Police Act itself does not contain any rules of procedure regarding the conduct of investigations by the Calcutta Police. Hence where after the commencement of trial of some accused, notice under S. 78-A, Calcutta Police Act, is issued, the notice is not **ultra vires** because the investigation cannot be supposed to have come to an end the moment a **chalan** is put up. A.I.R. (Vol. 25) 1938 Cal. 545=39 Cr.L.J. 842=177 Ind. Cas. 171.

CALCUTTA PORT ACT (III OF 1890).

——S. 83—"Erection"—Adding bandh to Hoogly river bed.

If a person adds a platform or **bandh** to the existing bed of Hoogly river, within the limits of the Port of Calcutta, it is an erection within S. 83. 22 Cr.L.J. 504=62 Ind. Cas. 328 (Cal.).

——S. 83—Scope and effect of—Interference with private right.

S. 83 does expressly deprive owners of property of their rights. It prohibits the erection of certain structures on private land, i.e., land below high water mark which is clearly an interference with the rights of the owners. If it were assumed that all land below high water mark is the property of the Crown to which no other person had any rights, the provisions under the Act would have been superfluous since it would not be necessary to provide a special statute for the removal of structures erected by trespassers. 51 Cal. 1030=84 Ind. Cas. 941=26 Cr.L.J. 397=A.I.R. 1925 Cal. 404.

——S. 84—Jurisdiction of Civil Court—Proceedings for contravention of S. 83—Injunction by a Civil Court—Competency.

The Commissioners for the Port of Calcutta cannot be restrained by injunction by a Civil Court from proceeding with a certain criminal prosecution instituted by them against certain persons under S. 84, Calcutta Port Act, for contravention by the said persons of the provisions of S. 83 of the Act. 55 Cal. 978=112 Ind. Cas. 712=32 C.W.N. 576=A.I.R. 1928 Cal. 464.

——S. 84—Power of Court—Conviction—Direction to remove obstruction—Legality.

Where a person is convicted under S. 84 he should not be directed to remove the obstruction. The Port Commissioners should themselves remove the obstruction under S. 84 (1). 22 Cr.L.J. 504=62 Ind. Cas. 328 (Cal.).

——S. 84—Scope—Addition to illegal erection—Effect.

Where the original wall itself is an illegal erection, the making of additions or re-erecting part of it brings the case within S. 84, Calcutta Port Act. A.I.R. (Vol. 24) 1937 Cal. 45=38 Cr.L.J. 666=I.L.R. (1937) 1 Cal. 603=168 Ind. Cas. 972.

——Ss. 113 and 114—Liability for loss of goods.

Port Commissioners are liable in respect of the goods for three days from their arrival, but not afterwards unless they are in default. 46 Cal. 56=50 Ind. Cas. 58.

——S. 142—Applicability—Making and leaving holes open—Unusual downpour of water through holes damaging machinery in pumping station—Suit for damages—Protection under section—If available.

Held, that the making and leaving of the holes in the track by the defendants could not be said to be anything done or purporting or professing to be done in pursuance of Calcutta Port Act, and hence the defence under S. 142 did not apply. (1936) 63 Cal. 592.

——S. 142—Applicability—Question of—Decision—If to be on pleadings—Evidence—Admissibility.

The Corporation of Calcutta instituted a suit on the 20th of July, 1928, against the Commissioners for the Port of Calcutta for damages in respect of the flooding of the engine-room of the Corporation's pumping station on 22nd July, 1926. The defendants pleaded that the plaintiff's cause of action was barred by S. 142 of the Calcutta Port Act, and obtained an order that the suit be set down for the trial of this issue. Both the application of the defendants and the order obtained by them contemplated that the applicability of S. 142 should be determined upon the face of the plaint apart from evidence but the facts disclosed by the plaint were not sufficient for the purpose of deciding the issue:

Held, that the facts stated in the plaint being by themselves insufficient, the procedure of binding parties to the order was inapplicable. The defend-

ants could show by other evidence that the facts proved brought the case within S. 142. A.I.R. (Vol. 18) 1931 Cal. 419=58 Cal. 264=132 Ind. Cas. 91.

——S. 142—Applicability—Work relating to Commissioner of Port's Railway—Negligence—Damages to Calcutta Corporation—Suit for—Protection—If available.

An appeal by Calcutta Corporation had been made to the Commissioner of the Calcutta Port as a statutory body to do certain work. To that appeal they assented. The work related to the Commissioner's railway track. It was being done on their property, and in their interest. The workmen, including the Superintendent of Works were paid by the Commissioner presumably from statutory funds, and the work was superintended by them. In what the Superintendent of Works did or omitted to do, he was solely concerned with his employers' business. In point of fact, there was then no contract between the parties; the work being done was of an exploratory character. A contract may have been in contemplation of the parties; but it was not in being:

Held, that the Commissioners did not divest themselves of their capacity as a Port Authority, and did not assume some other capacity, in having the work done. And any act or omission on the part of the Superintendent in construction, must be deemed to have been done under the Calcutta Port Act. Therefore a suit against the Commissioners for the negligence on their part, in construction, causing damage to the Corporation, must be governed by S. 142 of the Calcutta Port Act. It could not be argued that while the Act protects against a claim based on breach of statutory duty, it does not protect against an omission to perform a statutory duty. A.I.R. (Vol. 24) 1937 P.C. 306=3 B.R. 777=1937 O.L.R. 973=41 C.W.N. 1317=1937 A. L. R. 737=1937 M.W.N. 1208=(1937) 2 M.L.J. 594=46 M.L.W. 721=1937 A. L.J. 1042=66 C.L.J. 188=40 Bom.L.R. 6=64 Ind. App. 363=31 S.L.R. 686=170 Ind. Cas. 322 (P.C.).

CALCUTTA RENT ACT (III OF 1920).

——Applicability—Transfer of rights by landlord.

Where a landlord transfers his rights, wholly or partially the Act must be applied as it stands to the new rights and the new relations thus created. 50 Cal. 491=75 Ind. Cas. 521=A.I.R. 1924 Cal. 57.

——Jurisdiction of controller—If ousted by including—Property outside Calcutta.

Where a lease of property in Calcutta included also property outside Calcutta to which the Calcutta Rent Act could not apply, and it was found that there was no genuine intention on the part of the lessor that the tenant should be put in possession of that property, and that such property was included in the lease to evade the provisions of the Rent Act:

Held: that the Rent Controller had jurisdiction to fix a standard rent in respect of the Calcutta property. 53 Cal. 115=91 Ind. Cas. 417=30 C.W.N. 114=A.I.R. 1926 Cal. 250.

——Power to review—Order fixing standard rent—Judgment in rem — Application by subsequent tenant for alteration—Competency.

An order passed by the Rent Controller fixing the standard rent is an order which affects the house and it is therefore one which operates as a judgment **in rem** and the question cannot be reopened on the application of a subsequent tenant. No doubt the standard rent can be altered or varied under certain circumstances, for instance, when there has been any alteration in the premises or an additional burden has been cast upon the landlord or similar circumstances, but that does not show that the judgment fixing the standard rent is not a judgment **in rem** and that it can be reopened at any subsequent time. 31 C.W.N. 308=100 Ind. Cas. 781=A.I.R. 1927 Cal. 305.

——Powers of controller—Premises let for more than Rs. 250 before November, 1918—Application after the Act to fix standard rent of part of premises—Power to apportion rent.

Where certain premises were let out before 1st November, 1918 for more than Rs. 250 and after the Act an application was made to fix the standard rent of a portion of the premises originally let:

Held: that the Rent Controller has power, for the purpose of fixing standard rent, if necessary for him, to decide what portion of the rent, originally paid for the entire premises was to be allocated in respect of premises in respect of which an application is made, so as to determine whether he has jurisdiction to deal with the matter. 87 Ind. Cas. 796=A.I.R. 1926 Cal. 372.

——Practice—Subsequent events — Suit by landlord to eject tenant—Dismissal—Appeal—Rent Act expiring at hearing of appeal—Effect—Act, if applicable.

It is true that an appellate Court has to decide a case as it was presented before the trial Court and on a consideration of which the original judgment is based. But if the right claimed is one which has either ceased to exist or been modified by certain events which have transpired since the decree of the trial Court, the Court is bound to take notice of it in order to give just and proper relief to the parties to the appeal before it. The plaintiff let his premises to the defendant and standard rent was fixed under the Rent Act of 1920. On 14th March, 1925, the plaintiff gave a notice to the defendant asking him to vacate the premises by the end of March, 1925. The defendant not having vacated within the time allowed to him, a suit was instituted on 13th May, 1925, for ejectment against the defendant. The trial Court dismissed the plaintiff's suit on the ground that the defendant was protected from ejectment under the provisions of S. 11, Rent Act. This order was pronounced on 30th July, 1926. There was an appeal by the plaintiff against the decree of the trial Court. The appeal came on for hearing on 29th July, 1927. In the meantime the Rent Act expired on 31st March, 1927 and ceased to exist. The appeal was heard and allowed. Defendant came on second appeal.

Held, that the case was rightly decided as on the day the lower appellate Court delivered its judgment, the law applicable was the general law, i.e.,

T. P. Act and the tenancy having been validly determined under it, a decree ordering ejectment was correct. 47 C.L.J. 530=110 Ind. Cas. 715 =A.I.R. 1928 Cal. 436.

——Revision—Powers of High Court—Question of facts.

High Court is not entitled to revise President's decision even if on going through the evidence High Court should think he has devoted an insufficient amount of attention or attributed an insufficient importance to one element of a question of fact. 28 C.W.N. 467=83 Ind. Cas. 368=A.I.R. 1924 Cal. 629.

——Tenant ceasing to be a tenant, by notice to quit —Right to benefit of Act.

After a landlord gives a notice to quit the tenant thereafter becomes a trespasser and can no longer claim the advantage under the Act. 30 C.W.N. 152=92 Ind. Cas. 1001=A.I.R. 1926 Cal. 481.

——(as amended by Act I of 1924), S. 1 (4)—Proviso—Scope and effect—Proceedings before President, C. I. T. not over on 31st March, 1924 —Premises of higher monthly rental than Rs. 250 on 1st November, 1918—No appeal.

By the Calcutta Rent (Amendment) Act 1924 (Bengal Act No. I of 1924) the duration of the Calcutta Rent Act of 1920 was extended until the end of March, 1927, but it was provided by this last amending Act that after the 31st March; 1924, the principal Act should cease to apply to any premises the rent of which exceeded Rs. 250 a month or Rs. 3,000 a year, on the 1st November, 1918.

Held, that the President of the Calcutta Improvement Tribunal was right in holding that by virtue of this proviso he could not entertain appeals to him from decisions of the Rent Controller in cases in which the proceedings before him had not terminated on the 31st March, 1924, if such proceedings related to premises the rent of which exceeded Rs. 250 a month or Rs. 3,000 a year on the 1st November, 1918. 29 C.W.N. 281=86 Ind. Cas. 139=52 Cal. 551=A.I.R. 1925 Cal. 571.

——S. 2—Applicability—Tenant at sufferance.

A monthly tenant, whose period of tenancy had terminated and who received a notice to quit before the Act came into force, remains a tenant within the scope of S. 11, though he is not a tenant under S. 2. 49 Cal. 369=68 Ind. Cas. 361 =25 C.W.N. 967=A.I.R. 1922 Cal. 391.

——S. 2—Fans and lights in building—If part of premises—Test.

It depends on the intention of the parties and on the nature of the agreement to be gathered from the same whether electric fans and lights are intended to go with and to form a part of the premises or building demised. 53 Cal. 123=42 C.L.J. 87=30 C.W.N. 274=90 Ind. Cas. 4= A.I.R. 1926 Cal. 469.

——S. 2—'First let'—Entire building let out—Sub-letting of part thereof is not 'first letting'.

If the words 'first let' in S. 2 (f) (ii) should be construed to mean first letting between the tenant and the sub-tenant, the object of the Act may be frustrated. If such a construction is accepted, then an entire premises may be taken on lease by a tenant at a rent of Rs. 500 a month, and he may sub-let in four flats at a rent of Rs. 500 or at any rent he pleases for each flat, each of which will be a first letting so far as that particular flat is concerned. 27 C.W.N. 569=77 Ind. Cas. 623 =A.I.R. 1923 Cal. 553.

——S. 2—Hire of furniture—Power of controller to fix.

The Rent Controller cannot fix the hire of furniture though he is entitled to fix the standard rent of premises, where they are comprised in a furnished flat. Though the controller or the tribunal as the case may be, may make an order about the standard rent to be paid in respect of premises when such premises have been let at a given rent which includes payment for the use of furniture, still the liability of the parties under the original agreement remains unaffected, whatever be the effect of such an order as between other parties or in other circumstances. The order does not determine the agreement. 28 C.W.N. 774=81 Ind. Cas. 853=A.I.R. 1924 Cal. 868.

——S. 2—"Premises"—Meaning.

It cannot be said that because a house consists of different blocks, consisting of servants' quarters and offices, garage and the main building. It is not premises within the meaning of the Act. 53 Cal. 479=30 C.W.N. 308=95 Ind. Cas. 289=A. I.R. 1926 Cal. 681.

——S. 2—'Premises'—Part of hut.

The definition of premises as given in S. 2 (e) does not cover a part of a hut. 69 Ind. Cas. 976 =A.I.R. 1924 Cal. 535.

——S. 2—"Premises"—Test—Purpose of letting.

To see whether a property comes within the term 'premises' as defined in the Act it is necessary to ascertain the purpose for which the premises were let. The Rent Controller will have to determine whether the premises in question were let for the purposes mentioned in S. 2, Cl. (c) of Calcutta Rent Act, though on the question what was the purpose of the original letting the actual user of the premises may be evidence. 67 Ind. Cas. 302=A.I.R. 1923 Cal. 311.

——S. 2—"Premises"— Workshop, if.

A workshop is not within the meaning of the word "premises" as used in the Calcutta Rent Act. The mere fact that the Engineer of the Company had a retiring room, or that a room was used for the purpose of an office connected with the workshop does not bring the case within the word "premises" as used in the Rent Act. 26 C.W.N. 102=68 Ind. Cas. 907=A.I.R. 1921 Cal. 470.

——S. 2—Standard rent—What is—Application to Controller to fix—Necessity.

Prima facie the standard rent mentioned in sub-S. (i) of Cl. (f) of S. 2 should bt the standard rent, and in the absence of any application by the landlord to fix it at a higher rate, under S. 15 the "standard rent" should be taken to be the rent at which the premises were let on the 1st Nov. 1918 with the addition of ten per cent. as provided by sub-S. (i). It is not necessary that an application should be made to the Rent Controller to fix

it. 30 C.W.N. 152=92 Ind. Cas. 1001=A.I.R. 1926 Cal. 481.

——S. 4 (3)—Applicability—Demise for three years with provision for renewal—If one for five years or upwards—Discretion of Controller—Interference by High Court.

Where the demise was clearly for a period of three years the fact that there was option for renewal for a further period of three years after the expiration of the first three years does not make it a lease for five years or upwards within the meaning of S. 4, Sub-S. 3. If the Rent Controller has refused to exercise the jurisdiction conferred upon him by the Calcutta Rent Act, the High Court will interfere under S. 115. 86 Ind. Cas. 227=49 Cal. 928=26 C.W.N. 711=39 C.L.J. 85=A.I.R. 1922 Cal. 514.

——S. 8—Abatement—Application for standardization of rent—Relationship of landlord and tenant ceasing—Effect—Proceedings, if to be dropped.

There is nothing in the Act to justify the dropping of a proceeding which has been started regularly under the Act because one of the parties was not at the date of the hearing occupying the position which he did at the commencement of the case. When a case has been regularly started there must be some direct provision in law to disqualify it from being carried to the end. 51 Cal. 577=29 C.W.N. 30=78 Ind. Cas. 874=A.I.R. 1924 Cal. 715.

——S. 9—Meaning and effect of—Premium paid in pursuance of agreement prior to 15th March, 1920—If recoverable as prohibited.

The meaning of S. 9 with its sub sections and proviso is that if a grant of a tenancy is made after the commencement of the Act, and if a fine or premium is required as the consideration thereof, and if it has been paid after the date of the commencement of the Act, the tenant can recover it from the landlord, unless the payment, which has in fact been made, was in accordance with the agreement entered into before the 15th March, 1920. 53 Cal. 492=97 Ind. Cas. 376=A.I.R. 1926 Cal. 927.

——S. 11—Applicability—Breach of covenant by tenants—Removal of fixtures contrary to covenant—Effect—Forfeiture of right to protection.

The defendants had committed a breach of one of the covenants in that when they vacated the premises they removed certain fixtures which they had no right to remove and when they gave up possession the premises were not in good and substantial repair and condition in accordance with the terms of the lease.

Held, that the fact that the defendants had committed a breach of that covenant when they gave up possession of the premises, was not sufficient to disentitle them to the protection of the Rent Act during the whole of the period during which they were holding over after the expiry of the term of their lease and that the landlord was merely entitled to damages for the breach of covenant and not to any mesne profits on the footing that the tenant's possession after the expiration of the term of the lease was wrongful. 88 Ind. Cas. 589=29 C.W.N. 636=A.I.R. 1925 Cal. 791.

——S. 11—Bona fide requirement—What is—Person having sufficient premises letting it out—Right to eject tenants in other premises.

To allow a landlord who has premises sufficient for his requirements to eject tenants because he chooses for his own convenience or profit to deprive himself of the use of the premises which he is occupying would be to defeat the objects of the Act. It is not sufficient that a plaintiff in order to defeat a plea under the Calcutta Rent Act, should merely say that he desires the premises **bona fide** for his own occupation. The word in the Act is not "desire" but "require". This involves something more than a mere wish and involves an element of need to some extent at least. The tenant is justified in paying rent to the Controller month by month once there has been a refusal by the landlord to accept it. 69 Ind. Cas. 963=26 C.W.N. 499=A.I.R. 1923 Cal. 223.

——S. 11—Defaulting tenant—Right to benefit of section.

The Act gives to a mere monthly tenant considerable fixity of tenure upon a condition, namely, that he is a rent-paying and not a defaulting tenant. Where the rent payable for certain premises on the first Novermber, 1918 was Rs. 65 and not Rs. 55 as alleged by the tenant, and the sum of money which the tenant had paid to the Rent Collector was insufficient to meet either the contractual rent or the rent allowed under S. 2 (1) of the Act or the rent ultimately fixed as the standard rent by the Controller. **Held,** that the tenant was not in the circumstances a person who was entitled to the benefit of the provisions of S. 11 of the Act. 49 Cal. 383=69 Ind. Cas. 988 =A.I.R. 1922 Cal. 380.

——S. 11—Defaulting tenant—Landlord's right to eject.

If the tenant does not pay regularly the rent chargeable under the Act, he is not entitled to the benefits of the Act and the landlord is entitled to get an order for ejectment. The privilege under the Act is given to a tenant who pays his rent and performs the conditions and to no one else. 49 Cal. 369=25 C.W.N. 967=68 Ind. Cas. 361=A.I.R. 1922 Cal. 391.

——S. 11—Landlord's right to eject—Agreement for lease—Tenant paying standard rent regularly—Liability to ejectment.

There was an agreement for a lease, though finally fixed, after occupation by the tenant. The tenant, however contended that the rent fixed was high and got standard rent fixed by the Controller after notice to the landlord. The approximate stanard rent was paid monthly to the Controller and the covenants for the deposit of rent and the advance rent were complied with.

Held, the rent of the premises was the statutory rent fixed by the Controller and so long as the conditions were complied with, the landlord was not entitled to a decree for ejectment. 49 Cal. 150=70 Ind. Cas. 75=A.I.R. 1922 Cal. 394.

——S. 11—Scope—Grounds for eviction under—If exhaustive—Discretion of Court.

The legislature in enumerating in the proviso

to S. 11 the grounds upon which a landlord can successfully claim an order for possession did not intend to limit the claim to those grounds but merely enumerated those grounds for the purpose of indicating the grounds upon which a landlord would be entitle to possession as of right, leaving it open to the Court to exercise a discretion in his favour upon any other grounds which might appear to the Court to be satisfactory. The tenant suggested to the plaintiff landlord long before the expiration of the term of the lease that the plaintiff was free to negotiate with other people for letting out the premises in question after the expiration of the lease. On the faith of that representation the plaintiff entered into a binding agreement for lease with another on the expiration of the existing lease or as soon as the existing tenant vacated.

Held, that the arrangement with the new tenant was not conditional and the landlord undertook to give possession of the premises to this new tenant on the expiration of the term of the previously existing lease, or, at any rate, within a reasonable time thereafter. If possession was not given by the plaintiff to the promisee, the plaintiff will be exposed to the consequences of a breach of his agreement and that it was just and proper that protection should be afforded to the plaintiff. 25 C.W.N. 1012=68 Ind. Cas. 417=A.I.R. 1921 Cal. 213.

——S. 11 (1), Proviso—Scope of—Breach of covenant by tenant—Effect of—Discretion of Court.

With reference to the words of the first sub-section of S. 11 there are some things that those words must import; some things which they may import and there are somethings which they cannot import. They cannot possibly mean that because a breach of covenant was committed in 1921 which was perfectly harmless, which never was made a grievance of, and as to which no request for compensation or damage was ever made, therefore, it is impossible for the Court to give the tenant in 1924 the benefit of the Rent Act. By the last words of the proviso to sub-S. (1) the Court could in a proper case take into account breaches of the conditions of the tenancy committed during the course of the original tenancy. 30 C.W.N. 199=94 Ind. Cas. 857=A.I.R. 1926 Cal. 624.

——S. 11 (4) and (5)—Scope—Compliance—Landlord refusing rent—Rent Controller's Office closed at expiry of fortnight from due date—Rent paid at earliest opportunity after re-opening—Sufficiency.

Where a landlord refused to accept the rent offered by the tenant and at the expiry of a fortnight from the date on which the rent became due, the Rent Controller's Office was was closed on account of some holidays and the rent was paid into his office at the earliest opportunity after the re-opening of it.

Held, that there was sufficient compliance with the section. 29 C.W.N. 636=88 Ind. Cas. 589=A.I.R. 1925 Cal. 791.

——S. 11 (5)—Scope—Suit for ejectment—Conditions to be fulfilled—Default—Subsequent acceptance of rent—Effect.

Where the benefit of the Rent Act is claimed the defendant must show that he has paid arrears within three months of the Rent Act coming into force, and subsequently paid his rent regularly within the time fixed in the contract with his landlord or in the absence of any such contract by the 15th day of the following month or in the event of the landlord refusing to accept rent by depositing it with the Rent Controller within a fortnight of its becoming due. Where such of these conditions as are applicable are not fulfilled it is mere waste of time to consider any other plea under the Calcutta Rent Act. Where there is an agreement to extend the time for payment before the rent actually becomes due under the lease, there it might well be that the time within which under S. 11 (5) rent has to be paid to the landlord is such extended date but where the default has already taken place, subsequent acceptance of rent by the landlord does not take the matter out of the provisions of S. 11, sub-S. (5). 26 C.W.N. 678=70 Ind. Cas. 494=A.I.R. 1923 Cal. 227.

——S. 14—Applicability—Tenant—If should continue to be such at time of claim.

S. 14 is intended to give relief to any person who, having been a tenant, comes within the period of limitation to assert his claim to recover excessive rent paid, whether at the time he claims it, he is actually a tenant or not: A.I.R. 1926 Cal. 708, Reversed. 56 Cal. 80=55 I.A. 344=32 C.W.N. 1093=28 M.L.W. 862=111 Ind. Cas. 300=A.I.R. 1928 P.C. 227=55 M.L.J. 464 (P.C.).

——S. 15—Applicability — Conditions — Duty of tenant.

The intention of the section is to give the tenant the benefit of the section if he complies with two conditions: in the first place he must have paid any arrears of rent which might be due at the time of the passing of the Act within three months of the commencement of the Act; and, secondly, he must pay the rent to the full extent allowable by the Act within the time fixed by the contract with his landlord, and in the absence of any such contract by the 15th day of the month next following that for which the rent is payable. 30 C.W.N. 152=92 Ind. Cas. 1001=A.I.R. 1926 Cal. 481.

——S. 15—Applicability — No fixation of rent—Effect.

S. 15 of the Calcutta Rent Act contemplates a decision of the Rent Controller fixing the standard rent and therefore it does not apply where no rent is fixed. 31 C.W.N. 308=100 Ind. Cas. 781=A.I.R. 1927 Cal. 305.

——S. 15—Application to fix — Standard rent—When to be made.

There is nothing to prevent an application being made before the expiry of the lease for fixing the standard rent. 49 Cal. 528=68 Ind. Cas. 274=26 C.W.N. 78=A.I.R. 1922 Cal. 427.

——S. 15—Certificate of rent—Duty to grant Rent Controller is bound to grant certificate.

S. 15 makes it obligatory on the Rent Controller to grant a certificate certifying the standard rent. 49 Cal. 931=70 Ind. Cas. 371=26 C.W.N. 845=A.I.R. 1923 Cal. 169.

——S. 15—Estoppel—Tenancy unlawful—Landlord always treating tenancy as valid—Plea of illegality—Right to object to fixation of standard rent.

Where in an application by the tenant to fix standard rent the landlord has never set up the invalidity of the tenancy due to the tenancy being for an unlawful purpose, but has always treated the tenancy as valid, standard rent should be fixed although the tenant admits the unlawful purpose of the tenancy. 26 C.W.N. 52=64 Ind. Cas. 709=A.I.R. 1921 Cal. 486.

——S. 15—Expenses of improvement—When to be considered in standardization of rent.

The expenditure to be taken into account must be made by the landlord who applies for standardization of rent or against whom an application for standardization has been made. Upon the plain construction of the sections of the Rent Act the expenditure made by a third person cannot be taken into consideration in fixing the standard rent as between two contending parties. 53 Cal. 479 =30 C.W.N. 308=95 Ind. Cas. 289=A.I.R. 1926 Cal. 681.

——S. 15—Jurisdiction of Controller — Wrong decision—Remedy.

Sub-S. (3) is ungrammatical; the first limb of the sentence should read: "Where by reason of any premises having been let in parts any difficulty arises in giving effect to this Act". Where the premises are first let as a whole, the Controller has jurisdiction to determine whether there is any difficulty which makes it in his opinion just to fix the standard rent under Cl. 3 (a), and if he comes to a wrong conclusion the remedy is not by way of attack on his jurisdiction, but by appeal to the President of the Improvement Tribunal under S. 18. 56 Cal. 80=55 I.A. 344=32 C.W.N. 1093=28 M.L.W. 862=111 Ind. Cas. 300=A.I.R. 1928 P.C. 227=.55 M.L.J. 464.

——S. 15—Jurisdiction of High Court.

The Appellate Side of the High Court has jurisdiction to hear an application against an order of the Rent Controller refusing to fix a standard rent. 26 C.W.N. 52=64 Ind. Cas. 709=A.I.R. 1921 Cal. 486.

——S. 15—Petition for standardization after decree for ejectment—Competency.

An application for standardization of rent to Rent Controller, after a decree in suit for ejectment is passed ejecting the tenant, is not competent as there is no tenancy in existence thereafter. 92 Ind. Cas. 392=A.I.R. 1926 Cal. 697.

——S. 15—Petition for standardization pending suit for eviction—Maintainability.

On the 15th August, 1923, the landlords served a notice on the tenants determining the lease on the ground of breach of covenants in the lease. They brought an action in ejectment on 10th September, 1923. During the pendency of the suit, on 1st December, 1923, the tenants applied to the Rent Controller under the Rent Act for standardization of rent. The Rent Controller fixed standard rent on the 11th March, 1924.

Held, that the petition for fixing standard rent was incompetent as the Rent Controller had no jurisdiction to fix a standard rent, the applicant being merely a trespasser from 1st December, 1923 and, therefore, the decision of the Rent Controller was without jurisdiction and ought to be set aside. The fact that the decree was passed after the order of the Rent Controller fixing a standard rent did not affect the question because the decree did not terminate the tenancy. The judgment of the Court only showed that the plaintiffs were justified in terminating the tenancy on the 15th of August, 1923. 30 C.W.N. 236=93 Ind. Cas. 56=A.I.R. 1926 Cal. 708.

——S. 15—Scope—Rent—If can be fixed retrospectively.

The Controller has power to fix the standard rent so as to operate retrospectively. 56 Cal. 80 =55 I.A. 344=32 C.W.N. 1093=28 M.L.W. 862 111 Ind. Cas. 300=A.I.R. 1928 P.C. 227=55 M. L.J. 464 (P.C.).

——S. 15—"Tenant"—Ex-tenant.

In order to give any working effect to the Act it is necessary that the words "landlord and tenant" in S. 15 (1) must include, as they often do in ordinary parlance, ex-landlord and ex-tenant. **Remon v. City of London Real Property Co.,** (1921) 1 Q.B. 49, Rel. on. 56 Cal. 80=55 I.A. 344=32 C.W.N. 1093=28 M.L.W. 862=111 Ind. Cas. 300=A.I.R. 1928 P.C. 227=55 M.L.J. 464 (P. C.).

——S. 15—Proviso—Scope of inquiry—Duty of controller.

In order that it may be a question at large how much the standard rent should be, there has first of all to be a finding within one or other of the sub-divisions of Cl. (3) of S. 15. If that finding is come to then by the proviso the hands of the controlller are tied, as to the amount to which he may raise the rent. He is forbidden to fix the rent at a higher amount than the highest actually paid for the premises since November, 1918. But by the second part of the proviso, if one or other of the things therein mentioned is found, that particular restriction on the question of the amount is taken away and the result is that the amount is entirely at large. The test throughout the Act is intended to be the actual rent, that is to say, the rent at which the premises were let in fact on the 1st day of November, 1918. Under Cl. (d) the Controller has to ask himself whether that rent at that date was unduly low and the reference there is not to a hypothetical or notional state of normal repairs but the actual condition of the premises as compared with the actual rent paid or agreed to be paid. It is perhaps open to some argument, that in a case where in November, 1918 the premises were let at a rent which was low by reason only of bad condition, the landlord having put up the premises in repairs will be unable under the Rent Act to get an increase of rent. In order that the rent of a house may be unduly low all things must be considered. The premises may be out of repairs and still the rent may be unduly low. 28 C. W. N. 467=83 Ind. Cas. 368=A.I.R. 1924 Cal. 629.

——S. 18—Jurisdiction—Award of Costs.

The jurisdiction exercised by the President of the Calcutta Improvement Trust under S. 18 of

the Rent Act is civil jurisdiction, so that in proceedings under that section the President is, a Court of Civil Jurisdiction. Therefore he has power to pass an order for costs and also to execute the same. Apart from the provisions of the Rent Act the President would have power to execute an order for costs passed by him as every Court has power to execute its own orders. 34 Cal. 880, Appl. 26 C.W.N. 30=65 Ind. Cas. 177=A.I.R. 1921 Cal. 413.

——S. 18—Jurisdiction — Case started before amendment of the Act in 1924 — Hearing after amendment—Law applicable.

The appellant was let into possession on the 1st June, 1920, as a tenant, but the rent payable was not then fixed. He remained in possession until March, 1923. The question of rent having been mooted in the meantime, the respondent-landlord demanded from the appellant rent at the rate of Rs. 4,500 per mensem, inclusive of taxes. The Appellant conceiving that this demand was excessive, decided to avail himself of the provisions of the Calcutta Rent Act (Bengal) No. 3 of 1920, which had come into force on the 5th May, 1920. The appellant accordingly applied to the Controller. On the 23rd October, 1922, the Controller fixed the rent at Rs. 4,500 per month; on the 25th November, 1922, the appellant appealed to the President of the Improvement Committee to review that decision. The President, whose time was fully occupied by appeals, did not take up the appellant's appeal at once, but from time to time adjourned the hearing, so that it was only finally disposed of on the 3rd August, 1924. He disposed of it by holding that he had no jurisdiction to determine the matter, by which time the Act had ceased to apply to premises of higher rent by virtue of the proviso to Calcutta Rent Amendment Act (Bengal) No. 1 of 1924.

Held, that the President had jurisdiction as the application of an Act is when the parties begin to move. 54 Cal. 508=54 I.A. 152=1927 M.W.N. 340=101 Ind. Cas. 38=29 Bom.L.R. 868=31 C.W.N. 646=38 M.L.T. 95=26 M.L.W. 435=25 A.L.J. 956=46 C.L.J. 341=A.I.R. 1927 P.C. 97=52 M.L.J. 655 (P.C.).

——S. 18—Jurisdiction — Lease — Sub-lease to prostitutes — Effect — Application to fix standard rent—If barred.

Where the premises are rented for the purposes of continuing a brothel and are used as such, the contract becomes void and the Rent Controller will not take action on an application of a party for fixing standard rent. But the mere fact that the house in question is in the occupation of prostitutes as sub-tenants does not necessarily affect the validity of the contract between the landlord and the tenant. 51 Cal. 1005=80 Ind. Cas. 682=A.I.R. 1925 Cal. 315.

——S. 18—New plea.

Under the Act the Controller should first form his opinion whether the rent on the prescribed date was unduly low under Cl. (d) of S. 15 (3) of the Rent Act, and then he is to exercise his discretion in fixing the standard rent. When he does that it is open to the President of the Tribunal to revise that order on an application made by any of the parties, but it is a wrong application of the word "revision" to say that although the decision of the Rent Controller was not sought for on a particular point it was open to any of the parties by an application for revision to the President of the Tribunal to start a new point altogether and to have his decision—not revising a decision of the Rent Controller but a new decision of his own—for the first time. 53 Cal. 393=42 C.L.J. 588=30 C.W.N. 116=91 Ind. Cas. 1011=A.I.R. 1926 Cal. 305.

——S. 18—Power of President—Question of jurisdiction of Controller—Power to decide.

The landlords are entitled to a decision from the President of the Calcutta Improvement Tribunal as to whether or not the Controller of Rents has jurisdiction to fix any standard rent in the case which is brought before him. The fact that the Petitioners before the President of the Tribunal contend that the Controller had no jurisdiction in the matter, cannot be construed to be a point against the Petitioners disentitling them to any relief at the hands of the President, for revision of an order fixing a standard rent. 27 C.W.N. 287=73 Ind. Cas. 47=A.I.R. 1923 Cal. 180.

——S. 18—Scope—Controller's order not fixing rent—Revision.

Where there is no decision by the Rent Controller fixing the standard rent, the President of the Improvement Trust Tribunal has no jurisdiction under section 18 of the Rent Act to revise the order. 26 C.W.N. 78=68 Ind. Cas. 274=49 Cal. 528=A.I.R. 1922 Cal. 427.

——S. 18—Scope—Order under S. 2 (f) (ii).

The Act contemplates fixing the standard rent by the Controller even in cases not coming under S. 15, in other words in cases coming under S. 2 (f) (i). The order under S. 2 (f) (ii) of the Rent Controller is therefore liable to revision under S. 18 of the Act. 27 C.W.N. 50=72 Ind. Cas. 221=37 C.L.J. 101=A.I.R. 1923 Cal. 33.

——S. 19—Object and scope of—Liability of landlord—Extent of.

Section 19 must be directed against a person who knowingly receives a sum in excess of the standard rent, or a fine, premium or any other like sum in addition to the standard rent in contravention of the provisions of the Act. It cannot mean that if certain of the provisions of the Act authorize the landlord to receive and retain such sums, he is still to be liable to a fine by reason of the provision of S. 19. 53 Cal. 492=97 Ind. Cas. 376=A.I.R. 1926 Cal. 927.

——S. 20—Powers of President—Summary inquiry.

The President of the Tribunal is competent to hold summary enquiry referred to in section 20 of the Calcutta Rent Act. The combined operation of Ss. 29 and 5 (2) of the Cr. P. Code is that the enquiry must be held according to the provisions of Chap. 22 of the Cr. P. Code, under section 20,

Calcutta Rent Act. 37 C.L.J. 298=71 Ind. Cas. 611=A.I.R. 1923 Cal. 339.

——S. 20—Scope—If ultra vires.

S. 20 so far as it has invested the President of the Tribunal, with power to try a criminal case and thereby has created a new Criminal Court is not **ultra vires** of the Legislature of the Governor in Council of Bengal, as the Rent Act was passed with the previous sanction of the Governor-General under S. 79 (2) of the Government of India Act. 48 Cal. 955=33 C.L.J. 551=22 Cr. L.J. 354=61 Ind. Cas. 210=A.I.R. 1921 Cal. 708.

——S. 23—Controller if Civil Court.

The Rent Controller is a Court of Civil Jurisdiction. 26 C.W.N. 78=68 Ind. Cas. 274=49 Cal. 528=A.I.R. 1922 Cal. 427.

——S. 23—Rules under, R. 4—If ultra vires.

Rule 4 framed under S. 23 of the Rent Act for regulating the procedure in enquiries by the President of the Tribunal in so far as it has provided that the procedure laid down in the C. P. Code, 1908, should apply, is **ultra vires**. The rule is not an "enactment" within S. 5 (2) of the Cr. P. Code. 48 Cal. 955=33 C.L.J. 551=22 Cr. L.J. 354=61 Ind. Cas. 210=A.I.R. 1921 Cal. 708.

——S. 24—Scope of inquiry—Application for revision—If can be treated as suit.

S. 24 apparently lays down that where there is a decision of the Controller on a particular question the President in revising that decision may take further evidence and come to his own conclusion having the decision of the Controller before him, but it does not mean that the President can treat the application for revision as a suit irrespective of what was done before the Rent Controller. 53 Cal. 393=42 C.L.J. 588=30 C.W.N. 116=91 Ind. Cas. 1011=A.I.R. 1926 Cal. 305.

——S. 24—Scope of inquiry—Application—If suit—C. P. Code, O. 46, R. 1—Applicability.

The Court of the Rent Controller is in certain respects a Court of Civil Jurisdiction but the enquiry before the Rent Controller is not a suit within the meaning of O. 46, R. 1 and therefore the Rent Controller cannot make a reference under this order. 40 C.L.J. 578=84 Ind. Cas. 543=29 C.W.N. 521=A.I.R. 1925 Cal. 391.

——S. 24—Scope—Rent fixed by Controller increased by President of Tribunal—Notice under S. 8—Necessity.

A notice under S. 8 of the Rent Act is not necessary when the standard rent as fixed by the Controller has been further increased by the President of the Tribunal, the landlord having complied with the provisions of S. 8 as regards the increase allowed by the Controller. A certificate from the Controller is not necessary to entitle the landlord to recover the rent so increased. 26 C.W.N. 961=70 Ind. Cas. 551=A.I.R. 1922 Cal. 475.

——S. 26—Standard rent—Assessment — Increase of above standard rent—Calcutta Municipal Act (1923), S. 131.

Per **Rankin, C.J., Buckland** and **Cammiade, JJ.** agreeing with **Mukerji, J., Roy, J.,** dissenting.—The Corporation of Calcutta, in assessing certain premises under S. 131, Sub-S. (1) of the Calcutta Municipal Act while the Calcutta Rent Act, 1920, is in force, are not competent to increase the assessment above the standard rent under S. 2, sub-S. (f), Cl. (i) of the Calcutta Rent Act, 1920. 31 C.W.N. 864=103 Ind. Cas. 683=46 C.L.J. 535=A.I.R. 1927 Cal. 659 (F.B.).

CALCUTTA RENT ORDINANCE (V OF 1946).

——Jurisdiction of Controller—Permission to file ejectment suit—Grant of—If conditional on service of notice to quit.

The Rent Controller in granting permission to a landlord to file a suit for ejecting his tenant is not required to grant it only when the tenancy has been terminated by the landlord. He has ample jurisdiction to grant the permission without any notice to quit having been given by the landlord. A.I.R. 1950 Cal. 96.

——Scope—Suit for ejectment filed with permission of Rent Controller—Ordinance expiring after suit—If causes abatement of suit.

The fact that after a suit is filed for ejectment with the permission of the Rent Controller, the Ordinance under which the permission was granted has expired does not cause any abatement of the suit. A.I.R. 1950 Cal. 96.

——Ss. 3 and 26—Suit for rent decided after. Bengal House Rent Control Order (1942), ceased to exist—Rent accruing before ordinance—Law applicable—Rate of rent.

The Bengal House Rent Control Order, 1942, has no application to a suit for rent decided after 30th September, 1946, when that order came to an end. The Court has therefore to decide in such a suit the rate of rent with reference to the provisions of the general law and to the Calcutta Rent Ordinance of 1946. As the proviso to S. 3 (1) of the Ordinance says that sub-S. (1) has no application to any rent which accrued due before the date of the commencement of the ordinance, sub-S. (1) has no application to a suit to recover such rent and the general law will apply. Under the general law, the rent payable would be the rent agreed upon between the parties. S. 26 of the Calcutta Rent Ordinance does not keep alive the provisions of the Bengal House Rent Control Order of 1942, as far as the rate of rent recoverable is concerned. I.L.R. (1948) 2 Cal. 166.

——Ss. 6 and 9—Payment of salami—If renders contract of tenancy illegal.

Ss. 6 and 9 of the Calcutta Rent Ordinance do not make the contract of tenancy illegal if salami is paid, but provide that the salami shall not be taken and if taken, would be refundable when claimed within six months. These provisions therefore indicate that while salami, if taken, will be refunded, the contract of tenancy will continue. 83 C.L.J. 328.

——S. 9 (2)—Order of refund sent to Civil Court for execution—Power of latter to transfer it to another Court—C. P. Code, S. 39.

Where an order of refund passed by the con-

troller is sent to a Civil Court under S. 9 (2) of the Calcutta Rent Ordinance for execution, the matter comes to that Court not as a part of its ordinary jurisdiction but by reason of a special jurisdiction conferred upon that Court by the provisions of S. 9 (2) of the Ordinance. The Civil Court has no power to transfer it to another Court for execution. S. 39, C. P. Code, cannot be availed of for the purpose. A.I.R. 1949 Cal. 681=54 C.W.N. 205.

——Ss. 9 and 3—Order of refund—When may be passed.

Under S. 9 read with S. 3 of the Calcutta Rent Ordinance, the Controller has power to pass an order of refund only when the payment in excess of the standard rent was due to an increase of rent. A.I.R. 1949 Cal. 681=54 C.W.N. 205.

——S. 12—Sub-letting—What is—Tenant inducting licensees on portion of premises—If liable to ejectment.

The Calcutta Rent Ordinance speaks of sub-letting only, not of inducting licensees, and a tenant who inducts licenses on a portion of premises does not, therefore, disentitle himself from the benefit of the ordinance. Persons who are allowed by the tenant to occupy portions of premises without payment of rent, are licensees and not sub-tenants. 84 C.L.J. 50.

——S. 12 (1), Proviso (b)—Applicability—Subletting prior to 1st October, 1946.

The sub-letting referred to in S. 12 (1), proviso (b) of the Calcutta Rent Ordinance includes a subletting prior to the enactment of the ordinance. Therefore, a tenant who has sublet a portion of the premises before 1st October, 1946, in the absence of a contract without the landlord's consent in writing, is not entitled to the benefits of provision of S. 12 (1) of the ordinance. 52 C.W.N. 693.

——S. 12 (1), Proviso (b)—Applicability—Subletting before ordinance.

Under S. 12 (1), read with clause (b) of the proviso to S. 12 (1) of the Calcutta Rent Ordinance, the tenant will be entitled to claim the protection of the ordinance in a case of subletting only if he can show that he has sublet with the express consent in writing of the landlord. Where the subletting had taken place before the enactment of the ordinance and continued till after the ordinance was passed, that subletting would be quite effective to attract the operation of clause (b) unless it is shown by the tenant that he had obtained the consent in writing from the landlord to such subletting after the ordinance had come into operation. 52 C.W.N. 604=A.I.R. 1949 Cal. 61.

——S. 12 (1), Proviso (b)—Applicability—Subletting by tenant prior to the ordinance coming into force.

Though a tenant might have sub-let the property in question before the coming into force of the Calcutta Rent Ordinance of 1946, he is prevented by proviso (b) to sub-S. (1) of S. 12 of the ordinance from obtaining the benefit of sub-S. (1) of S. 12 namely protection against ejectment. 52 C.W.N. 379.

——S. 12 (1), Proviso (b)—Application for ejectment filed under Calcutta Rent Control Order—Ordinance coming into force—Law applicable—Tenant, if can be ejected on ground of subletting.

An application for ejectment was filed by the landlord under the Calcutta Rent Control Order, 1943, on the ground that the tenant was a defaulter within the meaning of the order. While this application was pending, the Calcutta Rent Control Order ceased to have effect, and the Calcutta Rent Ordinance, 1946, came into force. Thereafter the landlord applied to the Court to amend the application by including an averment that the tenant had granted a sub-lease. The Court allowed the amendment and held that in view of proviso (b) to S. 12 of the Calcutta Rent Ordinance, the tenant was not protected against eviction and accordingly passed an order directing him to give possession of the property to the landlord.

Held, that the Court was right in allowing the amendment and disposing of the application according to the law as laid down in S. 12 of the Calcutta Rent Ordinance. The tenant was liable to ejectment on the ground that he had granted a sub-lease, although it was granted at a time when the Calcutta Rent Control Order was in force and when the grant of such a sub-lease did not entail a liability to ejectment. The application on the amended ground could not be defeated on the ground that permanent rights had accrued under the Calcutta Rent Control Order. The Calcutta Rent Control Order merely prevented the Courts granting a particular reliefs during the continuance of the order, which by its very nature was of temporary effect. It did not purport to confer permanent rights on a party. A.I.R. 1947 Cal. 401=83 C.L.J. 173.

——Ss. 12 and 13—Bona fide requirement of landlord—Finding of Rent Controller—If conclusive.

Under S. 12 of the Calcutta Rent Ordinance all that the Rent Controller has to decide, is whether the petitioner before him for permission to institute a suit for ejectment has shown sufficient cause which would entitle the Rent Controller to hold that the petitioner required the premises **bona fide** for his own use. The finding of the Rent Controller on this point is not conclusive so far as the Court deciding the suit for ejectment or application for ejectment is concerned. The Court must come to its own conclusion on this point. The Rent Controller's decision merely removes the bar to the entertainment of the suit. It does nothing further. A.I.R. 1949 Cal. 65=52 C.W.N. 602.

——S. 13 (1)—Scope—Suit for ejectment of tenant—Prior permission of Rent Controller—If pre-requisite—Permission granted in prior suit—If valid—Suit instituted without permission, pending when West Bengal Premises Rent Control Act came into operation—If maintainable—Latter Act, if retrospective.

Under S. 13 (1) of the Calcutta Rent Ordinance 1946, permission of the Rent Controller is a prerequisite to the institution of a suit by the land-

lord against the tenant for ejectment on the ground that he required the premises **bona fide** for his own use. Any suit which has been instituted without such permission is no suit at all in the eye of the law and is liable to be dismissed, and the defect of not obtaining permission cannot be cured by the subsequent obtaining of permission.

A permission granted by the Rent Controller for the institution of a prior suit for ejectment which has been dismissed, does not remain valid for the institution of a fresh suit. If the Rent Controller dismisses an application by the landlord for a fresh permission for the institution of the second suit on the ground that it is not necessary, the order cannot be construed as granting of permission to institute the second suit. The landlord should appeal against the order and insist in the Court of appeal that the Rent Controller should grant a second permission in respect of the second suit.

If a suit for ejectment instituted without the permission of the Rent Controller while the Calcutta Rent Ordinance, 1946, was in force, remains pending when the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, came into operation, the latter Act does not have the effect of making the suit maintainable although under that Act no permission of the Rent Controller is necessary, and the tenant has still the right to resist ejectment on the ground of want of permission. The suit, being a pending suit, must be governed by the provisions of the Calcutta Rent Ordinance, as there are no words in the West Bengal Premises Rent Control (Temporary Provisions) Act which make the Act retropective. The question involved is not a question of mere procedure, it is a question relating to a substantive right. By S. 13 (1) of the Calcutta Rent Ordinance, a tenant is given a substantive right to insist on the dismissal of any suit in ejectment unless previous permission of the Rent Controller has been obtained. 53 C.W.N. 855=A.I.R. 1949 Cal. 674.

——S. 14—Applicability—Nature of suits.

S. 14 of the Calcutta Rent Ordinance is a bar only to the institution of a suit of the nature referred to therein. The section requires that non-compliance with the provisions of the ordinance as to the payment or deposit of rent must have been taken as a ground for eviction in the suit. If that is not the ground on which the suit is brought, the section will not operate as a bar although the ultimate decree may be passed on that ground. 52 C.W.N. 698.

——S. 14—Applicability—Pending proceedings.

S. 14 of the Calcutta Rent Ordinance is not intended to be applicable to pending proceedings. 52 C.W.N. 698.

——S. 17—Appeal—Order rescinding decree.

An order rescinding a decree under the provisions of S. 17 of the Calcutta Rent Ordinance, 1946, is in itself a decree and appealable as such. I.L.R. (1948) 2 Cal. 494.

——S. 17—Discretion of Court.

S. 17 of the Calcutta Rent Ordinance is not mandatory but enabling. It vests in the Court a discretion to rescind or vary its own earlier decree or not to do so. 51 C.W.N. 148.

——Ss. 17 and 14—Decree for ejectment under S. 9-B (3) of Calcutta House Rent Control Order—If can be rescinded on ground that permission of Controller was not obtained for suit.

Under S. 17 of the Calcutta Rent Ordinance the Court cannot rescind its earlier decree for ejectment made under S. 9-B (3) of the Calcutta House Rent Control Order, 1943, on the ground that the landlord had not obtained the permission of the Controller to institute his suit as required by S. 14 of the Ordinance. 51 C.W.N. 148.

——Ss. 21 and 26—Applicability and scope—Order on landlord under S. 11-A, House Rent Control Order (1943)—Non-compliance—Liability to fine under S. 21 of Ordinance (1946)—Jurisdiction of Rent Controller.

S. 21 of the Calcutta Rent Control Ordinance can come into operation only when there has been application under S. 18 of that Ordinance, and when there has been no such application no fine can be imposed under S. 21. The Calcutta House Rent Control Order which came to an end on 30th September, 1946, contained no provision corresponding to S. 21 of the Ordinance of 1946, for fining a landlord for non-compliance with an order passed under the House Rent Control Order, 1943, and when proceedings under that order had terminated in an order under S. 11-A of that order, before the Ordinance of 1946, came into force, the Controller has no jurisdiction to fine a landlord under S. 21 of the new Ordinance for failure of the latter to comply with the order under S. 11-A. S. 26 of the Ordinance of 1946 does not empower the Court to act under S. 21 in such a case. It would be against all the canons of construction of statutes to enforce the penal provision of S. 21 of the Calcutta Rent Ordinance, 1946, in respect of proceedings under S. 11-A, Calcutta House Rent Control Order, 1943. A.I.R. 1949 Cal. 251=50 Cr.L.J. 482.

——S. 25—District Judge—Jurisdiction—Appeal from order of Controller—If appeal under C. P. Code—C. P. Code, O. 41.

S. 25 of the Calcutta Rent Control Ordinance gives the District Judge jurisdiction to hear and decide an appeal against an order of the Rent controller. In such an appeal he can grant a landlord unconditional permission to file a suit in ejectment, where the Rent Controller had granted a conditional permission. The District Judge is not a Court of appeal in the sense of the C. P. Code and O. 41, C. P. Code, does not apply to the case. A.I.R. 1950 Cal. 96.

——S. 25—District Judge — Status of — Order passed by him—Revision by High Court—Calcutta House Rent Control Order, S. 14.

The District Judge, as contemplated in S. 14 (1) (b) of the Calcutta House Rent Control Order and in the corresponding provision in S. 25 (1) (b) of the Calcutta Rent Ordinance, is not the District Judge in his ordinary judicial capacity or the Presiding Officer of the Principal Court of Original Civil Jurisdiction in the District, but a **persona designata**. An order passed by him as an Appellate authority under this provision is, therefore, not an order passed by a Court and accordingly is not revisable by the High Court under S. 115, C.P.

Code. I.L.R. (1948) 1 Cal. 376=51 C.W.N. 818.

——S. 26—Appeal under Calcutta House Rent Control Order pending—Power of Appellate Court to grant permission under ordinance.

An appeal under the Calcutta House Rent Control Order, 1943, is also a proceeding commenced under the provisions of that order, and if the appeal was pending on the date on which the Calcutta Rent Ordinance, 1946, came into operation, it must, on the strict interpretation of the words of S. 26, be deemed to have been commenced under S. 25 of the Calcutta Rent Ordinance, and the Appellate Court has full power to grant permission under that Ordinance. 53 C.W.N. 462.

CALCUTTA SUBURBAN POLICE ACT (II OF 1886).

——Ss. 4 (2) and 8-B—Police-officer under suspension—Duty to obey order of superior officer to report to Police Training School.

S. 4 (2) of the Calcutta Suburban Police Act clearly shows that the responsibility of a Police officer under suspension to obey the orders of his superior officers in matters of internal discipline continue even after suspension. An order given by a superior officer to a police officer under suspension to report to the Police Training School comes clearly under the term of "discipline", and its disobedience is punishable under S. 8-B of the Act. The words in S. 4 (2) of the Act "during the term of such suspension the duties conferred upon him as a police officer shall be in abeyance" refer to his official duties as a police officer **vis a vis** the public, and have no effect on his duty to continue to obey for the purpose of internal discipline the orders of his superior officers. I.L.R. (1945) 2 Cal. 9.

——S. 18—Place of Public resort.

A stall on which soda water is sold not for consumption on the premises cannot be held to be a place of public resort within the meaning of S. 18. 49 Cal. 451=62 Ind. Cas. 577=26 C.W.N. 56=34 C.L.J. 198=22 Cr.L.J. 561=A. I. R. 1923 Cal. 135.

——S. 33-A—Burden of proof.

Under S. 33-A of the Calcutta Suburban Police Act there are two things to be proved. First of all, the prosecution must satisfy the magistrate that there is reason to believe that the property has been stolen. If the prosecution establishes this, the accused must account for his possession to the satisfaction of the Magistrate. I.L.R. (1944) 2 Cal. 603=228 Ind. Cas. 323=48 Cr.L.J. 197=A.I.R. 1947 Cal. 40.

——(As amended by Act III of 1910), S. 47-A—Police diary—Privilege.

In areas covered by the Act, a police-officer investigating a case maintains a diary under S. 47-A and hence no privilege attaches to it. 24 Cr.L.J. 757=74 Ind. Cas. 261=A.I.R. 1924 Cal. 542.

——S. 93-A—Discretion of Commissioner.

Whether a particular order under S. 93-A prohibiting in the Suburbs of Calcutta any procession or assembly on a particular day within a particular place is or is not necessary is a matter entirely for the Commissioner of Police to decide. A.I.R. (Vol. 18) 1931 Cal. 419=35 C.W.N. 716=32 Cr. L. J. 844=1931 Cr. Cas. 506=58 Cal. 1305=132 Ind. Cas. 174.

CALCUTA SUBURBS ACT (XXI OF 1857).

——S. 2 (1)—Applicability—Possession of cement—Absence of evidence of loss by theft—Offence—Penal Code, S. 411—Distinction.

The accused was convicted under S. 2 of Act XXI of 1857 for being found in possession of some cement on the mere evidence, that he was a maistry of the E. I. Ry., Co., and that there was a heap of cement lying on the premises of the Railway. **Held,** that in the absence of evidence of any missing of the cement by the Company shortly before or previous to the finding of the cement, there could not be any reasonable suspicion within S. 2 of the Act. The only difference between an offence under this Act and one under S. 411, I.P. Code is that under this Act, poof that the stolen property has been in the hands of a third person who actually stole it, need not be given as is required under S. 411. 13 Cr.L.J. 492=15 Ind. Cas. 492.

CALCUTTA SUPPRESSION OF IMMORAL TRAFFIC ACT (XIII OF 1923).

——S. 3—Applicability—Girl over sixteen—Jurisdiction of police.

If a girl has attained the age of 16, the police has no further jurisdiction to exercise under the Act of 1923. 30 C.W.N. 72=27 Cr.L.J. 159=91 Ind. Cas. 895=A.I.R. 1926 Cal. 339.

——S. 4—Applicability—"Girl"—Meaning of.

Acts apply whether the female in question is unmarried or married and the whole matter turns not on the status of the female from the point of view of marriage or no marriage but on the question of age. If the word "girl" were limited to mean a young unmarried female, it would be easy for a person who desired to live on the immoral earning of young girls to marry them solely for the purpose of enabling him to put himself outside the provisions of the statutes and to set the whole law at defiance. 48 C.L.J. 586=33 C.W.N. 198=115 Ind. Cas. 266=30 Cr.L.J. 440=56 Cal. 750=12 A.I.Cr.R. 304=A.I.R. 1929 Cal. 99.

——S. 4—Applicability—Temporary residence—Sufficiency.

A residence in a brothel for about four days before rescue comes within the meaning of the words "lives in." The whole purpose of the Act would be frustrated if a girl has to be an ordinary resident before the section can come into operation. 30 C.W.N. 768=27 Cr.L.J. 1066=97 Ind. Cas. 42=A.I.R. 1926 Cal. 944.

——S. 6—Applicability—Lessee sub-letting premises to prostitutes, collecting rent daily by sitting outside and actively associating with the business—Liability to conviction.

The accused took on lease certain houses for the purpose of making a living out of them and sub-let the houses to prostitutes and made a fine

profit out of them. He was not content with simply collecting his rents once a week or once a month but he attended there daily and had full control over them. He was also daily sitting outside the houses collecting his rents, at times interviewing visitors, and having men there to assist him.

Held, (Per **Graham** and **Duval, JJ.**)—That it was not a case of simply having let out the houses to some women who used them for immoral purposes, but was also a case where the lessee took the houses so as to make a profit out of prostitution and that his conviction under S. 6 was proper.

Per **Cammiade, J.**, contra.—Letting rooms to prostitutes and sitting at the gate of the premises to collect daily rent does not amount to the offence punishable under S. 6. 32 C.W.N. 195=29 Cr. L.J. 917=111 Ind. Cas. 725=A.I.R. 1928 Cal. 381 (F.B.).

——S. 6—Scope—Female—Conviction for abetment—Owner of house occupied by prostitute supporting a male person by prostitution—Offence.

Although a female is incapable by statute of committing an offence under S. 6 (1), Calcutta Suppression of Immoral Traffic Act, still there is nothing to bar her conviction for aiding and abetting that offence, if the facts justify it.

Abetment is not constituted by the mere fact that a woman is the owner of an undivided half share of a house in which another woman leads a prostitute's life and supports a male person by the earnings of her profession. A.I.R. (Vol. 19) 1932 Cal. 457=36 C.W.N. 650=55 C.L.J. 435=59 Cal. 1260=1932 Cr.Cas. 438=33 Cr.L.J. 68=138 Ind. Cas. 661.

——S. 8—Applicability—Person either stranger or relative of woman brought for immoral purposes—Carrying on profession of singer or dancer—Offence.

The language of S. 8, Calcutta Suppression of Immoral Traffic Act, is fairly wide and would apply to any person either a stranger or a relative of a woman, provided the alleged offender had brought a woman or girl to Calcutta with a view to her doing the things mentioned in the section. The question of the woman or girl is not material. This section is not like other sections of this Act or those of the Penal Code which are framed for the protection of minor girls but is wide enough to include any case of bringing or causing to be brought any woman to Calcutta for immoral purposes.

It is carrying the matter a little too far to suggest that the carrying on of the profession of a singer or dancer by a woman does necessarily and of course connote the business of prostitution. A.I.R. (Vol. 21) 1934 Cal. 198=35 Cr.L.J. 722=1934 Cr. Cas. 297=58 Cal.L.J. 1=148 Ind. Cas. 597.

CALCUTTA SURVEY ACT (I OF 1887).

——Applicability to Municipalities in Bihar.

By S. 223-A, Bengal Municipal Act, the Calcutta Survey Act had been extended to all the Municipalities in Bihar Province. A.I.R. (Vol. 24) 1937 Pat. 640=39 Cr.L.J. 136=4 B.R. 154=172 Ind. Cas. 215.

——S. 3—Survey—Khasra—Entry in—Presumptive value.

A survey khasra prepared under S. 3 of the Calcutta Survey Act which is not finally published is not in the nature of a record of rights and entries therein have no presumptive value, although the survey may be admissible in evidence. The section itself does not contemplate preparation of any record of rights in respect of the lands surveyed under the Act. An entry in such Khasra showing a plot of land as **gairmazrua am sarak kham** has no presumption of correctness attached to it and is not sufficient to destroy in any way the title of the owner thereof. 18 P.L.T. 466, diss. 29 Pat. 448=A.I.R. 1950 Pat. 432.

——S. 22—Construction — "Demarcation of boundaries—Meaning of—Line in survey map representing boundary—If can be shown as erroneous after more than one year.

The expression "demarcation of boundaries" in S. 22 of the Calcutta Survey Act, must be given its natural meaning, which is the marking out or laying down of a boundary. If there is a dispute about a boundary and the survey authorities decide that dispute and demarcate the boundary, a suit by the party aggrieved by that decision must be brought within one year under the section. But if there has been no dispute and no actual demarcation of the boundary, a person cannot be prevented even after the lapse of several years from showing that a line in the survey map representing the boundary between his premises and the premises of his neighbour is erroneous. In such a case a presumption of correctness would, no doubt, attach to the survey map, but it would be a rebuttable presumption. [1937 Pat. 516, overruled.] 27 Pat. 701=A.I.R. 1949 Pat. 132.

——S. 22—Scope—Declaration suit that title of plaintiff exists over area in excess of area included within boundaries—Nature of Suit.

The boundaries stated in the survey are supposed to correspond with the title and, therefore, any decision affecting the title necessarily affects the boundaries that have been demacrated and when the plaintiff sues for a declaration that her title exists over an area in excess of the area included within the boundaries that have been demarcated, the suit is in effect a suit to set aside the demarcation of the boundaries and comes under S. 22 of Calcutta Survey Act. A.I.R. (Vol. 24) 1937 Pat. 516=18 P.L.T. 466=3 B.R. 776=171 Ind. Cas. 45.

CALCUTTA THIKA TENANCY ACT (II OF 1949).

——S. 2 (5)—"Thika tenant"—Meaning of—Tenant holding over after expiry of lease—Calcutta Thicka Tenancy Ordinance, S. 2.

A tenant can only be called a **thika** tenant under any particular system. It may be the system which has the well known names mentioned in S. 2 (5) of the Calcutta Thika Tenancy Act or S. 2 of the Calcutta Thika Tenancy Ordinance.

It may also be a similar system. It is essential for the tenant to prove and esatblish the system or "any other like system" referred to in the above provisions of the Act or the Ordinance before he can be called a thika tenant under them. It is a matter of proof and evidence in every case. A tenant holding over after the expiry of a lease cannot be treated as holding the land within the meaning of the expression "under any other like system" in the Act or Ordinance. 53 C.W.N. 640=83 C.L.J. 285=A.I.R. 1950 Cal. 230.

——S. 2 (5)—"Thika tenant"—Proof required.

Before a Thika tenant can claim any of the benefits of the Calcutta Thika Tenancy Act, he is required to show that he belongs to the apparently rare (if at all existent) variety defined in S. 2 (5) of the Act. 53 C.W.N. 640 and 54 C.W.N. 287, foll. 54 C.W.N. 541=A.I.R. 1950 Cal. 319.

——S. 2 (5)—"Thika tenant"—Tenant building structures on vacant land.

When a tenant takes a vacant land and then builds structures thereon he does not ipso facto become a thika tenant under the Calcutta Thika Tenancy Act. If that were so, every lessee under an ordinary building lease whereby he takes a vacant land and agrees to build on it would become a thika tenant under the Act. Neither the express language nor the intention of the Act justifies such a conclusion. A thika tenant under the Act must prove (1) a system, which is either the "commonly known system" or "a similar" system and (2) that he "holds" under that system.

The Act is not a Charter of Rights for the bustee dwellers of Calcutta. 43 C.W.N. 640, foll. 85 C.L.J. 66=54 C.W.N. 287.

——S. 28—Appeal—Order rescinding decree.

No appeal lies from an order rescinding a decree under S. 28, Calcutta Thika Tenancy Act. The power given under the section is a special and extraordinary statutory power and an appeal would only lie if special provisions were given by the Act for an appeal creating a power. 54 C.W.N. 541=A.I.R. 1950 Cal. 319.

——S. 28—"Court which made the decree"—Meaning of.

The phrase "Court which made the decree" in S. 28 of the Calcutta Thika Tenancy Act cannot mean Court other than the trial Court. A.I.R. 1950 Cal. 381.

——S. 28—Scope of inquiry—Decree for ejectment, arrears of rent and damages until delivery of possession—How may be varied—Date of varied decree—Procedure.

In dealing with an application under S. 28 of the Calcutta Thika Tenancy Act for variation of a decree passed before the commencement of the Act, the Court has in substance (1) to see if it amounts to the sort of order that would have been passed by the controller in a case under the Act, in other words, whether the conditions of S. 3 are fulfilled which lays down the grounds on which a thika tenant can be ejected and (2) whether in form the order is of the type that would be passed under S. 6 of the Act.

Under the Act the controller is only given power to pass an order for ejectment. He cannot pass any order which can be executed for recovery of arrears of rent. Where therefore the decree to be varied is both for ejectment and for payment of arrears of rent, it is clearly necessary to separate the two. It is only the decree for ejectment which is to be converted into an order such as the Controller could pass and such as the controller can execute, under the powers given to him under S. 27 (6) of the Act.

Where the decree, as it stands, includes a decree for damages from the date of the suit till delivery of possession, the decree must be altered, as that is not an order which the controller could pass. Under S. 6, the limits of the controller's powers are to specify the actual arrears, the costs and the damages, if any, and the total is to be an amount which the tenant may pay within 30 days of the date of the order and so save himself from ejectment. The decree for ejectment must, therefore, be limited to one containing the actual order of ejectment plus the specification of arrears, costs and damages, limited to damages up to the date of the order.

The varied decree is to be executed as if it was an order made under and in accordance with the provisions of the Act. It follows that the varied decree to be treated as such order must be dated after the commencement of the Act. Therefore, in cases where under the Act the decree is amended to an order for ejectment under S. 3 (1) of the Act, and the provisions of S. 6 are to be carried out, the date of the order will be the date of the varied order, and thus the tenant will have the opportunity of paying the arrears.

Under S. 28 of the Act, the variation of the decree is not to be one of mere form, but the whole proceedings have to be gone over to see if the landlord can bring his case under S. 3. The whole law of ejectment has been changed by the Act and it is unfair to tie either the landlord or the tenant to pleadings and evidence led when the matter in issue was entirely different. Before the Act the "ground" for ejectment was termination of the tenancy on expiry of the lease, or on notice, and other grounds given in the T. P. Act. If the conformity is to be with the whole new Act, in particular S. 3, and not merely some change in the decree itself, both sides must be given opportunity to establish a case of conformity or non-conformity. A.I.R. 1950 Cal. 381.

——Ss. 28 and 31—Pre-Act consent decree—Power of Court to rescind.

It cannot be said in view of the provisions of S. 31 of the Calcutta Thika Tenancy Act that a consent decree even if in some points it is not in conformity with the Act is not in a broader sense in conformity with the Act in the view that pre-Act contracts may exist having the effect of barring the provisions of the Act.

Where a pre-Act consent decree for ejectment was passed on the ground that proper notice giving at least 15 days' notice had been given to the tenant who was also in arrears of rent, and there was no agreement by the tenant to overlook the

fact that full one month's notice had not been given to him as required by S. 4 of the Act, the decree should not be rescinded under S. 28 of the Act. 54 C.W.N. 541=A.I.R. 1950 Cal. 319.

CALCUTTA THIKA TENANCY ORDINANCE (II OF 1948).

——"Thika tenant"—Meaning of.

If the structure on the land has not been erected by the tenant, then even though the other conditions mentioned in the definition are fulfilled, the tenant is not a "thika tenant" within the meaning of the Ordinance (II of 1948). 53 C.W.N. 553=84 C.L.J. 92.

——S. 2—Thika tenant—Who is.

A person seeking the protection of the Calcutta Thika Tenancy Ordinance must show that his tenancy is under one of the various systems mentioned in S. 2 of that Ordinance. It is a matter of proof and evidence in every case and it is essential for the tenant to establish it by evidence, the onus of proving this being upon him. Where any particulars of a tenancy or of any system under which the tenancy is held are not known and it is not proved that the structures or any of them standing on the land are erected by the tenant, it cannot be said that the tenant is a "thika tenant" within the meaning of the Ordinance. 53 C.W.N. 553 and 640, rel. on. 54 C.W.N. 281=A.I.R. 1950 Cal. 428.

——S. 3, Proviso—Deposit under — Limitation—Taxed costs, if to be paid.

Before a tenant can take the benefit of Ordinance II of 1948, he must deposit the amounts referred to in the proviso to S. 3 within 30 days from the date of the decree. The proviso does not require that the taxed costs have to be paid. All that is necessary is to pay such costs, if any, as the Court may direct. 53 C.W.N. 553=84 C.L.J. 92.

CALCUTTA TRAMWAY ACT (I OF 1880).

——S. 21—Offer of rupee for fare with demand for change—If avoidance of payment. I.L.R. (1945) 1 Cal. 262.

CALCUTTA UNIVERSITY ACT (II OF 1857).

——and (VIII of 1904)—Trusts and grants to.

Powers of the Calcutta University under the above Acts to hold and possess property are extensive and the University can accept trusts, grants, etc. even when burdened with conditions and the grant cannot fail even if the conditions accompanying it are invalid or incapable of fulfilment by the University. The discretion of the Calcutta University to accept gifts subject to conditions is not fettered by either Act II of 1857 or Act VII of 1904. An acceptance of a gift or trust by the Calcutta University under the Acts without obtaining the sanction of the Governor-General or without a formal acceptance by the Senate as required by Regulations is valid as these are mere irregularities curable at any time. 22 C.L.J. 593=34 Ind. Cas. 657.

CALCUTTA UNIVERSITY REGULATIONS.

——Ss. 1 and 2—Scope of.

The sections read together do not mean that the University can accept such professorships only as are sanctioned by the Governor-General. The discretion is vested exclusively in itself. 22 C.L.J. 593=34 Ind. Cas. 657.

(CANADA)—BRITISH COLUMBIA MUNICIPAL ACT (1914).

——S. 141—Scope—Rate-payers having exempted lands are not bound bye-law—But rate-payers can be collectively made answerable for debenture, debt and interest.

S. 141 of Cl. 52 of the statute of British Columbia, 1914, does not mean that a rate-payer having lands that are exempted shall be bound by the bye-law but that rate-payers in the charged area shall as a body—that is collectively—be liable to be made answerable for the debenture debt and the interest. A.I.R. 1921 P.C. 240.

——S. 197—"Building"—"Building" includes land on which it stands.

The word "building" occurring in S. 197, subsection 1 of the Act of 1914 means a thing composing of the fabric of the building and the ground that the fabric rests upon and encloses. A.I.R. 1921 P.C. 240.

——Ss. 216 and 230—Sections do not estop assessee from claiming exemption to which he may be otherwise entitled.

Ss. 216 and 230 of the Act of 1914 are merely machinery sections dealing with irregularities, mistakes and errors occurring in the drawing up, shaping and forming of the assessment rolls, and do not by any means empower the Corporation or its officers to assess and tax any kind of property expressly or impliedly exempted from taxation by the provisions of these very statutes from 1914 to 1918, both inclusive. These sections in no way disentitled the assessee from insisting for exmple on the contention that the ground on which a cathedral which is exempt under Ss. 197 (1) stands is exempted from general taxation. A.I.R. 1921 P.C. 240.

——S. 484—Applicability—Suit for declaration that certain land is not taxable and for injunction restraining sale of land for taxes.

S. 484 only deals with actions brought against a Municipality for the unlawful doing of a thing which the Municipality might have lawfully done. Where the action is not of that character but is an action brought to obtain a declaration that the land upon which plaintiff's cathedral stands is not taxable and an injunction restraining the Corporation from offering the land for sale in respect of unpaid rates. S. 484 does not apply. A.I.R. 1921 P.C. 240.

(CANADA)—CITIES AND TOWNS' ACT OF QUEBEC (1909).

——Art. 5755—Proceedings under—Appeal.

The power given to take proceedings before the different Courts mentioned in Art. 5755 enables

those proceedings to be taken as part of the ordinary business of the Courts mentioned, and the rights of appeal that exist from judgments given by those Courts are applicable to such proceedings, although no rights of appeal are found in the statute. A.I.R. 1921 P.C. 219.

(CANADA) DOMINION ACT (1905).

——Railway —Railway declared to be worked for general advantage of Canada passes within exclusive legislative jurisdiction of Canadian Parliament.

Upon the passing of the Dominion Act of 1905 in virtue of the enactments of S. 91, head 29, and S. 92, head 10 of the British North America Act, 1867, the "railway" declared to be a "work of general advantage of Canada," passed within the the exclusive legislative jurisdiction of the Parliament of Canada and accordingly the Legislature of the province ceased to possess the authority theretofore vested in it under heads 10 and 13 of S. 92 of that Act, to deprive the railway company of its legal title to any of the subjects actually forming part of the "railway" so declared to be "a work for the general advantage of Canada" and to vest the title in another. However lands acquired by the railway company as a subsidy granted for the purpose of aiding the construction of the railway and not held by the company as part of its "railway" within the meaning of S. 2, Sub-S. 21 of the Dominion Railway Act (R.S. Can., 1906, C. 37) or for its undertaking as a railway company were not withdrawn from the Legislative jurisdiction of the Province in relation to "property and civil rights" and that authority was notwithstanding the enactment of the Dominion Act of 1905, still exercisable in relation to such subjects. A.I.R. 1921 P.C. 234.

(CANADA) DOMINION TRADE AND INDUSTRY COMMISSION ACT (1935).

——Legislation, if within competence of the Dominion Parliament—Trade mark—National mark—Rights conferred by trade mark.

If the Dominion of Canada has power to create trade mark rights for individual traders, the power can be extended to that which is now a usual feature of national and international commerce, a national trade mark. The substance of the Dominion Trade and Industry Commission Act, 1935, is to define a national mark, to give the exclusive use of it to the Dominion so as to provide a logical basis for a system of statutory licences to producers, manufacturers and merchants. To vest the "exclusive property" in the mark in His Majesty is probably no more than to vest "the use of" the mark in His Majesty. It may afford a useful civil protection for the mark when it is violated in Canada by persons who have not violated the somewhat restricted prohibition of the penal sub-section (which only applies to persons who "apply" the mark to commodities) or violated abroad, where the penal provisions of the law of Canada could not be applied at all. Sections 18 and 19 as well as Ss. 23 to 26 are not **ultra vires** and the legislation is within the competence of the Dominion Parliament. A.I.R. (Vol. 24) 1937 P.C. 99=168 Ind. Cas. 128 (P.C.).

(CANADA) EMPLOYMENT AND SOCIAL INSURANCE ACT (1935).

——Whether ultra vires of the Parliament of Canada.

The substance of the Employment and Social Insurance Act, 1935, is contained in the sections constituting Part III. They set up a now familiar system of unemployment insurance under which persons engaged in employment as defined in the Act are insured against unemployment. The funds required for making the necessary payments are to be provided partly from money provided by Parliament, partly from contributions by employed persons and partly from contributions by the employers of those persons. The two sets of contributions are to be paid by revenue stamps. Every employed person and every employer is to be liable to pay contributions in accordance with the provisions of the second schedule, the employer being liable to pay both contributions in the first instance, recovering the employed person's share by deduction from his wages, or if necessary, in certain cases by action.

Prima facie provisions as to insurance of this kind, especially where they affect the contract of employment, fall within the class of property and civil rights in the Province, and would be within the exclusive competence of the Provincial Legislature. The Act was in pith and substance an Insurance Act affecting the civil rights of employers and employed in each Province and was as such invalid. A.I.R. (Vol. 24) 1937 P.C. 89 =168 Ind. Cas. 316 (P.C.).

(CANADA) LIMITATION HOURS OF WORK ACT (1935).

——The Act is **ultra vires** of the Parliament of Canada. A.I.R. (Vol. 24) 1937 P.C. 82=168 Ind. Cas. 117 (P.C.).

(CANADA) LAND REGISTRY ACT.

——Effect.

The statutes 4 Geo. 5, c. 9, 4 Geo. 5, c. 10, and 4 Geo. 5, c. 11 have effectively met the difficulty which was pointed out in the case of **Cotton v. The King,** (1914 A.C. 176) as to the taxation imposed by the earlier statutes being indirect. A.I.R. 1921 P.C. 163.

(CANADA) MINIMUM WAGES ACT (1935).

——The Act is **ultra vires** of the Parliament of Canada. A.I R. (Vol. 24) 1937 P.C. 82=168 Ind. Cas. 117 (P.C.).

(CANADA) MONTREAL STATUTE.

——Art. 1387 (g)—"Every person" refers to persons within the province.

The words "every person" to whom moveable property outside the province is transmitted in Art. 1387 (g) refers to every person on whom the duties are imposed, and those persons are, persons within the province. A.I.R. 1921 P.C. 163.

——6 Edward 7, c. 11—Ultra vires—Decision in 1914 A.C. 176 that statute was ultra vires was not obiter dictum.

The decision that the statute was **ultra vires** was in no sense a wayside dictum in Cotton's case. (1914) A.C. 176, it was just as complete and fundamental as the decision that bore on the constructions of the statute. A.I.R. 1921 P.C. 163.

——4 Geo. 5, c. 9, 4 Geo. 5, c. 10 and 4 Geo. 5, c. 11—Effect.

The statutes 4 Geo. 5, c. 9, 4 Geo. 5, c. 10 and 4 Geo. 5, c. 11 have effectively met the difficulty which was pointed out in the case of **Cotton** v. **The King,** (1914 A.C. 176) as to the taxation imposed by the earlier statutes being indirect. A.I.R. 1921 P. C. 163.

——4 Geo. 5, c. 10—Interpretation—Taxation regarding property outside province—Person to whom property is transmitted must be domiciled or ordinarily resident within the province.

The conditions stated in 4 Geo. 5, c. 10 upon which taxation attaches to property outside the province are two. (1) That the transmission must be within the province and, (2) That it must be due to the death of a person domiciled within the province. The first of these conditions can only be satisfied if the person to whom the property is transmitted is either domiciled or ordinarily resident within the province. A.I.R. 1921 P.C. 163.

CANADA NATURAL PRODUCTS MARKETING ACT (1934).

——(As amended in 1935)—Whether ultra vires of the Parliament of Canada.

The Provisions of the Natural Products Marketing Act, 1934, as amended by the Natural Products Marketing Act, Amendment Act, 1935, cover transactions in any natural product which are completed within the Province, and have no connection with inter-provincial or export trade. The Act purports to affect property and civil rights in the Province, and if not brought within one of the enumerated classes of subjects in S. 91, British North America Act must be beyond the competence of the Dominion Legislature. The enactments in so far as they relate to matters which are in substance local and provincial are beyond the jurisdiction of Parliament. Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and inter-provincial trade and committing the regulation of external and inter-provincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority. The Act is **ultra vires** the Parliament of Canada. The A.I.R. (Vol. 24) 1937 P.C. 93=168 Ind. Cas. 10 (P.C.).

(CANADA) QUEBEC CIVIL PROCEDURE CODE.

——S. 54—Appeal—No appeal lies from Circuit Court.

There is no right of appeal from the judgment of Circuit Court. A.I.R. 1921 P.C. 219.

(CANADA) QUEBEC CODE.

——Art. 405—Fishery—Right of fishing can be separately transferred—Such a right may not be for life only but may be perpetual.

The principles on which the jurisprudence of Quebec with regard to rights in land rests, are very different from those which obtain in the common law of England. In the latter country there has always been permitted great latitude in splitting up the title to the fee simple, with important results as regards the right of possession. But in other countries, such as, those where the Roman law prevails, and in countries such as Scotland, which has its own system, the fee simple cannot be so freely disintegrated. The property title may, as for example in the latter country, be in the main indissoluble, a right for life only being treated, not as a separate right of property as in England, but as a mere burden on the radical title. In the system in Quebec, to some extent, and quite apart from the Code, encroachments on the radical rights of property have been permitted. A right of fishing could be excluded and held separately from the right of the tenant to the land held by him under the seignior whether the river is navigable or not. Even where the tenure of the land to which the fishing rights belongs was not seignorial, but was of the ordinary kind, the owner of the land could, in virtue of his general title divide or split off the fishing rights which fell within his ownership and convey them separately as a subject of property strictly so called. It may be that no grant of fishing rights is practically possible without its comprising some right of using the **solum**. Where the terms of the cession are sufficient to have passed such a right, even if the right to fish and to use the **solum** for the purpose constituted no more than an usufruct, this would not constitute a difficulty for such a right may be a transferable one. Art. 479 of the Civil Code of Quebec ought not to be relied as cutting down the duration of such a right, at all events when granted under circumstances in which there is no practical objection to its existence in perpetuity. The words "if for life" refer only to the kind of usufruct which is ended by death. However marked was the tendency in the earlier Roman and French Law to restrict what was called usufruct to a personal title, this tendency became relaxed in the latter phases of both of these systems, to such an extent that the expression "usufruct" became so general as to extend to rights analagous in incident to those of property. At least in modern times dismembermant of the complex of property rights is possible under Quebec law, through which a usufruct may be created which is a veritable right **in rem**. A usufruct is a right of enjoying things in which another possesses the property. But it may by a splitting off of incidents in that property, become a true real right against all who seek to interfere with it. The right to fishing accompanied with a right of way for the enjoyment of the former right is more than usufructuary in the older and stricter meaning. It is right to a separate subject or incident of property. There is no inherent reason for refusing to treat a fishing right as a self-

contained and separable subject. In the seigniorial cases they were treated as self-contained and separable. In the law of Scotland, where the fee cannot be split up, they are regarded as proper subjects for a separable title to property in fee. The definition in Art. 405 of the Quebec Code presents this analogy that it places no difficulty in the way of regarding the right of fishing as an item among others comprised in the subject-matter. There is no reason why, consistently with the language of Arts. 405, 406 and 408 of the Quebec Code there should not be ownership of a fishing right as a mode of enjoying and disposing of separable and physical subject for possession. The title to take the fish is a title to take a product of the river and Art. 408 recognizes as possible in law the union with it as an accessory of the right to use bed of the river or the banks when naturally or artificially stipulated for as part of that which is joined to the fishing right. A.I.R. 1921 P.C. 200.

(CANADA) QUEBEC STATUTE.

——10 Geo. 5, c. 79, Ss. 64 and 62—Appeal—No right of appeal exists from Circuit Court.

By the statute of Quebec, 10 Geo. 5, c. 79, the whole of the sections of the C. P. Code in which the provisions relating to the Circuit Court and the right of appeal find place are declared to be replaced by the other provisions, and so far as the Circuit Court is concerned, the provisions as to appeal drop out, and therefore, S. 64 of the Act, does not avail to confer a right of appeal to the Court of King's Bench from the decisions of the Circuit Court. A.I.R. 1921 P.C. 219.

(CANADA) SEDUCTION ACT, (1922).

——S. 5—Unmarried seduced female—Right of action.

The Legislature in S. 5, Canada Seduction Act, 1922, intended to give a new right of action "in the same manner as an action for any other tort" to an unmarried female who has been seduced. The action under S. 5 has nothing to do with the parental relations, nothing to do with the relation of master and servant, and nothing to do with loss of service or services, and there is no **a priori** probability that S. 5 contemplates relief conditioned upon the seduction being followed by childbirth or pregnancy or illness directly traceable to the physical act of copulation and giving rise to some disability for service. No such conditions are expressed in S. 5. A.I.R. (Vol. 27) 1940 P. C. 219=1941 O.L.R. 35=191 Ind. Cas. 433 (P.C.).

(CANADA) TEMPERANCE ACT, R.S.C. (1927).

——Chap. CXCVI—If within the legislative competence of the Parliament of Canada—True test of the validity of a legislation—The Board, if and when bound by its previous decisions.

The Canada Temperance Act, 1878, the object of which was to authorise the adoption of a system of local option in regard to the sale of intoxicating liquor in counties and cities throughout the dominion, has been amended from time to time by the Dominion Parliament and has been re-enacted in a consolidated form on more than one occasion under the provisions of the Acts relating to the statutes of Canada. The last revision took place in 1924 under the provisions of the Dominion Act, 1924, and now appears on the Statute Roll as the Canada Temperance Act, R.S.C. of 1927, Chap. 196. The material provisions of the Act of 1927 are admittedly identical with those of the Act of 1878. The constitutional validity of the 1878 Act was challenged in 1882 in **Russell's case**, (1882) 7 A.C. 829, but it was held that the Act did not deal with any of the matters exclusively reserved to the provinces and its validity was upheld on the ground that it related to the peace, order and good government of Canada. On a question as to the validity of the Canada Temperance Act, R.S.C., 1927, Chap. CXCVI, it was sought to challenge the decision of the Board in **Russell's case,** (1882) 7 A.C. 829, which had declared the Canada Temperance Act of 1878 to be within the legislative competence of the Dominion Parliament or at any rate to deny its applicability to the Act in question.

Held: The true test of the validity of a legislation must be found in the real subject-matter of the legislation; if it is such that it goes beyond local or provincial concern or interests and must from the inherent nature be the concern of the Dominion as a whole, then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a Provincial Legislature dealing with an aspect of the same subject in so far as it specially affects that Province. In tendering humble advice to His Majesty, their Lordships are no doubt not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments. But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted upon both by Government and subjects. In the present case the decision now sought to be overruled, **i.e., Russell's case**, has stood for over sixty years; the Act has been put into operation for varying periods in many places in the Dominion; under its provisions businesses must have been closed, fines and imprisonments for breaches of the Act have been imposed and suffered. Time and again the occasion had arisen when the Board could have overruled the decision had it thought it wrong. Accordingly, the decision must be regarded as firmly embedded in the constitutional law of Canada an it is impossible now to depart from it. If the Act of 1878 was constitutionally within the powers of the Dominion Parliament it could not be successfully contended that the Act of 1927 which replaced it was **ultra vires**. Moreover, if the subject-matter of the legislation is such that it comes within the province of the Dominion Parliament that legislature must have power to re-enact provisions with the object of preventing a recurrence of a state of affairs which was deemed

to necessitate the earlier statute. To legislate for prevention appears to be on the same basis as legislation for cure. Once it has been decided that the Act of 1878 was constitutionally valid, it follows that an Act which replaces it and consolidates therewith the various amending Acts that have from time to time been enacted must be equally valid. 225 Ind. Cas. 63=(1946) F.L.J. 50=50 C.W.N. 535=12 B.R. 635=1946 M.W.N. 419=A.I.R. 1946 P.C. 88 (P.C.).

(CANADA) VANCOUVER ISLAND SETTLERS RIGHTS ACT (1904).

——S. 3—Procedure.

The Statute of 1904 requires that before the authority to issue a Crown grant under S. 3 is acted upon the Lieutenant-Governor in Council shall decide the question whether or not there is "reasonable proof" or "improvement" or "occupation" and of intention to reside; and the function of the Lieutenant-Governor in Council in deciding upon such questions is judicial in the sense that he must "preserve a judicial temper" and perform his duties "conscientiously with a proper feeling of responsibility" whether or not the proof advanced is "reasonable proof" is a question of fact for the designated tribunal, and the decision by the Lieutenant-Governor in Council in the affirmative cannot be questioned in any Court so long as it is not demonstrated that there was no "proof" before him which acting judicially, he could regard as reasonably sufficient. The Lieutenant-Governor in Council is not bound by the technical rules of British Columbia law touching the reception of hearsay evidence, and there is nothing necessarily incompatible with the judicial character of the inquiry in the fact that such evidence is received. Where there is some evidence in support of the application and there is no adequate reason for holding that this evidence might not be properly considered to be reasonably convincing, the grant made by the Lieutenant-Governor in Council cannot be questioned. As to matters touching the refusal to direct the production of the deponents in support of the application for grant for cross-examination and the refusal to grant an adjournment for the purpose of the opposite party to adduce evidence in opposition to the application, where the opposite party were given the fullest opportunity to present before the Lieutenant-Governor in Council everything they might desire to urge against the view that the depositions produced in themselves constituted "reasonable proof" and they had the fullest opportunity also of supporting their contention that the depositions alone in the absence of cross-examination ought not to be considered sufficient and that further time should be allowed to enable them to prepare their case.

Held, that the appointed authority for dealing with the matter, was the Executive Government of the province directly answerable to the Legislature and that the Lieutenant-Governor in Council was not bound to govern himself by the rules of procedure regulating proceedings in a Court of justice. Where it cannot be suggested that he proceeded without any regard to the rights of the respondents the procedure followed must be presumed, in the absence of some conclusive reason to the contrary, to have been adopted in the exercise of his discretion under the statute as a proper mode of discharging the duty entrusted to him. His decisions taken in the exercise of that discretion are, final and not reviewable in legal proceedings. A.I.R. 1921 P.C. 234.

CANADA WEEKLY REST IN INDUSTRIAL UNDERTAKINGS ACT (1935).

——Whether ultra vires of the Parliament of Canada.

The Weekly Rest in Industrial Undertakings Act is **ultra vires** of the Parliament of Canada. A.I.R. (Vol. 24) 1937 P.C. 82=168 Ind. Cas. 117 (P.C.).

CANADIAN STATUTE (23 & Geo. V, C. 53, AMENDING CRIMINAL CODE), S. 17.

——S. 17—Validity.

S. 17 of the Canadian Statute amending the Criminal Code was valid. Consequently petition to the King in Council from the judgment of the King's Bench Court (Appeal Side) of the province of Quebec in criminal cases is prohibited. A.I.R. (Vol. 22) 1935 P.C. 158=157 Ind. Cas. 571 (P.C.).

CANNING COLLEGE AND BRITISH INDIAN ASSOCIATION CONTRIBUTION ACT (IV OF 1920)

——S. 3—Contribution payable under—Suit for declaration that plaintiffs are not liable to pay—Suit, if barred by S. 233, Cl. (m), U. P. Land Revenue Act (III of 1901).

The contributions payable under S. 3 of the Canning College and British Indian Association Contribution Act, are realizable as revenue within the meaning of Cl. (m) of S. 233, U. P. Land Revenue Act. But a suit brought by persons in whose favour under-proprietary rights have been created by a deed of gift executed by a **taluqdar** for a declaration that they are not liable to make contributions towards the Canning College and the British Indian Association but that the defendant is liable for the same, does not fall under any of the clauses of Cl. (m) of S. 233. It does not fall under the third clause as it is neither connected with nor arises out of any process enforced on account of any sum realizable as contribution to the Canning College and the British Indian Association. The words 'any process enforced' must be read along with the words "on account of any sum which is by this or any other Act realizable as revenue" and where no such process has given rise to a suit, the suit does not fall under the last portion of Cl. (m) of S. 233. A.I.R. (Vol. 24) 1937 Oudh 323=1937 O.W.N. 566=1937 R.D. 281=13 Luck. 279=1937 O.L.R. 277=168 Ind. Cas. 361.

——S. 3—Taluqdar by deed of gift creating defendant superior proprietor—Other donees to be proprietors of under-proprietary rights transferred to them—If liable to pay contribution.

Where under a deed of gift executed by a **taluqdar**, the defendant was to hold the entire **taluqa** as

a superior proprietor and entire land revenue for the entire estate and the other donees were to hold the villages as under-proprietors liable to pay under-proprietary rent, as under-proprietors they are liable to pay the amount fixed by the deed of gift to the **taluqdar** and are not liable to pay land revenue to Government as such. The superior proprietor is liable to pay the contribution under S. 3 of the Canning College and British Indian Association Contribution Act. A.I.R. (Vol. 24) 1937 Oudh 323=13 Luck. 279=1937 O.L.R. 277=9 R.O. 474=1937 O.W.N. 566=168 Ind. Cas. 361.

——Canon Law.

It is a recognised interpretation of the Canon that one common ancestor is sufficient to bring the parties within prohibited degrees of consanguinity. A.I.R. (Vol. 18) 1931 Pat. 213=12 P.L.T. 213 =12 P.L.T. 380=133 Ind. Cas. 175.

——Canon Law—Roman Catholic Churches.

The canon law should be invoked to decide questions of temporal rights in Roman Catholic Churches. 39 Mad. 418=(1912) M.W.N. 152= 24 M.L.J. 630=13 Ind. Cas. 599.

CANTONMENT.

——Land in—Adverse possession.

The Secretary of State is absolute owner of all Cantonments land, unless it can be proved that he parted with it. There can be no adverse possession against him. A person occupying land, in cantonments not specifically transferred to him by the Secretary of State, can only hold it as a licencee from him, who could eject him at will by revoking his licence. 66 Ind. Cas. 582=A.I.R. 1922 All. 57.

——Land in—Building—License—Rights of original owner.

Within the limits of the bazaar area of the Meerut Cantonment there was a plot of land of which although the ownership was transferred to the Secretary of State on establishment of the cantonment, possession continued to be of the original owner. Along portion of its sides were a number of shops which with the boundary walls made the area practically into an enclosure with open gate-ways. In the official records the original owner's possession was shown as that of "malik".

The original owners let out the shops to tenants and collected rents for the same. Before these shops and enclosure were built, original owners obtained the permission of the cantonment authorities to build the shops as required.

Held: that the fact of the grant of the permission did not mean the grant of the licence of the site only and the original owner had wide extent of rights in the whole enclosure and of which he was a licensee. A.I.R. 1930 All. 587.

——Military zone—Right of private individuals—Licensees—Right to compensation—Presumption of title from possession.

The Secretary of State sued to eject defendant from premises within limits of the Poona Cantonment on the ground that the land belonged to the Government and defendant held it only on Cantonment or Military tenure which entitled the Government to resume it at their will and pleasure, subject to payment of compensation for the structures erected thereon. Defendant contended that he was the absolute owner of the land and claimed compensation on that footing: **Held**, on the evidence and on the construction of Bombay Regulations I of 1819, and XXII of 1827, etc., that the Military had the full proprietary right in the whole Cantonment. The defendants was a mere licensee of the land in suit and the house thereon was subject to expropriation at a price to be fixed by the authorities. Mere possession or occupation of the site of the house in question did not afford any presumption that defendant was the owner in fee. 36 Bom. 1=38 I.A. 204=15 C.W.N. 909=10 M.L.T. 97=(1911) 2 M.W.N. 23=14 C.L.J. 268= 13 Bom. L. R. 788=8 A.L.J. 1219=21 M.L.J. 1100=12 Ind. Cas. 117 (P.C.).

——Land in—Permanent tenancy—Evidence of—Building on land—Estoppel.

The burden of proving permanent tenancy in Cantonment area is on him who pleads it. The facts that they and their predecessors held the lands without a lease for a very long time, that the rent was never altered, that succession to the lands by transfer and inheritance has been established, and that buildings have been erected on the lands are not sufficient to establish permanent tenancy, nor do they raise any presumption of ownership in favour of the defendants or their predecessors-in-title. Plaintiff is not estopped from denying the permanent character of the tenancy though permanent structures are constructed on such lands to his knowledge. 2 U.P.L.R. (Pat.) 124=56 Ind. Cas. 813.

——Cantonment tenure — Bungalows constructed under — Government giving proper notice with tender of compensation—Owner, if entitled to rent or interest.

If a proper notice is served by the Government accompanied with a proper tender the title of the owner of the bungalows constructed under a cantonment tenure, is determined and if thereafter he refuses to accept the compensation or to vacate the premises, he does so at his own peril, and though the Government cannot take forcible possession of the property, it would not be open to him to maintain a suit for recovery of rent against the Government. If the compensation is wrongly refused, Government cannot be held liable to pay interest although it was in possession of bungalows without paying rent. A. I. R. (Vol. 31) 1944 All. 13=1943 A.L.J. 545=I.L.R. (1943) All. 878 =210 Ind. Cas. 393.

——Compulsory acquisition—Allowance of 15 per cent. cannot be claimed.

The statutory allowance of 15 per cent. compensation rests only on the provision of the Land Acquisition Act and it does not apply to a case where the bungalows are resumed under G.O. No. 179 of 1836. A.I.R. (Vol. 31) 1944 All. 13=1943 A.L.J. 545=I.L.R. (1943) All. 878=210 Ind. Cas. 393.

——Resumption—Assessment of compensation for building.

Grant of rights within cantonment area—Government retains power of resumption on one month's notice—When such notice is given, Government is required to pay value of buildings which may have been authorized to be erected—After valid resumption the tenure-holder ceases to have any right to keep buildings on land or claim rent from tenants and there is no room for assessing upon an assumed rental basis the compensation for the value of the buildings as materials standing upon a site, but liable to be removed at any moment. A.I.R. (Vol. 29) 1942 P.C. 35=1942 A.L.J. 380=55 M.L.W. 472=46 C.W.N. 921=(1942) 2 M.L.J. 289=1942 O.W.N. 602=44 P.L.R. 432 =44 Bom.L.R. 788=I.L.R. (1942) All. 601=8 B.R. 793=I.L.R. (1942) Kar. (P.C.) 94 Sup. =69 I.A. 93=201 Ind. Cas. 193 (P.C.).

——Land vesting in Secretary of State—Amount of compensation—Presumption.

Where subsequent to the establishment of a cantonment the ownership of the land within the cantonment becomes vested in the Secretary of State and the prior owners of the land were compensated for the loss of such rights as they may have actually suffered, it is a fair presumption that the amount of compensation would vary according to whether the prior owner was deprived wholly of ownership and possession or whether he was deprived only of ownership and allowed to remain in possession as licensee without the payment of any rent A.I.R. 1930 All. 587.

——Records.

General Land Register of Rawalpindi Cantonment—Implicit reliance cannot be placed without corroborative evidence of the other records of the Cantonment Board or other testimony of an unimpeachable character. A.I.R. (Vol. 22) 1935 Lah. 588=37 P.L.R. 236=1935 Cr. Cas. 963= 36 Cr.L.J. 1475=158 Ind. Cas. 858.

——Suit for declaration—Regulation allowing sale to civilians with sanction of military authorities creates licences in favour of grantees — Transfer without consent justifies a suit for declaration.

Where Army Regulations were in force by which a house could not be sold at all to Civilians and later on it was allowed to be sold with the sanction of the commanding officer: **Held**, in the absence of evidence as to the actual terms, it must be presumed that the permission was subject to a reservation about sanction. Therefore every transfer made with the permission of the military authority must be treated as indicating an admission of a new licence upon the prevailing conditions. **Held** further, that a transfer without sanction furnished a cause of action for a declaration that it was not binding on the Secretary of State.

Per Sulaiman, J.—The rights of the occupier to sell the materials of the house are not affected by the Regulation. 22 A.L.J. 354=78 Ind. Cas. 642 =5 L.R.A. Civ. 242=46 All. 427=A.I.R. 1924 All. 415.

——"Old grant"—Tenure—Power of Board.

There is nothing in Cantonment Act or rules thereunder which would prevent the Cantonment Board from giving to a person "old grant" rights in the newly encroached land. Even if the contract is in excess of the authority, the consideration or the object of the agreement would neither be forbidden by law nor would it be of such a nature that if permitted, it would defeat the provisions of any law and would not therefore be void under S. 23, Contract Act. A.I.R. (Vol. 30) 1943 Oudh 99=1942 O.W.N. 699=203 Ind. Cas. 555.

CANTONMENT REGULATION (1836).

——Cl. 6.

Clause 6 does not declare all lands in Cantonment areas to be property of Government though the said clause suggests that some, and probably the greater part of the lands were at that time Government property. A.I.R. (Vol. 18) 1931 P.C. 1=60 M.L.J. 142=33 M.L.W. 41=35 C. W.N. 173=53 C.L.J. 1=33 Bom.L.R. 175= 1931 A.L.J. 249=1931 M.W.N. 41=58 Cal. 858 =57 I.A. 339=130 Ind. Cas. 616 (P.C.).

CANTONMENTS ACT (XIII OF 1889).

——Cantonment Committee—If public Officer.

A Cantonment committee formed under the Act is a public officer within S. 2, C. P. Code. 34 Bom. 583=12 Bom.L.R. 615=7 Ind. Cas. 679.

——S. 4 (2)—Power to define—General Clauses Act (1897), S. 14.

Power to "define" means power to extend or reduce the cantonement limits by including areas clearly outside the limits already fixed. Such power can be exercised from time to time under S. 14 of the General Clauses Act. 24 P.R. 1910 =37 P.W.R. 1910=209 P.L.R. 1910=5 Ind. Cas. 905.

——S. 13—Supply—Interpretation.

The word "supply" in S. 13 of the Cantonments Act, 1889, must have a restricted meaning put upon it. Its context "barters or sells" indicates that it has the same idea underlying it in common with the words preceding it. It relates to a transaction between two persons dealing at arm's length and therefore independent of each other for its purposes. Hence, the servant of a soldier who buys liquor on his master's behalf and gives it to his master cannot be said to have 'supplied' the liquor to his master within the meaning of S. 13 of the Cantonments Act, 1889. (1907) 9 Bom. L.R. 703=31 Bom. 523.

——S. 32—Oral gift of property—Validity.

Under S. 32 of Cantonment Act a gift of property situate in a Cantonment must be made in the manner provided by S. 123 of the Transfer of Property Act. An oral gift by a Muhammadan of such property is not valid. 2 U.P.L.R. (Lah.) 33=54 Ind. Cas. 829.

——Ss. 76, 79, 96—Powers delegated to a Committee of two, not exercisable by surviving member.

Where power to issue notices in respect of breaches of cantonment rules was delegated by the Cantonment Committee to a sub-committee of two members, it was **held** that a notice issued by the

surviving member of the sub-committee only was invalid. (1907) A.W.N. 275=4 A.L.J. 694.

——Ss. 89 and 283—Offence under—Building with permission of Commanding Officer. **See** CANTONMENT CODE, S. 5. 1 A.L.J. 608.

——(II of 1902) S. 19—Liability of landlord for repairs by tenant—Procedure.

To entitle a tenant to deduct the cost of repairs carried out by him from the rent the procedure laid down in Act II of 1902 should have been adopted. 8 All.L.J. 1060=11 Ind. Cas. 471.

CANTONMENTS ACT (XV OF 1910).

——S. 15—Taxation — Committee empowered to levy tax on water—Tax could not be increased or varied without sanction from Government.

The Cantonment Committee, Hyderabad, received its supply of water from the Hyderabad Municipality on payment of certain charges settled by the two bodies on some date prior to 1913. The Cantonment Committee recouped itself for the amount paid to the Municipality by recovering certain water rates from the occupants of the property within the Cantonment limits, which were sanctioned by Government in 1913. Government Notification No. 5099 of 1923 empowered the Committee **inter alia** to levy for use of water for domestic purposes a flat rate of 10 per cent. on the rental of all premises within their limits and provided for the mode of fixing such rentals. Government Notification No. 5594 empowered the Committee to charge certain water rates for buildings under construction with minimum flat rate of Rs. 4 per month where no water-main was on the premises, and a graduated, but a uniform scale of rates to be levied depending on the dimensions of the water-main.

Held, that the rates were levied as a tax and could not be increased or varied by the Committee without the like sanction of Government. 20 S.L.R. 325=92 Ind. Cas. 361=A.I.R. 1926 Sind 130.

——S. 266—Interpretation.

S. 266, Cantonments Act, only lays down that no Court shall proceed to the trial of any offence under Cantonments Act unless moved by the persons mentioned therein and if the persons mentioned therein initiate the proceedings as provided in the section, the Court must follow the procedure laid down in Cr. P. Code. 10 A.I.Cr.R. 365=109 Ind. Cas. 607=29 Cr.L.J. 591 (Nag.).

——S. 266—Cantonment Board lodging a complaint signed by execution officer filing no authority but having power to file such complaint—Irregularity curable—Cr. P. Code, S. 537.

A complaint was lodged by the Cantonment Board, through a Sub-Overseer, signed by the Executive Officer of the Board. The Executive Officer never appeared before the Magistrate. Sub-Overseer did not hold any power of attorney on behalf of the Board. No power of authority was filed to show that the Executive Officer had any authority to lodge such a complaint. On conviction the accused filed a revision. The Executive Officer filed an affidavit that he had an authority to file the complaint.

Held, that failure to file the authority is an omission curable under S. 537; 116 P.L.R. 1907, Foll. 11 A.I.Cr.R. 13=111 Ind. Cas. 326=29 Cr.L.J. 822=A.I.R. 1928 Lah. 946.

CANTONMENTS ACT (II OF 1924).

——Tax under—Suit for refund—Civil Court—Jurisdiction.

Where the plaintiff is demanding a refund of the amount of assessment of tax levied under the Cantonments Act and, if the Court is of the opinion that the tax is **ultra vires** of the Act, the Civil Court will have jurisdiction. If, however, the Court is of the opinion that the tax is **intra vires**, in that case it would not be open to the Civil Court to go into the question whether the tax is excessive or whether it has been rightly levied. A.I.R. (Vol. 26) 1939 Lah. 147=41 P.L.R. 597=184 Ind. Cas. 469.

——S. 2 (37)—Space having gates on both sides.

Where gates have been in existence on both sides for a number of years, it cannot be presumed that the public have a right of way over this space and the land cannot be deemed to be a street. A.I.R. (Vol. 22) 1935 Lah. 588=37 P.L.R. 236=1935 Cr. Cas. 963=36 Cr.L.J. 1475=158 Ind. Cas. 858.

——S. 3—Building site — Acquisition by Government—Proof.

Where the land in dispute is in the centre of the cantonment area and no other land in the centre of the area is privately owned, and in 1849-50 this land was either already built upon or was about to be built upon and the site was included in the plan of the land which Government was proposing to acquire, the proper conclusion is that the land was acquired by Government. A.I.R. 1947 P.C. 178.

——S. 3—Building site — Private ownership—Proof.

The fact that the person who owns a building situated in a cantonment area executed in favour of Government a mortgage or lease on a monthly tenancy of the building together with the site thereof, does not establish his title to the land. Although the person who prepared the mortgage believed that the mortgagor was the absolute owner of the land mortgaged, it cannot carry the matter very far when there is no statement in the mortgage which can bind the Government by estoppel to admit the absolute ownership of the mortgagor. A.I.R. 1947 P.C. 178.

——S. 5—Ownership—Vesting of—Mere declaration of lands to be within Cantonment area does not vest their ownership in Government.

The mere fact that certain lands are declared by the Government to be within a Cantonment area does not vest their ownership in the Government unless it is shown that the lands were acquired by the Government for that purpose. 31 C.W.N. 1033=105 Ind. Cas. 565=A.I.R. 1927 Cal. 786.

——Ss. 84 and 88—Refund of tax—Resort to Civil Court for refund or for injunction barred.

Where the Legislature has given powers to a person for a public purpose from the exercise of which a particular individual receives injury, and has at the same time pointed out the mode of redressing the injury, the jurisdiction of the Civil Court is barred.

Section 84, Cantonments Act, affords a remedy to an injured person against the levy of a tax from him, which has been imposed under the Act. Not only that but S. 88 of the Act provides that an order passed by the appellate authority mentioned in S. 84 shall be final. Under the circumstances, the remedy of the person to resort to a Civil Court for refund of the excess tax levied from him or for an injunction restraining the Cantonment Authorities to levy the alleged excess tax in future is clearly barred. A.I.R. (Vol. 24) 1937 Sind 305=172 Ind. Cas. 732.

——Ss. 84 and 88—Matters relating to valuation by Cantonment Board—Jurisdiction of Civil Court.

Under Cantonments Act, the jurisdiction of the Civil Court is excluded in all matters relating to any valuation, assessment, liability to assessment or taxation by a Cantonment Board. Any decree that may be passed by Civil Court in such matters is therefore wholly without jurisdiction and **ultra vires** and hence cannot be excluded. A.I.R. (Vol. 20) 1933 All. 163=1933 A.L.J. 162=144 Ind. Cas. 1016.

——Ss. 84 and 88—Refund of tax—Resort to Civil Court for refund or for injunction barred. **See** IBID, Ss. 84 and 88. A.I.R. 1937 Sind. 305.

——S. 106 (c)—Whether ultra vires Government of India Act, 1919, S. 84 (2).

No doubt fines imposed by Criminal Courts in the Province would be properly credited to provincial revenues as receipts accruing in respect of the administration of justice, but only if not otherwise appropriated by competent authority; and entry No. 30 in the list of Central subjects, contained in Sch. 1 of Government of India Act of 1919, "Criminal Law, including criminal procedure," clearly includes the power to legislate for the destination of fines for any criminal offences with respect to which it was competent for the Indian Legislature to legislate. The Devolution Rules of 1920, in making criminal law a Central subject, gave the then Indian Legislature power not only to create criminal offences but also to provide for the destination of fines imposed in respect of such offences. Thus the Indian Legislature had power under the Devolution Rules to legislate with respect to cantonments and with respect to criminal law and the latter power included a power to legislate with respect to the destination of fines imposed for breaches of the criminal law. The Indian Legislature had, therefore, power to enact S. 106 of the Cantonments Act, 1924, S. 106 was not, therefore **ultra vires** the then Legislature.

Even if S. 106 of the Cantonments Act, 1924, had related to a provincial and not a Central subject, the Act once passed could not be successfully challenged in any Court of law by virtue of S. 84 (2) of Government of India Act of 1919. Accordingly, it was a law in force in British India immediately before the commencement of Part III of the Constitution Act of 1935, and by reason of S. 292 of that Act it continued in force in British India until altered or repealed or amended by a competent Legislature or other competent authority. A.I.R. (Vol. 26) 1939 F.C. 58=I.L.R. (1939) Kar. F.C. 98=40 Cr.L.J. 403=5 B.R. 554=1939 O.L.R. 246=1939 M.W.N. 750=1939 2 M.L.J. 1 Sup.=50 M.L.W. 209=180 Ind. Cas. 863 (F.C.).

——S. 108—Land vested in Board—Board, if has ownership as well—Cantonment Land Administration Rules, R. 9.

By R. 9 of the Cantonment Land Administration Rules, the management of the land vested in the Board under S. 108 of the Cantonments Act is also vested in the Board so that the Board has both the ownership as well as the management. A.I.R. 1947 All. 243=1946 A.L.W. 458=1946 A.W.R. (H.C.) 83.

——S. 118—Ingredients.

The giving of offence by the exposure of the person is not a necessary ingredient of the offence under S. 118 (1) (a) (iii). The offence is complete if the exposure is "wilful or indecent" and in a public place. 27 Cr.L.J. 107=91 Ind. Cas. 539=A.I.R. 1926 All. 263.

——S. 118—'Public place'—Verandah of private house.

A verandah of a private house accessible to a public street is not a public place within the meaning of S. 118 of the Cantonments Act and the mere fact that it is open to the road, and can be entered by the public is not sufficient for holding it to be a public place. A.I.R. (Vol. 18) 1931 Lah. 576=1931 Cr. Cas. 864=33 Cr.L.J. 345=33 P.L.R. 448=136 Ind. Cas. 720.

——S. 118 (1) (c)—Scope.

A takhtposh or moveable wooden platform cannot be held to be "earth, or material of any description, or any offensive matter or rubbish" within the meaning of Cl. (c), S. 118 (1). 28 Cr.L.J. 683=103 Ind. Cas. 411=9 A.I.Cr.R. 24=A.I.R. 1927 L. 647.

——Ss. 141 (1), (2) and 268—Offences not specified in Sch. IV—Trial of them—Procedure.

Offences under S. 141 (1) read with S. 268, Cantonments Act, and offences under S. 141 (2), Cantonments Act are not specified in Sch. IV of the Act and therefore no Court can proceed with the trial of an of these offences except on the complaint of or upon information received from the Cantonment Authority concerned or a person authorised by such authority by a general or special order in that behalf.

The use of the word "again" suggests that the offence contemplated in Sub-S. (2) of S. 141, Cantonments Act is a recurring and not a continuing offence. In other words, the Legislature contemplated the service of a notice upon a person and eventually a cleaning up of the premises with or without an offence committed under S. 141 (1) read with S. 268, Cantonments Act. The Legis-

lature then provided that if within three months of the service of the original notice the premises were again found to be filthy, proceedings could be commenced at once without a fresh notice. After the expiry of three months fresh notices would be required under S. 141 (1) of the Act. Consequently, where a person fails to comply with a notice under S. 141 (1) he cannot be prosecuted under S. 141 (2). He can be dealt with under S. 141 (1) read with S. 268 and in case of a continuing failure to comply with it he is liable to an additional fine. A.I.R. (Vol. 22) 1935 All. 905 =1935 Cr. Cas. 1056=1935 A.L.R. 1036=36 Cr. L.J. 1493=158 Ind. Cas. 1010.

——S. 181—Permission—If can be subsequently modified.

Where Cantonment authority grants permission without any reservation so far as the use of the building for shops was concerned, its subsequent resolution modifying the previous one by adding the words "shops rejected" is **ultra vires**. A.I.R. 1930 Lah. 822.

——S. 184—Continuing failure—Penalty for — If provided.

Section 184 provides no penalty for a continuing failure or contravention, although such a penalty is provided in S. 268. A.I.R. (Vol. 21) 1934 Oudh 29=11 O.W.N. 156=1934 Cr. Cas. 83 (2) =35 Cr.L.J. 666=148 Ind. Cas. 420.

——Ss. 184, 185 and 207—Construction of building before new Act—Notice to alter after Act—Non-compliance — Prosecution under new Act—Competency of—Limitations.

Under the Cantonments Act of 1924, erecting or re-erecting a building without the permission of the Cantonment Authority and failure to comply with a notice to alter or demolish a building are separate offences; and therefore non-compliance with a notice given after the enactment of 1924, is punishable under the Act of 1924, even though the building in respect of which such notice was given was erected before 1924.

Further, prosecution for such disobedience may be launched within 6 months of such disobedience. A.I.R. (Vol. 19) 1932 Lah. 370=33 Cr.L.J. 336=33 P.L.R. 380=1932 Cr. Cas. 488=136 Ind. Cas. 713.

——Ss. 184 (b), 181, 268—Mere non-compliance with provisions of S. 181 (1)—Whether punishable —Substitution of conviction under S. 268 for one under S. 184 (b)—Propriety of.

S. 184 (b) does not provide a punishment for mere non-compliance with a direction made under Sub-S. (1) of S. 181. What it makes punishable is the beginning, continuation or completion of the erection of a building without complying with such a direction. It is not proper to substitute a conviction under S. 268 for one under S. 184 (b). A.I.R. (Vol. 21) 1934 Oudh 29=11 O.W.N. 156=1934 Cr. Cas. 83 (2)=35 Cr.L.J. 666=148 Ind. Cas. 420.

——S. 187—Applicability—Conditions.

Under S. 187 of the Cantonments Act, only projections or structures overhanging, projecting into, or encroaching on, any street or drain, sewer or aqueduct therein can be demolished. 1946 A.L.W. 458=1946 A.W.R. (H.C.) 83=A.I.R. 1947 A. 243.

——S. 187—Sanction on official form conveyed by officer—If can be acted on.

Where the petitioner makes an application to the Cantonment Authority for sanction and a person ordinarily authorised to communicate the sanction writes and conveys sanction on an official form of the Cantonment Board, the petitioner is entitled to act on such sanction, it being not his business to enquire if the sanction conveyed by him had been granted by the Board. A.I.R. (Vol. 21) 1934 Lah. 510=35 P.L.R. 414=1934 Cr. Cas. 803=36 Cr.L.J. 700=155 Ind. Cas. 273.

——Ss. 187, 288—Conviction for disobedience of notice of Executive Officer—Legality of — Subsequent confirmation by Board, effect of.

A conviction cannot be sustained for disobedience of a notice issued by the Executive Officer of a Cantonment when the notice was not issued by or with the approval of the Cantonment Authority. Subsequent confirmation by the Board is of no avail. A.I.R. (Vol. 20) 1933 Lah. 545 (1)=35 Cr.L.J. 612=1933 Cr. Cas. 816 (1)=148 Ind. Cas. 56.

——Ss. 187 and 268—Qualified sanction to proceed with construction—Subsequent notice to demolish 'unauthorised construction' — Non-compliance — Prosecution.

A person is not bound to comply with any notice whatever, however illegal or peremptory, merely because it was issued to him by a Municipal Board or a Cantonment Authority, and if he fails to comply with it, he does not render himself liable to a fine under the Act.

Where the Cantonment Authority gave a qualified sanction to a person to proceed with the construction of his building at his own risk, the site having been claimed by the Government, but there was no 'Municipal objection', and when he proceeded to build, the Cantonment Authority served him with a notice to demolish the unauthorised building on non-compliance with which he was prosecuted under S. 187, Cantonments Act, read with S. 268:

Held, that there was no unauthorised construction as he had sanction from the Board to build the room which alone he had built; that it was preposterous to suggest that when he had the sanction of the Board in writing under S. 181 he did not have the permission in writing of the Cantonment Authority; and that the question between the parties was purely civil one. A.I.R. (Vol. 20) 1933 All. 486=34 Cr.L.J. 1191=146 Ind. Cas. 2.

——S. 210—Notice served on person prohibiting him from selling fruit in cantonment area—On representation allowed to continue business—He applying for licence but not paying prescribed fee —No issue of licence—Summary trial and conviction—Interference in revision.

When the Cantonment Authority first served a notice upon certain person prohibiting him from selling fruit in his shop in cantonment area, he represented to the Authority that he had been carrying on business for 50 or 60 years, whereupon, he was allowed to continue his business.

Whether the Cantonment Authority required him then to take out a licence or not, was not clear but he subsequently applied to the Cantonment Authority for licence. The person did not pay the prescribed fee for the licence and therefore no licence was issued to him. He was tried summarily and convicted under Ss. 210 (g) and 213 of the Cantonments Act:

Held, that the person could not take advantage of S. 210 (3) owing to his own conduct in applying for a licence and not taking it out subsequently and his conviction could not be interfered with in revision:

Held, also that this was not a case which should have been tried summarily by the Magistrate as the question of compensation might have arisen under certain contingencies and it would have been difficult to ascertain it without sufficient record. A. I.R. (Vol. 25) 1938 Lah. 427=39 Cr.L.J. 653=175 Ind. Cas. 544.

——S. 210 (3) (a)—"Same part of the Cantonment," meaning explained.

The word "locality" is not an unfair interpretation of the word "part" in Cl. (a) of S. 210 (3). It covers all that part of the Cantonment where the bazar was situated and where the particular trader could carry on his occupation without offence or danger to other parts of the Cantonment not used for the purpose of a bazar, but where residences of officers or the barracks for troops are situated. A.I.R. (Vol. 29) 1942 Sind 95=I.L.R. (1942) Kar. 87=43 Cr.L.J. 733=201 Ind. Cas. 66.

——S. 210 (3) (a) and 213—Person carrying on trade from commencement of Act—Whether must apply for licence—3 months' notice to apply for licence—Duty of Authorities.

Where a person has been carrying on a trade in the same part of the Cantonment from the commencement of the Cantonments Act, there is no obligation upon him to apply for licence to carry on the trade and it is incumbent upon the Cantonment Authority to give him 3 months' notice of his obligation to apply for a licence. Without such notice he cannot be convicted for carrying on trade without a licence. A.I.R. (Vol. 29) 1942 Sind 95=I.L.R. (1942) Kar. 87=43 Cr.L.J. 733=201 Ind. Cas. 66.

——Ss. 210 (m) and 268—Selling of bamboo within Cantonment area without licence—Conviction—Legality.

Bamboo being an inflammable wood, a person selling bamboos; **ballies takhats; and karies** within the Cantonment without licence is guilty under S. 268. A.I.R. (Vol. 21) 1934 All. 987 (1)=1934 Cr. Cas. 1304=36 Cr.L.J. 261 (2)=L.R. 16 A. 20 (1) Cr.=153 Ind. Cas. 131 (2).

——S. 213—Presumption—Evidence Act, S. 114

Where a person, who was a butcher by trade and had no licence, actually imported meat in large quantities for more than could be required for his personal use and had distributed it but where there was no evidence that he actually received any money the presumption that he actually imported meat and sold it can be legitimately drawn. 1929 Cr. C. 318=118 Ind. Cas. 223=30 Cr.L.J. 906=A.I.R. 1929 Sind 150.

——S. 236—Males—If can be convicted.

A Magistrate can convict a male of the offence of loitering for the purpose of prostitution under S. 236 (1). 28 Bom.L.R. 298=27 Cr.L.J. 555=93 Ind. Cas. 1051=A.I.R. 1926 Bom. 227.

——S. 236 (1), (2)—Regimental Provost Sergeant sending complaint under S. 236 to Sub-Inspector—Latter forwarding original to Magistrate—Complaint, if proper.

The Regimental Provost Sergeant made a complaint under S. 236, Cantonments Act in writing which he sent to the Sub-Inspector of Police and which the Sub-Inspector forwarded in original to the Magistrate who acted upon the complaint. The Regimental Provest Sergeant who was authorised to make complaints under S. 236 was a member of the Military Police employed in the Cantonment and the Magistrate found that at least part of the offence was committed in the presence of the Regimental Provost Sergeant:

Held, that a proper complaint was made to the Magistrate in accordance with the provision of S. 236 (2), Cantonments Act. A.I.R. (Vol. 23) 1936 All. 129=1933 A.L.R. 189=1936 Cr. Cas. 132=37 Cr.L.J. 372=1936 A.L.J. 193=58 All. 684=160 Ind. Cas. 884.

——S. 236 (1)—Scope of.

There is nothing in the wording of S. 236 (1), Cantonments Act, which says that the person importuning must importune to the commission of sexual immorality with himself or herself. A.I.R. (Vol. 23) 1936 All. 129=1933 A.L.R. 189=1936 Cr. Cas. 132=37 Cr.L.J. 372=1936 A.L.J. 193=58 All. 684=160 Ind. Cas. 884.

——S. 236 (2)—Conviction under — Legality — Condition.

A person can be legally convicted under S. 236, Cantonments Act, only when the prosecution is instituted strictly in accordance with the provisions of S. 236, Sub-S. (2). A.I.R. (Vol. 22) 1933 Lah. 590=35 P.L.R. 284=1933 Cr. Cas. 845=35 Cr.L.J. 609=147 Ind. Cas. 1200.

——S. 247—Notice—Necessity for—Entry with implied consent.

The entry contemplated in S. 247, which requires four hours' written notice is an entry without the consent of the occupier or the owner and when the entry is with the implied consent no question of notice arises. A.I.R. (Vol. 22) 1935 All. 160=1935 A.L.J. 175=36 Cr.L.J. 356=1935 Cr. Cas. 212=153 Ind. Cas. 469.

——S. 249—Mere refusal to pay rent—Whether amounts to obstruction.

Where a tenant who is liable to pay rent to a contractor of the Cantonment Committee who had been duly authorised to collect rent from him refused to pay rent either to him or to his servant, the mere refusal to pay rent does not amount to an obstruction within the purview of S. 249. A.I.R. (Vol. 19) 1932 All. 386=138 Ind. Cas. 282.

——S. 259—"Recoverable by the Cantonment Authority under the Act"—Meaning of.

The expression "recoverable by the Cantonment

Authority under the Act" does not include the case of money due under ordinary contract between the Authority and others. It merely applies to such dues as are recoverable by the Cantonment Authority under the express provisions of certain sections of the Cantonment Act, which entitled it to levy fees for permitting acts to be done which cannot otherwise be done without the sanction or permission of such authority in the interest of sanitation and general welfare of the Cantonment. It does not include moneys which are payable to the Cantonment Authority under express agreements or contracts which the Cantonment Authority is authorized to enter into or to make like an ordinary individual. Consequently, where the Cantonment Authority recovers arrears of rent due from a tenant by distress and sale of his immovable property, its action is illegal and the Authority becomes liable to pay damages for its illegal action. A.I.R. (Vol. 20) 1933 Lah. 517=150 Ind. Cas. 682.

——Ss. 266, 141 (1) (2)—Complaint or information from Cantonment Authority.

There was upon the record a letter addressed to the Sub-Divisional Magistrate, purporting to be signed by the Executive Officer of the Cantonment Authority. No evidence was called to prove this letter. Neither was it proved that it was signed by the Cantonment Authority nor that the officer was authorised by the Cantonment Authority:

Held, that S. 266 of the Cantonment Act was not complied with and the proceedings held on that letter and orders were invalid. A.I.R. (Vol. 22) 1935 All. 905=1935 Cr. Cas. 1056=1935 A.L.R. 1036=36 Cr.L.J. 1493=158 Ind. Cas. 1010.

——S. 267 (2)—Applicability—Offender not in custody.

Where an offence of failure to comply with a notice under S. 267, Cantonments Act, is compounded, the executive officer of the Cantonment Board will be acting within his statutory powers if he applies to the Court for dropping further proceedings in the matter. It is only if the offender is in custody, he has to be discharged. But when he is not in custody no order of discharge is called for; it is sufficient if further proceedings are dropped. The fact, however, that the offender is not in custody does not exclude the operation of S. 267 (2), in so far as it provides that if an application has been made and an offence properly compounded, no further proceedings shall be taken against the offender. 229 Ind. Cas. 174=48 Cr.L.J. 300=A.I.R. 1937 Sind 128.

——S. 268—A person selling bamboo, **ballis, takhtas** and **haries** within the Cantonment without licence is guilty under S. 268. A.I.R. (Vol. 21) 1934 All. 987 (1)=1934 Cr. Cas. 1304=36 Cr.L.J. 261 (2)=L.R. 16 A. 20 (1) Cr.=153 Ind. Cas. 131 (2).

——S. 271—Offence under—Completion of building more than six months prior to complaint.

Where there is nothing to show that any new building was built by the accused within limitation and what was built had been completed more than six months before the date of complaint, trial for an offence under S. 271, Cantonments Act, is not proper. A.I.R. (Vol. 21) 1934 Oudh 29=1934 Cr. Cas. 83 (2)=11 O.W.N. 156=35 Cr.L.J. 666=148 Ind. Cas. 420.

——S. 272—Applicability—Bar of suit where notice under S. 187 of the Act was itself bad.

S. 272 of the Cantonment Act would apply only to such cases where from the facts proved it appears that the notice was given by the Board according to the terms of the Act; that is if it had been held that the encroachment was on a public street then the Board would be justified in issuing a notice under S. 187 and no suit could be maintained against such an order. But where it is found that the notice itself was bad for the reason that the encroachment were not on a public street but were on the land belonging to the plaintiff and hence a notice under S. 187 was not justified, then S. 272 would have no application. 1946 A.L.W. 458=1946 A.W.R. (H.C.) 83=A.I.R. 1947 A. 243.

——S. 273—Scope of protection under.

It is to acts which the Cantonment Board has not merely authority but also the duty to perform, that is, acts which are enjoined upon the Board that the protection afforded by S. 273 of the Cantonments Act extends. Hence, where the Board makes an appointment which it was not statutorily bound to make but gives the person appointed a salary less than that which it was bound by its own rules to pay and is sued for the balance of pay, the provisions of S. 273 (1) of the Act could not be invoked in aid by the Board. 1946 A.W.R. (H.C.) 460=1946 A.L.W. 235=A.I.R. 1947 A. 42=231 Ind. Cas. 788.

——S. 273—Applicability—Suit for recovery of price of goods supplied to Cantonment Board—Cause of action for suit, when arises—Limitation for suit—Limitation Act (IX of 1908), Sch. I, Art. 52.

S. 273, Sub-S. (1), Cantonments Act, does not contemplate the class of suits on private contracts for which specific rules of limitation are prescribed in the Limitation Act. They contemplate actions brought against the Board in respect of acts done in pursuance of the Act itself or done in pursuance of any rule or bye-law that has the force of law. A suit for the recovery of the price of the goods supplied by the plaintiff to the Cantonment Board which is still unpaid is not a suit for any act done by the Board in pursuance of the Cantonments Act; nor is the plaintiff suing the Board for any act done by the Board or purporting to have been done by the Board under any rule or bye-law made under the Cantonments Act. The cause of action for the suit is not the action of the Board in omitting to pay the price of the goods, but would ordinarily arise from the fact that goods were supplied by the plaintiff to the Board. Such a suit is governed for purposes of limitation by Art. 52, Lim. Act, and the starting point of limitation is not the date of the delivery of the goods. A.I.R. (Vol. 21) 1934 All. 436=1934 A.L.J. 805=149 I.C. 49.

——S. 287—Transaction purporting to create a mortgage by deposit of title deed is invalid if it is effected at a place where such transactions are prohibited, the situation of the property mortgaged being immaterial. Hence when such a mortgage is effected in a cantonment area it is invalid. The determining factor in such a case is not the place where the property alleged to have been mortgaged is situated but the formalities required by the law for the creation of a valid mortgage at a place where

the title-deeds are alleged to have been delivered to the creditor. A.I.R. (Vol. 20) 1933 Lah. 972=35 P.L.R. 249=147 Ind. Cas. 942.

——S. 287—Lease from month to month—Need for registration.

Lease of land in Cantonment from month to month has not to be registered under S. 287. A.I.R. (Vol. 18) 1931 Lah. 501=32 P.L.R. 361=134 Ind. Cas. 289.

CANTONMENT CODE (1899).

——S. 5—Building with permission of Commanding Officer.

Held, that the officer commanding a regiment is not the cantonment authority whose permission to build within cantonment limits is sufficient under S. 5 of the Cantonment Code. Building a hut with the permission of the officer commanding, but without the permission of the Cantonment Magistrate, who is the proper authority, is an offence under Ss. 89 and 283 of Act XIII of 1889. (1904) 1 A.L.J. 608.

——S. 66 (1)—Offence under—Master's liability.

The offences aimed at by S. 66 (1) of the Cantonment Code are personal offences and not offences which can be committed by delegation. Hence a master cannot be punished under the section for an act of his servant in carrying meat in a bullock cart exposed to public view, which is not proved to be committed with his knowledge or authority. (1905) 10 Bom.L.R. 1052.

——Ss. 89 and 104—Conviction under a wrong section—Legality.

It is illegal to convict an accused person under a wrong section of the Cantonment Code; whether the conviction can be maintained on other grounds is perfectly immaterial. A conviction under section 104 cannot be set aside on the ground of mere ignorance on the part of the accused of the amendment to that section. Ordering payment of a future daily fine on default of compliance with an order of Court is improper. The proper procedure in cases, where such an order is not complied with is to institute further proceedings giving the accused an opportunity of defending himself. The penal sections of the Cantonment Code must be construed strictly both in favour of and against an accused. 206 P. L. R. 1911=60 P.W.R. Cr. 1911=12 Cr.L.J. 371=11 Ind. Cas. 139.

——S. 94—Notice not containing particulars—Legality.

Under S. 94 of the Code, notice must be given to the owner as to the precise nature and extent of the repairs to be carried out and a notice not containing these particulars is illegal. 3 P.R. (Cr.) 1912=9 P.W.R. (Cr.) 1912=13 Cr.L.J. 17=56 P.L.R. 1912=13 Ind. Cas. 209.

——S. 96—Powers of Magistrate.

An order requiring the owner of land to remove a wall and rebuild it with certain specific materials, made by a Cantonment Magistrate not being based on the opinion of the Cantonment Committee is invalid because the Magistrate being only the executive officer has no authority to act under S. 96. 3 S.L.R. 11=9 Cr.L.J. 447=1 Ind. Cas. 940.

——S. 167, Cl. (j)—Article of 'perishable nature'—Brown sugar—Cr. P. Code, Ss. 190, 191.

Where a Cantonment Magistrate institutes a prosecution under the Cantonment Code against the accused, he ought to inform him that the latter is entitled to have his case tried by another magistrate and his not doing so is an irregularity which will vitiate the proceedings.

Brown sugar is not an article of food which is of a 'perishable nature' within the meaning of S. 167, Cl. (j), of the Cantonment Code, and the person selling it within the cantonment is not guilty of any offence. (1906) 3 A.L.J. 694=1906 A.W.N. 303.

——S. 203—'Grounds'—Meaning of.

Information forwarded by the medical officer of one Cantonment to the authorities of another that a woman is believed to have a venereal disease is **prima facie** ground for believing within S. 203 of the Code. 3 S.L.R. 184=11 Cr.L.J. 199=4 Ind. Cas. 1157.

——S. 283—Order of Fine—Revision.

An order of fine under S. 283 of the Code, for breach of the conditions of a license is a judicial one and therefore subject to revision by the Chief Court. Under S. 283 a fine cannot be inflicted where the license only provides for suspension or cancellation in case of breach. 37 P.L.R. 1910=30 P.W.R. Cr. 1909=11 Cr.L.J. 17=9 P.R.Cr. 1909=4 Ind. Cas. 611.

——(1912), Ss. 92 and 107—Occupier—Magistrate ordering prosecution—Cr. P. Code, Ss. 191 and 556.

An offence against S. 92 of the Cantonment Code may be committed by the occupier or trespasser and not merely by the owner or lessee. On a report by a Cantonment Official the Cantonment Magistrate directed a prosecution and then tried the case himself. **Held,** the Magistrate should have informed the accused that he was entitled to have the case tried by another Magistrate and should not have tried the case himself. 21 C.L.J. 394=2 U.P.L.R. (Lah.) 78=55 Ind. Cas. 1002.

——S. 103-B—Proceedings without notice—Legality

Proceedings without written notice to accused under S. 103-B are illegal. 17 A.L.J. 503=20 Cr. L.J. 384=50 Ind. Cas. 992.

——S. 231, Cl. (2)—Absence of nine days—Failure to appoint agent—Liability to conviction.

An absence of nine days from Cantonment station without appointing an agent renders the delinquent liable to conviction and punishment under S. 231, Sub-S. (2) of the Code. 12 S.L.R. 40=19 Cr.L. J. 974=47 Ind. Cas. 874.

——R. 97—Building in ruinous condition—Removal or repair—Choice of owner.

The option given by R. 97 of the Cantonment Code of deciding, whether the building should be removed or repaired is an option given to the Cantonment authority and not to owner of the building. 43 Bom. 838=21 Bom.L.R. 761=20 Cr.L.J. 697=52 Ind. Cas. 665.

——Rr. 97 and 107-A—Notice—Validity.

It is competent to a Magistrate to sentence a person for having persisted in his failure to carry out his order only as regards the past; but not as regards the

failure in the future. A notice under R. 97 of the Code may require the owner to do one of two things, i.e., to remove the building or cause repairs to be made. The notice need not be in the alternative or give a choice to the owner. 43 Bom. 836=21 Bom.L.R. 759=20 Cr.L.J. 624=52 Ind. Cas. 288.

——R. 141 (d)—Obstruction to free passage.

The accused kept for years past a wooden box in front of his shop for use as a step to facilitate access to his **ota** which was three feet above ground. The wooden box was placed upon a slab stone covering the gutter at the side of the road adjoining the accused's shop. **Held**, that the accused was not guilty of the offence of causing wilful obstruction to the free passage of a street under R. 141 (d) of the Cantonment Code, 1899. (1903) 5 Bom.L.R. 741.

CANTONMENTS (HOUSE ACCOMMODATION) ACT (II OF 1902).

——Ss. 6, 8, 18 and 21—Dispute as to rent—Reference to arbitration—Decision final—Military Officers, meaning of—Amount of rent when matter of contract.

The decision of the Committee appointed under the Act on a matter referred to them under S. 21 is final. The words 'a Military Officer' and 'the Military Officer' in Ss. 6, 8 and 18 refer only to the particular Military Officer at whose instance a notice under S. 9 is issued and not to his successor-in-office. The Act contemplates a fresh appropriation of rent whenever the owner of a house in Cantonment refuses to let it at reasonable rent to a Military Officer who can bring himself under S. 8 (2) of the Act. When the procedure prescribed in the Act is not followed, the amount of rent payable by Military Officer is a matter of contract expressed or implied between the owner and that officer. 11 A.L.J. 129 =18 Ind. Cas. 708.

——Ss. 6 and 11—Restriction by cantonment's Magistrate that the intending purchaser must vacate the house for military officer is not illegal.

The Cantonment Act does not contain any prohibition against a transfer by an owner of his right to continue in occupation of the house. All that the Act says is that no notice shall be issued under S. 6 if the house is occupied by the owner. The owner, therefore, may agree that if the house is required by the military authorities, he would deliver possession thereof to them. The Cantonment Magistrate is not prohibited from entering into any agreement with an intending purchaser or even an owner in possession. Such an agreement would not defeat the provisions of the Cantonment Act. 25 Bom.L.R. 938=85 Ind. Cas. 442=A.I.R. 1924 Bom. 258.

——Ss. 6, 35 and 37—Order of Officer commanding division—Finality.

Under S. 35 of the Act the Officer Commanding the division is the tribunal to which a person aggrieved by a notice under S. 6, must apply for redress, and the decision of the officer thereon is final under S. 37 of the Act. 10 S.L.R. 113=37 Ind. Cas. 267.

——Ss. 26, 28, 21 and 34—Military tenant and landlord—Constitution of Committee of arbitration—Failure to act by landlord's nominee—Appointment of member by District Magistrate without notice—Validity.

When a Committee of Arbitration is convened under the Act for settling a dispute between an owner of a house and his tenant and the nominee of the owner neglects to act, the owner must be given seven days' notice to nominate another person in place of his nominee. The omission to give notice is not a mere irregularity but a patent illegality. It is an act **ultra vires** on the part of the District Magistrate to appoint another member in place of the nominee if the conditions specified in provisos (1) and (2) to S. 26 of the Act are not fulfilled. Such an appointment is invalid and does not confer the status of member on the person so appointed and there can be no legally constituted Committee of Arbitration without a nominated or a duly appointed member for the owner. 13 P.R. 1909=17 P.W.R. 1909=. 31 P.L.R. 1909=1 Ind. Cas. 431.

CANTONMENTS (HOUSE ACCOMMODATION) ACT (VI OF 1923).

——S. 4—Ownership in land—Presumption—Occupiers of buildings on land, whether licensees—Onus—Applicability to Peshawar Cantonment.

Where Government once owned land in Cantonment to which General Order No. 179 applied, the occupiers of buildings thereon are licensees and the onus is upon occupiers of houses to show that they own the land on which the houses are situated. If General Order No. 179, dated September 12, 1836 or any order or regulation embodying its provisions applied to Peshawar Cantonment at and after its inception in 1851, the onus is on the occupiers to show that the original private occupation was not that of a licensee and that they themselves are not licensees holding under Cantonment tenure. A.I.R. (Vol. 23) 1936 Pesh. 217=168 Ind. Cas. 230.

——S. 4—Applicability to licences given under General Order No. 179.

Cantonments (House Accommodation) Act of 1923, under S. 4 does not apply to a licence under General Order No. 179 unless the Secretary of State and the other party entitled consent to be bound by the terms of the Cantonments (House Accommodation) Act and consent in writing. A.I.R. (Vol. 23) 1936 Lah. 582=164 Ind. Cas. 1046.

——S. 7—Reasonable rent—Criterion.

The best criterion for arriving at a reasonable figure of rent of a house is to find out the rent of bungalows in the locality.

There should be some provision in the Act that where a house has been taken over and the question of rent is contested by the landlord, the amount fixed by the Officer Commanding should be paid to the landlord without prejudice to his right to fight in Court the question of the enhancement of the rate of rent. A.I.R. (Vol. 26) 1939 Pesh. 22=1939 Pesh. L. J. 39=182 Ind. Cas. 566.

——S. 13—Peshawar Cantonment—Presumption of ownership of sites within Cantonment area—Right to eject occupants on payment of compensation.

The Cantonment Board of Peshawar must be re-

garded as the owner of all sites within the Peshawar Cantonment and the Board is entitled to eject the occupants of such sites on payment of compensation, in the absence of evidence to prove that the latter had acquired proprietary rights therein. A.I.R. (Vol. 20) 1933 Pesh. 56=142 Ind. Cas. 657.

——S. 15—Reference—Mortgagee not in possession of lease property, whether necessary party—Action under Civil Procedure Code, O. 1, R. 10—Advisability.

The Cantonments (House Accommodation) Act only refers to an owner. A notice is issued to an owner, and if there is any person in occupation, to the occupier, and it is the owner alone who can make a reference to the Civil Court. Therefore, in a reference under S. 15 the owners are not bound to make a mortgagee, who is not in possession of the lease property, a party, and his non-joinder will not defeat the suit, though the Judge would be well advised if he under O. 1, R. 10, Civil Procedure Code, adds him not as a necessary party but as a person whose presence before the Court is necessary "in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit." A.I.R. (Vol. 24) 1937 Pesh. 17=1937 Pesh. L. J. 17=167 Ind. Cas. 158.

——S. 18—Claim for enhanced rent made after commencement of tenancy—Owner cannot claim enhanced rent through Committee.

Section 18 only refers to the case where rent is fixed by the Committee of Arbitration upon a requisition by the owner at the very commencement of the tenancy, but where the owner does not raise the question of enhancement until the commencement of the tenancy, and he is served with a notice for repairs, he is not entitled to enhanced rent from the commencement. 25 A.L.J. 91=97 Ind. Cas. 71=A.I.R. 1926 All. 746.

——S. 29—Appeal under—Limitation Act, S. 5.

Cantonments (House Accommodation) Act (VI of 1923) is a special Act and S. 5, Limitation Act, does not apply to an appeal under S. 29 of the Act. A.I.R. (Vol. 28) 1941 All. 207=1941 A.L.J. 267 =1941 O.W.N. 453=I.L.R. (1941) All. 356=194 Ind. Cas. 404.

——S. 30—Notice issued under S. 7—Remedy of—Person aggrieved.

A person aggrieved by the issue of a notice against him under S. 7 for vacating a house in the Cantonment, has only one remedy open to him namely, to appeal under S. 30, whether the notice is legal or not. Civil Courts have no jurisdiction to entertain a suit in respect of such notice. 49 Bom. 152=27 Bom.L.R. 56=86 Ind. Cas. 81=A.I.R. 1925 Bom. 162.

CARRIAGE.

See CARRIERS.

CARRIAGE OF GOODS BY SEA ACT, 1924 (14 & 15 Geo. V, Ch. 22).

See also CARRIERS—SHIPPING.

——Sch. I, Art. 3—Port Trust, whether agent of ship-owners.

The Port Trust are not the agents of the ship-owners to hold identified and ascertained consignments indefinitely at the will of the consignees, so as to make the ship-owners liable for the loss caused to the consignment, although in particular cases it may well be that they are agents of the ship-owners for the limited purpose of identifying and delivering the consignment mixed together. A.I.R. (Vol. 24) 1937 Sind 11=30 Sind L. R. 345=168 Ind. Cas. 330.

——Sch. I, Art. 3, para. 6—'Removal', meaning of.

Although the words 'removal' and 'delivery' naturally convey distinct notions, the word "removal" in para. 6, Art. 3, Sch. I, Carriage of Goods by Sea Customs Act, means physical removal. A.I.R. (Vol. 24) 1937 Sind 11=30 Sind L. R. 345=168 Ind. Cas. 330.

——Sch. I, Art. 3, Para. 6—Ship leaving port on particular date—Presumption as to delivery of cargo to consignees—Extension of limitation.

The period of one year has been fixed in para. 6, Art. 3, Sch. I, Carriage of Goods by Sea Act, and that period of one year is to be construed strictly and is not to be allowed to be extended by vague and indefinite arguments and pleas.

When the ship leaves a particular place, she must be presumed to have delivered her cargo to the consignees within the meaning of para. 6, Art. 3, and the consignees cannot take advantage of a survey, which has been unduly delayed in order to extend the period of time. A.I.R. (Vol. 24) 1937 Sind 11=30 Sind L.R. 345=168 Ind Cas. 330.

——Art. 3, Cl. (vi)—Extinction of right after one year—Incorporation of Cl. (vi) in Bill of Lading—Validity of.

Article 3, Cl. (vi) of the Schedule of the Carriage of Goods by Sea Act, 1924, does not purport to limit the time within which the holder of a bill of lading may enforce his rights against the carrier; but it extinguishes the right itself which is thereby not enforceable by the usual legal proceedings in the ordinary tribunals within the meaning of S. 28 of the Contract Act, but is irretrievably lost. The insertion of a clause in a bill of lading incorporating the said article is not, therefore, inoperative or void. A.I.R. (Vol. 18) 1931 Sind 124=25 Sind L. R. 222=133 Ind. Cas. 77.

CARRIAGE OF GOODS BY SEA ACT (XXVI OF 1925).

See also CARRIERS—SHIPPING.

——S. 2—Scope—Lighter carrying goods from port to ship which carries those goods to another port.

Where a lighter carries goods from the port but it does not carry those goods to any other port, the fact that the goods transported are placed in another ship, which itself carries them to another port, would not bring such lighter within the purview of S. 2 of Act XXVI of 1925. Moreover, even if such lighter was of a "ship" to which that Act applies, Cl. (q) of R. 2, Art. 4 of the Schedule to that Act would make the owners of the lighter liable for the loss of goods which is due to the fault of the agent of the carriers. A.I.R. (Vol. 26) 1939 Mad. 401=49 M.L.W. 341 =(1939) 1 M.L.J. 235=1939 M.W.N. 216=185 Ind. Cas. 16.

CARRIERS.

See also (1) CARRIERS ACT.

(2) CONTRACT ACT, Ss. 150-164.

(3) RAILWAYS ACT, Ss. 72-77.

Synopsis.

1. **Common carriers.**
2. **Negligence.**
3. **Liability of.**
4. **Rights of.**
5. **Conversion.**
6. **Damages.**
7. **Railway.**
8. **Shipping. See also (1)** CARRIAGE OF GOODS BY SEA ACT.

(2) SHIPPING.

1. Common carrier.

——Common carrier—Meaning of.

Per **Costello, J.**—If a person holds himself out to carry goods or if one makes a business of carrying goods from a **jetty** to a ship in a harbour, he is a common carrier. A.I.R. (Vol. 20) 1933 Cal. 735=37 C.W.N. 559=60 Cal. 879=149 Ind. Cas. 206.

——Common carrier—Position of.

Carrier is ordinarily the agent of the buyer not only to take delivery but also to assent to appropriation. 5 S.L.R. 97=12 Ind. Cas. 662.

——Common carrier—Duties and liabilities of—Bill of Lading—Clauses exempting from liability for loss or damage—Validity and effect.

A common carrier's liability is not within the Indian Contract Act; the law relating to Carriers in India is not affected by that Act. Notwithstanding some general expressions in the chapter on bailments contained in the Contract Act, a common carrier's responsibility is not within the Act. The duties and liabilities of a common carrier in India are governed by the principles of the English Common law on the subject except where they have been departed from by the Carriers Act, or the Railways Act or the Carriage of Goods by Sea Act. It is open to a carrier under the law to protect himself by appropriate clauses from all liability regarding any loss or damage caused to the goods by him.

Where a Bill of Lading provides, **inter alia,** that the carrier shall not be liable for loss, damage or delay directly or indirectly resulting from Act of God, King's enemies, piracy, robbery, theft or pilferage with or without violence on board or elsewhere; breakage, leakage, vermin, sweat, rust, temperature of holds, climate, rain, injurious effect of other goods, whether by contact or otherwise however, perils, dangers and accidents of sea, rivers, navigation, any act, neglect or default whatsoever of.....in the loading, unloading or delivery of the cargo; on deck, shipper's risk, Steamer not responsible for breakage and leakage; it must be held that the carrier is immune from all liability whatever for shortage, damage or loss to the goods. A.I.R. 1951 T.C. 1.

——Carriers by sea—Law governing—Warranty of seaworthiness.

Carriers by sea for hire are common carriers though the Carriers Act of 1865 does not apply to them. 28 Mad. 400, foll. The duties and liabilities of a common carrier are governed in India by the principles of the English Common law on the subject except where they have been departed from by the Carriers Act, 1865 or by the Railways Act of 1878 and 1890. A common carrier's responsibility is not within the Contract Act. 18 Cal. 620 (P.C.), foll. There is no implied warranty of seaworthiness for lighters and boats, etc., employed to land goods. 38 Mad. 941=(1913) M.W.N. 558=14 M. L. T. 137=25 M.L.J. 162=20 Ind. Cas. 546.

——Carriers—Common carriers—Carriers by sea—Law applicable to—Non-liability for loss—Misfeasance and negligence.

Carriers by sea for hire between certain **termini** on a certain route are common carriers. The law applicable to them is the **lex loci contractus;** and where the contract is made in Calcutta, the **lex loci** is the law of England. A common carrier may enter into any contract so as to protect himself, but he can only do so by clear, definite and unambiguous words. Loss incurred by the carriers delivering goods in rainy weather instead of waiting to deliver till the weather was fine is loss occasioned by negligence and not by misfeasance and was covered by the exemption clause in the plaint contract. (1905) 28 M. 400.

——Owners of sea-going merchant ships, how far carriers.

Owners of sea-going merchant ships are carriers, though not as defined by Act III of 1865. 3 M. 107, foll. (1902) 4 Bom.L.R. 447=26 Bom. 562.

——Contract to carry—No route fixed—Convenient route to be followed—Cartage.

In a contract to carry a load from one place to another where no fixed route is settled upon, the more convenient route may be followed though it is a longer one and cartage should be calculated on the same. 11 Ind. Cas. 43 (All.).

2. Negligence.

——Negligence—Liability for.

Goods consigned to a Railway Company for carriage were during transmission destroyed by a severe cyclone. **Held,** in a suit for value of the goods that the Company was not liable. Where the negligence of a person together with some ordinary cause causes injury to some other person, the happening of such ordinary cause extraneous to the negligent person will not excuse the person. But when an extraordinary cause co-operating with the negligence of a person produces injury to some other person, the negligent person is not liable. 25 C.L.J. 37=38 Ind. Cas. 702.

——Negligence—Liability for—Perils of the sea.

The mere fact that the accident might have been avoided by greater foresight does not make it negligence. The difference between ordinary perils and extraordinary perils suggested in Story on Bailments (S. 512) has not been accepted by the authorities. (Carver, S. 87). The loss need not be extraordinary in the sense that the cause must be uncommon.

It is true that negligence does not save the defendants' liability; but if reasonable care is taken the perils of the sea while not including the effects of mere ordinary wear and tear will include the consequences of any kind of accident ending in damage by sea water. 20 M.L.W. 91=80 Ind. Cas. 154=47 Mad. 610=1924 M.W.N. 648=A.I.R. 1924 Mad. 773=47 M.L.J. 150 (P.C.).

3. Liability of.

——Liability of—Goods to be carried by several carriers—With which carrier the contract was made is a question of fact.

Where goods are booked to be carried over the lines of several carriers, the proper person who is liable is the person to whom the goods were delivered and the contract is not a divisible one and the question with whom the contract was made is a question of fact. 54 Cal. 430=31 C.W.N. 358=103 Ind. Cas. 903=A.I.R. 1927 Cal. 304.

——Liability of—Non-delivery of goods—Continuous carriage.

A carrier in its general sense means a person or company which undertakes to transport the goods of another person from one place to another for hire. Where goods have to be carried with the aid of different agencies to arrive at the destination, the carrier with whom the contract is made at one end is, in the absence of a contract, limiting his liability, to his own transport system, liable for loss or destruction of the goods beyond his own system or in consequence of act done by or default of persons other than his own servants. Unless there is a contract to the contrary the consignor cannot hold the Company with whom he did not contract, liable for the loss when all that is complained of is non-feasance. Where there is an agreement between two Companies constituting one as the agent of the other and both are working for joint benefit, either Company may be sued. 34 M.L.J. 553=8 L.W. 46=24 M.L.T. 175=45 Ind. Cas. 485.

——Liability — Exemption — Stipulation — Construction.

Stipulations exempting the carrier from liability will be held to limit his liability as insurer and not his liability for negligence unless negligence is expressly included. 32 Mad. 96, foll. Words of exception in contracts and grants are construed strictly against the persons in whose favour they are inserted on the principle that no man shall derogate from his grant. 8 S.L.R. 103=17 Ind. Cas. 37.

——Liability — Exemption — 'Restraint of Rulers' clause'.

Where the contract between the Steamship Company and consignees provided for exemption in case of restraints of Rulers and a ship carrying goods to be delivered to the consignees at Cochin was commandeered at Bombay and where the Steamship Company through their Bombay agents arranged for the carriage of the goods to Cochin from Bombay but only on payment of the freight and other charges incurred in carrying the goods from Bombay to Cochin.

Held, that the Steamship Company were free from the obligation to carry the goods from Bombay to Cochin.

Held, further, that even if the Company had no authority to carry the goods from Bombay to Cochin, in view of the correspondence of the party after commandeering of the ship, S. 70 of the Contract Act entitled the Company to claim charges for carriage as compensation. 20 M.L.W. 378=80 Ind. Cas. 892=A.I.R. 1924 Mad. 885.

——Liability—Exemption—Contract exempting liability for negligence of servants—Validity—Carrier of passengers by air.

A carrier of passengers by air can reasonably, if he thinks fit, refuse to carry any one save at the passenger's own risk. It does not matter for this purpose whether the carrier is a common or general carrier or not. His duty to carry for all and sundry according to his profession is something different from the terms on which he so carries. His general duty to exercise care may, subject to statutory restrictions, be superseded by a specific contract which may either enlarge, diminish or exclude it. He can by a special contract exempt himself from liability even for negligence of his servants provided there are no statutory conditions limiting his right, and such a contract cannot be pronounced unreasonable, invalid or illegal by a Court of Justice. 51 C.W.N. 498=1947 O.A. (P.C.) 27=1947 A.W.R. (P.C.) 27=1947 M.W.N. 353=60 L.W. 602=1947 A.L.J. 387=A.I.R. 1947 P.C. 151=(1947) 2 M.L.J. 237 (P.C.).

——Liability—Exemption—Contract exempting from negligence—Validity—Carriers by sea.

Under Indian Law, a common carrier by sea can contract out of the Common Law liability for negligence of himself and his servants provided the saving clause is expressed in clear and unambiguous terms. 62 Ind. Cas. 378 (2)=10 L.B.R. 292 (F.B.).

——Liability — Exemption — Negligence — Action for personal injuries—Condition relieving from liability—Special Contract by Railway Company.

A carrier is liable for injury arising from negligence in the execution of his contract to carry unless he has effectively stipulated that he shall be free from such liability. If the contract is one which deprives the passenger of the benefit of a duty or care which he is **prima facie** entitled to expect that the Railway Company has accepted, the latter must discharge the burden of proving that the passenger assented to the special terms imposed. This he may be shown to have done either in person or through the agency of another. Such agency will be held to have been established when he is shown to have authorised antecedently or by way of ratification the making of the contract under circumstances in which he must be taken to have left everything to his agent. In such a case, it is sufficient to prove that he has been content to accept the risk of allowing terms to be made without taking the trouble to learn what was being agreed to. In such cases, the Railway Company may infer his intention from his conduct. Where, therefore, a passenger who is to be carried upon special conditions at a reduced fare has allowed terms to be made for him by an agent the presumption is that the passenger was content to accept the risk without enquiring what the terms agreed upon by his agent were. 19 C.W.N. 905=31 Ind. Cas. 684 (P.C.).

4. Rights of.

——Special property.

To maintain trover there must be a right of property as well as a right to possession but this requirement does not operate to exclude such actions by bailees or carriers or by vendors whom the law regards as having a special property. A.I.R. (Vol. 18) 1931 Cal. 269=52 C.L.J. 365=134 Ind. Cas. 82 (S.B.).

——Wrong delivery of goods—Right to demand the goods.

If the goods in possession of a carrier on behalf of another are wrongfully put on board a vessel and the vessel innocently accepts them in the ordinary course of business, the carrier would be entitled to demand the goods. A.I.R. (Vol. 18) 1931 Cal. 269=52 C.L.J. 365=134 Ind. Cas. 82 (S.B.).

5. Conversion.

——Importance of intention.

Where a bailee or carrier deals with goods entrusted to him his intention is material to the question whether he converts them, because dealing with them in the ordinary course of business manifests no intention to deny the owner's title of or to intermeddle or interfere with the title of anyone. A real owner may, however, demand the goods from the carrier and if the carrier does not interplead but sets up the title of his bailor he must prove such title or be liable to the owner for the value of the goods. A.I.R. (Vol. 18) 1931 Cal. 269=52 C.L.J. 365=134 Ind. Cas. 82 (S.B.).

6. Damages.

——Goods not delivered by carrier according to contract—Measure of damages.

Where goods entrusted to a carrier are not delivered according to the contract, the measure of damages is the value of the goods at the place of destination, in the condition in which the carrier undertook to deliver them, at the time when they should have been delivered, less the proper charges of transportation and delivery, if these have not been paid by the consignor. The fundamental principle that the party wronged by the breach of obligation should be awarded compensation for the losses which he has sustained in consequence and should be placed in the same position pecuniarily as if the contract had been performed, is subject to important limitations, and compensation is not in fact recoverable for every loss or detriment which may be traceable as a consequence however remote, of the breach of obligation. The natural and probable consequence of the failure of the carrier to deliver the goods at the time and place they should have been delivered, is **prima facie** is a loss to the owner amounting to the value of the goods at that point. But this ordinary and definite effect of the failure of the carrier may be aggravated in a particular case by special circumstances, such as, the intention of the consignee to sell the goods in the most profitable market in the world. The aggravations of the normal consequences are not to be taken into account in the assessment of damages, except so far as the circumstances to which they are due were the ordinary probable circumstances which might beforehand be expected to attend or follow upon the breach of obligation. This is subject to the exception that if the party, who has broken the contract, entered into it, in contemplation of special circumstances which would affect the consequences of a breach and accepted those circumstances as condition under which the contract was to be performed, he is liable for any special loss which may have resulted. The knowledge must be brought home, to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it. A person cannot consequently be allowed compensation for losses which might have been reasonably avoided. 33 C.L.J. 72=61 Ind. Cas. 14=A.I.R. 1921 Cal. 315.

7. Railway.

——Railway—Freight—Consignor is primarily liable for freight.

In a suit for freight, by a carrier, against the consignor and the consignee, the person who is primarily liable for the payment of freight is the consignor because the carrier in accordance with the ordinary rule of agency, is entitled, **prima facie,** to treat the consignor as the person with whom he contracts. 10 P.L.T. 287=8 Pat. 669=117 Ind. Cas. 305=A.I.R. 1929 Pat. 265.

——Railways—Freight—Liability of consignee.

Ordinarily, freight is payable only by the contracting party. The person who is liable is the consignor and in the absence of an independent contract express or implied the consignee is not liable. 57 Cal. 1168.

——Goods accepted—Railway company subsequently finding description wrong and certificate false.

The fact that a railway company has accepted goods and the certificate and the declaration made as to the nature, quality and description of the goods does not mean that the company is precluded from charging the higher rate, when it discovers that the certificate is false and the description is wrong and that the goods ought to have had applied to them a higher rate. A.I.R. (Vol. 24) 1937 Mad. 407=45 M.L.W. 262=(1937) 1 M.L.J. 341=I.L.R. (1937) Mad. 764=171 Ind. Cas. 259.

——Railway—Duty to re-weigh goods.

At the time of delivery a Railway Company is not bound to give, after re-weighing, a certificate of shortage. Refusal on the part of the consignee to take delivery in consequence of the refusal to give a certificate is sufficient to throw the loss arising from deterioration of the goods on the consignee. 22 C.W.N. 902=45 Ind. Cas. 933.

8. Shipping.

——Mate's receipt.

The Mate's receipt is not a document of title to the goods shipped. Its transfer does not pass property in the goods, nor is its possession equivalent to possession of the goods. It is not conclusive and its statements do not bind the ship-owner as do the statements in a bill of lading signed within the master's authority. It is, however, **prima facie** evidence of the quantity and condition of the goods received and **prima facie** it is the recipient or

possessor who is entitled to have the bill of lading issued to him. But, if the Mate's receipt acknowledges receipt from a shipper other than the person who actually receives the Mate's receipt, and in particular if the property is in that shipper, and the shipper has contracted for the freight, the shipowner will **prima facie** be entitled and indeed bound to deliver the bill of lading to that person.

It is true generally that a bill of lading is not a negotiable instrument in the sense that a Bill of Exchange is, and that the transferee of a bill of lading does not get a better title than his transferor. But while that is true of title in law it cannot be asserted in regard to equitable rights. The legal right given by a possessory lien can indeed be distinguished from the general legal property in a thing. An illustration of an equitable right which is defeated by the transfer of a bill of lading to **bona fide** indorsee for value is the right of stoppage ***in transitu.***

The bills of lading are frequently issued without Mate's receipts against an indemnity. Such an indemnity is a common commercial precaution in use all over the world whenever bills of lading are issued without Mate's receipts, and no sinister inference can be drawn from its being taken. A.I.R. (Vol. 25) 1938 P.C. 152=1938 A.L.R. 367=1938 O.L.R. 235=42 C.W.N. 677=(1938) 1 M.L.J. 834=1938 M.W.N. 487=4 B.R. 549=67 C.L.J. 299=40 Bom.L.R. 799=65 I.A. 263=32 S.L.R. 502= I.L.R. (1938) Cal. 381=174 Ind. Cas. 564 (P.C.).

——Bills of Lading.

Held, Per Lort-Williams, J., on facts of the case that the shipowners were not justified in handing the Bills of Lading to the company without the production of the mate's receipts.

That possession of the mate's receipts was **primâ facie** evidence of ownership. The holder was entitled to a Bill of Lading in exchange in absence of notice to the shipowner that the holder was not the owner. That from the evidence in the case the appellants had full knowledge upon the terms upon which the gunny trade was carried on in Calcutta and they knew or ought to have known when they delivered the Bills of Lading to the company without the production of the mate's receipts that there was a strong probability that the company was not then entitled to the Bills and in delivering them to the company they were running a risk. A.I.R. (Vol. 18) 1931 Cal. 269=52 C.L.J. 365=134 Ind. Cas. 82 (S.B.).

——Shipping company—Contract of carriage—When comes to an end.

A contract of carriage by a shipping company is at an end when it delivers the goods to the Port Commissioners. The act of the Company in sending out notice of arrival and issuing a delivery order to a person, whom, they **bona fide** believed to be the person entitled to the goods was not an act for which they could be made liable. It is the duty of the consignee to ascertain when the goods will arrive and to be ready to take delivery. 41 Cal. 703=25 Ind. Cas. 885.

——Delivery of dogs to shipping agent for carriage—Liability of shipping agent—Breach of contract—Negligence—Shipping agent's right to recover from owner of dog advance for freight and expenses paid to shipping company.

The appellant bought some dogs in England and instructed the respondent company to take delivery of the dogs there and to ship them to Bombay. The respondents accordingly received the dogs and shipped them on board a steamer belonging to a Steam Navigation Company to Bombay, paying the latter a sum of about Rs. 269 in advance for the carriage of the dogs and other sundry charges incurred or to be incurred on the dogs' behalf. During the voyage, one of the dogs slipped its collar while being exercised on the ship's deck and jumped into the sea and was lost. The appellant filed a suit against the respondent company basing his claim on breach of contract as well as upon negligence and the respondent company sued for recovery of the amount of Rs. 269 advanced by them:

Held (1) that the respondents were not guilty of any negligent act and inasmuch as the dog was also to be carried at the owner's risk, the appellant's suit was liable to be dismissed:

(2) that the company was entitled to recover the advance paid by them to the Steamship Company, even though one of the dogs had not been safely delivered. A.I.R. (Vol. 23) 1936 Mad. 977=71 M.L.J. 425=44 M.L.W. 473=166 Ind. Cas. 805.

——The fact that the Government is a 'common carrier' within the meaning of the Carriers Act (III of 1865) does not make the Secretary of State for India in Council incapable of taking advantage of Art. 31, Sch. I, Limitation Act, as Art. 31 refers to "carriers" and not "common carriers". A.I.R. (Vol. 20) 1933 All. 466=1933 A.L.J. 796=144 Ind. Cas. 703.

——Common carriers—Liability—Contract to carry partly by river and partly by train.

The plaintiff consigned through a Steamer Company some silk-endi cloth. The Steamer Company had to carry it to a distance and the Railway Company to the remainder of the distance so as to reach the destination. He did not declare the value or the description of the goods as required by the Carriers Act or the Railway Act. The goods were lost. **Held,** that the Steamer Company and the Railway Company were equally protected from liability for damages to the plaintiff by the failure of the plaintiff to declare their value and description as required by the respective Acts. (1904) 11 C.W.N. 1071=34 C. 419.

——Common carrier, liability of—Negligence—Burden of proof.

A common carrier in India is liable as an insurer. He is responsible for safety of goods entrusted to him except when loss or injury arises from Act of God or King's enemies. But this liability may be varied by contract. The burden of proving absence of negligence is on the common carrier, loss or damage being deemed to be **prima facie** proof of negligence. 21 C.L.J. 565=29 Ind. Cas. 260.

——Property delivered to common carrier not by consignor but by another carrier—Liability for loss or damage—Onus of proof.

A common carrier cannot escape liability for loss or damage to property delivered to him to be carried merely by showing that he had not received it directly from the consignor but only from another carrier.

In view of the provisions of S. 9 of the Carriers Act, the burden is on the carrier to prove the absence of negligence on his part and all that the plaintiff consignor is required to prove is the factum of the

loss or damage in respect of which the liability of the carrier is said to arise. As the carrier cannot obviously be made liable for any loss or damage which might have occurred before the goods were actually entrusted to him for carriage, the condition of the goods as delivered to him and not as delivered at the station of origin must be proved and the onus of proof is on the plaintiff-consignor. 51 C.W.N. 551.

——Indian Railways Act.

A common carrier does not cease to fill that character, if he enters into a special contract limiting his liability both under the Carrier's Act, and under the Indian Railways Act, which contemplates such limitations. 11 N.L.R. 174=31 Ind. Cas. 474.

——Scope.

The Carriers Act is not exhaustive. The liability of the common carriers is governed by the English Common Law as modified by the Carriers Act. A common carrier is therefore subject to two distinct classes of liability, the one as insurer in which the element of default is absent, the other for losses as he is under an obligation to carry safely, in which that element is present. The Carriers Act modifies this by providing that the liability as insurer for goods not mentioned in the schedule may be limited by special contract where the loss is due to negligence. 38 Cal. 28=15 C.W.N. 226=9 Ind. Cas. 364.

——S. 2—Applicability.

The Act does not apply to carriage by sea. 52 Bom. 37=29 Bom.L.R. 1551=106 I.C. 470=A.I.R. 1928 Bom. 5.

——Application—Carriers by sea in India.

In India carriers by sea do not get the benefit of Act (III of 1865). 40 Bom. 529=18 Bom.L.R. 126=33 Ind. Cas. 536.

——S. 2—Carrier—Meaning of.

The definition of a 'Common Carrier' in S. 2 of the Carrier's Act 1865, is framed without reference to the extent of his liability. 11 N.L.R. 174=31 Ind. Cas. 474.

——Ss. 2 and 6—Common carrier—Law governing.

Duties and liabilities of common carriers in India are governed by English Common Law and Carriers Act and not by the law relating to bailess under the Contract Act. Common carriers are liable as insurers and not merely as bailees protected by statute or special contract. A licensee of a ferry is a common carrier. 3 U.B.R. (1918) 120=50 Ind. Cas. 562.

——S. 2—"For all persons indiscriminately"—Meaning of.

So far as the words "for all persons indiscriminately" are concerned these simply mean that persons so engaged in and catering for business satisfy the demands or applications of customers as they come and are not at liberty to refuse business. This arises from the public employment in which they are engaged. Apart from danger arising, say, from the nature of the goods received, the carrier is by his office bound to transport the goods as clearly as if there had been a special contract which purported so to bind him, and he is answerable to the owner for safe and sound delivery. 51 I.A. 28=5 L.R.P.C. 121=80 I.C. 1038=26 Bom.L.R. 571=51 Cal. 304 =34 M.L.T. 53=22 A.L.J. 173=19 M.L.W. 277 =1924 M.W.N. 158=28 C.W.N. 302=A.I.R. 1924 P.C. 40.

——Ss. 2, 9—Licensee carrying goods—Position vis-a-vis owner of goods of common agreement—Suit.

Where under the terms of the licence a licensee is under an obligation to carry goods of all persons who required his services, subject to his having any reasonable ground in any particular case for refusal and there is no evidence about his other business, he is a common carrier. The fact that a person makes a special stipulation does not mean that he is acting outside the business of a common carrier. Where a common carrier entered into a special stipulation with agents of a Steamship Company to carry goods safely and he was taking their goods along with others:

Held, that the business done under this contract was not business of a different character from that of a common carrier.

Whoever tenders the goods to the common carrier, whatever his position **vis-a-vis** the owner of the goods, if the common carrier's duty is not performed he will make himself liable to the person who suffers damage—**prima facie** the owner of the goods—unless he has, at the time of the contract, restricted his obligation so as to give himself greater protection, and a person, who has suffered loss by the common carrier's breach of his common law obligation, can maintain a suit independent of contract. A.I.R. (Vol. 20) 1933 Cal. 735=37 C.W.N. 559=60 Cal. 879=149 Ind. Cas. 206.

——Ss. 3, 4 and 8—Liability for loss of property—Merchandize delivered as goods.

The liability for loss or damage is not defeated by the fact that the goods delivered as luggage are in fact merchandize. 41 Cal. 80=17 C.W.N. 970=19 Ind. Cas. 756.

——Ss. 3, 8—Through booking of goods—Stipulation in forwarding note that original carrier is not liable for damage or delay of other companies—Validity—Package containing scheduled and non-scheduled articles—Omission to declare—Right to recover price of non-scheduled articles.

A condition in a forwarding note issued by a carrier that in the event of goods being carried by the carrier's vessels for carriage to destination by other transport administration the carrier shall be under no liability for any loss or damage or delay to the goods after they have been handed over to the on-carrying administration, is void as it contravenes the provisions of S. 8 of the Carriers Act.

When a package containing both scheduled and non-scheduled articles is lost, the value of the non-scheduled articles may be recovered although the value of the scheduled articles cannot be recovered. A.I.R. (Vol. 19) 1932 Cal. 344=36 C.W.N. 129 =59 Cal. 472=138 Ind. Cas. 89.

——Ss. 3, 8, 9—Through booking of goods by steamer and rail—Liability of Steamer Company for loss during transmission by rail—Railways Act (IX of 1890), S. 75.

The plaintiffs consigned a parcel of silk articles through the Indian General Steam Navigation and Railway Company, Ltd., for delivery at Khagra, knowing that the articles would be carried in the

first instance by the defendant Company then by the Eastern Bengal State Railway, and then by the East India Railway Company. They did not declare the value of the articles which exceeded Rs. 100 nor disclose the contents of the parcel. It was found that the goods were lost after they had been made over to the Eastern Bengal State Railway. **Held,** that the agreement was in substance with both the Steam Navigation Company and the Railway Companies and the former could not be held responsible for the loss. 11 C.W.N. 1071, foll. (1907) 11 C.W.N. 1076.

——S. 6—Limitation to liability — Requirement.

What is required to limit the liability in the case of a person who answers the definition under the Indian Carriers Act, **viz.,** of transporting for hire goods from place to place for all persons indiscriminately, is that the nature of the contract entered into must either have the limitation of the liability under the Indian Carriers Act made expressly and in writing or the facts must be such that for the contract in question the contractor was departing from his usual business and engaging in a different type of business from that of common carrier. The special circumstances that goods were to be carried by a through route, does not decategorise carriers from being common carriers under statute, nor does it relieve them from their legal obligations as such. In order to effect such a result the particular contract would require to come up to this, that **quoad** that transaction, another and different type of business had been entered on. 51 I.A. 28=80 Ind. Cas. 1038 =5 L.R.P.C. 121=26 Bom.L.R. 571=51 Cal. 304= 34 M.L.T. 53=22 A.L.J. 173=19 M.L.W. 277= 1924 M.W.N. 158=28 C.W.N. 302=A.I.R. 1924 P.C. 40 (c).

——Ss. 6 and 8—Consignment booked at station of defendant Railway Co., for despatch to station on different railway—Defendant contracting to act only as forwarding agents of that railway—Loss of consignment on that railway—Liability of defendant.

A consignment was booked at a station of the defendant railway company to be despatched to a station on a different railway. It was lost ater it was made over by the defendant company to the other railway administration. Under the contract evidenced by the Parcels Consignment Note of the defendant Company, the latter agreed to act as common carriers over their own transport system only, and beyond that they agreed to transport the consignment as agents of the other railway and the contract was to be treated not as one indivisible contract, but as a series of contracts.

Held, that as the defendant company did not act nor purport to act, as common carriers of the consignment over the other railway but merely acted as the forwarding agents of that railway, they were not liable for the loss of the consignment on that railway. A.I.R. 1949 Assam 25.

——Ss. 6 and 8—Negligence or criminal act of common carrier—Loss of goods—If prima facie evidence.

Where by a special contract a Steamer Company, common carriers were exempted from liability for any loss or damage unless it arose from the negligence or criminal act of their servants or agents. **Held,** that if the carriers seek exemption from liability they must prove that the loss must have been occasioned otherwise than by the negligence or criminal act of themselves, their servants or agents. The loss of goods is **prima facie** evidence of the negligence of criminal act of the carriers, their servants or agents. 40 Cal. 716=17 C.W.N. 633= 17 C.L.J. 639=19 Ind. Cas. 245.

——S. 8—Under S. 8, negligence is presumed by the loss of goods, and no question of misconduct arises. A.I.R. (Vol. 18) 1931 Mad. 115=1930 M.W.N. 816=130 Ind. Cas. 658.

——S. 8—Goods delivered to Railway Company—Carriage by Steamship Company under arrangement with Railway Company—Loss—Liability of Steamship Company.

Where by an arrangement with Railway Company goods delivered to it, were to be transported by a Steamship Company and the goods were destroyed on board a steamer. **Held,** that although there was no contract between it and the plaintiff the Steamship Company was nevertheless liable as a common carrier for the loss. 47 Cal. 6=23 C.W.N. 989= 57 Ind. Cas. 406.

——S. 8—Agreement limiting liability of carrier—Effect of.

A clause in a contract of carriage agreeing to hold the carriers indemnified from and against all claims which may be insured against nevertheless is governed by S. 8 and does not relieve the carriers of liability arising from the negligence of their servants. It is not a separate contract of indemnity but part of the contract of carriage. 15 C.W.N. 226 =38 Cal. 28=9 Ind. Cas. 364.

——S. 9—Negligence—Presumption from loss of goods.

Under the Carriers Act negligence is presumed by the loss of the goods. Where a canal company which transported goods under a contract with a Railway company was sued for damages for loss of goods,

Held, that the canal company was a carrier and that was liable for negligence. 1930 M.W.N. 816.

——S. 9—Negligence—Presumption.

Loss from an unknown cause is presumptive proof of negligence. 24 Cal. 786 and 26 Cal. 398 (P. C.), Foll. 116 Ind. Cas. 148=A.I.R. 1928 Cal. 371.

——S. 9—Loss of goods—Suit against carrier —Plaintiff need not prove negligence—Railways Act, S. 72.

Under S. 9, in a suit brought against a common carrier for the loss, damages or non-delivery of goods entrusted to him for carriage, it is not necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents. The burden of proof of absence of negligence is thus thrown upon the common carrier, on the theory that the loss or damage to the goods is **prima facie** proof of negligence. But where evidence has been given on both sides, of the circumstances under which the loss took place and the Court has arrived at a finding upon the whole of such evidence, the question of burden of proof ceases to have any practical importance. 33 C.L.J. 72=61 Ind. Cas. 14=A. I.R. 1921 Cal. 315.

——S. 9—Negligence—Burden of proof.

The onus of proving negligence of the carrier is not upon the plaintiff who seeks to make the carrier liable. 41 Cal. 80=17 C.W.N. 970=19 Ind. Cas. 756.

——S. 10—Contract—Condition in—Reasonableness.

A contract with a carrier provided: "No claim of any kind whatsoever in respect of this contract shall be valid unless in writing and delivered at the office of the Company.....within six months from the date of any default, loss or damage in respect of which such claim arises."

Held, that the condition was not unreasonable. 116 Ind. Cas. 148=A.I.R. 1928 Cal. 371.

——S. 10—Notice to local agent is sufficient.

Notice to local agent is sufficient. The essential of a good notice appears to be that it should reach the person who is liable to make good the loss. 54 Cal. 430=31 C.W.N. 358=100 Ind. Cas. 903=A.I.R. 1927 Cal. 394.

——S. 10—Notice — Essentials.

It is necessary that notice should be given by the plaintiff to the carrier upon institution of the suit. It is not sufficient that the carrier is aware of the loss from some other source. 38 Cal. 50=9 Ind. Cas. 960.

——S. 10—Notice—Necessity of—Damages—Suit for.

To maintain a suit for damages for short delivery against a common carrier, a notice of claim under S. 10 of the Act must be given even though the carrier came to know of the claim **aliunde** within six months time and had no difficulty in tracing the goods. 27 C.L.J. 294=41 Ind. Cas. 919.

——S. 10—Notice—Necessity for—Suit against Steamship Company.

S. 10 of the Common Carriers Act as amended by Act X of 1899 placed a Steamship Company in the same position as a railway, and made it obligatory upon a person wanting to sue a Steamer Company to give notice of such suit within the time mentioned in the section. (1907) 8 C.L.J. 192.

——S. 10—Plaint, if should contain averment that notice has been sent to defendants.

Section 80, Civil P. C., says in terms that the plaint shall contain a statement that the notice which is required has been served upon the requisite person, whereas S. 10, Carriers Act, contains no such condition. In a suit against persons alleged to be common carriers within the meaning of the Carriers Act for loss of goods entrusted to them for carriage, it is not necessary that the plaint should expressly state that a notice under S. 10 has been issued. Such an averment is implied under O. 6, R. 6, C. P. Code. It is for the defendants, in accordance with O. 8, R. 2, to deny in their written statement that they are common carriers or to raise the plea of the absence of notice. On their failure to do so, the onus is on them to prove that they took good care in the carriage of the plaintiff's goods.

Per **Dunkley, J.**—A statement in a plaint that demands were made for the amount of damages claimed but to no avail, and which was not denied by the defendants is a sufficient compliance in any case with the provisions of S. 10, Carriers Act. Absence of the plea in the written statement that there was no notice amounts to waiver on the part of the defendants of the proof of notice. The notice is not of itself part of the cause of action; it is merely a condition which has to be performed before the suit can be brought, and in that respect differs from a notice under S. 80, C. P. Code. A.I.R. (Vol. 25) 1938 Rang. 437=178 Ind. Cas. 739.

——Ss. 58 and 9—Carrier's liability—Through booking of goods.

Plaintiff delivered 343 chests of tea to the first defendant (Railway Company) for transport to Chittagong and thence to England, the railway receipt being in the usual form used for land transport from Assam to Chittagong. The first defendant delivered the goods to the second defendant by river in steamers and flats belonging to the second defendant under some arrangement which was notified. The tea was burnt during transit. Plaintiff sued both the defendants for the recovery of the value of the tea. The action against first defendant was dismissed under S. 77 of the Railways Act, 1890, for want of the requisite notice. **Held,** there was no contract between the plaintiff and the second defendant and that under the arrangement there was a general contract between the defendant whereby one became a sub-contractor to the other. Under the circumstances the 1st defendant had no authority to act as agent of the second defendant to enter into a contract for carriage on the latter's behalf. The second defendant was a common carrier and as such was liable to the plaintiff who was the owner of the goods. The Carriers Act, 1865 makes a common carrier liable to the owner of the goods as such though not as insurers. Plaintiff was entitled to succeed inasmuch as he had established negligence on the part of the second defendant. 47 Cal. 6=23 C.W.N. 998=57 Ind. Cas. 406.

CASBATI. See LAND TENURE.

CASE DIARY. See CR. P. CODE, S. 162.

CASE LAW. See PRECEDENT.

CASTE. See also (1) CUSTOM (PUNJAB).
(2) **Hindu Law—Succession.**
(3) **C. P. Code, S. 9.**

Synopsis.

1. **Caste offences.**
2. **Ex-communication.**
3. **Proof of.**
4. **Rights of member.**
5. **Jurisdiction of Court.**

1. Caste offences.

——Inquiry into caste offence by jamat—Member should have access to papers.

It is obviously a matter of great importance to persons found guilty of an offence by the managing committee that all the members of the **jamat** should have access to the papers before they pass punishment. A.I.R. (Vol. 22) 1935 Bom. 367=37 Bom. L.R. 603=159 Ind. Cas. 650.

——Evidence before domestic tribunal—Nature of.

In regard to offences against caste the domestic tribunal must act as reasonable men, and not capriciously. There must be some evidence upon which they can come to their decision; if three is none, they

cannot be said to have acted in good faith, and the Court will interfere. It is not necessary that there should be before a domestic tribunal evidence of the character which would be required in a Court of law. But a duty is cast upon the Court to see whether there was any evidence upon which the domestic tribunal could act. A.I.R. (Vol. 22) 1935 Bom. 268=37 Bom.L.R. 261=157 Ind. Cas. 127.

——Cutchi Memon girl over 15 years refusing to live with her husband—She is not guilty of caste offence—Husband's remedy.

A Cutchi Memon girl over the age of fifteen is in the eye of the law a free agent in regard to matrimonial matters, and her husband has remedies in a Court of law if she will not live with him after marriage; she is not guilty of an offence against caste rule or usage in the absence of any caste rule or proof of usage that this is an offence. A.I.R. Vol. 22) 1935 Bom. 367=37 Bom.L.R. 603=159 Ind. Cas. 650.

2. Ex-communication.

——Caste offence—Opportunity to defend—Necessity of giving—Domestic tribunal enquiring into offence—Requirements of natural justice fulfilled—Interference of Court of law—Propriety of.

For inquiries into caste offences and ex-communication from caste there must be a caste offence; the rules of procedure of the caste (if any) must be complied with, the notice of the charge and of the meeting at which it is to be dealt with must be given to the person accused, and full opportunity afforded to him of defending himself, and the notice must be given to the members of the caste of the meeting and of what is intended to be dealt with at the meeting. In such an inquiry the requirements of natural justice must be complied with. If they have, a Court of law will not act as a Court of Appeal in reference to a decision of a domestic tribunal. A.I.R. (Vol. 22) 1935 Bom. 268=37 Bom.L.R. 261.

——Essentials—Requirements of natural justice.

The general principles applicable to the expulsion of members from a club govern cases of expulsion of persons from a caste: there must be a caste offence, the rules of procedure of the caste (if any) must be complied with, notice o the charge and of the meeting at which it is to be dealt with must be given to the accused, and full opportunity afforded to him of defending himself, and notice must be given to the members of the caste of the meeting and of what is intended to be dealt with at the meeting. If the requirements of natural justice have been complied with a Court of law will not act as a Court of Appeal as regards a decision of a domestic tribunal. A.I.R. (Vol. 22) 1935 Bom. 367=37 Bom.L.R. 603=159 I.C. 650.

——Principles governing.

The general principles applicable to the expulsion of members from a club govern cases of expulsion of persons from caste, and those principles, so far as relevant, involve that the expulsion must be in accordance with the rules of natural justice, which means primarily that the accused must have a fair hearing, and that the expulsion must be in accordance with the rules of the caste. A.I.R. (Vol. 21) 1934 Bom. 431=36 Bom.L.R. 901=153 Ind. Cas. 283.

——Panchayat—Notice.

The standard of notice of a caste meeting cannot be that of a Civil Court to a party to a suit; and if it is found that actually there was a widespread notice of a meeting in the customary way enabling a substantial proportion of the caste to attend, the requirements of natural justice are broadly satisfied. A.I.R. (Vol. 22) 1935 Bom. 361=37 Bom.L.R. 417=158 Ind. Cas. 414.

——Affecting civil rights—Civil Court, whether can recognise such legal consequences—Who can ex-communicate.

If the parties whose civil rights are alleged to be deleteriously affected by ex-communication for certain actions or events, the Civil Court cannot recognize such alleged legal consequences unless it is established that the law or custom, by which the party in question is governed, recognizes that his original status was capable of being subjected to such "diminution of status" by an act that is called ex-communication emanating from some third persons. It is not unreasonable to presume that where such authority is recognized at all, it must be exercised by some person occupying some special status or dignity; that the authority must be exercised on the happening of certain specified events or misconduct of a specified class and gravity; and that the existence of such misconduct must be proved in the course of proceedings not entirely opposed to natural justice. A.I.R. (Vol. 24) 1937 Bom. 169=39 Bom.L.R. 211=168 Ind. Cas. 821.

——Whether caste has inherent power of expulsion.

Obiter.—It is doubtful whether there is an inherent power to expulsion in a caste not dependent on proof of usage within the caste. A.I.R. (Vol. 22) 1935 Bom. 367=37 Bom.L.R. 603=159 Ind. Cas. 650.

——Ex-communication is a mode of enforcing payment of fine or is a punishment in default of payment.

Distinctions are supposed to exist between ex-communication and fine and also between payment of a fine and giving a caste dinner. The fine imposed may be a fixed sum of money or the price of a dinner, but it is a fine in both cases. And the ex-communication is merely the only means available for enforcing the payment of the fine. Every such disciplinary decision of a case can be regarded either as a sentence of ex-communication which can set aside on payment of a fine or as a sentence of fine with ex-communication in default of payment. 76 Ind. Cas. 341=A.I.R. 1924 Nag. 157.

3. Proof of.

——Certificate or bonds in person's favour containing person's own statement as to his caste, value of.

In the matter of caste, certificates containing the persons's own statement as to his caste to the officials by whom it was issued and who had no need to enquire at the time into the truth or falsehood of the assertion made by him, carry very little evidentiary value as they are no weightier than one's own admission. The same remarks apply to description

of caste in bonds executed in the person's favour. A.I.R. (Vol. 27) 1940 Lah. 475=I.L.R. (1941) Lah. 843=191 I.C. 676 [4 C.P.C. (1934) Edn., O. 41, R. 1, N. 12].

——Race distinction—Maternity is of no importance.

It is settled that as regards the racial claim maternity is of no importance. 30 C.W.N. 289=92 Ind. Cas. 200=28 B.L.R. 161=53 I.A. 42=3 Rang. 582=23 A.L.J. 1016=43 C.L.J. 23=A.I.R. 1925 P.C. 298=49 M.L.J. 821 (P.C.).

4. Rights of member.

Every member of a caste is entitled at all reasonable times and on proper demand to inspect the documents of title relating to the caste property and all account books, papers and vouchers regarding its management, in the absence of any special rules framed by the caste relating thereto. A.I.R. (Vol. 19) 1932 Bom. 122=34 Bom.L.R. 343=56 Bom. 242=137 Ind. Cas. 461.

——Notice of charge—Meeting—Proper notice to all members—Necessity of.

When the conduct of a member of the caste is impugned, and the punishment may be ex-communication, there ought to be evidence that all the members of the caste received proper notice of the charge and of the proposed punishment. When notice of the meeting is found to be insufficient, the resolution passed thereat should be held to be invalid. A.I.R. (Vol. 22) 1935 Bom. 268=37 Bom.L.R. 261=157 Ind. Cas. 127.

——Persons setting up title in derogation of rights of members of caste—Recovery of possession held necessary before property can be administered.

Held, that recovery of possession is absolutely necessary from persons who are setting up a title in derogation of the rights of the members of the caste before the property can be administered for the common purposes of the caste, whether by Courts or the caste. A.I.R. (Vol. 24) 1937 Mad. 591=1937 M.W.N. 217=45 M.L.W. 510=169 Ind. Cas. 819.

5. Jurisdiction of Court.

——Jurisdiction of Court—Expulsion from caste.

If the caste chooses to make a rule as to the procedure and methods which shall be adopted before a certain power is exercised, then the caste must comply with the rule. Where the expulsion of the plaintiff has been carried out in complete disregard of the rules of the caste, the plaintiff is entitled to a declaration that a resolution expelling him from the caste is invalid and of no effect and an injunction to restrain the defendants from giving effect to the resolution. Where the plaintiff's membership of the caste involves a right to property, the Court has jurisdiction to entertain a suit brought by him alleging wrongful expulsion.

Questions as to whether a particular rule is a vital rule, or a rule of procedure, are really hardly appropriate to consider when one is dealing with the rules of a body like a caste, which itself has not drawn any such distinction. All that the Court can do is to see that the rules as they stand are obeyed.

Per **Rangnekar, J.**—The caste as a whole has an inherent jurisdiction to inquire into a caste offence, but if the caste makes a rule that such inquiry should in the first instance be held by its Managing Committee, then that rule must be followed. The failure to follow the rule amounts to a denial of a right of hearing given by the caste to an accused person, and a denial of an opportunity to defend himself before the tribunal set up by the caste itself. A.I.R. (Vol. 21) 1934 Bom. 431=36 Bom.L.R. 901=153 Ind. Cas. 283.

——Court can decide that rights to the user of property in accordance with caste usage exist but cannot decide whether a particular user is sanctioned by custom of caste.

Court has jurisdiction to decide that the plaintiffs were entitled to the user of the properties in dispute in accordance with the caste usage and custom because a question of property is involved. But once the Court holds that the Plaintiffs have that right then the way in which they might exercise their right is a question which is really one for the castes themselves to decide and not for any particular individual or faction and is certainly a question which to Court would possibly determine. 76 Ind. Cas. 635=A.I.R. 1924 Bom. 522.

——Procedure to be followed by Panchayat—Courts not competent to lay down Rules—Panchayat.

Members of the caste committing caste offence—Civil Courts are not competent to lay down rules as to the procedure to be followed by **panchayat—Panchayat** itself can lay down that procedure. A.I.R. (Vol. 22) 1933 Bom. 361=37 Bom.L.R. 417=158 Ind. Cas. 414.

CASTE DISABILITIES REMOVAL ACT (XXI OF 1850).

See also (1) HINDU LAW—SUCCESSION.
(2) MAHOMEDAN LAW—SUCCESSION.

——S. 1.

Synopsis.

1. Applicability.
2. Effect on rights of convert.
3. Succession to convert's property.
4. "Deprived of caste"—Meaning of.

1. Applicability.

——S. 1—Applicability.

The Act does not apply to a son born of a marriage between a Brahmin male and a Sudra a woman where the degradation of caste has not involved any forfeiture of rights or property or impaired his right of inheritance under Hindu Law. 32 Bom. L.R. 1348.

——S. 1—Applicability to Oudh—Conversion before 13th February, 1856.

Regulation VII of 1832 or Act (XXI of 1850) can be held to be applicable to the Province of Oudh from the date of annexation at the earliest, i.e., on 13th February, 1856, and therefore the Regulation and the Act do not apply to the case of convert who renounced his religion before that date. 3 Luck. 154=107 Ind. Cas. 890=4 O.W.N. 1243=A.I.R. 1928 Oudh 138.

2. Effect on rights of convert.

——S. 1—Hindu Law—Succession—Even after conversion right to inheritance is not lost.

A convert or an outcaste retains his right of inheritance whether the right occurs before or after the conversion to another religion or exclusion from caste. 3 Pat. 152=78 Ind. Cas. 749=5 P.L.T. 203=1924 P.H.C.C. 85=A.I.R. 1924 Pat. 420.

——S. 1—Effect on rights of property.

Act (XXI of 1850) secures after apostacy the same rights to individuals in property as they enjoyed before apostacy. 98 P.R. 1915=31 Ind. Cas. 476.

——S. 1—Effect of.

Exclusion from caste no longer entails forfeiture of right of inheritance. 40 Cal. 650: A.I.R. 1924 Pat. 420 and 33 All. 356, Foll. A.I.R. 1930 Pat. 564.

——S. 1—Power to give Hindu son in adoption. See HINDU LAW—ADOPTION. 3 Bom.L.R. 89=25 Bom. 551.

——S. 1—Hindu mother out-casted—Right to be guardian of her infant daughter.

In the absence of any special reason to the contrary a Hindu mother has a better right to the guardianship of her infant daughter than the infant's paternal grandfather, and this right is not taken away by the act that the mother has been out-casted. 1 A. 549, foll. 28 A. 233=1905 A.W.N. 205=2 A.L.J. 663.

——S. 1—Partition — Conversion from Hinduism does not give right to partition.

The effect of the Act is not to enlarge the convert's interest in any property or to get rid of any condition or restriction to which it was originally subject. 19 Cal. 289, Foll. Conversion from Hinduism cannot give a member of a Tarwad a right to a partition of Tarwad property which is impartible under the Marumakkathayam Law.

Kumaraswami Sastri, J.—All that the convert is entitled to is to continue to reside in the house and be maintained as before if the other members are willing or to get separate residence and the maintenance allotted to him if the other members refused. 44 Mad. 891=64 Ind. Cas. 676=14 M.L.W. 257=1921 M.W.N. 594=A.I.R. 1921 Mad. 224=41 M.L.J. 243 (F.B.), overruling (1912) M.W.N. 386.

3. Succession to convert's property.

——S. 1—Hindu lady converted to Mahomedanism and marrying Mahomedan—Inheritance of husband's estate—Death of widow issueless—Her Hindu relations whether her legal representatives.

A Hindu lady became converted to Islam and married a Muslim who predeceased her. She inherited a share of her husband's estate on his death and died issueless leaving her uterine brother, her step-brother and the children of her sister. It was conceded that the Muslim relations of the deceased through her husband were not her legal representatives so as to be impleaded in her place in the testamentary proceeding to which she was a party. The question was raised that her Hindu relations were enabled to inherit to and represent her by virtue of the Caste Disabilities Removal Act.

Held, that the Caste Disabilities Removal Act accorded protection only to the person who had renounced or had been excluded from the communion of his former religion and that it did not enable the Hindu relations of the deceased to be brought on record as her legal representatives. 61 L.W. 489=1948 M.W.N. 501=A.I.R. 1949 Mad. 141=(1948) 2 M.L.J. 87.

——S. 1—Act does not deal with succession to estate of convert.

The Caste Disabilities Removal Act is intended to deal with the rights to property of the person who is converted and not with succession to the estate of the convert. A.I.R. (Vol. 27) 1940 All. 134=1940 A.L.J. 1=I.L.R. (1940) All. 100=187 Ind. Cas. 170.

——S. 1—Christian becoming Muhammadan after marrying Christian woman—Succession to convert's property.

Christian becoming Muhammadan after marrying Christian woman—He can contract another valid marriage after conversion, even though one with the Christian wife subsists—But if the first marriage were contracted in England in English form, a second marriage during its subsistence would be a nullity. But an Indian Christian domiciled in India and married to a Christian woman also domiciled in India can validly marry a Muhammadan woman after his conversion. There is nothing either in Caste Disabilities Removal Act or in Divorce Act which would invalidate such marriage—Succession to property of the convert would be governed by Muhammadan Law—Neither Caste Disabilities Removal Act nor S. 37, Bengal, Agra and Assam Civil Courts Act, has application to such succession. A.I.R. (Vol. 26) 1939 Cal. 417=69 C.L.J. 338=43 C.W.N. 656=I.L.R. (1939) 2 Cal. 12=183 Ind. Cas. 75.

——S. 1—Applies only to person actually converted or outcasted—Succession to such person however is governed by law applicable to convert after conversion.

Section 1 in terms only applies to protect the actual person who either renounces his religion or has been excluded from the communion of any religion or has been deprived of caste. It is intended to protect such a person from losing any right of property or of succeeding as heir. But when once a person has changed his religion and changed his personal law that will govern the rights of succession of his children. 11 All. 100, Overruled; 40 Mad. 1118, Appr. A.I.R. 1930 P.C. 251.

——S. 1—Ancestor of propositus changing his religion—Act will not apply for determining the heirs of such propositus.

The Act has no application to a case where the claimant of rights has neither renounced nor has been excluded from the communion of any religion or been deprived of caste, and S. 1 cannot be read in any wider sense than that it removes the personal disability of the person who has changed his religion from enforcing his rights which he possessed prior to the change. Therefore, if any ancestor of the propositus in any degree of ascent has changed his religion the Act would not apply in determining the status of an heir to such a propositus. 3 Luck.

154=107 Ind. Cas. 890=4 O.W.N. 1243=A.I.R. 1928 Oudh 138.

——S. 1—Heir to estate of convert—How determined.

In determining the heir or heirs to the estate of a person who has renounced the Hindu religion and embraced the Shia faith of Islam recourse must be had to the Shia law of inheritance and not to Act XXI of 1850. 3 Luck. 154=107 Ind. Cas. 890=4 O.W.N. 1243=A.I.R. 1928 Oudh 138.

——S. 1—The Act only relieves from forfeiture the person who has for some reason or other changed his religion and not any other person who may be affected by such a change. 24 M.L.W. 675=1926 M.W.N. 952=98 Ind. Cas. 867=A. I. R. 1927 Mad. 72.

——S. 1—A Hindu daughter cannot inherit from her father who has been converted to Mahomedanism because of Act XXI of 1850; 40 Mad. 1118, Foll. 11 All. 100, Not Foll. 24 M.L.W. 675=98 I.C. 867=1926 M.W.N. 952=A.I.R. 1927 Mad. 72.

——S. 1—Muhammadan convert—Death—Non-Muhammadan relatives, not entitled to succeed to him otherwise than as Muhammadans, cannot succeed.

On the death of a Burman Buddhist who, adopted the Muhammadan faith, his mother, brothers and sisters, who were still Burmese Buddhists, claimed as heirs, their shares in the estate of the deceased. It was contended that, though according to Muhammadan law they were not entitled to inherit any portion of the estate of the deceased by reason of their religious disability, this disability had been removed by Act XXI of 1850;

Held, the Burmese Buddhist relations of the deceased could not succeed as they failed to show that they had a right to succeed otherwise than as Muhammadans. 64 Ind. Cas. 514=A.I.R. 1922 L. Bur. 15.

——S. 1—Mahomedan Law — Non-Muslim — Right to succeed.

The Caste Disabilities Removal Act has abrogated the rule of Mahommedan law by which a Non-Muslim is excluded from succession to a Muslim. 11 All. 100, foll. The fact of the vendees being Christians did not deprive them of their rights of succession to the vendors who being Christians were converted to Islam. 55 Ind. Cas. 420 (Lah.).

——S. 1—Section applies only to the convert and not to his descendants.

When a convert to Christianity leaves descendants behind him, they cannot, as reversioners, claim the estate of a deceased Hindu, as the provision for removal of disabilities under the above Act applies only to the apostate and does not extend to his descendants. 11 All. 100, diss. from. 40 Mad. 1118 =37 Ind. Cas. 753.

——S. 1—Hindu son of a Mahomedan convert —Inheritance.

A convert's son must be put in the position in which he would have been, if his father had not changed his religion. The words 'any right of inheritance' in Act (XXI of 1850) refer to any right of inheritance accruing to any person which right is not affected by conversion. A Hindu son is entitled to inherit the property of his father who was converted to Mahomedanism. But the burden of proving that he will not be excluded as a **'Kafir'** is on him (though he is entitled to a share even under the Mahomedan Law as a son) because of the fact of his being a Hindu. 11 All. 100, foll. 8 S.L.R. 156=27 Ind. Cas. 357.

——S. 1—Bengal Regulation (VII of 1832), S. 9—Effect of—Joint Hindu family—Conversion of father to Islam—Right of son—Adverse possession—Lim. Act (XIV of 1859), S. 12.

The effect of S. 9 of the Bengal Regulation, (VII of 1832) and of Act (XXI of 1850) which extended the principles of the Regulation to the whole of British India is virtually to set aside the provisions of Hindu Law which penalises the renunciation of religion or exclusion from caste by enforcing forfeiture of the property of the convert. A Hindu who was joint in estate with his son became a convert to Mahomedanism in 1845 and died in 1851, his son having predeceased him. **Held,** that the convert's son who remained a Hindu did not acquire any enforceable right to his father's share in the joint family property which he could either assert in himself or transmit to his heirs for enforcement in a British Court of justice. Even otherwise, a suit to enforce the right was barred under S. 12 of the Lim. Act (XIV of 1859) by the lapse of 12 years. The later Acts of Limitation did not revive the barred right. 33 All. 356=38 I. A. 87=15 C.W.N. 545 =8 A.L.J. 552=18 C.L.J. 75=13 Bom.L.R. 427 =10 M.L.T. 25=(1911) 1 M.W.N. 432=21 M.L. J. 645=19 Ind. Cas. 477 (P.C.). [Reversing 29 All. 487.]

——S. 1—Succession after conversion.

The Act only abrogates any law or usage which inflicts forfeiture by reason of change of religion or caste but does not lay down rule any rule of succession after conversion. 36 P.R. 1909=1 Ind. Cas. 697.

4. "Deprived of caste"—Meaning of.

——S. 1—'Deprived of caste', meaning of.

The words "he is deprived of caste" in Act XXI of 1850 have to be read with those preceding as meaning what is generally understood by the word "outcaste", one excluded from religion and community, Deprivation of caste in the Act means deprivation of caste owing to change of religion and not merely for moral degradation. A.I.R. (Vol. 18) 1931 Cal. 741=35 C.W.N. 726=54 C.L.J. 61=58 Cal. 1392= 134 Ind. Cas. 1272.

CASTE QUESTIONS. **See** C. P. CODE S. 9.

CASTE "SABBA".

——Nature and incidents—If a club or unregistered society.

A caste **"Sabba"** or association which is nothing more than a loosely knit caste organisation exercising certain ill-defined powers of discipline over its members does not partake of the nature of a "club" which essentially signifies a centre of social intercourse, and hence such a sabba cannot claim the privileges or immunities claimable by a club or unregistered society. 14 Cut.L.T. 25=A.I.R. 1949 Pat. 184.

CATTLE. **See** CATTLE TRESPASS ACT.

CATTLE POUNDS. **See** CATTLE TRESPASS ACT.

CATTLE TRESPASS ACT (I OF 1871).

——Conviction not justified under law and fine arbitrary—Conviction can be set aside—Cr. P. Code, S. 439.

Where a conviction was not justified under the Cattle Trespass Act and especially where the fine was arbitrary High Court interfered and set aside the conviction. 7 O.W.N. 461=A.I.R. 1930 Oudh 250.

——Ss. 1 and 18—Object of—Private cattle pounds—Abolition of, by Government — Not actionable.

The maintenance of private cattle pounds is incompatible with the provisions of the Cattle Trespass Act and the establishment and maintenance of cattle pounds under the superintendence and control of Government. Officials assisted by the police, may be considered essential for the maintenance of law and order and the peace and good government of the country. It is an act of the Executive Government, with which it is not competent to the Civil Courts to interfere. 39 Cal. 615=39 I. A. 31=16 C.W.N. 362=9 A.L.J. 585=15 C.L.J. 633=(1912) M. W.N. 657=14 Bom.L.R. 812=13 Ind. Cas. 965 (P.C.).

——S. 8—When the cattle are brought to the pound it is not necessary to inform the pound-keeper whether the cattle were seized rightly or wrongly. A. I.R. (Vol. 30) 1943 Oudh 280=1943 O.W.N. 202 =44 Cr.L.J. 640=207 Ind. Cas. 374.

——S. 10—Applicability—Grass land—"Occupation" depends on nature of land.

S. 10, Cattle Trespass Act, refers to the crop or produce of the land, and grass being clearly the produce of land, S. 10 applies to grass land, S. 10 is not intended to apply to a case where, one claimant to the disputed possession and the disputed title sends his men, not primarily to protect his crop or produce, but to take by force the cattle of his opponent who claims in good faith a right to graze his cattle on the same land.

What is or is not "occupation" must depend upon the nature of the land. The fact that **X's** cattle grazed upon **Y's** land from time to time before a certain date is not itself sufficient to show that **Y** was not in possession or occupation of the land on that date. A.I.R. (Vol. 30) 1943 Sind 152=I.L. R. (1943) Kar. 112=44 Cr.L.J. 761=208 Ind. Cas. 258.

——S. 10—Burga Lease—Lessor chargeable for cattle trespass.

Unless the burgadar is shown to be a mere servant of lessor, the lessor is chargeable for cattle trespass on land under **Burga** lease. 23 C.W.N. 387=20 Cr.L.J. 398=50 Ind. Cas. 1006.

——S. 10—Who may seize.

Where an indigo factory supplies the seed, pays for the labour of sowing and gives compensation to raiyats growing indigo on their own land, but no advance in cash is proved to have been made.

Held, that a servant of the factory is not person authorised under S. 10 of the Cattle Trespass Act to seize the cattle doing damage to the indigo. (1904) 9 C.W.N. 624.

——S. 10—Watchman—General instruction to seize cattle trespassing—Rescuing cattle seized by watchman if an offence.

Under S. 10, a watchman watching crops on land on behalf of a cultivator or occupier is entitled to seize cattle trespassing on the land under his charge when he is given general instructions to seize them while so trespassing. A.I.R. 1922 Pat. 317.

——S. 10—'Impounding while trespassing'.

The impounding of the cattle by a watchman who has got general Instructions from the cultivator or occupier is authorized under S. 10 Cattle Trespass Act to seize them while trespassing. 16 Cr.L.J. 772=31 Ind. Cas. 372.

——S. 10—Damages—Nature of—If can be presumed.

Damages required under S. 10 of the Cattle Trespass Act is not necessarily substantial damage; it may be nominal damages. When cattle enter a sugarcane field it can be presumed that in fact they would have committed damages. I.L.R. (1949) A. 211=1948 A.W.R. (H.C.) 296=A.I.R. 1949 A. 180=50 Cr.L.J. 232.

——S. 10—Damages to private protected forests and to the embankment—S. 10 applies. (1939) 20 P.L.T. 340.

Ss. 10, 22—For compensation under S. 22 there must be finding that the seizure or detention of cattle was illegal, **i.e.**, not in accordance with S. 10. Question here is whether cattle was doing damage to land or crop, etc.; if damages is done, the accused is entitled to impound. Compensation cannot be given. 1939 Oudh W.N. 150.

——S. 10—Right of seizure—Cattle coming back within their owner's possession.

In order to cover the act of the owner or occupier of a field who pursues a trespassing animal and captures it outside the field which has been damaged, the words 'cattle trespassing on such land' in S. 10 of the Cattle Trespass Act have to be given an extended meaning and such an extension must be confined within reasonable limits. These words cannot be stretched to cover a case where the cattle had traversed a great distance from the field damaged and had come not merely constructively but actually within their owner's possession. It follows from this that in seizing or attempting to remove the animals in those circumstances, the act of the owner or occupier of the damaged field is not only not covered by S. 10 of the Cattle Trespass Act but it also amounts technically to an offence of theft. Consequently, the owners of the animals are entitled under S. 104, I. P. Code, to use force to any extent short of causing death in order to prevent the owner or occupier of the field from carrying out his purpose. A.I.R. 1947 Lah. 380.

——Ss. 10, 22—Right of seizure, if extends to changing cattle even outside field trespassed.

Although the right of capture of the cattle would not extend to following them to their sheds and seizing them there, yet if the owner of a field attempts to seize them while actually trespassing, he is within his rights in capturing them before they have definitely made their escape from the spot, even though they were not actually inside the field when captured. A.I.R. (Vol. 21) 1934 Nag. 258=1934 Cr. Cas. 1297=36 Cr.L.J. 361=31 N.L.R. 139= 153 Ind. Cas. 427.

——S. 10—Trespass by cattle—Cattle can be chased even outside the fields trespassed.

Certain cattle belonging to accused trespassed a field where they were grazing. An attempt was made by the owner of the field to seize them in order to take them to cattle pound. The cattle ran towards the field of the accused where the chasers followed them. The accused inflicted mortal injuries on one of the chasers, who consequently died. It was urged that the chaser had no right to pursue out of the field trespassed and the accused were entitled to a right of private defence.

Held, that notice of trespass being taken at once, the mere fact that the cattle had left the land, before they could be seized, did not deprive the owner of the field of the right of seizure conferred upon him by S. 10, and no case for private defence was proved. 13 A.I.Cr.R. 39=116 Ind. Cas. 463=30 Cr.L.J. 627=A.I.R. 1928 Lah. 692.

——S. 10—Seizure—Right to seize cattle subsists only until the cattle leave the land.

The owner of the land trespassed on cannot go to the owner of the errant cattle and demand their delivery in order that he may take them to the cattle pound. Because, under S. 10 the right to take hold of cattle trespassing on land and doing damage subsists only while the cattle are on the land. It does not continue after the cattle have left the land. 25 Cr.L.J. 1004=81 Ind. Cas. 716=A.I.R. 1925 Nag. 50.

——S. 10—Occupier—Person taking settlement of land for pasture—Right to seize cattle eating grass.

A person with whom land is settled for the purpose of pasture may be regarded as the occupier of the land within the meaning of S. 10 of the Cattle Trespass Act; the grass standing on the land is the produce of the land, and the person with whom the land is settled for pasture is entitled to seize cattle eating the grass. 266 Ind. Cas. 536=12 B.R. 785=A.I.R. 1947 Pat. 172=1946 P.W.N. 354=47 Cr. L. J. 986.

——Ss. 10 and 24—Occupier defined.

A man in exclusive pos session of a plot of land is an occupier under S. 10 and is entitled to seize cattle and any resistance to the removal is punishable under S. 24. 8 Bur.L.T. 246=8 L.B.R. 217=17 Cr.L.J. 62=32 Ind. Cas. 654.

——S. 10—Occupier, meaning of.

A person in exclusive possession of land is an occupier thereof under S. 10. He can seize any cattle trespassing on his land. 3 P.R.Cr. 1916=17 Cr.L.J. 63=54 P.W.R.Cr. 1915=32 Ind. Cas. 655.

——S. 10—Detaining cow for 24 hours is not theft, or any offence.

A person, detaining cow in his custody for less than 24 hours as he is entitled under S. 10, Cattle Trespass Act, is not guilty of offence under S. 379, intention for causing wrongful loss being absent. Where the accused kept the cow in his custody for damages done over night for the purpose of impounding unless he received compensation, **held,** that he was legally entitled to keep it in his own custody for 24 hours before lodging it in the pound. 14 C.W.N. 238, Foll. 23 Cr.L.J. 511=68 Ind. Cas. 47=A.I.R. 1923 Nag. 64.

——S. 10—Seizure of cattle for getting rent for grazing — Theft.

Per **Huda, J.**—Seizure by the lessee without any intention to take the cattle to the pound for the purpose of coercing the owner of the cattle to pay the arrears of rent for grazing is illegal and amounts to an attempt to commit theft. 22 C. 1017, foll. 18 Cr.L.J. 849=41 Ind. Cas. 817.

——S. 10—Limitation.

Where the occurrence is alleged to have taken place on September 29, 1933, but the complaint is not filed till October 10, 1933, the complaint is barred by time under S. 20 of the Cattle Trespass Act. A.I.R. (Vol. 22) 1935 Cal. 116=38 C.W.N. 1072=36 Cr.L.J. 495=1935 Cr. Cas. 143=154 Ind. Cas. 197.

——S. 11—Seizure of straying cattle—Legality not dependent on actual damage caused—Sentence—Considerations.

The legislature with a view to protect the persons and property of the public in general has made it an offence to let cattle stray about without there being anyone to look after them. The legality of the seizure of such cattle and the conviction of the persons responsible therefor is not therefore made dependent on actual damage being caused.

Where the accused with several others have combined in order to flout lawful authority, such challenges to the upholders of law and order must necessarily be visited with deterrent punishment. But the fact that this was the first endeavour of the Municipality to purge the city of nuisance due to cattle and that the accused beyond lending the weight of their presence did nothing to cause hurt to the raiding party, must be considered in passing sentence on the accused. A.I.R. (Vol. 21) 1934 Sind 34=28 S.L.R. 73=35 Cr.L.J. 830=148 Ind. Cas. 982.

——Ss. 11 and 24—Railways Act, S. 125 (4)—Cattle passing over regular track at place where there is no fencing to railway line — Unless there is damage, conviction under S. 24 cannot be sustained.

In order that an offence may be established under S. 24, the seizure of the cattle must be legal and consequently driving herds of cattle across the railway line at a place where there is no fence and where there is a regular tract does not constitute any offence under S. 24 in the absence of any damage to the line. 7 O.W.N. 461=A.I.R. 1930 Oudh 250.

——S. 20—Complaint under—Proper person to complain — 'Agent personally acquainted,' meaning of—Complaint by wrong person—Validity.

The expression 'agent personally acquainted' in S. 20, Cattle Trespass Act, need not necessarily mean an eyewitness, but it may mean an agent or servant who could be said to have acted as an agent, such as a **kamdar,** who, if not present at the time of the seizure, had received information of it shortly after the evident and was in a position to verify the information given to him. It cannot, however, include an agent, who lives at a distance and who has received information of the seizure at second hand.

Where a complaint under S. 20, Cattle Trespass Act, is made by a wrong person, there is no complaint at all and the Court has no jurisdiction to inquire into the matter.

A servant actually present at the time of the sei-

zure might make a complaint under S. 20 when the owner himself is unable to do so, or when there is no agent who is able to make a complaint for the owner, but where the owner himself is able to make a complaint or there is an agent, then a complaint should be made by the owner or such agent. A.I.R. (Vol. 18) 1931 Nag. 98=32 Cr.L.J. 896=27 N.L.R. 167=1931 Cr. Cas. 450=132 Ind. Cas. 457.

——S. 20—Complaint—Contents of—Different heads of losses not specified—If fatal.

The different heads of losses suffered by a complainant under S. 20, Cattle Trespass Act, must be specifically indicated in the petition of the complainant. But the fact that the petition of complaint is silent on this point is no reason for throwing out the complainant's claim for compensation, provided he alleges and proves the same during the hearing and the opposite party gets an opportunity to lead and prove in rely. 16 C.L.T. 51=4 A.I.Cr.D. 256.

——S. 20—Award of costs to complainant.

A complainant under S. 20, Cattle Trespass Act, may be allowed the costs of the proceeding, though not the pleader's fee, if any, incurred by him. 4 A.I.Cr.D. 256=16 C.L.T. 51.

——S. 20—Complaint under—Jurisdiction of District or authorized Magistrate to transfer.

Though a complaint under S. 20 of the Cattle Trespass Act must be entertained either by a District Magistrate or a Magistrate specially authorized, such Magistrate has power to transfer the case after taking cognizance of it to any Subordinate Magistrate as contemplated by the Code of Criminal Procedure. (1907) 34 C. 926.

——S. 20—Complaint under—General Clauses Act, S. 10—Applicability.

Although S. 10, General Clauses Act, only applies to Acts made on or after 14th January, 1897, and does not cover in terms, an Act like Cattle Trespass Act passed in 1871, the principle underlying S. 10, General Clauses Act, should be applied to complaints under Cattle Trespass Act, S. 20. 30 Cr.L.J. 125 =113 Ind. Cas. 285=12 A.I.Cr.R. 69=A.I.R. 1929 Nag. 96.

——S. 20—Offence under—Magistrates empowered to try.

A Magistrate generally empowered under the Cr. P. Code to receive complaints of offences, has jurisdiction in respect of offences under S. 20 of the Cattle Trespass Act without any special authorization by the District Magistrate to receive complaints under the above section; 44 Bom. 42 and 34 Cal. 926, Foll. 100 Ind. Cas. 381=25 M.L.W. 282= 1927 M.W.N. 167=28 Cr.L.J. 301=50 Mad. 841 =A.I.R. 1927 Mad. 396=52 M.L.J. 251.

——S. 20—Offence under—Cognizance.

A Magistrate authorised under S. 190, Cr. P. Code to take cognizance of offences upon receiving complaints can take cognizance of an offence under S. 20 of the Cattle Trespass Act, 1871, though there is no special authorisation in that behalf. 44 Bom. 42=21 Bom.L.R. 1084=54 Ind. Cas. 495.

——S. 20—Order of compensation by Magistrate not competent to entertain complaint—Legality.

An order of compensation awarded by a Magistrate other than the one before whom a complaint of illegal seizure is made and who is not competent to entertain the same is illegal and void under S. 20 of the Cattle Trespass Act. 4 A.I.Cr.D. 256=16 Cut.L.T. 51.

——S. 20—Limitation—Computation of period of 10 days—Limitation Act, S. 14—Application of. **See** LIMITATION ACT, S. 14. 16 Cut.L.T. 51.

——Ss. 20, 22—U. P. Village Panchayat Act (VI of 1920), S. 17—Jurisdiction of Panchas to entertain complaint under S. 22—Such complaint filed within 10 days as required by S. 20 —Case sent to proper Court—Limitation expiring — Court, if can entertain it.

Under S. 17 of the U. P. Village Panchayat Act (VI of 1920) the Court of the **Panchas** has no judisdiction to entertain the complaint under S. 22, Cattle Trespass Act, though in the complaint, Ss. 323 and 501, I. P. Code, are casually mentioned. Where, therefore, the complaint is made to the **Panchas** within ten days are required by S. 20 of the Cattle Trespass Act, but is subsequently transferred to the proper Court by which time the limitation has already expired the complaint is out of time and cannot be entertained. Section 537, Criminal P. C., does not cure the defect. A.I.R. (Vol. 25) 1938 Oudh 183=1938 O.L.R. 303=1938 O.W.N. 596=39 Cr.L.J. 827=175 Ind. Cas. 662.

——S. 20—Complaint under—Order of dismissal—Revision, if lies.

The effect of inclusion of any act in respect of which a complaint may be made under S. 20 of the Cattle Trespass Act in the definition of offence in S. 4 (o), Cr. P. Code, is to confer jurisdiction on a Magistrate to hear such complaints and to hold an enquiry into the wrongful seizure and detention of the cattle. The result of the enquiry, however, is not acquittal or conviction. A person against whom a complaint is made under S. 20 is not an accused; if the seizure is found to be wrongful he is not convicted of any offence and the amount of compensation which he is required to pay is not a fine. If, therefore, a District Magistrate sets aside an order of a subordinate magistrate imposing a fine and ordering compensation under Ss. 20 and 22 of the Cattle Trespass Act, his order does not amount to an acquittal of the accused and a revision is maintainable against his order. I.L.R. (1950) Nag. 393= 4 A.I.Cr.D. 254=1950 N.L.J. 36.

——S. 20—Revision—Interference by High Court.

Where the compensation awarded under S. 20, Cattle Trespass Act, is excessive, the High Court's power to interfere in revision cannot be challenged. 4 A.I.Cr.D. 256=16 C.L.T. 51.

——S. 21—Duty of District Magistrate.

Under S. 21 the District Magistrate is enjoined to summon the person complained against and make an inquiry into the case. A.I.R. (Vol. 24) 1937 Lah. 748=39 P.L.R. 915=169 Ind. Cas. 922.

——S. 21—Complaint by Agent—Validity of—Agent authorised to file a complaint though cannot give direct evidence of all circumstances.

For a complaint by an agent to be valid, it is not necessary that the agent must know all about the matter from what he has seen himself and not from what he has been told by others; that is, the agent need not be a person who is capable of giving what is called direct evidence of all the circumstances and

not of a part of them only. 26 Cr.L.J. 327=84 Ind. Cas. 551=A.I.R. 1923 Nag. 156.

——S. 21—Persons entitled to complain.

The person entitled to camplain under S. 21 of the Cattle Trespass Act, 1871, is either the complainant in person or an agent personally acquainted with the circumstances; hence where the cattle belonging to one person are in the custody of another, and are seized from that custody, the owner, if he is not personally acquainted with the circumstances is not entitled to institute a complaint under S. 21 of the Cattle Trespass Act, 1871. (1902) 5 Bom.L. R. 205.

——S. 22—Award of compensation under S. 545 (1) (a), Cr. P. Code—Legality.

What is awarded to the complainant under S. 22 of the Cattle Trespass Act is compensation which is not a fine as contemplated by S. 545 (1), Cr. P. Code. An award of compensation under S. 545 (1) (a), Cr. P. Code, in such a case is, therefore, illegal and without jurisdiction. 1948 N.L.J. 394=A.I.R. 1949 Nag. 136=50 Cr.L.J. 335.

——Ss. 22 and 23—Imprisonment in default of payment of compensation—If may be ordered —Cr. P. Code, S. 545 (1) (b)—If applicable.

The person who is held liable under S. 22 of the Cattle Trespass Act is not "an accused" nor is he "convicted" of the "offence". Under S. 22 of the Act compensation together with fines and expenses, can only be ordered against the person who is adjudged liable. This money is recoverable under S. 23 of the Act as if it were a fine. No imprisonment can be ordered in default of payment of this money. Similarly, S. 545 (1) (b), Cr. P. Code, is not applicable. All the necessary powers are given by S. 22 of the Act. 1948 N.L.J. 389=A.I.R. 1949 Nag. 117=50 Cr.L.J. 289=I.L.R. (1948) Nag. 620.

——S. 22—Compensation—Imprisonment in default—Legality.

A Magistrate is not competent under S. 22 of the Cattle Trespass Act to pass a sentence of fine. He can only award compensation for an illegal seizure of cattle. An order of imprisonment in default of payment of such fine is also illegal. (1900) 27 C. 992=5 C.W.N. 32.

——S. 22—Compensation, when can be awarded —Sentence of imprisonment if can be awarded in default of payment of compensation.

Under S. 22 of the Cattle Trespass Act, compensation is to be awarded, but no compensation can be awarded for loss caused by the seizure of cattle unless the complainant makes the specific claim for it. The Magistrate is not competent to pass a sentence of imprisonment under S. 22 of the Cattle Trespass Act in default of payment of the compensation. A.I.R. (Vol. 26) 1939 Oudh 37=1938 O. W.N. 1130=1938 O.L.R. 512=40 Cr.L.J. 141= 14 Luck. 325=178 Ind. Cas. 722.

——S. 22—Compensation cannot be awarded in absence of loss—Sentence of imprisonment in default of compensation is illegal.

Compensation under S. 22 cannot be allowed in the absence of loss alleged or proved. The Magistrate cannot award it arbitrarily at his own sweet will. The complainant must make a specific claim about it. Further the Magistrate can only award compensation for illegal seizure of cattle and cannot impose fine. He is also not competent under S. 22 to pass sentence of imprisonment and thus when he passes a sentence of imprisonment in default of payment of compensation, the sentence is illegal. 31 Cr. L.J. 278=121 Ind. Cas. 665=26 N.L.R. 158=A.I.R. 1930 Nag. 149.

——S. 22—Seizure found to be illegal and loss caused to complainant—Court's duty to award compensation.

There is nothing whatsoever in the language of S. 22, Cattle Trespass Act, to support the view that compensation can only be given to the complainant if he actually lays a claim for it in the petition of complaint. The only meaning that can be read into the words of S. 22 is that if the Court is of opinion that the seizure was illegal and that loss has been caused to the complainant thereby, it is its duty to award compensation for such loss to the complainant. A.I.R. (Vol. 22) 1933 All. 925=1935 Cr. Cas. 1140 (1)=1935 A.L.J. 1113=1935 A.L.R. 1075= 37 Cr.L.J. 29=159 Ind. Cas. 154.

——S. 22—Compensation need not be claimed in the complaint.

There is no restriction in the Act that the Court cannot award compensation unless it is claimed in the complaint; A.I.R. 1923 Pat. 292, Not Foll. 29 Cr.L.J. 325=108 Ind. Cas. 80=1 M.Cr.C. 125= A.I.R. 1928 Mad. 369.

——S. 22—Loss not proved—Compensation not asked for in petition—Compensation order is illegal.

If no compensation was claimed in the petition of complaint and no allegation was made as to the loss caused by seizure of the cattle, the order directing payment of compensation cannot stand. The person under whose orders the cattle were seized is liable to compensate the complainant, equally with those who directly seized them under his orders. 4 P. L.T. 231=72 Ind. Cas. 71=1923 P.H.C.C. 96= 1 Pat.L.R.Cr. 34=24 Cr.L.J. 311=A.I.R. 1923 Pat. 292.

——S. 22—Grazier—Grazier of cattle is agent within S. 23.

A grazier is entrusted with the charge of the cattle during the period the cattle are with him for the purpose of grazing and therefore he may be presumed to be an agent of the owners of the cattle during the time the cattle are in his charge. Such an authority must be presumed from the circumstances of the case. The person personally acquainted with the circumstances can only be the person in charge of the cattle when seizure is made and therefore comes under the category of "an agent personally acquainted with the circumstances" mentioned in S. 21. 30 Cr. L.J. 633=116 Ind. Cas. 424=1929 Cr.C. 18=13 A.I.Cr.R. 63=A.I.R. 1929 Nag. 152.

——S. 22—Compensation may be awarded to owner of the cattle and not to an agent filing complaint.

Where the complaint is lodged by an agent, the Magistrate can award reasonable compensation, which will be paid to the complainant (owner of cattle and not to the agent who filed the complaint. 30 Cr.L.J. 633=116 Ind. Cas. 424=1929 Cr.C. 18= 13 A.I.Cr.R. 63=A.I.R. 1929 Nag. 152.

——S. 22—Impounding of cattle by Municipal servant—Prosecution of—U. P. Municipalities Act, S. 326 (1).

S. 326 (1) of the U. P. Municipalities Act relates only to suits of a civil nature in a Civil Court and has nothing to do with prosecutions under Cattle Trespass Act. The Magistrate found that cattle had done no damage to Municipal trees and that consequently the seizure of the cattle by the accused Municipal Servants was bad, **held**, that the accused were rightly convicted under S. 22 of the Cattle Trespass Act. 16 A.L.J. 148=19 Cr.L.J. 368=44 Ind. Cas. 592.

——S. 22—Illegal seizure and detention by Forest Officer—Jurisdiction to award compensation—Counsel's fees, if can be taken into consideration.

Where the seizure and detention of the sheep and goats belonging to the complainant and his party were wrongful and illegal, it makes no difference to the jurisdiction of the Magistrate to grant compensation under S. 22, Cattle Trespass Act, if the person who is responsible for the wrongful or illegal detention happens to be a Forest Officer who claims to act under colour of the Forest Act, if as a matter of fact the seizure and detention had nothing to do with any forest.

In awarding compensation under S. 22 of the Act, fees paid by the complainant to his counsel in prosecuting the application should not be considered. A.I.R. (Vol. 25) 1938 Mad. 820=1938 M.W.N. 831=(1938) 2 M.L.J. 285=48 M.L.W. 214=39 Cr.L.J. 956 (1)=177 Ind. Cas. 896 (1).

——S. 22—Pleader's fee—Award of, to successful complainant—Legality of.

The language of S. 22 of the Cattle Trespass Act, 1871, is not wide enough to enable a Magistrate to award Pleader's fees to a successful complainant especially when the cattle had been released long before the complainant engaged a Pleader. A.I.R. (Vol. 20) 1933 Mad. 502=37 M.L.W. 736=65 M. L.J. 24=34 Cr.L.J. 676 (1)=1935 Cr. Cas. 779 =1933 M.W.N. 549=144 Ind. Cas. 154.

——S. 22—Appeal from order of compensation —Cr. P. Code (V of 1898), Ss. 408 and 413.

An order awarding compensation and re-payment of fines under S. 22 is appealable under S. 408 of the Cr. P. Code, the compensation so awarded not being a fine, the restrictive provisions of S. 413, Cr. P. Code are not applicable. 46 Bom. 58=63 Ind. Cas. 160=23 Bom.L.R. 836=22 Cr.L.J. 624=A.I.R. 1922 Bom. 191.

——S. 22—Appeal from order awarding compensation.

Under the altered definition of a complaint in S. 4 (o), Cr. P. Code, a person against whom an order under S. 22 of the Cattle Trespass Act is made is competent to appeal, being 'a person convicted on a trial.' (1901) 29 M. 517.

——S. 22—Suit for damages for illegal seizure—Maintainability—Onus.

In a suit for damages for illegal seizure of cattle the onus lies on defendant to prove that the seizure was justifiable in law. Such a suit is not barred by reason of Chap. V of the Cattle Trespass Act. 15 W.R. 279; 16 Cal. 159, foll. 44 Ind Cas. 237 (N.).

——S. 24—Conviction under—Appeal.

Where a person was convicted under S. 447, Indian Penal Code, and S. 24, Cattle Trespass Act, and fined Rs. 50 for the former and Rs. 20 for the latter offence, by a Magistrate in the exercise of summary powers:

Held, that there was a combination of two punishments of the nature referred to in S. 414, Cr. P. Code, and the order was appealable. A.I.R. (Vol. 19) 1932 Oudh 27=1932 Cr. Cas. 59=8 O.W.N. 1373=33 Cr.L.J. 278=7 Luck. 501=136 Ind. Cas. 248.

——S. 24—Conviction under—If necessary for trial for other offences.

A conviction under S. 24, Cattle Trespass Act, is not essential before any offence under the Indian Penal Code connected with such an offence can be taken into consideration. A.I.R. (Vol. 32) 1945 Oudh 116=1944 O.W.N. 523=1944 A.W.R. 318.

——S. 24—Conviction not legal unless place of seizure found to be public.

A conviction under S. 24 of the Cattle Trespass Act for rescuing cattle after seizure is not legal unless the place of seizure is found to be public property in charge of the Public Works Department. (1900) 24 M. 318=1 Weir 716.

——S. 24—Forests in a zamindari treated as reserve forest for some purposes by the application of Ss. 26 and 32 of the Madras Forest Act —Zamindar's Range Officer seizing trespassing cattle—Rescue of such cattle—Offence.

When a forest in a zamindary is for some purposes treated as a reserve forest by the application of Ss. 26 and 32 of the Madras Forest Act, the Zamindar is still the owner and occupier of the same. The forest has not been taken over by the Government as a reserve forest to which all the provisions of the Madras Forest Act are extended. A Range Officer appointed by the zamindar for the forest is in charge of the forest under the occupier who is the zamindar, and is entitled to seize cattle trespassing on land under his charge. People rescuing such cattle which have been thus lawfully seized commit an offence punishable under S. 24 of the Cattle Trespass Act. 1948 M.W.N. 407=61 L.W. 483= A.I.R. 1948 Mad. 467=49 Cr.L.J. 689=3 A.I. Cr.D. 92=(1948) 1 M.L.J. 428.

——S. 24—Conviction—Damage to crops, proof of.

It must be shown that the cattle were causing damage to land or crops before it can be held that the owner was justified in seizing them and taking them to the pound. But the fact that the cattle have been grazing on crops in a field is sufficient to establish damage for the purposes of S. 24. A.I.R. (Vol. 32) 1945 Oudh 116=1944 A.W.R. 318=1944 O. W.N. 523.

——S. 24—Conviction under—Clear finding of damage by cattle essential.

A clear finding of damage done by the trespassing cattle is essential to a conviction under S. 24 of the Cattle Trespass Act. A.I.R. (Vol. 27) 1940 Pat. 299=21 P.L.T. 627=6 B.R. 301=41 Cr.L.J. 257 =186 Ind. Cas. 182.

——S. 24—Conviction—Finding as to legality of seizure.

To sustain a conviction, the accused must not only remove the cattle from the pound but the cattle must

be liable to be seized under the Act, in other words, it must be proved that the cattle were seized while they were trespassing upon and doing damage to the field of the owner and were then put into the pound. 4 Pat.L.W. 40=19 Cr.L.J. 202=43 Ind. Cas. 618.

——S. 24—Conviction under—Finding of trespass and of damage.

For a conviction under S. 24 of the Cattle Trespass Act there must be a finding of trespass and of damage as contemplated by S. 10 of the Act. 19 Cr.L.J. 157=43 Ind. Cas. 445.

——S. 24—Conviction under—Liability of the cattle to be seized must be proved.

Before a conviction under S. 24 can be sustained it is necessary to prove that the cattle which has been rescued was liable to be seized under the Act. 24 A.L.J. 280=27 Cr.L.J. 313=7 L.R.A.Cr. 40 =92 Ind. Cas. 697=A.I.R. 1926 All. 276.

——S. 24—Offence under—Proof of damage.

There can be conviction under S. 24 of the Cattle Trespass Act, unless it is proved and found that the cattle were liable to be seized within S. 10 and that damage was caused. 1 Pat.L.T. 176=57 Ind. Cas. 464.

——S. 24—Rescue of cattle.

Rescue of cattle not seized in accordance with the act is not illegal. 23 C.W.N. 387=20 Cr.L.J. 398 =50 Ind. Cas. 1006.

——S. 24—'Rescue' includes driving by shouts and cries.

Driving cattle by shouts and cries does constitute rescuing them under S. 24. 24 Cr.L.J. 456=72 Ind. Cas. 616=17 M.L.W. 546=32 M.L.T. 365= 1923 M.W.N. 437=A.I.R. 1923 Mad. 608.

——S. 24—Offence—Penal Code, Ss. 447, 441 and 40—'Offence' in S. 441 includes offence under S. 24.

Entering the cattle pound with intent to commit an offence under S. 24, Cattle Trespass Act amounts to criminal trespass within the meaning of S. 417, I. P. Code, and entering the pound with intent to intimidate the person in charge of the pound amounts to an offence under S. 447. 8 Lah. 331=103 Ind. Cas. 201=28 Cr.L.J. 665=28 P.L.R. 519=8 A. I.Cr.R. 293=9 L.L.J. 354=A.I.R. 1927 Lah. 495.

——S. 24—Plea of title to land.

Persons claiming that they are the owners of the cattle and also of the land, are liable under S. 24, if they do not remove the cattle. Their claim will not affect the title of the true owner. 3 P.R.Cr. 1916=16 Cr.L.J. 63=54 P.W.R.Cr. 1916=32 Ind. Cas. 655.

——S. 24 and Penal Code, S. 323—Separate sentences can be passed.

The offence of causing hurt is a separate offence from that of rescuing cattle and separate sentences may legally be passed. 39 M.L.T. 543=1927 M. W.N. 850=105 Ind. Cas. 806=28 Cr.L.J. 982= 9 A.I.Cr.R. 160=A.I.R. 1928 Mad. 18=53 M. L.J. 653.

CAUSE OF ACTION. See (1), C. P. CODE, Ss. 11, 20, 99 & O. 2, Rr. 2, 3.

(2) DAMAGES.

(3) TORT.

——Cause of Action—Meaning of.

Cause of action has no relation whatsoever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as to cause of action, or in other words to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. Cause of action means the whole bundle of material facts which it is necessary for the plaintiff to prove in order to entitle him to succeed in the suit. In a restricted sense, the words 'cause of action' mean the circumstances forming the infringement of the right or the immediate occasion for the action, and, in a wider sense, those words mean the necessary conditions for the maintenance of the suit including not only the infraction of the right but the infraction coupled with the right itself. This expression means every fact which might be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. A.I.R. 1950 Pepsu 21.

——Concurrent suit for cancellation of deed of gift under which defendant claimed. See SPECIFIC RELIEF ACT, Ss. 9, 39. 1904 A.W.N. 7=26 A. 230.

——Crown servant—Wrongful dismissal—Suit to declare ultra vires and for arrears of salary —Re-instatement pending suit and order of suspension—Dismissal of suit—Legality—Decree for arrears of salary—Right to.

Where a servant of the Crown is dismissed from service, and files a suit challenging the dismissal as **ultra vires** and wrongful and for arrears of salary, but pending suit the plaintiff is reinstated in service, but again suspended, and the plaintiff in his evidence also says that he is still in service, the suit cannot be dismissed in its entirety on the ground that he has no cause of action because he is still in service though under suspension.

The plaintiff has a cause of action for the salary due to him up to the date of the suit and the suit for arrears of salary is maintainable and the plaintiff is entitled to a decree for the arrears of salary so due him. 10 F.L.J. 56, foll. 28 Pat. 562=30 P.L.T. 332=A.I.R. 1950 Pat. 17.

——Damages, suit for, against decree holder for not certifying payment—Fresh realization of money not necessary. See C. P. CODE, S. 258.

——Defamation—Publication. See DEFAMATION. 6 Bom.L.R. 684.

——Plaint—Enough, if there is sufficient disclosure of cause of action, and if the defendant has understood the claim rightly, though the cause of action is not correctly set out. See LIMITATION ACT, Art. 116. 25 M. 50.

CAVEAT.

See (1) PROB. AND ADMN. ACT, Ss. 50, 70.
(2) WILL.

CAVEAT EMPTOR.

See also (1) CIVIL P. C., O. 21, R. 93.
(2) T. P. ACT, S. 55.

——Pawning of bangles describing them as 'gold bangles'—Bangles found to be of alloy of gold:

Held, that the principle of caveat emptor applied.

A.I.R. (Vol. 22) 1935 Rang. 426=1935 Cr.Cas. 1201 (1)=37 Cr.L.J. 179=159 Ind. Cas. 789.

CEDED TERRITORIES.

See CONSTITUTIONAL LAW — POSSESSIONS.

CENSUS ACT (X OF 1929).

——S. 12—Extracts from census register—Admissibility of.

Extracts from census register are inadmissible in evidence under S. 12 of the Indian Census Act. (1932) 138 Ind. Cas. 399=33 P.L.R. 225.

CENSUS ACT (XXIV OF 1939).

——S. 9—Trial under S. 9 (a), Census Act, 1939—Prosecution asked for without any particulars, sanctioned without any particulars and started without any particulars — Case was not allowed to proceed further. A.I.R. (Vol. 29) 1942 Pat. 130=8 B. R. 192=43 Cr.L.J. 160=197 Ind. Cas. 359.

——Ss. 10, 11—Prosecution either under Census Act or Penal Code—Sanction of Provincial Government, if necessary.

Under Ss. 10 and 11, Census Act, no prosecution either under the Census Act or under the I. P. C. can be instituted except with the previous sanction of the Provincial Government or of an authority authorized in this behalf by the Provincial Government. A.I.R. (Vol. 28) 1941 Cal. 715=74 C.L.J. 204=45 C.W.N. 902=43 Cr.L.J. 326=198 Ind. Cas. 196.

CENTRAL PROVINCES ACTS, ETC.

(And Berar) Board of Revenue Act.
(And Berar) Board of Revenue Ordinance (1948).
(And Berar) Borstal Act (IX of 1928).
(And Berar) Children Act (X of 1928).
C. P. Civil Circulars.
(And Berar) Collection of Information and Letting of Houses Order (1946).
Consolidation of Holdings Act.
Co-operative Societies Act.
Courts Act (II of 1894).
Courts Act (I of 1917).
Court Fees Amendment Act (I of 1923).
Court of Wards Act (XVII of 1885).
Court of Wards Act (XXIV of 1899).
Courts Act.
Criminal Circulars.
(And Berar) Criminal Procedure Amendment Ordinance (II of 1948).
(And Berar) Debt Conciliation Act (II of 1933).
Debt Relief Act. See C. P. RELIEF OF INDEBTEDNESS ACT.
Entertainment Duty Act (XXX of 1936).
(And Berar) Excise Act (II of 1915).
(And Berar) Food Grains Control Order (1945).
General Clauses Act (I of 1914).
(And Berar) House Rent Control Order (1947). See also C. P. AND BERAR REGULATION OF LETTING OF ACCOMMODATION ACT (1946).
Land Alienation Act (II of 1916).
Land Revenue Act (XVIII of 1881).
Land Revenue Act (II of 1917).
Laws Act (XX of 1875).
(And Berar) Local Funds Audit Act (IX of 1933).
(And Berar) Local Self-Government Act (IV of 1920).
(And Berar) Maintenance of Public Order Act (XV of 1946).
(And Berar) Maintenance and Restoration of Order and Collection of Fines (Indemnity) Act (II of 1945).
(And Berar) Money Lenders Act (XIII of 1934).
(And Berar) Money Lenders (Second Amendment) Act (XXIV of 1937).
(And Berar) Money Lenders (Supplementary) Act (XVII of 1939).
Motor Vehicles Rules (1927).
(And Berar) Motor Vehicles Taxation Act.
(And Berar) Motor Vehicles Taxation Act (IV of 1940).
Municipal Act (XVIII of 1889).
Municipal Act (XVI of 1903).
(And Berar) Municipalities Act (II of 1922).
(And Berar) Oil Cake (Control) Order.
Police Manual.
(And Berar) Prohibition Act (VII of 1938).
(And Berar) Protection of Debtors Act (IV of 1937).
(And Berar) Provincial Co-operative Bank Bye-laws.
(And Berar) Public Safety Act (XXXVIII of 1947).
(And Berar) Public Safety Act (LXII of 1948).
Reduction of Interest Act (XXXII of 1936).
(And Berar) Reduction of Interest (Amendment) Act (X of 1938).
(And Berar) Regulation of Letting of Accommodation Act (1946).
(And Berar) Relief of Indebtedness Act (XIV of 1939).
(And Berar) Religious and Charitable Trusts Act (XVII of 1937).
Revenue Book Circular.
(And Berar) Revision of the Land Revenue of Estates Act (I of 1939).
(And Berar) Sales of Motor Spirit and Lubricants Taxation Act (XIV of 1938).
(And Berar) Sales Tax Act (XXI of 1947).
Settlement Code.
Stamp Law Rulings Circulars (1887).
(And Berar) States Land Tenure Order (1949).
(And Berar) Temple Entry Authorization Act, S. 8 (2) (c).
(And Berar) Temporary Postponement of Execution of Decrees Act (XVI of 1938).
Tenancy Act (IX of 1883).
Tenancy Act (XI of 1898).
Tenancy Act (I of 1920).
(And Berar) Tobacco Act (VIII of 1939).
(And Berar) Village Panchayat Act (V of 1920).

(And Berar) Village Sanitation and Public Management Act (II of 1920).

(And Berar) Board of Revenue Act. See C. P. BOARD OF REVENUE ACT.

(And Berar) Municipalities Act (II of 1922). See C. P. MUNICIPALITIES ACT.

(And Berar) Public Safety Act. See C. P. PUBLIC SAFETY ACT.

(And Berar) Sales Tax Act. See C. P. SALES TAX ACT.

C. P. & BERAR BOARD OF REVENUE ACT.

——S. 6—Order under Panchayats Act—Power of Board of Revenue.

The Board of Revenue has no jurisdiction to take up cases under the C. P. and Berar Panchayats Act, 1946, either in appeal or in revision. 1949 N.L.J. 585.

——Ss. 7 (1) and 11—Rules framed under, R. 23—"Date of order"—Meaning of.

The words "the date of the order" in R. 23 of rules made by the Board of Revenue under Ss. 7 (1) and 11 of the C. P. and Berar Board of Revenue Act, must be interpreted to mean the date on which the order was known to the party. An aggrieved party cannot be expected to proceed to take any action with regard to filing an application for revision against an order unless and until he comes to know of it. 1949 N.L.J. 325.

C. P. AND BERAR BOARD OF REVENUE ORDINANCE (1948).

——S. 6 and Schedule—Powers of Board of Revenue—Cases invoking leases granted under S. 55 (1) (d), Berar Land Revenue Code.

The power to dispose of cases involving leases granted by the Provincial Government under S. 55 (1) (d), Berar Land Revenue Code, not being specially delegated to the Board, it is not the Board's function to deal with them or with any matter connected with them. 1949 N.L.J. 465.

C. P. AND BERAR BORSTAL ACT (IX OF 1928).

——S. 5—Order for detention in default of payment of fine imposed—Legality.

Section 5 of the C. P. and Berar Borstal Act, authorises detention in lieu of transportation or imprisonment. There is no provision, however, for further detention in default of payment of fine, and such an order is illegal. It is inexpedient to impose a fine when there is no hope of realisation. A.I.R. (Vol. 25) 1938 Nag. 131=39 Cr.L.J. 427 (1)=1938 N.L.J. 8=173 Ind. Cas. 899.

——S. 5—A person who had been detained at the Borstal Institution and had served out his term, cannot be so detained again a second time. (1936) 19 N.L.J. 162.

C. P. AND BERAR CHILDREN ACT (X OF 1928).

——S. 3—"Youthful offender"—Meaning of.

S. 3 of the C. P. and Berar Children Act contains the definition of the expression 'youthful offender,' but it cannot include the case of a boy under the age of 16 years at the time of conviction and sentence who has been convicted of any offence punishable with death. Only S. 3 was made applicable to male persons in the whole of the Central Provinces with effect from 15th September, 1932. The whole Act was not brought into operation. A.I.R. (Vol. 29) 1942 Nag. 74=1942 N.L.J. 210=I.L.R. (1942) Nag. 305=43 Cr.L.J. 631=200 Ind. Cas. 368.

C. P. CIVIL CIRCULARS.

——Circular II, 4, Para. XI—Many defendants—Separate counsel—Suit dismissed with costs—Counsel's fee.

Where in a suit there are more than one defendants and each one of them is represented by a separate counsel but in the judgment there is a simple direction that the suit is dismissed with costs, it must be taken to mean that the Court has not otherwise ordered and only one counsel's fee should be allowed and that fee is to be apportioned equally between the defendants. A.I.R. (Vol. 25) 1938 Nag. 84=I.L.R. (1938) Nag. 348=176 Ind. Cas. 257.

C. P. AND BERAR COLLECTION OF INFORMATION AND LETTING OF HOUSES ORDER (1946).

——If ultra vires.

The C. P. and Berar, Collection of Information and Letting of Houses Order made under S. 2 of the C. P. and Berar Regulation of Letting of Accommodation Act, 1946, is **intra vires** of the Act. I.L.R. (1949) Nag. 396=1949 N.L.J. 38=A.I.R. 1949 Nag. 140=3 A.I.Cr.D. 294=50 Cr.L.J. 343.

——Cl. 3 (1)—Applicability—New buildings.

The words 'Every landlord of a house' in Cl. 3 (1) of the C. P. and Berar Collection of Information and Letting of Houses Order, mean every landlord of a building or part of a building, having regard to the definition of the word 'house' in Cl. 2 (a) of the order. Clearly enough, these words do not merely refer to an old building or part of an old building alone, but to a building or part of a building, whether new or old. I.L.R. (1949) Nag. 396=1949 N.L.J. 38=A.I.R. 1940 Nag. 40=3 A.I.Cr.D. 294=50 Cr.L.J. 343.

CENTRAL PROVINCES CONSOLIDATION OF HOLDINGS ACT.

——S. 26—Powers of Tribunal—Nature of.

S. 26 of the Consolidation of Holdings Act confers supervisory powers and not appellate or revisional powers. It is not intended that under those powers the Revenue Tribunal should adjudicate on disputes relating to a consolidation. It is only intended to secure that the provisions of the Act are complied with. 1948 N.L.J. 192.

CENTRAL PROVINCES CO-OPERATIVE SOCIETIES ACT.

——R. 26—Scope 'Touching the business of a co-operative society'—Ex-member—Trading contrary to rules of society—Imposition of fine by society—Validity—Suit in Civil Court to challenge—If barred.

Where a member of a Co-operative Society tenders his resignation, he ceases to be a member of

the society and the rules of the society no longer bind him. If he thereafter trades in a manner contrary to the rules of the society, the society has no power to impose a fine upon him, and the imposition of such a fine is not a matter touching the business of the society, within the meaning of R. 26 of the rules under the C. P. Co-operative Societies Act. The imposition of a fine in such a case being ultra vires, Civil Courts have jurisdiction to entertain a suit challenging the imposition of the fines. I.L.R. (1948) Nag. 449=A.I.R. 1948 Nag. 327=1948 N. L.J. 285.

CENTRAL PROVINCES COURTS ACT (II OF 1894).

——S. 15—'Value of suit'—Appeal—Forum Valuation of plaint.

Jurisdiction in the matter of appeals in the Central Provinces is governed by S. 15. The words 'Value of the suit' as used in that section invariably mean value of the relief originally claimed by the plaintiff in the plaint or when increased or reduced by voluntary amendment the value of such relief as is made the subject-matter of the Court's decision. 20 Bom. 675; 11 N.L.R. 13 dist. Where a plaintiff voluntarily reduces an original claim, it is the reduced claim which represents the value of the suit for the purposes of appeal. A Court cannot adjudicate itself out of the jurisdiction given to it by law over the suit as instituted. 44 Ind. Cas. 287.

CENTRAL PROVINCES COURTS ACT (I OF 1917).

——S. 9—Question of law referred to Bench—Judge disposing of the case need not be on the Bench.

S. 9 does not make it necessary that the Judge who is disposing of the case should be a member of the Bench for the decision of which a question of law is referred. 12 N.L.J. 148=121 Ind. Cas. 57=A.I. R. 1929 Nag. 251 (F.B.).

——Ss. 16, 26—Different Subordinate Judges of same class—Whether distinct and separate Courts.

Under S. 16 of the Central Provinces and Berar Courts Act, the Local Government is entitled to establish as many Courts of Subordinate Judges of each class for any District as it may deem fit. It is also empowered under S. 26 to appoint an Additional Judge or Judges to a Court of a Subordinate Judge of either class whenever it thinks it necessary or expedient to do so. Therefore it is clear that in the first place the Court has to be created and that in the absence of an Additional Judge or Additional Judges specially appointed under S. 26 only one Judge to each Court is contemplated. Different Subordinate Judge of the same class created under S. 16 are distinct and separate. A.I.R. (Vol. 25) 1938 Nag. 534=I.L.R. (1940) Nag. 334=1938 N.L.J. 336= 180 Ind. Cas. 903.

——Ss. 16 and 26—Appeal wrongly filed before Additional District Judge—District Court transferring it to Judge having jurisdiction—Presentation for purposes of limitation.

Additional District Judges do not form separate Court but are attached to the District Court and form part of it. It is true their powers are not necessarily as extensive as those of the District Judge himself, but a mere curtailment of powers by executive orders cannot constitute a separate Court. The Local Government has no power to create Courts; only the Legislature can do that, and the Legislature has very clearly indicated that there is to be only one District Court in each Civil District. Therefore, these Additional District Judges do not form independent Courts but are part of the District to which they are attached. Consequently where an appeal is wrongly presented before an Additional District Judge but the District Court transfers it to another Additional District Judge having jurisdiction, the original presentation is really a presentation to the District Court itself for the purposes of limitation. A.I.R. (Vol. 24) 1937 Nag. 80=I.L.R. (1937) Nag. 219 =171 Ind. Cas. 371.

——S. 17 (1) (a)—'Original proceeding'—If includes execution proceeding.

The term 'original proceeding' in S. 17 (1) (a), C. P. Courts Act, is used in contradistinction to the term 'appeal' used in S. 20 of that Act, and includes an execution proceeding. I.L.R. (1949) Nag. 981 =A.I.R. 1950 Nag. 115=1949 N.L.J. 588.

——Ss. 17 (1) (a) and 22—Inherent jurisdiction of Civil Judge (class II)—If affected by Distribution Memorandum of District Judge.

It is clear from the provisions of S. 17 (1) (a) of the Central Provinces Courts Act that the Court of a Civil Judge, Class II, has jurisdiction 'to hear and determine any suits or original proceeding of a value not exceeding Rs. 5,000'. It is true that for reasons of convenience a District Judge has power under S. 22 of that Act to direct that any civil business cognisable by the Courts under his control shall be distributed among these Courts in such manner as he thinks fit. But this provision does not take away the inherent jurisdiction of a Court under the control of a District Judge "to hear and determine any suit or original proceeding which the C. P. Courts Act empowers it to entertain. I.L.R. (1949) Nag. 981 =A.I.R. 1950 Nag. 115=1949 N.L.J. 588.

——S. 21—Under the general power of superintendence and control conferred on it by S. 21, the Judicial Commissioner's Court of Nagpur has jurisdiction to revise an order of a Subordinate Court made in a proceeding under S. 36, Legal Practitioners Act. A.I.R. (Vol. 19) 1932 Nag. 50=28 N.L.R. 4=33 Cr.L.J. 408=137 Ind. Cas. 66.

——S. 26 (before amendment by Act (II of 1939)—Scope.

S. 26 does not take away or limit the "jurisdiction" and "powers" which the earlier part of the section had already conferred upon the Additional District Judge. Hence where he accidentally and by mistake takes a case under S. 92. C. P. Code. on his file which according to the distribution memo he ought not to try he cannot be said to be acting without jurisdiction. The defect is curable irregularity. 1941 N.L.J. 625.

——S. 26—Appeal filed in Court of Additional District Judge is one presented in District Court.

The Additional District Judge is clearly a Judge of the District Court although his power to exercise the jurisdiction of District Court is restricted. Whenever the Additional Judge hears and determines an appeal, the appeal would be deemed to be

heard and determined by the District Court to which he is an Additional Judge:

Held, that the appeal presented in the office of the Additional District Judge, Khamgaon, must be regarded as having been presented to the District Court, West Berar, Akola, and hence to the proper Court. Although the presiding officer of that section of the District Court which had its venue at Khamgaon had himself no jurisdiction to hear the appeal, it could not be held to have been presented to an improper Court. All that the Additional District Judge had to do was to submit the appeal to the District Judge who was the Chief Judicial Officer in charge of the District Court of Akola and to have it transferred to a Judge of that Court competent to hear and determine the appeal. Instead of doing so, he returned the appeal to the appellant for being presented to the Additional District Judge, Akola, but that returning of the appeal and its representation at Akola could not impair the validity of the original presentation of the appeal, the appeal was merely transferred from one section of the District Court to another and not from one Court to another Court. A.I.R. (Vol. 26) 1939 Nag. 42=1938 N.L.J. 454 =I.L.R. (1939) Nag. 306=181 Ind. Cas. 556.

CENTRAL PROVINCES COURT-FEES AMENDMENT ACT (I OF 1923).

——Retrospective effect.

Neither the notification of the C. P. Local Government to the effect that in suits for possession of land the value of the land for purposes of jurisdiction would be 12½ times the annual revenue payable for the land nor the C. P. Court-Fees Amendment Act (I of 1923) can have retrospective operation so as to affect the value of such land either for purposes of court-fees or for purposes of jurisdiction in suits previously instituted for possession of such land. 89 Ind. Cas. 407=A.I.R. 1926 Nag. 71.

CENTRAL PROVINCES COURT OF WARDS ACT (XVII OF 1885).

——Ss. 6 and 18—Joint Hindu family—Court of Wards, if can take charge of properties of—Mortgage by Court of Wards—Sanction of Chief Commissioner.

On the application of the managing members of a joint Hindu family the Court of Wards can assume the superintendence of the joint family property under S. 6 of Act (XVII of 1865). The interest of a member of an undivided **mitakshara** family is not individual property of which the Court of Wards could assume charge under the Act. It is not necessary under S. 18 of Act (XVII of 1865) that the actual mortgage to be executed by the Court of Wards should be submitted to the Chief Commissioner for sanction or that his previous sanction should be obtained to its precise terms. It is enough if sanction is obtained for effecting a mortgage. 40 Cal. 784=40 I.A. 117=17 C.L.J. 619=17 C.W.N. 918=15 Bom.L.R. 613=(1913) M.W.N. 542=14 M.L.T. 55=25 M.L.J. 179=9 N.L.R. 117=19 Ind. Cas. 521 (P.C.).

CENTRAL PROVINCES COURT OF WARDS ACT (XXIV OF 1894).

——Commissioner Powers of.

The Commissioner as representing the Court of Wards is not entitled to make a voluntary alienation of his ward's immovable property so as to bind the ward even after his attaining majority. 4 N.L.J. 1=62 Ind. Cas. 198=A.I.R. 1921 Nag. 56.

——Scope of Act.

Act does not contemplate the taking of a partnership business of the Government ward by the Court of Wards against the wishes of the other partners. 1942 N.L.J. 229.

——Ss. 12 and 10—Applicability.

S. 12 does not apply to a claim already submitted to the arbitration of a Civil Court before publication of a Notification under S. 10. 8 N.L.R. 169=17 Ind. Cas. 621.

——S. 12—Court of Wards taking over management of defendant's estate while suit pending—Defendant abandoning contention under S. 12 (2)—Compromise decree — Validity—Whether can be challenged in execution proceedings.

The Court of Wards assumed superintendence of the defendant's estate while the suit was pending against him. The plaint was amended accordingly and the Court of Wards was shown as the guardian **ad litem** of the defendant. The defendant contended that the claim of the plaintiff should be deemed to have been discharged under S. 12 (2) on the ground that the claim had not been submitted within six months as required by S. 12 (1). Later on the parties compromised the claim and a decree was passed in terms of that compromise directing the defendant to pay a certain sum by a certain date with interest in case of default from the date of suit till satisfaction.

Held, that as the defendant had abandoned the contention under S. 12 (2), the Court had jurisdiction to pass the decree that it passed on the consent of the parties, and whether the Court had jurisdiction to pass that decree or not, the validity of the decree could not be challenged in execution proceedings. I.L.R. (1947) Nag. 576=230 Ind. Cas. 66=A.I.R. 1948 Nag. 70=1947 N.L.J. 232.

——S. 13—S. 13 (1) though mandatory is procedural. The section requires substantial compliance with its terms and provided there is no prejudice or injury, the Court of Wards can waive small and unessential irregularities. 1942 N.L.J. 229.

——S. 15—If a Court of Wards receives a claim and accepts the documents produced, the force of Ss. 12 and 13 spends itself, so far as the claim submitted and received, and the documents produced are concerned, and S. 15 (3) comes into operation. 1942 N.L.J. 229.

——S. 16 (2) (b)—The words 'for the preservation and benefit of such property' must be taken to mean the usual powers of guardians to bind the minor's estate. No agreement of transfer by a guardian should be specially enforced against a minor unless it is beneficial to him in the opinion of the Court. 45 Ind. Cas. 192 (N.).

[Even when it is beneficial, it seems it cannot be enforced. **See** 39 Cal. 232=13 Ind. Cas. 331 (P.C.) Ed.].

——S. 18—Deputy Commissioner can execute documents for Court of Wards.

The Deputy Commissioner is authorized to execute a document on behalf of the Commissioner who is the

Court of Wards, under S. 18 (2). 95 Ind. Cas. 824=A.I.R. 1926 Nag. 466.

——S. 25—Court of Wards selling property, if delaying execution of decree.

The Court of Wards, by virtue of S. 25, Court of Wards Act, has full power to sell the whole or part of the property for the benefit of the property and the advantage of the ward. The Court of Wards does not sell the property for the purpose of delaying or defeating the execution of the decree which the creditor may eventually obtain. It is acting in the ordinary course of its management and its object is, by statute, for the benefit of the ward and his estate. It is doubtful whether circumstances would ever arise which would justify the Court in allowing an order of attachment in respect of property under the control of the Court of Wards. A.I.R. (Vol. 21) 1934 Nag. 169 (2)=17 N.L.J. 5=150 Ind. Cas. 1142.

——S. 26—Applicability.

S. 26 of the Act, has no application to a suit filed already against the predecessor-in-title of a Government ward and continued against the ward who was legal representative of the original defendant in accordance with order XXII, Rule 4, C. P. Code. 8 N.L.R. 169=17 Ind. Cas. 621.

——S. 27—Under S. 27, the manager of the Court of Wards is to be named as the next friend. A.I.R. (Vol. 25) 1938 Nag. 458=175 Ind. Cas. 911.

——Ss. 27, 33—Suit by ward—Death of ward—Continuance of suit by Court of Wards whether as legal representative.

The position of the Court of Wards after the death of the ward in respect of a suit by the ward is not that of a person acting as the next friend attempting to pursue the suit when the minor dies, but the position of a person acting as a legal representative of the deceased. The Court of Wards represents no particular ward in the administration of the estate but administers the estate on its own authority and being a person who in law represents the estate of deceased, as it does by the order of the Local Government falls within the definition of a legal representative in S. 2 (11) of C. P. Code. The Court of Wards, therefore, is fully entitled to carry on the suit in its own name. In such a case the property is no longer a ward's property and the Court of Wards acting on its own authority and not in the capacity of the next friend, is under no obligation to act through a manager. A.I.R. (Vol. 20) 1933 Nag. 85=29 N.L.R. 118=144 Ind. Cas. 368.

——S. 30—Scope.

S. 30 can only relate to suits which the ward alone can bring. It clearly cannot affect the rights and interests of others who are not affected by the Act. (1942) N.L.J. 229.

——Under S. 30 a suit on behalf of any Government ward has to be brought under a written authority of the Court of Wards. A.I.R. (Vol. 25) 1938 Nag. 458=175 Ind. Cas. 911.

——S. 31—The reference in S. 31, C. P. Court of Wards Act to S. 68, Contract Act, was made because S. 68 comes in the chapter dealing not with contracts but with certain relations resembling those created by contract or quasi-contracts. A.I.R. (Vol. 23) 1936 Nag. 15=31 N.L.R. Sup. 62=161 Ind. Cas. 351.

——S. 31—Where the consideration for a pro-note in suit was advanced at a time when the defendant's estate was under the superintendence of the Court of Wards, the defendant was incompetent to enter into any contract by reason of S. 31 of the C. P. Court of Wards Act which might involve him in pecuniary liability, and his property is not liable under S. 68 of the Contract Act. A.I.R. (Vol. 23) 1936 Nag. 15=31 N.L.R. Sup. 62=161 Ind. Cas. 351.

——S. 31 (as amended by Act I of 1915)—Effect of.

The effect of S. 31 as amended is to declare that the property or person of a ward is not liable for necessaries under S. 68 of Contract Act. 61 Ind. Cas. 563 (2)=17 N.L.R. 20=A.I.R. 1921 Nag. 105.

——S. 31—Powers of Court of Wards to bind minor's estate are not greater than those of natural guardian.

The powers of the Court of Wards to bind the minor ward by a simple money bond executed on his behalf are no greater than those of a natural guardian. Except in so far as the Court of Wards Act gives special powers to bind the minor's estate, the powers of the Court of Wards are co-extensive with those of a natural guardian. 5 N.L.J. 49=65 Ind. Cas. 53=18 N.L.R. 145=A.I.R. 1922 Nag. 98.

CENTRAL PROVINCES CRIMINAL CIRCULARS.

——Nos. 1-28, Para. 6—Trial of young offenders by 2nd Class Magistrate is barred.

The Circular states that adolescents should be tried by a Magistrate not below the rank of Sub-Divisional Magistrate. It does not say that a Second Class Magistrate may try an adolescent but must refer the case for punishment to the Sub-Divisional Magistrate. 22 N.L.R. 166=74 Ind. Cas. 66=24 Cr. L.J. 738=A.I.R. 1924 Nag. 37.

CENTRAL PROVINCES AND BERAR CRIMINAL PROCEDURE (AMENDMENT) ORDINANCE (II OF 1948).

——S. 2—If ultra vires—Government of India Act (1935), S. 100 (1) and Schedule VII, List I, Items 29 and 42 and List 3, Item 2.

S. 2 of the C. P. and Berar Cr. Procedure (Amendment) Ordinance, 1947, is not **ultra vires** the Provincial Legislature. The pith and substance of the section lies entirely within item 2 of the Concurrent List, relating to Cr. Procedure. The fact that it incidentally touches upon a field reserved for the centre does not render it **ipso facto ultra vires.** When the power to enact the legislation is to be found in either the Provincial or the Concurrent List, then the incidental overlapping does not necessarily render that law ineffective. I.L.R. (1948) Nag. 785=A.I.R. 1949 Nag. 16=50 Cr.L.J. 84.

C. P. AND BERAR DEBT CONCILIATION ACT (II OF 1933).

——Construction.

Act is a coercive measure affecting vested interests and rights of creditors. It must therefore be con-

strued strictly. Ambiguity must be resolved in a way which would least interfere with existing rights. A.I.R. (Vol. 31) 1944 Nag. 235=1944 N. L. J. 220=I.L.R. (1945) Nag. 260.

——Construction.

The C. P. and Berar Debt Conciliation Act is a harsh one, and in so far as it effects a departure from the ordinary law it ought to be strictly construed and construed in favour of the subject who relies upon the ordinary laws of the land. A.I.R. (Vol. 28) 1941 Nag. 249=I.L.R. (1941) Nag. 428=1941 N. L.J. 250=199 Ind. Cas. 427.

——Construction.

The Debt Conciliation Act is a coercive measure intended to affect vested interests and rights and to bring pressure upon creditors to effect a settlement with their debtor. Therefore, however beneficient it may be from the point of view of debtors, it operates to the detriment of another class of persons, namely, creditors and consequently, the Act must, in accordance with the usual rules of construction, be construed strictly. Any ambiguity in its clauses must therefore be resolved along lines which interfere as little as possible with existing rights unless the contrary is unmistakably indicated in other parts of the Act. A.I.R. (Vol. 27) 1940 Nag. 42=1939 N.L.J. 451 =189 Ind. Cas. 178.

——Construction.

The C. P. and Berar Debt Conciliation Act is a coercive measure intended to affect vested interests and rights and to bring pressure upon creditors to effect a settlement with their debtors. Therefore, however beneficient it may be from the point of view of debtors, it operates to the detriment of another class of persons, namely, creditors, and consequently, the Act must, in accordance with the usual rules of construction, be construed strictly. Any ambiguity in its clauses must therefore be resolved along lines which interfere as little as possible with existing rights unless the contrary is unmistakably indicated in other parts of the Act. A.I.R. (Vol. 26) 1939 Nag. 282=1939 N.L.J. 283=I.L.R. (1939) Nag. 654=189 Ind. Cas. 118.

——Construction.

It is a well recognised rule of construction of statutes that an enactment such as the Debt Conciliation Act which purports to deprive the subject of his Common Law right to resort to the ordinary Courts of Justice ought to be construed very strictly and the Court should not extend its operation further than the language of the enactment requires. (1937) 169 Ind. Cas 323=20 N.L.J. 21.

——Debt contracted in Bombay discharged under Act—Such discharge is no answer to suit filed in Bombay to recover the debt. A.I.R. (Vol. 27) 1940 Bom. 362=42 Bom.L.R. 873=I.L.R. (1940) Bom. 799=191 Ind. Cas. 653.

——Procedure followed by D. C. Board—Legality—Presumption.

Presumption about legality of procedure followed by D. C. Board arises unless contrary is established. 1940 N.L.J. 614.

——Rules under—R. 18—Rule, if cures illegality under R. 47.

Rule 18 made under C. P. Debt Conciliation Act does not cure illegality occurring under R. 47 but deals with a notice sent in an irregular form. A. I.R. (Vol. 26) 1939 Nag. 277=1939 N.L.J. 472= I.L.R. (1939) Nag. 697=185 Ind. Cas. 418.

——Rules under—R. 47—Failure to secure representation of minor—Proceedings null and void.

A failure to secure the representation of the minor by the appointment of a guardian after a notice to him and to the guardian will render null and void the proceedings before the Debt Conciliation Board. A.I.R. (Vol. 31) 1944 Nag. 235=1944 N.L.J. 220=I.L.R. (1945) Nag. 260.

——S. 2 (d)—Creditor.

'Debt' as defined in S. 2 (e) includes any liability for a cash payment under a decree and the decree-holder entitled to realise such amount due is a creditor. A.I.R. (Vol. 23) 1936 Nag. 145=I.L.R. (1937) Nag. 76=165 Ind. Cas. 412 (1).

——S. 2 (e)—"Debt"—Liability of guardian to pay sum taken from minor while he was his guardian.

"Debt" as defined in S. 2 (e) of the C. P. and Berar Debt Conciliation Act is wide and comprehensive and includes the liability of a guardian of minor's property to pay to the minor the sum which he had taken from him while he was his guardian and which he had not repaid. I.L.R. (1948) Nag. 794=A. I.R. 1949 Nag. 235=1949 N.L.R. 154.

——S. 2 (e)—"Debt"—Mortgage-debt merging into preliminary decree.

A mortgage-debt does not cease to be a 'debt' within the meaning of S. 2 (e) of the Debt Conciliation Act merely because it has merged into a preliminary decree for foreclosure. I.L.R. (1948) Nag. 555= A.I.R. 1948 Nag. 312=1949 N.L.J. 320.

——S. 2 (e)—"Debt"—Decree for land revenue payable by defendant but paid by plaintiff —Amount due under—If "debt".

The definition of "debt" in S. 2 (e) of the C. P. Debt Conciliation Act is wide enough to include the amount due under a decree for arrears of land revenue payable by the defendant but paid by the plaintiff. The land revenue having been paid to Government ceases to be land revenue, and the liability of the judgment-debtor to the decree-holder is one arising under S. 69, Contract Act. The decree is not a decree in a suit for land revenue so as to exempt the same from the definition of "debt". I.L.R. (1948) Nag. 559=1948 N.L.J. 140=A.I.R. 1949 Nag. 104.

——S. 2 (e)—Debt—Decree for arrears of theka jama—Jurisdiction of Board.

The words "recoverable as an arrear of land revenue" should be given their ordinary English meaning, that is to say, to treat them as words of description describing what could conceivably happen. Looked at from this point of view, the definition means that if the debt could be recovered in conceivable circumstances as an arrear of land revenue, then it is excluded from the definition. Courts are not then to look to the point of time, or to the remedy but to the nature of the debt, and that is what the definition aims at. Looked at from that point of view, it is clear that a decree for arrears of **theka jama** falls within the exclusion though under S. 157, C. P. Land Revenue Act, it is recoverable as arrears of land revenue, provided certain steps are taken and provided they are taken within certain

time. It follows that the Debt Conciliation Officer has no power to include it within the purview of his proceedings. A.I.R. (Vol. 28) 1941 Nag. 161=1941 N.L.J. 150=195 Ind. Cas. 522.

——S. 2 (e)—Debt—Final foreclosure decree whether debt of record.

A final foreclosure decree is not a money-decree and cannot be regarded as a debt of record so that the decree is not a debt at all. The old debt has merged in the decree and there is accordingly no debt left which can confer jurisdiction on a Debt Conciliation Board despite the definition of the term "debt" in the C. P. Debt Conciliation Act, S. 2 (e). A. I. R. (Vol. 27) 1940 Nag. 42=1939 N.L.J. 451=189 Ind. Cas. 178.

——S. 2 (e)—Debt—Liability for a cash payment under a decree.

The definition of 'debt' in S. 2, Cl. (e), C. P. and Berar Debt Conciliation Act, is wide enough to include any liability for a cash payment under a decree and the decree-holder entitled to realise such amount due is a creditor.

In a suit for partition, one **G** obtained a decree against **B** and his brothers who applied to the Debt Conciliation Board for a settlement of their debts including the sum due to **G** as outstanding under the decree. The decree had been by then transferred to **P** who failed to appear before the Board and submit a statement of the debts due to him:

Held, the dues amounted to a debt which must be deemed to have been discharged and it was not open to **P** to take out execution to recover it. A.I.R. (Vol. 23) 1936 Nag. 145=I.L.R. (1937) Nag. 76 =165 Ind. Cas. 412 (1).

——S. 2 (e)—Debt does not exclude arrears of rent. 1938 N.L.J. 360.

——S. 2 (e)—'Debt' whether includes liability that may be found due on taking accounts.

It is clear from the definition of 'debt' in S. 2 (e), that unless any liability becomes "payable", it does not become a debt. A suit for village profits is primarily for rendition of accounts by the agent to the principal. The liability to render accounts becomes a debt when it is ascertained and becomes payable after such ascertainment. Where it is not proved that the parties were agreed as to the exact sum due by one to the other, the liability merely to render account of village profits could not be any basis for conciliation. Nor could the Board have jurisdiction to compel the lambardar to render accounts, which is a matter purely within the jurisdiction of the Civil Courts. (1937) 167 Ind. Cas. 843=19 N. L. J. 16.

——S. 2 (f)—Jurisdiction of Board—Inquiry by Civil Court.

If the Board had no jurisdiction to try to effect a settlement, all proceedings before it would be completely invalid, and the Civil Courts would have jurisdiction to inquire whether those proceedings were invalid for want of jurisdiction, but if the Board had jurisdiction to attempt to effect a settlement, then the Civil Courts would not have jurisdiction to inquire whether that jurisdiction was properly exercised, and the legality or validity of any orders passed in the exercise of the Board's jurisdiction cannot be questioned in any Civil Court on any ground except perhaps fraud. If the Board had no jurisdiction, the fraud would not confer it; but if the Board had jurisdiction, then the fact that it failed to exercise that jurisdiction properly would not entitle the Civil Court to question the legality or validity of the orders passed by the Board in the exercise of its jurisdiction. This applies only to suits or applications for execution. A.I.R. (Vol. 24) 1937 Nag. 259=20 N.L.J. 57=I.L.R. (1938) Nag. 489=170 Ind. Cas. 905.

——S. 2 (f)—Jurisdiction of Board.

The Debt Conciliation Board has no jurisdiction to effect a settlement except between a debtor as defined in S. 2 (f) of the C. P. Debt Conciliation Act and his creditors, and if the Board exercised a jurisdiction which is not conferred by the C. P. Debt Conciliation Act, then all proceedings before the Board and orders passed by it are invalid. A.I.R. (Vol. 24) 1937 Nag. 259=20 N.L.J. 57=I.L.R. (1938) Nag. 489=170 Ind. Cas. 905.

——Ss. 4 and 7-A—Jurisdiction assumed by Board—If can be challenged in Civil Court.

If a body is constituted by statute to exercise certain functions, then a civil Court cannot either interfere with those functions or treat an act done by the body as a nullity unless the Civil Court has some special supervising power, for example by appeal, or unless the body has acted, while doing this act, outside its powers; if that be the case then it is as though the act had been done by a mere man in the street and the Civil Court will treat it as not done.

Even if the jurisdiction of the Civil Court is excluded, the Civil Court has jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

Section 7-A applies where the application is on the face of it an application under S. 4; but where on the face of it, it is an application which could not be made under S. 4, as where the debt of the applicant exceeded Rs. 50,000 then the Board cannot confer on themselves a jurisdiction that they do not possess and the jurisdiction thus assumed by the Board can be challenged in a Civil Court. A.I.R. (Vol. 33) 1946 Nag. 249.

——Ss. 4, 16, 7-A—Jurisdiction of Board—Power of Civil Court to inquire into.

To acquire the character of a debtor within the meaning of that term used in the C. P. Debt Conciliation Act, it is not merely necessary that a person should have tenancy or proprietary land but also that it should be the main source of his maintenance.

The only authority that is competent to decide whether a Special Tribunal has acted strictly within its limits of authority or not would be the Civil Court.

In deciding whether a Special Tribunal like the Debt Conciliation Board has power to deal with any particular application, one has to see whether its act was one which fell within the limits of its jurisdiction or was in the nature of a mere irregularity. If inherently it had no jurisdiction, no amount of consent or acquiescence on the part of any party to or in its jurisdiction would validate its decisions which are in their nature void **ab initio**. Of course if the Tribunal has jurisdiction but it has been exercised with material irregularity, the question is different.

Civil Court sitting in execution has power to enquire into the question whether the Board had jurisdiction to hear an application under S. 4, C. P. and

Berar Debt Conciliation Act, by a person who was not an agriculturist. The Board in such a case has inherently no jurisdiction and the failure of the party to raise the plea of jurisdiction before the Board cannot deprive the Civil Court of its jurisdiction to try the issue which has been raised. A.I.R. (Vol. 25) 1938 Nag. 373=1938 N.L.J. 17=182 Ind. Cas. 81.

——S. 4 — Application under — Procedure—Notice to creditors.

Where an Act requires a tribunal to give notice that it is about to enter upon the determination of point A it cannot effectively decide point A without giving notice and in the absence and behind the back of the person affected. Where the Debt Conciliation Board never effectively admitted the application under S. 4, C. P. and Berar Debt Conciliation Act, the Board cannot act thereafter as if it had admitted the application, without giving notice to the creditor and hearing his objections. A.I.R. (Vol. 29) 1942 Nag. 3 =1941 N.L.J. 220=I.L.R. (1941) Nag. 732=198 Ind. Cas. 262.

——S. 4—Purchase of one acre of land within jurisdiction of Board to be eligible for making application for settlement of debt is not a fraud. There is nothing in the Debt Conciliation Act to suggest that persons owning one acre of land are incompetent to apply for settlement; nor is there anything to prevent a man from purchasing land in order to acquire the necessary qualifications to make such an application. 1938 N.L.J. 235.

——S. 4, Proviso—'Prescribed', meaning of.

Where, as in S. 4, Proviso, C. P. and Berar Debt Conciliation Act, the word 'prescribed' is used simpliciter in a context which makes it perfectly easy to do the prescribing by rules, 'prescribed' must have its defined meaning of 'prescribed by rules.' A.I.R. (Vol. 28) 1941 Nag. 226=I.L.R. (1941) Nag. 279=1941 N.L.J. 351=200 Ind. Cas. 715.

——S. 6—Under S. 6 of the Debt Conciliation Act, the application of the debtor is not to be deemed as a statement of the amount admittedly due but of the amount claimed. The debtor comes to the Board with a view to having his liability cut down and it cannot be inferred that there is any promise to pay anything or any admission of liability for anything. A.I.R. (Vol. 28) 1941 Nag. 95=1941 N.L.J. 134=194 Ind. Cas. 120.

——S. 7—Notice not issued—Board's decisions are not final.

Where notice under S. 7 is not given, the proceedings must be treated as if the application has never been admitted. The Board's subsequent decisions are not final. A.I.R. (Vol. 31) 1944 Nag. 235=I.L.R. (1945) Nag. 260=1944 N.L.J. 220.

——S. 7 (1), Proviso—'At any time.'

It is not correct to say that the words 'at any time' in S. 7 (1), Proviso must mean any time before the Board has accepted the application. A.I.R. (Vol. 28) 1941 Nag. 226=I.L.R. (1941) Nag. 279=1941 N.L.J. 351=200 Ind. Cas. 715.

——S. 7 (2)—Failure to issue notice—Proceedings before Board—If void.

The notice under S. 7 (2) of the C. P. Debt Conciliation Act is not the **sine qua non of the** admission of the application, and the failure to issue such notice cannot, therefore, render the proceedings of the Board null and void. I.L.R. (1948) Nag. 1=A.I.R. 1948 Nag. 211=1948 N.L.J. 181 (F.B.), overruling 1941 N.L.J. 220.

——S. 7-A—Construction.

It is not proper construction of S. 7-A to say that if the application is made not under powers conferred by S. 4 but in flat violation of provisions of that section it is not an application under S. 4. A.I.R. (Vol. 28) 1941 Nag. 226=I.L.R. (1941) Nag. 279=1941 N.L.J. 351=200 Ind. Cas. 715.

——S. 7-A—Jurisdiction of Board—If and when can be challenged in Civil Court.

If the application is on the face of it an application under S. 4 of the Debt Conciliation Act and no objection is taken to the Board's jurisdiction, or if an objection is taken on the ground that the applicant is not a 'debtor' within the meaning of the Act or that he has no holding, land or village in the area for which the Board has been appointed or that his debts exceed Rs. 50,000 and the Board holds otherwise, then clearly the Board's decision on such a point is final and, whether that decision is right or wrong, the Board's jurisdiction cannot be challenged in the Civil Courts. If, however, the Board were to hold that the applicant was not an agriculturist or that his debts exceeded Rs. 50,000 but that it was a deserving case and that they considered they ought to entertain the application, then the jurisdiction thus assumed by the Board could be challenged in a Civil Court; and the position would be the same if the Board assumed jurisdiction, when on the admitted facts it clearly had no jurisdiction. S. 7-A of the Act applies where the application is on the face of it an application under S. 4; but where on the face of it is an application which could not be made under S. 4, then the Board cannot confer on themselves a jurisdiction that they do not possess. I.L.R. (1946) Nag. 557=225 Ind. Cas. 252=1946 N.L.J. 267=A.I.R. 1946 Nag. 249.

——S. 7-A—Retrospective effect—Effect of the section.

Section 7-A inserted by C. P. Act (XV of 1936) has no retrospective effect, but in cases where this section applies, the result of it is that it is not open to any Civil Court to say that the Board had not in fact jurisdiction. A.I.R. (Vol. 24) 1937 Nag. 259=20 N.L.J. 57=170 Ind. Cas. 905.

——S. 7-A—Retrospective operation.

S. 7-A inserted in the Debt Conciliation Act by Act (XV of 1936) has no retrospective operation. A.I.R. (Vol. 25) 1938 Nag. 373=1938 N.L.J. 17 =182 Ind. Cas. 81.

——S. 7-A—Retrospective operation.

In respect of applications made after the enactment in S. 7-A the Civil Court cannot go into the question of jurisdiction but as regards applications pending. 1940 Nag.L.J. 562.

——Ss. 7-A, 12 (1)—S. 7-A not applying—Powers of Civil Court.

S. 7-A, C. P. Debt Conciliation Act, has no retrospective operation; where that section does not apply the Civil Courts have the right to determine whether the facts necessary to constitute the 40 per cent. rule mentioned in S. 12 (1) are present or not. A.I.R. (Vol. 26) 1939 Nag. 136=1939 N.L.J. 142=184 Ind. Cas. 719.

——**S. 7-A, not applying—Jurisdiction of Civil Court.**

When S. 7-A of the C. P. Debt Conciliation Act does not apply, the Civil Courts have jurisdiction to consider whether the Board acted with jurisdiction or not in any particular matter. A.I.R. (Vol. 25) 1938 Nag. 203=174 Ind. Cas. 962.

——**Ss. 7-A, 8—Minor—Procedure to be followed—Minor effectively represented—Omission to record order appointing guardian—Effect.**

Under R. 47 of the Rules framed under the C. P. Debt Conciliation Act, 1933, in the case of a minor, the Board and the parties concerned have to follow the procedure laid down in O. 32 of the C. P. Code. If, however, a minor is effectively represented in the proceedings then a mere omission to record a formal order of appointment of a guardian is an irregularity in procedure and the proceedings will not be a nullity unless prejudice to the minor is shown by reason of that defect in procedure.

A minor cannot be said to be properly represented unless there has been a proper and formal order of appointment. Such orders cannot be made behind the back of the proposed guardian. It is necessary in all such cases that the guardian should consent to it and, therefore, unless the Court is satisfied that the person mentioned is ready and willing to accept the office of guardian, mere notice to appear, which is ignored, would not be effective in securing the representation of a minor. A.I.R. (Vol. 25) 1938 Nag. 203=174 Ind. Cas. 962.

S. 8—

Synopsis.

1. Application by one of debtors.
2. Notice to creditors.
3. Submission of accounts by post.
4. Minor creditors.
5. Discharge of debt.
6. Application for revival of debt.

1. Application by one of debtors.

——An application by one of two debtors cannot refer to the liability to discharge a debt of a debtor who has not applied. (1937) 20 N.L.J. 25.

2. Notice to creditors.

——**S. 8**—Notice to manager of joint family for submission of accounts is sufficient. Statement of each brother is not necessary. 1939 N.L.J. 225.

——**Ss. 8, 4 and 6, Rr. 15 and 16—Must be read together.**

Rr. 15 and 16 framed under the Act are to be read side by side with Ss. 8 (1), 4 and 6 of Act. General notice under R. 16 is really a notice only to those creditors whose names are mentioned in application. The omitted creditors are not affected. They are entitled to a decree under C. P. Code for whole claim and for immediate payment. 1938 N.L.J. 141.

——**S. 8, Rr. 16, 17—Non-compliance with provisions—Creditor is not bound to file statement.**

The provisions of S. 8 (1) are mandatory. If there has been no compliance with the provisions of the section or Rr. 16 and 17, framed under the Act, there is no statutory obligation cast upon a creditor to file a statement of debts owed to him by the debtor and the failure to do so would not entail the consequences stated in S. 8 (2). A.I.R. (Vol. 31) 1944 Nag. 235=I.L.R. (1945) Nag. 260=1944 N.L.J. 220.

——**S. 8, Rr. 16 and 17—Publication without attempt to serve personally—Service is not authorised.**

Under the rules, personal service on the creditors has to be effected either by tendering or delivering a copy of the notice or sending such copy by registered post to the creditor. If service in the manner aforesaid cannot be made, then it may be affixed at his last known place of residence. Under S. 8 the Board has no option either to serve the notice or to issue a proclamation. Personal service is the rule and in case personal service cannot be effected then a substituted service is made. Without trying to serve the creditors it is not competent for the Debt Conciliation Board to publish the notice. Such publication is not authorized. A.I.R. (Vol. 31) 1944 Nag. 235 =I.L.R. (1945) Nag. 260=1944 N.L.J. 220.

3. Submission of accounts by post.

——**S. 8**—Submission of accounts by post is sufficient. 1939 N.L.J. 225.

4. Minor creditors.

——**S. 8**—Rules under Act, R. 47—Board must follow procedure laid down in O. 32, C. P. Code—Failure would render proceedings null and void. A.I.R. (Vol. 31) 1944 Nag. 235=I.L.R. (1945) Nag. 260=1944 N.L.J. 220.

——**S. 8 (2) and R. 47**—Formal order of appointment of guardian not made—Minor creditor effectively represented by co-proprietor of firm—**Held**, that no prejudice was caused on account of want of formal order and the proceedings were not void. 1940 N.L.J. 256.

——**S. 8—Due notice to minor creditor and guardian—Board and debtor failing to appoint proper guardian—Effect.**

Where after due notice to minor creditor and his guardian the Board and the debtor failed to have a proper guardian appointed, the proceedings are initially illegal and if this has resulted in failure to submit a statement of debt due to minor, the minor is gravely prejudiced. In such a case the minor is entitled to a declaration in Civil Court that the proceedings are null and void. A.I.R. (Vol. 26) 1939 Nag. 277=1939 N.L.J. 472=I.L.R. (1939) Nag. 697=185 Ind. Cas. 418.

——**S. 8—Application by debtor mentioning mother as guardian of one of three joint promisees—Notice issued to mother ignored—Order discharging minor's share in debt—Held, without jurisdiction.**

Where a debtor made an application to the Debt Conciliation Board and in his application mentioned the mother as a guardian of one of the three joint promisees of a pronote executed by him and the Board issued notice to her for filing statement under S. 8 (1) without making proper and formal appointment, and on such notice being ignored an order was passed under S. 8 discharging the share of debt of the minor:

Held, that there was no representation of the minor and he was prejudicially affected. The action of the Board was without jurisdiction and not a mere irregularity in procedure. A.I.R. (Vol. 25) 1938 Nag. 203=174 Ind. Cas. 962.

5. Dicharge of debt.

——S. 8—Discharge of debt—Not a matter of declaration but a statutory effect.

The discharge comes about automatically, as a result of statutory provision. The Board has no power to issue an order discharging a debt, for such an order has no effect. 1942 N.L.J. 348.

——S. 8—Notice to submit statement within less than two months—Creditor filing statement within two months of service of notice—**Held,** that the debt could not be discharged and the discharge order was without jurisdiction. 1939 N.L.J. 164.

——S. 8—Delay in filing statement—Notices duly served—Warning to creditors to be reasonable as otherwise debts liable to be discharged not improper—**Held,** that conciliation of debts of defaulting creditors who accepted terms offered to them does not amount to condonation of delay in case of creditor who did not accept terms proposed and hence whose debt was discharged. 1940 N.L.J. 252.

——S. 8—Notice issued to creditor ambiguous—Delay presumed to be condoned. 1938 N.L.J. 296.

——S. 8 (2)—Creditor complying with provisions of S. 8 (1)—Discharge of debt.

It is only where the creditor fails to comply with the provisions of Sub-S. (1) of S. 8 that the debt is deemed to have been duly discharged under Sub-S. (2): the Board has no jurisdiction to declare that his debt has been duly discharged if the creditor has complied with the provisions of Sub-S. (1). A.I.R. (Vol. 24) 1937 Nag. 259=I.L.R. (1938) Nag. 489=20 N.L.J. 57=170 Ind. Cas. 905.

——Ss. 8 (1), 15—Debt when duly discharged—Compliance with S. 8 (1)—Claim dismissed—Legality—Suit to recover amount, if barred.

A Debt Conciliation Board has no authority to say that a debt is deemed to have been duly discharged except where the creditor has failed to comply with the provisions of S. 8 (1) of the C. P. and Berar Debt Conciliation Act. There is no provision in the Act under which a Board is entitled to say that the claim is dismissed. When a creditor refuses to accept a reasonable offer, the Board can deal with the matter under S. 15 and where there has been compliance with the provisions of S. 8 (1), the Board cannot say the claim is dismissed. Consequently, where the Board says it has dismissed the claim, a suit to recover the amount is not barred. A.I.R. (Vol. 24) 1937 Nag. 195=I.L.R. (1937) Nag. 530 =174 Ind. Cas. 991 (1).

——Ss. 8, 9—Creditor failing to make statement but producing documents—Effect — Document not in possession of creditor—Order of Board discharging debt.

The statement which is required to be submitted under S. 8, C. P. and Berar Debt Conciliation Act, should be accompanied by the documents bearing upon the creditor's claim, but the penalties for failure to file a statement and for failure to produce the documents are distinct. The debt would be deemed to have been discharged only in case the statement is not filed. That penalty is provided by Sub-S. (2) of S. 8 and its scope is limited strictly to what is required by the creditor to be done under S. 8, Sub-S. (1). The position is that if the creditor fails to make a statement although he may produce the necessary documents, still the Debt Conciliation Board would have the power to declare that all his debts are discharged. On the other hand, if he files a statement but fails to produce his documents the case falls under S. 9, and goes out of the scope of S. 8 and comes within that of S. 9. That section does not authorise the Debt Conciliation Board to declare the debt having been duly discharged when the creditor files a statement but fails to produce the documents. If in such an event as this the Debt Conciliation Board makes an order declaring that the debts have been duly discharged, that order would be obviously beyond their power and consequently, illegal, so as not to affect the jurisdiction of the Civil Court in regard to the matter pending before it arising out of the same transaction. To the extent that the Debt Conciliation Board's order is **ultra vires** it would not be binding on the Civil Court which would, therefore, have full jurisdiction to proceed with the creditor's suit as if the debt had not been discharged.

Section 9 requires a little analysis. It appears from the wording of Sub-S. (3) of S. 9 that it contemplates the case of a creditor who has not filed his suit and it, therefore, would not apply to a case when a suit is actually brought on the basis of the instrument of obligation. Apart from this initial difficulty it cannot strictly be said that the bond is either in the creditor's possession or under his control where it had been filed in Civil Court along with the plaint as he is bound to do as required by the provisions of the C. P. Code. On this point the Civil Courts would be guided not by the order of the Debt Conciliation Board but by the terms of Sub-S. (3) of S. 9 only. Granting for the nonce that Sub-S. ((3) rendered the bond inadmissible in evidence, S. 58 of the Evidence Act which dispenses with the necessity of proof of any matter which is admitted would not preclude the Civil Court from decreeing the creditor's claim. 169 Ind. Cas. 323=20 N.L.J. 21.

——S. 8 (2)—Delay in producing accounts condoned—Discharge of debt.

Where delay in producing accounts or documents is condoned, the debt cannot be discharged under S. 8 (2). (1937) 169 Ind. Cas. 268=20 N.L.J. 29.

——S. 8 (2)—Non-compliance with S. 9 (1), whether discharges debt.

It is not open to the Board to say that the debt was duly discharged under S. 8 (2) merely because the plaintiffs had not, in the opinion of the Board, complied with S. 9 (1). 169 Ind. Cas. 268=20 N.L.J. 29.

——S. 8 (2)—Statement under S. 9 (1) filed—Debt cannot be discharged.

When the statement as required by S. 9 (1) is actually filed, the debt to which the statement referred cannot be declared to have been discharged under S. 8 (2). A statement which is sound in substance though defective in form is not fatal. A. I. R. (Vol. 28) 1941 Nag. 159=1941 N.L.J. 151=199 Ind. Cas. 354.

——S. 8 (1) and (2)—Furnishing of statement —Particulars not furnished—Debts if automatically discharged.

S. 8 (1) of the C. P. Debt Conciliation Act requires no more than the furnishing of a statement of the debts and when that is done, the failure to furnish particulars of the debt cannot have the effect of automatically discharging the debt under S. 8 (2). The latter sub-section makes no mention whatever of the furnishing of full particulars of the debt. I.L.R. (1948) Nag. 441=A.I.R. 1949 Nag. 111=1948 N.L.J. 248.

——Ss. 8 (2), 9—Scope of—Non-submission of account—Debt, whether discharged.

Sub-section (2) of S. 8, C. P. Debt Conciliation Act, refers to a debt of which a statement is not submitted. It does not apply to a case of non-submission of accounts where there is no statutory provision for discharge of the debts.

An order of a Debt Conciliation Board was as follows: "Creditor was duly served with a notice under S. 8 (1), Debt Conciliation Act, on January 23, 1937. The accounts were due by September 23, 1937. C submitted accounts on February 2, 1938. There is no explanation for not submitting accounts by the due date. The creditor also refuses to make a settlement on any terms whatsoever. Certificate will be issued against him under S. 15 (1), Debt Conciliation Act. He has a claim of Rs. 7,454-0-0." It was contended by the debtor that the debt must be considered to have been discharged under this order:

Held, that the reference in the order was to the non-submission of accounts and not to the submission of the statement of debts owed to the creditor by the debtor. Such a statement of debtors was not an account. If the statement of debt itself was submitted late, that late submission was condoned by the Board and no debt could, therefore, be deemed to be discharged. A.I.R. (Vol. 30) 1943 Nag. 215=1943 N.L.J. 156=I.L.R. (1943) Nag. 268=205 Ind. Cas. 606.

——S. 8 (2)—Mortgagor appearing before Board and noticing mortgagee—Mortgagee not appearing—Debt extinguished under S. 8 (2) —Plaintiff in his suit against mortgagee attaching debt under Civil P. C. (Act V of 1908), O. 21, R. 46, before the commencement of conciliation proceedings—Effect of attachment—Debt, if also extinguished against plaintiff.

Attachment under O. 21, R. 46, Civil P. C., creates no new title. The attaching creditor only obtains certain negative rights which are limited in scope. Section 64 of the Civil P. C. sets out those limits. Under it, certain dealings are void against claims enforceable under the attachment if they are made or done contrary to the attachment. Where there has been a statutory extinction of the debt under S. 8 (2), C. P. and Berar Debt Conciliation Act, neither S. 64 nor any other section covers such a case. Section 64 does not apply. It is restricted to private transfers of, and private dealings with, the property attached and does not extend to involuntary transfers or other consequences which ensue **ad invitum** the parties because of a statutory enactment.

Order 21, R. 46 (1) (i) does not provide any penalty for non-observance of its conditions. All it says is that in the case of a debt the creditor shall be prohibited from recovering the debt, and the debtor from making payment, without an order from the Court. In the case of an extinction of debt under S. 8 (2), C. P. and Berar Debt Conciliation Act, neither money nor its equivalent pass hands, but statute intervenes and extinguishes the debt before the money passes hands. Order 21, R. 46 (1) (i) does not apply.

The mortgagor went before the Debt Conciliation Board and named the mortgagees as his creditors in respect of a certain debt. They were noticed but did not put in their statement of claim within the time specified and so the debt was extinguished under S. 8 (2) of the Debt Conciliation Act. The plaintiff (a decree-holder against the mortgagees) had attached under O. 21, R. 46 the debt before the Debt Conciliation proceedings commenced. The contention of the plaintiff was that after that neither the mortgagor nor the mortgagees had any right to conciliate. All rights to the debt thereafter resided in the plaintiff and aside from paying the mortgage money to him the mortagagor's only other right was to deposit the sum in Court under O. 21, R. 46 (3). Therefore, the Board had no jurisdiction to deal with this debt in his absence, and consequently, he not having been noticed, S. 8 (2) of the Debt Conciliation Act was not attracted:

Held, that the attachment did not vest the plaintiff with any right, title or interest in the debt except the negative right of seeing that it was not paid (except into Court) without an order of the Court. Consequently, until the plaintiff purchased at the auction and thus got title he could not have been noticed by the Debt Conciliation Board, nor could he have appeared and offered to conciliate the original mortgagees' claim. He had no **locus standi** at that stage.

Held, further the mortgagee was not prevented from settling with his debtor, nor the debtor with him. Both S. 64 and O. 21, R. 46, are limited, so far as debts are concerned, to their payment and not to their settlement. Therefore, the debtor and the creditor could have effected a conciliation before the Board though nothing could have been paid under the agreement except into Court, or with the sanction of the Court. A.I.R. (Vol. 29) 1942 Nag. 36=I.L.R. (1942) Nag. 691=1941 N.L.J. 593=198 Ind. Cas. 665.

——S. 8 (2)—Unverified written statement—No objection taken—No opportunity to amend—Irregularity.

On the question whether an unverified written statement is fatal under S. 8 (2), there is no doubt that the Act is not very clearly worded and that it is possible to take either view. The Act is a harsh one, and in so far it effects a departure from the ordinary law it ought to be strictly construed and construed in favour of the subject who relies upon the ordinary laws of the land. Every irregularity in the statement cannot be held to invalidate it and thus bring into operation the very harsh provision of S. 8 (2). It must, therefore, be a question for decision in every case whether the irregularity complained of is so fatal as to go to the root of the matter and make the statements in point of law no statement at all. That is the ordinary rule which is followed in the Civil Courts in respect of the provisions of the Civil P. C., even where the Code employs language which is mandatory as the language in S. 9-A. It has, however, never been doubted that an unverified plaint is not a nullity; it has never been doubted that

the defect, if discovered in time, can be cured; and it has never been doubted that a decree passed on the basis of such a plaint when not cured, is not a nullity; that is to say, the plaint even though not verified is a valid document. The same rule of interpretation should be applied in the case of the Debt Conciliation Act especially when the Act is a harsh one, taking away rights and privileges which the ordinary law confers.

If no objection is taken at the time and the matter is allowed to proceed on the basis of the unverified statement and the party concerned is afforded no opportunity of setting the irregularity right, then, the statement should be regarded as complying substantially with the provisions of S. 8 (1) in exactly the same way as a plaint would in similar circumstances be regarded as complying substantially with the provisions of the Civil P. C., even though not verified. A.I.R. (Vol. 28) 1941 Nag. 249=I.L.R. (1941) Nag. 428=1941 N.L.J. 250=199 Ind. Cas. 427.

——**S. 8**—Section 8 must be read along with S. 9-A—Statement without signature or verification as prescribed is not in proper form—Board can give time for amendment—Civil Court cannot interfere with order of discharge which is technically correct. 1939 N.L.J. 171.

——**Ss. 8 (2) and 16—Debt contracted in Bombay discharged under—Such discharge is no answer to suit filed in Bombay to recover the debt.**

Where questions arise as to whether the incidents of a contract should be governed by the law of one country or of another, the general rule is that all the rights and incidents arising under the contract are governed by the proper law of the contract, and the law of the contract is the law of the place where the contract was made. Where the law of one province of British India is distinct from the law of another province, the two provinces must be regarded for the purposes of this rule as foreign countries **inter se**. Consequently, where a debt contracted in Bombay Presidency has been declared to be discharged under C. P. Debt Conciliation Act, this discharge is no answer to a suit filed in a Court in Bombay Presidency to recover the debt. A.I.R. (Vol. 27) 1940 Bom. 362=42 Bom.L.R. 873=I.L.R. (1940) Bom. 799=191 Ind. Cas. 653.

——**S. 8 (2)**—Decree in favour of two persons—Judgment-debtor applying to Debt Conciliation Board—Notice issued only to one—Debt discharged under S. 8 (2)—Other decree-holder applying for execution of full decree—**Held**, that only the portion owing to the decree-holder on whom notice was not served by Debt Conciliation Board could be recovered in execution, and not the whole decretal amount. 1938 N.L.J. 361.

——**Ss. 8 (2), 15 (3)—Principal debtor and surety—Debtor going before Board—Statement by creditor giving out certain debt but declaring that he could recover it from surety—Effect of—Whether can recover debt from surety—Contract Act (IX of 1872), S. 126.**

The liability of the surety, though distinct, postulates the existence of the liability of the principal debtor. The surety undertakes this obligation at the request, express or implied, of the principal debtor. It is because the surety pays the principal debtor's debt that he is entitled to enforce the debt against the principal debtor after he discharges it. When the surety seeks his remedy against the principal debtor, he does it in respect of the same debt as the one owed by the principal debtor to the creditor. It is clear that the debt must exist although the creditor may choose to enforce his remedy against the surety only to the exclusion of the principal debtor. Under S. 8 (2) of the C. P. and Berar Debt Conciliation Act every debt of which a statement is not submitted to the Board in compliance with the provisions of Sub-S. (1) shall be deemed "for all purposes and all occasions" to have been discharged. Where a creditor declares a certain debt in his statement but that declaration is not made for settlement of the debt but to intimate that it should not be debt to recover but I do not wish it to be settled" and maintain nevertheless that the debt subsists in the face of S. 8 (2) of the Act. The words "for all purposes and all occasions" cannot be overlooked and they, confronting the creditor, make it impossible for him to say that the debt exists for the purpose of its being enforced against the surety of debtor. The original debt cannot be regarded as subsisting. Granting for once that it subsists it cannot be overlooked that under S. 15 (3) of the Debt Conciliation Act, the surety's remedy is very substantially impaired. The plaintiff by lifting the burden of the debt off the shoulders of the principal debtor and laying it on those of the surety, cannot shift his own disability entailed by the Debt Conciliation Act on the surety, in an aggravated form.

The special authority, viz., Debt Conciliation Board has been created to scrutinise the contracts of debtors and effect equitable settlement of the debt irrespec- of the terms of the contracts. The settlement will be of no effect unless all the debts owed by a debtor are covered by it. It is, therefore, essential that every debt due by the debtor should be brought to the notice of the Board. The Insolvency Act exempts the debtor from personal liability and restricts the creditor's remedy to his property whereas the Debt Conciliation Act protects both the person and the property of the debtor from the attacks of the creditor and cripples him by demolishing his fortifications of contract, although this result is attained by his concurrence induced by indirect compulsion. A.I.R. (Vol. 25) 1938 Nag. 413=1939 N.L.J. 150=I.L.R. (1939) Nag. 175=176 Ind. Cas. 686.

——**S. 8**—Decree-holder applying for execution of decree—Judgment-debtor delivering property to avoid attachment—Applying to executing Court for restoration of property on ground of debt being discharged by Board—Decree-holder contending no knowledge—Creditor proved to have knowledge—Property should be restored. 1938 N.L.J. 233.

——**S. 8 (2)—Order discharging debt—Civil Court can enquire whether conditions for discharge were satisfied.**

A legal fiction is limited to the purposes indicated by the context and cannot be given a larger effect. Since the order of discharge is automatic the Civil Courts have jurisdiction to decide whether the conditions have been fulfilled which will bring into operation S. 8 (2). A.I.R. (Vol. 31) 1944 Nag. 235=I.L.R. (1945) Nag. 260=1949 N.L.J. 220.

——S. 8 (2)—Order discharging debt—Jurisdiction of Civil Court to question.

In the matter of claims in respect of which a certificate of discharge has been issued under S. 15 (1), C. P. Debt Conciliation Act, by the Board, that the debt stood discharged under S. 8 (2), the Civil Court has in each case to determine whether in fact the matters which bring the provisions of S. 8 (2) into operation were present or not. If they were present then the discharge is automatic, if they were not present then no order of the Board purporting to discharge the debt for the reason given in S. 8 (2) is binding on a Civil Court. The operation of S. 8 (2) is independent of the Board and is automatic. No question of the Board's jurisdiction to determine whether the matters which S. 8 requires are present or not arises. It is for the Civil Court to determine when the matter comes before it whether the facts which bring S. 8 (2) into play are present or not. It is no part of the Board's business to discharge debts under S. 8 (2). A.I.R. (Vol. 28) 1941 Nag. 249=I.L.R. (1941) Nag. 428=1941 N.L.J. 250=199 Ind. Cas. 427.

6. Application for revival of debt.

——S. 8 (2), Proviso—Creditor's debt discharged—Application for revival lies to Debt Conciliation Board or Civil Court if suit or execution proceedings about the debt are in progress. Independent application paying for revival cannot be filed. 1939 N. L.J. 62.

——S. 8—Mere placing on file statement of account by creditor after prescribed time does not amount to condonation of delay—Debt Conciliation Board dismissing application for revival of debt holding that no good cause is shown—Creditor is debarred from approaching Civil Court for revival of the debt on same ground. 1940 N.L.J. 256.

——S. 9—See also S. 8—Document not produced with statements but later—Fact of late production endorsed on document by Chairman—Civil Court, if can admit document.

S. 9 of the C. P. and Berar Debt Conciliation Act enacts in a mandatory manner that along with the statement of debts furnished under S. 8 the original documents on which the creditor relied together with their true copies should be filed by the creditor. There is a proviso added to this section by Act (XXXVIII of 1935), which gives a description to the Board to order production on a date fixed for the purpose if it is satisfied that the creditor was for good and sufficient cause unable to produce such documents along with the statement. This clearly shows that it is the duty of the creditor who is not in a position to produce the document along with the statement of debts to bring that fact to the notice of the Board and to satisfy the Board that he had good and sufficient cause for not producing them along with the statement of debts. S. 9 (3) of the Act gives no discretion to the Civil Court to see whether the creditor could comply with the provision of S. 9 (1) or not. It says that if the document was not produced as required by Sub-S. (1) it shall not be admissible in evidence against the debtor in any suit brought by the creditor or by any person claiming under him. There is no proviso added to Sub-S. (3). There is a proviso to Sub-S. (1) and that proviso only entitles the Board to look into the circumstances under which the original documents were not produced by the creditor along with the statement of debts. The provisions of S. 9 cannot be waived. The mere fact that conciliation proceedings went on for a long time after the day on which the documents had to be filed would not mean that the provision of law was held to be complied with or that the Board waived compliance with that provision, if the document is produced after the day on which it should have been produced. The mere fact that the proceedings were pending for a long time in spite of the fact that the particular creditor had not filed the original document cannot be an indication either of production of the document in time or of waiver by the Board. A.I.R. (Vol. 30) 1943 Nag. 151=1943 N.L.J. 97=I.L.R. (1943) Nag. 259=207 Ind. Cas. 64.

——S. 9—Admission by debtor, of agreement to pay sum due on bond.

Where there is an admission by the debtor of an agreement to pay the sum due on a bond, it is not necessary to prove the bond. Therefore S. 9 of the Debt Conciliation Act does not operate. That section does not declare that no suit could be brought on the debt. It merely states that some documents cannot be proved. A.I.R. (Vol. 28) 1941 Nag. 95=1941 N.L.J. 134=194 Ind. Cas. 12.

——S. 9—Non-compliance with S. 9 (1).

It is not open to the Board to say that the debt was duly discharged under S. 8 (2) merely because the plaintiffs had not, in the opinion of the Board complied with S. 9 (1). 169 Ind. Cas. 268=20 N. L.J. 29.

——S. 9 (1)—Statement under—Creditor's son duly authorised to verify pleadings making statement—Defect, if fatal.

The statement of debts should conform to the procedure relating to pleadings as laid down in Rr. 14 and 15 of O. 6 of the C. P. Code, which requires the pleadings to be signed and verified. Where a party pleading is by reason of absence or any other good cause unable to sign the pleading, it may be signed by any person duly authorised by him to sign the same or to sue or defend on his behalf. But the omission by a party to sign his pleadings is a defect which can be cured even in appeal. Creditor's failure to sign the statement of account under S. 9 (1), C. P. and Berar Debt Conciliation Act is only a defect of procedure which would not be fatal to the statement itself. The statement under S. 9 (1) of the Debt Conciliation Act would be nonetheless a statement because of the absence of the creditor's signature. Where the statement was signed by the son of the creditor who held the power of attorney from his father to sign and verify pleadings and he was moreover a member of the joint family along with his father and was virtually a party to the proceeding his signature would be as good as the signature made by his father, specially when he signed the statement under the direction of his father. When the statement as required by S. 9 (1) is actually filed, the debt to which the statement referred cannot be declared to have been discharged under S. 8 (2). It may be conceded that S. 9-A should be read along with S. 9 (1). S. 9-A simply lays down a rule of procedure. Any defect of procedure cannot affect the substance of a party's claim. The Board exceeds

their jurisdiction in making the declaration under S. 8 (2) of the Debt Conciliation Act in the face of the statement which they actually receive, a statement which is sound in substance though defective in form. The right procedure for the Board in such a case is to give an opportunity to the creditor to rectify the defect and not to deprive him of his civil right.

Under O. 16, R. 6, even a witness who is summoned merely to produce a document is deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same. A letter of authority for the production of a certified copy of a public document like a final decree is altogether unnecessary. A.I.R. (Vol. 28) 1941 Nag. 159=1941 N.L.J. 151=199 Ind. Cas. 354.

——S. 9 (1), (3)—Creditor not producing mortgage deed and pronote which was part of consideration—Order excluding both documents —Effect of.

It is the object of the C. P. and Berar Debt Conciliation Act to effect a settlement between a debtor and his creditors so that the debtor can start afresh and the creditors be paid rateably. It is desirable that such settlements should be effected as speedily as possible and so somewhat drastic provisions have been inserted in the Act. If a creditor was allowed to evade them by the simple process of refusing to produce his documents, it would render these provisions largely nugatory. Of course the Act has to be construed according to its tenor and the undesirable consequences that might ensue cannot be allowed to influence the plain meaning of unambiguous provision, but Courts are naturally reluctant to bring about such a result unless forced to do so.

Under S. 9 (1) of the C. P. and Berar Debt Conciliation Act, every creditor submitting a statement of the debts owed to him has at the same time to produce all documents on which he relies in support of his claim. Where the promissory note is relevant to prove a part of the consideration for the mortgage, it should be produced when the statement is submitted. If it is not produced, the Debt Conciliation Officer has power to act under S. 9 (3) and where he does so, the effect of his order is to exclude both the mortgage-deed and the promissory note from evidence in any suit brought by the creditor against the debtor. That order cannot be challenged in a subsequent suit which effectually precludes a suit upon the mortgage and also precludes a suit upon the promissory note assuming such a suit would lie.

But the Debt Conciliation Act does not extinguish the liability in such circumstances; all it says is that these documents shall not be receivable in evidence. The rule that if a plaintiff's claim upon a promissory note fails, he can usually fall back upon the original consideration and sue upon that, provided it is otherwise open to him to do so might apply in certain cases of mortgage where the mortgage fails as a mortgage but it cannot so long as the mortgage is still alive. So long as the mortgage is in being as a mortgage, it is clear, the rights and liabilities of the parties must be worked out on the basis of the mortgage and of nothing else.

It is not open to a party to a contract to destroy it by some unilateral act on his part. If his opponent does so and he exercised his option of avoiding it, that of course is another matter, and so also if the law avoids it for him or renders it inoperative, but so long as the later contract is alive and in full force it is impossible to allow the party to it to ignore it and fall back upon an earlier transaction simply because it suits him to do so.

The mere failure of the other side to carry out his undertaking on the second contract does not destroy it and so unless the second contract expressly or impliedly makes it part of the bargain, that this in itself will give the plaintiff a right to fall back upon an earlier transaction which the later replaces and discharges, he cannot do so. The position is entirely different when the later contract ceases to exist as a contract whatever the reasons. A.I.R. (Vol. 25) 1938 Nag. 251=I.L.R. (1939) Nag. 674=1938 N. L. J. 276=177 Ind. Cas. 698.

——S. 9-A—Rule of procedure.

Section 9-A should be read along with S. 9 (1). Section 9-A simply lays down a rule of procedure. A.I.R. (Vol. 28) 1941 Nag. 159=1941 N.L.J. 151 =199 Ind. Cas. 354.

——S. 12—Agreement registered under—When may be avoided.

The only ground on which an agreement having the force of a decree registered under S. 12 of the C. P. Debt Conciliation Act by a Board with initial jurisdiction can be set aside is the ground of fraud. I.L.R. (1947) Nag. 985=A.I.R. 1948 Nag. 150= 1948 N.L.J. 65.

——S. 12 (2)—Registration of agreement—Effect.

On the registration of an agreement under S. 12 the agreement takes effect as if it were a decree of a Civil Court. Though the agreement is not a decree, it is to be treated as a decree. Under S. 13 (1), the amount payable under such a decree is to be recovered as an arrear of land revenue. Sections 12 (2) and 13 (1) thus import a legal fiction in order to enable in the one case to execute an agreement as a decree and in the other case to recover the amount payable under the agreement as if it were an arrear of land revenue. A.I.R. (Vol. 33) 1946 Nag. 30 =I.L.R. (1945) Nag. 975=1945 N.L.J. 431.

——Ss. 12 and 13—"Decree".

The term 'decree' in S. 12 (2) is different from the term 'decree' in S. 13 (4). These are 'decrees' by a fiction introduced in the Act. Where the analogy arises by a legal fiction only it must be limited to the purposes indicated by the context and cannot be given a larger effect. A.I.R. (Vol. 33) 1946 Nag. 30=I.L.R. (1945) Nag. 975=1945 N.L.J. 431.

——S. 12—Agreement under—Suit for specific performance not necessary—Such suit can be converted into execution proceedings.

Where a settlement effected by an agreement duly registered in accordance with the provisions of the Debt Conciliation Act involves the promise to transfer property in settlement of debt and the debtor avoids the execution of a sale-deed, the primary remedy open to the creditor is to treat the agreement as a decree of a Civil Court. A suit, however, brought for specific performance of the agreement falls directly within S. 47 (2) of the Civil P. C. Even if it did not owing to the extremely difficult construction of the Debt Conciliation Act and the doubt which could be left in any reasonable mind as to what

to do where such an agreement was not carried out, the Court should, if it were impossible to convert the proceedings into a proceeding in execution of that statutory decree, then have to exercise its inherent powers and convert the mistaken suit into the necessary proceeding given to effect to the statutory decree created by the provisions of the Debt Conciliation Act. The Court must do this irrespective of the period of limitation. A.I.R. (Vol. 27) 1940 Nag. 92=1939 N.L.J. 500=188 Ind. Cas. 743.

——Ss. 12 and 13—Agreement under Act executable as decree of Civil Court—Certificate not necessary.

An agreement under the Act on registration takes effect from the date of registration as if it were a decree of a Civil Court under S. 12 (2), and is executable as a decree. Section 13 (1) which gives the creditor a right to apply to the revenue authorities to recover any defaulted amount as an arrear of land revenue, merely gives a creditor an alternative remedy, and S. 13 (4) which provides in effect for a decree for the outstanding debt is not irreconcilable with S. 12 (2) which provides in effect for a decree for the payment of instalments.

Under the agreement under the Act the mortgage amount was reduced and made payable by 12 annual instalments subject to the condition: "In default of two instalments condition of foreclosure of the field Survey No. 4." The instalments of 1936, 1937 and 1938 were paid, though not punctually; the instalment of 1939 was not paid; the instalment of 1940 was recovered by the Deputy Commissioner under S. 13 and the instalment of 1941 was not paid. The mortgagee contending that there had been a default of two instalments, applied to the Civil Court to place him in possession of the field or, if it was held necessary, to pass a final decree for foreclosure:

Held, that no certificate under S. 13 (3) was necessary and it was open to the mortgagee to apply to the Civil Court to enforce the agreement as a decree. It was open to the parties to the agreement to agree that the agreement should take effect as a preliminary or a final decree, and therefore the question whether the creditors were entitled to be placed in possession of the mortgaged property straightway or whether a final decree should be passed depended upon what the parties intended.

Held, further, that the mortgagee by his application to recover the instalment of 1940 could not be deemed to have waived the previous default in 1939. The principle contained in O. 2, R. 2, Civil P. C., could not apply because when the mortgagee applied to recover the arrears of 1940 it was no longer open to him to ask the revenue authorities to recover the arrears of 1939 as the time limit of 90 days had long elapsed.

Held, also, that there was no substance in the contention that the defaults in the first three years had not been waived and therefore the application for foreclosure was barred by limitation because the right to claim foreclosure in consequence of those defaults was given up when the mortgagee accepted payment of those instalments. A.I.R. (Vol. 30) 1943 Nag. 324=1943 N.L.J. 467=I.L.R. (1943) Nag. 696=215 Ind. Cas. 106.

——Ss. 12 and 13—Agreement—Default of debtor—Remedy of creditor.

The binding nature of an agreement executed by a debtor and his creditors under S. 12, Debt Conciliation Act, is based on a contract and does not owe its efficacy to any decision of the Board. The agreement is a composite document which settles mutual rights and obligations of the debtor and his creditors. If the debtor fails to discharge his obligation to any of the creditors in accordance with the terms of the agreement the creditor would have to enforce the rights under the agreement in a civil Court to sue for the recovery of the amount payable under the agreement if not paid on the appointed time and to sue for specific performance in case of non-transfer of property on the due date. Sections 12 (2) and 13 (1) of the Act, however, import a legal fiction in order to enable in the one case to execute an agreement as a decree and in the other case to recover the amount payable under the agreement as if it were an arrear of land revenue. If the Deputy Commissioner fails to recover the sum as an arrear of land revenue then the agreement ceases to subsist and a fictional decree comes into existence for the amount payable under the agreement but which had not been paid. A.I.R. (Vol. 33) 1946 Nag. 30=I.L.R. (1945) Nag. 975=1945 N.L.J. 431.

——Ss. 12, 15 (3)—Agreement—Powers of Civil Court.

The Civil Courts have the right to determine whether the special tribunal constituted to oust the jurisdiction of the Courts is acting within the ambit of its powers or not and the Civil Courts must decide whether the facts necessary to constitute the 40 per cent. rule mentioned in S. 12 (1), C. P. and Berar Debt Conciliation Act are present or not. Where it is obvious that the creditors agreeing to the settlement do not represent 40 per cent. of the debts, then the agreement reached is not an agreement under S. 12 at all and it is open to the Civil Courts to point this out. The decision of the Small Cause Court under such circumstances that the execution of the decree of the decree-holder who does not agree to the settlement under S. 12 (1) will not be postponed under S. 15 (3) of the Debt Conciliation Act must, therefore, be upheld. A.I.R. (Vol. 27) 1940 Nag. 268=1940 N.L.J. 261=190 Ind. Cas. 38.

——Ss. 12 and 13 (3)—Agreement with several creditors—One of them obtaining certificate—Effect of.

S. 13 of the C. P. Debt Conciliation Act concerns itself with an application by a single creditor who has been disappointed of his instalment which was agreed to by the agreement mentioned in S. 12. It does not concern itself with the whole of the creditors as a body. Therefore the certificate is granted under S. 13 (3) in respect of what the individual creditor claims and the agreement which ceases to subsist must be interpreted as being only the particular agreement between the particular creditor who applied and the detor. So far as S. 12 is concerned the agreement is certainly one and indivisible, but so far as S. 13 is concerned "the agreement" is to be interpreted as the agreement between the individual creditor and the debtor. I.L.R. (1947) Nag. 150=228 Ind. Cas. 361=1947 N.L.J. 49=A.I.R. 1947 Nag. 177.

——S. 12—Mortgage—Final decree for sale—One of debtors getting his debt scaled—Right of creditor to execute decree.

Final decree for sale obtained—One of the two

judgment-debtors having equal interest in property getting his debt scaled down by Debt Relief Court—Creditors, **held**, entitled to execute decree to the extent of half the decretal amount against property of the other judgment-debtors on condition of realizing only half the amount settled under the scheme from the judgment-debtor whose debt was scaled down. A.I.R. (Vol. 31) 1944 Nag. 241=1944 N.L.J. 240=I.L.R. (1945) Nag. 232=219 Ind. Cas. 248.

——S. 12—Consent obtained of genuine creditors, by setting up fictitious creditors is not valid. Persons resorting to such fraud cannot get the benefit of the Act. 1942 N.L.J. 194.

——S. 12—Rule about 40 per cent. must be applied taking into consideration the extent of debts at time of settlement. In a case where debts owing to certain creditors were discharged under S. 8 (2), the debts so discharged must be left out of consideration while calculating proportion of debt for settlement. 1940 N.L.J. 614.

——S. 12—Scheme of S. 12 is that efforts should be made to arrive at an amicable settlement, that that settlement should be put into form and that that form shall be signed by all parties. It was never contemplated that there should be as many agreements as creditors. 1940 N.L.J. 67.

——S. 12—Scope—Settlement by transfer of land.

Section 12 of the C. P. and Berar Debt Conciliation Act contemplates a settlement by way of payment of money and not by transfer of lands. A.I.R. (Vol. 26) 1939 Nag. 224=1939 N.L.J. 256=I.L.R. (1941) Nag. 464=183 Ind. Cas. 478.

——S. 12—Agreement to satisfy debt by transfer of portion of holding—Creditor's application to Collector for partition does not lie—Civil suit is not maintainable—Agreement before Board takes effect as decree of Civil Court and as such is executable. 1939 N.L.J. 85.

——S. 12 (1)—"Amount", meaning of.

The word "amount" in S. 12 (1), C. P. and Berar Debt Conciliation Act, is used in a wider sense than usual and it includes the total quantity of the debtor's liabilities in cash or in kind. Consequently, the payment of these "amounts" can also be either in cash or in kind. The word "amounts" is not limited to sums of money and both liabilities as well as payments in kind are contemplated. A.I.R. (Vol. 26) 1939 Nag. 227=1939 N.L.J. 218=I.L.R. (1939) Nag. 503=184 Ind. Cas. 864.

——S. 12 (1)—Special oath—Agreement to take special oath takes effect on registration as if it were a decree of Civil Court. (1937) 20 N.L.J. 27.

——S. 13—Agreement registered under S. 12, providing that the decree-holder would recover only from mortgage property—Execution in Civil Court is not barred—Agreement containing extraneous matter and not in prescribed form is not invalid. 1942 N.L.J. 52.

——S. 13—Agreement drawn up under S. 12 (1)—On default in payment, provision for recovery by obtaining decree on mortgage—Remedy of the creditor (mortgagee) is to approach the Deputy Commissioner first for summary remedy for enforcement of the mortgage by means of recovery proceedings and if the Deputy Commissioner fails and certifies accordingly under S. 13 (3), to execute the decree under Sub-S. (4) of S. 13. 1942 N.L.J. 18.

——S. 13—Payment can be agreed to be made in cash or kind—Jurisdiction of Civil Court, when arises.

The settlements contemplated by the C. P. and Berar Debt Conciliation Act, are not restricted in their scope and payment of the debts can be agreed to be made either in cash or in kind, and if the "amounts" due are made payable in cash, then the provisions of S. 13 are attracted and in that case the jurisdiction of the Civil Courts does not arise until the provisions of S. 13 (3) have been complied with, but if the amounts are payable in kind, then the agreement is enforceable as a decree by Civil Courts the moment it is registered. A suit for specific performance of the contract is not necessary. A.I.R. (Vol. 26) 1939 Nag. 227=1939 N.L.J. 218=I.L.R. (1939) Nag. 503=184 Ind. Cas. 864.

——S. 13 (1) merely gives alternative remedy.

Section 13 (1) which gives the creditor a right to apply to the revenue authorities to recover any defaulted amount as an arrear of land revenue, merely gives a creditor an alternative remedy and S. 13 (4) which provides in effect for a decree for the outstanding debt is not irreconcilable with S. 12 (2) which provides in effect for a decree for the payment of instalments. A.I.R. (Vol. 30) 1943 Nag. 324=1943 N.L.J. 467=I.L.R. (1943) Nag. 696=215 Ind. Cas. 106.

——S. 13 (3)—Second certificate—Issue of—Permissibility.

Under S. 13 (3) of the C. P. Debt Conciliation Act, there is no legal objection to the issue of a second certificate. 1947 N.L.J. 169.

——S. 15

Synopsis.

1. Applicability.
2. Sub-S. (1)—Certificate of discharge.
3. Sub-S. (2)—Award of interest.
4. Sub-S. (3)—Postponement of execution of decree.
5. Sub-S. (3)—Waiver of right or benefit.
6. Sub-S. (3)—"Sues"—Meaning of.
7. Sub-S. (3)—Remedy of surety against principal debtor.

1. Applicability.

——S. 15 (1) and (2)—Applicability—Condition.

In order to entitle a debtor to claim the imposition of penalty on his creditor under S. 15 (1) and (2) of the C. P. Debt Conciliation Act, **viz.**, disallowance of costs and interest, the debtor must produce the certificate. The actual issue of the certificate is a **sine qua non** for penalising the creditor. It is not sufficient that an order for the issue of a certificate was made under S. 15. It is the duty of the debtor to apply for the grant of the certificate in the prescribed form and to produce it. If he fails to do so, for whatever reason, he has himself to thank, and cannot have the privilege of an order imposing a penalty on the creditor. I.L.R. (1947) Nag. 131=228 Ind. Cas. 457=1947 N.L.J. 385=A.I.R. 1947 Nag. 201.

——Ss. 15, 21—Applicability—Sale in execution before application under S. 4—Power of trial Court to confirm sale under O. 21, R. 92, Civil Procedure Code.

S. 15 can have no application where after the sale, but before its confirmation, the judgment-debtor put in an application to the Debt Conciliation Board under S. 4. Moreover, the proceedings under O. 21, R. 92, C. P. Code, for the confirmation of a sale already made cannot be said to be proceedings in respect of a debt for settlement of which application has been made, within the meaning of S. 21. Hence neither S. 15 nor S. 21 affects the power of the Civil Court under O. 21, R. 92 of the C. P. Code, to confirm a sale held in execution proceedings when such sale has taken place before an application under S. 4 of the Debt Conciliation Act has been made to the Debt Conciliation Bord. A.I.R. (Vol. 26) 1939 Nag. 282=1939 N.L.J. 283=I.L.R. (1939) Nag. 654=189 Ind. Cas. 118.

2. Sub-S. (1)—Certificate of discharge.

——S. 15 (1)—Grant of certificate—Power of Board.

There is no limitation on the power of the Board to grant a certificate under S. 15 (1), C. P. and Berar Debt Conciliation Act if a fair offer is refused by the creditors during the hearing of an application made under S. 4. Once a certificate has been properly issued during the hearing, it is immaterial whether efforts at amicable settlement are eventually successful or not, and whether the application was or was not dismissed because settlement was not arrived at. A.I.R. (Vol. 31) 1944 Nag. 14=1943 N.L.J. 563 =210 Ind Cas. 405.

——S. 15—Jurisdiction of Board to issue certificate.

All that the Debt Conciliation Board is concerned with is the issue of a certificate after consideration of the conduct of the creditor under S. 15 of the Act. The Debt Conciliation Board cannot be expected to take into consideration whether the conditions implied by the granting of a certificate can in fact he implemented in the Civil Court or not. If it happens that they cannot be implemented, that in no way derogates from the jurisdiction of a Debt Conciliation Board to issue such a certificate. A.I.R. (Vol. 30) 1943 Nag. 215=I.L.R. (1943) Nag. 268=1943 N. L.J. 156=205 Ind. Cas. 606.

——S. 15—Jurisdiction of Board to issue certificate—Debts due to creditors accepting award, less than 40 per cent.

Where the debts due to the creditors who accepted the award do not come to the necessary 40 per cent. Debt Conciliation Board Acts without jurisdiction in issuing certificates under S. 15 and the creditors are entitled to pursue their remedy in a Civil Court in the usual way. A.I.R. (Vol. 26) 1939 Nag. 136= 1939 N.L.J. 142=184 Ind. Cas. 719.

——S. 15 (1) and (2)—Certificate when can be issued—S. 15 (2) when comes into operation.

S. 15 (1) gives the Board power to issue a certificate at any time if the creditor has refused to accept what the Board considers to be a fair offer and it is in no way dependent on the making of an agreement under S. 12; if, for example, there is one creditor and he refuses to accept a fair offer, then the Board can issue a certificate under S. 15 (1). Where such a certificate is issued, Sub-S. (2) comes into force and the Court shall not allow the plaintiff any cost in the suit or any interest on the debt after the date of such certificate in excess of simple interest at 6 per cent. per annum. Sub-S. (3) comes into force only when there is an agreement and in such a case execution of the decree is postponed but that has nothing to do with the disallowing of costs and interest under Sub-S. (2). In such a case S. 15 (2) of the Act applies and not S. 15 (3). A.I.R. (Vol. 27) 1940 Nag. 268=1940 N.L.J. 261=190 Ind. Cas. 38.

——S. 15—Certificate cannot be issued where 40 per cent. debt is not conciliable. 1939 N.L.J. 322.

——S. 15—When a creditor refuses to accept a reasonable offer, the Board can deal with the matter under S. 15 and where there has been compliance with the provisions of S. 8 (1) the Board cannot say that the claim is dismissed. A.I.R. (Vol. 24) 1937 Nag. 195=I.L.R. (1937) Nag. 530=174 Ind. Cas. 991 (1).

——S. 15 (1)—Certificate of discharge—Powers of Civil Court.

In the matter of claims in respect of which a certificate of discharge has been issued under S. 15 (1) by the Board that the debt stood discharged under S. 8 (2), the Civil Court has in each case to determine whether in fact the matters which bring the provisions of S. 8 (2) into operation were present or not. If they were present then the discharge is automatic; if they were not present then no order of the Board purporting to discharge the debt for the reason given in S. 8 (2) is binding on the Civil Court. A.I.R. (Vol. 28) 1941 Nag. 249=I.L.R. (1941) Nag. 428=1941 N.L.J. 250=199 Ind. Cas. 427.

——Ss. 15 and 21—Certificate granted to judgment-debtor—If enures for benefit of surety.

A certificate granted to the judgment-debtor under S. 15 of the Debt Conciliation Act does not enure for the benefit of the surety, and the surety is not entitled to a postponement of execution against him. The liability of a surety and the liability of a principal debtor are separate liabilities. I.L.R. (1946) Nag. 353=225 Ind. Cas. 355=1946 N.L.J. 74=A.I.R. 1946 Nag. 135.

——S. 15 (1)—Debt by member of joint family in individual capacity—Creditor attaching his share in house belonging to family—Debtor dying—Brothers of deceased obtaining certificate under S. 15 (1) in respect of debt of deceased brother—Execution in respect of share attached.

A member of a joint family had incurred a debt in his individual capacity on a bond. He was sued on this bond; a decree was passed against him. In execution of this decree the creditor attached a house. His brothers, three in number, raised an objection to the attachment and succeeded in getting their three-quarters interest in the house released, but the attachment in respect of the debtor's brother remaining quarter share subsisted. After the death of the debtor his brothers made an application to the Debt Conciliation Board in respect of their own family debts some of which were conciliated and an agreement under S. 12 (2) of the Debt Conciliation Act followed, and a certificate under S. 15 (1) of the Act was issued in respect of them. Among these

debts was the debt due by their deceased brothers and this debt fell within the ambit of the certificate under S. 15 (1). When the creditor attempted to carry on with his execution proceedings in respect of the quarter share of the house which he had attached, the executing Court held that the execution could not proceed in view of the certificate granted by the Debt Conciliation Board; but the Court directed that the attachment should continue. In appeal the order was set aside, the Court holding that the debt was not a debt of the three brothers at all, and he ordered the execution case to proceed according to law:

Held, that despite the wide definition of 'debt' in S. 2 of the Debt Conciliation Act, this debt was not a debt of the three brothers at all, and there was no liability on their part to pay the debt at all, since they had not inherited any property from their deceased brother. The interest which their deceased brother had in the family property disappeared on his death except in so far as that interest had been attached.. The brothers, then, had placed before the Debt Conciliation Board a fictitious debt in order to avoid the embarrassment which would arise by the sale of the deceased brother's interest in the attached house, and the issue of a certificate in respect of a debt which was not the debt of the persons making the application to the Debt Conciliation Board was one beyond the Board's jurisdiction and was ineffective in so far as that particular debt was concerned. A.I.R. (Vol. 27) 1940 Nag. 38=1939 N.L.J. 458 =I.L.R. (1941) Nag. 334=194 Ind. Cas. 895.

3. Sub-S. (2)—Award of interest.

——S. 15 (2)—It is unfair to allow maximum rate of 6 per cent. to a creditor who refuses settlement on any terms. 1942 N.L.J. 455.

——S. 15 (2)—Award of interest—Power of Court.

Section 15 (2) does not prevent the Court from allowing interest should it think proper and does not fetter the discretion which S. 34 confers except as to rate. 1941 N.L.J. 591.

——S. 15 (2)—Applicability—Decree payable in monthly instalments carrying interest with default clause—Execution proceedings—Judgment-debtor producing certificate from Board—Order that no interest should run on decree—Propriety.

S. 15 (2) applies only where the credior is suing for the recovery of a debt in respect of which a certificate has been granted. It does not apply where the creditor is applying in execution for the recovery of a decretal debt.

The applicant obtained a decree against the non-applicants for Rs. 472 payable in monthly instalments of Rs. 7 and carrying interest at 6 per cent. per annum with the condition that the entire decretal amount should become exigible on default of three instalments. Later the applicant started execution proceedings to recover Rs. 481-8-0. One of the judgment-debtors produced a certificate from the Debt Conciliation Board showing that the decree-holder had put in a claim before the Board for Rs. 472-11-0, that he had refused to accept a fair offer of settlement and that execution of his decree was, therefore, postponed. On this the lower Court passed an order, that no further interest on the decree should run:

Held, that th Court had no jurisdiction to pass an order altering the decree so as to stop interest. A. I.R. (Vol. 24) 1937 Nag. 120=I.L.R. (1937) Nag. 344=20 N.L.J. 28=169 Ind. Cas. 294.

——S. 15 (2)—Applicability—Debtor producing certificate after filing of plaint but before decree —Penalty in regard to costs and interest.

S. 15 (2) comes into operation not only when the certificate is granted before the institution of the suit but also when it is granted during the pendency of the suit. Consequently under S. 15 (2) the plaintiff creditor is liable to be subjected to penalty in regard to costs of the suit and interest on the debt even in case in which the certificate is produced by the debtor after the filing of the plaint but during the pendency of the suit, that is before the decree is passed. A.I.R. (Vol. 22) 1935 Nag. 43=19 N. L.J. 24=31 N.L.R. 147=155 Ind. Cas. 1032.

4. Sub-S. (3)—Postponement of execution of decree.

——S. 15 (3)—"Such agreement has ceased to subsist," meaning of.

The words "such agreement has ceased to subsist" in S. 15 (3) do not mean "such agreement has ceased to subsist in part."

When according to the terms of the agreement one debtor has been fully paid off before the others the agreement, it may be said, has partly ceased to subsist, **i.e.,** so far as that debtor is concerned. But even in these circumstances the execution of the decree of a creditor against whom a certificate has been granted would sill be held up. 1939 N.L.J. 38.

——S. 15 (3)—Debtor transferring property to creditor under agreement under S. 12—Arrears of municipal taxes subsequently recovered from creditor—Decree obtained by creditor against debtor for amount so recovered—Whether can be executed.

Where in pursuance of an agreement registered under S. 12 (2) of the Central Provinces Debt Conciliation Act a debtor transferred his property to his creditor in satisfaction of his debt and agreed that he would be liable to the creditor if any arrears of municipal taxes due from the property transferred were realised from the creditor, a decree subsequently obtained by the creditor against the debtor for the amount recovered from him as arrears of taxes is hit by S. 15 (3) of the Act, and could not, therefore, be executed until all amounts payable under the agreement had been paid or such agreement had ceased to subsist. Although the liability to pay the arrears of taxes was incurred by the debtor as soon as they became payable before the date of the agreement, the arrears of taxes did not become a debt owing to the creditor until they were recovered from the latter after the registration of the agreement under the Act. I.L.R. (1948) Nag. 606=A.I.R. 1949 Nag. 8.

——Ss. 15 (3) and 12—Creditors entering into settlement not representing 40 per cent. of debt —Decree-holder not agreeing cannot be postponed.

Where the creditors agreeing to the settlement do not represent 40 per cent. of the debts, the agreement

is not an agreement under S. 12 and the execution of the decree of the decree-holder who does not agree to the settlement will not be postponed under S. 15 (3). A.I.R. (Vol. 27) 1940 Nag. 268=1940 N. L.J. 261=190 Ind. Cas. 38.

5. Sub-S. (3)—Waiver of right or benefit.

——Applicability of the rule that any one may renounce a law introduced for his own benefit.

The rule that any one may renounce a law introduced for his own benefit applies only to such right or benefit as is of a personal or private nature and not to one which is created on the ground of public policy or interest or interest of third parties. S. 15 (3) is intended to protect the rights of the creditors in respect of the property incorporated in the agreement reduced to writing under S. 12. A.I.R. (Vol. 32) 1945 Nag. 177=1945 N.L.J. 126=I.L.R. (1945) Nag. 379.

——Ss. 15 (3) and 12 (1)—Agreement in terms of S. 12 (1)—Whole property of S charged with debts of creditor—S has no right or benefit under S. 15 (3) to waive or renounce.

S had applied to the Debt Conciliation Board for settlement of his debts and there was an agreement of amicable settlement in terms of S. 12. The agreement was effected and registered on 12th December, 1938. S executed a surety bond on 2nd April, 1939, in favour of A guaranteeing the debt incurred by one G, A instituted a suit against both G, the principal debtor, and S, the surety, and obtained a consent decree. A sought to execute the decree against S and he raised an objection that the decree should not be executed until all amounts recorded as payable under the agreement used to subsist, S contended that the decree which was passed in favour of A was a compromise decree and as such it had the effect of a waiver of the protection accorded to S by S. 15 (3):

Held, that S had no right or benefit under S. 15 (3) to waive or renounce; the whole of his property was, in effect, charged with the debts of the creditors under the agreement made in terms of S. 12 (1) and S had no right left in him to deal with the property. A.I.R. (Vol. 32) 1945 Nag. 177=I.L.R. (1945) Nag. 379=1945 N.L.J. 126.

6. Sub-S. (3)—"Sues"—Meaning of.

——S. 15 (3)—"Sues for the recovery of a debt", meaning of.

The word 'sues' in S. 15 (3) is not equivalent to the words 'commences a suit.' The words 'sues for the recovery of a debt' include the prosecution of a suit for the recovery of a debt, even if the suit was instituted before registration of the agreement. A. I.R. (Vol. 23) 1936 Nag. 267=I.L.R. (1937) Nag. 37=166 Ind. Cas. 459 (1).

7. Sub-S. (3)—Remedy of surety against principal debtor.

——S. 15 (3)—Surety—Remedy of, against principal debtor.

Under S. 15 (3) the surety's remedy is very substantially impaired. The plaintiff creditor by lifting the burden of the debt off the shoulders of the principal debtor and laying it on those of the surety, cannot shift his own disability entailed by the Debt Conciliation Act, on to the surety, in an aggravated form. A.I.R. (Vol. 25) 1938 Nag. 413=1939 N. L.J. 150=I.L.R. (1939) Nag. 175=176 Ind. Cas. 686.

——S. 16—Construction.

S. 16 ousts the jurisdiction of a Civil Court and has to be strictly construed. A.I.R. (Vol. 31) 1944 Nag. 235=I.L.R. (1945) Nag. 260=1944 N. L.J. 220.

——Ss. 16 and 8—Debt discharged by Board—Application for revival—Personnel of the Board changed—Application dismissed—Creditor can prove in Civil Court that discharge was not legal. A.I.R. (Vol. 31) 1944 Nag. 235=I.L.R. (1945) Nag. 260 =1944 N.L.J. 220.

——S. 16—Creditor of unsound mind—Omission to appoint guardian—Notice served on lunatic—Creditor's decree debt discharged—Discharge is ineffective and execution proceeding is not barred. 1941 N.L.J. 653.

——S. 16—Civil Court can enquire whether Board exceeded jurisdiction—But will not interfere if proceeding is within Board's jurisdiction. 1940 N.L.J. 256.

——S. 16—Decree-holder alleging that debt was bogus—Board holding it genuine—Question if can be re-agitated in Civil Court.

The intention of the Legislature in S. 16 was to preclude the Civil Courts from examining the reasons, whether right or wrong, which induced the Debt Conciliation Board to issue a certificate under S. 15. It may be that if fraud was practised on the Board without the knowledge of the Board, the Civil Courts could set the matter right; but where the decree-holder did allege to the Board that the other debt was bogus, but in spite of that the Board accepted it as a genuine one, the decree-holder is not entitled to re-agitate the question of fraud in the Civil Court. A.I.R. (Vol. 26) 1939 Nag. 312=1939 N.L.J. 486 =185 Ind. Cas. 888.

——S. 16—Certificate of reasonable settlement by Debt Conciliation Board—Creditor refusing settlement—Civil Courts have no jurisdiction to enquire whether the jurisdiction has been properly exercised or to question the legality or validity of any order framed in the exercise of the Board's jurisdiction except perhaps on the ground of fraud. Such an enquiry is excluded by S. 16 (a) (ii) of the Act. 1939 N.L.J. 322.

——S. 19—Agreement before Board—Subsequent unforeseen events—Power to revise agreement.

There is nothing in the Act to show that the agreement should be deemed to have ceased to subsist either wholly or partly because of subsequent unforeseen events which might lighten the burden on the debtor. It may be quite equitable that if circumstances change in favour of the debtor the agreement should be revised. But it is the Debt Conciliation Board itself under S. 19 of the Act which has this power to revise it and not the Civil Court. 1939 N.L.J. 38.

——S. 21—Board failing to issue certificate for stay of proceedings in civil suit—Decree passed by civil Court—Subsequent discharge of debt by Board under S. 8 (2)—Debtor, if estopped from questioning decree—Evidence Act, S. 115.

It is quite clear from the provisions of S. 21 of the Debt Conciliation Act that the statutory duty is cast upon the Board to issue a certificate of suspension of civil suit proceedings, pending the determination of the application filed before it. It is the business of the Board to issue such a certificate *suo motu* The only responsibility that lies upon the debtor is to bring it to the notice of the Board that some suit or proceeding is pending in a civil Court. If the debtor mentions in his application to the Board for concilaition of a mortgage-debt that it is the subject-matter of a suit, and if in spite of this definite notice the Board does not issue a certificate for stay of proceedings in the civil suit with the result that a preliminary decree for foreclosure is passed by the civil Court, the debtor is not estopped from questioning the preliminary decree although he was a party thereto, if the Board subsequently discharges the debt of the plaintiff under S. 8 (2) of the Act.

If the order of discharge under S. 8 (2) of the Act is *intra vires*, the decretal amount is wiped out by operation of law. The preliminary decree for foreclosure is dead as against the debtor and it cannot certainly be revived on the ground of estoppel. Estoppel is always personal and the failure to obtain a certificate is not the fault of the debtor but the mistake of the Board. It is certainly not the result of any personal acts or representations on his part and it cannot possibly serve as the basis for the plea of estoppel. Further as the preliminary decree is wiped out by operation of law, there can be no estoppel against a statute. I.L.R. (1948) Nag. 555=A.I.R. 1948 Nag. 312=1949 N.L.J. 320.

——S. 21 (as amended in 1935)—No certificate under R. 11 framed under Act—Execution proceeding, if can be continued.

Under S. 21 the Civil Court is not bound to stay execution proceedings until it has been brought to its notice that there are proceedings pending before the Debt Conciliation Board by production of a certificate before it. Rule 11 of the rules under the Act provides that the Board shall grant a certificate in Form No. II suspending proceedings under S. 21 of the Act, and the purpose of this rule is to enable formal intimation to be given to the Civil Court that proceedings before the Board are pending. In the absence of such formal intimation it is open to the Court to continue the proceedings and the sale held therein is valid and the subsequent confirmation of the sale would not be barred by any provision in the Debt Conciliation Act. A.I.R. (Vol. 25) 1938 Nag. 109=172 Ind. Cas. 592.

——S. 21, Rules under Act, R. 11—Object of certificate.

Rule 11 of the rules framed under the Act merely empowers a Board to issue a certificate in respect of proceedings "which should be suspended under S. 21". The object of the certificate is merely to bring to the notice of the Court officially that there are proceedings pending before the Board which must be stayed under S. 21. A.I.R. (Vol. 26) 1939 Nag. 282=1939 N.L.J. 283=I.L.R. (1939) Nag. 654=189 Ind. Cas. 118.

——Ss. 21 and 15—Stay of proceedings by executing Court—Production of copy of order sheet directing issue of certificate—If sufficient.

Under the scheme of the C. P. Debt Conciliation Act the executing court can only stay its hands if the certificate granted by the Board under S. 15 (1) is filed by the judgment-debtor as required by the proviso to S. 21. No other form of proof is possible except the production of the certificate. A certified copy of the order-sheet of the Board directing that a certificate be issued cannot be accepted as an equivalent of the certificate. I.L.R. (1948) Nag. 384=A.I.R. 1949 Nag. 42=1948 N.L.J. 125.

——S. 21—Suspension, when takes place.

Suspension under S. 21, C.P. and Berar Debt conciliation Act, does not operate from the moment the proceedings are commenced before the Board, but takes place only after the Civil Court has been informed, by the filing of a certificate, of the existence of the proceedings before the Board. A.I.R. (Vol. 27) 1940 Nag. 42=1939 N.L.J. 451=189 Ind. Cas. 178.

——S. 21—Stay under, when operates.

The stay under S. 21 operates from the date on which the certificate is produced in Court and not from the date on which it is granted. A.I.R. (Vol. 26) 1939 Nag. 282=1939 N.L.J. 283=I.L.R. (1939) Nag. 654=189 Ind. Cas. 118.

——Ss. 21 and 15—Neither S. 15 nor S. 21, C. P. and Berar Debt Conciliation Act, affects the power of the Civil Court under O. 21, R. 92, Civil P. C. to confirm a sale held in execution, when such sale has taken place before an application under S. 4 of the Debt Conciliation Act has been made to the Board. A.I.R. (Vol. 26) 1939 Nag. 282=1939 N.L.J. 283=I.L.R. (1939) Nag. 654=189 Ind. Cas. 118.

——S. 21—Confirmation of execution sale held prior to application by debtor under S. 4.

The object of the C. P. and Berar Debt Conciliation Act is the settlement or adjustment of debts owed by agriculturists and in the settlement of the debts any interest which arises in favour of a third party should not be disregarded. The word 'proceedings', occurring in S. 21 of the Act must be understood as referring to those proceedings in which the decree-holder and the judgment-debtor alone are concerned and its meaning should not be extended to cover a case of an auction-purchaser. The proceeding relating to confirmation of sale cannot be overridden by any other provision of law unless there is an express provision controlling or impairing the effect of R. 92 of O. 21, Civil P. C. Consequently S. 21 does not preclude the executing Court from confirming the

execution sale held prior to an application made by the debtor under S. 4 of the Debt Conciliation Act. The word "debt" used in S. 21 means a debt of that debtor who applies under S. 4. A.I.R. (Vol. 25) 1938 Nag. 273=1938 N.L.J. 60=I.L.R. (1939) Nag. 104=178 Ind. Cas. 268.

——S. 21—S. 21 cannot come into operation to suspend proceedings subsequent to the execution sale —Property sold ceases to be judgment-debtor's property. 1938 N.L.J. 229.

——S. 21 (as amended in 1935)—Scope of—Sale in execution—Purchase by decree-holder and sale price set-off—Subsequent proceedings for confirmation—Whether in execution.

After an execution sale has been held and the sale price has been set-off against the judgment-debtor deposited in Court, subsequent proceedings for confirming the sale are proceedings between the judgment-debtor and the auction-purchaser just as are proceedings for the delivery of possession to the auction-purchaser. In these proceedings the decree-holder plays no part and these proceedings do not amount to executing a decree so as to fall within the ambit of the proviso to S. 21, C. P. and Berar Debt Conciliation Act. The property has been sold in execution of the decree and the title of the auction-purchaser vests in him from the date of sale, subject to confirmation which is inevitable in the absence of any objection. The sale price has either been set-off against the judgment-debtor is held by the Court on behalf of the decree-holder. The proceedings thereafter cannot be called execution of the decree, and there is nothing in the proviso to S. 21 as amended, to prevent the Court from confirming the sale. A.I.R. (Vol. 24) 1937 Nag. 98=19 N.L.J. 296=169 Ind. Cas. 99.

——S. 21 (as amended by Act XIV of 1935)—Retrospective effect.

Amendment by Act XIV of 1935 affect substantive rights and is not merely procedural. Amendment is not retrospective. 1938 N.L.J. 101.

——S. 21—Certificate enures until disposal of application before Board.

Any suit or proceeding in respect of any debt for the settlement of which application has been made to the Board under S. 4 shall be suspended till the Board has disposed of the application and that the date of the presentation of the certificate which is issued under a rule made under the provisions of the Act is immaterial. A certificate under S. 21 or rather under R. 11 of the rules made under the Act is in effect a stay order and enures until such time as the application before the Board has been disposed of. 1938 N.L.J. 150.

——S. 21—Certificate issued by Board in Berar (not British India).

Courts ought to recognise the certificate issued by Debt Conciliation Board in Berar (not British India) as a matter of judicial commity, and objection to the recognition is technically correct. (1937) 20 N.L.J. 240.

——S. 21—"Other proceedings"—Insolvency proceedings, if included.

Words "other proceedings" in S. 21 do not include insolvency proceedings. 1938 N.L.J. 133.

——S. 21—"Any suit or other proceedings" — If applies to insolvency proceedings.

The expression "any suit or other proceedings" in S. 21, C.P. and Berar Debt Conciliation Act, does not apply to insolvency proceedings because they are not in respect of any "debt". The order of adjudication in insolvency destroys the relation of debtor and creditor and all that remains is to realise the insolvent's property and distribute its sale-proceeds among his creditors. Section 6 of the C. P. and Berar Debt Conciliation Act, presupposes that the debtor has some property of his own and that his creditors have a remedy available to them in ordinary Civil Courts. When a debtor is divested of all his property in consequence of his having been adjudged insolvent, he cannot possibly describe the property vested in the Insolvency Court as his property, in the application which is required to be made in terms of S. 6 of the Debt Conciliation Act. The C. P. Debt Conciliation Board can have no jurisdiction to settle a debt after it has ceased to exist and consequently, if a debtor who is adjudged an insolvent applies to the Debt Conciliation Board for settlement of his debts the proceedings pending in the Insolvency Court are not suspended under S. 21 of the C. P. and Berar Debt Conciliation Act. A.I.R. (Vol. 24) 1937 Nag. 288=20 N.L.J. 252=I.L.R. (1938) Nag. 165 =172 Ind. Cas. 697.

——S. 21—Certificate under—Suit for possession of land—If can be stayed.

The certificate under S. 21 of the Act can stay only suits in respect of any debt for the settlement of which application has been made, but it cannot justify the stay of a suit for possession of land. (1937) 20 N.L.J. 218.

——S. 21—Suit for declaration that mutation effected is wrong and for possession on basis of sale deed executed in satisfaction of mortgage debt—Subsequent application by debtor to Debt Conciliation Board—Suit cannot be stayed—Proper forum for determining whether sale deed conveyed title to vendee is Civil Court and not the Debt Conciliation Board 1938 N.L.J. 475.

——S. 21—Execution proceedings stayed on production of certificate under S. 21—Objection under S. 7-A overruled by Debt Conciliation Board—Later, creditor raising objection questioning validity of certificate in Civil Court—Judgment-debtor falling to prove that decree-holder had knowledge of circumstances disentitling judgment-debtor to make application to Board before—Decree-holder can raise objection later—No constructive *res judicata*. 1940 N.L.J. 562.

——S. 23 — Applicability — Debtor not showing particular debt — Creditor moving for including same—Debtor denying it as fraudulent.

Section 10 gtve the Board ample powers not only

to enter into the merits regarding admitted debts, but to try and bring debtor and creditor to an agreement even in a case where the debt was denied. Where the debtor in his application for conciliation of his debts does not show a particular debt, and on the creditor's move to have his debt included denies the same as being fraudulent, such debt is still the subject of proceedings which were within the scope of the Debt Conciliation Act to which S. 23 is applicable. A.I.R. (Vol. 31) 1944 Nag. 142=1944 N. L. J. 108=I.L.R. (1944) Nag. 264=214 Ind. Cas. 335.

——S. 23—Applicability—Extension of time against surety.

The liability of the surety and the liability of the principal debtor are separate liabilities although arising out of the same transaction. Where therefore the debtor has applied to the Debt Conciliation Board, the debt of the surety is not a matter before the Board and S. 23 of the C. P. and Berar Debt Conciliation Act will not extend time as against the surety. A.I.R. (Vol. 27) 1940 Nag. 91=1939 N.L.J. 604=186 Ind. Cas. 763.

——S. 23—Applicability—Board having no jurisdiction to entertain application.

S. 23 of the Debt Conciliation Act applies even in cases in which the Board is later found to have no jurisdiction to entertain the application. I. L. R. (1944) Nag. 244 and I. L. R. (1947) Nag. 572, foll. I. L. R. (1949) Nag. 284=A.I.R. 1949 Nag. 354=1949 N.L.J. 344.

——S. 23—"Proceedings under the Act"—If include proceedings wrongly begun before Board.

A proceeding wrongly begun before the Board is no less a proceeding under the Central Provinces Debt Conciliation Act and the time spent before the Board can be deducted under S. 23 of that Act I.L.R. (1947) Nag. 572=A.I.R. 1948 Nag. 197=1947 N.L.J. 399.

——S. 23—"Time during which such proceedings had continued"—Interpretation of.

The proceedings before a Debt Conciliation Board, initiated on an application made by a debtor must be deemed to be effective proceedings until the agreement is actually registered. The expression "the time during which such proceedings had continued" in S. 23 of the C. P. and Berar Debt Conciliation Act necessarily postulates effective proceedings which call for the exercise of some judicial act as distinguished from a ministerial or a clerical act. When the agreement embodying the scheme of conciliation of debts is registered, the whole proceedings before the Debt Conciliation Board come to an end altogether. Mere receipt of the registered agreement in the office of the Board from the office of the Registering Officer, and a mere order to file papers cannot be regarded as proceedings before the Board so as to exclude also the period from the date of registration to the date of the order to file the papers. I.L.R. (1948) Nag. 445=1948 N.L.J. 539=A.I.R. 1948 Nag. 411.

——S. 23—Exclusion of time under—Execution of decree—C. P. Code, S. 48.

In computing the period of 12 years prescribed by S. 48, C. P. Code, for execution of a decree, the time spent on proceedings before a Debt Conciliation Board is to be deducted under S. 23 of the C. P. Debt Conciliation Act in addition to any period that may be excluded under S. 15 (1) of the Limitation Act. I.L.R. (1947) Nag. 25=228 Ind. Cas. 576=1947 N.L.J. 33=A.I.R. 1947 Nag. 101.

——S. 23—Prior mortgagee applying to Board impleading subsequent mortgagee—Debt of latter, if becomes subject of proceedings before Board.

The moment an application is made to a Board and the existence of certain debts is brought to its notice, those debts form the subject-matter of the proceeding before the Board irrespective of who makes the application and institutes the proceedings. If, therefore, a prior mortgagee applies to the Board impleading a subsequent mortgagee, the debt of the latter becomes the subject of proceedings before the Board within the meaning of S. 23 of the Central Provinces Debt Counciliation Act. Consequently the subsequent mortgagee is entitled under that section to exclude the period of the debt conciliation proceedings in calculating the period of limitation for a suit on his mortgage. I.L.R. (1946) Nag. 783=224 Ind. Cas. 49=1946 N.L.J. 203=A.I.R. 1946 Nag. 271.

——S. 23—Surety agreeing to pay decretal amount in certain time if not recovered from judgment-debtor—Time enlarged—Judgment-debtor applying to Debt Relief Court—Amount made payable by instalmetns:

Held, decree-holder can recover from surety entire decretal amount. A.I.R. (Vol. 31) 1944 Nag. 277=1944 N.L.J. 271.

C. P. DEBT RELIEF ACT.

..*See* C. P. (AND BERAR) RELIEF OF INDEBTEDNESS ACT (XIV OF 1939).

C. P. ENTERTAINMENTS DUTY ACT (XXX OF 1936).

——S. 8—Rules framed under, R. 18 — If ultra vires.

Rule 18 of the Rules framed under S. 8 of the Entertainments Duty Act does not resrict the issue of complimentary tickets and is clearly within the rule-making powers conferred on Government by S. (2) (*d*) of the Act. I.L.R (1950) Nag. 895=4 A. I. Cr.D. 488=A.I.R. 1950 Nag. 193=51 Cr.L.J. 1362=1950 N.L.J. 367.

——S. 8—Rules framed under, R. 18—Maximum percentage of complimentary admissions—Mode of determination.

There is no warrant for taking the aggregate of the total accommodation of all the shows held in a particular day for arriving at the maximum percentage of complimentary admissions on that day. Rule 18 speaks of "admission to an entertainment" which

means nothing more than "a show". It does not mean *all the shows* held on a particular day. I.L.R. (1950) Nag. 895=4 A.I.Cr.D. 488=A.I.R. 1950 Nag. 193=51 Cr.L.J. 1362=1950 N.L.J. 367.

C. P. AND BERAR EXCISE ACT (II OF 1915).

——S. 34—Powers of Excise Sub-Inspector.

An Excise Sub-Inspector exercises in investigation the powers conferred on an officer in charge of a Police Station by the provisions of Chap. XIV, Criminal P.C., as regards offences under S. 34, C. P. and Berar Excise Act. A.I.R. (Vol. 32) 1945 Nag. 217=1945 N.L.J. 303=46 Cr.L.J. 710 =220 Ind. Cas. 226.

——S. 34—Offence under—Bottling of liquor so that it may be kept and sold—Whether same transaction—Cr. P. Code, S. 239.

Where the bottling of the liquor is done some time previous to the selling but in order that the liquor should be kept and sold in pursuance of the unlawful designs of the accused, there is such continuity of action as is required by S. 239, Cr. P. C. A.I.R. (Vol. 23) 1936 Nag. 250=1936 Cr. Cas. 1042 =38 Cr.L.J. 482=I.L.R. (1937) Nag. 165=167 Ind. Cas. 860.

——S. 34—Possession of charas.

The point for decision in a case under S. 34 (*a*), C. P. and Berar Excise Act, is whether or not the accused had legal possession of *charas*, and it is necessary to consider the evidence even if the Excise authorities had acted illegally in making the search. A.I.R. (Vol. 20) 1933 Nag. 99=29 N.L.R. 67= 1933 Cr. Cas. 364=34 Cr.L.J. 721=144 Ind. Cas. 240.

——Ss. 34 (a), 37—Rules 84 (7) and 498 if ultra vires.

Before a conviction can be obtained either under S. 34 (*a*) or under S. 37 read with R. 498 of Excise Act, for illegally importing or indenting foreign liquor, the Crown must show that it is necessary under the law to pay fees and obtain either a licence or a permit for the indent and import of foreign liquor. But no such law is in existence so far as indenting is concerned, and since the C. P. & Berar Excise Act does not empower the Provincial Government to make rules authorising the Government to collect a fee or require the possession of a licence in respect of the indent or purchase of foreign liquor, Rr. 84 (7) and 498 are *ultra vires* in so far as they attempt to regulate the purchase or indent of foreign liquor. A.I.R. (Vol. 29) 1942 Nag. 133=1942 N.L.J. 552=44 Cr.L.J. 104=I.L.R. (1943) Nag. 502=203 Ind. Cas. 532.

——S. 36—Conviction under—Trial for subsequent offence—"Warrant-case".

Where a person who has been convicted of an offence under S. 36 C. P. and Berar Excise Act, again commits a similar offence, the subsequent offence, should be tried as a warrant case inasmuch as such subsequent offence is punishable under S. 45 of the said Act with imprisonment for more than 6 months. A.I.R. (Vol. 19) 1932 Nag. 111=28 N.L.R. 18=1932 Cr. Cas. 275= 33 Cr.L.J. 573=137 Ind. Cas. 150.

——S. 43—Applicability—Diluted denatured spirit.

Under S. 2 (13) "liquor" includes spirit and under S. 2 (6) "excisable article" means any liquor. Diluted denatured spirit is therefore excisable article and presumption under S. 43 applies. 1939 N.L.J. 75.

——S. 58—Search witnesses.

Section 58, C. P. and Berar Excise Act, makes provisions of the Criminal P. C. applicable in regard to search and seizure of excisable articles and these require that the witnesses to the search must be residents of the locality. A.I.R. (Vol. 21) 1934 Nag. 156=1934 Cr. Cas. 660=35 Cr.L.J. 1163 (2)=150 Ind. Cas. 916.

——S. 62 and R. 6—Partnership to jointly work liquor shops—Agreement, if valid—Refund of sum advanced—Whether can be allowed.

The plaintiff and defendant were partners, each having 8 annas share in certain liquor contracts auctioned by Government. After the bid was accepted, an agreement of partnership was written and signed. The agreement said that the parties jointly agreed to work the liquor shops and there was nothing in it to prevent the other partner also taking an occasional hand in the management or at least influencing or advising in the management:

Held, that the partnership was prohibited by R. 6 made under S. 62, Excise Act. It would be against public policy and would tend to defeat the object of the rules if unapproved persons were allowed to have any hand in the working of the licence and the agreement of partnership was void *ab initio* as being opposed to public policy.

Held, also, that the plaintiff might be allowed refund under S. 65, Contract Act, of the amount which he had advanced to defendant under the partnership. A.I.R. (Vol. 24) 1937 Nag. 250=I.L.R. (1937) Nag. 376=171 Ind. Cas. 948.

CENTRAL PROVINCES AND BERAR FOOD GRAINS CONTROL ORDER (1945).

——Cl. 3 (1)—Partnership—Contravention by one partner—Liability of other partner or partners—*Mens rea*—Proof of. *See* ESSENTIAL SUPPLIES (TEMPORARY POWERS) ACT, S. 3. I.L.R. (1949) Nag. 488.

CENTRAL PROVINCES GENERAL CLAUSES ACT (I OF 1914).

——S. 5 (c)—Scope.

It cannot be said that S. 5 (*c*) requires the proceedings to continue before the original Court and not before the Court to which jurisdiction may have been tranferred by the repealing Act. 12 N.L.J. 82 =119 Ind. Cas. 682=A.I.R. 1929 Nag. 282.

——S. 7—The words "by a Judge of a Civil Court exercising powers not less than those of a Subordinate Judge as defined in the C. P. Courts Act, 1917" in S. 83 of the C. P. Tenancy Act must be understood to refer only to the Court of the present Subordinate Judge first class. A.I.R. (Vol. 22) 1935 Nag. 257=31 N.L.R. Sup. 15=160 Ind. Cas. 128.

——S. 22—Rule and notification—Difference.

A rule is not a rule until there has been prior publication which opens to the public the opportunity to object, whereas a notification can be without any prior publication and no one has a chance to object before the notification becomes operative A.I.R. (Vol. 28) 1941 Nag. 226=I.L.R. (1941) Nag. 279=1941 N.L.J. 351=200 Ind. Cas. 715.

CENTRAL PROVINCES AND BERAR HOUSE RENT CONTROL ORDER (1947).

——Para. 13—Applicability—Pending proceedings. *See* C. P. & BERAR REGULATION OF LETTING OF ACCOMMODATION ACT, 1946. 1948 N.L.J. 323.

——Cl. 14—Applicability — Water supply cut off by Municipality on application by landlord.

Cl. 14 of the C. P. and Berar House Rent Control Order is not restricted to direct interference by the landlord with water connections. Interference of any kind which materially affects the tenant's enjoyment of the premises is prohibited by Cl. 14. The prohibition applies also to indirect interference by the landlord, *e.g.*, through the Municipality. Where therefore the landlord sends an application to the Municipality as a result of which the water supply to the house is cut off, the landlord renders himself liable under Cl. 14. I.L.R. (1948) Nag. 365=A.I.R. 1948 Nag. 414=49 Cr L.J. 623=1948 N.L.J. 439.

——Cl. 14—If ultra vires.

Cl. 14 of the C. P. and Berar and House Rent Control Order (1947), is clearly designed to place restrictions on a landlord's powers of intermedding with a tenant's conveniences in such a manner that the latter's enjoyment of the premiess let to him is materially affected thereby; and the provisions of Cl. 14 are covered by S. 2 of the C. P. and Berar Regulation of Letting of Accommodation Act of 1946. It cannot therefore be contended that Cl. 14 of the C. P. and Berar House Rent Control Order is *ultra vires*. I.L.R. (1948) Nag. 365=A.I.R. 1948 Nag. 414=49 Cr.L.J. 623=1948 N.L.J. 439.

C. P. LAND ALIENATION ACT (II OF 1916).

——Ss. 3 and 9—Mortgagor declared under member of aboriginal tribe after execution of mortgage—Effect.

The effect of a notification under S. 3 declaring a tribe as an aboriginal tribe is that, though in reality, they are not members of an aboriginal tribe, they are to be treated as such for purposes of the Act. Once this declaration is made, a mortgage executed by a member of such tribe will be deemed to have been made by him as a member of aboriginal tribe whatever be the date of the execution of the document and he is entitled to the protection given to a member of an aboriginal tribe under the Act. A.I.R. (Vol. 31) 1944 Nag. 371=1944 N.L.J. 438.

——S. 9—'Commencement of Act.'

The expressions 'after the commencement of this Act' and 'before the commencement of this Act' in S. 9 refer to the date fixed under S. 1 (3), *i.e.*, April 15, 1917. A.I.R. (Vol. 28) 1941 Nag. 163=1941 N.L.J. 224=I.L.R. (1942) Nag. 602=196 Ind. Cas. 360.

——Ss. 9 (1), (3) and 25 (2)—Applicability—Kanwar of Bilaspur Tahsil mortgaging his village share in 1926 by conditional sale—Notification under S. 1 (2) and (3) issued in 1933 making Act applicable to Bilaspur Tahsil.

A Kanwar of Bilaspur Tahsil mortgaged by conditional sale his village share in 1926. In 1933, the Government published notification under S. 1 (2) and (3) of C. P. Land Alienation Act making the Act applicable to the Bilaspur Tahsil and declaring the Kanwars to be aboriginal tribes for the purposes of the Act. In 1936 the mortgagee brought a mortgage suit and the foreclosure decree having been made absolute was put into possession:

Held, that S. 9 (1) did not affect the mortgage in this case at all as it was not a mortgage made by a member of an aboriginal tribe after the commencement of the Act, since, when the mortgagor made it, he was not a member of an aboriginal tribe. Nor did S. 9 (3) apply, as, it was not a mortgage made by a member of an aboriginal tribe before the commencement of the Act because it was not made before the commencement of the Act. Therefore, under S. 9 (3) the Civil Court was not required to refer the case to the Deputy Commissioner and consequently the Deputy Commissioner had no authority to apply under Sub-S. (2) of S. 25 for revision of the decree. A.I.R. (Vol. 28) 1941 Nag. 163=I.L.R. (1942) Nag. 602=1941 N.L.J. 224=196 Ind. Cas. 360.

——S. 9 (3)—Applicability—Suits instituted after commencement of Act.

In a suit on a mortgage executed by a member of the original Tribes in the Central Provinces and containing a condition of foreclosure in case of the non-payment of the debt, no foreclosure decree can be passed and Sub-Section (3) of Section 9 applies to suits pending at the commencement of the Act or instituted afterwards. 64 Ind. Cas. 729=A.I.R. 1921 Nag. 146.

——S. 16—Interpretation.

The word "made" qualifies the words "decree or order" and not the word "execution". The very plain meaning of the words of the section is that a sale shall not be held in execution of a decree or order if that decree or order is passed or made after a certain date but that it can be held if the decree or order is prior to that date whether the application for execution is prior or subsequent to that date. 60 Ind. Cas. 545=A.I.R. 1921 Nag. 93.

——S. 16—Property not saleable—If attachable for temporary alienation.

The Civil Court is not competent to attach for the purpose of temporary alienation property of a judgment-debtor which is not saleable in execution under S. 16 of the C. P. Land Alienation Act. A.I.R. (Vol. 24) 1937 Nag. 41=I.L.R. (1937) Nag. 261 =167 Ind. Cas. 807.

——S. 16—When the property sought to be attached is inalienable under S. 16. the Court has no power to attach it the reason being that the attachment will be futile in such a case. A.I.R. (Vol. 22) 1935 Nag. 133=31 N.L.R. 239=156 Ind. Cas. 65.

——S. 25 (3)—Right of revision.

Section 25 (3) of the Act does not reserve a right of applying for revision to the Deputy Commissioner alone but any other aggrieved party has such a right. Sub-Section (3) of S. 25. is merely an enabling provision so as to remove any doubts whether the Deputy Commissioner, as an outsider to the litigation, could apply for revision. A.I.R. (Vol. 28) 1941 Nag. 163=I.L.R. (1942) Nag. 602=1941 N.L.J. 224=196 Ind. Cas. 360.

——Ss. 25 and 21—Application by Deputy Commissioner, Procedure — Limitation — Powers of Deputy Commissioner conferred on Sub-Divisional Office—Knowledge of latter is knowledge of former.

The object of S. 25 of the C. P. Land Alienation Act is clearly to bring to the notice of the Court an illegality in its decree or order and thus to save the property of a certain class of persons. The Act does not contemplate that the ordinary rules of procedure in respect of the presentation of applications are to be followed for it states expressly that these rules are not to apply until receipt of the application. Therefore it does not matter how the application under S. 25 (3) reaches the High Court; all that is necessary is that it should arrive whether by post or by personal appearance by the Deputy Commissioner.

In the case of a simple money-decree the order of attachment involves permanent alienation. mortgage or lease of land and so the copies of such orders ought to be sent to the Deputy Commissioner under S. 25 (1). If it is not sent, then the Courts have failed to perform their duty and the Deputy Commissioner is entitled to apply under S. 25 (2) within two months of the date on which he is informed of such order the manner in which he obtains his information being immaterial. Section 25 (2) allows the Deputy Commissioner for presentation of an application only two months from the date on which he obtains the necessary information. The section does not lay down any limitation as to the manner in which the information is to be received by him.

Where under S. 21 the Governor-General-in-Council has conferred power under the Act on the Sub-Divisional Officer, the knowledge of the Sub-Divisional Officer is knowledge of the Deputy Commissioner within the meaning of S. 25.

If the property cannot be sold then it cannot be attached either. So the prohibition against sale in the Act is also a prohibition against its attachment.

Under the Act the Deputy Commissioner has no power to apply to any Revenue Authority. He is not a party to the proceedings and the only action he can take in the matter is under S. 25 of the C. P. Land Alienation Act. A.I.R. (Vol. 25) 1938 Nag. 504=I.L.R. (1940) Nag. 261=176 Ind. Cas. 163.

——S. 25—Judgment-debtor belonging to aboriginal tribe—Simple money-decree — Attachment and sale.

Where a decree is a simple money-decree and so does not involve the permanent alienation of land. the Court is not empowered to send it to the Deputy Commissioner under S. 25, C. P. Land Alienation Act. The Deputy Commissioner has no more power to execute such a decree under the Act than the Civil Court itself.

The copy of the decree or order is sent to the Deputy Commissioner under S. 25 not for execution, but for the sole purpose of enabling him to scrutinise it and to have it revised if it offends the provisions of the Act. The order of the Court sending the Deputy Commissioner the decree with the rider that the property can be sold (apparently by him) subject to the provisions of the Act is wrong and must be set aside.

The two processes of attachment and sale cannot be separated. Both are part and parcel of the procedure of execution, and attachment is not an independent process in itself. It is a part of the process of sale and its object is to protect the decree-holder by preventing the judgment-debtor from alienating the property before the decree-holder can bring it to sale. Only saleable property can be attached. The decree may sometimes be satisfied before the process is complete but that in itself is no ground for supposing that one is not an adjunct of the other. In Collector's cases the property is sometimes mortgaged or leased and not sold, but that is because the Code itself provides an alternative to sale in those special cases. It does not indicate that attachment is an end in iself.

If then attachment is not an end in itself but is an adjunction to sale, it follows that whenever the Court is for any reason prohibited from selling the property or dealing with it otherwise in lieu of sale, the attachment must be raised. So the Court cannot even attach the property of a judgment-debtor who is a member of an aboriginal tribe, in execution of a money-decree and where it is attached, the attachment must be raised. A.I.R. (Vol. 25) 1938 Nag. 281=I.L.R. (1939) Nag. 398=173 Ind. Cas. 877.

COMPARATIVE TABLE OF THE SECTIONS OF THE C. P. LAND REVENUE ACT OF OF 1881 AND THE CORRESPONDING SECTIONS OF THE LAND REVENUE ACT OF 1917.

C.P. Land Revenue Act, 1881.	C.P. Land Revenue Act, 1917.	C.P. Land Revenue Act, 1881.	C.P. Land Revenue Act, 1917.	C.P. Land Revenue Act, 1881.	C.P. Land Revenue Act, 1917.
1	1	29	58 amended	67 B (ii)	207 amended
2	..	30	60 amended	67 C	211 amended
3	..	31	..	67 D	215 amended
4 (1)	2 (2)	32	61 amended	67 E (1)	212 (1) amended
4 (2)	2 (7) amended	33	..	67 E (2)	212 (2)
4 (3)	2 (21) amended	34	..	67 E (3)	212 (3) amended
4 (4)	2 (14) amended	35	..	67 E (4)	..
4 (5)	2 (1) amended	36	..	67 F	..
4 (6)	2 (18) amended	37	..	67 G	..
4 (7)	2 (8) amended	38	..	67 H	..
4 (8)	2 (20)	39	..	68	66
4 (8-*a*)	2 (13) amended	40	63	69 (1)	68 (1)
4 (9)	..	41		69 (2) *a*	68 (2) amended
4 (10)	2 (9) amended	42	64	69 (2) *b*	..
4 (11)	2 (6) amended	43	..	69 (3)	68 (4)
4 (12)	2 (15) amended			69 (4)	68 (5) & (6)
4 (13)	2 (10) amended	44	65	69 (5)	68 (7)
4 (13-*a*)	2 (11) amended	45	..	69 (6)	..
4 (13-*b*)	2 (12) amended	46	81 amended	70	77 amended
4 (14)	2 (19) amended	47	..	71	..
4 (15)	..	48	..	72	70 (1)
4 (16)	2 (19) amended	49	82 & 83 (1) amended	73	73 amended
4 (17)	..			74	75 (1) & (2) amended
4 A	2 (17) amended	50	83 (2)		
5	3 & 4	51	83 (3)	75	..
6 (1)	3	52	..	76	76 amended
6 (2)	5 (4) amended	53	85 amended	77 (*a*)	..
7	7, 9 & 10			77 (*b*)	78 (*a*)
8	11	54	86 (1) & (2)	77 (*c*)	78 (*b*)
9	..	55	87 amended	77 (*d*)	78 (*c*)
10	8	56	88 amended	78	80 amended
11	14 (2)	56 A	..	79	79
12	14 (4)	57	89	80	..
13	15	58	90 (1) (2) & (3)	81	..
14	6 (2)		amended	82	80 (3)
15	..	59 (*a*) & (*b*)	91 amended	83	80 amended
16	..	60	92	84	..
17	18 & 19 amended	61	93 (*a*) & (*b*) amended	85	98
18	17	62	..	86	99
18 A (1)	20 amended	63	..	87	100 (1) & (2)
18 A (2)		64	..	88	101
19	..	65	122 (1) amended	89	..
20	32 amended	65 A (1)	107 (1)	90	124 (1) & (2)
21	29 amended	65 A (3)	114	91	125
22	33 (1) amended	65 A (4)	109 amended	91 A	..
23	35 amended	S. 65 A (4) (*d*)	108 (2)	92	126
24	39		..	93	127 amended
25		66	..	94 (*a*)	128 (*a*)
26	40 amended	67		94 (*b*)	128 (*b*)
27	..	67 A	204	94 (*c*)	128 (*c*)
28	57 amended	67 B (i)	206 (1)	94 (*d*)	128 (*d*)

COMPARATIVE TABLE OF THE SECTIONS OF THE C. P. LAND REVENUE ACT OF 1881 AND THE CORRESPONDING SECTIONS OF THE LAND REVENUE ACT OF 1917.

C.P. Land Revenue Act, 1881.	C.P. Land Revenue Act, 1917.	C.P. Land Revenue Act, 1881.	C.P. Land Revenue Act, 1917.	C.P. Land Revenue Act, 1881.	C.P. Land Revenue Act, 1917.
94 (*e*)	128 (*e*)	124 A (2)	202 (4) *a*	137	227 (*o*), 192
94 (*f*)	128 (*f*)	124 A (3)	202 (6)		Provisos 1 and 2
94 (*g*)	128 (*g*)	124 A (4)	202 (7) amended		187 proviso to (4)
94 (*h*)	216 (1-A)	124 A (5)	202 (8)		190 (1), (2), (3),
94 Proviso 1	128 Proviso 1	124 A (6)	202 (9)		(4) & 191.
94 ,, 2	128 ,, 2	122 A (7)	202 (3) amended	138 (*a*)	188 (*a*)
94 ,, 3	128 ,, 3	124 A (8)	202 (10)	138 (*b*)	188 (*b*)
94 Last para.	129 4	126 (*a*) & (*b*)	227 (*f*) (1) & (2)	138 (*c*)	188 (*c*)
95 Para. 1	130 (1)	126	47 (4) & (5) amended	139	..
95 ,, 2	130 (2)	127	48 amended	140	..
96	130 (3)	128	51 amended	141	193
97	131 (1)	129	50 (*a*) and (*b*) amended	142	194
98	133 (1)			143	..
99	133 (2)	130	103 (*a*) & (*b*)	143 (A)	210
100	133 (3)	131	226 (1)	144	227 (*d*)
101	133 (4)	132 (*a*)	..	145	Repealed.
102	134 (1), (2), & (3)	132 (*b*)	106 (*a*)	146	..
103	135 (1) & (2)	132 (*c*)	..	146 A	
				147	..
104	135 (3) amended	132 (*d*)	106 (*b*)	147 A	227 (*g*)
105	135 (4)	132 (*e*)	106 (*i*)	148	..
106	136	132 (*f*)	106 (*e*)	149	197
107	137 (1)	132 (*g*)	..	150	..
108	138 (1)	132 (*h*)	..	151	218 (1) & (4)
108 (*a*)	138 (2) amended	132 (*i*)	..	152 (*a*)	..
108 (*b*)	138 (2) (*b*)	132 (*j*)	106 (*c*) amended	152 (*b*) 1	220 (*c*)
108 (*c*)	..	133	102 amended	152 (*b*) 2	220 (*g*)
108 Last para.	138 (3)	134	54 amended	152 (*b*) 3	220 (*f*)
109 (*a*)	143 amended	135	..	152 (*b*) 4	220 (*h*)
109 (*b*)	139 amended	136(1) (2)&(3)	161 amended	152 (*b*) 5	220 (*j*)
109 (*c*)	..	136 A	162 amended	152 (*b*) 6	220 (*k*)
109 (*d*)	..	136 B	163 amended	152 (*b*) 7	..
109 (*e*)	141 (3) amended	136 C	..	152 (*b*) 8	..
109 (*f*)	..	136 D	164	152 (*b*) 9	220 (*d*)
109 (*g*)	..	136 E	167	152 (*b*) 10	220 (*m*)
109 (*h*)	..	136 F	168 amended	152 (*b*) 11	..
110 (*a*) (*b*) & (*c*)	151 (*a*) (*b*) & (*c*)	136 G	169 amended	152 (*b*) 12	220 (*a*)
111	153	136 H	..	152 (*b*) 13	220 (*g*)
112	154	136 I	..	152 (*b*) 13 *a*	220 (*o*)
113 (*a*)	227 (*h*) (i)	136 J	170	152 (*b*) 14	220 (*p*) amended
113 (*b*)	227 *k* (ii)	136 K	171	152 (*b*) 15	220 (*s*)
113 (*c*)	227 *k* (iii)	136 L	173	153	221
114	155 amended	136 M	174	154	222
115 (*a*) & (*b*)	156 (*a*) & (*b*)	136 N	175	155	..
116	157 amended	136 O	176	156	223
117	159 (1) & (2) amended	136 P	177	157	224
118	160 amended	136 Q 1	..	157 A	225
119	..	136 Q 2	165	158	..
120	46 (1)	136 R	..	159	..
121	46 (2)	136 S (1) & (2)	182	160	..
122	..	136 T	184 amended	161	..
123	201 amended	136 U	185	161 A	198 (1)
124	201 Proviso 1	136 V	227 (*n*)	161 B	199
124 A (1)	..	136 W	183	162	227 (1)

CENTRAL PROVINCES LAND REVENUE ACT (XVIII OF 1881).

——Wajib-ul-arz—Agreement by lambardar not to amend haqq is valid—Abandonment.

Where the lambardar agreed not to demand his *haqq*, in consideration of the consent of the co-sharers to his appointment.

Held, any person can agree to abandon a claim to money already due to him. There is nothing invalid in an abandonment for consideration of a payment to which a person is declared entitled by the law But future right could not be relinquished or transferred to which the holder is not declared entitled by the law, directly or indirectly. 70 Ind. Cas. 72 =A.I.R. 1923 Nag. 211.

——Ss. 4 (3) and 153—Desehra Bhet—Suit for recovery—Suit for recovery of Desehra Bhet and Kot Chhauni not sanctioned or recorded does not lie.

Payments of *Desehra Bhet* and *Kot Chhauni* are village cesses and unless sanctioned by the Commissioners or recorded at the settlement a suit for recovery of the same is barred by S. 153. 64 Ind. Cas. 722=A.I.R. 1922 Nag. 19.

——Ss. 4 (3), 76, 132 (h) and 153—Cess determined by Settlement Officer—Sanction by Commissioner of the cess is sufficient—No sanction as to rates is necessary.

S. 76 authorizes the Settlement Officer to determine and record the village cesses, if any, which are leviable, according to village custom, and the persons by and from whom and the rates at which, they are leviable, and it directs that such cesses shall, if sanctioned by the Chief Commissioner, be leviable accordingly. S. 132 (h) gives similar powers to the Deputy Commissioner when the settlement is not in progress. When the cesses are thus sanctioned it is not necessary for the Chief Commissioner to sanction the rates. 1 Pat. 83=69 Ind. Cas. 672=A.I.R. 1922 Pat. 399.

——S. 4 (8-A) and Central Provinces Tenancy Act (XI of 1898)—Suit for ejectment by Gaontia —Jurisdiction of Civil Court.

Gochar lands are lands reserved for the proprietor of a Government village in the District of Sambalpur and cannot be classed in the same category as common lands which are the property of the general body of villagers. For the purposes of a suit in ejectment brought by a *gaontia* of a village, the *gaontia* must be taken to a "proprietor" of the same class as defined in S. 4 (8-A) of Act XVIII of 1881. and as such he is entitled to bring the suit. Civil Courts must adjudicate on the rights of the parties as they existed when the plaint was filed, as a recognition of the defendant's tenancy by the settlement department subsequent to the institution of an ejectment suit by the *gaontia* is of no avail to the defendant. Besides, the entry in the settlement record is not conclusive It is only a matter of presumption. "The holder of survey number" mentioned in S. 2 (10), Exhibit II of the Central Provinces Tenancy Act XI of 1898 means the holder when proceedings are instituted in the Civil Court and a holder under a subsequent settlement cannot claim to be a tenant of the former *gaontia*. (1908) 12 C.W.N. 1036=8 C.L.J. 116.

——Ss. 33, and 152—Jurisdiction of Civil Court—Lambardar co-sharer paying land revenue on behalf of co-sharers as zabti bhogra—Suit to recover such amount.

For a case to come under Cl. (10) of S. 152, C. P. Land Revenue Act, the matter complained of and which gives rise to the suit must actually be connected with or arise out of an actual collection or some process for the recovery of arrears of revenue.

Where a *lambardar* co-sharer pays the whole of the revenue and brings a suit against other co-sharers to recover the amount paid by him on their behalf as *zabti bhogra*, the cause of action does not arise out of the collection or anything connected with the collection but rather from a payment made to the defendants' use and in view of S. 33 which presupposes that the Civil Courts have jurisdiction to hear suits by *lambardars* for arrears of revenue payable through them by the proprietors whom they represent, such a suit does not fall within S. 152 (b) (10). Such a claim is one under S. 69, Contract Act, and the Civil Court has jurisdiction to entertain it. A.I.R. (Vol. 26) 1939 Pat. 497=6 B. R. 218=185 Ind. Cas. 602.

——S. 65-A—Scope and effect of—Thikadari tenure in Sambalpur District—Incidents of—If capable of being owned and enjoyed by Hindu joint family—Partition — Right to—Forfeiture—Effect on Sir and Bhogra lands.

The *Thikadars' gountlias* or farmers in Sambalpur district hold an interest very similar to that of a permanent tenure. *Thikadari* leases, either permanent or temporary, but renewed or renewable from time to time, are, like any other property, capable of being possessed by a coparcenary and the joint family estate in such leases can grow, either if they are acquired with joint family funds, or with joint family labour, or are allowed to be treated as joint family property by the acquirer.

The declaration of protected status under S. 65-A of the C. P. Land Revenue Act does not effect any change in its character, so as to debar acquisition of joint family rights in it or to divest any pre-existing or subsisting right in them enuring to the benefit of the members of the family. S. 65-A, in saving pre-existing arrangements with regard to Thikadary tenures saves not only partition of the tenure, but also joint or separate enjoyment of the *Sir* and *Bhogra* lands appertaining to the tenure or any other emoluments arising therefrom.

The prohibition of partition attaches to the tenure as such, namely, the right to collect rents and the privilege of representing the tenure before the landlord and the liability to pay the thikadari rent to him. In case the tenure, as such, is forfeited for non-payment of rent, the tenure as such lapses but not to the detriment of the rights already acquired prior to the enactment of S. 65-A, C. P. Land Revenue Act, as applied to Sambalpur. It is not the case that *Sir* and *Bhogra* lands also revert to the Zamindar on forfeiture of the *Thikadari* tenure; simultaneously with the forfeiture of the tenure the right of occupancy grows in such lands in the tenure-holder who is bound by any arrangement as to right to or possession of the *Sir* lands of the joint family members and the Thikadar, *inter se*, even though the landlord was not

a party to any such arrangement or was unconcerned with it all the time when it was in force. I.L.R. (1949) Cut. 139.

——Ss. 65-A, 132 and 152 (A)—Gaontia—Resignation of eldest heir.

S. 65-A of the Act was not enacted for the benefit of the zemindar but to retain certain selected families in the gaontiaships of their villages and to protect them against the transfer and Sub-Divisions. The rights of the eldest male to resign or renounce his rights as *gaontia* with a view to giving up all claims to inherit the estate which has by statutory devolution descended upon him must be exercised at the time when the succeesion opens, *viz.*, on the death of the last protected *gaontia* and it is not open to him subsequently to transfer the estate by sale or gift in favour of a younger brother. Per *Atkinson, J.* (*Imam, J.*, contra). If two or more villages form the protected tenure of a *gaontin*, even though they may have been declared protected by separate certificates at different times, the eldest male heir must exercise his choice of resignation or adoption of all or none of such villages. There can be no splitting up of the estate or tenure into different parts having distinct entitles. Where the election is made by the person upon whom the tenure devolves by inheritance, it is irrevokable in its operation and automatically one heir is succeeded by another of equal degree.—In the absence of evidence to show that the eldest son of the last protected *gaontia* resigned his claim to the *gaontiaship* a younger son is not entitled to surrender the estate to the remindar.—Per *Atkinson, J.*—The onus of establishing resignation lies on the person who affirms it.—*Obiter.*—A *gaontia* is not entitled to surrender his estate in favour of estate Zemindar. Per *Alkinson, J.* The word "resign" in S. 65-A, means 'release.' 3 Pat. L.J. 229=4 Pat.L.W. 256=44 Ind. Cas. 817.

——S. 65-A—Gaontia can surrender tenure.

In a case of surrender of tenure a "protected" *Gaontia* to a Zemindar plaintiff it was held that S. 65-A of the above Act did not prohibit such a surrender and that there could be no adverse possession of defendants against the plaintiffs, who could himself claim no present possession till the relinquishment of the tenure. Permanent rights in the village which would bind the Zemindar after cessation of the *Gaontia* tenure cannot be conferred by the *Gaontia*. 1 Pat.L.T. 293=1 Pat.L.W. 449=37 Ind. Cas. 107.

——S. 65-A — Unregistered lease by Thekada-whether confers permanent title—Sanction of Zemindar —Effect of.

An unregistered lease by a Thekadar does not confer a permanent title though the lessee is in possession for a long time and the sanction of Zemindar in guarded terms does not improve the position. 26 Ind. Cas. 476 (Cal.).

——S. 65-A—Joint family property—Certificate of protected status in the name of one member—Effect.

A certificate of protected status issued under S. 65-A in the name of one member of a joint family with regard to joint family property does not convert it into self-acquired property of the *thickadar*. The certificate merely curtails the rights of the Zemindar as regards ejectment and enhancement of rent; joint family property does not cease to be such merely because a subsequent statute forbids partition. 10 N.L.R. 64=24 Ind. Cas. 855 (F.B.).

——Ss. 65-A and 83—Suit for correction of entry in Khewat as to status of plaintiff—If maintainable.

A suit for a declaration that an entry in a *Khewat* of the Dewar Settlement is incorrect and that the plaintiffs hold the property in dispute as a maintenance grant and are not liable to pay any rent therefor to the *zemindar*, falls within S. 83 of the Act and is maintainable. S. 65-A of the Act does not apply where a suit is instituted, not to have a fair and equitable *ticca jamma* arressed in respect of a land, but to determine the true status of the plaintiffs. 17 C.L.J. 468=20 Ind. Cas. 322.

——S. 65-A (4)—Thekadari — Transferability of —Legality of award directing sale.

The transfer of interest in a Thekadari tenure is prohibited under S. 65-A, Sub-S. 4 (*a*) of the C. P. Land Revenue Act, (1881). An award directing a sale of such an interest is illegal and unenforceable and no decree can be passed on such an award. 54 Ind. Cas. 274 (N.).

——S. 65-A (4)—Thekadar—Right to fell trees.

Apart from the grant of protected status the thekadar of a village has no right to cut down and appropriate timber trees. And the mere grant of of protected status does not confer the right to out down and appropriate trees to his own use. 13 N.L.R. 1=38 Ind. Cas. 686.

——S. 65-A (4) (b), Proviso (1)—'Joint' 'Separate'—Meaning of when applied to Hindus.

In applying to Hindus S. 65-A (4) (*b*), proviso (1) of the Act, the terms 'joint' and 'separate' must be taken in the sense in which they are used in Hindu Law and therefore a separation must be proved, not by a mere separation in mess nor by the receipt of a maintenance grant, but by separation in worship and estate as well. 19 C.L.J. 255=20 Ind. Cas. 28.

——S. 65 (A) (4) (d)—Arrears of Jama—Limitation Act, Art. 110.

Where the amount of Thekajama has to be fixed by Deputy Commissioner under S. 65 (A), (*d*), no arrears of jama become due within Art. 110, Limitation Act until the amount is finally ascertained by concluding the dispute regarding the jama; when the landlord has to proceed to have the proper rate of rent asertained time runs from the date on which the rent is finally determined and not from the close of the year for which the rent is payable. 7 N.L.R. 169=12 Ind. Cas. 804.

——S. 65-A (7)—Scope and applicability—Protected thikadar, if can be ejected for mere non-payment of thika jama.

The landlord has no common law right in India to eject a tenant-holder for non-payment of rent. His right to obtain ejectment depends in each case upon the terms of the agreement or lease. Where a right to eject the tenure-holder is not given by the agreement or lease mere failure to pay the *thika jama* does not entitle the landlord to eject the *thikadar*. The form of the sub-S. (7) of S. 65-A, C. P. Land

Revenue Act suggests that the Legislature intended to save existing rights rather than to create new ones. The sub-section also intended to give the protected *thikadar* protection not only against the sale of the property in execution but also against ejectment except where law allowed it. All that sub-S. (7) does is to save for the landlord any rights which he might have under the law for the time being in force, and which is not inconsistent with the Act to eject the *thikadar*, on certain ground. The sub-section is designed to deal with protection in relation to liability to ejectment, and does so by leaving such liability unaffected only in cases where it arises under decrees of the kind specified and by implying that the protected *thikadar* will not be liable to ejectment in any other case. Protection by limiting liability to ejectment to specified cases is easily intelligible, but not protection by extending it to cases where apart from the sub-section in question, it does not exist The interpretation of the expression 'any law for the time being in force' as some law relating to the procedure of ejectment may possibly be suggested by the words "passed in accordance with" which precede it, but would mean ignoring the fact that a decree cannot be passed on mere procedure. What the words of the sub-section require is a decree which is good under the general law and not inconsistent with this Act. The words "in execution of a decree for ejectment passed in accordance with law' taken by themselves, cannot be restricted in their meaning. The words 'passed in accordance with law' mean in accordance with the substantive or adjective law. But the words must be taken in conjunction with the other words in the sub-section: the words are "and not inconsistent with this Act." The Act deals with substantive rights and does not deal with matters of procedure. It is therefore evident that the expression "in execution of a decree for ejectment passed in accordance with any law for the time being in force" refers to law other than that contained in the statute in other words, sub-Cls. (*a*) and (*b*) do not give substantive rights apart from the general law but are conditions to be applied in testing the question whether a decree has been passed in accordance with the law. Consequently a landlord cannot eject a protected *thikadar* for mere non-payment of *thika jama*.

Obiter.—Holders of interests similar to that of a *thikadar*, gaontia or farmer cannot be ejected solely on the ground of non-payment of rent. A.I.R. (Vol. 26) 1939 Pat. 305=5 B.R. 803=20 P.L.T. 497=18 Pat. 509=182 Ind Cas. 721 (F.B.).

——S. 67-E—Crops grown by deceased Government ryot's widow—If attachable in execution of decree against him.

Crops grown by the deceased Government ryots' widow cannot be regarded as property and hence are not attachable in execution of decree against the deceased ryot where S. 67 is applicable to him. 9 N.L.R. 137=21 Ind. Cas. 272.

——S. 69—Dispute as to ownership of sir land—Omission to set up finality of order—Res judicata.

Section 69 relates to disputes as to whether or not land admittedly belonging to a particular proprietor is *sir* land or not *sir* land. It has no application to disputes as to whether a particular person is the proprietor of such land and the special rule of limitation laid down in S. 69 (4) of the said Act has, therefore, no application to a case where the dispute was of the latter kind.

When in a suit for a determination of the question of title in which the plaintiff claimed both the proprietary and cultivating rights, the defendant denied the plaintiff title only to the cultivating rights in spite of the fact that an year prior to the institution of the suit the Settlement Officer had recorded his Land as his *sir*:

Held, that the defendant might and ought to have set up his proprietary rights and he was barred by the rule of *res judicata* from setting up such right in a subsequent suit. A.I.R. (Vol. 19) 1932 Nag. 36 =14 N.L.J. 171=136 Ind. Cas. 884.

——S. 69—How land become sir and when.

Land, not falling under section 69 (1) of the Act, cannot become Sir land until it is finally recorded as such by the Settlement Officer and the date of its so becoming Sir is the date of the officer's order. 9 N.L.R. 99=20 Ind. Cas. 554.

——Ss. 69 (4) and 83—Record of rights—Wrong entry—Remedy of aggrieved person.

S. 69 (4) and 83 of the C. P. Land Rev. Act, (1881) exhaust the remedy open to a person to alleged wrong entry in the Record of Rights regarding *sir* land. Such an entry regarding sir land cannot be questioned otherwise than in a suit under S. 83, (1881) and is, subject to any such suit, final and conclusive. 11 N.L.R. 56=23 Ind. Cas. 888.

——S. 69 (4) (1)—Suits under—Limitation Act—Applicability.

The Limitation Act does not apply to suits under S. 69 (4) (1) of the C. P. Land Revenue Act as the Act itself provides for limitation for such suits. 46 Ind. Cas. 879 (N.).

——S. 72—Exemption from rent—Power of Settlement officer to grant—Exemption recorded in wajib-ul-arz.

A Settlement Officer is empowered under S. 72 of the Land Revenue Act of 1881, to enquire into and record the conditions on which the tenants hold their fields, and the rents (if any) payable by them. The Settlement Officer under the law has the power to allow a reduction of or exemption from rent, and his decision is binding during the currency of the settlement. Consequently, where the occupancy tenants claim that they are exempt from paying rent because they have been recorded in the *wajib-ul-arz* as *muafikhairati*, the landlord cannot recover rent during the currency of the settlement. A.I.R. (Vol. 23) 1936 Nag. 221=I.L.R. (1937) Nag. 71=164 Ind. Cas. 941.

——S. 72—Settlement Officer, power to reduce rent—Decision how far binding.

A Settlement Officer can allow a reduction or exemption from rent and his decision is binding during the course of the settlement. 13 N.L.R. 179 =42 Ind. Cas. 292.

——Ss. 74 and 78—Rent.

The case of a person in possession of land as plot proprietor and claiming to hold revenue free, while the Settlement Officer makes him liable to pay

rent, falls under S. 74 and not under S. 78. 2 Ind. Cas. 69 (Cal.).

——Ss. 74, 132 and 152—Jurisdiction—Civil or revenue Court—Malguzar claim to hold revenue free.

A Civil Court cannot recognise a claim by proprietor to hold land revenue free against malguzar, whether in a suit or as defence to a suit. 1 N.L.R. 140, 2 Ind. Cas. 69, Foll. 6 N.L.R. 27=5 Ind. Cas. 705.

——Ss. 78, 82, 83, 120 (b), 152, Sub S. (b) Cl. (12)—Record of rights, entry in—Suit to correct, as provided in S. 83 not instituted—Title suit by party affected, if maintainable.

When an entry has been made in the record-of-rights as to any matter referred to in S. 78 of the Central Provinces Land Revenue Act (XVIII of 1881), such entry is presumed under S. 82 to be correct until the contrary is shown: and under S. 83 a person aggrieved by the entry may institute a suit in the Civil Court to have such entry cancelled or amended, but it does not follow that the "contrary" referred to in S. 82 can be proved in such a suit only and not otherwise. Cl. (12) of Sub-S (b) of S. 152 of the Act means only that the entry cannot be corrected except by the Revenue authorities, but it does not preclude a suit by the person affected by the entry to establish his title in the Civil Court. The remedy provided by S. 83 of the Act is cumulative and not exclusive:

Held—That the present suit by the plaintiff in which he sought relief *inter alia* on the basis of this alleged title as occupancy-tenant was maintainable, although defendant's name had been entered as the occupancy-tenant in the record of rights, and the plaintiff had not instituted a suit under S. 83 for the cancellation or amendment of the entry. (1908) 14 C.W.N. 686=6 Ind. Cas. 672.

——S. 79—Zemindari—Wajib-ul-arz and Village Wajib-ul-arz—Cultivation Begar—Village cess.

Zemindari *wajib-ul-arz* prevails over *Village wajib-ul-arz* the latter being supplementary to the former. Every cess paid, delivered or rendered in money, kind or service by a tenant for occupation of land let to him is part of the rent which the Act charges on his holding. The cultivation *begar* is such a cess. 6 N.L.R. 117=8 Ind. Cas. 276.

——S. 82—Wajib-ul-arzs—Entries of village customs—Presumption of correctness.

Entries of village customs embodied in the *wajib-ul-arz* prepared by the settlement officer should, by virtue of S. 82 of the C. P. Land Revenue Act, be presumed to be correct. I.L.R. (1949) Cut. 540.

——S. 82—Record of Rights—Entry in—Evidentiary value.

Under S. 82, when the Board of Rights is duly made and attested, all entries therein shall be presumed to be correct until the contrary is shown. An entry in the Record of Rights does not create or extinguish title but is only a piece of evidence which is capable of being rebutted. The fact that a co-tenant had not been in active enjoyment of the property would not necessarily be inconsistent with his having held constructive possession as a co-sharer, for such constructive possession continues until there is a definite ouster. A.I.R. (Vol. 20) 1933 Pat. 93=143 Ind. Cas. 272.

——S. 82—Entry in Jamabandi or Settlement parcha—Presumption—Every entry of the settlement is not, but only entry in the record-of-rights is presumed to be correct.

S. 82 of the Land Revenue Act shows that when the record-of-rights is duly made and attested all entries therein shall be presumed to be correct until the contrary is shown. This presumption does not apply to every entry of the settlement, but as the clear wording of S. 82 shows it applies only to such entries as are to be found in the record-of-rights. The decision which the Settlement Officer has to make after the due enquiry into all claims to hold lands rent-free is required to be embodied in paragraph 8 of the wajib-ul-arz which is a part of the record-of-rights of the village. An entry in the jamabandi or a settlement parcha which is only a certificate given to a tenant showing the list of lands held by him is not such an entry. No presumption can therefore be attached to any of these documents in the absence of a copy of the village *wajib-ul-arz*. 89 Ind. Cas. 741=A.I.R. 1925 Nag. 452.

——Ss. 82, 83 and 39—Record of Rights—Settlement—Ejectment—Onus.

A Record of Rights prepared by a Settlement Officer under S. 82 of the Act is complete even before the Chief Commissioner has under S. 39 declared the Settlement to be completed. A plaintiff, who sues to eject a person who has been recorded as a tenant and in whose favour a settlement *parcha* has been issued must prove that the defendant in not a tenant. 45 Ind. Cas. 470 (N.).

——Ss. 82 and 83—Record-of—Rights—Presumption of correctness of entry until contrary shown—Contrary may be shown otherwise than by suit under S. 83.

According to S. 82 the remedy provided by S. 83 is cumulative and not exclusive. When the Record of Rights is duly made and attested all entries therein shall be presumed to be correct until the contrary is shown and according to S. 83 any person deeming himself aggrieved by any entry made in the Record of Rights may institute a suit in the Court to have such entry cancelled or amended; but not that the contrary may be shown by a suit under S. 83 only and not otherwise. It does not, therefore follow that if that entry is not corrected and is left outstanding, the person affected by the entry cannot establish his right in a Civil Court if he can do so to the satisfaction of the Court. 14 C.W.N. 686=6 Ind. Cas. 672.

——S. 83—Settlement entries—Suit for amendment—Limitation Act, Arts. 14 and 120.

In the matter of limitation, a suit under S. 83 of C. P. Land Revenue Act of 1881 for the amendment of Settlement entries is governed by Art. 14, Sch. I of the Limitation Act. A suit of this nature is to be filed within one year of the date on which the assessment is offered to the proprietors after the

Record-of-Rights is 'duly made and attested.' 5 N. L.J. 199=65 Ind. Cas. 970=A.I.R. 1922 Nag. 76

——S. 83—Entry in Record of Rights—Suit for amendment for cancellation — Limitation Act (1877) Art. 14 or 120.

The statutory power given under S. 83 is not to set aside but to cancel or amend an entry made in the Record of Rights and therefore a suit for the cancellation or amendment of certain entries in the Record of Rights is not one for setting aside an act of an Officer of Government and so does not fall within Art. 14 but falls within Art. 120, Limitation Act. 14 Ind. Cas. 50 (Cal.).

——Ss. 83, 120 (b)—Record of Rights—Entry in —Correction of—Civil Court—Jurisdiction.

In the Record of Rights prepared under Ch. VI of the C. P. Land Revenue Act, 1881 defendants were described as Shikmi gaontias or permanent tenants under the plaintiffs who were the gaontias of the village. A suit was brought under S. 83 of the Act to have the entry amended so that the defendants may be described as mortgagees in possession and not as permanent tenants. *Held*, that in deciding the question between the parties or in making the disputed entry in the Record of Rights the settlement officer acted either under S. 68 or S. 72 of the Act and his decision or the entry, was open to review by the Civil Court under S. 83. A suit under S. 83 is governed not by Art. 14 but by Art. 120 of the Limitation Act. It is in the nature of a declaratory suit as to how the Record of Rights should be amended, but the Court can execute its decree only by the decree being taken to the Deputy Commissioner who can give effect to it under S. 120 of the Act. 19 C.W.N. 1303=21 C.L.J. 646=30 Ind. Cas. 61.

——S. 83—Wajib-ul-arz omitting custom of payment of Desehra Bhet and Kot Chhauni—No direction under S. 77 (d) for its being recorded—Suit for correction of record does not lie. 64 Ind. Cas. 722=A.I.R. 1922 Nag. 19.

——S. 83—Proviso (1)—Suit under—Parties—Secretary of State—Notice of suit.

The plaintiffs in a suit under S. 83 of the Act are not bound to give notice of the suit to the Secretary of State and where the latter does not intervene to be joined as a party the suit is not bad under the first proviso to the section. 17 C.L. J. 468=20 Ind. Cas. 322.

——S. 83—Suit for amendment of settlement record—Notice to Government, if necessary.

Under Section 83 of the Act, notice is necessary to be given to the Government where a suit is brought for a declaration that a plaintiff is the maintenance grant-holder and for amendment of settlement papers wherein he is described as a *ticcadar*. 16 C.L.J. 28= 13 Ind. Cas. 184.

——S. 87—Bar under.

Section 87 bars a claim only if it was made or tabled as the subject of consideration and expressly decided. A.I.R. (Vol. 23) 1936 Nag. 80=31 N.L. R. Sup. 191=162 Ind. Cas. 577.

——S. 87—Widow—Succession—Widow merely temporary thekadar—Award of Settlement Officer subsequently creating permanent hereditary right—Widow holds such interest as widow of her husband—It descends not as stridhan to her heirs but to her husband's heirs.

An award by a Settlement Officer, conferring upon a widow rights which she had not hitherto enjoyed must be held to be governed by the provisions of S. 87. Where, therefore, a widow was merely a temporary thekadar, her interest could not be described as a proprietary interest, and subsequently if a permanent and heritable right is created by the award of a Settlement Officer such permanent interest by virtue of the provisions of S. 87 is held by the widow as the widow of her husband and it descends to his heirs and not as stridhan of the widow. A.I.R. 1930 Pat. 357.

——Ss. 108 and 64—Applicability—Malik malguzar—Sale for arrears of revenue due to malguzar.

Section 108 of the Act applies only when a sale takes place for recovery of the arrears of revenue payable to the **malguzar** in respect of **malik makbuza** plot as S. 64 makes it clear that land revenue in respect of a **malik makbuza** plot is paid not directly to the Government but through the **malguzar**. 48 Ind. Cas. 92 (N.).

——Ss. 132 and 65-A—Powers of Deputy Commissioner.

Section 132 was intended to enable the Deputy Commissioner merely to determine the claim to protection under S. 65-A and to enforce the provision of that section. It was never intended that the Deputy Commissioner should be empowered to deal with an ejectment suit or for recovery of a gaontiaship. 3 Pat.L.J. 229=4 Pat.L.W. 256=44 Ind. Cas. 817.

——S. 136—Revenue partition—Date of— Effect.

A revenue partition under the provisions of the Act does not take effect from the date of sanction by the Commissioner but from the date of the first agricultural year next after the publication of the Notification by the Deputy Commissioner with the Commissioner's sanction. A Revenue partition is unaffected by the rule of Hindu Law that partition dates from the ascertainment of shares. 8 N.L.R. 139=17 Ind. Cas. 144.

——S. 136-G—Order of Deputy Commissioner —Forum of appeal.

The Court of the District Judge under the Bengal N. W. P. and Assam Civil Courts Act, (XII of 1887) having taken the place of the Court of the Deputy Commissioner in Sambalpur under the C. P. Civil Courts Act (XVI of 1885), an appeal can be preferred only to the High Court against an order of the Deputy Commissioner under the C. P. Land Revenue Act (XVIII of 1881), S. 136-G as an order of the District Judge. 1 Pat.L.T. 290=2 Pat.L.W. 404=37 Ind. Cas. 115.

——Ss. 136-G and 136-H—Order of Deputy Commissioner—Appeal — Second appeal.

An order of a Deputy Commissioner under S. 136 (G) of the Act is appealable as if passed by the Court of the District Judge acting as a Court of civil jurisdiction of first instance under the Bengal Civil

Courts Act. If the appeal is preferred to the Commissioner no second appeal to the High Court will lie. 17 C.W.N. 155=14 Ind. Cas. 160.

——S. 136-H (1)—Forum of appeal.

Under this section an appeal from Deputy Commissioner's order dismissing an application for partition lies to the District Judge. If the appeal is wrongly preferred to the Commissioner, no second appeal lies. 38 Cal. 391=13 C.L.J. 412=9 Ind. Cas. 202.

——S. 137—Lambardar is not entitled to Mukaddam Gomasta's remuneration.

The proprietors of a village cannot be made liable for the money paid to a Mukaddam Gomashta over and above 5 per cent. on the land revenue. 63 Ind. Cas. 1000=A.I.R. 1921 Nag. 88.

——S. 137—Lambardari haq.

The amount of cesses must be excluded in calculating Lambardari haq. 63 Ind. Cas. 1000=A.I.R. 1921 Nag. 88.

——S. 138—Remuneration of Lambardar's servant—Liability of Co-sharers.

Unless there is an agreement between the co-sharers of a village about the remuneration of a servant employed by Lambardar to act for him, he cannot charge them for the same. 58 Ind. Cas. 958 (N.).

——S. 138—Lambardar — Appointment of gumashtah—Right to claim contribution from other shares for wages.

A Gumastah appointed by a non-resident Lambardar Mukkaddam to discharge the duty of Mukkaddam is his agent alone and not that of the whole proprietary body. The lambardar cannot therefore claim contribution from the other co-sharers for the wages paid by him to the Mukkaddam Gumashtah. 43 Ind. Cas. 967 (N.).

——S. 138—Powers of Lambardar—Settlement.

Custom in the District of Sambalpore authorises a lambardar **gaontia** of a village to make settlement of **raiyati** lands without his co-sharer's consent. 24 C.L.J. 83=37 Ind. Cas. 261.

——S. 138—Mailk-makbuza must pay his revenue through Lambardar.

In spite of any arrangement between co-sharers **malik-makbuza** must pay his revenue through the lambardar as a **malik-makzuza** is not bound by any agreement between lambardar and co-sharers to which the **malik-makbuza** is not a party. 5 N.L.R. 189=4 Ind. Cas. 801.

——S. 141—Mukaddam receiving information of non-bailable offence—Agent omitting to report—Offence.

The Makaddam is not relieved of responsibility by the appointment of a Gumashta, for Gumashta works as his agent. The Gumashta should discharge the duties laid upon the Mukaddam by the Land Revenue Act but if Mukaddam finds that the Gumashta is neglecting his duties, he must take steps to get them performed by the Gumashta or perform them himself. If a Mukaddam receives information of a non-bailable offence, he must report the offence under S. 45 of the Cr. P. Code; an omission to do so will constitute an offence under S. 176, I. P. Code. 7 N.L.R. 101=12 Cr.L.J. 441=11 Ind. Cas. 785.

——S. 152—Scope—Suit by lambardar to recover from co-sharers, revenue paid by him on their behalf.

For a case to come under Cl. (10) of S. 152, the matter complained of and which gives rise to the suit must actually be connected with or arise out of an actual collection or some process for the recovery of the arrears of revenue.

Where a **lambardar** co-sharer pays the whole of the revenue and brings a suit against other co-sharers to recover the amount paid by him on their behalf as **zabti bhogra**, such a suit does not fall within S. 152 (b) (10) but the claim is one under S. 69, Contract Act. A.I.R. (Vol. 26) 1939 Pat. 497=185 Ind. Cas. 602.

——S. 152 (a)—Jurisdiction.

In the case of an estate of disqualified Chief under Government supervision of Political Agent gave sub-lease of Chief's gauntia interest. The Local Government subsequently granting protected status on the kadar—Original lease if not fraudulent, civil Court cannot try question about validity of grant of protected status. If, however, the sub-lease on which the protected status was granted is obtained by fraud and is voidable on that ground the sub-lessee can gain nothing by the fact that the protected status has been granted on a fraudulent sub-lease. A.I.R. 1930 Pat. 357.

——S. 152—Suit for gaontiaship—Jurisdiction of Civil Court.

A suit for a gaontiaship is maintainable in the Civil Court. 3 Pat.L.J. 229=4 Pat.L.W. 256=44 Ind. Cas. 817.

——S. 152—Decision of Settlement Officer under S. 74—Jurisdiction of Civil Court.

A Civil Court cannot cancel the decision of the Settlement Officer in a case under S. 74 of C. P. L. R. Act (1881). 2 Ind. Cas. 69 (Cal.).

——S. 162—Forest Rules under—Breach of—If "offence" under "Cr. P. Code"—Order of fine by Deputy Commissioner—If conviction for offence or order by Court subordinate to High Court—Power of revision in civil or criminal jurisdiction. **See** C. P. CODE, S. 115. 13 Cut.L.T. 14.

CENTRAL PROVINCES LAND REVENUE ACT (II OF 1917).

——Not retrospective — Settlement Record—Entry—Effect of.

A statute like the Central Prov. Land Rev. Act (II of 1917) which prejudicially affects vested rights in existence cannot be applied retrospectively. The bare entry in a Settlement Record of a person as **Malik Makbuza Muafidar** is not sufficient to justify a Civil Court in holding that his heir is entitled to enjoy a like privilege. 16 N.L.R. 106=55 Ind. Cas. 426.

——Appeal—Entry by Deputy Commissioner in character roll of Official—Jurisdiction of Board of Revenue.

According to Item 3 under "Land Revenue Department" in the list enclosed with Survey and Settlement Department Memorandum No. 1081-994|VII-I, dated 22nd October, 1948, the Board of Revenue has been empowered "to hear appeals preferred by Patwaris, Revenue Inspectors, Nazul Surveyors and Assistant Nazul Surveyors on the orders passed by

Deputy Commissioners in respect of their appointments, promotion, punishments, etc., under the provisions of the C. P. Land Revenue Act, 1917, and Berar Land Revenue Code, 1928". Ordinarily, an appeal would not be entertained by the Board of Revenue against a routine entry recorded by the Deputy Commissioner in the character roll of an official. But where in a particular case the entry is of an unusual nature and of a very damaging character and is such as bound to affect the future promotion and prospects of an official adversely, the Board of Revenue would entertain an appeal. 1950 N.L.J. 135.

——Protected status—Whether can be conferred on garhtias.

Protected status cannot be conferred on **garhtias** for the reason that they are not proprietors. 1947 N.L.J. 215.

——"Common land"—"Communal land"—Meaning of.

Expressions like "Common land" and "Communal land" used in connection with the Act refer to land in which no person has a right to sole and exclusive occupation of any particular portion of it. A.I.R. (Vol. 26) 1939 Nag. 145=1939 N.L.J. 153=182 Ind. Cas. 613.

——S. 2—Agriculture—Land under grass.

Keeping land under grass is 'agriculture' within the meaning of that term in the Tenancy Act and therefore where a plot is recorded as khudkhast, villagers are not entitled to graze their cattle free of charge therein merely because it is left under grass. 25 N.L.R. 16=116 Ind. Cas. 76=A.I.R. 1929 Nag. 108.

——S. 2—Gaontia is proprietor of bhogra land and lessee of the rest from Government—All co-sharer Gaontias hold share in tenancy land.

In a Gaontiahi village the Gaontia is the proprietor of the bhogra and the lessee from Government of all the rest and where out of all the co-sharers the Lambardar alone pays the land revenue in respect of the tenancy lands, and himself takes or pays the difference between that and the amount of rents he collects he would be the sole lessee of the tenancy lands. 95 Ind. Cas. 381=A.I.R. 1926 Nag. 373.

——S. 2—Lambardar.

The definition of lambardar may include a person who has been appointed a lambardar and has subsequently ceased to be a proprietor of a mahal. A.I.R. 1930 Nag. 210=123 Ind. Cas. 897.

——S. 2—Rights of Malguzar.

Held, that escheated **malik makbusa** plots, when made over to the **malguzar** for the te m of settlement are not survey numbers within the meaning of the C. P. Land Revenue Act. **Held, further,** that where such plots are made over to the **malguzar** for the term of the settlement, unless the **malguzar** continues to cultivate the land he will have no rights when the settlement expires. 26 N.L.R. 181.

——S. 2—Sir right, components of.

Proprietary and cultivating rights are co-existing and component parts of **sir** right. A.I.R. (Vol. 31) 1944 Nag. 350=1944 N.L.J. 293=I.L.R. (1945) Nag. 363.

——S. 2—Sir right—Accrual—Proprietary and occupancy right must be in same prison.

The **sir** right is undoubtedly made up of two parts, one the proprietary and the other occupancy and it can accrue synthetically by the union of these two parts in the same person, and this is made clear in the proviso to S. 2 (17) of the Land Revenue Act, 1917. But it must be in the same person. 19 N.L.R. 26=71 Ind. Cas. 129=A.I.R. 1923 Nag. 93.

——S. 2 (5)—Khudkasht land held in severalty—In execution of decree against landlord, entire proprietary share, excluding **sir,** and **khudkasht** sold—**Khudkasht** land held not exempt from attachment subsequently by another creditor on the ground that the landlord had become an occupancy tenant thereof. 1942 N.L.J. 177.

——S. 2 (8) and (12)—Bhogra Bhogi plot, if can form patti.

A **Bhogra Bhogi** holder is the owner of a plot or plots of land separately assessed to land revenue in a **mahal**. Therefore, his area is excluded from the definition of **mahal** given in S. 2 (8), C. P. Land Revenue Act, and since **patti** is defined to mean the lands held in a **mahal,** it follows a **malik-makbuza** plot, or, what is the same thing, a **Bhogra Bhogi** plot, cannot form part of a **mahal,** and, therefore, cannot form a patti. It is true that these definitions have been rather badly drafted, for, if a **malik-makbuza** plot is excluded from a **mahal** under Sub-S. (8) it is difficult to see how it can be a plot within a **mahal** within the meaning of Sub-S. (9). But, in spite of the drafting, the meaning is clear, and there is no doubt whatever about the general practice prevailing in the Central Provinces. Consequently, a **malik-makbuza** or a **Bhogra Bhogi** plot does not form a separate **patti.** A Civil Court has jurisdiction to entertain a suit for recovery of rent of **Bhogra Bhogi** land, the jurisdiction not being ousted under S. 106 (j), C. P. Land Revenue Act. A.I.R. (Vol. 24) 1937 Nag. 184=I.L.R. (1938) Nag. 167=171 Ind. Cas. 783.

——S. 2 (17)—Construction.

S. 49 of the C. P. Tenancy Act and S. 2 (17) of the Land Revenue Act, are intended for the benefit of the proprietor of **sir** land, and therefore, any ambiguity should be resolved in his favour. A.I.R. (Vol. 28) 1941 Nag. 351=I.L.R. (1941) Nag. 749 =1941 N.L.J. 527=200 Ind. Cas. 806.

——S. 2 (17)—Ex-proprietor subsequently purchasing share in village—He regains proprietary rights in sir.

When there are a number of co-sharers in a undivided village, the proprietary rights are not vested in any one of them but reside in the entire body regarded as a corporate whole. Each co-sharer has an undivided though defined interest in the whole. Therefore each is possessed of 'the proprietary right' in that sense, to the extent of his share. It is not at the time a divided interest though it is a divisible entity. Hence it does not matter how small a portion of the whole an ex-proprietary tenant acquires. The moment he becomes a co-sharer again, whether to the same extent or not he regains his proprietary rights in the **sir,** and the land thereupon ceases to be occupancy land. A.I.R. (Vol. 28) 1941 Nag. 351=I.L.R. (1941) Nag. 749=1941 N.L.J. 527=200 Ind. Cas. 806.

——S. 26—Dismissal of appeal for default—Appellant's counsel not appearing on date of hearing—Notice of date served only on him and not on appellant—Propriety.

Under S. 26, Land Revenue Act, an appeal may be dismissed in default, if the appellant's counsel on whom a written notice of the date of hearing has been served fails to appear without any intimation to the Court. In such circumstances, an application for restoration by the appellant will be refused, although he was not informed of the date of hearing. 1950 N.L.J. 62.

——S. 26—Absence of applicant—Dismissal of case—If justified.

A revenue officer is not ordinarily justified in dismissing a case in the absence of the applicant on a date on which there is nothing for the applicant to do. He must hear and determine the case or proceedings in his absence. 1945 N.L.J. 580.

——S. 26—Dismissal of pre-emption application in default—Fresh application—Maintainability.

After a pre-emption application has been dismissed in default under S. 26 of the Land Revenue Act, a fresh application on the same facts can be entertained by a Revenue Court if it is within limitation. 6 R. R. 9 and 2 N.L.J. 75, foll. 1949 N.L.J. 260.

——Ss. 28, 33 and 39—Order under S. 28 (2)—Appeal—Revision.

No appeal lies against any order passed under S. 28 (2) of the Land Revenue Act. Superior Courts can, however, exercise control in revision under S. 39 of the Act. In revision, however, the superior Court will not attempt to come to an independent judgment on the merits of the case, but will confine itself to the broader question of the legality, propriety or regularity of the order challenged. 1949 N.L.J. 177.

——Ss. 28 (2) and 37—Restoration of appeal dismissed in default before admission—Notice to opposite party—Necessity for.

An appeal which has been dismissed in default before it has been admitted under S. 37, can be restored to file under S. 28 (2) of the Land Revenue Act without notice to the opposite party. 1947 N. L.J. 492.

——Ss. 33 to 39—Appeal and Revision—Entries in Nazul Maintenance Register.

The Nazul Maintenance Register is, in all respects, a parallel document to a village **khasra**. The entries in it have only evidential value as regards possession and are not "orders". They are made by a Patwari or Nazul Surveyor who are not "Revenue Officers". As only orders passed by "Revenue Officers" are appealable or revisable under the provision in Chap. IV of the Land Revenue Act, there can be appeal or revision in respect of an entry in the Nazul Maintenance Register, even though a Nazul Officer may have mistakenly passed a formal order as to the entry to be made. 1948 N.L.J. 387.

——Ss. 33 (1) and 168—Partition — Title of applicant admitted — Court declining to partition—Appeal.

Where the title of an applicant for partition is admitted, the Court is bound to partition the land unless an objection has been made by a co-sharer in possession under S. 136-F and the objection has been upheld by the Court. If no such objection has been made and the Court declines to partition the land, the decision is appealable to the High Court since such a decision virtually decides "the right of the parties" within S. 106-H, inasmuch as it decides whether the land should be held jointly or separately. 5 Pat.L.J. 140=55 Ind. Cas. 438.

——S. 33—Question of law—Finding based on interpretation of entries in revenue records—Third appeal.

Where no evidence is recorded and finding regarding tenancy is based on inferences and interpretations of entries in the revenue records, a question of law arises and therefore a third appeal is maintainable. 1947 N.L.J. 110.

——S. 37 (2) and (3)—If mandatory.

The provisions of S. 37 (2) and (3) of the Land Revenue Act are mandatory and the appellate Revenue Officer is bound to follow them. His failure to do so renders his order illegal and invalid, and the illegality cannot be condoned for any reason whatsoever. 1950 N.L.J. 40.

——S. 39—Application for revision when appeal not filed—Practice.

An application for revision may be entertained by the Revenue Tribunal even if no appeal was filed within time. In a matter relating to a dispute between a landlord and tenant the Revenue Courts do not, in practice, take too rigid a view of the accessibility of the parties to the Revenue Courts. 1948 N. L.J. 303.

——S. 39—Jurisdiction of Revenue Tribunal—Order of Revenue Officer leasing Government land.

The Revenue Tribunal is only concerned with orders passed under the Land Revenue Act or the Rules made thereunder or under other statutory enactments where the Revenue Officer acts in a judicial or semi-judicial capacity. It is not concerned with action taken by Revenue Officers under the instructions of the Executive Government in regard to the management of Government land. The mere fact that Revenue Officers lease out Milkiyat Sarkar land does not confer supervisory powers over them in that respect on the Tribunal. 1948 N.L.J. 42.

——S. 39—Nazul cases—Whether revenue cases—Revision—Government of India Act, S. 296 (1).

The appeal and revision procedure prescribed in Chap. IV of the Land Revenue Act applies only to orders passed under that Act or rules made thereunder or to orders passed under other enactments to which the provisions of Chap. IV of the Act are applicable. Such orders are orders which are passed by Revenue Officers acting in a judicial or semi-judicial capacity in virtue of powers conferred on them by a statutory enactment. It is well-known that the control, management and disposal of **nazul** land in the Central Provinces is regulated by executive instructions of Government, which are not statutory rules under any Act. The orders passed by Revenue Officers under powers vested in them by the Provincial Government under these instructions are not judicial orders. They are subject to control by higher Revenue Officers, and ultimately by the Provincial Government. The fact that **nazul** cases are registered as revenue cases in the register maintained by the Revenue Courts does not make them proceedings under the Land Revenue Act or other

allied Acts in which Revenue Officers Act in a judicial capacity. They are merely proceedings relating to the general administration, which for convenience of record and disposal are classified and registered as "revenue cases"; orders passed in such proceedings are not therefore subject to the appellate and revision procedure prescribed in Chap. IV of the Act. 1948 N.L.J. 402.

——S. 40 (1)—Sanction to review—Duty of sanctioning authority.

Under S. 40 (1), Land Revenue Act, sanction to review should be given without prejudice to any order that may later be passed in appeal against the review order. The sanctioning authority should not, therefore, go into the merits and commit himself to any views in advance of what may follow in due course of law. 1950 N.L.J. 152.

——S. 40 (1), Provisos (1) and (2)—Sanction for review — Notice to parties — If necessary.

Under S. 40 (1), Proviso (1) of the C. P. Land Revenue Act, the Deputy Commissioner is not required to give notices to all parties before giving sanction for review. The only mandatory part of the section in this respect is from Proviso (2) under which the subordinate officer after obtaining sanction must hear all the parties before passing his review order. 1947 N.L.J. 28.

——S. 45—Record of Rights — Contents of.

Under S. 45 of the C. P. Land Revenue Act, the Record of Rights includes both the **khasra** and the village administration paper. **Khasra** falls under S. 45 (2) (b), while village administration paper falls under S. 45 (2) (c). A. I. R. (Vol. 27) 1940 Nag. 178=I.L.R. (1941) Nag. 299=1940 N. L.J. 519=189 Ind. Cas. 26.

——Ss. 45, 70—Right of irrigation—Conflict between khasra and village administration paper.

The village administration paper is expressly intended to record irrigation rights. The purpose of **khasra** is, however, merely to record conditions of the cultivation of the fields and hence the entry of irrigation right in the remarks column of the **khasra** must be treated as incidental. Greater value should, therefore, attach to the entries in the village administration paper, if there is a conflict between the two documents. A.I.R. (Vol. 27) 1940 Nag. 178 =I.L.R. (1941) Nag. 299=1940 N.L.J. 519=189 Ind. Cas. 26.

——S. 46 (1) (a)—Modification of entries in wajib-ul-arz—Objection by some tenants.

Every tenant who can show that he "is interested" in the modification of the entries in the **wajib-ul-arz** has a right to object; and if he so objects, the modification cannot legally be made. Where there is any room for doubt whether all agree, it would be safer to issue a proclamation or proclaim the intention by beat of drum. 1947 N.L.J. 23.

——Ss. 47 and 49—Applicability—Correction of revenue papers—Tenancy land becoming khud-kasht.

A change of the status of a land, which was originally a tenancy land and subsequently becomes **khud-kasht**, will only be a correction of the annual papers referred to in S. 47 (1), C. P. Land Revenue Act, and the provisions of S. 49 of the Act do not apply to the case. 1950 N.L.J. 403.

——S. 47—Milkiyat Sarkar land—Mutation—Appeal to Revenue Board—If lies.

There can obviously be no "mutation" of **Milkiyat Sarkar** land under the provisions of S. 47 of the Land Revenue Act. The "Registrar of **Milkiyat Sarkar**" maintained under the instructions in para. 12, Revenue Book Circular 11—10, is a register maintained for administrative purposes and changes made in it are not "mutations". **Milkiyat Sarkar** land is managed by the Deputy Commissioner as the agent of Government by powers delegated to him by the instructions in Revenue Book Circular IV-2. Hence no appeals can lie to the Revenue Board against a Deputy Commissioner's orders in such cases.

Whoever is in actual possession of the fields will presumably be shown against the khasra numbers in the **khasra** and **jamabandi**. As to who is entitled to be in possession the matter depends on the terms and conditions on which cultivating rights were leased by the Deputy Commissioner or Settlement Officer and the person to whom they were leased. These are not matters which are regulated by any of the provisions in the Land Revenue or Tenancy Act. 1949 N.L.J. 339.

——S. 49—"Lawful possession"—Meaning of —Possession obtained by party under O. 39, R. 9, C. P. Code—If entitles him to mutation.

The phrase "lawful possession" used in S. 49, C. P. Land Revenue Act, means "a legal possession" which is also rightful or at least excusable and which may be consistent with a superior right in some other person. Accordingly, possession given to a party in pursuance of an order of a Civil Court under O. 39, R. 9, C. P. Code, entitles him to mutation under S. 49, C. P. Land Revenue Act, as such possession is undoubtedly lawful possession. 1950 N.L.J. 248.

——S. 55—An order of Deputy Commissioner made under S. 55, deciding that a lane is not public, is final and cannot be assailed in a Civil Court. A.I. R. (Vol. 20) 1933 Nag. 257=29 N.L.R. 330=147 Ind. Cas. 21.

——S. 66—Cause of action—Wrong entries by Patwari in khasra and jamabandi.

The entries made by the Patwaris in the khasras and jamabandis are merely a piece of inclusive evidence as to the real position of the persons and do not carry the same weight as the entries made in the Record-of-Rights by the Settlement Officer. Thus wrong entries made by the Patwari do not cast any cloud on the title of the person affected thereby making it necessary for him to rush into Court with a suit. The cause of action to sue arises when such entries are made in the Record-of-Rights by the Settlement Officer. 26 N.L.R. 94=120 Ind. Cas. 321=A.I.R. 1930 Nag. 92.

——S. 68 (3)—Mortgage of khudkasht land subsequently declared as sir—Cultivating rights.

Where lands that were **khudkasht** at the time of the mortgage have subsequently been declared to be **sir** by the Settlement Officer under S. 68 (3) of the C. P. Land Revenue Act, on foreclosure, the mortgagee can only obtain proprietary rights over the land. The cultivating rights in such land will remain with the mortgagors who will become occupancy tenants under S. 49 (1) of the C. P. Tenancy Act. A.I.R. (Vol. 20) 1933 Nag. 104=29 N.L.R. 142 =142 Ind. Cas. 603.

——S. 68 (5)—Full effect must be given to entry—Notice of entry.

Once the entry becomes final, full effect must be given to its implications, however much vested rights are affected. Section 68 (5) affords a **locus penitentiae** within which any person aggrieved can institute a civil suit for the cancellation of the entry, but if that is not done, no other remedy is available. Even if notice of these matters is not sent to mortgagees but on the other hand wide publicity is given to all settlement operations, the Legislature deems this sufficient notice to all concerned, and it is not for the Courts to hold otherwise. A.I.R. (Vol. 26) 1939 Nag. 287=1939 N.L.J. 429=189 Ind. Cas. 273.

——S. 68 (5)—The power to record land as **sir** rests solely with the Revenue Authorities, and the only remedy which a person aggrieved by an entry of land as **sir** at a settlement has, is to institute a suit within one year of the date on which assessment is offered to the proprietor under S. 68 (5) of the Land Revenue Act. When no such suit is brought, the entry of the land becomes conclusive and final. A. I.R. (Vol. 20) 1933 Nag. 378=30 N.L.R. 109= 147 Ind. Cas. 561.

——S. 70—Scope—Right to irrigate home-farms from village tank—Malguzar's right.

Section 70 only deals with what the **khasra** is to contain as far as tenancy lands are concerned. It does not touch what it is to contain in the case of home-farm lands.

The mere fact that a person is a **malguzar** and that the tank is in joint ownership of the proprietary body does not give the person the right of using the water for irrigating his fields. Such right must be proved **aliunde**. A.I.R. (Vol. 27) 1940 Nag. 178 =I.L.R. (1941) Nag. 299=1940 N.L.J. 519=189 Ind. Cas. 26.

——Ss. 70, 79—Note by Revenue Inspector as to nature of tenancy—Evidentiary value.

A mere note made by a Revenue Inspector in a copy of the **jamabandi** to the effect that certain lands were formerly recorded as **'muafi khairati'** but that in a particular year, there was a change and the holders were recorded as **malguzar's** servants, has no evidentiary value. When an entry is made during the pendency of the suit in respect of that land, the entry may be corrected if it is found incorrect. A.I.R. (Vol. 20) 1933 Nag. 313=146 Ind. Cas. 404.

——S. 72—Applicability.

Under Rules in Central Provinces, waste land sold to plaintiff "with all rights of....forest....and all other proprietary right and interest for....ever free from all present and future demand on account of Government Land Revenue....but subject to all claims of the Government of India in respect of such land other than claims to Government Land Revenue:"

Held, (1) transfer was not governed by Crown Grants Act, 1895; (2) C. P. Land Revenue Act applied to the estate so as to invest the Settlement Officer with jurisdiction to declare the estate as a **mahal** and ascertain and determine under S. 72 thereof the status and rent of the tenants therein; (3) the C. P. Tenancy Act governed the relation between the grantee and his tenants. A.I.R. (Vol. 19) 1932 Nag. 75=15 N.L.J. 35=28 N.L.R. 169 =137 Ind. Cas. 750 (F.B.).

——Ss. 74 and 159—Malik makbuza rights held rent free as result of family arrangement at partition—Whether enure for benefit of transferee outside family.

Where persons hold **malik makbuza rights** revenue free as against the lambardar as a result of family arrangement at partition the right to hold in perpetuity extends only to the descendants of the original grantee and does not run with the land or enure for the benefit of transferees outside the family. It is the duty of such transferees, who are alien to the family, on obtaining possession to make an application to the revenue authorities claiming exemption from payment of the land revenue under S. 75 of the C. P. Land Revenue Act. If this is not done the **lambardar-malguzar's** right to recover the revenue operates by virtue of S. 159 of the Act. I. L.R. (1948) Nag. 316=A.I.R. 1949 Nag. 88= 1949 N.L.J. 61.

——S. 75 (3)—Order referring question to Settlement Officer—Appeal.

An order of a Civil Court that a reference should be made to the Settlement Officer under S. 75 (3), C. P. Land Revenue Act is not appealable as a decree. A.I.R. (Vol. 30) 1943 Nag. 94=1942 N. L.J. 574=204 Ind Cas. 272.

——Ss. 78, 105—Village tank—Irrigation of fields—Custom arising out of contract.

The tank was built by the predecessors of the **malguzars** at a time not known but certainly before Mr. Napier's Settlement of 1896. When the tenants or their predecessors in the fields began to take water from the tank, they paid a rate of Rs. 2 a head to the **malguzar.** Despite a prohibitory order by the Settlement Officer in 1918, that this payment should be abolished, the payment nevertheless continued and was discontinued for the first time in 1928. The statement of the Siwai Income of the village included income derived from this very rate of Rs. 2 a head and a proportion was taken into account in assessing the revenue payable by the proprietor:

Held, that the flat rate of Rs. 2 did not constitute rent and the order of the Settlement Officer could be questioned. The Settlement Officer could not abrogate in settlement operations a custom arising out of contract. The custom arising out of contract had not been abrogated by the Settlement Officer's order which had been passed in misapprehension. The custom was a clear custom and should have been recorded and could not be abolished unless absorbed in rent. A.I.R. (Vol. 31) 1944 Nag. 175=1944 N.L.J. 151=I.L.R. (1944) Nag. 431=216 Ind. Cas. 285.

——S. 78—The Settlement Officer is bound to ascertain and record custom in regard to irrigation rights. The presumption is that the enquiry was duly made and the burden is on the person who asserts to show that no enquiry was made. 1942 Nag.L. Jour. 102.

——Ss. 78, 80—Entry in wajib-ul-arz—Person challenging entry—Burden of proof.

When S. 78, and the rules framed by the Local Government for the guidance of the Settlement Officers, make it obligatory upon the Settlement Officer to ascertain and record custom in each estate or village, it is to be presumed that due inquiry was made by him before he prepared his wajib-ul-arz

The burden of proof therefore, that no inquiry was made by the Settlement Officer must lie very heavily on the person who asserts the contrary. He should also adduce definite proof that before the custom was recorded in the **wajib-ul-arz**, his rights to the lands were not expressly considered and decided by the Settlement Officer. A.I.R. (Vol. 20) 1933 Nag. 77=29 N.L.R. 70=150 Ind. Cas. 737.

——S. 80—Retrospective effect.

S. 80 which requires the defeated party to sue within one year has no retrospective operation. A. I.R. (Vol. 23) 1936 Nag. 71=31 N.L.R. (Supp.) 202=163 Ind. Cas. 179.

——S. 80—Applicability.

S. 80, C. P. Land Revenue Code, deals with settlement decisions only and does not apply to year to year **khasra** entries made by the **patwari**. A.I. R. (Vol. 27) 1940 Nag. 7=1939 N.L.J. 496=184 Ind. Cas. 797.

——S. 80—Scope.

S. 80 applies to an entry made in accordance with the order of the Settlement Officer and not to an entry made contrary to his order. 81 Ind. Cas. 1039=A.I.R. 1925 Nag. 34.

——S. 80—Muafi khairati occupancy.

Certain mortgaged land was recorded in the mortgage deed as **muafi khairati** and rent-free but in the subsequent settlement it was described as **muafi khairati** occupancy and that rent had been remitted in lieu of share:

Held, though no doubt the recording of the fields as occupancy at the settlement could not be challenged, yet it did not necessarily follow that the fields were correctly recorded as occupancy and that they were in fact occupancy during the previous years. The entry in the settlement **parcha** that the rent had been remitted for ever in lieu of a share suggested that the mortgagors had a proprietary right and not a tenancy right. The use of the term **'muafi khairati'** is undecisive as **'muafi khairati'** could be applied to land held in proprietary rights or to absolute occupancy or to occupancy land. A. I.R. (Vol. 23) 1936 Nag. 171=19 N.L.J. 123=166 Ind. Cas. 686.

——S. 80—Suit to challenge entry in Settlement Record—Burden of proof.

The object of **nazul** proceedings is no doubt that disputed matters should be determined then and there, and unless the decisions arrived at are promptly questioned, they must stand good. The provision is certainly salutary, for it is very difficult in subsequent years to ascertain the precise facts.

The entries of 1892 and 1912 were settlement entries binding on the parties if not set aside within one year under Art. 14, Limitation Act, read with Ss. 78 and 83 of the C. P. Land Revenue Act of 1881 corresponding to S. 80 of the Land Revenue Act of 1917. Where after settlement a **parcha** is given to a **malik makbuza** and the entry regarding the area is challenged after more than one year from the offering of settlement record to proprietor, the burden of proof is on the plaintiffs, who assert that no due enquiry was made. A.I.R. (Vol. 24) 1937 Nag. 407=I.L.R. (1938) Nag. 377=176 Ind Cas. 346.

——S. 80—Settlement Officer's order not produced—No presumption can be made in favour of his having duly enquired into question involved.

The lower Court had held on the evidence that the Settlement Officer had not made an enquiry on the point involved in the case. Neither party produced the order of the Settlement Officer.

Held, that although there was a presumption in favour of the Settlement Officer having passed his orders after due enquiry, yet in the absence of the order passed by him, the Court could not make any presumption that it contained or did not contain any reference to the matter in question as being passed after enquiry, because the party relying on it had not produced it either, although it would have materially strengthened his case. 8 N.L.J. 36=87 Ind. Cas. 81=A.I.R. 1925 Nag. 324.

——S. 80—Wajib-ul-arz prepared at the time of granting proprietary rights not restricting them—Restrictions in a subsequent wajib-ul-arz are incorrect—Proprietor was not deprived of any rights ordinarily due.

In 1903, inferior proprietary rights were conferred on the malik makbuza holder of mouza Deosur in Amagarh Chowki which was transferred from Chanda to Drug District in 1907. The **wajib-ul-arz** of 1904 prepared about the time when the inferior proprietary rights were granted does not record restrictions on the rights of the inferior proprietor.

Held, that the entries in a subsequent **wajib-ul-arz** which curtail such rights are incorrect and that it could not be presumed that the inferior proprietor was deprived of any rights, which are ordinarily enjoyed by inferior proprietors. 116 Ind. Cas. 666 =A.I.R. 1929 Nag. 139.

——S. 80—Suit to set aside entry—Copy of wajib-ul-arz not produced—Copy applied for but not granted—Suit is not bad.

Where a certified copy of the **wajib-ul-arz** was applied for but was not granted, the same not being ready, its non-production cannot vitiate a suit to set aside an entry in the Settlement Record. 7 N.L.R. 176, foll. 8 N.L.J. 36=87 Ind. Cas. 81=A.I.R. 1925 Nag. 324.

——S. 80—Order declining to interfere—Limitation.

No question of limitation arises where the only order passed by the Revenue authorities was on declining to interfere. 20 N.L.R. 70=78 Ind. Cas. 872=A.I.R. 1924 Nag. 256.

——S. 80 (3)—Apart from the provisions of S. 80 (3), C. P. Land Revenue Act, there is nothing to prevent a person from proving if he can that the records are erroneous even upon a fundamental matter. A.I.R. (Vol. 30) 1943 P.C. 48=9 B.R. 378=I.L.R. (1943) Kar. (P.C.) Supp. 53=207 Ind. Cas. 9 (P.C.).

——S. 84 (3)—Drawback allowed to lambardar.

The drawback allowed under S. 84 (3) of the C. P. Land Revenue Act not exceeding 20 per cent. of the land revenue is a part of the village profits for which the **lambardar** is liable to account to his co-sharers. A.I.R. (Vol. 29) 1942 Nag. 124=1942 N.L.J. 211=I.L.R. (1942) Nag. 615=202 Ind. Cas. 524. [Overrules A.I.R. 1939 Nag. 121=181 Ind. Cas. 915.]

——Ss. 106 (b-1) and 67—Person selling malguzari share in village reserving proprietary interest in Sir land—Position of—Occupancy tenant or malik makbuza of that land—Subsequent sale of Sir land—If gives rise to pre-emption right—C. P. Tenancy Act, Ss. 12-A and 49.

A person selling his malguzari share in village can retain his proprietary interest in his Sir land. He becomes then not a Sir holder but a 'plot proprietor' and is entitled to be declared a malik makbuza under S. 106 (b-1) read with S. 67 of the Land Revenue Act. His rights over the Sir land are that of an undeclared malik makbuza and not of an occupancy tenant and as such the pre-emption provisions in the Tenancy Act do not apply to a subsequent sale of those rights. 1949 N.L.J. 172.

——Ss. 106 (d), 46 and 71—New abadi site declared by Deputy Commissioner—Residents of old abadi—If can be compulsorily evacuated and re-settled on new abadi—Powers of lambardar.

An area entered as 'abadi' in the Record of Rights continues as 'abadi' until the entry is corrected. When an abadi is abandoned, it is the Settlement Officer who corrects the Record of Rights when it is re-written at Settlement. Where a new abadi site is declared by the Deputy Commissioner under the provisions of S. 106 (d) read with S. 71, Land Revenue Act, because of the old abadi site being subject to floods, it would be quite legitimate for the lambardar to ask that such compact areas of the old abadi as have been abandoned to be excised from the old abadi and included in the wasteland of the village which would then become available for cultivation. He can also refuse to allot new sites in the old abadi. But residents who are unwilling to give up their sites cannot be forced to do so and resettle on the new abadi. 1950 N.L.J. 382.

——S. 106 (j)—Bhogra Bhogi plot—Suit for rent of—Civil Court, jurisdiction of.

A Civil Court has jurisdiction to entertain a suit for recovery of rent of Bhogra Bhogi land, the jurisdiction not being ousted under S. 106 (j). A. I.R. (Vol. 24) 1937 Nag. 184=I.L.R. (1938) Nag. 167=171 Ind. Cas. 783.

——S. 106—Deputy Commissioner's order regarding village customs—Civil Court can set aside order.

Where a Deputy Commissioner passed an order declaring that the tenants had the right to take water and earth free and that they could take fuel and timber, also that they were entitled to graze a number of cattle and that the excess grazing dues taken by the plaintiff should be refunded to the defendants.

Held, that a suit lay for a declaration that the order complained of was erroneous and for a declaration of the properrights of the defendants and for an injunction against them. 87 Ind. Cas. 1054=A. I.R. 1925 Nag. 371.

——S. 107—Lease in A's name—Money belonging to A and B—B's right against A is not affected—Principle applies whether lease is granted voluntarily or lessor is compelled to give it.

When any person takes in his own name a lease in perpetuity, or indeed any other lease or any other contract, with money belonging to himself and others, the rights of these others against him are not affected by his omission to mention their names, though their rights and liabilities in respect of the other party to the contract may be. There is no difference in principle when the lessor does not grant the lease voluntarily but is compelled to do so under the provisions of S. 107 of the Land Revenue Act. 100 Ind. Cas. 772=A.I.R. 1927 Nag. 207.

——S. 107—Plea challenging lease and kabuliyat is barred.

Anyone, who is entitled to the benefits of a protected thekadar, is equally bound to perform the duties prescribed by the law for such a thekadar. Therefore, the thekadar is not entitled to question the conditions laid down in the lease and kabuliyat. 10 N.L.R. 64, Foll. 91 Ind. Cas. 304.

——S. 108—Leases and kabuliyats drawn by Settlement Officer—Civil Court cannot question terms of such lease.

Where under the provisions of S. 108 the Settlement Officer enquires into the conditions under which the villages are held and draws up written leases and kabuliyats by which the theka-jamas are enhanced considerably, the civil Court has no jurisdiction to question the terms of the lease and kabuliyats. A. I.R. 1930 Nag. 209.

——Ss. 109, 112, 117—Thekedari right acquired out of joint family funds—Conferral of protected status on manager—Right of other members.

If a thekedari right in respect of a mouza is acquired by the joint family out of the joint family funds, it will be joint family property and every member of the joint family would be entitled to share in the theka and to be maintained out of its income. The conferral of the protected status on the manager will not affect the rights of the members to be maintained out of the income. A.I.R. (Vol. 32) 1945 Nag. 229=1945 N.L.J. 291.

——S. 109—Exclusive possession—Members of thekadar's family taking exclusive possession of a village—No arrangement for joint or divided enjoyment proved—Thekadar is entitled to claim exclusive possession.

A protected thekadar, who has been excluded from a village and a house therein included in the theka by the other members of his joint family, is entitled to absolute possession of the village as well as the house on the strength of his protected status certificate, even though the other members be held to be co-sharers in the theka with the thekadar when there is no arrangement for the joint or divided management and enjoyment of the village or part thereof among the members as provided in S. 109 (1) (a). 55 Cal. 725=55 I.A. 150=24 N.L.R. 179=27 M.L.W. 763=108 Ind. Cas. 365=A.I.R. 1928 P.C. 96=54 M.L.J. 576 (P.C.).

——S. 109—Exclusive possession can't be granted to protected thekadar against other members of his family.

No decree for exclusive possession of a village can be granted to the manager of a joint Hindu family who is the recorded protected thekadar of the village against other members of that family who are co-sharers in the theka. S. 109 of the Land Revenue Act (1917) certainly makes the tenure impartible but that does not take away the ownership of any person who has a share in it nor his right to joint possession. 79 Ind. Cas. 400=A.I.R. 1924 Nag. 163.

——S. 109—Succession to tenure of protected thekedar—Hindu holder.

Succession to the tenure of protected **thekedar** is governed under S. 109, by the personal law of the deceased **thekedar**. The law which is to be applied is the ordinary law of Hindu succession and modified in minor details by S. 109, and irrespective of any idea of notional jointness which might arise from the principle that the tenure is impartible.

Hence where a person who after expressly denying the status of jointness with his deceased brother who was the last holder of the tenure, subsequently puts forward a claim as reversioner on the death of the widow of his deceased brother and not as a survivor, he is not entitled to succeed to the exclusion of the daughter of the last holder. In such a case no question of notional jointness arises. A.I.R. (Vol. 27) 1940 Nag. 102=I.L.R. (1941) Nag. 673=1939 N.L.J. 605=187 Ind. Cas. 750.

——S. 109—Thekedars co-sharers can have private partition so as to affect surrenders by tenants of several co-sharers.

There is no distinction between a private partition and a partition effected under the Land Revenue Act. If the proprietors elect to partition the village and if they agree that each proprietor shall collect the rents from those tenants whose lands fall within his share, and if the tenants in their turn make attornment, then each proprietor becomes the landlord of his **patti** within the meaning of the Tenancy Act, and therefore if a tenant in one **patti** surrenders land to the owner of another **patti**, the surrender is not binding on the proprietor of the first **patti** who is consequently entitled to possession. 78 Ind. Cas. 134=A.I.R. 1924 Nag. 383.

——S. 109 (1) (a)—Suit by protected thekadar for possession of lands included in theka—Defendant not substantiating plea of family arrangement—Thekadar, if entitled to possession—Defendant's right to claim his share of profits.

A protected thekadar is entitled to possession of all the lands included in the theka, in the absence of any family arrangement under S. 109 (1) (a) of the C. P. Land Revenue Act. In a suit by him for possession based on his title the defendant who fails to substantiate his plea of family arrangement is not entitled to resist the plaintiff's claim for possession. But this fact does not affect the right of the defendant to claim his share of profits, or maintenance. 24 N.L.R. 179 (P.C.), foll. I.L.R. (1949) Nag. 883.

——S. 109 (1) (b)—Protected thekadari succession case—Procedure—Order deleting name of protected thekadar without substituting another name—Effect of.

Succession to the protected thekadari rights in a village is regulated by the provisions in S. 109 (1) (b) of the C. P. Land Revenue Act. But the law does not provide for special proceedings in protected thekadari succession cases. They are dealt with as ordinary mutation cases under Ss. 47-49 of the Act. When in a protected thekadari village no one claims to have his name mutated in place of a deceased thekadar the only order the Court can pass is that the name of the deceased thekadar should be deleted and no other entry made. Blank spaces cannot be retained in the register until the lease is determined by order of a Court. But this does not prevent any one from establishing his right to succeed to a protected theka under the provisions of the Land Revenue Act. An order of the Revenue Court deleting the name of a protected thekadar from the mutation register without substituting another name in its place is not evidence that the theka has been terminated or that any right in the theka has been lost. 1948 N.L.J. 188.

——S. 109 (1) (c)—Interpretation.

Words "protected thekadar shall be entitled on the expiry of his lease to a renewal and on the currence of any such renewal the provisions of S. 108 shall apply" refer to the expiry of the lease before the enquiry under S. 108 has been made and does not lead to the inference that no enquiry under S. 108 should be made unless the lease has expired. The only inference that can be drawn is that a valid lease affords some protection to a protected thekadar and that on the expiry of that lease, his position requires special consideration. A.I.R. 1930 Nag. 209.

——Ss. 109 (3) and 112—Deputy Commissioner transferring theka to applicant—Order by him rejecting subsequent application under S. 109 (3)—Validity.

When the Deputy Commissioner upon application under S. 112 and upon proper enquiry and with the consent of the then thekadar transferred the theka to the applicant and where subsequently an application was made under S. 109 (3) to set aside transfer and it was rejected by him as there was nothing bad in the previous transfer such order rejecting an application is not without jurisdiction although the transfer was not made by the thekadar but by Deputy Commissioner upon application and will bar a suit in a Civil Court to set aside the transfer. 118 Ind. Cas. 469=A.I.R. 1929 Nag. 201.

——S. 109 (3)—Civil Court cannot entertain application under—C. P. Land Revenue Act (1917), S. 220—(Obiter).

The fact that S. 109 is not expressly mentioned in S. 220 (1) does not in any way prejudice the general provisions of S. 220 and a civil Court has no authority to entertain an application under S. 109 (3). 118 Ind. Cas. 469=A.I.R. 1929 Nag. 201.

——Ss. 111 and 112—Order forfeiting protected thekadari—Subsequent application by son of last protected thekadar to be declared protected thekadar—If lies.

After the Deputy Commissioner passes an order forfeiting a protected **thekadari** under S. 111 of the Land Revenue Act, there is no **theka** left to be transferred to any one or to be dealt with under any of the provisions of Chap. IX of the Act. Therefore, a subsequent application by a son of the last protected **thekadar** under S. 112 of the Act asking that he may be declared protected **thekadar** of the village, does not lie. 1948 N.L.J. 336.

——Ss. 111, 220 (1)—Protected status—Effect of forfeiture—Jurisdiction of Civil Court.

Under the C. P. Land Revenue Act when the protected status is forfeited, the **theka** itself is also forfeited, subject to the provision that the rights of an occupancy tenant in the whole or part of the **sir** or **khudkasht** land may be reserved in favour of the **thekadar**.

When the status of protected **thekadar** is forfeited on the application of the proprietor, the ques-

tion of notice by the proprietor does not arise and in any case, the fact that the proprietor had made an application to the Deputy Commissioner that the protected status should be forfeited under S. 111, would in itself be notice of an intention to terminate the theka.

An order of a Revenue Court under S. 111, C. P. Land Revenue Act, cannot be challenged in a Civil Court. A.I.R. (Vol. 18) 1931 Nag. 72=27 N.L.R. 15=132 Ind. Cas. 463.

——Ss. 112 and 220—Jurisdiction of Civil Court.

Order by Revenue Court upon matter within jurisdiction is not **ultra vires,** though based on mistake of fact—Application under S. 112 by person purporting to be member of family of protected thekadar—Deputy Commissioner upon enquiry holding appellant entitled to be maintained out of income of theka and transfering theka to him—His order not without jurisdiction though as matter of fact applicant not entitled to be maintained out of income of theka—S. 220 bars jurisdiction of civil Court to question such order. 118 Ind. Cas. 46=A. I. R. 1929 Nag. 201.

——S. 122—Charge—Award under Co-operative Societies Act.

Where a member of a co-operative society mortgages his **malguzari** share in a **mauza** in favour of the co-operative society and the Registrar gives an award in favour of the society ordering the sale of the mortgaged property in the first instance and if the claim of the society is not satisfied by the sale proceeds ordering the sale of the other property of the member, the award does not create a charge on the property to be sold within the meaning of S. 122, C. P. Land Revenue Act. A.I.R. (Vol. 32) 1945 Nag. 281=1945 N.L.J. 510=I.L.R. (1945) Nag. 651.

——Ss. 122, 157 (3)—Default by co-sharer in payment of land revenue—Lambardar paying such revenue, if acquires charge on defaulter's share—Interest.

A **lambardar** or **sadar lambardar** who pays arrears of land revenue on behalf of his defaulting co-sharer acquires a charge on the share of the defaulting co-sharer or the **patti lambardar.** Because he stands in the position of a co-mortgagor so as to be entitled to the benefit to the securities on the principle of subrogation embodied in S. 92 of the T. P. Act, and even if the benefit of the Crown charge be not available to a private party, the principle of maritime salvage lien as a principle of equity is applicable to such a case.

The **lambardar** or **sadar lambardar** is, in such cases, entitled to charge interest on equitable principles and the more so because of the specific provision in S. 157 (3) of the C. P. Land Revenue Act. A.I.R. (Vol. 28) 1941 Nag. 245=I.L.R. (1941) Nag. 474=1941 N.L.J. 311=197 Ind. Cas. 327.

——Ss. 122 (1), 128 and 157—Revenue sale—Previous incumbrances—Presumption.

S. 122 declares that the land revenue assessed on land shall be a first charge on the estate to which it relates and a speedy remedy for its recovery is specifically provided for in Ss. 128 and 157 of the Act. Where there is no allegation or proof that the sale of land held under Ss. 128 and 157 was directed to be held not to be free of previous incumbrances, the sale must be held to be one free of prior incumbrances. A.I.R. (Vol. 22) 1935 Nag. 185=18 N.L.J. 149=158 Ind. Cas. 263.

——Ss. 123 and 187—Land revenue—Failure of lambardar to pay—Payment by sadar lambardar—Right of latter to subrogation.

Where on the failure of the **lambardar** of a **patti** to pay the land revenue of the **patti** to the **sadar lambardar,** the latter pays the whole land revenue for the village, he is subrogated to the rights of the Government and can recover the land revenue by bringing a portion of the property to sale. A.I.R. (Vol. 19) 1932 Nag. 171=28 N.L.R. 214=140 Ind. Cas. 532.

——S. 125—"Assigns".

The word "assigns" as used in S. 125 does not include a non possessory mortgagee. A. I. R. (Vol. 25) 1938 Nag. 554=1938 N.L.J. 342=I. L.R. (1938) Nag. 550=181 Ind. Cas. 478.

——S. 125, proviso—Scope.

S. 125 (Proviso) does not override S. 65 (b), Transfer of Property Act. A.I.R. (Vol. 25) 1938 Nag. 459=I. L. R. (1939) Nag. 246=178 Ind. Cas. 485.

——S. 127 — Notice of demand — Discretion of Tahsildar.

It is not obligatory on the Tahsildar to cause notice of the demand to be served on any defaulter; it is a step which under S. 127 depends on the discretion of that officer. A.I.R. (Vol. 25) 1938 Nag. 554=I.L.R. (1938) Nag. 550=1938 N.L.J. 342=181 Ind. Cas. 478.

——Ss. 128 and 227 (2) (k)—Warrant for arrest under Central Provinces Tenancy Act (I of 1920), not bearing seal of Court—Legality.

Warrant for arrest issued under the provisions of C. P. Tenancy Act must be in Form II appended to the C. P. Land Revenue Act and that form provides for the affixing of the seal of the Court which issues it and thus, like S. 75 of the Criminal Procedure Code, lays stress on the general principle that a process must always bear the seal of the Court from which it issues. The warrant not bearing the seal of the Court has, therefore, no force and the arrest under it is illegal, and in breaking arrest the person commits no offence, and his conviction under S. 225 B, Penal Code cannot stand. A.I.R. (Vol. 25) 1938 Nag. 45=39 Cr. L.J. 118=20 N.L.J. 219=172 Ind. Cas. 335.

——S. 128—Sale of agriculturist's house—Co-operative Societies Act, S. 44.

Under S. 44, Co operative Societies Act, read with S. 128, Land Revenue Act, an agriculturist's house as such is not exempt from sale for the recovery of debt due from him to the Society. 23 N.L.R. 66=103 Ind. Cas. 131=A. I. R. 1927 Nag. 217.

——S. 128 (g)—Sale of occupancy holding—Permissibility—C. P. Tenancy Act, S. 12.

S. 128 (g) of the C. P. Land Revenue Act cannot override the provisions of S. 12 of the C.P. Tennancy Act, and occupancy holdings cannot be sold under S. 128 (g) of the C.P. Land Revenue Act for recovery of arrears of land revenue. 1950 N.L.J. 375.

——S. 128 (g)—Scope and effect.

Award under Co-operative Societies Act—Application under R. 33, framed under Co-operative Societies Act for enforcement of award under Central Provinces Land Revenue Act, S. 128 (g) —Transfer of Property — Subsequent attachment and sale under S. 128 (g)—Transferee is not affected by lis pendens. A.I.R. (Vol. 32) 1945 Nag. 281=1945 N.L.J. 510=I.L.R. (1945) Nag. 651.

——S. 131—Sale without notice to parties—Validity—Death of judgment-debtor after attachment —Sale without notice to his legal representatives —Validity.

As S. 131 of the C. P. Land Revenue Act directs that all sales under Chap. 10 of the Act other than S. 128 shall be as nearly as may be in accordance with the law relating to the attachment and sale of such property under the decree of the Civil Court, it follows that the law which prevails there must obtain here as well. Under that law a sale which is held without notice to the parties concerned is a nullity. Again, when a judgment-debtor dies even after attachment, any sale of his property held after his death is a nullity against his legal representatives unless they are noticed. I.L.R. (1948) Nag. 264=A.I.R. 1948 Nag. 300=1949 N.L.J. 70.

——S. 131—Warrant issued under—C. P. Code, O. 21, R. 24=Applicability.

Where the date fixed for the return of the warrant had already expired on the day that the process-server went to execute it:

Held, that he was not acting in the execution of his duty and the conviction under S. 353 for assaulting him was bad. O. 21, R. 24, C. P. Code applies to a warrant issued under S. 131 of the Land Revenue Act. 10 C. 18 and 31 C. 424, Foll. 19 N.L.R. 183=76 Ind. Cas. 655=25 Cr. L.J. 223=A.I.R. 1924 Nag. 68.

——S. 138—Applicability—Tenant rights under C. P. Tenancy Act.

S. 138 (1), C. P. Land Revenue Act does not apply to tenant rights recognised by or arising out of the C. P. Tenancy Act. I.L.R. (1948) Nag. 324=1948 N.L.J. 275=A.I.R. 1948 Nag. 283.

——Ss. 138 and 128—Attachment and sale of mortgaged village share for satisfaction of land revenue due on entire village—Proclamation in form X —Purchaser, if gets property free from encumbrance.

When the revenue officer proceeds under Cl. (e) or (g) of S. 128, C. P. Land Revenue Act, he has to attach the property in accordance with Form V-A. That form is applicable to both Cls. (e) and (g) as it expressly states and the property has to be proclaimed for sale in Form X in which case the purchaser takes the property subject to encumbrances. Where a mortgaged village share is attached and sold for satisfaction of land revenue due on the entire village and the proclamation is in Form X and the sale is under Cl. (g), the purchaser cannot get anything more than what was offered for sale and what he actually purchases, namely, the interest of the mortgagor, i.e., he does not get the property free from encumbrance. A.I.R. (Vol. 32) 1945 Nag. 234=1945 N.L.J. 226 =I.L.R. (1945) Nag. 621.

——S. 138—Validity of sale—Instructions in Revenue Manual—Failure to observe.

The instructions contained in a Revenue Manual, Vol. II, p. 43, are mere executive instructions and have not the force of law. Failure to observe the instructions does not amount to an illegality so as to invalidate the sale. A.I.R. (Vol. 25) 1938 Nag. 554=I.L.R. (1938) Nag. 550=1938 N.L.J. 342=181 Ind. Cas. 478.

——S. 138—Sale free of encumbrance is general rule.

Under S. 138, sale free of incumbrances is the rule, and sale subject to encumbrances is an exception. The Deputy Commissioner would make an order only when he does not wish to sell free of incumbrances. That would be when he gets notice of the existence of incumbrances. It is, therefore, for the mortgagee to see that his mortgage was brought to the knowledge of that officer. A.I.R. (Vol. 25) 1938 Nag. 554=I.L.R. (1938) Nag. 550=1938 N.L.J. 342=181 Ind. Cas. 478.

——S. 141 (2)—Sale held before expiry of thirty days from date of proclamation—Validity.

A sale held before the expiry of thirty days from the date of publication of the proclamation, is not **ipso faco** void, but is merely voidable. The holding of the sale within thirty days is a material irregularity and the person affected thereby must object and satisfy the Court that he has sustained substantial injury by reason of such irregularity. 1945 N.L.J. 580.

——S. 145—Deposit made on behalf of defaulting tenant without knowledge or consent of Court—Validity.

A mere deposit by a stranger on behalf of the defaulting tenant independently of the Court seized of the matter and without its knowledge or consent is not a sufficient compliance with S. 145 of the Land Revenue Act. The Court would be acting within the law in confirming the sale and refusing to take cognisance of such an irregular deposit. 1949 N.L.J. 300.

——S. 145—Powers of Tahsildar.

A Tahsildar is vested with powers under S. 145, Land Revenue Act —**Vide** the schedule below S. 14 of the Act. He is therefore competent to accept a deposit under the section. 1948 N.L.J. 288.

——S. 145—Relation of defaulter—If entitled to deposit.

Under S. 145 of the C. P. Land Revenue Act, a defaulter should either make the deposit himself or through his counsel or else clearly state in writing that the deposit is being made by so and-so on his behalf. A relation of the depositor who is not authorised to make the deposit on behalf of the defaulter is not entitled to make the deposit on his own behalf. 1947 N.L.J. 272.

——S. 145 and Relief of Indebtedness Act—S. 6 (3)—Sale of defaulter's share for arrears of land revenue—Application to set aside sale by Collector before whom decrees against defaulter are pending execution — Validity—Prior application by defaulter before Debt Relief Court.

A share of the defaulters was sold for arrears of land revenue. The Collector before whom certain decrees against the defaulters were pending execution applied to set aside sale under S. 145 of the Land Revenue Act, depositing the required amount. It was contended by the defaulters that proceedings in the Collector's Court were automatically stayed under S. 6 (3) of the Relief of Indebtedness Act when their applications thereunder were admitted and therefore the application under S. 145 of the Land Revenue Act was void. The debts of the defaulters were admitted to exceed Rs. 25,000.

Held, that the Debt Relief Court had clearly no jurisdiction to stay proceedings in the Collector's Court and that the Collector's application under S. 145 of the Land Revenue Act was valid. 1946 N.L.J. 102.

——S. 146—Sanction by Sub-Divisional Officer for sale of "so much" village as is necessary—Absence of demand for fraction of village—Sale of whole village—Legality.

Where the Sub-Divisional Officer sanctions the sale of "so much" of a village as is necessary to clear the arrears of land revenue due on it, the words "so much" in the sanction includes the whole if a part alone is unsaleable. The Tahsildar will be acting within the authority given to him if he sells the whole village in the absence of any demand for a fraction of the village. 1950 N.L.J. 512.

——S. 148—Sale of holding without proper sanction—Illegality—Remedy of defaulter after confirmation.

A sale of a whole holding of three fields under a sanction of the Deputy Commissioner for the sale of one field, is not a mere irregularity but is an illegality. The fact that all the three fields were, in fact, proclaimed for sale makes no difference It is an act without jurisdiction and is therefore void and liable to be set aside even after confirmation. A sale which is void cannot create any rights, and although an auction-purchaser is an innocent third party his rights cannot supersede the rights of the defaulter who has been grievously wronged. In the circumstances an appeal lies under S. 33 of the Act against the order confirming the sale. 1948 N.L.J. 288.

——Ss. 149 (2) and 39—Setting aside sale on ground of fraud—Proper remedy—Civil suit or revision.

A sale can be set aside on the ground of fraud only by a Civil Court, and the aggrieved party has to file a suit under S. 149 (2) of the C. P. Land Revenue Act. When a particular procedure is laid down in the Act revisional jurisdiction cannot be invoked seeking the same remedy on the same grounds. If there is an illegality patent on the face of the record, e.g., absence of sanction to the sale there may be some justification for looking into the matter in revision. Where the record shows that the sale was proclaimed and properly published, a Revenue Court cannot go behind this and investigate whether the kotwar's signature to the proclamation was obtained by the fraudulent acts of some party or other. 1949 N.L.J. 176.

——S. 151—Pre-emptor, if can come in in course of sale.

It is clear from the language of S. 151 of the C. P. Land Revenue Act that the pre-emptor can come in as early as he likes after the bid has been accepted. He can come in in the course of the sale and not merely at the conclusion of the sale. I.L.R. (1948) Nag. 584=A.I.R. 1948 Nag. 369 =1950 N.L.J. 218.

——S. 151—Claim for pre-emption—Power of Collector to decide—Application dismissed by him —Fresh application before Civil Court—Maintainability.

The power to investigate and decide a claim for pre-emption under S. 151 of the C. P. Land Revenue Act remains in the Civil Court which transferred the decree to the Collector for execution, and is not delegated to the Collector under the rules framed by the Provincial Government. The fact that the Collector rejected an application for pre-emption when filed before him is not therefore a bar to the maintainability of a fresh application before a competent Court, viz., the Civil Court, which alone has jurisdiction to receive and decide the application. I.L.R. (1947) Nag. 445=229 Ind. Cas. 132=A.I.R. 1947 Nag. 246= 1947 N.L.J. 115.

——S. 151—Collector holding sale, if can try pre-emption claim.

Where the sale is held by the Collector it would be in fitness of things if the claim in respect of pre-emption under S. 151, is presented in the first instance to the Collector. The Collector may not be a Court competent to try the claim but he can still be an officer competent to receive the claims made in the course of a sale held by him. A.I.R. (Vol. 21) 1934 Nag. 283=17 N.L.J. 242 =31 N.L.R. 135=153 Ind. Cas. 281.

——S. 151—Co-sharer, also co-judgment-debtor if can claim right of pre-emption.

There is nothing in law to preclude a co-judgment debtor from claiming a right of pre-emption if he happens to be a co-sharer. The right given to a co-sharer by S. 151 cannot be lost because the co-sharer also happens to be a co-judgment debtor with one whose share is sold in execution. If the co-sharer is recorded as a co-sharer in the mahal it is immaterial whether he has any interest in the particular patti or not. A.I.R. (Vol. 21) 1934 Nag. 283=17 N.L.J. 242=31 N.L.R. 135= 153 Ind. Cas. 281.

——S. 151—Claim for—Pre-emption—If enforceable by suit.

A claim to pre-empt under S. 151 is enforceable in execution proceedings, and not by separate suit. 23 N.L.R. 141=10 N.L.J. 228=106 Ind. Cas. 170=A.I.R. 1928 Nag. 48, overruling A.I.R. 1926 Nag. 193=21 N.L.R. 157.

——S. 156—Set-off—Right to—Agreement not necessary.

S. 156 does not contemplate an agreement between parties in order to entitle a co-sharer to claim set-off although it cannot be claimed without the permission of the Court. 100 Ind. Cas. 812= A.I.R. 1927 Nag. 175.

——S. 156—Suit for arrears of revenue—Interest.

There is nothing in law debarring a **malguzar** from claiming interest on arrears of land revenue from the holder of a **malik makbuza** plot in a suit for recovery of such arrears. A.I.R. (Vol. 20) 1933 Nag. 361=144 Ind. Cas. 370.

——S. 157 (1)—"Any land Revenue due by any proprietor", meaning of.

It is not justifiable to read the words in S. 157 "any land revenue due by any proprietor" as meaning any land revenue due by any proprietor qua proprietor and to leave it open to the **lambardar** to neglect his duty with impunity.

P was a co-sharer in a **patti** and was the **lambardar** of that **patti**. The Land Revenue on this **patti** was assessed on the share held by the other co-sharers, **P's** share being held free of assessment. On failure of **P** to collect the land revenue assessed on that **patti** and to pay it to the **sadar lambardar**, the **sadar lambardar** paid the entire land revenue assessed on the village into the treasury and then applied to the Tahsildar under S. 157 of the C.P. Land Revenue Act to recover from **P** the land revenue assessed on **P's patti**. The Tahsildar recovered the amount from **P**. In the following year, **P** paid the land revenue herself into the treasury in order to avoid any action being taken against her as in the previous year. **P** then brought a suit against **sadar lambardar** to recover these two sums:

Held, that as **P** was the proprietor of the **patti** and the entire land revenue of her **patti** was due from her, the Tahsildar was entitled under S. 157 to recover that amount from her. **P** had misconceived her remedy in bringing the suit. She could have sued her co-sharers for their share of the land revenue or she could have applied to the Tahsildar to recover it from them or she could have sued the **sadar lambardar** for her share of the village profits. Similarly, her payment of the land revenue that was paid into the treasury merely discharged the liability imposed upon her as a **lambardar** and no suiu would lie to recover these amounts. A.I.R. (Vol. 25) 1938 Nag. 490=1938 N.L.J. 292=179 Ind. Cas. 12.

——S. 157 (3)—Sadar Lambardar paying land-revenue—If entitled to interest.

A **lambardar or sadar lambardar** who pays arrears of land revenue on behalf of his defaulting co-sharer acquires a charge on the share of the defaulting co-sharer or the **patti lambardar** and is entitled in such cases to charge interest on equitable principles and the more so because of the specific provision in S. 157 (3). A.I.R. (Vol. 28) 1941 Nag. 245=I.L.R. (1941) Nag. 474=1941 N.L.J. 311=197 Ind. Cas. 327.

——S. 157 (3)—Sadar lambardar paying land revenue due of mortgagor's land—Priority over mortgagee—Sale by him, effect.

When the land revenue in respect of the mortgagor's land has been paid by the sadar lambardar he gets priority over the mortgagee, standing in the shoes of the Government to the extent of the land revenue paid by him. He can accordingly sell the land giving to the purchaser a like priority unless the mortgagee redeems this charge by payment. A.I.R. (Vol. 26) 1939 Nag. 302= 1939 N.L.J. 477=185 Ind. Cas. 780.

——S. 157(4)—Scope—Whether governed by S. 149.

S. 157 (4) of the C. P. Land Revenue Act is not governed by S. 149 of that Act. The section provides the lambardar with a speedy and summary remedy when he pays the land revenue on behalf of a Malik-Makbuza, but it does not take away any of his ordinary rights of suit. In the same way, though immediate effect is given to the Deputy Commissioner's order of sale the rights of those affected to agitate the matter in the regular Courts is not taken away. I.L.R. (1948) Nag. 264=A.I.R. 1948 Nag. 300=1949 N.L.J. 70.

——Ss. 159 and 220—Recovery of revenue chargeable but not assessed—Proper course.

The proper course for the proprietor to recover land revenue not asessed from a person who has not paid it is to apply to the Deputy Commissioner to assess a proportionate share of the land-revenue of the village on the land under S. 159 and a suit in a civil Court is barred by S. 220 (o). 22 N.L.R. 121=89 Ind. Cas. 292=A. I. R. 1925 Nag. 419.

——S. 160—Rent fixed for ex-proprietary holding should be taken into consideration while calculating profits payable to co-sharers.

The ex-proprietary tenant becomes the tenant of his vendee and pays the rent to the vendee. While calculating the profits of the village payable to the co-sharers, the rent which may be fixed for such a holding and which is recovered by the incoming proprietor has to be taken into consideration. A.I.R. (Vol. 30) 1943 Nag. 5=1942 N.L.J. 475= I.L.R. (1942) Nag. 599=202 Ind. Cas. 427.

——S. 160 (1)—Attachment of share in village profits before it accrues due—Sale—Validity.

The rights of a co-sharer to village profits do not accrue till the end of the agricultural year. The rights are not ascertainable until the year has ended. Therefore, the share of a co-sharer in village profits before the first day of the agricultural year next following is only a mere right to sue and a sale in pursuance of it is of no effect.

A Court cannot sell what has not been attached. If what was attached had not accrued at the date of the attachment, then what is later sold in virtue of that attachment is a mere right to sue. A.I.R. (Vol. 23) 1936 Nag. 218=168 Ind. Cas. 266.

——Ss. 160 and 188 (2) (c)—Claim for accounts of village profits against lambardar—Cause of action, when arises.

The claim for accounts of village profits by a co-

sharer against the lambardar of a village is founded on a statutory duty under S. 188 (2) (c), C. P. Land Revenue Act and that statutory duty arises in the year following the year in which the profits arise. Such a suit does not relate to profits but to the duty to account. The plaintiff does not claim profits. He claims the payment of the sum found due on taking accounts. There may be profits and yet no sum found due. The obligation on the part of the lambardar is not to hand on the share of profits as and when received but to account within six months and forthwith pay the amount found due. The remedy which the plaintiff seeks in such a suit arises in the year following that in which the profits arise.

A suit for accounts for village profits, was instituted on 2nd October, 1936 The plaintiff claimed account inter alia for the year 1932-33. The defendant pleaded that the claim in respect of the year 1932-33 was time-barred under S. 160 (1), C. P. Land Revenue Act:

Held, that the claim was within time. A.I.R. (Vol. 29) 1942 Nag. 95=I.L.R. (1942) Nag. 320 =1942 N.L.J. 111=200 Ind. Cas. 591.

——S. 160—Suit to enforce charge acquired by subrogation—Limitation.

Suit by sadar lambardar against some co-sharers of patti—Satisfaction of decree by one co-sharer only—Suit by such co-sharer against other including co-sharer not impleaded in former suit for contribution on principle of subrogation or re-imbursement:

Held, that the remedy lay in enforcing the charge acquired by subrogation, regard being had to S. 160. Limitation was three years from the 1st day of the agricultural year next following that to which the suit related. A.I.R. (Vol. 29) 1942 Nag. 111=1942 N.L.J. 267=I.L.R. (1942) Nag. 393 =201 Ind. Cas. 472.

——S. 160—Suit for profits—Limitation—Notifications Nos. 1521, XII of April, 26, 1928, and No. 185 of September 15, 1927—Effect of.

The effect of Notification No. 1521-XII, dated 26th April, 1928, read with the previous notification No. 185, dated 15th September, 1927, is to make the agricultural year 1928-29 consist of 14 months commencing from 1st April, 1928, and ending on 31st May, 1929. Consequently a suit for agricultural profits for the year 1927-28 must be brought within three years from 1st April, 1928, according to S. 160, C.P. Land Revenue Act, and where it is brought subsequently (28th April, 1931), it is barred by limitation. A.I.R. (Vol. 22) 1935 Nag. 244=31 N. L. R. Sup. 33=159 Ind. Cas. 950.

——S. 160—Period of Limitation.

By S. 12 (1) of the Limitation Act, or S. 8 of the General Clauses Act and S. 160 of the Land Revenue Act the period of limitation is not three years but three years and one day. Therefore either the claim in respect of the first year is not time barred or the claim in respect of the fourth year is not premature, if the suit is brought on the first day of the Revenue year which is the first day of limitation in respect of the fourth year and last day in respect of the first year. 69 Ind. Cas. 527=A.I.R. 1922 Nag. 261.

——S. 160—Suit by co-sharers for recovery of their shares of proprietary profits from the lambardar under S. 160—Section 6, Limitation Act, applies. 163 Ind. Cas. 623=18 N.L.J. 285.

——S. 160 (3)—Scope—Limitation Act, S. 6.

Operation of Limitation Act, S. 6 is not excluded. 91 Ind. Cas. 563=A.I.R. 1926 Nag. 236.

——Chap. XI, (S. 161)—Perfect partition proceedings — Jurisdiction of Civil Court in respect of questions of title—Perfect and imperfect partition —Distinction.

The C. P. Land Revenue Act does not oust the jurisdiction of Civil Courts altogether. S. 220 merely states that no Civil Court shall entertain any suit or application with respect to any matter "which the Governor-General in Council, the Chief Commissioner, or any Revenue Officer is by this Act, empowered to "determine, decide or disposes of". It follows that the Civil Courts' jurisdiction remains as before with respect to all else, and so it is necessary to determine in every case where the question arises, whether the Revenue Authorities have been empowered to deal with the particular matter in dispute or not.

Chapter XI of the Act dealt with partition, and it is important to observe the distinction made between perfect and imperfect partition, not only with respect to the subject-matter and proceedings, but also as regards the powers conferred on the Revenue Authorities. S. 169 contemplates questions of title in imperfect partition proceedings, and gives the Deputy Commissioner certain limited powers to deal with them. There is no similar provision in cases of perfect partition. The distinction is understandable. Imperfect partition ordinarily postulates differences between the co-sharers. If they are agreed among themselves, there is no need to go to an outside authority for the settlement of their disputes. Perfect partition, on the other hand, contemplates either a settled fact, or a situation, in which all parties are agreed.

The Settlement Officer, to whom the application for perfect partition has to be made, has not been given authority to enquire into objections and decide them; at any rate in Chap. XI, R. 3 merely states that he shall "record their objections." The Settlement Officer has not been given power to decide questions of title in perfect partition proceedings under Chap. XI, and consequently the jurisdiction of the Civil Courts is not ousted so far as that Chapter is concerned. An order for partition does not, therefore, oust the jurisdiction of the Civil Court in respect of question of title; but the Civil Court cannot consider whether a partition should have been made in the particular circumstances and whether any particular piece of land ought to have been assigned to this mahal rather than to that. S. 71 deals with the area to be reserved for the residence of the inhabitants, and S. 80 precludes a Civil Court from interfering after a year. A.I.R. (Vol. 24) 1937 Nag. 163= 19 N.L.J. 168=170 Ind. Cas. 34.

——S. 162—Application for imperfect partition—Maintainability—Patti sought to be partitioned already privately partitioned—Consolidation of holdings—It destroys partition already made.

An application for imperfect partition under the provisions of Chap. XI of the Land Revenue Act is not tenable when the patti which is sought to be partitioned has already been privately partitioned. The revenue Courts have no authority to upset a private partition unless all the parties agree to a fresh partition. An imperfect partition under the provisions of Chap. XI is a partition by metes and bounds, whereas a private partition is practically never so. So that what can be done under Chap. XI of the Act is a fresh partition which would be illegal if one party objects to it. Consolidation of holdings makes no difference to this position. It does not destroy the partition which has already been made. It is for the parties themselves to re-adjust their private partition, if there is any need to do so. The Revenue Courts are not concerned with that. 1949 N.L.J. 269.

——S. 169 (1)—Order not stating clause of sub-section under which it is passed—Validity.

A Revenue Court should always and without exception cite the section of the substantive law or statutory rule under which it passes an order. If it passes an order under S. 169 (1) of the Land Revenue Act, it should specify the clause of that sub section under which the order is passed, as important and divergent consequences follow according as to whether the order is under Cl. (a) or Cl. (c) of S. 169 (1) of this Act. A failure to do so invalidates the order completely. 1949 N.L.J. 105.

——S. 169 (1) (a)—Scope—Order of Sub-Divisional Officer rejecting objections as late.

Where there is nothing in the terms of the Sub-Divisional Officer's order to show that the Sub-Divisional Officer declined to entertain the application until the question had been determined by the Civil Court, and all that he said was that the plaintiffs had failed to avail themselves of the opportunity of putting forward their objections at the time when they were called for by proclamation and that the objection which was made, was made so late that it could not be entertained, the order does not fall under S. 169, C.P. Land Revenue Act though in passing the order the Sub-Divisional Officer added certain observations and suggested that the remedy of the objectors lay against the vendors in the Civil Court. A.I.R. (Vol. 24) 1937 Nag. 177=I. L. R. (1937) Nag. 476=171 Ind. Cas. 601.

——Ss. 169 (1) (a) and (b), 220 (n)—Order of Sub Divisional Officer directing party to file Civil suit—Case kept pending—Order submitted to Deputy Commissioner for information—Endorsement by Deputy Commissioner that case be filed—Effect of.

In partition proceedings before a Sub-Divisional Officer L claimed that certain lands belonged to her exclusively The Sub-Divisional Officer passed an order under S. 169 (1) (b), C.P. Land Revenue Act, directing L to file a civil suit to establish her claim within six months. The order ran thus: "I grant her (L) time for six months for this purpose under S. 169 (1) (b). Till then this case will "pend". This order bore an endorsement "submitted to Deputy Commissioner for information." There was a further endorsement by Deputy Commissioner "Seen. It is no use keeping the case pending for six months. It may be filed. Applicant can renew it after the Civil Court decision." The suit was, however, filed beyond six months and it was contended that the order of the Deputy Commissioner was final and had an effect of changing Sub-Divisional Officer's order under S. 169 (1) (b) to one under S. 169 (1) (a):

Held, that the order of the Sub-Divisional Officer was final. The order passed by the Deputy Commissioner on submission of the order was merely passed in an administrative capacity and he had no power in law to vary the order unless in appeal or in revision. His order, therefore, had no effect of changing the order under S. 169 (1) (b) to one under S. 169 (1) (a). A.I.R. (Vol. 25) 1938 Nag. 241=I.L.R. (1940) Nag. 110=176 Ind. Cas. 952.

——Ss. 169 (1) (b), 220 (n)—Order to file civil suit within six months—Suit filed after six months—If barred.

Where in partition proceedings a party is ordered under S. 169 (1) (b), C.P. Land Revenue Act. to file a civil suit within six months but a suit is filed beyond such period, the suit is barred under S. 220 (n) and the Civil Court cannot entertain it. Such party has to face the consequences under S. 169 (2) (b) and take its chance before the Revenue Court. A.I.R. (Vol. 25) 1938 Nag. 241=I.L.R. (1940) Nag. 110=176 Ind. Cas. 952.

——S. 169 (1) (b)—Limitation—Starting point.

An order was passed by Deputy Commissioner on 15th February, 1921 under S. 169 (1) (b) requiring plaintiff to institute within six months a suit in the Civil Court for the determination of the questions raised. The plaintiff went up to the Commissioner in second appeal but that appeal was dismissed on 21st November, 1921. The suit as directed by Deputy Commissioner was instituted on 3rd March, 1922 for a declaration of title to the lands.

Held, that the suit not having been brought within six months from the date of the order of the Deputy Commissioner, namely 15th February, 1921, was barred by S. 169 (2) (b) of the C.P. Land Revenue Act (II of 1917). 20 N.L.R. 145=79 Ind. Cas. 161=A.I.R. 1924 Nag. 275.

——S. 169 (1) (b)—Order referring objector to Civil Court — Omission to direct that application should be made within six months — Validity of order—Time spent in appeal—Declaratory suit under general law.

Where certain persons applied for partition under S. 169 of the C. P. Land Revenue Act, but the application was opposed by others and the Revenue Court directed the objectors to bring a suit in the Civil Court:

Held, (i) that the order was one under S. 169 (1) (b) of the C.P. Land Revenue Act and the mere omission in the order to mention specifically

that application should be made to the Civil Court within six months could not affect the validity of the order;

(ii) a suit for declaration could not be brought independently of the orders of the Revenue Court;

(iii) the time taken in appeal in the Revenue Court cannot be excluded in calculating the period of limitation for a suit in such cases.

Where both parties admit that there has been a partition and the question is whether certain villages were acquired before or after the partition, it is for the plaintiffs to show that the partition took place at a time when the villages were joint family property. A.I.R. (Vol. 20) 1933 Nag. 340=29 N.L.R. 350=149 Ind. Cas. 622.

——S. 169 (1) (b)—Partition order to file Civil suit—Suit for ascertaining titles of parties—Limitation Act, Art. 120.

A Civil Court can enquire into the question as to whether the **khudkasht** or **sir** lands are or are not the sole property of a person or whether they are joint property; though it cannot decide whether there should be a partition or not, the question of title may have to be decided for other purposes for partition. Even as regards the question of partition the Civil Courts are not precluded from giving a declaratory decree as to what are the pre-existing titles of the parties, though of course they can give no direction whatever as whether there should be a partition or how a partition should proceed. So far then as a suit is a suit for ascertaining what the titles of the parties respectively are over the lands in the **mahal**, the suit cannot be time-barred merely because the Revenue Officer declined more than six years before the institution of the suit to proceed with a partition until the question of title had been decided in a Civil Court. 19 N.L.R. 11=71 Ind. Cas. 205= A.I.R. 1923 Nag. 86.

——S. 173—Rent.

Where a person does not hold the **sir** land from another person, he is not liable to pay rent to the latter. A.I.R. 1928 Nag. 39, Foll. 111 Ind. Cas. 527.

——S. 173—Partition.

Where, **Sir** or **khudkasht** land, held merely in severalty by a co-sharer and not as his own exclusive property, is allotted, at an imperfect partition, to a **patti** other than his, and there is no express order of the Deputy Commissioner making him a tenant, or he is not recognised or created a tenant of that land by the co-sharer in whose **patti** it fell, he does not become a tenant of that land. 17 N. L.R. 107=A.I.R. 1921 Nag. 80.

——S. 174—Partition of village owned by two brothers in two pattis—Each brother retaining house in patti allotted to other—Ground rent not fixed—House, if retained as licensee.

Two brothers, **G** and **S**, were members of a joint Hindu family, and they owned a village. Many years ago they partitioned, and the village was consequently imperfectly partitioned by the Revenue Officer and divided into two **pattis**. **Patti** No. 1 fell to the share of **G** and **Patti** No. 2 to that of **S**. **G** nevertheless continued to retain a house which he had been occupying before the partition and which, at the partition, fell within **Patti** No. 2. **S** similarly retained in his possession a house which he had occupied before the partition and which at partition fell in **Patti** No. 1. Some years later these two **pattis** were converted into **mahals**. No ground rents were fixed under S. 174 of the C.P. Land Revenue Act. The question arose whether the land retained could be used by the ex-sharer in his own right or as a mere licensee:

Held, that since **S** held the house after the imperfect partition under the conditions contemplated by S. 174, he could not be held to be a licensee. The position was not altered by the fact that no ground rent was fixed. It was for the other co sharer who, in the imperfect partition was made the proprietor of the **mahal** to ask the Deputy Commissioner to fix that ground-rent. If he did not choose to do so then the co-sharer in occupation of the dwelling house was not bound to pay the rent until it was fixed.

Held, also that so long as **S** paid the ground rent he could retain the land and sub-let it without losing his right of retention. A.I.R. (Vol. 30) 1943 Nag. 23=1942 N.L.J. 506=I.L.R. (1943) Nag. 67=203 Ind. Cas. 67.

——S. 174—Transferor, a proprietor, retaining a plot—Whether licensee—Right to transfer.

Where the transferor who was one of the proprietors of a village retains a particular plot by virtue of S. 174, C. P. Land Revenue Act, the provision that he should be allowed to retain the land does not degrade him to the position of a licensee. The section ensures the payment of ground-rent to the **malguzar**, and the right to transfer subsists subject to the continuation of the payment of the ground-rent. 160 Ind. Cas. 601= 18 N.L.J. 143.

——S. 175—Exclusive property—Mode of partition.

The partition must be so made that whole of the exclusive property falls to its owner as part of his share in the whole mahal. The rental valuation of the exclusive property is included in the assets of the mahal and the property cannot be excluded from the mahal. What is reserved to the owner of the exclusive property is the right to the cultivating profits. 1947 N.L.J. 401.

——S. 187—Appointment of lambardar—Principles to be followed.

Lambardari appointments should be decided on the basis of the principles enunciated in R. 11 of the Lambardari Rules. The Rule empowers the appointing authority to "select" a lambardar from amongst the candidates before appointing him. Discretion is thus vested in the "Revenue Officer exercising the power of appointment." This is as it should be, since that officer has the opportunity of seeing and questioning the candidates and their supporters The appellate authorities should only intervene if the principles referred to have not been given full consideration or if discretion has been so used as to amount to an arbitrary or ignorant disregard of the instructions in the rule. Established hereditary claims descending from father to son cannot be lightly disregarded in selecting a lambardar. A fresh

series of appointments must be based on something more than a mere quantum of shares held by the supporters of a candidate weighed against hereditary claim reinforced by substantial support. 1948 N.L.J. 48.

——S. 187—Protected thekadari village—Appointment of lambardar—Interference by Revenue Tribunal—Rules framed under S. 50, R. 11.

The instructions contained in the note below R. 11 of the rules framed under S. 50 of the Land Revenue Act summarise the law and practice which should be applied to protected thekadari mutations and consequently to lambardari cases.

In a protected thekadari village, the recognised protected thekadar becomes by virtue of that status the lambardar of the village. Where the conflicting claims in a case are incapable of final adjudication in the lambardari proceedings, the Revenue Tribunal will not be justified in interfering with an order of the lower Courts appointing one of the claimants as lambardar, but such appointment cannot be regarded as final and irrevocable. It is still open to the parties or others interested in the protected **thekadari** status to establish their sole right of succession to that status in the village. When that is done the lambardars proceedings can be re-opened. 1948 N.L.J. 422.

——S. 187—Appointment of protected thekadar as lambardar prior to Act — Validity—Right of such lambardar to lambardari haq.

Even under the C. P. Land Revenue Act of 1881, there was no prohibition against the appointment of lambardars from among the thekadars. Therefore, a protected thekadar who was appointed a lambardar before the present Act of 1917 came into force is entitled to all the benefits of his appointment under the latter Act. He is entitled to the **lambardari haq**. I.L.R. (1948) Nag. 628=A.I.R. 1949 Nag. 144=1949 N.L.J. 67.

——Ss. 187 and 189—Imperfect partition of mahal—Previous lambardar, if continues to function as lambardar of Shamlati patti and as sadar-lambardar.

A person appointed lambardar of a village under S. 187 (1), C. P. Land Revenue Act before its imperfect partition, continues after partition to function as lambardar of his own **patti**, as lambardar of the **Shamlati patti** and as **sadar-lambardar** of the village. As he has no interest in the pattas allotted to the other proprietors, he should be formally removed from the office under S. 189 (1) (a) of the Act, and the other proprietors should be appointed as lambardar of their respective **pattis**. Having an interest in the **Shamlati patti**, he cannot be removed from the office of lambardar of that patti under S. 189 (1) (a). He is entitled to be appointed **the Sadar-lambardar** of the village for the reason that he was its lambardar before it was partitioned. 31 N.L.R. (Suppl.) 132, foll. 1950 N.L.J. 321.

——S. 187—Lambardar of Mahal — Whether ceases to be lambardar when mahal is imperfectly partitioned.

Per Grille and Gruer, A. J. Cs.—A person who has been appointed **lambardar** of a **mahal** does not cease to be **lambardar** when the **mahal** is imperfectly partitioned

Per **Subhedar, A. J. C.**—If the Legislature had intended that until the appointment of separate **lambardars** for the **pattis**, created by imperfect partition of a **mahal**, is made, the quondam **lambardar** of the **mahal** would be deemed to be also the **lambardar** of the **pattis** in which he had lost all interest by the partition, it would have expressly said so and worded S. 187 of the Land Revenue Act differently.

Consequently, on the imperfect partition of a **mahal** into **pattis** the original appointment of a person as the **lambardar** of the **mahal** terminates and does not continue with respect to the **pattis** of which he ceases to be a proprietor until the proprietor of the said **patti** is expressly appointed its **lambardar**. A.I.R. (Vol. 23) 1936 Nag. 44=31 N.L.R. 132 Sup.=161 Ind. Cas. 806.

——Ss. 187 and 188—Lambardar — Powers of—Presumption.

Where a lambardar has been appointed under S. 187, until his appointment as lambardar is upset, he must be presuumed to have all the ordinary powers of the lambardar under S. 188, Land Revenue Act. 11 N.L.J. 1=107 Ind. Cas. 527 =A.I.R. 1928 Nag. 123.

——Ss. 187 to 189—A lambardar of a mahal can exercise powers in another patti, though not a proprietor therein.

S. 188 (2) does concentrate in the lambardar certain powers appertaining to the whole proprietary body, which before 1917 were in almost all cases given to him by that body, sometimes expressly but more often tacitly but which need not have been so given and could be withdrawn or modified at any time; now under the new Act the lambardar has those powers by law, and his co-proprietors can neither refuse or limit them at the beginning nor withdraw or modify them subsequently. But this does not by any means involve the impossibility that a lambardar appointed for a mahal should continue to exercise those powers over a separate patti in which he is not even a proprietor. 6 N.L.J. 85=71 Ind. Cas. 777=19 N.L.R. 59=A.I.R. 1923 Nag. 153.

——Ss. 187 and 188—Guardian of minor lambardar—Whether can exercise powers of lambardar in relation to proprietary body.

The guardian of a minor cannot exercise the powers of a **lambardar** in relation to the proprietary body. The power of a **lambardar** to act through a guardian is nowhere recognized in the Land Revenue Act; the only provision for the exercise of the powers of a **lambardar** who is under a disability is through a duly appointed **lambardar-gumastha**. A.I.R. (Vol. 27) 1940 Nag. 377=I.L.R. (1942) Nag. 53=1940 N.L.J. 430=193 Ind. Cas. 75.

——Ss. 187 (3) and 188—Lambardar-gumashta's authority.

The phrase in sub-S. (3) of S. 187, Central Provinces Land Revenue Act, "the duties of the office" is sufficiently wide to cover both the phrases "the duties imposed" and "the powers conferred" in sub-S. (1) of that section. The **lambardar gumashta's** activities are not limited to the duties imposed under S. 188 (1) and he has authority to exercise any of the powers mentioned in Sub-S. (2). It is the same person who performs both the functions, whether he be a **lambardar** or a **lambardar-gumashta** appointed because of the **lambardar's** disability. The granting of leases is within those powers as much as is the collecting of rents or the acceptance of surrenders. A.I.R. (Vol. 27) 1940 Nag. 377=1940 N.L.J. 430=I.L.R. (1942) Nag. 53=193 Ind. Cas. 75.

——S. 187 (5)—Appointment of sadar-lambardar—Procedure—Considerations.

According to S. 187 (5) of the C.P. Land Revenue Act, if in any **mahal** more **lambardars** than one have been appointed one of them is selected and appointed its **sadar-lambardar**. The section presupposes the existence of a **lambardar** for each **patti** and suggests that before a **sadar-lambardar** can be appointed the **mahal** must have its full complement of **lambardars**. The selection has to be done in accordance with the instructions in R. 11 (2) of the **Lambardari** Rules. In selecting the **sadar-lambardar**, the interest possessed in the **mahal** by the candidates, the wishes of the **lambardars** and the interest represented by them have to be considered. In a case in which the **sadar-lambardar** was also a **lambardar** of a **patti**, the vacancy in the office of the **lambardar** must be filled before the appointment to the office of **sadar-lambardar** can be taken up as otherwise the elimination of one **lambardar** will narrow down the scope for selection and the considerations referred to in the rule will not be available to the fullest extent to the officer making the selection. If a **sadar-lambardar** is appointed without the **mahal** having its full complement of **lambardars**, the excluded proprietors will be debarred from claiming the office, thus giving the residuary body the unfair advantage of a restricted contest. The appointment of a **sadar-lambardar** is, for administrative reasons, as much the concern of the Revenue Officers as of the proprietors as even for the limited purpose of collecting the revenue payable through him, the **sadar-lambardar** represents all **lambardars**. That is why in selecting a **lambardar** the wishes of all the **lambardars** have to be considered. 1950 N.L.J. 394.

——Ss. 187 and 157—Sadar lambardar—Responsibility to collect land revenue.

S. 187, C. P. Land Revenue Act, which lays down that it is the duty of the **sadar lambardar** to collect from the **lambardars** the land revenue assessed and pay it to Government, lays a primary responsibility on the **sadar lambardar**, though his ultimate responsibility may be no more and no less than that of other co-sharers who are all jointly and severally liable for the entire land revenue of the village. It is the duty of the **sadar lambardar** to collect from the **lambardars** the land revenue assessed on the **mahal**, and to collect does not merely mean to sit still and accept what is brought to him. A.I.R. (Vol. 25) 1938 Nag. 490=1938 N.L.J. 292=179 Ind. Cas. 12.

——S. 188.

Synopsis.

1. **Powers of lambardar.**
2. **Powers of lambardar-gumashta.**
3. **Sub-S. (2) (a)—Lambardar is deemed to be landlord.**
4. **Sub-S. (2) (b)—Co-sharer's right to enjoy common property.**
5. **Sub-S. 2 (c)—Duty of lambardar to collect and account for village profits.**
6. **Sub-S. 2 (d)—Suit for rent.**

1. Powers of Lambardar.

——S. 188—Powers of Lambardar—Lease of banjar land.

The act of a lambardar in granting a lease of **banjar** land over which the co-sharers exercised certain rights does not amount to their ouster. It is true that in such a case the co-sharers would lose their actual possession over the land, but so long as their proprietary title to the land is not questioned, mere dispossession does not result in an ouster As the **lambardar** has power to grant leases of unoccupied land in the village, it must be presumed that a lease of such land granted by him was granted in pursuance of that power. The action of the lambardar, falling within the scope of his powers, must be deemed to be one on behalf of the whole proprietary body. I.L.R. (1950) Nag. 218=A.I.R. 1950 Nag. 107=1950 N.L.J. 51.

——S. 188—Powers of lambardar—Lease of land held separately by other co-sharers.

S. 188 of the Land Revenue Act gives no authority to the lambardar to grant a lease of land already separately held by other co-sharers and thus to oust them. 7 N.L.J. 241=85 Ind. Cas. 73=A.I.R. 1925 Nag. 181.

——S. 188—Fractional co-sharer leasing his sir land—Lessee recorded as occupancy tenant surrendering land to lambardar—Land becomes original grantor's separate khudkasht and lambardar cannot lease it to any one—Original tenant is entitled to possession.

A fractional co-sharer in a village holding land in severalty as **sir** leased it to another who was recorded as an occupancy tenant. Then the latter surrendered the land to the lambardar who put in another as an occupancy tenant. In a suit by the fractional shareholder against this last named person for possession.

Held, that immediately on the extinction of the original lessee's rights the land became the plaintiff's separate **khudkasht**, that the **lambardar** was not entitled to grant a lease of it and that plaintiff was entitled to possession. 63 Ind. Cas. 733=A.I.R. 1921 Nag. 163 (2).

——S. 188—Leasable trees not leased by lambardar—No negligence can be presumed.

Where a lease of the sindi trees for tapping

could admittedly bring in Rs. 50 a year, but no such lease was given, **held**, until it is at least alleged that the actual reason was negligence it is not incumbent on the **lambardar** to deny or disprove it, and the presumption is that it was not negligence. 70 Ind. Cas. 72=A.I.R. 1923 Nag. 211.

——S. 188—Lambardar cannot transfer rights of other co-sharers without their consent.

Under S. 188 of the C. P. Land Revenue Act the lambardar has authority to manage the village on behalf of the proprietors. But under that section the lambardar has no authority to dispose of the proprietary rights of other co-sharers without their consent. 81 Ind. Cas. 276=A.I.R. 1925 Nag. 101.

——S. 188—Lambardar—Power to appoint village servants.

There is no authority to support the proposition that a person as the lambardar of the undivided village has the right to appoint persons who simply make a living in the village by their labour as village servants and a co-sharer has no right to interfere with their appointment. 1929 Cr.C. 532 =31 Cr.L.J. 20=120 Ind. Cas. 215=A.I.R. 1929 Nag. 328.

——S. 188—Consent—Condition in a wajib-ul-arz —Consent of every co-sharer in petty cases is not necessary.

Where under the **wajib-ul-arz** of the village the **lambardar** was to manage the village with the consent of the co-sharers, the **lambardar** need not obtain the consent of every individual co-sharer, in petty cases such as allowing a cow to graze in the village. 7 N.L.J. 193=84 Ind. Cas. 862=26 Cr.L.J. 382=A.I.R. 1923 Nag. 336.

——S. 188 (2)—Lambardar exercising powers under—If agent of proprietary body.

The **lambardar** in exercising the powers imposed on him under S. 188 (2) acts as the proprietor of the **mahal** and not as the agent of the proprietary body. A.I.R. (Vol. 27) 1940 Nag. 370=I.L.R. (1941) Nag. 571=1940 N.L.J. 480=192 Ind. Cas. 291.

2. Powers of lambardar-gumastha.

——S. 188—The lambardar-gumastha's activities are not limited to the duties imposed under S. 188 (1) and he has authority to exercise any of the powers mentioned in Sub-S. (2). A.I.R. (Vol. 27) 1940 Nag. 377=I.L.R. (1942) Nag. 53=1940 N.L.J. 430=193 Ind. Cas. 75.

——S. 188 (1) (a)—Lambardar-gumastha, if can collect that proportion of rent which would constitute revenue payable.

Sub-S. (1) (a) of S. 188, Central Provinces Land Revenue Act, does not empower the **lambardar-gumastha** to collect that proportion of the rents which would constitute the revenue payable. A. I.R. (Vol. 27) 1940 Nag. 377=I. L. R. (1942) Nag. 53=1940 N.L.J. 430=193 Ind. Cas. 75.

3. Sub-S. (2) (a)—Lambardar is deemed to be landlord.

——S. 188 (2) (a)—Pre existing practice—Legislative sanction.

Before 1917 the custom of appointing the **lambardar** as the agent of the whole of the proprietary body was so general that it was held that he must be deemed to have been so appointed unless and until the contrary was proved and the enactment in S. 188 (2) (a) of the Act II of 1917 can only have been intended to give the legislative sanction and confirmation to this view, which after all is only an inference of fact drawn in each particular case from the known facts of that case and the judge's knowledge of the common course of human conduct and public and private business. 6 N.L. J. 231=84 Ind. Cas. 639=AI.R. 1923 Nag. 286.

——S. 188 (2) (a)—Lambardar is not landlord vis-a-vis his co-proprietors.

In so far as the **lambardar** is deemed to be the landlord he is so **vis-a-vis** his tenants only and only in so far as they hold land of him. This does not make the **lambardar** the landlord **vis-a-vis** his co-proprietors, except in so far as one or more of them may happen to be a tenant of the whole proprietary body and hold "land" of them. A.I.R. (Vol. 26) 1939 Nag. 287=1939 N. L. J. 429=189 Ind. Cas. 273.

——S. 188 (2) (a)—Division of title between co-sharers—Transfer by cosharers, of proprietary rights—Whether transferee or lambardar, becomes landlord of transferor ex-proprietary tenant—Central Provinces Tenancy Act (I of 1920), Ss. 2 (7), 49.

Per Full Bench; **Stone, C. J.** and **Bose, J.**, contra.—An exproprietary occupancy tenant holds land of the **lambardar** if the transferring co-sharer had not acquired exclusive ownership over his **sir** land of which he became the tenant. The ownership of the land still remaining with the body of the proprietors of the village the ex-proprietary tenant would be deemed to hold land of the proprietary body, but on the other hand if there was division of title so as to make the co-sharer exclusive proprietor of the **sir** land appurtenant to his share, he would, on the transfer of his proprietary right, become the occupancy tenant of his transferee. The entire proprietary right in the land which before the transfer was **sir** and after it became an occupancy land would vest in the transferee and he alone would become the proprietor and landlord of it. The transferor to whom occupancy right accrues in pursuance of S. 49 of the Central Provinces Tenancy Act, must be deemed to be holding his land from the proprietor of the land, namely, the transferee and would be liable to pay rent to him and to no one else. In such a case the **lambardar** cannot be deemed to be the landlord of either the **sir** land which has passed into the exclusive ownership of one of the co-sharers or of the ex-proprietary occupancy land when the exclusive owner of it disposes of his proprietary right in his exclusive **sir** Where, however, there is no partition involving division of title but only an arrangement for separate enjoy-

ment and appropriation of profits, the **lambardar** would be bound to hand over the rent collected by him to the particular co-sharer entitled to it but since the **lambardar** does not cease to be a co-sharer in respect of land so exclusively held by the other, the tenant of that land will, in point of law, be deemed to be the tenant of the whole proprietary body. Consequently, the **lambardar** as the agent of that body will, by virtue of S. 188 (2), Central Provinces Land Revenue Act, be entitled to recover the rent. A.I.R. (Vol. 28) 1941 Nag. 21=I.L.R. (1941) Nag. 54=1941 N.L.J. 56=192 Ind. Cas. 472 (F.B.).

——S. 188 (2) (a)—Ex-proprietor becoming an occupancy tenant of his sir land held in severalty is tenant of the purchaser of his village share—The latter and not the lambardar can claim rent from him—C. P. Tenancy Act (1920), S. 49.

Where a co-proprietor of a village sells his share to a third party and becomes an occupancy tenant of his **sir** held in severalty, such an ex-proprietor is the tenant of his vendee and the vendee is primarily entitled to claim the rent and not the **lambardar**. Having regard to the definition of "landlord" and "tenant", in S. 2 (7) and (11) respectively of the Tenancy Act, this conclusion is inevitable. A.I.R. 1928 Nag. 39 (1), Foll. S. 188 (2) (a), Land Revenue Act, does not exclude the co-sharer concerned in such a case from demanding rent from his tenant. 108 Ind. Cas. 790=A.I.R. 1928 Nag. 229.

——S. 188 (2)—Lambardar can sue for ejectment of transferee of absolute occupancy holding transferred without his consent but with consent of other co-sharers.

Notwithstanding consent of other co-sharers to the transfer of an absolute occupancy holding the **lambardar** is entitled to maintain a suit for the ejectment of the transferee when the transfer has been made without his consent. 21 N.L.R. 139=82 Ind. Cas. 495=A.I.R. 1925 Nag. 140.

4. Sub-S. (2) (b)—Co-sharers right to enjoy common property.

——S. 188 (2) (b)—'Others' does not include co-sharer.

The word "others" in Cl. (b), S. 188 (2) does not include co-sharers. Every co-sharer in the village has got a right to enjoy the common property as best he can and he cannot be deemed to have lost right under the aforesaid section which only gives the **lambardar** the powers of the whole proprietary body for the preservation, among others, of the waste land of the village. No co-sharer can be recorded as a trespasser on the common property under Cl. (b) aforesaid. A.I.R. (Vol. 22) 1935 Nag. 61 (1)=17 N.L.J. 251.

5. Sub-S. (2) (c)—Duty of lambardar to collect and account for village profits.

——S. 188 (2) (c)—Lambardar is bound to recover and account for village profits to co-sharers—Merely because he allows another person to collect it, he is not relieved of his responsibility.

A lambardar is a person entitled and bound to recover the village profits and he is bound to account for them to his co-sharers. If he allows another person to assist him in discharge of his statutory duties and to recover some portion of the profits, then that person must be regarded as his agent for the purpose and that in no way relieves the **lambardar** of his responsibility. A. I. R. (Vol. 31) 1944 Nag. 7=1942 N.L.J. 355=I.L.R. (1944) Nag. 63=217 Ind. Cas. 39.

——S. 188 (2) (c)—"Proprietor"—Whether means recorded proprietor only.

To restrict the meaning of the word 'proprietor' in S. 188 (1) (c) of the C. P. Land Revenue Act to mean, 'recorded proprietor', only would be beyond the scope of the powers of the Court. The Legislature has used the expression "recorded proprietor" in Ss. 151, 162 and 167, but has omitted the word "recorded" in S. 188 (2) (c). The omission must be deemed to have been made deliberately and with a purpose. The purpose appears to be to leave the door open to the unrecorded proprietor to sue in a Civil Court which alone has the jurisdiction to try suits for village profits. Of course the unrecorded proprietor will not succeed in his claim for village profits unless he establishes his proprietary title as is contemplated in S. 66 (2) of the C.P. Land Revenue Act, 1917. A. I. R. (Vol. 23) 1936 Nag. 71=31 N.L.R. Sup. 202=163 Ind. Cas. 179.

——S. 188 (2) (c)—Village profits—If include profits of cultivation — Liability of lambardar to render accounts of cultivating profits of Sir and Khudkasht land in his possession.

A **lambardar** is not liable to render accounts of the cultivating profits of the **Sir** and **Khudkasht** land in his possession even though he is not in exclusive possession thereof. Under S. 188 (2) (c), C.P. Land Revenue Act, the **lambardar** has to collect the village profits and render an account of the same to the proprietors. Profits of cultivation is not an item of village profits. 1950 N.L.J. 526.

——S. 188 (2) (c)—Profits made by Lambardar—Co-sharer's right to share.

The **Lambardar** is an agent of the proprietary body and has a fiduciary character as regards them despite the fact that he is also one of the co-sharers. No agent can make a profit of the property of his principal even if he is a co-sharer himself. Where a **lambardar** acquires certain absolute occupancy land, a house and a **bari** and sells them for profit, the co-sharers are entitled to claim their share of the profit made by the **lambardar** in this transaction, and not merely their share of **nazrana**. I.L.R. (1948) Nag. 780=A. I. R. 1949 Nag. 193=1948 N.L.J. 360.

——S. 188 (2) (c)—Term "collect village profits" explained.

The term "collect the village profits" in S. 188, Sub-S. (2) (c), includes profits said to have been derived by co-sharers in the village from excess **sir** and **khudkasht** land in their possession. 11 N.L.J. 113=A.I.R. 1928 Nag. 176.

——S. 188 — Village profits — Suit for accounts against lambardar—Basis of accounting.

Where the **lambardar** is not being sued for negligence, nor is the accounting on the footing of wilful default but the suit is for accounts pure and simple, the co-sharer is only entitled to receive his share in what the **lambardar** actually received and not in what he might or ought to have received. I.L.R. (1948) Nag. 780=A.I.R. 1949 Nag. 193 =1948 N.L.J. 360.

——S. 188—Village profits—Right to interest on.

A co-sharer suing his **lambardar** for accounts can claim interest at 4 per cent. per annum provided he has given a notice in writing. If the **lambardar** had given the plaintiff a certain set of accounts and offered to pay him a certain sum in satisfaction of the claim, the plaintiff should have accepted that sum under protest and sued for the balance. If he did not do so, he will not be allowed interest on the sum offered. I.L.R. (1948) Nag. 780= A.I.R. 1949 Nag. 193=1948 N.L.J. 360.

——S. 188 (2) (c)—Interest on profits unreasonably withheld can be allowed from date when demand for profits was made.

Interest can be allowed on profits which are unreasonably withheld.

Where there was evidence to show that the plaintiff co-sharer associated himself with the **lambardar** in the management of the property, and there was nothing to indicate that for a time at least they were not on good terms:

Held, that it was not proper to allow interest until such time as the relations became strained and one side demanded profits and interest from the other. A.I.R. (Vol. 31) 1944 Nag. 7=1942 N. L.J. 355=I.L.R. (1944) Nag. 63=217 Ind. Cas. 39.

——S. 188—Suit for profits against landlord—Interest should be allowed from 1st November of the year for which profits are due.

Under S. 188 (2) (c) of the Land Revenue Act, 1917, the cause of action from 1st November, therefore, interest on profits should be allowed from that date and not from the last day of the agricultural year when they became due. 9 N.L.J. 7 =93 Ind. Cas. 196=A.I.R. 1927 Nag. 62.

——S. 188—Interest on profits—C. P. Code, S. 34.

There is certainly no ground for granting interest where a co-sharer makes no demand for his share of the profits. 19 N.L.R. 24=73 Ind. Cas. 142=A.I.R. 1923 Nag. 197.

——S. 188—Refusal to pay debt—Interest must be allowed.

An offer to pay about half the sum really due is clearly a refusal to pay the debt. The plaintiff is therefore entitled to interest. Interest should not be awarded in suits of this nature unless the plaintiff proves special circumstances entitling him to claim interest. One of such circumstances is the refusal to pay the debt. 70 Ind. Cas. 72=A.I. R. 1923 Nag. 211.

——S. 188 — Expense of public festivals — Co-sharers are not bound to share unless they have agreed to.

Before the co-sharers can be made liable for money which the lambardar spends on celebration of public festivals, distinct proof of a prior agreement to share these expenses on the part of the other co-sharers would be necessary. Such items cannot be regarded as essential expenses for village management. The mere fact that they were shared in the past is not sufficient to assume that there was an implied agreement to pay. 102 Ind. Cas. 612=A.I.R. 1927 Nag. 267.

——S. 188—Remuneration of mukaddam, gumashta and havildar—Co-sharers are not bound to share unless they have agreed and their service are necessary.

There is no authority for the view that when a **lambardar** chooses to engage a havildar or **mukaddam** gumastha he is entitled to saddle the co-sharers with a share of his wages. At any rate, before he can be entitled to charge the co-sharers with such expenses, it must be proved that their entertainment was absolutely essential for the collection of the rent and land revenue, and the co-sharers agreed thereto. The legislature intended the **lambardari** haq to cover expense like these. 102 Ind. Cas. 612=A.I.R. 1927 Nag. 267.

——S. 188 (2) (c)—Lambardar's right to commission—Fact that he was bound to render accounts within six months—Whether prevents him from suing for recovery of commission before lapse of six months.

Per **Pollock, A. J. C.**—Under S. 188 (2) (c), C. P. Land Revenue Act, the **lambardar** must collect the village profits and render an account to the proprietors within six months of the close of the agricultural year. The fact that the **lambardar** must render an account within six months does not affect the date when the cause of action arose. The **lambardar** became entitled to his commission when he paid the land revenue, and the fact that he was bound to render accounts within six months does not prevent him from suing for the recovery of that commission before the lapse of six months. A.I.R. (Vol. 23) 1936 Nag. 44= 31 N.L.R. Sup. 132=161 Ind. Cas. 806.

——S. 188 (2) (c)—Suit within six months of the end of the year is not premature.

A suit within six months of the end of the year by co-sharers against **lambardar** mentioned in S. 188 (2) (c) is not premature in view of S. 6. 6 N.L.J. 234=A.I.R. 1923 Nag. 287.

6. Sub-S. (2) (d)—Suit for rent.

——S. 188 (2) (c), (d)—Suit by lambardar against co-sharer for rental assessment.

Under Cl. (c) of S. 188, C. P. Land Revenue Act, a *lambardar* has been given the right to collect village profits which includes rental assessment and under Cl. (d) he has been empowered to institute a suit to enforce this right. Consequently, such a suit against a co-sharer for rental assessment for *sir* and *khudkasht* lands held by him is maintainable. A.I.R. (Vol. 24) 1937 Nag. 201=20 N.L.J. 77=I.L.R. (1939) Nag. 274=171 Ind. Cas. 956.

——S. 188—Suit for rent—Lambardar can sue for arrears of rent due for the period of his predecessor.

A suit for arrears of rent by a lambardar for the

period for which his predecessor held office is maintainable. 22 N.L.R. 11=98 Ind. Cas. 357=A.I.R. 1926 Nag 244.

——S. 188 (2)—Suspension of rent by order of Government — Tenant, in ignorance of order, paying rent to lambardar, whether can plead set off in suit by new lambardar for rent for subsequent period.

In a suit for rent by a new *lambardar* a tenant cannot plead a set off for the amount of rent paid by him on account of previous year to the previous *lambardar* in ignorance of the Government order suspending the rent for that period, whatever the cause of action the tenant has as against the previous *lambardar*. The claim to set-off is also barred under S. 81, Central Provinces Tenancy Act. A.I.R. (Vol. 32) 1945 Nag. 271=1945 N.L.J. 341=I.L.R. (1945) Nag. 691.

——S. 188 (2)—Insolvency of proprietor—Receiver appointed by Court, if can sue rent of exproprietary occupancy land.

A Receiver appointed by the Insolvency Court on the insolvency of the proprietor of a village can sue to recover rent of the ex-proprietary occupancy land although he is not the *lambardar*. When the proprietary interest in the *sir* land held formerly by the insolvent proprietor vests in the Insolvency Court the Receiver, who is appointed by that Court, derives his authority from that Court to perform the duties of a proprietor including that of recovering rent. As the ex-proprietary occupancy land is appurtenant to the village which exclusively vests in the Insolvency Court, the Court or its nominee, the Receiver, is alone entitled to recover rents of the ex-proprietary occupancy land to the exclusion of the *lambardar*.

Thus, the fact that the Receiver is not a *lambardar* does not affect his right to recover rents. A.I.R (Vol. 30) 1943 Nag. 269=1943 N.L.J. 374=I.L.R. (1943) Nag. 387=208 Ind. Cas. 601.

——S. 189—Proprietary interest in patti lost by lambardar-gumastha—Whether ground for his removal.

Section 189, C. P. Land Revenue Act is not mandatory but permissive, and if a *lambardar-gumastha* has been appointed who has a proprietary interest in the *patti* and subsequently loses that interest, it is open to the Deputy Commissioner to remove him on that ground. A.I.R. (Vol. 27) 1940 Nag. 377 =1940 N.L.J. 430=I.L.R. (1942) Nag. 53=193 Ind. Cas. 75.

——S. 189—Lambardar continues to be so even after he ceases to be proprietor.

Where a person who is a proprietor and is appointed a lambardar the appointment continues even after he ceases to be a proprietor till he is removed from office under S. 189. 123 Ind. Cas. 897=A.I.R. 1930 Nag. 210.

——S. 189 (1) (d)—Applicability to sadar-lambardar.

A *sadar-lambardar* is also a *lambardar* and is not merely a channel for the payment of revenue from other *lambardars*, and consequently S. 189 (1) (d) can also apply to a *sadar-lambardar*. A.I.R. (Vol. 27) 1940 Nag. 377=1940 N.L.J. 430=I.L.R. (1942) Nag. 53=193 Ind. Cas. 75.

——Ss. 189 (2) and 187—Temporary lambardar—Appointment in death vacancy—Permissibility—Powers of lambardar so appointed.

As the only provision for the appointment of a temporary *lambardar* is made in S. 189 (2) of the Land Revenue Act in a vacancy caused by the suspension of the permanent *lambardar*, a temporary *lambardar* cannot, under the law, be appointed in a death vacancy. The appointment of a temporary *lambardar* in a death vacancy is, therefore, and *ad hoc* appointment made for administrative convenience and has no statutory effect or validity. The temporary *lambardar* so appointed has none of the powers of a *lambardar* appointed under the provisions of S. 187 of the Act. 1949 N.L.J. 377.

——S. 192—Expense which lambardar is entitled to charge co-sharers.

The only items of expenditure which can be based on a suit against the *lambardar* for village accounts are those properly incurred in the ordinary course of village management unless the *lambardar* can show that other items were incurred with the consent of the other co-sharers. A.I.R. (Vol. 31) 1944 Nag. 7=1942 N.L.J. 355=I.L.R. (1944) Nag. 63=217 Ind. Cas. 39.

——S. 192—Cost of Collection—Lambardar's right to.

Even if S. 192 does not entitle lambardar to get 5 per cent of the revenue payable as costs of collection in the absence of any order by the Deputy Commissioner, he is entitled to get it on general principles of equity or under S. 70 of the Contract Act. 6 N.L.J. 1=71 Ind. Cas. 140=A.I.R. 1923 Nag. 164.

——S. 192—Suit for village profits—Lambardar or mukaddam—Remuneration for services for period preceding its fixation.

In a suit for village profits, a *lambardar* or *mukaddam* is entitled to claim whether as a plaintiff or as a defendant remuneration for his services for such years prior to the year in which his remuneration has been fixed by the Deputy Commissioner under the provisions of S. 192 of the Land Revenue Act as are within the period of limitation. A.I.R. (Vol. 26) 1939 Nag. 75=I.L.R. (1938) Nag. 509=1938 N.L.J. 448=181 Ind. Cas. 5.

——S. 192—Lambardar's right to remuneration.

Defendant's contention was that the plaintiff was not entitled to get any remuneration at all as lambardar because the Deputy Commissioner had never fixed the remuneration for the lambardar of that village under S. 192 of the Land Revenue Act, 1917.

Held that as the defendant has admitted in the first Court that the plaintiff was legally entitled to recover this money from him, he could not deny it in appeal, and that in any case S. 229 of the Act II of 1917 continued the state of things existing under Act XVIII of 1881 in regard to the remuneration of lambardars. 66 Ind. Cas. 465=A.I.R. 1922 Nag. 111.

——S. 192—Remuneration of lambardar—If recoverable by suit.

In all appointments of lambardars the remuneration of that post, unless fixed by a revenue officer is not recoverable by suit. A.I.R. 1926 Nag. 274 and 6 N.L.R. 27. Foll. Similarly, if such a suit

is not maintainable, on the same analogy a decree also may not be available. 105 Ind. Cas. 567=A.I.R. 1928 Nag. 68.

——S. 192—Lambardar's remuneration — If recoverable by suit.

S. 192 (1) does not say that the fixation of the remuneration payable to a lambardar is a condition precedent to his maintaining a suit for the recovery of such remuneration in a Civil Court although the section as amended by Act VI of 1923 confers exclusive jurisdiction on a Revenue Court to fix such remuneration. S. 192 does not abrogate the right of a lambardar who has been already appointed, before the new Act came into force to recover his lambardari dues at the rate fixed by the rules under S. 137 of the repealed Act. S. 229 of the new Act expressly saves this right. 20 N.L.R. 142=83 Ind. Cas. 172=A.I.R. 1925 Nag. 129.

——S. 192 (1)—Lambardar's commission for collecting land revenue from malik makbuzas—Co-sharers, if can share it.

A *lambardar* receives one commission on the land revenue assessed on a *mahal* and another commission on the land revenue assessed on the *malik makbuzas*, and this commission is given to him not as proprietor of the village but to compensate him for the trouble he has in collecting the money. Neither forms part of the village assets and in neither have the co-sharers any right. A.I.R. (Vol. 26) 1939 Nag. 121=1939 N.L.J. 140=I.L.R. (1941) Nag. 345=181 Ind. Cas. 915. [Overruled in A.I.R. (Vol. 29) 1942 Nag. 124=202 Ind. Cas. 524].

——S. 192—Sadar lambardar—Right to remuneration.

A Sadar lambardar as such is not entitled to any remuneration. A.I.R. 1926 Nag. 274, Foll. 100 Ind. Cas. 812=A.I.R. 1927 Nag. 175; 23 N.L.R. 31 =93 Ind. Cas. 121=A.I.R. 1926 Nag. 318.

——S. 192—Mukaddam—Remuneration for period prior to order of Deputy Commissioner fixing his remuneration—Civil Court, if can award remuneration, already fixed, for such period.

A *mukaddam* of a village, who is not a *lambardar*, is entitled to recover his remuneration for a period prior to the order of the Deputy Commissioner fixing his remuneration. The Civil Courts are not precluded from awarding the remuneration as already fixed by the Deputy Commissioner for any period proceeding such fixation subject, of course, to the Limitation Act. But the Civil Court is incompetent to fix the remuneration. A.I.R. (Vol. 24) 1937 Nag. 411=173 Ind. Cas. 7.

——S. 192—Pay of mukaddam gumastha, whether chargeable to proprietary body.

Where a *mukaddam gumastha* has been appointed, his pay, though fixed by the Deputy Commissioner, must be paid as a rule by the *lambardar* himself. It cannot be charged to the whole proprietary body in addition to the *lambardar's* remuneration.

If the *lambardar* thinks that he should recover more from the proprietors on the ground of the necessity of a *mukaddam gumastha* being appointed then he should make such an application to the Deputy Commissioner and such extra remuneration could be allowed for special reasons to be recorded under the first proviso to S. 192 (1), C. P. Land Revenue Act. A.I.R. (Vol. 18) 1931 Nag. 120=27 N.L.R. 262=134 Ind. Cas. 264.

——S. 193 (c)—Enforcement on public path within abadi site by mukaddam—Power of Tahsildar to direct its removal.

There is no internal survey of a village *abadi* and therefore neither the current village papers nor the wajib-ul-arz can possibly contain a record of lanes and public paths within the *abadi* site. The Revenue Courts can intervene when the question of encroachment on a public path or lane within the *abadi* site is raised before it. Such questions can be raised by executive action taken by the *mukaddam* under S. 193 (c) of the Land Revenue Act. If the *mukaddam* himself commits an encroachment, the Tahsildar who is a superior Revenue Officer can exercise powers under that section and direct removal of the encroachment. In order to "prevent" an encroachment a Tahsildar must necessarily have power also to direct removal of an existing encroachment. 1949 N.L.J. 182.

——S. 196—Kotwar's remuneration—Mode of assessment and collection—Liability of co-sharers.

Co-sharers in a *malguzari* village are not assessed separately to Kotwar's remuneration. The whole of the home-farm land is assessed as a single unit. The person responsible for the payment of the Kotwar's remuneration on this account is the Lambardar of the village. He is responsible for collecting it from the proprietors of the Mahal or Patti of which he is lambardar. It is not for the Kotwar to collect his remuneration individually from each co-sharer proprietor of a village or take action against the proprietors severally for their failure to pay him his dues. The remuneration payable by the proprietary body as fixed at settlement is not an unalterable sum. It should be re-calculated according to the prescription in the Wajib ul-arz whenever there is an accretion to or diminution in the total home-farm area. Any proprietor who holds land in his individual capacity, other than *Sir* or *Khudkasht* land is liable to be assessed for Kotwar remuneration on that land as if it were tenancy land. This is an individual liability which he must discharge not as proprietor of a share in the village but as an independent holder of land. 1948 N.L.J. 475.

——Ss. 197 and 77 (1) (c)—Suit to recover dues from proprietor of one mahal by proprietor of another mahal—Such dues representing share of latter's loss in respect of assessment of Kotwar's service holding situated in his mahal—Jurisdiction of Civil Court.

Where under the terms of a Wajib-ul-arz, the proprietor of Mahal No. 1 had to pay to the proprietor of Mahal No. 2 the share of the latter's loss in respect of the assessment of the Kotwar's service holding which was situated in Mahal No. 2.

Held, that the amount, payable could not be recovered under S. 197 of the Central Provinces Land Revenue Act but only by a suit in a Civil Court. The amount payable was *not* on account of Kotwar's dues; it was merely an adjustment of rent between the proprietors of the two mahals which happened to arise from the fact that the Kotwar held his land free and that land was all situated in one mahal. S.

197 was not therefore applicable to the present case. 1946 N.L.J. 689.

——S. 201—Breach by Malguzar of wajib-ul-arz entry regarding gazing — Tenant's right to graze cattle over banjar land.

Where the *wajib-ul-arz* entry is to the effect that the cultivators graze their cattle free on the *banjar* land,, the tenants are entitled to graze their cattle over the whole of the existing *banjar* land except that area which was specifiically recognised as reserved for grass for the Malguzar. Where there is a breach by the Malguzars of the *wajib-ul-arz* entry regarding grazing by reserving more of the *banjar* land for the grazing of their own cattle than was recognised at settlement, action can be taken under S. 201 of the Land Revenue Act against them. 1950 N.L.J. 207.

——S. 201 — Application under—Procedure — C. P. Code—Applicability.

Any application made under S. 201 of the C. P. Land Revenue Act is an original proceeding which must be governed by the procedure laid down in the Civil P. C. Similarly, the provisions of O. XLI of the Civil P. C. apply to the proceedings in appeal before any Revenue Court. Under O. XIX, R. 2, it is permissible for any party to give evidence upon any application by affidavit, although the Court may at the instance of either party, order the attendance for cross-examination of the deponent. Thus, as the Revenue Court is a Court of civil judicature it is authorised to receive affidavits in evidence. A.I.R. (Vol. 22) 1935 Nag. 125 (1)=36 Cr.L.J. 765= 1935 Cr. Cas. 564=155 Ind. Cas. 557.

——S. 201 and Central Provinces Tenancy Act, S. 88-A—Cases under—Procedure—Cr. P. Code or I. P. Code—If applicable.

Cases under S. 201 of the Central Provinces Land Revenue Act and under S. 88-A of the Central Provinces Tenancy Act are not governed by S. 5 (2) or any other provisions of the Cr. P. Code or of the I. P. Code. The definition of 'offence' contained in S. 4 (o), Cr. P. Code, does not apply to cases under these Acts. 1945 N.L.J. 542.

——S. 201 and Central Provinces Tenancy Act, S. 88-A—Cases under—Revenue officer, if can start suo motu.

Cases under S. 201 of the Land Revenue Act and S. 88-A of the Tenancy Act, can be started by the revenue officer *suo motu*. In S. 201 there is nothing to bar this and in S. 88-A, the words "or otherwise" would authorise it. 1945 N.L.J. 542.

——S. 201 and Central Provinces Tenancy Act, S. 88—Contravention of rule or custom by landlord—Separate fine in respect of each tenant injured thereby—If can be imposed.

Under S. 201 of the Central Provinces Land Revenue Act separate fines cannot be inflicted in the case of each tenant injured by a contravention of the rule or custom by the landlord. For each occasion (*e.g.*) each season that the landlord contravenes each separate rule or custom, the maximum fine which can be imposed under the section is Rs. 200. This does not, however, apply to cases under S. 88 of the Tenancy Act. 1945 N.L.J. 542.

——S. 201—Lease of "banjar" land for cultivation —Liability of Malguzar and lessee—Construction of wajib-ul-arz.

If an entry in the wajib-ul-arz of a village states that the agricultural cattle of the cultivators "graze free in the 'banjar' land of the village", its legal effect is that the tenants are only entitled to graze their agricultural cattle free on whatever waste land there may be in the village from time to time. The malguzar is not bound to preserve an adequate area of waste land for the grazing of the village cattle. He may, if he chooses, lease out the whole of it for *cultivation* but not for grazing. If, therefore, a malguzar leases out a portion of "banjar" land for cultivation, neither he nor the lessee is liable under S. 201 of the C. P. Land Revenue Act. 30 N.L.R. 246. diss. from. 1949 N L.J. 329.

——S. 201—Right of free grazing—Construction of wajib-ul-arz—"Banjar" land—Meaning of.

The word "*banjar*" has not been defined anywhere It includes all unoccupied village waste land which is regarded by custom as communal land and on which the grazing of cattle is possible. "*Banjar*" is the generic term for grazing land. In popular parlance it means waste land in the village over which cattle wander about and find their grazing. Where the wajib-ul-arz of a village recites that "there is no *banjar* land in the village", it cannot be contended from a stereotyped entry in the wajib-ul-arz that agricultural cattle graze free of charge on all the *banjar* land of the village that a certain khasra number which is recorded as "*jhudpi jungle ghas*" is "*banjar*" land and should, therefore, be open to free grazing. 1950 N.L.J. 73.

——S. 202 (as amended by Act I of 1945)—Retrospective effect.

The enhanced penalty of Rs. 1,000 under S. 202 of the C. P. Land Revenue Act was brought into force by Act I of 1945, which became law on 9th February, 1945, and can therefore only be imposed when it is proved that the breach was committed after that date. 1948 N.L.J. 329 and 429.

——S. 202—Provision in S. 202 must be read with the general rule stated in the opening words of S. 220 of the Act. A.I.R. (Vol. 18) 1931 Nag. 187= 134 Ind. Cas. 281.

——Ss. 202 and 220—Lease of malguzari forest without sanction — Deputy Commissioner taking forest under protection—Suit for recovery of consideration and damages — Jurisdiction of Civil Court.

Where a lease of *malguzari* forest was giving without the sanction of the Deputy Commissioner and in ignorance of the fact that such sanction was necessary and the Deputy Commissioner took the forest under protection under S. 203, C. P. Land Revenue Act, and the lessee sued the lessor for refund of the consideration paid by him and damages:

Held, (*i*) that the jurisdiction of the Civil Court to entertain the suit was not barred by S. 220;

(*ii*) the lessee was entitled to recover under S. 65, Contract Act, the consideration paid but not damages. A.I.R. (Vol. 18) 1931 Nag. 137=134 Ind. Cas. 281.

——S. 202—Forest Rules—Interpretation.

The Rules under S. 202 of the C. P. Land Revenue Act will fail in their purpose if they are interpreted with too strict a regard to legal technicalities Practical considerations must be the guide in the interpretation of the words occurring in the Rules. 1948 N.L.J. 376.

——S. 202 — Forest Rules — Applicability — "Jarkharedi" villages.

The Rules framed under S. 202 Land Revenue Act, are applicable to *"Jarkharedi"* villages, and the lambardar-proprietor is liable to be penalised, as provided in the Rules, for any contravention of them. 1950 N.L.J. 131.

——S. 202—Forest Rules—Applicability—Forest growth on 'chota ghas' land.

"Chota ghas" land comes under the classification "scrub jungle and grass". By the definition in R. 1 of the Malguzari Forest Rules any forest growth on "chota ghas" land must therefore be subject to control under those rules. If there is no forest growth on the land then obviously the rules cannot apply. 1948 N.L.J. 552.

——S. 202—Forest Rules, Rr. 2 and 5 (c)—License given by Malguzar for cutting timber with condition that Forest Rules should be observed—Breach of Rules by licensee—Liability of Malguzar.

Written licences were given by a Malguzar for cutting timber in his forest with a condition embodied in them that the Malguzari Forest Rules should be observed. The licensees however disregarded the condition. They did not cut trees flush with the ground R. 5 (*c*), and offended further by cutting a large number of prohibited trees (R. 2).

Held, that the Malguzar could not be held liable for the breach of R. 5 (*c*) because it could not be held that he in any way abetted such breach, but that he was liable for a breach of R. 2 because he was the immediate source of the authority which led to a breach of the rule. 1948 N.L.J. 376.

——S. 202—Forest Rules, Rr. 3 (2) and 4—Application by lambardar for permission to clear forest land for cultivation—Need for proper enquiry—Duty of Deputy Commissioner.

If a lambardar applies under R. 3 (2) of the Malguzari Forest Rules for permission to clear forest land in the village for cultivation sufficient care must be taken to safeguard all interests concerned including the public interest, before permission is given. Any objection raised to the granting of permission must be enquired into and there must be an inspection of the village forest so that a responsible officer can decide which is the most suitable area to be disforested. R. 4 prescribes that the Deputy Commissioner should specify in the permission the period within which the land "after its clearance shall be brought under cultivation either by the proprietor himself or through his lessee". This is a very precise condition and a breach of it would be punishable under S. 202 (1) of the C. P. Land Revenue Act. It is essential that in those cases the Deputy Commissioner should have an enforceable hold on the proprietor or his lessee, otherwise *mala fide* applicants will succeed in converting to their advantage, and nobody else's, big tree forest into mere scrub jungle and not crop-bearing lands. 1950 N.L.J. 195.

——Ss. 202 and 23—Forest Rules, R. 4—Communication of prohibitory order—Presumption from direction in order sheet.

There is no provision in the Land Revenue Act as to the mode of communicating orders of Revenue Courts. Where in the case of a prohibitory order issued under R. 4 of the Rules under S. 202 of the Act there is in the order-sheet no copy of any 'parwana' which was issued nor an acknowledgment of any sort to show that any communication was made to the person concerned, a mere entry made in the order-sheet directing that the order should be communicated is not proof of service or communication, but is only proof of such an intention. No presumption adverse to a person affected by a prohibitory order can be draws from a direction in an order-sheet of which there is no proof of completion either by acknowledgment of the person concerned or by substituted service on his refusal to acknowledge. 1948 N.L.J. 468.

——S. 202—Forest Rules—R. 5 (1) (b)—Cutting of timber trees—Maximum penalty.

R. 5 (1) (b) of the rules framed under S. 202 of the C. P. Land Revenue Act empowers the Deputy Commissioner to penalise even the cutting of timber trees and in fact the cutting of any trees, in case, the conditions specified in that rule with regard to the trees left standing not being less than 90 per acre, are not followed under the Notification, dated the 16th May, 1945, the maximum fine that can be imposed under S. 202 has been raised from Rs. 200 to Rs. 1,000. 1949 N.L.J. 455.

——S. 202—Forest Rules—R. 5 (2)—Lessee of forest growth on "chota ghas" land granting sub-lessee—Un-restricted cutting of forest growth by sub-lessee—Liability of lesseee.

If a lessee of the forest growth standing on *"chota ghas"* grants a sub-lease and there is an unrestricted cutting of the forest growth by the sub-lessee, the lessee is liable for breach of R. 5 (2) of the Malguzari Forest Rules. 1948 N.L.J. 552.

——S. 203.

Synopsis.

1. Scope of section.
2. Abadi—Presumption as to ownership.
3. Definition of "land" does not apply to sites in abadi.
4. Tenant occupying Abadi site—Position of.
5. Rights of old occupants of Abadi site.
6. Sub-S. (1)—Right to house site in Abadi.
7. Sub-S. (2)—Forfeiture of right to house site.
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9. Sub-S. (4)—Allotment of sites in Abadi.
10. Sub-Ss. (5), (6) and (7)—Absence of Notification—Effect.
11. Sub-S. (7)—Nazrana—How to be estimated.
12. Sub-S. (8)—Contract between proprietor and holder of Abadi site.

1. Scope of section.

——S. 203—S. 203, C.P. Land Revenue Act, does not apply to co-sharers. It does not cover the case

of the person in occupation who was originally a proprietor of the *mahal* or the *patti*. A.I.R. (Vol. 30) 1943 Nag. 23=1942 N.L.J. 506=I.L.R. (1943) Nag. 67=203 Ind. Cas. 67.

——Ss. 203, 188 (2)—S. 203 has nothing to do with rights and liabilities of proprietors ts between themselves.

Section 203 C. P. Land Revenue Act, regulates the rights of the proprietor of the *mahal vis-a-vis* the persons specified in S. 203 and has nothing to do with the rights and liabilities of the proprietors, when there are more than one as between themselves. A.I.R. (Vol. 26) 1939 Nag. 287=1939 N.L.J. 429 =189 Ind. Cas. 273.

2. Abadi—Presumption as to ownership.

——S. 203—Abadi—Presumption as to ownership —Burden of proof.

Where the site in suit forms part of the *abadi* of the village, the presumption would be that the landlord of the village is the owner of it. The burden would rest on the plaintiffs who claim to be proprietors to substantiate their plea of ownership. A.I.R. (Vol. 24) 1937 Nag. 338=I.L.R. (1938) Nag. 326 =176 Ind. Cas. 936.

3. Definition of "land" does not apply to sites in abadi.

——S. 203—Definition of "land", if applies to sites in abadi.

The term "land" in C. P. Tenancy Act and C. P. Land Revenue Act does not apply to sites in the *abadi* because such sites are let out for the purpose of constructing houses for the habitation of human beings and that cannot be regarded as a purpose subservient to agriculture within the meaning of that definition. A.I.R. (Vol. 26) 1939 Nag. 287=1939 N.L.J. 429=189 Ind. Cas. 273.

4. Tenant occupying Abadi site—Position of.

——S. 203—Occupation by tenant can be ended by landlord selling the land unless tenant was given the land as house site.

A tenant occupying Abadi site in a village is only a licensee. S. 203 of the Act does not help him unless the land is given to him as house site. If the landlord sells the land the license will come to an end. A prescriptive title cannot be acquired by the tenant in regard to such land in the absence of any assertion of adverse title against the landlord. 82 Ind. Cas. 182=A.I.R. 1925 Nag. 81.

5. Right of old occupants of Abadi site.

——S. 203—Occupant of abadi site since before First Settlement—Whether mere licensee—Presumption—Absence of entry in wajib-ul arz relating to his right—Effect of.

There is a presumption that an occupant of an *abadi* site since before the 30 years' settlement possesses proprietary right and is not a mere licensee whose right is subordinate to the proprietary right of the *malguzar* which was conferred upon him by the said settlement. The onus, therefore, lies upon the *malguzar* to prove that the occupant was a mere licensee. The terms of *wajib-ul-arz* are not fully exhaustive and any absence of entry relating to the rights of the old occupants at the time of the first settlement does not negative their proprietary rights; nor does it indicate that they were regarded as licensees. I.L.R. (1948) Nag. 237=A.I.R. 1949 Nag. 120=1948 N.L.J. 127.

6. Sub-S. (1)—Right to house site in Abadi.

——S. 203—Abadi land sub-divided into pattis—A tenant in one patti of a mahal cannot hold house site in the abadi land of another patti.

Where the abadi of the mahal has been divided into pattis so that each pattidar has his separate abadi for the tenants or agriculturist of his patti, the agriculturists or non-agriculturists of each patti have a separate provision made for their residence in the abadi of their own patti and have no right to look to another patti or its abadi for residential quarters. 10 N.L.J. 262=110 Ind. Cas. 834= A.I.R. 1928 Nag. 86.

——S. 203—Mahal divided into patti—Tenant of one, if has right to house site in another.

When a *mahal* is divided into *pattis* each proprietor becomes the landlord of his particular *patti*. Under S. 203, C. P. Land Revenue Act, the tenant is entitled to claim a place of residence from his own landlord and not from any other person. He can only look to the landlord of his own *patti* and has no right to a house site beyond it and then as the license comes to an end he loses his right of residence. A.I.R. (Vol. 21) 1934 Nag. 168=17 N.L.J. 173=150 Ind. Cas. 974.

——S. 203 (1)—House site—Owner of house having no intention of constructing a house for residence there—Landlord is entitled to its possession.

Sub-Section (1), S. 203 means that each person described in it is entitled to a site of reasonable dimensions for his house, his house meaning his residence. Unless, then, there is an intention to construct a house for a residence, there is no right to any site and such a person is liable to ejectment at the will of the landlord. 11 N.L.R. 126 Foll. 23 N.L.R. 150=109 Ind. Cas. 177=A.I.R. 1928 Nag. 69.

——S. 203 (1)—"Every person"—Meaning of.

"Every person" must include females, but excludes married females living with their husbands as by their doing so they are deemed to have no intention to have separate house for themselves and so they are not entitled to house sites in the abadi land. 23 N.L.R. 150=109 Ind. Cas. 177=A.I.R. 1928 Nag. 69.

——Ss. 203 and 188—Ex-proprietor transferring site and building in abadi and keeping acre or two of occupancy land—Palatial residence created by him in abadi, whether preserved for him.

It is not the intention of the Legislature to preserve to an ex-proprietor a palatial residence which he may have erected in the *abadi* in the past when subsequently he may have only an acre or two of occupancy land left to him after he has himself transferred the site and the building on it and reaped the full benefit of the proceeds. The Court may,

however, if it is just and convenient direct suspension of the operation of the decree for a short period to give him breathing space in which to make other arrangements. A.I.R. (Vol. 26) 1939 Nag. 287 =1939 N.L.J. 429=189 Ind. Cas. 273.

——S.203—Proprietor mortgaging his village share and house in abadi—Mortgage foreclosed—Whether can claim to retain possession of house.

If a proprietor mortgages his village-share (without cultivating rights in *sir*) and his house in the *abadi*, he cannot, after the mortgage has been foreclosed and he has become an ex-proprietary tenant, claim to retain possession of the house on the ground that under S. 203 of the C. P. Land Revenue Act, he is entitled to a house-site in the *abadi*. A.I.R. (Vol. 26) 1939 Nag. 83=1939 N.L.J. 9=I.L.R. (1939) Nag. 59=181 Ind. Cas. 577.

——S. 203—Mortgage of house in abadi and village including sir—Mortgagor becoming ex-proprietary tenant of sir—Mortgagee—If can execute decree against house.

A village including *sir* lands was mortgaged by the *malguzar*. His house in the *abadi* was also mortgaged. Upon a decree obtained on these mortgages, the mortgagee foreclosed the proprietary interest. Thus the mortgagor became an ex-proprietary tenant of the *sir* lands. When the mortgagee sought to execute his decree against the house it was contended by the mortgagor that under S. 203 C. P. Land Revenue Act, he was entitled to a house in the *abadi* and as such the house could not be attached:

Held that he was entitled only to a house site of reasonable dimensions in the *abadi* as tenant and not to any particular site or house and hence the house was attachable. A.I.R. (Vol. 25) 1938 Nag. 544= 1938 N.L.J. 445=180 Ind. Cas. 690.

7. Sub-S. (2)—Forfeiture of right to house site.

——S. 203—Co-sharer parting with agricultural land and retaining only proprietary share in village —If forfeits his right to house site.

It is wrong to say that a co-sharer who parts with all his agricultural land and retains only a proprietary share in the village would forfeit his right to a house site in the *abadi* however long he may have been there and, however palatial a residence he may have set upon it. A.I.R. (Vol. 26) 1939 Nag. 287=1939 N.L.J. 429=189 Ind. Cas. 273.

——S. 203 (2)—Sub-S (2)—Scope and effect.

Sub-Section (2) merely lays down that the right to a site is forfeited when certain contingencies happen: it does not state that a right which exists cannot cease unless one of those contingencies happens. 23 N.L.R. 150=109 Ind. Cas. 177=A.I.R. 1928 Nag. 69.

——S. 203 (2) and (3)—Tenant deserting village—Malguzar's right to house.

Where a *wajib-ul-arz* provided that the *malguzar* was unless there was an agreement to the contrary, entitled to the ownership of vacant houses after they had been abandoned for two years and after the original owner had abandoned the village and the *malguzar* had obtained possession of his house the plaintiffs claimed the house by purchase in pursuance of a mortgage:

Held, that S. 203 (3) of the C. P. Land Revenue Act was inapplicable to such a case and the *malguzar* was entitled to the house.

Section 203, Sub-S. (2), is not limited in its applicability to cases where the right is forfeited on certain contingencies arising but can also include forfeiture of existing rights. A.I.R. (Vol. 20) 1933 Nag. 187=30 N.L.R. 99=144 Ind. Cas. 201.

8. Sub-S. (3)—Transfer of House site in Abadi. See also Heading 9.

——S. 203—A tenant has right to transfer site subject to exceptions without landlord's consent.

A tenant has a right of transfer subject to certain exceptions mentioned in the section. A transfer of a site to a person entitled to and not already in possession of it being perfectly legal is not voidable at the instance of the landlord, because the transferrer and the transferee settled the bargain without reference to him. 11 N.L.J. 240=113 Ind. Cas. 176=A.I.R. 1929 Nag. 59.

——S. 203 (3)—Even person becoming agriculturist subsequent to his entering abadi is not competent to transfer site.

Even a person who originally held site in abadi as a non-agriculturist but became agriculturist subsequently is equally incompetent to transfer the same as a person who entered the abadi as an agriculturist. 75 Ind. Cas. 925=A.I.R. 1924 Nag. 225.

——S. 203 (3)—Co-sharer—Site chosen with implied consent of lambardar—Transfer of site to such person—Legality of.

Even a co-sharer would not have a right to choose any site he wished unless he had the consent of the *lambardar* to that choice. When the *lambardar* has consented, though impliedly, the co-sharer is placed in the position of a person entitled to, though at that time not in possession of, that site. Being a person within this category, he is one to whom under the provisions of S. 203 (3), another's site can be transferred. In such a case the prohibition contained in S. 203 (3) does not apply but the exception does. A.I.R. (Vol. 23) 1936 Nag. 283=19 N.L.J. 211= I.L.R. (1937) Nag. 58=166 Ind. Cas. 563.

——S. 203 (3)—Applicability — "Transfefr"—Simple mortgage—If prohibited.

A simple mortgage by a tenant of his house in the *abadi* together with a mortgage of the site under it, is not a "transfer" which would entitle the landlord to eject the tenant on the ground of the the prohibition contained in S. 203 (3) of the C. P. Land Revenue Act. "Transfer" in that sub-section means a transfer of the right to possession. Since there is no transfer of a right of possession in a simple mortgage, there is no transfer within the meaning of S. 203 (3). I.L.R. (1948) Nag. 259= A.I.R. 1948 Nag. 314=1948 N.L.J. 580.

——S. 203—"Transfer"—Mortgage of house in adabi site without malguzar's permission.

A mortgage is undoubtedly a transfer. The term "transfer" cannot be limited to a conveyance of all the transferor's interest in the property and includes such limited form of conveyance as a mortgage. A transfer under S. 203 of the C. P. Land Revenue

Act does not connote only a transfer involving a complete conveyance of all rights. A transfer of a house in the *abadi* site without the *malguzar's* permission by means of a mortgage is, therefore, as repugnant to the Land Revenue Act as is a transfer by means of a sale. A.I.R. (Vol. 27) 1940 Nag. 182=1940 N.L.J. 44=I.L.R. (1940) Nag. 167=186 Ind. Cas. 250.

——S. 203—Usufructuary mortgage of abadi site—Position of mortgagee—Suit by landlord for possession—Limitation Act, Arts. 142, 144, 120.

Interest of a usufructuary mortgagee of an *abadi* site is undoubtedly a limited interest. But such a transfer is struck by S. 203, C. P. Land Revenue Act and the mortgagee is in relation to this land a mere trespasser. A suit, therefore, by landlord for possession is governed by Art. 142 or Art. 144 and not by Art. 120, Limitation Act. A.I.R. (Vol 26) 1939 Nag. 163=1939 N.L.J. 136=I.L.R (1941) Nag. 337=182 Ind. Cas. 527.

——S. 203—Transfers of all kinds of houses in abadi without malguzar's permission are forbidden.

Walib-ul-arz forbids all kinds of transfers, whether by sale or otherwise of houses in the abadi without malguzar's consent. Thus a mortgage of such a house without malguzar's permission is void against him and can only be enforced as against the superstructure. 13 N.L.J. 1=121 Ind. Cas. 666=A.I.R. 1930 Nag. 89.

——S. 203—Mortgage by tenant does not entitle landlord to sue for re-entry.

As a mortgage is not a transfer, which permanently extinguishes a tenant's interest it affords no cause of action to a landlord to sue for re-entry. In respect of an Abadi site the landlord does not get any right of re-entry under S. 203 of the C. P. Land Revenue Act unless there is a permanent transfer such as a sale, etc. It is not competent for him to sue for ejectment from the Abadi site when there is only a temporary loss of a right of enjoyment of occupation of the site on account of an execution of a possessory mortgage. 82 Ind. Cas. 1056=A.I.R. 1925 Nag. 204.

——S. 203—Mortgage of a house is not necessarily abandonment — License is heritable — Burden of proof is on stranger to prove that his transferer had transferable interest.

A license granted to a non-agriculturist labourer to occupy the abadi site is heritable but if the heir has never signified his intention to take it up, the malguzar cannot be presumed to have knowingly extended the license to him. A landlord has a right to demand back possession of abadi site from a stranger in possession of the house on it and the burden of proof lies on the latter to establish that his transferer had a transferable interest in the abadi and not merely a license to occupy or that the terms of the license were such as disentitled the proprietor from re-entering on the site. Execution of a possessory mortgage deed by an agriculturist resident of an abadi site does not work a forfeiture so as to give a right of re-entry to the proprietor, where there is no proof that the agriculturist has abandoned the site finally. The mere fact that the equity of redemption has not yet been foreclosed does not necessarily indicate that the mortgagor or his heirs have maintained their hold on the abadi site of the house. 86 Ind. Cas. 763=A.I.R. 1925 Nag. 396.

——S. 203 (3) and (4)—Person having site insufficient for his agricultural needs can purchase abadi site without landlord's consent — Civil Court can decide validity of transfer.

The words "such site" in Cl. (3) do not refer to the site which it is desired to transfer. They refer to the words "a house-site of reasonable dimensions in the abadi." A person having a site insufficient for his requirements as agriculturist is, therefore, entitled to purchase an abadi site without the permission of the landlord. Cl. (4), S. 203 does not prevent Civil Court from deciding whether such a transfer is valid. 114 Ind. Cas. 452=A.I.R. 1929 Nag. 64.

——S. 203 (3) (4)—'Such site' in Cl. (3)—Meaning of.

The words "such site" in S. 203 (3) of the C. P. Ladn Revenue Act, refer to the words "a house site of reasonable dimensions in the *abadi*" in Cl. (1) of S. 203. A.I.R. (Vol. 24) 1937 Nag. 107=I.L.R. (1937) Nag. 350=169 Ind. Cas. 524.

9. Sub-S. (4)—Allotment of sites in Abadi. See also Heading 8.

——S. 203 (4)—Lambardar alone can allot sites in abadi—Co-sharer cannot buy site without consent of lambardar.

The *lambardar* in exercising the powers imposed on him under S. 188 (2), C. P. Land Revenue Act, acts as the proprietor of the *mahal* and not as the agent of the proprietary body. The allotment of sites in the *abadi* is a matter that has been placed in the hands of the *lambardar*, and it is not open to a co-sharer to buy up a site without the *lambardar's* consent and claim to retain possession of that site. A.I.R. (Vol. 27) 1940 Nag. 370=1940 N.L.J. 480=192 Ind. Cas. 291.

——S. 203—License to occupy Abadi site—Condition not to dispose of site—Breach—Forfeiture of license.

Where the condition on which the licensees hold the *abadi* sites is that they and their descendants may occupy the sites but cannot dispose of them, any attempt to dispose of the site is an infringement of the condition attached to the license and must work forfeiture.

A person who has a license to occupy the *abadi* site must use it for the purpose of residence, that is he must erect a building on it for his dwelling. His failure to do so would be treated as an infringement of the terms of the license and bring about forfeiture of the license. Where the licensee does not build for such a long period as 30 years, it is a good evidence to show that he has no intention of ever building a house on it, and in such circumstances the license can be revoked. A.I.R. (Vol. 24) 1937 Nag. 338=I.L.R. (1938) Nagl. 326=176 Ind. Cas. 936.

——S. 203—Erection of substantial building—Right to transfer site.

Section 203 of the C. P. Land Revenue Act is not confined to the rights of agricultural house-

holders only; their rights and liabilities are determined by the first three sub-clauses, and householders in general are governed by the remaining sub-clauses. Clause 5 is governed by the general sub-S. (8).

A license to occupy a village site cannot carry with it a right to transfer the site with permission to occupy unless such permission is proved and the fact that the licensee has built a substantial building on the site would not preclude the *malguzar* from ejecting a person to whom the licensee has transferred the site. A.I.R. (Vol. 19) 1932 Nag. 30=14 N.L.J. 154=136 Ind. Cas. 882.

——S. 203—Acquisition of land in growing town for building purposes—Presumption of transferability—Onus of proof.

Where a person acquires land in a growing town in order to build a residential house presumption would be that the land was acquired with a right of transfer.

If the landlord contends that the tenant had no right to transfer the building which he had built and which he was occupying, it is for him to show that under the terms of the licence the right of the tenant was limited and it was expressly agreed that he would be incompetent to make a transfer. A.I.R. (Vol. 25) 1938 Nag. 480=1938 N.L.J. 144=178 Ind. Cas. 535.

——S. 203 (3) (4)—Plea that a person is not in possession of a sufficient site and hence transfer was competent—Question of allotment, if involved—Proper venue for decision.

A plea that a person is not in possession of a sufficient site, and is, therefore; not already in possession of such a site as is referred to in S. 203 (3) and so the transfer to him was competent is a dispute regarding the allotments of sites in the *abadi* and the Civil Court has no jurisdiction to settle such a matter. It involves a question of allotment and the proper venue for its decision is, under S. 203 (4), the Revenue Court. A.I.R. (Vol. 24) 1937 Nag. 107 =I.L.R. (1937) Nag. 350=169 Ind. Cas. 524.

——S. 203 (3) and (4)—Purchase of house site in abadi by person entitled to site—Lambardar not recognising purchase and suing purchaser for ejectment—Power of Tahsildar to allot that site to purchaser.

A person holding land in a village and entitled to a house site in the *abadi* under the provisions of S. 203 (1) of the Land Revenue Act, is fully entitled under S. 203 (3) to acquire by purchase a site independently of any consent of the Lambardar. It is within the powers of the Tahsildar to allot that site to the purchaser under the provisions of S. 203 (4) of the Act if the Lambardar is not prepared to recognise the purchase as a valid one, although a suit by the latter for ejectment of the purchaser from the house site is pending. 1949 N.L.J. 111.

10. Sub-Ss. (5), (6) and (7)—Absence of Notification—Effect.

——S. 203 (5), (6) and (7)—No notification—Effect.

Provisions of sub-Ss. (5) to (7) of S. 203. C. P. Land Revenue Act, can hardly help an individual resident who, to acquire the rights of transfer, would have to get a declaration made by the Local Government under sub-S. (5) of S. 203. In the absence of any notification by the Local Government under sub-S. (5) of S. 203, the fact that the activities in the village are mainly commercial will avail nothing. A.I.R. (Vol. 24) 1937 Nag. 338=I.L.R. (1938) Nag. 326=176 Ind. Cas. 936.

11. Sub-S. (7)—Nazrana—How to be estimated.

——S. 203 (7)—Transfer of house in abadi pursuant to final decree for foreclosure—Nazrana payable by transferee—How to be estimated—'Site' in the phrase 'site with the house on it,' meaning of.

On the transfer, sale or foreclosure of a house which stands on an *abadi* the landlord is entitled to recover from the transferee a sum as *nazrana* equal to 5 per cent. on the value of the house together with the site and not on the site apart from or merely as influenced by the fact of the house standing on it.

The word "site" in the phrase 'a site with the house on it" cannot be read disjunctively from the house but conjunctively with it. A.I.R. (Vol. 22) 1935 Nag. 20=157 Ind. Cas. 582.

12. Sub-S. (8)—Contract between proprietor and holder of Abadi site.

——S. 203 (8)—Word "contract" does not include entry in wajib-ul-arz.

The word "contract" cannot be so liberally or widely interpreted as to include within its scope an entry in the *wajib-ul-arz* that the landlord's permission is necessary for the validity of a transfer. 11 N.L.J. 240=113 Ind. Cas. 176=A.I.R. 1929 Nag. 59.

——S. 203 (8)—Wajib-ul-arz—Express provision that tenant of 30 years can transfer his house site—No consent of lambardar was held necessary.

Where wajib-ul-arz provided that such of the tenants as are in possession of village sites from before the thirty years settlement are fully entitled to transfer the said sites and it was contended that lambardar's consent was necessary to a transfer of a house in abadi.

Held, that no consent was necessary in view of the explicit language of the wajib-ul-arz. 24 N. L. R. 85=109 Ind. Cas. 647=11 N.L.J. 123=A.I.R. 1929 Nag. 41.

——S. 203 (8)—Abadi site originally given under contract that it be used for building cattle shed—Site turned into bidi factory—Proprietor's right to eject.

Where the *abadi* site was not a house site, but was granted to the predecessors of the respondents, to build *kothas* for keeping their cattle and the respondents used the site for a *bidi* factory, S. 203 (1) of the C. P. Land Revenue Act, which relates only to house sites, would not apply. Section 203 (1) only means that every tenant is entitled to a house site of reasonable dimensions for his residential purposes, but that he has no right to a site unless he means to construct a residence thereon. On the other hand, in such a case S. 203 (8) would apply.

and the matter must be decided according to the terms of the contract between the proprietor, and the holders of the sites. The site has been used for purposes other than those for which it was granted, and that amounts to a clear breach of contract, which gives the proprietor a cause of action. The respondents are in the position of licensees; the appellant being the owner of the whole *abadi* the license may be deemed to be revoked under S. 62 (f) of the Easements Act. A.I.R. (Vol. 21) 1934 Nag. 158=17 N.L.J. 177=31 N.L.R. 18=150 Ind. Cas. 54.

——Ss. 209 and 211—Watandari patel—Succession —If regulated by personal law.

Succession to the post of watandari patel is not regulated by personal law. There is no mention of personal law in S. 211 of the C. P. Land Revenue Act or the rules thereunder. The senior member of the senior branch of the family, if eligible, would ordinarily have the best claim. 1946 N.L.J. 600.

——S. 212—Ryotwari lands in possession of one heir—Other heirs have a right to share therein.

Where ryotwari fields are in the possession of one heir and they are entered in his name in the Revenue papers, the right of other heirs to a share therein is not lost by such entry. They can sue for a share in the produce or they may apply for partition to the Deputy Commissioner. 6 N.L.J. 161=73 Ind. Cas. 959=A.I.R. 1923 Nag. 307.

——S. 212 (2)—Survey number not included in raiyatwari village—Liability to sale.

The prohibition in Sub-S. (2) of S. 212 of the C. P. Land Revenue Act in respect of the sale or foreclosure of a right of a *raiyat* in survey number in execution of a decree does not apply to survey numbers which are not situated in a *raiyatwari* village. The right of a *raiyat* in field survey numbers which are not included in a *raiyatwari* village are liable to sale or foreclosure in execution of a decree. A.I.R. (Vol. 31) 1944 Nag. 82=1943 N.L.J. 571=I.L.R. (1944) Nag. 166=212 Ind. Cas. 289.

——S. 218 (3), Proviso—Failure to serve notice before delegation—Effect of—Objection, if can be raised at any stage.

Under S. 218 (3), proviso, of the C. P. Land Revenue Act, no delegation can be made until notice has been duly served on all persons having rights in the land affected, and their objections have been heard and considered. A failure to comply with this provision is a serious omission and apart from the inequity involved, may lead to a considerable confussion when the order of delegation is to be executed actually on the spot. The error is so fundamental that a legal objection based thereon can be urged at any stage. 1949 N.L.J. 619.

——S. 218 (4)—Mining lease—Area leased to another lessee after its abandonment by previous lessee—Landlord's right to fresh compensation—Compensation payable.

Where after a previous lessee has abandoned the area leased to him, a new mining lease is granted to another party, the landlord is entitled to compensation from the latter although compensation has been paid by the previous lessee.

Compensation is not payable both for occupation and also for disturbance of the surface of the land. The word "or" in S. 218 (4) of the Land Revenue Act means whether by mere occupation without disturbance of the surface or by disturbance of the surface. 1948 N.L.J. 193.

——S. 218 (7)—Applicability — Excavation made for digging well.

The removal of minerals without lawful authority from mines and quarries is made punishable under S. 218 (7), Land Revenue Act. The words "mines and quarry" are applied usually only to those excavations which are made with the object of extracting minerals. An excavation made not for the purpose of extracting minerals but for the purpose of digging a well does not therefore come under S. 218 (7) of the Act. Of course, as the right to all minerals vests with Government, Government is entitled to get the necessary royalty on all minerals extracted from land. 1950 N.L.J. 362.

——S. 218, Explanation—"Minerals"—Boulders extracted from ground while digging well.

The explanation given at the end of S. 218, Land Revenue Act, is not an exhaustive definition of the word "minerals." There is no doubt that the boulders extracted from the ground during the course of digging a well are "minerals". 1950 N.L.J. 362.

——S. 218—'Minerals'—Limestone boulders.

Limestone boulders lying on the surface of land are not minerals within the meaning of S. 218 of the C. P. Land Revenue Act. A 'mineral' within the section must be something that can be mined and not something that may be casually picked up. A. I. R. (Vol. 20) 1933 Nag. 233=29 N.L.R. 148 =143 Ind. Cas. 586.

——S. 219—Government Notification No. 332 341-XII, dated 29th January, 1931—Tahsildar removing unauthorised encroachments—Whether acting in execution of duty as public servant—Penal Code (Act XLV of 1860), S. 353.

By Government Notification No. 332-341-XII, dated January 29, 1931, the Governor-in-Council invested all Tahsildars with the powers of a Deputy Commissioner under S. 219, Central Provinces Land Revenue Act and consequently a Tahsildar while removing unauthorised encroachments is acting in the execution of his duty as a public servant and a conviction under S. 353, I.P.C., for assaulting the Tahsildar while doing so, is justifiable. A.I.R. (Vol. 20) 1933 Nag. 295=1933 Cr. Cas. 1067=35 Cr.L.J. 746=148 Ind. Cas. 803.

——S. 219—Deputy Commissioner can eject a trespasser on communal land temporarily but not permanently.

The right to exclude a trespasser on communal land permanently is not a matter which the Deputy Commissioner can determine under S. 219 C. P. L. R. Act, he can only eject him summarily and the section itself expressly saves the jurisdiction of the Civil Court to decide the question of the right of permanent exclusion. 75 Ind. Cas. 914=A.I.R. 1923 Nag. 326.

——S. 220—Applicability.

Where plaintiffs do not ask for any correction of the Record-of-Rights or for any ruling in respect of any of the matters referred to in S. 220, that

section does not apply. 20 N.L.R. 70=78 Ind. Cas. 872=A.I.R. 1924 Nag. 256.

——S. 220 (b)—Jurisdiction of Civil Court—Decision of Deputy Commissioner that lane is not public lane.

An order of Deputy Commissioner made under S. 55, C. P. Land Revenue Act, deciding that a lane is not a public lane is final and cannot be assailed in a Civil Court. A.I.R. (Vol. 20) 1933 Nag. 257 =29 N.L.R. 330=147 Ind. Cas. 21.

——S. 220 (h)—Question regarding any engagement with Government or agreement by proprietors not involved—Jurisdiction of Civil Courts is not excluded.

Where no question as to the validity of any engagement with the Government for the payment of land revenue or of any agreement entered into by superior or inferior proprietors in a settlement or sub-settlement arises, the jurisdiction of the Civil Court is not excluded. 116 Ind. Cas. 666=A.I.R. 1929 Nag 139.

——S. 220—Civil Court cannot entertain application under S. 109 (3).

Obiter: The fact that S. 109 is not expressly mentioned in S. 220 (1) does not in any way prejudice the general provisions of S. 220 and a Civil Court has no authority to entertain an application under S. 109 (3). 118 Ind. Cas. 469=A.I.R. 1929 Nag. 201.

——Ss. 220 and 112—Jurisdiction of Civil Court—Order by Revenue Court upon matter within jurisdiction but based on mistake of fact.

An order passed by a competent Revenue Court upon a matter within its jurisdiction is not *ultra vires* or without jurisdiction even though it is based upon a mistake of fact. Where an application is made under S. 112 by a person purporting to be a member of the family of protected thekedar, who is entitled to share in the theka or to be maintained out of its income and the Deputy Commissioner upon enquiry holds that that member is entitled to be maintained out of the income and transfers the theka in his favour, his order cannot be without jurisdiction even though as a matter of fact the applicant is not entitled to be maintained out of the income; and S. 220 bars the jurisdiction of the Civil Court to question such order as it is not without jurisdiction. 118 Ind. Cas. 469=A.I.R. 1929 Nag. 201.

——Ss. 220 (m), 225 (c)—Jurisdiction of Civil Court—Recovery of amount certified as due to Co-operative Society.

Although under S. 225 (c), C. P. Land Revenue Act, the amount certified as due to a Co-operative Society can be recovered as an arrear of land revenue, yet that does not constitute the sum actually an arrear of land revenue so as to bar the jurisdiction of the Civil Court under S. 220 (m) of the Act. All that is meant by S. 225 (c) of the Land Revenue Act is that the amount can be recovered by the Revenue Courts according to the somewhat summary procedure allowed and no suit need be brought for recovering the amount. It does not follow that, because the amount can be recovered in that manner, it is actually an arrear of land revenue with all the incidents attaching to such arrears.

A Revenue Court proceeding under S. 225 (c) of the Land Revenue Act must be held to act under S. 128 (g) of the Act and not under S. 128 (f) and the procedure laid down by Ss. 131 and 132 of the Act will apply and objections may be made, and also a suit may be brought, in respect of such attachment. A.I.R. (Vol. 21) 1934 Nag. 201=30 N.L.R. 240= 17 N.L.J. 47=148 Ind. Cas. 714.

——S. 220—Imperfect partition by Revenue Officer—Civil suit for possession of share allotted at such partition—Maintainability.

Under Chapter XI of the C. P. Land Revenue Act, a Revenue Officer has jurisdiction to effect imperfect partition of land-revenue-paying estate. A Civil Court has no jurisdiction or power to effect a perfect or an imperfect partition of such estate or to reopen a partition already made by a Revenue Officer. The duty of a civil Court is to give effect to the partition made by the Revenue Officer. The Revenue Officer effecting partition has no doubt power to deliver possession to a person of the share allotted to him. If that is not done, that does not preclude such person from filing a suit in the Civil Court to recover possession in accordance with the partition made by the Revenue Officer. I.L.R. (1949) Nag. 836=A.I.R. 1950 Nag. 102=1950 N.L.J. 20.

——S. 220 (n) and (o)—Jurisdiction of civil Court—Imperfect partition alleged by one of co-sharers to be subsequently modified by arbitration—Parties in dispute as to basis of perfect partition—Decision by Revenue Member.

The plaintiff and the defendant were co-sharers in a village in 1913–14; there was an imperfect partition of the village, the parties being assigned certain shares. The defendant alleged that this partition was subsequently modified by arbitration in 1917. When, thereafter, settlement proceedings commenced, the perfect partition of this village came before the Settlement Officer for consideration and the parties were in dispute as to the basis on which the partition should proceed. The plaintiff said that the partition should be made in accordance with the imperfect partition of 1913, while the defendant said that it should be made in accordance with the 1917 award. The contest was carried up to the Revenue Member who ordered that the perfect partition should be made in accordance with the imperfect partition of 1913, as modified by the award. The plaintiff filed a suit for a declaration that the shares in the village were as they were fixed at the time of the imperfect partition and not as modified by the award. The question for determination was whether such suit was maintainable in view of the provisions of S. 220 (n) and (o) of the C. P. Land Revenue Act:

Held, that the suit was maintainable. The jurisdiction of the Civil Court, whether the decision of the Revenue Court was *ultra vires*, or *intra vires*, was not barred for the purpose of declaring the titles of the parties although such Court had no power to interfere with the partition made by the Revenue Court. A.I.R. (Vol. 26) 1939 Nag. 5=1938 N.L.J. 463=I.L.R. (1940) Nag. 16=180 Ind. Cas. 797.

——S. 220 (n)—Co-sharers seeking partition invoking aid of Revenue Officer—Whether can question partition in Civil Court.

When once the co-sharers who seek partition of their village invoke the jurisdiction of the Revenue Officer under the C. P. Land Revenue Act, they become bound by the special procedure of that statute and their rights and privileges thereon depend upon the compliance or non-compliance with the special procedure which is imperative on them to follow in the manner laid down by that statute. Where the co-sharers move the Revenue Court for partition they bring themselves within the provisions of Chapter XI of the C. P. Land Revenue Act, and unless the remedy in the Civil Court was available to them under that Chapter, they would be precluded by S. 220 (n) of that Act, from questioning the partition. A.I.R. (Vol. 24) 1937 Nag. 177=I.L.R. (1937) Nag. 476 =170 Ind. Cas. 601.

——S. 220 (p)—Fixation of sadar lambardar's remuneration—Exclusive jurisdiction of revenue authorities.

S. 2 (15) implies that sadar lambardar has to collect the land revenue from his fellow-lambardars and pay it to Government along with the land revenue of his own patti. He is no more and no less liable than the other lambardars for any deficiency on the part of any of the lambardars. The sadar lambardar is not *prima facie* entitled to the whole of remuneration. This share can only be fixed by the revenue authority under S. 220 (p). 22 N.L.R. 37 =92 Ind. Cas. 909=A.I.R. 1926 Nag. 274.

——S. 220—Suit by lambardar for arrears of his remuneration—Civil Court can try.

A Civil Court is not precluded by anything in S. 220 of the Act from maintaining a claim by lambardar to recover the arrears of his remuneration. 20 N.L.R. 142=83 Ind. Cas. 172=A.I.R. 1925 Nag. 129.

——Ss. 220 (q) and 202—Suit for damages for breach of conditions in contract—Jurisdiction of Civil Court.

The Chief Commissioner or any Revenue Officer is not empowered to "determine, decide or dispose of" under S. 202 (1), C. P. Land Revenue Act, the matter relating to a breach of contract and assess damages in respect thereof. Section 202 (1) empowers the Chief Commissioner to make rules regulating the contract and management of the forest growth on the lands of any estate or *mahal*, and the right of user over such forest growth and also entitles him to attach to the breach of such rules certain pecuniary penalties. The mere fact that the same set of facts gives rise to a civil action for damages as well as to revenue proceedings under S. 202 does not confer jurisdiction upon him to usurp the functions of the Civil Courts, any more than a similar set of conditions entitles the Civil and Criminal Courts to trespass upon the province of each other in cases of defamation. Consequently, the Civil Court's jurisdiction is not barred in suit for damages for breach of certain condition in an agreement. A.I.R. (Vol. 25) 1938 Nag. 530= 1938 N.L.J. 392=181 Ind. Cas. 177.

——S. 220—Lease of malguzari forest without sanction—Deputy Commissioner taking forest under protection under S. 203—Suit in Civil Court by lessee for refund of consideration and damages. See Ibid., Ss. 202 and 220.A.I.R. (Vol. 18) 1931 Nag. 137 =14 N.L.J. 8=134 Ind. Cas. 281.

——S. 220—Jurisdiction of Civil Court—Suit for possession of abadi.

A suit for possession of an abadi site, by a co-sharer to whose share it has fallen, against persons who own another patti in the same village can be entertained by Civil Courts. 112 Ind. Cas. 648=A. I.R. 1929 Nag. 17.

——S. 222—Scope and Effect.

The effect of S. 222 of the C. P. Land Revenue Act is only to preclude a suit and not to debar the defence based on title.

The failure of the owner to assert his claim even when invited to do so cannot destroy his title to the property on any known principle of law or natural justice. S. 222 debars the claim after the expiry of three years from any date of demarcation. The three years period laid down in that section is for making a claim for obtaining a particular remedy, namely, the release of the land from the Notification. It has, therefore, the effect of the rule of limitation. The rule of law is that there is no limitation against defence. The three years period specified in S. 222 was not intended to have the effect of extinguishing the right of property. The owner's failure to lodge his claim within three years specified in S. 222 cannot deprive him of his right to defend his possession.

S. 222 is indeed capable of being viewed either as laying down a rule of limitation or prescription. In the former case, the failure to assert a claim within the period specified in that section would only bar the remedy. In the latter case, it would destroy the right but the one essential condition for the application of the rule of prescription is that the claimant must be out of possession. The rule of prescription cannot operate against a person in possession. Hence it is clear that that section cannot be interpreted as laying down a rule of prescription. This view derives support from the proviso to Sub-S. (1) of S. 219. A.I.R. (Vol. 28) 1941 Nag. 300=I.L.R. (1941) Nag. 538=1941 N.L.J. 378=197 Ind. Cas. 33.

——S. 222—Applicability is a question of law after ascertainment of facts—'Waste land' whether applies to chabutra which is vacant and unoccupied—Demarcation.

The question of the applicability of S. 222, C. P. Land Revenue Act, 1917, is one of law after the facts have been ascertained and no special meaning is to be attached to the phrase 'waste land' and it will apply to the site of the **chabutra** which is vacant and unoccupied. As for demarcation it is to be inferred from the preparation of the maps which shows that the land must have been measured. Demarcation is a necessary and implied operation in the settlement work and it will be presumed that steps were taken according to law. A.I.R. (Vol. 24) 1937 Nag. 407 =I.L.R. (1938) Nag. 377=176 Ind. Cas. 346.

——S. 227—Patwari Rules—Lease executed by Patwari while in service—Validity.

The Patwari Rules of 1920 under S. 227, C. P. Land Revenue Act, do not render void a lease executed by the **patwari** while in Government service. (1933) 141 Ind. Cas. 515=15 N.L.J. 101.

——S. 227 (2)—Lambardar, appointment of—Co-sharers must be consulted.

Under the lambardari rules framed by the Financial Commissioner in the exercise of the powers conferred on him by S. 227, Sub-S. (2), Cl. (a), C. P. Land Revenue Act (Notification No. 19, dated 1st September, 1917), the Deputy Commissioner is bound to consult the co-sharers whom the lambardar is to represent (R. 2 (1) (b) (3). A.I.R. (Vol. 23) 1936 Nag. 71=31 N.L.R. Sup. 202=163 Ind. Cas. 179.

CENTRAL PROVINCES LAWS ACT (20 OF 1875).

——S. 5—Personal law of gonds—If would prevail over recorded statements.

If there were a system or body of law received and acknowledged by Gonds in general, the provisions of such law if proved might have some effect to cast doubt upon the truth of the recorded statements. They could be given effect, if proved, as a matter of justice, equity and good conscience under S. 5 of the C. P. Laws Act (20 of 1875). A.I.R. (Vol. 30) 1943 P.C. 48=9 B.R. 378=I.L.R. (1943) Kar. P.C. 53=207 Ind. Cas. 9 (P.C.).

——S. 5—Burden of proof of custom—Custom among Sunnis of Seoni District.

Under S. 5, C. P. Laws Act, the burden of proving a custom at variance with and seeking to alter the personal law of the parties, lies heavily on the person relying on it. The custom should be ancient and invariable and such a custom must be established to be so by clear and unamiguous evidence. A.I.R. (Vol. 20) 1933 Nag. 16=28 N.L.R. 267 (2)=141 Ind. Cas. 73.

——S. 5—Hindu Law—Apostacy effect of—Convertion to Muhammadanism—Succession—Gonds.

Apostates from the Hindu religion cease to be Hindus and where such apostacy takes the form of conversion to a religion which in itself regulates the devolution of property, **e.g.**, Muhammadanism, then except on proof of well established custom to the contrary and that only in regard to inheritance and succession, the convert becomes subject to the law of his adopted religion. The term 'Hindu' is S. 5 refers to profess some form of Hindu religion, whatever be the branch, school sect, or off shoot to which they belong, but it does not extend to persons who have never possessed any form of the Hindu religion or to those who have been converted from it to some entirely different religion. The word would apply to dissenters and non-conformists but not to apostates. Thus a Jain is a Hindu but a Brahmin converted to Buddhism or Islam is not. Gonds in the Central Provinces are not Hindus and they are not governed by the Hindu Law except when it is adopted by any family, sect or branch. 44 Ind. Cas. 435 (N).

——S. 6—Applicability of English Law principles—Case not covered by Contract Act.

Since the Contract Act is not exhaustive in matters not coming under it, the Courts are entitled, under S. 6, to apply the principles of English Law, if applicable to Indian conditions, as rules of justice, equity and good conscience. A.I.R. (Vol. 33) 1946 Nag. 114=1945 N.L.J. 468=I.L.R. (1946) Nag. 210.

C. P. AND BERAR LOCAL FUND AUDIT ACT (9 OF 1933).

——Ss. 8, 13—Procedure laid down not followed—Civil suit, whether maintainable.

There is nothing in the Local Funds Act to indicate that the procedure laid down in it is exclusive or must necessarily be followed before a civil suit is launched. A civil suit can, therefore, be filed, even if procedure laid down by Ss. 8 to 13, of the Act is not followed. A.I.R. (Vol. 26) 1939 Nag. 247=1939 N. L.J. 327=184 Ind. Cas. 494.

——Ss. 8 (b) (c), 10 (1)—Surcharge for loss—Loss must be the result of gross negligence or misconduct.

Before a notice can be served under S. 10 (1) of the C. P. and Berar Local Fund Audit Act, the Examiner, in cases which fall under Cls. (b) and (c) of S. 8, must be satisfied that the loss has been caused by gross negligence or misconduct. On an application to the District Judge under S. 11 of the Act, the Judge has to consider whether in point of fact there has been gross negligence or misconduct. In the absence of any such finding, his order of surcharge will be set aside. A.I.R. (Vol. 25) 1938 Nag. 422=I.L.R. (1939) Nag. 51=1938 N.L.J. 220=177 Ind. Cas. 902.

——S. 10—Gross negligence—Meaning of.

S. 10 of the C. P. Local Funds Audit Act imposes a liability for loss caused by gross negligence of a person; and "gross negligence" imports a high degree of careless conduct. A municipal member who acts with due care and attention as a man of ordinary prudence would act in his own affairs cannot be held to be grossly negligent. I.L.R. (1947) Nag. 256=228 Ind. Cas. 525=A.I.R. 1948 Nag. 24=1947 N.L.J. 281.

——S. 10—Expression 'gross negligence'—Meaning of.

Gross negligence is intended to denote a high degree of careless conduct which has to be determined from the circumstances of the particular case. It is not necessary that there should be fraud or something indicating fraud to bring a case within the category of gross negligence. A.I.R. (Vol. 32) 1945 Nag. 111=1945 N.L.J. 105=I.L.R. (1945) Nag. 218.

——S. 10—Bye-laws of Municipality fixing license fees—Secretary neglecting to collect—Liability.

According to the bye-laws of a Municipal Committee no person was to sell milk without a licence. The licence fee was Rs. 10. The Secretary of the Municipality, who was responsible for seeing these bye-laws brought into force, did nothing in this respect. As a result of this, no licence fees were recovered and an audit objection was taken to this. Eventually the Commissioner under S. 10, C. P. and Berar Local Funds Audit Act, held that this loss was caused by the gross negligence of the Secretary and certified that Rs. 115 was due from him. On the contention that it was open to the Municipal Committee to fix the time from which the bye-laws should be enforced and that it was competent to waive the licence-fee for a particular period:

Held, that the bye-laws could only be varied or rescinded in the same way, and subject to the same conditions, as they were originally made; and it was the duty of the Secretary to carry them out and the

subsequent resolution of the Committee could not absolve the Secretary from his responsibility for falling to carry them out. The Secretary's failure to do anything in the matter for the best part of the year was gross negligence that caused loss to the Municipal Committee. A.I.R. (Vol. 30) 1943 Nag. 283=1943 N.L.J. 404=I.L.R. (1943) Nag. 592=210 Ind. Cas. 42.

——S. 14—Application under—Appeal to High Court—Court-fee payable.

The District Judge acting under S. 14, C. P. and Berar Local Fund Audit Act is not intended to act as a Court but as a special tribunal, in much the same way as it does under the Workmen's Compensation Act. The appeal from his decision to High Court is not from a Court but from a special tribunal. Moreover, the jurisdiction which S. 14 confers is not revisional, nor can the 'appeal' to the High Court be called a 'reference.' S. 4, Court-Fees Act, therefore, does not apply nor does Art. 1 of Sch. I. No **ad valorem** court-fee can, therefore be demanded on the memorandum of appeal to High Court arising out of application under S. 14. A.I.R. (Vol. 28) 1941 Nag. 129=1941 N.L.J. 42=194 Ind. Cas. 731.

——S. 14—Applications under, by different persons.

Where applications are made by several persons under S. 14, to set aside the order of surcharge, in order to arrive at a conclusion whether in point of fact there was gross negligence or misconduct, the Judge must consider the evidence case by case and not take a lot of cases all together, decide one, and say that all are the same. Such a mode would be very inconvenient if there were any difference whatever in the evidence led in one case or another. A.I.R. (Vol. 25) 1938 Nag. 422=1938 N.L.J. 220=I.L.R. (1939) Nag. 51=177 Ind. Cas. 902.

C. P. LOCAL SELF-GOVERNMENT ACT (I OF 1883).

——S. 9—Right of land owners to hold bazar on their land—English law of markets—Applicability.

Prior to the enactment of the C. P. Local Self-Government Act, land owners of the Central Provinces had a right to hold markets or bazars on their land, provided that they did not infringe the rights of others and holding of such markets would include the levying of market-fees or tolls.

The English law relating to markets based upon a grant by the Crown does not apply to India. A.I.R. (Vol. 19) 1932 Nag. 159=141 Ind. Cas. 450.

C. P. AND BERAR LOCAL SELF-GOVERNMENT ACT (IV OF 1920).

——Election — Transgression of law.

It is a basic principle of election law that an election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the election where the Court is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, i.e., the success of one candidate over the other, was not and could not have been affected by those transgressions. A. I. R. (Vol. 20) 1933 Nag. 193=29 N.L.R. 278=143 Ind. Cas. 514 (F.B.).

——Special tribunal.

When the statute which creates the right also prescribes a special remedy, the person aggrieved is limited to the remedy so prescribed. A.I.R. (Vol. 20) 1933 Nag. 193=29 N.L.R. 278=143 Ind. Cas. 514 (F.B.).

——Suit for injunction to restrain elected members from performing duties—Considerations.

In deciding whether an injunction should issue to restrain elected members from performing their duties a Civil Court should be guided by the balance of justice and convenience, and the occasions must be few on which it will be more just and convenient to hold up elections or the administration of newly elected bodies more or less indefinitely whilst one or more individual persons sue for a declaration that the elections have been, or are going to be, invalidly conducted. A.I.R. (Vol. 20) 1933 Nag. 193=29 N.L.R. 278=143 Ind. Cas. 514 (F.B.).

——S. 14—Any meeting—Meaning of.

The meeting convened for the election of a President after the formation of a new Board is not contemplated by the words "any meeting" used in S. 14. The proviso to S. 14 only refers to a meeting at which the Chairman has the statutory right to preside, such as the one convened for the purpose of filling up a casual vacancy in the office of Chairman or Vice-Chairman of Local Board or its representative in the District Council. A.I.R. (Vol. 20) 1933 Nag. 193=29 N.L.R. 278=143 Ind. Cas. 514 (F.B.).

——S. 23—Applicability of, to village panchayat.

Section 23 of the C. P. Local Self-Government Act, has no application to the village **panchayat**. A.I.R. (Vol. 28) 1941 Nag. 128=1941 N.L.J. 49=I.L.R. (1940) Nag. 161=193 Ind. Cas. 609.

——S. 23 (1)—Market notified so as to become a public market—Exclusive right to levy toll, if vested in Council—Malguzar having title to land charging ground-rent—Right of Council to restrain malguzar from violating its exclusive right.

Where a market is notified so as to become a public market, S. 23 (1) of the Local Self-Government Act, applies. The effect of that section is **inter alia** to vest in the District Council the exclusive right to levy tolls.

Where a **malguzar** who had title to the land over which the public market was situated charged ground rent in respect of the cattle that were brought within the market:

Held, that this amounted to levying toll and was, therefore, in violation of the exclusive right of the District Council to levy it and the fact that the Council has no right to levy this kind of toll does not give the **malguzar** the right to levy this toll after it had been taken away from him by S. 23 (1). Only one kind of toll can be levied and that can be levied only by the Council. The Council was the proper authority to move to restrain a violation of its exclusive rights. A.I.R. (Vol. 23) 1936 Nag. 258=I.L.R. (1937) Nag. 246=165 Ind. Cas. 849.

——Ss. 23 (1), 2 (2)—Notification under—Court, when can set aside notification.

Under S. 23 (1), C. P. & Berar Local Self-Government Act, 1920, the Local Government is given power to order by notification that the right of levying fees and tolls and of controlling any market shall vest in the District Council and independent Local Board. This applies to any market which corresponds to the definition of market given in S. 2 (2) of the Act. Section 23 (3) of the Act gives to certain persons, the right to avoid these consequences resulting from such notification by instituting a suit within six months for the cancellation of the notification. It follows that the rights of Government to issue such a notification are not absolute. Government cannot prejudicially affect another's vested interests by such a notification under this section if that other chooses to sue within the time allowed. If he does not, then, of course, his right of protest goes and he loses whatever rights he might once have had in this respect. But if he does sue, then the intention of the Legislature is that the Courts should intervene and protect him by cancelling or amending the notification.

The owner of a market has in general a right to levy fees and tolls but these rights can be curtailed in various ways one of which is custom. Where the village **wajib-ul-arz** says "nobody has a right to make collection from the bazar", in so far as the notification directs that "the right of levying fees and tolls" in this market shall vest in the District Council, it does not infringe any of the plaintiff's rights, for they have none. Whether others are affected or not is no concern of theirs. They have their remedies and if they are content not to pursue them, the plaintiffs cannot do so on their behalf.

"Control" as used in S. 23 (1), can only mean to manage or to regulate. A.I.R. (Vol. 25) 1938 Nag. 188=I.L.R. (1939) Nag. 408=176 Ind. Cas. 736.

——Ss. 23 (1), (3), 25, 29—'Any market'—If includes private market—Notification by Government—Suit not filed—Remedy under S. 29—Whether can be resorted to.

Under S. 23, Local Self-Government Act, the expression 'any market' includes a private market and the notification issued in respect of such market cannot be regarded as illegal or irregular on the ground that it prejudicially affects the rights of the owner of a private market, unless the market is in a village notified under S. 25 of the Act.

Where a notification has been issued in respect of a market and no suit has been filed as required by S. 23 (3), the Local Government's order, by notification made under S. 23 (1), must be deemed to have become final and the effect of the order is to convert the market into a public market.

A person not resorting to the action prescribed in S. 23 (3) is not entitled to invoke the provisions of S. 29 to establish the right to which he lays claim. A.I.R. (Vol. 19) 1932 Nag. 105=28 N.L.R. 98 =139 Ind. Cas. 374.

——S. 27—Nistar dues—Realising of, for ten years—Whether entitles land-holder to levy fees or toll.

The mere fact that nistar dues were realized for ten years does not amount to such long usage as would entitle the levy of fees or tolls. A. I. R. (Vol. 19) 1932 Nag. 159=141 Ind. Cas. 450.

——S. 41—Work paid for out of public funds —Bribe alleged to be received in relation to such work—Vice-Chairman performing official acts.

Where the Vice-Chairman purports to act in an official capacity and the work in respect of which the receipt of bribery is alleged, is one which is paid for out of public funds, he is to be deemed to have been performing an official act in respect of the work, especially as there is a presumption that all acts of a public officer which purport to be official, have been regularly performed. 167 Ind. Cas. 752=19 N.L. J. 221=38 Cr.L.J. 444.

——Ss. 41, 42, 46, 79—Vice-Chairman if a public officer.

Persons like the Vice-Chairman of Local Board constituted under the C. P. and Berar Local Self-Government Act, who have been given authority to discharge certain public functions of a local or municipal nature are public officers within S. 21, Penal Code. (1937) 167 Ind. Cas. 752=19 N.L.J. 221= 38 Cr.L.J. 444.

——S. 46—Applicability—Case of disciplinary action.

S. 46 of the C. P. Local Self-Government Act has no application to a case where the salary of an employee is reduced as a disciplinary measure and as such an appeal to the Financial Commissioner against such an order cannot lie. 1948 N.L.J. 283.

——S. 46—Rule in S. 46 (2)—Object of.

A rule which merely deals with the discharge of officials from office cannot be extended to exonerate them from criminal liability. The only object of the rule in S. 46 (2) of the Local Self-Government Act is to prevent such officials from resorting to similar practices in the future, and to place these public bodies, as far as may be, beyond the pale of suspicion. (1937) 167 Ind. Cas. 752=19 N.L.J. 221= 38 Cr.L.J. 444.

——S. 51—Tax not collected for number of years—Notification is sufficient.

Where a tax imposed by District Council is not collected for a certain number of years, it is not necessary for the District Council again to follow the procedure prescribed in S. 51, Local Self-Government Act, for the imposition of tax. A notification making **ad hoc** rules for collection of tax is sufficient. A.I.R. (Vol. 32) 1945 Nag. 171=I. L.R. (1945) Nag. 134=1945 N.L.J. 597.

——S. 51—Tax on persons carrying on trade of husking, milling of grinding of grams—Levy of such tax in excess of Rs. 50 per annum from trader—Legality. **See** GOVERNMENT OF INDIA ACT, S. 142-A. 1948 N.L.J. 533.

——S. 51—Suit for declaration that District Council has no right to recover arrears of tax—Limitation.

In a suit in which it is claimed that District Council has no right to recover arrears of tax on the ground that it has no power to impose the tax, the question of limitation is not relevant. A.I.R. (Vol. 32) 1945 Nag. 171=1945 N.L.J. 597=I.L.R. (1945) Nag. 134.

——S. 51—Imposition of terminal tax by District Council is intra vires.

S. 51, Local Self-Government Act, which is a

general section for general taxation does not exclude a terminal tax and the imposition of such a tax by a District Council is ultra vires. A.I.R. (Vol. 32) 1945 Nag. 171=1945 N.L.J. 597=I.L.R. (1945) Nag. 134.

——S. 51—Object—Double taxation is not illegal.

S. 51 is a section the object of which is to enable a District Council to impose a tax whether terminal or otherwise, for general purposes, i.e., other than those specified Ss. 24, 48, 48-A, 49, 49-A and 50 of the Act. This section is not controlled by any of the provisions of the C. P. Municipalities Act, and double taxation, however repugnant it may be to the canons of taxation, is not illegal. A.I.R. (Vol. 32) 1945 Nag. 171=1945 N.L.J. 597=I.L.R. (1945) Nag. 134.

——S. 51—Passing of resolution by District Council—Presumption regarding its procedure.

A Court ought to presume until some evidence is given to destroy the presumption that a municipality has used the regular and lawful procedure and that the common course of business has been adopted in that procedure.

At a meeting of a District Council a resolution imposing a terminal tax was passed by the necessary majority, **A** contended that the meeting was not convened for the purpose of imposing tax

Held, that the burden of proof was on **A** to prove the irregularity. A.I.R. (Vol. 32) 1945 Nag. 171 =1945 N.L.J. 597=I.L.R. (1945) Nag. 134.

——S. 51—Collection of taxes imposed by District Council, Bhandara outside the jurisdiction of the Council, held collection at boundary of Bhandara District.

The taxes on **bidi** and **bidi** leaves imposed by Municipal Committee of Gondia and District Council, Bhandara were collected by the same agency, **viz.**, the Bengal Nagpur Railway in the goods shed and parcel office of the Gondia Railway Station and as the goods shed and parcel office were within the municipal limits of Gondia, they were, in virtue of the proviso to S. 3, C. P. Local Self-Government Act, outside the jurisdiction of the District Council:

Held, that the contention that the District Council had no power to impose or realise terminal tax on account of its being collected outside the jurisdiction of District Council could not prevail. The tax was not levied on persons trading within the municipal limits of Gondia nor on goods consigned from that town to any place in Bhandara District but on goods exported outside the jurisdiction of District Council. Although the tax was collected physically for the sake of convenience at the goods shed, it was, in law deemed to have been collected at the boundary of Bhandara District. In other words, the fact that the goods shed was not within the jurisdiction of the District Council was not material as the use of building for the collection of tax in respect of goods exported from Bhandara District did not in any way curtail or derogate from the rights of the Gondia Municipal Committee. There was no illegality on the part of the District Council although the municipality was in control of the municipal area. Any act could be performed within its limits if it was not illegal nor subjected to any legal obstacle imposed by the municipality. A.I.R. (Vol. 32) 1945 Nag. 171 =1945 N.L.J. 597=I.L.R. (1945) Nag. 134.

——S. 51—Difference between terminal tax and octroi.

A terminal tax differs from octroi in that it is not confined to articles brought into the town for use or consumption within the town itself and in that it is not confined to imports only but may also be applied to exports. A.I.R. (Vol. 32) 1945 Nag. 171=1945 N.L.J. 597=I.L.R. (1945) Nag. 134.

——S. 68 — Applicability—Prosecution for breach of Rule made by Local Government.

The words 'under this Act or by a bye-law made thereunder' in S. 68 of the C. P. and Berar Local Self-Government Act, should not be read as including any rule made by the Local Government consistent with this Act.

Where what the accused has broken is not any section of the Act nor any bye-law under the section, which are the only cases mentioned in S. 68 in respect of which prosecution by a District Council or Local Board or Market Committee is necessary, but a rule made by the Local Government, there is no provision in S. 68 that prosecution for a breach of such a rule can only be initiated by a local body. A.I.R. (Vol. 24) 1937 Nag. 387=38 Cr.L.J. 1093=I.L.R. (1938) Nag. 420=171 Ind. Cas. 620.

——Ss. 71, 73 and 79—Suit for refund of tax recovered in excess of what was legally recoverable—Maintainability—Notice—If necessary.

Per **Bose, J.**:—A civil suit for the refund of tax recovered in excess of what was legally recoverable is not incompetent by reason of the provisions of S. 71 and S. 79 (1) (xxix) of the C. P. Local Self-Government Act. Both S. 79 and the Rule framed under that section are confined to orders and decisions given 'under the Act'. It is impossible to say that an order which contravenes the law or is made in the face of an express statutory prohibition can be said to be under the Act.

Such a suit is maintainable even without notice prescribed by S. 73 of the Act being given. The recovery of an amount in excess of what was legally recoverable is not an act done 'under the Act' or 'purported to be done' under the Act within the meaning of that section. I.L.R. (1940) Nag. 87= A.I.R. 1949 Nag. 190=1948 N.L.J. 533.

——S. 73—Scope—Suit for arrears of pay against District Council.

Suit by the plaintiff against District Council for arrears of pay payable to him according to the resolution of the Council which entitled him to higher pay which was not acted upon is governed by S. 73. 1942 N.L.J. 332.

——S. 73—Scope—Claims arising out of contract.

The words 'anything done or purporting to be done under the Act or any rule or bye-law made under it' in S. 73 must be interpreted as relating only to an act done or purporting to be done in direct execution of the Act or of a rule or bye-law. Breach of a duty imposed or exercise of a power conferred by a contract is not such an act. 26 N.L.R. 81=123 Ind. Cas. 903=13 N.L.J. 71=A.I.R. 1930 Nag. 179.

——S. 73—Applicability—Suit by person to recover rent of house in which school was housed by District Council—Limitation for such suit.

Where a person brings a suit against the District

Council to recover rent of his house in which the District Council had housed a school, S. 73, Local Self-Government Act, does not apply to such a suit and the period of limitation will not be that which is provided by Sub-S. (2) of S. 73 but the period provided by the ordinary law of limitation which is three years. No doubt, the placing of a school in the plaintiff's house is an act done by the Council under the Act, but it is not for that act that the Council is being sued, it is for the failure on the part of the Council to pay rent which has been agreed upon with the owner of the house. A.I.R. (Vol. 28) 1941 Nag. 273=1941 N.L.J. 371=I.L.R. (1942) Nag. 294=197 Ind. Cas. 76.

——S. 73 (2)—Applicability—Suit by member against District Council for travelling allowance. See LIMITATION ACT, ART. 115. 224 Ind Das. 12.

——S. 73 (2)—Limitation under—Starting point —Suit by employee for damages for wrongful dismissal.

When an aggrieved party obtains relief at one time but as a result of some proceeding, he is deprived of it and he is relegated to his original position a new cause of action should be deemed to accrue in his favour. This is a rule of construction and not a rule of law.

In pursuance of a resolution the Chairman of a District Council issued an order to an employee of the Council informing him that his services were dispensed with. The employee appealed to the Deputy Commissioner who set aside the Chairman's order. The Deputy Commissioner's order was upheld by the Commissioner. The District Council thereon moved the Local Government for revision of Commissioner's order and the Minister for Local Self-Government, reversed the Commissioner's order and restored that of the Chairman, District Council. The employee filed a suit challenging the lagality of the order of the Chairman as well as that of the Minister and prayed for damages for wrongful removal from service:

Held, that the period of limitation, **viz.,** six months prescribed by S. 73 (2) of the C. P. and Berar Local Self-Government Act, must be computed from the date of the Minister's order as the cause of action for the suit arose on the day on which the Minister passed his order which had the effect of making the Chairman's order final and effective. A.I.R. (Vol. 25) 1938 Nag. 499=I.L.R. (1939) Nag. 312=179 Ind. Cas. 434.

——S. 75—Contract made in contravention of section—Legality.

If the Legislature says that the breach of one of its provisions shall be deemed to be an offence under the I. P. Code, then those provisions of law must be intended to protect the public and its breach, therefore, is impliedly prohibited and, therefore, illegal.

Hence a contract made in contravention of S. 75, C. P. Local Self-Government Act, is illegal and void and attracts the provisions of S. 23, Contract Act. A.I.R. (Vol. 28) 1941 Nag. 273=1941 N. L.J. 371=I.L.R. (1942) Nag. 294=197 Ind. Cas. 76.

——S. 79—Scope.

Section 79, Local Self-Government Act, does not restrict the power to make rules to one occasion alone and S. 13, C. P. General Clauses Act, 1914 (I of 1914) lays it down that where, by a Provincial Act, any power it conferred, then unless a different intention appears, that power may be exercised from time to time as occasion requires. A.I.R. (Vol. 32) 1945 Nag. 171=I.L.R. (1945) Nag. 134=1945 N.L.J. 597.

——S. 79 (1) (iv)—Rules under, R. 16-A—Complaint by local body—If necessary.

Where a person has been convicted under R. 16-A (2) made under S. 79 (1) (iv) of the Act and which runs: 'Any person who wilfully acts in contravention of Sub-R. (1) and any voter who takes any voting paper received by him or a part thereof outside the polling station shall be punishable with fine which may extend to fifty rupees,' the conviction is not illegal on the ground that the prosecution was not made on a complaint of the District Council or Local Board or Market Committee or some person authorized by the District Council or Local Board, in this behalf, as required by S. 68 of the Local Self-Government Act, but by a complaint of a Sub-Divisional Magistrate. A.I.R. (Vol. 24) 1937 Nag. 387=38 Cr.L.J. 1093=171 Ind. Cas. 620.

——S. 79 (1) (iv)—Rules under, R. 18—If. ultra vires.

Where suits were instituted by some of the members of a Local Board impugning the validity of the election of the defendants as members of the District Council on two grounds, (1) that the meetings were held in voilation of the terms of R. 18 of the rules framed under the C. P. Local Self-Government Act, 1920, because persons who presided were not of the newly elected Local Board, and (2) that if R. 18 permits of an outsider presiding at the meeting that rule itself is **ultra vires** and void:

Held, (i), that the first ground was a matter which fell exclusively within the purview of the power conferred upon the Deputy Commissioner by the rules and it could not, therefore, be the subject-matter of such in the Civil Courts; (ii) that the second ground raised an issue which was beyond the power of a Deputy Commissioner to decide and could, therefore, lawfully form the subject-matter of a suit.

Held, further, that R. 18 of the rules framed by the Local Government under S. 79 (1) (iv) of the Local Self-Government Act, was not repugnant to any provision in the Act and was, therefore, not **ultra vires.** A.I.R. (Vol. 20) 1933 Nag. 193=29 N.L.R. 278=143 Ind. Cas. 514 (F.B.).

CENTRAL PROVINCES (AND BERAR) MAINTENANCE OF PUBLIC ORDER ACT (15 OF 1946).

——Whether ultra vires—Provincial Legislature—Government of India Act, Sch. VII, List II, Entry No. 1.

The Central Provinces and Berar Maintenance of Public Order Act, 1946, is **intra vires** the Provincial Legislature and is not repugnant to the Trade Unions Act or the Trade Disputes Act.

The pith and substance of the Act is preventive detention for reasons connected with the maintenance of public order and not industrial and labour disputes. The Act has for its purpose the maintenance of public order and though incidentally it touches upon the subject of strikes and trade disputes, it does so merely because strikes promoted solely for the sake

of causing unrest among workmen lead directly or indirectly to a subversion of public order. Since the entire subject of the Act falls within Entry No. 1 of List II of the Seventh of the Constitution Act no question of repugnancy either directly or indirectly arises. No sanction of the Governor-General was necessary because all the powers for the enactment of the Act are to be found in the Provincial Legislative List and it is not necessary to go to the Concurrent Legislative List at all. As the pith and substance of the Act falls fully within the Provincial Legislative List, it does not matter if it incidentally touches some matters included in the first and the third list. I.L.R. (1947) Nag. 579=A. I.R. 1948 Nag. 199=49 Cr.L.J. 230=1947 N.L.J. 326.

——S. 2—Order of detention by Provincial Government — Validity—Presumption—Cr. P. Code, S. 491.

S. 2 (1) of the C. P. and Berar Maintenance of Public Order Act invests the Provincial Government with the power to make orders of detention. If therefore an order of detention purports to have been made by the Provincial Government and is valid on the face of it and the detenu does not show that the authority which made the order is not the authority invested with the requisite powers under the Act, in summary proceedings under S. 491, Cr. P. Code, where the burden is on the detenu it is not permissible for the Court to presume that the order is invalid. I.L.R. (1947) Nag. 579=A.I.R. 1948 Nag. 199=49 Cr.L.J. 230=1947 N.L.J. 326.

——S. 2—Order of detention on basis of past acts—Legality.

Under S. 2 of the C. P. and Berar Maintenance of Public Order Act, detention cannot be ordered on the basis of past action. The section uses the words 'is acting'. That imports continuity of action sustained on and after the passing of the Act. It is not enough that the person concerned should have acted in the past. There must be material to indicate that he continued so to act after the Act was passed and that, but for his apprehension, he would be likely to go on doing so. I.L.R. (1947) Nag. 579=A. I.R. 1948 Nag. 199=49 Cr.L.J. 230=1947 N.L.J. 326.

C. P. AND BERAR MAINTENANCE AND RESTORATION OF ORDER AND COLLECTION OF FINES (INDEMNITY) ACT (2 OF 1945).

——S. 4—If ultra vires.

S. 4 of the C. P. and Berar Maintenance and Restoration of Order and Collection of Fines (Indemnity) Act is not **ultra vires.** That section deals with various matters which fall under different heads of classification in Lists 2 and 3 of the Constitution Act. It is not necessary that all the provisions of an Act should fall within a single category. The legislature can derive its powers partly from one or more entries in the list and partly from those in another, and, provided the field is covered in one way or another, the legislation will be **intra vires.** I.L.R. (1949) Nag. 560.

——S. 4—Question of good faith—When relevant.

Under S. 4 of the C. P. and Berar Maintenance and Restoration of Order and Collection of Fines (Indemnity) Act, no question of good faith enters into consideration when the person proceeded against is a servant of the Crown. So long as he acts, or **purports** to act, for the purpose of maintaining or restoring order the section applies, without any question of good faith, and this is so, whether he himself does the immediate act complained of or orders the act to be done by another.

Under the section, the element of good faith is introduced when other persons **purport to act** under the orders of a servant of the Crown. Therefore, persons other than servants of the Crown have to establish either that they acted under the orders of a servant of the Crown for the purpose of maintaining or restoring order (in which case no question of good faith arises) or, that they purported to act for that purpose under such orders in **good faith.** If they can establish that they actually acted for the purpose specified, then no question of good faith arises, but if they are unable to establish that, then they can only be absolved if they show that they **purported** to act under the requisite orders for that purpose in good faith. I.L.R. (1949) Nag. 560.

——S. 4—Suit filed before Act—If automatically discharged—Subsequent sanction of Provincial Government—Effect of.

If a suit has been instituted before the passing of the C. P. and Berar Maintenance and Restoration of Order and Collection of Fines (Indemnity) Act, the Court would be unable to proceed with it because S. 4 leaves the Court no discretion. The Act itself discharges the suit. It is not the Court which puts an end to the suit by the order but the Act which operates automatically as a guillotine. So long as the suit continues, it is a previously instituted suit within the meaning of the Act and it would not cease to be that simply because the Provincial Government accorded subsequent sanction. The only power conferred on the Provincial Government is to afford **previous** sanction to the institution of a suit and not to condone proceedings already instituted or to give its sanction retrospective effect. I.L.R. (1949) Nag. 560.

CENTRAL PROVINCES AND BERAR MONEY-LENDERS ACT (13 OF 1934).

——Applicability—Pending litigation.

The C. P. Money-Lenders Act is clearly retrospective, except for S. 3, 4, 5, 6 and 7 and the retrospective provisions must be applied to pending litigation in the absence of anything to show that they were not intended to be so applied. I.L.R. (1948) Nag. 290=A.I.R. 1949 Nag. 81=1949 N.L.J. 212.

——Proof that creditor is money-lender—Onus.

The C. P. and Berar Money-Lenders Act only applies to money-lenders and therefore, before it can be applied it must be shown by the person seeking to apply it and seeking to take advantage of its provisions that the creditor is a money-lender. A.I.R. (Vol. 28) 1941 Nag. 177=1941 N.L.J. 194=195 Ind. Cas. 463.

——(As amended by Act 17 of 1939)—If affects pending proceedings.

The litigant's rights do not vary with statutory changes unless those changes expressly affect pend-

ing litigation. The lis does not have a series of beginnings, one when the plaint is filed, another when a memorandum of appeal is filed and so on. The law applicable is the law as it shood when the lis commenced. This position can, of course, be altered if the Legislature so divides but there must be no ambiguity about the matter. To say that an act has retrospective operation is one thing; to say that it affects pending litigation is another thing. C. P. Money-Lenders Amending Act XVII of 1939 is obviously retrospective but does not affect pending proceedings. A.I.R. (Vol. 27) 1940 Nag. 196=I.L.R. (1940) Nag. 468=1940 N.L.J. 187=190 Ind. Cas. 807.

——S. 2—"Money-lender"—Who is.

The word 'regular' in the definition of a "money-lender" in the C. P. & Berar Money-Lenders Act shows that the person must have been in the habit of advancing loans to other person as a matter of regular business. An isolated act of money-lending does not constitute a regular course of business. It is an act of business, but not necessarily an act done in the regular course of business. A.I.R. (Vol. 28) 1941 Nag. 177=1941 N.L.J. 194=195 Ind. Cas. 463.

——S. 2—(as amended by Act XVIII of 1939) —Loan includes mortgage.

A mortgage transaction which is essentially a transfer of property to secure a loan can be regarded as falling within the definition of "loan". A.I.R. (Vol. 27) 1940 Nag. 196=I.L.R. (1940) Nag. 468=1940 N.L.J. 187=190 Ind. Cas. 807.

——Ss. 3 and 7 (b) and (c)—Applicability—Non-resident foreigner—Suit by foreigner in Court of Province—Submission to jurisdiction.

The C. P. Money-Lenders Act does not affect money-lenders residing outside the limits of the Province. Such money-lenders are therefore not bound by S. 3 of the Act, particularly in the matter of furnishing accounts to the debtors every year; nor can the penalties prescribed by S. 7 (b) and (c) be imposed on non-resident foreigners. But when a foreign money-lender institutes a suit in a Court in the Province and thereby submits to the jurisdiction of the Court in the Province, he cannot be heard to repudiate the mode in which the authority of Court is exercised according to the law of the Province. I.L.R. (1947) Nag. 131=228 Ind. Cas. 457=1947 N.L.J. 385=A.I.R. 1947 Nag. 201.

——S. 3—Form of accounts.

All that the C. P. Money-Lenders' Act requires is that an account of the debtor's indebtedness should be maintained in sufficient form and sent to the debtor in such a form as to enable him to see clearly what his indebtedness is. Hence, where regular accounts were not kept but only **tipan bahis** were maintained and the extent of indebtedness could be easily seen from them, the conditions in S. 3 cannot be said to have been violated. A.I.R. (Vol. 30) 1943 Nag. 240=1943 N.L.J. 220=I.L.R. (1943) Nag. 555=206 Ind. Cas. 504.

——S. 7—Suit on bond which was in name of minor—Father acting as next friend—Evidence showing father as carrying on money-lending—No accounts maintained in respect of bond—Minor plaintiff held should be deprived of costs. 1942 N.L.J. 130.

——Ss. 7 and 8—Power of Court to re-open accounts—Repayments by debtor appropriated by creditor towards interest—Creditor not furnishing accounts for certain periods—Exclusion of such periods in computing interest—Duty of Court.

In order to give effect to the provisions of S. 7 (c) of the C. P. Money-Lenders Act the Court is entitled to re-open the accounts to the limited extent indicated in that section. No express words are necessary to give the power to re-open accounts as the operation involved in computing the interest due on the loan requires the Court to traverse the entire period from the date of the loan or the date of the Act, whichever is later, provided of course that the proviso to S. 8 is applicable to the loan if the loan was given prior to the date on which the Act came into force, and to exclude such period or periods during which accounts were not furnished. The action of the parties is immaterial because the duty is laid on the Court to give effect to the Act. Once these periods are excluded, any repayment even if expressly made towards interest would go first towards the reduction of such interest as may be due and next towards the reduction of the principal sum regard being had to the circumstances of the case. The word "due" in S. 7 (c) is connected with the phrase "upon the loan" which follows it and shows that the Court has to compute the amount of interest for the whole period, making allowance for repayments and excluding from calculation such period or periods as are hit by S. 7 (c). I.L.R. (1948) Nag. 203=A.I.R. 1949 Nag. 31=1948 N.L.J. 223.

——S. 7 (c)—Powers of Court.

Section 7 does not enunciate rights of the parties but prescribes powers of the Courts. Section 7 (c) authorizes the Court to disallow interest in respect of a certain period, but it has under S. 7 (c) no power to call upon the money-lender to pay back to the debtor the amount of interest which the former received from the latter in respect of the 'excluded' period. A.I.R. (Vol. 31) 1944 Nag. 151=1944 N.L.J. 123=I.L.R. (1944) Nag. 241=215 Ind. Cas. 122.

——S. 7, Proviso—Creditor filing statements of accounts in substantial compliance with law—Sufficiency.

In view of the proviso to S. 7 of the C. P. Money-Lenders Act a creditor who carries out the spirit of the law by filing complete statements of accounts before the Debt Conciliation Board must be held to have complied with the requirements, though he has not acted according to the strict letter of the law. I.L.R. (1947) Nag. 131=228 Ind. Cas. 457=1947 N.L.J. 385=A.I.R. 1947 Nag. 201.

——S. 7—Explanation—Applicability.

Where the accounts are maintained on the **mahajan** system and there has been no attempt to show principal and in interest separate in the account according to the terms of Cl. (a) of S. 3 (1), it cannot be held that the accounts have been kept with the intention of complying with the provisions of S. 3 (2) of the Act and therefore the explanation to S. 7 does not apply. 1942 N.L.J. 25.

——S. 9—Balance of principal—How to be arrived at.

Section 9 of the C. P. Money-Lenders Act was intended to incorporate the ordinary law of **damdu-**

pat and the section means that as the time of the passing of the decree the Court must find out the sum due as principal. In doing this the Court must ordinarily take into account any repayment of the principal sum and find out the balance of the principal due on that date. I.L.R. (1948) Nag. 853=A.I.R. 1949 Nag. 195=1948 N.L.J. 277.

——S. 9—Decree on account of arrears of interest—If includes interest after decree.

Section 9 of the C. P. Money-Lenders Act means that a decree on account of arrears of interest cannot include interest for any period after the decree but will include interest for any period up to the date of the decree. 227 Ind. Cas. 176=1946 N.L.J. 364 =A.I.R. 1946 Nag. 343.

——S. 9—According to S. 9 no Court shall decree on account of arrears of interest a sum greater than the principal loan. It is quite beside the point that the total amounts paid as interest from time to time since the loan was incurred may amount altogether to more than the principal. Arrears of interest claimed in the suit only must be considered. 1938 N.L.J. 364.

——S. 11—Applicability—Order terminating scheme under S. 13 (3), Relief of Indebtedness Act—Recovery of amount remaining due.

The provisions of S. 11, C. P. Money-Lenders Act do not apply to the recovery of the amount remaining due on the termination of the scheme framed by D. R. Court by the Deputy Commissioner under S. 13 (3), Relief of Indebtedness Act and the Executing Court has, therefore, no power to grant instalments. I.L.R. (1946) Nag. 821, appl. I. L. R. (1949) Nag. 981=A.I.R. 1950 Nag. 115=1949 N. L.J. 588.

——S. 11—Applicability—Amount in respect of which certificate is issued under S. 13 (3), Debt Conciliation Act.

If a Deputy Commissioner being unable to recover the sum settled by the Debt Conciliation Board issues a certificate under S. 13 (3) of the C. P. Debt Conciliation Act, that sum is recoverable under S. 13 (4) of that Act as if a decree of a Civil Court has then been passed. S. 13 (4) does not introduce a fiction nor does it create a decree. It merely prescribes a procedure by which the amount due is to be recovered. The procedure is the same as applies in the case of a Civil Court's decree. It follows therefore, that an application by the judgment-debtor for instalments in respect of that amount is incompetent under S. 11 of the C. P. Money-Lenders Act. This section cannot apply for two reasons. The first is that it applies only in respect of "any decree passed against him". No decree is passed in this case, nor is any decree deemed to have been passed. The second is that the section does not apply in the executing Court. I.L.R. (1946) Nag. 821=226 Ind. Cas. 436=1946 N.L.J. 445=A.I.R. 1946 Nag. 371.

——S. 11—Applicability—Mortgage executed prior to Act.

S. 11 of the C. P. Money-Lenders Act, as the law stands to-day, applies to mortgage transactions entered into prior to the 1st April, 1935, the date of commencement of the Act, to the same extent as it does to unsecured loans of an anterior date, and it is not limited to transactions which took place after that date. 1950 N.L.J. 370.

——S. 11—Order for instalments after passing of final decree—Whether can be passed—C. P. Code, O. 34, R. 5.

An order directing payment by instalments can be passed under S. 11 of the C. P. and Berar Money-Lenders Act even after the passing of a final decree for sale under O. 34, R. 5, C. P. Code. When a final decree is passed, it continues to be a decree for the payment of a sum of money or for the payment of an amount found due. I.L.R. (1949) Nag. 182 =1949 N.L.J. 113=A.I.R. 1949 Nag. 174 (F.B.), overruling 1942 N.L.J. 150 and I.L.R. (1947) Nag. 470=A.I.R. 1948 Nag. 180.

——S. 11—Secured creditor getting his security valued to get himself scheduled as creditor in insolvency with respect to balance due to him is not a decree-holder under S. 11, with respect to amount of valuation of security: Court cannot compel him to accept payments of secured debt by instalments. A.I.R. (Vol. 27) 1940 Nag. 369=1940 N.L.J. 387=I.L.R. (1940) Nag. 675=188 Ind. Cas. 695.

——S. 11—Section 11 is applicable to a case where a decree has been passed and an application is made in respect of that decree by the judgment-debtor. A. I.R. (Vol. 27) 1940 Nag. 369=1940 N.L.J. 387= I.L.R. (1940) Nag. 675=188 Ind. Cas. 695.

——S. 11—In order that power of Court under S. 11 could be applied it is necessary that decree-holder should be money-lender and transaction must arise out of loan. 1938 N.L.J. 9.

——S. 11—Application for instalments—Proper Forum.

An application for instalments must be made to the civil Court exercising ordinary jurisdiction as the Court empowered by S. 11 to vary the decree is the Court that passed the decree. The fact that the section now provides that the order is to be "deemed" to be under S. 47, Civil P. C., indicates that a fiction is involved. It is not really made in execution for the very good reason that it is, or should be made by the Court in exercise of its ordinary civil jurisdiction. The provision is merely a compendious way of providing the various rights given where an order is made under S. 47, **e.g.**, a right of appeal. A.I. R. (Vol. 27) 1940 Nag. 196=I.L.R. (1940) Nag. 468=1940 N.L.J. 187=190 Ind. Cas. 807.

——S. 11 (As amended in 1937)—Execution Court has no power to grant instalments.

The word "Court" used in S. 11 as amended in 1937, has a restricted meaning. It refers to the Court which passed the decree and not to the Court to which the decree is transferred for execution. The execution Court has no power to grant instalments under S. 11 of the Act. A.I.R. (Vol. 30) 1943 Nag. 340=1943 N.L.J. 596=I.L.R. (1944) Nag. 1=214 Ind. Cas. 130 (F.B.).

——S. 11—Proper Court to exercise power under.

The proper Court for exercising powers under S. 11 of the Money-lenders' Act is the decree Court and not the executing Court. 204 Ind. Cas. 174=I.L. R. (1942) Nag. 777.

——S. 11—Application for stay of execution—Proper forum—Decree transferred to Collector for execution.

Under S. 11 an application for stay of execution lies to the civil Court even after the transfer of the

decree to the Collector for execution. A. I. R. (Vol. 27) 1940 Nag. 372=1940 N.L.J. 473=193 Ind. Cas. 274.

——S. 11—Decree passed by Court outside C. P.—Coming before Court in C. P. for execution—Power of executing Court to grant instalments.

An executing Court in the Central Provinces in executing decree passed by a Court outside the Central Provinces and transferred to the executing Court for execution has power to grant instalments when the decree does not provide for such instalments by virtue of S. 11, C. P. Money-lenders' Act, 1934, and not by virtue of O. 20, R. 11 (2) read with S. 42 of the Civil P. C. A.I.R. (Vol. 24) 1937 Nag. 409=I.L.R. (1938) Nag. 407=20 N.L.J. 141=172 Ind. Cas. 671.

——S. 11—Application for instalments dismissed for default—Second application, if maintainable—Remedy of judgment-debtor—C. P. Code, S. 141 and O. 9, R. 9.

The proceedings under S. 11 of the C. P. Money-Lenders Act are not, strictly speaking, execution proceedings, but as they have to be treated as proceedings under S. 47, C. P. Code, and as the order passed therein is to be deemed as an order under S. 47 and appealable as such, the provisions of O. 9 of the Code must, therefore, come into play. Where, therefore, an application for instalments under S. 11 of the C. P. Money-Lenders Act was dismissed for default, a second application based on the same identical allegations is barred by the provisions of O. 9, R. 9, C. P. Code. The only remedy of the judgment-debtor is to apply for setting aside the dismissal under O. 9, R. 9 read with S. 141, C. P. Code. The proceedings under S. 11 of the C. P. Money-Lenders Act are, undoubtedly, in the nature of original proceedings, which must attract the provisions of S. 141, C. P. Code. A.I.R. 1948 Nag. 350.

——S. 11—Discretionary power.

The power conferred by S. 11 of the C. P. Money-Lenders Act, 1934, is a discretionary power. A.I.R. (Vol. 27) 1940 Nag. 196=I.L.R. (1940) Nag. 468=1940 N.L.J. 187=190 Ind. Cas. 807.

——S. 11—Order under—Right of appeal.

The decision on an application for making the decretal amount payable in instalments is appealable. A.I.R. (Vol. 29) 1942 Nag. 140=1942 N.L.J. 398=I.L.R. (1942) Nag. 772=202 Ind. Cas. 480.

——S. 11—Order granting instalments—Interference in appeal.

Section 11 of the C. P. Money-Lenders Act confers upon the Court discretionary power and where that discretion in granting instalments is exercised judicially it is not proper for an Appellate Court to interfere with it. 204 Ind. Cas. 174=I.L.R. (1942) Nag. 777=1940 N.L.J. 561.

——S. 13—Scope.

Section 13 does not cover a case of the plaintiff suing for recovery of amount advanced to defendant for agricultural purposes, describing himself as money-lender in the plaint. In such a case the plaintiff cannot claim protection of S. 13. 1942 N. L.J. 339.

C. P. AND BERAR MONEY-LENDERS (SECOND AMENDMENT) ACT (XXIV OF 1937).

——S. 2—'Loan', includes mortgage.

Although a mortgage transaction is correctly described as a transfer, it is also correctly described as a loan transaction and would fall within the term "loan" in S. 2, C. P. and Berar Money-lenders' Act in its natural sense unless it were excluded from that term. Therefore as from March 19, 1937, the C. P. and Berar Money-lenders' Act, applies to mortgage transaction made with money-lenders. A.I.R. (Vol. 25) 1938 Nag. 112=20 N.L.J. 285=I.L.R. (1938) Nag. 91=179 Ind. Cas. 129.

——S. 9—Whether retrospective.

A Court should be very slow to give retrospective effect to S. 9 of the amending Act of 1937, in the case of a transaction of loan which was not a loan within the meaning of the Act at the time when the suit was brought. The amending Act of 1937 is not retrospective in operation. A.I.R. (Vol. 25) 1938 Nag. 112=20 N.L.J. 285=I.L.R. (1938) Nag. 91=179 Ind. Cas. 129.

C. P. AND BERAR MONEY-LENDERS (SUPPLEMENTARY) ACT (XVII OF 1939).

——Act does not affect pending suits.

The C. P. and Berar Money-Lenders' Act (XVII of 1939) which amends an earlier Act of 1935, does not affect pending suits. A.I.R. (Vol. 27) 1940 Nag. 303=1940 N.L.J. 414=I.L.R. (1940) Nag. 483=191 Ind. Cas. 124.

—Applicability.

The Money-Lenders' Amendment Act of 1939 applies to suits instituted between 1st April, 1935, and 19th March, 1937. A.I.R. (Vol. 31) 1944 Nag. 163=1944 N.L.J. 229=I.L.R. (1944) Nag. 383 =216 Ind. Cas. 296 (F.B.).

C. P. MOTOR VEHICLES RULES (1927).

——R. 29—Scope.

R. 29 (i) does not prohibit taking liquor but prohibit being under influence of liquor during employment. 1939 N.L.J. 204.

CENTRAL PROVINCES MOTOR VEHICLES TAXATION ACT.

——S. 3 (1), Proviso (as amended in 1935)—License fee imposed by Amraoti Town Municipality on motor lorry, if a tax—Person residing in Chandur Bazar Notified Area Committee plying lorry between Chandur Bazar and Amraoti—Amraoti Municipality, if can impose such fee.

By an Amending Act in 1935 the words 'rent or fees' were deleted from the Proviso to S. 3 (1), C. P. and Berar Motor Vehicles Taxation Act. This clearly raises the implication that the person residing within one Municipality would not be liable to pay any tax on his motor vehicles which any other Municipal Committee might impose under the provisions of S. 66 of the C. P. Municipalities Act as applied to Berar, but would be liable for any other fee imposed by its bye-laws. It would be quite impossible to conclude that the definition of 'tax' in the Municipalities

Act would include any toll, rate, due or fee of any kind whatever in addition to whatever kind of impost is mentioned in S. 66. License fee for motor lorry imposed by Amraoti Town Municipality is not a tax. Consequently, a person residing in Chandur Bazar Notified Area Committee would be liable for license fee imposed by Amraoti Town Municipality on motor lorries plying between Amraoti and Chandur Bazar. A.I.R. (Vol. 26) 1939 Nag. 171=1939 N. L.J. 262=I.L.R. (1941) Nag. 294=40 Cr.L.J. 556=181 Ind. Cas. 520.

C. P. AND BERAR MOTOR VEHICLES TAXATION ACT (IV OF 1940).

——S. 3 (1)—There is no initial presumption that a motor vehicle is necessarily kept for use. 1942 N. L.J. 419.

CENTRAL PROVINCES MUNICIPAL ACT (XVIII OF 1889).

——S. 66 (5)—Notice requiring alteration of building—Reasonable time to be granted.

A notice given by a Municipal Committee requiring a person to alter or demolish a building is bad unless a reasonable time is given; what is 'reasonable time' is determined according to circumstances of the case and with particular reference to the means and ability of the person by whom the duty is to be discharged. 11 N.L.R. 87=16 Cr.L.J. 532=29 Ind. Cas. 660.

CENTRAL PROVINCES MUNICIPAL ACT (XVI OF 1903).

——Ss. 15, 19, 21 and 22—Discharge of duty—Exercise of power—Punjab Municipal Act, (1891), S. 26.

To discharge the duty under the Act is not the same thing as to exercise a power. Any action to be taken under the Act must be taken by the Committee, by passing resolutions in a meeting convened and conducted according to Ss. 15 to 19. The procedure laid down in S. 21 is to be followed delegating powers to Sub-Committee, individual members including President and Vice-President. S. 22 which is a reproduction of the Punjab Municipal Act, S. 26, requires that the section is to be applied in cases of emergency; and safety and service of the public must necessitate the exercise of its power. The plea of urgency will otherwise fail, if private rights are sacrificed. 6 N.L.R. 53=6 Ind. Cas. 431.

——S. 21—Bye-laws, Cl. 4—Committee, if it adopts procedure of sending round one notice of special meeting to all members, should send it round to every member concerned that call may come to his notice.

Obiter:—Taking into consideration the intention of either sending, giving or serving notice of a special meeting which is to invite every member because he must be given facility to exercise his right to attend it and to influence his deliberations, the committee, if it adopts the procedure of sending round one common notice to all members can be reasonably expected to send it round to every one of the members concerned as often as possible in order that the call may come to his notice. A.I.R. 1930 Nag. 157=127 Ind. Cas. 337.

——S. 21—Mere circumstance that proof of service of notice of special meeting to a member is not forthcoming is no reason for holding that meeting is not duly summoned and properly conducted.

Where Municipal records are in due order and state that meetings are held, it will be presumed in the absence of clear evidence to the contrary that such meetings are duly summoned and properly conducted. Thus mere circumstance that the matter of personal service of notice of a meeting to a member is left in doubt and its proof is not forthcoming is no reason for holding that meeting is not duly summoned and properly conducted. A.I.R. 1930 Nag. 157=127 Ind. Cas. 337.

——S. 21—Provisions as to certificate are not mandatory.

Obiter: The provisions in respect of the certificate that the proceedings have been confirmed as required by Cl. 19 of the bye-laws are merely discretionary and not mandatory. A.I.R. 1930 Nag. 157 =127 Ind. Cas. 337.

——S. 24—Irregularity of decision by circulating papers is not curable.

Where there was no meeting of the Building Sub-Committee and all that the Engineer did was to circulate the papers to a majority of the members of such Building Sub-Committee who endorsed on them their opinions that the application should be refused.

Held, that the expedient of circulating the papers to individual members is highly inexpedient, and the defect in question was not curable or cured by S. 24. 92 Ind. Cas. 796=A.I.R. 1926 Nag. 281.

——Ss. 30 and 31—Auction sale held on behalf of Municipality and confirmed by President in a meeting becomes a contract.

The word 'contract' as used in Ss. 30 and 31 of the C. P. Municipal Act must be taken in its ordinary meaning. Where a Municipal Committee sold certain grass by auction to the plaintiff as the highest bidder and the sale was confirmed in a resolution of the municipality and memorandum of auction was signed by plaintiff highest bidder and the Vice-President and Secretary of the Municipality.

Held, that the contract as contemplated by S. 30 and 31 was complete. 78 Ind. Cas. 1052=A.I.R. 1924 Nag. 227.

——S. 35—Market due—Unpaid lease money.

At an auction held by the Municipal Committee of Nagpur of the right to sell provisions at a certain stall in the Cotton Market near the Railway Station the applicant Yeshwant made the highest bid. He paid a portion of the amount of his bid and the sale was presumably sanctioned in due course. But before Yeshwant executed the deed required of him, the Committee broke one of the conditions of the contract and he filed a suit for damage. The Committee then applied under S. 44 to a Magistrate to recover the unpaid balance of the lease money from him by distress and sale of his moveable property.

Held, that the unpaid lease money was not a 'market-due' or tax of the kind mentioned in S. 35 as it was never imposed in the manner prescribed by that section and, therefore, not recoverable by the summary procedure provided by S. 44. 19 N.L.R. 122=73 Ind. Cas. 52=24 Cr.L.J. 516=A.I.R. 1923 Nag. 264.

——S. 39—Imposition of tax by Committee—Notice defining rate.

A Municipal Committee published a notice defining the amount or rate of tax to be imposed on the trade of ginning and pressing cotton by means of steam or mechanical process. Sub-S. (1) of S. 39 of the C. P. Municipal Act provided that the Committee should 'resolve at a special meeting to propose the imposition of tax for purposes of this Act' and by Sub-S. (2), the Committee was required to publish a notice defining the amount of tax so imposed:

Held, on evidence that the Committee failed to prove that the amount or rate of tax had been resolved upon at the special meeting and that the tax had not therefore been validly imposed. 172 Ind. Cas. 461=(1937) 2 M.L.J. 792=1938 O.L.R. 38=4 B.R. 244=1938 A.L.R. 63 (P.C.).

——S. 39—Notice—Service on members forming quorum is not necessary.

Obiter: The statutory requirement is the presence of a particular quorum for the validity of a special meeting. It does not require that the quorum must be of members served with notice of meeting. A. I.R. 1930 Nag. 157=127 Ind. Cas. 337.

——S. 39—Notification of imposition of tax—If conclusive proof.

The new S. 67 (8) has not introduced any new change in the existing state of the law beyond making S. 67 self-contained; it expressly dispenses with the necessity of reading it in conjunction with the corresponding provisions of Ss. 22 (5) and 23, C. P. General Clauses Act (I of 1914). Therefore whether the old C. P. Municipalities Act or the new one is applied, the law makes the notification of the imposition of the tax issued by the Local Government the conclusive proof of the fact that 'the tax has been imposed in accordance with the provisions' of the law applicable and so the moment the notification is proved to have been published the Judge is expressly directed to dispense with all corroborative evidence and to forbid all opposing evidence and to draw the presumption of law that the tax is imposed in accordance with the provisions of the law authorizing its imposition. A.I.R. 1930 Nag. 157=127 Ind. Cas. 337.

——S. 39—"Purposes of the Act."

Obiter: The Act being intended to make better provision for organization and administration of municipalities, any tax imposed as a means to this end is within its purposes. A.I.R. 1930 Nag. 157=127 Ind. Cas. 337.

——S. 39 (1), (2)—Resolution—Contents.

In view of Sub-Ss. 1 and 2 of S. 39 of the Act of 1903, it is essential that the resolution contemplated by Sub-S. (1) should settle the amount or rate of the proposed tax. A.I.R. (Vol. 21) 1934 P.C. 62 =1934 M.W.N. 546=66 M.L.J. 551=39 L.W. 739=30 N.L.R. 121=61 I.A. 125=147 Ind. Cas. 894 (P.C.):

——S. 39 (8)—Notification under, on 25th November, 1922—C. P. Municipalities Act (II of 1922), Ss. 2 (2), 67 (8)—Notification, if subject to the provisions of S. 67 (8)—Meeting of Municipal Committee—One member not served with notice of meeting—Effect of resolution of Committee not fixing amount or rate of tax—Whether renders proceeding relating to the imposition of tax invalid.

Where a notification was made by the Local Government under S. 39 (1), C. P. Municipalities Act, 1903, on 25th November, 1922, and the C. P. Municipalities Act of 1922, came into force on 1st July, 1923, and it was argued that by virtue of S. 2 (2) of the Act of 1922, the notification should be deemed to have been issued under the Act of 1922 and hence subject to the provisions of S. 67 (8) of the latter Act.

Held, that it was not possible to place upon S. 2 (2) of the Act of 1922 a construction which would involve the validation of proceedings which purported to be under the Act of 1903, but which, were invalid and without the powers of the Act of 1903.

Where the proceedings of meeting of a Municipal Committee were impeached on the ground that one of the members of the Committee did not receive notice of the meeting.

Held, that on the evidence in the case, the challenge to the proceedings failed, and that any such attack on the proceedings of a statutory body, such as the Committee, should be clearly defined and clearly proved and while the attendance of the member, who has not been duly notified, at the meeting would obviate any objection to the want of notice, in the case of a statutory meeting which is to affect the rights of third parties, such as tax-payers, the failure to summon duly all the persons entitled to take part in the meeting is not a defect which can be waived by the individual member concerned.

Where it is alleged that the resolution passed at a special meeting did not comply with the provisions of S. 39 (1) of the Act of 1903, in respect that it did not fix the amount or rate of the proposed tax, although the original burden of proof is on those who allege invalidity of the meeting, it is shifted when the Committee produce the written record of the resolution so impeached and take their stand on it. A.I.R. (Vol. 21) 1934 P.C. 62=1934 M.W.N. 546 =66 M.L.J. 551=61 I.A. 125=39 M.L.W. 739= 30 N.L.R. 121=147 Ind. Cas. 894 (P.C.).

——Ss. 52 and 53—Municipal Committee—Land within Municipal limits—Ownership of.

There is no rule that all the land within the limits of a Municipal town must, in the absence of evidence to the contrary, be taken to belong to the Municipal Committee. 47 Ind. Cas. 892 (N.).

——Ss. 64 and 68—Cowshed is a building.

Cowshed is a building. S. 68 has no application in the case of a nazul plot specifically let out for a long term of years for building thereon by a private individual. 92 Ind. Cas. 796=A.I.R. 1926 Nag. 281.

——S. 66—Building.

A building means a structure with a roof. 22 Cr. L.J. 754=64 Ind. Cas. 274=A.I.R. 1921 Nag. 147.

——Ss. 66, 67 and 88—'Re-building'—Meaning of.

Merely to change the posts of a shed by keeping the old roof as before, can hardly be termed re-building. The power of removal is to be exercised in cases of new structures, but does not extend to new structures taking exactly the place of old ones. The object of the Act requiring notice of erection or re-erection is to ensure sanitation, external appearance, health, safety and convenience of public and neighbours. It does not deprive the owners of the

rightful use of their lands. 6 N.L.R. 53=6 Ind. Cas. 431.

——S. 66 (1) (3)—Delay in passing orders—Presumption.

Under S. 66 of the C. P. Municipal Act, delay in passing orders on a valid notice given under S. 66 (1) of the Act may, if followed by a failure to reply to a written reminder, lead to a conclusion that the proposed building has been absolutely sanctioned. 20 Cr.L.J. 89=48 Ind. Cas. 889.

——Ss. 67 (1), (2), 122 and 139—Old encroachment—Punishment.

S. 122 cannot reasonably be construed as making punishable an existing encroachment not made by the accused person but by his predecessor-in-title. In the case of an encroachment not made by the accused, S. 67 (2) of the Act provides full means of redress which can be enforced by the penal provisions of S. 139. The word 'such' in Sub-S. 2 of S. 67 of the Act refers back to the words 'structure encroaching on any street' in Sub-S. (1) and not only to new encroachments as is clear from the provision in which encroachments of old standing are referred to. 19 Cr.L.J. 979=47 Ind. Cas. 879.

——S. 86—Notice to erect latrine—Contents.

A notice under S. 86 (1) of the C. P. Municipal Act must contain the directions as to the nature and position of the latrine. Delegation to an individual officer of the power to give directions, is improper. 20 Cr.L.J. 82=48 Ind. Cas. 882.

——S. 105—Bye-law 5 (a)—Termination of lease—Resolution of committee.

A lease can only be terminated according to law and it does not come to an end, at the sweet will of the Committee, by passing a resolution. A Municipal Committee granted a lease of immovable property. The lease was from month to month. No 15 days' notice as required by law was given, but the Committee passed a resolution by which the lessee was to quit the land after seven days' notice. On lessee's failure to do so he was convicted for breach of the bye-law 5 (a).

Held, that the lease could only be terminated with 15 days' notice and as no such notice was given there was no breach of the bye-law 5 (a), and the conviction was illegal. 1929 Cr.C. 511=A.I.R. 1929 Nag. 332.

——S. 105 (1)—Bye-Law No. 7—Applicability.

Bye-Law No. 7 does not apply to the case of a refusal to vacate land held for some years and subsequently found to be nazul. A.I.R. 1923 Nag. 157.

——S. 114—Permission granted under—Provisions of S. 91 are not applicable.

The provisions of S. 91 are not applicable to permission granted by municipality under S. 114 for connecting the private drain with the municipal drain. 120 Ind. Cas. 221=A.I.R. 1930 Nag. 130.

——S. 122—Applicability—Encroachment by previous owner.

Section 122 cannot be interpreted as making punishable an omission to remove an existing encroachment not made by the accused person. The word "obstructs" in S. 122 of the Act applies to the persons who built or caused to be built the encroachment and not to the accused who originally had nothing to do with its erection. Sub-S. (2) of S. 67 read with S. 139 provides a remedy in the case of an encroachment not made by the present owner. 23 Cr. L.J. 127=65 Ind. Cas. 559=18 Nag.L.R. 92=A. I.R. 1922 Nag. 167.

——S. 139—Fine in respect of future breach.

The daily fine may be increased under S. 139 of the C. P. Municipal Act. It must relate to a period anterior to the Magistrate's order of conviction. There cannot be punishment for future breach. 6 C.P.L.R. 32, foll. 20 Cr.L.J. 89=48 Ind. Cas. 889.

——S. 152—Notice—Attestation of service by non-official persons—If necessary.

Section 152 does not require that the report of services of notice should be attested by any non-official person. 20 Cr.L.J. 256=49 Ind. Cas. 928.

——S. 159—Complaint—Accused tried jointly.

A complaint has to be made as required by S. 159 of the C. P. Municipal Act in order to enable a Court to take cognizance of an offence punishable under the Act. Once cognizance has been legally taken of an offence the Magistrate is seized of the whole matter as to all other accused whose guilt may appear during the trial of the case. 20 Cr.L.J. 86 =48 Ind. Cas. 886.

CENTRAL PROVINCES AND BERAR MUNICIPALITIES ACT (II OF 1922).

——Notification No. 456, dated 29th April, 1913—Effect.

The operation of the Notification No. 456, dated the 29th April, 1913, is not subject to the maximum of Rs. 500 imposed by proviso 1 to R. 1 of the Hyderabad Residency O. 112, dated the 18th March, 1899. 22 N.L.R. 153=99 Ind. Cas. 422=A.I.R. 1927 Nag. 102.

——Bye-laws—Notice of meeting sent within time but not received three days before meeting—Irregularity, if curable. **See** CENTRAL PROVINCES MUNICIPALITIES ACT, S. 26. 1946 N.L.J. 227.

——Ss. 3 (a) and 103—"Building"—If includes wall—Person reconstructing dilapidated wall without permission—If can be proceeded against.

A wall is not included in the definition of a building in S. 3 (a), C. P. Municipalities Act, and the reconstruction of a dilapidated or a broken wall cannot be regarded as an alteration to or enlargement of a building. No action can therefore be taken under S. 103 of the Act against a person for reconstruction of the wall without the Municipal Committee's permission. 1950 N.L.J. 524.

——S. 3 (a)—"Building"—If includes compound wall.

A compound wall is certainly an enclosure and would thus come under the definition of "building" in S. 3 (a) of the C. P. Municipalities Act. 1949 N.L.J. 610.

——S. 4—"Good faith"—Standard of Care.

A thing must be held to be done in good faith, when it is in fact done honestly, whether it is done negligently or not. The standard of care is that of a man of ordinary prudence, and is not higher than that of a trustee under S. 15 of the Trust Act. I.

L.R. (1947) Nag. 256=228 Ind. Cas. 525=A.I.R. 1948 Nag. 24=1947 N.L.J. 281.

——S. 10—Rules framed under, R. 9 (1) (i)—"Duly qualified elector"—Meaning of.

"A duly qualified elector" in R. 9 (1) (i) of the rules framed under S. 10 of the C. P. and Berar Municipalities Act, can only mean a person entitled to vote and elect a candidate in the constituency in which he is an elector. As each elector has only one vote and can only vote in one constituency under the Act, it follows that he cannot be a "duly qualified elector" except in the ward or constituency in which he is entitled to vote. It follows, therefore, that the proposer and seconder of a candidate must be electors in the ward in which the candidate is seeking election, and it is not enough if they are electors from other wards in the same municipality. I. L. R. (1950) Nag. 340=A.I.R. 1950 Nag. 109=1950 N. L. J. 60.

——S. 12 (a)—Right to vote—Member of joint Hindu family having an annual income of not less than Rs. 120.

Where a member of a joint Hindu family is clearly a person in receipt of an annual income of not less than Rs. 120, he is entitled to vote under S. 12 (1) (a). It matters not, whether such person pays in or does not pay in his income or part thereof to the joint family fund. He is clearly under Cl. (a) entitled to a vote. The explanation to Cl. (a) is not a disabling provision, but only applies where the total income of a joint Hindu family exceeds Rs. 120 but the income of individual members is less than that amount. In such a case, the Legislature intended to provide that the manager of a joint Hindu family alone should have a vote in a quasi-representaive capacity on behalf of the family. 21 N.L.R. 182=88 Ind. Cas. 480=A.I.R. 1926 Nag. 66.

——S. 14 (3)—Nomination of same person in respect of two constituencies—Validity—Subsequent withdrawal of nomination paper in respect of one of them on date of scrutiny—Effect of.

The nomination of a person in respect of two constituencies contravenes the provisions of S. 14 (3) of the C. P. and Berar Municipalities Act. The material date for determination of the question if a candidate was duly nominated, is the date of nomination and not the date of scrutiny. Any invalidity or lacuna in his nomination paper or in nomination cannot be legalised or rectified by a subsequent act of the candidate on the date of scrutiny. The object of the scrutiny is to see whether the nomination was valid on the date on which it was made. The date with reference to which the question of eligibility of a candidate is to be determined is the date fixed for the nomination, and if on that date a candidate is not eligible, his nomination paper must be rejected. The candidate has to make his choice in respect of his constituency on or before the date fixed for filing the nomination papers. The choice cannot be deferred till the date of scrutiny. I.L.R. (1950) Nag. 975=A.I.R. 1950 Nag. 195.

——S. 14 (3)—Scope of—Candidature of same person for two wards—If prohibited.

The language of S. 14 (3) of the C. P. and Berar Municipalities Act is plain and means that a person is entitled to contest an election from one constituency only—that constituency may be a ward or a special constituency. He cannot be a candidate for two wards, nor can he be a candidate for two special constituencies. Similarly, he cannot be a candidate for a ward and a special constituency. I.L.R. (1950) Nag. 975=A.I.R. 1950 Nag. 195.

——Ss. 16 (3) and 21—Scope—Resignation of member—When takes effect.

S. 16 of the C. P. Municipalities Act merely regulates the normal term of office of a member of a committee, and all that it says is that even if the term should happen to expire in any particular case the member in question will nevertheless continue in office until his successor is appointed and notified. It has nothing to do with cessation of membership by other means. S. 16 (3) of the Act does not govern S. 21. That section indicates that the resignation of a member of a committee becomes valid from the moment the President accepts it. No qualification is placed upon that and accordingly the resignation takes effect from the date of the acceptance. I.L.R. (1946) Nag. 73=1946 N.L.J. 227=A.I.R. 1946 Nag. 152.

——S. 16 (3)—Period of nominated members extended till new body elected—New body constituted subsequent to meeting in question—Failure to summon old nominated members and summoning of new elected members—Validity of meeting.

The period of office of the nominated members of the Municipal Committee was extended till a new body was elected and began to function. The new elected body was to consist of nine elected, two nominated and two selected members. The nine elected members could not displace any nominated members of the old body for the reason that it was not possible to determine which elected member was a successor of which nominated member so as to attract the application of Sub-S. (3) of S. 16. That new body was fully constituted subsequent to the meeting in question:

Held, that the failure to summon the old members who were qualified to act as corporators and summoning the new elected members who were then not so qualified rendered the proceedings of that meeting invalid and of no effect. A.I.R. (Vol. 27) 1940 Nag. 293=I.L.R. (1940) Nag. 446=1940 N. L.J. 685=193 Ind. Cas. 473.

——Ss. 18, 33—Rules under S. 18 (6), R. 20—Applicability—Bye-election of Vice-President.

At a meeting convened for the purpose of electing a Vice-President on the occurrence of a casual vacancy, in the absence of any rule to the contrary, the duly elected President of the Committee has the statutory right to preside under S. 33 of the C. P. Municipalities Act. Rule 20 of rules framed under S. 18 (6) of the Act does not apply to such bye-elections. A.I.R. (Vol. 18) 1931 Nag. 175=27 N.L.R. 244=134 Ind. Cas. 860.

——S. 20-A—Powers of High Court—Discretion of Judge under R. 18 of C. P. Municipal Electoral Rules—Interference.

Under R. 18 of C. P. Municipal Electoral Rules, the Judge has a discretion if an election is declared void under R. 17 either to declare that a casual vacancy has been created or that the petitioner or any other candidate has been duly elected. It is not open to the High Court sitting in revision under S. 20-A, C. P. and Berar Municipalities Act to ques-

tion the discretion exercised by the Judge in accordance with R. 18. I.L.R. (1950) Nag. 975=A. I.R. 1950 Nag. 195.

——S. 20-A (2)—Enquiry into election petition —Power of Additional District Judge not specially empowered.

The words "specially empowered by the Provincial Government in this behalf" in S. 20-A (2), C. P. and Berar Municipalities Act, qualify not only "a Civil Judge" but also "the District Judge or Additional District Judge". That is to say, neither a District Judge nor an Additional District Judge can enquire into an election petition unless he has been specially empowered in that behalf. 1950 N.L.J. 520=A.I.R. 1950 Nag. 212.

——Ss. 21 and 16 (3)—Scope—Resignation of member—When takes effect. **See** C. P. MUNICIPALITIES ACT, Ss. 16 (3) and 21. 1946 N.L. J. 227.

——S. 21 and S. 16 (3)—Person ceases to be member after acceptance of his resignation.

Section 16 merely regulates the normal term of office and has nothing to do with cessation of membership by other means. Sub-S. (3) of S. 16, does not govern S. 21, which says that the resignation becomes valid from the moment the President accepts it. No qualification is placed upon that. Accordingly a resignation takes effect from the date of the acceptance and the member ceases to be a member after such acceptance. A.I.R. (Vol. 33) 1946 Nag. 152=I.L.R. (1946) Nag. 73=1946 N.L.J. 227.

——S. 23—Decision of election tribunal declaring election invalid, set aside on appeal—If creates temporary vacancy—Transaction of municipal business—Section, if can be used to cure irregularity.

The decision of the election tribunal declaring the election of a member of a municipal committee to be invalid creates a temporary vacancy on the committee, although it is set aside on appeal. The balance of advantage unquestionably lies in treating the decision of the tribunal as good and effective for purposes of transacting municipal business so long as it enures, and in using S. 23 of the C. P. Municipalities Act for curing irregularities should the decision be varied in appeal. I.L.R. (1946) Nag. 73=1946 N.L.J. 227=A.I.R. 1946 Nag. 152.

——S. 23—Irregularity—Prejudice—Burden of proof.

Under S. 23 of the C. P. Municipalities Act, an irregularity is not to be treated as fatal unless it has occasioned prejudice. The burden of establishing prejudice is on the person seeking to vitiate the irregular proceedings. It must be pleaded, particulars must be furnished and it must be proved. I.L.R. (1946) Nag. 73=1946 N.L.J. 227=A.I.R. 1946 Nag. 152.

——S. 23—Notice of meeting sent within time but not received three days before meeting—Irregularity, if curable.

Where a bye-law framed by the municipal commitee requires that a notice of meeting should be sent to each member not less than three days before the date thereof, and the notice is sent in time, no question of illegality can arise on the score that the notice was not received three clear days before the meeting. All that the bye-law requires is that the notice shall be "sent" that is to say, despatched, not less than three days before the meeting. At best, this would be a curable irregularity under S. 23 of the C. P. Municipalities Act. I.L.R. (1946) Nag. 73=1946 N.L.J. 227=A.I.R. 1946 Nag. 152.

——S. 23, applied in Berar—Assessment not in accordance with bye-laws—Irregularity merely procedural.

Where the validity of tax assessed is challenged the Courts should lean towards its validity rather than its invalidity though they have power to declare a tax **ultra vires** where the question relates to jurisdiction.

The municipality prepared an assessment list in flagrant violation of the bye-laws of the committee. The irregularities were such as could be treated as procedural. The tax levied was, however, legal and there was no proof that injustice was done:

Held, that S. 23 of the C. P. Municipalities Act as applied to Berar cured the defects. A.I.R. (Vol. 30) 1943 Nag. 224=1943 N.L.J. 277=I.L.R. (1943) Nag. 623=208 Ind. Cas. 116.

——S. 23—Failure to summon member, whether invalidates meeting—Invalidity, if cured by his attendance.

Failure of the President to summon or non-receipt of summons does not invalidate a meeting but is capable of being regularized by the member's attendance at the meeting. A.I.R. (Vol. 27) 1940 Nag. 293 =I.L.R. (1940) Nag. 446=1940 N.L.J. 685=193 Ind. Cas. 473.

——Ss. 23, 31 (2)—President assenting to call meeting—Whether deemed to have convened it —Assent, if can be inferred from his presence —Irregularity, if cured.

To convene means to call together or to assemble. When notices are sent to every member or circulated among the members by the Secretary, it must be presumed that it was with the consent of the Chairman, particularly when he attends the meeting. There is no law, rule or bye-law laying down any special procedure to regulate the exercise of the President's power to convene meetings. If there is evidence of the President's assent to the calling of any meeting, he must be deemed to have convened the meeting. His assent is inferable from his presence at the meeting. Every meeting that is held must be presumed to have been convened by order of the President. Even on the assumption that there was any irregularity it cannot, in its nature, affect the validity of the meeting itself and is cured by S. 23 of the C. P. and Berar Municipalities Act. Strictly speaking, it is nothing more than an informality. A.I.R. (Vol. 27) 1940 Nag. 293=I.L.R. (1940) Nag. 446=1940 N.L.J. 685=193 Ind. Cas. 473.

——S. 25—Approval of budget is not approval for payment—Provincial Government's sanction for payment is imperative.

Where the President of a Municipal Committee was aware that the previous approval of the Provincial Government was necessary for the alteration of the emoluments of the Secretary but ordered payment when the Officiating Secretary placed before him the approval of the Provincial Government to the budget provision:

Held, that the approval of the budget provision by itself was not sufficient and separate approval of the Provincial Government for payment was necessary.

The President ought to have seen the letter of the Provincial Government sanctioning the increment before he could accept the words of his subordinate and order payment:

Held, also that the President acted with gross negligence by ordering payment without obtaining necessary sanction when he was aware that special sanction was required. The necessity of sanction was imperative. A.I.R. (Vol. 32) 1945 Nag. 111=I. L.R. (1945) Nag. 218=1945 N.L.J. 105.

——S. 25—Rules, R. 2 (iii)—Scope and effect of.

R. 2 (iii) of the rules framed under S. 25 of the C. P. Municipalities Act gives a right of appeal to the Commissioner. The right to appeal is not restricted to an employee; it does not prohibit an appeal at the instance of the Municipal Committee, if it is dissatisfied with the decision of the Deputy Commissioner. The rule though in wide terms, can be justified by the terms of S. 175 of the Act which confers wide powers on the Provincial Government as regards the right of appeal. I.L.R. (1947) Nag. 256=228 Ind. Cas. 525=A.I.R. 1948 Nag. 24=1947 N.L.J. 281.

——S. 25—Rules under, R. 3—If ultra vires.

S. 25 (7) of the C. P. Municipalities Act does not confer upon the Provincial Government any power to frame rules about the filing of revision applications. R. 3 of the rules framed under S. 25, in so far as it provides for a revision is in excess of the rule making power and is therefore to that extent **ultra vires.** I.L.R. (1947) Nag. 256=228 Ind. Cas. 525=A.I.R. 1948 Nag. 24=1947 N.L.J. 281.

——S. 25—Rules under, R. 7—Scope—Representation on behalf of Committee.

Rule 7 of the Rules made under S. 25, C. P. and Berar Municipalities Act, makes no provision for representation on behalf of the Committee but only for the employee in special cases. Engaging of Counsel for the Committee being outside the scope of the rules would certainly require special sanction which can justifiably be applied for only in extraordinary circumstances.

Where therefore in an appeal by a dismissed employee to the Local Government against his dismissal, the members of the Municipal Committee engaged a Counsel to represent their case without getting sanction and paid him:

Held, that the members were liable for the payment made to the Counsel. A.I.R. (Vol. 26) 1939 Nag. 247=1939 N.L.J. 327=184 Ind. Cas. 494.

——S. 25—Allowance paid to employee by Committee without Government sanction—whether can be recovered.

In the **M** Municipal Committee, **A** was originally employed as a Sanitary Inspector. Three years later he was appointed Secretary on a monthly consolidated pay of Rs. 75. Later on he applied to the Committee to give him some allowance for doing the work of supervision of sanitation and the Chairman of the Public Health Committee proposed that **A** should get Rs. 12 as monthly allowance for doing additional work from the date on which he became Secretary. This proposal was ultimately confirmed by the Municipal Committee and **A** was accordingly paid this allowance with retrospective effect. The payment of this allowance was, however, objected to by the auditor on the ground that it required sanction of the Local Government under the proviso to S. 25. The Committee applied for sanction but the Commissioner returned the application without forwarding it to the Local Government. The Committee thereupon sued **A** for the recovery of the amount of allowance paid to him.

Held, that assuming that sanction of Local Government was necessary the burden of obtaining it was on the Committee and that unless the Local Government was approached and it refused to accord its sanction, the payment already made to **A** could not be said to have been illegally received by him so as to give the Committee a right to recover the amount from him. 116 Ind. Cas. 418=A.I.R. 1929 Nag. 213.

——S. 32 (2), Proviso—'Such other day' does not mean any part of the same day. 1942 N.L.J. 329.

——S. 36—Bye-law 23 of Municipal Committee of Katol—'Members on the Committee'—Meaning of.

The words 'members on the committee' in Bye-law 23 (Municipal Committee of Katol) mean those who are actually serving on the committee at the time of the meeting and not those who ought to be on it when the committee is fully constituted. A person not in existence cannot be said to be a member, still less can he be said to be on a committee or on anything else.

Where, therefore, of the 19 members of the committee one had resigned and the election of one was declared to be invalid, the members on the committee for the purpose of quorum were held to be only 17. A.I.R. (Vol. 33) 1946 Nag. 152=I.L.R. (1946) Nag. 73=1946 N.L.J. 227.

——S. 36—Bye-law under—Expression 'Secretary shall send to each member a notice', meaning of—Notices sent before three days—Fact that they are not received by members before three days does not make them illegal.

The bye-law of the Municipal Committee, Katol, under S. 36 which lays down that 'the Secretary shall send to each member a notice..not less than three days' makes no provision for the **receipt** of the notices by the member. All it requires is that the notices shall be 'sent' that is to say, despatched, not less than three days before the meeting. Where the notices are **sent** before three days, the fact that they are not **received** before three days by the members does not affect their legality. At best this would be a curable irregularity under S. 23. A.I.R. (Vol. 33) 1946 Nag. 152=I.L.R. (1946) Nag. 73=1946 N.L.J. 227.

——S. 36—Bye-law under—President ordering convening of meeting—Day fixed by Vice-President who signed notices also—Irregularity, If curable by S. 23.

Where a bye-law under S. 36, requires the President or in his absence the Vice-President to fix a day for an ordinary meeting and the President ordered that the meeting should be convened but the Vice-President fixed the day for it, and also signed the notices which were required to be signed by the Secretary:

Held, that in the absence of the plea or proof that anybody was prejudiced by reason of these

defects, S. 23 applied and the meeting was validly convened. A.I.R. (Vol. 33) 1946 Nag. 152=I.L.R. (1946) Nag. 73=1946 N.L.J. 227.

——S. 38—Absence of inclusion of disputed road in Municipal jamabandi—Whether negatives plea of road being public road.

Under S. 38 of the C. P. Municipalities Act, 1922, all public streets vest in the Municipal Committee; consequently, the absence of the inclusion of the disputed road in the Municipal jamabandi is prima facie good evidence which tends to negative the plea that the road is a public road. (1933) 146 Ind. Cas. 601=1933 Cr. Cas. 1001=35 Cr.L.J. 145=29 N.L.R. 361.

——S. 44—Re-sale held before service of notice on defaulting auction-purchaser—Latter, if liable for deficiency in price.

A re-sale under S. 44, Central Provinces Municipalities Act, cannot be held before the notice of the sale is served upon the auction-purchaser who has not paid balance of purchase money. If notice is not served on the party before re-sale he will not be liable for any deficiency in price. A.I.R. (Vol. 19) 1932 Nag. 128=28 N.L.R. 130=140 Ind. Cas. 776.

——S. 45 (1)—Interested in contract with Municipality—Meaning of.

There was an auction sale of night soil manure belonging to a Municipality and one **M** purchased it for Rs. 625. Under the condition attached to the sale, he had to pay the full price immediately and until payment he was not entitled to remove the material. He paid Rs. 300. He borrowed Rs. 325 from one **N** who deposited that amount with the Municipal Committee. Being unable to pay off the loan he sold the manure to **N** for Rs. 625 on receipt of Rs. 300 in cash and in adjustment of the loan of Rs. 325. **N** was the natural brother of **H**, one of the accused. **N** got permission from the Committee to-remove the manure. Thereon the accused got it removed through the Municipal sweepers to **H's** field. The other accused **G** who was also a member of the Committee, helped the accused **H** by giving Municipal sweepers, in the removal of the manure:

Held, that the contract could not be discharged until the conditions were fulfilled, **i.e.,** by payment of the full price. The transaction could be characterised as a 'contract' even after the property in the manure had passed to **M**, the highest bidder, and by the purchase of the manure from **M** after he became owner of it, **H** could be regarded as having become interested in a contract with the Municipal Committee.

Held, also that **G** who simply assisted in the removal of the stuff could be regarded as a person interested in the contract with the Municipal Committee. The word 'interested', in S. 45 (1), C. P. Municipal Act, is to be interpreted in its ordinary wide sense and not confined to interest in money and includes jobbery. A.I.R. (Vol. 27) 1940 Nag. 81 =1939 N.L.J. 567=I.L.R. (1940) Nag. 133=41 Cr.L.J. 424=187 Ind. Cas. 161.

——S. 45 (1)—Offence under S. 168, Penal Code—Sanction of Local Government—If necessary—Cr. P. Code, S. 197.

A member who in his private capacity takes a contract with Municipal Committee cannot be said to have done so while acting or purporting to act in the discharge of his official duty. It is open to the Court to take cognizance of an offence under S. 168 against a member of a Municipal Committee within the meaning of S. 45 (1), C. P. Municipalities Act, without previously obtaining the sanction of the Local Government. A.I.R. (Vol. 19) 1932 Nag. 133=28 N.L.R. 156=1932 Cr. Cas. 669=34 Cr. L.J. 70=140 Ind. Cas. 711.

——S. 48—Scope—Act of Municipal Committee prohibited by law.

S. 48 of the C. P. Municipalities Act comes into play only when the act of the Municipal Committee is done or purported to be done under that Act. If its action is something which is prohibited by law, and so wholly beyond its jurisdiction, the section does not apply. I.L.R. (1948) Nag. 971=1948 N.L.J. 541=A.I.R. 1949 Nag. 215.

——S. 48—Levy of illegal tax—If done under Act.

The tax purports to be levied in virtue of taxation imposed in accordance with the provisions of the Act in virtue of powers conferred by S. 66 (1) (o), and the levy of tax, even though illegal is something purporting to be done under the C. P. and Berar Municipalities Act. A.I.R. (Vol. 32) 1945 Nag. 197=1945 N.L.J. 305.

——S. 48 (2)—Municipality cutting off private water pipe—Suit for mandatory injunction to re-connect it—Limitation for suit.

The plaintiff filed a suit on 4th May, 1933, against the Secretary, Municipal Committee, asking for a mandatory injunction to re-connect his private water-pipe which had been disconnected by the municipality without notice on 19th June, 1930. The municipality defended the case on its merits and also claimed that the suit was barred by provisions of S. 48 (2) of the C. P. Municipalities Act inasmuch as the suit was filed more than six months after the act concerning which the complaint was made and in respect of which the injunction was asked for. The plaintiff contended that the wrong was a continuing wrong, that the wrong was not one arising out of contract but out of tort, that there was a statutory obligation on the municipality to supply water, and that a cause of action arose on every day on which the municipality failed to supply water, and that consequently there was no bar of limitation:

Held, that no statutory duty to supply water to a private house was imposed on any municipal committer by the provisions of the C. P. Municipalities Act. The statutory duty under S. 50 (1) (k), did not include the provision of water supply to private houses. As the committee then was under no statutory obligation to supply water to a private house there had been no continuing breach of that obligation which would warrant the application of the doctrine of continuing wrong giving rise to a cause of action from day to day. The suit, therefore, was barred under S. 48 (2). A.I.R. (Vol. 30) 1943 Nag. 95=1942 N.L.J. 526=I.L.R. (1943) Nag. 230=203 Ind. Cas. 400.

——S. 48—Municipality enhancing tax—Irregularity by omitting to consider objections—Suit to recover amount collected in excess of lawful rate—Limitation.

If the Municipal Committee exercised a power which it did not possess, it should not be regarded as acting in pursuance of the statute governing its

powers, and its acts should not be regarded as being those done under the statute. But there is a difference between a case when a corporate body exercises a power which is wholly absent and a case where it has power but it exercises it illegally or with material irregularity. In the former case the Municipal Committee's act from beginning to end is illegal; whereas in the latter case the act is quite legal in the beginning but becomes illegal in the end.

The Municipal Committee had power to enhance the tax on animals brought to slaughter-house. In following the procedure laid down in S. 68, C. P. Municipalities Act, it lapsed into an irregularity by omitting to consider the objections by the butchers:

Held, that the Committee was exercising the power under S. 68, although irregularly, and to this extent, the Committee was acting under the statute. Consequently suits to recover amounts collected in excess of lawful rate were governed by S. 48 and not having been filed within six months were barred by time. A.I.R. (Vol. 25) 1938 Nag. 455=I.L.R. (1939) Nag. 216=179 Ind. Cas. 817.

——S. 49 (1)—Duty of President of Municipal Committee.

Where an increment is authorised to be paid by the President of a Municipal Committee without obtaining the necessary sanction from the Provincial Government under S. 25, C. P. Municipalities Act, it is the duty of the president as a member or officer of the committee under S. 49 (1) of the same Act to prove that he acted in good faith and with due care and attention. A.I.R. (Vol. 32) 1945 Nag. 111=1945 N.L.J. 105=I.L.R. (1945) Nag. 218.

——S. 49 (1)—Definition of 'good faith' in General Clauses Act—How far applicable.

Inasmuch as S. 49 (1), C. P. and Berar Municipalities Act, requires the member to act, not only in good faith but also with due care and attention, the element of negligence which was condoned by the definition of 'good faith' in General Clauses Act is taken away. A.I.R. (Vol. 32) 1945 Nag. 111=1945 N.L.J. 105=I.L.R. (1945) Nag. 218.

——S. 57 (2) and (4)—Order superseding municipal committee for certain period—If may be amended extending that period—C. P. General Clauses Act, S. 20.

Neither S. 57, C. P. Municipalities Act, nor S. 20, C. P. General Clauses Act, empowers the State Government to amend its original order of supersession of a municipal committee for a certain period under S. 57 (2), C. P. Municipalities Act, by extending that period. The necessary conditions for supersession of a municipal committee are (a) the existence of the committee, and (b) its incompetence, etc. After the supersession of the municipal committee these two conditions cease to exist, and therefore it would not be within the competence of the Government to amend their previous order. The State Government are bound to reconstitute the municipal committee under S. 57 (4), C. P. Municipalities Act, after the expiry of the period specified in the original order of supersession. 1950 N.L.J. 509.

——Ss. 58 (as amended) and 83 (1)—Order passed on merits or appeal—Revision to Financial Commissioner's Court—If lies.

No revision application lies to the Financial Commissioner's Court against an order passed on the merits in appeal under S. 83 (1) of the C. P. Municipalities Act. The amendment of S. 58 of the Act in 1947 does not alter the position in respect of this matter. The provisions of S. 84 (3) of the Act limit by specific provision the very wide powers conferred by the amended S. 58 of the Act on the Provincial Government (by delegation on the Financial Commissioner), in matters relating to objection to municipal assessments, taxation, etc. The words 'in any other manner' occurring in S. 84 (3) of the Act are of considerable significance. The scheme for deciding objections to municipal assessments provides (Cl. (2) of S. 83 of the Act) that the officer hearing the appeal may in certain circumstances refer any doubtful point of substance arising in the appeal to the High Court for decision. This clearly is the 'manner' in which the legislature intended that these disputes should be finally resolved. It is manifestly impossible to reconcile any procedure in revision under S. 58 of the Act with the manner laid down for the final decision of the appeal under S. 83 (1) of the Act. Jurisdiction is limited to an appeal alone and the appellate authority is vested with discretion to seek guidance from the High Court. A power to revise an appellate order, in such circumstances, would be entirely illogical. [1942 N.L.J. 221, foll.] 1948 N.L.J. 586.

——S. 66.

Synopsis.

1. **Construction of section.**
2. **Haisiyat tax.**
3. Sub-S. (1) (a)—Property Tax.
4. Sub-S. (1) (b)—Tax on ginning and pressing of cotton.
5. Sub-S. (1) (c)—Tax on Bicycles.
6. Sub-S. (1) (e)—Octroi duty.
7. Sub-S. (1) (k)—Water Tax.
8. Sub-S. (1) (o)—Terminal Tax.
9. Sub-S. (2)—Power to levy tax.
10. Sub-S. (4)—Power to Vary Tax.

1. Construction of section.

——S. 66—'According to their circumstances and property within these limits'—Meaning of.

When the Act speaks of circumstances within certain limits it means circumstances within those limits and not property giving rise to them and circumstances arising out of agricultural property (situated in the same district as the limits mentioned or elsewhere) are in this respect not different from circumstances arising out of other kinds of property. Malguzari villages outside the limits of the Municipality cannot be called circumstances within the limits of the Municipality. But words 'within those limits' do qualify the 'circumstances' and 'the circumstances' do not include land revenue payable. 107 Ind. Cas. 902=A.I.R. 1928 Nag. 243.

2. Haisiyat tax.

——S. 66—Haisiyat tax—Assessment of.

In assessing the haisiyat tax the Municipal Committee should make allowance for income-tax paid by the assessee, but the extent to which allowance should be made in respect of house rent and insurance premia is a matter to be decided in connexion with each case by the Municipal Committee or the Deputy Commissioner, Commissioner or other officer hear-

ing the appeal and no principle can be laid down on the point. 23 N.L.R. 161=106 Ind. Cas. 397=A. I.R. 1928 Nag. 71.

3. Sub-S. (1) (a)—Property Tax.

——S. 66 (1) (a)—Assessment of property tax —Value of nazul land held by assessee under lease—If may be taken into consideration.

In assessing the property tax imposed under S. 66 (1) (a) of the C. P. Municipalities Act, the value of the nazul land held by the assessee under a lease from Government cannot be taken into consideration. A.I.R. 1949 Nag. 152=1947 N.L.J. 602.

——S. 66 (1) (a)—Agricultural lands lying within municipal limits of Nagpur—Whether liable to be assessed to property tax.

Agricultural lands lying within the municipal limits of Nagpur are liable to be assessed to property-tax under S. 66 (1) (a) of the C. P. Municipalities Act. I.L.R. (1947) Nag. 305=229 I.C. 564=A.I.R. 1948 Nag. 38=1947 N.L.J. 216.

——S. 66 (1)—Nagpur Civil Station Sub-Committee Assessment Rules, R. 3—Building not ordinarily let—Valuation of each building, occupied site and surrounding grounds—Alteration of assessment.

S. 66 (1), C. P. Municipalities Act, draws a distinction between buildings and lands by referring to them separately. This distinction is made further clear in R. 3 of the Rules framed by the Provincial Government under S. 71 of the Act with regard to buildings and lands situate within the limits of Civil Station Sub-Committee, Nagpur. Under the Rule there is one uniform basis for determining the assessment on lands, whether they are ordinarily let or not. while the basis for determining the assessment on buildings depends upon whether they are ordinarily let or not.

According to R. 3 (1), the annual letting value of a building which is not ordinarily let out is to be determined by first ascertaining the estimated cost of constructing a similar building, deducting therefrom a reasonable amount on account of depreciation and adding thereto the estimated present value of the land as an occupied site. The word 'land' in this connection means only the land on which the building stands and not the land surrounding the building. Therefore, a building (not ordinarily let) and the land on which it actually stands are to be valued in one way while the surrounding lands or grounds in another. The surrounding lands or grounds have to be valued in the manner provided by R. 3 (2) and the gross annual letting value of such lands should be deemed to be the gross annual rental at which they may be reasonably expected to be let.

R. 3 (4) of the Assessment Rules deals only with valuation and not assessment. Thus, while the valuation cannot be altered for five years, the assessment can be. There is no provision in the Act or the Rules made thereunder keeping the assessment once made inviolate or unalterable for any particular period. I.L.R. (1950) Nag. 371=A.I.R. 1950 Nag. 223=1950 N.L.J. 271.

——S. 66 (1)—'Gross annual letting value,'—Meaning of.

The expression 'gross annual letting value' or 'gross rent' does not include the sums paid by the tenant on account of conservancy tax or water rate unless the tenant agrees to pay a lump-sum as rent including taxes or rates without specifying their amounts. When a tenant pays specific sums on account of taxes or rates in addition to what he pays for use and occupation of the premises demised to him, to the Municipal Committee directly or through the owner, such sums cannot be included in the calculation of the 'letting value' or 'rent.' A.I.R. (Vol. 27) 1940 Nag. 253=I.L.R. (1941) Nag. 323=1940 N.L.J. 112=192 Ind. Cas. 762.

——S. 66 (1) (h) and (k)—Assessment—In assessing the value of a house unfit for human occupation the deduction of certain percentage for determination is not correct. (1937) 20 N.L.J. 175.

4. Sub-S. (1) (b)—Tax on ginning and pressing of cotton.

——S. 66 (1) (b)—Tax on ginning and pressing of cotton, whether tax on income derived from trade and ultra vires.

The tax on ginning and passing of cotton is not a tax on income derived from the trade but on the process of ginning and pressing. This tax does not seek to take anything out of the income and consequently is not ultra vires. A.I.R. (Vol. 27) 1940 Nag. 293=I.L.R. (1940) Nag. 446=1940 N.L.J. 685=193 Ind. Cas. 473.

5. Sub-S. (1) (c)—Tax on bicycles.

——S. 66 (1) (c)—Tax cannot be levied on bicycles used but not kept within municipal limits. 1942 N. L.J. 310.

6. Sub-S. (1) (e)—Octroi duty.

——S. 66 (1) (e) and Excise and Salt Act (I of 1944)—Levy of octroi duty on tobacco by the Municipality — Legality—Government of India Act (1935), Ss. 143, 292 and Sch. VII—List I, Entry 45 and List II, Entry 49.

The question was whether the levy of octroi duty by the Municipality on tobacco under S. 66 (1) (e) of the Central Provinces Municipalities Act before it was made into bidis conflicts with the legislative power of the centre in the matter of imposition of excise duty.

Held, the octroi duty as levied by the Municipality on tobacco under S. 66 (1) (e) of the Central Provinces Municipalities Act comes within the exact wording of Entry 49 of List II of the seventh Schedule to the Government of India Act. Such levy remains unaffected by reason of S. 292 of the Government of India Act. There is nothing in Excise and Salt Act to make its provisions contrary to the provisions of S. 66 (1) (e) of the Central Provinces Municipalities Act or to the levy of the octroi duty under the same.

Excise duty is a tax on manufactured goods. Octroi duty is a tax levied on the entry of goods within a particular area. Under the Excise Act, tobacco becomes excisable goods within the meaning of Item 9 in the Schedule. Therefore it becomes subject to excise duty when it reaches the stage of manufacture mentioned in Item 9 of the Schedule to the Excise Act. Even before it is converted into

bidis or any other article mentioned in the entry, it has become excisable goods and liable to pay excise duty. The levy of such duty is therefore not in conflict with the levy of an impost on the entry of the goods within a certain area. It is wrong to think that any impost of tax from the time tobacco came into existence till the same was converted into **bidis** is necessarily excise duty. 1950 S.C.R. 15=1950 R.L.W. 109=A.I.R. 1950 S.C. 11=(1950) S.C.J. 148.

——S. 66 (1) (e)—Notification by Provincial Government—Levy of octroi duty by Municipal Committee on tobacco imported within municipal limits—Validity—Excise duty imposed on tobacco by Central Government under Central Excises and Salt Act—Double taxation of assessee.

An octroi duty levied by a Municipal Committee under a notification issued by the Provincial Government under S. 66 (1) (e) of the Central Provinces Municipalities Act on tobacco imported into municipal limits for sale, consumption or use within those limits, falls within the ambit of Item 49 of List II to the 7th Schedule of the Constitution Act, and is **prima facie** valid. It is not rendered invalid by the mere fact than an excise duty has been imposed on tobacco by the Central Government under the Central Excise and Salt Act and the assessee is in consequence taxed twice. The Central Act taxes the manufacture or production of tobacco. The Provincial Law does not touch that. It taxes something quite different, namely: the import of the produced or manufactured article into a certain area for sale, use or consumption there. It is true that both tax the same commodity but they do so at different stages and there is no overlapping in law because the taxes are "separate and distinct imposts."

Even if the assessee is a manufacturer who has already paid excise duty on the tobacco, he is liable to the octroi duty because he **imports** it for a particular purpose and not because he **manufactures** the commodity.

If the power is validly exercised there is no limit in law to the number of times a commodity may be taxed, whether by the same or by different authorities. I.L.R. (1949) Nag. 544=1950 N.L.J. 173.

——Ss. 66 (1) (e), 71, 76 and 85—Rules for assessment, collection and refund of octroi tax, R. 6—Assessment of octroi tax—Powers of Municipal Committee—Inclusion of Excise duty into price of goods—Whether ultra vires—Jurisdiction of Civil Court.

Under S. 66 (1) (e) of the C. P. Municipalities Act, a Municipal Committee can impose an octroi, on goods brought within the limits of the municipality for sale, consumption or use within those limits. Under the powers conferred by Ss. 71, 76 and 85 of the Act, the Local Government has made rules for assessment, collection and refund of the octroi tax. The powers of the Municipal Committee in these matters are circumscribed by these Rules. Under R. 6 of the Rules framed by the Local Government, the price of the goods imported on which the Municipal Committee is to assess the octroi tax is to be made up of only the cost price and the cost of carriage and nothing else. If, therefore, the Municipal Committee assesses the octroi tax after including into the price of the goods the amount paid by the importer as Excise duty under the Central Excises and Salt Act, 1944, it acts illegally and **ultra vires**, and the Civil Court has jurisdiction to entertain a suit for refund of the tax.

Primarily the assessment and levy of a tax are governed by the common law rights of the subject and any grievance in that matter falls within the cognizance of Civil Courts under S. 9, C. P. Code, and any Special Act which ousts the jurisdiction of Civil Courts is to be very strictly construed. I.L.R. (1948) Nag. 766=A.I.R. 1949 Nag. 270=1949 N.L.J. 473.

——S. 66—Rules framed under, R. 1—Crude oil and diesel oil—Liability to octroi duty.

Both crude oil and diesel oil, which is produced from crude oil, are petroleum within the meaning of R. 1 of the Rules framed under the Municipalities Act and are therefore not liable to assessment of octroi tax. I.L.R. (1948) Nag. 581=1948 N.L.J. 404=A.I.R. 1949 Nag. 148.

——S. 66—C. P. Government Notification No. 90 of 1911—Octroi duty, whether leviable on motor cars.

C. P. and Berar Municipalities Act gave powers to Municipal Committee to impose octroi on goods brought within Municipal limits. A notification was issued stating that octroi shall ordinarily be levied on commodities included in the following classes and specified in the schedule Class VIII referred to 'metals and their manufactures' and the entry in the schedule referred to 'iron....and manufactured article of the same.'

Held, that motor cars did not come within the purview of the notification, and Municipal Committees had no power to levy octroi duty on such cars brought within their limits. A.I.R. (Vol. 18) 1931 Nag. 156=134 Ind. Cas. 850=27 N.L.R. 175 (F.B.).

7. Sub-S. (1) (k)—Water-tax.

——S. 66 (1) (k)—Agricultural lands lying within municipal limits of Nagpur—Whether liable to be assessed to water-tax.

Agricultural lands lying within municipal limits of Nagpur and already assessed to the land revenue under the C. P. Land Revenue Act are liable to be assessed to water-tax under S. 66 (1) (k) of the C. P. Municipalities Act and the bye-laws thereunder. I.L.R. (1947) Nag. 305=229 Ind. Cas. 564=A.I.R. 1948 Nag. 38=1947 N.L.J. 216.

——S. 66 (1) (k)—Land containing well—If liable to be assessed with water rate.

Where a piece of land contains a well and by reason of that well an increase in value results, assessment to water-rate can be made taking into account the increased value of the land due to the well. I.L.R. (1947) Nag. 305=229 Ind. Cas. 564=A.I.R. 1948 Nag. 38=1947 N.L.J. 216.

——S. 66 (1) (k)—Suit for recovery of rent for water-meter by Municipality under S. 66 (1) (k) is cognizable by Small Court. This is a part of water-tax and is not a rent within Art. 8, Sch. II of the Provincial Small Cause Courts Act. A.I.R. (Vol. 24) 1937 Nag. 209=170 Ind. Cas. 241.

——S. 66 (1)—Conservancy cess and water-rate —Assessment of.

The gross annual letting value of land held by a person under a lease should be taken into consideration in assessing conservancy cess and water rate under S. 66 (1) of the C. P. and Berar Municipalities Act. A.I.R. (Vol. 27) 1940 Nag. 257= I.L.R. (1941) Nag. 330=1940 N.L.J. 303=188 Ind. Cas. 541.

——S. 66—Rules for assessment of conservancy and water rates, Rr. 9 (a), 12 (a).

If the Municipal Committee treats the quarters as separate buildings in pursuance of the rules of assessment in force, it does not stand exposed to the charge of contravening the spirit of law. Hence the residential quarters which are attached to a police station can be assessed separately as if they were distinct and independent buildings. 1942 N.L.J. 184.

——S. 66—Rules under, R. 12 (a)—Non-domestic purpose—Test—Water used by inpatients in doctor's house.

The true test as to whether water is used for non-domestic purposes is to see whether the water is directly used for any trade or business. If the trade or business requires for its prosecution the direct use of water that use is clearly non-domestic, but when the business is of a nature where the use of the water is only incidental although it may be necessary so far as the persons connected with the business are concerned, then it does not cease to be a domestic purpose. Thus when a medical practitioner uses a part of his dwelling for providing accommodation for the residence of his in-door patients, he does not use the water directly for his business. The water is used incidentally by persons for the same purpose for which he himself uses it as a part of the amenities of the building temporarily occupied by them. The water therefore used in connection with the hospital, that is to say, by the in-door patients residing in the building is not used for any purpose other than domestic purpose. The use of water for drinking or washing is admittedly a domestic purpose. It does not cease to be domestically used only because it is used by the patients as opposed to the owner or his family or that the part of the dwelling house is used for a professional or business purpose. A.I.R. (Vol. 25) 1938 Nag. 466=I.L.R. (1939) Nag. 330=178 Ind. Cas. 755.

8. Sub-S. (1) (o)—Terminal Tax.

——S. 66 (1) (e) and (o)—Distinction between 'octroi' and 'terminal tax'.

'Terminal tax' differs from 'octroi' firstly in that it is not confined to articles brought into the town for use or consumption within the town itself, and secondly in that it is not confined to imports only but may also be applied to exports. A.I.R. (Vol. 33) 1946 Nag. 190=I.L.R. (1946) Nag. 99=1946 N.L.J. 190.

——S. 66 (1) (o)—Goods imported into Municipality for immediate export—Terminal tax—Liability for.

Goods imported into the Nagpur Municipality by road with the express purpose of exporting them by rail are liable to an import terminal tax. So also goods imported by rail with the express purpose of further and immediate export by rail without the goods leaving the station yard. I.L.R. (1946) Nag. 99=1946 N.L.J. 190=A.I.R. 1946 Nag. 190= 228 Ind. Cas. 82.

——S. 66 (1) (o)—Goods passing through municipal limits—Liability to export terminal tax.

Goods passing through the limits of Wardha Municipality by road dispatched from Yeotmal to their destination at Nagpur without being unloaded or reloaded at Wardha are liable for an export terminal tax. The word "terminal" refers not to the destination or origin of the goods but to the terminii of the municipal limits. The words "export" and "import" have no special meaning but bear the ordinary dictionary meaning. These words mean only "taking out of" and "bringing into". I. L. R. (1950) Nag. 403=A.I.R. 1950 Nag. 169 (F.B.).

——S. 66 (1) (o)—Import terminal tax can be levied on through traffic.

The plain meaning of the words "imported into" or "exported from" in S. 66 (1) (o), C. P. Municipalities Act, namely "brought into" or "taken out from" the limits of the municipality, must be given to them without any regard to intention of the person bringing them in or taking them out. Thus, articles which are the subject of through trade are liable to terminal taxation. Under the rules as they stand and under the law, the municipality is fully empowered to impose a terminal import tax on all goods scheduled by them entering the municipality whether for internal consumption or whether for through passage either with or without transhipment. The scheme of the Act and the rules made by the municipality preclude any consideration of the element of "pause and repose". The memoranda circulated by the C. P. Government to all Deputy Commissioners during 1936-37 explaining the term "import" as article imported into the municipality for local consumption and "export" as export from within the municipal area, and not applicable to through traffic have not the force of law and cannot affect their plain meaning.

Where, therefore, goods are imported into the Nagpur Municipality either by road with the express purpose of exporting them by rail, or imported by rail with the purpose of further and immediate export by rail without the goods leaving the station yard the goods are liable to an import terminal tax imposed by the municipality. A.I.R. (Vol. 33) 1946 Nag. 190=I.L.R. (1946) Nag. 99=1946 N. L.J. 190.

——S. 66 (1) (o)—Word "export"—Meaning of.

When goods are brought in from outside the municipal limits for export from the terminus of these municipal limits, they are, when so exported, exported from the limits of the municipality. The words "export" or "exported" are clear enough and in connection with a terminal tax, they are related to traffic rather than origin. One has to look at the municipal limits from which the traffic proceeds, and not to the place where the goods were originally manufactured and from which they were first exported. The term 'export' in S. 66 (1) (o) applies to through traffic. A.I.R. (Vol. 32) 1945 Nag. 197=1945 N. L.J. 305.

9. Sub-S. (2)—Power to levy tax.

——S. 66 (2)—Power to levy tax—Limit to.

The notification of the Local Government published in the **C. P. Gazette,** dated 4th February, 1928 must be read as being subject to the proviso that in no event the amounts collected should exceed the maximum prescribed by the rules under S. 66 (2). The power given by the notification extends only up to the maximum limits prescribed. The power to levy tax at a certain rate per maund on a commodity must therefore be construed as being subject to the maximum prescribed by the rules framed under S. 66 (2). A.I.R. (Vol. 22) 1935 Nag. 224.

——S. 66 (2)—Rules framed under—Force of.

The rules framed by the Local Government under S. 66 (2) must be read as forming part of the Municipalities Act and have the force of law. So long as they are in force, they are as much binding on the Municipal Committee as on the Local Government. A.I.R. (Vol. 22) 1935 Nag. 224.

10. Sub-S. (4)—Power to vary tax.

——S. 66 (4)—Power to vary tax.

It is not obligatory upon the Local Government to fix any maximum under S. 66 (2) and, if none is fixed, the Municipal Committee is still competent to effect variation under S. 66 (4). 13 N.L.J. 13=122 Ind. Cas. 691=A.I.R. 1930 Nag. 153.

——S. 67—Imposition of tax—Notification by Local Government—Conclusive proof.

The new S. 67 (8) has not introduced any new change in the existing state of the law beyond making S. 67 self-contained; it expressly dispenses with the necessity of reading it in conjunction with the corresponding provisions of Ss. 22 (5) and 23, C. P. General Clauses Act (I of 1914). Therefore whether the old C. P. Municipalities Act or the new one is applied, the law makes the notification of the imposition of the tax issued by the Local Government the conclusive proof of the fact that "the tax has been imposed in accordance with the provisions" of the law applicable and so the moment the notification is proved to have been published the Judge is expressly directed to dispense with all corroborative evidence and to forbid all opposing evidence and to draw the presumption of law that the tax is imposed in accordance with the provisions of the law authorizing its imposition. A.I.R. 1930 Nag. 157.

——S. 67 (1)—Resolution—Integral part.

There is a close connection between sub-sections (1) and (2) of S. 67. The integral part of a resolution contemplated in sub-S. (1) is not only the proposal to impose the tax which is implicit in the resolution but defining the class of persons or description of property proposed to be taxed, amount of tax to be imposed, and the system of assessment to be adopted. When the intention is clearly apparent from the wording of the resolution it is futile to stress the mere inelegancy of expression. A.I.R. (Vol. 27) 1940 Nag. 293=I.L.R. (1940) Nag. 446=1940 N.L.J. 685=193 Ind. Cas. 473.

——S. 67 (5) and (7)—Sanction by Government for imposition of tax—Publication in Gazette—If necessary.

If the Municipal Committee is imposing a new set of taxes the sanction of the Local Government under S. 67 (5) of the Municipalities Act is necessary but not publication of the sanction in the Gazette—The sanction can be accorded in the usual manner. But in that event it will also be necessary for Government to direct the imposition of the tax under S. 67 (7) and fix a date for the coming into effect of the tax. The latter need not find place in the notification because if no date is fixed, then the tax comes into operation at once. But the other provision cannot be ignored. If the Local Government does not direct the imposition of a tax under S. 67 (7), the tax cannot come into effect. I.L.R. (1949) Nag. 778.

——S. 67 (7)—Non-mention of S. 67 (7) in notification, if material.

The omission to mention Sub-S. (7) of S. 67, is not material because the Local Government cannot publish a Notification under any other provision except that one. A.I.R. (Vol. 27) 1940 Nag. 293=I.L.R. (1940) Nag. 446=1940 N.L.J. 685=193 Ind. Cas. 473.

——S. 67 (8)—Notification of imposition of tax—Presumptive Force—Omission to specify date from which tax is to come into effect—Effect of.

The order of the Local Government sanctioning the proposal to impose a tax is not a mere executive order but an order having the force of law from which the Municipality concerned derives its authority to impose the tax of a particular nature. It is in its nature a legislative order with all the force of law. The Notification itself is nothing but publication of the order. The rule of interpretation bearing on the question of commencement of statutes is that a statute takes effect from the first moment of the day on which it was passed unless another day is expressly named for the beginning of its operation. On this principle the order sanctioning the proposal to impose the tax and the rules relating to its assessment and collection would be deemed to come into force on the day on which they were notified in the **Gazette.** In any case the omission to specify the date cannot deprive the Notification itself of its presumptive force bearing on the proceedings relating to the imposition of the tax. Under sub-S. (8) of S. 667 the Notification of the imposition of a tax is conclusive evidence that the tax has been imposed in accordance with the provisions of the Act. That serves to validate the entire proceeding relating to the imposition of the tax and precludes any objection to its regularity or legality. A.I.R. (Vol. 27) 1940 Nag. 293=I.L.R. (1940) Nag. 446=1940 N.L.J. 685=193 Ind. Cas. 473.

——S. 67 (8)—Notification of imposition of tax—Conclusive proof.

Under S. 67 (8) of the C. P. Municipalities Act a notification of the imposition of a tax is conclusive evidence that the tax has been imposed in accordance with the provisions of the Act. Therefore, under S. 4 of the Evidence Act, the Court must regard it as proved that the tax was imposed in accordance with the provisions of this Act and must not allow evidence to be given for the purpose of disproving it. A.I.R. (Vol. 24) 1937 Nag. 168=I.L.R. (1937) Nag. 414=170 Ind. Cas. 133.

——S. 68—Jurisdiction of Civil Court—Legality of tax.

S. 44 (9), Berar Municipal Law and S. 68 (9), C. P. Mnuicipalities Act, do not oust the jurisdiction of Civil Court to determine if a particular tax purporting to be imposed under those enactments is illegal or *ultra vires* even when the tax is levied in pursuance of notification published in the Government Gazette. 13 N.L.J. 13=122 Ind. Cas. 691=A.I.R. 1930 Nag. 153.

——Ss. 70 (1) and (2), 38 (i), 45—Unauthorised occupation of Municipal road—Suit by Municipality for use and occupation—If lies.

Where a person occupied a portion of a Municipal road for dumping materials without any express contract with the Municipality and the latter sued to recover a sum less than Rs. 50 as compensation for use and occupation:

Held, that the suit was maintainable.

An implied contract presupposes a capacity in the parties to contract. If either is incapable of entering into an express contract it follows none can be implied.

Public streets are not ordinarily intended for use as dumping grounds for building materials. But S. 91 gives the Committee power to allow them to be used temporarily for this purpose subject to such conditions as it may prescribe.

The first sub-section of S. 70 of the C. P. Municipalities Act refers to the temporary occupation of public streets and the second to that of other land. The second alone requires bye-laws not the first. A.I.R. (Vol. 20) 1933 Nag. 93=29 N. L.R. 57=144 Ind. Cas. 667.

——Ss. 71 and 175 (3)—Rules by Local Government—Mode of publication — Publication in Gazette—If conclusive proof of their Legality—C. P. General Clauses Act, S. 22 (2), (3) and (5).

Before a tax can be imposed the procedure prescribed by Ss. 66 and 67 of the C. P. Municipalities Act must be followed. But as regards the making of rules the only restrictions are the onus imposed by S. 22 of the C. P. General Clauses Act and S. 175 (3) of the C. P. Munipalities Act. S. 175 (3) requires that all rules shall be subject to previous publication. No particular mode of publication is enjoined, therefore S. 22 of C. P. General Clauses Act is called into play. S. 22 (3) of this Act does not require publication in the Gazette, nor does it prescribe any particular mode of publication. On the other hand, sub-S. (2) indicates that the previous publication may be in different ways and leaves that to the discretion of the authority making the rule, sub-S. (5) prescribes that once the rule is published in the Gazette it shall be *conclusive* proof that it was duly made. This cannot be understood to mean that this will cure all defects. If there was complete want of authority to tax, or if the tax had been prohibited, or if the manner of assessment and collection were to be prohibited by the Act or any other law, sub-S. (5) would not cure such fundamental defects. Sub-S. (5) only extends to the mode and manner of making the rule, that is to say, to the procedure prescribed for bringing a rule into being and not to the power or authority to make a rule at all. If the right to make the rule is there, then once there is publication in the *Gazette* the Act directs the Courts to regard that as *conclusive* proof that the rules were "duly" made. It follows that Courts are prohibited from looking into any facts directed to indicate that they were not. I.L.R. (1949) Nag. 778.

——S. 71—Rules framed under, R. 19—If ultra vires.

R. 19 of the Rules published by the Local Government in the Notification, dated 21st March, 1936, requiring the owner of every bicycle within municipal limits to inform the Secretary of the fact of possession within a certain time, is not in contravention of S. 72 of the C. P. Municipalities Act, and is not, therefore, *ultra vires*. I.L.R. (1941) Nag. 722, disapproved. I.L.R. (1949) Nag. 778.

——S. 73 (a) (ii)—Leasehold right.

Leasehold rights by the occupants of Government site at Dhantoli do not fall under the category of land. (1937) 20 N.L.J. 175.

——Ss. 77, 77 (1)—Municipality, whether can recover interest only after arrears of tax are paid—Tax collected through Magistrate—Deputy Commisioner,. if can decide legality of levy—Civil Courts, if can entertain suits for only interest on arrears of Municipal tax.

There is nothing in the C. P. Municipal Act apart from S. 77 which gives a right to the Committee to recover interest on any tax which falls into arrears. The claim for interest which the Committee is entitled to make is ancillary to the claim to recover an arrear of any tax. Section 77, S. 78 as well as the rules framed under S. 77 (1) only speak of the arrears of Municipal tax which as is evident from sub-S. (1) of S. 78, refers to a tax payable under S. 66, sub-S. (1), Cl. (*a*) of that Act. S. 66 does not endow the Committee with any right to recover interest as a part of the tax. Interest, therefore, cannot be regarded as an arrear of tax, nor can it be regarded as "any other money claimable by the Committee" under this Act within the meaning of that expression used in S. 77 (1). Consequently, the procedure laid down in S. 78 is not available to the Committee for recovering interest which it claims independently of the amount payable as tax.

Where a Municipal Committee collects the tax through the agency of the Magistrate, the Deputy Commissioner has full jurisdiction to decide whether the levy of the sum by resorting to the provisions of S. 77 (1) of the Act was or was not according to law.

The Municipal Committee's right to recover either the tax or any interest on it is not contractual but statutory. When a statute creates that right and provides the procedure for enforcing it and also sets up the tribunal to enforce it, the party who has the right must seek his remedy in the manner and before the authority prescribed by the enactment. In view of S. 77 of the C. P. Municipalities Act, the Civil Court has no jurisdiction to entertain suit for recovering only interest on the arrears of tax which is already paid. A.I.R. (Vol. 25) 1938 Nag. 119

=20 N.L.J. 145=I.L.R. (1938) Nag. 482=175 Ind. Cas. 476.

——S. 78—Scope—Money due under S. 246 (2).

Money due under S. 246 (2) does not fall under S. 78. Nor is it deemed to be an arrear of tax. A. I.R. (Vol. 33) 1946 Nag. 78=1945 N.L.J. 520= I.L.R. (1945) Nag. 670.

——Ss. 81 and 66 (1) (a)—Property tax—Whether recoverable from occupier.

Though the property-tax must be assessed on the owner under S. 66 (1) (*a*) of the C. P. Municipalities Act, the Municipality can under S. 81 of that Act recover it also from the occupier who is entitled in his turn to recover it from the owner unless there is a contract to the contrary. I.L.R. (1947) Nag. 305=229 Ind Cas. 564=A.I.R. 1948 Nag. 38=1947 N.L.J. 216.

——Ss. 83 and 84—Jurisdiction of Civil Court—Suit to recover tax illegally recovered—Government of India Act, S. 142-A.

A suit for refund of tax illegally recovered by a Municipal Committee is not barred by the provisions of Ss. 83 and 84 of the C. P. Municipalities Act as applied to Berar. These provisions come into play only when the Municipal Committee acts within the scope of its authority, that is to say, when it is acting or purporting to act under the Act. When a Municipality is prohibited by S. 142-A of the Government of India Act from imposing a tax in excess of a certain amount, it cannot be said to be acting either under the Act or purporting to act under the Act if it exceeds that amount, and in such a case the jurisdiction of the civil Courts is not barred. I.L.R. (1948) Nag. 971=A.I.R. 1949 Nag. 215=1948 N.L.J. 541.

——Ss. 83, 84 and 85—Sections 83, 84 and 85 have no bearing on the question as to power of municipality to realize certain amount as octroi duty. A.I.R. (Vol. 22) 1935 Nag. 224.

——S. 83 (2)—Commissioner, if can make reference.

The Commissioner is competent to hear the appeal from an order of the Deputy Commissioner. Consequently he must be deemed to have the same powers as are conferred on the Deputy Commissioner under S. 83 of the C. P. Municipalities Act as an appeal is only a continuation of the original proceedings. The Commissioner, therefore, is entitled to make a reference under S. 83 (2). A.I.R. (Vol. 28) 1941 Nag. 137=I.L.R. (1941) Nag. 236=1941 N.L.J. 137=195 Ind. Cas. 147.

——S. 83 (2)—Contents of reference.

A reference under S. 83 (2) of the C. P. Municipalities Act should clearly state the facts and formulate the point referred. I.L.R. (1948) Nag. 581 =1948 N.L.J. 404=A.I.R. 1949 Nag. 148.

——S. 83 (2)—Reference under—Contents.

In a reference under S. 83 (2) of the C. P. Municipalities Act, the High Court should be provided with the facts of the case and the referring officer's own opinion. I.L.R. (1946) Nag. 99=1946 N.L.J. 190=A.I.R. 1946 Nag. 190=228 Ind. Cas. 82.

——S. 84—S. 84 (3) (as applied to Berar)—Power of Municipality to continue assessment made under old Berar Municipal Law—Assessee questioning assessment of tax—His remedy.

The Act, as applied to Berar is self-contained with respect to the remedies available to a person regarding assessment or levy or refusal to refund any tax under the Act. Where the plea of the assessee is that the scavenging tax can be assessed on them only if service is rendered and that the Municipal Committee is neglecting the rendition of services, their remedy is, not to go to a Civil Court but to resort to the other ways of dealing with the municipality which are provided for in the Act. The imposition of the scavenging tax, by the Ellichpur Municipality though made under the old Berar Municipal Law of 1886, was validly continued even after the application of the C. P. and Berar Municipalities Act of 1922 to Berar. If a duty is imposed by a statute, which but for the statute, would not exist, and a remedy for default is provided by the statute that creates the duty, then that is the only remedy. Under the present Municipalities Act there are ample provisions made against the municipality for dereliction of duty. A.I.R. (Vol, 30) 1943 Nag. 277=1943 N.L.J. 377=I.L.R. (1943) Nag. 527= 209 Ind. Cas. 399.

——S. 84 (3)—Suit for refund of taxes paid—When barred.

It is the duty of the Municipal Committee to assess each house, to decide who is the owner or occupier liable to assessment, and to recover that assessment. Whether that assessment has been correctly calculated or not or whether it is being levied on the right person is a matter for the Municipal Committee to decide, and it cannot be said that its action is *ultra vires* if it decides it wrongly. An assessee has a right of appeal under S. 83 of the C. P. and Berar Municipaities Act, and under S. 84 (3) no objection shall be taken to any assessment or levy, nor shall the liability of any person to be assessed or taxed be questioned in any other manner or by any other authority than is provided in this Act. According to S. 85 (2), no refund of any tax shall be claimable by any person otherwise than in accordance with the provisions of the Act and the rules made thereunder. Unless the allegations in the plaint show that the action of the Committee was *ultra vires*, no civil suit will lie for a refund of the taxes paid. A.I.R. (Vol. 27) 1940 Nag. 174=1940 N.L.J. 684=185 Ind. Cas. 893.

——S. 85—Nagpur Municipality—Terminal Tax Rules, R. 3—Hard-drawn bare copper wire imported by rail.

If an article is imported by rail, it must fall under the first part of R. 3 of Nagpur Municipality Rules which refers specifically to railway consignments. Hence the hard drawn bare copper wire imported to Nagpur by rail is liable to be assessed under serial No. 5 and not under serial No. 7 of the terminal tax schedule in accordance with the first part of R. 3 of the Terminal Tax Rules. A.I.R. (Vol. 28) 1941 Nag. 137=I.L.R. (1941) Nag. 236=1941 N. L. J. 137=195 Ind. Cas. 147.

——S. 85—Rules under, R. 1—Applicability Application for refund of excess amount recovered as tax.

The refund of an excess amount recovered as a tax even if that amount was calculated on a wrong basis, is governed by the rules made under S. 85 of the C. P. Municipalities Act, and an application for the same is governed by 3 months' rules as laid down in R. 1.

Municipal Committee has no power to levy tax except at the scheduled rates. A.I.R. (Vol. 27) 1940 Nag. 73=1939 N.L.J. 493=I.L.R. (1941) Nag. 471=184 Ind. Cas. 489.

——S. 85—Contractor bringing Government property within Municipal limits—According to agreement contractor depositing amount equivalent to tax and to get refund on consolidated certificate—Suit for refund—Limitation.

The time limit mentioned in S. 85, C. P. and Berar Municipalities Act is not operative in respect of goods which are all along the property of Government and in respect of which no tax is leviable at all.

Where in accordance with an arrangement between the contractor of the Public Works Department and the Municipality, the contractor is allowed to bring within municipal limits goods which are the property of the Government without a certificate but after depositing an amount equivalent to the tax, and is subsequently to get refund of the same when he is furnished with a consolidated certificate, in foregoing the demand of a certificate at the moment of entry the Municipal Committee obtains the privileges of indemnifying themselves agtinst any potential loss by the demand of a deposit equivalent to the amount of tax were such tax leviable. The deposit is not a tax and the suit for the refund of it has no connection with the payment of tax. The claim for a refund of this deposit is governed by the ordinary laws of limitation and not by the special rule applicable to refund of taxes. A.I.R. (Vol. 22) 1935 Nag. 172=31 N.L.R. 347=158 Ind. Cas. 793.

——S. 98—Breach of Sub-S. (2)—Bye-laws framed under Sub-S. (3) enabling Municipality to prosecute party concerned are not ultra vires.

If a person who does not give notice in writing of his intention to erect or re-erect any building as required by Sub-S. (2), erects or re-erects or commences to erect or re-erect the building without the sanction of the Committee which is necessary under Sub-S. (1) of S. 98 of the new Act, the person can be prosecuted for not giving the notice in the manner prescribed by bye-laws framed by the Committee in exercise of the power conferred under sub-S. (3) of the said section. Such bye-laws are not *ultra vires*. 26 Cr.L.J. 1084=88 Ind. Cas. 28=A.I.R. 1925 Nag. 393.

——S. 103 — Applicability — Unauthorised construction of compound wall.

A compound wall is certainly an *enclosure* and would thus come under the definition of "building" in S. 3 (a) of the C. P. Municipalities Act. Similarly the construction of a compound wall, would under S. 3 (d) amount to "erect or re-erect any building". There is, therefore, no doubt that the provisions of S. 103 of the Act apply to an unauthorised construction of a compound wall. 1949 N.L.J. 610.

——Ss. 103, 167 and 168 (4)—Building erected after refusal of sanction—Right to prosecute—When arises—Notice requiring demolition not fixing time—Validity.

S. 103 of the C. P. Municipalities Act makes no distinction between a case of building without sanction and a case of building where sanction has been refused. If a building is erected when sanction is refused, the only power the committee has, in the first place, is to issue a notice under S. 103 and fix a reasonable time for the demolition under S. 167. The right to prosecute only arises on a failure to comply with this notice provided the notice is valid and according to law. The fixing of a time for demolition in the notice is a matter of substance and not of form and S. 168 (4) of the Act cannot therefore validate a notice which omits to fix a time. No conviction can, therefore, be based on these sections in such a case. I.L.R. (1948) Nag. 373=49 Cr. L. J. 602=A.I.R. 1949 Nag. 18=1948 N.L.J. 105.

——S. 103—Person reconstructing dilapidated wall without Municipal Committee's permission—If can be proceeded against under section. *See* C. P. MUNICIPALITIES ACT, SS. 3 AND 103. 1950 N.L.J. 524.

——S. 133—Conviction under—Continuing fine—Legality.

Where the accused was convicted under the C. P. and Berar Municipalities Act, and the Magistrate further ordered the accused to remove all his merchandise outside municipal limits by a certain date and imposed a daily fine in default of removal:

Held, that such an order was an illegal order, as the imposition of a continuing fine cannot be prospective but can only follow on proof that the offence has been continued. A.I.R. (Vol. 19) 1932 Nag 116=33 Cr.L.J. 859=139 Ind. Cas. 496.

——S. 133 (e)—Flour mill not producing offensive smell or noise—Whether requires licence—Parties agreeing to abide by opinion of Court after inspection—Effect—C. P. Code (Act V of 1908), O. XVIII, R. 18.

If a flour mill is to be licensable under S. 133 it must be one from which offensive or unwholesome smells, noises or smoke arise. But where such a mill produces no offensive smell, noise or smoke, no licence under S. 133, C. P. and Berar Municipalities Act, is required.

When in Cl. (e) of S. 133 the Legislature describes "as any other manufactory engine house or place of business from which offensive or unwholesome smells, noises or smoke arise," it means that the manufactory, engine house or place of business must be capable of description as one from which offensive or unwholesome smells, noises or smoke arise. It is obviously not intended that any manufactory should require a licence whether offensive or unwholesome smells, noises or smoke arise from it or not.

The opinion of a Judge as formed by an inspection of the subject-matter of the dispute (*e.g.*, whether a certain factory gives out offensive smell or noise) is envisaged by the provisions of O. XVIII, R. 18, Civil P. C. If the Judge was not

expected to form any opinion of what he saw himself there could be no object in allowing a spot inspection. Though in an ordinary case the opinion of the Judge so formed cannot take the place of evidence, yet, where the parties have agreed to accept the opinion of the Judge on that point, and for that reason lead no evidence, the opinion of the Judge can be accepted in place of evidence. The situation is similar to the taking of a special oath by a party or the constitution of the Court as an arbitrator for the purpose of one particular finding. A.I.R. (Vol. 28) 1941 Nag. 292=1941 N.L.J. 403=I.L.R. (1942) Nag. 269=197 Ind. Cas. 300.

——S. 140 (1)—Power of Municipal Committee to abolish slaughter house—Penal Code (Act XLV of 1860), S. 447.

Under S. 140 (1), C. P. and Berar Municipalities Act, a Municipal Committee is empowered, with the approval of the Deputy Commissioner to fix premises for the slaughter of animals and implies power to abolish premises so fixed. The power to abolish does not require the previous sanction of the Deputy Commissioner but merely his approval.

Where such a slaughter house has been abolished, slaughtering animals therein without the permission of the Municipality is an offence, and when the accused act with intent to annoy the Municipal Committee they are punishable under S. 447, I.P.C. 141 Ind. Cas. 543 (1)=15 N.L.J. 89=34 Cr.L.J. 224 (2).

——S. 167—Scope—Mandatory—Failure to fix time in notice under S. 103—Effect—Prosecution and conviction for non-compliance with notice—Sustainability. *See* C. P. MUNICIPALITIES ACT, SS. 103 AND 167 AND 168 (4). I.L.R. (1948) Nag. 373.

——Ss. 168, 199—Health Officer appointed Secretary of Municipal Committee—Notice by such officer not signed by him as Secretary—Legality.

There is nothing in the C. P. Municipalities Act to prevent the appointment of two Secretaries and allocation of duties between them. It is not a case of delegation of duties but of distribution of duties. An order appointing the Health Officer, as Secretary to the Municipal Committee, for the purpose of issuing notices relating to the Health Department which received the sanction of Government does not amount to delegation of powers, but there is distribution of duties.

The consequent notice under S. 199, by the Health Officer in his capacity as an officer and not as a Secretary is perfectly correct and legal and any defect in form would be cured by S. 168 (4). A. I. R. (Vol. 24) 1937 Nag. 119=19 N.L.J. 192=38 Cr.L.J. 437=167 Ind. Cas. 729.

——S. 168 (4) — Applicability — Notice under S. 103—Absence of time limits—Defect—If one of form—Notice, if validated. *See* C. P. MUNICIPALITIES ACT, SS. 103 AND 167 AND 168 (4). I.L.R. (1948) Nag. 373.

——Ss. 175 and 176—Rule making power of Provincial Government—Limitations—Rr. 19, 20 and 21—If ultra vires.

In framing the rules, the Local Government cannot overlook the limitation contained in S. 175 (1) of the C. P. and Berar Municipalities Act that they should be consistent with the Act. If the rules framed under the statute are in excess of or in contravention and inconsistent with the provisions of the statute they must be regarded as *ultra vires* and ineffectice: neither S. 175 (1) nor S. 176 (1) confer on the Local Government expressly or by implication the power to impose pecuniary burden for any public purpose.

The sole subject of compelling the payment of 4 annas for the metal disc for cycle registration is to prevent evasion by facilitating its detection. The saving of harassment to the cycle owners is subsidiary and consequential to the main object. It cannot be gainsaid that preventing evasion of the tax is a public purpose and, therefore, the sum of 4 annas which is compulsorily recovered is so recovered for a public purpose. The device, while it facilitates detection and checks evasion, saves the Municipal Committee from the necessity of maintaining an expensive inspecting staff. The levy of 4 annas is, therefore, a tax. Consequently Rr. 20 and 21 of the Rules framed by the Local Government are *ultra vires* and inoperative. Similarly R. 19 is a direct contravention of S. 72 of the C.P. and Berar Municipalities Act and is, therefore, equally *ultra vires* and of no effect. A.I.R. (Vol. 28) 1941 Nag. 232 =1941 N.L.J. 165=I.L.R. (1941) Nag. 722=196 Ind. Cas. 578.

——S. 176 (1) (as applied to Berar)—Rules under R. 1 (v)—"Offence"—Meaning of—Absence of employee from service due to his arrest by Police —If "good and sufficient cause" for suspension.

The term "offence" as used in R. 1 (v) framed under S. 176 (1) of the C. P. Municipalities Act, as applied to Berar, does not necessarily imply anything criminal, nor yet anything malicious or wilfully negligent. It merely imports such matters as constitute a breach of the conditions, express or implied, of service, and may be due, in given circumstances, to no fault of the servant at all. As the fundamental condition of a contract of service is that the employee should serve, if the employee does not serve, even though it is due to his arrest by the Police on a charge of embezzlement of the Municipal funds, he commits a breach of his contract of service and therefore commits an "offence" within the meaning of the rule, unless the Municipal Committee is responsible for this breach. The burden of proof as regards this is on the employee. The moment it is shown that he absented himself from service, then a *prima facie* case for suspension is at once made out and thereafter it is for the employee to justify his absence. If the employee absents himself from duty for a long period, there is "good and sufficient cause" within the meaning of the rule for his suspension. 224 Ind. Cas. 567=1946 N.L.J. 495=A.I.R. 1946 Nag. 347=I.L.R. (1946) Nag. 789.

——S. 176 (2) (1)—Deputy Commissioner, if can delegate his duty of holding enquiry—Local Government's control over him.

A *persona designata* must be a single person, whether described by name or by office, without any powers of delegation in himself in respect of the jurisdiction conferred on him. An examination of the rules framed under S. 176 (2) (1), Municipalities Act, shows that the Deputy Commissioner is not

bound to hold an inquiry himself and that he may direct one of his assistants not below the rank of Extra Assistant Commissioner to do so. Such an assistant need not be specially empowered by Government and it is for the Deputy Commissioner to decide whether he will entertain the application himself or direct that such petition be presented to one of his assistants. The Deputy Commissioner under the rules framed under S. 176 (2) (1), Municipalities Act, cannot be considered a *persona designata*. The Local Government has, by virtue of S. 58 of the Act, general powers of control over the Deputy Commissioner acting under Ss. 15, 45, 253. A.I.R. (Vol. 22) 1935 Nag. 5=31 N.L.J. 1=154 Ind. Cas. 311.

——S. 176 (2) (1)—Judge deciding election dispute, whether persona designata—Judicial Commissioner's Court's power to revise orders.

A Judge deciding an election dispute under the rules made under S. 176 (2) (i), C.P. and Berar Municipalities Act, acts as a Civil Court and not a *persona designata* and the Judicial Commissioner's Court has jurisdiction to revise orders passed by the Court of the Subordinate Judge of the First Class on Municipal election petitions. A.I.R. (Vol. 18) 1931 Nag. 82 (2)=27 N.L.R. 61=131 Ind. Cas. 424.

——S. 176 (2) (1)—Rules under, R. 15-B—Decision of Deputy Commissioner—Finality—Revision by Local Government.

The rule that under R. 15-B the decision of the Deputy Commissioner shall be final is a rule which is operative only as against the parties concerned. It precludes any right of appeal, but the finality of the decision as between the parties is no bar to the right of any authority having power to review from exercising its right to do so. The controlling power of the Local Government in matters of election petitions is in no way abrogated by R. 15-B, making the decision final and the order of the Deputy Commissioner which the Local Government considers to be palpably wrong, is open to revision by the Local Government as is any other act of a Commissioner or a Deputy Commissioner done in pursuance of their respective duties under the Act. A.I.R. (Vol. 22) 1935 Nag. 5=31 N.L.R. 1=154 Ind. Cas. 311.

——R. 176 (2) (i)—Rules framed under R. 22 (2)—If ultra vires.

R. 22 (2) of the Rules framed under S. 176 (2) (i), C. P. and Berar Municipalities Act is *ultra vires* the Provincial Government's Power. This section enables the Provincial Government to frame rules relating to inquiries by the Judge relating to petitions presented under S. 20-A and some other allied matters but it says nothing about revision applications before the High Court. I.L.R. (1950) Nag. 572=A.I.R. 1950 Nag. 208.

——S. 176 (2) (i)—Rules framed under, R. 22 (2)—Revision petition not accompanied with requisite deposit—Maintainability.

R. 22 (2) of the Rules framed under S. 176 (2) (i) of the C. P. and Berar Municipalities Act, does not make the making of the deposit a condition precedent. It only provides that the application for revision and the deposit be made simultaneously. Where they are not so made, the application will be regarded as imperfect and the Court will not be competent to adjudicate upon its merits. But it does not mean that the application cannot be allowed to be presented or that it must be dismissed *eo instanti*. There is nothing to prevent a party from remedying the defect existing at the time of presentation before the application goes up before the Court in the ordinary course provided that there is no other impediment. If the applicant does nothing till the period of limitation provided by S. 20-A (5) elapses, the defect will be incapable of being cured and the application will lapse. If, however, the defect is removed while the application is yet within time the application can and ought to be regarded as having been made on that date for it is only on that date that it becomes perfect in form. I.L.R. (1950) Nag. 572=A.I.R. 1950 Nag. 208.

——S. 176 (2) (i)—Election Petition Rules, R. 22 (3)—If ultra vires.

Rule 22 (3) of the Election Petition Rules, even if it be regarded as a legitimate exercise of the power to make rules of procedure, is *ultra vires* in so far as it directs the High Court to dismiss an appeal for failure to deposit Rs. 250 as security for the costs of the appeal. Under S. 176 (2) (*i*), C. P. and Berar Municipalities Act, rules can be made only for regulating the procedure to be followed by the Judge in inquiries relating to petitions presented under S. 20-A of the Act and not the procedure of the High Court in hearing the appeal. The High Court in dealing with an appeal may act under O. 41, R. 10, C. P. Code; and make an order for security for costs of the appeal. But that, however, is entirely discretionary except in a case falling under the proviso to sub-R. (1). 1950 N.L.J. 520=A.I.R. 1950 Nag. 212.

——S. 176 (2) (ii)—Rules framed under, R. 1 (b)—Corrupt or illegal practice—Employment of municipal servant for painting posters and leading processions.

Under R. 1 (*b*) of the Rules framed under S. 176 (2) (*ii*) of the C. P. and Berar Municipalities Act, what is regarded as a corrupt or illegal practice is the employment of a municipal servant (*i*) as an agent or (*ii*) for canvassing. The employment of a municipal servant for painting posters and leading processions, though highly improper, does not amount to canvassing in the proper sense of the term, even though such acts may indirectly influence the votes of electors. I.L.R. (1950) Nag. 572=A.I.R. 1950 Nag. 208.

——S. 176 (2) (iii)—Rules do not authorise Commissioner to withhold application to Local Government for sanction of allowance.

Rule 1 of the rules under S. 176 (2) (*iii*) not only does not delegate to the Commissioner the power of the Local Government of according sanction in a case covered by the proviso to S. 25, Municipalities Act, but does not even authorise the Commissioner to withhold forwarding such a proposal and the action of the Commissioner in refusing to forward to the Local Government the representation of the Municipal Committee for sanction

of the amount is *ultra vires*. 116 Ind. Cas. 418= A.I.R. 1929 Nag. 213.

——S. 178 (5)—Kamptee Municipality Rules and Bye-laws—Schedule, Art. 36 — Scope—Bullock-cart with pneumatic rubber tyres.

A bullock cart with pneumatic rubber tyres composed largely of iron, but which has also wooden planks in it does not fall under Art. 36 of the Schedule attached to the amended notification No. 427-3295, dated 24th January, 1928, which is printed at p. 128 of Rules and Bye-laws of the Municipal Committee, Kamptee, and cannot come under the vague heading of 'manufacture', as statutes imposing pecuniary burden must be strictly construed. A.I.R. (Vol. 24) 1937 Nag. 11.

——S. 179—Bye-law No. 5 framed under—Whether ultra vires.

Bye-law No. 5 framed under S. 179 of the C. P. and Berar Municipalities Act of 1922, is not *ultra vires* and a breach of the bye-law is punishable. 157 Ind. Cas. 781=36 Cr. L. J. 1336=31 N.L.R. 261=1936 Cr. Cas. 312.

——S. 179 (1) (b-1)—Power to frame bye-laws for regulating use of market—Extent of.

Under S. 179 (1) (*b*-1) the municipal committee is given power to frame bye-laws for regulating the use of the market. Since the regulation is of the use of the market, it must affect the physical as well as the commercial use of the building and therefore the municipal committee will have the power to make bye-laws for ensuring rectitude in the business transactions conducted at the place no less than the health, safety and convenience of the dealers. The power of regulation is not confined merely to the prevention of nuisance or the maintenance of order but extends to the imposition of restrictions on the trade itself provided they do not have the effect of preventing or prohibiting it. A.I.R. (Vol. 31) 1944 Nag. 73=1943 N.L.J. 490=I.L.R. (1943) Nag. 740=218 Ind. Cas. 161.

——S. 179, Sub-S. 1, Cl. (b)—Bye-law No. 3 framed by Committee under Notification No. 987-611—VIII, dated 18th March, 1926, whether ultra vires.

The mere fact of the Local Government having singnified its approval to a bye-law will not render the bye-law valid, in the absence of clear and unmistakable language in the Act empowering a Committee to make such a bye-law.

The bye-law framed under S. 179, sub-S. (1), Cl. (*b*) of the C. P. and Berar Municipalities Act for regulating the used of grain, cotton and timber markets within the limits of a particular notified area, is *ultra vires* as the Committee exceeded the power conferred upon it by S. 179 (1) (*b*) of the Act in framing the bye-law in question. A.I.R. (Vol. 20) 1933 Nag. 68=15 N.L.J. 168=34 Cr. L.J. 408=1933 Cr. Cas. 297=142 Ind. Cas. 857 (2).

——S. 179 (1) (b-1)—Bye-laws under, by Bina Municipality—Bye-Law No. 11—If ultra vires.

The chief feature of the market mentioned in S. 179 (1) (b-1), C. P. Municipalities Act is the putting up of grain to auction, and rules regulating these auctions thereby regulate the use of the market. Such rules, if wisely framed, afford salutary protection to sellers and purchasers alike and secure stability in trading and avoid needless disputes. No doubt, the bye-laws must be reasonable and not repugnant to the general law. Rules and bye-laws made under statutory powers enforceable by penalties must, on pain of invalidity, be not unreasonable; nor in excess of the statutory power authorising them, nor repugnant to that statute or to the general principles of law. Courts of Justice are slow to condemn Municipal bye-laws as invalid on the supposed ground of unreasonableness, and support them if possible by a 'benevolent' interpretation, crediting those who have to administer them with an intention to do so in a reasonable manner, and with being the best Judges whether a particular bye-law is required in their district or not.

If a bye-law can be divided one part may be rejected as bad while the rest may be held to be good.

The bye-law No. 11 framed under S. 179 (1) (*b*-1) by Bina Municipality which was alleged to be *ultra vires* was as follows: "Buyers shall satisfy themselves as to the quality of any commodities before these are put to auction. They shall not be allowed to cancel any purchase on the ground that they had not inspected the commodities or commodities were not up to sample":

Held, that the first rule applicable to purchase of a specific article is that of *caveat emptor*. According to S. 16 (2) of the Sale of Goods Act there is an implied condition that the goods shall be of merchantable quality but with the important proviso that if the buyer has examined the goods there shall be no implied condition as regard defects which such examination ought to have revealed. It would be just the same if he had an opportunity of examining and did not take advantage of it. Thus, the bye-law under examination in no way goes against the general rule of contract or the provisions of the Sale of Goods Act. On the contrary it simply emphasizes them. Nor could it be said that such a provision hampers trade. On the contrary it should help trade by introducing certainty into dealings and making people careful and avoiding subsequent futile disputes. Consequently the bye-law was not *ultra vires*. A.I.R. (Vol. 28) 1941 Nag. 203=1941 N.L.J. 201=42 Cr.L.J. 732=I.L.R. (1941) Nag. 624=195 Ind. Cas. 369.

——S. 179 (g), (as applied to Berar)—Rules under—R. 1, by Amraoti Town Municipal Committee—"Plying for hire within limits of Amraoti Town Municipality," interpretation of.

The words "plying for hire within the limits of Amraoti Town Municipality," occurring in R. 1, framed by Amraoti Town Municipality under S. 179 (g), C. P. Municipalities Act (as applied to Berar) cannot be confined to the narrow interpretation that the whole of the service which is offered must take place within the limits of the Municipalities and that otherwise the rules do not apply.

Therefore vehicles operating as a regular service between Amraoti and Chandur Bazar and picking up passengers within limits of the Amraoti Town Municipality ply for hire within the limits of the Amraoti Town Municipality. A.I.R. (Vol. 26) 1939 Nag.

171=1939 N.L.J. 262=40 Cr.L.J. 556=181 Ind. Cas. 520.

——S. 180—Proviso—"At the time of the making of such bye-law," meaning of—Delegation of powers to Health Officer—Fresh delegation, if to be made each time a bye-law is made.

The words "at the time of the making of such bye-law" in the proviso to S. 180. C. P. and Berar Municipalities Act must refer to the making by the Municipal Committee and can have no reference to the confirmation of a bye-law by an authority which has no power to make any bye-law. The date of confirmation by Government may be a more covenient and generally intelligible starting point for the limitation provided in the proviso to S. 180, but it is impossible to depart from the clear meaning of the words used. Government has no power to make bye-laws or to alter them. It can only accept or reject what is put before it by a Municipal Committee, and the making of bye-laws must accordingly refer to the final resolution of the Municipal Committee in respect of the bye-laws:

Sanction is given to prosecute in respect of offences against bye-laws framed *inter alia* under S. 180, Cl. (a), and not in respect of specific or existing bye-laws. The sanction is given to take action for breach of any bye-laws which have been made under that section or which will be made under that section, and it is quite unnecessary for the Municipal Committee to give fresh delegation each time a bye-law is made, if it falls under the clause in respect of which sanction has already been given. 167 Ind. Cas. 777 =19 N.L.J. 195=38 Cr.L.J. 459.

——S. 199—Words "every day after the first"—Meaning of.

The words "every day after the first" must be interpreted as every day after the first to which the conviction relates. If a person has been committing a breach of a bye-law since 8th July, 1928, he can be properly fined Rs. 50 on 21st November, 1928. It is misreading S. 199 to think that he should be fined Rs. 5 only on 21st November, 1928 because he was on that date continuing the offence. 1929 Cr. Cas. 684=121 Ind. Cas. 64=A.I.R. 1929 Nag. 360.

——S. 199—Proof required of prosecution.

What the prosecution has to prove under S. 199 is that a lawful direction was given to the accused by a notice lawfully issued under the powers conferred by Part 3 of the Act and that the accused disobeyed the said direction. 10 A.I.Cr.R. 566= 29 Cr.L.J. 785=111 Ind. Cas. 113=A.I.R. 1928 Nag. 337.

——Ss. 199, 103 — Applicability — Erection of building without sanction.

Under S. 199, C. P. Municipalities Act, it is disobedience of a lawful direction given by the Municipal Committee which is punishable. There is no provision in that section for punishing the mere erection of a building without the sanction of the Committee. The correct procedure, if a person erects a building without sanction, is laid down in S. 103 of the Municipalities Act whereby the Committee may require the building to be demolished. If that order is disobeyed, then S. 199 comes into play but not before. When the Municipal Committee has omitted this necessary step, there is no order in existence in respect of which a person can be convicted for disobedience of an order. A.I.R. (Vol. 24) 1937 Nag. 79=19 N.L.J. 81=I.L.R. (1936) Nag. 56=37 Cr.L.J. 1038 (2)=164 Ind. Cas. 939.

——Ss. 215 and 159 (3)—Applicability—Conditions.

The condition precedent to an exercise of authority under S. 215 of the C. P. Municipalities Act is that the article which is unfit for human consumption should be brought before the Magistrate under S. 159 (3). S. 159 (3) cannot come into play until the person in possession has been asked whether he will consent to the destruction of the unfit article. Therefore, before such person is fined he must be afforded the chance of exercising the option of consenting to the destruction of the offending article or of fighting the case before a Magistrate. An omission to do so is not a curable irregularity. I.L.R. (1946) Nag. 976=226 Ind. Cas. 286=1946 N.L.J. 479=47 Cr.L.J. 891=A.I.R. 1946 Nag. 432.

——S. 218—Complainant—Police officer authorised to make complaints by Committee.

Where a police officer is authorized under S. 218 by the Municipal Committee to make complaints with regard to offences under the Municipal Act, that police officer making the complaint and not the committee is to be regarded as complainant. 25 N. L. R. 194=1930 Cr. Cas. 89=31 Cr.L.J. 382=12 N. L. J. 127=122 Ind. Cas. 258=A.I.R. 1930 Nag. 33.

——S. 218—Committee delegating authority of making complaint to public servant—Complaint by latter—Cr. P Code, S. 200, proviso (aa).

As a Municipal Committee is empowered to delegate its authority of making complaint under S. 218 (2), when such authority is delegated to a public servant by virtue of his office and not by name, he acts in his capacity as a public servant when making a complaint within the meaning of S. 200, proviso (aa) Cr. P. Code, and his personal attendance for examination is not necessary. 25 N.L.R. 194=122 Ind. Cas. 258=1930 Cr. C. 89=31 Cr.L.J. 382=12 N.L.J. 127=A.I.R. 1930 Nag. 33.

——Ss. 246 (2), 78 and 79—Money due under S. 246 (2) is not arrear of tax.

Money due under S. 246 (2) does not fall under S. 78 nor is it deemed to be an arrear of tax though it can be recovered under the provisions of S. 79. A.I.R. (Vol. 33) 1946 Nag. 78=1945 N.L.J. 550= I.L.R. (1945) Nag. 670.

——Ss. 246 and 79—Work executed—Recovery of expenses—Injunction against committee, if can be granted—Specific Relief Act, S. 56 (i).

Where a municipality executes a work under S. 246 (2) of the C. P. and Berar Municipalities Act after notice under S. 246 (1), it may recover the expenses incurred in doing so under the provisions of S. 79 on an application by the committee to the Deputy Commissioner, as if the property were an estate assessed to land revenue and the arrears were arrears of land revenue due thereon. No relief of injunction to prevent from doing so can be granted under S. 56 (i), Specific Relief Act, as the relief

in respect of the recovery of the amount is an equally efficacious relief which can certainly be obtained by another usual mode of proceedings. What is 'usual' will depend upon the circumstances of the case. A. I. R. (Vol. 33) 1946 Nag. 78=1945 N.L.J. 520= I.L.R. (1945) Nag. 670.

C. P. POLICE MANUAL.

——S. 10, Para. 418.

Para. 418 of S. 10 of the Central Provinces Police Manual requires a report book to be maintained by village watchmen in connection with the reports of births and deaths they have to make to the Police. A.I.R. (Vol. 24) 1937 Nag. 264=20 N. L. J. 139=I.L.R. (1937) Nag. 382=172 Ind. Cas. 287.

——Ss. 621, 636—The Village Crime Note Book is one of the registers prescribed for station houses under S. 621 of the Police Manual, and according to S. 636 every cognizable crime committed in a village should be entered in it. A.I.R. (Vol. 24) 1937 Nag. 17=38 Cr.L.J. 237=I.L.R. (1937) Nag. 315=166 Ind. Cas. 587.

C. P. AND BERAR PROHIBITION ACT (VII OF 1938).

——S. 3—Definition of 'liquor' in S. 3 (h) includes methylated spirit. 1942 N.L.J. 81.

——S. 11—Applicability.

Section 11 is not intended to apply to a host who offers spirituous refreshment to a friend. 1940 N.L.J. 574.

——S. 11—Sentence of four months for first offence of drinking is entirely disproportionate when provision for binding over exists. 1940 N.L.J. 574.

——S. 19—Bond contemplated by S. 19 is in addition to and not in lieu of the sentence. 1939 N.L.J. 289.

C. P. AND BERAR PROTECTION OF DEBTORS ACT (IV OF 1937).

——S. 3—"Molestation"—What amounts to.

The terms of the definition of "molestation" given in S. 3. C. P. and Berar Protection of Debtors Act, indicate that the obstruction or using violence or intimidation to constitute molestation should be accompanied by the intent to cause the debtor to abstain from doing what he has right to do or to compel him to do what he has a right to abstain from doing. It is evident that the particular intent is a question of fact in every case. If the Court holds that the creditor's intention in obstructing, or using violence to or intimidating, the debtor is to compel him to pay a debt which he has a right in certain circumstances to abstain from doing, the creditor's act would amount to molestation.

The creditor demanded payment of his debt, from his debtor whereupon the latter became angry and bade him go to Civil Court. The creditor lost his temper and beat the debtor with a shoe and left the place. The creditor was prosecuted for an offence punishable under S. 4 of the C. P. Protection of Debtors Act, 1937. for molesting the debtor for the recovery of a debt owed by him:

Held, that the circumstances in which the creditor used violence did not warrant any assumption that the creditor's intention was to compel him to pay the debt. But on the contrary its effect would presumably be to confirm the debtor's resolve not to pay. Here the creditor did not resort to violence as an instrument to compel the debtor to pay when he was not disposed to pay. It was only a manifestation of the pitch of his passion that was aroused by the debtor's remark that the creditor should look to Civil Court. But the creditor was indeed liable to be punished for assault under the Penal Code. A.I.R. (Vol. 26) 1939 Nag. 281=1939 Nag. L.J. 455=41 Cr. L.J. 168=185 Ind. Cas. 348.

C. P. AND BERAR PROVINCIAL CO-OPERATIVE BANK BYE-LAWS.

——Bye-law 40—Board of Directors of Provincial Bank—Right of affiliated Central Banks to send representatives.

All Central Banks which are affiliated to the Provincial Bank are entitled to be represented on the Board of Directors of the Provincial Bank by their representative under Bye-law 40 (1) (4) of the Provincial Co-operative Bank bye-laws. The representatives sent by each of the affiliated Banks have to be accepted as directors by the Provincial Bank provided that they do not suffer from any disability, such as being ineligible for being directors of the affiliated Banks. 1950 N.L.J. 501.

C. P. AND BERAR PUBLIC SAFETY ACT (XXXVIII OF 1947).

——Applicability—Membership of Communist Party.

Mere Membership of the Communist Party which has not been declared illegal, without any thing else, does not *prima facie* attract the provisions of the C. P. and Berar Public Safety Act. I.L.R. (1949) Nag. 363=A.I.R. 1949 Nag. 146=50 Cr.L.J. 363.

C. P. AND BERAR PUBLIC SAFETY ACT (62 OF 1948).

——S. 2 (1) (a)—Validity of—Extent—Constitution of India, Art. 22 (7).

Reading Arts. 13 (1), 21, 22 and 372 (1) of the Constitution of India together, only those provisions of the C. P. and Berar Public Safety Act which are inconsistent with the provisions of Part III, have now become void. Art. 22 of the Constitution contemplates and permits the preventive detention of a person, though subject to certain conditions. Therefore, S. 2 (1) (a) of the C. P. and Berar Public Safety Act, in so far as it provides for the detention of certain classes of persons is not rendered void by the Constitution. What is rendered void, however, is the implied provision conferring a power to detain a person for an indefinite period because Art. 22 (7) (b) requires a maximum period to be fixed by the law governing preventive detention. Therefore, S. 2 (1) (a) of the Act, being still extent, is "any law" within the meaning of the expression used in

Art. 22 (7) (a). 4 A.I.Cr.D. 432=A.I.R. 1950 Nag. 203=51 Cr.L.J. 1372.

——S. 35 (2) and S. 4, Proviso—Scope and effect—Grounds communicated to detenu under S. 5 of Act of 1947 vague—Defect, if cured.

S. 35 (2) of the C. P. and Berar Public Safety Act of 1948 merely continues the order of detention made under the Act of 1947, but it does not give retrospective effect to S. 4 of the Act of 1948 nor is there anything in that section which indicates that it is to have retrospective effect. In fact the proviso to that section refers specifically to the communication made to a detenu under the section itself and there is no reference whatever to S. 5 of the Act of 1947. If, therefore, the grounds communicated to a detenu under the latter section are vague and insufficient, the defect cannot be cured by invoking the proviso to S. 4 of the Act of 1948. I.L.R. (1949) Nag. 363=A.I.R. 1949 Nag. 146=50 Cr. L. J. 363.

C. P. REDUCTION OF INTEREST ACT (XXXII OF 1936).

——Act is retrospective.

The C. P. Reduction of Interest Act is clearly restrospective in its operation. A.I.R. (Vol. 25) 1938 Nag. 112=20 N.L.J. 285=I.L.R. (1938) Nag. 91=179 Ind. Cas. 129.

——Applicability—Act in force when suit in progress but repealed before judgment.

Before a Court can act under the provisions of the Act, that is to say, before it can enforce the prohibition contained therein, the Act must be in force.

Where, therefore, the Reduction of Interest Act was in force when the suit was in progress but was repealed before the trial Court gave its judgment and the Court applied the provisions of the Act:

Held, that the Court was wrong in resorting to the provisions of the Act. A.I.R. (Vol. 28) 1941 Nag. 177=1941 N.L.J. 194=195 Ind. Cas. 463.

——Applicability — Application under, for reduction of decretal amount—Application taken up after expiration of Act—No relief can be granted.

Where the C. P. Reduction of Interest Act, 1936, was in force when the judgment-debtor applied for the reduction of the decretal amount under it but the application is taken up for decision by the Court after the expiration of the Act (*i.e.*, after December 31, 1939), no relief can be granted to the judgment-debtor. After the expiration of a statute, in the absence of provision to the contrary, proceedings already commenced *ipso facto* determine. A.I.R. (Vol. 29) 1942 Nag. 122=1942 N.L.J. 400=I.L.R. (1942) Nag. 764=202 Ind. Cas. 465.

——S. 2—Attachment, if causes judgment-debt to be a secured debt.

In India attachment of the judgment-debtor's property after judgment does not create a charge on attached property. It also does not create any kind of a charge and consequently does not create that particular type of charge known as an equitable or judicial lien and therefore does not cause judgment-debt to be secured debt so as to affect the interest that may be allowed after January 18, 1932. A.I.R. (Vol. 26) 1939 Nag. 267=1939 N.L.J. 257=189 Ind. Cas. 161.

——S. 3 (1)—Nature of interest — Determining factor.

The nature of the interest to be awarded is to be determined according to the agreement between the parties, and it is not permissible to change from one side of the schedule in the Act to the other simply because one works out at a higher amount than the other. I.L.R. (1946) Nag. 334=1946 N.L.J. 336 =A.I.R. 1946 Nag. 336.

——S. 3 (1)—Nature of interest — Determining factor.

The nature of interest to be awarded under the Reduction of Interest Act is to be determined according to the agreement between the parties, and it is not permissible to change from one side of the schedule to the other because one works out at a higher amount than the other. A.I.R. (Vol. 30) 1943 Nag. 240 =1942 N.L.J. 220=I.L.R. (1943) Nag. 555=206 Ind. Cas. 504.

——S. 3 (1)—Decree passed awarding future interest at reduced rate—Subsequent expiry of period fixed by notification under S. 3 (1)—Decree-holder is entitled to recover contract rate beyond the period. 1942 Nag. L.J. 47.

——S. 3—Where the plaintiff claims compound interest in excess of scheduled rate and the scheduled rates are beneficial to the debtor, compound interest at scheduled rate should be allowed. 1941 Nag. L. J. 672.

——S. 3—If the consideration of a mortgage is made up of, among other things, amounts due on an old mortgage and on an old bond, the Court cannot re-open the transaction of the mortgage. The suit mortgage becomes the "debt incurred" within S. 3. 1941 Nag. L.J. 669.

——S. 3 (3)—Decree passed after Act came into force—If can be re-opened.

Section 3 (3), C. P. Reduction of Interest Act is intended to apply only to decrees passed before the Act came into force. The scheme of S. 3 is first to provide for claims not decreed and then for claims already decreed. It cannot be assumed that the word "already" is entirely superfluous, and the only meaning that can be given to it is, "if a decree has been passed before the Act came into force." A decree, therefore, passed after the Act came into force cannot be re-opened under S. 3 (3), for reducing the amount of interest allowed in it. A.I.R. (Vol. 27) 1940 Nag. 159=1940 N.L.J. 260=189 Ind. Cas. 214.

C. P. AND BERAR REDUCTION OF INTEREST (AMENDMENT) ACT (X OF 1938).

——Validity — Whether repugnant to Contract Act—If contravenes O. 34, R. 11, C. P. Code, or S. 58, T. P. Act—Government of India Act, S. 107.

Act X of 1938 which purports to amend the C. P. Reduction of Interest Act, 1936, is *intra vires* the Provincial Legislature. There is no repugnancy between this Act and the Contract Act, as S. 37

of the latter Act itself contemplates other laws which may override the contract between the parties. S. 37 of the Contract Act is not limited to cases where performance as a whole is dispensed with, but covers cases of partial performance as well. This Act does not contravene O. 34, R. 11, C. P. Code; which besides being permissive is subject to S. 4 (1) of the Code. This Act does not contravene S. 58 of the T. P. Act. This section is by virtue of S. 4 of that Act subject to S. 37 of the Contract Act as are the relevant sections in the Contract Act itself. I.L.R. (1940) Nag. 334=1946 N.L.J. 336=A.I.R. 1946 Nag. 336.

C. P. AND BERAR REGULATION OF LETTING OF ACCOMMODATION ACT (1946) AND HOUSE RENT CONTROL ORDER (1947).

——Para. 13 — Applicability — Pending proceedings.

The right of a landlord to terminate the tenancy of his tenant must be determined according to the state of affairs existing on the date he files the suit and the plaintiff in such a case acquires a vested right which cannot be taken away except by legislation which is either expressly or by necessary implication made retrospective. There are no circumstances which take the Regulation of Letting of Accommodation Act, 1946, or para. 13 of the House Rent Control Order, 1947, out of the application of the rule that all legislation affecting substantive rights are prosepective and therefore, they do not apply to past transactions or pending proceedings. I.L.R. (1948) Nag. 910=A.I.R. 1949 Nag. 3=1948 N. L. J. 323.

C. P. AND BERAR RELIEF OF INDEBTEDNESS ACT (XIV OF 1939).

——S. 1 (3), Proviso—If ultra vires—Absence of assent of Governor-General.

The proviso to S. 1 (3) of the C. P. and Berar Relief of Indebtedness Act, added by Act XI of 1942, is not *ultra vires* the Governor, although it has not been assented to by the Governor-General. The pith and substance of the main Act is not laying down procedure; on the contrary, it aims at affecting substantive rights. In as much as the Act provides for the relief of indebtedness of agriculturists, it falls partly within entry No. 20 and partly within entry No. 27 of the Provincial List and therefore the Act falls within the provincial field. The fact that some of the provisions of the Act appear to trench upon some provisions of the C. P. Code, does not render the Act, or the repugnant provisions void, as the invasion upon the law of Civil Procedure is no more than was necessary to carry into effect the purpose of the Act. It follows then, that the Act is within the competence of the Provincial Legislature. Therefore, it was wholly unnecessary to obtain the assent of the Governor-General. The mere fact that such assent was obtained makes little difference to the question whether assent for the amending Act was also necessary. As no such assent was necessary, Act XI of 1942 is *intra vires* the Government. I.L.R. (1949) Nag. 829=1949 N.L.J. 545.

——Ss. 2 (d) and 11 (1)—Debt — Mortgage—Final decree for sale—Jurisdiction of Debt Relief Court.

A mortgage debt does not cease to be a "debt" within the meaning of S. 2 of the C. P. Relief of Indebtedness Act, merely by reason of a final decree for sale having been passed in a suit upon that mortgage debt. Hence the Debt Relief Court has jurisdiction under S. 11 (1) of the Act to conciliate such a mortgage debt and prepare a scheme for its repayment. I.L.R. (1949) Nag. 81=1949 N.L.J. 18 =A.I.R. 1948 Nag. 355.

——Ss. 2 (d) and 6 (3)—Debt Mortgagors' liability under — Preliminary foreclosure decree—Jurisdiction of D. R. Court.

There is no difference between a preliminary decree for sale and a preliminary decree for foreclosure on the point of Judgment-debtor's obligation to pay. The definition of the word 'debt' contained in S. 2 (d) does therefore include the liability which the mortgagor is called to discharge by a preliminary decree for foreclosure. Hence the Debt Relief Court has jurisdiction to issue the notice under S. 6 (3) to the Civil Court suspending the proceedings and the Civil Court cannot question the validity of that notice. A.I.R. (Vol. 31) 1944 Nag. 289=1944 N.L.J. 357=I.L.R. (1944) Nag. 568 (F.B.).

——S. 2 (d)—Debt—Claim on promissory note.

There is a general presumption that a Legislature does not intend to exceed its jurisdiction. General words in an Act are to be construed with reference to the powers of the Legislature which enacts it. As it has been held that the Provincial Legislature cannot enact a measure dealing with promissory notes, the word 'debt' appearing in the provincial impugned Act should be interpreted to exclude a claim due on a promissory note.

Consequently, the word 'debt' which has been defined in S. 2 (*d*) of C. P. and Berar Relief of Indebtedness Act, 1939. in such large and comprehensive terms as to include a claim on a promissory note, though it has not been so stated in express terms, should not be interpreted to include such claims, *i.e.*, the claims due on promissory notes. A. I.R. (Vol. 33) 1946 Nag. 81=1945 N.L.J. 456.

——S. 5—A suit for specific performance of an agreement to sell land and alternatively for award of compensation cannot be stayed, the liability under the agreement not being a "debt". The other relief for compensation may never become due. 1942 N.L. J. 460.

——Ss. 5 (3), 3 and 6—Debt Relief Court, if Civil Court.

The Debt Relief Courts are special tribunals created *ad hoc* for the special purposes of the Relief of Indebtedness Act. They are not Civil Courts.

In the Relief of Indebtedness Act a distinction has been maintained between "plaint" and 'application". A.I.R. (Vol. 29) 1942 Nag. 8=I.L.R. (1941) Nag. 588=1941 N.L.J. 484=198 Ind. Cas. 824.

——Ss. 6 (3) and 23—Preliminary decree for foreclosure of mortgage—Proceeding for making final decree started — Application before Debt Relief Court—Proceedings, if should be stayed.

Mortgagees were intended to fall within the purview of the Relief of Indebtedness Act and are intended to be included in the definition of "debt". But though mortgage claims are intended to be included, a distinction is drawn between the position before the decree and after decree. The Debt Relief Court is not empowered to entertain an application in respect of the mortgage which has become the subject of a preliminary foreclosure decree and proceedings in the Civil Court to make such decree final cannot be stayed.

In the case of a foreclosure mortgage, the mortgagor's "interest in the property" passes at the date of the mortgage. According to the strict terms of the bargain it is lost for ever the moment there is a failure to pay on due date. It is only the law which steps in and says that in spite of this bargain and in spite of the broken agreement the defendant is to be given a further period of grace. Regarded, from that angle this is a privilege and not a liability. In effect it confers on the defendant the right and the privilege of, in a way, buying back for himself property which has been lost to him forever under the terms of his bargain, and this despite his own default. The right to buy back property for a given sum can hardly be described as a liability when the option to buy or not to buy is left with the purchaser; and it is certainly not a debt within any ordinary meaning of the term. Nor can it become so simply because the privilege is conferred by a decree or order of a Court. A. I. R. (Vol. 29) 1942 Nag. 88=1942 N. L. J. 113=I. L. R. (1942) Nag. 357=200 Ind. Cas. 709.

——Ss. 6, 20, 23—Suit on mortgage against mortgagors and transferees of part of mortgaged property—During pendency of proceedings to make decree final transferees alone applying to Debt Relief Court—Proceedings must be stayed for all or for none.

Under Ss. 60 and 67 of the T. P. Act a mortgage is one and indivisible. Where therefore, in a suit for foreclosure of a mortgage against the mortgagors and subsequent transferees of a part of the mortgaged property, the transferees alone make a joint application to the Debt Relief Court under S. 6 (1) of the C. P. and Berar Relief of Indebtedness Act praying for the determination of the mortgage debt during the pendency of proceedings to make the preliminary decree absolute, the proceedings for making the decree final must be stayed for all the defendants or for none, on receiving a notice from the Debt Relief Court to stay such proceedings. They cannot be stayed only against the transferees who applied to the Debt Relief Court and continued against the mortgagors who did not so apply. A.I.R. (Vol. 28) 1941 Nag. 268=1941 N L.J. 391=I.L.R. (1942) Nag. 577=199 Ind. Cas. 453.

——S. 6 (3)—Where there is a money decree against surety and principal debtor and the principal debtor applies to the Debt Relief Court and a notice of admission under S. 6 (3) is sent to the executing Court, execution against the surety also must be stayed. 1942 N.L.J. 391.

——Ss. 6 (3) and 23—Preliminary mortgage decree—Defendant going before Debt Relief Court—But no notice under S. 6 (3) to Civil Court—Final deccree passed by Civil Court, if without jurisdiction.

The proceedings before the Civil Court are not to be stayed until the Civil Court has received notice under S. 6 (3) of the C. P. Relief of Indebtedness Act. The pending proceeding in a Civil Court will not be stayed merely because an application has been made before the Debt Relief Court. Where, therefore, in a mortgage suit the defendant applies to the Relief Court for the determination of his debt after the passing of the preliminary decree but the Court does not receive any notice under S. 6 (3), the final decree passed by the Court cannot be set aside on the ground that it was passed when the defendan's application before the Relief Court was pending. A.I.R. (Vol. 29) 1942 Nag. 78=I.L.R. (1942) Nag. 675=1942 N.L.J. 12=200 Ind. Cas. 14.

——S. 6 (3)—Sale held after issue of notice by Debt Relief Court but before its receipt—Validity.

Under S. 6 (3) of the C. P. Relief of Indebtedness Act the stay of proceedings before a Civil Court only operates from the date on which notice is *given* to it by the Debt Relief Court. A sale held after the issue of notice of stay by the Debt Relief Court but before its receipt by the Civil Court is, therefore, valid, and must be confirmed. I.L.R. (1947) Nag. 470=A.I.R. 1948 Nag. 180=1947 N.L.J. 391.

——S. 6 (3)—Debtor applying to Debt Relief Court—Decree-holder taking out execution in Civil Court—Notice for stay of proceedings issued—Sale by Civil Court ignoring notice is invalid. 1942 N.L.J. 52.

——S. 6—Hindu joint family house—Father adjudicated insolvent—Joint family property—Father's disposing power of son's share vesting in Court—Sons applying to Debt Relief Court—Notice from Relief Court—Subsequent sale by Insolvency Court held not valid. 1942 N.L.J. 36.

——S. 6 (3)—Notice to Civil Court—Sale by Collector in ignorance of it is invalid.

The sale held by the Collector in ignorance of the notice of admission issued by the Debt Relief Court to the Civil Court is not a valid sale. The Collector's power to execute the decree is automatically suspended as soon as the Civil Court receives the notice from the Debt Relief Court under S. 6 (3). It does not continue in the absence of any intimation from the Civil Court acting on the notice received by it. It is incumbent on the Civil Court to act *suo motu* and stop further proceedings before the Collector. In ommitting to do so the Civil Court commits an error and the judgment-debtor's right would remain unaffected by the error of the Court and that right whatever it be would be determined on the footing as if the Civil Court had discharged its obligation. A.I.R. (Vol. 31) 1944 Nag. 195=1944 N.L.J. 90=I.L.R. (1944) Nag. 468=219 Ind. Cas. 415.

——S. 8—Chitti debt — Payment — Appropriation in satisfaction — Proceeding before Debt Relief Board—Creditor not appearing—Debt discharged—Suit for rent—Court holding appropriation should have been towards rent under S. 75, C. P. Ten. Act—Suit for recovery of chitti debt —Whether maintainable.

Where, in a suit for rent, the Court holds that the plaintiff should have appropriated under S. 75, C. P. Tenancy Act, the payment made by the defendant towards rent and not towards a *chitti* debt, and the plaintiff thereupon files a suit for recovery of the *chitti* debt which was already discharged under S. 8 by the non-appearance of the plaintiff before the Debt Relief Court, thinking that his debt was satisfied by appropriation, the suit is based on a new cause of action which arises as a result of the appropriation of the amount towards rent. It is not a suit either for recovery of debt which was discharged under S. 8 or one for revival of a debt. A.I.R. (Vol. 33) 1946 Nag. 130=1945 N.L.J. 503.

——S. 8—Creditor's debt discharged — Debtor's application dismissed subsequently on ground that he was found able to pay—Discharged debt does not revive. A.I.R. (Vol. 31) 1944 Nag. 283=1944 N. L. J. 277=I.L.R. (1944) Nag. 416.

——S. 8 (1)—"Claim" — Meaning of—Creditor failing to submit his claim for village profits—Effect of.

The word "claim" in S. 8 (1) of the C. P. and Berar Relief of Indebtedness Act is not restricted to a claim which the Debt Relief Court is competent to decide, but means all claims including those which have been specifically enumerated in S. 4 of the Act. A failure of the creditor to submit his claim for village profits will, therefore, result in the automatic discharge thereof under S. 8 (1) of the Act. I.L.R. (1948) Nag. 789=A.I.R. 1949 Nag. 227=1949 N.L.J. 150.

——Ss. 9 and 20—Application of debtor dismissed on finding him not unable to pay debts—No question of jurisdiction is involved. A.I.R. (Vol. 31) 1944 Nag. 283=1944 N.L.J. 227=I.L.R. (1944) Nag. 416.

——S. 10—Claims on promissory note—Legality of provincial enactment—Government of India Act, 1935, S. 107, Sch. 7, Lists I and II—Negotiable Instruments Act (XXVI of 1881), S. 4.

It was not within the competence of the Provincial Legislature to enact a measure like C. P. and Berar Relief of Indebtedness Act which will affect claims on promissory notes. A.I.R. (Vol. 33) 1946 Nag. 81=1945 N.L.J. 456.

——S. 10 (2)—If ultra vires—Government of India Act. 1935 (25 & 26, Geo. V, Chap. 42), Ss. 107 (2), 109 (2).

Contracts is Item No. 10 in the Concurrent List, therefore under S. 107 (2), Government of India Act, 1935 a Provincial Legislature can interfere with contracts provided the measure is reserved for the consideration of the Governor-General and receives his assent. If, however the bill is not reserved for consideration, it can still be validated by receiving the subsequent assent of the Governor-General under S. 109 (2) of the Act. The C. P. and Berar Relief of Indebtedness Act (XIV of 1939) received the assent of the Governor-General before it became law and, therefore, it is immaterial whether it had been reserved for his consideration or not. Hence the provision in S. 10 (2) of the C. P. Act (XIV of 1939) which enables the Debt Relief Courts to reduce the principal of a debt in the case of a loan originally advanced before 1st January, 1932 in accordance with the second schedule to the Act is *intra vires*. A.I.R. (Vol. 30) 1943 Nag. 312=1943 N.L.J. 408=I.L.R. (1943) Nag. 546=210 Ind. Cas. 352.

——S. 11—Conditional scheme—Power to prepare.

There is nothing in the C. P. and Berar Relief of Indebtedness Act which prohibits the Debt Relief Court from preparing a conditional scheme of repayment of the debts. It is therefore competent to that Court to attach any condition to the scheme under S. 11 of the Act. I.L.R. (1949) Nag. 81=A.I.R. 1948 Nag. 355=1949 N.L.J. 18.

——S. 11—Final mortgage decree for sale—Order for instalments—Jurisdiction of Debt Relief Court.

A final mortgage decree for sale continues to be a decree for the payment of a sum of money. The Debt Relief Court has, therefore, jurisdiction to order the payment of the amount due under the decree in instalments. 1949 N.L.J. 113, foll. I.L.R. (1949) Nag. 829=1949 N.L.J. 545.

——S. 11 — Mortgage suit—Some defendants applying to Debt Relief Court for reduction of their proportionate liability—Their liability reduced and instalments of payment fixed. Only balance of mortgage debt can be recovered from the defendants who had not applied. Section 60, T. P. Act has no application. A.I.R. (Vol. 31) 1944 Nag. 225=I.L.R. (1945) Nag. 194=1944 N.L.J. 182=220 Ind. Cas. 99.

——Ss. 11 and 19—Powers of Debt Relief Court Order for transfer of property not carried out—Sale-deed by Court directing creditor to take possession—Effect of—Suit in Civil Court for possession—Bar of.

The Debt Relief Court constituted under the C. P. and Berar Relief of Indebtedness Act has no power either to pass a decree for possession or to execute it. It has power only to do two things: (1) to sanction a transfer of property under S. 11, and (2) to fix instalments for any decree it may pass. It has no power to direct delivery of possession. In executing an order under S. 11, as regards transfer of property, the only power of the Court is to execute the deed of transfer; it has no power to do anything else. Even if the deed of transfer executed by the Debt Relief Court contains a provision "you should take possession of the.....from this Court, by taking out execution in execution thereof", that would form no part of the operative order of the Court and that Court has no power either to pass a decree for possession or to execute one for delivery on the basis of such a provision in the sale-deed. A civil suit is the proper remedy for obtaining possession and the Civil Court's jurisdiction in that respect is not barred or ousted by reason of such a provision in the sale-deed executed by the Debt Relief Court. I. L.

R. (1949) Nag. 633=A.I.R. 1949 Nag. 370=1949 N.L.J. 597.

——Ss. 12 and 13 (3)—Tender of instalments refused by creditor—Debtor taking no further action to pay—Court if bound to terminate scheme.

The legal fiction that a tender refused amounts to a payment created by S. 38 of the Contract Act, does not apply in respect of the words "be paid" in S. 12 of the Relief of Indebtedness Act, which specially provides an alternative in case the tender is refused by the creditor. If therefore a tender of insatlments by a debtor is refused by the creditor and no further action is taken by the debtor to pay or deposit, there is no compliance with the terms of S. 12 of the Act and the Court is bound to order the termination of the scheme under S. 13 (3) of the Act. 1947 N.L.J. 171.

——S. 12 (2)—Applicability—Debtor not being occupant of land.

A debtor who has been given the protection afforded by the Relief of Indebtedness Act as an "agriculturist", cannot claim the benefit provided by S. 12 (2) of the Act which is clearly intended to apply to landlords and tenants, if he is not the occupant of the land in question and is not recorded in the village papers as tenant or even as sub-tenant and no rent is shown as due from him. 1946 N.L.J. 681.

——S. 12 (2)—Joint debtors—Land revenue of one of them remitted in year of debt instalment—Whole instalment, if suspended.

If there is remission of land revenue in respect of one of two joint debtors in the year of the debt instalment, that debtor is entitled to suspension of the debt instalment of that year under the mandatory provision in S. 12 (2) of the Relief of Indebtendness Act, and as it is not possible to determine separately the extent of the liability of each for the payment of such instalment, the whole of the instalment must remain suspended. As the debt instalment cannot be split up so as to enable the recovery to be made separately from one who is not entitled to suspension, such debtor must get the same benefit which his co-debtor is entitled to get under S. 12 (2). 1950 N.L.J. 517.

——Ss. 12 (2) and 13 (2)—Suspension of instalment because of remission—Omission to pay instalment—If amounts to default.

Where there is a suspension of instalment payable under a scheme by Debt Relief Court, because of a remission in respect of the just prior agricultural year, the omission to pay that instalment will not amount to a default. Where such an omission is treated as a default and an order is passed under S. 13 (3) of the C.P. and Berar Relief of Indebtedness Act, it is one without jurisdiction and it would be open to the executing Court to refuse to execute the decree in such cases. I.L.R. (1948) Nag. 376=A.I.R. 1949 Nag. 106 =1948 N.L.J. 272.

——S. 13.

SYNOPSIS.

1. Sub-S. (1)—Applicability.
2. Sub-S. (3)—Application under—Limitation.
3. Sub-S (3)—Application under—Powers and duty of Deputy Commissioner.
4. Sub-S. (3)—"Consecutive instalments".
5. Sub-S. (3)—Review.
6. Sub-S. (3)—Powers of Extra-Assistant Commissioner.
7. Sub-S. (3)—Powers of Executing Court.

1. Sub-S. (1)—Applicability.

——S. 13 (1)—Applicability—Conditional scheme—Breach of condition precedent—Effect—Application to Deputy Commissioner and certificate under S. 13 (2)—Necessity.

S. 13 (1) of the C. P. and Berar Relief of Indebtedness Act comes into operation only on the basis of a subsisting scheme of repayment made by the Debt Relief Court. When that Court has prepared a scheme subject to a condition precedent and there is breach of the condition by which the scheme ceases to have legal effect, the scheme no longer exists. A creditor in such a case is not required to apply to the Deputy Commissioner under S. 13 (1) of the Act. He is entitled to approach the civil Court direct and to ask that Court to carry on the proceedings from the stage at which they were stayed at the instance of the Debt Relief Court, to their legal termination, without any certificate under S. 13 (2). I.L.R. (1949) Nag. 81=A.I.R. 1948 Nag. 355=1949 N.L.J. 18.

2. Sub-S. (3)—Application under—Limitation.

——S. 13 (3)—Application under—Limitation.

The limitation of eighteen months for an application under sub-S. (1) does not apply to an application under sub-S. (3) of S. 13 of the Relief of Indebtedness Act. The creditor as well as the debtor has his rights under the debt relief scheme prepared under S. 11 of the Act, and one of these is the choice of proceedings under sub-S. (1) within eighteen months or waiting till two consecutive instalments have been defaulted and then proceeding under sub-S. (3). 1946 N.L.J. 681.

——S. 13 (3)—Order terminating scheme—Recovery of balance of amount—Limitation.

It is clear from the terms of S. 13 (3) of the Relief of Indebtedness Act that once the Deputy Commissioner passes an order that the scheme framed by the Debt Relief Court fixing instalments shall cease to have effect, any balance remaining due on that date will be recoverable by the creditor. S. 13 does not provide any period of limitation for making an application under sub-S. (3) thereof and therefore the question of the recovery of any instalments being barred by time does not at all arise. All that S. 13 (1) of the Act says is that if a creditor wants to have a defaulted instalment recovered as an arrear of land revenue, he has to move the Deputy Commissioner within a particular time and that if he does not do so, he

loses that right. This obviously cannot affect the other right conferred upon him by sub-S. (3) of S. 13 which is to move the Deputy Commissioner to terminate the scheme because of two consecutive defaults made by the debtor. I.L.R. (1949) Nag. 981=A.I.R. 1950 Nag. 115=1949 N.L.J. 588.

3. Sub S. (3)—Powers and duty of Deputy Commissioner.

——S. 13 (3)—Arrears of two consecutive instalments offered after due date—Creditor refusing to accept payment—Deputy Commissioner, it obliged to issue certificate.

All the Deputy Commissioner has to do on receipt of an application under S. 13 (3) of the C. P. and Berar Relief of Indebtedness Act is to verify that two consecutive instalments remained —even for one day only—in arrears and if he finds that this is so, he **must** issue the certificate demanded. The words "remain in arrears" in S. 13 (3) mean remain on the date fixed for payment of the second consecutive instalment if that instalment and the previous one have not been duly paid by them. The cause for action really arises then, although action by the Deputy Commissioner cannot start except on an application by the creditor. Even if the debtor offers to pay the amounts due after the due date and before the date of the application by the creditor, the creditor is entitled, if he chooses, to refuse to accept the payment, and the Deputy Commissioner is obliged to issue the certificate. 1946 N.L.J. 535.

——S. 13 (3)—Two instalments remaining unpaid—Duty of Deputy Commissioner to pass order —Creditor's right to refuse payment after second instalment falls due.

Under S. 13 (3) of the Relief of Indebtedness Act, the Deputy Commissioner is bound to pass an order terminating the repayment scheme in two consecutive instalments if the debt remain unpaid on the date when the second instalment falls due The creditor is entitled to refuse to accept payment after that date. 1946 N.L.J. 683.

——S. 13 (3)—Order of Deputy Commissioner—Legality—Amount of both instalments paid before order.

The wording of S. 13 (3) of the Relief of Indebtedness Act is imperative and all that the Deputy Commissioner has to do is to ascertain whether two consecutive instalments did or did not remain in arrear. The Deputy Commissioner has no power to grant any extension of time and if he finds, at the very latest at the time that the application by the creditor is made, a cause of action he is bound to pass the order under S. 13 (3) after satisfying himself that the arrears did subsist at that time. Such an order is not **ultra vires** merely by reason of the fact that it was passed after the amount due on both instalments was paid. I.L.R. (1946) Nag. 786=A.I.R. 1947 Nag. 78=1946 N.L.J. 481=226 Ind. Cas. 294.

——S. 13 (3)—State of affairs at time of application is to be looked to.

It is not clear whether sub S. (3) of S. 13 means that instalments must be in arrears when the creditor applies to the Deputy Commissioner or when the Deputy Commissioner passes his order, but it appears that the state of affairs on the date of the application is what should be looked to. A.I.R. (Vol. 33) 1946 Nag. 45=I.L.R. (1945) Nag. 973=1945 N.L.J. 462.

——Ss. 13 (3) and 11 (3)—Defaulted instalments paid but not interest—Instalments, if "remain in arrears."

Under S. 11 (3) of the Relief of Indebtedness Act, the Court "shall" fix the instalment and "may" also fix interest in case of default. Interest is therefore not part of the instalment, but only the penalty which may be fixed for default. Where, therefore, the defaulted instalments alone are paid without the interest due, the instalments cannot be deemed to "remain in arrears" within the meaning of S. 13 (3) of the Act. 1946 N.L.J. 239.

——S. 13 (3)—"Instalment" — Interest if and when forms part of instalment—Duty of Revenue Court.

Under S. 13 (3) of the Relief of Indebtedness Act, the Revenue Court in dealing with debt relief instalments is only concerned with concrete and specific sums described as instalments in the order of the Debt Relief Court. Interest can only form a part of an "instalment" if it is so calculated and described by the Court. Where the Court's order states that the debtor should pay the scaled down debt by certain instalments of a specified sum and also provides for payment of interest on such debt, the Revenue Court in interpreting the word "instalment" in S. 13 (3) cannot say instalment of the specified sum **plus** interest. It is no part of the Revenue Court dealing with an application under S. 13 (3) of the Act to attempt to interpret an order of a Debt Relief Court or discover what the Court **intended** by its order. 1949 N.L.J. 439.

——S. 13—Instalments—Meaning of—Order of Debt Relief Court regarding interest not specifying sums payable—Whether can be treated as instalments.

In dealing with debt relief instalments, the Revenue Courts are only concerned with concrete and specific sums described as "instalments" in the order of the Debt Relief Court. Subsidiary entries in the order or elsewhere regarding interest, etc., which do not specify specific sums payble on specified dates cannot be treated as "instalments". This may be part of the scheme of repayment of the debt, but it is no part, of the scheme of "instalments" which Revenue Courts are directed or empowered to recover under S. 13 of the Debt Relief Act. 1948 N.L.J. 343.

——S. 13 (3)—Certificate granted by Deputy Commissioner — Existence of arrears—Jurisdiction of Civil Court to go into.

The Deputy Commissioner is authorised by S. 13 (3) of the C. P. and Berar Relief of Indeb-

tedness Act, to give the certificate if two consecutive instalments of a debt remain in arrears and it is obvious that he and he alone is empowered to decide whether or not such arrears exist. Scrutiny thereof is not contemplated in the Act by the Civil Court and it follows that if he makes adequate investigation and comes to a conclusion in the matter, he acts with jurisdiction and the question of the propriety or otherwise of his decision cannot bring the civil Courts into the picture. While the civil Courts have power to decide whether the Deputy Commissioner has acted with jurisdiction, they have no power to decide whether he has exercised his jurisdiction rightly or wrongly. I.L.R. (1950) Nag. 314=A.I.R. 1950 Nag. 97=1950 N.L.J. 137.

——Ss. 13 (3) and 12 (2)—Grant of certificate—Power of Deputy Commissioner—Remission of only a minute fraction of land revenue payable by debtor.

The Deputy Commissioner cannot issue a certificate under S. 13 (3) of the Relief of Indebtedness Act if a part of the land revenue due from the debtor has been remitted. It may be that the debtor owns property in several villages and that only a small sum was remitted in one of the villages, but the words "in whole or part" occurring in S. 12 (2) are entirely unambiguous and have to be interpreted as they are. The question whether the debtor's capacity to pay the instalment was impaired or not by the remission of only a fraction of his land revenue is not relevant. 1950 N.L.J. 38.

——S. 13 (3)—Foreclosure preliminary decree—Instalments fixed by Relief Court—Failure to pay two instalments—Deputy Commissioner ordering balance to be recovered as if final decree has been passed—Effect.

Where, after the preliminary decree for foreclosure, the judgment-debtor applies to the Relief Court which makes the amount repayable by fourteen instalments and the judgment-debtor fails to pay two consecutive instalments upon which the decree-holder applies to the Deputy Commissioner who orders that since the order of the Relief Court has ceased to have effect, the balance due should be recoverable as if a final decree has been passed, the order has the effect of the final decree for foreclosure and the decree-holder is entitled to be put in possession of the property. A.I.R. (Vol. 33) 1946 Nag. 45=I.L.R. (1945) Nag. 973=1945 N.L.J. 462.

——S. 13 (3)—Order under—Legality—Claim of one of two legal representatives of deceased debtor not enquired into.

An order under S. 13 (3) of the Relief of Indebtedness Act without enquiring into the claim of one of the two legal representatives of a deceased debtor, who contested the creditor's application, is bad and is liable to be set aside. 1950 N.L.J. 69.

——S. 13 (1) and (3)—Deputy Commissioner rejecting application under sub-S. (3)—If should grant relief under sub-S. (1).

When an application to the Deputy Commissioner specifically made under S. 13 (3) of the Relief of Indebtedness Act fails, it is no part of the Deputy Commissioner's function to proceed to take action under S. 13 (1). It is not a case of granting some minor relief when a major relief is found inadmissible. The reliefs which the different sub-sections provide are entirely different in character. 1950 N.L.J. 38.

4. Sub-S. (3)—Consecutive instalments.

——S. 13 (3)—"Consecutive instalments."

Where the instalment of a particular year is suspended on account of the suspension of the rents of that year, the instalment of the immediately succeeding year becomes payable after that of the immediately preceding year. In other words these two become consecutive. 1946 N.L.J. 112.

——S. 13 (3)—Two consecutive instalments—Meaning of.

The words "two consecutive instalments" in S. 13 (3) of the Relief of Indebtedness Act mean complete instalments and not a part of the instalments. 1946 N.L.J. 681.

5. Sub-S. (3)—Review.

——S. 13 (3)—Order of Deputy Commissioner issuing certificate—Preliminary enquiry to ascertain whether there was ground for seeking Commissioner's sanction to review—Inherent power of successor of Deputy Commissioner to hold.

A Deputy Commissioner has inherent power to hold a preliminary inquiry in order to ascertain whether there was any ground for seeking the Commissioner's sanction to review an order passed by his predecessor issuing a certificate under S. 13 (3) of the Debt Relief Act. That power cannot be questioned on the ground that the inquiry would be infructuous. The time for questioning anything in revision or appeal is when an order is passed in pursuance of the inquiry. 1950 N.L.J. 155.

——S. 13 (3)—Order under—Review—Extension of time for payment of instalments—Power of Deputy Commissioner.

The Deputy Commissioner is empowered to review his own order passed under S. 13 (3) of the C. P. Relief Indebtedness Act. But in reviewing his order, he has no jurisdiction to enlarge the time for the payment of the instalments in default. The penalty unnder S. 13 (3) is incurred on the failure to pay the instalments on the due date and the Deputy Commissioner on an application has to pass an order under S. 13 (3) if the instalments are in arrears at least on the date of the filing of application. It is open to the Civil Court to question the jurisdiction of the Deputy Commissioner. I.L.R. (1948) Nag. 142=(1948) N.L.J. 20=A.I.R. 1948 Nag. 409.

6. Sub-S. (3)—Powers of Extra-Assistant Commissioner.

——S. 13 (3)—Order under—Power of Extra-Assistant Commissioner.

An Extra-Assistant Commissioner exercises all

the powers conferred by the Land Revenue Act on a Deputy Commissioner. He does not become a Deputy Commissioner generally for other purposes as well. He has thus no power to pass an order under S. 13 (3) of the Relief of Indebtedness Act. 1950 N.L.J. 290.

——S. 13 (3)—Order of Debt Relief Court in a case of lahaniegahan mortgage—Powers of executing Court.

A Civil Court executing an order of a Debt Relief Court under S. 13 (3) of the Relief of Indebtedness Act in a case of a mortgage, must enforce the mortgage according to its terms and regard the matter as if a decree in terms of the mortgage had been passed. If the mortgage is a **lahan-gahan** mortgage, an order directing delivery of possession to the decree-holder is right. The Civil Court at that stage is merely an executing Court and therefore cannot exercise the discretion which O. 34, R. 4 (3), C. P. Code, confers on the Court before the stage of final decree either to pass a decree for foreclosure or one for sale.

The Civil Court when executing the order of the Debt Relief Court cannot go behind the Deputy Commissioner's certificate. The only person who could issue notice to the judgment-debtor about the passing of a final decree would be the Deputy Commissioner because the law regarding execution in the Civil Court does not take effect until he has issued his certificate. That being the case, and the Deputy Commissioner acting under the Debt Relief Act not being subordinate to the Civil Court, the latter has no power to go behind his certificate. I.L.R. (1947) Nag. 838=A.I.R. 1948 Nag. 136=1947 N.L.J. 342.

——S. 15 (2)—Sanction for transfer of property—Grant of—Creditor's right to be heard.

Under S. 15 (2) of the Relief of Indebtedness Act, the Deputy Commissioner cannot sanction transfer of the property without giving the creditor an opportunity to be heard. 1946 N.L.J. 680.

——Ss. 16 and 13 (3)—Substitution of legal representatives of deceased party—Case deposited in record room.

Legal representatives of a deceased party cannot obviously be substituted in cases which have been disposed of and are deposited in the record room. It can only be done in current proceedings. The words "so far as may be" which occur in S. 16 of the Relief of Indebtedness Act, cover cases of this sort. 1950 N.L.J. 69.

——S. 19—Order for costs by Debt Relief Court—Jurisdiction of Civil Court to execute—C. P. Code, Ss. 36 and 38.

The Civil Court has no jurisdiction to execute an order for costs passed by the Debt Relief Court. Although the Debt Relief Court has jurisdiction to pass an order for costs, there is no machinery provided in the Act for execution of that order. I.L.R. (1949) Nag. 187=1949 N. L.J. 201=A.I.R. 1949 Nag. 359.

——S. 20—Revision application to District Judge—District Judge, if can make reference to High Court.

Held, right of reference is a substantive one and not mere matter of procedure. District Judge to whom revision application is made under S. 20 of Relief of Indebtedness Act cannot refer the case to the High Court under S. 113 and O. 46, R. 1, C.P. Code. A.I.R. (Vol. 29) 1942 Nag. 8=I. L.R. (1941) Nag. 588=1941 N.L.J. 485=198 Ind. Cas. 824.

——Ss. 20, 23 and 6—Order of Civil Court staying proceedings—Remedy of aggrieved party.

C.P. and Berar Relief of Indebtedness Act provides a complete code of appeal for any person aggrieved by an order of the Debt Relief Court and that procedure cannot be avoided by applying for revision to the High Court against the order of the Civil Court which has acted in obedience to directions received from the Debt Relief Court for which there is provision made in the Act. The correct procedure, therefore, for the persons aggrieved by the order of the Civil Court staying proceedings on notice from the Debt Relief Court, is to raise the questions before the Debt Relief Court and, if that Court came to a conclusion adverse to them, to apply, under S. 20 to the District Court for redress of their grievance. They cannot omit that procedure and agitate the questions in the High Court in the guise of an application for revision of the Civil Court's order, which is merely carrying out the directions of the Debt Relief Court to stay the proceedings. A.I.R. (Vol. 28) 1941 Nag. 268=1941 N.L.J. 391=I.L.R. (1942) Nag. 577=199 Ind. Cas. 453.

——S. 20—Order of District Judge under—Revision to High Court—If lies.

No application for revision of the District Court's order passed under S. 20 of the C.P. Relief of Indebtedness Act in a case coming before it from Debt Relief Court, can be made to the High Court. District Court's order is final. A.I.R. (Vol. 29) 1942 Nag. 5=I.L.R. (1941) Nag. 581=1941 N.L.J. 480=198 Ind. Cas. 155.

——Ss. 20 and 23—Order of Deputy Commissioner under S. 13 (3)—Jurisdiction of Civil Court.

As an order passed by a Deputy Commissioner under S. 13 (3) of the Relief of Indebtedness Act is not one passed by the Debt Relief Court, the limitations imposed by Ss. 20 and 23 of the Act have no effect, and it is open to the Civil Courts to determine whether the Deputy Commissioner had jurisdiction or not, the question depending on the fact whether the instalments did or did not remain in arrears. I.L.R. (1946) Nag. 786=A. I.R. 1947 Nag. 78=1946 N.L.J. 481=226 Ind. Cas. 294.

——S. 23—"Any matter pending before a Debt Relief Court"—Meaning.

The provision in S. 23 which bars the jurisdiction of the Civil Courts "in respect of any matter pending before a Debt Relief Court" must be construed to mean any matter lawfully pending before a Debt Relief Court. A.I.R. (Vol. 29) 1942 Nag. 88=1942 N.L.J. 113=I.L.R. (1942) Nag. 357=200 Ind. Cas. 709.

——Ss. 23 and 11 (1)—Debtor bound by scheme—Whether can file insolvency petition — Provincial Insolvency Act, S. 28.

A debtor who is bound by a scheme framed under S. 11 (1) of the C.P. and Berar Relief of Indebtedness Act, is not entitled to file an insolvency petition and the Insolvency Court has no jurisdiction to adjudge him an insolvent. The vesting of the property in the Insolvency Court under S. 28 of the Provincial Insolvency Act is the test to determine whether the debtor is entitled to make an insolvency application. Such vesting is impossible so long as the scheme under S. 11 (1) of the Relief of Indebtedness Act remains in force, as under S. 15 (2) of that Act the debtor who is bound by the scheme is incompetent to sell his immovable property without the sanction of the Deputy Commissioner. I.L.R. (1946) Nag. 490=224 Ind. Cas. 558=1946 N.L.J. 276=A.I.R. 1946 Nag. 315.

——S. 23—Pre-emption decree passed by Civil Court on basis that transaction by applicant before Debt Relief Court was a sale—Finding by latter that it was a mortgage—Validity of pre-emption decree.

A Debt Relief Court is only concerned with debts, and the subject-matter which is barred in the Civil Courts when a question of debts is pending before a Debt Relief Court must have a very definite relation to those debts. Proceedings in respect of a suit for pre-emption have nothing to do with an application for the settlement of debts. If in a suit for pre-emption the Civil Court passes a decree on the basis that the transaction by the applicant before the Debt Relief Court for settlement of debts was an out-and-out sale, a finding by the Debt Relief Court that it was only a mortgagee does not affect the validity of the pre-emption decree or the rights of parties under that decree. As the matter before the Civil Court trying the pre-emption suit was not one which was pending in the Debt Relief Court, the decision in the Civil Court was not barred and was valid independent of anything that took place in the Debt Relief Court. I.L.R. (1949) Nag. 457=A.I.R. 1949 Nag. 381=1949 N.L.J. 234.

——S. 23—Scope—Decision of Debt Relief Court—Res judicata—C. P. Code, S. 11.

S. 23 of the C. P. and Berar Relief of Indebtedness Act deals with the matters in respect of the jurisdiction of the Civil Courts and the Courts having jurisdiction under the Provincial Insolvency Act and not with the question of **res judicata.** So, the section does not come in the way of the raising of the question of **res judicata**.

If a Debt Relief Court having jurisdiction to entertain the application of the debtor decides that a transaction included by him in his debts is a mortgage and not a sale, that decision operates as **res judicata,** although it does not come under any of the clauses of S. 23 of the Act. The Debt Relief Courts like the Small Cause Courts and Revenue Courts are Courts of exclusive jurisdiction, and it is not S. 11. C. P. Code, but the general principle of **res judicata** that applies to their decisions. I.L.R. (1949) Nag. 220=A.I.R. 1949 Nag. 304=1949 N.L.J. 244.

——S. 23—Preliminary mortgage decree for sale passed against several mortgagors—Application by one of them to Debt Relief Court—Debt scaled down—Right of mortgagee to proceed against other mortgagors—Rights and privileges of debtor-applicant.

Per **Full Bench (Pollock,** dissenting).—If after a preliminary decree for sale is passed in a mortgage suit against several mortgagors, one of them applies to the Debt Relief Court which scales down the whole of the debt and gives him the right to redeem the whole mortgage on his paying the reduced amount and also grants him instalments, it is open to the mortgagee to proceed against the rest of the mortgagors in respect of the whole debt and to throw the entire burden on to the remaining property excluding the debtor-applicant's share. The remaining mortgagors will of course be entitled to credit for such payments as the debtor-applicant may make. The order of the Debt Relief Court has the effect of not only releasing the debtor-applicant's share in the mortgage from liability in the civil suit but also the debtor-applicant himself. This does not have the effect of splitting up the mortgage or releasing the others from liability.

S. 23 (1) of the Relief of Indebtedness Act only excludes the jurisdiction of the Civil Courts in respect of the **recovery** of the debt against the debtor-applicant. It does not touch the privileges and the rights which he has obtained under the preliminary decree. Therefore he must be given the privilege of redeeming the whole on payment of the whole, if he wants, because the preliminary decree gives him that privilege and the Debt Relief Court does not take away the privilege. But so far as his liabilities go, the jurisdiction of the Civil Courts is barred. Therefore, if he does not redeem, the mortgagee cannot proceed against either his property or him and must content himself with his rights against the rest and their share in the property. I.L.R. (1947) Nag. 1=229 Ind. Cas. 360=1947 N.L.J. 55=A.I.R. 1947 Nag. 61 (F.B.).

——S. 23—Mortgage — Final decree for sale against two persons—One only obtaining reduction of debt under Act—Proper order.

When a final decree for sale of a mortgaged property has been passed against two persons, one of whom obtains a reduction of the debt by the Debt Relief Court while the other is not entitled to apply to that Court, the proper order to pass would be that the decree-holders should execute their decree to the extent of half the decretal amount against the debtor who had not gone to the relief Court in respect of the half of the mortgaged property owned by him on condition that the decree-holders will realise only half of the amount settled by Debt Relief Court from the other judgment-debtor. A.I.R. (Vol. 31) 1944 Nag. 241 =1944 N.L.J. 240=I.L.R. (1945) Nag. 232=219 Ind. Cas. 248.

——S. 23 (a)—Jurisdiction of the Civil Court to execute an award having the force of a decree under the Co-operative Societies Act is not barred owing to the fact that defaulting member's application was pending before the Debt Conciliation Board, and had not been transferred to the Debt Relief Court. 1942 N.L.J. 38.

——S. 24—"Debt" in S. 24 means debt of the person who has made an application to the Debt Relief Court. A.I.R. (Vol. 31) 1944 Nag. 277=1944 N.L.J. 271.

——S. 24—Limitation.

Decretal debt determined and instalment fixed—Execution against surety — Period of proceeding cannot be excluded in computing limitation against surety. A.I.R. (Vol. 31) 1944 Nag. 277=1944 N.L.J. 271.

——S. 26, Proviso—Creditor's application.

The expression "all proceedings" in the proviso to S 26 includes application of the creditor, as well as the debtors. A.I.R. (Vol. 32) 1945 Nag. 292=I.L.R. (1945) Nag. 664=1945 N.L.J. 358.

——S. 26-A, 24, 23, and 26—C. P. Debt Conciliation Act, S. 21—Proceedings before Debt Conciliation Board transferred to Debt Relief Court—Limitation for suit — Exclusion of period of pendency before Debt Relief Court.

When proceedings before the Debt Conciliation Board are transferred to the Debt Relief Court, the proceedings remain pending in the latter Court till action is taken under S. 26-A (2) of Relief of Indebtedness Act. Question of the jurisdiction of the latter Court is immaterial. As long as the proceedings remain so pending, the jurisdiction of the Civil Court is barred to deal with the matter. Hence this period of pendency shall be excluded in computing the period of limitation for suit. A. I. R. (Vol. 32) 1945 Nag. 292=I.L.R. (1945) Nag. 664=1945 N.L.J. 358.

C. P. AND BERAR RELIGIOUS AND CHARITABLE TRUSTS ACT (17 OF 1937).

——Act, if ultra vires.

The Act is not ultra vires the Provincial Legislature. A.I.R. (Vol. 32) 1945 Nag. 266=I.L.R. (1945) Nag. 837=1945 N.L.J. 335.

——S. 12—Application under, for action under S. 10—Maintainability.

Since no notifications under S. 1 (2) of the (Central) Charitable and Religious Trusts Act, 1920, and S. 17 (2) of the C.P. Act, are issued by the C.P. Government, an application under S. 12 of the C.P. Act for action under S. 10, is not tenable. A.I.R. (Vol. 32) 1945 Nag. 266=I.L.R. (1945) Nag. 837=1945 N.L.J. 335.

——S. 12—Application under—Scope of enquiry—Enquiry into past administration and for redress—Proper remedy.

Where in an application under S. 12, C.P. and Berar Religious and Charitable Trusts Act what is being asked is an enquiry into past administration and redress for the same, the relief claimed is clearly beyond the scope of the Act, and the proper remedy would be by a regular civil suit. A. I.R. (Vol. 27) 1940 Nag. 262=1940 N.L.J. 173 =188 Ind. Cas. 320.

——Ss. 12 and 10—Application signed only by two persons empowered by more than three persons—Validity.

Under S. 12, C. P. Religious and Charitable Trusts Act the application must be signed by three persons and where it is signed by only two persons it cannot be assumed that because two applicants have been empowered by more than three persons the application itself is to be deemed to be made by three or more. Just as under S. 92 of the C.P. Code, a minimum of two persons is prescribed for taking action under S. 12, the written report itself has to be made by three persons. The idea is that three persons represent those having interest in the public trust and the Legislature does not contemplate that these three persons in their turn be represented by a smaller number Order VII, R. 4, C.P. Code is not applicable to such a case.

Where an application under S. 12 is signed by only two persons the defect is not curable as it means that the application was bad at its institution and amendment could not better it. A.I.R. (Vol. 27) 1940 Nag. 262=1940 N.L.J. 173=188 Ind. Cas. 320.

——Ss. 13 and 16—Lists not maintained—Operation of Act.

In the absence of rules by the Provincial Government under S. 16, S. 13 cannot be given effect to. The fact that the Deputy Commissioner has not maintained a list of public trusts, would not enable a Court to hold that the Act did not come into force. The Act is rendered a dead letter only by reason of the exemption given in R. 17 (1) (d). A.I.R. (Vol. 32) 1945 Nag. 266=I.L.R. (1945) Nag. 837=1945 N.L.J. 335.

——S. 17—Applicability — Trusts governed by Central Act of 1920.

The C. P. Act does not apply to a trust governed by the (Central) Charitable and Religious Trusts Act, 1920. The words 'apply' in Cl. (a), and 'govern' in Cl. (b) of S. 17 have the same meaning, though this construction would result in making the Provincial Act a dead letter A.I.R. (Vol. 32) 1945 Nag. 266=I.L.R. (1945) Nag. 837=1945 N.L.J. 335.

CENTRAL PROVINCES REVENUE BOOK CIRCULAR.

——Vol. II—S. 4 (3), R. 39—"Dastaki" appointments—Interference by Chief Controlling Revenue Authority.

"Dastaki" appointments are more in the nature of token appointments which have no concern with the revenue administration of the locality. Exceptional circumstances must therefore be shown to exist for intervention by the Chief Controlling Revenue Authority in orders relating to "dastaki" appointments. 1948 N.L.J. 88.

C. P. AND BERAR REVISION OF THE LAND REVENUE OF ESTATES ACT (1 of 1939).

——Validity.

The Act operates from July 1, 1938 and consequently fastens on the contracts (if there be any) as opposed to a grant, between the parties made in 1920 and 1924 not to collect more than a certain amount of land revenue during specified future periods. Consequently, it does not operate on any interest in or over immovable property and in so far as the Act fastens on contracts, it is not **ultra vires** because it has received the assent of the Governor-General. A.I.R. (Vol. 31) 1944 Nag. 201=I.L.R. (1944) Nag. 180.

C. P. AND BERAR SALES OF MOTOR SPIRIT AND LUBRICANTS TAXATION ACT (14 OF 1938).

——S. 3—Provisions of Act, if ultra vires—Government of India Act, 1935 (25 and 26 Geo. V, Ch. 42), S. 100, Sch. VII, Lists I and II.

Per **Gwyer, C. J., Sulaiman and Jayakar, JJ., concurring.**—The power to make laws with respect to duties of excise given by the Constituion Act to the Federal Legislature is to be construed as a power to impose duties of excise upon the manufacturer or producer of the excisable articles, or at least at the stage of, or in connection with, manufacture or production and it extends no further. Thus, the Central Legislature will have the power to impose duties on excisable articles before they become part of the general stock of the Province, that is to say, at the stage of manufacture or production, and the Provincial Legislature, an exclusive power to impose a tax on sales thereafter. Consequently the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, is not **ultra vires**, the Legislature of the Central Provinces and Berar.

Per **Sulaiman, J.**—There is really nothing absolutely irreconcilable between excise duty mentioned in Entry No. 45 of List I and tax on retail sales included in Entry No. 48 of List II, Government of India Act. They can be mutually exclusive so as not to bring in operation the provisions of S. 100 at all. Excise duties can be imposed by the Centre on motor spirits and lubricants manufactured or produced at the place or in the Province of their origin, while the Central Provinces and Berar can impose a tax on the retail sale of all such goods (both Foreign and Indian) within the Province. Giving to the words "taxes on the sale of goods" as used in the Provincial Legislative List, Entry No. 48, their ordinary and natural meaning, and comparing them with the words "duties of excise on goods manufactured or produced in India" as used in the Federal List, Entry No. 45, the tax on the retail sales to the consumers is in pith and substance not an excise duty, and therefore, the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, and all the provisions thereof are not **ultra vires** of the Legislature of the Central Provinces and Berar.

Per **Jayakar, J.**—As regards goods centrally excisable, taxes on their sale within the Province for purposes of consumption, when such taxes are in no way connected with their production, manufacture, etc., within the Province, but are imposed on their sale in the Province merely as existing articles of trade and commerce, should be exclusively within the competence of the Provincial Legislature. Save as aforesaid, all duties of excise on those goods, whether levied and collected at the stage of manufacture, production or any subsequent stage up to consumption (exclusive of sale in the Province, as stated above), should remain exclusively within the competence of the Centre. A corollary of this rule will be that the residuary powers, if any, of levying and collecting excise duties on those goods (save on their sales as aforesaid) will remain exclusively within the competence of the Central Legislature. A.I.R. (Vol. 26) 1939 F.C. 1=1939 M.W.N. 25=49 M.L.W. 36=5 B.R. 405 (2)=20 P.L.T. 197=1939 O.L.R. 144=43 C.W.N. 1=I.L.R. (1939) Kar. F.C. 6=1939 F.C.R. 18=180 Ind. Cas. 161=(1939) 1 M.L.J. (Supp.) 1 (F.C.).

C. P. AND BERAR SALES TAX ACT (21 OF 1947).

——S. 2 (g)—"Sale"—Test—Order placed with printing press for printing pamphlets—Delivery of pamphlets not taken—Transaction, if sale.

Where goods are merely ordered but delivery is not given or taken and there is nothing from which it can be ascertained that the property in the goods has actually been transferred from the seller to the buyer it cannot be said that there was a sale as defined in S. 2 (g), C. P. and Berar Sales Tax Act. A contract of sale is not the same thing as sale. Where therefore an order was placed with the owner of a printing press for printing certain pamphlets but delivery of those pamphlets was not taken, the transaction does not amount to a sale. I.L.R. (1950) Nag. 991=4 A.I.Cr.D. 723=1950 N.L.J. 558.

——S. 2 (g), Expl. II—Trading concern sending goods outside State to its agents for disposal—Liability to pay sales tax.

Where a trading concern having its principal place of business in Madhya Pradesh despatches goods to its agents outside the State for disposal, and the invoice specifically states quantities, rates, total price, discount, etc., and the account books are entered up from the invoices, the whole transaction is a trading one and not a mere transfer of goods from one warehouse to another, and is covered by Explanation II below S. 2 (g) of the C. P. and Berar Sales Tax Act. There is an implied contract of sale between the trading concern and its agents outside the State and it must be deemed to have been made in the State. The transaction in question is therefore liable to the payment of sales tax. 1950 N.L.J. 277.

——S. 4 (1)—Private concern converted into private limited company—If different entities.

Where the private concern of a single individual is converted into a private limited company, the

latter is not the same entity as the previous single proprietary concern. Legally they are not identical for the purposes of determining the taxable turnover. 1950 N.L.J. 63.

——Ss. 4 (1) and 8 (1)—"Year"—Meaning of—Dealer maintaining accounts from Diwali to Diwali—When liable to get himself registered.

The word "year" in S. 4 (1) of the C. P. and Berar Sales Tax Act means the "year" as defined in S. 2 (j) of the Act, and not the 12 months preceding the 1st June, 1947, the date on which the Act was brought into force. Where a dealer maintains accounts from Diwali to Diwali and he exercised his option under S. 2 (1) (a) by making his year Diwali year his gross turnover for the period between the 4th November, 1945, and the 24th October, 1946, must exceed the taxable quantum to render him liable to get himself registered under S. 8 (1) of the Act. 1950 N.L.J. 63.

——S. 22 (5) and R. 57, Proviso—"Substantial question of law"—Question of liability to pay sales tax.

Under the proviso to R. 57 of the Rules under the C. P. and Berar Sales Tax Act, a revision application cannot be entertained unless it raises a "substantial question of law." Where the point raised is the liability of the applicant to pay any sales-tax at all, the question of law must be regarded as substantial because it affects the practical issue fundamentally. If the arguments adduced on the applicant's behalf were not adduced earlier, the Revisional Authority cannot reject the application summarily on that ground or refuse to consider them. The Revisional Authority, which is in a sense a superintending authority, would not be violating the law or exceeding its authority if it gives a decision on merits in the case. 1950 N.L.J. 277.

——S. 22 (5)—Revisional application against Commissioner's revisional order—Jurisdiction of Board.

Under S. 22 (5) of the C. P. and Berar Sales Tax Act, the Board has jurisdiction to entertain a revision application against an order passed in revision by the Sales Tax Commissioner. The words "in like manner" in S. 22 (5) cannot be interpreted to mean that the Board can only entertain a revision application against the Commissioner's appellate order but not against the Commissioner's revisional order. 1950 N.L.J. 63.

CENTRAL PROVINCES SETTLEMENT CODE.

——Art. 223—Sewaijama, meaning.

Under Art. 223, sewaijama includes the produce of forest lands. But such produce means the normal annual produce. A malguzar's sewaijama does not include the wholesale cutting down of timber trees. 13 N.L.R. 1=38 Ind. Cas. 686.

CENTRAL PROVINCES STAMP LAW RULINGS CIRCULARS (1887)

——Nos. 7, 9, 11 and 12—Agreement must be for price paid or promised.

An agreement for sale of goods or merchandise within the meaning of the C. P. Stamp Law Rulings Circulars Nos. 7, 9, 11 and 12 of 1887 is one in consideration of a price paid or promised and not one to deliver goods in exchange for goods and further it must be unattested. 98 Ind. Cas. 631=A.I.R. 1927 Nag. 72.

C. P. STATES LAND TENURE ORDER, (1949).

——Cls. 3 and 27—Retrospective effect.

The provisions of Cls. 3 and 27 of the C. P. States Land Tenure Order, 1949, were brought into force with effect from the 16th March, 1949, and are inapplicable to a case where the ryot died before that date. Such a case must be decided in accordance with the State wajib-ul-arz as it existed on the date of the death of the ryot. 1950 N.L.J. 141.

C. P. AND BERAR TEMPLE ENTRY AUTHORIZATION ACT

——Ss. 8 (2) (c), 3 (1) and 6 —"Worship"—Meaning—Rules regarding religious service not made—Conviction for preventing worship by member of excluded class—If sustainable.

The word "worship" in S. 3 (1) of the C. P. and Berar Temple Entry Authorization Act must be construed in the terms of its definition in S. 2 (c) of that Act. The religious service which members of an excluded class may at present offer in a temple is not only that which the bulk of the worshippers may offer or participate in but a religious service which is in accordance with rules, and regulations to be made under the Act. If such rules and regulations have not been made, it is not possible for the Court to determine the exact nature of the religious service which a member of an excluded class is entitled to take part in or to offer. Therefore, in the absence of rules and regulations, it is not open to the Court to hold that a person acted illegally in preventing a member of an excluded class from offering worship in a temple, and his conviction under S. 6 of the Act cannot be sustained. I.L.R. (1949) Nag. 421=A.I.R. 1949 Nag. 383 =51 Cr.L.J. 95=3 A.I.Cr.D. 559=1949 N.L.J. 508.

C. P. AND BERAR TEMPORARY POSTPONEMENT OF EXECUTION OF DECREES ACT (16 OF 1938).

——S. 3—Application under—Requisite amount paid—Duty of Court.

When a judgment-debtor applies under S. 3 and pays the amount required under that section and prays for stay of execution and release of his attached cattle, the Court cannot decline the latter relief on the ground that the judgment-debtor was a dishonest debtor whose object was merely to avoid payment of the debt. A.I.R. (Vol. 27) 1940 Nag. 284=188 Ind. Cas. 432.

——S. 3 (3)—'Livestock'—Cattle of judgment-debtor if included.

The cattle of the judgment-debtor are livestock

within the meaning of S. 3 (3) of Postponement of Execution of Decrees Act. The words "of a perishable nature" cannot be read along with the word "livestock." Those words appear to be intended to qualify other movable property. A.I. R. (Vol. 27) 1940 Nag. 284=188 Ind. Cas. 432.

CENTRAL PROVINCES TENANCY ACT (9 OF 1883).

——S. 38 (2)—Interest.

For the purposes of S. 38 (2) of the Tenancy Act of 1883 (or S. 41 (2) of the Act of 1898, which is identical with it) interest on previous mortgage for five years or for the period since its executoin whichever is greater should be included as part of the sum secured thereby. 64 Ind. Cas. 99=A.I.R. 1921 Nag. 161.

——S. 38 (2)—"Interest"—Meaning of.

"Interest" in S. 38 (2) means a compensation for the use of money or grain and therefore includes a re payment in cash or in grain. 10 N. L.R. 21=23 Ind. Cas. 213.

——S. 38 (2)—Mortgage of occupancy holding—Notice—When necessary—Interest.

The test for determining whether notice to the landlord is necessary on the mortgage of an absolute occupancy holding is the rent of the entire holding if the entire holding is to be transferred or so much as corresponds with the portion intended to be transferred if only a part is to be transferred. In applying the test prescribed by S. 38 (2), 1883), the whole interest payable for the succeeding 5 years should be taken into consideration even though repayment in full in contemplated within 5 years. 8 N.L.R. 147=17 Ind. Cas. 370.

——S. 38 (2)—Mortgage.

A Zur-i peshgi lease is usually nothing less than a mortgage and might well be held to be included in the term "mortgage" in S. 38 (2) of the Tenancy Act. 64 Ind. Cas. 99=A.I.R. 1921 Nag. 161.

——S. 42—Applicability to mortgages.

S. 42 of Tenancy Act (1883) applies only to sales of three specified kinds and not to mortgages whether by conditional sale or of any other kind. 7 C.P.L.R. 25, foll. 8 N.L.R. 123=17 Ind. Cas. 129.

——S. 42—Vendor and Vendee—Decree not containing express direction for sale of judgment-debtor's rights in sir land due to agreement between parties—Vendor cannot plead the statute as objection to vendee's claiming those rights.

Where the decree did not contain an express direction for the sale of the judgment debtor's rights in the sir land due to the fact that by agreement of the parties the question was purposely left open, **held**, that the judgment debtor was prevented by estoppel from setting up the plea that as there was no sale of his rights in the sir land expressly directed by the decree, the auction-purchaser by virtue of S. 42 of the C.P. Tenancy Act was not entitled to those rights. 48 I.A. 220=48 Cal. 591 =19 A.L.J. 361=61 Ind. Cas. 769=34 C.L.J. 1=25 C.W.N. 938=14 M. L. W. 228=1921 M. W.N. 310=17 N.L.R. 84=A.I.R. 1921 P.C. 13=40 M.L.J. 418 (P.C.).

——S. 43—Suit by landlord against a transferee of tenant—Limitation Act, Art. 91.

To a suit by the landlord against the transferee of a tenant in C.P. Who has taken possession of a holding in execution of a decree on a mortgage voidable at the instance of the landlord, Art. 91 of the Limitation Act (1908), 1st Schedule, is inapplicable. The transfer is binding on the tenant and cannot be cancelled by the landlord though it can be declared void as against him. 18 N.L. R. 11=76 Ind. Cas. 884=A.I.R. 1922 Nag. 60 (b).

——S. 43—Transfer of possession of occupancy-holding — Unauthorised alienation — Ejectment — Jurisdiction.

Under the Rent Law of the Central Provinces contained in Act 9 of 1883 as amended by Act 17 of 1889, the Civil Courts have jurisdiction to deal with a suit for ejectment when a tenant having a non-transferable holding made an alienation and parted with the possession of a holding.

The right to institute a civil suit upon an alienation which took place in 1892 was not taken away by Act 11 of 1898 the provisions of which, in this respect, are not retrospective. S. 43 of Act 9 of 1883 refers to the transfer of an entire holding and not to a portion thereof. (1908) 12 C.W.N. 636=35 C. 470=7 C.L.J. 499.

——S. 50-B (2)—Applicability—Village service tenure—Two Kotwars—In the settlement one selected for service and the other recorded as sub-tenant of the first—In the next settlement this arrangement not recorded and sub tenant dispossessed—Right to possession and record of his life-tenancy.

At the last settlement the Settlement Officer decided that one Kotwar sufficed for the village. Of the two Kotwars one was retained by lot and the other dismissed. The latter was however to retain possession of the field under his cultivation as sub-tenant of the retained Kotwar, paying him the assessed rental as embodied in the Settlement Record and **Wajib ul-arz**. At the current settlement the entire village service holding was recorded in the sole name of Kotwar's son and the new **Wajib-ul-arz** omitted the clause as to the sub-tenancy. On ejectment the sub tenant sued for re-instatement in possession and correction of the new **Wajib-ul-arz**.

Held, a right of sub-tenancy was created in favour of the Kotwar whose services were dispensed with and he is entitled to remain in possession of the field in his cultivation and the new **wajib-ul arz** should be modified by insertion of an entry that the sub-tenancy enjoyed by him until ejectment will enure for his life time only.

Held, also that the case was not governed by S. 50 B (2) of the Tenancy Act, 1883. 18 N.L. R. 34=A.I.R. 1922 Nag. 158.

COMPARATIVE TABLE OF C. P. TENANCY ACTS OF 1898 AND 1920.

C.P. Tenancy Act, 1898.	C.P. Tenancy Act, 1920.	C.P. Tenancy Act, 1898.	C.P. Tenancy Act, 1920.	C.P. Tenancy Act, 1898.	C.P. Tenancy Act, 1920
			Do.		
1	1	36		58 (2)	46 & 47
2 (1)	2 (1)	37	90 ..	59	37 amended
2 (2)	2 (3)	38		60	38 (1)
2 (3)	2 (4)	39	4	61	40 amended
2 (4)	2 (5)	40 (1)	8	61-A	41
2 (5)	2 (6)	41 (1)	5 & 6 (1)	62	..
2 (6)	2 (7)	41 (2)	6 (2) amended	63	..
2 (7)	2 (8)	41 3 (*a*)	6 (4) *a*	64	..
2 (9)	2 (10)	41 3 (*b*)	..	65	..
2 (10)	2 (11)	41 (4)	6 (1) *b*	66	..
3	3 amended	41 (5)	6 (4) *c*	67	..
4	59	41 (6)	6 (5)	68	..
5	60	42	7	69	..
6	61	43	9 (1)	70	..
7	..	44	10 amended	71	..
8	68 amended	45 (1)	49 (1)	72	..
9 (1)	70 (2)	45 (2)	50 (1) & (2) amended	73	..
9 (2)	..	..		74	78
9 (3)	..	45 (3)	49 (2)	75	79 amended
10	74 amended	45 (4)	51 (2)	76	80
11	75 (1)	45 (5)	..	77	81
12	77	45 (6)	49 (3)	78	..
13	56	47 (7)	105 (*g*)	79	..
14	57	46 (1)	11 amended	80	82
15	62	46 (2)	12 (2)	81	83
16	63	46 (3)	12 (1) i & ii & (3)	82	84
17 (1)	64 (1) amended	46 (5)	12 (4)	83	85
17 (2)	64 (2)	47 (1)	13	84	..
17 (3)	..	47 (2)	14 (3)	85	..
18	65	48	14 (1) & (2)	86	86 amended
19, 20, 21, 22	..	48 Proviso	14 Proviso	87	27
23 (*a*) & (*b*)	20 (*a*) (*b*)	49	15 amended	88	28
24, 25, 26, 27	..	50 (1) & (2)	..	89	29
		50 (3)	15 (2) amended	90	..
28	22	51	16 Do.	91	..
29	..	52	25	92	100
30	88	53	91	93	103
31 (1)	52 amended	54	92	94	104 amended
31 (2)	53 Do.	55	42 amended	95	105 Do.
32 (1)	30	56 (1)	43	96	107
32 (2)	31 (1) & (2)	56 (2)	44 (1)	97	106
33 (2) & (3)	33 (1) & (2)	56 (3)	44 (2)	98	108
34	55	57	..	99	109
35	89 amended	58 (1)	45	100	111

CENTRAL PROVINCES TENANCY ACT (11 OF 1898).

——Jurisdiction.

Suit by tenant to maintain a person as his sub-tenant is cognizable only by the Revenue Court. A.I.R. 1923 Nag. 4.

——Landlord—"Landlord" must act as a whole proprietary body.

Anything which the landlord is required or authorised to do under the Tenancy Act must be done by the whole proprietary body or by an agent acting on their behalf. 4 N.L.J. 138=63 Ind. Cas. 352=A.I.R. 1921 Nag. 12.

——Co-Sharer landlords—Ejectment suit for—Lambardar's right to sue alone.

Under the Central Provinces Act, a lambardar is not alone entitled in the absence of the other co-sharers, to bring a suit for ejectment. He is not an agent for the co-sharers for any other purpose than that of representing them in their dealings with Government. 12 C.L.J. 104=37 C. 694=6 Ind. Cas. 389.

——Trees—Tenant's right as regards trees in his holding.

Under the C. P. Tenancy Act, 1898, the tenant's rights as regards trees in his holding were not defined and the law was that the landlord was the

owner of the trees and entitled to carry away the corpus of the trees which was severed from the soil, whilst the tenant was only entitled to the fruit and flowers forming the natural annual produce of the trees standing on his holding. All that a tenant can transfer is the fruit of the trees and not the trees themselves. The tenant cannot transfer the right beyond the substance of his own tenancy and on his death any right transferred by him will also lapse. A.I.R. (Vol. 20) 1933 Nag. 265=16 N.L.J. 163=146 Ind. Cas. 982.

——S. 2—Tenant—Holder of land for growing vegetables.

Where land is let for the purpose of growing vegetable crop, the holder of such land comes within the category of a tenant as defined in the Tenancy Act because cultivation of gardens, orchards or planting of agricultural gardens is a species of agriculture, and there is nothing inherently impossible which would prevent the holder of such land from claiming to acquire the status of a tenant on the basis of such letting of the land to him. The mere circumstance that the period or the term for which he holds the land is only a part of the year or particular season of the year does not and ought not to make any difference in his status. 9 N.L.J. 215=97 Ind. Cas. 694= A.I.R. 1927 Nag. 19.

——S. 2—Tenant, rights of—Whether may be joint family property.

There is no warrant for the proposition that the rights of a tenant cannot be joint family property. 57 Ind. Cas. 339 (N.)

——S. 2—Tenancy cannot be acquired by prescription.

In the Central Provinces a tenancy cannot be acquired by prescription. A person who occupies land without the consent of the landlord and claims to hold it as a tenant, does not hold even the limited right of a tenant adversely to the landlord. 1 N.L.R. 163=17 Ind. Cas. 606.

——S. 2—Land let for cultivation of water nuts.

A village tank which is let for the cultivation of water nuts is not land let or occupied for agricultural purposes or for purposes subservient to agriculture within the meaning of the Act and the cultivator is not a tenant. 11 N.L.R. 49=28 Ind. Cas. 689.

——S. 2—Land let or occupied for agricultural purpose.

A village tank over which the landlord gives a right to fish and grow water nuts (singhara) is not land let or occupied for agricultural purposes or for purposes subservient to agriculture. 11 N. L.R. 122=31 Ind. Cas. 294.

——S. 2—Agricultural purpose—Meaning.

The term "agriculture" is not confined to the cultivation by annual tilling, ploughing and sowing of that which yields an annual crop, cultivation of betel (pan leaf) is an agricultural purpose. Everything treated as 'agricultural' by settlement authorities must be so treated by Civil Courts. 12 N.L.R. 57=33 Ind. Cas. 497.

——S. 2 (6) "Landlord"—Meaning.

The term "landlord" in the Act denotes in a village with more than one proprietor, the whole body of landlords so that anything that a landlord is required or authorised to do under the Act must be done by the whole proprietary body or an agent acting in their behalf. 12 N.L.R. 24=33 Ind. Cas. 758.

——S. 5—Mortgage without consent of malguzar —Validity.

There is no authority for saying that a mortgage which has not been consented to by the malguzar must be held to be in abeyance, to have no real existence and to be in fact void until it is so consented to by the malguzar and can, until it is so consented to, have no priority against another mortgage of a later date. As between the mortgagor and mortgagee a mortgage is valid unless and until it is avoided by the malguzar. 19 N.L. R. 10=71 Ind. Cas. 325=A.I.R. 1923 Nag. 91.

——S. 6—Applicability—Exchange of land between two tenants.

The provisions of S. 6 (old) of the Tenancy Act were intended to apply only to a unilateral transaction by a tenant and not to a bilateral transaction like an exchange of land between two tenants of the same village. 1948 N.L.J. 384.

——S.6—Decree for rent transferred for execution to Collector—Collector permitting tenant to sell privately portion of holding—Landlord's right of pre-emption—C. P. Code, O. 21, R. 83 and Sch. 3, Para. 11.

In execution of a decree for arrears of rent obtained by the landlord, the Collector, to whom the decree was transferred for execution, gave permission to the defaulter tenant to sell privately a portion of the holding. On an application by the landlord for pre-emption under S. 6 of the old Tenancy Act,

Held, that as the decree was one for arrears of rent of an absolute occupany holding which was a first charge on the holding the permission given by the Collector could not be under O. 21, R. 83, C.P. Code, which could not be invoked if the property was directed to be sold in execution of a decree for sale in enforcement of a charge on such property. It could only be regarded as an open permission given to the judgment-debtor under paragraph 11, Sch. 3, C.P. Code, releasing a portion of the property in the hope that the judgment-debtor would negotiate a private sale and find the money to satisfy the decree. Such a transaction was not a sale "in pursuance" of the decree, but only because of the decree. The sale being a private one, a right of pre-emption accrued to the lanlord under S. 6 of the Tenancy Act. 1948 N. L.J. 373.

——Ss. 11 and 13—Admission of two to tenancy —Payment of rent jointly—Death of one of tenants —Landlord's rights.

Where an owner of property carves a lesser interest, such as a tenancy, out of his rights, the reversion remains in him, but when the reversion falls in, there is no transfer of title from the tenant to

himself. He has retained to himself his title intact all the time but his right to possession and to the exercise of certain other acts of ownership remains in abeyance until the lesser right which he has created in the land is determined. If then he chooses to place two persons on the land giving each a right to uninterrupted possession of the whole upon their paying him jointly the whole rent, his reversion cannot fall in until the rights of both have determined. It is not a question of survivorship as ordinarily understood, and is certainly not a question of the landlord, succeeding to the deceased tenant as his heir. The rule is not one of succession or of a transfer of title, but that the reversion falls in when the lesser interests carved out of the estate have determined.

It is on this principle that one co-tenant is not allowed to surrender his undivided share in a holding which has not been divided by metes and bounds. (1938) 175 Ind. Cas. 536=I. L. R. (1940) Nag. 255.

——Ss. 21 and 32—Permanent lease by Thekadar —Improvement by tenant—Compensation — Landlord if bound by equities affecting Thekadar.

A Munsif authorised under the C.P. Tenancy Act to assess compensation for improvements in a holding with the aid of assessors commits an irregularity, if he does not associate them in doing so, which may however be waived by the parties. An unregistered lease "for ever" by a Thekadar cannot confer any permanent title though the lessee may have been in possession under it for a long time, nor the assent of the Zamindar in guarded terms has such an effect. If a tenant under a bona fide belief that his tenancy is permanent makes permanent improvement with the knowledge of the landlord, he is entitled to compensation on ejectment. A landlord who gets possession of his holding by the surrender of the person who held it and who gave a permanent lease for valuable consideration may be bound by the equities binding on the surrenderor. 26 Ind. Cas. 476 (Cal.).

——S. 32—Compensation—Tenant's right to.

Compensation for improvement can be claimed only if tenant is ordinary or occupancy tenant—Sub-tenant can claim it only if landlord has consented to improvement. A.I.R. 1922 Nag. 47.

——S. 32—Improvements by Tenant bona fide made—Compensation—Landlord whether bound by equities binding on his Thekadar.

A tenant who makes an improvement under a bona fide belief that he is a permanent tenant, within the knowledge of his landlord, which are also beneficial to the other holdings of the landlord is entitled to get compensation for ejectment. A landlord getting possession of a holding by surrender of a person who has given permanent lease for valuable consideration is bound by the equities binding upon the person surrendering. 26 Ind. Cas. 476 (Cal.).

——S. 33—Assessor—Failure to appoint—Irregularity.

A Munsif at the time of assessing compensation for an improvement of a holding should under rules of the section 33 takes them, he commits an irregularity which however is such as can be waived. 26 Ind. Cas. 476 (Cal.)

——S. 35—Surrender of portion—Validity.

Surrender of portion of holding is invalid. 18 N.L.R. 82=64 Ind. Cas. 902=A.I.R. 1922 Nag. 216.

——S. 35—Abandonment of undefined share of holding—Landlord—Right of re-entry.

A claim for partition of a holding and for separate possession of the share of the tenant based on the allegation of abandonment or impled surrender of an undefined share of the holding is not sustainable. There is no abandonment or implied surrender of a holding where a person has either paid rent or tendered it. 13 N.L.R. 175=42 Ind. Cas. 270.

——S. 35—Surrender of portion of holding with consent of landlord.

According to the rule referred to in 14 C. P. L.R. 33 a tenant cannot give up a portion of the holding without the landlord's consent but if a landlord has accepted the surrender of a defined portion of a holding and allowed the tenant to continue as tenant of the remainder on a defined rent, the tenant cannot resile from the transaction. 7 N.L.R. 8=10 Ind. Cas. 692.

——S. 35 (4)—Surrender—Holding left uncultivated without payment of rent for more than two years.

Where a tenant leaves his holding uncultivated and without paying its rent for a period of more than two years his tenancy is deemed to have been surrendered under S. 35 (4).. The malguzar cannot at his option treat the tenancy as still subsisting and make the tenant liable for the rent of the subsequent years. There is no right of forfeiture in such cases which the malguzar can be said to have waived by applying for ejectment. 120 Ind. Cas. 334=A.I.R. 1930 Nag. 139.

——S. 35—Surrender, when implied.

An ordinary tenant is deemed to leave the holding uncultivated and the rent of it unpaid after a transfer (after which he leaves the village), even if it is cultivated by the transferee who is not a sub-tenant or the malguzar or anybody else and the rent is paid in full. There is clearly an implied surrender. A.I.R. 1923 Nag. 4.

——S. 35 (4)—Implied surrender—Doctrine of.

The doctrine of implied surrender in S. 35 (4) of the Act of 1898 is intended to apply to normal circumstances where the landlord of the person, put in by him, holds adversely to the tenant. Where, however a female holder alienates an occupancy tenancy and the alienation is not for legal necessity, the alienee does not begin to hold adversely to the ultimate reversioner until the death of the female holder, and the doctrine of implied surrender has no application to such a case. 48 Ind. Cas. 623 (N.).

——S. 35 (4)—Applicability—Case of obstruction by landlord.

S. 35 (4) of the C. P. Tenancy Act, (1898) has no application where the case is not one of voluntary inaction on the part of the tenant but one of obstruction on the part of the landlord. 14 N.L.R. 176=48 Ind. Cas. 188.

——S. 35 (4)—Death or abandonment by tenant—Landlord if bound to wait for 2 years.

If an occupancy or ordinary tenant abandons his land or dies, the landlord is not bound to wait for two years before a putting in some one else as his tenant. In the case of the death of the tenant, if the real heire does not come forward to take up the tenancy, the *malguzar* may put in anybody he likes as his tenant. The right of such a tenant is liable to be defeated. If the real heir comes forward and cultivates or pays rent or does both before the end of two years. But after the two years the landlord can successfully plead implied surrender. Implied surrender may be pleaded by the landlord or by anybody accepted as a tenant by the landlord but not by a trespasser. 49 Ind. Cas. 219 (N.).

——Ss. 35 (4) and 94—Tenancy right—Will—Ouster of true tenant by devise—Surrender implied—Payment of rent on behalf of tenant.

A lessee of the ordinary tenant right in sir lands has no right to will away the tenant right; and S. 94 is not applicable where the ouster, if any of the plaintiff by the lessee from the holding is not at the instance of the landlord. There is no surrender under S. 35 inasmuch as the payment of rent in advance must be taken to have been on behalf of the true tenant. Mere non-cultivation of a holding by or on behalf of a tenant is not sufficient to constitute an implied surrender. 47 Ind. Cas. 28 (N.).

——S. 35 (4)—Implied surrender—Knowledge of landlord—Payment of rent to one of several.

There can be no implied surrender according to S. 35 (4) of the C. P. Tenancy Act, without the knowledge and intervention of the landlord. Where the holding is in the name of an uncle and his minor nephews, the rent paid by the uncle is presumed to be paid on his behalf and on account of his nephews especially where the nephews continue as the recorded tenants. 43 Ind. Cas. 180 (N.).

——S. 35 (4)—Implied surrender of holding—Plea of surrender if available to others than malguzar.

A mortgage of the tenancy right is annulled by operation of law on the extinguishment of the tenancy right. S. 35 (4) comes into operation when the tenant has in a way, abandoned the holding. The provisions of the section do not justify the view that the plea of the implied surrender can only be taken by the malguzar. 14 N.L.R. 107=46 Ind. Cas. 244.

——Ss. 35 (4) and 94—Dispossession—Lambardar mortgagee.

S. 94 of the C. P. Tenancy Act has no application to a case where the deferent took possession in 1909 *qua* mortgagee and not *qua* lambardar. 45 Ind. Cas. 184 (N.).

——S. 35 (4)—"Leaves his holding uncultivated"—Meaning of.

The expression "leaves his holding uncultivated" in the section means "omits to cultivate the holding himself or to arrange for its cultivation"; the proviso applies to a case where a minor's guardian makes a bad bargain in surrendering on his behalf. 9 N.L.R. 54=19 Ind. Cas. 759.

——S. 35—Surrender by Hindu widow.

A surrender of an ordinary tenancy if not impeachable for fraud or on other like ground is binding on the widow's husband's reversioners. 9 N.L.R. 126, Foll. 73 Ind. Cas. 126=A.I.R. 1924 Nag. 95.

——S. 35 (1)—Surrender by Hindu widow.

A Hindu widow's surrender of an absolute occupancy tenure, cannot be questioned by a reversioner. 9 N.L.R. 126=20 Ind. Cas. 920.

——Ss. 36 and 45 (1)—Object of S. 36.

The object of S. 36 is to defeat an exproprietary tenant of *sir* who tries to circumvent S. 45 (1) which gives his occupancy rights. 9 N.L.R. 126=20 Ind. Cas. 920.

——S. 36—Surrender of holding—Claimant put in possession by Revenue authorities — Civil Court cannot interfere.

Where an occupancy holding is surrendered and the heir of the person surrendering applies to the Revenue authorities to be put in possession and he is so put in possession, there is no power in any outside authority to revise the decision of the Revenue Officer and divest the claimant of the right vested in him under the order. 21 N.L.R. 25=87 Ind. Cas. 1045=A.I.R. 1925 Nag. 277.

——Ss. 36 and 46—Surrender for consideration—Reinstatement of tenant's heir—Rights of landlord.

When an occupancy tenant surrenders his holding for consideration, and his nearest heir is placed in possession under S. 36 (1) of the Act, the landlord can recover from the surrendering tenant in a Civil Court the consideration, less any sum to be paid by the heir. A surrender for consideration is not a transfer within the meaning of S. 46 (3). 14 N. L. R. 125=47 Ind. Cas. 32.

——S. 36—Surrender set aside—Female heir—Nature of holding.

Female heir applying to have surrender of occupancy holding set aside—Surrender set aside and female heir placed in possession—Statutory liabilities paid from her separate funds—She does not become absolute owner. 21 N.L.R. 62=89 Ind. Cas. 44=A.I.R. 1925 Nag. 306, Overruling A.I.R. 1923 Nag. 34.

——Ss. 36 and 95—Jurisdiction of Civil Court.

A Civil Court has no jurisdiction to entertain a suit for a declaration that a person declared to be entitled to possession under S. 36 of an occupancy holding has no right in the holding. S. 95 governs S. 36 in its entirety. 5 N.L.R. 176=4 Ind. Cas. 795.

——S. 38 (11)—Interest of Hindu widow.

A Hindu widow on whom an absolute occuancy holding has devolved under S. 38 (11) of C. P. Tenancy Act of 1898 obtains an interest analogous to that of a Hindu widow subject only to the provisions of the statute as to surrender and alienation. 8 N.L.R. 154=17 Ind. Cas. 366.

——S. 39—Whether creates bar to application of principles of equity.

The terms of a lease with a sub-tenant are matters between him and his landlord and are not regulated by the terms of the Tenancy Act and are governed by the ordinary laws of contract subject to the exception provided in S. 30 of the C. P. Tenancy Act. As the parties are at liberty to contract as they wish in the matter of sub-tenancy, the principles of equity can be applied in matters relating to the contract. Although S. 39, C. P. Tenancy Act, states that a decree for arrears of rent may be executed by ejectment, it does not lay down that ejectment is an inevitable consequence of a decree for arrears of rent and that the consideration of granting relief against the penal clause is excluded. Section 39 of the Tenancy Act creates no bar to the application of the principles of of equity. (1936) 160 Ind. Cas. 1012=18 N.L.J. 159.

——S. 39—Interpretation.

Absolute occupancy right is a tenancy and not a proprietary right. 65 Ind. Cas. 952=A.I.R. 1922 Nag. 222.

——S. 41.

SYNOPSIS.

1. **Devolution of occupancy holding.**
2. **Sub-S. (2)—Premium.**
3. **Sub-S. (2)—Previous sums secured by mortgage.**
4. **Sub-S. (2)—Notice.**
5. **Sub-S. (5)—Landlord's right of pre-emption.**
6. **Sub-S. (6)—Charge on purchase money.**
7. **Sub-S. (7)—Transfer of occupancy holding.**
8. **Sub-S. (8)—Reinstatement of tenant.**

1. Devolution of occupancy holding.

——S. 41—Occupancy holding—Devolution of—Inheritance and not survivorship.

Under the Tenancy Act of 1898 the devolution of absolute occupancy holdings was governed by the rule of inheritance and not by the rule of survivorship obtaining under the Hindu Law, irrespective of the question whether the person or persons who held the tenancy or was or were interested in the holding for the time being, was or were the sole tenant or co-tenants thereof or members of a joint co-parenary. 9 N.L.J. 207=95 Ind. Cas. 589=A.I.R. 1926 Nag. 433.

——S. 41—Devolution of occupancy holding—Law as to.

The law applicable to the devolution of occupancy holding is the law existing at the date of devolution. The mere fact that during the interval the Legislature thought fit to change the law is no ground for thinking that the old law which it repealed was of the same nature as the repealing enactment itself. 9 N.L.J. 207=95 Ind. Cas. 589=A.I.R. 1926 Nag. 433.

2. Sub-S. (2)—"Premium".

——S. 41 (2)—"Premium".

The term "premium" should be regarded as the equivalent of the vernacular *nazarana* by which is commonly meant, a payment made in lump when a lease is granted or renewed. In the Central Provinces, it is usual when *nazarana* is taken to take also a periodical rent. The term "rent" as defined in S. 2 (8) of the Tenancy Act may include a *nazarana*. In S. 41 (2), however, the term "premium" is used in contradiction to rent and so, similarly; to its employment in S. 105, Transfer of Porperty Act. But the restriction in S. 41 (2) of the Tenancy Act should be strictly construed. The term "premium," therefore should not be pressed so as to make it include what is ostensibly is merely periodical payment. 6 N.L.R. 65, Foll. 59 Ind. Cas. 419=A.I.R. 1921 Nag. 137.

3. Sub-S. (2)—"Previous sums secured by mortgage."

——S. 41 (2)—Ejusdem generis—Previous sums secured by mortgage.

The expression "and the previous sums, if any, secured by mortgage of the holding' includes sums due to one taking the contemplated mortgage and the other creditors. Landlord's special right to pre-empt is not affected by the concealment of a prior mortgage by a tenant to different persons. Rule of *ejusdem generis* does not apply to principal, interest and the previous sums secured by the mortgage. These must be taken into account. 12 N.L.R. 5=33 Ind. Cas. 489.

4. Sub-S. (2)—Notice.

——S. 41 (2)—Notice—Need for.

Where the consideration for mortgage and lease together exceeds eight times the rent of the holding no notice need be given under S. 41 (2). The restriction is on the natural right to transfer and should be strictly construed. 6 N.L.R. 65=6 Ind. Cas. 817.

——S. 41 (2)—Notice—Contents.

A notice under S. 41 (2) of the C. P. Tenancy Act need not be worded with the accuracy of a plea. Where the information given in the notice is amply sufficient to inform the landlord of the tenant's intention to mortgage the whole of his absolute occupancy holding it is sufficient compliance with the law. S. 41 (2) does not say that the particulars specified in that sub-section should be given in the notice but it merely states the circumstances under which the tenant must give notice, and presupposes a knowledge on the part of both landlord and tenant as to the particlars of the tenant's holding. 65 Ind. Cas. 816.

——S. 41 (2)—Notice, sufficiency of—Posting of notice.

The word "give" in S. 41 (2) means something more than posting. A notice by being put into post is not "given" or 'served' and a period of a month allowed to the landlord under than sub-section begins from the date on which he receives the notice. 12 N.L.R. 42=32 Ind. Cas. 991.

5. Sub-S. (5)—Landlord's right of pre-emption.

——S. 41 (2) (5)—Absolute occupancy holding—Mortgage by vendee—Absence of prescribed notice—Landlord's right of pre-emption.

An absolute occupancy tenant after giving his

landlord notice under sub-S. (2) of S. 41 sold the holding by a registered conveyance and on the same day took a mortgage from the vendee to secure payment of so much of the price as had not been paid. The requisite notice of intention to mortgage was not given to the landlord, but the original tenant regained possession of the holding in execution of a final decree for foreclosure. *Held*, that the sale and the mortgage were distinct transactions and that the landlord was entitled to eject the original tenant. The landlord was not entitled to pre-empt under sub-S. 41 (5) of the C. P. Tenancy Act as the sub-section has no application and the mortgage foreclosed is effective without notice to the landlord. 6 N.L.R. 69, foll. 15 N.L.R. 109=51 Ind. Cas. 721.

——S. 41—An absolute occupancy tenant gave notice to his landlord of his intention to sell the holding to a certain person. The landlord thereon in a notice expressed his willingness to purchase the hoding as a price to be fixed by a Revenue Officer to whom he applied accordingly and had the price fixed. The tenant refused to sell at that price. The landlord then sued to enforce the sale. *Held*, that the claim must succeed us it was not for specific performance of a contract to sell but for the enforcement of a statutory duty. *Held*, further that a document whereby the tenant gives up his holding to the proprietary body is really a surrender though it is called a sale for consideration, therefore, no sale deed is necessary, the plaintiff being entitled to be put in possession on paying into Court the price fixed. 6 N. L.R. 190=8 Ind. Cas. 1186.

——S. 41 (5)—Tenant giving notice of sale—Suit for pre-emption—Limitation Act, Art. 120.

In a suit for pre-emption under S. 41 (5) where the tenant had merely given notice but had not actually sold his holding.

Held, that Art. 120 applied to the case. 65 Ind. Cas. 959=A.I.R. 1922 Nag. 14.

6. Sub-S. (6)—Charge on purchase money.

——S. 41 (6)—Charge.

Where a second mortgagee forecloses the mortgage of an absolute occupancy holding and remains in possession and afterwards the malguzar purchases the holding from him under the provisions of S. 33 of the C. P. Tenancy Act, (1883) the mortgage debt due to the first mortgagee which was a charge on the land in possession of foreclosing second mortgagee, is converted into a charge on the purchase money held by him in exoneration of the land within the meaning of S. 41 (6). The first mortgagee therefore does not obtain a new cause of action. 12 N. L. R. 90=34 Ind. Cas. 704.

7. Sub-S. (7)—Transfer of occupancy holding.

——S. 41—Transfer by Tenant.

On receipt of notice by tenant of the intended transfer by tenant, landlord must intimate his desire to purchase and must apply for fixing the value to revenue officer or should bring a regular suit within the prescribed period on payment of the price fixed. Otherwise the transfer becomes unavoidable. 22 N. L.R. 19=91 Ind. Cas. 290=A.I.R. 1927 Nag. 110.

——S. 41 (5)—Failure to pre-empt—Effect.

If the landlord fails to pre-empt on receiving notice of the intention to mortgage, he must accept the mortgage whether its legal consequences include the ouster of the tenant or not. 6 N.L.R. 69 =6 Ind. Cas. 819.

——S. 41—Mortgage of tenancy without notice to landlord—Fact that decree for sale was obtained in mortgage suit to which landlord was not party, whether affects position.

On its true construction S. 41 (7), C. P. Tenancy Act appears to require notice to be given before a transfer is made to enable the landlord to decide what he will do. If that notice is not given and the transfer is completed, then it is made in contravention of the provisions and is voidable. It is made in contravention for it is made without notice given and the section requires that the transfer shall not be made until after a month from the date of the notice; the landlord, if in possession, can treat the alienation as a nullity as against him. If the mortgagee got possession, then of course, the landlord would have to take some active step to avoid, otherwise the mortgagee would get title when the right to sue for possession was lost. The fact that a decree for sale was obtained in a mortgage suit to which the landlord was not a party cannot affect the landlord's position one way or the other. The fact that that decree was obtained against persons who appear to have had no interest also does not affect the matter. A.I.R. (Vol. 26) 1939 Nag. 91=1938 N.L.J. 366=182 Ind. Cas. 263.

——S. 41 (7)—Transfer in contravention of the section—Landlord not claiming right of re-entry—Trespass, if constituted.

Under S. 41, sub-S. (7), C. P. Tenancy Act, any transfer made in contravention of that section, that is to say, without the consent of the landlord, is viodable at the instance of the landlord. It means that the transfer is valid until it is avoided by the landlord. So long as the landlord does not claim re-entry, there is no question of trespass. A.I.R. (Vol. 24) 1937 Nag. 189=170 Ind. Cas. 71=19 N.L.J. 290=I.L.R. (1937) Nag. 208.

——Ss. 41 and 47—Absolute occupancy holding—Mortgage without landlord's consent—Decree—Sale—Ejectment.

A mortgage of an absolute occupancy holding without the consent of the landlords or their lambardar is voidable and not void. In an execution sale of the mortgage decree the lambardar can only claim pre-emption and not an avoidance of sale. The purchase of an absolute occupancy holding, at a sale in execution of a mortgage decree, is not a trespasser. 50 Ind. Cas. 936 (N.).

——S. 41—Abolute occupancy holdings — Mortgage of—Suit by malguzar—Subsequent sale of holding in execution—Purchaser's rights.

Where a malguzar obtains a declaration that a mortgage of the absolute occupancy holding by the tenant is invalid as against him and subsequently obtains a decree against the tenant for money and not for rent and sells the holding in execution thereof, the purchaser at the sale is not entitled to impeach the mortgage. 15 N.L.R. 48=43 Ind. Cas. 907.

——S. 41—Mortgage without notice—Apportionment.

A mortgagee of an absolute occupancy holding along with other property cannot ask the Court to value such other property and apportion the mortgage debt so as to render the mortgage without notice to the landlord valid. 7 N.L.R. 20=10 Ind. Cas. 698.

——S. 41—Mortgage with consent of landlord's lessee.

Lessee's interest includes the interest of those claiming under or through him. Consent of the lessee of the landlord to a mortgage of an occupancy tenure is not binding on the original landlord after the termination of the interest of the lessee. 6 Ind. Cas. 75 (Cal.).

——S. 41—Voidable mortgage with possession by tenant—Malguzar buying rights of tenant—He is entitled to possession even against mortgagee.

A malguzar who has bought up the rights of an absolute occupancy tenant is entitled to possession as against a mortgagee when the mortgage is voidable at the option of the malguzar. 12 N.L.J. 156=122 Ind Cas. 697=A.I.R. 1930 Nag. 119, Overruling 12 C. P.L.R. 127 and 134.

——S. 41 (7)—Mortgage in contravention of section—S. 6 of Act of 1920 does not validate.

S. 6 of Act of 1920 applies only to mortgages effected after the date of its coming into force. It does not do away with the voidability under Cl. (7) S. 41 (Tenancy Act of 1898), attached to mortgages in contravention of that section. 24 N.L.R. 153=113 Ind. Cas. 128=A.I.R. 1929 Nag. 30.

——S. 41—Mortgage of occupancy holding with possession — Suit by Mulguzar in ejectment — Maintainability.

Where the malguzar sued to eject the mortgagees in possession of an absolute occupancy land on the ground that the mortgage was without his consent and it also appeared the mortgagees had taken possession after the new Act came into effect. *Held*, that the malguzar had no vested right to eject the mortgagees under the old Act that therefore he could not eject them after the new Act came into force and that his remedies were only those prescribed in the new Act. 98 Ind. Cas. 767 (1)=9 N.L.J. 192.

——S. 41 (7) and (8)—S. 6 of the new Act of 1920—Transfer by tenant—Landlord's right to sue tenant in ejectment under old Act not taken away by the new Act.

S. 41 of the Act of 1898 gave the landlord more than a mere right of pre-emption. The landlord had right to sue the transferee in a case where the sale had been made without his consent. S. 6 of the Act of 1926 does not give the landlord the power to bring the suit; but if his right to do so had already arisen under the former Act, it would not be taken away by the change in the new Act. 68 Ind. Cas. 427=A.I.R. 1923 Nag. 33.

——S. 41—Transfer of defined part — Right of entry—Consent to mortgage by conditional sale.

A transfer without the consent of the landlord of a part of an absolute occupancy holding, even though defined and demarcated, will not give the landlord a right of re-entry under S. 41 of the Tenancy Act. Consent to the mortgage by conditional sale is consent to the conditional sale as well as to the mortgage. An involuntary transfer under compulsion is something more than a voluntary transfer, not something less, and consent to the greater naturally includes consent to the less. 8 N.L.R. 147, Diss. 7 N.L.J. 99=81 Ind. Cas. 664=A.I.R. 1924 Nag. 139.

——S. 41—Sale of portion voidable by landlord.

The landlord has a right to eject the transferee of a portion of absolute occupancy holding assuming that there was a genuine transfer and that such transfer was not consented to by the landlord. 8 N.L.R. 147, Foll. 7 N.L.J. 105=78 Ind. Cas. 834=A.I.R. 1924 Nag. 264.

——S. 41—Transfer of part of absolute holding—Landlord's right to sue for ejectment.

In order to maintain an action for ejectment a plaintiff (landlord) must be entitled to immediate entry into possession and before a landlord can eject his tenant's transferee he must prove abandonment by the tenant. A tenant's holding is one and indivisible; where it is not alleged that he has refused to pay the rent of the whole, he cannot be said to have abandoned the holding while still in possession of part. The landlord's interests are safeguarded by recognising his right to hold the original tenant liable for the rent of the entire holding; if he fails to pay, S. 43 will enable him to sell the holding and the sale cannot be opposed by the transferee. 18 Nag.L.R. 109=A.I.R. 1922 Nag. 241.

——S. 41 (7)—Alienation of part of absolute occupancy holding.

Landlord cannot eject the trnsferee as trespasser and enter on the holding when a part of absolute occupancy holding is sold without his consent. 58 Ind. Cas. 112 (N.).

——S. 41 (7)—Transfer of sub-lease—Consent of landlord, if necessary.

The Tenancy Act requires the consent of the landlord only in respect of a transfer by the tenant and not in respect of transfer of a sub-lease which is valid and binding against the landlord. 14 N. L. R. 188=43 Ind. Cas. 970.

——S. 41—Absolute occupancy holding—Alienation by father—Son's right to challenge.

Under the old C. P. Tenancy Act, sons obtained by birth have no vested interest in an absolute occupancy holding for it is did not recognise succession by right of survivorship. Therefore, an alienation by a Hindu occupancy tenant effected before the new Act came into force could not be challenged by his son on the score of want of legal necessarily. A.I. R. (Vol. 19) 1932 Nag. 28=27 N.L.R. 371=136 Ind. Cas. 235.

——S. 41—Mortgage or Lease—Test.

Whether mortgage or lease depends on whether the document secures a debt or discharges a debt. 4 N.L.J. 262=65 Ind. Cas. 241=A.I.R. 1922 Nag. 156.

8. Sub-S. (8)—Reinstatement of tenant.

——S. 41 (8)—Landlord ejecting transferee—Tenant can apply to Revenue Officer for reinstatement under sub-S. (8) even after the new Act

coming into force—S. 6 of Act of 1920 cannot override vested right under S. 41 (8) of old Act—C. P. Tenancy Act (1920), Ss. 110 and 6. 22 N.L.R. 114 =96 Ind. Cas. 905=A.I.R. 1926 Nag. 499.

——S. 41—Tenant applying for reinstatement—Time fixed for depositing landlord's costs—Time can be extended. 22 N.L.R. 114=96 Ind. Cas. 905= A.I.R. 1926 Nag. 499.

——S. 41—Reinstatement—Forcible possession not equivalent to.

Where a lessee from a tenant has been ejected by landlord through Court the tenant must apply within one year for reinstatement. In the absence of such an application to the revenue Court tenant cannot be deemed to be reinstated by his taking forcible possession of the holding. 93 Ind. Cas. 125= A.I.R. 1926 Nag. 328.

——S. 41 (8)—Scope.

S. 41 (8) presupposes the right of a landlord to bring a suit for ejectment against the transferee and specially provides against both the landlord and the transferee. 12 N.L.R. 86=34 Ind. Cas. 698.

——S. 43—Priority—Charge for rent—Money claim—Incumbrance otherwise binding on landlord.

S. 43 gives the landlord *a real* remedy in the form of a charge enforceable by a suit for sale as distinguished from *personal* remedy *enforceable* by a money suit for arrears of rent. The section gives priority to the first over the second remedy. A landlord wishing to enjoy the priority given to his charge must enforce it according to law. A landlord who himself purchases the tenant's holding in execution of a mere money decree for rent cannot claim priority over an existing incumbrance on the holding which is otherwise binding on him. 3 N. L.R. 164, foll. 7 N.L.R. 107=11 Indl. Cas. 694.

——Ss. 44 and 56 (2)—Village service land—Occupancy right—Sub-lease for a period not exceeding a year—Effect.

Occupancy rights under S. 44 of the Act cannot be acquired in village service lands and a sub-lease thereof for a year or less is void under S. 56 (2). 23 Ind. Cas. 604 (Cal.).

——S. 44—Possession—Continuance of—Presumption.

The presumption as to continuance of possession of a person is not retrospective. Possession once proved to exist is presumed to continue until the is shown. 50 Ind. Cas. 196 (N.).

——S. 45—Application of—Devolution by death.

S. 45 of the Tenancy Act has no possible application to a case of devolution by death, and therefore sub-S. 3 of that section does not forbid the registration of a will by which *sir* land is bequeathed. 4 N.L.J. 43=62 Ind. Cas. 246=A.I.R. 1921 Nag. 34.

——S. 45—Sir land—Will—Transfer without reservation of occupancy right—Will illegally registered—Admissibility in evidence—Registration Act, Ss. 49, 17 and 18.

A deed of gift or transfer of *sir* land without reservation of occupancy rights and of other property as well would be wholly inoperative and wholly inadmissible in evidence only by reason of the provisions of S. 49 of the Registration Act, which apply only to documents of which registration is compulsory under S. 17 of the same Act. They do not forbid the operation or admissibility in evidence of documents of which registration is optional under S. 18, and a will is such a document. Provided, therefore, that the will has been properly proved it can operate in respect of all property mentioned in it which the testator legally was competent to devise even if it was illegally registered. 4 N.L.J. 43=62 Ind. Cas. 246=A.I.R. 1921 Nag. 34.

——S. 45—Alienation by will, of cultivating rights in sir land—No sanction is necessary.

S. 45 of the Tenancy Act does not take away the proprietor's right to alienate the cultivating rights in his *sir* land. It merely lays down a condition which must precede the exercise of that right *inter vivos*. 4 N.L.J. 43=62 Ind. Cas. 246=A.I.R. 1921 Nag. 34.

——S. 45—Sale and surrender of occupancy holding forming part of one transaction — Surrender, whether void.

The surrender of tenancy right is void, as being part and parcel of the transaction of the sale-deed.

Where the sale-deed was executed on April 22, and on 22nd was executed the deed of surrender with regard to the occupancy rights in all the *sir* sold by the sale-deed.

Held, that the surrender was a clear evasion of S. 45 of the C. P. Tenancy Act 11 of 1898, and as such, was void. A.I.R. (Vol. 21) 1934 Nag. 153=30 N. L.R. 306=149 Ind. Cas. 992.

S. 45—Surrender taking place 9 months after sale—Agreement to surrender entered into on the date of sale—Both are one transaction but the surrender only is void. 22 N.L.R. 136=86 Ind. Cas. 515=A.I.R. 1925 Nag. 302 following 39 A. 173 (P. C.) and 39 A. 645.

——S. 45—Sale of trees and surrender of occupancy holding executed on the same day—Both are one transaction and are invalid.

Where an occupancy tenant executed a sale-deed in respect of mango trees standing on the holding and on the same day surrendered the holding to the co-sharer malguzar,

Held, that the sale and the surrender together constituted a single transaction, the object of which was to avoid necessity of obtaining the sanction prescribed by S. 45 (1), Tenancy Act, and was therefore illegal and void.

Held, further that the mere fact that the vendee obtained possession did not suffice to separate the surrender from the sale, nor does the mere fact that the sale-deed purporting to deal with the trees apart from the soil was executed first and the surrender of the soil, pure and simple, followed it make any difference. In order that there could be a valid severance of interest or property in the trees the trees must themselves have already become the separate property of a person other than the owner of the soil on which they stand, by an independent transaction, and further the interest in the trees as also in the soil must be of a nature transferable under the law applicable to the land. 21 N.L.R. 25=87 Ind. Cas. 1045=A. I.R. 1925 Nag. 277.

——S. 45 (1)—Sale of share in a village—Surrender of occupancy rights in sir.

Defendants sold plaintiff their share in a village reserving to themselves the occupancy right in the *sir* land. On the same day they executed another deed by which they surrendered their occupancy right in the *sir* land accrued to them by virtue of the sale. *Held*, that the mere fact of the possession having been delivered to plaintiff did not suffice to separate the transaction of surrender from that of sale and the surrender must be held to be void under S. 45 (1) of the C. P. Tenancy Act (1898). Plaintiff was not entitled to a refund of the consideration for the surrender as both the parties knew that they were contravening the provisions of the C. P. Tenancy Act and the maxim *in pari delicto portior est condito, etc.*, applied. The test as to whether a surrender in such a case is an invasion of S. 45 (1) of the C. P. Tenancy Act consists in the fact as to whether the transaction is distinctly separate from that of sale of the village share. 54 Ind. Cas. 794 (N.).

——S. 45 (1)—Scope—Lease—Creditor put in possession—Debtor recorded as occupancy tenant—Debt allowed to be recovered from usufruct—Rent not reserved—Effect of.

Where, ever since the execution of document the defendant has been recorded as an occupancy tenant and the plaintiff as proprietor, it is evident that the proprietary rights passed. If in such a case the document places the plaintiffs in possession of the land and allows them to recover their debt from its usufruct, and so clearly transfers the cultivating rights as well, and no rent is reserved, the document transfers both cultivating and proprietary rights in the *sir* land and the document falls within the prohibition of S. 45 (1), C. P. Tenancy Act of 1898, read with its explanation. A.I.R. (Vol. 23) 1936 Nag. 168 =I.L.R. (1936) Nag. 60=164 Ind. Cas. 792.

——S. 45—Sir lands—Lease of.

The Tenancy Act contemplates leases to ordinary tenants of *sir* lands apart from transfers of the kind provided for in S. 45 (1) which applies only to leases or other transfers of proprietary rights in *sir* fields and does not apply to agricultural leases which do not affect the proprietary rights. 87 Ind. Cas. 72=A.I.R. 1925 Nag. 377.

——S. 45—Transfer of sir — Unconditional sanction.

Unconditional sanction for transfer of the cultivation rights in *sir* by Financial Commissioner can be used in favour of any man. 58 Ind. Cas. 23 (N.).

——S. 45 (5)—Where a proprietor executes an instrument of tenancy to commence in future in regard to *sir* land but in the meanwhile loses his proprietary rights, the would-be tenant cannot claim the protection of S. 45 (5). The fact that he is already in possession under a previous tenancy makes no difference so far as his rights to possession under the subsequent instrument is concerned. 5 N.L.J. 251=69 Ind. Cas. 870=A.I.R. 1921 Nag. 170

——Ss. 45 (5) and 69 (c)—Proprietor becoming tenant—Effect—Position of tenant.

When the proprietor becomes the occupancy tenant of the *sir* land under S. 45 (1) of the Act the relations between him and the ordinary tenant of *sir* are not changed by virtue of Cl. (5) of the section. The ordinary tenant does not thereby become a sub-tenant and is liable to be ejected by the ex-proprietary occupancy tenant only under the provisions of S. 69 (c) of the Act. 11 N.L.R. 170=31 Ind. Cas. 470.

——S. 45, sub-Ss. (1) and (6)—Proprietary right—Transfer by decree in pursuance of award—Occupancy—Tenant right in sir land—Accrual of.

By two deeds of 1881 and 1884, certain malguzari villages including the *sir* lands were mortgaged and on 30-6-1899 the mortgagee obtained a decree *nisi* for foreclosure.

In 1905, while proceedings for an order absolute were pending, the parties referred the whole case for disposal to a Board of Conciliation acting as arbitrators. The Board made an award that on default of payment within a certain date, the creditor should be entitled to enforce the whole of his rights under the deeds of 1881 and 1884, against seven of the mortgaged villages specified in the award, the rest of the mortgaged villages being released from liability. Default in payment having occurred, a final decree was made on 16-6-1910. The mortgagees claimed possession of the *sir* lands. *Held*, that the conciliation award of 1905 was, for the purposes of the case, a fresh origin of rights between the parties; that S. 45 (6) consequently did not apply, and that under S. 45 (1) the mortgagors had occupancy rights in the *sir* lands of the seven villages. 46 Cal. 76=45 I. A. 179=24 M.L.T. 345=14 N.L.R. 165=28 C.L.J. 247=(1918) M.W.N. 885=23 C. W. N. 297=21 Bom. L. R. 53=48 Ind. Cas. 141 (P.C.).

——S. 45—Sale of ex-proprietary rights—Rights in sir.

An ex-proprietor whose rights in a village are sold in execution of a decree has only the status of an occupancy tenant of the *sir* land, unless the decree expressly directs the sale of his rights therein. 55 Ind. Cas. 573 (N.).

——S. 45 (6)—Sir right—Nature of.

The cultivating or occupancy rights do not come into existence on the loss of proprietary right in *sir* land. The proprietary and cultivating rights are co-existing and component parts of the *sir* right. 11 C.P.L.R. 133, foll. 8 N.L.R. 123=17 Ind. Cas. 129.

——S. 45—Mortgage decree for sale—Competency of Court to interpret.

A mortgage decree for sale should expressly direct the sale and not leave this to be inferred. Although it is desirable that the decree should be self-contained it need not necessarily be so. The Court is empowered to refer to anything outside the decree. A Court is competent to interpret a decree but not when it would be premature to do so. 57 Ind. Cas. 177 (N.).

——S. 46.

Synopsis.

1. **Sub-S. (1)—Occupation.**
2. **Sub-S. (2)—Mortgage decree for foreclosure and possession.**

3. Sub-S. (3)—Transfer by occupancy tenant.
4. Sub-S. (5)—Registration of deed of Transfer.
5. Succession.

1. Sub-S. (1)—"Occupation".

——S. 46—Occupaion.

Partition of holding and accretion by one co-sharer to his share—Death of such co-sharer—Other sharers cannot be said to have "occupied the holding" of the deceased sharer and cannot resist claim of landlord for possession. 18 N.L.R. 48=69 Ind. Cas. 359=5 N.L.J. 243=A.I.R. 1922 Nag. 21.

——S. 46 (1)—"Occupy".

A proprietor holding cultivating possession of *sir* land can be said to "occupy" that land for the purposes of S. 46 (1). 23 N.L.R. 75=103 Ind. Cas. 178=A.I.R. 1927 Nag. 245.

2. Sub-S.—Mortgage decree for foreclosure and Possession.

——S. 46 (2)—Mortgage decree for foreclosure and possession of rights of occupancy tenant—If prohibited.

There is no prohibition in the C. P. Tenancy Act against executing a mortgage decree for foreclosure and possession of the right of an occupancy tenant in his holding although a decree for sale is contrary to the provisions of S. 46 (2) of the Act. A.I.R. (Vol. 28) 1941 Pat. 352=8 B.R. 89=196 Ind. Cas. 724.

——Ss. 46 and 47—Mortgagee in possession.

It is doubtful whether Ss. 46 and 47 apply to a mortgagee in possession of property under a foreclosure decree. 1 Pat.L.J. 525=3 Pat. L.W. 77=38 Ind. Cas. 98.

3. Sub-S. (3)—Transfer by occupancy tenant.

——Ss. 46 and 47—S. 47 is execution to S. 46.

Section 46 of the C. P. Tenancy Act is a general provision which prohibits the transfer by an occupancy tenant of his holding. Section 47 gives the heir a bare right to be put into possession by the Revenue Officer and is an exception to the general rule, in S. 46, but creates no interest in the heir under the general rule. A.I.R. (Vol. 23) 1936 Pat. 542=3 B.R. 56=18 P.L.T. 125=165 Ind. Cas. 585.

——Ss. 46 (3), 47 and 48—Transfer of occupancy holding—If void.

Obiter:—There is no prohibition on a transfer of an occupancy holding in the sense that the transfer is void. S. 46 (3) of the Tenancy Act makes such transfers "voidable in the manner and to the extent provided by the two next following sections". Those sections only give certain heirs, and after them the landlord, the right to avoid those transactions and then only by application to a Revenue Officer. I.L.R. (1950) Nag. 97=1950 N.L.J. 528.

——S. 46—Gift not to the nearest heir—Effect.

In regard to the view that S. 46 contemplates a transfer only to the nearest existing heir at the time it is made, if the words of that section and S. 47 did not make it clear that this is not so, it seems the matter would be set beyond doubt at least for all practical purposes by Sub-S. 2 of the latter section. Even if a gift of his holding to his daughter by an occupancy tenant who has a son is invalid and the landlord sets it aside, the daughter can immediately re-enter, and the result is exactly the same as if the gift were valid, except that there have been two sets of procedure and one change of possession more than was necessary. 71 Ind. Cas. 409=A.I.R. 1923 Nag. 195.

——Ss. 46, 47 and 48—Transfer by occupancy tenant in contravention of S. 46 (3)—Whether void or voidable—Remedy of landlord.

A transfer by an occupancy tenant in contravention of S. 46 (3) of the C. P. Tenancy Act of 1898 is not void but voidable by the landlord, and that too only in the manner provided by Ss. 47 and 48 and not by a suit in the Civil Court. But where they are not avoided by a person who can do it under S. 47, it would be a perfectly good transfer. Where the tenant has voluntarily surrendered his holding to the landlord with the sole object of defeating his mortgage, the surrender cannot affect the tenancy which must be deemed to continue to preserve the rights of the mortgagee. A.I.R. (Vol. 26) 1939 Nag. 166=1939 N.L.J. 308=182 Ind. Cas. 239=I.L.R. (1941) Nag. 203.

——S. 46—Mortgage of occupancy fields—Mortgagor, whether retains tenant's rights—Such mortgage, whether void or voidable — Mortgage not avoided—C. P. Tenancy Act (I of 1920), Sch. II, Art. 1, if applies.

In a redemption suit of a mortgage of an occupancy field, assuming the mortgage to be invalid for some reasons, the tenant's rights still remain in fact in the mortgagor, the mortgagee merely becoming a licensee of the mortgagor.

Under S. 46, C. P. Tenancy Act of 1898, mortgages of occupancy fields are not void, but voidable at the instance of certain persons only, and where the persons who had the right to avoid the transaction have not done so, the mortgage subsists, and so Art. 1 to Sch. 2 of the new Tenancy Act of 1920 cannot apply for the tenant has not been dispossessed of his land nor has he been excluded from possession within the meaning of that article. A.I.R. (Vol. 24) 1937 Nag. 43=171 Ind. Cas. 174=I.L.R. (1936) Nag. 167.

——S. 46—Mortgage of occupancy land is invalid even *inter partes*. 81 Ind. Cas. 873=A.I.R. 1925 Nag. 130.

——S. 46—Mortgage—Trees standing on sir—Ownership in sir rights separate from that in trees—Mortgage of trees not illegal.

Where property in trees is separate from that in *sir* land on which they stand and cultivating and other *sir* rights are separated from the ownership of such trees, there is nothing illegal in these trees being included in mortgage by the owner of the trees. 113 Ind. Cas. 891=A.I.R. 1929 Nag. 6.

——S. 46—Trees standing on occupancy holding—Transfer of, is invalid.

An occupancy tenant has the same analogous rights in the trees as he has in the holding on which they

stand, and therefore he cannot transfer the trees by sale as apart from the land on which they stand. 21 N.L.R. 25=87 Ind. Cas. 1045=A.I.R. 1925 Nag. 277.

——S. 46—Transfer of trees is transfer of rights in occupancy tenure.

Mortgage of trees amounts to a transfer of the rights in the occupancy tenure in a portion of the tenancy holding and the document cannot be registered in contravention of S. 46 (5). The mortgage is not operative as regards the other property except the trees covered by it. An instrument so registered cannot operate in respect of any part of the property ostensibly transferred by it. 70 Ind. Cas. 34 =A.I.R. 1922 Nag. 252.

——S. 46, Sub-Ss. (3), (5)—Mortgage of trees on occupancy land—Land expressly excluded—Other items also mortgaged — Deed registered — Trial Court, holding trees did not constitute right of occupancy—But trees excluded from properties to be sold for realization — No appeal by mortgagee — Held, claim against exempted property cannot be enforced.

Certain trees standing in the occupancy land were mortgaged along with other items of property. The occupancy land was expressly excluded from the mortgage. The mortgage-deed was registered. A suit was brought on the mortgage by the mortgagee but the purchaser of the property contended that since the transfer of occupancy land was prohibited by S. 46, Sub-S. (3), C. P. Tenancy Act; the registration was invalid and hence the mortgage was also invalid. The trial Judge, while holding that the property in question did not constitute a right of occupancy, considered it "undesirable that trees standing on a holding should belong to anybody except the occupier of the holding"; and he accordingly excluded it from the properties to be sold for the realisation of the debt. The plaintiffs did not appeal against the decree which followed upon that judgment:

Held, that the plaintiffs could not enforce their claim against the exempted property.

Held, further the question whether the transfer of the trees comes within the prohibition did not require determination in this appeal. A.I.R. (Vol. 23) 1936 P.C. 301=19 N.L.J. 228=I.L.R. (1936) Nag. 104=1936 O.L.R. 522=3 B.R. 6=1936 A.L.R. 861 =17 P.L.T. 937=41 C.W.N. 101=64 C.L.J. 301 =45 M.L.W. 7=1937 M.W.N. 135=164 Ind. Cas. 345=71 M.L.J. 856 (P.C.).

——S. 46—Occupancy tenant—Right to bequeath by will.

A *raiyat* has no right to bequeath his occupancy right by will under the provisions of the C. P. Tenancy Act.

The C. P. Tenancy Act is not an Act which merely regulates the relationship existing between the landlords and tenants but prescribes a complete Code relating to agricultural tenancies. A.I.R. (Vol. 19) 1932 Pat. 70=13 P.L.T. 469=10 Pat. 786=135 Ind. Cas. 101.

——S. 46—Civil Court—Suit for possession of occupancy tenancy by heir—Occupancy tenancy—Testamentary disposition.

Where the suit is one for possession of an occupancy tenancy and not to set aside an alienation made by the former tenant in contravention of the Act, the Civil Court has jurisdiction to entertain the suit. Apart from the provisions of the C. P. Tenancy Act the deed of gift regarded as an attempt to alienate anything more than a life-interest of a Hindu widow is invalid. An occupancy tenant cannot leave any testamantary direction for disposal of his right by his widow after his death. 44 Ind. Cas. 1001 (N.).

——S. 46—Surrender, if a transfer.

A surrender is in no sense a transfer, much less a transfer within S. 46 of the C. P. Tenancy Act, (1898). The Act while providing for the recovery of possession of a holding by the heir of a surrendering tenant, makes no provision for such recovery by a co-sharer landlord. 3 Pat.L.J. 88=44 Ind. Cas. 317.

——S. 46, Sub-S. (3)—Ejectment, suit for—Sub-lease, grant of, by tenant.

Under the Central Provinces Tenancy Act, none but an occupancy tenant can be ejected from his holding for granting a sub-lease. (1908) 8 C.L.J. 156.

——S. 46 (1)—Alienation by father—Minor sons, if bound.

An alienation by the father of his interest in an occupancy holding is not binding on a minor son except in those cases in which an alienation of the family property binds the son. An occupancy right may be acquired by an individual, a firm, a body corporate or a joint family. 4 Pat. L.J. 354=51 Ind. Cas. 896.

——Ss. 46 (3), 47 and 95—Transfer of occupancy right—Jurisdiction of Civil Court.

Occupancy right is transferable under S. 46 (3); but the landlord can avoid it only by applying to a Revenue Officer within 2 years from the date when the tenant parted. Civil Court has no jurisdiction in such a case. 17 C.W.N. 621=17 C.L.J. 616=18 Ind. Cas. 273.

——Ss. 46, 47, 48, 70, 71, 72 and 95—Where a transfer of tenant right would be valid in the absence of prohibition under S. 46 or S. 70 of the Act, it cannot be avoided except in the manner and to the extent provided by that Act. 17 C. P. L.R. 49, not foll. 8 N.L.R. 22=13 Ind. Cas. 909.

——Ss. 46 (3) and 47—Mortgagee in possession—Occupancy holding—Consent of one of the landlords.

Mortgagee foreclosing the mortgage and entering into possession of the tenancy, may be said to become a tenant. A mortgage of occupancy holding with the consent of one of the body of landlords, cannot be avoided. 50 Ind. Cas. 274 (N.).

——S. 46—A proprietor or a tenant purchasing the tenant's or proprietor's right, the result is the same in both cases.

When the rights of co-sharer and an occupancy or absolute occupancy tenant converged in the same person he is an occupancy or absolute occupancy tenant according to the nature of the tenancy. 20 I. L.R. 162=82 Ind. Cas. 126=A.I.R. 1925 Nag. 125.

4. Sub-S. (5)—Registration of deed of transfer.

——S. 46 (5)—Scope and effect—Duty and jurisdiction of Registering officer.

Sub-section (5) of S. 46, C. P. Tenancy Act, does not determine the question of validity or otherwise of the transaction itself. Sub-S. (5) merely shuts out the evidence, which would furnish a proof of the transfer, but does not enlarge the sphere of the prohibition. The registration or non-registration of the document does not affect the inherent character of the transfer, which is to be judged by another provision.

Where the document of transfer includes only the trees and expressly excludes the occupancy land on which the trees stand, and the Registering Officer evidently thinks that *ex facie* the instrument does not transgress the law, it cannot be held that the Registering Officer had no jurisdiction to register the document, because in included a transfer which was of a doubtful validity and the registration cannot be avoided. He is not required to enter upon an inquiry as to whether certain property sought to be transferred would, or would not, amount to an occupancy right. Such an inquiry would obviously be beyond his province. His function is to presence the instrument and to see whether it purports to make a prohibited transfer, and, if he thinks that it does not embody any such transfer, he is bound to admit it to registration. A.I.R. (Vol. 23) 1936 P.C. 301=1936 O.L.R. 522=3 B.R. 6=1936 A.L.R. 861=19 N.L.J. 228=I.L.R. (1936) Nag. 104=17 P.L.T. 937 =41 C.W.N. 101=64 C.L.J. 301=45 M.L.W. 7 =1937 M.W.N. 135=164 Ind. Cas. 345=71 M.L.J. 856 (P.C.).

——S. 46 (5)—Deed presented for registration—Recitals—Registrar—If can question.

The Registration Officer is not expected under S. 46 (5) of the C. P. Tenancy Act to decide as to the soundness of the recitals in a deed presented for registration. If the document contains a recital of any of the kinds mentioned, he is not precluded from effecting registration. 52 Ind. Cas. 744 (N.).

——S. 46—Occupancy holding diverted to non-agricultural purposes—Mortgage of—Registration of—Validity—Mortgagee if entitled to foreclosure—Jurisdiction of Civil Court.

C. P. Tenancy Act does not cease to apply to an occupancy tenant the moment he diverts his land to non-agricultural purposes. Otherwise, S. 52 would become redundant. The very fact that this section gives a special remedy to the landlord shows that such a tenant remains an occupancy tenant within the meaning of Chap. IV, and if the landlord does not institute a suit against him on the ground of his having diverted the land to non-agricultural purposes, the tenant remains a tenant and gets the protection provided by the other provisions to be found in Chap. IV. The section is like a forfeiture clause in a lease which can be availed of by the landlord subject again to the restrictions mentioned in S. 87. Section 46 of the Act, therefore, applies to a transfer by such a tenant. The registration of a mortgage by such a tenant of his holding is in violation of the clear prohibition by the statute and disobedience of that provision renders the registration as null and void. The document, therefore, is not effective as a mortgage document and the mortgagee is not entitled to a foreclosure decree.

The mere fact that a registering officer admits a document to registration cannot clothe the transferees with any rights which can be enforced in Courts of Law. Section 95 is no bar to the Civil Court considering the question of the validity of the registration.

It is immaterial whether the mortgagor was an occupancy tenant or an ordinary tenant. A.I.R. (Vol. 30) 1943 Pat. 386=9 C.L.T. 67=22 Pat. 532=10 B.R. 156=24 P.L.T. 418=209 Ind. Cas. 438.

——S. 46—Finding that land is non-agricultural, whether binding in second appeal.

A finding of the lower Appellate Court that land is non-agricultural and transferable must stand in second appeal. A.I.R. (Vol. 28) 1941 Pat. 352=8 B.R. 89 =196 Ind. Cas. 724.

——S. 46—Transfer — Validity — Inadvertent inclusion of occupancy field along with others in mortgage deed.

Inadvertent inclusion of an occupancy field amongst fields, other than occupancy, in a mortgage-deed in a case of genuine and *bona fide* mistake on the part of the parties to a mortgage, where the mortgage deed does not purport to transfer any rights in occupancy land, does not vitiate the registration of the deed and does not strike at the root of the whole transaction. Its inclusion is to be treated merely as a surplusage. 113 Ind. Cas. 891=A.I.R. 1929 Nag. 6.

——S. 46 (5)—Provision does not prohibit registration merely for inclusion of trees standing on occupancy land.

Where a mortgage deed draws an explicit distinction between the land and the trees thereon and implies that trees are held under a different title from the land held under occupancy right and are, unlike the land, capable of being validly mortgaged, then the mortgage deed does not come within the prohibition laid down in sub-S. 5 of S. 46 of the Act of 1898. 23 N.L.R. 174=104 Ind. Cas. 843=10 N.L.J. 162= A.I.R. 1928 Nag. 41.

——S. 46 (5)—Registration induced by false recitals.—Fraud.

If owing to fraudulent recitals in a document, the registering officer has been deceived into registering a document, which he is not empowered to register, the document must be deemed to have been not registered and not effective for the purpose for which it is created. If the recitals in a deed of gift which induce the Sub-Registrar to register it are false, the jurisdiction of the Civil Courts to declare the deed to be inoperative is not barred. 1 N.L.R. 112, foll. 43 Ind. Cas. 16 (N.).

——S. 46—Registration contravening S. 46 is ineffective.

Registration in contravention of S. 46, Tenancy Act, is ineffectual whether it be brought about by the fraud of the parties to the document or effected owing to ignorance or inadvertence on the part of the registering officer. 22 N.L.R. 128=97 Ind. Cas. 1015=A.I.D. 1927 Nag. 30.

——S. 46—S. 46 prohibits registration of deeds of transfer, or in other words, such transfers as could not be made except by registered instruments. Transfers which can be made otherwise than by a registered instrument, such as an oral sale for less than Rs. 100 under S. 54, T. P. Act, are not prohibited. 9 N.L.J. 123=96 Ind. Cas. 353=A.I.R. 1926 Nag. 432.

——S. 46—Provisions, if can be avoided—Mortgages split up—Legality—Registration Act.

It is open to a party to avoid the provisions of a penal statute like the Income Tax Act, Registration Act and so on, provided he does not infringe the law. Such an act may be unsocial but it is not illegal.

Where, therefore, the parties entered into three transactions by splitting up the amount of the mortgage and also the mortgaged security, it was held that they did not infringe any law, although they had been successful in avoiding the stringent provisions of the C. P. Tenancy Act and the Registration Act. A.I.R. (Vol. 32) 1945 Pat. 465=11 Cut. L.T. 42.

——S. 46 (5)—Mortgage of occupancy holding—Prohibition of registration.

Nothing in S. 46 (5) of the Act justified a Registering officer to admit to registration, after the Act, an instrument executed before that date and falling within the prohibition contained in the section. A registration in contravention of the law is invalid *in toto* and cannot operate. 13 N.L.R. 165=42 Ind. Cas. 384.

——S. 46—Sale decree of occupancy rights—Unregistered mortgage, if allowed.

Under S. 46 of the Act, no sale decree of occupancy rights can be passed on an unregistered mortgage even though the deed was executed before the Act. 10 N.L.R. 42=23 Ind. Cas. 888.

5. Succession.

——S. 46—Succession—Daughter's daughter's son and brother's son—Latter is preferred.

The brother's son, who will as a collateral ordinarily be excluded from succeeding to an occupancy holding if not cultivating jointly with the previous holder will be preferred to daughter's daughter's son. The condition requiring the collateral who claims succession to have shared in the cultivation is a disqualification which disentitles the nearest collateral if he has not fulfilled the condition. But it does not confer any right of the succession to the occupancy tenure on a more remote relation, like a *Bandhu* even though he may have shared in the cultivation. 5 N.L.J. 270=67 Ind. Cas. 292=18 N.L.R. 105=A.I.R. 1922 Nag. 117.

——S. 46—"In the male line."

The expression "in the male line" does not necessarily mean that the person at the lower end of the line must be a male S. 46 does not disqualify a female from inheriting an occupancy holding if she is otherwise qualified according to the personal law to which she is subject. 5 N.L.J. 261=67 Ind. Cas. 229=A.I.R. 1922 Nag. 207.

——S. 46—Devolution.

When an occupancy tenant dies his right in his holding devolves as if it were land. A Hindu son who had remained joint with his father is his heir and succeeds to his separate or self-acquired property in preference to a separated son. 7 N.L.R. 36=10 Ind. Cas. 733.

——S. 47—Scope.

Section 47 gives the heir a bare right to be put into possession and is an exception to the general rule in S. 46. A.I.R. (Vol. 23) 1936 Pat. 542=3 B. R. 56=18 P.L.T. 125=165 Ind. Cas. 585.

——S. 47—Exchange.

About 1903 the defendant started to cultivate an absolute occupancy holding belonging to one *H* and allowed *H* to cutivate an occupancy holding of his own in exchange, each finding the land of the other more conveniently situated than his own. The record remained unchanged and each paid rent for the land he cultivated, but in the name of the other till in 1917-18, the Settlement Officer recorded each of them as the occupancy tenant of the land he was actually cultivating.

Held, if the arrangement of 1903 was an out-and-out exchange, the landlord lost his right to set it aside many years before he filed his suit. If it was only an arrangement by each tenant for the cultivation of land by the other which it undoubtedly was, he has no right whatever to interfere with it. 83 Ind. Cas. 946=A.I.R. 1923 Nag. 144.

——S. 47—Transfer by occupancy tenant to non-co-sharer—Remedy of landlord.

If an occupancy tenant of land belonging to the sole landlords of the whole of it transfers it to a stranger or a person who is not a co-sharer landlord, and if the document is by mistake admitted for registration, the proper remedy for the landlords is to make an application to the Revenue Courts unless there is fraud involved in which case Civil Courts will have jurisdiction. S. 47 refers not only to sub-Section 3 of S. 46 but also to sub-S. 5. 67 Ind. Cas. 121=A.I.R. 1922 Nag. 126.

——S. 47 (1)—Avoidance of transfer—Jurisdiction of Civil and Revenue Courts.

The question of avoidance of transfer of occupancy or ordinary holding is cognizable by Revenue Courts, but the question of illegality of document of transfer is cognizable by Civil Courts. 50 Ind. Cas. 681 (N.).

——S. 48—Occupancy land—Parties believing mortgagors had proprietary rights — Mortgage, voidable and not void.

Where the land was recorded either as *muafi khairati* or as *muafi khairati mokasa* and the parties seemed to believe that the mortgagors had a proprietary right in the land and there was nothing on the face of the document to indicate to the Registering Officer that the mortgage was forbidden by the Tenancy Act:

Held, that the registration was not invalid and could not be ignored. It was not void *ab initio* but merely voidable. A.I.R. (Vol. 23) 1936 Nag. 171=19 N.L.J. 123=166 Ind. Cas. 686.

——S. 49—"Proprietor."—Lessee.

A lessee whether permanent or not, is not a proprietor within the meaning of that section, and therefore he does not retain any interest as an occupancy

tenant in the *Sir* land on the determination of the lease. 8 N.L.J. 44=87 Ind. Cas. 253=21 N.L.R. 133=A.I.R. 1925 Nag. 274.

——S. 49—Private agreement as to rent payable—Effect of.

The combined effect of Ss. 49 and 51 is to make the occupancy tenant liable for the rent fixed at the settlement for the term of the settlement. A private agreement not inconsistent with the Act as to the rent payable may be given effect to only until the next settlement; but at the next settlement the agreed rate of rent is superseded by a rate of rent fixed by the Settlement Officer. 89 Ind. Cas. 741=A.I.R. 1925 Nag. 452.

——S. 49—Rent—Contract between parties.

Occupancy holding under S. 49 of the Tenancy Act is subject to any contract between the parties and to conditions settled under S. 72 of the Land Revenue Act. 13 N.L.R. 179=42 Ind. Cas. 292.

——Ss. 49 and 51—Rent—Private agreement—Validity.

Ss. 49 and 51 must be read together; and when taken together a private agreement not inconsistent with the Act as to the rent payable is valid until the next settlement, when the rate of rent agreed upon is superseded by the rate fixed by the Settlement Officer. 7 N.L.R. 17=10 Ind. Cas. 697.

——S. 49—Transfer in favour of next reversioner by widow—Validity.

The transfer by a widow of occupancy rights in *sir* land in favour of her next reversioner is invalid in absence of the sanction of revenue authorities. Ss. 49 and 50 do not make any exceptions in the case of a transfer to an heir and reversioner. 81 Ind. Cas. 878=A.I.R. 1925 Nag. 95.

——S. 52—Non-agricultural purposes — Orange trees.

Planting orange trees is not a diversion of the holding to non-agricultural purposes so as to justify ejectment of an occupancy tenant. 22 Mad. 39, foll. 15 N.L.R. 60=50 Ind. Cas. 967.

——S. 56 (2)—Kotwar—Service holding settlement—Kotwar in possession after loss of office.

J. and N. two Kotwars in a village held each, one of two fields constituting the village service tenure. It was decided that the one Kotwar would suffice and the question as to who was to be retained was decided by the parties drawing lots. It was understood that the loser would continue for his life in possession of the field he was cultivating. J, lost and was thus deprived of the office of the Kotwar, but continued in possession of the field. In the new settlement some years later, the entire holding was recorded in the name of N's son D, who consequently ejected J. *Held*, that section 56 (2) did not apply. As the sub-tenancy in favour of J was part of the arrangement under which N became the village service tenant J should not be ejected merely because a new settlement had been made or because D was substituted in place of N. 56 Ind. Cas. 749 (N.).

——S. 58—Bhumak—If servant—Refusal to do private work of malguzar—Village—Ejectment.

A Bhumak in the Chanda District of the Central Provinces is no longer a village servant, but one who renders service to the *Malguzar* alone, and his rights in the land held by him are not governed by Ch. 5 of the C. P. Tenancy Act. If he refuses to do the private work of the Malguzar, he is liable to be ejected from the land. 14 N.L.R. 152=46 Ind. Cas. 779.

——S. 60—Contract before Act.

Section does not apply to contracts before the Act. 18 N.L.R. 85=77 Ind. Cas. 798=A.I.R. 1922 Nag. 227.

——S. 60—Perpetual lease by occupancy tenant—Sub-lessee—Title by prescription.

S. 60 of the C. P. Tenancy Act precludes an occupancy and ordinary tenant from granting a perpetual lease. A sub-tenant of such a tenant cannot therefore acquire title by prescription as no such title is recognised by law. 53 Ind. Cas. 212 (N.).

——S. 60—Sub-lessee of occupancy land—Position of.

Under S. 60 of the C. P. Tenancy Act a sub-lease of an occupancy land cannot be made from year to year but it can be made for a term of one year only. If before the end of the year no notice is given, there may be a presumption that, the parties intend to make a fresh, lease for the ensuing year, but where a notice is given by the occupancy tenant to his sub-tenant that he does not intend to renew the sub-lease, the sub-lease comes to an end with the end of the agricultural year, and the sub-tenant is therefore in the position of a trespasser liable to be ejected in a Civil Court. 48 Ind. Cas. 948 (N.).

——S. 60—Sub-tenancy from year to year—Presumption.

In the case of sub-tenancy from year to year of a field of an absolute occupancy tenant there is no presumption in the absence of an express agreement that the sub-tenancy terminates at the end of the year without notice being given. It should be presumed that the intention of the parties was that the sub-tenancy would not come to an end without reasonable notice given by one party or the other. 14 N.L.R. 3=43 Ind. Cas. 392.

——S. 61—Sub-tenant declared to have rights of ordinary tenant—Status of, after enactment of Act of 1920—Rights to transfer holding.

A sub-tenant in an occupancy holding who was declared under the provisions of S. 61 of the C. P. Tenancy Act, 1898, to have all the rights of an ordinary tenant, continues only to have the rights of an ordinary tenant under that Act even after the Act of 1920 was enacted. He can thus have no rights of transfer in the holding and his special tenure is regulated by the relevant provisions in the Act of 1898. No question of pre-emption can therefore arise on an alleged sale of a holding of this kind. 1949 N.L.J. 402.

——S. 61 (2)—Lambardar's authority.

Though a *lambardar* represents the body of co-sharers in their relations with Government for certain purposes he is not alone entitled to bring an ejectment suit against a trespasser. 37 Cal. 694=12 C.L.J. 104=6 Ind. Cas. 389.

——S. 62—'Ordinary tenant'.

In Central Provinces even an ordinary tenant ac-

quires an interest in his holding, which so long as he pays his rent and has lineal heirs, is permanent. 6 N.L.R. 140=8 Ind. Cas. 288.

——S. 62 (2), 63 (1) and 69 (c)—Applicability—Tenant of holding entirely of sir land—Suit for ejectment cognizable by Revenue Officer.

Section 62 (2) of the C. P. Tenancy Act concerns itself only with the cultivation of land in partnership with the proprietor and its effect is to enable the Local Government to make a person a tenant, who would not otherwise be one. A tenant whose holding consists entirely of *sir* land is an ordinary tenant and a suit for ejectment under S. 69 (c) is one between landlord and tenant and so cognizable by a Revenue Officer. If the plaintiff had once stated that the defendant was a tenant of *sir* land, he cannot afterwards set up the plea that he is a trespasser so as to oust the jurisdiction of the Revenue Officer. Until actually ejected, the person to whom *sir* land is let continues to be in law a tenant though the period contracted for, had expired. 9 N.L.R. 158=21 Ind. Cas. 607.

——S. 63—Agreement for remission of rent—Effect of.

The respondent claimed the right to hold his tenancy field free of rent on the ground that in 1874 the then landlord agreed to allow his father to hold the field free of rent and executed an agreement to that effect In the *pattas* of both the settlements, *i.e.*, 1897 and 1913 a note was made to the effect that the landlord would pay the rent.

Held, that the Settlement Officer in 1913 has not decided as he is supposed to have decided, that the terms of the original agreement would be binding on the successors of the parties, and S. 63 of the Tenancy Act, 1898, plainly enacts that no agreement for reduction or remission of rent can prevail for more than one settlement. A.I.R. 1923 Nag. 247.

——S. 63 (3)—Land recorded in wajib-ul-arz as held by occupancy tenant rent-free for ever, for maintenance—Successor of tenant is entitled to tenure of rent-freeship during currency of settlement.

In the settlement of 1912–13, as stated in the *wajib-ul-arz*, one *K* was recorded as the tenant of the lands in suit as *muafi khairati* holder, and there was a note attached which stated that the lands were held free from rent for ever for maintenance, the vernacular words being *waste parwarish hamesha ke liye maf*. On the death of *K* the landlord claimed rent from *K's* successor on the ground that the entry in the *wajib-ul-arz* enured for the benefit of *K* during his lifetime only.

Held, that the tenure of rent-freeship would under the proviso to S. 63 (3), C. P. Tenancy Act, be effective during the currency of the settlement. No doubt the mere use of the words "for ever" would not be sufficient to come to the conclusion that freedom from rent was to be perpetual even after the death of the holder in whose name it was recorded; but the *wajab-ul-arz* entry made it effective throughout the currency of the settlement and during the currency of the settlement the landlord could not charge rent for the holding. A.I.R. (Vol. 30) 1943 Nag. 250=I.L.R. (1943) Nag. 516=1943 N.L.J. 343=208 Ind. Cas. 634.

——S. 64 (4) and 69—Correction of Record of Rights.

The special rule of limitation under S. 69 (4) has no application to the correction of an entry in the Record of Rights that the defendant is the proprietor instead of occupancy tenant of *sir* land. 48 Ind. Cas. 932 (N.).

——S. 65 (7)—No express provision for ejectment on ground of *thekadar's* failure to pay *theka jama*—Agreement providing for re-entry in such case is valid. 15 N.L.R. 39=49 Ind. Cas. 840.

——S. 69—Bhogra Land—Permanent lease by gaontia—Validity of.

In a suit for ejectment from Bhogra land, the defendant can rely on a permanent lease granted by by the *gaontia* who subsequently acquired proprietary rights. 4 Pat.L.J. 505=53 Ind. Cas. 96.

——S. 69—Defendant inducted on khudkasht and sir land by widow—Reversioner suing to eject defendant as trespasser after widow's death—Defendant setting up unregistered perpetual lease by widow—Plaintiff's remedy lies in Revenue Court under S. 97.

Defendant was put in possession of the land in dispute, which consisted of *sir* and *khudkasht*, by a woman who was the sole *malguzar* of the village, holding a Hindu widow's interest in it. The plaintiff was the sole reversionary heir after her death and sued to eject the defendant alleging that he was a trespasser. The defendant alleged that the widow had given him the *sir and khudkasht* land under two separate written perpetual leases which were not registered.

Held, that plaintiff's remedy lay in Revenue Court under S. 97. 61 Ind. Cas. 593=A.I.R. 1921 Nag. 169.

——S. 69 (c)—Applicability—Sikmi raiyat holding bhogra land in Sambalpur District—Liability to ejectment.

S. 69 (c), C. P. Tenancy Act, can apply only if the tenant sought to be ejected is an ordinary tenant and the holding consists entirely of *sir* land. *Bhogra* land in Sambalpur District is *sir* land. A *sikmi* raiyat is not an occupancy tenant under the Act, but is only an ordinary tenant.

A tenant recorded as a *sikmi* raiyat in respect of *bhogra* land in the district of Sambalpur is therefore liable to eviction under S. 69 (c) of the Act. 27 Pat. 391.

——S. 69 (c)—Perpetual lease by one deed on same set of conditions of sir and khudkasht land before C. P. Tenancy Act (I of 1920)—Position of lessee—Separation of sir from khudkasht in 1934, under S. 94 of the Act of 1920—Effect.

Where in 1918, a recorded proprietor made a lease in perpetuity by one deed, of two fields: one *sir*, and the other *khudkasht* under the Tenancy Act of 1898, which was in force when the lease was made, the lessees became ordinary tenants of the holding. Had the holding consisted only of *sir* land they could have been ejected at will under S. 69 (c) of that Act, but, as the holding consisted partly of *sir* and partly of *khudkasht*, they acquired the rights of an ordinary tenant and were not liable to ejectment. According to S. 37 (1) (b) of the Tenancy Act of 1920 a per-

son who holds *sir* land as a tenant is deemed to be a sub-tenant; otherwise an ordinary tenant becomes an occupancy tenant under the new Act. It is not possible for a man holding a parcel of land to be an occupancy tenant of part of it and sub-tenant of the rest of it. The lessee cannot be the sub-tenant of the part that was formerly *khudkasht* and he must, therefore, be the occupancy tenant of the entire holding and not liable to ejectment and the subsequent separation in 1934, under S. 94 of the Act of 1920, of the *sir* land from the rest of the holding would not affect the position. A.I.R. (Vol. 27) 1940 Nag. 335=1940 N.L.J. 377=190 Ind. Cas. 145.

——S. 70—Sale void—Return of consideration.

In the case of a sale made to circumvent the Statute prohibiting the sale of ex-proprietary rights the consideration is not recoverable. Defendant, if he fails to get possession, cannot recover the consideration, on the ground that the so-called surrender was a sale in contravention of the Tenancy Act, and the Registration obtained was a fraud upon the Registration Statute; he can, however, claim compensation, before he delivers back possession. 68 Ind. Cas. 252 =A.I.R. 1923 Nag. 111.

——Ss. 70 and 71—Incomplete sale—Ejectment—Suit, maintainability of.

Where a transaction falls short of a complete sale S. 70 of the Act does not apply and the plaintiff cannot apply to the Revenue Officer under S. 71 of the Act. He can come to a Civil Court and eject the defendant who had acquired no title to the holding. 42 Ind. Cas. 288 (N.).

——S. 70—Mortgage property including trees and a well in an ordinary field—Registration of the mortgage is invalid as a whole.

Where, by a mortgage-deed a house and crops situated in occupancy and ordinary fields as well certain trees and a well situated in an ordinary field were hypothecated,

Held, that under S. 70 sub-S. (3), the mortgage of the well and trees situated in the ordinary field was invalid and that the whole mortgage-deed was, therefore, void, having been registered in contravention of S. 70, sub-S. (5): 13 N.L.R. 165 and 1 N.L.R. 112 Foll. 11 N.L.J. 119=109 Ind. Cas. 586=A.I.R. 1928 Nag. 248.

——Ss. 70 (5)—Deed of surrender in favour of lambardar — Registration prohibited—Trespass.

Surrender of ordinary tenure in favour of one co-sharer landlord in his personal capacity is a sale the registration of which is forbidden by Section 70 (5). As the defendant was in possession with consent of other landlords only and was a trespasser to the extent of plaintiff's share, the latter was entitled to a decree for joint possession to the extent of that share. 41 Ind. Cas. 954 (N.).

——S. 71—Tenancy—Widow of tenant transferring tenancy to daughter—Death of daughter—Succession—Lapse.

B, an ordinary tenant, died and his widow transferred in 1907 all his moveable and immoveable property to his daughters with the *Malguzar's* consent. The daughters died in 1918 and their husband took possession of the ordinary holding. In a suit by the *Malguzar* for recovery of possession on the ground, that the tenancy lapsed in the absence of any heir to *B*,

Held, that (1) the transfer by *B's* widow to his daughters was not a transfer but an acceleration of the succession; that (2) in all matters of tenancy the personal law applies except in so far as it is limited or altered by the Tenancy Law and there is nothing in the Tenancy Act to limit a Hindu widow's power to accelerate succession by retiring from the ownership of it; (3) that the daughters of *B* were not absolute owners of the tenancy, but held a limited estate so that it passed on their death to their father's heirs and not to their own heir, the husband. In the absence of heir the tenancy lapses and the landlord can resume possession. A.I.R. 1922 Nag. 24.

——S. 81—Appeal—Maintainability—Test.

The test of determining whether an appeal lies from a decree under S. 81 is the nature of the suit as originally framed and not the form it may assume subsequently. Though a suit for rent due by a tenant of *Malik Makbuza* fields is not triable by a Small Cause Court, it is still one of a nature cognizable by a Small Cause Court and unless the subject-matter involved in the suit exceeds Rs. 500, there is no second appeal from a decree in it. 56 Ind. Cas. 845 (N.).

——S. 81 (b)—Rent suit—Rival claimants—Second appeal.

To have a right of second appeal in a suit for rent for less than Rs. 100 in value, there should have been an adjudication between persons impleaded as parties to the suit and having conflicting interests. 14 C. P.L.R. 81 foll. 47 Ind. Cas. 540 (N.).

——S. 85—Holding—Separation into two plots—Forfeituure—Decree as to the plot—Effect on mortgagee of tenant.

If the landlord agrees to distribute the rent on each parcel separately there is a splitting of the original holding. Under S. 85 the tenant may pay up the arrear on one holding and save it from forfeiture without paying the arrear on the other. If a tenant consents to a decree as against the holding from which no arrear is due, it is binding on him but not on the mortgagee just as in the case of a surrender by the tenant. 10 N.L.R. 129=26 Ind. Cas. 810.

——S. 88—Ejectment—Compensation for crops—Claim by sub-tenant.

An ejectment of a tenant on legal grounds is binding on a sub-tenant and the sub-tenant is not entitled to any remedy not open to the tenant. His only valid cause of action is as representative of the tenant within S. 47, C.P.C. and he can claim compensation for crops raised by him and reaped by the landlord under S. 88 of the C. P. Tenancy Act. 11 N.L.R. 105=29 Ind. Cas. 836.

——S. 92—Jurisdiction.

Suit by an ejected tenant against a co-sharer who had since ceased to be a *lambardar* is not a suit between a landlord and tenant and is triable by a judge who is not a Revenue Officer. [*Note*.—This question of jurisdiction will not now arise since the passing of the new Tenancy Act of 1920]. 65 Ind. Cas. 127=A.I.R. 1922 Nag. 27.

——S. 92—Occupancy holding acquired by operation of law—Status of Tenant.

Where the occupancy holding of a certain tenant is acquired by some persons under a foreclosure decree, their becoming tenants of the entire proprietary body is only one of several possibilities, and that status can only arise by its acceptance by both parties. 4 N.L.R. 120 foll. 4 N.L.J. 55=63 Ind. Cas. =A.I.R. 1921 Nag. 17.

——S. 93—Revenue Court not ordering costs—Subsequent suit therefor does not lie.

If the Court is not entitled to order costs, and costs are incurred, they may be made the subject of consideration as to damages in a subsequent suit. If the Revenue Officer has power to award costs, and he does not do so, he must be held to have disallowed them and a subsequent suit will not lie. All Revenue Officers holding enquiries of the nature described in S. 95 of the Tenancy Act, which includes enquiries under S. 93 have, by rules having the force of law, been given the powers of Civil Courts in the matter of costs. 18 N.L.R. 65=65 Ind. Cas. 67=A.I.R. 1922 Nag. 169.

——S. 93—Applicability — Disputes between neighbouring tenants.

The Tenancy Act is an act mainly to provide for the relations between landlord and tenant, and contains no provisions, for settling disputes between neighbouring tenants as such. They must have recourse to the common law. 18 N.L.R. 65=65 Ind. Cas. 67= A.I.R. 1922 Nag. 169.

——S. 94 (1)—Ejectment—Peaceable dispossession.

"Ejectment" in S. 94 means a dispossession, that is to say, a loss of possession through some act of the defendant which was a taking of possession with the intention of excluding the plaintiff. Force also included the moral equivalent of force. 11 N.L.R 8=27 Ind. Cas. 864.

——S. 94 (1)—'Ejected.'

Suit by an ordinary tenant for possession against landlord to whom the holding was let out and who got it entered as his *Khud Kast* is not barred even after two years of such entry as there has been no ejectment of the defendant as such, by the landlord. Possession of tenant by sufferance is not wrongful withholding of possession as against the lessor. 6 N.L.R. 95=6 Ind. Cas. 937.

——S. 94 (1)—'Ejected'—Sale to landlord.

The word "ejected" in S. 94 of this Act implies some degree of force or notice and hence where the landlord has taken possession with the consent of the tenant, this section has no operation though fraud may be alleged. Where the landlord purchases the tenant right of a holding of which he is already in possession, this is only a surrender and hence his possession is not that of a vendee of the tenant. A suit to avoid surrender by an occupancy tenant on the ground of fraud is governed by Art. 91 of the Limitation Act and not by S. 94 of the Tenancy Act. 5 N.L.R. 97=3 Ind. Cas. 51.

——S. 94 (1)—Ejectment by a co-sharer—Limitation—Landlord.

The special period of limitation prescribed by S. 94 (1) applies only to cases in which the ejectment is by the whole body of proprietors or by the *Lambardar* representing it and not to cases of ejectment by a fractional co-sharer in the village, acting on his own account. The term "landlord" does not include one of two or more co-sharers in an undivided village acting independently, in respect of a transfer voluntary or involuntary on the part of the tenant. 28 Ind. Cas. 250 (N.).

——S. 94 (3)—Proviso—Retrospective effect.

The proviso to S. 94 (3) is retrospective and governs all claims for arrears of rent to which its terms are applicable from the moment of its passing, as the right to sue for arrears of rent does not accrue under the Tenancy Act but under the general law of contract and the fact that the Tenancy Act of 1883 was repealed by the Act of 1898 does not make the present period of limitation inapplicable. 7 N.L.R. 125=11 Ind. Cas. 912.

——Ss. 95 and 97—Civil and Revenue Court—Suit for possession and mesne profits by occupancy tenant.

A suit for possession of land of which plaintiff is occupancy tenant, by operation of law, upon the sale of the proprietary rights in *sir*, is a suit between landlord and tenant and cognizable by a Revenue Officer, though plaintiff has not obtained possession of the land as tenant and has not been recognized as such by the landlord. A claim for mesne profits and for a house which plaintiff seeks to recover as an agriculturist is ancillary to the main relief and does not change the nature of suit. 54 Ind. Cas. 827 (N.).

——S. 95—Jurisdiction of Civil Court—Trespass, suit for.

A suit based on trespass does not fall under C. P. Tenancy Act and is thus cognizable by Civil Court. 1 Pat.L.J. 525=3 Pat.L.W. 77=38 Ind. Cas. 98.

——Ss. 95 and 97—Nazarana—If rent—Small Cause Court.

The *nazarana* paid or agreed to be paid as price for the grant of a lease is rent and a suit therefore is not cognizable by a Small Cause Court. 9 N.L.R. 94=20 Ind. Cas. 261.

——Ss. 95 and 97—Civil and Revenue Courts—Jurisdiction.

A suit for possession on the allegation that the possession of the landlord is due to a sale by an unauthorised guardian of the tenant is cognizable by the ordinary Civil Court. 9 N.L.R. 54=19 Ind. Cas. 759.

——S. 97—Illegal ejectment—Jurisdiction.

A suit for recover of possession by tenant illegally ejected is triable only by a Judge who is also a Revenue Officer. Mere exclusion from possession constitutes ejectment of the tenant from the holding. 50 Ind. Cas. 770 (N.).

——S. 97—Suit between landlord and tenant—Jurisdiction of Civil Court.

The policy of S. 97 of the Act is that all questions concerning the right of a tenant, as such, of an agricultural holding which arise out of the relationship of tenant and landlord should, except in so far as appeals are concerned, be tried by a Judge who is also a Revenue Officer. The mere fact that some

one, not a landlord, is joined as a co-defendant in a suit between a landlord and a tenant does not take away the operation of S. 97. 45 Ind. Cas. 654 (N.).

CENTRAL PROVINCES TENANCY ACT (1 OF 1920).

——Retrospective operation.

Act 1 of 1920 has no retrospective operation. A.I.R. 1922 Nag. 227 and A.I.R. 1923 Nag. 227, Foll. 109 Ind. Cas. 543=11 N.L.J. 41.

——Construuction — Determination of rights of landlord and tenant—Notions derived from English law and other Indian law must be set aside.

Per *Bose, J.*—In dealing with the rights of landlords and tenants under C. P. Tenancy Act, notions derived from the English law of landlord and tenant, and indeed from that of the ordinary Indian law as well, must be placed completely on one side. The Tenancy Act creates special tenures which are unknown to the ordinary law. It prescribes in detail the rights, remedies and liabilities of the various persons and subjects with which it deals. It creates a status of a very special and peculiar kind. Therefore, unless one follows closely the spirit and the provisions of the Act and excludes from consideration preconceived notions gathered from other laws, one will be landed in fallacies and contradictions and will be trapped into giving a false interpretation to the meaning and intent of the Legislature. A.I.R. (Vol. 27) 1940 Nag. 49=1940 N.L.J. 121=I.L.R. (1940) Nag. 348=186 Ind. Cas. 731 (F.B.).

——Object—Disposition by will.

The intention of enacting the law of tenancy in the Central Provinces has been understood, in all the law Courts for all these years, to be to recognize a tenant's right of a restricted character as regards its heritability, transferability, partibility under certain conditions and limitations, but it has never been understood to carry with it the incident of divisibility by will at the instance of the tenant. It is property in which the interest carved out is more of a limited or personal character, than of a character conveying unlimited powers of disposition to the incumbent for the time being. The whole trend of the decisions on the question of tenancy has always been one way and consistent with such intention. 90 Ind. Cas. 247=A.I.R. 1926 Nag. 222.

——Policy of Act—Right of Proprietor—Occupancy rights in sir—Policy if can be defeated by gift and surrender.

Whenever it appears that a transaction is void, as contrary to the policy of a statute the Court should take notice of the nullity and proceed accordingly.

The policy of the C. P. Tenancy Act is to secure and preserve to a proprietor, whose proprietary rights are transferred, otherwise than by gift or by exchange between co-sharers, a right of occupancy in his *sir* lands and that such right of occupancy is by the Act secured and preserved to the proprietor, who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not and notwithstanding any agreement to the contrary between him and the transferee. This policy cannot be defeated by giving and then as part of the same transaction surrendering. A.I.R. (Vol. 25) 1938 Nag. 185=173 Ind. Cas. 145 (2).

——Scope of.

In the Central Provinces, the Tenancy Act fastens itself upon the original contract between the parties and regulates their future rights and liabilities, the moment there is a transaction which falls within its purview. A.I.R. (Vol. 23) 1936 Nag. 180=I.L.R. (1936) Nag. 5=165 Ind. Cas. 122.

——Absolute occupancy tenant is tenant only and has no proprietary rights.

Per *Bobde, J.*—An absolute occupancy tenant is a tenant and not a sort of proprietor. The right of an absolute occupancy tenant is a tenant-right pure and simple and not a proprietary right.

The landlord even in respect of lands held by absolute occupancy tenants as also occupancy tenants, is nothing short of an actual owner in *praesenti* and has also a right of possession vested in him the only embargo in law being the tenant, his heir or his transferee under a transfer which the Tenancy Act permits or the landlord accepts. So when the tenant dies without an heir, the impediment gives way, leaving the landlord free to step into possession. Hence the holding of an absolute occupancy tenant dying heirless does not escheat to the Court. A.I.R. (Vol. 31) 1944 Nag. 250=I.L.R. (1944) Nag. 473 =1944 Nag.L.J. 553 (F.B.).

——Absolute occupancy holding—Purchaser in execution—Rights of.

The auction-purchaser in execution of a rent decree of an absolute occupancy holding does not get it free from all incumbrances. He steps into the shoes of the holder of the first charge and has the capacity to redeem *qua* holder of the equity of redemption. He has the option to fall back on the prior charge or offer to redeem the mortgage. 9 N.L.J. 229=99 Ind. Cas. 445=A.I.R. 1927 Nag. 119.

——Occupancy holding—Devolution—Law as to.

The law applicable to the devolution of occupancy holding is the law existing at the date of devolution. The mere fact that during the interval the Legislature thought fit to change the law is no ground for thinking that the old law which it repealed was of the same nature as the repealing enactment itself. 9 N.L.J. 207=95 Ind. Cas. 589=A.I.R. 1926 Nag. 433.

——Occupancy tenant.

Where the landlord has regarded the transferee of the occupancy tenant as being validly in possession of the holding, the transferee becomes an occupancy tenant in his own right. (1935) 18 N.L.J. 163.

——Occupancy tenancy—Lease—Mode of creation —Value of interest only Rs. 50—Necessity of registration.

Under the C.P. Tenancy Law, the creation of an occupancy tenancy need not be effected by granting a lease in perpetuity; it is sufficient to grant a lease for one year. Consequently, the right need not be conferred by a registered instrument where the value of the interest is only Rs. 50. A.I.R. (Vol. 20) 1933 Nag. 44 (1)=15 N.L.J. 99=141 Ind. Cas. 652.

——Arrears of rent—Decree for, nature of.

A decree for arrears of rent against a tenant whose tenure is governed by the C. P. Tenancy Act,

is a simple money decree and in itself does not differ from any other decree of that character. There is nothing special or peculiar to it *qua* decree. It can, therefore, so far as the Civil Procedure Code, is concerned, be executed in the same way as any other money decree. The only restrictions upon execution are those contained in the C. P. Tenancy Act, and these restrictions being exceptions to the general law must be interpreted strictly in accordance with the terms of the Act which imposes them. A.I.R. (Vol. 27) 1940 Nag. 270=1940 N.L.J. 56=189 Ind. Cas. 807.

——Ejectment—Person in line of occupancy tenant's heirs acquiring tenancy by adverse possession—If can be ejected by landlord.

A landlord is not entitled to eject a person who claims to have acquired occupancy tenancy by adverse possession against the admitted tenant when such person is in the line of the tenant's heirs. A.I.R. (Vol. 27) 1940 Nag. 49=1940 N.L.J. 121=I.L.R. (1940) Nag. 348=186 Ind. Cas. 731 (F.B.).

[Overrules A.I.R. (Vol. 17) 1930 Nag. 124=122 Ind. Cas. 259.].

——Right to sue—Mortgagee—Possessory mortgagee of fractional interest in village is not landlord and cannot sue for rent.

The position assignable to a mortgagee in possession of a fractional interest in a village is that of a mere transferee of a money claim to a portion of the arrears of rent when they have been proved due to the landlord of the holdings held by tenants of the village. Therefore such mortgagee is not a landlord within the meaning of the C. P. Tenancy Act and a suit for rent against the tenants is not maintainable by him. 82 Ind. Cas. 201=A.I.R. 1925 Nag. 183.

——Tenant — Registered kabuliyat executed by defendant to cultivate malik makbuza land for fixed period and to pay a sum of money annual'y—Defendants, if tenants within meaning of Act.

Where the defendants have executed a registered *kabuliyat* to a *malik makbuza* holder to cultivate the latter's land for a particular period agreeing to pay a certain sum of money every year in return, the defendants are tenants and the amount they have bound themselves to pay, is rent within the meaning of the C. P. Tenancy Act. A.I.R. (Vol. 23) 1936 Nag. 180=I.L.R. (1936) Nag. 5=165 Ind. Cas. 12.

——Abadi.

The term "land" in C. P. Tenancy Act and C. P. Land Revenue Code does not apply to sites in the *abadi*. A.I.R. (Vol. 26) 1939 Nag. 287=1939 N.L.J. 429=189 Ind. Cas. 273.

——S. 1—Absolute occupancy right is tenant right.

The inevitable consequence of placing the holder of an absolute occupancy right in the category of a 'tenant' is to make his enjoyment of the tenant right subjec to the acceptance by him of the responsibilities attaching to that right in so far as they may be incidental to his position as such tenant towards his landlord under the general law which must govern the relations of landlord and tenant. 25 N.L.R. 198=122 Ind. Cas. 259=A.I.R. 1930 Nag. 124.

——S. 2—Co-lambardars—Right to sue.

One out of two lambardars can bring a suit to recover a village site, when he is not acting adversely to the interests of the other lambardar. 108 Ind. Cas. 434=A.I.R. 1928 Nag. 275.

——S. 2—Grazing—Khudkhast land left under grass—Tenants cannot graze free of charge.

Keeping land under grass is "agriculture" within the meaning of that term in the Tenancy Act and therefore where a plot is recorded as khudkhast, villagers are not entitled to graze their cattle free of charge therein merely because it is left under grass. 25 N.L.R. 16=116 Ind. Cas. 76=A.I.R. 1929 Nag. 108.

——S. 2—Tenancy—Person in possession of holding for five years without protest—No tenancy is created even by acquiescence.

A tenancy cannot be created by implication or acquiescence. Tenancy can only be created by a contract. The failure of the landlord to protest against a person's possession of a holding for five years is entirely insufficient as proof that the landlord had entered into a contract with that person. 114 Ind. Cas. 622=A.I.R. 1929 Nag. 13.

——S. 2—Benami Tenancy.

Although tenancy is personal, there is nothing in the C. P. Tenancy Act to prevent a tenancy being held benami. 118 Ind. Cas. 684.

——S. 2—Tenancy can be held benami though it is personal.

In the Central Provinces under the C. P. Tenancy Act the contract of tenancy is a personal one. But a recorded tenant may hold land benami for some other person. If there are circumstances showing that the landlord knew that the recorded tenant was merely a benamidar he is not entitled to treat the tenancy as abandoned, when the benamidar disappears and the person for whom the benamidar was holding the benami cultivated the holding. 92 Ind. Cas. 80=A.I.R. 1926 Nag. 239.

——S. 2 (3)—"Arrear", when becomes due.

Agricultural rent payable on May 1—According definition of "arrear" in S. 2 (3), an instalment of rent does not become an arrear on the day on which it was payable, *i.e.*, May 1. It becomes arrear only after midnight of that day and hence a suit for arrear of rent payable on May 1, would be premature if filed on that day. A.I.R. (Vol. 30) 1943 Nag. 20=1942 N. L. J. 487=I. L. R. (1943) Nag. 321=202 Ind. Cas. 779.

——(as amended in 1940), S. 2 (5)—Improvement—Construuction of temple.

The construction of a temple by an occupancy tenant of a holding on lands let out for agricultural purposes of cultivation cannot by any stretch of reasoning, be said to be an improvement as defined by S. 2 of the C. P. Tenancy Act. Such a construction cannot be said to be for the betterment of the crops and for the improvement of gariculture. I.L.R. (1949) Nag. 167=A.I.R. 1949 Nag. 218=1948 N.L.J. 575.

——Ss. 2 (5) and 25—"Improvement"—Construction of house for residence and protection of crops from stray cattle.

The consruction of a building on the holding to enable the tenants to stay there permanently and pro-

tect their crops from stray cattle is not conversion of the holding for non-agricultural purposes but an improvement which the tenants are entitled to make. A.I.R. (Vol. 18) 1931 Nag. 182=27 N.L.R. 125=134 Ind. Cas. 849 (2).

——S. 2 (5) (d)—Improvement, what is.

A building which adds materially to the letting value of the holding, is suitable thereto and consistent with the purpose for which the holding is held and is required for the convenient and profitable use or occupation of the holding is an improvement. A.I.R. (Vol. 33) 1946 Nag. 131=1945 N.L.J. 516=I.L.R. (1945) Nag. 709.

——S. 2—Finding of fact.

Finding that certain buildings were not erected for the convenient or profitable use or occupation of the holding and were not consistent with the purpose for which it was let are findings of fact which cannot be challenged in second appeal. A.I.R. (Vol. 33) 1946 Nag. 131=1945 N.L.J. 516=I.L.R. (1945) Nag. 709.

——S. 2 (5) (d)—Agricultural holding Building constructed—Prima facie there is diversion—Tenant must prove contrary.

Prima facie the erection of a building on land which is let for agricultural purposes, that is to say, for the purpose of being cultivated and for no other purpose, is a diversion for non-agricultural uses; and once the fact of the erection of a substantial building is established it is for the tenant to show that it has been built in circumstances which make it an improvement on the land which is permitted or that it is not in fact a diversion from agricultural purposes. A.I.R. (Vol. 33) 1946 Nag. 131=1945 N.L.J. 516=I.L.R. (1945) Nag. 709.

——S. 2 (10)—Application for pre-emption—Whether may be sent for enquiry to Naib Tashildar—C. P. Land Revenue Act, Ss. 3 and 19.

It is not illegal for a Tahsildar to send an application for pre-emption to a Probationary Naib Tahsildar who was not empowered under S. 2 (10) of the C. P. Tenancy Act read with S. 19 of the Land Revenue Act. Under S. 3 of the Land Revenue Act, all Naib Tahsildars are "Revenue Officers" and para. 3 of the introduction to that Act makes it clear that, even before they are empowered under S. 14 of the Act, they may "investigate and report on cases for the orders of the Tahsildars". If the final order is passed by the Tahsildar, there is nothing whatever illegal in this procedure. 1947 N.L.J. 137.

——S. 2 (11)—Gaontias of Sambarpur village—If occupancy tenants—Transfer of gaonti rayoti lands—Validity.

As Government has parted with its proprietary rights in the Sambarpur village, that village is no longer "the property of Government" within the meaning of S. 2 (18). Land Revenue Act, and therefore, the *gaonti rayoti* lands (*i.e.*) khudkasht lands of the *gaontias* of the village are not "survey numbers" within the meaning of S. 2 (18) and as they are not "survey members" Expl. II of S. 2 (11), Tenancy Act does not come into play. As history makes it clear that the *gaontias* held this village before the Zamindar came on the scene, the Zamindar did not let them into possession of either the village or the lands, and there is nothing to show that they have since attorned to him. There is no evidence to the effect that the *gaontias* pay any rent to the Zamindar. They do not therefore come within the definition, of "tenant" in S. 2 (11) and cannot claim protected status. As there are no restrictions on transfer of the *gaonti rayoti* lands, a mortgage of such lands is valid. I.L.R. (1950) Nag. 97=1950 N.L.J. 528.

——S. 2 (11), (7)—"Another person" does not include Government—"Landlord" does not include Government—Use of words "occupancy" or maurusi in Nazul Settlement, whether gives right to occupants to claim that land is not liable to attachment in execution of decree.

The definition of "tenant" in S. 2 (11) of the C. P. Tenancy Act as a person who holds land of another person does not include a person who holds land from Government and the words "another person" are used in contradistinction to Government. Again the term "landlord," as defined in S. 2 (7) of the Tenancy Act, would not include Government. The distinction between Government and proprietor is made clear in the Land Revenue Act. The mere fact that the word "occupancy" or *maurusi* is used in the *Nazul* Settlement records would not give the occupants a right to claim that the land was not liable to attachment in execution of a decree. A.I.R. (Vol. 27) 1940 Nag. 210=1940 N.L.J. 162=189 Ind. Cas. 512.

——Ss. 2 (17), 49 (2), and 95 (1)—General Clauses Act (9 of 1897), S. 3 (25).

Where a registered deed of mortgage stated clearly that *sir* rights in the village were not affected by the deed but contained a statement that certain mango trees "with trunks and blossom" standing in *sir* fields formed part of the mortgaged property and it was contended that S. 49 (2) of the C. P. Tenancy Act prohibited registration of such a deed and the registration was therefore invalid.

Held, (*i*) that there was not presumption that *sir* land included trees and the deed though it purported to transfer the right in the trees, did not thereby purport to transfer the right to occupy any portion of *sir* land;

(*ii*) that ever if under a proper interpretation of the law the trees must form part of the *sir* land, the parties to the deed may sitll assert in good faith that they do not do so, and the registering officer acting with due care may register the document under a mistaken view of the law and the registration will not be invalid in such a case. A.I.R. (Vol. 20) 1933 Nag. 53=16 N.L.J. 1=29 N.L.R. 1=142 Ind. Cas. 147.

——S. 3—"Tenant"—Thalwa, meaning of—Sub-tenant in village, if a thalwa.

The word 'tenant' in the C. P. Tenancy Act includes a sub-tenant. The word *thalwa* in the *wajib-ul-arz* means a person who is not a tenant and hence a sub-tenant in a village who has been so for 6 or 7 years is a tenant in the village and not a *thalwa*. A.I.R. (Vol. 24) 1937 Nag. 160=171 Ind. Cas. 909.

——S. 4—Absolute occupancy.

Landlord can create absolute occupancy tenancy. 65 Ind. Cas. 952=A.I.R. 1922 Nag. 222.

——S. 5—Scope of.

All that S. 5 of the Central Provinces Tenancy Act does is to legislate for the rights of succession to a holding after the tenant has died. It does not make all the incidents applicable to the joint Hindu family apply during the life-time of the tenant. 121 Ind. Cas. 661.

——S. 5—Will made by tenant—Validity—Estoppel.

Although under S. 5 the interest of an absolute occupancy tenant passes by inheritance or survivorship according to his personal law and hence a will made by the tenant of the field in favour of a person not entitled to succeed under the personal law would be void in law, still, where one devisee sues another co-devisee under the same will who is estopped from challenging the will to enforce the terms of the will, the latter cannot say that the will is void. 1938 N.L.J. 181.

——S. 5—Absolute occupancy right cannot be bequeathed.

An absolute occupancy tenant is not empowered to bequeath any right in his holdings. 15 C. P. L. R. 1, affirmed. 82 Ind. Cas. 1038=A.I.R. 1925 Nag. 190.

——Ss. 5 and 11—Absolute occupancy holding—Son's interest.

Under the new Act sons of an occupancy tenant take an interest by birth where the law of the parties recognises succession by survivorship. A. I.R. (Vol. 19) 1932 Nag. 28=27 N.L.R. 371=136 Ind. Cas. 235.

——S. 5—No vested right by birth before new Act.

The law of survivorship was not applicable to absolute occupancy land under the Tenancy Act of 1898; a person could, therefore, get no vested right by birth in the absolute occupancy land before the introduction of the Tenancy Act, 1920. 4 N.L.R. 9; 5 N.L.R. 103 and A.I.R. 1926 Nag. 433, Foll. 104 Ind. Cas. 291=A.I.R. 1927 Nag. 381.

——S. 5—Landlord's right of re-entry—Nearest heir failing to take up tenancy.

In the case of an absolute occupancy tenant if the nearest heir fails to take up the tenancy the malguzar thereupon is entitled to re-enter and the whole line of more remote heirs need not be exhausted before the malguzar can claim to come in. 25 N.L.R. 198=122 Ind. Cas. 259=A.I.R. 1930 Nag. 124.

——S. 5 — Occupancy holding — Surrender by widow—S. 89, C. P. Tenancy Act.

A Hindu widow has not the right to surrender her late husband's holding, whether absolute occupancy or occupancy, in such a manner as to defeat the expectancy of a reversioner when the object of the surrender is to defeat that expectancy, although according to the nature of property she may surrender it to escape liability for rent. 6 C.P.L.R. 135; 15 C.P.L.R. 89; 8 N.L.R. 154; 6 C.P.L.R. 138; 5 N.L.R. 172; A.I.R. 1925 Nag. 306, Foll.; A.I.R. 1927 Nag. 129; A.I.R. 1927 Nag. 330, Not Appr. 26 N.L.R. 1=123 Ind. Cas. 449=A.I.R. 1930 Nag. 65.

——S. 5—Succession—Son dying—Mother getting his property by prescription—On her death the reversioners of the son succeed.

The title to an absolute occupancy field acquired by a mother by prescription after her son's death is a limited title of a female heir, and on her death the person entitled to inherit the property would be the reversionary heir of the son. 114 Ind. Cas. 454=A.I.R. 1928 Nag. 329.

——S. 6.

Synopsis.

1. Transfer by tenant under old Act.
2. Transfer by tenant under new Act.
3. Transfer by Hindu widow.
4. Pre-emption by landlord.
5. Landlord's righ to eject trespasser.

1. Transfer by tenant under old Act.

——S. 6 — Mortgage — S. 6 does not validate mortgage which is voidable under Tenancy Act (1898), S. 41 (7).

S. 6 applies only to mortgages effected after the date of its coming into force. It does not do away with the voidability under Cl. (7), S. 41 (Tenancy Act of 1898), attached to mortgages executed in contravention of that section. 24 N.L.R. 153=113 Ind. Cas. 128=A.I.R. 1929 Nag. 30.

——S. 6—Jurisdiction—Landlord ejecting transferee—Vested rights of tenant.

Landlord's right to eject the transferee is correlative with tenant's right to force the landlord to put him in possession, and therefore if the landlord is entitled to enforce his right under the provisions of S. 41 of the old Act, it follows that the tenant's right to be reinstated must be enforced under the provisions of sub-S. (8) of the old section. Rights already acquired under the repealed enactment were expressly saved by S. 110 of the new Act of 1920. S. 6 of the new Act which abolishes the provisions of sub-S. (8) of S. 41 of the old Act cannot override a right already vested and acquired under the old Act. 7 N.L.R. 125, Diss. from.

Consequently, Revenue Officer has jurisdiction to entertain an application for reinstatement by the tenant. 22 N.L.R. 114=96 Ind. Cas. 905=A.I.R. 1926 Nag. 499.

——S. 6 (4) (c)—Mortgage of absolute occupancy—Foreclosure after 1920—Landlord's right to eject mortgagee.

An absolute occupancy tenant mortgaged his holding in 1919. The transfer was made in contravention of S. 41, Act 11 of 1898, and was, therefore, voidable at the instance of the landlord. After Act 1 of 1920 came into force the mortgagee foreclosed and obtained possession of the holding:

Held, that the provisions of Act 1 of 1920 did not prevent the landlord from ejecting the mortgagee. A.I.R. (Vol. 18) 1931 Nag. 4=27 N.L.R. 108=130 Ind. Cas. 97 (F.B.). [Overrules (1) A.I.R. (Vol. 14) 1927 Nag. 127=101 Ind. Cas. 284; (2) A.I.R. (Vol. 14) 1927 Nag. 277=103 Ind. Cas. 71.]

2. Transfer by tenant under new Act.

——S. 6 (1) (a) (b) and (c)—Transfer not covered by Covenant for reconveyance therein—If binds landlord or his lessee.

Any transfer by an occupancy tenant, which is not covered by S. 6 (1) (a), (b) and (c) of the Tenancy Act, is not binding on the landlord. It follows that a covenant for reconveyance in such a transfer is equally inoperative as against the landlord or his lessee to whom the landlord leased out the occupancy field after obtaining possession by proceedings under S. 6-A of the Act. I.L.R. (1950) Nag. 719=A.I.R. 1950 Nag. 198=1950 N.L.J. 390.

——S. 6—Sale of absolute occupancy holding in execution of decree—Effect of—Position of purchaser—Liability for rent.

If an absolute occupancy holding is sold in execution of a decree, the tenant loses his rights from the moment of the transfer and the purchaser becomes a tenant from the date of the transer till it is avoided by the landlord in the manner and to the extent provided by S .6 of the C. P. Tenancy Act. The purchaser is, therefore, liable to pay rent to the landlord for that period. I.L.R. (1949) Nag. 251=A.I.R. 1949 Nag. 364=1949 N.L.J. 180.

——S. 6—Transfer by absolute occupancy tenant —Liability for either rent or damages for occupation between date of transfer and date on which it is avoided.

In a case of transfer of absolute occupancy holding, the original tenant ceases to be a tenant from the date of transfer. He is not, therefore, liable for the rent after that date. Whether the transferee is a tenant or not between the date of the transfer and the date on which it is avoided, he is liable either for rent or for damages for use and occupation. A.I.R. (Vol. 26) 1939 Nag. 175=I.L.R. (1941) Nag. 369=1939 N.L.J. 196 =182 Ind. Cas. 617.

3. Transfer by Hindu widow.

——S. 6—Hindu widow—Interest of, in occupancy tenancy.

Though a Hindu widow's interest in an absolute occupancy tenancy which has devolved on her at her husband's death is the same in all respects as the estate of a Hindu widow in land inherited from her husband, there is the important exception that the limitations of her interest in the tenancy are subject to the provisions of the Tenancy Act as to surrender and alienation. 65 Ind. Cas. 952=A.I.R. 1922 Nag. 222.

——S. 6—Alienation by Widow with landlord's consent—Validity.

A sale by a widow in possession of her husband's absolute occupancy fields without legal necessity is liable to be set aside by the reversioners and the landlord's consent to the transfer cannot validate the transfer so as to amount to a surrender plus a subsequent grant of tenancy. 8 N.L.R. 154, Foll. 95 Ind. Cas. 626=A.I.R. 1926 Nag. 367.

——S. 6—Surrender and transfer by limited holder—Distinction.

There is no distinction between a surrender and a transfer by a limited holder where the limited holder has done all that was required of her under Ss. 5 and 6, C. P. Tenancy Act (1920), before making the transfer. A.I.R. 1925 Nag. 306 and A.I.R. 1927 Nag. 129, Foll. 10 N.L.J. 257= 105 Ind. Cas. 559=A.I.R. 1928 Nag. 32.

——Ss. 6, 11 and 89—Surrender of tenancy by Hindu widow to landlord—Reversioner, whether becomes entitled to immediate possession.

When a widow surrenders a holding inherited from her husband, the reversioner, who successfully challenges the surrender, is entitled only to a decree for a declaration that he is entitled to possession on the death of the widow. He is not entitled to a decree for immediate possession. A.I.R. (Vol. 18) 1931 Nag. 129=27 N.L.R. 186 =133 Ind. Cas. 385 (F.B.).

4. Pre-emption by landlord.

——S. 6—Oral sale alleged—Tenant continued to be recorded in revenue papers—Possession with vendee—Landlord's claim for pre-emption—If sustainable.

It is possible that in certain circumstances a transfer, irregular under the civil law can nevertheless be taken cognizance of under the Tenancy Act for purposes of pre-emption. But where it is alleged that there has been an oral sale by the tenant but the tenant continued to be recorded as tenant in the revenue papers and the alleged vendee who was put in possession as sub-tenant, there must be something more tangible than this to support a landlord's pre-emption claim. 1948 N.L.J. 330.

——S. 6 (2)—Transfer by absolute occupancy tenant without written notice to landlord—Validity—Landlord, if can avoid it.

Section 6 (2), C. P. Tenancy Act, requires an absolute occupancy tenant who intends to transfer any right in his holding to any extent or in any manner not provided for in sub-S. (1) to give his landlord a written notice of his intention and requires him to defer proceeding with the transfer for a period of one month, but neither this section nor any other section in the Act prescribes a penalty for non-compliance with these provisions. A transferee from an absolute occupancy tenant without a written notice to the landlord as prescribed by the section obtains a title good as against all the word from the moment of the transfer, subject only to the fact that it may be set aside by the landlord in the manner and to the extent provided by S. 6. A.I.R. (Vol. 25) 1938 Nag. 292=I.L.R. (1940) Nag. 190=1938 N.L.J. 152=177 Ind. Cas. 173.

——S. 6 (2) and S. 105—Pre-emption—Tenant a minor—His mother contracting to sell the field—Landlord exercising his right of pre-emption—Tenant cannot subsequently recover possession on the ground of want of legal necessity.

Plaintiff's mother, as guardian, entered into an agreement to sell an occupanccy field to a third

party. In accordance with sub-S. (2), S. 6 she gave notice to the lambardar of her intention to sell, who claimed the right to purchase the field in exercise of his pre-emptive title. In the revenue proceeding, the question of valuation alone was contested. The plaintiff brought a suit for possession alleging that there was no legal necessity for his mother to have made the transfer to the third party and the possession of the field by the defendant was illegal and that the plaintiff was entitled to retain possession.

Held, that the statutory right of pre-emption given to the landlord under S. 6, sub-S. (2) cannot be regarded as an ordinary transfer. That right having been duly exercised, having regard to S. 105 (a) of the Act, the jurisdiction of the Civil Court was excluded and it was not open to the plaintiff, to come to Court on the alleged cause of action of want of legal necessity for the intended transfer. 11 N.L.J. 125=109 Ind. Cas. 615=A.I.R. 1928 Nag. 249.

——S. 6 (4) (c)—Fixing up of the price by Revenuue Officer—If conclusive.

The value of the absolute occupancy right free from incumbrances as fixed by the Revenue Officer is conclusive. S. 6 (4) (c), C. P. Tenancy Act, gives the landlord a substantive right of pre-emption when an absolute occupancy holding is sold in execution of a decree obtained by any person other than the landlord. That right is independent of the right of any mortgagee of the tenant right and is paramount. In addition to this, the value of the absolute occupancy holding as if it were not mortgaged or charged as fixed by the Revenue Officer is conclusive and cannot be challenged in Civil Couurt in view of S. 105 (a) of the C. P. Tenancy Act, 1920, unless it is clearly shown that either the Sub-Divisional Officer had no jurisdiction to fix the price or that the procedure followed by him was flagrantly illegal. S. 6 does not provide for notice to the encumbrancers and it is, therefore, not imperative on the Officer to give any notice to them. His order, therefore, cannot be declared illegal because he omits to do what the law never imposed any obligation on him to do. A.I.R. (Vol. 25) 1938 Nag. 80=I.L.R. (1938) Nag. 268=174 Ind. Cas. 762.

——S. 6—Mortgage by tenant—Subsequent sale—Pre-emption—Rights of the mortgagee.

Where a tenant mortgages an absolute occupancy field and that field is subsequently sold to another creditor and the sale is pre-empted by the landlord, the original security gets converted into the pre-emption price so that the mortgage is lifted from the land and becomes attached to the pre-emption price. In these circumstances, the sale of the holding in pursuance of the final decree for sale in the mortgage suit cannot convey any interest in the holding to the mortgagee purchaser. Consequently his suit to recover the holding is obviously misconceived. A.I.R. (Vol. 25) 1938 Nag. 80=I.L.R. (1938) Nag. 268=174 Ind. Cas. 762.

——S. 6—Mortgage—Absolute occupancy field—Pre-emption—Deposit by landlord—Mortgagee has prior lien on amount deposited.

Where an absolute occupancy field subject to a mortgage is allowed to be pre-empted and the pre-emption amount being fixed, the amount is deposited in Court, the deposit takes the place of the mortgaged property and the mortgagee becomes entitled to a prior lien on the money deposited in place of the mortgaged land, whether that money is placed into the hands of third persons or not. A.I.R. (Vol. 20) 1933 Nag. 42 (2)=29 N.L.R. 152=143 Ind. Cas. 417.

——S. 6 (5)—Proceedings behind the back of mortgagee—Holding, if exonerated from mortgage debt.

An abolute occupancy tenant cannot dispose of his holding behind the back of his mortgagee and possibly in collusion with his landlord, so as to convert a secured debt into an unsecured debt and perhaps leave his creditor with no remedy. Sub-S. (5) of S. 6, C. P. Tenancy Act, applies when an application is made to a Revenue Officer to fix the value of any right in an absolulte occupancy holding which is already mortgaged. On such an application he must fix the value of the right as if it were not mortgaged, and, if the landlord is then put in possession the mortgage debt becomes a charge on the purchase money in exoneration of the land.

But when the proceedings are behind the back of the mortgagee and he is given no opportunity to contest the value put on the holding by the landlord or to take steps to see that the deposit made by the landlord is not withdrawn so as to be no longer available to him, there are no proceedings under Sub-S. (5) of S. 6, and the holding does not become exonerated from the mortgage claim. A.I.R. (Vol. 21) 1934 Nag. 232=31 Nag.L.R. 315 =152 Ind. Cas. 214.

——S. 6 (5)—Mortgage of absolute occupancy—Pre-emption by malguzar—Suit to enforce mortgage—Liability of pre-empted property.

Under S. 6 (5) of the C. P. Tenancy Act, 1920, when the proprietor exercises his right of pre-emption and deposits the amount which has been fixed by the Revenue Officer as the value of the land free from incumbrances, the mortgage-debt becomes a charge on the purchase-money in exoneration of the lien. And in a suit brought on the basis of the mortgage, such pre-empted land must be excluded when the mortgaged property is brought to sale. A.I.R. (Vol. 19) 1932 Nag. 47=14 NL.J. 149=136 Ind. Cas. 876.

——S. 6—Mortgage of absolute occupancy holding—Surrender of part of it to A by mortgagor for consideration—A getting it recorded as sir in exchange for another land—Sale of remaining portion to another—A pre-empting them—Foreclosure suit—Pre-emption proceedings found to be collusive—Mortgagee's right to follow pre-empted property.

Where certain absolute occupancy holding is mortgaged and the mortgagor surrenders part of it to **A** who gets it recorded as **sir** in exchange for another land and the remaining portion is sold to

another and **A** pre-empts them but it is found that the pre-emption proceedings are vitiated by collusion between **A** and mortgagor, they are not binding on the mortgagee and the mortgage lien still attaches to the property, and S. 6 is no bar to the mortgagee proceeding against the pre-empted property. And as regards the exchanged property, the doctrine of substituted security applies and it also is liable for the mortgage-debt. A. I. R. (Vol. 22) 1935 Nag. 65=17 N.L.J. 257.

——S. 6 (6)—Transfer by tenant without notice to landlord—Landlord's right to possession—Date of accrual—Right to mesne profits.

Under S. 6 (6) of the C.P. Tenancy Act the right of the landlord to obtain possession does not accrue until he actually deposits the price fixed by the Revenue Officer and he is not, therefore, entitled to claim mesne profits or compensation for use and occupation from the transferee for the period intervening the date of the sale and his making the deposit.

The proper course for the landlord in such cases is to file a suit for rent against the tenant, since the original tenancy continues until the transfer is either confirmed in favour of the transferee by the landlord's failure to make the deposit, or the landlord himself acquires it by depositing the price.

The transferee's possession in such a case is neither that of a tenant nor of a transferee. A. I.R. (Vol. 20) 1933 Nag. 205=142 Ind. Cas. 358.

5. Landlord's right to eject trespasser.

——Ss. 6, 12, 13 and Sch. 2, Art. 1—Tenancy rights extinguished by exclusion by trespaser for over three years—Trespasser does not become tenant—Landlord is entitled to eject him — Jurisdiction of Civil Court.

Per **Full Bench.**—The Legislature when applying S. 28, Limitation Act, to suits between tenant and trespasser which provision extinguishes the tenant's right after exclusion for the prescribed period (in this case three years), did not confer by implication tenancy right on the trespasser against the landlord and the trespasser does not become a tenant of the landlord. The effect of S. 28, Limitation Act, is not to vest the tenancy in the trespasser. The three years' prescription does not effect a "transfer" within the meaning of S. 6 or S. 12, C. P. Tenancy Act, 1920. When the trespasser has been on the land for three years, the trespasser cannot, when the landlord seeks to eject him, successfully plead that the tenancy still exists, or be permitted to shelter any more behind the tenant whom he had displaced. The landlord is entitled to eject the trespasser. The exercise of the proprietary right to eject a trespasser after the termination of the tenancy remains unqualified.

Obiter: Per **Full Bench.**—When the period of limitation has expired under S. 28, Limitation Act, and no remedy has been allowed under S. 13, Tenancy Act, the Civil Courts have jurisdiction to eject the trespasser to whom the tenant had "transferred" the land in contravention of S. 12, Tenancy Act. The verb "transfers" in S. 13 of the Act includes the entry into transactions in contravention of S. 12 of the Act, which are not transfers under the ordinary law. A.I.R. (Vol. 31) 1944 Nag. 250=1944 N.L.J. 553=I.L.R. (1944) Nag. 473 (F.B.).

——S. 6-A—Pre-emption against person substituted by Court in transferee's place—If lies.

The right of pre-emption under S. 6-A of the Tenancy Act accrues only to the landlord. Pre-emption can only lie against the transferees of the tenant of the holding and not against the person who was substituted in place of the transferees by a Court which dealt with the pre-emption application of the person so substituted. 1948 N.L.J. 333.

——Ss. 6-A and 63-A—Re-assessment of holding—Buildings constructed by tenant thereon—Sale by tenant of land and buildings—Landlord, if entitled to pre-empt only land.

S. 63-A of the Tenancy Act deals with tenancy holdings diverted to non-agricultural purposes. The sole object of this section is to enable Revenue Officers to revise the rent of a diverted holding with reference to its increased value during the currency of a settlement. Sub-S. (3) of the section however throws the holding back into the category of an agricultural tenancy by postulating that even after the revision of rent the tenant will have the same rights in the holding as he had in it before diversion. If a tenant of a holding which has been re-assessed under S. 63-A exercises his right and constructs a building, the building becomes merged in his right in the holding. If the land and the building are sold by the tenant without notice to the landlord, the landlord is not entitled to pre-empt only the land. It would be illogical for him to contend that a building on a non-agritural absolute occupancy holding is not an inseparable adjunct of the holding. 1949 N.L.J. 395.

——Ss. 6-A and 12-A — Right to apply for pre-emption—Cause of action arising pending appointment of lambardar in death vacancy.

If pending the appointment of a **lambardar** in a death vacancy, a cause of action for pre-emption under S. 6-A or 12-A of the Tenancy Act arises in a vilage, an application for pre-emption can only be made by the whole proprietary body or a single **de facto** landlord, if there is such a one, as the latter takes the place of the **lambardar**. 1949 N. L.J. 377.

——S. 6-A — Tenant transferring holding to brother's daughter and her male heirs—Landlord's right to pre-emption.

A transfer by a tenant of his absolute occupancy fields to his brother's daughter and her male heirs for maintenance, is a transaction which falls under S. 6 (1) (a) of the C.P. Tenancy Act in as much as it is made not only to the brother's daughter but also to her male heirs who are also the heirs of the transferor, and the landlord cannot therefore claim pre-emption under S. 6-A of the Act. 1947 N.L.J. 146.

——(As amended by Act 11 of 1940), S. 6-A—Sale of holding before amendment — Possession taken by auction-purchaser after amendment—Landlord, if can pre-empt.

A sale of an absolute occupancy holding in reali-

sation of a debt conciliation instalment took place before the (C. P. and Berar Act 11 of 1940) came into force, and the auction-purchaser entered into possession after the Amendment Act came into force. Thereupon the landlord applied under the new S. 6-A of the Tenancy Act for pre-emption.

Held, that the Amendment Act had no retrospective operation, that when the new S. 6-A came into force the auction-purchaser had already purchased the holding and had acquired the right to hold it without let or hindrance from the landlord and to deprive him of that right (because the law was afterwards altered and gave the landlord the right to pre-empt even in the circumstances of the case) was to apply the new law retrospectively in an indirect manner and that the landlord was, therefore, not entitled to pre-emption. 1946 N. L.J. 94.

——S. 6-A (8) and (15)—Landlord failing in civil suit under Sub-S. (15)—Whether can seek pre-emption in Revenue Court under Sub-S. (8).

A landlord failing in a civil suit for pre-emption filed under Sub-S. (15) of S. 6-A of the Tenancy Act, cannot seek pre-emption in the Revenue Court under Sub-S. (8) of that section. 1948 N. L.J. 442.

——S. 6-A (8) (a) — Landlord's consent not in writing—Proof of such consent—Burden of proof.

The written consent of the landlord is not legally necessary under Sub-S. (8) (a) second option, as it is under Sub-S. (2) of S. 6-A of the C. P. Tenancy Act. But if consent in writing is not forthcoming, the tenant must carry a heavy burden of proof that consent was in fact given or else the landlord's claim for pre-emption in accordance with the first option holds good. 1946 N. L.J. 570.

——S. 6-A (10)—Sale of holding to stranger in execution of money decree—Surplus used to satisfy rent decree—Landlord's right of pre-emption—Presence of his agent at auction sale—Equitable estoppel.

Two decrees were pending for execution with the Collector at the date of sale of an absolute occupancy holding held by him; (1) a money decree obtained by a stranger, and (2) a decree for arrears of rent obtained by the landlord. The holding was sold to a stranger in execution of the money decree and the surplus was used for satisfying the rent decree also. On an application by the landlord for pre-emption, it was contended for the auction-purchaser that the two decrees were merged and therefore the words "other than a decree obtained by the landlord" in S. 6-A (10) of the Tenancy Act removed the landlord's right of pre-emption. It was further contended that the landlord acquiesced in the auction as his agent was actually present thereat and therefore in equity he was estopped from exercising the right to pre-empt after the sale. Overruling both the contentions,

Held, that the holding was actually sold in execution of the money decree, that fact was not altered by use of some of the surplus for satisfying the rent decree also and that S. 6-A (10) of the Tenancy Act therefore applied. Moreover the landlord was bound to wait, under the provisions of that sub-section, until possession had been obtained by the auction-purchaser and there could be no waiving of his right or estoppel before that (e.g., the auction) because that right had not then accrued. 1949 N.L.J. 109.

——S. 6-A (10) (a) and (12) (b)—Sale of mortgaged holding in execution of money decree against tenant—Pre-emption by landlord—Price payable.

Where an absolute occupancy holding subject to a mortgage is sold in execution of a money decree against the tenant and purchased by the mortgagee, the landlord is entitled to pre-empt the holding under S. 6-A (10) (a) of the C.P. Tenancy Act for the amount of the purchase money paid at the sale. The mortgagee-purchaser cannot contend that the value of the holding should be fixed by the Revenue Officer under S. 6-A (12) (b) of the Act. Sub-S. (12) of S. 6-A can only come into play when there is other immoveable property in the lot, or the right is foreclosed. 1948 N.L.J. 190.

——S. 6-A (11), (8) (a)—Application for pre-emption—Deposit by landlord—If mandatory.

A landlord applying for pre-emption under S. 6-A (8) (a) of the C.P. Tenancy Act must make the deposit as required by Sub-S. (11). Not only no permission of the Court is required for it, but the deposit is mandatory. A tender is not a deposit. 1947 N.L.J. 137.

——S. 6-A (11) (a)—Deposit within one year—If necessary—Power of Court to extend time.

Under S. 6-A (11) (a) of the Tenancy Act, though the deposit need not accompany the application, it must, like the application itself, be made within one year of the loss of possession. The Court has no power to extend the time for deposit. 1945 N.L.J. 549.

——S. 6-A—Landlord not making deposit being misled by Court—If entitled to reasonable time to make deposit.

Where the original notice by the tenant was invalid, and the landlord's failure to pay the deposit within time after the transfer was completed was the result of his being misled by the attitude of the Court, the landlord should be permitted within a reasonable time to apply, paying the necessary amount into the office of the Tahsildar, to get a sale deed executed in his favour. 1946 N.L.J. 188.

——S. 6-A (12) (c) — Omission to deposit pre-emption amount within period fixed by Revenue Officer—Right of pre-emption—If lost.

The period fixed by the Revenue Officer under S. 6-A (12) (c) of the C.P. Tenancy Act for the deposit of the pre-emption amount by the landlord must be rigidly observed. Otherwise the right of pre-emption would be lost. The delay cannot be condoned. 1949 N.L.J. 385.

——S. 8-A and R. 3—Preliminary order under R. 3—Appeal, if competent—Final order passed before filing of appeal.

The words "preliminary order" occurring in R. 3 must mean that the Revenue Officer takes a decision after inquiring into the Malguzar's objections, if any. An appeal lies from a preliminary order and it is not rendered incompetent by the passing

of a final order under R. 4 before the appeal is filed. 1949 N.L.J. 53.

——S. 8-A—Tenant applying three out of seventeen khasra members to be declared malikmakbuza —These numbers shown in jamabandi in numerical order—Originally held by two persons as two separate holdings—Separate identity preserved by separate rents—Application, if competent.

A tenant holding 17 **khasra** numbers in absolute occupancy right applied to have 3 **khasra** numbers out of them declared **malik-makbuza**. The application was refused on the ground that under the proviso to S. 8-A of the C. P. Tenancy Act the applicant could not have a portion of the holding declared **malik-makbuza**. In the **jamabandi** these numbers were not shown separately from the others, and the 17 numbers went through in numerical order. They were originally two separate holdings held by two different people and they came to the applicant for different reasons at different times. Their separate identity was preserved by separate rents.

Held, that they were two separate holdings and the fact that they were not shown in two separate groups was only a result of the land record procedure whereby the **khasra** numbers were placed in numerical order, and that therefore the application was competent. 1946 N.L.J. 274.

——S. 9—Execuution — Powers of Collector—C. P. Code, S. 68.

A Collector, executing a decree under S. 9, C. P. Tenancy Act, and S. 68, C. P. Code, is a Judge of a Civil Court to which the decree has been transferred for execution, but his powers are limited to those which the Court from which the decree was transferred to him could exercise in the execution, of the decree only. He has no power to enquire into objections to attachment or applications for rateable distribution or matters of that kind. 109 Ind. Cas. 381=A.I.R. 1928 Nag. 297.

——S. 9—Mortgagee of holding paying rental arrears to avert sale—If entitled to reimbursement from purchaser of holdings—Contract Act, S. 69.

S. 9 of the C. P. Tenancy Act is a special enactment which overrides the general law. Under this section a mortgagee of an absolute occupancy holding is entitled to pay rental arrears to avert a sale of the holding in execution of a rent decree, and recover the amount so paid under S. 69 of the Contract Act from a purchaser of the holding although the latter was not a party to the rent decree which related to the period during which he was in occupation. Even assuming that the mortgagee, on the strict view of law could not be deemed to be interested in payment, he would get the benefit of S. 69 of the Contract Act if he made the payment under the **bona fide** belief that it was necessary for him to save the mortgaged property from being sold. 1946 N.L.J. 360.

——S. 9—Scope—If gives rights of subrogation.

The charge given in S. 9, C.P. Tenancy Act, is a special statutory right, that is to say, it is a charge which in the words of S. 100 of the T.P. Act, arises "by operation of law". That being so, its scope and limitations are those which the law creating it gives. The extent to which the ordinary law is set aside is therefore clearly indicated in S. 9 and the departure cannot be carried further by implication. The object of S. 9 (1) is to give the landlord precedence for his rent. That object is completely attained the moment the holding is sold in the manner specified in the section. The "first charge" enures not further than that. S. 9 does not confer rights of subrogation. Therefore any person claiming such rights has to found them on the T.P. Act, and not under this section. A.I.R. (Vol. 27) 1940 Nag. 156=1940 N.L.J. 179=I.L.R. (1941) Nag. 607=190 Ind. Cas. 641.

——S. 9—Sale of holding—Rights of auction-purchaser.

An auction-purchaser in a sale in execution of a decree for arrears of rent under S. 9 of the C. P. Tenancy Act purchases the holding subject to any encumbrances that may exist on it. Such an auction-purchaser steps into the shoes of the holder of the first charge and he may either redeem the mortgage or fall back on his prior charge and it makes no difference whether the auction-purchaser is himself the decree-holder or not. I.L.R. (1948) Nag. 573=A.I.R. 1949 Nag. 114=1948 N.L.J. 430.

——S. 9—Sale of holding—Rights of auction-purchaser.

An absolute occupancy field sold in execution of a rent decree under S. 9, C.P. Tenancy Act is not sold free from encumbrances. What is sold in execution of the rent decree is the interest of the judgment-debtor and where he has mortgaged the holding he holds it subject to the mortgage which he has created. The ordinary principle is that a purchaser cannot get a better title than that possessed by his vendor. A.I.R. (Vol. 27) 1940 Nag. 97=I.L.R. (1940) Nag. 522=1939 N.L.J. 601=187 Ind. Cas. 785.

——S. 9—Normally a sale is subject to encumbrances and in S. 9, C.P. Tenancy Act there is no mention of this general rule being abrogated. A.I.R. (Vol. 24) 1937 Nag. 376=I.L.R. (1937) Nag. 498=176 Ind. Cas. 155.

——S. 9—Sale of absolute occupancy holding—Effect on person claiming interest in holding.

When an absolute occupancy holding is sold in execution of a decree for arrears of rent, the charge in favour of the landlord is satisfied and the purchaser of the holding gets the holding free of that charge. Any person who claims to have any interest in the holding can pay up the decretal amount during execution proceedings until the holding is sold in execution. On sale of the holding, the right of such person to redeem the charge is barred and he is not bound thereafter to pay the amount of the decree for arrears of rent. A.I.R. (Vol. 23) 1936 Nag. 148=I.L.R. (1936) Nag. 138=161 Ind. Cas. 931.

——S. 9—Scope and effect—Landlord's charge for rent on absolute occupancy holding—Priority over prior charge-holders—Remedies of latter—Landlord purchasing holding in execution of rent decree — Rights of prior charge-holder — Holding consisting of two fields — Charge only on one of them—Piecemeal redemption—T. P. Act, Ss. 60, 92 and 101.

S. 9 of the C. P. Tenancy Act which makes the rent a first charge on an absolute occupancy holding gives the landlord priority over other charge-holders and mortgagees. It merely means that even though the landlord's right to recover the rent may have arisen after a prior encumbrance the landlord shall be put in the same position as if it had occurred first. Though the prior charge-holder is postponed to landlord and is thus relegated to the position of a subsequent encumbrancer by the section, his charge is not wiped out altogether. He can therefore redeem the landlord's charge either under S. 9 (3) of the Act by depositing the amount of the decree in Court any time before the sale, or by a subsequent suit.

What the landlord sells at the auction in execution of his rent decree is the tenant's interest in the holding and not his (the landlord's) fee simple in the land. Accordingly, a stranger auction-purchaser gets only the tenant's rights in the land and he does not acquire any of the landlord's superior rights. He cannot, therefore, step into the landlord's shoes and acquire his charge. But the position is otherwise if the landlord himself purchases in execution of his rent decree. He does not of course redeem his own charge but extinguishes it by the sale and accordingly he does not come in under S. 92 of the T. P. Act. But S. 101 of that Act comes into play, and he is entitled to set up his own charge against any other charge-holder or encumbrancer. In such a case, therefore, the prior charge-holder who is relegated to the position of a subsequent encumbrancer under S. 9 of the C. P. Tenancy Act must redeem the landlord's charge before he can enforce his own charge.

Where the absolute occupancy holding purchased by the landlord in execution of his rent decree consists of two fields a plaintiff charge-holder suing to enforce his charge on one of them cannot obtain the other field to which he has no title. The defendant landlord, on the other hand, is entitled to use his prior charge as a shield against the plaintiff's attack on the field in suit. But as regards the other field, the defendant is its owner having purchased it. Therefore, so far as the prior charge which relates to both fields is concerned, the defendant is in the position of a charge-holder who has acquired an indefeasible right as owner to a portion of the charged property. This attracts the provisions of S. 60 of the T.P. Act and results in a splitting up of the charge, and that results in piecemeal redemption. I.L.R. (1947) Nag. 912=A.I.R. 1948 Nag. 316=1948 N.L.J. 231.

——S. 10—Malguzar's servant entered in settlement parcha as mamuli, muafi khairati—If becomes an occupancy tenant.

A malguzar's servant who was entered in the settlement parcha as "mamuli, muafi khairati" was an ordinary tenant under the Old Tenancy Act of 1898. The Land Records Manual prescribes that such tenants should be recorded as occupancy tenants under the Act of 1920. S. 10 of this Act clearly authorises this. The fact that in the current jamabandi he has been shown only as "kabzedar" and that entry has not been corrected, cannot take away his existing right of tenancy. 1947 N. L.J. 110.

——S. 11 (as amended by Act 11 of 1940)—Amendment, if retrospective.

The amendment of S. 11, C. P. Tenancy Act which was made by Act 11 of 1940 deleting the proviso which had been appended to the C. P. Tenancy Act (1 of 1920) has no retrospective effect.

Where on the death of widow the tenancy rights had devolved on the landlord for want of heirs within the meaning of S. 11, Proviso (ii) as it stood before amendment the tenancy right was extinguished so as to give the landlord the right of re-entry. It would be preposterous to say that the legislature by the amendment of 1940 intended to affect that right. A.I.R. (Vol. 29) 1942 Nag. 49=I.L.R. (1942) Nag. 205=1942 N.L.J. 72=200 Ind. Cas. 54.

——S. 11—Applicability—Female tenant.

The provisions of S. 11 are to be read as applicable to male as well as female tenants **mutatis mutandis**. 23 N.L.R. 9=9 N.L.J. 221=98 Ind. Cas. 669=A.I.R. 1927 Nag. 68.

——S. 11—"Collaterals" and "kindred"—Construction.

The primary meaning of the words "collaterals" and "kindred" cannot be treated as the only meaning which the legislature intended to assign to them when used in the Tenancy Act. It would be proper to say that those words have only such technical meaning as they may bear under the system of personal law applicable to the tenant concerned, so that it should be open to the Court to put such different constructions on them as the personal law of inheritance of the particular tenant may justify. 23 N.L.R. 9=9 N.L.J. 221=98 Ind. Cas. 669=A.I.R. 1927 Nag. 68.

——S. 11—"Collateral" — Construction—Devolution of Hindu married woman's self-acquired occupancy tenant right.

In interpreting the rule of inheritance enunciated in S. 11, read with second proviso, as applicable to the devolution of a Hindu married woman's self-acquired occupancy tenant right, the word "collaterals" should be construed as the collaterals of her husband. 23 N.L.R. 9=9 N.L.J. 221=98 Ind. Cas. 669=A.I.R. 1927 Nag. 68.

——S. 11—Occupancy holding — Surrender by Hindu widow—Reversioners cannot challenge.

A surrender of occupancy holding by a Hindu widow cannot be challenged by the reversioners of the last male holder on the ground of want of legal necessity. A.I.R. 1927 Nag. 129; 9 N.L.R. 126;

and 5 N.L.R. 172, Foll.. 102 Ind. Cas. 888=A. I.R. 1927 Nag. 362.

——S. 11—Surrender by widow of tenancy inherited from a male is not invalid against reversioners.

The surrender to the landlord by a Hindu woman of a tenancy inherited from a male without legal necessity for making it is not invalid against the male's reversionary heirs. 5 N.L.R. 172 and 9 N.L.R. 126, Foll. 23 N.L.R. 1=99 Ind. Cas. 187=A.I.R. 1927 Nag. 129.

——S. 11—Hindu widow cannot make a Will in respect of her husband's occupancy holding—Suit to challenge such Will lies in Civil Court.

A Hindu widow in posession of her husband's estate as limited owner cannot make a testamentary disposition of the inherited occupancy holding of her husband so as to defeat the provisions of S. 11 of the new Tenancy Act, 1920, which provides that the occupancy holding shall on the death of the tenant pass by inheritance in accordance with his personal law. A suit to set aside such a disposition lies in Civil Court a "Will" not being a "transfer". 33 All. 233 and 5 C.P.L.R. 1, Foll. 90 Ind. Cas. 247=A.I.R. 1926 Nag. 222.

——S. 11—Scope—Survivorship—If excluded.

S. 11 of the C.P. Tenancy Act rules out survivorship. The use of the word "inheritance" together with the proviso manifestly rules out survivorship. 25 Pat. 764=A.I.R. 1947 Pat. 424=14 Cut.L.T. 35.

——S. 11—Death of occupancy tenant—Succession—Survivorship or Inheritance under personal law.

Under S. 11, C. P. Tenancy Act, 1920, the interest of an occupancy tenant in his holding passes on his death by inheritance according to his personal law and does not pass by survivorship. A.I.R. (Vol. 20) 1933 Nag. 240=16 N. L.J. 211=29 N.L.R. 323=147 Ind. Cas. 583.

——S. 11—Occupancy holding in name of manager of joint Hindu family—If passes by survivorship.

Ordinarily in the case of a lease taken by the Manager of a joint Hindu family in his own name but with family funds and really on behalf of the whole family, it is universally accepted that the lease and the benefits of it belong to the whole family and if it is heritable it will pass by survivorship and not by inheritance. Whatever the mutual rights and liabilities of the lessor and the members of the family other than the manager may be. This principle applies to an occupancy holding; 13 C. P.L.R. 137; 7 N.L.R. 36 and 10 N.L.R. 36 and 10 N.L.R. 64, Foll. 92 Ind. Cas. 916=A. I.R. 1926 Nag. 277.

——S. 11—The omission to mention survivorship in the case of an occupancy holding in S. 11 seems to have no more meaning or effect than the omission to state that the interest in that section is the interest in holding, and the difference in the wording of the two sections seems to be merely a curiosity in drafting. 102 Ind. Cas. 711=A.I. R. 1927 Nag. 272.

——S. 11—Tenancy—Hindu Law of survivorship does not apply.

The Hindu Law of Succession by survivorship and the vesting of a son's interest by birth is not applicable to a tenancy governed by the Central Provinces Tenancy Act. 78 Ind. Cas. 63=A.I. R. 1924 Nag. 372.

——S. 11—Inheritance — Exclusion from—Mere separation in mess and residence of a son is not sufficient.

The personal law of the Hindus has no doubt to be administered in dealing with cases of inheritance to occupancy tenancy holdings; but it does not follow that the rule of Hindu Law that a 'joint' son excludes a 'separated' son must hold good even where the separation consists only in mess and residence and not in estate. 9 N.L.J. 163=97 Ind. Cas. 730=A.I.R. 1927 Nag. 107.

——S. 11—Proviso (ii)—Female tenant—Succession—Collaterals of husband.

There is nothing in S. 11, Proviso (ii) of the C. P. Tenancy Act to show that it was ever intended that the succession should be confined to the collaterals of the female tenant only. The collaterals of the female tenant's husband can also succeed. 122 Ind. Cas. 377.

——S. 12.

Synopsis.

1. Acquisition of tenancy holding.
2. Assets of deceased tenant.
3. Mortgagee of Sir Land—Rights of.
4. Surrender by landlord.
5. Transfer of occupancy holding.
6. Sub-S. (2)—Insolvency of proprietor of sir land.
7. Sub-S. (2)—Insolvency of occupancy tenant.
8. Sub-S. (4)—Registration.
9. Sub-S. (5)—Pre-emption.

1. Acquisition of tenancy holding.

——S. 12—Tenancy holding — Land originally malik makbuza treated by holder as tenancy holding for more than 12 years—Holder becomes an occupancy tenant—His decree-holder cannot therefore attach the land.

Where land originally malik makbuza has been treated by the holder as his tenancy holding for more than 12 years, he cannot claim any rights greater than those of a tenant in the land, and as an auction-purchaser cannot obtain any rights which the judgment-debtor can no longer enforce, and as tenancy rights are not attachable, the rights of such malik makbuza cannot be attached and sold. 103 Ind. Cas. 697=A.I.R. 1927 Nag. 330.

2. Assets of deceased tenant.

——S. 12—Assets of deceased, what are—Compensation money for occupancy holding acquired under Land Acquisition Act.

Where occupancy rights are acquired under the Land Acquisition Act, the compensation money for such acquisition is not a part of deceased's assets since the occupancy-holding does not form part

of the assets of the deceased tenant in the hands of the heir. A.I.R. (Vol. 31) 1944 Nag. 304= I.L.R. (1944) Nag. 881=1944 N.L.J. 304.

3. Mortgagee of Sir Land—Rights of.

——S. 12—Mortgage—Sir land—Mortgagee entitled to decree against mortgage right in 'sir' land —Right to cultivating rights in purchaser's occupancy holding.

A mortgagee who is entitled to a decree against the mortgagor's right in sir land is entitled to claim a decree for cultivating rights in the land that had been sir but afterwards became the occupancy holding of another person whose rights by purchase accrued after the mortgage. A.I.R. (Vol. 20) 1933 Nag. 81=15 N.L.J. 8=28 N.L.R. 166 =138 Ind. Cas. 184.

4. Surrender by landlord.

——Ss. 12 and 15—Scope—Surrender by landlord, if prohibted.

S. 12, C.P. Tenancy Act, does not prohibit a transfer as such. It expressly permits, transfers, but limits them to the persons specified there. Such prohibition as there is was enacted for the benefit of the tenant, but for the protection of his co-tenants and heirs. If a transaction, viewed as a whole even though it purports to consist of two parts, is designed to defeat the statutory prohibition, the Courts very naturally decline to uphold it. But when the Act does not pretend to protect the tenant himself and provides those whose interests are being safeguarded with ample remedies to set aside alienations which affect them, then the position is very different.

S. 12 does not expressly prohibit a surrender by the landlord and in the absence of an express prohibition or one that is necessarily implied, the ordinary law which permits a tenant to surrender to his landlord must be applied. A.I.R. (Vol. 24) 1937 Nag. 235=20 N.L.J. 89=170 Ind. Cas. 170.

5. Transfer of occupancy holding.

——Ss. 12, 13 and 14—Transfer—Scope of.

The T.P. Act does not strike at all transfers, but only at certain specified types of transfers. The word "transfer" in Ss. 12, 13 and 14 of the C. P. Tenancy Act is not confined to the narrow types of "transfers" with which the T.P. Act deals, it covers a transfer by prescription. Hence, it follows that the "transfer" by prescription is good under S. 12 (1) when the person prescribing is the heir presumptive within the meaning of S. 11.

Per Niyogi, J.—The word "transfer" used in S. 12, C. P. Tenancy Act though has a wider meaning, that word when read with Sub-S. (4) of that section becomes limited to the transfers specified in the T.P. Act. If there is an instrument of transfer, the remedy of the landlord must lie under S. 13, notwithstanding that the registration being void, there is no transfer of title. That the landlord in such a case as this, is bound to apply within one year (as provided in the Second Schedule of the Tenancy Act) computed from the first day of the agricultural year next after the transfer of possession. If there is a transfer deed, the matter is simple and the Revenue Court can decide it summarily. If there is no transfer deed, the landlord may seek his remedy in Civil Court. A. I.R. (Vol. 27) 1940 Nag. 49=1940 N.L.J. 121 =I.L.R. (1940) Nag. 348=186 Ind. Cas. 731 (F. B.).

——S. 12—'Transfer' whether includes surrender.

Per Stone, C.J.—"Transfer" in S. 12, C. P. Tenancy Act does not include the "surrender" referred to in S. 89 of the Act. A.I.R. (Vol. 25) 1938 Nag. 335=I.L.R. (1939) Nag. 1=177 Ind. Cas. 6 (F.B.).

——Ss. 12, 13 and 14—Transfer of holding to stranger by unregistered sale-deed — Possession transferred to purchaser—Transfer, if in contravention of S. 12.

A transfer of an occupancy holding to a stranger to whom possession is transferred, is a transfer in contravention of S. 12 of the C.P. Tenancy Act, although the value of the property exceeds Rs. 100 and the transfer is effected by a document which is not registered, and the provisions of Ss. 13 and 14 of the Act can therefore come into operation. 1950 N.L.J. 349.

——Ss. 12 and 89—Scope—One co-sharer purporting to take surrender from tenant without authority from others—Whether contrary to S. 12.

'A surrender determines the tenancy, it affects the rights of the landlord and the landlord is the whole of the co-sharers or the lambardar as representing them. If a co-sharer purports, without authority from other co-sharers to take a surrender he is a transferee and the matter falls under S. 12 and not under S. 89, C.P. Tenancy Act. Such a transfer would normally be, in contravention of S. 12. A.I.R. (Vol. 27) 1940 Nag. 403=1940 N.L.J. 404=I.L.R. (1941) Nag. 348=192 Ind Cas. 6.

——Ss. 12 and 13 (as amended)—Partially excluded area—Transfer of occupancy holding to stranger by some of co-tenants—Right of others to apply to be placed in possession.

S. 12 of the C. P. Tenancy Act, 1920, as amended by Act 11 of 1940, does not apply to partially excluded areas. But S. 13 of the Act as amended by Act 11 of 1940 is in force in those areas. If, therefore, some of the co-tenants of an occupancy holding in a partially excluded area transfer the holding to strangers in contravention of S. 12 of the Act of 1920, which is still in force in that area, the other co-tenants are entitled to apply to be placed in possession under the amended S. 13 of the Act. This section provides for the placing in possession of certain entitled persons by dispossessing certain other persons who are in actual possession by virtue of a prohibited transfer. 1949 N.L.J. 183.

——S. 12—Transfer contravening section—Effect of.

S. 12 does not render transfers which contravene its provisions void. They are only voidable. On such transfer the tenancy is not determined. The estate created is not only heritable but is also transferable, though to a limited extent. A.I.R.

(Vol. 29) 1942 Nag. 136=1942 N.L.J. 531=I. L.R. (1943) Nag. 379=203 Ind. Cas. 439.

——S. 12—Transfer by occupancy tenant—Transfer valid between the parties, but for S. 12—Transfer can be avoided only in manner and to extent mentioned in S. 13—Civil Court cannot entertain suit to avoid the transfer.

No landlord can sue in a Civil Court to evict a person to whom an occupancy tenant has made over his holding unless that person is one of those mentioned in S. 12 (1), (2) of the Tenancy Act, 1920 or holds under a lease for not more than one agricultural year granted not more than two months before the beginning of that year, without any covenant to renew being attached to it; in all other cases he must apply to a Revenue Officer under S. 13 of the Act. 87 Ind. Cas. 826=A.I. R. 1925 Nag. 442.

——S. 12 and 13—Surrender of occupancy field and creation of tenancy—Validity.

Where an occupancy field has been surendered to landlord and lease has been created in favour of a third person, the transfer stands good until it has been set aside in the manner contemplated by the provisions of Ss. 12 and 13. 111 Ind. Cas. 358=A.I.R. 1928 Nag. 338

——S. 12—Surrender of occupancy rights—Legality—Contract Act, S. 23.

Surrender of occupancy rights contrary to S. 12 is not void but only voidable, and therefore the consideration of such a transfer is not illegal within S. 23, Contract Act, so as to debar the rights of contribution among the transferees inter se. 22 N.L.R. 86=9 N.L.J. 90=94 Ind. Cas. 941=A. I.R. 1926 Nag. 345.

——S. 12—Transfer in contravention of—Lambardar cannot recover beyond his share without consent of co-sharers.

Even after the C. P. Land Revenue Act, 1917, lambardar cannot recover beyond his share, on transfer in contravention of S. 12, C. P. Tenancy Act, without consent of other co-sharers. 4 N.L. R. 120, Foll. 22 N.L.R. 86=9 N.L.J. 90=94 Ind. Cas. 941=A.I.R. 1926 Nag. 345.

——S. 12—Sale in contravention — Suit in Civil Court—Maintainability—Remedy.

The fact that a sale is liable to be set aside as being in contravention of S. 12, C. P. Tenancy Act, in itself affords no remedy by suit, but only by an application under S. 13. A suit in the Civil Court is barred under S. 105. The only remedy so far as the contravention is concerned is an application under S. 13. 25 Pat. 764=A.I.R. 1947 Pat. 424=14 Cut.L.T. 35.

——Ss. 12 and 13—Contravention of S. 12—Remedy, whether lies in Civil Court or Revenue Court.

While S. 12 (4), C. P. Tenancy Act is preventive, S. 13 remedial. The latter section provides a special remedy not only against the transfer but also against the illegal registration. The object of the Tenancy Act in prescribing one year's limitation and conferring summary powers on the Revenue Officers is to give cheap and expeditious remedy and to eliminate disputes in regard to the cultivation of agricultural land. That object would be frustrated if the landlord were permitted to take recourse to the Civil Courts within the more extended period of limitation under the general law. In every case of unauthorised transfer that is effected by a registered instrument, it is possible to attack the transfer as being void in law by reason of the illegality of registration, and thus circumvent the special period of limitation of one year provided in Sch. 2 of the C. P. Tenancy Act. It is unreasonable to impute to the Legislature the intention to nullify S. 13 in this manner. A.I. R. (Vol. 23) 1936 Nag. 18=19 N.L.J. 44=31 N. L.R. Sup. 96=159 Ind. Cas. 862 (2).

——Ss. 12 and 13—Policy underlying sections.

The policy underlying S. 12 of the C.P. Tenancy Act, is to prohibit transfers of occupancy holding and to prevent such transfers it authorises the Registering Officer (notwithstanding the Registration Act) to withhold registration of documents which purport to transfer such holdings. This provision is intended **ex majore cautela** to operate as a safeguard against transfers by ignorant cultivators. Even though the illegality of the transfer escapes the vigilance of the Registering Officer, and he registers it in spite of the prohibition contained in S. 12, that would not preclude the application of S. 13 of the C. P. Tenancy Act. There can be no transfer without a registered document if the value of the property affected by the transfer is Rs. 100 or upwards. The word "transfer" by necessary implication signifies registration which imparts validity to the instrument of transfer. As both the transfer of occupancy holding and the registration of the instrument of transfer would be valid except for the prohibition contained in S. 12 of the C. P. Tenancy Act, the remedy for the contravention, whether by the Registering Officer or the transferring tenant, of that enactment must be sought in the Tenancy Act itself. Thus, the party who is prejudiced by a transfer of an occupancy holding must have recourse to the provisions of S. 13 of the C.P. Tenancy Act, and cannot invoke the jurisdiction of the Civil Court. A. I.R. (Vol. 23) 1936 Nag. 18=19 N.L.J. 44=31 N.L.R. Sup. 96=159 Ind. Cas. 862 (2).

——Ss. 12 (1) and (4), and 12-A—Transfer by tenant—Landlord's right to pre-empt.

A tenant can only transfer in one of the three ways stated in cls. (a), (b) and (c) of sub-S. (1) of S. 12 of the C. P. Tenancy Act. Sub-S. (4) of that section does not constitute any other kind of transfer. Under S. 12-A, the landlord is entitled to pre-emption on a transfer of the holding by the tenant. 1946 N.L.J. 184.

——S. 12—B and D joint occupancy tenants—B seling some fields to plaintiff who if he survived B would inherit B's right—Plaintiff going in possession and recorded as tenant—In execution of rent decree D and B ejected and landlord placed in possession:

Held, that the transfer did not offend against S. 12. A.I.R. (Vol. 27) 1940 Nag. 160=1940 N.L.J. 164=188 Ind. Cas. 825.

——Ss. 12 (1) (c) and 13—Sale by Hindu widow —Remedy of reversioner.

A transfer by sale by the recorded occupancy

tenant of a holding, even though she may be a Hindu widow, is not a transfer in contravention of S. 12 (1) (c) of the Tenancy Act, and the reversioners have, therefore, no remedy under S. 13 of the Act. The Revenue Courts cannot short-circuit the Civil Courts by attempting a final adjudication of a dispute between a Hindu widow and her reversioners by a resort to the provisions of that section. 1948 N.L.J. 410.

——S. 12 (1) (ii)—Sale of occupancy right to distant heir—Validity.

The intention of the Legislature in framing S. 12 (1) (ii), was to clothe an occupancy tenant with a power to transfer his right in the holding to any distant heir even during the life-time of other nearer heirs, provided the transferee is a person to whom the right is likely to go by inheritance to the transferring tenant, in the absence of nearer heirs entitled to succeed under the new Tenancy Act and therefore a sale by an occupancy tenant to a distant heir is not in contravention of S. 12 (1) (ii). 21 N.L.R. 144=94 Ind. Cas. 655=A.I.R. 1925 Nag. 421.

——Ss. 12 and 13—Remedy of landlord when occupancy tenant transfers holding the value of which is Rs. 100, without a registered instrument.

Where an occupancy tenant purports to transfer a holding the value of which is Rs. 100, without registered instrument, there is, in fact, no transfer. What purports to be a sale is, by the Transfer of Property Act, a nullity. The provisions of S. 12, C. P. Tenancy Act are not offended by the occupancy-tenant, and consequently the landlord can have no locus standi in applying to a Revenue Court under S. 13, and his remedy lies against the trespasser in the Civil Courts. A.I.R. (Vol. 32) 1945 Nag. 119=1945 N.L.J. 94=I.L.R. (1945) Nag. 433=22 Ind. Cas. 437.

——S. 12—Transfer from a tenant in another person's patti—Owner of the patti can prove his claim in a Civil Court.

If an owner of an independent patti chooses to accept a surrender or a transfer from a tenant in another person's patti and then gives the land out to another tenant, the owner of the patti is not debarred from presenting his claim in a Civil Court. 107 Ind. Cas. 671=A.I.R. 1928 Nag. 221.

——S. 12—Ex-proprietary tenant of sir land held in severalty surrendering it to the proprietor—Lambardar is not entitled to dispossess the proprietor under S. 13.

Where co-sharers, holding sir land in severalty sell their share to a stranger and then surrender their ex-proprietary rights to him, the lambardar is not entitled to apply under S. 13 to set aside the transaction and the revenue Court has no jurisdiction to put the lambardar in possession. 103 Ind. Cas. 818=A.I.R. 1927 Nag. 325.

——S. 12—Void mortgage by tenant—Adverse possession by mortgagee—Mortgagee, whether acquires any right against landlord—Decree for rent—Deposit by mortgagee—Validity.

As a tenancy cannot be acquired by prescription, a mortgage right in tenancy cannot also be acquired by prescription as against the landlord, though such a right could be acquired against the tenant.

Therefore, a landlord is entitled to refuse a tender of arrears of rent made by a person who has acquired rights of a mortgagee in the tenancy by adverse possession. A.I.R. (Vol. 20) 1933 Nag. 255=30 N.L.R. 25=148 Ind. Cas. 257.

——S. 12—The three years' prescription does not affect a "transfer" within the meaning of S. 12. A.I.R. (Vol. 31) 1944 Nag. 250=1944 N.L.J. 553=I.L.R. (1944) Nag. 473 (F.B.).

6. Sub-S. (2)—Insolvency of proprietor of Sir Land.

——Ss. 12 (2) and 49—Insolvency of proprietor—Receiver's and insolvent's respective rights—Lease of land by Receiver, legality of—Standing crops Attachment and sale.

The effect of adjudication as an insolvent of proprietor of sir land is that he becomes the occupancy tenant in the sir land. The proprietary right vests in the Receiver for the administration of the insolvent's estate for the benefit of the creditors and he has power to sell the proprietary rights which vest in him. But the cultivating rights remain with the insolvent and the Receiver is not entitled to lease out the land.

The standing crops are a part of the cultivating rights and are exempt from attachment or sale in enforcement of an order of adjudication. A.I.R. (Vol. 31) 1944 Nag. 350=1944 N.L.J. 293=I.L.R. (1945) Nag. 363.

7. Sub-S. (2)—Insolvency of occupancy tenant.

——S. 12 (2)—Insolvency Court, if can lease out occupancy holding of insolvent and distribute lease money among creditors.

Where the Insolvency Court leases out the occupancy holding, has the lease money deposited in Court, and distributes it amongst the creditors, the Insolvency Court obtains possession of the lease money by doing something which it had no right to do and, therefore, the Insolvency Court is not entitled to retain the lease money for distribution to the insolvent's creditors. But if the insolvent himself chooses to lease out his occupancy holding, the lease money will vest in the Court, but it is not open to the Court to lease out the property for him and take the lease money for distribution amongst the creditors. A.I.R. (Vol. 24) 1937 Nag. 242=I.L.R. (1937) Nag. 484=170 Ind. Cas. 284.

——S. 12 (2)—Occupancy tenant adjudicated insolvent—Power of Insolvency Court to compel him to transfer land—Provincial Insolvency Act, S. 28.

S. 12 (2) of the C. P. Tenancy Act which has not been amended by Act 11 of 1940 prevents the interest of an occupancy tenant in his holding from vesting in the Insolvency Court on his adjudication as an insolvent. It is not open to the creditor to ask the Insolvency Court to compel the tenant to transfer the land: nor is it compe-

tent for the Insolvency Court to do so. I.L.R. (1947) Nag. 296=229 Ind. Cas. 266=1947 N.L. J. 21.

8. Sub-S. (4)—Registration.

——S. 12 (4) and 35—Document prima facie not embodying transfer prohibited by Act—Document if must be admitted to registration—Registration does not, however, cure defect in conveyance—Registered surrender by tenant of occupancy holding to stranger invalid—If transaction amounts to abandonment lambardar's remedy is under S. 35—Transfer in violation of S. 12—Lambardar must proceed before Revenue Court.

Where, in point of fact, the registering authority receives a document, his function is to peruse the instrument and to see whether it purported to make a prohibited transfer, and, if he thinks that it does not embody any such transfer, he is bound to admit it to registration. The resulting registration cannot be regarded as void though at the same time the fact that the document is registered does not in the least cure the defects in the conveyance.

Tenants by a registered deed surrendered the occupancy fields to one **B** who posed himself a **sadar lambardar**, in January, 1920. In January, 1932, the **lambardar** instituted a suit against **B** in the Civil Court for possession:

Held, that since B was neither a **lambardar** co-sharer nor landlord, the document was not a surrender.

Held, also that if the tenants did not validly surrender the holding, they could effectively get rid of their tenant rights only by abandonment. In that case the remedy of the **lambardar** was to proceed under S. 35, C. P. Tenancy Act.

Held, further that if the transaction amounted to transfer in violation of S. 12, the proper course for **lambardar** was to proceed before the revenue authorities. Consequently, the suit for possession must be dismissed. A.I.R. (Vol. 28) 1941 Nag. 328=I.L.R. (1941) Nag. 743=1941 N.L. J. 497=198 Ind. Cas. 449.

——S. 12 (4)—Scope—Mortgage bond—Inadvertent inclusion of occupancy land—Legality of registration.

If a document does not, on the face of it, contravene the provisions of S. 12, C. P. Tenancy Act, then the Registrar has jurisdiction to admit it to registration and the registration in such circumstances cannot be re-opened, except on the ground of fraud. The inadvertent inclusion of a property, which has subsequently been found to be of occupancy tenure, in a mortgage deed on account of a genuine and **bona fide** mistake does not invalidate the entire mortgage deed so as to make it inoperative against the rest of the mortgaged property. In such circumstances the inclusion of an occupancy holding must be treated as mere surplusage. A.I.R. (Vol. 22) 1935 Nag. 182=31 N.L.R. 223=157 Ind. Cas. 793.

——S. 12 (4)—Scope of—One tenant executing deed of relinquishment in favour of another in settlement of dispute regarding right to holding of deceased tenant—Document, if can be admitted for registration.

Section 12 (4) of the C. P. Tenancy Act, prohibits registration of documents which purport to contravene the provisions of that section. Transfers except those mentioned later on in the section are prohibited. Where a deed is a settlement of a dispute between two persons each of whom claimed a right to the holding of a deceased tenant, one of them merely stating that for valuable consideration she gives up her claim, the deed blots out her interest but does not necessarily convey any title to the other party. There is, consequently, no transfer of title and, therefore, no contravention of S. 12. It follows, therefore, that the document of this nature can be rightly admitted to registration. A.I.R. (Vol. 25) 1938 Nag. 30=I.L.R. (1940) Nag. 94=176 Ind. Cas. 57.

——S. 12 (4)—Deed of lease of Occupancy holding—Need for registration—Registration Act, Ss. 17 and 49.

A deed of lease of an occupancy holding is not a document required by S. 17 of the Registration Act to be registered, and is not affected by the provisions of S. 49 of that Act because of C. P. Tenancy Act (1920), S. 12 (4). 93 Ind. Cas. 633=A.I.R. 1926 Nag. 335.

——S. 12—Scope—S. 12 (4) is an incidental provision and only a further safeguard.

Section 12, sub-S. (4) is obviously an extra safeguard introduced to prevent or discourage as far as possible improper transfers; it is an incidental provision so to speak, while the real nature of the transaction, as well as the extent to which it can be avoided are laid down in S. 13 of the Tenancy Act. A.I.R. 1926 Nag. 310, Diss. 22 N.L.R. 86=9 N.L.J. 90=94 Ind. Cas. 941=A.I.R. 1926 Nag. 345.

——S. 12—Mortgage of trees fully owned in occupancy fields is valid.

Where the property mortgaged was fruit trees in occupancy fields and where the mortgagors were proprietors of the trees:

Held, that the mortgage deed was validly registered. 8 N.L.J. 153=93 Ind. Cas. 850=A.I.R. 1925 Nag. 414.

——Ss. 12 and 13—Scope of—Transfer of occupancy land by registered deed—Plea that registration is void and there is no transfer, if can be raised.

In every case of transfer of occupancy land effected by a registered deed it is possible to raise the plea that the registration is void and there is no transfer. If the Registering Officer refuses to register the document but the tenant delivers physical possession of the holding. S. 13 can have obviously no application. If, however, by fraud or inadvertence he registers the document and the registration is held to be void, no case can ever arise for the operation of S. 13, when the value of the holding is Rs. 100 or upwards. A.I.R. (Vol. 23) 1936 Nag. 18=19

N.L.J. 44=31 N.L.R. Sup. 96=159 Ind. Cas. 862 (2).

9. Pre-emption.

——S. 12 (5)—Tenant's notice defective—Failure of landlord to reply—If fatal to his claim for pre-emption.

A landlord is not entitled to set pre-emption proceedings in motion under Cl. (5) of S. 12-A of the Tenancy Act without disclosing his intention to purcase the land by replying under Cl. (2) of that section to the tenant's notice under Cl. (1), although the tenant's notice is incorrect in material particulars and would be subject to the mischief of Cl. (9) of the section. Cl. (5) of the section must be read with the preceeding Cl. (4) and the malguzar becomes entitled to purchase the right only after he gives notice to the tenant. An application to a Revenue Officer under Cl. (5) is not a reply to the tenant. The failure of the malguzar to reply to the tenant's notice disclosing his desire to purchase the holding is a fatal defect. By failure to reply to the notice he never became entitled to purchase the right before it was sold. 1948 N.L.J. 332.

——S. 12-A–

Synopsis.

1. Landlord's right to pre-emption.
2. "Lanldord" — Status of Lambardar—His right to apply for pre-emption.
3. Sub-S. (1)—Notice by tenant.
4. Sub-S. (5)—Application by Landlord.
5. Sub-S. (7)—Applicability.
6. Sub-S. (8)—Application for pre-emption.
7. Sub-S. (9)—Limitation for application.
8. Sub-S. (11)—Application for pre-emption.
9. Sub-S. (12) (a)—Fixing of price—Duty of Revenue Court.
10. Sub-S. (15)—Suit for Pre-emption.

1. Landlord's right to pre-emption.

——S. 12-A—Purchase of occupancy land by sub-lessee of tenant during currency of sub-lease Landlord's right to pre-emption—If postponed until termination of sub-lease.

Where the sub-lessee of the original tenant is himself the purchaser of the occupancy land during the currency of his sub-lease, pre-emption by the landlord is not subject to the sub-lease right of the purchaser. The law does not contemplate postponement of pre-emption of occupancy lands which are held by the lessees of the tenant. 1950 N.L.J. 307.

——Ss. 12-A and 36-A—Declaration of tenant to be malik-makbuza—When takes effect—Sale of holding by tenant after such declaration and before it takes effect—Effect of—Landlord's right to pre-empt.

Under S. 36-A (2) of the Tenancy Act, an order of the Deputy Commissioner declaring an occupancy tenant to be a *malik-makbuza* of the land comprised in his holding does not become effective until the commencement of the agricultural year next following the date of the declaration. In between the date of the declaration and the date on which it takes effect, the tenant is in the position of an occupancy tenant *vis-a-vis* his landlord. If during this period the tenant sells his occupancy holding, he loses his prospective right of becoming *malik-makbusa* proprietor of his holding, which is not a transferable right while it is in abeyance, and the landlord is entitled to pre-empt against the transferee even though he may have consented to the conferral of *malik-makbuza* status on the transferring tenant. 1949 N. L. J. 484.

——S. 12-A—Partial pre-emption by landlord—Permissibility.

Under S. 12-A of the C. P. Tenancy Act it is the duty of the landlord to claim pre-emption of the whole of that part of the property sold as to which he has a right of pre-emption. Thus in a case where a tenant has sold four *khasra* numbers forming part of the same holding, the landlord has no option but to seek pre-emption of all the four numbers together, although the position may be different if these numbers formed part of different holdings. 1948 N.L.J. 419.

——S. 12-A—Pre-emption of holding by landlord —Doubt regarding transferee's right—Whether to be decided in landlord's favour.

In a case relating to the pre-emption of an occupancy holding by the landlord of the village, any genuine doubts regarding the right of a transferee to inherit a tenant's occupancy rights must be decided by the Revenue Courts in the landlord's favour. 1948 N.L.J. 81.

——Ss. 12-A and 49—Person selling malguzari share in village reserving proprietary interest in *Sir* land—Position of—Occupancy tenant or *Malik-makbuza* of that land—Subsequent sale of *Sir* land—If gives rise to pre-emption right. *See* C. P. LAND REVENUE ACT, SS. 106 AND 67. 1949 N.L.J. 172.

——Ss. 12-A and 12-B—Pre-emption—Landlord's rights—"Stranger"—If includes landlord.

The amendments made in 1940 restrict rather than liberalise the landlord's rights *viz-a-vis* those of tenants, and priority should still go to the co-tenant, and after him, to the heirs before the landlord. This position is also prescribed for sales in execution of rent decrees under S. 12-A (10) of the C. P. Tenancy Act. Under the old S. 12-A and the new S. 12-B the word "stranger" is used to denote any one who is not specifically referred to in the section itself. A landlord is therefore a "stranger" within the meaning of S. 12-B of the Act. 1947 N.L.J. 20.

——S. 12-A—Applicability—Unregistered sale.

S. 12-A of the C. P. Tenancy Act covers all sales effected under S. 12 (1) (c) whether they are registered or not. 1947 N.L.J. 170.

——S. 12-A—Pre-emption proceeding — Landlord's oral consent—When may be pleaded.

The landlord's oral consent, whether implied or express, cannot be pleaded in pre-emption cases unless special circumstances are proved, (*e.g.*). the accep-

tance of consent money before the transfer. 1950 N.L.J. 257.

——S. 12-A—Application for pre-emption dismissed for default — Restoration—Duty of Revenue Court.

The restoration of an application for pre-emption dismissed for default is correct even if there has been considerable delay in applying for it, if the same has been adequately explained. As a general principle there should be no hesitation on the part of the Revenue Courts to re-open a matter which has not been finally adjudicated upon on merits. 1949 N.L.J. 393.

2. "Landlord"—Status of Lambardar—His right to apply for pre-emption.

——S. 12-A—'Landlord'—Status of lambardar—Whether affected by private partition.

The word "landlord" occurring in the various clauses of S. 12-A of the Tenancy Act refers to the lambardar of the *mahal* or patti, unless he is expressly excluded by any contrary substantive provision in the Act itself. The Revenue Courts are not concerned with persons who claim to be *de facto* landlords under the civil law. Nor are they concerned with the consequences which follow pre-emption decisions on this basis as between the co-sharers in a *mahal* or patti.

A partition under the provisions of Ch. 6 of the Land Revenue Act is a partition by metes and bounds. A private partition, by allotment of tenants to the different co-sharers, amounts, in revenue law, to no more than a consent given by the lambardar to the co-sharers to receive rents direct from certain tenants instead of these sums passing through the lambardari accounts. It cannot have the effect of depriving the lambardar of his statutory status of landlord in the *mahal* or patti of which he has been appointed lambardar by a Revenue Court. The Revenue Courts are bound to give effective recognition to such an appointment, and a private partition is not a matter which the Revenue Courts can take cognisance of so as to deprive a lambardar of his statutory rights as the managerial landlord if he may be so termed, of a *mahal*, or patti. 1948 N.L.J. 412.

——S. 12-A—Transfer of holding before lambardar coming into office—Right of latter to apply for pre-emption.

A lambardar in office is entitled to apply for pre-emption in respect of a transfer of an occupancy holding which took place before he came into office. 1947 N.L.J. 309.

——S. 12-A—Right to pre-emption—Lambardar of mahal or purchaser of share in mahal of ex-proprietary occupancy tenant—C. P. Land Revenue Act, S. 188 (2).

Sir land held in "exclusive ownership" by a co-sharer forms part and parcel of the *mahal* in which it lies and with which it is assessed to land revenue. When such land becomes ex-proprietary occupancy land it continues to form part and parcel of the *mahal*. Under S. 188 (2) of the Land Revenue Act *lambardar* is deemed to be the landlord in the *mahal* or *patti* for which he is appointed. He is clearly therefore the landlord of the ex-proprietary occupancy tenant. Consequently, for purposes of pre-emption under the provisions of S. 12-A of the Tenancy Act, the lambardar of a mahal and not the purchaser of a share in the *mahal* of an ex-proprietary occupancy tenant has to be regarded as the "landlord" of that tenant. 1945 N.L.J. 102, 1947 N.L.J. 403 and 1948 N.L.J. 412, foll. I.L.R. (1941) Nag. 54 (F.B.), Not Foll. 1949 N.L.J. 447.

——S. 12-A and Land Revenue Act, S. 187 (3)—Right to apply for pre-emption—Minor lambardar—His natural guardian or lambardar gumastha.

If a lambardar is a minor and a lambardar gumastha has been appointed under S. 187 (3) of the Land Revenue Act, the latter derives his authority to function as lambardar from the Act and his appointment under that Act results in the ouster of the lambardar under a disability so long as it lasts. This is so even if in matters unconnected with the village management he is competent to act on the minor's behalf. A natural guardian of such a minor cannot function as lambardar as he derives no such authority from the Act. The lambardar or when he is under a disability the *gumastha* must be deemed the landlord within the meaning of the C. P. Tenancy Act and nobody else. Therefore, the minor's natural guardian, if he is not the gumastha, is not competent to apply for pre-emption under S. 12-A of that Act. 1949 N.L.J. 323.

——S. 12-A—Pre-emption proceedings—Position of landlord.

The landlord acts not in his personal capacity but as the agent of the proprietary body in pre-emption proceedings. If a holding is pre-empted and consequently becomes *khudkasht*, the benefits out of that *khudkasht* land are not enjoyed only by the landlord and his family, but are enjoyed by the whole proprietary body. Again, if the landlord accepts *nazarana* in lieu of pre-emption, then the amount of *nazarana* is not enjoyed by the landlord himself but it goes into the village profits which are distributed amongst all the co-sharers. 1950 N.L.J. 533.

3. Sub-S. (1)—Notice by tenant.

——S. 12-A—Transfer of holding when there is no lambardar—Notice, to whom to be given.

If a transfer of an occupancy holding takes place when there is no lambardar—the lambardar having died and a successor not having been appointed—the notice under S. 12-A of the Tenancy Act must be given to the manager of the family of the deceased lambardar, and if no such manager exists, all the members of the proprietary body are entitled to receive a notice. 1947 N.L.J. 309.

——S. 12-A (1)—Joint notice by two tenants—Landlord's right to pre-empt holding of each tenant separately.

Under S. 12-A of the C. P. Tenancy Act, a landlord has the right to deal with each of his tenants individually. If a tenant joins with another tenant and gives a joint notice under S. 12-A (1) that is his own business. It does not affect the landlord's right to pre-empt his holding separately. 1949 N.L.J. 95.

——S. 12-A (1) (c)—Notice by tenant defective —Landlord, if can initiate proceedings.

All that is necessary to enable a landlord to initiate proceedings under S. 12-A of the Tenancy Act is the receipt of a notice from a tenant stating his intention to make a sale as provided for in S. 12 (1) (*c*) of the Act. It is the disclosing by the tenant of his intention to sell any right in his holding which is the essence of the notice. The fact that the notice is defective is immaterial. A defective notice is still a notice. 1949 N.L.J. 95.

——S. 12-A—Tenants' notice not mentioning purchaser's name—Landlord acting on such notice and applying for pre-emption—Whether can plead invalidity of notice.

Where a landlord receiving a notice from the tenant of his intention to sell a holding for a named price acts on that notice and applies to the Tahsildar electing to purchase the right and asking to have the price fixed, and his application is rejected for failure to deposit the amount of the notice within the time allowed, he is not entitled to plead that the original notice of the tenant was invalid in that it did not mention the name of the purchaser. 1946 N.L.J. 187.

——S. 12-A—Validity of notice—Notice not mentioning consideration for which holding is to be sold or name of intending purchaser.

A notice by a tenant which offers to sell to the *malguzar* certain named fields at a certain rate per acre and declares an intention to sell to others if the offer is declined, is a statutory notice under the provisions of S. 12-A of the C. P. Tenancy Act, although it does not mention the amount of consideration for which the holding is to be sold or the names of the intending purchasers. Such a notice is a perfectly valid one, although it is incomplete. The landlord is entitled to apply to a Revenue Officer under the provisions of sub-Cl. (12-a) of the section and to ask that the value of the right which the tenant proposes to sell may be fixed by him. 1949 N.L.J. 31.

——S. 12-A (1) and (8)—Irregular notice—Whether can be regularised by landlord's action.

An irregular notice by the tenant under S. 12-A (1) of the C. P. Tenancy Act, (*e.g.*) a notice not mentioning the name of the prospective purchaser, cannot be regularised by any action the landlord may see fit to take on its receipt. As the notice is defective in a material particular, the landlord is free to apply under S. 12-A (9) of the Act although he had reacted to the notice by filing an infructuous application before the Tahsildar to fix the price. 1948 N.L.J. 396.

——S. 12-A (1)—Notice not mentioning name of prospective purchaser—Validity.

A notice given by the tenant to his landlord under S. 12-A (1) of the Central Provinces Tenancy Act, which does not mention the name of the prospective purchaser is invalid. 1945 N.L.J. 605.

4. Sub-S. (5)—Application by landlord.

——S. 12-A (4) and (5)—Notice by tenant to landlord—Latter replying that he would buy only at lower price—Effect—Tenant, if bound to defer intended sale for 30 days.

If in reply to a notice under S. 12-A (1) of the Tenancy Act, the landlord states that he is prepared to buy the land only at a price lower than that stated in the notice, the tenant is not bound to defer proceeding with the intended sale for a period of 30 days. S. 12-A (4) and (5) impose a limitation on the landlord, as well, of the period within which he must put the transaction through. A reply to the effect that he will buy at a lower price amounts to a refusal to buy at the price stated. This must amount to a permission to the tenant to sell at the higher price. The law does not contemplate the existence of a bargaining period of 30 days. 1950 N.L.J. 104.

——S. 12-A (5) (as amended in 1939)—Application by landlord—Deposit within thirty days of notice—If necessary.

A landlord applying under S. 12-A (5) of the Tenancy Act to the revenue officer for the fixation of fair prices must deposit the amount mentioned in the notice of the tenant within thirty days. Otherwise, he would lose his right to pre-empt. 1945 N.L.J. 575.

——S. 12-A (5) (as amended in 1939)—Landlord considering price stated in tenant's notice as excessive—Whether can apply to revenue officer to fix fair price.

Where a tenant gave notice of his intention to sell his holding for a sum named and the landlord replied that he was willing to buy the right but that the price quoted was exorbitant and applied to the revenue officer for the determination of a reasonable price,

Held, that the landlord must be deemed to have permitted the sale, that if he intended to purchase the right he must purchase it from the tenant at the price stated in the notice, and that the revenue officer was not competent in the circumstances of the case to fix the fair price. 1945 N.L.J. 575.

——S. 12-A (5) and (11)—Tenant giving notice to landlord of his intention to sell—Application by latter for getting sale-deed executed—Intending purchaser—If necessary party.

Where an occupancy tenant gives the landlord notice of his intention to sell his right in his holding to a person for a sum specified in it and the landlord applies under S. 12-A (5) of the Tenancy Act to the Tahsildar for getting a sale-deed executed by the tenant and to be placed in possession of the right, the intending purchaser is not a necessary party to the proceeding. In a case under S. 12-A (5), when the original tenant is still in possession of the right and no sale has actually taken place, the only party to the proceeding started by the landlord will be the tenant and not the intending purchaser. 1950 N.L.J. 18.

5. Sub-S. (7)—Applicaiblity.

——S. 12-A (7)—Applicability—Tenant not giving notice of sale—Landlord, if can be deemed to have permitted it.

S. 12-A (7) of the C. P. Tenancy Act comes into operation only when Cls. (1) and (2) or (3) have been invoked, *i.e.*, when the tenant gives notice as required by Cl. (1), and the landlord either agrees to purchase the right or permits the sale [Cl. (2)], or fails to give notice [Cl. (3)]. Where no notice of the sale has been given by the tenant, the landlord cannot "be deemed to have permitted it." Unless the tenant has given notice and the landlord failed to reply, the latter cannot be held to have waived his right or deemed to have permitted the transfer. 1946 N.L.J. 435.

6. Sub-S. (8)—Application for pre-emption.

——S. 12-A (8)—Application for pre-emption by lambardar—Limitation—Starting point.

Limitation for an application for pre-emption by a lambardar who is a sub-tenant of the occupancy holding, runs from the date of the loss of possession of the occupancy tenant and not from the date of the loss of his possession as a sub-tenant. 1950 N.L.J. 257.

——S. 12-A (8) and Sch. II—Application for pre-emption—Limitation—Starting point.

The right to apply for pre-emption under S. 12-A (8) of the Tenancy Act arises when a tenant "makes a sale" and the purchaser "temporarily or permanently obtains possession". Under Sch. II of the Act the period of limitation for pre-emption application is one year counting from the date on which the purchaser obtained possession. The date of registration of the sale deed is of no relevance. 1948 N.L.J. 115.

——S. 12-A (8)—Sale deed by tenant in favour of lessee—Application for pre-emption—Limitation—Starting point—Date of execution or registration.

Where on a sale of an occupancy holding by the tenant to his lessee the Lambardar who had no notice of the sale applies for pre-emption under S. 12-A (8) of the Tenancy Act, the starting point of limitation of one year is the date of the execution of the sale deed when the purchaser who was already in possession as a lessee obtained possession as vendee, and not the date of registration. The word "right" in sub-S. (8) of S. 12-A of the Act is not synonymous with the word "title". When a tenant sells the right to cultivate, possession can only be of the land and not of any intangible title created by a registration of a document. The words "obtain possession of the right" in the sub-section must mean the right to cultivate land by obtaining physical possession of the land. 1948 N.L.J. 385.

——S. 12-A (8)—Interpretation—Sale of holding by tenant and subsequent reconveyance to him—Possession not delivered to purchaser—Application for pre-emption—If lies.

The words "right in" in S. 12-A (8) of the C. P. Tenancy Act simply mean the straightforward right which accrues from tenancy (*e.g.*) to grow crops, the rights defined in Ss. 95 and 96 of the Act, the right to sublet and the liability to pay rent. To justify an application for pre-emption under Sub-S. (8) it has also to be proved that the purchaser temporarily or permanently obtained possession of that right. Where, therefore, an occupancy tenant sold his holding in order to raise a loan and later obtained a reconveyance of it from the purchaser who never in fact took possession of the holding, the landlord is not entitled to apply for pre-emption under S. 12-A (8) of the Act. 1947 N.L.J. 136.

——S. 12-A (8) and (11) (a) and S. 2 (4)—Sale of two occupancy fields by tenant—Landlord's right to pre-empt each field separately.

All the land which a tenant holds in occupancy right in one village forms one holding as defined in S. 2 (4) of the Tenancy Act, no matter when each field came into his possession. The fact that the fields are not contiguous to each other does not matter. If the tenant sells two of his occupancy fields in the village for a composite price, the landlord has no right to file separate pre-emption applications in respect of each of the fields and ask that the price of each field may be fixed by Court. As both the fields constitute one holding, the landlord is bound to apply for pre-emption of both the fields and deposit the composite price stated in the sale deed within the period of limitation as provided in S. 12-A (11) (a) of the Act; otherwise he would lose his right of pre-emption. 1949 N.L.J. 206.

——S. 12-A (8)—Sale with condition permitting re-purchase—Landlord's right to pre-empt.

If a tenant sells his occupancy holding with a condition permitting re-purchase by him within a specified time, the landlord is entitled to pre-empt so much of the rights in the land which the tenant has lost as a result of the transaction he has entered into with the purchaser and he is entitled to be placed exactly in the same position as the purchaser. The tenant is entitled to re-purchase from the purchaser even though pre-emption proceedings are pending and if a genuine and legally valid repurchase takes place the pre-emption proceedings will abate. The tenant will be entitled to re-purchase from the landlord even if he has pre-empted the purchaser's rights. 1948 N.L.J. 291.

——S. 12-A (8) (a)—Waiver by landlord not in writing—Burden of proof.

Although the written consent of the landlord is not prescribed by Sub-S. (8) (a) as it is under Sub-S. (2) of S. 12-A of the C. P. Tenancy Act, in the absence of a written waiver the transferee must carry a heavy burden of proof. 1947 N.L.J. 170.

7. Sub-S. (9)—Limitation for application.

——S. 12-A (9)—Limitation for application—Suspension of—Mistake of Court.

The limitation for an application by the landlord under S. 12-A (9) of the C. P. Tenancy Act is one year from the date of loss of possession of the holding by the tenant. Once limitation begins to run no mistakes committed by the parties or the Courts can have the effect of suspending it. 1948 N.L.J. 396.

8. Sub-S. (11)—Application for pre-emption.

——S. 12-A (11)—Application by landlord under —Parties—Tenant if necessary party.

A tenant who has transferred his interest is not a necessary party to an application by the landlord under S. 12-A (11) of the C. P. Tenancy Act. 1946 N.L.J. 238.

——S. 12-A—Application by landlord for pre-emption—Parties—Tenant, if necessary party.

A tenant who has sold his holding is not a necessary party to an application for pre-emption by the landlord under S. 12-A of the C. P. Tenancy Act. 1949 N.L.J. 123.

——S. 12-A (11) and (15)—Landlord simultaneously filing suit in Civil Court and applying for pre-emption before Revenue Court—Subsequent withdrawal of civil suit—Effect on application before Revenue Court.

An application by the landlord for pre-emption before the Revenue Court under S. 12-A (11) of the C. P. Tenancy Act is perfectly legal although the landlord withdraws his suit which he simultaneously filed in the Civil Court under S. 12-A (15) of the Act, when he clearly states in the application before the Revenue Court that he is if necessary prepared to pay the amount mentioned in the sale deed, which he deposits. 1946 N.L.J. 238.

9. Sub-S. 12 (a)—Fixing of price—Duty of Revenue Court.

——S. 12-A (12) (a)—Application by landlord for pre-emption—Sale deed by tenant not registered—Fixing of price—Duty of Revenue Court.

If a tenant sells his holding without giving notice to the landlord as required by S. 12-A (1) of the C. P. Tenancy Act, and the sale deed is not registered, the landlord applying for pre-emption must be assumed to have had no knowledge of the consideration which passed between the parties. He is quite free to state what he likes in his application, but it is for the Revenue Court to fix the price if it finds that the application must be allowed. 1949 N.L.J. 123.

10. Sub-S. (15)—Suit for pre-emption.

——S. 12-A (15)—Civil suit by landlord for pre-emption—Consideration not proved to have been stated fraudulently in sale-deed—Maintainability.

The only ground on which a landlord can bring a suit under S. 12-A (15) of the C. P. Tenancy Act is that he considers and claims that the consideration in the sale-deed has been fraudulently stated and does not represent the actual consideration. Under the section what the landlord is entitled to sue for is the determination of the consideration if the consideration stated in the sale-deed has been stated fraudulently. The Civil Court has jurisdiction to determine what the consideration should be if fraud is established, but it has no jurisdiction to determine the consideration to be that which is stated in the sale-deed. The landlord has no right in law to ask, and the Court has no jurisdiction in law to give the landlord a decree in consonance with the terms of the sale-deed. 1945 N.L.J. 404, approved. I.L.R. (1949) Nag. 191=1949 N.L.J. 197 (S.B.).

——S. 12-A (15)—Basis of suit—Consideration found not fraudulent—Suit must fail.

The right to institute a civil suit under S. 12-A (15) is based on the ground that the consideration is fraudulently stated in the sale-deed and if it be found that the consideration was not fraudulently stated, then basis for the civil suit disappears and the suit must fail entirely and the landlord will not be entitled to get a fair consideration fixed by the Court and a decree on that basis. A.I.R. (Vol. 32) 1945 Nag. 248=1945 N.L.J. 404=I.L.R. (1945) Nag. 865.

——S. 12-A (15)—Landlord's suit for pre-emption dismissed by Civil Court—Pre-emption through Revenue Court—Permissibility.

Where a landlord's suit for pre-emption under S. 12-A (15) of the C. P. Tenancy Act is dismissed by the Civil Court on the ground that he had given oral consent to the sale, he cannot be allowed to pre-empt through the Revenue Court subsequently. 1948 N.L.J. 442, foll. 1949 N.L.J. 538.

——S. 12-A (15)—Suit by landlord for pre-emption—Right to standing crops — Sale-deed, if nececssary for delivery of possession.

A landlord obtaining a decree for pre-emption of an occupancy holding in a suit brought under S 12-A (15) of the C. P. Tenancy Act has a right to take the crops standing on the field along with the field.

A suit under S. 12-A (15) of the Act being a pre-emption suit, a decree in terms of O. 20, R. 14, C. P. Code, is passed. No sale-deed is necessary for delivery of possession in execution of the decree. Under O. 20, R. 14 (b), the title in a pre-emption suit accrues from the date of the deposit and no registered document is necessary for the passing of title. 1949 N.L.J. 205=A.I.R. 1949 Nag. 338.

——S. 12-A (15)—Suit for pre-emption—Limitation. **See** LIMITATION ACT, Arts. 10 and 95 and S. 18. 1950 N.L.J. 396.

——S. 12-B—Sale of shares of both co-tenants of holding—Wife of one—If entitled to pre-empt whole holding.

On a sale of the shares of both the co-tenants of a holding, the wife of one of them can claim to pre-empt not only her husband's share as his heir, but the whole holding. 1946 N.L.J. 286.

——S. 12-B—"Stranger"—Meaning.

The word "stranger" in S. 12-B of the C. P. Tenancy Act, contemplates a person who has no claim on the tenancy rights of the land in question, either as a co-tenant or as a possible heir. 1946 N. L. J. 286.

——S. 13—See also C. P. TENANCY ACT, S. 12.

——S. 13—(Obiter: Per Full Bench).—The verb 'transfers' in S. 13 includes the entry into transaction in contravention of S. 12 which are not transfers under the ordinary law. A.I.R. (Vol. 31) 1944 Nag. 250=1944 N.L.J. 553=I.L.R. (1944) Nag. 473 **(F.B.).**

——Ss. 13 and 14—Object of.

The provisions of Ss. 13 and 14 of the C. P. Tenancy Act, are designed to protect the heirs of a tenant and to preserve to them, as far as that can be done, the very special estate of inheritance which the Tenancy Act and its predecessors have created. That is the broad aim of the Legislature. It, therefore, behoves Courts when interpreting the Act to give effect to that object as far as they can, bearing in mind of course all the usual rules of interpretation. A.I.R. (Vol. 29) 1942 Nag. 136=1942 N.L.J. 531=I.L.R. (1943) Nag. 379=203 Ind. Cas. 439.

——S. 13—Applicability—Question between landlord and trespasser.

The plaintiff as *lambardar* sued to recover possession of the suit land from the defendants alleging that *K* the original tenant had actually surrendered the land to him on 18-6-1918 and put him in possession. On 1-7-1920 the defendants took wrongful possession. The defendants pleaded that they were in possession under an agreement (which was held to be a sub-lease) dated 25-12-1907 executed by *K* in favour of their father. They denied their surrender and pleaded that the suit was not tenable under S. 47 of the old C. P. Tenancy Act and under S. 13 of the new Tenancy Act, and that the suit was not triable by a Civil Court, and was barred by limitation.

Held, that agreement of 25-12-1907 was a sub-lease; that when *K* surrendered his tenancy, the sub-tenancy was determined also; that this is not a case between landlord and tenant but between landlord and trespassers, and thus triable by a Civil Court; that S. 47 does not apply and that no question of adverse possession arises. (6 C.P.L.R. 74, Foll.) 6 N.L.J. 224=73 Ind. Cas. 15=A.I.R. 1923 Nag. 261.

——S. 13—Applicability—Transfer under S. 12 (1) (c)—Application by co-tenant.

An application for ejectment under S. 13 of the C. P. Tenancy Act by a co-tenant does not lie on a transfer of an occupancy field made by a tenant in accordance with S. 12 (1) (c) of the Act. It is only when the transfer is not in accordance with any part of S. 12 that ejectment under S. 13 arises. Sale under S. 12 (1) (c), is subject only to the landlord's right of pre-emption under S. 12-A. A co-tenant may pre-empt only in the case of involuntary sale described in S. 12-B. 1947 N.L.J. 149.

——S. 13—Scope—If enables tenant to apply for order for possession.

Section 13, C. P. Tenancy Act, enables the tenant's heirs or the *lambardar* to apply for an order of possession. It does not enable the tenant to get such an order. Thus, the Act accepts the position that the tenant has divested himself but makes provision for his heirs to get back in his place, alternatively it empowers the *lambardar* to apply for possession. A.I.R. (Vol. 27) 1940 Nag. 403=1940 N.L.J. 404=I.L.R. (1941) Nag. 348=192 Ind. Cas. 6.

——S. 13—Scope—Whether applies to transactions void ab initio.

Although S. 13 C. P. Tenancy Act, applies to all voidable transactions, it does not apply to transactions which are void *ab initio*. A.I.R. (Vol. 22) 1935 Nag. 58=31 N.L.R. 208=157 Ind. Cas. 737.

——S. 13—Landlord of ex-proprietary tenant—Purchaser of his share or lambardar.

S. 49 of the C. P. Tenancy Act secures to a co-sharer, who parts with his share, occupancy rights in his *sir* land, but it does not automatically partition the newly purchased share from the rest of the mahal. The landlord of an ex-proprietary tenant for the purpose of S. 13 of the Act is, therefore, the lambardar of the village and not the purchaser of his share. 1947 N.L.J. 403.

——S. 13—Application by landlord—Maintainability—Landlord not admitting title of non-applicant as occupancy tenant.

A landlord applying for relief under S. 13 of the Tenancy Act must admit that the non-applicant is his occupancy tenant. If he denies it, his application is liable to be rejected summarily. 1950 N.L.J. 84.

——S. 13—Application by landlord for possession on tenant transferring occupancy holding by conditional gift—Tenant revoking gift while application pending in appeal—Landlord's cause of action—If ceases to subsist.

Where on a tenant transferring his occupancy holding by a conditional gift revocable at his will the landlord applies under S. 13 of the Tenancy Act to be placed in possession of the holding on the ground that the transfer is in contravention of S. 12 of the Act and while the application is pending before the appellate Court the tenant revokes the gift and regains the possession of the holding, the landlord's cause of action for continuing the proceedings thereby cease to exist. 1948 N.L.J. 50.

——S. 13—Tenant living and his right existing—Lambardar has no preferential right to possession.

The lambardar as such has no preferential right and cannot be allowed to take possession of the land sold to stranger, when the tenant is alive and his tenant's right has not come to an end. 113 Ind. Cas. 110=A.I.R. 1929 Nag. 65.

——S. 13—Transfer by tenant—Lambardar not taking steps under S. 13—Lease by lambardar is illegal.

On a tenant transferring his right to a co-sharer the lambardr does not get the right to lease the land to a third person without taking any steps under S. 13 to set the transfer aside. 8 N.L.J. 52=87 Ind. Cas. 115=A.I.R. 1925 Nag. 259.

——Ss. 13 and 105 (c)—Surrender by tenant to co-sharer—Lambardar's right to sue for joint possession in Civil Court.

A *lambardar* who omitted to apply under S. 13 of the C. P. Tenancy Act, for possession of an occupancy holding surrendered by the tenant to his co-sharer, can sue his co-sharer in the Civil Court for joint possession of the holding, because when a *lambardar* sues his co-sharer in the Civil Court for joint possession of the holding he is so suing as a co-sharer, which he may do in spite of the fact that he could as *lambardar* sue to set aside the transfer under S. 13 of the Tenancy Act, and claim to be put into exclusive possession of the whole holding on behalf of the proprietary body. A.I.R. (Vol. 28)

1941 Nag. 221=1941 N.L.J. 307=I.L.R. (1941) Nag. 454=195 Ind. Cas. 869.

——S. 13—Surrender from tenant to one co-sharer—Lambardar suing for joint possession—If liable to contribute.

Where one co-sharer gets a surrender of a field from the tenait, the lambardar suing for joint possession is bound to contribute to the costs of acquisition of the surrender: A.I.R. 1926 Nag. 345, Fo.l. 108 Ind. Cas. 878.

——Ss. 13 and 89—Co-sharer but not lambardar purporting to take surrender from tenant for consideration—Lambardar on application under S. 13, put in possession—Amount which X is entitled to get from his co-sharers as contribution.

One *X* who was not a *lambardar* but only a co-sharer in the village paid consideration to a tenant and purported to take surrender from him of certain lands. An application was made by the *lambardar* under S. 13, C. P. Tenancy Act, which resulted in an order putting the *lambardar* into possession and directing *X* to apply to Civil Court, if he wanted joint possession:

Held, that the *lambardar* having been shown to ahve received possession in those circumstances he received on behalf of all and unless the contrary was proved *X* was entitled to receive his share in those fields.

Held, further that in equity *X* should be recompensed not necessarily the amount he expended but such amount as a reasonable man would have paid less the cots his co-sharers have incurred in the proceeding under S. 13. A.I.R. (Vol. 27) 1940 Nag. 403=1940 N.L.J. 404=I.L.R. (1941) Nag. 348 =192 Ind. Cas. 6.

——S. 13—Occupancy holding transferred by tenant to co-sharer—Lambardar co-sharer, if can obtain possession of holding—Proprietors, whether can accept transferee co-sharer as tenant of proprietary body.

A transfer by a tenant, of an occupancy holding, to a co-sharer is contrary to the provisions of S. 12, C. P. Tenancy Act, and the landlord can, therefore, apply under S. 13 to be placed in possession. The "landlord" here means the *lambardar*, as provided in S. 188 (2) (*a*) of the C. P. Land Revenue Act. It is open to the *lambardar* to obtain possession of the holding even against a co-sharer, though his possession would be possession on behalf of the entire proprietary body. On the other hand, the proprietors may accept the co-sharer as a tenant of the proprietary body or they may all come to any arrangement they like between themselves. A.I.R. (Vol. 27) 1940 Nag. 370=1940 N.L.J. 480=I.L.R. (1941) Nag. 571=192 Ind. Cas. 291.

——S. 13—Occupancy holding transferred to one co-sharer—Lambardar consenting—Suit to challenge lies only on ground of fraud—Ejectment proceedings can lie in Revenue Court under S. 13.

If an occupancy holding transferred to one of several co-sharers in the village is regarded as khudkasht, then it is admittedly transferred to the whole proprietary body. In that case if the separate holding of it as khudkasht has the consent of the lambardar, that is of the whole body of co-sharers, no member of that body can set aside that agreement except on the ground of fraud, or under S. 215 or S. 216 of the Contract Act or S. 90 of the Trusts Act if the lambardar has allotted the land to himself. In either case the whole proprietary body would have to sue, except of course the defendant. But a co-sharer who buys as occupancy holding does it for his own benefit, and he must surely be considered an outsider for the purposes of ejectment as well as in the transfer; he is simply the transferee of an occupancy holding, and can be ejected only on application to a Revenue Officer under S. 13 of the Tenancy Act, 1920, by the whole proprietary body; after ejectment he would of course go into possession as a co-sharer with the others, but he would be entitled to no contribution from them of a share in the cost of acquisition; Remarks in 4 N.L.R. 120 held as obiter and not Foll. 100 Ind. Cas. 27=A.I.R. 1927 Nag. 161.

——S. 13—Widow can surrender the tenancy even to defeat the reversioners—Reversioners' remedy is to attack it as transfer under S. 13.

S. 11, is the only provision which makes any distinction between the tenancy of a house and an agricultural tenancy of an occupancy field. Tenancy, like other contracts, is essentially personal and there is nothing apart from the said provision which limits the rights of a Hindu woman in respect of the contract of tenancy. A Hindu widow is therefore entitled to surrender the tenancy and that holds good, evne if her motive is to affect the reversioners' rights and to secure the tenancy for her intended husband; A.I.R. 1927 Nag. 129, Foll. The only remedy the reversioners have is to attack the surrender as a transfer under S. 13, C. P. Tenancy Act, 1920. 103 Ind. Cas. 801=A.I.R. 1927 Nag. 330.

——Ss. 13 and 105—Transfer of holding by occupancy tenant—Remedy of landlord—Forum.

A transfer of his holding by an occupancy tenant can be set aside and the landlord can recover possession only by application to a Revenue Officer under S. 13; under S. 105 he cannot be given any remedy by a Civil Court. 89 Ind. Cas. 231=A.I.R. 1926 Nag. 177.

——S. 13—Civil Court has no jurisdiction to set aside sale of occupancy field worth less than Rupees 100 without the consent of the landlord by unregistered deed but by delivery of possession. Such a transfer is valid under general law but is voidable and liable to be set aside under S. 13, C. P. Tenancy Act. 1941 N.L.J. 643.

——S. 14 (as amended)—Retrospective operation.

A transfer made by an occupancy tenant in contravention of S. 12 of the C. P. Tenancy Act of 1920 before it was amended by the C. P. and Berar Act XI of 1940 was set aside by a Sub-Divisional Officer as illegal and the son of the transferring tenant was placed in possession after the amending Act came into force. On appeal a joint brother of the transferring tenant contended that he had a preferential claim under the amended S. 14 (3) as the son was placed in possession after the Amending Act had come into force.

Held, that the brother could not oust the son as the provisions of the new Act could not be construed so as to take away rights that had accrued under the old Act. 1947 N.L.J. 150.

——Ss. 14 and 13—Tenant's heir put in possession —Liability of such heir to pay arrears of rent due from last tenant.

The rights given to the heirs of a transferring tenant by Ss. 13 and 14, are nothing but modified versions of rights which were originally rights of pre-emption which is basically a right of substitution. The heir, therefore in a sense, steps into the shoes of the transferee and thus acquires the tenancy subject to all its liabilities just as much as he would have done had he succeeded as an heir on death. The usual rule is that the assignee of a tenant's rights is liable for arrears in the same way as the original tenant (bearing personal responsibility) because of the privity of estate between the landlord and himself.

One *T* was the occupancy tenant of the holding in question. His rent fell into arrears and so the *lambardar* sued him and obtained a decree for the years 1932–33, 1933–34 and 1934–35. Soon after the decree, *T* transferred his holding to a third person who has passed out of the picture. The transfer contravened the provisions of S. 12 and so the *lambardar* (plaintiff) applied to the Revenue Authorities under Ss. 13 and 14 for being placed in possession. Notices were issued as contemplated by S. 14 (2) and the Revenue Officer, after considering the various claims, put *T's* widow in possession. He also determined, in accordance with the rules framed under S. 109, that the widow should accept the liabilities of *T* for the arrers of rent due for the years 1935–36, 1936–37 and 1937-38. He did not include in this the arrears for the years in respect of which the decree was passed. The question was whether the plaintiff could eject the widow under Ss. 25 and 26 of the Act in execution of decree which was passed against *T*, as he could have ejected *T*. It was contended on behalf of the widow that she was not liable to pay the amount of the decree nor could she be ejected in the manner suggested:

Held, that the old-tenancy was not extinguished in such cases and the new tenant (the widow) entered not indeed as heir (because there was neither civil nor actual death), but on the same terms and conditions as she would have entered had the tenant died and hence she was liable to pay the arrears of rent. A.I.R. (Vol. 29) 1942 Nag. 136=1942 N.L.J. 531=I.L.R. (1943) Nag. 379=203 Ind. Cas. 439.

——Ss. 13 and 14—Rights and liabilities of incoming tenant—Structures erected by previous tenant.

A tenant placed in possession of an occupancy holding under the provisions of S. 14 of the Tenancy Act cannot be made to pay any cost of improvement which the previous tenant or transferee did to the holding. His liabilities are limited to arrears of rent and advances for necessary expenses of cultivation. The incoming tenant has to be placed in possession of the whole holding irrespective of whatever structures the transferee may have erected on the land. It does not matter when these structures were erected. 1948 N.L.J. 321.

——S. 21—Sub-tenant is not liable for arrears.

A sub-tenant of an occupancy holding who has grown and reaped crops in such holding is not liable to the landlord of the village for arrears of rent under S. 21. 11 N.L.J. 82=109 Ind. Cas. 775=A.I.R. 1928 Nag. 211.

——S. 21—Limitation.

The plaintiff claimed arrears of rent from defendants of whom defendant No. 3 was the purchaser of the standing crops prior to three months of the suit.

Held, that purchase of crops not brought to the knowledge of the landlord would not start limitation against the landlord. Appropriation commences from the date when crops began to be cut and limitation runs from that date. 7 N.L.J. 80=81 Ind. Cas. 651=A.I.R. 1924 Nag. 87.

——S. 23—Ejectment—Effect on arrears of rent.

The natural meaning of S. 23, C. P. Tenancy Act, is that all arrears of rent, whether decreed or not, must be deemed to be satisfied when the defendant is ejected under that section. A.I.R. (Vol. 23) 1936 Nag. 269=19 N.L.J. 237=I.L.R (1937) Nag. 161=168 Ind. Cas. 52.

——S. 24—Tenant ejected in execution of rent decree—Ejectment order set aside on appeal—Application by tenant for mesne profits—Jurisdiction of executing Court—C. P. Code, Ss. 47 and 144.

A tenant, was ejected in execution of a rent decree but the ejectment order was set aside on appeal, asd the tenant was placed in possession. Subsequently the tenant applied for mesne profits for the period during which the landlord remained in possession, while the case was being fought in the Revenue Courts. The landlord contended that since S. 24 of the Tenancy Act was deleted before the tenant applied for mesne profits, the executing Court was no longer in existence and could not deal with the application.

Held, that as the possession by the landlord as a result of an erroneous order related to the execution of the decree, any profits that he might make in that way must be adjusted by the executing Court, and the application for mesne profits could therefore be dealt with by the Revenue Officer who executed the decree. 1947 N.L.J. 496.

——S. 24—Order of ejectment transferred to revenue officer—Defendant tenant pleading the discharge of decretal debt—Revenue officer should return the matter to the Court which transferred the order for determination of the matters. 1942 N.L.J. 348.

——Ss. 24, 23 and 25—Co-tenant not party to suit —Whether can be ejected constructively—Tenant in arrears—Right of dispossessed tenant.

Before a tenant can be ejected from his holding the landlord must obtain a decree against him and then proceed in accordance with S. 24, C. P. Tenancy Act, before a Revenue Officer. Since the tenant cannot be ejected without a decree for arrears, it follows a co-tenant, who was not a party to the suit, cannot be ejected when there is no decree against him, and if he cannot be ejected, it is difficult to understand how he can be ejected constructively.

It is the duty of a tenant to pay his rent, and if he does not, the landlord has a right to eject him but the landlord cannot eject the tenant unless he complies with the provisions of Ss. 23 to 25. It is true that the landlord is entitled to re-enter if the rent is left in arrears and that he is not bound to wait until the whole line of more remote heirs is exhausted. But if he does so re-enter then the tenant who has been dispossessed or who has right to possession as heir can sue for possession provided he comes within the period of limitation allowed for such a suit. A.I.R. (Vol. 24) 1937 Nag. 175=171 Ind. Cas. 935.

——Ss. 24 (2) and 12—B and D joint occupancy tenants—B selling some fields to plaintiff who if he survived B would inherit B's right—Plaintiff going in possession and recorded as tenant—Landlord's right to possession in execution of rent decree.

B and his brother *D* were the joint occupancy tenants of certain fields. *B* sold two fields out of this holding to the plaintiff who obtained possession and was recorded as tenant of those fields. At that time there were decrees for arrears of rent outstanding against *B* and *D*. In execution of these decrees *D* and *B* were ejected and the landlord was placed in possession. The plaintiff brought a suit to recover possession of the two fields sold to him. The plaintiff was a person who, if he survived the vendor-tenant without nearer heirs, would have inherited his right:

Held, that the transfer did not offend against S. 12, C. P. Tenancy Act. That the landlord was not entitled to take possession of these fields in execution of decree for arrears of rent without giving notice to the plaintiff who was recorded as a tenant. A.I.R. (Vol. 27) 1940 Nag. 160=1940 N.L.J. 164 =188 Ind. Cas. 825.

——S. 25—Permanent lease of khudkast by Hindu widow—If binding on her reversioner—Position of lessee.

The Hindu Law applies to tenancies in the Central Provinces up to a certain point but not beyond that. It applies, for instance, in all matters of devolution and for that reason it has been held that a Hindu widow cannot surrender her holding so as to defeat the reversioner. No limited holder can defeat the expectation of those heirs by a surrender. That, however, is an entirely different matter from the question dealing with village management. A widow has the right of village management and can give leases in the exercise of that right and the question in every such case resolves itself into, not whether there was legal necessity for the lease by her, though that might be relevant in some cases, but whether the act was done in the ordinary course of village management.

The burden of displacing the tenancy would lie on the person who pleads that the act was not done in the ordinary course of village management. It does not lie on the tenant to show that there was legal necessity, though of course if that is established it would secure his tenure. A reversioner is not in any better or stronger position than a co-sharer whose rights are vested. If a Hindu widow happens to be a co-sharer in a village and happens to be appointed as *lambardar*, then no co-sharer can challenge a lease of *khudkast* lands by her unless he is able to allege and prove that it was not an act of ordinary village management.

Consequently, an alienation in the ordinary course of village management in the shape of a permanent lease of *khudkast* land by a Hindu widow is binding on her reversioner after her lifetime. The lessee becomes an occupancy tenant and so is entitled to the protection afforded to such tenants by the Tenancy Act. A.I.R. (Vol. 28) 1941 Nag. 306=I.L.R (1942) Nag. 680=1941 N.L.J. 435=195 Ind. Cas. 603.

——S. 25 (b)—Validity of ejectment decree cannot be questioned unless set aside in apply. (1937) 20 N.L.J. 8.

——(as amended in 1940), S. 27 (1)—Diversion of land by tenant—Landlord's right to eject tenant.

A diversion of lands by a tenant does not automatically work a forfeiture under S. 27 (1) of the C. P. Tenancy Act. The landlord cannot straightaway eject a tenant following a diversion unless and until he gives the tenant an opportunity to remove the diversion under S. 27 (1). I.L.R. (1949) Nag. 167=1949 N.L.J. 575=A.I.R. 1949 Nag. 218.

——S. 27 (2)—Notice under—Object of—Holding recorded in names of two brothers—Elder in actual occupation—Notice to him alone—Sufficiency.

S. 27 (2), C. P. Tenancy Act, does not prescribe any particular form of notice. The object of the notice prescribed by the section is only to give a previous warning to the tenant to undo the wrong done by him before taking the drastic step of ejecting the tenant by a suit, in other words, to give the tenant, so to say, a *locus penitentiae* to mend matters. In the case of a holding recorded in the names of two brothers the elder being the *de facto* and *de jure* manager of the property and being also on the spot in actual occupation a notice to that elder brother is a valid notice not only to him but also to his younger brother, under S. 27 (1) of the Act. I.L.R. (1949) Nag. 167=A.I.R. 1949 Nag. 218=1949 N.L.J. 575.

——S. 27 (2) (b)—Rights of ordinary tenants.

According to S. 27 (2) (b), any person who holds *sir* land as a tenant shall be deemed to be a sub-tenant of such land, but as the provisions of Act 1 of 1920 are not retrospertive, the rights which were acquired under the Tenancy Act of 1898, remain unaffected, and, therefore, ordinary tenants of *sir* land remain ordinary tenants and do not become sub-tenants. 109 Ind. Cas. 543=11 N.L.J. 41.

——S. 35—'Abandonment'—Meaning of.

The word "abandonment" in S. 35, C. P. Tenancy Act, is used in its usual legal significance, and not in some special sense. A.I.R. (Vol. 29) 1942 Nag. 108=1941 N.L.J. 612=I.L.R. (1942) Nag. 703=202 Ind. Cas. 25.

——Ss. 35 and 36—Intention to abandon holding —Scope of enquiry.

It was not intended that S. 35 of the Tenancy Act, should prescribe tests by which a tenant's intention to abandon a holding could be established. Nor is it a penal section for confiscation of a holding in certain contingencies. It seems to lay down certain *ad-hoc* circumstances in which a landlord can publish

a notice and treat a tenant's holding as abandoned, so that he can allot it to another or cultivate it himself. The enquiry under S. 36 must be as entirely independent one and a tenant should be free to establish as best he can that he had no intention of abandoning the holding in spite of the truth of what was stated in the notice. Therefore under S. 36 of the Act all circumstances, and not only those specified in S. 35, must be taken into account. 1948 N.L.J. 309.

——S. 35—Abandonment by life-holder—Right of reversioner.

Where an occupancy holding is 'abandoned' by a tenant who is only a life-holder of a tenancy, the next presumptive reversioner of the deceased occupancy tenant can get a declaration in a suit brought for that purpose that the tenancy was not extinguished by abandonment and that on the death of the life-holder his right as occupancy tenant of the holding would accrue. A.I.R. (Vol. 29) 1942 Nag. 108=1941 N. L. J. 612=I.L.R. (1942) Nag. 703=302 Ind. Cas. 25.

——S. 35, Sch. II, Art. 1—Abandonment by life-holder — Suit by reversioner — Limitation—Starting point.

There can be no adverse possession against a person not entitled to immediate possession until his right to possession accrues. Hence where on the abandonment of a holding under S. 35, C. P. Tenancy Act, by a life-holder the next presumptive reversioner sues for possession of the holding, the limitation will be computed from the date on which the plaintiff gets the tenant right *i. e.*, the death of the holder. A.I.R. (Vol. 29) 1942 Nag. 108=1941 N.L.J. 612=I.L.R. (1942) Nag. 703=202 Ind. Cas. 25. [Reverses 1939 N.L.J. 60].

——S. 35—Registered surrender by tenant of occupancy holding to stranger is invalid. The tenants could however effectively get rid of their tenant rights only by abandonment; and in that case the remedy of the *lambardar* was to proceed under S. 35, C. P. Tenancy Act. A.I.R. (Vol. 28) 1941 Nag. 328=I.L.R. (1941) Nag. 743=1941 N.L.J. 497=198 Ind. Cas. 449.

——S. 35—Abandonment—Landlord's remedy.

Obiter, per *Bose, J.*—If the land is left vacant, the landlord can re-enter but only at his own risk unless he takes steps to determine the tenancy. His right will of course avail him against all the world but not as against the tenant whose tenure has not been determined. His true remedy is to proceed under S. 35 if there has been abandonment. If not, to sue for his rent, and in the event of its not being paid, to proceed to determine the tenancy in execution. A. I. R. (Vol. 27) 1940 Nag. 49=1940 N.L.J. 121=I.L.R. (1940) Nag. 348=186 Ind. Cas. 731 (F.B.).

——S. 35—Transfer set aside by landlord—Effect of.

The mere transfer of a right of occupancy does not entail a forfeiture of such right and if a landlord elects to set aside such transfer, all parties revert to the status in *qua ante*. A.I.R. 1930 Nag. 193=26 N.L R. 190=124 Ind. Cas. 252.

——S. 36-A—Application under—Maintainability—Title of applicant as occupancy tenant in dispute.

An application under S. 36-A of the Tenancy Act to be declared as *malik makbuza* of a certain *khasra* number, cannot be made by a person whose title to that land as occupancy tenant is in dispute. 1950 N.L.J. 98.

——S. 36-A—Applicability—Zamindaris.

Zamindaris have not been excluded by notification from the operation of S. 36-A of the C. P. Tenancy Act. The *mulik makbhuza* tenure is not unknown in inalienable or impartible zamindaris. The contention that the creation of proprietary rights within a zamindari is a violation of the incidents of the zamindari tenure is untenable. The section admits of, no such interpretation. 1948 N.L.J. 43.

——S. 36-A—Discretion of Revenue Officer.

A Revenue Officer has a discretion to reject an application by an occupancy tenant to be declared *Malik Makbusa* under S. 36-A of the Tenancy Act, even if all the prescribed requirements of that section are fulfilled. The section cannot be invoked to operate in certain circumstances where the occupancy tenant is not merely a tenant pure and simple, but is also a *Maufidar* of the landlord with which status the tenancy right may be interconnected. 1948 N. L. J. 109.

——S. 36-A—Discretion of Revenue Officer.

A missionary society acquired occupancy right in land and applied under S. 36-A, C. P. Tenancy Act, for declaration to be a *malik-makbuza* of the land.

Held, that the discretion of the Revenue Officer could be rightly used to refuse the application. In permitting the tenancy right to pass to the missionary society, the landlord was presumably actuated by a desire to facilitate the philanthropic object of the society, whereas, if the discretion allowed in S. 36-A is to be exercised in such a way as to transfer the proprietary rights to the society, the result may well be, if at any time the society decides to close down this particular activity, the land would be bought by any person and used for a non-agricultural commercial purpose. If the landlord had been approached to part with proprietary rights unconditionally to the society, he might well have refused to do so in view of this possible contingency. 1946 N.L.J. 285.

——Ss. 36-A and 12-A—Declaration of tenant to be *malik-makbusa*—When takes effect—Sale of holding by tenant after such declaration and before it takes effect—Effect of—Landlord's right to pre-empt. *See* C. P. TENANCY ACT, Ss. 12-A, and 36-A. 1949 N.L.J. 484.

——S. 36-A and Rule 2—Proceeding under—Notice—Service on all co-shares—If necessary.

Rule 2 of the Rules under S. 36-A, Tenancy Act, requires a notice, to the landlord only, and under the provisions of S. 188 (2) of the Land Revenue Act, the lambardar is deemed to be the landlord. Therefore, in proceedings under S. 36-A of the Tenancy Act, it is enough if the notice is served on the lambardar and it need not be served on all the co-sharers. 1950 N.L.J. 143.

——S. 37—Occupancy rights in malik makbuza acquired before 1884—If can be extinguished.

Though occupancy rights acquired before the first January, 1884 were left untouched by Act IX of 1883 (as amended) they can be extinguished under S. 37 of Act of 1920. The intention of S. 37, as

regards occupancy rights under a malik makbuza is that, though a person might have acquired such rights, yet, if he was not recorded in the settlement records of the last settlement made before the Tenancy Act of 1920 came into force, he would be deemed to be a sub-tenant. 116 Ind. Cas. 80=A.I.R. 1929 Nag. 112.

——S. 37—Person not recorded occupancy tenant —Status of.

If a person is not recorded an occupancy tenant in the papers of the settlement of 1913 which preceded the Tenancy Act of 1920, but on the contrary he is recorded as a sub-tenant, he does not acquire the status of occupancy tenant in view of S. 37, C. P. Tenancy Act of 1920. 107 Ind. Cas. 661.

——S. 37 (1) (b)—According to S. 37 (1) (b), a person who holds *sir* land as a tenant is deemed to be a sub-tenant, otherwise an ordinary tenant becomes an occupancy tenant under the new Act. A.I.R. (Vol. 27) 1940 Nag. 335=1940 N.L.J. 377=190 Ind. Cas. 145.

——S. 37—Person cultivating sir and khudkasht lands—Status of.

The ordinary presumption is that a man who cultivates the land of the *malguzar* whether on *batai* or on payment of rent is a tenant. The status of a person cultivating the proprietor's *sir* land under S. 37 of the new Act of 1920 is that of a sub-tenant. Where *sir* land and other land is given to a person under one lease or one set of conditions so as to constitute one holding, the status of the defendant so far as the *sir* land is concerned, is that of a sub-tenant. The landlord in an ejectment suit can therefore be given a decree declaring that defendants are liable on partition by proper authorities. In the case of *khudkasht* lands the status of defendant is that of an occupancy tenant and as such he is not liable to be ejected therefrom by the landlord except under S. 25 of the said Act. 90 Ind. Cas. 76=A.I.R. 1926 Nag. 35.

——Ss. 37 and 38—Permanent sub-tenancy—Malik makbuza fields in possession of sub-tenant's family for over 40 years—Rent not paid—Effect of.

Certain *malik makbuza* fields were in possession of *A's* family ever since 1888. The origin of the tenancy was unknown. *A's* grandfather in 1888 by a registered deed, leased out the fields for 12 years. When in 1913, the family partition took place; the fields were treated as family property. Throughout the possession of *A's* family for over 40 years no rent was paid to the *malik makbuza*:

Held, that the original contract of tenancy was a contract for a permanent tenancy and that *A* was therefore, a sub-tenant in perpetuity. A.I.R. (Vol. 21) 1934 Nag. 166=17 N.L.J. 19=150 Ind. Cas. 883.

——Ss. 37 and 38—Liability to ejectment—Possession for a large number of years—Whether material.

The rule that the tenants who were classed as ordinary tenants at the time when the C. P. Tenancy Act of 1920 came into force, should ipso facto become occupancy tenants, is not meant to be enforced with regard to that special class of ordinary tenants whose holding consists entirely of sir lands. If a tenant takes his stand on the Tenancy Act of 1898, he must be judged under that Act and according to S. 69 (c) of the Act he can, as an ordinary tenant, be ejected from his holding on the ground that the holding consists entirely of sir land. If, on the other hand, he wishes to rely on the provisions of the Act of 1920 he must be judged under Ss. 37 and 38 of that Act. The fact that he has been in possession for a large number of years will not give him any title or right to continue in occupation in the absence of a permanent lease in his favour. A.I.R. (Vol. 30) 1933 Nag. 378=30 N.L.R. 109=147 Ind. Cas. 561.

——S. 38—Equitable principles can be applied to tenancy by contract.

The fact that the incidents of tenancy are governed by contract does not prevent a Court of justice from applying equitable principles in regard to its enforcement. A.I.R. (Vol. 31) 1944 Nag. 229=1944 N.L.J. 321=I.L.R. (1944) Nag. 877.

——S. 38—Permanent lease of sir lands commencing from the year 1917—**Held**, C. P. Tenancy Act, 1920, did not affect the status of the permanent lessee nor his position worsened though the same was got altered from that of an ordinary to that of a sub-tenant. (1937) 20 N.L.J. 35.

——S. 38—Under S. 38, the person from whom a sub-tenant holds is termed landlord. A.I.R. (Vol. 20) 1933 Nag. 76=29 N.L.R. 10=144 Ind. Cas. 191.

——S. 38—Sub-tenancy for one year—Presumption.

There is no presumption that a sub-tenancy for a single year continues after that year expires. 23 N.L.R. 148=193 Ind. Cas. 713=A.I.R. 1927 Nag. 320.

——S. 39—No notice or order of ejectment is necessary.

No notice and no order of ejectment is necessary after the passing of a decree for arrears before actual ejectment under S. 39 as it under S. 24. 25 N.L.R. 119=12 N.L.J. 57=116 Ind. Cas. 426=A.I.R. 1929 Nag. 120.

——S. 40—Application by sub-tenant for declaration—Expiry of his lease—Date of—Presumption.

Under S. 40, C. P. Tenancy Act, a declaration can be made only in favour of a person who is a sub-tenant and in possession on the date of the commencement of the proceedings. Sub-tenants are virtually tenants-at-will and the terms of their tenure are determined by their agreements with their lessors. Where an agricultural lease does not refer to any crop that the lessee may grow in the holding leased out and does not specifically state the period in terms of dates but with reference to cultivation generally, the presumption is that the lessee retains possession of the land till the end of the agricultural year. 1949 N.L.J. 602.

——S. 40 (1), proviso (2)—Application by sub-tenant holding lease made after 1st November, 1932 —Evidence of habitual sub-letting prior to that date —Admissibility.

According to the second proviso to S. 40 (1) of the C. P. Tenancy Act, no declaration under the section can be made in the case of a sub-tenant holding land under a lease made before 1st November, 1939. Where an application for a declaration is made by a sub-tenant holding land under a lease made after that date, the proviso does not suggest the exclusion from the evidence to prove habitual sub letting of leases made prior to that date. 1949 N.L.J. 602.

——S. 40, Expl..—Scope and effect.

The explanation appended to S. 40, C.P. Tenancy Act, merely lays down a rule of presumption regarding habitual sub-letting although this presumption does not arise until seven years have elapsed, a declaration can be made taking into account a shorter period if the fact of habitual sub-letting can be otherwise proved. 1949 N.L.J. 602.

——S. 41—Declaration in favour of person not sub-tenant on date of proceedings—If can be made.

S. 41, C. P. Tenancy Act, shows that the declaration can only be made in favour of a person who was a sub-tenant on the date of the beginning of the proceedings. If a person is not a sub-tenant on the date of application, he has no right to apply under the section. Even if the Revenue Officer acts on his motion, the person in question has to be a sub-tenant on the date when he initiates the proceedings. 1950 N.L.J. 345.

——S. 41—Remuneration of patwari—Payment made by malik makbuza—Right to recover from occupancy tenant.

The **malik makbuza** who have lost their right to cultivate their holding under S. 41 of the C.P. Tenancy Act, stand only in the position of proprietors who have foregone their right to cultivate the land. In view of the explanation appended to R. 1 of the Rules framed by the Financial Commissioner to determine the nature and amount of the remuneration of the **patwaris**, the person that will be deemed to be proprietor would not be the **malik makbuza** but the occupancy tenant who actually cultivates the land. The principle underlying the explanation appended to R. 1 appears to be to make persons actually cultivating the land liable for payment of **patwari's** dues. Consequently, the person who has acquired occupancy rights under S. 41, C. P. Tenancy Act and as such has been in actual possession of the land, is primarily liable for payment of the **patwari's** dues and not the **malik makbuza**. Where the latter has, by compulsion, been made to discharge an obligation which was not his but that of the occupancy tenant, the latter should pay that amount to the **malik makbuza** with such incidental costs and interest as are reasonable. A.I.R. (Vol. 24) 1937 Nag. 211=I.L.R. (1939) Nag. 290=20 N.L.J. 173=171 Ind. Cas 658.

——S. 45—Land recorded as "Muafi Khairati Sadharan" held by Bhumak—Latter ceasing to perform services—Liability to ejectment.

Ordinarily, if land is recorded as **"Muafi Khairati Sadharam"**, and there are no other conditions attached to it, under instructions contained in paragraph 20 of the C.P. Settlement instructions No. 1, the land would be treated as occupancy land. But if such land is held by a **Bhumak** in consideration of rendering services as a **Bhumak**, it should be recorded as **"Muafi Khidmati"**. Where the **Bhumak** has to do service not only to the Malguzar but to the Government Officers visiting the village, the land can be rightly treated as village service land, and the **Bhumak** is liable to ejectment under S. 45 of the C.P. Tenancy Act on his ceasing to perform the services of **Bhumak**. 1949 N.L.J. 471.

——S. 46—Mukaddam Gumashta is a village servant.

The Mukaddam Gumashta is a village servant and in that respect is in exactly the same class as the Kotwar, being merely higher than the **Kotwar** in the performance of practically the same duties. A holding granted to him in lieu of service is village service holding. 101 Ind. Cas. 693=A.I.R. 1927 Nag. 208.

——Ss. 46 (3), 47 and 48—Transfer of occupancy holding voidable — Procedure for setting aside — Transferee's suit for ejectment.

The transfer of his rights by an occupancy-tenant is only voidable and not void and can be avoided only in the manner prescribed in Ss. 47 and 48. If the procedure prescribed by these sections is not followed by the person entitled to avoid it, the transfer remains good. But the transferee also cannot sue for ejectment if he has no valid title deed in his favour. A.I.R. (Vol. 32) 1945 Pat. 124=23 Pat. 645=10 Cut.L.T. 71=11 B.R. 265=218 Ind. Cas. 185.

——Ss. 46 (3), 47 and 48—Transfer of occupancy holding—If void.

Obiter.—There is no prohibition on a transfer of an occupancy holding in the sense that the transfer is void. S. 46 (3) of the Tenancy Act makes such transfers "voidable in the manner and to the extent provided by the two next following sections". Those sections only give certain heirs, and after them the landlord, the right to avoid those transactions and then only by application to a Revenue Officer. I.L.R. (1950) Nag. 97=1950 N.L.J. 528.

——S. 49.

Synopsis.

1. **Construction of section—Rule as to.**
2. **Section not retrospective.**
3. **Object of section.**
4. **Sale without reserving cultivating rights in Sir land—Validity.**
5. **Relinquishment by Hindu widow without reserving cultivating rights in sir land—Validity.**
6. **Loss of proprietary rights in Sir land—Accrual of occupancy rights therein.**

7. Extinction of rights in Sir land before Act—Revival.
8. Sale of village share and surrender of ex-proprietary rights in Sir land—Validity.
9. Sanction by Sub-Divisional Officer—Sufficiency.
10. Person acquiring proprietary and cultivating rights—Powers of.
11. Sub S. (2)—Procedure not followed—Validity of Registration.
12. Execution sale of proprietary share of gaontia—Purchaser's rights.

1. Construction of section—Rule as to.

——S. 49—S. 49 of the C.P. Tenancy Act and S. 2 (17) of the C.P. Land Revenue Act are intended for the benefit of the proprietor of sir land, and therefore any ambiguity should be resolved in his favour. A.I.R. (Vol. 28) 1941 Nag. 351=I.L.R. (1941) Nag. 749=1941 N.L.J. 527=200 Ind. Cas. 806.

2. Section not retrospective.

——S. 49—Not retrospective in respect of leases of sir land validly granted under old Act.

S. 49, C. P. Tenancy Act, has no retrospective effect in respect of leases of sir land, validly granted under the old Act by an ex-proprietor, when he was proprietor. The leases and rights acquired by the tenant under the old Act are expressly saved by S. 110 of the present Tenancy Act. A.I.R. (Vol. 26) 1939 Nag. 230=1939 N.L.J. 347=183 Ind. Cas. 695.

——S. 49 (1)—Section is not retrospective.

The provisions of S. 49 (1) of the Tenancy Act of 1920 relating to the lapsing of the tenancy rights granted by an ex-proprietor in the sir land cannot have retrospective effect over the tenancy rights created by him before the passing of the Act. 83 Ind. Cas. 752=A.I.R. 1925 Nag. 249.

——S. 49 (1)—Last portion has no retrospective effect.

The latter portion of Sub-S. (1) of S. 49 has no retrospective effect. 19 N.L.R. 110=6 N.L.J. 227=72 Ind. Cas. 438=A.I.R. 1923 Nag. 227.

3. Object of section.

——S. 49—Object of—Safeguards should be maintained effectively.

Per **Stone, C. J.**—It is the policy of the law to prevent the land-working classes being driven into the state of landless proletariates so far as may be, and accordingly it is provided by S. 49 of the C.P. Tenancy Act that alienations of sir land that is home farm land in cultivation, shall be ineffective unless the sanction of the appropriate official has first been obtained. It is of the utmost importance that this safeguard should be maintained in full force and effect. It is desirable that collusive actions having as their real object to defraud alienees who have given consideration should fail.

Per **Bose, J.**—The anxiety of the Legislature to protect this class is so great that S. 49 (2) of the Act prohibits registration of any document which does not reserve the right of occupancy specified in Sub-S. (1). The object of this prohibition is clearly to bring to the notice of the parties exactly what their bargain amounts to under the law and if they have understood the position a right to enable them to amend their document so as to make their meaning clear beyond all possibility of doubt, and if not, then to let them realise that they have entered into a transaction, one of whose objects is prohibited by law. The illegal part of the transaction is not the sale of the sir but the arrangement or device which attempts to evade the provisions of the Act.

Per **Digby, J.**—Where a surrender and a sale-deed are both executed on the same date and it has been arranged to make the surrender before the sale-deed is executed, the surrender deed is the execution of "device which is void and illegal." A.I.R. (Vol. 25) 1938 Nag. 335=I.L.R. (1939) Nag. 1=177 Ind. Cas. 6 (F.B.).

4. Sale without reserving cultivating rights in Sir land—Validity.

——S. 49—Sale of a village without reservation of occupancy in the sir land—Validity.

Sale of a village without reservation of occupancy rights in the sir land which had not been sanctioned by a revenue officer, constitutes a void agreement. The whole agreement has to be set aside and not one or other of the two parts to which the parties try to give the appearance of separate agreements. The reason for holding such an agreement void is that the subject of the agreement "is of such a nature that, if permitted, it would defeat the provisions" of S. 49, completely. 110 Ind. Cas. 351 =A.I.R. 1928 Nag. 232.

5. Relinquishment by Hindu widow without reserving cultivating rights in Sir land—Validity.

——S. 49—Relinquishment by Hindu widow is not transfer.

A relinquishment by a Hindu widow of the whole estate including sir, inherited from her husband, in favour of his reversionary heirs without reservation of the cultivating rights in it, does not require permission from a revenue officer and its registration cannot be refused on the ground of its absence. A.I.R. 1927 Nag. 44, Foll. 102 Ind. Cas. 30=A.I.R. 1927 Nag. 394.

6. Loss of proprietary rights in Sir Land—Accrual of occupancy rights therein.

——S. 49 (1)—Mortgagor losing his right to occupy sir land by foreclosure.

Where a mortgagor loses his right to occupy his sir land as proprietor by means of foreclosure suit by mortgagee he is entitled to the protection of S. 48 (1), C.P. Tenancy Act, even if the land was declared to be sir after the date of mortgage but before the date of the foreclosure suit.

The benefit of S. 49 (1) can be claimed in execution when the decree itself does not confer it. The right does not arise until the date of the loss, that is to say, until the date of the foreclosure de-

cree. All that will pass to the decree-holder will be possession of the proprietary rights in the land subject to the occupancy rights which have accrued in the mortgagor's favour. A.I.R. (Vol. 26) 1939 Nag. 287=1939 N.L.J. 429=189 Ind. Cas. 273.

——S. 49—Lease of sir—Subsequent sale of proprietary interest—Purchaser purchasing also lessee's interest—If becomes only a lessee from occupancy tenant.

Where the proprietor lets out his **sir**, and then sells his proprietary interest, he becomes the occupancy tenant of the **sir**, and if the purchaser of the proprietary interest also purchases the interest of the lessees of **sir**, he still remains the lessee of the occupancy tenant, i.e., the original proprietor and the original proprietor is entitled to possession as occupancy tenant on the expiration of the lease term. 88 Ind. Cas. 126=A.I.R. 1925 Nag. 383.

——S. 49—Execution sale against widow—Widow becoming occupancy tenant—Right of, will pass to reversioners after her death.

The tenant right in his **sir** land left in proprietor after alienation of his ownership is all along a constituent part of the right he held in the **sir** land and is not something new which is created by the law. Therefore the heirs of the husband of a widow, who became an occupancy tenant owing to loss of proprietary right, by sale in execution of a decree against her, succeed to her occupancy right. 71 Ind. Cas. 129=19 N.L.R. 26=A.I.R. 1923 Nag. 93.

——S. 49 (1) (b) (as amended in 1941)—Final mortgage decree for sale against khudkasht lands —Subsequently land becoming sir—Cultivating rights.

In a mortgage suit, a final decree for sale was passed on November 26, 1936, as against **khudkasht** fields of the mortgagor. In 1938 some of the fields became recorded as **sir**, and as a result of this the decree-holders on August 28, 1941, applied in the executing Court asking for an amendment of the decree by making an express order for the sale of both the proprietary rights and the cultivating rights in these **sir** fields: This application was granted. In an appeal, by the judgment-debtors:

Held, that the reservation of the cultivating rights in the land had not been lost as the land had been declared **sir**. The decree which was passed in 1936 made no mention of the **sir** lands as required by S. 49 (1) (b) of the C. P. Tenancy Act as the land was not **sir** land but **khudkasht** at the time of the decree. The Act as amended in 1941 could have no application to decree passed as far back as 1936. The law in any case had in no wise been altered by the amendment of the Tenancy Act in 1941. The material date was the date when the proprietor loses his rights. The decree, in this case, being one for sale the proprietary right could not be lost until the field was actually sold. A.I.R. (Vol. 31) 1944 Nag. 29 =1943 N.L.J. 448=I.L.R. (1943) Nag. 634= 209 Ind. Cas. 549.

——S. 49 (1)—Mortgage of khudkasht subsequently recorded sir—Mortgagee's rights.

A mortgagee is entitled only to the proprietary rights in the land that was **khudkasht** at the time of the mortgage but was subsequently recorded as **sir** and the cultivating rights in it will remain with the mortgagor who will become occupancy tenant of the land under S. 49 (1), C. P. Tenancy Act. A.I.R. (Vol. 21) 1934 Nag. 241=17 N.L.J. 100 =151 Ind. Cas. 1062.

——S. 49—Land mortgaged as **khudkasht** subsequently becoming **sir**—Foreclosure — Mortgagee gets only proprietary rights—Cultivating rights continue with mortgagor. A.I.R. (Vol. 20) 1933 Nag. 104=29 N.L.R. 142=142 Ind. Cas. 603.

——S. 49—Mortgagor becomes occupancy tenant also of lands becoming sir after the date of mortgage.

On the transfer of a village by foreclosure the mortgagor becomes an occupancy tenant not only of so much of the **sir** land as had that character at the date of the mortgage but also of that part which has become in the interval. 76 Ind. Cas. 637=A.I.R. 1924 Nag. 155.

——S. 49—Owner of sir land adjudged insolvent —If becomes occupancy tenant of sir land—Provincial Insolvency Act, S. 28 (5).

The intention of the S. 49 appears to be that whenever proprietary possession temporarily passes from the owner of **sir** land he becomes an occupancy tenant. If an owner of **sir** land is adjudged insolvent and order is passed vesting his property in the receiver he no doubt loses his right to proprietary rights in **sir** land but by the vesting order he becomes the occupancy tenant of the **sir** land and is entitled to possession of the land. 12 N.L.J. 117=26 N.L.R. 46=121 Ind. Cas. 54=A.I.R. 1929 Nag. 338.

——S. 49—"To occupy any portion of his sir land as proprietor"—Meaning of.

The words "to occupy any portion of his **sir** land as a proprietor" in S. 49, mean to enjoy the proprietary rights in any portion of **sir** land. 12 N.L.J. 117=26 N.L.R. 46=121 Ind. Cas. 54=A.I.R. 1929 Nag. 338.

——S. 49—Per Full Bench, **Stone, C. J.** and **Bose, J., contra.**—The transferor to whom occupancy right accrues in pursuance of S. 49, C. P. Tenancy Act, must be deemed to be holding his land from the proprietor of the land, namely, the transferee and would be liable to pay rent to him and to no one else. In such a case, **lambardar** cannot be deemed to be a landlord of either the **sir** which has passed into the exclusive ownership of one of the co-sharers or of the ex-proprietary occupancy land when the exclusive owner of it disposes of his proprietary right in his exclusive **sir**. A.I.R. (Vol. 28) 1941 Nag. 21=I.L.R. (1941) Nag. 54=1941 N.L.J. 56=192 Ind. Cas. 472 (F.B.).

——S. 49—Ex-proprietor becoming an occupancy tenant of his sir land held in severalty is tenant of the purchaser of his village share—The latter and not the lambardar can claim rent from him—C. P. Land Revenue Act (1917), S. 188 (2) (a).

Where a co-proprietor of a village sells his share to a third party and becomes an occupancy tenant of his sir held in severalty, such an ex-proprietor is the tenant of his vendee and the vendee is primarily entitled to claim the rent and not the lambardar. Having regard to the definition of "landlord" and "tenant" in S. 2 (7) and (11) respectively of the Tenancy Act, this conclusion is inevitable. A. I. R. 1928 Nag. 39 (1), Foll. S. 188 (2) (a), Land Revenue Act does not exclude the co-sharer concerned in such a case from demanding rent from his tenant. 108 Ind. Cas. 790=A.I.R. 1928 Nag. 229.

——S. 49—Ex-proprietary occupancy tenant is not a tenant of the proprietary body.

An ex-proprietor becoming an occupancy tenant of sir held by him in severalty is the tenant of his vendee and the vendee is entitled to claim the rent and not the lambardar. 23 N.L.R. 160=10 N. L.J. 167=106 Ind. Cas. 429=A.I.R. 1928 Nag. 39.

——S. 49—Section impliedly treats sir as held in severalty.

S. 49 impliedly treats sir land as held in severalty. Where a mortgage on sir lands was foreclosed and the mortgagor afterwards surrendered the lands to the lambardar who leased them to another.

Held that the lease was invalid, that the lambardar had no right to accept the surrender and that on surrender the lands became the mortgagee's **khudkasht** and not that of the proprietary body. 78 Ind. Cas. 730=A.I.R. 1924 Nag. 381.

7. Extinction of rights in Sir land before Act—Revival.

——S. 49—Rights in sir lands already extinguished before the Act cannot be revived by compromise between the parties after the new Act.

The predecessor of the respondents took a mortgage from the appellant's father under which some part of the property in dispute was mortgaged by conditional sale, and he obtained a foreclosure decree on the mortgage, which was made absolute in 1897. Subsequently the present appellant brought a suit to have the former decree set aside. This suit ended in a compromise in 1923 under which the property was divided between the parties, some portion being left to the mortgagee as his absolute property and some passing to the mortgagor free from incumbrance on the mortgage. In the course of the execution proceedings for obtaining possession the mortgagor objected that the mortgagee could not obtain actual possession of the sir lands, as the occupancy tenancy rights vested in him under S. 49 of the new Tenancy Act.

Held, that the effect of the compromise decree was merely to vary the original decree, but even if it be taken to have superseded and extinguished the original decree, it did not purport to revive the rights of the mortgagor regarding the sir fields under S. 49 of the new Tenancy Act. 90 Ind. Cas. 162=A.I.R. 1926 Nag. 216.

8. Sale of Village share and surrender of expro-prietary rights in sir land—Validity.

——S. 49—Sale and surrender forming part of same transaction—Validity.

Where the sale of a village share and the surrender of ex-proprietary rights in sir appertaining to that share form part of the same transaction but are evidenced by separate deeds and the consieration for each transaction is separately mentioned and there is no plea to the consideration mentioned in the sale-deed in respect of the village share did not in fact represent the value paid for that share, it ought to be held that the sums mentioned in the two deeds represented the consideration for the transactions and although the surrender is void and unenforceable, the sale of the village share, if in other respects valid, cannot be avoided and declared illegal. A.I.R. (Vol. 18) 1931 Nag. 6=27 N.L.R. 113=130 Ind. Cas. 91.

——S. 49—Surrender of sir land is void if it forms part of the transaction of sale.

If a covenant to relinquish the sir lands is part of the transaction of sale or of mortgage, then only the agreement to surrender will be void and unenforceable. Where there was a difference of more than three months between the dates of the two transactions, sale of one anna share of a particular village and surrender of occupancy rights in sir land, and where no evidence was led to show that the two transactions were really one, the surrender was held to be not invalid. 118 Ind. Cas. 865=12 N.L.J. 86=A.I.R. 1929 Nag. 257.

——S. 49, Sch. II, Art. 1—Surrender illegal on account of its being part of transaction against S. 49—Suit to set it aside—Limitation applicable.

Per **Stone, C. J.** and **Bose, J**, **Digby, J.** contra.—It is not Art. 1 of Sch. II, C. P. Tenancy Act, that applies to a suit to set aside surrender which is illegal on account of its being part of a transaction which is against the provisions of S. 49. To such a case limitation applicable is that provided by the Limitation Act. As the surrenderee holds the land as a **quasi** trustee, he cannot set up a title adverse to the **cestui que trust** and hence it is Art. 142 and not Art. 144, Limitation Act, that will govern the suit.

Per **Digby, J.**—Such a case is a clear case of exclusion from possession and Art. 1 of Sch. II, C. P. Tenancy Act governs the case.

The intention of the C. P. Tenancy Act is evidently to secure freedom from the disputes regarding tenancy land, and set some short time-limit to claims stirred up in villages, and to attain quick finality in the revenue records. A.I.R. (Vol. 25) 1938 Nag. 335=I.L.R. (1939) Nag. 1 =177 Ind. Cas. 6 (F.B.).

9. Sanction by Sub-Divisional Officer—Sufficiency.

——Ss. 49 and 50—Sanction by Sub-Divisional Officer—Sufficiency.

All that is required in the way of sanction by Ss. 49 and 50 of the Tenancy Act, 1920, or even by any of the rules on the subject made under S. 109 of the same Act, is the sanction of the Revenue Officer, that is, the Sub-Divisional Officer. There is nothing in the Act or the rules making the sanction of the Financial Commissioner (or the Deputy Commissioner) necessary for the validity of a transfer, even in these cases which have to be forwarded for orders; and a sanction granted by a Sub-Divisional Officer, after forwarding the case to the proper authority for orders, would be valid and sufficient even in the unlikely event of its being not in accordance with those orders. 94 Ind. Cas. 829=A.I.R. 1926 Nag. 343.

10. Person acquiring proprietary and cultivating rights—Powers of.

——Ss. 49—Proprietary and cultivating rights given up — Person acquiring these rights can transfer cultivating rights to another.

Where along with the proprietary rights the cultivating rights also have been given up, a person acquiring both the rights in respect of a filed can transfer the cultivating rights to any one he pleases or confirm the transfer to them if they had already been transferred. A.I.R. (Vol. 28) 1941 Nag. 79=1941 N.L.J. 142=I.L.R. (1941) Nag. 124=192 Ind. Cas. 826.

11. Sub-S. (2)—Procedure not followed—Validity of registration.

——S. 49 (2)—Procedure not followed—Validity of registration.

S. 49 (2), Tenancy Act, lays down the way in which a registering officer must satisfy himself that proper sanction has been given to the transfer of the right to occupy **sir** land before registering a document purporting to transfer that right, that is, it regulates the procedure and nothing else. If therefore, a registering officer commits a mistake in following the procedure, the registration is not invalidated thereby. 111 Ind. Cas. 148=A.I.R. 1928 Nag. 283.

12. Execution sale of proprietary share of gaontia—Purchaser's rights.

——S. 49—Gaontiahi's proprietary rights, components of—Sale in execution—Purchaser's rights.

The **gaontiahi's** right comprises the right to collect rent and pay a fixed sum to the Government the right to hold **bhogra** land in ownership and the right to hold non-**bhogra** land an occupancy tenant. Therefore, where land is sold by the Collector in execution of a decree the purchaser is entitled to a proportionate share in the **bhogra** land. A.I.R. (Vol. 31) 1944 Nag. 369=1944 N.L.J. 427=I.L.R. (1945) Nag. 548.

——S. 50—(Before amendment of 1940)—Power of Civil Court.

Civil Court should not pass order dictating to the Revenue Court that sanction to transfer **sir** should be given. It can only order the defendant to take necessary steps in the matter. It is for the Revenue Court to decide whether sanction should be granted or withheld. 1942 N.L.J. 340.

——S. 50—Sanction to transfer cultivation rights in sir granted—Transfer may be made in any form.

Permission by the proper Revenue Officer to transfer the cultivating rights in **sir** land is permission to transfer them in any way for any consideration to any person at any time the owner pleases, unless the permission is expressly limited in any of these ways, and sanction for a complete transfer by sale includes sanction for a partial transfer by mortgage. 94 Ind. Cas. 829=A.I.R. 1926 Nag. 343.

——S. 50—Contract to sell a share in a village with cultivating rights in sir—If can be specifically enforced—Specific Relief Act, S. 21.

A contract to sell a share in certain village with the cultivating rights in the **sir** is specifically enforceable where sanction to transfer **sir** land cannot be refused, the conditions necessary for sanction being satisfied. 22 N.L.R. 101=9 N.L.J. 125=96 Ind. Cas. 898=A.I.R. 1926 Nag. 465.

——S. 50—Cultivating right in sir is not alienable—Insolvency Court cannot apply under section.

A proprietor's rights in **sir** land are composed of two component parts. The proprietary right is alienable and attachable but the cultivating right is neither. Under S. 12, para. 2 of the Tenancy Act, 1920, a Receiver cannot be appointed to manage an occupancy holding and the tenant's right does not vest in the Court or in the Receiver under the Provincial Insolvency Act of 1907.

The Legislature contemplated that no one but the proprietor of **sir** land could divest himself of the occupancy rights and that the Insolvency Court cannot even apply under S. 50 of the Tenancy Act. 76 Ind. Cas. 634=A.I.R. 1924 Nag. 158.

——Ss. 55 and 58-A—Retrospective Effect.

The provisions of Ss. 55 and 58-A of the C. P. Tenancy Act newly added by the amending Act of 1940 are not retrospective and so cannot apply to transactions prior to 1940. A.I.R. 1948 Nag. 139.

——Ss. 56 and 58—Lambardar and Punches—Order dismissing Nariha—Jurisdiction of Revenue Officer to examine lawfulness or otherwise—Rule—Procedure.

Under Ss. 56 and 58 of the C. P. Tenancy Act, and the **Wajib-ul-arz**, the entries in which must, under S. 82, C. P. Land Revenue Act, be presumed to be correct, the **Lambardar** and the **Punches** have no unfettered right to dismiss a **Nariha**. They have no doubt the power to dismiss the **Nariha** on his failure to perform his service; but if they want it to be followed up by deprivation of the service lands held by him that can be done only through the machinery of a de-

cree by the Revenue Officer. The power of the latter to eject the **Nariha** in pursuance of the dismissal by the **Lambardar** and **Punches** is a mere power to execute and give effect to the order of dismissal. When approached to give effect to the dismissal by ejecting the **Nariha,** the Revenue Officer has the right and the duty to examine the **factum** and the legal validity of the dismissal. He has full jurisdiction to inquire into the lawfulness or otherwise of the order of dismissal passed by the **Lambardar** and the **Punches**. Substantial defects in procedure, e.g., failurue to frame a proper or specific charge, the omission to give the **Nariha** a reasonable opportunity to show cause, or any substantial defect in the constitution of the authority dismissing him, or fraud in the exercise of the power of dismissal, for instance, really for a private grudge though ostensibly on the ground of failure to perform service, would be clear grounds for holding the dismissal unlawful. The Revenue authorities can enquire and see whether any such defects vitiate the order of dismissal, though they are not vested with any appellate or revisional powers over the **Lambardar** and the **Punches**. At the same time the revenue authorities are not mere confirming or executing Courts in respect of the orders of the village officers. I.L.R. (1949) Cut. 540.

——S. 58—If overrides wajib-ul-arz.

There is no conflict between S. 58, C.P. Tenancy Act and the provisions in the **wajib-ul-arz**; both of them have to be construed together. Even if there be any conflict the provisions in the statute would obviously override any entry regarding the village customs contained in the **wajib-ul-arz**. I. L.R. (1949) Cut. 540.

——S. 58-A—Applicability—Decree for arrears of rent against occupancy tenant before amendment.

Where a decree for arrears of rent is obtained against an occupancy tenant before the amendment of the C. P. Tenancy Act by Act 11 of 1940, the entire S. 58-A applies by virtue of S. 55 of the amending Act. A charge is created against the holding and such a holding becomes liable to be sold for satisfaction of such a charge in execution of a decree for rent against the tenant, whether such decree orders such a sale or not. Such a creditor, being a charge-holder, cannot be placed as creditor in schedule under the Insolvency Act, if he is not prepared to give up his charge. A.I. R. (Vol. 33) 1946 Nag. 119=1945 N.L.J. 507= I.L R. (1946) Nag. 39.

——Ss. 58 C and 58-D—Strict adherence to procedure—Need for.

A Tahsildar has no jurisdiction to act under S. 58-D of the Tenancy Act until he has properly complied with the provisions of S. 58-C of the Act. 1946 N.L.J. 609.

——Ss. 58-C and 58-D—Requirements of S. 58-C not complied with—Jurisdiction to sell holding.

Under S. 58-C of the C. P. Tenancy Act, the Revenue Officer must "record a finding" regarding the amount due and "require the tenant to pay the total amount determined" by a specified date. This can only mean that he must either issue a notice to the tenant or, if the tenant is present, at least record in the order sheet that he has informed the tenant clearly regarding the amount to be paid and the time-limit for payment. Even if no question arises regarding interest or costs, the tenant must be clearly told the amount due and be given a specified time in which to pay. A general notice to appear on the date fixed for hearing does not comply with the requirements of the section. A sale of the holding held after service of such notice without jurisdiction under S. 58-D of the Act. 1947 N.L.J. 77.

——S. 58-C—Requirements — Oral information — Sufficiency.

It is sufficient compliance with S. 58-C of the Tenancy Act to inform the tenant orally of the amount which he has to pay and the date before which it has to be paid. 1949 N.L.J. 300.

——S. 58-C—Order under—Revision—Right of aggrieved party.

S. 58-C (3) of the Tenancy Act bars an appeal from an order made under Sub-S. (1), and gives the aggrieved party the only remedy of instituting a suit in a civil Court to establish the right which he claims. He cannot therefore establish the right which he claims in a revisional Revenue Court.

This does not mean that a superior Revenue Court cannot exercise revisional authority over a Revenue Officer when that officer exercises powers under S. 58-C of the Tenancy Act. Such powers exist under S. 39 of the Land Revenue Act. But they are, in the obvious circumstances of the case, of very limited range. In any event, they cannot operate to give a decision contrary to the one recorded by the original Court. They can only be of a supervisory nature to see, for instance, whether the original Court was empowered by law to exercise the jurisdiction it did, or whether it exceeded its powers by, for example, imposing a fine or ejecting a tenant. The order passed in revision in such a case would not be an order "setting aside" the decision of the Original Court and giving a different decision, but would be one quashing the entire proceedings as illegal and void. 1949 N.L. J. 42.

——S. 58-H—Recovery of consent money—Application made beyond seven months of date of default—Jurisdiction of Revenue Court.

The Revenue Court has no jurisdiction to entertain an application under S. 58-H of the Tenancy Act to recover consent money made more than 7 months after the date on which it became payable. 1949 N.L.J. 392.

——S. 62—Part of holding compulsorily acquired —Landlord can initiate proceedings to get the rent reduced.

If there is any failure on the part of the land acquisition officials to take the necessary steps, it is open to the landlord to initiate the necessary proceedings under S. 62 to have the rent of the holding proportionately reduced when a part of it is compulsorily acquired by Government. 106 Ind. Cas. 665=A.I.R. 1928 Nag. 143.

——S. 65—Remission under, if applies to sub-tenants.

Remission under S. 65, C. P. Tenancy Act applies to sub-tenants also. A I.R. (Vol. 21) 1934 Nag. 252=30 N.L.R. 351=152 Ind. Cas. 521.

——S. 65—Remission of rent of sub-tenant of sir —Propriety of.

The word 'tenant' in S. 65, C.P. Tenancy Act, refers to the classes of tenants mentioned in S. 3. It is, therefore, open to the Deputy Commissioner to remit rent even of a sub-tenant of sir under S. 65. A.I.R. (Vol. 20) 1933 Nag. 76=29 N.L.R. 10=144 Ind. Cas. 191.

——S. 65—Applicability—Sub-tenants.

S. 65, does not say that it will apply to sub-tenants also and, therefore, a sub-tenant can neither claim suspension nor remission of his rent because his landlord may so claim it under S. 65. The tenure of a sub-tenant is governed by the terms as settled between him and the tenant from whom he holds. 108 Ind. Cas. 881=A.I.R. 1928 Nag. 149.

——S. 68—Tenant knowing about dispute as to claim to landlord's title but choosing one claimant —He is not protected—In case of doubt he can proceed as under S. 68—Transfer of Property Act, S. 50.

Where a tenant knew of the dispute between two rival claimants to the title of landlord but chose one of them and paid rent to him.

Held, that the payment cannot be said to be **bona fide** and S. 50 did not cover the case.

Held, further, that if he had entertained any genuine doubt as to whom the payment should be made, an easy way of escape was provided for him by S. 68. 101 Ind. Cas. 647=A.I.R. 1927 Nag. 237.

——S. 72—Where, under the rules for the sale of waste land in the Central Provinces, certain waste lands were sold to the plaintiff with all rights of forest.....and all other proprietary right and interest.....for ever free from all present and future demand on account of Government Land Revenue.....but subject to all claims of the Government of India in respect of such land other than claim of Government Land Revenue:

Held, that the provisions of the C. P. Land Revenue Act applied to the estate so as to invest the Settlement Officer with jurisdiction to declare the estate as a **mahal** and ascertain and determine under S. 72 thereof, the status and the rent of the tenants therein.

Also that the C. P. Tenancy Act governed the relation between the grantee and his tenants. A. I.R. (Vol. 19) 1932 Nag. 75=15 N.L.J. 35=28 N.L.R. 169=137 Ind. Cas. 750 (F.B.).

——Ss. 74 and 201—Complaint against Malguzar for illegal levies—Need for separate complaint by each tenant.

A complaint that the Malguzars charge Re. 1 from each cultivator for repairing village **'chandas'**, although under the **wajib-ul-arz** the responsibility is theirs, is really one under S. 74 of the Tenancy Act. Under this section, each tenant has to make a separate complaint so that it can be enquired into in detail. The **wajib-ul-arz** has nothing to do with illegal levies by a Lambardar, except to the extent that it can be cited as evidence to prove that the levy was an illegal one and was not authorised by custom. Thus S. 201 of the Act has no application and the Malguzars cannot be taken to task under that section. 1950 N.L.J. 207.

——S. 75 (1)—Interpretation.

Rent ceases to be due within S. 75 (1) when a decree therefor has been passed. 22 N.L.R. 63 =96 Ind. Cas. 1027=A.I.R. 1926 Nag. 352.

——S. 81—Set-off in respect of rent paid to previous lambardar in ignorance of order of suspension —Permissibility.

Suspension of rent by Government order—Tenant paying rent to **lambardar** in ignorance of order—He cannot plead set off for the amount in a suit for rent by new **lambardar** for subsequent period. A.I.R. (Vol. 32) 1945 Nag. 271=I.L. R. (1945) Nag. 691=1945 N.L.J. 341.

——S. 83—Section 83, C.P. Tenancy Act, means that there would be an appeal from the decision of a Munsif, and if for Munsif is substituted "Subordinate Judge, Second Class," there would be an appeal from the decision of a Subordinate Judge of the Second Class. A.I.R. (Vol. 24) 1937 Nag. 156=I.L.R. (1937) Nag. 381=171 Ind. Cas. 733.

——S. 83—Decree for arrears of rent by Court other than Sub-Judge, First Class—Appealability.

Under S. 7 of the C. P. General Clauses Act of 1914, the words "by a Judge of a Civil Court exercising powers not less than those of a Subordinate Judge as defined in the Central Provinces Courts Act, 1917" in S. 83 of the C.P. Tenancy Act must be understood to refer only to the Court of the present Subordinate Judge, First Class. In other words, a decree passed for arrears of rent by any other Subordinate Judge of a Civil Court is appealable. A.I.R. (Vol. 22) 1935 Nag. 257=31 N.L. R. Sup. 15=160 Ind. Cas. 128.

——S. 83—Remission of sub-rent by Government for a particular year—Sub-tenant, if acquires rights to hold land rent-free.

If by virtue of the Government notification the sub-rent for a particular year was remitted, then the sub-tenant who had at first the right to hold it on payment of a certain rent, acquired the right to hold it for that year without any rent at all. The explanation to S. 83, C.P. Tenancy Act, makes no distinction between concessions granted by landlords and those granted by the Government and binding on the landlords. A.I.R. (Vol. 21) 1934 Nag. 252=30 N.L.R. 351=152 Ind. Cas. 521.

——S. 88-A—Payment by landlord—If must be made at market rate—Payment in kind—Permissibility.

Unless payment is made in full (i.e.) at reasonable or market rates and according to the work performed the landlord is liable to be penalised as provided in S. 88-A of the Tenancy Act, in respect of each day's work or each task which has not been fully paid for. Payment in kind, if accepted as such by the labourer, is legally permissible—provided, of course, that the value thereof is equivalent to the amount of wages due at reasonable, or market rates. 1945 N.L.J. 542.

——S. 88-A—Cases under—Procedure—Cr. P. Code or I. P. Code—If applicable. See C. P. LAND REVENUE ACT, S. 201. 1945 N.L.J. 542.

——S. 88-A—Cases under—Revenue Officer, if can start suo motu. See CENTRAL PROVINCES LAND REVENUE ACT, S. 201. 1945 N. L.J. 542.

——S. 89.

Synopsis.

1. Applicability—Termination of tenancy by agreement.
1-a. Exercise of right.
2. Rights of absolute occupancy—Nature of.
3. Alienation by Hindu widow.
4. Surrender by Hindu widow.
5. Surrender by tenant.
6. Surrender without registration—Validity.

1. Applicability—Termination of tenancy by agreement.

——S. 89 (1)—Applicability—Case where landlord is willing to end tenancy.

S. 89 provides only for the case where the tenant wishes to put an end to his tenancy without reference to the wishes of the landlord and has not application to a case where the landlord is willing to end the tenancy. 24 N.L.R. 3=105 Ind. Cas 495=A.I.R. 1928 Nag. 70.

——S. 89—Termination of tenancy by agreement.

S. 89 (1) specifies the conditions under which an absolute occupancy or an occupancy tenant may surrender his holding without consulting the wishes of his landlord. It does not state that the contract of tenancy cannot be terminated in other ways at the desire of both contracting parties. 23 N. L.R. 148=103 Ind. Cas. 713=A.I.R. 1927 Nag. 320.

Exercise of right.

——Sanction for any act does not necessarily prevail over all circumstances and considerations.

Simply because the law declares that a person has a right to do an act, it does not follow that each and every act of his or heirs would under all circumstances be upheld as an act done lawfully or in the lawful or proper exercise of a right. The lawfulness or otherwise of any particular act must depend upon the surrounding facts and circumstances existing at the time of the performance of the act, in each case, and it cannot be considered independently of or divorced from such surroundings as if it involved a pure question of law only, and not a mixed question of law and facts. 95 Ind. Cas. 371=8 N.L.J. 14=A.I.R. 1925 Nag. 251.

2. Rights of absolute occupancy—Nature of.

——S. 89—Rights of absolute occupancy.

Per **Macnair, Officiating J.C.**—The rights of an absolute occupancy tenant are now so similar to those of owner of property that it seems impossible to hold that a Hindu widow can wilfully defeat the expectancy of a reversioner. 26 N.L.R. 1=123 Ind. Cas. 449=A.I.R. 1930 Nag. 65.

——S. 89—Per **Mohiuddin, A.J.C.**—In the case of absolute occupancy holding the basis of contract is wholly inapplicable. It is a right created by Government and conferred on old malguzars who had lost their proprietary rights in course of time. It is, therefore, not a contractual tenancy right but a sort of semi-proprietor's right with certain restrictions. 26 N.L.R. 1=123 Ind. Cas. 449=A.I.R. 1930 Nag. 65.

3. Alienation by Hindu widow.

——S. 89—Alienation by widow.

A Hindu widow is not at liberty to defeat the rights of a reversioner by alienating or wasting property of any kind inherited from her husband. A. I. R. 1925 Nag. 306, Foll.; 9 N.L.R. 126, Deemed overruled by 21 N.L.R. 62; A.I.R. 1925 Nag. 306; 89 Ind. Cas. 44 and A.I.R. 1927 Nag. 30, Not Appr. 26 N.L.R. 1=123 Ind. Cas. 449= A.I.R. 1930 Nag. 65.

——S. 89—Gift by widow with landlord's consent.

A transfer by gift with the consent of the landlord, even though it was a subsequent consent, can be regarded as a surrender to him by the widow and a fresh grant by him to the transferee. 65 Ind. Cas. 952=A.I.R. 1922 Nag. 222.

4. Surrender by Hindu widow.

——S. 89—Surrender by Hindu widow.

Lease by landlord to third person according to wishes of widow—Whole transaction amounts to transfer and is not binding on reversioners after the death or re-marriage of widow. 26 N.L.R. 342=128 Ind. Cas. 414.

——S. 89—Surrender by Hindu widow—If binding on reversioner.

If surrender by a Hindu widow was necessitated by the inability of the widow to pay the rent of her holding, it is binding on the reversioners; but if the surrender was made while she was in a position to pay the rent of the holding, then it cannot be treated as valid and binding on the reversioners if it was not justified by legal necessity although it was not intended to defeat the expectancy of the reversioners. A.I.R. (Vol. 21) 1934 Nag. 89= 30 N.L.R. 175=150 Ind. Cas. 358.

——S. 89—Surrender by widow—Personal decree —Attachment, if justifies surrender.

No debt which cannot be saddled on the estate can, in point of law, operate as a pressure. The test is, will the widow's sale to satisfy her personal debts bind the reversioners? The attachment of the widow's lands in execution of a personal decree cannot be regarded as a 'pressure' justifying her surrender. A.I.R. (Vol. 21) 1934 Nag. 89=30 N.L.R. 175=150 Ind. Cas. 358.

——Ss. 89, 5 and 11—Surrender by widow.

A Hindu widow has not the right to surrender her late husband's holding, whether absolute occupancy or occupancy, in such a manner as to defeat the expectancy of a reversioner when the object of the surrender is to defeat that expectancy, although according to the nature of property she may surrender it to escape liability for rent. 6 C.P.L. R. 135; 15 C.P.L.R. 89; 8 N.L.R. 154; 6 C.P. L.R. 138; 5 N.L.R. 172; A.I.R. 1925 Nag. 306, Foll.; A.I.R. 1927 Nag. 129; A.I.R. 1927 Nag. 330, not Appr. 26 N.L.R. 1=123 Ind. Cas. 449 =A.I.R. 1930 Nag. 65.

——S. 89—Hindu widow can surrender without consent of nearest reversioner.

A Hindu widow can surrender a tenancy without the consent of the next reversioner. A.I.R.

1925 Nag. 306=21 N.L.R. 62, not Foll. A.I.R. 1926 Nag. 431=95 Ind. Cas. 456.

——S. 89—Surrender by Hindu widow—Effect of —Collusive surrender—Injunction may be granted.

A surrender by a Hindu widow under S. 89 operates only on the widow's interest in the holding and the surrendering Hindu female should be treated as dead as it were by a fiction of law unless the surrender may be deemed to be in the best interests of the estate which she represents. Injunction can be granted to restrain collusive surrender of the holding by the widow. 8 N.L.J. 14=95 Ind. Cas. 371=A.I.R. 1925 Nag. 251.

5. Surrender by tenant.

——S. 89—Surrender — Validity—Tenant not in possession of holding.

The surrender of a holding properly understood signifies the relinquishment of the tenant-right in favour of the landlord as affecting the parcel of land which is the subject-matter of the contract of tenancy. Surrender signifies the merger of the tenant-right in the proprietary right so as to convert the tenancy holding into the landlord's **khudkasht**. The tenant-right which means the right to cultivate the land is distinct from actual cultivation just as title is from possession. Delivery of possession is not a necessary ingredient of a validity of a transfer of title or any kind of right recognised by law. **A fortiori,** a relinquishment of a right to be valid need not be accompanied by delivery of possession. There is nothing in law to preclude the tenant from relinquishing his tenant-right because he is out of possession. So long as he has the tenant-right, the holding is his and relinquishment of the tenant-right must mean relinquishment of the holding. The land may be in possession of a trespasser but the "holding" remains with the rightful tenant. A.I.R. (Vol. 27) 1940 Nag. 247=1940 Nag.L.J. 208 =187 Ind. Cas. 247.

——S. 89—Surrender by tenant in favour of landlord—Effect of.

When the tenancy is determined, there is no transfer of title from one to the other but merely a blotting out of the intervening interest and a release of the bar to the exercise by the landlord of his full rights as a proprietor. Hence, title cannot be obtained by landlord from his tenant and so he does not claim under him. (1938) N.L.J. 123.

——S. 89—Relinquishment by occupancy tenant in favour of landlord temple—Tenant one of trustees of temple—Tenant, if can hold deed on behalf of trustees—Delivery of deed, if sufficient.

An occupancy tenant executed a deed of relinquishment in favour of the landlord temple. The tenant was one of the **panchas** and, therefore, would **prima facie** have had authority to hold the deed on behalf of the Committee till they were in a position to consider the matter:

Held, that in the circumstances, that amounted to a sufficient delivery of the deed. Therefore, the provisions of S. 89, C. P. Tenancy Act, were satisfied. A.I.R. (Vol. 25) 1938 Nag. 30=I.L.R. (1940) Nag. 94=176 Ind. Cas. 57.

——S. 89—Surrender of undivided share by co-tenant—Validity.

Where a co-tenant relinquishes his undivided share and on such relinquishment his sons succeed and where they are recognized by the landlord as tenants instead of their father, the arrangement is valid. 22 N.L.R. 17=80 Ind. Cas. 734=A.I.R. 1925 Nag. 124.

——S. 89—Surrender by some of joint tenants in discharge of debt binding on all.

Every act done by one joint tenant for the benefit of himself and his companion binds the other, but not those acts which prejudice the other. Thus where surrender is made by four brothers who are joint tenants with the fifth and who are in sole charge and management of the holding in consideration of a debt which is binding on all the tenants and where the value of the surrendered holding is not more than the amount of debt, such surrender made in discharge of the debts is not prejudicial to the fifth tenant and is valid and binding even on him. 26 N.L.R. 130=121 Ind. Cas. 39=A.I.R. 1930 Nag. 8.

——S. 89—Surrender by one co-tenant of his undivided share—Suit for joint possession of such share by landlord.

Where one of two or more co-tenants has purported to surrender his undivided share of an occupancy holding, the landlord cannot sue the other co-tenants for joint possession of that undefined share relying on what purported to be a surrender. A.I.R. (Vol. 21) 1934 Nag. 237=31 N.L.R. 62 =151 Ind. Cas. 505 (S.B.).

——S. 89—Surrender to a fractional co-sharer —Validity.

The lambardar is the proper person to whom the surrender should be made, and the fractional owners of the village have not the power to accept the surrender of a holding. Such a surrender in favour of a fractional co-sharer is a device to evade the tenancy law as to the transfer of the holding. It is, therefore, an agreement forbidden by law. Therefore, when a tenant is induced to part with his land to a fractional co-sharer and not to the lambardar, the land thus becoming khudkasht of the whole proprietary body, the purchasing co-sharer should not be allowed to claim compensation from his other co-sharers, because he had obtained possession by a device intended to defeat the Tenancy Law; and that unless the proper mode of procedure, **viz.**, a surrender to the lambardar, is followed, other co-sharers can claim shares according to their shares in the village without the payment of compensation. 93 Ind. Cas. 106 =A.I.R. 1926 Nag. 310.

——S. 89—Surrender to co-sharers.

Where surrender was made to some of the co-sharers without the intervention of the lambardar.

Held, that such a transaction is a transfer, not a surrender and does not put an end to the tenancy unless the lambardar chooses to recognize it, and any arrangement between the co-sharer and the tenant is not binding of the lambardar. 4 N.L.R 120, Foll. 89 Ind. Cas. 51=A.I.R. 1926 Nag. 178.

——Ss. 89 and 13—Occupancy tenant allotted to co-sharer at private partition surrendering his land in his favour—Validity.

Where by virtue of a private partition an occupancy tenant in a patti was allotted to the share of a co-sharer who thus became his landlord, a surrender of the occupancy land by the tenant in favour of the co-sharer landlord is perfectly valid under the provisions of S. 89, of the C. P. Tenancy Act, and it cannot be challenged by the lambardar of the patti under the provisions of S. 13 of the Act. A.I.R. 1948 Nag. 365.

6. Surrender without registration—Validity.

——S. 89 (2)—Surrender of holding without registration—Validity.

Per Division Bench.—What the C. P. Tenancy Act is talking about in S. 89 (2) is any kind of surrender whatsoever. It is not dealing with the particular type of surrender which S. 89 (1) is concerned with, for if that were so, S. 89 (2) is tautalogous. There cannot, therefore, be a valid surrender of an absolute occupancy or an occupancy holding without a registered instrument even when the landlord and the tenant are both agreed. A.I.R. (Vol. 27) 1940 Nag. 113=I.L.R. (1941) Nag. 386=1939 Nag.L.J. 216=189 Ind. Cas. 111.

——S. 89—Surrender by tenant without registration.

A surrender by a tenant under S. 89 is not a transfer and as there is no question of title passing between the parties, S. 53-A, T. P. Act, can have no application at all, apart from the question that no surrender can be valid unless it has been effected by a registered document. A.I.R. (Vol. 27) 1940 Nag. 175=1940 N.L.J. 87=I.L.R. (1940) Nag. 177=190 Ind. Cas. 766.

——Ss. 92 and 105 (c)—Applicability—Exchange between tenents inter se—Suit for possession by landlord—Jurisdiction of Civil Courts.

Section 92, C. P. Tenancy Act, only applies to an exchange effected between a tenant and his landlord and can have no application to a mutual exchange between two tenants, to which the landlord was not a party. Similarly, S. 119 of the Transfer of Property Act which only lays down the rights of parties to an exchange **inter se** and the remedy of the parties, can have no reference to the case of a third person, who is not a party to the exchange and who is not in any way bound by it.

Although under S. 105 (c), C. P. Tenancy Act, a Civil Court has no jurisdiction to set aside transfers by occupancy tenants under S. 13 of the Act, yet that section contemplates transfers in contravention of S. 12 of the Act. The jurisdiction of the Civil Court to try a suit for possession of lands exchanged by tenants **inter se** is not barred and S. 105 (c), C. P. Tenancy Act, will not apply to the case. A.I.R. (Vol. 21) 1934 Nag. 61=30 N.L.R. 208=148 Ind. Cas. 733.

——S. 93—More than one person holding absolute occupancy rights—One of them suing for partition of holding—Partition resulting in portion less than 10 acres—Court held could order the portion to be sold and sale proceeds distributed. 1942 N.L.J. 134.

——S. 93—Partition of holding — Re-distribution without breaking up—Partition, when comes into effect.

The partition of a holding is a very different matter from the partioning of land held by parties in a village by holdings, and is not a matter which a Revenue Officer under S. 93 of the Tenancy Act is concerned with at all. The business of the Revenue Officer is to divide the holding physically and apportion the rent on the parts so divided. There is nothing in the Tenancy Act which empowers the Reveue Officer to consolidate the holdings and actually divide them individually.

The rule that when a holding is partitioned the partition shall not take effect until the following agricultural year is equally effective as regards the position of the tenant himself relative to a creditor as it is to his landlord. A.I.R. (Vol. 20) 1933 Nag. 121=29 N.L.R. 197=149 Ind. Cas. 1181.

——S. 94—Perpetual lease by one deed on same set of conditions of **sir** and **khudkhast** land before C. P. Tenancy Act of 1920—Separation of **sir** from **khudkast** in 1934, under S. 94 of the Act does not change the position of lessee. A.I.R. (Vol. 27) 1940 Nag. 335=1940 N.L.J. 377=190 Ind. Cas. 145.

——S. 95—Right to fruits—Prescription.

The right of removing the fruits from the trees standing in the field of a tenant by a third person cannot be acquired by prescription and it is immaterial whether that person (though he is the malguzar) has been for years taking the produce. 5 N.L.R. 52, Foll. 109 Ind. Cas. 58.

——S. 95—Right to produce of harra trees on tenancy lands.

Under the ordinary law the ownership in trees standing on tenancy lands is always with the landlord but the tenant is entitled to the naural annual produce of such trees. This is the general law though it may be controlled and varied by contract or custom. This principle has been adopted in S. 95 of C. P. Tenancy Act.

A custom entitling the landlord to the produce of *harra* trees in tenancy holdings is a modification of the ordinary law and, if it really existed, should have been recorded in the *wajab-ul-arz*. The absence of any such entry raises a presumption that no such custom existed at the time of the settlement of 1909. A party who relies on a custom which is at variance with the ordinary law must show that it is ancient, invariable, continuous and notorious. (1936) 160 Ind. Cas. 990=18 N.L.J. 172.

——Ss. 95 and 96—Tenant deliberately forbearing from uprooting tree—Presumption—Trees from such saplings—Right of tenant.

If a tenant does not uproot a tree standing in his field it does not follow that he planted the tree. Where a tenant deliberately forbears to uproot saplings which interfere with his cultivation, he must be considered to have taken care (*hifazat*) of them;

the saplings when they grow into trees belong to him. But it is by no means clear that all the trees grew from saplings which obstructed cultivation. A.I.R. (Vol. 20) 1933 Nag. 167=29 N.L.R. 180=146 Ind. Cas. 735.

——S. 95—There is no right but it is a matter of pure contract between the *zamindar* and the tenant to permit tenants to graze their cattle and take dead wood, etc., from forest or the waste land. (1937) 20 N.L.J. 131.

——S. 95—Surrender of holding with mango-trees —Landlord then giving patta of the holding—No mention of mango-trees in document — Lessee's right to mango-trees.

On October 15, 1937, the tenants surrendered the holding with the mango-trees in favour of *K*, the *lambardar*. On February 15, 1938, a document purporting to be on behalf of *K* was scribed in favour of *R*. This was a sale of the land with the mango-trees. *K* did not sign the document and refused to execute it. On that very date *K* executed a *patta* in favour of *R*. There was no mention of the mango-trees in the document nor was there any reservation of the right in the mango-trees by *K*, or any recital therein that the rights in the mango-trees were not transferred in favour of *R*:

Held, that the intention of the parties was to be gathered from the language of the document. No oral evidence was admissible to prove that there was an intention to reserve such a right by the landlord and that this right was not transferred to the tenant. In the absence of any reservation the right to the mango-trees would pass in favour of the lessee as they stood on his holding. A.I.R. (Vol. 31) 1944 Nag. 94=I.L.R. (1944) Nag. 141=1944 N.L.J. 32=217 Ind. Cas. 75.

——S. 95—Surrender of holding reserving right to fruit trees—Right of tenant.

An occupancy tenant cannot on surrendering his holding to the landlord retain any right in the fruit trees standing on the holding even with the landlord's consent. A.I.R. (Vol. 20) 1933 Nag. 149=144 Ind. Cas. 86.

——S. 95 (1) (old)—Applicability—Toddy trees.

A toddy tree is not a fruit tree within the meaning of the old S. 95 (1) of the C. P. Tenancy Act. Toddy juice extracted from the tree is neither fruit nor flower, nor is it in the nature of annual produce appertaining to agriculture. I.L.R. (1948) Nag. 882=A.I.R. 1949 Nag. 245=1949 N.L.J. 168.

——S. 95—Tamarind tree, if a fruit tree.

The tamarind is a fruit tree and S. 95, C. P. Tenancy Act, gives the tenant right in babul and tamarind trees. A.I.R. (Vol. 20) 1933 Nag. 167=29 N.L.R. 180=146 Ind. Cas. 735.

——S. 95 (1), Proviso (2)—Scope of—Tenant removing trees hindering cultivation — Landlord's right to price of such trees.

Sub-S. (2) of S. 95, C. P. Tenancy Act, relates to a case where a tenant other than a sub-tenant wants to purchase the rights in the trees in his holding, which do not belong to him but belong to the *malguzar*. Whenever, however, any trees are to be removed in the interests of proper cultivation, proviso (2) to sub-S. (1) of S. 95, will apply, and the landlord is not entitled to the price of such trees but only to the felled timber. 1949 N.L.J. 478.

——S. 95 (2)—Occupancy-tenant entitled to remove scrub-jungle—If entitled to appropriate it.

An occupancy-tenant who is entitled to remove scrub-jungle under S. 95 (2), C. P. Tenancy Act, is not entitled to appropriate it or its sale proceeds to himself. A.I.R. (Vol. 30) 1943 Nag. 200=I.L.R. (1943) Nag. 298=1943 N.L.J. 214=207 Ind. Cas. 539.

——S. 96—'Trees'.

The word "Trees" in S. 96 does not refer to palas trees only but refers to all trees on which lac can be propagated: 13 N.L.J. 62=122 Ind. Cas. 440=A.I.R. 1930 Nag. 143.

——S. 96—Ss. 96, 2 (2) (as amended)—Lac cultivation, if agricultural occupation — Lease of lac jungle—If requires registration.

Lac is raised and harvested twice a year. Since S. 96, C. P. Tenancy Act, expressly places it on the same footing as the other "produce" of a tenant's holding, and since the section occurs in an Act dealing with agricultural tenancies, it follows that lac cultivation is now considered an agricultural occupation and so falls within the extended definition of agriculture given in S. 2 (2) of the Act. This, as the section shows, includes "the raising of periodical crops." That in its turn means that S. 107 of the T. P. Act, will not apply, and it follows, a written and registered instrument is no longer necessary for the lease of lac jungle. But if such a lease is reduced to writing, then it will require registration under S. 17 (1) (d) of the Registration Act, provided it is regarded as a lease of immovable property. Such a lease does not differ from a lease of land for the purposes of cotton, wheat or any other kind of cultivation. Trees are undoubtedly immovable property unless severed from the ground; and, unless the intention of a lease is that the trees should be cut down and the wood removed, the lease must be a lease of immovable property. That being so, it requires registration if reduced to writing. A.I.R. (Vol. 24) 1937 Nag. 289=I.L.R. (1938) Nag. 31=171 Ind. Cas. 553.

——S. 97—Applicability—Suit for declaration of right of Lambardar and Punches to dismiss Nariha —If barred—Specific Relief Act, S. 42.

S. 97 of the C. P. Tenancy Act contemplates a suit between a landlord and a tenant. A suit by the *Lambardar* and *Punches* of a village for a declaration of their sole and exclusive right to dismiss a *Nariha* is in substance one merely for a true construction of S. 58 of the C. P. Tenancy Act and the *Wajib-ul-arz*, and cannot be held to fall under S. 97, and as such not cognizable by an ordinary Civil Court. Such a suit cannot also be held to be barred under S. 42, Specific Relief Act. A pure declaratory suit of this type is clearly maintainable; a suit to have true construction of a statute declared and to have an act done in contravention of the statute pronounced void does lie and is not barred under S. 42, Specific Relief Act. 22 Mad. 270 (P.C.); A.I.R. 1933 All. 488; A.I.R. 1931 Mad. 502; A.I.R. 1933 Mad. 618, foll. I.L.R. (1949) Cut. 540.

——S. 97—Scope.

Attachment of trees standing in land belonging to another person is not prohibited by S. 97. 19 N.L.R. 150=77 Ind. Cas. 620=A.I.R. 1924 Nag. 42.

——S. 100—Applicability—Tenancy right supported by settlement entries.

The powers conferred by S. 100 of the C. P. Tenancy Act can be rightly used in cases where the tenancy right is supported by settlement entries and possession rests with the tenant, although the entry in the annual papers is equivocal. 1947 N.L.J. 110.

——S. 100—"Ejectment"—Meaning of—Lessee of tenant refusing to give up possession on expiry of lease.

The word "ejectment" in S. 100 of the Tenancy Act connotes wrongful and forcible dispossession which must have occurred at some point of time when possession of the land was secured. A voluntary surrender of possession cannot at any subsequent stage evolve into an "ejectment" which attracts the provisions of this section. If a lambardar who has taken a lease of the occupancy holding from the tenant refused to give up possession on the expiry of lease, his refusal does not amount to an "ejectment" of the tenant from the holding so as to entitle the tenant to be reinstated under S. 100 of the Act. 5 N.L.R. 97, approved. 1949 N.L.J. 517.

——S. 100—"Otherwise than in accordance with this Act"—Meaning of—Tenant putting landlord in possession under unregistered surrender deed.

Under S. 100, C. P. Tenancy Act, Revenue Courts are given power to interfere summarily when a landlord 'ejects' a tenant from his holding. The words "otherwise than in accordance with this Act" in the section simply mean "wrongfully". If therefore a tenant voluntarily puts the landlord in possession by an unregistered surrender deed, he has no remedy under the Act if he thinks that he has been defrauded or changes his mind for some other reason. 1948 N.L.J. 303.

——S. 100—Enquiry into title—Function of Revenue Court.

An order passed under S. 100 of the Tenancy Act is intended to restore the status as between the landlord and tenant. It in no sense decides any question of title as between them. It is no part of the functions of a Revenue Court to enquire into such matters. It is enough for the applicability of the section if the applicant establishes *prima facie* that he is the tenant and that he was dispossessed by the landlord otherwise than in accordance with the Act. Where the applicant was in possession of the holding for two consecutive years as an occupancy tenant, recorded as such in the village *jamabandi* without objection by the landlord who summarily ejected him, he is fully entitled to seek redress from a Revenue Court under S. 100 of the Act. 1948 N.L.J. 382.

——Ss. 100 and 105—Rights of tenants—Civil and Revenue Courts.

The rights of tenant to sue in Civil Court under Specific Relief Act, S. 9, for possession or to apply to a Revenue Officer are alternative remedies, and the tenant's right to sue in Civil Court is not conditional on the rejection of his application by the Revenue Officer. 88 Ind. Cas. 126=A.I.R. 1925 Nag. 383.

——S. 104—Applicability — Mortgagee foreclosing mortgage without impleading owners of equity of redemption — Entry in settlement records on basis of that decree.

A mortgagee who forecloses a mortgage, omitting to implead the owner of the equity of redemption as a party to the suit and at a time when he had left in him no interest to foreclose, cannot plead that the settlement entry based on a foreclosure, which brought him no part of the equity of redemption that had already vested in another person and gave him nothing beyond his own right as prior mortgagee, secured to him the status of an absolute occupancy tenant under the provisions of S. 80, C. P. Land Revenue Code, and also under S. 104 of the Tenancy Act, and deprive the owner of the right of redemption which the Transfer of Property Act secures to him. 25 N.L.R. 19=A.I.R. 1929 Nag. 246.

——S. 104 (4)—S. 14 of Limitation Act—If applicable to suit under Act.

S. 104 (4), C. P. Tenancy Act, says that the *remainder* of the Limitation Act (except Ss. 6, 7, 19 and 20) shall apply. Therefore S. 14 of the Limitation Act is applicable to a suit under the C. P. Tenancy Act. I.L.R. (1936) Nag. 5, not foll. I.L.R. (1949) Nag. 743=A.I.R. 1950 Nag. 37=1949 N.L.J. 586.

——S. 104 (4)—Tenancy right is extinguished with the loss of the remedial right to recover possession —Limitation Act, S. 28.

S. 28, Limitation Act, does apply in view of the provision contained in S. 104, Sub-S. (4), C. P. Tenancy Act, to a case where the remedy by way of suit by the tenants is lost, having regard to Art. 1, Sch. 2, Tenancy Act and the tenancy right is extinguished with the loss of the remedial right to recover possession. 109 Ind. Cas. 403=A.I.R. 1928 Nag. 281 (1).

——S. 104—S. 28, Limitation Act, applies to the right in a tenancy in the Central Provinces. A.I.R. 1926 Nag. 99, Diss. from. A.I.R. 1927 Nag. 352.

——S. 105—Transfer of holding by occupancy tenant—Landlord's remedy—Forum.

A transfer of his holding by an occupancy tenant can be set aside and landlord can recover possession only by application to a Revenue Officer under S. 13; under S. 105 he cannot be given any remedy by a Civil Court. 89 Ind. Cas. 231=A.I.R. 1926 Nag. 177.

——Ss. 105 and 100—Rights of tenants—Civil and Revenue Court. *See Ibid* SS. 100 AND 105. A.I.R. 1925 Nag. 383.

——S. 105—Civil Court cannot entertain a suit by a service tenant for restoration to possession on ejectment by landlord after the Act came into force. 71 Ind. Cas. 48=A.I.R. 1923 Nag. 51.

——S. 105 (2)—Rent-free land—Civil Court's jurisdiction is barred.

Where the land has been recorded rent-free, and held without payment of rent and the tenant claims it to be held rent-free, S. 105 (2) applies and the

suit is removed from the cognizance of the Civil Court. A.I.R. 1922 Nag. 207.

——S. 105—Alienation of holding intended by mother—Lambardar exercising right of pre-emption — Suit by minor son for possession on the ground of want of legal necessity—Whether barred.

Plaintiff's mother as guardian entered into an agreement to sell an occupancy field to a third party. In accordance with sub-section (2), S. 6, she gave notice to the lambardar of her intention to sell, who claimed the right to purchase the field in exercise of his pre-emptive title. In the revenue proceeding, the question of valuation alone was contested. The plaintiff brought a suit for possession alleging that there was no legal necessity for his mother to have made the transfer to the third party, and the possession of the field by the defendant was illegal and that the plaintiff was entitled to retain possession.

Held, that the statutory right of pre-emption given to the landlord under S. (2) cannot be regarded as an ordinary transfer. That right having been duly exercised, having regard to S. 105 (a) of the Act, the jurisdiction of the Civil Court was excluded and it was not open to the plaintiff, to come to Court on the alleged cause of action of want of legal necessity for the intended transfer. 11 N.L.J. 125 =109 Ind. Cas. 615=A.I.R. 1928 Nag. 249.

——Ss. 105 (a) and 6—Sale of share of minor in occupancy holding by one not his guardian—Pre-emption by lambardar—Suit by minor for possession—Jurisdiction of Civil Court.

The share of a minor in an absolute occupancy field was sold by one who was not his guardian. The lambardar thereupon pre-empted the sale under S. 6 of the C. P. Tenancy Act as it stood before the amendment made by the C. P. Tenancy (Amendment) Act, 1939. In a suit for possession brought by the minor, it was contended by the lambardar that the jurisdiction of the Civil Court was barred under S. 105 (a) of the C. P. Tenancy Act.

Held, that S. 105 (a) of the C. P. Tenancy Act did not bar the jurisdiction of the Civil Court in a case like this where there was no legal transfer at all. The Court of special jurisdiction did not carry with it a power to act beyond and outside that jurisdiction, and action which was *ultra vires* of such jurisdiction gave a cause of action in the Civil Court. I.L.R. (1947) Nag. 812=A.I.R. 1948 Nag. 299= 1947 N.L.J. 444.

——S. 105—Powers of the Civil Courts.

The Civil Courts are not powerless to administer proper relief to the mortgagees in the circumstances where the Revenue Officer fixes the price as if there were no incumbrances on the land. The Revenue Officer has not been given any special powers to distribute or dispose of the deposit of the amount of the purchase money fixed by the Revenue Officer, made by the landlord, under S. 6, C. P. Tenancy Act. Any order passed by the Revenue Officer in this behalf lies beyond the scope of the special powers of the Revenue Officer and consequently S. 105 (a) of the C. P. Tenancy Act will not operate to deprive the Civil Courts of their indisputable jurisdiction to direct how the sum deposited by the landlord should be disposed of. Any order affecting the disposal or distribution of the deposit made by the Revenue Officer is, therefore, liable to be reviewed in Civil Courts as to its legality, in view of the ascertained rights of the several claimants. The mortgagee, therefore, has only one alternative remedy, that is, to recover his mortgage debt from the pre-emption price which he, in fact ought to have claimed in his mortgage suit. The question is whether he is entitled to that relief in his suit which purports to be one to recover possession. He must be given such relief as he is found entitled to get on the facts proved in the case. The fact that he failed to ask for a decree against the pre-emption price in his previous suit cannot preclude him from recovering that money which is only a security substituted for land. He would have the same right in respect of this sum as he would have in respect of the land. A.I.R. (Vol. 25) 1938 Nag. 80=I.L.R. (1938) Nag. 268=174 Ind. Cas. 762.

——S. 105—Revenue Officer placing person in possion of occupancy holding under S. 13—Civil Court has jurisdiction to consider whether there had been a transfer or not.

The grant of a special jurisdiction does not carry with it the power to act beyond and outside that jurisdicion and so any question of exercise of power which is *ultra vires* can be agitated in the Civil Court. Thus if the Revenue Officer takes action under S. 13 by placing a person in possession of the occupancy holding, the jurisdiction of the Civil Court to consider whether there had been transfer is not barred for otherwise it would be possible for the Revenue Court to hold that a set of incidents amounted to a transfer although in fact or law they were not so and so to oust the jurisdiction of the Civil Court. 13 N.L.J. 33=122 Ind. Cas. 703=A.I.R. 1930 Nag. 205.

——S. 105—Jurisdiction of Civil Court—Transfer by occupancy tenant void independently of Act.

Where the transfer by the occupancy tenant is invalid independently of the prohibition of the Act, the jurisdiction of the Civil Court to avoid transfer is not barred. 11 N.L.R. 124, not foll. 26 N.L.R. 190=124 Ind. Cas. 252=A.I.R. 1930 Nag. 193.

——S. 105—Jurisdiction of Civil Court—Suit for possession — Unregistered sale-deed of occupancy holding for over Rs. 100.

Where an occupancy holding is sold by an unregistered document for more than Rs. 100, the sale being for more than Rs. 100, registration is necessary and as the document is not registered, there is no transfer and the vendee is a trespasser and the Civil Court has jurisdiction to entertain a suit to recover possession. 113 Ind. Cas. 110=A.I.R. 1929 Nag. 65.

——S. 105—Jurisdiction of Civil Court—Transfer bad under general law.

S. 12 of the Tenancy Act lays down certain limitations on the right of an occupancy tenant's transfer of his holding. If the said provision is transgressed, S. 13 allows "any person who, if he survived the tenant without nearer heirs, would inherit the holding or the landlord of such tenant to apply" for a certain remedy in the Revenue Court. In such a case the Revenue Court has exclusive jurisdiction and this would naturally cover a case of transfer which

was good under the general law and only bad under the special provision of the tenancy law. But where the alleged transfer is bad under the general law the jurisdiction of the Civil Court is not excluded. A.I.R. 1925 Nag. 442, Foll. 10 N.L.J. 90=101 Ind. Cas. 822=A.I.R. 1927 Nag. 226.

——S. 105 (g), (h)—Order of Settlement Officer —Jurisdiction of Civil Court—Decree of Civil Court declaring land as khudkhast—Entry as village service lands in subsequent settlement—Decree, whether operates as res judicata.

In view of the express prohibition contained in S. 105 (g) and (h), C. P. Tenancy Act, the Civil Court can have no jurisdiction to question or revise the order of a Settlement Officer relating to village service tenants, even though that order was passed under S. 70 (1) (a), Land Revenue Act.

Under the C. P. Tenancy Act, 1920 a decision of the Revenue Authorities made at the settlement or in connexion with the settlement, even though it goes against the former decision of the Civil Court, cannot be called into question in such a case.

The decree of the Civil Court that certain lands are *khudkasht* and not village service lands may operate as *res judicata* during the currency of the settlement but when a new settlement takes place and a change is effected in that settlement, the decree ceases to operate as *res judicata*. A.I.R. (Vol. 18) 1931 Nag. 124=14 N.L.J. 41=27 N.L.R. 265=134 Ind. Cas. 266.

——Ss. 105 (o), 93—Jurisdiction of Civil Court to effect partition by allotting entire holdings.

Section 105 (o), C. P. Tenancy Act, does not prevent the Civil Court from partitioning a number of holdings by allotting some holdings to each co-sharer. It only prevents the breaking up of a holding. A.I.R. (Vol. 19) 1932 Nag. 31=27 N.L.R. 341=135 Ind. Cas. 413.

——Ss. 106, 49 — Suit purporting to be for arrears of rent—Defendant found not to be tenant —Suit must be dismissed.

Where the plaint purports to be by a landlord against an occupancy-tenant for arrears of rent and the Court finds that the defendant is not a tenant and that, therefore the plaintiff can make no claim for arrears of rent against him the order of the first Court returning the plaint should either be treated as a dismissal of the claim or the first Court should be asked to pass such an order and draw up the usual decree. A.I.R. (Vol. 28) 1941 Nag. 351=I.L.R. (1941) Nag. 749=1941 N.L.J. 527=200 Ind. Cas. 806.

——S. 106—Revenue Officer trying rent suit is a Civil Court and not a Revenue Court. 1942 N.L.J. 348.

——S. 106—Trial of suit for rent.

Under S. 106 of the new Act suits for arrears of rent are to be heard by a Judge who is also a Revenue Officer. Where a suit is brought in such Court against a person as trespasser, that suit is not maintainable, but where the plaintiff, in the course of suit, admits the defendant as tenant the suit becomes a suit for arrears and thus triable by the Court but if the date of admission happens to be after the coming into force of the new Act, the suit should be regarded as filed on the date of admission and arrears for three years only can be claimed. 90 Ind. Cas. 279=A.I.R. 1926 Nag. 212.

——S. 106, Proviso—Suit for arrears of rent—Judge also Revenue Officer.

The proviso to S. 106, C. P. Tenancy Act, limits the jurisdiction of regular Civil Courts (that is, presided by Judges who are not also Revenue Officers) to hearing suits for arrears due by a sub-tenant, but it does not purport to restrict in any way the powers of Judges of a Civil Court who are also Revenue Officers. It does not follow that because a Judge, not being a Revenue Officer, may hear a suit for arrears due by a sub-tenant, therefore, a Judge who is also a Revenue Officer may not hear a suit for arrears of rent due by a sub-tenant. A.I.R. (Vol. 24) 1937 Nag. 156=I.L.R. (1937) Nag. 384=171 Ind. Cas. 733.

——S. 106—Suit for arrears of rent—Jurisdiction of Civil Court.

Where a field was separately assessed for a certain rent and this was clear from the *jamabandi* entry, but was jointly assessed with another field and it so appeared from the settlement entry, and a suit for recovery of arrears of rent was brought on the basis of the *jamabandi* entry:

Held, that the settlement entry must be presumed to be correct and would prevail over the *jamabandi* entry, and that as there had been no apportionment of rent between the two fields and until that had been done, a Civil Court was incapable of awarding a decree for arrears of rent. A.I.R. (Vol. 24) 1937 Nag. 156=I.L.R. (1937) Nag. 384=171 Ind. Cas. 733.

——S. 106—Decree for arrears of rent—Execution.

Once the Court whose presiding officer is a Revenue Officer passes a decree in respect of an arrear of rent, the decree becomes a debt of record which can be executed as an ordinary money decree in a Court whose presiding officer need not be a Revenue Officer. A.I.R. (Vol. 30) 1943 Nag. 138 =1942 N.L.J. 344=I.L.R. (1943) Nag. 319= 206 Ind. Cas. 93.

——S. 110—The leases and rights acquired by the tenant under the old Act are expressly saved by S. 110 of the present Tenancy Act. A.I.R. (Vol. 26) 1939 Nag. 230=1939 N.L.J. 347=183 Ind. Cas. 695.

——S. 110—Mortgage of occupancy holding prior to Act of 1920—Possession under mortgage decree taken after Act of 1920—Malguzar has no right to sue in ejectment—C P. Tenancy Act (1898), S. 41.

Where a mortgage of absolute occupancy holding was executed without malguzar's consent, when the Tenancy Act (1898) was in force, but possession in execution of decree on that mortgage was taken by the mortgagee decree-holder after the Act of 1920 came into force.

Held, that the cause of action for ejectment suit by the malguzar arose on the date possession was taken and the new Act of 1920 not providing for an ejectment suit the mulguzar's suit for ejectment was not maintainable. A.I.R. 1927 Nag. 127, Affirmed. 103 Ind. Cas. 71=A.I.R. 1927 Nag. 277.

——S. 110—Landlord ejecting transferee—Tenant can apply to Revenue Officer for reinstatement under S. 41 (8) of the old Act, even after the new Act came into force.

Landlord's right to eject the transferee is correlative with tenant's right to force the landlord to put him in possession, and therefore if the landlord is entitled to enforce his right under the provisions of S. 41 of the old Act, it follows that the tenant's right to be re-instated must be enforced under the provisions of sub-S. (8) of the old section. Rights already acquired under the repealed enactment were expressly saved by S. 110 of the new Act of 1920. S. 6 of the new Act which abolishes the provisions of sub-S. (8) of S. 41 of the old Act cannot override a right already vested and acquired under the old Act. 7 N.L.R. 125, Dissented from.

Consequently Revenue Officer has jurisdiction to entertain an application for re-instatement by the tenant. 22 N.L.R. 114=96 Ind. Cas. 905=A.I.R. 1926 Nag. 499.

——Sch. 2, Art. 1.

Synopsis.

1. "Tenant"—Meaning of.
2. "Dispossession"—Meaning of.
3. Sch. 2, Art. 1 and Limitation Act—Relative scope.
4. Sch. 2, Art. 1—Inapplicability.
5. Sch. 2, Art. 1—Applicability.
6. Extinction of right on expiry of time.

1. "Tenant"—Meaning of.

——Sch. 2, Art. 1—"Tenant"—Holder of survey number.

The holder of a survey number in the Sambalpur territory is included in the word "tenant" used in Art. 1. 92 Ind. Cas. 708=A.I.R. 1926 Nag. 289.

——Sch. 2, Art. 1—Tenant includes absolute occupancy tenant.

The word tenant in Art. 1 does include an absolute occupancy tenant. 92 Ind. Cas. 62=A.I.R. 1926 Nag. 61.

2. "Dispossession"—Meaning of.

——Sch. 2, Art. 1—Dispossession—Owner wrongfully obtaining possession through Revenue Officer, but subsequently dispossessed.

If rightful owner obtains possession though wrongfully through a Revenue Officer and is subsequently dispossessed, a suit brought within two years from such dispossession is not barred. 117 Ind. Cas. 281=A.I.R. 1929 Nag. 129.

——Sch. 2, Art. 1—Dispossession — Widow declaring that her adopted son was tenant since adoption—Widow cannot be said to be dispossessed.

Where a Hindu widow having adopted a son alleges that she has in law ceased to be entitled to hold the land, the adopted son having taken her place as tenant that does not amount to an unqualified abandonment and the cessation of her possession cannot be said to be brought about by any act of dispossession or exclusion within Art. 1. 98 Ind. Cas. 537=A.I.R. 1927 Nag. 76.

3. Sch. 2, Art. 1 and Limitation Act—Relative Scope.

——Art. 1 applies in preference to Art. 47, Limitation Act.

Where the specific article applicable is the one contained in the Tenancy Act, while the more general article is the one contained in the Limitation Act, the former applies. 10 N.L.J. 246=105 Ind. Cas. 431 =A.I.R. 1927 Nag. 402.

4. Sch. 2, Art. 1—Inapplicability.

——Sch. 2, Art. 1—Inapplicability—Art. 148—Suit for redemption of usufructuary mortgage of tenancy lands—Debt discharged by order of Debt Conciliation Board—Limitation Act, Art. 148.

A suit for redemption of a usufructuary mortgage of tenancy lands on the ground that the mortgage claim was fully satisfied out of the usufruct or must be deemed to have been discharged under S. 8 (2) of the C. P. Debt Conciliation Act, is governed by Art. 148 of the Limitation Act and not by Art. 1 of Sch. 2 of the C. P. Tenancy Act. The discharge of a debt by the operation of a Statute does not amount to a redemption of the mortgage. By the mere fact of satisfaction of the mortgage debt the possession of the usufructuary mortgagee does not become adverse to the mortgagor and as such it cannot be said that such mortgagee must be deemed to exclude the mortgagor from possession from the date of satisfaction of the mortgage for the purposes of Art. 1 of Sch. 2 of the C. P. Tenancy Act. I.L.R. (1950) Nag. 68=1949 N.L.J. 539.

——Sch. 2, Art. 1—Inapplicability—Mortgage of occupancy fields—Mortgage not avoided. A.I.R. (Vol. 24) 1937 Nag. 43=I.L.R. (1936) Nag. 167= 171 Ind. Cas. 174.

——Sch. 2, Art. 1—Inapplicability—Suit to enforce mortgage of absolute occupancy holding.

Suit to enforce mortgage of absolute occupancy holding does not come within the purview of Art. 1. 9 N.L.J. 229=99 Ind. Cas. 445=A.I.R. 1927 Nag. 119.

——Sch. 2, Art. 1—Inapplicability — Co-tenant claiming to be in exclusive possession.

Article 1 of the Second Schedule to the C. P. Tenancy Act has no application to a co-tenant claiming to be in exclusive possession of a holding and to such a case the ordinary law of limitation applies. A.I.R. (Vol. 25) 1938 Nag. 89=173 Ind. Cas. 103.

——Sch. 2, Art. 1—Inapplicability—Suit by widow to set aside gift by co-widow—Limitation Act, Art. 141.

In a suit by co-widow to set aside a gift of husband's property by her co-widow, the limitation begins to run from the date of co-widow's death. Art. 1 of the second schedule of the Tenancy Act does not apply. 10 N.L.J. 90=101 Ind. Cas. 822= A.I.R. 1927 Nag. 226.

——Sch. 2, Art. 1—Inapplicability—Trees do not constitute holding or portion of holding.

Trees do not constitute holding or a portion of a holding and therefore the period of limitation laid down in Art. 1 does not apply to them. Where

therefore tenant does not exercise the right under S. 96 to propagate lac for more than two years and malguzar propagates lac during that period, the tenant's right is not extinguished. 13 N.L.J. 62=122 Ind. Cas. 440=A.I.R. 1930 Nag. 143.

5. Sch. 2, Art. 1—Applicability.

(a) Application by landlord for pre-emption.
(b) Suit for possession by claimant to tenancy.
(c) Suit for possession by fresh grantee of tenancy.
(d) Claim for joint possession in holding.
(e) Suit by co-tenant.
(f) Suit by tenant dispossessed from part of holding..
(g) Holding used for building.
(h) Dispossession of tenant by person other than landlord.

5. (a) Application by landlord for pre-emption.

——Sch. 2, Art. 1—Application by landlord for pre-emption—Limitation—Starting point — Transferred holding in possession of third party.

Under Sch. II, Art. 1 of the C. P. Tenancy Act, the landlord must file his application for pre-emption under S. 6 (4) (*c*) within one year from the date on which possession is lost by the transferring tenant. Where the tenant transfers whatever interest he has in the holding by a registered sale-deed, limitation for pre-emption runs from the date of the deed, although the transferee does not actually obtain physical possession by reason of the holding being in possession of a third party and has to file a suit against him for possession. The wording used in the Article is: "The date on which possession was lost". The wording does not refer to the dates on which any particular person took possession. 1949 N.L.J. 505.

5. (b) Suit for possession by claimant to tenancy.

——Sch. 2, Art. 1—Applicability—Suit by claimant to tenancy for possession of holding on ground of dispossession.

Art. 1 of Sch. 2 to the C. P. Tenancy Act does not relate to suit under the special provisions of the Act only. The reference is to an ordinary suit in the Civil Court. A suit by a person claiming to be a tenant for possession based upon dispossession or exclusion from possession of the holding is governed by Art. 1 of Sch. II to the Act. 25 Pat. 764 =A.I.R. 1947 Pat. 424=14 Cut.L.T. 35.

5. (c) Suit for possession by fresh grantee of tenancy.

——Sch. 2—Surrender by tenant—Suit for possession against licencee from tenant, by fresh grantee of the tenancy—Limitation—Starting point.

On the surrender of a tenancy the license granted by the former tenant expires. In the absence of a fresh license granted by the new grantee of the tenancy, the possession of the licensee is adverse to the new tenant from the date on which the tenancy rights were granted to him. A suit for possession by the incoming tenant after two years of his becoming tenant is barred. 87 Ind. Cas. 823=A.I.R. 1926 Nag. 51.

5. (d) Claim for joint possession in holding.

——Sch. 2, Art. 1—Claim for joint possession.

The word "possession" used in Art. 1 of Sch. 2 is wide enough to include joint possession. Similarly, the word "tenant" includes a person claiming to be a co-tenant. A right to joint possession is a lesser right than that of exclusive possession. A.I.R. (Vol. 33) 1946 Nag. 235=I.L.R. (1946) Nag. 312.

——Sch. 2, Art. 1—Claim for joint possession.

Article 1, Sch. 2, is applicable to the lessee of an absolute occupancy tenant. In such a case the lessee is the person who holds land of the tenant and is, or but for a special contract would be, liable to pay rent to him.

A right to joint possession being a lesser right than that of exclusive possession is included in the special provision of limitation relating to the exclusive right and therefore the limitation prescribed by Art. 1 of Sch. 2, Tenancy Act, will apply alike to claims for exclusive and joint possession. A.I.R. 1928 Nag. 178=108 Ind. Cas. 785.

——Sch. 2, Art. 1—Claim for joint possession in holding.

Art. 1, Sch. 2, C. P. Tenancy Act, relating to possession or dispossession of or from a holding does not include a question of a claim for joint possession or resistance of such a claim in that holding.

A person who is in joint possession cannot be said to have been dispossessed or excluded from possession of the holding by his co-tenant since his right of possession extends over the entire holding. Consequently, Art. 1, Sch. 2 of the C. P. Tenancy Act has no application to such a case and the ordinary rules of the Limitation Act must apply.

Special enactments which derogate from the ordinary law must be strictly construed. A.I.R. (Vol. 22) 1935 Nag. 120=31 N.L.R. (Sup.) 9=155 Ind. Cas. 813.

——Sch. 2, Art. 1—Claim for joint possession.

The words "possession" and "person" do not comprise within their scope a claim for "joint possession," nor do they include a dispossession or exclusion from possession by a co-owner or a co-tenant. 10 N.L.J. 174=111 Ind. Cas. 76=A.I.R. 1928 Nag. 96.

5. (e) Suit by co-tenant.

——Sch. 2, Art. 1—Applicability — Suit by co-tenant.

Art. 1 of Sch. 2, C. P. Tenancy Act, applies where there has been exclusion from possession and denial of the title of a co-tenant. I.L.R. (1946) Nag. 312=1946 N.L.J. 381=A.I.R. 1946 Nag. 235=227 Ind. Cas. 499.

——Sch. 2, Art. 1—Applicability—Suit for possession by co-tenant who is excluded from possession and whose title is decreed.

The normal presumption is that the possession of one co-owner is not on his own account but on

behalf of all; but where it is admitted that one co-owner has denied the title of another co-owner and has been in adverse possession, there is no question of any presumption.

Article 1 of Sch. 2 of the C. P. Tenancy Act applies to suits for possession of a holding by a person claiming to be a tenant from which he has been dispossessed or excluded from possession by another person. A co-tenant is a tenant as defined in the Act, and 'holding' in this Article means 'holding or portion thereof'. When, therefore, a co-tenant is excluded from possession and his title is denied, this Article would apply to a suit for possession, and such suit must, therefore, be brought within two years. A.I.R. (Vol. 24) 1937 Nag. 265=I.L.R. (1937) Nag. 346=20 Nag.L.J. 143=172 Ind. Cas. 934.

——Sch. 2, Art. 1—Applicability — Dispossession by one tenant of another.

The words "by any person" have their ordinary meaning and are not confined to a person claiming under the landlord. Dispossession by one tenant of another is governed by the same rule of limitation as dispossession by landlord. 20 N.L.R. 103=78 Ind. Cas. 743=A.I.R. 1924 Nag. 249.

5. (f) Suit by tenant dispossessed from part of holding.

——Sch. 2, Art. 1—Holding includes part of holding. A.I.R. 1925 Nag. 197, Foll. 92 Ind. Cas. 824=A.I.R. 1926 Nag. 387.

——Sch. 2, Art. 1—"Holding" includes a part of holding.

The word "holding" in Art. 1 of the Act means not only an entire holding but also a part thereof. 22 N.L.R. 46=93 Ind. Cas. 110=A.I.R. 1926 Nag. 305.

——Sch. 2, Art. 1—Suit by occupancy tenant dispossessed from part of holding.

The period of two years' limitation prescribed by Schedule 2, Art. 1 applies to a suit by an occupancy tenant who is dispossessed from a part of his holding. 83 Ind. Cas. 3=A.I.R. 1925 Nag. 225.

——Sch. 2, Art. 1—Dispossession from part.

There is no reason whatever for holding that the words of article (1) have reference only to an entire holding and not a part of it. 78 Ind. Cas. 214=A.I.R. 1925 Nag. 197.

5. (g) Holding used for building.

——Sch. 2, Art. 1—Holding used for building—Tenancy created by contract—Suit for possession.

A suit for removal of encroachment on the plaintiff's occupancy land is, for purposes of limitation, governed, not by the provisions of the Limitation Act, but by Schedule 2, Art. 1 of C. P. Tenancy Act, even though the land in suit is not used for agricultural purposes but has been utilised for building. The fact that the tenancy is a creation of contract also makes no manner of difference. A.I.R. (Vol. 32) 1945 Nag. 78=I.L.R. (1944) Nag. 753=1944 N.L.J. 467.

——Sch. 2, Art. 1—Holding used for building.

An absolute occupancy holding originally granted for agricultural purposes but which for long has been utilized for building upon is still a holding within the meaning of Art. 1. 25 N.L.R. 9=112 Ind. Cas. 657=A.I.R. 1929 Nag. 5.

5. (h) Dispossession of tenant by person other than landlord.

——Sch. 2, Art. 1—Applies to dispossession of a tenant by any person whether landlord or not.

The plaintiff's suit was for recovery of possession of a holding on the ground that the plaintiff was an occupancy tenant of the holding who had been dispossessed by the defendant in July, 1920. Defendant contended that the plaintiff had been out of possession since 1918 and had surrendered his tenancy and that the malguzar had placed the defendant in possession. Plaintiff in the course of the pleadings, stated through his pleader, that he had been out of possession since the end of 1918 and that the defendant had not actually dispossessed him but that the suit was filed against him as he was in wrongful possession. It was pleaded in reply that plaintiff not having been in possession of the land within two years of the suit, Art. 1 of Schedule 2 stood as a bar to his claim. On the day fixed for hearing arguments the plaintiff put in an application to amend his pleadings on the ground that he had by some oversight stated that he was dispossessed in 1918 whereas he was dispossessed of two fields out of three in 1919 and of one in 1920 and the plaintiff also applied to file copies of jamabandis in support of the statement.

Held, that the plaintiff not having in his plaint relied on the jamabandis he was debarred from amending his pleadings in order to get out of the effect of his admission and that under Art. 1 of Schedule 2 was not necessary that the dispossession should necessarily have been caused by the landlord and that the plaintiff's suit was undoubtedly barred under that article. 80 Ind. Cas. 355=A.I.R. 1925 Nag. 127.

6. Extinction of right on expiry of time.

——Sch. 2, Art. 1—Expiry of time under—Effect of—Limitation Act, S. 28.

Per *Bose and Niyogi, JJ.*—Section 28 of the Limitation Act has been made expressly applicable to tenancies in the Central Provinces by S. 104, C. P. Tenancy Act. It follows that in the case of tenancies in the Central Provinces the extinguishment spoken of in S. 28, Limitation Act occurs at the end of the period specified in the Second Schedule to the Tenancy Act and not at the end of the period prescribed by the Limitation Act. Hence as soon as the two (now three) years prescribed by Art. 1 to Schedule 2, Tenancy Act have elapsed from dispossession or exclusion of a tenant, his right to the tenancy is extinguished and not merely barred. The tenancy itself is killed so far as the *quondam* tenant is concerned, but not altogether. It passes on to the next man. There is a "transfer." The right passes to the person who prescribes for it.

Obiter per *Bose, J.*—The moment the two years prescribed by Art. 1 to Schedule 2 elapse, then by reason of the special sense in which the word "transfer" has been used in the Tenancy Act, the trespasser becomes a "transferee" within the meaning of S. 12

and the landlord then has a quick and cheap remedy for getting possession under Ss. 13 and 14 unless the "transferee" is within the line of heirs centemplated by S. 11. If the landlord does not proceed under Ss. 13 and 14, then it has to be assumed, and the landlord will not be allowed to assert the contrary, that he has elected to accept the new man as his tenant. All that the person in possession can prescribe for during the continuance of the tenancy is the limited interest of the tenant. If he wishes to prescribe for the higher right, then ouster, that is to say a fresh assertion of a hostile title brought home to the knowledge of the landlord (for till that is done the landlord is entitled to assume that only a lesser right is being claimed) made after the determination of the tenancy will be necessary. In that event of course, the landlord can sue in the ordinary way within 12 years from the date of such hostile assertion: normal forfeiture of the tenancy is then involved. A.I.R. (Vol. 27) 1940 Nag. 49=1940 N.L.J. 121=I.L.R. (1940) Nag. 348=186 Ind. Cas. 731 (F.B.).

CENTRAL PROVINCES AND BERAR TOBACCO ACT (8 OF 1939).

——S. 2 (o)—Wholesale dealer—Who is.

A wholesale dealer is a person who keeps for wholesale sale to traders a commodity for the purpose of trade. 224 Ind. Cas. 293=I.L.R. (1946) Nag. 422=1946 N.L.J. 319=47 Cr.L.J. 587=A.I.R. 1946 Nag. 258.

——S. 3—Applicability—Agent or servant.

S. 3 of the C. P. and Berar Tobacco Act does not apply to an agent or servant who offers for sale and delivers tobacco to customers on behalf of a wholesale dealer. I.L.R. (1946) Nag. 422=224 Ind. Cas. 293=1946 N.L.J. 319=47 Cr.L.J. 587=A.I.R. 1946 Nag. 258.

——Schedule, Cl. (e), Proviso—If ultra vires.

The proviso to Cl. (e) of the schedule to the C. P. and Berar Tobacco Act is not *ultra vires* the Provincial Legislature. 224 Ind. Cas. 293=I.L.R. (1946) Nag. 422=1946 N.L.J. 319=47 Cr.L.J. 587 =A.I.R. 1946 Nag. 258.

C. P. AND BERAR VILLAGE PANCHAYAT ACT (5 OF 1920).

——Ss. 12 (1), 15 (1) (c)—Panchayat, if can levy taxes on shops in market without reference to District Council.

Section 12 of C. P. and Berar Village Panchayat Act confers a discretionary power on *panchayats* to undertake the control and administration of certain matters specified in that section. That section does not expressly mention markets but there can be no doubt that holding of a market being a measure of public utility would be a matter falling under the head (d) of S. 12 (1). The contention that the village *panchayat* cannot undertake control of a market without reference to the District Council must fail for the reason that there is no mention of the District Council in that section and a Court of law cannot insert that expression when it is not there. A.I.R. (Vol. 28) 1941 Nag. 128=1941 N.L.J. 49=I.L.R. (1941) Nag. 161=193 Ind. Cas. 609.

——S. 15 (1) (c)—The holding of a market is a measure of a public utility and as such the village *panchayat* can undertake control and administration of it and be responsible for the arrangement of conservancy and cleanliness and general maintenance of order in the market. Where the *panchayat* has assumed control of the market by a formal resolution, it has power to levy fees on persons exposing goods for sale in that market under S. 15 (1) (c) with the approval of the District Council. A.I.R. (Vol. 28) 1941 Nag. 128=1941 N.L.J. 49=I.L.R. (1941) Nag. 161=193 Ind. Cas. 609.

——S. 62—Powers of Deputy Commissioner—Nature of.

The action which a Deputy Commissioner takes under S. 62 of the Village Panchayat Act is in the nature of administrative action and not as a Revenue Court. The powers vested in the Deputy Commissioner are neither appellate nor revisional. 1948 N.L.J. 194.

——S. 66 (2)—Protection under—Scope of.

It is only with respect to the acts of the members of the Village Court or Village Bench that some protection is afforded by S. 66 (2). The resolution of the Village Panchayat Committee that a well standing on a particular land be excavated for meeting water supply of a village is not passed as that of a Village Court or a Village Bench, and therefore the members of the Village Panchayat Committee are not in any way protected by reason of S. 66 (2). A.I.R. (Vol. 31) 1944 Nag. 130=1944 N.L.J. 79 =I.L.R. (1944) Nag. 687=216 Ind. Cas. 30.

C. P. AND BERAR VILLAGE SANITATION AND PUBLIC MANAGEMENT ACT (2 OF 1920).

——Ss. 3 and 5—Village Sanitation Panchayat, if can sue—If can sell right to collect dues payable to it under Act.

A village Sanitation Panchayat brought into existence under C. P. Village Sanitation and Public Management Act not being a juristic person cannot sue.

It is not empowered to sell the rights to collect dues which are payable to it under C. P. Village Sanitation and Public Management Act. A.I.R. (Vol. 29) 1942 Nag. 114=1942 N.L.J. 438=I.L.R. (1942) Nag. 717=202 Ind. Cas. 621.

——S. 5 (1) (a)—Assessment under—Basis of.

The assessment under S. 5 (1) (a). C. P. Village Sanitation and Public Management Act, must be imposed with reference to the circumstances of, and the property possessed by the owners or occupiers within the local area. A.I.R. (Vol. 22) 1935 Nag. 242= 31 N.L.R. (Sup.) 108=160 Ind. Cas. 301.

CENTRAL PROVINCES AND BERAR BOARD OF REVENUE ACT.

See CENTRAL PROVINCES BOARD OF REVENUE ACT.

C. P. AND BERAR MUNICIPALITIES ACT (2 OF 1922).

See C. P. MUNICIPALITIES ACT.

C. P. AND BERAR PUBLIC SAFETY ACT (62 OF 1948).

See C. P. PUBLIC SAFETY ACT.

C. P. AND BERAR SALES TAX ACT.

See C. P. SALES-TAX ACT.

CEREMONIES.

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CERTIORARI—WRIT OF.

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——Against whom can issue—Authority acting judicially.

The High Court has jurisdiction and power to issue writs of *certiorari* against persons or bodies of persons who, though not ordinarily called Courts, yet have legal authority to determine questions affecting the rights of subjects and have a duty to act judicially, and who are therefore subject to the controlling jurisdiction of the High Court exercising those rights. 49 Bom.L.R. 454=A.I.R. 1947 Bom. 413.

——Against whom can issue—Authority acting judicially—Bombay City Police Act, S. 45—Inquiry under—Chief Presidency Magistrate—If acts judicially or in executive capacity — Interference — Grounds.

It is perfectly true that under S. 45 of the Bombay City Police Act it is for the Chief Presidency Magistrate to determine what inquiry he should hold for the purpose of determining the claim put forward by any party, but it cannot be disputed that in holding the inquiry the Chief Presidency Magistrate is discharging *quasi*-judicial functions and not acting in an executive capacity. While the Court will not interfere with the discretion of the Magistrate as to the nature of the inquiry he should hold or as to its scope. If the Magistrate, in holding the inquiry, contravenes any rule or principle of natural justice, the Court has jurisdiction to interfere and to prevent injustice being done to a party. If he prevents a party from calling evidence and deprives himself of the opportunity of hearing material evidence, he acts in a manner which is not in conformity with the principles of natural justice. If a judicial officer permits his mind to be affected by certain testimony, it is his duty, if a testimony of an opposite character is sought to be adduced before him, not to reject it, but to hear both the pieces of the evidence and come to an impartial conclusion. If he does not do so, the High Court will interfere by issuing a writ of *certiorari*. 49 Cr.L.J. 511=A.I.R. 1948 Bom. 236 =49 Bom.L.R. 889.

——Against whom can issue — Authority acting Judicially—Chief Judge of Small Cause Court hearing appeal under S. 217, City of Bombay Municipal Act (3 of 1888)—Issue of writ.

The High Court has power to issue a *writ of certiorari* in respect not only of the orders of subordinate Courts, but also of the proceedings of any tribunal or officer who though not a Court, is yet acting judicially in these proceedings. Although the Chief Judge of the Small Cause Court, Bombay, hearing an appeal under S. 217, City of Bombay Municipal Act, 1888, be not a Court, his decision is a judicial act, and if he acts without jurisdiction or in excess of his legal authority his act can be controlled by the High Court by a writ of prohibition or *certiorari*, as the case may be. It is no doubt true that sub-S. (1) of S. 219 of the Act provides that the decision of the Chief Judge upon any appeal under S. 217 against any such value or tax shall be final. But that only means that there are no further appeals but it does not affect the power of the High Court to issue a *writ of certiorari*. There are two conditions to be fulfilled before a writ can be issued, namely, that the tribunal or officer whose act is complained of must be acting judicially, and that the act complained of must be without jurisdiction or in excess of the legal authority of that tribunal or officer. An officer or tribunal having jurisdiction to decide a question cannot be said to have acted in excess of the legal authority if the decision happens to be wrong. The mere fact that the order of the Chief Judge of the Small Cause Court, Bombay is opposed to the principle of *res judicata* and that the provisions of sub-S. (2) of S. 154, City of Bombay Municipal Act, have been misinterpreted by him are not adequate grounds for

the issue of a *writ of certiorari*. A.I.R. (Vol. 26) 1939 Bom. 471=41 Bom.L.R. 984=(1940) 3 F.L.J. 61=187 Ind. Cas. 8.

——Against whom can issue—Authority not acting judicially—Authority acting under R. 75-A, Defence of India Rules not Court—Writ of certiorari does not lie. [Per Das, J. in the original judgment.]

The authority acting under R. 75-A, Defence of India Rules is not a Court. An order under R. 75-A is not a judicial order but a ministerial and executive act and therefore no *certiorari* would lie against the authority making the order but a *mandamus* can be granted under S. 45, Specific Relief Act. A.I.R. (Vol. 33) 1946 Cal. 140=80 C.L.J. 136=49 C.W.N. 322=222 Ind. Cas. 48.

——Against whom can issue—Authority not acting judicially—Madras Hindu Religious Endowments Board assessing costs of litigation relating to temple and demanding the same from trustee.

A *writ of certiorari* does not lie to quash an order which is merely ministerial but is intended for the purpose of adjudicating on the validity of acts judicial. The term 'judicial' in this connection does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law but means an act done by competent authority upon consideration of facts and circumstances and imposing a liability or affecting the rights of others.

In assessing the costs and expenses in respect of legal proceedings to which a Board or a Committee is a party, under S. 70 of the Madras Hindu Religious Endowments Act, and in making a demand of such costs and expenses from a party, the Board cannot be said to be acting judicially and a *writ of certiorari* cannot be issued in respect of such an act A writ cannot be issued in such a case for the further reason that a remedy is provided by the said Act itself for an aggrieved party.

The words 'all costs and expenses incurred in connection with legal proceedings' in S. 68 of the said Act are wide enough to cover not only the amounts which the Board had spent but also what they had to pay to others in respect of such proceedings, e.g., costs of the opposite party. Where the managing trustee of a temple was removed from his officer by the Board but this order was set aside by the High Court and the Board was directed to pay the trustee's costs and after paying the amount the Board, acting under S. 70 of the Madras Hindu Religious Endowments Act, assessed the amount of costs and expenses in connection with the said proceedings including the costs paid to the said trustee and made a demand on the trustee for such amount:

Held, that the Board had power to make such a demand on the trustee and as its order was also a ministerial one, no *writ of certiorari* could be issued in respect of such order. A.I.R. (Vol. 24) 1937 Mad. 103=71 M.L.J. 594=1936 M.W.N. 1186=166 Ind. Cas. 169.

——Against whom can issue—Authority not acting judicially—Madras Hindu Religious Endowments Act—Order of distribution of honours at a temple, nature of.

A question relating to the distribution of *theertham* or other temple honours cannot be made the subject-matter of a suit as it is not a question which affects a legal right. In settling questions relating to the allocation of honours in religious institutions over which it has superintendence, the Board acts in its administrative capacity.

Hence, where the Board established under Madras Hindu Religious Endowments Act, determines the order of the distribution of such honours, it cannot be said that it has declared any one's legal right or deprived any one of any legal right which he had and such a decision is merely an order dealing with internal management of the temple. A *writ of certiorari* cannot be issued in such a case. A.I.R. (Vol. 26) 1939 Mad. 511 (512)=49 M.L.W. 632=1939 M.W.N. 442=(1939) 1 M.L.J. 901=I.L.R. (1939) Mad. 904=185 Ind. Cas. 77.

——Against whom can issue—Authority not acting judicially—Madras Hindu Regious Endowments Board declaring order of precedence for distribution of theerthams and honours:

A *writ of certiorari* does not lie in respect of administrative acts but only in respect of judical acts. The right to obtain *theetham* or honours in a particular order of precedence in a temple is not a civil right which can be enforced or declared in a Civil Court and a *writ of certiorari* cannot be issued in respect of an order of the Religious Endowments Board declaring the order in which *theertham* and honours should be distributed in a temple. A.I.R. (Vol. 23) 1936 Mad. 973=1936 M.W.N. 954=44 M.L.W. 539=71 M.L.J. 588=166 Ind. Cas. 256.

——Against whom can issue—Election tribunal—Issue of writ.

A Court having jurisdiction to issue a *writ of certiorari* will not and cannot issue it to bring up an order made by a Judge of that Court. Nor will a Superior Court issue the writ directed to another Superior Court and if the Election Judge is to be regarded as a special or independent tribunal, his Court would be a Superior Court. Cognizance of election petition is an extension of, or addition to the ordinary jurisdiction of the Supreme Court and consequently, *certiorari* cannot be granted to bring up any order made in the exercise of that jurisdiction. A.I.R. (Vol. 32) 1945 P.C. 83=58 M.L.W. 371=1945 M.W.N. 536=(1945) 2 M.L.J. 314 (P.C.).

—Against whom can issue—Election tribunal—Commissioners appointed by Governor of Province to enquiry into election—Status and functions of—If Court or independent tribunal outside the jurisdiction of High Court. *See* GOVERNMENT OF INDIA (PROVINCIAL ELECTION) CORRUPT PRACTICES AND ELECTION PETITIONS ORDER, 1936, PART III, PARA. 4. 49 Bom L. R. 468.

——Against whom can issue—Judicial or quasi-judicial act — Textile Controller revoking textile licence—If amenable to certiorari.

Although the Controller of Textiles for Ceylon is a "person" within the meaning of S. 42 of the Ceylon Courts Ordinance and although there must exist in fact reasonable grounds of belief, known to the Controller, before he can validly exercise the power of revocation of a textile licence under Regulation 62 of

the Defence (Control of Textiles) Regulation, 1945, his decision to revoke a licence under that Regulation is not a judicial or quasi-judicial act to which the remedy of *certiorari* can be applied by the Court. 54 C.W.N. 883 (P.C.) foll. 54 C.W.N. 893 (P.C.).

——Against whom can issue—Judicial or quasi-judicial act—Textile Commissioner cancelling licence—If amenable to writ.

The English Law does not recognise any distinction for this purpose between the regularly constituted judicial tribunals and bodies which, while not existing primarily for the discharge of judicial functions yet have to act analogously to a Judge in respect of certain of their duties. In truth the only relevant criterion by English Law is not the general status of the person or body of persons by whom the impugned decision is made but the nature of the process by which he or they are empowered to arrive at their decision. When it is a judicial process or a process analogous to the judicial, *certiorari* when he cancels a textile licence acting

Even assuming that the Controller of Textiles is a "person or tribunal" within the meaning of S. 42 of the Ceylon Courts Ordinance he is not acting in a capacity that would make him amenable to *certiorari* when he cancels a textile licence acting under the powers of Regulation 62 of the Defence (Control of Textiles) Regulations, 1945. The words in Regulation 62 "where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer" must no doubt be treated as imposing a condition that there must in fact exist such reasonable grounds, known to the Controller before he can validly exercise the power of cancellation. But it does not follow necessarily from this that the Controller must be acting judicially in exercising the power. He can act reasonably without acting judicially. If he is not under a duty so to act then it would not be according to law that his decision should be amenable to review and, if necessary, to avoidance by the procedure of *certiorari*. 54 C.W.N. 883 (P.C,).

——Against whom can issue—Judicial or quasi-judicial act—Government of Bombay requisitioning premises under S. 3 of the Bombay Land Requisition Ordinance (5 of 1947)—Writ—If can issue to quash.

The main question for decision was whether a writ of *certiorari* was available to an aggrieved party to remove or quash an order made by the Government of Bombay requisitioning certain premises under S. 3 of the Bombay Land Requisition Ordinance (5 of 1947).

Held (Mahajan and Mukherjea. JJ., contra).—As the decision of the Provincial Government about the existence of a public purpose in regard to the requisitioning of a property is not a judicial or *quasi*-judicial decision there was no scope for an application for a writ of *certiorari*.

Per *Kania, C.J.*—Wherever any body of persons having legal authority to determine questions affecting the rights of subjects. and having the duty to act judicially act in excess of their legal authority, a writ of *certiorari* may issue.

It is not correct to say that whenever there is a determination of a fact which affects the rights of parties, the decision is *quasi*-judicial. Where the executive authority has to form an opinion about an objective matter as a preliminary step to the exercise of a certain power conferred on it, the determination of the objective fact and the exercise of the power based thereon are alike matters of an administrative nature and are not amenable to the writ of *certiorari*. The true position seems to be that when the law under which the Court is making a decision, itself requires a judicial approach, the decision will be *quasi*-judicial.

There appears nothing in the Bombay Land Requisition Ordinance to show that in arriving at its decision about a public purpose, the Provincial Government has to act judicially. The words of S. 3 of the Ordinance read with the proviso, and the words of S. 4 taken along with the scheme of the whole Ordinance do not import into the decision of the public purpose the judicial element required to make the decision judicial or quasi-judicial. The decision of the Provincial Government about public purpose is therefore an administrative act.

Inconvenience or want of adequate remedy does not create a right to a writ of *certiorari*.

Per *Fazl Ali, J.*—There is nothing in the Bombay Land Requisition Ordinance to suggest that the public purpose is to be determined in a judicial way.

A petition for a writ of *certiorari* can succeed only if two conditions are fulfilled; firstly, the order to be quashed is passed by an inferior Court or a person or authority exercising a judicial or quasi-judicial function and secondly, such Court or quasi-judicial body has acted in excess of its legal authority. Though the second element would seem to be present in this case that would no be enough for the purpose of granting a writ of *certiorari* to the applicant. Since the requisitioning of the premises under S. 3 of the Ordinance was a purely administrative act and did not involve any duty to decide the existence of a public purpose or any other matter judicially or quasi-judicially, the remedy of the aggrieved party is clearly by action and not by asking for a writ of *certiorari*.

Per *Mahajan, J.*—The Provincial Government of Bombay acting under the Bombay Land Requisition Ordinance is a body of persons having legal authority to determine questions affecting the rights of subjects and its duty is to act judicially. It cannot arrive at its determination on a mental process of its own. The questions that have to be decided under S. 3 of the Ordinance are not questions for the mere determination of the Government subjectively by its own opinion but are matters of determination objectively.

A writ of *certiorari* lies against the Government of Bombay.

Per *Mukherjea, J.*—The Provincial Government when acting under the Bombay Land Requisition Ordinance has to satisfy itself that there is a public purpose before it proceeds to requisition any property.

The act of requisition being an executive act the determination of the existence of a public purpose upon which the exercise of powers is dependent is either a part of the executive act itself or is something collateral to it. As in the present case it is a thing collateral and preliminary to the exercise of executive

authority and not a part of it, the determination of this collateral matter by the executive authority which is a judicial function cannot be regarded as final and if the determination is erroneous, it can be corrected and removed by a writ of *certiorari*.

A writ of *certiorari* will lie against the Provincial Government.

Das, J.—On a proper construction of S. 3 of the Bombay Land Requisition Ordinance, there can be no doubt that the section left it to the Provincial Government to form its own opinion on the entire matter, namely, whether it was necessary or expedient to requisition any land for a public purpose and to act upon that opinion. So construed, the formation of opinion on the whole matter and the act founded thereon was nothing but a purely administrative (*i.e.*) executive act. If the acts were done in good faith and within the four corners of the Ordinance the Court cannot interfere with it in any proceeding and far less by the prerogative of *certiorari* or prohibition.

Apart from the question of construction and assuming that the matter had not been left to its opinion the determination of the existence of a public purpose or the necessity or expediency for making the order could not be regarded as a quasi-judicial act, because (a) there was no *lis* in the sense of dispute between two contesting parties to be decided by the Provincial Government; and (b) the Provincial Government was not required by the Ordinance to hold any judicial inquiry or to act judicially and the determination of the existence of a public purpose was only a step in the process of the exercise of the administrative power and, if erroneous, the decision could at best be challenged by an action, but a *certiorari* would be a wholly inappropriate remedy. 1950 S.C.J. 451=1950 M.W.N. 802=A.I.R. 1950 S.C. 222=53 Bom.L.R. 1=86 C.L.J. 330=(1950) 2 M. L. J. 703 (S.C.).

——Against whom can issue—Judicial or quasi-judicial act—Order of requisition under Bombay Land Requisition Act, 1948, S. 5—Writ of certiorari or prohibition—If can issue.

There is no warrant for holding that either the proviso to S. 5 (1) or S. 5 (2) constitutes a condition precedent to the act of requisition under the Bombay Land Requisition Act; it cannot therefore be said that by virtue of this proviso or sub-section the power to requisition is subject to a condition precedent which has got to be determined judicially. The act of requisition under S. 5 is therefore not a *quasi*-judicial act and no writ of *certiorari* or prohibition can lie in respect of an order made under S. 5. 51 Bom.L.R. 993=A.I.R. 1950 Bom. 158.

——Against whom can issue—Judicial or quasi-judicial act—Requisition under Bombay Land Requisition Act, S. 6.

A writ of *certiorari* lies in respect of an order of requisition under S. 6 of the Bombay Land Requisition Act, the order being a *quasi*-judicial order.

The existence of "premises" as defined in the Act is a condition precedent to the exercise of the power to requisition; and that condition in so far as premises intended to be let are concerned is not capable of subjective determination; nor is there any indication in the Act that it is left to the subjective determination of the Government. Hence the order of requisition must be held to be a *quasi*-judicial act.

Though it is true that the first proviso to S. 6 (4) of the Act makes a provision for an inquiry only in cases where no intimation of vacancy was given it does not follow therefrom that Government have to determine nothing in relation to premises relating to which an intimation has been received before they proceed to requisition them. Government are bound to satisfy themselves (a) that the intimation relates to premises as defined by S. 4 (3), (b) that such premises are vacant within the meaning of that term in sub-S. (1) read with the explanation, and (c) that the intimation is in fact given *bona fide* by the real landlord. These are objective facts not left to the subjective determination of Government, and, therefore the act of requisition is a *quasi*-judicial act even in cases in which an intimation of vacancy is given by the landlord.

Where the proviso to S. 6 (4) enacts that the declaration made by Government shall be "conclusive evidence," it makes the declaration conclusive with regard to all facts involved in the determination of vacancy; but the declaration is not conclusive with regard to the inference to be drawn from or the legal consequences of such facts since these are not matters of evidence. Notwithstanding the proviso, therefore, the legal concept of vacancy is still left for objective determination, and the act of requisition is therefore a *quasi*-judicial act. 51 Bom.L.R. 342; 51 Bom.L.R. 438, rel. on. 51 Bom.L.R. 997=A.I.R. 1950 Bom. 144.

——Against when can issue—Judicial or *quasi*-judicial act—Jurisdiction to issue—Bombay Land Requisition Ordinance, 1947 S. 4—Order under—If subject to writ. *See* BOMBAY LAND REQUISITION ORDINANCE, 1947, S. 4 (4). 51 Bom.L.R. 418.

——Against whom can issue—Judicial or *quasi*-judicial act—Jurisdiction to issue—Bombay Rents Hotel Rates and Lodging House Rates (Control) Act, S. 38—Order of review by Collector under on ground not specified—Issue of writ. *See* BOMBAY RENTS HOTEL RATES AND LODGING HOUSE RATES (CONTROL) ACT, S. 38. 50 Bom.L.R. 146.

——Against whom can issue—Judicial or quasi-judicial act.

A writ of *Certiorari* can only be issued against an inferior Court or against a person or persons who are required by law to act judicially or *quasi*-judicially. It is a high prerogative writ its purpose being to prevent a judicial or *quasi*-judicial body from acting in excess of its jurisdiction or to see that in exercising its jurisdiction that body acts in conformity with principles of natural justice. Such a writ can never lie to correct administrative or executive orders, though illegal or *ultra vires* the very basis and foundation of the writ being that the act complained of must be a judicial or a *quasi*-judicial act. 51 Bom. L. R. 342=A.I.R. 1949 Bom. 277.

——Against whom can issue—Judicial or *quasi*-judicial act—Collector of Madras acting under Madras Buildings (Lease and Rent) Control Act of 1946. *See* MADRAS BUILDINGS (LEASE AND

RENT) CONTROL ACT (15 OF 1946), S. 3. (1948) 1 M.L.J. 266.

——Against whom can issue—Judicial or *quasi*-judicial act—Appellate authority under Madras Buildings (Lease and Rent Control) Act setting aside its own *ex parte* appellate order—Writ if can issue to quash. *See* MADRAS BUILDINGS (LEASE AND RENT CONTROL) ACT. (1947) 2 M. L. J. 482.

——Against whom can issue—Judicial or quasi-judicial act—'Judicial act'—Order of Collector requisitioning immovable property.

The general principles which afford a guide to the determination of the question whether an act which is done by a tribunal or competent authority is a judicial act or an executive, administrative, or a ministerial act, are that the tribunal or competent authority should have power by its determination within jurisdiction to impose liability or affect rights of others, that it should act in exercise of some right or duty to decide, that the act should be done by it upon consideration of facts and circumstances and imposing liability or affecting the rights of others, that it decides on the materials before it as between a proposal and an opposition, even though it is not bound to treat as though it was a trial, though it has no power to administer oath and need not examine witnesses and though it can obtain information in any way it thinks best always giving a fair opportunity to those parties in controversy for correcting or contradicting statements prejudicial to their view.

Regard must also be had to the terms of the particular rule, the nature scope and effect of the particular power in exercise of which an act may be done read with the provisions of S. 15. Defence of India Act. An order of Collector acting under R. 75-A, Defence of India Rules and S. 15, Defence of India Act, requisitioning immovable property on the material gathered after proper inquiries is a judicial order and if it is in excess of power or without jurisdiction it is amenable to the jurisdiction of the High Court to issue a writ of *certiorari* or prohibition. A. I. R. (Vol. 33) 1946 Bom. 280=47 Bom.L.R. 1070=(1945) 8 F.L.J. 300.

——Against whom can issue—Judicial or quasi-judicial act—Departments of Government or statutory bodies—Interference by High Court by writ.

The power of the High Court to issue *writs of certiorari* is unquestioned and the power of the Supreme Court to issue writs of prohibition has also been inherited by the High Court. Where departments of Government or statutory bodies are given judicial or *quasi*-judicial functions, the Courts will interfere to prevent the exercise of such functions in a non-judicial manner. The regular exercise of *quasi*-judicial powers will be enforced by *writ of certiorari* and prohibition. A.I.R. (Vol. 25) 1938 Cal. 385=I.L.R. (1938) 1 Cal. 476=42 C.W.N. 230=181 Ind. Cas. 973.

——Against whom can issue—Judicial or quasi-judicial act—Test of—Bombay Land Requisition Ordinance (1947), S. 3—Order of Government under—Nature of—Writ to correct—If competent.

The true definition of a judicial or *quasi*-judicial act is that in order that the act may be a judicial or *quasi*-judicial act as distinct from an executive order, a duty must be cast by the Legislature upon the person or persons empowered to act to determine or decide some fact or facts. There must also be some *lis* or dispute resulting from there being two sides to the question to be decided. The duty must not only be to determine and decide a question; but there must be a duty to determine or decide the fact judicially, after weighing the pros and cons. What is really enquired is there should be a proposition and an opposition, and also that the deciding authority should have to weigh facts and law. In the matter of making an order of requisition under S. 3 of the Bombay Land Requisition Ordinance, 1947, the act of the Provincial Government is a *quasi*-judicial act; the Legislature has limited the power of Government and made it exercisable only upon the happening of a particular contingency, namely the existence of a public purpose, and has not empowered Government to affect the rights of the subject and to impose a liability upon him by a mere executive act of Government arrived at purely by subjective reasoning on the part of Government. If the Government acts in excess of its jurisdiction its acts can be controlled and corrected by a writ of *certiorari*. But the writ can only be directed against the Province of Bombay, which alone is empowered under the ordinance to make an order of requisition and cannot lie against any minister of the Province or any Secretary of that Government who might issue the order under the authority of the Governor. I.L.R. 39 Bom. 279=17 Bom.L.R. 100 (P.C.); 48 Bom.L.R. 717, ref. 51 Bom.L.R. 342=A.I.R. 1949 Bom. 277.

——Against whom can issue—Judicial or quasi-judicial act—Test of—Defence of India Rules (1939), R. 17 (1) (a) (ii) (a) and (iii) — Order directing cutting off of telephone connection of premises and requiring surrender of apparatus.

It is only in cases of judicial or *quasi*-judicial orders that the writ of certiorari can issue. Whether an act is a judicial act or *quasi*-judicial act or a purely executive act, will depend upon the terms of the particular section of an Act or rule, the nature, scope and effect of a particular power, under which or in exercise of which the act may be done. An order under R. 17 (i) (a), (ii) (a) and (iii) of the Defence of India Rules (1939), directing that the telephone connection of a specified person be cut off for a period of one year and that, that person do forthwith surrender the telephone apparatus installed in his premises and the fittings in connection with it, is not a *quasi*-judicial act and therefore a writ of certiorarii cannot issue. It is not every order passed under the Defence of India Rule, that can be *quasi*-judicial unless the authority invested with the power to pass an order had to act judicially, *i.e.*, to weigh a question from two sides and decide on the matter no question of *quasi*-judicial act can arise. The two sides cannot include the authority making the order as he is the deciding authority. I.L.R. (1946) Bom. 1056=48 Bom.L.R. 717=A.I.R. 1947 Bom. 153=231 Ind. Cas. 302.

——Against whom can issue—Ministers of State acting as such—Issue of writ.

The remedy by way of a writ of *certiorari* is avail-

able only where it is sought to review a judicial as distinct from a ministerial act of an inferior tribunal. The writ therefore cannot issue against Ministers of State who act as such in exercise of powers given to them by legislative enactments and statutory rules. A.I.R. 1950 T.C. 97 (F.B.).

——Against whom can issue—Parties outside jurisdiction — Central Road Traffic Board, Madras — Order of in respect of a transport service in the mofussil—Writ of certiorari—If can issue.

The decision of their Lordships of the Privy Council in the *Parlakimedi case* decides the scope and conditions of the exercise of jurisdiction by the High Court in the matter of prerogative writs and that decision must, therefore, govern all cases where there are applications for the issue of such writs.

Where an application was made for the issue of a writ of *certiorari* to call for the records of the Central Road Traffic Board, Madras, and quash its order purporting to allow an appeal in respect of a transport service operating in the mofussil.

Held, though the respondena Board had its offices in the Presidency Town, the subject-matter was entirely outside the original jurisdiction of the High Court, as it related to a transport service in the mofussil and as such the decision in the *Parlakimedi case* precluded the High Court from issuing the writ of *certiorari* asked for. 61 L.W. 406=A.I.R. 1948 Mad. 497=1948 M.W.N. 424=(1948) 1 M. L. J. 401.

——Against whom can issue—Parties outside jurisdiction—Jurisdiction to issue.

The High Court has no jurisdiction to issue the writ of *certiorari* when both the parties to the proceedings are outside the jurisdiction of the High Court, and particularly when the party affected thereby is outside such jurisdiction, although the tribunal against whom the writ is sought has its office within the jurisdiction of the High Court. I.L.R. (1946) Bom. 360=225 Ind. Cas. 402=48 Bom.L.R. 76=A.I.R. 1946 Bom. 309.

——Against whom can issue—Persons subject to jurisdiction.

Wherever any person or body of persons is invested with legal authority to determine questions affecting the rights of subjects and has the duty in exercising that authoity to act judicially, he or they are subject to the controlling jurisdiction of the High Court of justice exercised in the *writ of certiorari*. A.I.R. (Vol. 27) 1940 Rang. 84=1940 Rang L.R. 325=188 Ind. Cas. 422 (S.B.).

——Against whom can issue—Provincial Government calling for the records relating to the rejection of a revision petition to Government under Madras House Rent Control Order. Writ to quash—If can be issued. *See* GOVERNMENT OF INDIA ACT (1935), SS. 306 (1) AND 223. (1947) 2 M. L. J. 146.

——Against whom can issue—Unauthorised person purporting to act under the Rajasthan (Administration of Evacuee Property) Ordinance (14 of 1949).

A writ of *certiorari* or prohibition can be issued only against an inferior Court which includes bodies created by the acts of the Legislature. It can only be issued against such bodies if a duty has been cast upon them of exercising, after hearing evidence, judicial functions in the sense that they have to decide on evidence between a proposal and an opposition.

When a person is neither a custodian nor an Additional Deputy or Assistant Custodian under the Rajasthan (Administration of Evacuee Property) Ordinance, but has been simply acting on behalf of the Deputy Custodian under an alleged authority which is not warranted by law, it cannot be said that he has been acting as an inferior Court because law has cast no duty upon him to decide questions under the Ordinance in a judicial or *quasi*-judicial manner and so a writ of *certiorari* cannot be issued against him in respect of his acts purporting to be done under the Ordinance. 1950 R.L.W. 186=A.I.R. 1950 Raj. 58.

——Against whom can be issued—Unauthorised person or authority—Issue of writ.

The writs of prohibition and *certiorari* can be issued to an inferior Court or an officer having some jurisdiction in law, which such Court or officer is attempting to exceed or has exceeded. Therefore, when there is no such jurisdiction vested in law or no legal authority in such Court or officer, or when such jurisdiction or authority of such Court or officer is challenged by the applicant for the writs, there is no scope for such writs to issue. I.L.R. (1948) 1 Cal. 310.

2. Costs.

——Costs—Application to quash District Collector's order—Collector opposing—Liability for costs.

Where an application to the High Court for a *writ of certiorari* to quash an order passed by the District Collector in an appeal under S. 41-B (2) (d) (i), Madras Hindu Religious Endowments Act is opposed by the District Collector and the application is allowed, the District Collector can be made liable for costs as a public officer. A.I.R. (Vol. 29) 1942 Mad. 706=55 M.L.W. 616=(1942) 2 M.L.J. 470=1942 M.W.N. 806=I.L.R. (1943) Mad. 402=204 Ind. Cas. 470.

3. Grounds for issue of.

——Grounds for issue of—Act without or in excess of jurisdiction—Question of taxation or rating —Adoption of arbitrary mode of assessment in contravention of statute—Power of High Court to issue writ.

A writ of *certiorari* is a high prerogative writ issued by a superior Court in respect of the exercise of judicial or *quasi*-judicial functions by another authority, when the contention is that the exercising authority had no jurisdiction or had exceeded its jurisdiction. The question whether that authority has jurisdiction or not depends on a decision of a matter which is not the subject of adjudication but on some extensive material. Where an assessment for rating purposes is made without jurisdiction, that is to say, when an unauthorised arbitrary method is adopted or jurisdiction is exercised in express contravention of a section of an Act, and the taxation is made on

that footing, the High Court has power to issue and will issue a writ of *certiorari*. I.L.R. (1946) Bom. 963=A.I.R. 1947 Bom. 108=48 Bom.L.R. 691.

——Grounds for issue of—Acts without or in excess of jurisdiction—'Judicial Act'—Meaning of—Collector acting under R. 75-A of Defence of India Rules—Order of requisition of premises—Issue of writ.

There is no difference in principle between the writ of *certiorari* and the writ of prohibition except that the latter may be invoked at an earlier stage. The conditions precedent for the High Court exercising its jurisdicaion to issue the writs of *certiorari* and prohibition are that there should be a body of persons having legal authority to determine questions affecting rights, of subject and having a duty to act judicially and acting in excess of that legal authority. There is no warrant for limiting the Court's jurisdiction to issue these writs only to cases of the body of persons, or to use another expression, the tribunal or officer acting in excess of their legal authority. The absence of any authority whatever to act in a particular manner is certainly much worse than mere excess of legal authority, and it is inconceivable that even though the Courts would have jurisdiction to issue a writ of *certiorari* or a writ of prohibition in cases where the tribunal or officer is acting in excess of the legal authority invested in him, the Courts would be helpless where the tribunal or officer concerned was seeking to exercise an authority or jurisdiction which was not at all vested in him. Hence the Court would have jurisdiction to issue these writs not only in cases where the tribunal or officer acted in excess of their legal authority but also in those cases where the tribunal or officer acted without authority or jurisdiction at all. The phrase 'judicial act" must be taken in a very wide sense including many acts that would not ordinarily be judicial. The main processes which go to form an aca of a tribunal or a competent authority a "judicial act" is that the tribunal or competent authority should decide on the materials before it between a proposal and an opposition even though the mode in which the materials are collected and placed before it or the process adopted by it in connection with the decision on those materials as between a proposal and an opposition may not strictly conform to what is ordinarily adopted in the regular Course of Law. The procedure of *certiorari* applies in many cases in which the bodies whose acas are criticised would not ordinarily be called Courts nor the acts ordinarily be termed judicial acts. In order to decide whether an act is a judicial act so as to invoke the jurisdiction of issuing these writs which is vested in the High Court, regard must also be had to the terms of the particular rule, the nature, scope and effect of the particular power in exercise of which an act may be done read with the provisions of the relevant statute. The tribunal or competent authority should have power by its determination within jurisdiction to impose liability or affect rights of others, it should act in exercise of some right or duty to decide. The act should be done by it upon consideration of facts and circumstances and imposing liability or affecting the rights of others and it should decide on materials before it as between a proposal and an opposition even though it is not bound to treat it as though it was a trial. The function exercised by the tribunal or competent authority may be exercised in a *quasi*-judicial manner and not a strictly judicial way as a Court of Law would do. It is however, incumbent on the tribunal or competent authority to act in good faith and fairly listen to both sides. Where a Collector acts under the powers vested in him under R. 75-A of the Defence of India Rules, and notification dated 25th April, 1942, by the Government of India Defence Co-ordination Department and requisitions a certain flat in the possession of a person and directs the latter to deliver possession of the said flat to another named officer of the Central Government, the Collector exercises, in the matter of the issue of the requisition order, a judicial function in the sense that he has to decide upon the materials before him as between a proposal and an opposition and therefore he performs what is a "judicial act" within the extended definition of that term. If he acts in excess of his legal authority or without any authority or jurisdiction at all, it would be competent to the High Court to issue a writ of *certiorari* or a writ of prohibition against him. I.L.R. (1946) Bom. 636=47 Bom.L.R. 1070=(1945) F.L.J. 300=A.I.R. 1946 Bom. 280.

——Grounds for issue of—Conditions pre-requisite to—Basis of writ—Administrative order—If subject to correction by certiorari.

The very basis of a writ of *certiorari* is that the order challenged must be a judicial or a *quasi*-judicial order, and the authority which has passed the order must be discharging judicial functions. Only when the Court is satisfied that the authority is acting in excess of jurisdiction which is vested in it or is acting with material irregularity in the exercise of its jurisdiction, *e.g.*, violating the principles of natural justice, will the Court issue the prerogative writ of *certiorari*. An administrative order cannot be corrected by a writ of *certiorari*. A.I.R. 1950 Bom. 363=52 Bom.L.R. 544 (F.B.).

——Grounds for issue of—Hyderabad C.P. Code, S. 615—Powers under—Distinction—Error of law—Leading to non-exercise of jurisdiction—Interference by issue of writ—Principles.

Generally, the writ of *certiorari* is issued to correct error of jurisdiction where no such jurisdiction is vested in the authority whose decision is challenged, or where such authority fails to exercise jurisdiction vested in it or has exercised it illegally or with material irregularity. The power to issue the writ is wider than the power of the High Court under S. 615, Hyderabad C. P. Code. The writ can be invoked against any person or authority exercising judicial or *quasi*-judicial functions, whereas the operation of S. 615 C. P. Code, is confined to Courts which are subordinate to the High Court. Though the word "Court" in S. 615, C. P. Code, cannot be extended to the authorities who are not proper judicial Courts but whose decisions can be corrected by writ of *certiorari*, yet decisions under S. 615, C. P. Code may be taken as authorities for ascertaining and holding what amounts to improper

refusal or exercise of jurisdiction. If a Court of law by an error of law, *e.g.*, by a wrong interpretation, refuses to exercise jurisdiction, such non-exercise of jurisdiction is a ground for interference by the High Court in revision, and on similar grounds the High Court can issue a writ and interfere with decisions of other authorities exercising judicial or *quasi*-judicial functions. Where the Appellate authority under the Hyderabad Rent Control Order comes to an incorrect or erroneous decision about the application of the doctrine of *res judicata*, the High Court in the exercise of its extraordinary powers quash that decision by the issue of a writ of *certiorari* on the ground of non-exercise or irregular exercise or wrong assumption of jurisdiction. 76 I.A. 131; (1949) 2 M.L.J. 594, rel. on. A.I.R. 1950 Hyd. 59.

——Grounds for issue of—Error of law.

When a Court acting within its jurisdiction misconceives a point of law, it cannot be a ground for quashing proceedings by *certiorari*, for otherwise there will be little or no difference between *certiorari* procedings and an appeal. 1936 M.W.N. 1214.

——Grounds for issue of. **See** MADRAS BUILDINGS (LEASE AND RENT CONTROL) ACT (15 OF 1946), S. 7. (1948) 2 M.L.J. 559.

——Grounds for issue of—Procedure, if exclusively relates to question of jurisdiction.

Per *Venkatasubba Rao, J.*—It is wrong to assume that nothing short of some sort of defect connected with jurisdiction can afford ground for *certiorari*. Procedure by *certiorari* is not at all exclusively connected with the cases of jurisdiction or its absence. But it is not every mistake in law that can be remedied by this writ.

As to *certiorari* there is a well settled rule, namely, that it lies when in the exercise of jurisdiction there is error on the face of the adjudication. A.I.R. (Vol. 23) 1936 Mad. 669=1936 M. W. N. 720=44 M.L.W. 101=71 M.L.J. 199=I.L.R. (1937) Mad. 132=165 Ind. Cas. 433.

4. Jurisdiction.

——Authority outside Presidency Town—Madras Hindu Religious Endowments Board removing trustee of mofussil temple—Issue of writ.

The High Court has no jurisdiction to issue a writ of *certiorari* to quash the order of the Madras Hindu Religious Endowments Board purporting to exercise the powers of an Assistant Commissioner under S. 26 of the Madras Hindu Religious Endowments Act by which a person was removed from the office of the trustee of a temple in the Salem District. By the mere location of its office in the Presidency Town the Madras Hindu Religious Endowments Board cannot be deemed to be an inhabitant thereof within the meaning of S. 8 of the Letters Patent. Nor can it be said that the subject-matter of dispute was one which can be said to have arisen in the Presidency Town. The subject-matter in dispute in the case is the right to the office of trustee in a mofussil town. [(1943) 2 M.L.J. 254; I.L.R. (1944) Mad. 457 (P.C.), appl.;] 62 L.W. 150=1949 M.W.N. 127=A.I.R. 1949 Mad. 857=(1949) 1 M.L.J. 187.

——Jurisdiction — Bombay High Court—Power of—If restricted or affected by S. 45, Specific Relief Act.

The High Court of Bombay has jurisdiction to issue a writ of prohibition as well as a writ of *certiorari*. The power conferred on the Supreme Court by Cl. 5 of the Charter Act still exists and is not taken away or restricted by the provisions of S. 45 of the Specific Relief Act. The writs of certiorari and prohibition are complementary of each other. I.L.R. (1946) Bom. 832=225 Ind. Cas. 577 =48 Bom.L.R. 255=A.I.R. 1946 Bom. 407.

——Jurisdiction—Bombay High Court—Governor-General in Council appearing in pursuance of notice under R. 584, High Court Rules—Issue of writ if barred under S. 306, Government of India Act, 1935.

The Bombay High Court has jurisdiction to issue a writ of *certiorari*.

On an application for issue of writs of prohibition and *certiorari* there is no obligation on the High Court under the High Court Rules to serve the rule on any party except the respondent against whom the writ is sought to be issued. Where a notice is served on the Governor-General in Council or a Province under R. 584 of the High Court Rules, the fact that they appear before the High Court would not make them automatically parties to the proceedings, when they are not made parties to the application. Consequently, the question as to applicability of the prohibition contained in S. 306, Government of India Act, 1935, cannot arise in such a case. A.I.R. (Vol. 33) 1946 Bom. 407=48 Bom. L.R. 255.

——Jurisdiction—Bombay High Court—Government of India Act, (1935) S. 306.

On a proper construction of S. 306, Government of India Act, the right of issuing a *writ of certiorari* is statutorily limited and the Court must accept the law as it finds it. A Chartered High Court, therefore, has no jurisdiction to issue a *writ of certiorari* against the Local Government. A.I.R (Vol 32) 1945 Bom. 419=47 Bom.L.R. 500.

——Jurisdiction—Bombay High Court's jurisdiction to issue.

The Bombay High Court has no jurisdiction to issue *writs of certiorari* with regard to the decision of tribunals outside the area of its original jurisdiction, namely, the Torosi and the Island of Bombay. A.I.R. (Vol. 32) 1945 Bom. 7=46 Bom. L.R. 675=I.L.R. (1944) Bom. 683.

——Jurisdiction — Central Road Traffic Board—Order without jurisdiction — Entertaining and allowing incompetent appeal — Motor Vehicles Act, Rules, Rr. 149 and 150—Scope of powers under.

The petitioner had a permit to run buses on a particular route from Madras to Mahabalipuram. He applied to the Regional Transport Officer, Vellore, for permission to divert his buses at an intermediate place along a different route. The Regional Transport Authority notified under S. 57 (3) of the Motor Vehicles Act about the receipt of this application and after waiting till the date fixed for its consideration granted on 28th April, 1947, the permission as prayed for by the petitioner as apparently no representations were received from anybody. The

second respondent, another bus service, preferred an appeal to the Central Traffic Board against the granting of the permission to the petitioner, though it had at no time till then objected to the grant of the permission. Without apparently realising that the second respondent was not entitled to appeal under S. 64 of the Motor Vehicles Act, the Central Traffic Board purported to allow it on 25th June, 1947, and cancelled the diversion of the route. The petitioner preferred a petition to the Provincial Government but they declined to interfere with the order passed. The petitioner thereupon applied to the High Court for the issue of a writ of *certiorari* to quash the order of the Central Traffic Board on the ground that the appeal by the second respondent was not competent and that the Board acted without jurisdiction in purporting to allow surh an appeal and in cancelling the permission already granted to the petitioner. On behalf of the Central Traffic Board while it was conceded that the appeal was incompetent, it was contended that the High Court has no jurisdiction to issue the writ, and that though the order sought to be quashed could not be justified as an order on a valid appeal nevertheless it was a valid order passed in exercise of the powers conferred on the Central Traffic Board under R. 149 of the rules framed by the Local Government under the Motor Vehicles Act. It was further contended that in effect the petitioner was seeking to obtain the issue of the writ against the Provincial Government which the High Court has no power to issue.

Held: The body whose order was being challenged is located and had passed the order within the limits of the original jurisdiction of the High Court. Further as Madras is a terminus on the bus route, it must be held that the transport business was being carried on at least in part in Madras, though it was also being carried on outside the limits of Madras, and as such it cannot be said that the High Court has no jurisdiction to issue a writ of *certiorari* to quash the order of the Central Traffic Board.

The order sought to be quashed cannot be supported as an order passed in the exercise of powers conferred by R. 149 of the rules framed under the Motor Vehicles Act as it does not empower the Central Board to call for any order passed by the Road Traffic Board and to pass an order setting aside or modifying that order. Further, it did not appear on the face of the record that the Central Traffic Board was purporting to exercise a power conferred by R. 149. It is not a good return to a rule *nisi* for the issue of a writ of *certiorari* to state that the order is justified on facts not contained in the order and the High Court cannot take notice of such facts.

The dismissal of the petitioner's petition to Government cannot be said to be an order passed under any of the provisions of the rules validly framed under the Act. The language of R. 150 is both inadequate and inappropriate to confer a right on the Provincial Government to interfere in revision with orders of the Road Traffic Board and the Central Board in respect of which appeals are specially provided.

The order of the Central Traffic Board was without jurisdiction and must be quashed. I.L.R. (1949) Mad. 194=61 L.W. 297=A.I.R. 1948 Mad. 454=1948 M.W.N. 319=(1948) 1 M.L.J. 322.

——Jurisdiction—Election—Power of High Court to issue writ.

Madras Legislative Assembly (Elections and Election Petitions) Rules 1936. R. 7 does not prevent High Court from issuing *certiorari* when tribunal has acted without jurisdiction and a subject has been deprived of a right. *Certiorari* can only be taken away by express negative words. A.I.R. (Vol. 24) 1937 Mad. 660=45 M.L.W. 623=1937 M.W.N. 694=I.L.R. (1938) Mad. 162=173 Ind. Cas. 169.

——Jurisdiction — Election — Madras District Municipalities Act (5 of 1920), S. 49—Power to issue writ.

The Madras District Municipalities Act gives only to the Election Officer the jurisdiction to examine the nomination papers in an election and scrutinise them on hearing objection and decide whether the nomination papers should be received or rejected.

The High Court cannot interfere by *certiorari* with the decision of the Election Officer even if it be erroneous. If he was wrong the remedy provided is by means of an election petition. A.I.R. (Vol. 19) 1932 Mad. 321=1932 M.W.N. 61=35 M.L.W. 360=62 M.L.J. 644=187 Ind. Cas. 868.

——Jurisdiction—Income-tax Writ, if can be issued to determine validity of assessment to income-tax.

No doubt the issue of a *writ of certiorari* is within the competence of the High Court in a proper case and such issue is in exercise of the original jurisdiction of the Court. But it is not open to the High Court in view of S. 226, Government of India Act, to call for the record of the Income-tax department in order to satisfy itself that the assessment was legal. The High Court is not capable of determining any question as to the validity of an assessment to income-tax under a *writ of certiorari*. A.I.R. (Vol. 30) 1943 Bom. 77=45 Bom.L.R. 31=I.L.R. (1943) Bom. 152=205 Ind. Cas. 499.

——Jurisdiction of High Court—Inherent power.

In the matter of issuing a writ of certiorari the High Court acts not under statute but under the inherent powers which devolve upon it from the old Supreme Court. The High Court, therefore, stands with regard to prerogative writs in the same position as the Court of King's Bench in England and it ought to follow the rules laid down by that Court. 50 Mad. 130=24 M.L.W. 778=1926 M.W.N. 985=99 Ind. Cas. 152=A.I.R. 1927 Mad. 130=51 M.L.J. 742 (F.B.).

——Jurisdiction—Madras High Court —Power to issue writ to person outside Presidency Town.

The Madras High Court has no power to issue a *writ of certiorari* on any one outside the Presidency Town of Madras unless he is a British subject, though the High Courts of Calcutta, Madras and Bombay have power to issue *certiorari* in the exercise of their local jurisdiction. The power of superintendence given by S. 15, Indian High Courts Act, 1861, and then by S. 107, Government of India Act, 1915, does not include a right to issue a *writ of certiorari* to individuals or official bodies excepting judicial func-

tions in the *mofussil*. (History of High Court's power to issue prerogative writs traced.)

In proceedings for settling fair and equitable rent under Chapter 2, Madras Estates Land Act, the Special Revenue Officer of the District of Ganjam in the Northern Circars double the previous rents in respect of the lands situated in the District of Ganjam. On the *ryot's* appeal to the Board of Revenue, a member of that Board sitting alone reversed this decision and allowed an increase of rent of only 12½ per cent. The *zamindar* appealed by way of revision to the Collective Board of Revenue which under S. 172, Madras Estates Land Act allowed the increase of rent of 6 annas in the rupee or 37½ per cent. The *ryots* then applied to the Madras High Court to issue a *writ of certiorari* to the Board of Revenue and quashed the order passed by it:

Held, that the lands in dispute being situate in the *mofussil* and the *ryots* and the Special Revenue Officer being residents in the *mofussil* the High Court had no jurisdiction to issue a *writ of certiorari*. The fact that the Board of Revenue as a body was ordinarily resident or located within the town of Madras did not give jurisdiction to the High Court to issue a *writ of certiorari*.

Held, further that in giving directions under S. 172, Madras Estates Land Act the Board of Revenue was to be considered not as a Court, or as the highest Court in a hierarchy of Revenue Court, but as an official body especially entrusted with particular duties which include duties of a judicial character. A.I.R. (Vol. 30) 1943 P.C. 164=56 M.L.W. 460 =1943 M.W.N. 525=(1943) 2 M.L.J. 254=48 C.W.N. 18=10 B.R. 278=70 I A. 129=210 Ind. Cas. 239 (P.C.).

——Jurisdiction—Origin, nature and scope of—Judicial and ministerial acts.

The ancient *writ of certiorari* in England is an original writ which may issue out of a superior Court requiring that the record of the proceedings in some cause or matter pending before an inferior Court should be transmitted into the superior Court to be there dealt with. The writ is so named because, in its original Latin form, it required that the King should 'be certified' of the proceedings to be investigated, and the object is to secure by the exercise of the authority of a superior Court, that the jurisdiction of the inferior tribunal should be properly exercised. The writ does not issue to correct purely executive acts, but, on the other hand, its application is not narrowly limited to inferior "Courts" in the strictest sense. Broadly speaking, it may be said that if the act done by the inferior body is a judicial act, as distinguished from being a ministerial act *certiorari* will lie. The remedy, in point of principle, is derived from the superintending authority which the Sovereign's Superior Courts, and in particular the Court of King's Bench, possess, and exercise over inferior jurisdictions. This principle has been transplanted to other parts of the King's dominions and operates, within certain limits, in British India. A.I.R. (Vol. 30) 1943 P.C. 164=56 M.L.W. 460 =1943 M.W.N. 524=(1943) 2 M.L.J. 254=48 C.W.N. 18=10 B.R. 278=70 I. A. 129=210 Ind. Cas. 239 (P.C.).

——Jurisdiction to issue—Madras High Court—Madras Charter, 1800—Cls. 8, 21, 22 33, and 34—Scope of—Supreme Court—Power to issue writ of certiorari on any one outside Madras.

It is incorrect to say that Cl. 8 of the Madras Charter of 1800 gave jurisdiction to the Supreme Court to issue the *writ of certiorari* to a Court of the Company anywhere throughout the Province. Clause 8 gives and in general terms defines an authority which is to be exercised over those, who by the latter clauses are made subject to it. It is not possible to treat Cl. 8 as giving a separate jurisdiction over all persons in the province independently of Cls. 21, 22, 23 and 34. The words "as far as circumstances will admitt" in Cl. 8 render it impossible to regard the reference to the King's Bench as founding a general jurisdiction outside the Presidency Town independent of and inconsistent with the other provisions of the Charter. It is impossible to maintain that under Cl. 8 the Supreme Court derived a right to issue prerogative writs to a person outside the limits of the Presidency Town who was not personally subject to their civil and criminal jurisdiction. The Supreme Court did not possess the power to issue *writ of certiorari* on any one beyond the limits of Madras unless he was a British subject. No distinction can be drawn as regards the issue of prerogative writs between a criminal, a civil, a revenue, or any other Court of the Company and an officer of the Company authorised to make a decision of a judicial character. A.I.R. (Vol. 30) 1943 P.C. 164=56 M.L.W. 460=1943 M.W.N. 525=(1943) 2 M.L.J. 254=43 C.W.N. 18=10 B.R. 278=70 I. A. 129=210 Ind. Cas. 239 (P.C.).

——Jurisdiction—Madhya Bharat High Court.

The Madhya Bharat High Court has got no right to issue a writ of *certiorari* which is only possessed by the chartered High Courts and which were expressly conferred on them by charters and Letters Patent. A.I.R. 1950 M.B. 28=4 A.I.Cr.D. 195 =51 Cr.L.J. 813.

——Jurisdiction—Nagpur High Court—Power of.

The High Courts in India other than the Chartered High Courts have not the power to issue the prerogative *writ of certiorari* either under the Letters Patent or the Government of India Act. The Nagpur High Court has no other jurisdiction or authority except as provided in Ss. 24 and 115, Civil P. C., or Ss. 435 or 439, Criminal P. C. A.I.R. (Vol. 28) 1941 Nag. 282=I.L.R. (1941) Nag. 397=1940 N.L.J. 426=197 Ind. Cas. 36.

——Jurisdiction—Nature and extent of.

The jurisdiction possessed by the High Court in the matter of certiorari is original and supervisory or corrective, and on the English analogy extends over all inferior tribunals amenable to its authority. A.I.R. 1930 Mad. 896.

——Jurisdiction—Power of High Court to issue writ of certiorari or writ in nature of mandamus—If can be taken away by Provincial Legislature—Government of India Act, 1915-1919 — Calcutta Municipal Act (3 of 1923), S. 25 (3)—Effect of.

The jurisdiction of a High Court to issue a *writ of certiorari* which it has inherited from the Supreme

Court under Successive Acts of Parliament and Royal Charters issued thereunder, or a mandatory injunction in the nature of *writ of mandamus* under S. 45, Specific Relief Act, cannot be taken away by the Provincial Legislature as constituted under the Government of India Act, 1915-1919. Consequently, S. 25 (3), Calcutta Municipal Act, 1923, which provides that the orders made by a Revising Authority shall be final, cannot take away by implication the jurisdiction of the High Court to issue those writs. A.I.R. (Vol. 33) 1946 Cal. 206=I.L.R. (1944) 2 Cal. 464=48 C.W.N. 662.

——Jurisdiction—Rangoon High Court—Power of —Letters Patent (Rangoon)—Rent Settlement Officers appointed under Burma Tenancy Act (10 of 1939), if amenable to such jurisdiction.

The Letters Patent sets out the jurisdiction of the Court in general terms and does not particularize the remedies or processes whereby that jurisdiction may be exercised, and the grant of jurisdiction includes by implication the authority to issue such writ or process as is necessary to enforce it.

Rangoon High Court is the King's Court with general jurisdiction throughout Burma, and therefore, it must have inherent power to issue the King's writs unless that power has been taken away by His Majesty by express terms. There is nothing in the Letters Patent which in terms deprives High Court of the power to issue the high prerogative writs. The High Court has, therefore, power to issue a *writ of certiorari* and Rent Settlement Officers appointed under the Burma Tenancy Act are amenable to that jurisdiction. A.I.R. (Vol. 27) 1940 Rang. 84=1940 Rang. L.R. 325=188 Ind. Cas. 422 (S.B.).

5. Nature of.

——Nature of—Interim orders—Issue of—Injunction—Practice.

The High prerogative writs of *certiorari* and prohibition are exceptional remedies and interim orders, such as an interim injunction, will not be made in petitions for the issue of such *writs* as a matter of course. A strong *prima facie* case has to be made out before that can be done. 51 Bom.L.R. 993= A.I.R. 1950 Bom. 158.

——Nature of — Prohibition — Writ of — Distinction—Principles governing issue.

The power to issue a writ of *certiorari* is exercised by the High Court by virtue of its extra-ordinary jurisdiction where the act complained of is a judicial or a *quasi*-judicial act, and the object of the writ is to correct excess of jurisdiction. The right to apply for a writ is a very valuable right which a subject enjoys, and under this a subject can compel a *quasi*-judicial body to act within the four corners of its jurisdiction. A writ, however, will not issue where there is another adequate remedy, provided that remedy is equally beneficial and speedy and is merely one which will at some future time bring relief.

A writ of *certiorari* is invoked before a trial is completed to secure a fairer trial than can be obtained before an inferior Court or to prevent an excess of jurisdiction after trial; it is in fact to quash an order which has been made without jurisdiction or in defiance of the rules of natural justice.

A writ of prohibition, on the other hand, is issued to prevent the commission of a future act and not to undo an act already performed. An application for a writ of prohibition cannot lie to restrain an inferior tribunal after its judgment has been executed. Where the tribunal has nothing further to do in pursuance of its order the question of restraining its action does not arise. This would be so even if the order be void. But the remedy by way of a writ of *certiorari* is open where there is something left for it to operate upon and an application for a writ is never too late, so long as there is something left for it to operate upon.

The two writs are independent writs issued under different circumstances; their object is to compel Courts by issuing writs to keep within the limits laid down by the statute and the Court issuing the writ keeps Courts within those limits.

The Hyderabad High Court has in this respect the same powers as the Indian High Courts. A.I.R. 1950 Hyd. 5.

6. Notice.

——Notice to inferior tribunal—Necessity.

It is absolutely necessary that the tribunal to quash whose order the application for the issue of a writ is taken should be a party, because without notice issuing to the tribunal, the record of the proceedings cannot be brought up to the High Court. Whether the officer or authority concerned should also be required to appear is a matter which may depend on the circumstances of each particular case. 61 L.W. 267=1948 M.W.N. 264=A.I.R. 1949 Mad. 53=(1948) 1 M.L.J. 276.

7. Other remedy open.

——Other remedy by way of appeal—Bar to issue of writ.

Quaere: Whether the High Court would refuse to issue a writ of *certiorari* on the mere ground that the aggrieved party had another adequate remedy by way of appeal, even when the Court or tribunal below had acted in a way contrary to the fundamental principles of justice? 49 Bom.L.R. 454=A.I.R. 1947 Bom. 413.

——Other remedy open—Issue of writ.

If there is another suitable remedy, as, for instance, a right of appeal; the High Court would be very loath to issue the high prerogative writ of *certiorari* unless it is satisfied that the tribunal or the officer against whom the writ is sought has acted in a manner contrary to the fundamental principles of justice. If the Court finds that there has been a breach of the fundamental principles of justice the Court will not hesitate to issue the writ. I.L.R. (1946) Bom. 940=229 Ind. Cas. 212=A.I.R. 1947 Bom. 46=48 Bom.L.R. 565.

——Other remedy open — Election — Calcutta Municipal Act—Issue of writ. I.L.R. (1945) 1 Cal. 240.

——Other remedy open—Issue of writ—Election under Madras City Municipal Act.

Where by the time the *certiorari* proceedings are

taken and orders are passed thereon, a candidate seeking election to a vacant seat in the Municipal Council is declared duly elected and has taken the oath of office, the *writ* should not be issued. The proper procedure when the validity of such an election is challenged is for the aggrieved party to file an election petition and have it adjudicated by the Court of Small Causes as provided in the rules under the Madras City Municipal Act. A.I.R. (Vol. 29) 1942 Mad. 348=(1942) 1 M.L.J. 70=1942 M.W.N. 94=55 M.L.W. 311=203 Ind. Cas. 607.

——Other remedy open—Issue of writ.

The issue of *writ of certiorari* or prohibition is a matter of discretion. They are extraordinary remedies and the Court does not have recourse to them except in extraordinary situations in which justice cannot otherwise be done. The *writ of mandamus* can no longer be issued by the Calcutta or any other High Court, but it is practically replaced in effect by provisions of S. 45 of the Specific Relief Act. The excercise of the powers given by that section, however, is subject to various provisos one being that the applicant has no other specific and adequate legal remedy.

Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the High Court. Before, however, these extraordinary remedies are used, the Court must be sure that they will be effective. (1936) 163 Ind. Cas. 997=62 Cal. 596=39 C.W.N. 573.

——Other remedy open—Issue of writ.

Where a person has another remedy open to him he cannot come to the High Court by way of *certiorari*. A.I.R. (Vol. 19) 1932 Mad. 171=34 M.L.W. 903 =1931 M.W.N. 1118=62 M.L.J. 263=136 Ind. Cas. 319.

——Other remedy open—Grant of writ.

Madhavan Nair, J.—Writs of *certiorari* are not generally granted when other equally efficacious remedies exist under the law for the satisfactory redress of the grievances complained of. 49 Mad. 49=92 Ind. Cas. 918=1926 M.W.N. 467=A.I.R. 1926 Mad. 297.

——Other remedy open—Election—Madras Local Boards Act, Ss. 54 (1), 52 and 51—President for Union Panchayat rejecting nomination—Issue of writ.

The President of a Union Panchayat issued a notice for the election to be held, and fixed a day for nominations. On the same day a new election roll was published which omitted the name of the petitioner, apparently on the ground that he had not paid his taxes. The date for the scrutiny of nominations was fixed a few days later. On that day, the President scrutinized the nominations on the footing of the new electoral roll, and rejected the petitioner's nomination as he was not on the new electoral roll.

Held, that the decision of the President was a ministerial act and not a judicial one. And even if it be held that his act in rejecting the nomination was judicial, still his act was in accordance with rules and there was no fault to find with it. There was no ground, therefore, for the issue of a writ of *certiorari*. The petitioner's remedy was by way of election petition. A.I.R. 1923 Mad. 475, Dist. 28 M.L.W. 642= 1928 M.W.N. 727=113 Ind. Cas. 874=A.I.R. 1928 Mad. 1271=56 M.L.J. 162.

8. Powers of High Court.

——Powers of High Court—Inquiry into merits—Conclusions of statutory tribunals on the merits—If can be gone into in *certiorari* proceedings *See* INDUSTRIAL DISPUTES ACT (14 OF 1947), SS. 7 AND 10. (1950) 2 M.L.J. 479.

——Powers of High Court—Simultaneous issue of certiorari and prohibition — Permissibility—Writ of certiorari and writ of prohibition should not be claimed simultaneously.

Reliefs for the writ of *certiorari*, and writ of prohibition order under S. 45, Specific Relief Act, should not be claimed simultaneosuly but alternatively. Where a person claims a writ of *certiorari*, Court will not issue a writ of prohibition also merely because the applicant desires it for the sake of greater caution. A.I.R. (Vol. 33) 1946 Bom. 280 =47 Bom.L.R. 1070=(1945) 8 F.L.J. 300.

——Powers of High Court—If taken by S. 45, Specific Relief Act.

The power of the High Court to issue writ of prohibition is not taken away by S. 45, Specific Relief Act. A.I.R. (Vol. 33) 1946 Bom. 280=47 Bom.L.R. 1070.

——Powers of High Court.

Certiorari can only be taken away by express negative words and not merely by words which direct that certain matters should be finally determined. But even in cases where *certiorari* is taken away, a writ may be issued if the authority acted without jurisdiction. A.I.R. (Vol. 24) 1937 Mad. 660=45 M.L.W. 623=1937 M.W.N. 694=I.L.R. (1938) Mad. 162=173 Ind. Cas. 169.

——Powers of High Court.

High Courts have only such powers in the matter of issuing *writs of certiorari* as the Supreme Courts had. The Letters Patent have not enlarged their jurisdiction in this respect.

The Supreme Court had no jurisdiction to issue a *writ of certiorari* concerning any act ordered or done in the collection of revenue according to the usage and practice of the country or regulations of the Governor-General in Council, and income-tax is revenue within the meaning of this rule. A.I.R. (Vol. 23) 1936 Mad. 398=1936 M.W.N. 55=70 M.L.J. 343=43 M.L.W. 396=59 Mad. 702=163 Ind. Cas. 60.

——Powers of High Court—Madras Estates Land Act (1 of 1908), Chap. XI, Ss. 171 173 (3) (d), 172, 168 to 171—Proceedings of the Board of Revenue under—Issue of writ.

Where the case is a proper one for issuing a writ, the High Court can issue a *writ of certiorari* in respect of proceedings of the Board of Revenue under Chap. XI, Madras Estates Land Act.

Where the Board of Revenue after dismissing an appeal under S. 171. Estates Land Act, took up the matter under S. 172 and passed an order reducing

the rate of rent by three annas in the rupee throughout:

Held, that although the procedure was irregular in that the Board of Revenue had no power under S. 172 to revise the record itself and could only send it to the Revenue Officer for revision, yet as no substantial injury could result from the irregularity in the procedure no *writ of certiorari* ought to be issued:

Held, also, that assuming the power of the Board is only to order the revision, they will order it along certain lines. The Settlement Officer will have no choice except to follow these directions laid down by the Board of Revenue. Consequently, for all practical purposes, the record will be made in accordance with the directions of the Board of Revenue. Therefore, the difference between revising the record itself and ordering its revision is largely formal. A.I.R. (Vol. 21) 1934 Mad. 231=1933 M.W.N. 792=56 Mad. 579=38 M.L.W. 353=65 M.L.J. 423=148 Ind. Cas. 698.

——Powers of High Court—If taken away by Press Acts.

Semble:—The High Court has power to issue a writ of *certiorari* in cases not coming within S. 115, C.P.C. or S. 435, Cr.P.C. *Quaere*:—If S. 22 of the Press Act takes away the power. 43 Mad. 146 =46 I.A. 176=37 M.L.J. 139=17 A.L.J. 925 =23 C.W.N. 986=21 Bom.L.R. 867=(1919) M. W. N. 555=10 L.W. 451=20 Cr.L.J. 593=26 M. L. T. 408=1 U.P.L.R. (P.C.) 74=52 Ind. Cas. 209 (P.C.); 39 Mad. 1085=21 M.L.T. 124= (1916) 2 M.W.N. 385=5 L. W. 1=18 Cr.L.J. 157=37 Ind. Cas 525 and 39 Mad. 1164=32 M.L.J. 151=21 M.L.T. 190=(1916) 2 M.W.N. 497=4 L. W. 625=18 Cr.L.J. 239=37 Ind. Cas. 607, affirmed.

9. Right to apply for.

——Right to apply for—Personal right in claimant not necessary to support a claim for such writ.

A writ of *certiorari* does not require any personal right or interest to support a claim for such writ. The only distinction is that in the case of a man who is personally aggrieved he can ask for the writ almost *ex debito justitiae* and that in the case of a man who has not suffered any injury, the Court has discretion to grant or refuse the application according to the circumstances of a case. A.I.R. (Vol. 33) 1946 Cal. 206=I.L.R. (1944) 2 Cal. 464=48 C. W. N. 662.

——Right to apply for—Applicant not objecting to jurisdiction and getting decision on merits in lower Court—Writ cannot be issued.

Where the applicant armed with a point either of law or of fact which would oust the jurisdiction of the lower Court has elected to argue a case on its merits before that Court, he must be taken to have submitted himself to a jurisdiction which he cannot be allowed afterwards to seek to repudiate by applying for a certiorari. 50 Mad. 130=24 M.L.W. 778=1926 M.W.N. 985=99 Ind. Cas. 152=A.I.R. 1927 Mad. 130=51 M.L.J. 742 (F.B.).

10. When can issue.

——When can issue—Order of Board of Revenue in a stamp matter passed without oral hearing of party. *See* STAMP ACT (2 OF 1899). (1950) 2 M.L.J. 399.

——When can issue.

The remedy under a writ of *certiorari* is as a rule only applicable where it is sought to review a judicial, as distinct from a ministerial act of an inferior tribunal. Where the act complained of does not partake of a judicial proceeding no writ can issue. A.I.R 1950 T. C. 97 (F.B.).

——When can issue.

There is no difference in principle between the writ of *certiorari* and the writ of prohibition except that the latter may be invoked at an earlier stage.

The condition precedent for the High Court exercising its jurisdiction to issue the writs of *certiorari* and prohibition are that there should be a body of persons, or to use another expression, a tribunal or officer: (1) having legal authority, (2) to determine questions affecting rights of subjects, and (3) having a duty to act judicially and (4) they should act in excess of their legal authority, or without authority or jurisdiction at all. The Collector acting under R. 75-A, Defence of India Rules, and S. 15, Defence of India Act, and requisitioning immovable property is a tribunal or officer having legal authority to determine questions affecting the rights of the subjects and having authority to act judicially and if he acts in excess of his legal authority or without any authority or jurisdiction at all it would be competent to the High Court to issue a writ of *certiorari* or a writ of prohibition against him. A.I.R. (Vol. 33) 1946 Bom. 280=47 Bom.L.R. 1070= (1945) 8 F.L.J. 300.

——When can issue.

Where the granting of a writ of *certiorari* or a mandatory injunction under S. 45, Specific Relief Act, will not be an effective remedy, the High Court will not issue such writs in vain and will refuse to interfere with the proceedings. A.I.R. (Vol. 33) 1946 Cal. 206=I.L.R. (1944) 2 Cal. 464=48 C. W. N. 662.

——When can issue.

A *writ of certiorari* cannot be issued in respect of an order which is not a judicial order. A.I.R. (Vol. 33) 1946 Cal. 140=80 C.L.J. 136=49 C. W. N. 322=222 Ind. Cas. 48.

——When can issue.

The *writ of certiorari* can only be granted when there is no other suitable remedy available to the party aggrieved. A.I.R. (Vol. 29) 1942 Mad. 348= (1942) 1 M.L.J. 70=1942 M.W.N. 94=55 M.L.W. 311=203 Ind. Cas. 607.

——When can issue—Suppression of material facts—Effect.

In an application for the issue of a writ of *certiorari* or prohibition (which are high prerogative writs) it is incumbent on the applicant to state all material facts, and if the applicant is guilty of suppression or non-statement of material facts, the application is liable to be rejected. But where the suppression or non-statement is not the result of any deliberate intention on the applicant's part to mislead or deceive the Court but is a result of inadvertence or want of

appreciation of the true legal position on the part of his legal advisers, the Court will allow the applicant to amend his application. 49 Bom.L.R. 454=A.I.R. 1947 Bom. 413.

——When can issue—Suppression of material facts—Effect.

The rule of the Court requiring *uberrima fides* on the part of the applicant for an *ex parte* injunction applies equally to the case of an application for a rule *nisi* for a writ or prohibition, and where there has been a suppression of material facts, the Court will refuse the writ without going into the merits of the case. A.I.R. (Vol. 25) 1938 Cal. 385=I.L.R. (1938) 1 Cal. 476=42 C.W.N. 230=181 Ind. Cas. 973.

——When can issue.

A proceeding is none the less a judicial proceedings subject to prohibition or *certiorari* because it is subject to confirmation or approval by some other authority. An application for prohibition is never too late as long as there is something left for it to operate upon. A.I.R. (Vol. 24) 1937 P.C. 265 =46 M.L.W. 232=170 Ind. Cas. 425 (P.C.).

——When can issue

A *writ of certiorari* will only issue where it is shown that the Court whose order is sought to be made the subject of the writ has acted either without jurisdiction or in excess of it. A writ will not be issued merely because its decision is erroneous. A. I. R. (Vol. 22) 1935 Mad. 610=42 M.L.W. 249= 158 Ind. Cas. 624.

——When can issue.

A *writ of certiorari* is of a purely discretionary character and only to be resorted to where the merits of the case call for it. A.I.R. (Vol. 21) 1934 Mad. 190=39 M.L.W. 193=66 M.L.J. 468=1934 M.W.N. 642=57 Mad. 791=148 Ind. Cas. 477.

——When can issue.

A *writ of certiorari* may be issued when a Court, or similar authority, gives to itself a jurisdiction which it properly has not got, by taking an erroneous view of the law. The Court is only entitled to interfere if there was want of jurisdiction at the commencement of the proceedings. Once there is jurisdiction any errors committed subsequently cannot take away the jurisdiction once obtained.

But if in an enquiry, for which there is jurisdiction, an error is made which can be regarded as something which went beyond the jurisdiction of the Court or was done without jurisdiction and is not merely a wrong view of the law, then a writ can be granted. A.I.R. (Vol. 21) 1934 Mad. 357=66 M.L.J. 601=39 M.L.W. 534=57 Mad. 582=150 Ind. Cas. 911.

——When can issue.

Issue of writ to an Election Commissioner—Question is not whether there has been any error of law on the part of the Election Commissioner—If there is want of jurisdiction at the commencement of proceedings then only writ will be issued—Jurisdiction of Court depending on existence of some peculiar fact which is collateral to actual matter which the Court has to try—Court cannot by wrong decision give itself jurisdiction which it would not otherwise possess—If the fact in question is not collateral but a part of the very issue which the Court has to inquire into, *certiorari* will not be granted although the Court may have arrived at an erroneous conclusion with regard to it. A.I.R. (Vol. 22) 1935 Mad. 47=1934 M.W.N. 1349=40 M.L.W. 924= 68 M.L.J. 151=153 Ind. Cas. 652.

——When can issue—Award of Industrial Tribunal under the Industrial Disputes Act declared by Government under S. 15 of the Act to be binding —Power to issue writ.

It cannot be said that a writ of *certiorari* cannot be issued to quash the award made by an Industrial Tribunal under the Industrial Disputes Act after the Government had under S. 15 of the Act declared the award to be binding on the employed and employees. (1941) 2 M.L.J. 175=I.L.R. (1941) Mad. 807, relied on. 1949 M.W.N. 819=(1949) 2 M.L.J. 789.

CESS.

See (1) Bengal CESS ACT (9 OF 1880).
(2) B. T. ACT, S. 74.
(3) LANDLORD AND TENANT.
(4) MADRAS ESTATES LAND ACT, S. 143, ETC.

——Decree as to—Effect of, as regards cess in subsequent years. *See* RES JUDICATA (C. P. CODE, S. 11). 28 C. 109.

——Gharghanna, no cess—**See** U. P. ACTS—LAND REVENUE ACT, S. 56. 5 A.L.J. 361=30 A. 235.

——Illegal, recovery of—See PRINCIPAL AND AGENT. 7C.W.N. 535. 535=30 Cal. 1011.

——Lawful origin of—Presumption from—Long continued course of payment.

From a long continued payment of cess, a lawful origin can be presumed, that is to say, an agreement to pay as well as consideration for it, the two essentials of a valid contract. A.I.R. (Vol. 22) 1935 Mad. 718=1935 M.W.N. 897=42 M.L.W. 583=160 Ind. Cas. 680.

——Liability to pay—Absence of contract—Effect of.

Although the liability to pay cess under the Cess Act can be contracted out, but in order to make the legal provisions for the responsibility to pay cess ineffective the contract must be clear and expressive. Where there is no such contract and the plain meaning of the lease is that the cess so far paid has been included in the rent, and there is no mention that further cess assessed upon the tenure would not be payable by the tenure-holder by whom it must be paid under the provisions of law, increased cess for the period after the re-assessment should be allowed. A.I.R. (Vol. 22) 1935 Pat. 305=155 Ind. Cas. 96.

——Suit for—Jurisdiction of Small Cause Court—*See* PROVINCIAL SMALL CAUSE COURTS ACT, ART. 13. 13 M.L.J. 21.

CESSION OF TERRITORY.

See (1) ACT OF STATE.
(2) CROWN.
(3) GRANT.

CESTUI QUE TRUST.

See (1) TRUST.
(2) TRUSTS ACT, SS. 3, 7, AND 9.

——Who can be—A community of individuals.—See TRUST—CONSTRUCTION. 8 C.W.N. 918.

CEYLON CIVIL PROCEDURE CODE (1860).

——S. 349 — Applicability and construction—If confined to decrees for money—"Otherwise adjusted"—Meaning of.

The word "otherwise" in S. 349, Ceylon Civil Procedure Code grammatically can only mean "otherwise than by payment out of Court."

S. 349 of the Ceylon Code relates only to decrees for the payment of money. A.I.R. (Vol. 23) 1936 P.C. 126=1936 O.W.N. 390=38 P.L.R. 407=1936 O.L.R. 261=44 M.L.W. 640 =162 Ind. Cas. 8 (P.C.).

CEYLON CRIMINAL PROCEDURE CODE (ORDINANCE NO. 15 OF 1898).

——S. 355 (1)—Reference—Full note of Judge's summing up—Necessity of recording.

In cases under S. 355 (1), Ceylon Cr. P. Code, it is desirable that there should be available for the tribunal dealing with the reference a full note of the Judge's summing up. A.I.R. (Vol. 20) 1933 P.C. 7=64 M.L.J. 290=1933 Cr. Cas. 130 (2)=34 Cr.L.J. 550=143 Ind. Cas. 224 (P.C.).

CEYLON EVIDENCE ORDINANCE (14 OF 1895).

——Effect—Application of Indian Evidence Act to Ceylon—Evidence Act, S. 1.

The Evidence Ordinance of Ceylon is merely the application to Ceylon of the Indian Evidence Act, S. 1. 52 I.A. 372=A.I.R. 1925 P.C. 229.

——S. 9—Intercepted correspondence—If evidence—Divorce.

Any intercepted correspondence between the respondents in divorce cases cannot be considered as evidence against the person to whom it is addressed for any purpose whatever. 10 B.L.R. 301, Ref. 52 I.A. 372=A.I.R. 1925 P.C. 229.

CEYLON INCOME-TAX ORDINANCE (2 OF 1932).

——S. 90—Rules under, R. 1—Business carried on by Ceylon branch—If must be banking business—Banking business—Test—Question of mixed fact and law.

R. 1 of the Rules framed under S. 90 of the Ceylon Income-tax Ordinance, in defining 'Ceylon branch' refers to 'the business carried on in Ceylon by any such bank' and does not contain the words 'of banking' after business, but these words must be implied.

The proper test for determining whether the Ceylon branch carried on the business of banking at the material time is to consider whether that branch, at that time, could fairly be described as "a company which carries on as its principal business the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order."

The question whether the Ceylon branch carried on the business of banking at the relevant time is a question of mixed fact and law, involving the construction of the Ordinance and Rules. A.I.R. 1949 P.C. 48=1949 Comp. C. 20 (P.C.).

CEYLON INSOLVENCY ORDINANCE, (1853).

——Ss. 126 and 130—Effect of insolvency.

The effect of an insolvency certificate is to extinguish the debt. 14 Ind. Cas. 560 (Mad.).

CEYLON LAND ACQUISITION ORDINANCE (46 OF 1917).

——Scope—If retrospective — The Ordinance is not retrospective.

The amending Land Acquisition Ordinance of 1917 is prospective and not retrospective in its operation. (1921) 2 A.C. 357=A.I.R. 1921 P.C. 138.

CEYLON LAND REGISTRATION ORDINANCE.

——S. 17—Sham transaction—Agreement for sale —Subsequent registered sale—Executed as device to defeat prior claim—Enforceability of.

Under the Ceylon Land Registration Ordinance a subsequent registered deed takes effect over an unregisterd earlier deed provided there is no fraud or collusion. Where the subsequent purchaser however did not pay cash consideration but the deed was executed in consideration of monies paid alio intuitu and the entire transaction was merely advice to get priority.

Held, that the later transaction was a sham one and that it was unenforceable. 1930 M.W.N. 211=A.I.R. 1930 P.C. 214 (P.C.).

CEYLON MARRIAGE LAW.

——Presumption of valid marriage—Living as man and wife—Inference.

According to the law of Ceylon, where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage. 4 O.W.N. 759=104 Ind. Cas. 327=A.I.R. 1927 P.C. 185=54 M.L.J. 388.

CEYLON MONEY-LENDING ORDINANCE (1918).

——S. 2—Closed transactions—If may be reopened—Decision of English Court of appeal—If to be followed.

Under S. 2, Ceylon Money-Lending Ordinance, a borrower is entitled to relief in respect of money-lending transactions closed before the date of his application for relief. This section has

been expressed in language identical with that of S. 1 of the English Money-Lenders Act, and it is the duty of the Courts in Ceylon to follow the decision of the English Court of appeal on the construction of the identical words used in the English enactment, unless the local conditions make it inappropriate. 54 C.W.N. 878 (P.C.).

CEYLON ORDINANCE (21 OF 1844).

——Scope—Will by Muhammadan—Property in Island and British India—Operation and validity.

Ceylon Ordinance 21 of 1844 confers upon the testator complete powers of disposing of all his property within the island of Ceylon and even moveable property outside it, but does not intend to alter the Muhammadan law of succession in respect of immovable property outside the island. A.I.R. (Vol. 32) 1945 Mad. 81=I.L.R. (1945) Mad. 476=57 M.L.W. 584=(1944) 2 M.L.J. 365=1945 M.W.N. 14.

CEYLON ORDINANCE (10 OF 1863).

——S. 9—Scope — Partition decree — Rights of Crown under Waste Lands Ordinance of 1897—If affected.

There is nothing in the Ordinance to bind the Crown and a partition decree has not the effect of depriving the Crown of the important rights conferred under the Waste Lands Ordinance of 1897. (1922) 1 A.C. 262=A.I.R. 1921 P.C. 173.

CEYLON ORDINANCE (2 OF 1889).

——S. 9—Scope—Indian defendant—Jurisdiction of Ceylon Court.

Courts of Ceylon are not authorised by British Parliament to adjudicate upon matters against a British Indian defendant. 32 Mad. 469=19 M. L.J. 457=3 Ind. Cas. 190.

——Chap. 52—Decree of Ceylon Court under summary procedure—Suit in British India on such decree—Maintainability.

A suit on a foreign judgment cannot be maintained under S. 13, C.P. Code, unless there is a judgment on merits asd no judgment is contemplated in an **ex parte** summary procedure under S. 704 and Form 19 of the Ceylon Ordinance 2 of 1889. A.I.R. (Vol. 20) 1933 Mad. 544=38 M. L.W. 232=144 Ind. Cas. 22 (2).

CEYLON ORDINANCE (14 OF 1891).

——Notice of prior unregistered deed—Effect on priority.

In Ceylon, mere notice of a prior unregistered instrument is not of itself sufficient evidence of fraud so as to deprive a person registering of the priority conferred by law as laid down by the Ceylon Ordinance 14 of 1891. A.I.R. (Vol. 23) 1936 P.C. 259=165 Ind. Cas. 417 (P.C.).

CEYLON ORDINANCE (10 OF 1931).

——Scope—If retrospective.

Ceylon Ordinance (10 of 1931) defining the law relating to Muslim intestate succession, donations and charitable trusts, is not retrospective in operation. A.I.R. (Vol. 20) 1933 P.C. 49=143 Ind. Cas. 170.

CEYLON PENAL CODE.

——S. 386—Criminal misappropriation—Trustee—Hypothecary action—Private arrangement between trustee and defendants—Offence.

A was one of the trustees of the marriage settlement of **H** and the trust property included a first mortgage on an estate. The interest on the mortgage having fallen into arrears, **A** and his co-trustee began an hypothecary action to enforce the mortgage. The defendants to this action were the mortgagor and certain other persons (called collectively as the syndicate) who claimed an interest in the equity of redemption of the mortgaged estate through the mortgagor. The syndicate being anxious to obtain a postponement of the hypothecary action entered into an agreement with **A** under the following terms "I understood from you at the interview you had with Mr. C.W. Peiris at my office some days ago that provided you were paid Rs. 10,000 on account of accumulated interest you would get the case to lay by for one year and that during that period the balance interest should be paid from time to time as my clients were able. Further, that you would undertake not to certify or record any payments made by my clients on account, should it become necessary for you to enforce writ for the recovery of the claim. Of course, if the amount realised by the sale of the property does not fetch the amount of your claim, then you could appropriate the moneys paid by my clients towards the deficiency."

The whole of the accumulated interest was paid to **A** on whose failure to account for the sum, the beneficiary procured the launching of a prosecution against **A** for criminal misappropriation:

Held, that the letter afforded no evidence that the moneys were paid to **A** as agent for the beneficiary or that such moneys by reason of the payment to **A** became the beneficiary's property, and that, therefore, the conviction of **A** under S. 386, Ceylon Penal Code, should be quashed. A.I.R. (Vol. 20) 1933 P.C. 7=64 M.L.J. 290=1933 Cr. Cas. 130 (2)=34 Cr.L.J. 550=143 Ind. Cas. 224 (P.C.).

CEYLON REGISTRATION OF BUSINESS NAMES ORDINANCE (6 OF 1918).

——Ss. 2 and 9—Scope—Non-registration—Effect —Right of one partner to sue another for profits.

The Ceylon Ordinance requires the names of the partners who are in the business to be stated and sent to the proper officer under the Act. But there is no provision which prohibits the unregistered business being carried on. Where there has been no compliance as to registration the partnership agreement or the transactions between the partners and third persons is void. In such a case one of the partners can sue the other for his share of the profits. 1929 M.W.N. 847.

——S. 9—Scope—Disability—Default to notify Registrar—Breach of contract with defendant in relation to other business—Right to sue, if lost.

The business, in respect of which the disablement from suing mentioned in S. 9, Ceylon Registration of Business Names Ordinance arises, is the business which the plaintiff was carrying on under a business name in respect of which he was required under the Ordinance to furnish a statement of particulars or any change in such particulars. But the default, namely, the failure to notify the change in the particulars of the business, does not deprive him of his right to sue the defendant for breach of contract made by him with the plaintiff in relation to his other business. A.I.R. (Vol. 21) 1934 P.C. 36=148 Ind. Cas. 607 (P.C.).

CEYLON TRUST ORDINANCE (9 OF 1917).

——S. 93, Proviso—Applicability and construction.

S. 93 of the Ordinance of 1917 is in the following terms: "Where a person acquired property with notice that another person has entered into an existing contract affecting that property of which specific performance could be enforced the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract. Provided that in the case of a contract affecting immovable property such contract shall have been duly registered before such official."

Held, on a question as to the construction of the final words on the section that the prior registration of the contract was a condition of the application to it of the benefit conferred by the section. The proviso applied even though the contract was incapable of registration for want of proper description. The object in the mind of the legislature in imposing such a condition even if it could be known, would not affect the meaning of the words used. 1930 M.W.N. 211=A.I.R. 1930 P.C. 214.

CEYLON WASTE LANDS ORDINANCE (1 OF 1897).

——S. 20—Scope — Dismissal of claim as out of time—Appeal.

An appeal lies to the Supreme Court, Ceylon, from an order dismissing a claim under the Waste Land Ordinance as out of time. 225 Ind. Cas. 94 =1946 A.L.J. 372=1946 O.A. (P.C.) 166=1946 A.W.R. (P.C.) 166=A.I.R. 1946 P.C. 135 (P. C.).

——S. 24—Applicability—Chena lands—Presumption of ownership of Crown—Words "which can only be cultivated after intervals of several years" —Construction of.

Chena lands are jungle lands subjected to periodic cultivation by means of burning down the jungle and then growing some grain crop upon the site. After this crop has been grown the land relapses once more into jungle until the period has come when it can again be profitably burned and the process of cultivation resumed. The character and quality of Chena lands must be determined by the actual use of the land itself and not by its potential possibilities. Land which is Chena land cannot be taken out of the category merely by evidence to show that by another method of cultivation, by the application of other processes in other hands, it might be cultivated in a different way. 1 Sup. Ct. Cir. 26 Foll. The expression "Which can be only cultivated after intervals of several years" has no application to Chenas. The section means that such enumerated head stands alone and unqualified and the last of these is the "other lands which can only be cultivated after intervals of several years." 4 Ceylon N.L.R. 135 and (8 Ceylon N.L.R. 265 Approved. (1922) 1 A.C. 262= A.I.R. 1921 P.C. 173.

——Chalgeni tenure—Presumption. See LAND TENURE.

CHAMPARAN AGRARIAN ACT (1 OF 1918).

——S. 4—Rent noted in Record of Rights—Finality of.

In proceedings under S. 4 of the Act, the Asst. Settlement Officer recorded in the Schedule, the rent before the enhancement, the new rent, and also ordered the new rent mentioned in the schedule to be noted in the Record of Rights. **Held,** there was a decision as to the amount of rent which had become final and its correctness could not be contested in a Civil or Revenue Court. The decision of the authority prescribed under S. 4 (3) (a), is final under the Act, with respect to the matters contained therein but not with respect to any questions other than those referred to in S. 4. (1920) Pat. 4=4 Pat.L.J. 312=50 Ind. Cas. 857.

CHAMPERTY.

See CONTRACT ACT, S. 23.

CHANDAWAND.

See CUSTOM (PUNJAB).

CHARGE.

See (1) CR. P. CODE, Ss. 221 to 240.
(2) DEED—CONSTRUCTION.
(3) HINDU LAW—WIDOW.
(4) MORTGAGE.
(5) T. P. ACT, Ss. 55, 58, 95 and 100.

——Creation—Essentials.

Where a fund is indicated out of which a specified liability is to be met, a charge is created. A. I.R. (Vol. 24) 1937 All. 424=1937 A.L.J. 348= 1937 A.L.R. 594=1937 All.W.R. 284=169 Ind. Cas. 836.

——Creation — Hypothecation of present and future book debts as security for payment—Effect of.

Hypothecation of all the book debts, present and future, as security for default in payment on demand, of the balance of account due, creates a valid charge on, or to use the term familiar in English law, assignment of, the future book debts of the debtor. Nothing, however, passes to the assignee until the property comes into present existence. A.I.R. (Vol. 25) 1938 Rang. 426=1938 Rang.L. R. 480=179 Ind. Cas. 541.

——Equitable charge—Company—Agreement with Banian—Banian undertaking to collect bills and pay dues—Equitable charge for advances.

Where under an agreement the banian was to collect all moneys due to the company and to see that the company's dues were properly credited: **held,** that the banian had a valid equitable charge for his advances on the outstanding bills due to the company. 34 C.W.N. 570.

——Equitable charge—Building on another's land —Owner encouraging construction—Charge on land for cost of building.

Where **X** raises a superstructure on the land belonging to **Y** with the knowledge of **Y** and **Y** without the slightest protest on his part encourages **X** to lay out his monies on the construction, an equity arises in favour of **X** and he is entitled to a charge on the property in respect of the monies expended by him. A.I.R. (Vol. 30) 1943 Mad. 373=56 M.L.W. 116=1943 M.W.N. 113=(1943) 1 M.L.J. 203=I. L. R. (1943) Mad. 794=210 Ind. Cas. 180.

——Maintenance—Decree charging property for amount awarded—Option of decree-holder—Right to proceed against other property.

Where there is a charge created on a particular property by a decree for the amount decreed as maintenance, it is open to the decree-holder to proceed either as against that property or other property of the judgment-debtor. Whenever any property is charged for any decretal amount the option stands with the plaintiff to proceed either against the property charged or against other property or properties of the judgment-debtor. A.I.R. 1951 Sau. 18.

CHARGE TO JURY.

See CR. P. CODE, Ss. 297-307.

CHARITABLE BEQUEST.

——Bequest to poor relatives and dependants and servants. **See** HINDU LAW—WILL. 31 C. 166.

CHARITABLE ENDOWMENTS ACT (6 OF 1890).

——Claim against Committee—Enforcement—Suit against Secretary alone—Decree—Executability against Committee.

There is no justification for suing the Secretary alone in respect of a claim which is directed against the Committee as a whole. The mere fact that the Secretary is described in the plaint as "**ex officio** Secretary of the King's Unani Hospital Committee" would not be sufficient to enable the plaintiff to execute against the Committee any decree which might be granted in his favour. 26 O. C. 333=80 Ind. Cas. 495=A.I.R. 1924 Oudh. 128.

——S. 14—Scope—Suit in defiance of trust based on title paramount to settlor's.

Suit for property alleged to be vested in the Treasurer of Charitable Endowments is maintainable, where settlor is alleged to have only a life interest based on a title paramount to the settlor's. The Act has nothing to do with a case where the claim is made in defiance of the trust and on a title paramount to the settlor's. 2 Luck. 507=29 O.C. 176=3 O.W.N. Sup. 56=96 Ind. Cas. 47=13 O. L.J. 762=A.I.R. 1926 Oudh 431.

——Charitable Trusts—Cypres doctrine—Application to charity provided by Parsi donor. **See** CYPRES. 9 Bom.L.R. 1203.

CHARITABLE AND RELIGIOUS TRUSTS ACT (14 OF 1920).

——Applicability—Conditions.

In order to bring the matter within the purview of Charitable and Religious Trusts Act, the points which must be established are the same as the requirements of S. 92, C.P. Code. A.I.R. (Vol. 28) 1941 Nag. 317=1941 N.L.J. 396=I. L. R. (1942) Nag. 468=197 Ind. Cas. 602.

——Applicability—"Public purposes"—Trust mainly for worship of idol and incidentally for feeding sadhus and wayfarers.

For Act 14 of 1920 (Charitable and Religious Trusts Act) to apply to a trust, the trust must be substantially for public purposes. It is not sufficient if one of the purposes of a trust is public. A mere provision for the service of **sadhus,** occasional guests and wayfarers in a dedication to an idol does not render the dedication substantially for public purposes.

Where the main purpose of the trust is making provision for the due worship of the idol and performance of the necessary ceremonies, the feeding of **sadhus** and giving hospitality to occasional guests and wayfarers is inevitable. Where the worship of an idol is carried on, these duties are regarded in a sense as part of the due worship of the particular god. A.I.R. (Vol. 30) 1943 Pat. 135=21 Pat. 815=9 B.R. 273=206 Ind. Cas. 214.

——Applicability—"Public purpose"—Muhammadan wakf—Charity if public or private—Test—Intention of wakif.

The Charitable and Religious Trusts Act, 1920, applies only to those cases where the entire benefit under the **wakf** in trust is allotted to public purposes and not where the purpose of the trust is partly public and partly private. The Courts have to look to the real substance of the trusts. The question to be decided is whether the dedication in favour of the poor relations of the creator, destroyed the public nature of the trust. The intention of the **wakif** has to be taken into consideration in this behalf. That intention has to be gathered from the **wakfnama** itself. The test whether a charity is public or private is to see whether the class benefited is one which extends to a substantial body of the public. The extensiveness of the nature of the charity has to be kept in view in applying the test. A.I.R. (Vol. 24) 1937 Cal. 313 =173 Ind. Cas. 453.

——Applicability—"Public purpose".

Where a substantial portion of the profits of the endowed property is earmarked for the support and maintenance of certain specified individuals who are also the relations of the settlor and the remaining portion for public of Shia community, the wakf is not wholly for public purposes and the

Acts 14 of 1920 and 42 of 1923 are not applicable to it. A.I.R. 1929 Oudh 225 (F.B.), Rel. on. 119 Ind. Cas. 365=A.I.R. 1930 Oudh 53.

——Applicability—"Public charity"—Provision for sadabarat—Contributions towards marriages and education of Brahman children—Nature of.

A Hindu lady executed a deed of trust whereby she settled her properties by way of private gifts to relations, to friends, to Brahmans and Pandas and to others; there were gifts to the adopted boy too. In addition to these by Cl. 3 of the document she provided for maintenance and Puja of the deity of Thakurji, for public alms or food called sadabarat, for contribution towards the marriages and education of Brahman children. The lady called these as "religious and charitable purposes".

Held, that the charity referred to in the document undoubtedly meant public charity within the meaning of S. 2.

Held, further, that the trust created by Cl. 3 is not a private trust and comes well within the purview of Charitable and Religious Trusts Act, 1920. 23 Bom. 659, Foll.; 8 Bom. 432 and 34 All. 468, Rel. on. 10 P.L.T. 677=A.I.R. 1929 Pat. 723.

——Applicability—"Public purpose"—Grant of law to Mahant of temple and his heirs as occupancy tenants—No right of transfer—Grant to last so long as temple would be in existence—No condition of income being devoted to expenses of the temple—If public trust.

The Settlement Officer gave a Mahant and his heirs rights as occupancy tenants without a right of transfer, without any condition as to the purposes to which the income of the land was to be devoted, without any reference to their being Mahants of a particular temple and without suggesting that the temple was to benefit from their possession. There were no conditions requiring the Mahant and his successors to devote any portion of the income towards the expenses of the temple. They were granted the property subject only to the condition that they might retain it so long as the temple was in existence.

Held, that the grant was not a grant to the temple, but a grant to an individual on the condition that he satisfied certain expenses of the temple from the income of the property granted, and the land given by the settlement decree was not wakf property given for religious or charitable purpose and Act 14 of 1920 was not applicable.

Wazir Hasan, J.—The essence of a trust for a public or religious purpose lies in its characteristic of permanency. The possibility of such a trust cannot be conceived in a tenure where the tenure can come to an end on default or even on the exercise of a volition on the part of the trustee. Where the right of occupancy which the plaintiff's predecessor had obtained in the lands in suit from the settlement Court is liable to be extinguished altogether in the event of non-payment or refusing to pay rent to the superior proprietor, the case is not one of trust falling within the purview of Act 14 of 1920. A.I.R. 1924 P.C. 109 and 5 Cal. 438 (P.C.), Foll. 3 Luck. 392=108 Ind. Cas. 98=5 O.W.N. 50=A.I.R. 1928 Oudh 241.

——Applicability—Mussalman Wakf Act—Distinction.

A trust covered by the provisions of the Charitable and Religious Trusts Act of 1920 is not to be so wide in its purpose as a wakf under the Mussalman Wakf Act of 1923. The Act of 1923 deals with a trust by a person professing the Mussalman faith whatever its purpose, public or private, or partly public and partly private. On the other hand, the Act of 1920 covers such trusts only as are created or exist for a public purpose only. 6 O.W.N. 316=117 Ind. Cas. 739=4 Luck. 429=A.I.R. 1929 Oudh 225 (F.B.).

——Constitution of trust—Essentials for.

To constitute a trust "created or existing for a public purpose of a charitable or religious nature" within the meaning of the Act, the author or authors of the trust must be ascertained, and the intention to create a trust must be indicated by words or acts with reasonable certainty. Moreover, the purpose of the trust, the trust property, and the beneficiaries must be indicated so as to enable the Court to administer the trust if required. A.I.R. (Vol. 32) 1945 Sind 57=I.L.R. (1945) Kar. 40.

——Constitution of trust—Essentials for.

To constitute a trust "created or existing for a public purpose of a charitable or religious nature" within the meaning of the Charitable and Religious Trusts Act the author or authors of the trust must be ascertained, and the intention to create a trust must be indicated by words or acts with reasonable certainty. Moreover, the purpose of the trust, the trust property, and the beneficiaries must be indicated so as to enable the Court to administer the trust, if required:

Held, on facts and evidence that the institution and property attached to it was not the subject-matter of a trust for a public purpose of a charitable or religious nature. A.I.R. (Vol. 25) 1938 P.C. 195=1938 O.L.R. 309=1938 A.L.R. 502=4 B.R. 673=42 C.W.N. 1013=48 M.L.W. 62=1938 O.W.N. 693=65 I.A. 252=67 C.L.J. 540=(1938) 2 M.L.J. 228=40 P.L.R. 829=1938 M.W.N. 885=19 P.L.T. 712=1938 A.L.J. 799=40 Bom.L.R. 907=I.L.R. (1938) Lah. 453=32 S.L.R. 821=175 Ind. Cas. 459 (P.C.).

——Construction and scope—Mussalman Wakf Act (42 of 1923), if to be considered—Acts, if mutually exclusive.

The Charitable and Religious Trusts Act (14 of 1920) was passed earlier and was applicable to persons of all creeds, whereas the Mussalman Wakf Act of 1923 was confined to Mussalmans only. The general Act has laid down certain provisions which are applicable to all trusts. The mere fact that the two Acts contain provisions which are overlapping would not necessarily justify an inference that the two Acts should necessarily be mutually exclusive. An examination of the two Acts shows that there is really no contradiction. The later Act is a special Act intended to apply to wakfs of the Mussalmans, which has more stringent provisions and can, in no way, derogate from the provisions of the earlier Act. There is no justification for trying to interpret the earlier Act of 1920 in the

light of the later Act, which was intended to be applicable to one particular community only. It is true that the later Act deals with **wakfs** whether for purposes public, private, or partly private and partly public; but it does not follow that the earlier Act must deal with only such public trusts as are created by deeds in which there are no provisions for private purposes. A.I.R. (Vol. 24) 1937 All. 786=1937 A.L.J. 1183=1938 A.L.R. 46=I.L.R. (1938) All. 1=1937 A.W.R. 373=172 Ind Cas. 945.

——Creation of trust—Essentials for.

In order that a trust of a religious and charitable nature may be valid and enforceable according to law, certain material matters must be ascertainable. In the first place, it is material to ascertain the author or authors of the alleged trust. Next the intention to create a trust must be indicated by words or acts with reasonable certainty. The purpose of the trust, the trust property and the beneficiaries must be indicated in such a way that the trust could be administered by the Court if the occasion arose.

A trust deed was executed by certain members of the Central Council Radha Swami Satsang and the objects of the trust were that "the trustees named above or those that may be appointed hereafter to succeed them, all of whom will hereafter be called 'trustees', shall collect, preserve, administer, and if necessary, alienate the properties, moveable or immovable, that have been or may hereafter be dedicated to the Supreme Being, Radha Swami Dayal, or that may be acquired for or presented to the Radha Swami Satsang and its branches in accordance with such directions as may, from time to time, be issued in this behalf by the said Council or the Sant Sat Guru for the time being, if any who is recognised as the representative of the Supreme being, Radha Swami Dayal, and as such is the sole matter of all moveable and immovable properties of the aforesaid Satsang, provided that **Samadhs** and places of public worship of the Radha Swami Satsang shall at no time be alienated":

Held, (i) that the deed could not be treated as a title deed creating a legal trust;

(ii) that according to the tenets of the Radha Swami religion, and in consideration of the position and authority of the Sant Sat Guru, the complete and absolute submission of his followers to him and the teachings and doctrines, the followers of the true faith when making their gifts to the "Sant Sat Guru," whom they regarded as their spiritual head (whether he was the incarnation of the Supreme Being or only his representative) in accordance with the mandates of their religion, could not be supposed to have intended to create any trust and it could not be said that the donors of the gifts were the authors of the alleged public trust;

(iii) that the provisions in the deed were wholly inconsistent with any intention on the part of the "Sant Sat Guru" for the time being to alter his position as "Sant Sat Guru" or to divest himself of the control of the property and to create a trust for a public purpose of a charitable or religious nature, such as it contemplated by Act 14 of 1920, but on the other hand, the regulations relating to the Central Council and the provisions of the so-called "trust" deed were inconsistent with a desire on the part of the Sant Sat Guru to obtain the assistance of some of his followers in the management of the property, which was increasing as the years passed;

(iv) that in view of the essential and unalterable doctrines of the faith with respect to the "Sant Sat Guru," his supremacy and his controrl over the offerings, by which the properties were acquired, it would be difficult to arrive at the conclusion that it was ever intended that such a truust as is contemplated by Act 14 of 1920, should be created

[Doctrines, principles and tenets of the Radha Swami religion discussed.] A.I.R. (Vol. 22) 1935 P.C. 97=1935 O.W.N. 627=61 C.L.J. 285=39 C.W.N. 865=1935 M.W.N. 625=69 M.L.J. 1=1935 A.L.J. 775=42 M.L.W. 188=37 Bom.L.R. 567=57 All. 330=62 I.A. 146=155 Ind. Cas. 409 (P.C.).

——Jurisdiction of District Judge—Application for accounts—Decision as to nature of property—Res judicata.

The Charitable and Religious Trusts Act of 1920 authorises the District Judge to decide the question, whether the property is or is not devoted to public religious or charitable purposes. This, however, is only in order to enable him to determine whether he would or he would not order the respondents to file accounts. The proceedings are of a summary nature and do not fall within the definition of a suit, nor does the decision operate as **res judicata**. A.I.R. (Vol. 21) 1934 Lah. 771=36 P.L.R. 13=16 Lah. 85=154 Ind. Cas. 229.

——S. 2—Function of District Judge—Court, if subordinate to High Court.

In the cases under Charitable and Religious Trusts Act, Judge acts as a Court of law and therefore under S. 3, C. P. Code, District Judge's Court is a Court subordinate to the High Court. 51 All. 957=121 Ind. Cas. 267=1929 A.L.J. 911=A.I.R. 1929 All. 581.

——S. 3—Jurisdiction of District Judge—Muslim trust property—Mussalman Wakf Act, S. 12.

The Charitable and Religious Trusts Act applies to all trusts created for public purposes of a charitable and religious nature without any distinction of the caste or creed of the author of the trust. This is one of the enactments saved by S. 12 of the Mussalman Wakf Act. The District Judge, has, therefore, jurisdiction to entertain and decide an application under S. 3 of the Charitable and Religious Trusts Act for an order calling upon the trustees of a Muslim trust property to furnish accounts. I.L.R. (1947) Nag. 538=A.I.R. 1948 Nag. 183=1947 N.L.J. 299.

——S. 3—Applicability—Constructive trust—Deed comprising several trusts some public and some private—If falls within section.

Section 3 applies to a deed which contains more than one trust, one of which may be a trust for a public purpose of a charitable or religious nature and the other for a private purpose. The words 'constructive trust" in S. 3 further show that the

trust to which the Act applies need not be an express trust for a public purpose, but it would apply also to a trust which, on the construction of the deed of trust, may be held to be a trust created for a public purpose of a charitable or religious nature. A.I.R. (Vol. 23) 1936 All. 411=1936 A.L.J. 546 =1936 A.L.R. 536=1936 A.W.R. 420=163 Ind. Cas. 234.

——S. 3—Applicability—Grant for upkeep of "Idgah"—Caretaker maintaining himself out of income—If ceases to be public trust.

A grant does not to cease to be a public grant for charitable and religious purposes as contemplated by Act XIV of 1920, merely because the caretaker maintains himself out of the income of the grant. The maintenance of the caretaker of a charitable or religious institution is a legitimate expenditure in the interest of the institution itself.

A grant of **maufi** land in the interest of the Muslim community for the maintenance of an **"Idgah"** in which 'Id' prayers are held is a public grant, and the mere fact that the **mutawalli** is maintaining himself out of the income of the property granted does not make it a private grant or a conditional grant. The fact that in the settlement papers the **maufi** land is recorded in the name of the caretaker is not in any way inconsistent with the existence of grant for **Idgah.** Such a grant cannot possibly be turned into a private grant merely by the wrongful acts of the caretakers or **mutawallis** in dealing with it as a private property without any protest from the Muslim community. I.L.R. (1947) Nag. 538=A.I.R. 1948 Nag. 183=1947 N.L.J. 299.

——S. 3—Applicability—Public trust—Some income allotted for purposes not public—Effect—Character of trust.

If the trust is in substance a trust for public purposes, then even though part of the income might have been specifically allotted to purposes which cannot be regarded as public, the trust would nevertheless be for public purposes. On the other hand, if the trust is substantially for private purposes, then even though a small and negligible amount may be set apart for public purposes either in the present time or in a future eventuality, the trust in itself would not be for public purposes. But where under the same deed either a specified part of the property, for example, a defined share in property, or a specified part of the income has been definitely set apart for public purposes, then the mere fact that any other part of the property or any other specified part of the income is for private purposes would not take the case out of the provisions of the Charitable and Religious Trusts Act. A.I.R. (Vol. 24) 1937 All. 786= 1937 A.L.J. 1183=1938 A.L.R. 46=I.L.R. (1938) All. 1=1937 A.W.R. 873=172 Ind. Cas. 945.

——S. 3—Applicability—Public trust or endowment—Essentials.

To constitute a valid public trust or endowment there must be proof of a grant with the intention that the profits should be utilised for the services of the idol, and that the members of the family of the founder had not treated the property as their own personal property, the income of which could be applied for their own personal benefit. A.I.R. (Vol. 22) 1935 Oudh 96=1934 O.L.R. 890=152 Ind. Cas. 861=11 O.W.N. 1435.

——S. 3—Applicability to wakfs—"Trust", meaning of—Denial that wakf is a trust—Jurisdiction of District Judge.

Religious endowments created for public purposes of a charitable or religious nature either by Hindus or by Muhammadans are not trusts in the strict sense of the term as understood in English law. The term 'trust', as used in Act 14 of 1920 and in other Acts of the Legislature, does not bear the strict English significance and is indiscriminately used to signify endowments for religious and charitable purposes.

The District Judge has, therefore, jurisdiction to proceed under the Charitable and Religious Trusts Act, 1920, in respect of a **wakf** the bulk of the income of which is devoted to public and charitable purposes.

Where the opposite party does not deny that there is a **wakf** but only denies that they are trustees and that the **wakf** is a trust within the meaning of Act 14 of 1920, it is open to the District Judge to proceed under that Act. A.I.R. (Vol. 18) 1931 Pat. 354=10 Pat. 506=12 P.L.T. 793=134 Ind. Cas. 417.

——S. 3—Applicability — Trust by Muslim—Trust partly private and partly public—If "public."

Where a trust is of a public nature any person having an interest in the said trust is entitled to make the application contemplated by S. 3, Charitable and Religious Trusts Act of 1920, but he is not so entitled if the purpose of the trust created by a Mahomedan is partly public and partly private. In the latter case his remedy lies to make an application under S. 4 of the Act of 1923. 6 O.W.N. 316=117 Ind. Cas. 739=4 Luck. 429=A.I.R. 1929 Oudh 225 (229) (F.B.).

——S. 3—Applicability—Wakf for benefit of specified kindreds, dependants and others—If trust for public purpose.

The signification of "charity" is very wide in the Mahomedan law generally and it is wider in the Imania law. Provision for the maintenance of one's kindred, dependants, servants and persons occupying similar position in relation to the wakif is "charity" in the eyes of a Mahomedan law and a wakf made in favour of any such person or class of persons is a valid wakf. But it cannot be said according to the same law that every wakf made for the benefit of a specified person or class of persons including persons and class of persons of the character described above is a trust for a "public purpose". 6 O.W.N. 316=117 Ind. Cas. 739=4 Luck. 429=A.I.R. 1929 Oudh 225 (F.B.).

——S. 3, Cl. (2)—Audit of—Direction as to accounts—Power of Court.

Under S. 3, Cl. (2), Charitable and Religious Trusts Act, the Court is enabled to direct the examination and audit of the accounts, in whosoever's hands the funds or the properties of the

trust may be, quite apart from whether he is a trustee or not. A.I.R. (Vol. 25) 1938 Pat. 280 =4 B.R. 622=19 P.L.T. 639=175 Ind. Cas. 636.

——S. 3—Construction—'Interest in trust'—Meaning of.

Words "having an interest in trust" must in each case depend upon the nature of the trust. 50 All. 880=111 Ind. Cas. 129=26 A.L.J. 1379 =A.I.R. 1928 All. 758.

——S. 3—"Construction" — Person interested—Meaning of.

Members of the general public who worship at religious institution are persons interested in the public trust for the purposes of Act 14 of 1920. A.I.R. (Vol. 21) 1934 Lah. 949=36 P.L.R. 162 =155 Ind. Cas. 620.

——S. 3—Construction — "Public purpose"—Meaning of—Test—Intention of creator.

The words "public purpose" in S. 3 of the Act of 1920 should not be interpreted in such a sense as to allow a trust which is created or exists for a public purpose in its substance and essence though supplemented by an illusory or wholly trifling provision, the purpose of which may not be public or may be even private to be taken out of the provisions of the Act of 1920. The real substance of the trust and the primary intention of the creator of the trust must be looked at in every case. 6 O.W.N. 316=117 Ind. Cas. 739=4 Luck. 429=A.I.R. 1929 Oudh 225 (F.B.).

——S. 3—Parties—Person claiming adversely to trust.

In proceedings under the Act a person who has claims adversely to the trust and who is liable under S. 3 is not a proper party. 78 Ind. Cas. 174 =A.I.R. 1925 Cal. 537.

——S. 3—Right to apply—Person interested—Secretary of public institution if person having interest in Dharmasala.

A Secretary of a public institution is a person who has an interest in a Dharmasala created by a trust instrument, inasmuch as he is entitled to stay in the Dharmasala and as Secretary of a public institution, and can ask for accounts from the trustee of the Dharmasala. 50 All. 880=111 Ind. Cas. 129=26 A.L.J. 1379=A.I.R. 1928 All. 758.

——S. 3—Revision—Order under—If open to.

Revision lies against an order passed under S. 3 of the Charitable and Religious Trusts Act. A.I.R. (Vol. 25) 1938 Oudh 262=1938 O.W.N. 1054=1938 O.L.R. 467=178 Ind. Cas. 167.

——S. 3—Revision—Order under—If revisable—C. P. Code, S. 115—Punjab Courts Act (6 of 1918), S. 44.

The provisions of S. 115, C. P. Code and S. 44, Punjab Courts Act, are very wide and an order of the District Judge under S. 3, Charitable and Religious Trusts Act should be revisable.

A mosque was built with public subscriptions and was used by the Muhammadan public for offering prayers. In fact the respondent **mutawalli** who was a party to a certain compromise relating to this very mosque admitted therein that it was a "religious trust" within the meaning of S. 3, Act 14 of 1920:

Held, that the mosque was a public trust and that an application under S. 3, Charitable and Religious Trusts Act, calling upon the respondent to furnish certain information should be decided on merits. A.I.R. (Vol. 23) 1936 Lah. 695=38 P.L.R. 900=17 Lah. 768=165 Ind. Cas. 664 (1).

——S. 3—Scope—Dedication to idol—Nature of trust—Registered instrument—Necessity.

There can be a trust in the case of dedication of property to an idol, though it is not the exact kind of trust which is contemplated by the English law. None the less they are trusts though of a special and peculiar kind. These are the sorts of trusts which the Charitable and Religious Trusts Act is intended to cover.

A dedication of property to an idol is not a gift and it can be accomplished without a registered instrument. A.I.R. (Vol. 28) 1941 Nag. 317= 1941 N.L.J. 396=I.L.R. (1942) Nag. 468=197 Ind. Cas. 602.

——S. 3—Scope of inquiry—Finality of decision.

Application under S. 3—District Judge holding that trust was public one and ordering furnishing of accounts—Order is a decision in a summary proceeding and is not revisable. A.I.R. (Vol. 29) 1942 Oudh 387=1942 O.W.N. 337=200 Ind. Cas. 611.

——S. 3—Scope of inquiry—Proceedings—Nature of—Decision, if operates as res judicata.

The decision of the District Judge under the Charitable and Religious Trusts Act—a decision from which by S. 12 there is no appeal—is a decision in a summary proceeding which is not a suit nor of the same character as a suit; it has not been made final by any provision in the Act; and the doctrine of **res judicata** does not apply so as to bar a regular suit even in the case of a person who was a party to the proceedings under the Act.

The existence of a public trust is the foundation of the proceedings authorised by S. 3 of the Act; **prima facie** while the District Judge may have to come to a decision upon this point in order to satisfy himself on the question of his own jurisdiction, he cannot, by an erroneous decision thereon give himself jurisdiction. No matter how long or how peaceably an individual may have been in possession and enjoyment of property, it is always possible for persons claiming to be acting for the public to lay claim to the property a having been impressed with a trust of a charitable or religious nature. It would be both drastic and anomalous to provide that a person in possession, if not willing to bring a suit to establish his own title affirmatively, must be content to abide without right of appeal by the decision of the District Judge in a proceeding of this character. A.I.R. (Vol. 27) 1940 P.C. 7=1939 O.W.N. 1078=6 B.R. 179= 1939 O.L.R. 729=(1940) 1 M.L.J. 1=51 M.L.W. 4=1940 M.W.N. 3=42 Bom.L.R. 190=44 C.W.N. 294=71 C.L.J. 169=15 Luck. 1=1940 Kar. (P.C.) 25 Sup.=67 I.A. 1=42 P.L.R. 457 =185 Ind. Cas. 305 (P.C.).

——S. 5—Abatement—Death of trustee—Effect of.

The right to demand accounts from an alleged trustee is a personal right available against him. That right will not survive as against his widow and daughters but will terminate by death of the trustee. A.I.R. (Vol. 31) 1944 Nag. 190=1944 N.L.J. 170=I.L.R. (1944) Nag. 775=220 Ind. Cas. 57.

——S. 5—Jurisdiction of District Judge—Trust denied by non-applicant—Order if operates as res judicata.

The provisions under the Charitable and Religious Trusts Act are wider than those under the Mussalman Wakf Act.

The jurisdiction of the District Judge to decide the question as to the existence of a trust (wakf) is not ousted by the mere denial of trust by the non-applicant or by his setting up an adverse title.

The order of the Court is passed in a summary proceeding. It does not operate as **res judicata** nor does it preclude the persons aggrieved from filing a suit. A.I.R. (Vol. 31) 1944 Nag. 190=I.L.R. (1944) Nag. 775=1944 N.L.J. 170=220 Ind. Cas. 57.

——S. 5—Res judicata—Question of title—Decision on—If conclusive—Suit in civil suit for declaration—If barred.

As there is no express provision in Act 14 of 1920 making the decision of the District Judge under S. 5 of the Act final and conclusive, that decision will not debar the party that is unsuccessful before him from filing a declaratory suit challenging the correctness of his order in a regular suit and it is for the party who seeks to oust the jurisdiction of the Civil Court to establish that contention of his. A.I.R. (Vol. 22) 1935 Oudh 96=11 O.W.N. 1435=1934 O.L.R. 890=152 Ind. Cas. 861.

——S. 5—Revision—Order under—Right of suit—Revision—C. P. Code, 115.

A decision under the Charitable and Religious Trusts Act is a decision in a summary proceeding which is not a suit and it is not made final by any provision in the Act. It is open for the party aggrieved by the order to file a suit impeaching the order or to raise the question by way of defence in a suit filed by the opposite side. The High Court will be reluctant to interfere with such an order in revision as another remedy is open to the aggrieved party. It cannot however be laid down that in no case a revision from an order passed under the Act interference is permissible. I.L.R. (1947) Nag. 538=A.I.R. 1948 Nag. 183=1947 N.L.J. 299.

——S. 5—Res judicata — Order under—Regular suit to establish title—If barred.

An order passed by the District Judge under S. 5 of the Act does not debar the opposing party from filing a regular suit afterwards to establish his title. A.I.R. (Vol. 21) 1934 Bom. 343=36 Bom.L.R. 687=58 Bom. 623=152 Ind. Cas. 781.

——S. 5—Revision—Order under—If open to revision.

An application for revision lies against an order passed under S. 5, Charitable and Religious Trusts Act. A.I.R. (Vol. 23) 1936 All. 411=1936 A.L.J. 546=1936 A.L.R. 536=163 Ind. Cas. 234.

——S. 5—Scope — Trespass—Remedy of mutwalli—Suit or application.

Limitation is a matter of procedure and the Limitation Act, 1908, applies to immovables made **wakf** under the Muhammadan Law. The remedy of the **mutawalli** against a person claiming adversely to trust is to file a suit for ejectment and recovery of mesne profits against the trespasser and not an application under the Act. A.I.R. (Vol. 31) 1944 Nag. 190=1944 N.L.J. 170=I.L.R. (1944) Nag. 775=220 Ind. Cas. 57.

——S. 5—Scope—Permission granted for suit—Trustee not filing suit—Order against trustee—Right of latter to bring regular suit to declare that property is not trust property.

Per **Niamatulla, J., (Mukerji, J., contra).**—Where the alleged trustee fails to institute a suit for which permission is granted to him under S. 5, and consequently an order against him is passed by the District Juduge, a regular suit by him for declaration that the property is held by him in private ownership or in the alternative that it is not held in trust which is governed by Act 14 of 1920, is maintainable. 1929 A.L.J. 653=118 Ind. Cas. 513=51 All. 805=A.I.R. 1929 All. 506.

——S. 5 (1)—Parties—Management of temple vested in archakas—Latter if necessary parties.

Where the management of the temple is by the vote of the majority of the archakas it is absolutely necessary under S. 5 (1) for a petitioner under S. 3 to make all the archakas respondents to his petition and for the Court to serve a copy of the petition together with notice of the date fixed for the hearing of the petition on each of these archakas or trustees. A.I.R. 1925 Mad. 135.

——S. 5 (1) and (5)—Jurisdiction of District Judge—If taken away by Madras Hindu Religious Endowments Act.

The Madras Hindu Religious Endowments Act of 1927 does not take away the jurisdiction of the District Judge to take action under the Charitable and Religious Trusts Act in respect of a religious endowment.

The fact that the Madras Hindu Religious Endowment Board had shown no inclination to exercise its powers under the Madras Hindu Religious Endowments Act is a good reason for the District Judge for taking action under the Charitable and Religious Trusts Act. A.I.R. (Vol. 22) 1935 Mad. 56 (1)=40 M.L.W. 920=68 M.L.J. 55=152 Ind. Cas. 1052.

——S. 5 (3)—Burden of proof—Suit by shebait—Shebait in possession—Owners.

Where the **shebaits** of an idol bring a suit under S. 5 (3), Charitable and Religious Trusts Act for a declaration that the Act did not apply to the properties and the properties are admittedly in possession of the **shebaits** on behalf of the idol, onus is on the party alleging that the property is trust property held for public purposes. A.I.R.

(Vol. 30) 1943 Pat. 135=21 Pat. 815=9 B.R. 273 =206 Ind. Cas. 214.

——S. 5 (3) and (4)—Scope—Undertaking to file suit not given—Decision of question by District Judge—If without jurisdiction—Revision—C. P. Code, S. 115.

In a case when no such undertaking to institute a suit for a declaration, as referred to in S. 5 (3) of the Act is given, sub-Cl. (4) of the section applies and the Court shall itself decide the question. The section thus in terms gives the Court of the District Judge jurisdiction to decide the question whether the trust is one to which the Act applies. Where, therefore, the District Judge so exercises a jurisdiction vested in him by law and there is no illegality, or material irregularity, no application under S. 115, C. P. Code, against his order shall be entertained. A.I.R. (Vol. 25) 1938 Oudh 262=1938 O.L.R. 467=1938 O.W.N. 1054=178 Ind. Cas. 167.

——S. 5 (6)—Scope and effect—Petition under S. 3—Claim adverse to trust, if ousts jurisdiction of Court.

It is not the intention of S. 5 (6), Charitable and Religious Trusts Act, that the moment a claim adverse to the trust is advanced, the jurisdiction of the Court should be ousted. If a person claims to hold adversely to the trust, it is open to him to take advantage of the concession given to him by S. 5, sub-S. (3), and to get the question determined by a regular suit. If he does not claim this concession, or if, having claimed it, he does not avail himself of it, the Court must decide for itself whether a trust exists. But the Court is precluded from trying or determining any question of title between the petitioner and the party claiming adversely to the trust. A.I.R. (Vol. 21) 1934 Bom. 343=36 Bom.L.R. 687=58 Bom. 623=152 Ind. Cas. 781.

——S. 6—Construction and scope—"If a trustee without reasonable cause fails to comply"—Meaning and effect of.

The terms of S. 6 of the Act are intended to define the consequences of an order made by the District Judge directing the persons to furnish particulars of the property, etc., but the words "if a trustee without reasonable excuse fails to comply" in S. 6 cannot be read to exclude a contention in a regular suit that the plaintiff is not a trustee or to prevent a similar contention being raised by a defendant to a suit under S. 92 of the C. P. Code. A.I.R. (Vol. 27) 1940 P.C. 7=1939 O.W.N. 1078=6 B.R. 179=1939 O.L.R. 729=(1940) 1 M.L.J. 1=51 M.L.W. 4=1940 M.W.N. 3=42 Bom.L.R. 190=44 C.W.N. 294 =71 C.L.J. 169=15 Luck. 1=67 I.A. 1 =I.L.R. (1940) Kar. (P.C.) 25=42 P.L.R. 457=185 Ind. Cas. 305 (P.C.).

——S. 6—Jurisdiction of District Judge—Failure to comply with order under S. 5 (5)—Effect—Suit for breach of trust under S. 6—Power to grant reliefs under S. 92 (1), C. P. Code.

When the order of the District Judge for filing of accounts under S. 5, Charitable and Religious Trusts Act, had not been complied with there is a breach of trust, by virtue of S. 6, which could be made the basis of a suit under S. 92, C. P. Code. Once such a suit is filed the District Judge has jurisdiction to grant any or all the reliefs mentioned in S. 92 (1), C. P. Code. A.I.R. 1930 All. 582.

——S. 6—Powers of Court—Order for accounts for whole period of trusteeship—Competency.

Where a regular suit under S. 92, C. P. Code, is instituted on the basis of S. 6, Charitable and Religious Trusts Act, Court has jurisdiction to order a trustee to render accounts for the whole period of his trusteeship, if such accounts have not been rendered before. A.I.R. 1930 All. 582.

——S. 6—Scope—Disobedience of order of District Judge to produce accounts—Suit under S. 92, C. P. Code—Sanction of Advocate General, if necessary.

Under S. 6 of the Charitable and Religious Trusts Act once the breach referred to in that section is committed by the disobedience of an order passed by the District Judge for production of accounts, a suit so far as it is based on such disobedience may be instituted under S. 92, without the sanction of the Advocate-General and it is not necessary that the suit under S. 92 should be instituted only by the person who secures the order from the District Court:

If the plaintiff who has obtained permission under S. 6 of the Act to institute a suit under S. 92, C. P. Code, drops out, it is open to the other plaintiffs who had joined with him in instituting the suit to proceed with the suit. A.I.R. (Vol. 20) 1933 Mad. 854=1933 M.W.N. 1286=65 M.L.J. 690=38 M.L.W. 730=57 Mad. 153=146 Ind. Cas. 628 (2).

——S. 7—Application by trustee—If "case".

When trustee makes an application to the District Judge to obtain his opinion or advice, a case is presented before the District Judge for the decision. A.I.R. 1917 P.C. 71, Appl. 1929 A.L.J. 911=121 Ind. Cas. 267=51 All. 957=A.I.R. 1929 All. 581.

——S. 7—Power of Court—Advice of Court not followed by trustee—Power to compel compliance.

Under S. 7 of the Charitable and Religious Trusts Act a trustee is entitled to seek the opinion, advice or direction of the Court in certain matters and if he follows such advice, opinion or direction, he is protected but if he chooses not to follow it, he cannot be compelled by the Court to do so, although his failure to act according to such opinion, advice or direction would be at his own risk. I.L.R. (1949) 1 Cal. 461=52 C.W.N. 899.

——S. 7—Power of Court—Failure of trustee to comply with direction—Power to compel compliance.

It is not intended by S. 7, Charitable and Religious Trusts Act, that a District Judge should have any power to compel a trustee to follow his advice given under this section or to carry out any direction so given. The trustee is entitled to seek advice for his own protection and if he follows that advice, he is protected, but if he does not choose to follow it, he cannot be compelled to do

so, although his failure to follow it would be at his own risk.

On a dispute between two brothers, who were **mutawallis** of certain **wakf** as regards profits, the District Judge appointed a third person to manage the property. He directed the brothers to execute the power of attorney in favour of the third person, for the purposes of collection. On refusal of one of them, the District Judge himself executed the power of attorney:

Held, that the action of the District Judge was without jurisdiction and the person had no right to collect the profits at all, and if he collected them, he was liable to be called to account by the person who was entitled.

Held, also that the District Judge was acting merely on behalf of the brother and the person appointed by the Court was in the same position as he would have been if the brother had executed the power of attorney himself.

Held, further that the agent was liable to be sued for profits without the issue of any notice under S. 80, C. P. Code. A.I.R. (Vol. 23) 1936 All. 801=1936 A.L.J. 1112=1936 A.L.R. 948=165 Ind. Cas. 681.

——S. 7—Revision—Order of District Judge—If decree—Revision.

Order by District Judge on application under S. 7 cannot be treated as a decree and is not appealable. But where there has been a material irregularity in the exercise of jurisdiction and the case has certainly been decided, High Court will interfere in revision. A.I.R. (Vol. 22) 1935 All. 147=1935 A.L.J. 113=1935 A.L.R. 1064=159 Ind. Cas. 64.

——S. 7—Revision—District Judge not allowing parties to produce evidence—Material irregularity.

When an application is filed under S. 7, Charitable and Religious Trusts Act, the District Judge should not express an opinion without allowing the parties to produce evidence and without going into the points in controversy. Where he disposes of the matter without doing so, it constitutes a material irregularity in exercise of jurisdiction. A.I.R. (Vol. 22) 1935 All. 147=1935 A.L.J. 113=1935 A.L.R. 1064=159 Ind. Cas. 64.

——S. 7—Scope—Right of trustee to apply to Civil Court—Duty of Court.

A trustee of an express or constructive trust created or existing for a public purpose of a charitable or a religious nature can apply by petition to the Civil Court, within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate, for the opinion, advice or direction of the Court on any question affecting the management or administration of the trust property, and the Court shall give its opinion, advice or direction, as the case may be, thereon. A.I.R. (Vol. 22) 1935 All. 360=4 A.W.R. 111=1935 A.L.R. 481=155 Ind. Cas. 933.

——S. 19—Applicability—Suit coming to an end—Order for costs—Legality.

S. 10 of the Charitable and Religious Trusts Act is a provision which the plaintiff in a suit relating to public trust may avail of during the pendency of the suit. The Court if it is **prima facie satisfied** as to the **bona fides** of the plaintiff's suit may help him with money from the trust estate for the purpose of carrying on the litigation, which was started entirely for the benefit of the public. The section has, however, no application after the suit has ended. If the suit was carried on by the plaintiff somehow or other, and is brought to an end, the proper order to be made at that time is not under the section, but an order for costs to be embodied in the final decree, by which the successful plaintiff may be allowed, not merely the costs as between party and party but as between solicitor and client. I.L.R. (1948) 1 Cal. 315=52 C.W.N. 40.

——S. 10—Construction—Option of defendant.

The section can only mean that the option of furnishing the serurity or depositing the money rests with the defendant. The Court can order that he shall do one of these two things but it cannot specify which he is to do. The case is quite different from one where security for costs has been taken under the Code of Civil Procedure under which an order may subsequently be passed directing the person who has furnished the security to pay the costs for which security has been given and this order can then be executed against the surety under S. 145, Civil Procedure Code. But the security furnished under S. 10 of Act 14 of 1920 relates to the expenditure actually incurred or likely to be incurred by the plaintiff which is quite a different matter from the costs of the suit. The Court cannot order execution against the surety. 69 Ind. Cas. 658=A.I.R. 1924 Lah. 408.

——S. 10—Revision—Order under—If "case".

An order asking defendant to deposit money in Court under S. 10 of Act 14 of 1920 is a 'case' within S. 115 and revision lies. 69 Ind. Cas. 658 =A.I.R. 1924 Lah. 408.

——S. 12—Revision—Order of District Judge under S. 14—Revisional powers of High Court.

The acts of a District Judge under Act 14 of 1920 are open to correction by the High Court under its revisional jurisdiction exercisable under S. 115, C.P. Code Legislators were not ignorant of the existence of revisional jurisdiction in the High Court when they framed S. 12. They might have said that neither an appeal nor a revision shall lie. The omission of the word revision confirms the opinion that a revision is not shut out. 51 All. 957=121 Ind. Cas. 267=1929 A.L.J. 911=A.I.R. 1929 All. 581.

CHARITY.

See (1) CHARITABLE AND RELIGIOUS TRUSTS ACT.
(2) C. P. CODE, S. 92.
(3) CYPRES.
(4) HINDU LAW—
(i) RELIGIOUS ENDOWMENT.
(ii) WILL.
(5) MUHAMMADAN LAW—WAKF.
(6) RELIGIOUS ENDOWMENT.
(7) T. P. ACT, S. 14.

(8) TRUST.
(9) TRUSTS ACT.
(10) WILL.

CHARTER OF 1800.

See LETTERS PATENT (MAD.), Cl. 17.

CHARTER ACT (3 & 4 WILL, IV. CH. 85).

——S. 1—Interpretation—'Trust'—Meaning of.

The word 'trust' is not used in the Charter Act in its strict technical sense and it will be far-fetched to hold that because the word used is "t ust", therefore the law of trusts as strictly understood should govern the relations of the Company and the Crown. 49 Mad. 349=96 Ind. Cas. 1011=1926 M.W.N. 897=A. I. R. 1926 Mad. 706=50 M.L.J. 699.

CHARTER ACT (24 AND 25 VIC. CH. 104).

See also GOVERNMENT OF INDIA ACT, (1915), S. 107.

——S. 15—Applicability—Conditions — Interference—When justified.

To justify interference by High Court under S. 15 in a case where the Magistrate has acted in accordance with law, it must quite clearly be shown that the procedure though right in law amounts to an absolute failure of justice. 38 Cal. 24=11 Cr. L. J. 530=7 Ind. Cas. 798.

——S. 15—Applicability — Powers under—When exercised.

The power under S. 15 of the Charter Act can only be exercised in extraordinary cases and subject to the enactments of the Indian Legislature. 19 M.L.T. 364=30 M.L.J. 486=(1916) 1 M.W.N. 301=34 Ind. Cas. 372.

——S. 15—Error of law—Order of discharge by Presidency Magistrate.

There is no form of judicial injustice which the High Court, if need be, cannot reach. It would be unfortunate if it were otherwise. Injustice may equally be done where persons in fact guilty are improperly acquitted or discharged as well as where innocent persons are convicted. *Held also*, that the order of discharge by the Presidency Magistrate in the case was unsustainable. 27 C. 126; 6 C.L.J. 705, ref. to. (1908) 12 C.W.N. 678.

——S. 15—Error of Law—Presidency Magistrate's order of discharge—Revision.

S. 15 of the Charter Act gives the High Court only a limited jurisdiction. Revisional powers can be exercised under the section only in cases of non-exercise or illegal exercise of jurisdiction. A Presidency Magistrate's order of discharge cannot be revised under the section. (1907) 6 C.L.J. 705.

——S. 15—Interlocutory orders—Revision.

Under the Charter Act the High Court can revise interlocutory orders. 31 Mad. 60; 28 Mad. 28 foll. 9 M.L.T. 273=21 M.L.J. 484=(1911) 2 M. W. N. 363=9 Ind. Cas. 672.

——S. 15—Interlocutory orders—Revision.

If the High Court finds that an interlocutory order has been made without jurisdiction or under such circumstances as are likely to cause irreparable injury to one of the litigants, the High Court can set matters right under S. 15 of the Charter Act. 10 C.L.J. 407=14 C.W.N. 147=4 Ind. Cas. 364.

——S. 15—'Judgment', meaning of—Remand of case.

Where a single Judge of a High Court sets aside the decree, of the lower appellate Court, and remands the case for rehearing, it amounts to a "judgment" within S. 15 of the Charter Act inasmuch as it deals with the whole case. 13 C.W.N. 105=4 Ind. Cas. 329.

——S. 15—Jurisdiction — Contempt of Court—High Court's powers.

In dealing with cases of contempt of civil or criminal Courts, subordinate to a High Court, the High Court possesses the same jurisdiction as the old King's Bench in England but no such jurisdiction has been conferred on the High Court by virtue of section 15 of the Charter Act. 10 M.L.T. 209=21 M.L.J. 832=12 Cr.L.J. 525=12 Ind. Cas. 293.

——S. 15—Jurisdiction of High Court—Order under S. 144, Cr. P. Code, ex parte—Revision.

Where the order of a Magistrate passed *ex parte* under S. 144, Cr. P. Code directing the petitioner to abstain from obstructing Christians taking water from a well and to remove the walls put up round the well aforesaid did not disclose any emergency or want of time to serve the notice on him, the High Court reversed the order of the Magistrate. (1910) M.W.N. 354=8 M.L.T. 180=11 Cr.L.J. 449=7 Ind. Cas. 343.

——S. 15—Jurisdiction of High Court—Order under S. 145, Cr. P. Code—Interference in revision.

The High Court has no jurisdiction to interfere with an order of a Magistrate passed under S. 145, Cr. P. Code. 18 Cr.L.J. 23=5 L.W. 165=36 Ind. Cas. 855.

——S. 15—Jurisdiction of High Court—Order under S. 145, Cr. P. Code—Revision.

The High Court will not under S. 15 of the Charter Act interfere with order under S. 145 of the Cr. P. C. except where the question of the Magistrate's jurisdiction is involved or there is a gross miscarriage of justice. 26 M.L. J. 208=(1914) M.W.N. 352=16 Cr.L.J. 509=24 Ind. Cas. 597.

——S. 15—Jurisdiction of High Court—Order under Ss. 145, 445 and 139—Powers of revision.

See 6 C.W.N. 417, 469. See also 1903 A.W.N. 212=26 A. 144.

——S. 15—Powers of High Court—Letters Patent, Cls. 28 and 29—Stay order under S. 476, Cr. P. Code—Stay of proceedings pending appeal on the civil side from original decree.

The High Court has power to stay criminal proceedings taken in consequence of an order under S. 476 Cr. P. C. The power of general superintendence given by S. 15 of the Charter Act includes the power to point out to the Subordinate Court the inexpediency of trying a case when it is

likely to interfere with the due course of justice. Their Lordships stayed the criminal proceedings in a case taken in consequence of an order by a Civil Judge under S. 476, Cr. P.C., for prosecution for forgery pending an appeal from a final decree of the Civil Court against the finding of forgery. (1908) 18 M.L.J. 466=31 M. 510.

——S. 15—Powers of High Court—Interference in cases under S. 145, Cr. P. Code.

The High Court's power of interference under S. 15 of the Charter Act is discretionary and ought, in relation to cases under S. 145, Cr. P.C., to be exercised with every caution. In a case in which the Courts have proceeded with irregularity, the High Court should not interfere, unless it can be shown that some one has been materially perjudiced by such irregularity. (1905) 9 C.W.N. 1046=33 C. 68 (F. B.).

——S. 15—Powers of High Court—Issue of commission for examination of witnesses without jurisdiction—Revision. **See** C. P. CODE, S. 115. (1907) 31 M. 60=3 M.L.T. 246.

——S. 15—Powers of High Court—Transfer of proceedings, under S. 145, Cr. P. Code—Cr. P. Code, S. 526—Applicability.

Per *Ghose, J.*—The High Court has power under S. 145 of the Charter Act to transfer a proceeding under S. 145, Cr. P.C., from one Magistrate to another. It is doubtful if S. 526, Cr. P.C., applies. (1901) 28 C. 709=5 C.W.N. 749.

——S. 15—Jurisdiction to interfere—Order directing issue of Commission to examine and refusing right to examine in Court. **See** LETTERS PATENT, S. 15. 14 M.L.J. 329.

——S. 15—Sanction for prosecution—Order granting—Interference.

Practice:—Where sanction had been accorded by the Sub-Judge and confirmed by the District Judge although the High Court might not interfere under S. 622, Civil Procedure Code where the Courts below did not act illegally or with material irregularity, yet where the High Court had to consider the subject-matter of the sanction upon the merits in connection with another application by way of appeal under S. 195, Cr. P. C., with respect to the sanction of other offences on the same materials and the High Court held that the sanction accorded was not proper, the High Court might, in exercise of the powers vested in them under S. 15 of the Charter Act, set aside the sanction for the offences accorded by both Courts. (1903) 14 M. L.J. 74=27 M. 223.

——Ss. 15 and 36—Scope—Letters Patent appeal —C. P. Code, S. 575—Judgment of the affirming Judge—Decree—Appeal—Points on which the appeal should be heard. **See** 11 M.L.J. 10.

——Ss. 24 and 25—Reference to Full Bench—Point not arising in trial—If can be referred.

No point which arises before the prisoner has been called on to plead can be referred to a Full Bench inasmuch as it could not be said to have arisen in the trial. (1900) 5 C.W.N. 169=28 C. 211.

——S. 29—See Cr. P. CODE, S. 155. 26 M. 188=12 M.L.J. 391.

——S. 29 — Extraordinary jurisdiction—Decree imposing perpetual liability—Revision.

The High Court will exercise its extraordinary jurisdiction in cases where the effect of a decree of a lower Court is to impose a perpetual liability and thus affect the parties to an extent far beyond the money value of the suit. (1904) 6 Bom.L.R. 642.

——S. 39—See PRIVY COUNCIL—LEAVE TO APPEAL, 30 C. 679.

——S. 40—Leave to appeal to Privy Council—Interlocutory order—Question of jurisdiction. **See** PRIVY COUNCIL, 6 Bom.L.R. 86.

CHARTER PARTY.

See (1) BILL OF LADING.
(2) CONTRACT.
(3) MARITIME LAW.

CHASTITY.

See HINDU LAW.
(*i*) MAINTENANCE.
(*ii*) SUCCESSION.
(*iii*) WIDOW.

——Chaeating—See PENAL CODE, Ss. 413 to 420.

——Auction sale—Bidding at under assumed name —**See** PENAL CODE, S. 415. 1903 A.W.N. 231.

——Bill—False item—Payment towards—**See** PENAL CODE, S. 415. 5 C.W.N. 255.

CHELAS.

See HINDU LAW—SUCCESSION.

CHEMICAL EXAMINER'S REPORT.

See Cr. P. CODE, S. 510.

CHEQUE

See also (1) BANKER AND CUSTOMER.
(2) NEGOTIABLE INSTRUMENTS ACT.

——Payment by Banker of forged cheque—Customer's liability.

A banker cannot make his customer liable for his own payment of a forged cheque except in case of negligence imputable to the customer. 31 C. 249.

CHIEF COURT—JURISDICTION.

See (1) JURISDICTION.
(2) C. P. C., S. 115.
(3) CR. P.C., SS. 435 AND 439.

CHILD.

See (1) Cr. P. CODE, S. 488 (2).
(2) EVIDENCE ACT, S. 118.
(3) FATAL ACCIDENTS ACT.
(4) OATHS ACT, S. 13.
(5) PENAL CODE, S. 118.

CHILD MARRIAGE RESTRAINT ACT (19 OF 1929).

——Applicability—Child marriage to be performed outside British India with money from source in British India.

Application in administration suit to spend money on marriage expenses of minor plaintiff—Marriage against provisions of Child Marriage Restraint Act—Parties to marriage domiciled in Bikanir—Marriage to be performed in Bikanir—Source of income in British India. *Held*, application should not be granted as it would amount to facilitating conduct which in British India is illegal, though it would not be so in Bikaner. A.I.R. (Vol. 28) 1941 Cal. 244=194 Ind. Cas. 730.

——Applicability — Minor's estate—Marriage in contravention of Act to be performed at place where it is not prohibited—Court if can sanction expenditure.

Even assuming that the parties to the intended marriage are not British subjects and are domiciled of British India, it would surely be wrong in principle for the Court to facilitate conduct which the Legislature has made penal as being socially injurious, on the ground that the promotion of the contemplated marriage is not punishable by the law of the place where it is proposed to celebrate it. More so, when the minor's estate is in the hands of the Receiver appointed by the Court and where the property, from which the funds for the marriage are sought to be obtained, is in the hands of the Court, through its Receiver, the Court ought not to sanction it being used for a purpose, of which the Legislature has so clearly expressed its disapproval. A.I.R. (Vol. 24) 1937 Cal. 257=63 Cal. 1153=170 Ind. Cas. 309.

——Scope—Early marriage — If sanctioned by Hindu Law.

There is no rule of Hindu Law sanctioning early marriage. Sanction by usage also has been disapproved by the passing of the Act I.L.R. (1937) 2 Cal. 764=65 C.L.J. 557=41 C.W.N. 1176.

——Applicability — Invalid marriage — Performance of—Offence.

The Child Marriage Restraint Act aims at and deals with the restraint of the performance of the marriage. It has nothing to do with the validity or invalidity of the marriage. The question of the validity or invalidity of the marriage is beyond the scope of the Act. Consequently, the Act applies even where the parties to the marriage belong to the same *gotra*. A.I.R. (Vol. 23) 1936 All. 11=1935 A.L.R. 1035=36 Cr.L.J. 1483=1935 A.L.J. 1166=1936 Cr. Cas. 14=58 All. 402=158 Ind. Cas. 1007.

——Burden of proof—Failure to prove girl's age—Effect—Charge of false complaint—Maintainability.

In a prosecution under the Sarda Act, it is the duty of the prosecution to establish that the girl in question was below 14 at the time of her marriage, but for awarding compensation under S. 250, the position is the reverse. There ought to be evidence before the Magistrate for a positive finding that the complainant's allegation that the girl was below 14 at the time of her marriage was false. The mere fact that the evidence produced by the complainant in support of his allegation was unreliable or inconclusive will not justify the opposite finding that the allegation was false. In the absence of definite evidence showing the age of the girl, it is impossible to say that the complainant's allegation that the girl was below 14 at the time of her marriage is false. All that can be said is that he failed to prove his allegation. It does not necessarily follow that his allegation was false. A.I.R. (Vol. 23) 1936 All. 363=1936 Cr. Cas. 427=1936 A.L.J. 248=1936 A.L.J. 189=37 Cr. L. J. 424 (2)=161 Ind. Cas. 49.

——Scope—If extra-territorial.

The Child Marriage Restraint Act as well as the Penal Code are extra-territorial to the extent that if native Indian subjects commit offences punishable under these laws even outside British India, they are liable to be tried and punished when found in British India. A.I.R. (Vol. 24) 1937 Mad. 273 =1937 M.W.N. 22=45 M.L.W. 210=(1937) 1 M.L.J. 388=38 Cr.L.J. 587=168 Ind. Cas. 736.

——Scope—If ultra vires.

So far as Hindus are concerned the Child Marriage Restraint Act is not *ultra vires*. A.I.R. (Vol. 20) 1933 Pat. 471=14 P.L.T. 438=1933 Cr. Cas. 1027 =35 Cr.L.J. 20=146 Ind. Cas. 298.

——Scope—Validity of marriage not affected.

A distinction must be observed between the performance of the act and the act itself. The Child Marriage Restraint Act aims at the restraint of the solemnization of child marriages. It does not affect the validity of the marriages after they have been performed. A.I.R. (Vol. 26) 1939 All. 340=1939 A.L.J. 173=1939 A.W.R. 246=182 Ind. Cas. 568.

——Scope—Validity of marriage—If affected.

It is true that the celebration of marriage of child of 12-13 years contravene the provisions of the Child Marriage Restraint Act of 1929; but such marriage is not declared by the Act to be invalid. The Act merely imposes certain penalties on persons bringing about such marriages. A.I.R. (Vol. 23) 1936 All. 852=1936 A.L.J. 1097=1937 A.L.R. 90=38 Cr.L.J. 301=1936 Cr. Cas. 1111=166 Ind. Cas. 847.

——S. 3—Scope—Possession of wife below 14 years, by force—Husband's right.

To obtain the benefit of exception in S. 89, Penal Code, it is necessary to show that the Act was for the benefit of the minor wife not attaining age of puberty—Husband desiring to take her possession presumably for purpose of sexual intercourse—Act is not for her benefit—It is against the policy of Act 19 of 1929 that a husband should obtain possession of his wife, if she has not attained the age of 14 years. Although for husband to take his wife would not be an offence, he has no legal right to cause injury, fear, and annoyance to her by using criminal force and his right can be enforced by having recourse to the Court, and not by use of force. A.I.R. (Vol. 22) 1935 All. 916=1935 Cr. Cas. 1133=1935 A.L.J. 1096=1935 A.L.R. 1078=37 Cr.L.J. 35=17 L.R. A.Cr. 30=159 Ind. Cas. 183.

——S. 4—Procedure — Summary trial—Whether permitted —Cr. P. Code, Ss. 260 (1) (a), 4 (1) (o).

A trial under the Child Marriage Restraint Act may be summary, as it is permitted by S. 260 (1) (a), Criminal P. C., as the offences charged come under the heading "offences not punishable with imprisonment for a term exceeding six months". Section 4 (1) (o), Criminal P. C., states that "offence" means any act or omission made punishable by any law for the time being in force. Therefore, an offence under any law such as the Child Marriage Restraint Act will come under this provision in S. 260 (1) (a), Cr.P.C. A.I.R. (Vol. 21) 1934 All. 331=1934 A.L.R. 387=35 Cr.L.J. 677 (2)=1934 Cr. Cas. 414 (2)=148 Ind. Cas. 351.

——S. 4—Proof of age—Certificate by private medical officer that girl is 14 years of age—Civil Surgeon finding the girl to be only 12 years old—Which prevails.

Where in a case under the Child Marriage Restraint Act, the defence put forward was that the applicants were misled by a certificate granted by the woman medical officer in charge of a hospital to the effect that the girl was not less than 14 years of age, but according to the Civil Surgeon, the girl was about 12 years of age only and no evidence was produced to contradict the Civil Surgeon:

Held, that the applicant should have gone to the Civil Surgeon in order to obtain a certificate and that the fact of their having secured a certificate from the woman medical officer was not material although the existence of the certificate was a matter which might be taken into account in considering whether imprisonment or fine should be ordered. A.I.R. (Vol. 21) 1934 All. 331=1934 A.L.R. 387=35 Cr.L.J. 677 (2)=1934 Cr. Cas. 414 (2)=148 Ind. Cas. 351.

——S. 4—Sentence—Deterrent sentence.

Obiter.—The Courts are not at liberty to treat the Act as a legislative imposture and manifestly, if it is to be effective, the sentence upon the priest or other celebrant without whose aid ordinarily no infringement of the Act is possible, should be such as to deter other avaricious members of his caste from following his example. A.I.R. (Vol. 20) 1933 Pat. 471=1933 Cr. Cas. 1027=14 P.L.T. 438=35 Cr.L.J. 20=146 Ind. Cas. 298.

——Ss. 4, 5 and 6—Scope—Absence of previous sanction to Bill—If renders Act ultra vires—Government of India Act, 1915 (5 & 6 Geo. V, Ch. 61) S. 67 (2) (b).

Where the mother of a *Rajput* girl of seven years of age, the bridegroom and the priest who conducted the marriage were convicted under Ss. 6 4 and 5, Child Marriage Restraint Act, respectively and in revision it was urged that the Act was *ultra vires* of the Indian Legislature, previous sanction of the Governor-General in Council not having been given to the Bill as passed:

Held, that the contracting parties in the case being *Rajputs* who were unquestionably Hindus of high caste they came within the scope of the original Bill; and that it was safe to hold that the changes introduced in the Select Committee were not such as to render inadequate the "previous sanction" accorded by the Governor-General or the introduction of the Bill unlawful. A.I.R. (Vol. 20) 1933 Pat. 471=14 P.L.T. 438=1933 Cr. Cas. 1027=35 Cr.L.J. 20=146 Ind. Cas. 298.

——S. 5—Applicability—Applying for permission to hold music and fire-works on occasion of marriage—Offence.

Merely applying for permission to the Municipal Board for conducting festivities like *nach* with music and fireworks on the occasion of a marriage does not amount to "performing, conducting or directing a child marriage." It is a sort of act that might be done by any servant or agent of the parents of the children to be married and clearly does not amount to an offence under S. 5. A.I.R. (Vol. 23) 1936 Oudh 311=12 Luck. 263=1936 O.W.N. 480=1936 O.L.R. 254=37 Cr.L.J. 616=1936 Cr. Cas. 712=162 Ind. Cas. 389 (2).

——S. 5—Applicability — Participation in child marriage performed beyond British India—Offence.

Section 5 of the Child Marriage Restraint Act takes account only of performing, conducting or directing a child marriage, that is to say, the actual marriage ceremony itself, and not of any negotiation, preparation or any other preliminary acts.

Section 3 of the Penal Code postulates that before any person can be tried in British India for an offence committed beyond British India, there must be in existence a law making him liable to be so tried. The contraction of a child marriage outside British India is not an offence under the Child Marriage Restraint Act, since there is no provision in the Act nor in any application of any part of the Penal Code that participating in such a marriage is an offence when committed outside British India. A.I.R. (Vol. 25) 1938 Nag. 235=39 Cr.L.J. 651=I.L.R. (1939) Nag. 241=175 Ind. Cas. 615.

——S. 5—Interpretation — "Perform, conduct or direct" child marriage.

The words 'perform, conduct or direct' in S. 5 Marriage Restraint Act bear the same import and mean working towards the end, that is completing the union; and are used by the Legislature to indicate the solemnization of the marriage. That is the ordinary interpretation of those words. They do not suggest the arranging of marriage merely or attending a marriage ceremony with a view to assisting in the solemnization of the marriage. The mere participation by parents in the ceremoney of *kanyadan* would not offend against the provisions of S. 5. A.I.R. (Vol. 27) 1940 Bom. 363=42 Bom.L.R. 857=I.L.R. (1940) Bom. 709=42 Cr.L.J. 62=190 Ind. Cas. 794.

——S. 5—Jurisdiction—Court at place where Tilak ceremony was performed—Jurisdiction—Cr. P. Code, Ss. 177, 179 and 182.

Where the accused are not charged with the commission of an offence by reason of having performed the *Tilak* ceremony, nor can the marriage be properly called a "consequence" of the *Tilak* ceremony, for the offence of performing, conducting or directing the child marriage under S. 5, Child Marriage Restraint Act. Ss. 179 and 182, Criminal P.C., do not apply and the case is not triable in the place where the *Tilak* ceremony took place, inasmuch as for

the purpose of S. 5 of the Act, it is only the marriage ceremony that has to be considered and it is quite immaterial where or when or by whom the *Tilak* ceremony was performed. A.I.R. (Vol. 21) 1934 All. 829 (1)=35 Cr.L.J. 1175 (1)=1934 A.L.J. 681=L.R. 15 A. 160 Cr.=192 Cr. Cas. 1012 (1) =150 Ind. Cas. 993.

——S. 5—Offence—Consummation of marriage, if necessary for completion.

The fact, that the *Gauna* ceremony has not been performed does not affect the performance of the marriage, which is complete as soon as the ceremony of the marriage is performed. Consummation is not a part of the marriage ceremony. A.I.R. (Vol. 23) 1936 All. 11=58 All. 402=1935 A.L.R. 1035=36 Cr.L.J. 1483=1935 A.L.J. 1166=1936 Cr. Cas. 14=158 Ind. Cas. 1007.

——S. 5—Parents—Duty of.

Section 5 applies only to the solemnization of marriage by persons other than parents and hence S. 6 alone applies to parents who promote a child marriage or permit it or negligently fail to prevent it. A.I.R. (Vol. 24) 1937 Mad. 490=1939 M.W.N. 212=45 M.L.W. 437=38 Cri.L.Jour 594=I.L.R. (1937) Mad. 854=1937 M.Cr.C. 73=168 Ind. Cas. 723.

——S. 5—Purohit—Duty of—Proof of enquiry and bona fide belief—Necessity.

Section 5 contemplates that the person who solemnizes a marriage must make some reasonable enquiry as to the ages of the parties to the marriage and satisfy himself that neither of the participants is a child. It is not enough if he merely looks at the bride and the bridegroom and forms his own opinion. He must know that it is difficult to judge by appearance and the law casts upon him the duty of making reasonable enquiry before he can claim to have had reason to believe that neither the bride nor the bridegroom was a child. A.I.R. (Vol. 24) 1937 Mad. 490=1937 M.W.N. 212=45 M.L.W. 437 =38 Cri.L. Jour 594=I.L.R. (1937) Mad. 854=1937 M.Cr.C. 73=168 Ind. Cas. 723.

——S. 5—Scope—If covers fathers of both bridegroom and bride, if covered.

Section 5 is wide enough to cover the case of the fathers of both the bridegroom and the bride. A. I. R. (Vol. 23) 1936 All. 11=58 All. 402=1935 A.L.R. 1035=36 Cr.L.J. 1483=1935 A.L.J. 1166 =1936 Cr. Cas. 14=158 Ind. Cas. 1007.

——S. 5—Scope—If extra-territorial — Marriage contracted outside British India—Offence—Applicability of S. 188, Cr. P. Code.

The Child Marriage Restraint Act contains no provision similar to S. 4, Penal Code, and before S. 188, Criminal P. C., can be applied for trial of an offence under the Act, the prosecution must prove that the Act makes penal a child marriage performed outside British India. The Act is limited in its operation to British India and only strikes at marriages contracted in British India. Therefore the child marriage contracted outside British India is not an offence under the Act, and if it is not an offence under the Act, there is no offence to which S. 188 Criminal P. C., can apply. A.I.R. (Vol. 22) 1935 Bom. 437=37 Bom.L.R. 885=1935 Cr. Cas. 1305 =37 Cr.L.J. 211=59 Bom. 745=159 Ind. Cas. 923.

——Ss. 5 and 6—Applicability—Advancing money for marriage of child—Offence.

Advancing money to enable an infant to marry in violation of the Act is not by itself punishable and does not bring the creditor within the mischief of the Act. I.L.R. (1939) 2 Cal. 764=65 C.L.J. 557=41 C.W.N. 1176.

——Ss. 5 and 6—Applicability and scope of—Parent or guardian of minor contracting party—Punishment—If can be under both sections.

Where a Hindu parent or guardian takes part in a child marriage, he must be deemed to have done an act to promote the marriage, to have permitted the solemnization of the marriage or to have negligently failed to prevent the solemnization and is liable to punishment only under S. 6 of the Child Marriage Restraint Act and not for two offences under Ss. 5 and 6 respectively.

Section 5 of the Act should not be construed so broadly as to include the bridegroom and the parent or guardian of a minor contracting party. The section applies to persons other than the contracting parties to the marriage and the parent or guardian of a minor contracting party. A.I.R. (Vol. 19) 1932 Nag. 174=28 N.L.R. 302=1932 Cr. Cas. 909 =34 Cr.L.J. 311=142 Ind. Cas. 277.

——Ss. 5 and 6—Offence under—Essentials.

In cases of complaints under Ss. 5 and 6 of the Child Marriage Restraint Act, it is essential that the trying Magistrate should find definitely that either or both of the contracting parties to the marriage were infants within the meaning of the Act, that is to say, that the bridegroom was under the age of 18 or that the bride was under the age of 14. A.I.R. (Vol. 26) 1939 Cal. 288=40 Cr.L.J. 605=181 Ind. Cas. 916.

——Ss. 5 and 6 (1)—Offence under Act committed in British India, by Native Indian subject —Accused, if guilty.

The Child Marriage Restraint Act is a penal statute and, under its provisions, whoever offends against those provisions commits a crime. Such a statute is, of course, applicable to all such crimes committed in British India. The fact that the persons accused are foreigners makes no difference even if such an act is not an offence in the foreign place. This matter can be considered in mitigation of punishment. (1936) 163 Ind. Cas. 147=39 C.W.N. 656=37 Cr.L.J. 757.

——Ss. 5 and 6—Scope—If extra-territorial—Marriage celebrated outside British India under mistake of fact—Offence—Cr. P. Code, (1898), Ss. 186 and 188.

A mistake of fact can be pleaded successfully only if on account of such mistake an act which otherwise would be an offence ceases to be an offence.

The Penal Code as well as the Child Marriage Restraint Act are extra-territorial to the extent, that native Indian subjects commit offences punishable under these laws even outside British India, they are liable to be tried and punished when found in British India. Where a child marriage is celebrated under a mistaken view that the territory where it was celebrated was outside

British India the mistake of fact does not have the effect of rendering the celebration of the child marriage in question innocuous or innocent. The Child Marriage Restraint Act, 1929, can pursue them even when they have broken that law after going outside British India, and *a fortiori* after going to a place which they believed to be not part of British India but is really part of British India, A.I.R. (Vol. 24) 1937 Mad. 273=1937 M.W.N. 22=45 M.L.W. 210=(1937) 1 M.L.J. 388=38 Cri.L. Jour. 587=168 Ind. Cas. 736.

——S. 6—Abetment of offence under Act—Prosecution for—Legality.

There can be no doubt that although the Child Marriage Restraint Act of 1929 makes no mention of abetting, yet under the provisions of the Penal Code, it is possible for there to be a prosecution for abetting an offence although the accused is not the father of one of the parties who is under age so long as the other party is below the prescribed age. A.I.R. (Vol. 22) 1935 Pat. 474=16 P.L.T. 629 =1935 Cr. Cas. 1175=2 B.R. 164=37 Cr.L.J. 227 =160 Ind. Cas. 116.

——S. 6—Intention to give child in marriage—Offence—'Unlawful purpose.'—Penal Code, S. 361—Exception.

An intention to give a child in marriage in contravention of Act 19 of 1929 is an 'unlawful purpose' within the exception to S. 361, Penal Code, on the ground that if the purpose is carried out the person giving the child in marriage is liable to conviction and punishment for a criminal offence. A.I.R. (Vol. 20) 1933 Rang. 98=34 Cr. L.J. 696 =1933 Cr. Cas. 573 (2)=11 Rang. 213=143 Ind. Cas. 872 (F.B.).

——S. 6—Applicability—Mother of bridegroom—Liability of.

Where the mother of the bridegroom had no authority by law to prevent the marriage, her mere participation in the marriage cannot be regarded as constituting an offence punishable under S. 6 of the Act which is confined only to the person who has actual charge of the minor either as parent or as guardian at the time. A.I.R. (Vol. 24) 1937 Mad. 490=1937 M.W.N. 212=45 L.W. 437=38 Cr.L.J. 594=I.L.R. (1937) Mad. 854=1937 M.Cr.C. 73 =168 Ind. Cas. 723.

——S. 6—Applicability—One party a minor—Case if falls under section.

The expression "when a minor contracts a child marriage" used in S. 6 is wide enough to cover a case of a marriage to which both parties are minor as well as to one to which one party is a minor. A.I.R. (Vol. 19) 1932 Nag. 174=28 N.L.R. 302= 1932 Cr. Cas. 909=34 Cr.L.J. 311=142 Ind. Cas. 277.

——S. 6—Applicability—Parents of bridegroom—Liability of.

Section 5, applies only to the solemnization of marriage by persons other than parents and hence S. 6 alone applies to parents who promote a child marriage or permit it or negligently fail to prevent it. The parents of the bridegroom cannot be convicted under S. 6 merely because the bride was under 14 years and they can be convicted, if at all under S. 6 only if the bridegroom that is their own son who was in their charge was under 18 years at the time of the marriage. A.I.R. (Vol. 24) 1937 Mad. 490 =1937 M.W.N. 212=45 L.W. 437=38 Cr.L.J. 594 =I.L.R. (1937) Mad. 854=1937 M.Cr.C. 73=168 Ind. Cas. 723.

——S. 6—Applicability—Promotion of marriage performed outside British India—Offence.

Section 6 has reference only to the promotion of a marriage referred to in Ss. 4 and 5, that is to say, a marriage that is prohibited. As such marriage is not prohibited when performed outside British India, the promotion of such marriage cannot be made punishable under the Child Marriage Restraint Act itself. A.I.R. (Vol. 25) 1938 Nag. 235=I.L.R. (1939) Nag. 241=39 Cr.L.J. 651=175 Ind. Cas. 615.

——S. 6—"Complaint".

Complaint not inculpating complainant—Magistrate deputed for local investigation—In his report, Magistrate recommending prosecution of complainant also under S. 6:

Held, that the report constitute a complaint and the District Magistrate could take cognizance on it. A.I.R. (Vol. 20) 1933 Pat. 87=13 P.L.T. 791 =34 Cr.L.J. 237=141 Ind. Cas. 810.

——S. 6—Duty of Courts.

In a case under the Act under which the Police can take no action and the Legislature has in a sense made the members of the public litigants under it, Courts should not apply strictly the principles with regard to setting aside of acquittals. A.I.R. (Vol. 22) 1935 Pat. 474=16 P.L.T. 629=1935 Cr. Cas. 1175=37 Cr.L.J. 227=2 B.R. 164=160 Ind. Cas. 116.

——S. 6—Proof of age.

Certificate of birth of a person is conclusive evidence of his age so long as it is not disproved by evidence of the party denying its correctness. A.I.R. (Vol. 22) 1935 Pat. 474=16 P.L.T. 629=1935 Cr. Cas. 1175=37 Cr. L. J. 227=2 B.R. 164=160 Ind. Cas. 116.

——S. 6—Scope—Father alive and in charge of daughter—Conviction of grandfather—Legality.

When the father is alive and is presumably in charge of the daughter, it cannot be held that the grandfather has also charge of her. Hence the conviction of the grandfather for the marriage of the daughter in contravention of the Act is bad. A.I.R. (Vol. 32) 1945 All. 306=1945 A.W.R. (H. C.) 67=1945 A.L.J. 232=I.L.R. (1945) All. 272=47 Cr.L.J. 43=221 Ind. Cas. 47.

——S. 6—Scope—Permission of lawful marriage—Offence.

Section 6 only aims at permitting or failing to prevent a marriage which is made penal under the earlier sections, and does not impose a penalty for permitting a marriage which is lawful. A.I.R. (Vol. 22) 1935 Bom. 437=37 Bom.L.R. 885=1935 Cr. Cas. 1305=37 Cr. L.J. 211=59 Bom. 745=159 Idn. Cas. 923.

——S. 8—Jurisdiction—Additional District Magistrate.

An Additional District Magistrate who has been given all the powers of a District Magistrate is

empowered to try a case under the Child Marriage Restraint Act also. A.I.R. (Vol. 24) 1937 Mad. 637 =1937 M.W.N. 321=45 L.W. 435=(1937) 1 M.L.J. 498=38 Cr.L.J. 664 (2)=I.L.R. (1937) Mad. 1034=169 Ind. Cas. 71.

——(as amended by Act XIX of 1938), Ss. 8 and 9—Scope—Jurisdiction of First Class Magistrate—Limitation of one year—If affected by Repealing Act of 1942.

Though under S. 8 of the Child Marriage Restraint Act as it stood originally, only a District Magistrate had jurisdiction, jurisdiction having been extended by the Amending Act (19 of 1938) to First Class Magistrates the latter continue to have jurisdiction under the Act, notwithstanding the repeal of the Amending Act by the Repealing Act of 1942. Section 4 of the Repealing Act (25 of 1942) embodies a saving clause which saves the incorporation of the words "Magistrate of the First Class" in S. 8, which was effected by the repealed Act. Likewise, the limitation of one year incorporated by S. 9 of the repealed Act of 1938, also remains in spite of the Repealing Act of 1942. I.L.R. (1947) Nag. 80=A.I.R. 1947 Nag. 79=1946 N.L.J. 460=47 Cr.L.J. 794=225 Ind. Cas. 624.

——Ss. 8 and 10—Scope—Issue of process without holding enquiry—Legality.

A preliminary enquiry is absolutely necessary before the Court can take cognizance of an offence under the Child Marriage Restraint Act. Section 10 of that Act is very clear on the point and the provisions of it are mandatory. Hence the issue of process in a case under S. 8 without holding an enquiry under S. 10 is unauthorized by law and must be set aside. A.I.R. (Vol. 26) 1939 Mad. 530=49 L.W. 552= 1939 M.W.N. 411=(1939) 1 M.L.J. 900=40 Cr.L.J. 818 (1)=183 Ind. Cas. 581.

——S. 9—Cognizance—Certificate under S. 188, Cr. P. Code—If condition precedent.

Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Thus, it occurs as soon as he reads the complaint and even before he examines the complainant which he is bound to do. Having taken cognizance he proceeds to enquire into the charge.

Hence, a Magistrate has jurisdiction to take cognizance under S. 9 of the Child Marriage Restraint Act before certificate is obtained under S. 188 of the Criminal P. C.; the taking of cognizance is an action which is prior to and independent of the enquiry into the charge, so that the Court may have jurisdiction to take cognizance, although it has no jurisdiction to enquire into the charge before certificate required by S. 188, Criminal P. C., is obtained. A.I.R. (Vol. 27) 1940 Nag. 245=1940 N.L.J. 304 =41 Cr.L.J. 645=I.L.R. (1942) Nag. 193=188 Ind. Cas. 606.

——S. 9—Scope—Applicability of—Limitation Act, S. 14.

Section 14 Limitation Act does not apply to a complaint under S. 9. A.I.R. (Vol. 26) 1939 Mad. 512=49 M.L.W. 547 (1)=1939 M.W.N. 315 =(1939) 1 M.L.J. 775=40 Cr.L.J. 816 (1)=183 Ind. Cas. 595.

——(as amended in 1938), S. 9—Scope if repealed by Repealing Act of 1942—Limitation for complaint. See CHILD MARRIAGE RESTRAINT ACT, Ss. 8 and 9. 25 Ind. Cas. 624.

——S. 10—"Complaint"—Case sent by Magistrate to police, for investigation—Letter by such officer to Magistrate held not "complaint".

When a Police Officer investigates a non-cognizable case under the orders of a Magistrate, the report which he makes, at the end of his investigation, is of the same nature as a report made under S. 157, Criminal P. C., and such a report being a police report is not a "complaint," though if a Police Officer acting without instructions from a Magistrate reports a non-cognizable offence to a Magistrate with a view to the Magistrate taking action, this is a complaint.

An offence under S. 5 of the Child Marriage Restraint Act, XIX of 1929, being punishable only with simple imprisonment up to one month or a fine of Rs. 1000 or both, under Schedule 3, Criminal P.C., is not cognizable; so when such a case is forwarded to an Assistant Superintendent of Police for investigation a letter written on behalf of the Assistant Superintendent of Police to the District Magistrate is a "police report" and not a "complaint." A.I.R. (Vol. 25) 1938 Rang. 257=1938 Rang.L.R. 150= 39 Cr.L.J. 776=176 Ind. Cas. 694.

——S. 10 — Non-compliance — Issue of process without enquiry—Legality.

Section 10 is mandatory and, therefore, the issue of process in a case under S. 8 without holding an enquiry under S. 10 is unauthorised by law. A.I.R. (Vol. 26) 1939 Mad. 530=49 M.L.W. 552=1939 M.W.N. 411=(1939) 1 M.L.J. 900=40 Cr.L.J. 818 (1)=183 Ind. Cas. 581.

——S. 10—Procedure—Transfer of case—When illegal.

Transfer of case under S. 10 to Sub-Divisional Magistrate for disposal according to law without an inquiry under S. 202, Criminal P. C., is illegal. A.I.R. (Vol. 26) 1939 Mad. 294=48 M.L.W. 774 =1938 M.W.N. 1312=(1939) 1 M.L.J. 111=40 Cr. L. J. 514 (2)=180 Ind. Cas. 902 (1).

——S. 10—Scope—Absence of inquiry—Effect.

The omission to hold a preliminary inquiry under S. 202, Criminal P. C., vitiates the later proceedings. A.I.R. (Vol. 27) 1940 Sind 213=I.L.R. (1940) Kar. 442=42 Cr.L.J. 83=191 Ind. Cas. 123.

——S. 10—Scope — Non-compliance—If fatal —Court of competent jurisdiction taking cognizance and deciding case—No injustice occasioned—Defect is curable under S. 537.

It is proper in revision to send a case back for correction of an illegality such as an omission to hold preliminary enquiry provided under S. 10, Child Marriage Restraint Act in a case under that Act, when that can be done before the case is tried, but after judgment has been delivered the position is different. It would be harassing then to remand the case and start proceedings with a preliminary enquiry all over again. Where a Court of competent jurisdiction had taken cognizance of the offence and decided the case without any objection being raised, the mere omission to comply with S. 10, Child Marriage

Restraint Act, is an irregularity of procedure only although it is non-compliance with a mandatory provision of law and when it has not occasioned any failure of justice it is curable under S. 537, Criminal P. C. The High Court will not in such a case interfere under S. 439, Criminal P. C. A.I.R. (Vol. 27) 1940 Nag. 375=1940 N.L.J. 224=I.L.R. (1940) Nag. 488=42 Cr.L.J. 37=190 Ind. Cas. 838.

——S. 10—Scope—Omission to hold preliminary inquiry—Validity of trial.

A Court taking cognizance of an offence under the Child Marriage Restraint Act, is bound to hold a preliminary inquiry before directing the issue of process for the attendance of the accused and an omission to comply with this mandatory provision of the Act is an illegality which vitiates the trial. A. I. R. (Vol. 18) 1931 Lah. 56 (1)=31 P.L.R. 945 =32 Cr.L.J. 616=12 Lah. 383=1931 Cr. Cas. 120 (1)=130 Ind. Cas. 783 (2).

——S. 10—Scope—Preliminary inquiry—Duty of Magistrate to hold.

The Court taking cognizance of an offence under the Child Marriage Act is bound to hold a preliminary inquiry before taking further action unless it dismissed the complaint under S. 203, Cr. P. Code. The failure to hold a preliminary inquiry will vitiate the trial. 31 P.L.R. 945.

——S. 10—Scope—Preliminary enquiry—If condition precedent.

Under S. 10 the Court taking cognizance of an offence under this Act is bound to hold a preliminary enquiry before taking further action unless it dismisses the complaint under S. 203 of the Criminal P. C. A.I.R. (Vol. 21) 1934 Lah. 155=1934 Cr. Cas. 333 =15 Lah. 63=35 P.L.R. 8=35 Cr.L.J. 1436 =151 Ind. Cas. 830 (1).

——S. 10—Scope—Preliminary inquiry—Omission to hold—Accused making no objection—Result of trial going against him—Subsequent technical objection—Permissibility.

The object of S. 10 is that no one should be harassed by a prosecution under the Act until a Magistrate has satisfied himself by inquiry that there is a *prima facie* case against him. The object of the preliminary enquiry is, therefore, to inquire whether there is a *prima facie* case or not. If the accused objects to being tried until a preliminary inquiry is made, the Magistrate must make such an inquiry, and if he proceeds in disregard of the objection of the accused, his order would be set aside. But where the accused makes no objection to the trial, he cannot, when the result has gone against him, showing that there was not only a *prima facie* case against the accused, but there was a substantive case against the accused, benefit by an objection which is entirely technical in its nature. A.I.R. (Vol. 26) 1939 Pat. 525=20 P. L. T. 495=40 Cr.L.J. 887 (1)=6 B.R. 24=184 Ind. Cas. 230.

——S. 11 (1)—Bond not taken—Omission to record reason—Irregularity—If cured by Cr. P. Code, S. 537.

The provision contained in S. 11 (1) is imperative and where the Magistrate has not recorded any reason why the complainant was not required to execute a bond, a material irregularity is committed and this irregularity cannot be cured by anything contained in S. 537, Criminal P. C. and the conviction of the accused is liable to be set aside for this reason. A.I.R. (Vol. 20) 1933 Cal. 433 (1)=34 Cr.L.J. 554 =37 C.W.N. 626=1933 Cr. Cas. 705 (1)=143 Ind. Cas. 279.

——S. 11—Bond not taken—Omission to record reasons—If vitiates proceedings.

Ordinarily the District Magistrate ought under S. 11 to record in writing his reasons for exempting the complainant from liability to execute a bond, but where the complaint is by a Judicial Officer, omission to record reasons for not requiring him to execute a bond cannot be held to vitiate the proceedings. A. I. R. (Vol. 20) 1933 Pat. 87=13 P.L.T. 791=34 Cr.L.J. 237=1933 Cr. Cas. 211 (2)=141 Ind. Cas. 810.

——S. 11—Security found defective—Trial, if vitiated.

The mere fact that the security bond under S. 11, Child Marriage Restraint Act which was *prima facie* sufficient was afterwards found to be defective does not vitiate the trial. A.I.R. (Vol. 23) 1936 Oudh 311=1936 O.W.N. 480=1936 O.L.R. 254=37 Cr. L. J. 616=1936 Cr. Cas. 712=12 Luck. 263=162 Ind. Cas. 389 (2).

——S. 12—Scope—Powers of Court—Proceeding for appointment of guardian—Injunction against father preventing marriage of child.

Where a relation of the mother of a girl applied to be appointed the guardian of the girl and obtained an injunction against the father of the girl restraining him from giving her in marriage in contravention of the provisions of the Child Marriage Restraint Act, and the father gave the girl in marriage notwithstanding the injunction and it was contended on behalf of the father that the Court had no jurisdiction to issue the injunction and that he did not receive any notice of the injunction before the marriage:

Held, that the father was entitled to an opportunity to prove that he had not received the notice before the marriage.

Quaere:—Whether the Court has jurisdiction in a proceeding under the Guardians and Wards Act to issue an injunction restraining the father from giving the girl in marriage. A.I.R. (Vol. 19) 1932 Cal. 719=137 Ind. Cas. 425.

CHILD WITNESS.

See (1) EVIDENCE ACT, S. 118.
(2) OATHS ACT, S. 13.

——Children Ordinance of Trinidad and Tobago (Revised Ordinance) (1940), S. 2—Applicability —Conditions.

Section 2 applies only in cases where there is no specific provision to the contrary in Trinidad law. It refers mainly to rules about hearsay, corroboration and the like and does purport to make the provisions of an English statute a Master Code which automatically nullifies the express law enacted for Trinidad and Tobago. A.I.R. (Vol. 33) 1946 P.C. 79=1946 M.W.N. 182=47 Cr.L.J. 639=224 Ind. Cas. 534.

CHIN HILLS REGULATION (V OF 1896).

——S. 4—Interpretation—"So far as persons other than Chins"—Meaning of — Proceedings under S. 488, Cr. P. Code —Nature of.

(An application under S. 488, Cr. P. Code, canno. be regarded as a proceeding of a civil nature within S. 12 although the failure to maintain a child is not a criminal offence.) Cl. 1 of S. 4 is qualified by Cls. 4 and 5. The words "so far as regards persons other than Chins" in S. 4 (i) must be construed as meaning "so far as regards liabilities imposed by law on persons other than Chins." 25 Cr.L.J. 111=76 Ind. Cas. 111=4 U. B. R. 169=A.I.R. 1925 Rang. 140.

——S. 10—Jurisdiction of Rangoon High Court—Revision in proceedings from Chin Hills—Forum.

The Rangoon High Court has no power of revision in proceedings from Chin Hills, whatever the nationality of accused or the law under which he has been or should be tried. The High Court in revision is the Court of the Commissioner. A.I.R. (Vol. 28) 1941 Rang. 332=1941 Rang.L.R. 555 =43 Cr.L.J. 258=197 Ind. Cas. 734.

——S. 34-A—Applicability—Offence by Chinaman in Chin Hills—Conviction—Law applicable.

A Chinaman committing an offence in Chin Hills, which falls under S. 34-A of the Regulation, should be convicted under the Excise Act and not under the Chin Hills Regulation. A.I.R. (Vol. 28) 1941 Rang. 332=1941 Rang.L.R. 555=43 Cr. L.J. 258=197 Ind. Cas. 734.

——S. 34-A—Construction—"Whoever", meaning of.

Though S. 34-A begins with the word "whoever," that wording merely refers to any person who commits an offence punishable under the Regulation. A.I.R. (Vol. 28) 1941 Rang. 332=1941 Rang. L.R. 555=43 Cr.L. 258=197 Ind. Cas. 734.

——Ss. 34-A, 3 and 4—Manufacture and possession of liquor—If two offences.

Where the accused is found in possession of liquor manufactured by him he need not be charged with and convicted of two offences for, the offence of manufacture necessarily includes the possession of the article manufactured. It would be otherwise where the accused is not found manufacturing but only in possession of apparatus for manufacturing plus the article manufactured. A.I.R. (Vol. 28) 1941 Rang. 332=1941 Rang.L.R. 555=43 Cr.L.J. 258 =197 Ind. Cas. 734.

CHIT FUND.

——Bond by subscriber for payment of future instalments—Collapse of kuri—Starter's right to enforce terms of bond—Construction of bond.

A security bond executed by a prize winner in a chit fund must be construed in the light of the rules of the fund and not as if it created an independent debt payable by instalments. The obligation undertaken by it is not re-payment of the benefit already received as if it were a debt but the payment of future subscriptions. Whether the continuance of the chit is a condition precedent for enforcing the liability under the bond or not will not depend merely on the terms of the bond but must be decided with reference to the surrounding circumstances including the rules of the chit fund; and for this purpose a distinction may have to be drawn between cases in which benefited subscribers cease to have any share in the profits arising out of future drawings and cases in which they continue to share in such profits. A.I.R. (Vol. 23) 1936 Mad. 985=1936 M.W.N. 1370=44 M. L.W. 710=(1937) 2 M.L.J. 17=168 Ind. Cas. 402.

——Bond by successful bidder for future instalments—Default clause providing for all instalments becoming payable at once—If penalty.

Provision was made in a document that was executed by a subscriber to chit fund in favour of the stake-holder giving security for the amount of the instalment, engaging to pay the sum as and when they fell due regularly, for the payment of substantial interest on the amount of the chit or instalment omitted to be paid and for the payment of the whole amount if further default should be made for a period of one month;

Held, that on a proper construction of the document each instalment, on the due date and then alone, accrues as a debt due and in that view there can be no doubt whatever that the provision with regard to the whole amount becoming payable on default must be regarded as a penal clause and should be relieved against. A.I.R. 1925 Mad. 177, Rel. on. 1927 M.W.N. 527=108 Ind. Cas. 319=A.I.R. 1928 Mad. 245.

——Bond by successful bidder—Default clause—Penalty.

A bond executed by the successful bidders of the first chit in favour of the stake-holders for the regular payment of instalments due provided that on default of an instalment, the whole of the arrears should fall due, **held,** the provision was penal and could be relieved against. Test of penal stipulations pointet out. 21 M.L.W. 54=A.I.R. 1925 Mad. 177=47 M.L.J. 833.

——Bond by successful bidder—Default clause—Penalty.

The defendant, the successful bidder at the second auction, executed in favour of the plaintiff, the stake-holder, a bond which provided, **inter alia,** that in case the defendant failed to pay his subscriptions, he was not only to forfeit the dividend, interest and premium, but was also to pay the whole amount on demand with interest thereon at 1½ per cent. per mensem from the date of the auction, and that the defendant should within 15 days execute another document to the plaintiff for the due payment of the chit amounts of the subsequent instalments and for abiding by the terms of the bond. The defendant executed the other document referred to above. He paid the third, fourth and fifth instalments correctly and defaulted in payment of the sixth. In a suit by the plaintiff to recover the amount due under Exhibit A, held that the terms of the bond as regards (1) the defendant's liability for future instalments from the date of his default; (2) his deprivation of the dividend and interest; and (3) the imposition on him of liability for interest on the amount due from him at 18 per cent. from the date of his default, did not either each

taken by itself, or altogether, amount to a penal stipulation. In cases such as the above, the Court has to decide whether the terms are unreasonable as a whole and whether they are so unreasonable that the parties never contemplated that they should receive effect.

Held, further, that the waiver by the plaintiff of his right to enforce the terms of the bond in connection with the fourth and fifth instalments did not affect his right to use the coercive measures provided by the bond in cases of future default. 1922 M.W.N. 203=67 Ind. Cas. 995=A. I. R. 1922 Mad. 67=42 M.L.J. 551.

——Default by stake-holder—Subscriber—If relieved from liability for future subscriptions.

Apart from a specific agreement to that effect the default by the stake-holder in the payment of the prize does not relieve the subscriber from his liability to pay future subscriptions. 23 M.L.W. 210=93 Ind. Cas. 641=A.I.R. 1926 Mad. 926.

——Default by stake-holder—Subscriber—If relieved from liability for future instalments—Default—Waiver.

A **Kuri** was started by plaintiff's predecessor in 1893, to consist of 14 tickets of Rs. 500 each and to continue for 13 years. Defendant, one of the subscribers, won a prize at the 6th drawing, a portion of which was paid to him by the plaintiff and the balance was reserved with the latter to be paid on giving security for payment of future subscriptions. It was found that the defendant offered the security but the balance reserved was not paid. It was also a condition that in default of defendant's payment of any one instalment, all future instalments would become due at once; plaintiff credited the unpaid prize money towards subsequent instalments and sued defendants for the last two instalments. Defendant pleaded non-liability to pay future instalments, as plaintiff did not give him the balance of prize money and that as he made default in payment of the instalment due for 1900, all the instalments became then due and the suit was time-barred. **Held**, (1) that a default in payment of the prize money did not relieve the defendant from liability to pay future subscriptions; (2) that as it was found that plaintiff had waived the benefit of stipulation for payment of all overdue instalments in default of any one instalment, the suit was not barred. 9 M.L.T. 36=(1911) 1 M.W.N. 79=8 Ind. Cas. 510.

——Legality—Liability — Defaulting subscriber—Enforceability by another subscriber.

If a trustee who is bound to collect the funds for the benefit of beneficiaries fails to do so, he commits breach of trust and the proper procedure is to have the defaulting trustee removed and have another trustee appointed or to sue for the administration of the trust by the Court. A subscriber to the kuri chit made default in the payment of an instalment; he had bid for and obtained the proceeds of a sale at auction and executed a security bond in favour of the manager. Plaintiff who was a successful highest bidder sued to enforce the security and joined the representatives of the defaulting subscriber and manager as defendants.

Held, that he was not entitled to enforce the security against the defaulter. The manager with respect to the transaction of security must be regarded in law only as a trustee and the proper course would be a suit for the enforcement of a trust against the trustee or for the administration of the trust. 1927 M.W.N. 721=108 Ind. Cas. 404=A.I.R. 1928 Mad. 256.

——Legality—Validity of Contract Act, S. 30.

Where the cardinal feature of the chit fund in suit is that lots are drawn for prizes monthly and that the winners get Rs. 50, the full amount of the chit without any liability for further subscription and after the 50th drawing, the unsuccessful subscribers get back the full amount of their subscriptions, but without interest.

Held, that the suit chit fund is not a wagering contract and there is no objection to enforce its terms in a Court of law: 48 Mad. 661, affirmed; 5 A.C. 685, Foll.; 92 Ind. Cas. 968=A.I.R. 1926 Mad. 168: 49 M.L.J. 791 and 52 Ind. Cas. 989, Overruled. 1927 M.W.N. 545=38 M.L.T. 390=50 Mad. 696=26 M.L.W. 796=103 Ind. Cas. 318=A.I.R. 1927 Mad. 583=52 M.L.J. 687 (F.B.).

——Legality—If lottery—Contract Act, Ss. 30 and 65.

In a chit transaction 500 persons undertook each to subscribe Rs. 2 at each instalment and there were to be 50 drawings at each of which the winner was to get Rs. 100 and walk out without any liability to subscribe for any subsequent instalments. After the 50th drawing those who had not drawn a prize were entitled to get their money back without interest. After subscribing for 48 instalments, one of the subscribers sued the stakeholder for the amounts subscribed by him with interest.

Held, that the whole transaction amounted to a lottery and the agreement between the promoter and the subscribers, amounted to a wagering agreement within the meaning of S. 30 of the Contract Act.

Held, further, that the agreement to repay the subsriptions in a case like this is not severable from the prize arrangement and the provisions of S. 65 cannot be invoked, for the agreement in this case did not become void nor was it discovered to be void but it was void for illegality from its inception. A.I.R. 1925 Mad. 281, Rel. 22 M.L.W. 772=1925 M.W.N. 857=92 Ind. Cas. 968=A.I.R. 1926 Mad. 168=49 M.L.J. 791.

——Legality—If lottery—Suit on promissory note executed by one stake-holder to another is maintainable.

The plaintiff and the defendant promoted a 'Chit-Fund'. A capital fund of Rs. 500 a month was raised by 500 subscribers, subscribing each 1 rupee per mensem. At the end of the month, there was a drawing by lot and the subscriber who drew the ticket was paid Rs. 50 and his connection with the transaction forthwith ceased. This process was repeated month after month, till the end of the 49th month. At the close of the 50th month, each of the remaining subsccribers was paid Rs.

50 and the stake-holders divided the profit and the fund was dissolved.

Held, that the Chit Fund was not a lottery.

Held, further that the plaintiff's suit to recover from the defendant the amount due to him (the plaintiff) on the basis of a pro-note executed by the defendant for the share of the profits of the Chit Fund found due to the plaintiff on a settlement of the accounts between the two was maintainable.

Per **Venkatasubba Rao, J.**—In this case, while chance determines the disposal of the interest earned, there is absolute certainty, with reference to the disetribution of the capital fund itself. Though it may be said it is a small element of chance that tempts some to join the fund, the dominant feature of the transaction is that it enables a large number to gradually lay by money and receive their savings in a lump sum and the scheme is in their case an incentive to thrift.

Per **Ramesam, J.**—Unless the object of the main transaction is to commit an offence made punishable by the Indian Penal Code, there can be no objection to enforcing the terms of a contract of this kind, which is collateral to another transaction even when the main transaction itself is merely void. 23 All. 165=25 All. 639 and 14 M.L.J. 326, ref. to. The word 'lottery' is not defined either in the Indian Penal Code, or Act 5 of 1844 nor in the English Statutes. When the scheme has for its object the carrying on of a legitimate business, the fact that it provides for the distribution of its profits in certain events by lots will not vitiate the scheme. All chit-funds, the main object of which is the promotion of co-operation, prudence and thrift ought to be regarded as legitimate, even though there is an element of chance. If by the time a society of this kind became known to the public, all its members were ascertained and there is no invitation to any member of the public to join it, it cannot be said that any person keeps a lottery office, at which the public were invited to join and to pay, within the meaning of the English Acts or S. 294-A of the Indian Penal Code. That is, it is not that every lottery constitutes an offence but the keeping of a lottery office, which is a standing invitation to the public, that consttutes the offence. As in the present case, there wos nothing to show when and how the 500 subscribers joined the Fund, whether there was any invitation to the public to join it and an office was kept for the purpose, there was no offence under S. 294-A of the Indian Penal Code. (English and Indian Case Law discussed). (1858) 1 S.D. 54; 1 M.H.C. 448 and 22 Mad. 212 and (1880) 5 A.C. 685, Foll. 90 Ind. Cas. 420=21 M.L.W. 403=1925 M.W.N. 655=48 Mad. 661=A.I.R. 1925 Mad. 870.

——Legality—Contract Act, S. 65.

The defendant was carrying on a chit fund. There were 500 subscribers each paying one rupee per month. The chit was to go on for 50 months and every month two prizes of Rs. 25 each were to be drawn by lot; any subscriber who happened to win a prize would get Rs. 25 at once and had to pay thereafter only 8 annas a month, while if he won a second prize he would be given another Rs. 25 and thereafter his subscriptions would cease and his name would no longer be included in drawing the prize. At the end of 50 months all subscribers who had won no prize would be paid back the whole of the money they had subscribed. **Held**, the arrangement was clearly a lottery. Where the stake-holder discontinued the chit after 27 months and thereupon a subscriber sued him for refund of the subscriptions he had paid, **held**, per **Krishnan, J.** (**Odgers, J.**, holding contra) the main point was to pay back the total amount of subscriptions paid while the arrangement to give prizes were only a collateral one serving as an inducement to join the chit and hence the former was severable from the latter and the illegality of the latter did not necessarily attach to the former. The suit for refund was therefore maintainable. (1919) M.W.N. 570, not foll.

Per **Odgers, J.**—As a material part of the illegal purpose had been carried out, the subscriber was not entitled to recover the amounts paid, as both the plaintiff and defendant were in **pari delicto** and there was no ground for holding they were not **potir est conditio possidentis**. Nor is the case one to which S. 65, Contract Act, would apply as the contract was illegal from the beginning. 85 Ind. Cas. 1016=A.I.R. 1925 Mad. 281=47 M.L.J. 876.

——Manager's discretion to accept or refuse security.

When according to the rules of the Chit Fund, security had to be furnished by the prize-winner to the satisfaction of the Manager, the latter is entitled to refuse a security not so given so long as he has acted not unreasonably or capriciously. 121 Eng. Rep. 904, foll. (1914) M.W.N. 715=1 L.W. 818=27 M.L.J. 447=25 Ind. Cas. 669.

——Nature of—Bond by bidder—Clause in bond if penal—Test—Obligation to pay lump sum on failure to pay instalment.

A chit fund transaction is not a case of borrowing at all. A chit fund auction is not different from any other auction save that as a rule what is sold is a present sum of money which is "moveable property" and no "goods" within the meaning of the Contract Act, whereas at most auctions what is sold are goods, in the ordinary sense. In essence the person who offers the highest discount and, therefore, becomes the owner of the chit fund is a purchaser at an auction and the contract is one of sale and not of borrowing. The highest bidder purchases the chit by offering, (1) the highest discount and (2) a bond for the future payments of instalments and these two things together constitute the consideration that he gives for the right which he buys immediately, the subject-matter of the chit.

In order to determine whether a clause in a bond in the case of a chit fund transaction is a penalty under S. 74, Contract Act, or not, it is irrelevant to consider whether the amount of the chit that he buys and amount of the instalments that he undertakes to pay are or are not the same. To hold that the obligation to pay the lump sum on failure to pay an instalment is a penalty would have the effect of relieving the purchaser of the chit fund

from his obligation to carry out the contract that he has made and to pay the consideration that he has offered at the time of the auction.

It can make no difference that the amount of the bond is larger than the amount of the chit fund. A.I.R. (Vol. 22) 1935 Mad. 385=1935 M.W.N. 70=41 M.L.W. 376=68 M.L.J. 283=158 Ind. Cas. 1037.

——Nature of—If partnership — Stake-holder — Members—Relationship—Assignee of rights—Set-off.

A Kuri is not a partnership composed of the stake-holder and the members but a transaction between the stake-holder and each individual member independent of the transaction between him and each of the other members. 20 Mad. 68, ref. The auction-purchaser of the rights of a benefited ticket-holder may claim a set-off against the assignee of the stake-holder. S. 132 of the T.P. Act allows such a set off. (1912) M.W.N. 1235 =16 Ind. Cas. 686.

——Nature of—Starter and subscriber—Relationship—Suit by starter to recover instalment from subscriber—Maintainability.

A suit by the starter of a chit fund against a subscriber for recovering the amount due from the latter for an instalment is not a suit to enforce a mere contract to lend money. It is more in the nature of a suit to enforce a contract on the part of the subscriber to pay a certain sum of money to the stake-holder under the rules of the chit fund, and when he has broken the contract, he is entitled to institute a suit for recovery of the money which the subscriber had contracted to pay. A. I.R. (Vol. 24) 1937 Mad. 364=(1937) 1 M.L. J. 163=45 M.L.W. 609=1937 M.W.N. 439=169 Ind. Cas. 692.

——Rules—Construction—Right of subscriber.

Company conducting chit fund—Rules providing division of discount on each occasion **pro rata** among subscribers—Subscribers to be given credit for same in next instalment of subscription—Prize amount to be given to successful bidder on furnishing security—On failure of furnishing security within two months, the prize amount to be retained by company or paid to some body—Successful bidder was entitled to receive payment of prize money one week after date of next instalment—Company ceasing to carry on business on 21st June, 1938—Petition for insolvency on 19th July, 1938 and winding up order on 26th August, 1938:

Held, that no default would be committed by successful bidder until two months had elapsed from holding of the auction.

Held, further that in respect of auctions held two months prior to 21st June, 1938, no discount should be debited against the successful bidders during that time. 1940 M.W.N. 545.

——Rules—Construction—Bond by successful bidder—Default—Assignment of bond by its starter to third person—Validity.

Where there is a provision in the rules of a chit fund that the conduct of the chit fund affairs cannot be assigned by the starter except with the consent of all the subscribers, the starter cannot be allowed to treat a security bond executed by a benefited subscriber as an idependent debt and to assign it over to a third party who will have nothing to do with the conduct of the chit fund affairs. A.I.R. (Vol. 23) 1936 Mad. 985=44 M.L.W. 710=1936 M.W.N. 1370=(1937) 2 M.L.J. 17= 168 Ind. Cas. 402.

——Subscriber—Assignment of rights—Suit by assignee for declaration of his rights as assignee—Maintainability—Specific Relief Act (1 of 1877), S. 42.

Where the plaintiff who had obtained an assignment of the rights of a subscriber to a chit fund with the consent of the starter of the fund instituted a suit for a declaration that he was entitled to all the rights of his assignor and it was contended on behalf of the starter that such a declaration cannot be granted in view of the provisions of S. 42 of the Specific Relief Act:

Held, that the plaintiff was entitled at least to a declaration that he was entitled to such of the rights of his assignor as had actually accrued on the date of his assignment subject of course to the liabilities of the assignor, and that to this extent the Court could grant a declaration. A. I. R. (Vol. 23) 1936 Mad. 989=44 M.L.W. 704=166 Ind. Cas. 573.

——Subscriber—Bond by for future subscriptions —Security bond—Charge.

By the rules of a kuri a subscriber who took a brize was to furnish security for the payment of future subscriptions. The subscribers who took a prize executed a bond to the stake-holder which was stamped as if it was a mortgage, by which the executants undertook, when required, to give the stake-holder a mortgage on the property. But there was another clause which was added to the deed as a sort of supplement before it was signed by the executants. This clause ran as follows: "We and the properties are liable for any arrears of future subscription mentioned above."

Held, that the supplementary clause was as much part of the completed deed as the undertaking to give a mortgage when required and the intention of the executants was to create a charge on the properties. 39 M.L.T. 404=106 Ind. Cas. 508 =A.I.R. 1927 Mad. 1069=53 M.L.J. 730.

CHITTAGONG PORT ACT (BENGAL ACT 5 OF 1914).

——S. 29—Effect of non-compliance.

Non-compliance with the provisions of S. 29 renders the agreement not binding upon the Commissioners. Case-law discussed. 54 Cal. 189= 103 Ind. Cas. 2=A.I.R. 1927 Cal. 465.

——S. 38 (g)—Scope—Commissioner's powers of letting out.

The words used in S. 38 (g) are wide and it is not ultra vires of the Commissioners to let out a steam tug for operations outside the Chittagong river. 54 Cal. 189=103 Ind. Cas. 2=A. I. R. 1927 Cal. 465.

CHOSE-IN-ACTION.

See (1) CONTRACT ACT, S. 78.

(2) T.P. ACT, Ss. 132 to 137.

CHOTA NAGPUR ENCUMBERED ESTATES ACT (6 OF 1876).

See also BENGAL ENCUMBERED ESTATES ACT (6 OF 1876).

——Applicability—Property outside Chota Nagpur.

The Chota Nagpur Encumbered Estates Act (Bengal Act 6 of 1876) does not apply to immoveable property outside Chota Nagpur. That being so, the Act cannot in any case apply to properties in the district of Midnapur. 45 I.A. 105, Foll. 40 C.L.J. 331=82 Ind. Cas. 886=A.I.R. 1925 Cal. 116.

——Applicability—Property outside Chota Nagpur.

The Chota Nagpur Encumbered Estates Act (6 of 1876) has no application to immoveable property outside the limits of Chota Nagpur. Consequently a manager appointed under the Act has no power to reduce the rate of interest provided by a mortgage of land not situated within Chota Nagpur. 16 C.L.J. 527 appr. 46 Cal. 1=45 I.A. 103=16 A.L.J. 569=5 P.L.W. 64=(1918) M.W.N. 441 =24 M.L.T. 66=28 C.L.J. 165=8 L. W. 186 =22 C.W.N. 1009=20 Bom.L.R. 856=35 M.L. J. 347=45 Ind. Cas. 827 (P.C.) (Affirming 27 Ind. Cas. 526.).

——Applicability and construction.

The statute having no application to lands situate outside the limits of Chota Nagpur, cannot prevent a mortgagee from enforcing his rights in courts of Ordinary Civil Jurisdiction. Political or administrative considerations determine the scope of the Act. As this statute gives special privileges, to a particular class, to have their liabilities determined not by a regular Court, but by a manager, it must be strictly construed; when the Act is silent as to its application to all estates in British India owned by holders in Chota Nagpur, it should be limited in its application to estates in Chota Nagpur. The Chota Nagpur Encumbered Estates Act has no application to land lying outside of Chota Nagpur, and consequently, the privilege of a mortgagee in respect of such land to enforce his rights in a Civil Court has not been abrogated. (Per **Mookerjee, J.**) Under the Act the question of liability for debts and the mode of their satisfaction is determined by the manager. A statute of this description limiting the jurisdiction of the Civil Court must be strictly construed. 17 C. manager unuder the provisions of the Chota W.N. 754=16 C.L.J. 527=17 Ind. Cas. 957.

——Construction—Language of the Act is obscure.

The Act is so framed as to render it not easy to construe; the language of the Act is obscure. 40 C.L.J. 331=82 Ind. Cas. 886=A.I.R. 1925 Cal. 116.

——Manager—If Court.

Per **Das, J.**—Whether manager under the Act is a Court. 10 P.L.T. 879=A.I.R. 1929 Pat. 694 (F.B.).

——Notice to quit—Necessity.

Where a person sued the lesseee for **khas** possession after cancellation of permanent lease granted by the Manager of his estate on the ground that it was obtained by fraud, no notice to quit is necessary before instituting the suit. 36 Cal. 675=9 C.L.J. 523=1 Ind. Cas. 626.

——Object and effect of.

The object of the Chota Nagpur Encumbered Estates Act is that the manager shall have unfettered power of management and control over the property so that he may apply the rents and profits of the land to speedly relieve the holder's estate from the burdens created on it by the holder before the provisions of the Act were brought into operation for his benefit. The Act does not make the manager the holder of the estate but merely prohibits the holder in his own interest from exercising the acts of ownership so that they may not interfere with the wide powers given to the manager to manage the estate. A.I.R. (Vol. 28) 1941 Pat. 465=20 Pat. 280=7 B.R. 703=194 Ind. Cas. 23.

——Object and scope of—Bar of Civil proceedings.

The object of the Chota Nagpur Encumbered Estates Act is to protect the estate and at the same time do justice to its creditors by administering it in such a manner as to satsfy all claims against it in respect of debts antecedently incurred by the proprietor. For these claims all other remedies are barred except one which is to apply to the manager and get the debt entered on the schedule of debts and paid by the manager, failing recourse to this procedure, not only all remedies are barred but the debt itself is barred. The aim of the whole proceedings is to hand back the property to the proprietor unencumbered by any of his old liabilities. A.I.R. (Vol. 24) 1937 Pat. 486=16 Pat. 459=18 P.L.T. 717=3 B.R. 801=171 Ind. Cas. 65.

——Object of.

Object is to relieve embarrassed landholders in Chota Nagpur—Scheme and scope explained. 40 C.L.J. 331=82 Ind. Cas. 886=A.I.R. 1925 Cal. 116.

——Scope—If abrogates law of limitation—Title by lapse of time—If void.

A title acquired by lapse of time cannot under the Chota Nagpur Encumbered Estates Act be regarded as void since there is nothing in the Act to sugest that it expressly or by necessary implication abrogates the law of limitation. 33 Bom. 116 Rel. on. 8 Pat. 549=115 Ind. Cas. 699=A. I.R. 1929 Pat. 117.

——S. 2—Aplicability to lands outside Chota Nagpur.

The provisions of the Act are strictly confined to land which is actually situated in Chota Nagpur and do not apply to land outside Chota Nagpur. A.I.R. (Vol. 22) 1935 Cal. 402=62 Cal. 145=156 Ind. Cas. 417.

——S. 2—If vesting order—Effect of on limitation.

Per **Rowland** and **James, JJ.**—On a proper construction of S. 3 of the Act, the institution of the suit is prohibited and this prohibition is not restrcted to debts notfied under S. 7. The fact that no suit was instituted by the creditor does not bar the claim by limitation except as regards the

claim allowed by the Commissioner. A.I.R. 1928 Pat. 179, not appr.; 20 Cal. 609, Rel. on; 10 P.L.T. 879=A.I.R. 1929 Pat. 694 (F.B.).

——Ss. 2 and 12-A—"Holder"—Joint Hindu family—Estate put under management of Collector on application by karta—Effect—Prohibition under —S. 12-A—If extends to all members of family.

Where an entire estate is placed under the management of the Collector or some other officer under the provisions of the Chota Nagpur Encumbered Estates Act, upon an application of **karta** of a joint Hindu family, governed by Mitakshara, such person being described as a "holder" in the notification under S. 2 of the Act, which expression is used in the same sense as holder of land, the prohibition under S. 12-A applies not only to that person but also to other members of the joint family who were the owners of the property at the time when the authorities assumed charge on the applicaton of him who must be assumed to be acting as a **karta** with the implied authority of the other members. The word "holder" used in the Chota Nagpur Encumbered Estates Act, is expressly used to mean a land-holder who has a title to the property in question as owner in possession. It is a compendious way of describing the proprietors or the owners of the estate which is going to be assumed charge of. It comprises every sort of proprietor, irrespective of his personal law whether he is a Christian or a Muhammadan or is governed by the Dayabhag or Mitakshara School of Hindu Law. Any subsequent partition cannot operate to remove that bar of superimposed disqualification.

Where the karta of a joint Hindu family consisting of himself, his son and brother places under S. 2 in charge of the Deputy Commissioner, the family estate which after his death is released and handed over to the brother and son as members of the joint family and both of them execute a mortgage of a portion of the estate and later, on partition between them, the brother mortgages a portion of the property which has been released without Commissioner's sanction, this mortgage executed without sanction cannot be enforced so as to affect the portion of the property so released. But the mortgagee is entitled to enforce a personal covenant which is always implied in a mortgage unless it is barred by time. A.I.R. (Vol. 26) 1939 Pat. 451=20 P.L.T. 619=18 Pat. 434=6 B.R. 56=184 Ind. Cas. 597.

——S. 2-B—Applicability—Undivided interest in joint family property.

An undivided interest in joint family property cannot be made the subject-matter of protection under the Chota Nagpur Encumbered Estates Act. The fact that certain creditors had attached and sold the petitioner's undivided interest in certain villages would not cause a disruption of the family and the undivided interest cannot be made the subject-matter of an order under S. 2-B. A. I.R. (Vol. 27) 1940 Pat. 565=6 B.R. 630=188 Ind. Cas. 269.

——S. 3—"Alienation"—Testamentary disposition, if.

The word "alienation" ordinarliv means alienation of all kinds but applying the principle of **ejusdem generis** as the general words in S. 3 follow specific words and again are followed by specific words the word 'alienation' means an alienation **inter vivos** only. In other words the prohibition against alienation in the Chota Nagpur Encumbered Estates Act is a prohibition against alienation **inter vivos** and does not affect the testamentary power of the holder. A.I.R. (Vol. 28) 1941 Pat. 465=20 Pat. 280=7 B.R. 703=194 Ind. Cas. 23.

——S. 3—Applicability—Decree against manager —Notice—Necessity—Notice of claim need not be given.

In a decree against the manager of an incumbered estate, the decree-holder need not notify his claim to the manager as Ss. 3 (thirdly) (b), 5 and 6 do not apply to such decree. 61 Ind. Cas. 902 (Pat.).

——S. 3—Applicability — Tenant's liability under rent decree passed before estate was taken over—If affected.

Where a usufructuary mortgagee of a part of an estate brought a suit for rent against certain tenants of that estate and obtained a decree and the estate was subsequently placed under a Nagpur Encnumbered Estates Act,

Held, that the decree obtained by the mortgagee was not barred under S. 3. S. 3 could not in any way be applied to the liability of a tenant to pay rent or his liability to have his holding sold under a decree for rent by the mortgagee in possession. That liability arose before the landlord's estate was placed under management and from the moment the decree was passed the liability under it was a liability of the tenant under the decree and in no sense a debt or liability of the landlord mortgagor under the mortgage. The section is applicable only to debts or liabilities of the disqualified proprietor and not the debts or liabilities of some body else such as a tenant. 6 Pat. 742=109 Ind. Cas. 833=A.I.R. 1928 Pat. 153.

——S. 3—Applicability — Usufructuary mortgage by proprietor—Decree for rent against tenants—Estate vested in manager—Executability of decree.

Where the proprietor of the encumbered estate grants a usufructuary mortgage and the rent due by the tenants is taken by the mortggee in lieu of interest on the loan:

Held, that in recovering a decree for rent against the tenants, the mortgagee is only recovering interest against his debtor and it is a debt or liability of the proprietor of the encumbered estate; and that, consequently, no proceedings in execution of the decree can be taken after the estate has vested in the manager. 96 Ind. Cas. 587=A.I.R. 1926 Pat. 524.

——S. 3—Construction — Intention — Considerations.

For the purpose of ascertaining the intention of the statute it is not necessary to draw a distinction between institution of suit and issue of summons. Regard should be had to the general scope of the statute. 10 P.L.T. 879=A.I.R. 1929 Pat. 694 (F.B.).

——S. 3—Construction—"Such debts and liabilities"—Meaning of.

The words "such debts or liabilities" in S. 3 no doubt refer to the debts and liabilities mentioned in S. 2-A, but the Act contemplates that the holder should disclose all debts and liabilities to which the holder is subject and "such debts and liabilities" must mean "all debts and liabilities to which the holder is subject." 7 Pat. 480=10 P.L.T. 21==112 Ind. Cas. 236=A.I.R. 1928 Pat. 457.

——S. 3—Construction and scope—"Process as aforesaid"—Meaning of—Bar against execution—Extent of.

The words "process as aforesaid" in Para. (b), S. 3, must mean "process for or in respect of such debts and liabilities" and the words that follow, namely, "except for or in respect of debts due, or liabilities incurred to Government" support this view and, therefore, a Court is incompetent to execute a decree in respect of debts or liabilities of the defaulting proprietor except debts due or liabilities incurred to Government. 7 Pat. 480=10 P.L.T. 21=112 Ind. Cas. 236=A.I.R. 1928 Pat. 457.

——S. 3 (3) (c)—"Debts and liabilities"—Meaning of—Contract by person subsequently declared to be owner of encumbered estate — Subsequent withdrawal of encumbrance—Effect on validity of contract.

A contract, entered into by a person who is subsequently declared to be the heir of a deceased person whose estate had been at the time of the contract taken charge of under the Encumbered Estates Act, is void as such person had no competency to contract.

Even though at the time of the execution of the contract he had not been declared to be the heir, yet as soon as he was found to be the heir, he became heir from the time of the devolution of the estate which was admitted prior to the execution of the contract, and such contract became void for want of capacity to contract. On the release of the estate from the operation of the Act the validity of the contract could not be revived as it was absolutely void.

While the suit was pending the estate was taken charge of for the second time, and the suit therefore became barred. It does not matter if the particular liability has not been mentioned in the application under the Act, as 'debts and liabilities' in S. 3 mean 'all debts and liabilities of the holder of the estate taken charge of' other than debts or liabilities incurred by Government. I.L.R. 20 C. 600; I.L.R. 33 C. 1065 foll. (1906) 7 C.L.J. 578.

——S. 3 (3)—Khorposh grant when under disability—Ratification on disability ceasing.

A Khorposh grant made when under a disability can be ratified after the disability ceases. 16 I.A. 221 foll. (1905) 10 C.W.N. 149=33 C. 363.

——S. 3—'Heir'—Meaning of.

As the Act is obsecure, the word 'heir' has been loosely used in the Act and may be taken to include a person who has a right to succeed in law to the holder. A.I.R. (Vol. 28) 1941 Pat. 465=20 Pat. 280=7 B.R. 703=194 Ind. Cas. 23.

——S. 3—"Pending"—Mortgage suit—Duration of pendency.

A mortgage suit does not come to an end with the preliminary decree and the proceedings are still pending at least until a final decree is made or the same becomes barred by limitation. Therefore, proceedings in a mortgage suit are deemed to be pending within the meaning of S. 3 of the Chota Nagpur Encumbered Estates Act after preliminary decree has been passed and before application for a final decree has been made. 1926 P.H.C. C. 358=8 P.L.T. 189=99 Ind. Cas. 959=A.I.R. 1927 Pat. 105.

——S. 3—Scope—Institution of Suit—If barred by vesting order—Institution of suit is not barred—Limitation Act, S. 15.

There is no provision in the Chota Nagpur Encumbered Estates Act providing that a vesting order under S. 2 has the effect of barring the institution of suits. 20 Cal. 609, Diss. But if such a suit be instituted, the institution of the suit has the effect of keeping the claim alive as against the person whose estate is attached under the Act. But where no such suit is filed, the period during which the property was under attachment cannot be excluded by the mortgagee of the attached property from limitation for instituting his suit on mortgage. 7 Pat. 109=9 P.L.T. 252=105 Ind. Cas. 643=A.I.R. 1928 Pat. 179.

——S. 3—Scope and effect of.

S. 3 enacts that as soon as charge is taken of an estate under the Act, all proceedings in Courts, Civil and Revenue, for debts of the disqualified owner shall be barred. 38 Cal. 288=15 C.W.N. 155=7 Ind. Cas. 787.

——S. 3—Scope—If controlled by S. 21-B—Suit pending—Estate taken over under the Act—Effect.

S. 21-B cannot restrict the provisions of S. 3; this section refers to suits other than proceedings in regard to the debts or liabilities referred to in S. 2-A. The suit instituted before the estate is taken over cannot proceed after the estate is taken over, even though the manager is brought on record. 1922 P.H.C.C. 112=6 P.L.J. 685=65 Ind. Cas. 283=A.I.R. 1923 Pat. 85.

——S. 3—Scope of bar—"Debt" and "liability"—Meaning of.

The liability in respect of which protection is accorded under the Act is a liability to which the holder of the property or his heir is subject. If the proprietor is not the holder of the property but is an expropriated proprietor, then he does not come within the bar under S. 3 and other connected sections of the Act. **Obiter.** The words 'debt' and 'liability' in S. 3 mean pecuniary debt and pecuniary liability and do not cover contractual liability. (1918) Pat. 8=3 Pat.L.J. 156=4 Pat.L.W. 116=43 Ind. Cas. 120.

——S. 3—"Such debts and liabilities"—Meaning of—Agreement while estate under management—Validity—Compromise decree—Binding nature of as against Manager.

The words "such debts and liabilities" mean debts and liabilities other than debts due or liabi-

lities incurred to Government and include every other debt or liability. An agreement to grant a paper lease which a proprietor entered into is a "liability." An agreement to grant a paper lease entered into by the proprietor while the estate was under the management of a Manager under the Encumbered Estates Act on the proprietor's behalf is a void agreement. The fact that a compromise decree had been passed in terms of the agreement does not make it enforceable especially when the Court had by the agreement gone beyond the question of succession—i.e., by way of decreeing the grant of a paper lease. Compromise made behind the back of the Manager under the Act and a decree which followed such a compromise cannot bind the estate. **Held also,** that the agreement in the case was unenforceable, being an infringement of the rule of perpetuity and indefinite, and therefore incapable of enforcement. (1906) 4 C.L.J. 238=33 C. 1065.

——Ss. 3 and 7—Relative scope—Mortgage—Decree—Appeal—Estate taken over pending appeal—Effect—Bar of execution.

Under S. 7, every debt or liability other than those mentioned in the section and which is not duly notified to the manager, shall be barred; S. 3 merely bars all proceedings pending in Courts and institution of new proceedings in respect of such debt during the continuance of the management of the estate of the proprietor. S. 7 does not merely, like Cl. (1), S. 3, create a bar not restricted to the continuance of the management, but takes away the very foundation for any proceedings by the creditors after the release of the estate.

The estate of the mortgagor was taken under management under the Act, during pendency of appeal from decree on mortgage against the mortgagor proprietor. The manager was made a party to the appeal. The appeal was dismissed and the decree-holder sought to execute it against the manager:

Held, that the decree could not be executed against him as it was not on a debt contracted by him but by the proprietor himself. A.I.R. (Vol. 24) 1937 Pat. 486=16 Pat. 459=18 P.L.T. 717 =3 B.R. 801=171 Ind. Cas. 65.

——Ss. 3 and 12—Relative scope and effect of—Release of estate taken over—Effect on creditor's right to pursue remedies.

S. 3 gives a statutory protection to a person whose property is brought within the operation of the Encumbered Estates Act, and S. 12 removes that protection when the proprietor is restored to possession and provides in effect that all remedies which, but for S. 3, the creditor could enforce against the proprietor shall be enforcible against the proprietor as soon as he is restored to possession. 3 Pat.L.T. 94=1922 P.H.C.C. 152=6 P. L.J. 328=63 Ind. Cas. 743=A.I.R. 1922 Pat. 287.

——Ss. 3 and 12—Suspension of limitation—Extent of.

The period, during which the estate is in charge of Government under the Act, is excluded for limitation to file an application for execution. 38 Cal. 288=15 C.W.N. 155=7 Ind. Cas. 787.

——Ss. 3 and 12-A—Scope of—Contract by heir of holder.

S. 3 contemplates the existence of an heir of the holder of property under management under the Act. Any contract by an heir during the life time of the holder involving either of them in pecuniary liability is bad. 32 Ind. Cas. 937 (Cal.).

——Ss. 3, 12 and 22—Bar of suit—Scope and extent of—Civil Court's jurisdiction.

S. 22 of the Act bars a suit against the Manager of an incumbered estate in respect of an order made **bona fide.** During the time that an estate is held by the Revenue Authorities under the Act, a Civil Court has no jurisdiction to interfere on a suit brought by the creditors. The creditors have their remedy against any order of the Manager before the Deputy Commissioner and the Commissioner.

Where the Manager finds that the accumulation of interest would render the estate insolvent, he must at once get the Deputy Commissioner to release the estate. 29 Ind. Cas. 420 (Cal.).

——Ss. 3 (1) and 12—Construction and scope of—"Bar"—Meaning of—Manager—Determination of debt by—If "decree".

There is no doubt that the Act is inartistic in its drafting. Too strict interpretation cannot be placed on S. 12. It could never have been in contemplation of the Legislature that the mere approval by the Commissioner of a scheme should for ever deprive all creditors of redress. The first clause of S. 3 becomes ineffectual when the vesting order itself is cancelled by a subsequent notification by merely drawing up a scheme for payment. The manager does not make himself liable to creditor since there is no contract between the manager and the creditor. The determination of a debt by the manager is not a judicial proceeding and his decision as to what the debt is does not amount to a decree. The word "bar" in regard to pending proceedings in Cl. (1) of S. 3 means that all pending proceedings shall be stayed. 5 Pat. 404 =1926 P.H.C.C. 65=94 Ind. Cas. 624=A.I.R. 1926 Pat. 260.

——Ss. 3 (c) and 12-A—Scope and effect of—Debt incurred during disqualification — Fresh contract after removal of disqualification—Validity.

In a suit on the basis of a hand note, after the death of a Rajah against his son and grandsons, executed by the Rajah who was a disqualified proprietor under the Act, 6 of 1876, and was therefore, incompetent to enter into any contract involving him in any pecuniary liability under S. 3 (c) of the Act: **Held,** that although the late Rajah had ratified the said debts by execution of a handnote, the suit was barred under S. 12-A of the Act as amended. S. 12-A was a bar to the suit against the sons and grandsons of the late Rajah also. (1918) Pat. 318=4 Pat. L. J. 1=47 Ind. Cas. 705.

——S. 7—Powers of Manager.

Where a Manager satisfies a debt or liability, the proprietor cannot sue him for the money after restoration of the estate to him. Lease in perpetuity granted by Manager binds the proprietor. Lessee under **Ijara** lease need not give notice of his claim to **Mokarari** lease to the Manager, as the

latter is presumed to have constructive notice of the claim, when he took over the management. 36 Cal. 675=9 C.L.J. 523=1 Ind. Cas. 626.

——(As amended by Act 5 of 1884), Ss. 7, 10 and 17—Scope—Powers of Manager—Mokurari lease—Notice—Deputy Commissioner's order final—Manager without notice satisfying a debt or liability, if valid—Proprietor if to be party in granting a lease—Personal covenant—Specific performance, suit for—Benefit or burden of a covenant running with land—Test—Benefit of lease—Equity.

Per **Curiam**.—Though S. 17 of the Chota Nagpur Ensumbered Estates Act (6 of 1876 as amended by Act 5 of 1814) is apparently wide in its terms and though it probably confers on the manager a somewhat large measure of discretion for the management of the estate, it does not enable him to do any act which is demonstrably injurious to the interest of the estate. The execution of a lease in perpetuity without a bonus and not for the purposes of reclamation of any waste land or other purposes of a similar kind cannot be justified as an act done in the course of prudent management of the estate. Assuming that the right of the lessee under the covenant to call upon the lessor to execute a **mokurari** lease imports on the part of the proprietor a liability within the meaning of that term in S. 17 of the Chota Nagpur Encumbered Estates Act, the notice of that claim is unnecessary, because the manager, when he assumed management of the estate which was at the time under **ijara** must be deemed to have had under the law constructive notice of the lessee's right to claim under the covenant in the **ijara** lease the Mokurari lease of any land within the lease-hold for certain purposes.

Per Doss, J.—The order of the Deputy Commissioner granting **mokurari** lease and upheld by the Commissioner is under S. 10 of the Chota Nagpur Encumbered Estates Act, final, and the matter cannot be reopened by a suit. The debt or liability which is barred under S. 7 of the Chota Nagpur Encumbered Estates Act is not extinguished, but so long as the estate continues under the operation of the Act, the remedy only is barred, the right subsisting. If the manager without any notice, as required by S. 7, satisfies a debt or liability, the proprietor cannot, after the restoration of the estate to him, bring a suit to recover back the money so paid or annul any deed executed by the manager in fulfilment of that liability merely on the grounl of absence of notice.

Per **Curiam**.—Under Act 6 of 1876 the manager had power to devise any part of the property for a period not exceeding twenty years without the consent of the proprietor, but under the Amending Act 5 of 1884, he is now entitled to sell or demise in perpetuity without the consent of the proprietor.

Per **Doss, J**.—A lease in perpetuity granted by a manager which is otherwise valid is not the less binding on the proprietor because he was party to it or that it was granted without his consent. The rule against perpetuities applies only to future interests in land, which may, by any possibility, be capable of vesting beyond the legal limit of perpetuity. The laying out of considerable sums of money by the lessees in the erection of permanent structures on the land for those very purposes that are mentioned in the covenant and hence referable to the covenant and to the covenant alone, and all this done to the knowledge of the lessor who resided close by, must be regarded as part performance and indeed a substantial part performance of the covenant for a perpetual lease such as would entitle the covenantee to claim specific performance of the covenant on the ground that it would be inequitable and fraudulent for the covenantor to refuse to perform the covenant.

Per **Richardson, J**.—There is a difference between a suit for specific performance and a suit to set aside a completed conveyance. When there is no common mistake of fact and no common mistake of law of the kind equivalent to a mistake of fact which goes to the root of the executed contract, the Court will not be justified in saying that it is inequitable that the defendants should not be allowed to retain the benefit of the lease.

Per **Doss, J**.—A mere personal covenant is not open to objection on the ground of remoteness or as tending to create a perpetuity. One very important test whether the benefit or burden of a covenant in any particular case runs with the land or not is whether such covenant or contract in its inception binds the land. If it does, it is capable of passing with the land to subsequent assignees; if it does not, it is incapable of passing by mere asignment of the land. Another test laid down by the House of Lords in the case of Dyson v. Forster, (1909) A.C. 98 is whether the covenant affects the nature, quality and value of the land. The **ijara** lease with a covenant for a **mokurari** is more valuable than it would be without such covenant. Time cannot run against the covenantees or their assigne unless there is demand on their part and refusal on the part of the covenantor or his assigns. It is not necessary for the Deputy Commissioner in conducting his enquiry before granting the **mokurari** to examine witnesses on oath or record their depositions. It would be enough if he makes a full and complete investigation in the matter. (1909) 9 C.L.J. 523=36 C. 675.

——Ss. 8 and 19—Mortgage—Property outside Chota Nagpur—Liability of proprietor—Right of Manager to reduce interest.

A Manager of an Encumbered Estate appointed under the Act and the Revenue authorities in Chota Nagpur has no jurisdiction to reduce the interest on a mortgage debt created by the proprietor of the estate on a property outside Chota Nagpur. The Act itself does not apply to the case. 27 Ind. Cas. 526 (Cal.).

——Ss. 8 and 22—Interest—Decree by Court—Power to induce—Manager's power.

The Manager of an estate under the Act can cut down interest already decreed by Court under S. 8 of the Act. If the Manager's action was in good faith under S. 8, no suit would lie for a declaration against him; but if what he purported to do was not really authorised by S. 8, a suit would lie for a declaration that what he had done was out-

side the scope of the Act altogether. (1919) Pat. 235=4 Pat. L. J. 321=51 Ind. Cas. 69.

——Ss. 9 and 17—Powers of Manager—Lease—Delegation of authority to Commissioner—Powers of holder.

So long as the estate is under the Manager under the Act, the holder of the estate is incompetent to mortgage, charge or lease under S. 8 of the Act. The power to lease vests in the Manager and the mere fact that the sanction of the Commissioner was refused, does not in itself give the Deputy Commissioner power to grant a lease without consulting the Manager at all. R. 5 of the rules framed by the Lt.-Governor does not dispense with the functions of the Manager and does not empower the Deputy Commissioner to exercise the powers vested in the Manager by the statute, which, however, are to be construed strictly. The power to grant leases given to the Manager by S. 17 of the Act does not include the power to enter into an executory contract such as an agreement to lease. (1919) Pat. 305=4 Pat.L.J. 580=53 Ind. Cas. 333.

——S. 10—Applicability—Lease of land lying outside Chota Nagpur.

Where a certain estate in the District of Manbhum was taken charge of under the Chota Nagpur Encumbered Estates Act, and thereupon the manager proceeded to cancel under that Act a lease of land lying in the district of Bankura: **Held**—That the Act had no application inasmuch as the Act applies only to land in Chota Nagpur. The High Court allowed this question to be raised for the first time in second appeal. (1907) 11 C.W.N. 1127.

——S. 12—Revival of debts and liabilities.

Under S. 12, the debts barred under S. 3 are revived when the estate is released. 38 Cal. 288 =15 C.W.N. 155=7 Ind. Cas. 787.

——S. 12—Revival of proceedings—If effected on restoration to holder or heir.

It is impossible to hold that there is a revival of proceedings which were stayed under the provisions of S. 3, where the holder of the property or his heir has been restored but not under the circumstances mentioned in the second clause of the section. 7 Pat. 109=105 Ind. Cas. 643=9 P.L.T. 252=A.I.R. 1928 Pat. 179.

——S. 12—Scope and effect of—Alienation—If void ab initio—Charge—Validity.

S. 12 provides that an alienation is void from the moment of such alienation although it suggests that a charge may be good for lifetime of the holder of the property. 8 Pat. 549=115 Ind. Cas. 699=A.I.R. 1929 Pat. 117.

——S. 12—Scope and extent of prohibition—Personal covenant in mortgage—If void.

All that is prohibited or meant to be prohibited is the alienation of the property or the creation of any charge on the property without the sanction of the Commissioner. There is nothing in the section to suggest that a person who is affected by the Act is debarred from borrowing money altogether. Though a mortgage cannot be enforced against the property under the terms of the Act the personal covenant to repay which is always implied in a mortgage can be enforced. A.I.R. 1925 Pat. 470, Foll. 8 Pat. 212=121 Ind. Cas. 367=11 P.L.T. 258=A.I.R. 1929 Pat. 375.

——(As amended by Act 8 of 1922), S. 12, Paras. 1, 2, 3, and 6—Restoration of estate — Revival of debts—When effected.

S. 12, Para. 6 of the Act, does not apply to a case to which Para. 2, as amended by Act 8 of 1922 does not in terms apply. The wording of S. 12, as it now stands, fully agrees with this view of the intention, and there can be no revivor of any debt or of any proceeding when an estate is handed back under Para. 1, S. 12 after satisfaction of all notified debts. Likewise, if the restoration takes place under Para. 1 or, Para. 3 of S. 12, there is no revival of barred proceedings and debts. A.I.R. (Vol. 24) 1937 Pat. 486=16 Pat. 459= 18 P.L.T. 717=3 B.R. 801=171 Ind. Cas. 65.

——Ss. 12 and 23—Relative Scope and effect—Restoration to heir—Right of devisee to sue in Civil Court—"Succession"—Meaning of.

It is true the Act recognises only the heir and not the devisee, and the restoration of the estate is to be made to the heir on the death of the holder. But under S. 23, the Civil Courts in Chota Nagpur have jurisdiction to entertain and dispose of suits relating to the succession to immoveable property. "Succession" would include intestate as well as testamentary succession, so that although the heir would be restored to possession and a person claiming under a testamentary disposition would have to establish such claim in the Civil Court the possession of the heir would be subject to the result of such suit. 40 C.L.J. 331=82 Ind. Cas. 886 =A.I.R. 1925 Cal. 116.

——S. 12-A—"Alienation"—Sale in execution.

The sales in execution come within the provisions contained in S. 12-A. A.I.R. (Vol. 26) 1939 Pat. 19=5 B.R. 482=180 Ind. Cas. 736.

——S. 12-A—"Alienation"—Sale in execution.

A sale in execution of a decree is an alienation within the meaning of S. 12-A, and consequently the sanction of the Commissioner is necessary. A. I.R. (Vol. 25) 1938 Pat. 427=5 B. R. 18=177 Ind. Cas. 810.

——S. 12-A—Appeal—Order on application to set aside execution sale as contravening S. 12-A—Applicability—C. P. Code, S. 47.

Application to set aside sale in execution of property released from management under Act, on ground of irregularity and of non-liability to attachment and sale under the Act, falls under S. 47, C.P. Code, and an order thereon is appealable. A.I.R. (Vol. 18) 1931 Pat. 97=12 P.L.T. 505 =131 Ind. Cas. 533.

——S. 12-A—Applicability—Charge by holder after disqualification had ceased—Protection under S. 12-A—If available.

The object of the Chota Nagpur Encumbered Estates Act is to protect the property against the extravagance of any particular holder or holders for the time being and creates disqualification not so much in connection with the property as of an individual. S. 12-A provides that when an estate is restored to a person formerly disqualified, such person shall not be competent to alienate such pro-

perty nor to create a charge extending beyond his lifetime, that is to say, it is a disqualification applying to a particular person holding a particular property.

Where the ancestor of the judgment-debtor was the original proprietor of an estate which was placed under a manager appointed by the Commissioner under the provisions of the Chota Nagpur Encumbered Estates Act and the estate was ultimately released to the judgment-debtor and in execution of a decree on a hand-note executed by the judgment-debtor after the release, the property was sought to be made liable:

Held, that inasmuch as the property was charged not by the original disqualified proprietor but by the holder after the disqualification had ceased and he was a person under no disability at all, the estate was not protected from execution. A. I. R. (Vol. 20) 1933 Pat. 611=145 Ind. Cas. 916.

——S. 12-A—Applicability—Joint Hindu family—Application for protection by karta in representative capacity—Mortgage by some members—Validity.

Joint family property can be mortgaged by all the members of the family or by the **karta** who manages the property and represents each and every one of the member of such family. Family property, however, cannot be mortgaged by one or two members of a family who are not managers or **kartas** and who are not authorised to bind the family property. A.I.R. (Vol. 29) 1942 Pat. 213=20 Pat. 904=8 B.R. 337=198 Ind. Cas. 208.

——S. 12-A—Applicability—Proprietor not falling under S. 12 (1) to (5).

The provision contained in S. 12-A, restraining alienation without the sanction of the Commissioner applies only to cases covered by S. 12-A (1) to (5). It does not apply where the proprietor falls within S. 12-A but not within Cls. (1) to (5) of the said section.

S. 2 of the said Act is not wide enough to include heirs. A.I.R. (Vol. 19) 1932 Pat. 143=11 Pat. 89=13 P.L.T. 398=137 Ind. Cas. 448.

——S. 12-A—Applicability to will—"Alienation".

S. 12-A refers to alienations **inter vivos** and not to wills. And if the expression "alienate" has been used in that sense in S. 12-A, it should be taken to have that meaning in S. 3 also, unless it is clear that some other meaning was intended. 40 C.L. J. 331=82 Ind. Cas. 886=A.I.R. 1925 Cal. 116.

——S. 12-A (1) (b) and (3)—Applicability—Property released on 2nd October, 1915—Mortgage on 10th October, 1915—Validity.

The estate was attached under the provisions of the Encumbered Estates Act; but it was released on the 2nd October, 1915. On the 10th October, 1915, a mortgage of the property was executed.

Held, that the mortgage was void under the provision of Sub-S. (1), Cl. (b) read with Sub-S. 3 of S. 12-A of the Encumbered Estates Act. 4 Pat. 478=86 Ind. Cas. 721=6 P.L.T. 497=1925 P.H.C.C. 104=A.I.R. 1925 Pat. 470.

——S. 12-A (3)—Applicability and Scope.

Sub-section (3) of S. 12-A, Chota Nagpur Encumbered Estates Act,, renders void any transaction to which it is applicable, but the question as to whether it applies to a particular transaction entitles the Court to consider the construction of the section and the determination of its applicability rests with the Court. A.I.R. (Vol. 23) 1936 P.C. 46=63 Ind. App. 53=1936 O.L. R. 67=1936 A.L.R. 98=17 P.L.T. 28=2 B.R. 223=43 M.L.W. 159=40 C.W.N. 289=1936 O.W.N. 127=70 M.L.J. 122=38 Bom.L.R. 339 =1936 M.W.N. 321=15 Pat. 203=62 C.L.J. 521=1936 A.L.J. 101=38 P.L.R. 325=160 Ind. Cas. 68 (P.C.). [A.I.R. (Vol. 19) 1932 Pat. 337=12 Pat. 147=13 P.L.T. 509=142 Ind. Cas. 495, reversed.]

——S. 12-A—"Holder" — Joint Hindu family—Application by manager for protection—Other members of family—If also "holders".

Quaere.—Whether in the case of a joint Hindu family, the holders contemplated by S. 12-A, are such members of the joint family as were in existence at the date of the application for protection made by the karta of the family in a representative capacity. A.I.R. (Vol. 29) 1942 Pat. 213=20 Pat. 904=8 B.R. 337=198 Ind. Cas. 208.

——S. 12-A—"Holder" — Joint Hindu family—Application by karta for protection—Other members—If "holders" and disqualified.

Where an entire estate is placed under the management of the Collector or some other officer under the provisions of the Act, upon an application of a **karta** of a joint Hindu family governed by **mitakshara,** such person being described as a "holder" in the notification under S. 2 of the Act, which expression is used in the same sense as holder of land, the prohibition under S. 12-A applies not only to that person but also to other members of the joint family who were the owners of the property at the time when the authorities assumed charge on the application of the **karta.** A.I.R. (Vol. 26) 1939 Pat. 451=20 P.L.T. 619 =18 Pat. 434=6 B.R. 56=184 Ind. Cas. 597.

——S. 12-A—Res Judicata—Decision as to validity of grant—If conclusive.

The decision in a suit as to the construction of S. 12-A, is **res judicata** as to the validity of a grant which was made in fulfilment of the obligations of that decision. A.I.R. (Vol. 23) 1936 P.C. 46=63 Ind. App. 53=1936 O. L. R. 67=1936 A.L.R. 98=17 P.L.T. 28=2 B.R. 223 =43 M.L.W. 159=40 C.W.N. 289=1936 O.W. N. 127=70 M.L.J. 122=1936 A.L.J. 101=62 C.L.J. 521=38 Bom.L.R. 339=1936 M.W.N. 321=15 Pat. 203=38 P.L.R. 325=160 Ind. Cas. 68 (P.C.). [Reverses A. I. R. (Vol. 19) 1932 Pat. 337=12 Pat. 147=13 P.L.T. 509=142 Ind. Cas. 495.]

——S. 12-A—Scope — Joint Hindu family—Disqualification of manager—Effect—Alienation by manager and some members—Validity—Mortgage, if void as a whole.

Where the manager of a joint Hindu family, who is incompetent to alienate or charge the property by reason of the provisions of S. 12-A, executes a mortgage of the family property with one or two adult members of the property, the whole mortgage is void. To hold that such a

mortgage is valid by reason of the fact that some of the adult members of the family have executed it along with the manager would in effect be permitting a mortgage by the disqualified proprietor. A.I.R. (Vol. 29) 1942 Pat. 213=20 Pat. 904=8 B.R. 337=198 Ind. Cas. 208.

——S. 12 A—Scope — Mandatory character—Subsequent sanction—Sufficiency.

An alienation or charge made or created by a holder of the estate without the previous sanction of the Commissioner as required by S. 12-A, is absolutely void and any subsequent sanction given by the Commissioner cannot validate such a transfer. A.I.R. (Vol. 29) 1942 Pat. 213=20 Pat. 904=8 B.R. 337=198 Ind. Cas. 208.

——S. 12 A—Scope — Property released from management—Sale for money decree without Commissioner's sanction—Validity.

Under S. 12-A, Chota Nagpur Encumbered Estates Act, read with S. 60, C. P. Code, property released under S. 12 of the Act cannot be sold without the sanction of the Commissioner in execution of a money decree against the proprietor. Such an objecton cannot be thrown out on the mere ground that a similar objection was raised before the sale and overruled. A.I.R. (Vol. 18) 1931 Pat. 364=10 Pat. 582=12 P.L.T. 508=132 Ind. Cas. 868.

——S. 12-A—Scope — Property released from management—Sale of, in execution—Sanction—Necessity.

Under S. 12-A, Chota Nagpur Encumbered Estates Act, read with S. 60, C. P. Code, property released from management under S. 12 of the former Act cannot be sold without the sanction of the Commissioner in execution of a money-decree against the proprietor. A.I.R. (Vol. 18) 1931 Pat. 97= 12 Pat.L.T. 505=131 Ind. Cas. 533.

——S. 12-A—Scope—Validity of alienation — Plea as to—When to be raised.

Question whether property sold could be alienated in spite of provisions of S. 12-A is one to be decided in execution proceedings—Judgment-debtor cannot raise it in separate suit even though such suit is brought against the auction-purchaser. A.I.R. (Vol. 29) 1942 Pat. 244=23 P.L.T. 56=8 B.R. 417=21 Pat. 233=198 Ind. Cas. 411.

——S. 17—Powers of Managers—Contract of sale—Validity.

Under the Act the owner is disabled not only from acts of management but from mortgaging, charging, leasing or alienating the property, whereas on the other hand the manager is vested and alone vested with such powers. Therefore a contract for sale for part of such estate entered into with Lieutenant Governor of Bengal is neither binding on the manager nor on the estate. 51 I.A. 208=80 Ind. Cas. 841=3 Pat. 625=34 M.L.T. 120=22 A.L.J. 935=5 L.R.P.C. 190=29 C.W.N. 342=1924 M.W.N. 710=21 M.L.W. 1=5 P.L.T. 639=3 Pat.L.R. (Civ.) 157=A.I.R. 1924 P.C. 156=47 M.L.J. 562 (P.C.).

——S. 17—Powers of Manager to lease.

Under S. 17, the Manager has no absolute power to grant permanent leases if it would be injurious to the estate. 36 Cal. 675=9 C.L.J. 523=1 Ind. Cas. 626.

——S. 17—Sanction—Grant of, for lease to firm not incorparated—Execution of lease to limited company of same name—Validity.

Where it is affirmatively established that a proposed patni lease transaction in all its essential particulars has been sanctioned by the Commissioner it is not necessary that the actual deed by which it is carried out should have been submitted for his sanction. Where the Commissioner purported to sanction the grant of a patni lease to R. W. & Co., (i.e.,) to a firm of individual men, but the lease was ultimately granted to R. W. & Co., Limited (i.e.) to a different and incorporated persona, the change was a change in the essentials of the transaction. As it appeared, however, that during the negotiations R. W. & Co., was understood by the parties to mean R. W. & Co., Ltd., the question was one of misdescription only and did not affect the validity of the transaction. 42 Cal. 1029=42 I.A. 97=19 C.W.N. 585=17 M.L.T. 377=13 A.L.J. 534=21 C.L.J. 446=17 Bom.L.R. 449=2 L.W. 555=30 Ind. Cas. 55=29 M.L.J. 80 (P.C.).

——S. 18—Scope—Sale by manager—Validity.

Section 18 only prohibits a sale until a scheme has been prepared and approved, and does not require the preparation of any further scheme to justify a sale which in the opinion of the Commissioner and the Manager may be expedient in the interests of the estate.

Under the above section, the Commissioner and the superior Revenue Authorities, if they like to intervene, are entitled to have a controlling voice in any sale under the Act, and a sale by the Manager on terms granted by the Commissioner is a sale which satisfies the requirements of S. 18. A.I.R. (Vol. 20) 1933 P.C. 176=1933 M.W.N. 685=14 P.L.T. 383=57 C.L.J. 586=37 C.W.N. 966=12 Pat. 634=60 I.A. 224=143 Ind. Cas. 216=65 M.L.J. 48 (P.C.).

——S. 21—Effect of.

Section 21 declares that every manager appointed under the Act shall be deemed a public servant within the meaning of the Penal Code. A.I.R. (Vol. 24) 1937 Pat. 160=3 B.R. 114 (2)=38 Cr. L.J. 94=17 P.L.T. 932=165 Ind. Cas. 966.

——S. 23—Jurisdiction of Civil Court—Restoration of estate to heir—Right of devisee to sue in Civil Court—"Succession"—**See** Chota Nagpur Encumbered Estates Act, Ss. 12 and 23. 40 C.L.J. 331=82 Ind. Cas. 886=A.I.R. 1925 Cal. 116.

CHOTA NAGPUR ENCUMBERED ESTATES (AMENDMENT) ACT (B. & O. 8 OF 1922)

——Scope—Retrospective operation.

The provisions of the amending Act were intended to apply to estates already under management as well as to those which might be vested in a manager subsequently. The provisions relate to procedure only and no question of vested right

arises. 1926 P.H.C.C. 358=99 Ind. Cas. 959 =8 P.L.T. 189=A.I.R. 1927 Pat. 105.

CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT (1 OF 1879).

——Tenant, holding over — Ejectment—Notice to quit—Necessity.

Under Act (1 of 1879) a reasonable notice to quit is necessary to eject a tenant, holding over after the expiration of his period of lease; what is reasonable notice is a question of fact in each particular case. 16 C.L.J. 30=11 Ind. Cas. 368.

——S. 6—Notice to quit—Effect of—"Raiyat."

After a due notice to quit, a tenant without occupancy right has no further title to the land and cannot be called a **raiyat** within the Act, and therefore he cannot acquire a right of occupancy. 14 C.W.N. 297=3 Ind. Cas. 436.

——S. 10 (a) and (b)—Scope and effect—Occupancy holding—Transfer in execution—If binding.

A transfer in execution of an occupancy holding is binding on the raiyat unless it is set aside. 42 Ind. Cas. 172, rel. on. Such a transfer effected before the Tenancy (Amendment) Act is not affected by S. 10 (a) (b) of the Act of 1879 as amended by the Act of 1903. 2 Pat.L.W. 149= 42 Ind. Cas. 387.

——(As amended by Bengal Act 5 of 1903), S. 10 (b)—Applicability—Transfers between 1st January and 4th November, 1903.

S. 10 (b) contempates that all transfers whether made before the Act came into operation or not, provided they were made after the 1st January 1903, would come within the provisions of this secction; though the section is silent as regards the fate of the transfers between the 1st day of January and 4th November, 1903, yet the meaning is plain and such transfers would come within the operation of the section, and would be rendered invalid, by the operation of that section. Where such title is invalid, the title remains in the original tenant or his heirs. It is not permissible to add words to the section in order to construe it. The section must be construed as it stands. 4 Pat. 838=88 Ind. Cas. 1032=6 P.L.T. 500=1925 P.H.C.C. 320=A.I.R. 1925 Pat. 741.

——S. 10-B—Scope—Mortgage of raiyati holding for five years or until re payment of ad ance thereafter—Validity—Possession by mortgagee—If adverse.

A mortgage of a **raiyati** holding in Chota Nagpur for a period of five years or (impliedly) till re-payment thereafter of the amount advanced, contravenes S. 10 B (1), Chota Nagpur Landlord and Tenant Procedure Act, and is hence invalid. In such a case, the mortgage being invalid, the mortgagee as such begins to prescribe from the date of the mortgage. The mortgagee prescribes as such and the result is in ordinary circumstances that after the period of limitation has expired he is entitled to retain possession until his mortgage is redeemed. The mortgagee is not, however, debarred from prescribing in another capacity, as on a claim of title as **raiyat** of the holding, provided it is clear from the circumstances that he asserted adverse possession thereafter as a **raiyat**. A.I.R. (Vol. 20) 1933 Pat. 288=14 P.L.T. 294=144 Ind. Cas. 439.

——S. 21—Scope—Chota Nagpur Tenancy Act, S. 26—Effect of.

S. 26 of the Chota Nagpur Tenancy Act was not intended to invalidate agreements which were valid in their inception but to validate agreements in special cases out of such agreements as would otherwise have been invalid owing to the provisions of S. 21 of the Chota Nagpur Landlord and Tenant Procedure Act. 1924 P.H.C.C. 307=82 Ind. Cas. 988=6 P.L.T. 144=A.I.R. 1925 Pat. 297.

——Ss. 21 and 24—Effect of—S. 26—Scope.

Ss. 21 and 24 of the Act have effected vital alterations in the law invalidating all private agreements. S. 26, Tenancy Act was framed to mitigate the rigour of the law on the landlords and not to prejudice their position. 16 C.L.J. 422= 17 C.W.N. 430=16 Ind. Cas. 929.

——S. 30—"Agent"—Meaning of.

The term 'agent' in S. 30 means a man who is employed as such by a landlord as a landlord, that is, a person employed to assist a landlord in his dealings with the tenants. A person employed to sell timber in a Forest Mehal and credit the proceeds to his employer is not an 'agent' within the Act and to a suit against him, Act 8 of 1869 does not apply. (1909) 10 C.L.J. 106=2 Ind. Cas. 205.

——Ss. 31 and 88—Ejectment decree — Effect of on tenancy—Suit by ryot for possession—Competency.

Where a landlord obtained a decree for rent and ejectment against a ryot under Ss. 31 and 88, Chota Nagpur Landlord and Tenant Procedure Act, the effect of the decree is not to terminate the tenancy. Under S. 31 no ryot could be evicted except in execution of a decree; and in spite of the ryot's mortgagee repudiating the mortgagor's title and attorning to the landlord, the ryots had yet a subsisting title. 21 Ind. Cas. 955 (Cal.).

——S. 34—Applicability—Conditions.

When a tenure has been created by a deed which makes it resumable upon the failure of the heirs of the grantee, the interest created is not inalienable and the tenure is resumable only upon the contingency specified and not on the ground of forfeiture by reason of alienation. Omission to register the name of the successor or heir of the original grantee under S. 34 of Act 1 of 1879 B.C. does not work a forfeiture of the tenure. Under S. 34 of Act 1 of 1879 B.C. two conditions must be satisfied before an application for registration can be made, viz., the applicant must be in possession and must be a transferee by succession or inheritance. Where therefore, the successor of the original grantee had transferred his interest before Act 1 of 1879 B.C. came into force and gave him possession of the property, an application under S. 34 could not be made, either by the transferor or the transferee.

When, under such circumstances, an order was made putting the Zamindar in possession of the tenure, such order is not binding upon the transferee who is not a party thereto. S. 4 of the Civil Procedure Code does not bar a suit in the Civil Court by the transferee for a declaration that his title has not been affected by such order under S. 34 of Act 1 of 1879 B.C. and for recovery of possession. (1905) 1 C.L.J. 557.

——S. 37—Applicability—Suit by assignee from auction-purchaser of permanent tenure against landlord for possession—If possessory suit.

A suit by a transferee from a purchaser of a permanent tenure at a rent sale to recover possession of the tenure from the landlord who denied the title of the plaintiff on the ground that on the death of the previous tenant, the land reverted to himself, was not a possessory suit to which the provisions of S. 37 of the Chota Nagpur Landlord and Tenant Procedure Act could apply. (1908) 12 C. W.N. 617=7 C.L.J. 560.

——Ss. 37 (6) and 42—Applicability—Title Suit—Jurisdiction.

S. 37 (6) of the Act refers only to possessory suits and not to title suits in which possession may be asked in pursuance of the declaration of title. S. 42 does not apply to such a title suit which is cognizable by the Civil Court. 7 W.R. 186; 16 Cal. 741, rel. on. 142 P.L.R. 1912=196 P.W. R. 1912=14 Ind. Cas. 66.

——Ss. 37 and 144—Applicability—Suit for arrears of rent—Jurisdiction of Revenue Court—Second appeal.

S held a tenure under B who unlawfully resumed the same. S thereupon sued for possession, during pendency of which defendant was settled as a raiyat by the Manager under the Chota Nagpur Encumbered Estates Act, who was in possession of the properties of B. S being ultimately successful, subsequently granted a lease in favour of the plaintiff who brought an action against the defendant in the Revenue Court for arrears of rent and ejectment. **Held,** that the decision of the Lower Appellate Court negativing the claim for rent was a decree as defined in S. 2, C.P. Code. As after the suit being decreed by the first Court, defendant appealed to the lower Appellate Court under S. 144 and the appeal was allowed, the appellate decree was passed under the Act and therefore a second appeal lay. The suit was one for arrears of rent within S. 37, of the Act, and was maintainable in the Revenue Court. 16 Ind. Cas. 904 (Cal.).

——Ss. 44-A—Construction and scope—S. 62—Limitation Act, S. 4.

The section must be construed in favour of the plaintiff as it encroaches on the rights to sue for arrears. The section restricts the Court's jurisdiction rather than the plaintiff's right of suit; the latter exists though it is suspended for 6 months. The section means that when the landlord has sued for rent, he shall not file another suit for subsequent rent within 6 months from the 1st suit. The section refers to a period during which action may not be taken and such a restrictive section is not covered by S. 4, Limitation Act, (1877). The phrase "any rent" refers to any rent covered by the previous suit and any rent covered by the second suit, the subject-matter of the respective suits being different. S. 44-A is not a provision for the limitation of suits under S. 62. The limitation for fresh suits referred to in S. 62 is contained in Ss. 42 to 45 and not in S. 44-A. Only in the case of a fresh suit, the rent claimed may be the same as in the suit struck off. The effect of striking off a suit under S. 62 is not the same as if the previous suit was never filed. The second suit is not a continuation of the first suit and is a new suit. The section is intended only to refer to the latest date by which a suit might be instituted. 1 Ind. Cas. 447 (Cal.).

——S. 123—Rent—Decree for—Exemption of portion of tenure—Sale of unexempted portion free of encumbrance—Sale proclamation—Contents of.

A decree for rent was obtained in respect of a tenure comprising several villages over some of which the judgment-debtor had created encumbrances by way of maintenance grants in favour of dependants. When the decree-holder applied for execution of his decree by sale of the tenure, the maintenance grantees applied for exemption of villages comprised in their grants under S. 123 and an order of exemption was made by the Commissioner. **Held,** that notwithstanding the order for partial exemption of the tenure for sale, the decree was to be executed as a decree for rent in respect of the unexempted portion, and the effect of a sale of the unexempted portion was to pass the property to the purchaser free of all encumbrances. The decree-holder was not bound to apportion the rent and he would comply with the provisions of S. 5 of the Bengal Rent Recovery Act of 1865 if he stated in the sale proclamation the yearly rent payable in respect of the entire tenure together with a remark that the villages named were exempted from sale under the order of the Commissioner. 40 Cal. 623=16 C.W.N. 1024=15 Ind. Cas. 842.

——S. 123 (2)—Power of Rent Court.

A Rent Court cannot in execution of a rent decree sell, free of encumbrances, a part of a tenure. (1918) Pat. 333=38 Ind. Cas. 451.

——S. 124—Scope—Resumable tenure—Sale—Validity and effect.

Under S. 124 of the Old Act, a resumable undertenure could not be sold but the right and title of the judgment-debtor could be sold and the new Act made the rule applicable to all cases pending at its commencement so that a tenure sold on 18th August, 1903, conferred upon the purchaser only the right and title of the defaulting tenure holder. 13 Ind. Cas. 201 (Cal.).

——Ss. 135, 136, 137, 144—Appeal—Deputy Collector—Order in execution—Appeal—Revision.

Under Act 1 (B.C.) of 1879 as it stood before its amendment by Act 5 of 1903, an order made by a Deputy Collector relating to the execution of a decree for rent was open neither to appeal nor revision. An agreement of parties cannot authorise a superior Court to revise a judgment of an inferior Court in any other mode of proceeding than that

what the law prescribes. (1904) 9 C.W.N. 956=2 C.L.J. 384.

——S. 144—Execution—Second appeal—Act 5 of 1903 (B.C.), S. 41.

Under Act 1 (B.C.) of 1879, as amended by Act 5 (B.C.) of 1903, no second appeal lies from an order passed in execution. (1904) 10 C.W.N. 284=33 Cal. 378.

——S. 164—Applicability and scope—Entry in record of rights—Suit challenging correctness.

Where a purchaser under the provisions of S. 128 of the Chota Nagpur Tenancy Act of certain tenures of which a record-of-rights had been prepared, sued to have a declaration that certain entries in the record with regard to a mundari khuntkuttidari tenancy were incorrect:

Held, that the provisions of S. 164 of the Chota Nagpur Landlord and Tenant Procedure Act (1 of 1879) as amended by Act 5 of 1905 applied: and that the object of these provisions was to make the entries irrebuttable, and the legislature intended to preclude suits of this nature. The word "particulars" in S. 164 has a very wide application and covers entries declaring that the tenants have to pay certain rents named in the record-of-rights to a person other than the plaintiff. There is no limitation as to the nature of the suit to which the provisions of S. 103, Bengal Tenancy Act apply. The presumption as to the correctness of the entires in the record-of-rights will operate even in a suit to declare the entries incorrect. 13 C.W.N. 111=9 Cal.L.J. 83=3 Ind. Cas. 689.

CHOTA NAGPUR LAND TENURES.

See LAND TENURES.

CHOTA NAGPUR TENANCY ACT, (5 OF 1901).

——Ss. 208 (1) and 211 (1)—Rent decree—Sale of part of tenure—Permissibility.

S. 208, sub-S. 1 of the Act contemplates the sale of an entire tenure and not of any share thereof, so that a decree-holder in a rent suit cannot bring to sale ¾ of a tenure owing to the ¼ share having been exempted from sale under S. 211 (1) but could treat the decree as one for money and execute it in the Civil Court. 18 C.W.N. 170=23 Ind. Cas. 105.

CHOTA NAGPUR TENANCY ACT (VI OF 1908).

——Agricultural land—Meaning of.

Agricultural land has not been defined in the Act, and it would appear that this omission is intentional. 6 Pat. 48=7 P.L.T. 641=97 Ind. Cas. 789=A.I.R. 1926 Pat. 527.

——Applicability and scope—Jurisdiction of Revenue Courts—Declaration of relationship of landlord and tenant by Civil Court—If condition precedent.

The Chota Nagpur Tenancy Act is an Act for the regulation of the relationship between landlords and tenants. It is not for the regulation of the relationship between landlords and trespassers. Revenue Courts under the Chota Nagpur Tenancy Act cannot entertain an application for relief until the relationship of landlord and tenant is first established. It is open to a Civil Court to decide that the relationship of landlord and tenant in fact existed and then to leave further proceedings between the parties for ejectment to take place under the Chota Nagpur Tenancy Act. A.I.R. (Vol. 20) 1933 Pat. 695=150 Ind. Cas. 242.

——Applicability and scope of.

Provisions of the Act, are provisions which primarily affect and regulate the relationship between the landlord and tenant, and not the rights of the tenant in relationship to third persons. 10 P.L.T. 595=120 Ind. Cas. 300=A.I.R. 1929 Pat. 734.

——Goraiti tenure—Services refused by grantee—Zamindar's right to resume.

Where the lands were goraiti lands and the grantees of that land have refused to perform services the zemindar can resume possession by ejecting the grantee. 22 Cal. 938, Foll. A.I.R. 1929 Pat. 587.

——Khewat—Entry as Khuntkatti—If implies permanent tenure.

Where in the **khewat** the plaintiffs were shown as having **khuntkatti** rights in the lands in question under the proprietor of the village:

Held, that the survey entry does not necessarily show that the plaintiffs possessed the right of a raiyat having **khuntkatti** rights and that it cannot be definitely said that the plaintiffs were permanent tenure-holders and not temporary tenure-holders. 2 P.L.T. 638=63 Ind. Cas. 764=A.I.R. 1921 Pat. 426.

——Khuntakattidars—Nature of tenure.

Though there is no provision in the Chota Nagpur Tenancy Act giving any permanent rights to **Khuntakattidar** tenure-holders, yet it cannot be said that in every case where the **Khuntakattidars** are entered in the **khewat** as tenure-holders, it must be held as a matter of law that they are merely temporary tenure-holders. A.I.R. (Vol. 33) 1946 Pat. 313.

——Object of Act—Holding—Liability to sale in execution.

Lands governed by the Act cannot be sold in execution of decree, the very object of the Act being, to prevent the **raiyats** from mortgaging their property in time of need and from having them displaced by more wealthy persons from other parts of India. (1937) 18 Pat.L.T. 430.

——Procedure—Rent decree—Sale—Applicability of C. P. Code.

Sale of homestead of a tenant, which was not part of his holding, in execution of a rent decree is governed by C.P. Code. (1919) Pat. 120=1 Pat. L. W. 438=42 Ind. Cas. 559.

——Procedure—C. P. Code—Applicability — Appeal—Order of remand by Judicial Commissioner—Revision.

An order of remand by the Judicial Commissioner of Chota Nagpur in a case tried by a Revenue Court is neither appealable nor revisable, as no provisions of the Civil Procedure Code have been incorporated in the Tenancy Act. 25 Ind. Cas. 899 (Cal.).

——Record of Rights—Entry in—Presumption of correctness—Digwari tenancy—Entry in Record of Rights that tenant has occupancy right—Evidentiary value—Custom in Chota Nagpur.

The mere existence of a general legal proposition that non-accrual of a right of occupancy is an inherent incident in a **ghatwali** tenancy, would not rebut the statutory presumption that the Record of Rights is correct until the contrary is proved by evidence, any more than the general proposition that a landlord is entitled to all land within his estate would rebut an entry that a certain **raiyat** possesses a right of occupancy in his holding. Least of all would it do so in Chota Nagpur, where it is common knowledge, that in such tenancies a local custom or usage exists that a right of occupancy can accrue even as regards agricultural land settled with a new **raiyat**, and much more so where the land is **korkar**. A.I.R. (Vol. 20) 1933 Pat. 57=11 Pat. 464=139 Ind. Cas. 385.

——Record of Rights—Entries in—Conclusiveness of—Evidence to prove contrary—Admissibility.

Where the holding is not recorded as a Mundari Khuntkatti tenancy in the Record of Rights no evidence is admissible to prove such a tenancy in bar of execution of a decree for sale of that holding. 9 Pat. 952.

——Record-of-Rights—Entry showing relationship of landlord and tenant—Suit for rent in Revenue Court on basis of—Competency.

That the Record-of-Rights showed the relationship of landlord and tenant is sufficient basis for the suit in the Revenue Court for rent under Act although that relationship may not be admitted. 11 P.L.T. 387=120 Ind. Cas. 35=8 Pat. 581=A.I.R. 1930 Pat. 24.

——Rent suit—Description of tenancy—Duty of plaintiff.

Neither the Chota Nagpur Tenancy Act, nor the Sale of Tenures Act, makes it incumbent upon the plaintiff to describe the nature of the tenure in a rent suit. The only object to describe the nature of the tenure in execution case is to give information to the intending bidders. It will be enough if in the sale proclamation the two entries in the Record of Rights be mentioned, leaving it to the future purchaser to have the matter settled in the Civil Court. It is not necessary for the executing Court to go further. A.I.R. (Vol. 22) 1935 Pat. 400=16 P.L.T. 622=156 Ind. Cas. 474.

——Rent decree—Execution sale—Transferee of occupancy holding—Deposit of decree amount—Withdrawal by landlord decree holder—Relation of landlord and tenant, if established.

Where under the Chota Nagpur Tenancy Act, 1908, a landlord obtains a rent decree regarding an occupancy holding and gets it sold and the transferee of the holding deposits the decretal amount which is withdrawn under protest in pursuance of an order of Court:

Held, that the mere withdrawal of the amount by the landlord did not establish the relationship of landlord and tenant, and no recognition of the tenancy was made by the Act.

Per **Macpherson, J.**—Even if withdrawal of such a deposit had that effect in the area where the Bengal Tenancy Act, is in force, the position under the Chota Nagpur Tenancy Act, is altogether different. If in the former, the tenancy is not to "abridge still further the rights of a transferee of a non-transferable occupancy **jote**" the contrary position indisputably obtains in Chota Nagpur where the Legislature sternly discountenances transfers of **raiyati** holding save in most strictly limited circumstances.

Apart from general considerations, it is inconceivable that in a case, where the express order of the Court on the objection of the landlord that the depositor is not his tenant, was that the landlord was permitted to withdraw the deposit on the distinct understanding that he would do so without detriment to his claim as set out in his objection, a tenancy could be created by implication in favour of the depositor. A.I.R. (Vol. 19) 1932 Pat. 192=11 Pat. 257=13 P.L.T. 387=138 Ind. Cas. 20.

——Rent decree in respect of part of holding—Execution—Deposit by purchaser of part—Withdrawal by landlord—Effect—Recognition of part purchaser—Estoppel.

Where in execution of rent decree in respect of a holding, the decree amount is deposited in Court by the purchaser of part of the holding and the landlord withdraws such amount he is precluded from denying that he recognised the part purchaser as co-tenant of the holding. 1924 P.H.C.C. 281=83 Ind. Cas. 203=6 P.L.T. 220=3 Pat. L.R. 268=A.I.R. 1924 Pat. 669.

——Rent decree—Execution — Court's power to exempt portion of holding.

There is nothing in the Act which would authorise the Court to exempt from sale in execution of rent decree, any portion of a holding or to forbid an intending purchaser to bid for a portion of it. The order of Court exempting the portions of the holding from sale is without jurisdiction and the sales themselves which purport to exclude the portions of the holdings which were put up for sale are also clearly without jurisdiction. 1 Pat. 750=71 Ind. Cas. 345=4 P.L.T. 439=A.I.R. 1923 Pat. 64.

——Under raiyat—Ejectment—Notice to quit—If necessary.

Giving of notice to an under-raiyat before ejectment is not provided for by Chota Nagpur Tenancy Act and the Transfer of Property Act does not apply to such a case by reason of S. 117. Therefore want of notice does not deprive a mortgagor to take khas possession of land after redemption of mortgage. 10 P.L.T. 625=119 Ind. Cas. 551=A.I.R. 1929 Pat. 630.

——Under-raiyat — Position of, after ejectment —Bengal Rent Act (10 of 1859), S. 2.

The ejectment of an occupancy tenant for non-payment of rent makes his under-raiyat a trespasser liable to ejectment by the landlord; and the under-raiyat cannot question the decree for ejectment against the occupancy tenant. 20 C.W.N. 1240=1 Pat.L.J. 543=2 Pat.L.W. 435=37 Ind. Cas. 658.

——Sale of holding in execution—Under-valuation—Effect—Material irregularity.

Though there is no provision in the Chota Nagpur Tenancy Act requiring the Court to assess the value of property sought to be sold, and there are no rules in the said Act requiring the parties to assess the value the mention of a low valuation in the sale proclamation at the instance of the decree-holder amounts to a material irregularity which will vitiate the sale if low price is the result of the sale. (1898) 20 All. 412, Appl. 3 Pat. 325=83 Ind. Cas. 772=5 P.L.T. 88=A.I.R. 1924 Pat. 524.

——Right of re-entry—Surrender of part of holding by one tenant—Effect.

In order to re-enter, there must be surrender of the whole holding and without such right of re-entry the rights of a tenant of a portion of the holding cannot be affected by a surrender of another portion of the holding occupied by another tenant. (1931) 12 Pat.L.T. 314=131 Ind. Cas. 390.

——S. 3—Decree for cess—If rent decree.

Provided certain formalities are adopted the decree in suit for cess operates as a rent decree. A.I.R. 1922 Pat. 303, Foll. 6 Pat. 317=103 Ind. Cas. 464=A.I.R. 1927 Pat. 266.

——S. 3—'Korkar'—Meaning of.

Korkar is land reclaimed from waste for the purposes of rice cultivation. 105 Ind. Cas. 58=A.I.R. 1928 Pat. 87.

——S. 3—"Landlords"—Meaning of.

A landlord is not the same as a proprietor and a tenant may also be a landlord as defined in S. 3. 105 Ind. Cas. 58=A.I.R. 1928 Pat. 87.

——S. 3—Permanent or temporary tenure.

Description of tenancy as "non-resumable" does not necessarily imply that it is not of a temporary nature. A.I.R. (Vol. 21) 1934 Pat. 24=148 Ind. Cas. 190.

——S. 3—"Rent"—Personal service, if.

Under the Act rent does not include personal services. A.I.R. 1929 Pat. 587.

——S. 3—Resumability of grant—Grant to a person and his brothers—One branch becoming extinct—If entitles grantor to resume grant.

Where a grant is made to J and his brothers and not to J alone the mere fact that J's branch has become extinct does not entitle the successors of the grantor to resume the grant so long as the brances of J's brother are also not extinct. 123 Ind. Cas. 640=A.I.R. 1930 Pat. 78.

——S. 3—Suit for cess—If rent suit—Revenue Court jurisdiction to try.

A suit for recovery of cess is triable by the Revenue Court as under S. 3, Cl. (23) of the Chota Nagpur Tenancy Act, rent includes cess. 6 Pat. 317=193 Ind. Cas. 464=A.I.R. 1927 Pat. 266.

——S. 3—Usufructuary mortgage by landlord—Subsequent suit for cess due prior to mortgage—Decree—If rent decree.

Usufructuary mortgagee of landlord's interest becomes landlord since mortgage—So where landlord making usufructuary mortgage of his interest sues for cess accruing due prior to mortgage date and obtains decree, that decree is not rent decree but merely money decree. A.I.R. 1914 P.C. 111, Appl.; 18 C.W.N. 1016, Rel. on. 8 Pat. 366=118 Ind. Cas. 727=A.I.R. 1929 Pat. 321.

——S. 3 (11)—Forest produce—If includes live animals.

The "forest produce" in S. 3 of the Act includes live animals. 2 Pat. L.J. 323=2 Pat.L.W. 282=39 Ind. Cas. 868.

——S. 4—Mundari Khuntkattidar—If tenant.

A Mundari Khuntkattidar is a tenant under S. 4. 105 Ind. Cas. 58=A.I.R. 1928 Pat. 87.

——S. 4—Non-occupancy rights—When accrue.

Under Chota Nagpur Tenancy Act, non-occupancy rights can arise only in the case of a holding which means "parcel or parcels of land" which is the subject-matter of a separate tenancy and not an undivided share. Where a person is inducted on the land by one of the co sharer thicadars without the consent of others, he is not a non-occupancy raiyat.

And where the defendant has been so inducted during the currency of a thica lease and the defendant continues on the land even after the expiry of the thica lease, the position of the defendant at the time he occupied the land was that of a tenant and it is not necessary for the plaintiff with whom the land has been settled by the landlord after the expiration of the lease, in a suit for ejectment of the defendant and for possession, to prove that he was in possesssion of the land within 12 years of the suit.

The fact that the plaintiff does not establish his own possession is irrelevant and whether the defendant was prescribing against the landlord before his induction is quite immaterial. Once he occupies the position of the tenant, there is an end of the matter. A.I.R. (Vol. 25) 1938 Pat. 113=4 B.R. 411=174 Ind. Cas. 207.

——S. 4—Prodhani patta — Status of holder—Ejectment—Jurisdiction of Revenue Court.

The holder of a prodhani patta is not in the position either of a non-occupancy raiyat, or of an occupancy raiyat, but is a quasi service-tenure-holder, i.e., tenureholder of a kind but not one under the Chota Nagpur Tenancy Act. There is no provision in the Chota Nagpur Tenancy Act to justify a Court, constituted to hear suits under that Act, to eject a tenure holder. (1918) Pat. 65=5 Pat.L.W. 199=45 Ind. Cas. 72.

——S. 4—Scope—If exhaustive—Classification is not exhaustive and does not cover all tenants contemplated by S. 3 (26).

The classification of tenants under S. 4 is not exhaustive. There are tenants, for example, tenants of private land who though they are tenants under the general definition of the tenant under S. 3 (26) are not tenants under S. 4 and as such are not dealt with by the Act. Such class of tenants is governed by the general law laid down in the Transfer of Property Act. A.I.R. 1922 P.C. 142, Rel. on. 10 P.L.T. 453 =118 Ind. Cas. 305=A.I.R. 1929 Pat. 444.

——S. 4—Scope—If exhaustive.

The enumeration of tenants in S. 4 is not exhaustive. 2 P.L.T. 638=63 Ind. Cas. 764=A. I.R. 1921 Pat. 426.

——S. 4—Thika dowami tenancy—Origin and Nature of.

The name thika dowami is given in the Record-of-Rights to a cultivating tenancy which has arisen after the desertion of a village or part of a village by a khuntkatti founder's family. When a family settles down on a deserted village site and carries on reclamation on land already cleared or partially cleared of jungle a tenancy arises which will not be within the definition of khuntkatti but which will be permanent and non-resumable. Such tenancies partake so much of a raiyati type, in being reclaiming tenancies, that in some old judgments the holders have been held to possess a right of occupancy in their tenure. But while by their nature and by custom they are permanent, neither permanency of rent nor transferability (early partnership is not understood as transfer) is an inherent characteristic of the tenancies; periodical settlement of rent are made between landlord and tenant on the basis of the permanency of the tenancy. 7 Pat. 752=9 P.L.T. 379=111 Ind. Cas. 675=A.I.R. 1928 Pat. 451.

——S. 5 (As amended in 1920)—Pradhani tenancy —Villages in Dhalbhum estate—Nature and incidents of—Holder—If tenure-holder.

The **pradhani** is undoubtedly a tenancy and the **pradhan** a tenat as these words are used in the Act. **Pradhani** tenancy in the villages in Dhalbhum estate is the interest of a person who has acquired from the proprietor a right to hold land for the purpose of collecting rents. It, therefore, satisfies the conditions which according to the Act make it a tenure as that word is used in the Act. Though the **raiyats** of the village are entitled to clear jungle not within the area of the tenancy and to do so without the **pradhan's** consent, yet it is from the **pradhan** and from him alone that they can take settlement. The land of his tenancy being held by the **pradhan** for the purpose of collecting rents, he is not taken out of the definition of tenure-holder by reason that he has a right to settle tenants on newly reclaimed waste and thus to increase the area of his tenancy. This is a valuable right incident to his tenancy in the lands he holds. The customary right of the **pradhan** is acquired from the proprietor who pays land revenue for the whole of his permanently settled estate.

Hence, the **pradhani** in villages in Dhalbhum estate is a tenancy and the **pradhan** a tenure-holder within the meaning of S. 5, Chota Nagpur Tenancy Act. A.I.R. (Vol. 23) 1936 Pat. 563=165 Ind. Cas. 378=15 Pat. 644, reversed. A. I.R. (Vol. 27) 1940 P.C. 137=6 B.R. 876=1940 O.L.R. 506=21 P.L.T. 1005=19 Pat. 949=67 I.A. 290=189 Ind. Cas. 606 (P.C.).

——S. 5—Tenure-holder or raiyat—Patta granting all rights except right to receive rent—Status of grantee—Grantee, if a tenure-holder within S. 5.

The question whether a tenant is a **raiyat** or a tenure-holder ultimately depends upon the question of facts and the Court must look to the attendant circumstances and no importance can be attached to the mere form of the **kabuliyat** or to the use in it of the word 'cultivator'. Courts are free to discover by ordinary means the purpose for which the right of tenancy was originally acquired. It may discover it for example by the construction of a **kabuliyat** or a **patta**. In the absence of evidence of that kind, it may discover it by investigation of all the relevent circumstances But the purpose which is the subject-matter of the inquiry is the purpose of the lessor and the lessee to use the English phrase, in the letting in question. One has to see whether their common purpose in respect of this land was that the land should be held for collecting rents and so forth or for cultivation by the tenant himself. Fixity of rent is no criterion for a determination of the point at issue, for a **raiyati** holding may be held at a fixed rent equally with a tenure. There is nothing in the Chota Nagpur Tenancy Act, which is inconsistent with there being a **raiyat** at fixed rate, though this class of **raiyat** is not mentioned in the Act. But such a **raiyat** will be an occupancy **raiyat** with all its incidents, rights and liabilities and will not have the special rights given to a **raiyat** at fixed rate under the Bengal Tenancy Act, under which such a **raiyat** stands in a class by itself.

The words used were "**bazariey khud kasht khwah basabil digar jis sabil se munasib samjhen mahasil paidawar se mokarrari mazkur ka be tasaruf khudaha dar laya karen, etc.**" meaning that either by cultivating themselves or by any other means by whatever method they like they may enjoy the produce of the **mokarrari** property, etc., etc.:

Held, that the Courts were perfectly right to look to the attendant circumstances to judge the purpose for which the lease was acquired and to determine the status of the defendant and that the lease was not a **raiyati** lease and the lessees were not **raiyats** but tenure-holders.

In cases under the Chota Nagpur Tenancy Act, no presumption arises on the basis of area.

Where a **patta** grants all the rights in the land except the right to receive the rent payable to the superior landlord, the grantee is a tenure-holder within the meaning of S. 5 of the Chota Nagpur Tenancy Act. A.I.R. (Vol. 22) 1935 Pat. 63=154 Ind. Cas. 399.

——S. 5—Tenure-holder or occupancy-raiyat—Test to decide.

In deciding whether a person is a tenure-holder as shown in the Record-of-Rights or an occupancy-raiyat as he asserts relying on the original settlement, the Court has to see what was the intention at the inception of the tenancy, and it is the intention of the person acquiring the right and not the intention of the landlord who creates it, that has to be looked to. 119 Ind. Cas. 545=A.I.R. 1929 Pat. 220.

——S. 5—"Tenure-holder" — Grantee under patta getting all rights except right to rent—Status of.

Where a pattah grant something more than the mere right to cultivate, in fact, where it grants all

the rights save and except the right to receive the rent payable to the superior landlord, the grantee comes withis the definition of tenure-holder under S. 5 of the Chota Nagpur Tenancy Act. Therefore there is no bar to the sale of his interest in execution of a decree. 70 Ind. Cas. 976 (Pat.).

——S. 6—"Raiyat"—If includes under-raiyat.

The definition of "raiyat" in S. 6 is wide enough to include an under-raiyat; but Cl. (2) of S. 6 makes the position clear. A person shall not be deemed to be a raiyat, unless he holds land either immediately under a proprietor or immediately under a tenure-holder or immediately under a Mundari khuntkattidar. Where a person does not claim to hold the land under a proprietor or a tenure-holder or a Mundari khuntkattidar, he cannot be held to be a raiyat in the sense in which the expression has been used in the Chota Nagpur Tensancy Act though he may be an under-raiyat. There are only three classes of raiyats mentioned in this section, and these are occupancy raiyats, non-occupancy raiyats and raiyats having khuntkatti rights...Under-raiyats, on the other hand are tenants, holding whether immediately or mediately under-raiyats. A.I.R. (Vol. 28) 1941 Pat. 485 =7 B.R. 772=194 Ind. Cas. 441.

——S. 6—Scope—Lease for planting orchard and lease of existing orchard—Distinction.

There is no distinction between taking settlement of land for the purpose of planting an orchard, which may be held to be cultivation, and taking settlement of a land upon which an orchard already exists; in other words, taking settlement for gathering all the fruit from an existing orchard. A.I.R. (Vol. 23) 1936 Pat. 265=2 B.R. 533=162 Ind. Cas. 981.

——S. 7—Dowami thikas—Nature and incidents of —Permanent or temporary tenure.

The tenancies of the type which are usually dealt with under the category of dowami thika are in fact raiyati tenancies which have grown into tenures. Where there is nothing in the kabulityats to show that the lease was granted to the ancestors of the tenants for the purpose of collecting rents or bringing it under cultivation by establishing tenants upon it. But on the other hand, these leases were given for the purpose of reclaiming the lands of the village and for bringing them into cultivation.

Held, that in origin the tenancy was essentially a cultivating or raiyati tenancy though it may now have all the appearance of a tenure and the mere fact that the tenants were described now as tenure-holders did not necessarily show that their interest was not permanent. A.I.R. 1928 Pat. 451, Rel. on. 10 P.L.T. 359=121 Ind. Cas. 360=A.I.R. 1929 Pat. 376.

——S. 7—Dowami Thikadars—Who are—Ancestor of defendant-tenants reclaiming and settling land from earliest times but not founder of village —Defendants are dowami thikadars.

Even though the ancestor of the tenants through whom they claim dowami thikadari rights was not the founder of the village in the strict sense of the terms but if he came upon the scene during the earlier stages of reclamation and did the most of the reclamation and otherwise improved and settled the land through himself and his partners as well as their descendants, it is impossible to deny to the tenants the status of a dowami thikadar. 10 P.L.T. 359=121 Ind. Cas. 360=A.I.R. 1929 Pat. 376.

——S. 9-A—Enhancement of rent—Suit for—Deputy Commissioner's jurisdiction—Denial by defendant of right to enhance—Effect.

Per **Wort, J.**—It is quite clear from the general provisions of the Chota Nagpur Tenancy Act, that the jurisdiction lies in the Deputy Commissioner in cases of enhancement of rent. The right thus given by the Act is not to be defeated by the mere statement of the defendants well founded or otherwise, that there was no right to enhance the rent. A.I.R. (Vol. 24) 1937 Pat. 469=18 P.L.T. 593= 4 B.R. 25=171 Ind. Cas. 438.

——S. 11—Burden of proof—Registration—Onus.

The onus of proving registration is on the plaintiff whose claim for rent is questioned on the ground of non-registration under S. 11. 2 P.L.T. 580 =64 Ind. Cas. 358=1921 P.H.C.C. 355=6 P. L.J. 677=A.I.R. 1921 Pat. 357.

——S. 11—Rent from date of transfer to date of registration—Right to.

The landlord is not entitled to recover from the tenant the rent due between the date of transfer and the date of registration. 2 Pat.L.W. 146= 41 Ind. Cas. 778.

——S. 11—Rent prior to application for registration—Right to.

The transferee of a tenure cannot recover rent for the period prior to his application to the landlord for registration in his office. 19 C.W.N. 461=27 Ind. Cas. 605.

——S. 11—Scope — Non-registration — Effect on maintainability of suit.

In the absence of registration under S. 11, the transferee cannot maintain a suit for rent at all. It cannot be held that registration may be made after the suit has been filed and a decree has been obtained therein and that the decree may be executed after such registration. 2 P.L.T. 580=64 Ind. Cas. 358=1921 P.H.C.C. 355=6 P.L.J. 677=A.I.R. 1921 Pat. 357.

——S. 11 (4)—"Recover" — Meaning of — Non-registration—Effect—Payment of rent to superior landlord and entry in Record of Rights—If registration.

Plaintiffs purchased a tenure on 28th May, 1899, and thus were bound to have their names registered under the provisions of S. 34 (1) of the Amendment Act of 1903), they could not recover arrears of rent from the fasli years 1317 to 1320 in spite of the fact that S. 11 of the Chota Nagpur Act (1908) contains no provision for past transfers . The repealed statute of 1903 prohibited the plantiff from exercising his right of suit for rent by reason of S. 8 (c) Bengal General Clauses Act, (1899). Payment of rent to the superior landlord and his acceptance of the same and the entry in the Record of Rights do not suggest a presumption of registration under the Chota Nagpur Tenancy Act. The term 'recover'

in Cl. (4) of S. 11 of the Act of 1908 means to recover legally. (1917) Pat. 63=1 Pat.L.W. 571=38 Ind. Cas. 59.

——S. 14—Applicability—Onus.

S. 14 (1) (a) of the Chota Nagpur Tenancy Act says inter alia that upon the resumption of a resumable tenure, no annulment can be made of a lease of land whereon a tank has been made. In order that it may apply it must be proved that the tank in question was made by the lessee. 222 Ind. Cas. 57=12 B.R. 234=A.I.R. 1946 Pat. 77.

——S. 14—Construction and scope—"Grantee or any of his ancestors"—Meaning of—Resumption of Jagir—Effect—Consent—Burden of proof.

"Land whereon a mine has been sunk under lawful authority is expressly excepted from annulment by exception (a) of S. 14. When a jagir tenure is resumed all sub-tenures created by the previous Jagirdars are annulled and became void, and not merely voidable. The words "grantee or any of his ancestors" clearly mean 'succceeding grantees' and under-tenures, created by whichsoever grantee (who successively held the tenures), would be annulled on resumption. To prove consent to the under-tenure is upon him who asserts it. A grantee or any of his successors could not create an under-tenure to exceed in duration the subsistence of their own tenure. S. 14 expressly provides that on resumption of the tenures all sub-tenures granted by the grantee of tenure whom he succeeded should be deemed to be annulled. 27 Cal. 156, 24 Cal. 715 and 17 M.L.J. 598 Foll. 71 Ind. Cas. 999=3 P.L.T. 628=24 Cr.L.J. 279=A.I.R. 1923 Pat. 76.

——S. 14—Limitation—Starting point.

Limitation for annulling sub-tenancy under S. 14 starts from the date the suit to resume the tenure is filed and not from the date of actual resumption. The word 'resumption' does not mean in S. 14 actual re-entry upon or actual physical possession of the tenure nor does it refer to the happening of an event entitling the landlord to resume the tenure. Resumption means nothing more than an unequivocal demand for possession so as to operate as a final election by the landlord to re-enter. The word 'successor' in S. 14 includes a successor **de facto**. Sub-tenancy created by a successor **de facto** is one contemplated under S. 14. 3 Pat. 320=78 Ind. Cas. 474=5 P.L.T. 85=2 Pat.L.R. (Civ.) 69=1924 P.H. C.C. 60=A.I.R. 1924 Pat. 449.

——S. 14—Tenure-holder creating zarpeshgi—Landlord resuming on death of such tenure-holder without heirs and granting zarpeshgi to another—Suit by new zarpeshgidar for possession under S. 14—Maintainability.

Where a person who was granted a tenure creates a **zarpeshgi** in respect of the land and, on the death of such tenure-holder without heirs, the landlord resuming the land grants a **zarpeshgi** to another who sues for possession of the land from the original **zarpeshgidar**, the landlord being impleaded as defendant, the suit is properly framed even though the landlord is not the plaintiff. Even if the landlord were not impleaded, the new **zarpeshgidar** as the transferee of the landlord can equally enforce the rights under S. 14, Chota Nagpur Tenancy Act, just as much as the landlord. A.I.R. (Vol. 25) 1938 Pat. 118=4 B.R. 464=174 Ind. Cas. 627.

——Ss. 14 (4), 203 and 212—Ryot at fixed rates—Right to deposit and set aside sale under rent decree.

A ryot at fixed rates is entitled to deposit the decree amount and to have a sale held in execution of a rent decree set aside under S. 212. Whether his right or interest was liable to annulment under Ss. 14 and 208, is immaterial. 4 P. L.J. 11=49 Ind. Cas. 193.

——S. 16 — Occupancy rights — Acquisition—Long possession after expiry of patta—Effect.

Where persons entering into possession under a **patta** remain there long after the expiry of the period, for 23 years, they acquire occupancy rights in the land, and in the absence of distinct relinquishment a subsequent mortgage in their favour by the **brahmottardar** will not in any way affect their rights. A.I.R. (Vol. 21) 1934 Pat. 239=151 Ind. Cas. 144.

——S. 16—Patta — Construction — Theka or cultivating tenancy.

A village was given by a **patta** in **theka ijara** to **A** by **B** for a term of ten years "with the details that in 1857, he will have 25 **bights** land and 9 **mahua** trees at an annual rental of Rs. 12-8-0 and from 1858-1866 he will have the entire **mouza** including **uthati** (culturable) and fallow lands within the boundaries of the said **mouza** at an annual rent of Rs. 106-4-0". The **patta** also provided that after the expiry of the lease "the **mouza** will be temporarily settled with none else than **A** on properly enhanced rent and if the money is not paid **B** will be at liberty to do what he likes":

Held, that a cultivating tenancy cannot be spelled out of the **patta** of 1857, in respect of 25 **bighas** or any other area: that the **patta** was a single lease of the entire village for the purpose of collecting rents and bringing it under cultivation by establishing tenants on it: that the mere fact that only 25 **bighas** were let for the first year and the tenancy of the whole village was not to commence until the next year raised no presumption that that parcel was singled out for the purpose of cultivation by **A** as a **raiyat** and hence no right of occupancy could be founded upon the **patta**. A.I.R. (Vol. 19) 1932 P.C. 105=36 C.W.N. 626=36 M.L.W. 130=55 C.L.J. 487=138 Ind. Cas. 234=63 M.L.J. 1 (P.C.).

——S. 19—Scope.

S. 19 is confined to "land for the time being held by him as a raiyat" and in the village of which he is a settled raiyat. 11 P.L.T. 207=A.I.R. 1930 Pat. 236.

——S. 20—Occupancy rights—Settlement of khast land with right to irrigate it from tank on another land—Accrual of—Occupancy right.

Where settlement was made only of the khast land and along with it the right to irrigate it from a tank on another piece of land, no occupancy right can accrue in the land covered by the tank.

222 Ind. Cas. 57=12 B.R. 234=A.I.R. 1946 Pat. 77.

——S. 20—Thickadar—Right of occupancy—If can be acquired.

A **Thickadar** cannot acquire occupancy or non-occupancy right in the land that he ultivated as a **thickadar,** under the sections. 3 Pat.L.T. 107=1921 P.H.C.C. 296=A.I.R. 1922 Pat. 28.

——S. 20 (3) Proviso—Scope—Raiyati settlement of kasht land by grantee of resumable tenure—Raiyat allowed to irrigate land from tank and catch fish—Raiyat's claim to occupancy right in tank—Sustainability.

The fact that a raiyat with whom kasht land has been settled by the grantee of a resumable tenure is allowed to irrigate the kasht land from a tank situate within the resumable tenure and to catch fish therein does not warrant the conclusion that the land upon which the tank is situated was also settled with the raiyat for agricultural purposes so as to confer occupancy rights on him in respect of that land on the termination of the interest of the grantee. A.I.R. (Vol. 33) 1946 Pat. 77=12 B.R. 234=222 Ind. Cas. 57.

——S. 21—"Irrespective"—Meaning of.

The word 'irrespective' in S. 21 cannot be held to mean 'subject to'. A.I.R. (Vol. 26) 1939 Pat. 161=5 B.R. 78=178 Ind. Cas. 274.

——(as amended in 1947), S. 21—Right of tenant—Manufacture of bricks out of earth dug out of land.

A raiyat has no right under S. 21, Chota Nagpur Tenancy Act, as amended by Act 25 of 1947, to manufacture, out of the earth dug out of the land of his holding, bricks which are not required for the domestic or agricultural purposes of the raiyat and his family, nor to sell them to strangers, even if the digging be for the purpose of improving the holding. A.I.R. 1951 Pat. 525.

——Ss. 21, 22 and 139 (4)—Jurisdiction—Misuse of land by tenant—Suit by landlord for ejectment on ground of—Deputy Commissioner's jurisdiction to try.

Quaere.—Under S. 21, Chota Nagpur Tenancy Act, an occupancy **raiyat** is not entitled to use his land in such a way as to render it unfit for the purpose of tenancy. The penalty for such use is provided in S. 22, and the **raiyat** is liable to be ejected. A suit for such ejectment is entertainable exclusively by the Deputy Commissioner under S. 139 (4), Chota Nagpur Tenancy Act. It is doubtful whether under the tenancy law of Chota Nagpur a suit lies in Civil Court against an occupancy **raiyat** for injunction to restrain him from using his land in a way detrimental to the tenancy. The landlord by suing for injunction cannot circumvent the jurisdiction of the Deputy Commissioner. A.I.R. (Vol. 23) 1936 Pat. 142=2 B.R. 355=161 Ind. Cas. 695.

——(as amended by Act 25 of 1947), S. 21-A—Scope—Pala trees growing on land in holding—Right of raiyat to cultivate lac—Right of landlord—Burden of proof.

The right to trees standing on the holding would, in the absence of a specific entry in the record of rights or proof of a custom to the contrary, go along with the land in posession of the **raiyat** and the landlord seeking to deprive the tenant of his right to grow lac on the **pala** trees on the holding must establish that he at the time of the original settlement with the **raiyat** reserved his right to go upon the land and put lac on the trees that might grow upon the land later on. 24 C.L.J. 21, foll. A.I.R. 1951 Pat. 385.

——S. 22—"Misuse"—Erection and maintenance of huts—Effect of.

An erection and maintenance of huts is a misuse of the holding which constitutes continuing wrong to the landlord and, which continues as long as the huts remain standing and, therefore there is a fresh **terminus a quo** from every moment that the wrong continues. Consequently the two years limitation under S. 233, Chota Nagpur Tenancy Act can be calculated from any day the misuser continued. A.I.R. (Vol. 31) 1944 Pat. 26=22 Pat. 648=10 B.R. 502=212 Ind. Cas. 362.

——S. 22—"Misuse",—Continuing wrong.

Where the wrong is one which is capable of being corrected and is not corrected, it is wrong which continues; as for instance where an obstruction to a water-course is caused, the wrong to the person entitled to the use of the water continues until the obstruction is removed, whereas in the case of a single act of trespass, such as walking into another person's house or on his land the wrong ceases when the trespasser leaves the premises, and the trespass in such a case does not constitute a continuing wrong. A.I.R. (Vol. 27) 1940 Pat. 561=19 Pat. 848=6 B.R. 701=188 Ind. Cas. 495.

——Ss. 22—"Misuse" — Tenant building huts—Effect—Finding of misuse—Interference in second appeal.

Where a tenant commits breach of S. 22, Chota Nagpur Tenancy Act, by building coolie huts on the land and the Judge comes to the conclusion that the land by reason of the building of these huts has been rendered unfit for the purposes of tenancy, the High Court is not entitled as a Court of second appeal to interfere with this finding. A.I.R. (Vol. 26) 1939 Pat. 161=5 B.R. 78=178 Ind. Cas. 274.

——S. 22—Under tenant holding homestead land If acquires status of raiyat—Ejectment—Grounds.

An under-tenant holding homestead land does not acquire a **raiyat's** status in respect of the holding merely because he holds other lands in the village as a **raiyat** and the homestead is not held as a part of the **raiyat's** holding. Such a tenant can be ejected only on the grounds stated in S. 22, Chota Nagpur Tenancy Act.

A **raiyat** instituted a suit to eject his under-tenant on the ground that the lease given by him was invalid from its beginning being in contravention of S. 46. It appeared that the defendant had been holding the land for sixteen years and during the period the plaintiff had allowed him to build a house on the land and had taken **nazrana** from him:

Held, that the plaintiff could not be permitted to take advantage of his own wrong and to eject the defendant. A.I.R. (Vol. 19) 1932 Pat. 257 =11 Pat. 456=13 P.L.T. 603=139 Ind. Cas. 394.

——S. 23—Testamentary Disposition—If prohibited—Testamentary disposition of raiyati holding in favour of third persons.

Although testamentary disposition by a raiyat in respect of his holding may or may not be binding upon the landlord there is nothing in the provisions which would prohibit such disposition in relation to third persons. 10 P.L.T. 595 =120 Ind. Cas. 300=A.I.R. 1929 Pat. 734.

——S. 25—Scope—Occupancy tenant—Enhancibility of rent.

Enhancibility of rent is an ordinary incident of occupancy holding, but there is nothing incompatible between the nature of an occupancy holding and fixity of rent under Chota Nagpur Tenancy Act. 11 P.L.T. 251=A.I.R. 1930 Pat. 392.

——S. 26 — Applicability — Rent enhanced by private agreement.

S. 26 of the Chota Nagpur Tenancy Act was not intended to apply to enhanced rents by private agreement under the law in force at that time. 16 C.L.J. 422=17 C.W.N. 430=16 Ind. Cas. 929.

——S. 26—Scope and object of—Agreements valid at inception—If invalidated—Chota Nagpur Landlord and Tenant Procedure Act, S. 21.

S. 26 was not contemplated to invalidate agreements which were valid in their inception but to validate agreements in special cases out of such agreements as would otherwise have been invalid owing to the provisions of S. 21 of the Chota Nagpur Landlord and Tenant Procedure Act. 6 P.L.T. 144=82 Ind. Cas. 988=1924 P.H.C.C. 307=A.I.R. 1925 Pat. 297.

——Ss. 26 and 27—Occupancy tenant—Kabuliyat agreeing to pay enhancecd rent—Legality.

A **kabuliyat** executed by an occupancy tenant to pay enhanced rent is illegal and not binding upon the tenant under S. 27. 51 Ind. Cas. 27 (Pat.).

——S. 41—Scope—Non-occupancy raiyat—Liability to eviction.

Where a non-occupancy raiyat is admitted into the land under a registered lease for a term, he is liable to ejectment under S. 41, Cl. (d) upon the termination of that period. 7 Pat. 675=9 P.L.T. 811=110 Ind. Cas. 494=A.I.R. 1929 Pat. 18.

——S. 41—Scope — Thekadar — Settlement of tenant—Surrender of Theka—Landlord's right to eject tenant.

A thekadar is entitled to make an ordinary settlement with tenants under the Act and confer the status of non-occupany raiyats on them. The landlord on the surrender of Theka can eject such a raiyat on the ground stated in S. 41 and on no other ground. 3 Pat. L.W. 333=39 Ind. Cas. 521.

——S. 41 —Under-raiyat—If non-occupancy raiyat —Ejectment—Notice determining tenancy—Necessity.

An under-raiyat is distinct from non-occupancy raiyat. Provisions dealing with tenants generally can be applied to under-raiyats. No notice in writing is needed for terminating a tenancy of an under raiyat as the tenancy is ordinarily from year to year. 40 Cal. 858=17 C.W.N. 810=19 Ind. Cas. 588.

——S. 43—Acquisition of occupancy rights—When barred.

Under S. 49 of the Chota Nagpur Tenancy Act, in order to bar the acquisition of occupancy rights it is necessary to show (1) that the lands are landlord's privileged lands within the meaning of S. 118 (a); (2) either that they are held on a registered lease for a term exceeding one year; or (3) that they are held on a lease, written or oral, for a period of one year or less. 27 Pat. 1179=A.I.R. 1949 Pat. 265.

——S. 46—Applicability—Jurisdiction—Allegation of fraud—Cause of action based on fraud—Bar of Civil Suit.

Where the plaintiff complains that the mortgagee had fraudulently got his land sold by failing to make payment of the rent which he was bound to pay, the fraud and the sale accomplished by the alleged fraud constitute a cause of action and entitle him to a relief which is quite distinct from the relief contemplated in Cl. (4) of S. 46, Chota Nagpur Tenancy Act, and there is no bar in the Chota Nagpur Tenancy Act to the Civil Court trying an action which is based on such allegations. A.I.R. (Vol. 22) 1935 Pat. 473=1 B. R. 847=158 Ind. Cas. 29.

——S. 46—Applicability—Lease—Period not fixed —Duration—Ejectment—Forum.

In the absence of definite period agreed to between the parties a lease of a holding continues to be governed by S. 46 and is legal only for a period of five years, a term fixed by statute. Therefore, suit for ejectment in such case lies to revenue Court. 10 P.L.T. 661=121 Ind. Cas. 328=A.I.R. 1929 Pat. 635.

——S. 46—Applicability—Misdescription of defendant as raiyat in notice—If ousts Civil Court's jurisdiction.

The mere fact that the plaintiff misdescribed the defendant as **korfa raiyat** in his notice, although he was actually a trespasser, cannot exclude the jurisdiction of the Civil Court and bring the case within the provisions of S. 46 of the Chota Nagpur Tenancy Act. 11 P.L.T. 539.

——S. 46—Applicability—Surrender to landlord or sale by tenant to stranger with consent of landlord —If transfer and invalid.

It is open to a tenant to give back his holding or to let his landlord take his holding (i.e., surrender it) for a pecuniary consideration. A surrender is not a transfer within the meaning of S. 46. Even where a third party had paid consideration to a tenant as a result of which the tenant had agreed with the landlord to surrender his holding whilst the landlord had agreed to resettle the property with the person who had given the consideration

to the outgoing tenant: **Held**, this circuitous arrangement could not in law be regarded as definitely illegal. 75 Ind. Cas. 601=A.I.R. 1924 Pat. 793.

——S. 46—Occupancy right—Acquisition by non-occupancy tenant.

Ordinarily a person holding under a *melabagh* agreement is not an occupancy *raiyat* and cannot acquire occupancy right. A.I.R. (Vol. 21) 1934 Pat. 53=150 Ind. Cas. 987.

——S. 46—Retrospective effect.

S. 46 clearly shows that it is intended to be retrospective except as regards transactions after 1903. 8 P.L.T. 850=105 Ind. Cas. 33=A.I.R. 1928 Pat. 109.

——S. 46—Scope—Insolvency of raiyat—Sale by receiver of house and homested land—Validity.

The house and homested lands of an insolvent raiyat forming part of his raiyati holding cannot be sold by the receiver in insolvency in view of the provisions of Ss. 46 and 47. 8 P.L.T. 669=106 Ind. Cas. 298=A.I.R. 1927 Pat. 353.

——S. 46—Scope—Mortgage—Right of mortgagor to decree for possession after five years—Equitable relief—Right of mortgagee to claim dues.

By the terms of S. 46, Chota Nagpur Tenancy Act, a mortgagee is not entitled to remain in possession of the mortgaged lands after the expiry of five years and the mortgagor is entitled to a decree for possession. An order making the decree conditional upon payment of the mortgage dues and other sums spent by the mortgagee can be passed only on equitable grounds. But a person who comes to Court with unclean hands, is not entitled to any equitable relief. A.I.R. (Vol. 22) 1935 Pat. 473=1 B.R. 847=158 Ind. Cas. 29.

——S. 46—Scope—Raiyati holding in Manbhum prior to extension of Act—Validity.

There is nothing in S. 46 of the Chota Nagpur Tenancy Act which was extended to Maubhum by Government Notification dated 22nd December, 1909 to invalidate a sale of a raiyati holding in Maubhum which took place on the 19th August, 1909, (*i.e.*) prior to the extension of the Act to the District. (1910) 15 C.W.N. 43=7 Ind. Cas 763.

——S. 46—Scope—Raiyat mortgaging his right in holding beyond five years—Legality.

There is nothing in the Chota Nagpur Tenancy Act, which provides that a transaction whereby a *raiyat* mortgages his right in his holding for a period exceeding five years, is illegal.

Whether the transaction is invalid or not, whether the landlord is bound to recognize it or not, the position of the mortgagee is that of a mortgagee and nothing more unless some adverse title is set up by him. A.I.R. (Vol. 23) 1936 Pat. 63=2 B.R. 276=160 Ind. Cas. 1066.

——S. 46—Scope—Sale of occupancy holding by illegitimate son of Bania born of an aboriginal Ghasi woman—Validity.

An illegitimate son of a Bania born of an aboriginal Ghasi woman, belongs to a separate class higher than Ghasi and lower than Bania. A transfer of an occupancy holding by him is, therefore, not within the mischief of S. 46, Chota Nagpur Tenancy Act, and is valid. 12 M. 72, rel. on. 28 Pat. 355=A.I.R. 1949 Pat. 473.

——S. 46— Scope — Suit for ejectment of under-tenant—Maintainability—Remedy.

Under S. 46 an application for the ejectment of an under-tenant was cognizable by the Deputy Commission and under Cl. (8) of S. 139, as it stood before the amendment of 1920, and as it still stands an application under S. 46 is an application cognizable by the Deputy Commissioner. Thus it seems clear that under the terms of S. 139-A no suit could be brought in the civil Court for the ejectment of an under-tenant by his immediate landlord. 6 Pat. 69=8 P.L.T. 231=1926 P.H.C.C. 288=97 Ind. Cas. 175=A.I.R. 1926 Pat. 403.

——S. 46—Scope—Tenancy from year to year—Validity.

The Act does not contemplate creating of an under-raiyat a tenant from year to year. This is expressly forbidden by S. 46 of the Act which does not recognize the lease by a raiyat for a period exceeding five years. 10 P.L.T. 625=119 Ind. Cas. 551=A.I.R. 1929 Pat. 630.

——S. 46 (2)—Applicability—Surrender by tenant after valid sale—Settlement of surrendered land by landlord with another—Title of latter to eject vendee—S. 46 (6).

A person taking settlement from a landlord in Chota Nagpur of land surrendered by an occupancy-*raiyat* after the latter has made a valid sale thereof under S. 46 (6) of the Chota Nagpur Tenancy Act, 1908, does not obtain title to the land settled so as to be entitled to eject the vendee, Section 46 (2) is not applicable. The landlord secures nothing by accepting the surrender of his holding by a *raiyat* who has made a valid sale of it under S. 46 (6) and so has nothing to surrender. The landlord, therefore, confers no title on the person with whom he settles such a holding. A.I.R. (Vol. 22) 1935 Pat. 46=15 P.L.T. 769=14 Pat. 259=153 Ind. Cas. 179. (F.B.).

——S. 46 (2)—Eviction of sub-tenant—Landlord's right.

The section gives rights to the landlord to maintain a suit as against those persons who take a lease from occupancy tenants. (1937) 18 P.L.T. 374.

——S. 46 (2)—Scope—If controlled by rules under S. 46 (6)—Transfer by raiyat—Absence of consent in writing of landlord—Validity of transfer.

The rules framed under S. 46 (6), Chota Nagpur Tenancy Act, published in notification dated 29th June, 1924, conferring on a *raiyat* the right to transfer his entire holding to another person of the same tribe or caste as himself, do not control the operation of S. 46 (2). Consequently, even a transfer which falls under the notification is not binding upon the landlord if it be not made with his consent in writing. A.I.R. (Vol. 19) 1932 Pat. 218=13 P.L.T. 328=138 Ind. Cas. 97.

——Ss. 46 (4)—Applicability—Lease executed before 1903—Lease for a specified term of years.

Where a lease has been effected before 1903, neither the restrictions on the transfer of their rights by *raiyats* contained in S. 46, sub-S. (1), Chota

Nagpur Tenancy Act, nor the special procedure for recovery of possession within three years after the expiry of a lease, provided by sub-S. (4) of the section, can have any application. A.I.R. (Vol. 20) 1933 Pat. 457=148 Ind. Cas. 353.

——S. 46 (4)—Applicability—Transfer by raiyat in 1901—"Under the Act"—S. 139 (4)—Scope.

A transfer by a *raiyat* in 1901, that is before the Chota Nagpur Tenancy Act or Chota Nagpur Landlord and Tenant Procedure Act (as amended in 1908) came into force, does not come under S. 46 (4), Chota Nagpur Tenancy Act, and the cause of action in a suit for ejectment of the under-*raiyat*, though it may arise after 1908, is not a cause of action in respect of a matter which was provided either by Act of 1908 or by Act of 1903. The suit, therefore, will not be affected by S. 139 (4), since the suit is not one "under the Act." A.I.R. (Vol. 25) 1938 Pat. 174=16 Pat. 682=19 P.L.T. 63=4 B.R. 421=174 Ind. Cas. 283.

——S. 46 (4)—Jurisdiction—Civil Court—Suit by landlord to eject under-raiyat—Maintainability.

If in a suit to eject a party the landlord admits that the party was his under-*raiyat* and it is also found to be so from evidence, the suit is not maintainable in the Civil Court, for under S. 46 (4) the remedy of the landlord is by way of an application within three years of the expiration of the period for which the lease was granted to the Deputy Commissioner to put the landlord in possession. A.I.R. 1929 Pat. 577 (1).

——S. 46 (4)—Jurisdiction of Civil Court—When ousted.

The Chota Nagpur Tenancy Act makes no provision for suits to eject under-raiyats, but it does make provision for suits to eject raiyats and non-occupancy raiyats. All that it provides for the ejectment of under-raiyats is that the Deputy Commissioner may entertain an application for the ejectment of an under-raiyat under the circumstances provided in Cl. (4), S. 46. If the claim made by the landlord is such that he cannot ask the Deputy Commissioner to intervene, then the jurisdiction of the Civil Court is not ousted; 9 W R. 513 14 C.W. N. 297 and 23 I. C. 407; Foll. 108 Ind. Cas. 887 =A.I R. 1928 Pat. 232.

——S. 46 (4) (a)—Applicability—Conditions—Pleading and proof.

Before the provisions of S. 46 (4) (a) of the Chota Nagpur Tenancy Act can be applied, it must be found as a fact that the person in question was not a resident within the local limits of the police station area within which the lands in suit are situate. There must be a specific issue raised on the point at the instance of the party who takes the plea relying on the section. The party challenging the right of a person as a resident must specifically plead the facts which negative the right claimed as a resident and lead evidence on the point. (1946) P.W N. 63=A.I.R. 1946 Pat. 423=228 Ind. Cas. 468=13 B.R. 220.

——S. 46 (4) (a)—"Resident"—Meaning of.

The expression "resident" in S. 46 (4) (a) of the Chota Nagpur Tenancy Act cannot be read as contemplating permanent residents. (1946) P.W.N. 63=A.I.R. 1946 Pat. 423=228 Ind. Cas. 468=13 B.R. 220.

——(As amended in 1938)—S. 46 (4) (a)—If retrospective.

There is nothing in the language of S. 46 (4) (a), Chota Nagpur Tenancy Act to show that it has retrospective effect. Neither expressly nor by necessary implication does it lead to the conclusion that it was the intention of the Legislature to validate transfers which under the former law were invalid when they were made. A.I.R. (Vol. 28) 1941 Pat. 510=7 B.R. 624=193 Ind. Cas. 851.

——S. 46 (6) (before amendment of 1938)—Estoppel—Transfer to person to whom transfer could not validity be made—Plea of invalidity of transfer—If barred by estoppel.

The plaintiff is not estopped from challenging the validity of the transfer by showing that the defendants were not persons to whom a transfer of a part of the holding could be validly made according to the provisions of the Act as they stood at the time of the transfer, even if the plaintiff had obtained sanction of the Deputy Commissioner on making false representation to him. It is especially so when the defendants were aware that they could not accept the transfer. A.I.R. (Vol. 28) 1941 Pat. 510=7 B. R. 624=193 Ind. Cas. 851.

——Ss. 46 and 47—Scope and object.

Sections 46, 47, Chota Nagpur Tenancy Act, are intended to protect the rights of a *raiyat* only. A.I.R. (Vol. 28) 1941 Pat. 485=7 B.R. 772=194 Ind. Cas. 441.

——S. 46 and 47—Scope—Mortgage in violation of S. 46—Validity.

Where a mortgage has been entered into in violation of S. 46, Chota Nagpur Tenancy Act, it cannot under that section or S. 47 form the basis of a valid decree for sale and the fact that the land subsequent to the mortgage ceases to be *raiyati* will not validate a transaction regarding the land which was previously invalid. A.I.R. (Vol. 27) 1940 Pat. 494=21 P.L.T. 219=19 Pat. 507=6 B. R 446 =187 Ind. Cas. 266.

——Ss. 46, 47—Scope—Mortgage of holding—Decree—Sale in execution—Legality.

Although under S. 46, Chota Nagpur Tenancy Act the tenant can mortgage the holding or a portion of the holding for a period not exceeding five years, yet by reason of the plain provision of S. 47 that holding could not be sold in execution of the mortgage-decree once it is found that the lands sought to be sold from a *raiyati* holding, whether the judgment-debtor took the objection or not, the sale of such a holding cannot take place in the face of the clear provisions of S. 47. A.I.R. (Vol. 23) 1936 Pat. 561=15 Pat. 414=17 P.L.T. 650=3 B.R. 53 =165 Ind. Cas. 574.

——S. 47—Applicability—Judgment debtor's family doing business in cloth—Building pucca house for residence and shop—Family not depending on agriculture—Land—If exempt from attachment and sale.

It was found that the land attached in execution of a decree was purchased by the judgment-debtor's ancestors who built the houses and had come to the

village for doing business in cloth and grocery. The land was not acquired by the judgment-debtor's family and they did not depend for any appreciable portion of their livelihood on agriculture:

Held, that the land was liable to be sold in execution of a decree against the judgment-debtors as the land did not fall within purview of S. 47, Chota Nagpur Tenancy Act. A.I.R. (Vol. 24) 1937 Pat. 321=18 P.L.T. 341=16 Pat. 316=3 B. R. 638=169 Ind. Cas. 872.

——S. 47—Applicability—Raiyati land ceasing to be such.

The protection given by S. 47 of the Chota Nagpur Tenancy Act cannot be extended to land which was once part of a raiyati holding but has altogether lost its nature of raiyati character. 12 B.R. 420=223 Ind. Cas. 457=A.I.R. 1946 Pat. 466=27 P.L.T. 497.

——S. 47—Limitation—Application to set aside sale after one year—Bar of—S. 231.

In execution of a mortgage decree, the mortgaged property was sold and purchased by the decree-holder and the sale confirmed. More than one year afterwards the judgment-debtor applied to set aside the sale on the ground that under S. 47, the sale was null and void. *Held*, that the application was time-barred under S. 231 of the Act if not under Art. 166 of the Limitation Act. 1 Pat.L.J. 483=20 C. W. N. 1243=3 Pat. L.W. 57=37 Ind. Cas. 683.

——S. 47—Objection to sale—When to be raised—Executing Court.

An objection to the sale of raiyati right in execution of a mortgage decree under S. 47 may be taken after the passing of the decree and the executing Court must determine the question. 1 Pat. L.J. 33=3 Pat. L. W. 399=34 Ind. Cas. 733.

——S. 47—"Raiyat"—Person not recorded as raiyat but shown as not liable to be ejected—Status of.

The fact that the Settlement Report shows that the *raiyats* whose lands are sold in execution of decrees and who are allowed to continue residing in the village are by custom entitled to hold their homestead lands without payment of rent and that it has been recorded in the Record of Rights that the appellant is not liable to be ejected by the landlord and that he is not liable to pay any rent, does not give the appellant the status of a *raiyat*.

The appellant was not recorded as *raiyat* in the Record of Rights. He held no agricultural land in the village, in fact no land except the house and a piece of land attached to it. There was nothing to show that he was a *raiyat* within the definition of the term in the Chota Nagpur Tenancy Act:

Held, that it was not clear whether the appellant was ever a *raiyat* of the village. A.I.R. (Vol. 22) 1935 Pat. 468=1 B R. 810=157 Ind. Cas. 754.

——S. 47—Scope—If retrospective.

S. 47 of the Act is not retrospective and a suit can be brought to enforce a mortgage executed in 1906 by sale of the raiyati interest. 4 Pat. L.J. 411=50 Ind. Cas. 515.

——S. 47—Scope—Land in Manbhum—Mortgage—Preliminary decree on—Extension of Act subsequently—Final decree—Sale—Legality.

When between the dates of a preliminary and final decrees of a mortgage of properties situate in the Manbhum, the Chota Nagpur Tenancy Act is extended to the area, the sale of the mortgaged property in execution, by the Court is illegal. 40 Cal. 534=21 Ind. Cas. 117.

——S. 47—Scope—Land merely part of compound of house—If protected.

Land which is merely part of a compound of a house and shop does not come within the purview of the provisions of the Act at all. A.I.R. (Vol. 22) 1935 Pat. 105.

——S. 47—Scope—Land recorded as "stitiban" in khatian—If raiyati—Presumption—Absence of cultivation—Effect.

The plots of land had nothing whatever to do with the matter of cultivation:

Held, that the presumption which might have arisen from the use of the word '*stitiban*' in settlement *khatian* had been amply rebutted by the evidence. A.I.R. (Vol. 22) 1935 Pat. 105 (1).

——S. 47—Scope—Sale of raiyati holding—Legality—Failure to raise objection—Relevancy.

It is altogether illegal to sell a raiyati right in land even in execution of a decree or order directing such a sale. Not only may an objection be taken in execution that the land sought to be sold in execution is not saleable but whether the judgment-debtor took the objection or not, the sale of a holding which is found to be raiyati cannot take place in face of clear provisions of S. 47: A.I.R. 1928 Pat. 227, Foll. 11 P.L.T. 207=A.I.R. 1930 Pat. 236.

——S. 47—Scope—Sale of a raiyati holding—Legality—Failure to raise objection—If material.

Even if there is a mortgage decree for the sale of a raiyati holding such a decree cannot be executed. Not only may an objection be taken in execution that the land sought to be sold is not saleable, but it is the duty of the executing Court itself to endeavour to prevent abuse of its process in contravention of S. 47: 49 Cal. 534 and 1 P.L.J. 33 Foll. 7 Pat. 178 =9 P.L.T. 228=107 Ind. Cas. 145=A.I.R. 1928 Pat. 227.

——S. 47—Scope—Sale of shop or house of tenant—If prohibited.

Where the money-decree-holder is not trying to sell the occupancy right in the lands but merely trying to sell the shop or house and such right, title and interest as the judgment-debtor who is not a *raiyat* has in the land in question, such interest cannot be said to be protected under S. 47. There is nothing in S. 60 Civil P. C., to prevent the sale of such judgment-debtor's interest in the land in dispute. The shop or house which has been erected by him certainly belongs to him, and he has undoubtedly a disposing power over the profits of the land which he may exercise for his own benefit. The case therefore, comes within the category of those properties which can be sold under the provisions of S. 60 of the Civil P. C. A.I.R. (Vol. 28) 1941 Pat. 485=7 B. R. 772=194 Ind. Cas. 441.

——S. 48—Pahan lands—Incidents of—Alienation of land before Act by pahan—Suit to set aside—Limitation—Starting point.

Before the enactment of S. 48, Chota Nagpur

Tenancy Act, in 1908, there was no bar to the transferability of pahan lands.

Plaintiff, in his suit for possession in 1941, alleged that the lands in question were pahnai and mahtoi lands which belonged to the whole village community and were, therefore, inalienable; that plaintiff's deceased father, who was the former pahan of the village made some illegal alienations in 1892 and 1905 in favour of the defendant, and that plaintiff was the present pahan of the village. He sought possession of the lands on the allegation that defendant's possession was wrongful:

Held, that the lands in question originally belonged to the village community and were made over to the family of the pahan as reward for services in the past as also as a remuneration for services in the future as village priest. Usually the eldest member of the family took upon himself the execution of the duty of the village pahan and remunerated himself and his family from the usufruct of the lands, and so long as the family continued to have some member ready and willing to do the duties of the village pahan, neither the community nor any member of it could interfere with the position of the pahan. In the absence of any election or nomination of each successive pahan, the property vested either in the family of the pahan or the village community as a whole. In either case, when the pahan for the time being alienated the pahan lands, there would be some person entitled to question the transaction of the transfer of the lands of such a tenure and hence each successive pahan did not get a fresh cause of action on his succession to the office. A suit for recovery of such lands alienated by the pahan brought more than 12 years after transfer would be barred by limitation. As the transaction in the present case took place more than 12 years before the institution of the suit it was barred by limitation. A.I.R. (Vol. 33) 1946 Pat. 207=24 Pat. 251=225 Ind. Cas. 156.

——S. 48-A (2)—Construction—Bhuinhari tenure—Holder of rent decree, if can attach and sell produce of land crop grown not by Bhuinhar but by some under-tenants.

Section 48-A, Chota Nagpur Tenancy Act, does not anywhere say that in order to be attached and sold the produce of the land comprised in the tenure must be still in the possession of the *bhuinhar* judgment-debtor and it is wrong to import any such limitation or exception into the words of the section when they are not there. The intention of the Legislature was to make the produce of the land liable to be proceeded against in the hands either of the judgment-debtor or of any transferee (under-tenants) just in the same way as mortgaged property or hypothecated property is liable for the mortgage debt whether or no it is in the hands of the original mortgagor. This produce is security of the landlord for the rent. Any alienations of it by the *bhuinhar* must be in the same position as alienations of hypothecated property by the mortgagor, that is to say, subject to the charge, lien or mortgage which attaches to the property itself. A.I.R. (Vol. 29) 1942 Pat. 37=22 P.L.T. 717=7 B. R. 986=196 Ind. Cas. 86.

——S. 50—Denial of title in application—Dismissal of application not based on denial—Ejectment.

Application under S. 50 by landlord—Title denied by tenant—Application dismissed but not on the ground of denial of title—Tenant is not liable to be ejected. 1926 P.H.C.C. 332=97 Ind. Cas. 123=8 P.L.T. 171=A.I.R. 1927 Pat. 57.

——S. 51—Suit for rent—Plea of payment to third person—Procedure—S. 177.

On tenant's plea of payment to third party, he should be made a party under Section 177 and the suit decided after going into the question of the *bona fide payment* by the tenant. In rent suits, when plaintiff has obtained delivery of possession from the Civil Court, and his possession is recognised in the survey proceedings, he should be permitted to realize his rent leaving it to any third person who disputes plaintiff's title to bring a civil suit. (1917) Pat. 189=2 Pat.L.J. 386=41 Ind. Cas. 191.

——S. 52—Landlord and tenant—Suit to recover arrears of rent—Limitation—Co-sharer landlord—Suit for apportionment of rent—Effect—Suspension of right to rent.

Under Ss. 52 and 234 of the Act, rent falls due on the last day of each quarter of the agricultural year. A suit for arrears of rent should be brought within three years from the end of the agricultural year in which the arrears became due. Where, however, a co-sharer landlord brings a suit for apportionment of rent making the tenants and the other co-sharers parties to the suit the right to recover rent is deemed to be, held in suspense till a decree is passed in the suit. 59 Ind. Cas. 314 (Pat.).

——S. 55—Duty of tenant to deposit rent—Liability for interest.

Where a tenant bound to pay money on account of rent, has reason to believe, owing to a tender having been refused or receipt withheld on a previous occasion that the landlord or his agent would not be willing to receive it and to grant him a receipt for it, he must deposit to the credit of the landlord the full amount which he considers to be due and such deposit shall in all respects operate as, and have the full effect of a payment then made by the tenant to the credit of the landlord. Unless he so deposits he cannot avoid liability to pay interest for the same. A.I.R. (Vol. 22) 1935 Pat. 415=16 P.L.T. 363=2 B.R. 46=158 Ind. Cas. 1134.

——Ss. 59 and 79—Applicability — Permanent tenure.

Sections 59 and 79 of the Act do not apply to cases of permanent tenure and therefore a stipulation therein that the lease is liable to be cancelled for non-payment of rent is a valid stipulation. 17 C.W.N 1068=20 Ind. Cas. 294.

——S. 59—Scope—Thika tenure—Saleability.

Unless a *thika* tenure comes to an end with the period for which arrears of rent had been decreed the judgment-debtor has an interest which would *prima facie* appear to be saleable. A.I.R. (Vol. 25) 1938 Pat. 464=19 P.L.T. 280=5 B.R. 405 (1)=180 Ind. Cas. 423.

——S. 60, Proviso—Purchase of tenure by landlord —Liability for arrears of rent.

A landlord purchasing a tenure in execution of his own decree for recovery of arrears of rent of that tenure purchases it subject to the liability for the arrears of rent accruing due between the date of the suit and the date of the sale even though such liability has not been notified in the sale proclamation. A.I.R. (Vol. 32) 1945 Pat. 33=24 Pat. 9 =26 P.L.T. 66=12 B.R. 157=221 Ind. Cas. 529.

——S. 60, Proviso—Scope and effect of—Tenure sold for rent arrears—Landlord himself purchasing —Liability for rent of period prior to sale.

In face of the proviso to S. 60, Chota Nagpur Tenancy Act, in Chota Nagpur, liability for rent for a period prior to the date of the sale in execution of a rent decree cannot be imposed on the purchaser of the tenancy whatever may be the contents of the sale proclamation.

The landlord decree-holder sought to execute the decree which, he held against the tenant for rent of a tenure for a period beginning sometime in 1936 and extending upto May 30, 1937, the date on which the tenure was put to sale in execution of an earlier decree for its own arrears of rent upto sometime in 1936 and was purchased by the decree-holder who was the landlord of the tenure:

Held, that the judgment-debtor could not object that as the landlord had purchased the tenure and as the rent of the tenure was a charge on the tenure itself, the landlord purchaser was the person responsible for the rent for the period between 1936 and the auction purchase and could not recover this amount from other assets of the sold up tenant. A.I.R. (Vol. 28) 1941 Pat. 600=7 B.R. 989=196 Ind. Cas. 33.

——(As amended by Act 2 of 1938)—S. 63—Applicability and scope—Essentials of offence—Procedure for investigation and trial—Cr. P. Code—Applicability.

An offence under S. 63, Chota Nagpur Tenancy Act is only committed if the landlord or his agent levies or makes certain demands over and above the rent legally due from the tenants. There is no offence if anybody other than the landlord or an agent of the landlord demands commodities from persons who are not his tenants. Where the Manager of the Court of Wards demands certain commodities or animals or birds from the tenants of the estate which he is not entitled to demand, he commits an offence under S. 63.

Section 63 (1) (*a*) of the Chota Nagpur Tenancy Act creates an offence but does not deal with the method in which investigation is to be made and the trial to be held; therefore by reason of S. 5 (2) of the Criminal P.C., it must be investigated into and tried according to the provisions of the Code. A.I.R. (Vol. 27) 1940 Pat. 316=6 B.R. 241=41 Cr. L.J. 221=185 Ind. Cas. 738.

——S. 63—Appeal—Order under S. 63—Procedure in appeal—S. 215—Cr. P. Code—Applicability.

An order under S. 63 shall have the force and effect of a decree of a civil Court and consequently it follows that any procedure to be adopted by a party subsequent to the making of that order cannot be governed by the Code of Criminal Procedure but comes under S. 215 and the appeal lies to the officers named therein. 7 Pat 421=9 P.L.T. 496=29 Cr. L.J. 420=108 Ind Cas. 556=10 A.I.Cr.R. 154= A.I.R. 1928 Pat. 370.

——S. 63—Procedure—Offence by Manager of Court of wards—Prosecution—Sanction—Necessity —Cr. P. Code, S. 197—Applicability.

There is nothing in S. 63 which deprives the ordinary Criminal Courts of jurisdiction to try all offences under that section. Section 258 does not deprive a Criminal Court of its jurisdiction to try a criminal offence.

Under S. 59-A, Court of Wards Act, a Manager of Court of Wards is a public servant and where according to the rules made by the Court of Wards under S. 70 of that Act such a person getting certain salary cannot be appointed without the previous sanction of the Government, it follows that he cannot also be dismissed without the sanction of the Government. When such a manager therefore commits an offence under S. 63, Chota Nagpur Tenancy Act while acting in his capacity as a manager of the estate, a sanction of the Government under S. 197, Criminal P. C., is necessary for his prosecution. A.I.R. (Vol. 27) 1940 Pat. 316=6 B.R. 241=41 Cr.L.J. 221=185 Ind. Cas. 738.

——S. 63—Scope—Suit in ejectment on ground of trespass—Compromise providing for enhanced rent —Validity.

Suit for ejectment based on trespass—Enhanced payment claimed as alternative relief—*Bona fide* compromise under which defendant bound himself to pay a certain annual amount over and above the rent which he was already paying—*Held* this was not merely a device to override the provisions of the Act and was valid. A.I.R. (Vol. 31) 1944 Pat. 293=23 Pat. 334=217 Ind. Cas. 14.

——S. 64—Applicability—Trespasser—If can acquire occupancy rights—Waste land in occupancy holding—Reclamation by trespasser—Latter if becomes occupancy raiyat—S. 64 (1) (a).

Sub-section (1) (a) of S. 64, Chota Nagpur Tenancy Act excludes land included in the tenancy of a cultivator who has acquired a right of occupancy in it, so that nothing in S. 64 can be treated as applying to acts of trespass of the nature of reclamation of waste land committed on land which forms part of the holding of an occupancy-*raiyat*. Persons so trespassing do not become occupancy-*raiyats* under S. 64. A.I.R. (Vol. 25) 1938 Pat. 222=19 P.L.T. 133=17 Pat. 210=4 B.R. 537 =175 Ind. Cas. 165.

——S. 64—Korkardar under-raiyat—Acquisition of occupancy rights.

Chota Nagpur Tenancy Act does not expressly acknowledge the occupancy rights of a *korkardar* under-*raiyat*. Nevertheless, in certain villages there is a custom or usage prevalent whereby an under-*raiyat* has invariably an occupancy right which is heritable at least in respect of land in his tenancy which is his. A.I.R. (Vol. 20) 1933 Pat. 635=14 P.L.T. 723=146 Ind. Cas. 115.

——S. 64—Korkar—Right to make.

It is not merely a tenant or resident of a village who can make Korkar in that village. A.I.R. 1921

Pat. 506, Foll. 105 Ind. Cas. 58=A.I.R. 1928 Pat. 87.

——S. 64—Pardhani village—Nature of—Proprietor's right to settle land—Limitations—Pardhan—Status of—Custom—Force of.

It is true that a proprietor has a right to settle his land in any way he likes, but this right is subject to the rights which others have acquired either by contract or custom. The position is similar to the position if a proprietor creates a tenure and thereby limits his right over the land of such a tenure. *Pardhani* villages are something like tenures, though not exactly so. A *pardhan* partakes the position of a tenure-holder and also of a *raiyat* of a privileged class in respect of the lands actually held by him. He is for some purposes an agent of the proprietor, though of course a hereditary agent not removable according to the will of the proprietor. At the same time he is for certain purposes an agent of the *raiyats* also and custodian of their interest. When a village is *pardhani* the rights of the proprietor in that village must be subject to the rights of the *pardhan* and of the *raiyats* of the village of which the *pardhan* is the custodian. Under S. 64 of the Chota Nagpur Tenancy Act a custom is recognised under which *raiyats* are entitled to bring land under cultivation without the consent of the landlord. This clearly shows that the Legislature has recognised custom in derogation to the theoretical right of the landlord. A.I.R. (Vol. 23) 1936 Pat. 508=2 B.R. 577=17 P.L.T. 467=163 Ind. Cas. 24.

——S. 64—Scope—Acquisition of occupancy right under another occupancy raiyat—Acquisition of.

(*Obiter*).—Occupancy right cannot be acquired under another occupancy *raiyat*.

A right of occupancy under a landlord is a right subordinate to him but if such a right is acquired against a man who himself is an occupancy *raiyat*, the right so acquired is the complete annihilation of right of the *raiyat* and that can only be acquired after 12 years under the general law. A.I.R. (Vol. 24) 1937 Pat. 422=3 B.R. 711=170 Ind. Cas. 385.

——S. 64—Scope and effect of—Trespass on occupancy holding and making—Failure to eject within time—Effect—Occupancy rights—If acquired.

If a man trespasses upon the holding of an occupancy *raiyat* and makes *korkar* therein, he acquires no occupancy rights even if no application for ejectment is made within two years of the commencement of the *korkar*. A.I.R. (Vol. 24) 1937 Pat. 422 =3 B.R. 711=170 Ind. Cas. 385.

——S. 64 (3)—Construction and scope—Tenant commencing korkar—Ejection of—Application to Deputy Commissioner—Necessity of.

The concluding portion of S. 64 (3) of the Act means that if a person who has commenced *korkar* is a tenant or a resident of the village where the *korkar* is being done, he cannot be ejected otherwise than by an application to the Deputy Commissioner. There is one mode and one mode only for ejecting a *raiyat* or a tenant of the village. A.I.R. (Vol. 21) 1934 Pat. 80=150 Ind. Cas. 933.

——(As amended by Chota Nagpur Amendment Act 6 of 1920), S. 64 (3)—Effect—Conversion of land into korkar—No application to Deputy Commissioner within two years—Consent of landlord, if deemed given—Deputy Commissioner, jurisdiction of.

The effect of S. 64 (3) of the Chota Nagpur Tenancy Act is that within two years of the commencement of the conversion the landlord may apply to the Deputy Commissioner to eject the cultivator and may in such application prove that the work was begun without his consent. If he fails to take this step then his consent will be deemed to have been given, and the concluding sentence added by amendment has the effect of giving to the Deputy Commissioner exclusive jurisdiction in the matter of ejecting a tenant or a resident of the village from land which he began to convert into *korkar*. Circumstances may occur in which a tenant or resident begins conversion and then abandons the attempt, but the question of whether any such attempt has or has not been abandoned is a matter of fact. Where no such abandonment has been found, a commencement of conversion has taken place and in such case the application for ejectment can only be made in the Court of the Deputy Commissioner. The Act specially gives to the Deputy Commissioner exclusive jurisdiction and the only way in which that jurisdiction can be ousted in favour of the Civil Court is by showing that the defendant is neither a tenant nor a resident of the village. A.I.R. (Vol. 21) 1934 Pat. 680=13 Pat. 781=15 P.L.T. 611=154 Ind. Cas. 179.

——S. 64 (3)—Jurisdiction—Ejectment suit by landlord based on disputed title—Defendant neither a tenant nor resident—Civil Court, if has jurisdiction.

Where a landlord brings an action which is based on his title which is disputed and attempts to eject a person who is neither a tenant nor resident of the village, the Civil Court has jurisdiction. A.I.R. (Vol. 21) 1934 Pat. 541=152 Ind. Cas. 22.

——S. 64 (3)—Limitation — Tenants reclaiming lands in village—Ejectment suit by Mundari Khuntkattidar more than two years after—Bar of.

Where the tenants reclaimed lands of a certain village and Mundari Khuntkattidar sued as Maliks to eject them after the expiry of two years from the commencement of that reclamation:

Held, they cannot be ejected from the land as the suit was barred under S. 64 (3). 105 Ind. Cas. 58 =A.I.R. 1928 Pat. 87.

——S. 64 (3)—Right to apply—Change and ghatwal—Procedure for application.

Where there is a change of *ghatwal* the application under S. 64 (3) will have to be made by the *ghatwal* who is holding office at the time of such application. On receipt of the application the Deputy Commissioner has to decide between the applicant and the cultivator and will have no jurisdiction to require the former *ghatwal* or his heirs to pay compensation for the benefit of his successor. A.I.R. (Vol. 20) 1933 Pat. 52=13 Pat. L.T. 781=142 Ind. Cas. 673 (2).

——Ss. 64 and 67—Relative scope and operation of.

Section 64 affects procedure rather than substantive rights, and S. 77 does not bar the application of the provisions of the Act regarding procedure to *ghatwali* land. A.I.R. (Vol. 20) 1933 Pat. 52=13 P.L.T. 781=142 Ind. Cas. 673 (2).

——Ss. 64 (3) and 67—Applicability and scope—Mundari Khuntkattidari tenancy—Landlord consenting to conversion of land into karkar by person not Mundari Khuntkattidar—Effect—Acquisition of right of occupancy. 225 Ind. Cas. 632=12 B.R. 643=A.I.R. 1946 Pat. 105.

——Ss. 64 (3), 67—Scope—Defendant reclaiming land and preparing paddy field—Land recorded in plaintiff's name—Defendant, if gets occupancy right.

Where a person has reclaimed land and prepared a paddy field, he is entitled under Ss. 64 (3) and 67, Chota Nagpur Tenancy Act, to have a right of occupancy in the land reclaimed by him although it falls within another's recorded plots, and although it involves trespass on the latter's land. It is enough if the *korkar* right is urged in appeal though it is not as such pleaded in the written statement. A.I.R. (Vol. 23) 1936 Pat. 39=2 B.R. 78=159 Ind. Cas. 350.

——Ss. 64 (3) and 67—Scope and effect of—Occupancy rights—Acquisition by trespasser.

Defendants wrongfully obtaining possession of land settled on plaintiff by Government converting it to *Kor Kar* land, and holding it over for more than 20 years and then obtaining settlement of it from Government become occupancy tenants of that land and cannot be ejected by plaintiff. 38 Ind. Cas. 478 (Pat.).

——S. 66—Scope—Suit by occupancy raiyat for declaration of title and recovery of possession—Maintainability — Plea by defendant of occupancy rights under S. 66—Competency.

An occupancy *raiyat* should not be deprived of his land by a person who trespasses upon it and converts it into paddy land, unless the trespasser acquires a title by adverse possession for the period prescribed by the general law of limitation. In such a case a suit by an occupancy-*raiyat* for declaration of his title and for recovery of possession, within 12 years of his dispossession is maintainable and S. 66, Chota Nagpur Tenancy Act, is a bar to defendant's contention that he converted the land into paddy land and, therefore, acquired occupancy rights under S. 64. A.I.R. (Vol. 24) 1937 Pat. 367=18 P.L.T. 275 =3 B.R. 655=170 Ind. Cas. 94.

——S. 67—Applicability—Korkar land—Occupancy right — Acquisition of—Cultivation and possession for over two years—Effect of.

Under S. 67 of the Chota Nagpur Tenancy Act, 1908, a raiyat who cultivates or holds lands which he or any member of his family has converted into korkar has a right of occupancy therein. Nothing in the definition of korkar expressly or impliedly requires that the cultivator who artificially levels or embanks land primarily for the cultivation of rice must at the time when he commences the preparation of the land for cultivation be a raiyat of the landlord of such land or of the village wherein the land is situated. If no application to the Deputy Commissioner for the ejectment of the korkardar has been made by the landlord within two years from the time when they commenced to convert the lands into korkar the consent of the landlord to the conversion is, under the provisions of S. 64 (3) deemed to have been given, and they are not only raiyats of the landlord but have under S. 67, also an occupancy right in the lands and cannot be ejected. 2 P.L.T. 635=63 Ind. Cas. 783=A.I.R. 1921 Pat. 506.

——S. 67—Jalsasan tenure—Cultivation by raiyat —Effect of—If becomes occupancy holding.

In the absence of anything to show that the tenancy created was in the nature of a tenure, the definition of the word "korkar" including jalsasan given in S. 3 (13) read with the statutory provision in S. 67 inevitably leads to the conclusion that a jalsasan tenure cultivated or held by a raiyat comes to be an occupancy holding. A.I.R. 1921 Pat. 506, Rel. on. 10 P.L.T. 625=119 Ind. Cas. 551=A.I.R. 1929 Pat. 630.

——Ss. 67 and 77—Relative scope — Occupancy right—Acquisition by person converting land into korkar—Custom of—Acquisition in ghatwali tenure lands—If barred.

S. 67, Chota Nagpur Tenancy Act, recognises the customary right of a person who converts the land into Korkar to acquire an occupancy right. S. 77 does not bar the acquisition of such occupancy rights by korkar. There is nothing inconsistent in such right being acquired by custom which offends against the provisions of S. 77. No incident of a ghatwali tenure is affected. The right of occupancy in korkar is almost an inevitable corollary to a customary right to convert land into korkar. 11 Pat. 464; 13 P. L. T. 781, foll. 7 Pat. 556, not foll. A.I.R. 1949 Pat. 457=30 P.L.T. 302.

——S. 68—"Decree"—Meaning of.

The word "decree" in S. 68 should not be read with the expression "passed under the Act." 23 Ind. Cas. 407 (Cal.).

——S. 68—Construction—"Any portion thereof"—Meaning of—Suit for ejectment of tenant from part of holding—Maintainability.

A suit to eject a tenant from a part of his holding on the ground that he had misused it in a manner contrary to the provisions of S. 21, Chota Nagpur Tenancy Act, is not maintainable. The words "any portion thereof" in S. 68 do not authorise an ejectment suit for a part of the holding, and are merely intended to emphasise the fact that the tenant cannot be ejected from his holding, or even from any portion thereof except in execution of a decree. The words do not mean that the decree is not to be for ejectment from the entire holding. A.I.R. (Vol. 31) 1944 Pat. 26=22 Pat. 648=10 B.R. 502=212 Ind. Cas. 362.

——S. 69—Construction—"Misuse"—Tenant parting with land—Misuse, if becomes irremediable.

The only possible construction to be placed on S. 69, Chota Nagpur Tenancy Act, is that the misuse does not become incapable of remedy by reason of the tenant parting with the land. It is rather the nature of the misuse to which the section is directed and not to the person who is guilty of the misuse.

Where therefore a tenant transfers his land to a sub-tenant who builds a house on a part of the land contrary to the terms of the tenancy, the misuse is capable of remedy. A.I.R. (Vol. 26) 1939 Pat. 149=5 B. R. 237=179 Ind. Cas. 482.

——(As amended by Amending Act of 1920), S. 71 —Retrospective operation—Cause of action arising before 1920—Suit in Civil Court—If barred.

The amending Act of 1920 was not intended or expressed to have retrospective effect. A suit for possession by tenant against his landlord in 1921 the cause of action for which arose in 1919 was held to be cognizable by Civil Court. 8 P.L.T. 397=1926 P.H.C.C. 293=97 Ind. Cas. 608=A.I.R. 1926 Pat. 561.

——S. 71—Suit for possession—Test—Question of tenant's status—If material.

This question of the status of the tenant makes no difference in determining whether a suit is a suit by a tenant to recover possession from his landlord. 8 P.L.T. 397=1926 P.H.C.C. 293=97 Ind. Cas. 608 =A.I.R. 1926 Pat. 561.

——Ss. 71 and 217—High Court's powers of revision — Order of Deputy Commissioner restoring transferee to possession—Finality—Interference by High Court—C. P. Code, S. 115—Government of India Act (1915), S. 107.

A landlord turned out a transferee of a non-transferable holding in Chota Nagpur as a trespasser and the latter was restored to possession by Deputy Commissioner. The landlord moved the High Court under S. 115 of the C. P. Code and under S. 107 of the Government of India Act. In cases falling within S. 217 of the Act where the Legislature has deliberately placed the power of revision in the hands of the Revenue authorities, the High Court should not usurp that power until it has been shown to be abused. 3 Pat.L.W. 281=3 Pat. L. J. 143=43 Ind. Cas. 933.

——S. 72—Construction and scope—Surrender—Rights of landlord and tenant.

Section 72 gives the right to the tenant to surrender his whole holding. Sub-section (5) of S. 72 provides that nothing in the section shall affect any arrangement by which a *raiyat* and his landlord may arrange for a surrender of the whole or part of the holding. Sub-section (4) provides that when there has been a surrender of the whole holding the landlord may enter on the holding and either let it to another tenant or take it into cultivation himself. (1931) 12 Pat. L. T. 314=131 Ind. Cas. 390.

——S. 72—Incumbrance by tenant—Subsequent surrender—Effect—Landlord—If bound by prior incumbrance—B. T. Act, S. 76.

The provisions contained in S. 72 of the Act are similar to those contained in S. 86 of the B. T. Act with this difference that the provisions contained in clause (6) of the B. T. Act do not find place in S. 72 of the Chota Nagpur Tenancy Act. The absence of a provision similar to clause (6) of S. 86 of the B. T. Act from S. 72 of the Chota Nagpur Tenancy Act leaves no power to surrender conferred by the section, unhampered by the existence of any incumbrance over the property. Therefore in spite of a prior sale or mortgage by a raiyat he is free to exercise his right of surrender of the holding in favour of the landlord, for under clause (2) of S. 46 no transfer by a raiyat of his right in his holding on portion thereof is binding on the landlord unless it is made with his consent in writing. 2 Pat. 898=75 Ind. Cas. 209=4 P.L.T. 562=1924 P.H.C.C. 117=A.I.R. 1924 Pat. 100.

——S. 72—Under-raiyat—Effect of surrender by raiyat — Liability to ejectment — Notice to quit — Necessity.

S. 72, Cl. (4), does not require an ejectment suit to be brought against the under-raiyat, nor is any notice or formality necessary to eject him. The landlord is entitled to enter on the holding immediately after surrender by the raiyat and either let it to another or take it under cultivation. The right of an under-raiyat ceases after surrender by the raiyat and he becomes a trespasser so far as the landlord is concerned. 40 Cal. 858; 4 C.W.N. 792; A.I.R. 1922 Pat. 197; and A.I.R. 1926 Pat. 244 foll. 10 A.I.Cr.R. 420=110 Ind. Cas. 98=9 P.L.T. 728= 29 Cr.L.J. 642.

——S. 72 (5)—Partial surrender—Permissibility.

Section 72 (5) contemplates cases of partial surrender of a holding by arrangement between a *raiyat* and his landlord. A.I.R. (Vol. 23) 1936 Pat. 52 =2 B.R. 91=159 Ind. Cas. 490 (2).

——S. 74—Retrospective — Prior agreements — If affected.

S. 74 apparently cannot possibly have retrospective effect inasmuch as it affects the substantive rights of parties. Therefore, all agreements entered into prior to the date when the Act came into operation would obviously be beyond the scope of the section. The section contemplates only the case of a lease executed "with a view to the continuance of such occupation." 6 P.L.T. 144=82 Ind. Cas. 988= 1924 P.H.C.C. 307=A.I.R. 1925 Pat. 297.

——S. 74-A—Applicability—Pradhani tenures with customary incidents—If fall under section.

Pradhani tenancies *i.e.*, tenancies held by village headmen, with customary incidents, are not outside the scope of S. 74-A, Chota Nagpure Tenancy Act. The Act recognises such customary tenancies apart altogether from its provisions as to *Mundari khuntkattidars* who are specially defined by S. 8 and regulated by Chapter XVIII of the Act. The mere fact that a village was first cleared and cultivated at some date later than 1788 is no reason why it should not be governed by a custom of *pradhani*. A.I.R. (Vol. 27) 1940 P.C. 137=6 B.R. 876=1940 O. L. R. 506=21 P.L.T. 1005=19 Pat. 949=67 I.A. 290=189 Ind. Cas. 606 (P.C.).

——S. 74-A—Applicability—If confined to one class of village headman only.

On the death of the village headman *A* on his application was appointed headman of the village. The Deputy Commissioner declined to interfere on a subsequent application with the order already made. Thereupon, the villagers instituted a case before the Sub-Divisional Officer to set aside *A*'s appointment. The Sub-Divisional Officer's order was confirmed by the Deputy Commissioner by which *B* was appointed Munda of the village. Plaintiff then sued for a de-

claration that the second order was made without jurisdiction.

Held, that on a careful perusal of the section and particularly of sub-S. (3) what was intended by S. 74-A was to deal with all applications whether the village headmanship was held in conjunction or not in conjunction with land. By the words used in sub-S. (3) it was intended to express that the village headmanship was held in accordance with the custom of the village, and that the legislature did not intend to limit the section to one class of cases and, therefore, it could not be said that the Deputy Commissioner in making his order had no jurisdiction.

Held also, that the Sub-Judge had jurisdiction to enter into the merits of the case. A.I.R. 1929 Pat. 436.

——S. 74-A—Construction and scope—Limitation for application for appointment of village headman — Delay — Effect — S. 231 — Application of —Custom of Pradhan—Finding as to by Board of Revenue—Interference.

Section 74-A, Chota Nagpur Tenancy Act, as amended in 1920, according to ordinary interpretation is not dealing with a cause of action at all; it is defining the right to apply to the Deputy Commissioner to make an appointment of a village headman in the event of a vacancy and that application may be made either by the landlord or by the tenants. It pre-supposes that there is a custom requiring the appointment of a village headman and what is dealt with by the section is not in the nature of a litigation or a dispute, but it is the calling into operation of an administrative duty on the part of the Deputy Commissioner. It would appear, therefore, more natural to say that as there is not in the strict sense a cause of action under S. 74-A but merely a right to invoke an administrative operation which may be exercised by either the landlord or the tenants or both, S. 231 of the Act is incapable of application. Where the propriety of the application under S. 74-A being granted has been disputed by the landlord, it is not easy to apply the idea of a wrong, to a case of this sort where either side may apply and all that has happened is that there has been a delay in making the application. Assuming, therefore, that to such a case S. 231 does apply, then the right of application can be regarded as a continuing right. It would fit in with the exigencies of the case and indeed with the language of S. 74-A which does not fix any specific time at which the application should be made and accordingly from which the period of limitation would run. On the contrary the section makes the right of applying conditional on a state of facts, namely, where a tenancy has been vacated. While that condition exists, there is no ground for fixing on any specific moment of time. If the language had been "when a tenancy has been vacated" it may be that the limitation period, would run from the moment of the vacancy occurring, but that is not the language of the section.

The headman or *pradhani* system is characteristic of the social organisation of the aboriginal tribes who established themselves in Chota Nagpur before the advent of the Hindus; in some cases the headmen seem to have had Police duties also imposed upon them so that such tenancies came to be regarded as *ghatwali* tenancies.

Their Lordships declined to interfere with the findings of the Board of Revenue on the question of custom, that in the village called Lango, which is situate in Taraf Atkosi of Perganna Dhalbhum, there was a custom of *pradhani* which had not been broken. A. I. R. (Vol. 25) 1938 P. C. 61=32 Sind. L.R. 298=1938 O.W.N. 52=1938 O.L.R. 53 =4 B.R. 234=1938 A.L.R. 71=19 P.L.T, 74=17 Pat. 110=67 C.L.J. 179=172 Ind. Cas. 649=(1938) 1 M.L.J. 302 (P.C.).

——S. 74-A—Custom—Finding as to when implied.

Where the Deputy Commissioner in his judgment refers to the advantages of headmanship as belonging to the tenants of a holding by custom and states that their interest cannot be bartered away by an individual *pradhan* resigning, the reference implies a finding that the custom referred to in S. 74-A, Chota Nagpur Tenancy Act, exists. A.I.R. (Vol. 24) 1937 Pat. 202=2 B. R. 457=8 R. P. 552=17 P. L. T. 445=15 Pat. 488=162 Ind. Cas. 582.

——S. 74-A—Custom of Pradhani—New pradhani —Applicability of old custom.

Pradhani is the custom of the locality, and when a new *pradhani* is formed, and treated as the ancient *pradhani*, it will be governed by the same custom. A.I.R. (Vol. 23) 1936 Pat. 563=3 B.R. 44=15 Pat. 644=18 P.L.T. 46=165 Ind. Cas. 378.

——S. 74-A—Jurisdiction of Deputy Commissioner —Finding as to custom—Omission to record—Interference by Civil Court.

It is wrong to say that while taking action under S. 74-A of the Chota Nagpur Tenancy Act, the Deputy Commissioner decides that there is a custom of having a headman in a certain village, that decision can be questioned in a Civil Court.

A simple omission to decide the existence of custom does not take away from the Deputy Commissioner the jurisdiction to appoint a village headman, but in case of such omission, it is competent to the Civil Court to examine whether the foundation of jurisdiction existed. If the Civil Court finds that there was such a foundation, the order cannot be interfered with simply on the ground that the legally constituted authority failed to decide a fact which it was necessary to decide before the appointment could be made. A.I.R. (Vol. 24) 1937 Pat. 202 =2 B.R. 457=17 P.L.T. 445=15 Pat. 488=162 Ind. Cas. 582.

——S. 74-A—Retrospective operation—Rights conferred by S. 208 on Pradhans—If taken away.

The terms of S. 74-A are addressed to the case in which the *pradhan* has been evicted by the landlord but, either no other person has been given the tenancy or else it has been given to someone who is not suitable to hold it, having regard to its customary character. The sales of such tenancies under rent decrees had been going on since 1906 or 1910 and if it had been intended to abrogate the practice by legislation in 1920 the amendment could hardly have taken the form of S. 74-A, which is plainly inapt for that purpose. The case of purchase at execution sale by a third party does not come within its terms, and in no view of the matter is it right to hold that

the amendment of 1920 had the effect of taking away an existing right conferred by S. 208. A.I.R. (Vol. 27) 1940 P.C. 137=6 B.R. 876=1940 O.L.R. 506=21 P.L.T. 1005=19 Pat. 949=67 I.A. 290 =189 Ind. Cas. 606 (P.C.). [Reverses A.I.R. (Vol. 23) 1936 Pat. 563=165 Ind. Cas. 378=15 Pat. 644].

——S. 74-A—Scope—Saleability of pradhani—Custom as to—Validity.

A custom recognizing saleability of *pradhani* tenancy cannot be given effect to as such custom is, by necessary implication, inconsistent with S. 74-A of the Chota Nagpur Tenancy Act. A.I.R. (Vol. 23) 1936 Pat. 563=3 B.R. 44=15 Pat. 644=18 P.L.T. 46=165 Ind. Cas. 378.

——S. 76—Custom of non-transferability of dwami thica — Evidence — Sifton's Settlement Report—Statement in—Admissibility.

Settlement Report of Mr. (now Sir) Sifton, who was deputed by Local Govt. in investigate and record the incidents of the tenancies of the district and the customary rights and liabilities of the holders thereof, containing the statement that *dwami thicas* being in their origin cultivating tenancies are by custom non-transferable is admissible under S. 35, Evidence Act, to prove the custom of non-transferability of the *dwami thicas* as the statements in the report were made in discharge of an official duty, and preparation of the records was enjoined on him by law, that is, the Chota Nagpur Tenancy Act, secondly, his opinion about the custom being the opinion of an officer who made special enquiry into it and was likely to know the existence of the custom, is admissible under S. 48, Evidence Act. It is also admissible under S. 57 (13), it being a book of reference. Lastly, the Settlement Report would be admissible under S. 32, without examining the author, if being very expensive to call him as a witness. A.I.R. (Vol. 24) 1937 Pat. 463=18 P.L.T. 575=3 B.R. 811=171 Ind. Cas. 115.

——S. 76—"Thica dwami"—Incidents of.

The name *thica dwami* in the Record of Rights in Chota Nagpur is given to a cultivating tenancy which partakes largely in its origin and development of a *raiyati* character and is in fact a *raiyat* tenancy which has grown into a tenure. A.I.R. (Vol. 24) 1937 Pat. 463=18 P.L.T. 575=3 B. R. 811=171 Ind. Cas. 115.

——S. 76—Scope—Custom of non-transferability of dwami thica—Force of.

Section 76, Chota Nagpur Tenancy Act, enacts that nothing in the Act shall affect any custom, usage or customary right not inconsistent with or not expressly, or by necessary implication, modified or abolished by its provisions. The non-transferability of *dwami thicas* is not inconsistent with any provision of the Act and therefore that custom must prevail.

The custom is of absolute non-transferability of *dwami thicas* and, even a landlord cannot sell the tenure for arrears of rent but can eject the tenure-holder. A.I.R. (Vol. 24) 1937 Pat. 463=18 P.L.T. 575=3 B.R. 811=171 Ind. Cas. 115.

——S. 77—Ghatwali lands—Occupancy rights in—Acquisition of—Chota Nagpur Landlord and Tenant Procedure Act (1 of 1879), S. 6—Effect of.

A person in possession of *ghatwali* lands for only ten years prior to the C. P. Tenancy Act of 1908 is not entitled to occupancy right under Act 1 of 1879 when Act 6 of 1908 came into force, S. 77 of Act 6 of 1908 prevented the occupancy rights being acquired in respect of *ghatwali* land as soon as the Act came into force. 6 P.L.T. 534=84 Ind. Cas. 383=1924 P.H.C.C. 304=A.I.R. 1925 Pat. 306.

——(As amended in 1920)—S. 77—Pradhani tenancy in Dhalbhum estate—If service tenure—Saleability.

The saleability of tenures generally in execution of rent decrees was introduced by the Act of 1903 and general considerations of the interests of *raiyats* as a matter of public policy cannot be allowed to interfere with direct provisions of the Act:

Held (*i*) that the *pradhanis* in villages in Dhalbhum estate were not service tenures within meaning of Section 77;

(*ii*) the *pradhan's* right to have the area increased as jungle is cleared and cultivated by the *raiyats*, is only an incident of his tenure and if he fails to parform his duty to pay rent the existence of other duties towards the *zemindar* is no reason to bar a sale if the *zemindar* is otherwise entitled to such remedy. A.I.R. (Vol. 27) 1940 P.C. 137=6 B.R. 876=1940 O.L.R. 506=21 P.L.T. 1005=19 Pat. 949=67 I.A. 290=189 Ind. Cas. 606 (P.C.).

——S. 77—Scope—Incidents of ghatwali tenure—If effected.

Section 77 of the Chota Nagpur Tenancy Act merely leaves the incidents of *ghatwali* tenures untouched by the Act except in so far as the Local Government may otherwise direct by notification. It does not displace any local custom regarding occupancy rights in *ghatwali* land. Such occupancy rights are not barred by the principle which has been applied against the accrual of occupancy rights by twelve years' *raiyati* occupation and there is no reason why they should not, by custom or otherwise, accrue in *ghatwali* lands. A.I.R. (Vol. 20) 1933 Pat. 52=13 P.L.T. 781=142 Ind. Cas. 673 (2).

——Ss. 77 and 208—Ghatwali tenure—Saleability for arrears of rent.

Where the right of nomination of the ghatwal rests with Government and not with Raja, a ghatwali tenure cannot be sold in execution of a decree for arrears of rent. 9 Cal. 187, foll. 1 Pat.L.J. 601=2 Pat.L.W. 427=36 Ind. Cas. 963.

——S. 78 — Applicability — Extent of—Tenant ceasing to be raiyat of their land—Effect.

Section 78 (1) (*c*) saves a tenant from ejectment notwithstanding any contract with the landlord made even before the commencement of the Act, and the section would apply even if a tenant took a settlement of the homestead before taking a raiyati or agricultural settlement. But the moment the holding ceases to exist, the raiyati incidents of the homestead cease to exist and S. 78 will only apply so long as the tenant of the homestead continues to be a raiyat in respect of other land but no longer. A.I.R. 1930 Pat. 224, Rel. on. 11 P.L.T. 207=A.I.R. 1930 Pat. 236.

——S. 78—Object and scope—Tenant parting with raiyati land—Effect on homestead tenancy.

Section 78, Chota Nagpur Tenancy Act, was enacted as a protection to the cultivating tenant, so that he may not be turned out of his homestead as long as he holds his *raiyati* land. If he parts with the *raiyati* land, his tenancy of the homestead becomes subject to the ordinary incidents and does not suffice to keep his status as a *raiyat*.

The Legislature could not possibly have meant by S. 78, that though a *raiyat* may hold one homestead otherwise than as part of his holding as a *raiyat* and use it for carrying on his cultivation, the incidents of his tenancy of some other homestead held somewhere else for other business shall be regulated by the provisions of the Act applicable to land laid by a raiyat. A.I.R. (Vol. 24) 1937 Pat. 444=3 B.R. 748=170 Ind. Cas. 677.

——S. 78—Scope—If creates raiyati interest.

Section 78 regulates incidents of tenancy of homestead and does not create raiyati interest. 11 P.L.T. 207=A.I.R. 1930 Pat. 236.

——Ss. 80, 84 (3) and 127—Khuntkatti tenancy—Entry of non-resumable khuntkatti—Presumption of correctness.

The proprietor of an estate sued for resumption of a village on the allegation that he was entitled to resume on the death of the last survivor of two persons to whom the estate had granted an *istimrari mukarrari* tenancy of the village and for a declaration that the entry "non-resumable *khuntkatti*" made in the *khewat* and its sub-heads were erroneous and made without jurisdiction. The defence was that the tenancy of the village was held not upon the *istimrari mukarrari* lease but on a *mohtoi* grant and that the tenancy was not liable to resumption;

Held, that the entries as to the existence of the nature and permanence of the tenure were made with jurisdiction and that the presumption of correctness having arisen from S. 84 (3), Chota Nagpur Tenancy Act, it was upon the landlord to rebut it.

In a village containing *raiyats* having *khunthatti* rights, one of them the village headman, is often the tenure-holder of the village and the tenancy is his ancestral *maurusi khuntkatti*. Accordingly not only could an entry of the *khuntkatti* nature of a tenure be made with jurisdiction on an appropriate notification under S. 127 (*c*) but an entry of *maurusi khuntkatti* will be made with jurisdiction under S. 127 (*b*) when the rights and liabilities of a village headman are being recorded, if such village headman is a tenure-holder and his tenancy is *mouruti khuntkatti*. The term implies at least permanence (or as it is styled non-resumability) of the tenure and that is a reason why it must be recorded. A.I.R. (Vol. 20) 1933 Pat. 504=14 P.L.T. 457=148 Ind. Cas. 565.

——Ss. 80, 127 and 132—Entry in Record of Rights—Correctness—If open to challenge in Civil Court.

Entries in Record of Rights are correct until disproved, if the Record is made by Notification under S. 80; but they are conclusive proof if the Record is made by Notification proof if the Record is made by Notification under S. 127 of the Act. The rights and obligations of tenants with reference to landlords, once they are ascertained, cannot be questioned by any Civil Court. (1919) Pat. 147=50 Ind. Cas. 454.

——S. 81—Applicability—Manbhum.

Entry to the effect "occupancy raiyat with rent subject to enhancement" does not attract operation of S. 51-A (5) in Manbhum. 11 P.L.T. 251=A.I.R. 1930 Pat. 392.

——S. 81—Presumption under—Scope of.

The ordinary rule with regard to official documents like record-of-rights is that they must be presumed to be correct until the contrary is shown, that is to say, it must be presumed that the entries made in the record-of-rights were those entries and those entries only which are required to be made in the order passed under S. 80, and if any party wishes to dispute the validity of the entry, then the onus would be on him to produce the order passed under S. 80 to show that these particulars were not in fact required. 1926 P.H.C.C. 338=99 Ind. Cas. 492=8 P.L.T. 239=A.I.R. 1927 Pat. 97.

——S. 81—Rent of trees—Settlement officer—Duty and Jurisdiction of.

If payment beyond the rent of the holding has to be made by the raiyat in respect of the trees standing thereon it would also be the duty of the settlement officer to record the fact in the remarks column and he has jurisdiction to do so under S. 81. 8 Pat 266=120 Ind. Cas. 756=10 P.L.T. 311=A.I.R. 1929 Pat. 328.

——S. 81, Cl. (n)—Scope—Coal in mine—If covered.

S. 81 (n) does not include coal contained in a mine not yet opened but only minerals lying on the surface of the soil which may be taken by any person whether tenant or not. 17 C.W.N. 408=17 C.L.J. 239=17 Ind. Cas. 490.

——S. 83—Draft record-of-rights—Admissibility against final record-of-rights.

Only the finally published record-of-right carries with it any presumption in the own favour. But this presumption is rebuttable and the draft record-of-rights and the proceedings leading to the final record may be put in evidence or rebutting the presumption in its favour. 2 Pat. 814=81 Ind. Cas. 326=A.I.R. 1924 Pat. 248.

——S. 83—Scope of Order.

Any order passed under S. 83 relates to the draft record only. 94 Ind. Cas. 1007=A.I.R. 1926 Pat. 369.

——Ss. 83 and 87—Mundari Khunt-kattidari tenant—Jurisdiction of Settlement Officer to record.

A Settlement Officer has jurisdiction to record a tenant as *Mundari Khunt-kattidar*, in a settlement proceeding, under the Act, on deciding a dispute between the tenant who claims to be a Mundari Khunt-kati tenant and the landlord who says he is not, although there is no suit between the parties under S. 87 of the Act. 20 C.W.N. 582=34 Ind. Cas. 385.

——S. 84—Jurisdiction of Civil Court to alter entry in record.

If the entry in the khewat is not rectified under S. 87, the entry stands and cannot be altered by the civil Court and under S. 84 (3) it is to be "evidence of the matter referred to in such entry" and is to be

presumed to be correct until it has been proved by evidence to be incorrect. 31 M.L.W. 352=32 Bom. L.R. 515=123 Ind. Cas. 145=51 C.L.J. 502=A. I.R. 1930 P.C. 45.

——S. 84—Presumption of correctness.

The entry in the survey record of rights as to the nature of tenancy must be presumed to be correct. Where the entry in the survey record of rights shows that the defendants were in possession of a tenure which was non-resumable, the onus is on the plaintiff to show that the entry was incorrect. A.I.R. (Vol. 33) 1946 Pat. 313=12 B.R. 446=223 Ind. Cas. 615 (F.B.).

——Ss. 84—Presumption of correctness.

The record of rights relating to a particular plot though it may not be a record under S. 132, Chota Nagpur Tenancy Act, is record entitled to the presumption of correctness under S. 84 of the Act and should not be overlooked. A.I.R. (Vol. 29) 1942 Pat. 489=9 B.R. 91=44 Cr.L.J. 95=203 Ind. Cas. 521.

——S. 84—Presumption of correctness—Rebuttal—Entry of rent-free tenure—Land within zemindari—Presumption, if rebutted.

Where land lying with the limits of a regularly assessed estate or **mahal** is claimed as rent-free and it is recorded in the Record of Rights as rent-free, the onus is on the landlord to prove that the entry is wrong. The entry in the Record of Rights is not rebutted by the mere fact that the land is situated within the **zemindari.**

If it is established that the only evidence whereon an entry in the Record of Rights has been made by the Settlement Officer does not support his conclusion, that is the strongest possible proof that the entry is incorrect. The aggrieved party is not limited to a particular mode of proof; he can prove **aliunde** that the entry in fact is incorrect. A.I.R. (Vol. 18) 1931 Pat. 224=131 Ind. Cas, 788.

——S. 84—Presumption of correctness—Scope and extent of—Order under S. 80 containing particulars not mentioned in S. 81—Such particulars are proper to be recorded in the record-of-rights—Presumption under S. 84 (3) applies to them.

Any particulars appearing in the record-of-rights which are specified in the order made under S. 80 are proper particulars to be recorded in the record whether they come within the different classes mentioned in S. 81, or whether they are in addition thereto and the presumption under S. 84 (3) will also attach to such particulars. 1926 P.H.C.C. 338 =99 Ind. Cas. 492=8 P.L.T. 239=A.I.R. 1927 Pat. 97.

——S. 84—Record-of-rights if conclusive proof of tenancy rights.

S. 132 applies only to Khuntkati lands and under S. 84 (3) a record-of-rights is not a conclusive proof of any tenancy right. 3 Pat.L.T. 107=1921 P.H.C.C. 296=A.I.R. 1922 Pat. 28.

——S. 84 (3)—Applicability—Record of Rights in respect of non-agricultural land—Presumption—Evidence required to rebut.

Under the Chota Nagpur Tenancy Act the preparation of the Record of Rights in respect of non-agricultural lands is not **ultra vires the survey authorities** and the presumption as to the correctness of an entry in the Record of Rights arises even with regard to non-agricultural lands.

Even though the entries must be presumed to be correct until proved to be incorrect, their incorrectness may be established by reference to the state of things existing before the Record of Rights was prepared.

The evidence relied on to rebut the presumption must show definitely that the entry is incorrect and evidence which merely suggests a doubt as to the correctness of the entry, or evidence about which it is arguable that some other person might have reached a conclusion different from that of the Settlement Officer, is not sufficient to rebut the presumption of correctness attaching to an entry in the Record of Rights. A.I.R. (Vol. 20) 1933 Pat. 621=12 Pat. 829=148 Ind. Cas. 410.

——S. 84 (3)—'By evidence', meaning of.

The words 'by evidence' in S. 84 (3), Chota Nagpur Tenancy Act, should not be read as if they were 'by evidence of the person challenging the entry.' An entry in the Record of Rights can, therefore, be rebutted by evidence of both sides. A.I.R. (Vol. 20) 1933 Pat. 698 (2)=148 Ind. Cas. 193.

——S. 84 (3)—Burden of proof—Plea of incorrectness of entry—Onus.

Under S. 84 (3) the onus is on the parties challenging an alienation to prove that an entry made in the **khewat** is incorrect. A.I.R. (Vol. 18) 1931 P.C. 30=58 Ind. App. 9=53 C.L.J. 11=35 C. W.N. 233=33 L.W. 277=10 Pat. 296=12 P.L. T. 375=131 Ind. Cas. 325 =60 M.L.J. 253 (P.C.).

——S. 84 (3)—Entry in survey of rights—Value of.

The entry in the survey of rights in Chota Nagpur has a presumptive value under S. 84 (3), Chota Nagpur Tenancy Act, and is entitled to great weight. A.I.R. (Vol. 28) 1941 Pat. 625=22 P.L.T. 829 =8 B.R. 449=198 Ind. Cas. 680.

——S. 87—Decree under—Subsequent variation by agreement—If barred.

Under S. 258, a decision under S. 87 gives a finally to the decree in a suit under that section and places it on the same footing as a decree of the civil Court and there is nothing to warrant that the parties cannot vary it by an agreement arrived at subsequent to such a decision. 122 Ind. Cas. 831 =A.I.R. 1930 Pat. 384.

——S. 87—Res judicata—Decision of Judicial Commissioner—Subsequent suit for possession—If barred.

There is a clear line of distinction between those cases where the suit is instituted for the purpose of varying, modifying or setting aside a decision under S. 87, Chota Nagpur Tenancy Act, and those where the suit has been instituted for a relief which could not be granted under that section but in granting which the Court may have to find that the entry in the Record of Rights is not correct even though it may be based on a decision under S. 87. There is no provision in the Act to the effect that the presumption of correctness which attaches to an entry in the Record of Rrights becomes irrebuttable after a decision under S. 87. If, therefore, the entry can be held to be incorrect, the decision under S. 87, upon which the final entry may have been based, may also be shown to be wrong. The mere fact, therefore, that some of the issues in a suit may be the same

as the issues before the Revenue Officer in a suit under S. 87 will not be enough to bar the former suit if it is clear that the scope of the suit is different from the scope of the suit before the Revenue Officer and the suit has been instituted for obtaining such reliefs as the Revenue Officer was not competent to grant. A.I.R. (Vol. 23) 1936 Pat. 611==15 Pat. 229=17 P.L.T. 956=3 B.R. 120=166 Ind. Cas. 86.

——S. 87—Second appeal—Decision not a decree.

A decision under S. 87 of the Chota Nagpur Tenancy Act is not a decree; it is a decision and there is no appeal to the High Court under the Civil Procedure Code from a decision not under S. 224 (2). 1922 P.H.C.C. 109=65 Ind. Cas. 285=6 P.L.J. 634=A.I.R. 1923 Pat. 135.

——S. 87—Second appeal—"Decision" under—If decree.

There is no second appeal to the High Court from a decision in a suit under S. 87 of the Act. The word 'decision' in S. 87 is not synonymous with a "decree" and therefore S. 100 of the C. P. Code does not apply to the decision of an appeal under S. 87. 40 Ind. Cas. 891 not foll. 39 Ind. Cas. 241, foll. 5 Pat. L. J. 697.

——S. 87—Second appeal—Limitation Act, S. 14—Deduction of time spent on appeal to Commissioner.

No second appeal lies to the High Court from the decision of a Judicial Commissioner passed on appeal against the decision of a Revenue Officer under S. 87. 39 Cal. 24, foll. "Decision" in the Chota Nagpur Tenancy Act does not mean "decree" as used in S. 100 of the C. P. Code. Where the three months provided for a suit under S. 87 of the Act having expired, the plaintiff sought to exclude the time taken up by a previous application under S. 89, followed by an appeal to the Commissioner; **Held**, that though the appeal to the Commissioner was incompetent, the Settlement Officer had jurisdiction to entertain the application under S. 89 and the period during which the application was pending before the officer could not be excluded. (1920) Pat. 302=58 Ind. Cas. 434.

——S. 87—Second appeal.

In a suit under S. 87 filed in the Revenue Court for a declaration that an entry in the Record of Rights is wrong and that the lands are the Zerait lands of the plaintiff and that the defendant has no right of occupancy therein, a second appeal lies to the High Court from the decision of the Judicial Commissioner in appeal. 40 Ind. Cas. 891 (Pat.).

——Ss. 87 and 224—Second appeal—Competency.

An appellate order under S. 87 of the Chota Nagpur Tenancy Act is not open to second appeal. 39 Cal. 241=16 C.W.N. 294=15 C.L.J. 145=13 Ind. Cas. 193.

——Ss. 87, 258 and 264 (8)—Res judicata—Judicial Commissioner hearing appeals—If Revenue Officer—Order—If bars civil suit.

The Judicial Commissioner by virtue of his appointment under S. 264 (8) performed the functions of a "Revenue Officer" within the meaning of S. 258 in disposing of appeals from decisions of Revenue Officers under S. 87. The decision under S. 87 is a bar to the trial of a subsequent suit in a Civil Court for the same relief but the party who is in possession can defend his title in a suit for resumption of the tenure. 43 Cal. 136=19 C.W.N. 998=23 C.L.J. 118=31 Ind. Cas. 691.

——S. 89 — Applicability — Order of Attestation Officer—Revision by Settlement Officer—Effect—Bar of civil suit.

All orders whether by khanapuri officers or by Attestation Officers have to be made during the preparation of the draft Record-of-Rights and all such orders passed before final publication of the Record-of-Rights are subject to revision under the provisions of S. 89 of the Act. The order of the Attestation Officer is an entry made in the draft Record-of-Rights within the meaning of S. 89 and therefore the Settlement Officer has jurisdiction to revise that entry under the provisions of S. 89 of the Act and, therefore, S. 258 which provides that such an order of revision will be final and shall have the force and effect of a decree of Civil Court, operates as a bar to the suit in Civil Court to set aside the order. 90 Ind. Cas. 489=A.I.R. 1926 Pat. 64.

——S. 91 (1)—Applicability—Grant of relief under—Conditions.

A plaintiff can obtain relief under S. 91 (1) only when waste or damage has actually been committed and even then he can only prohibit the commission of further waste or damage and cannot obtain an order for injunction or for the appointment of a Receiver. S. 91, (b) does not refer to suit when the status of the tenant only comes up for consideration. S. 91 does not authorise the dismissal or the suit but only adjustments pending the final publication of the Record-of-Rights. 17 C.W.N. 408=17 C.L.J. 239=17 Ind. Cas. 490.

——S. 94—Object and scope of—If overrides S. 84—Claim to rent in excess of entry in Record-of-Rights—Enforceability.

Section 94, Chota Nagpur Tenancy Act, overrides S. 84 and no demand for rent in respect of an occupancy holding in excess of the amount entered in the Record-of-Rights is enforceable except in circumstances referred to in S. 94.

Section 94 is designed to prevent parties, who have not availed themselves of the opportunity provided by the Act for revision of rents, from re-opening the question in an ordinary rent suit and is based upon the special conditions of Chota Nagpur. A.I.R. (Vol. 19) 1932 Pat. 93=10 Pat. 806=135 Ind. Cas. 105.

——S. 118 (1) (b)—Land described in record of rights as Manjhihas—Occupancy or non-occupancy rights—If can be acquired.

The term **Zirat** is a general term including all kinds of proprietors' privileged lands; whereas the term **Manjhihas** has a special significance, with particular reference to S. 118 (1) (b), Chota Nagpur Tenancy Act. Land described in the Record-of-Rights as **Manjhihas** falls under S. 118 (1) (b) of the Act and is absolutely privileged and occupancy or non-occupancy rights cannot be acquired therein in any circumstances. A.I.R. 1948 Pat. 357.

——Ss. 123 and 164—Applicability—Entry of Mundari Khunt-katti tenancy—Suit impeaching—If lies.

When the disputed lands are settled and a Record-of-Rights regarding them is drawn up and they are entered as **Mundari Khunt-khattidhari** tenancies,

and the plaintiff who had purchased them under S. 123, sued for declaration that the entries were incorrect. **Held**, that S. 164 of the Act as amended by Act (V of 1905) B. C., applied that the entries were irrebuttable, and that the Legislature intended to preclude suits being brought to impeach the entries. 9 C.L.J. 83=13 C.W.N. 111=3 Ind. Cas. 689.

——S. 139—Applicability—Bar of civil suit—Conditions.

In order to bar a suit or an application to eject a tenant of an agricultural land from the jurisdiction of Civil Courts it must be shown that such a suit or an application is made under the Act. Since there are no provisions dealing with ejectment of a tenant of a proprietor's private land known as manjhihas or zerait land the suit for such ejectment lies in the Civil Court. 10 P.L.T. 453=118 Ind. Cas. 305=A.I.R. 1929 Pat. 444.

——S. 139—Applicability—Basis and essentials of.

Section 139 contemplates a case where the relationship of landlord and tenant is admitted to exist between the parties; it does not contemplates cases where there is a dispute as regards title. Where the relationship of landlord and tenant is not admitted a suit for possession of occupancy holding on the ground of defendant's denial of the tenancy right is not cognizable by the Deputy Commissioner, and S. 139 does not operate as a bar to the maintainability of such a suit in the Civil Court. 90 Ind. Cas. 489=A.I.R. 1926 Pat. 64.

——S. 139—Applicability—Case involving question of title—Civil Court's jurisdiction — If barred.

S. 139 does not contemplate a case where there is a dispute with regard to title: and where the relationship of landlord and tenant is not admitted, a suit for possession of an occupancy holding on the ground of the defendants' denial of the tenancy right is not cognizable by the Deputy Commissioner. A.I.R. 1926 Pat. 64, Foll. 96 Ind. Cas. 452=1926 P.H.C.C. 246.

——S. 139—Applicability—Suit alleging determination of tenancy—Jurisdiction to try.

Where a plaint sets out that tenancy having been duly terminated no longer exists, the suit lies in Civil Court though of course it is liable to dismissal if the averment of the termination of the tenancy is not substantiated. 123 Ind. Cas. 609=A.I.R. 1930 Pat. 143.

——S. 139—Applicability—Suit for rent of homestead land—Jurisdiction of Civil Court.

A suit or rent of homestead land held by raiyat is not within ambit of S. 139, and is cognizable by a Civil Court. A.I.R. (Vol. 31) 1944 Pat. 391=23 Pat. 654=11 B.R. 168=26 P.L.T. 93=217 Ind. Cas. 7.

——(as amended in 1920), S. 139—Applicability—Suit on title.

Section 139, Chota Nagpur Tenancy Act does not apply to suits based on title. A.I.R. (Vol. 21) 1934 Pat. 80=150 Ind. Cas. 933.

——S. 139—Applicability—Suit not based on relationship of landlord and tenant.

The provision of Cl. (4), S. 139 refers only to a suit as between a landlord and a tenant. Where a plaintiff brought a suit for the recovery of a certain share in a tank on the footing that the defendants had no tenancy rights in the tank and though it was quite true that the Record-of-Rights was in favour of the defendants both the Courts below had concurrently found that the Record-of-Rights in so far as it recorded the defendants as tenants of the 6-anna shareholders was incorrect.

Held, that Cl. (4), S. 139, had no application to the facts of the case. 7 Pat. 82=109 Ind. Cas. 477=9 P.L.T. 724=A.I.R. 1928 Pat. 198.

——S. 139 (4)—Applicability—Suit to eject trespasser holding adversely—Civil Court's jurisdiction—When ousted.

Clause (4), S. 139, only applies to the ejectment of persons to whom Cls. (a), (b), (c) and (e), S. 41, are applicable. It does not apply to a person who has ceased to be a tenant and who has become a trespasser and is holding adversely to the landlord. Under S. 139 (4) (a) a trespasser is ejected if the landlord claims as an alternative relief that the defendants shall be declared liable to pay rent for the land, and in that case the suit is exclusively triable by the Revenue Court, but if no such alternative relief has been asked, the jurisdiction of the Civil Court is not ousted. 7 Pat. 675=9 P.L.T. 811=110=Ind. Cas. 494=A.I.R. 1929 Pat. 18.

——S. 139—Applicability—Suit to recover cess—Revenue Court can try.

A suit for recovery of cess is triable by the Revenue Court as under S. 3, Cl. (23) of the Chota Nagpur Tenancy Act, rent includes cess. 6 Pat. 317=103 Ind. Cas. 464=A.I.R. 1927 Pat. 266.

——S. 139—Applicability—Summary suits for possession—Jurisdiction to try—Title suit—Distinction.

The words "suits" and "applications" in S. 139, were not interchangeable terms, S. 139 (5), prior to amendment by S. 38 of Act 6 of 1920, barred only applications under S. 71 to be tried by Civil Courts, but it did not bar suits. But the new S. 139-A, which came into force on the 5th November, 1920, and the amended S. 139, Cl. (5), which by the amendment included "suits" also, bar the cognizance of purely possessory suits under the Specific Relief Act by Civil Courts and to restore the law as it stood prior to 1908. These new provisions in the Act do not in any way take away the jurisdiction of the Civil Courts to entertain suits for possession based upon the determination of title. Only summary suits for possession, and not title suits with consequential relief for possession are barred by these provisions. Nor do they bar suits in which the right to sue had accrued prior to their coming into force. A.I.R. 1926 Pat. 363, Diss. from; A.I.R. 1926 Pat. 561, Appr. 6 Pat. 296=8 P.L.T. 841=104 Ind. Cas. 580=A.I.R. 1927 Pat. 203.

——S. 139—Applicability—Under-raiyat—Suit for ejectment of—If maintainable in Civil Court.

In a suit for the ejectment of an under-tenant, the plaintiff must seek his remedy by application or suit before the Deputy Commissioner and such a suit is not maintainable in the Civil Court. A.I.R. 1926 Pat. 403, Foll. 101 Ind. Cas. 645=A.I.R. 1927 Pat. 402.

——S. 139—Pradhani rights—Suit for declaration of—Jurisdiction.

A suit for declaration that the plaintiff has pradhani rights in a certain mauza and for possession by dispossessing defendant is cognizable only by a revenue Court. 7 Pat. 816=9 P.L.T. 544=112 Ind. Cas. 309=A.I.R. 1928 Pat. 515.

——S. 139—Procedure—Suit to eject trespasser—Finding that defendant was non-occupancy tenant—Effect—Dismissal of suit.

Where the suit as framed was one to eject trespassers, but on the facts found the defendants were not trespassers but non-occupancy raiyats.

Held, the suit should be dismissed and the plaint cannot be returned for presentation to proper Court, **viz.,** that of Deputy Commissioner. 2 Pat. 746=77 Ind. Cas. 587=5 Pat.L.T. 422=A.I.R. 1924 Pat. 267.

——S. 139 (2)—Applicability—Defendant, if should be agricultural raiyat.

A suit against a person who is not a raiyat but a tenure-holder, and is collecting rent in respect of agricultural land for the determination of the rent payable by him comes expressly under the provision of S. 139. In order that S. 139, Cl. (2), may apply, it is not necessary that the defendant should be an agricultural raiyat, but it is necessary that the rent should be payable for agricultural land. 6 Pat. 48 =7 P.L.T. 641=97 Ind. Cas. 789=A.I.R. 1926 Pat. 527.

——Ss. 139 (2)—Scope—Suit to correct entry in Record-of-Rights—Commutation of rent during—Effect—Bar of suit.

In the finally published Record-of-Rights, it was entered the rent was payable in kind and also small cash payments in addition. The tenants applied for the commutation of the rent. The landlord sued in the Civil Court for a declaration that the rent was payable wholly in cash. The Revenue Officer during the pendency of the civil suit allowed the commutation. **Held** that the institution of the suit in the Civil Court did not take away the Revenue Officer's jurisdiction, and that the suit was barred by S. 139 (2). 23 C.W.N. 372.

——S. 139 (2) and (4)—Scope—Under raiyat—Suit for ejectment—Jurisdiction of Civil Courts.

S. 139 (2) and (4) do not bar jurisdiction of Civil Courts in a suit under the provisions of general law for ejectment of an under-raiyat by a raiyat. 23 Ind. Cas. 407 (Cal.).

——S. 139 (3)—Scope—Ghatwali property—Homestead land in—Suit for rent—Civil Court's jurisdiction.

Where rent is claimed in respect of **Bastee** or homestead land, the mere circumstance that crops have been grown on a part of the land, does not change its character. Such a suit is not one for arrears of rent due on account of agriculture lands and is maintainable in the Civil Court and not in the Revenue Courts, although the **Bastee** land forms part of a **Ghatwali** property including agricultural land. 40 Cal. 402=17 C.W.N. 615=16 Ind. Cas. 776.

——S. 139 (4)—Applicability—Civil suit—Bar of.

Where Chota Nagpur Tenancy Act applies to lands in suit, S. 139 (4-A) of the Chota Nagpur Tenancy Act confers jurisdiction in such cases on the Deputy Commissioner and bars the jurisdiction of Civil Courts. A.I.R. (Vol. 29) 1942 Pat. 86=8 B.R. 77=196 Ind. Cas. 650.

——S. 139 (4)—Applicability—Suit to eject on ground of misuse—Jurisdiction.

Suit by landlord for ejection of occupancy tenant for using land in way detrimental to tenancy is entertainable by Deputy Commissioner under S. 139 (4). A.I.R. (Vol. 23) 1936 Pat. 142=2 B.R. 355=161 Ind. Cas. 695.

——S. 139 (4)—Applicability—Suit to eject on termination of tenancy—Cognizability in Civil Court.

A suit for the ejectment of a tenant in which it is averred that the tenancy having been duly terminated, the relationship of landlord and tenant does not exist between the plaintiff and the defendant, lies in the Civil Court.

Where in a suit for ejectment under the Chota Nagpur Tenancy Act, the tenant pleads that the tenancy is a fixed one, the onus of proving that the tenancy is a permanent one is upon the person who asserts it to be so. A.I.R. (Vol. 20) 1933 Pat. 664=14 P.L.T. 616=147 Ind. Cas. 1177.

——S. 139 (4)—Applicability—Suit to eject tenant holding over as trespasser.

A lessee who has been granted a lease for a specified term of years becomes a trespasser after the expiry of the period unless the landlord chooses to treat him as a tenant for a fresh period. S. 139 (4) does not bar the jurisdiction of the Civil Court to entertain a suit under S. 41 (4) for his ejectment. A.I.R. (Vol. 20) 1933 Pat. 457=148 Ind. Cas. 353.

——S. 139—Applicability—Suit for declaration that defendant tenant is not occupancy tenant—Civil Court—Jurisdiction of.

A suit filed not to eject the defendants-tenants or to cancel the lease but to declare that the defendants are not the occupancy raiyats and that they have no right to continue to hold possession of the land against the wish of the plaintiff-landlord after the expiry of the term of the lease is not barred by S. 139 (4). 8 P.L.T. 606=104 Ind. Cas. 800= A.I.R. 1927 Pat. 348.

——S. 139 (4-A)—Applicability—Conditions of—Defendant—If to be trespasser with no right.

What the Legislature intended to provide for the class of cases referred to in S. 139 (4-A), Chota Nagpur Tenancy Act, is that the person sought to be ejected as a trespasser is one who has gone upon the land with no cost of right and was a trespasser **ab initio.** A.I.R. (Vol. 25) 1938 Pat. 174=16 Pat. 682=19 P.L.T. 63=4 B.R. 421=174 Ind. Cas. 283.

——S. 139 (5)—Applicability—Tenant putting another in charge of his land—That other taking possession—Suit by former against latter—If 'ejectment.'

Where a tenant, being in possession of the land gave up possession voluntarily to the defendants for purposes of management, and he remained away for some years, then returned and, when he tried to get back possession the defendants refused to give it up:

Held, that this was not a case of ejectment and S. 139 (5) did not apply. 6 Pat. 436=104 Ind. Cas. 205=A.I.R. 1927 Pat. 326.

——S. 139 (5)—Construction—'Application'—If 'suit'.

'Application' in S. 139 (5) is not interchangeable with 'suits'. The Act distinguishes between the two terms. 13 C.L.J. 250=15 C.W.N. 387=9 Ind. Cas. 478.

——S. 139 (5)—Scope of bar—Suit by raiyat for declaration of title and recovery of possession of holding—Jurisdiction of Civil Court.

The suit of a **raiyat** for declaration of title to and recovery of possession of his holding from a landlord lies in the Civil Court and does not lie in the Revenue Court and the period of limitation is the ordinary one and not one year as it is in a possessory suit under S. 139 (5), Chota Nagpur Tenancy Act. A.I.R. (Vol. 20) 1933 Pat. 539=14 P.L.T. 657=12 Pat. 802=148 Ind. Cas. 1093.

——S. 139 (5)—Scope of bar—Suit for declaration of title to and consequent recovery of possession of tenancy—Civil Court—Jurisdiction of.

S. 139 (5), Chota Nagpur Tenancy Act, only bars the Civil Court from entertaining a suit regarding a matter cognizable by the Deputy Commissioner by way of application and so far as recovery of possession of a tenancy is concerned by no provision does it bar the Civil Court from entertaining a suit for a declaration of title to and consequent recovery of possession of a tenancy nor interfere with the period of limitation prescribed for such a suit. A.I.R. (Vol. 24) 1937 Pat. 117=18 P.L.T. 8=3 B.R. 291=16 Pat. 215=167 Ind. Cas. 17 (F.B.).

——S. 139 (5)—Scope and effect of—Extent of bar.

S. 139, Cl. (5) draws a distinction between suits and applications and the latter alone which are in the nature of the summary procedure are intended to be instituted in the Court of the Deputy Commissioner. (1918) Pat. 131=4 Pat.L.W. 189=44 Ind. Cas. 262.

——S. 139 (6)—Scope—Suit for recovery of possession by headman—Maintainability in Civil Court.

S. 139 (6) of the Act bars only a suit which relates to agricultural land and is instituted by the headman of a village as such. It does not bar a suit for recovery of possession on declaration of title. A raiyat with a right of occupancy in his agricultural lands, who is at the same time the rent collector of the village and is remunerated as such does not lose his right of occupancy. 19 C.W.N. 578=21 C.L.J. 629=27 Ind. Cas. 538.

——S. 139 (6) and (8)—Applicability—Prodhan—Suit to eject—Forum.

S. 139 (6) of the Act gives jurisdiction to the Deputy Commissioner to deal with disputes as between parties claiming the office of **prodhan** coupled with possession of land attached to such office in a civil proceeding between parties other than landlord and tenant, which would otherwise apparently be outside the scope of the Act. A suit to eject a **prodhan** does not fall within this sub-section nor under Sub-S. 8. The Deputy Commissioner, has, therefore, no jurisdiction under the Act to hear such a suit. (1918) Pat. 65=5 Pat.L.W. 199=45 Ind. Cas. 72.

——S. 139 (8)—Scope—Under-raiyat—Suit to eject from homestead—Jurisdiction.

Section 139, Cl. (8), Chota Nagpur Tenancy Act, will not bar a suit to eject an under-**raiyat** who is in possession of the property under a lease exceeding five years or under a lease for any definite term or under a permanent lease. Even if the defendants have acquired occupancy right there is no provision in the Act for a suit to eject them from their homestead land which they hold separate from their agricultural holding. A.I.R. (Vol. 19) 1932 Pat. 257=11 Pat. 456=13 P.L.T. 603=139 Ind. Cas. 394.

——S. 139, Proviso—Procedure—Rent suit before Deputy Collector transferred to Civil Court—Subsequent procedure—Chota Nagpur Tenancy Act, or by Civil P. C. (5 of 1908)—Appeal—Forum—Judicial Commissioner.

Where a rent suit is commenced before the Deputy Collector but by reason of the question of title raised by the introduction of the intervener the case is transferred by the Deputy Collector under the proviso to S. 139 of the Chota Nagpur Tenancy Act, to the Civil Court, the procedure of the suit is governed by the Civil P. C. and not by the Chota Nagpur Tenancy Act, and hence an appeal from the decision of the Civil Court in such a suit lies to the Judicial Commissioner of Chota Nagpur and, therefore, to the High Court. A.I.R. (Vol. 26) 1939 Pat. 369=5 B.R. 324=20 P.L.T. 161=179 Ind. Cas. 954.

——Ss. 139 and 231—Scope of—Suit by auction purchaser for delivery of possession—C. P. Code, S. 47.

Neither Act (10 of 1895), nor Act (8 of 1865), nor the Chota Nagpur Tenancy Act has enacted that that the provisions of the C. P. Code should apply to the suits or the decrees obtained under those Acts; therefore S. 47 of the C. P. Code does not apply to decrees passed and executed and sales held under the Rent Act (10 of 1859). 21 Cal. 428 and 28 Cal. 368, foll. 1919 Pat. 354=4 Pat.L.J. 716=52 Ind. Cas. 711.

——Ss. 139 and 139-A—Relative scope—Jurisdiction of Civil Court—Bar of—Extent of.

The scope of Ss. 139 and 139-A of the Chota Nagpur Tenancy Act, in relation to the jurisdiction conferred upon the Deputy Commissioner by S. 46 (4) before it was amended in 1938, are the same apart from the remedial distinction between 'a suit' and 'an application.' The 'matter' excluded by way of suit from the jurisdiction of the Civil Court under S. 139-A is the same as what is excluded therefrom by way of an application under S. 139. In relation to the old S. 46 (4), what is excluded from the jurisdiction of the Civil Court is the application in respect of which jurisdiction is thereby conferred upon the Deputy Commissioner, that is to say, the jurisdiction **at any time within three years after the** expiration of the period for which a raiyat has, under the section, transferred his right in his holding or any portion thereof, to put the raiyat in possession. The Legislature cannot be taken to have intended to deprive the raiyat of the rights already conferred upon him by the old S. 46 (1). S. 139-A must be held to be restricted in its application to cases in which an application is cognizable by the Deputy Commissioner at the date of the suit. 26 Pat. 377=A.I.R. 1948 Pat. 49.

——S. 139-A—Applicability—Suit to declare title as occupancy raiyat and possession.

A suit for declaration of title as occupancy raiyats with consequential relief of recovery of possession by tenants who have been dispossessed of their lands by the landlord who settled the land with other tenants is cognizable by a civil Court. A.I.R. 1927 Pat. 203, Foll. 9 P.L.T. 340=105 Ind. Cas. 561 =A.I.R. 1928 Pat. 128.

——S. 139-A—Applicability—Suit for declaration as occupancy tenant and for possession—Bar of.

A suit based on the allegation that the plaintiff had an occupancy right in the land but had been dispossessed by the defendant, whom the landlord set up as a tenant in order to get rid of the plaintiff is clearly barred by the provisions of S. 139-A, and the case is not excluded from the operation of S. 139-A by the mere fact that a declaration as to his occupancy status was asked for in the suit. 6 Pat. 64=7 P.L.T. 870=1926 P.H.C.C. 223=96 Ind. Cas. 1036=A.I.R. 1926 Pat. 363.

——S. 139-A—Retrospective effect—Cause of action arising before 1920—If affected.

S. 139-A cannot have any retrospective operation over a right of action occurring prior to 1920 and S. 139, Cl. (5), as amended in 1924, cannot have also any retrospective effect upon a right which accrued before 1924. A.I.R. 1927 Pat. 203, Foll. 8 P.L.T. 850=105 Ind. Cas. 33=A.I.R. 1928 Pat. 109.

——S. 139-A—Retrospective effect.

There is nothing in the Amending Act (6 of 1920) to show that the Legislature intended to give the new S. 139-A retrospective effect and to destroy the right which had already accrued prior to the section coming into force. 6 Pat. 296=8 P.L.T. 841=104 Ind. Cas. 580=A.I.R. 1927 Pat. 203.

——S. 139-A—Scope—Extent of bar.

Section 139-A only bars the Civil Court from entertaining a suit regarding a matter cognizable by the Commissioner by way of application. A.I.R. (Vol. 20) 1933 Pat. 539=14 P.L.T. 657=12 Pat. 802=148 Ind. Cas. 1093.

——S. 139-A—Scope and effect—Suit for ejectment of under-tenant by immediate landlord—Bar of Civil Court's jurisdiction.

Under S. 46 an application for the ejectment of an under-tenant was cognizable by the Deputy Commissioner; and under Cl. (8) of S. 139, as it stood before the amendment of 1920; and as it still stands, an application under S. 46 is an application cognizable by the Deputy Commissioner. Thus it seems clear that under the terms of S. 139-A no suit could be brought in the civil Court for the ejectment of an under-tenant by his immediate landlord. 6 Pat. 69=8 P.L.T. 231=1926 P.H.C.C. 288=97 Ind. Cas. 175=A.I.R. 1926 Pat. 403.

——S. 164 — Applicability — 'Particulars'—Meaning of—Entry in record of rights—Suit to declare it incorrect—Bar of.

Where a purchaser under the provisions of S. 128 of the Chota Nagpur Tenancy Act of certain tenures of which a record-of-rights had been prepared, sued to have a declaration that certain entries in the record with regard to a **mundari khuntkattidari** tenancy were incorrect:

Held, that the provisions of S. 164 of the Act (1 of 1879) as amended by Act (5 of 1905) applied; and that the object of these provisions was to make the entries unrebuttable, and the legislature intended to preclude suits of this nature. The word 'particulars' in S. 164 has a very wide application and covers entries declaring that the tenants have to pay certain rents named in the record-of-rights to a person other than the plaintiff. There is no limitation as to the nature of the suit to which the provisions of S. 103-B apply. The presumption as to the correctness of the entries in the record-of-rights will operate even in a suit to declare the entries incorrect. (1906) 13 C.W.N. 111=9 C.L.J. 83=3 Ind. Cas. 689.

——S. 177—Appeal—Forum — Judicial Commissioner or Deputy Commissioner.

Question as to title or interest in land cannot arise to be decided under S. 177 and so appeal from an order under that section can lie not to the Judicial Commissioner but to the Deputy Commissioner: 4 P.L.J. 163, Foll. 120 Ind. Cas. 320=A.I.R. 1929 Pat. 258.

——S. 177—Appeal—Forum — Judicial Commissioner or Deputy Commissioner.

Where proceedings are taken under S. 177 the Court will not come to a decision as to the respective title of parties to the suit, but where the Deputy Collector has decided a question regarding the interest in land as between the parties appeal lies to the Judicial Commissioner and not to the Deputy Commissioner.

Where in a suit for rent a person was joined under S. 177 of the Chota Nagpur Tenancy Act as an intervenor and the Deputy Collector decided a question of title or interest in land.

Held, that though the value of the suit was less than Rs. 100 appeal lay to Judicial Commissioner. 1924 P.H.C.C. 278=84 Ind. Cas. 286=A.I.R. 1924 Pat. 807.

——Ss. 177—Appeal—Forum—Rent suit—Judicial Commissioner or Deputy Commissioner—Appeal—Claim of third person.

An appeal from rent suit in which no question of title is decided lies to Deputy Commissioner and not to Judicial Commissioner. 4 Pat.L.J. 163=50 Ind. Cas. 712.

——S. 177—Applicability—Case transferred by Deputy Collector to Civil Court under S. 139, Proviso.

Section 177, Chota Nagpur Tenancy Act, applies only to a case tried before the Deputy Commissioner. Where a rent suit commenced before the Deputy Collector is transferred to the Civil Court, a question of title being raised in the suit, the suit is not a suit before the Deputy Commissioners and S. 177 does not apply to such a suit. A.I.R. (Vol. 26) 1939 Pat. 369=20 P.L.T. 161=5 B.R. 324=179 Ind. Cas. 954.

——S. 177—Applicability—Rent suit—Plea of payment to third person—Effect.

In a suit for recovery of rent, the defendants pleaded that they paid the rent to a third person namely the minor son of the previous proprietor.

Held, the case did not fall within S. 177, no claim to receive payment having been made by or on behalf of a third person. 1 Pat. 255=69 Ind. Cas. 858=A.I.R. 1922 Pat. 480.

——S. 177—Applicability — Claim to receive rent on behalf of third person by tenant—Maintainability.

What the tenants had done in this case was to claim the right, or rather, to acknowledge an obligation, to pay rent to a third person:

Held, a right to receive rent can only be claim by or on behalf of the person entitled to receive it and not by a person who is under the obligation to pay it. 3 P.L.T. 131=64 Ind. Cas. 1003=1922 P.H.C.C. 54=6 P.L.J. 603=A.I.R. 1923 Pat. 55.

——S. 177—Applicability—Tenant setting up right of third person.

Section 177 does not bar a suit where the tenant pleads the right of a third person as landlord nor is plaintiff bound to implead such a person. 57 Ind. Cas. 28 (Pat.).

——S. 177—Parties.

In an action for rent under the Chota Nagpur Tenancy Act it would be necessary to join as a third party or intervener a person, who, from the circumstances alleged, could be shown to have received the payment of rent in good faith; it is not so much the use of the words "in good faith" that becomes necessary under S. 177, but such facts as would indicate **prima facie** that the payment had been received in good faith are necessary. Under S. 177 the pleading to the effect that payment was received in good faith is sufficient to entitle the Court to join that person who receives the payment from the tenant. A.I.R. (Vol. 21) 1934 Pat. 121=148 Ind. Cas. 757.

——S. 177—Parties—Rent suit—Zur-i-peshgidars—If necessary or proper parties.

Zur-i-peshgidars were entitled to be registered under the old Act; but they were not necessary or proper parties to a rent suit. 8 Pat. 122=9 P.L.T. 627=113 Ind. Cas. 681=A.I.R. 1928 Pat. 615.

——S. 177—Parties.

A person who is alleged to have been entitled to receive rent should be made a party to the suit and the matter must be decided in his presence. 2 Pat. L.R. (Civ.) 24=79 Ind. Cas. 601=5 Pat.L.T. 614=A.I.R. 1924 Pat. 522.

——S. 178—Power of Sub-Divisional Officer—Exercise of after execution of decree for ejectment.

The Power vested in the S. D. O. under S. 178 (3) is not exercisable after the decree for ejectment has been fully executed. 3 Pat.L.T. 108=63 Ind. Cas. 779=6 P.L.J. 300=1921 P.H.C.C. 195=A.I.R. 1922 Pat. 29.

——S. 177—Scope of inquiry—Questions of title, if can be gone into.

Section 177, Chota Nagpur Tenancy Act, precludes the Deputy Collector from going into any question of title. His functions are restricted to a decision upon the question of fact as to who had actually in good faith received and enjoyed rent before the institution of the suit. A.I.R. (Vol. 19) 1932 Pat. 353=14 P.L.T. 135=11 Pat. 629=140 Ind. Cas. 576.

——S. 177—Scope of inquiry—Title—If can be gone into.

No question of title to land can arise under S. 177—If it is determined, it is only incidental. A.I.R. 1930 Pat. 273.

——S. 177, proviso—Applicability—Suit contemplated.

Section 177 of the Chota Nagpur Tenancy Act does not suggest that the suit which may be brought under the proviso should not be merely a declaratory suit but there should also be a prayer in such a suit for some kind of consequential relief. A.I.R. (Vol. 29) 1942 Pat. 449=8 B.R. 459=198 Ind. Cas. 711.

——S. 178 (2) and (3)—Rent decree—Enlargement of time to pay—Application made after execution—Power of Court.

In respect of a decree for rent passed under S. 178 (2) of the Act, Court executing the decree being the Court which had tried the suit and made the decree, has power to grant an extension of time and thus in a manner to alter the decree even after the expiry of the period prescribed in the decree in conformity with Sub-S. (2) and even after the decree-holder had applied for execution. 17 Cal. 1; 17 Cal. 512: 10 Ind. Cas. 268, rel. 16 C.W.N. 1090 =16 C.L.J. 520=15 Ind. Cas. 689.

——S. 181—Applicability—Execution by Civil Court—Limitation governing.

The limitation for an application to execute a decree would be that provided by S. 181 of the Chota Nagpur Tenancy Act, even if the decree had been lawfully transferred to a Civil Court for execution and an application to renew old execution would be governed by S. 231. A.I.R. (Vol. 26) 1939 Pat. 230=5 B.R. 830=18 Pat. 378=20 P.L.T. 726=182 Ind. Cas. 821.

——S. 181—Applicability—Execution by Civil Court—Limitation governing.

Where a decree is passed under the Chota Nagpur Tenancy Act, even though it is transferred to Civil Court for execution, the operation of the more liberal provisions as to limitation obtaining in Civil Courts cannot be attracted. The execution application is governed by S. 181, Chota Nagpur Tenancy Act. A.I.R. (Vol. 23) 1936 Pat. 615=15 Pat. 439=3 B.R. 112=18 P.L.T. 36=165 Ind. Cas. 959.

——S. 181—Applicability—Limitation — Revival—Second application—If continuation of first.

On 19th July 1926, an **ex parte** decree was obtained and on 19th February 1929, an application for execution was made. On 5th September 1929, certain properties belonging to judgment-debtors were sold but upon certain objections the sale was set aside on 21st November 1929. In the meantime one of the judgment-debtors had died and the other became insane; on 14th December 1929, the Court directed the decree-holder who revived the execution proceedings, to take necessary steps to bring the legal representatives and the guardian respectively of the judgment-debtors on record by 23rd December 1929, failing which the case was to be dismissed for default; the case was dismissed for failure of the decree-holder to take necessary steps by that date, and afterwards on 5th September 1930, the decree-holder filed his second application:

Held, that the mere fact that both in the application of 5th February 1930, and the application that was made in February 1929, a prayer had been made by the decree-holder for the sale of the same property, would not necessarily make the second application a continuation of the first, and the application of the decree-holder made on 5th February 1930, was barred by

limitation. A.I.R. (Vol. 21) 1934 Pat. 237=150 Ind. Cas. 1123.

——S. 181—Starting point of limitation.

The starting point of limitation for execution of a revenue decree runs from the date when the decree is signed. 5 P.L.T. 374=78 Ind. Cas. 224=2 Pat. L.R. 7=A.I.R. 1924 Pat. 712.

——S. 181-A—Assignee of decree—Right to execute.

Where a landlord assigns a decree for arrears of rent but not his interest in the land his assignee cannot apply for its execution. 6 Pat. 807=108 Ind. Cas. 432=9 P.L.T. 678=A.I.R. 1928 Pat. 144.

——S. 182—Construction and Scope—Decree of Deputy Commissioner—Transfer for execution to Civil Court—Legality—Procedure applicable —C. P. Code and Limitation Act—Application of.

Section 182, Chota Nagpur Tenancy Act, and the notification regarding maintainability of an execution case in a prescribed Court must be given a wider meaning. It is impossible to say that only a Rent Court or Deputy Commissioner can hear proceedings under the Act, for the Act itself provides instances to the contrary. The transfer of decrees of Deputy Commissioner to the Civil Court for execution is legal. When, however, an application for execution is transferred to a Civil Court, it will not lose its character as a proceeding under the Act and will not be governed by the rules and statutes which regulate the procedure of the Civil Court including the Civil P. C. and the Limitation Act. A.I.R. (Vol. 26) 1939 Pat. 230=5 B.R. 830=18 Pat. 378=20 P.L.T. 726=182 Ind. Cas. 821.

——S. 175—"Warrant of execution"—Meaning of.

The term "warrant of execution" is not limited to cases of attachment of the person or movable property only of the judgment-debtor. 8 Pat. 122=9 P.L.T. 627=113 Ind. Cas. 681=A.I.R. 1928 Pat. 615.

——S. 190—Scope—Sale of tenure for arrears —Notice—Necessity.

Where a tenure is sold under S. 208 of the Act for arrears of rent, a notice under S. 190 of the Act is necessary to give the Court jurisdiction to sell the property. 8 Pat. 122=9 P.L.T. 627=113 Ind. Cas. 681=A.I.R. 1928 Pat. 615.

——S. 190 (1)—Applicability and Scope—Absence of notice—'Subsequent sale in execution'—Validity.

Failure to issue notice under S. 190 (1), Chota Nagpur Tenancy Act, is a matter of jurisdiction, and where no notice is issued the subsequent sale in execution is void. The section contains nothing to suggest that it was not intended to apply to all warrants issued in execution proceedings under the Act and it is not confined to cases where a warrant is to be issued against the person or movables of the judgment-debtor. A.I.R. (Vol. 25) 1938 Pat. 97=16 Pat. 632=4 B.R. 315=19 P.L.T. 259=173 Ind. Cas. 644.

——S. 191 (2)—Landlord's option.

A landlord who has obtained a decree for rent of a tenure under the Act may proceed at once to execute it against the person of the tenant. He is not bound to put up the tenure to sale in the first instance. The warrant of arrest so taken out has the effect of staying proceedings for the sale of tenure. S. 191 (2) of the Act does not apply. 20 C.W.N. 111=34 Ind. Cas. 22.

——S. 198—Applicability—Decree for arrears of rent. See CHOTA NAGPUR TENANCY ACT, Ss. 210 (2), 208 and 198. A.I.R. 1946 Pat. 358 (F.B.).

——S. 198—Limitation—Fresh application.

Original application to execute decree as rent decree under S. 210 (2) filed within 3 years of date of decree—Subsequent application to execute same decree as money-decree under S. 198 is a fresh application and if filed more than 3 years of passing of decree is barred. A.I.R. (Vol. 29) 1942 Pat. 84=8 B.R. 488=199 Ind. Cas. 83.

——S. 198—Applicability—Decree for payment of money—Decree for arrears of rent against some of several co-sharer tenure-holders—S. 210 (2).

A decree for arrears of rent obtained against some of the co-sharer tenure-holders only does not fall within S. 210 (2). Such a decree must be regarded as a decree for payment of money and consequently executable under S. 198 against the right, title and interest of the judgment-debtor in the tenure. The expression 'any immovable property' in S. 198 is wide enough to cover the right, title and interest of the judgment-debtors in the tenure. A.I.R. (Vol. 29) 1942 Pat. 84=8 B.R. 488=199 Ind. Cas. 83.

——S. 208—Applicability—Pradhani tenancy—If exempt from sale.

The **pradhan** is not exempt from the liability to have the tenure sold in execution of a rent-decree under S. 208. A.I.R. (Vol. 23) 1936 Pat. 563=15 Pat. 644=165 Ind. Cas. 378, reversed; A.I.R. (Vol. 27) 1940 P.C. 137=6 B.R. 876=1940 O.L.R. 506 =21 P.L.T. 1005=19 Pat. 949=67 I.A. 290=189 Ind. Cas. 605 (P.C.).

——S. 208—Applicability—Rent decree—Conditions of validity—Joinder of all interested parties—Effect of non-joinder.

In order to justify a sale of the tenure under the provisions of S. 208 of the Chota Nagpur Tenancy Act all parties interested in the tenure must be joined as defendants in the rent suit, or they must be sufficiently represented by parties joined as defendants.

An order for the sale of a tenure without having the whole interests in the tenure represented before Court is **ultra vires** and outside the jurisdiction of the Revenue Court that orders the sale. Consequently, a Civil Court has jurisdiction to challenge the sale. A.I.R. (Vol. 20) 1933 P.C. 122=60 Ind. App. 176=12 Pat. 626=17 R.D. 334=L.R. 14 A. 272 Cr.=14 P.L.T. 289=37 L.W. 767=37 C.W.N. 629=57 C.L.J. 412=1933 M.W.N. 522=142 Ind. Cas. 781=64 M.L.J. 590 (P.C.).

——S. 208—Applicability—Rent decree and rent sale — Conditions of validity — Jurisdiction of Revenue Court—All tenure-holders not represented—Effect—Suit to set side sale in Civil Court —If barred—Ss. 211 and 214—Scope of.

It is settled law that unless a tenure is fully represented in the suit or in the execution proceedings, a sale of the entire tenure, held by a revenue Court, under S. 208, Chota Nagpur Tenancy Act, is void. To invest the revenue Court with juris-

diction to sell a tenure or holding, the execution must be levied against the entire tenure or holding and as against the entire body of tenure-holders or raiyats, as the case may be. Where some of the tenure-holders had died before the execution started, and their heirs and legal representatives had not been brought on record, S. 211 of the Act does not apply and the revenue Court has no jurisdiction to order a sale. In such a case S. 214 does not preclude the civil Court from entertaining a suit to set aside the sale. 12 Pat. 626, foll. 20 P.L.T. 346, rel. A.I.R. 1950 Pat. 384.

——S. 208—Applicability—Requisites of—Joinder of all tenants of tenure—Necessity.

All the tenants of a tenure are necessary parties to the suit in order that the decree and the sale in execution of it may have the important consequences described in S. 208, Chota Nagpur Tenancy Act, or Ch. 14, Bengal Tenancy Act. It is not sufficient to show that the landlord has chosen to obtain a decree for rent against one out of several heirs; but it has to be established that all the tenants have held out one of them as their representatives in their transaction with the landlord. 17 C.W.N. 833 and A.I.R. 1921 Cal. 434, Foll. 10 P.L.T. 125=8 Pat. 620=116 Ind. Cas. 538=A.I.R. 1929 Pat. 188.

——S. 208—Applicability—Rent decree—Decree for cess—If rent decree.

Provided certain formalities are adopted the decree in suit for cess operates as a rent decree. A. I.R. 1922 Pat. 303, Foll. 6 Pat. 317=103 Ind. Cas. 464=A.I.R. 1927 Pat. 266.

——S. 208—Ejectment of occupancy raiyat—Right of purchaser of under-tenure.

In the case of a sale under S. 208, Chota Nagpur Tenancy Act, S. 16, Bengal Rent Recovery Act does not entitle the purchaser of an under-tenure to eject an occupancy raiyat in actual possession of the land. Nor does it entitle the purchaser of a raiyat holding to eject an under-raiyat having occupancy right in the land. In view of Ss. 22 and 73, Chota Nagpur Tenancy Act, an under-raiyat who acquires by custom an occupancy right is also protected from eviction. A.I.R. (Vol. 29) 1942 Pat. 140=20 Pat. 870=8 B.R. 603=23 P. L.T. 540=199 Ind. Cas. 684.

——S. 208—Rent sale—Validity—Power of Civil Court to question.

The power of the Civil Court to question a rent sale is limited to cases of fraud and want of jurisdiction. 8 Pat. 122=9 P.L.T. 627=113 Ind. Cas. 681=A.I.R. 1928 Pat. 615.

——S. 208—Rent sale—Rights of purchaser—Effect on incumbrances—Bengal Rent Recovery Act (8 of 1865), S. 16—Applicability.

S. 16 of the Bengal Rent Recovery Act of 1865 does apply to the sale of a tenure or holding for arrears of cess by virtue of S. 208 of the Chota Nagpur Tenancy Act. It follows, therefore, that the purchaser acquires the property free from all incumbrances unless the case comes within the proviso to S. 16. 6 Pat. 317=103 Ind. Cas. 464 =A.I.R. 1927 Pat. 266.

——S. 208—Sale in execution of rent decree—What passes.

The sale purported to be effected in execution of a rent decree under the provisions of S. 208, Chota Nagpur Tenancy Act, can only pass the interest of the judgment-debtor in the tenancy in respect of which the rent decree is passed. 9 Pat.L. T. 372=106 Ind. Cas. 563=A. I. R. 1928 Pat. 243.

——S. 208—Sale of part of holding—Validity.

Deputy Commissioner has no jurisdiction to sell under S. 208 anything less than the whole holding on which the arrear of rent has accrued. Such a sale is not merely irregular. A.I.R. 1922 Pat. 64, Foll. 7 Pat. 832=10 P.L.T. 36=119 Ind. Cas. 894=A.I.R. 1929 Pat. 28.

——S. 208—Scope—Decree against some tenants of holding only—Order of sale of holding in execution—If void.

S. 208, Chota Nagpur Tenancy Act, does not authorise the sale of a holding in execution of a decree obtained against some only of the tenants of the holding and an order directing the sale of the holding in execution of such a decree is void and without jurisdiction. A.I.R. (Vol. 28) 1941 Pat. 490=7 B.R. 770=194 Ind. Cas. 435.

——S. 208—Scope—Decree against only some tenants—Sale—Validity—Application to set aside—Necessity.

No application is needed to set aside a null sale. When a decree is effective against only a part of the tenancy interest, a sale held in execution of it is entirely without jurisdiction and does not affect the interest of any of the judgment-debtors. A.I.R. (Vol. 28) 1941 Pat. 490=7 B.R. 770=194 Ind. Cas. 435.

——S. 208—Scope—Sale in contravention of—If wholly without jurisdiction and void.

When a sale under S. 208 is entirely without jurisdiction it does not affect the interest of any of the judgment-debtors even though the sale of their interest under S. 210 (b) might be valid. A. I.R. (Vol. 28) 1941 Pat. 490=7 B.R. 770=194 Ind. Cas. 435.

——S. 208—Scope—Sale in contravention of—Validity.

A sale held in execution of a rent-decree obtained by a superior landlord in a suit to which all the tenure-holders were not made parties is not a sale under S. 208 and does not affect the share in the tenure, of persons not parties to such suit even if they have not got themselves recorded in landlord's Sherista. A.I.R. (Vol. 27) 1940 Pat. 482 =6 B.R. 232=19 Pat. 111=185 Ind. Cas. 671.

——S. 208—Scope of—If exhaustive—Execution by Civil Court—Procedure—S. 210 (3)—Effect of.

The Chota Nagpur Tenancy Act like Bengal Act 1 of 1879, is a complete Code in itself and it contemplates that all decrees passed by the Deputy Commissioner in suits for arrears of rent are decrees passed under the Act irrespective of the manner in which such decrees may be executed. If the decree cannot be executed under S. 208, the decree-holder may, with the permission of the Deputy Commissioner, proceed against any other

property moveable or immoveable of the judgment-debtor, a special procedure adapted from the C. P. Code, being prescribed by S. 210 (3) for executions in which the decree-holder is not entitled to the highly favourable procedure of S. 208. Civil Court has no jurisdiction to execute a decree which it had not passed and which had not been transferred to it. A.I.R. (Vol. 23) 1936 Pat. 615=15 Pat. 439=3 B.R. 112=18 P.L.T. 36=165 Ind. Cas. 959.

——S. 208—Scope—If exhaustive as to procedure and effect of rent sale—Execution—Procedure—Law governing.

No doubt S. 208 with the Rent Recovery Act forms a complete Code for the actual process of selling and the effect of the sale of a tenure of holding, but this does not prevent the operation of sections dealing with the institution of the execution proceedings themselves; and if a decree is more than one year old, there is no reason why it should be executed, without notice, against a tenure or holding. 8 Pat. 122=9 P.L.T. 627=113 Ind. Cas. 681=A.I.R. 1928 Pat. 615.

——S. 208 (2)—Applicability—Execution of rent decree—Application for arrest—Effect on sale proceedings.

A warrant for the arrest of a person against whom a decree for rent has been obtained, has the effect of only staying the proceedings for sale of the tenure and neither S. 208 nor S. 199 has any application to the case. 20 C.W.N. 111=34 Ind. Cas. 22.

——S. 208, Proviso 1—Applicability—Purchaser of holding.

Proviso 1 to S. 208, Chota Nagpur Tenancy Act, applies to the purchaser of a tenure and not of a holding. A.I.R. (Vol. 29) 1942 Pat. 140=20 Pat. 870=8 B.R. 603=23 P.L.T. 540=199 Ind. Cas. 684.

——Ss. 208 and 209 (a)—Appeal—Sale certificate—Order directing issue of—Appealability—"Confirmation of sale"—Meaning of.

No appeal lies to the High Court from an order of a Deputy Collector directing the issue of a sale certificate under S. 208 read with S. 11 of the Bengal Rent Recovery Act, unless the order is one passed after decree and relating to the execution thereof. The phrase "confirmation of sale" in S. 209 (a) must refer to the completion of the sale proceedings by deposit of the balance of purchase money under S. 11 of the Bengal Rent Recovery Act. The practice of confirming sales held under the Chota Nagpur Tenancy Act is not warranted by the Act. (1920) Pat. 73=5 Pat.L.J. 101=1 Pat. L.T. 146=2 U.P.L.R. (Pat.) 69=55 Ind. Cas. 27.

——Ss. 208 and 210 (b)—Scope—Decree against portion of tenancy interest—Sale in execution—If wholly void.

A sale under S. 208, Chota Nagpur Tenancy Act, is only valid when held in execution of a decree for the rent of the tenancy obtained against the whole of the tenancy interest. Where a decree on the basis of which a sale is held is against only a part of the tenancy interest the sale is not valid even with regard to the interest of those judgment-debtors against whom the decree was valid. A.I.R. (Vol. 20) 1933 Pat. 537=14 P.L.T. 670=12 Pat. 799=148 Ind. Cas. 168 (2).

——S. 210—Scope—Permission if can be given impliedly.

Permission under S. 210 (2) is not a formal affair and cannot be given impliedly. A.I.R. (Vol. 25) 1938 Pat. 464=19 P.L.T. 280=5 B.R. 405 (1)=180 Ind. Cas. 423.

——S. 210 (2)—Applicability—Procedure under S. 208—If essential.

S. 210 (2) applies whether or not the decree-holder has proceeded under S. 208. If in execution of a rent decree an application for sale of the entire holding is refused, the decree holder can ask permission from the Deputy Commissioner to proceed against the other properties of the judgment-debtor. Even if one of the judgment-debtors pays a portion of a joint decree, he remains jointly liable with the others for the balance. 12 Ind. Cas. 599 (Cal.).

——(As amended by Act 2 of 1938), S. 210 (2)—Scope of—Rent-decree against some co-sharer tenure-holders—Nature of.

It is clear from the language of the amended S. 210 (2), Chota Nagpur Tenancy Act, that one of the requisites of this provision is that the decree must be a decree for arrears of rent due in respect of a tenure, that is to say, it must be a rent-decree in the sense in which that expression has been understood in the Chota Nagpur Tenancy Act. Hence, a decree for arrears of rent obtained against some of the co-sharer tenure holders only, does not fall within the purview of S. 210 (2). A.I.R. (Vol. 29) 1942 Pat. 84=8 B.R. 488=199 Ind. Cas. 83.

——Ss. 210 (2), 198 and 181—Limitation—Original application to execute decree as rent-decree within limitation—Subsequent application to execute same as money-decree—If fresh application or revival of first.

Where the original application is filed within three years from the date of the decree for executing the decree as a rent-decree under S. 210 (2), a subsequent application for executing the same decree as a money-decree under S. 198 cannot be treated as one made in continuation of the original application inasmuch as it is essentially different from the original decree. Consequently, the subsequent application being a fresh application must be treated as barred under S. 181 when presented more than three years from the date of the decree though within three years of the original application. A.I.R. (Vol. 29) 1942 Pat. 84=8 B. R. 488=199 Ind. Cas. 83.

——Ss. 210 (2), 208 and 198—Applicability—Decree for arrears of rent—One of persons interested in tenure not impleaded in suit—Right, title and interest of judgment-debtors in tenure — Whether saleable—Power of Deputy Commissioner.

When a decree for arrears of rent has been passed by the Deputy Commissioner in a suit from which a person holding an interest in the tenure has been omitted, the right, title and interest of

the judgment-debtors in the tenure is not saleable under S. 210 (2) of the Chota Nagpur Tenancy Act, as that section relates to property belonging to the judgment-debtor other than the tenure, or any interest he may have in it. The Deputy Commissioner has, however, power to execute the decree by sale of the right, title and interest of the judgment-debtors under S. 208 of the Act. S. 198 of the Act does not apply to a decree for arrears of rent. 1941 P.W.N. 553, overruled. 25 Pat. 470=226 Ind. Cas. 374=1946 P.W.N. 300=12 B.R. 738=A.I.R. 1946 Pat. 358 (F.B.).

——S. 211—Applicability—Sale of holding—All tenure-holders not represented — Effect. See CHOTA NAGPUR TENANCY ACT, Ss. 208, 211 and 214. A.I.R. 1950 Pat. 384.

——S. 211—Applicability—Non-joinder of all parties interested in tenure—Effect.

S. 211, Chota Nagpur Tenancy Act, relates to a case where parties interested in the whole 16 annas of the tenure have been joined as defendants, but a third party claims an interest in room and place of one or more of the defendants, and does not apply where the whole interest is not covered by the parties joined as defendants, and the party omitted should have been joined in addition. A. I.R. (Vol. 20) 1933 P.C. 122=60 Ind. App. 176 =12 Pat. 626=17 R. D. 334=L.R. 14 All. 272 Cr.=14 P.L.T. 289=37 L.W. 767=37 C.W.N. 629=57 C.L.J. 412=1933 M. W. N. 522=142 Ind. Cas. 781=64 M.L.J. 590 (P.C.).

——S. 211—Scope—Transferee of tenant not getting himself recorded in landlord's Sherista—Effect of.

There is nothing in S. 211, Chota Nagpur Tenancy Act to suggest that the non-registration will also defeat the claimant in the suit which he is authorised to bring under S. 211, Cl. (2) (which corresponds to O. 21, R. 63, C.P. Code). There is also nothing in the section to show that the transferee's failure to get himself recorded in the landlord's **Sherista** shall in every case and as a matter of law amount to a representation to the landlord that in any suit which may be brought by him for recovery of rent he is to assume that the transferee is represented by the old tenants. A. I.R. (Vol. 27) 1940 Pat. 482=6 B.R. 232=19 Pat. 111=185 Ind. Cas. 671.

——Ss. 211 and 214—Applicability—Rent decree—Sale—All necessary parties not represented—Effect—Civil Court, if precluded from entertaining suit to set aside sale.

Where all the necessary parties are not joined or represented in the proceedings relating to a sale in execution of a decree for rent, S. 211 of the Chota Nagpur Tenancy Act does not apply, and the Revenue Court has no jurisdiction to order a sale, and consequently S. 214 of the Act does not preclude the Civil Court from entertaining a suit to set it aside. A.I.R. (Vol. 26) 1939 Pat. 225= 5 B.R. 298=20 P.L.T. 346=179 Ind. Cas. 834.

——Ss. 211 and 270—Appeal—Order of Deputy Collector under S. 211—Appeal to Deputy Commissioner.

No appeal lies to the Deputy Commissioner from a decision of a Deputy Collector under S. 211 of the Act. If a Deputy Collector whilst exercising the delegated powers of the Deputy Commissioner fails to exercise a jurisdiction or usurps a jurisdiction, then the Deputy Commissioner has power to order him either to exercise that jurisdicton or to refrain from exercising it as the case may be. The same rules apply in the case of the Commissioner and the Board of Revenue dealing with acts performed by the Deputy Commissioner. Where the circumstances of the case show that there had been recognition by the landlord of the tenancy of the objector, there is sufficient reason for not having the transfer registered under S. 211. 5 Pat. L. J. 468=1 Pat.L.T. 729=58 Ind. Cas. 268.

——S. 212—Applicability—Persons interested in portion only—If person "who claim an interest".

The fact that certain persons are interested in a portion only of the property does not exclude them from the class of persons "who claim an interest therein." 8 Pat. 122=9 P.L.T. 627=113 Ind. Cas. 681=A.I.R. 1928 Pat. 615.

——S. 212—"Claims", meaning of—Sale in execution of decree—Right to deposit purchase-money — Application claiming — Order on—Appeal.

The word "claims" in section 212 is used in the sense of asserting that a thing is one's own or affirming one's possession of a thing. A sale is not set aside by mere statements. A person claiming to hold **dar-mokarari** interest in the tenure sold in execution of a decree, claimed to be entitled to deposit the money under S. 212. His application being rejected he appealed to the Judicial Commissioner. **Held** the appeal lay to judicial Commissioner. (1917) Pat. 97=2 Pat.L.J. 153=37 Ind. Cas. 891.

——S. 213—Applicability of—Sale attacked as being without jurisdiction and void.

Section 213 does not apply where the sale is challenged not on the ground of any irregularity or fraud in publishing or conducting it but on the ground that it is void for want of jurisdiction in the executing Court. A.I.R. (Vol. 28) 1941 Pat. 490=7 B.R. 770=194 Ind. Cas. 435.

——S. 213—Applicability to Khorposhdar.

Khorposhdars not being owners of property cannot come under S. 213. A.I.R. 1923 Pat. 29, Foll. 8 Pat. 122=9 P.L.T. 627=113 Ind. Cas. 681=A.I.R. 1928 Pat. 615.

——S. 213—"Owner in possession immediately before sale"—Reversioner holding half-share in Hindu widow's estate—Position of.

A right of succession as reversioner to the husband of a Hindu widow is merely a **spes successionis** and the expectant reversioner has no vested interest so long as the widow lives, so that where a half share of a tenure is held by a widow and the other half by the reversioner, he cannot be regarded as the owner "in possession immediately before sale" of the half tenure in her possession in that capacity within the meaning of S. 213, Chota Nagpur Tenancy Act. A.I.R. (Vol. 24) 1937 Pat. 621=18 P.L.T. 753=4 B.R. 99=16 Pat. 643=172 Ind. Cas. 115.

——S. 213—Scope of—Application to set aside sale—If bars suit for recovery of holding.

Suit for rent by landlord against person not his tenant—Decree obtained and property sold in execution and purchased by third person—Suit by tenant for recovery of holding—Application by tenant under S. 213 to set aside sale is no bar to the recovery of his holding. A.I.R. (Vol. 26) 1939 Pat. 171=5 B.R. 745=182 Ind. Cas. 446.

——S. 213—Scope—Partition of tenure by metes and bounds—Joint liability for rent—Owner of one patti—Right to object to sale of other.

When partition has been made by metes and bounds, whether by the Civil Court or by private arrangement, the owner of one separate **patti** is no longer the owner of the other, even though there may be a joint liability for rent. Owner of one **patti** cannot object to the sale of the other **patti** after sub-division of the tenure and apportionment of the rent, on the ground that the property described in what would have been the **hawalgi legan khewat,** if apportionment of rent had been made before the preparation of the Record of Rights, must also be brought to sale. A.I.R. (Vol. 24) 1937 Pat. 621=18 P.L.T. 753=4 B.R. 99=16 Pat. 643=172 Ind. Cas. 115.

——S. 213—Scope—Execution Sale—Suit to set aside—Bar of.

S. 213 of the Act does not bar a suit to set aside an execution sale on account of want of jurisdiction. 1 Pat. 750=71 Ind. Cas. 345=4 P.L.T. 439=A.I.R. 1923 Pat. 64.

——Ss. 213 and 215—Scope — Execution sale—Application to set aside—Refusal to summon witnesses—Revision.

A person applied under S. 213 to set aside a rent sale on the ground of material irregularity and inadequacy of price and applied for summonses on a number of witnesses. The Deputy Collector refused to issue summonses on the witnesses on the ground that they were not necessary. **Held,** the High Court ought to interfere under S. 115 of the C. P. Code or under S. 107 of the Government of India Act because there has been something in the nature of a denial of the right of fair trial.

Per **Mullick, J.**—S. 215 of the Chota Nagpur Tenancy Act is wide enough to make an appeal competent in the case. (1919) Pat. 60=4 Pat. L.J. 371=49 Ind. Cas. 389.

——S. 213-A—Applicability—Suit for setting aside decree on ground of fraud.

S. 213-A, Chota Nagpur Tenancy Act, is confined to cases where a decree for rent is set aside under the Chota Nagpur Tenancy Act; but a suit for setting aside a decree on the ground of fraud, though saved by S. 258 of the Act, is no more a suit under the Act than a suit for a declaration that a sale held in execution of a rent-decree has been fraudulently confirmed and for recovery of possession, which is saved by S. 214 of the Act. Therefore, to such a suit S. 213-A is not applicable. A.I.R. (Vol. 24) 1937 Pat. 644=18 P.L.T. 728=4 B.R. 108=172 Ind. Cas. 147.

——S. 214—Applicability—Conditions of—Benefit of S. 214; when available.

In order to take advantage of S. 214; it must be established that the sale was a sale made under Chap. 16 of the Act; which includes Ss. 135 to 229; which in effect is a question of jurisdiction. Under Chap. 16 of the Act a statutory jurisdiction is conferred on the Revenue Courts; but that jurisdiction must be exercised within the statutory powers conferred. A.I.R. (Vol. 20) 1933 P.C. 122=17 R. D. 334=L. R. 14 All. 272 Cr.=14 P.L.T. 289=60 Ind. App. 176=12 Pat. 626=37 L.W. 767=37 C.W.N. 629=57 C.L.J. 412=1933 M.W.N. 522=142 Ind. Cas. 781=64 M.L.J. 590 (P.C.).

——S. 214—Scope—Bar of suit—Sale of holding by revenue Court—All tenure-holders not represented — Effect — Civil suit to set aside sale — Bar of. **See** CHOTA NAGPUR TENANCY ACT, Ss. 208, 211 and 214. A.I.R. 1950 Pat. 384.

——S. 214—Scope—Bar of Civil Suit.

All necessary parties not represented in sale proceedings in execution of rent decree—S. 214 does not preclude the Civil Court from entertaining a suit to set it aside. A.I.R. (Vol. 26) 1939 Pat. 225=5 B.R. 298=20 P.L.T. 346=179 Ind. Cas. 834.

——S. 214—Scope—Suit to declare effect of sale—Bar of.

S. 214 is no bar for declaring effect of particular sale. 8 Pat. 366=118 Ind. Cas. 727=A.I.R. 1929 Pat. 321.

——S. 214—Scope—Rent suit entertained without jurisdiction—Suit to set aside the sale—Maintainability.

Court cannot entertain a rent suit under Chota Nagpur Tenancy Act where a tenant who is a necessary party is omitted, and the whole tenancy is not represented by the members on record, another suit is maintainable under S. 214 to set aside the sale thereunder, because the former suit was entertained without jurisdiction. 10 P.L.T. 125=8 Pat. 620=116 Ind. Cas. 538=A.I.R. 1929 Pat. 188.

——S. 214—Scope—Suit for declaration that certain auction-sale, although ostensibly rent sale, was not so in fact—Nature of—Limitation Act, Art. 12—Chota Nagpur Tenancy Act, S. 177.

A suit for declaration that certain auction-sale, although ostensibly a rent sale was not so in fact and cannot operate as a rent sale, but will pass only the right, title and interest of the judgment-debtor is a "suit" to set aside the sale or at all events to modify the effect of the "sale" within S. 214 of the Act and such a suit can only be brought on the ground of fraud or want of jurisdiction. To hold otherwise would be to destroy the special jurisdiction which the Act is designed to create. To a suit to set aside a sale operative as against the plaintiff, though liable to be set aside or fraud or want of jurisdiction, Art. 12, Limitation Act applies, 25 Bom. 337 (P.C.)., Foll. The suit is not one contemplated by proviso to S. 177, Tenancy Act. 8 Pat. 122=9 P.L.T. 627=113 Ind. Cas. 681=A.I.R. 1928 Pat. 615.

——Ss. 214 (b), 212—S. 214 (b)—Scope of—Amount due accepted after expiry of 30 days—Sale ordered to be set aside—Order, whether ultra vires—Civil suit to set aside order—If barred.

S. 214 (b), Chota Nagpur Tenancy Act, purports to bar a suit to set aside an order passed under S. 212, but the application of S. 212 is confined to the statutory period of 30 days, and a Court passing an invalid order after that period cannot be said to be acting under that section and such an order is one passed without jurisdiction and is **ultra vires** and S. 214 does not bar a civil suit to set aside that order. A.I.R. (Vol. 23) 1936 Pat. 590=17 P.L.T. 673=15 Pat. 698=3 B.R. 82=165 Ind. Cas. 812.

——S. 215—Appeal—Order extending time under S. 178 (3)—Appeal to Judicial Commissioner.

In a suit under S. 139, Cls. (3) and (4) for arrears of rent and ejectment a decree was passed by the S.D.O. in the terms of S. 178. After the decree was fully executed, the S.D.O. extended the time for payment under S. 178 (3). On the question, whether an appeal lay to the Judicial Commissioner.

Held, that the order was one coming under S. 215 (3) and that, consequently the appeal from an order, such as was passed in the present case, lay to the Judicial Commissioner under S. 224. (1912) 16 C.L.J. 520, Dist. 3 Pat.L.T. 108=63 Ind. Cas. 779=6 P.L.J. 300=1921 P.H.C.C. 195=A.I.R. 1922 Pat. 29.

——S. 215 (3)—Appeal—Order on application to set aside sale—Appealability.

The terms of S. 215 (3), Chota Nagpur Tenancy Act, make it clear that orders passed on applications to set aside sales are within the section and hence, an appeal lies in such a case. A.I.R. (Vol. 27) 1940 Pat. 54=18 Pat. 649=6 B.R. 324=186 Ind. Cas. 291.

——Ss. 215 and 212—'Relating to execution thereof'—Meaning of.

"Relating to the execution thereof" includes order about payment for getting a sale set aside. A person merely alleging a lawful title in him, may apply to have a sale set aside under S. 212. The proceeding under this section is a summary one. 36 Ind. Cas. 829 (Pat.).

——S. 217—Appeal—Rent suit—Ex parte decree—Application to set aside—Dismissal—Appeal—Revision.

A suit for rent was tried by the Deputy Collector as Deputy Commissioner and was decreed **ex parte**. An application to set aside the decree was dismissed in default and a further application for restoring the previous one was also dismissed. In an appeal to Deputy Commissioner who set aside the decree and remanded the suit for re-trial: **Held,** on revision that (1) the second application is incompetent not being provided for in the Act, (2) that no appeal lay to the Deputy Commissioner against the order dismissing the application and therefore the Deputy Commissioner's order setting aside the **ex parte** decree was invalid but could not be revised by Revenue authorities under S. 227 but the High Court could revise the order and set it aside, if illegal. 60 Ind. Cas. 175=3 U.P.L.R. Pat. 13.

——S. 218 (2)—Appeal—Forum.

If the Deputy Collector goes outside the functions provided for him in the section, his decision will not bind the parties and cannot operate as **res judicata** in any subsequent title suit which may be brought under the proviso to the section. An appeal against such a decision will lie to the Deputy Commissioner under S. 218 (2) of the Act and not to the Judicial Commissioner. A.I.R. (Vol. 19) 1932 Pat. 353=11 Pat. 629=14 P.L.T. 135=140 Ind. Cas. 576.

——S. 218—Appeal—Forum—Order under S. 177—No question of title decided—Appeal lies to Deputy Commissioner.

Where no question of title is decided the appeals certainly lie to the Deputy Commissioner and he does not act without jurisdiction in hearing and determining them. A.I.R. 1929 Pat. 258, Foll. A.I.R. 1930 Pat. 273.

——S. 218—Appeal—Forum—Order under S. 177—Appeal—If lies to Judicial Commissioner or Deputy Commissioner.

Question as to title or interest in land cannot arise to be decided under S. 177 and so appeal from an order under that section can lie not to the Judicial Commissioner but to the Deputy Commissioner. 4 P.L.J. 163, Foll. 120 Ind. Cas. 320=A.I.R. 1929 Pat. 258.

——S. 218—Appeal—Forum—Order under S. 177—Question of title decided—Appeal—If lies to Judicial Commissioner or Deputy Commissioner.

Where proceedings are taken under S. 177 the Court will not come to a decision as to the respective title of parties to the suit, but where the Deputy Collector has decided a question regarding the interest in land as between the parties appeal lies to the Judicial Commissioner and not to the Deputy Commissioner. Where in a suit for rent a person was joined under S. 177 as an intervenor and the Deputy Collector decided a question of title or interest in land.

Held, that though the value of the suit was less than Rs. 100 appeal lay to Judicial Commissioner. 1924 P.H.C.C. 278=84 Ind. Cas. 286=A.I.R. 1924 Pat. 807.

——S. 218—Appeal—Revision—Forum—Rent suit under Rs. 100.

Under S. 218 of the Act the judgment of the Deputy Collector in a suit for rent, where the amount sued for is less than Rs. 100, is not open to revision or appeal, except an appeal to the Deputy Commissioner. In such a suit no revision lies against the appellate judgment of the Deputy Commissioner on a decree passed by the Deputy Collector. The Courts of appeal and revision in rent suits are the Commissioner and Board of Revenue, and the High Court has got nothing to do with them where there is no question of title. 113 Ind. Cas. 697=A.I.R. 1928 Pat. 567 (1).

——S. 218—Appeal—Rent suit for less than Rs. 100—Second appeal.

No first appeal or second appeal lies from a rent suit for less than Rs. 100 unless a question relat-

ing to title to land or to some interest in land as between parties having conflicting claims thereto has been determined. (1917) Pat. 183=2 Pat. L.W. 154=42 Ind. Cas. 790.

——S. 218—Revision—Rent suit of Rs. 100 or less —Deputy Commissioner's order, finality of—Revision—High Court's powers.

Revision is expressly barred in suits of the value of Rs. 100 or less under S. 218, Chota Nagpur Tenancy Act. This section makes it perfectly clear that the judgment of the Deputy Commissioner shall be final and not open to revision or appeal, except as provided therein, and the only provision is that if a suit is tried by the Deputy Collector, an appeal shall lie to the Deputy Commissioner.

The Rent Courts of Chota Nagpur are subordinate to the Patna High Court, and though in certain class of cases no appeal lies to the High Court, the right of superintendence exists. But the power of superintendence is to be exercised very sparingly and only in cases where there has been a patent abuse of power by the Subordinate Court, and should not be exercised to rectify a wrong decision on a point of law or fact in cases in which the Subordinate Court had jurisdiction to decide those points. The question whether or not lands for which rents were claimed under S. 218, Chota Nagpur Tenancy Act, were agricultural is one of those cases in which the Subordinate Courts have jurisdiction to decide the points. A.I.R. (Vol. 22) 1935 Pat. 417=16 P.L.T. 797=2 B.R. 72 =159 Ind. Cas. 339.

——Ss. 218 (2), 215 and 11—Rent suit—Defendants objecting that it is barred—Issue tried and decided in favour of plaintiff—Defendant's right to appeal.

Section 215 of the Chota Nagpur Tenancy Act, provides that no judgment of a Deputy Commissioner (which term includes a Deputy Collector empowered to try rent suits) in any suit and no order of a Deputy Commissioner passed in any suit relating to the trial thereof.....shall be open to revision or appeal otherwise than as expressly provided in the Act. Section 218 allows an appeal only where the suit had been tried and decided. But where in a rent suit, on the objection by the defendant, only a preliminary issue, as to whether the suit is barred by the provisions of S. 11 of the Chota Nagpur Tenancy Act, is tried and decided in favour of the plaintiff, no appeal lies from the decision as from a decree, for, it does not, so far as the Court that made it was concerned, conclusively determine the rights of the parties with regard to any of the matters in controversy in the suit. The position would of course be different if the Court decides the issue against the plaintiffs and dismisses the suit. The plaintiffs would then have had a right of appeal. A.I.R. (Vol. 23) 1936 Pat. 356=2 B.R. 354= 161 Ind. Cas. 694.

——S. 224—Appeal—Forum—Order under S. 177 —Question of title—Jurisdiction to hear appeal.

Where proceedings are taken under S. 177 the Court will not come to a decision as to the respective title of parties to the suit, but where the Deputy Collector has decided a question regarding the interest in land as between the parties appeal lies to the Judicial Commissioner and not to the Deputy Commissioner. Where in a suit for rent a person was joined under S. 177 as an intervenor and the Deputy Collector decided a question of title or interest in land.

Held, that though the value of the suit was less than Rs. 100 appeal lay to Judicial Commissioner. 1924 P.H.C.C. 278=84 Ind. Cas. 286=A.I.R. 1924 Pat. 807.

——S. 224 (2)—Second appeal—Suit for declaration—Appellate decree by Judicial Commissioner —Second appeal to the High Court—"Decree", meaning of.

Where the Judicial Commissioner makes an appellate decree within the meaning of S. 224 (2), there is a second appeal from his decree to the High Court and the provisions of Chapter XLII of the C. P. Code 1882 apply. The word "decree" in S. 224 clause (2) means "decision". 40 Ind. Cas. 891 (Pat.).

——S. 225—Appeal—Forum—Rent suits, value of one above Rs. 100 and others below Rs. 100—Appeals preferred in latter suits to Deputy Commissioner and transferred under S. 225 to Judicial Commissioner — Judicial Commissioner's jurisdiction to try.

One out of the rent suits tried by the Deputy Collector was of the value of above Rs. 100 and the others were below Rs. 100. No question relating to title to land or to some interest in land was involved in any of the suits. An appeal was filed before the Judicial Commissioner in the suit which exceeded Rs. 100 in value and the other appeals were preferred to the Deputy Commissioner but under S. 225 of the Act of 1908 were transferred to the Court of the Judicial Commissioner and all the appeals were heard and decided by him.

Held, the Judicial Commissioner had jurisdiction to deal with the transferred appeals. 1922 P.H.C.C. 154=A.I.R. 1922 Pat. 184.

——S. 227—Finality of order.

An order under S. 227 setting aside such a judgment is final under S. 228. A decree need not appear on the face of it to have been passed **ex parte** so as to be within S. 157, it is sufficient if it is shown to have actually been passed ex parte. 1 Pat. 32=62 Ind. Cas. 886=1921 P.H.C.C. 345 =2 P.L.T. 734=A.I.R. 1922 Pat. 400.

——S. 231—Applicability — Application under S. 74-A.

Application under S. 74 (A)—Section 231 is incapable of application—Assuming that it does apply, then the right of application can be regarded as a continuing one. A.I.R. (Vol. 25) 1938 P.C. 61=32 Sind L.R. 298=1938 O.W.N. 52= 1938 O.L.R. 53=4 B.R. 234=1938 A.L.R. 71= 19 P.L.T. 74=17 Pat. 110=67 C.L.J. 179=172 Ind. Cas. 649=(1938) 1 M.L.J. 302 (P.C.).

——S. 231—Applicability—Revival of execution.

An application to renew old execution would be governed by S. 231 when the decree has been lawfully transferred to a Civil Court. A.I.R. (Vol.

26) 1939 Pat. 230=5 B.R. 830=18 Pat. 378=20 P.L.T. 726=182 Ind. Cas. 821.

——S. 231—Applicability—Suit to set aside sale on ground of fraud—Limitation—Limitation Act, Art. 95.

A suit for possession of land and the right to ask for a declaration that a sale under the Chota Nagpur Tenancy Act has been fraudulently confirmed is clearly not a suit under the Chota Nagpur Tenancy Act. It is governed by Limitation Act, Art. 95. It is true that the Act in some cases takes away the right to sue for setting aside a sale, but it nowhere grants that right although to some extent it limits it. 5 Pat. 759=1926 P. H.C.C. 225=8 P.L.T. 124=96 Ind. Cas. 529= A.I.R. 1926 Pat. 401.

——S. 231—Applicability—Suit to set aside execution sale on ground of fraud—Limitation—Limitation Act, Art. 95.

S. 214 bars a suit to set aside a sale under Chapter 16 of the Act except on the ground of fraud or want of jurisdiction. S. 258 contains a provision similar to that in S. 214. These sections do not create right to institute a suit to set aside a sale for holding made under the Act. They bar the institution of such a suit except on the ground of fraud or want of jurisdiction. The right to institute a suit to set aside a sale has not been created but has been taken away under the provisions of these sections. The right exists in a person to bring a suit to set aside a sale under the general law and it was taken away by these sections except the right to bring a suit on the ground of the fraud or want of jurisdiction. Therefore a suit to set aside an execution sale on the ground of fraud is not a suit instituted under the provisions of the Chota Nagpur Tenancy Act as contemplated by S. 231 of the Act; and consequently the period of limitation is not the one provided by that section but the one provided by Art. 95 of the Limitation Act and the period of limitation is three years from the time when the fraud became known to the plaintiffs. 90 Ind. Cas. 325=A.I.R. 1926 Pat. 47.

——S. 233—Starting point of limitation—Continuing wrong.

The misuse within the terms of S. 233, Chota Nagpur Tenancy Act, is a continuing wrong and the misuse continues so long as the huts in question remain standing and the suit is within time until within two years from the date when the misuse ceases. A.I.R. (Vol. 27) 1940 Pat. 561 =19 Pat. 844=6 B.R. 701=188 Ind. Cas. 495.

——S. 237—Applicability—Suit in Civil Court for possession from trespasser—"Application"—Meaning of.

"Application" in S. 237 does not include a suit. S. 237 has no application to a suit where plaintiff alleged that he was ejected by the landlord or any person claiming under or through him, and seeks in the Civil Court to recover possession from defendant as trespasser. 16 Ind. Cas. 418 (Cal.)

——S. 240—Appeal—Forum—Suit for more than Rs. 100—Appeal in respect of Rs. 41—Forum of appeal.

When a rent suit is brought against several tenants or sets of tenants collectively under section 240 of the Chota Nagpur Tenancy Act, and the total amount sued for exceeds Rs. 100, the appeal lies to the Judicial Commissioner even though the appeal relates to a tenant or a set of tenants against whom the claim does not exceed Rs. 100. 1 Pat. 32=62 Ind. Cas. 886=1921 P. H.C.C. 345=2 P.L.T. 734=A.I.R. 1922 Pat. 400.

——Ss. 240, 64 (3) and 67—Scope and effect—Person who not mundari khuntkattidar creating korkar in mundari khuntkattidari tenancy—Landlord not making application under S. 64 (3)—Effect—Occupancy right —If and how acquired.

If a landlord merely gives a consent to the creation of **korkar** in a particular village or area to a particular person, that consent itself does not create any tenancy and does not, therefore, amount to any transfer of alienation of any portion of his interest by the landlord. There is, therefore, nothing in S. 240 which will prevent the landlord from giving his consent to a person, who is not a **mundari khuntkattidar** for converting the land into **korkar** in the **mundari khuntkattidari** tenancy.

Where such a person, with the consent of the landlord, actually creates **korkar** in the land, S. 64 (3) is applicable, and if no application to eject him is filed before the Deputy Commissioner within two years when he started converting the land into **korkar,** he cannot be ejected.

Strictly speaking it is not correct to say that such a person acquires an occupancy right or title by adverse possession. After the application of S. 64 (3), S. 67 comes into force and it is under this section that the title accrues to him. A.I.R. (Vol. 33) 1946 Pat. 105=1945 P.W.N. 370.

——S. 256—Scope—Tenure recorded as maurusi khuntkatti—Evidence to prove that tenure was mundari khuntkatti—Admissibility.

Under S. 256, Chota Nagpur Tenancy Act, where a tenancy has not been recorded as **mundari khuntkatti** in the Record of Rights but as a **maurusi khuntkatti,** it is not open to the Court to find that the tenancy is **mundarikhunkatti.** A.I.R. (Vol. 18) 1931 Pat. 136=9 Pat. 952=12 P.L.T. 125=130 Ind. Cas. 162.

——Ss. 257 and 72 (5)—Scope—Each of two sets of landlords in receipt of own share of rent—Character of possession at law.

Although S. 257 of the Chota Nagpur Tenancy Act requires that when two or more persons are joint landlords, they must act jointly in respect to acts required or authorised under the Act, the section cannot apply to a case where by arrangement between the parties, each of the two sets of landlords was in receipt of his own share of rent, so that their possession in law was that of co-owners. Section 72, sub-S. (5), Chota Nagpur Tenancy Act, contemplates cases of partial surrender of a holding by arrangement between a **raiyat** and his landlord.

Where in so far as the portion of a holding surrendered was concerned, the landlords were certain brothers and a widow, who were holding their eight annas interest separately from the eight annas interest of S and the whole of the brothers' interest was represented by the member of the family who was the manager and who accepted the transfer from the tenant:

Held, that there was no objection in law to the surrender which was made to the brothers or to the settlement which they subsequently made with a stranger. A.I.R. (Vol. 23) 1936 Pat. 52=2 B.R. 91=159 Ind. Cas. 490 (2).

——S. 258—Applicability—Suit challenging correctness of entry in Record of Rights—If barred.

Section 258, Chota Nagpur Tenancy Act, is not a bar to the entertainment of a suit by a Civil Court where the correctness of the entry in the record of rights is challenged on the ground that the proceedings under Chap. 15 of the Act were without jurisdiction. A.I.R. (Vol. 31) 1944 Pat. 348=23 Pat. 233=11 B.R. 333=217 Ind. Cas. 20.

——S. 258—Applicability—Rent suit—One tenant not impleaded—Decree and sale—Suit by such tenant for declaration of title—If barred.

Where one of the tenants of a holding is not impleaded in the suit for rent, a part of the tenancy interest is not represented in the suit and the decree obtained in the suit does not affect the interest of the tenant not impleaded and the sale held in execution of that decree is a nullity. A suit brought by such tenant for declaration of his title to the land is not, therefore, barred by S. 258. A.I.R. (Vol. 28) 1941 Pat. 490=7 B.R. 770=194 Ind. Cas. 435.

——S. 258—Applicability—Suit and decree for rent by landlord against person not his tenant—Execution sale—Purchase by stranger—Suit by tenant for recovery of holding—Maintainability—Application by tenant to set aside sale—If bar to recovery of holding—S. 213—Right of purchaser to refund of sale price.

Where a landlord brings an action for rent against a person who is not his tenant and obtains a decree and the holding is sold in execution and purchased by a third person who is innocent of the fraud alleged to have been practised by the landlord, a suit by the tenant for recovery of the holding is not barred by S. 258, Chota Nagpur Tenancy Act, as the tenant is merely claiming what undoubtedly belongs to him. Nor is an application by the tenant under S. 213 to set aside the sale, a bar to the recovery of his holding. The purchaser of the holding is not entitled to an order for refund of the purchase price paid by him and withdrawn by the landlord. A.I.R. (Vol. 26) 1939 Pat. 171 =5 B.R. 745=182 Ind. Cas. 446.

——S. 258—Applicability—Suit based on ground of fraud—Bar of.

Under S. 258 fraud and gross laches are not identical; and it is fraud not gross laches which removes the bar imposed by that section, i.e., so long as fraud, as distinct from gross negligence, is not established. S. 258 is a bar. 12 Cal. 69, Rel. on. 5 Pat. 763=96 Ind. Cas. 437=A.I.R. 1926 Pat. 528.

——S. 258—Applicability—Record-of-Rights recording tenure to be non-resumable—Suit to declare tenure resumable—If barred.

S. 258 does not bar a suit for declaring that a particular tenure recorded to be non-resumable in the Record-of-Rights is resumable; S. 84 (3) creates a statutory presumption in favour of the correctness of the finally published record, but implies the right to bring a suit averring the contrary. 94 Ind. Cas. 1007=A.I.R. 1926 Pat. 369.

——S. 258—Construction—"Directly or indirectly" —Meaning and implication.

The words "directly or indirectly" in S. 258 apply to the machinery used for the purpose of altering the decision and not to the result. 10 P.L.T. 854=118 Ind. Cas. 135=7 Pat. 388=A.I.R. 1928 Pat. 244.

——S. 258—"Fraud"—What is.

The fraud or want of jurisdiction contemplated in S. 258 is fraud or want of jurisdiction in the order passed under S. 213 refusing to set aside the sale. 8 P.L.T. 688=106 Ind. Cas. 430=A.I.R. 1927 Pat. 382.

——S. 258—Jurisdiction of Civil Court—Question of possession or title to land ejected from under S. 65—Cognizability in Civil Court.

S. 139 gives a list of suits and applications which are cognizable only by a Deputy Commissioner. That is a very different thing from the express provisions under S. 258 that where an order has been passed by a Deputy Commissioner under S. 65 no suit shall be entertained in any Court to vary, modify or set aside directly or indirectly such order or decision, and so the Civil Court has no jurisdiction, to enter into question of title or possession to land ejected from under S. 65. A.I.R. 1929 Pat. 467.

——S. 258—Jurisdiction of Criminal Court—If ousted.

S. 258 does not deprive a Criminal Court of its jurisdiction to try a criminal offence. A.I.R. (Vol. 27) 1940 Pat. 316=6 B.R. 241=41 Cr.L.J. 221=185 Ind. Cas. 738.

——S. 258—Res Judicata—Constructive res judicata—Might and ought—Settlement of fair rent—Subsequent suit for confirmation of possession of lands which plaintiff might have claimed in settlement proceedings—Maintainability.

What S. 258, Chota Nagpur Tenancy Act, prohibits in respect of rent settled under S. 85 is any claim in a suit that it is not the fair rent for the land in respect of which it has been settled. There is no constructive **res judicata** under S. 258 that any land which in the rent settlement proceedings the plaintiffs either unsuccessfully claimed or did not claim though they might have claimed, to be covered by the rent entered in that particular **khata** of the Record of Rights, does not belong to them at all.

In Chota Nagpur, the settlement of fair rent is not necessarily made in respect of the whole tenancy. A.I.R. (Vol. 18) 1931 Pat. 31=130 Ind. Cas. 174.

——S. 258—Res judicata—Issue decided by Revenue Court—If can be raised by defendant in subsequent suit brought against him.

S. 258 does not contemplate that no Court shall try any issue already decided by a decree of any Deputy Commissioner or Revenue Officer so as to bar a defendant in a suit brought against him from raising the issue. 1921 P.H.C.C. 369=70 Ind. Cas. 232=A.I.R. 1921 Pat. 218.

——S. 258—Scope—Application under S. 46 (4) as it stood before amendment of 1938—Dismissal as being out of time—Subsequent civil suit for declaration of title and ejectment of transferee—If barred.

Where the Deputy Commissioner, on an application under S. 46 (4) of the Chota Nagpur Tenancy Act, as it stood before it was amended in 1938, refuses to order the ejectment of the transfree on the ground that the application has been made to him after the period of three years mentioned in that sub-section, his decision will not, under S. 258 of the Act, bar a subsequent suit in the Civil Court for a declaration of the raiyat's title and ejectment of the transferee. The substance and scope of his decision is quite different from that demanded from the Civil Court, and the decision of the Civil Court will not, therefore, vary, modify or set aside the Deputy Commissioner's decision. Nor would the jurisdiction of the Court be ousted by Ss. 139 and 139-A of the Act, when at the date of the suit it was not open to the plaintiff to have recourse to the Deputy Commissioner under the old S. 46 (4). S. 46 (4) has no application to invalid transfers, but applies only to such transfers as are authorised by the section. 26 Pat. 377=A.I.R. 1948 Pat. 49.

——S. 258—Scope—Decree obtained by fraud—Suit to set aside.

S. 258 contemplates that a decree passed under S. 139 can be questioned in a suit on the ground of fraud in obtaining the decree. 8 P.L.T. 688=106 Ind. Cas. 430=A.I.R. 1927 Pat. 382.

——S. 258—Scope of—Suit for possession by one tenant against another—Bar of.

S. 258 of the Act is no bar to a suit for possession by one set of tenants against another set of tenants for joint possession, in a Civil Court. (1919) Pat. 147=50 Ind. Cas. 454.

——S. 265—Scope and effect—Suit by plaintiff for partition of properties jointly purchased by him and defendant at auction held by Deputy Commissioner in execution of rent decree—Whether barred—C. P. Code, S. 66—Applicability.

Cl. (1) of S. 265, Chota Nagpur Tenancy Act, by implication renders the provisions of the C.P. Code, inapplicable to matters before the Deputy Commissioner except in so far as the provisions of the Code are applied to such matters by rule. Consequently, a suit by plaintiff for partition of certain properties alleging that such properties were purchased by him and the defendant jointly at the auction sale held by the Deputy Commissioner in execution of a certain rent decree is not barred by S. 66 of the C.P. Code. A.I.R. (Vol. 24) 1937 Pat. 324=18 P.L.T. 397=3 B.R. 615=169 Ind. Cas. 736.

——S. 270—Scope and effect—Jurisdiction of Deputy Commissioner and Commissioner—Powers of control over Subordinate Revenue Officers.

S. 270 provides for giving certain powers of control both to the Commissioner and to the Deputy Commissioner over acts performed by subordinates whilst exercising the powers of their superiors. If it can be shown that the Deputy Collector whilst exercising the powers delegated to him of the Deputy Commissioners has failed to exercise a jurisdiction which he might have exercised or has usurped a jurisdiction which it was not within his competency to exercise, then the Deputy Commissioner would have power to order him either to exercise that jurisdiction or to refrain from exercising it as the case may be. The same, of course, would apply in the case of the Commissioner and the Board dealing with acts performed by the Deputy Commissioner. 1922 P.H.C.C. 3 =A.I.R. 1923 Pat. 83.

CHOTA NAGPUR TENANCY (AMENDMENT) ACT (6 OF 1920).

——Ss. 38 and 39—Retrospective operation—Vested right of action not affected.

The amending Act of 1920 was not intended or expressed to have retrospective effect; that is to say, it was not intended to take away rights of action which had already vested. A suit for possession by tenant against his landlord in 1921 the cause of action for which arose in 1919 was held to be cognizable by Civil Court. 8 P.L.T. 397=1926 P.H.C.C. 293=97 Ind. Cas. 608=A.I.R. 1926 Pat. 561.

CHOTA NAGPUR TENURE-HOLDERS RENT ACCOUNT ACT (1 OF 1929).

——Rent, if includes cess.

Wherever the expression "rent" is used in the Chota Nagpur Tenancy Act—and consequently in Act 1 of 1929—it is to be read not in the limited sense of primary rent, but as such rent plus other dues recoverable as if they were rent. Under S. 47, Cess Act, cess is recoverable as if it were rent. Cess is, therefore, one of the dues referred to, and where the expression "rent" is used, it must be taken to include cess. A.I.R. (Vol. 27) 1940 Pat. 658=19 Pat. 662=7 B.R. 315=192 Ind. Cas. 56.

——S. 11—Registration fee—Basis and mode of calculation.

The registration fee under S. 11 (a) is to be calculated on the rent of the separated portion as in the case of S. 11, Chota Nagpur Tenancy Act. A.I.R. (Vol. 27) 1940 Pat. 658=19 Pat. 662=7 B.R. 315=192 Ind. Cas. 56.

——S. 11—"Tenure"—Meaning of.

When the Chota Nagpur Tenure-holders' Rent Account Act prescribed a fee of two per centum on the rent of the tenure, it meant the rent of the tenure as a whole as the word "tenure" in the Act without qualification means the whole tenure. Consequently, the annual maintenance fee is to be calculated on the rent of the whole tenure, and not merely on the rent of the share of the tenure for

which a separate account has been opened. A.I. R. (Vol. 27) 1940 Pat. 658=19 Pat. 662=7 B. R. 315=192 Ind. Cas. 56.

CHOUKIDARI ACT (BENGAL ACT (6 OF 1870).

See BENGAL VILLAGE CHAUKIDARI ACT (6 OF 1870).

CHOUKIDARI CHAKRAN.

See BENGAL CHOWKIDHARI CHAKRAN ACT.

CHOUKIDARI CHAKRAN LAND.

See also (1) BENGAL VILLAGE CHAUKIDARI ACT.

(2) LAND TENURES.

——Burden of proof—Zamindari—Lands alleged to be Choukidari Chakran—Zemindar's right to resume.

The onus of proving that certain lands in a zemindari are chaukidari chakran lands is on the Government; the zamindar has no power of resumption over them, under Bengal Regulation 1 of 1793 and 13 of 1805. 42 I.A. 30, rel. 43 Cal. 1104=43 I.A. 172=20 M.L.T. 235=20 C. W. N. 1245=(1916) 2 M.W.N. 175=4 L.W. 251= 14 A.L.J. 1009=18 Bom.L.R. 838=24 C.L.J. 296=37 Ind. Cas. 223=31 M.L.J. 745 (P.C.).

——Estate—Resumption—Mortgage of Zemindari before resumption—If includes chowkidari lands—Tenants holding under chaudikar — Occupancy rights—If accrue.

Chaukidhari Chakran Lands form part of the estate before resumption and re-settlement. On this resumption they form a separate estate for the purpose of being hypothecated for the payment of the Choukidhari settlement. A mortgage of the Zemindari before resumption would cover resumed choukidhari chakran lands upon their transfer to the Zemindar as they would be accretions to the mortgage within S. 70 of the T.P. Act. Tenants holding under the chaukidhar for over 50 years acquire occupancy rights in the lands and cannot be ejected by the Zemindar upon resumption of the chakran lands. 31 Cal. 1021, rel. on. 15 C.W. N. 61=13 C.L.J. 109=8 Ind. Cas. 828.

——Meaning of — Service grant — Resumption — Transfer of zemindari —Patnidar and darpatnidar —Rights of—Bengal Act (6 of 1870), S. 51.

The expression "Chaukidari Chakran lands" means lands held on service tenure by Chaukidari or village watchmen who also rendered acts of personal service to the Zemindar. In fixing the Jamma payable for the Zemindari, the Chaukidari Chakran lands were usually left out of account, as the services were such as the public were interested in them. Since the Permanent Settlement Regulation 1, (1793) the Zemindars have had at least a **prima facie** title to all lands for which they pay revenue, such lands being commonly known as **malguzari** lands. All Chakran lands are to be considered as malguzari for the purpose of ascertaining the lands in respect of which the jamma is paid and upon which it is secured. Though, having regard to the performance by Chowkidars of public duties, chowkidari chakran lands could not be resumed by the Zemindar, the Zemindar subject to the requirements of the public interest, was the owner of these lands. Therefore a patni grant by a Zemindar of certain lands includes his interest in Chaukidari Chakran lands within the area granted. If the chakaran lands are resumed and transferred to the Zamindar under S. 51 of the Village Chaukidari Act, the patnidar or darpatnidar holding from him is entitled to the possession of those lands subject to a fair and reasonable rent. 44 Cal. 841 =21 C.W.N. 609=15 A.L.J. 390=25 C.L.J. 499=19 Bom. L.R. 462=(1917) M.W.N. 459= 6 L.W. 101=2 Pat.L.W. 1=22 M.L.T. 489= 44 I. A. 117=40 Ind. Cas. 981=32 M.L.J. 565 (P.C.).

——Meaning of—Grant of in lieu of wages—Service tenure—Right to resume—Government or Zemindar—Bengal Regulation 1 of 1793, S. 8—Bengal Regulation 7 of 1793, S. 41—Chaukidari Act (6 of 1870), S. 1.

(1) From time immemorial it has been customary in India to renumerate officers charged with certain public or quasi public duties by grants of land to be held either rent-free or at a reduced rent. The lands known as choukidari chakran lands were granted in lieu of wages to individuals who were charged with the performance of police duties in rural areas. 10 M.I.A. 16, Ref. (2) The power of resumption under S. 8 (4) of Bengal Regulation 1 of 1793 and S. 41 of Regulation 8 of 1793 was reserved in respect of such chaukidari lands as had been set apart by the zemindars with the permission or under the authority, of the Government and which although included in the mahal and annexed to the malguzari lands were not taken into consideration for the assessment of revenue. (3) It was proved that a Zemindari was held under a sanad of 1803, confirmed by Regulation 12 of 1805, the grantee being thereby required to maintain peace and order within the Zemindari. The Zemindar employed chaukidars, to whom he assigned lands from time to time and changed the lands so granted. On some occasions the appointments were made with the approval of Government Officers. It was not proved that in fixing the assessment for the Zemindari, any parcel of land within the Zemindari was not taken into account as being chaukidari lands. **Held**, that the Government had no right to resume the Chaukidari chakran lands and that the provisions of the Bengal Village Chaukidari Act (6 of 1870) did not authorise the resumption by Government of lands assigned by the Zemindar as in the present case. (4) A Zemindar as such has **prima facie** title to the full enjoyment of every parcel of land within the Zemindari for which he pays revenue to the Government and it rests on the Government to show that the settlement with the Zemindar was subject to reservation in respect of any land which gave Government the power of resuming and assessing it. 42 Cal. 710=42 I.A. 30=19 C.W.N. 65=

2 Lah. 11=17 M.L.T. 1=21 C.L.J. 31=17 Bom. L.R. 32=26 Ind. Cas. 676=28 M.L.J. 467 (P. C.).

——Patni grant—Zamindar's power to appoint chowkidars—If excludes such lands from Patni lease.

The **chowkidari** chakran lands which formed part and parcel of the permanently settled estate of the Zamindar vested in the **patnidar** subject to the rights of the **chaukidars**: 44 Cal. 84 P.C. The clause authorising the Zamindar to appoint a **chaukidar** did not exclude **chaukidari chakran** lands from the **patni** lease. The terms of an unambiguous document cannot be controlled by the conduct of the parties. 32 C.L.J. 15=58 Ind. Cas. 541.

——Patni lease—Resumption by Government—Settlement with Zemindar—Patnidar's rights.

Where **chowkidari chakran** lands are resumed by Government and are settled with the Zemindar, full power to appoint or dismiss the chowkidars has not the effect of reserving to the Zemindar, and excluding from the Patni, the **chowkidari chakran** lands. 22 C.W.N. 487, foll. 53 Ind. Cas. 1004 (Cal.).

——Patni—Resumption of—Title of patnidar—Liability to pay rent—Extent of.

Chawkidari chakran land situate within the ambit of patni belong on their resumption, to the patnidar. If the patnidar, has been enjoying the service of the chowkidar before the resumption, he is not liable to pay for those lands any rent in excess of what the zemindar has to pay to the chowkidari fund unless by the terms of the patni lease the zamindar is entitled to profit in respect of such lands. 47 Ind. Cas. 840 (Cal.).

——Patni—Lands included in—Patnidar and Zamindar—Rights of.

Chaukidari Chakran land included within a patni belong to the patnidar after they are resumed and Zamindar's settlement of those lands after their resumption with a third person is ineffective as against the patnidar. 47 Ind. Cas. 164 (Cal.).

——Patni lease—Power to Zemindar to appoint and dismiss Chowkidars—If excludes Chowkidari chakran lands from Patni.

Where a patni is granted in respect of a whole **mouza**, unless there is a provision to the contrary in the terms of the patni lease, the **chowkidari chakran** lands which form part of the Zemindari estate in the **mouza** must be held to be included in the patni. A clause in a patni lease which reserves to or confers on the Zemindar, the right to appoint and dismiss chowkidars has not the effect of reserving the **Chowkidari Chakran** Land. 22 C.W.N. 487 =44 Ind. Cas. 526.

——Patni—Resumption and transfer to Zemindar—Settlement with patnidar—Rent, assessment of.

When **Chowkidari Chakran** land covered by a patni is resumed, in the absence of terms in the patni contract restricting the right of the Zemindar to the recover from the patnidar of only the amount of the assessment made by the Collector under S. 49 of the Chowkidari Chakran Act, the Zemindar would be entitled to recover a portion of the profits also. (1910) 14 C.W.N. 1049=37 Cal. 598.

——Patni lease—Resumption and transfer to Zemindar—Patnidar's right—Suit against Zamindar for recovery—Scope of—Liability for assessment—Extent of.

A suit by a **patnidar** against his Zemindar for recovery of resumed **Chowkidari Chakran** lands brought on the ground that under the terms of the patni the **patnidar** became entitled to the **Chowkidari Chakran** lands as soon as they were transferred by the Government to the Zemindar, is virtually a suit for specific performance of contract. The Zemindar would be equitably entitled to refuse settlement asked by the **patnidar** unless the **patnidar** agreed to the conditions as to the payment of the assessment made by the Collector and a proportionate share in the profits such as the Zemindar would in the circumstances be entitled to impose on him.

Semble.—It is not correct to hold that the **patnidar** is not bound to pay to the Zemindar more than the assessment made by the Collector. (1907) 14 C.W.N. 995=7 Ind. Cas. 554.

——Resumption of—Effect on rights of patnidar.

When **Chowkidari Chakran** lands are enfranchised, the Zamindar does not acquire a new title and the patnidar is entitled to hold possession of the lands subject to the liability to pay new assessment, and in some circumstances a sum by way of profits. 22 C.W.N. 660=28 C.L.J. 160=46 Ind. Cas. 435.

——Resumption of—Patnidar—Rights of.

A patnidar can recover possession of **Chowkidari Chakran** lands, included in his lease which on resumption by Government under the Bengal Chowkidari Act have been settled by the Collector with the Zamindar. He can hold them as part of the patni under the zamindar on condition of paying the assessment on those lands as well as a proportionate share of the profits of all the lands including the chakran lands unless the profits were fully taken into account, at the time of assessing the lands including the chakran lands. 45 Cal. 685=27 C.L.J. 494 =41 Ind. Cas. 964.

——Resumption and transfer by Collector to Zemindar — Effect — If excluded from parent estate.

The transfer of **Chowkidari Chakran** lands resumed by the Collector to the Zemindar does not separate them from the parent estate and grant a new title to them in favour of the proprietor. 15 C.W.N. 5=13 C.L.J. 102=8 Ind. Cas. 766.

——Resumption under Village Chowkidhari Act—Effect—Zemindar and Patnidar—Rights of.

The effect of the transfer of resumed **Chowkidhari Chakran** lands under the Village Chowkidhari Act is to make the zemindar hold the property subject to the rights previously created by him in favour of subordinate holders. The assessment of rent for those lands as between the patnidar and the Zemindar should be on the same basis of calculation as between the Zemindar and the State. 27 C.L.J. 532 =46 Ind. Cas. 187.

——Resumption—Whether lands belong to particular mauza—Question of fact.

The question whether certain resumed **chakran** lands are the **chaukidari chakran** lands of one **mouza** or of another is a question of parcel or no

parcel, and as such it is purely a question of fact. 21 C.W.N. 238=32 Ind. Cas. 545.

——Settlement by Collector in disregard of a Government order—Effect.

A settlement of **Chowkidhari Chakran** lands by the Collector in disregard of a Government order is **ultra vires** and nugatory and does not affect the rights of person entitled to the settlement under the Government order. 46 Ind. Cas. 883 (Cal.).

——Title of Zamindar—Right of purchaser of the Zamindari at revenue sale—Bengal Revenue Sales Act (11 of 1889).

Chowkidari Chakran lands form part of the original estate and when they are resumed and transferred to zamindar, the latter does not acquire thereby a new estate but the new estate is a continuance of his existing estate. 21 C.W.N. 609 (P.C.) 33 Cal. 596, 15 C.W.N. 61; 34 C. 109, foll. A purchaser of an estate at a revenue sale acquires no title to these lands where the Collector has constituted the lands into a separate estate and has put up to sale only the original estate for arrears of revenue. 45 Cal. 765=27 C.L.J. 491=41 Ind. Cas. 894.

CHOULTRY.

See MADRAS DISTRICT MUNICIPALITIES ACT, 1920, S. 83 (a).

CHRISTIAN MARRIAGE ACT (15 OF 1872).

——Scope—Age of consent.

There is nothing either in the Divorce Act, or in the Christian Marriage Act, as regards the age of consent. A.I.R. (Vol. 20) 1933 All. 135 (2)=1933 A.L.J. 168=55 All. 243=144 Ind. Cas. 960.

——S. 4 — False declaration — If invalidates marriage.

Bridegroom taking oath under S. 42 and making false declaration as to the age and residence of the bride—False declaration does not make marriage void under S. 4. A.I.R. (Vol. 24) 1937 Mad. 895=46 L.W. 481=1937 M.W.N. 1054=I.L.R. (1938) Mad. 113=174 Ind. Cas. 195=(1937) 2 M.L.J. 590.

——Ss. 4 and 5—Scope—Non-compliance—Effect on marriage—Ss. 4 and 5.

Section 4 provides that every marriage between persons one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of S. 5 and any such marriage solemnized otherwise than in accordance with such provisions shall be void. A.I.R. (Vol. 23) 1936 Rang. 429=164 Ind. Cas. 974 (S. B.).

——Ss. 4 and 5—Scope—Omission of banns—Whether invalidates marriage.

The question, whether the omission of the banns and the omission of the dispensation will make a marriage otherwise valid, void, is a question which must be decided according to the "rules, rites, ceremonies and customs of the Church." The Church, which lays down the rules, rites, ceremonies and customs, must necessarily also lay down which of such rules, etc., are essential and which are not essential. If the Church says that certain rules should be observed but that non-observance will not render the marriage void, there is nothing in S. 5 of the Christian Marriage Act which says that such a marriage is to be declared void by a Court. A.I.R. (Vol. 21) 1934 All. 273=1934 A.L.J. 1129=56 All. 428 =153 Ind. Cas. 733.

——Ss. 4, 5—Jurisdiction of High Court.

The various grounds on which the Court can give a decree of nullity, under the Divorce Act, refer to cases where there has been a marriage validly performed. Questions arise under Ss. 4 and 5, Christian Marriage Act, when the marriage has not been validly performed. There is a clear distinction between a decree of nullity of a valid marriage and a declaration that the marriage itself is illegal and void. A High Court in India has, therefore, jurisdiction to decide questions under the Christian Marriage Act. A.I.R. (Vol. 20) 1933 All. 122=55 All. 185=144 Ind. Cas. 906.

——S. 5—Scope of—Question of Canon law.

Section 5, Christian Marriage Act, deals only with the necessary preliminaries to the ceremony, the ceremony itself, and the person who performs it. It has nothing to do with Canon law. A.I.R. (Vol. 20) 1933 All. 122=55 All. 185=144 Ind. Cas. 906.

——S. 19 (3)—Burden of proof—Allegation of invalidity due to duress—Idiocy—Doctor's evidence, not conclusive — Misrepresentation inducing consent to marry—What amounts to—Non-publication of banns—Effect of—English Law—Applicability.

Misrepresentation inducing consent to marry cannot upset a marriage. The position in law is that the party imposed upon must be deceived to such an extent that there is in reality no consent at all to the marriage.

Where the idiocy of a person is alleged, the Court has to satisfy itself that he is an idiot. Evidence of doctors is not conclusive but only serves as a guide for the Court to form its opinion. A man aged 54 with the mentality of a child of 8 or 9 years cannot be termed an idiot within the meaning of S. 19 (3), Divorce Act.

There is a very great burden on a person to show that a marriage which is otherwise valid ought to be upset on the ground of duress.

The English rules that the non-publication of the banns is only a ground of declaring the marriage void if the lack of due publicity is within the knowledge of both the parties to the marriage, is no guide to an Indian Court. A.I.R. (Vol. 20) 1933 All. 122=55 All. 185=144 Ind. Cas. 906.

——Ss. 19 and 42 (c)—Construction—Minor—Absence of parent or guardian—Issue of certificate—Procedure.

On a proper construction of the provisions of Ss. 19 and 42 (c) where the father of the minor is dead or where the guardian of the person of such minor, either testamentary or otherwise, appointed by the father or by any competent authority, is not in existence or where, in the absence of any such guardian, the mother of the minor also is dead, it cannot be stated that there is any person authorised to give the consent to such marriage of the minor. It is only when any person answering any of the three categories above mentioned is in existence and happens to be "not resident" in India that the latter part of S. 19 comes into operation and the consent of such guardian is dispensed with. It does not, therefore, follow that if any of the persons answering any of the three categories above mentioned is not in existence, a guardian has to be appointed for the

purpose of giving such consent to the marriage of the minor. There is no provision in the Act for the appointment of such guardian. A.I.R. (Vol. 33) 1946 Bom. 129=47 Bom.L.R. 938.

——S. 38 — Applicability and scope — Form—Space for age, whether should be filled.

Section 38, Indian Christian Marriage Act, governs the schedule and the space left for age is not necessary to be filled with that particular, because no such provision is made in the section. A.I.R. (Vol. 22) 1935 Cal. 678=39 C.W.N. 1303=36 Cr.L.J. 1462 =158 Ind. Cas. 791.

——Ss. 41 and 46—Jewess—Divorce—Intended marriage with a Christian — Order of High Court—Necessity.

A Jewess was married and subsequently divorced from her husband according to the Jewish Law. She desired to marry a Christian who applied to the Senior Marriage Registrar of Calcutta to marry them but the Registrar refused to do so without an order of the High Court. The High Court directed the Registrar to take the necessary steps to solemnize the marriage. 16 C.W.N. 417=15 Ind. Cas. 398.

——S. 42—Scope—Bridegroom making false declaration as to age and residence of bride—If renders marriage illegal.

The parties to the marriage were Indian Christians and were in a position to contract a lawful marriage. The bridegroom took an oath as required by S. 42 of the Indian Christian Marriage Act, and made two false declarations in the course of his statements (i) that the bride was of age, and (ii) that they both lived within the district. As a result of this declaration, he obtained a certificate which entitled the parties to be married. The marriage was solemnized by the Registrar in accordance with the provisions of the Act. A suit was instituted by the bride and her father to declare the marriage void owing to false declaration:

Held, that there was no provision in the Act which rendered this marriage illegal by reason of the false declaration of the bridegroom. The marriage having been solemnized by an official authorized in this respect it could not be declared to be void under S. 4, only because a certificate was obtained by false declaration owing to provisions of S. 77. A.I.R. (Vol. 24) 1937 Mad. 895=46 L.W. 481=1937 M.W.N. 1054=I.L.R. (1938) Mad. 113=174 Ind. Cas. 195=(1937) 2 M.L.J. 590.

——Ss. 68 and 3—Christian marrying according to Hindu rites—If prohibited—"Christian" —Who is.

The Act is not applicable to cases which do not come within the reasonable meaning of its terms and within the spirit and scope of the enactment. The word "means" in S. 3 is an inclusive term; therefore no one except a person who professes the Christian religion comes under S. 68 of the Act. The mere fact that a person was baptised as an infant or that he is attending a Christian School or he is dressing as a Christian is not sufficient to treat him "a person professing the Christian religion." One who performs **'Devi ka puza,'** at the time of his marriage cannot be said to profess the Christian religion. There is no express prohibition preventing a person professing Christianity from doing violence to his faith and marrying a Non-Christian, by a Non-Christian ceremony. S. 68 does not make it penal for a professing Christian to marry by a ceremony which is void under S. 4 of the Act. 40 All. 393=16 A.L.J. 414 =19 Cr.L.J. 615=45 Ind. Cas. 519.

——Ss. 68 and 5—Applicability—Marriage between Hindu and Christian, performed by Hindu —Offence.

A Hindu by religion performing a marriage according to the Hindu mode, between two persons one of whom is a Christian, commits an offence under S. 68. 17 Mad. 39; 20 Mad. 12, foll. 40 Mad. 1030 =6 L.W. 126=22 M.L.T. 163=(1917) M.W.N. 589=18 Cr.L.J. 840=41 Ind. Cas. 664=33 M.L.J. 113.

——S. 88—Construction — "Personal law" — Marriage between Roman Catholic and Jew—Validity.

The expression "personal law" in S. 88 of the Christian Marriage Act includes any personal law which forbids either of the parties to enter into a contract of marriage with one another. As the personal law of the Roman Catholic forbids marriage between Catholics and persons who have not been baptised, a marriage between a Roman Catholic woman and a Jew, who is a non-baptised person, under the provisions of the Act, is not valid and is null and void. [12 C. 706 and 54 B. 288, rel.] I.L.R. (1945) 2 Cal. 462=A.I.R. 1949 Cal. 563.

——S. 88—Construction and scope—"Personal law"—Meaning of—Form of marriage and objection to validity thereof—Distinctions.

The Act is only concerned with the forms in which the marriage is to be solemnized, and does not deal with objections to the validity of the marriage. The expression "personal law" in S. 88 includes any personal law, apart from any personal law as to the form of the marriage, forbidding any of the parties to enter into a contract of marriage with one another. 54 Bom. 288=124 Ind. Cas. 776=32 Bom. L.R. 17=A.I.R. 1930 Bom. 105.

——S. 88—Scope—Marriage of Roman Catholic male and Jewish female—If prohibited—Right of wife to order for maintenance under S. 488, Cr. P. Code.

A marriage between a Roman Catholic male and a Jewish female is not prohibited or invalid under S. 88 of the Christian Marriage Act, so as to disentitle the Jewish female to maintenance under S. 488, Cr. P. Code, on the ground that the parties are not husband and wife.

The prohibition referred to in S. 88 of the Christian Marriage Act must be an absolute impediment or a total incapacity according to the personal law of the parties and not an impediment or incapacity which is dependent upon the fact that the marriage is a sacrament or on the form of the marriage. As such a marriage between a Roman Catholic husband and a Jewish wife is not prohibited according to the personal law of the parties, there is no bar to an order for maintenance being made under S. 488, Cr. P. Code, in favour of the wife against the husband. A I.R. 1951 Cal. 293.

——S. 88—Scope—"Personal law"—Impediments to marriage.

Section 88 relates to impediments to marriage and not all the impediments enumerated in the Canon law are necessarily attracted by the section. As the marriage, to attract the provisions of S. 88, must be a nullity according to the personal law of a party and

that part of the personal law of the parties only is contemplated by the section which relates to absolute impediments to any marriage at all between the parties, even marriage according to the rites of their own churches, impediments such as prohibited degrees of consanguinity or affinity. A.I.R. (Vol. 32) 1945 Mad. 516=58 L.W. 446=47 Cr.L.J. 421=1945 M.W.N. 421=222 Ind. Cas. 328=I.L.R. (1946) Mad. 367=(1945) 2 M.L.J. 80.

——S. 88—"Personal law"—Custom as to dissolution of Christian marriage by release deed—If personal law.

Custom of dissolution of a Christian marriage by a release deed is not a part of the personal law which invalidates the marriage **ab initio** within the meaning of S. 88. There is nothing in the Divorce Act which permits the dissolution of a legal marriage between Christians by virtue of any custom applicable to either or both of the parties to the marriage. A.I.R. (Vol. 32) 1945 Mad. 516=58 L.W. 446=47 Cr.L.J. 421=1945 M.W.N. 421=222 Ind. Cas. 328=I.L.R. (1946) Mad. 367=(1945) 2 M.L.J. 80.

——S. 88—Scope of—Marriage contemplated.

Section 88 of the Christian Marriage Act clearly contemplates and prevents a marriage which would be invalid in places elsewhere, including in England and it does not become a valid marriage because it is celebrated in India. A.I.R. (Vol. 24) 1937 Mad. 565=1937 M.W.N. 363=46 L.W. 602=169 Ind. Cas. 516.

CHUKAIN RIGHTS.

——Chukain Rights in Rangpore—Nature and incidents of.

Chukain rights in Rangpore have a permanent element in them which may develop into occupancy rights and they are transferable even before they so develop. 42 Cal. 28=24 Ind. Cas. 193.

CHUNDAWAND.

See CUSTOM (PUNJAB).

CHUR LAND.

See (1) ALLUVION AND DILUVION.

(2) BENGAL ALLUVION AND DILUVION REGN. (11 OF 1825).

(3) FISHERY.

(4) LANDLORD AND TENANT.

——Possession, suit for—Pleadings, construction of—Absence of proof of continuous possession—Principles applicable—Possession following title—Rule of.

In the case of **chur** lands which are constantly going under water and re-forming, it is very difficult, until a full investigation based on a proper survey and comparison of maps is made, to premise with any degree of certainty whether a claim would really lie on the ground of a new formation as being reformation **in situ** or a contiguous accretion. Pleadings in cases concerning such matters should not be construed too strictly unless one must do so for some very good reason.

Where there is no proof of any continuous or systematic possession through tenants by which the title of the rightful owner may be displaced, those principles must be applied which are applicable to newly formed **chur** lands in which both parties were merely scrambling for possession, namely, that possession lay with him who had title. A.I.R. (Vol. 20) 1933 Cal. 199=56 C.L.J. 263=142 Ind. Cas. 525.

CINEMATOGRAPH ACT (2 OF 1918).

——Object and scope of—Corporation's power under S. 391, Calcutta Municipal Act—If abrogated.

The Cinematograph Act is an All-India Act and applies to Cinematograph shows exhibited at any time or place within British India and the chief object of the Act is to prevent the showing of unlicensed cinematograph films and further to have proper safeguard against fire. For this purpose, no one may open a cinematograph show at any place without any licence under the Cinematograph Act of 1918. But this will not necessarily take away the power of the Calcutta Corporation under S. 391, Calcutta Municipal Act. A.I.R. (Vol. 23) 1936 Cal. 145=40 C.W.N. 497=63 C.L.J. 1=162 Ind. Cas. 666.

CIRCUMSTANTIAL EVIDENCE.

See (1) CRIMINAL TRIAL.

(2) EVIDENCE.

(3) EVIDENCE ACT, S. 114.

CITATION.

See PRACTICE—PRECEDENTS.

CITY OF BOMBAY MUNICIPAL ACT.

See BOMBAY CITY MUNICIPAL ACT.

CIVIC GUARDS ORDINANCE (8 OF 1940).

——S. 4—Applicability—Omission to notify order calling out—Effect—Resistance to arrest—Offence.

When the order calling out the members of the Civic Guards on duty was not notified in the **Calcutta Police Gazette,** as required by R. 7, the members cannot be said to have been called out on duty within S. 4 and hence resistance to arrest attempted to be made by them cannot constitute an offence under S. 353, Penal Code. A.I.R. (Vol. 31) 1944 Cal. 79=45 Cr.L.J. 384=48 C.W.N. 138=I.L.R. (1944) 1 Cal. 456=211 Ind. Cas. 392.

——S. 5 (1)—Civic guard called out under S. 4—If public servant—Penal Code, S. 21.

It is plain from S. 5 (1) of the Civic Guards Ordinance that no member of the Civic Guard force can enjoy the powers, privileges and protection of an officer of Police unless he has been called out in accordance with S. 4 of the Ordinance. A civic guard who has been so called out, is a public servant within the definition contained in S. 21, I. P. Code. I.L.R. (1947) 1 Cal. 409.

——S. 5 (2)—Applicability—Abetment of extortion by Civic Guards—Prosecution—Sanction—Necessity.

No sanction is needed for a prosecution of mem-

bers of the civic guard for an offence of abetment of extortion. The section gives them no protection in respect of such a charge. I.L.R. (1945) 2 Cal. 478=230 Ind. Cas. 271=A.I.R. 1948 Cal. 47=48 Cr.L.J. 587.

——S. 5 (2)—Applicability—Civic guard committing acts of violence while controlling crowd in discharge of duty—Prosecution without sanction—Legality.

The protection afforded by S. 5 (2) of the Civic Guards Ordinance is available to members of the civic guards only after they have been called out in the manner indicated in S. 4. Under S. 5 (2), no prosecution can be launched against a civic guard without the sanction referred to for anything done in the discharge of his duty for the time being. Where the prosecution case rested upon the allegation that a civic guard committed acts of violence while he was controlling a crowd in the discharge of his duty, his trial and conviction without the sanction required by S. 5 (2) of the Ordinance is illegal and must be set aside. I.L.R. (1947) 1 Cal. 302.

——S. 8—Rules under, R. 7—Scope—If mandatory—Omission to notify order calling out under S. 4—Resistance to arrest—Offence—Penal Code, Ss. 21 and 353.

Under R. 7 of the rules made under S. 8, Civic Guards Ordinance (8 of 1940), any order calling out the Civic Guard to duty must be notified in the **Calcutta Police Gazette.** Until and unless this mandatory provision of R. 7 is observed, it cannot be said that the Civic Guard has been called out for duty, and its members cannot therefore, legally perform any of the functions, with which Police Officers are specially invested under the law. It follows that, until such time as the Civic Guard has been legally called out for duty and the order calling them out for duty has been notified in the **Calcutta Police Gazette,** the members of the Civic Guard are merely empowered to perform duties which an ordinary citizen may perform, and are invested with the further duties mentioned in R. 5 of the rules regarding regular attendance at parades and lectures, and they are also required to obey lawful orders of their superior officers. Nor can it be said that members of the Civic Guard are in actual possession of the situation of Police Officers within the meaning of S. 21, Expl. 2, Penal Code, until they are legally called out for duty under the terms of Ordinance 8 of 1940 read with the rules. A.I.R. (Vol. 31) 1944 Cal. 79=45 Cr.L.J. 384=48 C.W.N. 138=I.L.R. (1944) 1 Cal. 456=211 Ind. Cas. 392.

CIVIL CODE OF REPUBLIC OF CHINA.

——Applicability to Burma—Chinese Buddhist—Succession to—Law as to.

Succession to the estate of a Chinese Buddhist is governed by Chinese Customary law as being his personal law, and not by the Civil Code of the Republic of China, which has only a limited application. The Code may be referred to when it is of assistance in ascertaining what the Customary law is but not in other cases. A.I.R. (Vol. 20) 1933 Rang. 313=11 Rang. 310=148 Ind. Cas. 492.

CIVIL COURT.

See also (1) C. P. CODE, S. 9.
(2) JURISDICTION.

——Jurisdiction of—Statutory tribunals—Power to interfere with functions or question decisions of—Principles governing.

If a body is constiuted by statute to exercise certain functions, then a Civil Court cannot either interfere with those functions or treat an act done by that body as a nullity unless the Civil Court has some special supervising power, for example, by way of appeal, or unless the body has acted in doing the act, outside its powers. I.L.R. 17 Cal. 590 and A.I.R. 1924 P.C. 175, rel. on. But even if the jurisdiction of the Civil Court is excluded, the Civil Court has jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of natural justice. A.I.R. 1940 P. C. 105, rel. on. A.I.R. 1951 M.B. 63.

CIVIL AND REVENUE COURTS.

——Jurisdiction of.

See (1) JURISDICTION.
(2) VARIOUS TENANCY ACTS.
(3) VARIOUS LAND REVENUE ACTS.

CIVIL PROCEDURE CODE (8 OF 1859).

——S. 15—Applicability and construction—Suit for declaration of bare change of succession—Maintainability.

S. 15 of the C. P. Code (1859) has to be construed with reference to the principles upon which the Court of Chancery proceeds with such slight modification as the conditions in India may require. On such principles, a declaratory decree cannot be made unless there be a right to consequential relief capable of being had in the same Court or in certain cases in some other Court. So a suit for a declaration of a bare chance of succession would not have been allowed by the Courts. 93 Ind. Cas. 705=48 Mad. 1=A.I.R. 1925 Mad. 497.

CIVIL PROCEDURE CODE (5 OF 1908)

——Applicability—Proceedings under Arbitration Act.

The provisions as to arbitration as laid down in the C. P. Code do apply to proceedings under the Arbitration Act of 1899. 47 All. 179=22 A.L.J. 1031 =5 L.R.A. (Civ.) 756=85 Ind. Cas. 341=A.I.R. 1925 All. 154.

——Applicability to Berar.

The whole C. P. Code of 1908 has been made applicable to Berar so far as may be applicable, without any distinction as to the power of revision. 6 N. L.R. 49=6 Ind. Cas. 429.

——Applicability—Duty of Courts not to go outside.

Where the law has been codified, it is of little avail to enquire what is the law apart from such codification and the Courts must look to the code itself as their guide in the matter. (1908) 13 C.W. N. 255=9 C.L.J. 190=36 C. 354=1 Ind. Cas. 829.

——Applicability to foreigners.

The Code of Civil Procedure extends to the whole of British India, and there is no limitation in the Code or in any other Act in force in this country excepting foreigners from the jurisdiction of British Indian Courts. 49 All. 669=25 A.L.J. 356=101 Ind. Cas. 673=A.I.R. 1927 All. 413.

——Applicability—Government of India Act, 1935—Effect of.

The effect of S. 292, Government of India Act is that the existing law of India continues to operate and hence the Civil P. C. continues in force subject to alteration, repeal or amendment. A.I.R. (Vol. 29) 1942 Mad. 614=(1942) 1 M.L.J. 137=55 L.W. 45=I.L.R. (1942) Mad. 376=203 Ind. Cas. 17.

——Applicability to High Court's jurisdiction under Letters Patent.

Regulations duly made by Orders and Rules under the Code of Civil Procedure, 1908, are applicable to the jurisdiction exercisable under the Letters Patent, except that they do not restrict the express Letters Patent appeal. 25 Mad. 555 and 27 Mad. 121 overruled.

There is no reason why there should be any general difference between the procedure of the High Court in matters coming under the Letters Patent and its procedure in other matters. The Code is framed on the scheme of providing generally for the mode in which the High Court is to exercise its jurisdiction, whatever it may be, while specifically excepting the powers relating to the exercise of original civil jurisdiction, to which the Code is not to apply. It confers a general rule-making power saving only what is excepted in the body of the Code. 48 Cal. 481=48 I. A. 76=19 A.L.J. 281=23 Bom.L.R. 681=25 C.W.N. 557=33 C.L.J. 307=14 M.L.W. 362=1921 M.W.N. 159=60 Ind. Cas. 274=A.I.R. 1921 P.C. 80=40 M.L.J. 308.

——Applicability to land in Agency tract.

The Subordinate Judge of Vizagapatam has no jurisdiction in a suit pending before him to attach before judgment properties which admittedly are in the Agency tracts over which his Court has no jurisdiction. 42 M. 813, P. C., Rel. on. 88 Ind. Cas. 430=A.I.R. 1925 Mad. 1100=48 M.L.J. 680.

——Applicability to Letters Patent appeal.

The C. P. Code, has no bearing on the right of Letters Patent appeal. A.I.R. (Vol. 26) 1939 All. 618=1939 A.L.J. 818=I.L.R. (1939) All. 750=184 Ind. Cas. 502.

——Applicability—Proceedings under Divorce Act.

By S. 45, Divorce Act, the C. P. Code applies to petitions under Divorce Act. A.I.R. (Vol. 20) 1933 All. 135 (2)=1933 A.L.J. 168=55 All. 243=144 Ind. Cas. 960.

——Applicability—Proceedings of the Hindu Religious Endowments Board.

The provisions of the C. P. Code are not in terms made applicable to the proceedings of the Hindu Religious Endowments Board. A.I.R. (Vol. 22) 1935 Mad. 755=1935 M.W.N. 127=68 M.L.J. 178=41 L.W. 199=156 Ind. Cas. 932.

——Applicability of—Proceedings in Revenue Courts under Land Revenue Act.

The provisions of the C. P. Code do not apply **en-bloc** to proceedings in Courts constituted under the Land Revenue Act. A **bona fide** compromise on behalf of a minor who was represented in certain mutation proceedings by his elder brother without leave of the Court as required by O. 32, R. 7 of the C. P. Code, is not bad merely for want of such leave. 21 O.C. 220=48 Ind. Cas. 119.

——Applicability—Rule of procedure.

Every procedure is to be taken as permissible till it is shown to be prohibited by law. (1910) 5 Ind. Cas. 532=11 C.L.J. 285 at 289=37 Cal. 399.

——Applicability—Proceedings under S. 201, U. P. Land Revenue Act.

Any application made under S. 201, C. P. Land Revenue Act, is an original proceeding which must be governed by the procedure laid down in the Civil Procedure Code. A.I.R. (Vol. 22) 1935 Nag. 125 (1)=36 Cr.L.J. 765=155 Ind. Cas. 557.

——Applicability—Village Munsiffs' Courts.

The Civil Procedure Code, 1908, does not apply to Village Munsiffs' Courts. 2 L.W. 890=29 M.L.J. 474=18 M.L.T. 377=(1915) M.W.N. 765=31 Ind. Cas. 59.

——Applicability — Proceedings of Village Courts.

The C. P. Code does not apply to proceedings before village Courts and litigants need not adopt the procedure laid down therein. 1930 M.W.N. 712=32 L.W. 158=A.I.R. 1930 Mad. 795.

——Construction—Analogy of Limitation Act—In pari materia.

Code of Civil Procedure and the Indian Limitation Act are the two great procedure Codes in India and they were amended in the same year and were to come into operation on the same day. They are statutes in **pari materia** and are to be taken together as forming one system, and as interpreting and enforcing each other. (1784) 1 Leach, C. C. (4th Ed.), p. 355, Foll. 3 Pat. 371=78 Ind. Cas. 200=5 P.L.T. 145=1924 P.H.C.C. 33=A.I.R. 1925 Pat. 1 (F.B.).

——Construction—Body of Code and rule—Relative scope of.

The body of the Code is unalterable except by the legislature and is expressed in more general terms and has to be read in conjunction with the rules which are more readily alterable and which are concerned with details and machinery indicating the mode in which the jurisdiction created by the body of the Code is to be exercised. 43 Cal. 148=33 Ind. Cas. 329.

——Construction—'Code'—'Consolidating Act'—Meaning and effect of.

The expression 'Code' as well as 'Consolidating Act' imply an exhaustice treatment of all matters that fall within its purview. 1904 A.W.N. 135=26 A. 594=1 A.L.J. 266.

——Construction—Conflict between body of Code and Schedule—Which prevails.

The scheme of the Code of Civil Procedure is to make its body confer jurisdiction and the Schedule to detail the mode in which that jurisdiction is to be exercised. Therefore if there is any conflict between the body and the Schedules, the former must prevail. A.I.R. (Vol. 26) 1939 Nag. 186=1939 N.L.J. 228=I.L.R. (1939) Nag. 250=183 Ind. Cas. 128 (F.B.).

——Construction—Conflict between the Code and its schedule.

When there is a conflict between the body of the

Code and its schedule, the Code must prevail. 22 Ind. Cas. 690 (Cal.).

——Construction—Principles.

A code of procedure should not be construed as taking away or affecting existing substantive rights, unless it says so. 33 Cal. 789=10 C.W.N. 581.

——Construction—Effect to be given to other provisions of Code.

In construing a particular provision of the Civil P. C., the Courts must give, so far as they can, to other provisions of the Code their proper and effective meaning in order to attain their proper and effective purpose. A.I.R. (Vol. 23) 1936 Sind 59=29 S.L.R. 437=163 Ind. Cas. 240.

——Construction—Incorrect description or informality in procedure—Duty of Court.

Courts should not hold themselves fettered by any incorrect description or by any informality in procedure which can have had no practical influence on the result. A.I.R. (Vol. 20) 1933 Nag. 73=29 N.L.R. 89=144 Ind. Cas. 663.

——Construction—Reference to old Code—Permissibility.

It is not right to interpret the Code of 1908 with reference to the Codes of 1859 and 1882. 7 O.W.N. 232=A.I.R. 1930 Oudh 148 (F.B.).

——Construction—Sections and rules—Relative scope.

Per **Woodroffe, J.**—The body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. The body of the Code must therefore be read in conjunction with the rules either as existing at the date of publication of the Code or as added or altered subsequently. The power of remand under S. 107 is not limited to the case described in O. 41, R. 23. 44 Cal. 929=21 C.W.N. 877=26 C.L.J. 49=41 Ind. Cas. 598 (F.B.).

——Construction—Sections and rules—Relative scope.

The method of construction applicable to an Act divided into sections and rules, as the new C. P. Code, is, that the sections lay down general principles and the rules provide the means of applying them, and they cannot be otherwise applied. The rules restrict the sections. 41 Cal. 108=18 C.L.J. 613=20 Ind. Cas. 39.

——Nature and scope—Effect on powers of Court.

The C. P. Code is a Code conferring powers on a Court and is not a Code restricting and delimiting its unlimited powers. 30 M.L.W. 424=52 Mad. 899=120 Ind. Cas. 567=A.I.R. 1929 Mad. 757=57 M.L.J. 381.

——Nature and scope of—If confers rights or controls substantive law.

Per **Otter, J.**—The C. P. Code cannot of itself establish a right which does not exist under the ordinary law. It is a Code of procedure only, and not of substantive law, and if, under the terms of the Provincial Insolvency Act (an Act enacting substantive law) a person is barred from filing a suit, the Civil Procedure cannot assist him.

Baguley, J.—Although the C. P. Code is a Code of procedure it gives a definite right, such as the suit under O. 21, R. 63, for a declaration with a period of limitation of its own. But the Provincial Insolvency Act being of a later origin than the Code, it must be regarded as limiting so far as the creditor of the insolvent is concerned a statutory right that he may have obtained under the Code. A.I.R. 1927 Mad. 201, Not Foll. A.I.R. 1930 Rang. 317.

——Retrospective operation—Applicability to case under old Code.

The Civil Procedure Code of 1908 has nothing to do with a matter governed by old rules in force before 1909. 37 Cal. 853=8 Ind. Cas. 724.

——Retrospective operation—Applicability to pending cases.

The new Code applies so far as procedure is concerned, to all cases which were pending or about to be instituted at the time it came into force. 9 Ind. Cas. 815 (Cal.).

——Retrospective operation—Applicability to—Pending proceedings.

No person has a vested right in any course of procedure, which prescribes the mode of enforcing rights. When an Act deals with procedure, it applies to all actions pending as well as future. The general principle is that alterations in procedure are always retrospective unless there be some good reason against it. There is a clear distinction between relief and the mode or procedure for obtaining such relief. 7 Ind. Cas. 11 (All.).

——Retrospective operation—Order under old Code—Appellate Court's power to reverse.

An Appellate Court cannot reverse an order of the lower Court passed under an old Code on the ground that since then a different rule has been enacted by the new Code. (1911) 2 M.W.N. 386=12 Ind. Cas. 553.

——Retrospective operation—Applicability of—Pending proceedings under old Code—Remand—Appeal.

Where a suit was filed when the C. P. Code of 1882 was in force the course of appeal is regulated by that Code. Therefore an appeal against the order of remand of the suit though not allowed by the present Code, will lie. 12 P. R. 1900, foll. 272 P.W.R. 1912=169 P.L.R. 1912=16 Ind. Cas. 834.

——Retrospective operation — Procedure—Liability incurred under old Code.

A liability incurred under the old Code to pay an amount, the consideration for a sale in a pre-emption suit, within a certain time, is not a matter of procedure. (1909) 6 A.L.J. 647.

——Retrospective operation—Applicability to suit filed under old Code.

The New Code does not apply to a suit filed in 1906. 5 Ind. Cas. 980, approved. 3 Bur.L.T. 93=8 Ind. Cas. 1189.

——Retrospective operation—Vested rights.

The C. P. Code of 1908 is not retrospective so as to affect vested rights. 7 M.L.T. 296=5 Ind. Cas. 102.

——Scope—Duty of Courts to follow—Proceduce by agreement—If binding.

Whenever two of the parties to a litigation have come to an agreement, the Court is not bound at their wish to follow a procedure contrary to that directed by the statute. It may or may not be so

done when each and every one of the parties before the Court are agreed but where there is no such general agreement, the proper course for the Court to follow is to adhere strictly to what is laid down for its guidance in the statute itself. A.I.R. (Vol. 24) 1937 Pat. 537=18 P.L.T. 409=4 B.R. 129=172 Ind. Cas. 8.

——Scope—Effect on pre-existing powers.

The Civil Procedure Code does not affect pre-existing powers of the Court unless it takes them away. (1908) 34 C. 97=(1906) 34 C. 101.

——Scope—Exhaustive character—Power of Court to travel outside.

The essence of a Code is to be exhaustive on matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction. 29 C. 707, ref. to. (1902) 26 M. 423.

——Scope—If controlled by—Forms in schedules.

The forms given in the schedule to C. P. Code cannot control the clear words, of the Code itself. 21 C.W.N. 1147=40 Ind. Cas. 816.

——Scope—If controlled by S. 65, Government of India Act, 1858.

The regulation of civil procedure has nothing to do with the obligations formerly vesting in the East India Company as a trading corporation, for it is incidental to the duties of the ruling power, and cannot be said to be subject to the Government of India Act, 1858, S. 65. 25 A.L.J. 641=104 Ind. Cas. 257=29 Bom.L.R. 1227=46 C.L.J. 76=1927 M.W.N. 561=1 L.C. 291=54 I. A. 338=51 Bom. 725=32 C.W.N. 61=26 M.L.W. 809=A.I.R. 1927 P. C. 176=53 M.L.J. 81.

——Scope—If exhaustive—Effect on pre-existing and inherent powers of Court.

Per **Woodroffe, J.**:—Civil Courts in this country have in matters of procedure powers beyond those which are expressly given by the Code of Civil Procedure which binds the Courts only so far as it goes. The Code does not affect powers previously possessed, unless it expressly takes them away. It does not affect the power and duty of the Courts to act according to equity and good conscience in cases for which no express provision is made. The Court has an inherent power to do that justice for the administration for which alone it exists. (1905) 3 C.L.J. 29=3 C.L.J. 67 at 70, 79=33 C. 927=(1905) 10 C.W.N. 719=33 Cal. 1094=4 C.L.J. 306.

——Scope—If exhaustive.

The Code was not intended to be and is not, exhaustive and it does not affect the power and duty of the Court in cases where no specific rule exists. The Court in such cases should act according to equity, justice and good conscience. (1904) 36 Cal. 193=5 C.L.J. 611=1 Ind. Cas. 913 (Cal.).

CIVIL PROCEDURE CODE (5 OF 1908).

——Scope—If exhaustive.

The essence of a Code is to be exhaustive on the matters in respect of which it deals, and the Judge should not disregard the letter of the enactment according to its true construction. 29 Cal. 707; 35 Cal. 353, foll. 10 C.L.J. 527=4 Ind. Cas. 442.

——Scope — If exhaustive—Court's inherent power.

The Code of C. P. is not exhaustive and when a Court has made an order which it has jurisdiction to make, it has inherent power to have it set aside. 1 Pat.L.W. 551=2 Pat.L.J. 361=59 Ind. Cas. 763.

——Scope—If exhaustive—Court's power to go beyond Code.

The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction. 29 Cal. 707 (P.C.), Foll. 44 C.L.J. 399=30 C.W.N. 415=94 Ind. Cas. 235=A.I.R. 1926 Cal. 568.

——Scope—If exhaustive—Court's power to go outside to do justice.

As the provisions of the C. P. Code are not exhaustive, a Court can pass an order necessary for the justice and not expressly or impliedly forbidden even if there be no section in the Code to support his order. 1 Lah. 339=58 Ind. Cas. 748.

——Scope—If exhaustive—Court's power to travel beyond.

The essence of a Code is to be exhaustive on the matters in respect of which it declares the law and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction. 29 Cal. 707 (P.C.), Foll. 63 Ind. Cas. 131=15 S.L.R. 61=A.I.R. 1921 Sind 38.

——Scope—If exhaustive—Set-off—Equitable set-off apart from Code.

An equitable set-off can be claimed independently of the specific provisions of the C. P. Code. 27 All. 145, Foll. A.I.R. 1930 All. 875.

——Scope—If exhaustive—Partnership action—English rules, if can be referred.

The rules of procedure in England have no effect upon the rules of procedure in partnership matters in this country because procedure here is clearly laid down in the Civil P. C. and the rules in Sch. 1 which are made under it. Courts in India can only refer to the Law of England upon these points if there is no provision for them in Indian rules and if the English law represents the principles of justice, equity and good conscience. A.I.R. (Vol. 24) 1937 All. 502=1937 A.L.J. 571=1937 A.W.R. 527=170 Ind. Cas. 743.

——Scope—If exhaustive—Power of Court to act on general principles.

The Civil Procedure Code is not exhaustive and where in the Code a particular point has not been specifically dealt with, it must be determined upon general principles. 2 Pat.L.J. 306=1 Pat.L.W. 636=(1917) Pat. 137=39 Ind. Cas. 779.

——Scope—"Procedure", meaning of.

Per **Venkataramana Rao, J.**—The law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions—all the residue is substantive law and relates, not to the process of litimation, but to its purposes and subject-matter. Thus, under 'procedure' are comprised all steps which a party must take in order to get the aid of the Court for the enforcement of his rights. It, thereore, includes, not only the steps which a party has to take after an action is

launched in Court but also steps which he has to take before commencing it. The issue of a citation or a summons, the procuring of necessary evidence and such other steps in the further progress of the suit are all comprised in procedure which a party has to observe after a suit is launched, but there may be certain steps which he has to take outside Court in order to enable him to initiate proceedings in Court. The familar instance is the service of notice by the plaintiff on the defendant as enacted by S. 80. The rule of limitation which enjoins a party to bring his action within a particular period is another instance. A.I.R. (Vol. 25) 1938 Mad. 688=1938 M.W.N. 682=(1938) 2 M.L.J. 44=48 L.W. 81=179 Ind. Cas. 16.

——Scope—Procedure under—Departure from—Permissibility.

It is not open to the parties to lay down a fresh procedure for themselves and depart from the procedure laid down in the C. P. Code. A.I.R. (Vol. 22) 1935 Mad. 234=1934 M.W.N. 1394=156 Ind. Cas. 246.

——Scope—Procedure under—Duty of Courts to follow.

It is more important that Indian Courts should have regard to the form of the procedure in vogue in this country. A.I.R. (Vol. 23) 1936 Rang. 95=13 Rang. 764=162 Ind. Cas. 125.

——Scope—Rights under—Right of litigant to waive.

There is nothing to prevent any litigant waiving any right he may have under the C. P. Code or under any statute for that matter unless the waiver of the right or the absence of the right makes any particular matter illegal. A.I.R. (Vol. 23) 1936 Pat. 75=2 B.R. 106=17 P.L.T. 108=159 Ind. Cas. 717.

Construction.

——S. 2 (2)—Construction — "Decree" — "Final determination"—Decision ascertaining amount of **mesne profits** in final decree—Discretion not to draw up decree till payment of court-fee—Date of decree or decision. **See** LIMITATION ACT, Art. 182. A.I.R. 1950 Pat. 524.

——S. 2 (2)—Construction—Formal expression of adjudication, meaning of—Interlocutory order not finally settling suit—Effect of.

The words "formal expression of an adjudication" used in S. 2 (2) of the C. P. Code, do not cover an interlocutory order insufficient for the decision of the suit. No decree can be drawn at that stage even though the order may finally settle some of the matters in controversy in the suit. No finding of interlocutory order which is not sufficient to dispose of the suit as a whole can in itself give rise to a right of appeal except where an appeal is expressly provided. In no case can a party come up in appeal unless a formal decree is drawn up and signed. If the Court refuses to draw up a decree on an application made by the party aggrieved, a wrong omission to do so can be set right in revision. A.I.R. (Vol. 30) 1943 Nag. 204=I.L.R. (1943) Nag. 241=1943 N.L.J. 228=207 Ind. Cas. 625 (F.B.).

——S. 2 (2)—Construction—"Matters in controversy"—Meaning of.

For an adjudication to be a decree it is not enough that there is a determination or even a conclusive determination, of the rights of parties, but that, that determination must be on matters in controversy in the suit. The expression "matters in controversy in the suit" means such matters as have been brought up for adjudication by the Court by the pleadings in the case so framed as to include them either in the beginning or by amendment made later with the sanction of the Court. It will not do to bring up new matters by an application and then to contend that those very matters were to be adjudged on the footing by the application itself they became matters of controversy in the suit.

A preliminary decree was passed in a partition suit between **A** and **B** declaring **B** to be entitled to a half share in the items of the family property allotted to his father **C** under partition. **A** then applied to Court asking to exclude from partition or to allot certain items to the share of **C**, which were sold by **C** to **A** during pendency of the suit. The application was rejected:

Held, that the order rejecting the application was not decree as those items were not in controversy and hence was not appealable. A.I.R. (Vol. 26) 1939 Mad. 897=50 L.W. 541=1939 M.W.N. 1121 =I.L.R. (1940) Mad. 394=189 Ind. Cas. 484.

——S. 2 (2)—Construction—"Decree"—Meaning —Order on application.

In the definition of 'decree' the C. P. Code has made a distinction between a proceeding commenced by an 'application' and one commenced by a 'plaint'. A.I.R. (Vol. 21) 1934 Mad. 103 (2) =1933 M.W.N. 1385=66 M.L.J. 43=39 L.W. 4=57 M. 271=147 Ind. Cas. 614 (F.B.).

——S. 2 (2)—Construction—"Matters in controversy"—Meaning of.

Wazir Hasan, J.—"Matters in controversy in the suit" are not merely matters which arise on the face of the plaint as at first presented; they may include matters which are of vital importance between the parties, but which may come to arise, and in respect of which the parties may be at controversy, at a subsequent stage of a suit. 5 O.W.N. 633=3 Luck. 628=110 Ind. Cas. 826=A.I.R. 1928 Oudh 362 (F.B.).

——S. 2 (2)—Construction—"Matters in controversy"—Meaning of.

The expression "matters in controversy" in **S. 2** (2) must not be understood as relating solely to the merits of a case. It would cover any question relating to the character and status of a party suing, to the jurisdiction of the Court, to the maintainability of a suit and to other preliminary matters which necessitate an adjudication before a suit is enquired into in a pending suit. It does not include proceedings preliminary to institution of suit (e.g.) an application for leave to sue as a pauper and proceedings passed in execution in regard to such orders as well as orders granting day costs. The latter are not appealable as a decree as they do not come within the scope of S. 47 although they can be executed under S. 36. 2 L. W. 519=17 M.L.T. 447=29 Ind. Cas. 393.

——S. 2 (2)—Construction—"Parties" — "Matters in controversy in the suit"—Meaning of.

The word 'parties' in S. 2 (2) means the same thing as the expression 'parties to the suit' in S. 47 and includes only those that are joined on either side as plaintiffs or defendants. The expression "matters

in controversy in the suit" in S. 2 (2) does not include matters forming the subject of dispute between a surviving plaintiff and a third person as to who is the legal representative of deceased plaintiff. 160 C. 350=20 Ind. Cas. 898.

——S. 2 (2)—Construction—"Any adjudication", etc.—Meaning of.

The expression 'any adjudication from which an appeal lies as an appeal from an order' refers to S. 104. A.I.R. (Vol. 26) 1939 Oudh 104=1939 O.W.N. 128=1939 O.L.R. 88=179 Ind. Cas. 799.

——S. 2 (2)—Order issuing Commissioner to take accounts.

"Rights of parties" in S. 2 of the C. P. Code mean general rights, such as those relating to status, jurisdiction, limitation, framing suits, accounts, etc. which if decided must have a general effect upon the proceedings in the suit. 36 Bom. 392=16 Bom.L.R. 206=23 Ind. Cas. 889.

——S. 2 (2)—"Decree"—Rights of parties—Meaning of.

The words 'rights of parties' in the definition of 'decree' in S. 2 (2) mean rights of the parties inter se in the subject-matter of the suit. 82 P.R. 1911=13 Ind. Cas. 800.

——S. 2 (2)—"Decree".

Synopsis.

1. Abatement, order as to.
2. Accounts, order as to.
3. Adjournment.
4. Adjustment.
5. Mortgage suit.
6. Order in execution.
7. Preliminary and final.
8. Rejection of plaint.
9. Return of plaint.
10. Dismissal of suit for default.
11. Rejection of appeal.
12. Dismissal of cross-objection.
13. Refusal of application.
14. Requisites.
15. Decree—What is.
16. Decree—What is not.
17. Decree—Test.
18. Miscellaneous.

1. Abatement, order as to.

——S. 2 (2)—Decree—Abatement—Order as to.

An order of abatement of a suit is a decree and should not be made **ex parte** without notice to plaintiff. 45 Cal. 94=33 M.L.J. 486=22 M.L.T. 362=6 L.W. 592=126 P.W.R. 1917=15 A.L.J. 777=19 Bom.L.R. 866=3 Pat.L.W. 313=26 C.L.J. 572=104 P.R. 1917=(1917) M.W.N. 811=22 C.W.N. 169=127 P.L.R. 1917=44 I.A. 218=42 Ind. Cas. 43 (P.C.).

——S. 2 (2)—Abatement order as to—Order rejecting application for final foreclosure decree on ground of abatement—Appeal.

An order rejecting an application for making a preliminary decree for foreclosure final on the ground that the whole suit had abated and the preliminary decree was a nullity having been passed after the death of one of the plaintiffs without bringing his legal representatives on record, amounts to a decree and is appealable as such, and there can, therefore, be no application for revision. The course which the plaintiffs should adopt is to apply to the lower Court to draw up a final decree. If the Court refuses to draw up a decree, on an application made by the party aggrieved, the matter may be set right in revision. 1950 N.L.J. 516.

——S. 2 (2)—"Decree"—Order as to abatement.

An order that an appeal abates is appealable as a decree. A.I.R. (Vol. 26) 1939 Nag. 39=1938 N.L.J. 399=I.L.R. (1940) Nag. 324=181 Ind. Cas. 411.

——S. 2 (2)—"Decree"—Abatement—Order as to.

Suit abating against one of the defendants—Application for setting aside abatement—Court dismissing application for setting aside abatement and holding that consequently suit abated in toto in special circumstances of the case—Former adjudication is appealable under O. 43, R. 1 (k) and later adjudication is appealable as a decree. 26 P.L.R. 32=86 Ind. Cas. 104=A.I.R. 1925 Lah. 456.

——S. 2 (2)—'Decree'—Order as to abatements.

An order deciding that inasmuch as the interests of all the plaintiffs were common and the legal representatives of the deceased plaintiff had not been brought on record within time, the whole appeal had abated, falls within the definition of the term 'decree' and is appealable as such. 1 Lah. 582=2 Lah.L.J. 762.

——S. 2 (2)—Decree—Abatement—Order as to.

Order directing the abatement of a suit as no legal representative of the deceased plaintiff applied within the time to be brought on the record is a decree and is appealable by a person who is a party to it. But an order dismissing an application by the legal representative to be brought on record is not a decree. 1 Lah. 493=2 Lah.L.J. 738=57 Ind. Cas. 137.

——S. 2 (2)—Decree—Abatement—Order of.

Where a Court passes a purely formal order recognising the abatement which is a *fait accompli* such an order though virtually disposing of the suit does not adjudicate upon any rights and cannot be treated as a decree. But an order of abatement, which is the result of an adjudication upon the rights of the parties with respect to a matter in controversy and not passed upon an application for the revival of the suit, made under O. 22, R. 9 C.P.C. amounts to a decree and is appealable. 176 P.W.R. 1916=146 P.L.R. 1916=128 P.R. 1916=34 Ind. Cas. 822 (F.B.).

——S. 2 (2)—Decree—Abatement—Order as to.

An order of a Court declaring that a suit abates owing to the cause of action not surviving, is a decree since it declares that the right of the plaintiff, dies with him. 31 Ind. Cas. 4 (Mad.).

——S. 2 (2)—Decree—Abatement—Order of.

An order of abatement of a suit is not a decree and is not appealable. 17 A. 172; 13 A. 575 (F.B.), Foll. 12 A.L.J. 1113=26 Ind. Cas. 643.

——S. 2—Decree—Dismissal of suit as abated.

An order dismissing a suit as abated is a decree from which an appeal and a second appeal will lie.

18 M. 496, foll. (1900) 12 M.L.J. 380=26 M. 224.

——S. 2 (2)—Decree—Accounts—Order as to.

Order defining mode and period of taking accounts is a decree. 38 C.L.J. 255=74 Ind. Cas. 373=27 C.W.N. 989=A.I.R. 1924 Cal. 160.

2. Accounts, order as to.

——S. 2 (2) — "Decree"—Accounts—Order directing taking of—Order holding defendant not liable to pay.

Order directing accounts to be taken in precise terms, is a decree within S. 2 and is appealable. A decision, in a suit concerning a charge containing a formal covenant to pay a sum of money to the effect that the defendant is not liable to pay, is a decree and therefore appealable. 36 Cal. 493=2 Ind. Cas. 553.

——S. 2 (2)—Decree—Settled accounts, order directing reopening of.

Plaintiff, a solicitor, had advanced various sums of money to a client from time to time on a mortgage bond and three further charges. In a suit by the plaintiff against the heirs of his deceased client to realize the amount due on the mortgage and the three further charges the plaintiff obtained a decree on the three bonds, but the 4th bond was ordered to be re-opened.

Held, that this order was a decree. The fact that the Subordinate Judge intended hereafter to adjust the equities arising out of the contract did not in any way do away with his adjudication that the contract, as it stood was not binding on the defendants. 15 B. 155 S.C. 18 I.A. 6 at p. 8. (1907) 12 C.W.N. 1102=36 Cal. 493=2 Ind. Cas. 553.

3. Adjournment.

——S. 2 (2)—"Decree"—Adjournment—Order refusing.

A suit can be dismissed under O. 17, R. 3, only when time has been expressly granted for a specific purpose and the party to whom time has been so granted has failed to do what was necessary for that purpose. Where appellant prayed for adjournment on the ground of his illness but the Court refused and on the next day passed orders refusing adjournment and dismissing suit.

Held, that the order is a decree and is appealable as such. 5 Rang. 838=6 Bur.L.J. 77=101 Ind. Cas. 618=A.I.R. 1927 Rang. 148.

4. Adjustment.

——S. 2 (2)—Decree—Adjustment—Order refusing to record.

Application to record adjustment of a decree—Order of refusal is a decree. 26 P.L.R. 237=105 Ind. Cas. 724=A.I.R. 1927 Lah. 809.

5. Mortgage suit.

——S. 2 (2)—Decree—O. 34, R. 5—Order dismissing application for final decree under.

An order dismissing an application filed under O. 34, R. 5 Civil P. C., praying that a final decree in a suit for sale may be passed amounts to a decree and is appealable as such. A.I.R. (Vol. 19) 1932 Lah. 214=33 P.L.R. 56=137 Ind. Cas. 273.

——S. 2 (2)—Decree—Mortgage suit—Order dismissing application for final decree.

An order dismissing an application for final decree for sale in a mortgage suit is a decree and is appealable as such. 42 Mad. 52=(1918) M.W.N. 792=35 M.L.J. 552=8 L.W. 526=24 M.L.T. 486=48 Ind. Cas. 298.

——S. 2 (2)—Decree—Order refusing to pass decree under O. 34, R. 6.

An order refusing to make a decree unter O. 34, R. 6 is a decree within S. 2, C.P.C. and an appeal from it must bear and *ad valorem* Court-fees calculated on the subject matter of the appeal. 40 All. 553=16 A.L.J. 438=47 Ind. Cas. 561.

——S. 2 (2)—"Decree"—Mortgage decree—Order extending time for payment.

An order extending time for payment of mortgage money under a decree, is not a decree under S. 2, nor does it determine any question within S. 47, C.P.C. and is not appealable. 39 Mad. 876=2 L.W. 1074=29 M.L.J. 708=18 M.L.T. 486=31 Ind. Cas. 240.

——S. 2 (2)—Decree—Order for stay of sale of property in execution of mortgage decree—S. 244—Appeal.

An order for stay of sale of mortgaged properties in execution of a mortgage decree is an order virtually for stay of execution within the meaning of Cl. (c) of S. 244, C. P. Code, though the order is in terms one under S. 291 and appeal lies from such order. (1901) 31 C. 373.

——S. 2—Decree—Foreclosure — Application to re-open—Order on—Second appeal—S. 244.

An order on an application to set aside an **ex parte** order absolute for foreclosure is an order in execution and no second appeal will lie against the appellate order on such application. (1901) 29 C. 644.

6. Order in execution.

——S. 2 (2)—Decree—Order under S. 151, C. P. Code, allowing amendment of execution application. **See** C. P. CODE (V OF 1908), Ss. 151 and 2 (2). 1950 A.L.J. 833=A.I.R. 1950 A. 580 (F.B.).

——S. 2 (2)—Decree—Order on application for stay of execution. **See** C. P. CODE (V OF 1908), Ss. 47 and 2 (2). (1948) 1 M.L.J. 425.

——S. 2 (2)—Decree—Order in execution.

Executing Court holding that the term in the consent decree is not penal. The order amounts to a decree within the meaning of S. 2 (2). A.I.R. (Vol. 30) 1943 Sind 247=I.L.R. (1943) Kar. 245=210 Ind. Cas. 397.

——S. 2 (2)—Decree—Order in execution.

Decree shall be deemed to include determination of any question within S. 47, C. P. Code. A.I.R. (Vol. 29) 1942 Mad. 406 (1)=1942 M.W.N. 190=55 L.W. 159=(1942) 1 M.L.J. 386=205 Ind. Cas. 91.

——S. 2 (2)—"Decree"—Decision under S. 47.

The case of a judgment-debtor when he is fighting with the decree-holder-auction-purchaser falls under S. 47 and an order passed against the judgment-debtor is a decree within S. 2 (2) and is appealable. A.I.R. (Vol. 25) 1938 Nag. 212=I.L.R. (1938) Nag. 583=177 Ind. Cas. 643.

——S. 2 (2)—Decree—Order in execution.

Decision of Court that judgment-debtor is not a debtor under Bengal Agricultural Debtor's Act falls under S. 47 and is a decree. A.I.R. (Vol. 27) 1940 Cal. 257=44 C.W.N. 364=I.L.R. (1940) 1 Cal. 393=188 Ind. Cas. 483.

——S. 2 (2)—Decree—Order in execution—Decision that executing Court had jurisdiction to hear objection application of judgment-debtor.

If an order passed in execution proceedings decides a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree, it falls within the scope of S. 2 (2), C. P. Code, and is a decree. But orders that are merely incidental and refer to the conduct of the proceedings are not within the section. The decision, that the Court had power to hear the objection, is an order which finally and conclusively determines, so far as the Court passing such order is concerned, a very important and substantial right which according to the decree-holder, the Court had no jurisdiction to make. The decision is one of substance and is not an ordinary interlocutory order, or one merely incidental to the conduct of the proceedings. In fact, the assumption of jurisdiction where the Court has no jurisdiction is a decision which can be said to be more important than any other decision except a decision on the merits. It follows that the order is one which is appealable under S. 2 (2) and S. 47, C. P. Code. A.I.R. (Vol. 26) 1939 Lah. 177=41 P.L.R. 555=183 Ind. Cas. 697. [Overruled in A.I.R. (Vol. 30) 1943 Lah. 140=208 Ind. Cas. 89 (F.B.).].

——S. 2 (2)—Decree—Order in execution—Order on appeal setting aside sale of judgment-debtor's property.

An order passed on appeal setting aside the sale of judgment-debtor's property is a decree. S. 144 is wide enough to cover such an order. A.I.R. (Vol. 25) 1938 Lah. 456=40 P.L.R. 692=177 Ind. Cas. 430.

——S. 2 (2)—Decree—Order in execution—S. 47.

A determination made under S. 47 must affect the rights of the parties with regard to all or any of the matters in controversy, in order, that it would be tantamount to an order which amounts to a decree within the meaning of S. 2 (2). A.I.R. (Vol. 24) 1937 Rang. 157=171 Ind. Cas. 636.

——S. 2 (2)—Decree—Order under S. 47—Stay of execution.

The order for staying execution of a decree till the decision of the appeal clearly falls under S. 2 (2) read with S. 47 and is appealable as a decree. The order finally and conclusively determines the question concerning the very important right of the decree-holder to reap forthwith the fruits of the decree and arising between parties to the suit and relating to the execution of the decree. 7 All. 73; 7 Cal. 733; 8 Cal. 477; 12 Cal. 624; 13 Cal. 111; 12 Bom. 30; 39 Mad. 541 and 14 C.L.J. 489; Ref. A.I.R. 1922 Lah. 480; A.I.R. 1923 Lah. 514; A.I.R. 1924 Lah. 631; A.I.R. 1925 Lah. 69; A.I.R. 1924 Lah. 602 and A.I.R. 1927 Lah. 915 Rel. on. A.I.R. 1921 Bom. 203 Diss. from.; A.I.R. 1924 All. 808; 41 Cal. 160; 55 Ind. Cas. 228; A.I.R. 1922 Lah. 400 and A.I.R. 1927 Lah. 852, Expl. A.I.R. 1930 Lah. 187.

——S. 2 (2)—Decree—Order in execution—Order rejecting application under O. 21, R. 90.

An order rejecting an application under O. 21, R. 90, C. P. Code, is an order from which an appeal is expressly provided under O. 43, R. 1 (j). It follows that the order being one from which an appeal is provided as an appeal from an order, it cannot come within the definition of the word 'decree.' S. 105 provides for a second appeal in cases of decrees and not in cases of appealable orders. As the order in question is not a decree, no second appeal lies. A.I.R. (Vol. 23) 1936 All. 763=1936 A.L.J. 959=9 R.A. 292=1936 A.L.R. 934=165 Ind. Cas. 654.

——S. 2 (2)—Decree—Order in execution—Decision as to limitation.

Whenever a plea of limitation is raised in an execution petition and there is a finding thereon, the order is appealable as a decree. A.I.R. (Vol. 23) 1936 Mad. 801=1936 M.W.N. 575=71 M.L.J. 388 =44 L.W. 486=164 Ind. Cas. 670.

——S. 2 (2)—Decree—Order in execution.

It is not every order in execution which is a decree; it is only such orders as conclusively determine a question between the parties to the suit relating to the execution of the decree. A.I.R. (Vol. 22) 1935 Rang. 500=160 Ind. Cas. 810.

——S. 2 (2)—Decree—Order in execution.

Interim Receiver making an application in execution enforcing the right conferred on him by S. 52, Provincial Insolvency Act. Order on such application does not fall either under S. 47 or under definition of 'decree' in S. 2 (2)—No appeal lies therefrom. A.I.R. (Vol. 20) 1933 Mad. 152=37 L.W. 114=1933 M.W.N. 43=64 M.L.J. 119=56 M. 453=141 Ind. Cas. 817.

——S. 2 (2)—Decree—Order staying or refusing to stay execution of decree.

An order staying or refusing to stay execution of a decree is not appealable as a decree. A.I.R. (Vol. 18) 1931 Rang. 221=9 R. 354=133 Ind. Cas. 491.

——S. (2) (2)—Order in execution—Order for arrest.

The order to have the force of a decree must not only relate to a question which falls within S. 47, but it must also determine the rights of the parties with regard to any matter in controversy between them as regards the decree. Hence an order passed under O. 21, R. 22, for arrest, not being a final order, is not a decree which can be appealed against. 14 C.L.J. 489, Foll. 30 M.L.W. 230=119 Ind. Cas. 43=1929 M.W.N. 74=A.I.R. 1929 Mad. 718.

——S. 2 (2)—Decree—Objection to execution—Dismissal for default.

The expression "order of dismissal for default" refers not only to dismissal of suit for default but also to an order of the execution Court dismissing an objection for default. 94 Ind. Cas. 1=A.I.R. 1926 All. 401.

——S. 2 (2)—Decree—Order in execution.

Order in proceedings under S. 47 is decree only if it determines a question which parties ask Court to decide as to their rights or liabilities and not if it decides merely incidental questions of procedure. The duty of the Court to decide any of the questions that may arise does not come into existence till the parties are brought before the Court or after having been

served they fail to appear. 2 Pat.L.R. 222=84 Ind. Cas. 576=A.I.R. 1924 Pat. 683.

——S. 2 (2)—Decree—Order in execution—Order under O. 21, R. 66.

An order under O. 21, R. 66 is not a decree within S. 2 (2) and is not therefore appealable. 59 Ind. Cas. 282=1 Pat.L.T. 647.

——S. 2 (2)—Decree—Order under S. 73.

The term "Suit" in S. 2 (2) does not include an application under S. 73, C.P.C. and an order under the Section is not a decree. 1 Pat.L.T. 296=5 Pat. L. J. 415=57 Ind. Cas. 591.

——S. 2 (2)—Decree—Execution proceedings—Order quashing decree.

(Per *Kennedy, J. C.*)—Appeal in execution matter —Appellate Court's order quashing plaintiff's decree and remanding case for fresh decree—Appellate Court's orders is "decree" and appealable.

Contra—Per Madgavkar, A.J.C. 16 S.L.R. 260 =79 Ind. Cas. 553=A.I.R. 1921 Sind 102.

——S. 2 (2)—'Decree'—Order as to valuation to be inserted in sale proclamation.

A decision under S. 47, C. P. Code, is not a decree within S. 2 (2) unless it in some way determines the rights of the parties with regard to all or any of the matters in controversy. A decision on a question of the valuation to be inserted in a sale proclamation is merely an interlocutory order and although the Court, acts judicially in coming to its conclusion that does not in itself make the decision a decree, and therefore, it is not appealable. 30 Cal. 617; 27 Mad. 259 appr. 5 Pat.L.J. 270=1920 Pat. 227= 1 Pat.L.T. 645=56 Ind. Cas. 452.

——S. 2 (2)—Decree—Restitution—Order for payment of mesne profits by way of.

An order directing the decree-holder purchaser to pay mesne profits by way of restitution consequent upon setting aside of the sale is appealable even though the amount has not been worked out. It determines the rights of the parties finally with regard to matter in question and so it falls within the definition of decree under S. 2 of the Code. 56 Cal. 550=120 Ind. Cas. 807=A.I.R. 1930 Cal. 89.

——S. 2 (2)—Decree—Order under S. 145, directing surety to pay.

An order directing a surety to pay the debt of a judgment-debtor is not a decree except for purposes of an appeal under S. 145. 2 Pat. L.J. 197 =3 Pat. L.W. 414=39 Ind. Cas. 648.

——S. 2 (2)—Decree—Order in execution—Order setting aside execution sale.

An application to set aside a sale is a proceeding leading to an adjudication referred to in S. 2 and so it is a suit within O. 43, R. 1 (C.). 20 C.W.N. 1203=33 Ind. Cas. 581.

——S. 2 (2)—Decree—Order in execution—Order refusing leave to bid under O. 21, R. 72.

An order refusing leave to bid to a decree-holder under O. 21, R. 72 of the C. P. Code is not a decree and is not appealable. 13 Cal. 174 foll. 38 Cal. 717=15 C.W.N. 862=(1911) 2 M.W.N. 449 =13 Bom.L.R. 694=14 C.L.J. 241=8 A.L.J. 1117 =6 L.B.R. 26=4 Bur. L.T. 257=11 Ind. Cas. 545 (P.C.).

——S. 2—Decree—Dismissal of objections to execution application for default—Want of instructions' of pleader—Appeal.

An order dismissing for default objections by the judgment-debtor to an execution application by the decree-holder is appealable under Ss. 2, 244 (c) and 540. **Ex parte** orders under S. 244 (c) are appealable under S. 540 under the addition made to S. 540 by Act (7 of 1888) if the addition applies; if not, under the section itself as it originally stood. The explanation added to S. 647, C. P. Code, must be read with the addition made to S. 540 by Act (7 of 1888, and Ss. 103 and 108 have no application to orders under S. 244. (1909) 28 C. 81.

——S. 2 (2)—'Decree'—Decision of question under S. 244—Mesne profits—Years for which recoverable—Order for account—If final adjudication —Appeal.

An order in execution deciding that future mesne profits awarded by the decree are recoverable for a certain number of years whether embodied in a separate judgment or combined with decisions on other points is, like a preliminary decree for account, not an interlocutory order, but a final adjudication; and being one which determines a question mentioned in S. 244 and not specified in S. 588, is appealable under Ss. 2, 244 and 540, C. P. Code. Where a decree awarding future **mesne profits** under S. 211, C. P. Code, is affirmed by the appellate Court, the three years from the date of the decree until the expiration of which alone **mesne profits** are recoverable should be calculated not from the date of the original decree, but from the date of the decree on appeal. (1900) 10 M.L.J. 290=5 C.W.N. 52= 2 Bom.L.R. 978=23 A. 152=27 I.A. 209 (P. C.).

——S. 2 (2), (S. 2, Old Code)—Decree—Order of Appellate Court refusing stay of execution—No decree—No appeal. **See** C. P. CODE, S. 545. 6 Bom.L.R. 780=29 Bom. 71.

——S. 2 (2)—Decree—Garnishee proceedings—Attachment of debts due to judgment-debtors—Improper realization of such debts by third parties—Application to compel third parties to disgorge—Limitation—Appeal—S. 244.

Certain plaintiffs attached before judgment some debts due to the defendants. The defendants sold the right to collect those debts to third parties, who in defiance of the attachment, proceeded to collect some of them for their own benefit. The plaintiffs having obtained a decree in their suit, applied to the Court to compel the third parties to pay into Court the money which they had improperly collected in defiance of the Court's order.

Held, that this was not an application in execution of their decree but an application to the Court to exercise its inherent power of punishing for contempt of Court, and that the limitation rules provided for applications to execute decree did not apply to it. The Court can only order refund of moneys recovered as costs of litigation. No appeal lies from the order passed in the exercise of the inherent powers of a Court to punish contempt. 27 A. 378; 1905 A.W.N. 9; 2 A.L.J. 16.

——S. 2—Decree—Contempt proceedings—Order passed in appeal S. 47. **See** CONTEMPT OF COURT. 1905 A.W.N. 10=2 A.L.J. 18=27 A. 380.

——S. 2 (2)—Decree—Order in execution—Assistant Collector—U. P. Tenancy Act, S. 177—Appeal—S. 244. See U. P. TENANCY ACT, S. 11. 1 A.L.J. 305=(1904) A.W.N. 156=27 A. 31.

7. Preliminary and Final.

——S. 2 (2)—Decree—Preliminary or final—Decree declaring future mesne profits from date of suit payable at fixed rate.

A decree declaring future mesne prtfits from date of suit to be payable at a fixed annual rate is final as to the declaration but preliminary as to the amount sought to be executed. A.I.R. (Vol. 33) 1946 Sind 58=I.L.R. (1945) Kar. 313=223 Ind. Cas. 611.

——S. 2 (2)—Decree—Preliminary or Final.

Where in a suit for the recovery of money the amount found due to the decree-holder is declared and it is also laid down in the decree in what manner that amount is to be paid, there is nothing left to be done in the suit and the decree is not a preliminary decree but a final decree which is capable of execution. A.I.R. (Vol. 29) 1942 Oudh 1=1941 O.W.N. 1138=1940 O.L.R. 848=17 Luck. 249=197 Ind. Cas. 167.

——S. 2 (2)—Decree—"Preliminary" and "final".

"Decree" can include "preliminaary" as well as "final decree". A.I.R. (Vol. 27) 1940 Nag. 196=I.L.R. (1940) Nag. 468=1940 N.L.J. 187=190 Ind. Cas. 807.

——S. 2 (2)—Decree—Preliminary or final.

The direction in a final decree dissolving partnership that a partner should take good outstandings as found in the commissioner's report and account for them to the other partners leaves undetermined and undisposed of the distribution of assets and is in essence a preliminary decree; and the decree is final as regards matters finally decided and preliminary as regards matters still undisposed of. 53 Mad. 378=A.I.R. 1930 Mad. 528.

——S. 2 (2)—Decree—Preliminary or final.

Where final decree for partition cannot be drawn up without a partition having been effected as directed by a preliminary decree but the Court though no partition is made uses the form of the final decree and signs it, the decree does not amount to final decree for partition. 13 N.L.J. 83=122 Ind. Cas. 441=26 N.L.R. 166=A.I.R. 1930 Nag. 206.

——S. 2 (2)—Decree—Preliminary or final.

When a decree is made for possession, that portion of the decree is final; and when a decree is made for mesne profits in a suit it is only preliminary, because the final decree for mesne profits cannot be made unless the amount due is found upon further enquiry. In such a suit, although one decree is made, it is partly preliminary and partly final. The final part of the decree can be executed apart from the preliminary part and it falls within the provision of Art. 182, Limitation Act. Time for execution of the decree for possession runs at the latest from the date of the final decree of the appellate Court and not from the time when the decree ascertaining the mesne profits was passed. 118 Ind. Cas. 852=A. I. R. 1929 Cal. 383.

——S. 2 (2)—Preliminary or final decree—Partition suit.

In a partition suit, what the plaintiffs are required to do is to plead their title to and possession of and share in the property that is to be partitioned. It is not necessary for the plaintiffs to plead that particular lands purchased by the defendants at a sale in execution were liable to partition because that is a matter to be determined at the time of final decree. 6 P. L. T. 152=86 Ind. Cas. 785=A.I.R. 1925 Pat. 433.

——S. 2 (2)—Decree—Preliminary or final.

If the Court in a suit for possession after ascertaining mesne profits passes a decree for past and future mesne profits besides directing defendant to deliver possession to plaintiff without directing an inquiry, the decree is not preliminary but final. 22 M.L.W. 347=90 Ind. Cas. 789=A.I.R. 1925 Mad. 1276.

——S. 2 (2)—Decree—Preliminary or final—Preliminary point decided first but no formal preliminary decree drawn up.

The drawing up of a decree, or the omission to do so must be taken as conclusive on the question whether the Court has in fact passed, or not passed, a preliminary decree and this is the only proper test to apply in considering whether the provisions of S. 97 are or are not applicable. Ss. 2 and 96 of the Code, upon which alone the right of appeal is based must be construed with reference to S. 33, which distinguishes between a judgment and a decree, and O. 20, R. 6, which prescribes the contents of a decree. If no such formal document has been drawn up, then, no decree has been "passed" from which an appeal can be brought under S. 96 or S. 97. 25 Bom.L.R. 826=76 Ind. Cas. 1014=A.I.R. 1924 Bom. 33.

——S. 2 (2)—Decree—Preliminary — Finding under the Deccan Agriculturists' Relief Act.

The finding that a party is an agriculturist within the meaning of the Deccan Agriculturist Relief Act is not by itself an adjudication which can be embodied in a decree, though it may result in the plaint being returned for presentation in the proper Court. So such finding is not a preliminary decree within S. 2 or S. 97, C. P. Code.

Per **Macleod, C.J.**—Issues of law on which a case may be disposed of most often raise questions of jurisdiction or of limitation. But a finding that the Court has jurisdiction or that the plaintiff has brought his suit within the time prescribed by the law of limitation, does not determine the rights of the parties with regard to all or any of the matters in controversy in the suit, it merely enables the Court to proceed to inquire into those rights. So, too, an issue of **res judicata** found in the plaintiff's favour enables the Court to deal with the merits of the case. It cannot be said that decisions in the plaintiff's favour on such issues as these determine his right to sue which is a matter of controversy in a suit, for there is no such right known to law as the 'right to sue'. A plaintiff in a suit claims to be entitled to a remedial right on the consequences, of an infraction of an antecedent right. But an aggrieved party is not debarred from appealing at the end of the case from certain findings during the hearing of the case which merely decide that the suit must proceed, or which decide questions without disposing wholly or partially of the case. 45 Bom. 627=23 Bom.L.R. 92=60 Ind. Cas. 885=A.I.R. 1921 Bom. 220.

——S. 2 (2)—Decree—Preliminary — Finding under the Deccan Agriculturists' Relief Act, S. 15.

A finding on an issue whether a party to a suit was an agriculturist prior to taking accounts under the provisions of Deccan Agriculturists' Relief Act is not a preliminary decree within the meaning of Ss. 2 and 97 of C. P. Code. 39 Bom. 422: A.I.R. 1921 Bom. 220, Foll. 70 Ind. Cas. 728=A.I.R. 1922 Bom. 336.

——S. 2 (2)—Decree—Preliminary — Remand order.

Where in a case falling under O. 20, R. 12, C. P. Code the Appellate Court held that a party was entitled to possession and mesne profits and remanded the case to the lower Court held that the decision of the Court left nothing to be done by the lower Court and that under the circumstances the remand order must be construed to be a preliminary decree and is appealable. 45 Mad. 449=68 Ind. Cas. 869 =1922 M.W.N. 269=15 M.L.W. 537=30 M.L. T. 217=A.I.R. 1922 Mad. 112=42 M.L.J. 372.

——S. 2 (2)—Preliminary or final decree—Decree for accounts.

A decree for accounts is not a mere direction to report but is one determining the rights of the party entitled to it and such a decree is a final one. 14 C. L. J. 603=13 Ind Cas. 374.

——S. 2 (2)—Decree—Final—Failure to appeal—Effect.

Where there is a decree but there is no appeal, the decree becomes final on the date on which time for filing an appeal expires. 47 All. 533=23 A. L.J. 215=86 Ind. Cas. 957=A.I.R. 1925 All. 291.

——S. 2 (2)—"Decree"—"Final decree"—Amended decree.

The decree which can be called the final decree is the one which finally settles all disputed questions between the parties. And if a decree is modified in review, to whatever extent it may be, the modified decree is the decree which must be considered as the final decree in the case. 34 C.W.N. 1002.

——S. 2 (2)—Decree—Final—Order absolute for redemption in mortgage suit.

An absolute decree for redemption sale or foreclosure is a final decree within S. 2 (2). 7 N.L. R. 41=10 Ind. Cas. 736.

——S. 2 (2)—"Decree" — Preliminary — Suit under S. 36, Bengal Money-lenders Act—Mortgage decree re-opened and new decree passed—Decree containing all requirements of O. 34, Rr. 2 and 4, Civil Procedure Code—Nature of decree.

Where in a suit brought under S. 36, Bengal Money-lenders Act, the trial Court re-opens a mortgage decree and passes a new one whereby all rights between the parties are finally adjudicated upon and what is left to the Accounts Commissioner is merely the supplying of the figure, if any amount is found due, and the decree not only contains all that it has to contain under O. 34, Rr. 2 and 4, Civil P. C., but also the supplementary provisions which require to be added under the provisions of S. 34, Bengal Money-lenders Act, there is a proper preliminary decree and an appeal therefrom is perfectly competent. A.I.R. (Vol. 33) 1946 Cal. 323.

——S. 2 (2)—Decree—Preliminary.

"Decree" does not include interlocutory decision in ordinary suits on every controversial point, though such a decision is embodied in a separate order during the pendency of proceedings. An order is not a decree unless it is drawn as such or could be drawn as such. A preliminary decree is passed when the Court after adjudication of rights of the parties has to stay for a time to pass a final order thereon. 41 P.R. 1911=115 P.L.R. 1911 =179 P.W.R. 1911=9 Ind. Cas. 1019.

8. Rejection of plaint.

——S. 2 (2)—"Decree"—Order rejecting plaint as insufficiently stamped—Whether decree—Memorandum of appeal also rejected—Second appeal.

An order of rejection of the plaint by the trial Court on the ground that it was insufficiently stamped has the force of a decree under S. 2 (2), C. P. Code and therefore, a second appeal lies, notwithstanding the rejection of the memorandum of appeal by the lower appellate Court for non-payment of deficit court-fees. I.L.R. (1948) 2 Cal. 149=83 C.L.J. 247=52 C.W.N. 684.

——S. 2 (2)—"Decree"—Order rejecting plaint under S. 22 (4), Punjab Pre-emption Act.

The definition of the term 'decree' given in the C. P. Code, includes all rejection of plaints either under the Code or otherwise. The rejection of a plaint under S. 22 (4) of the Punjab Pre-emption Act is a rejection within the meaning of that definition and is, therefore, appealable as a decree. A. I.R. 1947 Lah. 302.

——S. 2 (2)—"Decree"—Rejection of plaint under O. 7, R. 11.

An order rejecting a plaint under O. 7, R. 11, C.P. Code, is a decree within the definition of S. 2 (2). A.I.R. (Vol. 22) 1935 All. 49=1935 All. L.R. 295=154 Ind. Cas. 1028.

——S. 2 (2)—"Decree"—Order rejecting plaint.

The definition of decree given in S. 2, C. P. Code, wherein it is noted that "a decree shall be deemed to include the rejection of a plaint" renders an order rejecting a plaint itself equivalent to a decree and hence eliminates the necessity for preparing a separate decree-sheet. Consequently, an appeal filed from such order without any decree-sheet is correctly presented. A.I.R. (Vol. 23) 1936 Pesh. 155=164 Ind. Cas. 181.

——S. 2 (2)—Decree—Rejection of plaint for non-payment of deficit court-fee.

Order rejecting plaint for non-payment of extra court-fee is decree—Appeal therefrom must be stamped ad valorem. 3 Lah.L.J. 237=67 Ind. Cas. 901=A.I.R. 1921 Lah. 43.

——S. 2 (2)—Decree—Plaint—Order rejecting.

An order rejecting a plaint is appealable but not as a decree. 1 L.W. 875=25 Ind. Cas. 738.

9. Return of Plaint.

——S. 2 (2)—Decree—Plaint—Order returning.

An order returning plaint for amendment is not a decree within the meaning of Section 2 (2) C.P.C.

and is not appealable. 96 P.R. 1911=143 P.W.R. 1911=216 P.L.R. 1911=11 Ind. Cas. 231.

10. Dismissal of suit for default.

——S. 2 (2)—"Decree"—Order dismissing suit for non-payment of adjournment costs.

An order dismissing a suit for non-payment of adjournment costs is not appealable either as a decree or as an order. A petition for revision against such an order, however, lies and it is open to the High Court to set aside the order where in the exercise of its revisional jurisdiction it finds that interference is called for or justified. A.I.R. 1950 Assam 169.

——S. 2 (2)—Decree—Dismissal of suit for default under O. 9, R. 8.

An order under S. 102, C.P. Code (1882), dismissing a suit is a decree and an appeal lies from it. 14 C.W.N. 573=13 C.L.J. 153=5 Ind. Cas. 493.

——S. 2—Decree—Dismissal of suit for default.

An order dismissing a suit for default is not a decree and neither appeal nor second appeal will lie therefrom. 23 C. 115; 23 C. 827, ref. to. (1901) 29 C. 60.

28 C. 81=12 M.L.J. 473=8 C.W.N. 313. (Affirmed by Cl. (b) of S. 2 New Code).

11. Rejection of appeal.

——S. 2 (2)—Memorandum of appeal—Rejection for failure to furnish copy of judgment appealed from—Remedy—Application under S. 151—Competency—Power of Court to restore appeal.

An order rejecting memorandum of appeal for failure to furnish a copy of the judgment appealed from is not a decree as defined by S. 2 (2), and hence is not appealable, nor is it covered by O. 7, R. 11, C. P. Code. Hence an application for restoration of the application under S. 151, C. P. Code, is competent and the Court in its inherent powers can restore the appeal for sufficient cause. 17 Pat. 245, foll.; 19 Pat. 159, rel. A.I.R. 1950 Pat. 443.

——S. 2 (2)—"Decree"—Order rejecting memorandum for non-payment of deficit court-fee—Appeal.

An order of an Appellate Court dismissing the memorandum of appeal for non-payment of deficit court-fee is a decree and is appealable as such. A.I.R. (Vol. 29) 1942 Lah. 64=43 P.L.R. 710 =199 Ind. Cas. 298.

——S. 2 (2)—"Decree"—Rejection of appeal as being out of time—Appeal.

The rejection of a memorandum of appeal as being out of time does amount to a decree and is appealable. A.I.R. (Vol. 28) 1941 Pat. 108= 22 P.L.T. 549=7 B.R. 126=190 Ind. Cas. 671.

——S. 2 (2)—Decree—Dismissal of appeal as time barred.

An order dismissing an appeal as having been filed beyond time is a decree. 17 C.W.N. 807=19 Ind. Cas. 931.

——S. 2 (2)—"Decree"—Rejection of appeal for want of sufficient court-fee—Appeal.

An order rejecting a memorandum of appeal on the ground that it was insufficiently stamped without giving the appellant any time at all to make up the deficit, amounts to a decree, and as such is appealable. A.I.R. (Vol. 26) 1939 Pat. 83=5 B.R. 59=19 P.L.T. 885=17 Pat. 587=178 Ind. Cas. 150.

——S. 2 (2)—"Decree"—Rejection of appeal for failure to pay deficit court-fee.

Appeal—Rejection for failure to pay deficit court-fee is a decree and not dismissal for default. 3 Pat.L.T. 117=63 Ind. Cas. 99=1921 P.H.C. C. 337=6 P.L.T. 625=A.I.R. 1922 Pat. 281.

——S. 2 (2)—"Decree"—Appeal from dismissal of suit in forma pauperis—Dismissal for appellant's failure to pay court-fees and costs of Government —If "decree".

Before an order can amount to such rejection as is contemplated by S. 2 (2), C.P. Code, it must be rejection, authorized by some provision of the Code of Civil Procedure. If the plaint is rejected for a cause for which the Code does not empower the Court to do so, it will not be a decree, as defined in the C.P. Code, even though the Court may use the word 'reject' in disposing of the suit. What can be done by a Court of first instance in reference to a plaint may also be done by a Court of Appeal as regards the memorandum of appeal. This is plainly the effect of S. 107, C.P. Code. Consequently, where the Appellate Court dismisses an appeal for failure of the appellant to pay court-fee and costs awarded to Government on dismissal of the pauper suit, it does not amount to a decree within S. 2 (2). A.I.R. (Vol. 24) 1937 All. 280=1937 A.L.J. 171=1937 A.L.R. 389= I.L.R. (1937) All. 484=168 Ind. Cas. 676.

——S. 2 (2)—"Decree"—Dismissal of appeal memo. as time barred.

Obiter.—An order dismissing an appeal as being time-barred before it has been admitted or registered is a decree. A.I.R. (Vol. 24) 1937 Cal. 732 =42 C.W.N. 72=176 Ind. Cas. 361.

——S. 2 (2)—Decree—Dismissal of appeal under O. 47, R. 11.

The expression of opinion dismissing the appeal is a judgment, although as a matter of practice such judgments are not pronounced in the form prescribed under O. 41, R. 31 and so the dismissal of an appeal under O. 41, R. 11, by the High Court is a decree within the definition of a decree in S. 2 (2). 24 Cal. 759; 22 Mad. 293; 30 All. 290 and 21 C.W.N. 430, Foll. 30 C.W.N. 334=93 Ind. Cas. 909= A.I.R. 1926 Cal. 638.

——S. 2 (2)—Decree—Rejection of appeal for non-payment of deficit court-fee.

Appeal—Order rejecting memorandum of appeal for deficient Court-fee is appealable. 18 N.L.R. 15=67 Ind. Cas. 225=A.I.R. 1922 Nag. 62.

——S. 2 (2) (S. 2, Old Code)—Decree—Order dismissing appeal for default—Decree.

Held, by the Full Bench (**Prinsep, J.**, dissenting).—An order dismissing an appeal for default is a decree within the meaning of S. 2 of the Code of Civil Procedure. 23 C. 115, 23 C. 827, overruled. 16 B. 23, approved. (1903) 7 C.W.N. 486=30 C. 660 (F.B.).

——S. 2 (2) (S. 2, Old Code)—Decree—Order rejecting appeal as out of time—Second appeal.

An order rejecting an appeal as being presented out of time is a decree, and a second appeal lies to the High Court from such decree. 7 A. 42, 9, B. 452, 12 C. 30, 16 M. 285 and 22 M. 156, followed. (1901) 13 M.L.J. 300=27 M. 21.

See LIMITATION ACT, S. 12.

12. Dismissal of Cross-objection.

——S. 2 (2)—"Decree"—Order dismissing cross-objections in appeal.

An order dismissing the cross-objections to an appeal will amount to a decree within the meaning of S. 2 (2), if it is embodied in the decree. A. I.R. (Vol. 20) 1933 Lah. 961=34 P.L.R. 1073=146 Ind. Cas. 1075.

13. Dismissal of application.

——S. 2 (2) (S. 2, Old Code)—Decree Order refusing application to appoint Commissioner in partition suit. See APPEAL. 14 M.L.J. 436=28 Mad. 127.

——S. 2 (2) (S. 2, Old Code)—Decree Order on application under S. 525. See ARBITRATION. 14 M.L.J. 356=27 M. 255 (F.B.).

——S. 2 (2)—"Decree"—Rejection of application for leave to appal as pauper.

Where an order rejecting an application for leave to appeal as a pauper is in fact a rejection of the appeal itself, the order is appealable as a decree. A.I.R. (Vol. 23) 1936 Mad. 101=1935 M.W.N. 1262=42 M.L.W. 831=69 M.L.J. 781=59 Mad. 805=159 Ind. Cas. 718.

14. Requisites.

——S. 2 (2)—"Decree"—Requisites—Finding.

A decree is a formal document which must be drawn up in accordance with some decision of a Court. But a finding itself is not a decree. A.I.R. (Vol. 32) 1945 All. 268=I.L.R. (1945) All. 798=1945 O. W.N. (H.C.) 251=1945 A.L.J. 316=1945 A.W. R. (H.C.) 244=221 Ind. Cas. 612 (F.B.).

——S. 2 (2)—"Decree"—Requisites of—Formal drawing up — Necessity—Judgment—Distinction.

A judgment under the Code is only the basis of a decree or order. The decree itself is the formal expression of the judgment and the order may not be appealable; but no right of appeal is obtained from a judgment Drawing up of a decree being the conscious and formal act, notifying the Court's disposal of the case according to its adjudication of the matter in dispute, no right of appeal accrues until it is drawn up. Though the passing of a preliminary decree is imperative in certain cases yet in the rest the Court has a discretion. But a right of appeal does not arise till it is finally expressed in a decree or is followed by an appealable order. In a redemption suit by a Hindu's sons, after a foreclosure decree was obtained against their father, the mortgagee defendant, pleaded that he had no notice of the plaintiff's rights at the time of foreclosure suit, and that the decree was binding on them as their father was the managing member of their family. Preliminary issues were framed and decided by the Court against the defendant without drawing a formal decree:

Held, that the decision was not a preliminary decree and hence unappealable.

Obiter:—A person ought to apply for a decree following upon a judgment; if he is refused the decree in terms of the judgment he should move the High Court in revision. Because unless and until a decree is drawn up in terms of the judgment, there can be neither appeal nor execution. 8 N.L.R. 92 =15 Ind. Cas. 935.

——S. 2 (2)—"Decree"—Requisites of—Formal drawing up—Necessity.

No appeal lies in the absence of a decree, even where no decree is drawn up through in advertance or otherwise, is pursuance of a finding of the Court in its judgment on a particular issue. 34 Bom. 182 =11 Bom.L.R. 1326=4 Ind. Cas. 829.

15. Decree, what is.

——S. 2 (2)—Decree—What is—Order—Striking of party under O. 1, R. 10.

An order striking out the name of a party is not necessarily a decree. Where the plaintiff had impleaded a person merely upon the ground of convenience and the plaint discloses no cause of action against him and the plaintiff has claimed no relief against him, the order of the Court directing the removal of the name of such a defendant does not operate as a decree, for, it has not the effect of an adjudication, and the integrity of the original claims remains unbroken. Where, however, a cause of action against a defendant has been specifically pleaded and a distinct relief has been claimed against him the order directing the removal of his name from the array of parties is in substance although not in form, a decree, because the effect of the order is the refusal to grant the relief to the plaintiff which he had prayed for against him.

Where a suit for damages for malicious prosecution was instituted against the complainant and the Magistrate before whom the complaint was lodged on the allegation that the complaint was filed at the Magistrate's instigation and the Court holding that the Magistrate had not instigated or connived at the prosecution made an order under O. 1, R. 10 (2), C. P. Code, that the name of the Magistrate be struck off the plaint and that the plaintiff do pay his costs:

Held, that the order was in substance a decree as defined in the C.P.C. and appealable as such and and no revision lay under S. 115, Civil P.C. A.I.R (Vol. 18) 1931 All. 333=1931 A.L.J. 181=53 All. 466=131 Ind. Cas. 548.

——S. 2 (2)—Decree—What is—Dismissal for default.

Per *Mukerji, J.—Obiter.* The whole object of defining a "decree" in the Code appears to be to classify orders in order to determine whether an appeal or in certain cases a second appeal lies therefrom. It is not possible to reconcile either in principle or in theory why an order rejecting a plaint should stand on a different footing from orders of dismissal for default and yet one is a decree and the other is not. The question whether an adjudication is an order or decree is to be tested not by general principles but by the expressions of the Code and those words are to be construed in their

plain and obvious sense; only such orders of dismissal for default as are treated as such by the Code itself are excluded from the definition. 51 Cal. 715 =83 Ind. Cas. 220=28 C.W.N. 795=39 C.L.J. 399=A.I.R. 1924 Cal. 830.

——S. 2 (2)—"Decree"—What is — Abatement—Order of.

An order of abatement is a judgment and should be followed up by a decree and is appealable as such. If the legal representative of the deceased plaintiff does not seek to set aside the abatement, the order of abatement is conclusive of the defendants' rights to the property. 45 Cal. 94, 30 M.L.J. 486 foll. 38 M.L.J. 266=11 L.W. 139=54 Ind. Cas. 565.

——S. 2 (2)—"Decree"—What is—Rent suit in Revenue Court—Dismissal by Appellate Court on ground of want of jurisdiction of trial Court.

The decision of a District Court on appeal holding that the Revenue Court had no jurisdiction to decide the validity of the resumption claimed by the plaintiff in a suit for rent is a decree within S. 2 (2), S. 100, C.P. Code gives a right of second Appeal to the High Court against such a decree passed on appeal. 11 L.W. 3=54 Ind. Cas. 749.

——S. 2 (2)—Decree—What is.

If a decision really determines the rights of the parties fully and finally, it is in the eye of the law a decree and as such appealable even though the Court giving the decision has not formally embodied its result in the form of a decree. 20 C.L.J. 476 and A.I.R. 1923 Cal. 308 Foll. 37 Bom. 480; 38 Bom. 331, Not foll. 26 N.L.R. 24=A.I.R. 1930 Nag. 122.

——S. 2 (2)—"Decree"—Revenue decree.

"Decree" includes Revenue Court decree. 6 L. R. A. Civ. 63=85 Ind. Cas. 660=A.I.R. 1925 All. 264.

——S. 2 (2)—"Decree"—Revenue Officer's Order.

It is competent to the Collector or other Revenue Officer to institute the enquiries specified in Regn. 2 of 1819 and Regn. 9 of 1825, and to follow the procedure laid therein and he has to record in a robokari his judgment as to the liability of the lands to assessment or otherwise in manner directed by S. 20, Regn. 2 of 1819 and such decision has the force and effect of a decree. 51 C.L.J. 297=A.I.R. 1930 Cal. 411.

——S. 2 (2)—Decree—What is—Order refusing to admit time-barred appeal.

Quaere.—Whether an order refusing to admit an appeal presented out of time is a decree. 45 Ind. Cas. 725 (Cal.).

——S. 2 (2)—Decree—What is conditional decree providing for dismissal of suit on default of payment within time—Appeal.

Where a decree declared that on default of payment of the amount specified therein within a particular time the suit shall stand dismissed with costs; it is a decree for dsmissal in such event and is at once appealable. 17 O.C. 14=21 Ind. Cas. 193.

——S. 2 (2)—Decree—What is—Order declaring liability to account.

The determination of the right of one party to an account for certain years and dismissing the claim for certain other years is a "decree" within the meaning of S. 2, Cl. (2) and as such is appealable. 23 All. 152 (P.C.) Foll. 1 Pat.L.W. 781 =3 Pat.L.J. 67=40 Ind. Cas. 579.

——S. 2 (2)—Decree—What is—Partition suit—Order permitting withdrawal after preliminary decree.

An order by a Court allowing a party to withdraw a partition suit after a preliminary decree affects the rights of parties and hence an appeal lies from such an order as a decree. (1912) M.W.N. 494 =11 M.L.T. 390=14 Ind. Cas. 259.

——S. 2 (2)—Decree—What is—Mesne profits—Order declaring liability for.

An order declaring that a decree-holder is entitled to get mesne profits from the judgment-debtor is a decree within S. 2 and as such is appealable even before the exact sum to be paid to the former by the latter is ascertained. 44 P.W.R. 1910= 44 P.L.R. 1910=6 Ind. Cas. 648.

——S. 2 (2)—Decree—What is—Interpleader suit —Dismissal of—O. 35, R. 5.

Where in an interpleader suit by a lessee under a woman who was herself a perpetual lessee from her husband against defendants 1 and 2 who claimed to be lessees from her daughters and the 7th defendant, who claimed as adopted son of her husband, the Court dismissed it as prohibited by S. 474, C.P. Code, (1882). **Held,** the said order was an adjudication on the defence set up in the suit and was a decree within the meaning of S. 2 and that S. 474 was no bar as the 7th defendant was only claiming through the plaintiff's landlord. 33 Mad. 220=7 M.L.T. 49=20 M.L.J. 36=4 Ind. Cas. 319.

——S. 2 (2)—Decree—What is—Administration suit—Order directing accounts.

An order in an administration suit directing Commissioner to take accounts of the debts and assets of the testator is a decree. 11 Bom.L.R. 250=2 Ind. Cas. 161.

16. Decree—What is not.

——S. 2 (2)—Decree—What is not—Execution proceedings—Interlocutory order in.

The expression "determination of any question" is used **ejusdem generis** with the phrase "conclusively determines" etc. An interlocutory order in the cause of execution proceedings is not a decree. A.I.R. (Vol. 30) 1943 Lah. 140=208 Ind. Cas. 89 (F.B.).

——S. 2 (2)—Decree—What is not—Application dismissed as permature.

An order dismissing application for making the preliminary decree final as premature is not a decree and not appealable. Revision lies. A.I.R. (Vol. 32) 1945 Nag. 277=1945 N.L.J. 394=I.L.R. (1945) Nag. 885=222 Ind. Cas. 350.

——S. 2 (2)—Decree—What is not—Suit for partition—Preliminary one—Order of Court antecedent to final decree.

In a suit for partition, there can be only one decree after the passing of the preliminary decree for parti-

tion and not several decrees. Any order which the Court may pass antecedent to the passing of the final decree for partition in course of proceedings for the preparation thereof cannot be designated a decree liable to appeal under S. 96. Such an order is merely of an interlocutory character and cannot be regarded as the formal expression of an adjudication which conclusively determines the rights of the parties within the meaning of S. 2 (2) of the Civil P. C. A.I.R. (Vol. 32) 1945 Oudh 312=1945 A.W.R. (C. C.) 214=1945 O.W.N. (C. C.) 363=222 Ind. Cas. 34.

——S. 2 (2)—Decree—What is not—Refusal of stay of execution under O. 41, R. 5.

No appeal lies from an order by the Appellate Court passed under O. 41, R. 5, refusing to stay execution, such an order not being a decree within the meaning of S. 2, Cl. 2 as it is not passed by the Court executing the decree. A.I.R. (Vol. 26) 1939 Bom. 65=40 Bom. L.R. 1198=180 Ind. Cas. 34.

——S. 2 (2)—Decree—What is not—Scheme decree—Order giving directions in pursuance of.

Scheme by High Court in suit on original side—Appointment of trustees—Procedure for vacancy provided—Vacancy occurring—Order directing continuing trustee to fill up vacancy—Order is not a "judgment" within Cl. 13, Letters Patent (Rangoon) or "decree" within S. 2 (2) and no appeal lies therefrom. A.I.R. (Vol. 24) 1937 Rang. 268=1937 Rang. L.R. 97=170 Ind. Cas. 822.

——S. 2 (2)—Decree—What is not—Trust—Dismissal of petition under S. 84, Trusts Act.

An order dismissing petition under S. 34, Trusts Act, not being a decree, is not appealable. The trial Court does not in such a case decide any matters in controversy arising out of suit. A.I.R. (Vol. 22) 1935 Oudh 72=11 O.W.N. 1533=153 Ind. Cas. 267.

——S. 2 (2)—Decree—What is not—Rejection of appeal for want of sufficient court-fee.

Memorandum of appeal rejected for want of sufficient stamp. The order does not amount to a decree. A.I.R. (Vol. 23) 1936 Pesh. 140=163 Ind. Cas. 463.

——S. 2 (2)—Decree—What is not—Conditional order providing for dismissal of appeal automatically on default.

In a certain appeal, the District Judge passed an order remanding the suit for re-trial provided that within one month certain papers were filed. It was also provided that if the papers were not filed, the remand order would not take effect and the appeal would stand dismissed. The papers were not filed within the time given and the Judge dismissed the application to extend time saying that he had no power to do so, and added that the appeal stood automatically dismissed. On appeal against this order:

Held, that the first order of the District Judge did not amount to a decree and it was hence open to him to give further time. A.I.R. (Vol. 20) 1933 All. 261=144 Ind. Cas. 129.

——S. 2 (2)—Decree—What is not—Refusal of ejectment under Madras Act 1 of 1917.

An application under S. 4 (2), Madras Agency Tracts Interest and Land Transfer Act (1 of 1917) is not a suit and an order refusing ejectment is not a "decree" within S. 2 (2), C.P.C. A.I.R. (Vol. 20) 1933 Mad. 695=38 L.W. 397=65 M.L.J. 383 =1933 M.W.N. 975=56 M. 984=145 Ind. Cas. 941.

——S. 2 (2)—Decree—What is not—Rejection of appeal for non-payment of deficit court-fee.

An order rejecting a memorandum of appeal for non-payment of deficit court-fee within the period allowed by the Court, is not a decree within the meaning of S. 2 (2). A.I.R. (Vol. 19) 1932 Cal. 482=59 C. 388=138 Ind. Cas. 643.

——S. 2 (2)—Decree—What is not—Stay of execution—Refusal.

Order refusing to stay execution is not decree. 122 Ind. Cas. 182=A.I.R. 1930 All. 121.

——S. 2 (2)—Decree—What is not—Execution—Grant of leave to apply for.

Ex parte order granting leave to apply for execution does not have the force of decree. 1929 A. L.J. 553=115 Ind. Cas. 865=A.I.R. 1929 All. 390.

——S. 2 (2)—Decree—What is not—Dismissal of suit against some defendants.

The dismissal of a suit against some defendants on account of non-representation for which plaintiffs are not to blame is not a decree within the meaning of S. 2 (2). As regards these defendants there is no adjudication, far less any expression of an adjudication determining the rights of the parties with regard to any of the matters in the suit. 33 C.W.N. 742=A.I.R. 1929 Cal. 669.

——S. 2 (2)—Decree—What is not—Finding.

Preliminary decree for taking accounts and dissolution of partnership—Court finding account books to be in possession of particular partner and making order that accounts should be taken up to certain date—Such a finding is only a finding of fact and is not decree and therefore not appealable. 120 Ind. Cas. 429=A.I.R. 1929 Lah. 699.

——S. 2 (2)—Decree—What is not—Decision under Chap. 7 of the Presidency Small Cause Courts Act.

Proceedings instituted under Chap. 7 are not suits within the meaning of the C.P. Code. The decision of the Court based on such proceedings cannot be said to be a decree under S. 2 (2), C.P. Code; 17 Mad. 216; 43 M.L.J. 288; and 25 L.W. 115; Followed. 1929 M.W.N. 174=115 Ind. Cas. 504=29 M.L.W. 537=A.I.R. 1929 Mad. 69=56 M.L.J. 199.

——S. 2 (2)—"Decree"—What is not—Grant of permission to withdraw suit—O. 23, R. 1.

An order permitting the withdrawal of a suit or appeal is not a decree within the meaning of the C. P. Code. 51 Mad. 664=27 M.L.W. 286=108 Ind. Cas. 539=A.I.R. 1928 Mad. 416=55 M.L.J. 345.

——S. 2 (2)—Decree—What is not—Partnership suit—Directions to Official Commissioner.

Directions given to an Official Commissioner appointed to determine certain matters in a partnership suit by a preliminary decree to allow credit to one of the parties in respect of partnership goods is not a decree and so no appeal lies therefrom: 39

Bom. 339; 35 All. 159; A.I.R. 1921 Oudh 224; 20 C.L.J. 476; and 24 Cal. 725 (F.B.), followed. 23 S.L.R. 87=107 Ind. Cas. 214=A.I.R. 1928 Sind 100.

——S. 2 (2)—Decree—What is not—Stay of execution—Order for security.

An order for security to stay execution is not an order determining any rights of the parties. It is neither an order under S. 47, nor is it a "decree" within the meaning of S. 2 (2). It is therefore, not appealable; 41 Cal. 160, Followed. 106 Ind. Cas. 890 (Lah.).

——S. 2 (2)—Decree—What is not—Remand by appellate Court under inherent powers.

Rule 23 operates only when one of the preliminary issues is tried by the Court of first instance and it Where the trial Court tries all the issues, but the disposes of the suit on that ground and says that it is not going to try the suit on any other issue. lower appellate Court frames some more and remands the case for decision thereon, the remand is not under R. 23, but one in the exercise of the inherent power of the Court. The order is not appealable as an order, nor is it a decree within S. 2. 6 Pat. 380=103 Ind. Cas. 722=A.I.R. 1927 Pat. 296.

——S. 2 (2)—Decree—What is not—Order under O. 1, R. 10 (2), discharging a defendant.

An order under O. 1, R. 10 (2) discharging a defendant from a suit cannot be regarded as falling within the definition of a "decree" in S. 2 (2) and as such is not an appealable order; 42 Mad. 219, Diss. The mere drawing up a formal decree does not *ipso facto* make the corresponding order an appealable one, if it does not, in itself, really fall within the definition of a decree; 17 N.L.R. 66, followed. 89 Ind. Cas. 331=A.I.R. 1926 Nag. 75.

——S. 2 (2)—Decree—What is not—Decision in default of plaintiff.

Whenever any Court delivers a decision in default of the plaintiff that decision will be an order and not a decree and will not be appealable. 28 O.C. 124=85 Ind. Cas. 393=A.I.R. 1925 Oudh 485.

——S. 2 (2)—Decree—What is not—Reference to Official Referee for taking accounts.

An order simply referring to Official Referee to take accounts without determining any matter in controversy is not a Decree. Letters Patent (Madras), Cl. 15. 73 Ind. Cas. 903=A.I.R. 1924 Mad. 406.

——S. 2 (2)—Decree—What is not—Striking off parties under O. 1, R. 10.

An order striking out names of parties under O. 1, R. 10 is not a decree and so not appealable. 45 Mad. 194=69 Ind. Cas. 961=30 M.L.T. 172=14 M.L.W. 642=1921 M.W.N. 799=A.I.R. 1922 Mad. 332=42 M.L.J. 97.

——S. 2 (2)—Decree—What is not—Grant of permission to withdraw suit—O. 23, R. 1.

An order granting permission to a plaintiff to withdraw a suit under O. 23. R. 1, is not a decree and is, therefore, not appealable. 65 Ind. Cas. 719=A.I.R. 1922 Lah. 267.

——S. 2 (2)—Decree—What is not—Order as to rateable distribution—S. 73.

An order under S. 73 is not an order under S. 47 inasmuch as the question which arises is not one between the parties to the suit and the order rejecting the application under S. 73 does not otherwise come within the definition of decree in S. 2, because it does not conclusively determine the rights of the parties. It would also be unduly extending the meaning of the word "suit" in that section, to make it include an application under S. 73, 42 Cal. 1, followed. 1921 P.H.C.C. 204=A.I.R. 1921 Pat. 401 (b).

——S. 2 (2)—Decree—What is not—Order as to costs.

A right to costs is not a vested right and there is a very limited right of appeal. An order for costs is not a decree; it has to be included in decree or may be part of a decree. It is only appealable, if the original decree or order is appealable and in that event an appeal on the question of costs alone will lie, if any question of principle is involved. There can be no second appeal for costs, except on a ground of law. 1 Pat.L.T. 403=5 Pat.L.J. 472=57 Ind. Cas. 236.

——S. 2 (2)—Decree—What is not—Dismissal of appeal for default.

An order dismissing an appeal for default is not a decree. Limitation for execution under S. 48, C. P. C., runs from the original decree. 5 O.L.J. 252=47 Ind. Cas. 125.

——S. 2 (2)—Decree—What is not—Order as to costs.

An order passed under S. 24 of the C.P. Code read with S. 15 of the Upper Burma Civil Court Regulation, is not a decree and is not appealable. No appeal, therefore lies from an order as to costs forming part of such order. (1917) 3 U.B.R. 61=44 Ind. Cas. 690.

——S. 2 (2)—"Decree"—What is not—Order disallowing interrogatories, O. 11, R. 7.

A party adversely affected by the disallowance of interrogatories has a right to appeal from the original decree; and hence he cannot prefer an appeal from an order disallowing interrogatories which is not a decree, nor can apply for revision. 14 S.L.R. 28=58 Ind. Cas. 721.

——S. 2 (2)—"Decree"—What is not—Order in execution refusing process to witness or refusing any relief.

Every order in execution proceedings not a decree. An order granting or refusing process for examination of a witness or determining a point of law arising incidentally and not granting or refusing any relief is not a decree. 2 U. P.L.R. (Lah.) 96=115 P.L.R. 1920=56 Ind. Cas. 173.

——S. 2 (2)—"Decree"—What is not—Order absolute under O. 34, R. 5.

An application for an order absolute under S. 89 of the T. P. Act (O. 34, R. 5) is really an application to execute the decree passed under S. 88, T. P. Act (O. 34, R. 4) and the order will itself be an order in execution and not a decree. Decree under Rule 4 is a preliminary

decree. 40 Bom. 321=18 Bom.L.R. 38=33 Ind. Cas. 749.

——S. 2 (2)—"Decree"—What is not—Preliminary objection—Order overruling.

An order overruling a plea against the maintainability of a suit is not a "decree" within S. 2 (2), C.P. Code. 8 L.B.R. 213=9 Bur.L.T. 195=33 Ind. Cas. 664.

——S. 2 (2)—Decree—What is not—Order under O. 23, R. 1.

An order under O. 23, R. 1, C. P. Code, is not a decree and is not appealable although a portion of the order may require the plaintiff to pay costs. 6 O.L.J. 151=51 Ind. Cas. 69.

——S. 2 (2)—"Decree"—What is not—Order allowing withdrawal of suit—O. 23, R. 1.

An order under O. 23, R. 1 of the C. P. Code allowing plaintiff to withdraw his suit with liberty to sue again does not come under the definition of decree in S. 2 (2) of the C. P. Code nor is it appealable under O. 43, R. 1. 57 P.W.R. 1919=51 Ind. Cas. 766.

——S. 2 (2)—Decree—What is not—Order allowing extension of time—S. 148.

An order under S. 148 of the C.P. Code extending time is not appealable. It is neither a decree nor an order under S. 104. 35 All. 582=11 A. L.J. 950=21 Ind. Cas. 585.

——S. 2 (2)—Decree—What is not—Security for stay of execution—Order accepting.

An interlocutory order to be a decree must conclusively determine the rights of the parties. An order accepting security for stay of execution proceedings is not a decree as it does not determine conclusively rights of the parties, and is not appealable. 41 Cal. 160=17 C.W.N. 1240=20 Ind. Cas. 72.

——S. 2 (2)—Decree—What is not—Order of dismissal for default.

An order of dismissal for default is not a decree and is not appealable. The fact that a decree was drawn up in the case cannot alter the nature of the order, which must depend on the circumstances under which it was made. 18 C.L.J. 128=18 C.W.N. 604=20 Ind. Cas. 1.

——S. (2)—Decree—What is not—Dismissal of appeal for default.

An order of dismissal of an appeal for default under O. 41, R. 17 is not appealable as it is not a decree, nor, is it an order specified in the Code as an appealable order. (1912) M.W.N. 382=11 M. L. T. 280=22 M.L.J. 284=14 Ind. Cas. 823.

——S. 2 (2)—Decree—What is not—Order overruling objections to award.

An order over-ruling objections to an award is not a decree. 1 P.L.R. 1911=12 P.W.R. 1911 =9 Ind. Cas. 385.

——S. 2 (2)—Decree—What is not—Order rejecting application to sue in forma pauperies.

An order rejecting or refusing an application for permission to sue as a pauper is not a decree and, therefore, is not appealable as such. (1910) 1 U. B.R. 128=8 Ind. Cas. 475.

17. Decree—Test.

——S. 2 (2)—Decree—Test—Finding—Drawing up in formal form—Relevancy.

A finding, unless it operates in the eye of the law as a decree, will not be a decree merely because the Judge chooses to make use of a printed form entirely inapplicable to that finding. Conversely, the absence of a formal decree will not make an adjudication any the less a decree, if in point of law the adjudication operates as a decree. 17 N. L.R. 66=62 Ind. Cas. 467=A.I.R. 1921 Nag. 108.

——S. 2 (2)—'Decree'—Test—Suit for dissolution of partnership and accounts—Court giving findings on points in controversy—Decision whether amounts to 'decree'.

Where in a suit for the taking of partnership accounts the Court has adjudicated on the substantive rights of the parties with regard to the several matters in controversy in the suit and the determination of those matters is clearly intended to be final and conclusive so far as that Court is concerned, the decision operates as a preliminary decree and is appealable. The mere fact that the Court which passed the decree took the view that only findings and directions had been given and that no final disposal was made will not affect the question of applicability. The question whether an adjudication is a decree or not must be determined with reference to S. 2 (2) of the Code of Civil Procedure and not with reference to implications, true or supposed, arising from the general provisions relating to judgments and decrees or to disposals of suits. Nor can any considerations of policy as to the expeditious administration of justice or the avoidance of expense and delay be imported into the determination of the question.

There is nothing in the Code which can be construed as a prohibition against the Court in a proper case passing more than one preliminary decree. On the other hand, there are indications that the Code contemplates more than one preliminary decree and one final executable decree in a suit. 1947 M.W.N. 723=(1947) 2 M.L.J. 523.

18. Miscellaneous.

——S. 2 (2)—"Decree"—Compromise—Provision for payment of amount within fixed time and in default suit to stand dismissed—Default—Decision holding that condition was not complied with—"Decree"—Appeal.

Where in a suit for specific performance of a contract of sale, a compromise decree is passed to the effect that on the plaintiff depositing into Court a certain sum of money within a certain period, the defendant should execute and register a deed of sale within a week, and that in case the amount is not deposited within the time fixed, the plaintiff's suit would stand dismissed with costs, it is essential that the plaintiff should deposit the amount within the time limited in order to entitle him to the relief awarded. If he fails to deposit the amount or tender it on that day, it is fatal. The action is no longer open after the specified date, as by operation of the default clause the suit would automatically stand dismissed after the expiry of the time, by reason of the failure to deposit or tender. A decision by the Court that the plaintiff has failed to

comply with the clause in the decree operates as a dismissal of the suit and is a decree as defined by S. 2 (2), C. P. Code, and is therefore appealable under S. 96. 22 Luck. 196=228 Ind Cas. 350=1947 O.W.N. 146=1947 O.A. (C.C.) 52=1947 A.W.R. (C.C.) 52=A.I.R. 1947 Oudh 146.

——S. 2 (2)—"Decree"—Declaration under S. 33 (2), U. P. Agriculturists Relief Act.

The declaration which is passed under the first part of sub-S. (2) of S. 33, U. P. Agriculturists' Relief Act, 1934, is a decree. (1943) 204 Ind. Cas. 506=1942 O.W.N. 789=1943 R.D. 110.

——S. 2 (2)—"Decree"—Decree on admission—O. 9, R. 8.

The word 'decree' in O. 9, R. 8 is governed by the defintion given in S. 2 (2). Therefore a decree passed on the admission of the defendant is appealable by a persons aggrieved thereby. 56 Ind. Cas. 845 (N.).

——S. 2 (2)—"Decree"—Decree on admission for portion of claim—O. 9, Rr. 8 and 9.

Where part of claim being admitted a decree is passed for it and the rest of the claim is dismissed for default of the party, the order is entirely a decree and must be so treated, because the same adjudication on the same bond cannot be partly a decree and partly something else. 35 Ind. Cas. 65 (Mad.).

——S. 2 (2)—"Decree"—Decree, admission—O. 9, R. 8.

A decree under O. 9, R. 8, C. P. Code being not an order of dismissal for default within the meaning of S. 2 (2), is appealable. 16 C.L.J. 559=15 Ind. Cas. 601.

——S. 2 (2)—Decree—Decision allowing damages not yet ascertained.

In a suit for damages parties agreed to calculate the damages themselves but before they determined them, a judgment was passed without the amount of damages being ascertained. The defendants filed an appeal.

Held, that the appeal was premature as the suit had not been finally and completely disposed of by the Court below and consequently there was no decree against which an appeal could be filed. 110 Ind. Cas. 177=A.I.R. 1928 Lah. 841.

——S. 2 (2)—"Decree"—Decision in appeal—Appellate decision in suit for contribution determining liability of parties and sending the case to trial Court for passing final decree—If "decree" or "order"—Appeal.

An appellate decision in a suit for contribution sending the case back to the trial Court for the purpose of passing a final decree in the light of the findings of the appellate Court (the liability having been decided and the working of the arithmetical result being only a consequence of the liability) is a 'decree' within the meaning of S. 2 (2) of the C. P. Code, and as such appealable under S. 96, C. P. Code, and not under O. 43, R. 1 (u). 1947 M.W.N. 741=60 L.W. 806=(1947) 2 M.L.J. 532.

——S. 2 (2)—"Decree"—Decision in appeal—Appellate Court.

The decree in appeal is decree in the suit, for, an appeal is a continuation of the suit. (1916) 1 M.W.N. 223=30 M.L.J. 379=19 M.L.T. 268=33 Ind. Cas. 9.

——S. 2—Decree—Decision of Collector in summary suit.

A decision of a Collector in a summary suit is a decree within the meaning of S. 2, C. P. Code and decides a civil right. (1902) 13 M.L.J. 296=26 M. 518.

——S. 2 (2) (S. 2, Old Code)—Decree—Inter-pleader suit—Decision in—Appeal.

An adjudication upon the claims of defendants in an inter-pleader suit is a decree and appealable as such under S. 540, C. P. Code and not under S. 588 of the Code. (1907) A.W.N. 270=4 A.L.J. 683=30 A. 22.

——S. 2 (2)—Decree—Decision negativing one of two alternate remedies.

What are being referred to in S. 2, C. P. Code, are matters of substance which the suit is concerned to have determined in order to lead to a remedy on the part of the plaintiff or to a denial of a remedy on the part of the plaintiff.

Where there are two alternative modes of seeking a remedy and a Court finally decides that one of those modes is not available that branch of the case is finally decided: that branch of the case relates to substantive rights and raises a matter of controversy in the suit. It does not raise all the matters of controversy but S. 2 clearly distinguishes between "all" and "any", and, therefore, an appeal lies from such decision. A.I.R. (Vol. 28) 1941 Nag. 84=I.L.R. (1941) Nag. 90=1940 N.L.J. 663=195 Ind. Cas. 91.

——S. 2 (2)—Decree—Bengal Regulation 5 of 1799, S. 4—Order under.

An order under S. 4 of the Regulation 5 of 1799 is not a decree. 13 C.L.J. 677=9 Ind. Cas. 994.

——S. 2 (2)—"Decree"—Discharge of some defendants from suit.

Where in a suit by a **lambardar** against certain person for recovery of the amount of revenue paid by him and a charge on the property in their hands, the Court finding that there is no charge on the property in the hands of some of the defendants discharges them from the suit, the order of discharge is a final adjudication of the most important point of issue between the parties and amounts to a decree within the meaning of S. 2 (2), C. P. Code, and is therefore appealable. A.I.R. (Vol. 25) 1938 Nag. 233=176 Ind. Cas. 33.

——S. 2 (2)—Decree—Divorce suit—Order refusing to strike off name of co-respondent.

An order of a single judge of the Chief Court, Punjab, sitting on the original side, refusing to strike off the record the name of a co-respondent to a petition for dissolution of marriage and damages, does not determine the rights of parties and is not a decree, merely because it holds that the co-respondent is amenable, to the jurisdiction of the Court. 98 P.R. 1909=172 P.W.R. 1909=4 Ind. Cas. 852.

——S. 2 (2)—"Decree"—Interest pendente lite—Order refusing.

An order refusing interest **pendente lite** is a decree and is appealable. A.I.R. (Vol. 20) 1933 Pat. 207=14 P.L.T. 133=143 Ind. Cas. 43.

——S. 2 (2)—"Decree"—Order of ejectment in proceedings under Chap. VII, Presidency Small

Causes Courts Act. See LIMITATION ACT, ART. 11-A. 50 Bom.L.R. 747.

——S. 2 (2) (S. 2, Old Code)—Decree—Order under S. 474, dismissing interpleader suit.

An order dismissing an interpleader suit under S. 474 of the Code of 1882 is a decree within the meaning of S. 2 of the Code, and is therefore appealable. (1907) 20 M.L.J. 36=33 M. 220=7 M. L.T. 49=4 Ind. Cas. 319.

——S. 2 (2)—"Decree"—Order dismissing application for final decree as premature—Appeal. 222 Ind. Cas. 350=1946 Nag. (Rul.) 63.

——S. 2 (2)—"Decree"—Award of Court in Land acquisition reference.

An award of a Civil Court under S. 26, Land Acquisition Act (as amended) is a judgment and decree and the decision of the High Court in appeal also is a judgment and a decree. A.I.R. (Vol. 31) 1944 Nag. 284=1944 N.L.J. 267=I.L.R. (1944) Nag. 780.

——S. 2 (2)—Decree—Leave to sue, order granting—Appeal. **See** RELIGIOUS ENDOWMENTS Act, S. 18. 34 Cal. 584.

——S. 2 (2) (S. 2, Old Code)—Decree—Acquisition Act—Reference under—Refusal to decide.

An order declining to decide a reference under the Land Acquisition Act, but referring the parties to another Court is no decree. (1902) 8 C.W.N. 320. [**See** COURT FEES ACT, Sch. II, No. 11].

——S. 2 (2)—Decree—Land Acquisition reference —Decision in.

Decision in reference under S. 30 being one on rights of contending parties, is a decree within S. 2 (2), and is appealable under S. 96. B.L.R. Sup. Vol. 985, Rel. on. 29 M.L.W. 237=115 Ind. Cas. 345=1929 M.W.N. 62=A.I.R. 1929 Mad. 223=56 M.L.J. 387.

——S. 2 (2)—"Decree"—Rejection of application by legal representative to be brought on record.

Order rejecting application by legal representative to be brought on record on ground that right to sue does not survive amounts to decree. A.I. R. (Vol. 22) 1935 Lah. 47 (2)=36 P.L.R. 359.

——S. 2 (2)—Decree — Legal representative — Order as to.

If an order rejecting the claim of a person to be the legal representative of a deceased plaintiff is to have the character of a decree it must conclusively determine the right of the parties in the suit. 35 M.L.T. 82=80 Ind. Cas. 942=1924 M.W.N. 763 =A.I.R. 1924 Mad. 813=47 M.L.J. 370.

——S. 2 (2)—"Decree"—Order as to legal representative of deceased.

No appeal lies against an order deciding that a person is not the legal representative of a deceased party as it is not a decree. 13 N.L.R. 32=38 Ind. Cas. 833.

——S. 2 (2)—Decree Order refusing to implead a person as legal representative.

Where an application to bring on record a person as the legal representative of a deceased plaintiff is refused, the order is a decree as it negatives the right of the applicant to the relief which the original plaintiff had sought in the suit and is an adjudication of the applicant's claims. The order is therefore appealable. 42 Mad. 219, app. 39 M.L.J. 218=12 L.W. 188=(1920) M.W.N. 467 =58 Ind. Cas. 498.

——S. 2 (2)—"Decree"—Decision as to who is legal representative—O. 22, R. 5.

An order under O. 22, R. 5, C. P. Code, determining who is the legal representative of a deceased party under the new Code in a matter which arose under the Old Code is not a decree and so is not appealable his under new Code, though such an order was appealable under the Old Code. 13 Ind. Cas. 70 (Cal.).

——S. 2 (2) (S. 2, Old Code)—Decree—Application to be brought on the record of appeal as assignee of deceased appellant—Rejection—Appeal.

No appeal would lie from an order rejecting the application of a person who claimed to be brought on the record of an appeal as being the assignee of the deceased sole appellant. 4 C.W. N. 403, foll. 22 A. 384, overruled. 1902 A.W.N. 112=24 A. 532 (F.B.).

——S. 2 (2)—Decree—Decision on preliminary point.

Where a preliminary point raised in defence in a suit may possibly be decided against the plaintiffs and may terminate in dismissal of the suit on that point alone, the adjudication would no doubt amount to a formal expression conclusively determining the rights of the parties, but where such an adjudication does not put an end to the suit, no right of appeal against such an adjudication will come into existence as the adjudication does not amount to a decree as defined in S. 2 (2). A.I.R. (Vol. 28) 1941 Oudh 590= 1941 O.W.N. 957=1941 O.L.R. 598=195 Ind. Cas. 615.

——S. 2 (2)—"Decree"—Preliminary issue whether a party is an agriculturist—Decision on—Revision—Dekhan Agriculturists Relief Act (17 of 1879), S. 53—S. 115.

The plaintiffs, alleging that they were agriculturists, filed a redumption suit. The Subordinate Judge raised a preliminary issue whether the plaintiffs were agriculturists, and found it in the plaintiffs' favour. The defendant applied to the District Judge in revision under S. 53 of the Dekhan Agriculturists' Relief Act, 1879; but he, being of opinion that the decision of the preliminary issue was not a decree, declined to consider the correctness of the decision of the Subordinate Judge. The defendant next applied to the High Court under S. 115 of the Civil Procedure Code on the ground that the District Judge had declined to exercise the jurisdiction vested in him by law under S. 53 of the Dekhan Agriculturists' Relief Act.

Held, (1) that the formally expressed decision upon the point would be a preliminary decree within the meaning of S. 2 of the Civil Procedure Code, 1908, being an adjudication which so far as regards the Court expressing it conclusively determined the rights of the parties with regard to the manner in which accounts between them should be taken notwithstanding the written contract that they had entered into before suit; (2) that, therefore, the District Judge should not have declined jurisdiction in the case. (1910) 12 Bom.L.R. 762.

——S. 2, Cl. (2)—"Decree"—Decision of an issue—Appeal.

In an administration suit, the Court of First Instance decided on one of the issues a substantial question of right between the parties and having so decided it appointed receivers for all the property in dispute. On appeal to the District Judge, the finding on the issue was sought to be challenged on the ground that it was a decree. The District Judge held that there was no decree and therefore no appeal lay to his Court. It was contended that there was a decree with reference to the question raised in the issue in the first Court and that an appeal lay from it.

Held, that no appeal lay to the High Court, for there was in fact no formal decree upon the question raised in the issue. (1909) 11 Bom.L.R. 1326 =34 Bom. 182.

——S. 2 (2)—"Decree" — Finding — Redemption suit—Direction as to accounts.

The definition of a decree is undoubtedly couched in very wide terms, but it is now settled law that not every finding will amount to a decree even though it may conclusively determine the rights of the parties with regard to some of the matters in controversy in the suit. The definition in S. 2 (2), must be taken along with the provisions of the Code regarding the stage at which a decree may be prepared. To hold otherwise would mean that an appeal may be heard piecemeal, and that is undesirable as it is opposed to the scheme of the Code as a whole. Directions by the Court with regard to the mode in which the account is to be taken will not at least in redemption suits, amount to preliminary decrees. A.I.R. (Vol. 21) 1934 Pat. 97 (2)=14 P.L.T. 735=149 Ind. Cas. 311.

——S. 2 (2)—"Decree"—Finding, if.

Record of some findings in a suit and a remark by the Judge that he should not pass a final decree, does not amount to a 'decree' and hence no appeal lies. To constitute a decree there must be final adjudication. No particular form is necessary. 12 M.L.T. 309=(1912) M.W.N. 1122=16 Ind. Cas. 45.

——S. 2 (2)—"Decree" — Mesne profits — Order refusing to ascertain on ground of limitation.

In so far as the Court declines to ascertain the mesne profits and holds that the plaintiff's claim is beyond time under Art. 181 it is the formal expression of an adjudication conclusively determining the rights of the parties with regard to a matter in controversy in the suit within the meaning of S. 2, Cl. (2), C. P. Code. In such a case the decision of the lower Court operates as a decision and, therefore, a second appeal lies. 52 Bom. 360=109 Ind. Cas. 734=30 Bom. L.R. 503=A.I.R. 1928 Bom. 236.

——S. 2 (2)—"Decree" — Mesne profits — Order fixing period for which right is granted.

An order limiting the right of the decree-holder to recover mesne profits for a certain period is of the nature of a final decree as defined in S. 2 and is appealable as such. 23 All. 152 (P.C.), Foll. 115 Ind. Cas. 591=A.I.R. 1928 Cal. 804.

——S. 2 (2)—Decree—Mesne profits—Order holding defendant not liable.

An order declaring the defendants not liable for mesne profits, amounts to a decree and is therefore appealable. 67 Ind. Cas. 93=A.I.R. 1923 Cal. 308.

——S. 2 (2)—Decree—Mesne profits—Order directing assessment.

An order directing assessment of mesne profits is an interlocutory order and does not determine the rights of the parties, and is not appealable. 15 Ind. Cas. 573 (Cal.).

——S. 2 (2)—Decree—Partition suit—Orders between preliminary and final decree—If decrees and appealable. 28 Luck. 557=222 Ind. Cas. 34=1946 Oudh (Rul.) 39.

——S. 2 (2)—"Decree"—Determination of mesne profits after final decree ex parte.

After a final decree **ex parte** has been passed mesne profits were assessed by the executing Court,

Held, that the procedure was not one in execution of a decree for it resulted in a final decree being passed, and the aggrieved party may either appeal or apply for review of the final decree. 11 C.L.J. 501=5 Ind. Cas. 387.

——S. 2 (2)—'Decree'—Order holding that application does not lie under O. 20, R. 12, C. P. Code—Appeal.

An order under O. 20, R. 12, C. P. Code, is not appealable. An order that no application lies under O. 20, R. 12, is not a decree within the meaning of S. 2 (2), C. P. Code, and hence no appeal lies from such an order. I.L.R. (1947) Kar. 194=A. I.R. 1948 Sind 124.

——S. 2 (2)—"Decree"—Orissa Money-Lenders Act, Ss. 11 and 15—Order on application under—Appeal. **See** ORISSA MONEY-LENDERS ACT, Ss. 11 and 13. 12 Cut.L.T. 85.

——S. 2 (2), (S. 2, Old Code)—Decree—Order allowing objection under S. 372—Order or decree —Appeal.

An order allowing objections to an application under S. 372, C. P. Code, to be brought on the record in the place of the plaintiff is not appealable; nor is such an order a decree within the meaning of S. 2, C. P. Code. 4 C.W.N. 473, ref. to. 1902 A.W.N. 84=24 A. 342.

——S. 2 (2)—Decree—Order permitting withdrawal of suit—Appeal.

An order permitting the withdrawal of a suit is not a "decree" either preliminary or final and is not, therefore, appealable. 130 P.W.R. 1911=248 P. L. R. 1911=11 Ind. Cas. 830.

——S. 2 (2)—Decree—Striking off certain defendants.

If a Court before deciding a case finally, orders the names of certain defendants to be struck off from the record as the plaintiff made out no cause of action against them, such order amounts to dismissal of the case against those defendants and the plaintiff can treat the order as a "decree" and can appeal against it. 8 Ind. Cas. 409 (Oudh).

——S. 2 (2)—Decree—Striking out the name of a defendant and dismissing suit against him.

An order striking out the name of one of the defendants and dismissing the suit as against him on the ground that the plaint disclosed no cause of action though purporting to be made under O. 1 R. 10 of the C. P. Code is a decree and is appealable as such.

42 Mad. 219=36 M.L.J. 169=25 M.L.T. 184=9 L. W. 329=49 Ind. Cas. 835.

——S. 2 (2)—Decree—Set off—Claim to—Order on.

The order of the Subordinate Judge disposing of the defendant's claim to a legal set-off did not amount to a decree and therefore was not appealable, as the decision could be attacked in an appeal against the final order in the case. 65 P.W.R. 1917=62 P.R. 1917 =39 Ind. Cas. 508.

——S. 2 (2)—Decree—Orders appealable under O. 43, R. 1.

Order appealable under O. 43, R. 1 are not decrees, though coming under S. 47 or the definition of decree in S. 2. 8 N.L.R. 177=17 Ind. Cas. 884.

——S. 2 (2)—"Decree"—Remand under S. 151.

An order of remand under S. 151, C. P. Code, which merely sets aside the decree of the Trial Court on the ground that the rights of the parties cannot be decided until some more material is brought on the record and which does not determine the rights of the parties with regard to any of the matters in controversy in the suit, cannot amount to a decree within the meaning of S. 2 (2), C. P. Code and is not, therefore, appealable. A.I.R. 1947 Pesh. 55.

——S. 2 (2)—"Decree"—Remand under S. 151.

An order remanding a case under S. 151, to the trial Court for a decision is not a decree and no appeal lies from such an order. A.I.R. (Vol. 23) 1936 Pesh. 79=161 Ind. Cas. 716.

——S. 2 (2)—"Decree"—Order passed in revision.

An order passed in revision comes within the definition of 'decree' in S. 2 (2), C.P.Code. A. I.R. (Vol. 21) 1934 All. 134=1934 A.L.R. 485 =1934 A.L.J. 552=56 All. 608=148 Ind. Cas. 893.

——S. 2 (2)—Decree—Review allowed—Effect of.

The effect of allowing an application for review is to vacate the decree originally passed. The decree that is subsequently made on the review, even if it does not modify the decree originally passed, is a new decree superseding the original one and therefore no appeal can lie from the decree originally passed. 107 Ind. Cas. 751=A.I.R. 1928 Cal. 418.

——S. 2 (2)—"Decree" — Several plaintiffs—Withdrawal by one—Court dismissing whole suit as withdrawn—If decree.

The decision of the Court that as soon as the first plaintiff withdraws or compromises or abandons the suit, the other plaintiffs who derive title from the first plaintiff cannot succeed, is a decision on the merits and is not simply an order permitting withdrawal under O. 23, R. 1. Such a decision amounts to a decree within the meaning of S. 2 (2), C. P. Code, and is, therefore, appealable and no revision lies against such a decision. The mere fact that no appeal can be filed until the decree is formally drawn up would not invest the High Court with jurisdiction to interfere in revision. A.I.R. (Vol. 28) 1941 Nag. 180=1941 N.L.J. 179=197 Ind. Cas. 275.

——S. 2 (2)—"Decree"—Order of reference to Civil Court by Settlement Officer—C. P. Land Revenue Act, (1917), S. 75 (3).

An order of a Civil Court that a reference should be made to the Settlement Officer under S. 75 (3), C.P. Land Revenue Act, 1917, is not appealable as a decree. A.I.R. (Vol. 30) 1943 Nag. 94= 1942 N.L.J. 574=15 R.N. 154=204 Ind. Cas. 272.

——S. 2 (2)—"Decree"—Striking off some defendants—If decree.

Order of trial Court striking off some of the defendants on ground that suit was not maintainable against them in absence of consent of Governor of Province under S. 270, Government of India Act, amounts to a decree. (1941) 193 Ind. Cas. 276=7 B.R. 506=42 Cr.L.J. 375=13 R.P. 576.

——S. (2)—"Decree"—Surety for judgment-debtor—Application for discharge—Order on—If decree.

An order passed on an application by a surety for judgment-debtor to have his surety bond cancelled, he having discharged his obligation thereunder, is not a decree inasmuch as it is not made in an application against the surety by the decree-holder, and is consequently not appealable. The remedy of the injured party is only by way of revision. A.I.R. (Vol. 20) 1933 All. 382=55 All. 548=144 Ind. Cas. 731.

——S. 2 (2)—Decree—Trust—Scheme of Management for wakf.

An order of the Court appointing a committee to draw up a scheme of management with regard to a wakf is a decree within the meaning of S. 2 (2) and is therefore appealable. 31 P.L.R. 220=121 Ind. Cas. 74=A.I.R. 1930 Lah. 476.

——S. 2 (2)—Decree — Trust — Scheme decree—Elections in pursuance of—Order on application for confirmation.

Where the Court reserves to itself the right to confirm elections held under a scheme framed by it and where application for confirmation is made by parties on one side in the suit and is opposed by parties on the other side, the order which the Court makes is not really an order in execution but is a decree in the suit itself and is, therefore, appealable as a decree under the Code. 6 Rang. 97=110 Ind. Cas. 41=A.I.R. 1928 Rang. 168.

——S. 2 (2) Explanations 96 and 100—Decree for possession in appeal and remand for inquiry into mesne profits.

Plaintiff's suit for possession and mesne profits was dismissed but the lower appellate court held that the plaintiff was entitled to possession and sent the case back to the trial Court for ascertainment of mesne profits and passing a decree. *Held*, the order of the lower appellate court must be considered a decree and the appeal to the High Court must be construed not as an appeal against the order of remand but as an appeal against an appellate decree and proper court fees must be paid. 3 Pta.L.J. 99=45 Ind. Cas. 100.

——S. 2 (2) and (14)—Decree or order—Award in arbitration—Application for—Dismissal of.

An order dismissing an application to have an

award made by arbitrators is not a decree but an order under S. 2 (14). A.I.R. (Vol. 26) 1939 Oudh 104=1939 O.W.N. 128=1939 O.L.R. 88=179 Ind. Cas. 799.

——S. 2 (2) and (14)—'Decree' and 'order', distinction—Manner of expression, whether material.

The presence or absence of a formal expression cannot be the true criterion of the difference between a decree and an order. Reading the two definitions together, the essence of the distinction seems to lie in the nature of the decision—whether it is an adjudication of a particular kind or not—rather than in the manner of its expression. A.I.R. (Vol. 24) 1937 Pat. 349 =18 P.L.T. 321=3 B.R. 558=169 Ind. Cas. 359.

——S. 2 (2) and (14)—Decree or order—'Rubkari' —Award of costs in setting aside ex parte decree.

An order granting an application to set aside an *ex parte* decree "with costs" was made on 27th Febrary, 1915. On the 8th March, 1915 a document, described as a "rubkari" was drawn up fixing the amount of the costs payable on 6th March, 1918. The applicant applied in execution for realisation of his costs but his application was dismissed as time barred, the Court holding that the *rubkari* was a decree, and that limitation began to run, on 27th February, 1915.

Held, that the rubkari was not a decree under S. 2 (2), C.P. Code but was an order within S. 2 (4) of the Code which completed and rendered the order of 27th February, 1915 capable of execution. Limitation commenced to run from 8—3—1915 and therefore. the application for execution was within time. 59 Ind. Cas. 51 (1) (Cal.).

——S. 2 (2) and (14)—"Decree" or "order"—Application to file private award invalid in part —Order on—If decree—Second appeal.

The decision of a Court on an application to file a private award part of it being on a matter outside the scope of the arbitration, is an 'order' and is not open to second appeal. 66 P.R. 1915=146 P.W.R. 1915=31 Ind. Cas. 80.

——Ss. 2 (2) and 47—Decree—Stay of execution—Order as to—Nature of—Order relating to stay of execution, whether appealable—Ss. 2 (2) and 47, scope of.

An order relating to the stay of execution does not fall within S. 47, Civil P.C., and such an order is not an adjudication conclusively determining the rights of the parties with regard to a matter in controversy, and no appeal, therefore, lies from such an order. A.I.R. (Vol. 20) 1933 Nag. 84=16 Nag. L.J. 17=29 N.L.R. 121=141 Ind. Cas. 841.

——Ss. 2 (2) and 47—Order accepting or refusing security bond.

An order accepting or refusing to accept a security bond is not appealable either as a 'decree' under S. 2 (2), or under the provisions of S. 47, Civil P.C. A.I.R. (Vol. 19) 1932 Lah. 120=32 P.L.R. 806=136 Ind. Cas. 792.

——Ss. 2 (2) (a) and 14 — Adjudication—When decree.

Where an adjudication is intended to finally dispose of the rights of the parties with regard to a matter in controversy in a suit, it is a decree and appealable as such. A.I.R. (Vol. 18) 1931 Mad. 471=60 M.L.J. 167=33 L.W. 143=54 Mad. 337= 1931 M.W.N. 590=132 Ind. Cas. 654.

——S. 2 (2) and Agra Tenancy Act, S. 3 (14)—Relative.

Definition of decree in S. 3 (14), Agra Tenancy Act (3 of 1926), gives a considerably enlarged meaning to "decree" as compared with "decree" defined in S. 2 (2), Civil P.C. A.I.R. (Vol. 21) 1934 All. 100 =12 R.D. 905=L.R. 14 A. 715 Rev.=146 Ind. Cas. 81.

——S. 2 (2) (b)—"Default"—Meaning of—If includes all kinds of default.

The word "default" in S. 2 (2) (b) of the C. P. Code is not qualified by any adjective and there is no reason why any words should be imported in the section so as to confine its operation to dismissals for default in appearance only. It would include other defaults as well, like default of prosecution. I.L.R. (1949) A. 391=1948 A. W.R. (H.C.) 320=A.I.R. 1949 All. 261.

——S. 2 (2) (b)—"Default"—Meaning of.

Word 'default' in S. 2 (2) (b) does not necessarily mean default of appearance. It also includes default of prosecution. Consequently, an order dismissing appeal for non-prosecution does not amount to a decree. The mere fact that a decree was prepared by the Court will not convert an order which did not amount to a decree into a decree. A.I.R. (Vol. 29) 1942 Oudh 362=1942 O.W.N. 206=199 Ind. Cas. 835=1942 A.W.R. C.C. 156.

——S. 2 (2)—Explanation—Preliminary and final decree—Relation between.

Per *Dhavle, J.*—The function of the final decree is merely to re-state and apply with precision what the preliminary decree has ordained, and the final decree is not only based on but is also controlled by the preliminary decree and cannot travel beyond it. A.I.R. (Vol. 27) 1940 Pat. 204=19 Pat. 1=6 B.R. 653=188 Ind. Cas. 337.

——S. 2 (2), Explanation—Preliminary or final decree—Test.

There is nothing illegal in passing more than one final decree.

No conclusive reference as to the preliminary or final character of a decree can be drawn from the mere circumstance that the Court failed to provide for any further hearing. The language of the decree has to be looked into in each case. A. I.R. (Vol. 17) 1930 Mad. 528=53 M. 378=59 M.L.J. 102=32 L.W. 329=131 Ind. Cas. 160.

——S. 2 (2), Explanation—Preliminary decree—Character of.

A preliminary decree must define the rights of the parties, though it does not necessarily lead to a final and complete disposal of the case. 17 N. N.L.R. 66=62 Ind. Cas. 467=A.I.R. 1921 Nag. 108.

——S. 2 (2) Expl.—Preliminary decree—Specific performance—Suit for—Conditional decree—Nature of.

A decree in a suit for specific performance of a contract though conditional in form, is not a preliminary decree. A preliminary decree can only be drawn up in those cases for which express provision is made in the Code. 51 Ind. Cas. 442 (Cal.).

——S. 2 (2) Expl —Preliminary decree—Effect of—Proceedings after—Nature of—Death of defendant—Final decree—If void.

The proceedings between a preliminary and final decree are proceedings in suit and a final decree against a defendant dead at the time is void. (1919) Pat. 105=4 Pat. L.J. 240=50 Ind. Cas. 529 (F.B.).

——S. 2 (2) Expln.—Preliminary and final decree—Supplemental final decree—Duty of Court to pass.

Where pending an appeal from a preliminary decree subsequent proceedings were stayed by the appellate Court in respect of a portion of the joint property, and the lower Court passed a final decree wi h regard to the rest of the property, and after the disposal of the appeal, one of the parties applied for a Court in respect of a portion of the joint property final decree in respect of the portion omitted but the Court refused. *Held*, that the trial Court had refused to exercise jurisdiction vested in it, inasmuch as it was quite competent to deal with as much of the suit as had not been already dealt with in the final decree and to make a supplementary final decree in regard to the joint business. 44 Ind. Cas. 671 (Cal.).

——S. 2 (2) Expl.—Preliminary decree—Rejection of plaint in limine.

Where a plaint is rejected by the Court to which it is presented as being void and that no proceedings could be had on it as the decree on the plaint was set aside for fraud the decision amounts to a preliminary decree and a second appeal would lie against the order of the Lower Appellate Court setting aside the preliminary decree. 1 Pat.L.W. 499=39 Ind. Cas. 791.

——S. 2 (2) Expl.—Preliminary decree—Meaning of—Finding in issue of limitation.

The wording of the definition of "decree" in S. 2, C.P.C., (1908) is very wide, but it cannot be said that it was ever intended to allow a separate appeal against each and every decision on each and every issue in a case. A finding by the first Court on the issue as to limitation in favour of the plaintiff when there is another issue to be decided, does not amount to a "decree." It is not a preliminary decree in the ordinarily accepted technical sense and as such does not debar an appeal against the decree in the suit because the defendant did not appeal against it. 7 P.R. 1917=39 Ind. Cas. 100.

——S. 2 (2) Expl.—Preliminary decree—Decision on preliminary issue.

A decision on a preliminary issue merely enabling the plaintiff to go on with the suit, is not a preliminary decree as defined in S. 2 (2) as it does not decide any of the matters in controversy, in the suit. 9 Bur.L.T. 119=36 Ind. Cas. 431.

——S. 2 (2), Explanation—Preliminary and final decree—Distinction.

The preliminary decree is not dependent on the final one but the latter is really dependent and subordinate to the former, which is not extinguished by the passing of the finnal decree but on the contrary is given effect to by the final one. 21 C.W.N. 1174=1 Pat.L.J. 406=1 Pat.L.W. 13=35 Ind. Cas. 873 (F.B.).

——S. 2 (2) Expl.—Preliminary decree—What is—Order dissolving partnership as from a certain date.

The C.P. Code makes no provision for something which is neither a decree nor an order, nor anything which is both; nor does is prove that one adjudication by the Court can be resolved into diverse elements, some of which are decrees and some orders. The question is one of substance, whether an adjudication is a decree or order. In a suit for taking accounts of a partnership, the trial Judge made an order declaring the partnership as dissolved from a particular date and ordered that an enquiry be made by the referee as to who were the partners and as to dealings of the partners with the assets of the partnership. No appeal was preferred against this adjudication. The inquiry was made, accounts were taken and a final decree was passed. In an appeal against the final decree, the appellant contended *inter alia*, that the trial Judge had no jurisdiction to refer the question as to who were the partners. *Held*, that the former adjudication of the trial Judge was a "decree" in so far as it declared the rights of the parties. The appellant were precluded from disputing its correctness by reason of their omission to appeal against it. The adjudication did not cease to be a decree, because a subordinate part of it, if correctly made, might have been separately made as an order. 42 Cal. 914=42 I.A. 91=19 C.W.N. 449=17 M.L.T. 312=2 L.W. 377=21 C.L.J. 419=13 A.L.J. 540=17 Bom.L.R. 432=29 M.L.J. 70=(1915) M.W.N. 485=28 Ind. Cas. 710 (P.C.).

——S. 2 (2) Expl.—Preliminary decree—Finding of the factum of being an agriculturist.

An order that a Court will proceed to hear a suit on the merits is not an order which should be immediately followed by a decree. A finding that a party is or is not an agriculturists is not a judgment. A decree based upon such a finding is not a legal decree. But if the finding necessarily involves a direction that an account be taken between the parties in the manner provided by S. 13 of the Dekkhan Agriculturists Relief Act, it amounts to a preliminary decree and is appealable. 39 Bom. 422=17 Bom.L.R. 324=28 Ind. Cas. 589.

——S. 2 (2) Expl.—Preliminary decree—Decision on issue as to res judicata.

A decision that a matter is not *res judicata* and that therefore the trial can proceed, is not a preliminary decree and no appeal lies from such a decision. 39 Bom. 421=17 Bom.L.R. 271=28 Ind. Cas. 461.

——S. 2 (2) Expl.—Preliminary decree—What is—Decision on issue.

The "matter in controversy in suit" in S. 2 (2) refers to the subject matter of the litigation and should not be understood in its wider sense, so as to include a decision in plaintiff's favour on the issue of his *locus standi* to sue. Such a decision is not a preliminary decree and is not appealable. Mere omission to style an order a preliminary decree or to embody it as such does not negative the party's right to appeal. There should be only one preliminary decree in a suit, to be followed by one final decree. A preliminary decree ascertains what is to

be done while the final decree states the result achieved by means of the preliminary decree. The cases where the Legislature contemplates a preliminary decree are specified in O. 20. Rr. 12 to 18. 20 C.L.J. 476=19 C.W.N. 755=27 Ind. Cas. 317.

——S. 2 (2) Expl.—Preliminary decree—Suit for possession and mesne profits—Decision as to possession.

The decision as to possession in a suit for possession and mesne profits is a preliminary decree within S. 2, C.P.C., having regard to O. 20 R. 12 (2) C.P.C. 19 C.L.J. 346=25 Ind. Cas. 436.

——S. 2 (2)—Explanation—Preliminary issues of limitation—Decision.

The decision in plaintiff's favour upon preliminary issues of limitation and *res judicata*, is not a decree and so not appealable. 18 C.L.J. 78=21 Ind. Cas. 387.

——S. 2 (2) Expln.—Partition suit—Preliminary decree—Subsequent events—Second preliminary decree—Permissibility.

It is not in itself an impossibility that there should be a second preliminary decree passed in a suit for partition, if such second decree is based upon facts or circumstances alleged to have come into existence after the passing of the first preliminary decree. If a second preliminary is passed, such decree is appealable. 11 A.L.J. 120=16 Ind. Cas. 372.

——S. 2 (2) Expln.—Preliminary decree—Decision on preliminary issue of res judicata.

The decree on a preliminary issue based on the point of *res judicata* is not a preliminary one and hence is unappealable. 10 A.L.J. 78=15 Ind. Cas. 566.

——S. 2 (2) Expl.—Preliminary decree—Decision on issue of res judicata.

A decision of a Civil Court passed on a preliminary issue of *res judicata* not being a perliminary decree is not appealable. 191 P.L.R. 1912=218 P. W. R. 1912=16 P. R. 1913=15 Ind. Cas. 563.

——S. 2 (2)—Expln.—Preliminary decree—Decision on preliminary issue that plaintiff is an agriculturist.

In a redemption suit the plaintiffs contended that they were agriculturists. The preliminary issue, whether the plaintiffs were agriculturists was determined by the Sub-Judge in favour of the plaintiffs. *Held*, the decision was a preliminary decree within S. 2, C.P. Code and appealable. 12 Bom.L.R. 762 =7 Ind. Cas. 966.

——S. 2 (3)—'Decree-holder'—Assignee from decree-holder.

By taking an assignment from a person in whose favour the decree was passed, the assignee does not become a decree-holder with the meaning of S. 2 (3). A.I.R. (Vol. 32) 1945 Oudh 225=20 Luck. 414= 1945 O.W.N. 106=1945 A.W.R. (cc) 81=1945 A.W.R. Rev. B. 33.

——S. 2 (3)—'Decree-holder'—Assignee of decree.

The definition of a "decree-holder" in the Civil Procedure Code of 1882 included a transferee of a decree and those words have now been omitted in S. 2 (3) of the Code of 1908. But that omission is made good by the newly added S. 146. A.I.R. (Vol. 32) 1945 Bom. 380=I.L.R. (1945) Bom. 463=47 Bom. L.R. 104.

——S. 2 (3)—'Decree-holder'—Assignee of decree—Position and rights of.

Order 21, R. 16 Civil P. C., does not compel the assignee of a decree to come forward and have himself substituted on the record in place of the judgment-creditor. It gives him an option to do so; he has a right to bring himself on record if he wants to see that his rights are enforced, but he is not bound to do so. And the *darkhast* which is regularly filed by the holder of the decree, cannot come to an end because, pending execution the judgment-creditor has assigned his interest in favour of another person. An assignee does not become a holder of the decree within the meaning of O. 21, R. 16 and S. 2, Civil P. C., unless he applies to the Court to bring himself on record in place of the judgment-creditor. A.I.R. (Vol. 22) 1935 Bom. 331=37 Bom. L.R. 489=159 Ind. Cas. 358.

——S. 2 (3)—'Decree-holder'—Attaching creditor.

Decree-holder does not include an attachnig creditor. 5 L. R. A. Civ. 629=80 Ind. Cas. 947=A.I.R. 1925 All. 123.

——S. 2 (3)—'Decree-holder'—Benami character of—Plea as to—Permissibility.

There is no provision in the Code which allows a person to come forward and say that the decree-holder is a mere nonentity and a *benamidar* of the applicant and that he, the applicant, is in substance and in fact the holder of the decree. A.I.R. (Vol. 27) 1940 Pat. 472=21 P.L.T. 146=6 B.R. 357=186 Ind. Cas. 355.

——S. 2 (3)—'Decree-holder'—Defendant in suit for specific performance.

Definition of "decree-holder" in S. 2 (3) is wide enough to cover the case of a defendant in a suit for specific performance. A.I.R. (Vol. 19) 1932 Cal. 579=59 Cal. 501=36 C.W.N. 172=139 Ind. Cas. 230.

——S. 2 (3)—Decree-holder—Defendant in suit for specific performance.

Where the plaintiff got a decree for specific performance of an agreement to sell immoveable property against defendant but did not want to execute the decree:

Held, that the defendants were also 'decree-holders' within S. 2 (3) of the Code and as such could take out execution of the plaintiff. 46 Bom. 990=24 Bom. L.R. 496=67 Ind. Cas. 667=A.I.R. 1923 Bom. 26.

——S. 2 (3)—'Decree-holder'—Party other than plaintiff—If can be.

If is not necessary that a decree-holder in a decree for the sale of immoveable property should necessarily have been the plaintiff in the case. A sub-mortgagee and a puisne or a prior mortgagee sometimes become decree-holder as against the judgment-debtor in suits brought for foreclosure or sale of mortgaged property or for redemption thereof, as on the happening of certain contingencies, they acquire the right to have the property sold to discharge the

amount declared to be due to them. 116 Ind. Cas. 212=A.I.R. 1929 Lah. 492.

——S. 2 (3)—'Decree-holder'—Person not party to decree.

A decree-holder need not be a party to the decree. It is enough if the decree confers upon him some right enforceable under the decree. A.I.R. (Vol. 19) 1932 Mad. 193=61 M.L.J. 904=35 L.W. 22 =136 Ind. Cas. 771.

——S. 2 (3)—Decree-holder—Person not party to suit—Right of Government to execute order for costs awarded in case where Government undertook the defence of its Officer.

It is clear from the definition of 'decree-holder' in S. 2 (3) of the C. P. Code, that a person in whose favour an order capable of execution has been made is also a decree-holder and that a decree-holder need not be a party to the suit. He may be any person. It is enough if the decree confers some right enforceable under the decree upon some person mentioned in it. Hence, where the Government undertakes the defence in pursuance of r. 8 of O. 27, C. P. Code, of a Tahsildar who is sued for damages for an alleged illegal arrest and the suit is dismissed with costs and the order provides for the realisation of the costs by Government, the latter is entitled to file an execution application for its realisation. I.L.R. (1947) A. 191=1947 A.L.W. 201=1947 A.W.R. (H.C.) 89=1947 A.L.J. 79 =A.I.R. 1947 A. 390.

——S. 2 (4)—District Court—Chief Court of Sind if a District Court.

The Chief Court of Sind is not a 'District Court' within the meaning of S. 2 (4) of the C. P. Code. I.L.R. (1947) Kar. 164=A.I.R. 1948 Sind 89.

——S. 2 (4)—'District Court'—High Court original side.

Though the word "District" in the C. P. Code, does include the local limits of a High Court in its ordinary original civil jurisdiction, still it is not legitimate to construe the words "District Court" wherever they appear to mean and include a High Court in its ordinary original civil jurisdiction. 12 C.W.N. 446 Diss. from. 45 C.L.J. 71=100 Ind. Cas. 331=A.I.R. 1927 Cal. 290.

——S. 2 (5)—Applicability to Provincial Insolvency Act.

The definition of the term "foreign Court" as contained in the Code is not applicable to all other enactments. In Provincial Insolvency Act, there is nothing as regards the definition of the term and though for the purpose of sending processes or of execution, provision is made in the Code, it is only for those purposes alone. 30 M.L.W. 531=A.I.R. 1929 Mad. 900=57 M.L.J. 393.

——S. 2 (5)—Foreign Court—Court in Ceylon.

Under International Law two provinces which are part of the same empire may be treated as foreign to each other. The Ceylon Court being outside the Courts of British India is a foreign Court as defined by S. 2, C.P.C. and its judgments are foreign judgments and the recognition of such judgments by a Court in British India would be subject to the general rules which govern foreign judgments. 32 Mad. 469=19 M.L.J. 457=3 Ind. Cas. 190.

——S. 2 (5)—Scope—If exhaustive.

The definition of "foreign court" in the Code is for the purposes of the Code only, and no further. 36 Cal. 233=13 C.W.N. 346=1 Ind. Cas. 927.

——S. 2 (5)—'Foreign Court'—Courts in Berar.

Per *Full Bench*; *Niyogi J.*, contra.—The Courts in Berar which have been established or continued by the authority of the Governor-General in Council are not "foreign Courts" within the meaning of the Civil Procedure Code and *vice versa*.

Per *Niyogi J.*—The Berar Courts are indeed British Courts but not British Indian Courts and as such they are foreign Courts. The British Indian Courts do not possess the inherent authority to adjudicate on a matter relating to property situated in Berar and *vice versa*. A.I.R. (Vol. 28) 1941 Nag. 36=I.L.R. (1941) Nag. 1=1941 N.L.J. 1.

——S. 2 (5)—'Foreign Court'—Definition—Scope of.

The definition of 'Foreign' Court' in S. 2 of the Code of Civil Procedure (Act 14 of 1882) is for the purposes of that Code only, and does not apply to extend the jurisdiction of the High Court for the purpose of restraining suits pending in Courts outside its jurisdiction under the Charter. (1907) 13 C.W.N. 346=36 C. 233=1 Ind. Cas. 927.

——S. 2 (5)—"Foreign Court"—Supreme Court of Mauritius.

The Supreme Court of **Mauritius** is a foreign Court within the meaning of S. 2, C. P. Code, and as such its judgment passed **in absentem** against a defendant, who at the time of the suit or judgment was neither resident in, nor subject of, the same country are not enforceable against him in a Court in British India. A person is no less a 'foreigner' within the meaning of the cases above referred to. because he is the subject of the sovereign, who is both the sovereign of the country in which the judgment was passed and the country in which it was sought to be enforced. 67 L.T.N., S. 767, ref. to. (1902) 6 C.W.N. 829=29 C. 509.

——S. 2 (6)—'Foreign judgment'—Meaning of.

Judgment in the expression "foreign judgment" as used in S. 2 (6) has the English meaning and not the meaning (as regards the word judgment) given by S. 2 (9). That is, the term "foreign judgment" means the decree or order of a foreign Court as defined in S. 2 (4). A.I.R. (Vol. 19) 1932 Mad. 661=62 M.L.J. 566=35 L.W. 763=138 Ind. Cas. 648.

——S. 2 (6)—Foreign Judgment—Judgment of Ceylon—Territorial legislation, scope of—Private international law—Submission to jurisdiction of foreign Court—Estoppel.

No amount of mere territorial legislation can enforce its recognition beyond the territory itself; in the absence of any express enactment the ordinary presumption that the jurisdiction of all Courts is properly and strictly territorial would not be displaced. For the purposes of private international law two provinces which are part of the same Empire may be treated as foreign to each other. The Ceylon Court being outside the limits of British India is a foreign Court as defined by S. 2, C. P. Code (14 of 1882) and its judgments are foreign judgments and the recognition of such judgments by a Court in

British India would **prima facie** be subject to all the rules which govern foreign judgments. A foreign judgment passed **in absentem** against a defendant who was a native of British India and not resident in the foreign territory at the time of the action will not be binding on him, if he had not otherwise submitted to the jurisdiction of the foreign Court. It is not even necessary that submission must be by an act done in the course of the action; it can be constituted by a contract to that effect entered into between the plaintiff and the defendant previously to the action. A defendant who has taken his chance of a decision in his favour cannot afterwards take exception to the jurisdiction of the Court. A defendant appeared in obedience to the process of the foreign Court and applied for leave to defend the action, without raising any objection to its jurisdiction. The action was one on a negotiable instrument under the provisions of summary procedure relating thereto.

Held:—That the defendant voluntarily submitted himself to the jurisdiction of the foreign Court.

Obiter.—A judgment of a foreign Court which does not decide upon the merits of the dispute—for instance, if a suit is dismissed as barred by limitation—cannot be pleaded as a bar to a suit instituted in the Court of the plaintiff's domicile on the same cause of action. (1908) 19 M.L.J. 457=32 M. 469=3 Ind. Cas. 190.

——S. 2 (6)—'Foreign Judgment'—Judgment of King's Bench of the High Court of Justice in England.

Judgment of the King's Bench Division of the High Court of Justice in England is a 'Foreign Judgment' within S. 2. (1899) 28 C. 641=5 C.W. N. 741.

——S. 2 (9)—"Judgment"—What is—Court making diary note rejecting judgment-debtor's application and ordering final decree to be drawn up—Judge signing typed decree form on reverse—Diary note, if Judgment.

A preliminary decree for sale in a mortgage suit was passed on 24th August 1934. Early the next year, 1935, the Court had before it two applications, one filed by defendant asking for more time in which to pay the decretal amount, and one filed by the mortgagee asking for final decree for sale. The two applications were heard together and on 8th May, 1935, the Judge recorded in the diary the following note: "No enlargement of time can be given....Draw up final decree as applied for by the decree-holder." A final decree for sale was drawn up and signed. As the Court had no printed decree form, a form was typed out and filled up. It did not contain the usual note at the bottom. "Given under my hand and the Seal of this Court this.....day"; but at the bottom of the reverse was merely the signature of the Judge with the words "Sub-divisional Judge, Insein. 29th June 1935." On 25th June 1938 the decree-holder applied for sale of the mortgaged property, and was met with the objection that the final decree was passed on 8th May, 1935, more than three years before the date of the application for sale:

Held, that the diary note of 8th May must be regarded as a judgment within the meaning of S. 2. The decree which had no date of its own must, by virtue of O. 20, R. 7, Civil P. C., be held to be dated on the day on which judgment was pronounced, *i.e.*, 8th May, 1935, and this being so, the application for execution was time-barred. A.I.R. (Vol. 26) 1939 Rang. 294=1940 Rang. L R. 72=183 Ind. Cas. 894.

——S. 2 (9) and (14)—"Judgment"—"Order"—Order containing reasons for decision—No formal order drawn up—Effect—Allahabad High Court Rules, Chap. 3,-R. 2.

Where the only order on the record of proceedings contains not only the grounds on which the decision is based but contains also "the formal expression"; and the decision itself, it should be taken to be of a dual character, being both the "judgment" and the "order" as defined in the Civil P. C. and if the appellant files a copy of such an order with his memorandum of appeal he should be considered to have substantially complied with R. 2, Chapter 3, of the Rules of the Allahabad High Court.

Necessity of amending either O. 41, R. 3, Civil P. C., or Chapter 3, R. 2 of the Allahabad High Court Rules, pointed out. A.I.R. (Vol. 20) 1933 All. 762=1933 A.L.J. 1301=56 A. 27=147 Ind. Cas. 865.

——S. 2 (9)—"Judgment"—What is—Shorthand notes.

The shorthand notes dictated by, but never approved by, the Judge, cannot be considered as part of his actual judgment. 51 Bom. 267=100 Ind. Cas. 941 =29 Bom. L.R. 126=A.I.R. 1927 Bom. 113.

——S. 2 (9)—"Judgment"—What is.

A bare statement, without reasons assigned, that there is nothing to show a fact, which admissible and unimpugned documents on the record purport to evidence, is not a judicial decision at all. (1902) 4 Bom. L.R. 587.

——S. 2 (10)—"Judgment-debtor"—Assignee—Judgment-debtor.

The definition of judgment-debtor does not include the assignee of the judgment-debtor. 11 M.L.T. 144=(1912) M.W.N. 176=13 Ind. Cas. 659.

——S. 2 (10)—"Judgment-debtor"—Mortgage suit—Title paramount set up by one defendant—Question left open in preliminary decree—Final decree—No reservation of the question of title paramount—Defendant pleading paramount title —If "judgment-debtor."

In a suit on a mortgage to recover the mortgage amount by sale of the hypotheca, one of the defendants, the 6th defendant, set up her own title to one of the properties as a defence to the mortgagee's suit. A preliminary decree in favour of the mortgagee was passed, but the question of title of that defendant was left open specifically. Subsequently a final decree was passed against all the defendants in which the clause about the reservation of the question of the 6th defendant's title to that item of property was not repeated. The hypotheca was brought to sale and the sale confirmed in favour of the decree-holder and delivery also was effected. Long after the 30 days after the date of sale, the 6th defendant filed an application to set aside the order of delivery and to direct re-delivery of the property to her.

Held, that the 6th defendant was a judgment-debtor within the meaning of section 2 (10) of the Code of

Civil Procedure as a final decree capable of execution had been passed against her. Even if the sale is a nullity and the judgment-debtor has no saleable interest, article 166 of the Limitation Act applies and the judgment-debtor must have it set aside within 30 days of the date of sale and as the application of the judgment-debtor was filed long after the 30 days allowed it was barred by limitation. 61 L.W. 373=1948 M.W.N. 469=A.I.R. 1948 Mad. 301=(1948) 1 M.L.J. 422.

——Ss. 2 (10)—"Judgment-debtor"—Surety for judgment-debtor.

Where a person has stood surety for costs and a decree for costs has been made, he is a judgment-debtor within the meaning of S. 2 (10), Civil P. C. and he is competent to apply for stay of execution of the decree pending an appeal from it. A.I.R. (Vol. 21) 1934 Bom. 252=36 Bom. L.R. 499=58 B. 485=151 Ind. Cas. 78.

——S. 2 (11)—'Legal representative'—Administrator de son tort.

The definition of legal representative given in S. 2 (11), Civil P. C., is wide; it is clearly not restricted to executors, administrators and heirs for it includes even an administrator *de son tort*. A.I.R. (Vol. 24) 1937 Sind 318=172 Ind. Cas. 805.

——S. 2 (11)—'Legal representative'—Auction-purchaser.

The auction-purchaser in execution of a decree for sale on a mortgage of an under proprietary tenure cannot be called the legal representative of the original under-proprietor because the term legal representative only denotes the class of persons on whom the status of a representative is fastened by reason of the death of a person whose estate they are held to represent. Further such an auction-purchaser cannot be called the representative of the original under-proprietor in respect of a liability arising subsequent to the mortgage on which the decree for sale is founded and in execution of which decree he becomes the purchaser though he is certainly a representative of the under-proprietor *qua* the rights and liabilities which stood on the date of the mortgage. 6 O.W.N. 469=117 Ind. Cas. 452=A.I.R. 1929 Oudh 353.

——S. 2 (11)—Legal Representative—Benamidar.

A *benamidar*, in some sense is a trustee for the real owner and his sons having some interest can succeed to the trusteeship and he can be considered to be his legal representative within the meaning of S. 2 (11) Civil P. C. A.I.R. (Vol. 24) 1937 Mad. 101=(1937) 1 M.L.J. 33=45 L.W. 171=1936 M.W.N. 1008=168 Ind. Cas. 937.

——S. 2 (11)—'Legal representative'—Beneficial owner—If legal representative of benamidar.

Under O. 22, R. 3 read with S. 2 (11), the real owner of a property cannot represent the estate of a *benamidar* and so cannot be added as the legal representative of a deceased *benamidar* in a suit filed by such *benamidar* for recovery of rent due in respect of a property belonging to the real owner. A.I.R. (Vol. 31) 1944 Mad. 27=56 L.W. 532=(1943) 2 M.L.J. 362=1943 M.W.N. 598=211 Ind. Cas. 298.

——S. 2 (11)—Legal representative—Beneficial owner.

The expression "legal representative" means a person who in law represents the estate of a deceased person and not necessarily the beneficial owner of that estate. 42 Mad. 76=35 M.L.J. 632=9 L.W. 26=(1918) M.W.N. 107=49 Ind. Cas. 11.

——S. 2 (11)—Legal Representative—Donee.

Application for probate—Widow of testator producing codicil under which she was legatee and claiming probate—Applicant granted probate and codicil held not genuine—Appeal by widow—During pendency gift by her of legacy to *A*—Widow dying—*A's* application for substitution:

Held, that *A* was the legal representative of the widow within the meaning of S. 2 (11) and was entitled to be substituted as party under O. 22. A.I.R. (Vol. 19) 1932 Cal. 206=35 C.W.N. 1028=136 Ind. Cas. 543.

——S. 2 (11)—Legal representative—Executor de son tort.

Executor *de son tort* need not be added when there is other legal representative. 30 C.W.N. 565=96 Ind. Cas. 695=A.I.R. 1926 Cal. 825.

——S. 2 (14)—Legal representative—Executor de son tort.

An inermeddller with the property of the deaased is liable to the extent of the property taken by him. The onus is on the plaintiff, primarily to show that assets have come into the hands of the defendant. 3 Pat. L.W. 302=(1918) Pat. 86=42 Ind. Cas. 122.

——S. 2 (11)—Legal Representative—Heir and legatee.

One *D* died leaving a will and two sons, *H* and *R*. By his will he appointed his son *H* and one *N* as joint executors. The landlord of *D* who had obtained a rent decree against *D* in his lifetime took out execution of this decree after his death making his two sons parties to the execution proceedings as his legal representatives, and the property was sold before the executors of *D* obtained the grant of the probate of the will. It was contended that as the executors of the will of *D* were not made parties to the proceedings in execution of the decree for rent of the tenure. the tenure, did not pass to the auction-purchasers by the auction sale:

Held, that as the only plea taken was that in law the tenure did not vest in the sons and as it was not even alleged that the two sons were not in possession of the estate of the deceased, that they did not intermeddle with the estate of the deceased, the auction-sale passed the tenure to the auction-purchaser. A.I.R. (Vol. 31) 1944 Cal. 42=77 C.L.J. 155=211 Ind. Cas. 388.

——S. 2 (11)—Legal representative—Heir of Hindu coparcener.

There is no doubt that in a joint family the law of inheritance does not apply to the joint family property, and on the death of a coparcener the property passes to the remaining coparceners by right of survivorship, but even in a joint family a coparcener may be possessed of separate property which will be governed by the law of succession. Where a suit is brought against such coparcener not as a

member of the joint family, but in his individual capacity, his legal heirs can rightly be brought on record as his representatives after his death. A.I.R. (Vol. 27) 1940 All. 99=1940 A.L.J. 32=1940 O.L.R. 132=I.L.R. (1940) All. 153=186 Ind. Cas. 542 (F.B.).

——S. 2 (11)—"Legal representative"—Heir or legatee.

The estate which devolves upon an heir or a legatee by right of inheritance or on the basis of a will is the estate which belonged to the deceased and it is this estate which comes into the hands of the heir or legatee upon the death of the deceased. Therefore, the heir or legatee represents in law the estate of the deceased which has come to his hands and can be a legal representative of the deceased within the meaning of S. 2 (11). A.I.R. (Vol. 30) 1943 Oudh 24=1942 O.W.N. 636=15 R.O. 159=203 Ind. Cas. 125.

——S. 2 (11)—Legal representative—Heir in possession.

An heir in possession of the deceased's property is liable to the extent of the assets of the deceased in his hands. 36 All. 439=12 A.L.J. 785=24 Ind. Cas. 200.

——S. 2 (11)—Legal representative—Heir of mortgagor who has no equity of redemption.

Heirs of deceased mortgagor whose equity of redemption has already been sold are not his legal representatives relating to that property but the proper representatives are the purchasers of the equity of redemption. 95 Ind. Cas. 904=1926 M.W.N. 276.

——S. 2 (11)—"Legal representative"—Heirs of intestate Parsi.

Heirs of intestate Parsi who intermeddle with his estate are his legal representatives and proper parties to suit on mortgage by the deceased Parsi. 29 Bom. L.R. 900=104 Ind. Cas. 794=51 Bom. 771=A.I.R. 1927 Bom. 474.

——S. 2 (11)—"Legal representative"—Heir of Parsi.

An heir of a Parsi is not his legal representative. A.I.R. (Vol. 25) 1938 Bom. 6=39 Bom.L.R. 1156 =I.L.R. (1938) Bom. 64=172 Ind. Cas. 919.

——S. 2 (11)—"Legal representative"—Hindu brother.

When a member of a Hindu joint family, who has been sued on a pro-note, dies, and it is contended that his brothers can be impleaded as legal representatives, it must be shown *prima facie* that the deceased has an estate before the first definition in S. 2 (11), can be applied. A.I.R. 1930 Mad. 575.

——S. 2 (11)—Legal representative—Hindu coparcener—Surviving coparceners—If legal representative.

Where a member of a joint Hindu family dies, the surviving father, son and the widow are his legal representatives for the purpose of the execution of a decree obtained against him. A.I.R. (Vol. 28) 1941 Lah. 447=43 P.L.R. 576=14 R.L. 335=198 Ind. Cas. 569.

——S. 2 (11)—'Legal representative'—Hindu coparcener.

The last portion of the definition of a legal representative in S. 2 (11) is wide enough to cover case of a co-parcener who gets property by survivorship on the death of a co-parcener who sues or is sued in representative character. A.I.R. (Vol. 25) 1938 All. 163=1938 A.L.J. 56=10 R.A. 560=1938 A.L.R. 264=174 Ind. Cas. 307.

——S. 2 (11)—"Legal representative"—Hindu coparcener—Joint Hindu family—Decree against one member—Surviving coparceners—Liability to pay decree against deceased judgment-debtor.

Surviving co-parceners of a joint Hindu family are not bound by the decree against one member of the family and on no construction of the term "legal representatives" can members of a joint Hindu family be brought within the definition as contained in S. 2, Cl. 11. A.I.R. (Vol. 24) 1937 Oudh 327= 1937 O.L.R. 245=1937 O.W.N. 516=13 Luck. 241 =168 Ind. Cas. 268.

——S. 2 (11)—Legal representative—Hindu coparcener.

A person on whom the estate of the deceased devolves would be the legal representative. If the deceased had left an estate then the surviving members of joint family would certainly be his legal representatives. A creditor of the deceased co-parcener is entitled to a decree against the surviving brother of the deceased without giving any proof that he has got possession over any property belonging to the deceased. When he applies for the execution of his decree, then the question will come up for consideration whether the deceased has left any assets. If the decree-holder can prove that the surviving co-parcener got any assets then he would be entitled to execute his decree against surviving co-parcener or co-parceners. A.I.R. (Vol. 22) 1935 All. 390=1935 A.L.J. 293= 1935 A.L.R. 694=1935 A.W.R. 263=157 Ind. Cas. 51.

——S. 2 (11)—Legal representative—Hindu Coparcener.

Surviving co-parceners in a Hindu joint family are not "legal representatives". 42 Bom. 504 and Mayne's Hindu Law, 8th edn. R. 329. Ref. 2 Lah. 114=61 Ind. Cas. 628=3 L.L.J. 349=73 P.L.R. 1921=A.I.R. 1921 Lah. 34.

——S. 2 (11)—Legal representative—Daughter-in-law.

Where a mortgagee brought the widowed daughter-in-law of the mortgagor on his death as his legal representative while his widow was still alive and purchased the mortgaged properties in execution sale, *held* that the daughter-in-law not being the proper legal representative, the sale was not binding on the reversioners. 29 Ind. Cas. 6 (Mad.).

——S. 2 (11)—Legal representative—Hindu father.

Where a father and son are co-parceners and where after the son's undivided share is attached in execution of a decree against him alone, the son dies the equity of redemption in the property in respect of which the charge is created by the attachment vests in the father and the father is the legal representative of his deceased son and the decree can be executed against him. 48 All. 4=23 A.L.J. 877=6 L.R.A. (Civ.) 511=89 Ind. Cas. 291=A.I.R. 1926 All. 157.

——S. 2 (11)—Legal representative—Hindu Manager.

Where a managing member sues and the suit refers to joint family estate, it is really a suit in a representative character for all the members of the family. When he dies, the next managing member can come in, as the legal representative. 42 B. 504, not Appr. 21 M.L.W. 21=86 Ind. Cas. 178=A. I. R. 1925 Mad. 456.

——S. 2 (11)—Legal representative—Hindu reversioner.

The words 'Legal representatives' must be interpreted in the wide sense so as to include a person whose rights would be affected or might be affected if he survived the widow who had sued her deceased husband. I.L.R. (1950) A. 120=1949 A.L.J. 191 =A.I.R. 1949 All. 604=1949 A.W.R. 303.

——S. 2 (11)—Legal representative—Hindu reversioner.

In a suit for a declaration of the invalidity of an adoption or alienation by a Hindu widow instituted by the presumptive reversioner, if the plaintiff dies the next presumptive reversioner has a right to continue the suit as legal representative. 38 Mad. 406=42 I.A. 125=17 M.L.T. 435=28 M.L.J. 535 =17 Bom.L.R. 458=19 C.W.N. 641=2 L.W. 596 =(1915) M.W.N. 555=21 C.L.J. 515=29 Ind. Cas. 298 (P.C.) [On appeal from 22 M.L.J. 395 =11 M.L.T. 307=(1912) M.W.N. 519=14 Ind. Cas. 209]. [For the main judgment by Lord Wrenbury in the above case *See* 39 Mad. 107=43 I.A. 20=29 M.L.J. 851=(1916) 1 M.W.N. 97=19 M. L. T. 147=3 L.W. 177=32 Ind. Cas. 373 (P.C.).

——S. 2 (11)—Legal representative—Hindu reversioner.

A Hindu reversioner seeking to continue a suit instituted by a nearer reversioner since deceased is not his legal representative within S. 2 clause 11 but he can be added as a party in a representative action under O. 1, Rr. 1, 8 and 10 of the Code. 25 M.L.T. 116=9 L.W. 166=(1918) M.W.N. 888=49 Ind. Cas. 268.

——S. 2 (11)—Legal representative—Hindu reversioner.

A suit for possession brought by a Hindu widow in a representative capacity as representing the estate does not abate on her death. The right to sue survives to the reversioners of the last male owner who are her legal representative under S. 2 (11), C.P.C. 1908 and as such are entitled to be brought on record. Cases discussed. 39 Mad. 382 =17 M.L.J. 186=27 Ind. Cas. 1001.

——S. 2 (11)—Legal representative—Hindu reversioner.

When a Hindu widow dies pending disposal of the suit instituted by her for recovery of certain property, the reversioners of her husband are her legal representatives entitled to continue the suit. 9 M. I. A. 540; 23 Cal. 636; 20 All. 341 foll. 33 All. 15=7 A.L.J. 960=7 Ind. Cas. 97.

——S. 2 (11)—Legal representative—Hindu son.

Where the deceased coparcener was the father of the family, who represented the joint family, his son is the person who is law represents the estate of the deceased. A.I.R. (Vol. 32) 1945 Bom. 126=46 Bom.L.R. 737.

——S. 2 (11)—"Legal representative"—Hindu son.

The son of a Hindu where there has been no appointment of an executor or administrater in law, represents the estate of his father and is, therefore, the legal representative within the meaning of S. 2 (11), and where there is an allegation that the estate of the father is in the hands of the son, the son is liable to to have a decree passed against him for the father's debt to be recovered only out of any assets of the father which come to his hands and are not duly accounted for. A.I.R. (Vol. 28) 1941 Bom. 23=42 Bom. L.R. 1066=I.L.R. (1941) Bom. 177=13 R. B. 240=192 Ind. Cas. 198 (F.B.).

——S. 2 (11)—Legal representative—Hindu son.

The claim of a son to be a legal representative within S. 2 (11) is not in any way negatived by S. 53, Civil P. C. A.I.R. (Vol. 28) 1941 Bom. 23= 13 R.B. 240=42 Bom.L.R. 1066=I.L.R. (1941) Bom. 177=192 Ind. Cas. 198 (F.B.).

——S. 2 (11)—Legal Representative—Hindu son.

The definition of the term "legal representative", as given in S. 2 (11), Civil P.C. includes the son who becomes owner of his father's property by virtue of survivorship, for, he does represent in law the estate of the deceased and at any rate it is he who intermeddles with the estate of the deceased. A.I.R. (Vol. 26) 1939 Pesh. 45=184 Ind. Cas. 456.

——S. 2 (11)—Legal representative—Hindu son —If legal representative of father—Joint Hindu family—If sons legal representatives for the purpose of execution against them.

Where an injunction obtained against a person without impleading his sons who formed a joint Hindu family with him, was sought to be executed, after the death of the person against the sons, held that it could not be executed against them in as much as they were neither parties to the suits nor legal representatives of the judgment-debtor. 42 Bom. 504=20 Bom.L.R. 660=46 Ind. Cas. 745.

——S. 2 (11)—Legal representative—Hindu widow.

A Hindu widow taking an interest in her husband's estate which devolves upon her under the Hindu Women's Rights to Property Act would be his "legal representative" within the meaning of S. 2 (11) of the Code of Civil Procedure, and is as such entitled to be brought on record as a person who in law represents the estate of her deceased husband who was a defendant in a suit. 225 Ind. Cas. 335=59 L.W. 189=1946 M.W.N. 301=A.I.R. 1946 Mad. 283=(1946) 1 M.L.J. 159.

——S. 2 (11)—Legal representative—Hindu widow.

Where a co-parcener in a joint Hindu family dies leaving movable property, his widow being one of the natural heirs, is his legal representative. A.I.R. (Vol. 31) 1944 Lah. 473=46 P.L.R. 292=18 R. L. 4=218 Ind. Cas. 167.

——S. 2 (11)—Legal representative—Holder of Impartible estate—Suit for specific performance of contract to alienate part of impartible estate against holder—Decree for compensation and not specific performance—Holder dying—In execution property attached in hands of his son—Son held was legal representative.

In a suit for specific performance of a contract against the holder of an impartible estate who had contracted to alienate a part of the estate, a decree for compensation instead of specific performance was passed. After his death the estate devolved on his son as his successor and the estate in his hands was attached in execution of the decree:

Held, that the decree was passed against the deceased in his representative capacity and that his successor was his legal representative within the meaning of S. 2 (11). Civil P. C. A.I.R. (Vol. 27) 1940 Nag. 278=1940 N.L.J. 275=I.L.R. (1941) Nag. 632=193 Ind. Cas. 598.

——S. 2 (11)—Legal representatives—Intermeddler. See EXECUTION—MERGER OF INTERESTS. (1948) 1 M.L.J. 82.

——S. 2 (11)—Legal representative—Intermeddler.

Where a mortgagee decree-holder has died leaving her daughter as lawful heir and collaterals who are not lawful heirs, the collaterals cannot be considered to be legal representatives of the deceased within the definition of that term given in S. 2 (11) if they are not shown to be in possession of the property which is the subject of the mortgage. Moreover, even if they are in possession the definition cannot help them. Because a person who has merely managed to obtain unlawful possession of the property of a deceased person should not be entitled to execute decrees in favour of the deceased on the strength of such possession, when he is not the lawful heir. A person who intermeddles with the property of a deceased person has been probably included in the definition of a 'legal representative' in the Civil P. C. merely to enable persons who wish to obtain relief against the property to proceed against it in the hands of such a person. This cannot affect the substantive rights of the lawful heirs. A.I.R. (Vol. 26) 1939 Lah. 321=41 P.L.R. 814.

——S. 2 (11)—Legal representative—Intermeddler.

When a person intermeddles with the property of the deceased he is a legal representative of the deceased for the purposes of procedure to the extent of the property with which he has intermeddled, but there is no principle of law which makes him the representative of the deceased so far as succession to the property of the deceased is concerned. The definition of "legal representative" in the Code of Civil Procedure is only for the purposes of procedure in instituting and defending suits. Any definition for the purposes of adjective law cannot alter the rule of substantive law and the mere fact that an intermeddler is joined as a party to the suit for recovery of possession cannot make a decree in that suit in any way binding on the real heir who is not a party to that suit and who later on gets a decree against the intermeddler declaring his superior right. 75 Ind. Cas. 114=A.I.R. 1924 All. 717.

——S. 2 (11)—Legal representative—Landlord—Right to represent estate of tenant.

A Zamindar, to whom, by village custom, the house and grove in the possession of his tenants, escheat on the latter's dying without heirs, is not his legal representative. 1 O.L.J. 86=23 Ind. Cas. 969.

——S. 2 (11)—"Legal representative"—Legatee of part of estate.

The persons or class of persons indicated by the expression "legal representative" would depend on the context. Subject to that qualification it includes properly appointed executors and administrators; it includes persons who have taken on themselves duties and responsibilities, which belong to the office of executor or administrator even though only in respect of part of the estate; it includes heirs-at-law, whether they take by succession or by survivorship; it includes reversioners where the action has been brought by or against the widow representing her husband's estate; it includes a universal legatee; it may perhaps in some cases and for some purposes include persons in *de facto* possession of the entire estate of the deceased; but it does not include trespassers; it does not include creditors who have received payments of the debts due from the estate of the deceased; it does not include persons dealing in the ordinary course of business with goods of the deceased received from another; it does not include persons who intervene merely for the purposes of preserving the goods of the deceased or providing for his funeral or for immediate necessities of his family; it does not include legatees of a part of the estate and it does not include those taking possession of the property of the deceased from the legatees of a part of the estate. 63 L.W. 388=1950 M.W.N. 311=A.I.R. 1950 Mad. 541=(1950) 1 M.L.J. 476.

——S. 2 (11)—Legal representative—Mahant—Succeeding to asthal—If legal representative of former Mahant.

A decree for removal of the defendant as mahant of a shrine on the ground of mismanagement cannot be executed against the succeeding mahant who was, on the death of the first, appointed by the Bhek, since the successor could not in any sense be treated as the legal representative of the deceased. 5 L.L.J. 459=77 Ind. Cas. 585=A.I.R. 1924 Lah. 251.

——S. 2 (11)—Legal representative—Meaning of.

The expression "legal representative" means and includes one person as well as several persons according as they represent the whole interest of the deceased person. A.I.R. (Vol. 20) 1933 Lah. 356=31 P.L.R. 11=14 Lah. 543=142 Ind. Cas. 649.

——S. 2 (11)—Legal representative—Next of kin.

Obiter.—The term "next-of-kin" is peculiar to the English Law of inheritance and is not the same thing as "legal representative" as understood in the Civil P. C. A.I.R. (Vol. 23) 1936 Lah. 578=9 R.L. 184=164 Ind. Cas. 971.

——S. 2 (11)—Legal representative—Nominee of Deceased.

A person deposited a certain amount in a Bank and signed a nomination form prescribed by the Bank whereby he nominated a certain person to

receive the amount of deposit on his death. The depositor died before withdrawing the deposit.

Held, that the nominee cannot recover the deposit if the nomination does not observe all the necessary formalities of a will. Also the nomination cannot be enforced as a contract between the Bank and the depositor as the nominee being a stranger to the contract cannot take advantage under it. Nor can the nomination be considered as a mandate as it became revoked after depositor's death. 33 M.L.J. 476, Dissented from. 1921 M W.N. 70=60 Ind. Cas. 239=A.I.R. 1921 Mad. 199.

——S. 2 (11)—Legal representative—Person having no interest—Decree against—Binding nature of.

A suit was brought on a mortgage executed by a minor with his step-mother as his heir. The grandfather of the minor was also made a party but was subsequently struck off on his pleading that he was an unnecessary party. Subsequently, on an objection raised by certain transferees from the grandfather and the step-mother it was held that so far at least the grandfather and persons claiming under him were concerned, the decree must be deemed to have validly passed. 51 Bom. 125=29 Bom.L.R. 107=100 Ind. Cas. 956=A.I.R. 1927 Bom. 131.

——S. 2 (11)—Legal representative—Person in possession.

The person in possession of the property of a deceased judgment-debtor after his death is the legal representative of the deceased according to the definition in S. 2 (11) and if he is properly substituted as the legal representative in the execution proceedings the sale passes the title which the deceased debtor had in the property to the auction-purchaser. 69 Ind. Cas. 179=A.I.R. 1924 Cal. 362.

——Ss. 2 (11)—Legal representative—Person in possession not heir at law.

Where a creditor in good faith obtains a decree against a person who is in possession but is not the heir of the deceased debtor's estate, the decree and the proceedings in execution bind the interest of the real heir. Such a case is an exception to the general rule that proceedings in execution of a decree do not bind the interest of any person who was never brought on the record as party to the proceedings in the suit. 36 M.L.J. 106=52 Ind. Cas. 509.

——S. 2 (11)—Legal representative—Person in possession.

A person who is in possession of the estate belonging to the deceased can validly represent the deceased defendant under the C. P. Code of 1908. 31 M.L.J. 222=(1916) 2 M.W.N. 233=35 Ind. Cas. 124.

——S. 2 (11)—Legal representative—Person not heir—Decree against—Effect of.

A decree passed in a suit in which the true legal representatives of a deceased party were not brought on record would not be binding on the estate of the deceased party in the hands of the true legal representatives even in the absence of fraud. A.I.R. (Vol. 20) 1933 Mad. 43=37 M.L.W. 199=53 M.L.J. 319=139 Ind. Cas. 465.

——S. 2 (11)—Legal representative—Person not heir—Decree against—Effect of.

In certain circumstances a person wrongly impleaded as a legal representative represents the estate and the decree passed against him is binding on the true representative if the decree-holder had acted *bona fide, i.e.*, in good faith and with due care and attention. Failure to make more detailed enquiries will not necessarily lead to the conclusion that the decree-holder had not acted *bona fide*. A.I.R. (Vol. 20) 1933 Nag. 73=29 N.L.R. 89=144 Ind. Cas. 663.

——S. 2 (11)—Legal representative—Person not heir—Decree against—Effect of.

Prima facie no person can be held bound by a decree or order to which neither he nor the person from whom he claims was a party. But when a person, who is impleaded as the legal representative of another which he is not, in a suit or in proceedings of the execution of a decree, sufficiently represents the estate the result is that a decree or order which is passed against him an assumed representative character is held to be binding on the true representative though the latter was no party to the same. The conditions necessary for making such representation effective against the true representative are that the plaintiff or decree-holder, must have acted, *bona fide*, the decree obtained must be free from fraud or collusion, and the person wrongly impleaded must have been impleaded in a representative capacity and the decree or order must have been passed against him as representing the estate of the deceased, the plaintiff must have been ignorant of facts which operate to displace the title of the supposed legal representative, and the person having the real title must not have intervened during the pendency of the suit. 30 M.L.W. 778=120 Ind. Cas. 65=A.I.R. 1929 Mad. 482.

——S. 2 (11)—'Legal representative'—Person not heir—Decree against—If binds heir.

The properties in suit, belonged absolutely to the testatrix who by her will, dated 23-3-1872, appointed her sons *J* and *N* as trustees and directed them to maintain the relations of the testatrix and gave them during their lifetime the income from the estate after meeting all the charges. On the death of *J* and *N*, their sons were to be equally entitled to, and divide the properties with no power of sale etc. They had power however if the income of the estate was insufficient to mortgage the estate for necessary purposes. *J* having died issueless probate of the will was granted to *N* who in 1889 mortgaged the estate for necessity. *N* died intestate in 1891 and letters of administration of the estate were granted to his daughter. The mortgagee instituted a suit on his mortgage and obtained a decree in 1892 impleading the daughter of *N* as representing the estate. In execution of the decree the property was sold and purchased by the defendants. In a suit by the daughter's son of the testatrix:

Held that *J* and *N* having taken only a life estate in the properties of the testatrix, there was an intestacy on their death without male issue. Consequently on the death of *N* the plaintiff became the heir to the properties and decree passed against the daughter of *N* did not bind the estate in his hands. 70 Ind. Cas. 886=37 C.L.J. 90.

——S. 2 (11)—Legal representative—Person not heir—Decree against—Validity.

Where in a suit by a creditor against the deceased's estate the real heir is not impleaded as a party the decree and the sale in execution thereunder are null and void as against him. The estate of a deceased person cannot properly be represented unless the real heir is a party. 15 Bom.L.R. 41=18 Ind. Cas. 381.

——S. 2 (11)—Legal representative—Person not rightful heir—Decree against—Validity.

A decree was obtained against an infant alone as adopted son of the debtor represented by his alleged adoptive mother as guardian *ad litem*. The adoption was subsequently declared invalid:

Held, execution could not be taken against the estate of the deceased adoptive father: and the adoptive mother though she was the guardian could not be proceeded against nor could she be substituted in the minor's place. 18 C.L.J. 362=18 C.W.N. 173=21 Ind. Cas. 519.

——S. 2 (11)—Legal representative—Person not in possession.

The fact that the legal representative has not taken possession of the property does not assist against another, who is not in possession of the estate, to claim as a legal representative. If he is the legal representative, it is his duty to take possesoin of the estate and it is no answer to the proposition that the legal representative has not taken possession of the property. A.I.R. (Vol. 26) 1939 Pat. 47=5 B.R. 65=178 Ind. Cas. 198.

——S. 2 (11)—Legal representative—Person not in possession of assets.

Suit against legal representatives of a deceased should not be dismissed merely on the ground that they are not in possession of any assets of the deceased. 89 Ind. Cas. 236=A.I.R. 1926 Nag. 170.

——S. 2 (11)—Legal representative—Person not in possession of assets.

A suit against the legal representatives of a deceased debtor should not be dismissed on the mere ground that no assets of the deceased came or are likely to come into the hands of the legal representatives. 2 N.W.P.H.C.R. 449, followed. 40 Ind. Cas. 407. (All.).

——S. 2 (11)—Legal representative—Purchaser of Hindu co-parcener's share.

A co-parcener can recover possession of the joint family property from an outsider but if he stands by it and allows the outsider to remain in possession he cannot demand account for the past profits though his interest in the property remains unaffected by the acquiescence. The possession of a purchaser of a particular portion of a joint family property or the purchaser of interest of one of the members of the joint family in any particular item of joint family is not wrongful possession against the other members though the purchaser is not entitled to possession, he is not liable to account for the mesne profits. 48 Bom. 428=87 Ind. Cas. 703 =26 Bom.L.R. 464=A.I.R. 1924 Bom. 433.

——S. 2 (11)—Legal representative—Representative in some capacity.

Where a person has been brought on the record in some capacity as a representative of the deceased, then although such a person is not impleaded as a representative in his real capacity, here is sufficient representation. 1926 P.H.C.C. 353=99 Ind. Cas. 865=8 P.L.T. 287=A.I.R. 1927 Pat. 114.

——S. 2 (11)—Legal representative—Rival claimants—Choice.

A decree holder has the right to select from among the claimants of the estate of the deceased, persons whom he *bona fide* believes to have *prima facie* the best title as legal representatives and he is sufficiently protected if he is not guilty of fraud or collusion in exercising that right. 20 C.W.N. 58; 33 Mad. 75, dist. Under the old Code too, the right was the same though the definition was not as it is now. 29 M.L.J. 698=31 Ind. Cas. 920.

——S. 2 (11)—"Legal representative—Rival claimants—Choice.

Where there are two rival claimants to the estate of the deceased it is open to the plaintiff or decree-holder to choose as the legal representative, the one who in the circumstances as they then exist appears to have the *prima facie* title. 30 M. L.W. 778= 120 Ind. Cas. 65=A.I.R. 1929 Mad. 482.

——S. 2 (11)—Legal representative—Several heirs—One alone impleaded—Effect.

When a Court has issued notice to a person supposed to be the only legal representative of a deceased defendant or judgment-debtor and held that service is sufficient, the decree passed and the execution thereof will be considered sufficient to cover the entire estate including the shares of those heirs of the deceased defendant or judgment-debtor who were not brought on the record and who had not received notice. Rights of party complaining of non-representation indicated. 12 O.L.J. 37=87 Ind. Cas. 892=2 O.W.N. 34=28 O.C. 177=A. I. R. 1925 Oudh 330.

——S. 2 (11)—Legal representative—Step-mother of husband — If legal representative of widow.

Held, she acted in a representative character and that on her death her husband's step-mother for whose maintenance also provision was made by his will, became her legal representatives for the purposes of the suit inasmuch as all the male heirs of the deceased had refused to recognise the dedication. 17 P.W.R. 1923=79 Ind. Cas. 670=A.I.R. 1925 Lah. 2.

——S. 2 (11)—"Legal representative" — Transferee pendente lite.

A transferee *pendente lite* of immoveable property decreed to be delivered to plaintiff with mesne profits, is liable to pay the mesne profits, as such transferees are, in law, in wrongful possession of land. 39 Cal. 220=16 C.W.N. 109=11 Ind. Cas. 939.

——S. 2 (11)—Legal representative—Trespasser.

Where a decree is passed for a debt due by a deceased debtor in a suit brought against a person in possession, but who is not the heir of the deceased debtor's estate, the decree and the proceedings in execution of such decree bind the interest of the real heir. 38 M.L.J. 106, Foll. A decision obtained on contest on the merits against the holder

of a property, who is subsequently found to be a trespasser, does, in the absence of anything to show that the decision was obtained through fraud or collusion, bind the rightful holder of the property.

All that is necessary in such cases is a sufficient representation of the estate through a person who has the estate under his control. 9 N.L.J. 183=96 Ind. Cas. 963=A.I.R. 1926 Nag. 476.

——S. 2 (11)—Legal representative—Trespasser.

The right of a trespasser to execute a decree depends on the nature of the decree. A decree in favour of an estate can be executed by a person recognised as proprietor, though he may be found to have no title to the estate ultimately. 48 Ind. Cas. 704 (Pat.).

——S. 2 (11)—Legal representative—Trespasser.

A decision obtained on contest on the merits against a person afterwards found to be a trespasser binds the rightful holder in the absence of anything to show that the decision was obtained by collusion or fraud. 4 C.L.J. 463=42 Ind. Cas. 57.

——S. 2 (11)—Legal representative—Trustees.

Within S. 2 (11), trustees are not legal representatives of their predecessors-in-office. 92 Ind. Cas. 520=A.I.R. 1926 Mad. 540.

——S. 2 (11)—"Legal representative"—Universal legatee.

The definition of "legal representative" includes a universal legatee to whom the whole assets of the deceased party have been bequeathed. It cannot be said that he does not represent the estate of that deceased person. A.I.R. 1950 Mad. 482=(1950) 1 M.L.J. 276.

——S. 2 (11)—Legal representative — Co-plaintiff of mutawalli of waqf.

A decree was passed in a suit by the plaintiff and a *mutawalli* of a mosque for a declaration that the mosque was *waqf* and while the appeal was pending the *mutawalli* died Since then the plaintiff had been managing the mosque and the properties and performing the same duties as the deceased was alleged to have performed during his lifetime:

Held, that the plaintiff could be treated as the legal representative of the deceased for the purpose of the appeal. A.I.R. (Vol. 28) 1941 Lah. 36=193 Ind. Cas. 323.

——S. 2 (11)—Legal representative—Who is—Test.

It is one of the essential tests with regard to the case of persons who intermeddle with the estate of another before they can be called as legal representatives of the deceased person that they must retain possession of properties belonging to the estate with the intention of representing the estate. A.I.R. (Vol. 20) 1933 Cal. 865=37 C.W.N. 758=149 Ind. Cas. 927.

——S. 2 (11)—Scope—If exhaustive.

The definition of the expression "legal representative" to be found in the Civil P. C., is meant only for the purposes of the Code and not as a general statement of a substantive rule of law. A.I.R. (Vol. 21) 1934 All. 474=6 R.A. 1070=L.R. 15 All. 476 Rev.=1934 All.L.R. 663=1934 A.L.J. 202=150 Ind. Cas. 323.

——S. 2 (11)—Scope of definition.

The definition of legal representative in S. 2 (11), Civil P. C., is very wide. A.I.R. (Vol. 21) 1934 Lah. 1=154 Ind. Cas. 375.

——S. 2 (11)—Scope of the definition.

"Legal representative" as defined in section 2 (11) of the C. P. Code includes any person who intermeddles with even a part of the estate of a deceased person; and an intermeddling with a part of the estate makes the intermeddler liable to the extent of the property taken possession of, by him. 115 P. R. 1913=39 P.L.R. 1914=22 Ind. Cas. 242.

——S. 2 (12)—Mesne profits—Amounts due from tenants not realised.

Amounts due from tenants when those could be realized but have not been realized, are mesne profits. A.I.R. (Vol. 30) 1943 Cal. 125=75 C.L.J. 479=206 Ind. Cas. 181.

——S. 2 (12)—Mesne profits—Amount actually received and might with ordinary diligence have been received—Onus of proof.

Under S. 106, Evidence Act, the burden of proving the amount of mesne profits actually received is on the person receiving them; but as regards the amount of profits that might with ordinary diligence have been received by the person in occupation, the burden of proving is on the person claiming it. A.I.R. (Vol. 30) 1943 Pat. 69=21 Pat. 735=9 B. R. 220=205 Ind. Cas. 294.

——S. 2 (12)—"Mesne profits"—Arrears.

"Mesne profits" does not exclude arrears for previous years which may be claimed and recovered at later years. 119 Ind. Cas. 366=A.I.R. 1930 Oudh 51.

——S.2 (12)—Mesne profits—Tenant holding over—Extent of liability.

Tenant holding over, receiving premium from sub-tenant—Landlord can recover premium as mesne profits. 25 Bom.L.R. 447=73 Ind. Cas. 442=A.I.R. 1923 Bom. 398.

——S. 2 (12)—Mesne profits—Ascertainment—Criterion.

True criterion for mesne profits is not the loss caused to the person wronged but the gain made by the wrong-doer. 62 Ind. Cas. 25, Foll. 10 P.L.T. 525=116 Ind. Cas. 40=A.I.R. 1929 Pat. 530.

——S. 2 (12)—Mesne profits—Ascertainment of—Considerations.

The principles which would ordinarily guide a Court in determining the mesne profits are (1) wrongful trespasser should not profit by it; (2) Restoration of status before dispossession financially; and (3) Use to which decree-holder would have put land if he was himself in possession. 1 Pat. L.W. 421=(1917) Pat. 146=39 Ind. Cas. 516.

——S. 2 (12)—Mesne profits — Ascertainment—Defendant not actually in possession—Liability—Extent of.

After a trespasser died while in possession of certain land, two persons claiming to be executors under a will took possession. The probate was revoked on an application by the heir who then took possession. The rightful owner got a decree for possession and mesne profits. Held that the

rightful heir of the original trespasser as representing the estate, is not liable for mesne profits during the time the so-called executors were in possession, as he could not be said to be in possession in fact or in law either personally or by agent or by tenant. 25 C.L.J. 140=38 Ind. Cas. 660.

——S. 2 (12)—Mesne profits—Assessment of—Guiding principle.

The main point in ascertaining mesne profits is ordinarily the nature of the plaintiff's possession before he was dispossessed or before the unlawful possession of the defendant began. The use which the defendant while in possession as trespasser actually made of the land does not determine the mesne profits. The question is what the plaintiff would have made out of it but for the defendant's unlawful trespass and not what the defendant has done. 9 A.L.J. 774=16 Ind. Cas. 126.

——S. 2 (12) — Mesne profits — Assessment—Principle of—Interest.

In assessing mesne profits the Court should take into consideration what the defendant gained by the cultivation of the land and not merely what the plaintiff lost by being deprived of possession. "Mesne profits" in S. 2 (12) includes also interest on mesne profits. 15 Ind. Cas. 1 (Cal.).

——S. 2 (12)—Mesne profits—Basis of—Calculation—Principles.

The test set by the statutory definition of mesne profits is clearly not what a person has lost by his exclusion, but what the trespasser has or might reasonably have made by his wrongful possession. What the person in such a case might or would have made can only be relevant as evidence of what the trespasser might with reasonable diligence have received. The true test in calculating mesne profits is what the ordinary prudent agriculturist would have grown. 1930 A.L.J. 128=121 Ind. Cas. 540=34 C.W.N. 257=7 O.W.N. 303=31 M.L. W. 425=32 Bom.L.R. 525=57 I.A. 105=A.I. R. 1930 P.C. 82=58 M.L.J. 215 (P.C.).

——S. 2 (12)—Mesne profits—Basis of—Calculation—Wrongdoer—Extent of liability.

Wrongdoers not shown to have cultivated lands but admitted to have settled land with tenants—Mesne profits are to be calculated on basis of rental value of land and must be either on the basis of such rent as they in fact received or could with ordinary diligence have received. A.I.R. (Vol. 22) 1935 Cal. 206=38 C.W.N. 1197=62 Cal. 217 =156 Ind. Cas. 489.

——S. 2 (12)—Mesne profits—Basis of Calculation.

Mesne profits should be calculated on the basis of the profits the trespasser might have made and not what the rightful owner was receiving before eviction—Joint trespassers are severally and jointly liable for whole of the profits. A trespasser is liable jointly with his lessees for the entire amount of mesne profits and not merely to the extent of the rents realized by him. 53 Cal. 992=31 C.W.N. 112=99 Ind. Cas. 428=A.I.R. 1927 Cal. 182.

——S. 2 (12)—Mesne profits—Basis of calculation—Actual produce—When to be taken.

The ordinary use to which the parties would put the land is what should be taken into account in determining mesne profits. Where parties are big zamindars who would not ordinarily cultivate lands in khas, mesne profits should not be awarded on the basis of actual produce. 44 C.L.J. 182=98 Ind. Cas. 198=A.I.R. 1926 Cal. 1233.

——S. 2 (12)—Mesne profits—Basis of calculation—Land held by tenant—Produce or rent.

In a suit for title and possession where the land was in the occupation of tenants, mesne profits should be awarded not on the basis of the produce but on the basis of rent. 94 Ind. Cas. 255=A.I.R. 1926 Cal. 860.

——S. 2 (12)—Mesne profits — Calculation—Claim against co-sharer.

In case of co-sharers, if a decree for mesne profits or for compensation is to be passed, it must be found that there was dispossession. 94 Ind. Cas. 255=A. I. R. 1926 Cal. 860.

——S. 2 (12)—Mesne profits—Basis of calculation—Mines—Working expenses and loyalties—Deduction of.

Persons in possession of mines under a *bona fide* claim of title and not "without any colour of title" or "in a manner wholly unauthorised and unlawful", though found to be trespassers, are entitled to the allowances for royalties paid and to compensation for expenses incurred in working the mines. 25 C. W. N. 369=66 Ind. Cas. 49=A.I.R. 1921 Cal. 363.

——S. 2 (2)—Mesne profits—Basis of calculation—Actual outturn.

Mesne profits must be calculated on the actual outturn in the years in suit and where the defendants have been in possession of separate plots of land within those years, mesne profits ought to be calculated as against each defendant on the basis of his possession. 61 Ind. Cas. 425=1 Pat.L.T. 235.

——S. 2 (12)—Mesne profits—Basis of claim.

The essence of a claim for mesne profits is that it rests upon an agreement implied in law that when one person occupies property of another he must be deemed to have tacitly assented to the condition that he is liable for an occupation rent in respect of that occupation. (1915) M.W.N. 319=29 Ind. Cas. 195.

——S. 2 (12)—Suit for mesne profits—Burden of proof. **See** EVIDENCE ACT, S. 106. A.I. R. 1950 Cal. 87.

——S. 2 (12)—Mesne profits—Burden off proof.

On an application by defendant for recovery of mesne profits, as regards the amount of mesne profits which might with ordinary diligence have been received by the person in occupation, the onus lies on the person claiming it, (here) the defendant. A court cannot act on the report of a Commissioner based upon the evidence of persons not recorded by him. 47 Mad. 800=92 Ind. Cas. 792=A.I.R. 1925 Mad. 145=48 M.L. J. 89.

——S. 2 (12)—Mesne profits—Claim against trespasser—Claim founded on contract—Distinction.

A claim for mesne profits against a trespasser stands

on a basis essentially different from a claim founded on contract. A.I.R. (Vol. 29) 1942 All. 358=1942 A.L.J. 411=I.L.R. (1942) All. 671=203 Ind. Cas. 223.

——S. 2 (12)—Mesne profits—Trespasser—Liability—Extent of.

A trespasser cultivating land must pay mesne profits to its owner on the basis of its produce. 94 Ind. Cas. 118=A.I.R. 1926 Cal. 847.

——S. 2 (12)—Mesne profits—Trespasser.—Calculation.

Where the person dispossessed by a trespasser is himself ordinarily a cultivator of the land in dispute the profits to which he is entitled are those that the wrongful holder might have obtained by actual cultivation with due diligence. It is not open to a trespasser to dispossess an actual cultivator and then to sublet the land trespassed upon, to some third person, and then claim to compensate the rightful occupant only to the extent of what he may have obtained by sub-letting. 43 Ind. Cas. 53 (N.).

——S. 2 (12)—Mesne profits — Calculation of—Claim against trespasser.

A trespasser is liable to compensate the real owner in respect of all losses sustained by the latter by reason of the tortious act of the former, whether in the shape of damages or profits, such damages naturally being the profits which the owner should have derived from the lands had they not been wrongfully detained from him. It is no defence to the trespasser to say that he left the lands waste immediately after the date of the decree in a possessory suit under S. 9 of the Specific Relief Act and he received no profits himself and so is not liable for mesne profits for period intervening between the decree in the possessory suit and the date of delivery of lands through the Court to the real owner. 30 M.L.J. 326=2 L.W. 157=(1915) M.W.N. 170=28 Ind. Cas. 1.

——S. 2 (12)—Mesne profits—Liability of person sued under S. 9—Specific Relief Act—Burden of proof.

A person who has secured a decree under S. 9 of the Specific Relief Act is entitled to recover mesne profits as against a person in possession other than the true owner and it is for the person in possession to prove that he has superior right to possession and to appropriate the profits. 24 All. 501, Foll. 97 Ind. Cas. 1028=A.I.R. 1927 Nag. 9.

——S. 2 (12)—Claim in Mortgage suit for redemption—Sustainability.

In a mortgage with a stipulation for redemption in Jeth, the mortgagee can only be called upon to vacate possession in favour of the mortgagors if all steps necessary to redemption have been taken so as to enable the mortgagee to vacate possession in the fallow season of Jeth. If in one particular year the mortgagors fail to take all the necessary steps to obtain redemption in the fallow season the mortgagee is entitled under the terms of the mortgage to remain in possession till the fallow season of the following year and it could not therefore be said, where the plaintiffs have made default in taking proceedings for redemption in one year, the mortgagee is, for the year which follows, in wrongful possession. On the contrary he is in possession in strict accordance with the terms of the mortgage contract and therefore in such a case mesne profits cannot be allowed from the date of the suit till the date of delivery of possession. 48 All. 611=24 A.L.J. 769=96 Ind. Cas. 1=A.I.R. 1926 All. 665.

——S. 2 (12)—Mesne profits—Collection charges—Deduction of—O. 20, R. 12.

It is only in cases where the person who has to pay mesne profits had no right to be in physical possession of the land but only to collect rent, can it be said that there would be justification for deducting the collecting charges out of the rent collected by him from the tenants in possession for ascertaining the mesne profits? In a case, where the person is entitled to be in actual possession, then the mesne profits have to be ascertained with reference to the yield of the land and, the net income, after deducting the cultivation charges and other expenses, would represent the mesne profits payable to the decree-holder. In such cases, the mesne profits have to be fixed with reference to the yield of the property and there is no scope for allowing any deduction for collecting charges. A.I.R. (Vol. 32) 1945 Mad. 246=(1945) 1 M.L.J. 70=58 M.L.W. 43=I.L.R. (1945) Mad. 571=1945 M.W.N. 132.

——S. 2 (12)—Mesne profits—Costs of collection—Deduction of.

Mesne profits mean amount realised minus the costs of collections, and, in the absence of any evidence, the costs of collection should be considered to be 10 per cent. A.I.R. (Vol. 28) 1941 Oudh 498=1941 O.W.N. 768=1941 R.D. 431=1941 O.L.R. 512=16 Luck. 812=194 Ind. Cas. 615.

——S. 2 (12)—Mesne profits—Costs of cultivation and reaping—Deduction of.

Where mesne profits are claimed from a trespasser the costs of cultivation and reaping shall be allowed to him. 4 Pat.L.J. 301=51 Ind. Cas. 747.

——S. 2 (12)—Mesne profits—Cultivation expenses and costs of collecting—Deduction.

In calculating mesne profits, cultivating expenses incurred by the trespasser should be deducted but not the costs for collecting the rent due from persons in occupation. (1913) M.W.N. 804=24 M.L.J. 30=18 Ind. Cas. 615.

——S. 2 (12)—Messe profits—Cost of collection—Deduction of.

A person is accountable not merely for what he received actually but for what he might have received with due diligence. The costs of collection may be fixed ot 10 per cent. on the gross rental regard also being had to the nett rental. 27 Cal. 951 (P.C.) foll. 16 Ind. Cas. 866 (Oudh.).

——S. 2 (12)—Mesne profits—Co-sharer—Liability of.

Receipt of profits by a co-sharer not being wrongful, the right to the profits against a co-sharer in possession, is not in law a right to mesne profits but is a right to obtain and call for an account and such a right can be transferred. A.I.R. (Vol.

20) 1933 Mad. 710 (1)=1933 M.W.N. 743=38 M.L.W. 408=145 Ind. Cas. 228.

——S. 2 (12)—Rate of interest—Discretion of Court.

Intrest should ordinarily be allowed on mesne profits, though inasmuch as the interest forms an integral part of mesne profits, the interest is as much in the discretion of the Cou t as the mesne profits themselves. The cases is the books do not disclose a uniform rule as to the rate of interest allowable on mesne profits. But there is a distinction between the respective liabilities of **bona fide** and **mala fide** trespassers. Thus, although all trespassers whether **bona fide** or **mala fide**, are liable for mesne profits the **bona fide** trespasser may be allowed to deduct collection charges, while no such coscession is made in favour of the **mala fide** trespasser ..Similarly, in regard to the rate of interest also, the fact of the trespasser being a **bona fide** one may be taken into consideration. Case law referred. 34 C.L.J. 415=70 Ind. Cas. 6=A.I.R. 1921 Cal. 699.

——S. 2 (12)—Mesne profits—Expenses of litigation when deducted.

A person in wrongful possession when accounting for mesne profits to the true owner is entitled to compensations for all sums spent by him in managing the property but not for infructuous proceedings in Court taken by him by mistake though **bona fide, e.g.,** distraint proceedings. 11 M.L.T. 90=22 M.L.J. 253=(1912) M.W.N. 101=14 Ind. Cas. 396.

——S. 2 (12)—Mesne profits—Government Revenue—Deduction of.

The Government assessment paid by the judgment-debtor ought to be credited in his favour on ascertaining mesne profits due to decree-holder. 33 Ind. Cas. 520 (Mad.).

——S. 2 (12)—Mesne profits—Future profits—Meaning.

Where execution of a decree is stayed on the judgment-debtor giving security for mesne profits from the date of the decree up to the disposal of an appeal therefrom.

Held, that the order certainly meant that such mesne profits (as would be determined by the executing Court) would be realized in the execution proceedings and that no further proceedings by way of a separate suit would be necessary. 28 P.L.R. 178=103 Ind. Cas. 328=A.I.R. 1927 Lah. 346.

——S. 2 (12)—Mesne profits—Future mesne profits—Meaning of.

Where the plaintiff obtained a decree for 'future mesne profits from the date of the suit to be ascertained in the execution department.'

Held, that under the decree the plaintiff is entitled to recover whatever rents have been realized by the judgment-debtor in the years in question irrespective of the fact whether those were arrears of rent for the years previous to the institution of the suit or whether they were on account of the current year. With regard to collections in villages the word 'profits' has always been intended to include realizations of arrears for past years as well as for current years. (1887) A.W.N. 250 and A.I.R. 1924 All. 481 (F.B.), Foll. 92 Ind. Cas. 768=A.I.R. 1926 All. 474.

——S. 2 (12)—Mesne profits—Interest—Right to.

Interest can rightly be awarded on mesne profits by the Court as mesne profits. The fact that by the delay in the filing of the suit for mesne profits the claim on the score of interest proved to be much larger in amount than it would otherwise have been, does not disentitle the plain iff to the interest. A.I.R. (Vol. 27) 1940 Mad. 934=1940 M.W.N. 901=(1940) 2 M.L.J. 427=52 M.L.W. 533=194 Ind. Cas. 840.

——S. 2 (12)—Interest—Right to.

Mesne profits include interest thereon. A.I.R. (Vol. 25) 1938 P.C. 139=1938 O.W.N. 504=1938 A.L.R. 338=1938 O.L.R. 200=42 C.W.N. 687=4 B.R. 508=40 Bom.L.R. 1057=32 S.L.R. 492=1938 P.W.N. 417=174 Ind. Cas. 288 (P.C.).

——S. 2 (12)—Mesne profits—Interest—Decree silent—Right to.

Per **Full Bench.**—Where a decree of Court which awards mesne profits under R. 12 of O. 20 of the C.P. Code, is silent as to interest, it is not open to the executing Court to fix the rate of interest and to execute the decree allowing interest.

It is a question of the construction of the final decree in each case, whether the same either specifically, or by necessary reference to the documents referred to by it awards and fixes the rate of interest.

Per **Reilly, J.**—If a decree for mesne profits is not only silent in regard to interest but properly interpreted does not award interest, the executing Court cannot allow interest. But even if the decree is "silent as to interest" in the sense that the word "interest" does not appear in it, nevertheless if by the use of the expression "mesne profits" combined with a reference to a rate of income or in any other way the decree indicates that interest is awarded, the executing Court must give it and, if no rate of interest is mentioned, should give it at the Court rate of 6 per cent. A.I.R. (Vol. 18) 1931 Mad. 650=61 M.L.J. 596=54 Mad. 955=34 M.L.W. 305=1931 M.W.N. 576=135 Ind. Cas. 305 (F.B.).

——S. 2 (12)—Interest, part of mesne profits.

Statutory definition of mesne profits includes interest. A.I.R. 1930 Cal. 525.

——S. 2 (12)—Interest—Discretion of Court.

Interest on mesne profits is in the discretion of the Court. 44 C.L.J. 182=98 Ind. Cas. 198=A.I.R. 1926 Cal. 1233.

——S. 2 (12)—Interest—Decree silent—Right to interest.

Where a decree declares that the plaintiff is entitled to mesne profits and says nothing about interest, if the amount of mesne profits is left for determination by the Court of execution, the decree-holder is entitled to interest added to the mesne profits when they are ascertained. But if the Court which ascertains the mesne profits has omitted to allow interest, it is not open to the Court which executes the decree for mesne profits

to allow interest in execution proceedings. 6 C. L.J. 462; A.I.R. 1922 All. 117, not foll.; 96 Ind. Cas. 697=A.I.R. 1926 Mad. 952=50 M.L.J. 563.

——S. 2 (12)—Interest, part of mesne profits.

Mesne profits now include interest; so the decree-holder is entitled to interest up to the date of realisation of the mesne profits. 4 Pat. 57=84 Ind. Cas. 272=5 P.L.T. 626=1924 P.H.C.C. 265=A.I.R. 1924 Pat. 781.

——S. 2 (12)—Interest—Decree silent—Right to claim.

Where a decree grants mesne profits but says nothing about interest,

Held, that the decree-holder can claim that the simple decree for mesne profits carries interest. 44 All. 579=67 Ind. Cas. 219=20 A.L.J. 348=A.I.R. 1922 All. 117.

——S. 2 (12)—Mesne profits—Interest.

The definition of mesne profits includes not only the profits of immoveable property but also interest on such profits. 4 L.L.J. 333=68 Ind. Cas. 807=A.I.R. 1921 Lah. 234.

——S. 2 (12)—Interest — Rate — Discretion of Court.

Rate of interest on mesne profits is a matter entirely within the discretion of the Court and the High Court will not interfere with its decision. 2 P.L.T. 648=68 Ind. Cas. 903=A.I.R. 1921 Pat. 430.

——S. 2 (12)—Mesne profits—Interest—Discretion—Decree silent.

It is not obligatory upon the Court to allow interest on mesne profits; it is a matter of judicial discretion to be exercised according to the circumstances of the case. A decree-holder cannot claim interest when the decree for mesne profits is silent as to interest; 27 Cal. 951 foll.

Held, on the construction of the decree that interest on the mesne profits was not granted. 30 C.L.J. 205=53 Ind. Cas. 227.

——S. 2 (12)—Interest—Power of Appellate Court to add.

Where the Court of first instance ascertains the amount of mesne profits, but does not award isterest, the Appellate Court is not competent to award interest. 6 C.L.J. 462, foll. 8 M.L.T. 356=7 Ind. Cas. 710.

——S. 2 (12)—Mesne profits—Interest.

Mesne profits mean and include the interest on mesne profits. 5 Ind. Cas. 529 (All.).

——S. 2 (12)—Mesne profits—Interest on.

Mesne profits include the right to interest on the profits. 31 All. 551=10 C.L.J. 257=11 Bom.L.R. 1200=6 M.L.T. 303=14 C.W.N. 55=19 M.L.J. 599=13 O.C. 180=36 I.A. 197=3 Ind. Cas. 798 (P.C.).

——S. 2 (12)—Mesne profits—Liability.

Mesne profits can be claimed only against the person who is in actual possession and limitation for its recovery is three years from the date when the cause of action for its recovery arises. 10 P.W.R. 1923=79 Ind. Cas. 687=A.I.R. 1924 Lah. 738.

——S. 2 (12)—Mesne profits—Liability of person not in possession.

Mesne profits can only be recovered for the time the possession was actually retained by the defendant but if defendant is himself out of possession he is not liable for the profits which he has not received unless he has abetted the trespass by the person in actual possession. 55 Ind. Cas. 48 (N.).

——S. 2 (12)—Mesne profits—Liability of purchaser of non-transferable holding—Basis.

The purchaser or a non-transferable holding is liable to the landlord for mesne profits on the basis of the rents received by him during the period of his possession and not on the basis of the rent which the landlord used to get from the tenant of the holding prior to its sale. 46 Ind. Cas. 624 (Cal.).

——S. 2 (12)—"Mesne profits"—Meaning and nature of—Expenses of collection—When refused.

The term "mesne profits" denotes damages or compensation recoverable from a person who has been in wrongful possession; it means that which the plaintiff has lost by reason of the wrongful act of the defendant. It is not the profit actually made by the defendant, but that which the plaintiff has lost, and might reasonably be expected to have made had his possession not been wrongfully disturbed. Where the wrongful possession is of an aggravated character, the Court may, in computing the mesne profits, refuse to take into account even the collection charges incurred by the wrong-doer. The Court may mould the damages according to the justice of the case. A.I.R. 1950 Pat. 497.

——S. (12)—"Wrongful"—Meaning of.

The word 'wrongful' in S. 2 (12) of the C.P. Code, is used in a special sense. It does not mean possession which is wrongful for all purposes. It only means that the person who has no right to possession as against the party claiming it is in wrongful possession as against that party for certain purposes including mesne profits but not wrongful for all purposes. Thus he is not liable for all losses which the party kept out of possession may have sustained but only for such profits as he actually received or which with due deligence he might have received. A.I.R. (Vol. 26) 1939 Nag. 23=1939 N.L.J. 21=181 Ind. Cas. 106.

——S. 2 (12)—"Mesne profits"—Meaning of.

Where a decree directed a party "to account for mesne profits" for a certain period, the order must be taken to intend the meaning given to the phrase "mesne profits" by S. 2 (12). C.P. Code and the order cannot be read as requiring the party to account for the gross receipts. A.I.R. (Vol. 25) 1938 P.C. 139=1938 P.W.N. 417=1938 O.W.N. 504=1938 A.L.R. 338=1938 O.L.R. 200=42 C.W.N. 687=4 B.R. 508=40 Bom.L.R. 1057=32 S.L.R. 492=174 Ind. Cas. 288 (P.C.).

——S. 2 (12)—Mesne profits—Meaning of.

The profits referred to in S. 2 (12) are the balance left after deducting the cost of cultivation, and the rent paid and the costs of maintenance.

A.I.R. (Vol. 21) 1934 Cal. 503=38 C.W.N. 384 =151 Ind. Cas. 922.

——S. 2, Cl. (12)—Mesne profits—Meaning of.

The claim for mesne profits is virtually a claim for damages, and the rule that the plaintiff must discharge the burden applies thrrefore to such a claim. But the expression "mesne profits" is defined in S. 2, Cl. (12), C.P. Code, as meaning not only those profits which a person in wrongful possession actually received, but also such profits as he might with ordinary diligence have received. If the defendant asserts that a particular amount and no more was received by him, the duty of establishing it affirmatively rests upon him, that fact being especially within his own knowledge. On his laying before the Courts sufficient evidence to prove that fact, he shifts the burden to the opposite party of proving that more might have been received. The only relevant consideration is whether the defendant's possession was wrongful or not. If it was wrongful, the Court is not justified in going further and inquiring what the degree of the misconduct or culpability is. A.I.R. (Vol. 20) 1933 Mad. 825=1933 M.W.N. 1182=38 L. W. 714=57 Mad. 49=66 M.L.J. 263=148 Ind. Cas. 356.

——S. 2 (12)—Mesne profits—Measure of.

As against a wrong doer possession relates back to the time when the right to enter accrued. 34 Mad. 269 foll. 9 N.L.R. 145=21 Ind. Cas. 590.

——S. 2 (12)—Mesne profits—"Right with ordinary diligence", etc.—Burden of proof.

The defendant in a suit for mesne profits was found to have been directly in possession during nine consecutive seasons and suffered considerable loss throughout.

Held, that in such a case he cannot be said to be dealing with due diligence, for if the lands had been let out they would have fetched some rent however low it may be. But in such case the person claiming mesne profits must produce some affirmative evidence as regards the amount for which the lands might have been reasonably let out. In the absence of such evidence it is not possible to ascertain mesne profits. The party claiming mesne profits must bear the onus of proving what profits might with diligence have been received in a year but the party in actual possession is bound to prove what profits he actually received when that question arises. Mesne profits are in the nature of compensation for damages except in cases in which it can be proved that what was received or recovered actually by the party in possession was below what would have been so recovered or received if due diligence was exercised. The proper measure to award is to be determined by what the party in possession actually received. 92 Ind. Cas. 139=A.I.R. 1925 Mad. 297=47 M.L.J. 730.

——S. 2 (12)—Mesne profits—Nature of—Mining operations.

Mesne profits are in the nature of damages which the Court may mould according to the justice of the case. 27 Cal. 951. Foll. Mining differs from agricultural operations on the surface. 25 C.W.N. 369=66 Ind. Cas. 49=A.I.R. 1921 Cal. 363.

——S. 2 (12)—Mesne profits—Period of claim—Starting point—Delay in taking possession—Effect of.

Where plaintiff had not taken steps to get possession as soon as he had become entitled, he can claim mesne profits only from date of filing suit. 1924 P.H.C.C. 268=84 Ind. Cas. 130=5 P.L. T. 616=A.I.R. 1924 Pat. 780.

——S. 2 (12)—Mesne profits—Period of claim.

Where a plaintiff succeeds in establishing that he has been kept out of possession, he is entitled to mesne profits for that period subject to the Law of Limitation. 53 Ind. Cas. 124 (Cal.).

——S. 2 (12)—Mesne profits—Possession by Court—Calculation.

In an action for mesne profits when the ground of the action is the bare fact of possession, damages can only be recovered for the time possession was actually retained. Where lands remained under attachment by the operation of the order under S. 146, Cr. P. Code, and Court was in custody of it on behalf of the rightful owners, held, that it cannot be said that the defendants were in possession of the lands. 51 Cal. 853=80 Ind. Cas. 529=39 C.L.J. 447=A.I.R. 1924 Cal. 1010.

——S. 2 (12)—Mesne profits—Assessment—Liability of joint wrong-doers.

Mesne profits should be assessed on the basis of what the persons in wrongful possession received or might with ordisary prudence have received; but not on what the owner was actually receiving before his eviction. The liability of joint wrongdoers is joint and several. 15 C.W.N. 825=11 Ind. Cas. 504.

——S. 2 (12)—Mesne profits—Principle of assessment.

The correct principle for the assessment of mesne profits is that the letting value of the property should be determined. The value of the use of the property is the messe profits and not what the defendant actually gained. 16 C. L. J. 93=10 Ind. Cas. 312.

——S. 2 (12)—Mesne profits—Procedure for ascertainment—Claim exceeding jurisdiction of trial Court due to pendency of litigation—Effect.

If a person sues for possession he can in the same suit recover mesne profits accrued before the suit and accruing pending litigation. The fact that owing to prosecution of appeal in higher Courts by the defendant, the mesne profits swelled up beyond the limits of the pecuniary jurisdiction of the Court which tried the suit originally, thereby necessitating the transfer of the proceedings in the suit to a Court of higher jurisdiction is not an interruption so as to make the subsequent proceeding in the higher Court a different suit. 24 C.W.N. 342=58 Ind. Cas. 170.

——S. 2 (12)—Mesne profits—Procedure for ascertainment.

Mesne profits should be determined in the suit itself by inquiries but not by way of execution for a fixed sum of money. 39 Cal. 229=16 C.W.N. 109=11 Ind. Cas. 939.

——S. 2 (12)—Interest—Right to.

In a decree for possession with mesne profits the jurgment-debtor should surrender possession sufficiently early to enable the decree-holder to cultivate the land and raise the crops thereon in order to avoid liability for mesne profits. The Court has a discretion whether to allow interest on mesne profits after three years or not. 27 Cal. 951 (P.C.); 33 Cal. 329; 12 C.W.N. 285 foll. 2 L.W. 1129=31 Ind. Cas. 387.

——S. 2 (12)—Interest—Right to.

The decree-holder can in execution of decree for mesne profits, claim interest on such profits, as mesne profits include interest. 10 A.L.J. 533 =17 Ind. Cas. 915.

——S. 2 (12—Mesne profits—Right to—Onus.

A plaintiff perhaps may recover mesne profits even when he is out of possession but he must at least show that he has a right to immediate possession. If he fails to prove such a right and it is found that the defendant is in possession, the suit must fail. 16 C.W.N. 288=10 Ind. Cas. 117.

——S. 2 (12)—Mesne profits—Salami, if.

Salami comes within the definition of mesne profits. A.I.R. (Vol. 22) 1935 P.C. 49=62 I.A. 53=1935 O.W.N. 261=1 B.R. 325=62 Cal. 499 =1935 A.W.R. 213=41 M.L.W. 284=1935 M. W.N. 165=(1935) A.L.J. 438=39 C.W.N. 405 =1935 R.D. 94=68 M.L.J. 580=37 Bom. L.R. 327=154 Ind. Cas. 1 (P.C.).

——S. 2 (12) — Mesne profits — Suit by lessee — Maintainability.

No suit is maintainable for mesne profits by a lessee for period subsequent to expiry of lease on dispossession by lessor. 101 Ind. Cas. 733=A. I.R. 1927 Nag. 373.

——S. 2 (12)—Mesne profits—What is.

Mesne profits mean those profits which the person in wrongful possession of such property actually receives or might with ordinary dilligence receive and not what the plaintiff has lost. When the purchaser gave notice to a **mokararidar,** to deliver possession within a certain time, the purchaser is not entitled to mesne profits for the period prior to that date but can get damages for use and occupation on the basis of **mokarari rent.** 17 C.W.N. 984=19 Ind. Cas. 974.

——S. 2 (12)—Wrongful possession—Possession of auction-purchaser.

There can be no doubt that the essence of a claim to mesne profits is the wrongful possession of the defendant. Where in a claim suit the plaintiff proves his title to the property claimed by him, the possession of the auction-purchaser who purchased the property in execution, becomes wrongful so far as the mesne profits are concerned. The plaintiff is entitled to claim mesne profits from the auction-purchaser. Possession which may be rightful for certain limited purposes against the judgment-debtor may be wrongful as against third parties, and the mere fact that the possession was obtained through the instrumentality of the Courts will not avail either the decree-holder or the auction-purchaser as against persons who were not parties to the decree. The ordinary rule is that an owner of property who is wrongfully kept out of possession is entitled to mesne profits, and however rightul the auction-purchaser's possession may be as against parties to the suit, if it can avail him nothing as against third parties in regard to the right to possession, it cannot avail him in respect of other matters which directly flow out of those rights. A.I.R. (Vol. 26) 1939 Nag. 23=1939 N. L.J. 21=181 Ind. Cas. 106.

——S. 2 (12)—Wrongful possession—Possession of mortgagee.

As long as mortgage subsists possession of a mortgagee who is in possession under a possessory mortgage is not wrongful and therefore mesne profits cannot be ordered against him. A.I.R. 1930 Rang. 152 (1).

——S. 2 (12)—Wrongful possession—Possession under voidable transfer.

A transfer by a Hindu widow is only voidable and until the reversioner signifies his intention to avoid it, the transferee cannot be deemed to be in wrongful possession. So, the transferee is not liable for any mesne profits or to pay any compensation for the use of the land until the transfer is repudiated. 34 Cal. 329 (P.C.), Foll. 69 Ind. Cas. 368=A.I.R. 1921 Nag. 133.

——S 2 (12)—Person in wrongful possession—Liability of.

In a suit for mesne profits defendants, who were in wrongful possession, gave no evidence to show that they could not cultivate the lands themselves or that the lands were in possession of tenants before they entered upon them as trespassers.

Held, that under these circumstances the defendants were bound to pay mesne profits on the basis as if they were in direct possession of the lands in suit. 108 Ind. Cas. 584=A.I.R. 1928 Cal. 474.

——S. 2 (12)—"Wrongful possession"—Possession under voidable title.

Where a deed is only to be set aside on payment of certain sums, the person holding under such a deed must be deemed to be lawfully in possession until it is set aside and is not therefore accountable for mesne prifits. 61 Ind. Cas. 543 =A.I.R. 1921 Nag. 132.

——S. 2 (14)—Order—Essentials.

If all the data for the ascertainment of liability of each tenant to his landlord can be found on the face of an order of Court, that order can be regarded as a final order although the actual liability of each such tenant may not have been worked out in detail. 8 P.L.T. 141=102 Ind. Cas. 106=A.I. R. 1927 Pat. 171.

——S. 2 (14)—'Order'—Guardians and Wards Act (8 of 1890), S. 34 (e)—Order under.

An order passed by the District Judge, under S. 34, Guardians and Wards Act, directing the guardian of a minor to pay a certain sum of money to her step-daughter for the expense of her marriage, is not one contemplated by S. 2 (14), C.P. Code and could not be executed under the Code, against the ward who in the meanwhile attained majority. The proper remedy is a suit. 41 Mad. 241=(1917) M.W.N. 602=6 L.W. 526=41 Ind. Cas. 341.

——S. 2 (14)—"Order" — "Judgment" — Distinction.

'Order' as defined in the C.P. Code, is analogous to 'decree' and does not imply what is popularly understood, namely, the views expressed by a Judge on the merits of the case before him and his decision thereon. What is ordinarily called an 'order' is, in fact a 'judgment' as defined in the Code, though a document may be so drawn up as to contain not only the reasons for the decision so as to fulfil the requirements of a 'judgment' but also the 'formal expression' of the decision of the Court so as to fulfil most of the requirements of an 'order' as defined in S. 2 (14), C.P. Code. A. I. R. (Vol. 20) 1933 All. 762=1933 A.L.J. 1301=56 All. 27=147 Ind. Cas. 865.

——S. 2 (14)—Order—Notice of motion—Order on—Executability—S. 36.

Section 36, C. P. Code is not limited to orders made only under the Code, but is applicable to all orders which could be included in the definition of the term "order" as defined in S. 2 (14). An order made on a notice of motion is an order within the meaning of S. 2 (14) and can be executed under S. 36. A.I.R. (Vol. 21) 1934 Bom. 452 =36 Bom.L.R. 992=59 Bom. 10=154 Ind. Cas. 162.

——S. 2 (14)—"Order"—Refusal to pass final decree in mortgage suit—If final order.

Where in a suit by mortgagee for a final decree debarring the mortgagor from redeeming the mortgaged land the Court merely refuses to pass a final decree in terms of the preliminary decree but leaves it open to the mortgagee to file another application under O. 34, R. 8 (2), C. P. Code, for a final decree in some other form according to law, it is doubtful whether the order is a final order against which an appeal can lie. 10 L.L. J. 198=110 Ind. Cas. 81=A.I.R. 1928 Lah. 355.

——S. 2 (14)—Order—Remand—Rent Recovery Act (8 of 1865, Madras), S. 69—Decision of Collector in summary suit—Civil Court—Remand order—Appeal.

A District Judge has jurisdiction under S. 562, C. P. Code, to remand a summary suit under Madras Act (8 of 1865) when there has been an appeal from the decision of the Sub-Collector in such suit; and hence an appeal will lie under S. 588, Cl. (28), C. P. Code, from such order of remand. (1902) 13 M.L.J. 296=26 M. 518.

——S. 2 (17)—Public Officer—Administrator-General.

The Administrator-General is a 'public officer' within the meaning of the expression in S. 2, C. P. Code. (1903) 8 C.W.N. 913.

——S. 2 (17)—Public Officer—Advocate engaged by Government to conduct suit.

An Advocate engaged by Government to conduct a suit on behalf of the Government is an officer and a public officer, giving the word 'officer' its dictionary meaning. A.I.R. (Vol. 26) 1939 Pat. 77=17 Pat. 706=19 P.L.T. 768=5 B.R. 61=178 Ind. Cas. 141.

——S. 2 (17)—Public Officer—British Officer of Indian army—S. 60 (1) (i).

A British Officer in Indian army is "Public Officer" within S. 2 (17), C. P. Code, and is liable to have half his pay attached under S. 60 (1) (i), C. P. Code. 21 Bom.L.R. 143=50 Ind. Cas. 683.

——S. 2 (17)—Public Officer—Cantonment Committee.

A Cantonment Committee formed under the Act is a Public Officer within S. 2, C. P. Code. 34 Bom. 583=21 Bom.L.R. 615=7 Ind. Cas. 579.

——S. 2 (17)—Public Officer—Cantonment Committee—S. 80.

The Cantonment Committee, constituted under the Indian Cantonments Act, 1889, is for the purposes of S. 80 of the Civil Procedure Code, 1908, a public officer as defined in S. 2 (17) of the Code S. 80 of the C. P. Code, 1908, applies to actions sounding substantially in torts although those actions may by operation of law be treated for certain purposes as actions **ex contractu**. (1910) 12 Bom.L.R. 615.

——S. 2 (17)—"—Public Officer"—Common manager appointed under S. 95, Bengal Tenancy Act. A.I.R. (Vol. 28) 1941 Cal. 643=73 C.L.J. 356 =197 Ind. Cas. 869.

——S. 2 (17)—Public Officer—Liquidator.

A liquidator is a public officer within the meaning of S. 2 (17), and hence S. 80 will apply to him. A.I.R. (Vol. 21) 1934 Nag. 201=30 N.L.R. 240 =17 N.L.J. 47=148 Ind. Cas. 714.

——S. 2 (17)—Public Officer—Manager of Court of Wards—C. P. Code, S. 80.

The Manager of a Court of Wards is not a public servant within S. 2, Cl. (17), C. P. Code and is therefore not entitled to a notice under S. 80 of the Code. 55 Ind. Cas. 515 (Cal.).

——S. 2 (17) (c)—'Public Officer'—Member of court-martial convened under Army Act. *See* C. P. CODE, SS. 80 AND 217 (c). A. I. R. 1946 Lah. 247 (S.B.).

——S. 2 (17) (c)—Military officers acting as members of Court-martial—'Public Officers.'

The military officers acting as the members of a General Court-martial which is convened by a Brigadier under the authority of the Commander-in-Chief are 'public officers,' within the meaning of S. 2 (17) (c). A.I.R. (Vol. 33) 1946 Lah. 247.

——S. 2 (17)—'Public Officer'—Municipal Chairman. **See** C. P. CODE, O. 21, R. 52. 13 B.R. 143.

——S. 2 (17)—Public Officer—Municipal Council.

A Municipal Council is not an officer of the Government. 1930 M.W.N. 821.

——S. 2 (17)—Public Officer—Officer working on commission charged to private person—Appointee of Court of Wards.

The payment to an officer of commission charged to a private person for service rendered or the refunding by Government of such commission for the purpose of meeting the cost of an officer who is paid a fixed salary by Government does not affect the question of such officer being a public officer. It is the performance of a public duty by an officer which renders him a public officer. The Court of Wards discharges the functions of Government delegated to

it by the Act and the officer-in-charge is amenable to Government in every way. Even a private person appointed by the Court of Wards to act as a manager of the property of a Government ward has been declared by the statute to be a public office. 22 S.L.R. 63=105 Ind. Cas. 729=A.I.R. 1928 Sind 76.

——S. 2 (17) (S. 2, Old Code)—'Public Officer'—Official Assignee.

The Official Assignee is a public officer within S. 2 (17). 49 Bom. 638=87 Ind. Cas. 1011=27 Bom.L.R. 545=A.I.R. 1925 Bom. 344.

——S. 2—'Public Officer'—Official Assignee.

The Official Assignee is a public officer within S. 2, C. P. Code. 4 Bom.L.R. 929=26 Bom. 809.

——S. 2 (17)—Public Officer—Official Liquidator.

The Official Liquidator, like the Official Receiver appointed in insolvency cases, is an Official of the Court and has got definite powers conferred upon him under Ss. 216 and 217 of the Companies Act and as such he is a public servant within the meaning of the term as defined by the C. P. Code, and to such a Public Officer notice under S. 80 of the Code is necessary. A.I.R. (Vol. 21) 1934 Oudh 158 (2) =9 Luck. 577=11 O.W.N. 398=148 Ind. Cas. 448.

——S. 2 (17)—Public Officer—Official Receiver—S. 80.

An Official Receiver appointed under Provincial Insolvency Act is a public officer within the meaning of S. 2, Sub-S. 17 and he is protected by S. 80. An Official Receiver stands on a higher footing than a receiver appointed in a particular case and therefore no suit is maintainable against him without the requisite notice. A sanction granted by Insolvency Court **ex parte** cannot be taken as an adequate compliance with the requirements of S. 80 of the Code of Civil Procedure. 47 All. 291=84 Ind. Cas. 739=22 A. L.J. 1116=6 L.R.A. Civ. 106=A.I.R. 1925 All. 241 (2) (a).

——S. 2 (17)—Public Officer—Official Receiver.

A Receiver appointed under the Provincial Insolvency Act is a public servant within S. 2 (17) of C. P. Code and hence must be served with a notice under S. 80 of the Code before any action is taken against him. 22 Bom.L.R. 987=58 Ind. Cas. 411.

——S. 2 (17)—Public Officer—Receiver appointed by Court—S. 80.

A receiver appointed under O. 40 of the Code is a public officer and he is entitled to notice as prescribed by S. 80, C. P. Code. 35 C.W.N. 161.

——S. 2 (17)—Public Officer—Sheriff.

The Sheriff of Bombay is a 'public officer'. 51 Bom. 749=29 Bom.L.R. 1071=104 Ind. Cas. 685 =A.I.R. 1927 Bom. 521.

——S. 2 (17)—Public Officer—Village Sanitation Panchayat.

Village Sanitation Panchayat is not a Public Officer within the meaning of S. 80 and no notice of suit is necessary. 14 Bom. 583, Diss. 114 Ind. Cas. 288 =A.I.R. 1929 Nag. 70.

——Ss. 2 (17) (c) and (h)—Applicability—Assistant Surgeon.

An Assistant Surgeon of a station hospital in Military employ is not a 'Public Officer' within S. 60 (i). He is not a 'Gazetted Officer' under S. 2 (17) (c) nor does he come under S. 2 (17) (h). His pay is therefore absolutely protected from attachment. 10 P.R. 1910=23 P.W.R. 1910=65 P.L.R. 1910=5 Ind. Cas. 802.

——S. 2 (17) (c) and (h)—Applicability—Officer in Indian Subordinate Medical Service—If public officer.

'Service under Government' means serving actively under the Government whether in the Civil or Military employ of the Government Officers holding commissioned rank in the Indian Subordinate Medical Service are Public Officers under S. 2, Cl. (17) (c). 1 O.L.J. 127=17 O.C. 99=23 Ind. Cas. 935.

——S. 2 (17) (d)—Applicability—Liquidator appointed by Registrar of Co-operative Societies—If public officer.

The appointing authority being not a Court of Justice but the Registrar of Co-operative Societies, the liquidator is not an officer of a Court of justice and therefore, Cl. (d) of sub-S. (17) of S. 2 is not applicable to him. A.I.R. (Vol. 29) 1942 Lah. 287=I.L.R. (1943) Lah. 389=203 Ind. Cas. 363.

——S. 2 (17) (d)—Applicability—Common manager under S. 95, B. T. Act, S. 80.

A common manager appointed under S. 95 of the B. T. Act is a Public Officer within S. 2 (17) (d) of the C. P. Code and notice under S. 80, C. P. Code is necessary for a suit for accounts against him. 24 C.W.N. 138=30 C.L.J. 279=53 Ind. Cas. 747.

——S. 2 (17) (d) and (h)—Applicability—Official Receiver—If public officer—S. 80.

The Official Receiver appointed to act as Receiver in any particular case, is a public officer both within Cl. (d) and also within Cl. (h) of the definition of 'public officer' in S. 2 (17) of the Code and a suit cannot be instituted against him in respect of an act purporting to be done by him in his official capacity without a notice under S. 80, C. P. Code. A.I.R. (Vol. 18) 1931 Cal. 61=57 Cal. 1127=130 Ind. Cas. 903.

——S. 2 (17) (d) and (b)—Official Receiver appointed in particular case as receiver—Status and position of.

The Official Receiver appointed to act as receiver in any particular case is a public officer both within Cl. (d) and also within Cl. (h) of the definition of public officer in S. 2 (17). 57 Cal. 1127.

——S. 2 (17) (e)—Applicability—Agent of Railway Company having power of arrest—Railways Act (IX of 1890), S. 131.

To place or keep a person in confinement connotes something more than mere arrest. Arrest connotes a check or stoppage of the activities of a person. A person is arrested when he is subjected to such restraint as is necessary to prevent his escape, and no more restraint. To place or keep a person in confinement connotes much more restraint than arrest. It connotes a person being surrounded with restraints so that his movements on each side are very materially limited. Hence an Agent of a Railway Company possessing power of arrest under S. 131, Railways Act, has no power to place or keep a person in confinement within the meaning of S. 2 (17) (e), C. P. Code and is not therefore a public officer. A. I.R. (Vol. 26) 1939 Cal. 386=43 C.W.N. 664= I.L.R. (1939) 2 Cal. 46=182 Ind. Cas. 870.

——S. 2 (17) (g) and (h)—Applicability—Manager appointed under Bengal Court of Wards Act—If public officer.

Although the manager appointed under Bengal Court of Wards Act is controlled and removable by the Court of Wards, he is actually paid by the estate which he manages, and his duties in connection with the property of such estate are 'to take, receive, keep or expend' such property, not on behalf of Government but on behalf of the disqualified proprietor. He is, therefore, not a public officer within the meaning of S. 2, Cl. 17 (g), C. P. Code. But since the Court of Wards is a Government Department, the Court of Wards Manager must be regarded as being in the 'service' of Government, within the meaning of S. 2, Cl. 17 (h), C. P. Code. Cosequently, he is entitled to notice under S. 80, C. P. Code. A. I.R. (Vol. 26) 1939 Cal. 720=I.L.R. (1940) 1 Cal. 73=43 C.W.N. 1212=188 Ind. Cas. 637.

——S. 2 (17) (h)—Applicability—Government officer on deputation—If public officer.

An officer of Government who is on deputation to an institution and receives his pay from that institution, does not cease to be in the service of the Government by reason of his deputation, and he is, therefore, a 'public officer' as defined in S. 2 (17) (h), C. P. Code. I.L.R. (1949) Nag. 232=A.I. R. 1949 Nag. 362.

——S. 2 (17) (h)—Applicability—Manager of Court of Wards.

A manager of Court of Wards can very well be said to be in the service of the Crown and must be regarded as a public officer within the meaning of S. 2 (17) (h), C. P. Code. I.L.R. (1948) 2 Cal. 77=52 C.W.N. 212=A.I.R. 1948 Cal. 150.

——S. 2 (17) (h)—'Public duty'—Meaning of.

The expression 'public duty' in S. 2 (17) (h) refers to duty concerning the affairs or service of the public. The word 'public' may include any class of the public or any community. A.I.R. (Vol. 31) 1944 Cal. 206=48 C.W.N. 157=214 Ind. Cas. 160.

——S. 2 (17) (h)—'Service'—Meaning of—Liquidator appointed by Registrar of Co-operative Societies—If public officer.

The word 'service' must necessarily mean something more than being merely subject to the orders of Government or to control by Government. A liquidator who is appointed by the Registrar of Co-operative Societies to liquidate a private Co-operative Society is not an officer in the service of the Government and therefore is not a public servant. Even if the liquidator is appointed by the Government it cannot be said that because the liquidator is given *quasi*-judicial powers, the duties which he performs must necessarily be regarded as being public duties. Nor can every person who is appointed by the Government to perform public duties is a public officer. A.I.R. (Vol. 27) 1940 Mad. 831=(1940) 2 M. L.J. 241=1940 M.W.N. 782=I.L.R. (1940) Mad. 929=52 M.L.W. 131=194 Ind. Cas. 769.

——S. 2 (20)—'Signed'—Use of stamp—Sufficiency.

Use of stamp bearing the name of the party is sufficient even in cases where he is able to sign. 3 All. 75, Appl. 51 Mad. 242=107 Ind. Cas. 804=27 M.L.W. 237=1927 M.W.N. 885=A.I.R. 1928 Mad. 175=54 M.L.J. 65.

——S. 3—Court subordinate to High Court—Collector acting under S. 18 of the Land Acquisition Act (1 of 1894).

The Collector though he may be acting judicially when exercising his functions under S. 18 of the Land Acquisition Act and though he may even be called a Court, is certainly not a Court, subordinate to the High Court. 123 Ind. Cas. 911=A.I.R. 1930 Nag. 271.

——S. 3—'High Court'—Chief Court of Oudh.

The Chief Court of Oudh is a High Court within the meaning of C. P. Code. 4 O.W.N. 1114=A.I.R. 1928 Oudh 89 (1).

——S. 3—Subordinate Court—Authority and jurisdiction—Source of.

A Senior Subordinate Judge does not exercise his powers in view of any authority delegated to him by the Provincial Government, but in view of the statutory provisions embodied in the Civil P. C. A.I. R. (Vol. 27) 1940 Pesh. 41=42 Cr.L.J. 68=191 Ind. Cas. 91.

——S. 3—Scope—If exhaustive.

The list of Subordinate Courts in S. 3 is not exhaustive and does not exclude all other Courts from being subordinate to the High Court. 37 Bom. 114 =14 Bom.L.R. 947=17 Ind. Cas. 676.

——S. 4—Special Law—Electricity Act—If controlled or abrogated.

The Electricity Act is a special law and the provisions under the Civil Procedure Code are subject to any condition regulating that procedure by the provisions of the Electricity Act. A.I.R. (Vol. 27) 1940 All. 24=1939 A.L.J. 983=I.L.R. (1939) All. 901=186 Ind. Cas. 689.

——S. 4—Special Law—Provincial Insolvency Act—Appeal under—Applicability of Code.

Provincial Insolvency Act is a special Act creating a Special Court. Hence, in appeals in insolvency, the High Court must be governed, not by Civil P. C., but by S. 75 (1), Provincial Insolvency Act. A.I. R. (Vol. 33) 1946 Nag. 42=I.L.R. (1945) Nag. 719=1945 N.L.J. 447.

——S. 4—Special law — Letters Patent (All.), Cl. (10)—If abrogated or saved.

The provisions of the Letters Patent (All.) are saved by S. 4, unless there is any specific provision to the contrary. Section 104 (2) does not contain any express provision which would suggest that the provisions of the Letters Patent have been abrogated. Hence, under Cl. (10), Letters Patent (All.) an appeal lies from the order of a Single Judge passed in appeal. A.I.R. (Vol. 24) 1937 All. 165=1936 A.L.J. 1326=1937 A.L.R. 211=I.L.R. (1937) All. 386=167 Ind. Cas. 653.

——S. 4—Special law—Letters Patent (Madras), S. 21—Power of High Court to issue injunction apart from O. 39, R. 2, in cases from mofussil.

In view of the provisions of S. 21 of the Letters Patent (Madras) where the High Court deals as appellate or revisional authority, with a case coming from a **mofussil** Court, it can only apply such law or equity and rule of good conscience as would be applied by the **mofussil** Court. Therefore, it can grant only an injunction in respect of such a case in accordance with the provisions of O. 39. Consequently, the High Court has no power in such a case

to grant an injunction staying the execution of a decree in a mofussil Court pending a revision petition. A.I.R. (Vol. 20) 1933 Mad. 500=37 M.L.W. 110=1933 M.W.N. 18=64 M.L.J. 112=56 Mad. 563=141 Ind. Cas. 607.

——S. 4—Special law—Oudh Laws Act (18 of 1876), S. 19—Evidence of witness given in Urdu but recorded in English — Need for explaining same to witness—Applicability of O. 18, R. 6.

Under S. 19, Oudh Laws Act, it is necessary to interpret the evidence recorded in English to a witness who gives his evidence in another language, such as Urdu only, if he does not understand English, and requests that his deposition be interpreted to him.

Under S. 4, Civil P. C., it is S. 19 of the Oudh Laws Act which applies to the recording of evidence in a criminal case in Oudh and not O. 18, R. 6, Civil P. C. A.I.R. (Vol. 18) 1931 Oudh 385=8 O.W.N. 685=32 Cr.L.J. 851=1931 Cr. Cas. 817=132 Ind. Cas. 270.

——S. 4—Special law—Letters Patent (Mad.), Cl. 36—If abrogated—Applicability of S. 98, C. P. Code.

Per **Full Bench.**—Whether the appeal is under C. P. Code or under the Letters Patent, the procedure to be adopted in either case by the High Court in case of an equal division of opinion between the Judges is to be covered by Cl. 36, Letters Patent, and not by S. 98, C. P. Code. 29 M.L.W. 823=116 Ind. Cas. 343=52 Mad. 563=A.I.R. 1929 Mad. 641=57 M.L.J. 264 (F.B.).

——S. 4—Special Law—Army Act—If overrides C. P. Code—Generalia specialibus non derogant—Army Act, S. 145.

In view of the S. 4, C. P. Code the law applicable to soldiers as defined in S. 90 of Army Act, (1881), is the Army Act and it overrides S. 60 of the C. P. Code. 43 Bom. 368=21 Bom.L.R. 137=50 Ind. Cas. 427.

——S. 4—Scope—Special or local law—U. P. Municipalities Act—Election under—Suit to declare invalidity—Competency — Remedy under local law.

From S. 4, Civil P. C., it follows that where there is special or local law the Civil Court would not have jurisdiction under S. 9, Civil P. C., to entertain a claim merely because it is of a civil nature. So far as the reliefs for the declaration regarding the illegality of the election of the members of the Board and the injunction against the Board are concerned, no suit would lie in a Civil Court for a declaration that the result of a Municipal election has been wrongly declared and that the plaintiff is the person entitled to be declared elected. No injunction can be issued against the Board for the same purpose. Election of a member of a Municipal Board cannot be challenged on grounds other than those mentioned in S. 19, U. P. Municipalities Act, in Civil Court. A.I.R. (Vol. 24) 1937 All. 365=1937 A.L.R. 490=1937 A.L.J. 336=169 Ind. Cas. 239.

——S. 4 (2)—Scope—Rent suit—Revision—Competency.

The plaintiffs filed certain suits for rent which were heard by an Assistant Collector of the second class. On appeal his decrees were confirmed by the Collector. There were further appeals to the District Judge, which were unsuccessful. The defendant then applied in revision under S. 115, C. P. Code, for the discharge of the decree passed by the District Judge.

Held, that an application for revision to the High Court in these circumstances is not maintainable. 10 O.L.J. 191=72 Ind. Cas. 1023=5 L.R. Oudh. 17 =A.I.R. 1924 Oudh 16.

——S. 6—Applicability—"Value"—Meaning of—Transfer of decree for execution to another Court—Jurisdiction of latter—Criterion to decide—Value of execution case or value of original suit.

Section 6, Civil P. C., applies to the valuation of the case actually transferred, that is, the execution case. There is no reason whatever why the question should go back to the valuation of the original suit. Where proceedings have terminated in a decree the execution of one decree is the same as the execution of another of the same amount and no question of the original valuation of the suit has any real bearing on the question of a decree. It is the valuation of the decretal amount which determines the importance of the case for the limits of pecuniary jurisdiction. It is not, therefore, necessary that the Court to which a decree is transferred for execution should be a Court having a limit of pecuniary jurisdiction which would include the original valuation of the suit. A.I.R. (Vol. 27) 1940 All. 331=1940 A.L.J. 381=I.L.R. (1940) All. 318=189 Ind. Cas. 376.

——S. 6—Applicability to execution proceedings.

Suits include proceedings in execution. (1940) N.L.J. 244.

——S. 6—Applicability — Proceedings before Calcutta Improvement Tribunal.

The proceedings before the President of the Calcutta Improvement Tribunal is not a suit, and S. 6 does not apply to an order passed in such proceedings. 31 C.W.N. 142=94 Ind. Cas. 170=A.I.R. 1926 Cal. 853.

——S. 6—Scope—Appeal to District Judge—Pecuniary jurisdiction of District Judge—Amount to be decreed beyond jurisdiction—Procedure.

District Judge in an appeal from a decree for an amount less than Rs. 5,000, cannot pass a decree for payment of a sum larger than Rs. 5,000, since this is his maximum pecuniary jurisdiction. In such a case what he should do is to submit the record to the High Court with the recommendation that the appeal be transferred to its own file and decree passed accordingly. He should not return the memorandum of appeal to the appellant for presentation before the High Court. A.I.R. (Vol. 27) 1940 Lah. 186 =190 Ind. Cas. 399.

——S. 6—Scope—Incidental issue raised by defence—Valuation of—Relevancy.

There is no warrant in the Civil P. C., for saying that a Court cannot try incidentally an issue as to property, the value of which is beyond its jurisdiction. All that S. 6 says is that no Court shall have jurisdiction over suits, the value of which exceeds the limits of its pecuniary jurisdiction. It is the valuation of the suit and not of an incidental issue raised by the defence which determines the jurisdiction. A.I.R. (Vol. 24) 1937 Rang. 219=169 Ind. Cas. 933.

——S. 6—Scope—Court not having jurisdiction—Remand order—If can confer jurisdiction.

A remand order cannot confer on the subordinate Court a jurisdiction which that Court would not have had but for remand. It would be highly anomalous to hold that a Court not having jurisdiction in the ordinary course becomes competent in consequence of a remand by a superior Court. 30 P.L.R. 244=116 Ind. Cas. 324=A.I.R. 1929 Lah. 534.

——S. 6—Scope—Suit within jurisdiction of Court—Preliminary decree—Inquiry into mesne profits—Amount found due exceeding jurisdiction of Court—Procedure—Return of plaint—Propriety—Power to pass final decree.

Per **Full Bench (Walmsley, J.,** dissenting).—Where a Judge has in the proper exercise of his jurisdiction passed a decree for possession and also a preliminary decree for mesne profits, he must be held to have jurisdiction to make a final decree in accordance with his decision. This jurisdiction is not limited, if, as a result of the inquiry directed by him, the mesne profits are found to exceed the amount of his pecuniary jurisdiction as regards the value of the suit. If a suit is rightly entertained as within the jurisdiction of the Judge and a decree passed, his power to grant the proper and adequate relief is not affected by any event which increases the value of the relief during the pendency of the suit. The forum of appeal is determined with reference to the value of the suit, and not the amount decreed. The plaintiff is neither required nor bound to state any amount in his application. The application is not a plaint, and the admission of both parties that the plaint should be returned for presentation to a higher Court cannot be accepted for the reason that a preliminary decree has already been passed in the case by the Munsif on the original plaint, and the only thing that remains to be done is to give effect to the preliminary decree by a final decree. There is no provision in the law for the return of a plaint after a preliminary decree has been passed. 53 Cal. 14=89 Ind. Cas. 726=42 C.L.J. 49=29 C.W.N. 869=A.I.R. 1925 Cal. 1076 (F.B.).

——S. 7—Scope—Principal and agent—Suit against agent for accounts—Jurisdiction of Small Cause Court.

Suit against agent for value of tickets received and not accounted for is cognizable by Small Cause Court. 187 Ind. Cas. 480 (Bhopal).

——S. 7—Scope of—Same Judge holding office both of Judge, Small Causes, and Judge on regular side—Power to transfer—Small Cause Court decree to regular side for attachment and sale of immovable property.

The principle underlying S. 7, Civil P. C., is that the transferor Court may transfer a decree where it is incapable of dealing fully with it itself. On this application of the **ejusdem generis** rule, there is no reason why Cl. (4) of S. 7 should not be invoked to empower a Small Cause Court to transfer one of his own decrees to a regular Court, whether the presiding officer of that regular Court be itself or some other person, in order to get it executed against the immovable property of the judgment-debtor. Hence, where the same Judge holds the office both of the Judge, Small Causes, and as a Judge on the regular side, he can, on an application of the decree-holder or otherwise, transfer a Small Cause Court decree to the regular side for the purpose of obtaining attachment and sale of the immovable property. A.I.R. (Vol. 28) 1941 Lah. 109=I.L.R. (1941) Lah. 670=43 P.L.R. 1=198 Ind. Cas. 446.

——S. 7—Small Cause Court—Charge on immovable property—Decree creating—Legality.

A Small Cause Court has no power to declare a charge on immovable property. So far as the decree of such Court seeks to create a charge on immovable property on failure of the judgment-debtor to pay instalment of the compromise decree, it must be regarded as void and inoperative. A. I. R. (Vol. 28) 1941 Nag. 197=1941 N.L.J. 207=196 Ind. Cas. 232.

——S. 7—Small Cause Court, if can create charge on immovable property.

A Small Cause Court has no power to declare a charge on immovable property and, therefore, where its decree seeks to create a charge, it must be regarded as void and inoperative. A.I.R. (Vol. 26) 1939 Nag. 118=I.L.R. (1941) Nag. 356=1939 N. L.J. 121=182 Ind. Cas. 102.

——S. 8—Small Cause Court, if can create charge on immovable property.

The creation of a charge upon the property is something entirely different from the execution of a decree against the property. The attachment of immovable property would be a step in execution. The creation of a charge is a not a step in execution and a Small Cause Court, though it has no jurisdiction to attach an immovable property has jurisdiction to create a charge on it. A.I.R. (Vol. 24) 1937 All. 194=1937 A.L.J. 93=1937 R. D. 39=I. L. R. (1937) All. 418=1937 A.L.R. 262=167 Ind. Cas. 784.

——S. 7—Small Cause Court—Jurisdiction of—Agreement of partnership—One party failing to utilise amount contributed for purpose of partnership—Suit by other for share—If cognizable in Small Cause Court.

It was agreed orally between the plaintiff and the defendant that each of them should contribute the sum of Rs. 700 and purchase a motor bus under the hire-purchase system and also run it between certain places as might be agreed to from time to time, the necessary permits, licences, etc., being obtained in the name of the defendant. It was further agreed that the monthly net profits realised by such plying were to be shared by the plaintiff and the defendant in equal shares. In pursuance of this agreement the plaintiff paid Rs. 305 towards the purchase of the motor bus in question. The plaintiff's case was that half of this sum, namely, Rs. 152-8-0, represented his contribution towards the capital of the partnership, and the other Rs. 152-8-0 the defendant's contribution towards his share of the capital. Subsequently, a further payment of Rs. 400 was made to the defendant and the plaintiff's case was that the defendant did not utilise it for the purpose of the partnership, but utilised it for his own purposes. The defendant denied the agreement as to the shares to be contributed, and set up the case that the plaintiff was to contribute the whole of the capital.

Held, that the effect of the agreement alleged was from the start an agreement of partnership. It was a co-adventure between the plaintiff and the defendant that the plaintiff contributed the half-share of the defendant to the partnership, that is to say, advanced

him his half-share in the sum of Rs. 705 and to that extent, namely, half of it, he was entitled to recover from the defendant and to that extent the suit was maintainable in the Small Cause Court. A. I. R. (Vol. 23) 1936 Mad. 673=170 Ind. Cas. 268.

——S. 7—Small Cause Courts—Power to attach immovable property.

A Small Cause Court, acting as such, cannot attach immovable property in execution of its decree. This is so even though the Small Cause Court is also an ordinary Court, unless the decree has been formally transferred to the ordinary side. 132 Ind. Cas. 208.

——S. 7—Small Cause Court—O. 38, R. 5—Applicability.

A Small Cause Court cannot attach immovable property in execution of a decree, even though it is also an ordinary Court, unless the decree has been formally transferred to the ordinary side. 30 P.L. R. 40=114 Ind. Cas. 329=A.I.R. 1929 Lah. 398.

——S. 7—Small Cause Court—C. P. Code, O. 38, R. 5—Applicability of.

A Small Cause Court has power to attach immovable property before judgment under O. 38, R. 5. 1925 M.W.N. 169=48 Mad. 488=87 Ind. Cas. 399 =22 M.L.W. 103=A.I.R. 1925 Mad. 589=48 M. L.J. 406.

——S. 7—Small Cause Court—Power to attach immovable property.

Under the Code of 1908, a Provincial Small Cause Court has no power to attach immovable property before judgment and to decide a claim case thereon. 28 C.W.N. 16=80 Ind. Cas. 300=A.I.R. 1924 Cal. 193.

——S. 7 (a)—Small Cause Court—Power to attach joint family property consisting of immovables.

A Small Cause Court cannot attach a half-share of joint family property, part of which at least is immovable property. 10 N.L.R. 17=23 Ind. Cas. 156.

——S. 7—Small Cause Court—Execution by sale of decree on mortgage—Jurisdiction.

A Small Cause Court can attach and sell a preliminary decree for foreclosure for immovable property. 44 Ind. Cas. 252 (N.).

——S. 7 (a)—Small Cause Court—Attachment of mortgage debt—Legality.

A debt secured on a hypothecation bond is not immovable property for purposes of attachment and Small Cause Court can attach it. 22 M.L.J. 105, Foll. 16 Ind. Cas. 816 (Mad.).

——S. 7 (b)—Small Cause Court—Power to attach movables before judgment.

The only orders excluded from the jurisdiction of a Small Cause Court are those specifically mentioned in S. 94 as injunctions or interlocutory orders, that is to say orders under Cl. (c) of S. 94. An attachment before judgment is not one of the orders. A Provincial Small Cause Court has the power to attach movables before judgment. 46 Cal. 717=31 C. L.J. 179=53 Ind. Cas. 814.

——S. 7 (b) (ii) and (iv)—'Injunctions and interlocutory orders'—Meaning of.

The words 'Injunctions and interlocutory orders' in S. 7 refer only to the orders under O. 39 and these two read together can mean only applications for injunctions and interlocutory orders on such applications. 26 Ind. Cas. 359 (Mad.).

——S. 8—Construction and scope.

When S. 8 says that "the provisions in the body of this Code shall not extend to any suit" it means that the provisions shall not also extend to any decree passed in such suit. A.I.R. (Vol.) 1942 Pat. 128 =23 P.L.T. 87=8 B.R. 256=197 Ind. Cas. 627.

——S. 8 — Scope — Decree of Madras Small Cause Court transferred to Mofussal District Munsif for execution—Order by Munsif—Appeal—Jurisdiction of District Judge.

Where the decree of the Madras Small Cause Court had been transferred to the original jurisdiction of a District Munsif's Court.

Held, that the C. P. Code was applicable to the execution of such proceedings, and that the District Judge had jurisdiction to hear an appeal from the decision of the District Munsif in execution proceedings and his order was not without jurisdiction. 22 M.L.W. 455=1925 M.W.N. 713=90 Ind. Cas. 509=A.I.R. 1925 Mad. 1179=49 M.L.J. 104.

——S. 9 (S. 11, Old Code).

Synopsis.

1. Bar of suit.
2. Expressly or impliedly barred.
3. Express bar.
4. Implied bar.
5. Civil and Revenue Court.
6. Revenue Court.
7. Scope.
8. Suit of civil nature.

——S. 9.

1. Bar of suit.

(a) Act of State.
(b) Birt jajmani.
(c) Caste question.
(d) Municipal assessment.
(e) Municipal election.
(f) Municipality.
(g) Test.
(h) Miscellaneous.

1 (a) Act of State.

——S. 9—Bar of Suit—Act of State—Change in status of individuals and character and authority of Court—Effect on vested rights—Principles governing — Applicability. **See** INTEREPRETATION OF STATUTES. 52 Bom.L.R. 660.

——S. 9—Bar of suit—Condition—Extent of bar.

The exclusion of the jurisdiction of the Civil Court is not to be readily inferred but such exclusion must either be explicitly expressed or clearly implied. Even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. A. I.R. (Vol. 32) 1945 Lah. 223=221 Ind. Cas. 107 (F.B.).

——S. 9—Act of State—Questions relating to, and to public policy — Jurisdiction of Civil Court.

Suits relating to acts of State or public policy are excluded from the jurisdiction of the Civil Courts. An "act of State" includes two main classes of acts, (1) acts which are capable of being done by a private individual and (2) acts which only the Supreme Government can perform, such as the making of treaties and the declaration of war. But there is also a third class which might be more accurately termed "facts of State", which consists of matters and questions the determination of which is solely in the hands of the Crown or the Government such as the question whether a particular territory is within the boundaries of a particular State.

The plaintiff was the **inamdar** of the village of Ankli in the district of Belgaum. He had a piece of land in the village bearing survey No. 54 to the east of which flowed a perennial stream of water. On the other side of the stream and opposite survey No. 54 were two survey Nos. 170 and 171 of the village of Nasalapur in the State of Kolhapur. The latter survey numbers belonged to defendants Nos. 2 to 4 who were subjects of the Kolhapur State. The stream in course of time flowed away from survey No. 54 and left an alluvion land measuring five **gunthas** adjoining the above land. In this process the land of survey Nos. 170 and 171 was eroded by the stream. A dispute arose between the plaintiff and defendants Nos. 2 to 4 as to the ownership of five **gunthas** of alluvial lands. At the instance of defendant No. 2, who owned survey No. 171, the Collector of Belgaum decided that the land belonged to defendant No. 2, and directed that it should be treated as part of survey No. 171 and not of Ankli. On appeal the Commissioner held that not only the five **gunthas** of land but other alluvial land may be lawfully claimed by defendants Nos. 2 to 4. This order was upheld by Government of Bombay. The plaintiff sued for a declaration that he was entitled to the whole of the alluvial land:

Held, that the dispute was one relating to the boundary between the territories of the Government of Bombay and the territories of the Kolapur State, and any decision on that point must be regarded as an act of State outside the jurisdiction of the Civil Court:

Held further, that the suit was barred also on the ground that the Court was bound by the statement of the Government Pleader that the Bombay Government did not claim the land in dispute as part of its own territories. A.I.R. (Vol. 30) 1943 Bom. 427 =45 Bom.L.R. 810=I.L.R. (1943) Bom. 534= 213 Ind. Cas. 348.

——S. 9—Bar of suit—Act of State—Obligation assured under treaty with ceding State—Civil suit to enforce—Bar of.

Any obligation assured under the treaty with the ceding State either to the Sovereign or to the individuals is not one which the Municipal Courts are authorised to enforce, unless the right claimed under the treaty has received a statutory recognition and has been incorporated in the Municipal Law. A.I.R. (Vol. 28) 1941 P.C. 109=1941 O.L.R. 753= 8 B.R. 102=196 Ind. Cas. 567 (P.C.).

——S. 9—Bar of suit—Principles governing—Extent of bar.

The exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but such exclusion must either be explicitly expressed or clearly implied. Even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. A.I.R. (Vol. 27) 1940 Cal. 554 =44 C.W.N. 1103=191 Ind. Cas. 571.

——S. 9—Bar of suit—Principles governing—Extent of bar.

The right of the subject to appeal to the Court to redress a simple wrong can only be taken away by statute. The ordinary rule is where a person's liberty or property is interfered with under colour of statutory powers, he has a cause of action which the Civil Courts are bound to entertain, unless a bar to such entertainment has been enacted expressly or at least by necessary implication. A.I.R. (Vol. 27) 1940 Mad. 493=51 L.W. 185=1940 M.W.N. 148= (1940) 1 M.L.J. 352=I.L.R. (1940) Mad. 825= 190 Ind. Cas. 753.

——S. 9—Bar of suit—Arbitration—Award—Suit to set aside on grounds covered by law of Arbitration—Arbitration Act, S. 14.

Quare:—It is doubtful whether a suit lies to set aside an award on grounds covered by S. 14, Arbitration Act.

Obiter:—A suit to set aside award even on grounds covered by S. 14 is a civil suit in the terms of S. 9 and it cannot be said that its cognizance is either expressly or impliedly barred by anything contained in the Arbitration Act. A.I.R. (Vol. 23) 1936 Bom. 250=38 Bom.L.R. 380=60 Bom. 645=163 Ind. Cas. 532.

——S. 9—Bar of suit — Arbitration — Award—Suit to set aside on ground of fraud.

A suit would lie to set aside the proceedings purporting to be taken under Sch. 2, C. P. Code, if the proceedings are fraudulent, fictitious or vexatious, but not if there has been an agreement to refer and the party wants to impugn the award made on such reference. 32 Bom.L.R. 389=A.I.R. 1930 Bom. 431.

——S. 9—Act of State—Appointment of Political Agents.

Political Agent appointed to manage State of minor Chief—Appointment cannot be questioned in Municipal Courts—Municipal Courts can, however, try suit by Chief for redress of breach of trust for embezzlement by Political Agent or his subordinates with regard to property in British India. A. I. R. 1930 Pat. 357.

——S. 9—Act of State—Commandeering order.

A commandeering order is one which no one but Government can make, and being an act of the Sovereign, the Secretary of State evidently cannot be sued in respect of it. 54 Cal. 969=107 Ind. Cas. 360= A.I.R. 1928 Cal. 74.

——S. 9—Bar of suit—Act of State—British Protectorate — Crown controlling foreign relations—Interference by Crown—Jurisdiction of Civil Court to challenge.

In the general cases of a British Protectorate although the protected country is not a British Dominion its foreign relations are under the exclusive con-

trol of the Crown so that its Government cannot hold direct communication with any other foreign power, nor a foreign power with its Government.

The protected State becomes only semi-sovereign for the protector may have to interfere at least to a limited extent with its administration in order to fulfil the obligations which International Law imposes on him to protect within the subjects of foreign powers. A restricted form of extra-territorial sovereignty may have its exercise called for, really in involving division of sovereignty in the hands of protector and protected. But beyond this, it may happen that the protecting power thinks itself called on to interfere to an extent which may render it difficult to draw the line between a protectorate and a possession. In South Africa the extension of British Jurisdiction by order in Council has at times been carried very far. Such extension may be referred to an exercise of power by an act of State unchallengeable in any British Court, or it may attributed to statutory powers given by the Foreign Jurisdiction Act, 1890. 30 C.W.N. 961=99 Ind. Cas. 265=A.I.R. 1926 P.C. 131.

——S. 9—Bar of suit—Act of State—Jurisdiction of Civil Court.

When a territory is acquired by a sovereign state for the first time that is an Act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty; it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can only make good in the municipal Courts established by the new sovereign such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay, more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights that does not give a title to these inhabitants to enforce these stipulations in the municipal courts. The right to enforce remains only with the High Contracting Parties. 7 M.I.A. 476 and 42 I.A. 229, Foll.

Where Scindia of Gwalior ceded certain districts in exchange for other districts to the British Government and both parties agreed to maintain intact rights of private subjects, on suit by certain persons for a declaration that they were Talukdars:

Held, the whole object of enquiry is to see whether after cession, the British Government has conferred or acknowledged as existing the proprietary right which the plaintiffs claimed. The view of the officials of the Government as to documents would influence them to make up their minds as to what title should be given or recognised, but even then it is what they did after investigation, not what they thought at investigation, that is matter of moment; a mere general statement that existing rights would be upheld could never prevail against exact determinations. Any statement in general terms that rights will be respected must necessarily mean as these rights are on investigation determined by the Government officials. To suppose that by such general statements in a proclamation the Government renounced their right to acknowledge what they thought right and conferred on a municipal Court the rights to adjudicate as upon rights which existed before cession, is to misapprehend the law as above set forth. 48 Bom. 613=51 I.A. 357=82 Ind. Cas. 779=1924 M.W.N. 694=22 A.L.J. 951=5 L.R.P.C. 199=26 Bom. L.R. 1143=40 C.L.J. 473=29 C.W.N. 317=21 M.L.W. 28=A.I.R. 1924 P. C. 216=47 M. L. J. 574 (P.C.).

——S. 9—Act of State—Resumption of inam.

A resumption by the Sovereign of an **inam** is an Act of State which cannot be questioned in the Municipal Courts. 28 Ind. Cas. 934 (Mad.).

——S. 9—Act of State—Annexation of territory—Suit in respect of—Maintainability.

Annexation of territory is an Act of State and any obligation assumed under a treaty either to the ceding sovereign or to individuals is not one which Municipal Courts are authorized to enforce. After a cession of territory to the British Crown by the Native Rulers, the only enforceable rights in respect of the land ceded are those subsequently confirmed by the Crown by express or implied agreement or by legislation. An agreement by the Crown to confer rights which existed before the cession may be inferred from evidence that the Crown recognized those rights and expressly 'or impliedly elected' to be bound by them. It is only for that purpose that the consideration of the existence, nature or extent, of the ante-cession rights become relevant subjects for inquiry. It is irrelevant in all other respects. 39 Bom. 625=19 C.W.N. 1087=13 A.L.J. 953=(1915) M.W.N. 563=29 M.L.J. 242=18 M.L.T. 179=2 L.W. 731=17 Bom.L.R. 730=23 C.L.J. 1=30 Ind. Cas. 303=42 I.A. 229 (P.C.) [O. A. 13 Bom. L. R. 609=11 Ind. Cas. 948].

——S. 9—Act of State—Non-feudatory chiefs—Withdrawal of police of Excise functions by Government—Abolition of cattle pounds—Suit for their restoration—Maintainability.

In 1864 the British Government declared that the status of feudatory chief in the Central Provinces, whose territory had become British by conquest, cession or lapse, was that of ordinary British subjects to whom certain judicial and administrative powers had been entrusted as a matter of convenience or for economy of administration. Sanads recognising their property and rights were granted in 1874. The Government gradually withdrew from them the administration of police, excise and cattle pounds giving compensation for the consequent loss of revenue. In the settlement of 1903 the Government obtained the execution under protest of **wajib-ul-arzes** from the Zemindars consenting to the resumption of these functions by Government. The Zemindars sued for annulment of these provisions and for the restoration of the rights which they alleged had been theirs from time immemorial of which they had been wrongfully deprived. **Held,** that the rights alleged had existed only by sufferance or delegation and the resumption of these functions by Government was a thing legitimately done in the exercise of its sovereign powers. Consequently an action was maintainable in a Civil Court with regard to such resumption. 39 Cal. 615=16 C.W.N. 362=15 C. L.J. 633=(1912) M.W.N. 657=14 Bom.L.R. 812 =39 I.A. 31=13 Ind. Cas. 965 (P.C.).

——S. 9—Bar of Suit—Act of state—Suit to enforce undertaking given for performance of decree by private individual — Jurisdiction of Municipal Court.

An Act of State cannot be controlled or interfered with by the Municipal Courts but the Courts must decide whether a particular act is in truth an Act of State or not. A guarantee given by the Secretary of State for the due performance of a decree obtained by one private individual against another is not an Act of State. 38 Cal. 754=15 C.W.N. 475=9 Ind. Cas. 862=13 C.L.J. 365.

——S. 9 (S. 11, Old Code)—Act of State—Test —Jurisdiction of Municipal Courts.

The test whether an act is or is not an act of State excluding the jurisdiction of the Courts, is not whether it is capable of being legally performed only by persons specially empowered in that behalf as authorized by the law to perform specific acts of Government, but whether it is an act of State in those external relations, which Municipal or positive law addressed by political superiors to political inferiors does not profess to regulate. An act of State in respect of which the jurisdiction of the Courts is barred must be an act which does not purport to be done under colour of a legal title at all, and which could neither assert nor violate any right conferable by law, but which must rest for its jurisdiction on considerations of external politics and interstate duties and rights. Per *Jacob, J.*—The resolution issued by the Government of Bombay libellously censuring a public officer for his delinquencies is not an act of State, and has therefore no absolute privilege. 6 Bom.L.R. 131=27 Bom. 189.

1 (b) Birt jajmani.

——S. 9—Bar of suit—Birt jajmani right—Suit by legal heir as Panda for declaration of his right of inheritance and for injunction—Maintainability—Manbirt—Distinction.

A **manbrit** essentially differs from a **birt jajmani.** In the **manbrit** the relation between **jajmani** and **purohit** is a temporary one and there is no fixity or hereditary character about it. But in **birt jajmani,** especially those relating to Hindu pilgrimages like Muttra, Benares and Allahabad, though it is open to parties to break away the old connection and establish a new one by custom and usage of the country, as a matter of practice and as general rule, the connection between **purohit** and **jajman** is both permanent and hereditary.

The right to **birt jajmani** is a right in property. It is a heritable property, in some cases transferable. An action by a legal heir (widow) of a Gangaputra or a Panda for declaration of his right to inherit the **birt jajmani** right and for an injunction restraining the defendants from interfering within the plaintiff's rights and for recovery of possession of the pilgrim's **bahis,** is a suit of a civil nature and is, therefore, cognizable by the Civil Court.

In such a case the defendants can be restrained by an injunction but the correct scope of that injunction must be specified. The defendants cannot be prohibited from working as **purohits** nor can they be restrained from accepting any pilgrim coming from a particular place as their **jajman,** provided the **jajman** of his own free will with full knowledge of the facts chooses to accept the defendants as their Panda. But the defendants cannot be permitted to work under name and colour of the plaintiff's birt **jajmani** nor can they be permitted to use **bahis,** marks and other paraphernalia associated with the plaintiff's **birt jajmani.** A. I. R. (Vol. 29) 1942 All. 320=1942 A.L.J. 346=I.L.R. (1942) All. 821=202 Ind. Cas. 653.

——S. 9—Bar of suit—Birt jajmani—Rights of Acharajs inter se—If can be decided and enforced by Civil Court.

A Court cannot control the selection of an acharaj by the jajman and if it transpires that that the jajman has chosen a particular acharaj to the exclusion of another, the Court will not give any decree so as to affect such a selection; but as between the acharajs themselves in the absence of an express selection by the jajmans to whom it may be immaterial whether the birt is received by one or the other, the rights of the acharajs **inter se** can be adjudicated upon and enforced by the Civil Court. 10 L.L.J. 242=112 Ind. Cas. 262=A.I.R. 1928 Lah. 730.

——S. 9—Bar of suit—Birt jajmani—Suit lies for share of income earned as Hindu priest on the river banks.

Gains made by the performance of services at the spots called **chaukis** built on the banks of the river where one or the other of the members of Hindu priest family use to sit, receive his clients and help them in the observance of their religious ceremonies connected with the river such as bath, offering flowers, etc., are property in law and a suit for a share in the business resulting in such gains is maintainable as a claim of a civil nature within S. 9 of the Code. 18 A.L.J. 679; 1923 All. 350; 43 All. 581, 15 C. L.J. 375, 5 O.C. 225, Foll. 10 O.L.J. 595=78 Ind. Cas. 256=27 O.C. 114=A.I.R. 1924 Oudh 252.

——S. 9—Bar of suit—Birt jajmani—Suit in respect of—Maintainability.

A pragwal, used a particular kind of flag, to attract the notice of pilgrims. The defendant who acted as his agent put up a similar flag so as to mislead pilgrims into the belief that he was the pragwal. **Held** that the action of the defendant was unlawful and the plaintiff had a right to maintain a suit to restrain the defendant from making the use of the emblem or flag. 18 A.L.J. 679.

——S. 9—Bar of suit—Birt jajmani—Voluntary offerings—Suit by co-sharer for share—Maintainability of.

A suit or definite amount due to plaintiff as a co-sharer of the offering of a temple (birt) realised by the defendant is maintainable in the Civil Court. 26 P.R. 1919=70 P.L.R. 1919=51 Ind. Cas. 236.

——S. 9—Bar of suit—Birt jajmani—Voluntary offerings—Suit for—Bar of.

Unless there is an express contract to make a refund no suit lies for the recovery of a voluntary offering if that suit is based on mere custom. 2 W. R. 69, foll. 1 Pat. L. J. 381=2 Pat.L.W. 390=35 Ind. Cas. 345.

——S. 9—Bar of suit—Birt of jajmani—Voluntary offerings—Right to perform Ramlila—Suit in respect of—If lies.

A suit, to establish a right to perform Ramlila, to receive offerings given on the occasion and to raise

subscription to meet the Ramlila expenses, is not cognizable by Civil Court. 32 All. 527=7 A.L.J. 529=6 Ind. Cas. 223.

1 (c) Caste Question.

——S. 9—Caste question—Jurisdiction of Courts.

A Civil Court has jurisdiction to entertain a suit for a declaration that a resolution of a caste tribunal excommunicating a person from caste is void. A.I.R. (Vol. 22) 1935 Bom. 367=37 Bom.L.R. 603=159 Ind. Cas. 650.

——S. 9—Caste matters — Question whether particular cult is within Vedic religion or not —Caste offence—Rules of Panchayats — Interference by Court.

The question whether the cult of the **leva patidar** caste is within the Vedic religion or not is one which the Civil Courts are not competent to decide. A properly assembled caste **panchayat** has jurisdiction to out-caste members of its community who have committed caste offences, and when the **panchayat's** proceedings are in order and consonant to natural justice, Courts of law cannot by decree interfere with them. Courts cannot lay down rules as to the procedure to be followed by a caste **panchayat** in such matters, which are for the **panchayat** itself.

The standard of a notice of a caste meeting cannot be that of a Civil Court to a party to a suit; and if it is found that actually there was a widespread notice of a meeting in the customary way enabling a substantial proportion of the caste to attend, the requirements of natural justice are broadly satisfied. A.I.R. (Vol. 22) 1935 Bom. 361=37 Bom.L.R. 417=158 Ind. Cas. 414.

——S. 9—Caste question.

A Konkani Brahmin had been excommunicated by order of spiritual tribunal which was the recognized authority in all such matters the order having been passed in perfect good faith, without malice and in due exercise of spiritual authority. There was no negation of natural justice, on which ground alone such private quarrels could have been recognizable by law Courts.

Held, that the suits by the Brahmin for declaration that he was in caste as well as for damages, on the ground that the order of the spiritual tribunal was illegal and libellous ought to be dismissed as uncognizable. 1929 M.W.N. 532=123 Ind. Cas. 14=A.I.R. 1930 Mad. 100.

——S. 9—Caste question—Khojas and Cutch Memon — Ex-communication — Decision of "Jamait"—Court's jurisdiction to interfere.

The decision of the "Jamait" or Council of the Khoja community excommunicating a person is within the scope of its authority if arrived at in a manner consonant with the ordinary principles of justice, but if it is not so arrived at, the Court would have jurisdiction to interfere. 26 Bom. 174, Foll. A.I.R. 1930 Sind 204.

——S. 9—Caste question—Rules of Panchayat —Breach—Interference by Courts.

A certain panchayat had passed a resolution to the effect that no member of the panchayat should marry a second wife in the lifetime of his first wife, and whosoever would do so disregarding the resolution of the panchayat, shall not be considered as a member of the brotherhood. A member married a second time when his first wife was living, and at a meeting of the panchayat an arbitrator was appointed to settle the dispute, who decided that the member should pay a certain sum as fine. The decision was accepted by the member as binding on him. When he refused to pay, a suit was brought to enforce the award.

Held, that a suit of this nature would clearly relate to matters affecting the internal autonomy of the caste and its social relations and it will not be open to the Court to go into the question of the validity or otherwise of a rule laid down by the Panchayat. Although the delinquent here agreed to pay the fine, yet the agreement involved a caste question and, therefore, no suit would lie to enforce it. 20 Bom. 190, Foll.

Held, further, that as the disputes referred to arbitration related to caste questions which could not be made the subject of a suit, they could not also, be the subject of an award enforceable in a Court of law, and even if the parties affected by such an award would agree not to challenge it, their consent cannot confer jurisdiction on a Court, where it has none, to enforce the award. 23 S.L.R. 299=111 Ind. Cas. 425=A.I.R. 1929 Sind 1.

——S. 9—Caste matters.

Where question at issue is not a matter relating to the internal administration and affairs of the caste, but to the property of caste the Court has jurisdiction to interfere. Such jurisdiction of the Court is not excluded in every case in which there has merely been a division of opinion in the caste. 50 Bom. 124=27 Bom.L.R. 1503=92 Ind. Cas. 549 =A.I.R. 1926 Bom. 69.

——S. 9—Caste question—Usage and custom of —Exercise of right under.

Court has jurisdiction to decide that the plaintiffs were entitled to the user of the properties in dispute in accordance with the caste usage and custom because a question of property is involved. But once the Court holds that the Plaintiffs have that right then the way in which they might exercise their right is a question which is really one for the castes themselves to decide and not for any particular individual or faction and is certainly a question which no Court would possibly determine. 76 Ind. Cas. 635=A.I.R. 1924 Bom. 522.

——S. 9—Caste question—Exemption of Christian community.

The recognition by Courts of Hindu Castes as distinct corporations with exclusive legal rights for certain purposes ought not to be extended to Christian communities as it would lead to complications and anomalies of a far reaching character. 39 Mad. 1056=19 M.L.T. 249=30 M.L.J. 423=3 L.W. 348 =(1916) 1 M.W.N. 307=34 Ind. Cas. 557.

——S. 9—Caste question.

Civil Courts may discuss and deal even with a caste question where the membership and character of a member are injuriously affected. 11 Bom. 534, foll. 28 M.L.J. 58=17 M.L.T. 369=2 L.W. 446=26 Ind. Cas. 460.

——S. 9—Caste question—Refusal to invite plaintiff.

Refusal to invite the plaintiff on auspicious occasions does not give him a cause of action unless his

rights as a member of the caste are violated. An allegation that defendants insisted on plaintiff's undergoing expiatory ceremonies to be performed by the caste members after pollution before he could be invited to certain functions in the defendant's house does not give the plaintiff a cause of action. (1912) M.W.N. 1220=17 Ind. Cas. 527.

——S. 9—Caste question—Religious office.

No right of property is conferred where a caste has appointed a man to a mere priestly office. His continuance or removal is exclusively in the power of the caste and it is a caste question. But it is difficult to apply the rule where the office of hereditary priest is created in certain families, for the performance of religious ceremonies. According to Hindu Law either the caste or the families can create such an office and give it the character of immovable property. 36 Bom. 94=13 Bom.L.R. 1171=12 Ind. Cas. 928.

——S. 9—Caste question.

A claim to be a Caste Officer and to be entitled to the right of performing duties and enjoying privileges and honours attached to such office, is a caste question and is not cognizable by a Civil Court; in the absence of any allegation of any specific damage the mere assumption of a patronymic of a family is a grievance for which law affords no redress. 34 Bom. 455=12 Bom.L.R. 358=6 Ind. Cas. 519.

——S. 9—Caste question—Forum.

It is on many grounds undesirable that the Courts should assume the jurisdiction to decide the numberless small points of religious or social usage and etiquette which form the common subjects of difference. To enforce caste privilege, the proper tribunal is the caste and not the Civil Court. Where, the question in dispute is in reality one between the caste and a section of the caste, it is outside the Court's jurisdiction. The test whether a question is a caste question is to see whether the taking cognizance of the matter in dispute would be an interference with the autonomy of the caste. 34 Bom. 467=11 Bom.L.R. 1014=4 Ind. Cas. 108.

——S. 9—Caste question.

A suit instituted by plaintiffs on behalf of themselves and others, as members of a certain caste, that they are entitled to have full and free inspection of the books of account kept by the defendants in their capacity as trustees of caste funds and properties is cognizable by a Civil Court. 11 Bom.L.R. 1269=4 Ind. Cas. 569.

——S. 9—Caste question.

Where some members of a caste refused to subscribe to a declaration of faith issued by the panchayat and instead issued a leaf-let calculated to bring the panchayat into contempt; there were social questions giving the panchayat jurisdiction to interfere and their temporary exclusion from social intercourse with other families is not contrary to natural justice. The matter is not one for the Civil Court. 12 A.L.J. 552=23 Ind. Cas. 301.

——S. 9—Caste question—Boycotting—Cause of action.

Every member of a caste has the right to refuse to associate with any other member for what he considers to be a breach of caste rule without being called upon by the Courts to give any reason; the members of a caste might impose any conditions they like, upon the delinquent from the caste rules, if he likes to associate with them. A man may be excommunicated or otherwise punished for a caste offence but that jurisdiction must only be exercised by the caste and with due care and caution and conformity to the usage of the caste. The caste may delegate its powers in respect of caste offences to its nominees. 33 Mad. 67=19 M.L.J. 714=6 M.L.T. 290=3 Ind. Cas. 955.

——S. 9 (S. 11, Old Code)—Caste question—Suit for declaration of exclusive right to use name of dignity.

The plaintiff sued to obtain a declaration that he was entitled to the fees and privileges appertaining to the Hiremath at Kamalapur by reason of his titles to be called the Ayyah of Hiremath, and he asked for a perpetual injunction to restrain the defendants from using the name "Ayya of Hiremath." The first Court held that the suit was barred by S. 11 of Regulation 2 of 1887. On appeal, the lower appellate Court held that the plaintiff was not entitled to the office claimed by him. On second appeal, the plaintiff contended that his case fell within the principle that the unauthorised use of the name of one person by another gave a cause of action to the former where the use was calculated to deceive and inflict pecuniary loss.

Held, (1) That the question for determination was whether any damages had been incurred or not. But the plaint did not afford any clear indication that what was complained of was the user of a name by the defendant in a maner calculated to deceive every one. (2) That all that the plaintiff complained of was that the defendant had assumed a name to which the plaintiff alone had the exclusive right; and that that assumption would enable, and had enabled, the defendant to attract to himself a large number of the plaintiff's followers and thereby appropriated to himself fees, which would have gone into his (plaintiff's) pockets. It was, therefore, a claim to a caste office or to enjoy certain privileges and honors at the hands of a caste in virtue of that office. That was a caste question not cognizable by a civil Court. The law does not recognize the absolute right of a person to a particular name entitling him to prevent the assumption of that name by a stranger. The mere assumption of a name which is the patrimony of a family by a stranger who has never before been called by that name, whatever cause of annoyance it may be to a family, is a grievance for which the law affords no redress. (1910) 12 Bom.L.R. 358=34 B. 455.

——S. 9—Caste-matters—Cognizance by Court.

A person who is a trustee of a caste fund has no legal claim to a roving inspection of all caste documents on the ground that some of such documents may possibly be found to contain entries bearing upon questions of expenditure having some connection with the trust. A right to inspection of documents belonging to a caste existing in any person by virtue of his being a member of the caste cannot be evolved by a reference to English Law. A Court will not grant a decree for the enforcement of a privilege granted by a caste because such privilege may be taken away by the caste at any time and the decree may be rendered nugatory. The proper tribunal in such cases is the caste itself and not a civil Court. Autonomy of a caste must at least mean that, where rights to property are not involved, all matters of internal management must be left to the decision of the caste.

Courts will not interfere where the rules of the caste make special provisions of the question in dispute. Where there is a question in dispute between the caste and a section of the caste it is outside the jurisdiction of the Court. The Hindu caste is an unique aggregation so wholly unknown to the English law that English decisions concerning English corporations and partnerships tend rather to confusion than to guidance upon matters relating to a caste. A Hindu caste may have points of resemblance to English corporations and partnerships, but its points of difference appear more numerous and radical. Where, according to well-established principles, certain questions have been removed from the jurisdiction of the Court they cannot be brought within the jurisdiction by the plea that the Court has inherent jurisdiction to do what justice requires for the parties before it. That plea cannot be urged in order to extend the jurisdiction of the Court but to meet the objection often raised that in matters within the jurisdiction the Court can only exercise such powers as are expressly given by the legislature and no others. (1909) 11 Bom.L.R. 1014=34 B. 467.

——S. 9—Caste matters—Jurisdiction of Court —Reference to English decisions—Permissibility.

A Court will not grant a decree for the enforcement of a privilege granted by a caste because such privilege may be taken away by the caste at any time and the decree may be rendered nugatory. The proper tribunal in such cases is the caste itself and not a Civil Court. Autonomy of a caste must at least mean that, where rights to property are not involved, all matters of internal management must be left to the decision of the caste. Courts will not interfere where the rules of the caste make special provision of the question in dispute. Where there is a question in dispute between the caste and a section of the caste it is outside the jurisdiction of the Court. The Hindu caste is an unique aggregation so wholly unknown to the English law that English decisions concerning English Corporations and partnerships tend rather to confusion than to guidance upon matters relating to a caste. A Hindu caste may have points of resemblance to English Corporations and partnerships, but its points of difference appear more numerous and radical. Where according to well established principles certain questions have been removed from the jurisdiction of the Court they cannot be brought within jurisdiction by the plea that the Court has inherent jurisdiction to do what justice requires for the parties before it. That plea cannot be urged in order to extend the jurisdiction of the Court but to meet the objection often raised that in matters within jurisdiction the Court can only exercise such powers as are expressly given by the legislature and no others. 9 Bom.L.R. 569, reversed; 11 Bom.L.R. 1014=34 B. 467.

——S. 9 (S. 11, Old Code)—Caste question—Inspection of documents—Right of any member of caste to inspect documents and books of account relating to caste property—Injunction.

Where a member of a caste who was also a trustee of the caste property, was refused inspection of books of accounts, documents, etc., by the President of the Managing Committee of the caste:

Held, that injunction could be granted restraining the President from refusing such inspection. Every member of a case, being interested in its affairs, has a right incidental to his membership to every information which the books, records and documents of the caste can give him to enable him to discharge the duties he owes to the caste. It is a right similar to that of a partner in a firm to the partnership book and can be taken away from him only by an express caste, rule, resolution or usage. But a trustee or a member of a caste has such a right to inspection only for the *bona fide* purpose and in the interest of the caste and not for any purpose hostile or injurious to those interests. Though a Court will not interefere with the jurisdiction and discretion of a caste as regards its internal purposes and management with reference to which it is its own master to frame rules and regulations, yet it will interfere in favour of any individual member of the caste as against any other member or members of it, where the Court is asked to give effect to any rule, resolution or usage of the caste, if the right claimed in virtue of such rule, resolution or usage is a civil right cognizable by the Court. In giving relief in such cases the Court, far from interfering with the autonomy of the caste or encroaching upon its jurisdiction as to its internal affairs, recognises them by giving effect to its rule, resolution or usage. 9 Bom.L.R. 569.

——S. 9 (S. 11, Old Code)—Caste question—Removal of trustee.

The question of the power of a caste to remove a trustee of any of its charitable trusts is not a caste question. A caste has power to do what it likes for the internal regulation of its affairs; and all questions relating to them are caste questions. But where a caste deals with its own property and creates civil rights in others, according to law, the rights and obligations arising out of such dealing do not appertain to caste questions as such or the internal regulation of its own domestic or social affairs. They are legal rights and legal obligations enforceable by our Courts as much as if any entity such as a private person had been a party to their creation. The fact that the caste happens to be a party to the creation is merely accidental. Where a trust is created whether by a caste or by an individual, the same law applies to both. (1906) 9 Bom.L.R. 514.

——S. 9 (S. 11, Old Code)—Caste question—Excommunication—Civil Court—Jurisdiction.

A suit for a declaration that his excommunication by his castemen was invalid and that he is still a member of the caste is not cognizable by Civil Courts.

Per *Chandavarkar, J.*:—(1) A declaration of continuing membership of caste and consequent right to social privileges is beyond the jurisdiction of Civil Courts. (2) While civil rights hang on the validity of the excommunication, the Court has jurisdiction, but it will not interfere with the decision of the domestic tribunal if it has acted *bona fide* in accordance with natural justice and the rules of the caste. (3) If damages are claimed as for loss of caste or character by libel on him, the Court has jurisdiction, but no damages will be given if the castemen were acting *bona fide* for the protection of their caste interests. (1900) 3 Bom.L.R. 718=26 Bom. 174.

1 (d) Municipal Assessment.

——S. 9—Municipal Assessment—Levy of Octroi duty by Municipality—Suit in Civil Court questioning legality—If barred—C. P. Municipalities Act, Ss. 83, 84 and 85.

The question whether the Municipal Committee has the power to realize certain amounts as octroi duty or not is a matter capable of being determined by the Civil Court alone. Sections 83, 84 and 85, C. P. Municipalities Act, have no bearing on the case, there being no question of assessment or refusal to refund taxes levied by the Municipal Committee. A.I.R. (Vol. 22) 1935 Nag. 224.

——S. 9—Municipal Assessment—Suit by Municipality to recover tax—Jurisdiction of Civil Court.

The jurisdiction of the Civil Court to entertain a suit brought by the Municipality to recover tax is not impliedly barred. A.I.R. (Vol. 22) 1935 Bom. 321=37 Bom.L.R. 235=159 Ind. Cas. 209.

——S. 9 (S. 11, Old Code)—Municipal assessment—Jurisdiction to review.

A mere erroneous exercise of judgment is not reviewable by the Civil Court, but any excess of jurisdiction is, *e.g.*, objection to the character and constitution of the Court, or the nature of the subject-matter of enquiry or the absence of some preliminary proceeding necessary to give jurisdiction to a *quasi*-judicial tribunal. (1908) 12 C.W.N. 709 at 710, 712=7 C.L.J. 631=35 Cal. 859.

——S. 9 (S. 11, Old Code)—Municipal rates assessment if may be questioned in Civil Court. *See* 14 C.W.N. 437=37 Cal. 374=11 C.L.J. 400=5 Ind. Cas. 321.

——S. 9 (S. 11, Old Code)—Municipal assessment—House tax—Assessment of—Civil Court—Jurisdiction.

In the absence of any proof of *mala fides*, perversity or manifest error, Civil Courts have no jurisdiction to interfere with the assessment of house tax made by a Municipality, unless it can be said that it is not merely that the valuation is wrong, but that it has been arrived at in contravention of the rules which the law prescribes for fixing the valuation. (1901) 3 Bom.L.R. 882=26 Bom. 294.

1 (e) Municipal Election.

——S. 9—Bar of suit—Municipal election—Suit to declare valid—Competency of Civil Court.

A suit for a declaration that the plaintiff's election as a Commissioner of a Municipality is valid, is competent under S. 42, Specific Relief Act, and being one of a civil nature is cognizable by the Civil Court. A.I.R. (Vol. 20) 1933 Cal. 492=37 C.W.N. 122=60 Cal. 438=145 Ind. Cas. 248.

——S. 9—Bar of suit—Municipal election—Suit for declaration that plaintiff is a qualified voter.

Where the Chairman of a Municipality has acted in contravention of the rules, a suit for a declaration that plaintiff is a qualified voter and for mandatory injunction against the Chairman to enter the plaintiff's name in the register of voters, lies in a Civil Court. 48 Cal. 378=A.I.R. 1921 Cal. 85.

——S. 9—Suit of civil nature—Municipal election—Suit by one candidate to declare election of other declares void.

A suit by one of two rival candidates for an election to have an election of the other declared void as being contrary to law is one of a civil nature and maintainable in a Civil Court. 35 All. 308=11 A.L.J. 349=20 Ind. Cas. 490.

——S. 9—Municipal Election—Order of Collector—Suit to set-aside—Competency.

A Civil Court cannot interfere with the order of the Collector passed in substantial conformity with the rules for Municipal Councillor's election. A suit will probably lie to set aside an order as **ultra vires** if passed by the Collector without inquiry or on grounds other than those set forth in R. 35 of the Election Rules. No fresh inquiry can be made by the Civil Court to nullify an order of the Collector passed against a candidate. (1911) 2 M.W.N. 241=12 Ind. Cas. 310.

1 (f) Municipality.

——S. 9—Municipality—Exercise of powers—Power of civil question to go into propriety.

In general the Civil Courts have the rights to adjudicate upon the question whether a statutory body like a municipality has exceeded its powers. A.I.R. (Vol. 33) 1946 Nag. 78=I.L.R. (1945) Nag. 670=1945 N.L.J. 520.

——S. 9—Municipality—Act in excess of powers—Suit in Civil Court—Competency.

The lack of jurisdiction must be distinguished from the wrong exercise of jurisdiction while on an act done without any power to do so is null and void an act done in erroneous exercise of that jurisdiction is one that is voidable, that is, rectifiable by a superior authority. Civil Courts have power to interfere with an act (i.e. of Municipality) which is in excess of jurisdiction, and not with the exercise of discretion which is within its power, whether such exercise of discretion was right or wrong. A.I.R. (Vol. 28) 1941 Nag. 364=I.L.R. (1941) Nag. 266=1941 N.L.J. 211=197 Ind. Cas. 570.

——S. 9—Municipal Board—Orders of—Civil Court's power to review.

It is not for the Civil Court to review the orders of a statutory body like a Municipal Board as long as the officers of that body act within the power vested in them by law. The Court can assume jurisdiction only in case the Chairman or any other officer acts in contravention of the mandatory provisions of the Act. A.I.R. (Vol. 25) 1938 All. 520=1938 A.L.J. 686=1938 A.L.R. 768=177 Ind. Cas. 663.

——S. 9—Municipality—Municipal Committee vested with power to execute works to improve drainage—Acts done—Suit in Civil Court questioning—Competency.

Where a Municipal Committee is invested by statute with the power of executing works for improving the drainage of the town, it is for the Committee to determine as to how work can best be done, and any act done, or intended to be done by it, in furtherance of this object can only be questioned in a Civil Court, if it is shown that the Committee is not acting **bona fide**, or that the act complained of is oppressive, wanton or capricious. A.I.R. (Vol.

24) 1937 Lah. 252=39 P.L.R. 480=172 Ind. Cas. 336.

——S. 9—Municipality—Refusal permission to erect platform on ground of site being Municipal land—Suit in Civil Court for declaration of title—Competency—Punjab Municipal Act, S. 193.

A person intended to erect a chabutra in front of his house and gave notice of the intention to the Committee under the provisions of S. 189 (2). The Committee refused permission to build on the ground that the title of the land on which it was proposed to build vested in the Committee. He brought a suit for 'an injunction against the Committee restraining it from preventing him from building a platform on the land owned and possessed by him."

Held, that the relief claimed implied a prayer for the declaration of the person's title and the Court should adjudicate on the question of title in the land and if it was found to vest in the person he was entitled to the injunction prayed for. 115 Ind. Cas. 755=A.I.R. 1929 Lah. 774.

——S. 9—Municipality—Municipality acting ultra vires—Civil Court can interfere and grant relief to aggrieved party.

If the Municipality acted *ultra vires*, the Civil Court has the power to interfere as also the power to grant proper relief to the aggrieved party. This is the principle on which Civil Courts interfere with acts of public bodies such as Municipalities, created by statutes. 27 Cal. 849, Foll. 32 C.W.N. 1055=56 Cal. 280=115 Ind. Cas. 515=A.I.R. 1929 Cal. 33.

——S. 9—Municipality—Dismissal of employee —Civil Court's jurisdiction to go into validity —Bombay District Municipal Act, S. 49.

In a suit for damages for wrongful dismissal brought by an officer or servant of the Karachi Municipality against the Municipality, once the Court is satisfied that the plaintiff's dismissal has been in accordance with the rules and bye-laws of the Municipality, it has no jurisdiction to probe any further into the question. If, however, the Court finds that the plaintiff's dismissal had been wanton and in utter disregard of the rules and bye-laws of the Municipality, the Municipality would forfeit the protection and privileges afforded to them by Statute and the plaintiff would be entitled to succeed as in an ordinary suit between master and servant for wrongful dismissal. 113 Ind. Cas. 387=A.I.R. 1929 Sind 69.

——S. 9—Muncipality—Suit for injunction against Municipality restraining demolishing plaintiff's latrine—If lies.

A suit by the owner of a house for perpetual injunction restraining Municipality from demolishing a latrine in the plaintiff's house is maintainable in Civil Court, the object of the suit being to prevent an infringement of the plaintiff's proprietary rights by the Municipal Board. 101 Ind. Cas. 446=A.I.R. 1927 All. 432.

——S. 9—Municipality—Notice to residents to leave specified area—Suit in Civil Court for injunction to restrain enforcement—Punjab Municipal Act, S. 152.

The Civil Courts have jurisdiction to decide in a suit by alleged public prostitutes against Municipal Committee for their having issued notice under S. 152 of the Municipal Act, the question whether or not the plaintiffs were public prostituted and, on a finding of this issue in their favour, to issue an injunction restraining the Municipal Committee from enforcing their notice prohibiting them from residing within the specified limits of the Municipality. A.I.R. 1926 Lah. 461, Rel. on.

There is no express provision of the law which bars the jurisdiction of the Civil Courts in such a case and it is for the Municipality to show that such jurisdiction is barred by implication.

It is only when the Municipal Committee acts **bona fide,** reasonably and in conformity with and strictly within the powers conferred by the law that it can escape the exercise of the restraining powers of the Civil Courts; and that if its requisitions go beyond the powers conferred upon it then the Civil Courts have jurisdiction to restrain it from enforcing them. The Courts have no jurisdiction to interfere with the mode in which the powers of Municipal bodies are exercised, but they are competent to restrain such bodies if they act **ultra vires,** and as the act of the Municipal Committee issued a notice under S. 152 of the Municipal Act against persons who are proved not to be public prostitutes, the Committee acted beyond the powers conferred upon it by the Legislature and its action in issuing the notice was **ultra vires,** and hence Civil Courts would interfere. 100 Ind. Cas. 1010=A.I.R. 1927 Lah. 358.

——S. 9—Municipality—Municipal Committee —Action of civil Court's jurisdiction to interfere—Punjab Municipal Act (3 of 1911), S. 152.

It is a well-recognized rule of the law that when it is alleged that action of the Municipal Committee is **ultra vires** or is not covered by the authority of the Act, the Civil Courts have power to interfere. It is only when the action of the Municipal Committee has been exercised in conformity with the powers conferred upon it by the Municipal Act that the jurisdiction of the Civil Courts is ousted. Their discretion as to the mode of action is not subject to a scrutiny by the Civil Courts but their power to take that action is always open to examination by such Courts. 93 Ind. Cas. 827=A.I.R. 1926 Lah. 461.

——S. 9—Municipality—Chairman refusing to insert name in Voter's List—Suit in Civil Court —If lies.

A suit for injunction by a voter against the Chairman of Municipality for his refusal to insert his name in the register of voters on a technical ground is maintainable under C. P. Code, S. 9, Sp. Rel. Act, S. 42 and Bengal Municipal Act, S. 15, proviso 2. 24 C.W.N. 969=57 Ind. Cas. 960=48 Cal. 378= A.I.R. 1921 Cal. 85.

——S. 9—Municipality—Refusal of license— Civil suit—If lies.

A Municipal Board will not be justified in refusing to grant a license properly applied for, under the bye-laws relating to dangerous and offensive trades, in order to secure an advantage to itself in a dispute about a question of title with another person. The Civil Court can interfere in a suit in such a case. 20 Cr.L.J. 705=17 A.L.J. 976=1 U.P.L.R. (H.C.) 126=52 Ind. Cas. 785.

——S. 9—Municipality—Refusal to pay compensation for building—Suit in Civil Court—If lies—Calcutta Municipal Act (2 of 1899).

Where the Corporation of Calcutta refuses to

admit the owner's right to compensation on the ground that building was erected after 1863 and proceeds to demolish it, the Civil Court has jurisdiction to entertain a suit for a declaration that the owner is entitled to compensation. 44 Cal. 87=43 I.A. 243=20 M. L. T. 383=18 Bom. L.R. 878=24 C.L.J. 498=(1916) 2 M.W.N. 544=21 C.W.N. 194=5 L.W. 199=36 Ind. Cas. 912=32 M.L.J. 631 (P.C.).

——S. 9—Municipality—Order for demolition of building by President of Municipal Corporation—Suit against President for injunction—If barred—Madras City Municipal Act, S. 287.

The Civil Courts have jurisdiction to entertain a suit against the President of the Madras Corporation for an injunction restraining him from demolishing a building under S. 287, Cl. (2) of the Madras City Municipal Act. When a right and an infringement thereof are alleged, a cause of action is disclosed, and unless there is a bar to the entertainment of such a suit the ordinary Civil Courts are bound to entertain the claim. The Standing Committee of the Madras Corporation is not an independent body authorised to settle finally disputes between the tax-payers or house owners and the Corporation whose members they are, and of which they form part and they cannot be treated as a special tribunal constituted to decide claims between the house owners and the Corporation under S. 28 of the Madras Municipal Act so as to oust the jurisdiction of the ordinary Civil Courts. 38 Mad. 41=23 M.L.J. 531=12 M. L.T. 469=(1912) M.W.N. 1162=16 Ind. Cas. 971.

1 (g) Test.

——S. 9—Test—Test to see if suit is cognizable by Civil Court.

In order to determine whether a suit is cognizable by the Civil Court, the allegations in the plaint have to be examined. A.I.R. (Vol. 22) 1935 All. 544=1935 R.D. 227=1935 A.L.R. 855=157 Ind. Cas. 690.

——S. 9—Test to decide—Nature of claim.

The venue in a particular case is determined by the nature of the claim as brought. 9 N.L.R. 54, Foll. 107 Ind. Cas. 671=A.I.R. 1928 Nag. 221.

——S. 9—Test to find out—Rights of parties—Relevancy.

S. 9 of the Code deals with the Courts, not with the rights of parties in order to find what is the jurisdiction of the Court and what civil suit the Court may try. 41 Cal. 384=20 Ind. Cas. 676.

1 (h) Miscellaneous.

——S. 9—Burden of proof.

Civil Courts must be taken **prima facie** to have jurisdiction to entertain and dispose of all suits of civil nature and the **onus** is upon those who allege that the civil Courts have no jurisdiction in any particular instance to make out the ground on which it is contended the Court has no jurisdiction. 1930 M. W.N. 945 (D.B.).

——S. 9—Bar of suit—Burden of proof.

S. 9 lays down a general rule in favour of the jurisdiction of the Civil Court and the burden of proof is on the party who maintains an exception to the general rule. Where evidence is inconclusive as to whether **kudivaram** rights were conveyed by grant the burden of proof that the **inam** is an estate lies on the defendant. A.I.R. (Vol. 21) 1934 P.C. 84=61 I.A. 177=39 L.W. 329=11 O. W.N. 468=1934 M.W.N. 386=1934 A.L.J. 402 =57 Mad. 443=38 C.W.N. 669=59 C.L.J. 434 =148 Ind. Cas. 327=67 M.L.J. 1 (P.C.).

——S. 9—Burden of proof.

It is for the party who seeks to oust the jurisdiction of the ordinary Civil Courts to establish his contention. 9 Lah. 504=108 Ind. Cas. 748=29 P.L.R. 396=A.I.R. 1928 Lah. 121 (F.B.).

——S. 9—Conditions—Extent of bar—Civil Court's jurisdiction, when excluded.

To exclude the jurisdiction of the Civil Courts, the exclusion must be explicitly expressed or clearly implied.

Where the liability is statutory as opposed to liability under the common law, the party must adopt the remedy given to him by the statute. A.I.R. (Vol. 28) 1941 Mad. 530=54 L.W. 7=(1941) 2 M.L.J. 47=1941 M.W.N. 644=I. L. R. (1941) Mad. 850=196 Ind. Cas. 353 (F.B.).

——S. 9 (S. 11, Old Code)—Consideration of expediency or policy—Permissibility.

The legal right to bring a suit and to have it determined by the proper Court created for the purpose of determining such suits cannot be barred upon considerations of policy or expediency. 2 A.L.J. 135=7 Bom.L.R. 97=9 C.W.N. 257=28 M. 42=32 I.A. 45 (P.C.).

——S. 9—Decree of Privy Council—Suit to declare void—Maintainability.

A Court in India cannot pass a declaratory decree that a decree or order made by the Privy Council is void, or record a finding on any point which is alleged to invalidate such an order, unless an issue on that point has been expressly remitted to it by the Judicial Committee for a finding. The grant of such a declaratory decree will conflict with the principle that an order of His Majesty in Council is final and conclusive. If the Order in Council is vitiated for any reason, the plaintiff would have his remedy by a petition or application to their Lordships of the Judicial Committee praying for a re-hearing or review. It would no doubt be open to their Lordships on receiving such a petition to remit an issue on the point to the proper Court in India for a finding. A.I.R. (Vol. 23) 1936 Oudh 67=1935 O.W.N. 1071=1935 O.L. R. 574=11 Luck. 486=158 Ind. Cas. 338.

——S. 9—Exclusion of jurisdiction—Conditions for and extent of.

The exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. A.I.R. (Vol. 27) 1940 P.C. 105=44 C.W.N. 709=1940 M.W.N. 610=52 L. W. 1=1940 O.L.R. 367=(1940) 2 M.L.J. 140=1940 O.W.N. 679=I.L.R. (1940) Mad. 599=71 C.L.J. 576=42 Bom.L.R. 767=I.L.R. (1940) Kar. P. C. 194=67 I.A. 222=188 Ind. Cas. 231 (P.C.).

——S. 9—Extent of Bar—Matters excluded—Effective judgment—Meaning.

It is a fundamental principle of international jurisprudence that a sovereign of a country acting through the Courts thereof has no jurisdiction over any matters with regard to which he cannot give effective judgment or which he can render effective only by interfering with the authority of a foreign sovereign or the jurisdiction of a foreign Court. Effective judgment means a decree which the sovereign under whose authority it is delivered, has, in fact, the power to enforce against the person bound by it, and which therefore, his Courts can, if he chooses to give them the necessary means, enforce against such person. 23 S.L.R. 46=101 Ind. Cas. 438=A.I.R. 1927 Sind 601.

——S. 9—Insolvency—Debt incurred after order of adjudication—Suit to recover—If barred—Provincial Insolvency Act.

The jurisdiction of a Civil Court to try a suit in respect of a debt or liability incurred by an insolvent after the order of adjudication, is not barred by the Provincial Insolvency Act. Such a debt or liability is not provable under the Insolvency Act. 22 N.L.R. 118=80 Ind. Cas. 946=A.I.R. 1925 Nag. 77 (a).

——S. 9—Ouster of jurisdiction—Inference of—Principles—Exclusion of jurisdiction by Act—Jurisdiction by Civil Court.

The jurisdiction of the Civil Court should not be lightly taken away and the law does not favour an enactment which transfers the right of adjudication "from the Courts of law to a board of executive officers."

The exclusion of the jurisdiction of the Civil Courts must either be explicitly expressed or clearly implied and even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. A.I.R. (Vol. 32) 1945 All. 273=1945 A.L.J. 218=1945 O.W.N. (H. C.) 218=1945 A.W.R. (H.C.) 235=I.L.R. (1945) All. 661.

——S. 9—Bar of suit—Ouster of jurisdiction—Inference of—When justified—Rule taking out jurisdiction must be explicit.

The jurisdiction of a Civil Court should not be taken away merely upon the ground that though the rule as formulated is not explicit enough, such a rule should be supplemented by a process of reasoning and the corollary or inference should be invested with the same legal efficacy as an express rule of law. 26 A.L.J. 673=9 L.R.A. Rev. 200 =115 Ind. Cas. 650=A.I.R. 1928 All. 511.

——S. 9—Presumption against ouster of jurisdiction.

Every presumption should be made in favour of the jurisdiction of a Civil Court, which can be taken away only by express words or necessary implication. 33 Mad. 208, foll. 17 C.W.N. 408= 17 C.L.J. 239=17 Ind. Cas. 490.

——S. 9—Presumption against.

It is a general principle of law that every presumption shall be made in favour of the jurisdiction of a Civil Court and that it should not be taken away except by express words or by necessary implication. (1909) 33 M. 208 (D.B.).

——S. 9—Public Demands Recovery Act—Certificate under—Civil Court's jurisdiction to go into validity of proceedings.

Civil Court can go into the question whether the certificate has been duly filed under the Bengal Public Demands Recovery Act. A.I.R. (Vol. 28) 1941 Cal. 167=I.L.R. (1940) 2 Cal. 342=44 C. W.N. 901=193 Ind. Cas. 807.

——S. 9—Subject-matter not falling under special Act.

In a suit for foreclosure the defendant pleaded that he came under a special Act and that the Civil Court cannot take cognizance of the case. When the case was referred by the Court to the Collector the latter held that the parties did not come under the special Act and returned the record. **Held,** that the Civil Court must continue the proceedings and pass a decree for foreclosure. 36 All. 376=12 A.L.J. 503=25 Ind. Cas. 400.

——S. 9—Special Act—Suit against Town Area Panchayat for declaration that assessment of town tax on plaintiff is illegal and ultra vires—Jurisdiction of Civil Court—U. P. Town Areas Act (2 of 1914), Ss. 14, 15, 18.

A suit against the Town Area Panchayat for a declaration that the assessment of town tax on the plaintiff is illegal and *ultra vires* being beyond the scope of the powers conferred on a *panchayat* by law, that the defendant be restrained by a perpetual injunction from realising the said tax, from the plaintiff, is not a suit between subject and subject but between a subject and a branch of Local Self-Government, and it does not deal with civil rights but it deals with the question of taxation. Further, by the provisions of Ss. 14, 18 (1) of the U. P. Town Areas Act, the jurisdiction of the Civil Court is barred and S. 15 (4) states that the assessment when confirmed by the District Magistrate shall not be liable to alteration except under the provisions of the Act. Consequently, the suit is not within the jurisdiction of the Civil Courts. A.I.R. (Vol. 23) 1936 All. 117=1935 A.L.R. 1209=1936 A.L.J. 33=159 Ind. Cas. 897.

——S. 9—Special Act—U. P. Land Revenue Act (3 of 1901), S. 233 (m)—Suit for recovery of amounts realisable by Collector on a requisition by the Registrar, Co-operative Societies.

No suit can be brought into the Civil Court for recovery of an amount realisable by the Collector from a person on a requisition to the Collector by the Registrar, Co-operative Societies, as that is a sum recoverable in the same manner as arrears of land revenue for S. 233 (m) of the Land Revenue Act bars institution of such a suit. A.I.R. (Vol. 22) 1935 Oudh 325=1935 O.W.N. 487=11 Luck. 26= 1935 R.D. 238=155 Ind. Cas. 92.

——S. 9—Special Act—Suit for damages against licensee under Electricity Act for failure to supply energy—If barred—Electricity Act, S. 22.

There is nothing in the Indian Electricity Act which bars, either expressly or impliedly, a suit for damages against licensee for failure to supply energy on proper requisition. 97 Ind. Cas. 537=A.I.R. 1926 Lah. 349.

——S. 9—Witness in criminal case—Expenses of—Suit for—Maintainability.

A civil suit for recovery of the expenses alleged to have been incurred by plaintiff in obedience to a subpoena in a criminal case requiring him to give evidence, is not maintainable. His proper remedy is to move a superior Court. 103 Ind. Cas. 655=31 C.W.N. 738=A.I.R. 1927 Cal. 604.

2. Expressly or impliedly barred.

——S. 9—Expressly or impliedly barred—Company—Wrongful termination of appointment of managing agent—Suit for declaration of invalidity —If barred.

An Article of Association of a company which requires an extraordinary resolution for the termination of the appointment of the managing agents, is obviously intended as a protection to a minority who are not to have the appointment terminated against their will unless a particular majority votes in favour of it. If a company terminates the appointment of the managing agents by an ordinary resolution contrary to the Articles of Association, the matter is not one merely concerning the internal management of the company, and the Civil Court can grant a declaration to the effect that the resolution is invalid. 77 I.A. 128=52 Bom.L.R. 501=A.I.R. 1950 P.C. 81=1950 Comp. C. 133 (P.C.).

——S. 9—Expressly or impliedly barred—Creation of special tribunals—Jurisdiction of Civil Court—Ouster—Theory of conditional ouster.

Per **Munir, Ag. C.J.**—While determining the question whether on a true construction of a statute the jurisdiction of the Civil Court is impliedly barred, the distinction between a right which is purely the creation of a statute and a right at common law becomes important because where a civil right did not exist before a statute was passed and was entirely created by that statute, it is reasonable to infer that the Legislature intended that right to be enforced only in the manner that the statute prescribes. The ouster of Civil Court's jurisdiction in such cases rests on the construction of the statute creating the right and a special tribunal for its enforcement and if as a matter of construction of the relevant statute the Court arrives at the conclusion that the Legislature intended that the right created by the statute should only be exercised or enforced in the manner provided by that statute then it is difficult to accept the view if the special tribunal is not constituted or having been constituted it does not function, the Civil Court's jurisdiction to adjudicate on that right is not affected. In such cases, either there is or there is no ouster but where there is ouster, it must be held to be absolute and not dependent on the functioning of the special tribunal. The theory of conditional ouster is, therefore, not at all applicable to such rights. It is, however, otherwise where a right is not created by a statute but existed before disputes relating to it or to some aspect of it were entrusted by statute to a special tribunal. Such pre-existing rights having originally been within the cognizance of the Civil Courts, the ouster is dependent on the functioning of the special tribunal.

The theory of conditional ouster is based on the assumption that the Legislature creating the right could never intend that the right should come into existence but that there should be no machinery for its enforcement. If the statute contains no provisions for the machinery to enforce the right, there is of course no ouster, and Civil Courts under S. 9, C. P. Code, will in that case undoubtedly have jurisdiction. The implied ouster depends on the intention to be inferred from the fact that the statute does contain a provision for the constitution of a tribunal to which the enforcement of such rights is entrusted. If there be such a provision, then it is wholly immaterial whether the statute itself creates the tribunal or delegates to some other authority the power to constitute it and that authority does not act or the authority having acted, the tribunal does not act.

As the jurisdiction of the Civil Court is excluded only to the extent that the power of adjudication is given to the special tribunal, while such Courts cannot assume to themselves the functions of the special tribunal, they would be perfectly competent to entertain and determine all actions the object of which may be to seek the determination of the right in the manner in which the statute intended it to be determined. Pak.L.R. (1949) Lah. 215=50 Cr.L.J. 598 =A.I.R. 1949 Lah. 131 (F.B.).

——S. 9—Expressly or impliedly barred—Action of executive authority ultra vires.

The Civil Court has power to entertain a suit in which the question is whether the executive authority has acted **ultra vires**. 74 I.A. 319=I.L.R. (1947) Lah. 741=61 L.W. 148=1948 M.W.N. 124= A.I.R. 1948 P.C. 33=50 P.L.R. 26=(1948) 1 M.L.J. 206 (P.C.).

——S. 9—Expressly or impliedly barred.

Creation of Special Tribunals—Jurisdiction of Civil Court—If and when ousted—Punjab Municipal Act, S. 240—Rules under—Rejection of election petition by Deputy Commissioner on erroneous ground of want of jurisdiction—Jurisdiction of Civil Court to entertain suit. 224 Ind. Cas. 322=A. I. R. 1946 Lah. 85.

——S. 9—Expressly or impliedly barred—Revenue sale—Setting aside by Commissioner without jurisdiction—Suit in Civil Court—If barred.

The jurisdiction of the Collector and the Commissioner is restricted by Rr. 998 and 1011 made under S. 70, and found in U. P. Revenue Manual, Vol. 1 . This means that they have no jurisdiction to confirm or set aside a sale except under the terms of R. 998. Where the judgment-debtor's objection was under R. 997, that is to say, he prayed for the sale being set aside on the ground of material irregularity or fraud in publishing or conducting it; and after considering the objection the Collector disallowed it but the Commissioner, in appeal without confining himself to the provisions of R. 998, set aside the sale on a ground which was not provided for by any of the rules:

Held, that his action was without jurisdiction. The order being without jurisdiction it was subject to adjudication by the Civil Court under the general provisions of S. 9. The Civil Court's cognizance of it was not barred by cl. (3) of R. 998, of the Manual of Revenue Department. That clause forbids a suit by which it is sought to set aside an order made under R. 998 and the order

of the Commissioner was not under that rule. A.I.R. (Vol. 25) 1938 Oudh 62=1938 O.W.N. 40=1938 O.L.R. 21=172 Ind. Cas. 655.

——S. 9—Expressly or impliedly barred—Guardians and Wards Act—Custody of minor—Suit for.

A civil suit for the custody of a minor will not lie in the ordinary Civil Courts; to obtain such custody proceedings under the Guardians and Wards Act are the only remedy. 42 Mad. 647=37 M.L.J. 93=26 M.L.T. 61=9 L.W. 600=(1919) M.W.N. 487=53 Ind. Cas. 399 (F.B.).

——S. 9—Expressly or impliedly barred—Foreign Subjects—Trust in British India.

British Indian Courts have jurisdiction to determine the question whether a plaintiff is the sole trustee of a temple in French territory though the parties may happen to be French subjects when the land in respect of which the suit is brought is situate in British India. The nationality of the party has nothing to do with the jurisdiction of the Court. 1 L.W. 724=26 Ind. Cas. 367.

——S. 9—Expressly or impliedly barred—Property or revenue of foreign State.

Courts in British India cannot try a suit regarding any right to or interest in immovable property situate in a foreign State, nor can they try an action brought to enforce the revenue laws of another country. 33 Bom. 373=11 Bom. L. R. 352=2 Ind. Cas. 489.

——S. 9 (S. 11, Old Code)—Expressly or impliedly barred.

The jurisdiction of courts can be excluded not only by express words but also by implication. (1907) 9 Bom.L.R. 417=31 Bom. 604.

3. Express Bar.

——S. 9—Express bar—Kumaun Rules and Orders—Validity of grant and grazing rights—Suit for declaration in Civil Court—Bar of.

The clause in Rule 14 of the Rules and Orders, Kumaun Division, that "no Court other than such Revenue Court shall take cognizance of any dispute or matter in respect of which any such suit or application might be brought or made," is of much wider scope and covers any case in which there may be a dispute or matter in respect of which a suit or application might be brought or made in the Revenue Court.

A suit in respect of the validity of the grant in favour of the defendant, made in the land in dispute which was unmeasured beore the grant, and also to establish a claim to the right of grazing cattle and taking timber which the plaintiffs possessed in the unmeasured land before the grant, and for an injunction restraining the defendants from cultivating the land falls under R. 14 of the Rules and Orders, Kumaun Division, and is cognizable only by Revenue Courts and not by Civil Courts. A.I.R. (Vol. 26) 1939 All. 301=1939 R.D. 141=181 Ind. Cas. 773.

——S. 9—Express bar—Agra Tenancy Act (1926), S. 99—Cause of action arising before Act—Suit in Civil Court—If barred.

Where the cause of action for suit under S. 99, Agra Tenancy Act, 1926, has arisen before the Act came into force, the suit is cognizable by Civil Court. A.I.R. (Vol. 24) 1937 All. 796=1937 A.L.J. 1111=1937 R.D. 548=1938 A.L.R. 8=172 Ind. Cas. 635.

——S. 9—Express bar—Order under S. 489, Cr. P. Code—Attachment in execution—Civil Court's power to go into question.

Under Ss. 4 and 9, Cr.P. Code, Civil Courts have no jurisdiction to go into the matter of attachment in execution of the maintenance order passed under S. 488, Cr.P. Code. A.I.R. (Vol. 24) 1937 Lah.367=39 P.L.R. 100=169 Ind. Cas. 944.

——S. 9—Express bar—Agra Tenancy Act (1926), S. 230—Civil Court, if can treat tenant as trespasser and order ejectment.

The Civil Court has jurisdiction to grant a declaration that a certain document which exists was obtained fraudulently and is, therefore, not binding on a person whose rights it purports to affect; but the Civil Court would not have jurisdiction to treat a person who is lawfully a tenant as a trespasser and order his ejectment when such a suit is barred from the cognizance of the Civil Court under S. 230, Agra Tenancy Act. A.I.R. (Vol. 23) 1936 All. 265=1935 R.D. 553=1936 A.L.R. 361=1936 A.L.J. 665=162 Ind. Cas. 49.

——S. 9—Express bar—Meaning of.

The words 'expressly barred' in S. 9 mean barred by any enactment for the time being in force. A.I.R. (Vol. 22) 1935 Oudh 96=11 O.W.N. 1435=152 Ind. Cas. 861.

——S. 9—Express bar—Cantonment Board—Levy of tax—Suit for refund and injunction—Bar of.

Resort to Civil Court for refund or for injunction restraining cantonment authorities from levying tax in future is barred by Ss. 84 and 88, Cantonments Act, 1924. A.I.R. (Vol. 24) 1937 Sind 305=172 Ind. Cas. 732.

——S. 9—Express bar—Cantonment Board—Jurisdiction of—If exclusive—Bar of civil suit.

Under the Cantonments Act, the jurisdiction of the Civil Court is excluded in all matters relating to any valuation, assessment, liability to assessment or taxation by a Cantonment Board. Any decree that may be passed by a Civil Court in such matters is, therefore, wholly without jurisdiction and *ultra vires* and hence cannot be executed. A.I.R. (Vol. 20) 1933 All. 163=1933 A.L.J. 162=144 Ind. Cas. 1016.

——S. 9 (S. 11, Old Code)—Express bar—Record of rights.

No suit lies for the alteration or correction of entries made in the record-of-rights published under Chapter X of the Bengal Tenancy Act. Persons aggrieved by the entries should have recourse to the special remedy provided in that chapter. (1908) 12 C.W.N. 1032=35 Cal. 1013=8 C.L.J. 322.

——S. 9 (S. 11, Old Code)—Express bar—Acts of Revenue authorities—Power of Civil Court to direct—Land Registration Act (Bengal).

Civil Courts have no jurisdicton to direct the

action of the revenue authorities under the Land Registration Act. (1908) 12 C.W.N. 441=18 M.L.J. 125=7 C.L.J. 395 (P.C.)=10 Bom. L. R. 262=3 M.L.T. 344.

——S. 9 (S. 11, Old Code)—Express bar—Special Acts creating special tribunals—Effect—Ouster of the jurisdiction ordinary Courts.

When statutory rights and liabilities have been created and jurisdiction has been conferred upon a special Court for the investigation of matters which may possibly be in controversy, such jurisdiction is exclusive and cannot concurrently be exercised by the ordinary Court. 10 C.W.N. 991; 3 C.L.J. 359, foll. 12 C.W.N. 636=35 C. 470=7 C.L.J. 499.

——S. 9 (S. 11, Old Code)—Express bar—Special Act creating special tribunal—Case under Jurisdiction of Civil Court.

Where a special tribunal, out of the ordinary course, is appointed by an Act of Legislature to determine questions as to rights which are the creation of that Act, then, except so far as other wise expressly provided or necessarily implied, the jurisdiction of that tribunal to determine those questions is exclusive. It is an essential condition of those rights that they should be determined in the manner prescribed by the Act to which they owe their existence. (1907) 9 Bom.L.R. 417=31 Bom. 604.

——S. 9 (S. 11, Old Code)—Express bar—Character of land tenure—Rent free or rent paying—Decision by Revenue Court—If bar to Civil Suit.

Per *Mookerjee, J.*—The Revenue Courts are Courts of limited jurisdiction and notwithstanding the decision of the Collectorate Court, a suit may be brought in the ordinary Civil Court to establish the character of the land in suit, that is whether it is rent free or rent paying; in other words, the Revenue Court and the Civil Court are not Courts of concurrent or equal Jurisdiction for the purpose of a suit to declare finally whether the land is rent free or liable to payment. A decision of the Revenue Court may be evidence, but it is by no means conclusive upon the issue whether the land is rent free or rent paying. (1907) 7 C.L.J. 202.

——S. 9 (S. 11, Old Code)—Express bar—Landholder and tenant—Suit by purchaser of arrears of rent against both—Jurisdiction.

Held, that a suit for recovery of arrears of rent the right to cover which had been purchased by the plaintiff from the landholder both the tenant and land holder, vendee being named as defendants, was primarily a Revenue and not a Civil Court suit. (1906) A.W.N. 304.

——S. 9 (S. 11, Old Code)—Express bar—Suit involving question as to class of tenancy—Maintainability—Suit for arrears of rent in Revenue Court—Adverse order—Subsequent suit for declaration and possession in Civil Court.

The Zemindar of a village sued a person as his tenant for arrears of rent. The plaintiffs intervened, alleging that they were the tenants. The Revenue Court found against them. Thereupon they instituted in a Civil Court the present suit in which they prayed for a decree for maintenance of possession, and declaration that they were tenants of the cultivatory holding in question, and in the alternative they prayed for possession being granted to them. *Held*, that such a suit was not cognisable by a Civil Court in as much as it involved the determination of the class of tenancy to which the plaintiffs belonged. (1904) 1 A.L.J. 703.

——S. 9 (S. 11, Old Code)—Express bar—Secretary of State, Governor and Members of Council—Suit against—Maintainability.

The Governor and the members of his council are exempt from the jurisdiction of the High Court so far as their acts in a public capacity are concerned. *A fortiori*, no suit, in respect of these acts, can be maintained against the Secretary of State for India in Council. The Secretary of State can be sued only in matters in which the East India Company could have been sued, *i.e.*, matters for which private individuals or trading corporations could have been sued, or in regard to those matters for which there was express statutory provision. (1902) 5 Bom.L.R. 30=27 Bom. 189.

——S. 9 (S. 11, Old Code)—Express bar—Compromise of proceedings in Court of Revenue—Suit to declare ultra vires and void—Maintainability.

A civil court is not competent to make a declaration that a compromise of proceedings in a court of revenue, in a matter in which the court of revenue, has exclusive jurisdiction and upon which the court of revenue has made a decree or order, is illegal or without authority. (1901) A.W.N. 49.

——S. 9 (S. 11, Old Code)—Express bar—Suit for establishing mulraiyati right and for position of a mustagir—Bar by positive rule of law.

A civil suit to establish a *mul raiyati* right, which by a Government order was not granted and also for the position of a *mustagir* and to set aside the executive orders of the Commissioner and Deputy Commissioner, on the ground they are *ultra vires* is not barred by any positive rule of law. (1901) 6 C.W.N. 411.

——S. 9 (S. 11, Old Code)—Express bar—Execution sale—Judgment-debtor found to have no saleable interest—Suit by auction-purchaser for refund of purchase money—If barred by S. 315.

Section 315 of the Code of Civil Procedure (1882) is not exhaustive and does not confine an execution-purchaser to the special remedy provided by that section and a suit lies under S. 11 of the Code for a claim to get a refund of the purchase money when the judgment-debtor is found to have no saleable interest in the property sold. (1898) 5 C.W.N. 240.

4. Implied Bar.

(a) Arbitration.
(b) Election Dispute.
(c) Domestic Tribunal.
(d) Special Acts.
(e) Special Tribunals.
(f) Statutory body.
(g) Miscellaneous.

4 (a) Arbitration.

——S. 9—Implied bar—Arbitration agreement in contract—Effect of.

The Courts have jurisdiction to decide all suits of a civil nature; it is, however, competent to a party to contend that no right of action exists by setting up an agreement to have the matter decided by a tribunal of their choice. Such an agreement can be set up by a party for the purpose of asking the Court to stay its hands and to refuse to exercise its jurisdiction until the dispute between the parties had been heard by a forum of their own choice. 226 Ind. Cas. 444=A.I.R. 1947 Lah. 215.

——S. 9—Implied bar—Award — Arbitration under Co-operative Societies Act—Right of suit.

Under S. 57, Bombay Co-operative Societies Act, it is not open to a Civil Court to go behind the award given under the Act. The jurisdiction of Civil Court must, in view of S. 9, C. P. Code, be held to be impliedly barred, even as to the part of the loan not covered by the award. A.I.R. (Vol. 24) 1937 Bom. 231=39 Bom.L.R. 249=169 Ind. Cas. 439.

——S. 9—Implied bar—Arbitration award—Suit to set aside—Maintainability—Arbitration Act, S. 14.

A suit to set aside award even on the grounds mentioned by S. 14, Arbitration Act is a civil suit in terms of S. 9. A.I.R. (Vol. 23) 1936 Bom. 250=38 Bom.L.R. 380=60 Bom. 645=163 Ind. Cas. 532.

——S. 9—Implied bar—Suit to set aside award by arbitrator appointed under Bombay Co-operative Societies Act—Jurisdiction of Civil Court to entertain—Bombay Co-operative Societies Act (7 of 1925), S. 57.

A Civil Court cannot under S. 9, C. P. Code, read with S. 57 of Bombay Co-operative Societies Act, entertain a suit to set aside an award of arbitrators or a decision by the Registrar or his nominee arrived at under the provisions of the Bombay Co-operative Societies Act. A.I.R. (Vol. 22) 1935 Bom. 91=36 Bom.L.R. 1245=154 Ind. Cas. 583.

4. (b) Election Dispute.

——S. 9—Implied bar—Election Dispute—Right of civil suit.

The subject has a right of action in cases of election disputes and the Civil Courts have jurisdiction to entertain such suits, under S. 9, C. P. Code and S. 42, Specific Relief Act. A.I.R. (Vol. 21) 1934 Pat. 670 (2)=14 Pat. 24=15 P.L.T. 623=152 Ind. Cas. 805 (F.B.).

——S. 9—Implied bar—Election of District Board Chairman—Civil Court's jurisdiction—U. P. District Boards Act, S. 35.

Jurisdiction of Civil Court to try a suit challenging the validity of the election of a Chairman of a District Board is impliedly barred by S. 35 (3), U. P. District Boards Act, 1922, and even an arbitrary disregard by the Local Government of the mandatory provisions of that section by refusing to appoint a tribunal to decide the question does not bring into play the jurisdiction of the Civil Court. A.I.R. (Vol. 20) 1933 All. 358=1933 A.L.J. 303=55 All. 406=142 Ind. Cas. 403.

4 (c) Domestic Tribunal.

——S. 9—Implied bar—Domestic tribunal—Race club—Decision of Stewards as to registration of horses for racing—Interference by civil Court.

Registration of horses gives right to the horse owners that their horses will be allowed to run unless their entries are refused or cancelled by Stewards. In the matter of disputes between the horse owners and the Club, Stewards can decide provided a fair opportunity to answer the charge is given to the parties. In such a case Civil Courts cannot sit in judgment on the orders of Stewards. (Civil Courts, when can interfere, indicated.) A.I.R. (Vol. 32) 1945 Sind 21=I.L.R. (1944) Kar. 364=218 Ind. Cas. 385.

——S. 9—Implied bar—Domestic tribunal—Race club—Decision by Stewards of dispute between club and owner of horse—Interference by civil Court.

If the matter in dispute between the horse-owner and the Turf Club is within the jurisdiction of the Stewards and they give the person against whom action is intended to be taken a fair opportunity of answering the charges made against him it is not open to the Civil Courts to sit on judgment on the orders passed by the Stewards. It is, however, for the Civil Courts to determine whether a certain matter in dispute is within the jurisdiction of the Stewards and if so, whether they have acted in accordance with the elementary principles of natural justice and fair play. The jurisdiction of the Civil Courts can only be exercised within these narrow limits. A.I.R. (Vol. 29) 1942 Lah. 179=44 P.L.R. 236=201 Ind. Cas. 619.

——S. 9—Implied bar—Domestic tribunal—Society—Dispute between management and individual members—Jurisdiction of Civil Courts.

It is a well-established principle that provided that the acts of the management are within the powers of the society itself, any dispute between individual members of the society and those responsible for its management must be decided by the machinery provided by the rules and not in a Court of Law. It is only when an act is *ultra vires* the society that member is entitled to come to a Civil Court and have the act of the management which is *ultra vires* declared to be void. A.I.R. (Vol. 27) 1940 Mad. 902=1940 M.W.N. 771=52 L.W. 308=(1940) 2 M.L.J. 330=194 Ind. Cas. 760.

——S. 9—Implied bar — Domestic tribunal — Decision of—Interference by Civil Court.

Where jurisdiction to decide a question has been conferred by statute upon what may be called a "domestic tribunal" that tribunal has jurisdiction to decide rightly or to decide wrongly. The decision of such a tribunal must be final. If it were found that persons who have a power of this description have, in the course of their enquiry, disregarded the procedure by the statute incumbent upon them, then the Court might interfere. But if they have followed that procedure correctly, Court has no power to interfere and must accept their decision. A.I.R. (Vol. 20) 1933 Sind 93=26 S.L.R. 469=141 Ind. Cas. 768.

——S. 9—Expressly or impliedly barred—Domestic tribunal—Chairman of meeting—Ruling of—Court's power to revise.

The decisions of a chairman are not necessarily final, and if on any important question he wrongly rules out a particular amendment, then it is open for the Court to revise his decision and to hold if necessary that the resolution passed thereafter was irregular and not binding. (1890) 45 Ch. D. 330, Rel. on. 29 Bom.L.R. 1325=106 Ind. Cas. 265 =A.I.R. 1927 Bom. 603.

4. (d) Special Act.

——S. 9—Implied bar—Co-operative Societies Act —Execution of decree or award—Jurisdiction of Civil Court.

It is not necessary that the jurisdiction of the Civil Courts should be expressly excluded. The exclusion can be implied. Where there is the same machinery for the execution of orders and the hearing of objections to sales in execution under the Madras Co-operative Societies Act as is to be found in the Civil Procedure Code, the only reasonable conclusion is that the Legislature intended the jurisdiction of the Civil Courts to be removed. A.I.R. (Vol. 32) 1945 Mad. 370=58 L.W. 341=1945 M.W.N. 453=(1945) 2 M.L.J. 112.

——S. 9—Implied bar—Act creating special jurisdiction—Suit in civil Court—Bar of—U. P. Municipalities Act, Ss. 318 and 322.

Per *Dar* and *Mathur, JJ.*—If a statutory authority is created, and it is armed with statutory powers and in the exercise of those powers any person receives an injury and the statute provides a special tribunal and an exclusive remedy for the redress of this wrong, then the person aggrieved must seek that remedy and no other and to that extent the jurisdiction of the Civil Court to grant redress for wrongs committed against a person or his property is ousted.

Sections 318 and 322, U. P. Municipalities Act, set up a special tribunal and give exclusive remedy and also give finality to the decision of the special tribunal and these sections may be sufficient to oust the jurisdiction of Civil Court and to bar an enquiry into the legality of the notice under S. 186 in a Civil Court. But notwithstanding the exclusiveness of the special jurisdiction and special remedy, and notwithstanding the finality to its orders given by the statute this finality only operates for acts of the statutory bodies within jurisdiction, and acts without jurisdiction notwithstanding the finality and exclusive clauses can be challenged in Civil Courts. A.I.R. (Vol. 30) 1943 All. 123=1943 A.L.J. 103=44 Cr.L.J. 426=I.L.R. (1943) All. 317 =206 Ind. Cas. 38 (F.B.).

——S. 9—Implied bar—Special Act creating special jurisdiction and prescribing special remedy—Suit in civil Court—Bar of.

Ordinarily, when a right is created by a special statute and a remedy is provided by that very statute for cases of violation of that right, the party aggrieved must pursue the remedy given by the statute. A.I.R. (Vol. 28) 1941 Mad. 857=54 L.W. 321=1941 M.W.N. 983=(1941) 2 M.L.J. 439=197 Ind. Cas. 761.

——S. 9—Implied bar—Special Act—Provisions in—Ouster of jurisdiction of Civil Court—U. P. Regularization of Remissions Act (14 of 1938).

U. P. Regulation of Remission Act (14 of 1938), even if it makes provision about jurisdiction of Civil Courts far from being repugnant is in consonance with the provisions of S. 9, Civil P.C. A.I.R. (Vol. 27) 1940 All. 272=(1940) A.L.J. 274 =1940 R.D. 135=I.L.R. (1940) All. 455=188 Ind. Cas. 586 (F.B.).

——S. 9—Implied bar—Special Act affording remedy—Bar of civil suit.

If a duty is imposed by statute which, but for the statute, would not exist and a remedy for default or breach of that duty is provided by the statute that creates the duty, that is the only remedy. A.I.R. (Vol. 26) 1939 Cal. 178=42 C.W.N. 768=68 C.L.J. 267=181 Ind. Cas. 762.

——S. 9—Implied bar—Special or local law—If bar to civil suit.

Where there is special or local law, the Civil Court would not have jurisdiction under S. 9, to entertain a claim merely because it is of a civil nature. A.I.R. (Vol. 24) 1937 All. 365=1937 A.L.J. 336=1937 A.L.R. 490=169 Ind. Cas. 239.

——S. 9—Co-operative Societies Act—Co-operative Society—Loan due to—Award by arbitrator Suit in Civil Court—If barred.

The jurisdiction of the Civil Courts must be held to be impliedly barred, even as to the part of the loan not covered by the award. A.I.R. (Vol. 24) 1937 Bom. 231=39 Bom.L.R. 249=169 Ind. Cas. 439.

——S. 9—Implied bar—Statute prescribing specific remedy—Bar of suit

If a statute prescribes a specific remedy, then the general rule is "that no remedy can be taken but the particular remedy prescribed by the statute." A.I.R. (Vol. 24) 1937 Oudh 209=12 Luck. 657=165 Ind. Cas. 834=1936 O.W.N. 1140.

——S. 9—Implied bar—Statute giving right and providing remedy—Suit in Civil Court—Bar of.

If a right is given to an individual by a statute and the mode of obtaining that right is provided in the statute itself, a suit to enforce the right is not maintainable in the Civil Court. A.I.R. (Vol. 23) 1936 Pat. 87=16 P.L.T. 877=2 B.R. 252=15 Pat. 246=160 Ind. Cas. 915.

——S. 9—Implied bar—Special Act prescribing procedure—Dispute concerning business of Co-operative Society—Appeal—Civil Court's urisdiction.

In a dispute concerning the business of a Co-operative Society, the only remedy open to the member is to appeal to arbitration; the jurisdiction of the Civil Courts to impugn the award is barred. A.I.R. (Vol. 22) 1935 Lah. 947.

——S. 9—Implied bar—Special Act providing or special remedy—Civil suit—Bar of.

It is an established principle of law that when an act of Legislature gives power to any person for a public purpose from which an individual may receive

an injury, then if the mode of redress is also specified in the statute jurisdiction of ordinary Courts will be ousted. 10 Lah. 338=111 Ind. Cas. 508=A.I.R. 1928 Lah. 562.

——S. 9—Implied bar — **Special Act barring** specified actions—Other actions—If **impliedly** barred.

When an Act specifically says that the right of action in a civil Court is not taken away except in the cases specifically mentioned in the Act, it would be opposed to the principles of construction of a special Act to hold that it takes away the right of a party to seek redress in a civil Court in other cases. The right of a person to seek relief in a civil Court is a common law right, and as long as he can show cause of action, he can bring a suit for redress. 105 Ind. Cas. 88=51 Mad. 76=26 M.L.W. 572=39 M.L.T. 389=1927 M.W.N. 913=A.I.R. 1927 Mad. 1035=53 M.L.J. 688.

——S. 9—Implied bar—Statute creating special jurisdiction—Ouster of civil Court's jurisdiction.

The jurisdiction of the ordinary courts is not ousted when a new duty or cause of action is created by statute prescribing a special jurisdiction out of the course of Common Law. (1911) 2 M.W.N. 241=12 Ind. Cas. 310.

4. (e) Special Tribunals.

——S. 9—Implied bar—Act creating special tribunal—Election tribunal—Rejection of election petition—Civil suit—Competency.

Exclusion of the jurisdiction of the Civil Courts is not to be readily inferred but exclusion must either be explicitly expressed or clearly implied. Even if the jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

Where a person aggrieved by erroneous rejection of his nomination paper files an election petition before the Special Tribunal which, however, refuses to entertain the same as being incompetent, there is refusal to exercise jurisdiction by the Tribunal and a suit in Civil Court challenging the rejection of the nomination paper and for injunction against the rival party is competent. A.I.R. (Vol. 33) 1946 Lah. 85=47 P.L.R. 94=224 Ind. Cas. 322.

——S. 9—Implied bar—Act creating special tribunal—Bar of civil suit.

If the special tribunals constituted under statute come into existence and they function in that event, there can be no manner of doubt that the Civil Courts would have no jurisdiction. On the other hands, if the tribunal, though contemplated by the rules and by the Legislature, do not come into existence, or, having come into existence, they refuse to deal with the matter with which they are entrusted, in that event the jurisdiction of a Civil Court which it has under S. 9 is revived. A.I.R. (Vol. 33) 1946 Lah. 85=47 P.L.R. 94=224 Ind. Cas. 322.

——S. 9—Implied bar—Act creating Special Court—Jurisdiction of ordinary Civil Court, if ousted.

Where by an Act Special Courts are appointed to determine disputes, it must be held that the jurisdiction of the ordinary Courts to determine such disputes is ousted. A.I.R. (Vol. 28) 1941 Cal. 326=I.L.R. (1941) Cal. 182=45 C.W.N. 79=195 Ind. Cas. 677.

——S. 9—Implied bar—Special tribunal with special jurisdiction — Decision of — Interference by civil Court.

The powers of a tribunal of special jurisdiction are circumscribed by the statute under which it is constituted. Such tribunal must act within its powers, and so long as it does so, its orders whether right or wrong, cannot be challenged. But where, and in so far as, its actions are in excess, or in contravention of the powers conferred on it, they are *ultra vires* and of no legal effect. Whenever, therefore, the question arises whether the Court of special jurisdiction has or has not jurisdiction to try a particular cause then the Court of general jurisdiction is always the final authority as to whether the cause is or is not within the special jurisdiction of the special tribunal. The principle is of course without prejudice to the general principle that all Courts must have inherent jurisdiction to decide whether a certain cause is or is not within their jurisdiction to try. But a Court cannot merely by a wrong exercise of discretion or by a wrong construction of law confer jurisdiction upon itself to try a cause and hence when the question arises as between the special Court and the Court of general jurisdiction as to whether a cause is within the jurisdiction of the Special Court or the jurisdiction of the Court of general jurisdiction, then the decision of the Court of general jurisdiction must override the decision of the Court of special jurisdiction. A.I.R. (Vol. 28) 1941 Lah. 234=I.L.R. (1941) Lah. 524=43 P.L.R. 383=198 Ind. Cas. 125 (F.B.).

——S. 9—Implied bar—Act creating Special Tribunal to exercise certain functions—Civil Court, when can interfere.

If a body is constituted by statute to exercise certain functions then a Civil Court cannot either interfere with those functions or treat an act done by the body as a nullity unless the Civil Court has got some special supervising power, for example, by appeal, or unless the body has acted, while doing the act, outside its powers. A.I.R. (Vol. 28) 1941 Nag. 226=I.L.R. (1941) Nag. 279=1941 N.L.J. 351=200 Ind. Cas. 715.

——S. 9—Implied bar—Act creating—Tribunal of special jurisdiction—Civil Courts if can question decision of such tribunal.

The powers of a tribunal of special jurisdiction are circumscribed by the statute under which it was constituted. Such tribunal must act within its powers and so long as it does so, its orders, whether right or wrong, cannot be challenged except in the manner and to the extent prescribed in the statute and Courts of ordinary jurisdiction cannot question them. But where, and in so far as, its actions are in excess, or in contravention of the powers conferred on it, they are *ultra vires* and of no legal effect

and obviously cannot have the same immunity. A.I.R. (Vol. 27) 1940 Lah. 401=42 P.L.R. 560=I.L.R. (1941) Lah. 71=191 Ind. Cas. 583 (F.B.).

——S. 9—Implied bar—Special Act creating special tribunal and special remedy—Bar of civil suit—Madras Co-operative Societies Act, Rules, R. 22.

The jurisdiction of the Civil Courts may be ousted by necessary implication when a special statutory machinery has been set up and the ouster need not be express. Where by a statute powers have been given to any person for a public purpose, by which powers an individual may receive injury, if the mode of redressing the injury is pointed out by the statute, the ordinary jurisdiction of the Civil Court is ousted. Where the statute creates a new offence or given a new right and prescribes a particular penalty or special remedy, no other remedy can, in the absence of a contrary intention be resorted to. Where a *quasi*-judicial machinery is set up by the statute for remedying injuries alleged to have been caused by the exercise of powers conferred under the statute, ordinarily it will be implied that the Civil Court's jurisdiction to give the same remedy will be ousted. Under R. 22, framed under the Madras Co-operative Societies Act the machinery which is prescribed for setting aside a sale on grounds of irregularity, fraud, etc., is definitely a machinery of a judicial nature functioning under rules precisely similar to those by which the Courts are bound under O. 21, Civil P.C. Where a person has not chosen that remedy he cannot when his legal remedy is barred, try to achieve the same result by instituting a suit in Civil Court requiring the Court to exercise a jurisdiction which the statute itself does not contemplate and which is inconsistent with the scheme of the Act. A.I.R. (Vol. 26) 1939 Mad. 967=50 L.W. 364=1939 M.W.N. 907=(1939) 2 M.L.J. 604=188 Ind. Cas. 200.

——S. 9—Implied bar — Act appointing Tribunal to try questions as to rights created by that Act—Jurisdiction of that Tribunal, whether exclusive—Civil suit—Bar of.

Section 9, Civil P. C., recognizes that the jurisdiction of the Civil Court may be limited expressly or impliedly. If there is a Special Tribunal appointed by an Act to decide questions as to rights created by that Act, then the jurisdiction of that Tribunal is exclusive except in so far as is expressly provided for or necessarily implied. It cannot be said that there is an ouster of the jurisdiction of the ordinary Courts because such Courts never had any such jurisdiction. A.I.R. (Vol. 25) 1938 Cal. 359=42 C.W.N. 441=69 C.L.J. 148=179 Ind. Cas. 746.

——S. 9—Implied bar—Act creating special tribunal to decide question of right under it—Bar of civil suit.

Where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive. A.I.R. (Vol. 25) 1938 Rang. 392=1939 Rang. L.R. 50=178 Ind. Cas. 674 (F.B.).

——S. 9—Implied bar—Act creating special Tribunal—Decision of latter—Interference by Civil Court.

The Civil Courts' powers remained unaffected except to the extent they are expressly taken away by the statute. The Civil Court is the only authority which can enquire into the issue whether a Special Tribunal acted within its powers or not. (1937) 167 Ind. Cas. 843=19 N.L.J. 16.

——S. 9—Implied bar—Act setting up Special Tribunal to decide on rights—Bar of suit.

Legislature setting up Special Tribunal for purposes of determining certain questions as to rights which are the creatures of the Act (Bengal Self-Government Act in this case)—Jurisdiction of Tribunal is exclusive—Civil Court cannot take cognizance of such matters. A.I.R. (Vol. 22) 1935 Cal. 10=38 C.W.N. 838=59 C.L.J. 523=61 Cal. 980=154 Ind. Cas. 82.

——S. 9—Implied bar—Act creating Special Tribunal—If bar to suit in Civil Courts—Madras Hindu Religious Endowments Act (1927).

It cannot be laid down that Civil Courts have a general power to decide by a suit questions of the propriety of the exercise of jurisdiction by Courts of particular jurisdiction like the Hindu Religious Endowments Commissioners, though perhaps there may be a remedy by way of *certiorari*. A.I.R. (Vol. 22) 1935 Mad. 621=41 L.W. 384=1935 M.W.N. 615=69 M.L.J. 14=156 Ind. Cas. 460.

——S. 9—Implied bar—Act creating special tribunal to decide disputes—Suit in civil Court—When barred.

Where the duty of deciding disputes between subjects and the Crown is cast upon a special tribunal by the Legislature, the tribunal so constituted must act in good faith. The decision must be come to in the spirit and with the sense of responsibility of tribunals whose duty it is to mete out justice. If the tribunal comes to a conclusion after due inquiry then the jurisdiction of the ordinary Civil Courts is barred and its decision is final. But if the conclusion is come to without any sort of enquiry and without an opportunity being given to the parties to be heard, the jurisdiction of the ordinary Civil Courts is not to be taken away. 43 Bom. 221=21 Bom.L.R. 27=49 Ind. Cas. 427.

4. (f) Statutory Body.

——S. 9—Implied bar—Statutory body—Tax imposed by Municipal Committee—Power of Civil Court to interfere.

Where a tax is imposed by a Municipal Committee acting in the exercise of its statutory powers, and it cannot be said that they have acted in bad faith or in excess of or abuse of the powers vested in them, the civil Court is not entitled to interfere. A.I.R. 1950 E. P. 324.

——S. 9—Implied bar—Statutory body—Municipality—Order for demolition of building—Suit to restrain by injunction—Competency.

A suit by a person against a Municipality for an injunction restraining it from demolishing a building on the ground that the land under the building

belonged to him and not to the Municipality, involves a controversy of title and a Civil Court has consequently jurisdiction to entertain it. If a committee does an unauthorized act, it cannot claim immunity from the ordinary law of the land. A.I.R. (Vol. 27) 1940 Lah. 451=42 P.L.R. 550=192 Ind. Cas. 729.

——S. 9—Implied bar—Statutory body—District Board—Acquisition of land—Resolution for —Suit in civil Court to challenge—If lies.

Public bodies should be kept within control. They may not exceed the limits of the authority committed to them by law; they must act in good faith and reasonably and with some regard for the interests of those who may suffer for the good of the community. Even when a public body is acting within the limits of its jurisdiction, the Court may, and will interfere, if it be shown that the discretion given by law has not been exercised **bona fide.**

Where a District Board acted within its powers in passing a resolution to acquire certain land but it is found that there was a complete want of good faith, and an entire lack of regard for the interests of the owners of the land recommended for acquisition:

Held, the Courts have jurisdiction to interfere and to safeguard the interests of the owners and it is immaterial that some future development of the situation might afford the plaintiffs a different remedy. The plaintiffs are entitled to claim protection from the Courts by way of injunction. A.I.R. (Vol. 23) 1936 Cal. 225=40 C.W.N. 687=162 Ind. Cas. 671.

——S. 9—Statutory body—Exercise of powers—Suit in Civil Court.

Where powers are given to a public body of acquiring property for purposes of an Act, misuse of the powers by attempting to acquire land not in furtherance of the objects of the statute but for the purposes of exacting exemption fee from owners is actionable in a Civil Court. 47 Cal. 500=47 I.A. 45=24 C.W.N. 881=32 C.L.J. 65=2 U P L.R. 98 (P.C.) =18 A.L.J. 521=22 Bom.L.R. 586=A.I.R. 1920 P.C 51=11 L.W 566=56 Ind. Cas. 32=38 M.L.J. 511=(P.C.) [44 Cal 219=21 C.W.N. 8=24 C.L.J. 246=36 Ind. Cas. 749, affirmed].

——S. 9—Implied bar—Statutory body—Appointment of trustee by Temple Committee—Power to question.

The Civil Court can question the appointment of a trustee by the Devastanam Committee if it is not made reasonably and in good faith. 42 Mad. 668=26 M. L. T. 143=(1919) M.W.N. 522=53 Ind. Cas 605.

4. (g) Miscellaneous.

——S. 9—Implied Bar—Removal of executor—Bar of civil suit.

There is no power in the Courts to remove an executor by virtue of their jurisdiction under S. 9 and hence there is no presumption against a construction of S. 391, Succession Act, in such a manner as to oust or limit the jurisdiction of the ordinary Court. A.I.R. (Vol. 22) 1935 Lah. 406=37 P.L.R. 77=16 Lah. 975=157 Ind. Cas. 87.

——S. 9—Implied bar—Income-tax—Illegal assessment—Suit to recover—Bar of.

Where a certain income is outside the scope of the Act, such as agricultural income or income not earned in or brought into British India, any assessment in respect of such income would be outside the scope of the Act and a civil suit to recover it would not be barred by reason of S. 52. 114 Ind. Cas. 829=52 Mad. 12=28 M.L.W. 667=A.I.R. 1929 Mad. 179=55 M.L.J. 770.

——S. 9—Implied bar—Suit for restoration of property sold under Ss. 87 and 88, Cr. P. Code —Bar of.

A "proclaimed" person, whose immovable property has been attached and sold by a Criminal Court in proceeding under Ss. 87 and 88, Cr. P. Code, has no right to maintain an ordinary civil action for the restoration of the property sold, even though the procedure laid down for issuing the proclamation and attachment have not been strictly followed. 27 All. 572, diss.; 39 P. R. 1917; 32 P. R. 1919 and A.I.R. 1926 Lah. 662, Rel. on.

A civil suit for the purpose of setting aside such a sale is impliedly barred by the provisions of Cr. P. Code. 10 Lah. 338=111 Ind. Cas. 508=A.I.R. 1928 Lah. 562.

——S. 9—Implied bar—Minor—Guardian of person and property—Suit for appointment of—Bar of—Guardians and Wards Act, S. 7.

The question of the appointment of a guardian for a minor's person and property is a matter specially within the provisions of the Guardians and Wards Act, and no suit can be brought for that purpose. 110 Ind. Cas. 46=A.I.R. 1928 Nag. 297.

——S. 9—Implied bar—Minor—Suit by next friend for possession of property—Plea by defendant that he is minor's guardian—Bar of suit—Guardians and Wards Act, S. 3.

A suit by minor with next friend for possession of property against a person who admits the minor's title but claims to be in possession as minor's guardian is not maintainable the proper procedure being under the Guardians and Wards Act for the appointment of a guardian. 26 All. 594, Appr. 21 N.L.R. 75=89 Ind. Cas. 55=A.I.R. 1925 Nag. 328.

——S. 9—Implied bar—Order of Collector under Sea Customs Act—Suit in Civil Court—Bar of.

The plaintiffs having sued in the Civil Court to recover the value of the silver confiscated under the Sea Customs Act and the amount of the fine, the trial Court threw out the claim on the preliminary ground that the Collector's decision was final under S. 188 of the Act. ***Held,*** reversing the decree that if there had been no legal adjudication of the matter by the Collector of Customs in accordance with the provisions of the Sea Customs Act, the jurisdiction of the Civil Court to take cognizance of the suit was not ousted. 43 Bom. 221=21 Bom.L.R. 27=49 Ind. Cas. 427.

——S. 9 (S. 11, Old Code)—Implied bar—Dismissal of application for review of judgment—Suit to set aside decree—If barred—Election of remedies—Doctrine of.

The doctrine of estoppel by election of remedies rests upon the principle that a litigant cannot come before a Court of Justice and have recourse to re-

pugnant remedies. A remedy by review and one by suit are not inconsistent and a prior application for review and its dismissal are no bar to a subsequent suit to set aside the decree. (1909) 13 C.W.N. 1197 at 1216. *See* 10 C. 1 at 7, 8; 5 M. 61; 8 M. 208; 10 M. 316; 12 .M. 325 at 437; .10 C. 924 (927, 922).

——S. 9 (S. 11, Old Code)—Implied bar—Charge of dacoity—Prosecution—Acquittal by criminal Court—Subsequent suit for damages for instigating decoity—Jurisdiction of civil Court.

Having regard to the provisions of S. 11 of C. P. Code, the fact that the criminal trial had not resulted in a conviction of the accused was no bar to the institution of the civil suit against them. The confession and sworn evidence of an approver in a criminal trial for dacoity, are admissible in evidence against him in a suit for damages, brought against him by the complainant for having instigated the dacoity. **Held,** further that the Civil Court could act upon such statements even though the Sessions Judge did not think it safe to convict the accused upon such statements. (1908) 13 C.W.N. 501=4 Ind. Cas. 523.

——S. 9 (S. 11, Old Code)—Implied bar—Remand order—Election to abide by—Subsequent appeal after trial on merits—Bar of.

When a litigant has the right to choose between two remedies which are not co-existent but alternative and adopts one of those remedies, his act at once operates as bar as regards the other, and the bar is final and absolute. After having taken the full benefit of an order of remand, it is not open to a party to turn round and appeal against it. 12 C.W. N. 590.

——S. 9 (S. 11, Old Code)—Implied bar—Barred decree—Suit on—Maintainability.

When the plaintiffs have allowed a previous decree obtained by them with regard to the same subject-matter to be barred by limitation and when that decree has become absolutely null, the barred decree cannot afford a fresh cause of action to maintain a second suit for the same relief. (1905) 33 C. 679.

——S. 9 (S. 11, Old Code)—Implied bar—Suit on judgment—Order in insolvency—A suit on an unsatisfied insolvency order for costs is maintainable. 9 C.W.N. 952=33 Cal. 560.

——S. 9 (S. 11, Old Code)—Implied bar—Assault—Conviction for in Criminal Court—If bar to civil suit for damages.

A conviction by a criminal court for an assault is no bar to a civil suit for damages. (1902) 6 C.W. N. 915.

5. Civil and Revenue Court.

——S. 9—Civil and Revenue Court—Latter having no jurisdiction as to part of claim—Civil Court's power.

Where the revenue Court is not competent to grant part of relief claimed, the Civil Court is the only forum. A.I.R. (Vol. 31) 1944 All. 194= I.L.R. (1944) All. 330.

——S. 9—Civil and Revenue Court—Personal covenant by tenant suit on—Civil Court's power—If suit for rent.

Suit to recover annual sum due under personal covenant by tenant is not suit for rent and is cognizable by Civil Court. A.I.R. (Vol. 31) 1944 Pat. 293=217 Ind. Cas. 14=23 Pat. 334.

——S. 9—Civil and Revenue Court—Revenue Court deciding without jurisdiction—Jurisdiction of Civil Courts.

Where the Assistant Collector has erroneously held the second petition to be competent, the matter cannot be taken in appeal to the higher Revenue Officer. The Assistant Collector having no jurisdiction to entertain the second petition, the proceedings before him are **ultra vires** and the Civil Courts are entitled to go into the matter. A.I.R. (Vol. 30) 1943 Lah. 176=45 P.L.R. 292=I.L. R. (1944) Lah. 1=208 Ind. Cas. 441 (F.B.).

——S. 9—Civil and revenue Court—Decision by latter—Interference by Civil Court—Jurisdiction.

When the Revenue Courts act with jurisdiction the Civil Court cannot interfere. But where they act without jurisdiction the Civil Court can and must interfere. A.I.R. (Vol. 30) 1943 Pat. 353 =24 P.L.T. 125=10 B.R. 326=211 Ind. Cas. 80.

——S. 9—"Civil Court"—Revenue Officer trying rent suit.

Revenue Officer trying rent suit is a Civil Court and not a Revenue Court. 1942 N.L.J. 348.

——S. 9—Civil and Revenue Court—Decree for rent by Revenue Court—Reduction of rent subsequently—Plea in execution that amount of decree should be reduced—Power of Civil Court to go into plea.

Where the judgment-debtor applies to the executing Court that the rent decree which was going to be executed should not be executed for a sum larger than the sum which would be payable to the decree-holder in accordance with the decision of the Revenue Officer reducing the rent and the decree-holder objects that the order of the rent reduction officer was without jurisdiction inasmuch as no notice was served upon the landlord decree-holder, that only one of the tenants had applied for reduction, an opportunity should be given to the decree-holder, to show that the order passed by the Revenue Officer was without jurisdiction. If the order was without jurisdiction obviously it cannot be relied upon and the Civil Court in the execution department is bound to ignore it. But the decree-holder is entitled to show only that the order was made without jurisdiction but not that in the exercise of his jurisdiction the Revenue Officer came to an erroneous conclusion. A.I.R. (Vol. 29) 1942 Pat. 258=23 P.L.T. 159=8 B. R. 532=199 Ind. Cas. 222.

——S. 9—Civil and Revenue Court—Decision of Revenue Court—Civil Court's power to examine correctness.

Where the orders of the Revenue Officers are passed with jurisdiction, the Civil Court cannot sit in judgment upon the findings of the Revenue Officers, nor can it set aside their orders except in suits under S. 104-H, Bihar Tenancy Act. As long as the Revenue authorities had jurisdiction to

decide the question, it is not open to the Civil Court to examine whether they in fact decide it correctly. (1942) 199 Ind. Cas. 154=8 B.R. 503.

——S. 9—Civil and Revenue Court—Fixed rate tenant — Suit against for injunction — Civil Court's jurisdiction.

Suit against fixed-rate tenant for a mandatory and prohibitory injunction—Revenue Courts not competent to entertain suit—Suit lies in Civil Court—S. 230 read with S. 120, Agra Tenancy Act, does not bar the jurisdiction of Civil Court merely because question of improvement is involved. A.I.R. (Vol. 28) 1941 All. 61=1940 A.L.J. 906=1941 O.W.N. 8=192 Ind. Cas. 496=I.L.R. (1941) All. 250 (F.B.) [Overrules A.I.R. (Vol. 25) 1938 All. 511=I.L.R. (1938) All. 754=177 Ind. Cas. 450].

——S. 9—Civil and Revenue Court—Suit to declare decree of revenue Court void—Bar of.

No civil suit lies for a mere declaration that a decree of a Revenue Court was without jurisdiction and therefore invalid. A.I.R. (Vol. 26) 1939 All. 446=1939 A.L.J. 382=1939 R.D. 363=182 Ind. Cas. 911.

——S. 9—Civil and Revenue Court—Agra Tenancy Act (1926)—Dispossession of co-tenant prior to Act—Suit for joint possession in Civil Court—If barred.

Where the plaintiff co-tenant has been dispossessed from his tenancy prior to September 6, 1926, **i.e.**, before the coming of Agra Tenancy Act, 3 of 1926, into force, his suit for joint possession lies in a Civil Court and the Civil Court has jurisdiction to try such a suit.

The Civil Court's decree must govern the rights of the parties and must be conclusive as between them. It is not open to any person who is a party to a decree or for his representative to deny the effect or the validity of such a decree unless and until such decree is set aside on the ground of fraud or any other ground. A.I.R. (Vol. 25) 1938 All. 259=1938 A.L.J. 373=1938 R.D. 458 =1938 A.L.R. 540=176 Ind. Cas. 85.

——S. 9—Civil and Revenue Court—Agricultural land—Ejectment of tenant—Civil suit—If barred.

It is open to the proprietor of agricultural land either to sue a trespasser for ejectment in the Civil Court or to avail himself of the speedy remedy provided by S. 44 of the new Tenancy Act and to file a suit for ejectment and for damages in the Revenue Court. A.I.R. (Vol. 25) 1938 All. 316=1938 A.L.J. 333=1938 R.D. 463 =1938 A.L.R. 497=I.L.R. (1938) All. 441=175 Ind. Cas. 902.

——S. 9—Civil and Revenue Court—Landlord and tenant — Agricultural land — Ejectment—Jurisdiction of Civil Court.

The settlement of a cultural land within the **zemindari** belonging to Muhammadan infant, by his **de facto** guardian, with tenants, for agricultural purposes does not come within the rule of Muhammadan Law, and such settlement does not amount to an alienation or transfer of the minor's interest in the immovable property. Any person, who is managing **zemindari** property belonging to a Muhammadan infant has the right to settle agricultural land with tenants and such acts of management do not amount to alienations or transfer of the minor's proprietary interest.

Hence, where a Muhammadan widow who has inherited **zemindari** property along with her minor son executes a perpetual lease in favour of a person in her own right and also purporting to act as a guardian of her minor son, in respect of agricultural land, although such lease is not binding on the minor, the relationship of landlord and tenant is established between the parties and their rights and liabilities can be adjudicated upon by the Revenue Court alone. The person in whose favour the lease has been executed becomes the tenant of the infant **zemindar** within the meaning of the Tenancy Act if the land is agricultural and he has been holding it as an agricultural tenant and has been paying rent. Therefore, a suit on behalf of the infant **zemindar** in Civil Court for ejectment of the tenant and possession of the land does not lie and as there exists a relationship of landlord and tenant between the parties, the Civil Court has no jurisdiction to entertain such a suit. The mere fact that the lessee in such a suit relies on the perpetual lease alleged to have been executed in his favour, does not prohibit him from relying in the alternative on his rights as an agricultural tenant. If a person is claiming a larger right, it is always open to him to plead in the alternative a smaller right also. A.I.R. (Vol. 26) 1939 All. 121=1938 A.L.J. 1110=1938 R.D. 910 =I.L.R. (1938) All. 89=180 Ind. Cas. 504.

——S. 9—Civil and Revenue Court—Lessee in possession under lease—Ejectment—Civil Suit—If barred.

Person granted lease by person, intention being to defraud creditors of grantor—Lessee recognised as tenant—Suit for his ejectment—Civil Courts have no jurisdiction, since the lessee is not a trespasser but a person recognised as tenant. A.I.R. (Vol. 25) 1938 All. 39=1937 R.D. 49=1938 A.L.R. 296=174 Ind. Cas. 605.

——S. 9—Civil and Revenue Court—Forum —Test to decide.

The question of forum should be determined by the dominant characteristic of the property in question.

Property sought to be partitioned consisted of a **kothi** and a small portion of land 4 **bighas** 19 **biswas** cultivated, attached to such **kothi**. It was situated in a part of the city and the **kothi** also had 37 shops connected with it. The value of the house property was considerably greater than that of the land attached to it:

Held, that the application of S. 233 (k), U. P. Land Revenue Act, to determine the forum in the Revenue Court for the agricultural portion would be a mere technical quibble and that as the dominant characteristic of the property was not agricultural property but house property with land attached to the house the Civil Court was the proper forum. A.I.R. (Vol. 25) 1938 All. 391=1938 A.L.J. 513=1938 A.L.R. 622=I.L.R. (1938) All. 556=176 Ind. Cas. 483.

——S. 9—Civil and Revenue Court—Suit for damages for cutting trees in grove—Defendant claiming to be land-holder—Defendant not recorded as co-sharer—Jurisdiction of Civil Court.

The plaintiff sued for damages upon the allegation that the defendant had cut down a tree in his grove. The defendant claimed to be the land-holder and argued that the suit was really one for dispossession, that an adequate relief could be given by the Revenue Court, and that, therefore, the Civil Court had no jurisdiction. The defendant was not recorded as a co-sharer. His case was that the property had been acquired by his father on behalf of a joint Hindu family of which he and his father were members:

Held, that even if the fact that the property was acquired on behalf of the joint family was true, it did not oust the jurisdiction of the Civil Court. The defendant could not claim that the suit should lie in a Revenue Court unless and until he had shown that the trees had been cut not by him individually but by the joint Hindu family which was the land-holder. The mere cutting down the tree did not amount to dispossession of the plaintiff so as to give jurisdiction to the Revenue Court. A.I.R. (Vol. 25) 1938 All. 146=1937 A.L.J. 1313=1938 R.D. 36=1938 A.L.R. 266=174 Ind. Cas. 326.

——S. 9—Civil and Revenue Court—Grant by Government—Provision that dispute with adjacent lessee to be settled by Revenue authorities—Suit by adjacent lessee for declaration of right to land and to correct entry in record of right.

Grant by Government containing clause that any boundary dispute between adjoining lessees shall be submitted to Commissioner for decision and that on appeal the decision of Board of Revenue shall be final and binding on lessees—Piece of land recorded in name of defendant in survey settlement—Suit by plaintiff, adjacent lessee, for declaration that that piece belonged to him and entry in settlement record was wrong, in Civil Court:

Held, that the Civil Court had jurisdiction to decide the boundary dispute. A.I.R. (Vol. 25) 1938 Cal. 211=I.L.R. (1938) 1 Cal. 626=42 C.W.N. 81=178 Ind. Cas. 718.

——S. 9—Civil and Revenue Court—Landlord and tenant—Revenue collected from tenant—Suit by latter against landlord to recover same—Civil Court's jurisdiction.

Where a covenant in a lease provided that the lessee was not liable to pay land revenue and if it was recovered from him, he could recover it with interest from the lessor and the lessee brought a suit against the lessor for the recovery of land revenue which the Government recovered from him:

Held, that the suit being for enforcement of a contract, the Civil Court had jurisdiction to entertain it. A.I.R. (Vol. 24) 1937 All. 346=1937 A.L.J. 229=1937 R.D. 126=1937 A.L.R. 400=9 R.A. 673=168 Ind. Cas. 696.

——S. 9—Civil and Revenue Court—Occupancy holding—Transferee getting decree for mutation in Civil Court—Suit to declare decree void—If barred.

Where on an occupancy tenant transferring his right and the transferee obtaining a Civil Court decree for mutation of his name as occupancy tenant, the landlord brings a suit for declaration that the decree obtained by the transferee was null and void, the Civil Courts alone are competent to hear the suit. A.I.R. (Vol. 24) 1937 Lah. 317=174 Ind. Cas. 120.

——S. 9—Civil and Revenue Court—Dispute between tenants as to possession of land held under different landlords—Bar of Civil suit.

Dispute as to possession between tenants—Landholders of the parties different.

Held, that the Civil Court has jurisdiction. If landholders of the parties are the same, the Revenue Court has jurisdiction. A.I.R. (Vol. 24) 1937 All. 261=1937 A.L.J. 137=1937 R.D. 72=1937 A.L.R. 275=167 Ind. Cas. 927.

——S. 9—Civil and Revenue Court—Ejectment of trespasser—Civil Court's jurisdiction—Agra Tenancy Act, Ss. 44 and 230.

Suit by landlord against trespasser lies in Civil Court in spite of S. 44 of the Agra Tenancy Act, 1926. Section 230 of that Act is no bar. A.I.R. (Vol. 24) 1937 All. 415=1937 A.L.J. 329=1937 R.D. 176=I.L.R. (1937) All. 570=1937 A.L.R. 668=170 Ind. Cas. 477.

——S. 9—Civil and Revenue Court—Mortgage and lease back—Mortgagee as lessee failing to pay rent and denying title of mortgagee—Suit in Civil Court—If barred.

A mortgagor executed a mortgage with possession of certain land. The mortgagee obtained possession and leased it back to the mortgagor. As the mortgagor failed to pay rent to the mortgagee, the mortgagee assigned his rights to collect rent to a third person who sued the mortgagor for rent. On mortgagor's repudiating the tenancy and the mortgage, a suit was brought to eject him as trespasser:

Held that the Civil Court had jurisdiction to entertain the suit. A.I.R. (Vol. 24) 1937 Lah. 68=39 P.L.R. 330=169 Ind. Cas. 938.

——S. 9—Civil and Revenue Court—Matter triable exclusively by Revenue Court—Suit in Civil Court—Bar of.

When a matter exclusively within the jurisdiction of a Court of Revenue has been tried and decided by such Court having final appellate jurisdiction as between the parties, no subsequent suit will lie in a Civil Court having for its sole object the annulment of the decree passed by the Court of Revenue. If the order of a Court of Revenue is not without jurisdiction, the Civil Court has no jurisdiction, to question the correctness or validity of the order of the Revenue Court when the matter decided was exclusively within the jurisdiction of the Revenue Authorities even if the latter made a mistake. (1937) 170 Ind. Cas. 639=1937 O.W.N. 886=1937 O.L.R. 466=1937 R.D. 404.

——S. 9—Civil and Revenue Court—Mortgagee of share in mouza obtaining decree and purchasing it—Prior lease of entire mouza—Civil Court's jurisdiction to declare not binding.

Where the mortgagee of a share in a mouza obtains a decree on the mortgage and purchases the

property in execution thereof, but before the sale in his favour, the entire mouza is leased out by the mortgagor and his co-sharers, the mortgagee-purchaser is entitled to have recourse to the Civil Courts for a declaration that the property which he purchased was not burdened with a lease, inasmuch as the lease was executed during the pendency of a suit in which the property leased was directly and specifically in issue, and he must have recourse to the Revenue Court for possession of the property in suit and for mesne profits. A.I.R. (Vol. 23) 1936 All. 661=1936 A.L.R. 822=1936 A.L.J. 1256=164 Ind. Cas. 762.

——S. 9—Civil and Revenue Court—Order by Board of Revenue without jurisdiction—Suit in Civil Court—If barred.

When authorities of limited jurisdiction act in excess of their jurisdiction, their acts become liable to be scrutinised by the Civil Court and become liable to be set aside. Consequently, an order passed without jurisdiction by the Board of Revenue is liable to be made the subject of a civil suit. A.I.R. (Vol. 23) 1936 Cal. 138=40 C.W.N. 539=161 Ind. Cas. 744.

——S. 9—Civil and Revenue Court — Notice of ejectment under Punjab Tenancy Act — Suit in Civil Court competency.

Suit for ejectment of tenant by notice under Punjab Tenancy Act is cognizable by Revenue Courts and not by Civil Courts. A.I.R. (Vol. 23) 1936 Lah. 571=164 Ind. Cas. 235.

——S. 9—Civil and Revenue Court—Question of title—Forum for trial.

Where the plaintiff is recorded as having proprietary title entitling him to institute a suit, the Revenue Court is not competent to go behind the record and receive evidence and itself try the question of proprietary title. A.I.R. (Vol. 24) 1937 Oudh 80=1936 O.L.R. 27=1936 O.W.N. 93=1936 R.D. 73=159 Ind. Cas. 1047.

——S. 9—Civil and Revenue Court—Batwara Court—Partition of estate—Interference by Civil Court.

If the Revenue Court has assumed jurisdiction correctly, that is to say, that if by reason of its local situation and pecuniary authority, or by reason of the subject-matter, or the position of the parties, the Revenue Court has power under the statute to entertain the partition proceeding, then not every order in the exercise of that jurisdiction will invalidate the proceeding and render it null and void, or entitle the Civil Court to correct it.

The Civil Court should be very slow to interfere with the jurisdiction which is exercised by a Revenue Court upon powers conferred by the Estates Partition Act. When such interference is invoked, the facts must be scrutinised with particular care. The Civil Court has no power to issue injunction to Batwara Court, it falls to the Revenue Officers, during the **batwara**, to consider and decide for themselves whether or not S. 77, Bengal Estates Partition Act, applied to the case, and in such matters, the jurisdiction of the Civil Court is limited. A.I.R. (Vol. 23) 1936 Pat. 226=17 P.L.T. 109=15 Pat. 404=162 Ind. Cas. 210.

——S. 9—Civil and Revenue Court—Mortgagor becoming lessee of mortgagee—Suit for possession of default in payment of payment of rent—Jurisdiction of Civil Court.

In a suit against the defendants on basis of two mortgages, it was alleged that the defendant by a contemporaneous deed of lease had taken the land in lease and that the defendants had satisfied the rent due till the termination of the lease and thereafter had retained the land on oral lease; that the defendants paid rent for some period under oral lease but had refused to pay rent later. The plaintiff sought a decree for possession or 'in case of failure' (*ba surat digar*) for the return of the mortgage money, or other relief deemed suitable. The trial Court granted a decree for the amount of the mortgage money, but refused a decree for possession on the ground that the parties had never intended that possession should pass under the mortgage. The decree was upheld on appeal.

Held, that the suit for possession was not cognizable by Civil Court but could be tried only by Revenue Court as the defendant's possession could not be otherwise than as a tenant. A.I.R. (Vol. 23) 1936 Pesh. 38=162 Ind. Cas. 658.

——S. 9—Civil and Revenue Court—Grove land—Suit for declaration as to and trees—Bar of.

Jurisdiction is determined by allegations in the plaint. Suit for declaration in regard to grove-land and trees is barred from the cognizance of a Civil Court. A.I.R. (Vol. 22) 1935 All. 966=1935 A.L.R. 1103=159 Ind. Cas. 298.

——S. 9—Civil and Revenue Court—Jurisdiction—Test—Tenant—Suit by to evict trespasser—Plea by defendant that he is a tenant—If bar to trial by Civil Court.

Jurisdiction is determined by allegations in plaint. It is not ousted by allegations in written statement. Where plaintiff alleging himself as tenant sues the defendant as trespasser for possessoin and compensation, the suit is cognizable by Civil Court and the jurisdiction is not ousted by defendant's plea that he is a tenant and not trespasser. 156 Ind. Cas. 967=1935 R.D. 297=1935 A.L.J. 832.

——S. 9—Civil and Revenue Courts—Suit for rent by transferee of mere right to recover rent in future—If barred.

Suit by a transferee of a mere right to recover rent in future for a particular period for realisation of rent is cognizable by Civil Court as the plaintiff has not the status of a landlord. A.I.R. (Vol. 22) 1935 Lah. 976.

——S. 9—Civil and Revenue Court—Rent—Suit by transferee to recover arrears of rent and suit by transferee of right to recover future rent—If cognizable by Civil Court.

As far as the question of jurisdiction is concerned a suit by a transferee to recover arrears of rent and a suit by a transferee of a mere right to recover rent in future for recovery of such a rent are not distinguishable both being within cognizance of Civil Courts. A.I.R. (Vol. 22) 1935 Lah. 976.

——S. 9—Civil and Revenue Court—Resumption of inam land—Tahsildar granting patta to person in possession—Civil suit to question validity—If barred.

Where, on the resumption of an *Inam* land the Tahsildar finds that a particular person is in possession and grants him the *patta* in respect of that land, the action of the Tahsildar is within the scope of his authority and a Civil Court cannot question the validity of the grant. A.I.R. (Vol. 22) 1935 Mad. 725.

——S. 9—Civil and Revenue Court—Sub-tenant —Suit by against original landlord—Forum—Civil or Revenue Court.

There is no provision in Agra Tenancy Act, 1926, for a suit by a sub-tenant against original landlord, which suit, therefore, cannot be maintained in the Revenue Court. A.I.R. (Vol. 21) 1934 All. 685=1934 A.L.J. 566=7 R.A. 516=L.R. 15 All. 403 (Rev.)=153 Ind. Cas. 479.

——S. 9—Civil and Revenue Court—Dispossession in execution of revenue Court decree passed without jurisdiction—Suit by possession by person dispossessed—If barred.

Where the plaintiff is dispossessed of his lands in execution of a decree which has been passed by a Revenue Court without jurisdiction in that the decree was passed against the plaintiff's father who was dead at that time and the plaintiff though brought on the record as his representative was not served with a notice or heard before the decree was passed, a suit brought by the plaintiff in a Civil Court for the possession of his land is competent. A.I.R. (Vol. 21) 1934 Lah. 841.

——S. 9—Civil and Revenue Court—Suit to eject trespasser—Absence of relationship of landlord and tenant—Jurisdiction of Civil Court.

Suit for foreclosure—Injunction prohibiting mortgagor from transfer during pendency of suit—Mortgagor executing perpetual lease—Decree in mortgage suit—Suit for possession of leased lands:

Held, that the plaintiff was no party to the lease and no relationship of landlord and tenant came into existence between him and the defendants. The position of the defendants as against the plaintiff was merely that of trespassers and that the relief for possession could be granted by the Civil Court. A.I.R. (Vol. 21) 1934 Oudh 55=11 O.W.N. 193=18 R.D. 97=9 Luck. 365=147 Ind. Cas. 910.

——S. 9—Civil and Revenue Court—Part of plaintiff's claim cognizable by Civil Court and part by Revenue Court—Suit in Civil Court—Maintainability.

Civil Courts may entertain suits which cannot be brought in the Revenue Court, although a portion of the claim is of a nature of which the exclusive cognizance is given to Revenue Courts.

The position would be different if the suit were essentially one which ought to have been instituted in the Revenue Court, and some unnecessary or unwarrantable addition had been made to the claims in the plaint, in order to make it appear that the case came within the cognizance of the Civil Court, as for instance if in a pure suit for accounts the plaintiff were to add an unnecessary prayer for a declaration of his title as *zamindar*. A.I.R. (Vol. 21) 1934 Pat. 439=13 Pat. 510=150 Ind. Cas. 56.

——S. 9—Civil and Revenue Court—Forum—Test to decide.

Determination of the question whether a suit is cognizable by the Civil or Revenue Court is dependent on the real nature of the suit and not on the form in which it is put. A.I.R. (Vol. 20) 1933 All. 564=17 R.D. 767=L.R. 14 A. 617 (Rev.)=1933 A.L.J. 1286=L.R. 14 A. 835 (Rev.)=146 Ind. Cas. 568.

——S. 9—Civil and Revenue Court—Poramboke—Entry of land in settlement register as cattle stand—Power of Government to assign such land—Suit in Civil Court—Bar of.

The registration of a land as cattle-stand in the settlement registers does not imply any grant and there is nothing in law to warrant the view that once it has been registered as cattle-stand, Government can only transfer it provided they do not prejudice the rights of the villagers by diminishing the cattle stand ground beyond what is required. The Revenue Official must be left to their own judgment in such matters and their judgment cannot be questioned by the Civil Courts. A.I.R. (Vol. 20) 1933 Mad. 610=38 L.W. 83=1933 M.W.N. 952=144 Ind. Cas. 20.

——S. 9—Deceased holding under hereditary lease and not having under-proprietary rights—Suit by heir for possession in Civil Court—If lies.

A suit for possession of land held by the deceased father of the plaintiff, cannot be instituted in the Civil Court if the deceased did not possess under-proprietary rights but only held under a hereditary lease. A.I.R. (Vol. 20) 1933 Oudh 191=10 O.W.N. 143=17 R.D. 147=L.R. 14 A. (O.) 130=8 Luck. 676=144 Ind. Cas. 967.

——S. 9—Civil and Revenue Court—Revenue Court having jurisdiction—Effect—Competency of Civil Court.

Suit filed in Civil Court for invalidating the lease and for possession—Revenue Court able to grant adequate relief under Ss. 44 121, Agra Tenancy Act—Civil Court has no jurisdiction. A.I.R. (Vol. 19) 1932 All. 460=(1932) 1 All. 521=16 R.D. 434=L.R. 13 All. 282 Rev.=141 Ind. Cas. 591.

——S. 9—Civil and Revenue Court—Tenant dispossessed by some proprietors—Suit by tenant for possession in Civil Court—Bar of.

Dispossession of tenants by some of the proprietors—Dispossession is not by land holders—Suit by tenants for recovery of possession is cognizable by Civil Court and is subject to 12 years' rule of limitation. A.I.R. (Vol. 19) 1932 All. 134=1931 A.L.J. 1098=16 R.D. 120=L.R. 13 All. 24 (Rev.)=135 Ind. Cas. 555.

——S. 9—Civil and Revenue Court—Question of title—Jurisdiction to decide—W. P. Land Revenue Act (1901), Ss. 111 and 233—Civil Court's jurisdiction.

Per *Hasan, C. J.*—Provisions of Chap. VII of U. P. Land Revenue Act, 1901 and of S. 233 Cl. (*k*) of the same Act not only create an exception to the general jurisdiction of the Civil Court as con-

templated by S. 9, Civil P. C., but they also clearly establish the point that the Courts of Revenue have exclusive jurisdiction of determining questions of title which are raised or which might and ought to have been raised in partition proceedings except when the jurisdiction of the Civil Court is invoked in accordance with Cl. (*b*) of sub-S. (1) of S. 111 of the U.P. Land Revenue Act. If the procedure specified in Cl. (*b*) is not resorted to and the Collector decides to proceed to inquire into the merits of the case his decision is final. A.I.R. (Vol. 19) 1932 Oudh 199=9 O.W.N. 488=10 R.D. 246 =L.R. 13 A. (O.) 246=7 Luck. 716=137 Ind. Cas. 606 (F.B.).

——S. 9—Civil and Revenue Court—Agra Tenancy Act (1926)—Partition of grove and damages—Suit after 1926—Cause of action accruing before—If lies in Civil Court.

Where a suit for partition of grove and damages was instituted after the passing of the Agra Tenancy Act, 1926, but the cause of action for damages arose before the Act of 1926 came into force, the Civil Court had jurisdiction to entertain the claim for damages though the relief of partition was the matter for Revenue Court under S. 37, Agra Tenancy Act, 1926. A.I.R. (Vol. 17) 1930 All. 365 (1)=1930 A.L.J. 769=131 Ind. Cas. 686 (1).

——S. 9—Civil and Revenue Court—Rent suit —Competency of Civil Court—Plea of denial of tenancy—Effect.

Jurisdiction to try a suit for rent has primarily to be determined by reference to the allegations in the plaint and if on those allegations the suit is cognizable by the Revenue Court only, the plaint cannot be returned by the Revenue Court because the defendant denies the existence of the relationship of landlord and tenant. A.I.R. (Vol. 17) 1930 Lah. 599 (1)=31 P.L.R. 704=129 Ind. Cas. 214.

——S. 9—Civil and Revenue Court—Question of distribution of Government revenue—Civil Court's jurisdiction.

The question of distribution of the Government revenue is primarily the duty of the Collector, and it is a matter which the Civil Court cannot deal with. 9 P.L.T. 661=8 Pat. 95=115 Ind. Cas. 225=A.I.R. 1929 Pat. 22.

——S. 9—Civil and Revenue Court—Suit between rival claimants of qubzadari land—Civil Court's jurisdiction.

A suit between rival claimants of qubzadari lands is not a suit between a tenant-in-chief and a sub-tenant and therefore, is maintainable in a civil Court. A.I.R. 1926 Oudh 205, Dist. 1 L.C. 677=107 Ind. Cas. 326=3 Luck. 273=9 L.R.A. (Rev.) 350=A.I.R. 1928 Oudh 95 (a).

——S. 9—Civil and Revenue Court—Suit to declare decree of revenue Court illegal—Jurisdiction of civil Court.

A suit cannot be maintained in a civil Court for a declaration that the decree of the Revenue Court in a matter in which that Court has exclusive jurisdiction is void and ineffectual on the ground that the proceedings of that Court were contrary to law. 21 A.W.N., foll. (1910) 7 A.L.J. 1064.

——S. 9 (S. 11, Old Code)—Civil and Revenue Court—Suit to set aside decree of Revenue Court—If lies in civil Court.

A civil Court has no power to interfere with decrees of the Revenue Court, which has been passed in matters exclusively within jurisdiction of the latter Court. (1909) 7 A.L.J. 810.

——S. 9—Fixed rate tenant—Suit for demolition of building and permanent injunction if barred.

Suit against fixed rate tenancy for demolition of building and permanent injunction—Under S. 9, Civil Courts are competent to try such a suit. A.I.R. (Vol. 28) 1941 All. 61=1940 A.L.J. 906=1941 O.W.N. 8=192 Ind. Cas. 496 (F.B.).

——S. 9—Oudh Rent Act, S. 108—Decision by Revenue Court—Suit in Civil Court that the decision is not binding on plaintiffs for want of proper representation—If barred.

If a plaintiff wants to re-agitate a matter by a suit in a Civil Court decided by the Revenue Court he certainly cannot do so. But there is no bar to a suit for a declaration that the decree of the Revenue Court is not binding on the plaintiffs on the ground that they were not properly represented. Such a right is recognized in law and there must be a remedy for a legal right. Section 108 of the Oudh Rent Act bars the jurisdiction of Civil Court in respect of some suits but the jurisdiction of the Civil Court in respect of a suit of this nature is not barred. A Civil Court has jurisdiction to entertain a suit of every nature—of course of a civil nature—unless its jurisdiction has been barred by some legislative enactment. In such matters the jurisdiction of the Civil Court has not been excluded by the Oudh Rent Act or by any other legislative enactment. A.I.R. (Vol. 28) 1941 Oudh 223=1941 O.L.R. 236=1941 O.W.N. 112=192 Ind. Cas. 849.

——S. 9—Tenant—Suit by to eject trespasser—Civil Court's jurisdiction.

Suit by one co-tenant or by a tenant to attain possession from a trespasser is a suit which properly lies in the Civil Court. A.I.R. (Vol. 27) 1940 All. 218=1940 A.L.J. 310=I.L.R. (1940) All. 159=188 Ind. Cas. 389.

——S. 9—Zamindari estate—Co-heirs—One appointed manager under will—Suit against by one co-heir for account of profits—If barred.

Where there is a settlement which makes provision for a distribution of profits, different from that to which co-sharers are entitled under the Agra Tenancy Act, no action under Ss. 226 or 227, Agra Tenancy Act, will lie and the rights of parties under the settlement must be vindicated in the Civil Court.

Three sisters succeeded to the residue of their father's zemindari estate under a will. The eldest sister, in the terms of the will, was appointed manager of the property. Her duties, however, were not confined merely to collecting accounts of profits of the property and dividing them between herself and her sisters; she was entrusted with the task of controlling the household and paying household expenses. She was not directed merely to ingather profits of the property and divide the same in three equal shares between herself and her sisters. In short, she

managed the property under an arrangement or settlement set forth in the will itself. One of the sisters filed a suit against the managing sister for accounts of profits received by her during a certain period:

Held, that the Civil Court had jurisdiction to try the suit:

Held, also that any money which was ingathered by the defendant in the course of her management of the estate which was entrusted to her care under her father's will was not money received by her for the use of anyone else. It was true that she was directed to make certain payments out of her collections, but it cannot be maintained in the face of the plain terms of the will that what she collected, she collected for the use of someone else, so the Art. 62, Limitation Acc, had on application. The defendant under the terms of the will, clearly was in the position of a factor or agent managing the estate on behalf of someone else within the meaning of Art. 89, which Article applied to the case. A.I.R. (Vol. 26) 1939 All. 442=1939 A.L.J. 428=I.L.R. (1939) All. 594=183 Ind. Cas. 584.

——S. 9—Chota Nagpur Tenancy Act, S. 46—Mortgagee in possession—Failure to pay rent—Sale of holding—Suit by mortgagor in Civil Court—If barred.

Where plaintiff complains that the mortgagee had fraudulently got his land sold by failing to make payment of the rent which he was bound to pay, the relief is quite distinct from one contemplated by Cl. (4) of S. 46 Chota Nagpur Tenancy Act, and there is no bar to Civil Court trying an action which is based on such allegations. A.I.R. (Vol. 22) 1935 Pat. 473=1 B R. 847=158 Ind. Cas. 29.

——S. 9—Bengal Revenue sale law—Order of Collector—Question of title—Civil suit—If barred.

Where the proceedings before the Collector are without jurisdiction, the Civil Court undoubtedly has the right to determine the rights of the parties. A question of title is a matter for the Civil Court and not for the revenue Court to decide, and the Civil Court has the right to entertain any suit of a Civil nature unless barred by any express enactment. There is nothing in Act (11 of 1950) to bar the right of the Civil Court to entertain a suit actually raising a question of title as to definite share. 9 P.L.T. 661=8 Pat. 95=115 Ind. Cas. 225=A.I.R. 1929 Pat. 22.

——S. 9—Decision of—Suit in Civil Court to quash.

Proceedings of Revenue authorities may be subject to being quashed in the ordinary Courts of law if they are tainted by fundamental irregularity. 53 Cal. 561=98 Ind. Cas. 334=A.I.R. 1926 Cal. 1064.

——S. 9—Co sharer landlords—Suit by some for settlement of fair rent—Civil Court's jurisdiction—B. T. Act, S. 158.

S. 158 is not restrictive and the right to claim a fair and equitable rent is an obligation arising out of the contract between the parties and is enforceable in the ordinary Civil Courts under the provisions of S. 9 of the C. P. Code. Hence S. 158 of the B. T. Act is no bar to the maintenance of a suit for fair and equitable rent, by plaintiffs who are not the entire body of the landlords. It cannot be held that the only jurisdiction for assessing a fair rent, where no rent has at any time been previously assessed, is that conferred by Ss. 52, 105, 157 and 158 and similar sections of Act 8 of 1885. 1926 P.H.C.C. 153=98 Ind. Cas. 959=6 P.L.T. 849=A.I.R. 1925 Pat. 517.

——S. 9—Suit for fixing liability of defendant regarding revenue.

Where the suit is not a suit for partition of revenue paying lands, and the plaintiff does not ask the Court to separate the Government revenue as between the plaintiff and the defendants, but invites the Court to fix the liability of the defendants in regard to the Government revenue for which the plaintiff is liable to the Collector. **Held**, this is a suit of a civil nature. 78 Ind. Cas. 188=A.I.R. 1924 Pat. 795.

——S. 9—Suit for possession of grove by tenant against Zamindar—Civil Court's jurisdiction.

A case in which a tenant, calling himself a groveholder, seeks to obtain possession of a tenancy against his landlord is a case over which civil courts have no jurisdiction. (1906) 3 A.L.J. 385=1906 A. W. N. 140.

——S. 9—Tenancy—Rights whether transferable—Question as to.

Where the land of a tenant was sold in execution of a decree and purchased by the plaintiff from the auction-purchaser and subsequently the zemindar (defendant) having obtained a decree for rent against the original tenant and the auction-purchaser obtained possession under S. 59 of the Rent Act:

Held, that the rights of the original tenant were not transferable, and that the suit was moreover not cognizable by the civil courts. (1906) A.W.N. 140=3 A.L.J. 385.

——S. 9—Crown's prerogative—Principle of assessment—Jurisdiction of Civil Courts.

Per **Subrahmanya Aiyar, Offg., C. J.**—According to the Mardas Regulation, (26 of 1802), and Madras Act (2 of 1864), Ss. 1, 2, 26 and 42, the land, in respect of which land-revenue is exigible must be vested in some person or persons other than the Crown and the Crown possesses nothing more than a first charge in respect of the revenue due to it upon the interest of such person or persons realizable by sale thereof. It is the prerogative of the Crown to exact from a subject holding arable land its proper share of produce thereof or the equivalent of such produce which is the modern land revenue. In the actual exercise of its prerogative, however, the Crown is not supposed to proceed without any regard to definite and well established principles, i.e., it takes a fixed share of the produce—be it the theoretical sixth of the Hindu writings or the one half nett again and again proclaimed by the present Government. Per **Bhashyam Iyengar, J.**:—The immemorial and common law prerogative of the Crown in India is only to the Rajabhagam or King's share in the produce of the land and the land revenue or assessment now levied on land represent the King's share in the produce. (1903) 14 M.L.J. 37=27 Mad. 386 (F.B.).

——S. 9—Land Revenue—Assessment—Question of amount—Jurisdiction.

Per **Boddam, J.**—Civil Courts are prohibited from going into the question of the amount of an assessment and can only deal with the general question of the liability to assessment. Per **Bhashyam**

Aiyangar, J.:—Civil Courts have jurisdiction to decide whether or not the land or person is under liability to be assessed to land revenue. M.H.C.R. 167; 7 A. 140; 12 B.H.C.R. 275 App. and Foll. They have no jurisdiction to question the rate or share that the executive Government may fix at the periodical revision of assessments. But a share of the produce however high the share or rate may be in relation to the total puroduce, cannot exceed the produce, and where it so exceeds, Civil Courts have jurisdiction over the actions of Government.

Quaere.—Whether 22 M. 100 rightly lays down the law for the Town of Madras. (1903) 14 M. L.J. 37=27 M. 386 (F.B.).

——S. 9—Occupancy-holding—Suit by usufructuary mortgagee for possession.

A suit brought by the usufructuary mortgagee of an occupancy-holding for possession of the property mortgaged to him was rightly brought in a civil and not in a Revenue Court. (1902) 26 A. 591=1904 A.W.N. 132.

——S. 9—Suit to set aside sale of land for arrears of road cess—Maintainability.

A suit to set aside a sale for arrears of road cess under Bengal Act VII of 1880 is a suit of a civil nature under S. 11 of the Civil Procedure Code. (1898) 6 C.W.N. 246=29 C. 94.

6. Scope.

——S. 9—Scope—Suit on judgment, maintainability.

In cases which fall outside the bar imposed by S. 47 and where the events following the decree render it unexecutable, a suit on judgment would be maintainable in India. The language of S. 9, C. P. Code, is wide enough to cover it and Art. 122, Limitation Act, in fact contemplates such a suit. An action, therefore, is permissible where a judgment cannot be enforced in some other way. Where a decree is obtained against a wrong legal representative the decree-holder can file a suit upon the judgment against the true legal representative and obtain a fresh decree against him. A.I.R. (Vol. 33) 1946 Oudh 1 (5)=20 Luck. 517=1945 O.W.N. 163.

——S. 9—Scope and effect of—Existing remedies—If affected.

A right which is enforceable by suit and which has not been expressly taken away by the Code remains unaffected by the particular remedies provided in the Code. A.I.R. (Vol. 23) 1936 Mad. 421=1935 M. W. N. 1207=43 L. W. 262=160 Ind. Cas. 209.

——S. 9—Scope—Suit—When barred—Prohibition.

A party's ordinary civil rights should not be reduced unless by clear statutory authority. 119 Ind. Cas. 46=29 M.L.W. 349=A.I.R. 1929 Mad. 323 =56 M.L.J. 489.

——S. 9—Scope—Declaratory suit—Settlement Court-decree—Suit on basis of—Competency.

Although no case for granting a declaratory relief under S. 42, Specific Relief Act, be made out on pleadings, yet there may be such evidence on the record and such attitude taken by the defendant as may have the effect of casting a cloud on the plaintiff's title, so as to justify the Court in granting the relief. A cloud upon a title is but an apparent defect in it. If the title, sole and absolute in fee, is really in the person moving against the cloud, the density of the cloud can make no difference in the right to have it removed. 30 C. 365 Appr. 5 O.C. 118; 20 L.J. 335; 48 I.A. 56, Foll.

Where a plaintiff asked a Civil Court to declare that according to a Settlement Court decree the defendant was a 30 years' lease-holder of certain land and that period had expired.

Held, that the Civil Court had no jurisdiction to grant such a relief. 10 O.L.J. 315=79 Ind. Cas. 784=A.I.R. 1924 Oudh 69.

——S. 9—Scope—Suit in foreign Court by person resident in India—Power of Court in India to restrain by injunction.

A Court has jurisdiction to restrain a party within the jurisdiction from prosecuting a suit in a foreign Court if it thinks that the action of the party in filing the suit in the foreign Court is opposed to notions of equity, etc., of the Court seeking to restrain him. It cannot actually prevent the party from continuing his action in the foreign Court but if he came within the jurisdiction of the Court, proceedings might be taken against him for contempt. 44 Bom. 272, Foll. 45 Bom. 550=59 Ind. Cas. 444=A.I.R. 1921 Bom. 128.

——S. 9—Scope and effect—Small cause suit—Jurisdiction of District Court.

The section bars the jurisdiction of the District Court in all cases of a nature cognizable by the Small Cause Court. As regards such cases the District Court is not the principal Court of original jurisdiction and therefore also for the purposes of S. 195, Cr. P. Code. 2 Pat.L.J. 1=18 Cr.L.J. 370 =38 Ind. Cas. 754.

——S. 9—Scope—Declaratory suits— Jurisdiction of Courts.

The general power vested in the Courts in India under the Civil Procedure Code to entertain all suits of a civil nature excepting suits of which cognizance is barred by any enactment for the time being in force does not carry with it the general power of making declarations except in so far as such power is expressly conferred by statute. 12 Bom.L.R. 697=34 Bom. 676=7 Ind. Cas. 945.

——S. 9—Scope—Administration suit in respect of an estate belonging to a living Hindu will not lie. *See* ADMINISTRATION SUIT. 10 Bom.L.R. 519=32 B. 381.

——S. 9—Scope—Lambardar—Suit against by co-sharers to set aside lease of joint property as ultra vires.

A suit brought by co-sharers against a lambardar to set aside a lease of co-parcenary property granted by the lambardar as in excess of his powers was properly cognisable by a Civil Court. 1907 A.W.N. 77=5 A.L.J. 564.

——S. 9—Scope—Suit to restrain exercise of customary right—Maintainability—Killing of cows by Mahomedans—Custom—Interference by Court.

Under certain limitations the slaughtering of kine by Mahomedans is not illegal. It is the legal right of every person to make such use of his own property as he may think fit, provided that in so doing he does not cause real injury to others or offend against the law, even though he may thereby hurt the susceptibilities of others. The right of Maho-

medans to slaughter kine is one to which they are legally entitled irrespective of custom, and it is only when they abuse the right that its exercise can be interfered with. 1908 A.W.N. 64=5 A.L.J. 147 =30 A. 181.

——S. 9—Scope—Public bodies—Discretion vested in, by statute—Interference by Court.

It is not open to Courts to question the discretion of public bodies vested in them by law. (1906) 9 Bom. L.R. 156.

——S. 9—Scope—Succession to the Raj of a foreign Sovereign State—Suit ostensibly for declaration of rights to immoveable property within British territory belonging to Tipperah Raj—If barred.

The Courts in British India have no jurisdiction to decide the question as to who is entitled to succeed to the Raj of a foreign Sovereign State. Where a suit was brought ostensibly for a declaration in regard to right to immoveable property within British territory belonging to a foreign Sovereign but with the real object of setting aside the appointment by such Sovereign of his son as his immediate successor:

Held—That the court had no jurisdiction to go into the question of the validity of such appointment. When the question is one of succession to immoveable property on the demise of the owner, the fact that such owner is a foreign Sovereign does not deprive the court of its jurisdiction to decide the question; nor, in deciding such question, is the Court bound merely to register the decree of the Foreign Sovereign however opposed it may be to the law of the land. (1908) 12 C.W.N. 777=8 C.L.J. 1 =35 Cal. 777 (S.B.).

——S. 9—Scope—Quasi-judicial authority—Jurisdiction of Civil Courts to revise orders of. *See* 12 C.W.N. 709=35 Cal. 859=7 C.L.J. 631.

——S. 9—Scope—Voluntary payment—Suit to enforce. *See* RIGHT OF SUIT. 1907 A.W.N. 228=4 A.L.J. 715=29 A. 683.

——S. 9—Scope—Inferior court—Jurisdiction to declare decree of superior Court void for fraud.

A court of inferior jurisdiction is competent to declare a decree of a superior court to be a nullity on the ground of fraud, if otherwise it has jurisdiction to entertain the suit. (1906) 11 C.W.N. 579.

——S. 9—Scope—Chowkidari chakran lands—Question of resumption.

The civil court has no jurisdiction to go into the question of the resumption and transfer of chowkidari chakran lands. (1905) 32 C. 1107=2 C.L.J. 107.

——S. 9—Scope—Civil suit for costs of prosecution—Maintainability.

A civil suit for costs of prosecuting the defendants is not maintainable. (1905) 32 C. 429.

——S. 9—Mistake in decree—Suit to correct—Maintainability.

A suit will lie to correct a mistake common to the decree and the judgment in the case. (1904) 8 C.W.N. 473.

——S. 9—Scope—Suit under special Act—Relief under general law or under C. P. C.—Jurisdiction to grant.

A person electing to proceed under a special statute can be given only the relief prescribed therein. (1903) 8 C.W.N. 404.

——S. 9—Scope—Decree of Mofussil Court—Jurisdiction of High Court to set aside. **See** JURISDICTION. 7 C.W.N. 353=30 C. 369.

——S. 9—Scope—Court's power to decide rightly or wrongly—Wrong decision—If nullity.

Where a court is competent to hear a particular suit, it is competent to decide every question whether of limitation or any other matter arising in the suit. A wrong decision is not a nullity and is nonetheless binding until reversed in some manner provided by law. 25 B. 337 and 22 A. 270, followed. (1902) 1 A.L.J. 217=26 A. 522=1904 A.W.N. 110.

——S. 9—Scope—Inferior Court—Jurisdiction to treat the judgment of superior court as a nullity.

Every court, whether superior or inferior, is competent to treat as nullity any judgment which can be clearly shown to have been obtained by manifest fraud and whether the impeached judgment has been ponounced by an inferior tribunal or by the highest tribunal in the realm. (1902) 25 A. 48=1902 A.W.N. 179.

7. Suit of a Civil Nature.

(a) Religious honour or dignity.
(b) Religious office.
(c) Right of worship.
(d) Ritual.
(e) Test.
(f) Miscellaneous.

7. (a) Religious honour or dignity.

——S. 9—Suit of civil nature—Religious honour or precedence—Right to receive honours, namely thulasi, thirtham and Sri Satari before any one else.

Where a religious office is claimed, any emoluments attached thereto may be sued for in a Civil Court either with the office or without the office; in other words, where a man's right to the office is not disputed but he does not get his emoluments, he may sue for the emoluments in a Civil Court; or if his claim to the office is not recognised, he may sue for the office as well as for the emoluments. But the right to perform a festival cannot be regarded as a right to an office. There is no doubt at the same time that a right to take part in public worship in a temple, or of a deity outside while being taken in procession is a civil right. The right of worship is one thing and the right to receive certain honours or trifling gifts such as **thulasi** and holy water, is another. The latter are only conferred by grace of the deity, and cannot be claimed as of right. Even otherwise, and even assuming that the right to receive **thirtham**, **thulasi** and to have the **Sri Satari** placed on one's head is a necessary concomitant of worship, it does not follow that precedence or the order in which these things are done is a civil right. Where, therefore, the controversy between the parties is not merely the right to receive the particular articles or honours, namely, **thulasi, thirtham** and **Sri Satari,** but to receive them before any one else, it is a mere question of dignity or precedence and nothing more. The

right to a dignity or precedence of this nature cannot be regarded as a right of civil nature, whether it is claimed in a temple or elsewhere so long as it is not attached to an office. A.I.R. (Vol. 25) 1938 Mad. 334=1938 M.W.N. 18 (2)=(1938) 1 M.L.J. 174=47 L.W. 459=173 Ind. Cas. 986.

——S. 9—Suit of civil nature—Religious honour or precedence—Right to obtain Thirtham in a particular order of precedence.

The right to obtain **theertham** or honours in a particular order of precedence in a temple is not a civil right which can be enforced or declared in a Civil Court. Hence, where the Board in proceedings under S. 79, Madras Hindu Religious Endowments Act, decides the question of such a right, the act is an administrative act and not judicial. The mere fact that parties were heard or evidence was taken would not convert an act which is really of an administrative nature into a judicial act. A.I.R. (Vol. 23) 1936 Mad. 973=1936 M.W.N. 954=71 M.L.J. 588=44 L.W. 539=166 Ind. Cas. 256.

——S. 9—Suit of civil nature—Religious honour—Claim to receive honours not pertaining to any office—Specific Relief Act (I of 1877), S. 42.

The plaintiff, a **sanyasi**, alleging that he was entitled to receive certain honours (the first **thirtham**) from a **mutt** in precedence to other **sanyasis**, sued for a declaration that a certain order issued by the 1st defendant, the Hindu Religious Endowment Board, was null and void and could not affect his right to the honours and for a permanent injunction restraining the defendants from enforcing the said order. It was admitted that the honours were not attached to any office:

Held, that the suit was not maintainable even though it was not one for declaration of the right to the first honours but only for a declaration that the proceedings of the Board were **ultra vires**. In order that a declaration may be made under S. 42, Specific Relief Act, the plaintiff must be entitled to a legal character or to a right as to some property. The section does not sanction every form of declaration. A.I.R. (Vol. 22) 1935 Mad. 621=69 M.L.J. 14=41 L.W. 384=1935 M.W.N. 615=156 Ind. Cas. 460.

——S. 9—Suit of civil nature—Dignity—Special kind of worship to which some dignity is attached but no emoluments of value.

A special kind of worship, to which some dignity is attached, but no emoluments of value are attached cannot be the subject of a suit in a Civil Court. A.I.R. (Vol. 22) 1935 Mad. 679=1935 M.W.N. 520=41 L.W. 752=158 Ind. Cas. 375.

——S. 9—Suit of Civil nature—Religious honours—Suit for mere honours.

To constitute an office it is essential to have some duties attached to it which the office-holder will be under a legal obligation to perform, the non-performance of which will be visited with penalties.

Where a suit is a claim for mere honours it will not lie and though it may be described as a suit for a declaration of the plaintiff's right to conduct an **utsavam**, when he is under no obligation to perform any particular function, it cannot be said that he has any rights which can be enforced against the temple, under S. 9, C. P. Code. A.I.R. (Vol. 20) 1933 Mad. 264=1932 M.W.N. 1090=143 Ind. Cas. 104.

——S. 9—Suit of civil nature—Dignity or honour—Suit for voluntary payments unconnected with office.

A suit is not maintainable to vindicate the plaintiff's right to a mere dignity unconnected with any fees, profits or emoluments. But if there is a recognised office to which remuneration is attached for performance of services, the Court has jurisdiction to entertain a suit relating to it and there is no distinction for that purpose between fees and voluntary offerings.

Where fairs were held at a village at irregular periods and voluntary subscriptions were raised to meet the expenses of the fairs and certain payments used to be made to the **kulkarni** of the village, though the **kulkarni** performed no function at the fair or at the temple:

Held, that as there was no office in connection with which these **babs** or **haks** were paid to him, a claim to such payments which were rather in the nature of 'dignities' than emoluments could not be entertained in the Civil Court. A.I.R. (Vol. 18) 1931 Bom. 273=33 Bom.L.R. 479=132 Ind. Cas. 440.

——S. 9—Suit of civil nature—Religious honours—Suit for declaration of right to.

As religious honours involve no civil right a Civil Court cannot entertain a suit for declaration of one's right to such honour. 29 M.L.W. 604=1929 M.W.N. 341=119 Ind. Cas. 149=A.I.R. 1929 Mad. 493.

——S. 9—Suit of civil nature—Honours—Right to be carried in palanquin as religious head of people.

A claim that the plaintiff has the right of being carried in a cross-palanquin in procession as Jagadguru if a religious dignity and privilege is not cognizable by a Civil Court. 45 Bom. 590=23 Bom. L.R. 75=60 Ind. Cas. 907=A.I.R. 1921 Bom. 140.

——S. 9—Suit of civil nature—Religious honours—Claim for honours as Gurikar.

A claim for certain temple honours to be shown to Plaintiff as 1st Gurikar of a certain caste in a certain village, having no duties to be performed, not being a claim of a civil nature cannot be maintained in a Civil Court. 2 Bom. 476; 19 Mad. 62; 7 Mad. 91 and 10 Bom. 233, Foll. 1921 M.W.N. 395=63 Ind. Cas. 115=41 M.L.J. 287.

——S. 9—Suit of civil nature—Honour or dignity—Claim to.

A suit does not lie for a mere honour, or dignity unconnected with fees, profits or emoluments. 97 P. W.R. 1919=1 Lah.L.J. 161=51 Ind. Cas. 905 (Lah.).

——S. 9—Religious honours — Claim to—By Sanyasis.

Courts are not bound to enter into detailed considerations and decide the rights of **Sanyasis** to receive honours in temples unless they are mixed up with matters of a civil nature in civil suits. 10 L. W. 480=(1919). M.W.N. 872=20 Cr.L.J. 755=53 Ind. Cas. 483.

——S. 9—Suit of civil nature—Religious honour—Claim to.

A right to religious honour is not cognizable unless it is an emolument attached to an office. The existence of the office and the connection between the office and the honour must be established. 7 L.W. 614=45 Ind. Cas. 959.

——S. 9—Suit of Civil nature—Religious honour —Suit for exclusive conduct of festival—Claim to honours and perquisites—Right to worship in a particular manner—Civil nature.

A right to worship in a particular manner and with particular incidents attached to it is a civil right and the Civil Court must adjudicate upon incidents connected with the exercise of such right. The right of a person to exclusively conduct a **mandagappadi** on the first day of a festival in a temple paying all the expenses himself, and receiving all the honours and emoluments of that right, is a civil right. A suit to establish such right is cognizable by Civil Courts as also a suit to enforce the claim for honours and perquisites where they have to be given as a matter of right to the **mandapamdar**. Per **Krishnan, J.**—The question whether an exclusive right to perform any festival in a temple is valid should be decreed on the facts of the case and the usage of the temple. They will be upheld subject to right of the trustees to perform the festival, if the man claiming the exclusive right fails and the interests of the temple do not suffer. Trustees of a temple may make such arrangements as they think fit for the performance of any recognized ceremony therein and, if, in the **bona fide** and honest exercise of that discretion they give a permanent and exclusive right to any worshipper to perform any particular ceremony, the arrangement is perfectly valid if it is not injurious to the temple. Per **Spencer, J.**—The maintainability of a suit depends on the nature of the right asserted and the relief claimed. 31 M.L.J. 758=(1916) 2 M.W.N. 327=4 L.W. 562=36 Ind. Cas. 568.

——S. 9—Suit of Civil nature—Religious honours —Suit claiming.

S. 9 empowers Civil Courts to try only suits of a civil nature and the explanation shows that they cannot try questions as to religious rites or ceremonies (and religious honours, by parity of reasoning) but a suit would lie for the honours if they are attached to an office as emoluments. Courts should require strong evidence before attaching mere honours to a temple office. If the honours are shown to persons only as marks of pure grace of the Deity they cannot be legally claimed by anybody as receivable by him in a temple. 13 M.L.T. 340=(1913) M.W.N. 289=19 Ind. Cas. 257.

——S. 9—Suit of civil nature—Religious honour or dignity—Voluntary offerings—Suit in respect of—When cognizable.

The Civil Courts have no jurisdiction to entertain suits for mere dignity, without any civil right or any office in the nature of property. Suits to claim the profits arising out of voluntary offerings made to the chief priest of a community by the worshippers of saints or by votaries, partake of the nature of those for mere dignity. 14 Bom.L.R. 573=16 Ind. Cas. 338.

——S. 9—Suit of Civil nature—Religious honours and precedence.

Civil Courts have jurisdiction to determine the order of precedence in the distribution of honours in a temple and to protect by an injunction persons having a right to the first honours from such right being infringed by others who are entitled to the same honours subsequently. 32 Mad. 291, foll. Where a long established usage in a temple has determined the rights of particular persons to receive the first **thirthams**, such usage will be followed by Civil Courts, even though it may be an innovation on any prescribed rule of the Hindu Shastras, unless the text of the latter is of such coercive authority that it cannot be disobeyed. 15 Ind. Cas. 409 (Mad.).

——S. 9—Suit for civil nature—Dignity—Claim to stanom.

A suit for a declaration that the plaintiff has a right to a **stanom** without mentioning the property is a suit for mere dignity and is not maintainable. (1911) 1 M.W.N. 353=10 Ind. Cas. 110.

——S. 9—Suit of civil nature—Religious honours —Right to have first theertham in temple—Suit to establish—If lies.

A suit will lie for honors, if they are claimed as attached inseparably to an office as part of its emoluments, and not simply accorded to its holder as marks of respect which might be extended to any other person to whom the same degree of respect is due; and the Court, in declaring the plaintiff entitled to the honors, has jurisdiction also to determine what the honors are to be. A general declaration that plaintiff is entitled to honors will not suffice but the decree need not set out the honors not disputed or infringed. The first theertham is not itself an office but an honor forming the emoluments of an office. (1908) 32 M. 291=5 M. L.T. 33=3 Ind. Cas. 881.

——S. 9—Suit of Civil nature—Religious honours and voluntary offerings—Suit for—Bar of.

Deciding disputes between purely religious functionaries is not a part of a Civil Court's business and no injunction restraining another from receiving prospective offerings can be given. 33 Bom. 278=11 Bom.L.R. 58=1 Ind. Cas. 331.

——S. 9 (S. 11, Old Code)—Suit of civil nature—Claim to dignitary headship of Math and to voluntary offerings—Cognizability by Civil Court.

The plaintiff, the Shankaracharya of the Sharada Math at Dwarka sued for a declaration that the defendant was not entitled to the style, title and dignities of Shankaracharya and that he was not entitled to call for or receive any offerings from the people of Ahmedabad or other places in Gujarat either in his assumed capacity of a Shankaracharya or of a Shankaracharya of the Jatir Math or of a branch of that Math; and for an injunction restraining the defendant from styling himself as a Shankaracharya in Gunjarat or from claiming or receiving offerings in Gujarat as a Shankaracharya or as a Shankaracharya of the Jatir Math or of a branch of that Math:

Held, that the suit was not of a civil nature such as the Court would entertain. The office of Mahunt of the Sharada Math is in no way endangered by the defendant's action in claiming to be a Shankaracharya of the Jatir Math, nor are voluntary offerings made to Shankaracharya in Gujarat, fees claimable as of right by the holder of the plaintiff's office. For interference with a mere dignity or for voluntary offerings no suit can be

maintained. Civil Courts will not decide disputes as to precedence or privilege between purely religious functionaries nor will they grant injunctions to prevent preachers from preaching where they like under any title they please, provided no office or property is disturbed or interfered with. (1907) 11 Bom. L.R. 58=33 Bom. 278=1 Ind. Cas. 331.

7. (b) Religious Office.

——S. 9 — Suit of civil nature — Religious office—Vatandar barber—Right to officiate as—Suit to establish.

The payments made to a vatandar barber for officiating at some ceremonies are not gratuities but are customary fees well recognized and therefore he can recover customary fee from another barber who without any right performs them. 22 Bom.L.R. 410 =57 Ind. Cas. 135=44 Bom. 733.

——S. 9—Suit of civil nature—Religious office—Suit for removal of Mahant of endowment or temple —Jurisdiction of Civil Court.

Where the secular and the religious duties of the *mahant* in the temple are interdependent and inseparably blended, efficient discharge of the one depends on the control of the other. In other words, in all such religious endowments, where tradition and custom play a vital part in intermingling the two functions, their division is unthinkable. Where such an office can be separated and the *mahantship* on its valuable properties and is associated with the control of extensive funds, even if the two capacities of the office can be separated and the *mahantship* on its spiritual side regarded as purely an office or dignity, the office is of such a nature that a suit relating to it must fall within the purview of the explanation to S. 9 of the Civil P.C., as being a suit of a civil nature lying within the competence of a Civil Court, notwithstanding that the functions of such office are associated with religious rites or ceremonies.

The matter relating to the removal of the *mahant* of such an institution from both the capacities, secular as well as religious, is one for the consideration of the Civil Court, which must necessarily enjoy a wide discretion to decide what form of punitive or ameliorative order will suit the requirements of the case. But the jurisdiction of the Civil Courts to decide such questions can no longer be doubted. The true rule in such matters can be stated to be that if it be found by the Court that the functionary, in the exercise of his duties has put himself in a position in which the Court thinks that the obligations of his office in connection with the endowment can no longer be faithfully discharged without danger to the endowment, that is a sufficient ground for his removal, if need be from both his offices. A.I.R. (Vol. 27) 1940 P.C. 24=44 C.W.N. 177=6 B.R. 291=51 L.W. 49=21 P.L.T. 91=1940 O.W.N. 104=1940 O.L.R. 64=1940 M.W.N. 172 (2)=42 P.L.R. 158=71 C.L.J. 1=42 Bom. L.R. 295=I.L.R. (1940) 1 Cal. 266=1940 A.L.J. 409=I.L.R. (1940) Kar. P.C. 47=67 I.A. 32=185 Ind. Cas. 616=(1940) 1 M. L. J. 371 (P.C.).

——S. 9—Suit of civil nature—Religious office —Right to lead a horse at festival and right to hold kalasam—Suit claiming such right—If lies.

Held, that the right to lead a horse whenever the Selli Amman festival was held and the right of holding *kalasam* were rights to an 'office' within the meaning of S. 9, and a suit was maintainable regarding such rights, although the plaintiffs were not temple servants, they received no remuneration which has any financial value for what they did, and they could not be compelled to do it. A.I.R. (Vol. 24) 1937 Mad. 403=1937 M.W.N. 143=45 L.W. 384= 171 Ind. Cas. 684.

——S. 9—Suit of civil nature—Religious office —Birt jijimani — Suit by priest for voluntary gifts made to another by jajman—Maintainability.

Both the hereditary priest as well as those appointed by the sacrificer or jajman stand on the same footing in the matter of dismissal. As to whether a priest, of whatever class he may be, is competent to perform the ceremonies and whether he is faultless or not must rest entirely upon the conscience, faith and judgment of the jajman, and a Court of Justice will be incompetent to deal with such a question. He may be guided by his sentiments of good and evil, or even by caprice and superstitions. 12 C.L. J. 74; 13 C.L.J. 449; 20 All. 234; 26 M.L.J. 482 (1850) S.D.A. 296; (1852) S.D.A. 398; (1857) S. D. A. 362; 14 C.W.N. 1037 and 13 C.L.J. 449, Foll. So far as the Provinces of Bihar and Orissa are concerned, it is well settled that a jajman has a right to appoint any priest he chooses to perform the religious ceremonies and to dismiss any priest who formerly used to perform the ceremonies whether appointed by himself or by the former generations, that is hereditary priest; and this is in accordance with the correct interpretation of the texts on the subject. 10 P.L.T. 147=116 Ind. Cas. 513=8 Pat. 677= A.I.R. 1929 Pat. 103.

——S. 9—Suit of civil nature—Religious office —Appointment to—Legal right.

The hereditary right to appoint to the office of a Swamiyar is a possible legal right. 1929 M.W.N. 161=113 Ind. Cas. 476=33 C.W.N. 382=29 M. L.W. 414=A.I.R. 1929 P.C. 53=56 M.L.J. 121 (P.C.).

——S. 9—Religious office—Obligation to be present at ceremonies with emoluments attached—Suit in Civil Court—Competency.

The presence at the performance of religious ceremonies of persons who are or may be supposed to be well versed in the rituals and the manner of performance may be regarded as not only useful but necessary in the interests of the institution, and it is impossible to hold that even though the performance of obligation or duty of such character may not possess all the aspects of a regular office, still it does not constitute an office of such a nature as to make it a civil claim with regard to which Civil Courts will have jurisdiction. If there is at least one specific duty and there are also emoluments, it must be regarded as an office. 109 Ind. Cas. 771=A.I.R. 1928 Mad. 377.

——S. 9—Suit of civil nature—Suit for a right to religious office.

A suit by a person, claiming to be entitled to a religious office against a usurper, for a declaration of his right to the office is a suit of a civil nature and will therefore be entertained by a Civil Court though

no emoluments are attached to the office at all. 15 Cal. 159 and 27 Cal. 30, Foll.; 19 Mad. 62; 28 Mad 23 and 2 Bom. 470, Not Foll. 54 Cal. 614=105 Ind. Cas. 188=A.I.R. 1927 Cal. 783.

——S. 9—Suit of civil nature—Turn of worship in temple and offerings—Right to—Suit by female heir.

Where the plaintiff a female heir prayed with regard to her share in the offerings of the temple that she should be allowed to take a turn at the worship in the temple so that her full share in the offerings might be secured to her without any future trouble and litigation.

Held, that such a suit is maintainable. 45 All. 437=71 Ind. Cas. 1026=A.I.R. 1923 All. 425.

——S. 9—Suit of civil nature—Religious office —Pujari of temple — Suit by for share in offerings to deity.

The offerings to the deity in temple may be uncertain and voluntary; still when the offerings are made they are the property of the temple. So a suit by the pujari for recovering a share in the offerings relates to that property and the Civil Courts can try it. 45 Bom. 683=23 Bom.L.R. 125=60 Ind. Cas. 924=A.I.R. 1921 Bom. 297.

——S. 9—Suit of civil nature—Religious office —Removal from — Validity — Court's power to go into.

There is nothing wrong in principle that the holder of a spiritual office should be subject to discipline and liable to deprivation for what may be called misconduct from an ecclesiastical point of view or for flagrant and continued neglect of duty.

Where a pujari of a deity was removed from office in accordance with his agreement after having been held to have been guilty of misconduct by a private tribunal duly constituted as per agreement:

Held, that although, so far as Hindus are concerned, there is no State church and no Ecclesiastical Court, there is nothing to prevent Civil Courts from holding that a pujari has been removed from his office on valid grounds. 25 C.W.N. 201=62 Ind. Cas. 510=A.I.R. 1921 Cal. 328.

——S. 9—Suit of civil nature—Family priest—Suit to restrain defendant from acting as—Maintainability in Civil Court—Specific Relief Act, S. 54.

A plaintiff is entitled to sue for an injunction restraining defendant from prohibiting plaintiff from officiating as the family priest of a certain caste. (36 Bom. 94, Foll). But where the plaintiff has acquiesced in the defendant's action such injunction will be refused. 45 Bom. 234=59 Ind. Cas. 271=A.I.R. 1921 Bom. 209.

——S. 9—Suit of civil nature—Religious office —Upadhyaya of caste—Vritti—Suit in respect of—Maintainability.

The right to officiate in a *vritti* as *Upadhyaya* of a caste and to receive the perquisites of the *vritti* is immoveable property and the holder of the office is entitled to restrain intermeddlers by an injunction from interfering with the office. Acquiescence for ten years in the interference would disentitle the plaintiff to the injunction. 22 Bom.L.R. 1202=59 Ind. Cas. 271=45 Bom. 234=A.I.R. 1921 Bom. 209 (2).

——S. 9—Suit of civil nature—Religious office —Gayawal priest—Suit for declaration and possession—Maintainability.

Whether a Gayawal gaddi is an office or a business, the person entitled to it can sue for possession of the gaddi and its books and for a declaration that he is the lawful holder of the gaddi. 3 Pat. L. W. 136=2 Pat.L.J. 705=(1918) Pat. 50=42 Ind. Cas. 478.

——S. 9—Suit of civil nature—Religious office —Right to enter deciple's house when invited—Suit in respect of—If lies.

The right to hold a certain office in a certain place at a certain season of the year confers upon the holder of that right a legal character so as to enable him to bring a suit to maintain such a right under S. 9, C. P. Code. But the right to enter a disciple's house when called by him is not a right to enter upon it as of right though not called and does not create any legal character to maintain a suit for a declaration of such a right. 1 Pat.L.J. 381=2 Pat.L.W. 390=35 Ind. Cas. 345.

——S. 9—Suit of civil nature—Religious office —Mahomedan law — Service of digging and burying pot and reciting koran — Suit in respect of—If lies.

The existence of an office involves the existence of some duties to be performed by the holder of the office. A suit for possession of a hereditary office, the functions of which are digging up and burying a pot, distributing *sherbet*, collecting money, and distributing a small portion of the collections and reciting portions of the Koran is not maintainable as it is not for a religious office, the duties of which are recognized by the Mahomedan Law and a suit will not lie in a Civil Court. 17 M.L.T. 256=28 Ind. Cas. 459.

——S. 9—Suit of civil nature—Religious office Turn of service—Gift to one on a day belonging to another—Suit by latter against former—If lies.

Where a donor makes a gift personally to the defendant. Maha brahmin on a day which belonged to the turn of the plaintiff. *Held,* the plaintiff could not recover the gift made to the defendant, as it was distinctly made to the latter in his individual capacity. Per *Richards, C. J.*—If the offering was of the nature which was included in the agreement between the parties, the defendant, was bound to make over the gift made on plaintiff's day even against the donor's wish. 35 All. 412=11 A.L.J. 563=19 Ind. Cas. 990.

——S. 9—Suit of civil nature—Religious office —Hereditary family priest—Claim as to—Civil Court's jurisdiction.

A Civil Court is competent to entertain a claim for the hereditary office of a family priest. 36 Bom. 94=13 Bom.L.R. 1171=12 Ind. Cas. 928.

——S. 9—Suit of civil nature—Office of "Dharmakarta"—Declaration of right—Civil Court's jurisdiction.

In the ordinary legal phraseology of religious institutions, the word 'Dharmakarta' means nothing more than a trustee; but it is sometimes used in a limited sense and the designation is by force of immemorial custom, given to a particular

functionary entrusted with certain rights and duties. Civil Courts are competent to give a declaration that a certain person is competent to perform the duties of an office. Power of Dharmakarta to fine an inferior spiritual dignitary should be strictly made out and proved and not merely presumed from his position and Civil Courts are competent to call in question the propriety of any such fine and to direct refund of the same. 21 M.L.J. 730=10 M.L.T. 133 =(1911) 2 M.W.N. 202=11 Ind. Cas. 175.

——S. 9—Suit of civil nature—Religious office —Right to recite stotram—Suit for declaration—If lies.

Held, that a suit for a declaration that plaintiffs (Vadagalais) are entitled to recite stotrams in the Conjeevaram temple and for an injunction restraining the Tengalais from interfering with their Stotrapatam is cognizable by a Civil Court. Though damages cannot be awarded when the offerings are voluntary, when once the voluntary offerings have been contributed, and the refusal of a person's right to participate in the fund causes damage, the Court will be entitled to award damages in those cases. (1910) 20 M.L.J. 530=1910 M.W.N. 304=7 Ind. Cas. 148=8 M.L.T. 137.

——S. 9—Suit of civil nature—Suit to establish exclusive right to officiate as priest in cremation ceremonies.

Where the plaintiff claims a hereditary right to officiate exclusively as a priest on the occasion of the cremation ceremony of all dead bodies brought from funeral to a particular place the suit is maintainable as one of a civil nature. A claim for a declaration that the plaintiff is entitled, to the exclusion of all other Brahmins of the class to which he belongs, to officiate as a priest at the cremation ceremony is not maintainable under Hindu Law or under any customary right. A custom to be valid, must have four essential attributes, **first,** it must be immemorial; **secondly,** it must be reasonable; **thirdly** it must have continued without interruption since its immemorial origin, and **fourthly,** it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect. In order to ascertain whether a particular custom is reasonable or not, one must look to the possible period of its inception. A voluntary consent of the people to the employment of the plaintiff or his predecessors as cremation priests, cannot confer upon him any exclusive right, and the continuance of this state of things even for generations cannot confer upon him a legally enforceable right. 12 C.L.J. 74=14 C. W.N. 1057=6 Ind. Cas. 864.

——S. 9—Suit of civil nature—Office of Pujari of temple—Suit to establish right to—If lies.

If a *pujari* does not obey the customs and follow the practices of an institution which entails his exclusion from the temple by the Managing Committee, a suit by the *pujari* to establish his right to enter into the temple is cognizable by a Civil Court. 100 P.W.R. 1909=4 Ind. Cas. 894.

——S. 9—Suit of civil nature—Religious Office —Emoluments—Honours attached to—Declaration as to rituals pertaining to Office—Civil suit—If lies.

In cases of hereditary office involving duties of different kinds, secular and religious, all inseparable from the office and remunerated by certain honours, Civil Courts can protect the holder of the office in the enjoyment of the office and declare the honour to which he is entitled. A civil suit would lie for honours if they are claimed as attached inseparably to an office as part of its emoluments and not simply as marks of respect. Civil Courts can declare the rituals in order to preserve to the claimant the enjoyment of his office. 32 Mad. 291=5 M.L.T. 33= 3 Ind. Cas. 881.

——S. 9—Suit of civil nature—Voluntary payments—Suit for declaration of right to receive fees as Chowdari's of certain bazaars—Maintainability.

The plaintiffs sued for a declaration that they were the "chowdris" of the bazaars in the villages Muhammadabad, Gohna, Khairabad and Behna, and that the defendants were not the "Chowdris" of the said bazaars and were not entitled to take 'chowdhris' dues. *Held*, that such a suit was not maintainable. N.W.P.H.C. Rep. 1867, p. 271; *Ib.*, p. 80 and N.W.H.C. Rep. 1869, p. 281 **foll.** 1907 A.W.N. 228=4 A.L.J. 715=29 A. 683.

——S. 9 (S. 11, Old Code)—Suit for civil nature —Declaration of exclusive right to act as Khatib and for injunction.

A declaration of plaintiff's exclusive right to act as a Khatib in a village and an injunction restraining others from acting as Khatib cannot be granted in the absence of any allegation by the plaintiff of his being disturbed in the exercise of his office. (1906) 17 M.L.J. 421.

(c). Right of worship.

——S. 9—Suit of civil nature—Public temple—Right of worshipper to take part in festivals and to conduct—Suit to establish—Bar of.

The right of every worshipper of a public temple to have the usual festivals conducted in the usual manner and to be allowed to take part in them in the usual manner is a civil right which he has as an individual and he is entitled to protection of the Court in the exercise of his right. A.I.R. (Vol. 32- 1945 Mad. 234=1945 M.W.N. 358=58 L. W. 287=(1945) 1 M.L.J. 300.

——S. 9—Suit of civil nature—Suit to establish right to perform worship in temple.

Though it may not be easy to draw the line between what is merely a part of the ritual of the worship and what is a right to conduct the worship itself, a straightforward claim to a right to celebrate the annual worship of a deity in a temple is a civil right in respect of which a suit for injunction is maintainable in a Civil Court. A.I.R. (Vol. 31) 1944 Mad. 416=(1944) 1 M.L.J. 421=57 L.W. 340=1944 M.W.N. 383.

——S. 9—Suit of civil nature—Worship of deity or God of Choice—Right of citizen—Suit to establish.

It is an ordinary right of a citizen to worship according to his own belief any deity or god as he chooses to do, and it is a right of a civil nature. A. I.R. (Vol. 26) 1939 Mad. 757=1939 M.W.N. 418 =189 Ind. Cas. 190.

——S. 9—Suit of civil nature—Right of worship—Suit to establish right to stop idol at plaintiff's house for worship—Maintainability.

The right to require an idol to be stopped at the plaintiff's house for worship is a right to participate in worship and a suit to establish such right is cognizable by a Civil Court.

In a suit of this nature if the plaintiff does not go so far as to say that the defendant's denial of his right is made by them as representing the trustees or that the trustees have denied his right the suit will not be bad for non-joinder of the trustees. A.I.R. (Vol. 20) 1933 Mad. 726=38 L.W. 333=145 Ind. Cas. 1014.

——S. 9—Suit of civil nature—Honours—Guru and disciple—Suit to recover share of offerings made by disciples—Maintainability.

A suit to recover a share of the offerings (technically called sishyadayam) made by disciples and collected by the guru, does not lie in a Civil Court when the existence of any office in connexion with which the voluntary offerings are made by the disciples has not been established: 19 Mad. 62; 32 All. 527; 1 L.W. 389; 1 P.L.J. 381; and 13 C.L.J. 449, Rel. on. 110 Ind. Cas. 782=A.I.R. 1928 Mad. 851.

——S. 9—Suit of civil nature—Right to perform worship and manage offerings—Suit to establish.

A suit to establish a claim to perform the Urus ceremonies and to manage the offerings, can be entertained in a Civil Court, because though the offerings may be uncertain and voluntary, still when they are made to a particular deity they are the property of the temple (or shrine) concerned and can be the subject-matter of a civil suit. 13 Bom. 429; 2 Mad. 62 (P.C.); 45 Bom. 683 and 12 Bom. 247, Foll. 50 Bom. 148=28 Bom.L.R. 60=93 Ind. Cas. 127=A.I.R. 1926 Bom. 161.

——S. 9—Suit of civil nature—Right to worship deity and receive offerings—Suit for declaration and injunction.

Plaintiff sued for an injunction permanently restraining the defendant from obstructing him in worshipping the deity in question, in doing every other business in connection with the deity and appropriating the profits at the temple of the deity, on the basis that he was entitled to all those rights to the exclusion of the defendant.

Held, that there was a dispute between the plaintiff and the defendant as to the right to the property which consisted of voluntary offerings made before the deity, and that is the property with reference to which the right was to be determined, hence the suit is maintainable. It is quite clear that there is a contest substantially as to the property, and incidentally as to the right to perform the worship at the temple which is connected with the right to take the offerings. 76 Ind. Cas. 629=A.I.R. 1925 Bom. 209.

——S. 9—Suit of civil nature—Right to worship—Right to carry processions through public streets—Suit to establish—Maintainability.

A suit to establish the right to worship in a temple according to the worshipper's belief is a suit of civil nature within S. 9. The right to conduct religious processions in public streets is a right inherent in every person provided he does not invade the rights of property enjoyed by others or cause a public nuisance or interfere with the ordinary use of the streets by the public and subject ot such directions or prohibitions as may be issued by the Magistrate to prevent obstructions to the thoroughfare or breaches of the public peace. 44 Bom. 410=22 Bom.L.R. 307=56 Ind. Cas. 419.

——S. 9—Suit of civil nature—Right to worship or perform festival—Suit to establish.

A right to worship is a civil right with some emoluments to the worshipper and can be enforced in a Civil Court. The amount of emoluments is insignificant. A person who has acquired or exercised a right to perform certain festivals hereditarily can ask for a declaration of his right if it is negatived by anybody. A *dharmakarta* cannot however, ask such a person to contribute for a festival on a grander scale than what that person is able to do. 3 L.W. 512=35 Ind. Cas. 88.

——S. 9—Suit of civil nature—Temple trustees holding funds—Suit for declaration of right to perform ceremonies in temple or to have them performed by temple servants or others with monies in their hands as trustees.

The plaintiffs were Members of the Committe of Management of a certain temple under a **sannad** from Government and received annually a certain sum of money for defraying the expenses of certain kinds of religious worship to the temple. The obligation attached to the office was to get the worship performed by the hereditary officers or servants attached to the temple. Plaintiffs alleged that they failed to perform the worship owing to differences among themselves with the result that the duties owing to the idol were neglected and the funds in the hands of the plaintiffs remained unexpended. The plaintiffs, therefore, asked for a declaration of their right to disburse the funds by getting the worship performed by a suitable person or persons in the event of hereditary officers or servants of the temple concerned failing to perform it; and for an injunction to restrain those servants from obstructing the plaintiffs in the exercise of the right so declared. It was objected that the Civil Court had no jurisdiction to try the suit in which the prayer was for a bare declaration of the plaintiffs' right either to perform by themselves or to get performed certain religious ceremonies in a temple and there was no contest as to any right to property or to any office. **Held,** overruling the objection, that the plaintiffs were trustees of a public charitable trust holding moneys in their hands for disposal in a certain manner for certain defined purposes. An action would lie against them by the Advocate-General acting on behalf of the public to compel them to a due execution of their particular acts of duty. The obligation cast on them by the trust gave them a corresponding right to disburse the funds after getting the religious worship for which those funds were intended properly performed. Such a right was not less of a civil nature though the funds were appropriated to religious ceremonies. The Court was not called upon to enter into the adjudication of rites and ceremonies, but only to decide the right of the trustees to ful-

fil the trust unhindered. (1909) 33 B. 387=11 Bom.L.R. 389=2 Ind. Cas. 419.

——S. 9—Suit of civil nature—Right to worship in temple—Suit to establish—Maintainability.

Right to worship in a temple, is enforceable in Civil Courts but should be exercised during hours of public worship but a right to stop the idol in front of a person's house is not cognizable by Civil Courts. A person alleging an immemorial custom of the latter kind must prove that he has a particular right under that custom in order that he may claim the relief under the custom. 19 M.L.J. 743=7 M.L.T. 248=5 Ind. Cas. 76.

——S. 9 (S. 11, Old Code)—Suit of civil nature—Temple—Right of entry and worship.

Civil Courts can try a suit regarding right of entry into a temple for worship, as such a right is a civil right. 7 M.L.T. 190=5 Ind. Cas. 57.

——S. 9 (S. 11, Old Code)—Suit of civil nature—Religious procession—Right to take along particular streets—Suit by worshipper for declaration—Maintainability.

[Per *Chief Justice*]:—The claim by an individual worshipper to have the procession of an idol carried along his street is not one cognizable by a Civil Court. The plaintiff claimed that the procession of an idol should be carried through his street in accordance with custom and deposed in his evidence that the dharmakarta had no discretion in the matter even if the street became deserted. The defendant-dharmakarta claimed to have a discretion to regulate the procession, and contended that he acted *bona fide* in the interests of the temple and in accordance with the wishes of a large number of worshippers. It was admitted that since 1878 the plaintiff's street formed part of the customary route of procession:

Held, (by the *Chief Justice*) that it was for the plaintiffs to prove that the custom was absolute and excluded all discretion of the dharmakarta and that they had failed to prove it. [Per *Davies*, J.]—(1) The claim to have a procession of an idol carried through a particular street being one to worship an idol at a particular place is cognizable by a Civil Court. (2) Though the dharmakarta of a temple may increase the circuit of the procession of an idol, he cannot omit from such procession any street through which, according to mamool the procession has always passed. (1896) 11 M.L.J. 215.

(d) Ritual.

——S. 9—Suit of civil nature—Suit in regard to the right to regulate the conduct of services in temples. **See** HINDU LAW—RELIGIOUS ENDOWMENTS—TEMPLE. (1947) 1 M.L.J. 159 (P.C.).

——S. 9—Suit of civil nature—Questions regarding rituals or ceremonies—Civil Court's jurisdiction.

Whenever a right has been violated, it would give rise to a cause of action and would be entertainable by Civil Courts of the country. But the questions regarding rituals or ceremonies alone cannot be adjudicated by Civil Courts if they are not essentially connected with what may be stated to be civil rights of an individual or individuals. A suit complaining against an infringement of a right including that of worship would ordinarily be presumed to be within the competence of a Civil Court, unless it has been shown not to be so by those who rely on the exception to S. 9, the rule being to the contrary. A.I.R. (Vol. 26) 1939 Mad. 757=1939 M.W.N. 418=189 Ind. Cas. 190.

——S. 9—Suit of civil nature—Rituals—Suit for declaration that plaintiffs alone have right to recite vedam and entitled to certain incomes.

Whether a particular deity is adorned with a particular ornament on a particular day is surely a matter of ritual and has nothing to do with a civil right. Where, however, it is alleged that the plaintiffs alone have the right to recite *vedam* and are entitled to certain incomes and honours on account of their being members of an assembly (*goshti*) holding a temple office, the allegations are sufficient to bring the claim within S. 9 and will not fall within the ambit of S. 92, Civil P. C., or S. 73; Madras Hindu Religious Endowments Act.

Executive trustee of a temple ordered the *archakas* to prostrate before the deity only once and not twice according to their own beliefs and threatened them with dismissal if they failed to carry out the order:

Held, that the case fell within the cognizance of the Civil Court and would not be barred either by S. 92, Civil Procedure Code, or by S. 73, Madras Hindu Religious Endowments Act. A.I.R. (Vol. 26) 1939 Mad. 757=1939 M.W.N. 418=189 Ind. Cas. 190.

——S. 9—Suit of civil nature—Ritual in temple—Putting of marks on Godhead—Suit against trustee—If lies.

An act of putting a **namam** on the God-head is a matter of ritual based on usage and must be held to be barred by S. 9. But where the plaintiffs alleged that the trustees who belonged to other sect committed breach of trust in putting or causing to be put new or additional **namams** or marks to the idols in and about the temple and in several articles and things thereof with a view to alter the character of the temple;

Held, that an attempt to alter the character of the temple by erasing the **namams** of one sect or by adding the **namams** of another sect in order to throw the **namams** of the other into oblivion or at least to reduce them to such an insignificant proportion that they may be almost ignored was cognizable by Civil Courts. But the right put forward by the plaintiffs not being one of individual worship but one relating to the administration of a trust, the suit was really one between trustees **inter se** and would be covered by S. 92 and could not be agitated without complying with the requirements of the section. A.I.R. 1939 Mad. 757=1939 M.W.N. 418=189 Ind. Cas. 190.

——S. 9—Suit of civil nature—Rituals—Suit to establish right to observe Kappu Kattu and Diparathana.

It is well-established that the Civil Courts have no jurisdiction to decide matters or ritual except in so far as a decision on such matters is a necessary incident to the decision of a civil right. It is also established that a general right of worship either in a particular temple or outside is a civil right which can be claimed in the Courts. Generally speaking,

the rule is that once the general right to worship is conceded or established, the Courts will not endeavour to lay down the ritual which is to be followed; nor will they prescribe the manner in which the worship is to be conducted. It is also the rule that when there is no obligation to perform an act of worship, there will be no civil right to claim honours or perquisites of nominal value which ordinarily accompany the voluntary act of worship. The position is different if the perquisites are attached to an office or an obligation; but when there is no obligation to render service to the deity, there is no legal right to claim any honorific return for the services rendered.

Kappa Kattu is an act of ritual, partly religious and partly appertaining to the caste, which is at the most a mere incident in a series of ritual observances making up the communal festival. There is no obligation upon the members of the community to take part in the festival or to have their young men decorated in a particular way by the priest who presides at the festival. In the same way, *Diparathana* is a matter arising out of no legal obligation and forming the basis of no legal claim. A suit therefore to establish right to observe *Kappu Kattu* and *Diparathana* is not of a civil nature and a civil Court has no jurisdiction to entertain it. A.I.R. (Vol. 26) 1939 Mad. 494=(1939) 1 M.L.J. 199=49 L. W. 295=1939 M.W.N. 273=185 Ind. Cas. 239.

——S. 9—Suit of civil nature—Rituals—Suit regarding—Competency.

The conception of an office involves a corresponding obligation to perform the duties of the office.

Where a person claimed a right in respect of a temple to lead the horse on a particular festival day whenever that festival is performed but there is no compellable duty on his part to do this and the provision is accordingly made that if he does not bring a horse or if he refuses to lead it, the temple authorities might make other arrangements to bring a horse or to have it led, the right that is claimed by him is not to an office but to an honour and consequently cannot be made the subject-matter of a suit under S. 9, Civil P. C. A.I.R. (Vol. 26) 1939 Mad. 886=50 L.W. 206=1939 M.W.N. 792=I.L.R. (1940) Mad. 40=186 Ind. Cas. 437=(1939) 2 M.L.J. 420.

——S. 9—Suit of civil nature—Ritual in temple at time of worship—Suit regarding—If lies.

The Civil Courts in India have no ecclesiastical jurisdiction and they cannot decide questions of ritual except in so far as the decisions of such questions is a necessary incident to the decision of civil right; a right to worship in a particular temple in a civil right and a right to perform a religious office to which obligations and emoluments are attached is also a civil right. It has been recognized that the Court in adjudicating on a right of worship or a right to a religious office not infrequently is obliged to decide incidentally questions of ritual but it follows that the Court will not, on a mere pretence that a right to worship has been infringed arrogate to itself a jurisdiction which it does not possess to prescribe forms of prayer, rights to religious precedence and questions of that nature.

Where the right of the plaintiffs to take part in the *adyapakam* worship has been not only recognized but defined and the right of the defendants *mirasidars* to conduct the *adyapakam* service has also been established by judicial decisions and the Courts have settled, with such definition as is necessarily incidental to the establishment of the civil right both of the *mirasidars* and of the ordinary worshippers, the ritual which, it is the duty of the office-holders to observe, the plaintiffs are not entitled to ask the Court to go further than this and prescribe a complete set of rubrics which shall establish precisely the prayers to be used, the positions to be occupied by the various classes of worshippers the time when the service is to begin and cease and the precise manner in which it is to be conducted. The Civil Courts have neither the power nor the duty to attempt to draft a prayer book for the temple and have therefore no jurisdiction to prescribe the modes of worship, prayers and religious precedence where no question of civil rights really arises. A.I.R. (Vol. 26) 1939 Mad. 102=48 L.W. 722=1938 M.W.N. 1206=183 Ind. Cas. 258=(1939) 1 M.L.J. 124.

——S. 9—Suit of civil nature—Rituals—Exclusion of individual worshipper from particular position during worship in temple—Right of suit.

The exclusion of one or two individual worshippers from a particular position during worship in a temple cannot have the effect of barring the right of the whole community to which those individuals belong, to worship in that position if the right claimed were a civil right, such as could be established in the Civil Courts. A.I.R. (Vol. 26) 1939 Mad. 102=48 L.W. 722=1938 M.W.N. 1206=183 Ind. Cas. 258=(1939) 1 M.L.J. 124.

——S. 9—Suit of civil nature—Ritual—Suit as to.

A Civil Court cannot interfere with a pure question of ritual. A.I.R. 1926 Mad. 559, Rel. on. 1929 M.W.N. 300=120 Ind. Cas. 874=A.I.R. 1929 Mad. 526.

——S. 9—Suit of civil nature—Right to recite Vedas in temple—Suit for declaration—Maintainability.

The Thengalai Vaishnava Brahmans, residents of Triplicane, brought a suit for a declaration that they were entitled to recite the Prabandam and Vedas in the Parthasarathi Swami temple and to receive the emoluments without being appointed or removed by the Dharmakarthas of the temple.

Held, that the suit was maintainable in a Civil Court. 98 Ind. Cas. 229=A.I.R. 1927 Mad. 131.

——S. 9—Suit of civil nature—Questions of religious rites or ceremonies—Suit as to—Maintainability.

Speaking very generally, the protection of the law in religious matters is confined to the protection of religious property or a religious office. The Court will not decide mere questions of religious rites or ceremonies, nor will it pronounce on any religious doctrine unless it is necessary to do so in order to determine rights to property. It is the policy of the State to protect all religions, but to interfere with none. 24 Bom. L.R. 1060=84 Ind. Cas. 759=A.I.R. 1921 Bom. 338.

——S. 9—Suit of—civil nature—Religious question of orthodoxy—Civil Court's jurisdiction to try.

The determination of question of orthodoxy is not within the province of Civil Courts. 10 Bur.L.T. 194=37 Ind. Cas. 780.

——S. 9—Suit of civil nature—Religious dispute—Suits of ecclesiastical nature.

The Government has not recognized the authority of the *Kothanabaing* in Lower Burma as they have done in Upper Burma. A suit between two Buddhist priests to recover possession of certain lands and religious manuscripts is one of a civil nature triable by the Civil Courts. 8 Bur.L.T. 62=8 L. B.R. 145=27 Ind. Cas. 112.

——S. 9—Suit of civil nature—Right to recite mantras at religious procession—Suit to establish.

A suit by a religious sect, to establish the right to recite *mantras* at a religious procession is a suit of civil nature. 5 Mad. 313 foll. 20 M.L.J. 530=8 M.L.T. 137=(1915) M.W.N. 304=7 Ind. Cas. 148.

——S. 9 (S. 11, Old Code)—Suit of civil nature—Religious rites and ceremonies—Suit as to—Bar of.

Suits as to religious rites and ceremonies which involve no question of the right to property or to an office, are not suits of a civil nature and therefore not cognizable by a Civil Court. A worshipper of certain idols cannot therefore maintain a suit against the custodians of these idols to locate them in a certain temple instead of in another temple so long as his right to worship the idols is not denied. (1905) 2 C.L.J. 590=10 C.W.N. 505=32 Cal. 1072.

——S. 9 (S. 11, Old Code)—Suit of civil nature—Religious rites and ceremonies—Suits as to—Bar of.

A suit by a dharmakartha of a temple against his co-dharmakarthas for an injunction restraining them from changing the form of, or any way interfering with, the Tengalai namams in the temple and directing them to remove from the temple a copper image of Vedanta Desikar is one relating to the property of the temple vested in the trustees and is cognizable by a Civil Court under S. 11, C.P.C. Per *Miller* J.—A departure from usage is not within the power of the trustees and any trustee making such departure will be restrained by the Civil Courts. Per *Wallis* J.—A suit is not necessarily a suit of a civil nature so as to be cognizable by Civil Courts merely because the facts constituting the cause of action are alleged to amount to a breach of trust. If such facts relate merely to religious rites and ceremonies, such question may be determined by the Civil Courts provided any right to property or an office depends on them. (1904) 17 M.L.J. 1=30 M. 158=2 M.L.T. 69.

——S. 9 (S. 11, Old Code)—Suit of civil nature—Matter of ritual or religious ceremony—Claim for imaginary damages—Jurisdiction of Civil Courts.

Where a plaintiff's claim is not to any office or emoluments but confined to rights in religious ceremonies, the same is not cognizable by the Civil Courts under S. 11, Expl., C.P.C. Even the addition of a claim for damages which is purely imagnary does not bring it within the cognizance of the Civil Courts. Where the Vadagalais sued for a declaration of their right to recite certain sacred text in a temple either after or apart from the Tengalais either under a usage or under a razinama which was only a temporary arrangement and asked for damages which were purely imaginary in respect of perquisites which they alleged they had been prevented from getting. **Held,** the suit was not cognizable by the Civil Courts. (1902) 14 M.L.J. 171 =28 M. 23.

(e) Test.

——S. 9—Suit of civil nature—Test of—Municipality depriving citizen of remedy under Municipal Act—Civil Suit—Bar of.

It is not the status of the parties to the suit but the subject-matter of the suit which determines whether or not the suit is one of a civil nature. If the Municipality by its conduct deprives the citizen of the only remedy which is open to him under the Act, then the citizen has his remedy under S. 9, Civil P. C. A.I.R. (Vol. 26) 1939 All. 394=1939 A.L.J. 183= I.L.R. (1939) All. 345=184 Ind. Cas. 57.

(f) Miscellaneous.

——S. 9—Execution sale—Setting aside—Suit by auction-purchaser to recover purchase-money—Maintainability. See C. P. CODE (5 OF 1908), O. 21, Rr. 92 (3), 93 and S. 9. A.I.R. 1950 All. 461.

——S. 9—Scope—Administration of estate—Suit for—Jurisdiction of Court.

"Administration" means management and disposal of an estate, whether it be that of a deceased person or of any other person. The power to entertain an administration suit is given not by O. 20, R. 13, but by S. 9, C. P. Code, which provides that the Court shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred, and if a suit for the administration of an estate is not barred expressly or impliedly by any provision of law, it must be entertained. It would appear that an administration suit need not necessarily relate to the estate of a deceased person. This conclusion may be drawn from the language of O. 20, R. 13 (1), which speaks of a suit "for an account of any property and for its due administration under the decree of the Court" without any reference to a deceased person, and the force of this language is brought out specifically in sub-R. (2) which makes a special provision for "the administration by the Court of the property of any deceased person". A.I.R. 1950 Lah. 12.

——S. 9—Suit of civil nature—Restituton of conjugal rights — Christians — Jurisdiction of Civil Courts. See DIVORCE ACT, Ss. 4 and 32. A. I.R. 1947 Pesh. 53.

——S. 9—Suit of civil nature—Public utility company — Dismissal of clerks by managing agents without consent of Board of Directors—Suit by latter for declaration of illegality.

Where the managing agents of a public utility company (limited) dismiss certain clerks without the consent of the Board of Directors, a suit by the latter for a declaration that the powers of the managing agents to dismiss clerks were subject to the

control of the Board of Directors and that the dismissal was illegal and improper is a suit of a civil nature cognizable by the civil Courts. 227 Ind. Cas. 33=1946 Comp. C. 204=A.I.R. 1947 Sind 31.

——S. 9—Suit of a civil nature—Right to carry vyasantol in procession through streets—Suit to enforce—Maintainability.

The right to take out a procession as a religious procession through the public streets is a civil right, and a suit will lie to enforce such a right in a Civil Court, and is not barred under S. 9, C. P. Code. But the carrying of the emblem **vyasantol** in procession along the streets is not the taking out of a religious procession; a suit to enforce a right to carry it is barred under S. 9, C. P. Code. I.L.R. (1946) Bom. 437=226 Ind. Cas. 102=48 Bom. L.R. 100=A.I.R. 1946 Bom. 353.

——S. 9—Suit of civil nature—Right to take processions—Suit to establish—Maintainability.

There is no general right of public to take out procession irrespective of the question whether it is religious or not.

The question whether a particular procession is a religious procession within the accepted description recognised by law is a question of fact. Carrying of **Vyasantol** in procession by the Lingayats or Veershaivas is not taking out a religious procession with appropriate religious observances and hence no suit lies to establish such right. (A.I.R. (Vol. 33) 1946 Bom. 353.

——S. 9—Suit of civil nature—Suit for declaration of right—Civil Court's jurisdiction.

The power of Courts in India to make merely declaratory decrees which merely serve to define rights, without giving present relief is governed by S. 42, Specific Relief Act. But where a decree has the effect of giving present relief as well, the power to make it will be governed by the general provisions of S. 9 or O. VII, R. 7, C. P. Code, and not by S. 42, Specific Relief Act. A.I.R. (Vol. 30) 1943 Cal. 361=47 C.W.N. 408=77 C.L.J. 32=210 Ind. Cas. 479.

——S. 9—Suit of Civil nature—Fees for officiating as priest—Suit for competency.

——Suit to recover fees from the defendant who officiated as priest in area allotted to plaintiff is maintainable in Civil Court. 1942 N.L.J. 443.

——S. 9—Suit of civil nature—Society—Dispute between members and managing body—Suit relating to—Maintainability.

It is only when an act is **ultra vires** the society that a member is entitled to come to a Civil Court. A.I.R. (Vol. 27) 1940 Mad. 902=1940 M.W.N. 771=(1940) 2 M.L.J. 330=52 L.W. 308=194 Ind. Cas. 760.

——S. 9—Suit of civil nature—Test.

It is the subject-matter of suit and not the status of parties that determine whether the suit is of civil nature or not. If a municipality by its conduct deprives the citizen of the only remedy under the Municipal Act, then the citizen has his remedy in Civil Court under S. 6. A.I.R. (Vol. 26) 1939 All. 394=1939 A.L.J. 183=I.L.R. (1939) All. 345=184 Ind. Cas. 57.

——S. 9—Suit of civil nature — Co-sharers—Claim for profits against another.

Where one of several co-sharers in an occupancy holding or other tenure is solely in possession, he cannot be considered to be in wrongful possession; nor can the co-sharers suing for profits be said to have been wrongfully dispossessed from the holding or tenure. Possession of one co-sharer is possession of all who should be deemed to be in constructive possession through the co-sharer who is in actual possession by cultivating the land or by receipt of rents from sub-tenants. A claim for profits by one-co-sharer of an occupancy holding against another is a suit of a civil nature and hence under S. 9, Civil P. C., the suit lies in the Civil Court. A.I.R. (Vol. 22) 1935 All. 271=1935 R.D. 40=1935 A. L. J. 112=155 Ind. Cas. 37=57 All. 852.

——S. 9—Suit of civil nature—Duty of Court to entertain.

A Civil Court must entertain a suit of a civil nature unless the jurisdiction of the Court is either expressly or impliedly barred. Unless the jurisdiction of a Civil Court is taken away altogether, or for enforcement of a right another method is provided for, namely, by means of a petition, a suit will be the proper remedy to get relief in respect of a civil right. A.I.R. (Vol. 23) 1936 Cal. 786=63 C.L.J. 105=168 Ind. Cas. 849.

——S. 9—Suit of a civil nature.

For the applicability of S. 9, two points have to be considered, first, whether the suit is of a civil nature and whether there is any provision of the Code which would bar the exercise of jurisdiction by the Civil Courts provided the suits were of a civil nature.

Suits are of a civil nature if they are suits between subject and subject dealing with civil rights. A.I.R. (Vol. 23) 1936 All. 117=1935 A.L.R. 1209=1936 A.L.J. 33=159 Ind. Cas. 897.

——S. 9—Suit of civil nature—Duty of Court to entertain and try.

The general rule of law is that where a legal right exists and its infringement is alleged, a cause of action is disclosed and unless there is a bar to the entertainment of such a suit, the ordinary Civil Courts are bound to entertain it. A.I.R. (Vol. 22) 1935 Oudh 96=11 O.W.N. 1435=7 R.O. 250=152 Ind. Cas. 861.

——S. 9—Suit of civil nature—Community—Right of members to hold certain religious beliefs and to exercise rights and privileges—Excommunication by High Priest—Suit touching such matters.

The right of conscience or the right of individual members of a community to hold certain religious beliefs and opinions is a religious one and one that cannot be called in question or adjudicated upon in the Civil Courts, and it is not covered by the Explanation to S. 9 of the Civil P. C. The right to remain in the community or to exercise rights and privileges of the members of the community, is of course a civil one, and one that must be decided by the Civil Court when it is called in question. Where, therefore the members of a community openly defy the authority of the chief priest as they entertain a conscientious doubt with regard to his appointment, then the high priest surely has the power in exercise of his authority to exclude them from the membership of the community with its attendant rights and privileges. A.I.R. (Vol. 22) 1935 Nag. 156=157 Ind. Cas. 302.

——S. 9—Suit of civil nature—Landlord paying revenue to Government for and on behalf of tenant—Suit in Civil Court—Debtor and creditor.

Where the claim is for recovery of money lent by the plaintiff to the defendants, the suit is triable by Civil Courts. It is immaterial whether the money is paid by the plaintiff direct to the revenue authorities. The fact that the plaintiff is the landlord and the defendants are his tenants would make no difference. A.I.R. (Vol. 21) 1934 Lah. 165 (1).

——S. 9—Suit of civil nature—Social obligation—Payment of neota—Suit to enforce—Maintainability.

Where the plaintiffs contended a certain amount representing **neota** and interest had been agreed to be given credit for by the defendant in execution of a decree:

Held, that the items of *neota* and interest thereon could not be sustained as *neota* was not a legal but social obligation. A.I.R. (Vol. 20) 1933 Lah. 317 =34 P.L.R. 218=148 Ind. Cas. 70 (1).

——S. 9—Suit of civil nature—Procession and music before mosque or temple—Suit relating to—If barred.

When objection is taken to the taking out of a procession or of playing music in the vicinity of a temple or a mosque, a civil suit lies for a declaration of the right to do so, and such a suit can be brought either by individual plaintiffs against individual defendants who object, or it may be of a representative character, the result of which will bind both the communities which are represented. A.I.R. (Vol. 18) 1931 All. 341=1931 A.L.J. 354=53 All. 484= 131 Ind. Cas. 40.

——S. 9—Suit of civil nature—Suit for declaration that plaintiffs are real owners of decree standing in defendant's name—Maintainability—Specific Relief Act, S. 42.

The defendant conducted a litigation on behalf of the plaintiffs as their agent. The case was compromised and a promissory note was taken in the name of the defendant. The defendant obtained a decree thereon. The plaintiffs instituted a suit for declaration that the defendant was merely acting as their agent and that they were the real owners of the decree. It was contended that the plaintiffs were not entitled to bring such a suit.

Held, that the plaintiffs were entitled to maintain the suit under S. 42, Specific Relief Act.

Held, further, that the result of a decree in the plaintiffs' favour would be that from the date of the decree they would be treated as decree-holders with power to execute the decree so far as it had not been executed. A.I.R. (Vol. 18) 1931 Rang. 24=1930 Ind. Cas. 366.

——S. 9—Suit of civil nature—Suit to declare title to decree.

Where a person conducts litigation as an agent of the plaintiff and the suit is compromised and in accordance with the compromise, the agent obtains a promissory note in his name and subsequently sues on the note and gets a decree, a suit for a declaration that the plaintiff is the actual decree-holder and that the person was merely acting as his agent in the case, is competent. Such a suit is not barred by S. 9 or 47, C. P. Code. A.I.R. 1931 Rang. 24.

——S. 9—Suit of civil nature—Suit relating to 'right of burial'.

A right of burial is a civil right. 30 Mad. 15, Foll. 6 O.W.N. 1109=A.I.R. 1930 Oudh 54.

——S. 9—Suit of civil nature—Right to burial —Suit by relation of deceased for possession of corpse and declaration of right to bury same.

The law regards the right to burial as a Civil Court right and recognizes the rights of an executor to obtain or retain possession of a corpse. The rights of an executor may reasonably be extended to the nearest relation of the deceased in the absence of an executor. Therefore a suit by a relation for possession of a corpse and a declaration of a right to bury it will lie. 26 Bom. 198; 7 Bom. 323 and 30 Mad. 15, Rel. on. 7 Rang. 603=121 Ind. Cas. 775=A.I.R. 1930 Rang. 143 (2).

——S. 9—Suit of civil nature—Ecclesiastical matter—User of religious property by monks—Right of—Civil suit—If lies.

In a suit, the nature and extent of the rights of monks to use and occupy monastic lands which is religious property invokes a dispute regarding ecclesiastical matter within the competence of the Buddhist ecclesiastical authorities to decide; consequently, the Civil Courts in Upper Burma have no jurisdiction to entertain the dispute. 6 Rang. 783=114 Ind. Cas. 540=A.I.R. 1929 Rang. 77.

——S. 9—Suit of civil nature—Question as to validity of votes at a meeting.

The question of the validity of a vote is a question of law, and a Court of Law has jurisdiction to entertain it. It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. But surely questions relating to the validity of votes are not questions relating to the internal management of a Corporation. They are questions that can be disposed of only by a Court of Law. 25 Bom.L.R. 689=83 Ind. Cas. 856=47 Bom. 809=A.I.R. 1923 Bom. 305.

——S. 9—Suit of civil nature—Watan—Hereditary Joshipana—Office of—Suit by Watandar Joshi for dues.

The office of hereditary Joshipana exists in Central Provinces as separate from Berar, and a Watandar Joshi in the Central Provinces proper can sue for his dues. 107 Ind. Cas. 911=A.I.R. 1928 Nag. 150.

——S. 9—Suit of civil nature—Validity of election under Bengal Village Self-Government Act (1949)—Suit to contest—If barred.

It is not the intention of the Legislature to set up the Divisional Commissioner as the person finally to decide questions of franchise to the annulment of the ordinary Civil Courts' right to decide such questions, and the Civil Courts are not debarred from exercising their ordinary powers to try all suits under their general power under S. 9, C. P. Code, including a suit to contest the validity of an election. 52 Cal. 943=90 Ind. Cas. 700=A.I.R. 1926 Cal. 279.

——S. 9—Suit of civil nature—Hindu marriage —Suit to declare invalid.

Civil Courts can declare a pat marriage to be invalid. 22 N.L.R. 134=9 N.L.J. 160=95 Ind. Cas. 705=A.I.R. 1926 Nag. 488.

——S. 9—Suit of civil nature—Land in monastery—Dispute as to—Suit between monk and layman—If cognizable by Civil Courts.

A suit between a layman and a Buddhist monk in regard to land on which a monastery stands is cognizable by Civil Courts. (1913) U.B.R. 183=7 Bur. L.T. 27=23 Ind. Cas. 157.

——S. 9—Suit of civil nature—Highway—Suit to establish right to go in procession—Civil right.

The right to go in procession in a highway or public street is a civil right of every citizen, the infringement of which is actionable in Civil Court. Special damages to the individual citizen is unnecessary. 29 M.L.J. 91=17 M.L.T. 453=29 Ind. Cas. 248.

——S. 9—Suit of civil nature—Right to sacrifice cow in one's house—Obstruction—Suit for declaration and injunction, if lies.

A plaintiff who is obstructed by the defendants in the sacrifice of his cow is entitled to a declaration that he is entitled to sacrifice a cow which is his own property in his own house at a place which is not exposed to the public view and is also entitled to a perpetual injunction restraining the defendants from obstructing him in the exercise of such a right. 26 A.L.J. 1001=110 Ind. Cas. 657=A.I.R. 1928 All. 710.

——S. 9—Suit of civil nature—Witness—Diet money—Suit to recover—If lies in civil Court.

There is no provision in the Code under which the Court can order payment of diet money to a witness.

There is no provision in the Code under which the Court can order payment of diet money to a witness. That power is vested in the Court under the general rules of the High Court and therefore a suit for recovery of such money is maintainable in a civil Court. S. 547, Cr. P. Code, does not apply to such a case. 29 C.W.N. 1033=90 Ind. Cas. 488=A.I.R. 1926 Cal. 289.

——S. 9—Suit of civil nature—Spiritual and temporal matters—Enquiry into—Civil Court's jurisdiction.

Courts have power in any matter of spiritual and temporal character to enquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury. It is an open question whether Courts have power to give declarations as between different classes of His Majesty's subjects on matters such as the existence of caste distinctions among Roman Catholic converts and whether any action can be founded on a disregard of such rights save as they arise out of trusts. 39 Mad. 1056=19 M.L.T. 249 =30 Mad.L.J. 423=3 L.W. 348=(1916) 1 M.W.N. 307=34 Ind. Cas. 557.

——S. 9—Suit of civil nature—Suit to enforce right to membership of Society—Maintainability.

No suit lies by a member of the public against the managing committee of a society or institution, which is managed by public subscriptions, to enforce the right to subscribe and to be admitted to the privilege of membership. 19 O.C. 15=34 Ind. Cas. 263.

——S. 9—Suit of civil nature—Honorary and gratuitous office—Suit for declaration of invalidity of dismissal from—If lies.

A plaintiff suing for a declaration that he is the Honorary Secretary to an Association and that a resolution dismissing him from that post is null and void is bound to satisfy the Court that the suit is one concerning the right to an office within S. 9, C.P. Code and also that what he seeks to enforce by the suit is his right to a certain "legal character" within S. 42, Specific Relief Act. Where the plaintiff's services are voluntary and gratuitous and where there is no question of any contract between him and the Association, the Civil Court has no jurisdiction to entertain that suit. 37 All. 313=13 A.L.J. 455=29 Ind. Cas. 53.

——S. 9—Suit of civil nature—Mahomedans—Right to slaughter cows—Suit to declare—If barred.

A Mahomedan's right to slaughter cattle is a Common Law right which he enjoys in accordance with the principle **sic uteri tuo at alie num non laedas**. 17 O.C. 354=1 O.L.J. 469=25 Ind. Cas. 908.

——S. 9—Suit of civil nature—Office of Ghatwal—Appointment to—Jurisdiction of Civil Courts.

(Per *Fletcher, J.*) Appointment to the office of Ghatwal or Digwar is a matter for Government, *i.e.*, executive authorities, so that Civil Courts cannot interfere to reinstate a *ghatwa* dismissed by Ghatwal or Digwar is a matter for Government police authorities nor in favour of one who has never been appointed as such. 18 C.W.N. 1036=23 Ind. Cas. 849.

——S. 9—Suit of civil nature—Trust Corporation—Dismissal of officer—Civil suit if barred—Civil Court—Trust Committee—Officer of—Whether trustee or servant—Dismissal of officer—If Court can interfere.

A Court will interfere in a case of dismissal of an officer of a Trust Corporation where the relationship between the Corporation and the officer is one of Trustee and **cestui-que-trust,** but will not, where the relationship is a contractual one as that of master and servant and the question whether the relationship is of the former or the latter kind depends upon the statute or deed creating the foundation. 41 Cal. 19=17 C.W.N. 1045=20 Ind. Cas. 157.

——S. 9—Suit of civil nature—Office of Honorary Lecturer in University—Suit to establish—Maintainability.

An honorary lecturership in a University is undoubtedly an office of consequence but the fact that no arrangements are being made by the University for the delivery of such lectures cannot be said to be an injury to the personal right of the lecturer. The fact of the lecturer having lectured during a part of a term does not establish a continuing right to lecture. 18 C.W.N. 830=41 Cal. 518=24 Ind. Cas. 404.

——S. 9—Suit of Civil nature—"Office"—Chamar—Suit to establish right to skins of dead animals in specified place—If lies.

The Civil Court cannot entertain a suit by a *chamar* that he is enttiled to the skins of animals dying in a private institution known as *goshala* but can bring pressure on the manager through the proprietors to re-instate him or to get a fresh manager

appointed. 4 P.L.R. 1912=226 P.W.R. 1912=15 Ind. Cas. 108.

——S. 9—Suit of civil nature—Suit for declaration—Jurisdiction to entertain.

The general power vested in the Courts in India under C. P. Code to entertain all suits of the civil nature excepting suits of which cognizance is barred by any enactment for the time being in force does not carry with it the general power of making declarations except in so far as such power is expressly conferred by statute. 34 Bom. 676=12 Bom. L.R. 697=7 Ind. Cas. 945.

——S. 9—Suit of civil nature—Right to hoist flag of a Saint—Claim to offerings.

Where a person claims merely the Common Law right to hoist the flag of a particular Saint and get offerings for it without claiming any exclusive privilege in it for himself, the Civil Courts are competent to entertain a suit to establish this right. An injunction would be a more appropriate relief than a declaration. 24 Cal. 524, foll. 7 A.L.J. 830 =7 Ind. Cas. 314.

——S. 9—Suit of civil nature—Mortgagor's relinquishment to prejudice of mortgagee—Suit by mortgagee for declaration.

Where the mortgagees of an ex-proprietary holding brought a suit for declaration that a deed of relinquishment whereby the mortgagor fraudulently and collusively relinquished his holding to the prejudice of the mortgagees and the subsequent ejectment proceedings consequent upon that relinquishment were not binding upon them, it was one exclusively cognizable by the civil court. (1909) 7 A.L.J. 305=2 Ind. Cas. 456.

——S. 9—Suit of civil nature—Enquiry into validity of Acts passed by Local Legislative Council—Jurisdiction of High Court.

The Governor-in-Council is a Subordinate Legislature, whose authority in the way of law-making is subject to, and dependent upon the Acts of Parliament from which these legislative powers are derived. The question whether a particular Act passed by a Local Legislature is within the scope of their authority is a legitimate subject of discussion by the High Court. (1903) 5 Bom. L.R. 431=27 B. 424.

——S. 9—Suit of civil nature—Right of burial—Right to recite prayers before burial—Declaration of right—Suit for—Maintainability.

In suits relating to ritual or religious observance only the Civil Courts in India have no jurisdiction. But Courts of Justice are bound to enquire into questions of religion or ritual when such an enquiry is material for the determination of civil rights in dispute between the parties. When the matter is of a mixed spiritual and temporal character, Civil Courts will have jurisdiction to enquire into the spiritual matter, when it is so intrinsically connected with temporal matter as to be inseparable from it. The plaintiffs sued for a declaration of their right to bury their dead within the precincts of a certain mosque in a particular manner, namely, that the relatives of the deceased or their delegates utter certain prayers over the body before the interment. The defendant, who claimed to be entitled to the office of labbi, asserted an exclusive right in himself to utter the prayer. The Magistrate passed an order under S. 147, Criminal Procedure Code, restraining plaintiffs from employing their own priests for performing the funeral ceremonies, until they should obtain the order of a competent Court entitling them to do so. Held, that the suit was cognizable by a Civil Court. *Held*, also the right of burial was a Civil right; that the right to recite prayers formed part of the right of burial and could not be split up from the latter, and that after the order of the Magistrate, a decision as to the respective rights of parties became imperative. (1906) 16 M.L.J. 471=30 M. 15=1 M.L.J. 423.

——S. 10—

Synopsis.

1. Agreement between parties regarding forum of suit.
2. Appeal and connected appeal.
3. Applicability.
4. Conditions for stay order.
5. Distinction between Ss. 10 and 11.
6. Interlocutory orders after stay.
7. Jurisdiction to stay.
8. Mandatory nature of section.
9. "Matter in issue"—Meaning of.
10. Orders under section—Appeal and Revision.
11. "Pendency" of Suit or appeal.
12. Pendency of Suit in foreign court.
13. "Previously instituted suit".
14. Remedy—When section inapplicable.
15. Scope of section.
16. Suit instituted pending appeal in first suit—Procedure.

1. Agreement between parties regarding forum of suit.

——S. 10—Existence of agreement to litigate in particular Court—Effect.

The fact of the existence of an agreement between the parties to litigate only in a particular High Court gives the Court no option but to obey the mandatory provisions of S. 10. A.I.R. (Vol. 28) 1941 Cal. 670=I.L.R. (1941) 1 Cal. 490=199 Ind. Cas. 32.

——Ss. 10 and 151, O. 39—Injunction—X and Y agreeing in case of dispute to bring suit at A—X filing suit at B—Y then filing suit at A.

Where the parties expressly agree that any disputes arising between them with regard to certain transactions shall be decided by the Court at particular place and one of the parties in violation of the agreement files a suit against the other party in a Court at different place and the other party sues the former on the same transaction in a Court at a place specified in the agreement, the Court at such place is entitled as well as justified in issuing injunction restraining the first party from proceeding with the suit filed by him in breach of the agreement even though an injunction in such a case does not come within the four corners of O. 39, Civil P.C., yet the Courts have an inherent jurisdiction to issue an injunction in a proper case to prevent an abuse of the process of

the Court and to further the ends of justice. A.I.R. (Vol. 27) 1940 All. 241=I.L.R. (1940) All. 232=1940 A.L.J. 188=189 Ind. Cas. 268.

——S. 10—Agreement between parties to bring suit at a particular place—A bringing suit in pursuance of contract—B bringing suit in another Court and asking for stay of A's suit—Such relief cannot be granted.

There was a binding contract between the plaintiff and the defendant that any suit in respect of the transaction between the parties should be brought either in the High Courts or in the Small Causes Court of Bombay. Plaintiff sued in the Bombay Court and defendant sued in the Ludhiana Court for their respective claims. Defendant applied for the stay of Bombay suit.

Held, that the defendant was not entitled to any relief. S. 10 is not a section which prevents the Court from enforcing contractual rights of this nature as between two parties. 30 Bom.L.R. 546=110 Ind. Cas. 727=A.I.R. 1928 Bom. 175.

——S. 10 and U. P. Tenancy Act (17 of 1939), Ss. 59 and 180—Two suits in respect of same holding and same parties, one under S. 59 and the other under S. 180—Agreement of parties for disposal of both together.

Where there are two suits in respect of the same holding and as between same parties the earlier filed under S. 180 of the U.P. Tenancy Act and the later one filed under S. 59 of the Tenancy Act, normally the earlier suit should be decided first; the other one should remain in abeyance until the previous one is decided. If however, parties are agreed to the disposal of both of them together, then it would be necessary for the trial Court to give specific findings on the issues framed in the suits. 1949 R.D. 360.

——S. 10—Consent of parties for disposal of both suits together.

The institution of a second suit is not barred by S. 10, Civil P. C. All that it says is that the trial of the suit cannot be proceeded with. It is consequently a rule of procedure pure and simple, and rules of procedure in civil cases can be waived with the consent of the parties. Where the parties not only waive their right to have the other suit stayed but expressly ask that it should proceed and be tried by the same Court along with the other suit, neither side can afterwards turn round and challenge the validity of these proceedings because of S. 10. A.I.R. (Vol. 24) 1937 Nag. 132=I.L.R. (1937) Nag. 6=173 Ind. Cas. 124.

2. Appeal and connected appeal.

——S. 10—Appeal before the District Judge—Another connected first appeal before High Court between same parties—High Court may order transfer of former before itself without any security.

Where an appeal is pending before the District Judge and a connected first appeal between the same parties is pending in High Court, the High Court may order the transfer of the appeal before the District Judge to be heard with the appeal pending before it without any security as S. 10 does not contemplate the giving of any security for such transfer. 8 L.L.J. 76=27 P.L.R. 185=A.I.R. 1926 Lah. 304.

3. Applicability.

(a) Appeals.
(b) Arbitration.
(c) Criminal proceedings.
(d) Execution proceedings.
(e) Probate proceedings.
(f) Proceedings under S. 83, T. P. Act.
(g) Revenue proceedings.

3 (a). Appeals.

——S. 10 — Applicability — Appeals — "Suit"—If includes appeal.

Obiter.—In S. 10, which is closely connected with S. 11, "suit" must include appeals. The section refers to suits pending before His Majesty in Council. A.I.R. (Vol. 26) 1939 Sind 329=I.L.R. (1940) Kar. 15=186 Ind. Cas. 533.

——S. 10—Suit includes appeal.

"Suits in S. 10 include appeals." 24 C.L.J. 514, Foll. 27 C.W.N. 772=75 Ind. Cas. 231=A.I.R. 1923 Cal. 716.

3 (b). Arbitration.

——S. 10—Applicability — Proceedings to file award.

Ss. 10 and 11, C. P. Code, are concerned with the law of procedure and the mere use of the word "suit" in S. 10 does not restrict its applicability to suits alone but the sections can be extended to Civil Miscellaneous proceedings by virtue of S. 141, if it is otherwise applicable. Where in a dispute between *A* and *B* an award is passed and the arbitrator applies to the Sind Court to file the award, and it appears that *B* has filed a suit against *A* in Delhi to set aside the award,

Held, that the arbitrators who are applicants in Sind, not being parties to the Delhi suits, S. 10 does not apply. Once an award is filed there is no equitable reason for checking its legitimate consequences because a suit has been filed to set it aside. 16 S.L.R. 79=66 Ind. Cas. 796=A.I.R. 1922 Sind 6.

——S. 10—Application to file award.

Application to file awards though not suits are governed by the same principles of general law, as S. 10. 4 S.L.R. 187=9 Ind. Cas 707.

——S. 10—Award passed at K—Suit to set aside award in M Court—Subsequent application under S. 14, Arbitration Act at K—Applications to stay proceedings at K on account of the pendency of the suit at M is not competent, M Court having no jurisdiction to entertain application under S. 14, Arbitration Act.

A brought a suti at *M*. The matter in dispute was already referred to arbitration and an award was passed at *K* during the pendency of the suit. An application was filed at *K* under S. 14, Arbitration Act. *A* subsequently filed another application to stay proceedings in *K* Court under S. 10, C. P. Code, on ground that he had filed a suit in *M* Court, where

the award was being enforced against him as a decree, to have the award set aside.

Held, that the only Court competent to entertain the application under S. 14, Arbitration Act, was the *K*. Court and hence the suit instituted by *A* at *M* was not pending in a Court having jurisdiction to grant relief claimed in *K* Court and therefore *K* Court was not barred to go into the same grounds. 23 S.L.R. 427=112 Ind. Cas. 318=A.I.R. 1928 Sind. 169.

——S. 10—Applications under C. P. Code, Sch. 2, S. 20—Section inapplicable.

An application under S. 20, Sch. 2, is not a plaint and the hearing of such an application is not a suit though under sub-Cl. (2), S. 20, it has to be numbered and registered as a suit. S. 10 is applicable only to suits. No doubt the principles embodied in S. 11 in some instances do apply when there have been previous litigious proceedings not amounting to suits but that does not mean that S. 10 also should be held to apply when one of the proceedings is not a suit. For S. 10 to apply the matter in issue in one suit must be directly and substantially in issue in the previously instituted suit. A.I.R. 1921 Bom. 389; A.I.R. 1921 Pat. 161, followed. 30 P.L.R. 395=117 Ind. Cas. 94=A.I.R. 1929 Lah. 533 (a).

——S. 10—Arbitration proecedings are not in the nature of suit—Nor is arbitrator a party to proceedings to set aside an award.

Arbitration proceedings are not in the nature of a suit within the purview of S. 10 read with S. 141, C. P. Code nor is an arbitrator a party to the proceedings instituted by a person adversely affected by the award filed under the Arbitration Act, to have it set aside. 23 S.L.R. 427=112 Ind. Cas. 318=A.I.R. 1928 Sind 169.

——S. 10—Where objections to an award are in a Court no application under S. 10 for stay of proceedings lies on the ground that a suit in respect of the same subject-matter has been instituted in another Court by the applicant. A.I.R. (Vol. 22) 1935 Sind 228=37 Cr.L.J. 175=159 Ind. Cas. 824.

3 (c). Criminal proceedings

——S. 10—Applicability—Criminal proceedings.

Where the stay asked for did not come under S. 10, being one asked for in criminal proceedings which were first instituted, the principle of S. 10 held might be applied, because the stay was asked for because of a Civil suit (stay, however, was refused on other grounds). A.I.R. (Vol. 21) 1934 All. 131=1934 A.L.J. 342=1934 Cr. Cas. 189=35 Cr.L.J. 1445 =151 Ind. Cas. 897.

3 (d). Execution proceedings.

——S. 10—Applicability—Execution proceedings.

Interlocutory orders under S. 10 occur in suits and not in execution proceedings. The section is not exhaustive and its application has been extended only to proceedings under certain Acts and miscellaneous proceedings by virtue of S. 141 and this latter section does not cover proceedings in execution of a decree. 119 Ind. Cas. 488=A.I.R. 1929 Lah. 694.

3 (e). Probate proceedings.

——S. 10—Applicability—Rival probate proceedings.

For the purposes of applying the principles involved in S. 10, Civil P. C., to rival probate proceedings the Court will, affidavit or no affidavit, dates or no dates, proceed upon what it thinks is substantially the earlier proceeding or substantially the subsequent proceeding. A.I.R. (Vol. 28) 1941 Cal. 417=196 Ind. Cas. 111.

——S. 10—Probate of will—Date of institution—Succession Act (39 of 1925), Ss. 295 and 273.

Proceedings for obtaining probate of a will are not suits. The direction in S. 295, Succession Act, is only that the procedure of a suit shall be followed and not that proceedings, on becoming contentious, shall "become" regular suits instituted on the date of their becoming contentious. Section 10, Civil P. C., is, therefore not strictly applicable to such proceedings. Even assuming however, that it is applicable in principle, it is clear that as between rival applications for probate it is by no stretch of reasoning possible to treat as the date of institution the date on which the caveator may choose to allow the proceedings to become contentious. The only date which can be regarded as the date of institution with a view to deciding which of two rival "suits" is "previously instituted" must be the date on which the petition was filed and not the date on which the caveat was entered. A.I.R. (Vol. 27) 1940 Oudh 113=1939 O.L.R. 750=1940 O.W.N. 1=15 Luck. 290=185 Ind. Cas. 377.

——S. 10—Application for probate—Until caveat supported by affidavit has been entered by person opposing it, there is no contentious proceeding and no suit and no defendant within the meainng of S. 10. A.I.R. (Vol. 27) 1940 Oudh 16=15 Luck. 107=1939 O.L.R. 637=1939 O.W.N. 932=184 Ind. Cas. 535.

3 (f). Proceedings under S. 83, T. P. Act.

——S. 10—Proceedings under S. 83 of T. P. Act—Whether may be stayed.

Jurisdiction is given by S. 10, C. P. Code, to stay suits. As a proceeding under S. 83 of the T. P. Act is not a suit, there is no power under S. 10, C. P. Code, to stay such proceedings. A.I.R. 1947 Cal. 386.

3 (g). Revenue proceedings.

——S. 10—Partition proceedings in Revenue Court—Stay of suit in Civil Court.

Where partition proceedings under the U. P. Land Revenue Act are complete, the matter cannot be reagitated in Civil Court. The aid of S. 10 would be invoked where the partition proceedings are still pending in the Revenue Court. Section 10 does not altogether rest the jurisdiction of the Civil Court to receive a plaint in a suit for declaration of title or possession of immovable property but only refers to the stay of the suit and prevents the Court from proceeding with the trial of such suit while the same matter is pending in another Court of competent jurisdiction. Therefore while a question of title has

been raised and is under consideration by the Revenue Court a suit to get relief in respect of the same matter would not be tried by a Civil Court but would be stayed until the matter has been disposed of by the Revenue Court. A.I.R. (Vol. 23) 1936 All. 484=1936 R. D. 128=1936 A.L.R. 339=1936 A. L. J. 347=161 Ind. Cas. 865.

——S. 10—Section 117, Punjab Land Revenue Act, 1887, does not contemplate institution of suit in Revenue Court—Direction by Revenue Officer to plaintiff to institute suit in his Court—Meantime proceedings relating to partition consigned to Record room—S. 10, Civil P. C., does not govern the case. A.I.R. (Vol. 23) 1936 Lah. 589=160 Ind. Cas. 953.

——S. 10—Applicability—Commutation proceedings under Tenancy Act pending in Revenue Court—If ground for stay of suit in Civil Court for rent. See C. P. CODE, S. 151. A.I.R. 1950 Pat. 363.

4. Conditions for stay order.

See also S. 9 infra.

——S. 10—Stay Order—Conditions for.

Before S. 10, Civil P. C., can apply to applications for letters of administration filed in two different Courts *X* and *Y* two circumstances must co-exist: first the matter in issue in both the applications must be substantially the same; and, secondly, each Court must have jurisdiction to grant reliefs claimed in both the applications. A.I.R. (Vol. 30) 1943 Cal. 19 =I.L.R. (1942) 2 Cal. 194=204 Ind. Cas. 457.

——S. 10—Complete identity of subject-matter—If eccential.

It is well-settled that in order to attract the application of S. 10, C. P. Code, there must be a complete identity of the entire subject-matter of the two suits. Every matter in dispute should necessarily be directly and substantially in issue in the two suits. 224 Ind. Cas. 532=A.I.R. 1947 Lah. 28.

——S. 10—Applicability — Conditions — Substantial identity of subject-matter—Sufficiency.

It is doubtful if for the application of S. 10, C. P. Code, there should be a complete identity of parties or a complete identity of the subject-matter. It is enough if the identity is substantial. I.L.R. (1948) Nag. 403=1948 N.L.J. 250=A.I.R. 1948 Nag. 297.

——S. 10—Stay of suit—Test—Identity of subject-matter and cause of action not necessary.

S. 10, C. P. Code, makes no reference the subject-matter or the cause of action and the test of its applicability to a particular case is whether on a final decision being reached in the previous suit such decision would operate as *res judicata* in the subsequent suit. I.L.R. (1947) Nag. 141=229 Ind. Cas. 219=1947 N.L.J. 31=A.I.R. 1947 Nag. 154.

——S. 10—Subject-matter and cause of action need not be same.

The provisions of S. 10, Civil P. C., are mandatory and leave no discretion to the Courts in respect of the stay of suits when the circumstances are such as to invoke the operation of that section.

One test of the applicability of S. 10 to a particular case is whether on the final decision being reached in the previous suit, such decision would operate as *res judicata* in the subsequent suit.

Section 10 contains no reference whatever to the subject-matter or the cause of action and hence it is not necessary for the operation of this section that the subject-matter and the cause of action should be the same. A.I.R. (Vol. 19) 1932 Cal. 751=36 C.W.N. 667=140 Ind. Cas. 155.

——S. 10—Relief sought need not be identical.

For a stay of a suit under S. 10, C.P.C., the relief sought in the two suits need not be identical. If the matter in issue in the two suits is the same, the later suit must be stayed without regard to the relief sought. 12 Bur. L. T. 203=55 Ind. Cas. 254.

——S. 10—Stay—Conditions for—Test.

For the application of S. 10, C. P. Code, it is not enough that one or other of the issues in the later suit will be determined by the decision of the first suit; all the issues in the second suit must be determined by the decision in the first suit before S. 10, C. P. Code, can come into operation. The test is whether, if the first suit is determined, the matters raised in the second suit will be *res judicata* by reason of the decision in the prior suit. 48 Bom.L.R. 633 =A.I.R. 1947 Bom. 84=229 Ind. Cas. 346.

——S. 10—Parallel suits—Test.

The words of S. 10, Civil P. C., are mandatory and require that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit. It is immaterial that the relief claimed in the earlier suit is of a different character from the relief claimed in the subsequent suit. The real question is whether the matter in issue in the subsequent suit is directly and substantially in issue in the earlier suit. The test whether a previouly instituted suit and a subsequent instituted suit are "parallel", is that if the first was determined, the matters raised in the second suit would be *res judicata* by reason of the decision of the prior suit. A.I.R. (Vol. 29) 1942 Bom. 314= 44 Bom. L.R. 699=203 Ind. Cas. 359.

——S. 10—Before an order under S. 10 staying a suit is passed, the Court must see that all the different conditions contained in that section are present in the case. The pendency of the previously instituted suit will not by itsel constitute a bar to the trial of the subsequent suit. The Court must see (1) if the matter in issue is also directly and substantially in issue in a previously instituted suit; (2) between the same parties; (3) in the same or any other Court in British India; and (4) having jurisdiction to grant the relief claimed. 110 Ind. Cas. 418.

——S. 10—Concurrent jurisdiction—Necessity for.

To attract the operation of S. 10, C. P. Code the suits must be pending in the Courts of concurrent jurisdiction in the sense that the suit to be stayed could be tried in the Court in which the first suit was instituted. 37 Ind. Cas. ref. 114 P.R. 1919=53 Ind. Cas. 467.

——S. 10—Concurrent jurisdiction—Stay order.

Concurrent jurisdiction of both Courts is an essential requisite for a stay order under S. 10. 12 N.L.R. 174=37 Ind. Cas. 510.

——S. 10—First Court should have jurisdiction to grant relief claimed in second suit.

Under S. 10, the Court in which the first suit is pending should have jurisdiction to grant relief claimed in the second suit. A.I.R. (Vol. 27) 1940 Oudh 440=1940 O.W.N. 802=16 Luck. 188=1940 R. D. 400=1940 O.L.R. 554=190 Ind. Cas. 240.

——S. 10—Court in which previous suit is pending must be competent to grant relief.

The words "relief claimed" in S. 10, Civil P. C., should apply to the suit which is to be stayed and not to the earlier suit. The essential condition for stay under S. 10, is that the Court in which the previously instituted suit is pending must be a Court of jurisdiction competent to grant the relief claimed in the subsequent suit. A.I.R. (Vol. 25) 1938 Mad. 602=47 L.W. 525=1938 M.W.N. 353=(1938) 1 M.L.J. 873=177 Ind. Cas. 102.

——S. 10—U. P. Land Revenue Act (3 of 1901), S. 118—Suit for partition pending in Revenue Court—Suit in Civil Court for partition of house is not barred.

The Revenue Court has no jurisdiction to partition a house, *i.e.*, partition the buildings, at all. It can partition the site occupied by a house along with other land in a village. If in making a partition it is necessary to include in the portion allotted to one co-sharer, the land occupied by a dwelling house or other building in possession of another co-sharer, the latter can, under S. 118 of the Land Revenue Act, be allowed to retain it (the land) with the buildings thereon on condition of his paying a reasonable ground rent to the co-sharer in whose portion it may be included. Hence the pendency of a suit for perfect partition in a Revenue Court is no bar to a suit in a Civil Court for possession of a certain share of a house by partition thereof. If a house is in the occupation of one co-sharer and the site is allotted to another, it would be retained by the occupier of the house on payment of a rent to be fixed. A.I.R. 1924 All. 854. Foll. 47 All. 915=89 Ind. Cas. 186 =23 A.L.J. 585=A.I.R. 1925 All. 677.

——S. 10—Land Acquisition Act (1 of 1894), S. 18—Stay of proceedings under—Civil Court trying earlier title suit—Power of.

The three essential conditions that are necessary for bringing in the operation of S. 10, Civil P. C., are: (1) that the matter in issue in the second suit should have been directly and substantially in issue in the previously instituted suit, (2) that the parties in the two suits are the same, and (3) that the Court, in which the first suit was instituted, was a Court of competent jurisdictión to grant the relief claimined in the subsequently instituted suit.

Per *Mallik, J.*—The Calcutta Improvement Tribunal is a Court of special and exclusive jurisdiction. When both the parties seek the tribunal as the forum for determination of the question of value and apportionment in a matter under the Land Acquisition Act, a Court of ordinary civil jurisdiction trying an earlier title suit has no jurisdiction to stay a reference which has been subsequently instituted before the Tribunal. A.I.R. (Vol. 20) 1933 Cal. 887=60 Cal. 1096=148 Ind. Cas. 1195.

——S. 10—Suit for profits which is solely cognizable by a Revenue Court cannot be stayed by prior suit for declaration of title pending in Civil Court.

In order to hold that S. 10 is applicable the two courts must be courts of concurrent jurisdiction, that is to say, each of those courts must be in a position to try any one of the two suits and to grant the relief claimed in either of them. So a suit for profits which is solely cognizable by revenue courts cannot be stayed on account of a prior suit for declaration of title which is pending in a civil court. 114 P. R. 1919 and 12 N.L.R. 174, Foll. 4 Luck. 573=114 Ind. Cas. 775=7 O.W.N. 157=A.I.R. 1929 Oudh 341.

——Ss. 10 and 151—Stay of suit—Matter involved in suit pending before special tribunal—Duty of Civil Court to stay suit pending decision by tribunal—Indore Rent Control order.

Where a special tribunal is created for the determination of a particular matter, the jurisdiction of the Civil Courts must be deemed to have been taken away *pro tanto* while such tribunal exist. Under the Indore Rent Control Order, the Rent Controller has jurisdiction to determine the fair rent, though the remedy for recovery of unpaid rent has to be sought in the civil Court. When the quantum of rent is in dispute and when an application under S. 5 of the Rent Control Order is pending before the controller, no decree can be passed by the civil Court in the suit for rent. The suit has to be stayed until the final determination of the fair rent, under S. 151, C. P. Code, though not under S. 10, C. P. Code. A.I.R. 1950 M.B. 8.

——S. 10—Agra Tenancy Act (2 of 1901), Ss. 167 and 199—Ejectment suit—Question of title raised in defence—Defendant directed to file suit in Civil Court—Suit filed after expiry of time prescribed but before the conclusion of suit in Revenue Court is not entertainable.

If a party ahs been offered by a Revenue Court to file a suit in a civil court within three months, he is not at liberty to ignore the restriction and file his suit after three months although the suit in the revenue court may be pending. A suit instituted after the thrte months should be dismissed by the civil court.

Per *Daniels, J.*—S. 10 of the Code of Civil Procedure will not apply because the revenue court, though its decision may indirectly produce the same result, could not have granted the relief asked for in the civil court.

Per *Sulaimian, J.*—Although it is not possible to bring the case within the provisions of S. 10 of the C. P. Code, as the revenue court is not competent to grant the relief asked for in the civil suit, nevertheless the principle underlying that section may be of wider application. 23 A.L.J. 529=88 Ind. Cas. 684=47 All. 904=A.I.R. 1925 All. 615.

——S. 10—'Having jurisdiction to grant the relief claimed'—No reference to territorial jurisdiction.

The words "court having jurisdiction to grant the relief claimed" in S. 10, C. P. Code, have no reference to territorial jurisdiction. The rule as to stay of suit though based on principles simliar to

those underlying the rule of *res judicata* is not part of the rule of *res judicata*. It is further intended to save inconvenience to parties of litigating over the same matter over places especially when the two places are far apart. 13 Bur.L.T. 19=10 L.B.R. 154=57 Ind. Cas. 904.

——S. 10—Court having jurisdiction to grant relief—No reference to territorial jurisdiction.

The words "jurisdiction to grant the relief claimed" do not mean territorial jurisdiction and the latter suit must be stayed if the matter in issue is the same as in the first suit although the Court in which the first suit was instituted has no territorial jurisdiction over the subject matter of the latter suit. 12 Bur.L.T. 203=55 Ind. Cas. 254.

——S. 10—Same question but different parties.

S. 10 does not apply where the two suits are not between the same parties on between parties under whom they or any of them claim, litigating under the same title, even though some of the questions in the two suits are the same. 15 M.L.W. 667=68 Ind. Cas. 167=1922 M.W.N. 521=A.I.R. 1922 Mad. 321.

——S. 10—Parties should litigate under same title.

S. 10, does not make the trial of the later suit without jurisdiction unless it is between parties under whom the parties in the earlier suit claim litigating under the same title. 31 Ind. Cas. 25 (Mad.).

——S. 10—Matters in issue—Parties—Difference in.

S. 10 cannot be applied if the matter in issue is not the same in the two suits and the parties do not fill the same legal position in two suits. 13 Bom.L.R. 109=9 Ind. Cas. 929..

——S. 10—S. 10 of the Code does not apply unless every matter in dispute is directly and substantially in issue in the two suits and the parties are the same. 61 Ind. Cas. 830 (Lah.).

——S. 10—Matter in dispute and parties—Substantial identity—Need for.

Before an order staying a suit can be made there must be substantial identity between the matter in dispute and in the matter of parties in the earlier and later suits. 21 Bom.L.R. 963=53 Ind. Cas. 518.

——S. 10—Suit on hundi—Three prior suits between same parties but on different hundis—Only one of the defendants contesting—Stay.

Where a suit was instituted on a *hundi* and it appeared that three previously instituted suits on different *hundis* had been decreed against the same defendants but in the subsequent suit only one of the defendants contested:

Held, that the suit being on a different *hundi* and only one of the defendants contested the right of the plaintiffs, it would be unfair to stay proceedings in the suit, even if it could legally be done. A.I.R. (Vol. 20) 1933 Lah. 34=33 P.L.R. 787=139 Ind. Cas. 48.

——S. 10—Same matter in issue—Suit by partner to recover deposit—Suit for dissolution pending.

Pending a suit for dissolution of a partnership plaintiff a partner sued for recovery of his desposit from the firm less his share of the liabilities. *Held*, that the suit was barred by S. 10 as the mttter in issue in the suit was directly and substantially in issue in the previous suit. 16 C.W.N. 897=16 Ind. Cas. 459.

——S. 10—Suits identical—Application in subsequent suit for declaration that attachment in previous suit was illegal and for injunction to stay the suit.

An application was filed in a subsequent suit for a declaration that an attachment made in hte prior suit was illegal and for injunction to stay the suit:

Held, that the asking for a declaration and for an injunction could not be said to be claiming reliefs of such a character as to spoil what would otherwise be the identity of the two sutis.

As a matter of common sense and convenience, generally speaking, if it is satisfactorily demonstrated that the second suit is "parallel" to the first suit then the best course for everybody concerned would be to put a stay upon or to arrest altogether the second suit at the earliest possible moment. In endeavouring to arrive at a correct decision, as to whether a subsequent suit is "parallel" to a previous suit, one must have regard to the position of affairs at the time when each of the suits was, respectively, instituted and further to what would be the position of affairs when both the suits have been tried and finally determined. It is to be noted that the provisions in S. 10, Civil P.C., have been put in front of those contained in S. 11. The real criterion to apply is this: Supposing the first suit was determined, would the position then be that when the second suit was instituted the matters raised in the second suit were *res judicata* by reason of the decision of the prior suit. A.I.R. (Vol. 22) 1935 Cal. 1=61 Cal. 670=38 C.W.N. 818=154 Ind. Cas. 645.

——S. 10—Same plea—Defendant sued as heir in former suit—Subsequent suit by former deendant as creditor—Stay.

Where a decree is obtained against a defendant as heir of the deceased and there is an appeal pending against it during which the defendant sues plaintiff as a creditor of the deceased for dower debt and raised the same plea as was raised in the previous suit, the Court can stay the later suit. 42 All. 290=18 A.L.J. 145=55 Ind. Cas. 89

——S. 10 (S. 12, Old Code)—Suit in Subordinate Court—Second suit in Munsif's Court—Jurisdiction—S. 13—Procedure.

The procedure under Ss. 10 and 11 (S. 12 and 13, Old Code), is the same; and where a second suit is instituted for the same relief, such that the matter in issue in it was also directly and substantnally in issue in a previously instituted suit between the same parties, the proper procedure is to dismiss the second suit and not merely to stay it pending the decision of the earlier suit.

The second suit was instituted in the Munsiff's Court, while the first had been instituted in the Sub-

ordinate Judge's Court. The second suit was moved into the Court of the Subordinate Judge, and he dismissed both of them together on the merits. On appeal to the District Judge he held that S. 10 (S. 12, Old Code) was a bar to the 2nd suit and treated the whole proceeding before the Subordinate Judge as a nullity and dismissed the appeal.—*Held*, that the District Judge had jurisdiction to hear the appeal against the decision of the Subordinate Judge and should have done so. (1908) 16 M.L.J. 526.

——S. 10—Appeal pending before Privy Council—Subsequent suit, when may be stayed.

For the validity of an order for stay of a subsequent suit on account of pendency of an appeal before His Majesty in Council, some matter must be common in substance and directly in issue in both the suits or the appeal and the subsequent suit, without any reference to the nature of the relief claimed. Plaintiff got a decree for joint possession with the defendants who appealed to the Privy Council. Plaintiffs then sued them for profits in the Revenue Court, whree also question of title was raised. *Held*, that the subsequent suit could be stayed under S. 10. 23 O.C. 214=7 O.L.J. 520=58 Ind. Cas. 629.

——S. 10—Subject-matter of suits different.

To attract the provisions of S. 10, Civil P. C., the entire subject-matter of the two suits must be the same.

Where two cross-suits were instituted one in Calcutta and one in Lucknow, and it appeared that even if the suit in the Calcutta High Court was dismissed the parties would still have to go to the Lucknow Court to settle their dispute:

Held, that the latter suit need not be stayed. A. I.R. (Vol. 18) 1931 Oudh 313=8 O.W.N. 644=132 Ind. Cas. 257.

——S. 10—Ground not traversed in former suit—Issue as under O. 14, R. 1, not raised in former suit—Subsequent suit for mesne profits no bar nder S. 10.

Where in the former suit for specific performance there was not even a prayer in the plaint for the award of future mesne profits, and consequently there could have been no allegation in the written statement traversing the right of the party and there was therefore no issue raised by reason of O. 14, R. 1.

Held, the same matter in a subsequent suit cannot be deemed to be a matter directly and substantially a matter in issue in a former suit within the meaning of S. 10. 30 M.L.W. 738=A.I.R. 1929 Mad. 785=57 M.L.J. 515.

——S. 10—Later suit not having same issue as previous suit cannot be stayed.

Where *A* filed a suit against *B* for partition and later. *B* filed a suit against *A* on a rent deed executed by *A* to *B*, and *A* prayed for a stay of the rent suit on the ground that the same questions of title were involved in both suits. *Held*, that no question of title could be raised in a rent suit and as there could thus be no common issue in both the suit, no stay of the rent suit could be granted. 33 P.W.R. 1922=69 Ind. Cas. 111=A.I.R. 1923 Lah. 69.

——S. 10—Applicability — Suits for distinct and different debts. 27 C.W.N. 772=75 Ind. Cas. 231=A.I.R. 1923 Cal. 716.

——S. 10 (S. 12, Old Code) and S. 11 (S. 13, Old Code)—Suit for ejectment of tenant of mesne profits—Decree—Appeal—Suit for rent of prior period—Not barred.

A purchased a tenure at a sale for arrears of rent, and some time after, served a notice upon *B* an under-tenure-holder, undre S. 167 of the Bengal Tenancy Act. *A* then sued to eject *B*, and to recover mesne profits. The Court made a decree for ejectment and allowed mesne profits from the date of the service of notice under S. 167. *B* preferred an appeal. During its pendency, *A* sued *B* for rent for the period between the date of his purchaser and the date of the service of notice. *Held*: (1) that the suit was not barred under S. 10 (S. 12 Old Code); (1900) 7 C.W.N. 720; (2) that the suit was not barred under S. 11 (S. 13, Old Code), as *A* could not join claims for rent and mesne profits in the previous suit. (1906) 8 C.L.J. 303.

——S. 10—Appeal in first suit pending—Stay of second suit—Disputes to be identical.

To attract S. 10, C. P. Code, every matter in dispute should be directly and substantially in issue in the two suits. A suit for arrears of pension for a subsequent period was not stayed pending a Privy Council appeal between the parties against the decision in a former suit for pension for an earlier period. 4 Pat. L.J. 557=(1919) Pat. 284=51 Ind. Cas. 36.

——S. 10—Appeal — Pendency of—Second suit, when may be stayed.

Section 10 is no bar to the trial of a suit for rent for a period between the present and previously instituted rent suits. The expression "matter in issue" in S. 10 refers to the entire subject in controversy between the parties. S. 10 prevents Courts of concurrent jurisidction simultaneously trying two similar suits in respect of the same matter in issue. Appellate stage of a suit is for many purposes deemed only a continuation of the suit below. 24 C.L.J. 514=36 Ind. Cas. 641.

——S. 10—Parallel suits—Result in subsequent suit may be affected by decision in previlous suit—Not sufficient.

The fact that the result in the subsequent suit, will be largely affected by the decision in the previous suit, still pending, is not sufficient for the application of S. 10, C. P. C. 6 O.L.J. 96=50 Ind. Cas. 272.

——S. 10—Burden of Proof.

The onus is on the defendant to produce such documents as will satisfy the Court that the case comes under S. 10 C. P. Code. 3 Pat. L.W. 327=39 Ind. Cas. 908.

——S. 10—Suit at B on partnership accounts—Defendant evading service and appearing only after publication in local newspaper—Meantime defendant obtaining ex parte decree in Small Cause Court at another place—Ex parte decree, if operates as bar to a suit at B.

A suit was filed at *B* for partnership accounts and summonses were ordered to issue for December 20.

On that date they were returned unserved and an order for a special process-server was passed. On the next hearing of February 17, 1933, the summonses were not returned, and then apparently a notice or summons was published in the "Kesari" of Poona and the applicants appeared by a Pleader at the next hearing on March 22. In the meantime the defendants who had filed their suit at Poona on November 30, 1932, obtained an *ex parte* decree on January 23, 1933, after a summons which had been issued by registered post to the non-applicants had been returned served. The defendants were evading service, and they only appeared after a notice was published in the local paper:

Held, that the decree in the Poona Court did not operate as *res judicata* in the previously filed suit which was pending in the Court at *B*. A.I.R. (Vol. 21) 1934 Nag. 178=153 Ind. Cas. 29.

——S. 10—Mortgage suit by insolvent's mortgagee —Application by receiver under S. 53, Provincial Insolvency Act, respecting the mortgage—Proper course is to stay mortgage suit.

The proper course, in cases where a civil suit is pending on a mortgage and where the Official Receiver applies to the Insolvency Court for a declaration that the mortgage is bad under S. 53, of the Provincial Insolvency Act would be to have the proceedings in the suit stayed till the disposal of the application by the Insolvency Court. It would save time and trouble if the proceedings in the civil suit are stayed pending the disposal of the application under S. 53. The order of the Insolvency Court under S. 53 would be binding upon the parties; and the ordinary Civil Court would therefore not be able to execute the mortgage decree passed by it. The application must be made either to the Court in which the civil suit is pending or to a Court which has power to stay the proceedings in that suit. But there is no warrant either in law or in practice for the contention that the presentation of an application to the Insolvency Court for an order under S. 53 takes away the jurisdiction of the Civil Court to proceed with the suit of a secured creditor. It does not follow that because a transaction is void under S. 53, therefore, the mortgagee has no remedy against the mortgagor. The transaction under S. 53 is only voidable and not void. The jurisdiction to set aside a transaction which is good against the mortgagor, but not good against the general body of creditors, is an exclusive jurisdiction of the Insolvency Court. But that does not take away the jurisdiction of the Civil Court to proceed with the mortgagee's suit. A mortgage which is voidable under S. 53 is only voidable to the extent to which the property transferred is necessary to satisfy the creditors of the insolvent. 48 Mad. 750=88 Ind. Cas. 934=1925 M.W.N. 672=A.I.R. 1925 Mad. 1051=49 M.L.J. 203.

——S. 10 (S. 12, Old Code)—Applicability—Suit for cancellation of putni and for mesne profits—Second suit for rent for the same period, maintainability of.

Plaintiff in the first instance sued the defendant for the cancellation of the *putni* lease which the latter held under him and for mesne profits. He also brought a second suit against the defendant to recover arrears of rent for the same period. *Held* that S. 10 (S. 12, Old Code), was no bar to the maintainability of the second suit and that plaintiff could simultaneously prosecute the two suits. The decree of the second suit was not, however, allowed to be executed till the first suit was finally decided in appeal. (1898) 7 C.W.N. 720.

——S. 10 (S. 12, Old Code)—Applicability—Suit by plaintiff in Small Cause Court on pro-note—Suit by defendant on running account in High Court—Pro-note not an item in running account.

Suit in Small Cause Court stayed as matter of convenience. Where a certain person instituted a suit on a pronote in the Small Cause Court and the defendant therein afterwards filed a suit for accounts in the High Court as against the plaintiff in the Small Cause Court and applied to the High Court for a stay of proceedings in the Small Cause Court:—*Held*, that, though not as a matter of right, but still as a matter of convenience a stay may be granted, on the applicant furnishing security in respect of the total amount of the indebtedness irrespective of the question whether the suit for the accounts is vexatious or not, it being competent to the court to deal with such matter finally in the apportionment of costs, even where the pro-note sued upon *prima facie* does not appear to be an item in the running accounts. (1903) 30 C. 627.

——S. 10—Conflict of jurisdiction.

Two points appear to be usual on considering whether the Court should have regard and defer to a jurisdiction with which it may come in conflict or whether the Court can fairly expect that other jurisdiction to defer to it. One is the priority in time and the other is the extent of the relief asked for or obtainable in the other jurisdiction. It is for the Court to say that the action is a collusive action and to recall the order made by it for the appointment of a receiver. It is of the utmost importance that where concurrent proceedings for similar relief are taken in two different and independent Courts, no order should be passed which may lead to friction or conflict of jurisdiction. No other Court of co-ordinate jurisdiction or independent jurisdiction can treat it as of no effect in an interlocutory proceedings. 3 Pat. 357=78 Ind. Cas. 620=5 P.L.T. 243=1924 P.H.C.C. 54=A.I.R. 1924 Pat. 491.

——S. 10—Filing of suit in one Court and subsequent application in another Court—Stay of application till suit is decided.

It is hardly open to a party to blow hot and cold and ask the Court not to inquire into an application filed by such party until a previous suit in respect of the same subject-matter filed by him is decided by another Court. A.I.R. (Vol. 21) 1934 Sind 38=149 Ind. Cas. 1169.

5. Distinction between Ss. 10 and 11.

——Ss. 10 and 11—Whilst S. 10 bars only a suit, S. 11 bars the trial of both the suit and of issue involved in that suit. 4 Luck. 573=114 Ind. Cas. 775=7 O.W.N. 157=A.I.R. 1929 Oudh 341.

6. Interlocutory orders after stay.

——S. 10—Stay of suit—Does not prevent passing of interlocutory orders.

An order staying a suit under S. 10 does not prevent a Court from making interlocutory orders, such as orders for a receiver or an injunction or an order for attachment before judgment. 46 Bom. 481 =23 Bom. L.R. 1228=64 Ind. Cas. 580=A.I.R. 1922 Bom. 276.

——S. 10—Date of appearance after stay—The Court has no jurisdiction to fix a further date for appearance unless moved.

Once a Court has made an order under S. 10 staying the proceedings in a suit, it has no jurisdiction to fix further dates for the hearing of the suit unless moved to do so by either party. 112 Ind. Cas. 324=A.I.R. 1928 Lah. 751.

7. Jurisdiction to stay.

——S. 10—Jurisdiction of original and appellate Courts.

Although an Appellate Court has jurisdiction to grant stay order, it is desirable that in the first place an application to this effect should be preferred in the original Court. A.I.R. (Vol. 28) 1941 All. 27=1940 A.L.J. 611=I.L.R. (1940) All. 737=192 Ind. Cas. 543.

——S. 10—Jurisdiction of High Court — High Court (Original Side), when can issue injunction on non-resident defendant.

There is nothing in law to prevent a Court on the original side of a Chartered High Court from granting an injunction to restrain a defendant (though not residing there) from proceeding with a suit in another Court, provided it was shown on the face of the plaint that the High Court had jurisdiction to entertain the suit. A.I.R. (Vol. 30) 1943 Bom. 206=45 Bom. L.R. 396=I.L.R. (1943) Bom. 286 =209 Ind. Cas. 12.

——S. 10—Stay of suit filed on original side of High Court pending decision in previous suit filed in mofussil—Application to be made on original side.

The proper and convenient procedure to stay a suit which has been instituted on the original side of the High Court until the decision of a previously instituted suit in the *mofussil* Court, is to apply under S. 10, Civil P. C., on the original side of the High Court to the Judge trying the suit and not on the appellate side.

The Judge on the original side can if necessary, restrain the parties from proceeding with the suit in the *mofussil* Court. If the Judge declines to make an order under S. 10 an appeal would then lie to an Appellate Bench. A.I.R. (Vol. 28) 1941 Bom. 160=43 Bom. L.R. 236=I.L.R. (1941) Bom. 325 =194 Ind. Cas. 510.

——S. 10—Jurisdiction of High Court—Ordering party not to proceed with a suit in another Court.

The High Court on its original side has power to issue an injunction restraining defendant in a suit before the High Court from proceeding with a suit instituted by him in a moffusal Court in such a way as to delay or embarrass the trial of the suit in the High Court. 21 Bom. L.R. 963=53 Ind. Cas. 518.

——S. 10 (S. 12, Old Code)—Scope—Suit in High Court and suit in Presidency Small Cause suit—Power of High Court to restrain suit in Presidency Small Cause Court.

The High Court has power to restrain a suit in the Small Cause Court instituted by the defendant in the High Court suit for a sum which the plaintiff himself has admitted in his plaint as being due to the defendant from him. (1905) 9 C.W.N. 748.

——S. 10 (S. 12, Old Code)—Power to stay proceedings—Two suits in two Courts—Each subject to the control of different High Courts. See C. P. Code, S. 2. 35 C. 341.

——S. 10—(As amended by Government of Burma Adaptation of Laws Order, 1937)—British Burma Courts, if can stay suits before them owing to pendency of suits in Courts in British India founded on same cause of action—Amended section, if has retrospective effect.

After April 1, 1937, the Courts in British Burma ceased to have power to stay suits in British Burma by reason of the pendency of suits founded on the same cause of action in British India, owing to S. 10, Civil P. C., as amended by Adaptation of Laws Order, 1937. The amended section has a retrospective effect as it makes an alteration in the form of procedure.

Where a suit is instituted in a Court in British India in 1934, and a subsequent suit involving directly and substantially the same issues as in the first, is instituted in the Court in British Burma before April 1, 1937, the Court in British Burma has no power under S. 10, Civil P. C., as amended, to stay the suit after April 1, 1937, pending the decision of the suit filed previously in the Court in British India as such Court is a foreign Court under S. 2 (5), as amended, and the British Burma Court is not precluded from proceeding with a suit founded on the same cause of action. A.I.R. (Vol. 25) 1938 Rang. 130=1938 Rang. L.R. 176=175 Ind. Cas. 275 (F.B.).

——S. 10—Power to stay suit in foreign court—Whether subordinate Court in British India cannot stay by injunction.

It is doubtful whether a subordinate Court in British India has power to restrain by injunction a party from prosecuting a suit in a foreign Court (though within the British Empire). The Chartered High Courts have such power, not by reason of O. 39, Rr. 1 and 2, C. P. Code but by reason of the equity jurisdiction they inherited from the old Supreme Courts. 27 M.L.W. 418=109 Ind. Cas. 281=A.I.R. 1928 Mad. 491.

——S. 10—Defendant filing a suit in a Native State—Plaintiff filing his suit in British India Court regarding the same subject-matter—Defendant submitting to the jurisdiction of British India Court—High Court has jurisdiction to restrain defendant from proceeding with his suit.

Where defendant filed a suit in the Hyderabad State, being a resident of that State, against the plaintiff and subsequently the plaintiff filed another suit against the defendant in the Bombay High Court, the subject-matter of the suit being the same as that in the

defendant's suit and the defendant entered appearance in the plaintiff's suit without protest and also made a counter-claim.

Held, that Bombay High Court would have jurisdiction in the plaintiff's suit to pass an order restraining the defendant from proceeding with his suit in the Hyderabad Courts. But the jurisdiction to stay suits is one of a delicate character and it requires to be exercised with caution. 29 Bom.L.R. 138=100 Ind. Cas. 951=A.I.R. 1927 Bom. 135.

8. Mandatory nature of section.

——S. 10—Provisions are mandatory.

The provisions contained in S. 10 are mandatory in character and when facts of a particular case invoke the operation of that section the Courts have no other alternative but to give effect to it and stay the suit. A.I.R. (Vol. 27) 1940 Mad. 7=(1939) 2 M.L.J. 290=1939 M.W.N. 793=50 L.W. 334. *See also* A.I.R. 1942 Bom. 314=44 Bom.L.R. 699 =203 Ind. Cas. 359.

——S. 10—The provisions of S. 10, C. P. Code, are mandatory. A.I.R. (Vol. 20) 1933 Sind 117 =144 Ind. Cas. 56.

——S. 10—Both parties instituting suit against each other in different Courts—Grounds same—Suit filed later should stop.

Where two parties have filed suits against each other covering the same grounds in two different Courts, one of the two Courts should stay its hand, so as to avoid a conflict of decisions on the same points which are involved in the two suits and on which the liability of one party to the other depends. The suit which is really the first suit should proceed and the other suit should be stayed. A.I.R. (Vol. 22) 1935 Sind 225=159 Ind. Cas. 933.

——S. 10—Where two suits contain same issues later suit cannot be proceeded with. 16 M.L.W. 607=70 Ind. Cas. 5=A.I.R. 1923 Mad. 88.

——S. 10—Duty of Court to stay trial—Inquiry into merits.

Under S. 10 a Court has no jurisdiction to decide the question of *res judicata*. The only jurisdiction is to stop the new suit if it finds circumstances warranting such procedure. 42 Cal. 926=27 Ind. Cas. 917.

——S. 10—Court's power to stay suit at any stage.

In a proper case the Court has power to stay a suit, generally at any stage at which it seems expedient to do so. A.I.R. (Vol. 22) 1935 Cal. 1= 61 Cal. 670=38 C.W.N. 818=154 Ind. Cas. 645.

9. "Matter in issue"—Meaning of.

——S. 10—"Matter in issue"—Meaning of.

The words "matter in issue" in S. 10, C. P. Code, mean "the entire matter in controversy" and not merely one of several issues in the suit. A Court has, therefore, no power under this section to stay a suit on account of some of the issues which it involves being also issues in another pending suit. Pak. L.R. (1948) Lah. 79=A.I.R. 1949 Lah. 69.

——S. 10—"Matter in issue".

Section 10, Civil P. C., only applies and forbids the Court from proceeding with the trial of any suit where the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties. The expression 'matter in issue' in S. 10 has reference to the entire subject in controversy between the parties. A.I.R. (Vol. 28) 1941 Cal. 434=I.L.R. (1941) 1 Cal. 373=196 Ind. Cas. 415.

——S. 10—"Matter in issue"—Rent suit.

The expression "the matter in issue" as used in S. 10 does not mean any matter in issue. The matter in issue in a previously instituted suit refers to entire subject-matter in dispute, not to one of the issues however important it may be for the decision of the suit.

Where the amount claimed as rent in the former suit was for a different period from the amount claimed in the later suit and there was no evidence whether the area of land in both the suits was the same:

Held, that the matter in issue in both the suits was not the same and therefore S. 10 did not apply. A.I.R. (Vol. 27) 1940 Mad. 7=(1939) 2 M.L.J. 290=1939 M.W.N. 793=50 L.W. 334.

——S. 10—'Matter in issue'—Suit for rent.

The expression 'matter in issue' in S. 10, Civil Procedure Code, has reference to the entire subject-matter in controversy between the parties and is not equivalent to 'any of the questions in issue.' The section does not bar the trial of a suit for rent for a period subsequent to that included in the previously instituted suit for rent although the same question may be involved in the two suits. A.I.R. (Vol. 25) 1938 Lah. 502=178 Ind. Cas. 821.

——S. 10—"Matter in issue".

The words "matter in issue," in S. 10, Civil Procedure Code, cannot be held necessarily to mean the subject-matter in dispute. They must clearly mean the entire matter in controversy and not one of several issues in the case. Consequently, where the entire matter is not directly and substantially in issue in the previously filed suits but it can be disposed of on one of the points raised in the subsequent suit, S. 10, Civil P. C., does not apply. A.I.R. (Vol. 22) 1935 Lah. 816=160 Ind. Cas. 805.

——S. 10—In order that a suit may be stayed under S. 10, Civil P.C., pending the decision of a previously instituted suit in another Court, it is not sufficient that there should be one matter in issue in common in both the suits. The entire matter in issue in the subsequent suit must be in issue in the previous suit. A.I.R. (Vol. 22) 1935 Mad. 112=1935 M.W.N. 123 =39 L.W. 449=155 Ind. Cas. 1002.

——S. 10—Matter in issue—Identical—Different reliefs asked for.

The balance of authority in Madras is in favour of the view that "the matter in issue" in S. 10, Civil P. C., denotes the entire subject in controversy and consequently a suit cannot be stayed under S. 10 pending the decision of another suit in a different Court if in one of the suits there are issues which do not arise in the other suit, though there are also common issues.

The omission in the Code of 1908 of the words

"for the same relief" which were found in the Code of 1882, though it widens the application of the section, still only renders it applicable to two suits of which the matter in issue is identical although the reliefs asked for may differ. A.I.R. (Vol. 22) 1935 Mad. 24=1934 M.W.N. 1380=40 L.W. 715=67 M.L.J. 748=153 Ind. Cas. 769.

——S. 10—"Matter in suit" means entire matter in controversy.

Unless the subject-matter in two suits is identical and the reliefs are also the same, S. 10 is inapplicable. The mere fact that one issue is common in two suits would not necessitate the stay of subsequent suit. The words "matter in suit" mean the entire matter in controversy and not one of the several issues in the case. S. 10 is limited in its scope. 51 All. 1017=1930 A.L.J. 284=A.I.R. 1929 All. 805.

——S. 10—"Matter in issue" means entire subject in controversy and not main question involved.

"Matter in issue" should not be construed as meaning the main question involved in the suit. The real intention of the Legislature in framing S. 10 was merely to prevent later suits relating to the same subject-matter being tried before an earlier suit relating to the same subject-matter is tried and disposed of. The expression "matter in issue" has reference to the entire subject in controversy between the parties. 88 Ind. Cas. 421=A.I.R. 1925 Mad. 574=48 M.L.J. 251.

——S. 10—Common issue—Different subject-matter—Former suit relates to declaration of title with regard to certain properties—Later suit for profits in regard to one of those properties.

In order to attract the provisions of S. 10 it is not enough that the same issue should be involved in the two suits but it is also necessary that the entire subject-matter of the two suits should be the same. So where the former suit is a suit relating to the declaration of title in regard to certain properties and the latter is a suit for profits in regard to a portion of these properties S. 10 will have no application. 24 C.L.J. 514; A.I.R. 1923 Cal. 716; 4 P.L.J. 557; A.I.R. 1925 Mad. 574; 6 O.L.J. 96 and 82 Ind. Cas. 539, followed. 4 Luck. 573=114 Ind. Cas. 775=7 O.W.N. 157=A.I.R. 1929 Oudh 341.

——S. 10—Common issue—Suits not embracing entire subject in controversy.

Where a suit was brought for the recovery of mesne profits which had accrued subsequently to the institution of a prior suit relating to the same property, and although there was one issue common to both the suits, yet they did not embrace the entire subject in controversy between the parties, the subsequent suit for mesne profits does not attract the operation of S. 10. 6 Rang. 775=115 Ind. Cas. 665=A.I.R. 1929 Rang. 67.

——S. 10—Identity of one or more issues—Mortgagee's suit for personal decree—Mortgagee's suit in another Court for declaration and injunction against mortgagee's selling mortgaged property.

Under S. 10 it is necessary that the matters directly and substantially in issue in the one suit should also be directly and substantially in issue in the other suit. Identity of reliefs is not necessary. But the mere identity of one or more issues, apart from their importance and bearing does not suffice. The object of the section is to avoid a conflict of judicial decisions. The cause of action as disclosed in the pleadings, the matter directly and substantially in issue, and the relief claimed, are three connected parts of the same legal structure and must be viewed both singly and as a whole. A suit for a personal decree against the mortgagor by mortgagee and another suit in another Court by mortgagor for a declaration and injunction against the mortgagee's right of possession or of sale and for damages do not come within the provision of S. 10. 29 Bom. L.R. 382=102 Ind. Cas. 229=A.I.R. 1927 Bom. 245.

——S. 10—Two suits having only one issue in common.

Section 10 is applicable to two suits of which the matter in issue is identical, although the reliefs asked for may differ. It does not apply to two suits merely because they have one issue in common. A.I.R. 1922 Mad. 304 and A.I.R. 1925 Mad. 574, followed. 26 M.L.W. 241=103 Ind. Cas. 274=A.I.R. 1927 Mad. 1132.

——S. 10—Some issues only common to two suits does not apply.

Where some of the issues alone are common to two suits between the same parties, S. 10 does not apply and there can be no stay of the subsequently filed suit. The terms, "the matter in issue" in S. 10, Civil Procedure Code, has reference to the entire subject in controversy between the parties. 24 C.L.J. 514, followed. 15 M.L.W. 646=70 Ind. Cas. 682=31 M.L.T. 360=A.I.R. 1922 Mad. 304.

——S. 10—Different subject-matter.

Where the plaintiff applied to the District Munsif to stay the trial of the suit which was ready for judgment on the ground that the Munsif was not competent to try the case because the very matter was the subject-matter of an appeal in the District Court but it was found that the suit in the Munsif's Court was for the recovery of certain sums of money as having been received by the defendant which ought to be paid to him and the main issue in the suit which was under appeal was whether there was a partnership or not,

Held, that the subject-matter being different, the suit need not be stayed. 106 Ind. Cas. 661=A.I.R. 1927 Mad. 1199.

10. Orders under section.

(a) Appeal.
(b) Revision.

10 (a). Appeal.

——S. 10—Order refusing stay—Letters Patent (Cal.), Cl. 15.

An order refusing to stay a suit to which the provisions of S. 10 apply, is a judgment within Cl. 15 of the Letters Patent and is appealable. A.I.R. (Vol. 22) 1935 Cal. 1=61 Cal. 670=38 C.W.N. 818=154 Ind. Cas. 645.

——S. 10—Order staying suit—Letters Patent (Rang.) Cl. 13.

An order under S. 10, Civil P. C., staying the hearing of a suit pending the determination of an

appeal to the Privy Council in a former suit between the same parties is not a "judgment" within Cl. 13 of Letters Patent (Rang.) since the order does not finally decide the rights of the parties nor does it put an end to the suit. A.I.R. (Vol. 22) 1935 Rang. 73 (1)=154 Ind. Cas. 774.

——S. 10—Appeal—Letters Patent (Bombay), Cl. 15.

A decision under S. 10. Civil P.C., either to allow or to refuse a stay is one that really determines the right of the plaintiff to sue and is a 'judgment' within Cl. 15 of the Letters Patent and is appealable under Cl. 17. A.I.R. (Vol. 20) 1933 Bom. 85=35 Bom.L.R. 15=57 Bom. 364=143 Ind. Cas. 806.

10 (b). Revision.

——Ss. 10 and 151—Refusing stay—Revision.

The defendant *B* did not object to the valuation put by plaintiff *A* of the suit at Rs. 300 but later on when apparently he thought that he had not raised a defence which might have been of benefit to him he approached another Court over the same subject-matter, put a valuation of Rs. 1,200 and virtually created a situation in which conflicting decisions may be given by two different Courts. The Court in which the subsequent suit was filed by *B*, refused to stay it under S. 10, Civil P. C., pending the previous suit on the ground that the Court in which the suit was previously instituted by *A* had no pecuniary jurisdiction to try it:

Held, that the order of the Court under S. 10 refusing to stay subsequent suit was an interlocutory one and it could not be subject of revision. The powers conferred by S. 151, Civil P.C., should not be exercised lightly but the case was eminently one in which they should be exercised in order to avoid "an idle multiplicity of suit" by ordering the subsequent suit to be stayed pending the decision of the previous suit. A.I.R. (Vol. 28) 1941 Pesh. 34=194 Ind. Cas. 268.

——Ss. 10 and 115—No revision lies against the stay of further proceedings. (1939) 41 P.L.R. 55.

——Ss. 10 and 115—Order refusing stay—Revision.

No revision is maintainable against an order of a Judge under S. 10, Civil P.C., refusing to stay proceedings and directing a suit to proceed. A.I.R. (Vol. 26) 1939 Sind 291=185 Ind. Cas. 765.

——S. 10—Refusal to say proceedings under S. 10—No revision lies. A.I.R. (Vol. 23) 1936 Lah. 569=165 Ind. Cas. 131.

——Ss. 10 and 115—Dismissal of an application under S. 10—Whether open to revision—Question of jurisdiction under S. 10, one of the issues in case—Decision that there is jurisdiction—Revision, competency of.

An application under S. 10. Civil P. C., for the stay of a suit if dismissed does not amount to a case decided so as to be open to revision under S. 115, Civil P.C.

Where one of the pleas taken by the defendant was that the Court had no jurisdiction to entertain the suit under S. 10, Civil P.C., and where an issue on that point was framed and decided against the defendant:

Held, that no revision lay, inasmuch as the order of the Court below was a mere finding on one out of several issues arising in a suit which was still pending and was not an order by which a case between the parties had been decided. A.I.R. (Vol. 21) 1934 All. 520=1934 A.L.J. 702=149 Ind. Cas. 176.

——S. 10—Government of India Act, 1915, S. 107.

The High Court may in a proper case revise under S. 107 of the Government of India Act, an order of a Subordinate Court staying a suit pending the decision of another suit or appeal. A.I.R. (Vol. 20) 1933 Lah. 605=34 P.L.R. 123=141 Ind. Cas. 186.

——S. 10—Revision—When stay not granted.

Order rejecting application for stay of suit is interlocutory order and is therefore not subject to revision—Court can, however, interfere under C. P. Code, S. 151 or Government of India, S. 107 or Punjab Courts Act, S. 44. A.I.R. 1922 Lah. 54; A.I.R. 1924 Lah. 567 and A.I.R. 1923 Lah. 615, followed; A.I.R. 1925 Lah. 144, not followed. 31 P.L.R. 174=A.I.R. 1930 Lah. 525.

——S. 10—Refusal to stay suit—No revision lies C. P. Code, S. 115.

No revision lies against an order refusing to stay a suit under S. 10 of the Civil Procedure Code, there being no case decided within S. 115. 75 Ind. Cas. 101=A.I.R. 1924 Lah. 567.

——S. 10—Order staying suit is not revisable.

Where the Lower Court wrongly passed an order staying a suit under S. 10 of the C. P. Code, the High Court refused to revise the order but pointed out to the Lower Court the desirability of revising its order on proper application. 33 P.W.R. 1922=69 Ind. Cas. 111=A.I.R. 1923 Lah. 69.

——Ss. 10 and 115—An order refusing to stay proceedings in a suit pending an appeal in another Court may be looked upon as a case within S. 115, Civil, P. C., and revised by the High Court under that section. In such a case, the question is independent of the matters which must necessarily be decided in the course of the suit. A.I.R. (Vol. 20) 1933 Lah. 50=144 Ind. Cas. 107.

——S. 10—Revision against order.

An order, the effect of which is to refuse to exercise a jurisdiction vested in the Court under S. 10, is open to revision. 3 Luck. 650=5 O.W.N. 604=111 Ind. Cas. 161=A.I.R. 1928 Oudh 355 (F.B.).

——S. 10—Refusal to stay—Revision.

High Court can set aside an order refusing to stay suit under S. 10 pending the final decision of a suit previously instituted for the same subject-matter and between the same parties. 82 Ind. Cas. 234=A.I.R. 1925 Lah. 144 (2).

——S. 10—Order resuming proceedings is "a case decided" within C. P. Code, S. 115.

An order by which proceedings are resumed in a suit which had been stayed under S. 10 is a "case decided" within the meaning of S. 115. 3 Luck. 650=5 O.W.N. 604=111 Ind. Cas. 161=A.I.R. 1928 Oudh 355 (F.B.).

11. "Pendency" of suit or appeal.

——S. 10—Suits for redemption of same mortgage —Decree passed in earlier suit but not executed—If deemed to be pending.

Where a suit for redemption has been instituted and a decree for redemption has been passed therein but not executed, a subsequent suit is not maintainable for the redemption of the same mortgage. S. 10 would be better applicable as the former suit cannot be deemed to have been taken to a conclusion and must be deemed to be still pending. 25 Mad. 300 and 39 Mad. 896, Foll.; 43 Bom. 334, Diss. 28 O.C. 212 =87 Ind. Cas. 290=A.I.R. 1925 Oudh 696.

——S. 10 and O. 23, R. 1—Suit withdrawn with liberty on payment of costs—Fresh suit filed without payment of costs—Former suit, if still pending.

When leave is given to withdraw on payment of costs, they should be paid at once, for until they are paid there is not withdrawal.

A suit was allowed to be withdrawn by the plaintiff with liberty to bring a fresh suit on condition of paying costs to the defendants. A subsequent suit having been brought without paying the said costs of the defendants, the Munsiff held that the suit was barred for non-payment of costs and dismissed the suit:

Held, that the Munsiff was not entitled to dismiss the suit and all that he could do was to regard section 10 as a bar to his proceeding with the trial of the suit inasmuch as the permission was not operative until the costs were paid, and so there was no withdrawal, with liberty to bring a fresh suit, and until there was such withdrawal, the former suit was still pending. 19 C.L.J. 529=23 Ind. Cas. 210.

——S. 10—Applying for or obtaining leave to appeal to His Majesty does not amount to pendency of appeal.

The mere applying for or obtaining leave to appeal to the Privy Council cannot of itself amount to the pendency of an appeal till such appeal is actually filed. 21 Mad. 18, Foll. 6 Rang. 775=115 Ind. Cas. 665=A.I.R. 1929 Rang. 67.

12. Pendency of suit in foreign court.

——S. 10—Suit in respect of property out of British India pending in appeal—Defendant residing in British India—Suit for mesne profits lies in British India but should be stayed till the dispute is subsisting out of British India.

A British Indian Court will not adjudicate on questions relating to the title to, or the right to the possession of, immovable property out of British India. But the Civil Procedure Code does not forbid the institution of a suit for mesne profits even if the decision in the suit involves adjudication regarding the plaintiff's title to immoveable property outside British India, where the decree of the Court for mesne profits can effectively be enforced by the personal obedience of the defendant within the jurisdiction. A. I. R. 1927 Cal. 768, Foll. 23 N.L.R. 170=10 N.L.J. 232=106 Ind. Cas. 7=A.I.R. 1928 Nag. 56.

13. "Previously instituted suit."

——S. 10—Suit when deemed filed—Pauper suit.

For purposes of S. 10, Civil P.C., the plaint in a suit *in forma pauperis* should be deemed to have been filed on the date when the application for leave to sue as a pauper was presented and not on the date when the application was allowed and the suit registered. A.I.R. (Vol. 27) 1940 Oudh 441=1940 O. W. N. 781=1940 O.L.R. 534=16 Luck. 184=190 Ind. Cas. 108.

——S. 10—Suit first instituted in wrong court and subsequently in proper court—Second suit is not continuation of the first.

The provisions of S. 10, C.P.C., are mandatory where a suit was instituted in a Court which has no jurisdiction to try it and it becomes necessary to institute a suit in a Court of competent jurisdiction, the second suit cannot be regarded as a continuation of the first suit although the subject-matter of the two suits is identical.

P filed a suit against *R* at *H* and a counter suit was brought by *R* against *P* at *T*. Pending the decision of the suit at *H* the suit at *T* was stayed. On the Court at *H* holding that it had no jurisdiction *P* presented his plaint at *K*. The court at *K* stayed the suit under S. 10, Civil P.C, on the ground that the matter directly and substantially in issue was similarly in issue in a previously instituted suit.

Held, that the stay order so far as regards the suit at *K* was correct. That the suit at *T* was previously instituted suit. A.I.R. (Vol. 20) 1933 Sind 117=144 Ind. Cas. 56.

——S. 10—Previously instituted suit—Jurisdiction depends on allegation in plaint.

The jurisdiction of the Court trying the previously instituted suit need not depend upon actual facts but upon allegations made in the plaint. 43 Cal. 144= 33 Ind. Cas. 288.

——S. 10—Suit pending in incompetent Court.

S. 10 does not apply where the previously instituted suit is pending in a Court not competent to try it. 157 P.W.R. 1914=283 P.L.R. 1914=26 Ind. Cas. 282.

14. Remedy—When section inapplicable.

——Ss. 10 and 151—Inherent power to stay.

In a case not covered by S. 10, an order for stay may be made under S. 151, C.P.C., if the court considers that it is necessary in the interests of justice and in order to avoid unnecessary harassment to any of the parties. 224 Ind. Cas. 532=A.I.R. 1947 Lah. 28. *See also* Per *Jack, J.*,in A.I.R. 1933 Cal. 887=60 Cal. 1096=148 Ind. Cas. 1195.

——S. 10—S. 10 is not the only section applicable for staying of suits—Courts can order stay of suits under S. 151 to prevent an abuse of Courts and to render effective, orders already passed.

A suit cannot only be stayed under the provisions of S. 10, but even under the inherent powers of the High Court and under the powers of general supervision and superintendence vested in it; a suit in a particular Court can be stayed pending the decision of another suit in different Court. To allow the former suit to proceed on the face of an injunction

issued by the latter Court for staying the proceedings of the former, pending the decision of the latter, would amount to an abuse of the Court and injunction issued by the latter would be rendered ineffective. 10 L.L.J. 470=113 Ind. Cas. 783=A.I.R. 1929 Lah. 12.

——S. 10—Court can stay suit under its inherent powers even where it does not come within the provision of S. 10.

The inherent powers of the Court are not to be deemed to be limited or otherwise affected by the express provisions of the Code and so even where a suit cannot be stayed under the terms of S. 10, it can be so stayed by the Court if it is necessary to do so to do justice between the parties. 33 Cal. 927, Foll. 4 Luck. 573=114 Ind. Cas. 775=7 O.W.N. 157=A.I.R. 1929 Oudh 341.

——S. 10—Applicability—Suit for recovery of profits—Appeal before Privy Council between the parties relating to question of title—Stay of suit—Inherent power of Court.

In order to attract the provisions of S. 10, C. P. Code, it is necessary that the entire subject-matter of the two suits should be the same and further that the two courts must be courts of concurrent jurisdiction. Where a suit before the Assistant Collector under S. 108 (16) of the Oudh Rent Act for recovery of profits was sought to be stayed because of an appeal pending before the Privy Council as between the parties relating to the question of title of properties including the suit items, *held*, that S. 10 was not applicable.

Held, however, that the court might stay the suit under S. 151, C. P. Code. 7 O.W.N. 386=14 R.D. 171=123 Ind. Cas. 50.

——S. 10—Suit for possession by vendee—Want of title in vendor pleaded—Suit dismissed—Appeal pending—Vendee filing suit against vendor for recovery of money—Vendor praying for stay of suit till disposal of appeal—S. 10 held inapplicable—But Court has power to safeguard interest of vendor by reserving judgment under C. P. Code, S. 151.

A instituted a suit for possession of property which he alleged he had purchased from one of the defendants by means of a sale deed. The plea of the defendants was that the vendor had no title to sell the land and that this fact was known to *A*. *A*'s suit was dismissed, over which he appealed. While the appeal was pending he filed a suit against his vendor for return of the money paid by him for the purchase of the property. The vendor applied to the trial Court to stay the suit still the decision of the appeal but the trial Court declined to stay the suit.

Held, that S. 10 did not apply to the circumstances of this case, therefore the order of the trial Court under the circumstances was correct.

Held, further, that it was necessary to safeguard the interest of the vendor which could be done under S. 151 by trying the suit but refraining from pronouncing the judgment till the appeal was disposed of. A.I.R. 1930 Lah. 527.

——S. 10—Relief under, available—Duty of party to apply under section.

A Court will not grant to a plaintiff an injunction restraining the defendant from prosecuting his suit in another court, if the plaintiff can apply under S. 10, C. P. Code to the other court for a stay of the defendant's suit. Where the Legislature, in S. 10, has provided a procedure to obtain relief, that procedure must be followed. 49 C.W.N. 58.

15. Scope of section.

——S. 10—Scope of.

If two Courts have concurrent jurisdiction, the institution of proceedings by one party in one Court cannot in law prevent the other party from taking proceedings with respect to the same subject-matter in the other Court, and all that can be done in such a case is to stay proceedings in one of the Courts on the principle of S. 10, Civil P. C., in order to avoid multiplicity of litigation. A.I.R. (Vol. 22) 1935 Lah. 76=157 Ind. Cas. 796.

——S. 10—Does not bar suit nor justifies dismissal.

A suit cannot be said to be premature under S. 10 if there is a valid cause for it. S. 10 does not bar a suit nor can a Court dismiss a suit under the section. 77 Ind. Cas. 157=A.I.R. 1925 Pat. 201.

——S. 10—Scope of.

S. 10 bars only the trial of suits and in this there is no difference between the old and new Codes. 27 M.L.J. 405=(1914) M.W.N. 740=25 Ind. Cas. 597.

——S. 10—Trial in contravention of—Not a nullity.

A decree passed contrary to the provisions of S. 10 is not a nullity and cannot be disregarded in executing proceedings. 22 P.R. 1919=42 P.L.R. 1918=93 P.W.R. 1918=46 Ind. Cas. 419.

16. Suit instituted pending appeal in first suit—Procedure.

——S. 10—Suit instituted pending appeal in first suit—Procedure to be followed.

Where an appeal lies, the finality of the decree, on such appeal being taken, is qualified by the appeal and the decree is not final in the sense that it will form *res judicata* as between the same parties. Therefore, where pending an appeal, a suit is instituted on the same cause of action and between the same parties, the proper course for the Court of the second action is to adjourn the action pending the decision of the appeal in the first action. A.I.R. (Vol. 18) 1931 P.C. 263=1931 A.L.J. 833=61 M.L.J. 420=34 L.W. 565=36 C.W.N. 1=134 Ind. Cas. 331 (P.C.).

——S. 10—Same matter involved in appeal—Proper procedure.

Application for stay of a subsequent suit because a previous suit in its appellate stage is pending is made on the principle of S. 10, Civil P. C. The proper procedure in such cases is to make an application in the trial Court, failing which the applicant may move the High Court by a substantive application for stay. A.I.R. (Vol. 18) 1931 Cal. 779=53 C.L.J. 619=133 Ind. Cas. 222 (1).

——Ss. 10, 151—Suit for possession by purchaser—Sale held invalid—Appeal—Second suit against seller for return of purchase-money—Application for stay of second suit pending appeal—Procedure to be followed.

The plaintiff instituted a suit for possession of property which he alleged he had purchased from one of the defendants by means of a sale-deed. The plea of the defendants was that the vendor had no title to sell the land. The suit was dismissed and the plaintiff appealed to the High Court. In the meantime he filed a suit against his vendor for return of the money paid by him for the purchase of the property. The defendant applied for stay of the suit till the decision of the appeal by the High Court:

Held, (1) that though S. 10, Civil P. C., was not applicable to the case, it was necessary to safeguard the interests of the defendant in case the suit was decreed against him and the appeal was subsequently accepted by the High Court;

(2) that under the circumstances the proper procedure was to make an order under S. 151, Civil P. C., that the Court might proceed with the trial of the second suit but should not pronounce judgment on the merits till the decision of the appeal. A.I.R. (Vol. 17) 1930 Lah. 527=131 Ind. Cas. 97.

——S. 10 and O. 41, R. 32—Appeal—Previously instituted suit pending—Subsequent suit to be stayed.

When an appeal has been preferred from a decree in a previous suit, the Court shall stay proceedings in a subsequent suit dealing with the same subject-matter till the appeal is decided. 18 M.L.T. 400=(1915) M.W.N. 844=30 Ind. Cas. 753 (1).

——S. 10—Stay of suit pending decision of appeal.

A suit on same cause of action was stayed pending decision of appeal on the ground of balance of convenience. A.I.R. 1931 Lah. 65.

——S. 10—Same matter in issue in suit in another Court and appeal in High Court between same parties—High Court can order stay.

In a suit where the matter in issue is also in issue in an appeal pending in High Court through previous suit between the same parties. High Court is competent to order stay of suit under S. 10. 96 Ind. Cas. 958=A.I.R. 1926 Lah. 692.

——S. 11.

See also CIVIL PROCEDURE CODE, S. 10 AND O. 11, R. 2.

1. **Adverse finding.**
(a) **When Res judicata.**
(b) **When not Res judicata.**
(c) **Evidentiary Value.**
2. **Applicability and Scope.**
3. **Cause of Action.**

See also CIVIL PROCEDURE CODE, S. 11—MIGHT AND OUGHT.

4. **Co-defendants.**
5. **Competent Court.**
6. **Compromise and consent decree.**
7. **Connected or cross suits and appeals.**
8-A. **Co-plaintiffs.**
8-B. **Co-respondents.**
9. **Directly and substantially in issue.**

See also CIVIL PROCEDURE CODE, S. 11—HEARD AND FINALLY DECIDED.

10. **Execution proceedings.**
11. **Fraud and collusion.**
12. **Heard and finally decided.**

See also (1) C. P. CODE, S. 11—EXECUTION PROCEEDINGS.

(2) C. P. CODE, S. 11—DIRECTLY AND SUBSTANTIALLY IN ISSUE.

13. **Issue of fact or law.**
14. **Judgments in personam and in rem.**
15. **Litigating under the same title.**

See also C. P. CODE, S. 11—PARTIES AND REPRESENTATIVES.

16. **Might and Ought.**
17. **Minor.**
18. **Miscellaneous Proceedings.**
19. **Parties and Representatives.**

See also C. P. CODE, S. 11—
(1) LITIGATING UNDER THE SAME TITLE.
(2) MINOR.

20. **Plea of.**
21. **Prior Decision.**
22. **Proforma defendant.**
23. **Res Judicata and Estoppel—Distinction.**
24. **Representative suit.**

See also C. P. CODE, S. 11—PARTIES AND REPRESENTATIVES.

25. **Withdrawal of suits.**

1. **Adverse Finding—**

1. **(a) When res judicata.**

——S. 11—Finding on unnecessary issue adverse to successful party—Res judicata.

Where a suit is dismissed on one issue, but the finding on another issue is against the defendants, the successful defendants cannot appeal against the finding on that issue. Hence the adverse finding cannot operate as **res judicata** against the defendants in a subsequent suit in respect of the same matter. 26 Pat. 717=A.I.R. 1949 Pat. 197.

——S. 11—Suit dismissed—Adverse finding—When res judicata.

Though a finding on an issue may not be necessary for the disposal of the suit, yet, if a party invites the decision of the Court on that issue and the Court also considers it necessary to go into it and gives a finding thereon, the decision on this issue will constitute **res judicata** in a subsequent suit provided the party against whom there was a finding on that issue would be in a position to carry the matter in appeal.

The plaintiff instituted a suit for ejectment on the basis of title and lease to the defendant; the defendant denied the lease and set up adverse possession

and also pleaded want of notice to quit. The first Court found the issues as to title, genuineness of lease and adverse possession in favour of the plaintiff but dismissed the suit on the ground of want of notice and refused to award costs to the defendants in view of its finding on the main issues. Both sides appealed and the Appellate Court also found the issues in the same way as the trial Court. The plaintiff instituted another suit for possession:

Held that the issues as to title, genuiness of lease and adverse possession were **res judicata** in the subsequent suit even though the plaintiff's earlier suit had been dismissed. A.I.R. (Vol. 24) 1937 Mad. 114 =1936 M.W.N. 1162=45 L.W. 531=168 Ind. Cas. 306.

——**S. 11**—On a suit by the landlord for ejectment of his under-raiyat, it was contended by the defendant that he was a co-sharer. The Courts held the plea to be unavailing, that point having been already decided in a prior suit between them in spite of defendant's contention that the previous suit having been dismissed on the ground that notice had not been served to the defendant that point was undecided.

Held, that even then the question of the status having been already decided in that suit, did operate as **res judicata.** A.I.R. 1929 Cal. 449.

——**S. 11—Appeal by defendant held incompetent but issue decided favourably—Finding, if res judicata against plaintiff.**

A usufructuary mortgagee brought a suit against mortgagor for possession. He applied for an amendment to add alternate prayer for recovery of debt but his application was refused and his suit dismissed. Court held that consideration had passed. On appeal by defendant, Court held that no consideration passed but the appeal was wrongly dismissed on the ground that defendant was successful in lower Court and no appeal lay. Plaintiff brought a second suit for money decree for the debt. **Held,** that the first suit operated as **res judicata.** 7 P.L.T. 150=1925 P.H. C. C. 338=90 Ind. Cas. 622=A.I.R. 1926 Pat. 87.

——**S. 11**—Per **Ayling and Odgers, JJ.**—Where a suit by the inamdar was dismissed for want of notice to quit on a finding that the inamdar was entitled to land and not merely assessment but that no notice was given and the order as to costs which were awarded to the plaintiff was based on the ground that the plaintiff had succeeded on the main contention and that decision remained unappealed against,

Held, that decision about the extent of the inam operated as **res judicata** in a suit for ejectment between the same parties. 19 M.L.W. 513=84 Ind. Cas. 799=34 M.L.T. 175=1924 M.W.N. 466=A. I.R. 1924 Mad. 626=46 M.L.J. 515.

——**S. 11**—Per **Sadasiva Aiyar, J.**—Finding against a party not necessary for a decree in his favour though given only to settle the main contentions of the parties is **res judicata.** 16 M.L.W. 802=1922 M.W.N. 763=31 M.L.T. 430=A.I.R. 1922 Mad. 514.

——**S. 11—Adverse finding—When res judicata.**

The fact that a party against whom an issue is found has no right of appeal does not affect the rule of **res judicata.** Where a decree is not based on a finding on an issue but in spite of it there can be no **res judicata.** Where the finding on an issue is unnecessary, but still it is embodied in the decree itself it operates as **res judicata.** Where a judgment is based on findings on more than one issue but it is doubtful as to on which issue the final conclusion is based, then the decision on all issues is **res judicata.** Where the decision of an issue is necessary but the party against whom the finding is made, could not appeal, as the final decree is in his favour, the decision on that issue is **res judicata.** 34 M.L.J. 431=7 L.W. 482=28 M.L.T. 291=45 Ind. Cas. 975=(1918) M.W.N. 384.

——**S. 11—Favourable decree—Adverse finding on necessary point.**

An unfavourable finding on a necessary point may be appealed against though the decree is favourable and may constitute **res judicata.** 40 Ind. Cas. 771.

——**S. 11—Adverse finding—When res judicata —Judgments and pleadings, if to be examined.**

However definite a finding may be, it will not operate as **res judicata** when it is not the basis of the decision. A finding in a suit will operate as **res judicata** in a subsequent suit against a party, when he has a right of appeal. The words in S. 11 "has been heard and finally decided by such Court" apply to what has been decided by the decree which cannot by a bare wording of the decree be ascertained. **Res judicata** is a matter of substance and not of form. In order to ascertain what matter directly and substantially in issue was heard and finally decided, the pleadings and the judgment should be examined. 2 Pat.L.J. 159=38 Ind. Cas. 211=1 Pat.L.W. 221.

——**S. 11—Adverse finding.**

The plaintiff sued in 1910, to eject the defendant from certain lands, praying that the **mulgeni** lease executed by a predecessor-in-title of his was invalid and not binding on him, and that the plaintiff was entitled to evict that defendant as a yearly tenant. The Court decided the first point in the plaintiff's favour; but held that for want of notice the plaintiff was not entitled at that stage to evict the defendant. After due notice was given, the plaintiff again sued the defendant in ejectment. The defendant cannot plead once more the **mulgeni** lease in his favour, as the defence was barred by **res judicata.** 40 Bom. 662=36 Ind. Cas. 74=18 Bom.L.R. 712.

1 (b) When not res judicata.

——**S. 11—Adverse finding against successful appellant—Res judicata.**

An adverse finding contained in the appellate judgment against the appellant who has succeeded in the appeal, does not operate as **res judicata** against him, as he could not have preferred any further appeal for challenging that finding. I.L.R. (1949) Nag. 313 =1949 N.L.J. 620.

——**S. 11—Suit decreed—Issue decided against plaintiff cannot be res judicata—Unsuccessful revision by plaintiff is irrelevant.**

If the plaintiff's suit is decreed in its entirety, no issue decided against the plaintiff can be **res judicata.** The plaintiff has no right to contest the finding and the fact that he unsuccessfully contested it in a previous revision petition, is not relevant.A.I.R. (Vol. 31) 1944 Nag. 154=1944 N.L.J. 156=I.L.R. (1944) Nag. 465=216 Ind. Cas. 88.

——**S. 11—Suit decreed—Findings adverse to plaintiff—Res judicata.**

No doubt, a right of appeal is a creature of the

statute and one has to look to the provisions of the C. P. Code, to find out whether in a particular case an appeal is competent or not. There is no provision for any appeal against a mere finding irrespective of the decree or order. Where, in a declaratory suit that a certain mortgage decree is not binding on the shares of the plaintiffs, the Court gives the relief asked for on the ground that the plaintiffs were not parties to the decree but at the same time finds that the mortgage in question was binding on them being executed by the manager for family necessity, the plaintiffs have no right of redress against any adverse finding contained in the judgment of the Court, and these findings cannot, therefore, operate as **res judicata** in a subsequent suit. A.I.R. (Vol. 25) 1938 Oudh 18=1937 O.W.N. 1127=171 Ind. Cas. 596.

——S. 11—Adverse finding though decision in favour of defeendant—If operates as res judicata.

Where a decision in a prior suit was in favour of the defendant so that he could not appeal against it, a finding against him in that suit would not operate as **res judicata** in a subsequent suit. 1948 R.D. 403, foll. 1950 R.D. 1.

——S. 11—Suit dismissed—Finding adverse to defendant—Res judicata.

A finding adverse to a defendant in a suit cannot be treated as **res judicata** if the suit be dismissed especially when the finding was not, in fact, necessary for determination of the suit. A.I.R. (Vol. 24) 1937 Pat. 56=2 B.R. 773=164 Ind. Cas. 851.

——S. 11—Suit dismissed—Finding adverse to defendant—Res judicata—Res judicata in subsequent suit.

Where the previous suit was dismissed on the ground that the plaintiffs being remote reversioners had no **locus standi,** although on the issue as to alienations the finding was against the defendants, **i.e.**, the alienees, the latter having thus succeeded in the suit, the adverse finding cannot operate as **res judicata** so as to bind them in a subsequent suit, for they could not have appealed against that finding, the decree having been in their favour. A.I.R. (Vol. 22) 1935 Mad. 701=1935 M.W.N. 871=8 R.M. 776=161 Ind. Cas. 103 (2).

——S. 11—Plaintiff's suit for khas possession alleging lease to defendant was invalid—Lease found invalid but defendant found to be occupancy ryot and hence not liable to eviction—Subsequent suit for enhancement of rent on basis that defendant was occupancy ryot—Finding in prior suit on validity of lease did not operate as res judicata.

In a suit for **khas** possession, the plaintiff alleged that the lease granted to the defendant was not valid. The defendant resisted the claim for **khas** possession on two grounds. He maintained: (1) that the said lease was a valid lease; and (2) that in any event, he having acquired occupancy rights could not be evicted from the lands. The Court held that the lease was invalid, but that the defendant was an occupancy **ryot** and so could not be evicted from the lands. Subsequently, the plaintiff sued for enhancement of rent on the footing that the defendant was an occupancy **ryot.** The defendant contended that he had a valid lease in his favour:

Held, that the tenant defendant won the suit on the finding that he was an occupancy **ryot.** The suit would have failed if he had at least an occupancy right. The finding against which he could not appeal, that the aforesaid lease was invalid did not sustain the decree made in that suit for, in spite of that finding, the plaintiff's suit was dismissed. For this reason, the decision on that issue was not a final decision, and did not operate as **res judicata.** A.I.R. (Vol. 22) 1935 Cal. 733=159 Ind. Cas. 1116.

——S. 11—Suit for rent by trustee decreed in his own right—Finding that there were other trustees—Suit for rent for subsequent period without impleading other trustees—Res judicata—Estoppel.

The plaintiff filed a suit for rent on a rental agreement executed by the defendants in favour of the plaintiff and his deceased **karnavan.** The defendants filed a suit against the plaintiff for a declaration that the plaintiff was not the only trustee of the temple to which the lands belonged but that there were two other **uralans** (trustees) also. The two suits were tried together and in a common judgment the plaintiff was given a decree in his own right to recover the rent although the Court found that two other persons were also **uralans** of the temple. The plaintiff sued for rent for a subsequent period without impleading the other trustees as parties. Issues of **res judicata** and estoppel were raised:

Held, (i) that the finding in the declaratory suit that there were two other **uralans** was not **res judicata** in the second suit as the plaintiff's suit for rent had been decreed entirely in his favour; on the other hand, the plea of the defendants that they were not bound to pay rent to the plaintiff was barred by **res judicata;**

(ii) since the decision that there were two other **uralans** was not **res judicata,** the defendants were estopped under S. 116, Evidence Act, from denying the plaintiff's title to the property until they had surrendered the land. A.I.R. (Vol. 20) 1933 Mad. 770=38 L.W. 614=149 Ind. Cas. 113.

——S. 11—Suit decreed—Adverse finding on unnecessary issue—Res judicata.

Where in a suit by a Hindu son for a declaration that a decree obtained against his father and himself was not binding upon him as he had not been properly represented in the suit and because the debt sued upon was not binding upon him, the Court found, on the one hand, that the plaintiff had not been properly represented and on the other, that the debt was binding on him and decreed the suit and no appeal was preferred from the decree:

Held, in a subsequent suit that the binding character of the debt was not **res judicata** inasmuch as the finding on this point was merely an adverse finding on an issue which in no way affected the decree in the former suit. A.I.R. (Vol. 19) 1932 Mad. 541=36 L.W. 388=1932 M.W.N. 1169=139 Ind. Cas. 197.

——S. 11—Successful party in suit—Adverse finding against him.

If a decree is wholly in favour of the defendant, no issue decided against him can operate as **res judicata** so as to bind him in a subsequent suit, for, he cannot appeal from a finding on any such issue. Conversely, if the plaintiff's suit is decreed in its entirety, no issue decided against him can be **res judicata,** for, he cannot appeal from a finding on any such issue, the decree being wholly in his favour.

A.I.R. (Vol. 19) 1932 Mad. 207=35 L.W. 35=1931 M.W.N. 1323=62 M.L.J. 141=55 Mad. 483=137 Ind. Cas. 616.

——S. 11—Adverse Finding—Favourable Decree.

A finding cannot be conclusive against a party if the decree is not based upon it but is made in spite of it. Such a finding against the plaintiff cannot found a plea of **res judicata** when they succeed on other pleas and have no occasion to go further as to the finding against them. 1929 A.L.J. 1100=121 Ind. Cas. 102=A.I.R. 1929 All. 910.

——S. 11—Suit decreed by appellate Court—Adverse finding by it.

In a suit for rent, tenant claimed a deduction in rent. The trying Court held that the plea was barred by reason of the decision in a previous rent suit, acting as **res judicata**; but the first Appellate Court on appeal was of a different opinion, but it decreed the plaintiff's suit in full so that the plaintiff could not prefer any appeal against this adverse finding of the appellate Court on the question of **res judicata.**

Held, that under circumstances such as these the finding as to **res judicata** cannot operate as **res judicata,** the decree of the first appellate Court not being based on the finding, but in spite of it, and such a finding not being necessary for its decision. 43 C.L.J. 116=94 Ind. Cas. 844=A.I.R. 1926 Cal. 672.

——S. 11—Suit dismissed—Finding adverse to defendant.

Where the plaintiffs in previous suit abandoned their rights to claim a mortgage decree against the defendants and the defendants against whom the suit had been dismissed had no right of appeal upon the finding as to the nature of the debts and therefore the question was not finally decided as between the opposing parties to the suit.

Held, the question could be reagitated. 1924 M.W.N. 807=20 M.L.W. 783=82 Ind. Cas. 438=A.I.R. 1925 Mad. 52=47 M.L.J. 487.

——S. 11—Decree in favour of party—Adverse finding.

Adverse finding in a decree in favour of a party is not **res judicata.** 47 Mad. 453=84 Ind. Cas. 622=19 M.L.W. 377=34 M.L.T. 62=1924 M.W.N. 241=A.I.R. 1924 Mad. 469=46 M.L.J. 198.

——S. 11—A finding not necessary to the relief granted by the decree cannot operate as **res judicata.** 10 O.L.J. 404=79 Ind. Cas. 666=A.I.R. 1924 Oudh 205.

——S. 11—Suit dismissed—Finding adverse to defendant.

In the first suit for ejectment the defendant pleaded that he was a permanent tenant and that the suit must fail as no notice to quit was served upon him. The Court in that suit held that the suit must fail for want of notice to quit. It also came to the finding that the defendant had failed to prove that he had a permanent tenancy. The decree was one of dismissal and the defendant could not appeal against that finding, **Held,** the decree could not operate as **res judicata** on the question whether the defendant had a permanent tenancy or not. 67 Ind. Cas. 271=A.I.R. 1923 Cal. 297.

——S. 11—Suit decreed—Finding adverse to plaintiff.

The bar of **res judicata** is not applicable, for though no doubt the issue as to the custom of exclusion of females from inheritance was heard and decided, it was not finally decided, because it was not necessary for the decision which the Court came to, **i.e.,** dismissal of the suit, and the plaintiff, had no opportunity of appealing against the Court's finding on that issue. 44 Bom. 321=55 Ind. Cas. 322=22 Bom.L.R. 64.

——S. 11—Adverse finding—Finding un-necessary for decision—No right to appeal.

A judgment-debtor cannot appeal from an order dismissing an application for the execution of a decree by reason of the decree-holder having failed to fulfil a condition as to the execution and registration of a lease in favour of the judgment-debtor. In order to give the judgment-debtor a right of appeal, the finding must be one that would operate as **res judicata.** 53 Ind. Cas. 558.

——S. 11—Adverse finding—Decision in spite of—Not res judicata.

Where a finding has been arrived at on a matter which is not necessary for the disposal of the suit and it is not made the basis of the decree, which is given in spite of it, the matter cannot be said to have been substantially in issue between the parties and consequently the finding cannot operate as **res judicata** in a subsequent suit. For a matter to be in issue under S. 11, it is not necessary that an express issue should be framed on it but is sufficient if a decision about it is necessary for the decree. A finding on a question in an appealable suit when the decree is in favour of the party against whom that finding is given, is not final so as to constitute **res judicata** under S. 11. 25 M.L.T. 66=9 L.W. 84=52 Ind. Cas. 258=(1919) M.W.N. 34.

——S. 11—Adverse finding—Collateral issue—Decision not res judicata.

Where in a suit for ejectment and arrears of rent, the suit was dismissed on the ground that the defendant was a tenant from year to year and no notice to quit was served on him, the decision on the nature of the tenancy is not **res judicata** in a subsequent suit where defendant sets up a permanent tenancy. Per **Heaton, J.:**—Where a finding is followed by a result which would equally follow from something essentially different, then it cannot be supposed that finding is a final decision. It is merely an expression of opinion and nothing more. Per **Pratt, J.:**—The question whether an issue was subsequently raised and decided is one of fact. Although no rule of general application can be laid down, yet when a decree of the Court is not based upon a finding but was made in spite of it, that finding cannot be **res judicata.** 43 Bom. 568=51 Ind. Cas. 109=21 Bom. L.R. 363.

——S. 11—Adverse finding—Decree in favour of parties.

Where the decree is in favour of a party an adverse finding in the judgment would not operate as **res judicata,** for such a finding would not be open to appeal. 44 Ind. Cas. 723=3 Pat.L.J. 178.

——S. 11—Adverse finding—Decision in spite of—Not res judicata.

The findings in favour of the plaintiff's title in prior rent suits could not operate as **res judicata** on the question of the plaintiff's title as the decrees in rent suits were not based on those findings but were passed in spite of those findings. 49 Ind. Cas. 248.

——S. 11—Adverse fidings—Unnecessary findings.

If a finding arrived at on a certain issue is sufficient to completely dispose of the case, other findings on other issues are not a final decision of the matter covered by them, and do not operate as **res judicata**. 19 O.C. 69=36 Ind. Cas. 643=3 O.L.J. 677.

——S. 11—Adverse finding—Finding not incorporated in the decree and not the basis of the decree.

The finding upon a stray point not forming basis of a decree and not entitled in the decree so as to admit of an appeal by the party aggrieved cannot be held as finally decided and to operate as **res judicata**. 33 Ind. Cas. 620.

——S. 11—Favourable decree—Adverse finding.

Where a point is incidentally decided against a party, but the case is ultimately decided in his favour, he is not entitled to appeal against that decision and the finding on that point does not operate as **res judicata** in a subsequent suit. 30 Ind. Cas. 502=2 O.L.J. 386.

——S. 11—Adverse finding—Dismissal of suit.

The plaintiff brought an enhancement suit against the defendant—his tenant. The decision was that the plaintiff had the right to sue for enhancement, but the rent being equal to that paid by the adjoining tenants could not be raised. The plaintiff again sued for enhancement of rent. **Held**, the decision was not **res judicata** and did not debar the defendant from objecting to the decision in the first suit as regards the plaintiff's right to bring the suit. 40 Cal. 29=16 C.W.N. 877=15 Ind. Cas. 453=16 C.L.J. 9.

——S. 11—Adverse finding—No res judicata.

A party aggrieved by a finding in the decree favourable to him has no right of appeal, unless the finding is necessarily implied in the decree and has prejudiced the party wishing to appeal. Such a finding would not operate as **res judicata**, when the decree is based on independent grounds and was not implied in the decree. 37 Mad. 25=21 M.L.J. 947=10 M.L.T. 291=12 Ind. Cas. 167=(1911) 2 M.W.N. 303.

1 (c) Evidentiary value of.

——S. 11—Adverse finding against successful party—Evidentiary value.

Where an issue decided against a successful party in a prior suit arises in a subsequent suit between the same parties, the previous judgment is admissible under S. 13, Evidece Act, and although the finding on that issue in the former suit does not operate as **res judicata**, still it throws upon such party the heavy responsibility of proving that that finding in the former suit was wrong. A.I.R. (Vol. 23) 1936 Oudh 189=1935 O.W.N. 894=165 Ind. Cas. 132.

2. Applicability and scope.

(a) Appeals.
(b) Applicability.
(c) Foreign Judgment.
(d) If exhaustive.
(e) Insolvency.

See also (1) C. P. CODE, S. 11—PARTIES AND REPRESENTATIVES.

(2) C. P. CODE, S. 11—MISCELLANEOUS PROCEEDINGS.

(f) Local (other) Law.

2. (a) Appeals.

——S. 11—Applicability—Appeals.

S. 11, C.P. Code, in terms does not apply to appeals. Though the word "suit" is often used as including an appeal it cannot be so interpreted in S. 11. As the section does not in terms apply to appeals, the question whether an appeal is barred by res judicata must be considered in the light of general principles. I.L.R. (1947) Nag. 691=1948 N.L.J. 155=A.I.R. 1947 Nag. 248.

——S. 11—Res judicata, rule of, whether applies at appellate Judge.

The doctrine, so far as it relates to prohibiting the re-trial of an issue, must refer, not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue. The rule of **res judicata** is not limited to the Court of first instance; it applies equally to the procedure of the first and second Appellate Courts and indeed, even to miscellaneous proceedings. A. I. R. (Vol. 24) 1937 Mad. 544=1937 M.W.N. 299=172 Ind. Cas. 268.

——S. 11—Final judgment in another case on same point pronounced pending appeal operates as res judicata.

The rule of **res judicata** applies equally to appeals and miscellaneous proceedings as it does to original suits and where, during the pendency of an appeal, a final judgment on the same issue is pronounced by a competent Court of jurisdiction in another case it operates as **res judicata**. A.I.R. (Vol. 29) 1942 Mad. 421=1942 M.W.N. 178=55 M.L.W. 128=(1942) 1 M.L.J. 281=I.L.R. (1942) Mad. 677=201 Ind. Cas. 733.

——S. 11—Appeal in earlier suit—Decision in later suit becoming final—Effect.

Where during the pendency of an earlier suit, the decision in a subsequent suit on the same point and between the same parties has become final by not being appealed against, it will operate as **res judicata**. 1949 R.D. 153.

——S. 11—Appeal in earlier suit—Decision in later suit becoming final—Effect.

The rule of **res judicata** contained in S. 11 applies to appeals as well as to trials in original Courts.

Where during the pendency of suit, another suit between the same parties and relating to the same subject-matter is instituted in another Court and the decision in the subsequent suit becomes final, no appeal having been filed against it, an appeal from the decision of the first suit is barred by **res judicata**. A.I.R. (Vol. 26) 1939 Sind 329=I.L.R. (1940) Kar. 15=186 Ind. Cas. 533.

——S. 11—An appeal against a preliminary decree filed on a date subsequent to the date of the final decree is barred but in the circumstances of the case the appeal was allowed to be converted into an appeal from final decree. 40 C.L.J. 291=84 Ind. Cas. 674=A.I.R. 1925 Cal. 218.

——S. 11—A brought a suit against B and C claiming certain plot of land. B claimed the plot as vendee of C. The trial Court held that the owner of the plot was A and not C and thereby necessarily negatived B's right. B preferred an appeal to which A alone was made party with the result that C was not a party on record in appeal. The contention was raised that the decree of the trial Court negativing C's right became final in the absence of an appeal by him and operated as a bar to B's attempt to re-open that decision:

Held, that the trial Court's finding negativing C's right did not operate as **res judicata** against B who claimed title through C. A.I.R. (Vol. 25) 1938 Mad. 501=47 L.W. 467=1938 M.W.N. 450 =178 Ind. Cas. 717 [Reversing A.I.R. (Vol. 24) 1937 Mad. 228=169 Ind. Cas. 318].

——S. 11—Letters Patent Appeal against decision in second appeal pending—Subsequent suit between same parties regarding same subject matter—Findings in second appeal whether binding.

The plaintiff firm filed a suit regarding right of easement against A and B. It was decided in second appeal that the land in question was not in the plaintiff's possession. There was a Letters Patent Appeal and during its pendency, A and B instituted a suit against the firm under S. 9, Specific Relief Act, alleging that they had obtained the land from the **zamindar** and were in possession of that land but in the meantime were dispossessed by the firm and that in consequence of the decision in the second appeal in the suit by the firm they should be restored to possession. The Munsif in deciding the suit ignored the decision in the second appeal on the ground that Letters Patent Appeal against it was pending. He made a finding that all along the firm was in possession:

Held, that under S. 11, C.P. Code, the finding of the second appeal was binding on the Munsif. A.I.R. (Vol. 25) 1938 All. 635=1938 A.L.J. 864 =1938 A.L.R. 887=178 Ind. Cas. 709.

2. (b) Applicability.

——S. 11—Rule of res judicata — How different from that under the Code of 1859.

While the bar of **res judicata** under the old Code of 1859, depend upon the identity of the causes of action, under the present Code it depends upon the identity of the issues raised in the two cases. Further the old Code did not include the rule of constructive **res judicata**, whereas the present Code has been enacted to give a statutory recognition to that rule also. 1949 A.W.R. 142=A.I.R. 1949 All. 596=1949 A.L.J. 33.

——S. 11—Applicability—Change of law after decision.

Any decision in a previous suit on a particular question between the same parties will not operate as **res judicata** on the same question in a subsequent suit when a different law is in force. 1948 O.A. (C.C.) 6=1948 A.W.R. (C.C.) 6=A.I.R. 1948 Oudh 270.

——S. 11—Lambardar—Suit for arrears of rent—Lambardar not having proprietary interest—Power of lambardar to collect rent—Decision under previous enactment cannot operate as res judicata. A.I.R. (Vol. 19) 1932 All. 416=1932 A.L.J. 507 =16 R.D. 403=54 All. 777=141 Ind. Cas. 142.

——S. 11—Change of procedure—Effect of.

(Per **Full Bench**).—Where a previous suit was tried according to the procedure then in force and was taken up to the highest Court of Appeal, the mere fact that the procedure then in force was of a summary character and was subsequently changed is immaterial for the purposes of S. 11, C.P. Code, and a subsequent suit is barred by **res judicata**. A.I.R. (Vol. 25) 1938 Lah. 369=40 P.L.R. 319 =175 Ind. Cas. 945 (F.B.).

——S. 11—Applicability — Alteration in current of authority after decision.

Even where law has been since determined to be otherwise by judicial decision, the rights of parties decided upon prior law remain unaffected. The legislature by statute may alter the rights of parties and when it does so, it makes such provision as it thinks proper to prevent injustice. Courts of law are in no way authorized to alter the rights of parties since they profess, at all events, to ascertain the law. If the binding character of a decision upon a concrete question as to the terms of particular holding is to fluctuate with every alteration in the current of authority, the Courts will become an instrument for the unsettlement of rights rather than for the ascertainment thereof. 10 Cal. 1087, Foll. 56 Cal. 723=48 C.L.J. 327=33 C.W.N. 126=115 Ind. Cas. 593=A.I.R. 1928 Cal. 777 (F.B.), overruling 32 Cal. 749.

——S. 11—Prior decision—Decision contrary to subsequent decision of Special Bench of High Court.

Question once decided against a party cannot now be allowed to be re agitated merely because a Special Bench of the Calcutta High Court has enunciated a rule different from what was recognised in previous cases. A.I.R. 1923 Cal. 629.

——S. 11—Applicability — Party having concurrent remedies.

Although ordinarily it is not open to a litigant to have recourse to two different proceedings for enforcement of his right, there are cases in which different concurrent remedies may be pursued without trenching upon the rule of res judicata or the doctrine of election of remedies; this is, however, subject to the restriction that, if the party aggrieved is successful in one proceeding, the judgment absorbs all his other judicial remedies. 10 C.L.J. 420, Foll. A.I.R. (Vol. 22) 1935 Pat. 59=16 P.L.T. 12=154 Ind. Cas. 393.

——S. 11—Applicability—Civil suit and criminal complaint raising same issue between parties.

Where a civil suit and a criminal complaint raise the same issues between the same parties, the judgment of neither Court is binding on the other and each must decide the case on the evidence before it. The risk of conflict is one that is inherent in the division of causes into criminal and civil. A.I.R. (Vol. 19) 1932 Mad. 254=35 L.W. 176=1931 M.W.N. 1305=62 M.L.J. 230 =1933 Cr. Cas. 184=55 Mad. 346=136 Ind. Cas. 348.

——S. 11—Applicability—Unnecessary suit.

A finding contained in a decree in a suit which the plaintiff was not bound to institute but which he as a fact instituted can very well operate as **res judicata**. It is not the law that a finding given in a suit which is perhaps an entirely useless suit and need not have been instituted at all does not create **res judicata** in a subsequent suit which concerns the same matter if the remaining requirements of law as found in S. 11 have been fulfilled. 78 Ind. Cas. 3=A.I.R. 1925 Lah. 160.

——S. 11—Applicability—Custom (Punjab).

Custom in the Punjab is primarily tribal and at any rate in the case of two villages situate within a few miles of each other it is not possible to contend that the decision on the question of custom given in a suit about the property situate in one village is not **res judicata** in a suit brought about the property situate in a neighbouring village. A.I.R. 1927 Lah. 289 (F.B.), not Appl. 119 Ind. Cas. 768=A.I.R. 1929 Lah. 769.

——S. 11—Civil Miscellaneous proceedings.

Ss. 10 and 11, C. P. Code, are concerned with the law of procedure and the mere use of the word "suit" in S. 10 does not restrict its applicability to suits alone but the sections can be extended to civil miscellaneous proceedings by virtue of S. 141, if it is otherwise applicable. 16 S.L.R. 79=66 Ind. Cas. 796=A.I.R. 1922 Sind 6.

——S. 11—Applicability—Preliminary and final decree.

Appeal from preliminary decree pending—Final decree passed is valid. 1929 A.L.J. 480=119 Ind. Cas. 510=51 All. 640=A.I.R. 1929 All. 287.

——S. 11—Application for Rule rejected—Subsequent grant if barred.

An application for a Rule and its rejection does not make the matter **res judicata** and does not prevent a Court on a subsequent occasion, if the occasion arises, from granting a Rule in the interest of justice. A.I.R. (Vol. 23) 1936 Pat. 119 =2 B.R. 307=161 Ind. Cas. 26.

——S. 11—Order passed more or less in executive capacity.

Decisions which are contemplated to operate as **res judicata** under S. 11 are those which are given after a complete observance of the procedure laid down by the law and not those which are more or less orders passed in an executive capacity. To found the decision of a Civil Court entirely on the findings arrived at in a criminal judgment, robs it of all its sanctity and binding force. A.I.R. (Vol. 25) 1938 Lah. 369 =40 P.L.R. 319=175 Ind. Cas. 945 (F.B.).

——S. 11—Applicability—Decision of Revenue Court.

A previous decision of Revenue Court holding that a suit was not maintainable in Revenue Court does not act as **res judicata** in a subsequent suit in revenue Court between the same parties regarding the same land. 10 L. R. A. Rev. 173 =A.I.R. 1929 All. 132.

——S. 11—Applicability—Judgment on property out of jurisdiction.

If a Court pronounces a judgment upon the title or the right to possession of land out of its jurisdiction, the Courts of the Country where it is situated, are justified in refusing to be bound by it, or to recognize it; and this even if the judgment proceeds on the **lex loci rei sitae**. 119 Ind. Cas. 482=A.I.R. 1929 Lah. 627.

——S. 11—Applicability—False case.

If a man fighting a case fights it on false statements and does not call necessary evidence to support his own statements, he cannot afterwards gain any advantage for those omissions of his. He must be considered to be as much bound by the decision as he would have been if he put forward a true case and called all the evidence that was available. 46 C.L.J. 596=31 C.W.N. 898 =100 Ind. Cas. 510=A.I.R. 1927 Cal. 421.

——S. 11—Applicability — Accepting decision under protest.

Accepting a decision and acting in accordance with it under protest does not prevent its being **res judicata**. 1 Pat.L.R. 145=73 Ind. Cas. 359 =A.I.R. 1924 Pat. 362.

——S. 11—Applicability — Subject-matter not identical.

It is not necessary to the application of the rule of **res judicata** that the subject-matter of the two suits should have been identical. It is enough if the issue determined is the same. 12 I.A. 16, Foll. 12 O.L.J. 248=88 Ind. Cas. 985=2 O. W.N. 292=29 O.C. 93=A.I.R. 1925 Oudh 390.

——S. 11—Basic conception underlying rule of res judicata.

The principle of res judicata is founded on the maxim of Roman jurisprudence **interest reipublicoe ut sit finis litium** (it is in the interest of the State that there should be an end to law suits). A further consideration which is responsible for the formulation of the doctrine is to be found in the maxim **Nemo debet bis vexari pro una et sadem causa** (no man shall be vexed twice over for the same cause). The bar which the law imposes on subsequent litigation is created by the existence of a previous judgment whereby the matter has once already been fully canvassed and fairly and finally determined between the parties by a competent Court of law. The application of this rule should be influenced by no technical considerations of form but by matters of substance within the limits allowed by law. A.I.R. (Vol. 33) 1946 Oudh 33=20 Luck. 339=1945 O.W.N. 247.

——S. 11—Technical considerations.

The application of the rule of **res judicata** by the Courts in India should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law. The **raison d'etre** of the rule is to confer finality on decisions arrived at by competent Courts between interested parties after genuine contest; and to allow persons who had deliberately chosen a position to reprobate it and to blow hot now when they were blowing cold before would be completely to ignore the whole foundation of the rule. A.I.R.

Vol. 25) 1938 Lah. 571=40 P.L.R. 591=178 Ind. Cas. 302.

——S. 11—Whether an issue is res judicata should be looked to when it comes to be decided and not when litigation commenced.

The rule of **res judicata**, so far as relates to the trial of an issue refers, not to the date of the commencement of the litigation but to the date when the Judge is called upon to decide the issue. 8 L.R.A. Rev. 33=99 Ind. Cas. 299=A.I.R. 1927 All. 189.

2. (c) Foreign judgment.

——S. 11—The principles of **res judicata** can be applied to the judgments of foreign Courts subject to the provisions of S. 11 and except in the six cases specified in S. 13. A.I.R. (Vol. 25) 1938 Bom. 173=40 Bom.L.R. 77=I.L.R. (1938) Bom. 16 =174 Ind. Cas. 615.

——S. 11 — Foreign judgment — Non-resident foreigner — Execution in British India—Objection for want of jurisdiction—Part payment and asking for time does not operate as **res judicata**. A.I.R. (Vol. 18) 1931 All. 689=53 All. 747=1931 A.L.J. 653=136 Ind. Cas. 353.

——S. 11—Issue decided by Foreign Court.

In the case of a former decision of a "Municipal Court" the decision of a "necessary" issue is under certain circumstances a bar to the re-trial of the same issue by another "Municipal Court." It cannot be said that every issue decided by the foreign Court is binding upon the British Indian Court. Every issue, albeit necessary for the decision of the matter in dispute, cannot be regarded as a matter directly adjudicated upon. S. 13, C. P. Code, is no bar to the Courts in British India deciding an issue relating to title to immoveable property in British India, though it had been adjudicated upon by a foreign Court. 13 Bom. 224, not Foll.; A.I.R. 1928 Mad. 327, Foll. 119 Ind. Cas. 482=A.I.R. 1929 Lah. 627.

——S. 11—S. 11 refers to the decision with regard to the issues also. S. 13 speaks only of the matter directly adjudicated upon by the foreign judgment. Although having regard to the language of S. 13, the contention that it refers only to a decree cannot be accepted, still at the same time it cannot be said that every issue decided by the foreign Court is binding upon the British Indian Court. The expression "matter directly adjudicated upon" in S. 13 should be held as undoubtedly to include the right set up, but limited only to the particular relief granted or refused. 51 Mad. 720=108 Ind. Cas. 305=29 M.L.W. 250= A.I.R. 1928 Mad. 327=54 M.L.J. 479.

S. 2 (d)—If exhaustive.

——S. 11—Not exhaustive.

The statement of the rule of **res judicata** contained in S. 11, C. P. Code, is not exhaustive. A.I.R. (Vol. 18) 1931 P.C. 114=1931 A.L.J. 453=35 C.W.N. 661=53 C.L.J. 552=33 Bom. L.R. 979=53 All. 103=1931 M.W.N. 742=61 M.L.J. 196=34 M.L.W. 459=58 I.A. 158=132 Ind. Cas. 598 (P.C.).

——S. 11—Not exhaustive.

The section does not cover all cases of estoppel by judgment. 46 Mad. 131=19 Ind. Cas. 656= 24 M.L.J. 469. See also 29 M.L.J. 558; 38 M. L.J. 108; 38 M.L.J. 266; 40 All. 593 (P.C.).

——S. 11—S. 11, C.P. Code, is not exhaustive of the subject of **res judicata**. A.I.R. (Vol. 20) 1933 Oudh 507=9 Luck. 249=10 O.W.N. 1125=L. R. 14 O. 785=146 Ind. Cas. 138 (F.B.); 62 Cal. 596=A.I.R. (Vol. 22) 1935 Cal. 596=158 Ind. Cas. 1074; 56 Cal. 639=120 Ind. Cas. 710= A.I.R. 1930 Cal. 5; A.I.R. 1930 Bom. 431.

——S. 11—If exhaustive.

S. 11, C. P. Code, though largely modified and improved is still not exhaustive of the law on the subject and the principles of **res judicata** apply to matters to which the section does not in terms apply. I.L.R. (1947) Nag. 691=1948 N.L.J. 155=A.I.R. 1947 Nag. 248.

——S. 11—The provisions of S. 11, C.P. Code are not exhaustive, and the principle of **res judicata** can be extended to cases which do not fall strictly within their terms. A.I.R. (Vol. 28) 1941 Mad. 861= 1941 M.W.N. 805=(1941) 2 M.L.J. 792=200 Ind. Cas. 324.

——S. 11—S. 11, C.P. Code, is not exhaustive regarding the principle of **res judicata** and the plea of **res judicata** may successfully be raised in circumstances which do not fall within the purview of the section. Such a plea can be supported on general principle of law that there must be an end to litigation. A.I.R. (Vol. 27) 1940 Cal. 225=190 Ind. Cas. 537.

——S. 11—Where S. 11, in terms, does not strictly apply, the principle of **res judicata** which is wider than that stated in that section can apply. A.I.R. (Vol. 24) 1937 Pat. 562=4 B.R. 53=18 P.L.T. 443=171 Ind. Cas. 665. **See also** 3 Luck. 487 =5 O.W.N. 265=112 Ind. Cas. 169=A. I. R. 1928 Oudh 359.

——S. 11—S. 11 of the Civil Procedure Code does not exhaustively state the whole law of **res judicata**. The effect of the section is not to supersede the general principles on the subject. 80 Ind. Cas. 847=A.I.R. 1925 Oudh 118.

——S. 11—The principle which prevents the same case from being twice litigated is of general application and is not limited by the specific words of the Code of Civil Procedure in this respect. 43 Cal. 694; A.I.R. 1922 P.C. 253, Foll. 39 C.L.J. 40=79 Ind. Cas. 520=A.I.R. 1924 Cal. 600. **See also** 117 Ind. Cas. 83=A.I.R. 1929 Lah. 781.

——S. 11—Recourse to English cases.

The statement of the doctrine of **res judicata** contained in S. 11, C.P. Code, is not exhaustive, and recourse may properly be had to decisions of the English Courts for the purpose of ascertaining the general principles governing the application of the doctrine. A.I.R. (Vol. 19) 1932 P.C. 161=36 C.W.N. 726=55 C. L. J. 403=10 Rang. 322 =34 Bom.L.R. 1040=63 M.L.J. 64=9 O.W. N. 647=1932 A.L.J. 735=33 P.L.R. 519=36 L. W. 1=59 I.A. 247=137 Ind. Cas. 328 (P.C.).

——S. 11—S. 11 of the C.P. Code is not exhaustive of the circumstances in which an issue is **res judicata**, and the plea of **res judicata** still remains apart from the limited provisions of the Code; and application of the rule of **res judicata** by the Courts in India should be influenced by no technical consideration of form, but by matter of substances within the limits allowed by law. A.I.R. (Vol. 18) 1931 Bom. 507=33 Bom.L.R. 1139=134 Ind. Cas. 970.

——S. 11—Doctrine one of substance—Liberal interpretation.

The doctrine of **res judicata** should not be unduly conditioned and qualified by all sorts of ingenious attempts at evassion, where there has been in fact a fair contest on a question in dispute between the parties and the Court intended to give and has given a final decision on that question. 36 M.L. J. 641, foll. 67 Ind. Cas. 755.

——S. 11—Matter of substance and not of form—Rule known to Hindu Law.

Though the rule of **res judicata** as embodied in S. 11 of the C.P. Code may be traced to an English source, it only embodies a doctrine known to Hindu Law. The application of the rule by the Courts in India should not be influenced by technical considerations of form, but by matter of substance within the limits allowed by law. 43 Cal. 694=43 I.A. 91=14 A.L.J. 466=20 C.W.N. 738 =18 Bom. L.R. 397=23 C.L.J. 621=(1916) 1 M. W. N. 419=20 M.L.T. 1=3 L.W. 544=33 Ind. Cas. 914=31 M.L.J. 77 (P.C.). (Affirming 6 Ind. Cas. 301=11 C.L.J. 623.)

——S. 11—S. 11, C. P. Code, is inexhaustive. The principle is much wider and is based upon the maxim **"interest reipublicoe ut sit finis litium."** It is to be applied always when an issue between the same parties has been determined by a Court competent to determine it in a subsequent proceeding. A.I.R. (Vol. 21) 1934 Pat. 270=151 Ind. Cas. 70.

——S. 11—S. 11, C.P. Code, is not exhaustive of the circumstances in which an issue may be **res judicata**. The plea of **res judicata** rests on the principle that there should be finality in litigation and the plea still remains apart from the limited provisions of the C.P. Code. Any finding which was not required cannot have the effect of operating as **res judicata**. In order to operate as **res judicata** the finding must be material and necessary. A.I.R. (Vol. 21) 1934 Cal. 430=61 Cal. 1=151 Ind. Cas. 743.

——S. 11 (S. 13 Old Code)—Scope—Principle of res judicata—Basis and nature of.

The principle of *res judicata* is a principle of rest and convenience and not of absolute justice. (1907) 14 C.W.N. 507=11 C.L.J. 250=37 C. 197=5 Ind. Cas. 198.

——S. 11—Applicability to appeals to Privy Council.

The provisions of the Code do not apply to appeals before the Privy Council. A.I.R. (Vol. 24) 1937 Bom. 433=39 Bom. L.R. 572=171 Ind. Cas. 844.

——S. 11—Order cannot be altered by Judge or his successor.

S. 11, C.P. Code, is not exhaustive of the applicability of the principle of **res judicata**. When an issue has been made the subject of a final order by a Court, that order cannot be ignored by a succeeding Judge nor has the Court jurisdiction to alter its decision except on grounds which would justify a review. A.I.R. (Vol. 27) 1940 Mad. 957=52 L.W. 462=1940 M.W.N. 994=(1940) 2 M.L. J. 499=193 Ind. Cas. 44.

——S. 11—Decision at one stage of litigation—Res judicata at subsequent stage.

A party who has been defeated at one stage of a litigation is not entitled, either by reason of the rule of constructive **res judicata** or by reason of the general policy of the law, to re-agitate the same question at a subsequent stage. A.I.R. (Vol. 23) 1936 Pat. 268=2 B.R. 127=159 Ind. Cas. 960.

——S. 11—Same proceedings.

An order made at an earlier stage in the same proceedings is binding upon the Court at a subsequent stage. 6 All. 269 (P.C.), Foll. 45 C.L. J. 462=103 Ind. Cas. 639=A.I.R. 1927 Cal. 616.

——S. 11—Previous decision in the same suit—Binding nature of.

A decision given in the same suit in previous proceedings, though not **res judicata** in the proper sense of the term, is binding. 94 Ind. Cas. 313 =A.I.R. 1926 Oudh 420.

——S. 11—Same proceedings.

On general grounds when a definite decision has been given between the parties on any matter in controversy and such decision purports finally to adjudicate on such matter, it is not competent to the same Judge or his successor in office to set aside the former decision in the same proceeding. The parties, if they consider themselves aggrieved have their remedy by review or appeal to superior Courts. A.I.R. 1924 P.C. 202, Foll. 7 Lah. L.J. 319=26 P.L.R. 587=90 Ind. Cas. 683=A. I.R. 1925 Lah. 507.

——S. 11—The principle of **res judicata** is applicable to all orders passed in the same suit between the same parties when the question arises in subsequent proceedings in the suit. 48 Cal. 409 (P. C.), Foll. 73 Ind. Cas. 903=A.I.R. 1924 Mad. 406.

——S. 11—Judicial order—Made in one stage of a suit binding.

The validity of a judicial order made at one stage of a suit, unless forthwith challenged is conclusive and cannot be attacked at a later stage. 70 Ind. Cas. 6=34 C.L.J. 415.

——S. 11—Applicability—Subsequent stages of same suit.

A question at issue between the parties once heard and finally decided, binds the parties at subsequent stages of the same suit, under general principles of law though not under S. 11. But for such a principle, there would be no end to litigation. 6 All. 269 (P.C.), foll. 48 Cal. 499=48 I.A. 187=19 A.L.J. 366=40 M.L.J. 423=29 M. L.T. 336=(1921) M.W.N. 313=33 C.L.J. 405 =3 U.P.L.R. (P.C.) 17=23 Bom.L.R. 648= 25 C.W.N. 915=60 Ind. Cas. 631=14 L.W. 221 (P.C.).

——S. 11—Applicability—All stages of suit.

The rule of **res judicata** is applicable to all the stages of a suit and is not confined to Courts of first instance. 11 All. 148, foll.; 16 Cal. 233, not foll. If the same question is in controversy, the final decision in the latter suit if given earlier, operates as **res judicata** in the earlier suit whose final stage is reached, later. 24 Ind. Cas. 243.

——S. 11—Proceedings arising out of the same suit before another Court.

The order of a competent Court operates as a bar to the same question being agitated in proceedings arising out of the same suit even before another Court unless that Court is a superior Court and is moved in exercise of its appellate or revisional jurisdiction. A.I.R. (Vol. 21) 1934 Lah. 416=36 P.L.R. 55=150 Ind. Cas. 735.

——S. 11—Adjudication against Hindu widow—Estate, when bound.

Even though S. 11, Civil Procedure Code, is not strictly applicable to the case, an adjudication against a Hindu widow will, in certain circumstances, bind the estate. Where the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding upon the reversionary heir and this rule is not limited to decrees obtained against the widow as a result of suits contested to the end. 62 L.W. 328=1949 M.W.N. 304=A.I.R. 1949 Mad. 804=(1949) 1 M.L.J. 523.

——S. 11—Adjudication against Hindu widow—Similarity between the positions of a Hindu widow and Talukdar's widow in Oudh.

If a litigation is fought out **bona fide** between a Hindu widow and a person who threatens the estate, the decision in that litigation operates as **res judicata** in a subsequent litigation between a third party and the reversioner. The position would be the same where a Talukdar's widow in Oudh is the party to such a litigation. Neither under the Hindu Law nor under the Talukdari law does the reversioner claim under the widow. The decision must be one which is fairly and properly obtained against her in regard to the estate. 23 Luck. 150 =A.I.R. 1948 Oudh. 165.

——S. 11—Decision conclusive though not as res judicata—Construction of will by High Court—Same will cannot be construed by same Court in suit with identical facts but different parties.

Where, in a previous suit, there is a definite pronouncement about the construction of a will by a High Court, the same matter cannot be raised again in the same High Court in a subsequent suit having identical facts even though the parties are different. A.I.R. (Vol. 25) 1938 Cal. 34=I.L.R. (1937) 1 Cal. 400=173 Ind. Cas. 857.

——S. 11—Decision conclusive though not res judicata.

Defendant No. 1 in the suit was a tenant. In a previous suit for rent by the plaintiff against another tenant of the same property the defendant pleaded that he had obtained a renewal from the second defendant who was also the second defendant in that suit. The second defendant was **ex parte**. It was decided that the second defendant had no right to manage the property.

Held, that the point as to the second defendant's right to manage the property was **res judicata** in the subsequent suit between plaintiff and defendant 2. Also it was binding on the first defendant though not as **res judicata**. 13 C.L.J. 38 and 17 C.W.N. 627, Foll. 85 Ind. Cas. 562= A.I.R. 1925 Mad. 1025.

——S. 11—Where in a previous suit between the husband and wife it was decided that there was no divorce, on the husband's suit for restitution of conjugal rights against his wife and father-in-law,

Held, that the question of divorce was **res judicata** and that the **father-in-law** could not be permitted to agitate it again. **Held**, further, that though S. 11, C. P. Code, had no application when the question was raised by the father-in-law yet that section was not exhaustive and that rules of justice should not be interpreted so as to operate against the course of justice. 78 Ind. Cas. 1049=A.I.R. 1924 All. 815.

——S. 11—Decision out of Court.

Walsh, J.—Obiter:—A decision between the parties out of Court in the course of a suit is governed by the principles of **res judicata**, independently altogether of the special provisions of S. 11 of the Code. 23 A.L.J. 561=88 Ind. Cas. 768= 47 All. 637=A.I.R. 1925 All. 503 (F.B.).

——S. 11—Doctrine of res judicata applies even if decision is not susceptible of appeal.

The doctrine of **res judicata** can have application as a consequence of a decision in proceedings which are in themselves final in the sense that they are conclusive between the parties, even if they are not susceptible of appeal. The provisions of S. 11 C. P. Code, are not exhaustive. A.I.R. (Vol. 26) 1939 Cal. 169=67 C.L.J. 363=42 C. W.N. 793=I.L.R. (1938) 2 Cal. 418=182 Ind. Cas. 69.

——S. 11—General principles of res judicata—Application of—Decision of Court having exclusive jurisdiction.

Under S. 11, C. P. Code, the Court deciding the former suit should have been competent not only to decide the issue which arises in the subsequent suit but the subsequent suit itself. Where a Court has exclusive jurisdiction to decide a question, its decision is binding on all Courts under the general principles of **res judicata**. For example, if a Revenue Court decides the question as to which class a tenant belongs, its decision is binding not only on the Revenue Court, but also on the Civil Court, though the Revenue Court deciding such question is not competent to decide the civil suit in which the question subsequently arises. Section 11, C. P. Code, applies where the two Courts, whose decisions are in question, have concurrent jurisdiction. A.I.R. (Vol. 25) 1938 All. 82=1937 A.L.J. 1339 =1938 A.L.R. 229=I.L.R. (1938) All. 184=174 Ind. Cas. 62.

——S. 11—Decision of Court having exclusive jurisdiction.

The principle of **res judicata** governs cases

where the matter in issue is the same and has been previously decided by a competent Court. For instance, when a Court has exclusive jurisdiction to try any matter, its decision on that point will operate as **res judicata**. Consequently, when a Court having jurisdiction to decide a point has decided it, the decision will operate as **res judicata** when the same matter arises in another suit though the former Court was not competent to try the subsequent suit. A.I.R. (Vol. 24) 1937 Lah. 346=174 Ind. Cas. 761.

——S. 11—Judgment of Court of exclusive jurisdiction.

S. 11 of the Code is not exhaustive and the plea of **res judicata** is not limited to a judgment of a Court of a concurrent jurisdiction being pleaded as a bar to the subsequent suit which is dealt with in S. 11, but it extends also to a judgment of a Court of exclusive jurisdiction: 21 S.L.R. 23=94 Ind. Cas. 423=A.I.R. 1926 Sind 236.

——S. 11—Case falling within its purview—Requirements of section to be complied with.

Although S. 11, C. P. Code, is not exhaustive of the circumstances under which the principle of **res judicata** may be applied and the principle may be applicable to a case which does not fall within the four corners of that section, where a case does fall within the purview of that section, then all the requirements of that section must be complied with before the rule of **res judicata** can be held to be applicable, as it is of the essence of a Code to be exhaustive on all matters with which it deals. The principles of **res judicata** independently of S. 11 have been applied to proceedings other than suits and to decisions given at different stages in the same suit. Where the question is whether a decision given in a previous suit about a particular matter should operate as **res judicata** in a subsequent suit in which the same matter is directly and substantially in issue, the rule of **res judicata** cannot be applied if all the requirements of the section have not been fulfilled. A.I.R. 1948 Lah. 195.

——S. 11—General principles of res judicata—Section cannot be flouted.

Section 11, C. P. Code, does not codify or crystalize the entire law regarding the doctrine of **res judicata**. The section deals with some of the circumstances under which a previous decision will operate as **res judicata** but not with all. Where circumstances other than those provided for in S. 11 exist, the principle underlying the rule of **res judicata** may be invoked in a proper case without recourse to the provision of that section. But, obviously it does not follow that the provisions of S. 11 may be flouted or overridden or that the prohibitions or reservations express or implied in that section may be ignored by reference to general principles of **res judicata** in case to which S. 11 applies. Hence, the general principles of **res judicata** cannot be invoked in a case when the Court which tried the first suit had not the jurisdiction to try the second suit inasmuch as S. 11 is explict in this respect. A.I.R. (Vol. 28) 1941 Cal. 104=72 C.L.J. 99=44 C.W.N. 1099=195 Ind. Cas. 870.

——S. 11—Section 11, C. P. Code, is not exhaustive of the law of **res judicata**, and the general principles underlying the rule can be invoked in reference to matters on which the section is silent or with regard to proceedings to which it does not, in terms, apply, but as regards matters specifically provided for in the Code, the Courts are bound to limit the operation of the rule in accordance with the conditions laid down by the Legislature, and have no power to ignore the express provision of the statute in order to give effect to general principles. A.I.R. (Vol. 24) 1937 Lah. 4=38 P.L.R. 757=163 Ind. Cas. 520.

——S. 11—Section 11 of the C. P. Code, is exhaustive in respect of all cases falling within its terms and with regard to such cases the Court is not entitled to travel outside the section and apply the general principles. A.I.R. (Vol. 22) 1935 Cal. 792=40 C.W.N. 174=159 Ind. Cas. 1008.

——S. 11—Section 11, C. P. Code, is not exhaustive and the principle of **res judicata** being wider than S. 11 can only be applied when it is not expressly forbidden by S. 11. A.I.R. (Vol. 21) 1934 Nag. 178=153 Ind. Cas. 29.

——S. 11—Section must be applied in its entirety, where applicable.

In circumstances to which the provisions of S. 11, C. P. Code are applicable, the provisions of S. 11, must be applied in their entirety; they must not be modified so as to allow of the application of other principles of **res judicata**. A.I.R. (Vol. 21) 1934 Sind 112=152 Ind. Cas. 894.

——S. 11—Doctrine of res judicata—Application of—Limits.

Though S. 11 is not exhaustive the doctrine of **res judicata** on general principles cannot be invoked so as to render the provisions of the section nugatory. A.I.R. (Vol. 20) 1933 Lah. 551=14 Lah. 369=34 P.L.R. 196=141 Ind. Cas. 454.

——S. 11—The general principles of **res judicata** cannot be invoked so as to override the express provisions of S. 11, C. P. Code. A.I.R. (Vol. 20) 1933 Lah. 614=145 Ind. Cas. 334.

——S. 11—The proposition of law, that S. 11 is not exhaustive of the circumstances in which an issue is **res judicata**, is undoubtedly unquestionable but at the same time the statutory principles as enacted in S. 11 must be fulfilled before any of the principles of **res judicata** can be applied in bar of suit. A.I.R. 1930 Lah. 487.

——S. 11—General principles of **res judicata** cannot be invoked for cases covered by S. 11. 44 C.L.J. 399=30 C.W.N. 415=94 Ind. Cas. 235=A.I.R. 1926 Cal. 568. See also 117 Ind. Cas. 68; 1928 M.W.N. 336=28 M.L.W. 82=110 Ind. Cas. 554=A.I.R. 1928 Mad. 840=56 M.L.J. 52.

——S. 11—Section cannot be extended to cases not strictly covered.

It would not be right on the part of a Court to extend S. 11 to cases which cannot be brought within the four corners of it. 29 Cal. 707 (P.C.) Foll. 99 Ind. Cas. 989=A.I.R. 1927 Mad. 450.

——S. 11—The provisions of S 11 are exhaustive and therefore the general principles of **res judicata** cannot be extended to cases which are within the terms of S. 11. 96 Ind. Cas. 910=A.I.R. 1926 Lah. 670.

2 (e) Insolvency.

See also (1) C. P. CODE, S. 11—PARTIES AND REPRESENTATIVES.

(2) C. P. CODE S. 11—MISCELLANEOUS PROCEEDINGS.

——S. 11—An element essential to the success of a plea of **res judicata** is that the matter must have been in controversy between the same parties or between parties under which the present parties claim. Where, therefore, on the application of certain creditors, a firm was adjudicated insolvent and a certain person was held not a partner of the insolvent firm, the decision is not **res judicata** against a creditor who was not a petitioning creditor in the insolvency proceeding. A.I.R. (Vol. 27) 1940 Cal. 225=190 Ind. Cas. 537.

——S. 11—Decision that certain persons are not partners—Whether bars subsequent suit to determine if they are partners.

Section 11, C. P. Code, should not be construed otherwise than strictly in relation to judgment delivered in insolvency proceedings.

A decision in an application for adjudication of certain persons as insolvents to the effect that they are not partners does not operate as **res judicata** in a subsequent suit for determining whether they are partners or not. A.I.R. (Vol. 20) 1933 Cal. 673=37 C.W.N. 390=148 Ind. Cas. 148.

——S. 11—It was found by the Court as a fact that the secured creditor had relinquished his security for the general benefit of the creditors and there was no appeal against the order:

Held, that the question whether the creditor had relinquished his security or not was **res judicata**. A.I.R. (Vol. 23) 1936 Rang. 393=14 Rang. 529 =164 Ind. Cas. 1061.

——S. 11—By virtue of S. 5, Provincial Insolvency Act, the provisions of C. P. Code, are applicable subject to the provisions of Provincial Insolvency Act. When an application under S. 53, Provincial Insolvency Act, is dismissed subsequent application under S. 54 is not barred by S. 11, Expl. IV, C. P. Code, particularly when the Official Assignee is not proved to be aware of the grounds of his subsequent application at the time when the first application was made. A.I.R. (Vol. 24) 1937 Lah. 668=39 P.L.R. 914=173 Ind. Cas. 514.

——S. 11—Where the decision in the former suit was passed by the Subordinate Judge who was competent to try the question of title as between parties and after adjudication of one of them as insolvent, the Official Receiver had been impleaded with the permission of the Court, it is not open to **L** who was one of the parties in the previous suit to raise the same matter once again on an application under S. 4, Provincial Insolvency Act, before the Insolvency Court, which has concurrent jurisdiction with ordinary Civil Courts to try questions of title relating to property alleged to belong to the insolvent. This, of course, is not, under the provisions of S. 11, C. P. Code, which does not, in terms, apply, as the proceedings before the Insolvency Court are not a suit within S. 11, C. P. Code, but under the general principles of the rule of **res judicata**. A.I.R. (Vol. 24) 1937 Lah. 4=38 P.L.R. 757=163 Ind. Cas. 520.

——S. 11—In an insolvency case under S. 4, Provincial Insolvency Act, in which one A was adjudged insolvent, the plaintiff had attached the house in suit and one **C** objected and it was held that the house was hers. Subsequently, the plaintiff obtained a decree absolute for foreclosure against **A** who had purchased the house in dispute from one **G**. He was placed in possession but was dispossessed by one **B** who claimed the property as hers as heir to **C** to whom it was gifted by **D** who had purchased from **G**:

Held, that the rule of **res judicata** applied and it must be accepted that the house belonged to **C** and not to **A**.

Held, also that **B** being in possession, she was entitled to set up **jus tertii** and that the fact that the plaintiff had already obtained a decree absolute for foreclosure made no difference. Had the decision in the objection proceedings been the other way, then **B** would have had to establish her right to the property. But when the decree-holder fails, the burden is on him, and he can only succeed on the strength of his own title and not on the weakness of the defendant's case. A.I.R. (Vol. 23) 1936 Nag. 112=I.L.R. (1936) Nag. 28=164 Ind. Cas. 694.

——S. 11—Decision of Insolvency Court—S 4, Provincial Insolvency Act.

Section 11 with all its explanations will apply to a decision of the Insolvency Court under S. 4, Provincial Insolvency Act. A.I.R. (Vol. 20) 1933 Nag. 373=30 N.L.R. 112=147 Ind. Cas. 539.

2 (f). Local (other) law.

——S. 11—Benefit under U. P. Debt Redemption Act, if can be claimed in execution.

U. P. Debt Redemption Act is meant for the benefit of a restricted class of persons and there can be no **res judicata**, in claiming benefit under the Act. Thus, a finding in the suit itself that the applicant is not an agriculturist will not bar the applicant from claiming exemption from arrest under S. 23 of the Act on the ground of his being an agriculturist, in execution proceedings. A.I.R. (Vol. 32) 1945 All. 281=1945 A.L.J. 224=1945 A.W.R. (H.C.) 134=1945 O.W.N. (H.C.) 204=1945 R.D. 360=I.L.R. (1945) All. 647 =221 Ind. Cas. 391=1945 A.W.R. Rev. B. 86.

——S. 11—U. P. Land Revenue Act, S. 233-K.

Even when a claim is not barred under S. 11, C. P. Code, it may be barred under S. 233-K, U. P. Land Revenue Act, 1901. The two bars

though sometimes they may overlap are independent of each other and the question of **res judicata** arising in a Revenue Court partition is really a matter to be determined under principles of S. 11. A.I.R. (Vol. 29) 1942 All. 425=(1942) A.L.J. 449=204 Ind. Cas. 540.

——**S. 11**—Section 233 (k), U. P. Land Revenue Act, should not be interpreted so as to make it co-extensive with the rule of **res judicata**. A.I.R. (Vol. 18) 1931 All. 462=1931 A.L.J. 307=15 R.D. 322=53 All. 568=133 Ind. Cas. 468.

——S. 11, Expl. 4—U. P. Land Revenue Act, S. 233 (k)—Omission to set up question of title—Res judicata—Same question whether can be raised.

If any co-sharer who is a party to the prior partition case has any objection to the entry in the khweal of the name of a co-sharer or of the amount of the share recorded for a co-sharer it is open to that party to make an objection before the partition Court. Where he omits to do so he cannot subsequently file a suit in the Civil Court for having the previous arrangement modified. The later proceeding will in such cases be barred by S. 11, C.P. Code and S 233 (k) of the U. P. Land Revenue Act. 1930 A.L.J. 1281=130 Ind. Cas. 382=A.I.R. 1931 A. 29.

——S. 11—U. P. Encumbered Estates Act.

The principle underlying Expl. VI of S. 11 cannot be applied in the case of an appeal under S. 45, U.P. Encumbered Estates Act, where some of the creditors are not made parties to the appeal. A.I.R. (Vol. 29) 1942 Oudh 199=1941 O.W.N. 1381=1942 R.D. 27=198 Ind. Cas. 775.

——S. 11—Decree amended under S. 30 of the U. P. Agricultural Relief Act—No objection that the original transaction was not a loan — Subsequent plea that it was not a loan—Bar of res judicata.

Where a Court amends a decree under S. 30 of the U.P. Agriculturists Relief Act and reduces the interest without any objection from the debtor, it must be deemed to have decided, by necessary implication, that the transaction was a loan, as otherwise, it could not have reduced the interest. In such a case the principle of constructive **res judicata** would bar the debtor from raising the plea subsequently that the transaction was not a loan. A.I.R. 1950 All. 106.

——S. 11—U.P. Agriculturists' Relief Act, S. 30.

Per Dar, J.—Principles of **res judicata** apply in civil litigation to cases where in terms S. 11 does not apply. S. 11 does not apply to proceedings under S. 4 (1), U.P. Agriculturists' Relief Act, when the whole of the C.P. Code is excluded; nor can the rule of **res judicata**.

In cases under S. 28 of the U.P. Agriculturists' Relief Act the principle of **res judicata** should be applied and a decree once passed on a loan taken after the Act should not be re-opened unless the bar of **res judicata** can be got rid of. A.I.R. (Vol. 29) 1942 All. 19=1942 A.L.J. 55=I.L.R. (1942) All. 45=198 Ind. Cas. 690 (F.B.).

——S. 11—Bengal Public Demands Recovery Act, (1919), S. 57—Certificate officer—Decision of—No Res judicata.

A Certificate Officer, who is a mere agent for speedy and summary recovery of rents due to an estate under the management of the Court of Wards and on whom certain powers of a Civil Court have been conferred, is not a Court exercising special jurisdiction. And so any decision arrived at by a certificate officer cannot operate as **res judicata** on any question raised in the Civil Court. 112 Ind. Cas. 71=A.I.R. 1929 Cal. 130.

——S. 11—B. T. Act, S. 26-F—Proceeding under —Decision in, as to nature of tenancy—Res judicata.

Although S. 11, C. P. Code, does not in terms apply to proceedings under S. 26-F, Bengal Tenancy Act, which are instituted by an application and are not suits strictly so called, principles analogous to those embodied in the said section apply. Accordingly, a decision in a proceeding under S. 26-F, Bengal Tenancy Act, to the effect that the tenancy in question is an occupancy holding, is **res judicata** in a subsequent suit between the same parties for a declaration that the tenancy is a **mokrari nowrashi** holding and not an occupancy holding. A.I.R. 1950 Cal. 300.

——S. 11—Bengal Tenancy Act, S. 26-J.

For the applicability of the principle of **res judicata** the previous proceeding must not be a summary one and must be a proceeding of the nature of a suit.

The immediate subject of the adjudication in an application under S. 26-J, Bengal Tenancy Act, is whether the landlord is entitled to transfer fees on a particular transfer. That matter cannot be withdrawn from the operation of that order, but however much it may be necessary to pass that order, that the Court should determine the nature of the tenancy, such matter being outside the jurisdiction of the Court dealing with the petition would only be 'incidentally cognizable' and hence the order under S. 26-J, cannot operate as **res judicata** in a subsequent suit involving determination of status. A. I. R. (Vol. 29) 1942 Cal. 445=I.L.R. (1942) 1 Cal. 510=75 C.L.J. 20=46 C.W.N. 169=202 Ind. Cas. 570.

——S. 11—Bengal Tenancy Act, S. 26-J.

Under S. 11 no question of **res judicata** arises unless there has been a suit. Hence an application by the landlord under S. 26-J, Bengal Tenancy Act, to recover his fees would not operate as **res judicata**. Apart from S. 11, no question of **res judicata** can arise in connection with summary proceeding unless of course the Legislature has made express provision on the point. A.I.R. (Vol. 25) 1938 Cal. 246=178 Ind. Cas. 892.

——S. 11—B. T. Act, S. 105—Ex parte decision of Settlement Officer.

In a suit for establishing **nishkar** rights the prior **ex parte** decision by the Settlement Officer under S. 105, Bengal Tenancy Act, as to fair and equitable rent, does not operate as **res judicata**. The principle of constructive **res judicata** has no application to such proceedings. A.I.R. (Vol. 21) 1934 Cal. 467=38 C.W.N. 168=152 Ind. Cas. 172.

——S. 11—B. T. Act, S. 105—Order of assessment—Res judicata.

An order of assessment under S. 105, Bengal Tenancy Act, until it is set aside by a competent authority has a force of a decree and operates as **res judicata** on the question of relationship of landlord and tenant in a subsequent suit. (1934) 60 C.L.J. 13.

——S. 11—Bengal Tenancy Act, Ss. 109, 105.

The tenant claimed abatement of rent under S. 52, but no such question was raised or investigated in the proceeding under S. 105. The landlord contended that as in a case where S. 11, C. P. Code, is applicable, a question which might and should have been raised is deemed to have been raised and decided, High Court should hold under S. 109 that a matter has been the subject of an application under S. 105 whenever it might and ought to have been raised and decided under S. 105 read with S. 105-A.

Held, that this contention is unsound. If this construction were accepted words which are not found there would have to be read into S. 109. It would be held on the analogy of the doctrine of constructive **res judicata** that the jurisdiction of the Civil Court has been constructively excluded even when a point has been neither raised nor decided under S. 105 read with S. 105-A. 44 C. 783, Foll. 67 Ind. Cas. 710=A.I.R. 1923 Pat. 174.

——S. 11—Bengal Tenancy Act, Ss. 106 and 107—Decision in rent suit—Res judicata.

Under provisions of S. 107 (1), Bengal Tenancy Act read with S. 11, C.P. Code, a Court trying a rent suit has no jurisdiction to decide an issue between the parties which has already been finally and definitely decided by a decision under S. 106 of the Bengal Tenancy Act.

But a decision in the rent suit that **bhaoli** rent is payable only in respect of certain area cannot be treated as **res judicata** to determine the areas for which such rent shall be payable in years subsequent to suit, where such decision is at variance with an earlier decision under S. 106. A.I.R. (Vol. 18) 1931 Pat. 215=10 Pat. 337=12 P.L.T. 717=136 Ind. Cas. 297.

——S. 11—Bengal Tenancy Act, S. 148-A—Decision in—Res judicata.

Suit under S. 148-A, Bengal Tenancy Act by co-sharer decided—Other co-sharers impleaded in suit as defendants are precluded from instituting another suit for their share of rent framed under S. 148A. Such a suit will be barred by **res judicata** as the entire rent was in issue in the previous suit and the decree passed in effect was for the entire rent. A.I.R. (Vol. 21) 1934 Pat. 350=150 Ind. Cas. 970.

——S. 11—Application under S. 174, Bengal Tenancy Act—Decision in—If **res judicata** in subsequent title suit. **See** B. T. ACT, S. 174. A.I.R. 1949 Dacca 1.

——S. 11 (S. 13, Old Code)—Applicability—Mamlatdar's Courts Act—Decision of mamlatdar.

There was no provision corresponding to S. 13, C.P. Code, which would make the decision of the Mamlatdar operative as **res judicata**. (1903) 6 Bom.L.R. 62=28 Bom. 310.

——S. 11 (S. 13, Old Code)—Applicability—Dekhan Agriculturists' Relief Act—Instalment decree.

S. 13, C.P. Code, is no bar (the same having no application) to a Court granting an instalment decree under S. 20 of the Dekhan Agriculturists' Relief Act even though it had refused to pass it originally. (1907) 10 Bom.L.R. 577=32 Bom. 391.

——S. 11—Bihar and Orissa Co-operative Societies Act.

Award made by Registrar under Bihar and Orissa Co-operative Societies Act—Dispute as to judgment-debtor's liability to pay—Registrar can make second award—S. 11, C.P. Code, has no application to such disputes. A.I.R. (Vol. 27) 1940 Pat. 552=21 P.L.T. 343=7 B.R. 79=190 Ind. Cas. 534.

——S. 11—S. 11 has no application to a dispute under Bihar and Orissa Co-operative Societies Act (6 of 1935). A.I.R. (Vol. 27) 1940 Pat. 552=21 P.L.T. 343=7 B.R. 79=190 Ind. Cas. 534.

——S. 11—Madras Hindu Religious Endowments Act, S. 84 (2)—Subsequent suit.

The doctrine of **res judicata** is not confined to a decision in a suit, but applies even to decisions in proceedings other than suits. If substantial rights of parties are determined in a decision rendered in proceedings other than a suit, such decision will operate as **res judicata,** even though the decision may not be open to appeal. The decision of a District Judge under S. 84 (2) of the Madras Hindu Religious Endowments Act following on the decision of the H. R. E. Board under S. 84 (1) of the Act, is not a summary decision, but one which determines substantial rights of parties, and will therefore operate as **res judicata** in a subsequent suit between the parties. I.L.R. (1946) Mad. 566=59 L. W. 67=228 Ind. Cas. 286=A.I.R. 1946 Mad. 509=1946 M.W.N. 27=(1946) 1 M.L.J. 200.

——S. 11—Madras Survey and Boundaries Act.

Per **Krishnaswami Ayyangar and Somayya, JJ.,** (in Order of Reference).—The rule of **res judicata** cannot be applied to the decision of a survey authority under the Madras Survey and Boundaries Act. A.I.R. (Vol. 27) 1940 Mad. 187=1940 M.W.N. 41=(1940) 1 M.L.J. 79=51 L. W. 73=I.L.R. (1940) Mad. 501=187 Ind. Cas. 321 (F.B.).

——S. 11 (S. 13, Old Code)—Decision of Collector under S. 13 of Act 3 of 1895 (Madras) as to lands being emoluments of office—Res judicata in suit in Civil Court.

A decision of the Collector under S. 13 of Act 3 of 1895 (Madras) as to whether the plaint lands are the emoluments of an office or not is a bar to the question being re-agitated in the Civil Courts. (1905) 30 M. 320.

——S. 11—Sikh Gurdwaras Act.

Where the Division Bench decided the nature of an institution in a suit under S. 92, C.P. Code, and in a subsequent proceeding under the Sikh Gurdwaras Act the Tribunal had to decide the question as to whether the institution was a Sikh Gurdwara according to the statutory definition to be found in the Sikh Gurdwaras Act, 1925, with which defini-

tion the Court was not concerned in the previous suit:

Held, that the previous decision did not operate as **res judicata**. A.I.R. (Vol. 18) 1931 Lah. 254 =33 P.L.R. 498=136 Ind. Cas. 31.

——**S. 11—Oudh Rent Act—Ex parte decree for ejectment in suits under S. 61—Subsequent suits by tenants under S. 108, Cl. (10) converted into suits under S. 183 of the U. P. Tenancy Act—Earlier judgment, if operates as res judicata.**

Where after **ex parte** decrees for ejectment had been obtained against tenants under S. 61 of the Oudh Rent Act, the tenants filed suits under S. 108, Cl. (10) of the Rent Act and they are converted into suits under S. 183 of the U.P. Tenancy Act, the prior judgment in the suits under S. 61 of the Rent Act would not operate as **res judicata** in the later suits under the Tenancy Act. I.L.R. (1949) All. 836.

——**S. 11**—Patels and Patwaris Law—Principles of **res judicata**—How far applicable. **See** BERAR PATELS AND PATWARIS LAW. 1946 N. L.J. 59.

——**S. 11—Charitable and Religious Trusts Act.**

An order of the Court passed under the Charitable and Religious Trusts Act is one passed in a summary proceeding and does not operate as **res judicata**; nor does it preclude the persons aggrieved from filing a suit. A.I.R. (Vol. 31) 1944 Nag. 190=I.L.R. (1944) Nag. 775=1944 N.L.J. 170.

——**S. 11—Charitable and Religious Trusts Act.**

Application under S. 3, Charitable and Religious Trusts Act—Proceedings being of a summary nature the decision does not operate as **res judicata**. A.I.R. (Vol. 27) 1940 P.C. 7=1939 O.W.N. 1078=6 B. R. 179=1939 O.L.R. 729=(1940) 1 M. L. J. 1=51 L.W. 4=1940 M.W.N. 3=42 Bom. L.R. 190=44 C.W.N. 294=71 C.L.J. 169 =15 Luck. 1=I.L.R. (1940) Kar. P.C. 25=67 I.A. 1=42 P.L.R. 457=185 Ind. Cas. 305 (P. C.).

——**S. 11**—Application for accounts under Charitable and Religious Trusts Act—Decision as to the nature of property does not operate as **res judicata**, proceedings being of a summary nature. A.I.R. (Vol. 21) 1934 Lah. 771=36 P.L.R. 13=16 Lah. 85=154 Ind. Cas. 229.

——**S. 11 and Income-tax Act (11 of 1922), S. 10 (2) (vi)—Res judicata in income-tax matters—Same questions referred to High Court in respect of two successive years—Decision in one only—Claim of assessee upheld becoming untenable by reason of a subsequent decision of the Privy Council—Decision of the High Court on the first reference, if operates as res judicata in the decision of the second reference.**

As regards decisions of Courts in income-tax matters, a distinction has to be drawn between decisions which affect the assessment of a particular year and decisions which settle rights or titles and which are, therefore, likely to affect the assessment of not only that year but of other years. In the latter class of cases the doctrine of **res judicata** will apply. If in the course of the assessment for one year a general question of right or title has been decided, this decision will not only govern the assessment for the year in question but in subsequent years. Even if the question has not been expressly decided but the decision is by implication, either because the point was not raised or was conceded, the same result will follow.

Where the question as to the right of an assessee to claim under S. 10 (2) (vi) of the Income-tax Act as set off of the unabsorbed previous depreciation was referred to the High Court in respect of two successive years in regard to the same assessee and the High Court upheld the claim in one reference (while the other was adjourned) and such a claim became untenable by reason of a subsequent decision of the Privy Council,

Held, that the decision of the High Court in the prior reference cannot operate as **res judicata** in decision of the second reference. A.I.R. 1950 A. 249=1950 A.L.J. 178=1950 I.T.R. 812.

——**S. 11—Income-tax Act — Assessment—Finality.**

The doctrine of **res judicata** does not operate in respect of an assessment made by an Income-tax Officer. The Income-tax Officer does not constitute a Court, and, therefore, the doctrine can have no application. But his assessments are final, unless they can be re-opened under some provision of the Act. A.I.R. (Vol. 25) 1938 Mad. 148= 1938 M.W.N. 171=47 L.W. 24=I.L.R. (1938) Mad. 183=(1938) 1 M.L.J. 130=173 Ind. Cas. 998 (S.B.).

——**S. 11—Decision of Income-tax authority.**

When in a previous year of assessment a decision is arrived at after investigation and enquiry, that certain amounts standing in the name of certain ladies in the petitioner's accounts were stridhanam amounts belonging to them, and as such the interest paid in respect of the said amounts, is held to be a valid deduction, it is still open to the income-tax authorities to reopen the question of the ownership of the amounts in a subsequent year of assessment, and the authorities not constituting a Court, are not barred by principle of **res judicata**. 31 M. L.W. 738=A.I.R. 1930 Mad. 209=58 M.L.J. 260 (F.B.).

——**S. 11**—Principle of **res judicata** does not apply to orders passed under S. 33, Income-tax Act. 29 M.L.W. 476=115 Ind. Cas. 814=A.I. R. 1929 Mad. 453=56 M.L.J. 451 (F.B.).

——**S. 11—Land Acquisition Act—Reference by Collector—Decision of title by Court—Res judicata.**

Where, in a matter referred to him by the Collector in accordance with the provisions of the Land Acquisition Act, a Judge to whom it is referred has, in a dispute as to their title to the land between two of the parties claiming compensation determined that dispute, the matter, if not appealed from, is **res judicata** and binds the parties in any later suit involving that issue.

Held, that in the reference made by the Collector to the Court under S. 18, Land Acquisition

Act, the Court had before it, not only the question of the amount of compensation for land but also the further question as to the persons to whom compensation was payable, and the decision of the Court operated as **res judicata** in a subsequent suit between the parties concerning title to land. A.I.R. (Vol. 26) 1939 P.C. 133=5 B.R. 583=1939 A.W.R. 58=43 C.W.N. 677=1939 O.W.N. 543=1939 R.D. 285=50 L.W. 66=20 P.L.T. 523=1939 A.L.J. 564=(1939) 2 M.L.J. 98=41 P.L.R. 638=66 I.A. 145=I.L.R. (1939) All. 460=1939 M.W.N. 894=41 Bom.L.R. 1028=I.L.R. 1939 Kar. P. C. 199=70 C.L.J. 23=181 Ind. Cas. 211 (P.C.).

——S. 11—Land acquisition proceedings—Decision as to title.

Where a dispute as to the title to receive the compensation has been referred to the Court under the Land Acquisition Act, a decree therein renders the question of title **res judicata** in a suit between the parties to the dispute or those claiming under them. 23 Cal. 526, (1896); 17 C.W.N. 935, (1910); 15 C.W.N. 1021=13 C.L.J. 547 (1911), Diss.; L.R. 43 I.A. 91=I.L.R. 43 Cal. 694; 20 C.W.N. 738 (1916); (1909) A.C. 623, Foll. 28 C.W.N. 295=86 Ind. Cas. 1023=A.I.R. 1924 Cal. 757.

——S. 11—Land Acquisition cases.

Persons who have not come before the Collector or the Acquisition Judge are at liberty to controvert the award of the Collector in a suit and to prove that they were the lawful owners of the property, and, therefore, the persons who were entitled to recover the amount of compensation awarded for it. A.I.R. (Vol. 23) 1936 Pesh. 29=160 Ind. Cas. 1010.

——S.. 11—Land Acquisition—Different Notification—No res judicata—Decision in land acquisition case—If res judicata.

A prior decision in land acquisition case, though between the same parties and in respect of adjacent land, is not **res judicata** if land is acquired under different notification. 112 Ind. Cas. 797=A.I.R. 1928 Lah. 263.

——S. 11 (S. 13, Old Code)—Applicability—Proceedings under Land Acquisition Act—Order of apportionment of compensation as to one parcel of land—Res judicata as to other parts.

A decision of the Court with respect to the apportionment of compensation under the Land Acquisition Act with reference to a single parcel of land should not be treated as *res judicata* affecting other parts of the claimant's property held under the same title. (1907) 34 C. 466=11 C.W.N. 525.

——S. 11—Succession Act.

The finding of a Court under the Succession Act with regard to the genuineness or otherwise of a will is conclusive and operative as **res judicata** against the parties affected. A.I.R. (Vol. 23) 1936 Pesh. 39=161 Ind. Cas. 47.

3. Cause of Action.

(a) Interpretation.
(b) Same cause of Action.
(c) Different causes of Action.
(d) Cause of Action arising subsequent to previous suit.
(e) Cause of action recurring.
(f) Cause of Action—Constructive Res Judicata.

3 (a)—Interpretation.

——S. 11—The expression 'cause of action' can be reasonably used in connection with proceedings other than suits and it must be construed with reference rather to the form of action. 1937 Mad.W.N. 465.

3 (b)—Same cause of Action.

——S. 11—Cause of action split up in previous suit but not in subsequent suit to change forum—Bar.

The decision in a previous suit in which the cause of action was split up with a view to confer jurisdiction on an inferior Court operates as **res judicata** in a subsequent suit between the same parties in which the same cause of action is not split up and consequently the suit is instituted in a Court of superior jurisdiction. A.I.R. (Vol. 32) 1945 Bom. 67=46 Bom.L.R. 728=218 Ind. Cas. 510.

——S. 11—Decree for possession by surviving coparcener but not executed—Fresh suit against transferee from widow.

Where, in a case of widow claiming portion of her husband's property by adverse possession, the surviving coparcener obtains a decree for immediate possession but does not execute the same until is is barred under S. 48, he cannot bring a fresh suit on the same cause of action, against the transferee of the widow, for, such a suit will be barred under Ss. 11 and 47 and its conversion into an application in execution is similarly barred under S. 48. The mere declaration of the plaintiff's title does not deprive her of her possession nor alters its character but on the other hand emphasises the fact of its adverse quality. A.I.R. (Vol. 26) 1939 Bom. 261=41 Bom.L.R. 497=183 Ind. Cas. 482.

——S. 11—Dismissal of suit to contest alienation—Subsequent suit for possession.

A suit to declare an alienation by a widow not binding upon the reversioner and which was dismissed, is **res judicata** in a subsequent suit by the same reversioner for possession after the death of the widow. 59 Ind. Cas. 946=A.I.R. 1921 Lah. 187 (1).

——S. 11—Same cause of action—Award not in terms of reference—Decree in terms of.

A decree on an award which is not strictly in accordance with the terms of reference, will nevertheless operate as **res judicata** in a subsequent suit on the same cause of action. 59 Ind. Cas. 89 (2).

——S. 11—Same cause of action—Decree for ejectment of tenant on payment of compensation—Fresh suit for ejectment barred.

A landlord obtained a decree for ejectment against a tenant on payment of statutory compensation but allowed execution of the decree to become barred by limitation.

Held, he cannot institute a fresh suit for ejectment. 23 Mad. 629; diss. Per **Wallis, C. J.** Ordinarily when a person has a cause of action and brings a suit upon that cause of action, it is merged in the decree and is **transit in rem judicatum** and then his remedy is in execution, and if he does not enforce his remedy and allows it to become barred his rights are gone. 41 Mad. 641=34 M.L.J. 167 =23 M.L.T. 156=44 Ind. Cas. 110=(1918) M. W.N. 205=7 L.W. 143.

——S. 11—Ejectment decree barred—No fresh suit after.

No fresh suit for ejectment, unless for a fresh cause of action, is permissible after execution of original decree is barred. 39 Ind. Cas. 954= (1917) M.W.N. 560.

——S. 11 and O. 2, R. 2—Partition—Two suits.

After a decree for a partition the only remedy for the plaintiffs is in execution and not by separate suit. 16 C.W.N. 839; 37 All. 155 and 35 Cal. 961 Diss. The cause of action for partition is one and the same and once it has merged into a decree a second suit for partition will not lie. 40 Ind. Cas. 820=(1917) M.W.N. 327. [Editorial Note. See cases to the contrary under 3 (e) infra.]

——S. 11 (S. 13, Old Code)—Partnership—Suit for dissolution and winding up—Decision—Subsequent suit against same parties and others not impleaded in prior suit though partners—Res judicata—"Cause of action".

Cause of action does not depend upon the relief claimed and a prior suit for dissolution and winding up of partnership is a bar to a second suit against the same persons based upon the same allegations especially in the absence of any allegation that there were any fresh transactions or any accounts to be gone into other than those which had been gone into in the prior suit. All partners should be made parties to a suit for the winding up of partnership; and if a suit is not maintainable against some of the partners by reason of a previous suit having been instituted for the same relief (e.g., by reason of the bar created by S. 13, C.P. Code, of 1882) the same is not maintainable even as against others alleged to be partners though not impleaded in the prior suit. (1904) 5 Ind. Cas. 362=20 M.L.J. 308=33 Mad. 423=7 M.L.T. 211=1910 M.W.N. 518.

——S. 11—Same cause of action—Suit for claim against agent or principal—Suit decreed against agent—Remedy against principal.

Where a person sued claiming a sum from the agent or the principal and his claim was decreed against the agent, held his remedy was exhausted and he could not get any decree against the principal. 25 Ind. Cas. 132.

——S. 11—Suit for accounts.

Subsequent suit is barred under S. 11 where the subsequent suit is exactly of the same nature as the previous suit with the difference that the date from which the accounts are asked for in the later suit is a few years later than in the previous suit. A.I.R. 1924 Bom. 118 .

——S. 11—Res judicata upon a cause of action against co-promisor.

A judgment against one joint and several promisor is no bar to a subsequent suit on the contract or obligation against the other or others. There can be no **res judicata** upon a cause of action against a co-promisor. A.I.R. (Vol. 20) 1933 Bom. 407=35 Bom.L.R. 881=145 Ind. Cas. 619.

——S. 11—Decision in respect of non-existing right.

An adverse decision as to plaintiff's right to impeach a transfer which was then not a valid transfer but only one of **spes successionis** is not **res judicata** as regards his subsequent suit to impeach the same transfer after the limited owner's death. 3 L.L.J. 211=61 Ind. Cas. 375=A.I.R. 1921 Lah. 133.

——S. 11—Dismissal of suit for default—Subsequent suit on same or different cause of action.

A dismissal of a suit for default does not operate to bar a second suit on the same cause of action, much less to bar a second suit on an entirely different cause of action. 22 Ind. Cas. 820=12 A.L.J. 53.

——S. 11—Rejection of plaint.

Under a compromise **A** and **B** were bound to pay maintenance to **C** every year. **A** paid the whole amount for two years and sued **B** for contribution. The appellate Court rejected the plaint as disclosing no cause of action because the compromise did not contain any clause as to contribution. **A** then sued again on the same cause of action and the same subject-matter.

Held, the suit was barred. (1920) M.W.N. 616=60 Ind. Cas. 694=12 M.L.W. 457.

3 (c)—Different causes of Action.

——S. 11—Suit by reversioner during widow's life time challenging alienation by her, dismissed—Suit for possession after her death, if barred.

A suit may be brought during the life-time of a Hindu female by a reversioner to have an alienation declared to be void except for the life-time of the female within 12 years from the date of the alienation. Such a suit, if decreed, will not empower the plaintiffs to obtain possession of the property. After the death of a Hindu female, a suit for possession may be instituted within 12 years of the death of the limited owner.

Though the suit brought by the reversioners to set aside the alienation by the widow brought during her life-time but more than 12 years after the alienation is dismissed, yet a fresh cause of action accrues to the reversioners after the death of the widow and the decision of the first suit would not bar the second suit. A.I.R. (Vol. 27) 1940 All. 433=1940 A.L.J. 479=1940 A.W. R. 434=191 Ind. Cas. 786.

——S. 11—Suit by adopted son for possession from widow's alienee—Dismissal of, on ground that adopted son had no cause of action till widow's death—Subsequent suit by adopted son's alienee after widow's death.

A Hindu widow alienated the property of her deceased husband to a third person and adopted a son who brought a suit against the alienee for recovery of possession of the property. The suit was dismissed solely on the ground that he could not bring the suit during the widow's lifetime. Subsequently the adopted son sold the property to his father who sold it to the plaintiff. The plaintiff sued for possession after the widow's death:

Held, that on the principle that a person cannot approbate and reprobate, the defence that the cause of action arose at the time of adoption was barred by **res judicata**; but the decision in the prior suit was not **res judicata** against the plaintiff in the subsequent suit. A.I.R. (Vol. 23) 1936 Bom. 402=38 Bom.L.R. 853=60 Bom. 1008=165 Ind. Cas. 987.

——S. 11, O. 2, R. 2—Muhammadan husband gifting property to wife in lieu of dower—After death of husband, widow remarrying—Brother of deceased suing for pre-emption alleging transaction to be sale—Suit dismissed—Subsequent suit for declaration of title on ground of remarriage and for avoidance of gift.

After the death of her husband, a Muhammadan widow to whom her deceased husband had gifted certain property in lieu of dower, remarried. The brother of the deceased husband brought a pre-emption suit alleging that the transaction was sale and not a gift. The suit was dismissed. Subsequently he filed a suit for declaration that he had acquired a title to the property on the ground of the remarriage of the widow and that the gift was null and void against him:

Held, that the plaintiff in his previous suit challenged what his deceased brother had done in relation to the land in suit. In his subsequent claim, however, he was basing his right of ownership on what had been done by the widow herself and there could be no question but that the two reliefs were based on separate causes of action altogether. It could not therefore be urged that at the time the pre-emption suit was instituted by the plaintiff, he was bound under any provision of law to seek relief on the other ground also which had nothing to do with the ground on which he was seeking the first relief. The suit, therefore, was not barred either under S. 11, or under O. 2, R. 2.

Held, however, that the plaintiff was not entitled to challenge the validity of the gift inasmuch as by bringing a suit for pre-emption, he should be taken to have consented to the transaction in the eye of the law. A.I.R. (Vol. 25) 1938 Lah. 492=40 P.L.R. 794=181 Ind. Cas. 87.

——Ss. 11, 80—V and J having equal shares in property—Insolvency of J—Release deed by Official Assignee in favour of V—J's share found already sold in execution of mortgage decree—V's suit against Official Assignee for return of consideration—Another suit by him against Official Assignee representing J's estate—Notice under S. 80.

V and J had equal shares in some property. J's share was subject to mortgage of one D. J was adjudicated insolvent. The Official Assignee executed a release deed in favour of V, in respect of J's share in consideration of Rs. 738. The deed read as follows "the release is at perfect liberty to enjoy the property without any let, hindrance or claim on the part of the said J, the insolvent, or anyone claiming under the said J." Prior to the release J's share was sold in execution of D's mortgage decree. V instituted a suit against Official Assignee for recovery of the consideration paid by him on the ground that the release had no legal effect. The suit was dismissed. Subsequently V filed another suit against the Official Assignee representing the estate of J for recovery of the amount on the ground that he had granted him a good title in respect of J's share but he had lost that and hence the Official Assignee was liable to him in damages. No notice was sent under S. 80, C. P. Code:

Held, that the causes of action in two suits were different and consequently the second suit was not barred by **res judicata**.

Held, also, the claim against the Official Assignee was not a claim against him personally, but a claim against him as representative of the estate of J, and throughout the case he merely occupied the position as the representative of that estate. Therefore, no notice was required to be given under S. 80, C. P. Code, to the Official Assignee before the suit was instituted. A.I.R. (Vol. 25) 1938 Mad. 221=1938 M.W.N. 10=47 L.W. 46=(1938) 1 M.L.J. 92=177 Ind. Cas. 579.

——S. 11, O. 2, R. 2—Suits arising out of same transaction.

The plaintiff's prior suit was for rectification of the sale deed so as to show that the area of the property purchased was a certain figure and that possesson over certain portion be decreed in his favour. In a subsequent suit it was prayed that portions of the building covered by the sale-deed in respect of which the defendant failed to deliver possession and wrongfully retained possession be decreed to him:

Held, that though both suits arose out of the same transaction, the cause of action was different and the subsequent suit was not barred by S. 11 or O. 2, R. 2, C. P. Code. A.I.R. (Vol. 24) 1937 Oudh 263=1937 O.L.R. 115=13 Luck. 192=1937 O.W.N. 252=167 Ind. Cas. 414.

——S. 11—Distinct cause of action—Suit by L, assignee of kanomdar against tenant R for ejectment—C another assignee of kanom interest making attempt to get possession in collusion with R—C made defendant to suit and relief claimed against him—C found in possession and suit dismissed, no collusion being found—Subsequent suit by L based on title—Suit held not barred. A.I.R. (Vol. 24) 1937 Mad. 804=175 Ind. Cas. 925.

——S. 11—Suit for possession of some or all of the coparcenary property and suit for partition

and possession of an undivided share are radically different and they are separate causes of action. 1936 M.W.N. 440.

——S. 11—Cause of action and issues different in suit by A against B at C and suit by B against A at S. A cannot plead before Court at S that decree of Court at C was **res judicata**. In such cases there are no conflicting decrees. A.I.R. (Vol. 22) 1935 All. 645=155 Ind. Cas. 571.

——S. 11—Prior suit claiming exclusive use of water—Rights to surplus water only upheld—Subsequent suit alleging obstruction of flow of surplus water not barred.

Where in the previous suit the plaintiffs claimed exclusive use of the water that flowed along a particular channel, but their rights were upheld only to surplus water which remained after the defendant's lands had been irrigated, a subsequent suit by the plaintiff stating that the flow of surplus water is obstructed by the putting up of another dam and by further raising the level of the channel, is not barred by **res judicata**. 99 Ind. Cas. 516=A.I.R. 1927 Mad. 415.

——S. 11—Suit for ejectment—Relationship of landlord and tenant not proved—Subsequent suit for rent—Dismissal on same grounds—Third suit for declaration of title and possession on allegation of tenancy and forfeiture—No res judicata.

A landlord filed a suit for ejectment of the tenant after giving notice to quit. The relationship of the landlord and tenant was not proved and the suit was dismissed. The landlord subsequently filed a suit for rent against the defendants for the same land. This suit was also dismissed on the ground that the relationship of landlord and tenant was not established. Another suit by the landlord was subsequently filed in which he stated that the defendants were his tenants but the tenancy had been terminated by reason of the denial of the defendants as to their relationship having been given effect to by the final decision in the prior suits. The plaintiff based his cause of action on the forfeiture of the tenancy on two dates, namely, those of the decisions and prayed for possession on declaration of title:

Held, that the subsequent suit was not barred by **res judicata**. The judgments passed therein were no doubt **res judicata**, but **res judicata** on a very limited point, viz., on the point that there was no relationship of landlord and tenant between the plaintiffs and defendants at the time when the notice to quit was served or for period in claim in the rent suit. It was not **res judicata** on the point of the plaintiff's title or on the point as to whether there was relationship of landlord and tenant between the plaintiff and defendant at a time prior to the date when the notice was served on the defendants. A.I.R. (Vol. 22) 1935 Cal. 607=61 C.L.J. 366=159 Ind. Cas. 515.

——S. 11—First suit based on contract of lease—Second suit for compensation based on tort.

The plaintiff instituted a suit against the defendant on the allegation that the latter had rented a room in the former's house. This suit was dismissed on the ground that the plaintiff did not prove the tenancy. Subsequently, plaintiff filed another suit against the defendant claiming compensation for use and occupation of that room by defendant. On the ground that the second suit was **res judicata**, the lower Court dismissed the suit:

Held, that the first suit was based on contract and the second on tort and these two being mutually exclusive causes of action when plaintiff sued on one of them and failed, he was entitled to sue on the other contrary cause of action and consequently the second suit was not barred by **res judicata**. A.I.R. (Vol. 20) 1933 Rang. 106=144 Ind. Cas. 734.

——S. 11—Different subject-matter.

Suit for declaration of title to certain share—Partition by Collector in the meantime under Bengal Estates Partition Act, of the parent estate into six—Execution and obtaining possession of shares decreed—Collector refusing to record plaintiffs' names—Fresh suit for distribution of decreed share to newly formed estates is not barred by **res judicata**, because the specification of shares in different estates was not the subject-matter of the previous suit. A.I.R. (Vol. 21) 1934 Pat. 515=15 P.L.T. 747=156 Ind. Cas. 575.

——S. 11—First suit for declaration of right to possession—Second suit for partition.

A partition suit by a purchaser of a coparcener's interest in a joint Hindu family is not barred by a prior decision against him for declaration of his right to possession under O. 21, R. 103. 49 Mad. 596=23 M.L.W. 551=95 Ind. Cas. 209=A.I.R. 1926 Mad. 683=50 M.L.J. 681.

——S. 11—Right to immediate possession and right to recover possession at some future time.

Heirs of a deceased Mahomedan sued his widow for immediate possession of his property held and retained by the widow in lieu of dower, on the ground that her dower-debt had already been satisfied. They also claimed mesne profits for some period before and during suit. The suit was decreed on condition that the plaintiffs were to pay to the widow certain amount as the balance of dower, within a certain time. The sum was not paid and the suit thus stood dismissed. The widow thereupon gifted away the property mentioning in the gift-deed that she had become absolute owner of the property.

Held, that the effect of the non-payment by plaintiff in the prior suit had not the effect of conferring absolute estate on the widow and the decision in the prior suit did not extinguish plaintiff's right to claim possession at any future time, a question different from that adjudicated, a right to immediate possession. 52 I.A. 145=47 All. 250=86 Ind. Cas. 579=27 Bom.L.R. 796=23 A.L.J. 115=30 C.W.N. 673=6 L.R.P.C. 25=2 O.W.N. 180=A.I.R. 1925 P.C. 63=48 M.L.J. 667 (P.C.).

——S. 11—First suit as reversioner—Second suit as widow's heir.

Where in the first suit the plaintiff based his title as reversioner to the deceased widow and in the subsequent suit he pleaded that he was entitled to the property as the widow's heir,

Held, that the later suit was not barred by **res judicata**. 1930 A.L.J. 1254=130 Ind. Cas. 13=A.I.R. 1931 A. 21.

——S. 11—First suit denouncing alienation in reversioner's capacity—Second suit as alienee's representative.

A previous suit in which plaintiffs, denounced the mortgagor's alienations in the capacity of reversioners is no bar to a subsequent redemption suit by the plaintiffs as representative of the mortgagors. The two suits are based on different causes of action. 172 P.W.R. 1916=37 Ind. Cas. 447=52 P.L.R. 1917.

——S. 11—First suit for declaration of title—Second suit for declaration that alienations bind reversion.

Dismissal of suit for declaration of title by survivorship is not **res judicata** on plaintiff's claim in a subsequent suit for declaration that certain alienations shall bind reversion. 47 Ind. Cas. 2.

——S. 11—Suit for possession — Previous suit for declaration no bar.

The dismissal of a suit of the reversioner for a declaration that he was the next reversioner during the lifetime of the widow on the occasion of transfer by her by way of gift is no bar to a subsequent suit for possession of the property. 70 Ind. Cas. 635=A.I.R. 1922 All. 401.

——S. 11—Suit for declaration—Dismissal for default—Subsequent suit for possession.

A suit, for declaration that an alienation in favour of the defendant is invalid was dismissed for default. The plaintiff subsequently sued for partition and possession of a share. **Held**, the cause of action being different, the suit is not barred. 60 Ind. Cas. 201=12 M.L.W. 431=39 M.L.J. 412.

——S. 11—Reliefs same—Cause of action different.

When the causes of action are different it cannot be said from the mere fact that the same relief is claimed in both, that the later suit is barred by reason of the earlier suit. 29 Mad. 153, Foll. 86 Ind. Cas. 949=A.I.R. 1925 Mad. 1172.

——S. 11—Two agreements—Separate suits.

Where there are two agreements to sell two consignments of **mohua** a suit for damages for failure to deliver one consignment and a decree thereon do no bar a fresh suit on the agreement to deliver the second consignment. 7 Nag.L.J. 25=83 Ind. Cas. 309.

——S. 11 and O. 2, R. 2—Mortgage—Suit for interest—Subsequent suit for mortgage amount.

A mortgage-deed contained a distinct and separate covenant to pay interest. The mortgagee sued for interest alone based on this covenant, obtained a money decree and in execution thereof got the mortgaged property sold in execution, free of his mortgage. He then sued for payment of the mortgage money out of the sale proceeds deposited in Court but his suit was dismissed. Thereupon he filed a suit on the mortgage itself.

Held, that the previous suits did not operate as a bar under O. 2, R. 2, inasmuch as the cause of action in those suits were different from the one in the present suit.

Held, further, that if no mortgage decree could be given on other grounds, a money decree for the mortgage amount will be barred either under O. 2, R. 2 if no such relief was asked for in the previous suit or under S. 11 if such relief was asked for and not granted. 4 U.B.R. 62=64 Ind. Cas. 953=A.I.R. 1922 U. B. 1.

——S. 11—Co-heir's suit for possession against widow—Conditional decree—Suit dismissed for non-fulfilment of condition—Subsequent suit for possession against donee from widow.

In a suit by Mahomedan heirs for possession against a widow in possession of the deceased's estate for her dower, a conditional decree was passed on non-fulfilment of which the suit was to stand dismissed. A subsequent suit was brought by the heirs for possession from a donee of the properties from the widow. **Held**, that the dismissal of the prior suit did not bar the suit, as the cause of action is entirely different. 41 All. 538=17 A.L.J. 629=51 Ind. Cas. 242=1 U. P. L. R. (H.C.) 106.

——Ss. 11, 47—Suit for ejectment of tenant-at-will—Plea of permanent tenancy—Decree for ejectment — Decree becoming time-barred—Denial of title by tenant—Fresh suit for ejectment by landlord.

A sued for ejectment of **B** on the ground that **B** was his tenant-at-will. **B** pleaded that he was a permanent tenant and was not liable to be ejected. The suit was decreed in **A's** favour but **A** allowed the execution of the decree to become time-barred. **A** thereafter instituted a suit for rent against **B** and obtained a decree. In this suit **B** denied **A's** title. **A** thereupon sued for ejectment of **B** on the ground of forfeiture by denial of title.

Held, that the suit was not barred either by the principle of **res judicata** or by the provisions of S. 47, C. P. Code. A.I.R. (Vol. 17) 1930 All. 479=1930 A.L.J. 908=130 Ind. Cas. 638.

——S. 11—Rent suits—Former suit for payment of rent—Subsequent suit for fixation of rent.

"It is said that the party is bound by the decisions in the rent suits which operated as **res judicata**. If this were the law, it would, indeed, be very strange; but having regard to the facts of this case and having regard to the way in which the rent suits were disposed of, we are of opinion that this is not the law." In this case, the former suit was for payment of rent and the new suit for fixation of fair and equitable rent under very different set of circumstances. The causes of action were therefore different. But the general question was left open. 37 C.L.J. 314=72 Ind. Cas. 1013=A.I.R. 1923 Cal. 333.

——S. 11—Cess suit.

In the Bengal Cess Act in almost every important section stress is laid upon the fact that the cess is for the year that is current. So there cannot be **res judicata** in regard to the amount of cess, unless it is first proved that the two years, which are to be compared one with the other fall under the same revaluation. A.I.R. 1927 Pat. 58.

——S. 11—Previous decree for cess.

A previous decree for cess does not operate as **res judicata** as a cess is a recurring charge. 1 Pat. 218=65 Ind. Cas. 138=1922 P.H.C.C. 167=3 Pat. L. T. 282=A.I.R. 1922 Pat. 303.

——S. 11—Suit for arrears of rent—Subsequent suit for ejectment.

Where a suit for arrears of rent, was dismissed on

the ground that no relationship of tenancy existed, a subsequent suit on title for ejectment is not barred by **res judicata**, by reason of the decision in the former suit. 61 Ind. Cas. 201=33 C. L. J. 334. A.I.R. 1921 Cal. 355.

——S. 11—Former suit on title—Subsequent suit to accept karar.

A former suit establishing plaintiff's right as poojari but that her right to sue for a share in the offerings without offering a **karar** to the defendant, does not exist, is no bar to a second suit to compel the defendant to accept a **karar** and thus give a share in the offerings. 21 Ind. Cas. 984.

——S. 11—Cause of action—Different—Suit on possession—Suit on title.

A lady inherited part of the property of her husband on his death and took possession of the rest as in lieu of dower. Her heirs brought a suit against her for possession. It was decreed. The defendants (plaintiffs) in subsequent suit brought a suit to recover possession of 3|4th of the widow's husband's property. **Held,** the present suit was not excluded by **res judicata** by reason of the former one by defendants against the plaintiffs. The decision in a suit based on a possessory right is no bar to a subsequent suit on title. 16 Ind. Cas. 431.

——S. 11—Cause of action—Different—No bar to suit against person in possession on basis of sale certificate.

J and his two minor sons purchased a certain property at an auction sale. **K,** subsequently brought a suit against **J** alone for possession of a portion of the property and won that suit. Afterwards **D,** one of the sons of **J,** brought the present suit against **K,** to recover possession of the property on the basis of the sale certificate. **Held,** that the suit was not barred by **res judicata.** 14 Ind. Cas. 745.

——S. 11—Rent suits—Different jotes—No res judicata.

The doctrine of **res judicata** is not applicable to rent suits (obiter).

Held, even otherwise, as the two suits related to different jotes, the doctrine was inapplicable. 37 C.L.J. 314=A.I.R. 1923 Cal. 333=72 Ind. Cas. 1013.

——S. 11—Landlord and tenant — Different lands.

Where the question in the previous suit was whether certain land entered as qabzadari should be recorded as ordinary tenancy without rent and the subsequent suit related to certain land which was recorded as **bila lagan.** **Held,** that the later proceeding was not barred by **res judicata.** 13 R.D. 114.

——S. 11 and O. 2, R. 2—Cause of action—Different mortgages.

Dismissal of a suit for redemption of an oral mortgage on the ground that no such mortgage existed is no bar to a subsequent suit for redemption of another mortgage found to be subsisting during course of the previous suit. 29 M. 153, foll. 33 All. 302=9 Ind. Cas. 53=8 A.L.J. 47.

——S. 11 (S. 13 Old Code)—First suit and second suit based on different causes of action.

The defendant, first brought a suit for redemption of land. The plaintiff in the present suit who was the defendant in the prior suit pleaded that he had an irredeemable Adimayacana tenure which was overruled and a decree was given to the plaintiff in the prior suit. The present suit was brought by the defendant in the former suit for recovery of Adimayavana allowance. **Held,** that the suit was not barred by **res judicata.** (1906) 30 M. 203.

——S. 11 (S. 13 Old Code)—Decree against dead man in former suit—Subsequent suit against his representatives—Cause of action different—Res judicata.

If a judgment be improperly obtained so that it never ought to have been signed, there can be no doubt, when set asde, it ought to be treated as never having existed. 1 Q.B. 455, foll. Where, therefore, a judgment was obtained against a dead man and subsequently another suit was brought against his representatives, it was held that the former judgment must be treated as never having existed and that it could not operate as **res judicata.** Where causes of action are different, the principle of **res judicata** does not apply. (1905) 9 Bom.L.R. 274.,

——S. 11 (S. 13, Old Code)—Suit on surety bond against a cash-keeper and the surety—Dismissal on preliminary point—Suit on the cause of action on the debt due—No bar.

Where **A** was employed by **B** as his cash-keeper and **A** and his father **R** executed a bond to **R** as surety for the proper delivery of monies received by **A** for **B,** and **B** afterwards took two others as partners, and on defalcation by **A** after the two partners came in, **B** and his partners sued **A** and **R** on their surety bond and the suit was dismissed because under **S. 260** of the Contract Act the surety bond was discharged: **Held,** such dismissal could not affect any cause of action based on the debt against **A** and **R.** (1901) 28 C. 597.

——S. 11—Previous suit claiming title by adverse possession — Subsequent suit claiming easement—Finding as to ownership of Government in previous suit—Res Judicata.

Where the plaintiff is claiming a right of ownership by adverse possession it is essential to decide what period of possession would give him such a right, i.e., whether his possession had been adverse to a private person or to the Government. The question whether the Government was the owner is one which has to be decided. In a subsequent suit by the same person claiming a right of easement the finding that the Government had been the owner of the property before it was transferred to the defendant operates as **res judicata.** A.I.R. (Vol. 30) 1943 All. 362=1943 A.L.J. 595=I.L.R. (1943) All. 792=209 Ind. Cas. 578.

——S. 11—Certain Hindu reversioners brought a suit contesting a sale deed executed by two widows **A** and **B.** In that suit both the parties treated **A** alone as having title as a Hindu widow in the entire property sold and the defendants raised no plea based on the title of **B.** The suit was decreed and a declaration was granted that the sale would be valid only for **A's** lifetime. In a subsequent suit for possession of the property brought on the death of the widow the defendants raised a plea based on the title of **B:**

Held, that the decree in the previous suit related to the transfer of the whole of the property sold

and not to a portion of it and that the defence based on the title of B as a co-vendor was barred by S. 11. A.I.R. (Vol. 29) 1942 Oudh 354=1942 O.W.N. 222=200 Ind. Cas. 241.

——S. 11—Reversioner suing to set aside attachment of property made in pursuance of decree against widow on ground of want of legal necessity and of gift—Suit dismissed—Subsequent suit by plaintiff for declaration that sale was not binding on his reversionary interest.

S. 11 of the C. P. Code does not require that the causes of action in both the suits should be the same for the application of the rule of **res judicata.** The causes of action may be different or the subject-matter may be different, but if the issue involved in both the cases is the same and if it was directly and substantially in issue in the former case between the same parties or between parties under whom they or any of them claim, litigating under the same title, the decision of such an issue in the former case will operate as **res judicata** provided the other conditions laid down in S. 11 are satisfied.

If it is possible to treat the entire cause of action upon which the latter suit is founded as divisible, and if in the earlier suit one of the component parts of the cause of action was relied on, then the previous decision will stand as a bar to the extent of the matter involved in the earlier suit.

A Hindu widow incurred some debts without legal necessity. The creditor obtained a decree and attached the property. The reversioner instituted a suit for release of the property on the ground that the debt being without legal necessity was not binding on his reversionary interest and because he was the owner of the property in pursuance of gift by the widow. The issue as to legal necessity was decided against the plaintiff. As regards the alleged gift, the Court held that the gift was made subsequent to the attachment and therefore the gift was void as against the same. The suit, therefore, was dismissed and the property was sold. The reversioner subsequently brought a suit for declaration that the sale was not binding on his reversionary interest as the debts were without legal necessity:

Held, that the previous suit was a composite suit claiming release in both capacities, one as reversioner and the other as donee. The subsequent suit therefore was barred by **res judicata.** A.I.R. (Vol. 25) 1938 Nag. 401=I.L.R. (1938) Nag. 496=180 Ind. Cas. 922.

——S. 11—First suit by mutawalli for possession of mosque dismissed on ground of adverse possession—Subsequent suit for its restoration and declaration of right to pray barred.

A **mutawalli** of a mosque had filed a suit for possession of a mosque which was dismissed on the ground that the opposite party had acquired a title to it by adverse possession. The mosque subsequently having been demolished, another suit was subsequently brought on behalf of the mosque and the Muslim community for declaration of right to pray at the mosque and for its restoration:

Held, per **Full Bench (Din Mohammad, J.,** dissenting):—That S. 11, C. P. Code, applied not only to the final decision but also to issues. The real issue in the subsequent case was whether the mosque in question retained its character as a mosque till when it was demolished. The decision of this issue depended upon the question whether the defendants had perfected their title by adverse possession and, therefore, even if there was no prayer for possession in the subsequent suit, it was barred by **res judicata.** A.I.R. (Vol. 25) 1938 Lah. 369=40 P.L.R. 319=175 Ind. Cas. 945 (F.B.).

——S. 11—The test as to whether a previous adjudication operates as a bar to a subsequent adjudication of the same matter does not lie in the fact as to whether the two causes of action are different or the same. 12 O.C. 347; 20 All. 110, affirmed in 24 All. 429 (P.C.), Foll. 6 O.W.N. 191=116 Ind. Cas. 200=4 Luck. 603=A.I.R. 1929 Oudh 172 (F.B.).

——S. 11—Different causes of action—Scope of res judicata.

Where the cause of action in two suits are different the estoppel by **res judicata** should be restricted to questions of fact and mixed questions of fact and law and should not be extended to pure questions of law. 11 C.L.J. 464, Foll. 49 C.L.J. 357=A.I.R. 1929 Cal. 445.

3 (d)—Cause of Action arising subsequent to previous suit.

——S. 11—Cause of action arising subsequent to suit.

There can be no **res judicata** regarding 'a cause of action' that arose subsequently to the suit. A.I.R. (Vol. 27) 1940 Pat. 204=19 Pat. 1=6 B.R. 653=188 Ind. Cas. 337.

——S. 11—Suit relating to mesne profits for different periods.

The decree in the previous suit awarding mesne profits up to the date of that suit cannot be **res judicata** upon the question of mesne profits for the subsequent period because the causes of action for the two suits are quite different. A.I.R. (Vol. 26) 1939 All. 52=1938 A.L.J. 997=1938 A.W.R. 728 =180 Ind. Cas. 356.

——S. 11—Suit for possession of immovable property and mesne profits—Future mesne profits not allowed—Subsequent suit for mesne profits accruing after former suit.

Where a suit has been brought for possession of immovable property and for mesne profits both before and after suit, the mere omission of the Court to adjudicate upon the claim for future mesne profits would not operate as a bar to a subsequent suit for mesne profits accruing after the institution of the former suit. But where the Civil Court in express terms holds that the plaintiff is not entitled to future mesne profits and dismisses the claim for it a second suit for the same amount would not lie.

When not only the subject-matter is different but the cause of action is also different the decision on a pure question of law would not be **res judicata** for all subsequent cases. A.I.R. (Vol. 19) 1932 All. 169=1931 A.L.J. 1076=135 Ind. Cas. 843.

——S. 11—Suit for possession—Decree silent as to mesne profits—Subsequent suit for mesne profits from date of prior suit.

Where the decree in the previous suit is silent on the question of mesne profits, a suit for mesne profits for a subsequent period, that is, for a period subsequent to the date when the cause of action in the previous suit arose, is not barred by the doctrine of **res judicata.** A.I.R. (Vol. 18) 1931 Cal. 788 =58 Cal. 1040=134 Ind. Cas. 1042.

——S. 11—Cause of action of subsequent suit not existing at time of previous suit—Previous suit does not operate as res judicata—Entire cause of action in subsequent suit divisible—Part of cause of action relied upon in previous suit—Previous decision bars only that part. A.I.R. (Vol. 22) 1935 Cal. 792=40 C.W.N. 174=159 Ind. Cas. 1008.

——S. 11—A selling to B properties with stipulation that if B lost possession of property sold in whole or in part A would be liable to make good the loss—Property subject to mortgage—Suit by mortgagee against A and B as parties—Decree against A personally and against properties sold, passed—B held purchased with knowledge of mortgage—B instituting suit for damages against A:

Held, that B's claim was not barred by **res judicata** and that cause of action for B's suit did not accrue till B was dispossessed. A.I.R. (Vol. 19) 1932 All. 553=1932 A.L.J. 598=138 Ind. Cas. 495.

——S. 11—Alienation by Hindu father set aside in a suit by sons—Subsequent suit by vendee for purchase money against sons.

Plaintiffs purchased a certain property from a Hindu father and the sale was subsequently cancelled in a suit by the sons to set it aside on their depositing a certain sum in Court. Plaintiffs sued the sons of vendor, for the balance of the purchase-money.

Held, that the suit is not barred by the principles of **res judicata** as money paid to the father as consideration for the sale at the time of the sale cannot be regarded as a debt of the father until the sale had been set aside and the right of the vendee to get back the sale consideration from the father has accrued. 100 Ind. Cas. 745=A.I.R. 1927 All. 421.

——S. 11—Right not available before.

Where at the time of a declaratory suit the plaintiff has not acquired title by adverse possession his subsequent declaratory suit on the basis of adverse possession is not barred by **res judicata.** 27 P.L.R. 617=97 Ind. Cas. 170=A.I.R. 1926 Lah. 668.

——S. 11 (S. 13 Old Code)—Former suit for ejectment in rent Court—Subsequent suit for specific performance of lease—Cause of action for second suit not available in former suit—Res judicata.

Where the plaintiff, a panjotdar, had executed a kabuliyat and the defendant, landlord, served upon him a notice under S. 36 of U. P. Rent Act, and the Rent Court ordered his ejectment: **Held,** that in a subsequent suit by the plaintiff for specific performance the decision of the Rent Court did not operate as **res judicata** as for want of a lease at that time (Kabuliyat not being itself a lease) plaintiff could not set up his right as a perpetual lessee in answer to the notice under S. 36 of Act (12 of 1881). (1903) 1 A.L.J. 516=27 A. 136=1904 A.W.N. 189.

——S. 11—Scheme suit.

Generally speaking the cause of action in respect of a claim for the modification of a scheme is or should be the defective or unsatisfactory nature of the scheme in force, as discovered or disclosed in the light of the events and experience during the period that has elapsed since the last modification and therefore a suit in respect of the period subsequent to the previous suit is not barred by **res judicata.** Any evidence relating to matters previous to the date of the institution of the previous suit cannot however properly be the basis of a cause of action, yet, evidence of matters relating to the management during the earlier period might also be taken into consideration in the light of the subsequent events in coming to a conclusion with regard to the modifications to be made in the scheme of management and also with regard to the removal of the defendants from the office of trusteeship. 1925 M.W.N. 505=A.I.R. 1925 Mad. 1070 (F.B.).

——S. 11—Scheme suits—Subsequent suit based on different facts and sanction.

Though a scheme of management was asked and prepared by the trial Court in a previous suit the first appellate Court gave a personal direction to the trustee and the High Court thought it sufficient. No finding was given on the question of scheme. The present suit so far as it prays for a scheme, being based on a different set of facts which came into existence at least partly after the previous suit had been filed and on a different sanction newly obtained from the Collector was held to be not barred. 70 Ind. Cas. 579=1922 M.W.N. 477=A.I.R. 1922 Mad. 413.

——S. 11—Decree in administration suit declaring rights of parties—Suit to enforce rights—Maintainability of.

Where in an administration suit a decree is passed declaring the shares of the heirs to the estate after payment of the charges thereon, it is open to the heirs to bring a suit for distribution of the shares declared by the decree. The subsequent suit is not barred by **res judicata** as the plaintiff could not have enforced his rights under the prior decree. 64 Ind. Cas. 813=11 L.B.R. 60.

——S. 11—Fresh cause of action—Fresh suit.

Plaintiff obtained a decree for possession of certain property which was not executed for three years. Possession over the property had been obtained otherwise than in execution and plaintiff was subsequently dispossessed. **Held,** that dispossession of the plaintiff subsequent to the date of the decree was a fresh cause of action and the suit was rightly brought. 38 All. 509=35 Ind. Cas. 601=14 A.L.J. 709.

——Ss. 11 and 47—Decree becoming inexecutable—Suit on judgment—Maintainability.

In cases where an executable decree became incapable of enforcement at the instance of the person entitled to its benefit and the rights thereunder are not extinguished by satisfaction or otherwise, neither S. 11, C. P. Code, nor the principle of **res judicata** operates as a bar to the maintainability of the suit on the judgment. 1950 A.W.R. 272.

——Ss. 11 and 47—Decree for possession—Execution of decree barred by limitation—Fresh suit maintainable.

Where plaintiff obtained a decree for possession but that decree is unenforceable owing to limitation a fresh suit is maintainable on the decree. Neither S. 11 nor S. 47 of the C. P. Code operates as a bar. The plaintiff in such a case as this is not suing upon the same cause of action, he is alleging that he has obtained a decree and that the defendant is under a legal obligation to him under that decree and that obligation arises out of matters subsequent to those liti-

gated in the original suit. A decree determines questions between parties in litigation at the commencement of the suit; the plaintiff here is relying on something in his favour at the end of the suit and independent of the question originally litigated. Indeed, questions originally litigated cannot be reconsidered in the suit upon the decree and that is all that S. 11 provides. 32 Ind. Cas. 634=14 A.L.J. 102.

——S. 11—Suit for possession—Execution of decree barred—Regular suit if lies.

When the execution of a decree for possession is time-barred the appellant is entitled to eject the judgment-debtor on the basis of the decree. 28 Ind. Cas. 851.

——S. 11—Maintenance — Varying claim—Fresh suit—No bar.

Where maintenance for a Hindu wife was fixed long ago in a suit at a time when she had a residence in one of the defendant's houses her subsequent ejectment therefrom gave her a cause of action to demand that the maintenance should be supplemented by provision for her residence in the family house and a fresh suit for maintenance is not barred. 29 Ind. Cas. 25=8 S.L.R. 306.

——S. 11—Cause of action not arising on date of suit—Relief not granted can be claimed in second suit.

If a cause of action in a suit had not arisen on the date of the presentation of the plaint in the first suit, reliefs claimed in the suit but matter relating to which was not finally heard and decided owing to a compromise decree having been passed which does not grant the reliefs can be claimed in the second suit. 27 Ind. Cas. 708.

——S. 11—Causes of action—Fresh assignment in respect of tort subsequent to that originally sued upon.

In order that a judgment may operate as **res judicata** in a subsequent suit, the cause of action in the latter must be precisely the same as in the former suit. A fresh assignment in respect of a tort subsequent to that originally sued upon will not come within the scope of the first judgment so as to bar a second suit. 36 Bom. 189=13 Ind. Cas. 849=14 Bom.L.R. 9.

——S. 11—Cause of action—Different—Fresh suit.

Dismissal of a previous suit for declaration of title by adverse possession is no bar to a subsequent suit for declaration of title on the same ground provided, adverse possession for more than 12 years before suit, but after the date of institution of the first suit, is proved. 33 All. 463=9 Ind. Cas. 572=8 A.L.J. 324.

3 (e) Cause of Action recurring.

——S. 11—Partition—Right to—Continuing right—Successive suit.

The right to sue for partition is a continuing right incidental to the ownership of joint property. Therefore so long as the property remains joint, one of the co-owners can bring a second suit for partition though a previous suit for partition has been dismissed. 56 Ind. Cas. 610.

——S. 11—Partition suit—Previous unexecuted decree.

Where a joint owner fails to execute the decree which he obtained in a previous suit for partition, and brings a fresh suit for obtaining partition, it is not barred by the previous non-executed decree. A decree-holder is not barred from bringing a fresh suit for possession of property for which he got a conditional decree previously and failed to execute it. 77 P.R. 1915=31 Ind. Cas. 205=164 P.W.R. 1915. [Editorial Note. **See** case to the contrary under 3 (b), **supra.**]

——S. 11—First suit for partition decree—Decree not acted upon—Second suit for partition—No res judicata.

In a suit for partition to which parties were Indian Christians, a decree was obtained by **X** in 1919 against her sister **Y** and her brother. The decree, however, was not executed as the parties had agreed not to take any advantage of the decree which had been passed and had continued to be in joint possession of the properties treating the decree as if it was not in existence. The parties, however, fell out in 1932 and **X** instituted a suit under S. 9, Specific Relief Act, to recover possession of the properties of which she was dispossessed by **Y** through her husband and her son and obtained a decree. **Y** then filed a suit for partition and possession of her share which was contested by **X** as being barred by **res judicata** by reason of the decree in the suit of 1919 and the findings in the suit under S. 9, Specific Relief Act:

Held, that as the parties did not give effect to the decree of 1919 and continued in joint possession of the properties as **per** subsequent agreement, the second suit for partition was not barred. The decision in suit under S. 9, Specific Relief Act, operated as **res judicata** only to the extent of the finding given therein that **X** was in possession of the properties on the day she alleged in that suit that she was dispossessed and nothing more and did not operate as a bar to the second suit. A.I.R. (Vol. 25) 1938 Mad. 287=182 Ind. Cas. 348.

——S. 11—Partition suit—Compromise—Subsequent suit maintainable.

Where a suit for partition is dismissed under a compromise which was not carried out a second suit for partition is not barred by **res judicata.** The right to bring a suit for partition is a continuing right incidental to the ownership of the joint property. 37 All. 155=27 Ind. Cas. 694=13 A.L.J. 98.

——S. 11—Partition—Second suit for partition.

Parties can bring a second suit for partition if the first decree declaring their right to partition has not been given effect to. 14 Bom.L.R. 1198=17 Ind. Cas. 955=37 Bom. 307.

——S. 11—Cause of action recurring—Matter decided in previous suit—Res judicata.

Even if the cause of action for a suit is a recurring one, every matter decided in a previous suit may be **res judicata** which was substantially and directly in issue. 1926 P. H. C. C. 113=94 Ind. Cas. 553 =A.I.R. 1926 Pat. 288.

3 (f). Constructive res judicata.

See also C. P. CODE, S. 11—MIGHT AND OUGHT.

——S. 11—Distinct incongruity between two claims—Alternative claim need not be added.

The ordinary rule is that an alternative claim need not be added if there would be a distinct incongruity between the two claims and there would be a considerable incongruity if the plaintiff had been suing on the basis that there was a valid sale and at the same time on the ground that the sale had been avoided at his instance. A.I.R. (Vol. 32) 1945 Lah. 210=47 P.L.R. 174.

——S. 11—Cause of action—Two mortgages of the same property in favour of the same person.

Where two successive mortgages are created on the same property by the same debtor, in favour of the same creditor, the creditor, may either sue on the first, including the claim as to the second or sue separately on each claim and he is not debarred from adopting the latter procedure either by S. 11, Expl. 4 or O. 2, R. 2. 33 C.L.J. 232=60 Ind. Cas. 809 =25 C.W.N. 129.

——S. 11—Different causes of action.

Where the suit in the revenue Court was for partition and the later suit was filed in the civil Court for a declaration of the plaintiff's title as against strangers.

Held, that the later suit was not barred by the principle of constructive **res judicata**. 7 O.W.N. 56=A.I.R. 1931 Oudh 21.

——S. 11—Cause of action—Previous suit for declaration that a certain land was Shamilat Deh—Subsequent suit for declaration of title—Not barred.

Where the only issue in a previous suit between the parties was whether a certain land was **Shamilat Deh**, a subsequent suit for possession on the ground that the defendants had no right to the **Shamilat Deh** is not barred by **res judicata** as the plaintiff in the previous suit need not have urged that the defendants had no right. 24 P.W.R. 1912=13 Ind. Cas. 445=134 P.L.R. 1912.

——S. 11—Mortgage suit—Defendant omitting to put forward—Counter-claim.

Where a mortgage has ripened, all claims relating to the mortgage between parties thereto, must be determined in one suit, whether for sale, foreclosure or redemption. Where in a mortgage suit, the defendant omits to put forward a counter claim due to him by the mortgagee, arising out of the mortgage transaction, a separate suit for such recovery is barred. 60 Ind. Cas. 226=12 L.W. 173.

——S. 11, Expl. 4—Cause of action—Not put forth in prior suit—Subsequent suit—Bar.

In a suit for possession, plaintiff must establish his title in that very suit by urging and proving all that would go to establish his title. He cannot reserve one or more of such grounds for a future suit. If plaintiff sues for property on a false claim when he has a true claim and a cause of action for the same property of which he is aware, he must be taken to have abandoned his true claim and cause of action. 26 Mad. 760; 13 M.L.J. 448, foll. 54 Ind. Cas. 200.

4. Co-defendants.

(a) Conditions.
(b) Conflicting interests.
(c) Necessary decision.
(d) No issue between.
(e) Partition suit.
(f) Pro forma defendants.
(g) Substantially in issue.
(h) Unnecessary finding.
(i) Constructive res judicata.
(j) Scope and extent of res judicata.

4 (a). Conditions.

In order that a decision should operate as **res judicata** between co-defendants, three conditions must exist: (1) There must be a conflict of interest between those co-defendants, (2) it must be necessary to decide the conflict in order to give the plaintiff the relief he claims, and (3) the question between the co-defendants must have been finally decided. A.I.R. (Vol. 30) 1943 P.C. 115=10 B.R. 74=1943 O.W.N. 238=1943 A.L.J. 307 =1943 A.W.R. 23=48 C.W.N. 66=I. L. R. (1943) Kar. P.C. 123=208 Ind. Cas. 553 (P.C.).

See also A.I.R. 1944 Pat. 185=22 Pat. 655=10 B.R. 606=213 Ind. Cas. 385.

A.I.R. (Vol. 30) 1943 Mad. 276=(1943) 1 M. L.J. 36=56 L.W. 21=1943 M.W.N. 78=I.L. R. (1943) Mad. 477=210 Ind. Cas. 89.

A.I.R. (Vol. 30) 1943 All. 197=1943 A.L.J. 82=1943 A.W.R. 40=207 Ind. Cas. 99.

A.I.R. (Vol. 29) 1942 Cal. 1=I.L.R. (1941) 2 Cal. 434=73 C.L.J. 475=200 Ind. Cas. 822.

I.L.R. (1942) 2 Cal. 299=A.I.R. (Vol. 30) 1943 Cal. 76=46 C.W.N. 729=75 C.L.J. 301= 205 Ind. Cas. 344.

19 Pat. 669=A.I.R. (Vol. 28) 1941 Pat. 83= 7 B.R. 402=192 Ind. Cas. 441.

A. I. R. (Vol. 27) 1940 Rang. 136=190 Ind. Cas. 609.

A.I.R. (Vol. 26) 1939 Pesh. 1 (2)=179 Ind. Cas. 13 (When all these ingredients are present, the decision operates as **res judicata** between the co defendants even if in the previous suit the plaintiff's case was dismissed in toto).

A.I.R. (Vol. 25) 1938 Lah. 227=40 P.L.R. 600=181 Ind. Cas. 199.

I.L.R. (1938) Lah. 75=40 P.L.R. 1030 (where the previous suit was dismissed, it is as much an adjudication as if the suit had been decreed).

A.I.R. (Vol. 25) 1938 Mad. 959=1938 M.W. N. 938=(1938) 2 M. L. J. 775=182 Ind. Cas. 312.

(1938) M.W.N. 224 (2)=47 L.W. 374.

A. I. R. (Vol. 23) 1936 Rang. 308=164 Ind. Cas. 468.

A.I.R. (Vol. 22) 1935 Lah. 605=37 P.L.R. 89=159 Ind. Cas. 340.

A.I.R. (Vol. 22) 1935 Mad. 81=1934 M.W. N. 910=40 L.W. 823=67 M.L.J. 927=154 Ind. Cas. 65.

A.I.R. 1934 Bom. 329=36 Bom.L.R. 694= 153 Ind. Cas. 637.

A. I. R. (Vol. 20) 1933 Rang. 255=148 Ind. Cas. 438.

A.I.R. (Vol. 20) 1933 All. 206=145 Ind. Cas. 461.

A.I.R. (Vol. 20) 1933 Lah. 325=34 P.L.R. 452=14 Lah. 442=143 Ind. Cas. 90 (2) (where there is identity not only of the matter in issue but also of the cause of action, and there is no ground for holding that the previous decision was erroneous in law, the principle of **res judicata** becomes applicable).

A.I.R. (Vol. 20) 1933 Lah. 274=14 Lah. 31=34 P. L. R. 313=142 Ind. Cas. 724 (The mere fact that no distinct issue was struck on the point is immaterial. So also is the fact that there was no active contest).

A.I.R. (Vol. 19) 1932 Cal. 271=35 C.W.N. 1203=59 Cal. 636=137 Ind. Cas. 46 (If these conditions are fulfilled, the fact that the defendant who has a common case with the plaintiff and who is a proper party to the suit does not enter appearance but chooses to stand by and let the plaintiff fight his battle does not stand in the way of the rule of **res judicata** applying as between him and his co-defendant who was in conflict with the plaintiff. But if in fact there was no conflict between the co-defendants, the fact that there should have been a conflict would not make the matter **res judicata**).

A.I.R. (Vol. 19) 1932 All. 520=1932 A.L.J. 1063=139 Ind. Cas. 161.

A.I.R. (Vol. 19) 1932 All. 643=1932 A.L.J. 605=138 Ind. Cas. 552.

A.I.R. (Vol. 18) 1931 P.C. 231=8 Oudh W. N. 973=34 L.W. 439=61 M.L.J. 415=35 C. W.N. 1217=133 Ind. Cas. 721 (P.C.).

A.I.R. (Vol. 18) 1931 Sind 170=25 S.L.R. 493=134 Ind. Cas. 1171.

A.I.R. 1929 Mad. 638=119 Ind. Cas. 167.

51 Cal. 997=84 Ind. Cas. 846=A.I.R. 1925 Cal. 431.

3 Rang. 77=92 Ind. Cas. 489=A. I. R. 1925 Rang. 228.

A.I.R. 1923 Lah. 186=71 Ind. Cas. 481.

21 C.W.N. 693=25 C.L.J. 322=34 Ind. Cas. 929.

——S. 11—The Courts are reluctant to apply the doctrine of res judicata as between co-defendants unless clear indications appear of the presence of all the requisite conditions; it should be applied with great care and caution. There must be a conflict of interests amongst the defendants, and a judgment defining the real rights and obligations of the defendants inter se. Without necessity the judgment will not be res judicata amongst the defendants nor will it be res judicata amongst them by mere inference from the fact that they have collectively been defeated in resisting a claim to share made against them as a group. A.I.R. (Vol. 21) 1934 Oudh 437=11 O.W.N. 1180=151 Ind. Cas. 1013.

——S. 11—Test of mutuality.

The conditions under which the rule of **res judicata** becomes applicable to co-defendants are: (1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided. If these conditions are established the question whether the party against whom the doctrine is sought to be invoked was a necessary party or whether he had entered appearance is immaterial.

The test of mutuality is often a convenient one in question of **res judicata**. A.I.R. (Vol. 18) 1931 P.C. 114=1931 A.L.J. 453=35 C. W. N. 661=53 C.L.J. 552=33 Bom.L.R. 979=53 All. 103=1931 M.W.N. 742=61 M.L.J. 196=34 L. W. 459=58 I. A. 158=132 Ind. Cas. 598 (P. C.).

——S. 11—Co-defendants—Res judicata between—Conditions—Party not entering appearance in previous suit—When bound.

The conditions for the application of the doctrine of **res judicata** as between parties who have been co-defendants in a previous suit are:—There must be (1) a conflict of interest between the co-defendants, (2) the necessity to decide that conflict in order to give the plaintiff the appropriate relief, and (3) a decision of that question between the co-defendants. The doctrine may apply even though the party, against whom it is sought to enforce it, did not in the previous suit think fit to enter an appearance and contest the question. But to this the qualification must be added that, if such a party is to be bound by a previous judgment, it must be proved clearly that he had or must be deemed to have had notice that the relevant question was in issue and would have to be decided. 77 I.A. 27=1950 A.L.J. 132=1950 M.W.N. 166 =52 Bom.L.R. 469=1950 P.W.R. 206=63 L. W. 108=A.I.R. 1950 P.C. 17=54 C.W.N. 211 =(1950) 1 M.L.J. 241 (P.C.).

——S. 11—Co-defendants—Finding on issue not incorporated in decree—Res judicata—Conditions.

It is well settled that under certain circumstances decision of issues between co-defendants even though not incorporated in the decree, may operate as **res judicata**. The conditions necessary for a finding to operate as **res judicata** between co-defendants are that there should be a conflict of interest between co-defendants and that it should be necessary to resolve the conflict in order to give relief to the plaintiff. The conflict or the issue must have been finally decided and the co-defendants must have been either necessary or at least proper parties in the former suit. A.I.R. 1950 Assam 119.

——S. 11—The limits within which the doctrine of **res judicata** should be applied as between co-defendants are these: (a) that the co-defendants were necessary or proper parties in the former suit; (b) that there was a conflict of interest between them; (c) that there was a necessity to decide that conflict in order to give the plaintiff appropriate relief; and (d) that there was a decision of the question between the co-defendants. A.I.R. (Vol. 29) 1942 Cal. 92=I.L.R. (1942) 1 Cal. 169=74 C. L. J. 180=46 C.W.N. 245=200 Ind. Cas. 216.

4 (b). Conflicting interests.

——S. 11—Suit to challenge validity of will—Decision operates res judicata between defendants who are beneficiaries under will.

It is true that a finding between a plaintiff and a

defendant need not always be binding and operate as **res judicata** between co-defendants, but where in a suit to challenge the validity of a will, the question of the validity of the will is not one between the plaintiff and one of the defendants but is one in which all the defendants who are beneficiaries under the will are interested the decision in the suit operates as **res judicata** among them. The decision is, more or less, like a decision in a partition suit. A.I.R. (Vol. 33) 1946 All. 399=I.L.R. (1946) All. 325=1946 A.W.R. (H.C.) 53=1946 A.L.J. 97=1946 A.L.W. 6=1946 O.W.N. (H.C.) 6.

——**S. 11**—Co-defendants—Earlier suit decreed in second appeal against a defendant who remained **ex parte** in trial Court after the co-defendant had been exonerated—Subsequent suit by such defendant who was compelled to pay decree amount, for indemnity against exonerated co-defendants—Not barred. **See** CONTRACT ACT, S. 124—INDEMNITY IMPLIED BY LAW. (1946) 1 M.L.J. 383.

——**S. 11—Decision, if res judicata against non-appearing defendants.**

Where the plaint itself in a prior suit did not raise any conflict between the co-defendants and a defendant did not appear, but a co-defendant appeared and claimed an interest conflicting with the interest of the absentee-defendant, the decision, if any, on the point cannot operate as **res judicata** unless the absentee defendant gets notice of the conflict. In such circumstances the matter cannot be said to have been heard and finally decided so as to bind the parties. The basis of the principle of **res judicata** is best expressed in the maxim **res judicata proveritate accipitur:** A judicial decision is conclusive evidence **inter partes** of the matter decided. A matter once formally decided is decided once for all. If, however, the pleadings on record, no matter whether the co-defendants pleaded anything **inter se** or not, should raise the conflict of interest as between the different sets of the defendants, this requisite condition, namely, that there must be a conflict of interest between the defendants concerned, shall be satisfied. A.I.R. (Vol. 30) 1943 Cal. 76=I.L.R. (1942) 2 Cal. 299=75 C.L.J. 301=46 C.W.N. 729=205 Ind. Cas. 344.

——**S. 11**—Where there was no real conflict of interest between the co-defendants in the previous suit and the real contest in that suit was between the plaintiff and some of the defendants and it was not necessary to determine the rights and liabilities of the co-defendants **inter se**, and there was, in fact, no decision in the previous suit as to the rights of the co-defendants, the decision in the previous suit does not operate as **res judicata** in a subsequent suit with regard to conflict between co-defendants in the previous suit. A.I.R. (Vol. 26) 1939 Mad. 228=(1938) 2 M.L.J. 287=48 L.W. 383=1938 M.W.N. 1041=182 Ind. Cas. 33.

——**S. 11—Co-defendants occupying positions of conflict—Defendant supporting plaintiff's claim, plea of res judicata, if negatived.**

Neither the fact that a defendant did not contest but supported the plaintiff's claim, nor the fact that he was merely joined as a **pro forma** defendant nor again the fact that the suit finally ended in a dismissal is a good reason for negativing a plea of **res judicata** between co-defendants if they occupied a position of conflict. A.I.R. (Vol. 26) 1939 Mad. 830=50 L.W. 166=(1939) 2 M.L.J. 236=1940 M.W.N. 632=189 Ind. Cas. 215.

——**S. 11—Objection by one defendant regarding liability of his property being sold in execution overruled—Similar objection by others not barred.**

Where one of the defendants objects to his property being sold in execution of the decree for costs and the objection is overruled, the other defendants are not precluded from raising the objection. A.I.R. (Vol. 26) 1939 Pat. 41=5 B.R. 11=177 Ind. Cas. 689.

——**S. 11**—Parties defendants in previous suit—No contraversy between them in previous suit—Decree beneficial to both defendants—Subsequent suit not barred by **res judicata**. (1937) A.L.J. 1141.

——**S. 11**—Previous decision held, did not constitute **res judicata** as there was no conflict of interests and it was not necessary to decide that conflict even if it had been raised in order to give the plaintiff the relief he claimed. (1937) 20 N.L.J. 159.

——**S. 11—Conflict decided—Decision operates as res judicata.**

In order that a decision may operate as **res judicata** as between co-defendants, it is not necessary that there should be first a decision of the conflict between the co-defendants **inter se**, before the decision of the plaintiff's plea. Although the plea of the plaintiff and the non-contesting defendant be identical, if there is really a conflict between the co-defendants and there is a decision of the conflict, the decision would operate as **res judicata** between the co-defendants. A.I.R. (Vol. 22) 1935 Lah. 102=157 Ind. Cas. 771.

——**S. 11—Person having same interest as plaintiff impleaded as defendant in prior suit—Interest of such person hostile to co-defendants — Subsequent suit by him—Res judicata.**

Where **A** was impleaded as a defendant in the previous suit, but his position was exactly the same as that of the plaintiffs and his interests were hostile to those of his co-defendants, and the plaintiffs could not obtain a relief against the defendants unless there was a decision by necessary implication between the conflicting interests of defendants 1 and 2 and **A** in the old suit:

Held, that the decision in the previous suit operated as **res judicata** in respect of **A's** subsequent suit on the same point. A.I.R. (Vol. 22) 1935 Lah. 544=37 P.L.R. 274=157 Ind. Cas. 776.

——**S. 11—Active contest not necessary.**

It is not necessary that there should have been an active contest between the co-defendants, for a conflict of interest may exist even though one of the defendants concerned does not contest at all. A.I.R. (Vol. 22) 1935 Mad. 81=1934 M.W.N. 910=40 L.W. 823=67 M.L.J. 927=154 Ind. Cas. 65.

——S. 11—Where in a prior suit the interest of the plaintiff was identical with that of the first defendant, but the second defendant set up a different interest there being thus a conflict of interests in respect of the issue between the plaintiff and the second defendant:

Held, that there was a conflict of interest as between the defendants and the decision on that issue in the suit would operate as **res judicata** in a subsequent suit between the first and second defendants. A.I.R. (Vol. 20) 1933 Rang. 255=148 Ind. Cas. 438.

——S. 11—Where in a suit there was no real contest among the defendants between themselves and they had no occasion to appeal against a particular finding in that suit as that suit was dismissed as against them, the decision will not operate as bar by way of **res judicata** in a subsequent suit in which some of the defendants in the former suit figure as plaintiffs. A.I.R. (Vol. 20) 1933 Oudh 439=10 O.W.N. 844=8 Luck. 602=146 Ind. Cas. 710.

——S. 11—**Absence of open conflict.**

The conflict of interests need not be open and express but may be latent. The facts that one of the defendants did not enter appearance in the suit or was not a necessary party to the suit are not really material factors. If a defendant was a proper party and had a right to be heard, the fact that he chose to stand by and let the plaintiff fight his case could not affect his legal position. A.I.R. (Vol. 19) 1932 All. 520=1932 A.L.J. 1063=139 Ind. Cas. 161.

——S. 11—A **zemindar** instituted a suit against the brother's sons of a deceased occupancy tenant and his mortgagees, for recovery of possession alleging that the tenant had died without leaving heirs and the holding had lapsed to her. The brother's sons did not contest the suit. The mortgagees pleaded that the tenant had left heirs and the holding had not lapsed. The plea was accepted. In a subsequnt suit for redemption by the brother's sons:

Held, (i) the question whether the plaintiffs were the heirs of the deceased tenant was not **res judicata** inasmuch as there was no conflict of interest between the defendants in the previous suit nor any final adjudication on the question; (ii) the defendants were not estopped in the second suit from setting up the plea that the plaintiffs were not the real heirs. A.I.R. (Vol. 19) 1932 All. 643=1932 A.L.J. 605=138 Ind. Cas. 552.

——S. 11—Donor's heirs challenging gift on the ground of insanity of donor—Donor and donee both made defendants and they successfully contesting suit—Subsequent suit by donor to cancel gift on the same ground is not barred nor was the plaintiff equitably estopped from challenging the gift. 100 Ind. Cas. 527=A.I.R. 1927 All. 365.

——S. 11—If there is a conflict of interests amongst the co-defendants and the judgment defines their real rights and obligations **inter se,** the decision is **res judicata** between them and will bar the same matter being litigated by one of the said defendants against the other. 96 Ind. Cas. 406=A.I.R. 1926 Sind 282.

——S. 11—**Suit by third party—Mortgagor and mortgagee as defendants.**

Money spent by mortgagee in possession in defending his title as a mortgagee in a suit brought by a third party in which both the mortgagor and the mortgagee were joined as defendants can be tacked on to the mortgage money under S. 72 of the T.P. Act and also on the ground of **res judicata** between mortgagor and mortgagee where the finding in the suit was that the mortgagee could add that amount to his mortgage money and recover it when the mortgagor seeks to redeem the property. 1 Luck. 367=29 O.C. 336=13 O.L.J. 303=3 O.W.N. 304=98 Ind. Cas. 542=A.I.R. 1926 Oudh 281.

——S. 11—Conflict of interest between co-defendants and necessity to adjudicate on that dispute to give relief to plaintiff are necessary to make the decision **res judicata** between them. 1926 P.H.C.C. 249=97 Ind. Cas. 205=A.I.R. 1926 Pat. 478.

——S. 11—**Res judicata** applies if conflict of interest existed and if decision of suit rested on the issue. 47 All. 778=23 A.L.J. 453=88 Ind. Cas. 130=6 L.R.A. (Civ.) 385=A.I.R. 1925 All. 546.

——S. 11—Where the plaintiffs and defendants in the subsequent suit were arrayed as two sets of defendants in the previous suit and therein they contested with each other on a point of relationship:

Held, that that point was **res judicata** in the subsequent suit. 26 P.L.R. 504=7 L.L.J. 195=90 Ind. Cas. 250=A.I.R. 1925 Lah. 434.

——S. 11—As regards co-defendants, adjudication which is necessary to give the proper relief to the plaintiff is **res judicata** as between the co-defendants as well, provided there is a conflict of interest. 46 All. 220=22 A.L.J. 91=79 Ind. Cas. 803=5 L.R.A. (Civ.) 71=A.I.R. 1924 All. 310.

——S. 11—**Res judicata** as between parties arrayed on same side does not arise in absence of active controversy between them and of the necessity for adjudication between them for granting relief to plaintiff. 20 N.L.R. 197=80 Ind. Cas. 389=A.I.R. 1924 Nag. 429.

——S 11—Co-defendants—No conflict of interests—Decision does not operate as **res judicata.** 77 Ind. Cas. 862=A.I.R. 1923 All. 169.

——S. 11—Co-defendants—Previous suit for ejectment—No contest between defendants—Decision is not **res judicata,** on the question of validity of partition deed where it was not necessary for one of them to raise the question of the validity of the partition in the previous suit. 77 Ind. Cas. 917=A.I.R. 1922 Mad. 404.

——S. 11—Consent decree—No conflict of interest between co-dendants—Decree is not **res judicata.** 35 C.L.J. 173=64 Ind. Cas. 603=A.I.R. 1921 Cal. 632.

——S. 11—Co-defendant not necessary party—No conflict of interest—Decision is not **res judicata.** 2 Lah. 88=3 L.L.J. 223=62 Ind. Cas. 665=72 P.L.R. 1921=A.I.R. 1921 Lah. 47.

——S. 11—**No conflict inter se.**

Where the parties to a suit were both defendants in a prior suit and there was nothing to show that

there was a clear conflict of interest between them **inter se** in the prior suit, **Held**, that the prior decision cannot be **res judicata**. 24 M.L.T. 205=8 L.W. 206=48 Ind. Cas. 905=(1918) M.W.N. 567.

——S. 11—Mortgagor and mortgagee as co-defendants.

Where the previous suit was one brought by minor reversioners for the usual declaration that the alienation being wanting in consideration and necessity, should not affect their reversionary rights and in that case it was decided that all the consideration had not passed and that necessity was not proved.

Held, that the decision did not preclude a suit for possession by the mortgagee against the mortgagor as there was no conflict of interest between mortgagor and mortgagee in the previous suit. 77 P.R. 1894, Foll. 3 L.L.J. 295=67 Ind. Cas. 881=A.I.R. 1921 Lah. 25.

——S. 11—Mortgagor and mortgagee as co-defendants.

The mortgagor and the mortgagee are not bound by a decision in a suit by the reversioner for a declaration that the mortgage is not valid though they may be parties to the suit as there is no conflict of interest between them. 67 Ind. Cas. 881=3 Lah. L.J. 295.

——S. 11—Co-defendants—Suit by reversioner contesting alienation—If res judicata against alienor.

There cannot be **res judicata** between co-defendants, unless there is a conflict of interest between them, a necessity for a decision between them and there is a decision **inter se**. A decision therefore in a suit by a reversioner to contest a mortgage, is not **res judicata** as against the mortgagor. 63 Ind. Cas. 735.

——S. 11—Co-defendants—Suit by third party against all the defendants.

A decision would operate as **res judicata** between defendants **inter se** if there was an active controversy between them and a judgment was given defining their rights and obligations **inter se**. Moreover if a judgment can operate as **res judicata** among defendants, one defendant must have had a right of appeal against the other. A suit, however by a third party against all the defendants in a prior suit is not affected by the rule of **res judicata**. 143 P.L.R. 1915=28 Ind. Cas. 238=57 P.W.R. 1915.

——S. 11—Conflict of interest inter se necessary.

To constitute **res judicata** between co-defendants there must have been a conflict of interests between the defendants **inter se** and a judgment defining the real rights and obligations of the defendants **inter se**. Without necessity a judgment will not be **res judicata** amongst the defendants. (1918) M.W.N. 580=49 Ind. Cas. 369=8 L.W. 473.

——S. 11—Active controversy inter se necessary.

The first requisite for a finding or decision to operate as **res judicata** as between defendants **inter se** is that there should be an active controversy as against each other between them. The second is that the adjudication **inter se** between the co-defendants should be necessary to give the appropriate relief to the plaintiff. 43 Ind. Cas. 860=33 M.L.J. 740.

——S. 11—Conflict of interest.

The principles of **res judicata** will be applicable between co-defendants only where there was a conflict of interest between them and a judgment defining their rights and obligations **inter se**. 40 Bom. 210=33 Ind. Cas. 423=17 Bom.L.R. 1106.

——S. 11—Co-defendants—Conflict of interest.

Where there is a conflict of interest between defendants, and there is an adjudication defining the rights between the defendants **inter se** in order to give proper relief to the plaintiff such adjudication is **res judicata** between the co-defendants and also between the defendants and the plaintiff. 30 Ind. Cas. 604=8 Bur.L.T. 160.

——S. 11—Conflict of interest necessary.

A decision between co-defendants may operate as **res judicata** in any subsequent suit between them, if there was a conflict of interests among them and the judgment defined the real rights and obligations of the defendants **inter se**. 38 Bom. 438=23 Ind. Cas. 944=16 Bom.L.R. 283.

——S. 11 (S. 13, Old Code)—Conflict of interest necessary.

When an adjudication between defendants, is necessary to give the appropriate relief to the plaintiff, there must be an adjudication and in such a case the adjudication will be **res judicata** between the defendant as well as between the plaintiff and the defendants; but for this there must be a conflict of interest amongst the defendants, and the judgment must define the real rights and obligations of the defendants **inter se**. (1904) 5 C.L.J. 611=36 C. 193=1 Ind. Cas. 913.

——S. 11—Co-defendants—Decision when res judicata—Right of appeal.

The decision in a previous suit on a matter raised and actively contested between co-defendants will operate as **res judicata** in a subsequent suit in which such co-defendants are arranged as plaintiff and defendant. The fact that the defendant in a previous suit had no right of appeal against the decision will not affect the operation and bar of **res judicata** when he having the right to be joined as plaintiff chose to contest the suit as co-defendant. 14 M.L.T. 189=(1913) M.W.N. 690=21 Ind. Cas. 15=25 M.L.J. 379.

——S. 11—Co-defendants—Actual controversy—Finding as to title.

As between co-defendants a finding as to a question of title after active controversy is **res judicata** in a subsequent suit in which they are arranged on different sides. (1911) 2 M.W.N. 306=11 Ind. Cas. 17=11 M.L.T. 71.

——S. 11—Co-defendants—Conflicting interest.

A judgment can operate as **res judicata** between co-defendants whose interests are conflicting. 57 Ind. Cas. 594.

——S. 11—Co-defendants—Conflict of interest in prior litigation.

Where a widow alienated certain occupancy rights and the reversioners brought a suit against the vendees and the widow and one issue in that

suit was whether consideration passed, which the widow did not plead, but on being examined as a party denied the sale as well as the receipt of consideration, and the issue was decided against the vendees who sued the widow for possession of the property alleged to have been sold to them. **Held**, that as the interests of the widow and vendees were conflicting in the previous suit the question of payment of the consideration decided in the previous suit was **res judicata** and the lower Court correctly decided it. 103 P.R. 1912=188 P.L.R. 1912=16 Ind. Cas. 80=157 P.W.R. 1912.

——S. 11—No contest inter se.

In order that a finding in a case should be **res judicata** between co-defendants, three factors are necessary; (1) a conflict of interest between the co-defendants; (2) a necessity to decide on that conflict in order to give to the plaintiff the relief appropriate to his suit; and (3) a discussion in the judgment of the question raised as between the co-defendants. Where in a suit for money, a decree was passed against some only of the defendants, that decision could not operate as **res judicata** in a subsequent suit between the defendants against whom the decree was passed and those against whom the suit was dismissed. Courts are generally unwilling to extend the doctrine of **res judicata** to co-defendants and where it has been applied, it has been applied with great caution. 25 C.L.J. 322=34 Ind. Cas. 929=21 C.W.N. 693.

——S. 11—Co-defendants—Absence of conflict of interest.

A suit wherein there was no conflict of interest between the co-defendants on a matter raised by the defence will not bar a subsequent suit between the latter on the same matter. 18 Ind. Cas. 117 =17 C.W.N. 128.

——S. 11—No conflict inter se.

The decision on a point of fact not directly and substantially at issue in a former suit cannot operate as **res judicata** in a subsequent suit as between parties arranged on the same side in the former suit with no difference whatever between them. 11 Ind. Cas. 936=8 A.L.J. 807.

——S. 11—Co-defendants — Pre-emption — Sale held unauthorised—subsequent suit by vendee against vendor.

In a suit for pre-emption against **B** the female vendor and **C**, the purchaser, **C** admitted the rights of the pre-emptor but pleaded that full consideration had passed, **B** pleaded that the alleged sale was invalid as her husband **A**, who had sold the land as his wife's attorney had no authority to effect it. Her plea was successful and pre-emptor's suit was dismissed on the ground that **A** was not authorised to effect the sale. **C** subsequently sued **B** for possession of the land sold to him or in the alternative to recover the consideration-money paid to **A**.

Held, that the question whether **A** had authority from **B** to effect the sale in dispute was not **res judicata** on the ground of the finding in the previous pre-emption suit. 154 P.L.R. 1912=42 P.R. 1912=16 Ind. Cas. 127=123 P.W.R. 1912.

——S. 11—Co-defendants—Absence of conflict in previous suit—No adjudication—Effect of on subsequent suit.

Where in a previous suit, there was no contest between the two sets of defendants and no question was necessary to be decided, and there was no adjudication in fact, the mere fact that the same point is at issue between them as plaintiff and defendant in the present as in the former case does not make the decision in the former suit **res judicata** between the present parties. 231 P.L.R. 1912=14 Ind. Cas. 535=220 P.W.R. 1912.

——S. 11 (S. 13 Old Code) —Co-defendants—Absence of conflict of interest in former suit—Effect.

Plaintiffs brought the suit for possession against the defendant, alleging that the mortgage which he held had been satisfied by the usufruct. The plaintiffs and the defendant were co-defendants to a suit for redemption which had been brought by a third party who represented only a portion of the equity of redemption. The plaintiffs who were defendants to that suit did not defend it although they might have then pleaded that the plaintiff to that suit was not entitled to the whole of the equity of redemption and that they had also an interest in it as reversioners. In their present suit the plaintiffs claimed possession of a portion of the property setting up their right to it as reversioners.

Held, that the present suit was not barred as **res judicata**, although they might have pleaded their title as owner of a portion of the equity of redemption in the former suit, as it was not incumbent on them to do so, as the former suit was brought by a person representing a co-mortgagor who was entitled under the law to redeem the whole of the property and there could not be said to be any conflict of interest between the co-defendants to that suit, which it was necessary for the Court to decide in order to give the relief claimed by the plaintiff to that suit. 1908 A.W.N. 173=5 A.L.J. 367=30 A. 394.

4 (c). Necessary decision.

——S. 11—Co-defendants — Decision between—Decision in suit on mortgage where subsequent mortgagee has also been impleaded as defendant —Subsequent mortgage found to be binding on mortgagor's sons and the amount due on it also determined—Subsequent suit by the subsequent mortgagee for the sale of the hypotheca—Decision in prior suit, if operates as res judicata.

In a suit on a mortgage, the mortgagor and his sons as also a subsequent mortgagee were impleaded as parties. The subsequent mortgagee impugned the validity of the prior mortgage. There was an issue as to the validity and binding nature of the subsequent mortgage. It was found that the mortgage was supported by consideration and that it was binding on the mortgagor's sons. The amount due was also determined and in accordance with that finding a decree was drawn up in the manner required by O. 34, R. 4 (4) of the C. P. Code. In a suit by the subsequent mortgagee for the sale of the hypotheca, on a

question whether the decision in the prior suit between the co-defendants operates as **res judicata** in the present litigation.

Held, it is clearly the object of the Legislature in sub-R. (4) of R. 4 of O. 34, C. P. Code, that not only the rights of the prior mortgagee, but also those of the subsequent mortgagees should be worked out in order to finally determine the claims on the property which is the subject-matter of the suit. The determination of the amount due to the subsequent mortgagee "was necessary in order to give the plaintiff the relief which he claimed". It was equally necessary in view of the provisions of O. 34, Rr. 1 to 4 to determine also the question whether the mortgage was binding on the sons of the mortgagor. The fact that the sons remained **ex parte** in the former suit cannot affect the question of **res judicata**. 1948 M. W.N. 9=A.I.R. 1948 Mad. 336=61 L.W. 16 =(1948) 1 M.L.J. 4.

——S. 11—Rent suit—Decision on title between defendants necessary — Defendant affected not appealing—Subsequent suit between one of them and an assignee from the other—Res judicata.

Where, in a rent suit against two defendants, it becomes necessary for the Court to pronounce between the conflicting titles of the defendants and the Court does pronounce in favour of one, but the other does not go in appeal against the pronouncement, thus allowing it to become conclusive, the matter becomes **res judicata** in a subsequent suit between one of the defendants and an assignee of the other. A.I.R. (Vol. 24) 1937 Pat. 27=3 B.R. 276=167 Ind. Cas. 141.

——S. 11—In order that a decision may operate as **res judicata** between co-defendants there must be a decision of conflict between the co-defendants and it must be necessary to give plaintiff his relief. 1936 O.W.N. 982.

——S. 11—Co-defendants—Necessary decision.

Where the decision of a dispute between co-defendants was necessary for the purpose of giving appropriate relief to the plaintiff:

Held, that in a subsequent suit between the co-defendants the decision operated as **res judicata**, and that it was immaterial whether one of them in the former suit had entered appearance but sided with the plaintiff and did not contest the suit. A.I.R. (Vol. 22) 1935 P.C. 139=62 I.A. 224= 1935 O.W.N. 800=1935 O.L.R. 518=1935 A. L.R. 872=42 L.W. 279=16 P.L.T. 589=1935 M.W.N. 841=39 C.W.N. 1124=14 Pat. 611=37 Bom.L.R. 794=37 P.L.R. 624=1935 A. L. J. 1147=157 Ind. Cas. 485 (P.C.).

——S. 11—Suit by one co-mortgagee—Finding that other co-mortgagee has been paid—Subsequent suit by assignee of such co-mortgagee—Whether barred.

In a prior suit by a co-mortgagee for his share of the mortgage amount which he had become entitled to under a partition deed, the defence was that the other sharer had received the whole amount. This other sharer did not contest the suit. It was held that the mortgage bond had not been discharged so far as the plaintiff was concerned but the other sharer had been paid. Subsequently, the other sharer's assignee filed a suit for his share of the mortgage amount:

Held, that the prior suit operated as **res judicata** in the subsequent suit:

Held, also, that it is necessary to adjudicate upon the claim of the co-mortgagee defendant in determining the amount due to the co-mortgagee plaintiff in a suit to which both the co-mortgagees and the mortgagor are parties. A.I.R. (Vol. 22) 1935 Mad. 821=69 M.L.J. 527=1935 M.W. N. 742=42 L.W. 298=158 Ind. Cas. 448.

——S. 11—Test of res judicata.

If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains. A.I.R. (Vol. 23) 1936 Rang. 308=164 Ind. Cas. 468.

——S. 11—As between co-defendants an adjudication upon a particular matter can only operate as **res judicata** in a subsequent suit when it is necessary to decide that matter in order to determine the suit. A.I.R. (Vol. 21) 1934 Lah. 688 =148 Ind. Cas. 441.

——S. 11—Test of res judicata.

The test of **res judicata** between co-defendants is that if a plaintiff cannot get at his right without trying and deciding a case between co-defendants the Court will try and decide that case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtained. A.I.R. (Vol. 20) 1933 Pat. 146=144 Ind. Cas. 253.

——S. 11—In order to constitute **res judicata** between co-defendants it is necessary that there should be active controversy between those defendants and an adjudication upon that controversy should be necessary for the purpose of granting relief to the plaintiff. A.I.R. (Vol. 20) 1933 All. 206=145 Ind. Cas. 461.

——S. 11—A decision cannot operate as **res judicata** between co-defendants where the suit as framed was not such that no relief could have been granted to the plaintiffs without adjudicating upon the conflicting interests nor was there any adjudication upon those interests. A.I.R. (Vol. 18) 1931 P.C. 231=8 O.W.N. 973=34 L.W. 439= 61 M.L.J. 415=35 C.W.N. 1217=133 Ind. Cas. 721 (P.C.).

——S. 11—Plaintiff not granted any relief—Decision does not operate as res judicata between co-defendants.

Where it became unnecessary to decide the conflict between the co-defendants because the plaintiffs were not given any relief as they failed to establish their title the decision cannot operate as **res judicata**. A.I.R. (Vol. 27) 1940 Rang. 136 =190 Ind. Cas. 609.

——S. 11—Co-defendant—Conflict of interest—Decision necessary to grant relief to plaintiff.

One of the two reversioners brought a suit to obtain possession of half of the property sold by a Hindu widow making the other reversioner **K** a co-defendant with the vendee. **K** was not a contesting defendant to the suit. The suit was decreed on the finding that the sale was not for legal necessity. Subsequently **K** sued the same vendee to obtain possession of the other half of the property and it was contended that the finding regarding legal necessity in the previous suit was not binding on the vendee inasmuch as **K** was not a contesting defendant in that suit.

Held, that though **K** was not a contesting defendant, there was an issue between **K** and the vendee, **viz.**, whether the sale was binding on the reversioners and **K** was equally interested in the issue with the plaintiff in the previous suit and as it was necessary to decide that issue in order to grant relief to the plaintiff the decision operates as **res judicata** in the subsequent suit. 26 N.L.R. 121=121 Ind. Cas. 41=A.I.R. 1930 Nag. 3.

——S. 11—Co-defendants—Necessary decision—Suit by Jenmi.

In a suit for redemption brought by a Jenmi, if there is a contest as to which of the defendants is entitled to get the value of the improvements, it is the duty of the Court to decide the contest and declare as to who should be given the value of improvements, instead of leaving that question to be fought out in a separate suit between the defendants and so the decision of that question becomes necessary in the suit. A.I.R. 1928 Mad. 354, Foll. 119 Ind. Cas. 167=A.I.R. 1929 Mad. 638.

——S. 11—Co-defendants—Necessary decision—Co-existing right.

9, out of 15 properties mortgaged, purchased by mortgagee, 4 by **A** and 2 still in mortgagor's possession—**A** suing for redemption making mortgagor and mortgagee defendants—Court taking account of liability for redemption and deciding that certain sum was payable by properties in mortgagor's possession—Decision is binding on mortgagor in his subsequent redemption suit. 1929 A. L. J. 908=119 Ind. Cas. 97=A.I.R. 1929 All. 814.

——S. 11—Co-defendants—Necessary decision—Test.

The test for finding whether a decision is **res judicata** between co-defendants is whether it was necessary for the purpose of supporting his actual decision for the Judge to decide directly or by implication any conflicting issue between co-defendants. 6 Rang. 575=114 Ind. Cas. 686=A.I.R. 1928 Rang. 315.

——S. 11—Co-defendants—Necessary decision.

Issue between co-defendants should be decided by a Court where such determination is necessary before the plaintiff's claim can be determined. But such issues should not be determined after the plaintiff's suit has been dismissed. 6 Bur.L.J. 52 =101 Ind. Cas. 637=A.I.R. 1927 Rang. 156.

——S. 11—Notwithstanding the dismissal of the plaintiff's suit, the decision can be held to operate as **res judicata** as between co-defendants but, it should be necessary to decide on the conflict between co-defendants in order to give to the plaintiff the relief appropriate to his suit, and the judgment should contain a decision on the question as between co-defendants. 44 C.L.J. 399=30 C. W.N. 415=94 Ind. Cas. 235=A.I.R. 1926 Cal. 568.

——S. 11—Co-defendants—Necessary decision.

Previous decision would operate as **res judicata** if the co-defendant had actively supported the plaintiff in the previous case as against the other defendant, though the active support was limited to filing a written statement admitting the plaintiff's claim and leaving it to the plaintiff to press the claim in which both he and such defendant were jointly interested. Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be **res judicata** between the defendants as well as between plaintiff and defendants. 3 Bur.L.J. 54=82 Ind. Cas. 423=A.I.R. 1924 Rang. 279.

——S. 11—Co-defendants—Necessary decision.

Where in a prior suit by mortgagee against persons who were arrayed as plaintiff and defendant in the latter suit the decision as to relationship between them was absolutely necessary to decide the prior suit.

Held, that the decision was **res judicata** in the subsequent suit. 78 Ind. Cas. 987=A.I.R. 1924 Nag. 142.

——S. 11—If a plaintiff cannot get at his right without trying and deciding a case between co-defendants the Court will try and decide that case and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains. 34 M.L.T. 301=1924 M.W.N. 204=78 Ind. Cas. 921=A.I.R. 1924 Mad. 604=46 M.L.J. 298.

——S. 11—Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be **res judicata** between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests between the defendants and a judgment defining the real rights and obligations of the defendants **inter se**. Without necessity a judgment will not be **res judicata** amongst defendants, nor will it be **res judicata** amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group. 47 Bom. 534=25 Bom.L.R. 268=73 Ind. Cas. 912=A.I.R. 1923 Bom. 203.

——S. 11—Active controversy — Suit in Revenue Court—Taluqdars v. Plaintiff and defendant—Court not deciding defendant's right—Decision is not res judicata between plaintiff and defendant.

In a suit by taluqdars against plaintiff and defendant the defendannt pleaded that he was a partner, and the Revenue Court decided that the taluqdars were entitled to get the relief they sought from the plaintiffs whom they themselves had named, and who were the only ones entered in the

revenue papers, but the Court refused to decide whether or not the defendant had any partnership right, **held**, that, in a subsequent suit by the plaintiff against defendant in which the defendant raised the plea that he was entitled to a partnership right with plaintiff the previous decision did not operate as res judicata. 9 O.L.J. 540=74 Ind. Cas. 195 =A.I.R. 1923 Oudh 101.

——S. 11—If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case, and the co-defendants will be bound by the decision. The father of defendants 2, 3 and 4 mortgaged certain property to plaintiff. In a previous suit for partition brought by defendants 2 and 3 the plaintiff's mortgage was declared fraudulent and not binding. Plaintiff was a party to this suit, while the father was **ex parte**. Plaintiff then brought this suit to enforce his mortgage against the mortgagor and his sons one of whom was born after the execution of the mortgage. **Held**, the present suit was barred since the after-born son had no **locus standi** to challenge the mortgage on any ground whatsoever as he had no independent right to do so. The decision in the previous suit for partition declaring the invalidity of the mortgage so far as the unborn son was concerned must be deemed to have, by necessary implication, decided that the mortgage was invalid as against the father mortgagor. **Held**, further that though the father was **ex parte** in the previous suit the decision was **res judicata** as between him and the present plaintiff. 1922 M.W.N. 526=31 M.L.T. 370 =16 M. L. W. 981=70 Ind. Cas. 769=A.I.R 1922 Mad. 452.

——S. 11—Conflict of interest—Necessary decision.

In order that an adjudication be **res judicata** between plaintiffs and defendants or the latter **inter se**, there must be a conflict of interest between the defendants and a judgment defining their rights **inter se**; without necessity a judgment will not be **res judicata** nor will it be **res judicata** by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group. 2 Lah. 88=62 Ind. Cas. 665=3 Lah.L.J. 223.

——S. 11—An **ex parte** decree on a bond against two joint debtors is not **res judicata** between those two debtors, when the question of their respective liability is raised in a suit for contribution by one against the other. 57 Ind. Cas. 252.

——S. 11—Co-defendants—Suit by puisne mortgagee—Prior mortgagee a defendant—Claim for redemption—Mortgage denied by mortgagor—Subsequent suit.

In a suit for sale on a puisne mortgage, prior mortgagees were impleaded as parties to the suit. The prior mortgage was alleged to have been discharged and in the alternative redemption was also claimed. The mortgagor pleaded that the prior mortgages were fictitious and were not subsisting mortgages. An issue was framed by the Court and decided in favour of the prior mortgagees. In a suit by the prior mortgagees for foreclosure. **Held**, that in order to give relief to the plaintiff in the former suit it was necessary to decide the question raised by the mortgagor and the question having been finally decided could not be raised in the present suit. 2 U.P.L.R. (H.C.) 46=54 Ind. Cas. 974=18 A.L.J. 126.

——S. 11—Decision necessary to grant appropriate relief to plaintiffs.

In a suit by a puisne mortgagee impleading the mortgagors and the prior mortgagees as co-defendants the mortgagor denied the validity of the prior mortgages and an issue was raised and decided in favour of the mortgagees. In a subsequent suit by the mortgagors for a declaration that the mortgages were not binding. **Held**, that the issue as to the validity of the mortgages having been raised distinctly in the former suit and decided as between the defendants and the decision being necessary to give the appropriate relief to the plaintiff in that suit the decision operated as **res judicata**. 49 Ind. Cas. 808=17 A.L.J. 225.

——S. 11 (S. 13, Old Code)—Decision necessary to grant relief to plaintiff.

An adjudication between the co-defendants in a suit as to their rights to the property operates as **res judicata** between them in a subsequent suit. The plaintiff in the prior suit claiming title under the 6th defendant (present plaintiff) sued the present defendant (then the 1st defendant) for possession. The 6th defendant supported the plaintiff in that suit and it was held that first defendant held adversely to the 6th defendant for over 12 years. The 6th defendant's successor in title now sued the original first defendant for the land. **Held**, the claim was barred by **res judicata**. (1902) 29 M. 515.

——S. 11 (S. 13, Old Code)—Adjudication necessary to grant relief to plaintiff.

Where an adjudication between defendants, who had a conflict of interest between them was necessary to give the appropriate relief to the plaintiff and there was such adjudication, the adjudication which defined the real rights of the defendants *inter se* will be *res judicata* between the defendants as well as between the plaintiff and the defendants. (1907) 5 C.L.J. 611; 36 C. 193 and (1907) 5 C.L.J. 653, foll. (1908) 11 C.L.J. 461=6 Ind. Cas. 554. *Also* 5 Ind. Cas. 826=7 M.L.T. 116; 5 C.L.J. 653; 5 C.L.J. 611.

——S. 11—Co-defendants—Decision on contest.

There can be no **res judicata** between co-defendants unless there is decision on necessary points which were actively contested between them. 41 Ind. Cas. 468=2 Pat. L. W. 108.

——S. 11—Co-defendant.

A decision in a former suit is not **res judicata** unless it was necessary for the decree in that suit. A decision as to the rights and liabilities of the defendants, **inter se** operates as **res judicata** and bars further litigation. But if the decree in the former suit had been simply one dismissing the suit, without any decision on the merits, the decision would not be **res judicata**. 2 Lah.L.J. 605.

——S. 11—Liability inter se.

The liability between two defendants **inter se** was left undetermined in a suit. One of the defendants then sued the other defendants for contribution. **Held**, that the question that was left undecided was not **res judicata**. 71 P.L.R. 1911=10 Ind. Cas. 839 =66 P.W.R. 1911.

——S. 11—Where it is necessary to determine certain issues, for the purpose of granting relief to the plaintiff, between co-defendants, and the issue is decided it acts as **res judicata** between the co-defendants. 10 Ind. Cas. 324.

——S. 11 (S. 13 Old Code)—Co-defendants—Adjudication of their rights inter se should be necessary to grant relief plaintiff—Essentials.

A decree in favour of a plaintiff in a suit cannot be taken to have decided the rights as between the defendants, unless for the purpose of giving relief to the plaintiff it was necessary to adjudicate and the Court by that decree did adjudicate, upon the rights as between the defendants. Where there is such adjudication it becomes binding upon the defendants and constitutes **res judicata** in a subsequent suit between them. (1902) 5 Bom.L.R. 97.

——S. 11—Where there is no judgment defining the real rights and obligations of the defendants **inter se** the principle of **res judicata** has no application. (1910) 12 C.L.J. 434=7 Ind. Cas. 892.

4 (d) No issue between.

——S. 11—Previous suit not decided on matter on which there was dispute between co-defendants—Subsequent suit between co-defendants, if barred.

Lessees filed a suit against their land-holder in Revenue Court. Defendants 2 to 15 got themselves impleaded in it. Defendant 1, i.e., land-holder, contended that the Revenue Courts had no jurisdiction to entertain the suit. Defendants 2 to 15 whose case was very much the same as the lessees in some respects supported this plea of jurisdiction put forth by defendant 1. The suit was dismissed on this ground. In appeal, the Appellate Court, without saying anything on this point, dismissed the appeal on other grounds. Subsequently, defendants 2 to 15 brought a suit in Revenue Courts against defendant 1 and the lessees. In this suit defendant 1, i.e., the land-holder put forth the plea of **res judicata:**

Held, that the Courts did not dispose of the previous suit on a matter on which there was any dispute between defendant 1 (land-holder) on the one hand and defendants 2 to 15 on the other. Since it was only the land-holder and not the lessees who put forth the plea of **res judicata** in the subsequent suit, it would not be barred by **res judicata**. A. I. R. (Vol. 32) 1945 Mad. 375=1945 M.W.N. 331=58 M.L.W. 295.

——S. 11—A suit was brought against two defendants on the footing that one of the defendants was principal and the other was surety. The question as to which of the defendants was surety and which the principal was neither agitated between the defendants **inter se** nor decided. In a subsequent suit by one of the defendants against the other defendant:

Held, that the defendant (in the subsequent suit) could raise the defence that he was not the principal, such defence not being barred by **res judicata**. A. I.R. (Vol. 28) 1941 Pat. 211=7 B.R. 817=194 Ind. Cas. 739.

——S. 11—B was in possession of the entire property. In a suit for partition by **A** against **B** and **C, B** did not put in any appearance. It was decided that **A** was entitled to a certain share in accordance with a particular pedigree table. Subsequently, **C** put in an application for their shares under a different pedigree table. Thereupon **B** instituted a suit for a declaration that **C** would be entitled to those shares only which were in accordance with the pedigree table relied on in **A's** suit. This was disputed by **C** and **B** claimed that the point was **res judicata** as between **B** and **C,** both of them being co-defendants in **A's** suit:

Held, that the question of preference between the two pedigree tables was neither raised nor decided as between **B** and **C** in **A's** suit. Nor was it necessary to decide that in that suit. Consequently, the decision in **A's** suit was not **res judicata** in favour of **B** in his suit against **C**. A. I. R. (Vol. 25) 1938 Lah. 227=40 P.L.R. 600=181 Ind. Cas. 199.

——S. 11—It is only when the determination of the question as between co-defendants is necessary for the determination of the plaintiff's claim that the decision as between co-defendants would operate as **res judicata**. If such determination as between co-defendants were not necessary for the decision of the plaintiff's case such decision would not operate as **res judicata**. Whenever the contest between co-defendants is not indicated and included in the plaintiff's action itself, then it follows that for the purpose of a decision operating as **res judicata** as between co-defendants there must have been actually a conflict or issue raised as between them and that such conflict or issue must have been necessary for the determination of the plaintiff's case or claim: A. I.R. 1922 Mad. 452 (F.B.), Foll. **A** filed a suit against **P,** a tenant, for possession and rent and joined **B** and **C** as co-defendants. In the plaint **A** admitted that the property belonged to **A, B** and **C. B** contested that **C** had no interest in the property. **C** remained **ex parte**. The suit was decreed and possession also decreed in favour of **A** and **B** in two equal shares. Later on **C** sued **A** and **B** for partition, ascertainment, and delivery of one-third share in the property. The defence was that the decision in the previous suit was **res judicata**.

Held, that the suit was not so barred. 1928 M. W.N. 321=110 Ind. Cas. 596=A.I.R. 1928 Mad. 630.

——S. 11—A decision in a suit in which there is no issue between co-defendants cannot operate as **res judicata between them.** 117 Ind. Cas. 100.

——S. 11—The finding of a Court of competent jurisdiction operates as a bar against the trial of issues in respect of which the finding is given in a subsequent suit only if the issue is directly and substantially the same. Where in prior resumption proceedings certain issues were not raised **inter se** between the parties who were arrayed on one side but the only question was as regards the proprietors' rights as against the parties, **held,** that the finding did not operate as **res judicata** as among the defendants in the prior proceedings as regards issues between them. 122 Ind. Cas. 329.

——S. 11—Directly and substantially in issue—Co-defendants.

The finding upon a point not directly and substantially in issue among others raised in a previous

suit, does not operate as **res judicata** in a subsequent suit. In a suit for possession on the ground of survivorship it was alleged that one of the defendants, had no right by reason of a custom excluding daughters from inheritance and a finding was had on the issue. The finding is not **res judicata** in a subsequent suit by one of the defendants against another defendant as the plea of custom in the previous suit was not directly and substantially in issue. 39 Ind. Cas. 248=4 O.L.J. 75.

——S. 11 (S. 13 Old Code)—Decision as between plaintiff and some of defendants—Not res judicata between co-defendants.

Tenants of a certain land claimed registry of it in their names in proceedings instituted before the Settlement Officer against the landlord and rival claimants of the tenancy. The Settlement Officer decided in plaintiff's favour. On appeal the order was reversed on the ground that the plaintiff had not proved his right and registry was made in defendant's name. In a suit by plaintiff for a declaration of his title: **Held,** that the previous decision of the appellate Court was not **res judicata** between the landlord and the tenants and because the decision not one between them, as the landlord was satisfied with the decision in favour of the plaintiff and did not care to appeal. (1899) 5 C.W.N. 421.

4 (e)—Partition suit.

——S. 11—Co-defendants—Suit for partition—Defendant applying for his share—Alienees being co-defendants—Finality of decision.

In a partition action the sharers are both the plaintiffs and the defendants, and each defendant sharer is also in the position of a plaintiff. Where one of the defendants in fact applies for a decree in respect of his share, and the alienees are arrayed as co-defendants, the decision operates as **res judicata** and cannot again be re-opened in a subsequent suit between the particular defendant whose share was the subject of decision and the alienee defendants. 59 L.W. 612=A.I.R. 1947 Mad. 170=1946 M.W.N. 687=(1946) 2 M.L.J. 321.

——S. 11—Co-defendants—Res judicata between—Suit for partition and possession—Benami character of purchase raised and found against—Subsequent suit by representatives of real owners against benamidar—Question of title whether can be gone into.

The general rule is that a party to a suit cannot in a subsequent proceeding be heard to allege that a decree obtained against him in a former litigation was obtained as a result of collusion between himself and the plaintiff. In a suit for partition and possession it was alleged that a certain purchase made by a defendant was benami for others who were also made parties as defendants and the suit was decreed. In the final decree proceedings, the alleged real owners unsuccessfully attempted to establish their title to the property as against the alleged benamidar. In a subsequent suit by them to establish their title to the property,

Held, that they were barred by the rule of **res judicata** from raising the contention as to benami purchase as their title had been found against in the earlier final decree proceedings. 226 Ind. Cas. 175 =59 L.W. 220=1946 M.W.N. 237=A.I.R. 1946 Mad. 372=(1946) 1 M.L.J. 282.

——S. 11—One defendant asking for separation of his share.

Where defendants in a partition suit pray for a partition of their share, then before such relief can be given to them, their share must be ascertained. In such a case there is obviously a conflict of interest between the defendants and between that particular defendant and the plaintiff. A defendant who asks for partition of his share is entitled to such relief, and when a decree is drawn up he can take steps to enforce such a decree in much the same manner as if he was a plaintiff. The decision in the partition suit in such a case operates as **res judicata** because in ascertaining the share of the defendant who claims partition, the Court must adjudicate on the rights of the various defendants. In such a case if the defendant does not appear, he cannot afterwards challenge the decision as to the shares of the various parties arrived at in that partition suit. A. I. R. (Vol. 28) 1941 Pat. 83=19 Pat. 669=7 B.R. 402=192 Ind. Cas. 441.

——S. 11—As it is not possible in a suit for partition to make a hard and fast line between the plaintiffs and the defendants a decision affecting the right of one defendant as against another is a decision **inter partes** so as to be **res judicata.** A.I.R. 1914 P.C. 31, Foll. 6 O.W.N. 281=118 Ind. Cas. 766 =4 Luck. 713=A.I.R. 1929 Oudh 275.

——S. 11—Partition suit.

Partition suit by son against father and other sons —Mortgagee from father impleaded as defendant—Mortgage impeached on several grounds as not binding—Decree giving both reliefs—Subsequent suit by mortgagee against father and other sons—Prior decision **res judicata.** 1936 M.W.N. 963.

——S. 11—Where there is a complete decree for partition the rights of each party are determined not only as against the plaintiff but as against all the other parties including co-defendants, and therefore in order to see whether the rights between co-defendants amongst themselves have not been determined, the nature of a partition suit should be borne in mind. 96 Ind. Cas. 406=A.I.R. 1926 Sind 282.

——S. 11—Co-defendants—Partition suit.

In a partition suit all the parties who are interested in the property to be partitioned occupy much the same position whether they are plaintiffs or defendants and a party claiming or resisting partition whether he is plaintiff or defendant is bound by the decision of the Court. 47 Bom. 534=25 Bom.L.R. 268=73 Ind. Cas. 912=A.I.R. 1923 Bom. 203.

——S. 11—Co-defendants—Partition—Decree—Form of.

Where in a suit for partition the decree declares the shares of every one of the parties interested in the property, the declaration as to the extent of the shares of the defendants is as binding between the co-defendants themselves as between the defendants and the plaintiff. 22 O.C. 300=54 Ind. Cas. 320= 6 O.L.J. 529.

——S. 11—Partition proceedings—Question of title.

Where the parties were arrayed on the same side in partition proceeding and the Court allowed partition and formed a separate Mahal in the names of each of the parties, a subsequent suit by plaintiff for

a declaration that he alone was the owner of the entire Mahal to the exclusion of the defendant is barred by the rule of **res judicata.** 42 All. 309=18 A.L.J. 110=U.P.L.R. (All.) 50=55 Ind. Cas. 22.

——S. 11—A suit for partition was brought to R against the plaintiffs and M the husband of the defendant. The Court of First Instance passed a decree and defined the rights of the defendants in the suit. M died during the pendency of the suit. The plaintiffs brought this suit for declaration of their right to the property of M. **Held,** that having regard to the decision in the suit of R against the plaintiff, it was no longer open to the plaintiff to bring the present suit inasmuch as in the previous suit a decree ascertaining and declaring the rights of the parties was passed. (1909) 7 A.L.J. 451=32 A. 469=6 Ind. Cas. 692.

——S. 11 (S. 13 Old Code)—Co-defendants—Res judicata—Suit for partition—Decree deciding rights of defendants inter se—Subsequent suit by one defendant against another—Bar of.

Where in a suit for partition shares are allotted to the various defendants also and they are directed to execute the decree after paying regular Court fees:

Held, that a subsequent suit for partition and delivery of his share by one defendant who had failed to avail himself of the decree against another was barred by **res judicata.** (1900) 3 Bom.L.R. 94.

——S. 11—Co-defendants—Partition suit — Subsequent suit to determine their rights inter se.

Where in a previous partition proceeding initiated at the instance of a third party, it was not necessary for the shares of the parties to a subsequent suit to be decided they having been arrayed in the same side in those proceedings, subsequent suit to determine the shares of the parties between themselves is not barred by **res judicata.** A.I.R. (Vol. 20) 1933 Oudh 415=10 O.W.N. 958=17 R.D. 887=L.R. 14 A. (O.) 746=9 Luck. 97=146 Ind. Cas. 131.

——S. 11—Partition suit—Dismissal without clear finding as to rights of defendants inter se—Subsequent suit as among co-defendants—Not barred.

Where in a suit for partition the defendants pleaded an independent right and the suit was dismissed without a definite finding as to their rights **inter se.**

Held, in a subsequent suit for partition as among co-defendants that the decision in the prior suit did not operate as **res judicata.** 7 Rang. 80=117 Ind. Cas. 587=A.I.R. 1929 Rang. 162.

——S. 11—Obiter. Where, in a prior suit for partition certain parties were arrayed as co-defendants and the decision in that suit did not decide any question of partition amongst them **inter se,** that decision does not operate as **res judicata.** A.I.R. 1922 All. 19, Foll. 44 C.L.J. 399=30 C.W.N. 415 =94 Ind. Cas. 235=A.I.R. 1926 Cal. 568.

——S. 11—Co-defendants—Res judicata—Partition suit.

Where in a partition suit none of the parties claimed or resisted partition except the plaintiff, any questions regarding partition which might thereafter arise between the defendants in that suit remains open to be decided. 47 Bom. 534=73 Ind. Cas. 912=25 Bom.L.R. 268=1923 Bom. 203.

——S. 11—Co-defendants—Partition suit—Res judicata.

Unless it is necessary to decide an issue between the defendants themselves to grant relief to the plaintiff decision in a prior suit does not operate as **res judicata** between co-defendants. Where in a prior suit for partition certain parties were arrayed as co-defendants and the decision in that suit did not decide any question of partition amongst them **inter se,** that decision does not operate as **res judicata** as between the co-defendants in a subsequent suit for partition. 44 All. 334=4 U.P.L.R. (A.) 55=67 Ind. Cas. 523=20 A.L.J. 193=1922 All. 19.

——S. 11, Expl. 4—Co-defendants—Partition suit.

In a previous partition suit against the present plaintiff's vendor and the present defendants, an issue was raised whether the share of the vendor was subject to the mokurari interest of the other defendants, but was expunged by the order of the Court. But at the time of partition, the present defendants, were allotted possession not only of their proprietary share but also the mokurari interest. In a subsequent partition suit by the vendees from vendor against the defendants for a declaration that vendors' share was not subject to any mokurari and for allotting to the plaintiffs a separate takhta out of the takhta which was allotted to the defendants in the previous suit,

Held, that the question was not expressly decided in the previous suit and it was impossible to hold that a decision might and ought to have been obtained in the previous partition suit by the vendor or the present plaintiffs, and the defendants failed to make out that the plaintiffs were barred by **res judicata.** 39 Ind. Cas. 259=20 C.W.N. 1177.

4 (f)—Pro forma defendant.

——S. 11—Applicability—Pro forma Defendant—If bound—Person impleaded as formal party—Plaintiff assuring him that no relief would be claimed against him—Effect.

A **pro forma** defendant is in no better position than any other defendant as regards the application of the doctrine of **res judicata.** At the same time, in order that a former judgment **inter partes** may be **res judicata** in a subsequent suit, there must be reciprocity. Where a person is made a party to a suit only as a formal party, but before the plaint is filed the plaintiff's solicitor writes to him, (sending a copy of the plaint) that no relief would be claimed against him and that he is joined as a formal party only, the doctrine of **res judicata** would not apply and the decision in the suit could not be pleaded in bar of a subsequent suit as against either party. I.L.R. (1948) Bom. 1=48 Bom.L.R. 828=A.I.R. 1947 Bom. 217.

——S. 11—Person not joined as plaintiff added as pro forma defendant.

The fact that persons happened to be arrayed as defendants and not as plaintiffs does not save from **res judicata.** Persons who did not join in an administration suit as plaintiffs but were arrayed as **pro forma** defendants are just as much affected by the plea of **res judicata** as the plaintiffs in the suit. In such a case the same principles apply which are applicable to the case of **res judicata** as between co-defendants. A.I.R. (Vol. 31) 1944 Oudh 139 =1944 O.W.N. 37=216 Ind. Cas. 276.

——S. 11—Even a **pro forma** defendant is ordinarily bound by a decree which has been obtained in his presence. A decision in a former suit, to which the **pro forma** defendant was a proper party and which affects the interest of a **pro forma** defendant against whom no relief had been claimed, can operate as **res judicata** in a subsequent suit between the same parties. A.I.R. (Vol. 29) 1942 Cal. 1=I.L.R. (1941) 2 Cal. 434=73 C.L.J. 475=200 Ind. Cas. 822.

——S. 11—Prior mortgagee made pro forma defendant in subsequent mortgagee's suit—Suit not contested—Subsequent title suit by prior mortgagee—Lis pendens, if prevails over res judicata.

Where a prior mortgagee who has obtained decree and purchased the property in execution is made a **pro forma** defendant in a mortgage suit on a second mortgage but nothing is alleged in the plaint in derogation of his title, the fact that he does not contest the suit, paramount title being outside the scope of the controversy in the suit, does not bar a subsequest suit for declaration of title and recovery of possession instituted by the prior mortgagee after the second mortgagee's decree and possession on its basis. The rule of constructive **res judicata** does not apply to the case.

Held, also, that the doctrine of **lis pendens** could not prevail over **res judicata** in case the latter rule applied. A.I.R. (Vol. 21) 1934 Cal. 552=38 C.W.N. 492=61 Cal. 494=150 Ind. Cas. 321.

——S. 11—Res judicata against pro forma defendants—Dismissal of previous suit.

The plaintiff instituted a suit for the administration of the estate of her deceased mother against her two brothers who had taken possession of the estate and her sister, alleging that the parties were governed by the Burmese Buddhist Law and that the plaintiff was, therefore, entitled to an equal fourth share in the estate. Her brothers contended that the parties were governed by Chinese Customary Law which excluded female issue in the presence of male issue. In this suit it was ultimately held that the parties were governed by Chinese Customary Law and the suit was dismissed. Subsequently the other daughter who was a **pro forma** defendant in the previous suit instituted a suit for a similar relief and the defendants raised the same contention:

Held, that there was a conflict of interest between the present plaintiff and her brothers who were co-defendants in the previous suit on the question at issue and the matter was **res judicata**.

Held further, that the doctrine of **res judicata** could be applied as between co-defendants to a previous suit even if no relief had been granted to the plaintiff in that suit. A.I.R. (Vol. 19) 1932 P.C. 161=36 C.W.N. 726=55 C.L.J. 403=10 R. 322 =34 Bom. L. R. 1040=63 M.L.J. 64=9 O.W.N. 647=1932 A.L.J. 735=33 P.L.R. 519=36 L.W. 1=59 I.A. 247=137 Ind. Cas. 328 (P.C.) Reverses A.I.R. (Vol. 17) 1930 Rang. 222=127 Ind. Cas. 378.

——S. 11—Suit by remote reversioner dismissed as unsustainable—Nearer reversioner impleaded as proforma defendant—Subsequent suit by his transferee.

A widow was alleged to have taken a boy in adoption. He having died, she made certain alienations. A remote reversioner who admitted the adoption sued the natural father of the adopted boy, the widow and the alienees, for a declaration that the alienations were not for legal necessity. The Court recorded a finding that the adoption was not made out, but the suit was dismissed on the ground that the nearer reversioners who had been impleaded as **pro forma** defendants had not colluded with the widow. After the death of the widow the reversioners who succeeded her, transferred their title to the plaintiff. The latter having sued to avoid the prior alienations by the widow:

Held, that the finding as to adoption in the prior suit did not operate as **res judicata**. A.I.R. (Vol. 18) 1931 All. 695 (2)=1931 A.L.J. 314=133 Ind. Cas. 785.

——S. 11—Co-defendants — Pro forma defendants.

Suit for arrears of rent by one-co-sharer making other co-sharers **pro forma** defendants under S. 148-A, Bengal Tenancy Act—Decision as to amount of rent does not operate as **res judicata** in a similar suit brought by other co-sharers. 122 Ind. Cas. 529=11 P.L.T. 458=A.I.R. 1930 Pat. 355.

——S. 11—Where in a suit there were two sets of defendants, one set being merely impleaded **pro forma** and no question fell to be determined between the two sets of defendants,

Held, no matter raised in a subsequent suit between the defendants can be **res judicata.** 7 Pat. 566= 109 Ind. Cas. 287=A.I.R. 1928 Pat. 603.

——S. 11—Rent suit—Decision in—Principal and pro forma defendants—Res judicata.

In a suit for rent by plaintiffs co-sharer landlords, judgment in a previous rent suit between other co-sharer landlords and in which the plaintiffs in this suit were **pro forma** defendants, can neither be binding on the present plaintiffs nor operate as **res judicata** against them on matters which were not and could not be in issue in that suit between them as **pro forma** defendants and the principal defendants. 57 Ind. Cas. 567.

——S. 11—Pro forma defendants—Active contest.

Res judicata operates against a person who took an active part in the litigation in contesting, though unsuccessfully, the claim of the then plaintiff, notwithstanding the fact that he was merely described as a **pro forma** defendant. 21 C.L.J. 157=27 Ind. Cas. 954=19 C.W.N. 1280.

——S. 11—Pro forma co-defendant.

The decision in a previous suit, wherein the plaintiffs were **pro forma** defendants is not **res judicata** in the present suit, where the plaintiffs in the prior suit together with the other defendants in the prior suit joined as **pro forma** defendants in this suit. 17 P.W.R. 1914=23 Ind. Cas. 381=35 P.L.R. 1914.

——S. 11—Pro forma co-defendants.

The decision in a suit for redemption by one of three mortgagors against the mortgagee impleading the other two mortgagors as **pro forma** defendants, will operate as a bar by **res judicata** to a subsequent suit by the latter for redemption of the same mortgage. 20 Ind. Cas. 372=11 A.L.J. 844.

——S. 11 (S. 13 Old Code)—Co-defendants—Res judicata—Pro forma defendant.

A judgment in a previous suit does not operate as **res judicata** against a co-defendant who was merely a nominal party to the previous suit and who was under no obligation to make any defence in that suit. The test which distinguishes a necessary party from a nominal one is that there must be a conflict of interest among the defendants and the judgment must define the real rights and relations of the defendants **inter se**. (1900) 25 Bom. 74=2 Bom.L.R. 511.

4 (g) Substantially in issue.

——S. 11—Co-defendants—Issue that family property is joint, decided between co-defendants in a suit by another.

Plaintiff sued **A, B** and **A's** son for partition of joint family estate held by **A**. Estate was in the name of **A's** son. **A** at first denied existence of joint estate but later on entered into compromise with the plaintiff by admitting jointness. Decree was passed on the compromise. Subsequently **B** sued **A** and **A's** son for his share:

Held, that the former decision was **res judicata** as to the jointness of property and consequently **A** or **A's** son or any one claiming through them could not deny **B's** share. A.I.R. (Vol. 23) 1936 Mad. 252=168 Ind. Cas. 1005.

——S. 11—A bringing suit for possession of his share against some members—B and C made co-defendants—B and C supporting A's claim—A's claim dismissed as time-barred—Subsequent suit by B and C against same members for partition of same property.

A suit was brought by **A** in 1913 against his three step-brothers for a share in a house which was in their possession. **A's** two nephews, **B** and **C** were made co-defendants. The plaint averred that there was a separation of the joint family by virtue of an agreement in 1878, though not by metes and bounds and since then the step-brothers were in exclusive possession of the property. **A's** case was supported by **B** and **C** who also asked the Court to ascertain their respective shares in the house. The High Court, on appeal, against the dismissal of the claim by the trial Court on the ground that it was time-barred and that the step-brothers were in adverse possession, found on evidence that there was a separation of the family members in 1878, and dismissed the claim as time-barred. In 1925, **B** and **C** brought a suit against their step-uncles for a share by partition in the same house alleging that it was joint ancestral property:

Held, that **B** and **C** were bound by the decision in the former suit and consequently the second suit was barred by **res judicata**. A.I.R. (Vol. 21) 1934 Bom. 313=58 Bom. 544=36 Bom.L.R. 612=155 Ind. Cas. 50.

——S. 11—When a matter is drawn in controversy of two defendants, it would also operate as **res judicata** as between them. A.I.R. 1930 Cal. 810.

——S. 11—Question in issue between co-defendants.

A judgment-debtor (Yajaman of an Aliasantana family) sued the other members of his family impleading in the suit the judgment-creditor as party defendant for a declaration that the decree was binding on the family properties. The suit was dismissed. **Held,** that the decision was **res judicata** in a subsequent suit between the other members of the family and the judgment-creditor. It was open to the judgment-creditor to have appealed against the dismissal of the prior suit, and even if it were not so, that cannot have any effect upon the question of **res judicata.** (1904) 17 M.L.J. 260=30 M. 447=2 M.L.T. 368 (2).

——S. 11—Co-defendants — Substantially in issue.

Per **Jackson, J.**—Inasmuch as the principle of **res judicata** can only apply to a matter which has been substantially in issue between the parties, an issue raised by a defendant which is not strictly appropriate to the pleadings in the plaint cannot be held to have been a matter substantially in issue between that defendant and another defendant who elected to remain **ex parte** after perusal of the plaint alone. 1928 M.W.N. 321=110 Ind. Cas. 596=A. I. R. 1928 Mad. 630.

——S. 11—A matter may be **res judicata** in a subsequent suit, although the parties in such subsequent suit were arrayed as co-defendants in the previous suit, if the matter in dispute in the second suit was directly and substantially in issue in the former one, especially when there is a contest **inter se** between the defendants in the previous suit and their rights are then fully adjudicated upon. 103 Ind. Cas. 701=A.I.R. 1927 Nag. 369.

——S. 11—Title—Rent suit.

Where the issue raised in a previous rent suit only incidentally raised the question of a co-defendant's title and the question of title as between the co-defendants was neither directly nor substantially in issue in the previous suit, the decision of such an issue incidentally raised in the previous suit cannot be treated as **res judicata** when the question is directly and substantially in issue between these co-defendants in a subsequent suit. 11 Cal. 301 (P.C.) and 12 Cal. 580 (F.B.), Foll. 96 Ind. Cas. 625.

4 (h) Unnecessary finding.

——S. 11—Issue specifically raised and decided but not necessary for giving relief to plaintiff.

A sued to enforce a mortgage executed by **B** against **B** and **C** who were brothers seeking to recover the debt from the joint family of **B** and **C** as a debt binding on the family. **C** was impleaded on the allegation that some of the joint family properties had been allotted to **C** in a partition between **B** and **C**. **B** contended that under the partition **C** had to pay this debt. An issue was raised as to whether the partition was true or not and it was found that it was not proved but the plaintiff was given a decree against **B's** share alone on the ground that the debt was not binding on the family. **B** then filed a suit against **C** to recover the debt on the basis of the partition deed:

Held, that though the question as to whether there was a partition between **B** and **C** was specifically raised and decided in the prior suit, it was not necessary in that case for the decision of the claim of the plaintiff and, therefore, the decision in the prior suit on the question was not **res judicata.** A. I. R.

(Vol. 22) 1935 Mad. 649=1935 M.W.N. 801=157 Ind. Cas. 1047.

——S. 11—In a suit for possession by **A** against **B**, **C** and **D** the first Court held that the suit was barred by adverse possession against **B** but decreed the suit against **C** and **D**. On appeal by **C** and **D**, however, the entire suit was thrown out on the ground that **A** had no title. In a subsequent suit between **B** and **C**:

Held, that the adjudication by the first Court in favour of **B** in the earlier suit did not operate as **res judicata** as against **C**. A.I.R. (Vol. 18) 1931 Oudh 375=8 O.W.N. 722=136 Ind. Cas. 241.

——S. 11—Suit against transferee from mortgagee.

A brought a suit for redemption against **B**, the mortgagee, impleading **C**, a transferee from **B**. **B** alleged that sale to **C** was benami. Court found that sale to **C** was for consideration and with notice of the mortgage. Redemption was allowed against **B** as well as **C**. Subsequently **B** brought a suit against **C** for declaration that he was the owner of lands.

Held, that as the decision in the previous suit that the sale to **C** by **B** was benami was not necessary to give relief to plaintiff in that suit, the previous suit would not be **res judicata**. 4 Bur.L.J. 250=93 Ind. Cas. 197=A.I.R. 1926 Rang. 71.

——S. 11—Suit between shebaits.

A suit was instituted by some of the co-shebaits of a deity against the other co-shebaits for the better management of the debuttar properties. One of the defendants in the suit denied the debuttar character of the properties.

Held, that the question of debuttar was not **res judicata** as between the co-defendants as it was not necessary to decide that question between them in order to give relief to the plaintiff in the suit. 41 C.L.J. 396=88 Ind. Cas. 616=A.I.R. 1925 Cal. 996.

——S. 11—A finding against a co-defendant on a question of title does not operate as **res judicata** if it was not necessary for the disposal of the suit and was not embodied in the decree and no decree was passed against the co-defendant against whom it was given. 1919 M.W.N. 34, Foll.; 9 M.L.W. 180, Diss. and A.I.R. 1924 Mad. 469 and A.I.R. 1922 P.C. 241, Foll. 86 Ind. Cas. 384=A.I.R. 1925 Mad. 947.

——S. 11—Where both defendants claimed property exclusively but both denied plaintiff's claim and plaintiff's claim was dismissed and one of the defendants was declared to be sole owner. **Held**, the decision was not **res judicata** between the co-defendants as there was no necessary conflict between them nor was the point necessary for disposal of plaintiff's suit. 33 M.L.J. 740, Foll. 34 M.L.T. 147=78 Ind. Cas. 1055=1924 M.W.N. 569=A.I.R. 1924 Mad. 711=47 M.L.J. 20.

——S. 11—Co-defendants—Finding not in decree.

Where suit is dismissed, findings in judgments as between co-defendants not embodied nor implied in decree are not **res judicata** nor appealable. 1924 M.W.N. 867=22 M.L.W. 384=85 Ind. Cas. 868 =A.I.R. 1924 Mad. 858=47 M.L.J. 612.

——S. 11—In a prior suit **L** sued **A** on a bond and **G** was added, he being the surety. **G** admitted his liability as surety but the suit against **A** was dismissed on the ground that there was no evidence to prove the execution of the bond in suit. A decree was passed against **G** on his own confession. **G** then sued **A** to recover the money which he was compelled to pay under **L's** decree.

Held, that the decision in the prior suit was not **res judicata** and that **G** could recover. 79 Ind. Cas. 22=A.I.R. 1924 Nag. 168.

——S. 11—A decision between co-defendants cannot be **res judicata** under the provisions of S. 11, C. P. Code, unless it was necessary to decide an issue between the co-defendants in order to grant relief to the plaintiff in that suit. A decision in a suit in which a co-sharer was made a defendant, simply because he had an interest, could not be held to have the effect of **res judicata** as between the defendants whose title was not in issue and was never determined in the previous suit. 28 Mad. 457, Foll. 44 All. 334=67 Ind. Cas. 523=20 A.L.J. 193=A.I.R. 1922 All. 19.

——S. 11—Co-defendants—Decision when operative as res judicata.

A decree could not operate as **res judicata** as between co-defendants if there was no conflict of interest and no decision as between the defendants themselves. It will be an **a fortiori** case where a decision as between the defendants was not necessary to give the appropriate relief to the plaintiff in the suit. 64 Ind. Cas. 603=35 C.L.J. 173.

——S. 11—Co-defendants—Unnecessary decision.

A decision, not necessary for the due disposal of suit is not **res judicata** between co-defendants. 50 Ind. Cas. 802.

——S. 11 (13 Old Code)—Declaratory suit—Declaration partly refused—Incidental declaration in favour of certain defendants—Other defendants how far bound.

Where in a suit for declaration of title the Court refused the declaration as to part of the properties which it found to belong to certain defendants and made a declaration in their favour, the other defendants were held not bound by such declaration. (1899) 5 C.W.N. 724.

4 (i) Constructive res judicata.

——S. 11, Expl. (iv)—Inter-pleader suit.

An inter-pleader suit from its very nature, as described in S. 88, C. P. Code, is a suit in which several claimants are to be deemed to be claiming adversely to each other. Consequently though a widow who adopts a son and another person who is adopted by a co-widow are arrayed in that suit on the same side as defendants, yet they must be deemed to be claiming adversely to each other. If in such a suit the latter puts forward his adoption by the widow under the powers conferred upon her under the will of her late husband it is the duty of co-widow to contest the said adoption, both in respect of the factum as well as its validity, by filing a written statement to that effect. If she does not do so in spite of the fact she is represented by a pleader on the date, when the issue relating to the adoption was framed on the pleadings of other defendants,

she must be deemed to have raised the point, and if the Court decided it adversely, the matter must be deemed, under Expl. 4 to S. 11, C. P. Code, to be a matter directly and substantially in issue in that suit and it is no more open to her to contest the factum and the validity of the adoption in a subsequent suit, the decision in the previous suit operating as **res judicata** against her. 1 L.C. 733=108 Ind. Cas. 817=A.I.R. 1928 Oudh 155.

——S. 11—Constructive **res judicata** principle is not applicable between co-defendants **inter se.** 44 C.L.J. 399=30 C.W.N. 415=94 Ind. Cas. 235=A.I.R. 1926 Cal. 568.

——S. 11 — Co-defendants—Mortgagor and second mortgagee.

The fact that in a previous suit by a first mortgagee against the mortgagor and the second mortgagee, the mortgagor did not plead that the second mortgage was not executed for any necessity does not preclude him from pleading it in a subsequent suit, by the mortgagee on his mortgage. 24 Ind. Cas. 84=12 A.L.J. 603.

S. 4 (j)—Co-defendants—Scope and extent of res judicata.

——S. 11—Suit for contribution.

Where the amount of a decree has been recovered from one of two judgment-debtors against whom it was jointly passed and he sued the other judgment-debtor for contribution, a **prima facie** case is made by the production of the judgment and the certificate of satisfaction. That judgment is conclusive as between the judgment-debtors in the sense that it will not be open to either of them to contend that the former suit should have been dismissed, or that one of the parties should not have been held liable to the decree-holder therein, or that the amount deemed was excessive or based on principles erroneous on the face of the judgment. But it will be open to the party from whom contribution is sought, without impugning the propriety of the judgment, to plead and establish that as between the joint debtors, the plaintiff is solely liable for the debt or that the defendant is not equally liable with the plaintiff, or that the suit is not maintainable by reason of the fact that the plaintiff and the defendants are joint tort-feasors in a sense in which, on public grounds the right to claim contribution is negatived. And though it may have been rightly held in the former suit that both judgment-debtors were jointly liable for the mesne profits of land for three years, it will still be open to the defendant in the suit for contribution to show that the plaintiff alone enjoyed those profits, and in that case the plaintiff will not be entitled to contribution. A.I.R. (Vol. 21) 1934 Oudh 437=11 O.W.N. 1180=158 Ind. Cas. 1013.

——S. 11 (S. 13 Old Code)—Co-defendants—Res judicata—Scope of.

S. 13, C. P. Code, does not preclude the decision upon any issue operating as **res judicata** between co-defendants. The expression "in issue in a former suit between the same parties" should be read as a whole and the only essential for an adjudication on an issue operating as **res judicata** is that the issue in the former suit must have been one between the same parties claiming adversely to each other, irrespective of the side on which they were arrayed in the former suit. A decision in a former suit that as between two portions of a mortgaged property subsequently purchased by two different people a certain portion should be sold first does not prescribe the determination of the question in a subsequent suit whether after such sale and satisfaction of the mortgage, the purchaser of the sold portion would be entitled to contribution from the purchaser of the second portion. (1899) 8 C.W.N. 30=31 Cal. 95 at 100.

5. Competent Court.

(a) Award.
See also CIVIL P. C., S. 11—HEARD AND FINALLY DECIDED—ARBITRATION.
(b) Binding effect.
(c) Civil and Revenue Courts.
(d) Exclusive Jurisdiction.
(e) Foreign Court.
See also CIVIL P. C., S. 11—APPLICABILITY AND SCOPE—FOREIGN JUDGMENT.
(f) Former suit.
(g) Scope.
(h) Settlement Court.

5 (a) Award.

——S. 11—Decree on award—Competency of Court.

If a decree passed by a Court cannot operate as *res judicata* owing to incompetency of that Court to try the subsequent suit, the fact that the decree was based upon an award cannot render the matters decided in that decree or the award itself *res judicata.* A.I.R. (Vol. 19) 1932 Pat. 105=11 Pat. 50=12 P.L.T. 582=136 Ind. Cas. 577.

——S. 11—Competent Court — Arbitrator — Award—Matters not embodied in decree.

An award is as binding as a decree of the Court even in respect of those matters not embodied in the decree as not being referred to arbitration. 57 Ind. Cas. 982=38 M.L.J. 470.

——S. 11—Competent Court — Arbitrator — Award—Effect of—Property not the subject of.

Where the arbitrators neither gave any adjudication nor made any inquiry about the existence of joint property other than that mentioned in the reference to arbitration, their award does not operate as a bar to a suit for partition of the rest of properties. 52 Ind. Cas. 503=68 P.R. 1919.

——S. 11—Competent Court—Arbitrator—Private award.

A valid and enforcible award made out of Court bars a suit on the original cause of action. 33 Ind. Cas. 494=68 P.W.R. 1916.

——S. 11—Competent Court—Arbitration—Award.

A valid award bars a suit based on any of the claims covered by the award. 35 Ind. Cas. 710=9 Bur. L. T. 98.

——S. 11—Competent Court—Arbitration—Reference before suit.

A suit is not barred by a reference to arbitration made before, but the award in which is delivered after the suit. Per *Kemp, A. J. C.,*—The case would be different if by a reference and award before the

suit the rights and liabilities of the parties had been determined at the date of the suit. 56 Ind. Cas. 150 =13 S.L.R. 193.

——S. 11—Competent Court—Arbitration—Reference incompetent.

Where a reference under S. 617, C. P. Code, 1882 is incompetent, any opinion expressed on such reference could not operate as *res judicata* in subsequent stage of the proceedings. 45 Ind. Cas. 201.

5. (b)—Binding effect.

——Plaintiff's suit finally decided—No appeal preferred—Decree becoming final—Plaintiff cannot file a fresh suit for same relief on the ground that Privy Council has decided the point of decision in first suit differently.

When a plaintiff has filed a suit in a Court of competent jurisdiction and that suit has been finally decided and no appeal against that decree has been preferred and that decree, therefore, has not been set aside, the mere fact that in some other litigation the point which is the basis of the decision in the previous suit was differently decided will not affect the right of the parties under the decree that had become final. When the first suit of the plaintiff was finally dismissed by a Court of competent jurisdiction, the plaintiff cannot file a fresh suit for the same relief merely because in some other litigation between the parties, Privy Council had decided differently a point which was the basis of the decision of the previous suit.

The decision of the first suit having become final, it cannot be nullified or wiped out by subsequent decision of the Privy Council unless the decision of the Privy Council has that effect directly or by implication. A.I.R. (Vol. 32) 1945 All. 121=1945 A.L.J. 11=I.L.R. (1945) All. 75=1945 A.W.R. (H.C.) 414=222 Ind. Cas. 196.

——S. 11—A decree passed by a competent Court, unless it is set aside by appropriate proceedings, is always binding and operative against the parties thereto. A.I.R. (Vol. 29) 1942 Pat. 120=8 B.R. 121=196 Ind. Cas. 837.

——S. 11—Money recovered under decree—Decree subsisting—Whether can be recovered by suit.

Money recovered under a decree or judgment cannot be recovered back in a fresh suit or action while the decree or judgment under which it was recovered remains in force; but this rule of law rests upon this ground that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceedings. A.I.R. (Vol. 25) 1938 Pat. 41=18 P.L.T. 896=4 B.R. 217=10 R.P. 378=16 Pat. 748=173 Ind. Cas. 123.

——S. 11—Finding by Court not competent to try subsequent suit.

Though the finding by a Court not competent to try the subsequent suit is not *res judicata*, it creates a paramount duty in the party against whom it is given to displace it. A.I.R. (Vol. 23) 1936 Cal. 629=64 C.L.J. 458=168 Ind. Cas. 249.

——S. 11—Suit by Liquidator of company dismissed on merits—Matter cannot be reagitated in Liquidation Court.

Where a suit by the liquidator of a company on a promissory note executed by a person for money due on shares is dismissed on the merits, the same matter cannot be re-agitated in the liquidation Court, as the acceptance of the pronote in lieu of the shares amounted to a novation of the contract to pay the premium and thus the suit on the pro-note was dismissed on the merits by a competent Court. 87 P. W.R. 1918=46 Ind. Cas. 586=86 P.L.R. 1918.

——S. 11—Order of—Revenue Court—Alteration of position by subsequent events—Effect.

An order of Revenue Court determining relations of landlords and persons as tenants is *res judicata* between them, but the question can be re-settled if events have changed the position terminating the tenancy. 38 All. 538=35 Ind. Cas. 41=14 A.L.J. 734.

——S. 11—Revenue Court—Decision on title or propriety of patta—Res judicata.

The decision of a Revenue Court as to the propriety of a particular condition in a patta or as to title of the landlord is *res judicata* between the parties in subsequent suits in the same Courts, when such decision does not proceed on any consideration peculiar to the particular fasli, unless it be that subsequent events have arisen to determine the landlord's title or render the condition in a patta applicable. 17 M.L.J. 518=30 M. 510=2 M.L.T. 455.

——S. 11—Regular Court having jurisdiction—If loses jurisdiction by reason of existence of another Court with Small Cause powers.

A regular Court does not cease to be a Court of jurisdiction competent to try the subsequent suit merely by reason of the existence of another Court with a Small Cause and therefore preferential jurisdiction to try the subsequent suit. (1902) 6 Bom. L.R. 77=28 B. 338.

5 (c)—Civil and Revenue Courts.

(i) Decision of Revenue Court—When res judicata.

See also (1) C. P. CODE, S. 11—COMPETENT COURT—EXCLUSIVE JURISDICTION.

(2) C. P. CODE, S. 11—APPLICABILITY AND SCOPE.

(ii) Decision of Revenue Court—When not res judicata.

(iii) Prior Civil Court decree—Res judicata.

5 (c) (i)—Decision of Revenue Court—When res judicata.

——S. 11—Finding by Revenue Court, when operates as res judicata in civil suits.

The principle of *res judicata* is not confined to the provisions of S. 11, C. P. Code, and the finding of a Revenue Court in a matter in which it has exclusive jurisdiction operates as *res judicata*. A.I.R. (Vol. 20) 1933 Lah. 738=34 P.L.R. 642=150 Ind. Cas. 155.

——S. 11—Decision of Courts of exclusive jurisdiction—Constructive res judicata.

The decisions of Courts possessed of exclusive jurisdiction such as Revenue Courts have the effect

of *res judicata* irrespective of the limitation that the first Court must be competent to decide the subsequent suit. A.I.R. (Vol. 19) 1932 Oudh 199=9 O.W.N. 488=16 R.D. 246=7 Luck. 716=137 Ind. Cas. 606.

——S. 11—The decision of a Revenue Court in matters in which it has exclusive jurisdiction is *res judicata* in a subsequent suit in Civil Court. 11 L.L.J. 248=121 Ind. Cas. 507=30 P.L.R. 427=A.I.R. 1929 Lah. 586.

——S. 11—The decision of the Revenue Court, in a matter within the exclusive cognizance of that Court, is binding on the Civil Courts. 8 L.R.A. (Rev.) 33=99 Ind. Cas. 299=A.I.R. 1927 All. 189.

——S. 11—When a matter exclusively within the jurisdiction of a Court of Revenue has been tried and decided by the Court as between the parties, no subsequent suit will lie in a Civil Court having for its sole object the annulment of the decree passed by the Court of Revenue. 6 O.W.N. 1214=93 Ind. Cas. 374=A.I.R. 1926 Oudh 348.

——S. 11—If after a decision of a suit by a Revenue Court, the losing party comes to the Civil Court for the same relief which would have the effect of setting aside the decree of the Revenue Court the civil suit would not be maintainable and would stand barred by the principles of *res judicata*. 77 Ind. Cas. 638=A.I.R. 1923 All. 527.

——S. 11—Decision of Revenue Court.

The decision of a Revenue Court can be *res judicata* against a party in a subsequent civil suit, if the matter decided by the Revenue Court could have been heard in appeal by a District Judge who could have sent the case for trial to the Court of the same jurisdiction as the Civil Court in the subsequent suit. 33 All. 453=10 Ind. Cas. 924=8 A.L.J. 341.

——S. 11—Powers of Civil Court.

It is not open to a Civil Court to treat a decree of a Revenue Court as *ultra vires* because it is of opinion that the revenue Court has exceeded its special jurisdiction. 93 Ind. Cas. 85=A.I.R. 1926 Oudh 369.

——S. 11—Question of title—Decision of Revenue Courts.

A decision of a Revenue Court upon a question of title can operate by way of *res judicata* in a subsequent suit in a Civil Court between the parties. A.I.R. (Vol. 24) 1937 All. 481=1937 R.D. 302=10 R.A. 142=I.L.R. (1937) All. 628=1937 A.W.R. 539=(1937) A.L.J. 979=170 Ind. Cas. 657.

——S. 11—A decision of a Revenue Court under S. 199 (3) of the Agra Tenancy Act operates a decision by a Civil Court for the purpose of *res-judicata*. A.I.R. 1922 All. 95 and A.I.R. 1924 All. 10, Foll. 49 All. 606=25 A.L.J. 387=101 Ind. Cas. 501=8 L.R.A. (Rev.) 122=A.I.R. 1927 All. 717.

——S. 11—Agra Tenancy Act, S. 199 (b).

A decision of Assistant Collector acting under S. 199 (b), Agra Tenancy Act, bars a subsequent suit to determine title between the same parties. 5 L.R.A. (Rev.) 26=73 Ind. Cas. 460=A.I.R. 1923 All. 556.

——S. 11—Revenue Court—Decision on title—Res Judicata.

Where, in a previous suit, the Revenue Court decided against the plaintiff with respect to his title to certain plots, *held*, that the matter could not be raised and decided in a subsequent suit, under S. 11 of the C. P. Code. 21 A.L.J. 330=4 L.R.A. (Rev.) 165=72 Ind. Cas. 155=A.I.R. 1924 All. 10.

——S. 11—Rent Court—Decision in suit for ejectment—Question of title—Res judicata in Civil suit—U. P. TENANCY ACT, Ss. 58 & 199.

When a Rent Court orders the ejectment of a tenant upon one of the grounds mentioned in S. 58 of the U.P. Tenancy Act deciding itself under S. 199 of the Act the question of title against him, he is barred by the rule of *res judicata* from re-opening the question of that in a Civil Court. (1905) 2 A.L.J. 334.

——S. 11—Decision by Revenue Court on title—Subsequent suit in Civil Court on title—Bar of.

The plaintiffs sued to recover their share of an annuity chargeable on a 7½ biswas share of a certain village for the years 1309, 1310 and 1311 Fasli. In a previous suit between the same parties in respect of the years 1306, 1307 and 1308, the plaintiffs' right to receive the annuity had been admitted by the defendant and a decree passed accordingly which had been affirmed by the High Court. *Held*, that the fact that the two suits related to different years did not prevent the judgment in the former operating as *res judicata* in the latter. I.L.R. 24 A. 112, foll. Neither did not fact that the first decision was that of a Court of Revenue make any difference. Either the suit was wrongly brought in a Revenue Court—a defect which was cured by its coming to a Civil Court in appeal—or the Revenue Court deciding a question of title might be regarded *quoad hoc* as a Civil Court. (1908) 1908 A.W.N. 192=5 A.L.J. 407=30 A. 470.

——S. 11—Decision of Revenue Court—Subject-matter different—Adjudication on title—Res judicata.

In a prior suit between the parties as regards a particular plot of land the Revenue Court had decided against the plaintiff. In subsequent suit in the Civil Court brought by the plaintiff for recovery not only of that plot of land but also of other plots to which the title was identical, *held*, that the decision of the Revenue Court was *res judicata*. L.R. 4 A. 165 (Rev.)=72 Ind. Cas. 15=21 A.L.J. 330=1924 All. 10.

——S. 11—Revenue Court—Ejectment—Finding of rent—Free grant—Subsequent suit for declaration.

In a suit for ejectment in a Revenue Court defendants set up that they were rent free grantees of the land and not the tenants of the plaintiff and the plea was found by the Court and affirmed on appeal by the Revenue Court. Subsequently the plaintiff sued to declare that the defendants were not free grantees. *Held*, that a question of proprietary title was raised by the defendants and decided in their favour by the Revenue Court and that by not appealing to the District Judge the plaintiff allowed it to become final. The subsequent suit in a Civil Court was barred by the rule of *res judicata*. 37 All. 280 =28 Ind. Cas. 432=13 A.L.J. 326.

——S. 11—Question of title—Punjab Land Revenue Act.

A question whether a person holds such an interest in a plot of land as entitle him to ask for a partition in the Revenue Court is a question of title within S. 111 of the Punjab Land Revenue Act and the decision of a Revenue Court upon which question under S. 117 of the Act operates as *res judicata* in a Civil Court. 63 Ind. Cas. 781 (Lah.).

——S. 11—Decree of Revenue Court—Title to land.

A sale deed provided that the lands should remain in the proprietary possession of the vendor free from liability for the payment of rent (*bila lagani*). The vendee obtained however, from the Revenue Court decrees against the vendor for arrears of revenue. Subsequently the vendor sued in the Civil Court for a declaration that the land was not liable to pay the revenue or any other demand, and for damages. *Held*, that as the words *'bila lagani'* implied that the vendee was to be liable to pay the revenue, if any that might be assessed on the land, the declaration could not be granted as it would trench on the jurisdiction of the Revenue Court. Damages could not be granted as it practically meant a refund of the amounts decreed by the Revenue Court. 39 Ind. Cas. 133=4 O.L.J. 68.

——S. 11—Where there is a finding of the Revenue Court that a certain plot of land is *sir* of the defendant and not his ex-proprietary tenancy, the finding is binding on the Civil Court. A.I.R. (Vol. 21) 1934 All. 92=L.R. 14 A. 760 Rev.=17 R.D. 964 =149 Ind. Cas. 826.

——S. 11—Commissioner's final decision on question of tenancy operated as *res judicata*. A.I.R. (Vol. 21) 1934 All. 725=56 All. 983=1934 A.L.J. 389 =149 Ind. Cas. 54.

——S. 11—A decision of the Revenue Court on the question whether the plaintiffs were agricultural tenants or not is one within its jurisdiction and the trial of the same question by the Civil Court is barred by the principle of *res judicata*. 8 L.R.A. (Rev.) 235=102 Ind. Cas. 887=A.I.R. 1927 All. 613.

——S. 11—Decision of—Revenue Court—Status of tenant.

A Revenue Court's decision in a rent suit declaring a tenant's status operates as *res judicata* to bar a declaratory suit in the Civil Court declaring the tenant as an occupancy tenant. 42 All. 191=58 Ind. Cas. 772=18 A.L.J. 1030.

——S. 11—Although S. 167 of the Agra Tenancy Act does not apply to suits between rival claimants to a tenancy, nevertheless once a matter has been decided by a Revenue Court it cannot be re-opened in a Civil Court. This view is not based on the provisions of S. 167 nor on the principle of *res judicata* but rather on the general ground that the effect of allowing such a thing to be done would be to nullify the decree of the Revenue Court which is final binding on the parties. 41 A. 97, Foll. 78 Ind. Cas. 1008=A.I.R. 1924 All. 609.

——S. 11—Rent suit in Revenue Court—Defendants alleged to be liable as sub-tenants—Defendants denying allegation and claiming to be occupancy tenants —Defendants' contention overruled—Defendants subsequently suing for a declaration that they are occupancy tenants—Suit is barred. 43 All. 191=A.I.R. 1921 All. 348.

——S. 11—Where plaintiff sued to eject defendants on the basis of their being sub-tenants and on the latter's contention that they were landlords time was given to them to establish their case in the Civil Court but they did not do so and as a consequence the Revenue Court passed a decree for ejectment in plaintiff's favour, *held*, that the defendants could not thereafter, in a suit for actual possession by the plaintiff, contend again that their possession was that of landlords. 72 Ind. Cas. 1024=A.I.R. 1923 All. 113.

——S. 11—In a suit for ejectment of the defendant as a sub-tenant of certain holding the decision of the Revenue Court, that he is a tenant-in-chief and the suit must be dismissed, is binding as that Court is competent to decide the question and no suit lies in the Civil Court for setting aside that decision. 44 All. 724=77 Ind. Cas. 139=20 All.L.J. 606=A.I.R. 1922 All. 336.

——S. 11—Decision of Revenue Court for ejectment—Res judicata.

A subsequent suit for declaration in a Civil Court is not maintainable where there is a decree of the Revenue Court binding on the parties for ejectment of the mortgagee of an occupancy holding. 35 All. 464=21 Ind. Cas. 2=11 A.L.J. 671.

——S. 11—Agra Tenancy Act, S. 58.

In a former suit a landlord declared a tenant to be his non-occupancy tenant and desired his ejectment under S. 58, Agra Tenancy Act (2 of 1901). The Assistant Collector held that the tenant was not an occupancy tenant, but that he held the grove under such condition that he could not be ejected under S. 58. His view further was that in the alternative the tenant would be a rent-free grantee of the land for the purposes of planting a grove. Then the landlord sued the tenant in the Civil Court for his ejectment on the ground that the tenant was a licensee of that grove under certain conditions and he desired to eject him as the license terminated.

Held, that the Civil Court, after the refusal of the Revenue Court to eject the tenant could not inquire into the matter whether the tenant was a licensee of the landlord or not. The Revenue Court had jurisdiction to hold that the tenant was a grove-holder. 9 L.R.A. (Rev.) 141=118 Ind. Cas. 171=A.I.R. 1928 All. 343.

——S. 11—Partition case—U. P. Land Revenue Act, S. 233 (k).

If any co-sharer who is a party to the prior partition case has any objection to the entry in the khewal of the name of a co-sharer or of the amount of the share recorded for a co-sharer it is open to that party to make an objection before the partition Court. Where he omits to do so he cannot subsequently file a suit in the Civil Court for having the previous arrangement modified. The later proceeding will in such cases be barred by S. 11, C. P. Code and 233 (k) of the U. P. Land Revenue Act. 1930 A.L.J. 1281=130 Ind. Cas. 382=A.I.R. 1931 A. 29.

——S. 11—Orders of Revenue officer—Partition Proceedings—Punjab Act (18 of 1887).

A revenue officer's dealing with an application for partition under S. 117 of Punjab Act (17 of 1887) is an administrative adjustment to which the prin-

ciple of *res judicata* does not apply. But it does not mean that the orders passed by a revenue officer have no legal finality. 5 P.R. 1914 Rev.=27 Ind. Cas. 417=229 P.L.R. 1915.

——S. 11—A decree for profits in favour of defendant passed by the Revenue Court which was the competent Court of exclusive jurisdiction to pass such a decree, cannot be declared to be invalid and incapable of execution by a Civil Court, in a suit for a declaration brought by plaintiff, for that purpose. 5 L.R.A. (Rev.) 144=72 Ind. Cas. 276=A.I.R. 1923 All. 437.

——S. 11—Decision of Revenue Officer—B. T. Act, S. 105.

Where on an application under S. 105, Bengal Tenancy Act, the Revenue Officer had jurisdiction to decide whether or not the applicants when they made the application to him under S. 105 were joint landlords, and he did decide the question and his decision on this point was not questioned by appeal.

Held, that the applicants cannot challenge it subsequently by separate suit. 30 C.W.N. 974=97 Ind. Cas. 702=A.I.R. 1926 Cal. 1180.

——S. 11—Decision of Revenue Court—B. T. Act, Ss. 105 and 109.

Disposal of an application under S. 105 does not bar a suit concerning rent. Plea of bar under S. 109 must be made in absence of which decision plaintiff's right to rent based on Record of Rights will operate as *res judicata.* 57 Ind. Cas. 48.

——S. 11—Decree of Revenue Court—Wrong decision on question of jurisdiction—Res judicata.

Where a Revenue Court decides a suit brought before it, holding that it has jurisdiction, and the parties accept the decree and it becomes final, one of them afterwards cannot ask a Civil Court to set aside the decree of the Revenue Court because it had wrongly decided the question of jurisdiction. If the suit had been decided wrongly, it can be remedied by an appeal. 52 Ind. Cas. 98=1 U.P.L.R. (J.C.) 7.

——S. 11—Orders of Revenue Officer in Burma.

As there are no Revenue Courts in Burma there is no question of *res judicata* by reason of the orders of Revenue Officers. 9 Bur.L.T. 183=35 Ind. Cas. 356=8 L.B.R. 556.

——S. 11—Revenue Court—Decision as to rent.

The decision by a revenue Court fixing the rent at a particular fixed sum operates as *res judicata* between the parties and precludes the plaintiff from claiming at a higher rate. 16 Ind. Cas. 339=10 A. L.J. 52.

5 (c) (ii)—Decision of Revenue Court—When not res judicata.

——S. 11—*Res judicata*—Decisions of Revenue Courts on questions of title. *See* MADRAS ESTATES LAND ACT (1 OF 1908), Ss. 20-A AND 189. (1949) 2 M.L.J. 454.

——S. 11—Revenue proceedings—Decision as to title and possession in correction of papers case—If res judicata in later suit for declaration of rights.

A decision in a correction of papers case that a person had no title to a grove and was not in possession would not operate as *res judicata* in a subsequent suit by that person for a declaration of his rights in that grove. 1947 R.D. 208 (1)=1947 A. W.R. (Rev.) 103.

——S. 11—Question of title—Suit for profits in Revenue Court—Subsequent suit for profits in Civil Court—Question of title, whether barred.

The plea of title if not raised in the first suit for profits may be barred by the rule of *res judicata* in second suit even though the profits relate to different years. But if the first suit was in a Revenue Court, and the subsequent suit is in a Civil Court, the application of the rule is not attracted as the issue relating to title was not within the jurisdiction of the Revenue Court. A.I.R. (Vol. 32) 1945 All. 76=1944 O.W.N. 136=I.L.R. (1944) All. 601=1945 A.L.J. 7=1944 A.W.R. 224.

——S. 11—Question of title—Mutation proceedings.

Mutation proceedings—Dispute as to title also referred to arbitration with mutation dispute—Award—Subsequent civil suit on title is not barred—Award affects only mutation proceedings and all questions of validity of award are irrelevant in civil suit on title. A.I.R. (Vol. 29) 1942 Oudh 258=1942 O. W.N. 30=1942 R.D. 63=17 Luck. 558=198 Ind. Cas. 553.

——S. 11—Question of title.

Revenue Court deciding question of title under S. 199, Agra Tenancy Act, 1901, does not become a Civil Court. Even if it is deemed to become so, it does not become a Civil Court competent to try a suit for the purpose of S. 11. A.I.R. (Vol. 19) 1932 All. 483=1932 A.L.J. 511=54 All. 786=141 Ind. Cas. 641.

——S. 11—Rent suit—Plea of—Jus bertii—Subsequent declaratory suit—Not res judicata.

In a previous rent suit the defendant-tenant pleaded *jus tertii* and his plea was upheld. The landlord brought a suit for declaration of title against the tenant without making the third party a defendant.

Held, that the decision in a rent suit with reference to title is not *res judicata* in a subsequent declaratory suit. It is immaterial whether the third party under whom the defendants claimed to have held the land was made a party, or not. 12 C.L.R. 38; 10 C. W.N. 820 and 12 Ind. Cas. 9, Not Foll. 57 Cal. 371=A.I.R. 1930 Cal. 579.

——S. 11—Question of title—Decision of Revenue Court.

A decision of Rev. Court, in a case which it has jurisdiction to decide, *e.g.,* a decision on title in a suit for profits can be interfered with by a Civil Court if the Revenue Court proceeds upon an entry of a certain person's name in the Revenue papers as conclusive on the question of title. 19 A.L.J. 279=62 Ind. Cas. 684=3 U.P.L.R. (All.) 47.

——S. 11—Revenue Court—Question of title.

Where a rent Court has found upon evidence that the relationship of landlord and tenant obtains between two persons, that decision would often be final. But where the rent Court arrived at a decision without any evidence at all and upon a mere assumption of a question of proprietary title being involved and a tenancy not having been established, it is open to the Civil Court to arrive at a finding on the ques-

tion of the proprietary title. 49 Ind. Cas. 61=21 O.C. 324.

——S. 11—Revenue Court—Decision on title.

The decision by a Revenue Court on a question of title is no bar to the same question being litigated in a Civil Court. 45 P.R. 1918=77 P.W.R. 1918=46 Ind. Cas. 13=84 P.L.R. 1918.

——S. 11—Revenue Court—Question of title—Not res judicata.

The decision of a Revenue Court on a question of title will operate as *res judicata* in a claim based on the same title put forward subsequently in a Civil Court. 20 Mad. 392, foll. 34 Ind. Cas. 254.

——S. 11—Revenue Court—Decision on title—Not res judicata in subsequent suit in Civil Court.

In a suit of a peculiarly civil nature such as a suit for a declaration of proprietary right an adverse decision on the question of title, even though necessarily passed in Revenue Court, cannot be held to oust the jurisdiction of the Civil Court to decide that issue. 1904 A.W.N. 109=26 A. 468.

——S. 11—Rent Court—Decision in rent suit—Question of title—If res judicata in suit for declaration of title.

A decision as to title in a rent suit does not operate as *res judicata* in a suit for the declaration of title. 26 C. 428 foll. (1901) 6 C.W.N. 66.

——S. 11—Revenue Court—Decision as to under-proprietary title.

A decision in a previous ejectment case under S. 62 of the Oudh Rent Act as to under-proprietary rights, operates as *res judicata* between the parties in a subsequent case for recovery of possession in the Revenue Court until there is a final adjudication on the question in the Civil Court. 27 Ind. Cas. 525=2 O.L.J. 63.

——S. 11—Rent suit—Finding as to genuineness of lease—Whether conclusive between parties in subsequent title suit.

Although a decision in a suit for rent does not operate as *res judicata* in a subsequent suit for declaration of title, yet the decision should be taken into consideration and weight should be attached to the same.

A decision in a previous rent suit as to the genuineness of a lease is not to be treated as conclusive on the question of title in a subsequent title suit. A.I.R. (Vol. 21) 1934 Cal. 60=37 C.W.N. 924=60 Cal. 1307=147 Ind. Cas. 1031.

——S. 11—Suit for rent—Decision of Revenue Court—Declaration suit in Civil Court—Not barred.

The decision of the Revenue Court in the suit for rent that the defendant is a tenant and liable to pay rent does not bar the defendant from maintaining a suit in the Civil Court for a declaration that he is the owner. A.I.R. (Vol. 29) 1942 Oudh 301=1942 O.W.N. 66=1942 R.D. 162=199 Ind. Cas. 682.

——S. 11—Dismissal of a plaintiff's suit in the Revenue Court contesting a notice of ejectment does not operate as *res judicata* in a subsequent suit for declaration in a Civil Court that the plaintiff was in possession of the portion of the *shamilat* in his capacity as a co-sharer. A.I.R. (Vol. 23) 1936 Lah. 710=38 P.L.R. 915=165 Ind. Cas. 521.

——S. 11—Suit in Revenue Court for ejecting tenant—Subsequent suit in Civil Court involving question of title.

Where the revenue suit is instituted for ejecting the tenants and this is the only jurisdiction exclusively vested in the Revenue Courts, that Court cannot determine the question of title in that case and its decision therefore cannot operate so as to prevent the Civil Courts from entertaining a subsequent suit, which involves the question of title. A.I.R. (Vol. 22) 1935 Lah. 739=17 Lah. 38=38 P.L.R. 292=161 Ind. Cas. 201.

——S. 11—Revenue Court rejecting claim to be an occupancy-tenant—Whether bars subsequent civil suit to declare ownership.

Where the claim of the plaintiff to be an occupancy tenant has been rejected by the Revenue Court, it does not operate as bar by *res judicata* to a subsequent civil suit for declaration that the plaintiff is the owner of the land. A.I.R., (Vol. 20) 1933 Lah. 1016 (1)=147 Ind. Cas. 521 (1).

——S. 11—Bengal Tenancy Act.

The plaintiff's name was recorded in the finally published record-of-rights as the owner of 8 gandas 3 karas and 5 dantis. The defendant No. 1 thereupon instituted a suit under S. 106 of the Bengal Tenancy Act for a correction to be made in the entry of the names of the owners of the Taluk and alleged that she had 14 annas and odd share therein. She made one *J*, defendant No. 2, a *pro forma* defendant, alleging that he owned a share of one anna and odd. Defendant No. 1 was successful in the said proceedings. The plaintiff thereupon instituted a suit for declaration of title and recovery of possession.

Held, that the decision in the suit of defendant No. 1 under S. 106 of the Bengal Tenancy Act did not operate as *res judicata* in respect of the plaintiff's claim. 54 Cal. 114=44 C.L.J. 467=100 Ind. Cas. 293=A.I.R. 1927 Cal. 216.

——S. 11—A decision by the Revenue Court that defendant was not plaintiff's tenant does not bar a plea that a party was a rent-free grantee. 5 L.R.A. (Rev.) 103=79 Ind. Cas. 587=A.I.R. 1924 All. 479.

——S. 11—Where in a suit by the landlord for arrears of rent the tenant pleads payment in good faith to a third person who is therefore made a party to the suit and the suit is decided against him, *held*, that such a decision does not preclude the latter from establishing his title in a Civil Court, as the previous suit does not come within the purview of those rulings of this Court which held that a suit will not lie in a Civil Court if its object is to avoid a decision arrived at by a Revenue Court in a matter in which it had exclusive jurisdiction. 4 L.R.A. (Rev.) 138=71 Ind. Cas. 1017=A.I.R. 1924 All. 270.

——S. 11—Rent Court—Decision on question of tenancy—Civil suit for declaration of title.

A Rent Court passing a decision on a question of tenancy in a previous suit for rent is not *res judicata* in a subsequent suit, in the Civil Courts for a declaration of title. 21 A.L.J. 476=L.R. 4 A. 428=L.R. 5 A. 47 (Rev.)=1924 All. 163.

——S. 11—Decree for improvements by—Revenue Court—Subsequent civil suit setting up title.

The fact that the tenants sued in a Revenue Court and got a decree for improvements against the landlord will not estop them setting up an independent title of ownership. The decision of the Revenue Court though it cannot be treated as *res judicata* will carry greatest possible weight with the Civil Court in matters covered by it. 155 P.W.R. 1912=16 Ind. Cas. 886=186 P.L.R. 1912.

——S. 11—Decision of—Revenue Court—Title.

Where an alleged tenant sets up in a Civil Court an independent title against his landlord the decision of a Revenue Court is no bar to the same. 17 M. 106; 21 M. 482, Foll. 25 Ind. Cas. 372.

——S. 11—Decision of Revenue Court that plaintiff was sub-tenant—Civil suit to establish claim to holding.

A decision of Revenue Court in a previous suit that the plaintiff was the sub-tenant of the defendant in respect of the holding does not operate as *res judicata* in a suit in the Civil Court to establish his claim to the holding. 37 All. 223=27 Ind. Cas. 913=16 A.L.J. 278.

——S. 11—A decision in a previous proceeding by a Collector acting under S. 75, Estates Land Act, that rent was payable in cash does not operate as *res judicata* in subsequent proceedings. A.I.R. (Vol. 20) 1933 Mad. 231 (1)=145 Ind. Cas. 380.

——S. 11—Where proceedings for execution of a mortgage decree were transferred for execution to the Collector and judgment-debtor applied under O. 21, R. 2 to the Court to notify that the decree had been fully satisfied and on being referred to the Collector, the Collector certified the amount due which being paid, the Collector returned the papers to the Court holding that the decretal amount had been liquidated, and after the Court had passed an order accordingly, the decree-holder applied for execution claiming a large amount as still due:

Held, that the application was not barred either by *res judicata* or by estoppel by conduct and that it was competent. A.I.R. (Vol. 20) 1933 Sind 112=26 S. L.R. 506=142 Ind. Cas. 579.

——S. 11—*U*, the malguzar had brought a suit in Revenue Court for ejecting his tenant *M*. *S* was added as a defendant on his own application. *M* resisted the suit on the ground that he was looking after the land on behalf of *S*, who had the right of a grove holder. No issue was framed as to whether *S* had the rights of a grove-holder. It was found that the land was neither agricultural land nor a grove, and an ejectment decree was passed against *M*. *S* then brought a suit in Civil Court against *U* for possession of the grove.

Held, that the finding as to the state of the land in the previous suit could not be *res judicata* in the subsequent suit (whether *S* had rights of a grove-holder at the time of his suit; that the Revenue Court not being competent to try the subsequent suit, the finding of the Revenue Court could not amount to *res judicata* and that *S* would not be barred by estoppel as the decree granted by Revenue Court was merely to eject *M* and a decree in favour of *S* would not in any way affect that decree. 9 L.R.A. (Rev.) 289=115 Ind. Cas. 454=A.I.R. 1929 All. 17.

——S. 11—Status of tenant.

Held, that the Revenue Court's decision regarding the status of a tenant will not bar an adjudication on the point by the Civil Court. 14 R.D. 196.

——S. 11—The Court of Revenue has the exclusive jurisdiction to determine what is the status of a tenant of lands, and what are the special or other terms upon which such tenant holds and the Civil Courts have the exclusive jurisdiction to decide whether or not a person in possession of lands holds a proprietary or under-proprietary right in the lands and therefore a decision of a Revenue Court as to the status of a tenant is not *res judicata* in a suit in Civil Court. 100 Ind. Cas. 851=A.I.R. 1927 Oudh 183.

——S. 11—A decision by a Court recovering thakkavi arrears that rent was not paid by the sub-tenant to the tenant in proceedings for sale of the tenure to recover takkavi paid to the tenant is not *res judicata* in a subsequent suit by the purchaser against the sub-tenant for the recovery of the rent payable by the sub-tenant. 5 L.R.A. (Civ.) 230=78 Ind. Cas. 373=A.I.R. 1924 All. 910.

——S. 11—Estate Lands Act.

The Revenue Court is not a competent authority to decide finally whether any particular lands constitute an estate or not. If they constitute an estate, then the Revenue Court has jurisdiction and exclusive jurisdiction in the matter of commuting rents. For the purpose of deciding whether it should exercise that jurisdiction the Revenue Court like any other Court of limited jurisdiction has to determine whether the facts are such as to give it jurisdiction. That decision however will not be binding on a Civil Court. 14 M.L.W. 251=A.I.R. 1921 Mad. 473=69 Ind. Cas. 938.

——S. 11—Where during partition proceedings there was dispute among several co-sharers at to who should bear the burden of the lease and the deed of gift and it was definitely decided that the burden should be borne rateably by the Revenue Court sitting as a Civil Court,

Held, that in will be unfair to reopen the question subsequently in a Civil Court. 12 O.L.J. 638 =2 O.W.N. 539=89 Ind. Cas. 221=A.I.R. 1926 Oudh 72.

——S. 11—Decision of Revenue Court—Ejectment.

A suit for ejectment which is maintainable in a Civil Court is not barred merely because the plaintiff had previously sued in a Revenue Court treating the defendant as a tenant. 17 A.L.J. 646=50 Ind. Cas. 734=1 U.P.L.R. (H.C.) 74.

——S. 11—Madras Rent Recovery Act, Ss. 9 & 10—Dismissal of suit for enforcement of acceptance of patta—No bar to a suit for rent on the basis of a tender of proper patta.

The dismissal of a suit under S. 9 of the Rent Recovery Act to enforce the acceptance of a patta is no bar to a civil suit for rent due for the same fasli on the basis of a tender of a proper patta. The Revenue Court is not a Court of jurisdiction, competent to decide the suit for rent, and its decision

cannot operate as *res judicata* in a suit for rent. (1907) 17 M.L.J. 601=31 M. 62=3 M.L.T. 186.

——S. 11—Revenue Court—Decree for resumption under Tenancy Act—Subsequent title not in Civil Court—Not res judicata.

In a matter which fell within Chapter 10 of the Tenancy Act the decision of a Revenue Court was no bar to a suit subsequently brought in a Civil Court on title, the provisions of Ss. 199 and 201 of the Tenancy Act having no application to a suit against a *Muafidar*. (1908) 6 A.L.J. 527=2 Ind. Cas. 587.

——S. 11—U. P. Rent Act, Ss. 36 and 39—Decision of rent Court that defendant was not a tenant—Suit for ejectment in Civil Court.

Section 13, C. P. C., only applies in cases where the Court whose decision is cited as *res judicata* was competent to try the second suit. Hence where plaintiff applies to a Rent Court for issue of notice under S. 36 of N.W.P. Act, 12 of 1881, and upon a contest under S. 39 of the said Act, it was held on appeal by the Collector that the defendant to whom notice was issued was either the owner or rent-free tenant of many years' standing, and thereafter the landlord's application for assessment of rent was also rejected upon the ground that the defendant was in adverse possession:—*Held*, that an action in ejectment was maintainable in a Civil Court. 1904 A.W.N. 202=1 A.L.J. 503=27 A. 163.

——S. 11—Revenue Court—Decision of—Subsequent suit in Civil Court for declaration.

In a suit brought by a tenant under S. 142 of the Agra Tenancy Act to challenge the validity of distraint against the landlord, it was held that the mortgage by the tenant in favour of the landlord had been satisfied. Thereupon the mortgagee brought a suit in the Civil Court for a declaration that the mortgage still continued. *Held*, that the subsequent suit was not barred by *res judicata*. 41 All. 369=49 Ind. Cas. 591=17 A.L.J. 352.

——S. 11—Applicability.

Section 11, C. P. Code has obviously no application in a suit for declaration that the rent decree and the sale consequent thereon were fraudulent. 41 Ind. Cas. 905.

——S. 11—Decision of Revenue Court in respect of holding—Civil suit relating to grove.

The decision of the Revenue Court in respect of holding does not operate as *res judicata* in the Civil suit relating to the grove as the Revenue Court could not have decided the suit brought in respect of the grove. 34 Ind. Cas. 162.

——S. 11—Decision of—Revenue Court as to authority of an agent to grant lease—Suit for declaration—Not res judicata.

A Revenue Court has no jurisdiction to go into a question of the authority of an agent to grant a lease on behalf of his principal and so an incidental expression on that point by that Court is not *res judicata* in a suit for declaration that the lease was void for want of authority. 23 Ind. Cas. 705.

——S. 11—Rent suit—Decision of—Revenue Court—Suit for possession.

Decision of Revenue Court in a rent suit does not bar a subsequent suit for recovery of possession. 23 Ind. Cas. 592=19 C.L.J. 244.

——S. 11—Rent suits.

Decisions in rent suits do not operate as *res judicata*. 79 Ind. Cas. 621=A.I.R. 1924 Nag. 422.

——S. 11—Revenue judgment.

A Revenue judgment *inter partes* is relevant in a civil suit but not *res judicata*. 160 P.W.R. 1913 =20 Ind. Cas. 831=280 P.L.R. 1913.

——S. 11—Revenue Court—Decision of.

Where in a suit for partition brought in a Revenue Court it was decided that the plaintiff should seek his remedy in a Civil Court and it was subsequently found that the plaintiff had then no right to sue, *held*, that the decision did not operate as *res judicata*. 20 Ind. Cas. 429.

——S. 11—Decision of Deputy Commissioner in summary proceeding.

The decision given by a Deputy Commissioner in summary proceeding under the Revenue Act as regards the amount of rent and cess is not *res judicata* in a subsequent suit. 12 Ind. Cas. 331.

——S. 11—Revenue Court—Ejectment decree against mortgagee as sub-lessees of ex-proprietary holding—Not res judicata on question of right as mortgagees.

Held, that the decree for the ejectment of the mortgagees which was obtained in the Revenue Court on the ground that they were the sub-lessees of the ex-proprietary holding was limited to their ejectment as sub-tenants and could not in any way effect the ejectment of the plaintiffs as mortgagees and a Revenue Court having no jurisdiction to eject a mortgagee from an ex-proprietary tenant, the decision in the ejectment proceedings could not operate as *res judicata*. (1908) 7 A.L.J. 305=2 Ind. Cas. 456.

——S. 11—Revenue Court—Decision of—Subsequent suit in Civil Court—Res judicata.

The decision of a Revenue Court on any question at issue is not *res judicata* in any subsequent suit in a Civil Court where that question may arise, for the Revenue Court could not have tried the later suit and S. 13 of the Code of Civil Procedure is exhaustive on the subject of what constitutes *res judicata*. 1902 A.W.N. 220=25 A. 138.

——S. 11—Revenue Court—Order allowing mutation of names of tenant—Suit by landlord in Civil Court for ejectment as trespasser— *Res judicata. See* U. P. REVENUE ACT, S. 102. (1901) A. W.N. 204=24 A. 153.

5 (c) (iii) Prior Civil Court decree—Res judicata.

——S. 11—Decision of Revenue Court on question of tenancy accepted by Civil Court and decree passed thereon—Binding nature of decree in subsequent proceedings in Revenue Court.

Where on an issue being referred to a Revenue

Court a decision on a question of tenancy in regard to a particular plot is given and on the basis of that a decree is passed by the Civil Court, then that decree will be binding on the parties and their representatives in subsequent proceedings in the Revenue Court. 1949 R. D. 362.

——S. 11—Civil Court finding on tenancy right based on Revenue Court's finding—If operates as res judicata in a subsequent suit in the Revenue Court.

Where on an issue of tenancy right being raised the Civil Court gives its finding based on that of a Revenue Court, such finding would operate as *res judicata* in a subsequent suit in the Revenue Court between the same parties. 1949 R. D. 13.

——S. 11—Decree of Civil Court declaring landlord's right to portion of holding—Subsequent suit for recovery of rent on that portion —Liability of tenant for rent—Res judicata.

In a suit brought in the Revenue Courts by a landlord for recovery of rent of the area of a house site included in a tenant's holding, *held* that a prior decree of a Civil Court establishing and declaring the landlord's right to get a reasonable rate of rent on the site in question operated as *res judicata,* though mere finding in the judgment of the Civil Court on the question of the landlord's right might not operate as such. 23 M.L.T. 18=(1918) M.W.N. 340=44 Ind. Cas. 663=7 L.W. 471.

——S. 11—Competent Court—Jurisdiction since taken away—Decree under Rent Recovery Act (1865)—Rate of rent.

A Civil Court's decree under the repealed Rent Recovery Act deciding the rate of rent, bars a subsequent suit between the same parties, where the rate of rent is in question. 40 Ind. Cas. 587=6 L.W. 16.

——S. 11—Decision by Civil Court on title—Subsequent suit in Revenue Court for profits—Res judicata.

When as between parties to the Revenue suit, a Civil Court of competent jurisdiction has decided the title to the property adversely to the plaintiff who claims profits, the Revenue Court is not competent to ignore that decision, and that decision being binding upon the Revenue Court, the suit should be dismissed. (1904) 2 A.L.J. 834=1906 A.W.N. 1.

——S. 11—Suit for profits under S. 164, Tenancy Act—Prior Civil Court decree—Not res judicata.

Where a *lambardar* who had paid the profits to the plaintiff as a purchaser from a co-sharer, recovered it back by suit in a Civil Court on the ground that the plaintiff was not entitled to it, and thereupon the plaintiff sued the *lambardar* under S. 164 of the Tenancy Act, for his share of the profits, *held* that the Civil Court decree could not operate as *res judicata,* and bar the suit which is a suit for profits only triable by a Revenue Court. 65 Ind. Cas. 530= A.I.R. 1922 All. 397.

5 (d) Exclusive jurisdiction.

See also (1) C. P. CODE, S. 11—APPLICABILITY AND SCOPE—IF EXHAUSTIVE.
(2) C. P. CODE, S. 11—COMPETENT COURT—CIVIL AND REVENUE COURTS.

——S. 11—Rent suit in Small Cause Court—Decision on title.

There is one apparent exception to the rule that the first Court must be a Court competent to try the subsequent suit and that is where the first Court is a Court of exclusive jurisdiction, its decision on any matter on which it has exclusive jurisdiction is binding on the other Courts. An instance of this is a decision by a Revenue Court on a matter on which it has exclusive jurisdiction.

Similarly, if a Small Cause Court decides a matter on which it has exclusive jurisdiction, then that decision is binding on subsequent Courts.

In rent suit the Small Cause Court has no exclusive jurisdiction to decide the question of title. If it does its decision cannot be *res judicata* in subsequent suit for rent and for ejectment because the prayer for ejectment takes the suit away from the jurisdiction of the Court of Small Causes. A.I.R. (Vol. 25) 1938 Lah. 811=I.L.R. (1939) Lah. 183=41 P.L.R. 509=181 Ind. Cas. 814.

——S. 11—Small Cause Court.

The judgment of a Court of exclusive jurisdiction can operate as *res judicata* only on a matter which that Court can exclusively decide. Where the Small Cause Court which decided a case had no exclusive jurisdiction to decide the question to title, its decision on the question of title cannot operate as *res judicata.* A.I.R. (Vol. 21) 1934 Lah. 324=36 P.L.R. 64=150 Ind. Cas. 17.

——S. 11—Decision on question of title by Small Cause Court—Binding effect.

The Small Cause Court cannot decide any question of title and on that question the decree would not certainly be *res judicata* in a subsequent suit, but no suit would lie merely to annul the decree. A.I.R. (Vol. 27) 1940 Cal. 445=44 C.W.N. 847=I.L.R. (1940) 2 Cal. 443=190 Ind. Cas. 200.

——S. 11—Decision of Small Cause Court as regards actual subject-matter is *res judicata* although not as regards question of title. 98 Ind. Cas. 176= A.I.R. 1927 Mad. 96.

——S. 11—Small Cause Court—Decision on question of title—If res judicata in subsequent suit in Court of original jurisdiction.

Held, that the incidental determination, in the course of a suit of the nature cognizable by a Court of Small Causes, of a question of title does not operate as *res judicata* and prevent the same question being litigated afresh in a Court & competent to decide it. A.W.N. 1889 p. 44 and 2 A. 97 foll. 1907 A.W.N. 218=4 A.L.J. 517.

——S. 11—Question as to whether Gurdwara is owner, directly in issue before Tribunal—Gurdwara found owner—Subsequent suit by Gurdwara for possession—Claimant in previous suit, whether can question ownership of Gurdwara again.

The provisions of S. 11, Civil P. C., are not exhaustive. The principle which prevents the same case being twice agitated is of general application and is not limited by the specific words of the Code in this respect. Where in the prior suit there was a finding by the Tribunal that the property in suit belonged to the *Gurdwara* the question whether the *Gurdwara* was owner being directly and substan-

tially in issue before the Tribunal, and the claimant was defeated by evidence of the *Gurdwara's* ownership and subsequently *Gurdwara* sued for possession of the property:

Held, that even though the *Gurdwara* Tribunal was not competent to try the subsequent suit, the claimant was barred by *res judicata* from questioning the ownership of *Gurdwara*, a second time. A. I. R. (Vol. 22) 1935 Lah. 826=160 Ind. Cas. 352.

——S. 11—Decision of Revenue Court whether operates as res judicata in subsequent suit in Civil Court.

Apart from the provisions of S. 11, Civil P. C., the decision of a Court of special jurisdiction will be *res judicata* in a Court of general jurisdiction provided the decision of the Court of special jurisdiction was within the jurisdiction of that Court. A. I.R. (Vol. 19) 1932 Lah. 623=34 P.L.R. 462=143 Ind. Cas. 59.

——S. 11—If the procedure specified in Cl. (b) of Sub-S. (1) of S. 111, U. P. Land Revenue Act, 1901, is not resorted to and the Collector decides to proceed to inquire into the merits of the case, his decision is final and bars a suit in Civil Court. A. I.R. (Vol. 19) 1932 Oudh 199=9 O.W.N. 488=16 R.L. 246=L.R. 13 (A.) (O.) 246=7 Luck. 716=137 Ind. Cas. 606 (F.B.).

——S. 11—Madras Hereditary Village Offices Act (3 of 1895), S. 13.

Under S. 13, the Collector has jurisdiction to determine whether lands are the emoluments of an office or not, and the parties to the proceeding are debarred by S. 11, C. P. Code, and the general principles of *res judicata* from re-agitating the same question subsequently in a civil suit. 30 Mad. 320, Foll. 31 M.L.W. 537=A.I.R. 1930 Mad. 573=58 M.L.J. 542.

——S. 11—Exclusive jurisdiction—Land Record Officer.

The judgment of a Court of exclusive jurisdiction, directly upon the point is conclusive upon the same matter between the same parties, coming incidentally in question in another Court for a different purpose. Hence the order of the Land Record Officer declaring that a person who had mortgaged his village should be declared as ex-proprietary tenant of his *sir* land will operate as *res judicata* and the question cannot be opened again in a civil suit, although provisions of S. 11, C. P. Code are not applicable to such a case, the Land Record Officer having exclusive jurisdiction to pass such an order. 4 Luck. 220=115 Ind. Cas. 837=6 O.W.N. 1310=A.I.R. 1929 Oudh 362.

——S. 11—Judgment in rem—Probate Court—Decision of.

The decision of a probate Court as to the genuineness of a will is binding on Courts exercising other than testamentary jurisdiction in the country. 43 Cal. 694=43 I.A. 91=14 A.L.J. 466=20 C.W.N. 738=18 Bom.L.R. 397=23 C.L.J. 621=(1916) 1 M.W.N. 419=20 M.L.T. 1=3 L.W. 544=33 Ind. Cas. 914=31 M.L.J. 77 (P.C.).

——S. 11—Probate Court—Title.

A Probate Court is not competent to try an ordinary suit for title and its decision is no bar to a suit in the Civil Court. 15 C.W.N. 1021=10 Ind. Cas. 434=13 C.L.J. 547.

——S. 11—Insolvency Court—Decision of—Binding nature of.

A creditor who has unsuccessfully opposed his debtor's application to be declared an insolvent on the ground that he had made fraudulent transfer of the property, cannot in a subsequent suit raise the plea that the transfers were fraudulent and void. He is barred by the previous decision which is both a judgment in *rem* under S. 41 of the Evidence Act and also a judgment *inter partes* operating as *res judicata*. 57 Ind. Cas. 612=16 N.L.R. 201.

——S. 11—Insolvency Court—Decision on ownership of property—Subsequent suit for declaration of title.

Plaintiff objected to the attachment by a receiver of certain property under S. 22 of the Provincial Insolvency Act on the ground that the property belonged to him. The objection was dismissed and the order was upheld in appeal. Plaintiff then brought a suit for a declaration that the attached property belonged to him. *Held*, that the suit was barred by *res judicata*. 41 All. 378=49 Ind. Cas. 590=17 A.L.J. 374.

——S. 11—Liquidation Court—Winding up of company—Decision of Court final.

A question once settled by a liquidating Court cannot be re-opened by a regular suit. 40 P.R. 1918=45 Ind. Cas. 84=60 P.W.R. 1918.

——S. 11—Liquidation Court—Settlement of list of contributaries.

An order settling the list of contributaries unappealed, becomes final and cannot be challenged and the question of liability of such person under the list cannot be agitated. 41 P.L.R. 1915=28 Ind. Cas. 95=227 P.W.R. 1915.

——S. 11 — Company — Suit by Liquidator against share-holder dismissed—Application to place defendant on list of contributories—Res judicata.

On dismissal of a suit by the voluntary liquidator under O. 9, R. 8, C. P. Code, against a person for the recovery of a certain sum due by him to the Company by reason of his being a share-holder an application by an official liquidator to place defendant on list of contributories of the Company is barred. 57 Ind. Cas. 223=1 Lah. 237.

——S. 11—Land Acquisition Case—Decision in—Res judicata.

A prior decision in land acquisition case, though between the same parties and in respect of adjacent land, is not *res judicata* if land is acquired under different notification. 112 Ind. Cas. 797=A.I.R. 1928 Lah. 263.

5 (e) Foreign Court.

See also CIVIL P. C., S. 11—APPLICABILITY AND SCOPE—FOREIGN JUDGMENTS.

——S. 11—Foreign Court, whether includes arbitration proceedings in foreign Court of competent jurisdiction.

Arbitration proceedings are included within the word "suit" in S. 11 of the Code and matters which had been fully dealt with in those proceedings cannot be re-opened in a subsequent suit. This principle applies even if the proceedings took place in a foreign Court of competent jurisdiction where the decision was arrived at after taking evidence and after going

into the merits of the case. (1937) I. L. R. 1 Cal. 541=41 C.W.N. 193=169 Ind. Cas. 788.

——S. 11—Adjudication of Pondicherry Court with respect of land in British India.

Title to land is to be directly determined, not merely according to the laws of the country where the land is situate, but by the Courts of that country. So an adjudication by a Pondicherry Court with respect to land in British India is not *res judicata*. 51 Mad. 720=29 M.L.W. 250=108 Ind. Cas. 305= A.I.R. 1928 Mad. 327=54 M.L.J. 479.

——Ss. 11 and 13—Judgment of Court of British India in respect of property situate in Native State.

A Court in British India is not competent to try a suit in respect of property which is situated in the Native State, and the judgment of the Court in British India could not operate as *res judicata* in the Court of the Native State. 20 C.W.N. 1213=36 Ind. Cas. 710=(1916) 2 M.W.N. 153=A. I. R. 1916 P.C. 136 (P.C.).

——S. 11—A Court in British India is not competent to try a suit in respect of property situated in the Native States and its judgment could not operate as *res judicata* in the Court of a Native State. A foreign judgment may give a cause of action for a suit in a Court of British India but has no force or authority as such in such Court. 37 All. 1=25 Ind. Cas. 193=12 A.L.J. 1074.

——Ss. 11 and 13—Competent Court—Foreign Judgment—Rule applicable to.

The conditions of the judgment to be *res judicata* of the Foreign Court and of the Court in British India, are the same. Such a judgment in order to be *res judicata* in a subsequent suit must be the judgment of the Court which is competent to try the subsequent suit. 9 L.B.R. 103=43 Ind. Cas. 551= 11 Bur.L.T. 194.

——S. 11 (S. 13, Old Code—Suit in Agency Court in native suit—Subsequent suit in British Indian Court—Res judicata.

A finding in a suit brought in the Agency Court of Kathiawar, relating to the villages in Kathiawar that there was a custom of Mo'ap, *i.e.*, right to an extra share by the senior member will not operate as *res judicata* in a subsequent suit between the same parties in a British Court with regard to lands situate in British territory. S. 13 is not a precise reproduction of the rule in the *Duchess of Kingston's case* and should, therefore be construed strictly. A Court in a "Native State" is not a Court of jurisdiction competent to try within the meaning of the section a subsequent suit which is purely triable according to the processual law by a British Law Court even though it may be competent to try the subject matter. (1900) 6 Bom. L.R. 98.

——S. 11—Suit for partition filed at Shikarpur against father and brothers residing at Shikarpur and the trustees of Dev Samaj residing at Lahore—Some of the immovable property in dispute situated in Quetta:

Held, that the declaratory decree, if any, passed against the Dev Samaj would operate as *res judicata* against them in any suit filed on the strength thereof in the Quetta Court as they were not only British Indian subjects but they have voluntarily submitted to the jurisdiction of the trial Court. A.I.R. (Vol. 21) 1934 Sind 123=28 S.L.R. 54=155 Ind. Cas. 677.

5 (f) "Former Suit".

——S. 11—'Former suit'—What is.

A suit decided earlier though filed later is former suit within S. 11. 8 Pat. 107=117 Ind. Cas. 167= A.I.R. 1929 Pat. 173.

——S. 11—'Former suit'—Competent jurisdiction—Commencement of litigation, no test.

The rule of *res judicata*, so far as it relates to the retrial of an issue, refers not to the date of the commencement of the litigation but to the date when the Judge is called upon to decide the issue. 11 A. 148, followed. It is the competency of the Court of First Instance to entertain the former as well as the subsequent suit that regulates the application of the rule of *res judicata*. Where, therefore, a lessor brought a suit against his lessee for recovery of rent in respect of a period during which the lessee was out of possession and the lessee subsequently brought a suit for compensation in respect of the same period, the suit of the lessee being decreed: *Held* that the decree in the latter's suit having become final, operated as *res judicata*, irrespective of the facts that the suit was subsequent in date and that the appeal in the former lay to the Courts, in the latter to the Commissioner. (1908) 6 A.L.J. 991=32 A. 67=3 Ind. Cas. 707.

——S. 11—'Former suit'—Mortgage suit—Preliminary decree—Redemption suit some time before final decree in Munsiff's Court—Plaint returned for want of jurisdiction—Plaint filed in proper Court after final decree—Final decree, whether res judicata.

A suit by mortgagee was compromised and a preliminary decree was passed on its basis. Both the decree and the compromise were upheld by the High Court. Before the passing of the final decree, a redemption suit was instituted in the Court of a Munsiff who returned the plaint for want of jurisdiction for presentation to proper Court. The plaint was filed in proper Court some time after the passing of the final decree:

Held, that the fact that the final decree was passed before the institution of the suit cannot be held to be ineffective on account of the institution of the subsequent suit. As a matter of fact, the principle of S. 52, T. P. Act, applicable to transfers of property is not applicable to suits and decree passed in such suits. The plaintiff should have taken steps to get the proceedings stayed and if he failed to do that and allowed a decree to be passed against him, then the mortgage suit became 'a former suit' within the meaning of S. 11, C. P. Code, by virtue of Expl. 1 added thereto. Furthermore, putting the case for the plaintiff at its highest, all that could be said would be that the final decree would be subject to the result of the suit in the previous Court. But in point of fact, the plaint was actually returned by the Munsiff on account of want of jurisdiction and was, therefore, not fructuous. The mere fact that the plaintiff instituted another suit subsequently would not make the final decree which had been obtained previously null and void. A.I.R. (Vol. 24) 1937 All. 108= 1937 A.W.R. 1191=169 Ind. Cas. 577.

5 (g)—Scope.

(i) Order in former suit passed without jurisdiction—If res judicata.
(ii) Court trying former suit must be competent to try subsequent suit.
(iii) Test of competency.

5 (g) (i) Order in former suit passed without jurisdiction—If res judicata.

——S. 11—Order passed by Court lacking inherent jurisdiction.

For the purposes of applying the doctrine of *res judicata,* there is a distinction between an inherent want of jurisdiction in a Court and want of jurisdiction on grounds which have to be determined by the Court itself. The first makes the decree a nullity which can be ignored and need not be set aside. The second does not make the decree a nullity but only voidable and will be *res judicata* unless it is avoided. A.I.R. (Vol. 22) 1935 Mad. 835=1935 M.W.N. 677=69 M.L.J. 196=42 L.W. 446=59 Mad. 62=157 Ind. Cas. 917.

——S. 11—Decision on point without jurisdiction.

No adjudication on a point with reference to which a Court has no jurisdiction can operate as *res judicata.* A.I.R. (Vol. 29) 1942 Cal. 1=I.L.R. (1941) 2 Cal. 434=73 C.L.J. 475=200 Ind. Cas. 822.

——S. 11—Judgment by Court not competent to deliver it whether res judicata.

No question of *res judicata* arises where there has never been in the suit any Court competent to deliver any decree, judgment or order affecting its subject-matter nor to record any consent relating to it. A.I.R. (Vol. 22) 1935 Rang. 517=160 Ind. Cas. 818.

——S. 11—Where a decree is passed by a Court which has no jurisdiction, without considering the question whether or not it has jurisdiction, it cannot be conclusive between the parties under S. 11, C. P. Code, S. 11, Expl. 4 of the C. P. Code can have no application to such a case. A.I.R. (Vol. 18) 1931 All. 454=1931 A.L.J. 240=131 Ind. Cas. 248=53 All. 560.

——S. 11—Decision in rent suit by Revenue Court without jurisdiction—Confirmation on appeal—Plea of absence of jurisdiction in later rent suit—If barred by rule of res judicata.

Where it is subsequently held that a Revenue Court had no jurisdiction to entertain certain rent suits, decrees passed therein must be treated as nullities and cannot operate as *res judicata* in subsequent rent suits. The fact that such decrees were confirmed on appeal cannot affect the question because an appellate decree confirming a decree passed without jurisdiction can have no more validity than the decree of the first Court. Nor would the fact that such a decree was *ex parte* make any difference. I.L.R. (1946) Mad. 760=1946 M.W.N. 155=227 Ind. Cas. 544=A.I.R. 1946 Mad. 431=(1946) 1 M.L.J. 287.

——S. 11—Want of inherent jurisdiction—Decision cannot operate as res judicata—Rent suit under Madras Estates Land Act before Sub-Collector—Amendment of plaint disallowed—No revision lies to District Collector under S. 205, Madras Estates Land Act—Order of District Collector in revision disallowing amendment cannot operate as res judicata.

There is a clear distinction between the decisions of Courts, which had an inherent jurisdiction to come to those decisions, and cases in which Courts had no jurisdiction at all. In the former case the decisions are merely voidable, in the latter they are void and cannot be relied upon as constituting *res judicata*:

In a suit for rent under Madras Estates Land Act, before the Sub-Collector the plaintiff sought to amend the plaint by correcting the description of the suit land which by clerical mistake was wrongly given. The Sub-Collector before whom the suit was pending refused to permit the amendment and a revision before the Collector under S. 205, Madras Estates Land Act, against the order of the Sub-Collector was dismissed. The suit was ultimately dismissed on the ground that the plaint was defective on account of the wrong description. In appeal before the District Judge, the District Judge set aside the dismissal and holding that the wrong description arose out of a clerical error, allowed the amendment:

Held, that the suit being one in which an appeal did lie to the District Judge, the District Collector had no jurisdiction to entertain the application in revision under S. 205, Madras Estates Land Act, and therefore any decision by the District Collector in revision could not operate as *res judicata.* The decision of the District Judge therefore could not be attacked on the ground of *res judicata.* A.I.R. (Vol. 31) 1944 Mad. 257=(1944) 1 M.L.J. 33=57 M.L.W. 152=1944 M.W.N. 147.

——S. 11—Decree passed without jurisdiction executed without objection—Question whether decree could be executed in that Court, not res judicata.

Where, in a reference made to arbitration by a limited liability company, a decree is passed by a Sub-Judge and is executed in that Court without objection by the judgment-debtor, the question whether the decree could be executed in that Court or not does not become *res judicata.* The decree is a nullity in such arbitrations because it is the award which has to be executed. It follows that the Court should ignore the decree and the execution of such decree is *ultra vires. A fortiori* a point decided in such *ultra vires* proceedings cannot become *res judicata.* It is the award which has to be enforced and it can only be enforced by the District Judge and no one else. The consent of the parties cannot confer jurisdiction where no jurisdiction existed. A.I.R. (Vol. 25) 1938 Pesh. 54=177 Ind. Cas. 659.

——Ss. 11, 12, 21, O. 11. R. 2—Sale by mother acting as guardian of minor son—Suit for setting aside sale in original side of High Court when property is outside its jurisdiction—Subsequent suit for possession—Letters Patent.

The property in suit belonged to one *S,* the father of the minor plaintiff. After *S's* death, the mother of the plaintiff entered into an agreement to sell the property for a certain amount to *A* and applied to the High Court on the original side to be appointed the guardian of the person and property of her minor son. On such permission being granted to her, a sale-deed was executed by her in favour of *A.* After the death of the plaintiff's mother, his uncle filed a suit in 1924, for setting aside the appointment of the mother as guardian and for rescission of the

agreement of sale and mesne profits. An *ex parte* decree was passed. In 1929, the guardian filed a suit for possession of the property from *B* who alleged he was a tenant under *A*. *A* contended that the decree of the High Court in the 1924 suit was without jurisdiction and not binding, that the suit was barred by S. 11 and O. 11, R. 2, C. P. Code:

Held, (i) that the suit was not barred by O. 11, R. 2, as the cause of action in the previous suit was quite different from the cause of action in the subsequent suit and the cause of action for possession would not arise until the sale deed was set aside, and the claim for possession could not have been instituted on the original side of the High Court, as the suit would necessarily have been a suit 'for land' within Cl. 12, Letters Patent, (Bom.);

(ii) that the suit of 1924 did not operate as *res judicata* as the High Court on the original side was not competent to grant relief for possession;

(iii) that the decree of the High Court so far as it decided any question of title between the plaintiff and the defendant in respect of immovable property situate outside its original side limits was without jurisdiction and a nullity;

(iv) that the decision of the suit on the original side of the High Court did not in any way bind the parties, and under Ss. 40 and 44, Evidence Act, *A* could prove that the decision was passed without jurisdiction. A.I.R. (Vol. 20) 1933 Bom. 398=35 Bom.L.R. 630=57 Bom. 456=148 Ind. Cas. 116.

——S. 11—Under Ss. 4 and 6, Pensions Act, Civil Court has no jurisdiction to entertain suit relating to any pension or grant of money or land revenue made by the Government without a certificate from the Collector and a decree passed in a suit relating to any such claim instituted without obtaining such a certificate will not operate as *res judicata.* A.I.R. (Vol. 17) 1930 All. 681=1930 A.L.J. 1036=52 All. 868 =130 Ind. Cas. 801.

——S. 11—Decision on issue without jurisdiction—Obiter dictum.

Where a decision has been passed by a Revenue Court on an issue which it was not competent to decide, such a finding must be regarded as an *obiter dictum,* and it cannot operate as *res judicata.* 107 Ind. Cas. 895=A.I.R. 1928 Oudh 296.

——S. 11—Court not competent to try issues—No bar.

The judgment of a Court on issues which it is not competent to try could not operate as *res judicata* in a subsequent suit involving the same issue. 37 Bom. 563=20 Ind. Cas. 530=15 Bom.L.R. 672.

——S. 11—Question tried as a revenue but not as a Civil Court—Decision not of competent Court.

Where in partition proceedings a question of title was open to a Revenue Officer to be tried as a Civil Court, following the procedure of a Civil Court as the Presiding Officer of such a Court, but he did not try it as a Civil Court, it is not barred by the rule of *res judicata* in a subsequent civil suit. 91 Ind. Cas. 528=A.I.R. 1926 Lah. 178.

——S. 11—Where a judgment has been delivered by a Court of incompetent jurisdiction, that is to say, by a Court which had no jurisdiction to hear the case, the judgment cannot be pleaded as *res judicata.* 95 Ind. Cas. 406=A.I.R. 1926 All. 650.

——S. 11—The Court trying the first suit should be a Court having jurisdiction to try it. 28 Bom. L.R. 879=98 Ind. Cas. 341=A.I.R. 1926 Bom. 481.

——S. 11—Any order which is passed without jurisdiction is of no effect, *i.e.,* not *res judicata.* 92 Ind. Cas. 845=A.I.R. 1926 Cal. 991.

——S. 11—A previous decision in a rent suit of a Court having no jurisdiction is not *res judicata* in a subsequent suit between the same parties, but it is a valuable piece of evidence which must be considered in the subsequent suit. 91 Ind. Cas. 1026= A.I.R. 1926 Cal. 603.

——S. 11—Decision on title beyond competence of Court—No res judicata.

Where a mortgage suit was brought by mortgagee against a widow as legal representative of her deceased husband (mortgagor) for a mortgage decree, and the widow in her written statement claimed that the plaintiff was not entitled to a mortgage decree for the whole land, and on the pleadings the Court framed an issue; "Is the plaintiff entitled to have a decree on the mortgaged properties in Ex. A."

Held, that as the widow was not sued in her personal capacity and could not be sued in this capacity unless she had joined in the mortgage or consented to it, and as it is not open to the Court in mortgage suits to go into questions of title or claims of parties which are adverse to the title of the mortgagor, the Judge, in so far as he purported to go into the question of title to the property mentioned in the mortgage, was going beyond what he was legally entitled to do and therefore a decree passed in the suit is not *res judicata* in a subsequent suit by the widow for declaration that she was owner of half of the mortgaged land. 5 Bur.L.J. 114=98 Ind. Cas. 164 =A.I.R. 1926 Rang. 191.

——S. 11—The original mortgagors from whom plaintiff purchased the property subject to mortgage had sued the original mortgagees for redemption in 1896. That case had been tried by a Munsiff, second class, who, holding that the interest was a charge on the property decreed redemption on payment of Rs. 873. This decree had been varied on appeal by the Divisional Court, but the trial Court's decree was restored by the Chief Court. Plaintiff in appeal against the decree of the trial Court contended that the decision of the former suit by the Munsiff who had power up to Rs. 500 could not act as *res judicata* or estop him from urging that according to the terms of the mortgage deed itself, the interest was not a charge on the property as held by trial Court.

Held, the Munsiff, second class, in the former case had no jurisdiction in law to try the case. Therefore, the former suit does not operate as a bar to the consideration of the question relating to interest. 51 P.R. 1912, foll. 5 L.L.J. 494=73 Ind. Cas. 874= A.I.R. 1923 Lah. 141.

——S. 11—Mortgage suit—Failure of plaintiff to appear on the day fixed for appointing a guardian to minor defendant—Dismissal of suit—Fresh suit not barred.

In a mortgage suit a day was fixed for the appointment of a guardian of a minor defendant. The plaintiff having failed to appear on that day the suit was dismissed. *Held,* the order was without jurisdiction and if that is so there is no valid decree which

can operate as *res judicata* so as to bar a fresh suit of the plaintiff based upon the mortgage bond in question. 1922 P.H.C.C. 81=63 Ind. Cas. 570=6 P.L.J. 650=2 P.L.T. 572=A.I.R. 1922 Pat. 252.

——S. 11—Withdrawal of suit—Order in contravention of O. 23, R. 1 (4)—Subsequent suit not barred.

Where a Court allows a suit to be withdrawn in contravention of O. 23, R. 1 (4), *i.e.*, without the consent of other plaintiffs and grants leave for a fresh suit to be brought on the same cause of action, *Held*, that the order is without jurisdiction and the suit must be deemed not to be withdrawn. 1 Pat. 228=A.I.R. 1922 Pat. 489.

——S. 11 (S. 13, Old Code)—Order without jurisdiction.

A Committee of Oudh Talukdars had dismissed a claim for maintenance which was brought forward by the respondent in the case, on the ground that the respondent had been adopted into another family and had consequently ceased to have any interest in the heritage of his natural family. The award was subsequently affirmed by the Financial Commissioner. *Held*—That the Committee of the Oudh Talukdars was not in any sense a "Court" within the meaning of S. 13, C.P.C., and was much less a Court with competent jurisdiction within the meaning of section and that the Committee had no jurisdiction to decide the question of adoption. *Held also*—That the affirmation of the award by the Financial Commissioner could not give judicial validity to the decision of the said Committee on a point outside their jurisdiction. (1907) 6 C.L.J. 13=29 A. 519=4 A.L.J. 497=11 C.W.N. 841=9 Bom.L.R. 757=34 I.A. 125 (P.C.) 17 M.L.J. 354=2 M.L.T. 391.

——S. 11 (S. 13, Old Code)—Decision of Court adjudged to have no jurisdiction.

The High Court transferred a suit from the Agent's Court to the District Court. It subsequently declared that the transfer was bad and that the District Court had no jurisdiction to try the suit irrespective of the parties' consent. *Held*, in a subsequent suit brought in the Agent's Court on the same cause of action that the former decision of the District Court being one without jurisdiction is not *res judicata*. (1904) 7 Bom.L.R. 97=28 M. 42=2 A.L.J. 135=9 C.W.N. 257=32 I.A. 45 (P.C.).

——S. 11 (S. 13, Old Code)—Order without jurisdiction—Decision on title in rent suit—U. P. Rent Act, S. 43.

It is not within the power of the Revenue authority acting under S. 43 U. P. Rent Act, to decide any question of title when the liability to pay the rent is denied and such decision will not operate as *res judicata* between the parties. (1903) 25 A. 282=1903 A.W.N. 40.

——S. 11—Consent of parties cannot confer jurisdiction.

When a Court has no jurisdiction over the subject-matter of a suit in which an order is made such order as made is wholly void and does no operate as *res judicata*. Jurisdiction cannot be conferred by consent of parties, and no waiver or acquiescence on their part can be made up, for the lack or defect of jurisdiction. 24 C.W.N. 633=56 Ind. Cas. 532=31 C.L.J. 272.

——S. 11—A Court is not entitled to reject the decision in a declaratory suit by reason of the fact that the Court that passed it had no jurisdiction. The decree of such a Court is binding until it is set aside in appeal or by any other recognized method and operates as *res judicata*. Where therefore a Court trying a declaratory suit declaring certain execution application to be void and unlawful has *prima facie* jurisdiction to try it, its failing to take into consideration S. 47 will not render the decree operative. A Court that takes cognizance of a case and gives a decree must be deemed to have decided that it has jurisdiction. 24 C.W.N. 633, Not Foll. 13 O.L.J. 594=3 O.W.N. 233=93 Ind. Cas. 951=A.I.R. 1926 Oudh 239.

——S. 11—Application under wrong provision of law—Court having jurisdiction on merits—Its order can have effect of res judicata.

In order to determine whether a Judge had jurisdiction to entertain the application which was made to him, and to make the order he did on it, the test should be, not how the application was described by the petitioner before him, but what it contained. The Court should not be so astute as to throw out an application on the technical ground of mere misdescription, if on the merits it would have jurisdiction to entertain it. Consequently, an application purporting to be under S. 47, cannot fail merely because it could not be brought within the scope of S. 47, so long as it was possible to deal with it under the provisions of O. 21 R. 58. And an order on such application is not without jurisdiction and can have the effect of res judicata. A.I.R. (Vol. 30) 1943 Cal. 56=75 C.L.J. 294=205 Ind. Cas. 74.

——S. 11—Decree without jurisdiction—What will amount to—Jurisdiction of Court if affected by Court acting illegally and with material irregularity in the exercise of its jurisdiction.

A decree without jurisdiction under S. 11, C. P. Code, must be a decree in a suit which the Court had no jurisdiction to entertain. The mere fact that the Court acted illegally or with material irregularity in the exercise of its jurisdiction will not affect the jurisdiction of the Court under the provisions of S. 11, C. P. Code. 1950 A.W.R. 575=A.I.R. 1950 All. 488.

(ii) Court trying former suit must be competent to try second suit.

——S. 11—Essentials.

One of the essential conditions for the application of the rule of *res judicata* is that the Court trying the former suit must have been competent to try the second suit. A.I.R. (Vol. 32) 1945 Nag. 171=I.L.R. (1945) Nag. 134=1945 N.L.J. 597.

——S. 11—In suit for profits, Revenue Court deciding that defendants were muafidars—Subsequent suit in Civil Court for proprietary possession by partition and for declaration that defendants were not muafidars.

The decision of a Revenue Court in a suit for profits that the defendants were *muafidars* does not operate as *res judicata* in a subsequent suit between the parties in a Civil Court brought to establish proprietary possession by partition and to obtain a declaration that the defendants were not *muafidars* as the Revenue Court was not competent to try the suit brought in the Civil Court which is an essential condition under S. 11, C. P. Code. Even the general principle of *res judicata* cannot be applied to such a case because the question decided by the Revenue Court has not come before the Civil Court only incidentally but expressly in order that the decision of the Revenue Court may be negatived. A. I.R. (Vol. 29) 1942 Oudh 25=1941 O.W.N. 1101 =1941 O.L.R. 738=1941 R.D. 851=17 Luck. 215 =196 Ind Cas. 673.

——S. 11—Court trying previous suit not competent to try subsequent suit.

The decision in the previous suit does not operate as *res judicata* in a subsequent suit, when the Court which decided the previous suit was not competent to try the subsequent suit. A.I.R. (Vol. 28) 1941 Oudh 429=1941 O.W.N. 648=1941 O.L.R. 428= 194 Ind. Cas. 161.

——S. 11—Court trying former suit must be competent to try subsequent suit.

A suit cannot be barred by *res judicata* by reason of the decision in the previous suit, if the Court which tried it is not competent to try the subsequent suit. For the bar of *res judicata* under S. 11, C. P. Code, to apply one of the essential conditions is that the Court which decided the former suit must be competent to try the subsequent suit. A.I.R. (Vol. 26) 1939 Pat. 375=18 Pat. 342=5 B.R. 938=183 Ind. Cas. 400.

——S. 11—Test of jurisdiction.

The objection of *res judicata* fails when the test of jurisdiction is applied and it is found that the Court deciding the previous suit had no jurisdiction to decide the subsequent suit. A.I.R. (Vol. 25) 1938 Cal. 724=68 C.L.J. 435.

——S. 11—Subsequent suit not triable by Court which tried previous suit.

Where the subsequent suit is one which could not be tried by the Court which tried the previous suit, the decision of the previous suit cannot be *res judicata*. A.I.R. (Vol. 23) 1936 All. 459=1936 A. L.R. 328=1936 A.L.J. 282=1936 R.D. 201=161 Ind. Cas. 762.

——S. 11—Issues in two suits same but later suit not within jurisdiction of previous Court —Res judicata.

Where the previous suit had been decided by a Court which has no jurisdiction to entertain a subsequent suit, the decision can never be regarded as operating as *res judicata* when the same issue arises in such subsequent suit. A.I.R. (Vol. 22) 1935 Cal. 792=40 C.W.N. 174=159 Ind. Cas. 1008.

——S. 11—Court which decided first suit not competent to try second suit—Decision, whether res judicata.

The bar by *res judicata* would not operate unless the Court which decided the previous suit had jurisdiction to try the later case. A.I.R. (Vol. 20) 1933 Lah. 614=145 Ind. Cas. 334.

——S. 11—Under S. 11, the Court in which an issue is previously raised must be competent to try the subsequent suit or the suit in which the issue is subsequently raised. A.I.R. (Vol. 20) 1933 Bom. 398=35 Bom.L.R. 630=57 Bom. 456=148 Ind. Cas. 116.

——S. 11—The condition precedent to the applicability of the doctrine of *res judicata* is that the decision of the Court which is pleaded in bar should be the decision of a Court competent to try the subsequent suit or the suit in which the issue has been subsequently raised. 1928 M.W.N. 336=28 M.L.W. 82=110 Ind. Cas. 554=A.I.R. 1928 Mad. 840=56 M.L. J. 52.

——S. 11—The C. P. Code, like any other Code must ordinarily be taken to be exhaustive of the matters on which it does deal and S. 11 in a suit makes it essential that the original Court must be competent to try the subsequent suit before the law of *res judicata* can apply. 29 Cal. 707 (P.C.) and A.I. R. 1926 Lah. 603, Foll. 108 Ind. Cas. 623.

——S. 11—It has to be established before applying the doctrine of *res judicata* that the decision claimed to operate as *res judicata* was pronounced by a Court competent to try the later proceeding. A.I.R. 1921 P. C. 11 and A.I.R. 1922 P.C. 80, Foll. 107 Ind. Cas. 149.

——S. 11—The test of dettrmining the operation of a decree as *res judicata* in a subsequent suit is whether the Court that passed the decree in the previous suit could try the subsequent one or not. If he had not such a power, the decree would not operate as *res judicata* to bar the latter suit. 58 Ind. Cas. 576= 2 U.P.L.R. (All.) 59.

——S. 11—The decision in a previous suit by a Court not competent to try the subsequent suit does not operate as *res judicata* in a subsequent suit. 27 Ind. Cas. 537=2 O.L.J. 44.

——S. 11—Subsequent suit must also be one triable by former Court.

A decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide not only the particular matter in issue, but also the subsequent suit itself in which the issue is subsequently raised. A.I.R. (Vol. 31) 1944 Bom. 50=45 Bom. L.R. 980=212 Ind. Cas. 291.

——S. 11—Under S. 11, before a matter can be held to be *res judicata* it must be found, among other things, that the first Court was competent to try the subsequent suit and not merely an issue in that suit. A.I.R. (Vol. 19) 1932 All. 483=1932 A.L.J. 511 =16 R.D. 400=54 All. 786=141 Ind. Cas. 641.

——S. 11—Prior Court competent to decide issue raised in but not to try, subsequent suit.

Under S. 11, a decision in a former suit cannot be pleaded as *res judicata* in a subsequent suit unless the Judge by whom it was made has jurisdiction to try and decide not only the particular matter in issue but also the subsequent suit itself in which the issue is subsequently raised. A.I.R. (Vol. 20) 1933 Lah. 551=14 Lah. 369=34 P.L.R. 196=141 Ind. Cas. 454.

——S. 11—Under S. 11, there may be no *res judicata* unless the Court which tried the first suit was competent to try the subsequent suit or the suit in which issue in question has been subsequently raised. Mere competency to try the issue raised in subsequent suit is not enough. (1938) 67 C.L.J. 223.

——S. 11—A decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide, not only the particular matter in issue, but also the subsequent suit in which the issue is subsequently raised. 29 Cal. 707 (P.C.), Foll. 45 Bom. 805=23 Bom.L.R. 250=61 Ind. Cas. 276=A.I.R. 1921 Bom. 434.

——S. 11—Court trying former suit must have had jurisdiction to try latter suit and not merely the issue.

To establish the plea of *res judicata,* the Court which decided the former suit, must have been such a Court as would have been competent to try and decide not only the particular matter in issue in the latter suit but also the latter suit itself in which the issue is subsequently raised. 51 Ind. Cas. 127=29 C.L.J. 237.

——S. 11 (S. 13, Old Code)—Competency to try particular issue and also suit necessary.

Section 13 of the Civil Procedure Code a decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide not only the particular matter in issue, but also the subsequent suit itself in which the issue is subsequently raised. In this respect the enactment goes beyond S. 13 of Act 10 of 1877, and also beyond the law laid down in the *Duchess of Kingston's case.* (1902) 6 C.W.N. 825=4 Bom.L.R. 793=29 I.A. 196=29 C. 707 (P.C.).

——S. 11—Court in earlier suit not competent to try subsequent suit as a whole—Decision conclusive.

There is no reason why, when the matter has been decided by a Court of competent jurisdiction, the decision should not be regarded as conclusive between the same parties when the question arises again in a different suit, though the suit as a whole could not be tried by the Court which decided the earlier suit. In a previous suit for arrears of maintenance an issue as to whether the plaintiff was entitled to annual maintenance of a certain amount as a charge upon certain property, was decided by a Munsif. In a subsequent suit which was beyond the pecuniary jurisdiction of the Munsif as the amount of arrears claimed was large, the same issue as in the previous suit was raised:

Held (Per *Full Bench, Madeley, J., dissenting*)—That the principles of *res judicata* enunciated in S. 11, Civil P. C., applied and the decision in the previous suit operated as *res judicata* in the subsequent suit. A.I.R. (Vol. 30) 1943 Oudh 338=1943 O.W.N. 280=18 Luck. 683=210 Ind. Cas. 163 (F.B.).

——S. 11—The findings in the previous suit between the same parties are not *res judicata* in a subsequent suit not triable by the previous Court though the judgment is admissible in evidence. 32 Ind. Cas. 504=31 P.W.R. 1916.

——S. 11—The amount as well as the nature of the suit must be taken into consideration in deciding whether a subsequent suit is barred under S. 11. 23 M.L.W. 653=95 Ind. Cas. 968=A.I.R. 1926 Mad. 829=51 M.L.J. 630.

——S. 11 (S. 13, Old Code)—Several mortgages on same property—Suit on one—Subsequent suit on another involving same issues in different Court—Court trying former suit not competent to try second suit—Bar of res judicata—"Concurrent Jurisdiction"—Meaning of.

Concurrent jurisdiction means jurisdiction concurrent both as regards pecuniary limit and subject-matter. Per *Subrahmanya Aiyar* J.—A decision in a suit on one mortgage regarding questions relating to other mortgages on the same property is not *res judicata* in a subsequent suit on one of those other mortgages, if the Court which tried the former suit was one not competent to try the subsequent suit. This will be so even if on the date of the prior suit, a suit on the mortgage sued upon subsequently would lie within the pecuniary jurisdiction of that Court, but the accrual of subsequent interest only had taken it out of its competence to try the subsequent suit. 12 I.A. 23 foll. (1903) 29 M. 65.

——S. 11—Decision of Munsiff in a declaratory suit based on a will that it was a forgery—Confirmation in second appeal by High Court—Application to High Court for grant of Letters of Administration with copy of will annexed—Decision in prior suit as to forgery of will if operates as res judicata.

The decision of a Munsiff in a declaratory suit based on a will that it was a forgery was confirmed by the High Court in second appeal. Then the plaintiffs in that suit filed an application in the High Court for the grant of Letters of Administration with copy of the will annexed. On a question whether the prior decision of the Munsiff that the will was a forgery was conclusive in the High Court as a Court of Probate.

Held: The Munsiff's Court not being a Court of competent jurisdiction to try the subsequent petition, the case does not come within the scope of S. 11, C.P. Code and the question as to the genuineness of the will can be re-agitated in the High Court. 1950 A.W.N. 274=1950 A.L.J. 233=A.I.R. 1950 A. 402.

——S. 11—Suit for possession dismissed by Munsiff—Second suit for redemption in District Court.

Certain *inam* properties which were subject to some mortgages were purchased by the plaintiff in execution of a simple money-decree. They were again brought to sale under one of the mortgages and purchased by the defendant. A fresh *patta* was granted to plaintiff and on the basis of the title thus conferred on him he sued for possession in the District Munsif's Court. It was decided that the *patta* did not have the effect of cancelling the sale in the defendant's favour and that the plaintiff could not recover possession without paying off the mortgages. The plaintiff filed another suit for redemption in the District Court:

Held, that the decision in the first suit was no bar to the second suit for redemption, which was beyond its competence. A.I.R. (Vol. 20) 1933 Mad. 913=65 M.L.J. 761=38 L.W. 534=1933 M.W.N. 941=57 Mad. 335=148 Ind. Cas. 452.

——S. 11—Decision of Small Cause Court—Not res judicata in subsequent suit not cognizable by it.

The Small Cause Court is not competent to try a suit for maintenance and, therefore, its decision in a previous suit cannot be *res judicata* in a subsequent maintenance suit filed on the regular side although the same Judge presides over both the Courts. A. I.R. (Vol. 26) 1939 Nag. 130=1939 N.L.J. 87=183 Ind. Cas. 689.

——S. 11—If the later suit was not of a Small Cause Court nature a decree for money made in a previous suit instituted in the Small Cause Court does not operate as *res judicata* nor does the decision of the High Court refusing to interfere with that decree in revision. 28 C.W.N. 271=80 Ind. Cas. 210=39 C.L.J. 532=A.I.R. 1924 Cal. 487.

——Ss. 11 and 24 (4)—Small cause suit transferred to Munsiff—Decision not res judicata in suits not cognizable by Small Cause Court.

A small cause suit transferred to a munsiff retains its character as such and no appeal lies against his decision and it could not operate as *res judicata* for other suits not cognizable by the Small Cause Court. 26 Ind. Cas. 56=12 A.L.J. 853.

——S. 11—Same Judge in different capacity.

A judgment does not operate as *res judicata* where the Munsif in his capacity of an officer hearing a suit of a Small Cause Court nature is not competent to try the later suit. Apart from his capacity as an officer trying suits of a Small Cause Court nature he may be competent to try later suit but the combination of two functions in the same officer does not affect the question of competency. 66 Ind. Cas. 613 =A.I.R. 1922 All. 241.

——S. 11—Same Judge in different capacity—Provincial Small Cause Court's Act, S. 33.

Under S. 33 of the Provincial Small Cause Courts Act the Judge when trying a suit as a regular suit is a Court different from that of the judge trying a suit in the Small Cause Court jurisdiction, therefore a decision on an issue as a Small Cause Court Judge does not bar trial of the same issue as a regular Judge. 48 Bom. 541=26 Bom.L.R. 672=83 Ind. Cas. 45=A.I.R. 1924 Bom. 454.

——S. 11—Previous suit decided by Sub-Judge—Subsequent suit of a small cause nature.

An issue was decided by a Subordinate Judge not exercising the jurisdiction of a Small Cause Court. In a subsequent suit in a Small Cause Court the same issue arose and it was pleaded that the decision of the Subordinate Judge did not operate as *res judicata* as he was not exercising the jurisdiction of a Small Cause Court and was therefore incompetent to try the subsequent suit. *Held*, the subordinate judge's decision on the same issue in a prior suit operates as *res judicata* as his inability to try the subsequent suit of a Small Cause nature arose not from incompetence but from the existence of another Court with a preferential jurisdiction. 48 Ind. Cas. 268=14 N.L.R. 115.

——S. 11—Previous suit in Munsiff's Court—Suit for damages in Small Causes Court.

Plaintiff having been dispossessed brought a suit in Munsiff's Court for possession under S. 9 of the Specific Relief Act, and the suit was decreed. Plaintiff then brought a suit in the Court of Small Causes for recovery of damages by way of mesne profits on the allegation that he had been dispossessed. *Held*, that the issue as to dispossession was *res judicata* and the suit ought to be tried on this basis. The Munsiff who had tried the former suit was competent to try the present suit for damage cognizable by the Small Cause Court. 39 All. 717=42 Ind. Cas. 862=15 A.L.J. 789.

——S. 11—Claim for arrears of rent—Subject of issue in a suit on original side—Subsequent suit for the arrears in Small Cause Court.

The fact that a certain claim for arrears of rent falls under S. 15 of the Provincial Small Cause Courts Act does not preclude a Munsiff from adjudicating upon it when it arises incidentally in a suit on the original side. Such an adjudication acts as *res judicata* in a subsequent Small Cause suit for arrears of rent alone. 27 M. 63, foll.; 29 M. 195, dist. 18 M.L.J. 171=30 Ind. Cas. 522=(1915) M.W.N. 605.

——S. 11 (S. 13, Old Code)—Suit for rent of—Small cause nature in regular side—Decision on title—If res judicata in latter suit in on title.

A decision on a question of title in a suit for rent filed on the regular side of a Munsif's Court though the suit was of a small cause nature, is *res judicata* in a subsequent suit on title in the Munsif's Court. The Court which had tried the former case was competent to try the second within the meaning of S. 13, C.P.C. (1908) 24 M. 444.

——S. 11 (S. 13, Old Code)—Prior suit in Munsif's Court—Subsequent suit in subordinate Judges Court through cognizable in Munsiff's Court—Res judicata.

In a suit in a Munsif's Court it was held that certain parties were members of a tarwad. Some of them sued in the Subordinate Judge's Court for a declaration that they and the defendants were not members of a tarwad. The value of the whole property was Rs. 3,000 and that of the plaintiff's interest was only Rs. 2,000, and so the suit was triable by a Munsif:

Held, that the matter was hence *res judicata*. (1900) 24 M. 275.

——S. 11—Rent suit—Decision of Assistant Collector of Second Class—Subsequent suit for ejectment in Court of Assistant Collector of First Class.

Assistant Collectors of the Second Class in U. P. have no power to try a suit for ejectment at all. Therefore a dismissal of suit for arrears of rent in such Court is no bar to a suit for ejectment against the same party in the Court of Assistant Collector of First Class whose Court has jurisdiction to try an ejectment suit. 89 Ind. Cas. 379=A.I.R. 1926 All. 34.

——S. 11—A decision of an Assistant Collector of the Second Class about a certain Khudkhasht being owned by one party does not bar a suit in the Court of an Assistant Collector of the First Class. 5 L. R.A. Rev. 105=88 Ind. Cas. 164=A.I.R. 1924 All. 466.

——S. 11—An Assistant Collector, Second Class, who had no power to try an ejectment suit passed a decree for rent in favour of *A*; but later on an Assistant Collector, First Class, who had power to try an ejectment suit, dismissed *A's* suit for ejectment.

Held, that the decision of the Assistant Collector, Second Class, was no bar to the decision of the

Assistant Collector, First Class. 82 Ind. Cas. 790= A.I.R. 1925 All. 368.

——S. 11—A decision of an Assistant Collector of the Second Class cannot operate as *res judicata* in a subsequent suit not cognisable by him even though the plaintiff had omitted a portion of the claim in the first suit in order to bring the case before the officer. 19 Ind. Cas. 126=11 A.L.J. 231.

——S. 11—Gujarat Talukdar's Act (Bombay Act 6 of 1888), S. 16.

The decision of the District Court under S. 16 of the Act does not bar a regular suit on the principle of *res judicata*. 49 Bom. 442=27 Bom.L.R. 345= 87 Ind. Cas. 588=A.I.R. 1925 Bom. 241 (F.B.).

(iii) Test of competency—Joinder of additional causes of action in subsequent suit instituted in Court of higher grade —Effect of.

——S. 11—Competent Court—Subsequent suit in Court of higher grade comprised of additional causes of action against same defendants—Decision on prior suit on claims common to both suits—Res judicata.

Ordinarily, the decision of an issue in a Court of lower pecuniary jurisdiction will not operate as *res judicata* in a subsequent suit filed in a Court of superior jurisdiction and triable only by such Court. But it is not open to a plaintiff to evade the bar of *res judicata* by joining several causes of action against the same defendant or defendants in a subsequent suit instituted in a Court of higher pecuniary jurisdiction. Hence when a decision has been given by a competent Court in a previous suit regarding part of the claim in the subsequent suit and between the same parties, then so much of the claim as is common to both the suits is barred. A.I.R. (Vol. 32) 1945 Bom. 45=46 Bom.L.R. 658=218 Ind. Cas. 154.

——S. 11—Former Court though competent to try the first suit could not try the second suit which owing to joinder of other claims was beyond its jurisdiction.

Held, prior decision is a bar so far as that claim was concerned. 50 All. 306=113 Ind. Cas. 745= A.I.R. 1928 All. 714.

——S. 11—Although taking all the causes of action together, the second suit may be said to be outside the jurisdiction of the original Court, still if the specific question be within the jurisdiction of the original Court and was determined by the original Court, it is no answer to say that the whole suit was beyond the jurisdiction. The principles of *res judicata* would apply to that part of the claim which was within the jurisdiction of the Court which tried the first suit. 8 Mad. 83 and 25 M.L.J. 379, Foll.; 35 Cal. 353, not Foll. 25 M.L.W. 11=100 Ind. Cas. 40=A.I.R. 1927 Mad. 273.

——S. 11—The principle that, for the purpose of dealing with the question of *res judicata* it is open to the Court to split up the causes of action in the subsequent suit and if it be found that one of these causes of action is the same as the cause of action relied upon in the earlier suit; then although, taking all the causes of action together the second suit may be said to be outside the jurisdiction of the original Court; still if the specific question be within the jurisdiction of the original Court, and was determined by the original Court, it is no answer to say that the whole suit is beyond its jurisdiction, is dangerously wide and, if taken too literally, would entail a risk of a conflict with the statutory provision contained in S. 11. 9 N.L.J. 11=92 Ind. Cas. 913=A.I.R. 1926 Nag. 234.

——S. 11—Joinder of causes of action.

In determining whether the Court which tried the previous suit, had power to try the subsequent suit, Courts must look to the suit as it could have been framed but for the option given in the C. P. C. in the way of joinder of causes of action. A plaintiff cannot therefore evade the rule by joining several causes of action against the defendants in the subsequent suit and instituting it in a Court of superior jurisdiction. 42 Ind. Cas. 657.

——S. 11—Causes of action—Joinder of.

The plaintiff is not entitled to add causes of action for raising the valuation in the subsequent suit. The court for the purpose of *res judicata*, can split up causes of action in the subsequent suit; and if it be found that one of these causes of action is the same as in the first, and still if the specific question be within the jurisdiction of the court and determined by it, it is no answer, to say that the whole suit is beyond jurisdiction. 14 M.L.T. 189=(1913) M.W.N. 690=21 Ind. Cas. 15=25 M.L.J. 379.

——S. 11 (S. 13, Old Code)—Decision by Court of lower grade—Subsequent suit in Court of higher grade comprising district matters each of which congnizable in former Court—Res judicata.

If a suit instituted in a superior Court consist of several causes of action each of which is within the cognizance of an inferior Court prior decisions by such inferior Court will be *res judicata* even though it is not competent to try the subsequent suit as a whole. A plaintiff cannot be allowed to evade the provisions of S. 13 of the Civil Procedure Code by joining several causes of action against the same defendant in one suit and by bringing his suit in a Court of superior jurisdiction. (1898) 5 C.W.N. 483=28 C. 78.

——S. 11—Addition of—Untenable claim.

Bar of *res judicata* cannot be got over by adding untenable claim in the later suit. 23 M.L.W. 653 =95 Ind. Cas. 968=A.I.R. 1926 Mad. 829=51 M.L.J. 630.

Test of competency—Pecuniary jurisdiction.

See also Test of competency—Competency to try subsequent suit at the time of former suit.

——S. 11—Subsequent suit beyond pecuniary jurisdiction of Court which tried previous suit.

Where the Court which decided the previous suit under S. 90 and O. 36, Civil P. C., could not have decided the subsequent suit it being beyond its pecuniary jurisdiction, the subsequent suit is not barred by the rule of *res judicata* as enacted in S. 11. Civil P. C. A.I.R. (Vol. 30) 1943 Oudh 58=1942 O.W.N. 567=18 Luck. 220=204 Ind. Cas. 186.

——S. 11—Where the earlier suit was instituted in the Court of a Munsif and came before the Chief Court in second appeal and the Munsif lacked pecuniary jurisdiction to try the subsequent suit, the decision

in the former suit cannot operate as *res judicata* in the subesquent suit. A.I.R. (Vol. 23) 1936 Oudh 387=1936 O.W.N. 784=1936 R.D. 416=12 Luck. 371=164 Ind. Cas. 118.

——S. 11—The decision of a Court in order to be conclusive in another Court must have been that of a Court which would have had jurisdiction to decide the question raised in the subsequent suit in which the decision is given in evidence as conclusive. The two Courts must exercise such concurrent jurisdic ion in regard to the pecuniary limit of their powers that the subject-matter of the second suit would not have been beyond the powers of the Court which disposed of the prior one. (1935) 156 Ind Cas. 1031.

——S. 11—Second suit brought in Court with higher pecuniary jurisdiction.

Where the judgment in the previous litigation was given in a case which was decided by a Munsif of the First Class whose pecuniary jurisdiction extended to Rs. 1,000 only and the subsequent suit was brought in a Court with a higher pecuniary jurisdiction and could not have been decided by the Munsif who tried the previous suit:

Held, that the decision in the previous suit was not *res judicata*. A.I.R. (Vol. 20) 1933 Lah. 646=14 Lah. 437=34 P.L.R. 817=146 Ind. Cas. 880.

——S. 11—Decision in previous suit by Court which would have pecuniary jurisdiction to try the subsequent suit cannot operate as *res judicata* so as to bar the subsequent suit. A.I.R. 1930 Lah. 501.

——S. 11—The decision on an issue by a Court of an inferior jurisdiction does not operate as a bar to trial of that issue by a Court of superior jurisdiction in a subsequent suit, if the latter suit was beyond the jurisdiction of the Court of inferior jurisdiction. A suit for ejectment of tenant having been dismissed, another suit was brough for possession of the house on the basis of title. The first being valued at the annual rental (Rs. 42) and the second at the market value of the house (Rs. 2 800), the second was beyond the jurisdiction of the Munsiff, who tried the first and the suits were not identical.

Held, that the second suit could not be barred under S. 11. 117 Ind. Cas. 83=A.I.R. 1929 Lah. 781.

——S. 11—Pecuniary jurisdiction must be looked to, to determine competency.

It is not sufficient that the first Court should have been competent to try one or other of issues. Further pecuniary jurisdiction must be looked to to determine competency. 16 All. 183 Foll. 49 All. 543 =25 A.L.J. 564=8 L.R.A Rev. 101=100 Ind. Cas. 601=A.I.R. 1927 All. 297.

——S. 11—General doctrine of res judicata.

In order to make the decision of the Court final and conclusive in another Court, it must be the decision of a Court, which would have had pecuniary jurisdiction over the matter in the subsequent suit, on which the first decision is given in evidence as conclusive. There is no reason so far as the necessity for this condition is concerned. for making any distinction between a case, to which the strict rule of *res judicata* as enacted in S. 11 of the C. P. Code, applies and a case in which the principles of *res judicata* such as for instance, those laid down by the Privy Council in 9 M.I.A. 539 (P.C.) and 40 All. 593 (P.C.) and other cases, is sought to be availed of. 22 M.L.W. 178=91 Ind. Cas. 497=A.I.R. 1925 Mad. 1270=49 M.L.J. 430.

——S. 11—Decision by Court having no pecuniary jurisdiction to try subsequent suit.

Where the Court which tried the former suit could not, by reason of its limited pecuniary jurisdiction have tried the present suit the qusetion of *res judicata* does not arise. 29 M. 65, followed. 10 O.L.J. 376=77 Ind. Cas. 340=1924 Oudh. 147.

——S. 11—Where the prior suit was decided by a Munsiff who had jurisdiction to try suits up to the value of Rs. 1 000 only and the later suit was laid at Rs. 1 100 and was tried by a Munsiff who had jurisdiction to try sui s up to the value of Rs. 2,000.

Held, the Munsif who tried the previous rent suits had no jurisdiction to try the later suit.

Therefore the decision in the previous rent suits does not operate as *res judicata* in the subsequent suit. A.I.R. 1922 Cal. 138.

——S. 11—Pecuniary jurisdiction—Decision of Lower Court not res judicata.

The decision on a question in the Court of a munsif is no bar to a subsequent suit between the same parties brought in the Court of a Subordinate Judge. 56 Ind. Cas. 932.

——S. 11—Where the Court which tried the previous suit was by reason of the pecuniary limits of its jurisdiction incompetent to try the subsequent suit and the judgment in the former suit was binding on the defendant only in a representative capacity there would be no question of *res judicata*. 52 Ind. Cas. 545 =87 P.R. 1919.

——S. 11—Concurrent pecuniary jurisdiction necessary.

To constitute *res judicata*, Courts must be of concurrent pecuniary jurisdiction. 47 Ind. Cas. 21.

——S. 11—Suit for rent.

The earlier finding does not become final in a case where the Court that tried the prior suit for rent had no power over the cliam in a subsequent suit for rent. L.R. 3 A. 156 (Rev.).

——S. 11—Plaintiff valuing suit for jurisdiction—Suit dismissed—Whether can avoid effect of S. 11 by overvaluing subsequent suit.

Where a plaintiff has been allowed by law to fix the value for jurisdiction at his option provided it does not exceed a specified maximum and he brings a suit putting a value on it which is much below the maximum and he loses it, he cannot be allowed to bring another suit later on and avoid the effect of S. 11, Civil P.C., by putting a higher value on his suit although still below the maximum. When he has already exercised his discretion in adopting a valuation for purposes of jurisdiction in the first suit he is bound to keep up the same figure afterwards. Under the general law of estoppel, he cannot subsequently say that he wishes to alter the figure to the detriment of the opposite party, particularly when the previous valuation was perfectly legal. A.I.R. (Vol. 30) 1943 Pesh. 37=207 Ind. Cas. 282.

——S. 11—Overvaluation in subsequent suit.

In a previous suit for dissolution of partnership and

accounts the plaintiff tentatively valued the suit at Rs. 5,500, reserving the right to receive more than Rs. 5,500 if more ware found due to him, subject only to payment by him of additional court-fee. In a subsequent suit he valued his suit for jurisdiction at Rs. 2 lakhs.

Held, that S. 11, Civil P. C., could be applied:

Held, also that even if S. 11 did not apply in terms, the general principles of *res judicata* applied. A.I.R. (Vol. 28) 1941 Nag. 346=1941 N.L.J. 508 =199 Ind. Cas. 537.

——S. 11—In spite of large valuation in subsequent suit there would be *res judicata* at least with regard to so much of the property as was dealt with in the previous suit. (1938) 67 C.L.J. 223.

——S. 11—Losing party cannot add causes of action in subsequent suit for swelling valuation and claim former decision as not *res judicata*. A.I.R. (Vol. 22) 1935 Cal. 792=40 C.W.N. 174=159 Ind. Cas. 1008.

——S. 11—Suit as to a particular portion of property decided—Subsequent suit beyond jurisdiction of Court by addition of claim to other properties to set aside the previous decision—Suit is barred. A.I.R. (Vol. 21) 1934 Pesh. 7=148 Ind. Cas. 926.

——S. 11—Valuation of suit—Test.

The plaintiff sued in the Court of the Subordinate Judge to recover one-half of certain lands by inheritance from *U* and the other by inheritance from *S* and also by adverse possession. The suit was valued at Rs. 2,100. It appeared that as regards the claim against *S* there had been a prior adjudication by the Munsif regarding two of the plots which were valued at more than Rs. 50:

Held (*i*) that to decide whether the Munsif was entitled to try the later suit, only the value of that half which was claimed under the same cause of action, namely, inheritance from *S*, had to be considered;

(*ii*) that from the value of this one-half, *viz.*, Rs. 1,050, the value of the two plots (which exceeded Rs. 50) must be deducted and the suit would, therefore, come within the jurisdiction of the Munsif and was barred by *res judicata*. A.I.R. (Vol. 19) 1932 Cal. 162=35 C.W.N. 773=136 Ind. Cas. 604.

——S. 11—Higher valuation in subsequent suit.

The fact that the property in dispute was valued at a lesser figure on a previous occasion and at a higher figure on the second occasion does not take the case out of the rule of *res judicata*. A.I.R. (Vol. 18) 1931 Lah. 217=32 P.L.R. 214=134 Ind. Cas. 524.

——S. 11—Over-valuation of second suit.

Arbitrary or over-valuation of second suit will not prevent the application of *res judicata*. 25 A.L.J. 1035=108 Ind. Cas. 462=A.I.R. 1928 All. 127.

——S. 11—Where the value of the present suit was beyond the jurisdiction of the Court which tried the previous suits,

Held, that nevertheless the principle of *res judicata* applied as the increase in value was only due to the joining together of the subject-matter of the previous suits. 22 A.L.J. 745=83 Ind. Cas. 969=5 L. R. A. Civ. 580=A.I.R. 1924 All. 849.

——S. 11—Deliberate over-valuation of subsequent suit.

The plaintiff in the subsequent litigation cannot get rid of the bar of *res judicata* by deliberately over-valuing the subsequent suit. 39 Ind. Cas. 551=1 Pat. L. W. 418.

——S. 11—Plaintiff bound by his valuation.

The test as to whether the previous decision operates as *res judicata* or not depends on whether the Court which tried the former suit could have tried the subsequent suit and for determining Court's jurisdiction plaintiff is bound by his valuation. But if a particular relief claimed in the subsequent suit was adjudicated in the previous suit, the previous Court having jurisdiction to try, that relief would be barred in the subsequent suit. 43 C.L.J. 606=97 Ind. Cas. 209=A.I.R. 1926 Cal. 1053.

——S. 11—Suit undervalued and brought before Munsif—Second suit properly valued instituted before Sub-Judge—No res judicata.

Where a suit was undervalued and brought before a Munsif and a second suit for the same property on a different title was properly valued and instituted in the Subordinate Judge's Court:

Held, that the decision in the first suit could not operate as *res judicata*. A.I.R. (Vol. 18) 1931 All. 21=1930 A.L.J. 1254=130 Ind. Cas. 13.

Test of competency—Territorial jurisdiction.

——S. 11—Competency has no reference to territorial jurisdiction.

Competency within the meaning of S. 11, Civil P. C., has no reference to territorial jurisdiction.

One *K*, widow of one *H*, instituted a suit against one *A* for possession of certain property belonging to her husband. Her suit was dismissed on the ground that she had failed to prove her title against *A*. The appellant instituted a suit against *A* and *K*. *A* was subsequently exempted and the appellant obtained a decree against the assets of *H* in the hands of his widow *K*. He attached in execution the same property involved in the previous suit by *K* as belonging to *K*:

Held, that the principle of *res judicata* applied to the facts of this case and that the appellant must be held to represent his judgment-debtor *A* in respect to the property which his judgment-debtor had claimed by a suit as belonging to herself, but had failed to establish such claim as against *A*. He could not, therefore, attach property in execution of his decree, as belonging to *K*. A.I.R. (Vol. 26) 1939 All. 202=181 Ind. Cas. 80.

——S. 11—For purposes of res judicata it is not necessary that the two Courts must have concurrent territorial jurisdiction which depends entirely on the subject-matter in dispute. A.I.R. (Vol. 19) 1932 All. 660=1932 A.L.J. 984=54 All. 824=143 Ind. Cas. 75.

——S. 11—Competency in S. 11, C. P. Code, has reference to the value of the suit and not the territorial jurisdiction. 87 Ind. Cas. 705=A.I.R. 1925 Mad. 1167.

Test of competency—Competency to try subsequent suit at the time of former suit.

——S. 11—The expression 'competent to try the subsequent suit' in S. 11, means 'competent to try the subsequent suit if brought at the time the first suit was brought'. A.I.R. (Vol. 20) 1933 Cal. 879=37 C.W.N. 810=147 Ind. Cas. 718.

——S. 11—In determining the jurisdiction of the Court which decided the former suit, to try the subsequent suit in order to apply the rule of *res judicata*, regard should be had to the jurisdiction of that Court at the date, not of the subsequent suit, but of the former suit. 19 C.W.N. 1280=27 Ind. Cas. 954=21 C.L.J. 157.

——S. 11—Competent Court—Jurisdiction taken away before pronouncing judgment—Effect of.

Questions that have once been settled between the parties will be deemed to be *res judicata* notwithstanding that similar questions between the same parties have been decided otherwise in other litigations. A Court which at the date of the institution of the first suit had jurisdiction to try the subsequent suit but was deprived of such jurisdiction before it pronounced judgment in the first suit is a "Court of jurisdiction competent to try such subsequent suit" within S. 11 of the Code. 42 Mad. 702=37 M.L.J. 248=53 Ind. Cas. 33=(1919) M. W. N. 768.

——S. 11—Assistant Collector, Second Class, deciding suit for arrears of rent under Agra Tenancy Act (2 of 1901)—Subsequent ejectment suit under Tenancy Act, 1926, before Assistant Collector of First Class.

In order that a decision in a former suit may operate as *res judicata* in a subsequent suit, it is necessary that the Court which tried the former suit was a Court competent to try the subsequent suit. Mere competency to try the issue raised in the subsequent suit is not enough, but there should be competency to try also the subsequent suit itself in which the issue is subsequently raised. It is the competency of the original Court which decided the former suit that must be looked to and not that of the Appellate Court in which that suit was ultimately decided on appeal, and in order to determine whether the Court which decided the former suit had jurisdiction to try the subsequent suit, regard must be had to the jurisdiction of that Court at the date of the former suit and not to its jurisdiction at the date of the subsequent suit.

A decision by an Assistant Collector of the Second Class in a suit for arrears of rent under Agra Tenancy Act, 1901, cannot operate as *res judicata* in a subsequent ejectment suit under the Tenancy Act of 1926 brought before an Assistant Collector of the First Class which could not have been heard and determined by an Assistant Collector of the Second Class. A.I.R. (Vol. 24) 1937 All. 20=1936 A.L.J. 1313=1936 R.D. 547=1937 A.L.R. 75=166 Ind. Cas. 807.

——S. 11—Assistant Collector, Second Class, deciding in 1919 on question of proprietary title—Whether res judicata in subsequent suit under S. 82, Agra Tenancy Act (3 of 1926), involving same question.

In cases arising under the Agra Tenancy Act 2 of 1901, the Civil Courts and the Revenue Courts had concurrent jurisdiction as regards questions of proprietary right where they arose between landlord and tenant. The rule of *res judicata* applicable to that class of cases is S. 11, Civil Procedure Code. Unless, therefore, the Court which decided the former suit was competent to decide not only the issue which arose in the subsequent suit but also the subsequent suit itself, the decision in the former suit of the question of proprietary right will not be *res judicata* in the subsequent suit on the same question. Applying this rule the decision of 1919 by the Assistant Collector, Second Class, on the question of proprietary rights is not *res judicata* in a subsequent suit under S. 82, Agra Tenancy Act (3 of 1926) *i.e.*, a suit for ejectment of a tenant on the ground that he has sub-let his holding in contravention of the provisions of that Act, since the previous decision of 1919 by Assistant Collector was a decision of a Civil Court, which was not competent to try the suit under S. 82 of Act 3 of 1926. A.I.R. (Vol. 25) 1938 All. 82=1937 A.L.J. 1339=1938 R.D. 43=1938 A.L.R. 229=I.L.R. (1938) All. 184=174 Ind. Cas. 62.

——S. 11—Decision of Revenue Court on question of proprietary right under N. W. P. Rent Act (12 of 1881)—Subsequent suit under Agra Tenancy Act (3 of 1926), involving same question.

A decision of a Revenue Court under N.W.P. Rent Act 12 of 1881 on a question of proprietary right is no bar to the Revenue Court adopting the procedure under Agra Tenancy Act 2 of 1901, nor is it a bar to such Court taking action under Agra Tenancy Act 3 of 1926 and deciding the same question. A.I.R. (Vol. 25) 1938 All. 82=1937 A.L.J. 1339=1938 R.D. 43=1938 A.L.R. 229=I.L.R. (1938) All. 185=174 Ind. Cas. 62.

——S. 11, O. 2, R. 2—"In a Court of jurisdiction to try such suit," meaning of—Subsequent suit for more than one year's rent at enhanced rate in Court of high grade—Decision in previous suit for one year's rent in Court of lower grade.

The expression "in a Court of jurisdiction competent to try such subsequent suit" in S. 11, Civil P. C., refers to the jurisdiction of the Court at the time when the first suit was brought. The decision in an earlier suit between the same parties or their representatives brought to recover one year's rent will operate as *res judicata* in spite of the fact that the subsequent suit is instituted to recover arrears of rent, since enhanced for more than one year in the Court of a higher grade, if the former Court would have jurisdiction to try the subsequent suit assuming that it had been then filed in that Court for recovery of one year's rent. It is true that in view of the explanation appended to R. 2 of O. 2, Civil P. C., successive claims, in respect of rent, arising out of the same obligation are deemed to constitute one cause of action, but it cannot be said that a composite cause of action relating to

arrears of more than one year is a different one from that relating to one year. If the previous decisions bars a suit to recover arrears of one year, it must logically bar a suit in respect of any other year. A.I.R. (Vol. 29) 1942 Nag. 119=1942 N. L.J. 423=I.L.R. (1942) Nag. 721=202 Ind. Cas. 317.

——S. 11—Property in dispute in both suits identical—Application of S. 11, whether barred by mere rise in price of property by lapse of time.

The competency of the Court to entertain the subsequent suit must be determined by reference to the date on which the earlier suit was filed. If the properties in dispute in the two suits are identical, the mere rise in the value of the property by lapse of time cannot bar the application of S. 11, Civil P. C. A.I.R. (Vol. 28) 1941 All. 18=1940 A.L.J. 679=I.L.R. (1940) All. 691=192 Ind. Cas. 589.

——S. 11—Idendity of properties in two suits—Value rising in interval between suits—Effect.

When properties in two suits are identical, the mere fact that the value has risen in the interval between the two suits cannot affect the question of *res judicata*. 10 L. 528 and 17 L. 20 followed. A. I.R. (Vol. 23) 1936 Lah. 998=I.L.R. (1937) Lah. 100=39 P.L.R. 931=167 Ind. Cas. 867.

——S. 11—Rise in value of properties in dispute.

In determining the question of competency of the Court for the purpose of S. 11, Civil P.C., the Court need not take into account any change in the valuation from a mere rise in the market value of the properties involved. Section 43 of the Specific Relief Act which gives finality to declaratory decrees passed under S. 42 of that Act does not incorporate the limitations laid down in S. 11, Civil P. C., as to the competency of the Court to deal with the latter suit. Consequently, a decree passed by a District Munsif's Court declaring that an adoption is invalid will operate as *res judicata* in a subsequent litigation even though the value of the subsequent suit is beyond the jurisdiction of a Munsif's Court. A.I.R. (Vol. 23) 1936 Mad. 951=44 L. W. 530=1936 M.W.N. 1086=71 M.L.J. 619=166 Ind. Cas. 75.

——S. 11—Where a decree has been passed by Court which had jurisdiction to entertain the suit at the time, the fact that owing to the value of the properties having increased the subsequent suit could not be entertained by the former Court will one take the decree from the operation of the rule of *res judicata*. A.I.R. (Vol. 19) 1932 Cal. 271=35 C.W.N. 1203=59 Cal. 636=137 Ind. Cas. 46.

——S. 11—The reasonable construction of the words "in a Court competent to try such subsequent suit" as used in S. 11, C.P. Code, is that they must refer to the jurisdiction of the Court at the time when the first suit was brought, that is to say, if the Court, which tried the first suit, was competent to try the subsequent suit, if then brought, the decision of such Court would operate as *res judicata* although on a subsequent date by a rise in the value of the property the said Court has ceased to be a proper Court, so far as the pecuniary jurisdiction is concerned, to take cognizance of a suit relating to that very property. 10 Lah. 528=113 Ind. Cas. 90=30 P.L.R. 620=A.I.R. 1928 Lah. 929.

——S. 11—Subsequent increase in value—Effect of.

The competency of the Court to try the subsequent suit has to be judged with reference to the time when the first suit was brought, *i.e.*, as if the second suit had been instituted at the time when the first suit was filed. Thus where the suit was within the jurisdiction of a Munsif and the subsequent suit by reason of increase in the value of the property was beyond his jurisdiction and within the jurisdiction of a Subordinate Judge such subsequent suit would never heless be barred. 22 O.C. 331=54 Ind. Cas. 335=6 O.L.J. 547.

Test of competency—Competency of original and not of Appellate Court relevant.

——S. 11—In determining competency what has to be regarded is competency of original Courts.

Section 11, Civil P. C., operates to exclude the jurisdiction of a Court to try a subsequent suit only if the first suit was tried by a Court which was competent to try the second or subsequent suit. The competence of a Court is to be determined irrespective of any provision as to the right of appeal from the decisions of that Court, and the competence of a Court and the finality of a decision is not dependent upon whether an appeal was or was not made. A Court may be competent and a decision final within the meaning of S. 11 even if no appeal is made. It is the competing jurisdictions of the original Courts which are to be regarded. A.I.R. (Vol. 26) 1939 Sind 329=I.L.R. (1940) Kar. 15=186 Ind. Cas. 533.

——S. 11—Competency of the first Court.

For the purposes of *res judicata*, it is the competency of the Court of first instance that has to be looked to. A.I.R. (Vol. 21) 1934 Cal. 192=58 C.L.J. 120=150 Ind. Cas. 617.

——S. 11—The competency of Court for the purpose of S. 11 is to be determined irrespective of any provision as to right of appeal from the decision of such Court. 6 A.L.J. 991, followed. 8 L.R.A. Rev. 33=99 Ind. Cas. 299=A.I.R. 1927 All. 189.

——S. 11—Appeals to different courts.

It is the competency of the Court of first instance to entertain the two suits which regulates the application of the rule of *res judicata*, the fact that in the two suits appeals may lie in different Courts does not affect the application of the rule. 32 A. 67, followed. 76 Ind. Cas. 176=A.I.R. 1924 Lah. 644.

——S. 11 (S. 13, Old Code)—Competency—Test of—Both suits if to be appealable in same way.

To make a matter *res judicata* it is not necessary that the two suits should be open to appeal in the same way. (1898) 5 C.W.N. 483=28 C. 78.

[*See also* 13 M.L.J. 23=27 M. 63 though overruled by 16 M.L.J. 41=29 M. 195=1 M.L.T. 25 (F.B.) *also* 28 B. 338.]

——S. 11—The "competent Court" to which reference is made in S. 11 is the trial Court and it does not affect the question whether the decision is a decision of an appellate Court or whichever the appel-

late Court may be. 9 Cal. 439 (P.C.), followed. 44 All. 712=76 Ind. Cas. 932=A.I.R. 1922 All. 445.

——S. 11—Competent Court—Test of—Appellate Court.

The Court referred to in S. 11 of the C.P.C., is the original Court subjects to the proviso that, that Court s judgment is not final until the time of appeal has elapsed or till the appeal has been decided. 24 Ind. Cas. 243, diss. 48 P.R. 1916=34 Ind. Cas. 581=142 P.W.R. 1916.

——S. 11, Expl. 2—Appealability—Not the test—Suit under old Code in which no second appeal lay.

Section 11, Expl. 2 does not bar a suit brought under C.P.C. (1908) when a previous suit on the same was brought and decided under the old Code which permitted no second appeal. 31 Ind. Cas. 214=29 M.L.J. 535.

——S. 11 and Expl. 2—Suit of Small Cause nature tried by ordinary Court—No second appeal—Res judicata.

A suit to recover damages an account of the misappropriation of the fruit of a grove was dismissed on the ground that the plaintiff had failed to prove his title to the grove. The suit was not tried by a Court of Small Causes, but was tried by an ordinary Civil Court. There was no second appeal as the suit was one of a Court of Small Cause nature. *Held*, that a subsequent suit between the same parties for the recovery of possession of the grove and damages was precluded by *res judicata*. 16 Ind. Cas. 496=10 A.L.J. 106.

——S. 11—Competent Court—Powers of Appellate Court not to be considered.

In deciding the question whether a particular decision is *res judicata* the powers of the Court in which the suit was instituted and not the powers of the Appellate Court are to be considered. 14 Ind. Cas. 86.

——S. 11 (S. 13, Old Code)—Powers of appellate Court not to be considered—Competency.

In considering the competency of a Court for the purpose of deciding on a question of *res judicata*, one must look to the powers of the Court in which the suit was instituted and not to the powers of the Court by which that suit was decided on appeal. 5 C. 832 foll. (1905) 7 Bom. L.R. 821=30 B. 220.

——S. 11—Competency of appellate Court not relevant.

The words "competent jurisdiction" have reference to the Court of first instance. The competency of the Appellate Court in the previous litigation is immaterial. 21 M.L.J. 57=9 Ind. Cas. 686=9 M. L. T. 288.

——S. 11 (S. 13, Old Code)—Competency of—Not relevant.

In order to establish the plea of *res judicata*, the Court which decided the former suit must have been such a Court as would have been competent to try and decide not only the particular matter in issue in the subsequent suit but also the subsequent suit itself in which the issue is subsequently raised. It is the competency of the original Court which decided the former suit that must be looked to and not that of the appellate Court in which the suit was was ultimately decided on appeal. (1906) 35 C. 353 =12 C.W.N. 359=7 C.L.J. 470.

5. (h) Settlement Court.

——S. 11—Settlement proceedings—Officer with judicial power.

Where a Sadar Munsarim with judicial powers decrees, during settlement proceedings, under-proprietary rights in favour of a person, the decision is one by a competent Court within the meaning of S. 11, Civil P. C. A.I.R. (Vol. 28) 1941 Oudh 189=1941 O.L.R. 93=1941 R.D. 6=1940 O.W.N. 1344=192 Ind. Cas. 259.

——S. 11—Taluqdar holding estate on behalf of jointly family—Claim in share of estate by other members finally dismissed by competent Court—Decision operates as res judicata.

Where a *taluqdar* held certain estate on behalf of the joint family and the other members of the family claimed a share in the estate and filed a regular suit against the *taluqdar* which was decided by the Settlement Officer who had the power to decide it before introduction of Civil Procedure Code in Oudh and there was a final decision of the Financial Commissioner and their claim was rejected but no appeal was preferred to the Privy Council, this decision operates as *res judicata* in a subsequent claim by the descendants of the predecessor claimants on the ground that *taluqdar* was holding the estate for the family, be that regarded as a trust or not, and the question cannot be subsequently re-opened. A.I.R. (Vol. 26) 1939 Oudh 17=1938 O.W.N. 1267=178 Ind. Cas. 950.

——S. 11—Decision of Settlement Officer in 1853, on question of title relating to agricultural land in Cis-Sutlej and Trans-Sutlej territories.

In 1851-53 in Cis-Sultej and Trans-Sutlej territories the settlement Officer was the only judicial authority competent to decide questions of title relating to agricultural land. Consequently the decision of 1853 of the Settlement Officer on question of title is *res judicata*. A.I.R. (Vol. 24) 1937 Lah. 19=17 Lah. 787=39 P.L.R. 141=169 Ind. Cas. 847.

——S. 11—Decree of Settlement Court declaring nature of grant—Res judicata.

A decree of a Settlement Court which declares the nature of grant made by the Crown and the status of the grantee under Settlement Circular No. 20 of 1863 is not *ultra vires* and operates as *res judicata* in a subsequent civil suit. A.I.R. (Vol. 23) 1936 Oudh 225=11 Luck. 642=1936 O.W.N. 100=1936 R. D. 35=161 Ind. Cas. 158.

——S. 11—Competent Court—Settlement Court.

J, the holder of an estate died and at the Settlement in about 1867 certain claimants put forth their claims to the estate. The claimants were *I* daughter of *J*. and *B* an agnate of *J*. The questions raised were whether *J* was excluded from inheritance under the family custom and whether *B* was really an agnate as asserted by him. The Settlement Court held that *I* was entitled to inherit under Hindu Law, to a limited interest as a daughter and that *B* was the reversioner as alleged by him. Subsequently *I*

entered into an agreement with her son's daughter, whereby the latter was to be the owner of the estate after *I's* death. *B* instituted a suit for declaration that the agreement was invalid and not binding on him.

Held, that the question as to the status of *B* was *res judicata*, the same having been decided in *B's* favour in the Settlement Court. So also was the question as to the interest held by *I* as a limited owner, and *B* was entitled to the declaration prayed for. 23 O. C. 291=18 A.L.J. 1057=28 M.L.T. 334=7 O.L.J. 439=57 Ind. Cas. 397=25 C.W.N. 170=A.I.R. 1921 P.C. 131=39 M.L.J. 115 (P.C.).

——**S. 11—Where during settlement proceedings mortgagor applied to the Revenue Court for redemption and the Settlement Officer dismissed the application on the ground that the term within which redemption was to be made had expired and that in consequence the mortgagor had no right left in him to redeem.**

Held, that the Settlement Court acted with jurisdiction and a later redemption suit of the plaintiffs cannot be sustained, whether the mortgages were executed prior to the annexation of Oudh by the British Government in 1856 or were executed subsequently. 10 O.L.J. 606=5 L.R. Oudh 92=80 Ind. Cas. 698=A.I.R. 1924 Oudh 245.

——**S. 11—Competent Court—Decree by Settlement Court—Right of redemption.**

Where the Settlement Court through oversight decreed that the mortgagor had no right left in him with respect to a particular property the question of the existence of the right to redeem is final and suit for redemption by the mortgagor or his successors in title is barred. 23 O.C. 269=7 O.L.J. 524=60 Ind. Cas. 404=2 U.P.L.R. (J.C.) 163.

——**S. 11—Competent Court—Settlement Court—Decision binding on parties.**

When the Settlement Courts in Oudh investigate all rival claims and decide all the points raised no party can deny in subsequent proceeding the status of the other as found by the Court or claim more than what is given by that Court. 28 M.L.T. 334=25 C.W.N. 170=39 M.L.J. 115=7 O.L.J. 439=23 O.C. 291=57 Ind. Cas. 397=18 A.L.J. 1057 (P.C.).

——**S. 11—Previous decision based on title—Subsequent decision of Survey Officer in favour of the other party—Previous suit if a bar to another suit based on title—Decision of Survey Officer.**

The defendant pulled down the wall separating his and the plaintiff's (who was his neighbour) house, and built a new one. In 1923 in a suit against the defendant, the plaintiff claimed that he was the owner of the old wall and the defendant in re-building it had appropriated a strip of land belonging to the plaintiff, by lessening its thickness. Mandatory injunction directing the defendant to pull down and rebuild the wall of the original thickness on the original place and also the possession of the strip of land, were prayed for. In a previous suit between the parties which was decided in 1913, the ownership of the wall was declared to be in the plaintiff. In revisional survey of 1917, the boundary line included the wall within the defendant's plot. The lower Courts held in favour of the plaintiff and the matter was *res judicata*. The decree was reversed on second appeal when it was held that the Court which had decided the question had no jurisdiction to do it, as the question which related to the boundary, should have been referred to the Collector and the present suit was not, therefore, *res judicata*. It was also held that the decision of the Survey Officer was conclusive evidence and the plaintiff could not succeed. On appeal under Letters Patent:

Held, that the subsequent decision of the Survey Officer in 1917 with regard to boundary could not have the effect of setting aside the judgment of 1913, in which the ownership of the wall was decided in favour of the plaintiff. The question of title was, therefore, barred by *res judicata*. A.I.R. (Vol. 21) 1934 Bom. 248=36 Bom. L.R. 502=152 Ind. Cas. 60.

——**S. 11—Competent Court—Bihar Tenancy Act, S. 112-A—Rent Reduction Officer—Decision as to basic rent of holding—If *res judicata*.** *See* BIHAR TENANCY ACT, S. 112-A 27 Pat. 325.

——**S. 11—Settlement Officer—Decision in proceedings under S. 105, B. T. Act—If res judicata in subsequent rent suit in Civil Court.**

The decision of a settlement officer in proceedings under S. 105, Bengal Tenancy Act, cannot operate as *res judicata* in a rent suit in the Civil Court, the nature of the suit being such that the settlement officer could never try it. A.I.R. 1949 Cal. 609.

——**S. 11 (S. 13, Old Code)—Settlement officer, decision of, under S. 104 (2), Bengal Tenancy Act —How far *res judicata*.** *See* 5 C.W.N. 798=28 Cal. 471 *also* 6 C.W.N. 238.

——**S. 11 (S. 13, Old Code)—Settlement Officer —Order of—Res judicata—U. P. Revenue Act, Ss. 63 and 68.**

S. 68 of U. P. Revenue Act does no more than, as regards the list of tenants, direct the Settlement Officer what particulars respecting them he is to mention in the list. It in no way extends or amplifies the authority given by S. 66. An order passed by a Settlement Officer recording the name of a person as occupancy tenant of certain *sir* land on the basis of possession under S. 63, Act 19 of 1873, is no more than an executive order and cannot operate as *res judicata* in a subsequent litigation between parties who applied against each other to that officer for entry of names. (1904) 1 A.L.J. 9.

——**S. 11—Jamabandi—Order by Settlement Officer—No res judicata.**

An order passed by a Settlement Officer in a *Jamabandi* amendment case is not a decision in a suit to operate as *res judicata* either in a Civil or Revenue Court. 33 Ind. Cas. 343=14 A.L.J. 140.

6. Compromise and consent decree.

(a) Consent decree—Estoppel.
(b) Compromise decree—When res judicata.
(c) Compromise decree—When not res judicata.
(d) Compromise decree contravening statute —If res judicata.
(e) Rule of constructive res judicata—If applicable.

(f) Omission to settle part of dispute—Effect.

(g) Construction of compromise—Res judicata.

(h) Application challenging validity dismissed—Subsequent suit not barred.

(i) Order recording compromise not appealable after decree.

6. (a) Consent decree—Estoppel.

——S. 11—Consent decree—Estoppel.

A consent decree has to all intents and purposes the same effect as *res judicata,* and it raises an estoppel as much as a decree passed *in invitum.* A. I.R. 1949 East Punj. 141.

——S. 11—Compromise decree—Estoppel.

Though a compromise decree cannot operate as *res judicata* in a subsequent proceeding inasmuch as S. 11, C. P. Code, applies in terms to what has been heard and decided by a Court, nevertheless a judgment by consent would raise an estoppel between the parties as well as their representatives in interest. 1941 All. 18=1946 R.D. 234, foll. 1949 R.D. 53.

——S. 11—Consent decrees—Estoppel—Condition.

A decision operates as *res judicata* only in respect of matters that it decides. S. 11 of the C. P. Code, is not strictly applicable to consent decrees because it applies in terms only to what has been heard and finally decided by a Court. But a judgment by consent raises an estoppel between the parties as much as a judgment in a decided case. An estoppel by a consent decree can only arise when the question raised in the subsequent suit was present to the minds of the parties and was actually dealt with by the decree. In order to effect an estoppel it is also necessary that it should appear on record that the question had been put in issue. 22 Luck. 270=1946 A.W.R. (C. C.) 254=1946 O.A. (C.C.) 254=229 Ind. Cas. 112=1947 O.W.N. 30=A.I.R. 1947 Oudh 98.

——S. 11—Consent decree—Estoppel.

The question whether a consent decree comes within the purview of S. 11 is to all intents and purposes of question of mere academic interest, as even if such a decree creates an estoppel, it would bar the trial of the same question between the parties. A. I. R. (Vol. 28) 1941 All. 18=1941 A.L.J. 679=I.L.R. (1940) All. 691=192 Ind. Cas. 589.

——S. 11—Compromise decree—Estoppel—Person suing in one case as decree-holder and in another as zemindar.

In the eye of the law, a person occupies the same capacity so long as he sues or is sued for himself and in his own interest. The fact that in one case he sues as a decree-holder and in another as a *zemindar* makes no difference in his capacity which is in each case his individual capacity. The difference in such cases is not one of capacity or title as contemplated by S. 11, Civil P. C., but that of causes of action. The change in capacity or title which matters in the eye of the law takes place only when in one case he sues or is sued for himself in his individual capacity and in another as a trustee or a person representing the interest of another.

Where in a suit by a decree-holder for declaration that the property attached by him belongs to judgment-debtor, the decree-holder has entered into a compromise with the defendant under which the defendant has acquired a right to occupy the property attached in consideration of his payment of certain amount to the decree-holder a subsequent suit by the decree-holder for possession of the property based on his right as *zemindar* is barred as the compromise decree in the previous suit really puts up a bar of estoppel by agreement and not strictly that of *res judicata.* A.I.R. (Vol. 26) 1939 All. 110=1938 A.L.J. 1157=180 Ind. Cas. 65.

——S. 11—Consent decree—Estoppel—Fraud—Effect of.

The doctrine of *res judicata* does not apply to consent decrees. The matters which form the subject of a consent decree cannot be said to have been finally decided after the parties are heard. A judgment by consent acts as an estoppel, but a consent decree can be set aside on any ground which would invalidate an agreement and the correct procedure is to file a separate suit. A.I.R. (Vol. 20) 1933 Sind 53=145 Ind. Cas. 777.

——S. 11—Consent decree—Estoppel.

Section 11 does not apply in terms to consent decrees as it cannot be said in the case of such decrees that the matters in issue between the parties have been heard and finally decided within the meaning of the section. A consent decree, however, has to all intents and purposes the same effect as *res judicata* as it raises an estoppel as much as a decree passed *in invitum.* 12 Lah.L.J. 157=A.I.R. 1930 Lah. 487.

——S. 11—Applicability—Compromise decree.

Section 11, C. P. Code, does not apply to compromise suits as it applies in terms only to what was actually heard and finally decided. (1912) M.W.N. 1071, Foll. 1928 M.W.N. 654=116 Ind. Cas. 116 =A.I.R. 1929 Mad. 96.

——S. 11—Compromise decree—Estoppel.

A party cannot approbate and reprobate with knowledge of the facts, and if the husband or the wife once deliberately affirms the marriage, he or she cannot subsequently object to the marriage. Therefore, where a previous petition for declaring the marriage a nullity has been dismissed by consent of parties a second petition is not competent. 30 Bom. L. R. 523=110 Ind. Cas. 266=A.I.R. 1928 Bom. 279 (b).

——S. 11—Consent decree—Estoppel.

Res judicata by its very words means a matter upon which the Court has exercised its judicial mind, and a judgment passed on consent cannot be considered as a judicium. A consent decree, therefore, does not come within the rule of *res judicata* as contained in S. 11. It, however, raises as an estoppel as much as a decree passed *in invitum.* 43 C.L.J. 116=94 Ind. Cas. 844=A.I.R. 1926 Cal. 672.

——S. 11—Applicability—Compromise decree.

Section 11 does not strictly apply to compromise decrees. 17 Ind. Cas. 434=(1912) M.W.N. 1071.

——S. 11—Applicability—Consent decree.

Section 11 is not perhaps strictly applicable to consent decrees as it applies in terms only to what has been heard and finally decided by the Court. The principles applicable to judgments by consent are not the same as those applicable to judgments by default. 35 Mad. 75=(1911) 1 M.W.N. 290=9 M.L.T. 487=9 Ind. Cas. 875=21 M.L.J. 709.

6 (b) Compromise decree—When res judicata.

——S. 11—Decree in terms of award—Regular appeal and revision petition dismissed—Fresh proceedings—Res judicata.

A decree in terms of a compromise was passed in a suit, the compromise providing a reference to arbitration in the event of a dispute. A dispute having arisen there was a reference to arbitration and a decree was passed in terms of the award. A regular appeal and a revision petition were filed against the decree both of which were dismissed by the High Court on the grounds that no regular appeal lay and that there was no error in jurisdiction. An Original Petition was then filed in the lower Court seeking to re-agitate the matters.

Held, (i) that there was a final determination of the points raised which precluded the appellant from filing the Original Petition.

(ii) Where despite objection a wrong procedure is followed, or a jurisdiction is wrongly assumed the only remedy ordinarily available is to prefer an appeal against the decree, or, if no appeal lies, to prefer a revision petition, and the aggrieved party having done so and failed, the decree is final and binding on him. 60 L.W. 219=1947 M.W.N. 205=A.I.R. 1947 Mad. 410=(1947) 1 M.L.J. 233.

——S. 11—Finding based on agreement or admission of party can operate as res judicata—Mortgage suit—Compromise sale decree passed against mortgagor on assumption that mortgagor did not belong to agricultural tribe—Mortgagor precluded by res judicata from pleading in execution that he belonged to agricultural tribe.

An implied finding based on an agreement or admission by a party operates as *res judicata* in the subsequent suit in the same way as a finding based on an adjudication by the Court.

The point to be considered in deciding a question of *res judicata* is whether the judgment in the previous case could be sustained without the determination of the question at issue in the subsequent suit, even though the subject-matters of the two suits are different. If the judgment in the previous suit could not be sustained without the determination of the question in the subsequent suit the previous decision operates as *res judicata* and bars the subsequent suit.

Where in a mortgage suit a distinct issue is raised as to whether the mortgagor was a member of an agricultural tribe and whether the mortgage contravenes the provisions of the Punjab Alienation of Land Act and in a compromise, the mortgagor agrees to a decree for sale being passed against him on the assumption that the mortgage in the suit was perfectly valid and did not contravene the provisions of the Punjab Alienation of Land Act, the judgment-debtor is precluded, by reason of the operation of the rule of *res judicata,* from pleading that he belonged to the agricultural tribe and therefore the mortgaged land was immune from sale in execution of the consent decree. A.I.R. (Vol. 33) 1946 Lah. 73=47 Punj.L.R. 385.

——S. 11—Consent decree for purpose of res judicata has same effect as ex parte decree.

For purposes of *res judicata* a consent decree has the same effect as an *ex parte* decree. For a consent decree to operate as *res judicata,* it is not essential that the matter should have been at one time the subject of contention *inter partes.* It is not necessary that there should have been at one time an objection which is subsequently waived. A.I.R. (Vol. 31) 1944 Oudh 94=1943 O.W.N. 509=214 Ind. Cas. 277=19 Luck. 428.

——S. 11—A consent decree in a previous suit between the predecessor-in-interest of the parties in a subsequent suit acknowledging the liability to pay certain dues to the plaintiff, operates as *res judicata* in a subsequent suit and estops the defendant from raising the pleas which were raised in the former suit by his predecessor-in-interest and which were settled by consent. A.I.R. (Vol. 28) 1941 Nag. 271=1941 N.L.J. 388=I.L.R. (1941) Nag. 498=196 Ind. Cas. 493.

——S. 11—No proposition can be laid down that a consent decree can never operate as *res judicata* in a subsequent suit. On the other hand, a consent decree is binding upon the parties and would operate as *res judicata* in a subsequent suit unless there are some special reasons for holding that the compromise and decree were void.

In the previous suit, the custom of *dhardhura* was pleaded by the plaintiff and denied by the defendant so that an issue on the custom did arise in the case which was subsequently compromised by the parties and a decree was passed on the compromise:

Held, that the decree acted as *res judicata* on the issue of the custom of *dhardhura* between the representatives-in-interest of the parties in the previous suit. A.I.R. (Vol. 26) 1939 Oudh 269=1939 O.W.N. 809=1939 A.W.R. 153=14 Luck. 763=183 Ind. Cas. 808.

——S. 11—Where it appears that the plaintiff's father in a former litigation in the family thought it safe to come to terms with the defendants and it could not be said that what he did at that time was improper or unreasonable in the circumstances of the case:

Held, that the compromise and decree in that suit were binding on the plaintiff and the decision in the former suit operated as *res judicata* in the subsequent suit. A.I.R. (Vol. 20) 1933 Oudh 322=17 R.D. 379=10 O.W.N. 493=8 Luck. 586=145 Ind. Cas. 352.

——S. 11—Consent decree—Res judicata—Test.

Consent decrees cannot, merely because they are consent decrees, prevent the application of the doctrine of *res judicata.* Very often, no doubt, they do prevent it, but that is because there is nothing to show that the parties, in consenting to a decree, really intended that the decree should be the final decision of their disputes.

Previous suit by plaintiff for refund of taxes paid by him on behalf of defendant who had agreed to pay them—Defendants denying nothing and consent decree for whole claim to be paid by instalments passed—Subsequent suit for refund of taxes subsequently paid, against same defendant—Defendant is estopped by *res judicata* from denying liability. A.I.R. (Vol. 25) 1938 Mad. 225=1937 M.W.N. 1281=176 Ind Cas. 649.

——S. 11—Tests to be applied.

A consent decree can operate as *res judicata* but the Court must, on the facts of each case, determine whether the decree properly construed does so or not. The tests are: Did the parties while consenting to the decree advert to the point at issue and apply their

minds to it? And further, did they intend by the agreement on which the decree is based, to settle the question finally and did the consent decree actually so settle it? The Court on the facts proved must come to a clear conclusion that the parties intended that the consent decree should have the effect of deciding finally the question raised; for the fact that there was an active contest and the matter was actually put in issue, furnishes a valuable test. A.I.R. (Vol. 21) 1934 Mad. 454=1934 M.W.N. 528=40 L.W. 29=67 M.L.J. 199=151 Ind. Cas. 964.

——S. 11—Consent decree—Res Judicata—Test.

In case of a consent decree an estoppel by judgment is possible only when the question was present in the minds of the parties, was intended by them to be dealt with finally by the consent decree and was actually so settled by the decree. 27 Ind. Cas. 708.

——S. 11—Consent decree—Findings on essential facts—Res Judicata.

Consent decree operates as estoppel not only with regard to conclusion but also to the finding on the essential facts on which the judgment or the ultimate conclusion is founded. (1936) 63 Cal. 550.

——S. 11—Compromise decree—Matters directly in issue—Res Judicata.

A consent decree passed between the predecessors-in-interest of the parties touching matters now substantially and directly in issue between them, in a latter suit is *res judicata*. 36 Bom. 283=12 Ind. Cas. 535=13 Bom.L.R. 950.

——S. 11—Consent decree—Matters contained in—Res Judicata.

A decree or order passed on a *razinama* would constitute the matters contained in it *res judicata* between the parties to suit. 36 Mad. 46=21 M.L.J. 870=10 M.L.T. 332=12 Ind. Cas. 317=(1911) 2 M.W.N. 265.

——S. 11—Compromise decree—Basis on which relief is granted—Res judicata.

The principle of *res judicata* is applicable in a compromise decree so as to prevent the parties from agitating a matter on which they agreed in a previous action. To find out what the matter is it would not be enough merely to see what was the relief granted in the previous decree, but it would be necessary also to examine the basis on which it was granted. 43 Ind. Cas. 962=14 N.L.R. 35.

——S. 11—Compromise decree based on Commissioner's map—Subsequent suit to be determined on that basis.

A sued *B* for recovery of khas possession of some lands. The lands in dispute were included in a bigger area which formed the subject-matter of a previous litigation between the same parties, which was compromised and in which a decree was made in accordance with a Commissioner's map. In the present suit the lower Court held that the Commissioner in the litigation had committed a mistake and came to the conclusion that the disputed lands fell to share of *A*.

Held, that the lower Court was wrong in law when it went behind the compromise decree and proceeded to consider the question whether the Commissioner had committed any mistake in preparing the map. It ought to have proceeded in determining the case on the basis of the Commissioner's map as such. 111 Ind. Cas. 1=A.I.R. 1928 Cal. 852.

——S. 11—A compromise decree operates as *res judicata*. 22 Mad. 508 (P.C.), Foll. 5 O.W.N. 1081=4 Luck. 181=115 Ind. Cas. 294=A.I.R. 1929 Oudh 63.

——S. 11—A judgment by consent is intended to put a stop to litigation between the parties, just as much as is a judgment, which results from the decision of the Court, after the matter has been fought out to the end unless the compromise can be attacked in some effective manner. 18 M.L.W. 177 =75 Ind. Cas. 336=1923 M.W.N. 545=A.I.R. 1924 Mad. 88.

——S. 11—A decision in a former suit, unless tainted by fraud or procured by undue influence, against the predecessor-in--title of the plaintiff will be binding on him. 44 All. 334=67 Ind. Cas. 523= 20 A.L.J. 193=A.I.R. 1922 All. 19.

——S. 11—Compromise decree—Pre-emptor party to—Claim to pre-empt—Res judicata.

Certain occupancy tenants in a village sold their occupancy rights to the appellant *R*. The plaintiffs claimed to pre-empt the sale. The sale was by deed, dated 25th August, 1917, and the conveyance was registered on the 27th August. Shortly after the purchase he sold one-half to *B*, *P*. and *M*. The suit to pre-empt the sale to *R* was brought on 7th October, 1919. The vendees began to build shops on the land so purchased. Then, on 9th September, 1918, a suit was filed on behalf of all the landlords of the village numbering 216, among whom the plaintiffs were included, against the appellant *R* and his co-sharers. That suit was decreed by the Assistant Collector in January, 1919, but was dismissed in appeal. A further appeal was then made to the Commissioner and then a compromise among all the parties was effected, by which the sale to *R*, *B* and *M* was recognized and mutation allowed to be effected. The revenue officer sanctioned the sale in favour of the appellant *R*. The Commissioner passed a decree in terms of the compromise on 2nd June, 1919.

Held, that the occupancy right consolidated, or rather merged in the ownership rights; that these belonged to the appellants, and that as the respondents were themselves parties to the suit in the course of which the compromise arrangement was come to be followed by the decree and mutation proceedings and, therefore, whether the case be viewed under the heading of *res judicata* or of estoppel, or of no title and interest to sue, the result would be the same, namely, that the plaintiff's claim to per-empt cannot be entertained, apart from the question of limitation. 10 Lah. 75=110 Ind. Cas. 1=55 I.A. 266=48 C. L.J. 158=33 C.W.N. 90=30 P.L.R. 1=A.I.R. 1928 P.C. 190.

——S. 11—Consent decree against minor—Res judicata.

A consent decree so long as it stands binds the parties as effectively and in the same way as any other decree. There is no difference between a consent decree in which all the parties are adults and one where a minor is concerned. A decree passed against a minor properly represented is binding upon him to the same extent as a decree passed against an adult, though a minor is entitled to impeach a decree passed against him if the next friend or guardian for the suit is guilty of fraud or gross negligence.

If the decree has not been set aside and the suit is not one constituted for that purpose, it is binding upon the minor and operates as *res judicata* against him. I.L.R. (1947) Nag. 889=A.I.R. 1948 Nag. 304=1947 N.L.J. 556.

——S. 11—Consent Order—Res judicata.

An order by consent, not discharged by mutual agreement and remaining unreduced is as effective as an order of the Court made otherwise than by consent and not discharged on appeal. A party bound by a consent order must when once it has been completed, obey it unless and until he can get it set aside in proceedings duly constituted for the purpose. The only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the Court: the second stands unless and until it is discharged on appeal. 1929 A.C. 482=118 Ind. Cas. 7=30 M.L.W. 606=A.I.R. 1929 P.C. 289=57 M. L.J. 429 (P.C.).

6 (c). Compromise decree—When not res judicata.

——S. 11—Issue raised in previous suit but not decided—Subsequent suit raising same issue not barred.

M created an equitable mortgage in favour of *N* and subsequently mortgaged the same property to *K* and then again to *I*. *N* instituted a mortgage suit against *M* and impleaded *K* and *I*. An issue as to the validity of the equitable mortgage of *N* was raised in the suit but during the pendency, *I* purchased the right on the mortgage of *N*, got himself substituted as plaintiff and compromised the suit and the issue was not decided. A compromise decree was passed against *M* but the suit was dismissed as against other defendants. *K* subsequently executed a conveyance in favour of *R* who brought a suit to enforce his mortgage right and for declaration that his right was not subject to the equitable mortgage purchased by *I*:

Held, that the compromise decree was no bar to the plaintiff's obtaining a declaration that his mortgage was not subject to the equitable mortgage of *I*. The decree on the contrary helped the plaintiff to obtain such a declaration. A.I.R. (Vol. 24) 1937 Cal. 741=I.L.R. (1938) 1 Cal. 187=176 Ind. Cas. 580.

——S. 11—Question raised incidentally—No res judicata.

Where, in a previous suit, the question of validity of a *waqf* was raised and decided on the admission of parties and on other matters into which the question of validity of *waqf* did not directly but incidentally enter, the decision does not operate as a bar on the ground of *res judicata* in a subsequent suit where the validity of the *waqf* is in issue. A.I.R. (Vol. 22) 1935 Cal. 792=40 C.W.N. 174=159 Ind. Cas. 1008.

——S. 11—Consent decree—Absence of issue—No res judicata.

Judgment given by consent when there are no pleadings in action does not operate as *res judica*. In order to effect an estoppel it was necessary that it should appear on record that the question had been put in issue. Where in a prior suit claiming certain amount on account of a certain cess, defendants appeared in person, filed no written statement and simply confessed judgment whereupon a decree was passed against them.

Held, that the decision in the prior suit did not preclude the party from disputing in a subsequent suit the right of the party to levy the cess. 117 Ind. Cas. 295=A.I.R. 1929 Mad. 694.

——S. 11—Issue not raised or decided—No res judicata.

A compromise between the predecessors of the parties in a previous litigation in which there was no issue as to whether the plaintiff's predecessors alone were entitled to maintain the suit, and there was no decision on the point, does not operate as *res judicata* in a subsequent suit for recovery of dues from the defendant. A.I.R. (Vol. 21) 1934 All. 1038=150 Ind. Cas. 1005.

——S. 11—Compromise decree—Question not decided.

Where a person although showing his willingness to have a scheme settled, contended that his right to the ownership of a particular house should be left undisturbed, and the Board did not purport to decide that question, the order of the Board embodying the scheme, although it assumed that the temple was the owner of the house, cannot be a decision on the point of the ownership of the house. 116 Ind. Cas. 142=A.I.R. 1929 Mad. 687.

——S. 11—Compromise decree—Matters outside suit—No res judicata.

A consent decree based on a compromise relating to matters outside suit does not operate as *res judicata*. 48 Cal. 1059=66 Ind. Cas. 705=25 C.W.N. 990.

——S. 11—Consent decree—Matter left open—No res judicata.

Judgment obtained by consent of parties is binding on all but if some matter is left open to be determined, the judgment does not operate as *res judicata* in respect of that matter when agitated afresh. 57 Ind. Cas. 621=1920 P.H.C.C. 241.

——S. 11—Compromise decree—Guardian and Wards Act—Custody of minor.

Where under a compromise the petitioner (father) acquiesced in the retention of the custody of the minor by the respondent (mother).

Held, that the authority delegated by a natural guardian to any other person to retain the custody of the minor is revocable although the compromise has been embodied in a decree. 18 M.L.W. 173=73 Ind. Cas. 948=1923 M.W.N. 668=A.I.R. 1924 Mad. 45.

——S. 11—Compromise rent decree—Terms not known—Rate of rent—No res judicata.

A rent-decree passed in a previous suit on the basis of a compromise in the absence of the terms of the compromise, does not operate as *res judicata* in a subsequent suit between the parties with regard to the rate of rent, but only amounts to proof of an admission in respect of the amount claimed. 16 Cal. 300 (F.B.), Foll. 87 Ind. Cas. 781=A.I.R. 1925 Cal. 1011.

——S. 11—Compromise decree—Partitions dealing with matters not necessary for disposal of suit are not res judicata.

A compromise decree is to be confined to so much

as is necessary in order to dispose of the conclusions of the suit. In so far as it deals with other matters it cannot operate as *res judicata*. 48 Cal. 1055=56 Ind. Cas. 705=25 C.W.N. 990=A.I.R. 1921 Cal. 202.

——S. 11—One of parties not party to compromise—No res judicata against such party.

Where a previous suit between the parties ended in a compromise to which one person who was a party to the suit was not a party, neither the compromise nor the decree passed in appeal based on such decree is binding on such person, and does not operate as *res judicata* against him in a subsequent suit instituted by him. A.I.R. (Vol. 26) 1939 Pat. 225=20 P.L.T. 346=5 B.R. 298=179 Ind. Cas. 834.

——S. 11—Consent decree—If res judicata against persons not consenting to it.

It is extremely doubtful whether a consent decree, as opposed to a decree passed on contest, can be held to be *res judicata* as against any persons other than those who consented to that decree. A.I.R. (Vol. 21) 1934 Lah. 758=148 Ind. Cas. 548 (2).

——S. 11—Compromise Decree—Discharged defendant—No res judicata against.

Where in a previous suit certain defendants are discharged owing to a compromise between the plaintiffs of that suit and the contesting defendants the compromise decree does not operate as *res judicata* in a subsequent suit between the plaintiffs and the alienees from the discharged defendants. 2 O.W.N. 684=90 Ind. Cas. 408=A.I.R. 1925 Oudh 650.

——S. 11—Consent decree—Decree challenged on ground of fraud and collusion—If operates as res judicata.

A consent decree which is impugned in a subsequent suit as having been brought about by fraud and collusion of the parties other than the plaintiff in that suit cannot operate as *res judicata* in that suit. 51 C.W.N. 383=I.L.R. (1946) 2 Cal. 447.

6 (d). Compromise decree contravening statute —If res judicata.

——S. 11—Compromise decree sanctioning alienation prohibited by statute—Res judicata—Estoppel by.

The plea of estoppel by *res judicata* may prevail even when the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute.

Two persons claimed to be the heirs of a deceased holder of a *patilki watan* and one of them got a certificate of heirship and his name entered in the *watan* register. The other sued for a declaration that he was the heir of the deceased-holder. The suit was compromised and a decree was passed therein. Under the decree, the parties were declared entitled to the right of service in equal shares:

Held, that the consent decree operated as estoppel until set aside by a proper suit even though its effect might be to sanction the alienation of the *watan* and the *watan* rights which are prohibited by S. 5, Bombay Revenue Hereditary Offices Act:

Held, also that the person claiming from one of the parties to the compromise decree was bound by the decree which was a judgment *inter partes*. A.I.R. (Vol. 23) 1936 Bom. 301=38 Bom.L.R. 523=164 Ind. Cas. 703 (2).

——S. 11—Compromise decree contravening S. 29, B. T. Act—Res judicata.

A compromise decree passed in contravention of S. 29, Bengal Tenancy Act is binding as estoppel and operates as *res judicata* under suitable circumstances. A.I.R. (Vol. 20) 1933 Cal. 66=141 Ind. Cas. 849.

——S. 11—Compromise decree—Registration of Syndicate—Question as to—Res judicata.

In a suit by or against a syndicate the parties cannot compromise the question whether the syndicate is or is not an unregistered association if the Court was bound to take notice of want of registration, and in order that it may be incumbent upon the Court to investigate the plea, there must be circumstances which amount to something more than the possibility of the association being illegal. If the illegality is not *ex facie* apparent, or if it is a mixed question of law and fact or is a question the determination of which depends on extraneous facts, the Court is not bound to assume that the illegality exists or must necessarily come to light on trial of the facts, and consequently if the parties consent to the question of registration being *res judicata*, the fact of the illegality if subsequently established in other proceedings cannot overcome the plea of *res judicata*. 126 Ind. Cas. 305=32 Bom.L.R. 389=A.I.R. 1930 Bom. 431.

6 (e). Rule of constructive res judicata—If applicable.

——S. 11, Expl. IV—Constructive res judicata.

A consent decree is as much binding on the parties and their privies to the suit as a decree *in invitum*. But what has to be determined is the nature of the issues and the decision in the case compromised: A consent decree cannot be taken to decide every point that ought to have been pleaded as a decree on the merits must. A.I.R. (Vol. 32) 1945 Nag. 288=I.L.R. (1945) Nag. 1005=1945 N.L.J. 383.

——S. 11—Consent decree—Constructive res judicata.

A consent decree is as good a decree as that obtained on contest, especially between the parties to the previous suit in which the consent decree was obtained, and if a party did not choose to raise any grounds of attack or defence in a previous suit which could have been raised, had the judgment not been confessed, he cannot be allowed to reagitate that matter in a subsequent suit which is between the same parties litigating under the same title. A. I. R. (Vol. 22) 1935 Lah. 487=37 P.L.R. 65=157 Ind. Cas. 749.

——S. 11—Compromise decree—Might and ought.

A compromise decree cannot be taken to decide every point that ought to have been pleaded, as a decree on the merits must. 51 All. 575=116 Ind. Cas. 436=1929 A.L.J. 344=A.I.R. 1929 All. 243.

6 (f). Omission to settle part of dispute—Effect of.

——S. 11, Expl. 5—Compromise in which parties omitted to settle part of their dispute.

Explanation 5 to S. 11 of the C. P. Code, appa-

rently has reference to what had been adjudicated by the Court and not to the result arrived at by a compromise in which the parties had omitted to settle a part of their dispute. A.I.R. (Vol. 22) 1934 Oudh 293=11 O.W.N. 528=149 Ind. Cas. 244=10 Luck. 61.

——S. 11, Expl. 5, O. 2, R. 2—Omission to settle some disputes.

Explanation 5 to S. 11, has reference to what has been adjudicated by the Court and not to the result arrived at by a compromise, in which the parties have omitted to settle a part of their dispute. A.I.R. (Vol. 17) 1930 All. 619=129 Ind. Cas. 448.

——S. 11—Relief prayed but not granted.

A consent order raises an estoppel as much as a decree passed *in invitum*, so that where a particular relief is prayed for but the matter is settled by a consent order which does not grant the relief prayed, the relief must be deemed to be refused. The same relief cannot again be claimed. 2 P.L.T. 628=62 Ind. Cas. 469=6 P.L.J. 208=A.I.R. 1921 Pat. 131.

——S. 11—Absence of order for mesne profits after decree—Suit for such mesne profits not barred.

A obtained a consent decree against her tenants entitling her to recover possession of the property and to receive mesne profits till the date of the decree. There was no order regarding mesne profits after decree. Subsequently *A* instituted a suit for mesne profits accruing after the date of the decree:

Held, that the second suit was not barred by *res judicata*. A.I.R. (Vol. 19) 1932 Bom. 222=34 Bom.L.R. 447=56 Bom. 292=138 Ind. Cas. 578.

6 (g). Construction of compromise—Res judicata.

——S. 11—Construction of compromise.

The plaintiff claimed to be entitled to a charge under a compromise, on the estate in possession of the defendant. The defendant pleaded that *R's* 40 villages which were carved out of the defendant's estate were also charged, that *R* and *M* who had an interest in the defendant's estate were necessary parties as indeed they were if the plaintiff was to obtain the full relief which he claimed. *R* and *M* were, accordingly, added as defendants and the question whether *R's* 40 villages were charged was accordingly raised and had to be decided on a construction of the compromise before the Court could determine what relief claimed by the plaintiff could be given to him:

Held, that the question whether upon a construction of the compromise, the plaintiff was entitled to a charge on *R's* 40 villages operated as *res judicata* between the defendant. A.I.R. (Vol. 30) 1943 P.C. 115=1943 O.W.N. 238=1943 A.W.R. 23=1943 A.L.J. 307=10 B.R. 74=48 C.W.N. 66=I.L.R. (1943) Kar. (P.C.) 123=208 Ind. Cas. 553 (P.C.).

6 (h). Application challenging validity dismissed—Subsequent suit not barred.

——S. 11—Compromise decree—Application challenging validity dismissed—No res judicata—C. P. Code, S. 151.

Application challenging validity of a compromise decree under S. 151, C. P. Code, dismissed—Subsequent suit for the same purpose is not barred. 5 Pat. 276=94 Ind. Cas. 765=A.I.R. 1926 Pat. 289.

——S. 11 (S. 13, Old Code)—Compromise decree—Application for review withdrawn—Suit to set aside—No res judicata.

An application for review of a compromise decree was withdrawn and a suit was instituted to set the compromise decree aside. *Held*: That it cannot be said that any adjudication was arrived at on the grounds stated or which ought to have been stated on the application for withdrawal, and that the suit was not barred by *res judicata*. (1906) 34 C. 83.

6 (i). Order recording compromise not appealable after decree.

——S. 11—Compromise decree—Order recording compromise not appealable after preparation of decree.

Where a preliminary decree or order is followed by a final decree, appeal does not lie against the former after the final decree is passed. An appeal from an order, recording a compromise under O. 23, R. 3, filed after a decree is prepared in pursuance of that order in accordance with the provisions of R. 3, is incompetent. A.I.R. 1925 Cal. 218, 36 Cal. 726, 32 Cal. 1023 and 17 C.W.N. 868, Foll. 29 C.W.N. 928=87 Ind. Cas. 248=A.I.R. 1926 Cal. 412.

7. Connected or cross suits and appeals.

(a) Common judgment—Appeal in one—When barred by res judicata.
(b) Common judgment—Appeal in one—When not barred by res judicata.
(c) Appeal and cross-objection—Common judgment—Single second appeal—Res judicata.
(d) Connected reliefs—Appeal against one—Res judicata.

7 (a). Common judgment—Appeal in one—When barred by res judicata.

——S. 11—Consolidated suits—Same parties—Common judgment—Appeal in some suits alone—Res judicata.

When substantially the same parties in different suits expressly agree to have their suits decided on one and the same evidence and by one common judgment on a matter in issue identical in all such suits, such parties are to be treated as same parties for the purpose of applying the principle of *res judicata* to proceedings between them in continuation of the same suits.

Where in the case of such a common judgment an appeal is filed only in some of the suits, the decisions in the others which have become final operate as *res judicata*. 1949 R.D. 156, Diss. 1949 R.D. 367.

——S. 11—Cross suits—Same parties and same subject-matter—Common judgment—Decision in one suit becoming final—Effect on appeals in other suits.

Where cross suits between the same parties and regarding the same subject-matter are disposed of by a common judgment in the trial and appellate Courts and the decision in one becomes final further appeals in the other suit would be barred by *res judicata*, if the decisions on them would result in the

passing of two contradictory decisions. 1949 R.D. 283.

——S. 11—Connected suits—Common judgment—Plaintiffs and one set of defendants common in two suits—Different Zamindar defendants—Appeal in one suit only—Res judicata.

Where the plaintiffs and one set of defendants are common to two suits but the other set of Zamindar defendants are different in the two suits and the pleadings, issues and evidence are the same in the two suits, if the decision in one of the suits is allowed to become final by not being appealed against, the appeal in the other would be barred by *res judicata.* 1949 R.D. 265.

——S. 11—Connected cases—Single Judgment on question of title—Appeal in one case only—Res judicata.

In a number of rent suits in respect of different holdings the plaintiff claimed only an eight annas share and added a co-sharer landlord as defendant entitled to the other eight annas share who however claimed to be the sole landlord. The first Court negatived this claim of sole title and decreed the plaintiff's claim. The defendant co-sharer landlord filed an appeal in one of the suits only reiterating this claim to be sole landlord.

Held, the matter was *res judicata* and it was not open to the appellate Court to investigate the matter once again. A.I.R. 1948 Pat. 191.

——S. 11—Connected suits—Same issues between different parties—Appeal in one case barred—Appeal in the other, if barred.

Where the same issues arise between different parties to different suits and the evidence is also the same and the parties have agreed to abide by a common judgment, if an appeal against the decree in one suit is barred, the same result will attach to the appeal in the other suit or suits as in the circumstances two contradictory judgments cannot be allowed to stand. 1948 R.D. 433.

——S. 11—Connected suits—Single judgment—Appeal against decree in one suit only—Failure to appeal from decree in others—Res judicata.

The respondent instituted 225 rent suits against various persons, his claim for rent being based on his right as an *ijaradar* under an *ijarapatta* in his favour. The subject-matter of the suits was different and the principal defendants in the suits were also different. Besides the principal defendants, the respondent also impleaded the appellant as a *pro forma* defendant in all the suits, and the issue between the appellant and the respondent was common to all the suits, *viz.,* whether the appellant as sole executor of the estate under a will was entitled to recover the arrears of rent to the exclusion of the respondent. The plaintiff (respondent) obtained a decree in each of the suits, all of which were disposed of by one common judgment. The appellant preferred an appeal against the decree in one of the suits, but did not appeal against the decrees in the others.

Held, that the appeal was barred by *res judicata,* the decree in the order suits having become final. 1946 P.W.N. 158=A.I.R. 1947 Pat. 125=231 Ind. Cas. 123=13 B.R. 499.

——S. 11—Connected appeals dismissed by one common judgment—One appeal only filed—Res judicata.

Where the trial Court disposed of two similar suits by a common judgment and two appeals preferred to the Commissioner are dismissed by one common judgment and one appeal only is filed before the Board, the other case having become final would operate as *res judciata* and bar the hearing of the appeal before the Board. 1947 A.W.R. (Rev.) 7=1948 R.D. 372.

——S. 11—Consolidated—Presumption suits—One judgment but separate decrees—Appeal against one decree alone—Res judicata.

Both from the point of view of statute and of general principles, a decree will act as an estoppel by record against a person who has been directly or indirectly refused a relief thereby or whose rights (supposed or real) have been taken away from him. But, in consolidated suits, where the Judge delivers the main judgment in one suit and makes a brief reference to it in the other and prepares two decree-sheets, if the aggrieved party appeals from one decree and not from the other, then it is a question of fact which is to be decided on the merits of each case, whether the decree which has not been appealed against and has, therefore, become final in any way deprives the appellant of the alleged rights or refuses him the relief which he directly or indirectly seeks to get on appeal. If it does, the appeal should be dismissed, for the decree which has become final acts as *res judicata.* If it does not, the appeal should be entertained.

S sold some land to *R. A* and *Z* filed two separate pre-emption suits. The Judge consolidated the two suits and holding that *A* had superior right compared to *Z,* gave a judgment and a decree for possession in favour of *A.* In *Z's* case, a final order only to the effect that the order of the Court in *A's* case should be seen was passed and the decree also contained nothing more than the order of dismissal of the suit. *Z* filed an appeal in her case but did not file an appeal against *A*:

Held, that the decree in favour of *A* had become final and if *Z* were given the relief she asked for, the decree of the Appellate Court in her case and the decree in favour of *A* would be in conflict. *Z* was, therefore, estopped by the principles of *res judicata* from maintaining her appeal. A.I.R. (Vol. 32) 1945 Pesh. 35=224 Ind. Cas. 581.

——S. 11—Suit on pro-note—Debtor's suit against creditor under S. 33, U. P. Agriculturists' Relief Act (27 of 1934)—Suits disposed of by one judgment—Identical sum found due to creditor from debtor—Appeal by debtor from decree in suit filed by creditor but not from decree in his own suit.

A creditor instituted against his debtor a suit on a pro-note for recovery of a certain amount. The debtor also instituted a suit against the creditor under S. 33, U. P. Agriculturists Relief Act. Both these suits were disposed of by a single judgment and the same sum was found due to the creditor. The debtor went in appeal from the decree in the suit filed by the creditor but not from the decree in the suit filed by himself:

Held, that the appeal was barred under S. 11, C. P. Code. A.I.R. (Vol. 28) 1941 All. 277=1941 A.L.J. 246=1941 R.D. 460=1941 O.W.N. 502=I.L.R. (1941) All. 360=194 Ind. Cas. 801.

——S. 11—Question of title decided in both suits against defendant—Appeal in one—Res judicata.

Where the question of title was decided against de-

fendants in both cases and appeal was filed against one only, leaving the other action as it stood, it is not open to the Court in appeal to go into the matter of title again. 156 Ind. Cas. 998=1 B. R. 673.

——S. 11—Two suits decided by common judgment in lower Courts—Decree in one becoming final—Second appeal in the other barred.

The doctrine of *res judicata* is not confined to the provisions of S. 11, C. P. Code. It is based upon the principle that multiplicity of suits should be avoided and there should be an end to litigation.

Where two suits were decided by a common judgment in both the Courts below but two decrees were passed and the decree in one of them became final by the party not appealing against it:

Held, that the issue decided in the decree which had become final would operate as *res judicata* in the other suit even at the stage of second appeal. A.I.R. (Vol. 20) 1933 Pat. 78=13 P.L.T. 793=12 Pat. 139=141 Ind. Cas. 762.

——S. 11—Connected pre-emption suits—Dismissal of one and decree in another—Appeal filed only against dismissal—Res judicata.

Suit for pre-emption by rival pre-emptors *S* and *K*—Suit by *S* dismissed and that of *K* decreed—*S* appealing against the dismissal of the suit—No appeal filed against decree in *K's* suit—Appeal by *S* is barred by *res judicata*. 85 P.R. 1905 held to be no longer good law. 8 Lah.L.J. 136=27 P.L.R. 203=93 Ind. Cas. 1014=A.I.R. 1927 Lah. 98.

——S. 11—Connected suits—Same issue—Decision in one—Res judicata.

Where in two suits the lands in dispute are different but the issue as to defendant's title to the lands is raised in both and decided in one, that decision is *res judicata* as to the issue of title in the other suit. 4 Rang. 8=95 Ind. Cas. 104=A.I.R. 1926 Rang. 122.

——S. 11—Cross suits—Same Issue—Decision of one—Res judicata.

Where, in both of the cross-suits between the same parties the question at issue arising out of the same transaction is the same, and one is decided before the other, the decision in the suit decided first is *res judicata* against the other. 96 Ind. Cas. 694 (All.).

——S. 11—Connected Suits—Same matter—Appeal only in one of them—Res judicata.

S. 11 of the C. P. Code, or, at any rate the principle on which that section is based, will prevent an appellate Court from trying a case involving a matter decided finally by a suit heard along with the suit from which the appeal is pending. 86 Ind. Cas. 380=A.I.R. 1925 Oudh 598.

——S. 11—Cross suits—Common issue—Appeal from one decree dismissed—Appeal from other decree barred—Principle applies to appeals.

The question of *res judicata* is not confined only to the provisions of S. 11. 11 I.A. 37, Ref. Two cross-suits were tried together with common issues but two separate decrees were drawn up and also two judgments were written one relying on the other. Appeal from one decree was dismissed.

Held, that the appeal from the other decree cannot be heard, the subject-matter of the latter appeal being already decided in the prior appeal. 53 All. 15 (F.B.), Foll. 2 Rang. 633=84 Ind. Cas. 894=A.I.R. 1925 Rang. 104.

——S. 11—Connected pre-emption suits—Appeal filed in one—Res judicata.

Two pre-emption suits were filed by *L* and *A* with regard to the same property and in connection with the same transfer: they were jointly tried, issue being the same, and identical decrees were passed in both. Both were parties to both the suits. The decrees were to the effect that *L* was to pre-empt and deposit a certain amount and on his failure *A* was allowed to pre-empt. *L* appealed from the decree in his own suit but not from the decree in the suit in which he was defendant.

Held, that the decree in *A's* suit which had become final barred the appeal. 11 O.L.J. 22=81 Ind. Cas. 333=A.I.R. 1924 Oudh 311.

——S. 11—Connected suits—Appeal in one—Res judicata.

Where two suits were instituted against the same defendants for recovery of arrears of rent for different holdings at different rentals and the suits were tried together and on plaintiff's consent, only a decree for consolidated rent was passed, as the Court held that the lands covered by the two suits formed one holding and the other suit was dismissed by the trial Court but was set aside on appeal and where the defendant preferred a second appeal.

Held, that plaintiff having not appealed against the decree for consolidated rent was barred by *res judicata* and also on the ground of estoppel since he had accepted to take the decree for consolidated rent. 33 C. 1101, Diss. 75 Ind. Cas. 570=A.I.R. 1924 Pat. 823.

——S. 11—Connected cases—Order dealing with both—Separate appeals necessary.

Where an order dealt with two separate cases, two appeals are necessary, although in the Trial Court, Counsel received one fee for the two cases which he therefore considered to have been consolidated. But in a proper case, the appellant may be permitted to rectify the error by putting in a properly stamped appeal. 53 P.L.R. 1921=A.I.R. 1921 Lah. 346.

——S. 11—Cross-suits—Appeal from one of them only—Unappealed decree acts as *res judicata* as being a former suit. 15 Bom. 104; 29 M. 333 and 195, Diss. 37 C.L.J. 184=74 Ind. Cas. 591=A.I.R. 1923 Cal. 496.

——S. 11—Suit for possession dismissed—Defendant granted decree for pre-emption—Appeal filed against dismissal of suit—Decree for pre-emption not appealed against—Effect.

Where a Subordinate Judge not only dismissed the suit of a plaintiff for possession by partition but also granted the defendant a decree for pre-emption and the plaintiffs appealed only against the dismissal of their own suit and the lower Court granted a decree in their favour, *held*, that the decree for pre-emption stood, as it was not appealed against and the question of title was directly and substantially in issue in the pre-emption case, it was *res judicata* as between the parties and the plaintiffs and therefore the decree in favour of the plaintiffs given by the lower appellate Court is invalid. 74 Ind. Cas. 583=3 L.L.J. 473 =A.I.R. 1921 Lah. 255.

——S. 11—Cross Appeals consolidated—Maintainability.

A consolidated appeal against two cross-decrees is not maintainable but the appellant will have to con-

fine himself to one decree. If he fails to elect which decree he will confine himself to, then and then alone the entire appeal can be dismissed by the rule of *res judicata*. 42 Ind. Cas. 424=4 O.L.J. 512.

——S. 11—Cross-decrees—Appeal against one.

Where only one of two decrees in the same terms is appealed against the decree not appealed against will stand though the other one is set aside. 25 Ind. Cas. 266.

——S. 11—Cross-suits—Common issue—Separate judgment—Appeal against one—Res judicata.

A sued *B* and *B* filed another suit against *A*. The question at issue in the two suits was the same. Both the suits were tried together. But separate judgments were given.

Held, in an appeal from the judgment in one suit, that the judgment in the other suit which had not been appealed against operated as *res judicata*. 34 C.L.J. 281=27 C.W.N. 141=64 Ind. Cas. 574=A.I.R. 1921 Cal. 291.

——S. 11—Connected suits—Same issue decided—Appeal in one—Bar.

Where in two suits between the same parties the same issue is raised and decided against a party, and the latter appealed against only one decree. *Held*, that the decision on the issue had become final and could not be re-opened again. 18 Ind. Cas. 867.

——S. 11—Cross suits—Common issue—Appeal only in one suit—Res judicata.

Where there are two cross suits having a certain issue common to both and no appeal is brought against the decision in one suit the finding on the issue cannot be attacked in an appeal from the decision in the other suit. 5 Bur.L.T. 199=17 Ind. Cas. 860=6 L.B.R. 93.

——S. 11—Connected suits—Involving same issue—Appeal against one alone—Res judicata.

Where two suits involving the same issue are tried together but the decree in one of them is not appealed against the decision in that decree operates as *res judicata* in the appeal against the other decree. 5 O.C. 384: 7 Ind. Cas. 156; 35 A. 151, foll. 14 Ind. Cas. 321.

——S. 11—Connected suits—Appeal against one only—Res judicata.

Where there are two decrees to be set aside before the dissatisfied party can get the relief he asks for, and an appeal is filed against one only, the other operates as *res judicata* in the appeal against the former. 13 Ind. Cas. 984=15 O.C. 22.

——S. 11—Connected appeals—Res judicata—Failure to appeal against a decree.

Plaintiff appealed against one decree against him passed by the Appellate Court on the defendant's appeal; but he did not appeal against the appellate decree against him on his own appeal. *Held*, that the Appellate decree against which no appeal was filed was *res judicata* and that it could not be questioned in the other appeal. 10 Ind. Cas. 238=8 A. L.J. 605.

——S. 11—Two decrees in same suit—Appeal against one decree only.

Where both parties to a suit appealed and the appellate Court therein framed two decrees, an appeal against one decree onl would be barred by *res judicata*. 9 Ind. Cas. 667.

——S. 11—Same issue in two suits—Findings in one incorporated in the other—Appeal against one decree only—Effect.

In two suits or sale upon different mortgage, one of the defendants, a prior mortgagee, pleaded that his mortgage had not been satisfied. The Subordinate Judge found in the one case that the mortgage had not been satisfied and incorporated that finding in the other case. The plaintiff appealed in the one case against that finding but allowed the decree in the other to become final. *Held*, that the judgment in the case not appealed against operated as *res judicata*. 7 A.L.J. 816 F.B., foll. (1910) 7 A.L.J. 995=33 A. 151=7 Ind. Cas. 909.

——S. 11—Two suits—One Judgment, but two decrees—Appeal against one decree—Finality of the other decree.

The code of civil procedure requires a separate Judgment and decree for each suit or appeal and two or more decrees cannot be challenged by one appeal. A decree unless it be a decree which is a nullity by reason of for example, fraud cannot be superseded except it be upon appeal in the regular course. An appellate Court is bound to apply the rule of *res judicata* even though the decision pleaded in bar is the decision of an inferior Court, provided that that Court was competent to decide the case. Where, therefore, two suits were tried together and disposed off by one Judgment and a decree was passed in each suit, but an appeal was preferred against the decree in one of the suits only, held that the appeal would be barred by the other decree which stood unreserved and was binding upon the appellant. (1910) 7 A.L.J. 861=7 Ind. Cas. 156=33 A. 51 (F.B.), overruled 29 A. 730=4 A.L.J. 587=1907 A.W.N. 245. [Ed. Note: For cases to the contrary *see under* 7 (b), *infra*.]

——S. 11 (S. 13, Old Code)—Connected suits or appeals—Decrees—Appeal from one only—Res judicata.

It is the decision of the issue as a judicial act of the Court which bars a repetition of the same act and not the commencement of a suit. If an issue decided against a party is embodied in two decrees and that party appeals from one of them only, the other decree on becoming final operates as *res judicata* and precludes the original and appellate Courts from deciding that issue again. 10 A. 123; A.W.N. 1890, p. 183; A.W.N. 1893, p. 190; W. N. 1893 P. 221, foll.; 29 M. 333; 16 C. 233; 33 C. 1101; and 29 A. 730, diss. from. (1908) A.W.N. 211.

——S. 11—Suit—Counter-claim—Appeal preferred in both—Appeal against decree in counter-claim dismissed as out of time—Effect.

Plaintiff sued to recover a sum of money from the defendant on accounts and the latter denied the claim and counter-claimed for a sum of Rs. 46. The plaintiff's suit was dismissed and the defendant's, counter-claim decreed by the first Court and the plaintiff thereupon filed two appeals, one against the dismissal of the suit and the other against the decree on the

counter-claim. The District Court dismissed both the appeals whereupon the plaintiff preferred two second appeals, as in the Court below but the appeal against the decree on the counter-claim was dismissed as being out of time. *Held*, the dismissal operates as *res judicata* for plaintiff's claim. 4 Lah.L.J. 344. =A.I.R. 1921 Lah. 271.

——S. 11—Judgment operating as res judicata pending appeal—Duty of appellate Court to take note of and to admit same in evidence.

If before an appeal is disposed of there is another decision which has become final and which operates as *res judicata* on the question at issue in the pending appeal, the appellate Court ought not to refuse to allow the judgment in that decision to be filed. Once it is brought to the notice of the appellate Court that there is such a judgment, it is its duty to allow it to be filed in order to avoid conflicting judgments and further complications. I.L.R. (1946) Mad. 566=(1946) M.W.N. 27=59 L.W. 67=A.I.R. 1946 Mad. 509=228 Ind. Cas. 286=(1946) 1 M.L.J. 200.

7 (b). Common judgment—Appeal in one—When not barred by res judicata.

——S. 11—Common judgment in different suits between different parties—No proper consolidation—Appeal in some suits only—Effect.

Where different suits between different parties are disposed of by a common judgment without any proper consolidation and an appeal is preferred in some of the suits only the decision in those suits not appealed against cannot operate as *res judicata*. 1949 R.D. 231.

——S. 11—Connected suits—Common judgment—Same plaintiff but different defendants—Appeal in one suit alone—No res judicata.

Where different suits by same plaintiff against different defendants is disposed by a common judgment and there is an appeal only in one of the suits, it cannot be said that the absence of appeals in the other suits is a bar to the hearing of the appeal in one of the suits. 1949 R.D. 156.

——S. 11—Connected suits—Common judgment—Parties and properties different—Point at issue not common—Dismissal of one appeal—No res judicata.

Where though several suits are dealt with by a common judgment, if the parties, properties and points at issue are different, the dismissal of one appeal against such judgment cannot affect the others which raise different points. But each case has to be decided on its own facts. 1949 A.W.R. (Rev.) 4 =1949 R.D. 93.

——S. 11—Consolidated cases—Suits for ejectment against different defendants in respect of different plots—Common Judgment—Failure of one defendant alone to appeal—No bar to hearing of other appeals by other defendants.

It is impossible to lay down a fixed principle of law for consolidated cases where the omission to file appeal in some suits resulting in the order becoming final can operate as *res judicata* against the appeal which had been filed. Each case will have to be decided on its own merits.

Where a number of suits for ejectment filed against different defendants in respect of different plots is consolidated and disposed of by a common judgment, the failure of one of the defendants alone to appeal against the judgment would not bar the hearing of the other appeals by the other defendants. 1948 A.W.R. (Rev.) 315=1949 R.D. 45.

——S. 11—Consolidated suits—Common judgment in trial and appellate Courts—Failure of defendant in one suit alone to file second appeal—No bar to second appeals filed by other defendants.

It cannot be stated as a general rule that where there are several appeals dealt with by a common judgment and one of them happens to be dismissed for any reason, the other appeals are of necessity barred by the principle of *res judicata*. Each case has to be decided on its own merits and the general principles of *res judicata* hold good in the case of consolidated suits and appeals as well as they do in the case of suits and appeals dealt with individually.

Where, in the case of consolidated suits, the defendants are different, the subject-matter is different and the evidence is also discussed separately in the common judgment and the appeals therefrom are also disposed of by a common judgment, the failure of one of the defendants in one of the suits to file a second appeal would not bar the second appeals filed by the defendants in the other suits. 1948 R.D. 458 =1949 A.W.R. (Rev.) 81.

——S. 11—Connected appeals—Common Judgment—Dismissal of second appeal against decree in one appeal—If bars appeal against decree in the other.

Where in a suit against two different parties in respect of different lands disposed of by two judgments the appeals are disposed of by a common judgment for purposes of convenience the dismissal of a second appeal against the appellate decree in one of the appeals would not operate as a bar against the second appeal against the decree in the other appeal. 1948 R.D. 435=1948 A.W.R. (Rev.) 327.

——S. 11—Consolidated suit—Appeal in one suit—Not barred by decree in other suits.

In order that a decision should operate as *res judicata* it should be quite independent of the proceedings to which it is pleaded as a bar. The principle of *res judicata* cannot apply in the same proceeding in which the decision is given and by parity of reasoning it cannot apply to the consolidated proceedings. Where two suits having a common issue are, by consent of parties or by order of the Court, tried together and decided in one finding, there is in substance one judgment and one decree though in form the Court may have written two formal judgments and drawn up two decrees. An appeal filed against the decree passed in one of the suits is not barred by *res judicata* by reason of the non-filing of an appeal against the decree passed in the other suit. I.L.R. (1947) Nag. 691=1948 N.L.J. 155 =A.I.R. 1947 Nag. 248.

——S. 11—Connected suit—Same parties—Common issues—One judgment but two decrees—Appeal against one rejected as incompetent—No res judicata.

Where two suits between the same parties involving common issues are disposed of by one judgment but two decrees and an appeal is preferred against the decree in one but it is either not preferred in the

other or is rejected as incompetent, the matter decided by the latter decree does not become *res judicata,* and it can be re-opened in the appeal against the former. This rule is liable to exceptions which depend upon the circumstances of each case. A.I.R. (Vol. 33) 1946 Oudh 33=1945 O.W.N. (C.C.) 247=1945 A.W.R. (C.C.) 164=20 Luck. 339=1945 A.W.R. Rev. B. 92 (F.B.). [Overrules A.I.R. (Vol. 20) 1933 Oudh 531=17 R.D. 966=147 Ind. Cas. 966].

——S. 11—Pre-emption suits—One judgment—Identical decree in each record—Plaintiffs in suit given right in certain order of priority.

When there are several pre-emption suits relating to the same transaction, and when one judgment disposes of all the suits (a decree in identical terms being placed in each record), the plaintiff or plaintiffs in each suit being given the right to pre-empt in a certain order of priority, it is not necessary for a plaintiff who can under the decree exercise his right to pre-empt only on the failure to do so of one or more of the plaintiffs in other suits to appeal against the decree in the suit brought by himself as well as against the decree in the suit brought by a plaintiff who has been given a prior right. A.I.R. (Vol. 31) 1944 Oudh 220=1944 O.W.N. 131.

——S. 11—Three suits tried together and disposed by one judgment—Appeal against one decree only—Decision in other suits does not bar appeal.

Three suits were tried together and disposed of by a common judgment. The only issue which had been determined by the trial Court was the heirship of the plaintiff with the deceased. The three suits were dismissed and separate decrees were passed in each of them. An appeal was preferred against one decree only:

Held, (per *Division Bench*) that the object of the appeal being in substance to get rid of the very adjudication which was put forward as constituting *res judicata* that adjudication in the other two suits which had become final not being appealed against, should not be held to bar the appeal. It was immaterial whether the suits were cross suits or not. A.I.R. (Vol. 30) 1943 Mad. 139=(1943) 1 M.L.J. 1=1943 M.W.N. 21=56 L.W. 12=I.L.R. (1943) Mad. 235=205 Ind. Cas. 618 (F.B.).

——S. 11—Suit on mortgage effected by insolvent and application to set it aside by Official Receiver heard together and disposed of by one judgment holding mortgage to be valid—Official Receiver filing no appeal from mortgage decree but only from order of dismissal of his application—Appeal not barred by res judicata.

An appellate tribunal is not precluded from dealing with a question which comes before it because an inferior Court on the same facts in a case other than that under appeal had given a decision which had not been appealed against at the same time as the decision under appeal.

A suit by the mortgagee on a mortgage effected by an insolvent and an application to set aside the mortgage filed by the Official Receiver under Ss. 4 and 53, Provincial Insolvency Act, were heard together and disposed of by one judgment holding the mortgage to be valid with the result that the mortgagee was given a preliminary decree and the application of the Official Receiver was dismissed. The Official Receiver filed an appeal to the District Judge from the order of dismissal of his application but no appeal from the preliminary decree was filed. It was contended that rule of *res judicata* applied:

Held, that the appeal was not barred by the principle of *res judicata.* A.I.R. (Vol. 29) 1942 Mad. 226=54 L.W. 654=(1941) 2 M.L.J. 932=201 Ind. Cas. 187.

——S. 11—Two pre-emption suits were filed one by *D* and the other by *V* and they were by order consolidated. In *V's* suit, *D* was the 2nd defendant. He raised the objection that he had a preferential right. The defence of *D* was found against and the suit decreed. Defendant 1 and defendant 3 appealed but *D* did not. *D's* suit was dismissed. *D* appealed. It was contended that the appeal was incompetent because *D's* failure to appeal from the decree in *V's* suit concluded the matter against him:

Held, that appeal by *D* against the dismissal of his suit was competent. A.I.R. (Vol. 28) 1941 Nag. 199=1941 N.L.J. 296=I.L.R. (1942) Nag. 325=195 Ind. Cas. 671.

S. 11—Where matter in issue in two suits was the same and the finding in one suit has been adopted in the other, an appeal against one of these decrees is not barred by *res judicata* on the ground that no appeal was preferred against the other decree. A. I. R. (Vol. 28) 1941 Mad. 524=53 M.L.W. 258=1941 M.W.N. 198=(1941) 1 M.L.J. 354=200 Ind. Cas. 77.

——S. 11—Appeals by both, plaintiff and defendant—Appeals disposed of by one judgment—Plaintiff's appeal allowed and defendant's dismissed—Two second appeals by defendant but one against decree dismissing his own appeal barred by time—Certain question arising in plaintiff's appeal alone and not in defendant's—Other appeal, held not barred by res judicata.

Both the plaintiff and the defendant appealed from the decree of the trial Court. The appellate Court decided both the appeals by one judgment and dismissed the defendant's appeal and allowed that of the plaintiff and though the operative portion of the judgment which governed both the appeals was copied out in both the decrees, yet the question whether or not the plaintiff was liable to pay anything on account of the redemption of mortgage arose in the plaintiff's appeal alone and not in the defendant's appeal. The defendant preferred two second appeals from both the decrees but the appeal from the decree dismissing his own appeal was barred by limitation. There was nothing in the decree, appeal against which was barred which affected the question how far the plaintiff was liable on account of the redemption of the mortgage

Held, that the other appeal was not barred by *res judicata.* A.I.R. (Vol. 27) 1940 Oudh 45=15 Luck. 126=1939 O.W.N. 955=1939 A.W.R. 245=184 Ind. Cas. 771.

——S. 11—Cross-suits—Failure to appeal in one of them. effect.

Both *A* and *B* filed suits against one another. As the issues were practically identical, both the suits were consolidated and tried together. *A's* suit was dismissed but *B's* suit was decreed. *A* appealed against decree passed in *B's* suit but did not appeal against decree passed in his own suit:

Held, that the decree not appealed against did not

operate as *res judicata*. The existence of a contradictory decision was not fatal and it was the later decision of the highest Court that would be binding on the parties. A.I.R. (Vol. 25) 1938 Lah. 114=40 P.L.R. 198=177 Ind. Cas. 305.

——S. 11—Several suits involving common issues disposed of in one judgment—Appeal against one decree—Contention that the matter decided in the other decrees becomes *res judicata*.

Held, the bar of *res judicata* does not stand. (1936) 64 C.L.J. 431=40 C.W.N. 1176.

——S. 11—Cross-suits—Common issue—Appeal against only one decree—Decision in the other, does not operate as res judicata.

Where the same question was in issue in an original petition and in an original suit before the Subordinate Judge and both cases were tried together and decided on the same evidence and an appeal against the order made on the original petition was dismissed on the ground that the question at issue in the appeal was decided in the original suit and that decision had not been appealed against:

Held, that the doctrine of *res judicata* had no application as the very object of the appeal in substance, if not in form was to get rid of the decree which was pleaded as a bar. A.I.R. (Vol. 22) 1935 Mad. 214=1934 M.W.N. 797=67 M.L.J. 364=40 L.W. 662=152 Ind. Cas. 114 (2).

——S. 11—Two decrees arising out of suits heard together—Res judicata—Tests.

Where there are two decrees arising out of the suits heard together and raising the same questions and only one of such decrees is appealed against, the Appellate Court can proceed with the hearing of the appeal, if there is nothing prejudicial to the appellant in the decree from which no appeal is preferred, which is not raised and cannot be set right if the appeal which has been preferred succeeds. The ultimate rights of the parties in such a case must be adjusted and regulated according to the final decision of the last Court of Appeal. A.I.R. (Vol. 18) 1931 All. 660=131 Ind. Cas. 679.

——S. 11—Cross-suits—Omission to appeal from one decree—Appeal from other, competency of.

Where two separate suits are instituted by the same parties against each other and they are tried together as cross-suits, and one of the parties prefers an appeal from the decision in which he is defendant and not from the other suit instituted by him, the decision in the latter suit does not operate as *res judicata* in the hearing of the appeal. A.I.R. (Vol. 18) 1931 Cal. 353=34 C.W.N. 839=131 Ind. Cas. 562.

——S. 11—Cross-appeals—Second appeal from one decree—No res judicata.

Both parties appealing against trial Court's decision—One appeal allowed and the other dismissed—Second appeal filed against one appellate decree only—Other unappealed decree does not bar hearing of the second appeal. 50 All. 517=26 A.L.J. 258=113 Ind. Cas. 93=A.I.R. 1928 All. 274.

——S. 11—Connected appeals—Abatement of one of them—No res judicata.

In the first Court the suits were tried together. Appeals were filed in both the suits, but one of the appeals having abated, no decision on merits was given by the appellate Court.

Held, that on account of the appeal in the connected case having abated, the matters were never finally decided by the appellate Court, the abatement should not, therefore, operate as *res judicata*. A.I.R. 1927 Lah. 289 (F.B.) and A.I.R. 1927 Lah. 1, Foll. 109 Ind. Cas. 564.

——S. 11—Cross-suits—Appeal only in one of them—No res judicata.

Two suits by husband and wife against each other, tried together and disposed of by one judgment—Two decrees prepared—Appeal by husband against the decree in his own case—Unappealed decree does not operate as *res judicata*. 9 L.L.J. 526=105 Ind. Cas. 850=A.I.R. 1927 Lah. 821.

——S. 11—Where it appears to an appellate Court that there are two decrees arising out of two suits heard together or raising the same question between the same parties, or arising out of two appeals to a subordinate appellate Court, and only one of such decrees is brought before it in appeal, and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred either by the rule of *res judicata*, or at all, by reason of his failure to appeal from the decree which does not prejudice him. A.I.R. 1923 All. 490 and 15 O.C. 22, Foll. 4 O.W.N. 297=102 Ind. Cas. 171=A.I.R. 1927 Oudh 575.

——S. 11—Connected pre-emption suits—Both dismissed—Appeal in one with appealing in another—No res judicata.

Suit for pre-emption by *A* and *B*—*A's* suit dismissed by drawing lots, *A* and *B* having equal rights—Subsequently *B's* suit dismissed, sale being not liable to pre-emption—*B* can succeed in appeal without appealing against dismissal of suit against *A*. 4 O.W.N. 143=100 Ind. Cas. 450=A.I.R. 1927 Oudh 106.

——S. 11—Cross suits—Suits consolidated and one judgment delivered in both the suits, but two decrees framed—Appeal from one of the decrees only—No appeal from the other decree—Appeal is not barred by res judicata.

Two widows *A* and *B* were jointly in possession of certain land. Each sued the other for declaration that she (the plaintiff) was the exclusive owner of that land and that the other (defendant) had no right in it of any kind. Both suits were disposed of by a single judgment which decided that *A* was the owner but that *B* was entitled to hold possession of half the land in lieu of maintenance. A separate decree was drawn up in each suit declaring the rights of the plaintiff according to that decision. *B* appealed against one of these decrees only, namely, the decree given in the suit in which she was the plaintiff.

Held (per *Full Bench, Dalip Singh, J., dissenting*), that the fact that no appeal had been preferred by *B* against the decree in the other suit of *A*, could not prevent *B's* appeal from proceeding.

Held, further, that there could be no bar to the hearing of cross-objection filed by *A* pressing her claim to exclusive possession. 85 P.R. 1905 (F.B.): A.I.R. 1926 Lah. 458; 33 Cal. 1001 (F.B.); 29 Mad. 333 (F.B.) and A.I.R. 1923 All. 490 (F.B.), Appr.; 33 All. 51, Disappr.

Tek Chand, J.—S. 11 applies to suits and not to appeals. But the general principles of *res judicata*

will apply to appeals, and in applying these general principles, the Courts are not hampered by any technical rules of interpretation such as govern the applicability of a statute. Courts should ascertain the *raison-d'etre* of the doctrine and then apply to it the facts of particular case, unfettered by technicalities. It is the spirit of the law and not its letter which is to be the governing factor, the soul of the rule rather than its outward form. The essence of the rule is that the two proceedings should be so independent of each other that the trial of one cannot be confused with the trial of the other. Where two suits, having a common issue, are, by consent of parties or by order of the Court, tried together, the evidence being written in one record and both suits disposed of by a single judgment, it cannot be said that there have been two distinct and independent trials. The test is whether the Judge has applied his mind to the decision of the issue involved in the two suits twice or whether there has been in reality but one trial, one finding and one decision. *Res judicata* is either estopped by verdict or estoppel by judgment (or record) and there is no such thing as estoppel by decree. The determining factor is not the decree but the decision of the matter in controversy. Where the same property is the subject-matter of two contemporaneous suits between the same parties, in which common issues are involved, and the two suits are tried together and disposed of by a single judgment but two decrees are prepared and an appeal is preferred against one decree only, the Court must be presumed to have consolidated the two suits and passed one judgment and the fact that there is an unappealed decree will not create an estoppel against the hearing of the appeal. The estoppel in such a case would not be created by the decree. It could only be created by the judgment. Further, no anomaly or embarrassment in execution proceedings is likely to arise by there being two conflicting decrees on the records of the Court, for it is well settled that if two or more conflicting decrees happen to be passed regarding the same property in two different proceedings, it will be the last one which will prevail. 8 Lah. 384=104 Ind. Cas. 849=A.I.R. 1927 Lah. 289 (F.B.), overruling.

(1) 4 L.L.J. 344=A.I.R. 1921 Lah. 271.
(2) 3 Lah. 215=A.I.R. 1922 Lah. 390.

——S. 11—Connected pre-emption suits—Dismissal of one of them—Failure to appeal—Appeal in other suits not barred.

Where rival pre-emptors sue for pre-emption and the suit of one of them is dismissed, the failure on the part of the vendees or the remaining pre-emptors to appeal from the decree does not debar them from appealing against the decrees passed in their own suits. 101 Ind. Cas. 518=A.I.R. 1927 All. 540.

——S. 11—Connected appeals—Appeals from preliminary and final decree—Dismissal of latter for want of prosecution—No res judicata.

Where during pendency of appeal from preliminary decree in a mortgage suit an appeal from final decree was presented but was dismissed for want of prosecution:

Held, that the appellate Court is not, by such dismissal, debarred from granting, in the appeal before it, a relief inconsistent with the final decree. 36 All. 532 (F.B.). Foll. 48 All. 611=24 A.L.J. 769=96 Ind. Cas. 1=A.I.R. 1926 All. 665

——S. 11—Connected suits—Appeal filed against one decree—Not barred.

Where in two connected suits tried and decided together an appeal is filed against one decree but not against the other, the decree not appealed against is not *res judicata* and so does not affect the hearing of the appeal against the other decree. 29 Mad. 333, Foll. 92 Ind. Cas. 352=A.I.R. 1926 Mad. 378.

——S. 11—Two appeals in same suit—Two decrees passed—Second appeal filed from only one—Appellant not prejudiced by the other—Second appeal is not barred. 6 L.R.A. Civ. 222=87 Ind. Cas. 804=A.I.R. 1925 All. 488.

——S. 11—Connected appeals—Appeal filed in one of them—Parties to other appeal also impleaded—No res judicata.

Where a combined judgment was given in two appeals in the lower appellate Court and in the High Court only one appeal was filed against the judgment but it was filed by the principal parties and also the parties to the other appeal were impleaded and where it was objected that the omission to file a distinct appeal against the other appeal should cause the dismissal of the appeal in the High Court. *Held* that the objection was bad. 21 A.L.J. 465, Foll. 78 Ind. Cas. 1026=A.I.R. 1924 All. 834.

——S. 11—Decision in one not affecting decision in the other—Failure to appeal from one is no bar to appeal from the other. 83 Ind. Cas. 776=A.I.R. 1923 Lah. 8.

——S. 11—Finding on an issue—Whether res judicata—Companion suits—Appeal from a decree in one.

R filed a suit against *J* for a declaration that she was a joint owner with *J* of a plot. *J* at the same time filed a suit against *R* for an injunction, restraining *R* from flowing water over the same parcel of land on the ground of being the sole owner. *R* pleaded by way of defence joint ownership and as an alternative defence, *R* pleaded that she had a right of easement. The Judge who tried both suits together found, in *R's* suit, that *J* was the sole owner and dismissed the suit. In *J's* suit the Judge found that *R* had a right of easement and in consequence dismissed the suit. *R* who could not appeal from the latter decree as it was in her favour, appealed against the decree in her suit. It was argued for *J* that as *R* did not appeal against the decree in his suit, *R* had submitted to the finding in his suit that *J* was the sole proprietor of the suit land. *Held*: The Court having held in *J's* suit that *R* had a right of easement, the question of ownership of the land ceased to be substantially in issue so far as that (*J's*) suit was concerned. There is nowhere a right of appeal against a finding on an issue. The right of appeal given by C.P.C. is always a right of appeal against a decree. The finding on the issue of ownership in *J's* suit did not constitute *res judicata*. 20 All. L.J. 784=76 Ind. Cas. 618=A.I.R. 1923 All. 15.

——S. 11—Two decrees—Appeal from one only—No prejudice to appellant in unappealed decree—Appeal is not barred. 29 All. 730, Foll.; 21 A. L. J. 465=74 Ind. Cas. 411=45 All. 506=4 L.R. A. Civ. 265=A.I.R. 1923 All. 490 (2) (F.B.); Overruling (1) 1908 A.W.N. 211; (2) 33 All. 151;

(3) 9 Ind. Cas. 67; (4) 35 All. 187; (5) 18 A.L.J. 40.

——S. 11—Cross suits—Appeal only in one of them —No res judicata.

Where a suit was filed to recover money on accounts and the defendant having subsequently filed another suit against the plaintiff the two suits were consolidated and the plaintiff's suit was decreed and the defendant's suit was dismissed and the defendant preferred an appeal as against the decree in the plaintiff's suit only. *Held*, that the failure to appeal as against the decision in the other connected suit did not operate as a bar.

Per *Graham, J.*, that the decision in the defendant's suit was not a decision in a former suit within the meaning of S. 11, Explanation 1. 34 C.W.N. 839=A.I.R. 1931 Cal. 353=131 Ind. Cas. 562.

——S. 11—Connected suits—Two decrees—One decree becoming final—Appeal from the other not barred.

Where there are two connected suits between the same parties and the lower court dismissed both, the plaintiff is not precluded from appealing from the decree in one suit simply because he has allowed the decree in the other to become final. 41 All. 54=47 Ind. Cas. 837=16 A.L.J. 782.

——S. 11—Connected suits—Small cause and original suit tried together—Appeals in both suits dismissed—Second Appeal in plaintiff's suits not barred.

Where a small cause suit and an original suit were both tried together and two separate appeals filed against the decree were both dismissed and a second appeal was filed against the decree referring to the original suit: *Held*, that the appeal lies even if no appeal was preferred against the decree in the other suit. 133 P.W.R. 1918=46 Ind. Cas. 545=62 P.L.R. 1918.

——S. 11—Cross-appeals—Appeal against judgment in one—Right to question other decree.

Where both the parties to a suit appeal and both appeals are decided by a single judgment and one of them filse a second appeal from the decree which not only dismissed the appeal but embodied the result of the rival appeal the appellant is not precluded from impugning findings against him embodied in the rival decree though he has not filed through a *bona fide* mistake, a copy of the rival decree. 85 P.W.R. 1916 =33 Ind. Cas. 742=84 P.R. 1916.

——S. 11—Connected suits—Two decrees—Appeal against only one of them not barred.

Where two suits regarding same subject-matter are tried on the same evidence and separate decrees are drawn up though judgments follow closely each other, an appeal against one of the decrees is not barred by a failure to appeal against the other under S. 11 C. P. C., 29 Mad. 333 (F.B.), foll. 31 Ind. Cas. 216=20 M.L.J. 551.

——S. 11 (S. 13, Old Code)—Cross-suits—Suit by tenant to compel landlord to tender patta—Suit by landlord to compel acceptance of patta—Decisions in both suits against tenant — Appeal by tenant against one only—Effect.

An appellate tribunal is not precluded from dealing with a question which comes before it on appeal, because an inferior Court had given a decision upon the same facts in a case other than the one under appeal between the same parties and at the same time as the decision in the case under appeal. A tenant sued the landlord to compel them to grant a patta; subsequently the landlord sued the tenant for enforcement of acceptance of the patta tendered by him for the same fasli. The tenant's suit was dismissed and the landlord's suit was allowed. The tenant appealed only against the decision of the Court in the suit brought by him.—*Held*, that the failure of the tenant to appeal against the decision in the suit brought by the landlord did not preclude the appellate Court from disposing of the appeal preferred by the tenant on the merits. The proper course is to have allowed the appellant to amend his memorandum of appeal so as to make it an appeal in both suits. 16 M.L.J. 63=29 M. 333 (F.B.).

——S. 11 (S. 13, Old Code)—Cross-suits between the same parties involving same issue tried together —One judgment—Appeal in one only—No res judicata on common issue.

Per *Harrington* and *Ghose, JJ.*, (*Ranpini, J.*; dissenting). Where one judgment disposes of one issue which has been raised in two suits (between the same parties and tried together and a single judgment delivered) it would be an anomaly to hold that the party against whom the issue is decided cannot question the judgment unless he files two appeals against it. A Mahomedan died leaving two widows *M* and *J*. Both brought suits for dower. *M* claimed certain houses to be her own and consequently not liable for the dower, *J* said they belonged to the husband and an issue was raised as to the ownership of the houses. Both suits were tried together and a single judgment was delivered, holding that the houses belonged to *M*. *M* got a decree for half the sale properties of all items except the two houses. *J* got a similar decree. *J* apppealed from the decree in her suit only.—*Held*, that the fact that there was no appeal in the other suit did not operate as *res judicata*. (1906) 10 C.W.N. 934=4 C.L.J. 149=33 C. 1101.

——S. 11 (S. 13, Old Code)—Connected suits—Several suits for pre-emption—Dispute as to amount of sale price—Single judgment—Appeal against decree in one suit only—No res judicata.

Where with regard to the sale of certain property three suits for pre-emption were instituted all questioning the amount of the price and they were disposed of by one judgment awarding to the different sets of plaintiffs' separate shares in the property on payment of proportionate amounts of the sale consideration which was put at a much lower figure than that claimed by the vendees, and the vendees preferred an appeal against the decree in one of the suits: *Held* that the decree not appealed against did not operate as *res judicata* on the question of the sale-consideration. (1902) 1 A.L.J. 466.

——S. 11—Cross-appeals—Second appeal against one of two decrees in cross appeals—No res judicata.

If second appeal is preferred against one of two decrees made in two cross appeals decided by a single judgment and the matter at issue in the second appeal was not directly and substantially in issue in

the other appeal, there was no final decision of the question which would operate as *res judicata* against the hearing of that appeal. 21 Ind. Cas. 264.

7. (c) Appeal and cross-objections—Common judgment—Single second appeal—Res judicata.

——S. 11—Connected cases—Common judgment in appeal and cross-objections—Single second appeal though two decrees—No res judicata.

The cross-objection which was filed in an appeal was by mistake numbered as a separate appeal. The appeal and the cross-objection were disposed of by the Court by only one judgment. A separate decree was, however, prepared in respect of the cross-objection. The unsuccessful party preferred a second appeal challenging the entire decree of the Appellate Court but no separate appeal was preferred against the dismissal of the cross-objection:

Held, that the second appeal being in form and substance against the entire decree was not barred by the principle of *res judicata* on the ground that a separate appeal had not been filed against the dismissal of the cross-objection. A.I.R. (Vol. 29) 1942 Oudh 335=1942 O.W.N. 184=200 Ind. Cas. 172=17 Luck. 702.

——S. 11—Cross-objections dismissed — Appeal filed on same points not barred.

Where the cross-objections filed by one party were dismissed without going into the merits of the case on the ground of their being filed after the dismissal the appeal and an appeal was filed on the same points as the cross-objections.

Held, that the appeal was not barred. 22 A.L.J. 365=78 Ind. Cas. 677=5 L.R.A. Civ. 298=A.I.R. 1924 All. 867.

7. (d) Connected reliefs—Appeal against one—Res judicata.

——S. 11—Connected reliefs—Decrees declaring title to and for possession of properties—Both reliefs depending on same facts—Appeal against decree declaring title—Failure to appeal against decree for possession—Res judicata.

Where a decree in a suit awards two reliefs, namely, declaration of title to immovable property and possession thereof, the right to both reliefs depending on the same facts, but the unsuccessful party appeals only against the decree declaring title but not against the decree for possession, the appeal against the decree for possession would not be maintainable. So long as the decree for possession remains in fact, it would operate as *res judicata* to prevent the appellant from challenging the decree for declaration of title. 227 Ind. Cas. 172=13 B. R. 20=12 Cut.L.T. 10=A.I.R. 1946 Pat. 408.

8. Co-plaintiffs and co-respondents.
(a). Co-plaintiff.
(b) Co-respondent.
8. (a) Co-plaintiff.

——S. 11—Co-plaintiffs—Res judicata between—Conditions.

As between parties arrayed on the same side in the previous litigation, whether as co-plaintiffs or as co-defendants, a matter can be *res judicata* only if in the previous suit there was a matter directly and substantially in issue between the co-plaintiffs or the co-defendants and an adjudication upon that matter was necessary to the determination of the suit. It is well settled that unless there is an active contest between the parties arrayed on the same side in the previous suit, a decision with regard to which contest is necessary for the final determination of the matter in controversy in the suit, any decision given in the previous suit cannot operate as *res judicaat* between them or between parties claiming through or under them in any subsequent suit. A.I.R. 1948 Lah. 195.

——S. 11—Co-plaintiffs—Res judicata—Conditions of.

The rule of *res judicata* will not apply as between co-plaintiffs unless there is a conflict of interest among the co-plaintiffs and a judgment defining the real rights and obligtions of the plaintiffs, *inter se;* further the adjudication *inter se* between the co-plaintiffs should be necessary to give appropriate relief to the defendants. 5 I.A. 87; 58 I.A. 158; 59 I.A. 247; 62 I.A. 224; 36 Bom. 207, followed. 28 Pat. 814.

——S. 11—It cannot be denied that an issue may be *res judicata* between co-plaintiffs as well as co-defendants, and although for an issue to be *res judicata* between co-plaintiffs, there must be a real contest between them yet when the interests of various plaintiffs are common and no question of adopting two conflicting positions as between themselves arises, the decision arrived at by the united efforts of all will bind them for ever, especially when the only person concerned in holding the opposite position has had a full fight. A.I.R. (Vol. 25) 1938 Lah. 571=40 P.L.R. 591=178 Ind. Cas. 302.

——S. 11—No rights of co-plaintiffs inter se decided—No question of *res judicata* can arise. 1937 O. W.N. 423.

——S. 11—A, a female inherited some watan and non-*watan* lands from her father—*A* died leaving behind her husband *B* and three daughters *C*, *D* and *E*—*B* obtained decree for recovery of *watan* lands on his own behalf and on behalf of daughters *C D* and *E*—Subsequently *C* married and sued her father for her one-third share:

Held, that the former suit by *B* did not operate as *res judicata* as against *C*, as it was not necessary in former case to decide the rights between daughters and the father *inter se*. A.I.R. (Vol. 20) 1933 Bom. 287=35 Bom.L.R. 418=57 Bom 458=145 Ind. Cas. 262 (2).

——S. 11—Co-plaintiffs—Res judicata between—Essentials.

Before there can be any *res judicata* between co-plaintiffs there must have been a conflict between them. That conflict should have been necessary for the decision of the previous case and an actual decision should have been given. A.I.R. (Vol. 20) 1933 Lah. 569=148 Ind. Cas. 484.

——S. 11—The main tests to be applied are whether there was active controversy between the plaintiffs and whether that adjudication was necessary to enable the Court to grant any relief against the defendants. 21 M.L.W. 551=90 Ind. Cas. 124=A.I.R. 1925 Mad. 645.

——S. 11—Where a partition of a co-sharer village took place and the present plaintiffs and defendant lambardar were on the same side and continued to be joint and co-sharers in the same mahal, even after the partition:

Held the rate at which the profits payable to the outgoing co-sharers was calculated in the partition proceedings is not *res judicata* as between the plaintiffs and defendant *inter se* in a subsequent action for share of profits. 42 All. 309, Foll. 83 Ind. Cas. 231=A.I.R. 1925 All. 246.

——S. 11—Where there is no conflict of interest between the co-plaintiffs, the decision cannot be held binding as *res judicata* on their successors. 1921 P.H.C.C. 369=70 Ind. Cas. 232=A.I.R. 1921 Pat. 218.

——S. 11—Co-plaintiffs—Decision when not res judicata.

In a suit by a firm against a debtor a joint decree was obtained against the debtor in favour of the plaintiffs who were declared to be co-partners. *Held*, that such adjudication of the co-partnership was arrived at only for the purpose of the defendant who was sued in that litigation and did not operate as *res judicata* in a suit between the co-partners so as to bar a finding that one of the co-partners has no title to any share in the partnership business. 17 Ind. Cas. 205=14 Bom. L.R. 854.

——S. 11—Co-plaintiffs—Res judicata between—Test of.

A point is not *res judicata* unless it is clear from the pleadings in the previous suit. A finding to become *res judicata* as between co-plaintiffs must have been essential for giving relief against the defendant. Where in the previous suit it was an insignificant matter for the defendant therein for the relief to be given against him whether the one plaintiff succeeded or the other plea of *res judicata* ought to be disallowed. 36 Bom. 207=14 Ind. Cas. 466=14 Bom. L.R. 128.

——S. 11—No decision on points not actively contested between co-plaintiffs is *res judicata* between them. 38 Ind. Cas. 213=(1917) M.W.N. 14.

8. (b) Co-respondents.

——S. 11—Co-respondents—Res judicata.

Where an issue has been raised and decided, it operates as *res judicata* in a subsequent suit between the parties on the same question if their interest was conflicting even if the parties were appearing on the same side in the prior case. A.I.R. (Vol. 21) 1934 Pat. 270=151 Ind. Cas. 70.

9. Directly and substantially in issue.

(a) "Matter in issue"—Meaning of.

See also C. P. CODE, S. 11—HEARD AND FINALLY DECIDED.

(b) Connected issues.
(c) Disposal on Preliminary issue.
(d) Final adjudication.
(e) Incidental finding.
(f) Issues specifically raised.
(g) Necessary finding.
(h) Question not decided.
(i) Question not in issue.
(j) Unnecessary finding.

9. (a) "Matter in issue"—Meaning of.

——S. 11—"Matter in issue"—Test.

The matter directly and substantially in issue between the parties has to be viewed from the three aspects: (a) The matter must consist of proposition of fact or law directly and substantially alleged by one party and either denied or admitted expressly or impliedly by the other. (b) Such a proposition has been, or might and ought to have been, directly and substantially the ground of defence or attack, in the sense that the plaintiff directly and substantially did allege or might and ought to have directly and substantially alleged the proposition to show a right to sue, or the defendant alleged it or might and ought to have alleged it to constitute his defence. (c) The matter so determined to be directly and substantially in issue must have been heard and finally decided. A.I.R. (Vol. 23) 1936 Bom. 402=38 Bom. L.R. 853=60 Bom. 1008=165 Ind. Cas. 987.

——S. 11—The phrase "matter directly and substantially in issue," which occurs in S. 11, Civil Procedure Code, must mean, according to Explanation 3 appended to the said section, that the matter above referred to, must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly by the other. A.I.R. (Vol. 22) 1935 Oudh 121=11 O.W.N. 1571=10 Luck. 561=153 Ind. Cas. 585.

——S. 11—Issue same, but cause of action and subject-matter different—Decision, if res judicata.

A decision arrived at in a previous suit is *res judicata* in a subsequent suit if the matter in issue is the same on both the previous and subsequent suits and have arisen out of the same title even if the subject-matter and cause of action are different. 224 Ind. Cas. 117=48 P.L.R. 195=A.I.R. 1946 Lah. 387.

——S. 11—Identity of subject-matter not relevant.

The rule of *res judicata* as embodied in S. 11 does not depend upon the identity of the subject-matter but it depends on the identity of the issues and in order to consider whether a previous decision is *res judicata* or not the substantial effect of what has been decided in the case has to be considered. A.I.R. (Vol. 20) 1933 Cal. 222=56 C.L.J. 369=143 Ind. Cas. 179.

——S. 11—"Matter in issue".

"Matter in issue" in S. 11 of the Code is distinct from the subject-matter and the object of the suit as well as from the relief that may be asked for in it and the cause of action on which it is based, and the rule of *res judicata* requiring the identity of the matter in issue will apply even when the subject-matter, the object, the relief and the cause of action are different. It is the matter in issue and not the subject-matter of the suit that forms the essential test of *res judicata*. 33 C.W.N. 876=57 Cal. 258 =A.I.R. 1930 Cal. 47.

——S. 11—Identity of—Subject-matter not relevant.

S. 11 only requires that the issue, and not the subject-matter of the suit, should be common. 25 M.L.W. 11=100 Ind. Cas. 40=A.I.R. 1927 Mad. 273.

——S. 11—For the application of the principle of *res judicata* it is not necessary that the subject-matter, in the sense of the property, involved in the two suits should be the same. 2 O.W.N. 430=12 O.L.J. 524=89 Ind. Cas. 282=A.I.R. 1925 Oudh 444.

——S. 11—S. 11 of the Code of Civil Procedure takes no note of the fact whether the cause of action is the same or different. The only matter for investigation is whether the matter directly and substantially in issue, has been directly in issue in a former suit between the same parties or between parties under whom they or any of them claim; and it is upon this investigation that the question of *res judicata* must, in each case be decided. 2 Pat. 772=74 Ind. Cas. 781=5 Pat. L.T. 7.

9. (b) Connected issues.

——S. 11—Several issues framed — Decision on issues which supports ultimate decision in case.

When several issues have been framed the decision on each issue which supports the ultimate decision in the case must be regarded as *res judicata* between the parties to the suit.

Where a decision to the effect that the *waqfs* were invalid, was a decision with regard to one of the issues which supported the ultimate decree to the effect that the plaintiff's suit should be dismissed, the decision is *res judicata*.

If a decision on an issue does not support the ultimate decree, such decision cannot operate as *res judicata* between the parties to the suit.

Hence a mere expression of opinion as to the invalidity of a *waqf* even if it can be regarded as finding cannot operate as *res judicata* in the defendant's favour when it does not support the ultimate decision that the declaration sought by the plaintiff with regard to the validity of the *waqf* should be refused. A.I.R. (Vol. 29) 1942 Cal. 1=I.L.R. (1941) 2 Cal. 434=73 C.L.J. 475=200 Ind. Cas. 822.

——S. 11—Where findings on two issues in a former suit tend to the same result and the decision therein proceeds on both the grounds, each finding may operate as *res judicata* but before a matter can be held to be *res judicata*, the finding in respect thereof should be certain and it must be clear that the decree in the previous suit was intended to be rested on that finding. A.I.R. (Vol. 22) 1935 Mad. 977=161 Ind. Cas. 800.

——S. 11—If there are two issues which had been determined in a suit and the decision of either of these issues was potent enough to defeat the plaintiff's whole suit, then it is open to the defendant in a subsequent suit to rely upon the previous decision on the one or the other of the issues and to ask the Court to throw out the then plaintiff's case as barred by *res judicata*. A.I.R. (Vol. 18) 1931 Lah. 335=32 P.L.R. 815=133 Ind. Cas. 641.

——S. 11—Although a finding upon an issue which is immaterial and unnecessary for the determination of the case may not have the force of *res judicata*, yet where the parties go to trial evidence is given and the Court at their invitation decides the points raised, a finding on one of the issues is conclusive between the parties in spite of the fact that it is only one of the several grounds on which the judgment was based and even if that issue had been decided the other way the decree would have been the same. 57 Cal. 872=A.I.R. 1930 Cal. 810=129 Ind. Cas. 310.

——S. 11—Decision based on two grounds.

If a decision is based on two grounds, both of them operate as *res judicata*. 31 M.L.J. 97=20 M.L.T. 284=(1916) 2 M.W.N. 96=4 L.W. 133=35 Ind. Cas. 266.

——S. 11—Several issues.

As regards questions raised and decided against a party, however numerous they might be, the estoppel of the judgment will apply to each point so decided as if it were the sole issue in the case. 21 Ind. Cas. 979=19 C.L.J. 34.

——S. 11—Decision based on more than one finding—Principle applicable.

Where in a prior suit the judgment is based on findings on two issues, one of which suffices to sustain the judgment, the decision on both the issues would be *res judicata* and the rule of logical priority is inapplicable. 2 I.A. 823, followed. 38 Mad. 158=21 Ind. Cas. 258=(1913) M.W.N. 775.

9. (c) Disposal on preliminary issue.

——S. 11—Previous suit disposed of an preliminary issue.

To apply S. 11, Civil P. C., it is necessary to see what is the matter directly and substantially in issue in the present suit. In judging whether or not a previous decision is a bar to a subsequent one, the Court must look to the matter directly and substantially in issue in both the suits and not to what was incidentally decided in the previous suit. Even if the matter which is not in dispute had been in dispute in the previous suit, the decision of that suit cannot operate as *res judicata* in the present suit if the previous suit is disposed of on a preliminary point. A.I.R. (Vol. 25) 1938 Oudh 54=1938 O.L.R. 19=1938 O.W.N. 126=1938 R.D. 219=172 Ind. Cas. 647.

——S. 11—Suit dismissed on preliminary point—Finding on merits—No res judicata.

Where a suit is dismissed on a preliminary point that the suit as framed is not maintainable, but a finding was recorded also on the merits, the decision would not operate as *res judicata* so far as the finidng on the merits was concerned because it was a decision on an unnecessary issue. 22 P.W.R. 1918=44 Ind. Cas. 983.

——S. 11—Disposal on preliminary point—Suit dismissed as time-barred.

Where a suit is dismissed as time-barred the dismissal does not operate as *res judicata* on the merits. 1 P.R. 1916=32 Ind. Cas. 485=206 P.W.R. 1915.

——S. 11—Disposal of suit on preliminary issue—Collateral issues, finding on, if would operate as res judicata.

Where a Court disposes of a case on a finding on a preliminary issue the findings on other collateral issues cannot be treated as final decisions operating as *res judicata* unless the decision on the preliminary

issue involves the decision of the other issues as well. 20 Ind. Cas. 266=16 O.C. 178.

9. (d) Final adjudication.

——S. 11—Suit between landlord and tenant—Question of title raised in issue and decided after evidence.

When parties to a litigation join issue upon a certain matter and adduce evidence and invite a decision by the Court, that decision will operate as *res judicata* and will not in any way be affected by the circumstance that the earlier suit was valued as a suit between a landlord and a tenant and not as a suit upon title. A.I.R. (Vol. 30) 1943 All. 340=1943 A.L.J. 437=I.L.R. (1943) All. 834=210 Ind. Cas. 420.

——S. 11—In order successfully to establish a plea of *res judicata* or estoppel by record it is necessary to show that in a previous case a Court having jurisdiction to try the question came to a decision necessarily and substantially involving the determination of the matter in issue in the later case. A.I.R. (Vol. 26) 1939 P.C. 133=5 B.R. 583=1939 A.W.R. 58=43 C.W.N. 677=1939 O.W.N. 543=1939 R.D. 285=50 L.W. 66=20 P.L.T. 523=1939 A.L.J. 564=(1939) 2 M.L.J. 98=41 P.L.R. 638=I.L.R. (1939) All. 460=1939 M.W.N. 894=66 I.A. 145=41 Bom.L.R. 1028=(1939) Kar. (P.C.) 199=70 C.L.J. 23=181 Ind. Cas. 211 (P.C.).

——S. 11—Decision independent of the issue raised possible.

When a matter directly and substantially in issue in a subsequent suit has been directly and substantially in issue in a previous suit and has been finally heard and decided between the same parties, the issue cannot be re-opened in a subsequent suit notwithstanding the fact that the previous suit could have been decided independently of the decision upon that issue.

A mortgagor brought a suit for possession of the mortgaged house against the mortgagee and his son *S* on the allegation that in a partition between the mortgagee and *S*, the mortgage-deed had fallen to the share of *S*, and he had paid the mortgage money to *S*. The suit was resisted by the mortgagee and it was pleaded that the mortgage-deed had not fallen to the share of *S* and so any payment made to him had not extinguished the mortgage and also that the mortgage had been foreclosed in favour of the mortgagee on account of the mortgagor agreeing that he would not redeem the property. The Appellate Court decided both the points in favour of the defendants and dismissed the suit. The mortgagor then brought another suit for redemption of the mortgage:

Held, that the fact whether the mortgage had been foreclosed or not was directly and substantially in issue in the former suit and the decision in the previous suit that the mortgage had been foreclosed in favour of the mortgagee operated as *res judicata*. A.I.R. (Vol. 29) 1942 Oudh 309=1942 O.W.N. 25=1942 R. D. 71=199 Ind. Cas. 509.

——S. 11—When a matter directly and substantially in issue in a subsequent suit has been directly and substantially is issue in a previous suit and has been finally heard and decided between the same parties, the issue cannot be re-opened in a subsequent suit notwithstanding the fact that the previous suit could have been decided independently of the decision upon that issue. A.I.R. 1924 P.C. 144, followed. 4 O.W.N. 307=101 Ind. Cas. 522=A.I.R. 1927 Oudh 625.

——S. 11—Findings not inconsistent with but not necessary for decree—Effect.

It is not the law that generally there is no *res judicata* where a plaintiff's suit is dismissed, on the findings in his favour. Under C.P. Code it is not necessary that a decision should be drawn up as a decree to constitute *res judicata*. Where the Court after a consideration of all the evidence in the case gives findings on all the issues, those findings will operate as *res judicata* though the suit itself disposed of on another point and though the findings might have been unnecessary for the disposal of the case, provided the findings are not inconsistent with the decree itself. 36 M.L.J. 641=25 M.L.T. 88=(1919) M.W.N. 7=52 Ind. Cas. 34=9 L. W. 180.

——S. 11—Decision on two or more grounds.

The matters that were in dispute between the parties, can be found by reference to the decree or the pleadings and the judgment. If a question was directly and substantially in issue in the previous case it will operate as *res juidcata* though decided on other grounds as well. 13 P.R. 1918=41 Ind. Cas. 479=122 P.W.R. 1917.

——S. 11—Obiter finding—Embodied in the decree.

Though a finding may be unnecessary to sustain the ultimate decision of the case still if it is embodied in the decree it will operate as *res judicata*. 43 Ind. Cas. 860=33 M.L.J. 740.

——S. 11—Construction of document.

It is well-established that a construction once placed on a document (including decree of a Court) by a competent Court before which the question was directly and substantially in issue is conclusive between the parties and it is immaterial that the property involved in the subsequent suit is not the same as that what formed the subject-matter in the first suit. 1937 M.W.N. 465 (2).

——S. 11—Time of dispossession of plaintiff directly and substantially in issue in prior suit.

Where the time at which the plaintiff was dispossessed is a matter directly and substantially in issue in connection with the question of limitation, and that was also a question directly and substantially in issue, in a case under S. 9, Specific Relief Act, between the same parties, litigating under the same title, in a Court competent to try the subsequent suit and a question which was finally decided by the Court:

Held, that the decision in the case under S. 9, Specific Relief Act, operated as bar by *res judicata* on this issue. A.I.R. (Vol. 20) 1933 Cal. 923=57 C.L.J. 549=37 C.W.N. 1148=60 Cal. 1171=147 Ind. Cas. 747.

——S. 11—Suit by reversioner to set aside alienation by widow—Issue of heirship specifically raised and decided—Subsequent suit by same person on inheritance opening by death of last female owner—Issue of heirship is res judicata.

If in a previous suit brought by a person claiming to be next reversioner on the ground of an illegal relationship it is held that there is no relationship between him and the deceased and on that finding the alienation made by the female owner was not declared as invalid against the reversioner, it will not be open to the same man when inheritance opens by the death of the last female owner who intervened between him and the last male owner, to contend that previous finding on the issue of heirship specifically raised and decided is not binding. Similarly, if the Court held that the alienation was invalid but refused a decree to the plaintiff on the ground that he was no reversioner it is not permissible for the same party to contend that he is the immediate heir when the last limited owner dies. But in such case if it is held that the plaintiff was the reversionary heir and on such a finding a decree is awarded that the alienation was not binding on the estate, it is not open to the defendant or a person claiming through heir to contend in the subsequent suit by the same reversioner, for possession on the death of last female owner that he was a stranger to the family. 10 P.L.T. 630=120 Ind. Cas. 292=A.I.R. 1930 Pat. 71.

——S. 11—Plaintiffs reversioners of last male-holder, sued for declaration that an adoption by the widow of the last male holder will not affect their reversionary rights. The question of plaintiffs' relation with the last male holder was raised and decided in the suit. Subsequently the widow made a gift of the property to another person and the plaintiffs again sued for declaration that the gift will not affect their reversionary interest.

Held, that the decision on question of plaintiff's relationship in the previous suit was *res judicata*. 59 Ind. Cas. 808=39 P.L.R. 1921.

——S. 11—Question of title—Decision in suit under S. 106, B. T. Act.

Plaintiff sued to recover possession of a tank with its banks on declaration of his title therein alleging that it was not the niskar property of the defendant but part of his *mal* property. The tank and its banks were recorded in the Record-of-Rights as held by defendant 1 in niskar right. The plaintiff had prior to this suit instituted a suit under S. 106 for correction of the entry alleging that it was his *mal* property but failed therein.

Held, that the decision in the suit under S. 106 operated as a bar to the present suit. 49 C.L.J. 285 =33 C.W.N. 623=120 Ind. Cas. 147=A.I.R. 1929 Cal. 385.

——S. 11—Title to malikana decreed.

Where plaintiff's title to malikana is decreed in previous suit, a denial of the title by the defendant in a subsequent suit is barred by *res judicata*. 40 Ind. Cas. 864=2 Pat. L.W. 64.

——S. 11—Redemption suit.

Any matter arising in a previous redemption suit which was dismissed for failure to pay decretal amount and decided in that suit, cannot be re-opened in a subsequent redemption suit. A.I.R. 1922 All. 377, Not Foll. 1929 A.L.J. 761=119 Ind. Cas. 525=A.I.R. 1929 All. 409.

——S. 11—A non-agriculturist purchasing property from a mortgagor—Suit for redemption before the expiry of the period—Dismissal of the suit principally on the ground of hollowness and fraudulent nature of the deed though other issues decided—Plaintiff suing again for redemption after expiry of the period—Suit was held barred by the rule of *res judicata*. 24 Cal. 900 and 38 Mad. 158, Foll. 30 Bom. L.R. 902=113 Ind. Cas. 155=A.I.R. 1928 Bom. 349.

——S. 11—Execution of certain kabulyat by defendant, a material issue in prior suit—Decision that plaintiff failed to prove the same—Admission in Kabulyat cannot be proved in subsequent suit.

Where the question whether the defendant executed a certain kabulyat in favour of the plaintiff was a material fact in issue in a previous suit and it was decided then that the plaintiff failed to prove the same there.

Held, that in a subsequent suit plaintiff is not entitled to prove and rely on admissions contained in the kabulyat. 97 Ind. Cas. 291=A.I.R. 1926 Cal. 1228.

——S. 11—Rent suit—Documents relied on held not proved—Subsequent suit on title.

Plaintiffs sued for rent on the basis of certain *Kabuliyats* said to have been executed by the defendants, as well as on certain *kobalas* and the defendants denied the relationship of landlord and tenant. The Court dismissed the suit holding that the documents relied on by plaintiffs had not been proved and that the plaintiffs were not landlords. In a subsequent suit by the plaintiff for declaration of their title and for recovery of possession. *Held*, that the suit was barred by *res judicata* because the documents found to have been not proved in the previous rent suit could not be set up in the subsequent suit. 49 Ind. Cas. 477.

——S. 11—Rent suit—Finding as to validity of kabuliyat.

The question whether the decision in a rent suit can operate as *res judicata* on matters other than the relationship of landlord and tenant, depends upon the issues raised and decided between the parties in the rent suit. If in a rent suit, a kabuliat has been held, on a judicial determination, to be valid and effective as against the tenant and to have been properly executed, a subsequent suit by the tenant for the declaration that the kabuliyat is null and void is barred. 47 Ind. Cas. 8.

——S. 11—Suit for rent for a certain year—Finding that patta was proper—If res judicata in subsequent suit for rent.

Where in a suit for rent against a tenant for a certain year the defendant pleaded that the *Patta* tendered was not proper and that the extent of the defendant's jeroyati land had been very much overstated, and the Court found the *patta* was a proper one the defendant was held estopped from raising the same plea that the extent of land mentioned in *patta* was wrong in a subsequent suit for rent for subsequent fasli because (1) the decision that the

patta was proper was an adjudication on the point now raised. (2) and this ground should be held to have been decided adversely to defendant as it was an available ground of attack or defence in previous suit. 37 Mad. 70=12 M.L.T. 500=23 M.L.J. 543 =17 Ind. Cas. 445=(1913) M.W.N. 1: [On appeal from 35 Mad. 216=21 M.L.J. 344=10 Ind. Cas. 75=10 M.L.T. 533.]

——S. 11—Rent suit—Construction of patta.

Where rent is capable of variation by contract, the decision in a previous suit is *res judicata* only to that extent that it raises a presumption that it remained the same in subsequent years. Where a document creating the relationship of landlord and tenant has been once construed that construction is *res judicata* for all time. If such a deed upon construction of which the rent for subsequent years depends, was not produced for the construction of the Court, the decision in default of that construction will be constructive *res judicata* as to the rate of rent. 4 Pat. L.W. 47=43 Ind. Cas. 753=(1918) Pat. 218.

——S. 11—Mortgage suit for sale decreed—Right to redeem—Res judicata.

The right to redeem is in issue in the mortgage suit for sale and is therefore *res judicata* when a decree in suit is obtained. The mortgagor cannot bring another suit for redemption. 25 Mad. 300, (F.B.) Foll. 49 Mad. 691=25 M.L.W. 258=96 Ind. Cas. 607=A.I.R. 1926 Mad. 816=50 M.L.J. 612. [Editorial Note. But *see* contra: A.I.R. 1925 Mad. 1191=86 Ind. Cas. 527].

——S. 11—Where a suit is brought by a person as the nearest reversioner against a rival claimant and he obtains a decree for possession of property and the rival claimant either during the pendency of the suit or soon afterwards redeems a usufructuary mortgage existing on the property in suit and obtains possession, the rival claimant, in a subsequent suit brought by himself, cannot raise the defence as against the plea of *res judicata* raised by the successful reversioner that the redemption having taken place subsequent to the institution of the previous suit the decision in that suit does not operate as *res judicata* because on the question of title the decision is clearly *res judicata* and the rival claimant cannot be allowed to go behind it by pleading the subsequent redemption for the simple reason that he had no title to redeem. 2 O.W.N. 710=90 Ind. Cas. 569= A.I.R. 1925 Oudh 607.

——S. 11—Where the plaintiff sued for his share of a certain amount deposited in Court on account of a mortgage decree in favour of two other persons, on the ground that he had purchased the whole rights of one of them,

Held, that he was not debarred from suing on the same ground for his share in sums that were subsequently deposited to the account of his vendor.

Held also, that the decree in the first suit would be *res judicata* so far as it decided about the grounds on which he claimed a share in the amounts deposited. 28 O.C. 2=84 Ind. Cas. 263=A.I.R. 1925 Oudh 303.

——S. 11—Interpretation of wajib-ul-arz.

The present plaintiff and defendant were parties to a previous suit in which they figured as rival pre-emptors. In that suit a certain interpretation of the *wajib-ul-arz* was adopted.

Held, that that interpretation was binding between the parties in the later suit in which one of them was the vendee and the other was the pre-emptor. 6 L.R.A. Civ. 296=88 Ind. Cas. 133=A.I.R. 1925 All. 663.

——S. 11—In the previous suit by the plaintiff under O. 21, R. 63 of the Code of Civil Procedure, *B* was added as defendant and after setting out the sale by the latter to the plaintiff, the plaint asked for a declaration that the properties belonged to plaintiff and were not liable for the decree in execution of which they were attached.

Held, that it cannot be said that the question was not in issue between the plaintiff and *B* merely by reason of the fact that *B* admitted plaintiff's claim, which was disputed successfully by the attaching creditor, and that the decision of the question against the plaintiff in the previous suit was *res judicata*. 85 Ind. Cas. 689=20 M.L.W. 979=A.I.R. 1925 Mad. 319.

——S. 11—Where a Court having the question before its mind decided that the issue did arise, that decision would be as much *res judicata* as the final determination of the issue on the merits. 33 C.L.J. 317=63 Ind. Cas. 161=A.I.R. 1921 Cal. 368.

——S. 11—If the matter was formerly in issue and has become *res judicata* a subsequent suit to agitate the same matter cannot be maintained, just as a defence raising the same issue cannot be maintained. A.I.R. 1921 P.C. 231.

——S. 11—Rent decree—Question of relationship of landlord and tenant.

A rent decree though only *ex parte* is *res judicata* on the question of the existence of the relationship of landlord and tenant between the parties. 54 Ind. Cas. 763.

——S. 11—Rent suit—Decision as to relationship of landlord and tenant—Suit for Khas possession by landlord.

A subsequent suit for khas possession is barred where in a previous suit for rent plaintiff's title as landlord was distinctly negatived by the Court. 40 Ind. Cas. 659.

——S. 11—Rent suit—Decision as to amount of rent—Relationship of landlord and tenant—Res judicata.

A decision as to the amount claimed in a rent suit operates as *res judicata* as an admission of the relationship of landlord and tenant. 25 Ind. Cas. 204.

——S. 11—Where in a previous suit by A against *B*, it was held that *B* was a tenant of *A*, a subsequent suit by *B* against *A* and *C*, a *pro forma* defendant for a declaration that *B* is not a tenant of *A* but of *C* is barred by *res judicata*. 20 Ind. Cas. 344 =18 C.W.N. 116.

——S. 11—Decree for rent—Existence of relationship of landlord and tenant—Res judicata.

A decree for rent operates as *res judicata* upon the

question of existence of the relationship of landlord and tenant between the parties. 10 Ind. Cas. 363.

——S. 11—Rent suit.

A decree for rent involves the question of the right of the plaintiff to recover and of the defendant's liability to pay rent to the plaintiff. It becomes *res judicata* in subsequent suit for rent. 12 Ind. Cas. 329.

——S. 11—Rent suit — Negation of title in prior suit—Subsequent suit after registering his name—Bengal Tenancy Act, S. 60.

Plaintiff sued defendants for rent as usufructuary mortgagee and the defendants pleaded that plaintiff was not entitled to sue inasmuch as his name had not been registered as mortgagee. The question of his title as mortgagee was also put in issue and was decided against him. In a suit for rent for the same period after registration of his name. *Held*, that the subsequent order was barred by *res judicata*, S. 60 of the B. T. Act had no application to the case inasmuch as the defendants denied the mortgage in favour of the plaintiff altogether. 44 Ind. Cas. 129=5 P. R. 1918.

——S. 11—Rent suit—Question of title.

If in a rent suit the defendant denied the relationship of landlord and tenant with the plaintiff on the ground that he himself was the owner of the property, the question as to title was directly and substantially in issue, but not where the defendant alleges title in a third person. 42 Ind. Cas. 785=1917 P. H. C. C. 311.

——S. 11—Directly in issue—Rent suit.

When an issue has been raised on a disputed point in a suit for rent and has been heard and finally decided the decision operates as *res judicata* in a subsequent suit. 16 C.L.J. 89=10 Ind. Cas. 382.

——S. 11—Rent suit—Rent for following years.

As regards rent suits the decision as regards the rent for one year precludes question as to rent for following years. 82 Ind. Cas. 990=A.I.R. 1925 Mad. 378.

——S. 11—Rent suit—Amount payable in issue—Decision, if res judicata for different period.

A suit for rent wherein the amount of rent annually payable is put in issue and finally decided. will operate as bar by *res judicata* in a subsequent suit for rent of the same holding for a different period. 42 Ind. Cas. 583.

——S. 11—Rent suit—Decision as to rent payable.

The case of *res judicata* may arise in a rent suit just as much as in any other suit and a decision as to the rate is *res judicata*. 41 Ind. Cas. 584.

——S. 11—Rent suit—Decision about annual rent payable, if bar.

Where in a suit for rent the question as to what rent is annually payable for the holding is directly raised and decided by the Court the decision operates as *res judicata* unless the rent had been subsequently changed. 40 Ind. Cas. 460.

——S. 11—Rent suit—Decree at certain rate.

In a previous rent suit, the issue was "At what rate is the plaintiff entitled to get rent". The first Court gave a decree at a rate between the rates alleged by the parties. The Appellate Court gave a decree at the rate admitted by the defendant. *Held*, that there having been no change of the conditions of the tenancy alleged, the rate at which the rent, was decided to have been payable in the former suit was *res judicata* in the subsequent suit. 16 Ind. Cas. 590.

——S. 11—Rent suit—Amount of rent payable—Res judicata—Test.

The question whether or not the decision in a suit for rent operates as *res judicata* upon the question of the amount of rent annually payable is dependent upon the scope of the issues raised and decided. If the question raised and decided relates to the amount recoverable for the particular years in dispute the decision has not the effect of *res judicata*. On the other hand if the question raised is as to the amount of rent annually payable, the decision clearly constitutes *res judicata*. 6 Ind. Cas. 860, followed. The tests are, whether the party who seeks to re-open the matter in controversy could with reasonable diligence have raised the matter, whether he had a fair opportunity to obtain an adjudication upon the matter, and, whether the question formed the proper subject of litigation in the previous suit. 16 Ind. Cas. 447=16 C.L.J. 41.

——S. 11—Rent suit—Rate of rent—Previous decision when bar.

In considering whether a previous decision in the previous suit as to the rate of rent payable is *res judicata* in a subsequent suit, it must be seen whether the decision in the former rent suit was given on an incidental or material point. 17 C.W.N. 76=16 Ind. Cas. 22=17 C.L.J. 71.

——S. 11—Rent suit—Decision as to rate in subsequent suit.

The controversy in a previous suit between landlord and the tenant was not the amount of rent payable for the particular years for which rent had been claimed, but the amount of *Jama* annually payable by the tenant to the landlord. The Court expressly found that the plaineiff had failed to prove, his allegation while the tenants (defendants) had established by affirmative evidence that the jamas were as stated by them. *Held*, that there was an express adjudication by the Court upon the question of the amount of rent annully payable and the decision in the previous suit must be deemed conclusive. 15 Ind. Cas. 863.

——S. 11—Rent suit—Scope of—Incidents of tenancy—Decision that Raikumat payable.

The decision in a rent suit may operate as *res judicata*, where it is upon a question as to the incidents of tenancy, not merely in relation to the claim for the particular year but from a wider point of view. *Raikumat* is legally recoverable if it is payable under a custom. A decision that *raikumat* was payable in a previous rent suit, involved by implication a decision that the *raikumat* claimed was payable under a custom, and the decision being upon a mixed question of fact and law, operates as *res judicata*. 15 Ind. Cas. 837.

——S. 11—Suit for possession—Defence of adoption set up—Finding that adoption not established—Subsequent suit by alleged adopted son.

A sued *B*, *C* and *D* for possession of land mort-

gaged to *C* by one *E*. The defence set up, ***inter alia*** was that *B* had been adopted by *E*. The Court found the adoption not established and decreed the cliams *B* thereupon sued *A*, *C* and *D* for possession on the ground that he was the adopted son of *E*:

Held, that the suit was barred by S. 11 of the Civil Procedure Code as in the previous suit the question of adoption was directly and substantially in issue between *A* and *B* and in that suit there was a real adjudication of the question of title as between the parties. 17 Ind. Cas. 365=309 P.W.R 1912.

——S. 11—Family Custom—Non-contesting branches of the family.

Where a custom in a family must be established or denied, and where every branch of the family has been carefully brought on the record, and where that custom has been the subject of contest and thoroughly threshed out in the presence of all branches of the family, the matter cannot again be raised by the descendants of those branches, though certain branches did not take an active part in the contest but were satisfied with admitting that the custom existed. 1 Pat.L.J. 221=36 Ind. Cas. 960 =2 Pat.L.W. 374.

——S. 11—Suit to enforce document—Document held in former suit to have no binding effect.

Where the suit was brought to enforce a document which was held is a former suit to have no effectual binding power over the estate in question and not to affect it in any way as between the parties, *held*, that the suit was barred by the rule of ***res judicata***. (1912) M.W.N. 73=11 M.L.T. 73=9 A.L.J. 165=15 C.L.J. 180=14 Bom.L.R. 177= 14 Ind. Cas. 463=16 C.W.N. 603 (P.C.).

——S. 11 (S. 13, Old Code)—Question directly in issue in previous suit—All available defences not raised—Res judicata.

Tho rule of *res judicata* applies where the question in the present suit was directly and substantially in issue in a previous suit, even though all the defences open to the party against whom the bar is sought to be applied were not raised in the previous suit. (1904) 1 C.L.J. 46=2 A.L.J. 237=27 A. 37 =32 I.A. 17 (P.C.).

9. (e) Incidental finding.

——S. 11—Transfer of mortgagee rights—Decision of transfer in mortgage suit, whether operates as res judicata in proceedings under S. 53, Provincial Insolvency Act.

T had a mortgagee right in a mortgagee. He obtained preliminary decree in the enforcement of the mortgage and transferred his rights under the decree in favour of *M*. The transferee thereupon applied for a final decree. During the pendency of the above-mentioned suit, *T* applied to the Insolvency Judge to be adjudged an insolvent. The Insolvency Judge declared him an insolvent. An Official Receiver made an objection to the application of *M* for the passing of the final decree on the ground that the transfer was fraudulent and without consideration. The Court dismissed the objection and passed a final decree as prayed by *M*. The Official Receiver thereafter applied to the Insolvency Court under S. 53, Provincial Insolvency Act, for a declaartion that the transfer was null and void against him. The Court granted the declaration asked for and held that the transfer was fictitious and without consideration and was made with the object of defrauding the creditors. On appeal, it was contended by *M* that the dismissal of the Receiver's objection in the final decree proceedings operated as ***res judicata*** to the proceedings under S. 53:

Held, that as the genuineness of the transfer by *T* in favour of *M* was not a question directly and substantially in issue in the suit on foot of the mortgage, the subsequent trial of this question by the Insolvency Judge was in no way barred. The question had arisen only incidentally. A.I.R. (Vol. 25) 1938 All. 555 =1938 A.L.J. 878=1938 A.W.R. 566=I.L.R. (1938) All. 800=178 Ind. Cas. 75.

——S. 11—Decision on incidental issue not res judicata.

Where it appeared that even if a decisoin on an issue in a prior rent suit had been decided in favour of the defendants in the rent suit, the Court was bound to decree the rent suit inasmuch as there was no dispute about the relationship of landlord and tenant and as to the rate of rent or of the period in arrears:

Held, that the decision in the rent suit on the point in controversy being a decision on an incidental and collateral issue, was not ***res judicata*** between the parties in a subsequent suit for declaration that lands in dispute constitute one *jama*. A.I.R. (Vol. 23) 1936 Cal. 772=62 C.L.J. 517=166 Ind. Cas. 1001.

——S. 11—Proceedings of Collector—Decision on incidental matter—Value.

The decision of an issue is **res judicata** only when the issue arose directly and not incidentally having regard to the subject-matter of the particular suit or proceeding.

Where, therefore, the Collector had given his decision in the course of a prior proceeding on an incidental issue also, but such issue arises in a subsequent suit, his decision cannot make it **res judicata** in the subsequent suit. But that decision is a piece of evidence under S. 13, Evidence Act, to which some weight must be given in the determination of the status of the two estates in relation to each other. A.I.R. (Vol. 22) 1935 Pat. 306 =14 Pat. 70=1 B.R. 777=157 Ind. Cas. 433.

——S. 11—Incidental decision—Value.

Though it is doubtful whether a decision on a point which is only incidental to the main decision in the case would operate as **res judicata** in a subsequent litigation, the finding would be of definite evidentiary value in the later proceedings. 1946 R.D. 257=1946 A.W.R. (Rev.) 50.

——S. 11—A matter which is res judicata cannot be agitated afresh merely by reason of a suggestion made in a judgment which was unnecessary to the decision of the case that the party may bring another suit. A.I.R. (Vol. 22) 1935 Pesh. 150= 158 Ind. Cas. 995.

——S. 11—Prior suit for ejectment—Later suit for redemption—Question of validity of gift indirectly in issue.

G, who was the uncle of **R**, executed a deed of gift in favour of **B** in January, 1918, in respect of a few plots of land. In April, 1919, the donee

made a mortgage of some of the plots in favour of R. Subsequently, B, relying on his title under the gift, sued for possession of the plots on the allegation that he had been wrongfully dispossessed of the same by R. The latter resisted the suit on various grounds. He denied the gift and its validity. The Court found that the execution of the gift was proved but that the donor was not competent to make the gift and dismissed the suit. In April, 1929, B executed a second mortgage of the plots in favour of D, the plaintiff, who sued for redemption of the prior mortgage. The defendant denied the prior mortgage and further alleged that even if it was proved, B had no right inasmuch as the gift by G in favour of B was incompetent

Held by Raza, J.—(on a difference of opinion between **Hasan, C. J.** and **Basheshwar Nath, J.**), that the decision in the previous suit relating to the invalidity of the deed of gift did not operate as **res judicata** in the later suit. A.I.R. (Vol. 18) 1931 Oudh 263=7 Luck. 73=8 O.W.N. 809=134 Ind. Cas. 465.

——S. 11—Incidental finding.

Decision under S. 149 (3), B. T. Act does not decide finally substantial rights of parties—Incidental decision on question of title does not operate as **res judicata**. A.I.R. 1927 Cal. 431=100 Ind. Cas. 427.

——S. 11—Some of the co-shebaits of a deity filed a suit against other shebaits for a scheme for the better management of the debuttar properties of the deity. One of the defendants denied the debuttar character of the properties.

Held, that the decision of the question of debuttar was only incidental to the suit, and did not amount to **res judicata**. 41 C.L.J. 396=88 Ind. Cas. 616=A.I.R. 1925 Cal. 996.

——S. 11—Probate case—Finding on question of distribution.

In a proceeding for grant of letters of administration, the question before the Court is one of representation to the estate and not of distribution and it is only for the purpose of determining the question of representation that the Court is called upon to decide whether the applicant would be entitled to the whole or any part of estate of the deceased within the meaning of S. 23 of the Probate and Administraton Act, and that such a finding is not **res judicata** in a suit in which the question of title to the properties has to be determined. 1918 P.R. 53, Foll.; 38 B. 309, Diss. 68 Ind. Cas. 671=11 L.B.R. 331=1 Bur.L.J. 59=A.I.R. 1923 Rang. 9.

——S. 11—Incidental finding—When res judicata.

In order that an incidental finding in one proceeding shall be **res judicata** in another, it is essential that the issue in the second proceeding should have been raised and decided clearly in the first. 14 M.L.W. 702=69 Ind. Cas. 570=1921 M.W.N. 754=A.I.R. 1921 Mad. 694=41 M.L.J. 437.

——S. 11—Obiter dictum.

Observation not arising out of the issues which were before the Court for decision are not binding as **res judicata**. 22 A.L.J. 866=5 L.R.A. Civ. 697=84 Ind. Cas. 631=47 All. 17=A.I.R. 1924 All. 884.

——S. 11—Obiter dictum.

A mere expression of opinion in a judgment as to the validity of a mortgage would not be **res judicata** as between the parties if the validity of the mortgage was not a matter in issue in the previous litigation. 4 Pat.L.J. 682=52 Ind. Cas. 338=(1919) Pat. 343.

——S. 11—Obiter dictum.

To constitute **res judicata** the matter must be directly and substantially in issue in a former suit. **Obiter dicta** will not constitute the matter **res judicata** in a subsequent suit. 40 Ind. Cas. 820=(1917) M.W.N. 327.

——S. 11—Obiter.

A decision on a point not substantially in issue in a suit cannot operate as **res judicata** in any latter suit in which it may be substantially in issue. 5 Bur.L.T. 199=17 Ind. Cas. 860=6 L.B.R. 93.

——S. 11—Incidental observation—Not res judicata.

Where the decree could be sustained independently of the findings on a particular point and there is no decision against a party in a former litigation the finding cannot become **res judicata**. 4 Lah.L.J. 376=A.I.R. 1921 Lah. 296.

——S. 11—Incidental finding of Revenue Court—Question of title—Madras Estates Land Act, Ss. 56 and 189 (3).

When in a suit to enforce acceptance of pattah under S. 56 of the Madras Estates Land Act the Revenue Court decided that the relationship of landlord and tenant exists between the parties, the decision is not **res judicata** in a subsequent suit for ejectment in the Civil Court between the same parties. Neither S. 11 of the C. P. Code nor S. 189 (3) of the Madras Estates Land Act makes an incidental decision of the Revenue Court on a question of title binding on the Civil Court. 43 Mad. 859=1920 M.W.N. 639=12 M.L.W. 512=60 Ind. Cas. 700=28 M.L.T. 359=39 M.L.J. 476.

——S. 11—Question of title decided incidentally.

Where in a rent-suit the question raised is whether the defendant is liable for the rent claimed, and the question of title is decided incidentally, that decision does not operate as **res judicata** in a subsequent suit for declaration of title and recovery of possession. 63 Ind. Cas. 762 (Cal.).

——S. 11—Rent suit—Title—Incidental decision.

The question of title incidentally gone through in a rent suit, does not operate as **res judicata**. 50 Ind. Cas. 598.

——S. 11—Rent suit—Incidental determination of title.

An incidental determination of an issue of title in a suit for rent is not a bar to any issue of title being raised subsequently. 34 Ind. Cas. 123.

——S. 11—Incidental finding.

An incidental finding as regards boundary of a plot in a previous suit is not **res judicata** as regards the question of title of that strip. 32 Ind. Cas. 738.

9 (f) Issue specifically raised.

——S. 11—Predecessor of party himself inviting and accepting jurisdiction—Jurisdiction, if can be questioned.

Where the predecessor of the party himself has instituted the suit and invited and accepted the jurisdiction of the Munsif he cannot subsequently be heard to plead that the Munsif had no jurisdiction. A.I.R. (Vol. 30) 1943 All. 340=1943 A.L.J. 437=I.L.R. (1943) All. 834=210 Ind. Cas. 420.

——S. 11—Matter in issue by implication—Application of doctrine of res judicata—Function of Court.

In order to determine whether a particular issue or matter is **res judicata**, the Court can only look at the pleadings, the judgment and the decree. It is, of course, not necessary that before a matter can be said to be **res judicata**, it should form the subject-matter of a definite issue. If the Court can gather from the materials before it, namely, the pleadings the judgment and the decree, that that matter was directly and substantially in issue and formed the basis of the judgment arrived at in the earlier suit, either expressly or by necessary implication, then the principle of **res judicata** would apply. It is difficult to lay down a hard and fast rule as to what matters can be said to be arising directly and substantially. The Court can only look at the manner in which that particular matter is dealt with by the parties themselves having regard to the course of the litigation, and the conduct of the parties and the manner in which the Court itself has dealt with it. Where it is impossible to show for want of proper materials as to whether an issue was raised and heard and finally disposed of, or whether it formed the basis of the decree, then, of course, the party, putting forward the contention based on the principle of **res judicata** must fail the burden obviously being upon him. A.I.R. (Vol. 25) 1938 Bom. 291 =40 Bom.L.R. 359=175 Ind. Cas. 866.

——S. 11—Even if a particular matter be not included in a formal issue, if it is directly and substantially in issue between the parties, and if there be a decision thereon, it will operate as **res judicata**. 30 C.W.N. 873=97 Ind. Cas. 73=A.I.R. 1926 Cal. 1022.

——S. 11—Rent suit—Express issue as to title not raised—Evidence taken.

The question of **res judicata** is one of substance and not of form: where the issue raised in the subsequent suit is substantially the same as that in the previous suit though not formally raised, the subsequent suit will be barred by **res judicata**. Where the Lakhiraj title set up by a person was negatived in a prior rent suit which was decreed, he cannot sue again for declaration of that title. 20 Ind. Cas. 700.

——S. 11—Issue not framed—Findings.

The finding on an evidentiary matter directly and substantially in issue though not covered by the issues in the suit will be **res judicata** in a future suit relating to the same matter. 18 Ind. Cas. 102=(1913) M.W.N. 858.

——S. 11—Whether assertion becomes claim.

A bare assertion in a plaint is not a claim. An assertion becomes a claim when the plaintiff prays expressly or impliedly for the Court's decision upon it. An assertion may become a claim if the defendant treats it as such by denying it and inviting the Court's decision thereon. A.I.R. (Vol. 28) 1941 Cal. 574=198 Ind. Cas. 462.

——S. 11—Party inviting decision on point.

Where the party himself has invited a decision, on the decision being adverse to him, he cannot turn round and impeach it on the ground that it was premature: A.I.R. (Vol. 23) 1936 Nag. 203: I.L.R. (1938) Nag. 1=165 Ind. Cas. 480.

——S. 11—Party inviting decision on issue.

Obiter: If a party invites the decision of the Court on an issue, he cannot afterwards avoid the consequences of the decision even though a decision on the issue was not necessary for the decision of the case. A.I.R. (Vol. 19) 1932 Lah. 421=33 P.L.R. 261=139 Ind. Cas. 676.

——S. 11—Points not raised in pleadings but in issues—Decision.

Where a point is not properly raised by the plaint, but both parties have without protest chosen to join issue upon that point, the decision on the point would operate as **res judicata** between the parties. A.I.R. (Vol. 19) 1932 P.C. 50= 35 L.W. 222=62 M.L.J. 221=36 C.W.N. 365= 1932 M.W.N. 284=34 Bom.L.R. 508=55 C. L.J. 411=136 Ind. Cas. 412 (P.C.).

——S. 11—Issue raised by parties even improperly and decided is **res judicata**. A.I.R. 1924 P.C. 144 and 28 All. 727 (P.C.) Foll. 102 Ind. Cas. 28=A.I.R. 1927 All. 803.

9. (g) Necessary finding.

——S. 11—Additional and supplemental grounds for decision.

Every one of the several findings gives rise to the bar of **res judicata** where each of them constitutes an additional and supplemental ground for the disposal of the suit. A.I.R. (Vol. 31) 1944 Oudh 321=1944 A.W.R. 214=1944 O.W.N. 308 =20 Luck. 64.

——S. 11—The finding which is the real ground of decision in the case operates as **res judicata** even though there may have been other issues on which the case might equally well have been decided. 5 O.L.J. 647 and A.I.R. 1924 P.C. 144 Foll. 12 O.L.J. 248=88 Ind. Cas. 985=2 O.W.N. 292= 29 O.C. 93=A.I.R. 1925 Oudh 390.

——S. 11—Decision of collateral issue not unnecessary to case.

Where the decision of a collateral issue in the previous suit was by no means unnecessary for the purposes of that case and the same question was subsequently agitated in a later suit, held that the suit was barred by **res judicata**. 1930 A.L.J. 1309.

——S. 11—A judgment operates by estoppel as regards all the findings which are essential to sustain the judgment: A.I.R. 1921 Cal. 750, Foll. 10 P.L.T. 630=120 Ind. Cas. 292=A.I.R. 1930 Pat. 71 .

——S. 11—Section 11, though not exhaustive, is binding as far as it goes, and, according to that section there is no bar of **res judicata** unless there is a final decision. A finding in the former suit in order to have the authority of **res judicata** must have been necessary to the determination of that suit. A.I.R. 1927 Lah. 804=102 Ind. Cas. 22.

——S. 11—Directly in issue—Finding of fact.

A finding of fact must be material and necessary for the decision of the suit in order that it may operate as **res judicata**. 33 Ind. Cas. 159.

——S. 11—Directly and substantially in issue—Test of.

The test of **res judicata** is to see if the issue in the previous suit was one on which the judgment was based quite apart from the question whether the decision itself would be affected by the matter being reopened in a latter suit or whether it could not logically be based on a different finding. 26 Ind. Cas. 873.

——S. 11—Necessary finding—Test.

A useful test for considering whether a finding is necessary for the decision of a case, is to see whether an appeal would lie against that finding, 10 P.L.T. 630=120 Ind. Cas. 292=A.I.R. 1930 Pat. 71.

——S. 11—Necessary decision—Test.

It depends upon the facts and circumstances of each case whether an issue, which logically may be unnecessary for the decision of a case, is or is not sufficient to constitute **res judicata** in the legal sense; it is for the Court, which decided the original suit to decide what was necessary to be decided for the purposes of that suit. And if a Court has chosen to decide more than what logically may be necessary, for the purposes of the suit its finding may none the less be **res judicata**. 31 P.L.R. 406=A.I.R. 1930 Lah. 690.

——S. 11—Necessary finding—Test.

If an issue has been directly raised and decided, and is not manifestly incidental or irrelevant, the Court which is considering whether that decision amounts to **res judicata** should not import nice questions as to whether the issue had been absolutely necessary to the determination of the suit; it is sufficient to find that the Court and the parties thought so and proceeded on that assumption. 25 M.L.W. 797=103 Ind. Cas. 90=A.I.R. 1927 Mad. 643.

——S. 11—Where in a case there are two findings either of which would in law be sufficient to dispose of the case, that one which in the logical sequence of necessary issues should have been first found rendering the determination of the other issue unnecessary is the finding which operates as **res judicata**. 9 Ind. Cas. 983=8 A.L.J. 409.

——S. 11—Necessary finding—Finding not made basis of decree—Res judicata.

In order that a decision in a previous suit on an issue should operate as **res judicata** it is not necessary that the decision of the issue should have been the basis of the decree. It is enough that the issue had been finally heard and determined and that it arose directly and substantially (and not incidentally or collaterally), for determination i.e., that it was necessary for the determination of the suit though it may not have been ultimately made the basis of the decree. If the determination of the issue is inconsistent with the decree, it cannot be said that it was necessary for the determination of the suit, and such a finding will be treated as unnecessary and will not operate as **res judicata**. It matters not that the defendant is described as **pro forma** defendant if there was a real contest, and if the contest was opened by defendant and not the plaintiff. 85 Ind. Cas. 953 =A.I.R. 1925 Cal. 985.

——S. 11—Finding not basis of decree.

In the previous suit, the plaintiff sued the defendants in ejectment as trespassers and the latter pleaded that neither the plaintiffs nor the predecessor-in-title were owners of the property and the defendants were usufructuary mortgagees from some third persons, the real owners. Both the lower Courts found against the defendant but plaintiff's suit was dismissed on the ground that the mortgagee was plaintiff's predecessor. In the present suit for redemption the defendant pleaded that the finding in the prior suit that they were mortgagees from the plaintiff's predecessor was not **res judicata**.

Held, that the finding was **res judicata** though it was not the basis of the decree. 60 Ind. Cas 397=12 L.W. 277.

——S. 11—Necessary finding—Absence of reference to it in judgment immaterial.

Where the plaintiff had excluded certain question by the statement of his pleader and the first Court had therefore expressly stated that it could not decide it but the defendant expressly urged in appeal that the Judge was wrong in not deciding that question even though his action was based on the plaintiff's adviser's statement and he asked the lower appellate Court expressly to decide it and the Court did decide it.

Held, that the question was necessary for the decision of the suit and therefore the decision thereon operated as **res judicata**. It was immaterial that the Court did not refer to that question in its judgment. 26 Bom.L.R. 651=80 Ind. Cas. 827=51 Cal. 631=35 M.L.T. 169=51 I.A. 293=23 A.L.J. 76=5 L.R.P.C. 137=29 C.W.N. 34=20 M.L.W. 770=1924 M.W.N. 723=6 P.L.T. 750=3 Pat.L.R. Civ. 193=A.I.R. 1924 P.C. 144=47 M.L.J. 23.

——S. 11—Doctrine of res judicata—Applicability to facts and grounds of earlier decision.

The doctrine of **res judicata** applies not only to the actual decision in the case but also to the facts and grounds for that judgment pleaded by the parties Anything which is admitted and which is fundamental to the decision of the earlier suit is also part of the **res judicata** created by the judgment. I.L.R. (1948) Nag. 747=A.I.R. 1948 Nag. 358.

——S. 11—Necessary findings—Res judicata—Scope of.

An estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or ground work in other words, a judgment ope-

rates by way of estoppel as regards all the findings which are essential to sustain the judgment, though not as regards findings which did not form the basis of the decision or were in conflict therewith. A. I. R. 1924 Cal. 600, Foll. 43 C.L.J. 501=95 Ind. Cas. 1011=A.I.R. 1926 Cal. 1003.

——S. 11—Necessary findings—Res judicata—Scope of.

Estoppel is not confined to the judgment but extends to all facts involved in it as necessary steps or ground work, in other words, a judgment operates by way of estoppel as regards all the findings which are essential to sustain the judgment though not as regards findings which did not form the basis of the decision or were in conflict therewith. The rule against reagitating matter adjudicated is subject generally to this restriction—that however essential the establishment of particular facts may be to the soundness of a judicial decision, however, it may proceed on them as established, and however binding and conclusive the decision may as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties and that either may again litigate them for any other purpose as to which they may come in question provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object. If both parties invoked the opinion of the Court upon the question, if it was raised by the pleadings and argued, the conclusion cannot be supported that the judgment upon it was **ultra vires**, merely because an issue was not framed which strictly construed embraced the whole of it. Where a defendant is entitled to set up in the same answer as many defences as he has if a judgment is entered in his favour which contains no provision that it shall be without prejudice or any like limitation or restriction the estoppel raised by it will extend to every matter or fact in issue actually found by the Court in favour of the defendant. (17 All. 174, Diss.) 79 Ind. Cas. 520=39 C.L.J. 40=A.I.R. 1924 Cal. 600.

——S. 11—The estoppel of a judgment extends to all facts involved in it as necessary steps on the groundwork upon which it must have been founded; in other words, a judgment operates by estoppel as regards all the findings which are essential to sustain the judgment. If the question was raised by the pleadings and argued, if both parties invoked the opinion of the Court thereupon, the Court cannot come to the conclusion that the judgment upon it was **ultra vires**, merely because an issue was not framed which, strictly construed, embraced the whole if it, regard must be had rather to the substance than to the form of action. 33 C.L.J. 186=62 Ind. Cas. 491=A.I.R. 1921 Cal. 750.

——S. 11—Essential findings.

An estoppel is not confined to the judgment but extends to all facts involved in it as necessary steps or ground-work; in other words, a judgment operates by way of estoppel as regards all the findings which are essential to sustain the judgment. The rule against reagitating matters adjudicated is subject to this restriction—that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may as to its immediate and direct object be, these facts are not all necessarily established conclusively between the parties, and, that either may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation so as to defeat its direct object. In a suit for construction of a will, the representatives of the original trustees appointed thereby are necessary parties. Where a party did not ask the Court to be dismissed from the suit on the ground that as he disclaimed all present interest in the estate, he was not a necessary party, but raised the question of the construction of the will in that suit, he is bound by the decree. 11 C.L.J. 461=6 Ind. Cas. 554.

——S. 11—Mortgage suit—Finding that possession of mortgagee was not as mortgagee—If res judicata in subsequent suit under Bengal Money-Lenders Act.

A decision in a mortgage suit, that the mortgagee is in possession not **qua** mortgagee but in satisfaction of his dues in respect of another loan due by the mortgagor, which is necessary to sustain the decree in the suit, operates as **res judicata** against the mortgagor in respect of that point in later proceedings under the Bengal Money-Lenders Act, when that question is directly and substantially in issue between the parties. 50 C.W.N. 703, foll. A.I.R. 1950 Cal. 135.

——S. 11—Suit by A against B on contract—Contract held unlawful—Subsequent suit by B against A—Legality of contract.

In a suit by **A** against **B** for damages for breach of a contract, **B** pleaded that the contract was unlawful inasmuch as the object of the agreement was to import gold into British India in contravention of Act 2 of 1916. It was decided that the object was to bring gold into French India and the contract was not unlawful. **B** subsequently sued **A** for accounts in respect of the same contract and **A** pleaded that the contract was unlawful:

Held, that the decision in the prior suit that the contract was not illegal operated as **res judicata** and **A** was not entitled to plead that it was unlawful. A.I.R. (Vol. 17) 1930 Mad. 714=58 M.L.J. 613=31 L.W. 757=130 Ind. Cas. 453.

——S. 11—Partition suit—Necessary finding.

The decree, passed in a partition suit in which for the purpose of giving relief to the plaintiff, if a question has to be decided as between the different parties, whether they are arrayed as plaintiff or defendant, must be binding on all the parties: 32 All. 469 and A.I.R. 1914 P.C. 31, Foll. 1929 A.L.J. 883=118 Ind. Cas. 175=51 All. 850=A.I.R. 1930 All. 287.

——S. 11—Prior suit was for refund of tax and declaration of right of free irrigation—Refund was decreed—Extent of land entitled to free irrigation also was declared—When a subsequent suit in respect of other lands is laid—Finding in prior suit is not incidental and second suit is barred. 38 M.L.T. 374=1927 M.W.N. 116=101 Ind. Cas. 648=A.I.R. 1927 Mad. 1131.

——S. 11—In the first suit the plaintiff sued for a declaration of his title and recovery of possession of two plots. His title was declared to these plots, but it was held that he could not recover possession in that suit from a co-sharer but that his remedy lay in a suit for partition. In the second suit he was suing for partition of these plots and some others having been deprived of possession by the defendants.

Held, that as in order to decide the first suit it was necessary to decide his title to the share in the whole property the question of the plaintiff's title to these plots also must be held to be **res judicata** as between the parties. 87 Ind. Cas. 811=A.I.R. 1926 Cal. 80.

——S. 11—Where a pro-note was executed on account of interest due on the mortgage in question and the suit on the pro-note could not have been decreed unless mortgage was found to be a valid mortgage, and in order to determine the validity of the consideration for the pro-note it was necessary for the court in the previous suit to determine the validity of the mortgage.

Held, that the question of the validity of the mortgage was directly and substantially in issue in the previous case, and the finding that no undue influence had been established and that the consideration was proved operates as **res judicata** in the later suit. 75 Ind. Cas. 1048=A.I.R. 1924 Lah. 702.

——S. 11—In a previous suit for the establishment of right to part of the property comprised in a sale-deed was declared as fictitious and nominal. In a subsequent suit between the same parties to recover possession of some other part of the property in the sale-deed, the validity of the sale-deed was in issue.

Held, the decision in the prior suit was **res judicata** and could not be re-agitated, as the determination of this issue was necessary for the disposal of the previous suit. 7 I.C. 388, Not Foll. 76 Ind. Cas. 370=45 All. 515=21 A.L.J. 421=4 L.R. A. Civ. 512=A.I.R. 1923 All. 613 (2).

——S. 11—Finding as to nature of tenancy—Proceedings under S. 26-J, B. T. Act.

In proceedings under S. 26-J, Bengal Tenancy Act, 1885, the nature of tenancy does not arise as merely subsidiary to the main point in dispute between the parties but arises directly and essentially. A.I.R. (Vol. 26) 1939 Cal. 169=67 C. L.J. 363=42 C.W.N. 793=I.L.R. (1938) 2 Cal. 418=182 Ind. Cas. 69.

——S. 11—Rent suit—Question of title—Decision as to.

Where in a rent suit the title of a person is in issue for the purpose of determining his share in the rent, the decision on the issue operates as **res judicata**. 85 Ind. Cas. 804=A.I.R. 1925 Cal. 1004.

——S. 11—Directly in issue—Rent suit—Title.

A tenant in a rent suit set up his ownership to the lands denying that of the landlord and the Court decided the question of title.

Held, it will operate as **res judicata** if the decision of title was necessary to decide the rent suit. 12 Ind. Cas. 9=14 C.L.J. 220.

——S. 11—It is plainly not open to the landlord, who was a party to the previous suit, to take up a position inconsistent with the decision in the previous litigation which was pronounced in his presence, e.g., that the tract then in dispute was covered by the lease of one of his two tenants and not that of the other. Where the lessee landlord could not have succeeded in the previous suit except on the footing that the tract was included in his lease and not in that of his rival it is not open to the plaintiff to have the rent and premium assessed on any portion of those lands on the basis that they are not covered by and subject to the operation of the grant in his favour. 38 C.L.J. 291=76 Ind. Cas. 917=A.I.R. 1924 Cal. 128.

——S. 11—Suit for enhancement of rent—Decision as to rate of rent.

In a suit for enhancement of rent the question of the rate of rent is an issue which must necessarily be decided by the Court, and the Court's decision on that point would operate as **res judicata** in a subsequent suit for rent in which the same question is in issue. 59 Ind. Cas. 752 (Cal.).

9. (h) Question not decided.

——S. 11—A question never raised and never decided before cannot operate as **res judicata**. A. I.R. (Vol. 27) 1940 Lah. 27=186 Ind. Cas. 653.

——S. 11—Matter not decided expressly or impliedly on merits—Matter, whether res judicata.

Ordinarily, when once a matter has been decided, for any reason whatsoever it should not be reopened in the same proceedings, but this is merely a rule of procedure and does not amount to a legal bar. The rule of **res judicata** does not come into operation unless the matter which is subsequently decided by the Court is expressly or impliedly decided on the merits in the previous proceedings. A.I.R. (Vol. 24) 1937 Lah. 211=39 P.L.R. 434 =172 Ind. Cas. 426.

——S. 11—Question of title—No definite finding.

Where the first suit did not give any definite finding on the question of title, and the judgment was very vague and it was not proved that the plaintiffs in the second suit were parties to the first suit:

Held, that the second suit where a question of title was at issue, was not barred by **res judicata**. A.I.R. (Vol. 21) 1934 Oudh 449=11 O.W.N. 1165=18 R.D. 490=152 Ind. Cas. 180.

——S. 11—Applicability—Need for decision in earlier suit.

The rule of **res judicata** can be applied to subsequent proceedings only when the point raised in the subsequent proceedings were raised in the earlier proceedings and were specifically decided. 1930 A.L.J. 1524=52 All. 901=130 Ind. Cas. 198=A.I.R. 1931 A. 99.

——S. 11—No adjudication.

A stray remark made by the arbitrators, which is not incorporated in the operative portion of the award, does not amount to a fresh adjudication which would supersede a previous decree. 117

Ind. Cas. 361=1929 A.L.J. 540=A.I.R. 1929 All. 521.

——S. 11—Matter not arising for determination.

In a suit for resumption of a muafi holding subsequent to its transfer the revenue Courts held that the holding was liable to resumption. They decided, however, that as the holding had been held for a long time and by two successors to the original grantor, the holding should be deemed to be a holding in proprietary right under S. 107, Oudh Rent Act. The transferees brought a suit for a declaration that they had obtained the title of the transferor as under proprietor.

Held, that the suit was not barred by the rule of **res judicata** owing to the decision of the revenue Court as the matter in civil suit was the relief by way of declaration of rights which had arisen in favour of the plaintiff by the effect of the rule of equity embodied in S. 43, Transfer of Property Act, and arising out of the declaration granted by the Court of Revenue. The matter was not only not within the exclusive jurisdiction of the Court of revenue but was not at all within its jurisdiction and did not arise for determination in those proceedings. 5 O.W.N. 487=3 Luck. 636=10 L. R. A. Rev. 38=110 Ind. Cas. 357=A.I.R. 1928 Oudh 344.

——S. 11—In an appeal against an order declaring that the suit abated on account of the death of the defendant also in respect of the prayer for a scheme for management under S. 92, an application was made for appointing a receiver. In the course of the hearing, the Court remarked that it was doubtful if on the plaint as it stood, the suit had not abated. At the hearing of the appeal itself from the order,

Held, that the order on the receiver application was not **res judicata** because the decision was not necessary, and that there was really no decision on the question involved in the appeal. 48 Mad. 688=22 M.L.W. 130=91 Ind. Cas. 109=1925 M.W.N. 569=A.I.R. 1926 Mad. 162=49 M.L. J. 324.

——S. 11—Casual remark.

A chance remark in a previous judgment does not operate as **res judicata** as the matter was not in issue and no proper finding was given. 56 P. R. 1916=35 Ind. Cas. 542=160 P.L.R. 1916.

——S. 11—Rent suit—Nature of tenancy.

The question of the determination of the defendant's tenancy which was not decided nor was necessary to be determined in a previous suit would not be **res judicata** in a suit between the parties. 257 P.L.R. 1914=25 Ind. Cas. 357=146 P.W.R. 1914.

——S. 11—Claim not adjudicated.

A claim for rural police rate should not be refused because the amount of rent fixed at the revision of settlement did not include it if the revision was made before the police rate was imposed. 12 Ind. Cas. 331.

9 (i) Question not in issue.

——S. 11—Question not in issue—Res judicata.

Where a point decided in the previous suit is not in issue in the subsequent suit but is only material so far as to weaken the case of the plaintiff, the subsequent suit is not barred by **res judicata** A. I.R. (Vol. 28) 1941 Cal. 449=197 Ind. Cas. 495.

——S. 11—Where the matter was not directly and substantially in issue in the former suit, the prior judgment cannot operate as **res judicata**. A.I.R. (Vol. 24) 1937 Pat. 141=3 B.R. 14=17 P.L.T. 677=165 Ind. Cas. 213.

——S. 11—Mere suggestion on point not in issue—Res judicata.

A mere suggestion by the Court in a judgment passed on a point not in controversy and in respect of which no issue has been framed has no binding effect and does not coostitute **res judicata**. A.I.R. (Vol. 23) 1936 Nag. 148=I.L.R. (1936) Nag. 138=164 Ind. Cas. 931.

——S. 11—Issue in subsequent suit not having directly arisen in prior suit—Bar, if operates.

A judgment can operate as **res judicata** only in so far as it finally determine a controversy which is directly and substantially in issue in the case. Where the question raised in the subsequent suit was altogether beyond the scope of the previous suit and the issue in the form in which it is raised in the subsequent suit did not directly arise in the previous case, the previous suit does not operate by way of bar by **res judicata**. (1936) 160 Ind. Cas. 632=18 N.L.J. 32.

——S. 11—A judgment is conclusive on the matters which are directly in issue and not those which are brought incidentally during the trial, and a fact canot be in issue directly when the judgment can be correct whether the fact exists or not. A.I.R. (Vol. 19) 1931 Cal. 353=34 C.W.N. 839 =131 Ind. Cas. 562.

——S. 11—Decision on a point not directly and substantially in issue cannot operate as **res judicata** in a subsequent suit. A.I.R. 1928 Nag. 169=113 Ind. Cas. 225.

——S. 11—Issue not arising on pleadings and indistinct.

Where a particular issue does not arise on the pleadings, or in any case is so indistinct that it does not indicate that the parties knew that they had to adduce any evidence on it, any finding on such issue does not operate as **res judicata**. 85 Ind. Cas. 690=A.I.R. 1925 All. 794.

——S. 11—Suit dismissed for want of cause of action—Whether can be res judicata.

Where a suit is dismissed against some defendants for want of cause of action against them and no issue is raised as between the plaintiff and these defendants, there is no decisios which can operate as **res judicata** in the second suit. A.I.R. (Vol. 21) 1934 Cal. 799=59 C.L.J. 328=153 Ind. Cas. 313.

——S. 11—Dismissal of previous suit for want of cause of action.

Where there is no cause of action, the Court

has no jurisdiction to try a case and is not competent to decide other issues. Under S. 11 the bar arises only where the issue has been directly and substantially raised in a former suit. Where there is no cause of action, no matter in the plaint can be directly and substantially in issue. Therefore, suit dismissed on the ground that there is no cause of action is not a bar under the principles of **res judicata**. 118 Ind. Cas. 711=A.I.R. 1929 All. 844.

——S. 11—Prior suit dismissed for want of cause of action—Subsequent suit—No bar.

In a suit by the plaintiff for the declaration of a public right of way, alleging special damage, it appeared that a previous suit for a similar declaration had been dismissed on the ground that the plaint did not disclose any cause of action (there being no allegation that plaintiff had suffered special damage).

Held, that the second suit was not barred by **res judicata**. 49 Ind. Cas. 79=23 C.W.N. 91.

——S. 11—A finding in a case in which the plaintiff has no cause of action, being unnecessary, cannot operate as **res judicata**. A.I.R. (Vol. 32) 1945 Mad. 11=(1944) 2 M.L.J. 186=57 L.W. 491=1944 M.W.N. 572.

——S. 11—Question not arising in suit—Order of attachment before judgment—Attachability of property—Res judicata.

The issue as to legality of an attachment before judgment does not arise in the suit. It can be taken only by way of an objection to the attachment before judgment in the proceedings consequent to the notice to show cause why the attachment before judgment should not be made. An order of attachment maintained in spite of objections raised as a defence, does not, therefore, act as **res judicata** in execution proceedings as to the attachability of property attached. A.I.R. (Vol. 21) 1934 Lah. 153=36 P.L.R. 155=150 Ind. Cas. 213.

——S. 11—Claim in respect of guzara decreed up to date of application under S. 4, U. P. E. E. Act—Suit for subsequent arrears not barred.

Where in an application under S. 4 of the U. P. E. E. Act a claim is filed in respect of a **guzara which** was being paid to her by the applicant and the Special Judge gives the claimant a decree for the amount due up to the date of the application and the decision is not appealed against and a suit is filed by the claimant for arrears of **guzara** subsequent to that, the decision of the Special Judge in allowing the claim cannot be pleaded as barring the adjudication of the question as to the enforceability of the claim to the **guzara**. The question of liability to pay **guzara** after the date of the application made under S. 4 of the U. P. E. E. Act was not directly and substantially in issue before the Special Judge. 1950 A.L.J. 168.

——S. 11—Question of right of way in a partition suit neither denied nor put in issue nor decided—No res judicata.

In a partition suit by a co-sharer, the defendant co sharer alleged that he had a right of way over the land in suit and prayed that this fact might be taken into account when the allotments were made. There was no issue raised as to the existence of this right of way. The right of way was not challenged and indeed it seemed from a passage in the trial Court's judgment that this right of way was admitted in the partition suit:

Held, that the decision in the partition suit could not operate as **res judicata** on the question as to the existence of the right of way in favour of the defendant. A.I.R. (Vol. 28) 1941 Cal. 289=199 Ind. Cas. 689.

——S. 11—Suit by tenants—Landlord producing kabuliyat in defence — Genuineness accepted by Court—Subsequent suit by landlord for recovery of additional rent—Held, genuineness of deed not being in issue in prior suit, was not res judicata.

In a suit instituted by the tenants against the landlord the landlord produced a **kabuliyat** of 1806 to show that only two **mouzas** were leased by it and the Court, accepting it as genuine, dismissed the suit. Finding that the subsequent Record of Rights showed the tenants to be in possession of a larger area than leased, the landlord instituted a suit for recovery of additional rent and to prove this, produced the **kabuliyat** of 1806. The defendants denied the genuineness of the document:

Held, that though the finding in the previous suit that the **kabuliyat** of 1806 was genuine may not be **res judicata** in the subsequent suit as the question of genuineness was not in issue in the prior suit, yet that finding was evidence of the highest value, and as such, ought to be considered, and in not doing so the lower Court had misdirected itself on facts and in law. The document could be taken as an admission by the tenants as regards the area leased and the rent payable. A.I.R. (Vol. 24) 1937 Cal. 237=65 C.L.J. 90=171 Ind. Cas. 834.

——S. 11—Title to particular lands not directly and substantially in issue in former suit—Subsequent suit, if barred.

Where the plaintiff who was in possession of lands in virtue of sale-deeds in favour of his predecessor-in title, filed a suit in respect of the lands and it was held therein that the sale-deeds were bogus and that the real owners were other persons, and he subsequently brought a suit for possession of other lands which he alleged to have leased to the defendants who contended that the plaintiff's title to the lands was extinguished by the decision in the former suit:

Held, that the plaintiff's title to these lands was not directly and substantially in issue in the former suit and that his claim as real owner was not barred by **res judicata**. A.I.R. (Vol. 22) 1935 Bom. 144=36 Bom. L.R. 1074=155 Ind. Cas. 249 (2).

——S. 11—Redemption suit claiming possession on payment of sum—Decree—Default—Another suit for redemption on ground that payment had been satisfied by increased profits of property and praying for possession on payment of amount.

In the year 1892 the mortgagor instituted a redemption suit alleging that nothing was due under the securities, and claiming to be put into possession or, if the Court should find that any sum was due, that it might order redemption subject to the

payment of such sum. Decree was passed that the mortgagor should pay a certain amount by certain date and in case of default the suit would stand dismissed. The default was made but the plaintiffs who were the representatives and heirs of the original mortgagor brought another suit for redemption of the same properties. In their plaint, the plaintiffs alleged that the whole of the sum had been satisfied out of the increased profits of the mortgaged properties, and claimed, (a) possesion of the shares of the property by redemption on the footing that the mortgage money had been satisfied, or (b) if any amount of the mortgage money be proved due, a decree for redemption on condition of payment of that amount:

Held, that the question was not **res judicata,** the issues decided in the former suit being, (1) whether the mortgagors were then entitled to redeem; and (2) the amount then to be paid if redemption then took place and the issues in the second suit being (1) whether the right to redeem now exists, and (2) the amount now to be paid if redemption now takes place:

Held, further that the right of redemption was not extinguished and another suit was maintainable. A.I.R. (Vol. 21) 1934 P.C. 205=61 I. A. 362=11 O.W.N. 1092=1934 A.L.J. 900=40 L.W. 390=1934 M.W.N. 1065=15 P.L.T. 697 =39 C.W.N. 9=36 Bom.L.R. 1189=60 C.L.J. 337=56 A. 561=67 M.L.J. 813=151 Ind. Cas. 37 (P.C.).

——S. 11—**C** instituted a suit against **S** together with **M** and **A** for recovery of money due on a promissory note executed by **M** and **A** but not by **S,** alleging that **S, M** and **A** were partners in a business and that **S** had given the other two authority to take loans on behalf of the business. The trial Court dismissed the suit against **S** while granting a decree against the other two. The Court also found that **S, M** and **A** were not parners though it was not necessary for decision of the case. **C** then brought another suit against **S** alleging that he was the owner of the business and he had directed his representatives **M** and **A** to take loans on behalf of the business. This suit was dismissed on the ground of **res judicata.**

Held, that as the question whether **M** and **A** were representatives of **S** was not directly and substantially in issue in the former suit, there was no bar by **res judicata;**

Held, also that even, if that question were substantially in issue, the former suit could not operate as **res judicata** as the suit had to be dismissed against **S** on the finding that he was not the executant of the promissory note. A.I.R. (Vol. 21) 1934 Rang. 375=153 Ind. Cas. 583.

——S. 11—Plea of want of consideration by assignor—Court recognizing assignment—Subsequent suit to recover balance of consideration by assignor.

Where in an application under O. 21, R. 16, Civil Procedure Code, for recognising an assignment of a mortgage decree, the assignor objected that the full consideration had not been paid but at the same time admitted the transfer and the Court recognized the assignment overruling the objections of the assignor who was absent at the hearing, and subsequently the assignor filed a suit to recover the balance of the consideration:

Held, that the suit was not barred by **res judicata** inasmuch as the question of the payment of consideration was not directly and substantially in issue in the proceedings under O. 21, R. 16. A. I.R. (Vol. 19) 1932 Mad. 327=1932 M.W.N. 326 =137 Ind. Cas. 715.

——S. 11—Suit dismissed for want of title—Subsequent suit claiming title through another person.

Previous suit dismissed as person through whom plaintiff claimed title was held not to be in title and title held in another person—Plaintiff bringing another suit claiming through that another person—Suit is not barred. A.I.R. 1931 All. 21.

——S. 11—A dispute regarding breach of contract in taking delivery of goods was referred to arbitration—Award was filed in Court—Execution taken out—Deposit of amount under award was made in Court under protest—Suit by purchaser for declaration that award is invalid—Suit was decided in favour of purchaser but important finding was in favour of seller—Findings as to breach of contract by purchaser was necessary for decision in that case but was not substantially in issue—Seller sued for damages for breach of contract—**Held,** issue concerning breach of contract could not be considered as finally decided. 56 Cal. 639=120 Ind. Cas. 710=A.I.R. 1930 Cal. 5.

——S. 11—Value of property in previous suit one-fourth of subsequent suit—Decision is not res judicata.

If in previous suit the value of the property included was one fourth of the property included in the second suit the decision in previous suit cannot be **res judicata** in subsequent suit. 124 Ind. Cas. 714=A.I.R. 1930 All. 430.

——S. 11—Different subject-matter.

Alluvial land in present suit not the same in previous suit but newly formed while old land disappeared—There can be no **res judicata** or estoppel. 12 Rev. Dec. 51=111 Ind. Cas. 370=A. I. R. 1929 Oudh 15.

——S. 11—Different issues.

Where a suit brought for recovery of possession of the property on the ground that the plaintiff was the proprietor was dismissed and another suit was brought by the plaintiff as a mortgagor for redemption of the said property,

Held, that the decision in the prior suit cannot operate as **res judicata** because the matter involved in the two is essentially different. 120 Ind. Cas. 420=A.I.R. 1929 Lah. 833.

——S. 11—Rent suit—Rate of rent—Decision in previous suit for previous years.

Liability for rent is a recurring liability and, therefore, a suit for rent at a certain rate for certain years is not barred by reason of a decision in a previous suit for rent allowing a different rate for previous years. 3 O.W.N. Sup. 313=98 Ind. Cas. 77=A.I.R. 1927 Oudh 32.

——S. 11—Rent suit—Rate of rent—Previous rent decree for previous years.

The plaintiffs sued for the rent for certain years

at the rate of Rs. 8 per annum. The defendant alleged that the rent was Rs. 6 per annum and relied upon a previous rent decree for rent for previous years. First appellate Court passed a decree at the rate as alleged by the defendant holding that the previous decree was in presence of both the parties and although the plaintiff had claimed rent at the rate of Rs. 8 per annum it was decreed at the rate of Rs. 6 as alleged by the defendant and the plaintiff was concluded by this decree.

Held, that the lower Court was entirely wrong in holding that the previous decree was conclusive evidence as between the parties as to the rate of rent at the date of that suit. The decree only stated that the rent for the years involved in that suit was decreed at a particular rate per year. This does not mean that the issue or question as to what was the yearly rental was tried and determined in the suit. It would be for the Court to consider the circumstances and events both prior and subsequent to the former suit to enable it to judge for itself the rentals rightly due to the plaintiffs for the years in the subsequent suit. 43 C. L.J. 135=95 Ind. Cas. 130=A.I.R. 1926 Cal. 698.

——S. 11—Rent suit—Rate of rent—Previous rent decree—If and when res judicata.

The essence of the doctrine of **res judicata** is that where a material issue has been tried and determined between the same parties in a proper suit and in a proper Court as to the status of one of them in relation to the other or as to the right or title claimed by one of them against the other the same question cannot be agitated by them again in another suit. In the case of suits for rent or other recurring liability, the causes of action for suits for successive periods are different. In the case of such suits for the doctrine to apply, it will have to be shown that the question of right or liability, not merely for the period in the previous suit but that for all times or once for all was directly and substantially in issue and was tried and determined. If a direct issue on the point was raised and decided the decision would be **res judicata** in respect of any suit for a subsequent period. If the decision falls short of that requisite and if the general question was gone into and decided merely for the purpose of deciding the right or liability for the period involved in the suit, then the issue was raised not directly and substantially but collaterally or incidentally. In a suit for rent, no issues need be framed, but where issues are framed, the non-existence of a direct issue of this character has to be seriously taken into account in determining whether the question of right or liability for all times was really directly and substantially in issue. 43 C.L.J. 146=30 C.W.N. 593=94 Ind. Cas. 837=A.I.R. 1926 Cal. 650.

——S. 11—So far as the rents of the years which were in contest in the previous suit were concerned, the decision no doubt is an absolute bar under the doctrine of **res judicata** to any suit for the rents of those years. But so far as the rents or rates of rent of subsequent years are concerned, that judgment cannot be held to be an absolute bar, so as to prevent the parties from raising the question in a subsequent suit. The prior decision may be taken to determine the rent claimed in that suit and to give rise under S. 51 of the Bengal Tenancy Act to the presumption that the rents for subsequent years remained the same. 6 C.W.N. 589, Foll. 77 Ind. Cas. 334=A.I.R. 1922 Pat. 213.

——S. 11—Rent suit—Rate of rent.

A decision about the amount of rent payable in a previous suit is not **res judicata** in a suit for rent for subsequent years; but the question of contract as to amount payable is **res judicata**. An **ex parte** rent decree does not operate as **res judicata** if defendant did never appear. 57 Ind. Cas. 48.

——S. 11—Rent suit—Decision as to rate of rent.

A decision in a previous rent suit as to the amount of rent annually payable does not operate as **res judicata** in a suit for the rent of the subsequent years although it may give rise to a presumption that the rent remains the same, If however the previous suit was based on a contract between the parties and the question of the rate of rent under the contract was a point in issue in the previous suit, the decision in the previous suit operates as **res judicata**. 51 Ind. Cas. 56.

——S. 11—Rent suit—Decision as to rate of annual rent if res judicata—Evidence.

A judgment in a suit for rent deciding the annual *jamma* payable on a holding even though it does not operate as *res judicata* on the same question in a subsequent suit for rent, is good evidence as to the rate of rent. 47 Ind. Cas. 173.

——S. 11—Rent suit—Rate of rent—Ex parte decree.

An *ex parte* decree in a rent suit decreeing the claim as prayed for, does not operate as *res judicata* as regards the rate of annual rent unless there was a prayer in the plaint for a declaration as to the rate of rent as part of the substantive relief claimed. 45 Ind. Cas. 416.

——S. 11—Rent suit—Rate of rent.

Where there is no contract fixing the rate of rent, an adjudication in a suit for rent for some years is not *res judicata* in a subsequent suit for succeeding years. 3 Pat.L.J. 372=45 Ind. Cas. 316=1918 Pat. 238.

——S. 11 (S. 13, Old Code)—Rent suit in respect of one year—Decision—If res judicata as to rate of rent of subsequent years.

The presumption raised by an adjudication for one year's rent must depend on the question whether the rate of rent was considered or not. If there was such an adjudication, then in a suit for a subsequent year's rent, the Court can only consider the circumstances subsequent to the year of previous adjudication. If there was not such an adjudication, then the Court can consider the circumstances both prior to and subsequent to such adjudication, in order to determine the amount to be paid by the tenant. 19 C. 656, foll. (1902) 6 C.W.N. 589.

——S. 11—Rent suit—Subsequent years.

A decree in a suit for rent obtained for a specific years or years does not bar a subsequent suit for rent in respect of subsequent years; but where the rent

sued for, is in regard to land held under a contract, oral or written for a term of years, such a decree bars a subsequent suit. 39 Ind. Cas. 576 (Pat.).

——S. 11—The decision in a previous rent-suit that rent was payable as Bhauli rent, does not operate as *res judicata* in a suit for the rent of the subsequent years at the cash rent system. The previous is merely presumptive evidence of the rent of future years and the presumption may be rebutted. 1 Pat. L.R. 109=72 Ind. Cas. 138=A.I.R. 1924 Pat. 371.

——S. 11 (S. 13, Old Code)—Suit for declaration of invalidity of appraisement of rent by Collector—If bar to subsequent suit involving issue as to rent being cash or partly cash and partly in kind.

The Court is not precluded under S. 13 of the C. P. Code from trying an issue whether the rent of the holding is payable entirely in cash or partly in cash and partly in kind as it was not directly and substantially in issue in a previous litigation between the same parties where the substantial relief sought was a declaration that the appraisement made by the Collector under S. 69 of the Bengal Tenancy Act was invalid. (1907) 7 C.L.J. 251.

——S. 11 (S. 13, Old Code)—Suit for melwaram of one Fasli—Res judicata.

A decision in a suit for melwaram for one fasli would not estop the defendant who was sued for melwaram of subsequent faslis from contending that he was not in possession of the lands in respect of which melwaram was claimed and that as such he was not liable although he might have raised the same contention in the suit for the previous fasli and the melwaram was decreed against him and although the defendant might not allege that the lands had gone out of his possession subsequent to the previous suit. (1904) 14 M.L.J. 379.

——S. 11—Though one and the same person can combine in himself the status of an occupancy raiyat and a raiyat at a fixed rent still decision as to status is no bar to the consideration of the question as to fixity of rent. 94 Ind. Cas. 310=A.I.R. 1926 Cal. 887.

——S. 11—Ejectment suit—Relationship of landlord and tenant not established—Suit subsequent, for ejectment based on title—Res judicata.

Where in a suit for ejectment it is found that the land in dispute belongs to the plaintiff and that a previous suit for ejectment was successfully resisted by the defendants on the ground that they were not tenants of the plaintiff, the defendants are not entitled to remain upon the land and the plaintiff is entitled to *khas* possession. 51 Ind. Cas. 307.

——S. 11—Suit for ejectment of defendant as landlord—Subsequent suit for ejectment based on title.

Where in a previous suit the plaintiff sued defendant for rent for certain period on the allegation that defendant was plaintiff's tenant during that period and where plaintiff's suit was dismissed on the ground that plaintiff had not established the relationship of landlord and tenant,

Held, that the decision in the suit was conclusive only on one point, *viz.*, that there was no relationship of landlord and tenant between the parties during the years in question and that if plaintiff made out his title he could bring a fresh suit for the ejectment of the defendant on the ground that he was not plaintiff's tenant. 33 C.L.J. 334=61 Ind. Cas. 201=A.I.R. 1921 Cal. 355.

——S. 11—Ejectment suit—Status of tenant—Question of.

Where an ejectment suit by a *rayat* alleging that the defendant was an *under rayat* failed because of the finding that the defendant had a "protected interest" under the Bengal Tenancy Act, it was held, in a subsequent suit that the determination of which depended on the precise ascertainment of status of both, that the judgment in the previous suit did not operate as *res judicata*, as there the question of status was not directly and substantially in issue. 57 Ind. Cas. 344=31 C.L.J. 507.

——S. 11—Rent suit—Question of title—Ejectment.

In a previous suit for rent brought by plaintiff against defendant, defendant pleaded that he had always paid his rent to the plaintiff for the benefit of the landlord and that the plaintiff was nothing more than a *gomastah*, and that he was a *raiyat* holding directly under the landlord. The rent suit was decided in favour of defendant. The plaintiff then sued for establishment of his title as *raiyat* and to eject the defendant as a trespasser. *Held*, that the decision in the rent suit did not operate as *res judicata* on the question of the title of the plaintiff. 27 Ind. Cas. 273.

——S. 11—Rent suit—Scope and effect—Subsequent suit for declaration of title.

The decision in the prior suit is *res judicata* as far as the question of settlement of under-tenure between plaintiff and defendant is concerned and not with regard to question of plaintiff's title which was not and had not to be decided. 40 Ind. Cas. 530=1 Pat. L. W. 634.

——S. 11—Landlord and tenant—Title to land.

Where the question of title raised in the subsequent suit was not directly and substantially in issue in a former suit. *Held*, that the former suit could not operate as a bar by *res judicata* to the subsequent suit. 24 Ind. Cas. 801.

——S. 11—Rent suit—Suit dismissed for want of proof of title—Subsequent suit for rent.

On dismissal of a suit for rent on the ground that the plaintiff had failed to prove the title on which he relied a subsequent suit for rent for the subsequent period is not barred. 22 Ind. Cas. 7.

——S. 11—Suit for rent against defendant as tenant-at-will dismissed—Subsequent suit for rent against him as exproprietary tenant.

A former suit for arrears of rent by plaintiff against defendant dismissed on the ground that the plaintiff had failed to prove the defendant to be a tenant-at-will, does not operate as *res judicata* so as to bar a subsequent suit for recovery of rent for the same period against the defendant as an ex-proprietary tenant. 15 Ind. Cas. 189=15 O.C. 45.

——S. 11—Rent suit—Previous certificate cancelled—No adjudication on merits—Public Demand Recovery Act, Ss. 7 (1) (c), and 8.

Where a previous certificate for arrears of rent was cancelled on the ground that a *bona fide* claim was involved but without entering into the merits a

subsequent suit for rent is not barred by *res judicata*. 13 Ind. Cas. 351.

——S. 11—Landlord and tenant—Decision as to existence of relationship—Question of inclusion of particular plot in tenancy.

Previous decision as to the existence of the relation of landlord and tenant is no bar to a defence in a subsequent suit that a particular plot is not included in the tenancy. 9 Ind. Cas. 2.

——S. 11—Rent decree—Pattah and Muchilikas —Question of—Madras Estates Land Act, S. 52 (3).

Where the appellants contended that the previous findings are *res judicata* in the suits as they have fully gone into the question of custom relating to be different stipulations in the patta; *held*, their Lordships' cannot sustain on legal grounds the plea of *res judicata* as suggested.

The doctrine of *res judicata* is not a question but the application of the special rule stated in S. 52 (3), Madras Estates Land Act under which *muchilikas* decreed for any revenue year remain in force, until the beginning of the year for which fresh ones are exchanged or decreed, and there is no reason for restricting the scope of the general reference to *muchilikas* decreed to those decreed by any particular description of Court. 16 M.L.W. 18=45 Mad. 475=74 Ind. Cas. 584=31 M.L.T. (P.C.) 31=49 I. A. 211=27 C.W.N. 1=20 A.L.J. 937= 36 C.L.J. 450=A.I.R. 1922 P.C. 257=43 M.L. J. 323.

——S. 11—A suit by plaintiff for possession of his share after partition is not barred by the dismissal of his prior suit for recovery of specific plot of the land based on his exclusive title. 24 M.L.W. 453 =1926 M.W.N. 724=98 Ind. Cas. 524=A.I.R. 1926 Mad. 1128.

——S. 11—Different issues.

Before the principle of *res judicata* can be applied it must be shown that the matter for decision had been directly and substantially in issue in a previous suit between the same parties. Where in the latter case the question in issue is the right to sell and in the previous case it was, the right to mortgage.

Held, that different considerations apply in the two cases and that the principle does not apply. 2 O.W. N. 944=91 Ind. Cas. 1021=A.I.R. 1926 Oudh 139.

——S. 11—Question not in issue.

Where a prior suit for share of profits was decreed and no question of right to partition was raised or decided,

Held, in a subsequent suit that the question of partition was not *res judicata*, but the Court added a declaration to the decree by which decree-holder could execute the decree without resorting to a suit for share of yearly profits. 21 N.L.R. 117=52 Cal. 971=30 C.W.N. 122=23 A.L.J. 667=52 I. A. 294=1925 M.W.N. 535=88 Ind. Cas. 347=A.I. R. 1925 P.C. 184=50 M.L.J. 136 (P.C.).

——S. 11—A Hindu woman cannot in a suit on a mortgage of the property executed by herself deny that she had power to alienate the property and, therefore, the question of her power to alienate it is not in issue in the suit so as to bar it from being agitated by her heirs in a subsequent suit for possession after her death. 4 Pat. 510=88 Ind. Cas. 141=87 Ind. Cas. 849=6 P.L.T. 634=A.I.R. 1925 Pat. 625.

——S. 11—In a previous suit by *T* against *C*, *B* and others, for the enforcement of an easement, the question directly and substantially in issue was whether *T* was a tenant under *B*. *B* subsequently sued for ejectment of *T*, or in the internative, for rent.

Held, that the questions for investigation in the later suit were essentially distinct in character and if at all they arose in the previous suit they arose not distinctly and subsequentially but incidentally and collaterally. 30 C.L.J. 13 and 31 C.L.J. 507, Foll. 85 Ind. Cas. 953=A.I.R. 1925 Cal. 985.

——S. 11—Decision that will was "wholly valid" does not bar question as to validity of its provisions regarding succession to the shebaitship, when the only question in the previous case was about the extent of bequest that operated under the will. 40 C.L.J. 564=85 Ind. Cas. 875=29 C.W.N. 17=A.I.R. 1925 Cal. 225.

——S. 11—Where the groves in later suit are different from the grove which formed the subject of the previous litigation and it could not be said that the matter in issue in later suit between the parties was directly and substantially in issue between them in the former litigation. *Held*, S. 11, did not apply. 5 L.R.A. Civ. 406=85 Ind. Cas. 76=A.I.R. 1924 All. 922.

——S. 11—Suit for rent alleging that defendant was tenant—Subsequent suit for ejectment alleging that he was trespasser.

Plaintiff sued the defendants for arrears of rent in 1915 on the allegation that they held the disputed land under him as his tenants. The defendants pleaded that they were not tenants under the plaintiffs and set up a title in themselves. The Court came to the conclusion that the plaintiff had failed to prove the relationship of landlord and tenants between the parties and in this view dismissed the suit for rent. The plaintiff then instituted another suit to eject the defendant on the allegation that they were trespassers. *Held*, that the previous decision does not operate as *res judicata*. That decision is conclusive upon one point and one point alone, namely, that the defendants were not the tenants of the plaintiff during the years for which rent was then claimed. No other questions were essentially in dispute at that stage and they cannot rightly be regarded as matters directly and substantially in issue in the suit and finally decided therein. 72 Ind. Cas. 655=A.I.R. 1924 Cal. 460.

——S. 11—Prior rent suit—Subsequent suit for possession.

A decision in a rent suit as to the length of the defendant's occupation, the main issue being whether the relationship of landlord and tenant existed is not *res judicata* in a subsequent suit between the parties to recover possession by ejectment where the main issue is, whether plaintiff's possession is within 12 years of the date of suit. 59 Ind. Cas. 316.

——S. 11—Rejection of claim by reversioners for cancellation of gift by widow is no bar to claim as reversioners after her death. The validity of the deed of gift and its effect are distinct matters. 26 O.C. 98=74 Ind. Cas. 459=A.I.R. 1924 Oudh 129.

——S. 11—Where pro-note was the subject-matter of the former suit and no set off was formally claim-

ed in the previous suit and the defendants' liability for the sums now in suit could only have been asserted and tried if there had been a formal set off.

Held, since the pleas in the first suit were not explicitly recorded it cannot be said with certainty that liability for the particular sums now in dispute was directly in issue in the other suit. 84 Ind. Cas. 382=A.I.R. 1923 Lah. 146.

——S. 11—Where in the previous suit the only question directly and substantially in issue was the validity of the mortgage, and the question of the amount which the mortgagor or his son may be called upon to pay in the event of a suit for sale being brought by the mortgagees on the basis of the mortgage-deed, could not and was not directly and substantially in issue in the previous suit. *Held,* any decision as to the exact amount of mortgage payable in either of the two events would have been premature and hence the question of the rate of interest being excessive could not be *res judicata.* 9 O.L.J. 612=74 Ind. Cas. 346=A.I.R. 1923 Oudh 139 (c).

——S. 11—Where in a previous suit by defendant against plaintiff, the former's claim to let out the water on his land through a particular opening, was denied and in the present suit the plaintiff claimed a prescriptive right to a flow of water from the defendant's land, to his own, *held,* that the issues in the two suits were not the same and the present suit is not barred by *res judicata.* 4 P.L.T. 81=69 Ind. Cas. 947=1922 P.H.C.C. 305=2 Pat. 110=A.I.R. 1923 Pat. 65.

——S. 11—A prior suit determining a question of title regarding a certain land of which the present disputed land does not appear to form part, does not bar a subsequent suit between the same parties in respect of the land in dispute. 50 Cal. 475=72 Ind. Cas. 1041=A.I.R. 1923 Cal. 379.

——S. 11—Suit for possession—Previous suit for declaration.

The dismissal of a suit of the reversioner for a declaration that he was the next reversioner during the lifetime of the widow on the occasion of transfer by her by way of gift is no bar to a subseuqent suit for possession of the property. 70 Ind. Cas. 635=20 A.L.J. 672=1922 All. 401.

——S. 11—Issue in former súit different from that in the present suit—Suit is not barred.

The plaintiff's wife filed a suit for arrears of maintenance according to agreement that she was to live separate and receive maintenance, if maltreated by husband. She alleged that her husband had turned her out; but the Court found that he had not done so, and that if the meaning of the agreement was that she was free to leave her husband at any time, then the agreement was not enforceable at law. The wife went to live with her husband but was soon turned out and she filed the present suit for maintenance.

Held, the facts in the former suit were different. It was found there that the wife had left her husband's house for no reason, and it was held that, if she set up an agreement under which she could do that, then any such agreement was contrary to Mohammadan law. That proposition does not govern the present case and therefore there is no *res judicata.* 25 O.C. 157=69 Ind. Cas. 778=10 O.L.J. 13=A.I.R. 1922 Oudh 251.

——S. 11—Where both parties in a dispute about land set forward certain measurements before the Commissioner appointed to measure the land decreed, and after some dispute about it, came to an arrangement by which the length of the measuring rod was taken as of more than the Nalkarsha rod and the plaintiff got more than they were entitled.

Held, in a subsequent suit, that as the question of the length of rod was not a point in issue and there was no adjudication thereon, the principle underlying S. 11, C. P. C., does not apply. 71 Ind. Cas. 378=27 C.W.N. 280=38 C.L.J. 17=A.I.R. 1922 Cal. 311.

——S. 11—Where the prior judgment decides only that according to the custom found to exist, a son by a "kept wife" inherits equally with a son by a wedded wife, it cannot be held to adjudicate on the question whether under Hindu Law the plaintiff was legitimate or entitled to succeed to his father's property. 2 Lah. 207=63 Ind. Cas. 387=3 L.L.J. 317=94 P.L.R. 1921=A.I.R. 1921 Lah. 20.

——S. 11—Previous judgment contesting the right of granthi—Findings regarding the nature of the property.

Where in a suit contesting the right of the then *granthi* of the Darbar Sahib (golden temple at Amritsar) to alienate a certain shop, it was held that the properties were waqf and attached to the *granthi* and could not be alienated by the *granthi* the judgment only proves that at the time also the right of the *granthi* to alienate certain property was called in question. The finding of the Court that the property was waqf and was attached to the *granthi* is not relevant in a subsequent suit by the successor to the office challenging the alienation by his predecessor in title. 214 P.W.R. 1920=59 Ind. Cas. 734=1 Lah. 540=49 P.L.R. 1921=A.I.R. 1921 Lah. 337

——S. 11—Mortgage and rent suit.

Though a mortgage suit is dismissed as time-barred a subsequent rent suit by mortgagee against mortgagor is not barred on that account. 50 Ind. Cas. 765.

——S. 11—Suit for mesne profits—Finding as to amount—If res judicata in subsequent suit

The finding in a previous suit as to the amount of *mesne profits* will not operate as *res judicata* in a subsequent suit for mesne profits. 45 Ind. Cas. 218=5 O.L.J. 67.

——S. 11—A decision of a Revenue Court deciding, that the plaintiff, as co-sharer, could not sue for ejectment, cannot operate as a bar to the question whether the plaintiff as a *lambardar* can maintain such suit. 35 Ind. Cas. 612.

——S. 11—Previous suit by mortgagee to remain in possession till debt is satisfied—Subsequent suit for redemption.

A previous suit by mortgagee to remain in possession till his debt is satisfied out of the usufruct (by right of *ijara*) against the mortgagor does not bar a subsequent suit for redemption. 33 Ind. Cas. 59=19 C.W.N. 1132.

——S. 11—Claim to title by survivorship—Finding of division—Dismissal of suit—Subsequent suit for declaration that property was exclusive property.

A brought a suit against the mother and widow of *B* for recovery of possession of the estate left by

the latter claiming by survivorship. One of the issues was whether *A* and *B* were joint or divided and another issue was as to whether a village has been divided between *A* and *B*. The suit was dismissed, both issues being found against *A*. Subsequently the heirs of *A* brought a suit against *B's* heirs for a declaration that the village was their own exclusive property. *Held*, that the suit was not barred by *res judicata*. The finding that *A* and *B* were divided in status was enough to dispose of the plaintiff's case in the prior suit and it is only that issue that could operate as *res judicata*. The right to the village in question was not substantially and directly in issue in the previous suit and therefore the finding thereon does not operate as *res judicata*. 28 Ind. Cas. 580=21 C.L.J. 296.

——S. 11—Directly in issue—First suit under general law—Second suit under special law.

The Dekhan Agriculturists Relief Act, 1879, is in relief of a certain class of His Majesty's subjects and, therefore, the finding in the first suit by the mortgagee could not affect and be *res judicata* in the second suit under Act which was of a different character given to it by a special law unless the previous suit also could fall within the class of suits to which that law applied. 36 Bom. 548=14 Bom. L.R. 579=16 Ind. Cas. 442.

——S. 11—Where plaintiff, the vendee of the mortgagor's share sued for redemption and the dispute was as regards the extent of the plaintiff's vendor's share. *Held*, that the decision in a prior suit for pre-emption brought by the defendants, in which the extent of the share was neither in issue nor determined is not *res judicata* in a subsequent suit for redemption. 14 Ind. Cas. 161.

——S. 11—*A*, a Hindu widow sued her husband's brother's heir for possession of her husband's share after partition by metes and bounds forming part of the joint family property. She also alleged that there had been an actual partition of the house property also. The Court held that the family land was undivided. *A's* suit was dismissed but there was no question about the partition of the house property in issue in that suit. Subsequent to *A's* death, her husband's reversionary heirs sued for possession of the house in which *A* resided during her lifetime. It was alleged by the plaintiff that there had been a partition of the house and that the house in suit fell to the share of *A's* husband and had become his exclusive property. The suit was not barred as the question about the partition of house property was not directly and substantially in issue in the previous suit and was not necessary to be decided nor had been decided in that suit. 36 Bom. 127=12 Ind. Cas. 711 =13 Bom.L.R. 1034.

——S. 11—Mortgage suit—Reference to prior mortgages but no relief asked for.

In a mortgage suit, if prior mortgages are simply referred to and no relief is asked, the absence of any mention thereof in the decree must not be understood as negativing them. 29 Mad. 84, foll. It would be otherwise if the plaint disputed the existence of the prior mortgages and asked for a sale free from incumbrances. 9 M.L.T. 90=9 Ind. Cas 285=21 M. L.J. 635.

——S. 11 (S. 13, Old Code)—Claim to maintenance by junior member under agreement between members of tarwad—Decree—If res judicata in later suit after members cease to be junior member and becomes a stanom.

Where in a suit by a member of a kovilagom to recover arrears of maintenance in accordance with the terms of an agreement between him and the then senior ranee, the defence was that the member, having passed out of the family by accession to a stanom, was not entitled to it, and that the agreement in so far as it purported to give him the right to it even after accession to the stanom was invalid:

Held (*Davies, J.*, diss.) that the decision as to the binding character of the agreement in a prior suit for arrears was not *res judicata*, as the plaintiff had not then acceded to the stanom and as the question of his right to maintenance even after such accession was not then in issue. (1898) 11 M.L.J. 10 (F.B.).

9 (j)—Unnecessary Finding.

——S. 11—Collateral and incidental issue—Decision not necessary for suit—Decision arrived at in spite of finding on issue—Res judicata.

A matter can never be said to be directly and substantially in issue which calls for a decision only collaterally or incidentally, and it cannot be said to be heard and finally decided if the finding on any particular issue is not necessary for the decision of the suit. Where an issue is not substantially raised, and the decision of the Court is not based upon the finding on that issue, but on the contrary the decision is come to in spite of the finding, and further it is not necessary to decide the issue for the purpose of deciding the cases, there can be no *res judicata*. I.L.R. (1948) Bom. 1=48 Bom.L.R. 828=A.I. R. 1947 Bom. 217.

——S. 11—Finding on unnecessary issue—Effect of.

A question which is foreign to the decision and unnecessary for decision does not invite decision and cannot be held to be matter directly and substantially in issue so as to operate as *res judicata* in a later suit. A question which is relevant to the issue in a suit will not necessarily be a matter directly and substantially in issue and a finding on that question will not be *res judicata* unless it is so connected with the question in issue that the decision upon one must necessarily determine the decision upon the other. 222 Ind. Cas. 439=12 B.R. 268=A.I.R. 1946 Pat. 225.

——S. 11—The rule that a judgment or decree is not conclusive of anything not required to support it, is not a mere rule of construction but an unyielding restriction on the power of the parties and of the Court. A.I.R. (Vol. 18) 1931 Cal. 353=34 C.W.N. 839=131 Ind. Cas. 562.

——S. 11—Decision on issue in previous suit, not necessary for decree does not bar the issue in subsequent suit. 6 O.W.N. 1320=122 Ind. Cas. 610=4 Luck. 404=A.I.R. 1930 Oudh 124.

——S. 11—Decision on an issue, which is not necessary for the determination of the real question in controversy between the parties, does not operate as *res judicata*. 21 A.L.J. 393=74 Ind. Cas. 656=45

All. 466=4 L.R.A. Civ. 532=A.I.R. 1923 All. 495.

——S. 11—A finding not necessary to the determination of the suit is not one against which a party could have appealed. It is not a matter directly and substantially in issue which was heard and finally decided and is not *res judicata* in a subsequent suit. 73 Ind. Cas. 854=A.I.R. 1923 Lah. 248.

——S. 11—Unnecessary finding—Not res judicata.

A finding by an Appellate Court on a point not necessary for the decision of the suit and on which no issue was raised in the primary Court cannot operate as *res judicata* in a subsequent suit between the parties. 49 Ind. Cas. 513.

——S. 11—Unnecessary finding.

That finding only which is necessary and sufficient for the decision of the case can operate as *res judicata,* especially when the Appellate Court has ignored the other findings. 48 Ind. Cas. 386=5 O.L.J. 647.

——S. 11—Finding on unnecessary issue.

The decision in a previous case on an issue which did not arise at all, cannot operate as *res judicata* in any subsequent suit. 43 Ind. Cas. 754=141 P.L.R. 1917.

——S. 11—Decision on issue not arising in suit.

A decision on issues, which did not arise at all and would not give the plaintiff the relief sought for, does not debar the parties from raising, in a subsequent litigation, the questions involved in those issues. 20 Ind. Cas. 17.

——S. 11—Finding not necessary for disposal of suit.

A finding in a former suit on a point not necessary for the disposal of the same is not *res judicata* in a subsequent suit. 11 Ind. Cas. 89.

——S. 11—An unnecessary finding not being a decision on a matter directly and substantially in issue will not operate as *res judicata.* 120 P.L.R. 1911=9 Ind. Cas. 1030=101 P.W.R. 1911.

——S. 11—Unnecessary point.

A decision on a point not material for the adjudication of the claim is not *res judicata.* (1911) 1 M.W.N. 188=9 Ind. Cas. 787=9 M.L.T. 450.

——S. 11—It is well established that a finding on an issue not necessary to the determination of a suit cannot operate as *res judicata.* So also, where the plaintiff in the former suit having obtained a decree for perpetual injunction as prayed for could not appeal from an issue decided against him, the finding on such issue cannot operate as *res judicata.* 30 P.L.R. 744=120 Ind. Cas. 795=A.I.R. 1930 Lah. 149.

——S. 11—Unnecessary finding.

Where the previous suit before the revenue Court was a suit brought by the plaintiff for the determination of the amount of rent to be paid by third parties on the allegation that these third parties were his ex-proprietary tenants, and they replied that they did not base their tenancy upon an agreement with the plaintiff, but that they were holding from *S* who was a tenant of the plaintiff, and *S* intervened and took the same position.

Held, that it was not necessary for the purpose of the decision of that suit to determine whether *S* was a benamidar of the plaintiff and therefore that finding to that effect was not *res judicata* in a subsequent suit by the plaintiff against *S* for possession. 88 Ind. Cas. 927=A.I.R. 1926 All. 77.

——S. 11—Unnecessary finding is not res judicata.

The main question in the previous suit was whether the plaintiff was a co-parcener with a certain person. The Court decided two points (1) that the pedigree set up by the plaintiff was not proved, and (2) that the plaintiff was not a co-parcener with the person in question.

Held, that as the question as to the exact relationship of the plaintiff with the person in question was not essential to the decision of the previous suit, the finding was not *res judicata* in a subsequent suit on that question. 12 O.L.J. 105=86 Ind. Cas. 686=A.I.R. 1925 Oudh 386.

——S. 11—The dismissal of a previous suit for ejectment for want of notice does not make the question of the defendant's status *res judicata* in a subsequent suit for the same relief, though that question may have been decided in the previous suit. 18 Cal. 647 and 40 Cal. 29, Foll. 78 Ind. Cas. 147=A.I.R. 1924 Nag. 333.

——S. 11—Unnecessary finding—Interpretation of deed.

The vendors had failed to deliver possession to the purchaser and he was compelled to bring a suit. The plaintiff based his claim very clearly on his proprietary title as purchaser under the sale-deed. The defendants in their written statement did not contest the nature of the deed as drawn, but pleaded however that the contract between the parties had been one of usufructuary mortgage, and alleged that the plaintiff had fraudulently altered its terms and got a deed drawn up which did not represent the real contract between the parties. The suit was decided in plaintiff's favour.

Held, it was doubtful whether this decree would operate as *res judicata* on the question whether the deed was a sale or mortgage, in a subsequent suit, because the plaintiff was entitled to recover possession of the property on the basis of his sale-deed on the case of fraud set up by the defendants being rejected. 45 All. 581=77 Ind. Cas. 572=21 A.L.J. 503=4 L.R.A. Civ. 433=A.I.R. 1923 All. 586.

——S. 11—The real point at issue in the previous suit was whether the mortgage was for necessity or not. It was found as a fact that the mortgage was for necessity and there was no necessity to arrive at any decision upon the question whether *M* was lawfully adopted son of *A,* though a decision was given.

Held, it is doubtful whether it can be said that the question of adoption was directly and substantially in issue in that suit within the meaning of S. 11, C. P. Code. 6 Lah. L. J. 39=75 Ind. Cas. 317=A.I.R. 1923 Lah. 523.

——S. 11—Where the decision as to ownership was not the basis or any part of the basis of the decree, and the final decision of the whole case, that is the decree would have been exactly the same if the decision on the point had been exactly the contrary.

Held, the matter was not "directly and substantially in issue" in the former proceedings and therefore the question of ownership of the property does not operate as *res judicata* in these proceedings. 82 Ind. Cas. 516=A.I.R. 1923 Nag. 139.

——S. 11—In an ejectment suit, where Court passes a decree for rent only, the finding as to title need not be incorporated in the decree. 6 Cal. 319 (F. B.), Diss. from. 30 Bom.L.R. 1602=114 Ind. Cas. 272=A.I.R. 1929 Bom. 32.

——S. 11—In a suit filed by a person against another who denies that the relation of landlord and tenant existed between him and the plaintiff, it is open to the Court to implead the person to whom the payment of rent is alleged to have been made by the defendant. But if any question of title is decided between the plaintiff and a third party so added, that decision does not operate as conclusive, and a suit by the defeated party to establish his title can lie in the Civil Court. 85 Ind. Cas. 302=A.I.R. 1925 All. 574.

——S. 11—Decision in rent suit on question of title—Suit for possession by receipt of rent.

The plaintiff brought a suit for decree for possession of land upon a declaration being made that he was entitled to receive rent at a certain rate from defendant No. 2 upon a finding and a declaration that the plaintiff was a tenant under defendant No. 1 in respect of the land under claim. The defendant No. 2 was in possession of the land holding under defendant No. 1. Plaintiff claimed that he took a settlement of the land from defendant No. 1 and that therefore the defendant No. 2 was bound to pay the rent to him previously paid to the defendant No. 1 by him. In previous rent suit by the plaintiff against the defendant No. 2 the latter had put forward the defence that he held the land not under the plaintiff but under the defendant No. 1 who was no party to that suit and had succeeded. *Held* that the decision in the previous rent suit on the question of the plaintiff's title was no bar to the present suit even though the question of title had to be investigated in that suit by reason of the fact that defendant No. 2 was previously on the land. 26 C. 428, foll. 68 Ind. Cas. 472=A.I.R. 1923 Cal. 327 (2).

——S. 11—Rent suit—Decision as to title.

Where a suit for rent in which the relationship of landlord and tenant is denied by the defendant who sets up the title of a third person who is not made a party to the suit, is dismissed and an adverse finding is given against the plaintiff's title, the decision cannot operate as *res judicata*, on the question of title in a subsequent suit between the parties. 51 Ind. Cas. 356=30 C.L.J. 13.

——S. 11—No contest regarding title.

If there is no real contest with regard to title of a party, the finding in a suit is not *res judicata* as regards the successor in title of the party. 50 Ind. Cas. 727.

——S. 11—Suit for redemption—Finding in favour of defendant—Suit decreed on another ground.

A mortgaged his property to *W*, who subsequently mortgaged it to *R*, *W* sued *R* for redemption. *R* pleaded that he was not a sub-mortgagee but an assignee of *W's* mortgagee rights and that *A* had sold the equity of redemption to him. The question whether the sale of equity of redemption was genuine or not was decided in favour of *R*, *W* was however granted a decree on another ground. Subsequently on *R* suing *W* for redemption on the basis of the sale of equity of redemption, it was held that the genuiness or otherwise of the sale of equity of redemption was not *res judicata* and that it was not open to *R* as a defendant in a suit by *W* to claim redemption of *W's* mortgage and hence S. 11, explanation 4 did not apply. 102 P.R. 1914=213 P.L.R. 1914=24 Ind. Cas. 636=135 P.W.R. 1914.

——S. 11—Suit for enhancement of rent dismissed—Finding as to plaintiff's right to enhance rent.

The owner of a share of a tenure sued for enhancement against the defendant tenant, holding under a lease the plaintiff's share of the property. It was held in that suit that the plaintiff had the right to enhance the rent of the defendant; but the suit was dismissed on the ground that the rent paid by the defendant was not lower than that paid by tenants of adjoining land. In a later suit for enhancement of the defendant's rent: *held*, that there was no *res judicata* and the defendant was not debarred from questioning the soundness of the decision in the first suit that the plaintiff was entitled to bring the suit. 40 Cal. 29=16 C.W.N. 877=15 Ind. Cas. 453=16 C.L.J. 9.

10. Execution Proceedings—
(a) Application of principles of res judicata —Scope and Extent.
(b) Decree binding.
(c) Dismissal for default.
(d) Erroneous decision.
(e) Estoppel.
(f) Ex parte order.
(g) Heard and finally decided.
(h) Implied decision.
(i) Incidental decision.
(j) Might and ought.
(k) Parties and representatives.
(l) Question not decided.
(m) Sale proclamation.

10. (a) Application of principles of res judicata—Scope and Extent.

——S. 11—Execution proceedings.

The provisions of S. 11 do not apply to execution proceedings. 70 Ind. Cas. 530=4 U.B.R. 132 =1923 Rang. 119 (2).

——S. 11—General principles applicable to execution proceedings.

The provisions of S. 11, C. P. Code, which though in terms do not apply to execution proceedings are applicable on general principles to such proceedings. A.I.R. (Vol. 30) 1943 Bom. 252=45 Bom.L.R. 519=208 Ind. Cas. 418. *See also* (1910) 11 C.L.J. 501=5 Ind. Cas. 387.

——S. 11—The principle of *res judicata* applies as much to proceedings in execution as to other legal proceedings. A.I.R (Vol. 30) 1943 Sind 11=I.L.R. (1942) Kar. 326=205 Ind. Cas. 256.

See also 1940 N.L.J. 244; A.I.R. 1935 All. 678 =58 All. 98=1935 A.W.R. 867=157 Ind. Cas. 511; 7 O.W.N. 363=123 Ind. Cas. 881=A.I.R. 1930 Oudh 305; 51 All. 346=26 A.L.J. 1160=112 Ind. Cas. 534=A.I.R. 1928 All. 527; 108 P.W.R. 1913 =181 P.L.R. 1913; 19 Ind. Cas. 481=109 P.R. 1913.

——S. 11—Principal of section applies to execution proceedings.

Section 11, C. P. Code, does not cover proceedings in execution, yet even where S. 11 does not apply, the principle it contains must be applied where it is relevant. Consequently, even though S. 11 does not

cover execution proceedings, a decision in such proceedings operates as *res judicata.* A.I.R. (Vol. 22) 1935 Bom. 174=37 Bom.L.R. 123=158 Ind. Cas. 1059.

See also A.I.R. 1934 All. 609=1934 A.L.J. 409 =149 Ind. Cas. 636 (F.B.); A.I.R. 1932 Pat. 357 =11 Pat. 607=14 P.L.T. 53=140 Ind. Cas. 507= 2 Pat. 771=5 P.L.T. 7=74 Ind. Cas. 781=A.I.R. 1924 Pat. 265.

——S. 11—Constructive res judicata—Doctrine applicable to execution proceedings.

Although S. 11, C. P. Code, does not, in terms, apply to execution proceedings, it is settled law that the doctrine of constructive *res judicata.* embodied in Expl. 4 to S. 11, C. P. Code, is applicable to such proceedings. A.I.R. (Vol. 30) 1943 Lah. 189 =46 P.L.R. 171=210 Ind. Cas. 40.

See also I.L.R. (1942) Lah. 559=44 P.L.R. 302=203 Ind. Cas. 166=A.I.R. 1942 Lah. 153 (F.B.); 42 P.L.R. 404=191 Ind. Cas. 612=A.I. R. 1940 Lah. 394; 42 P.L.R. 374; 38 P.L.R. 936= 166 Ind. Cas. 391=A.I.R. 1936 Lah. 696; 38 P. L.R. 517=162 Ind. Cas. 208=A.I.R. 1935 Lah. 949=14 Lah. 409=34 P.L.R. 528=141 Ind. Cas. 577=A.I.R. 1933 Lah. 594; A.I.R. 1930 Rang. 213.

——S. 11, Expl. 4—Applicability of, to execution proceedings.

Explanation 4 to S. 11, C. P. Code, applies to execution proceedings as well. The princples of constructive *res judicata* is a part of the general principles of *res judicata* and applies to execution proceedings. The rule of *res judicata* is founded on public policy and is meant to make some sort of finality to litigation. A.I.R. (Vol. 23) 1936 Nag. 123=19 N.L.J. 129=I.L.R. (1936) Nag. 30=165 Ind. Cas. 948.

——S. 11—Constructive res judicata—Applicability.

If an objection which might and ought to have been taken in the earlier execution proceedings is not so taken and the matter is heard and decided, the party concerned is debarred from raising it in subsequent proceedings. Though S. 11, C. P. Code, does not in terms apply to execution proceedings, the general principles underlying the rule of *res judicata* are applicable to them and the applicability of the rule is not limited to matters which were directly and substantially in issue and were heard and expressly decided in former execution proceedings, but the principle of constructive *res judicata,* as embodied in Expl. 4 to S. 11, is also applicable to such proceedings. A.I.R. (Vol. 24) 1937 Lah. 772=40 P.L. R. 38=174 Ind. Cas. 965.

See also 15 Lah. 869=35 P.L.R. 429=155 Ind. Cas. 286=A.I.R. 1935 Lah. 200.

——S. 11—The rule of constructive res judicata is applied whether the matter is decided on merits or not.

The rule of constructive *res judicata* may be applied to objections in execution proceedings, whether these have been decided on the merits or not. A.I.R. (Vol. 22) 1935 Lah. 966.

——S. 11, Expl. 4—Not applicable to execution proceedings.

The binding force of an order passed in execution depends not on S. 11, but upon general principles of law. The principle underlying this section cannot be applied unless there is an express order determining the rights of parties. Explanation 4 should not be extended to execution proceedings and the order made in execution proceedings should not have the force of *res judicata* unless the point raised in subsequent proceedings was actually raised in former proceedings and decided. A.I.R. (Vol. 20) 1933 Nag. 287=150 Ind. Cas. 685.

See also Per *Wallach, J.,* in 44 All. 130=19 A. L.J. 923=65 Ind. Cas. 295=A.I.R. 1922 All. 247.

——S. 11, Expl. 4—Not applicable.

The principle of constructive *res judicata* does not apply to execution proceedings. Although, if a question has been raised and decided by implication, the decision may operate as *res judicata,* yet if the question was never raised and for that reason not decided, it cannot be said that the party who might have raised such question is subsequently debarred from doing so. A.I.R. (Vol. 20) 1933 All. 922=147 Ind. Cas. 743.

——S. 11—Constructive res judicata—Applicability.

S. 11, C. P. Code, does not, in terms, apply to execution proceedings as they are not proceedings in a separate suit. The principle underlying that section has, no doubt, been applied to execution proceedings, but the principle of constructive *res judicata* has not been applied unless the point was expressly raised and decided or must be deemed to have been decided by necessary implication. A.I.R. (Vol. 18) 1931 All. 689=53 All. 747=1931 A.L.J. 653=136 Ind. Cas. 353.

——S. 11—Decision by implication at earlier stages—Res judicata.

A question may be treated as *res judicata* in subsequent execution proceedings in the same suit when it has been dealt with and disposed of at an earlier stage of those proceedings even by a necessary implication. A.I.R. (Vol. 21) 1934 Lah. 637 (2)= 35 P.L.R. 692=153 Ind. Cas. 238.

——S. 11—Special rules in explanation to S. 11 do not apply.

Although the doctrine laid down in S. 11 of the C. P. Code, relating to *res judicata* may be applied and rightly applied in certain proceedings in execution arising out of the same judgment, so as to put an end to litigation and may possibly be applied in certain cases where separate suits have been brought raising points which have already been decided in execution cases, fought between the same parties, still it cannot be thought that the special rules laid down in the explanation to that section which go beyond the ordinary doctrine of *res judicata* ought to be applied generally in execution cases. 67 Ind. Cas. 656=1 Pat. 593=3 Pat.L.T. 403=1922 P.H.C.C. 185=A.I.R. 1922 Pat. 289.

——S. 11, Expl. (5) (S. 13, Expl. 3, Old Code) —Inapplicability—Execution proceedings.

Where a decree-holder holding a decree for possession of land and mesne profits applied for both and got an order directing possession. **Held,** that a subsequent application for mesne profits was not barred as the law of res judicata as laid down in S. 11, Expl. (5) (S. 13, Expl. 3, Old Code) had no application to the case. (1901) 24 M. 681=11 M. L.J. 313.

——S. 11—The principle of S. 11 and the Explanations thereto, are of general application and should apply to execution proceedings except in so far as the application of these sections depends upon the special procedure and special provisions relating to the conduct of suits. A.I.R. (Vol. 19) 1932 Sind 116 =26 S.L.R. 91=140 Ind. Cas. 702.

——S. 11—Limits of application of principle.

The principle of *res judicata* or estoppel by judgment must be applied to execution proceedings within the limits prescribed for that principle when applied to suits and cannot be given an unlimited or an extended application. A.I.R. (Vol. 23): 1936 All. 21=1935 A.L.J. 1189=1935 A.W.R. 1371=58 All. 313=160 Ind. Cas. 394 (F.B.).

——S. 11—Application of general principles of Res judicata—Limits.

Although S. 11, C. P. Code, does not, in terms, extend to execution proceedings, the general principles of the rule of *res judicata* including the rules of constructive *res judicata* do apply to orders and decisions passed in execution cases. Like the statutory rule of *res judicata*, these rules are also subject to certain factors that limit their application, that is to say, the subject-matter of the proceeding in which any particular decision is given must be the same as in a subsequent proceeding in order to make the former decision *res judicata* between the parties. Similarly the issue decided in the previous decision must have directly and substantially arisen for decision. 25 Pat. 397=12 B.R. 466=244 Ind. Cas. 37 =A.I.R. 1946 Pat. 392.

——S. 11—Execution proceedings—Question of limitation or jurisdiction not raised at early stage—If can be raised later—Question once raised and decided—If can be re-agitated.

The principle of *res judicata* applies as much in execution proceedings as in a suit. The same objection cannot be raised again and again in execution applications; if it is once raised and decided and there is no appeal, or if it is not raised at the earliest stage when it could and should have been raised, it cannot be raised again and be the subject of a decision at a later stage in the same execution proceedings, whether it be a question of limitation or a question of jurisdiction of the executing Court to execute the decree under execution. I.L.R. (1945) Kar. 445=225 Ind. Cas. 472=A.I.R. 1946 Sind 103.

——S. 11—The rule of *res judicata*, as laid down in S. 11, C. P. Code, with reference to matters decided by a Court of competent jurisdiction in a previous suit is neither relevant nor applicable in any subsequent proceedings arising out of the same decree. If a matter has once been finally decided between the parties to those proceedings, the effect is the same as that of an interlocutory judgment in an ordinary suit and is binding upon the parties for the rest of the proceedings if it has been allowed to become final. On this view, if a matter has once beei allowed to be finally decided, there is no reason why the matter should be allowed to be re-opened whether it has been decided on the merits or not. A.I.R. (Vol. 29) 1942 Lah. 71=43 P.L.R. 727= 199 Ind. Cas. 160.

——S. 11—Execution proceedings—Res judicata—Conditions for applicability.

The application of the principle of *res judicata* to execution proceedings depends upon the existence of a decree or order and has no relation to the gathering of the fruits of such a decree or order. It cannot be said that the realization of money or partial satisfaction of the decree is a condition precedent to the application of the principle of *res judicata* to orders in execution. I.L.R. (1946) A. 843 =1947 A.L.W. 70=1947 A.W.R. (H.C.) 85= 1947 A.L.J. 31=A.I.R. 1947 A. 143.

——S. 11—There is no absolute rule of *res judicata* applying to execution proceedings, and it cannot be held that a man is debarred from defending his action under R. 89 because he desisted from his action under R. 58 of O. 21. 25 M.L.W. 106= 38 M.L.T. 30=99 Ind. Cas. 893=1927 M.W.N. 53=A.I.R. 1927 Mad. 327.

——S. 11—Decision in execution proceedings—When and when not res judicata.

A decision in execution proceedings operates as *res judicata* in subsequent stages of the same proceedings; but does not operate as *res judicata* in subsequent proceedings. A.I.R. (Vol. 30) 1943 Lah. 180=46 P.L.R. 171=210 Ind. Cas. 40.

——S. 11—Execution proceedings—Order at one stage res judicata.

An order made at one stage of the execution proceedings on an application to which the judgment-debtor is a party is binding on all the subsequent stages. 1918 M.W.N. 748=8 L.W. 519=35 M. L.J. 575=48 Ind. Cas. 226=24 M.L.T. 483.

——S. 11—Principles of res judicata, applicability of, to matters decided in same proceedings.

The principle of *res judicata* including the principle of constructive *res judicata* is applicable even to matters decided in the same proceedings and not only to matters decided in prior execution proceedings. A.I.R. (Vol. 29) 1942 Lah. 153=44 P.L.R. 302 =I.L.R. (1942) Lah. 559=203 Ind. Cas. 166 (F.B.).

——S. 11—Execution proceedings — Decision at one stage of the proceedings—Binding.

Where an order of attachment is made after the notice to the judgment debtor it is conclusive. If the order is intended to be attacked on the ground that certain pleas were not taken originally the propriety of the order can be questioned only in subsequent proceedings other than those in which it was passed. Otherwise the decision reached at any particular stage of the execution proceedings would be deprived of finality. 8 Cal. 51 foll. 44 Ind. Cas. 4=(1918) M.W.N. 143=35 M.L.J. 312.

——S. 11—Decision in one stage—Not res judicata in another stage.

Doctrine of constructive *res judicata* should be carefully applied to execution proceedings. A party who is sought to be barred by *res judicata* should have notice of the point. If after notice a decision is passed on an execution petition, the parties cannot object to that decision in a subsequent application. But decision in one stage of application is not *res judicata* in another stage of the same application. 38 Ind. Cas. 627=40 Mad. 1016.

——S. 11—Execution proceedings—Applicability of res judicata—Question arising in regular suit.

The doctrine of *res judicata* as embodied in S. 11 does not, in terms, apply to orders passed in exe-

cution proceedings, though the principle of *res judicata* is applied to preclude one of the parties to the execution proceedings from raising a question which had been previously raised and decided between the parties or should be taken to have been raised and decided between the parties. But a question arising in a regular suit between the parties, otherwise maintainable cannot be held to be barred by the rule of *res judicata* only because such question could have been possibly raised at some stage of the execution proceedings between the parties. 121 Ind. Cas. 702 =A.I.R. 1930 All. 628.

——S. 11—Execution proceedings—Decision in execution of decree in prior suit—If operates as res judicata in execution of decree in subsequent suit.

As execution proceeding is a continuation of the suit, the decision in one execution case should be deemed to be a decision in that suit which should operate as *res judicata* in execution proceedings taken in execution of a decree in a subsequent suit, if the parties are the same and the issues are identical. A.I.R. 1948 Pat. 192.

——S. 11—Similar matter at similar stage in subsequent suit.

The decision of an issue between the same parties in a prior execution petition under a different and anterior decree, is the decision of a question arising in part of the proceedings in one suit and an attempt to raise the same matter at a similar stage of the proceedings in a subsequent suit will be barred by *res judicata*. A.I.R. (Vol. 27) 1940 Mad. 59= 58 L. W. 677=1939 M.W.N. 1145=187 Ind. Cas. 852=(1940) 1 M.L.J. 143.

——S. 11—Execution sale set aside—Private sale to third party—Appeal by decree-holder auction-purchaser—Third party depositing amount—Decree-holder withdrawing amount—Appeal allowed, if operates as res judicata in suit by purchaser.

A sale in execution of a decree which *P* had obtained against *Q* and in which *P* had purchased the property was set aside and *P* appealed against it. *Q* sold the property to *R* on whose depositing in Court the decretal amount, *P* withdrew the amount in full satisfaction of the decree. *P's* appeal was heard without knowledge of these facts and allowed, *R* not being impleaded therein. *P* then claimed the property as his and *R* filed a suit for a declaration that the property was his:

Held, that S. 11, Civil P. C., did not apply to the case, that the proceedings which ended in the appeal were not a 'suit' but proceedings in execution only and an implied decision in that case could not be a bar to a trial to a question arising in a subsequent suit and that the plea was not one which might or ought to have been raised in the appeal by *P*. A.I.R. (Vol. 20) 1933 All. 579=1933 A.L.J. 1488=55 All. 735=147 Ind. Cas. 932.

——S. 11—Decree against dead man—Legal representatives brought on record in execution not pleading abatement—Subsequent suit by legal representative that decree is nullity is not barred.

Where one of the defendants in mortgage-suit died in January, 1912, after the preliminary but before the final decree, and the legal representative was brought on record in 1916 in connection with application for transfer of the decree and was served with a notice but he did not appear and brought a suit when some of the properties were brought for sale in execution.

Held, his failure to plead abatement in 1916 did not operate as *res judicata*. 19 M.L.W. 314=69 Ind. Cas. 465=1922 M.W.N. 597=A.I.R. 1923 Mad. 212=43 M.L.J. 293.

——S. 11—Execution proceedings—Decision as to liability of property to attachment—Not res judicata in later proceeding in execution of another decree.

In the execution of a decree the question arose "whether the property in dispute was the property of the first defendant or whether it was property in which the third defendant had a share which could be attached and sold in execution of the decree against him." The same question was decided in a former execution proceeding in execution of another decree.

Held, that the earlier decision does not operate as *res judicata*, as a decision in a claim suit as well as in the claim petition has no application beyond the execution of the decree which has given rise to those proceedings and has relationship only to the particular decree that was being executed. 60 L. W. 529=A.I.R. 1948 Mad. 118 (2)=1947 M.W.N. 493 =(1947) 2 M.L.J. 189.

——S. 11—Order passed in execution proceeding—Later suit for declaration—Bar.

An order passed in objection proceeding as to the nature of land which is sought to be sold is not a final one and the same cannot operate as *res judicata* in a later suit. 7 O.W.N. 1162=14 R. D. 706=130 Ind. Cas. 115=A.I.R. 1931 Oudh 62.

——S. 11—Order on claim petition—Subsequent suit—No res judicata.

Order on a claim put in by a person in respect of a property attached under a decree adversely to the claimant does not bar him from defending his claim in a suit against him for recovery of possession by a third party. 16 Ind. Cas. 529 (1)=(1913) M.W.N. 54.

——S. 11—Execution proceedings—Order in claim proceedings no bar to subsequent suit to vacate the order.

An order having been made in certain claim proceedings a subsequent suit for the order being vacated is not barred under S. 11, C. P. Code. 37 Ind. Cas. 401=5 L. W. 161.

——S. 11—Execution proceedings—Decision on procedure—Change of law—No res judicata.

Where substantive rights are decided in an order passed in execution proceedings such decision is *res judicata* in subsequent execution applications. But when the decision on the prior application was one on a question of procedure as it then stood, it does not operate as *res judicata* when that procedure itself is changed by the statute law. 39 Mad. 923=30 M.L.J. 460=18 M.L.T. 313=30 Ind. Cas. 707= (1915) M.W.N. 769. *See also* A.I.R. (Vol. 20) 1933 Mad. 745=38 L. W. 347=65 M.L.J. 305=1933 M.W.N. 970=145 Ind. Cas. 397.

——S. 11 and O. 21, Rr. 23 and 57—Prior order for execution not in force—No res judicata.

A prior order under O. 21, R. 23 for execution

is not *res judicata* but is vacated by a subsequent order of dismissal of execution application under R. 57. To be a bar, the previous order must be in force. 24 Mad. 669, 24 All. 282, diss. 31 Ind Cas. 293=2 L. W. 1055.

——S. 11—Execution proceeding—Order passed without jurisdiction.

An order passed without jurisdiction in an earlier execution proceeding or at an earlier stage of he same proceeding would not operate as *res judicata* in a subsequent proceeding or at a later stage of the same proceeding. 1948 M.W.N. 777=61 L. W. 795 =A.I.R. 1949 Mad. 196=(1948) 2 M.L.J. 421.

——S. 11—Hypothecation bond to stay execution proceedings—Liability under—Decision in execution—No res judicata.

Liability on a hypothecation bond executed to stay execution proceedings, can be enforced, not in the execution proceedings but only by a separate suit. Hence any decision given in the execution proceedings cannot operate as *res judicata* against a proceeding started on the basis of the hypothecation bond. 1930 A.L.J. 913=52 A. 964=130 Ind. Cas. 712=A.I.R. 1931 A. 65.

——S. 11—Court in which suit was filed losing territorial jurisdiction but passing decree—Order directing execution by another Court acquiring such territorial jurisdiction—No formal transfer of decree.

Where a decree is passed by a Court within a certain district but that Court loses its territorial jurisdiction, which is transferred to another Court in another district, the latter Court is incompetent to execute the decree without a formal transfer of the decree for execution and an order passed by that Court directing execution without such transfer does not make the matter *res judicata*. 114 Ind. Cas. 545=28 M.L.W. 885=A.I.R. 1928 Mad. 746.

——S. 11—Order ultra vires does not operate as res judicata in same proceeding.

An order of executing Court which is *ultra vires* does not operate as *res judicata* in a subsequent stage of the same execution proceedings. 4 Pat. 440=93 Ind. Cas. 257=7 P.L.T. 456=A.I.R. 1925 Pat. 807.

——S. 11—The subsequent mortgagee obtained a decree for sale against the mortgagor alone. Later on, the prior mortgagee obtained a decree against both the mortgagor and the subsequent mortgagee. On execution of the former decree, the prior mortgagee applied under O. 21, R. 62 for a declaration of his mortgage encumbrance. The Court dismissed the application. The point is not *res judicata* between the prior and subsequent mortgagees, as under O. 21, R. 63, the point could not be decided. 37 Ind. Cas. 78=3 O.L.J. 529.

——S. 11—Order not valid.

A decree-holder applied for execution of his decree in 1903. The Court ordered execution upon which the judgment debtor appealed and the appeal was dismissed on 2nd August, 1905. In the meantime the the decree-holder put in a fresh application in 1904 and this was rejected by the Court as time barred. In 1908, the decree-holder filed an application for the continuation of the execution proceedings of 1903 but he was asked to file a fresh application And so in 1907 the decree-holder filed a fresh application which was rejected as *res judicata*: *Held*, that the Appellate Courts' order in the decree-holder's favour was not affected by the application of 1904 and that the 1903 application was alive till 1905. The order passed by the lower Court in the darkasht of 1904 could not have legal validity so long as the darkasht of 1903 was kept alike by proper proceedings. 35 Bom. 245=10 Ind. Cas. 811=13 Bom.L. R. 230.

——S. 11 (S. 13, Old Code)—Order uncertain—No res judicata.

Estoppel by judgment is not confined to the judgment, but extends to all facts involved in it as a necessary step or as to ground-work upon which it must have been founded. What is relied on as estoppel must be certain to every intent. Where, therefore, upon a decree-holder applying for execution of his decree by attachment of the judgment-debtor's maintenance right in certain immoveable property and the rent due to the judgment-debtor in respect of the same, the judgment-debtor objected that she was not personally liable and that her maintenance right was not attachable and the executing Court held that she was personally liable and an order to 'attach' was made upon the execution petition:—*Held* (1) that this order was uncertain and did not create any estoppel, and (2) that the judgment-debtor is not precluded before confirmation of sale from raising the question that the property attached and sold in persuance of that order is exempt from attachment under S. 60 (S. 266 (b), Old Code). 1909) 15 M. L.J. 7.

10. (b) Decree binding.

——S. 11—Decree binding on executing Court—Court may interpret ambiguous decree.

The Court executing the decree is bound by the decision in the original suit. Where there is a distinct issue raised on the point in the suit and that issue is decided against the plaintiff even though his claim is decreed in part, it is not open to him to obtain by execution what was expressly denied to him by the decision in the original suit. Where the decree is ambiguous it is always open to the Court executing the decree to interpret it with reference to judgment. A.I.R. (Vol. 29) 1942 Pat. 196=8 B.R. 401=198 Ind. Cas. 250.

——S. 11—Where the judgment and decree are not set aside in appeal they are *res judicata* and cannot be questioned in an execution proceeding. A.I.R. (Vol. 28) 1941 Pat. 600=7 B.R. 989=196 Ind. Cas. 33.

——S. 11—Extraneous matters allowed to be included in decree without objection—Executing Court cannot refuse to execute that part of decree—Defendant has right of appeal against the decree thus drawn up and have that portion excluded—In the absence of such a step, execution that part of decree cannot be avoided. A.I.R. (Vol. 27) 1940 Lah. 7=186 Ind. Cas. 881.

——S. 11—Finding of trial Court not challenged in appeal—Whether can be questioned in execution proceeding.

A finding of the trial Court not questioned before the Court of appeal cannot be re-opened in execution proceedings under the decree between persons claiming as legal representatives. A.I.R. (Vol. 25) 1938 P. C. 98=1938 O.W.N. 138=1938 A.L.J. 200=1938 A.W.R. 67=42 C.W.N. 385=4 B.R. 365=40 Bom. L.R. 760=32 S.L.R. 401=173 Ind. Cas. 412 (P.C.).

——S. 11—Where a Court assumes jurisdiction upon certain averments made in the pleadings which unless they are challenged or shown to be inaccurate would give the Court jurisdiction to try the suit, the defendant against whom the decree is passed would not be entitled to contradict that statement and say that the averments were false, and hence the assumption of jurisdiction by the Court was illegal. A.I.R. (Vol. 24) 1937 Cal. 481=41 C.W.N. 887=172 Ind. Cas. 435.

——S. 11—Decree directing mesne profits to be determined in execution—No appeal—Decree becoming binding—Execution application dismissed for default—Claim to mesne profits.

A decree was passed after 1908 directing mesne profits in course of execution. The execution application was dismissed for default:

Held, that though the decree was wrong, the parties not having appealed against it it became conclusive and the dismissal of execution application for default did not amount to the dismissal of claim to mesne profits for which a fresh application was not barred. A.I.R. (Vol. 21) 1934 Cal. 472=38 C. W. N. 141=151 Ind. Cas. 913 (2).

——S. 11—Decree, when binding.

Decree to be binding on a person must have force of *res judicata*. A.I.R. (Vol. 18) 1931 Cal. 511=35 C.W.N. 66=132 Ind. Cas. 625.

——S. 11—Implied decision in suit—Bringing in execution proceedings.

Where the point as to whether the defendant was or was not an agriculturist was necessarily involved in the suit, though there was no express decision, as the point was not in dispute between the parties it must be taken to have been decided by necessary implication. The provisions of S. 11 of the C. P. Code, would not have any application to execution proceedings, but the principle underlying that section would necessarily govern such proceedings and it is obvious that any fact which is decided in the suit expressly or by necessary implication cannot be challenged in execution proceedings. 24 Bom. L. R. 1291=76 Ind. Cas. 148=A.I.R. 1923 Bom. 36.

——S. 11—Execution proceedings—Suit by prior mortgagee impleading subsequent mortgagee—Decree and sale in favour of prior mortgagee—Subsequent suit by subsequent mortgagee impleading prior mortgagee—Decree passed without objection by prior mortgagee—Latter if precluded from relying on his mortgage in execution proceedings. *See* MORTGAGE—PRIOR AND SUBSEQUENT. A.I.R. 1948 P. C. 89=(1949) 1 M.L.J. 101 (P.C.).

10. (c) Dismissal for default.

(1) Execution application dismissed for default of decree-holder.

——S. 11—Dismissal for default of decree-holder—Remarks about alienability of land.

When an execution application which has been fixed for considering the objection of the judgment-debtor to the effect that the land could not be sold is dismissed for default by the absence of the decree-holder, the remarks about the alienability of land are *obiter* because the application was dismissed in default and it was not necessary to decide whether the judgment-debtor was protected by S. 16, Land Alienation Act, or not and the order of the execution Court in the execution proceedings does not operate as *res judicata*. A.I.R. (Vol. 30) 1943 Pesh. 52=209 Ind. Cas. 424.

——S. 11—Order dismissing execution, application for decree-holder's default—When can be res judicata on point whether it is "in accordance with law".

If there is previous order of the Court operating as *res judicata* which holds that the application under consideration was not made in accordance with law, then clearly that matter cannot be re-agitated at a subsequent stage of the execution. But before an order can operate as *res judicata*, it must clearly decide that the application in question was not in accordance with law. If it merely rejects or dismisses the application on some other ground as for instance, the non-appearance of the decree-holder, then there is no decision on the merits and when there is no decision on the merits, there is of course, no *res judicata*. Where it is ambiguous whether an order is on merits, then the ambiguity must be construed in favour of a person against whom the order is made. Where the order is: "Decree-holder absent. Application incorrect. He is awaited for November 2, 1933, or "decree-holder absent. He has not yet turned up as yet though he was awaited till today. Application is, therefore rejected with costs" the order will not operate as *res judicata*. A.I.R. (Vol. 28) 1941 Nag. 152=1940 N.L.J. 319=194 Ind. Cas. 641.

——S. 11—Difference between dismissal of suits and dismissal of applications for default.

For the purpose of the rule of *res judicata*, there is a difference between the dismissal for default of suits and execution applications. In the case of dismissal of execution petitions for default or on the ground that they are not pressed, the only point that is decided is that the application is dismissed and there is no bar in the way of a fresh application being made subsequently with the very same prayer. Therefore unless it can be said that there was a decision or adjudication which either directly decided the question on which the parties are at issue or which must be deemed to have impliedly decided it, on the ground that the order could not have been made without such implied decision having been arrived at, the rule of *res judicata* cannot operate or apply. A.I.R. (Vol. 24) 1937 Mad. 289=1936 M.W.N. 840=44 L. W. 565=166 Ind. Cas. 72=71 M. L. J. 490.

——S. 11—An order dismissing an execution for default does not operate as *res judicata*. A.I.R. (Vol. 23) 1936 Pesh. 41=160 Ind. Cas. 835.

——S. 11—In execution proceedings where an application is dismissed in default of the appearance of the applicant that order does not operate as *res-judicata* against a subsequent application to the same effect by the same applicant. The rule of *res judicata* applies to subsequent proceedings in the same suit only when the point has been raised and decided. A.I.R. (Vol. 22) 1935 All. 238=1935 A.L.J. 278 =153 Ind. Cas. 508.

——S. 11—Dismissal of judgment-debtor's objection in default of decree-holder and judgment-debtor—Judgment-debtor, if debarred from raising same objection.

Where judgment-debtor objects to the execution of a decree on the ground that the application is barred by limitation and the objection is dismissed for default in the absence of the decree-holder and the judgment-debtor, the latter is not debarred when a subsequent application for execution is made, from objecting that the previous application was time-barred. A.I.R. (Vol. 19) 1932 Pat. 357=11 Pat. 607=14 P.L.T. 53=140 Ind. Cas. 507.

——S. 11 (S. 13, Old Code)—Dismissal of application and objection thereto for default—Objective in first application—Not barred.

The fact that an objection to the execution of the decree on a previous occasion was struck off along with the application on failure of both parties to appear will not bar the judgment-debtor from taking the objection again on a fresh application for execution. (1905) 3 C.L.J. 240=10 C.W.N. 209.

——S. 11 (S. 13, Old Code)—Plea of limitation raised—Subsequent dismissal of both execution application and objection for default—Point—No res judcata.

Where on an attachment in execution of a decree upon notice under O. 21, R. 22 (S. 248 old Code), the judgment-debtor pleaded limitation, but after certain adjournments at the instance of the decree-holder neither party appeared at the hearing and orders were made refusing the application for execution and dismissing the judgment-debtor's objection for default:

Held that the point was not *res judicata* (1) because the order did not amount to a decision on the merits, and because the final order on the execution was not in consequence of this dismissal of objection, but in spite of it. (1900) 5 C.W.N. 80=28 C. 122.

——S. 11—Execution disposed of in default—Decision is not res judicata.

A darkhast disposed of for default of appearance as plaintiff's pleader was absent cannot be said to have been heard and decided on merits. The decision in the previous darkhast passed without hearing the plaintiff or his pleader cannot be challenged except in a subsequent darkhast and it does not operate as *res judicata*. 31 Bom. L R. 400=118 Ind. Cas. 700 =A.I.R. 1929 Bom. 217.

——S. 11—Execution case dismissed for default—Objection not taken that the objector was not liable for the debt—Objection is not precluded in subsequent execution case.

Where the former execution case was dismissed for default.

Held that the contention, that as in the previous execution case the appellant did not take the point that he was not liable for the debt, he could not take it in the present execution, could not be maintained. In the previous execution case there was no adjudication which could even by implication be held to constitute a decision adverse to the appellant. The principle which was applicable to suits upon a party's failure to raise an issue, which he might have raised, was not applicable to execution cases but even if it were, the final order in the last execution case was made not in consequence of the conduct of the Appellant but in spite of it. The doctrine of *res judicata* did not apply. 6 P.L.T. 507=90 Ind. Cas. 276=1925 P. H. C C. 160=A.I.R. 1925 Pat. 588.

——S. 11—Default of decree-holder.

A party to an execution proceeding who allows an order for execution to be passed against him at one stage of proceeding, when he had an opportunity to contest the validity of that order cannot be permitted at a subsequent stage of the proceeding to reopen the whole matter in controversy. The essence is that the matter has either been controverted as well as determined or that it has been allowed to be decided to the detriment of the judgment-debtor when he had full opportunity to establish his defence. The principle has no application when it is proved that that there was no adjudication by reason of the failure of the decree-holder to prosecute the execution proceedings with due diligence. (1910) 12 C.L.J. 312=7 Ind. Cas. 55.

——S. 11 (S. 13, Old Code)—Execution proceedings—Parties not appearing—Question of limitation not decided—No res judicata.

Where the question whether execution of a decree is barred by limitation is not decided because the parties do not appear, there is no bar of the adjudication of the objection which actually raised at a late stage of the proceedings. (1900) 28 C. 122; (1905) 10 C. W. N. 209=3 C.L.J. 240; 15 A. 198 foll. (1908) 14 C.W.N. 114=3 Ind. Cas. 47.

(ii) Objection to execution petition dismissed for default of objector.

——S. 11 — Decree against father — Execution against sons—Objection—Dismissal for default—Application for restoration also dismissed—Subsequent execution application—Objections by sons again—If barred.

Where an objection to an execution petition preferred by the sons of the judgment-debtor (who had died) was dismissed for default in the presence of the decree-holder, and an application for restoration was also dismissed for default, they must be held barred by *res judicata* so far as the objections preferred are concerned and they cannot be permitted to prefer the same objections to another

execution application. 25 Pat 595=A.I.R. 1947 Pat. 298.

——S. 11—Objections dismissed in default—Subsequent objections, whether barred.

The principle of *res judicata* can apply only if there has been a decision on merits. Thus, where in an execution proceeding some of the judgment-debtors file objections which are dismissed in default and subsequently, the execution application meets the same fate, a subsequent objection petition on a fresh application for execution being filed is not barred by the rule of *res judicata*. A.I.R. (Vol. 32) 1945 Oudh 21=1944 O.W.N. 365=1944 A.W.R. 231=20 Luck. 93.

——S. 11—Decree against firm sought to be executed against alleged partners—Partner's objection dismissed for default—No appeal—Matter, if can be re-agitated in subsequent execution.

There was a previous execution taken against certain persons alleged to be partners of a firm and they filed an objection. They did not proceed with it and in the end it was dismissed for default. No appeal was preferred against that decision:

Held, that they could not be allowed to re-agitate the matter all over again. A.I.R. (Vol. 22) 1935 Cal. 816=160 Ind. Cas. 86.

——S. 11—Objection by judgment-debtor to attachment—Dismissal in default.

A house was attached in execution of a decree. One of the judgment-debtors asked for release of half the house from attachment on the ground that the house was ancestral. His objection against the attachment was dismissed in default. He applied for restoration of the objection, but that application was also dismissed. Afterwards he filed another objection on the same grounds as before, adding a reference to S. 60, Civil P.C.:

Held, that the dismissal of the previous application barred the second application. A.I.R. (Vol. 18) 1931 Lah. 6=32 P.L.R. 413=130 Ind. Cas. 406.

——S. 11—Execution—Objection to—Dismissal for default—Res judicata.

In execution of a money decree obtained against *X*, a member of a joint Hindu family, a house belonging to the joint family was attached. *X* raised the objection that the house as it belonged to an agriculturist could not be attached, but for default of prosecution the objection petition was dismissed. The house was subsequently sold. The wife and sons of *X* then brought a suit alleging that the house was ancestral property in *X's* hand and that being agriculturist's house it could not be sold in execution.

Held, that the wife of *X* had no personal interest although in the case of a partition between the father and sons she would be entitled to a share.

Held, further, that the suit would not be barred by *res judicata* because the order dismissing the objection petition had not decided whether the house belonged to an agriculturist and because the property being ancestral the father did not represent the sons.

Held, further, that the suit was maintainable as the sons were interested in the property and as they could not raise objection before the execution Court. A.I.R. 1930 All. 727=1930 A.L.J. 1244=127 Ind. Cas. 447.

——S. 11—Dismissal of a former objection to attachment—It is a bar to furnish objection.

Order 21, R. 63 renders the dismissal of the former objection to attachment, in default or on merits, a bar to the entertainment of a fresh objection. 41 All. 623; A.I.R. 1921 Oudh 54; 44 Cal. 785; A.I.R. 1922 Cal. 166, Foll. 26 P.L.R. 151=105 Ind. Cas. 693=A.I.R. 1927 Lah. 872.

10. (d) Erroneous decision.

(i) When res judicata.

——S. 11—Order for execution of decree barred by time.

Although the execution of a decree may have been actually barred by time at the date of the application made for its execution, yet, if an order for such execution had been regularly made by a competent Court having jurisdiction to try whether it was barred by time or not, such order, although erroneous must, if unreversed, be treated as valid. A.I.R. (Vol. 30) 1943 Lah. 129=207 Ind. Cas. 561.

——S. 11—Order for execution on application barred by time.

Where on an application for execution which in fact was barred by time the Court ordered execution, the order erroneously made is valid unless set aside on appeal and the judgment debtor cannot object on a subsequent application for execution that the intermediate application was barred by time. 8 C. 51, followed. 44 Bom. 227=55 Ind. Cas. 329=22 Bom.L.R. 76.

——S. 11 (S. 13, Old Code)—Erroneous decision holding execution not barred by limitation—If res judicata.

Where a Court executing a decree and competent to determine whether execution is or is not barred by limitation, decides that execution is not time-barred, such decision can only be questioned by means of an appeal against the executing Court's order. If that order is not appealed against, and becomes final, the determination that execution of the decree was not time barred must, in subsequent proceedings relating to the execution of the same decree be treated as valid, even though it may have been in fact erroneous. 24 A. 283 and 24 M. 669, followed. 1905 A.W.N. 237.

——S. 11—Construction of decree—Wrong decision.

A decision on a point which would be final at one stage of an execution application prevents the same point being raised in a subsequent stage of the same execution application irrespective of whether the decision is right or wrong.

Held, on facts that the decision on the construction of the decree was final as the objector, though he had right of appeal, did not avail himself of it and that the decision operated as *res judicata*. A.I.R. (Vol. 28) 1941 Mad. 861=1941 M.W.N. 805=200 Ind. Cas. 324=(1941) 2 M.L.J. 792.

——S. 11—Order of dismissal based on misapprehension—Order not appealed against is binding.

Where a decree-holder of a decree making the decretal amount payable within six months, applies before six months merely for attachment of the property by a regular execution petition without a prayer for sale and such application for execution is dismissed for non-payment of process fees for notice under O. 21, R. 66, as ordered by the Court and the decree-holder does not appeal or apply for review, the order of dismissal of execution although passed under a misapprehension, is still binding order on the decree-holder and must be taken to be an order under O. 21, R. 57. On the principle of constructive *res judicata*, which also applies to execution proceedings, such order must be regarded as binding on the decree-holder in a subsequent execution petition and he cannot be allowed to challenge it. A.I.R. (Vol. 28) 1941 Bom. 395=43 Bom.L.R. 727=I.L.R. (1941) Bom. 652=197 Ind. Cas. 422.

——S. 11—Erroneous order dismissing judgment-debtor's objection to transfer of decree.

Where an objection that transfer of decree for execution by Rent Court to Civil Court was without jurisdiction was agitated and was decided against the judgment-debtors in the earlier execution and an appeal was presented from that decision and failed; it is no longer open to the judgment-debtor to raise it, the principle of *res judicata* being a bar to the contention even though the Court before whom the previous execution was presented may have or may not have taken a wrong view of the law. A.I.R. (Vol. 26) 1939 Pat. 230=5 B.R. 830 =18 Pat. 378=20 P.L.T. 726=182 Ind. Cas. 821.

——S. 11 — Wrong order—Appeal dismissed — Effect.

Where a wrong order in execution, holding that the decree could not be executed, has become final because an appeal therefrom was dismissed as time-barred, the principles of *res judicata* apply and that order cannot be set aside in execution subsequently, A.I.R. (Vol. 25) 1938 Pesh. 77=178 Ind. Cas. 275.

——S. 11—Order for attachment and sale of crops of judgment debtor—Subsequent—Objection under S. 18, Colonization of Government Lands (Punjab) Act (5 of 1912)—Order of attachment, if can be revised.

Even a wrong decision on an issue of law operates as *res judicata*, inasmuch as S. 11. Civil P.C., makes no distinction between an issue of fact and an issue of law, especially when there is identity of the matter in issue and also of the cause of action. Consequently where once an order in execution proceedings for attachment and sale of crops of the judgment-debtor is passed the execution Court is barred to revise the order subsequently on an objection to attachment by the judgment-debtor under S. 18, Colonization of Government Lands (Punjab) Act. A.I.R. (Vol. 24) 1937 Lah. 393=39 P.L.R. 718=173 Ind. Cas. 218.

——S. 11—Applicability to execution proceedings —Case decided and not dismissed for default.

The doctrine of *res judicata* applicable to execution proceedings does not rest on S. 11 of the Code and distinctions are sometimes made between positive decisions and mere dismissals for default. Where there has been no dismissal for default but, on the contrary, the question whether *H* was not the representative of *B* which was directly raised by the respondent, was dealt with by the Court and decided adversely to the respondent, it is impossible to ignore the force of that decision, whether right or wrong, as *res judicata* on general principles. A.I.R. (Vol. 23) 1936 Pat. 616=2 B.R. 573=163 Ind. Cas. 38.

——S. 11—Orders passed in the course of execution proceedings adjudicating on the rights of the parties are *res judicata* and cannot be called in question by the parties or their representatives. When once the said orders become final, that effect cannot be sought to be avoided by making allegations that the previous decisions were wrong on the merits because full facts were not placed before the Court or that all available evidence was not let in on the former occasion. A.I.R. (Vol. 19) 1932 Mad. 86=34 L.W. 809=55 Mad. 495=1931 M.W.N. 1235=62 M.L.J. 302=136 Ind. Cas. 306.

——S. 11—Where judgment-debtor does not challenge by way of appeal, review or revision, a wrong order of an executing Court ordering issue of notice after a lapse of twelve years, he is precluded from challenging the order at any subsequent stage of the execution proceedings on principles analogous to those of *res judicata*. 22 N.L.R. 67 =80 Ind. Cas. 905=A.I.R. 1925 Nag. 82.

——S. 11—Erroneous order.

The application was for form C to be sent to the Collector for sale of the property mortgaged and no inventory of the property was needed as the decree showed what property was to be proceeded against. Nevertheless the Court passed the following order:—"Decree-holder No. 2 in person. There is no inventory of the property at the foot of the application in accordance with order and it is rejected as such with costs on applicant." The decree-holder acquiesced in this order, that is he did not appeal against it.

Held, that though the order of rejection was a wrong one, nevertheless the Munsif had jurisdiction to decide that the application was not according to law; and that the order was final and could not be questioned in subsequent execution proceedings and therefore the application can be of no avail to have limitation for further application.

Held, further, that the fact the order of the Munsif was passed against the decree-holder without any notice having been issued to the judgment-debtor was immaterial. 8 N.L.J. 91=72 Ind. Cas. 473 =A.I.R. 1923 Nag. 236.

——S. 11—Decision that former execution petition was invalid is res judicata.

Where a Court erroneously decides that a former execution application was not made to the proper Court, the decision is *res judicata* between the parties. 63 Ind. Cas. 189=1921 M.W.N. 344=13 M.L.W. 529=A.I.R. 1921 Mad. 315=40 M.L.J. 556.

(ii) When not res judicata.

——S. 11—Order dismissing application as premature on erroneous view of law.

The dismissal of the previous application as pre-

mature owing to an erroneous view of the law and on the Court's own motion, does not bar a subsequent application for execution on the ground of *res judicata* as there is no considered decision. A.I.R. (Vol. 30) 1943 Lah. 189=46 P.L.R. 171=210 Ind. Cas. 40.

——S. 11—Execution petition dismissed by Court on erroneous ground that it had no jurisdiction.

Where, petitions for execution of a decree are filed in a Court of competent jurisdiction within the meaning of S. 37 (b) Civil P. C., and the last of them is dismissed by the Court on the erroneous ground that it had no jurisdiction, the principle of *res judicata* has no application on the question of jurisdiction and all the execution petitions can be availed of to save limitation. A.I.R. (Vol. 28) 1941 Cal. 493=73 C.L.J. 410=196 Ind. Cas. 534.

——S. 11—Erroneous order dismissing judgment-debtor's objection.

Executing Court dismissed the objection of the judgment-debtor and held that the ancestral land in the hands of the son was liable to attachment in execution of decree-against deceased father. The proceedings continued and the executing Court began to arrange for the lease of the land. But before it had arranged for the lease the Punjab Debtors' Protection Act came into force and the executing Court relying on its provisions reversed its decision:

Held that the order of the executing Court dismissing judgment-debtor's objection was not final and hence it was not precluded from reversing its erroneous order. No question of *res judicata* therefore arose. A.I.R. (Vol. 26) 1939 Lah. 168=41 P.L.R. 635

——S. 11—Erroneous decision.

An erroneous decision in prior execution proceedings is not *res judicata* in subsequent proceedings in execution. 45 Ind. Cas. 201.

——S. 11 (S. 13, Old Code)—Erroneous decision —Order passed without jurisdiction—Effect of—Res judicata.

One Ram Chandra seeking to obtain execution of a decree against two Hindu widows after the death of the judgment-debtors was resisted by Lachmi Narain who claimed to be the nearest reversioner to the widow's deceased husband. Instead of taking proceedings under O. 21, R. 99 (S. 331, Old Code), the Court refused the decree-holder's application for execution and directed him to bring a suit to establish his title against Lachmi Narain. The decree-holder did not appeal against these orders, nor did he bring a suit; but he brought Lachhmi Narain on to the record of the execution proceedings and applied for execution as against him. *Held* that the former order on the decree-holder's application for execution, if intended to decide any question as to the rights of the parties, was made without jurisdiction and could not operate as *res judicata* in respect of the decree-holder's subsequent application. (1906) 1907 A.W.N. 64=4 A.L.J. 117.

——S. 11 (S. 13. Old Code)—Maintenance decree —Construction—Erroneous decision on law in prior execution—Res judicata in subsequent execution for subsequent maintenance.

An erroneous decision on a point of law in a prior application for execution of a maintenance decree cannot operate as *res judicata* with regard to a subsequent application made in reference to maintenance accrued due subsequent to the first application. (1906) 17 M.L.J. 402=30 M. 504. *See also* 18 M.L.J. 548.

10. (e) Estoppel.

——S. 11—Fraudulent collusion between decree-holder and one of judgment debtors—Estoppel.

Where fraud has not been carried out it may be pleaded by party to it. But where during execution some of the judgment-debtors object to execution on the ground that the assignee decree-holder is in fraudulent collusion with one of them but the objectors plead that they had acquiesced in the two previous applications for execution because the decree-holder assignee had promised them a share of the sale proceeds if the execution succeeded this amounts to carrying the fraud into effect and they are not bound by the rules of *res judicata* and what is more, they are estopped from pleading their own fraud entirely. A.I.R. (Vol. 23) 1936 Rang. 218=163 Ind. Cas. 671.

——S. 11—Execution application—Omission by J. D. to raise objections—Estoppel ogainst his L. R. S.

The ordinary rules of *res judicata* are applied by analogy to execution proceedings. Where therefore, when *A* sought to attach property *B* did not raise the objection that *A* was a *benamidar* or that decree had been settled in full or that execution could not proceed against him, *B's* legal representatives brought on record on his death are estopped from raising the objection, as the principle applies to matters falling under Explanation 4 to S. 11, Civil P.C. A.I.R. (Vol. 23) 1936 Rang. 218=163 Ind. Cas. 671.

——S. 11—Decree-holders included to agree to postponement of sale — Judgment-debtors, if can raise objections to execution subsequently.

Where in the execution proceedings the judgment-debtors induced the decree-holders to agree to postponement of sale in order that they might have an opportunity of paying the decretal amount:

Held, that having thus induced the decree-holders to agree to a postponement of the sale they could not be allowed to turn round afterwards and put in a delayed petition raising an objection against the execution. A.I.R. (Vol. 22) 1935 Cal. 816=160 Ind. Cas. 86.

——S. 11—Estoppel.

It is inequitable that a decree-holder should be able to put in an application stating that a certain sum was due under a decree and asking for the arrest of a judgment-debtor under that application and when that amount is paid up to put in another application for a further sum. Where in an application made for the execution of a decree, interest was inserted and then scored out and the deletion was accepted by the decree-holder that amounts to waiver of the claim to interest and the decree-holder is not entitled to make another application to execute decree for interest. 119 Ind. Cas. 223=A.I.R. 1929 Rang. 182.

——S. 11—The delivery of symbolical possession to a decree-holder, even in cases in which actual

possession should have been given, puts an end to the adverse possession of the judgment-debtor who is in actual possession of the property and effectually vest the property in suit in the decree-holder so as to give him a fresh cause of action for recovery of actual possession from the judgment-debtor. The operation of this rule is restricted to judgment-debtors. Symbolical possession wrongly given to a decree-holder does not give him a fresh starting point against persons who are not bound by the decree. A person who is a party to certain legal proceedings is not entitled to question the legality of the procedure adopted in such proceedings, except in the manner authorised by law and that is by appeal to a higher Tribunal, but if he allows wrong procedure to be followed without effective protest he must be deemed to have acquiesced in it and, therefore, to be bound by it. The general principle of estoppel similar to *res judicata* will apply to a case like this. 26 P.L.R. 546=89 Ind. Cas. 596=A.I.R. 1926 Lah. 35.

——S. 11—Omission by judgment debtor to challenge liability, where it does not affect decree-holder's position creates no estoppel.

Omission to raise objections where it in no way affects the position of the decree-holder does not estop judgment-debtor from contesting his liability when he has become aware of his legal position. 7 L.L.J. 343=91 Ind. Cas. 772=26 P.L.R. 634=A.I.R. 1925 Lah. 552.

——S. 11—Execution proceedings—Estoppel.

A judgment-debtor is barred by *res judicata* from contending in the course of execution proceedings, that a particular person is not the legal-representative of a deceased plaintiff while at his instance the particular legal representative was recorded as such and final decree passed. 45 Ind. Cas. 657.

——S. 11 (S. 13, Old Code)—Order construing decree — Contentions inconsistent with such order—Estoppel.

Where a decree, though not containing a direction for sale of property is construed by orders in execution as containing such a direction such orders will operate as *res judicata* and estop the judgment-debtor from afterwards raising contentions inconsistent with such orders. (1904) 15 M.L.J. 418.

——S. 11—Estoppel against statute.

Property released under S. 12 of the Chota Nagpur Encumbered Estates Act cannot be sold without the sanction of the Commissioner in execution of money-decree. Such an objection cannot be thrown out on the mere ground that a similar objection was raised before the sale and overruled, as such sale is void. A. I L. (Vol. 18) 1931 Pat. 364=12 P.L.T. 508=10 Pat. 582=132 Ind. Cas. 868.

10. (f) Ex parte order.

(i) When res judicata.

——S. 11—Notice under O. 21, R. 66—Judgment-debtor failing to appear in answer—Order for proclamation and sale—Plea by judgment-debtor of status of agriculturist and prayer for instalments—Constructive res judicata.

Where a judgment-debtor fails to appear in answer to a notice under O. 21, R. 66, C. P. Code, and the Court orders a proclamation to issue and fixes the date for sale it is not open to the judgment-debtor to appeal on the date of sale and plead his status as an agriculturist and to request for instalments on that ground. By failing to appear in answer to the notice under O. 21, R. 66, C. P. Code he brings into operation the principle of constructive *res judicata*, and his plea raised subsequently is therefore barred. I.L.R. (1948) Bom. 517=A.I.R. 1949 Bom. 79=50 Bom.L.R. 610.

——S. 11—Execution Proceedings——Res judicata —Application to substitute legal representatives of deceased judgment-debtor — Notice — Failure of heirs to appear and object—Order—Res judicata.

Where notice of an application to bring on record the legal representatives of a deceased judgment-debtor is served on them, but they fail to appear or to raise any objection and an order for substitution is made such order is conclusive between the parties and operates as *res judicata* in subsequent proceedings in execution. I.L.R. (1946) Kar. 371=A.I.R. 1947 Sind 149.

——S. 11—Ex parte order.

If after notice to the other party the execution Court passes an order for sale and the order is not appealed against, any subsequent application to reconsider the order is barred by *res judicata*. 8 Cal. 51 (P.C.) and A.I.R. 1923 Mad. 649, followed. 113 Ind. Cas. 92 (Mad.).

——S. 11—Ex parte order after notice directing execution—Executability of decree—Res judicata.

When an application is made for execution of a decree and notice of the application is served on the judgment-debtors, they are bound to appear and show cause why the decree should not be executed. If they fail to appear and show cause, and if on such failure an order *ex parte* should be made by the Court directing execution then the question of the executability of the decree should, according to the law of constructive *res judicata*, be regarded as having been decided by the Court in favour of the decree-holder and the rule of constructive *res judicata* will be available even if the parties are not personally served. All that is necessary under the law is that they should be properly served served according to the rules relating to service. 39 M.L.T. 34=103 Ind. Cas. 825=26 M.L.W. 481=A.I.R. 1927 Mad. 813.

——S. 11—A previous **ex parte** order for execution passed on service of proper notice to the judgment-debtor which raised a question about the executability of the decree operates as *res judicata* and the judgment-debtor cannot at a subsequent application raise the plea that the decree is not executable and that the previous application was barred by limitation. 98 Ind. Cas. 702=A.I.R. 1927 Mad. 149.

——S. 11 (S. 13, Old Code)—Ex parte order for arrest after notice—Objection to executability in subsequent execution—Res judicata.

Where after notice on a prior execution application by two alleged representatives of the decree-holder an order for a writ of arrest was made against the judgment-debtor, but the application pro-

ved ultimately infructuous on account of the judgment-debtor not being found: *Held*, that the judgment-debtor cannot on a subsequent application by the same persons object to the right of the applicants to execute the decree against him. (1901) 24 A. 138=(1897) A.W.N. 29.

——S. 11—Execution proceedings—Notice—Res judicata.

An order passed by the Court *ex parte* after holding that the notice was duly served binds the defendant on general principle of *res judicata* as much as a contested order. 37 Mad. 462=26 M.L.J. 189=(1914) M.W.N. 205=22 Ind. Cas. 899=1 L.W. 251.

——S. 11 (S. 13, Old Code)—Order allowing execution without contest—Subsequent plea at later stage that decree is not executable—Res judicata.

Where a decree which was said to be declaratory and therefore not executable was several times sought to be executed and the applications for execution were all granted after notice to the judgment-debtor, though without contest: *Held*, that the executability of the decree was *res judicata* and could not be contested in subsequent applications for executions. 8 I.A. 131 and 19 M. 54, followed. (1901) 11 M.L.J. 432=24 M. 683.

——S. 11 (S. 13, Old Code)—Execution proceedings—Order allowing execution of barred decree—Subsequent plea of limitation—Res judicata.

Where after execution was barred application for execution had been put in and granted after notice to the parties, and even moneys of the judgment-debtor in Court had been paid to the decree-holder: *Held*, that the judgment-debtor was debarred from raising the question of limitation. 14 M.L.J. 359.

——S. 11 (S. 13, Old Code)—Construction of decree—Order fixing rate of interest after notice—Objection to rate at later stage—Bar of.

An order in execution proceedings passed after notice to the judgment-debtor and determining the rate of interest payable on the decretal amount cannot be questioned by the judgment-debtor in subsequent proceedings. (1900) 12 M.L.J. 97.

(ii) When not res judicata.

——S. 11—Notice under O. 21, R. 22, served on judgment-debtor—Latter not appearing—If precluded from raising issue of limitation at time of sale—Limitation Act, S. 3.

A judgment-debtor who did not appear to contest a notice under O. 21, R. 22, C.P. Code, whether or not it was served on him is not precluded from raising the issue of limitation when his property is sold.

The judgment-debtor is not hit by *res judicata* or any principle analogous thereto, as under S. 3 of the Limitation Act which applies to execution proceedings the Court is bound to take the point of limitation itself and dismiss the application if it is not in time. 54 C.W.N. 900=A.I.R. 1950 Cal. 513.

——S. 11—Ex parte finding that execution application is not time-barred—Application dismissed owing to absence of both parties—Another execution application—Judgment-debtor raising objection that first application is not within time.

An execution application was *prima facie* time-barred but on the evidence of the decree-holder an *ex parte* finding that it was not time-barred was recorded. After this, notice was sent to the judgment-debtor to show cause why the execution should not be proceeded with against him, and both parties being absent on the fixed date, the execution application was dismissed. The decree-holder filed a second application where upon the question of limitation of the first application was taken by the judgment-debtor:

Held, that the *ex parte* order which had been recorded against the judgment-debtor and which was to the effect that the application for execution was *prima facie* within time could not be taken to operate as *res judicata* or by way of estoppel or on any principle analogous to it. A.I.R. (Vol. 22) 1935 Cal, 230=38 C.W.N. 1144=155 Ind. Cas. 723.

——S. 11 (S. 13, Old Code)—Omission to raise plea of limitation on notice of application—No res judicata.

A judgment debtor is not estopped from contending that a previous application for execution was barred by limitation merely because notice had been served on him and he did not appear to contest the proceedings. (1908) 8 C.L.J. 193=35 Cal. 1060.

——S. 11—Ex parte orders without specific notice of claims—Principles.

A compromise decree passed in a suit for specific performance provided that the 1st and 3rd defendants should execute a sale deed in favour of the plaintiff, and the said document be filed for registration on May, 30, 1917, at the expense of the defendants, who should get it registered, that the plaintiff do pay to the defendants Rs. 4,570-8-0 settled to be paid before the Registrar at the time of registration. It was further provided that if the plaintiff cannot pay the amount before the Registrar on the aforesaid due date, that is, on May 30, 1917, the defendants should recover the amount thence forward with interest at 12 annas per cent. per month till the amount is paid, the sale deed was not executed or get ready by the defendants on May, 30, 1917, and the plaintiff having got into possession of the land did not trouble himself to execute the decree, and get the sale-deed executed by Court. The sale-deed was executed on December 17, 1924 and the 4th and 2nd defendants applied asking the Court to call upon the plaintiff to deposit the amount in Court with interest from May 30, 1917. Notice issued to the plaintiff on this application did not convey any specific information that such interest was claimed. In a subsequent application for the same relief:

Held, that the reference to interest in the decree contemplates it as due from and after the date of the execution of the document but interest should be allowed from May 30, 1917 on equitable considerations as the plaintiff was in possession of the property.

Held, further that as the previous application did not convey any information that it contained a claim

for interest from May 30, 1917, an order made on it cannot be *res judicata* on the question of the right to recover interest in the subsequent application. A.I.R. (Vol. 20) 1933 Mad. 844=1933 M.W.N. 127=146 Ind. Cas. 317.

——S. 11—Execution proceedings—Order without notice.

An order in execution passed without notice to the parties does not operate as *res judicata*. 62 Ind. Cas. 480=13 L. W. 289=A.I.R. 1921 Mad. 532 (1).

——S. 11—Execution proceedings — Notice—Res judicata.

An order passed in execution of decree, against a party without notice, is not binding on that party. 56 Ind. Cas. 801=31 C.L.J. 382.

——S. 11—No notice of proceedings.

The principle that an order made at one stage of execution proceedings, cannot be questioned at a later stage of the proceedings, has no application when the party sought to be bound by such order has no notice of the proceedings. When, therefore, execution proceedings are shown to be fraudulent, the principle in question has no application. (1909) 11 C.L.J. 357=14 C.W.N. 433=5 Ind. Cas. 89.

——S. 11—Ex parte order.

An order made in execution proceedings without notice to the judgment-debtor does not estop the latter from subsequently contending that the application on which the order was made was barred by time. 54 Ind. Cas. 933.

——S. 11—Execution proceedings—Order without notice.

A judgment-debtor not having any notice of the order of the court admitting a previous application for execution as not time barred is entitled to show that the decree has become barred by limitation. 27 Ind. Cas. 225=18 C.W.N. 1288.

——S. 11—Execution proceedings—Order without notice.

An order in execution proceedings cannot operate as *res judicata* unless it is shown that it was passed after notice to the opposite side and allowing him an opportunity to be heard. 14 M.L.T. 530=26 M. L. J. 83=21 Ind. Cas. 782=(1914) M.W.N. 157.

——S. 11 (S. 13, Old Code)—Decree against assets of deceased person in hands of judgment-debtor—Death of latter—Notice to legal representatives not showing what properties were to be proceeded against—Subsequent plea that property sought to be sold was not assets of deceased—Not barred.

Certain decree-holders held a decree which was executable only against the assets of a deceased person in the hands of a judgment-debtor. The decree was sought to be executed against property which was not in the hands of their judgment-debtors as assets of such deceased person but was property purchased by her. The judgment-debtor died and her representatives objected to the execution. *Held*, that the judgment-debtor's representatives were not estopped from pleading that the property sought to be taken in execution was not liable to satisfy the decree merely from the fact that on previous occasions when notice of applications for execution of the decree had been served upon them the judgment-debtor had not taken this objection, there being nothing to show that these properties were to be proceeded against. (1906) 1907 A.W.N. 163 =4 A.L.J. 400. *See also* 17 M.L.J 311: But *see* 15 M.L.J. 247=28 M. 355.

——S. 11 (S. 13, Old Code)—Order after notice—Res judicata in subsequent execution.

An order for execution after notice to the judgment-debtor operates as *res judicata* in a subsequent execution but not when the notice in the former proceedings was insufficient to fix the judgment-debtor with the knowledge of the claim made in the prior application (here the claim being one for interest) the decree itself not containing anything so as to *ipso facto* convey the information as to the claim made. (1904) 15 M.L.J. 247=28 M. 355.

——S. 11—Judgment-debtor not given opportunity to challenge validity of proceedings.

In order that the principle of *res judicata* may be applied to execution proceedings, it is necessary that the judgment-debtor should have had an opportunity to challenge the validity of the execution proceedings and in spite of such opportunity, failed to avail himself of it. 9 Ind. Cas. 213=13 C.L.J. 26.

——S. 11—Ex parte order against decree-holder.

An *ex parte* order against the decree-holder holding the decree to be barred by limitation is no bar to the consideration of the application for execution filed by the assignee of the decree nor is the Court hearing this application bound by the former *ex parte* finding. 34 All. 518=16 Ind. Cas. 677=10 A.L.J. 140.

——S. 11—Transfer of decree by one of decree-holders—Application for execution by transferee decree-holder—Ex parte order against co-decree-holders.

A joint decree was transferred by one of the decree-holders after adjustment of the decree by the other decree-holders. The notice served on the latter of the application for execution filed by the transferee did not contain any indication that the Court was going to decide any question regarding settlement of the amount for which the decree were executable and the properties liable to be sold in execution. The case proceeded ex parte as against them.

Held, that they were not estopped in the subsequent proceedings from disputing their co-decree-holders' claims to execute the whole of the decree against any of the judgment-debtor's properties. 32 M.L.T. 118=70 Ind. Cas. 329=A.I.R. 1924 Mad. 518.

——S. 11(g)—Heard and finally decided—Question of limitation and jurisdiction once raised and decided cannot be raised subsequently in same proceeding.

The principle of **res judicata** does apply as much in execution proceedings as in a suit. The same objection cannot be raised again and again in execution applications. If it is once raised and decided and there is no appeal, then it cannot be raised again and be subject of a decision in the same execution proceedings. A question of limitation goes to the root of the execution proceedings. A question of limitation raised in execution proceedings and overruled cannot be raised on a subsequent occasion in the same execution proceedings. Objections to the pecuniary jurisdiction of the

transferee Court must be taken while proceedings before that transferee Court are pending or in appeal; they cannot be taken at a later stage in those same execution proceedings. A.I.R. (Vol. 33) 1946 Sind 103=I.L.R. (1945) Kar. 445.

——S. 11—Question of limitation adjudicated—Whether can be again raised.

If there is an adjudication on the question of limitation either expressly or by necessary implication that the earlier application for execution was in time, the judgment-debtor cannot raise that selfsame question again. A.I.R. (Vol. 22) 1935 Cal. 664=39 C.W.N. 1206=159 Ind. Cas. 637.

——S. 11—Objection to application for execution once adjudicated as without force, operates as res judicata.

Where the objection against execution application is raised on the ground of limitation and there is an adjudication between the parties it being held that the objection is without force, a fresh objection is barred by the principle of res judicata, when there has been no appeal from the order. 6 O.W.N. 1064=5 Luck. 458=124 Ind. Cas. 445=A.I.R. 1930 Oudh 65.

——S. 11—Execution proceedings—Plea of limitation raised and decided—Same plea could not be raised in a late stage.

Where a plea of limitation was raised by the judgment-debtor in a prior stage of an execution application, but was rejected and the decree holder allowed to execute the decree, it was not competent for the Court to admit the same plea in a subsequent stage of the execution proceedings. 48 I.A. 45=19 A.L.J. 168=40 M.L.J. 197=13 L.W. 290=(1921) M.W.N. 51=33 C.L.J. 218=25 C.W.N. 581=23 Bom.L.R. 701=59 Ind. Cas. 880=29 M.L.T. 345 (P.C.).

——S. 11—Where the Court, decided after due notice upon the judgment-debtors that the execution was in order and that it should proceed.

Held, that the order is binding upon the judgment-debtors. It is an order deciding as between the parties that the execution was not barred by limitation. Such an order operates as res judicata and whether right or wrong the order cannot be challenged in subsequent execution proceedings. 4 P.L.T. 204=68 Ind. Cas. 337=A.I.R. 1923 Pat. 180.

——S. 11—Decision as to limitation—When res judicata.

To bar as res judicata, the question of bar of limitation for execution of a decree, must be proved that (1) notice requiring the judgment-debtor to show cause why the decree should not be executed against him has been served on him and (2) he has thus been in a position to raise that plea of limitation, and (3) that a Court has expressly or impliedly decided by its order the question of limitation in favour of the decree-holder applicant and that this has been an effective order of adjudication. 33 Ind. Cas. 663=18 O.C. 374.

——S. 11 (S. 13, Old Code)—Plea of limitation not sustained—Order allowing execution although execution barred—Plea at later stage—Res judicata.

Although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet if an order for execution is made by a competent Court, having jurisdictin to try whether such execution is barred by time or not, such order although erroneous, must, if unreversed, be treated as valid. An application for execution of a decree was struck off on the 15th of January, 1894. The next application for execution was not made until the 29th of May, 1897. Notice of this application was served on the judgment-debtors and they filed objections, but on the day fixed for hearing, failed to support them and they were dismissed. The application for execution was, however, ultimately struck off by reason of the non-payment of process fees by the decree-holders. **Held**, that it was not open to the judgment-debtors on a subsequent application for execution being made to plead limitation in respect of the application of the 29th May, 1897, as a bar to the execution of the decree. 1902 A.W.N. 63=24 A. 282.

——S. 11 (S. 13, Old Code)—Dismissal of prior execution on ground of absence of jurisdiction—Fresh execution in same Court—Bar of—Res judicata.

A Munsif as a Court executing a decree dismissed an application for execution, holding that owing to certain proceedings in insolvency which had taken place at the instance of the judgment-debtor in the Court of the District Judge, he (the Munsif) had no jurisdiction to entertain it. No appeal was preferred against the order of the Munsif dismissing this application for execution, and the Munsif's order became final. **Held**, that a further application by the same decree-holder in the same Court to execute the same decree against the same judgment-debtor was barred by S. 13 of the Code of Civil Procedure. 1904 A.W.N. 197=1 A.L.J. 592=27 A. 148.

——S. 11—Finding by Court that clause in consent decree is not penal—Appeal not filed—Res judicata.

Where a Court in execution has decided that a clause in a consent decree does not fall under S. 74 of the Contract Act and is not a penal clause, and no appeal is filed against that finding, the question cannot be again raised for decision in a subsequent application, although the subsequent application is one under S. 47, C. P. Code, and not under S. 74 of of the Contract Act. I.L.R. (1946) Kar. 132=222 Ind. Cas. 628=A.I.R. 1946 Sind 150.

——S. 11—Order holding decree to be rent decree and refusing arrest.

Where, in an application for the arrest of a lessee in execution of a decree for arrears of rent due under a lease, the judgment-debtor pleads that he is not liable to arrest because the decree is a rent decree under S. 177-A of the Bihar Tenancy Act and cannot therefore be executed by his arrest, and the Court upholds the objection and refuses to pass an order for arrest such order holding the decree to be a rent decree operates as res judicata in a subsequent application by the decree-holder for execution of the same decree. The decree-holder cannot in the second application reopen the question whether the decree was a decree and is debarred from pleading that the decree is not a rent decree and that he can execute it by attaching the lessee's property. The fact that the decree-holder in the prior execution conceded that the decree was a rent decree or that the view that the decree was a rent decree was wrong in law, would make no difference. The order holding the decree to be a rent decree having become final the matter beomes res judicata and the Court must treat the decree as a rent decree and the matter

cannot be agitated afresh. 223 Ind. Cas. 131=1946 P.W.N. 248=12 B.R. 325=A.I.R. 1946 Pat. 441=27 P.L.T. 405.

——S. 11—Property attached—Objection dismissed—Suit by objector dismissed and during appeal decree satisfied—Parties still insisting on appeal being decided—Decision in appeal will debar parties from agitating same question on ground of res judicata and not on ground of finality of order of executing Court.

As soon as the decree in execution of which the lands have been attached is satisfied, during the pendency of appeal by the objector, the attachment must ipso facto be deemed to have been withdrawn under O. XXI, R. 55, Civil P. C. and there remains no order of the executing Court which can be made conclusive by the decision of the appeal. Yet the parties to the appeal may fight it out on its merits to its end, not for the purpose of giving finality to the order of the executing Court which has already spent itself, but to have their dispute about the right to the property settled once for all. The decision will then debar the parties from agitating the same question again on the ground of **res judicata** and not because of the finality of the previous order of the executing Court. A.I.R. (Vol. 31) 1944 Bom. 50=45 Bom. L.R. 980=212 Ind. Cas. 291.

——S. 11—Question of validity of assignment decided—It cannot be re-agitated.

Where the question regarding the validity of the assignment or a decree has been decided in execution preceedings by the Court which passed the decree, it cannot be re-agitated in execution proceedings in the Court to which the decree has been transferred. A.I.R. (Vol. 30) 1943 Bom. 455=45 Bom. L.R. 859=210 Ind. Cas. 605.

——S. 11—Order that plaintiff was entitled to continue darkasht on strength of his adoption—Res judicata in subsequent suit.

Where an order is passed by the executing Court after hearing both sides as to whether the plaintiff was entitled to continue the **darkhast** on the strength of his adoption and it is held on evidence that he was adopted, the decision would operate as **res judicata** to the subsequent suit between the same parties with reference to a part of the same estate. The principle of **res judicata** would apply even though the subject-matter of the two proceedings may be different, provided the issue is the same. A.I.R. (Vol. 29) 1942 Bom. 309=44 Bom.L.R. 678=I.L.R. (1942) Bom. 822=203 Ind. Cas. 339.

——Ss. 11, 145—Decree-holder seeking to recover decretal amount from surety—Surety raising defence—Decision against surety—Res judicata.

Section 145 gives the decree-holder the right to proceed against the surety in the manner provided for the execution of decrees, and if he does so, the surety is deemed to be a party for the purposes of appeal within the meaning of S. 47. It is open to the decree-holder either to proceed against the surety in execution of his decree or to bring a separate suit against the surety on the surety bond and it is open to the surety, if he has not been made a party to the execution proceedings, to bring a separate suit to decide his liability under the surety bond. Where, however, the surety has been made a party to the execution proceedings and has raised a defence that has been decided, then, it is not open to him to raise again the same defence in a separate suit. A.I.R. (Vol. 29) 1942 Nag. 107=1942 N.L.J. 413=I.L.R. (1942) Nag. 779=201 Ind. Cas. 692.

——S. 11—Order "striking off" execution after decision on merits.

Where, after a clear decision on the merits, the Court order the proceedings to be struck off, particularly where there is also a clear order dismissing the application in execution in the order sheet, the order "striking off" the execution application operates as **res judicata**. A.I.R. (Vol. 29) 1942 Oudh 183=1942 O.W.N. 1227=1941 O.L.R. 877=197 Ind. Cas. 305=17 Luck. 366.

——S. 11—Case struck off after determination of rights of parties.

If an order has been made which directly or by implication determines the rights of the parties to an execution proceeding, the fact that the decree-holder does not choose to proceed with the execution and the case is struck off does not entitle any party to re-open the question upon which there has been a previous adjudication. Though S. 11 does not apply to such a case, such a decision becomes final between the parties upon general principles of law. 17 C.W.N. 113, Foll. 7 N.L.J. 163=68 Ind. Cas. 239=A.I.R. 1923 Nag. 1 (b).

——S. 11—Review application to set aside sale decided against plaintiff by competent Court—Res judicata.

Where the question whether the sale in execution was proper or not was directly and substantially in issue in the application for review to set aside the sale and was decided against the plaintiff by the Court having jurisdiction to decide it, the decision is binding on the plaintiff and question is **res judicata** between the parties. A.I.R. (Vol. 27) 1940 Bom. 284=42 Bom. L.R. 525=I.L.R. (1940) Bom. 519=190 Ind. Cas. 837.

——S. 11—Order dismissing review petition.

Where on the date fixed for the appearance of the judgment-debtor, for settlement of the terms of a sale proclamation, the judgment-debtor did not appear, but appeared subsequently and applied by a review petition for setting aside the sale and the petition was dismissed, the order of dismissal operates as **res judicata** in subsequent proceedings and is not appealable. 22 Ind. Cas. 780.

——S. 11—Objections to execution under S. 47, Civil P. C. rejected—Decision affirmed in appeal—Judgment-debtor cannot re-agitate them.

Where the trial Court rejects the objections to execution of a decree, by judgment-debtor in his petition under S. 47, Civil P. C. and the decision is affirmed in appeal, the judgment-debtor cannot subsequently reagitate these objections by the general principles of **res judicata**. A.I.R. (Vol. 26) 1939 Cal. 601=69 C.L.J. 355=43 C.W.N. 401=I.L.R (1939) 1 Cal. 477=186 Ind. Cas. 215.

——S. 11—Objection once disposed of cannot be again raised in execution of the same decree.

An objection which has been disposed of finally by an order in execution proceedings is not to be entertained a second time in execution proceedings relating to the same decree. The binding force of such an order does not depend upon the provisions of the C. P. Code, relating to **res judicata** but upon the general principles of law. 6 All. 269, Foll. 99 Ind. Cas. 1006=A.I.R. 1927 Lah. 179.

——S. 11—Successive applications against same person—Maintainability.

There is nothing to prevent a succession of applications directed against persons who are ascertained to be, or believed to be partners in the particular venture out of which the decree has arisen. The limitation, however, that is imposed on all these applications, is that if there has been a previous application in which there has been a definite decision affecting a particular piece of property or particular person, and from that decision nothing has been done by way of appeal or institution of suit, if neither of these methods were available that decision is a final decision between the parties and if in any subsequent proceedings, the point again becomes material, the parties are bound by that previous decision, and the matter cannot be reopened. To that extent, and that extent only, is there limitation on the successive applications in execution. 45 A. 735=L.R. 4 A. 441=21 A.L.J. 641=74 Ind. Cas. 513=1924 All. 34.

——S. 11—Execution proceedings—Order made at one stage—Binding on parties.

Where a court executing a decree passes an order after notice to the parties, that decision is unless set aside on appeal, binding upon the parties. 73 Ind. Cas. 359=1 Pat.L.R. 145=A.I.R. 1924 Pat. 362.

——Ss. 11, 47—Execution proceedings—Decision—Res judicata.

If a matter is decided on an application under S. 47. C. P. Code the decision is final and operates as res judicata in a subsequent suit. (1910) 1 U.B.R. 66=10 Ind. Cas. 99.

——S. 11 (S. 13, old Code)—Plea in bar of execution not pressed and therefore overruled—Plea at subsequent stage—Res judicata.

In answer to an application for execution of a simple money decree, obtained against her deceased husband, the widow objected that the property sought to be taken in execution was in her possession by consent of the heirs of her husband in lieu of dower; but this objection was not pressed, and was disallowed, and no appeal was preferred from the order disallowing it. **Held**, that the same objection could not be raised again at a subsequent stage of the execution of the same decree. 25 A. 282, foll. 1906 A.W.N. 70=3 A.L.J. 198.

——S. 11—If an executing Court expressly decides a point inter partes that decision becomes final according to the general principles of law, though the question whether the law of res judicata applies would be irrelevant, as the term refers to a matter decided in another suit. But where there has been no express adjudication on a point it would not operate as a bar. 44 All. 159=65 Ind. Cas. 377=19 A.L.J. 954=A.I.R. 1922 All. 413.

——S. 11—Order at one stage, binding subsequently.

Where at one stage of an execution proceeding an order is made disallowing the objections of the judgment-debtor, the order is binding in all subsequent stages of the same execution. 64 Ind. Cas. 724 (Cal.).

——S. 11—Execution proceeding—Order made on an application.

An order made in execution proceedings whether right or wrong bars a subsequent application when the validity of the first order is directly in question to determine whether the latter application is maintainable. 40 M.L.J. 556=13 L.W. 529=29 M.L.T. 284=63 Ind. Cas. 189=(1921) M.W.N. 344.

——S. 11—Decision between same parties is a bar to a suit on same subject-matter.

The executors of a deceased Hindu sued his widow and others to recover various parts of his estate and the parties agreed to a compromise under which a decree was passed. In execution of it the widow objected to the attachment of the house she was residing in. The objection was overruled and execution was allowed to proceed. The Chief Court held that the widow had no right to live in the house and confirmed the execution proceedings. On a suit by the widow for declaration of her right to live during her lifetime in the house and for maintenance: **Held**, that the decision in the previous execution proceedings between the same parties was res judicata, that the widow was in possession of the house as a trespasser and that she was not entitled to claim maintenance unless and until she had given possession of the house and accounted for the mesne profits. 69 P.L.R. 1915=26 Ind. Cas. 430=17 P.W.R. 1915.

——S. 11—Execution proceedings—Order when res judicata.

An order, passed in the course of an execution proceeding, which is not appealed from, is final between the parties upon general principles of law as an interlocutory order in the suit. 6 A. 269, foll. 16 Ind. Cas. 238.

——S. 11—Order partly based on adjudication and partly on consent order.

A decision in the course of execution proceedings of a question which arises for consideration is final and binding between the parties, though as to the some of the parties it was based on agreement and as to the others on an adjudication by the Court. 47 Cal. 446=30 C.L.J. 496=55 Ind. Cas. 189=24 C. W.N. 269.

——S. 11—Order attaching judgment-debtor's salary—Order not appealed against—Effect.

An order under O. 21, R. 48, Civil P. C., directed attachment of judgment-debtor's salary. No appeal was filed assailing the validity of the order: **Held**, that the order became final against the parties and its validity could not be attacked subsequently on the general principles of res judicata. A.I.R. (Vol. 26) 1939 Rang. 384=186 Ind. Cas. 252.

——S. 11—Decision as to liability of Judgment-debtor.

Where, in the execution application, it is held that the judgment-debtor is liable for the decree but suggests that the proper remedy of the decree-holder is by suit, the decision is res judicata on the question of the judgment-debtor's liability. A.I.R. (Vol. 24) 1937 Cal. 226=172 Ind. Cas. 121.

——S. 11—Order that execution proceeding is not in accordance with law.

A party cannot be allowed to question the order passed by the execution Court in execution proceedings as not being in accordance with law after such an order has been affirmed by the High Court in a case in which he himself was a party. A.I.R. Vol. 23) 1936 Pat. 305=2 B.R. 530=162 Ind. Cas. 987.

——S. 11—Rateable distribution, question of.

An order allowing a claim to rateable distribution, when not challenged by way of appeal or any other proceeding, becomes final. The genera

doctrine of **res judicata** applies and the order cannot be attacked in a suit. A.I.R. (Vol. 23) 1936 Lah. 891=167 Ind. Cas. 910.

——S. 11—Decree-holder getting declaration that only half of property is attachable—Whether can attach the whole in execution of another decree against same judgment-debtor.

Where in execution of a decree, the decree-holder got a declaration that only half interest in certain property is liable to attachment:

Held, that in a second execution proceeding of another decree against the same judgment-debtor, he could not attach the whole interest in the same property. A declaration that the whole interest was attachable in execution of the decree should be asked for. A.I.R. (Vol. 22) 1935 Rang. 399=159 Ind. Cas. 465.

——S. 11—Several decrees in one suit—Agreement between decree-holder and judgment-debtor—High Court's order in appeal in respect of execution of one decree—Execution of another decree—Order of High Court, if binding.

The decree-holder in a suit against the judgment-debtor obtained a simple money decree and four minor decrees for different sets of costs. During the course of the execution proceedings in respect of the main decree the decree-holder gave a document to the judgment-debtor stating that the decree-holder would not take out execution against the person of the judgment-debtor and he would not attach the money due to the judgment-debtor from the B. & N. W. Railway on account of loading and unloading contracts. This was held to be not an adjustment of a decree because it did not state that any portion of the decree was satisfied but merely dealt with the remedies which a decree-holder might enforce under his decree. Meanwhile the decree-holder applied in a Court at G for execution of one of the decrees for costs by attachment of the money due from the B. & N. W. Railway for the loading and unloading contract. The judgment-debtor objected that the decree-holder was bound by his agreement. The High Court held that although the agreement was not an adjustment of the decree which should be certified under O. 21, R. 2, still the agreement was binding on the decree-holder and the execution Court should recognise that agreement as binding on the decree-holder and refuse execution contrary to the provisions of the agreement. While the appeals were pending before the High Court, the decree-holder applied in a Court at G for execution of another of the decrees for costs by attachment of the same money with the B. & N.W. Railway. The same objection was made and the Court ordered the release of the money but stayed execution pending the decision in the appeals. The decree-holder subsequently made an application to continue his execution application to which the Court ordered that the order of the High Court was binding on the decree-holder and that it could not go beyond that order:

Held, that although the decree was different, it was passed in the same suit, the only difference being that the two decrees were for different sets of costs and the order of the High Court was binding as **res judicata** on the decree-holder. Even if it were not so binding, the order of the High Court set out the law to be applied and it was not open to the Single Judge to differ from the law as laid down by the Bench. A.I.R. (Vol. 22) 1935 All. 364=1935 A.L.J. 287=154 Ind. Cas. 292.

——S. 11—Execution proceedings for enforcing award—Objections under S. 47 challenging decree and award overruled—Same objections cannot be taken by way of subsequent suit for declaration that the award was void and without jurisdiction. A.I.R. (Vol. 22) 1935 Cal. 396=60 C.L.J. 572=156 Ind. Cas. 405 (2).

——S. 11—Execution against undivided portion of same survey number—Previous order in execution as to its saleability, whether res judicata—Collector's decision, effect of—Res judicata—Decision as to nature of one portion of survey number.

A portion of an undivided survey number which had been mortgaged was sold. In proceedings under O. 21, R. 90, Civil P. C., it was decided that though the land was once service **inam**, it had been enfranchised and was, therefore, saleable. In a suit by the judgment-debtors under S. 13 of the Madras Hereditary Village Offices Act, 3 of 1895, the Collector held that the land was service **inam**. In proceedings for sale of the remaining portion of the survey number for the unrealised balance of the mortgage decree, the judgment-debtors again objected that the land was not attachable:

Held, (i) that so long as the original decision in execution that the land was saleable remained in force it was not open to the Courts to recognise and give effect to the decision of the Collector even though the Collector's decision would be binding on the Civil Courts ordinarily. The matter was **res judicata**;

(ii) that the fact that the property sought to be sold was not identical was immaterial as it was an undivided portion of the same survey number as was originally sold. A.I.R. (Vol. 20) 1933 Mad. 130=140 Ind. Cas. 779.

——S. 11—Objection raised in execution proceedings that land of judgment-debtor could not be attached as he was agriculturist dismissed—Separate suit for declaration that judgment-debtor is agriculturist is barred.

Where an objection by the judgment-debtor that his land could not be attached and sold in execution of decree, he being an agriculturist is dismissed, a separate suit by him for declaration that he is an agriculturist does not lie by reason of S. 47. It is a direct attempt to set aside a decision of the executing Court between the parties to the suit in matter relating to the execution or satisfaction of the decree. 31 P.L.R. 191=A.I.R. 1930 Lah. 628=127 Ind. Cas. 858.

——S. 11—Where an application in execution proceedings that the judgment-debtor belonged to an agriculturist caste was dismissed and no appeal or revision was preferred against it, the same question cannot be raised in an objection under O. 21, R. 90, as the principle of **res judicata** applies to the case. 110 Ind. Cas. 337 (Lah.).

——S. 11—The execution Court has no jurisdiction to entertain a second application of objection to the attachment and sale, when one has failed. It is immaterial that the grounds are different. 117 Ind. Cas. 816=A.I.R. 1929 Lah. 470.

——S. 11—Where an order releasing property from attachment is not appealed against, the order becomes final and so fresh application for the attach-

ment of the same property does not lie. A.I.R. 1921 Bom. 208; A.I.R. 1924 All. 808; 25 C.W.N. 555 and A.I.R. 1922 P.C. 341, Foll. 28 P.L.R. 607 =9 Lah.L.J. 193=100 Ind. Cas 23=A.I.R. 1927 Lah. 852.

——S. 11—Objection raised and decided—Decision binding.

Where in execution an objection is raised and gone into the same objection cannot be considered on any subsequent application in execution and the decision is binding on all parties. Where a decision of the executing Court is that no property of the judgment-debtor can be attached, that decision is final. 44 Ind. Cas. 654=4 Pat. L.W. 279.

——S. 11—Execution proceedings—Attachment —Objection—Allowance of—Failure to bring out—Subsequent objection to attachment in execution of another decree—Order allowing —Suit by decree-holder—Bar of res judicata by reason of order in prior execution.

The plaintiffs obtained a decree on the 19th December, 1899, against **A.C.** adopted son of **H.S.** and another against **H.S.** on the 29th June, 1900. On 21st May, 1900, before the second decree was passed, **H.S.** mortgaged his house to **R.D. H.S.** died in October or November, 1900, leaving **A.C.** his heir and representative. On the decree-holders attaching the house in execution of the second decree the mortgagee objected and his prior rights as mortgagee were recognised and his objection allowed on 5th February, 1902. In these proceedings the prohibitory order directing the judgment-debtor **A.C.** to refrain from transferring the house recited that the order was issued as the first decree had not been satisfied and the mortgagee in objection stated that the house had been attached in exetion of the first decree. The order allowing objection recited that "decree-holders obtained their decree on 29th June, 1900." No suit was filed to set aside the order passed on the 5th February, 1902. The decree-holders applied for execution of the first decree and again attached the house. The mortgagee again filed an objection which was allowed on the 13th November, 1906. On the 6th August, 1907, the decree-holders filed a declaratory suit attaching the mortgage. **Held**, that since the order of the 5th February, 1902, was still in force against the plaintiffs-decree-holders the suit mustt be dismissed, that the order was **res judicata** as regards the second decree and it was equally valid and binding as regards the first one. 10 P.L.R 329=4 Ind. Cas. 970.

——S. 11—Execution proceedings—Order for attachment after service of notice.

As long as there exists an order for attachment made after service of notice to the judgment-debtor the execution of the decree cannot be barred and entry of service of notice in the order sheet throws on judgment-debtor the burden of showing non-service. An order made at an earlier stage of the execution proceedings cannot be questioned at a later stage unless the party to be bound has had no notice of the proceedings. 21 C.W.N. 945=37 Ind. Cas. 66=26 C.L.J. 109.

——S. 11—Dismissal of execution petition—Res judicata against D.H.—Want of notice to J.D. —Effect of.

Want of notice to the judgment-debtors will not make the dismissal of an execution petition by the decree-holder any the less **res judicata** as against the latter. A.I.R. (Vol. 20) 1933 Mad. 745=38 L.W. 347=65 M.L.J. 305=1933 M.W.N. 970=145 Ind. Cas. 397.

——S. 11, O. 21, Rr. 66 (3), 90—Application for sale—Decree-holder stating property to be ancestral—Execution case sent to Collector—Decree-holder subsequently urging property to be non-ancestral.

An application for execution of a decree was accompanied by a statement containing the particulars mentioned in O. 21, R. 66 (3). It was stated therein that the property to be sold was ancestral property. The execution case was transferred to the Collector. In a statement before the Collector the decree-holder stated that the property sought to be sold was non-ancestral and that he did not propose to proceed with the application for execution. The record was therefore sent back to the Civil Court. In a second application to the Civil Court, the decree-holder stated that the property was non-ancestral. The property was sold under orders of the Civil Court and was purchased by the decree-holder himself. The judgment-debtor applied to set asidet he sale:

Held, (i) that the property to be sold having once been declared as between the parties to be ancestral property, the decree-holder was barred by the principle of **res judicata** from asserting that the property was non-ancestral;

(ii) the sale of such property by the Court **amin** was entirely without jurisdiction as the Collector and the Collector alone could sell such property.

Held also, that as the decree-holder himself was the auction-purchaser, it was open to the judgment-debtor to assail the validity of the sale on grounds apart from those specified in O. 21, R. 90. A.I.R. (Vol. 20) 1933 All. 192=1932 A.L.J. 1118=143 Ind. Cas. 522.

——S. 11—Order declaring property to be ancestral—Contrary report of Collector, effect of.

On an application for execution of a mortgage decree the Court called for a report from the Collector as to whether the property sought to be sold was ancestral or non-ancestral and on the basis of the report declared that property was ancestral and sent the decree for execution to the Collector. The decree-holder subsequently got the application struck off and made another application for execuion to the Civil Court alleging that the property was non-ancestral. On this application the Revenue Court made a contrary report but the judgment-debtor contended that the matter was **res judicata**:

Held, that the previous order of the Civil Court was binding on the parties as it was not set aside in proper proceedings and the matter was **res judicata**. A.I.R. (Vol. 18) 1931 All. 218=1931 A.L.J. 103=133 Ind. Cas. 839.

——S. 11—The question of executability of the decree is not a pure question of law but one of construction of the decree; hence the principle of **res judicata** applies. A.I.R. (Vol. 20) 1933 Lah. 594 =34 P.L.R. 528=14 Lah. 409=141 Ind. Cas. 577.

——S. 11—Construction of decree—Executability.

Where on an application for execution it was decided that the decree as it stood was not executable the order is binding on the decree-holder as **res judicata** and no further application for execution would lie unless the decree had been made absolute and executable. 59 Ind. Cas. 161=12 L.W. 34.

——S. 11—Executability of decree.

An order in execution to the effect that the decree is not executable, is **res judicata** in subsequent execution proceedings. 4 Pat.L.J 330=5 Pat.L.W. 208=47 Ind. Cas. 154=1918 Pat. 265.

——S. 11—Execution proceedings—Decision as to executability of a decree.

An order holding that a mortgage decree is executable as it stands without the necessity of an application under O. 34, R. 6, C. P. Code, is **res judicata** in subsequent applications for execution. 33 M.L.J. 543=(1917) M.W.N. 845=42 Ind. Cas. 282=6 L.W. 675.

——S. 11—Order as to party's right to execute —Subsequent dismissal for default.

The conclusive character of the adjudication in a former execution proceeding as to a party's right to execute the decree cannot be affected by the subsequent dismissal of that application for default. 3 L.W. 339=33 Ind. Cas. 443=(1916) 2 M.W.N. 64.

——S. 11—Question whether decree is declaratory in nature decided against in earlier application—Res judicata.

The question whether a decree is declaratory in nature and cannot be executed is not governed by the principle of **res judicata** as the question involved is one of jurisdiction. A.I.R. (Vol. 24) 1937 Pesh. 62=169 Ind. Cas. 942.

——S. 11—No appeal from order—Effect.

An order passed during proceedings in execution by a Court of competent jurisdiction between the same parties has the effect of **res judicata**, and when it is not appealed against, becomes final between the parties. A.I.R. (Vol. 19) 1932 Oudh 246=9 O.W.N. 513=137 Ind. Cas. 603 (1).

——S. 11—Appeal from decree—Effect of.

An order passed in the same execution proceeding operates as **res judicata** at a subsequent stage of the same proceeding and it does not cease to become so because the decree of the lower Court was appealed from and confirmed in appeal. A.I.R. (Vol. 18) 1931 Bom. 451=33 Bom. L.R. 797=133 Ind. Cas. 750.

——S. 11—Findings of executing Court—Appeal from its order—Effect of.

Executing Court allowed the objection by the judgment-debtor that he was governed by custom in the matter of succession. On appeal, that finding was reversed by the District Judge. On appeal to the High Court, the High Court declined to enter into the question of custom but on other points, reversed the findings of the District Judge and restored those of the executing Court:

Held, that it could not be fairly argued that any part of the District Judge's judgment had been left intact so as to make the findings arrived at by him binding on the parties. Consequently, the plea that the judgment-debtor was governed by custom could be re-agitated in subsequent suit. A.I.R. (Vol. 26) 1939 Lah. 540=41 P.L.R. 596=185 Ind. Cas. 232.

——S. 11—Where an objection to the execution of a decree on the ground that the decree had abated was once raised and dismissed on the ground that the objector had no **locus standi** to raise the point in the execution department and he raised the same objection again:

Held that the previous order was final and operated as **res judicata**. A.I.R. (Vol. 18) 1931 All. 746=133 Ind. Cas. 303.

——S. 11—Construction of decree or order.

Where a Court executing decrees decided a question raised in the course of execution proceeding relating to the true construction to be placed on a decree or order, that decision becomes final between the parties as an interlocutory order in the suit and the matter cannot be re-opened in a subsequent execution proceeding. 6 All. 269 (P.C.), Foll. 95 Ind. Cas. 31 (All.).

——S. 11—Construction of decree.

A particular construction of a decree may operate as **res judicata** in subsequent proceedings between the same parties. 26 Ind. Cas. 244=16 M.L.T. 399.

——S. 11—Construction of decree.

Where a decree has been interpreted in a particular sense as between the parties, that interpretation has the force of **res judicata** and the subsequent amendment of the law has no effect on this question. (1910) 5 Ind. Cas. 210=7 A.L.J. 190=32 A. 210.

——S. 11—Question of title.

Plaintiff and defendant both objected to the attachment of a plot of land in execution of a decree, each contending that the site belonged to him and it was decided that the site belonged to the defendant as owner in a suit by plaintiff for possession on the ground of his subsequent purchase from the vendor, Municipality.

Held, that the question of title was **res judicata** by reason of the executing Court's decision even though the Municipality was not a party to those proceedings. 7 Lah.L.J. 198=92 Ind. Cas. 131=26 P.L.R. 171=A.I.R. 1927 Lah. 112.

——S. 11—Order allowing legal representative to execute decree is appealable—Subsequent suit to challenge the order is barred.

An order passed in execution proceedings that a person is a legal representative is within the jurisdiction of the execution Court and if not appealed against bars a subsequent suit challenging that order. 92 Ind. Cas. 377=A.I.R. 1926 Mad. 536.

——S. 11—Order of satisfaction of decree bars fresh execution application unless set aside.

When an order of satisfaction of decree is entered by Court in execution and is not set aside, it operates as **res judicata** and bars a subsequent application for execution. 94 Ind. Cas. 172=A.I.R. 1926 Lah. 518 (2).

——S. 11 and O. 21, R. 2—Order disallowing objection by J. D. alleging payment.

In execution of a decree the payment of a debt was alleged and brought to the notice of the Court by the judgment-debtor within 90 days of the alleged payment. The Court going into the objection found against the judgment-debtor.

Held: that a suit by the judgment-debtor for a declaration that he had paid the amount was barred by **res judicata**. 91 P.R. 1912=141 P.L.R. 1912=14 Ind. Cas. 751=92 P.W.R. 1912.

——S. 11—Order allowing amendment of execution application.

Decree-holder applied for partial execution of the decree but subsequently applied for amendment for executing the entire decree. The judgment-debtor objected to the amendment but his objection was overruled and amendment was allowed. No

appeal was made by the judgment-debtor from the order allowing amendment.

Held, that judgment-debtor was precluded from raising the same question in subsequent execution proceedings. 53 Cal. 582=43 C.L.J. 596=96 Ind. Cas. 562=A.I.R. 1926 Cal. 1019.

——S. 11—Order returning execution application for amendment without notice to J.D.—Failure to appeal—Res judicata.

An order, passed without notice to the judgment-debtor, returning an execution application to the decree-holder for amendment as it adopted a wrong method of calculation of the amount due is appealable. The decree-holder who fails to appeal against such an order is barred from adopting the same method of calculation in any subsequent application as the order is similar to the dismissal of a suit as time barred without notice to defendant. The bar of **res judicata** cannot be avoided by a party who had an opportunity to make his defence though the other side was not served with notice. 37 Mad. 314 =18 Ind. Cas. 607=24 M.L.J. 26.

——S. 11—Decision that order on application to set aside execution sale is under S. 47 is binding on the parties so far as the proceedings taken on that application are concerned. 26 Bom.L.R. 817=48 Bom. 638=83 Ind. Cas. 155=A.I.R. 1924 Bom. 495.

——S. 11—Order against garnishee.

The decree-holder in a Small Cause suit applied for attachment of a debt alleged to be due by one **K** to the judgment-debtor. Notice of that application was served upon **K** as garnishee who appeared and put a counter-statement in which he alleged, that the debt had never been due to the judgment-debtor, that it had been assigned and he had promised to pay the assignee, and that the amount of the debt was not Rs. 350 but Rs. 300. The District Munsif passed an order in these words "Attachment is confirmed". In due course the debt was brought to sale and was purchased by the present plaintiff, who was himself the decree-holder. The plaintiff then sued to recover the debt, and the garnishee raised the same defence.

Held, the garnishee not having proceeded, when the claim was decided against him in execution, under O. 21, R. 63, the matter was **res judicata**. 17 M.L.W. 582=72 Ind. Cas. 558=32 M.L.T. 304= 1923 M.W.N. 282=A.I.R. 1923 Mad. 56=244 M.L.J. 588.

——S. 11—Interlocutory Judgment.

Per **Walsh, J.**—An interlocutory judgment in one stage of a judicial proceeding is binding upon the parties at a subsequent stage thereof. The binding from of such judgments depends not upon S. 11 but upon general principles of law. If it were not binding there would be no end to litigation. 44 All. 130=19 A.L.J. 923=65 Ind. Cas. 295=A.I.R. 1922 All. 247.

——S. 11—An interlocutory order passed in execution proceedings is final in respect of a matter decided by it whether such matter is raised again in subsequent or in continuation of the same proceedings. 6 All. 269 (P.C.) and 48 Cal 499 (P.C.), Foll. 1 Luck. 171=13 O.L.J. 111=3 O.W.N. 241= 93 Ind. Cas. 833=A.I.R. 1926 Oudh 291.

——S. 11—Order dismissing application for final mortgage decree.

Where in an application praying for a final decree for sale and for certain reliefs connected with execution, it was held that as owing to the failure to bring on record the representatives of a certain party, the mortgaged properties could not be brought to sale, there was no use in granting a final decree and the whole application was dismissed.

Held, that this finding that execution could not issue for the sale of the mortgaged properties was **res judicata** in a subsequent application for execution. 62 Ind. Cas. 856=14 M.L.W. 18=A.I.R. 1921 Mad. 461.

——S. 11—Execution proceedings—Decision as to mesne profits at one stage.

Where the question of the liability of the defendants to pay mesne profits and the amount of the mesne profits payable was directly and substantially in issue between the parties and decided by the Court, the decision is conclusive between them at all subsequent stages of the execution proceedings. 51 Ind. Cas. 98=29 C.L.J. 245.

——S. 11 and O. 21, R. 90—Execution sale—Setting aside—Executing Court's decision—Finality.

Once a judgment-debtor's application to set aside a sale on the ground of fraud is rejected by the executing Court, the decision bars the plea of fraud in subsequent proceedings between the parties. 38 Ind. Cas. 47.

——S. 11 (S. 13, old Code)—Execution proceedings—Order for sale of lots in specified order—Subsequent application—Question of order of sale of lots—Res judicata.

Where upon an objection to an application for execution of a decree for sale under the Transfer of Property Act, an order was made directing that different lots of the mortgaged property be sold in a certain order, and that order remained unappealed from and therefore became final. **Held**, that the principle of **res judicata** was applicable and that the question in what order the lots were to be sold could not be re-opened upon a subsequent application of the same decree. (1891) 11 A.W.N. 33, (1897) 17 A.W.N. 29, foll. 7 A.L.J. 401=5 Ind. Cas. 210.

——S. 11 (S. 13, old Code)—Decision under S. 47—Finality.

Where a question has been tried and determined under S. 47 (S. 244, old Code), it cannot be reopened under S. 64 (S. 276, old Code) merely because the assignee from the judgment-debtor has been made a party. It is **res judicata**. The decision is not binding not because of S. 13 Civil Procedure Code, but under general principles of law. (1908) 9 C.L.J. 356=4 Ind. Cas. 119.

—— S. 11—Relief not granted decree—Courts order granting such relief in execution proceedings is res judicata if not set aside in due course.

Though a relief may not have been granted by a decree, yet if in the execution proceedings the court passes order granting the relief, such order will become **res judicata** if it is not set aside in due course of law. 26 M.L.J. 255=15 M.L.T. 246=23 Ind. Cas. 390=(1914) M.W.N. 622.

10 (h). Implied decision.

——S. 11—Implied decision—Order directing execution to issue—Plea of limitation in subsequent proceedings—Permissibility.

Where after all the heirs of a deceased judgment-

debtor have been placed on the record, the Court makes an order directing execution to issue and thereafter transfers the case for execution to another Court, it is not open to the heirs of the judgment-debtor who have not taken any steps to have the order set aside to raise the plea of limitation in subsequent proceedings before the transferee Court. An order directing execution to issue is an order deciding as between the parties that the execution is not barred by limitation. Such an order operates as **res judicata** and cannot be challenged in subsequent proceedings. 54 C.W.N. 815=A.I.R. 1950 Cal. 493.

——S. 11—Implied adjudication—Order for execution after notice under O. 21, R. 22—Execution case subsequently dismissed for default —Bar of limitation—If may be raised in subsequent execution case—Order directing sale proclamation to issue—Implied adjudication as to executability of decree—Absence of attachment—If material.

An order in an execution case passed after a notice under O. 21, R. 22, C. P. Code, had been served on the judgment-debtor directing the decree holder to take further steps in execution of the decree, necessarily implies an adjudication that the decree at the time was capable of execution. The fact that the execution case was dismissed for default at a later stage does not matter, and the judgment-debtor is precluded by the order from raising the bar of limitation in the subsequent execution case on the ground that the previous execution case was filed beyond time.

An order in the subsequent execution case directing sale proclamation to issue also proceeds on an implied adjudication that the decree was executable and precludes the judgment-debtor from raising the bar of limitation in the subsequent execution case. The absence of attachment is not material in determining the question whether or not the order previously made directing execution to proceed, involved an adjudication that the decree was executable. 82 C.L.J. 278=A.I.R. 1948 Cal. 165.

——S. 11—Order "proclaim and sell" on execution petition filed out of time—Plea of limitation—Res judicata.

The law in Madras is that if an order prejudicial to the judgment-debtor is passed, then he is barred from raising any point at a later stage of the proceedings decided expressly or impliedly by that order.

In an execution petition filed out of time, the judgment-debtors remained **ex parte** even after notice to them and an order "proclaim and sell" was passed by the Court. Later, the judgment-debtors took the objection of limitation and it was upheld by both the Courts below;

Held, in appeal that the order "proclaim and sell" impliedly decided that the execution petition was not barred by limitation and that the order operated as **res judicata** at later stages of the proceedings and could not be disputed by the judgment-debtors. A.I.R. (Vol. 31) 1944 Mad. 420=(1944) 1 M.L.J. 494=57 L.W. 356=1944 M.W.N. 413.

——S. 11—Order for execution after notice—Plea of limitation—Res Judicata.

Where after service of notice under O. XXI, R. 22, an order is made that execution do proceed, it is not open to the judgment-debtor at a subsequent stage to plead that the original application itself was time-barred. A.I.R. (Vol. 18) 1931 Pat. 422=12 P.L.T. 701=11 Pat. 430=134 Ind. Cas. 425.

——S. 11—Court considering execution properly and impliedly holding decree capable of execution—Judgment-debtor voluntarily absent—Whether can subsequently raise objection that execution is barred by time.

Where in execution proceedings the Court properly considers the question of execution on such material as it had before it in the voluntary absence of the judgment-debtor and holds by necessary implication that the application is maintainable and the decree capable of execution, the judgment-debtor cannot subsequently raise an objection that the execution was barred by time. A.I.R. (Vol. 22) 1935 Lah. 844=159 Ind. Cas. 641.

——S. 11—Order allowing execution to issue operates as res judicata on the question that the application was time barred—Subsequent dismissal of execution application does not imply that the order ceased to have effect.

Orders in execution operates as **res judicata**: 8 Cal. 51 (P.C.). Foll. When an application is made to a Court for execution, notice is ordered to judgment-debtor to show cause why the decree should not be executed against him. If the judgment-debtor does not show cause the Court orders execution of the decree either against the person or against his property according to the terms of the decree. The implication of that order is that the applicant has a right to execute the decree and that it is an executable decree and that it is not barred by limitation, and that the judgment-debtor is liable to satisfy the decree. In the absence of opposition by the judgment-debtor, the Court is not bound to write an order **in extenso** on any of the above points. It is only when the judgment-debtor opposes the application for execution and urges certain grounds, that the Court is called upon to consider the grounds and give its decision and its reasons. The order of the Court "execute" or "attach" implies that the Court has considered all that need be considered before execution could issue. The order that execution will proceed implies that the execution of the decree was not barred and that the decree was an unsatisfied decree and therefore a contention that there was no decision on the point of limitation cannot be upheld in the teeth of the order that execution will proceed. 37 Mad. 462, Foll. Where execution is ordered the subsequent dismissal of the execution application, either for want of prosecution or owing to inability of the process of the Court to reach the judgment-debtor or his property, does not imply that the order passed on the application ceased to have effect. 116 Ind. Cas. 363=A.I.R. 1928 Mad. 1052.

——S. 11—On the 10th November, 1910, an instalment order was passed against the appellant whereby he had to pay a certain sum in 14 instalments. A number of these instalments were paid and then there was default. In 1921 the decree-holder applied for execution of the decree. In that execution case the judgment-debtor filed an objection contending that the execution was barred by limitation. The hearing of this objection in the execution case was fixed for the 8th April, 1921. Upon that occasion the judgment-debtor did not appear in support of his objection and as there was nothing

before the Court to show that the execution case was barred by limitation the Court dismissed the objection for default and on the same day passed an order that the decree-holder should take further steps and directed the case to be put up again on the 11th of the month for orders. On the 12th of the month no steps having been taken by the decree-holder his execution was dismissed for default. The next execution case was filed in September following that is to say well within three years of the last execution case. The appellant again objected that the case was barred by limitation on the ground that the previous execution case in which his objection was dismissed was itself barred by limitation.

Held, that the objection was no longer maintainable. 8 Cal. 51 and 24 All. 282, Foll. 2 Pat. 759=2 Pat. L.R. 163=74 Ind. Cas. 130=A.I.R. 1924 Pat. 122.

——**S. 11**—If the judgment-debtors have notice to appear and if they know that the issue then to be decided by the Court is the question of limitation, their failure to oppose the application precludes them afterwards from questioning the decision. It is not a question of **res judicata** at all. It is a decision in the very litigation upon the same application. 66 Ind. Cas. 751=A.I.R. 1922 All. 100 (1).

——**S. 11—Implied decision—Limitation.**

Where a prior application for execution had been put in and after notice to the judgment-debtors execution had been ordered the objection that it was barred by limitation cannot be raised on a subsequent application. 67 Ind. Cas. 56 (Lah.).

——**S. 11—Implied decision that application is within time—Res judicata.**

In 1904 a decree was passed in a mortgage suit. Within three years an application for order for sale of property was made, but was dismissed. Within three years of the latter application, similar application was made but was dismissed as no final decree was made as required by the new Civil Procedure Code. Within three years an application for final decree was made which was dismissed for non-payment of process fees. A similar application for final decree was made in time but was withdrawn.

Held. that the applications for final decree were steps-in-aid of execution because they were accepted by the Court as being within time though really out of time; such acceptance gives a fresh start for limitation.

Per **Shah, J.**—An adjudication by Court that a certain application is in time cannot be re-considered when a question that it is out of time is raised at a later stage of execution proceedings. 46 Bom. 269=63 Ind. Cas. 844=23 Bom. L.R. 1013 =A.I.R. 1922 Bom. 118.

——**S. 11—Implied decision—Limitation.**

Where the plea of limitation was raised inter alia in defence to an execution application and the application was granted.

Held, that the plea was barred by **res judicata** although the judgment did not expressly refer to it. 48 I.A. 45=19 A.L.J. 168=23 Bom.L.R. 701= 33 C.L.J. 218=25 C.W N. 581=13 M.L.W. 290= 1921 M.W.N. 51=59 Ind. Cas. 880=29 M.L.T. 345 A.I.R. 1921 P.C. 23=40 M.L.J. 197.

——**S. 11—Order delivering possession of property—Implied adjudication that application is in time.**

An order delivering possession of property on an execution application is an adjudication that the application is in time and it is not open to the judgment-debtor to question the legality of that order in proceedings started on a subsequent application for execution. 54 Ind. Cas. 924.

——**S. 11—Order directing sale papers to be filed amounts to decision that decree is executable.**

An order passed by the executing Court after notice to judgment-debtor refusing execution against some items of the judgment-debtor's property must be deemed to involve a determination by the Court that the decree in question was capable of execution and operates as **res judicata** notwithstanding that there was no express decision on the point and the execution petition is ultimately dismissed as not pressed. A.I.R. (Vol. 30) 1943 Mad. 449=(1943) 1 M.L.J. 198=I.L.R. (1943) Mad. 804==212 Ind. Cas. 633.

——**S. 11—Execution—Order for substitution of Legal Representative—Substitution not contested—Subsequent objection for Execution barred.**

In execution the creditor applied for substitution of the names of the brothers of the debtor as legal representatives in place of the debtors and notices were issued. Notices were refused and the Court made an **ex parte** order substituting their names.

Held, that the Court by ordering their names to be substituted in fact decided in favour of the executability of the decree against the assets of the deceased in their hands. This order had therefore the force of a decree within the meaning of S. 47 and fixed them with liability to satisfy the decree as the legal representatives of the deceased debtor out of such property as might be proved to be his assets in their hands, and on the principle of constructive **res judicata** they are debarred from raising any objection to the execution of the decree on the ground that they were not the legal representatives of the deceased debtor and should not have been brought on record as such: 9 N.L.J. 183=96 Ind. Cas. 963=A.I.R. 1926 Nag. 476.

——**S. 11**—Waiver of objection as to executability of decree by judgment-debtor creates **res judicata** 27 M.L.W. 20=1928 M.W.N. 67=109 Ind. Cas. 866 =A.I.R. 1928 Mad. 203.

——**S. 11—Implied decision—Executability of decree—Subsequent dismissal for default.**

An order in an execution proceeding which implies that the decree is capable of execution and is passed after due notice to the judgment-debtor is binding and the same question cannot be again agitated in a new application for execution, even if the first execution was subsequently dismissed for default. 14 C.W.N. 357. foll. 15 C.L.J. 453= 10 Ind. Cas. 359=17 C.W.N. 113.

——**S. 11—(S. 13, Old Code)—Order in execution treating decree as bearing interest—Plea if non-liability for interest in later execution—Res judicata.**

Where certain judgment-debtors allowed several applications for execution of the decree against them to be made, in which the decree-holders treated the decree as bearing interest and orders were passed by the executing Court in accordance with those applications;—**Held,** that the judgment-debtors could not on a subsequent application for execution being made, object that no interest was payable under the decree. (1901) A.W.N. 32.

——**S. 11—Confirmation of sale amounts to an adjudication that the property is alienable and operates as res judicata.** (1940)2 M.L.J. 487=52 L.W. 416.

——**S. 11—Judgment-debtor being aware of execution proceedings but not objecting to Court-sale—Sale confirmed—Neither judgment-debtor nor his transferee with notice of Court-sale can subsequently contend that the property was inalienable.**

Under O. 21, R. 92, C. P. Code, where no application is made to set aside a sale or where such application is made and disallowed, the Court is bound to make an order confirming the sale and it thereupon becomes absolute. Under S. 65 where property is sold in execution of a decree and the sale has become absolute the property vests in the purchaser. If the judgment-debtor objects under S. 47 to the sale and his objection is overruled he is bound by the deceision of the executing court. If being aware of the execution proceedings and having an opportunity to object he fails to do so he is likewise bound by the order confirming the sale in other words he is in effect in either case a party to the order by which the sale is confirmed equally with the auction-purchaser and he cannot go behind it. 9 C.W.N. 972; 26 Cal. 727; 34 Cal. 199 and 40 All. 680, Foll.

Plaintiff a transferee from the auction-purchaser sued to redeem a mortgage held by the defendant subject to which the property was sold at the auction. The defendant pleaded that the property being an inam land was inalienable and therefore the sale conveyed no title to the auction-purchaser and further that subsequent to the auction sale the land was enfranchised by the Government in the name of the judgment-debtor from whom he subsequently purchased the same. The defendant as well as the judgment-debtor had notice of the execution proceedings.

Held, that defendant must be considered to be bound by the order confirming the sale in favour of the auction-purchaser and that it was not open to him to question the validity of the Court-sale.

Held further that the question whether the sale of an unenfranchised inam is absolutely void did not strictly arise. 91 Ind. Cas. 443=A.I.R. 1926 Mad. 12=49 M.L.J. 401.

——**S. 11—Implied decision—Sale of lands in execution of a decree—Subsequent suit by a party for setting aside a sale as illegal, the lands being occupancy lands—Khoti Act, (Bom. Act, I of 1880), S. 9.**

Where in execution proceedings between the parties certain Khoti lands were sold and purchased by the defendant and the plaintiff sued to recover possession of the lands alleging that the lands being occupancy lands could not be sold under S. 9, Khoti Settlement Act. **Held** that as the execution sale decided inferentially between the plaintiff and the defendant against the occupancy nature of the lands, the plaintiff could not re-open and investigate the same question of fact a second time. 40 Bom. 675: 37 Ind. Cas. 22=18 Bom.L.R. 786.

——**S. 11, O. 21, R. 2 (3)—Objection to execution of decree on ground that it was satisfied by usufruct of property—Objection dismissed and not pressed before High Court in appeal.**

A obtained a maintenance decree creating a charge on certain property and in execution of that decree, purchased the property but the sale was subsequently set aside and the property was then purchased by **B** in execution of money-decree. **A** then sought to execute her decree by enforcing the charge on the property purchased by **B**. **B** objected among other grounds that the decree was satisfied by the usufruct of the property during the interval of **A**'s purchase and setting aside of that sale. This objection was dismissed on the ground that it came too late and it was not pressed by **B** when the case went before the High Court on other ground. After the record went back to the execution Court for continuing the execution, **B** took the same objection:

Held, that the objection was not maintainable as it was concluded by the previous decision of the High Court:

Held, also that the objection was a plea which fell within the description in O. 21, R. 2 (3) Civil P. C., of a payment or adjustment which had not been certified or recorded in the manner provided in the rule, and no such payment or adjustment could be recognized by any Court executing the decree. A.I.R. (Vol. 27) 1940 Pat. 56=6 B.R. 302=186 Ind. Cas. 187.

——**S. 11—Point raised at one stage of execution proceedings—Judgment-debtor having full opportunity to object but not objecting—Point decided against judgment-debtor—He cannot object at a later stage.**

Where a point has once been expressly decided in the execution department that decision binds the parties in all subsequent proceedings and in cases where a point has not been directly decided but is such as must be deemed to have been necessarily decided before an order of execution was passed the decision has also a similar binding force. 6 All. 269 (P.C.); 9 Cal. 51 (P.C.); 48 I.A. 45 (P.C.); A.I.R. 1925 All. 117, Foll.

Where the decree-holders in pursuance of declaratory decree also asking for injunction expressly applied to get a certain disputed pavement removed and the judgment-debtors had full notice that they had so applied and failed to raise any objections and the Court then ordered execution to issue and through its officer got its order carried into effect. **Held**: it must be deemed by necessary implication that the question of the pavement having been constructed in defiance of the injunction was decided adversely to the objectors who could not subsequently object to the demolition. 48 All. 201=24 A.L.J. 91=6 L.R.A. (Civ.) 606=90 Ind. Cas. 83=A.I.R. 1926 All. 71.

10 (i). Incidental decision.

——**S. 11—Decision on question not in issue—Res judicata.**

If in a previous execution proceeding the question whether the execution is to be taken against the entire tenure or could be limited only to the shares of the persons against whom the decree was being executed was not in issue, a decision in that proceeding that the execution is to be against the entire tenure is only an incidental decision and therefore cannot operate as **res judicata** in a subsequent execution proceeding directed against the shares of some of the judgment-debtors. A.I.R. 1949 Cal. 228.

——**S. 11—Proceedings under O. 21, R. 100—Finding of fact—Res judicata.**

A finding of fact in a summary proceeding under R. 100 of O. 21, would not be **res judicata** in a

subsequent suit. A.I.R. (Vol. 27) 1940 Cal. 16=70 C.L.J. 111=44 C.W.N. 251=186 Ind. Cas. 98.

——S. 11—Order staying execution of decree on judgment-debtor's producing certificate under S. 21, C.P. Debt Conciliation Act—Decree-holder's appeal against order dismissed—Fresh application praying continuance of proceeding to the same Court entertainable. The previous order did not in the least affect the rights of parties and therefore cannot be regarded as having the offect of **res judicata**. 1938 N.L.J. 229.

——S. 11—Construction of decree not necessary to dispose of execution application—Not binding.

Although an executing Court is entitled to interpret a decree, still, where on the finding arrived at it is not necessary for it to do so in order to dispose of the execution application before it, any opinion expressed by it will not be an adjudication binding on the parties. 57 Ind.Cas. 177, Foll. 118 Ind.Cas. 399=30 P.L.R. 323=A.I.R. 1929 Lah. 437.

——S. 11—Attachment of debt due to Judgment-debtor—Amount of debt—Order referable to O. 21. R. 66—No res judicata.

In execution of a decree a debt due by the defendant to the judgment-debtor was attached. The defendant contended that the debt was much smaller than the amount stated in the execution proceedings. Under O. 21, R. 66, an order for the issue of a proclamation of sale of the debt was made and the debt was purchased by the plaintiff. Subsequently the plaintiff sued to recover the full amount of the debt, the defendant put forth the same objection that the amount due from him was much smaller than that claim.

Held, that the order passed by the executing Court was referable to O. 21, R. 66, and that the defendant was not thereby precluded from showing what was actually due from him in the subsequent suit. 101 Ind. Cas. 335=29 Bom. L R. 285=A.J.R. 1927 Bom. 234.

——S. 11—Interlocutory order—Order that decree is preliminary and could not be executed.

An appeal need not be proferred against every order in execution proceedings. It is open to the party aggrieved to challenge by an appeal against the final order which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings. 36 Cal. 422, Foll. A person obtained a decree for realization of money by sale of certain property of judgment-debtor. He applied for execution but the Court held that the decree was preliminary and could not be executed. He then applied to have the decree made final and at the same time protested that the decree as it stood was capable of execution. The application for final decree was held as time barred. He preferred an appeal in which he again reiterated his plea that the decree could be executed.

Held that he could urge the plea though he did not appeal from the order of the executing Court disallowing execution. 100 Ind. Cas. 653=A.I.R. 1927 Lah. 232.

10 (j)—Might and ought.

(i) Rule of Constructive res judicata—When applicable.

——S. 11—Applicability to execution proceedings, extent of.

The doctrine of constructive **res judicata** is applicable to execution proceedings to this extent that where a judgment-debtor fails to raise all his objections to the application in execution made by the decree-holder which he might and ought to have raised and the application is ordered to proceed, all such objections will be deemed to have been impliedly decided against him and he will be precluded from raising the same objections in a later execution of the same decree. A.I.R. (Vol. 27) 1940 Pat. 251=6 B.R. 711=5 Cut.L.T. 39=188 Ind. Cas. 672.

——S. 11—Principles of constructive **res judicata** apply in execution proceedings. If a man with eyes open undertakes not to raise any objection of any kind to a certain position on the score of which he has secured a substantial advantage, he should not be allowed to reprobate it in the course of the same proceedings and to reagitate the matter. A.I.R. (Vol. 27) 1940 Lah. 7=186 Ind. Cas. 881.

——S. 11—An objection open to a party in execution proceedings but not taken by him cannot be taken at any subsequent stage of the same proceedings.

An objection which if taken might have been cured and which has not been taken in the Court below shall not be taken in the Court of appeal. Where at a certain stage of the execution proceedings a certain objection was open to a party and he fails to raise it at the proper time it is not open to him to urge the same at a subsequent stage of the proceedings on the principle of constructive **res judicata**. 89 Ind. Cas. 1009=A.I.R. 1926 Nag. 164.

——S. 11—Question raised but not decided.

The principle of **res judicata** applies to execution proceedings. Where a certain question is raised in the execution proceedings, although not decided, the matter becomes **res judicata**. A.I.R. 1938 Pat. 427, Foll. A.I.R. (Vol. 26) 1939 Pat. 19 =5 B.R. 482=180 Ind. Cas. 736.

——S. 11, Expt. 4—Money decree on mortgage—Property sold in execution—Objection to validity of sale on ground that no sanction of Commissioner under S. 12-A, Chota Nagpur Encumbered Estates Act, was obtained, raised but not decided—Objection dismissed—Suit by judgment-debtor for declaration that sale was void.

Explanation 4 to S. 11, Civil P.C. applies to proceedings under S. 47, Civil P.C.

A money decree was obtained on the footing of a mortgage and property sold in execution. Certain objections were put in by the judgment-debtor as to the validity of the execution proceedings. On two occasions the question whether the sale was a valid sale, that is to say, whether the executing Court had jurisdiction to sell the property in execution of a money-decree, having regard to the fact that no sanction of the Commissioner had been obtained under S. 12-A, Chota Nagpur Encumbered Estates Act, was mooted, but not decided. The objection-petitions were all dismissed and the property having come into the possession of the purchaser, a suit was brought claiming a declaration that there having been no sanction of the Commissioner, the sale to the defendant was void:

Held, that the objection having been raised under S. 47 though not decided, operated as **res judicata** under Expl. 4 to S. 11, Civil P.C. A.I.R.

(Vol. 25) 1938 Pat. 427=5 B.R. 18=177 Ind. Cas. 810.

——S. 11—Expl. 4—Non-saleability of property in execution—Objection as to—Failure to raise —Effect.

It is well-settled that the doctrine of constructive **res judicata** is applicable to execution proceedings; where a judgment-debtor fails to raise all his objections to the execution which he might and ought to raise, and execution is ordered to proceed, all those objections will be deemed to have been impliedly decided against him, and he will be precluded from raising such objections at a later stage of the same execution proceeding or in a subsequent application for execution of the same decree.

In cases where the property sought to be sold is admittedly non-saleable, the executing Court cannot sell the property, and the failure to raise the objections in time would not create any estoppel or **res judicata**, because there is no estoppel against a statute. But where the facts themselves have to be determined which may lead to the inference that the property is not saleable, those facts must be pleaded and proved like any other question for determination by the Court itself; and if those questions are not raised at a proper stage, the bar of **res judicata** would apply. It is not open to a judgment-debtor to raise his objections piecemeal, especially where they relate to a plea in bar to the execution case itself. I.L.R. (1942) Lah. 559; A.I.R. 1940 Pat. 251; A.I.R. 1942 Pat. 477, foll. 29 Pat. 732=A.I.R. 1950 Pat. 465.

——S. 11, Expl. 4—Order for sale—Fresh objections to saleability of property—Whether can be subsequently raised.

Although the provisions of S. 11, C. P. Code, have no application to execution proceedings, the rule of **res judicata** on general priniciple governs the proceedings in execution and on the same principle the rule of constructive **res judicata** has application to cases where a certain decision could not have been given by the executing Court if the matter sought to be raised later would have been raised at an earlier stage of the proceedings. A judgment-debtor objecting to the sale of property is bound to raise all questions that affect the saleability of the property before an order of sale is made, and if he fails to do so, he is barred by the rule of constructive **res judicata** from reagitating them after that order has been made. If no order for sale has been made in the earlier proceedings, then the matter would be different as the rule of constructive **res judicata** cannot apply to such a case. I.L.R. (1942) Lah. 559 (F.B.), applied. A.I.R. 1949 East Punjab 94 (F.B.).

——S. 11—Property of Mappilla tarwad held not liable to attachment in execution in earlier suit—Subsequent execution petition claiming that debtors had shares in the same property under Mappilla Marumakkattayam Act (1938) (Madras Act 17 of 1939)—Barred by res judicata.

Where in a suit to which the decree-holder was a party it has been held that the property of a Mappilla tarwad of which the judgment-debtors were members was not liable to attachment and the execution petition is dismissed it is not open to an assignee of the decree from the original decree-holder to claim in a fresh execution petition that the judgment-debtors were entitled to a share in the properties under the provisions of the Mappilla Marumakkattayam Act and ask for attachment of the debtors' rights in the property. Such a claim is barredby **res judicata** as that is a point which the decree-holder could have raised in the earlier proceedings but failed to do so. 54 C.W.N. 55=62 L.W. 770=1949 M.W.N. 683=A.I.R. 1949 P.C. 302 =51 P.L.R. 411=1949 A.W.R. 576=(1949) 2 M.L.J. 493 (P.C.).

——S. 11—Non-transferability of holding—Omission to raise objection.

If a tenant judgment-debtor omits to raise an objection to the non-transferability of a holding in execution proceeding in which the holding is attached, he is estopped from raising it in a subsequent execution proceeding in execution of the same decree. 47 Ind. Cas. 790.

——S. 11—Admission by decree-holder that property is not liable to attachment and sale.

Where during prior execution proceedings, the decree-holders admitted that ancestral property was not liable to attachment and sale in execution of their decree, the doctrine of constructive **res judicata** applies and the decree-holders cannot during subsequent proceedings adopt a line of attack which was not adopted during the earlier execution proceedings, and which if taken, was given up. A.I.R. (Vol. 23) 1936 Lah. 167=166 Ind. Cas. 982.

——S. 11—Failure to raise plea of limitation—Constructive res judicata—Implied decision.

The principle of constructive **res judicata** applies to execution proceedings; if a judgment-debtor fails to raise his objections (whether on the score of limitation or otherwise) to the application for execution which he might and ought to raise, and the application is ordered to proceed, all his objections would be deemed to have been impliedly decided against him and he is precluded from raising the same objections in a later execution of the same decree.

The principle must however be applied with reference to the particular facts of each case. If a plea in bar of execution is not taken, or is not pressed though taken, or is overruled, and execution is ordered to proceed then in those circumstances the judgment-debtor cannot and should not be allowed to raise the same plea again later. Where there is no such decision, either express or by necessary implication, it cannot be said that the rule of constructive **res judicata** applies. 14 Cut.L.T. 53.

——S. 11, Expl. 4—Notice under O. 21, R. 22, C. P. Code, on execution application for delivery of property—Judgment-debtor not raising plea of limitation—Order for delivery—Plea of limitation at later stage—Maintainability.

Where a notice of an execution application for delivery of possession under O. 21, R. 22, is served upon the judgment-debtor, but he remains silent though appraised of the fact that delivery proceedings had been started, he cannot, at a subsequent stage of the proceedings, raise a plea of limitation, which must be deemed to have been decided against him when the court makes an order for execution. The judgment-debtor, by reason of his omission to raise the plea on receipt of notice, must be held estopped from raising the question of limitation at a later stage, though the plea might be well-founded. I.L.R. (1946) 1 Cal. 637=224 Ind. Case. 111=

50 C.W.N. 667=A.I.R. 1946 Cal. 375=82 C.L.J. 226.

——S. 11—Notice under O. 21, R. 22—No objection as to limitation—Res judicata.

More than five years after the decree was pronounced, the decree-holder filed an execution application claiming the benefit of S. 20, Limitation Act. A notice under O. 21, R. 22, Civil P.C., was sent to the judgment-debtor but no objection to limitation was taken by him. On the day of hearing the execution was dismissed on part satisfaction with costs. No steps of any kind had been taken for a long time when the decree-holder commenced another execution case against heirs of the judgment-debtor. At this stage, an objection was sought to be raised that the original application was barred by time inasmuch as it was presented more than three years after the decree:

Held, that the objection was barred on the principles of **res judicata.** A.I.R. (Vol. 32) 1945 Cal. 335=49 C.W.N. 260.

——S. 11—Question of limitation not raised in execution proceedings—Res judicata.

Even where execution is definitely barred by time and the Court proceeds to execute in the absence of a plea of limitation, then the plea of limitation cannot be raised in a subsequent proceeding. It is not essential that the Court should have proceeded to execute the decree. What is material is that the judgment-debtors had opportunity to raise any plea which might have been available to them, and did not raise the plea of limitation. That the Court did not proceed to execute the decree is a fortuitous circumstance which does not affect the principle. A.I.R. (Vol. 23) 1936 Pesh. 9=160 Ind. Cas. 448.

——S. 11—Objection as to limitation not taken on admission of execution application—Objection, if can be made subsequently.

Final orders in execution proceedings given by Courts are binding on the parties. It is also clear that under S. 3, Limitation Act, it is the bounden duty of the Courts to dismiss suits or applications for execution if they are time-barred. Consequently, if the Court does not dismiss the application for execution and the judgment-debtor does not take any objection to it, the latter is debarred from raising the question again in a subsequent proceeding. A.I.R. (Vol. 21) 1934 Pesh. 64=151 Ind. Cas. 235.

——S. 11—Limitation—Plea of—Omission to raise in prior E. P.

Where notice was issued to the judgment-debtor before an order for sale in execution was passed and the judgment-debtor did not raise the plea that execution of the decree was barred, **held**, that the judgment-debtor was barred from raising the same plea in a subsequent execution application. 113 Ind. Cas. 92.

——S. 11—When execution has been allowed to proceed at a time when it was possible for the judgment-debtor to have alleged that the right to execute the decree was barred by limitation and such question was either decided affirmatively in favour of the decree-holder or not raised at all by the judgment-debtor, it is not open to the judgment-debtor to raise the question of limitation at a subsequent period. 8 Cal. 51 (P.C.) and A.I.R. 1921 P.C. 23, Foll. 105 Ind. Cas. 545=A.I.R. 1927 Oudh 488.

——S. 11—Failure to plead bar of limitation when execution was proceeded with bars the plea at a subsequent stage. 48 I.A. 45 (P.C.) foll. 1 Luck. 171=13 O.L.J. 111=3 O.W.N. 241=93 Ind. Cas. 833=A.I.R. 1926 Oudh 291.

——S. 11—The plea that a previous application for execution was barred by limitation and hence the subsequent application was not valid should be raised at the earliest possible opportunity. 22 M.L.W. 747=1926 M.W.N. 33=91 Ind.Cas. 1017=A.I.R. 1926 Mad. 177.

——S. 11, Expl. (4)—Applicability to execution proceedings.

In regard to execution procceedings what is binding upon the parties is the point actually decided. The principle of Explanation 4 of S. 11 has no direct application but in determining the exact effect of the point decided on the subsequent proceedings the principle cannot be altogether ignored. Where point of limitation was not raised in previous proceeding.

Held, it could not be raised in another proceeding on same application. 48 Bom. 638=26 Bom. L.R. 817=83 Ind. Cas. 155=A.I.R. 1924 Bom. 495.

——S. 11—Failure to raise plea of limitation.

Failure of judgment-debtor to raise the plea of limitation in a previous execution application will preclude him for raising it later on. 68 Ind. Cas. 267=25 O.C. 13=A.I.R. 1922 Oudh 117.

——S. 11—Plea of limitation on subsequent application as to question of limitation.

Where a prior application for execution had been put in and after notice to the judgment-debtors execution had been ordered, the objection that it was barred by limitation cannot be raised on a subsequent application. 46 P.R. 1906, Foll. 67 Ind. Cas. 56.

——S. 11—The judgment-debtor is not competent, after the sale has taken place, to impugn its validity on the ground that the application for execution was barred by limitation at the time it was made where he had notice of this application and by reason of his omission to take objection at the proper stage the order for the issue of the sale proclamation was made. 34 C.L.J. 163=64 Ind. Cas. 594=A.I.R. 1921 Cal. 606.

——S. 11—Execution proceedings—Limitation.

Where an intermediate execution application is ordered on notice to the judgment-debtor, it is not open to him on a subsequent execution application to plead that the intermediate application was barred by limitation and, therefore, the subsequent application was also barred. 22 Bom.L.R. 1389=59 Ind. Cas. 747=45 B. 453.

——S. 11—Plea of limitation.

The plea that a certain execution petition is barred by limitation cannot be allowed to be raised at a subsequent stage of the application if it had not been raised at the earlier stage. Failure to raise an objection on the ground of limitation operates as **res judicata.** 3 Pat.LW. 218=45 Ind. Cas. 404.

——S. 11—Order directing execution of barred decree—Res judicata.

An order of a Court directing execution of a barred decree to proceed after due notice to the judgment-debtor precludes the judgment-debtor from raising the same objection in a subsequent execution of that decree. 41 Ind. Cas. 675=3 Pat.L.W. 13.

——S. 11(S. 13, Old Code)—Order allowing execution—Plea of limitation not raised—Res judicata.

Where on an application for execution being put in more than three years after a previous application, the judgment-debtor did not set up bar by limitation, and execution was issued. **Held**, that the matter was **res judicata** and that the judgment-debtor could not object that such application was barred by limitation. 8 C. 51, foll. (1906) 24 M. 669.

——S. 11—Question of jurisdiction—Late stage.

Objections to the jurisdiction of the transferee Court must be taken while proceedings before the transferee Court are pending or in appeal; they cannot be taken at a later stage in the same execution proceedings. The question of jurisdiction is **res judicata**. A.I.R. (Vol. 33) 1946 Sind 103= I.L.R. (1945) Kar. 445.

——S. 11—Objection as to general executability of decree—Failure to raise in application to transmit decree for execution to another Court —Constructive res judicata.

In an application to transmit a decree for execution to another Court, the judgment-debtor must raise any objections he might have to the general executability of the decree. Objection as to the non-maintainability of the application for want of leave of the Insolvency Court and an objection that the liability under the decree had become extinguished by reason of the order of discharge of the Insolvency Court are objections that could and should have been taken in an application for transmission of the decree to another Court for execution and if not raised would preclude the judgment-debtors from raising them in a subsequent application for execution of the decree. But it is not so with regard to an objection as to the executability of the decree against a particular item of property. 1947 M.W.N. 131=60 L.W. 83=A.I.R. 1947 Mad. 305=(1947) 1 M.L.J. 110.

——S. 11—Executability of decree.

Where the decree-holder applies for the transfer of a decree to another Court for execution and the judgmeat-debtor raises objections as regards the executability of the decree the proper Court to decide such objections is the Court which transfers the decree and not the Court to which the decree is transferred; because if the judgment-debtor after receiving notice to show cause why the decree should not be transferred, does not raise all his objections to executions, he will be precluded from doing so in a later execution petition on the ground of constructive **res judicata**. 116 Ind. Cas. 113= 29 M.L.W. 246=1929 M.W.N. 36=A.I.R. 1929 Mad. 199.

——S. 11—Even in an application for transfer of a decree the judgment-debtor can plead limitation and he ought to do so. If he fails the point is barred by constructive **res judicata**. 19 M.L.W. 650= 1924 M.W.N. 527=47 Mad. 641=80 Ind. Cas. 103= A.I.R. 1924 Mad. 673=47 M.L.J. 4.

——S. 11—Declaratory decree executed—Subsequent objection barred.

Where a decree, even though declaratory, has been once executed, any objection on that score in subsequent execution proceedings is barred by the rule of **res judicata**. A.I.R. (Vol. 32) 1945 Bom. 20=46 Bom.L.R. 718=219 Ind. Cas. 375.

——S. 11—Where the Court passed a 'declaratory decree' on the basis of a compromise that the plaintiff was entitled to a certain sum of money per month by way of maintenance from the defendant and the decree was executed several times without any objection being raised by the defendant to the executability of the decree.

Held, that it was not open to the defendant at a subsequent stage to contend that the decree was merely declaratory and was not an executable decree, as the point must be deemed to have been impliedly decided against him. A.I.R. (Vol. 20) 1933 Lah. 594=34 P.L.R. 528=14 Lah. 409=141 Ind. Cas. 577.

——S. 11—Execution of preliminary decree—Failure to raise objection.

Where a preliminary decree under O. 34, R. 4, is as such incapable of execution unless made absolute under O. 34, R. 5, but the judgment-debtor fails to raise such objection at the first application for execution he is precluded from taking the objection at a later stage of execution proceedings. 7 Lah.L J. 397=92 Ind. Cas. 254=26 P.L.R. 784=A.I.R. 1925 Lah. 640.

——S. 11, Expl. 4—Maintenance decree—Failure to set up plea in prior application for execution that decree had become unexecutable by resumption of co-habitation after decree—Plea if can be set up in subsequent execution application—Bar of constructive res judicata.

Where in a prior application for execution of a decree for maintenance against the husband, the latter after notice does not come forward to resist the application, he cannot come forward to resist a subsequent application on the ground that co-habitation was resumed after decree and that as such the decree had become ineffective and unexecutable. Such a plea is barred by constructive **res judicata**. It is an objection which might and ought to have been raised in the prior application for execution. 227 Ind. Cas. 148=1946 M.W.N. 432=59 L.W. 219 =A.I.R. 1946 Mad. 481=(1946) 1 M.L.J. 277.

——S. 11—Execution by assignee of decree—Objection as to non-registration of assignment not raised in previous proceedings cannot be raised subsequently.

Where the point as to whether the deed of assignment of a decree requires registration or not has not been taken by the judgment-debtor in the previous execution proceedings, the judgment-debtor is barred by the principle analogous to **res judicata** from raising that contention at the subsequent execution proceedings. A.I.R. (Vol. 29) 1942 Bom. 134=44 Bom.L.R. 164=I.L.R. (1942) Bom. 190= 200 Ind. Cas. 440.

——S. 11—Objections raised by the judgment debtor to the execution of the decree were heard and dismissed. The objection that execution could not proceed because the deed of assignment in favour of decree-holder was not registertd was not, however, the taken at that time but was raised subsesequently.

Held, that this point ought to have been taken in the previous objections and that, not having been taken, the judgment-debtor was barred from raising it by the rule of constructive **res judicata**. A.I.R. (Vol. 27) 1940 Lah. 161=42 P.L.R. 189=188 Ind. Cas. 207.

——S. 11—Application by assignee to execute decree—Application allowed after notice.

Where an application for execution by a person claiming to be an assignee of a decree is allowed after due notice to the parties, the later cannot subsequently contest the assignee's right to execute, even if the first order had been passed for default of their appearance. A.I.R. (Vol. 20) 1933 Lah. 697 =34 P.L.R. 489=144 Ind. Cas. 488.

——S. 11—The provisions of S. 11 of the Code of Civil Procedure are not expressly made applicable to execution proceedings, but the principles are applicable and if a point has been directly or by implication decided in any particular execution proceeding the point cannot be raised subsequently. The transferee of a decree applied under Order 21, Rule 16, for the substitution of his name. A definite order of substitution of name was passed by the executing Court. later on the judgment-debtor applied to the Court that the money deposited by him may not be paid to the decree-holder on the ground that the decree-holder was not a rightful transferee. This application was not granted.

Held, that under the circumstances the question of the validity of the transfer of the decree was **res judicata** and could not be re-agitated.

Per **Mukerjee, J.**—It was incumbent on the judgment-debtor when he received the notice of the application for execution made by the assignee of the decree-holder to have come forward and raised any objection that he may have had to the execution of the decree by the assignee. 11 A.L.J. 815; 14 A.L.J. 370, foll.; 47 All. 86=22 A.L.J. 928 =5 L.R.A. (Civ.) 744=80 Ind. Cas. 722=A.I.R. 1925 All. 117.

——S. 11—Application to recognise assignment —Objection not raised.

Where the judgment-debtor on notice of an application of a transfer of a decree under O. 21, R. 16 for permission to execute the decree as transferee did not object to the application he will not be allowed to question the assignee's title in subsequent proceedings. 38 All. 289=35 Ind. Cas. 234= 14 A.L.J. 370.

——S. 11—Application by alleged transferee—Execution ordered without objection by Judgment-debtor—Res judicata.

Where a person applied for execution of a decree as an assignee of the decree by operation of law and a notice was issued to the judgment-debtor under O. 21, R. 11 and the judgment-debtor took no objection and the execution was ordered, **held** that the judgment-debtor was debarred from disputing the title of that person to execute the decree in a subsequent application by him to execute the decree. 23 Ind. Cas. 286=12 A.L.J. 206.

——S. 11 (S. 13, Old Code)—Omission to contest right to execute in prior execution—objection at later stage—Bar.

Where an order was made on a previous application after notice to the judgment-debtors where in a person was treated as a decree-holder it is not open to the judgment-debtors to contend on a subsequent application that the person is not a decree-holder. (1902) 1904 A.W.N. 51=26 A. 361 =1 A.L.J. 80. See also 17 M.L.J. 201=30 Mad. 255.

——S. 11—Application for execution as trustee —Dismissal on ground of want of locus standi—Subsequent application for execution, if barred.

The principle of constructive **res judicata** applies to execution proceedings.

Where, therefore, a person applies for execution of a decree as a trustee on behalf of an insolvent firm and the Court decides he has no **locus standi**, he cannot apply for execution on the strength of the credentials which he could very well have relied upon while prosecuting the former application. A.I.R. (Vol. 23) 1936 Lah. 942=39 P.L.R. 368=167 Ind. Cas. 354.

——S. 11—Application for execution by Mukhtyar—Absence of authority—Omission to raise—Res judicata.

Explanation 4 to S. 11 is not inapplicable to execution proceedings.

Where a judgment-debtor did not raise an objection to an application for execution by a **mukhtyar** that the power of attorney did not authorise him to apply for execution but raised it in a subsequent application:

Held, as this objection would have been a complete bar to the previous execution application proceedings at all and as it was not raised or decided but might and ought to have been raised and decided in the previous application, the judgment-debtor was barred from raising it.

Held further, that there was neither estoppel nor waiver on the judgment-debtor's part. A.I.R. (Vol. 20) 1933 Lah. 3=34 P.L.R. 685=15 Lah. 208=144 Ind. Cas. 259.

——S. 11—Where no point was taken in a previous darkhast that it was not maintainable by the decree-holder on the ground that a receiver was appointed in respect of the decree, that point cannot be raised in subsequent darkhast as it might and ought to have been taken in the previous one. 31 Bom.L.R. 320=118 Ind. Cas. 694=A.I.R. 1929 Bom. 279.

——S. 11—Omission to object to execution application being not in accordance with law operates as **res judicata**. 8 Cal. 51, (P.C.), Foll. 32 C.W.N. 1107=118 Ind. Cas. 337=A.I.R. 1928 Cal. 861.

——S. 11—Finding as to amount due.

An order of the executing Court that the amount due from the judgment-debtor is more than a certain amount (i. e., beyond the jurisdiction of the Debt Conciliation Board) is binding on the parties by the rule of constructive **res judicata** in subsequent proceedings. A.I.R. (Vol. 29) 1942 Lah. 87=44 P.L.R. 80=199 Ind. Cas. 700.

——S. 11—Objection as to insufficiency of assets of deceased not raised when application presented—Whether can be raised subsequently.

Where an objection as to the insufficiency of the assets of the deceased person to pay the debts was not raised at the time of raising other objections to an application for execution and when some part of the amount due under the decree was being realised:

Held, that the objection could not be raised subsequently when the decree-holder makes an application and receives the balance of money left with the Court from the proceeds of the sale of a certain property of the deceased in satisfaction of another decree. (1932) 137 Ind. Cas. 632=9 O.W. N. 315.

——S. 11, Expl. 4—Suit by judgment-debtor for damages for loss occasioned by fraud of decree-holder in getting property sold falsely representing it to be encumbered—Suit is barred.

A suit by the judgment-debtor for damages for the loss occasioned by the fraud of the decree-holder in bringing the property to sale in execution on the false representation that it was subject to a mortgage, is barred; this matter being directly and substantially in issue in the execution proceedings can only be dealt with by the executing Court and no other. A.I.R. (Vol. 22) 1935 Nag. 80=17 N.L.J. 227.

——S. 11—Liability of surety—Latter asking for fine to settle with decree-holder—Res judicata.

The judgment-creditor got a money decree against the judgment-debtor who was arrested in execution. **A** stood surety and executed a bond to pay the entire amount if during execution proceedings judgment-debtor absented himself. On judgment-debtor absenting himself, the decree-holder asked the Court to issue a warrant for the attachment of the surety's property. On 10th February, the surety asked for time to settle with the decree-holder, but the surety failed to make a settlement and on notice having been issued, stated that he was not a surety at all.

Held, that when the surety asked for time on 10th February to settle with the decree-holder he did not deny liability and the liability became res judicata, and the surety was, therefore, still liable to the decree-holder. A.I.R. 1930 Lah. 80=129 Ind. Cas. 689.

——S. 11—Execution of mortgage-decree pending—Purchaser of equity of redemption joined as judgment-debtor without objection from judgment-debtor—Judgment-debtor then has no status to object on ground that purchase was benami for decree-holder.

Where, during pendency of execution of a decree for sale of mortgaged property, a person purchased equity of redemption and is joined as the judgment-debtor without any objection from the judgment-debtor, the latter has no status afterwards to object on the ground that the purchase was only benami, the real purchaser being the decree-holder himself. A.I.R. 1929 Mad. 404.

——S. 11—An order passed with notice and not objected to, cannot be questioned afterwards.

In case of an execution proceedings an application was filed by the decree-holder asking that order on a previous application be set aside and it be restored to file under O. 9, R. 4, C.P. Code. Accordingly the application was restored. While challenging a subsequent application for execution the judgment-debtor contended that the application for restoration under O. 9, R. 4, could not be taken into consideration as O. 9, R. 4, was inapplicable to execution proceedings.

Held, that as the order on the application was passed presumably after notice, to the judgment-debtor, it was no longer open to him to question the validity of the order in subsequent proceedings. 77 Ind. Cas. 871=A.I.R. 1923 All. 600.

——S. 11—If no objection is raised to the executability of the decree with respect to some items contained therein, and the decree is executed, no objection can be raised to its executability with respect to the other items in latter application for execution. 17 M.L.W. 566=72 Ind. Cas. 397=1923 M.W.N. 299=A.I.R. 1923 Mad. 649=45 M.L.J. 71.

——S. 11—Plea that the decree is not capable of execution, not raised at the time of previous execution application is barred by res judicata.

If a judgment-debtor does not at the time of the first application for execution of the decree raise the objection that the decree was not capable of execution which, he might and ought to have done, he cannot be allowed to take it in later execution proceedings. 6 All. 269, Foll. 44 All. 350=20 A.L.J. 170=65 Ind. Cas. 799=A.I.R. 1922 All. 27.

——S. 11—Executability of decree—Absence of objections—Objection to decree.

Where successive applications for execution are admitted and ordered without any objection to the executability of decree, the judgment-debtor is barred from raising the objection at a subsequent execution. 4 Pat.L.J. 213=48 Ind. Cas. 245=1919 Pat. 121.

——S. 11—Execution application—Failure to raise objections on ground of illegalities—Res judicata.

Where the judgment-debtor does not object to the first application for execution of a decree on the ground of illegalities in relation to the execution proceedings, **e.g.**, non-service of notice on the transferor under O. 21, R. 16 of the C. P. Code, he cannot raise such an objection when a subsequent application for execution is made. 5 P.L.J. 639=57 Ind. Cas. 707=1 P.L.T. 504.

——S. 11 (S. 13, Old Code)—Mortgage decree—Sale—Objection as to want of order absolute—Omission to raise early—Res judicata.

A mortgagor is precluded from taking objection to the sale on the ground of want of an order absolute, if he does not take it at an early stage of the proceedings. (1903) 31 Cal. 370.

——S. 11 (S. 13, Old. Code)—Mortgage decree—Order allowing execution against non-mortgaged properties—Subsequent plea in bar of sale on ground of absence of personal decree—If barred.

Where an order was passed allowing execution to issue against properties other than that mortgaged and comprised in the decree a subsequent objection that no sale of such properties could be held in the absence of a decree under S. 90 of the Transfer of Property Act could not be allowed to prevail. (1902) 14 M.L.J. 103.

(ii) Rule of constructive res judicata—When not applicable.

——S. 11 — Different objection at different times.

In the course of the same execution proceedings a different objection can be raised at a different stage thereof. A.I.R. 1937 All. 446, Foll. A.I.R. (Vol. 27) 1940 Lah. 27=186 Ind. Cas. 653.

——S. 11—There is no rule of law which makes it incumbent upon the judgment-debtor to raise all possible objections under S. 47 at a given time. The Court must decide all objections under S. 47 when they are raised. In the absence of express adjudication and during the pendency of the same execution proceedings, there is nothing to prevent the judgment-debtor from taking any objection which might have been taken on the earlier occasion but was not taken. A.I.R. (Vol. 24) 1937 All. 446=1937 A.L.J. 482=1937 A.L.R. 613=169 Ind. Cas. 997.

——S. 11—A judgment-debtor need not put forward all possible objections in the execution department once for all. Matters which he has omitted to put forward must not be treated as **res judicata** against him. 27 Ind. Cas. 950=13 A.L.J. 162.

——S. 11—Nothing on face of decree to indicate that it was without jurisdiction—Failure to question validity of decree—No res judicata.

Where there is nothing on the face of the decree to indicate that it was without jurisdiction, the executing Court cannot go behind the decree and consider the question whether it was a valid decree or not and hence the failure of a party to raise the question of validity of the decree in such a case cannot operate as **res judicata** on the question of the validity of the decree. A.I.R. (Vol. 30) 1943 Bom. 288=45 Bom.L.R. 553=I.L.R. (1943) Bom. 400=212 Ind. Cas. 205.

—S. 11, O.21, R. 2—Decree-holder selling decree to another person—Such person's name substituted—Such person taking out execution—One of judgment-debtors applying that transferee was benamidar of one of judgment-debtors—Judgment-debtor not raising such objection at time of substitution, not being aware of it then.

G, the decree-holder executed a sale-deed in respect of the decree in favour of **R**. The latter applied under O. 21, R. 16, for substitution of his name in the decree in place of **G**. This application was allowed and the name of **R** substituted on February 4, 1933 and the case was transferred for execution. On November 5, 1934, the judgment-debtor filed an application stating that **R** was not the real purchaser of the decree but was only a **benamidar** for **M**, one of the judgment-debtors, and that according to the second proviso to O. 21, R. 16, the decree could not be executed against him. This objection was thrown out by the Court on the ground that adjustment of the decree was not certified to Court under O. 21, R. 2, Civil P. C., within time and that the application was, therefore, barred by time.

Held, that no question of an adjustment under O. 21, R. 2, could arise in the case. If the fact that the judgment-debtor was not aware of the fact that **R** was a **benamidar** for **M** when he received notice of the application were true, then the rule of **res judicata** on the basis of his failure to raise the plea on receipt of notice was inapplicable. A.I.R. (Vol. 25) 1938 Oudh 106=1938 O.W.N. 346=1933 O.L.R. 146=173 Ind. Cas. 880.

——S. 11 and O.21, R. 16—Failure of legal representative of judgment-debtor to plead non-service of notice on judgment-debtor—Absence of knowledge at that time—Effect.

Failure of the legal representative of the judgment-debtor to object to execution on the ground that no notice under O. 21, R. 16, had been served on the deceased judgment-debtor, cannot operate as **res judicata**, in a subsequent application if the legal representative had no knowledge at the time that no notice had been served on the deceased. A.I.R. (Vol. 18) 1931 Mad. 192=1930 M.W.N. 1187 =131 Ind. Cas. 171.

——S. 11—Notice under O. 21, R. 22—Judgment-debtor absenting—Failure of judgment-debtor to plead part satisfaction—Plea at subsequent stage of same execution proceedings not barred.

The failure of the judgment-debtor to raise the contention as to part satisfaction at an earlier stage of the execution proceedings does not preclude, by the operation of the rule of constructive **res judicata** underlying Expln. 4 of S. 11, the judgment-debtor from raising the same question at a subsequent stage of the execution proceedings. The rule of constructive **res judicata** must be applied with great caution against a party to the execution proceedings who had no direct notice of the point and therefore no opportunity to raise it. Hence the judgment-debtor, who has omitted to appear in response to a notice under O. 21, R. 22 of the Code, cannot be precluded from contending that there has been a partial adjustment of the decree. The rule of constructive **res judicata** cannot be so extended as to penalize the judgment-debtor for his omission. A.I.R. (Vol. 30) 1943 Bom. 252=45 Bom.L.R. 519=208 Ind. Cas. 418.

——S. 11—Mere failure to dispute correctness of decree amount at first opportunity.

Caution has to be exercised in applying the principle of constructive **res judicata** to execution proceedings. It can only apply to cases where the Court could not have acted if the judgment-debtor had successfully raised the points which are sought to be held by this principle against him. In general, a Court cannot order execution unless it is satisfied (i) that the petitioner has a right to execute; (ii) that the judgment-debtor is liable to satisfy the decree; (iii) that the decree is executable; and (iv) that it is not barred by limitation. If, therefore, an executing Court orders execution to proceed, it must be presumed to have held that all these conditions are satisfied. If a judgment-debtor with due notice of the proceedings fails to raise any objection on any of these grounds it must be held by the principle of constructive **res judicata** that his failure to do so has the same legal effect as if it had been raised and decided against him. The mere fact that the sum for which the decree is sought to be executed is not the correct amount due by the judgment-debtor to the decree-holder would not prevent execution from proceeding, and so the failure of a judgment-debtor to dispute at the first opportunity the correctness of the figure would not bar him by the principle of constructive **res judicata** from raising that point in subsequent proceedings or at some later stage of the same proceedings. A.I.R. (Vol. 24) 1937 Mad. 511=(1937) 1 M.L.J. 296=45 L.W. 291 =1937 M.W.N. 529=171 Ind. Cas. 581.

——S. 11, Expl. 4—Omission to object to correctness of amount.

In applying the rule of constructive **res judicata** to execution proceedings, a distinction must be made between an objection to the actual execution of the decree and one relating to merely the amount for which the decree is to be executed. As regards the former question, the judgment-debtor may well be held to be bound to raise an objection as soon as the execution of a decree is sought for and on his omission to do so he might reasonably be held estopped from raising the same objection by virtue of S. 11, Expl. 4, Civil P. C., but to preclude the party from raising the dispute relating to a clerical or arithmetical error on the ground of constructive **res judicata** is not warranted on any ground of justice, equity or good conscience. A.I.R. (Vol. 20)

1933 Nag. 182=29 N.L.R. 193=143 Ind. Cas. 783.

——S. 11—Execution for amount greater than decree—Failure of judgment-debtor to appear.

Section 11, does not apply to execution proceedings as it relates to matters decided in suits. It is only on principles analogous to that section that **res judicata** can be applied to execution proceedings. The principle of constructive **res judicata** should be very cautiously applied to execution proceedings; the Court must make an order as to the sufficiency of service if the doctrine of constructive **res judicata** is to be availed of.

Where execution is taken out for an amount greater than that mentioned in the decree, failure to appear by the defendant would not operate as **res judicata** and prevent him from showing in subsequent proceedings that that amount is not due.

It is very doubtful whether in any case the principle of **res judicata** by mere absence of the other party could in execution proceedings be pushed to an extreme. A.I.R. (Vol. 20) 1933 Mad. 466=1933 M.W.N. 478=37 L.W. 662=64 M.L.J. 629=147 Ind. Cas. 1242.

——S. 11—Objection as to amount in decree not raised in previous proceedings—No bar if raised in subsequent proceeding.

The mere fact that a judgment-debtor does not in a previous execution proceeding object that the amount for which the execution is taken out is in excess of the decree itself, does not bar the judgment-debtor from raising that objection in subsequent execution proceedings. To hold otherwise implies that the decree is itself superseded by orders in execution. 122 Ind. Cas. 161=A.I.R. 1929 Mad. 903.

——S. 11—Omission to raise objection to amount.

The provisions of the C. P. Code as to **res judicata** are not expressly made applicable to execution proceedings. Where a judgment-debtor did not take exception to the amount set forth as being due on the decree in an application for execution, he is not prevented by the rule of **res judicata** from afterwards raising the question. 37 All. 589=30 Ind. Cas. 523=13 A.L.J. 828.

——S. 11—Question of limitation not raised in transferee Court—If barred in decree Court.

Even if the plea that application for execution is time-barred is not raised in the Court to which the decree is transmitted for execution, the plea cannot be **res judicata** in the Court which passed the decree because the plea can be raised at any time in the transferee Court. A.I.R. (Vol. 28) 1941 Rang. 56=1940 Rang.L.R. 725=193 Ind. Cas. 318.

——S. 11—The fact that when notice under O. 21, R. 16 was given to the judgment-debtor of the application for execution, he failed to file any objection as to its executability before the decree was transferred for execution, does not prevent him from raising an objection to the right of the transferee of decree to execute the decree before the Court to which the decree has been transferred for execution. 8 P.L.T. 163=101 Ind. Cas. 616=A.I.R. 1927 Pat. 170.

——S. 11—Notice under O. 21, R. 22, to judgment-debtor — Non-appearance—Notice under, O. 21, R. 66—Judgment-debtor objecting on ground of limitation—Appeal not barred on that date—Petition, if could be entertained on that date—Constructive res judicata, if applies.

In an execution case, the Court ordered the issue of notice under O. 21, R. 22, Civ. P.C., upon the judgment-debtors to show cause why the decree should not be executed against them. On April, 10, 1933, May 13, 1933, was fixed as the next date of hearing. On that date, it was said that notice had been served but the judgment debtors did not appear. The Court ordered issue of notice under O. 21, R. 66, fixing June 10, 1933. On June, 10, the judgment-debtors-appeared and made an objection that the execution case was barred by limitation.

Held, that when, on June 10, the judgment-debtors appeared and took their plea of limitation, they were within time to appeal against the order of May 13, and the primary Court also had authority to review the order of May 13, on the petition of the judgment-debtors. Both the appeal and the petition for review being within time, the Court was within its jurisdiction on June 10 to entertain the petition of the judgment-debtors, that the case was barred by limitation and that the rule of constructive **res judicata** did not apply. A.I.R. (Vol. 22) 1935 Cal. 306=39 C.W.N. 583=68 C.L.J. 105=156 Ind. Cas. 604.

——S. 11—Purchase of share of judgment-debtor—Application to bring on record the purchaser—Plea of limitation not taken—Plea can be raised against application for execution at the time of execution. A.I.R. (Vol. 21) 1934 Outh 289=11 O.W.N. 814=150 Ind. Cas. 947.

——S. 11, Expl. 4—Order for notice—Question if application is within time—No res judicata.

Where there is no declaration by the Court under O. 5, R. 19, that the notice was duly served, it is not a due service for the purpose of creating constructive **res judicata** in execution proceedings.

Consequently, an order for notice on an application cannot operate as **res judicata** on the question whether it was within time, if as a matter of fact the respondent was not properly served and had no opportunity of raising the plea. A.I.R. (Vol. 20) 1933 Mad. 406=37 L.W. 487=1933 M.W.N. 257=64 M.L.J. 637=142 Ind. Cas. 765.

——S. 11—Question of executability not barred by constructive res judicata.

Where, on an application for execution of a declaratory decree, no objection is taken as to its non-executability and the decree is partly satisfied, to objection that the decree is not executable can be raised in subsequent execution proceedings; and the principle of **res judicata** does not apply to the question. A.I.R. (Vol. 22) 1935 Pesh. 119=157 Ind. Cas. 865 (2).

——S. 11—Executing Court proceeding with execution of declaratory decree—Judgment-debtor not objecting on notice under, O. 21, R. 22—He can object to execution subsequently on ground of non-executability of the decree inasmuch as the Court had no jurisdiction **ab initio** to proceed with the execution. A.I.R. (Vol. 21) 1934 Pesh. 64=151 Ind. Cas. 235.

——S. 11—J. D. can plead at a later stage non-executability though not previously pleaded where assignee of D.H. was benamidar of J.D. 18 M.L.W. 453=75 Ind. Cas. 845=A.I.R. 1924 Mad. 189.

——S. 11—Where in a suit on mortgage of khudkasht the defendant was not bound to agitate the question of mortgage of cultivating rights, he could not afterwards be precluded from agitating the question in execution, by an application under S. 47, Civil P. C., when the decree-holder in execution takes possession of the cultivating rights. A.I.R. (Vol. 25) 1938 Nag. 193=I.L.R. (1939) Nag. 367=173 Ind. Cas. 563.

——S. 11, Expl. IV—Application for final decree rejected—No order on prayer for execution—No res judicata.

In order to invoke in aid the doctrine of constructive **res judicata**, as embodied in Expl. IV to S. 11, there must be a decision by a Court either in express terms or by necessary implication.

Where therefore, the decree-holder wrongly applies for final decree and also prays for execution and the Court makes an order that as a final decree has already been passed the application is rejected, but makes no order on the prayer for execution, there is no decision given by the Court either in express words or by necessary implication and hence the order cannot operate constructively as **res judicata** against the decree-holder in his subsequent application for execution. A.I.R. (Vol. 24) 1937 Lah. 404=39 P.L.R. 680=173 Ind. Cas. 185.

——S. 11—Application to restitution or application for execution of portion of decree.

Where the execution of the decree has been allowed to proceed without any objection by the judgment-debtor which was open to him and which he had opportunity to make in such proceedings, he is not entitled to raise such objection in subsequent execution proceedings as the principle of **res judicata** debars him from doing so. But this principle does not apply to restitution or even to an application for execution of a portion of the decree. A.I.R. (Vol. 23) 1936 Lah. 246=38 P.L.R. 723=163 Ind. Cas. 97.

——S. 11—Claim for restitution.

The principle of constructive **res judicata** should not be applied to execution proceedings unless the decision of the question subsequently sought to be agitated was given expressly, or by necessary implication must be deemed to have been implied in the previous decision. O. 2, R. 2 does not apply to restitution proceedings. An Application for interest on the money paid to the decree-holder under a decree subsenquetly reversed, and of which restitution was claimed in a prior application is not barred as **res judicata**. 40 Mad. 780: 38 Ind. Cas. 806: 5 L.W. 267.

——S. 11—Claim of prior lien—Court selling property subject to lien but refusing to find out amount due to claimant.

Constructive **res judicata** has got to be cautiously applied in the case of execution petitions.

Where in execution proceedings a person claimed a prior lien but the Court refused to find out how much was due to him but it still sold property subject to some lien which he was considered to have.

Held, that though the procedure adopted was erroneous the order could not render the claimant's right to possessory lien **res judicata**. A.I.R. (Vol. 20) 1933 Mad. 595=38 L.W. 190=144 Ind. Cas. 365.

——S. 11—Plea of fraud—Res judicata.

The principle underlying explanation 4 of S. 11 can be applied to execution proceedings. It is however necessary, that the party who is sought to be affected by the bar of **res judicata**, should have notice of the point likely to be decided against him, and should have an opportunity of putting forward the contentions against such a decision. Where the plea of fraud is not alleged in the prior proceeding it cannot be held in a later proceeding that the same had been decided upon so as to operate as **res judicata**. 1930 M.W.N. 729.

——S. 11—Notice to legal representative—Absence of objection that property did not belong to Judgment debtor—No res judicata.

Devadoss, J.—That the principle of constructive **res judicata** applies to orders in execution is well settled. In the case of legal representatives of the judgment-debtor, when notice goes to them to show cause why the decree should not be executed the Court does not decide whether certain property was the property of the deceased judgment-debtor or not and, therefore, an objection that the property sought to be proceeded against did not belong to the judgment-debtor can be raised by the legal representatives and is not barred on the ground of constructive **res judicata**. 28 M.L.W. 885=114 Ind. Cas. 545=A.I.R. 1928 Mad. 746.

——S. 11 (S. 13, Old Code)—Execution against legal representative—Omission to raise plea of property being trust property—Sale in execution—Suit by auction purchaser for possession—Plea that property was trust property and not saleable—No res judicata.

Though a legal representative of a judgment-debtor who alleges that the property sought to be sold in execution was not the property of the judgment-debtor, but was property possessed by the representative as trustee for others may file an objection under O. 21, R. 58 (S. 278. Old Code) there is nothing to compel the filing of such an objection, and it is open to the legal representative to raise the defence in a subsequent suit brought by the auction-purchaser for possession. 1906A.W.N. 158=28 A. 644=3 A.L.J. 565.

——S. 11—Applicant for execution not pleading fraud which prevented his applying in time.

Assuming that the principle of constructive **res judicata** is applicable to execution proceedings it cannot be said that an applicant for execution ought to have pleaded the fraud or force which prevented his applying in time. 53 Ind. Cas. 862=10 L.W. 566.

——S. 11—The doctrine of constructive **res judicata** is not necessarily applicable to execution proceedings. The dismissal of an earlier execution application operates as **res judicata** only so far as the question of the maintainability of that application is concerned. Where the grounds relied upon by the decree-holder as saving limitation in respect of the subsequent application have not been adjudicated upon in the previous execution proceedings, it is not **res judicata**. 50 Ind. Cas. 972=21 Bom. L.R. 344.

——S. 11—In execution the decree-holder applied for sale of two mortgage bonds and the judgment-debors (being the representatives of the deceased

debtor) prayed for time to pay the decree amount and the Court granted time and struck off the execution application. Subsequently the decree-holder applied again for the same relief and the judgment-debtors contended that the mortgage bonds were their own property and could not be sold under the decree. **Held**, that the objection was not barred either by **res judicata** or estoppel. 11 Ind. Cas. 980=8 A.L.J. 844.

10 K. Parties and representatives.

——S. 11—The principle of res judicata applies to execution proceedings and would apply after the death of a party bound by it to his legal representatives A.I.R. (Vol. 33) 1946 Bom. 105=47 Bom.L.R. 884.

——S. 11—Decision on objection by one of several judgment-debtors—If res judicata against others—Notice issued only to decree-holder.

A decision in an execution proceeding on an objection taken by one of several judgment-debtors on notice to the decree-holder only, does not operate as **res judicata** against the other judgment-debtors who are parties to the execution proceeding but are not parties to the objection or to the miscellaneous case which arises out of it. 51 C.W.N. 452.

——S. 11—Suit under O. XXI, R. 63 Judgment-debtor's title decided in previous litigation between him and claimants—Claimants right to re-agitate whenever property is attached.

In a suit under O. XXI, R. 63, C. P. Code., the decree-holder claims under his judgment-debtor within S. 11. Consequently, if in a previous litigation between the claimant and the judgment-debtor, the latter's title has been decided, it is not open to the claimant to reagitate this matter each time the property is attached in execution of a decree against the judgment-debtor by impleading the attaching decree-holder and the judgment-debtor as parties to his suit under O. XXI, R. 63. A.I.R. (Vol. 21) 1934 Rang. 206=151 Ind. Cas. 417.

——S. 11—Matter in execution res judicata against Hindu father—Plea of res judicata is also effective against son.

Execution against father is effective enough to bind the son also and if any matter in execution is **res judicata** against the father, the plea of **res judicata** is operative against the son too, for practically the father represents the son in execution proceedings even where the suit was not framed against him as manager of the family. 120 Ind. Cas. 375=1929 M.W.N. 776=A.I.R. 1930 Mad. 257.

——S. 11—Assignee of decree applying but application dismissed for want of proof of assignment—Second application held barred as res judicata—Assignee retransferring decree to decree-holders—They and their subsequent assigns are bound by decision against first assignee.

An assignee of a decree applied for execution but his application was dismissed for want of proof of assignment. His second application was held as barred by **res judicata**. He then re-transferred the decree to original decree-holders who assigned the same to others.

Held, that the original decree-holders are in the position of representatives of the first assignee on re-transfer of the decree, and they and their further assigns are bound by the decision against him. 21 N.L.R. 159=92 Ind. Cas. 47=A.I.R. 1926 Nag. 200.

——S. 11—Judgment-debtor adjudged insolvent Official Assignee is not a representative of the judgment-debtor.

A prior decision in execution proceedings to which the defendant was party to the effect that the suit property was liable to be attached in execution of a decree against him, does not bind the Official Assignee appointed in consequence of the defendant's insolvency, as the Official Assignee, cannot be deemed to be the legal representative of the insolvent defendant within the meaning of S. 11 nor can he be deemed to be litigating under the same title as the defendant. 7 A. 752, Foll. 88 Ind. Cas. 85=A.I.R. 1925 Mad. 688=48 M.L.J. 530.

——S. 11—Agreement for sale of property by judgment-debtor—Notice of previous petition for execution by attachment and sale reaching judgment-debtor subsequently—Promisee is not prevented from asserting his rights in the execution proceedings.

Where after a judgment-debtor enters into an agreement for sale of property, notice of previous application for execution of the decree by attachment and sale of the property reaches the judgment-debtor and the property is subsequently attached and sold in execution of the decree, the promisee under the contract for sale is not precluded by the execution proceedings, on the ground of **res judicata**, from asserting his rights against the auction purchaser. 44 Mad. 232=62 Ind. Cas. 121=1921 M.W.N. 53=A.I.R. 1921 Mad. 30=40 M.L.J. 65.

——S. 11 (S. 13, Old Code)—Partition decree—Application by a party to make another party liable for certain outstandings—Subsequent application by another party for same relief—Bar of res judicata.

Where an application by a party to a partition decree to make other parties account for certain outstandings received by them according to the terms of the decree was disposed of, and another party put in an application praying for the same relief:

Held, that the second application was not barred by **res judicata** except as to items specifically dealt with by the previous application. (1902) 4 Bom.L.R. 960.

10 (1). Question not decided.

——S. 11—Dismissal for non-prosecution of execution application—Objections to sale not decided.

Where an execution application is dismissed for non-prosecution without deciding the objections to sale raised by the judgment-debtor, it cannot operate as a bar to the same objections being raised in a subsequent execution application. A. I.R. 1948 Pat. 192.

——S. 11—Execution of decree—Objection by judgment-debtors — Decree holder discharging them—Fresh execution — Subsequent objections not barred.

In the execution proceedings of a decree, the

judgment-debtors raised a plea of limitation. The decree-holder urged in reply that the limitation was saved by a certain payment. On the date fixed for hearing, the decree-holders discharged the objecting judgment-debtors and their names were struck off. Though a note was made on the file that the judgment-debtors did not press their objection, it did not appear whether they agreed not to press the objection after they were discharged or the decree-holder discharged them on their not pressing the objections:

Held, that the objecting judgment-debtors were not estopped by any rule of **res judicata** from raising the objection subsequently when they were sought to be made liable by the decree-holder. A.I.R. (Vol. 32) 1945 Oudh 21=1944 O.W.N. 365=1944 A.W.R. 231=20 Luck. 93.

——S. 11—Notice of execution served on judgment debtor—Failure to appear—Application consigned to record room—Subsequent execution—Plea of limitation, whether barred.

Where notice of an execution application is served on the judgment-debtor but he fails to appear and the application is consigned to record room after some proceedings for substitution of names, the judgment-debtor is not debarred on account of the rule of **res judicata** from raising in the subsequent application for execution the objection that the prior execution was time-barred. A.I.R. (Vol. 32) 1945 Oudh 21=1944 O.W.N. 365=20 Luck. 93=1944 A.W.R. 231.

——S. 11—Execution application infructuous—Plea of limitation.

Orders in execution proceedings are binding upon the parties thereto on principles analogous to those of **res judicata**, or of estoppel.

Where, however, no objection to execution is taken and the application for execution does not fructify, but is withdrawn and dismissed, the judgment-debtor is not debarred by the principles of **res judicata** or estoppel from raising the question of limitation later. A.I.R. (Vol. 26) 1939 Rang. 296=1940 Rang.L.R. 82=185 Ind. Cas. 70.

——S. 11—Execution proceeding infructuous—Failure to file objection on ground of limitation.

Where the execution proceeding has not fructified, the failure of the judgment-debtor to file an objection on the ground of limitation does not preclude him from filing such an objection on a subsequent execution application. A.I.R. (Vol. 29) 1942 Oudh 219=1941 A.W.R. 382=1941 O. W. N. 1313=17 Luck. 449=199 Ind. Cas. 636.

——S. 11—Order on question of limitation.

An order passed in execution on the question of limitation cannot operate as **res judicata** unless the point has been specifically decided or unless it must be inferred as a matter of necessary implication that a decision has been arrived at that the application was within time. A.I.R. (Vol. 25) 1938 All. 89=1937 A.L.J. 1349=1937 A.W.R. 1222 =173 Ind. Cas. 428.

——S. 11—Plea of limitation—Res judicata—Test.

The judgment-debtor is not barred by the principle of **res judicata** from raising the plea of limitation in execution proceedings unless—(1) there was an express adjudication on the question of limitation against him in an earlier proceeding or at an earlier stage of the same proceeding; or (2) there was an adjudication implied in an order which taken with surrounding circumstances, should be taken to imply a conscious determination of the question of limitation adversely to the judgment-debtor; or (3) where the judgment-debtor might and ought to have taken the plea of limitation, but failed to do so and the final result of the application was to grant the relief of partial satisfaction of the decree to the decree-holder. A.I.R. (Vol. 23) 1936 All. 21=1935 A.L.J. 1189 =1936 A.L.R. 118=58 All. 313=160 Ind. Cas. 394 (F.B.).

——S. 11—Execution application beyond time—Part payment out of Court alleged to save limitation—Notice on judgment-debtor—Application of decree-holder dismissed for not taking steps—Judgment-debtor raising plea of limitation in subsequent application—No bar.

Beyond three years of the date of the decree, the first application for execution by the decree-holder was filed. In that application, the decree-holder stated that the judgment-debtor had paid him out of Court a part of the sum which he wanted to certify under the provisions of O. 21, R. 2. The application for execution was not registered on that date, inasmuch as on the face of it, it was barred by limitation having been presented more than three years from the date of the decree. The Court issued a notice upon the judgment-debtor to file objections, if any, with regard to the question of limitation. But he did not appear with the result that the Court registered the application for execution. Another notice under O. 21, R. 22 was issued upon the judgment-debtor for putting in his objections if any, to the execution of the decree. On that date, the application was dismissed, as the decree-holder had failed to take steps. Subsequently, another application for execution was filed. Thereupon the judgment-debtor contended that the application was barred by time:

Held, that there was no adjudication on question of limitation either expressly or by necessary implication, that the earlier application was in time and that it was open to the judgment-debtor to raise the question of limitation. A.I.R. (Vol. 22) 1935 Cal. 664=39 C.W.N. 1206=159 Ind. Cas. 637.

——S. 11—Limitation.

In a previous application for execution notice of the application was offered to the judgment-debtor but he refused to sign it. No steps were taken to serve the notice according to the provisions of O. 5, Rr. 17 and 19. The Court, however, considered it as sufficient notice.

Held, that the notice was not properly served and as the judgment-debtor was not given opportunity to argue that the application was time barred, the application would not be step-in-aid of execution and the question of limitation would not be **res judicata** in subsequent application. 30 P. L.R. 38=119 Ind. Cas. 321=A.I.R. 1929 Lah. 334.

——S. 11—There was a mortgage decree passed on 21st August, 1921. First petition in execution was filed on 20th March, 1925. Court directed issue of notices under O. 21, R. 22, with special mention of question of limitation. Service was found defective and substituted service was allowed and decree-holders were ordered to take further steps. Execution proceedings were dismissed for failure of decree-holders to do so. In a later execution the property was sold. The judgment-debtor applied under S. 47 contending that the execution was time barred. The trial Court held that, as the objection was not taken in the first execution case, it was **res judicata**.

Held, that there was no adjudication in the previous proceedings that execution was not barred by limitation and the lower Courts were wrong in holding that the question was **res judicata** and that the judgment-debtor was entitled to raise the question of limitation and have it decided. 14 C.W.N. 114, Foll. 7 Pat. 465=9 P.L.T. 805=112 Ind. Cas. 265=A.I.R. 1928 Pat. 471.

——S. 11—Execution proceedings—Objection not decided—Subsequent application.

Where an objection to the maintainability of an application for execution on the ground of limitation was raised but not decided, it is competent to the judgment-debtor to raise the same objection in a later application for execution. 44 Ind. Cas. 220.

——S. 11—Plea of limitation.

A second application for execution was made beyond 3 years from the date of the first application but an order was made for attachment and on the default of the decree holder the application was struck off. Subsequent applications for execution were all made within time and in the last of them the judgment-debtor objected that the second application was barred by limitation. **Held**, that as the matter relating to the bar of the second application was not finally heard and determined, the judgment-debtor was not debarred by **res judicata** from raising the plea. 14 Ind. Cas. 977=14 Bom. L.R. 264.

——S. 11—Limitation—Plea of bar by.

So long as an application for execution is pending, the judgment-debtor can at any time show that it is barred and the Court has to dismiss it under S. 3 of the Lmitation Act. It is only when the point of limitation is concluded by proceedings in a previous execution that the judgment-debtor is not allowed to take objection on the score of limitation in a subsequent execution of the decree. 53 Ind. Cas. 85=1920 Pat. 109=2 P.L.T. 22.

——S. 11 (S. 13, Old Code)—Execution proceedings—Notice under O. 21, R. 22 (S: 248, Old Code)—Second application within three years of first one—Objection as to limitation of prior application—Res judicata.

A notice under O. 21, R. 22 (S. 248, Old Code) was issued upon an application for execution, which was clearly time-barred as being more than three years beyond the date of the decree, and nothing further was done till a second application was made for execution of the decree. The second application was within three years from the date of the first but the judgment-debtor raised the objection that the execution had become time-barred when the first application was made. **Held**, that the judgment-debtor's objection was valid and that the mere fact that a notice had been issued upon the first application which was clearly time-barred could not have the effect of reviving the decree. (1901) 2 A.L.J. 67.

——S. 11—Where all that is implicitly decided is that a previous execution petition was not barred by the 12 years rule, that decision cannot for ever remove the operation of S. 48 out of the way of all future execution petitions. 103 Ind. Cas. 311 =A.I.R. 1927 Mad. 842=53 M.L.J. 440.

——S. 11—Objection to executability of decree not decided expressly or impliedly.

It is not open to a judgment debtor at any time, however remote, to raise for the first time objections which go to the root of the decree such as that the compromise decree could not be executed as it went beyond the terms of the suit. He must do this at the first suitable opportunity, and if he does not, then the point must be deemed to have been raised and decided against him.

The compromise decree was passed in 1924. Subsequent execution applications by the decree-holder were never made the subject of a proper contest and decision, and were dismissed as the decree-holder pretended to be satisfied by agreements made on private references and awards. The execution application filed in 1937 was contested by the judgment-debtors:

Held, that it could not be said that the question whether the decree could or could not be executed was ever heard and decided or that in the circumstances it was by necessary implication heard and decided. Hence, the question as to how far the decree could be executed could be raised for the first time in the execution petition filed in 1937. A.I.R. (Vol. 30) 1943 Sind 11=I.L.R. (1942) Kar. 326=205 Ind. Cas. 256.

——S. 11—Different subject-matter—Decision that judgment-debtor is not proved to be agriculturist.

Where the subject matter of the previous execution proceedings is not the same as in the subsequent execution proceedings, the decision about the judgment-debtor not being proved to be an agriculturist in the previous execution application is not **res judicata** in the subsequent execution application. A.I.R. (Vol. 26) 1939 Lah. 556=41 P.L.R. 524=185 Ind. Cas. 609.

——S. 11—Different subject-matter.

A decision in execution proceedings that certain property is liable for payment of decree cannot operate as **res judicata** when the liability of another property is to be considered. 48 All. 245=24 A.L.J. 273=91 Ind. Cas. 785=A.I.R. 1926 All. 220 (b).

——S. 11—Objections by judgment-debtor premature and misconceived—Dismissal of—Objections in transferee Court, if barred.

Where, in execution proceedings, the objections raised by the judgment-debtor are premature and misconceived, their dismissal, even if such dismissal be considered to be one on merits, does not prevent another Court to which the decree is sent for execution from coming to an independent decision

untrammelled by the rules of constructive **res judicata**. A.I.R. (Vol. 25) 1938 All. 377=1938 A. L.J. 470=1938 A.W.R. 298=176 Ind. Cas. 376.

——S. 11—Previous objection in execution dismissed as premature—Subsequent suit in respect of the same plots is not barred.

Plaintiffs in the present suit were some of the defendants in a previous suit. That suit was decreed against the other defendants but dismissed as against the present plaintiffs. The decree-holder in that suit started execution proceedings and the present plaintiffs objected as regards execution in respect of their plots but their objections were disallowed as premature. They sued for declaration and also prayed for possession of the same plots in the event it were found they were not in possession. The Courts below dismissed the suit on the ground that it was barred by the provisions of S. 47, C.P. Code. In the lower appellate Court the plaintiffs asked that the plaint in the present suit might be treated as proceedings under S. 47. The Court below refused the prayer on the ground that proceedings under S. 47 were barred by the rule of **res judicata** arising out of the previous order in execution.

Held, that the suit was not barred by the rule of **res judicata** and it should be treated as proceedings under S. 47. 4 O.W.N. 1045=106 Ind. Cas. 133 =A.I.R. 1928 Oudh 38.

——S. 11—Objection under O. 21, R. 53 dismissed as filed late—No res judicata.

Plaintiff landlord in possession of holding as purchaser in execution of his rent decree—Defendant co-sharer landlord getting rent decree in respect of same holding—Execution by defendant—Objection by plaintiff under O. 21, R. 53 dismissed as filed late and not on merits—No appeal but title suit by plantiff—Suit held should be treated as application under S. 47—Constructive **res judicata** did not apply. A.I.R. (Vol. 25) 1938 Pat. 216=19 P.L.T. 157=175 Ind. Cas. 120.

——Ss. 11 and 47, O. 21, R. 90—Application under O. 21, R. 90 rejected as being too late—Plea of invalidity of sale—Res judicata.

Where a sale certificate was given in respect of lands not included in the decree and an application by the defendant under O. 21, R. 90 to set aside the sale was rejected on the ground that it was too late, held, in a suit by the auction-purchaser for possession of the property that the defendant was not barred by **res judicata** from raising the contention that the sale was invalid and that S. 47 was no bar to the defendant's plea being maintained. 14 L.W. 424=(1921) M.W.N. 536=70 Ind. Cas. 303=41 M.L.J. 261.

——S. 11 (S. 13, Old Code)—Application by auction-purchaser for possession under O. 21, R. 95 dismissed as time barred—Subsequent suit not barred.

An auction-purchaser applied for possession of property under O. 21, R. 95 (S. 318 of the old Code). Both the lower Courts rejected it as time barred. The second appeal too was dismissed on the same ground but the question whether the order of the first Court was an order under S. 47 (S. 244 of the old Code) was not decided by the High Court. The auction-purchaser was entitled to bring a separate suit for possession as the decision did not operate as **res judicata**. 9 A.L.J. 67 =13 Ind. Cas. 951.

——S. 11—Execution dismissed as not maintainable in form in which presented—Question of liability of judgment-debtor—Not res judicata.

Where an application for execution is dismissed as being not maintainable in the form in which it is brought and the judgment is confined purely to the procedure which has been adopted and does not consider the liability of the judgment-debtor, it is not **res judcata** regarding liability of the judgment-debtor. A.I.R. (Vol. 24) 1937 Cal. 226= 172 Ind. Cas. 121.

——S. 11—Objection dismissed on ground of vagueness—Review application dismissed on ground that applicant had no authority—Subsequent execution application.

In prior execution of the same decree an objection by **M** was dismissed on the ground that it was vague and indefinite. The question whether **M** was authorised to appear on behalf of **H** in his personal capacity was not raised. **M** subsequently made an application for review of the order but this application was dismissed on ground that **M** had no power to represent **H** personally:

Held, that this decision was not **res judicata** in the subsequent execution case. It was only the general principles of **res judicata** that applied in execution proceedings and, if it had been decided in the original application that **M** had no power to present it, it may have been the case that the matter would have been **res judicata**, for, an appeal would have been competent and the result of that appeal would have been binding on the parties, and if there was no appeal the original decision would have been binding, but the original decision was that the application was vague and was, therefore, liable to be dismissed. That order was appealable but that did not raise the question subsequently arising. Since the order rejecting an application for review being under O. 47, R. 7 (1), C. P. Code was not appealable, the question whether M was authorised or not could not be said to have been finally decided. A.I.R. (Vol. 24) 1937 Lah. 21=39 P.L.R. 202=169 Ind. Cas. 854.

——S. 11—Non-appearance of defendants—No relief asked for against them.

It would be unduly stretching the application of the principle of **res judicata** to execution proceedings if it is applied to non-appearance of defendants when no relief was asked for against them or against their property. (1937) M.W.N. 361.

——S. 11—Order striking off application.

An order striking off an execution application does not amount to a dismissal and cannot operate as **res judicata** to the consideration of a second petition. (1936) M.W.N. 1141.

——S. 11 (S. 13, Old Code)—Execution application for ascertainment of mesne profits—Striking off—Second application—Bar of.

Where an application in execution to ascertain mesne profits is struck off, there is no final disposal of such application, and a fresh application for the same purpose is not barred. (1900) 28 C. 242.

——S. 11—Non-appearance of judgment-debtor—Order to execute—Whether operates as res judicata by implication.

When after notice has been issued, the judgment-debtor does not appear and does not file objection, the Court is not called upon to make any further investigation into the matter, but it is its duty to order the decree to be executed. The order has to be passed automatically and there is no occasion for the Court to exercise its judgment as to the merits of any possible objection that might have been raised if the judgment-debtor had appeared. In such circumstances it is difficult to say that when the Court has no discretion in the matter, its order directing the decree to be executed is an adjudication of the dispute between the parties which operates as **res judicata** by implication. A.I.R. (Vol. 22) 1935 All. 727=1935 A. L. J. 642=155 Ind. Cas. 673.

——S. 11, Expl. 4—Judgment-debtor's objection to decree-holder's capacity to maintain application to execute — Rejection of—Subsequent objection to mode of execution.

The object of the notice issued under O. 21, R. 22, is to give the person against whom execution is taken an opportunity to urge objections as to the maintainability of the execution application and to prevent his being taken by surprise after the lapse of two years or more from the date of the decree.

While raising such objections, he is obviously not bound to raise all other points, which might exist against the particular mode in which execution is sought. Consequently, if the objection of a judgment-debtor as to the decree-holder's right to maintain an application is rejected, **res judicata** does not operate to prevent him from objecting to the mode of execution sought subsequently. A. I. R. (Vol. 20) 1933 Lah. 826=146 Ind. Cas. 1024.

——S. 11—Application to execute appellate decree—Construction of decree by trial Court—No res judicata.

Where the expression 'principal amount of the decree' which occurred in a decree was construed by the Court as including future interest, but the decree was subsequently affirmed by the Appellate Court:

Held, in an application to execute the appellate decree that the matter of the construction of the decree was not **res judicata**. A.I.R. 1932 All. 288, Foll. A.I.R. (Vol. 20) 1933 Lah. 352=14 Lah. 591=142 Ind. Cas. 408.

——S. 11—Dismissal of application for execution of trial Court's order—Subsequent application to execute Appellate Court's order.

The dismissal of an application for execution of the decree of the first Court does not operate as a bar by way of **res judicata** to a subsequent application for execution of the decree of the Appellate Court which is passed subsequent to that order and which directs payment afresh. A.I.R. (Vol. 19) 1932 All. 288=(1932) A.L.J. 226=54 All. 444=137 Ind. Cas. 70.

——S. 11—Where the prior execution proceeding related to a portion of the plaintiff's claim which had been decreed and the later suit was in respect of a liability which was not decided in the earlier suit.

Held that the decision in the earlier suit did not operate as **res judicata**. 1930 A.L.J. 913=130 Ind. Cas. 712=52 A. 964=A.I.R. 1931 A. 65.

——S. 11—Amount due under decree—Order passed on application to bid.

Where a Court finds that the point as to whether anything is still due under a decree is not raised and decided by an appealable or judicial order in an execution proceeing a mere order pased on an application to bid at the same execution proceeding does not operate as **res judicata**. 122 Ind. Cas. 161=A.I.R. 1929 Mad. 903.

——S. 11—Although orders in execution proceedings operate as **res judicata**, nevertheless the fact that execution has been ordered as regards a certain sum does not operate as **res judicata** with regard to the amount due under the decree. 120 Ind. Cas. 664=A.I.R. 1929 Rang. 172.

——S. 11 and O. 21, R. 22—Objection to amount claimed.

The judgment-debtor is not debarred in a subsequent execution application from objecting to amount claimed in a previous application, if he had been given no opportunity to so object in the first application. 34 Ind. Cas. 144.

——S. 11—Dismissal of application for substitution under O. 22—Subsequent application for execution under O. 21, R. 16.

An order dismissing an application in execution proceedings for substitution under O. 22, does not operate as **res judicata** as against an application for execution under O. 21, R. 16. 2 O.W.N. 352=12 O.L.J. 538=29 O.C. 98=88 Ind. Cas. 1016=A.I.R. 1925 Oudh 417.

——S. 11—Earlier order not deciding the point raised in the latter application is not res judicata.

An order in an earlier execution proceeding will not operate as **res judicata** if there is no adjudication of the point sought to be raised on the latter application. 18 M.L.W. 652=1923 M.W.N. 835=76 Ind. Cas. 761=33 M.L.T. 64=A.I.R. 1924 Mad. 145.

——S. 11—Proceedings after remand.

Fresh objection to an application in execution proceedings is not barred where the application has been remitted by superior Court overruling former objection. 5 L.R.A. (Civ.) 565=82 Ind. Cas. 65=A.I.R. 1924 All. 804.

——S. 11—Application dismissed as barred by limitation—Fresh application bringing it within limitation on other grounds—Not barred.

The dismissal of an application for execution as out of time does not prevent the executing plaintiff from filing another Darkhast and seeking to bring it within limitation on grounds which were not before the Court when the previous Darkhast was filed. The doctrine of **res judicata** cannot be extended to that length. 24 Bom.L.R. 97=66 Ind. Cas. 940=46 Bom. 467=A.I.R. 1922 Bom. 238.

——S. 11—Execution proceedings—Prior decision when a bar.

On an application to execute subsequent executable decree, the decision on a prior application to execute the decree as it originally stood, is no bar. 33 All. 264=38 I.A. 37=15 C.W.N. 370 =9 A.L.J. 332=13 C.L.J. 351=9 M.L.T. 380 =13 Bom.L.R. 367=9 Ind. Cas. 975=4 Bur.L. T. 121=21 M.L.J. 1140=(1911) 2 M.W.N. 177 (P.C.). [Affirming 29 All. 623.]

——S. 11—Question not in issue in prior petition.

The question at issue in a prior execution petition and appeal to High Court being only about the re-opening of a partition and not as to whether there was or was not a division of particular items of property, a subsequent execution petition for division of the same items is not barred by the rule of **res judicata**. 4 L.W. 101=37 Ind. Cas. 354=(1916) 2 M.W.N. 118.

——S. 11—Objections not raised and decided.

Though the judgment debtor in execution omits certain objections which are therefore never decided, they cannot operate as **res judicata**. 32 Ind. Cas. 754=2 O.L.J. 611.

——S. 11 (S. 13, Old Code)—Execution—Order dismissing objections to attachment of property in possession of reversioner—Objection based on ground of invalidity of decree—Subsequent suit for declaration by reversioner—If barred.

An order in execution overruling the objecitons of a reversioner in possession to the attachment of properties in his possession on the ground that the decree itself not binding on him is not a bar to a subsequent suit for a declaration by the reversioner. (1909) 17 M.L.J. 288=30 Mad. 402=2 M.L.T. 360.

——S. 11 (S. 13, Old Code)—Application claiming interest not awarded by decree—Order of attachment — Effect — Objection by judgment-debtor to claim for interest if res judicata.

A prior order of attachment on an execution cation wherein the petitioner had claimed interest not given him by the decree cannot operate as a bar by **res judicata** to the judgment-debtor subsequently raising the objection to the claim for interest, especially when the point was not raised on the prior occasion and the notice of the first application did not apprise the judgment-debtor of the claim. (1906) 17 M.L.J. 311.

——S. 11—Decree holder not prosecuting application—Objections not decided—Not barred.

A party to an execution proceeding who allows an order for execution to be passed against him at one stage of proceeding, when he had an opportunity to contest the validity of that order, cannot be permitted at a subsequent stage of the proceeding to open the whole matter in controversy. The essence is that the matter has either been controverted as well as determined or that it has been allowed to be decided to the detriment of the judgment-debtor when he had full opportunity to establish his defence. The principle has no application when it is proved that there was no adjudication by reason of the failure of the decree-holder to prosecute the execution proceedings with due diligence. (1910) 12 C.L.J. 312=7 Ind. Cas. 55.

10 (m). Sale proclamation.

——S. 11—Generally speaking, the principle of **res judicata** applies as much to execution proceedings as to suits, and it is not open ordinarily to the parties to raise the same contention again unless they can show substantial reason for being allowed to do so. Therefore, where the judgment-debtor raises the question of the legality of an attachment before sale and fails to substantiate his objection under S. 60 (c), C. P. Code, or otherwise, he is precluded from raising it afresh at a subsequent stage. A.I.R. (Vol. 18) 1931 Bom. 446=33 Bom.L.R. 781=133 Ind. Cas. 858.

——S. 11—Ground of want of attachment available at the time of notice of settlement of proclamation must be urged then and not reserved for later occasions—It operates otherwise as res judicata.

A party who is sought to be affected by the bar of **res judicata** should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contention against such a decision. Where a question of want of attachment is available to the judgment-debtor, the notice of settlement of proclamation gives him the opportunity of putting forward that ground, and that he must put it forward then, if he wants to do so and should not be allowed to reserve it for later occasion because if the objection succeeds it makes further execution proceedings futile. 40 Mad. 1016, Foll. 120 Ind. Cas. 863=A.I.R. 1930 Mad. 414.

——S. 11—Non-liability of property to attachment and sale—Failure to plead at time of proclamation —Res Judicata.

If the judgment-debtor fails to appear and plead, at the time of the proclamation for sale is settled, that the property attached is not liable to attachment and sale, he cannot be allowed to so plead at any later stage of the execution proceedings. 21 N.L.R. 23=88 Ind. Cas. 831=A.I.R. 1925 Nag. 320.

——S. 11—Decision that notice under O. 21, R. 66 is not necessary to a party, bars plea of want of notice as res judicata even after sale.

Where a puisne mortgagee who is a **pro forma** defendant asked to be made a party but his prayer was rejected.

Held, he cannot re-agitate the same matter by saying that he was not liable to be evicted as no notice was served upon him under O. 21. R. 66. 1924 P.H.C.C. 209=7 P.L.T. 353=92 Ind. Cas. 326=A.I.R. 1924 Pat. 628.

——S. 11—Settlement of sale proclamation after notice—Court canot go behind, in subsequent proceedings.

Where after notice to the judgment-debtors, a sale proclamation was duly settled under O. 21, R. 66, the Court cannot, in subsequent proceedings go behind that order. 1923 P.H.C.C. 76=1 Pat.L.R. 53=72 Ind. Cas. 860=A.I.R. 1923 Pat. 134.

——S. 11—Order under O. 21, R. 66 is not final and cannot be res judicata.

Order of the Court determining any of the particulars to be stated in the sale proclamation under O. 21, R. 66 is not a final order and the parties are at liberty to reopen the same question in a subsequent execution proceeding. 4 Pat. 731 =6 P.L.T. 843=3 Pat.L.R. 118=1925 P.H.C. C. 189=88 Ind. Cas. 332=A.I.R. 1925 Pat. 500 (S.B.).

——S. 11—Decision under O. 21, R. 66 is not res judicata in a later suit.

Proceedings under O. 21 R. 66 are ministerial proceedings or to be more accurate they are non-judicial or quasi-judicial proceedings. The Court has to decide the properties to be sold and the incumbrances on the property. A decision on any such point is no **res judicata** in a later regular suit. 5 L.R.A. (Civ.) 218=78 Ind. Cas. 582=A.I.R. 1924 All. 480.

——S. 11—Omission to appear to settle terms does not bar plea that property was not liable to attachment.

Where there is nothing more than the non-attendance at the hearing of an application to settle the terms of a sale proclamation, the non-applicant cannot be taken to be estopped by the principle of **res judicata thereafter** so as to prevent him from pleading that the property was not liable to attachment in execution by reason of that non-attendance. 46 Mad. 768=1923 M.W.N. 571= 18 M.L.W. 757=74 Ind. Cas. 155=A.I.R. 1924 Mad. 1=45 M.L.J. 346 (F.B.).

——S. 11—Issue of sale proclamation without deciding judgment-debtor's objections—Objections on subsequent application for sale—Not barred.

On an application for execution by sale of properties, the Court in spite of the judgment-debtor's objections to such execution ordered issue of sale proclamation in his presence but did not in express terms pass any order for sale or decide that execution could be so enforced.

Held, that the orders of the Court would not operate as **res judicata,** and the judgment-debtor could raise the question of defendant's right to sell on a subsequent application for their sale. 41 Ind. Cas. 73=45 Cal. 530.

——S. 11 (S. 13, Old Code)—Failure to object to valuation in sale proclamation at early stage—Res judicata—C. P. Code O. 21, Rr. 65, 69 (S. 287, Old Code). 8 C.W.N. 257.

11. Fraud and collusion.

——S. 11—Applicability—Judgment obtained by collusion.

Where the plaintiff and the defendant are striving to achieve the same result, there is no real fight and therefore, no judgment which can operate as **res judicata**. I.L.R. (1946) Lah. 300=A.I.R. 1947 Lah. 117=231 Ind. Cas. 421.

——S. 11—Inapplicability—Judgment obtained by fraud and collusion.

It is always open to any party to show that a judgment was obtained by fraud or collusion or that there was want of jurisdiction and in such cases. S. 11, C. P. Code would not apply. A.I.R. (Vol. 24) 1937 All. 28=1936 A.L.J. 1162= 1937 A.L.R. 61=166 Ind. Cas. 624.

——S. 11—Decision obtained by fraud is no bar.

A decision in a previous suit obtained by means of fraud, cannot operate as res judicata in a subsequent suit. A.I.R. (Vol. 23) 1936 All. 422.

——S. 11—Judgment obtained by fraud cannot operate as res judicata.

A judgment obtained by fraud or collusion cannot operate as **res judicata**. A.I.R. (Vol. 20) 1933 Lah. 573=144 Ind. Cas. 524.

——S. 11—Decision of issue between co-defendants—Fraud—Effect of.

A decision of issue in a previous suit between co-defendants cannot operate as **res judicata** if such decision is obtained by collusion and fraud and under circumstances when parties cannot be said to be properly represented. 34 C.W.N. 1129=A.I.R. 1930 Cal. 787=53 C.L.J. 91=130 Ind. Cas. 369.

——S. 11, Expl. (vi)—Inapplicability—Father of joint Hindu family acting in collusion with opposite party.

No doubt, in the case of a joint Hindu family, it is impossible to allow each member of the family to litigate the same point over and over again and S. 11, Expl. (vi) applies, but such would not be the case in the suit where there is a finding in the subsequent suit that the previous suit was collusive, and S. 11, Expl. (vi) would not apply. A.I.R. (Vol. 24) 1937 All. 28=1936 A.L.J. 1162= 1937 A.L.R. 61=166 Ind. Cas. 624.

——S. 11—Subsisting judgment set up as res judicata—It can be impeached on ground of fraud and collusion in the same suit.

When a subsisting judgment, order or decree is set by one party as a bar to the claim of other party, it is not necessary for the other party to bring a separate suit to have the same set aside, but it is open to him in the same suit in which it is sought to be used against him to show that it was obtained by fraud or collusion. 114 Ind. Cas. 407=A.I.R. 1929 Cal. 685.

——S. 11, O. 2, R. 2—Suit for partition—Subsequent suit for items left out by fraud.

Where the plaintiff who had instituted a suit for partition against the defendant instituted a second suit for partition of certain survey numbers which had been left out in the previous suit, alleging that he was not aware of the existence of these survey numbers and that the information about them had been withheld from him either through mistake or fraud:

Held, that the suit was not barred either by **res judicata** or under the provisions of O. II, R. 2, C. P. Code. A.I.R. (Vol. 18) 1931 Sind 27= 130 Ind. Cas. 552.

——S. 11—Judicial order—Binding effect of.

A judicial order passed by a Court having jurisdiction to pass it is always binding on the parties and cannot be set aside except on grounds

of fraud. A.I.R. (Vol. 27) 1940 Cal. 445=44 C.W.N. 847=I.L.R. (1940) 2 Cal. 443=190 Ind. Cas. 200.

——S. 11—Fraud—Suit to set aside decree.

A suit to set aside a decree on the ground of fraud is not an exception to the rule of **res judicata** but is independent of it. The unsuccessful party can impeach erroneous judgment by appeal or review but not by suit. 38 Mad. 203=(1913) M.W.N. 387=13 M.L.T. 421=25 M.L.J. 228=19 Ind. Cas. 579.

——S. 11 (S. 13, Old Code)—Consent decree—Application for review—Refusal—Subsequent suit to set aside decree on ground of fraud—If barred.

An application for review of a consent decree and its refusal are no bar to a subsequent suit to set it aside on the ground of fraud: 10 C.W.N. 529, S.C. 2 C.L.J. 508 not followed. Nor is Explanation II, IV, S. 13, applicable in any case. (1909) 10 C.L.J. 420=13 C.W.N. 1197=2 Ind. Cas. 129.

——S. 11 (S. 13, Old Code)—Application for review—Dismissal — Subsequent suit to set aside decree for fraud—Res judicata.

An application for review of judgment is not a suit, and its refusal will not bar a subsequent suit to set aside the same decree for fraud. (1907) 13 C.W.N. 1197=10 C.L.J. 420=2 Ind. Cas. 129.

——S. 11—Suit to set aside on ground of fraud—Proof required.

Suit to set aside a decree on ground of fraud—Plaintiff must prove that defendant carried out deliberate fraud which, through no default or neglect on his part, he was unable to expose in the previous suit—Reagitation of question already decided cannot be permitted; otherwise there would be no finality. A.I.R. (Vol. 24) 1937 Rang. 534=173 Ind. Cas. 954.

——S. 11—Fraud or collusion—Proof.

The provisions of S. 11, C.P. Code, are mandatory, and the ordinary litigant, who claims under one of the parties to the former suit can only avoid its provisions by taking advantage of S. 44, Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion. It is not for the Court to treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from the facts. When no case of fraud apart from collusion is suggested, party seeking to get over the bar of **res judicata** is bound to establish that the decree in the prior suit was obtained by collusion between the parties or that the litigation was not bona fide. A. I. R. (Vol. 24) 1937 P.C. 1=1937 O.L.R. 12=1937 O.W.N. 42=1937 A.L.R. 54=3 B.R. 223=41 C.W.N. 257=45 L.W. 43=18 P.L.T. 27=1937 M.W.N. 66=(1937) 1 M.L.J. 113=1937 A.L.J. 240=39 Bom.L.R. 317=65 C.L.J. 14=64 I.A. 17=I.L.R. (1937) Mad. 263=166 Ind. Cas. 1 (P.C.).

——S. 11—Ex parte decree—Suit to set aside on ground of fraud—Proof required.

In order to maintain a suit to set aside a decree on the ground of fraud, the plaintiff must do something more than prove that the evidence on which the decree was based was false. He must show that the defendant had carried out a deliberate fraud which, through no fault or neglect on his part, he was unable to expose in the previous suit. The mere reagitating of questions already decided cannot be permitted; otherwise there would be no finality.

An **ex parte** decree was passed against a party. Application to set it aside on the ground that no notices were served on them was dismissed. They instituted a suit to get the decree set aside, on the allegation that the decree was obtained by fraud and put in evidence to show that their signatures on the promissory notes on which the decree was passed were forged:

Held, that the question could not be allowed to be re-agitated. The party was duly served and could have challenged the claim in the previous suit. In order to succeed, the fraud must be an extrinsic fraud such as had prevented the party from placing his case before the Court. A.I.R. (Vol. 21) 1934 Rang. 135=150 Ind. Cas. 908.

——S. 11—Court finding in later suit that summons was not served on defendant in former suit—No fraud is established thereby.

The main allegation in this suit was that the defendant 1 did not receive summons in the previous suit and that the **ex-parte** decree was got fraudulently behind his back. The evidence discussed by the Judge was only the evidence of the service of summons. The finding was non-service.

Held, that is not evidence of fraud and the dogmatic statement that the previous decree was obtained fraudulently does not amount to a proper finding that the decree has no effect because of fraud. If there is nothing to indicate that the Court which tried the first suit had not satisfied itself of the service of summons it must be presumed that the Court was satisfied before the decree was made. 71 Ind. Cas. 573=1 Pat L.R. 127=A.I.R. 1923 Pat. 406.

——S. 11—Setting aside decree—Ground of fraud—Decision as to—Res judicata.

Although a decree can be set aside on the ground of fraud, if the question has already been agitated between the same parties and decided by a Court of competent jurisdiction the matter is **res judicata** and cannot again be re-opened between the same parties in a subsequent suit. 6 P.L.J. 1=60 Ind. Cas. 124=1921 P.H.C.C. 3=A.I.R. 1921 Pat. 12.

——S. 11 (S. 13, Old Code)—Prior decision under O. 9, R. 13—Subsequent suit to set aside decree on ground of fraud—Res judicata.

In a suit to set aside a decree as having been obtained against the plaintiff by fraud, substantially the only ground relied upon was that the suit had been improperly instituted against the plaintiff as of full age when in fact he was a minor. This had been decided against the plaintiff in earlier proceedings between the parties under O. 9, R. 13 (S. 108, Old Code). **Held**, that the suit was not maintainable. 29 A. 212, foll. (1907) A.W.N. 191 =4 A.L.J. 668=29 A. 608.

——S. 11—Suppression of facts in previous suit—Same facts cannot be used again to defeat the claim of others.

A party, having acquired an interest in some of the property upon a suppression of the fact that there are other persons with a superior right to it, cannot, in a subsequent suit, use that fact to defeat a claim for partition of another portion of the same estate. 8 Lah. 15=27 P.L.R. 504=96 Ind. Cas. 1002=A.I.R. 1926 Lah. 603.

——S. 11—Decree obtained by fraud—Decree by a mofussil Court—Original jurisdiction of High Court to set it aside.

The High Court has original jurisdiction under Cl. (12) of the Letters Patent and Ss. 11 and 7 of the C.P. Code to entertain a suit to set aside the decree of a mofussil court on the ground of fraud. 30 C. 369=7 C.W.N. 353.

12. Heard and finally decided.

See also C. P. CODE, S. 11—DIRECTLY AND SUBSTANTIALLY IN ISSUE.

(a) Arbitration.
(b) Decision not on merits.
(c) Decision on admission.
(d) Decision subject of appeal.
(e) Declaratory decree.
(f) (i) Ex parte decree.
(ii) Ex parte decree—Setting aside of.
(g) Final adjudication.
(h) Incidental findings.
(i) Interlocutory order.
(j) Mortgage suit.
(k) Necessary findings.
(l) Question not decided.
(m) Relief not granted.
(n) Unnecessary findings.

12. (a) Arbitration.

See also C. P. CODE, S. 11—COMPETENT COURT—AWARD.

——S. 11 and Sch. 2, Para. 20—Decree on award is as binding on parties as any other decree in suit.

A decree passed in proceedings under Sch. 2 and giving effect to an award must be held to be as binding on the parties as any other decree passed in a suit, whether with or without contest. A.I.R. (Vol. 27) 1940 Lah. 107=42 P.L.R. 77.

——S. 11—Decision in arbitration proceedings—Separate suit to set aside award does not lie.

Where objections have been preferred during the arbitration proceedings and disallowed, the principle of finality applies and the same matter cannot be agitated in a separate civil suit. A.I.R. (Vol. 23) 1936 Lah. 86=167 Ind. Cas. 730.

——S. 11—Award—Objections to—Adjudication by Arbitration Court—Res judicata.

The principle of finality of adjudication is not limited to the final adjudication of matters in issue in a suit. It applies equally to an adjudication by the arbitration Court of objections to an award falling within the purview of Arbitration Act. And the mere fact that no evidence was led at the date fixed for hearing would not prevent the principle of finality of adjudication from applying And the discovery of additional evidence of mis-representation would not entitle the plaintiff to have the matter retried. 121 Ind. Cas. 164=A.I.R. 1930 Sind 195.

——S. 11 (S. 13, Old Code)—Application to file award in private arbitration—Decree—Subsequent suit to declare decree invalid on grounds urged in prior application—Res judicata.

A reference to arbitration without the intervention of the Court resulted in an award in accordance with which a decree was passed. A suit was then brought to obtain a declaration that the decree was invalid. The grounds on which the plaintiff based his claim were grounds which had previously been substantially raised and determined in the proceedings taken under Sch. 2, para. 20 (S. 525, Old Code) on the opplication to file the award:

Held (1) That the order that the award be filed should be regarded as a decree. 29 C. 167; 33 C. 11 and 29 M. 33, foll. (2) That the points on which the plaintiff relied were matters which were directly and substantially in issue in a former suit and so could not be tried in the suit under S. 11 (S. 13, Old Code). (1907) 9 Bom.L.R. 259.

——S. 11—Award of arbitrators—Res judicata.

X mortgaged his property with possession to **Y** and then to **Z** directing **Z** to pay off **Y's** debt and obtain possession from him. **Z**, however, did not pay **Y's** debt. **X** then sued **Y** for redemption, deposited mortgage money in Court and obtained possession from Court. **Y** instead of taking away money deposited in Court alleged that he had received it from **Z** and on the same day **Z** executed a sale deed of his mortgagee rights in favour of **Y's** son **P**. Disputes then arose between the parties which were referred to arbitration. The agreement to refer to arbitration distinctly referred to the sale of mortgagee rights in favour of **P** and the arbitrators also considered the question of sale, decided that it was fictitious and passed award accordingly. **P** then sued **X** to recover possession on the basis of the sale deed executed in his favour.

Held, that it would be wrong to say that the question of the sale of mortgagee rights was not referred to arbitration. Hence **P's** suit against **X** was barred by the award of the arbitrators. 7 O. W. N. 541=A.I.R. 1930 Oudh 389=127 Ind. Cas. 254.

——S. 11—Award—When a bar to a suit.

Where an award has replaced the original rights of the parties, it is of itself a good defence to an action based on those rights; but where an award has merely ascertained and defined those rights, not only the award but also its performance must be established to complete the defence. 29 Bom. L.R. 301=101 Ind. Cas. 398=A.I.R. 1927 Bom. 237.

——S. 11—Decision under S. 14, Arbitration Act.

Question as regards validity of submission to arbitration heard and decided under S. 14, Arbitration Act—Principle of **res judicata** applies and the aggrieved party cannot be allowed to re-agitate the question. A.I.R. (Vol. 24) 1937 Sind 110=31 S.L.R. 55=169 Ind. Cas. 623.

——S. 11—Where an objection to an award on the ground of want of jurisdiction on the part of the arbitrator to make the award has been raised before the Arbitration Court under S. 14, Arbitration Act and rejected, it is not open to the aggrieved party to institute a fresh suit to set aside the award on the same ground. A.I.R. (Vol. 19) 1932 Lah. 378=33 P.L.R. 365=137 Ind. Cas. 846.

——S. 11—Application for stay of suit rejected—Res judicata—Arbitration Act, S. 19.

Where an application for stay of suit under S. 19, Arbitration Act, is rejected and the order is not set aside, a second application for stay is barred by **res judicata** even if the first order is erroneous. A.I.R. (Vol. 22) 1935 Sind 62=28 S.L.R. 366 =155 Ind. Cas. 895.

——S. 11—Award—Application to file, registered as suit—Abatement—Second suit to recover money due—Not barred.

Where a person makes an application to file an award, and it is registered as a suit, but the suit abated for plaintiff's failure to join deceased defendant's representatives, a second suit to recover the money due under the award is not barred **res judicata**. 27 Bom. L.R. 652=89 Ind. Cas. 68 =A.I.R. 1925 Bom. 418.

——S. 11 and Sch. 2, Paras. 20 and 21—Arbitration—Award, order refusing to file—If res judicata in a suit to enforce award.

Proceedings under paras. 20 and 21 of Sch. 2, to the Code are not proceedings in a suit and therefore an application to file an award, which is refused, is not **res judicata** in a suit to enforce the award. 22 Bom.L.R. 1377=59 Ind. Cas. 755= 45 Bom. 329=A.I.R. 1921 Bom. 389.

——S. 11 (S. 13, Old Code)—Applicability—"Suit" —Award in arbitration—Application to set aside—Refusal to file award—Subsequent suit to enforce award—Res judicata.

An application was made to file an award and the question of misconduct of the arbitrators was heard and decided in that proceeding and an order was made refusing to file the award. In a subsequent suit for enforcing the award, the same question was raised:

Held, that the issue as to misconduct of the arbitrators was decided in a proceeding which was not a suit within the meaning of S. 13 of the Code of Civil Procedure. and the decision on the said issue could not operate as *res judicata*. 6 A. 186; A.W.N. 1904 p. 2, 34; 28 A. 21, foll. (1910) 7 A.L.J. 425=6 Ind. Cas. 127=32 A. 484.

——S. 11—Award—Application to file—Refusal thereon—Suit to enforce such award—No res judicata.

Refusal to file a supplementary award does not operate as **res judicata** on a suit brought to enforce such award. 8 A.L.J. 315=9 Ind. Cas. 827=33 All. 490.

——S. 11—Arbitration—Award—Suit impeaching—Final decree in terms of award pending suit.

An arbitrator gave no indication in his award that it was only a preliminary stage to the final decision to be given by him. On the other hand he framed issues and gave decision on them. And although he did not state that so many rupees were to be paid by one of the party to the other he gave sufficient indications as to how the liabilities were to be assessed. Plaintiff brought his suit impeaching this award; and after the institution of the suit the arbitrator purported to give his final award and a decree was made in terms of it.

Held, that the suit was not premature since the award could not be said to be merely a preliminary award, and the subsequent conduct of the arbitrator could not vitiate the suit already instituted.

Held, further, that the decree passed in terms of the final award could not operate as **res judicata**. 1930 A.L.J. 1147=A.I.R. 1930 All. 584 =126 Ind. Cas. 10.

12. (b) Decision not on merits.

——S. 11—There is no **res judicata** where the Court has expressly refused to decide the case on merits. A.I.R. (Vol. 22) 1935 Lah. 686=37 P. L.R. 378=159 Ind. Cas. 419.

——S. 11—Suit dismissed for non-payment of adjournment costs—Fresh suit—If barred.

The dismissal of a suit on plaintiff's default to deposit adjournment costs not being a dismissal on the merits, will not create any bar to the institution of a fresh suit under S. 11, C. P. Code. A.I.R. 1950 Assam 169.

——S. 11—Division Bench expressing opinion on abstract question of law—Decision of subordinate Court applying that opinion to facts of case—If res judicata.

Where on a reference a Division Bench expresses its opinion on an abstract question of law detached from the facts of the case and leaves that opinion to be applied by the trying Judge, who happens to be a subordinate Judge, the decision of the latter applying the opinion to the facts of the case cannot be held to be final or to constitute **res judicata** between the parties so as to debar another Division Bench from considering its correctness on appeal from that decision. The opinion of the Division Bench on the question of law cannot be held to be **res judicata** as it is not its final decision on the facts of the case. 48 P.L.R. 205=223 Ind. Cas. 417=A.I.R. 1946 Lah. 419.

——S. 11—Decree subject to final decision of Privy Council in another case.

A decree expressed to be "subject to the final decision of the Privy Council" in certain other suit is not a final decree within the meaning of S. 11, C.P. Code. A.I.R. (Vol. 29) 1942 P.C. 8=8 B. R. 627=46 C.W.N. 802=I.L.R. (1942) 2 Cal. 1=I.L.R. (1942) Kar. P.C. 23=69 I.A. 51=199 Ind. Cas. 545 (P.C.).

——S. 11—First suit for redemption removed from pending file—Second suit, if barred.

The removal of a suit for redemption of a mortgage from the pending file at the stage of peremptory hearing on failure of the plaintiff to produce his witnesses, does not amount to a dismissal of the suit either on merits or on default, and is not a final decision of the suit within the meaning of S. 11, O. 9, R. 8 and O. 17, R. 3, C.P. Code, and a second suit for redemption is not

therefore barred on the principle of **res judicata**. A.I.R. 1950 Kut. 1.

——S. 11—Obiter.

In a suit for partition against the co-sharer landlord to which **L** was not a party a question arose as to whether the fact of **L's** tenancy was a bar to a partition of the lands in which the tenancy was comprised among the co-sharers. **L** filed a written statement claiming the status of a **mukurari** tenant and the trial Court gave effect to his claim. On appeal the District Judge merely held that **L** had proved his tenancy rights, but had not established the **mourashi mokurari** interest which he had claimed. **L** did not appeal:

Held, that in this particular case, having regard to the views expressed by the District Judge in the appeal, it could not be said that **L** was required to file an appeal against the so-called finding regarding the nature of the tenancy right, on pain of the question being finally concluded against him for all time to come. It was open to the trial Court to come to an independent finding regarding the nature of **L's** tenancy irrespective of what the District Judge might have said in the previous suit—what he said in the suit being no more than more **obiter**. Consequently, the decision could not operate as **res judicata** in subsequent suit involving the determination of the nature of tenancy. A.I.R. (Vol. 29) 1942 Cal. 486=46 C.W.N. 770=202 Ind. Cas. 545.

——S. 11, O. 2, R. 2—Obiter—Suit dismissed for formal defect with permission to bring fresh suit—Opinion on merits.

A obtained a decree against *B* and applied for execution of the decree. *B* instituted a suit for an injunction restraining *A* from executing the decree on the ground that it was obtained by fraud and at a time when *B* was a minor. This suit was dismissed by the trial Court on the merits but the plaintiff appealed. The Appellate Court without giving any finding on the question of minority, agreed with the trial Court in holding that no fraud had been established and dismissed the suit on the ground that it did not lie in the form in which it was brought inasmuch as the relief claimed by the plaintiff was not effective relief, but granted permission to *B* under O. 2, R. 2, Civil P. C., to file a fresh suit on the same cause of action. *B* instituted a suit for declaration that the decree obtained by *A* against him was fraudulently obtained and was a nullity on account of his minority. It was contended that the suit was barred by O. 2, R. 2, and by *res judicata*:

Held, that as the Appellate Court had dismissed *B's* suit on the ground that owing to a formal defect in the prayer asked for in the plaint the suit could not succeed and granted permission to him to file a fresh suit, its opinion on the question of fraud was a mere *obiter dictum* and the suit was not barred either by *res judicata* or under O. 2, R. 2, Civil P. C. A.I.R. (Vol. 17) 1930 Lah. 634=130 Ind. Cas. 572.

——S. 11—Previous suit dismissed as premature.

Where a claim in a previous case was resisted and rejected on the ground that it was premature, it cannot operate as *res judicata* in a subsequent litigation. A.I.R. (Vol. 32) 1945 Oudh. 70=1944 O.W.N. 509=1945 A.W.R. 32.

——S. 11—Suit dismissed as premature.

In order to create an effective bar of *res judicata*, a suit must have been finally heard and decided, and it cannot be said that a suit which is rightly dismissed on the ground that it is premature is so heard and decided. A.I.R. (Vol. 22) 1935 Lah. 974=38 P. L.R. 126=159 Ind. Cas. 853 (1).

——S. 11—Dismissal of suit as premature.

There is no *res judicata* where the decision in the previous suit merely amounted to this that on the plaintiff's own contention, the claim then made was premature and there is no decision of the plea that the claim was even then time-barred or not. There was no estoppel by defendant's plea in the former case as plaintiff's position had in no way been affected by it, for if limitation ran from the date of sale the claim was then already barred. 15 Ind. Cas. 890=8 N.L.R. 6.

——S. 11—Purchase by A in B's name—Sale by B to C in fraud of A—Suit by A for declaration of ownership—Dismissal of suit on the ground that the plea cannot be heard—Second suit by C for possession—Plea of A's ownership.

Whether a particular plea could be allowed to be raised or not is a question in the nature of a preliminary plea and any decision on that question is not a decision on the merits which could be regarded as *res judicata*.

A purchased a property in the name of *B* for *A's* own benefit. *B* sold it to *C*. *A* instituted a suit for a declaration that the sale to *B* was for *A's* benefit and that the sale by *B* to *C* was fraudulent. The suit was dismissed on the ground that *A* was not entitled to raise the plea on which the suit was based. Subsequently, *C* instituted a suit for possession and mesne profits:

Held, that *A* was not precluded by the doctrine of *res judicata* from raising the plea that the purchase by *B* was for *A's* benefit. A.I.R. (Vol. 23) 1936 Mad. 165=43 L.W. 116=160 Ind. Cas. 753.

——S. 11 (S. 13, Old Code)—Prior suit for possession dismissed as barred by S. 66—Subsequent suit by defendant in prior suit for share of mesne profits—Plea by the former plaintiff of benami purchase for him—If res judicata.

Where the defendant brought first a suit for possession of land and the suit was dismissed as contravening the provisions of S. 66 (S. 317, Old Code).

Held, that in a subsequent suit by the defendant in the prior suit for mesne profits, the prior plaintiff (now defendant) can set up the plea of benami purchase by him. (1905) 2 A.L.J. 111=27 A. 443=1905 A.W.N. 39.

——S. 11—Preliminary inquiry into prima facie title of claimants to property—Decision—Nature of.

Where a preliminary inquiry was held to inquire into the *prima facie* right of certain persons to remain in possession of certain properties for which a Receiver was appointed and it was found that no *prima facie* claim was established as to possession of the properties.

Held, that the decision was only as to which of the parties was to file a suit for declaration or possession and did not operate as *res judicata.* A.I.R. (Vol. 21) 1934 Rang. 379=153 Ind. Cas. 536.

——S. 11—Prior suit dismissed on preliminary point.

A question not directly in issue in a previous suit which had been dismissed in a preliminary point cannot be *res judicata* in a subsequent suit between the parties unless there has been a judicial determination expressly or impliedly on the matter. 42 Ind. Cas. 508.

——S. 11—Application by judgment-debtor under O. 21, R. 2, to certify payment out of Court—Dismissal—Order not showing clearly whether decision was on merits or on limitation—Subsequent suit for damages to recover amount of uncertified payment—Res judicata.

The dismissal of an application under O. 21, R. 2, C. P. Code, for certifying a payment made by the judgment-debtor to the decree-holder out of Court, on the ground of limitation and on the ground of absence of proof of payment, will not operate as *res judicata* so as to bar a suit by the judgment-debtor against the decree-holder for damages after he was made to pay over again the amount uncertified in execution, when the order of dismissal of the application does not show clearly, whether the dismissal of the same was on the score of limitation or on the merits. 28 Pat. 974=A.I.R. 1951 Pat 348..

——S. 11—Prior decision merely on question of jurisdiction — Matter, if res judicata.

Where, in the previous litigation between the same parties, the Appellate Court had merely held that the claim of the plaintiff to compensation could not be maintained in the Civil Court as the District Magistrate was the only authority to entertain it under S. 17, Bengal Ferries Act:

Held, that the matter did not constitute *res judicata.* A.I.R. (Vol. 23) 1936 Pat. 198=14 Pat. 633=2 B.R. 53=16 P.L.T. 819=159 Ind. Cas. 173.

——S. 11—Suit dismissed for want of jurisdiction—Investiture of jurisdiction—Fresh suit.

The plaintiff sued in the Revenue Court to eject the defendant from pasture land. The Revenue Court dismissed the suit on the ground that it had no jurisdiction. Subsequently, the Agra Tenancy Act of 1926 was passed and the Revenue Court was definitely given jurisdiction to deal with ejectment suits relating to pasture land. The plaintiff again went to the Revenue Court for ejectment of the defendant. The defendant raised the plea of *res judicata:*

Held, that the second suit was not barred by *res judicata* as the case had not been decided on the merits in the previous suit. A.I.R. (Vol. 18) 1931 All. 200=130 Ind. Cas. 4.

——S. 11—Cause of action must be decided in previous suit—Suit dismissed under S. 69 (2), Partnership Act, firm being unregistered—Cause of action not decided—Second suit on some cause of action after registration not barred.

In order that the subsequent suit may be barred by *res judicata,* it is not enough that the former suit has been heard and determined. The cause of action must be heard and determined.

Suit was dismissed under S. 69 (2), Partnership Act, on the ground that the firm was unregistered. The question whether the goods were supplied and not paid for was never decided. The firm was then registered, and a second suit was brought on the same cause of action:

Held, that the second suit was not barred by *res judicata.* A.I.R. (Vol. 24) 1937 Nag. 146=I.L.R. (1937) Nag. 430=169 Ind. Cas. 818.

——S. 11—Dismissal of suit for non-registration of plaintiff firm—Effect.

The dismissal of a suit by a firm not registered under S. 69, Partnership Act, on account of its non-registration does not operate as *res judicata* and the plaintiff can, after registration, file a fresh suit provided it is within time. A.I.R. (Vol. 22) 1935 Lah. 893=17 Lah. 275=38 P.L.R. 633=160 Ind. Cas. 513.

——S. 11—Application for amendment of decree—Court of second appeal holding that execution Court could not go behind decree and not deciding appeal on merits—Subsequent application for amendment.

Where the trial Court decided the matter between the judgment-debtor and decree-holder in an application for amendment of decree with regard to future interest, but the Court of second appeal disposed of the judgment-debtor's appeal not on the merits but on the ground that the Court was concerned with the execution of the decree, meaning thereby, that the execution Court could not go behind the decree and had no power to alter its terms, it cannot be said that the Court of second appeal "heard and finally decided" the judgment-debtor's application for amendment of the decree. Such decision does not operate as bar by *res judicata* on the question of the amendment of the decree with regard to future interest. A. I. R. (Vol. 24) 1937 Oudh 246=1937 O.W.N. 268=1937 O.L.R. 125=13 Luck. 186=167 Ind. Cas. 586.

——S. 11—Application for amendment of—Decree—Dismissal for failure to file process forms—Application for review—Rejection—Second application for amendment—Whether barred.

Where an application for amendment of a decree was dismissed for default on account of the applicant's failure to file the process forms and an application for review of that order also having been dismissed, he applied a second time for amendment of the decree:

Held, that as the previous application for amendment was not heard and decided on the merits, the rejection of that application did not operate as a bar to the entertaining of the second application and that the principle of *res judicata* did not apply. A.I.R. (Vol. 20) 1933 Pat. 208=12 Pat. 179=14 P.L.T. 556=144 Ind. Cas. 59.

——S. 11—First suit between landlord and tenant—No question of plaintiff's right as against rights of mortgagor or mortgagee entertainable—Suit dismissed for multifariousness and not on merits—Second suit on title is not barred. A.I.R. (Vol. 22) 1935 Bom. 131=37 Bom.L.R. 62=155 Ind. Cas. 7.

——S. 11—Dismissal of suit on ground of misjoinder.

The dismissal on the ground of misjoinder cannot certainly operate as *res judicata*; and there will be even less scope for application of O. 23, R. 1, if the Court is held to have dismissed the suit, for no question of "abandonment" will then arise. A.I.R. (Vol. 22) 1935 Mad. 696=1935 M.W.N. 737=42 L.W. 256=158 Ind. Cas. 909.

——S. 11—Suit dismissed for misjoinder—Subsequent suit—No bar.

In a suit for recovery of possession as owner, an alternative relief for redemption cannot be asked inasmuch as the two reliefs are contradictory. And if the relief for possession is refused on the merits and that for redemption owing to the defect of misjoinder of reliefs, the plaintiff can bring a fresh suit for redemption. 27 Ind. Cas. 575.

——S. 11—Dismissal of prior suit for non-joinder—Subsequent suit not barred.

To constitute a matter *res judicata* it is necessary that the matter must have been heard and finally decided in the former suit. But where the former suit is dismissed only on the ground of non-joinder of parties the matter cannot be said to have been heard and finally decided and a subsequent suit based on the same cause of action is not barred. 24 Cal. 616 (P.C.), Foll. 46 C.L.J. 118=104 Ind. Cas. 576=A.I.R. 1927 Cal. 794.

——S. 11 (S. 13, Old Code—Rent suit—Co-sharer—Suit for profits against two lambardars —Suit dismissed on ground of misjoinder—Subsequent suits separately against each lambardar for profits of other years—Res judicata.

A co-sharer sued two lambardars jointly for profits, and the Court (an Assistant Collector) held that they were not liable to be sued jointly and dismissed the suit. The plaintiff did not appeal but filed separate suits. **Held,** that this decision did not amount to a **res judicata** as to the lambardars' joint or separate liability in a subsequent suit by the same co-sharer against them for profits of other years. 1907 A. W.N. 47=4 A.L.J. 173=29 A. 287.

——S. 11—Dismissal of prior suit for non-joinder.

A dismissal of a prior suit for the same relief will not operate as *res judicata* in a subsequent suit for the same relief when the prior suit was only dismissed for non-joinder of parties. Explanation 4 to S. 11, Civil Procedure Code, deals only with a case which has been tried on the merits. 16 M.L. W. 26=73 Ind. Cas. 491=1922 M.W.N. 428=A. I.R. 1922 Mad. 259=43 M.L.J. 572.

——S. 11—Striking off of the previous application for ascertainment of mesne profits for want of sufficient court-fees, application not being necessary cannot act as *res judicata* for another application of the decree-holder for reminding the Court that the suit should be proceeded with. A.I.R. (Vol. 21) 1934 All. 465=1934 A.L.J. 86=151 Ind. Cas. 755.

——S. 11—Suit dismissed for want of proper court-fees—No bar to fresh enquiry.

A suit dismissed for want of proper court-fees cannot be said to have been decided by any competent Court, so as to bar a fresh enquiry. 5 O.W.N. 897=4 Luck. 159=114 Ind. Cas. 120=10 L.R.A. Rev. 211=A.I.R. 1928 Oudh 503.

——S. 11—Application for leave to appeal in forma pauperis—Dismissal—No res judicata.

Where only the application for permission to appeal *in forma pauperis* is dismissed the issues arising in the appeal not being heard and finally decided, the appeal cannot operate to raise the bar of *res judicata.* A.I.R. 1930 Lah. 501=126 Ind. Cas. 591.

——S. 11—Order of rejection of memorandum of appeal presented by unauthorised vakil—Not res judicata.

An order of rejection of a memorandum of appeal which has been presented by a vakil not properly authorized according to law cannot operate as *res judicata* in a subsequent proceedings in which an appeal has been filed in proper form but beyond limitation. 1930 A.L.J. 394=121 Ind. Cas. 546= A.I.R. 1930 All. 112.

——S. 11—Suit for declaration dismissed as not maintainable—Subsequent suit for possession not barred.

Where a previous suit by plaintiffs was dismissed under the provisions of S. 42, Specific Relief Act because in the opinion of the Judge mere declaratory suit could not be maintained when the plaintiff under the law could have asked for consequential relief.

Held, that the decision cannot operate as *res judicata* in the subsequent suit for possession. A. I.R. 1929 Lah. 596.

——S. 11—Decision on assumed facts.

In a suit for partition by a mortgagee in possession who was also a co-sharer the Court overlooking the fact that the mortgage-deed provided a period of 25 years for redemption assumed the mortgagee had become the owner of that property.

Held, that the question as to the extinction of the mortgage had not been "heard and finally decided," in the partition suit and a subsequent suit for redemption would not be barred. 30 Bom.L.R. 1089=113 Ind. Cas. 384=A.I.R. 1929 Bom. 116.

——S. 11—Decision based upon interpretation of judgment of Settlement Court—If res judicata in a subsequent suit between the parties.

Where in a previous suit the Court's decision was based entirely upon the interpretation of the judgment of the Settlement Court and the decision was no more than the statement of the legal meaning which the Court attached to the words of the Settlement Court's judgment and decree. *Held,* the decision would not act as *res judicata* in a subsequent suit between parties. 3 Luck. 392=108 Ind. Cas. 98= 5 O.W.N. 50=A.I.R. 1928 Oudh 241.

——S. 11—Dismissal for mis-description of suit property does not bar subsequent suit.

The dismissal of a suit on the ground of mis-description of property in suit is not a bar to a subsequent suit on the same cause of action either under S. 11 or under O. 2, R. 2. 78 Ind. Cas. 579=A.I.R. 1925 Lah. 193.

——S. 11—Dismissal of suit for wrong description of property does not bar a subsequent suit.

S. 11, C. P. Code, should not be pressed literally so as to contravene the principles underlying it. Non-suit does not operate as a bar. A Court in India should not refuse relief against a judgment or other proceeding at law not founded upon consent upon the ground merely that there has been a mistake in the pleadings or in the conduct of the case. 39 Ind. Cas. 126=2 Pat.L.J. 313.

——S. 11—Dismissal for default—Operation as res judicata.

Where the prior suit has been dismissed for default, there has been no decision on the merits of the case and no matter in issue between the parties has been heard and finally decided in the suit within the meaning of S. 11, C. P. Code, so as to operate as

a bar to the same question being raised in a subsequent suit. 1949 R.D. 66.

——S. 11—Dismissal under O. 9, R. 3, C. P. Code.

A dismissal under O. 9, R. 3, creates no *res judicata*. 12 O.L.J. 1=85 Ind. Cas. 509=28 O.C. 8=A.I.R. 1925 Oudh 337.

——S. 11 and O. 9, R. 8—Dismissal for default.

The dismissal of a suit under O. 9, R. 8, C. P. Code, is not intended to operate in favour of the defendant as *res judicata*. The application of principle of *res judicata* cannot be avoided by a defendant on the ground that he did not appear at the trial, but the conclusive effect of the decision must be confined to the point actually decided in the suit. 16 Cal. 300 (F.B.), foll. 54 Ind. Cas. 789.

——S. 11 and O. 9, R. 8—Dismissal for default —No res judicata.

Dismissal under O. 9, R. 8 cannot operate in favour of the defendant as *res judicata*. 23 Ind. Cas. 878=10 N.L.R. 39.

——S. 11 and O. 9, R. 9—Suit for possession —Dismissal for default—Subsequent suit for abatement of rent.

Dismissal of a suit by a tenant against his landlord for recovery of possession of certain property comprised in the plaintiff's *dar mourashi* tenure for default does not preclude him in a subsequent suit for rent brought by the landlord from claiming abatement of rent owing to dispossession by the landlord. 56 Ind. Cas. 932.

——S. 11—Partition suit.

Dismissal for default—Subsequent suit not barred. 28 All. 627, Foll. 46 All. 820=80 Ind. Cas. 933= 22 A.L.J. 749=5 L.R.A. Civ. 541=A.I.R. 1924 All. 905.

——S. 11—Application for ascertainment of mesne profits—Dismissal of for default or as not pressed in suit—Does not bar a fresh petition.

The dismissal of an application for ascertainment of mesne profits for default or as not pressed, in a suit in ejectment in which a preliminary decree for possession was passed, does not bar a fresh petition for ascertaining the mesne profits. 19 M.L.W. 69= 33 M.L.T. 261=79 Ind. Cas. 635=1924 M.W.N. 115=A.I.R. 1924 Mad. 473=46 M.L.J. 46.

——S. 11—Dismissal of suit for default—Effect of.

Where a suit brought by one of the parties to the reference to complete the arbitration and for a decree in terms of the award which might be passed, is dismissed for default it will not operate as *res judicata* in a subsequent suit for possession of the specific property awarded by the award. 8 L. W. 551=24 M.L.T. 424=49 Ind. Cas. 89=(1918) M. W.N. 683.

——S. 11—Dismissal in default.

A judgment which dismisses a suit in default does not operate as *res judicata*. 24 Ind. Cas. 480=12 A.L.J. 911.

——S. 11—Dismissal for default—B. T. Act, S. 106.

The dismissal of a suit under S. 106 of the B. T. Act for default may bar a second suit of the same scope and nature, but it does not operate as *res judicata*. Where there is no adjudication about the rent as alleged by the tenant or by the landlord the decree does not bar the determination of the question in controversy in a subsequent suit between the parties. 15 Ind. Cas. 863.

——S. 11—Previous suit against plaintiff—Plea of discharge—Dismissal of suit for default—Subsequent suit against defendant—If res judicata.

Where a previous suit by the defendant against the plaintiff for *waram* due to the former was dismissed for default and in that suit the plaintiff had raised the plea of discharge in respect of a loan due by the defendant to the plaintiff, a subsequent suit by the plaintiff against defendant for money advanced is not barred by *res judicata* when the pleadings and judgment in the previous suit had not been produced. 11 M.L.T. 201=13 Ind. Cas. 649=(1912) M.W.N. 172.

——S. 11—Dismissal for default.

No question of *res judicata* arises in favour of either litigants when a suit has been dismissed for default. 41 Ind. Cas. 905.

——S. 11—Dismissal for default of both parties.

A dismissal for default of both parties does not operate as *res judicata*. 24 Ind. Cas. 17.

——S. 11 (S. 13, Old Code)—Suit dismissed in defendant's absence on plaintiff's failure to adduce evidence—Res judicata.

S. 11 (S. 13, Old Code) is no bar to a fresh suit when the previous suit was dismissed in the defendant's absence on failure of the plaintiff to adduce evidence. (1904) 10 C.W.N. 40.

——S. 11—Absence of parties.

A suit disposed of in the absence of both the parties does not operate as *res judicata*. 39 Ind. Cas. 755=1 Pat. L. W. 375.

——S. 11—Dismissal of application for amendment of plaint without hearing parties—If bars subsequent application.

Where an application for amendment of plaint has been dismissed without hearing the parties on the ground that the application was not moved, a subsequent application for amendment is not barred by the principle of *res judicata*. 12 B. R. 383=223 Ind. Cas. 294=A.I.R. 1946 Pat. 429.

——S. 11—A matter decided behind the back of the judgment-debtor without notice to him may well have been decided in accordance with law, but it cannot be held to be *res judicata*. A.I.R. 1930 All. 699=1930 A.L.J. 1400=128 Ind. Cas. 607.

——S. 11—Decision without notice to party.

A party who is sought to be affected by the bar of *res judicata* should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contention against such a decision. 120 Ind. Cas. 863=A.I.R. 1930 Mad. 414.

——S. 11—Ex parte order.

Where the order is an *ex parte* order issued with out hearing the opposite party, it cannot operate as *res judicata* and can be reviewed by the successor of the Judge who made such *ex parte* order. 116 Ind. Cas. 101=A.I.R. 1929 Sind 110.

——S. 11—Petition to set aside ex parte decree —Withdrawal for formal defect—Second petition not barred.

Petition to set aside *ex parte* decree accompanied by security bond—Withdrawal of petition for defect in formalities—Subsequent petition with same security bond. Surety verifying it as genuine and correct later on—Bond is effective from date of its filing—Second application was not barred by *res judicata* by reason of the dismissal of the first application. A. I.R. (Vol. 22) 1935 Oudh 35=11 O.W.N. 1639=152 Ind. Cas. 974.

——S. 11—Withdrawal of application under S. 81, Agra Tenancy Act.

Suit for arrears of rent by assignee—Withdrawal of the application under S. 81, Agra Tenancy Act, 1926, when no court-fees have been paid over it has no effect of *res judicata* on a subsequent suit for recovery of rent. A.I.R. (Vol. 21) 1934 All. 1066 =L.R. 15 A. 593 Rev.=151 Ind. Cas. 967.

——S. 11—Suit by Hindu widow for declaration that an execution sale was illegal—Dismissal under S. 47, C. P. Code—Does not bar a subsequent suit by reversioner for possession.

Where a suit by a Hindu widow for declaring that a sale in execution was illegal was dismissed on the ground that the question of sale related solely to execution under S. 244 of Civil Procedure Code of 1882 or S. 47 of 1908.

Held, that there was no adjudication on the merits, as between the widow and the purchaser the suit having been dismissed on a preliminary point and that a suit by the reversioners, after the death of the widow for possession against the auction-purchaser is not barred. 24 Bom.L.R. 249=67 Ind. Cas. 209=46 Bom. 726=A.I.R. 1922 Bom. 96.

——S. 11—Dismissal of appeal for want of copy of first Court's judgment.

A dismissal of an appeal, for want of a copy of the first Court's judgment necessary under the Allahabad High Court rules, does not operate as *res judicata*. 63 Ind. Cas. 344=19 A.L.J. 706.

——S. 11 (S. 13, Old Code)—Dismissal of suit for default in effective service of summons—Res judicata.

Where a suit for profits against three defendants was dismissed owing to a failure of the plaintiff to cause one of the defendants to be served,

Held, that a second suit for profits for the same period against the same defendants was maintainable. The former judgment not being a decision on the merits did not bar the subsequent claim. (1904) 28 R. 749=(1906) A.W.N. 233=3 A.L.J. 576 (F.B.).

——S. 11—Dismissal on technical ground.

To conclude a plaintiff by a plea of *res judicata* it is necessary to show not only that there was a former suit between the same parties for the same matter upon the same cause of action but also that there was a decision finally granting or witholding the relief sought. 3 M.H.C.R. 84, foll. If a suit has been dismissed on some purely technical ground such as the frame of the suit rendering it unmaintainable, then a subsequent suit is not barred. 8 C.P.L.R. 3, foll. Though a decree read by itself may be an unconditional dismissal of the suit we are entitled to look at the judgment to see what was actually decided. 47 Ind. Cas. 909=16 N.L.R. 206.

——S. 11—Dismissal on pleadings—No bar.

If a suit is dismissed on the pleadings there was no decision on the merits and it is not barred by *res judicata*. 7 L.W. 557=(1918) M.W.N. 427=45 Ind. Cas. 969=24 M.L.T. 311.

——S. 11 (S. 13, Old Code)—Ejectment suit—Intermediate tenure-holder pleading title and also termination of plaintiff's tenancy by notice to quit—Suit decreed without considering plea—Subsequent suit by defendant for ejectment—No res judicata—Point taken in defence but not considered—Adverse decision against defendant —Effect of.

Where the decision in a former suit is necessarily inconsistent with a defence which was taken but not considered, the decision must be construed as deciding the point against the defendant. In a suit for ejectment previously brought by the defendant against the plaintiff, the latter who had acquired an intermediate tenure between the defendant and his landlord pleaded his title thereunder and also that he had terminated the defendant's tenancy by a notice to quit. The suit having been decreed although the plea taken was not specifically considered, *Held* that the result of the decision was that the notice which was given before the institution of the suit was ineffectual. It would not bar a suit by the plaintiff for ejectment brought after giving the defendant a second notice to quit. (1903) 13 C.W.N. 513=9 C.L.J. 962=1 Ind. Cas. 66.

——S. 11 (S. 13, Old Code)—Decree reserving right of fresh suit—Res judicata.

A decree which reserves to plaintiff the liberty of bringing a fresh suit in respect of the same matter cannot operate as **res judicata**. (1905) 18 M.L.J. 198.

12 (c) Decision on admission.

——S. 11—Decree based on facts admitted.

Where in a prior suit there was no issue or decision on a certain point because both parties admitted it, and a decree was passed on the footing of the facts admitted by all the parties, in such cases *res judicata* by reason of the prior decision extends not merely to the actual decision or finding in the case but to the common basis or facts accepted by both parties which are incorporated in and made the foundation of the judgment and decree in the case. A. I. R. (Vol. 29) 1942 Oudh 354=1942 O.W.N. 222=200 Ind. Cas. 241. *See also* A.I.R. (Vol. 19) 1932 Mad. 519=36 L.W. 414=139 Ind. Cas. 761.

——S. 11—Judgment by consent and facts admitted.

A judgment by consent and facts admitted are just as effective for the purposes of *res judicata* as a judgment passed on contest or facts which were in dispute. A.I.R. (Vol. 28) 1941 Nag. 346=1941 N.L.J. 508=199 Ind. Cas. 537.

——S. 11—Decree in previous suit based on admission.

On the death of a Hindu widow who sold a part of her interest in a *patti* to a co-sharer, her reversioner succeeded to the remaining interest in the *patti*. The purchaser co-sharer filed a suit against the reversioner for his share of the village profits. The

suit was decreed as the reversioner admitted the purchaser's interest in the *patti* and claim to the profits. Subsequently the reversioner brought a suit challenging the sale by the widow and questioning the purchaser's title:

Held, that the case fell within the plain terms of S. 11, Expl. 4, Civil P. C. The mere fact that the plaintiff in the prior suit was already a proprietor in the *patti* before his purchase did not change the position at all. Reversioner's clear and unequivocal admission of the title of the purchaser in his suit founded on the assertion by him that his sale was valid and binding on the reversioner must be treated as an election to affirm the sale. A.I.R. (Vol. 27) 1940 Nag. 396=1940 N.L.J. 499=191 Ind. Cas. 881.

12 (d) Decision subject of appeal.

See also CIVIL P. C., S. 11—CONNECTED OR CROSS APPEALS AND SUITS.

——S. 11—Judgment passed during pendency of appeal or revision.

A judgment coming into existence during the pendency of proceedings by way of appeal or revision may operate as *res judicata* in a proper case if it is allowed to become final. A.I.R. (Vol. 23) 1936 Mad. 190=43 L.W. 189=70 M.L.J. 223=1936 M.W.N. 243 (1)=59 Mad. 777=161 Ind. Cas. 219 (1).

——S. 11—Former suit decided in second appeal pending second appeal.

The prohibition in S. 11 of the C. P. Code applies not only to the original Court but also to an appellate Court. 11 All. 148 and 13 M.L.J. 135, foll. Where pending a second appeal, the former suit is decided on second appeal, it operates as *res judicata*. 52 Ind. Cas. 625=(1919) M.W.N. 455.

——S. 11—Decision in suit, subject-matter of appeal—Effect.

Where the decision of the previous suit is a subject-matter of an appeal before the Privy Council, it does not operate as *res judicata*. A.I.R. (Vol. 18) 1931 Lah. 161=32 P.L.R. 910=12 Lah. 497=135 Ind. Cas. 657.

——S. 11—Decision subject of appeal—No bar.

Where there has been an appeal the matter is no longer *res judicata* but *res sub judice* and where an appeal is not finally heard and decided any matters therein cannot possibly be said to be *res judicata*. 7 Lah. 423=27 P.L.R. 663=98 Ind. Cas. 584=A.I.R. 1927 Lah. 1.

——S. 11—Decision of lower Court—Filing of appeal—Effect.

Where there is an appeal, the conclusion of the decision of lower Court is no longer final. 57 Ind. Cas. 735=13 L.W. 25.

——S. 11—Decision subject of appeal—No bar.

Where an appeal is filed and admitted the matters decided by the Lower Court ceases to be *res judicata* and if the appeal is disposed of on some other ground, the finding of the Lower Court is not *res judicata* concerning matters not referred to by the Appellate Court. 56 Ind. Cas. 199=27 M.L.T. 54.

——S. 11—Pending appeal.

A matter pending appeal is not finally determined till the Appellate Court decides and if the suit is withdrawn with permission, there is no decision. 40 Ind. Cas. 853.

——S. 11—Abatement of appeal—Finding of trial Court, whether operates as res judicata.

Though when the decision of the trial Court is appealed from, all questions decided by it again become *sub judice*, where the appeal is not decided on the merits but abates so that the appeal becomes infructuous and the decision of the trial Court becomes conclusive, the latter will operate as *res judicata* as regards the questions decided by it, in a subsequent suit between the same parties. A.I.R. (Vol. 19) 1932 All. 603=1932 A.L.J. 615=138 Ind. Cas. 406.

——S. 11—Appeal dismissed for default—Findings of trial Court.

If an appeal is dismissed for default result is as if no appeal was preferred and the findings of a trial Court will operate as *res judicata*. A.I.R. (Vol. 18) 1931 Sind 170=25 S.L.R. 493=134 Ind. Cas. 1171.

——S. 11—Permission to withdraw suit—Grant of by Appellate Court—Decision of First Court not res judicata.

Where the order of the District Judge on appeal ran as follows: Ordered that the appeal be allowed and the decree of the Court below be set aside and plaintiff be permitted to withdraw the suit; permission to file a fresh suit.

Held, that an Appellate Court has power to pass orders under O. 23, R. 1 (37 A. 326, F. B., Foll.) and that the order of the District Judge having set aside the decision of the Munsif that cannot operate as *res judicata*. 74 Ind. Cas. 894=A.I.R. 1924 All. 260.

——S. 11—Leave to withdraw suit granted by appellate Court—Subsequent suit not barred.

A obtained a decree against *B* for payment of money and applied for execution of the same. *B* thereupon instituted a suit for an injunction restraining *A* from executing his decree on the ground that it had been obtained by fraud and during *B's* minority. The trial Court dismissed the suit on merits. On appeal by *B* the Additional District Judge dismissed the suit on the ground that it did not lie in the form in which it was brought and as the relief claimed by *B* was not an effective relief. He however, granted permission to *B* under O. 2, R. 2, to file a fresh suit on the same cause of action. *B* therefore in instituted a suit claiming a declaration that the decree had been obtained fraudulently and was a nullity on account of his minority.

Held, that *B's* suit was not barred by O. 2, R. 2, or S. 11, or under any law. The opinion of the Additional District Judge who dismissed *B's* suit owing to a formal defect on the question of fraud was in the nature an *obiter dictum* and therefore not binding on the parties. A.I.R. 1930 Lah. 634.

——S. 11 and O. 23, R. 1—Leave to withdraw suit—Order granting leave—Effect of—Res judicata.

Per *F. B.*—An Appellate Court can, in a proper case, when reversing the Lower Court's decree, give the plaintiff leave to withdraw the suit with liberty to file a fresh suit. In such a case where the Appellate Court allows the appeal to be withdrawn with liberty to file fresh suit, the Lower Court's decree is wiped out and the subsequent suit is not barred

as *res judicata.* 40 Mad. 259=21 M.L.T. 82=5 L. W. 588=32 M.L.J. 477=37 Ind. Cas. 414=(1917) M.W.N. 217 and 246 (F.B.).

——S. 11—Leave to withdraw suit granted by appellate Court without jurisdiction — Fresh suit barred.

O. 23, R. 1, C. P. Code being the only provision for permitting suits to be withdrawn, the decision of the trial Court operates as *res judicata,* where an appellate Court allows a suit to be withdrawn without jurisdiction. 2 U. P. L. R. (Pat.) 121=1 Pat. L.T. 300=56 Ind. Cas. 697=1920 Pat. 232.

——S. 11, O. 23, R. 1—Leave to withdraw suit—Order of appellate Court without jurisdiction—Effect.

An appellate Court has no jurisdiction to dispose of a case properly constituted otherwise than on the merits; it cannot allow a withdrawal of the suit dismissed by the trial Court for want of evidence, on the ground that the necessary evidence has not been let in. A subsequent suit brought in pursuance of the withdrawal will be barred by the rule of *res judicata.* 46 Ind. Cas. 392=3 Pat. L. J. 404= [But *see* 24 C.W.N. 723=31 C.L.J. 482=58 Ind. Cas. 806 (F.B.)] 40 Ind. Cas. 611=32 M.L.J. 434.

——S. 11—Finding of trial Court—Appellate Court not basing its decision thereon.

One *D,* a trustee, brought a suit for recovery of rent against a tenant of the property belonging to the trust. One *S* who was made defendant pleaded that *D* and himself were joint trustees and denied *D's* right to bring the suit. The trial Court held that *S* had disclaimed the office of trustee. In appeal, the appellate Court based its decision merely upon the finding that *D* was the one who had really managed the affairs of the trust and consequently was entitled to sue the tenant for arrears of rent:

Held, that as the judgment of the trial Court was made subject of appeal and as the appellate Court did not maintain the trial Court's finding that *S* had given up trusteeship that finding could not become *res judicata.* A.I.R. (Vol. 33) 1946 All. 362=226 Ind. Cas. 58=1946 A.W.R. (H.C.) 132=1946 A. L.W. 56=1946 O.W.N. (H.C.) 56.

——S. 11—Decision of trial Court on two issues —Appellate Court disposing of appeal on one issue.

Where the trial Court decided a case based on finding on two issues and the Appellate Court disposed of the appeal on one of the issues leaving open and undecided the other issue:

Held, that the Appellate Court whose decision is the test by which the question of *res judicata* is to be determined had, on the appeal before it ample authority to dispose of the appeal on one of the grounds on which the decision of the trial Court was founded and to leave open and undecided the other issue in the case, and that the finding of the trial Court on the issue left untouched and undecided in appeal did not operate as *res judicata* in a subsequent suit. A. I.R. (Vol. 21) 1934 Cal. 14=37 Cal.W.N. 892= 150 Ind. Cas. 386.

——S. 11—Decision of issue in trial Court—Issue left open in appeal—No res judicata.

Where, in a previous suit, one of the issues as to whether the suit property was appurtenant to the religious institution or was personal property of the *mahant* was decided in favour of the defendant but an appeal from the decision of the suit was decided on a different issue, the Court holding that it was unnecessary to decide other issue, a subsequent suit between the same parties involving the issue as to whether the property was appurtenant to the religious institution or personal property of the *mahant* is not barred by the decision of the trial Court in the previous suit. A.I.R. (Vol. 26) 1939 Oudh 2=1938 O.W.N. 962=14 Luck. 277=177 Ind. Cas. 785.

——S. 11—Issue in former suit decided by trial Court—Appellate Court refraining from deciding it—If can be deemed to have been finally decided.

Where in a previous suit between the same parties the trial Court decided a certain issue but the Appellate Court expressly refrained from deciding it, the issue cannot be said to have been finally decided within the meaning of S. 11, C. P. Code, and it can be raised in a subsequent suit between the same parties. A.I.R. (Vol. 24) 1937 Mad. 709=176 Ind. Cas. 590.

——S. 11—When a suit is "finally decided" on a particular point by a superior Court any finding recorded by the Courts below, which has not been dealt with by the Court of appeal, would not have the binding effect of *res judicata.* A.I.R. (Vol. 24) 1937 Lah. 167=164 Ind. Cas. 610.

——S. 11—Dismissal of second appeal on technical ground—Finality of the decision of the lower appellate Court.

Where a second appeal is dismissed on some technical ground the decision of the first appellate Court becomes final and the latter will operate as *res judicata* in a subsequent suit between the same parties as regards the questions decided by it. 21 Luck. 586=A.I.R. 1947 Oudh 74=1946 O.W.N. 287=227 Ind. Cas. 208=1946 A.W.R. (C.C.) 220=1946 O.A. (C.C.) 220.

——S. 11—Appeal decided on preliminary point and not on merits—Decision of trial Court on merits, whether res judicata.

Where an appeal is decided not on the merits but on a preliminary point, the decision of the first Court on the merits will not operate as *res judicata,* in a subsequent suit between the same parties. A.I.R. (Vol. 19) 1932 Lah. 452=13 Lah. 375=33 P.L.R. 424=139 Ind. Cas. 375.

——S. 11—Appeal—No decision on the merits —Effect of.

To support a plea of *res judicata,* besides the parties and the matter in issue being the same, the matter in issue must have been heard and finally decided. If there is an appeal it destroys the finality of the decision of the lower Court and if the ultimate Court of appeal dismisses the suit as being badly framed the merits of the case are not *res judicata.* 45 Cal. 442=44 I.A. 213=128 P.W.R. 1917=22 M.L.T. 451=22 C.W.N. 121=3 Pat. L. W. 381=26 C.L.J. 568=15 A.L.J. 889=19 Bom. L.R. 972=34 M.L.J. 12=7 L.W. 62=132 P.L. R. 1917=42 Ind. Cas. 959=(1918) M.W.N. 7 (P.C.).

——S. 11—Decision of a trial Court on a particular issue—Appeal disposed on other grounds—The conclusions of the First Court on that issue not res judicata.

When the judgment of a Court of first instance upon a particular issue is appealed against the judgment ceases to be *res judicata* and becomes *res subjudice*, and if the appellate Court declines to decide that issue and disposes of the case on other grounds, the judgment of the First Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of appeal. 90 Ind. Cas. 480=A.I.R. 1926 Cal. 179.

——S. 11—Decision of trial Court on an issue—Decree affirmed in appeal on another ground—No res judicata.

In a previous suit in ejectment which was *inter partes* the Munsif who tried the suit held that the defendants had no right of occupancy but he dismissed the suit on the ground of its being instituted before the expiry of the agricultural year in which the defendants' predecessor died. On appeal that decree of dismissal was affirmed on the second ground.

Held, that the decision of the First Court on the first issue would not operate as *res judicata* in a subsequent suit for ejectment. 42 C.L.J. 560=92 Ind. Cas. 981=A.I.R. 1926 Cal. 163.

——S. 11—Lower Court deciding on title and possession—Appellate Court deciding on title alone—No res judicata regarding possession.

Where the decision of the previous suit proceeded in the first Court both on the question of possession and title but the decision of the appellate Court was confined to the question of title alone.

Held, there was no *res judicata* regarding the question of possession. 5 L.R.A. Civ. 528=86 Ind. Cas. 295=A.I.R. 1925 All. 243.

——S. 11—Issue left open by Appellate Court.

When the decision of a lower Court is appealed to a superior tribunal and that tribunal for any reason does not think fit to decide the matter, it is left an open question and hence the second suit is not barred on the ground of *res judicata*. 29 C.W.N. 861 =89 Ind. Cas. 207=A.I.R. 1925 Cal. 1195.

——S. 11—Point left open by Appellate Court.

Where in a previous suit for declaration as to the genuineness of a will, the lower Court decided not only that it was genuine but that the will was admissible as an authority to adopt though the latter point was not in issue and the Appellate Court decided in favour of genuineness only, the validity of adoption can be questioned in a subsequent suit. 57 Ind. Cas. 852.

——S. 11—Matter left open on appeal.

Where an appeal is preferred against the finding of an issue but the Appellate Court does not decide finally on that point the appeal being disposed of on other points the finding of the lower Court is not final and the decision cannot operate as *res judicata*. 27 Ind. Cas. 959=7 Bur.L.T. 249.

——S. 11 (S. 13 Old Code)—Point decided by first Court but not dealt with by appellate Court—If res judicata.

When the decision of a lower Court is taken on appeal to a superior tribunal and that tribunal for any reason does not think fit to decide the matter, it is left an open question. If the appellate Court declines to decide an issue and disposes of the case on other grounds the judgment of the first Court upon that issue is no more a bar to a future suit than it would be, if that judgment had been reversed by the Court of appeal. 5 C.L.J. 653.

——S. 11—Appellate judgment—Point left undecided.

An appellate Court's judgment takes the place of and supersedes the decision of the trial Court and if the appellate Court does not decide a point decided by the first Court, it does not operate as *res judicata*. 47 Ind. Cas. 685.

——S. 11—Secondary relief claimed and determined by lower Court but not by appellate Court is not res judicata.

The suit was for declaring a will to be a forgery. The question of its operating as an authority to adopt was also raised and determined by the lower Court. But the High Court, although both the questions were raised before it, only decided on the genuineness of the will.

Held, that the question as to the will being operative as an authority to adopt was not barred by *res judicata*. 24 Cal. 616 (P.C.) and 45 Cal. 442 (P.C.), Foll.

Held, further as the matter was made the ground of attack in the trial Court and was raised in the appellate Court, there was no ground for the applicability of the doctrine of constructive *res judicata* enunciated in Expl. 4.

Per *Seshagiri Aiyar, J.*—A mere ground of attack relating to the main relief should not be regarded as a separate relief, and the refusal to entertain a ground which related to the relief which was adjudicated upon by the judgment, cannot be regarded as a refusal of relief. Therefore, the constructive *res judicata* referred to in Expl. 4 has also no application to the present case. 13 M.L.W. 25=A.I.R. 1921 Mad. 21 (F.B.).

——S. 11—Decree based on same reasoning.

If a portion of a decree has become *res judicata*, then the rest of the decree based on same reasoning would also become *res judicata* even with reference to the other portion of the decree which alone is brought for review before the appellate Court. Where, therefore, it is decided that a plaintiff is entitled to subrogation and there is no appeal to the lower appellate Court from that portion of the decree of the trial Court, it is not open to the defendant-appellant to appeal against some portion only of the decree in so far as subrogation is allowed and thus call in question the decision of the trial Court. 31 L.W. 832 =125 Ind. Cas. 247=A.I.R. 1930 Mad. 471=58 M.L.J. 343.

——S. 11—Decree on appeal—Effect of.

Obiter.—A decree on appeal supersedes the decree passed under appeal and the decree of the Court of first instance cannot be pleaded as *res judicata*. A.I.R. (Vol. 26) 1939 Bom. 522=I.L.R. (1939) Bom. 639=41 Bom. L. R. 1084=186 Ind. Cas. 393.

——S. 11 (S. 13, Old Code)—Judgment on appeal—Effect of on findings of first Court.

An appellate judgment operates as **res judicata** in respect of findings given by the lower Courts, even though it did not re-state them when the relief given by the appellate Court is possible only

on the acceptance of those findings. (1904) 28 M. 338.

——S. 11—Judgment set aside in appeal.

An appeal destroys the finality of the decision of the original Court and the judgment of the original Court is superseded by that of the Court of appeal. Where, therefore, a judgment operating as *res judicata* in a subsequent case is set aside by the appellate Court while the subsequent case is pending in appeal, the matter is not *res judicata* in appeal and the case should be disposed of on the merits. A.I.R. (Vol. 25) 1938 Lah. 232=40 P.L.R. 128 =181 Ind. Cas. 389.

——S. 11—Co-heirs—Suit for partition—Other heir and stranger made parties defendants—Defendant co-heir supporting plaintiff's claim and claiming share for himself—Dismissal of suit—Appeal by plaintiff, defendant co-heir being respondent—Reversal of finding.

A suit was brought by some of the heirs of the deceased owner impleading an alienee from the widow and another co-heir as defendants. The first Court dismissed the suit as barred by limitation. Plaintiffs appealed making the defendant co-heir respondent who died pending appeal without his legal representatives being brought on record. The appellate Court gave the plaintiffs a decree for share claimed by them. The legal representatives instituted another suit for recovery of his share. *Held*, that the finding of the Munsiff in the prior suit on the question of limitation having been reversed by the Appellate Court in an appeal to which the co-heir was a party, there was no subsisting decision of the Munsiff on the question of limitation to operate as a bar to the plaintiff's suit. The finding of the Appellate Court on the issue of limitation operated as a bar in plaintiff's favour by precluding the alienee from raising the plea. 49 Ind. Cas. 156=35 M. L.J. 625.

——S. 11—Appellate decree—Death of widow pending appeal—Legal representative brought on record.

The appellate decree supersedes the original decree and in deciding whether a certain decree operates as *res judicata* it should be seen whether the appellate decree had been passed against any body representing the interest of the plaintiff in the subsequent suit. So where a decree for foreclosure had been passed against a widow and she died pending appeal, and her legal representatives were brought on record and the appellate decree confirmed the lower Court's decree, nevertheless a subsequent suit by a reversioner is not barred inasmuch as the legal representative of the widow against whom the appellate decree had been passed did not and could not represent the full estate. 39 Cal. 925=14 Ind. Cas. 299=16 C.W.N. 658.

——S. 11—Decree for sale of mortgaged property—Preliminary decree specifying judgment-debtor's personal liability to pay in case of insufficiency of sale proceeds—Decree-holder getting order under O. 34, R. 6—On appeal preliminary decree set aside—Effect on order passed on application under O. 34, R. 6.

A decree for sale of mortgaged property under S. 88, T. P. Act, can validly provide that if the proceeds of sale are not sufficient to pay the mortgage-debt, the mortgagor should pay the balance personally, though the personal decree would not be executed until after the property is sold and the net sale proceeds are found to be insufficient to satisfy the debt. This being so, if the decision about the personal liability of the judgment-debtor is incorporated in the preliminary decree, any order passed on an application under O. 34, R. 6, C. P. Code, would certainly flow from the preliminary decree. Therefore, if an appeal against that preliminary decree succeeds the order or decree under O. 34, R. 6, would *ipso facto* fall to the ground and cannot operate as *res judicata*. A.I.R. (Vol. 24) 1937 Lah. 6= 39 P.L.R. 165=169 Ind. Cas. 876.

——S. 11—Decision under Land Acquisition Act based on order of Civil Court—If res judicata when latter order reversed on appeal.

A suit was instituted in 1904 to establish title to property attached. Trial judge abated the suit, but the order of abatement was appealed against. In the meanwhile District Judge in proceedings under the Land Acquisition Act paid compensation for part of attached property to decree-holders on the ground that suit having abated attachment was good. But the appellate Court subsequently set aside the order of abatement.

Held, that the District Judge's decision would not be *res judicata*. 10 Lah. 447=114 Ind. Cas. 62= A.I.R. 1929 Lah. 1.

——S. 11—Decree settling recurring liabilities —Subsequent dependant judgments—Reversal of decree in appeal—Effect.

When a decree has been passed determining the extent of recurring liability in one suit and when the decision is under appeal other decrees were passed on the authority of the first decision, they stand superseded by the decree passed in appeal and the fact that the subsequent suits were decided on the authority of the first decision and not on the ground of *res judicata*, makes no difference. 54 Ind. Cas. 647=37 M.L.J. 591.

——S. 11—Possibility of appeal being filed and decision upset—If affects finality.

The mere contingency or possibility that an appeal may be filed from the decision and the appeal Court may upset the decision, does not affect the finality of the decision. 4 Rang. 8=95 Ind. Cas. 104=A. I.R. 1926 Rang. 122.

12 (e) Declaratory decree.

——Ss. 11, 47—Suit by co-tenant for share of income decreed—Subsequent suit by son of such co-tenant for partition of same property.

A co-tenant *J* sued the other co-tenant *G* in 1924, alleging that *G* had been in sole possession of two fields and claiming an account of rents and profits. A decree was passed in favour of *J* for half the share of income or three years and mesne profits subsequent to suit. In 1937, the son of *J* sued the heirs of *G* for partition of those very fields:

Held, that the suit was not barred by *res judicata* or by S. 47, C. P. Code. Whether the decree of 1924 be regarded as a declaratory decree, or as the final decree of the Court, there was nothing for the parties to do in execution, and S. 47 did not apply. If the decree of 1924, was a final decree deciding the rights between the parties, and if the only difficulty was that the Collector had not performed his duties,

there was nothing to prevent him from performing his duties now; and if it was a declaratory decree, it was not a decree finally decided within S. 11, and that section was a bar to the filing of a fresh suit A.I.R. (Vol. 29) 1942 Bom. 44=43 Bom.L.R. 971=I.L.R. (1942) Bom. 14=198 Ind. Cas. 550.

——S. 11—Declaratory decree—Declaration of right to redeem—Subsequent suit for redemption—Not barred.

In a suit by widow of the mortgagor in respect of the mortgage, a decree was passed in favour of the plaintiff, declaring the right to redeem and the right to recover possession on payment of a certain amount and further declaring devolution of the right on the death of the plaintiff, but no period for the payment of the mortgage money was fixed.

Held, that the decree was to be interpreted as purely declaratory of the nature of the plaintiff's right to redeem the mortgaged property leaving it open to the plaintiff to claim actual possession whenever she found it convenient to do so on payment of the mortgage money.

Held, further, that a subsequent suit for redemption was neither barred by the rule of *res judicata* nor by the provisions of S. 47, C. P. Code. 4 O. W.N. 882=105 Ind. Cas. 93=A.I.R. 1927 Oudh 457.

12 (f) (i) Ex parte decree.

——S. 11—Ex parte decree—If can operate as res judicata.

An *ex parte* decree will operate as *res judicata* when it has not been set aside and has thereby become final. 1941 R.D. 321. Not followed. 1949 R.D. 149.

——S. 11—Summary suit on promissory note—Leave to defend—Failure of defendant to make deposit—Decree ex parte—Subsequent suit by defendant to declare promissory note as one without consideration—Res judicata.

An *ex parte* decree is nonetheless a decree on the merits and can operate as *res judicata.* The Court passing such a decree hears the case on the merits, finally decides it and passes the decree. Where in a summary suit on a promissory note, the defendant, who is given leave to defend on condition of making a deposit, fails to make the deposit as ordered by the High Court and an *ex parte* decree is passed in the plaintiff's favour, that decree would operate as *res judicata* and bar a subsequent suit by the defendant to have the promissory note declared as being without consideration. I.L.R. (1948) Bom. 145=49 Bom.L.R. 902=A.I.R. 1948 Bom. 232.

——S. 11—Ex parte decree.

If a date was fixed for the decision of the previous suit, it means that the parties were given an opportunity to be heard if they wished to be heard. If the defendant did not appear and the suit was decided *ex parte* against him, it cannot be said that the suit was not heard and decided for the purposes of applying the rule of *res judicata.* I.L.R. (1947) A. 186=A.I.R. 1947 All. 147.

——S. 11—Decision of suit ex parte or after contest—No distinction.

It makes no difference for the purposes of the application of the doctrine of *res judicata* whether a suit is decided *ex parte* or after contest. A.I.R. (Vol. 29) 1942 Pesh. 9=198 Ind. Cas. 803

See also 119 Ind. Cas. 567=A.I.R. 1929 All. 346.

——S. 11—Ex parte decree acts by way of res judicata quite as much as decree passed on proper contest.

All that S. 11 requires is that the issue has been heard and finally decided. It does not prescribe the method of hearing and the character of decision in order to make it binding in a subsequent suit so that an *ex parte* decree where the Court has not brought its mind to bear properly on the merits of the issue, is as binding by way of *res judicata* as a decree of any other kind. A.I.R. 1929 All. 761 (2).

——S. 11—A matter will be *res judicata* if it is actually heard and finally decided in a suit even though the decree is passed *ex parte.* A.I.R. (Vol. 28) 1941 Cal. 574=198 Ind. Cas. 462.

——S. 11—*Ex parte* decree does operate as *res judicata.* 24 M.L.W. 260=97 Ind. Cas. 601=A. I.R. 1926 Mad. 1144.

See also 11 O.L.J. 448=79 Ind. Cas. 660; A.I.R. 1924 Oudh 419; 6 Bur.L.T. 160=7 L.B.R. 56=20 Ind. Cas. 971.

——S. 11—A decision by a competent Court, even if *ex parte,* cannot cease to be binding on the parties in a later suit for this or any similar mere irregularity. A.I.R. (Vol. 26) 1939 Mad. 830=50 L.W. 164=(1939) 2 M.L.J. 236=1940 M.W.N. 632=189 Ind. Cas. 215.

——S. 11—Ex parte decree against one defendant—Finding recorded between plaintiff and other defendant—Whether res judicata between plaintiff and ex parte defendant.

The rule of *res judicata,* as contained in S. 11, C. P. Code, does not, in terms apply, except where the plea is taken in a suit. Where the appellant had not contested the suit, and the decree against him was *ex parte* and his co-defendant had raised the question, but failed to establish his allegation:

Held, Per *Niamat Ullah, J., Rachhpal Singh, J., doubting*), that apart from any bar which may exist as between the decree-holder and the appellant in consequence of the latter not having raised the question in the suit though he might or ought to have done so, the finding actually recorded between the decree-holder and another defendant could not be *res judicata* between the parties. A.I.R. (Vol. 22) 1935 All. 678=1935 A.W.R. 867=58 All. 98=157 Ind. Cas. 511.

——S. 11—Decree on terms of compromise against ex parte defendants—Validity of decree.

A suit for foreclosure was instituted against the members of a Hindu family. The major member who was not a party to the mortgage remained *ex parte.* The case was compromised by the minor members with the leave of the Court and a decree was passed against all the defendants in terms of the compromise. Some of the defendants instituted a fresh suit for possession of their share in the family ignoring the compromise decree:

Held, that assuming that the Court acted erroneously in passing a decree against the *ex parte* major member in terms of the compromise, there was no want of jurisdiction and the decree was binding on the major member as he had not taken the proper course to have it set aside. A.I.R. (Vol. 18) 1931 All. 425=1931 A.L.J. 301=131 Ind. Cas. 878.

——S. 11—Rent suit—Ex parte decree—Rate of rent.

Even if an *ex parte* decree for rent does not operate as *res judicata* on the question of the rate of rent, it would be almost conclusive evidence unless the decree could be attacked on some grounds such as fraud or collusion or such like. A.I.R. 1926 Cal. 767, foll. I.L.R. (1948) 1 Cal. 469.

——S. 11—Rent suit—Ex parte decree—Rate of rent.

The question whether an *ex parte* decree for arrears of rent operates as *res judicata* or not regarding the rate of rent in a subsequent suit must be determined with reference to the special facts of each case.

In a suit for arrears of mulgeni rent the only dispute was as regards the rate of rent payable and the plaintiff contended that the rate claimed by him was concluded by *res judicata* by reason of the judgment in a prior suit for arrears of rent between the same parties. The rate of rent claimed in that suit was not patent on the face of the records available but could be deduced by calculation from the amount decreed and it was also clear that the decree was *ex parte*.

Held, in the circumstances, the prior decree did not operate as *res judicata* as regards the rate of rent. 1947 M.W.N. 126=60 L.W. 97=A.I.R. 1947 Mad. 299=(1947) 1 M.L.J. 109.

——S. 11—Rent suit—Ex parte decree—Rate of rent—Res judicata.

A previous *ex parte* rent decree is admissible as evidence of the rate of rent decreed by it. It may in some cases be only a piece of evidence to which such value is to be attached as circumstances demand. It may in other cases be binding and conclusive if an examination of what was pleaded, proved and decided shows that one of the things pleaded, proved and decided was the rate of rent. 228 Ind. Cas. 426=A.I.R. 1947 Cal. 21.

——S. 11—Ex parte rent decree—Rate of rent—When res judicata.

An *ex parte* decree in a previous suit will not operate as *res judicata*, even though there is a statement of the alleged rate of rent in the plaint, or a recital in the decree of the rate of rent alleged by the plaintiff, unless it can be shown that a declaration had been asked for in the plaint as part of the substantive relief claimed that the rate was at a specified figure. The value to be attached to the decree as evidence will, however, vary with the circumstances of the particular case. A.I.R. (Vol. 31) 1944 Cal. 118=47 C.W.N. 362=I.L.R. (1943) 1 Cal. 430=212 Ind. Cas. 123.

——S. 11—Rent suit—Ex parte decision involving questions of status and rate of rent.

If in a previous suit by landlord against the tenant for rent the questions of status and rate of annual rent were directly and substantially in issue, they operate as *res judicata* in subsequent rent suit between the same parties or the landlord and the tenant's assignees or transferees, and this is the case even though the decree in the previous case be *ex parte*. 7 O.W.N. 507=A.I.R. 1930 Oudh 335=127 Ind. Cas. 241.

——S. 11—Rent suit—Ex parte decree—Res judicata.

It is not correct to state as a general proposition of law that an *ex parte* decree for arrears of rent operates, or does not operate as *res judicata* regarding the rate of rent in a subsequent suit. The question whether such a decree is *res judicata* or not must be determined with reference to the special facts of each case. In a previous suit for arrears of rent at a certain rate per year, the defendant-tenant raised the plea that the rate payable was lower than what was claimed. But no issue was framed on the point, and the defendant, having remained absent on the day of hearing, an *ex parte* decree was passed against him allowing the whole claim of the plaintiff.

Held, that the *ex parte* decree would not bar the defendant from pleading that the rate claimed was higher in a subsequent suit for rent. 118 Ind. Cas. 497=A.I.R. 1929 Mad. 673.

——S. 11—Rent suit—Rate of rent—Ex parte decree—Res judicata.

Plaintiff in a rent suit claimed rent at the rate of Rs. 16 and the entry in the Record-of-rights of 1918 was in his favour. But in a cess-return filed in 1912 under the Cess Act the jama was Rs. 5-2-5 gandas. The plaintiff in 1917 had sued for rent at the rate of Rs. 16 and had obtained an *ex parte* decree in full.

Held, that the suit in 1917 was *res judicata* and the entry in the Record-of-rights was not rebutted by the cess-return of 1912. 33 C.W.N. 507=117 Ind. Cas. 854=A.I.R. 1929 Cal. 515.

——S. 11—Rent suit—Ex parte decree.

Decree is admissible in a subsequent rent suit to prove rate of rent allowed but is not conclusive—Its value depends on the facts of each particular case. 91 Ind. Cas. 380=A.I.R. 1926 Cal. 767.

——S. 11—Rent suit—Ex parte decree—Rate of rent.

An *ex parte* decree may be *res judicata* in some respects but one such, for rent does not do more than affirm that a certain amount is claimed and allowed. There is no *res judicata* as to rate of rent and the same can certainly be contested in a later suit especially when it relates to a later year. 9 L. R. A. 345 (1) (Rev.).

——S. 11—Rent suit—Ex parte decree.

An *ex parte* decision can operate as *res judicata*, even in rent suits. 16 C. 300 (F.B.) not Foll. 82 Ind. Cas. 990=A.I.R. 1925 Mad. 378.

——S. 11—Rent suit—Ex parte decree—Omission to raise defences—B. T. Act, Ss. 29 and 147-A—Effect of.

Ex parte decrees in prior suits in which no issue was raised as to the rate at which the rent was payable by defendant and there was no decision with regard to such rate, do not operate as *res judicata* in favour of the plaintiff's landlords. Even though the defendant did not take in the previous rent suits the defence under S. 29 of the B. T. Act he can raise it in a subsequent suit for rent as there cannot be an estoppel against a statute. 65 Ind. Cas. 581.

——S. 11—Ex parte decree—Rent suit—Landlord and tenant.

The decision in a suit for recovery of rent between landlord and tenant, in which the tenants were *ex parte* and in which all the points in dispute were left open is not *res judicata* between the parties in a subsequent suit for compelling the acceptance of a *patta* as there was no adjudication therein on the question as to what the terms of the proper *patta*

were. 29 M.L.J. 362=(1915) M.W.N. 614=2 L. W. 650=30 Ind. Cas. 983.

——S. 11—Rent suit—Ex parte decree—Relationship—Res judicata.

The relationship of landlord and tenant is the very foundation of a decree in a suit for rent and, therefore, when such a suit has been decreed, the Court must proceed on the footing that it was a matter necessary to be determined and, in fact, determined in the earlier rent suit. It cannot be relegated to the category of matters only indirectly, collaterally and incidentally decided. The principle will hold good even in an *ex parte* decree passed against the landlord and this decree shall operate as *res judicata* in a subsequent suit between the parties. A.I.R. (Vol. 23) 1936 Pat. 556=17 P.L.T. 633=3 B.R. 67=165 Ind. Cas. 623.

——S. 11—Rent suit—Ex parte decree—Question of relationship of parties.

In the previous suit for rent filed in revenue Court the defendants sought to get the suit dismissed on the plea that no relation of landlord and tenant subsisted between the parties. The suit was decreed *ex parte.*

Held, that the *ex parte* judgment of the revenue Court established that the relationship of landlord and tenant does exist between the present parties and the decision in *res judicata* in a subsequent suit between same parties on the point of competency of Court. 49 All. 658=25 A.L.J. 467=8 L.R.A. Rev. 125=101 Ind. Cas. 516=A.I.R. 1927 All. 552.

——S. 11—Prior decision—Landlord and tenant—Rent suit—Ex parte decree—Landlordship—Res judicata.

Some of the co-sharers in a mahal in a suit to recover the arrears of rent obtained an *ex parte* decree. Some years later they instituted a suit again for recovery of rent of the same holding for subsequent years. The defence was that the lambardars had all along been collecting the rents in respect of the patti in which the holding was situated and that the rent had been paid to them in good faith.

Held, that the decision in the previous suit operated as *res judicata* in respect of the question whether for the years in respect of which that suit was brought the plaintiffs were entitled alone to sue for the rent of the holding, and that they were bound to regard the plaintiffs as their landlords by reason of the decree in the previous suit and that therefore they were not entitled to invoke any presumption that the lambardars are entitled to collect rents in view of the decision in the previous suit. 90 Ind. Cas. 981 =A.I.R. 1927 All. 145.

——S. 11—Rent suit—Ex parte decree—Question of relationship of parties.

An *ex parte* decree for rent which was subsequently satisfied can operate as *res judicata* on the question of the parties being landlord and tenant. 87 Ind. Cas. 672=A.I.R. 1926 Cal. 114.

——S. 11—Rent suit—Ex parte decree—Question of relationship of landlord and tenant not raised and decided—No res judicata.

An *ex parte* decree in a rent suit wherein the relationship of landlord and tenant was neither raised nor decided is not *res judicata* in a subsequent suit for rent upon the question of relationship. The effect of an *ex parte* decree does not depend on the question whether the decree has or has not been executed. 24 Ind. Cas. 739.

——S. 11—Rent suit—Ex parte decree—Question of relationship of landlord and tenant.

An *ex parte* decree in a rent suit is *res judicata* regarding the question of relationship of landlord and tenant because a decree for rent can only be passed upon a determination that such a relation does exist. But it may not operate as *res judicata* in respect of the rate of rent. 16 Ind. Cas. 911=17 C.W.N. 627.

——S. 11—Mortgage suit—Suit by second mortgagee—Ex parte decree against prior mortgagee—Question of priority—Res judicata.

Where a second mortgagee filed a suit on his mortgage impleading the prior mortgagee as a party to the suit and specifically stating in the plaint that that prior mortgagee was not entitled to priority, and that prior mortgagee did not appear in that suit, and the property was sold in execution of the decree in that suit, and, subsequently, the prior mortgagee instituted a suit on his prior mortgage. *Held,* that the prior mortgagee had lost his priority by reason of his omission to plead it in the second mortgagee's suit. 117 Ind. Cas. 820.

——S. 11—Ex parte proceedings — Amount claimed as revenue or rent with interest decreed ex parte—Right to receive interest in subsequent suit—If res judicata.

Where an issue of law or fact is raised and decided *ex parte* it is settled law that the adjudication will operate as *res judicata* but where a certain amount is claimed as revenue or rent for certain years with interest and is decreed *ex parte* in terms of the prayer all the requirements of the rule of *res judicata* are not necessarily fulfilled in a subsequent contested suit in which the plaintiff's right to receive interest is specifically in question. Unless the finding in the previous suit expressly or by necessary implication decides the question of a recurring right to receive interest as distinguished from a mere award of the interest claimed for the arrears in respect of the years then in suit the previous decision cannot operate as *res judicata* so as to entitle the plaintiff to receive interest on arrears of revenue or rent accruing due subsequently though he is not, apart from *res judicata,* so entitled.

If in the previous suit the interest was claimed as damages and the Court decreed as such it can have no greater effect than to establish the plaintiff's right to interest by way of damages for the default then in question. A subsequent default under different circumstances will not necessarily entitle the plaintiff to damages.

If expressly or by necessary implication the plaintiff's recurring right was affirmed or negatived so as to make such recurring right a matter directly and substantially in issue the decision will operate as *res judicata* even though the causes of action in the two suits may be different. 16 Cal. 300 (F.B.); A.I.R. 1922 Pat. 303 and 26 Bom. 25, Foll. 9 L.R.A. Rev. 306=113 Ind. Cas. 758=A.I.R. 1929 All. 29.

——S. 11—Decision against defendant who did not appear.

A decision in a suit against defendant who did not choose to appear is as much binding upon him as on the defendants who appeared and contested. 48

C.L.J. 184=32 C.W.N. 828=115 Ind. Cas. 588=A.I.R. 1928 Cal. 717.

——S. 11—Mutual and common account—Defendant's suit based on it decreed ex parte against plaintiff—Subsequent suit by plaintiff based on an account due from defendant is barred.

The parties carried on a mutual and common account each being purchaser of some articles from the other. The defendant brought against plaintiff in Small Causes Court a suit on the basis of mutual account which was decreed *ex parte*. In a subsequent suit by plaintiff against the defendant claiming a certain amount due from him on the basis of an account.

Held, that the plaintiff's suit was barred by *res judicata*. A.I.R. 1921 P.C. 11, Foll. 25 A.L.J. 711=103 Ind. Cas. 365=A.I.R. 1927 All. 799.

——S. 11—Ex parte decree—Plea by defendant in execution that he was agriculturist — Res judicata—Deccan Agriculturists' Relief Act, Ss. 3 (w), 7 and 12.

Where owing to absence of pleas on the part of defendant the Court passes an *ex parte* decree without examining him and the plaintiff under Ss. 7 and 12 the Court must be deemed to have decided by necessary implication that the defendant is not an agriculturist and therefore in execution proceedings the defendant cannot plead that he was agriculturist at the time of execution of the decree. 19 S.L.R. 247 =78 Ind. Cas. 806=A.I.R. 1925 Sind 86.

——S. 11—Ex parte decree—Number of defendants—Common interest—Contest by some of them.

Where a number of defendants in a case have a common interest and the contest is carried on by some of them *bona fide* against the plaintiff's claim the defendants who are *ex parte* are as much bound by the decision as those who contested. 19 M.L.W. 484=83 Ind. Cas. 985=34 M.L.T. 209=A.I.R. 1924 Mad. 571=46 M.L.J. 471.

——S. 11—Plaintiff ex parte in previous suit—Decision is res judicata.

Where the subject-matter of the subsequent suit was directly and substantially in issue in the previous suit and the plaintiffs (defendants in that suit) instead of contesting it were *ex parte*.

Held, the previous suit operated as *res judicata*. 5 Lah.L.J. 163=74 Ind. Cas. 577=A.I.R. 1923 Lah. 560.

——S. 11—Ex parte decree — Foreclosure—Mortgage—Paramount title—Assertion of, in later suit.

A decree for foreclosure passed *ex parte* against a person joined as defendant on the only ground that he possesses the mortgaged property does not operate as *res judicata* so as to prevent him or his transferee from setting up a title paramount in a subsequent suit, where there has been no express adjudication on the question of title though the final decree orders delivery of possession and possession has been delivered thereunder. 15 N.L.R. 114=52 Ind. Cas. 82 (F.B.).

——S. 11—Ex parte decree.

Per *Mullick, J.*—An *ex parte* decree can operate as *res judicata* only on an issue which is necessary to be determined. 2 Pat. L. W. 108=41 Ind. Cas. 468.

——S. 11—Ex parte decree—Declaration of status of party—Res judicata.

An *ex parte* decree declaring the status of certain persons as reversioners will operate as *res judicata* in a subsequent suit between the parties and their representatives. 12 A. L. J. 1011=25 Ind. Cas. 224.

——S. 11 (Expl. 4)—Ex parte decree on bond—Effect of.

Where, an *ex parte* decree was passed against the defendant under the terms of a bond for interest and compound interest, the defendant cannot plead undue influence, etc., in a subsequent suit on the same bond for principal, interest and compound interest; but the plea as to compound interest not being claimable is open to him. 128 P.W.R. 1914=12 P.R. 1915=226 P.L.R. 1914=24 Ind. Cas. 931.

——S. 11—Ex parte decree—Allegation on record uncertain.

An *ex parte* decree can render a question *res judicata*. But regard must be had to the rule that where the allegation on the record is uncertain there is no *res judicata* and the difficulty with regard to decrees passed *ex parte* is to ascertain precisely what matters must be taken to have been decided by the court, that is to say, what matters are involved in that *ex parte* decree passed by the Court. 12 Ind. Cas. 329.

——S. 11—Ex parte decree—Defence which could have been raised—Res judicata.

A decree though *ex parte* none the less operates as *res judicata* as regards defences which could have been raised in the prior suit. 9 Ind. Cas. 363.

——S. 11 (S. 13, Old Code)—Ex parte decree.

An ex-parte decree may not be res judicata. (1901) 28 Cal. 676 at 679; *see also* 24 All. 138.

12. (f) (ii) Ex parte decree—Setting aside of.

——S. 11—Ex parte decree—Application to set aside on ground of fraud dismissed—Subsequent suit on same ground, held barred.

Where defendant's application to set aside an *ex parte* decree obtained against him on the ground of fraud in the service of summons is dismissed and his appeal against it is also dismissed, he cannot subsequently bring a suit on the same ground since it is barred by *res judicata*. A.I.R. (Vol. 24) 1937 Lah. 614=39 P.L.R. 506=172 Ind. Cas. 1007.

——S. 11—Proceedings under O. 9, R. 13—Decision in—If *res judicata* in subsequent suit to set aside *ex parte* decree. *See* C. P. CODE, O. 9, R. 13. A.I.R. 1949 All. 198.

——S. 11—Ex parte decree—Suit to set aside—Dismissal of earlier application—Res judicata.

Later suit for declaration that a decree *ex parte* is void for fraud is untenable if an earlier application to set aside the decree has been dismissed unless fresh grounds of fraud are mentioned. 2 Pat. 833 =74 Ind. Cas. 825=5 P.L.T. 66=2 Pat. L. R. 65=A.I.R. 1924 Pat. 238.

——S. 11—Ex parte decree—Fraud—Application to set aside.

A subsequent suit to set aside a decree on the ground of fraud is barred by *res judicata*, if fraud in the service of summons had been already alleged and decided upon in a previous application under O. 9, R. 13, C. P. Code, to set aside the *ex parte*

decree. This is so where the fraud in the subsequent suit is conjoined to the mode of serving summons, but not so when the question in the subsequent suit was whether the whole suit was bad *ab initio*. 45 Ind. Cas. 250.

——S. 11—Defendant trying to set aside ex parte decree under O. 9, R. 13—Want of due service not proved—Same question not allowed in appeal or revision.

A defendant who has applied under O. 9, R. 13, C. P. Code, for setting aside a decree on the ground that proper service has not been carried out and has failed, is barred from agitating the same point later in an appeal from the decree or in a petition for revision against the order passing the decree. The order of the Court will stand in his way. Conversely, a defendant who has failed in an appeal or revision on that point cannot subsequently have recourse to proceedings under O. 9, R. 13, C. P. Code, for decision on it. A.I.R. (Vol. 23) 1936 Pesh. 1=160 Ind. Cas. 462.

——S. 11—Question of service decided in application of O. 9, R. 13—Bar in regular suit.

The decision in an application of O. 9, R. 13, C. P. Code, that the summons was duly served is *res judicata* and no further suit will lie on the ground that the summons had been fraudulently suppressed.

When the question of service or non-service of summons was agitated between the parties in proceedings under O. 9, R. 13 and it was held that the summons had been duly served, it is not open to one of them by regular suit to agitate the same point found against him. A.I.R. (Vol. 22) 1935 Pat. 458=14 Pat. 439=2 B.R. 70=16 P.L.T. 647=159 Ind. Cas. 256.

——S. 11—Application to set aside ex parte decree—Finding as to service of summons—Separate suit—If lies.

Where a party seeks to set aside an *ex parte* decree on the ground that summons was not served upon him, but the Court disbelieves him and dismisses the application, a suit to set aside the decree on the same ground is barred by *res judicata*. 1 Rang. 500 =76 Ind. Cas. 794=A.I.R. 1924 R. 119.

——S. 11—Ex parte decree—Application to set aside—Finding as to service of summons—If res judicata in subsequent suit to set aside decree.

When an application was put in to set aside an *ex parte* decree on the ground that summons was not served, but it was dismissed on the ground of service of summons a subsequent suit to set aside the decree on the same ground will be barred. But if some other ground of fraud apart from it is alleged, it is maintainable. 74 Ind. Cas. 825=2 Pat. 833.

——S. 11—Application for—Dismissal—If bars a fresh suit.

Where an application to set aside *ex parte* decree on the ground of wrong information about the date by the applicant's mukhtar was dismissed, *held*, no suit will lie to set aside the decree on the ground of fraud in that the Mukhtar in collusion with the plaintiff wrongly informed him of the date since that matter was already decided on the application though the information given by the Mukhtar was fraudulent. 1924 P.H.C.C. 155=81 Ind. Cas. 1035=A.I.R. 1924 Pat. 769.

——S. 11—Application to set aside ex parte decree under O. 9, R. 13 withdrawn—Subsequent suit on ground of fraud—Maintainability.

Where the application of the plaintiff for setting aside an *ex parte* decree under O. 9, R. 13, C. P. Code, is allowed to be withdrawn without any adjudication, a subsequent suit brought by him to set aside the *ex parte* decree on the ground of fraud independent of, and not merely confined to the service of summons in the suit, is not barred on the principle of *res judicata*. Even if the Court before which the application under O. 9, R. 13 has been filed decides the application on the merits, that decision cannot operate as *res judicata* on the more radical question of fraud because such a question is beyond the scope and purview of an application under O. 9, R. 13. A.I.R. 1948 Pat. 33.

——S. 11—Ex parte decree—Suit to set aside—Matters outside scope of O. 9, R. 13—Non-service of summons is not res judicata.

Where the subsequent suit to set aside an *ex parte* decree contained matters which could not have been raised in an application under O. 9, R. 13, which had been dismissed.

Held, that the question of non-service of summons was not precluded by *res judicata* in the subsequent suit. 41 C.L.J. 281=86 Ind. Cas. 779=29 C.W.N. 325=A.I.R. 1925 Cal. 663.

——S. 11—Ex parte decree—Suit to set aside after rejection of application under O. 9, R. 13—Non-service of summons—Res judicata.

The fact that the plaintiff applied and failed to have an *ex parte* decree set aside under O. 9, R. 13, does not prevent him from maintaining an action for setting aside the decree on the ground of fraud, and incidentally proving, as an index of the fraud that summons was not served on him in the previous suit. 29 Cal. 395, Foll. 1923 P.H.C.C. 336=75 Ind. Cas. 343=5 P.L.T. 37=A.I.R. 1924 Pat. 241.

——S. 11—Suit to set aside ex parte decree, on the ground of fraud—Personal service not effected—Conduct of plaintiff.

The mere fact that personal service of summons has not been effected on a defendant would not make the *ex parte* decree obtained against him, abortive. But where the non-service is due to the fraudulent conduct of the plaintiff and others acting with him the decree may be set aside as fraudulent. (1909) 7 A.L.J. 74=32 A. 145=4 Ind. Cas. 596.

12. (g) Final adjudication.

——S. 11—Final decision essential.

One of the necessary conditions for attracting the application of the rule of *res judicata* is that the matter should be heard and finally decided. A.I.R. (Vol. 18) 1931 Oudh 157=8 O.W.N. 179=132 Ind. Cas. 767.

——S. 11—Final decision essential.

For the bar of *res judicata*, a hearing as well as a final decision by the competent Court is necessary. 21 M.L.J. 57=9 Ind. Cas. 686=9 M.L.T. 288.

——S. 11—The docrine of *res judicata* should not be unduly conditioned and qualified by all sorts of ingenious attempts at evasion where there has been in fact a fair contest on a question in dispute between the parties and the Court intended to give and has

given a final decision on that question. 36 M.L.J. 641, Foll. 67 Ind. Cas. 755=108 P.L.R. 1919.

——S. 11—Implied finding—If operates as res judicata.

Even if a point is decided by necessary implication, it operates as *res judicata* in subsequent proceedings. I.L.R. (1946) Nag. 159=1946 N.L.J. 690=A.I.R. 1946 Nag. 277.

——S. 11—Question decided by necessary implication.

A question which is decided by necessary implication operates as *res judicata*. A.I.R. (Vol. 28) 1941 Nag. 346=1941 N.L.J. 508=199 Ind. Cas. 537.

——S. 11—Decision by necessary implication.

In order to sustain a plea of *res judicata* it is not necessary that an issue should have been expressly framed on the question. It is enough if the matter in controversy in the subsequent suit has been decided in the previous suit either expressly or by necessary implication. The application of the rule of *res judicata* by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law. A.I.R. (Vol. 21) 1934 Cal. 179=58 C.L.J. 196=150 Ind. Cas. 214.

——S. 11—Finding by implication.

For the purposes of *res judicata* a finding by necessary implication is no less potent than an express finding on a particular point. 15 Bom. 89; 24 C.W.N. 223, Foll. 113 Ind. Cas. 120=A.I.R. 1928 Lah. 888.

——S. 11—Question decided in effect though not in exepress terms—Res judicata.

The rule of *res judicata* extends to a question which must be taken to have been decided in effect though not in express terms. 12 O.L.J. 571=2 O.W.N. 872=91 Ind. Cas. 583=A.I.R. 1926 Oudh 101.

——S. 11—Implied adjudication.

In order to constitute the decision in a prior suit *res judicata* on an issue in a subsequent suit, it is not necessary that there must have been an actual adjudication on the issue in the prior suit. It is sufficient if the decision come to in the prior suit impliedly decides the point subsequently in issue. 40 Bom. 210; 33 M.L.J. 740, foll. 24 M.L.T. 205=8 L.W. 206=48 Ind. Cas. 905=(1918) M.W.N. 567.

——S. 11—Implied decision.

Where a question has been necessarily decided in effect though not in express terms between the parties to a suit they cannot raise the same question as between themselves in any other suit in any other form. 54 Ind. Cas. 952=24 C.W.N. 223.

——S. 11 (S. 13, Old Code)—Decision—If to be express.

Where a question is necessarily decided in effect, though not expressly, it is **res judicata.** (1903) 6 Bom.L.R. 288 at 290.

——S. 11—Implied decision.

The plaintiff sued for the property of his uncle's son *S*. The defendant claimed to be the adopted son of the plaintiff's uncle and stated that *S* was an imbecile and the *factum* and validity of adoption were *res judicata* as in previous suit the plaintiff had alleged that *S* was an imbecile and denied the *factum* and validity of the adoption and claimed the whole of the property of another uncle. The first Court had found that *S* was imbecile and that adoption was not proved. On appeal the adoption was held proved and opinion was expressed that the question of imbecility of *S* should not have been discussed. *Held,* that the plaintiff's present suit was barred by *res judicata,* for in the previous suit the Court by deciding in favour of adoption had impliedly found that *S* was an imbecile. 36 Ind. Cas. 267=95 P.L.R. 1916.

——S. 11—Implied decision—Boundary Marks Act, Ss. 24 and 25.

The plea of *res judicata* is available not only as regards final conclusions, but also regarding the findings necessary for arriving at conclusions, even if they are not given on formal issues. A decision under S. 25 of the Boundary Marks Act as well as its grounds are *res judicata* between the parties. 27 M.L.J. 529=16 M.L.T. 432=26 Ind. Cas. 817=39 Mad. 1202.

——S. 11—Implied decision—Scope.

The principle of implied decision is not confined to the decree but also applies to issues directly and substantially in issue in the previous suit. So even though the matter was not essential to the relief granted or the decree passed, still if it had been put in issue, it must be deemed to have been directly and substantially at issue. 37 Mad. 70=12 M.L.T. 500=(1913) M.W.N. 1=17 Ind. Cas. 445=23 M.L.J. 543 (F.B.)

[On appeal from 35 Mad. 216=21 M.L.J. 344=10 Ind. Cas. 75=10 M.L.T. 533.]

——S. 11 (S. 13, Old Code)—Decision on issue not expressly raised.

A decision may operate as **res judicata** although no issue has been expressly raised. The test to be applied is, whether it plainly appears that the question so raised by the parties in their pleadings was actually submitted by them to the Court and judgment given on it. An estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or ground-work upon which it must have been founded. (1907) 6 C.L.J. 622.

——S. 11 (S. 13, Old Code)—Implied decision—Suit for dissolution of partnership—Plea of indissolubility and claim for damages—Consent order of reference to Chambers for taking accounts—If decision and operates as res judicata in subsequent suit.

Where the partnership was for a term and a suit was brought by some partners for dissolution, and the other partners contended that the partnership could not be dissolved, or, if dissolved, that they would be entitled to damages, and when the case came on for the settlement of issues, a consent order of reference to chambers was made in order that accounts might be taken and the defendants sued for damages:—

Held, (1) that the order of reference amounted to an adjudication by consent, that on the terms

of the partnership the plaintiffs in that suit were entitled to a dissolution, and that the defendants weer not entitled to damages; (2) that the claim in the present suit was accordingly barred by **res judicata**. (1902) 12 M.L.J. 445.

——S. 11 (S. 13, Old Code)—Implied decision—Res judicata.

It is necessary to decide the nature of a tenancy before settling the rent, so where a Settlement Officer fixes the rent, he must be deemed to have decided the nature of the tenancy and the same question cannot be raised again bewteen the same parties. (1899) 6 C.W.N. 238=29 Cal. 252.

——S. 11—Decision not appealable—If res judicata.

The question whether a decision operates as *res judicata* does not depend upon the appealability of the decision. I.L.R. (1946) Mad. 566=(1946) M.W.N. 27=59 L.W. 67=A.I.R. 1946 Mad. 509=228 Ind. Cas. 286=(1946) 1 M.L.J. 200.

——S. 11—Appealability.

The question of finality is unaffected by considerations whether an appeal lay from the decision, or whether it was embodied in the decree. If the decision is on a matter which was substantially in issue between the parties it will be *res judicata* although there was no appeal, or could have been no appeal, and although the decree itself was based on ground independent or in spite of the particular decision. 25 M.L.W. 797=103 Ind. Cas. 90=A.I.R. 1927 Mad. 643.

——S. 11—Appealability not the test.

Where a suit of the nature cognisable by a Court of Small Causes is tried as a regular suit, the decision operates as *res judicata* even though it is not appealable. 41 All. 54=47 Ind. Cas. 837=16 A.L.J. 782.

——S. 11—Decree not appealable—No res judicata.

If a party could not have appealed against the decree, the decision cannot be held to operate as *res judicata*. 11 Cal. 580 and 41 C.L.J. 396, Foll. 44 C.L.J. 399=94 Ind. Cas. 235=30 C.W.N. 415=A.I.R. 1926 Cal. 568.

——S. 11—Order not appealable—No res judicata.

Where the previous application was to the lower Court and where the lower Court's order dismissing the application was not open to appeal, and where a fresh application for the same relief was made to the High Court by the previous applicant and another and where such application urged additional grounds.

Held, that it was not barred. 7 L.L.J. 6=86 Ind. Cas. 246=A.I.R. 1925 Lah. 309.

——S. 11—Bar of trial of both suit and issue involved in it.

Per *Malik, J.*:—S. 11, C. P. Code, not only bars the trial of an issue but also the trial of a suit in which the matter directly and substantially in issue has already been agitated upon in a previous suit. A.I.R. (Vol. 32) 1945 All. 121=1945 A.L.J. 11=I.L.R. (1945) All. 75=1945 A.W.R. (H.C.) 414=222 Ind. Cas. 196.

——S. 11—Whilst S. 10 bars only a suit, **S. 11** bars the trial of both the suit and of issue involved in that suit. 4 Luck. 573=114 Ind. Cas. 775=7 O.W.N. 157=A.I.R. 1929 Oudh 341.

——S. 11—Applicability to issues.

Section 11, C. P. Code, applies not only to the final decision but also to issues. A.I.R. (Vol. 25) 1938 Lah. 369=40 P.L.R. 319=175 Ind. Cas. 945 (F.B.).

——S. 11—Issue raised and determined.

It is a principle in every system of jurisprudence that there should be finality in litigation. A judgment not appealed from binds the parties and privies for all time by what appears upon its face, and if it can be shown that in the course of the action that resulted in the judgment, a certain definite and material issue was raised by the parties and determined judicially or by consent, it would be contrary to public policy to allow the same parties to re-agitate the same matter in subsequent legal proceedings. Estoppel by matter of record rests on this principle, and although it may be said in one sense to exclude the truth, it is essentially just and righteous. A.I.R. (Vol. 23) 1936 Sind 99=29 S.L.R. 455=164 Ind. Cas. 43.

——S. 11—Issue must be heard and decided.

Section 11 requires that the issue should be heard and finally decided before it amounts to *res judicata*. A.I.R. (Vol. 22) 1935 All. 457=1935 A.L.J. 419=1935 A.L.R. 921=158 Ind. Cas. 33 (1).

——S. 11—Where the decision of the Court in the previous suit determined that a particular section had never applied to a particular transaction, an issue as to its applicability cannot be tried a new in face of the express prohibitions in S. 11, C. P. Code. A.I.R. (Vol. 23) 1936 P.C. 46=63 Ind. App. 53=1936 O.L.R. 67=1936 A.L.R. 98=17 P.L.T. 28=2 B.R. 223=43 L.W. 159=40 C.W.N. 289=1936 O.W.N. 127=70 M.L.J. 122=1936 M.W.N. 321=15 Pat. 203=38 P.L.R. 325=1936 A.L.J. 104=62 C.L.J. 521=38 Bom.L.R. 339=160 Ind. Cas. 68 (P.C.).

——S. 11—Suit different in form but question directly in issue same.

Even if the form of the subsequent suit is different from that of the prior suit, where the main question directly in issue is the same in both, the decision in the former operates as *res judicata* in the subsequent suit. A.I.R. (Vol. 22) 1935 Nag. 156=157 Ind. Cas. 302.

——S. 11—Issue between parties in proper suit in competent Court, tried.

When a material issue has been tried and determined between the same parties, in a proper suit and in a competent Court as to the status of one of them, relative to the other, it cannot be again tried in another suit between them. A.I.R. (Vol. 21) 1934 Sind 112=152 Ind. Cas. 894.

——S. 11—Decision of issue—Res judicata.

The fact that in the subsequent suit that property which is the subject-matter of the dispute is not identical with the property which was in dispute in the previous suit is immaterial. S. 11 of the C. P. Code, makes not only the decision of a suit *res judicata* but even the decision of an issue alone if other necessary conditions are present. 80 Ind. Cas. 847=A.I.R. 1925 Oudh 118.

——S. 11—Issues finally decided—Retrial in the same suit—Barred.

The retrial of issues that have been finally decided in the same suit is barred by *res judicata.* 48 Cal. 499=48 I.A. 187=19 A.L.J. 366=23 Bom.L.R. 648=33 C.L.J. 405=25 C.W.N. 915=14 M.L.W. 221=1921 M.W.N. 313=60 Ind. Cas. 631=A.I.R. 1921 P.C. 11=40 M.L.J. 423.

——S. 11—Findings on issues not properly raised—Res judicata.

Where on the pleadings of the parties issues are raised without any objection from the parties, and they are tried and decided, the findings on such issues operate as *res judicata* though the issues were not properly raised. A.I.R. 1938 Nag. 401, Foll. I. L.R. (1949) Nag. 147=A.I.R. 1949 Nag. 311=1949 N.L.J. 535.

——S. 11—Where a point is not properly raised by the plaint but both parties have, without protest, chosen to join issue upon that point, the decision on that point would operate as *res judicata* between the parties. A.I.R. (Vol. 25) 1938 Nag. 401=I.L.R. (1938) Nag. 496=180 Ind. Cas. 922.

——S. 11 (S. 13, Old Code)—Finding on one issue—When res judicata.

Section 11 (S. 13, Old Code) applies to both suits and issues. Where after remand of an appeal to the lower Court, an issue was raised by the lower Court and both parties accepted it and went to trial treating the question raised as the main question in the case and the determination of the Court became final. *Semble.*—That even though the raising of the issue might have been open to objection at the time when it was raised, the decision will operate as *res judicata* in a subsequent suit between the parties. (1906) 4 C.L.J. 405=10 C.W.N. 1065=16 M.L.J. 440=28 A. 727=33 I.A. 156=3 A.L.J. 695=9 O.C. 377=1 M.L.T. 265=8 Bom.L.R. 722 (P.C.).

——S. 11—Decision of Issue—Res judicata—One of defendants in collusion with plaintiff.

Even if one of the defendants to the prior suit was in collusion with the plaintiff, the decision in the suit would still be binding on the defendants on the principle of *res judicata.* The only requisite condition is that the issue raised in the subsequent suit should have been raised in the prior suit directly and substantially between the parties and that it was finally decided. The fact of collusion would not affect the issue being substantially and directly in question. The only effect of the collusion would be that they would not contest the suit and had let an *ex parte* decree be passed. But even *ex parte* decrees and consent decrees operate as *res judicata.* 1950 A. W.R. 575=A.I.R. 1950 All. 488.

——S. 11—Decision regarding nature of transaction—Res judicata.

A mortgage with possession for a fixed period was executed and it was stipulated therein that on the expiry of the period, the mortgage money would be payable on demand. Simultaneously a lease-deed was executed by the mortgagor whereby he took the same property on lease. No interest or lease money was paid during the period fixed. On the expiry of the period, the mortgagee sued for possession of the mortgaged property and also lease amount which was treated by the Court as a claim for interest. The Court held that the two documents constituted one transaction, that the mortgagee's only remedy was to sue for the principal and interest and not for possession of land and the claim for possession was dismissed. Subsequently he brought a suit for the principal amount and interest:

Held, that the subsequent suit was barred by O. 2, R. 2.

Held, also, that so far as the nature of transaction was concerned, it was *res judicata* between the parties by the decision in the previous suit. Further, apart from that, the mortgage and lease could not be independent contracts. A.I.R. (Vol. 22) 1935 Pesh. 84.

——S. 11—Suit for redemption—Question as to how much usufruct was enjoyed by mortgagees—Usufruct of trees—Decision on the point—Subsequent suit alleging plaintiffs were owners of trees.

A and *B* separately owned *pattis* in a village and these *pattis* were called after their names respectively. *C* and *D* were the successors of *A* and *B* and became the owners of the *patti A* and also of *patti B.* The village was partitioned. *C* and *D* sold *patti B* to the defendants (or their predecessors) and mortgaged *patti A* to the same persons, the defendants thus getting possession of *patti B* as vendees and of *patti A* as mortgagees. The plaintiffs, the representatives-in-interest of *C* and *D,* instituted a suit for redemption of *patti A* against the defendants. The question in that suit was how much usufruct was enjoyed by the mortgagees. In the course of the determination of the usufruct, a question arose as to whether the usufruct of three trees was also to be accounted for by the defendants as mortgagees. No definite issue was struck on that point, but the parties made it clear by their pleadings that that point was to be decided by the Court, and this point was eventually decided. Subsequently the plaintiffs brought a suit alleging that they were owners of the trees in dispute, that the defendants had no right to or interest in the said trees, and that the possession of the trees had been delivered to the defendants' predecessors under misapprehension. The claim was resisted by the defendants and they set up the plea of *res judicata* also in defence:

Held, (Per *Raza* and *Allsop, JJ.*)—That the parties had, by their pleadings, invited the Court to decide the question of title to the three trees and had insisted on the point being tried and it was not open to the plaintiffs to turn round and say that the point was not a necessary or proper one to be tried in the former suit. The question was directly and substantially in issue between the parties in the former suit and they themselves had treated it as such and fought it out to the end and consequently the final decision on the matter in dispute must be *res judicata* between the parties.

Per *Wazir Hasan, C.J.*:—The issue as to whether the trees in suit were not included in *patti A* was an issue raised for the purpose of determining the question as to whether they were or were not part of the mortgaged property, that is as to whether the plaintiff of that suit was entitled to obtain a decree for redemption in respect of them or not, which was the direct and substantial issue in the case and hence the decision cannot operate as *res judicata* on the question of the plaintiff's title to these trees independently of the mortgage for the simple reason that the question of title as such was not directly and substantially

in issue in the previous suit. Such a question was wholly outside the natural and proper scope of the previous suit and any decision of that question therefore even if arrived at, was not a decision on a direct and substantial issue in the case, and consequently there was no bar by *res judicata*. A.I.R. (Vol. 21) 1934 Oudh 50=11 O.W.N. 53=18 R.D. 60=9 Luck. 291=147 Ind. Cas. 984.

——S. 11—Findings on issues—Parties inviting Court to decide.

Where at the invitation of parties the Court decides points, the determination of one of which might have been sufficient for the disposal of the suit, but which are such as it is open to the Court to base it judgment among others, the matters so decided operate as *res judicata* in a subsequent suit. A.I.R. (Vol. 17) 1930 Cal. 810=57 Cal. 872=129 Ind. Cas. 310.

——S. 11—Issue.

Issue constituting *"res judicata"*—Construction. 10 P.L.T. 630=120 Ind. Cas. 292=A.I.R. 1930 Pat. 71.

——S. 11—Issue unnecessary but invoked by party.

Where a person instituted a suit against another for possession of certain trees on the ground that he was their owner and the defendant contended that the plaintiff was only the mortgagee and not the owner and thereupon an issue was framed on the point and the Court decided that the plaintiff was only a mortgagee and granted relief to him as a mortgagee.

Held, that, the plaintiff himself having raised the question whether he was the owner and not the mortgagee, the finding thereon, even though unnecessary, operated as *res judicata* against him. 118 Ind. Cas. 168.

——S. 11 (S. 13, Old Code)—Unnecessary issue raised in previous suit and parties consenting—Effect.

Where after the remand of an appeal to the lower Court, an issue (the raising of which in the case being open to objection) was raised by the lower Court, and both parties accepted it and went to trial, treating the question raised as the main question in the case and the determination of the Court became final: **Semble.**—That the decision will operate as **res judicata** in a subsequent suit between the parties. (1906) 4 C.L.J. 405=10 C.W.N. 1065=16 M.L.J. 440=28 **A.** 727=33 I.A. 156=8 Bom.L.R. 722=3 **A.**L.J. 695=9 O.C. 377=1 M.L.T. 265 (P.C.).

——S. 11—Decision on an issue.

A party himself raised an issue which was decided in his favour by the trial Court. The issue was again fought out in the appellate Court whose decision was against the party.

Held, that as the issue was raised and fought by the party the decision would be binding on him and he cannot say that because he only raised the issue in the trial Court he is not bound by the consequences that followed in the appellate Court. A.I.R. 1924 P. C. 144, Foll. 118 Ind. Cas. 168.

——S. 11—Final decision of an issue.

An issue which is raised by the parties and tried out between them in the suit before the decree is passed cannot be re-agitated on the execution side. 13 O.L.J. 813=3 O.W.N. 771=99 Ind. Cas. 211=A.I.R. 1926 Oudh 613.

——S. 11—Two or three issues in a suit—One or some of them decided—Second suit on same grounds but some more reliefs claimed—Finding in the former suit if res judicata.

The finding of a Court on a point or some points in controversy in former suit when there were more issues in the suit and disposing the suit on that finding operates as **res judicata** in a later suit brought on the same grounds with some more reliefs added to them.

Mukerji, J.—Where only one particular issue is identical in two different suits, one filed after the other, a question would arise whether the decision on the issue arrived at in the former suit would operate or not as **res judicata**. But where the two suits are identical, the failure of the first suit must bar the trial of the second suit even if no issues were raised in the former suit. 197 Ind. Cas. 674=A.I.R. 1928 All. 62.

——S. 11—Previous suit covering portion of property which is subject-matter of subsequent suit.

Where the previous suit covers only portion of the property which is the subject-matter of the subsequent suit, if all other requirements of S. 11 have been fulfilled, the finding in the previous suit will be **res judicata** in the subsequent suit as regards that portion of the property which was the subject-matter of that suit. A.I.R. (Vol. 22) 1935 Lah. 391=17 Lah. 20=38 P.L.R. 252=161 Ind. Cas. 369.

——S. 11—Order striking out defendants from list—Res Judicata.

An order striking out a person's name from the list of defendants is in effect an order dismissing the suit as against him. Consequently, the dismissal of the suit as against him is final unless and until it is set aside by way of appeal, before the dismissal becomes final. A.I.R. (Vol. 21) 1934 Rang. 154=152 Ind. Cas. 1079.

——S. 11—Prior decision—Custom.

A finding in the previous suit **inter partes** as to the existence or non-existence of a custom of pre-emption ought to bind the parties to that litigation in a subsequent suit; of course, it would be open to either party at a subsequent stage to show that the custom has ceased to exist or has in any other way been abandoned: 94 Ind. Cas. 463=A.I.R. 1926 All. 420.

——S. 11—Prior decision—Divided status—Res judicata.

Where the parties distinctly put forward the contention that the deceased was divided from them, and on that plea the Court gave a decree against his assets in their hands.

Held, that in the face of that plea and the judgment it was not open to those parties to contend that they and the deceased were undivided in interest and that they succeeded to his property by survivorship. 22 M.L.W. 455=1925 M.W.N. 713= 90 Ind. Cas. 509=A.I.R. 1925 Mad. 1179=49 M.L.J. 104.

——S. 11—Decision as to character of possession.

A judgment in a prior suit operates as **res judicata** in a subsequent suit between the same parties or their representatives in interest if it decides what was the character of the possession of any person who was a party to that suit, **e.g.**, whether it was then adverse or permissive possession or whether it was separate or joint possession. 16 L.W. 514=31 M.L.T. 298=(1922) M.W.N. 676=43 M.L.J. 737=46 Mad. 525=70 Ind. Cas. 994=1933 Mad. 88 (2).

——S. 11—Mortgage suit—Paramount title—Decision as to—When res judicata.

As a general rule a paramount title cannot be drawn in controversy in a mortgage action. But if a defendant in a mortgage suit sets up a paramount title and without objection goes to trial upon that issue, neither party can afterwards say that the issue was irrelevant. 10 P.L.T. 645=121 Ind. Cas. 353=A.I.R. 1929 Pat. 678.

——S. 11—Mortgage suit—Preliminary and final decree passed without objection—Transfer of decree and sale of some properties—Suit for declaration that decrees were void for want of jurisdiction—Dismissal of — Application for personal decree—Question as to jurisdiction—If res judicata.

The appellant Bank filed a mortgage suit against the respondents in common form, and a preliminary decree was passed without objection from the respondents. An application was then made for a final decree for sale of the mortgaged properties. A final decree was passed, and by consent the decree was transferred to another Court for execution and certain properties were duly sold. Then the mortgagors (respondents) filed a suit alleging that the Court "had no inherent jurisdiction to entertain such a mortgage suit," and the relief sought was that the preliminary and final mortgage decrees in the mortgage suit should be declared null and void. That suit was dismissed with costs. Subsequently, an application for a personal decree against the respondents was made, pursuant to the final decree in the mortgage suit. The respondents objected **inter alia** that the Court had no inherent jurisdiction to entertain the mortgage suit, and therefore, had no jurisdiction to pass any personal decree against the respondents in the suit:

Held, that the effect of the dismissal of the suit by the respondents was that the question of jurisdiction became **res judicata** between the parties and could not be raised again by them or considered by the Court, in any subsequent proceedings in the mortgage suit. A.I.R. (Vol. 23) 1936 Rang. 87=14 Rang. 94=161 Ind. Cas. 989 (S.B.).

——S. 11—V's son becoming insolvent—Official Receiver selling his share in family properties to S and R—Suit by S for partition of insolvent's share—R and members of V's family impleaded as defendants—Plaint averring that R was benamidar for V's family—Preliminary decree passed in favour of S and R as prayed in plaint—R applying for final decree—Objection by V's family that R was benamidar—Objection overruled and final decree passed—Suit by certain members of V's family for declaration that R was benamidar held was barred by res judicata.

The general rule is that a party to a suit cannot in a subsequent proceeding be heard to allege that a decree obtained against him in a former litigation was obtained as a result of collusion between himself and the plaintiff.

One of the sons of one **V** became an insolvent and the Official Receiver in the insolvency sold his share of the family properties partly to **S** and partly to R who was the son-in-law of **V**. **S** filed a suit to which **R** and members of **V's** family were parties for partition of the share of the insolvent and allotment of the properties to himself and to R. The plaint contained a somewhat superfluous averment that R was colluding with**V's** family and that he purchased on their behalf. There was no denial in the pleadings of this contention, but in the evidence, **V** asserted that he had not contributed the money towards the purchase. On the prayer in the plaint that a share should be allotted not merely to **S** but also to **R** a preliminary decree followed which recognised as against **V's** family the right of R to recover possession of the share of the properties purchased by him by means of a final decree. When **R** applied for a final decree it was for the first time specifically averred on behalf of the members of **V's** family that **R** had purchased the insolvent's property **benami** for the benefit of that family. Overruling the objection, the Court passed a final decree in favour of **R**. In a suit brought by certain member's of **V's** family for a declaration that **R** was **benamidar** for the members of **V's** family and for an injunction restraining **R** from disturbing plaintiff's possession:

Held, that the preliminary decree treated **R** precisely as if no question of **benami** had been referred to in the plaint at all and it treated him as a mere stranger purchaser entitled in equity to the allotment of a proportionate share out of the properties which should have been allotted to the insolvent whose share had been sold. That being so, as between **R** who stood in the position of a plaintiff and **V's** family who were the real defendants it was decided that the right to the ownership of the properties to be so allotted was with **R** and not with the family. When **V's** family tried to raise in the final decree proceedings an objection regarding the **benami** nature of the purchase the Court rightly refused to give effect to the objection. Even if the decision in the final proceedings was wrong it bound the parties thereto.. The suit was, therefore, barred by **res judicata** by reason of the decision in the previous suit. A.I.R. (Vol. 33) 1946 Mad. 372=(1946) 1 M.L.J. 282.

——S. 11—Decision under S. 4, Provincial Insolvency Act, that property was insolvent's self-acquired property is final though it contained a direction that issue be tried in another suit.

If there is a final and conclusive adjudication by a competent Court of any issue between the parties, a mere statement in the order that the Court was only taking a prima facie view on the evidence before it coupled with a direction by that Court that another proceeding might be taken for having the point more adequately considered and decided is of no avail, when considering the plea of res judicata.

An order made by an Insolvency Court upon an application by the purchaser of the insolvent's property from the Official Receiver for removal of the obstruction caused by the sons of the insolvent that the property was insolvent's self acquired property and affirmed on appeals cannot be attributed to any other jurisdiction than the one conferred on the Insolvency Court under S. 4, Provincial Insolvency Act, a decision under which section is final and conclusiive.

Hence, a suit by one of the sons, in pursuance of the direction contained in the order under S. 4, is barred by **res judicata**. A.I.R. (Vol. 33) 1946 Mad. 141=(1945) 2 M.L.J. 384=58 L.W. 562 =1945 M.W.N. 673.

——S. 11—Security bond in penal sum—Execution proceedings under S. 386, Criminal Procedure Code (Act 5 of 1898), against executant—Objection under S. 386, Criminal Procedure Code, read with O. 21, R. 90, Civil Procedule Code, that charge created was for larger amount than notified—Decision as to extent of charge created, operated as res judicata.

A executed a security bond in the penal sum of Rs. 10,000 in favour of **B** on the security of certain property. Subsequently **A** was charged with embezzlement and fined. In the execution proceedings under S. 386, Cr.P. Code, **B** raised an objection under S. 386, Cr.P. Code, read with O. 21, R. 90, C.P. Code, that his charge over **A's** property ought to have been notified for the amount embezzled by **A** and not merely for Rs. 10,000. The criminal Court on a construction of the bond held that a charge for Rs. 10,000 only was created over the property secured:

Held, that the decision as to the extent of the charge created over the property secured operated as **res judicata** in a subsequent suit between the parties. A.I.R. (Vol. 29) 1942 All. 104=1942 A.L.J. 37=199 Ind. Cas. 212.

——S. 11—Suit against father and son for declaration that son had saleable interest in three properties — Suit dismissed against son, but against father only in respect of two properties—No appeal preferred—Decision, if can be attacked in appeal from decree relating to matters left undecided.

A suit instituted under O. 21, R. 63, C.P. Code, by a decree-holder against father and son for declaration that the son had saleable interest in certain properties and that all the properties were liable to attachment was dismissed as against son in respect of all the properties and against the father in respect of two properties and it was held that the suit could proceed against the father in respect of one property. No appeal was preferred against this decision:

Held, that the decision was clearly a final adjudication between the parties relating to these matters and was, therefore, a "decree" as defined in S. 2, Cl. (2), C.P. Code. No appeal having been filed, the decree became final and was not liable to attack on appeal from the decree relating to other matters, which had been left undecided. A.I.R. (Vol. 27) 1940 Lah. 1=I.L.R. (1940) Lah. 171 =42 P.L.R. 707=187 Ind. Cas. 35.

——S. 11, Expl. 4—Suit for injunction—Defendant claiming right of way as defence—Claim argued and decided by Court—Res judicata.

It is not essential for the purpose of S. 11, Expln. 4, C. P. Code, that an issue should have been framed. An issue which has been decided by the Court, although the issue was not in fact necessary or proper to be tried, will operate as **res judicata.**

In a case the defendant's claim to a right of way was set up by way of defence to the plaintiff's prayer for an injunction. It was not only raised in the pleading, but argued and supported by evidence at the trial, and decided by the Court:

Held, that the defendan's claim to a right of way was made a ground of defence to the plaintiff's suit and must be deemed to have been a matter in issue in that suit. A.I.R. (Vol. 24) 1937 Mad. 709 =176 Ind. Cas. 590.

——S. 11—Lease by transferee of one co-heir to another co-heir—Suit by transferee for ejectment —Decree declaring shares of all parties—Fresh suit by lessee to declare right to his share—Res judicata.

S died leaving four children and a widow. The widow (an executrix) conveyed a piece of land as to which the deceased had died intestate, to **R**. R granted a lease of the said land to **V**, one of the four children of **S**. **R** instituted a suit for ejectment against the widow and the children of **S** including **V**. It was ultimately held in this case by the Judicial Committee that the widow's conveyance operated to pass to **R** only her interest as widow in one-third of the said land and not the beneficial interest of the children. Their Lordships further held that **V** was estopped under S. 116, Evidence Act, and it was declared that **R** was entitled to one-third and a quarter of the remaining two-thirds. The decree further provided that the three children other than **V** were each entitled to one quarter of the two-thirds and gave liberty to any of them to apply for partition; **V** gave up possession and instituted a suit to obtain a decision that the one quarter of the two-thirds declared by the Board to belong to **R** belonged to V. He contended that the estoppel ceased to operate when the tenancy terminated:

Held, upon a construction of the judgment of the Judicial Committee in the previous case, that the Board had finally determined the ownership of the share in question and it was not open to **V** to seek to obtain in fresh proceedings a declaration of ownership of the share in question. A.I.R. (Vol. 17) 1930 P.C. 224=57 Ind. App. 208=8 Rang. 326=59 M.L.J. 296=52 C.L.J. 254=32 Bom L.R. 1522=33 L.W. 140=34 C.W.N. 720=130 Ind. Cas. 319 (P.C.).

——S. 11—Mortgage of khoti land with possession—Subsequent sale of equity of redemption to mortgagee in contravention of S. 9, Khoti Settlement Act—Adverse possession by mortgagee after date of sale—Mortgagor obtaining possession by possessory suit but mortgagee again regaining it by suit on basis of sale and title by adverse possession—Suit by mortgagor for redemption is barred by res judicata. 53 Bom. 676=31 Bom.L.R. 778 =122 Ind. Cas. 113=A.I.R. 1930 Bom. 135.

——S. 11—Partition suit—Decree effecting partition remaining unexecuted and getting time barred —Second suit for partition—Bar of res judicata.

The principle of **res judicata** applies just as much to partition suits as to any other suit; and if a decree in a suit for partition is time barred, it cannot be enforced in a subsequent partition suit. It may be that some act subsequent to the decree which has remained un-executed may give rise to a fresh cause of action, but no second suit can lie for partition of the properties involved in the prior suit between the same parties on the identical cause of action. A person cannot sue for partition of a property already finally partitioned by a decree in a regular suit. I.L.R. (1946) Kar. 140=224 Ind. Cas. 316=A.I.R. 1946 Sind 158.

——S. 11—Partition suit—Determination of share inter partes—Claim for larger share in subsequent suit.

Where the share to which a person is entitled in a certain property has been determined in a previous litigation **inter partes,** the decision operates as **res judicata** and consequently he is debarred from re-opening the question and claiming a larger share in subsequent litigation. A.I.R. (Vol. 20) 1933 Oudh 104=9 O.W.N. 1052=143 Ind. Cas. 338.

——S. 11—Partition Suit—Decision in as to the extent of the liability of a joint family to a creditor—Res judicata.

In a son's suit for partition against their father, the father's mortgagee also was impleaded as defendant the object being to get their share in the family property released from the burden of the mortgage. This point was fought out in the appellate Court though not in the trial Court, which reduced the rate of interest and held that the whole family property should be liable for the mortgage debt.

Held, that the decision of the appellate Court was complete and final and it would bar a subsequent suit by the mortgagee to recover from the separated property of the father the balance of interest disallowed in the previous suit. 6 O.W.N. 281=118 Ind. Cas. 766=4 Luck. 713=A.I.R. 1929 Oudh 275.

——S. 11—Suit on contract—Plea of contract illegal—Finding contract legal—Operates as a res judicata in a subsequent suit.

Plantiffs sued the defendants on the basis of an agreement which, according to them, was to import gold into French India from foreign parts. The defendants urged that the contract was for an illegal purpose being one to import gold into British India which was forbidden by law. But in a previous suit by defendants against the present plaintiff and a third person, the present plaintiffs had raised the same objection that the contract was for an illegal purpose and the Court had found that the contract was only to import gold into French India and therefore quite legal.

Held, that the finding in the previous suit would operate as **res judicata** in the present suit and the defendant cannot turn round and urge that in the previous suit he got a decree on an unlawful contract. 31 M.L.W. 757=A.I.R. 1930 Mad. 714 =58 M.L.J. 613.

——S. 11—Decision under Specific Relief Act, S. 9.

Where it was decided in a suit under S. 9, Specific Relief Act, that the plaintiff was not in possession of a certain property from a certain date, the question covered by that finding cannot be reagitated between the parties and is **res judicata** in a suit for possession on declaration of plaintiff's title. 114 Ind. Cas. 82=A.I.R. 1928 Cal. 758.

——S. 11—Prior suit for possession based on inheritance and agreement—Decree in—Bar of—Subsequent suit based on inheritance barred.

The plaintiff in a previous suit claimed his share under the Mahomedan Law. His claim was based partly on an agreement but mainly upon inheritance. A decree of Court was passed declaring that he should obtain possession of certain property subject to his making good what had been expended for the benefit of the family in the past. The question of his title was definitely and finally determined under the decree. He did not make any payment under the decree and allowed the decree to become time-barred. Subsequently he sued for the possession of the same property basing his claim upon inheritance under Mahomedan law independently of the decree in the previous suit.

Held, that the latter suit was barred, inasmuch as the question of his title being finally and definitely decided in the previous suit could not be reopened. 3 O.W.N. Sup. 287=99 Ind. Cas. 478=A.I.R. 1927 Oudh 60.

——S. 11—Plea of non-joinder not allowed to be taken.

Where a plea of non-joinder was not allowed to be raised in a suit on the ground that it was taken at a late stage.

Held, that the plea should be considered to have been taken and to have been decided against the party taking it and it would not, therefore, be open to that party in a subsequent suit to take that plea. 91 Ind. Cas. 683=A.I.R. 1926 Cal. 511.

——S. 11—Rent suit—How far res judicata.

The decision in a rent suit is not **res judicata** on the question of title, unless the question of title which had to be decided was expressly raised, and was expressly decided between the parties; in each case it is necessary to examine carefully the decision in the rent suit before any opinion can be formed as to whether it operates as **res judicata** on the question of title or not. Ordinarily the decision would be **res judicata** only with regard to the existence of the relationship of landlord and tenant; in other words the decision of the Rent Court would undoubtedly be **res judicata** on the question as to whether the particular tenancy which was

asserted did or did not exist in fact. 12 I.A. 23; 15 I.A. 97; 18 C.L.J. 553, foll. A.I.R. 1949 Pat. 510=30 P.L.T. 434.

——S. 11—Rent suit—Question of title—Decision on—Res judicata in subsequent suit.

Where in a suit for rent by a donee under a deed of gift, basing his claim on the gift deed, the question of title is raised and the gift deed is attacked as having been executed under undue influence and therefore inoperative, and an issue is raised between the parties on the point and it is held that the deed of gift set up in the plaint had been executed under undue influence and remained inoperative, not having been ever given effect to, it cannot be said that the issue as to title was raised and decided only incidentally. It must be held that the question was directly and substantially in issue and was finally decided by a Court competent to decide it and therefore the decision will be **res judicata** on the question of title in a subsequent suit between the parties. 1947 P.W.N. 42=A.I.R. 1948 Pat. 130.

——S. 11—Rent suit—Decision of title, if operates as res judicata.

If there is a suit for rent and the question of title is raised not directly but incidentally, then, any decision on the question of title cannot operate as **res judicata** in a subsequent suit between the parties based upon title between them. But if a question of title was raised and had a direct bearing upon the decision of the Court, then a subsequent suit based on title between the same parties would be barred by **res judicata** even though the earlier suit was one for rent. A.I.R. (Vol. 25) 1938 Bom. 291=40 Bom. L. R. 359=175 Ind. Cas. 866.

——S. 11—Rent suit—Defendant setting up his title —Subsequent suit in ejectment.

Where in a prior suit for arrears of rent, the defendant set up his title and the parties went to trial on the issue as to whether the disputed house belonged to the plaintiff and the issue was decided against the plaintiff and the plaintiff subsequently sued the defendant for ejectment:

Held, that on the queston of the plaintiff's title to the house, the matter should be regarded as **res judicata** having been determined in the prior suit. A.I.R. (Vol. 21) 1934 Pat. 282=147 Ind. Cas. 1055.

——S. 11—Rent suit—Amount of rent payable in money in default of payment of rent in kind—Decision as to—Res judicata.

A decision in a previous rent suit based on the construction of a lease as to the amount of rent payable in money in default of payment of rent in kind, operates as **res judicata** in a subsequent rent suit. I.L.R. (1946) 1 Cal. 510=50 C.W.N. 473 =82 C.L.J. 125.

——S. 11—Rent suits—Liability to pay rent—Amount of rent—Res judicata.

The fact that the previous suit for rent was in respect of a certain year of assessment or in respect of a certain sum different from that involved in the subsequent suit is not conclusive on the question of **res judicata**. The real test is what was decided in the previous suit: did it relate to the question of the general liability of the defendants to pay the rent or did it relate to the amount of rent payable by the defendants for a particular period? In the former case the decision does in the latter case it does not, operate as **res judicata**. 13 C.L.J. 38 and 51 Ind. Cas. 56, Foll. 9 Pat. 674=A.I.R. 1930 Pat. 585=11 P.L.T. 765=128 Ind. Cas. 337.

——S. 11—Rent suit—Decision as to rent payable —Res judicata.

In a former suit between the parties the amount mentioned in the **patta** was taken as the basis of the value of rent payable in kind, **held,** that it does operate as **res judicata** in a subsequent suit. 41 Ind. Cas. 833.

——S. 11—Rent decree—Rate of rent—Evidentiary value.

A previous decree in a rent suit, even though it has not been executed, has value as evidence as to the rate of rent in the same way as such a decree, if executed would have value although the fact that the decree has not been executed will be one of the circumstances to be taken into consideration along with other facts of the case in determining the value to be given to such a previous decree as evidence to establish the rate of rent. A. I.R. (Vol. 31) 1944 Cal. 118=47 C.W.N. 362 =I.L.R. (1943) 1 Cal. 430=212 Ind. Cas. 123.

——S. 11—Rent suit—Rate of rent—When res judicata.

Where, in a case, no plea is raised as regards the rate of rent and no specific issue is framed and the Court decrees the suit at a certain rate of rent, the decision would no doubt not constitute as **res judicata** in a subsequent suit but where the question has been pointedly raised and embodied in the form of a specific issue as to the proper rate of rent, then the decision arrived at by the Court upon such issue will be **res judicata** in subsequent suits for rent. A.I.R. (Vol. 28) 1941 Oudh 259 =1941 O.W.N. 22=1941 R.D. 332=1941 A. W.R. 75=192 Ind. Cas. 75.

——S. 11—Rent suit—Decision as to area and rate —Res judicata in a subsequent suit.

Where the Court in the previous suit definitely determines the area of the land in the defendant's possession and the annual rent payable for the same, the determination is general and not limited to the particular years for which rent is claimed and the defendant can only succeed in a subsequent suit by proving that the area and the rent have since altered. 43 C.L.J. 116=94 Ind. Cas. 844 =A.I.R. 1926 Cal. 672.

——S. 11—Rent suit—Question as to area of tenancy—Res Judicata.

A previous decision as to the question of the area of tenancy is **res judicata** in a subsequent suit between the parties: 1 Cal. 202, Foll. 91 Ind. Cas. 738=A.I.R. 1926 Cal. 513.

——S. 11—Rent suit—Area of holding.

In a prior suit for rent, the area of one holding was decided to be a certain number of bighas.

Held, in the absence of any allegation as to encroachment, increment, fraud or error, this finding will be **res judicata** in a subsequent suit for rent, though it is alleged and proved that a later

record of rights has an entry different from what was found before as regards the area. 74 Ind. Cas. 961=A.I.R. 1924 Pat. 307.

——S. 11 (S. 13 Old Code)—Rent suit—Decision of area for which rent was due—Res judicata in subsequent suit.

,A tenant whose defence that the landlord was entitled to rent in respect of a lesser area of land than what was stated in his claim was dismissed on the merits in a previous rent suit is precluded from raising the same defence in a subsequent rent suit by the rule of **res judicata.** (1905) 11 C.W.N. 1100=34 C. 1020=6 C.L.J. 715.

——S. 11—Rent suit—Decision as to status of defendant—Subsequent suit for arrears of rent for different period—Res judicata.

Where in a suit for arrears of rent, the status of the defendant, is determined and decided it will opetrate as **res judicata** in any subsequent suit for arrears of rent though for a different period. 1946 A.W.R. (Rev.) 40.

——S. 11—Rent suit—Relationship of landlord and tenant—Decision of—Res judicata.

Landlord and tenant—Rent suit—Teanant's plea that plaintiff was not his landlord investigated and overruled and suit decreed. Suit by tenant for declaration that third person and not plaintiff in rent suit was his landlord, held barred by S. 11. A.I.R. (Vol. 28) 1941 Cal. 512=197 Ind. Cas. 316.

——S. 11—Rent suit—Question of relationship—Res judicata.

The decision in a rent suit is conclusive upon one point and one point alone, namely, that the defendants were not the tenants of the plaintiff during the year for which rent was then claimed. 72 Ind. Cas. 655=A.I.R. 1924 Cal. 460.

——S. 11—Rent suit—Decision as to land being rent free—Res judicata.

The plaintiff purchased a **zamindari** in Court auction and he filed a suit to recover rent from the defendants on the suit land which admittedly had never paid any rent within living memory though it was shown in the **zamindari** records as a land in respect of which a rate of rent had been fixed. In 1903 when the Court of Wards was in charge of the estate, a similar claim was put forward to levy rent on this same land and the then occupant of the land contended that the land had been granted rent-free. This contention was upheld:

Held, that the decision operated as **res judicata.** A.I.R. (Vol. 26) 1939 Mad. 94=1938 M.W.N. 1134=48 L.W. 701=(1938) 2 M.L.J. 934=182 Ind. Cas. 944.

——S. 11—Rent suit—Plea of rent free title found against—Subsequent suit for different land on same titles barred.

A rent-free title set up by defendant in the first suit for rent and decided against him bars a subsequent title suit against the then plaintiff relating to different land but involving the same question of title. 59 Ind. Cas. 632=2 U.P.L.R. (A.) 379=43 A. 170=18 A.L.J. 1001=A.I.R. 1921 A. 369.

——S. 11—Rent suit—Findings in—If res judicata in subsequent suit for possession.

Where in a previous suit for enhancement of rent, the question as to whether the T. P. Act or the Bengal Tenancy Act applied to the tenancy was decided, such question cannot be re-agitated in a subsequent suit for possession. A.I.R. (Vol. 22) 1935 Cal. 725=159 Ind. Cas. 462.

——S. 11—The judgment in a former rent suit does operate as **res judicata** between the parties if the parties are the same, the areas of the lands are the same and the defence is the same, namely, a third party holding certain portion of the whole land. 90 Ind. Cas. 756=A.I.R. 1926 Cal. 369.

——S. 11—Rent suit—Decision in—How far res judicata in suit for subsequent years.

The principle of the **res judicata** is to be confined only to matters which actually existed at the time of former decision. The decision therefore as to matters existing at the date of former suit for rent for a particular year, even though erroneous, is **res judicata** in respect of those matters in a suit for rent for subsequent years. But this rule does not apply to suit for rent as to certain areas in respect of which no claim was and could be made in former suit. A.I.R. (Vol. 24) 1937 Mad. 254 =(1937) 1 M.L.J. 233=1936 M.W.N. 1362=45 L.W. 15=I.L.R. (1937) Mad. 364=168 Ind. Cas. 24 (F.B.).

——S. 11—Suit for rent—Defendants alleged to be in possession—Dismissal of suit—Subsequent suit for rent or in alternative for assessment of fair rent, barred.

A suit was filed claiming that the plaintiffs had a three-annas odd interest in a certain **mahal**, that the land, which, the defendants were in possession of, had fallen entirely within their **patti**, and consequently, the plaintiffs were claiming rent as against the defendants in that action. The action was dismissed as the Judge came to the conclusion that the case that the land for which the plaintiffs were claiming ground rent had fallen entirely within their **patti** was not made out. Subsequently, the plaintiff brought another action claiming that they had a separate **patti** and the land was clearly within that **patti** and that the defendants were in possession. The plaintiffs therefore claimed rent, or in the alternative, an assessment of fair rent:

Held, that the latter suit was barred by **res judicata.** A.I.R. (Vol. 23) 1936 Pat. 511=2 B.R. 565=17 P.L.T. 715=163 Ind. Cas. 136.

——S. 11—Rent suit by co-sharer landlord—Other co-sharer made party—Averment by defendant of previous purchase of tenancy:

Held, that the Court was competent to decide the question of the validity of the purchase and that such decision would be **res judicata** between the co-sharer landlords. A.I.R. (Vol. 19) 1932 Cal. 894=59 Cal. 1250=141 Ind. Cas. 56.

——S. 11—Rent suit—Dismissal—Fresh suit for apportionment of rent—Res judicata.

Where after the dismissal of a suit for rent, a subsequent suit by the tenant for a declaration of his rights was decreed and a suit was thereupon filed for the apportionment of rent, **held** that the

previous rent suit operated as **res judicata**. 35 C.W.N. 46 =132 Ind. Cas. 81=A.I.R. 1931 Cal. 397.

——S. 11—Suit by ryot to set aside a distraint on the ground that tender of patta is not proper—Decision as regards prpriety of the tender—Res judicata in subsequent suit for rent.

Suit by ryot to set aside a distraint on the ground that tender of patta is not proper. Where it is heard and finally decided, decision as regards propriety of tender works as **res judicata** in subsequent suit for rent. 45 M.L.J. 199=18 L.W. 169=33 M.L.T. (H.C.) 34=(1923) M.W.N. 357=72 Ind. Cas. 683=A.I.R. 1924 M. 299.

——S. 11—Rent suit—Previous suit deciding liability of defendant to pay interest as per Kabuliat—Res judicata.

In a suit for the recovery of arrears of rent on the basis of **kabuliyat** the **kabuliyat** stipulated that arrears of rent should bear interest at the rate of 75 per cent. per annum. Both Courts below enforced this stipulation and decreed the plaintiff's claim, as it appeared that the respondent had twice before obtained decrees for the arrears of rent on basis of this **kabuliat** with interest at the rate stipulated in 1911 and in 1915.

Held, that the liability of the defendant-appellant to pay interest on arrears of rent at the rate provided for in the **kabuliat** is **res judicata** between the parties. 76 Ind. Cas. 444=A.I.R. 1923 Cal. 361.

——S. 11—Rent suits—Terms of puttah—Res judicata.

The decision as to the proper terms of a puttah in respect of one **fasli** is res judicata for subsequent **faslis** also. 62 Ind. Cas. 501=13 M.L.W. 307.

——S. 11 (S. 13, Old Code)—Assessment of rent on additional area—Suit for—Decision in—Res judicata—Bar of second suit.

A suit for assessment of additional rent on the same additional area which formed the subject-matter of a previous suit, is barred by the decision in the previous suit which operates as **res judicata.** (1907) 12 C.W.N. 904.

——S. 11—Principal and agent—Suit for accounts Decision in—How far res judicata.

A decision in a prior suit by principals against agents wherein the amounts due by one party to the other were settled in respect of certain transactions bars a subsequent suit by agents against the principals in respect of the same transactions. 7 Lah.L.J. 420=92 Ind. Cas. 198=26 P.L.R. 585=A.I.R. 1925 Lah. 596 (2).

——S. 11—Objections raised and decided against in appeal—Same cannot be raised by way of cross-objections.

The rule allows a respondent to take any cross-objection which he could have taken by way of appeal; it does not allow him to take an objection which he has already taken by way of appeal and which has been decided against him. 22 A.L.J. 365=78 Ind. Cas. 677=5 L.R.A. Civ. 298=A.I.R. 1924 All. 867.

——S. 11—Demise—Dispute as to area—Decision as to—Res judicata in subsequent suit.

Where a fixed parcel of land was demised whose boundaries were known and the only question in the prior suit was what was the area of that parcel.

Held, in absence of encroachment, increment, fraud or error when once that question had been answered the decision was binding in all future litigation. 74 Ind. Cas. 961=A.I.R. 1924 Pat. 307.

——S. 11 and O. 17, R. 3—Dismissal for failure to pay costs.

Prior suit dismissed for failure to pay day costs —Default of party bars subsequent suit. The order of dismissal must be deemed to have been passed under O. 17, R. 3. In such a case the decision must be deemed to be one on the merits. 1936 M.W.N. 1230.

——S. 11—Dismissal for want of evidence.

Dismissal of a petition owing to failure of petitoner to produce evidence in support of the facts alleged in the petition is a dismissal on the merits and so is binding on the Court as well as the parties. 12 Cal. 563, Foll. A.I.R. 1929 Mad. 404.

——S. 11—Dismissal of suit for want of evidence.

Where a tenant's suit to contest a notice of ejectment is dismissed because of his failure to give evidence in support of his allegations, the decision bars a subsequent suit by him for recovery of occupancy land based on the same allegations, in spite of his being ready to prove them. 34 Ind. Cas. 640=3 O.L.J. 236.

——S. 11 and O. 9, Rr. 3 and 6; O. 17, Rr. 2 and 3—Dismissal of suit for non-prosecution—Second suit.

Where on the date fixed for hearing, the defendant was **ex parte,** and the plaintiff failing to adduce evidence, the suit was dismissed for want of prosecution.

Held, that the Court must be deemed to have acted under O. 17, R. 3 and dismissed the suit on the merits and that second suit for the same relief was barred. 'Want of prosecution' could only mean that the plaintiff did nothing to support his claim and that there was no evidence on record supporting his claim. 40 All. 590=46 Ind. Cas. 390=16 A.L.J. 462.

——S. 11 and O. 17, R. 3—Dismissal of suit—If bars a subsequent suit.

A dismissal of a suit under O. 17, R. 3 operates as **res judicata** in respect of the rights of the plaintiff to recover in a subsequent suit the property sued for in the first suit. 37 P.W.R. 1912=13 Ind. Cas. 172=25 P.L.R. 1912.

——S. 11 (S. 13, Old Code)—Dismissal for default of appearance under O. 10, R. 4.

The dismissal of a suit under O. 10, R. 4 (S. 120, Old Code) (1882) for default of appearance in obedience to the Court's order, is a decision and bars a subsequent suit on the same cause of action. 13 Bom.L.R. 658=11 Ind. Cas. 986.

——S. 11—Previous judgment upon merits after hearing some evidence on both sides is res judicata.

Where the subject-matters of two suits were the same and where the Court decided the previous case after both sides had given certain amount of evidence and wrote a judgment upon the merits dismissing the suit in plaintiff's absence and no appeal was preferred against that judgment.

Held, that it cannot be alleged that previous judgment has no worth because the decree in the suit was nothing more than a dismissal for default and that the matter was res judicata. A.I.R. 1928 Cal. 271.

——S. 11—(S. 13, Old Code)—Dismissal of suit for default after taking evidence in part—Subsequent suit—Bar of.

Where a plaintiff appears in a suit and goes into evidence, but before the evidence is closed makes default and the case is dismissed, matters directly and substantially in issue in the suit are **res judicata** in a subsequent suit between the same parties. (1900) 9 C.W.N. 678.

——S. 11—Suit for declaration—Dismissal on ground that plaintiff did not, substantiate his position—Subsequent suit for possession—Barred by res judicata.

A plaintiff out of possession sued for declaration that he be declared an occupancy tenant; his suit was dismissed on the ground that he did not substantiate his position as occupancy tenant. He filed another suit for possession against the defendants.

Held, that his suit was barred by **res judicata** and that he could not be allowed to contend in the second suit that the Court should not have gone into the merits in the former suit, as in that suit he would have failed only on the ground that he sued for mere declaration, when he ought to have sued for possession as well. 77 Ind. Cas. 756=A.I.R. 1923 All. 554.

——S. 11—Suit for declaration by Reversioner against widow decreed—Question of relationship—Res judicata.

Where a reversioner brought a suit for a declaration that an adoption by a widow is not binding on him and got a decree, the question of relationship is **res judicata** in a second suit for a declaration that a gift by her is not binding on him. 59 Ind. Cas. 808=34 P.W.R. 1921.

——S. 11—Declaratory suit by Reversioner dismissed—Subsequent suit for possession.

Dismissal of suit for a declaration that an alienation by a widow is not binding on the reversioner bars his subsequent suit for possession after the widow's death. 4 L.L.J. 442=59 Ind. Cas. 946=A.I.R. 1921 Lah. 187.

——S. 11—Suit for declaration of mortgage rights—Dismissal—Subsequent suit to enforce mortgage—Res judicata.

Where a claim of a third person based on a mortgage is disallowed, and also his suit for declaration of his mortgage rights is dismissed, he cannot enforce, by a regular suit, his rights under the mortgage. 44 Mad. 268=12 L.W. 725=28 M.L.T. 420=(1921) M.W.N. 33=60 Ind. Cas. 780=40 M.L.J. 7.

——S. 11—Co-sharers—Ejectment suit by some—Dismissal on ground of non-joinder of others—Subsequent suit by same co-sharers barred.

In the former ejectment, suit only two co-sharers sued. The suit was dismissed on the ground that all co-sharer had not sued. There was no appeal against that order as there could have been. In the District Judge's Court later in a case of profits it was held in appeal that the other two co-sharers alluded to in the former suit were not entitled to profits from the sir as their names were not set down as sirdars with the two who were the only plaintiffs in the former suit and who were the only plaintiffs in the later suit. The a fresh suit for ejectment by the plaintiff's co-sharers, **held,** that the principle of **res judicata** applied and that the later suit for ejectment should be dismissed on that ground. 13 R.D. 169.

——S. 11—Suit against Receiver on allegations already found against plaintiff.

Where a Court appointing a Receiver has gone into the Receiver's accounts and has passed them overruling the objections of the party impugning the accounts a suit will not lie against the Receiver for damages for negligence based on the same allegations already considered and overruled. 22 Bom.L.R. 1126=59 Ind. Cas. 421=45 Bom. 99 =A.I.R. 1921 Bom. 427.

——S. 11—Zamindar purchasing tenure—Possession disputed by tenant of neighbouring Zamindar—Suit as both purchaser and Zamindar to establish title in property purchased—Zamindar's title, if in issue.

Where a 4|5ths proprietor of a Zamindari purchased in execution of a decree for his share of the rent a defaulting tenure and sued the Zamindar of an adjoining estate and his tenant to establish his title both as landlord and purchaser of the tenure and obtained a decree that the tenure was situate in his Zamindari. **Held,** that the plaintiff in that suit was interested in establishing his title both as Zamindar and as purchaser and the Zamindari title having, upon the pleadings, been directly put in issue the decision so far as the plaintiff's 4|5ths Zamindari title was concerned was as between the rival Zamindars **res judicata**. 28 C.L.J. 223=47 Ind. Cas. 315=22 C.W.N. 721.

——S. 11—Relinquishment of portion of claim without leave—Consequence of.

Where the plaintiff relinquished his claim without leave of the Court in respect of the part of property in suit and the suit was dismissed with regard to that item, **held,** that a subsequent suit for recovery of possession against the defendants, was **res judicata**. 40 Ind. Cas. 408=29 C.L.J. 11.

——S. 11—Prior suit between landlord and tenant—Plea of permanent tenancy—Appeal by defendants dismissed with liberty to bring suit to establish permanent tenancy—Fresh suit.

In a previous suit for possession and mesne profits brought by the landlord, the tenants pleaded they were permanent tenants. The trial Court decided that they were only annual tenants. They

appealed but their appeal was, on their own invitation, dismissed with permission to bring another suit for declaration of their permanent tenancy. The tenants accordingly brought the subsequent suit and the question was if it was barred by **res judicata**.

Held, that there was only one issue in the prior case, viz., whether the defendants were annual or permanent tenants on which the case could have been decided; no permission could have been granted by the Court to reserve that question and the mere fact that the Court referred the party to a fresh suit or gave liberty to bring a fresh suit was not sufficient to take the case out of the bar of **res judicata**. A.I.R. (Vol. 18) 1931 Bom. 417=33 Bom.L.R. 613=134 Ind. Cas. 696.

——S. 11—Decree with consent of parties—Reservation of defendant's right to bring separate suit—Effect of.

Where in a suit for money, defendant pleaded discharge, and the Court decreed with the consent of the parties the full amount, reserving the right of the defendant, to bring a separate suit for the amount of his plea, **held**, that the reservation by agreement was not known to law and that a subsequent suit for the amount was barred by **res judicata** and not maintainable. 18 M.L.T. 93=30 Ind. Cas. 260=2 L.W. 605.

——S. 11—Suit for mesne profits—Title to land—Decision on—Res judicata.

In a suit for mesne profits or crops of land an issue as to right to that land was directly and specifically raised and decided against the plaintiff in that suit. While that suit was still pending, the plaintiff in that suit sold the land to another person who brought a suit for recovery of the land from the same defendant.

Held, that the second suit was barred by the rule of **res judicata**. 25 Ind. Cas. 133=1 L.W. 587=16 M.L.T. 158.

——S. 11—Mortgage suit—Suit for possession and mesne profits by prior mortgagee—Subsequent suit by second mortgagee for redemption—Prior mortgagee if can claim mesne profits in second suit.

Where a prior usufructuary mortgagee sued the subsequent mortgagee and obtained a decree for possession and mesne profits, he cannot again claim mesne profits in a subsequent suit for redemption by the subsequent mortgagee, by reason of the operation of the rule of **res judicata**. 22 Ind. Cas. 70 =11 A.L.J. 937.

——S. 11 (S. 13 Old Code)—Identity of subject-matter in both suits—If essential.

For purposes of **res judicata** it is not essential that the subject-matter of the litigation should be identical with the subject-matter of the previous suit. (1906) 12 C.W.N. 739=9 C.L.J. 597. to the extent indicated by **Geidt, J.** in 9 C.W.N. 402. (1906) 12 C.W.N. 739=9 C.L.J. 597.

——S. 11 (S. 13, Old Code)—Identity of subject-matter in both suits—If essential.

For the application of the principle of ***res judicata***, it is not necessary to show that the subject-matter of the former suit was the same as that of the subsequent suit in which it is sought to be applied, but that the question, the trial of which is sought to be barred in the subsequent suit, was directly and substantially in issue in the former suit, subject to the specified qualifications. (1900) 2 C.L.J. 540.

——S. 11 (S. 13, Old Code)—Occupancy holding—Joint tenants—Partition award in arbitration —Suit for possession on basis of in Civil Court—Force—Subsequent suit for declaration of right—Res judicata.

The parties were joint tenants of certain occupancy holdings. Disputes arose between them which were referred to arbitration. The arbitrators partitioned the tenure. In 1906, the present defendants brought a suit in the Civil Court for possession of the plots now in dispute, alleging that they belonged to them. The plaintiffs claimed some of them exclusively for themselves. The present defendants obtained a decree. The plaintiffs thereupon brought this suit for declaration of their right on the ground that the former decree was null and void, the Court having no jurisdiction to entertain that suit. **Held**, that the former suit was not a suit for partition and the Civil Court had jurisdiction to entertain it. The same question could not be raised in the present suit. (1910) 7 A. L. J. 918=33 A. 143=7 Ind. Cas. 398.

——S. 11 (S. 13, Old Code)—Compromise decree Review application on the ground that vakil was not authorized—Dismissal—Fresh suit for same purpose.

After compromise decree, the plaintiffs applied for review alleging that their pleader had no authority to enter into the compromise. The Judge found against the allegation and dismissed the petition, which was also confirmed on appeal by the High Court.

Held, that the dismissal of the application for review and the discharge of the rule issued by the High Court will bar a fresh suit to set it aside, raising the same question of want of authority of the peader, even though a ground other than those alleged in the review petition is taken in the plaint here for the first time. (1904) 10 C.W.N. 529=2 C.L.J. 508.

——S. 11 (S. 13 Old Code)—Decree partly in favour of and partly against plaintiff—Appeal as to part—Failure to implied all defendants as parties—Res judicata in subsequent suit as regards defendants not impleaded in appeal.

The present plaintiffs had previously brought another suit in which they had made two of the present defendants parties. Their claim regarding certain lands was decreed, and as regards certain other lands dismissed. In appealing against the portion disallowed, they omitted to make the said two defendants parties respondents.

Held, their claim against these two as regards the lands covered by the previous suit was **res judicata**. (1907) 9 C.L.J. 479=13 C.W.N. 746 =1 Ind. Cas. 539.

——S. 11 (S. 13 Old Code)—"Final decision"—What is.

The plaintiff's predecessors in title (vendees) brought a suit for redemption of lands against defendants. The defendants (mortgagees in posses-

sion) relied on a prior agreement by the owner to sell the lands to themselves. The Court found in favour of the defendants, and, holding that the then plaintiffs had notice of the same, dismissed the suit. The plaintiffs (grandsons of the plaintiffs in the original suit) brought the present suit to redeem on the ground that the defendants would be barred at the date of the present suit, if they sued for specific performance. **Held**, that the original decision was a bar to the present suit. (1903) 29 M. 320.

——S. 11 (S. 13 Old Code)—Plea of resumption of land in suit by lessee found against—Subsequent suit by Zamindar for possession on basis of right of resumption—Bar of res judicata.

Where in a prior suit between defendants lessees and the Zamindar, the Zemindar pleaded that he had resumed the lands, but the suit was decided against the Zemindar on the ground that there was no resumption in fact: **Held**, that in a subsequent suit by the Zemindar for possession of the lands on the ground that he had a right to resume the lands, the question of the right to resumption was involved indirectly in the former suit, though not adjudicated upon, and the Zamindar not having established his right to resume in the prior suit, his present suit is barred by **res judicata** to the extent of the right of the lessees to be in possession. (1902) 26 M. 403 at 410.

——S. 11 (S. 13, Old Code)—Decision as to ritual in temple for giving particular relief in suit—If operates as **res judicata**. See RELIGIOUS ENDOWMENTS. 16 M.L.J. 150.

——S. 11 (S. 13, Old Code)—Scope—Decree in former suit becoming barred—Fresh suit for same relief—If barred. See RIGHT OF SUIT. 33 C. 679.

——S. 11 (S. 13 Old Code)—Joint family—Partition suit by son against father impleading father's creditor—Debt declared binding an son—Subsequent suit by creditor on debt against father and son—Son's right to dispute amount of debt—Res judicata.

Where in a suit for partition between father and son, the son sought against a creditor of his father whom he made a party to the suit, a declaration of his non-liability to the debt and the issue was decided against him: **Held**, that in a subsequent suit by the creditor against both father and son, the latter was precluded by the decision in the prior suit from questioning the amount of money due upon the bond. (1899) 11 M.L.J. 7.

——S. 11 (S. 13, Old Code)—Claim suit—Decree declaring title of plaintiff as purchaser from judgment-debtor—Subsequent suit for possession on basis of declaration—Plea by judgment-debtor (defendant) that sale was sham and collusive—Res judicata—Plea of fraud by party thereto.

In execution of a decree against the father of the second defendant, plaintiff, by his next friend laid claim to the suit property and obtained a decree declaring him to be the owner as purchaser from the second defendant. To that suit, the defendant was a party. The plaintiff now brought the suit for possession on the strength of the declaration so obtained. In the prior suit, the Court found that the property was the self-acquisition and separate property of the defendant purchased by him after separation from his father.

Held per **Curiam**:—The decree operated as **res judicata** between the plaintiff and the defendant who were parties to the suit, and it was not open to the deffendant now set up that the sale deed by him to the plaintiff was nominal and colourable with the intention of defrauding the creditors.

Per **Abdur Rahim, J.**—It is a clear and well established principle of law that where the decree of a Court has been passed upholding a certain transaction between the parties to a suit, neither the plaintiff nor the defendant will be allowed afterwards to say that the decree was the result of a collusive arrangement arrived at by them in order to carry out a scheme of fraud and that it should, thererore, be treated as a nullity and the state of things which existed previously to the passing of such decree be restored. Where two persons have combined to defraud a third person and succeed in their effort without obtaining the decree of a Court, the Court will not permit one of the parties to such fraud to show that the transaction between him and the other party to the fraud was not really what it purported to be and that it does not therefore bind them. (1905) 18 M.L.J. 576=31 Mad. 485=4 M.L.T. 331.

——S. 11—Subsequent judicial decision—Effect.

A question once decided against a party cannot now be allowed to be re-agitated merely because a Special Bench of the High Court has enunciated a rule different from what was recognised in previous case. A.I.R. 1923 Cal. 629.

——S. 11—Decision on oath—Res judicata.

The decision by oath of any matter in issue in a former suit between the parties is **res judicata** in a subsequent litigation between them. 36 Mad. 287=24 M.L.J. 321=13 M.L.T. 261=18 Ind. Cas. 835=(1913) M.W.N. 220.

——S. 11 (S. 13 Old Code)—Decision on oath taken by party—Res judicata.

Where a decision in the first suit was arrived at in the first Court and was affirmed on appeal on the strength of an oath taken under the Oaths Act: ..

Held, (1) that the matter was **res judicata** as there was a confirmation of the original decree. (2) As between the parties a decree arrived at after the taking of an oath on a question of fact is none the less a final adjudication. (1900) 24 M. 444.

12. (h) Incidental findings.

——S. 11—Incidental finding—Question of title.

Where, in the previous suit, the question of title was raised incidentally, the question can be agitated in the subsequent suit. A.I.R. (Vol. 26) 1939 Pat. 519=5 B.R. 813=182 Ind. Cas. 329.

——S. 11—Rent suit—Incidental finding regarding title—No res judicata.

In a previous rent suit, the Court found that the landlord had failed to prove that a certain plot appertained to the disputed holding of the tenants. It was also remarked that the evidence adduced by

the landlord to identify the land as included in the kabala was neither sufficient nor reliable. In a subsequent suit for declaration of title to that plot by the landlord:

Held, that the previous decision regarding title was incidentally arrived at in the course of the determination of the principal case regarding the right to recover rent and as such was not **res judicata**. 57 Cal. 371=A.I.R. 1930 Cal. 579.

——S. 11 (S. 13 Old Code)—Rent suit—Adjudication upon title to land—Res judicata in subsequent title suit.

Where in a suit for a rent, the defendant denies the relationship of landlord and tenant and either sets up the title of a third person to the land for which rent is claimed, or pleads that she is not in occupation of the land, or that the tenancy which existed has expired, the only material issue to be decided in the suit is whether the relationship of landlord and tenant subsisted between the parties for the period covered by the suit and the issues, if any, raised as to the title to the land is an incidental or collateral issue not necessary for the decision of the suit; therefore, the adjudication on this latter issue cannot operate as **res judicata** in a subsequent suit between the parties for the establishment of title to the land. But where in a rent suit the alleged tenant denies the plaintiff's title to the land and sets up his own title to the same, an issue as to the title to the land becomes a substantial issue in the suit, and the decision of the Court on the question of title becomes **res judicata** in a subsequent suit between the parties for establishment of title to the land. Where in a suit brought by the plaintiff against the defendant for rent in respect of an alleged jama of Rs. 7 the defendant pleaded that he did not hold any separate jama of Rs. 7 under the plaintiff but that the lands covered by the suit were included in a jama of Rs. 33 and odd which they held under the plaintiff, and the Court held that the defendant did not hold any separate jama of Rs. 7 under the plaintiff and the lands of the alleged jama were included in the defendant's jama of Rs. 33 odd: **Held**, that the decision that the lands were included within the defendant's jama of Rs. 33 odd was not necessary for the decision of the suit and, consequently, could not be **res judicata** in a subsequent suit brought by the plaintiff against the defendant for the declaration of his title to those lands and for the possession thereof. (1906) 10 C.W.N. 820.

——S. 11 (S. 13, Old Code)—Rent suit—Incidental finding as to title—No res judicata.

Where a question of title was decided in a suit for rent in which the issue was as to whether the relation of landlord and tenant existed between the parties: **Held**, that in a subsequent suit brought by the same plaintiff for establishment of his title the decision in the rent suit does not operate as **res judicata**. (1899) 6 C.W.N. 66.

——S. 11—Rent suit—Decision on tenant's right to abatement of rent—If and when res judicata.

The question as to whether a decision in a rent suit on an issue bearing on the right of the tenant to abatement of rent is **res judicata** in a subsequent rent suit depends on the question as to whether that issue was directly and substantially in issue or arose only incidentally in the previous rent suit. If the issue was limited as to cover the period of the suit only or was decided in a manner so as to cover only the period for which the rent suit was instituted, the issue would be considered to be raised incidentally; if however, it would appear from the proceedings of the rent suit that the intention of the parties was to raise the question for all times to come and the decision of the Court was intended to cover the liability for all times to come, then and then only the point will be considered to be substantially in issue. Where the claim to proportionate abatement of rent as made in the previous suit and as made in the subsequent suit is founded by the tenant on what he alleged to be the deficiency in the area, and the question about the area was left open between the parties in the previous suit, it must be taken that the decision of the Court on the issue of the tenant's right to abatement of rent was given only for the period of that suit, and that decision is not, therefore, **res judicata**. 30 C.W.N. 593, foll. I.L.R. (1948) 2 Cal. 284.

——S. 11 (S. 13, Old Code)—Rent suit—Dismissal on finding of no rent being due—Finding that land was liable to payment of rent—If res judicata in subsequent suit for assessment of rent.

The primary issue in a rent suit is whether the rent claimed for the particular period is due. Where in a rent suit the suit was dismissed as no amount was found due by the defendant to the plaintiff, a further declaration by the Court that the land was held subject to payment of rent was only incidental and could not operate as **res judicata** in a subsequent suit **inter partes** for assessment of rent. (1891) 18 C. 647; (1885) 11 C. 301, foll. (1907) 9 C.L.J. 493=4 Ind. Cas. 175.

——S. 11—Suit by patnidar involving decision on rate of rent—Zamindar and Government made parties—Agreement between zemindar and patnidar to pay Government revenue plus half of it as profits—No issue on question agreed upon—Court deciding revenue payable by patnidar on other issues—Government appealing—Zemindar not made party—Revenue enhanced—Subsequent suit by zemindar for rent at enhanced rate—No res judicata.

A **patnidar** instituted a suit, the disposal of which involve a decision on the rate of rent payable by him. The **zemindar** and the Government were made parties to the suit. The **patnidar** and the **zemindar** entered during the preliminary stage of the suit into an agreement, whereby the **patnidar** agreed to pay the amount of the Government revenue plus half that amount as profits. The Court did not frame an issue on the question agreed upon as it was disposed of by the agreement. A certain amount was fixed by the Court as the amount of revenue payable by the **patnidar**. But on appeal by the Government to which the **zemindar** was not a party, the amount of revenue payable by the **patnidar** was enhanced. Subsequently, the **patnidar** was sued by the **zemindar** for rent at the enhanced rate and the rate of rent payable was disputed. The **patnidar** contended that the previous judgment was **res judicata**:

Held, that the judgment did not operate as **res judicata** to the question in issue, since the question of rent payable to the **zemindar** by the **patnidar** was not directly and substantially in issue in the previous suit. A.I.R. (Vol. 22) 1935 Cal. 766 =160 Ind. Cas. 199.

——S. 11—Decision by appellate Court on question of trial Court's jurisdiction—Incidental decision on nature of property—No res judicata.

Where in order to determine the question whether a Trial Court which has declined jurisdiction in a case has or has not jurisdiction to try the case, an Appellate Court gives an incidental decision on the nature of the property which is the subject-matter of the suit and holding that the suit is triable by the lower Court remands the suit to that Court for decision on the merits, the only question which must be taken to have been finally decided by the Appellate Court is the question of jurisdiction and the decision with regard to the nature of the property cannot be treated as final so as not to be open to question in an appeal against the decree finally passed by the trial Court., 22 M.L.W. 225=91 Ind. Cas. 666=A.I.R. 1925 Mad. 1046 =51 M.L.J. 131.

12. (i) Interlocutory order.

——S. 11—Interlocutory judgment—When res judicata.

An interlocutory judgment if it is an adjudication and not merely an opinion, is binding upon the successor of a Judge passing it. 113 Ind. Cas. 646 =A.I.R. 1929 Mad. 121.

——S. 11—When a Judge has decided a question which he had already decided in the same proceeding in a contrary sense, the re-opening of it thereafter is barred by the principle of **res judicata.** A.I.R. (Vol. 23) 1936 Pat. 447=2 B.R. 727= 17 P.L.T. 756=164 Ind. Cas. 282.

——S. 11 (S. 13, Old Code)—Interlocutory order —Finality of.

The validity of an order made at one stage of a litigation unless forthwith challenged by an appropriate proceeding in a superior tribunal is conclusive between the parties and cannot be questioned or collaterally attacked at a later stage. 2 I.A. 283, foll. 70 Ind. Cas. 6=34 C.L.J. 415=A.I.R. 1921 Cal. 699.

——S. 11—Interlocutory Order.

A point finally adjudicated upon at a previous stage cannot be reopened. 68 Ind. Cas. 903=2 Pat. L.T. 648=A.I.R. 1921 Pat. 430.

——S. 11—Remand.

An order of remand, if not appealed against, is final and cannot be re-opened thereafter. 52 Ind. Cas. 801=46 Cal. 738.

——S. 11—Mortgage suit—Appeal against order refusing extension of time for payment dismissed—If res judicata in appeal against final decree—Extension of time—Appeal against order.

When an appeal against an order refusing to extend the time for payment of the mortgage amount has been made, and dismissed the same point cannot be raised again as a ground of appeal in the appeal against the final decree. 42 Ind. Cas. 392 =14 N.L.R. 25.

——S. 11—Receiver—Application for discharge dismissed—Res judicata.

A decree-holder consented to the appointment of receiver of judgment-debtor's property but shortly after such appointment he applied for receiver's discharge. His application was dismissed.

Held, that this decision operated as bar to the trial of a second application for receiver's discharge. The binding force of such a judgment depends not upon S. 11 but upon general principles of law. 11 I.A. 37; 48 I.A. 187, Affirmed. 5 Pat.L.T. 491=81 Ind. Cas. 576=20 M.L.W. 456=35 M. L.T. 182=22 A.L.J. 968=5 L.R.P.C. 175=26 Bom.L.R. 1153=40 C.L.J. 431=29 C.W.N. 413 =3 Pat.L.R. Civ. 180=A.I.R. 1924 P.C. 202 =47 M.L.J. 286 (P.C.).

——Ss. 11, 47, 48, 115—Case under Guardians and Wards Act—District Judge holding that he had jurisdiction to examine accounts in detail—Order asking guardian to pay certain sum—Revision.

In a case under the Guardians and Wards Act, it was held by the District Judge that he had jurisdiction to go into accounts submitted by the guardian, in a detailed manner. Disbelieving the accounts, the Court ordered a detailed enquiry and a final order directing the guardian to pay a definite sum was passed. Accordingly the Court passed a judgment to the same effect on a later date. The guardian filed a revision against the order and filed along with his application a copy of the judgment and the copy of the formal order as well. It was contended on behalf of the minor that the previous decision of the District Judge holding that he had jurisdiction to go through accounts, prevented the guardian from re-agitating the point on principle of **res judicata** and also that the revision was against the interlocutory order asking the guardian to pay a definite sum, and hence should not be interfered with:

Held, that the former order on question of jurisdiction was an interlocutory order and could neither be appealed against under S. 47, C.P. Code, nor could a revision be filed under S. 48, C. P. Code, read with S. 115, C.P. Code. The matter had not been finally decided by the Court and the guardian was not prevented from raising the point when a final order directing the payment of a definite sum has been passed:

Held also, that under the circumstances the application in revision could be deemed to be against the final order and, therefore, the revision was competent. A.I.R. (Vol. 23) 1936 All. 179= 1936 A.L.J. 36=1936 A.L.R. 283=58 All. 721= 161 Ind. Cas. 493.

——S. 11—Order of remand under S. 151—Objection in appeal from final decree—Not barred.

The suit, as originally framed, was **prima facie** barred by limitation and yet the plaintiffs did not state the facts on which they relied to save the bar of limitation. It was only in an appeal from the original decree that the question was raised and the Appellate Court then remanded the case to afford the plaintiffs an opportunity of proving the

acknowledgment. The defendants had appealed against the order of remand and their appeal was dismissed. It was contended that the defendants were not entitled to challenge the order of remand in the appeal from the decree:

Held, that the order of remand itself, however, was an order under S. 151, C.P. Code, and was, therefore, not appealable. The rejection of their appeal, therefore, did not debar the appellants, i.e., the original defendants from raising the matter in the appeal from the appellate decree. A. I. R. (Vol. 28) 1941 Pat. 147=21 P.L.T. 702=6 B. R. 864=19 Pat. 938=189 Ind. Cas. 855.

——S. 11—Prior decision—Order of remand by the Judge—If binding on his successor.

Lower Appellate Court remanded case directing one of several documents in question to be admitted. When the case came up again before the successor of the Judge who passed the first order of remand, the latter, made a second order of remand directing that all the documents should be admitted.

Held, that the successor was not bound by the first order of remand and the second order of remand passed by him was proper. 116 Ind. Cas. 55=A.I.R. 1929 Oudh 398.

12. (j) Mortgage suit.

——S. 11—Mortgage suit—Application for personal decree—Order of rejection—Res judicata.

Although a mortgagee is entitled in his original suit on the mortgage to ask for a personal decree against the mortgagor, where a claim for personal decree is made and rejected on merits, it operates as **res judicata** and is binding on the parties to suit when not appealed from. A.I.R. (Vol. 24) 1937 All. 54=1936 A.L.J. 1228=1937 A.L.R. 99=166 Ind. Cas. 884.

——S. 11—Mortgage suit—Application for final decree—Dismissal—Res judicata.

In a proceeding under a mortgage decree, the assignee decree-holder applied to the Court to be recognised as such and to pass a final decree. The Court dismissed the application holding that no final decree can be passed, as the legal representatives of the deceased defendant were not brought on record within proper time. The present application is therefore made asking for sale of the mortgaged property. **Held,** that the application is barred on the principle of **res judicata.** 62 Ind. Cas. 856=14 L.W. 18=A.I.R. 1921 Mad. 461.

——S. 11—Decree for sale—Purchase—Decision of suit after mortgage but before purchase is not res judicata.

A purchase in auction-sale in execution of a mortgage decree for sale as also the proceedings in which the decree was obtained are a part of the working out of the rights of the mortgagee under his mortgage. The rights of the purchaser are not therefore affected by **res judicata** by the decision in a suit subsequent to the mortgage though previous to the purchase. 77 Ind. Cas. 922=A. I.R. 1922 Mad. 390 (1).

——S. 11—Mortgage—Successive suits.

A mortgagee who has sued for and obtained a decree for possession is barred from bringing a fresh suit for possession unless he had been dispossessed after the date of the former decree. 67 Ind. Cas. 281=2 Lah. L.J. 678=71 P.L.R. 1922 =A.I.R. 1921 Lah. 394.

——S. 11—Mortgage—Decree—Effect—Merger.

(Obiter).—When a decree is once passed in a suit on a mortgage, the mortgage merges in the decree and a second suit on the mortgage cannot be brought. 11 A.L.J. 634 (2), Foll. 20 P.R. 1917=22 P.W.R. 1917=39 Ind. Cas. 753=26 P. L.R. 1917.

——S. 11—Mortgage suit—Preliminary decree—Death of the mortgagor—Passing of final decree, despite objections from legal representatives—Separate suit if barred.

Where, after preliminary decree was passed in a mortgage suit for sale, certain persons were brought on record as legal representatives of the deceased mortgagor, who challenged the mortgage for want of consideration and legal necessity but final decree was passed against them, the Court having refused to go behind the preliminary decree, the final decree would not operate as **res judicata** in a separate suit brought by them for declaration that the decree was not binding on them. 1929 A. L.J. 425=115 Ind. Cas. 462=A.I.R. 1929 All. 252.

——Ss. 11 and 47—Mortgage suits—Puisne mortgagee's suit against prior mortgagee for redemption and against mortgagor for possession—Subsequent suit for possession against mortgagor alone barred.

A **puisne** mortgagee sued the prior mortgagee for redemption and the mortgagor for possession of the mortgaged premises and in 1893 obtained a decree for redemption and possession. In 1908, he again sued the mortgagor for possession alone dating his cause of action in 1897, the date of payment of the prior mortgage.

Held, the suit for possession was not a question relating to the execution, discharge, or satisfaction of the decree, though the plaintiff might have obtained possession by execution and that the cause of action against the mortgagor in both the suits was the same, and that the present suit was barred by S. 11. 12 P.R. 1914=22 Ind. Cas. 896= 124 P.L.R. 1914.

——S. 11 (S. 13, Old Code)—Suit on first mortgage—Second mortgagee not impleaded—Part of hypothecated prrperty sold—Second suit for sale of remainder—If barred.

Where there are two simple mortgages on a certain property, in a suit upon the first mortgage, the second mortgagee should be impleaded in order to give him an opportunity to redeem that mortgage. If he is not so impleaded and a decree is obtained and a sale held in execution of a decree the auction-purchaser may not be competent to maintain an action in ejectment against the second mortgagee, if the latter is in possession. But a person interested in the first mortgage is not precluded from bringing a second suit for the sale of a part of the mortgaged property for the sale of which a proper decree has not been passed against the second mortgagee. The object of the suit is to afford to the latter an opportunity to redeem

the property from the first mortgage, and neither S. 11 (S. 13, Old Code) nor O. 2, R. 2 (S. 43, Old Code), is a bar to this suit inasmuch as the mortgagee was not a party to the first suit. (1909) 7 A.L.J. 29=32 A. 119.

——S. 11—Mortgage—Decree for sale before T. P. Act unexecuted—Subsequent suit for redemption not barred.

In 1879 mortgagee filed a suit to recover the money due on the mortgage, by the sale of the mortgaged property. The suit ended in a decree and an ineffectual execution application was taken out. In 1926 mortgagor filed a suit to redeem,

Held, that the later suit was not barred by **res judicata.** 32 Bom.L.R. 933=A.I.R. 1930 Bom. 401=126 Ind. Cas. 882.

——S. 11—Mortgage suit—Decree directing mortgagee to withdraw mortgage money deposited by mortgagor and to deliver property to mortgagor—Subsequent suit for redemption is barred.

In the previous suit a decree was passed directing the mortgagee to take the mortgage money which had been deposited in Court by the mortgagor and to deliver the property to the mortgagor. The mortgagor applied for delivery of the property. Afterwards he gifted the property to the plaintiff. The application for the delivery of the property was subsequently dismissed. The plaintiff brought another suit to redeem the property,

Held, that the decree in the previous suit was not one under C. P. Code, O. 34, R. 7 but was a combined decree under O. 34, R. 8 and, as under it the mortgagee was permitted to withdraw the money that had been already deposited in Court, it had the effect of extinguishing the mortgage and a second suit for redemption was barred. 6 L.R.A. Civ. 241=85 Ind. Cas. 480=A.I.R. 1925 All. 484.

——S. 11—Redemption suit—Dismissal that mortgagor had no right then—Res judicata.

Obiter if a suit for redemption is brought by the mortgagor even though he had no right then to redeem and the suit is dismissed, the decision operates as **res judicata** in the subsequent suit for redemption brought when the mortgagor acquires such a right. 7 O.W.N. 209=122 Ind. Cas. 769=A.I.R. 1930 Oudh 270.

——S. 11—Prior suit for redemption—Consent decree—Right to redeem extinguished by default—Another suit barred.

Where there was not only an agreement between the parties, but also an order of the Court that in default of payment of two instalments. "the right to redeem was not to remain" it was held that on default the right to redeem was extinguished under S. 60, Transfer of Property Act and another suit for redemption was barred by the principles of **res judicata.** A.I.R. (Vol. 32) 1945 Bom. 307=47 Bom.L.R. 90.

——S. 11—Decree for redemption of mortgage—Second suit for redemption is barred.

A second suit for redemption does not lie. 46 Bom. 348=64 Ind. Cas. 1004=23 Bom.L.R. 1176=A.I.R. 1922 Bom. 127.

——S. 11—Mortgage—Two redemption suits.

There can be no second suit for redemption when once a decree has been passed, though it does not fix time for payment and consequences of non-payment. 48 Ind. Cas. 922=5 O.L.J. 698.

——S. 11—Redemption decree not executed—Subsequent suit for redemption—Maintainability.

Where a suit for redemption has been instituted and a decree for redemption has been passed therein but not executed, a subsequent suit is not maintainable for the redemption of the same mortgage. 25 Mad. 300, and 39 Mad. 896, Foll. 43 Bom. 334, Diss. 28 O.C. 212=87 Ind. Cas. 290=A.I.R. 1925 Oudh 696.

——S. 11—Redemption decree not executed—Mortgage.

A decree for redemption of usufructuary mortgage was defective in form as it did not fix a period for payment of mortgage amount and did not contain any provision or consequence for its non payment. The decree not having been executed by the mortgagor, his sons brought a suit for redemption. Per **Piggot, A. J. C.** The suit was not barred. Per **Evans, J. C.** and **Lindsay, A.J.C.** The suit was barred under S. 11 as the original cause of action had been exhausted. 12 Ind. Cas. 993=14 O.C. 257.

——Ss. 11 and 47—Mortgage—Suit for redemption under the Deccan Agriculturists' Relief Act—Subsequent suit for redemption barred.

Where in a suit for redemption of a mortgage a decree for payment of the mortgage amount by instalments is passed under the Deccan Agriculturist's Relief Act, but the decree is left unexecuted, it is not open to the mortgagor or any person claiming under him by a title subsequently derived, to bring a suit for redemption of the property. The remedy of the mortgagor or his representative is in execution and S. 47 of the C.P. Code will bar a suit. 20 Bom.L.R. 164=44 Ind. Cas. 908 =42 Bom. 246.

——S. 11—Mortgage—Decree for redemption under Deccan Agriculturists' Relief Act—Second suit for redemption.

Where a decree for redemption passed under the Dekhan Agriculturists' Relief Act does not put an end to the relationship of mortgagor and mortgagee, a second suit for redemption is not barred. The question whether the previous decree puts an end to such relationship is a question for decision in each case. A.I.R. (Vol. 18) 1931 Bom. 480 =33 Bom.L.R. 844=134 Ind. Cas. 699 (2).

——S. 11—Redemption suit—Decree nisi—Second suit not barred—Deccan Agriculturists' Relief Act.

If a mortgagor brings a redemption suit and obtains a decree **nisi,** which entitles him on payment of a certain sum by a certain time to get back the property and nothing further is done, and no attempt is made to get back the possession and no order is made barring the mortgagor to redeem, then a second suit can be brought for redemption and the same would not be barred either by S. 11, or S. 47 of the C.P. Code, even though the suit is under Deccan Agriculturists' Relief Act. Whether a decree made under the Deccan Agriculturists' Relief Act in a mortgage suit is a decree

nisi or a decree which puts an end to the mortgage will always be a question for decision in each case when it comes before the Court. 43 Bom. 334 F. B., Foll. 25 Bom.L.R. 211=72 Ind. Cas. 315 =A.I.R. 1923 Bom. 287 (2).

——S. 11—Mortgage suits—Second suit for redemption, maintainability of—Interpretation of prior decree.

The question whether a decree made in a suit for redemption bars a second suit for redemption depends upon the pleadings of the parties and the decision of the Court in the first suit. If the decree in the previous suit does not put an end to the relationship of mortgagor and mortgagee but merely fixes the amount of the mortgage-money and declares the mortgagors' right to recover possession on payment of that sum, then the matter as to when and how the mortgagors may recover possession of the mortgaged property on payment of the ascertained sum of money or the mortgagee may foreclose or sell in default and thus in either case the mortgage be extinguished, must be held not to have been finally heard and decided and a second suit for redemption would not be barred. A.I.R. (Vol. 17) 1930 Oudh 465=7 O.W.N. 902 =L.R. 11 O. 286 Rev.=130 Ind. Cas. 75.

——S. 11—Redemption suit—Dismissal for default under 1859 Code—No res judicata.

The dismissal of a suit for redemption for default under S. 127, C.P. Code of 1859, is not an order extinguishing the right of redemption under S. 60, T.P. Act, and does not bar a second suit for redemption of the mortgage. And this rule holds good even where the previous suit was dismissed before the Transfer of Property Act was made applicable to the province: 30 Bom.L.R. 1089=113 Ind. Cas. 384=A.I.R. 1929 Bom. 116.

——S. 11—Prior decree for redemption—Non-payment of sum fixed—If a bar to a fresh suit.

The fact of a previous redemption suit being brought and being dismissed for failure of the mortgagors to pay the sum decreed for redemption will not operate under the rule of **res judicata** to prevent the bringing of a subsequent suit for redemption. 24 All. 44 (F.B.); A.I.R. 1922 All. 377; Foll. 1929 A.L.J. 761=119 Ind. Cas. 525 =A.I.R. 1929 All. 409.

——S. 11—Redemption suit—Conditional decree—Subsequent suit not barred.

In a suit for redemption by the plaintiffs to redeem a simple mortgage, the Court gave a decree for redemption on payment of certain amount in default of which the suit was to stand dismissed. The money was not paid and the defendants recovered their costs. The plaintiffs brought a suitt to redeem the same mortgage; **Held,** the interpretation of the decree was that the dismissal of the former suit left the parties in the same position which they occupied before the suit was brought and the plaintiffs could sue for redemption. 44 All. 730=69 Ind. Cas. 167=20 A.L.J. 631=A. I.R. 1922 All. 377.

——S. 11 (S. 13 Old Code)—Mortgage—Suit for redemption—Conditional decree—Conditions not fulfilled—Second suit for redemption—If barred.

Where a mortgagor brings a suit for redemption and obtains a conditional decree but omits to fulfil the condition imposed upon him, he is not debarred from bringing a second suit for redemption unless the decree lays down that if he fails to fulfil these conditions the property will be sold or the will be debarred of all his rights to redeem. (1909) 5 Ind. Cas. 269=7 A.L.J. 185=32 A. 215.

——S. 11—Redemption Suit—Decree not drawn up as per O. 34, R. 7—Subsequent suit for redemption not barred.

Where it was provided in the previous decree that on plaintiff's failure to pay the money and the Court-fees within the prescribed period the decree could not be executed, but the decree was not drawn up in the manner prescribed by O. 34, R. 7, of the C.P. Code and did not contain any clause that, if payment was not made on or before the date fixed by the Court, the plaintiff should be debarred from all right to redeem or that the mortgaged property should be sold, and where no final decree was passed under R. 8.

Held, another suit for redemption was not barred either by O. 34, R. 7 or by S. 11. 5 Lah. 371 =84 Ind. Cas. 67=A.I.R. 1925 Lah. 31.

——S. 11—Redemption suit—Preliminary decree —Amount due not fixed nor date for payment fixed —Default in paying Commissioner's fee may entail dismissal of suit but would not extinguish right of redemption.

Unless there is an extinction of the mortgage right or of the right to redeem, there can be no question of a bar by way of **res judicata** to a second suit for redemption.

In a redemption suit, the preliminary decree after providing that an account should be taken of what would be due to the defendant on the mortgage and for costs, and that a commission should be issued for taking the accounts upon the plaintiff's application by 10th December, 1919, provided in the last clause that if the amount so due, that is to say, after taking the account and declared by the Court, is not paid within the period fixed by the Court, the plaintiff shall be debarred from all rights to redeem the property:

Held, that there had been no determination of the amount by the Court, nor any date fixed for payment thereof. The default in payment of the Commissioner's fee could not be regarded as bringing into effect what was only foreshadowed as a contingency in the last clause of the decree. The default might lay the plaintiff open to some other penalty, for instance, the dismissal of his suit, but the default in paying the Commissioner's fee would not extinguish the right of redemption altogether. The decree could not, therefore, operate as **res judicata.** A.I.R. (Vol. 28) 1941 Mad. 217=1940 M.W.N. 404=51 L.W. 666.

——S. 11—Redemption suit—Preliminary decree passed—Subsequent suit not barred.

When a preliminary decree in a redemption suit, stated that if the payment be not made at a certain date, the plaintiff would forfeit his right to redeem. **Held,** that the condition was illegal and a second suit was not barred. The right of redemption could not be extinguished by preliminary decree but could only be extinguished by a final

decree. (93 P.R. 1908, Foll.) 75 Ind. Cas. 919 =A.I.R. 1923 Lah. 680.

——Ss. 11 and 47—Mortgage—Decree nisi—Failure to apply to make the decree absolute—Execution time barred—Second suit for redemption not barred.

Held, by the Full Bench (**Shah J.** dissenting), a mortgagor, who has brought a suit for redemption and obtained a decree **nisi** which neither the mortgagor nor the mortgagee has applied to be made absolute, can after the execution of that decree is time-barred, bring a fresh suit for redemption, and the same would not be barred by S. 11 or S. 47 of the Code. (Per **Scott, C.J.**).—The accounts up to the date of the previous decree **nisi** cannot be re-opened in the subsequent suit. 21 Bom. L.R. 56=49 Ind. Cas. 894=43 Bom. 334.

——S. 11—Mortgage—Preliminary decree for redemption—Second suit for redemption not barred.

The right to redeem is not lost unless an order absolute is obtained under S. 93, T. P. Act, and a fresh suit for redemption is not barred by the preliminary decree for redemption. 18 Ind. Cas. 326.

——S. 11—Decree nisi.

A decree **nisi** is not **res judicata** and so is not the material upon which it is based. 10 Ind. Cas. 748=13 Bom.L.R. 162.

——S. 11—Mortgage—Successive suits for redemption.

Though redemption decree until made final does not extinguish the equity of redemption it may bar a second redemption suit by mortgagor. 19 Ind. Cas. 393=6 S.L.R. 140.

——S. 11—Redemption previously decreed—Right to redeem reserved—Subsequent suit for redemption.

Where the decree in a suit for redemption of a mortgage provided for payment by instalments by the mortgagor of the mortgage money, in default of which the mortgagee was to remain in possession in lieu of interest, and also reserved the right to redeem, a subsequent suit for redemption is not barred. 45 Bom. 1335=63 Ind. Cas. 902=23 Bom. L.R. 593.

——S. 11—Redemption suit—Mortgagor failing to comply with preliminary decree—Second redemption suit during the continuance of first suit—Maintainability.

A mortgagor, who has failed to comply with the terms of a decree in a redemption suit filed by him, is not entitled during the continuance of that suit, or before the final decree in that suit has become incapable of execution, to maintain a second suit for redemption of the same mortgage. 100 Ind. Cas. 324=A.I.R. 1927 All. 305.

——S. 11—Mortgage—Successive redemption suits in respect of different mortgages over the same property.

Where the first suit is to redeem one mortgage, it does not bar a suit to redeem a mortgage of a different date though the property sought to be redeemed and the principal amount of the mortgage are identical. For instance if a mortgagor, who sought to redeem a specific mortgage fails in the suit, because the mortgage is not proved, he is not thereby precluded from seeking to redeem the same property from another specific mortgagee. The dismissal, of a former suit brought to redeem an invalid mortgage, is really no bar to a subsequent suit in which a different mortgage, which subsequently sprang into existence by the operation of the statute of limitation, is sought to be redeemed. A.I.R. 1930 Mad. 264=127 Ind. Cas. 139.

——S. 11—Redemption decree—Amount due—Res judicata.

Suit for redemption—Decree in previous suit by mortgagee for possession of mortgaged property in terms of deed fixing amount due under mortgage and subsequent bonds executed by mortgagor in lieu of interest, held operated **res judicata** in respect of amount due under mortgage. A.I.R. (Vol. 27) 1940 Oudh 273=1940 O.W.N. 391 & 604=1940 A.W.R. 182 & 340=15 Luck. 545=188 Ind. Cas. 623.

——S. 11—Mortgage—First suit not framed as a redemption suit—Decree for possession—Second suit for redemption not barred.

Where the former suit was not properly framed as a redemption suit but ended in a decree for possession subject to the payment of the amount due under the mortgage and the amount remained unpaid within the prescribed period of 30 days, **held** a second suit for redemption was not barred by **res judicata**. 15 Ind. Cas. 15=10 A.L.J. 36.

12. (k) Necessary findings.

——S. 11—Decision on points properly belonging to subject of litigation.

The doctrine of **res judicata** applies not only to the actual decision in the case but also to the facts and grounds for the judgment pleaded by the parties. Anything which is admitted and which would be fundamental to the decision of the earlier suit is also part of the **res judicata** created by the judgment. The plea of **res judicata** applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment but also to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. I.L.R. (1948) Nag. 747=A.I.R. 1948 Nag. 358.

——S. 11—Plaintiff claiming ownership by adverse possession—Finding that Government was owner—Res judicata in subsequent suit claiming right of easement.

Where the plaintiff is claiming a right of ownership by adverse possession it is necessary to decide what period of possession would give him such a right **i.e.**, whether his possession has been adverse to a private person or to the Government. The question whether the Government was the owner is one which has to be decided. In a subsequent suit by the same person claiming a right of easement the finding that the Government had been the owner of the property before it was transferred to the defendant operates as **res judicata**. A.

I.R. 1943 All. 362=209 Ind. Cas. 578, reversing. A.I.R. 1942 All. 405=1942 A. L. J. 483=205 Ind. Cas. 220.

——S. 11—Suit failing on one issue and capable of being dismissed—Decision of another issue raised and decided, if can be said to be not necessary for decision.

Merely because the suit fails on one issue and can, therefore, be dismissed, it cannot be said that the decision of another issue which was raised and decided was not necessary for the purpose of the decision of the suit. Consequently, where the question as to the right to mesne profits depended upon the proof of title to the land, merely because on question of fact relating to accounts and to the veracity of the witnesses, the suit fails, the Appellate Court cannot put aside the finding of the lower Court on the question of title and leave the matter again to be re-agitated. A.I.R. (Vol. 24) 1937, Sind 157=31 S.L.R. 5=170 Ind. Cas. 310.

——S. 11—Suit by minor son dismissed—Finding that father's debt was binding—Res judicata—Suit dismissed also as not maintainable.

A joint Hindu family consisted of **A**, his son **B** and **B's** three minor sons. A decree was obtained against **B** by one of his creditors for a personal debt of **B**. The decree-holder attached a half share in the joint family property. The minor sons objected and the Court ordered that the rights and interest of **B**, without specifying the share, should be sold. **B's** sons sued for partition of their share in the property. The suit was dismissed on the ground that the debt not having been contracted for an immoral purpose, the whole estate was liable for the debt in execution for the decree and that the suit as brought was not maintainable, being one for partial partition. The purchaser of **B's** rights in Court sale then sued for a declaration that he was entitled to a half share:

Held, (i) that the decision in the minors' suit that the debt was binding on the minors operated as **res judicata** notwithstanding the fact that their suit was dismissed also on the ground that it was not maintainable:

(ii) that inasmuch as only the rights and interest of **B** were sold in execution, the purchaser did not acquire the shares of **B's** minor sons. A.I.R. (Vol. 18) 1931 All. 131=1931 A.L.J. 104=130 Ind. Cas. 1.

——S. 11—Scope of doctrine—Whether extends to facts involved as ground-work for decision.

The bar of **res judicata** is not merely confined to the decision itself but extends to all facts involved in it as necessary steps or ground-work for the decision.

In a previous litigation between the Official Assignee and firm **A** the Court held that a firm **P** was so intimately connected with firm **T** that the insolvency of firm **T** involved the right of the Official Assignee to have the transfers of firm **P** in favour of firm **A** declared void:

Held, that the first finding was impossible unless the Court had held that the **P** firm and the **T** firm were one and the same in the eye of the Insolvency Court and this finding was necessary for the decision of the question before it, and hence that finding was **res judicata** as between the parties. A.I.R. (Vol. 24) 1937 Rang. 214=14 Rang. 652=169 Ind. Cas. 491.

——S. 11—Estoppel as regards all findings essential to sustain judgment.

In dealing with questions as to what is and what is not **res judicata**, the substance must be regarded rather than the form. **Res judicata** or estoppel by judgment is not confined to the judgment but extends to all facts involved in it as necessary steps or ground work upon which it must have been founded. A judgment operates by estoppel as regards all the findings which are essential to sustain the judgment. A.I.A. (Vol. 22) 1935 Rang. 118=159 Ind. Cas. 45.

——S. 11—Decision based on several grounds—If res judicata with respect to each of them.

A decision which is based upon several grounds would operate as **res judicata** with respect to each of the grounds. A.I.R. (Vol. 19) 1932 Cal. 385=54 C.L.J. 479=36 C.W.N. 72=137 Ind. Cas. 696.

——S. 11—Suit to recover possession—Possession not given for want of notice—Question of title decided—Subsequent suit for possession.

Where the plaintiffs first filed a suit, as owners of the land in suit, to recover possession of the land from the defendants who were annual tenants, but the Court declined to give a decree for possession on the ground that proper notice to quit had not been given and ordered the defendants to pay damages for use and occupation of the land for three years prior to the suit, and the plaintiffs subsequently instituted a suit for recovery of possession of the land with mesne profits from the defendants and the defendants contended that the plaintiffs were barred from laying claim to possession, by virtue of the decree in the prior suit:

Held that inasmuch as the first suit had decided the question of plaintiffs' ownership of the lands and defendants' tenure as ordinary tenants and it was necessary to decide that question in the first suit, the defendants were not at liberty to re-agitate the question in the second suit. A.I.R. (Vol. 19) 1932 Bom. 484=34 Bom.L.R. 936=139 Ind. Cas. 206.

——S. 11—Suit for possession as owner—Finding that plaintiff had only mortgagee rights — Question of title—Res judicata.

A mortgaged a grove to **B**. **B** sold to **C** a mango tree as owner. **C** sued **A** for possession of half the mango tree and value of the fruit that **A** had taken, claiming to be owner of half the tree by virtue of his purchase. **A** contended that **C** did not acquire any ownership but had only mortgagee rights at the most, and that the tree was not included in **B's** mortgage. It was found that **C** had only mortgagee rights in half the mango tree. In a subsequent suit it was contended that the decision in the suit on the question whether **C** was the owner or mortgagee of half the tree did not operate as **res judicata** as the decision was unnecessary for passing a decree for possession:

Held, that it was necessary to find out the basis of **C's** title in the previous suit and the decision on that question operated as **res judicata**. (1931) 130 Ind. Cas. 194=1930 A.L.J. 1309.

——S. 11—Finding on issue considered necessary.

A question raised at the instance of a party and decided by the Court as necessary operates as **res judicata** in a subsequent suit, even though the issue in the previous suit was in fact not necessary. 63 Ind. Cas. 161=33 C.L.J. 317=A.I.R. 1921 Cal. 368.

——S. 11 (S. 13 Old Code)—Finding forming basis of decision not embodied in decree—Res judicata.

A finding which is essential to the decision of the Court may, when the order which is based upon it has become final, constitute a **res judicata,** notwithstanding that the finding is not embodied in the decree of the Court. (1907) 1908 A.W. N. 41=5 A.L.J. 48.

12. (1) Question not decided.

——S. 11—Question not decided—Effect on subsequent suit.

Where the question in issue between the parties in the subsequent suit was not before the Court and was not decided in the previous suit between the parties, there is no bar of **res judicata** in the subsequent suit. A.I.R. (Vol. 19) 1932 Bom. 3= 33 Bom.L.R. 1303=(1932) Bom. 209=136 Ind. Cas. 801.

——S. 11—Question left undecided.

If in a former suit between the same parties, the Court, finding itself unable to comes to a decision on a certain point owing to an error of form in the frame of suit, refrains from deciding that point and leaves it to the plaintiff to bring a fresh suit to seek relief on that point, the question advisedly left undecided in the former suit cannot be said to have been heard and finally decided within the meaning of S. 11, C.P. Code, nor is the subsequent suit barred by O. 2, R. 2. A.I.R. (Vol. 18) 1931 Mad. 830=1931 M. W. N. 1008=135 Ind. Cas. 718.

——S. 11—No finding.

A decision in a previous suit cannot operate as **res judicata** in a subsequent suit if there was no contest, no issue and no finding **between the parties** although they were ranged on opposite sides. 76 Ind. Cas. 635=A.I.R. 1924 Nag. 124.

——S. 11—No adjudication.

Where there is no express adjudication on a particular point there is no **res judicata**. 6 Lah. L.J. 45=80 Ind. Cas. 525=A.I.R. 1924 Lah. 469.

——S. 11—No decision.

Where a matter is only heard but not decided either because it is unnecessary or it is reserved, the matter is not **res judicata**. 57 Ind. 735=13 L.W. 25.

——S. 11—Refusal to decide issue.

Refusal of the Court to determine a particular issue does not operate as **res judicata** in the trial of that issue in a subesequent suit. 4 Pat.L.W. 299=45 Ind. Cas. 326=1918 P.H.C.C. 152.

——S. 11—Issue expressly excluded from decision —Decision not res judicata.

Expl. 4 of S. 11 of the C.P. Code is not applicable to a case where the parties had in a previous suit, put forward all the grounds of attack and defence which were embodied in clear and distinct issues but the Court not only did not decide them but expressly excluded them from decision. 70 P.R. 1918=11 P.L.R. 1918=44 Ind. Cas. 859= 71 P.W.R. 1918.

——S. 11—Question left open—Not res judicata.

Where a particular question in dispute is expressly left open for a separate proceeding, the question does not becomes **res judicata** in a subsequent suit. 96 Ind. Cas. 302.

——S. 11—Issues left open—No bar—C. P. Code, O. 2, R. 2.

Where a Court expressly declares (rightly or wrongly) that it is not competent in a particular suit to grant a specific relief claimed therein and directs the plaintiff to take separate proceedings for the relief, his subsequent suit to get that relief is not barred by **res judicata** or by O. 2, R. 2, C.P. Code. 72 P.W.R. 1915=29 Ind. Cas. 731 =160 P.L.R. 1915.

——S. 11—Issue left open by consent.

Where a claim for abatement of rent had been raised in a previous litigation but by mutual consent it was left open for consideration by the Court the matter would not be **res judicata** in a subsequent suit for rent. 27 Ind. Cas. 265=1914 M. W.N. 910.

——S. 11—Point left undecided.

Where a point is expressly left undecided by the Court in a suit it can be agitated in subsequent suit. 48 All. 34=88 Ind. Cas. 822=23 A.L.J. 950= 6 L.R.A. Civ. 547=A.I.R. 1925 All. 770.

——S. 11—Issue not decided upon.

Where a question though directly and substantially in issue was left open though it should have been decided, it is not **res judicata**. 41 Ind. Cas. 19.

——S. 11—Question raised but not decided.

A question raised in the previous suit between the same parties but remaining unadjudicated upon does not becomes **res judicata**. 6 P.W.R. 1918.

——S. 11—Issue raised but not decided—Not res judicata.

The plaintiff in subsequent suit was not sued in the prior suit in the same capacity in which he sued in the later; though he professed to have the capacity of trustee of the suit property and contended that the property in dispute was trust property, he did not contest the suit to the end, and no finding on his contention regarding the nature of property was recorded; and after he ceased to contest the suit it proceeded, as it had begun on the basis that the property concerned was private property.

Held, that the decision in the prior suit that the property was private property is not **res judicata**. 103 Ind. Cas. 887=A.I.R. 1927 Mad. 1100.

——S. 11—Plea of occupancy right raised but not decided.

Where the question of occupancy right was not decided in a previous suit but the same was disposed of on another plea.

Held, that the point was not **res judicata** in a subsequent suit. 30 M.L.T. (P.C.) 279=64 Ind. Cas. 231=48 I.A. 49=48 Cal. 460=14 M.L.W. 265=A.I.R. 1922 P.C. 241.

——S. 11 (S. 13 Old Code)—Issue raised but not decided in former suit—Res judicata.

Where a certain matter was not really dealt with and decided in a previous suit, although an issue was raised in regard to that matter, a subsequent suit involving the same matter would not be barred by reason of the previous suit. (1898) 5 C. W.N. 304.

——S. 11—Mere suggestion by Court—Not res judicata.

The mere compliance with a suggestion of the Court to take a proceeding contemplated by a certain enactment is not **res judicata** on the question as to whether that particular enactment applies to the case, where there is no judicial decision on the point. 13 M.L.W. 37=61 Ind. Cas. 979=1921 M.W.N. 181=A.I.R. 1921 Mad. 126.

——S. 11—Suit challenging mortgage held barred by limitation—No decision as to validity of mortgage—Question of validity of mortgage if can be raised in a subsequent suit.

Where a suit challenging a mortgage by a Hindu widow is dismissed as barred by limitation and the question of the validity of the mortgage is not decided, it cannot operate as **res judicata** so as to bar that question being raised in subsequent suit by the reversioner. I.L.R. (1950) A. 564=1949 A.W.R. 537=A.I.R. 1950 All. 7.

——S. 11—Suit by son claiming property on behalf of himself and his father and brothers, dismissed on ground of limitation—Subsequent title suit by father in respect of same property.

A person brought a suit claiming certain property not only on his own behalf but also on behalf of his father and brothers. The suit was dismissed only on the ground that the plaintiff had failed to sue within three years of his attaining majority. The father subsequently brought a title suit claiming the same property:

Held, that the question raised by the plaintiff in the previous suit was not finally decided and the father's suit was not, therefore, barred by **res judicata.** A.I.R. (Vol. 29) 1942 All. 410=1942 A. L.J. 506=I.L.R. (1942) All. 624=203 Ind. Cas. 371.

——S. 11 (S. 13, Old Code)—Suit for cancellation of bond—Dismissal on ground of limitation—Subsequent suit to enforce bond—Plea that bond was vitiated by fraud—If open.

The dismissal of a prior suit for cancellation of a bond on the ground of limitation cannot bar the defence in a subsequent suit on the ground that the bond was unenforceable in law for fraud. 6 Bom. L.R. 592, foll.; 7 Bom.L.R. 773, not foll. (1907) 8 Bom.L.R. 296=30 B. 395.

——S. 11—Suit to enforce mortgage by two of the sons of the mortgagee impleading third son as defendant—Decree for plaintiffs' two-third share reserving third son's remedy—Subsequent suit by third son as regards his share—Not barred by res judicata.

For part of the consideration for the sale of immoveable properties the vendee executed a mortgage over some properties in favour of the vendor and his sons. Later the vendor had another son. After his death two of the sons filed a suit on the mortgage for the whole amount due impleading the third son and the mortgagor as defendants. The Court however passed a decree only for the two-third share due to the plaintiffs and the third son was left with his remedy to recover his one-third share by separate suit. The mortgagor sold the properties and the vendee paid off the decree amount. The third son filed a suit to recover his share under the mortgage and it was contended by the purchaser from the mortgagor that the suit was not maintainable.

Held, that the suit was maintainable. Far from the plaintiff being barred by **res judicata** it was the mortgagor and his representative who were bound by the former judgment. That the decree in the former suit was not correct in form was no ground for not decreeing the present suit. I.L.R. (1948) Mad. 190=1948 Mad. 172=1947 M.W. N. 266=60 L.W. 249 (2)=(1947) 1 M.L.J. 279.

——S. 11—Application to set aside alienations under S. 54, Provincial Insolvency Act allowed—No decision on question of mesne profits and interest—Subsequent application for mesne profits and interest, held not barred.

Where, in his application under S. 54, Provincial Insolvency Act, asking for declarations that the alienations were void on the ground that they constituted fraudulent preferences, the Official Receiver had also asked for mesne profits and interest but no order was passed on these prayers by the District Judge who dismissed the application or by the High Court on appeal when it allowed the application and the Receiver subsequently applied for the recovery of mesne profits and interest:

Held, that the claim for mesne profits and interest was not barred by **res judicata.** A.I.R. (Vol. 33) 1946 Mad. 207=1945 M.W.N. 772=58 L.W. 665=(1945) 2 M.L.J. 557.

——S. 11—Decision as to ownership of particular portion of bed of river is not res judicata in suit regarding another portion of the same river.

A suit involving a question whether a bed of a particular portion of the river belongs to the Crown or not is not barred by **res judicata** by a decision in a previous suit involving the same question regarding another portion of the same river. A.I. R. (Vol. 32) 1945 Mad. 396=(1945) 2 M.L.J. 27=I.L.R. (1945) Mad. 420=221 Ind. Cas. 324.

——S. 11—Decision on a different point in previous suit does not operate as res judicata in a subsequent suit.

Where in a previous suit decided **ex parte** the only question involved on the construction of a document was whether defendant was entitled to rent and whether if rent was not paid he was entitled to possession:

Held, that the decision in that suit could not have operated as **res judicata** on the question whether that document was an outright sale or mortgage. A.I.R. (Vol. 31) 1944 Mad. 237=57 L.W. 42=(1944) 1 M.L.J. 30=1944 M.W.N. 38=219 Ind. Cas. 56.

——S. 11, O. 21, R. 58—Decision on claim for crops—Suit on claim for land.

The subject-matter of the claim order, that is the crops on the land, is not identical with the land itself. Consequently, a decision in a previous claim

for crops under O. 21, R. 58, does not operate as **res judicata** in a subsequent suit with respect to the land. A.I.R. (Vol. 29) 1942 Mad. 128=(1941) 2 M.L.J. 784=201 Ind. Cas. 199.

——S. 11—Suit framed under Muhammadan law barred under O. 22, R. 9 (1)—Suit under Customary Law not barred by res judicata.

Where a suit as framed under Muhammadan Law is barred by O. 22, R. 9 (1), C.P. Code, the question whether the subsequent suit, which is based on Customary Law, is barred cannot be held to be **res judicata** by reason of the previous decision whether that decision was right or wrong and whether it was on a pure point of law or on a mixed question of fact and law; for, in those circumstances, the question of Customary Law was neither heard nor decided and, therefore, there could not be any **res judicata** in the matter. A.I.R. (Vol. 28) 1941 Lah. 169=196 Ind. Cas. 130.

——S. 11—In a previous suit for **tangiand** it was found that lands were given in settlement for erecting **gola** house and the settlement rate was certain **dams** per **tangi** on grain etc., apart from the ground rent. The plaintiff relied on a judgment of 1872 holding him entitled to recover that sum:

Held, that the previous judgment did not amount to **res judicata** as it merely decided the defendant's liability to pay rather than the question of the nature of the sum payable. A.I.R. (Vol. 26) 1939 Pat. 633=20 P.L.T. 671=5 B.R. 983=183 Ind. Cas. 763.

——S. 11—Issue not raised.

A **jenmi** and the **melcharathdar** brought a suit in ejectment, having previously terminated the lease against the tenant to whom the lease was given before the **melcharath** was granted. The **jenmi** prayed for no relief in his favour. In the plaint was made the allegation that it was the **melcharathdar** that was both entitled to the property and liable to pay the value of the improvements. A decree in the suit was passed which directed possession to be delivered to **melcharathdar** on his depositing a certain amount, for payment to the tenant. This decree, however, was not executed and the tenant continued to remain in possession. Subsequently, another suit was brought to eject the tenant by the successor of the **jenmi** who granted the lease:

Held, that there was, in the former suit, no issue to be tried between the **jenmi** and the tenant, and there was no decree in favour of the **jenmi**. Consequently, there could not be actual or constructive **res judicata** which barred the subsequent suit. A.I.R. (Vol. 25) 1938 Mad. 581=47 L.W. 236=1938 M.W.N. 241=(1938) 1 M.L.J. 313=182 Ind. Cas. 68.

——S. 11—Issue not raised.

The defendant held a certain property under a **marupat** executed by his predecessor-in-title in favour of the plaintiff who subsequently granted a **melcharath** over the same property. A suit for eviction was filed by both plaintiff and **melcharathdar** in which a decree was passed in favour of the latter that if within three years he paid into Court the value of defendant's improvements, the defendant should surrender possession of the property to him. Such payment was never made and the defendant remained in possession. The plaintiff, the **jenmi**, then sued to evict the defendant. The question arose whether this suit was barred by reason of the previous decree:

Held, that there was no bar. The principle of **res judicata** cannot be applied against a party, who, though a plaintiff in name, obtains no decree in his own favour and cannot himself execute the decree which is obtained. The plaintiff's right to redeem would be barred only if the decree in the former suit declared it to be so. A.I.R. (Vol. 24) 1937 Mad. 213=1936 M. W. N. 759=169 Ind. Cas. 247.

——S. 11—Mortgage suit—Application for making decree final—Judgment-debtor alleging payment—Objection disallowed and decree made final—No appeal but suit by judgment-debtor for declaration that he had made payments and, therefore, decree could not be executed—Question of payment, whether res judicata.

In a mortgage suit, no payment which is made out of Court, whether or not it be certified under O. 21, R. 2, C.P. Code, can be taken into consideration at the time of passing the final decree.

In a mortgage suit, on application by the decree-holders for final decree, the judgment-debtor objected that he had made payments in satisfaction of the debt. The Court disallowed the objection and passed the final decree. In a suit by the judgment-debtor that he had made payments and hence the decree should not be executed:

Held, that the Court dealing with the final decree could not consider the payment and, therefore, the question of the payment of money was not governed by **res judicata**. A.I.R. (Vol. 25) 1938 Pesh. 12=174 Ind. Cas. 295.

——S. 11—Mortgagee applying for ejecting mortgagor—Application rejected—Another application by mortgagee at another stage, for same purpose.

Where, in a previous application by the mortgagee, the Court did not see fit to eject the mortgagor from possession, the mortgagee cannot be held to be estopped by principle of constructive **res judicata** from applying again to the Court for ejectment of the mortgagor. The Court, at a particular stage of the suit, might not have seen fit to pass an order evicting the mortgagor, but it is perfectly open to the Court if it seems fit at some later stage to do so. In making its first order, the Court considered what was the most convenient course to adopt at that time; and in doing so, it certainly did not decide any question against the mortgagee either expressly or by implication which would amount to a decision on some point which would prevent that point being raised in a subsequent stage of the suit. A.I.R. (Vol. 25) 1938 Mad. 325=(1938) 1 M.L.J. 249=1938 M.W.N. 1140=182 Ind. Cas. 87.

——S. 11, O. 2, R. 2—Prior suit for redemption alleging mortgage by conditional sale—Question of minority of executant raised but not decided—Subsequent suit to declare deed void on ground of minority of executant.

In an earlier suit for redemption the plaintiff alleged that the arrangement between the parties was a mortgage by conditional sale and the ques-

tion of the minority of the executant though raised was not decided. He also averred that the sale-deed was to be read in the light of an unregistered agreement for repurchase. The suit was dismissed, the Court holding that it could not look beyond the conveyance. In a subsequent suit, the plaintiff sought to declare the sale-deed void on the ground of the minority of the executant:

Held, that as the question of minority was not finally decided in the prior suit, the subsequent suit was not barred by **res judicata**. The causes of action were also different as the earlier suit proceeded on the basis that the sale-deed was valid while in the subsequent suit the plaintiff had to prove that he was a minor at the time of execution of the deed. The suit was, therefore, not barred by O. 2, R. 2, C.P. Code. A.I.R. (Vol. 24) 1937 Rang. 204=171 Ind. Cas. 913.

——S. 11—Mortgage suit—Plea of paramount title.

In respect of those against whom the decision in a suit to enforce a mortgage has proceeded **ex parte**, there is nothing to prevent them, if they so choose in a future suit to set up a paramount title. Even in respect of those who had appeared, if no express decision on the question of title has been given by reason of the indefiniteness, of the defendant's pleadings and the evidence in support thereof, they with the connected defendants would be equally entitled to raise the question of paramount title in a separate suit. A.I.R. (Vol. 21) 1934 Nag. 33=15 N.L.J. 173=144 Ind. Cas. 267.

——S. 11—Declaratory suit—Question of title not decided—No res judicata.

Where, in a suit by **inam** holder for a declaration that he was owner of whole village excluding communal **porambokes**, the decree does not decide whether tank beds were communal **porambokes**, the decree does not make title to tank beds **res judicata**. A.I.R. (Vol. 25) 1938 Mad. 193=1938 M.W.N. 244=47 L.W. 438=(1938) 2 M. L.J. 434=181 Ind. Cas. 688.

——S. 11—Declaratory suit—Question of plaintiff's title raised in appeal—Suit dismissed on another ground—Effect.

Where, in an appeal in a declaratory suit, plaintiff's title is challenged but the High Court dismisses the suit on another ground, not going into the grounds of title, the question of title is **sub judice** and cannot act as **res judicata** in a subsequent suit. A.I.R. (Vol. 25) 1938 Lah. 179=40 P.L. R. 662=178 Ind. Cas. 60.

——S. 11—Declaratory suit based on title dismissed on appeal—Question of title not gone into—No res judicata.

Where a suit for a declaration based upon the title of the plaintiff was dismissed on appeal without the question of title having been gone into at all, the question of title is not **res judicata** in a subsequent suit between the parties or their legal representatives, as that question cannot be said to have been heard and finally decided in the former suit. A.I.R. (Vol. 24) 1937 Rang. 421=1937 Rang.L.R. 136=173 Ind. Cas. 565.

——S. 11—Issue whether decree-holder could proceed against under-proprietary rights never raised—Judgment-debtor's failure to put in objection under S. 151, Oudh Rent Act, before date of sale—Res judicata, if applies.

Where it was argued that the judgment-debtor having failed to put in an objection under S. 151 of the Oudh Rent Act, earlier than the date fixed for sale of under-proprietary rights, the principle of **res judicata** applied and he was estopped from raising the objection:

Held, that in order to operate as **res judicata** there must be an order or decision of a Court on a point in issue but in the present case, the issue whether or not the decree-holder could proceed against the judgment-debtor's under-proprietary rights was never raised, much less decided, and hence there was nothing to operate as **res judicata** against the judgment-debtor. A. I. R. (Vol. 24) 1937 Oudh 43=1936 O.W.N. 717=1936 R. D. 388=164 Ind. Cas. 466.

——S. 11—Matters left undecided—Plea of res judicata—Pleadings and judgment in previous suit should be looked into.

When a decree in a previous suit simply dismisses a suit, it is necessary to look at the pleadings and judgment to see what were the points actually heard and decided in order to know what is barred by **res judicata**. It would be a contradiction in terms to say that the Court had finally decided matters which it expressly left untouched and undecided. A.I.R. (Vol. 24) 1937 Rang. 421=1937 Rang.L.R. 136=173 Ind. Cas. 565.

——S. 11, Expl. V, S. 151, O. XXXIV, R. 6—Application for personal decree—Court's failure to pass personal decree by mistake—Second application for personal decree—Whether barred by res judicata.

A preliminary decree in a mortgage suit was made final and the property sold. As some amount remained outstanding, the decree-holder applied under O. XXXIV R. 6, C. P. Code, for personal decree; but while overruling the objection that it was time barred, the Judge did not actually pass a personal decree. The decree-holder prayed under S. 151 to get the mistake corrected and also applied for personal decree, but this was rejected as being barred by **res judicata** under S. 11, Expl. V, C. P. Code:

Held, that it was an application which was disposed of by the Court and the word 'plaint' only being used in Expl. V, it did not apply in terms and hence the application was not barred.

Held, also that the Court had power to correct the mistake it had made as there was no fault of the decree-holder. A.I.R. (Vol. 24) 1937 Lah. 204=173 Ind. Cas. 894.

——S. 11—Finding negativing partition of particular date alleged by V cannot bar question whether V died joint with P at a date earlier than the alleged partition by V.

In the first suit **P** alleged that in 1910 he was divided from **V**. **V** replied that he separated in 1914. Court held that the latter partition never

took place. In the subsequent suit **P** alleged that **P** and **V** were joint till the death of **V** which took place some time after the year 1914. **V's** widow as the representative of **V** contended that **V** did did not die joint with P:

Held, that in the subsequent suit the question whether **P** died joint with **V** or not could not be barred by **res judicata** by the finding in the first suit which merely negatived the partition of 1914. A.I.R. (Vol. 23) 1936 Mad. 988.

——**S. 11**—Where a garnishee denies the debt but does not ask the Court to have the matter investigated, the garnishee can raise the matter in a subsequent suit by the purchaser. A.I.R. (Vol. 23) 1936 Nag. 218=168 Ind. Cas. 266.

——S. 11—Mutation application based on valid adoption dismissed—Question of validity, not considered.

Where an application was presented by the applicant for mutation of his name in place of the deceased and the application was based on valid adoption of the applicant but the application was rejected and subsequently a suit was filed against the applicant challenging the validity of his adoption:

Held, that since the validity of the adoption was not considered in the mutation proceeding, the order rejecting the application did not operate as **res judicata**. A.I.R. (Vol. 22) 1935 Cal. 716=63 Cal. 385=159 Ind. Cas. 437.

——S. 11—Question in subsequent suit not raised in previous suit—No res judicata.

A proceeding in which the **shebaits** raised a contest as regards their rights **inter se** cannot operate as **res judicata** in a subsequent suit in which the contest is as regards a right against the deity when the question could not be raised in the former suit due to the form of the suit. A.I.R. (Vol. 22) 1935 Cal. 641=158 Ind. Cas. 656.

——S. 11—Suit against widows by one of the members of family for possession—Suit dismissed—Question of nature of possession not gone into—Suit by son of the plaintiff against daughters of widows for possession of the same property on the ground that widows held only life estate.

In 1874, the father of the appellants instituted a suit against two widows in respect of the properties which had been mutated half and half in their names under the terms of a compromise of 1872. The suit of **A** was for possession of the one-half which had been mutated in the names of the two widows. The Subordinate Judge dismissed the suit. There was an appeal, and the High Court upheld the decision; the High Court's decision was that the plaintiff having agreed to the terms of the compromise of 1872, could not resile from them, and that under the terms of the compromise the widows were entitled to remain in possession of an 8 annas share. A second suit was brought after the death of one of the widows and the matter again went to the High Court and the Judges had held that the decision of the previous suit operated by way of **res judicata**. The plaintiffs brought a suit against the daughters of the widows for possession on the ground that the property was joint and the wodows held the 8 annas share as life-estate only:

Held, (1) that when the High Court is asked to apply the bar of **res judicata** it is entitled to see whether, according to their interpretation of the former judgment, the doctrine is applicable to the case.

(2) that the point in issue in this case was not diectly and substantially in issue in the previous case. The only point which was directly and substantially in issue in that case was whether, in view of the terms of the compromise set up by the two ladies, the plaintiff's father could claim possession over the estate which had been mutated in the name of the two ladies. The question as to the nature of the estate, whether it was limited for life or an absolute estate, was never put forward by the two ladies in their defence, and so there could have been no decision on that point and hence S. 11 of the C. P. Code, did not bar this suit. A.I.R. (Vol. 21) 1934 Oudh 265=11 O. W.N. 736=150 Ind. Cas. 519.

——S. 11—Suit on pronote by endorsee against endorser and executant—Note found to be forgery—Fresh suit against endorser, whether barred—Refusal to decide question of endorser's liability in prior suit, effect of.

The plaintiff as endorsee of a promissory note executed by *A* to *B* and endorsed by *B* to him brought a suit against *A* and *B*, seeking a decree against both. *A* denied the genuineness of the note. *B* admitted receipt of consideration for the endorsement but pleaded that he was an unnecessary party. The Court found that the pro-note was not genuine and that the plaintiff had no cause of action against *B* in that suit, his remedy being by way of a separate suit and dismissed the suit entirely. The plaintiff brought a fresh suit against *B*:

Held, that the decision of the Court in the prior suit that the plaintiffs could not recover in that suit but must sue again, though it was clearly wrong, was binding on the parties and as the liability on the endorsement was not heard and decided the second suit was not barred by res judicata. A.I.R. (Vol. 20) 1933 Mad. 868=1933 M.W.N. 587=38 L.W. 830=146 Ind. Cas. 487.

——**S. 11**—A after agreement to sell properties to *B*, selling them to *C*—*C* aware of agreement—*B* getting decree for specific performance in terms of award—In pursuance of decree, a sale-deed executed by Court on behalf of *C*:

Held, that the sale-deed was a sale for purposes of pre-emption; that the right to pre-empt accrued on date of execution of sale-deed; the question of the right of pre-emption was not *res judicata;* there was no constructive estoppel against *C* as the transfer was really one by *A* and not by *C* and the award had left the question of right to pre-emption open. A.I.R. (Vol. 19) 1932 All. 694=139 Ind. Cas. 714.

——**S. 11**—A sold certain property to **B** receiving a certain portion of the price in cash and leaving the balance to be paid to *C* to whom *A* had mortgaged other properties to secure a loan. *B* did not pay *C*, *C*,

sued and obtained decree against *A*. Thereupon *A* sued *B* for recovery of the sum for which *C* had obtained decree. In the plaint, *A* prayed that if the proceeds of the sale be insufficient to pay up the decretal amount due to the plaintiff at the time, he may be authorised to apply for a decree for the balance. *B* objected to this relief but the point was not considered and an ordinary decree under O. 34, R. 4 in Form 8, Appendix D, Sch. I, Civil P. C., giving *A* liberty to apply for a personal decree was passed. *A* sold the properties and for the balance applied for a personal decree under O. 34, R. 6. *B* contended that R. 6 was not applicable. *A* pleaded that the matter was *res judicata*:

Held, that as the matter had not been considered by the Court and it was only by an accident that whole of the Form No. 8 had been copied in the decree, the matter was not *res judicata*. A.I.R. (Vol. 18) 1931 All. 99=1930 A.L.J. 1524=52 All. 901=130 Ind. Cas. 198.

——S. 11, Expl. 5, O. XX, R. 12—Suit for possession with mesne profits —Right to mesne profit left open—Fresh suit for mesne profits from date of institution of prior suit, competency of.

Held, per *Fazl Ali* and *Wort, JJ.*, (*Das J. dissenting*).—Where a decree for possession of immovable property is silent as regards mesne profits which have accrued between the dates of the institution of the suit and delivery of possession, though claimed in the suit, a separate suit lies to recover such mesne profits. Section 11, Civil P. C., does not constitute a bar to such a suit.

Per *Das, J.*—Where a Statute confers an authority to do a judicial act in certain cases, it is imperative on those so authorized, to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application. Under the new Code consequently, under O. 20, R. 12, the Judge to whom power is given by the word "may" to decide a question of mesne profits accruing due after date of suit, is bound to exercise it when the case arises, and its exercise is duly applied for by the parties interested and having the right to make the application. He has no power to leave the matter 'open'. In any event, where the relief was claimed in the plaint and not expressly granted by the decree, it must be deemed to have been refused under S. 11, Explanation 5, and a fresh suit is barred. A.I.R. (Vol. 18) 1931 Pat. 1=12 P.L.T. 127=130 Ind. Cas. 785.

——S. 11—Redemption suit—Mesne profits left open.

Where, in a suit for redemption, the claim for mesne profits was not adjudicated upon, though prayed for, the question must be deemed to have been left open and a subsequent suit for the profits alone is not barred by *res judicata*. 124 Ind. Cas. 94=A.I.R. 1931 Pat. 13.

——S. 11—Striking off of application for accounts of mesne profits.

Striking off of the previous application for ascertaining mesne profits cannot be any bar in the way of the successful decree-holder's reminding the Court that the suit should be proceeded with, and the previous summary dismissal cannot operate as *res judicata* when such a fresh application is made. A. I. R. (Vol. 21) 1934 All. 465=1934 A.L.J. 86=151 Ind. Cas. 755.

——S. 11—One of the co-sharers brought a suit for his share of the revenue and it was decreed that the amount payable every year should be recovered through Court if unpaid. Amounts remained unpaid twice and the same was realised in execution notwithstanding the objection by the managing Jagirdar that the Revenue was remitted by Government. In a subsequent suit for recovery of the revenue remitted and for declaration that the co-sharer was not entitled to his share for that period it was pleaded that it was barred under Ss. 11 and 47.

Held, that the suit was not barred under S. 47 or under S. 11 as neither the declaration nor refund could be claimed under previous decree. 54 Bom. 162=31 Bom. L.R. 1415=A.I.R. 1930 Bom. 132 =124 Ind. Cas. 225.

——S. 11—Decision of the Settlement Officer under S. 104, B. T. Act (8 of 1885), enhancing rent under S. 30 (b), when no question was raised as to portion of land being an undivided share, is not *res judicata* in a subsequent suit for recovery of rent with a claim for enhancement under S. 30 (b). 33 C.W.N. 1156=A.I.R. 1930 Cal. 238=126 Ind. Cas. 132.

——S. 11—Absence of finding.

Certain property which belonged to three brothers *A*, *B* and *C* was subject to a mortgage and *C* had sold his share to *D*. Then *A* brought redemption suit making both his brothers and *D* as defendants. In that suit *C* pleaded and *D* denied that the sale in favour of *D* was not genuine but *C* afterwards withdrew his plea and no finding was given on the question, and Court gave redemption decree in favour of the three brothers only and not in favour of *D* also. *D's* representative-in-title then sued for partition.

Held, that the decree in the previous redemption suit, although it was not in favour of *D* also, did not act as *res judicata* as regards the suit for partition. 116 Ind. Cas. 137=A.I.R. 1929 Mad. 291.

——S. 11—Failure to institute a suit for which permission was given—Subsequent suit if barred.

Per *Niamatulla, J.*—Where the alleged trustee fails to institute a suit for which permission is granted to him under S. 5, and consequently an order against him is passed by the District Judge, a regular suit by him for declaration that the property is held by him in private ownership or in the alternative that it is not held in trust which is governed by Act 14 of 1920 is maintainable—*Mukerji, J.*, contra. 51 All. 805=118 Ind. Cas. 513=1929 A.L.J. 653=A.I.R. 1929 All. 506.

——S. 11—Where A claims her title under B, but the title of *B* alone was in question in the previous suit and the adjudication in that suit was subsequent to the title of *A* the adjudication so come to against the alienor *B* subsequent to the alienation to *A* cannot operate as *res judicata* against *A*. 110 Ind. Cas. 548=A.I.R. 1928 Mad. 635.

——S. 11—Mortgage suit against father and sons —Discharge of sons and decree against father alone—Sons—Subsequent suit by sons that property not liable to sale in execution—Not barred.

Where in a suit by a mortgagee for recovery of the mortgage debt against a Hindu father and his sons the pleader of the mortgagee stated that the sons may be discharged and a simple money decree passed against the father, the statement does not operate either as estoppel or as *res judicata* in a subsequent declaratory suit brought by the sons that the joint family property was not liable to attachment and sale in execution of the simple money decree passed against the father. 3 O.W.N. 862=98 Ind. Cas. 300=A.I.R. 1927 Oudh 15.

——S. 11—In a case where the previous proceeding was confined by statute to the question of possession a subsequent proceeding in which the question of title is raised is not barred by *res judicata*. 5 L. R. A. Rev. 132=78 Ind. Cas. 115=A.I.R. 1925 All. 200.

——S. 11—Point not decided on the prevalent view of the law—No bar in a subsequent suit.

In a claim suit the defendant pleaded that the sale in plaintiff's favour was fraudulent and voidable under S. 53, T. P. Act and the Court refused to entertain the plea in accordance with the view of the law then prevailing. Subsequently a Full Bench held such plea was open. In a suit by the defendant in the claim suit to have the sale declared fraudulent.

Held, it was not barred by *res judicata* as the question had not been decided at all in the previous suit. 85 Ind. Cas. 574=A.I.R. 1925 Mad. 1107.

——S. 11—Mortgagor suing for accounts under one mortgage—Mortgagee putting forth other mortgages—Court deciding suit only with respect to one mortgage—Subsequent suit on other mortgages by mortgagee is not barred.

If a mortgagor executes several mortgages on the same property, and asks for an account on one mortgage under S. 15-D of the Dekkhan Agriculturists' Relief Act, and the mortgagee claims that an account should be taken of all the mortgages existing on the property, so that the mortgagor would not be entitled to redeem except on paying what is due on all the mortgages, and still, if the Court takes an account of the one mortgage only, and decides nothing with regard to the validity of or the existence of other mortgages at the time when the account is taken, a subsequent suit by mortgagee to recover under the other mortgages is not barred under S. 11. 27 Bom. L.R. 488=87 Ind. Cas. 716=A.I.R. 1925 Bom. 311.

——S. 11—The mere fact that the petition in the suit itself, to have the property sold in a particular order is disallowed is no bar to the executing Court making such an order in the course of the execution. 19 M.L.W. 23=83 Ind. Cas. 918=1924 M.W.N. 134=A.I.R. 1924 Mad. 509=46 M.L.J. 32.

——S. 11—Provincial Insolvency Act (3 of 1907), S. 36—Court refusing to entertain application to set aside—Subsequent suit under S. 53, T. P. Act not barred.

Where a transaction, being several years old could not be questioned by the Insolvency Court under S. 36 the question which the Insolvency Court expressly declined to adjudicate upon, is not *res judicata* in a subsequent suit under S. 53 of the T. P. Act. 64 Ind. Cas. 523=A.I.R. 1922 All. 443.

——S. 11—Where there was nothing to show that issues were framed or that the application for correction of the jamabandi was decided on the evidence duly recorded, held that the order could not be deemed to be *res judicata* in a subsequent proceeding. 13 R. D. 856.

——S. 11—Claim not adjudicated—Not res judicata.

A decision is not *res judicata* on a question which the Court deliberately abstained from deciding. The dismissal of a claim based on survivorship on the death of a certain person does not operate as *res judicata* in a subsequent suit, for declaration that a kot kabula executed by the deceased and a compromise decree entered into in a suit to enforce it are not binding on the inheritance when it comes to the hands of the plaintiff as a reversioner. 47 Ind. Cas. 2.

——S. 11—Suit by widow against daughter-in-law for share of estate—Previous suit by collaterals compromised by widow.

Where a Hindu widow brings a suit as against her daughter-in-law for possession of a portion of her husband's estate, the decree on a compromise in a prior suit by the collateral against the widow does not operate as *res judicata* as no judicial pronouncement was made upon her claim. 45 P.W.R. 1918=44 Ind. Cas. 92=23 P.L.R. 1918.

——S. 11—Findings not recorded by Appellate Court.

If an Appellate Court does not record findings on certain points raised in the case, on the ground that they were not necessary for the decision of the case, its judgment in respect of those points does not operate as *res judicata*. 15 Ind. Cas. 229.

——S. 11—Previous suit decreed only against some defendants and dismissed against the rest—No cause of action—Subsequent suit whether barred.

In a declaratory suit a decree was passed against some of the defendants who compromised their dispute with plaintiffs and the suit was dismissed as against the others as it appeared to the Court that no cause of action had been disclosed against them. According to the decision the plaintiffs were allowed to bring another suit against these latter defendants.

Held, that there was no adjudication between the plaintiffs and the defendants against whom the suit was dismissed. Consequently a subsequent suit by plaintiffs against the same defendants, was not barred either by the rule of *res judicata* or by O. 2, R. 2 of the C. P. Code. 56 P. R. 1912=245 P. W. R. 1912=15 Ind. Cas. 930=251 P.L.R. 1912.

——S. 11—Prior decision—In suit based on non-existent cause of action—If res judicata.

The decision in a suit which proceeds on a cause of action which has no existence in the eye of the law, cannot operate as *res judicata*. 3 U.P.L.R. (Lah.) 49=61 Ind. Cas. 375=3 Lah. L.J. 211=A.I.R. 1921 Lah. 133.

——S. 11 (S. 13, Old Code)—Partition suit—Preliminary decree—Execution struck off for default—Fresh suit, if lies.

A previous suit for partition brought by the plaintiffs having been compromised, an Amin was appointed to effect a partition in terms of the compromise. Subsequently the parties not appearing the execution proceedings then pending were dismissed for default:

Held, that a fresh suit for partition is not barred by S. 11 or O. 9, R. 9 (S. 13 or S. 103, Old Code). I.L.R. 13 A. 309 at p. 313 (1891) followed. (1904) 10 C.W.N. 839.

——S. 11 and O. 2, R. 2 (Ss. 13 and 43, Old Code)—Suit for possession on basis of partition by Revenue Court—Dismissal—Second suit for partition of property—Res judicata.

In partition proceedings in a Court of Revenue the sites of certain houses were partitioned. The plaintiffs believing that the buildings themselves had been partitioned brought a suit for the recovery of their share in the house alleging a dispossession from their share by the defendants. But they were defeated in this suit upon the ground that the supposed partition of the houses by a Court of Revenue never could have taken place. Upon a second suit brought by the plaintiffs in a Civil Court asking for partition of the house property, *held*, that neither S. 13 nor 43, C.P.C., was a bar. 1904 A.W.N. 89=26 A. 501=1 A.L.J. 228.

——S. 11—Rent Suit—Decisions in Limits to their binding nature—Prior suit for rent claiming extra charge for water drawn from landholder's tank—Dismissal in limine—Liability of tenant for water rate as 'rent' not decided—Subsequent suit by landholder for subsequent years claiming water rate as part of the rent—If barred by res judicata.

With reference to suits for grant of patta and recovery of rent under the Madras Estates Land Act, if the terms and conditions of the tenancy generally are decided for a particular year in a litigation between the landlord and tenant, the decision would bind the parties in future years also, unless fresh circumstancies intervene or there is an alteration in the law governing the rights of parties. The case, however, would be different if the former decision was based on facts and circumstances, special or peculiar to the year, with respect to which the prior decision was rendered.

The rule that a decision would be *res judicata* even if it is not specific and express but is necessarily implied in the decree can have no application to a case where the Court in the former suit has expressly left undecided the issues that arose for decision in the later suit.

Where a Collector dismisses the previous suit for rent *in limine* on the sole ground that the landholder not having complied with the statutory requirements entitling him to an enhancement of rent, could not sue for the water rate which he had not hitherto collected, and declines to go into the question whether the tenant would be liable for the water rate as rent, the decision in that suit cannot operate as *res judicata* in a subsequent suit by the landholder against the same tenant claiming water rate as part of the rent for subsequent years. 1949 M.W.N. 466=(1949) 2 M.L.J. 153.

——S. 11—Rent suit—Question of title not decided—Effect in subsequent suit.

Where, in a suit, the rent decree was made operative between the plaintiffs and the tenant defendants with regard to the period in suit leaving the question of title between the plaintiffs and the *pro forma* defendants open, that is, the Court did not intend or decide the question of title finally:

Held, that in the subsequent suit by the plaintiffs against the *pro forma* defendants, the plea of *res judicata* on the question of title was not available to the plaintiffs. A.I.R. (Vol. 27) 1940 Cal. 347=71 C.L.J. 232=190 Ind. Cas. 822.

——S. 11—Previous suit considering question of correctness of tendering patta—Question of title not barred.

Where in a previous suit the question of correctness of tendering a *patta* was considered, the question of title to land is not barred in a subsequent suit. 35 Mad. 216=21 M.L.J. 344=10 M.L.T. 533=10 Ind. Cas. 75. On appeal. *See* 37 Mad. 70=25 M.L.J. 543=12 M.L.T. 500=17 Ind. Cas. 445=(1913) M.W.N. 1.

——S. 11—Suit for rent—Other land included in patta—Plea taken in previous suit—Question of title—If res judicata.

The plaintiff sued for arrears of rent. The defendant protested that the *Patta* tendered in evidence by the plaintiff covered some land not belonging to the plaintiff. The plaintiff contended that the plea was raised in a previous suit for arrears of rent and the *Patta* was found to be a proper one. *Held, (per Sankaran Nair, J.)* :—There being no express finding nor any implied decision in the previous suit, regarding the title to the land covered by the *Patta* the question was not *res judicata*. Cases dealt with by S. 11, can be divided in two classes, *viz.*, trials of suits and trials of issues. In cases of the former class the suit is either dismissed or decreed and a question not expressly decided may be dealt with impliedly in such cases. In the latter class of cases there can be no implied decision and there must be express finding to create a bar of *res judicata*. To hold that an issue was raised, the matter must be alleged by one and denied by the other party, and there must be a finding of the court thereon. Where there is no such finding the question can be raised in a subsequent suit. It is not necessary for the plaintiff to sue on all causes of action. After failing in one he can pass on to another. (Per *Munro, J.*) The finding in he previous suit determined the relationship of tenant and landlord in respect of the land covered by the *Patta* and the defendants were bound by the *patta* and could not in the subsequent suit put the landlord to the proof of title. The question was *res judicata*. 21 M.L.J. 344=10 M.L.T. 533=10 Ind. Cas. 75=35 M. 216.

——S. 11—Rent Court—Title to crops—No res judicata.

The decision of the Rent Court to the effect that a certain person was the tenant of the land and was liable for the rent does not decide the question of

the title to the sale proceeds of the crop in that field so as to bar a claim that another person grew the Crop. 21 A.L.J. 476=4 L.R. Civ. 428=5 L.R.A. Rev. 47=AI.R. 1924 All. 163.

——S. 11 (S. 13, Old Code)—Rent suit—Amount of rent—Res judicata.

A decision in a previous rent suit as to the amount of rent payable does not operate as **res judicata** in a suit for rent of subsequent years, although it may give rise to a presumption under S. 51 of the Bengal Tenancy Act. 6 C.W.N. 589, foll; 32 C. 336, diss. from. The same principle should be applied to the question whether a tenant held at **bhowh** or **nakdi** rents for a particular period. (1906) 5 C.L.J. 92.

——S. 11 (S. 13 Old Code)—Rent suit claiming specific amount—If res judicata as to rate of rent in subsequent suit.

The decree in a previous rent suit for a certain sum claimed for a certain period, which did not decide the question of the rate of rent, is not **res judicata** in a subsequent suit. (1909) 9 C.L.J. 343=36 Cal. 604=2 Ind. Cas. 828.

——S. 11 (S. 13, Old Code)—Rent suit—Absence of issue on adverse possession and limitation—Dismissal of suit merely on ground of non-payment of dues for 12 years—Subsequent suit—Res judicata by reason of prior decision on point of limitation.

It is not competent for Courts to depart from unequivocal statements in the judgment as to what was decided, and because such decision would by itself be unsound with reference to the reasons assigned for it, to substitute something else quite different in order to make it seem right so as to enable one of the parties thereto to found a plea of **res judicata** thereon. Where, in a suit for kattubadi, a prior decision between the parties in rsepect of the kattubadi due for previous faslies was pleaded in bar as **res judicata** and the decision so pleaded in bar merely dismissed the suit for kattubadi on the ground of non-payment of kattubadi for the previous twelve years.

Held, that the prior decision cannot be treated as determining that the plaintiff's right to collect the kattubadi had, as a periodically recurring right, become barred under S. 113 of the Schedule to the Limitation Act, there being nothing to show from the records that the Court determined that the plaintiff was **refused** the enjoyment of the right for twelve years previous to suit. (1905) 16 M.L.J. 35=29 M. 42.

——S. 11 (S. 13, Old Code)—Decree for road cess at particular rate for particular year—If res judicata as to rate in subsequent years.

The amount of road cess payable by landlords and tenants is not fixed for all time. It is a variable quantity changing from year to year according to the valuation of the estate made by the Collector and the rates fixed by him for the levy of cesses for the year. Therefore because decrees were passed for cess at one rate in previous years, it does not follow he is to get cess at that rate for ever. Such decrees are, no doubt, admissible in evidence, and there is a presumption that the tenant is liable to pay at the decree rate. They do not have the effect of **res judicata**. The fact that the Collector's valuation roll was filed in the previous litigation does not make any difference. (1898) 28 C. 109.

——S. 11 (S. 13, Old Code)—Order to put up application with case—Effect of Res judicata—Objection to right of applicant to apply—If barred.

An order merely allowing an application to be put up with the case for disposal even though preceded by recitals to the effect that notice had been issued to the parties, is indeed an order of adjournment and will not operate as **res judicata** so as to prevent the counter-petitioners from questioning the right if the petitioners to make the application. (1903) A.W.N. 99=25 A. 443.

12 (m). Relief not granted.

——S. 11, Expl. V—Suit for maintenance by Hindu widow—Claim to make it a charge on property not granted—Subsequent suit to charge property with maintenance.

Where a Hindu widow asks in a suit for maintenance that her maintenance should be made a charge on the property left by her husband and the Court assesses the amount of the maintenance but does not iharge it upon any property, she cannot subsequently ask the Court to declare that she is entitled to recover from the property in suit, her maintenance which has fallen into arrears or that which will fall due in the future as it is tantamount to a request to charge the property with her maintenance. A.I.R. (Vol. 25) 1938 Pesh. 68=177 Ind. Cas. 1005.

——S. 11, Expl. V, O. XXXIV, R. 6—Application for personal decree—Personal decree not granted—Fresh application.

An application under O. 34, R. 6, is not an application in execution but a substantive original application for a new decree in the suit. The procedure applying to this application would be governed by S. 141. Where, therefore, a definite application has been made for a decree under O. 34, R. 6, and the prayer for passing such a decree is not granted by the Court the provisions of Expl. 5 to S. 11, Civil P.C., would apply with the result that the relief which was not expressly granted shall be deemed to have been refused. A.I.R. (Vol. 23) 1936 Lah. 388=38 P.L.R. 700=163 Ind. Cas. 119.

——S. 11, Expl. V—"Relief claimed."

Per *Fazl Ali, J.*—The words "relief claimed" refer to a relief which the Court is bound to grant and not one which it is discretionary with the Court to grant. A.I.R. 1931 Pat. 1=12 P.L.T. 127=130 Ind. Cas. 785.

——S. 11, Expl. V and O. 20, R. 12—Decree for possession—Question of mesne profits left open—Second suit for future mesne profits—Maintainability.

Per *Wort and Fazl Ali, JJ.*—If in a suit for possession the relief claimed includes a claim for mesne profits from the date prior to the institution of suit up to the date of the delivery of possession, the fact that Court decrees the possession leaving the question of mesne profits open, does not bar subsequent suit for mesne profits from date of institution of suit to the date of taking possession. No doubt the claim up to the date of institution of suit is not maintainable.

Per *Das, J.* (*contra*).—Where a statute confers an

authority to do a judicial act in certain cases. It is imperative on those so authorised, to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application. Consequently under C. P. Code, O. 20, R. 12, the Judge to whom power is given by the word "may" to decide a question of mesne profits accruing due after date of suit, is bound to exercise it when the case arises, and its exercise is duly applied for by the parties interested and having the right to make the application, and there was no power in the Court in the Court in the former suit to leave the question "open". A.I.R. 1931 Pat. 1 =12 P.L.T. 127=130 Ind. Cas. 785.

——S. 11 (Expl. (5)) S. 13, Expl. 3, Old Code) —Future mesne profits claimed in previous suit, disallowed—Subsequent suit for mesne profits—Reservation if claim in appeal—Effect.

The words relief claimed in the plaint' in S. 11, Expl. (5) (S. 13 Expl. 3, Old Code), mean relief which, assuming the defence fails, the plaintiff is entitled to as of right. The granting of future mesne profits which the Court has a discretion in any event either to make or to refuse is not 'relief' within the meaning of the explanation. Future mesne profits accruing after the institution of the suit do not form part of the cause of action. It cannot be claimed as of right and cannot, but for O. 20, R. 12 (S. 211 Old Code) be asked for at all, and may, in any case, be refused by the Court at discretion. There is no distinction in this matter between mesne profits between the date of plaint and the date of decree and mesne profits accruing due after decree. Where a plaintiff prayed for future mesne profits in a suit for possession of lands and the suit, was dismissed *in toto* by the first Court and in appeal the plaintiff reserved his claim for future mesne profits for a separate suit, a second suit for such future mesne profits whether from date of the prior suit or decree is not barred by *res judicata* either by reason of the dismissal of the former suit *in toto* by the Court of first instance or by O. 23, R. 1 (S. 373, Old Code). 15 M.L.J. 462 (F.B.).

——S. 11, Expl. V—Suit for partition, possession and past and future mesne profits—Decree not giving future mesne profits—Subsequent suit to recover mesne profits from first suit or date of decree till delivery of possession.

The relief refered to in the Explanation *V* to *S* 11, Civil P. C. means relief arising out of a cause fo action accrued at the date of the institution of the suit, and such relied does not cover future mesne profits in respect of which the cause of action accrued subsequently to the suit. Consequently after a suit for partition and possession of lands and mesne profits, past and future, has been brought and decided and the decree fails to award the claim to future mesne profits a second suit to recover mesne profits from the institution of the first suit or the date of the decree till delivery of possession is not barred under S. 11, Explanation 5, Civil P. C. A.I.R. (Vol. 25) 1938 Bom. 231=40 Bom. L.R. 324=I.L.R. (1938) Bom. 655=174 Ind. Cas. 773 (F.B.). [Overruled A.I.R. 1920 Bom. 39=58 Ind. Cas. 419=44 B. 954=22 Bom. L.R. 982.

——S. 11, O. II, R. 2—Suit for possession and mesne profits—No adjudicaton as to mesne profits —Fresh suit.

The plaintiffs instituted a suit for possession and mesne profits. An issue was fraud whether the plaintiffs were entitled to damages and if so to how much. There was a very brief finding that no damages had been proved and in the order of the Court there was no relief granted in regard to mesne profits. The plaintiffs instituted a fresh suit for mesne profits.

Held, (*i*) that the suit was not barred by O. 2, R. 2, Civil P. C., inasmuch as the plaintiffs had asked for mesne profits in the former suit;

(*ii*) that the second suit was not barred by *res judicata* as the Court had failed to adjudicate on the relief of mesne profits in the former suit. A.I.R. (Vol. 19) 1932 All. 45=1931 A.L.J. 606=135 Ind. Cas. 254.

——S. 11—Suit for possession and mesne profits—Decree silent as to future mesne profits—Subsequent suit.

In a suit for possession of certain land and future mesne profits a decree was obtained for possession of the land. On execution of the decree, decree-holder obtained possession of the land and then brought a suit for mesne profits for the period between the date of the prior suit and the date on which he obtained possession of the land through Court in execution of the decree obtained in previous suit. A preliminary objection was raised that the claim for mesne profits was barred by S. 11, as there was a prayer in the previous suit for future mesne profits and as the decree in that suit was silent in regard to mesne profits.

Held, that the suit was not barred by S. 11, 41 Mad. 188; 40 All. 292, Foll.; 44 Bom. 954, Diss. from. 33 C.W.N. 943=A.I.R. 1929 Cal. 566.

——S. 11—Mesne profits claimed but not granted.

It is certainly a point for consideration whether, when a relief for *pendente lite* and future mesne profits was specifically claimed in the plaint and it was not granted, intentionally or owing to an oversight, that relief cannot be deemed to have been refused within the meaning of Explanation (5) to S. 11. 49 All. 565=25 A.L.J. 425=102 Ind. Cas. 96=A.I.R. 1927 All. 446.

——S. 11—Mesne profits—Suit for possession and future profits—Subsequent suit for mesne profits—No bar.

Where in a prior suit for possession and future mesne profits the Court did not purport to decide the question of future mesne profits a subsequent suit for mesne profits *pendente lite* is not barred. 16 A.L.J. 182=44 Ind. Cas. 88=40 All. 292.

——S. 11, Expl. (5)—Claim for mesne profits, past and future—Decree for past mesne profits only—Suit for future mesne profits—Not barred.

Where after a suit for possession of lands and mesne profits past and future, has been brought and decided and a decree had been obtained for possession and past mesne profits without the claim to future mesne profits being decided, a second suit was brought to recover mesne profits from the institution of the first suit till delivery or possession.

Held, that the suit was maintainable. 41 Mad. 188=33 M.L.J. 699=(1917) M.W.N. 847=6 L.W.

784=22 M.L.T. 484=42 Ind. Cas. 929 (F.B.), Overruling 2 L. W. 8=26 Ind. Cas. 622.

——S. 11—Suit for past and future mesne profits Decree silent as to latter—Fresh suit not barred.

When the decree in a previous suit for possession and past and future mesne profits is silent about future mesne profits a fresh suit for future mesne profits is not barred by *res judicata* by the mere omission of the Court to adjudicate upon the claim as to future mesne profits in the previous suit. 31 Ind. Cas. 103=(1915) 11 U.B.R. 81.

——S. 11, Expl. (5), (S. 13, Expl. 3, Old Code) —Mesne profits claimed in prior to suit not awarded—Second suit—If res judicata.

A second suit for future mesne profits, though the claim was included in the prior suit, is not barred by reason of the decree in the prior suit which omitted to deal with it. 17 C. 968; 21 A. 425; 19 B. 532; 14 M. 328 foll. (1903) 32 C. 118 at 122.

——S. 11, Expl. (5), (S. 13, Expl. 3, Old Code)—Past profits—Finding in the former suit—Sum not fixed—Second suit for the profits.

Where a claim for past profits was made in a former suit and inquired into and the finding recorded that there was a balance due to the plaintiff, but no particular sum was fixed by the decree, no second suit for the past profits can be maintained by reason of the bar created by S. 11, Explanation (5) (S. 13, old Code). (1900) 2 Bom. L.R. 781=25 B. 115.

——S. 11—Relief claimed but not granted.

In a suit for damages for occupation of property after the expiry of notice to quit the same, where such relief was sought but not granted in a previous ejectment suit between the same parties:

Held, that it was not competent to the Court to grant damages for the period between the expiry of the notice and the passing of decree in the prior suit. 104 Ind. Cas. 190=A.I.R. 1927 Pat. 395.

——S. 11—Prayer in plaint—Absence in decree—Effect.

The fact that the personal remedy is asked for in the plaint and that nothing appears about it in the decree, is not enough to say that the plaintiff is for ever after barred from asking for it. 1927 M.W.N. 330=103 Ind. Cas. 528=39 M.L.T. 22=A.I.R. 1927 Mad. 779=53 M.L.J. 489.

——S. 11—Prayer for declaration leading up to the main relief claimed, viz., of possession—Dismissal of suit on failure of main relief—Declaration cannot be deemed to have been refused.

Where the declaration which was claimed in the previous suit in the prayer was not a declaration under S. 42 of the Specific Relief Act but a declaration which led up to the main relief claimed in the suit, namely, possession.

Held, that the prayer for declaration was merely an argumentative step towards the only decree sought, *viz.*, possession and the Court was not entitled to make a declaration with regard to this prayer in the plaint after the failure of the sole cause of action, and hence the refusal of the relief cannot "be deemed to have been refused" under Explanation (5). 29 C.W.N. 861=89 Ind. Cas. 207=A.I.R. 1925 Cal. 1195.

——S. 11, Expl. (5)—Ground of attack relating to main relief—Refusal to entertain—Effect.

A mere ground of attack relating to the main relief is not a separate relief and a refusal to entertain such a ground relating to the relief which is adjudicated upon is not a refusal within the Explanation 5 of the section and is not *res judicata*. 57 Ind. Cas. 735=13 L. W. 25.

——S. 11, Expl. (5) (S. 13, Expl. 3, Old Code)—Suit, for sale on a mortgage—Compromise—Mortgagee accepting simple money decree—Second suit for sale—Bar of.

A suit for sale on a mortgage was compromised on the terms that the mortgagee should accept a simple money decree for the amount of the mortgage debt, and such a decree was accordingly passed. This decree not being satisfied, the mortgagee again sued for sale of the mortgaged property. *Held*, that the suit was barred. 33 C. 849 foll. (1908) 5 A.L.J. 732=1908 A.W.N. 265=31 A. 19=1 Ind. Cas. 561.

12 (n). Unnecessary Finding.

——S. 11—Issue decided in favour of plaintiff whose suit is dismissed on other ground if res judicata.

Any issue decided by a Court in favour of the plaintiff whose suit is ultimately dismissed on another ground cannot operate as *res judicata* as against the defendant in a subsequent suit. A finding cannot be conclusive against a party if the decree was not based upon it but was made in spite of it. A.I.R. (Vol. 25) 1938 All. 491=1938 A.L.J. 834=1938 A.W.R. 610=177 Ind. Cas. 373.

——S. 11—Former suit dismissed as being premature—Findings on other issues also given.

Where the ground on which the plaintiff's former suit was dismissed was solely the fact that the suit was premature, although findings were given on other issues as well and it cannot therefore be said that the other matters raised were directly and substantially in issue, or were finally decided, the principle of *res judicata* will not operate. A.I.R. (Vol. 23) 1936 Pesh. 61=161 Ind. Cas. 63.

——S. 11—Decision on points not necessary for decision of controversy—Whether operates as res judicata.

For the purpose of determining the effect of a former suit on subsequent one, it is not the issues only that should be looked into but the necessity for their decision. A decision in a former suit on a point not necessary for determination of the real dispute between the parties cannot operate as *res judicata* in a subsequent suit between the same parties. A.I.R. (Vol. 20) 1933 Lah. 412=34 P.L.R. 115=142 Ind. Cas. 606.

——S. 11 (S. 13, Old Code)—Finding not necessary for decision of suit—Res judicata.

To constitute **res judicata** something substantially and materially in issue between the parties must have been finally decided by the Court empowered to deal with it. And while, no doubt, everything which is necessary for the disposal of the suit, even though incidentally necessary, yet necessary, does fall within the scope of those words, and would constitute **res judicata**, yet once a decision has been come to upon any preliminary point, which is suffi-

cient in itself to dispose of the whole suit, if the Judge goes on to discuss other questions, the decision of them would not be final and would not operate as **res judicata**. A decision upon any question which does not open the door to the parties aggrieved to carry it to the next Court is not in any sense a final decision unless the Court which has decided it is itself the Court of final jurisdiction for that suit. A decision **obiter** of any question not necessary to the disposal of the suit is not a final decision. (1907) 11 Bom.L.R. 366=3 Ind. Cas. 124 (2).

——S. 11—Decision of—Issue not raised.

Court has no jurisdiction to decide an issue unless it is raised before it by pleading. Decision on an issue not raised cannot operate as *res judicata* in a subsequent suit. A.I.R. (Vol. 22) 1935 All. 268=153 Ind. Cas. 497.

——S. 11—When a finding is recorded only to avoid a possible remand and it is not the basis of the judgment the point is not finally determined and is not *res judicata*. 29 M.L.W. 526=82 Ind. Cas. 485=1924 M.W.N. 859=A.I.R. 1924 Mad. 893 (2) =47 M.L.J. 532.

——S. 11—A finding not necessary to the relief granted by the decree cannot operate as *res judicata*. 10 O.L.J. 404=79 Ind. Cas. 666=A.I.R. 1924 Oudh 205.

——S. 11—Obiter.

When the opinion expressed in the case is really *obiter*, that opinion does not operate as *res judicata*. A.I.R. (Vol. 23) 1936 Lah. 18=38 P.L.R. 780.

——S. 11—Obiter, whether operates as res judicata.

A statement in a judgment, which is merely *obiter* and without which the suit has already been decided, does not operate as *res judicata*. A.I.R. (Vol. 22) 1935 Lah. 96=157 Ind. Cas. 816.

——S. 11—Obiter.

A remark in the nature of an *obiter dictum* which is not the basis of a decree, cannot operate as *res judicata*. 114 Ind. Cas. 331=A.I.R. 1929 Lah. 225.

——S. 11—Obiter dictum.

Where a Court does not actually decide a point but simply expresses its concurrence with an *obiter dictum* quoted from another decision, its finding on the point does not operate as *res judicata*. 28 Ind. Cas. 217=2 O.L.J. 113.

——S. 11—Finding on unnecessary issues—Suit not maintainable for non-compliance with S. 80.

If a suit does not lie by reason of the failure to comply with S. 80, C. P. Code, the Court is bound to dismiss the suit under O. 7, R. 11, C. P. Code and the findings of the Court on the merits are *obiter* and cannot support a plea of *res judicata*. A.I.R. 1950 P. C. 80.

——S. 11—Obiter dictum.

In a suit by a wife for a declaration that a transfer of property by her husband *A* to *B* was inoperative against her right to maintenance, there was no issue as to whether they were nominal or sham transactions but in one portion of the judgment they were characterised as bogus transactions, while in another portion they were treated as collusive transfers brought about by *A* and *B*. After *A's* death, the wife sued *B*, to recover the properties on the ground that the transfers were nominal transactions. *Held*, that the question whether the transfers were nominal, was not *res judicata* by reason of the decision in the previous suit and that the judgment in the previous suit could not be treated as evidence on the question of the nominal character of the transfers. 15 Ind. Cas. 357=(1912) M.W.N. 380.

——S. 11—Obiter dictum.

A, a khoja Mahomedan of Bombay, governed by Hindu Law in matters of succession, was in possession of certain property. In 1884, one of *A's* sons sued *A* and another of his sons for partition of his property in *A's* possession. The two main questions in the suit were, whether the property in the hands of *A* was ancestral and as such belonged to the joint family and whether, if so, the son could, during his father's life-time claim a partition. The original Court decided both the questions in favour of the son. *A* preferred an appeal. The Appellate Court found that it was not proved that, according to the general custom of the parties, the son could demand partition of ancestral property. The Appellate Court expressed an opinion that the property was not ancestral. In a subsequent suit between *A* and his issue *A* contended that the question as to the property not being ancestral was *res judicata*. In the latter suit, besides the two sons who were parties in the previous suit, another son and a grandson of *A* were impleaded, the former as well as the latter's father was alive in 1884 but they were not impleaded in the former suit. *Held*, that the question that the property was not ancestral was not *res judicata*, because, in the first place, the opinion of the Appellate Court on the character of the property in the previous suit was mere *obiter dictum*, and secondly, the decision could not be binding on the son and grandson who were not parties to that suit. 12 Ind. Cas. 813=13 Bom. L.R. 1061.

——S. 11—Construction of award—Matter not in issue cannot be res judicata.

Where, in the previous litigation, the construction of the award was not an issue in the proceedings, but it was merely a ground upon which the Courts based their decision upon the question which was the issue between the parties, the matter of the construction of the award is not *res judicata* between the parties. A.I.R. (Vol. 27) 1940 P. C. 222=21 P.L.T. 935=1940 O.W.N. 1103=1940 A.L.J. 813 =1940 M.W.N. 1122=52 L.W. 800=7 B.R. 198=45 C.W.N. 204=I.L.R. (1940) Kar. (P.C.) 460=1940 A.W.R. 147=43 Bom. L.R. 381=73 C.L.J. 145=191 Ind. Cas. 7 (P.C.).

——S. 11—Finding not necessary for disposal of suit.

The finding on an issue which was not necessary for the disposal of a suit cannot be considered to be *res judicata* when the point involved in that finding arises for decision in a subsequent suit.

In a previous suit, the predecessor of the plaintiff asked for recovery of arrears of rent for *Faslis* 1324 and 1326. One of the issues was whether that suit was maintainable in its form as it was distinctly a suit for enhancement of rent. The Deputy Collector said on this issue that no finding was necessary on

the point. In a subsequent suit for recovery of water rate claimed for *Faslis* 1328, 1330, 1334 and 1336; it was urged that the finding on that issue in the previous suit operated as *res judicata*:

Held, that as it appeared from the opinion of the Deputy Collector that the finding on the issue was not necessary for decision of the prior suit, it could not be considered to be *res judicata* in the subsequent suit. A.I.R. (Vol. 22) 1935 Mad. 551=68 M.L.J. 625=41 L. W. 753=1935 M.W.N. 612=156 Ind. Cas. 1033.

——S. 11—Rent decree—Res judicata—Scope of—Area of tenancy.

The main question for determination in a suit for rent is whether the relationship of landlord and tenant exists between the plaintiff and the defendants and whether any rent is due. It is not necessary for the Court to determine the number of days of which the tenancy consists or the exact boundaries or extent of the land of the tenancy.

In execution of his rent decree, the landlord put the holding to sale and himself purchased it. The tenants prevented him from taking possession of two plots. Thereupon the landlord sued for a declaration that the plots formed part of the holding purchased by him. The land of the tenancy was described in the rent suit as including the aforesaid plots in order to comply with the procedural directions given in S. 148, Bengal Tenancy Act:

Held, that if the defendants in the present suit had invited the decision of the Court in the previous rent suit on the question whether the two plots appertained to the tenancy then they would have been bound by that decision and the matter would have become *res judicata*; but when no such decision was invited by any one and when a decision on the question was not necessary for the disposal of the suit, it could not be said that the question had been decided by implication merely because a decree for rent had been passed in a suit in which the plaintiff in describing the tenancy in his plaint stated that the two plots appertained to the tenancy the question, therefore, what was the two plots appertained to the tenancy or not was not *res judicata*. Hence the defence that the two plots did not appertain to the holding purchased by the landlord was not barred by S. 11. A.I.R. (Vol. 28) 1941 Cal. 574=198 Ind. Cas. 462.

——S. 11—Rent suit—Decree enhancing rent and holding tenancy to be permanent—Review, dismissal of—Observations as to nature of tenancy—If res judicata.

Where a review against a decree enhancing rent of a tenancy and holding it to be permanent was dismissed holding that the applicant was aggrieved not by decree but by judgment, but the pronouncement regarding permanent nature of the tenancy was treated as irrelevant by the Judge, such a judgment cannot be *res judicata* as to the nature of tenancy. 8 Lah. 573=54 I.A. 178=101 Ind. Cas. 355=29 Bom. L.R. 870=31 C.W.N. 677=1927 M.W.N. 481=39 M.L.T. 161=25 A.L.J. 959=28 P.L.R. 658=26 M.L.W. 634=A.I.R. 1927 P. C. 102=52 M.L.J. 663 (P.C.).

——S. 11—Decision unnecessary—No res judicata.

Where in a suit for specific performance of a contract of sale of land, relief as to possession was prayed for in the plaint but there was no reference to it in the judgment, held, that that relief may be taken to have been refused but the matter was not heard and finally decided within S. 11 and hence no *res judicata* especially when it was found that there was ground to hold that a decision on that relief was not considered to be necessary in that suit. 27 Bom. L.R. 42=86 Ind. Cas. 137=A.I.R. 1925 Bom. 181.

——S. 11—Dismissal of suit as not properly framed—Decision on other issues—Not res judicata.

Where a suit is properly framed, and the Court decides several issues the decision on each issue is binding upon the parties. But where the Court holds that the suit as framed is not maintainable, the suit should be dismissed on that ground alone, and the Court cannot try the other issues so long as the suit is not properly framed. The decision of the Court on the other issues in such a case will not be *res judicata*. 41 C.L.J. 396=88 Ind. Cas. 616=A.I.R. 1925 Cal. 996.

——S. 11—Ejectment suit dismissed for want of notice—Finding as to permanent tenancy—No res judicata.

Where an ejectment suit is dismissed on the ground of absence of notice but the Court records a finding that the permanent tenancy alleged by the defendant is not proved, under such circumstances the decree cannot operate as *res judicata* on the question whether the defendant had a permanent tenancy or not. 67 Ind. Cas. 271=A.I.R. 1923 Cal. 297.

——S. 11 (S. 13 Old Code)—Finding on unnecessary issue—Merits gone into and decided in former suit—Suit dismissed for default in payment of deficient court-fee—Subsequent suit raising same issues—If barred by res judicata.

In a previous suit between the parties there was a decision on the merits, but the suit failed on the ground that the plaint had been under-valued and the plaintiff had refused to pay the additional Court fee. A subsequent suit having been brought between the parties for determination of issues the decision in the first case was pleaded as **res judicata**.

Held, that the failure of the first suit on non-payment of additional Court fee was sufficient by itself for the dismissal of the previous suit, and that therefore the findings on the issues on the merits not having been necessary for the decision of the suit could not have the force of *res judicata* (1910) 12 Bom.L.R. 766=35 Bom. 38=7 Ind. Cas. 967.

——S. 11, (S. 13, Old Code)—Adverse finding on unnecessary issue—If res judicata.

A finding not necessary to the final decree, in spite of which the decree is made, is not binding upon the parties as **res judicata**. (1901) 5 C.W.N. 445=(1908) 12 C.W.N. 1002=36 C. 75=1 Ind. Cas. 523.

13. Issue of fact or law.

(a) Issue of fact.
(b) Issue of law.
(c) Mixed issue of fact and law.

13 (a). Issue of fact.

——S. 11—Decision on a question of fact—Res judicata.

When a Court of law has in any proceeding before it, decided upon evidence or in the absence of evidence, a question of fact, it is not competent to it to allow that question to be again re-opened except in the very restricted terms laid down by the provisions for review of judgment. A.I.R. 1921 P. C. 23; A.I.R. 1924 Mad. 673 and Mad. C.M.A. 467 of 1927, Foll.; A.I.R. 1923 Mad. 487, Not Foll. A.I.R. 1929 Mad. 404.

——S. 11—Prior petition on a question of fact—Dismissal—Subsequent petition on the same question—Barred.

Where, on a previous petition being dismissed, the petitioner files another petition praying for an apparently different relief, but the relief is such as rests only on the same question of fact as in previous petition, that petition cannot be entertained. A.I.R. 1929 Mad. 404.

——S. 11 (S. 13, Old Code)—Question of fact—Question whether a kabuliyat is binding on a party.

The question whether a kabuliyat is binding on a party to the suit is a question of fact for the purpose of *res judicata*. (1900) 28 C. 17.

——S. 11—Custom—Decision as to its existence—No res judicata.

Decision in prior suit as to mere existence of custom, is not *res judicata*. 22 Ind. Cas. 138.

——S. 11—Erroneous decision on a question of fact is res judicata.

A decision on a question of fact, however erroneous it may be constitutes *res judicata* between parties to the previous suit. 48 C.L.J. 184=32 C.W.N. 828=115 Ind. Cas. 588=A.I.R. 1928 Cal. 717.

——S. 11—Prior decision based on mistake of fact—Res judicata in a subsequent suit.

A decision was wrongly held to be *res judicata* though the parties in the subsequent suit were not the same as in the prior suit. The same question came up for decision again in a third suit. The parties to the second and third suit were the same.

Held, though there is a mistake of fact as regards the parties yet the Judges who decided the second suit decided that the matter was *res judicata* between the parties and therefore their decision was final. 17 M.L.W. 521=72 Ind. Cas. 789=1923 M.W.N. 347 =A.I.R. 1923 Mad. 545.

——S. 11—Issue of fact—Erroneous decision—Evidence not fully placed before the Court—Res judicata.

Per *Sadasiva Iyer, J*:—An erroneous decree establishing rights is as much *res judicata* between the parties as a just decree and evidence adduced to prove that the former decision is erroneous is irrelevant. A party's ignorance of a ground of plea during the former litigation does not make the former decision any the less binding. (1918) M.W.N. 580=49 Ind. Cas. 369=8 L. W. 473.

——S. 11—Issue of fact—Custom—Subsequent suit relating to other properties—Res judicata.

The existence of a custom is a question of fact and an erroneous decision on that point between the same parties operates as res judicata even though the subsequent suit relates to properties other than those involved in the prior suit. If, however, the decision was not necessary to the prior suit it does not operate as *res judicata* in the subsequent suit. 82 P. R. 1918=160 P.W.R. 1918=47 Ind. Cas. 373 =109 P.L.R. 1918.

13 (b). Issue of Law.

——S. 11—Decision on question of law.

A previous decision on a question of law is *res judicata* in a subsequent suit. I.L.R. (1946) Nag. 159=1946 N.L.J. 690=A.I.R. 1946 Nag. 277.

——S. 11—Question of law—Previous decision—Res judicata.

It is not correct to say that a previous decision on a question of law is not *res judicata* in a subsequent suit. A.I.R. (Vol. 25) 1938 Nag. 195=I.L.R. (1940) Nag. 181=175 Ind. Cas. 693.

——S. 11—Finding of law—Res judicata—Municipal Council and Chairman are same parties.

For the purpose of applying the rule of *res judicata*, a Municipal Council and its Chairman cannot be viewed as two independent entities. Consequently, if by a decision of the Civil Court the Municipal Council is precluded from declaring that certain rice mills are liable for the payment of the annual licence fees, the Chairman as the executive head of the Council cannot demand the taking of a licence in respect of such mills and levy the annual licence fee. A.I.R. (Vol. 20) 1933 Mad. 59=36 L. W. 664=1932 M. W. N. 1274=140 Ind. Cas. 326.

——S. 11—Decision on point of law—Father's failure to raise plea—Whether son can in subsequent suit plead that he was not properly represented.

Section 11 does not require the causes of action to be the same nor the reliefs claimed to be the same before the doctrine of *res judicata* can come into operation; what the section reqires is that the matters in issue shall be the same and it makes no distinction between questions of fact and questions of law.

A decision on a point of law will not operate as *res judicata* only if the matter in issue in the two suits is not the same or if the parties are not litigating under the same title, *i. e.*, when the requirements of S. 11 have not all been satisfied.

The mere failure by a Hindu father to make a possible plea will not entitle his son, in a subsequent suit to plead that he had not been properly represented in the previous suit. A.I.R. (Vol. 19) 1932 Nag. 90=15 N.L.J. 1=138 Ind. Cas. 161.

——S. 11—Issue of fact and Issue of law—No distinction for purposes of Res judicata.

The section draws no distinction between an issue of fact and an issue of law. An issue of law operates as *res judicata* in the same way as an issue of fact. In both cases however, the matter must have been, directly and substantially in issue in a former proceeding between the same parties or their representatives in interest. 2 Pat. 771=74 Ind. Cas. 781=5 P.L.T. 7 =A.I.R. 1924 Pat. 265.

——S. 11—Expl. III—"Matter"—If includes defence or claim set upon question of law.

The word "matter" in explanation 3 to S. 11, C.

P. C., includes any defence or claim set up on a question of law. 32 M.L.J. 63=(1917) M.W.N. 321=37 Ind. Cas. 857=5 L. W. 682.

——S. 11—Prior decision—On question of res judicata.

A decision in a former suit that the issue between the parties is barred by the plea of *res judicata* is in itself a decision which operates as *res judicata* in a subsequent suit. 27 Ind. Cas. 954 and A.I.R. 1928 Cal. 717, Foll. 9 Pat. 674=A.I.R. 1930 Pat. 585=11 P.L.T. 765=128 Ind. Cas. 337.

——S. 11—Decision holding prior decsion res judicata is conclusive.

A previous decision holding that a decision prior to that on a point of law was or was not *res judicata* between the parties, is conclusive between the parties. 48 C.L.J. 184=32 C.W.N. 828=115 Ind. Cas. 588 =A.I.R. 1928 Cal. 717.

——S. 11——Plea of res judicata—Decision on.

The decision regarding the operation of the *res judicata* between the parties in a previous suit is conclusive as between the parties or their representatives. 21 C.L.J. 157=27 Ind. Cas. 954=19 C.W.N. 1280.

——S. 11—Decision regarding jurisdiction—Res judicata.

A Court, before whom a cause is brought has always jurisdiction to decide for itself whether it has jurisdiction to try the suit and its decision thereon is as much *res judicata* in a subsequent suit relating to the same subject-matter as on any other point. A. I. R. (Vol. 24) 1937 Lah. 649=39 P.L.R. 117=175 Ind. Cas. 572.

——S. 11—Jurisdiction—Decision as to.

Where an objection that the Civil Court has no jurisdiction to make a reference is dismissed by the Court on full consideration of authorities, it is not open, on the principle of *res judicata*, to the successor-in-office to go behind the order and to dismiss the original application objection to which was first dismissed on the ground which had previously been decided against the objector. 122 Ind. Cas. 724=A.I.R. 1930 Lah. 836.

——S. 11—Decision on question of jurisdiction—No res judicata.

A decision of court that it has no jurisdiction to deal with the case without deciding anything regarding the rights of the parties, is not *res judicata*. A. I. R. (Vol. 28) 1941 Cal. 493=73 C.L.J. 410=196 Ind. Cas. 534.

——S. 11—Question of jurisdiction.

In a suit for rent in a Small Cause Court the defendant pleaded that the Court had no jurisdiction to entertain the suit as the land for which rent was claimed was part of an estate and relied upon a decision of the same Court in a suit between the same parties for rent for a prior *fasli* in respect of the same land. A revision was filed against the decision and the High Court declined to interfere. *Held*, that the decision in the earlier suit did not preclude the Court in the second suit from considering the question of its jurisdiction to entertain the suit. The doctrine of *res judicata* does not apply to question of jurisdiction. (1917) M.W.N. 318=37 Ind. Cas. 906=5 L. W. 467.

——S. 11—Question of law—Decision on—When binding on parties—Decision on question of jurisdiction.

It is not every decision of a question of law between the parties which is binding but only that decision on such a question which affects the subect-matter or creates a legal relation between the parties or defines the status of either of them, which is binding. Accordingly, a decision of a Division Court on the question of its jurisdiction to pass orders for certain purposes in a Privy Council matter does not operate as *res judicata* between the parties at a later stage so as to preclude another Division Court from making a reference to a Full Bench on the general question of the powers of the Court to pass orders in the same matter. The specific matters which were before the Court at the earlier stage are binding between the parties but the general question which is the subject-matter of reference was not directly and substantially in issue and is not so binding. 53 C. W. N. 533=A.I.R. 1949 Cal. 430 (F.B.).

——S. 11—Decision on issue of law—Res judicata—Conditions—Construction of document.

In 1906, *A* brought a suit against *B* and others and obtained a decree against them, and one of the issues was whether payment of money under a deed was not dependent upon the performance of worship in a certain temple. In 1925 in a suit between the successors of *A* and *B*, the same question was raised again:

Held, that in both cases there was an adjudication upon a point of law on the same subject-matter, *viz.*, the construction of the same document, and hence the formed decision operated as *res judicata*.

A suit on an issue of law operates as *res judicata* if the cause of action in the subsequent suit is the same as in the first suit. A.I.R. (Vol. 19) 1932 Bom. 257=34 Bom. L.R. 198=137 Ind. Cas. 600.

——S. 11—Question of law—Interpretation of words used in deed—If operates as res judicata.

Where the question decided is as to the correct interpretation of the words used in a deed and no question as to any principle of law or the interpretation of application of any statute is involved, the decision of such a point does operate as *res judicata*. The Oudh view has always been that a finding even on a question of law operates as *res judicata*. 21 Luck. 586=A.I.R. 1947 Oudh 74=227 Ind. Cas. 208=1946 O.W.N. 287=1946 A.W.R. (C.C.) 220 =1946 O.A. (C.C.) 220.

——S. 11—Issue of Law—Construction of statute—If res judicata.

Per *Macleod, C.J.*—An abstract question of law, *viz.*, construction of a section of a statute and not a concrete question such as the construction of a document is not a question of *res judicata* since at least a Full Bench will form its own opinion as to what the law is. But it is a question whether the principle of *stare decisis* would be invoked. 18 Bom. 525 doubted. Per *Shah, J.*—The binding character of *res judicata* does not depend on the correctness of the reasons for the conclusion. No distinction is made between issues of fact and issues of law. 18 Bom. 525, affirmed. Per *Fawcett, J.*—It is doubtful whether distinction between decisions on abstract questions of law and concrete questions such as construction of a particular document can be made. At

least where parties seek to litigate again the very same cause of action such a distinction cannot be drawn. 45 Bom. 1260=64 Ind. Cas. 162=23 Bom. L.R. 749 (F.B.).

——S. 11—Plaintiff's right to mamul dues decided by construing statute—Question is not res judicata.

On a construction of the statute governing the matter plaintiff was held entitled to collect mamul rates for certain years. In a subsequent suit in respect of another period.

Held, (per *Macleod, C.J.*; *Shah, J.,* Dissenting and *Fawcett, J., Doubting*), the question of plaintiff's right was not concluded by *res judicata.*

Per *Maclead, C.J. and Fawcett, J.*—The question may, however, be concluded by the principle of *stare decisis.* 45 Bom. 1260=23 Bom.L.R. 749=64 Ind. Cas. 162=A.I.R. 1921 Bom. 87.

——S. 11—Issue of law—Right established in favour of party—Res judicata.

Per *Sadasiva Iyer, J.*—The decision on a question of law in one proceeding does not bar later proceeding except that the right which was the subject-matter of the former proceeding and was established in favour of one party cannot be questioned in the subsequent proceeding. 40 Mad. 989=31 M.L.J. 513=20 M.L.T. 391=4 L.W. 507=37 Ind. Cas. 741=(1916) 2 M.W.N. 296.

——S. 11—Issue of law—Decree by consent—Res judicata.

The rule that estoppel by *res judicata* does not apply to a question of law has no force in the case of consent decree. 35 Mad. 75=9 M.L.T. 487=21 M.L.J. 709=9 Ind. Cas. 875=(1911) 1 M.W.N. 290.

——S. 11—Cause of action different—Earlier decision on issue of law.

When the cause of action is different, an earlier decision on an issue of law will not operate as *res judicata.* A.I.R. (Vol. 29) 1942 Bom. 322=44 Bom.L.R. 710=I.L.R. (1942) Bom. 798=203 Ind. Cas. 655.

——S. 11—There can be no *res judicata* on a pure point of law. A.I.R. (Vol. 17) 1930 Rang. 337 (2)=8 Rang. 544=129 Ind. Cas. 519.

——S. 11—Question of law—Different question raised in subsequent suit—No res judicata.

In a previous suit by the Secretary of Religious Association the defendant objected that the suit was not maintainable under O. 1, R. 8 as the plaintiffs were not 'numerous.' But the Court overruled the objection and held that the suit was maintainable without the aid of that rule. In the subsequent suit the defendant contended that R. 8 was bar to the suit as permission of the Court was not obtained. It was clear from the proceedings of the Executive Committee of the Samaj that the Secretary was authorized to institute the suit and presumably the Executive Committee had authority to so authorize him.

Held, that as the questions raised in the previous and the subsequent suit were different ones, the subsequent suit was not barred by the principle of *res judicata.* 49 C.L.J. 357=A.I.R. 1929 Cal. 445.

——S. 11—Question of law—Decision on—Subsequent change of law—Prior decision not res judicata in a subsequent suit.

Cases must be decided upon law as it stands when the judgment is pronounced, and not upon what the law was at the date of a previous suit; and if the said law has been altered in the meantime, and the effect of the law has been differently in interpreted by the judicial decision or altered by the statute, the decision on a particular question of law in an earlier suit would not operate as *res judicata* with regard to the same question in a subsequent suit. For instance if in a previous suit it was held that a particular rate of interest in a kabuliyat was penal, but the law is subsequently changed, then in a suit for subsequent rent on the same kabuliyat the previous decision is not *res judicata.* 32 Cal. 749, Foll. 30 C.W.N. 83=87 Ind. Cas. 767=A.I.R. 1925 Cal. 1193.

——S. 11—Question of law—Decision of in a case of recurring liability—If res judicata in a subsequent suit.

A decision on a point of law does not operate as *res judicata* if the cause of action in a subsequent suit is different from that in the former suit as often happens in the cases of recurring liability; but if the cause of action is the same the decision would be *res judicata.* The right to eject a tenant accrues fresh every year. Therefore the previous decision that an ejectment suit was not maintainable in a Revenue Court cannot operate as *res judicata.* 32 Cal. 749, Foll. 87 Ind. Cas. 789=A.I.R. 1925 All. 761.

——S. 11—Decision based on erroneous view of law—Res judicata.

A decision in a previous suit is binding on the parties even though it proceeds on an erroneous view of law. I.L.R. (1946) Nag. 568=A.I.R. 1947 Nag. 48=1946 N.L.J. 544.

——S. 11—Erroneous decision on question of law.

Even an erroneous decision on a question of law operates as *res judicata* between the parties to it.

Correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as *res judicata.* A decision in the previous execution case between the parties that the matter was ot within the competence of the executing Court even though erroneous is binding on the parties. A.I.R. (Vol. 30) 1943 Cal. 460=76 C.L.J. 183=209 Ind. Cas. 71.

——S. 11—A decision may be wrong and a decision may be on a pure point of law, but if the matter has been put into issue then the decision will bind the parties and their privies in a representative suit. A.I.R. (Vol. 28) 1941 Lah. 169=196 Ind. Cas. 130.

——S. 11—Question of law—Liability to pay kattubadi—Erroneous decisions.

The correctness or otherwise of a judicial decision has no bearing on the question whether it does or does not operate as *res judicata.* A previous decision determining the question of liability to pay *kattubadi,* though erroneous in law, will all the same operate as *res judicata* when the same question is raised between the same parties or their representatives in a subsequent suit for recovery of *kattubadi* for subsequent *faslis.* A.I.R. (Vol. 20) 1933 Mad. 925=57 Mad. 73=1933 M.W.N. 510=38 L. W. 755=65 M.L.J. 684=148 Ind. Cas. 221.

——S. 11—Erroneous decision on point of law —Res judicata.

An erroneous decision on a point of law will con-

stitute *res judicata* as much as a correct decision on a question either of law or of fact. 11 P.L.T. 765 =128 Ind. Cas. 337=9 Pat. 674=A.I.R. 1930 Pat. 585.

——S. 11—Erroneous decision on point of law.

An erroneous decision on a point of law is *res judicata* between the parties. A.I.R. (Vol. 23) 1936 Cal. 200=40 C.W.N. 627=162 Ind. Cas. 709.

——S. 11—Wrong decision on law—Res judicata.

Where a Court is competent to try a suit, the mere fact that the Court through an error in procedure comes to a decision which it is not permitted by law to make does not render its decree a nullity and the decision operates as *res judicata.* A.I.R. 1930 Rang. 294=128 Ind. Cas. 838.

——S. 11—Wrong decision—Question of law.

A question of law even when wrongly decided between the parties operates as *res judicata.* 53 Bom. 676=31 Bom.L.R. 778=122 Ind. Cas. 113=A.I.R. 1930 Bom. 135.

——S. 11—Prior decision based on error of law —Res judicata.

An error of law is not a ground for setting aside a previous decree as passed without jurisdiction or for a declaration that it must never operate as *res judicata.* 48 C.L.J. 590=115 Ind. Cas. 269=A.I.R. 1929 Cal. 156.

——S. 11—Question of law—Erroneous decision —Res judicata.

Decision though erroneous by a competent tribunal of a question of law directly and substantially in issue between the parties in a suit prevents a Court from deciding the same question arising between the same parties in a subsequent suit according to law. There is nothing to limit the matter in issue to an issue of fact. 30 Mad. 461, Diss. 49 All. 543=25 A.L.J. 564=8 L.R.A. Rev. 101=100 Ind. Cas. 601=A.I.R. 1927 All. 297.

——S. 11—Question of law—Erroneous decision—Res judicata.

A Court with jurisdiction to try a matter has jurisdiction to decide it wrongly even against a clear section of a statute and, if it so decides it wrongly, its decision may operate as *res judicata.* 8 L.R.A. Rev. 77=99 Ind. Cas. 528=A.I.R. 1927 All. 206.

——S. 11—Erroneous decision on point of law —Res judicata between same parties.

An erroneous decision on a point of law will, as between the parties to it, but no further, be a sufficient *res judicata* to preclude them from re-agitating it. 45 Bom. 1260, Foll. 28 Bom. L. R. 879=98 Ind. Cas. 341=A.I.R. 1926 Bom. 481.

——S. 11—Erroneous decision point of law—Res judicata.

An erroneous decision on a point of law can be *res judicata.* A.I.R. 1924 Pat. 265, Foll. 1926 P.H.C.C. 113=94 Ind. Cas. 553=A.I.R. 1926 P. 288. *See also* 79 Ind. Cas. 621=A.I.R. 1924 Nag. 422; 61 Ind. Cas. 603 (Nag.); (1906) 31 B. 128=8 Bom.L.R. 932.

——S. 11—Erroneous decision.

The objection that because a decision is erroneous it cannot operate as *res judicata* is untenable. 9 N. L.J. 183=96 Ind. Cas. 963=A.I.R. 1926 Nag. 476.

——S. 11—Issue of law—Erroneous decision—Res judicata.

The section draws no distinction between an issue of fact and an issue of law; and an issue of law operates as *res judicata* in the same way as an issue of fact. Consequently a decision of a question of law in an execution case is *res judicata* in a subsequent application for execution of the same decree even though the view of law enunciated in the prior execution case has been since disapproved by a full Bench. 2 Pat. 771=74 Ind. Cas. 791=5 Pat. L. T. 7.

——S. 11—Issue of law—Erroneous decision—Res judicata.

An issue of law may be *res judicata* of the cause of action in the subsequent suit if it is the same as that in the former suit. The operation of a decree as *res judicata* so far at any rate as the subject-matter of a direct adjudication contained in the decree is concerned can in no way be attacked in the absence of fraud or collusion, by the fact that the decision was based on a mistake of law. As between the parties thereto it must be held to be binding and to operate as *res judicata.* 37 M.L.J. 554=54 Ind. Cas. 202=26 M.L.T. 364.

——S. 11—Issue of law—Erroneous decision—Res judicata.

Decision in prior suit, though wrong in point of law, may bar subsequent suit on the same matter between the same parties. In a previous suit defendants were held liable for interest on arrears of rent. In a subsequent suit defendants pleaded they were *thikadars* and therefore not liable under S. 141 of the Oudh Rent Act to pay interest on arrears. *Held,* that the former decision operated as *res judicata.* 45 Ind. Cas. 252=5 O.L.J. 16.

——S. 11—Issue of law—Erroneous decision—Res judicata.

A decision on a pure question of law, even though erroneous, may in certain cases operate as *res judicata.* 21 Ind. Cas. 979=19 C.L.J. 34.

——S. 11—Issue of Law—Erroneous decision—Res judicata.

A decision in a previous suit on a question of law even if erroneous, would operate as *res judicata* in a subsequent suit. 15 All. 327; 28 Cal. 318 and 24 All. 138, foll. 19 Ind. Cas. 244.

——S. 11 (S. 13 Old Code)—Erroneous decision in law—Res judicata—Ex parte decree upholding void transaction.

A plea of estoppel by **res judicata** will prevail even if the effect of the previous **ex-parte** decree in the case be to uphold a transaction declared void by statute, **e.g.**, a mortgage and tenancy of bhagdari land not being a recognised sub-division of a share of bhag (S. 3 of the Bombay Act 5 of 1862). (1909) 11 Bom.L.R. 345=33 Bom. 479.

——S. 11—Decision based on erroneous reasoning on a point of law—Res judicata—Condition.

The question whether decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as *res judicata.* For this purpose, it is not true that a point of law is always open to a party. S. 11, C. P. Code, says nothing about causes of action, a phrase which always requires careful handling. Nor does the section say anything about points or points of law, or pure points of law.

Questions of law are of all kinds and cannot be dealt with as though they were the same. Questions of procedure, questions affecting jurisdiction, question of limitation, may all be questions of law. In any case in which it is found that the matter directly and substantially in issue has been directly and substantially in issue in the former suit and has been heard and finally decided by such Court, the principle of *res judicata* is not to be ignored merely on the ground that the reasoning, whether in law or otherwise of the previous decision, can be attacked on a particular point. What is made conclusive between the parties is the decision of the Court and the reasoning of the Court is not necessarily the same thing as its decision. The object of the doctrine of *res judicata* is not to fasten upon parties special principles of law as applicable to them *inter se,* but to ascertain their rights and the facts upon which these rights directly and substantially depend, and to prevent this ascertainment from becoming nugatory by precluding the parties from re-opening or recontesting that which has been finally decided. 56 Cal. 723=115 Ind. Cas. 593=48 C.L.J. 327=33 C.W.N. 126=A. I. R. 1928 Cal. 777.

——S. 11—Decision based on erroneous reasoning on a point of law—Ex parte decree.

Where the main point for consideration is whether the matter now in issue was directly and substantially in issue between the same parties and that very matter has been decided in a previous suit between the same parties, that matter cannot be re-opened merely because the reasoning of the Court in the previous suit on a point of law was erroneous.

The mere fact that the previous decisions were *ex parte* would not be sufficient to exclude these decisions from the rule of *res judicata.* A.I.R. (Vol. 20) 1933 Lah. 606=144 Ind. Cas. 669.

——S. 11—Erroneous decision on question of construction of deed of transfer—Res judicata.

An erroneous decision on the question of the construction of a deed of transfer operates as a bar. 29 Bom. 339 at 347 (P.C.); 10 Cal. 697, foll. 41 Ind. Cas. 778=2 Pat.L.W. 146.

——S. 11—Construction of grant—When res judicata.

Where a document has been construed in a suit between the parties that construction even if erroneous is binding on them in subsequent suits relating to the property not involved in the original suit. 23 M.L.W. 540=95 Ind. Cas. 325=A.I.R. 1926 Mad. 695.

——S. 11—Erroneous decision—Construction of grant.

Where a grant has been construed in a suit between the parties, the construction, though erroneous binds them in a subsequent suit relating to property not involved in the original litigation. 15 C.L.J. 684, foll. 31 M.L.J. 97=20 M.L.T. 284=(1916) 2 M.W.N. 96=35 Ind. Cas. 266=4 L.W. 133.

——S. 11—Issue of law—Erroneous decision—Suit for damages—Res judicata.

Defendant, being a surety for the plaintiff to a third party and being in default, the latter sued plaintiff and obtained a decree against him. The plaintiff then sued the defendant and the third party to compel the defendant to pay the amount of the previous decree to the third party. This suit was dismissed as plaintiff did not actually pay the decree amount, and the suit was premature. Thereafter plaintiff discharged that decree and brought the present suit against the defendants to recover the amount. The Sub-Judge dismissed the suit, holding that it was barred as the previous suit was wrongly decided and should have been decreed, *held,* that the defendant could not contended that the decision in the previous suit was wrong and not binding upon him under S. 11. 36 Ind. Cas. 268.

——S. 11—Erroneous decision—Decision on plea of res judicata.

Where a decision between the parties was considered by the Court and declared not to be *res judicata,* the latter decision, even if erroneous in law, becomes conclusive between the parties, and it is not open to any of them to plead in a later suit that the former decision still operated as *res judicata.* A.I.R. (Vol. 24) 1937 Lah. 649=39 P.L.R. 117 =175 Ind. Cas. 542.

——S. 11—Wrong decision of question of res judicata.

By deciding the question of *res judicata* wrongly a Court cannot be said to have exercised its jurisdiction illegally or with material irregularity. A.I.R. (Vol. 23) 1936 Lah. 100=162 Ind. Cas. 692.

——S. 11—Erroneous decision—Question of res judicata.

The expression 'no Court shall try any suit or issue' in S. 11 of the C. P. Code, while it prohibits an enquiry *in limine* as to matters already adjudicated upon does not affect the jurisdiction of the Court. The question of *res judicata* as of limitation or the like, raised in a case is not, even though wrong, a failure, or cause of failure to exercise jurisdiction any more than a wrong decision. A.I.R. (Vol. 21) 1934 Cal. 282=59 C.L.J. 35=38 C.W.N. 348=61 Cal. 234= 151 Ind. Cas. 253.

——S. 11—Erroneous decision on question of jurisdiction—Res judicata.

The rule of *res judicata* applies with reference to a given set of facts on which a claim is based, and erroneous decision on the question of jurisdiction is not a nullity which can be ignored or even impeached in a collateral decision. A.I.R. (Vol. 28) 1941 Lah. 327=43 P.L.R. 479=196 Ind. Cas. 611.

——S. 11—Plea of want of jurisdiction—Erroneous decision.

When the plea of want of jurisdiction has been raised in the lower Court and decided, even if erroneous, it is binding on the parties when not set aside on appeal or other proceedings allowed by law and its correctness cannot be questioned in a suit. A. I.R. (Vol. 24) 1937 Lah. 649=39 P.L.R. 117= 175 Ind. Cas. 542.

——S. 11—Wrong decision on a point of jurisdiction—View taken upset in another proceeding—Res judicata.

Where a Court has decided the question of jurisdiction although wrongly and no objection was raised to its jurisdiction, the question becomes *res judicata* between the same parties in a subsequent suit. A decided case cannot be re-opened merely because the view that was taken on a question of law in that case was subsequently upset not in that case but in another proceeding between different parties, by a superior Court. 28 Bom.L.R. 879=98 Ind. Cas. 341=A.I.R. 1926 Bom. 481.

——S. 11—Issue of Law—Erroneous Decision—Subsequent legislation—Res judicata.

In a suit on a mortgage of 1893 the High Court held in August, 1908, that the deed of mortgage was void and had no effect, on account of want of attestation as required by S. 59, T. P. Act. On 24th June, 1908, Government had by a notification excluded certain districts including the district to which the case belonged from the operation of S. 59, T. P. Act and given that notification a retrospective effect from 1893. Plaintiff thereupon brought another suit to enforce his mortgage: *Held,* that the suit was barred by *res judicata.* The Government notification did not remove the case out of the principle of *res judicata* as defendants had acquired as against the plaintiff a vested right under the decree of the High Court. The decree of the High Court was still subsisting and was not affected by Government notification although the notification operated retrospectively also. The notification could not put an end to rights which had been judicially declared and had become merged in decrees. A Government notification cannot have higher force than a rule of law. 36 Bom. 617=16 Ind. Cas. 1002=14 Bom.L.R. 744.

——S. 11 Erroneous—Decision issue of law—Res judicata—Limits.

There can be no *res judicata* laying down a wrong rule of law between parties for future guidance also. The decision must be confined to the matter to which it has been applied at the time of the former decision. A.I.R. (Vol. 24) 1937 Mad. 254=1936 M. W.N. 1362=45 L.W. 15=I.L.R. (1937) Mad. 364=(1937) 1 M.L.J. 233=168 Ind. Cas. 24 (F.B.).

——S. 11—Suit for profits against *lambardar*—*Lambardar* wrongly held to be responsible for getting ex-proprietary rent fixed and therefore suit decreed on gross rent—Decision as to duty of *lambardar* as regards ex-proprietary tenancy will not operate as *res judicata* in a subsequent suit for profits between the parties. 1938 O.W.N. 306.

——S. 11—Question of law — Erroneous decision—How far res judicata.

An erroneous decision on a question of law in a previous suit would not be a bar in a subsequent suit between the same parties, and a different decision may be given on that question, but the decision so given should not in any way affect the operation of the former decree or take away any rights acquired by the parties thereunder. A.I.R. (Vol. 20) 1933 Mad. 59=36 L.W. 664=1932 M.W.N. 1274=140 Ind. Cas. 326.

——S. 11—Question of law—Erroneous decision—Not res judicata.

A decision on a question of law may be *res judicata* but an erroneous decision on a question of law cannot be allowed to operate as *res judicata* so as to prevent a Court from deciding the same question on its arising between the same parties in a subsequent suit. 29 P.W.R. 1922=72 Ind. Cas. 177=A.I.R. 1922 Lah. 329.

——S. 11—Erroneous decision as to maintainability of appeal.

An erroneous decision as to the maintainability of an appeal is no bar so as to preclude an appeal in another proceeding. (1910) 20 M.L.J. 961=34 Mad. 450=8 M.L.T. 240=7 Ind. Cas. 418=1910 M.W.N. 574.

——S. 11—Failure by plaintiff to appeal against decree negativing part of claim as being barred by limitation—Defendant appealing—Different rule of limitation held applicable—Plaintiff's right to remaining property not affected.

Where on a wrong view of the law of limitation applicable, the trial Court holds part of a plaintiff's claim to be barred and the plaintiff submits to the decree and does not appeal against it he cannot be made to suffer by any rule of *res judicata* so far as the remaining property is concerned when the appellate Court on an appeal by the defendant finds that a different rule of limitation is applicable which really embraces the dismissed portion of the claim also. 1949 A.W.R. 368.

——S. 11—Decision based on erroneous view of law—Not res judicata in suit relating to another property.

Where a decision proceeds upon a certain view of the law and that view is found to be erroneous it cannot have the force of *res judicata* in a subsequent proceeding relating to a different property.

Where in a suit relating to a certain property it was held on an erroneous view of the Muhammadan Law that the plaintiff was not a legitimate son and the question of legitimacy was raised in a subsequent suit relating to another property:

Held, that the prior decision on the point of legitimacy did not operate as *res judicata.* A.I.R. (Vol. 17) 1930 Lah. 907=12 Lah. 52=31 P.L.R. 816=129 Ind. Cas. 12.

——S. 11 (S. 13 Old Code)—Erroneous decision on point of law—No Res judicata—Subject-matter of second suit different.

An adjudication upon a point of law, though binding upon the parties in any future suit, quod the same subject matter, is not conclusive even between the same parties when the subject-matter of the second suit is different from that of the first. (1902) 15 M.L.J. 466=28 M. 517. *See also* 16 M.L.J. 136=29 M. 225.

But the correctness of the decree given in the former suit cannot be questioned in the latter suit on the ground of error of law nor can another decree be given which will have the effect of setting at naught the prior decree in whole or in part be passed. (1906) 17 M.L.J. 250=30 M. 461. Also 36 M. 461; 30 M. 504, foll. (1906) 18 M.L.J. 548.

——S. 11—Question of law—Erroneous decision—Different cause of action—No res judicata.

A decision, however erroneous it may be, on a question of law, may not operate as *res judicata* only in cases where the causes of action are different, but in all other cases it must operate as *res judicata* between the parties. 48 C.L.J. 184=32 C.W.N. 828 =115 Ind. Cas. 588=A.I.R. 1928 Cal. 717.

——S. 11 (S. 13 Old Code)—Erroneous decision on question of law—Law altered by a Full Bench decision—No res judicata on fresh cause of action.

On a fresh cause of action, though on the same title [here a suit for rent subsequently accrued due] an erroneous decision in a previous suit on a

question of law will not be res judicata, whether the law was altered subsequently by a statute or by judicial decisions. (1903) 1 C.L.J. 176=9 C.W.N. 466=32 C. 749. See Contra. 9 C.W.N. 472.

——S. 11—Issue of law—Erroneous decision on subsequent proceeding for different relief.

A decision that is contrary to law when that expression is used in the wide sense attributed to it so far example in S. 100 of the Code it may or may not have the force of *res judicata*. Where a decision lays down what the law is and it is found to be erroneous, it cannot have the force of *res judicata* in a subsequent proceeding to recover a different relief. 11 C.L.J. 461, foll. A decision cannot alter the law of the land. 39 C. 848=16 C.W.N. 621=16 C.L.J. 154=14 Ind. Cas. 124.

——S. 11 (S. 13 Old Code)—Erroneous decision in law—Decree for rent—No res judicata.

In a previous suit for rent the landlord claimed a share of the produce of the betel-nut trees and obtained a decree without a contest; but he did not allege that either the rent in respect of the trees or the amount thereof was due **according to custom. Held**, in a second suit for rent according to custom that the landlord could not have more than what the survey officer declares to be due under Bombay Act 1 of 1880, S. 33, and that the previous decision was not **res judicata**. Per **Fulton, J.**—A Court is not bound to repeat an error of law. A decree for rent opposed to the provision of law cannot stand in the way of a correct decree in a new suit. Per **Chandavarkar, J.**—Unless the matter was directly raised and with precision and certainty, the decision cannot be **res judicata**. (1901) 3 Bom.L.R. 450=26 Bom. 25.

——S. 11—Decision wrong on point of law—Matters in which public have interest—If res judicata.

A decision is nonetheless *res judicata* even if in point of law that decision is wrong. But questions of law are of all kinds and cannot be dealt with as though they were all the same. Questions of procedure, questions affecting jurisdiction, questions of limitation, may all be questions of law. In such questions, the rights of parties are not the only matter for consideration. When a plea of *res judicata* is raised with reference to such matters in which the Court and the public have an interest, it is at least a question whether special considerations do not apply. A.I.R. (Vol. 23) 1936 Pat. 198=14 Pat. 633=2 B.R. 53=16 P.L.T. 819=159 Ind. Cas. 173.

——S. 11—Declaration of legal right based on erroneous view of law.

Though a decision on an abstract question of law in one suit is not *res judicata* in subsequent suits between the same parties, yet a legal right found and declared or awarded in favour of one of the parties in one suit, though based on an erroneous view of the law, is *res judicata* when the same legal right is controverted in subsequent suits between the same parties. A.I.R. (Vol. 22) 1935 Mad. 835=1935 M.W.N. 677=69 M.L.J. 196=59 Mad. 62=42 L.W. 446=157 Ind. Cas. 917.

——S. 11—Issue of law—Erroneous decision—Findings of facts and relief given—Res judicata.

An erroneous decision on a question of law in a previous suit is no bar to a subsequent suit between the same parties, but the findings of facts and the relief given in a previous suit may operate as *res judicata*. 4 Mad. 219; 19 Cal.L.J. 34; 30 Mad. 461; 37 Mad. 70, foll. 31 Ind. Cas. 269.

——S. 11—Party wrongly referred to suit in execution proceedings—No estoppel against opposite party.

Where in execution proceedings a party is wrongly referred to a suit when in fact no suit was maintainable under S. 47, C. P. Code, and the order referring the party to a suit cannot be allowed to override the provisions of the law and would not operate as estoppel or *res judicata* against the other party, the proper remedy is to go in appeal against the order. A.I.R. (Vol. 22) 1935 Mad. 923=1935 M.W.N. 785=158 Ind. Cas. 410.

——S. 11—Decision based on admission which was based on erroneous conception of Law—No res judicata.

A decision based solely on an admission which was based on an erroneous conception of law cannot operate as *res judicata*. 6 Rang. 691=117 Ind. Cas. 52=A.I.R. 1929 Rang. 55.

——S. 11—Later suit decided on wrong view of law—Question raised in appeal against decree in earlier suit—Not barred by res judicata.

A decision in a later suit, not on merits, but on mistaken view of law does not render the question raised in appeals against decrees in earlier suits on similar subject-matter, *res judicata*. (1916) 1 M.W.N. 223=19 M.L.T. 268=33 Ind. Cas. 9=30 M.L.J. 379.

——S. 11—Issue of fact or law—Ambiguous finding—Not res judicata.

A judgment in a matter of *res judicata* must stand by itself. It decides what it purports to decide no more and no less—If there is any ambiguity as to what it decided which cannot be cleared up without further evidence then it will not be a clear finding and therefore not a case of *res judicata* at all. 17 L.W. 322=32 M.L.T. 146=72 Ind. Cas. 582=A.I.R. 1923 Mad. 514=44 M.L.J. 543.

13 (c)—Mixed issue of fact and law.

——S. 11—Mixed issue of law and fact—Finding on—Res judicata.

A finding on a mixed issue of law and fact stands on the same footing as a decision on a question of fact and operates as *res judicata*. A judgment operates as *res judicata* with regard to all the findings that are necessary and essential to the judgment. 87 Ind. Cas. 811=A.I.R. 1926 Cal. 80.

——S. 11—A mixed question of law and fact cannot be re-agitated. 92 Ind. Cas. 769=A.I.R. 1926 Lah. 251.

——S. 11—Issue of Law—Mixed question of fact and law—Res judicata.

A decision upon a mixed question of law and fact operates as *res judicata*. 11 C.L.J. 461; 1 C.W.N. 687, foll. 21 Ind. Cas. 979=19 C.L.J. 34.

——S. 11—Mixed question of law and fact—Decision, if res judicata—Subsequent suit based on different cause of action.

Where the parties seek to litigate the same cause of action as had been decided in a previous suit the rule of *res judicata* applies in its entirety. But where the dispute though relating to matters which have

already been in controversy in a previous suit is based on a distinct cause of action the estoppel ought to be limited to matters distinctly put in issue and should further be restricted to questions of fact or mixed question of fact and law and should not be extended to questions of law. 11 C.L.J. 46, foll. 9 Ind. Cas. 568=13 C.L.J. 119.

——S. 11—Issue of res judicata is also issue of fact—Failure to plead—Effect.

As issue of *res judicata* is not only an issue of law but also an issue of fact, a party who fails to plead this defence is not entitled to take advantage of an evidence which happens to be on the record for a different purpose to establish a claim. A.I.R. (Vol. 25) 1938 Bom. 23=39 Bom.L.R. 867=173 Ind. Cas. 113.

——S. 11—Plea of res judicata.

The question whether or not an issue is barred as *res judicata* is not a matter of jurisdiction. It is a mixed question of law and fact. 9 Pat. 674=A.I.R. 1930 Pat. 585=11 P.L.T. 765=128 Ind. Cas. 337.

——S. 11—Mixed question of law and fact—Limitation—Res judicata.

A redemption suit was dismissed under O. 9, R. 2, but before dismissal the issue of limitation was decided in favour of plaintiff. The decision on the question of limitation would operate as *res judicata* in a subsequent fresh suit for redemption by plaintiff as the issue involved not merely a question of law but a mixed question of law and fact. 99 P.W.R. 1913=19 Ind. Cas. 399=156 P.L.R. 1913.

——S. 11—Limitation—Decision on the ground of not res judicata.

Decision of a point on the ground of limitation only does not operate, *res judicata.* 73 Ind. Cas. 705=A.I.R. 1923 Lah. 150 (2).

——S. 11—Mixed question of fact and law—Question whether there has been eviction of tenant.

The question whether there has been eviction of the tenant by the landlord is a mixed question of fact and law. 9 Ind. Cas. 568=13 C.L.J. 119.

——S. 11—Mixed question of law and fact—Construction of will.

So far as an issue of mixed law and fact is concerned, it stands on the same footing as an issue of fact, and a decision thereon operates as *res judicata.* Cases of construction of wills fall within this class. (1909) 11 C.L.J. 461=6 Ind. Cas. 554.

——S. 11 (S. 13, Old Code)—Mixed question of law and fact—Stipulation in a kabuliyat held valid—Res judicata.

Where the question is whether a particular stipulation in a particular kabuliyat having been held to be valid between the parties it is open to them to re-try that question again, the question is a mixed question of law and fact and the previous decision operates as **res judicata.** 5 M. 304 dissented from. (1901) 28 C. 318.

——S. 11—Question, whether document is award or partition deed—Decision of—Res judicata.

The question whether a document was an award or a partition is not a mere question of law but has to be determined with reference to the evidence of the circumstances in which the document concerned came to be executed and the decision in such a matter may certainly operate as *res judicata.* A.I.R. (Vol. 20) 1933 Lah. 274=34 P.L.R. 313=14 Lah. 31=142 Ind. Cas. 724.

——S. 11—Interpretation of document, whether question of law.

A decision on an issue of law operates as *res judicata* if the cause of action in the subsequent suit is the same as in the previous suit.

Though interpretation of document is a matter of law as a rule, a question of opinion as to the meaning of words employed in particular documents is not a pure question of law. A.I.R. (Vol. 18) 1931 Bom. 570=33 Bom.L.R. 1443=135 Ind. Cas. 470.

——S. 11—Construction of terms of a document is not a substantial question of law.

The question of the personal liability of the mortgagor is purely one of the construction of the terms of the document and is not a substantial question of law. 91 Ind. Cas. 200=A.I.R. 1926 Nag. 245.

——S. 11—Construction of Sanad—Mortgage suit—Money decree alone granted on ground that property was not transferable under Sanad granted to mortgagor—Other properties granted under same Sanad attached in execution—Transferability of properties—If res judicata.

A mortgagee was under his mortgage entitled to possession of the mortgaged properties and sued for possession; his suit was dismissed on the ground that the properties were not transferable under the *sanad* under which they were granted to the mortgagor; he was however given a money-decree. In execution of that decree he attached other properties of the mortgagor obtained by him under the same *sanad* under which he obtained the mortgaged properties. The mortgagor objected on the ground that under the *sanad* the properties were not transferable and pleaded that the matter was *res judicata* by reason of the decision in the suit. *Held,* overruling the plea, that so long as the mortgagee did not seek to avoid the operation of the prior decree by attempting to sell the mortgaged properties, he was entitled to ask for an adjudication on the question whether, under the terms of the *sanad,* the properties sought to be attached were inalienable, though his plea could only be supplied by arguments to prove that the prior decision was erroneous. 15 A.L.J. 369=39 Ind. Cas. 902=39 All. 379.

——S. 11—Mixed question of law and fact—Construction of document—Res judicata.

Plaintiff sued his tenants to recover cess in 1902 with the result that the Munsiff decided against plaintiff. A similar suit between the same parties on the same subject in 1905 ended with a similar decision. On appeal against this decision the District Judge reversed the decision. A second appeal having been preferred, it was held that the decision of the District Munsiff in 1902 was *res judicata,* and also that the decision of the High Court in 1912 that that decision was *res judicata* was also *res judicata.* What is meant exactly by "mixed question of fact and law" in the convenient proposition that the doctrine of *res judicata* does not apply to a case of mixed question of fact and law? The answer depends on the frame of the issues in the case. Any issue involving both questions of law and of fact must be so

split up as to admit of a pure issue of law being framed on the hypothesis of a finding of fact one way or another. A decision on an abstract question of law is not *res judicata* but a decision on the construction of a document as settling the rights of parties is *res judicata.* (1917) M.W.N. 321=5 L. W. 682=37 Ind. Cas. 857=32 M.L.J. 63.

——S. 11—Erroneous decision—Construction of document—Other property affected—Res judicata.

Where a grant has been construed in a suit between the parties, the construction though erroneous binds them in a subsequent suit relating to property not involved in the original litigation. 15 C.L.J. 684, foll. 31 M.L.J. 97=20 M.L.T. 284=(1916) 2 M.W.N. 96=35 Ind. Cas. 266=4 L.W. 133.

——S. 11—Issue of law—Construction of document—Res judicata.

Held, that had the matter been *res integra* the plaintiff landlord would have been barred by the clause in the *solenama* from obtaining a personal decree against the defendant and the facts that they had ceased to be tenants, did not make the decree any less a decree for rent although it would not be executed as a rent decree. But owing to a prior decision of the High Court to which the appellant was *pro forma* defendant that the decree was a money decree, which did not fall within the provisions of the *solenama,* the plaintiff was entitled to a personal decree against defendants. 46 Cal. 870=51 Ind. Cas. 922=29 C. L.J. 465.

——S. 11—Matter in issue in a prior suit a mixed question of law and fact—If res judicata in a subsequent suit.

Matter directly and substantially in issue in the former suit, namely whether one of the terms upon which a party held his ryoti is that he is liable to pay 75 per cent. per annum interest on arrears of rent, is *res judicata,* whether in deciding it, error was on a point of fact or on a point of law. Though, in order to decide whether the terms of the party's tenancy include a valid and binding term to the effect that he should pay interest on arrears of rent at 75 per cent. per annum in accordance with the kabuliat, the former court had to consider questions of law as well as questions of fact, the matter is not an abstract question of law. 56 Cal. 723=48 C.L.J. 327=33 C.W.N. 126=115 Ind. Cas. 593=A.I.R. 1928 Cal. 777.

——S. 11—Mixed question of fact and law—Erroneous decision—Res judicata.

In a previous suit between the parties the Court came to the conclusion that defendants had no right to deduct the Government revenue and the cesses but they were entitled to deduct only the collection charges from the gross income of the estate to determine the net assets upon which *malikana* was to be calculated. *Held,* that this being a mixed question of fact and law, the decision upon, it, though erroneous, was binding upon the parties and their successors. 15 Ind. Cas. 911=15 C.L.J. 684.

——S. 11—Erroneous decision—Res judicata.

In an appeal from a Munsiff's order of dismissal of the suit on the ground that the document was a promissory note and was inadmissible for want of stamp it was held to be an agreement. Plaintiff filed a fresh suit for compensation for breach of the agreement. *Held,* that though the document was a promissory note the question was *res judicata* for it had been held that it was an agreement. 89 P.L.R. 1917.

——S. 11 (S. 13, Old Code)—Mixed question of law and fact—Erroneous decision on question of law—Res judicata.

A prior erroneous decision between the parties on a question of law cannot have the force of **res judicata** if the prior decision was due to a misapprehension as to a general rule of law. This rule is not appicable in a case where the prior decision was as to a mixed question of law and fact, i.e., whether (as in this fase) an order was one passed on 'investigation' within the meaning of O. 21, R. 58 (S. 278, Old Code) or not. An order was passed against a claimant under that provision who objected to be attachment of certain properties. More than a year from the date of the order the attachment was subsequently removed on payment of the decree amount by one of the mortgagees in possession. The claimant subsequently brought a suit for redemption of the mortgage. The District Munsif who tried the suit erroneously held that there was no order against the claimant passed in investigation, that the suit by the claimant was not barred by reason of its being brought more than a year from the date of the order. He deccreed a redemption of two of the items and dismissed the suit as regards the others as premature. The claimants brought the present suit for redemption of the other items.

Held, that the prior decision was **res judicata** as against the defendants and that the plaintiffs were entitled to redeem. (1903) 16 M.L.J. 136=29 M. 225.

14. Judgments in personam and in rem.

——S. 11—Judgment in personam—Not interpartes—No res judicata.

When in a mortgage suit persons interested in equity of redemption were not impleaded in first suit, subsequent suit on the mortgage impleading those persons is not barred. 65 Ind. Cas. 654=A.I.R. 1923 A. 232.

——S. 11 and O. 21, R. 63—Claim suit—Decision in—If res judicata against auction-purchaser.

Where a claim suit under O. 21, R. 63 was decided against the claimant and the property was then sold in auction, and the auction-purchaser brought a suit for possession against the claimant; *held,* that the latter could not now set up a title at variance with what had been determined in the previous suit though there cannot be said to be any *res judicata* between the parties to the suit. 29 Cal. 187 (P.C.), foll. 19 C.L.J. 441=20 Ind. Cas. 815=18 C.W. N. 954.

——S. 11—Judgment in personam—When binding on third parties.

A decision between the plaintiff and another person that the latter is a co-proprietor with him binds all the third parties when the contention depended upon the relation between the plaintiff and such other person. 12 Ind. Cas. 715=10 M.L.T. 450.

——S. 11—Judgment in personam—Not inter partes—Admissibility in evidence.

A judgment not *inter partes* or *in rem* is not

res judicata in a subsequent suit. But such a judgment or the whole record in that previous suit is admissible as evidence that a right had, in the previous suit, been unsuccessfully set up by one of the parties to the present suit. 105 P.W.R. 1912=14 Ind. Cas. 66=142 P.L.R. 1912.

——S. 11—Judgment in personam—Not inter partes—Admissibility in evidence.

Former judgments not *inter partes* do not operate as a bar to the trial of a suit though they may be received as evidence in the case. In a suit by the plaintiffs against the Government for recovery of emoluments of a certain office, the Government pleaded as a bar to the maintainability of the suit, a former judgment in which the plaintiffs' claim to the office against certain contesting claimants was negatived though the Government was not a party to that litigation. *Held,* that it was open to the plaintiff to reassert his title to the office in spite of the former judgment. 44 Mad. 778=41 M.L.J. 223=14 L.W. 128=67 Ind. Cas. 971=(1921) M.W.N. 576 (F.B.); overruling (1) 33 Mad. 483; (2) 36 Mad. 141.

——S. 11—Judgment in personam—Later adjudication — Effect of.

In cases of judgments *inter partes* the later adjudication should be taken as superseding the earlier. There is no question whether the former adjudication was pleaded as a bar to the later suit or not. (1916) 2 M.W.N. 219=36 Ind. Cas. 289=31 M.L.J. 219.

——S. 11—Judgment in rem.

Judgments, orders or decrees which come within S. 41 of the Evidence Act partake of a conclusive character for certain limited purposes on the footing of their being judgments *in rem,* because where the parties to a litigation submit a question for the decision of the Court and the Court gives a decision on being so invited that decision binds all the parties for the future. 44 C.L.J. 399=30 C.W.N. 415=94 Ind. Cas. 235=A.I.R. 1926 Cal. 568.

——S. 11—Judgment in rem—Parties and representatives—Creditor—Bound by adjudication against debtor.

A creditor is bound by an adjudication against his debtor on his title to property in the absence of fraud, collusion, etc. It is not necessary that the adjudication should have been on the merits. It is enough if the adjudication has the effect of effectually depriving the debtor of his right to the property so long as the judgment stands. 33 Mad. 167; 36 Mad. 141; 29 M.L.J. 558, foll. 38 M.L.J. 266=54 Ind. Cas. 565=11 L.W. 139.

15. Litigating under same title.

See also C. P. CODE, S. 11—PARTIES AND REPRESENTATIVES.

(a) "Litigating under same title"—Interpretation.
(b) Different titles.
(c) Jus tertii.
(d) Same title.

15. (a) "Litigating under same title"—Interpretation.

——S. 11—Title—Meaning of.

The word "title" in the expression "litigating under the same title" in S. 11, C. P. Code, refers to the capacity or interest of a party, that is to say, whether he sues or is sued for himself in his own interest or for himself as representing the interest of others along with himself and it has nothing to do with the particular cause of action on which he sues or is sued. I.L.R. (1946) Nag. 159=1946 N.L.J. 690=A.I.R. 1946 Nag. 277. *See also* 116 Ind. Cas. 738=A.I.R. 1929 All. 400.

——S. 11—"Same title"—Meaning of.

The expression "the same title" in respect of the third condition of *res judicata* laid down in S. 11, C. P. Code, means 'the same capacity'. A verdict against a man suing in one capacity will not estop him when he sues in another distinct capacity, and in fact is a different person in law. A.I.R. (Vol. 22) 1935 Oudh 121=11 O.W.N. 1571=10 Luck. 361=153 Ind. Cas. 585.

——S. 11—The words "litigating under the same title" mean that the demand should have been of the same quality in the second suit as in the first. 33 C.W.N. 876=57 Cal. 258=A.I.R. 1930 Cal. 47=124 Ind. Cas. 161.

——S. 11—Litigating under same title—Scope.

Section 11, C. P. Code, must be read as a whole, and the words "litigating under the same title" must be read with the words: "No Court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in the former suit". A.I.R. (Vol. 27) 1940 Sind 227=I.L.R. (1941) Kar. 99=192 Ind. Cas. 676.

——S. 11—Matter in issue and not subject-matter of suit, test of res judicata.

The words 'same title' in S. 11, C. P. Code, means the same capacity and hence the expression "litigating under the same title" means that the demand should have been made of the same quality in the second suit as in the first one. The expression "matter in issue" in S. 11 of the Code is distinct from the subject-matter and object of the suit, as well as from the relief that may be asked for in it, and the cause of action on which it is based; and the rule of *res judicata* requiring the identity of the matter in issue will apply even when the subject-matter, the object the relief and the cause of action are different. Where the whole title was in issue in a previous litigation, the same cannot be agitated in a subsequent suit. In such cases, it is the matter in issue and not the subject-matter of the suit that forms the essential test of *res judicata.* It is the identity of title and not the identity of the subject-matter of the suit on which the doctrine of *res judicata* is based. If the subject-matters of the two suits are different, but the title is identical, then the principle of *res judicata* will apply. The section simply says "litigating under the same title", it does not say anything about the subject-matter of the suit. A.I.R. (Vol. 20) 1933 Oudh 535=10 O.W.N. 1166=9 Luck. 237=147 Ind. Cas. 540.

15. (b) Different titles.

——S. 11—Parties not litigating under same title—Prior decision not res judicata.

Where the parties are not litigating in the subsequent suit under the same title under which they litigated in the former suit, the plea of *res judicata* must be overruled. A.I.R. (Vol. 24) 1937 Oudh

165=12 Luck. 516=1936 R.D. 514=1936 O.W.N. 1003=164 Ind. Cas. 1003.

——S. 11—If the parties are not litigating under the same title in a subsequent suit, the decision in a prior suit will not operate as *res judicata*. The words "litigating under the same title" in S. 11 mean that the disputed title between the two parties must be the same in both cases. 14 Ind. Cas. 12.

——S. 11—Claim to attached property by Mahomedan widow claiming lien for dower allowed—Subsequent gift by widow—Attachment of property in hands of donees—Res judicata.

An order raising the attachment and allowing the claim of a Mahomedan widow on the ground that as she was in possession of her husband's property in lieu of her dower debt, she could resist the claim of a creditor of her husband and hold the property until her dower debt was discharged will not operate as **res judicata** against the decree-holder in subsequent proceedings between him and donees from the widow who subsequent to the order allowing her claim makes a gift of the property purporting to convey absolute property to the donees and surrender her possession to them. The **res** adjudicated in the earlier case being different from that in the latter case, the rule of **res judicata** will not apply. 27 Pat. 218=A.I.R. 1949 Pat. 427.

——S. 11—First suit to establish charge on property—Second based on ownership.

Where the right claimed in both suits is the same, the subsequent suit will be barred as **res judicata** though the right in the subsequent suit is sought to be established on a ground different from that in the first suit. If the rights claimed, however, in the two suits are different, the subsequent suit will not be barred as **res judicata** simply because the property is identical. If the first suit is only to establish a charge on a certain property the second suit based on ownership is not a suit for the same right that was litigated upon in the first suit. Not only are the grounds of title different from those of the first suit but the right itself is different that is ownership in one case and a charge for maintenance in the other. In these circumstances the plaintiff cannot be said to be litigating under the same title as in the first suit simply because the house in respect of which these two suits have been fought out is the same. A.I.R. (Vol. 31) 1944 Lah. 282=I.L.R. (1944) Lah. 568=215 Ind. Cas. 125 (F.B.).

——S. 11—Title derived from different transactions.

One **X** who was a distant agnate of **S** brought a suit in 1918 for a declaration that the adoption of **M** by **S's** widow **D** was invalid. There was a compromise decree to the effect that the adoption was null and void, the reason for such compromise being that under the law of adoption as understood then, **D** had no power to adopt without the authority of her husband. There was a change in the law of adoption in 1932 and in 1935 **D** again adopted **M** and **M** brought a suit for declaration that he was the adopted son of **S**.

Held, that **M** was not litigating under the same title. The title that he sought to make out in the two suits had according to him, been derived from different transactions. **Prima facie**, therefore, his title in each suit, though of the same nature in both was different.

Held, also that no Court could presume that the law relating to adoption would remain unaltered for all time or would be expected to make an unqualified pronouncement as to a party's legal capacity to act in a specific manner on a future date.

Held, further that **D's** right to adopt for all years was not alleged or decided in the earlier suit. A.I.R. (Vol. 29) 1942 Bom. 322=44 Bom.L.R. 710=I.L.R. (1942) Bom. 798=203 Ind. Cas. 655.

——S. 11—Title claimed on different basis in former and subsequent suits.

In the earlier case the question for consideration was whether the plaintiff had obtained title by virtue of the **dhardhura** custom and his claim to have done so was negatived. In the subsequent suit the plaintiff claimed title on some other basis:

Held, that the same question was not directly and substantially in issue in both the cases and hence the decision in the former suit did not operate as **res judicata** in the subsequent suit. A.I.R. (Vol. 29) 1942 Oudh 286=1942 O.W.N. 34=200 Ind. Cas. 126.

——S. 11—Where a suit for possession by a monk as representative of the Sanghas of **Kyaungdaik** is dismissed, a subsequent suit by him for possession in the capacity of a presiding monk is not barred by **res judicata**. A.I.R. (Vol. 28) 1941 Rang. 159=1941 Rang.L.R. 204=194 Ind. Cas. 597.

——S. 11—Previous suit claiming possession as owner, dismissed—Subsequent suit as mortgagee, if bared.

The plaintiff filed a suit as owner and limited to certain reliefs, namely, a declaration of title and a declaration that as owner, the plaintiff was in possession. The suit was dismissed. He filed a subsequent suit as mortgagee of the aforesaid property to enforce his mortgage:

Held, that since the subsequent suit was based on different title, constituting an entirely different cause of action, it was not barred by **res judicata**. A.I.R. (Vol. 27) 1940 Bom. 311=42 Bom.L.R. 470=192 Ind. Cas. 305.

——S. 11 (S. 13, Old Code)—First suit as purchaser at execution sale—Second suit as mortgagee—No res judicata.

A property was mortgaged first to *B*, then to *H*. Both the mortgagees brought suits for sale without joining the other mortgagee and obtained decrees and sold and purchased the mortgaged property. *H* executed his decree first and obtained possession. *B* applied for mutation of names and was resisted by *H*. He brought a suit for possession as auction-purchaser. The suit was dismissed. He then brought the present suit as mortgagee for sale, making all the persons interested including *H*, parties to the suit. *Held*, that the suit was nit barred by the rule of *res judicata* inasmuch as *B* in the suit for possession, as auction-purchaser, was not litigating under the same title as he was in the present suit. *Held*, further that the relief for sale could not have been joined in the suit for possession by the auction-purchaser. (1908) 5 A.L.J. 729=1908 A.W.N. 287.

——S. 11—Mortgagee suing in two different capacities.

A mortgagee suing in two cases under different capacities cannot be said to be litigating under the same title and, therefore, does not attract the application of S. 11, C.P. Code. A.I.R. (Vol. 19) 1932 Bom. 15=33 Bom.L.R. 1418=136 Ind. Cas. 161.

——S. 11, Expl. 4—Suit by person as exclusive owner against persons in wrongful possession dismissed—Subsequent suit for accounts as co-sharer.

A person instituted a suit as exclusive owner against persons in wrongful possession. The suit was dismissed and he then brought another suit for accounts as a co-sharer:

Held, that the two suits were brought in different capacities and the right to accounts was not in issue in the former suit and the rule of constructive **res judicata** embodied in Expl. 4, S. 11, C. P. Code, did not apply to the case. A. I. R. (Vol. 25) 1938 Lah. 139=182 Ind. Cas. 426.

——S. 11—Executor appointed trustee by will—Personal decree against executor—Attachment of trust property — Objection by executor that property cannot be attached for personal decree—Dismissal—Suit to set aside order also dismissed—Decree, whether binding on remainderman.

A person appointed his wife his executor and directed her to hold certain properties as trustee. There was also a provision that after her death his son should be the trustee of the said properties. A decree was obtained against the widow on a promissory note and the properties held by her as trustee were attached. She preferred a claim that the properties were trust properties, and on the dismissal of the claim, instituted a suit which was also decided against her:

Held, that the decree passed in this suit did not operate as **res judicata** against the son who succeeded her as remainderman. A.I.R. (Vol. 24) 1937 Mad. 153=1936 M.W.N. 1154=71 M.L.J. 823 =45 L.W. 35=166 Ind. Cas. 727.

——S. 11—Where the capacity in which the plaintiff in the previous suit from whom the plaintiff in the subsequent suit derives his right, was suing, was different, namely, that of the alleged trustee, and the matter directly and substantially in issue in that case was different from that in the subsequent case, the previous decision does not operate as **res judicata**. A.I.R. (Vol. 23) 1936 Nag. 71 =31 N.L.R. (Sup.) 202=163 Ind. Cas. 179.

——S. 11—Suit against party in personal capacity for portion of touzi—Subsequent suit against him but as mutawalli and for whole touzi.

Where a previous suit was instituted against a party in the personal capacity and with regard to a portion of a **touzi** and a subsequent suit is instituted against the same party with respect to the whole of that **touzi** and in his capacity as a **mutawalli** of an endowment, the decision of the first suit cannot operate as **res judicata** against that party in the subsequent suit. A.I.R. (Vol. 26) 1939 Cal. 148=68 C.L.J. 293.

——S. 11—A decision in a suit for possession and management of a certain estate against certain persons in their personal capacity, does not bar a subsequent suit against the same persons as shebaits and managers and in respect of the property of the idol. A.I.R. (Vol. 23) 1936 All. 422.

——S. 11—Suit by trustee—If barred by prior suit in personal capacity.

A person litigating in the character of a trustee is not litigating under the same title as when he litigates in his private and personal capacity. A. I.R. (Vol. 19) 1932 Mad. 589=35 M.L.W. 350= 1932 M.W.N. 321=137 Ind. Cas. 707.

——S. 11—Trustee—Individual capacity.

A decision against a person in his individual capacity does not bind his successor in the office of trustee of an endowment. 24 C.W.N. 690=58 Ind. Cas. 705=47 Cal. 866.

——S. 11—Religious endowments—First suit in personal capacity—Second as pujari of temple.

In order to apply the bar of **res judicata** it is necessary for the defendants to establish that the parties were litigating under the same title in the previous suit. The decision in a suit in which a person was sued in his personal capacity will not be **res judicata** in a subsequent suit where he is sued as the **pujari** representing a temple. A. I. R. (Vol. 20) 1933 Lah. 920=146 Ind. Cas. 136.

——S. 11—Different title—Identity of causes of action immaterial.

Where the title set up in a previous suit was a title based upon the property in suit being treated as **waqf** property in which plaintiff was interested like others in offering prayers, **held,** a suit claiming personal title as the heir of a certain person is not barred, capacity being different in the two suits. The fact of the identity of the causes of action in the two suits is immaterial. 46 All. 230 =78 Ind. Cas. 402=5 L.R.A. Civ. 177=A.I. R. 1924 All. 355.

——S. 11—Prior suit contested in private capacity —Subsequent suit in public capacity—No bar.

In order to hold that a particular decision operates as **res judicata,** it is necessary to prove that the decision arrived at in the previous suit was between the same parties, and that they were litigating under the same title. Where therefore certain persons were contesting a previous case in their own private capacity, but contested the subsequent suit in their public capacity as representing the public of a particular place, it cannot be held that the decision in the previous litigation constitutes **res judicata** in the subsequent suit. 1 Luck. 489=13 O.L.J. 696=97 Ind. Cas. 853= 3 O.W.N. 645=A.I.R. 1926 Oudh 578.

——S. 11—Decision against defendant in individual capacity does not bar suit in representative capacity.

Where in the former suit the defendants were impleaded in their representative capacity, but were proceeded against in their individual rights, the decision in the suit does not operate as **res judicata** in a subsequent suit against the defendants as representing the community. 69 Ind. Cas. 528=A.I.R. 1924 Lah. 275.

——S. 11—Former suit brought to establish personal right—Subsequent suit on behalf of guild.

Where a suit by the members of a community to assert their personal rights is dismissed, it is no

bar to a subsequent suit by them as representatives of the community to establish the right of the community. 18 A.L.J. 150.

——S. 11—Former decision against Municipality—Government not claiming under Municipality nor litigating under same title.

Where the Municipality was not acting as the agent of the Government but had a delegated authority from Government to manage certain tanks, a decision in a former suit against the Municipality cannot bind the Government as the Municipality were not owner of the tanks and the Government was not party to the former suit and Government could not be said to claim under the Municipal Committee, nor was the Municipal Committee litigating under the same title as the Government. A.I.R. (Vol. 22) 1935 Nag. 61 (2)=31 N.L.R. 165=156 Ind. Cas. 180.

——S. 11—Where the defendants started claim proceedings against the plaintiff in their capacity as **stridhan** heirs and the order passed had become conclusive by a suit not having been filed under O. 21, R. 63, a subsequent suit by plaintiff for partition under a different title is not barred. A.I.R. (Vol. 21) 1934 Cal. 356=60 Cal. 1406=149 Ind. Cas. 410.

——S. 11—Prior suit to succeed to mother's property in preference to brother—Subsequent suit to succeed to brother as sister.

Where in a prior suit the plaintiff contended that she as an illegitimate daughter was entitled to succeed to her mother's property in preference to the mother's illegitimate son:

Held, that the decision in the prior suit would not operate as bar by **res judicata** in a subsequent suit in which the plaintiff claims to succeed as sister of the son. A.I.R. (Vol. 21) 1934 Bom. 36=35 Bom.L.R. 1131=58 Bom. 119=149 Ind. Cas. 821.

——S. 11—First suit under S. 92 in representative capacity—Second suit in personal capacity—Res judicata.

The first suit by the plaihtiff was under S. 92, C. P. Code on the basis that the temple in dispute was a public one. The prayer in that suit was that the defendant should be made to render accounts and he should be removed from the position of the manager of the temple. The Court found that the temple was not a public one and dismissed the suit as incompetent. The basis of the second suit was that the plaintiff as a descendant of one of the founders had a right to a share in the management.

Held, that the second suit was not barred by **res judicata**. The causes of action in the two suits were different. The plaintiff in the second suit was litigating under a different title. His first suit was in a representative capacity and he was suing in the second suit in his individual capacity on the basis of personal rights. The ground of attack taken in the second suit could not have been included in the suit under S. 92. It would have destroyed the basis of the former litigation. The rule of constructive **res judicata** also could not apply as the cause of action set up in the second suit could not have been included in the former suit. A.I.R. 1949 Ajmer 23.

——S. 11—First suit under S. 92—Subsequent individual capacity.

Where the personnel in the first suit is different from the personnel in the second, the first suit being under S. 92 and the subsequent being in individual right, the principle of **res judicata** does not apply. A.I.R. (Vol. 18) 1931 Lah. 161=12 Lah. 497=32 P.L.R. 940=135 Ind. Cas. 657.

——S. 11—Prior suit in private capacity—Subsequent suit under S. 92, C. P. Code not barred.

A previous suit cannot operate as **res judicata** in the subsequent suit, where the plaintiffs now sue not in their individual capacity but under S. 92 of the Code, as representing all those who are directly interested in the maintenance of the charities while in the previous suit their claim was in their individual capacity. 16 M.L.W. 122=69 Ind. Cas. 15=1922 M.W.N. 464=31 M.L.T. 125=A.I.R. 1922 Mad. 394=43 M.L.J. 448.

——S. 11—Suit as reversioner—Second suit as heir of widow.

The plaintiff instituted a suit for recovery of a certain property alleging that he was entitled to the same as reversioner on the death of the widow of the last male holder. The suit was dismissed on the ground that the property belonged to the widow as absolute owner. The plaintiff instituted a second suit alleging that he was one of the heirs of the widow and was entitled to a share in the property:

Held, that the second suit was not barred by **res judicata** as the plaintiff was not litigating under the same title. A.I.R. (Vol. 18) 1931 All. 21=1930 A.L.J. 1254=130 Ind. Cas. 13.

——S. 11—Title of Reversioner and owner—Dinstinct.

The position of a reversioner is distinct from that of the owner and the two titles are entirely different. Therefore when the previous suit by a party was in the capacity of reversioners of their father and in the second suit they claim as owners they cannot be said to be litigating under the same title so as to make the previous suit as **res judicata**. 120 Ind. Cas. 532=A.I.R. 1930 Lah. 284.

——S. 11—Prior suit as Reversioner—Subsequent suit as owner—Not barred.

Where the plaintiff was suing in the previous suit as reversioner who challenged the alterations made by the owner, and where in the next suit he sued as the owner himself, the judgment in the first suit cannot operate as **res judicata** in the latter because while the plaintiff's title in the former suit was based upon the residuary interest he had in the property which was the subject of alienation, in the other the plaintiff's title as owner was totally different from the former. 117 Ind. Cas. 68.

——S. 11—Suit as reversionary heir—Second suit as trustee.

Dismissal of a suit by a person claiming possession of the property as reversionary heir of the deceased on the ground that the property was gifted away to a Hindu deity does not bar a sub-

sequent suit by the same person for the recovery of the same property as trustee. 13 Bom.L.R. 989=12 Ind. Cas. 577=36 Bom. 29.

——S. 11—In the prior suit, **A** as proprietor sued **B** and **C** as thekadars for arrears of rent. In that suit it was decided that **B** was thekadar and the suit was dismissed as against **C**. The relation between **B** and **C** was left open in the suit. The second suit was by **C** as thekadar against **A** as raiyat, and **B** as witness said that **C** was entitled to receive rents from tenants.

Held, that the parties in the two suits were different, the issues were different and the parties who were common to the suits were litigating under different titles and thus the former suit was not **res judicata**. 8 Pat. 107=117 Ind. Cas. 67=A.I.R. 1929 Pat. 173.

——S. 11—Where a Mahomedan widow was in possession of her husband's estate in lieu of dower and a suit was brought by the nephew for possession of his share and was decreed on payment of a certain sum within certain time and on his failure to pay anything he was kept out of possession, a subsequent suit by the daughter of the deceased nephew claiming her share of the property is not barred by **res judicata**. A.I.R. 1925 P.C. 63, Foll. 48 All. 803=24 A.L.J. 910=98 Ind. Cas. 978=A.I.R. 1927 All. 39.

——S. 11—Prior suit as donee—Subsequent suit as heir—Not barred.

The plaintiff with his brother brought a suit in 1910 for redemption of a mortgage as donees under a gift deed by widow of the original mortgagor. The plaintiff was then a minor. Plaintiff's pleader filed an application to the effect that a compromise had been arrived at and the suit should be dismissed and thereupon the Court passed an order "Compromised, dismissed with costs." Subsequently the plaintiff became an heir of the mortgagor and sued for redemption in 1923 in that capacity.

Held, that the earlier suit of 1910 being brought in an entirely different right was much the same as if it was brought by a different person. Consequently it could not be binding on the plaintiff as regards his suit of 1923. 28 Bom.L.R. 1507=99 Ind. Cas. 814=A.I.R. 1927 Bom. 87.

——S. 11—First suit on a gift—Second suit as a heir—No bar.

Plaintiff sued for possession of certain property basing his claim on a gift of the property by his grandmother. The suit was dismissed and he brought a suit for possession of certain other property as heir of his mother. **Held,** that the suit was not barred as **res judicata**. 43 Ind. Cas. 395.

——S. 11—Where the relief claimed by plaintiffs in the previous suit was based on a right inherited by them from their father, but the title upon which the plaintiffs instituted the second suit was a title not derived from their father but a title which they claimed as having devolved upon them as reversionary heirs of the last full owner,

Held, the principle of **res judicata** cannot apply as the two suits were not litigated under the same title. 29 C.W.N. 861=89 Ind. Cas. 207=A.I.R. 1925 Cal. 1195.

——S. 11—Person added as legal representative of deceased party—Decision is not binding on him in personal capacity.

Where a party was only added as a legal representative in the previous litigation and it was not open to him as such to raise any defences personal to himself.

Held, that he can subsequently raise objections personal to himself. 75 Ind. Cas. 623=A.I.R. 1925 Mad. 59.

——S. 11—Decision between parties in different capacity.

The decision of Court prior to Deceased Brother's Widow's Marriage Act (7 Edw. & C. 47) that the widow had no **locus standi** to apply for Letters of Administration to the estate of her first husband's brother whom she married in 1916 after the former's death was held not to be **res judicata** and not to debar her from presenting a fresh application in 1923 for Letters of Administration since the parties to the two applications were really not the same in the legal sense. 1924 P.H.C.C. 138=83 Ind. Cas. 951=2 Pat.L.R. 125=6 P.L.T. 303=A.I.R. 1924 Pat. 624.

——S. 11—Pre-emption suits—Parties not claiming under the same title—No res judicata arises.

In a previous suit a decision was given in favour of plaintiff pre-emptor, though a descendant of a remote ancestor of vendor, that he was entitled to inherit vendor's property. When the vendor again sold another property, plaintiff and another pre-emptor filed suits. The suit of the latter was decreed and upheld in appeal and in view of the decision the trial Court dismissed plaintiff's suit and the appellate Court decided on merits that the previous judgment was not of binding effect in determining plaintiff's status as a pre-emptor as it held the decision was wrong.

Held, on the one hand, plaintiff and vendor **pro forma** defendant in the first case and on the other plaintiff and the present vendees in this suit, both suits, being pre-emption suits, cannot be said to be parties litigating under the same title. As the vendees did not claim under the vendor, plaintiff did not and could not challenge vendee's right to own and possess the land in suit and his claim would therefore amount to asking the vendees to re-transfer in his favour the land in suit in virtue of the decision in previous suit. 84 Ind. Cas. 257=A.I.R. 1923 Lah. 16.

——S. 11—The plaintiff's father brought a suit asking for cancellation of a sale and for possession of the fields in dispute. The suit was dismissed. The next suit was brought by the plaintiff claiming possession of the same land contending that the defendants were not entitled to retain possession of this property as their title was not supported by a registered deed of sale, and the sale was not for necessity.

Held, that the question of **res judicata** does not arise in this case though so held by the Trial Court. 71 Ind. Cas. 808=A.I.R. 1923 Nag. 177.

——S. 11—Sale to tenant of proprietary right set aside and possession given to landlord in execution—Suit thereafter by tenant for occupancy rights not barred.

Where a sale of proprietary right in land in favour of the tenant having been set aside, the tenant (vendee) sues for occupancy rights;

Held, the suit is not barred by S. 11 as the plaintiff is not suing under the same title, nor is it barred by S. 47, because the suit is under a different title and no objection could be taken in execution proceedings beforehand. 4 L.L.J. 400 =67 Ind. Cas. 485=A.I.R. 1922 Lah. 44.

——S. 11—Suit for possession under a lease—Subsequent suit on title not res judicata.

Where a suit for possession of property based on a lease is dismissed, a subsequent suit for possession based on ownership is not **res judicata**. 63 Ind. Cas. 717=3 Lah.L.J. 215=A.I.R. 1921 Lah. 17.

——S. 11—Different title.

Where the plaintiff in a subsequent suit sues under a title different from the one he endeavoured to support in a prior suit, the decision in the prior suit will not be **res judicata**. 55 Ind. Cas. 767= 31 C.L.J. 163.

——S. 11—Suit on promissory note dismissed—Suit for damage for malicious prosecution—No res judicata.

Plaintiff sued defendant for money due on a promissory note. The suit was dismissed on the finding that the pro-note was not genuine Defendants then prosecuted the plaintiff for forgery but plaintiff was acquitted. In a suit for damages for malicious prosecution, inasmuch as plaintiff was not litigating under the same title in both the suits, the finding as to the genuineness of the pro-note in the prior suit was not **res judicata** in the latter. 47 Ind. Cas. 141.

——S. 11—Suit on pro-note and sale-deed—Subsequent suit for breach of covenant in sale-deed.

Plaintiff claimed certain money on the basis of a pro-note executed in favour of the defendant which the defendant had transferred to the plaintiff by a deed. The suit was dismissed. In a subsequent suit by plaintiff upon a covenant of indemnity in the conveyance executed by the defendant in his favour.

Held, that the plaintiff was not suing the defendant under the title which was the basis of the previous suit and that the subsequent suit was not, therefore, barred by **res judicata**. 42 Ind. Cas. 895.

——S. 11—Title not same.

When a person is not litigating under the same title in both the cases, judgment in the prior suit does not bind him in the subsequent suit as **res judicata**. 37 Ind. Cas. 881.

——S. 11—Litigating under the same title—Vendor—Reversioner.

Where **A**, as a purchaser of certain properties, sued **B**, his vendor, and **C** for possession of the properties and the suit was dismissed on the ground that **C** was entitled to the property owing to an earlier purchase, whereupon **A** sued **C** again as a reversioner impeaching the alienation to **C**.

Held, that the fomer suit did not operate as a bar by **res judicata** to the latter suit. 161 P.W.R. 1915=31 Ind. Cas. 159=68 P.R. 1915.

——S. 11—Litigating under the same title—Guardian ad litem of minor—Suing in his personal capacity about same right.

A decree against the minor represented by his guardian **ad litem** can be contested by the guardian in this individual and personal capacity on rights peculiarly his own; and the fact that he acted as guardian **ad litem** before, will not estop him from claiming his right. 118 P.L.R. 1914= 22 Ind. Cas. 955=1 P.R. 1914.

——S. 11—Proprietary and under-proprietary rights.

Where the point at issue in a suit was as to who was entitled to the proprietary estate of a deceased holder the decision therein does not bar a fresh dispute as to possession on the strength of under-proprietary rights. 17 Ind. Cas. 334.

——S. 11—Former suit for possession—Second suit on title.

Where a Mahomedan widow was in possession of the whole of her husband's property in lieu of her dower debt and on her death her personal heirs got a decree against the personal heirs of her husband, for recovering the property which was in the widow's possession.

Held, that the heirs of the widow's husband were not barred by the decree obtained by the widow's heirs from instituting a suit to recover the three-fourth share of the property (excluding the widow's share), and the matter was not **res judicata**. 16 Ind. Cas. 431 (2).

——S. 11—Wakf—Invalidity — Previous decision in another capacity is conclusive.

Previous adjudication of the High Court as to the invalidity of **wakf** between the same parties but in another capacity is conclusive though not as **res judicata**. 43 Cal. 158=32 Ind. Cas. 701= 19 C.W.N. 967.

——S. 11 (S. 13, Old Code)—Suit by father for redemption—Second suit by sons—No res judicata.

The sons of a joint Hindu family governed by the Mitakshara become by birth and in their own right, entitled to the family property. They can enforce this right against their father and do not claim under him within the meaning of S. 11 (S. 13, Old Code). A person is said to claim under another when he derives his title through that other by assignment or otherwise. 19 A. 411 foll. Hence where in a previous suit for redemption brought by the father the sons were not arrayed as parties, a second suit by the sons for the redemption of their shares in the property would not be barred. (1905) 3 A.L.J. 644=(1906) A.W.N. 242=29 A. 1.

——S. 11 (S. 13, Old Code)—Litigating under the same title—Suit brought in one capacity—Subsequent suit in another—See LIMITATION ACT, Art. 47. 5 Bom.L.R. 932=28 B. 215.

15. (c) Jus Tertii.

——S. 11—"Title" does not refer to cause of action—Plaintiff suing in both suits in individual capacity and in his own interest—Defendant in both suits sued in personal capacity—Plea of jus tertii.

The expression 'title' in S. 11, C. P. Code, does not refer to the cause of action on which the suit is brought but it refers to the interest or capacity of the party suing or being sued. If the plaintiff in both suits is suing in his individual capacity and in his own interest when he is litigating under the same title. When the defendant is sued in both suits in his individual capacity a plea of **jus tertii** cannot alter the character of the suit. A. I.R. (Vol. 28) 1941 Cal. 574=198 Ind. Cas. 462.

——S. 11—Jus tertii—Plea of—Decision thereon is not res judicata.

It cannot be said for the purpose of S. 11 that the decision on a plea of **jus tertii** is a decision between the parties litigating under the same title when the **jus tertii** is put forward and actually relied on in a later case by the third person. All that can be said is that in the former suit it was raised as a defence. It cannot be said that the defendant was actually relying upon that title or litigating under it. 50 Mad. 877=26 M.L.W. 115=104 Ind. Cas. 468=A.I.R. 1927 Mad. 844 =53 M.L.J. 864.

15. (d) Same Title.

——S. 11—Same title—Claim to possession as purchaser and as usufructuary mortgagee.

A person pleading his right to possession as purchaser in a prior suit and suing for possession later on his right to possession as usufructuary mortgagee of the same property must be held to be "litigating under the same title" for purposes of **res judicata**. In each of the two suits he is litigating in his individual capacity for his own self and in his own interest. It is only when the plaintiff or defendant, as the case may be sues or is sued in the different suits as different **legal persona**, that he can be regarded as not litigating under the same title. 26 Pat. 24=A.I.R. 1948 Pat. 302.

——S. 11—Suit by plaintiff as heirs of deceased mortgagor for redemption decreed ex parte—Subsequent suit against them as executors or administrators filed by mortgagee on mortgage for sale—Whether barred.

A and **B** instituted a suit for redemption of a mortgage on the basis of a claim that they were entitled at law to the estate of the deceased mortgagor. The suit was decreed **ex parte**. The mortgagee who was the defendant in the previous suit then instituted a suit for the recovery of the amount due under the mortgage by sale of the mortgaged property against **A** and **B** in their capacity as executors or administrators representing the estate of the deceased mortgagor. **A** and **B** were under the will of the deceased mortgagor the sole legatees. It was contended that the previous decision could not be **res judicata** as **A** and **B** **litigated in different capacities in the two suits.** Overruling that contention.

Held, that as everybody who could possibly be interested in the estate of the deceased mortgagor was a party to the first suit and the same persons were parties to the second suit, **A** and **B** in their capacity as executors or administrators did not represent the interest of persons who were not represented in the previous suit but represented only their own interest as legatees. Further the plaintiffs in the previous suit were alleging that they represented the estate of the deceased mortgagor and that they were the owners of the equity of redemption. As a decree was passed in their favour, it was also **res judicata** between the plaintiff in the present suit and the defendants that the persons entitled to redeem the mortgage had already redeemed it. I.L.R. (1947) A. 186=A.I.R. 1947 All. 147.

——S. 11—Rent suit by lessor against lessee—Lessee in possession and as such liable to pay land revenue to Government—Subsequent appointment of lessor and lessee as Sadar Lambardar and Lambardar respectively—Land revenue enhanced—Suit for such enhanced rent of subsequent years—Capacity of parties in both suits.

The defendant as a lessee in actual possession and enjoyment of the village was liable to pay land revenue. He was sued by the lessor for recovery of rent. The lessee was subsequent to the decision in the suit appointed Lambardar and the lessor Sadar Lambardar. In a fresh suit by the lessor to recover rent for subsequent years claiming the amount of enhanced land revenue:

Held, that the parties were "litigating under the same title" within the meaning of S. 11 and the subsequent suit was barred by **res judicata**. The mere fact that the lessor and lessee acquired the additional capacity of Sadar Lambardar and Lambardar would not alter the nature of the suit and bar the application of the rule of **res judicata**. A.I.R. (Vol. 29) 1942 Nag. 119=1942 N.L.J. 423=I.L.R. (1942) Nag. 721=202 Ind. Cas. 317.

——S. 11—Same title—Different agency—Res judicata

A instituted a suit against the trustees of a certain temple that a certain property attached to the temple belonged to him. The suit was defended on the ground that the title was in the temple. The suit was decreed in favour of **A**. Subsequently, the plaintiffs instituted a suit alleging themselves to be worshippers of the temple against **A's** heirs for a declaration that the property which was the subject-matter of the former litigation belonged to the temple. The plaintiffs contended that the decision in the previous suit was obtained collusively and could not, therefore, be **res judicata** and also because they were not the successors of the trustees—defendants in the former suit:

Held, that it was, no doubt, true that the present plaintiffs were not the successors of the **mahant** and the trustees who were defendants in the former suit, but this was immaterial. They alleged themselves to be worshippers of the temple, and as such, were persons interested in it and had a **locus standi** to sue to protect its property from being wrongfully claimed by third parties. Admittedly,

they did not claim any personal right of their own in the property; nor had they set up a **jus tertii**; they sued for the benefit of the temple. The title litigated under was clearly the same, though the agency asserting the title previously was different from that which asserted now. A.I.R. (Vol. 25) 1938 Lah. 499=40 P.L.R. 867=181 Ind. Cas. 267.

——S. 11, O. II, R. 1—House sold in execution—Plaintiff claiming it to be joint family property and that debt in respect of which the decree was obtained was not for legal necessity—Previous suit alleging that there was partition and property fell to his share, dismissed.

In execution of a decree against defendants 1 and 2, two houses were attached and sold. The plaintiff, who was a son of defendant 1 and brother of defendant 2, thereupon instituted the suit for a declaration that the debts in connection with which the decree was obtained had not been incurred for the benefit of the joint family consisting of himself and defendants 1 and 2; that the debts were in fact incurred for illegal and immoral purposes and, therefore, the house property in question was not liable to be sold in execution of the decree. The plaintiff had previously brought two suits to challenge the same sale but in those suits he had pleaded that there had been a partition of the joint property of the family and the house property in dispute in the present case had fallen to his share. The first suit was dismissed owing to plaintiff's failure to produce evidence on the date fixed by the Court. The second suit, which was also based on the alleged partition was dismissed on the ground of **res judicata**. Thereafter, the subsequent suit was instituted by the plaintiff basing his claim on the allegations stated above:

Held, that the plaintiff challenged the sale in execution in both the suits as an infringement of his right of ownership; in the first suit he maintained that he was the sole owner, while in the subsequent suit, he claimed to be a member of a joint family. According to O. 2, R. 1, C.P. Code, the plaintiff was bound to frame his suit so as to get a final decision on the subject-matter in dispute and prevent further litigation as far as practicable. The subsequent claim could not be considered to be a so dissimilar that its union with the claim in the previous suit would have led to confusion. The suit was therefore, barred by constructive **res judicata**. A.I.R. (Vol. 25) 1938 Lah. 443=40 P.L.R. 556=I.L.R. (1938) Lah. 729=181 Ind. Cas. 41.

——S. 11—Person holding dual capacities suing in previous suit in one capacity and in subsequent suit in another capacity—Both suits same—Same relief—Parties same—Subsequent suit, held barred by res judicata.

A person having two capacities, one as a **karnavan** of a **tarwad** and the other as a **uralan** of a **Dewaswom** filed a suit against another shrine claiming that the defendant shrine was subsidiary shrine owing allegiance to the plaintiff **Dewaswom** and bound to render homage to it by making certain recurring payments. Another suit had been previously instituted against the same defendant for the same relief. But there the **uralan** figured as plaintiff suing on behalf of the institution. In the later suit, he figured as plaintiff suing through trustee (who happened to be the same person in both the suits). In both the suits the right put forward was on behalf of the **Dewaswom** and not in his capacity as the **karnavan** of his **tarwad**. In both the suits, the two shrines were plaintiff and defendant respectively, and were represented by the same individual. The reliefs were identically the same;

Held, that the latter suit was barred by the principle of **res judicata**. A. I. R. (Vol. 25) 1938 Mad. 257=1937 M.W.N. 1292=(1938) 1 M.L.J. 193=48 L.W. 679=177 Ind. Cas. 91.

——S. 11—Where in a suit by a daughter to set aside a mortgage made by the widow of her deceased husband's estate it was decided that the deceased was a **jat** governed by the agricultural custom and the widow having made a gift of the same properties, the daughter again sued for a declaration on that the gift would not bind her reversionary rights:

Held, that the parties were litigating under the same title in the two suits and the decision in the prior suit that the deceased was a **jat** was **res judicata**. A.I.R. (Vol. 20) 1933 Lah. 66=34 P.L.R. 19=140 Ind. Cas. 796.

——S. 11—Partition suit—Decision that certain property is common—Assignee from one of the parties—If can question.

The former suit was for partition by one of several members of the two branches of a deceased Mahomedan against the other members of that branch and against **S** a member of the other branch. In that suit certain property was decided to belong to the common ancestor and the share of the plaintiff was ascertained. The subsequent suit was brought by **S** together with **X** and **Y**, two other members in his branch, for partition of their share. Before bringing this suit **S** had also acquired the shares in the suit property of **P** another member of his branch.

Held, that the decision in the previous suit was binding on the parties to that suit; and although **X** and **Y** were not parties to the previous suit, they were not interested in denying that the property belonged to the common ancestor. Hence their presence in the later suit made no difference. Further even so far as the right of **S** as assignee of **P** the principle of **res judicata** would apply for although now **S** sued in the capacity of **P's** assignee, the rights of both **S** and **P** were based on inheritance from the common ancestor. A.I.R. 1929 All. 500.

——S. 11—Suit by one Reversioner—Decision res judicata in suit by other reversioners.

The decree in favour of a reversioner in a former suit operates as **res judicata** in the subsequent suit brought by other reversioners against the same defendants if they have a right in common arising out of the same cause of action and are, therefore, litigating under the same title in the later suit. 110 Ind. Cas. 725=A.I.R. 1928 Lah. 371.

——S. 11—Where the ownership of a deal regarding which there is a dispute between the trustees of a mosque and the Municipality was decided against the former, they cannot in a subsequent

suit by the public set up their rights to it. 21 A. L.J. 882=L.R. 4 A. 583=46 All. 110=1924 All. 178.

——S. 11—Suits between reversioner and purchaser from widow—Legal necessity—Decision as —Res judicata.

In a former suit between a reversioner and a purchaser from a Hindu widow an issue as to legal necessity was raised and decided adversely to the purchaser, but the reversioner's suit for a moiety of the property failed as he had no title to it then. The reversioner filed the present suit after that moiety had passed to him. **Held**, that the decision on the issue of legal necessity was **res judicata** as in both the suits the plaintiff litigated as the owner of the reversion and the defendant as the purchaser from the widow. 27 Ind. Cas. 226 =18 C.W.N. 888.

——S. 11—Suit brought in representative capacity and defended on personal capacity—Later suit on same grounds barred.

A person was sued as trustee of an idol but he defended the suit in his personal capacity and was unsuccessful; later on he sued on the same grounds as his defence in the prior suit. The suit is barred. 60 Ind. Cas. 74.

——S. 11 (S. 13, Old Code)—Assignment of Government revenue of village divided into khatas—Claim for interest on revenue in arrears—Decision as to one khata res judicata in respect of other khatas.

The plaintiff was assignee of the Government revenue of a certain village. The village was divided into 'khatas,' but the title to the revenue in respect of each and every khata was one and the same. The plaintiff sued to recover arrears of revenue due in respect of khata No. 29 with interest, On his right to receive interest being disputed, it was held that a previous decision of a competent Court betwen the same parties, but dealing with a claim for interest due on arrears of revenue payable in respect of khata No. 47 operated as **res judicata** as to the claim with regard to khata No. 29. (1901) A.W.N. 177=24 A. 112.

16. Might and ought.

(a) Alternative claims and reliefs.
(b) Cause of action.
(c) Grounds of attack.
(d) Grounds of Defence.
(e) Knowledge of facts.
(f) Mesne profits.
(g) Miscellaneous proceedings.
(h) Mortgage Suit.
(i) Partition Suit.
(j) Pro forma defendant.
(k) Relief not claimed.
(l) Set-off or counter-claim.
(m) Scope of Rule.

16. (a) Alternative claims and reliefs.
(i) Failure of plaintiff to set up—When res judicata.

——S. 11—Alternative claims—When should be pleaded—Test.

The test, whereby to determine whether the subsequent claim ought to have been matter of attack in the previous suit is this; are the matters so dissimilar that their union might lead to confusion. Where the plaintiff might have, in the former suit, put in the claim, that he made in the subsequent suit as an alternative claim, and if he did so, there would have been no confusion, and all questions relating to his title in the property would have been completely and finally determined. **Held**, he ought to have made the claim that he made in the subsequent suit as a ground of attack in the former suit, and for this reason, the subsequent suit must be held to be **res judicata**. Where plaintiff claims title to certain property, in proving his title to that property he ought to put forward all means of attack in his armoury. S. 11 omits all references to the cause of action. A plaintiff's cause of action is a very different thing from his title, the one being something done contrary to a person's interest which obliges him to seek the aid of the Court, the other being the proof that something affords him a valid ground for relief. 20 Cal. 79; 25 Bom. 189, Foll. 11 L.B.R. 451=72 Ind. Cas. 14=2 Bur.L.J. 34=A.I.R. 1923 Rang. 122.

——S. 11, Expl. 4—Alternative claims not disclosed —Res judicata—Test.

If a plaintiff sets up a title as a proprietor and if he has two alternative capacities upon which to rest such a title he must disclose both these two capacities provided that they might and ought to have been made grounds of attack. The question as to whether a plaintiff can or cannot bring a second suit depends upon whether (1) he could have based his former suit upon the same cause of action, and (2) whether he ought to have so based it. In the first case he can escape from the operation of S. 11 and from O. 2, R. 2, if he can show that he was, when he instituted the first suit, actually unaware of his second cause of action. In the second case he can similarly escape from the operation of those sections if he can show that he could not unite his two causes of action in a single suit without inconsistency and confusion. **Held**, that the Court had to determine three points —(a) whether the plaintiff in the first suit did actually put forward his alleged claim as a heir as a basis for his suit, (b) whether, if he did not, he was unaware at the time that he could also claim as an heir, and (c) wheher, although he knew of this second cause of action as an heir he was nevertheless unable to combine it with his cause of action as a vendee without inconsistency and confusion. 71 Ind. Cas. 1009.

——S. 11—Alternative claims—Statement in previous judgment that 'fresh suit may brought', effect of.

Where a plaintiff has alternative claims arising out of the same cause of action, he might and ought to set them up all alternative claims unless they are incompatible with each other.

A statement in the judgment that the plaintiff may bring a separate suit will not create in the plaintiff any right to bring a fresh suit which he does not already enjoy. A.I.R. (Vol. 18) 1931 Mad. 268=135 Ind. Cas. 13.

——S. 11, Expl. 4—Previous suit claiming property as legatee of wife of S dismissed on ground that wife of S could not devise property—Subsequent suit against same defendants claiming as legatee and principally as heir of S.

S had a wife L and they had a daughter D, D had a daughter P. P in the previous suit claimed the property as owner on the ground that it was the absolute property of L. L devised it by will to D and D devised it by will to P. P then claimed as legatee under the will of her mother D. The Court found in the previous suit that the property did not belong to L as full owner, and she could not devise it to D who could not in her turn devise it to P. In the subsequent suit by P against the same defendants, P still relied on the two wills and claimed as legatee but she relied principally on her title as heir of S, alleging that the property was the property of S and that L had only a widow's estate:

Held, that there was nothing so conflicting between P's claim based on her title as heir to S as the owner of the property and her claim on her title as legatee under the will of D, herself claiming under the will of L, as full owner of the property. L after all was not a stranger to S; she was his wife and then his widow. P might well have claimed through L and in the alternative through S. The claim of P as owner of the property in suit was **res judicata** by reason of the decision in the previous suit. A.I.R. (Vol. 30) 1943 Sind 251=I.L.R. (1943) Kar. 386=210 Ind. Cas. 310.

——S. 11—Former suit for possession—Defendants successfully claiming exclusive possession as heirs—Subsequent suit for joint possession of same property as co-sharer is barred.

Where, in a previous suit, the plaintiff claimed certain property and defendants set up an exclusive claim to the possession of the property as devolved upon them as heirs and the suit was dismissed, a subsequent suit by the plaintiff against the same defendants claiming the joint possession of the same property as co-sharer is barred by **res judicata** under S. 11, Expl. 4, C.P. Code, as the plaintiff ought to have asserted his title as a co-sharer in the alternative in the previous suit in answer to the exclusive claim put forward by the defendants. I.L.R. (1939) Nag. 544=174 Ind. Cas. 777.

——S. 11—Suit by sub-mortgagee as assignee of mortgagee dismissed—Subsequent suit as sub-mortgagee—Res judicata.

Where failure to plead a specific cause of action, either as the sole course or as an alternative course, is due to a wrong view of the law, Expl. 4 will certainly apply. Where such failure, however, is due to the plaintiff having an honest belief as to a fact or series of facts, being sufficient to entitle him to the relief claimed, it will seldom be held that he was bound to raise a different cause of action or an alternative cause of action. Each case must be decided on its merits. Where a person, who was a sub-mortgagee, at first wrongly sued as an assignee of the mortgagee and his suit was dismissed, another suit by him on the basis that he was a sub-mortgagee will be barred by Expl. 4. 116 Ind. Cas. 738=A.I.R. 1929 All. 400. [Ed. Note. But see A.I.R. 1931 All. 73—16 (a) (ii), infra.].

——S. 11—Claim for the whole—Failure to claim a share in the alternative—Effect.

Where a person failed to assert in the alternative a claim to share and his claim for the whole is dismissed, he or his heirs are precluded from claiming the share. A.I.R. 1923 Mad. 257, Foll. 34 M.L.T. 147=78 Ind. Cas. 1055=1924 M. W. N. 569=A.I.R. 1924 Mad. 711=47 M.L.J. 20.

——S. 11, Expl. 4—Suit as transferee—Subsequent suit as heir of transferor—Res judicata.

F, a Muhammadan, died leaving a widow K and a nephew W. K sold certain property to M. M brought a suit against W for possession of some portion of the property claiming it as a transferee from K. W denied that M had any interest in the property and at the same time instituted a suit along with his co-sharers against M for declaration that he and his co-sharers were the owners of the property in dispute under a sale-deed executed in their father's favour by F. The suit by M was decreed and that of W dismissed on the ground that the sale in favour of W's father was not proved. W subsequently instituted a fresh suit impleading K as a defendant claiming a portion of the property under dispute as heir of F:

Held, that the second suit by W was barred under Expl. 4 to S. 11, C.P. Code, as he might and ought to have based his relief in the former suit also on his title as heir of F. The two grounds of relief were not destructive of each other nor dissimilar and could be combined in one suit. A.I.R. (Vol. 18) 1931 Lah. 217=32 P.L.R. 214=134 Ind. Cas. 524.

——S. 11—First suit on title by purchase—Second suit on title by inheritance—Second suit is barred.

The first case was for possession against the defendant as owner on the strength of plaintiff's title by purchase, the second case was again for possession on the strength of plaintiff's title as owner by inheritance. In both cases plaintiff was litigating under the same title, namely, his ownership. **Held**, he should have combined the two claims in the first suit. 1922 M.W.N. 845=72 Ind. Cas. 207 =17 M.L.W. 188=32 M.L.T. 82=46 Mad. 135 =A.I.R. 1923 Mad. 257.

——S. 11, Expl. 4—Suit for possession on the allegation that defendants were trespassers—Subsequent suit on the ground of under-tenancy—Duty to set up all titles.

In 1920 the plaintiffs brought a suit to eject the defendants, their father having died in 1914. It was alleged by the plaintiffs that the defendants and their father had no tenancy right, that the defendants were trespassers, and that they had wrongly dispossessed other persons who had been holding the land as tenants under the plaintiffs. In their defence, the defendants stated that they were tenants in respect of the lands for a long time past and that they were holding the lands at a rental of Rs. 67 a year. An issue was raised as to whether the defendants were tenants or trespassers and it was found that the defendants were tenants as alleged though the question of their status was not expressly decided and the plaintiffs' prayer for **khas** possession was refused. Subse-

quently, the plaintiffs sued to eject the defendants alleging that they were under-**raiyats** and had been served with notice to quit. The defence was that the defendants were not under-**raiyats**, but that they were occupancy-**raiyats** and that the notices were not sufficient:

Held, that the plaintiffs might and ought to have set up in the prior suit the plea that even if the defendants' father be found not to be a tenant, the tenancy being under **raiyati**, the defendants were trespassers, and as they had not done so the matter was **res juicata**.

Where the right claimed in both suits is the same, the subsequent suit will be barred as **res judicata** though the right in the subsequent suit may be sought to be established by a title different from that in the previous suit. A.I.R. (Vol. 17) 1930 Cal. 690=34 C. W. N. 442=129 Ind. Cas. 574.

——S. 11—Previous claim as kittima operates as a bar to a subsequent suit on the claim as apatitha.

The causes of action based on an apatitha claim and based on a kittima claim are distinct, but they are not so dissimilar that their union in one suit might lead to confusion. The adjudication of the latter claim in a previous suit operates as a bar to bringing a subsequent suit on the former claim: 5 Rang. 565=105 Ind. Cas. 586=A. I. R. 1928 Rang. 9.

——S. 11—Prior suit on the basis of a reversionary right—Subsequent suit as heir—If barred.

The plaintiff brought a suit to recover certain property alleging that he was the reversionary heir of one **V**. The property had been in the possession of **N**, a female relation of **V**. Plaintiff's suit to recover the property from the defendants who were in possession was brought after **N's** death. The suit was dismissed. Again a suit was brought to recover the same property from the same defendants on the ground that the plaintiff was the heir of **N** who had been in possession of the property.

Held, that the second suit was barred under S. 11, Expl. 4, as the plaintiff might and ought to have put forward both his titles in the previous suit. 23 M.L.W. 13=1926 M.W.N. 126=91 Ind. Cas. 660=A.I.R. 1926 Mad. 234=49 M.L.J. 701.

——S. 11, Expl. 4 (S. 13, Expl. 2, Old Code)—First suit as reversioner in one capacity—Dismissal—Second suit as reversioner in another relationship—Bar.

Per **Wallis** and **Miller, JJ.** (**Chief Justice** dissenting).—The plaintiff in the case first brought a suit claiming property as the last owner's brother's adopted son's son. The suit was dismissed on the ground that there was no adoption. The present suit was brought by the plaintiff on the ground that plaintiff is entitled to the property as the last owner's sister's son. **Held**, that the present claim was barred by S. 11, Expl. 4 and O. 2, R. 1 (S. 13, Expl. 2, and S. 42, Old Code). 26 M. 760, foll. ((1908) 31 M. 385.

——S. 11—Prior suit for damages for non-delivery—Dismissal—Bars a suit for delivery of goods.

Where the defendant Railway Company had failed to deliver certain parcels consigned by the plaintiff and the plaintiff filed suits for damages for non-delivery which suits had failed.

Held, that a subsequent suit for delivery of goods was barred. 22 A.L.J. 745=83 Ind. Cas. 969=5 L.R.A. Civ. 580=A.I.R. 1924 All. 849.

——S. 11, Expl. 4—First suit on contract—Second suit for compensation for service—Res judicata.

In a prior suit plaintiff sought to establish his claim on a personal contract with defendant for the supply of boats at an agreed rate. The case was decided against him and he brought another suit for recovery of the same money as compensation for services rendered. **Held**, that the second suit was barred as **res judicata**. The matter directly and substantially in issue in the first suit was whether the defendant owed the plaintiff any sum on account of the use by him of the plaintiff's boats, The ground in the second suit ought to have been taken as an alternative in the first suit in the event of a direct contract not being proved. 15 Ind. Cas. 374=5 Bur.L.T. 95.

——S. 11—Suit on title—Ejectment on ground of sub-tenancy—Dismissal of—Subsequent suit in Civil Court on ground of trespass—Maintainability of.

Where a suit by a person in a Revenue Court for ejectment on the ground of sub-tenancy of the defendant in respect of certain grove land was dismissed, a subsequent suit by the same person in a Civil Court on the ground of trespass is barred by **res judicata**. 13 Ind. Cas. 634.

——S. 11, Expl. 4 (S. 13, Expl. 2, Old Code)—First suit on mortgage unregistered—Omission to claim lien for unpaid purchase money—Second suit on such lien—Res judicata.

A vendor obtained an unregistered mortgage for portion of the purchase money and brought a suit on the same; which was dismissed for want of registration of the mortgage deed. He brought a 2nd suit framing his claim on his lien for unpaid purchase money. *Held*, that the plaintiff not having framed his first suit in the alternative, his present claim is barred by S. 11, Expl. 4 (S. 13, Expl. 2, Old Code). (1903) 26 M. 465.

——S. 11, Expl. 4 (S. 13, Expl. 2, Old Code)—Prior suit for confirmation of possession as surviving co-parcener—Dismissal on finding of no co-parcenary—Subsequent suit after dispossession for restoration of possession as nearest reversioner—Bar of.

In 1895 *G* brought a suit against *T* claiming to be confirmed in possession of certain property in virtue of his being a surviving co-parcener and asking for an injunction restraining *T* from obstructing him in the enjoyment of that property. This suit was dismissed, the Court holding that there was no co-parcenary. The same plaintiff being dispossessed of the property in the interim, brought a second suit for restitution of possession on the ground that he was the nearest reversioner:

Held, that the claim in the second suit was constructively in issue in the first and was, therefore, *res judicata*. (1900) 2 Bom. L.R. 872=25 B. 189.

(ii) Failure of plaintiff to set up—When not res judicata.

——S. 11—Previous suit by wife for divorce—No alternative plea for declaration that she is not wife—Subsequent suit for such declaration—Not barred.

It cannot be said that a person petitioning the Court for a divorce as a husband or wife ought to add an alternative plea asking for a declaration that he or she is not a husband or wife at all, because the marriage has long ago ceased to exist. The matters are so dissimilar that their union not only might but must certainly lead to confusion. Consequently, the failure of the wife in earlier suit for divorce to raise alternative plea for declaration that her marriage has ceased to exist will not bar a subsequent suit for such declaration. A. I. R. (Vol. 28) 1941 Rang. 118=1941 Rang.L.R. 14=194 Ind. Cas. 482.

——S. 11, Expl. 4—Suit against mortgagee as trespasser dismissed—Subsequent suit for redemption—Not barred.

Whether or not a matter might or ought to have been made a ground would depend upon the facts of each particular case.

Suit by plaintiff against mortgagee as trespasser—No question of plaintiff's right of redemption raised—Suit dismissed—Subsequent suit for redemption by plaintiff is not barred by S. 11, Expl. 4 or O. 2, R. 2, C.P. Code. A.I.R. (Vol. 27) 1940 Cal. 550=I. L. R. (1940) 1 Cal. 544=191 Ind. Cas. 398.

——S. 11—Failure to raise plea based on S. 9, Punjab Debtors' Protection Act in application based on personal claim to attached property, does not debar judgment-debtor from raising it subsequently.

The question whether alternative plea ought to have been made a ground of attack depends on the facts of each case. Where matters are so dissimilar that their union might lead to confusion, it cannot be said that the alternative plea ought to have been raised in the previous suit or application.

An application under S. 9, Punjab Debtors' Protection Act is inconsistent with the plea of the judgment-debtor that the property attached is his personal property. His failure, therefore, to raise the plea under S. 9 in an application based on personal claim does not debar him from raising the plea subsequently. A.I.R. (Vol. 27) 1940 Lah. 27=186 Ind. Cas. 653.

——S. 11, O. 2, R. 2—Plaintiff allowing his suit for declaration of title to property purchased by him, to be dismissed—Suit by plaintiff for refund of purchase money—Not barred.

The defendants purchased a property and sold a portion of it to the plaintiff. In a pre-emption suit in respect of the sale to the defendants, pre-emption was allowed on condition of payment of a certain amount deposited in Court. The money was taken by the defendants from Court. Plaintiff then instituted a suit for a declaration of title to the property purchased by him and after it was allowed to be dismissed, filed a suit for refund of the purchase money:

Held, that although it was open to the plaintiff to have asked for refund in the earlier suit itself an an alternative claim, the subsequent suit was not barred by S. 11, C.P. Code, and that O. 2, R. 2 was not applicable to the case, the causes of action in the two suits being different. A. I. R. (Vol. 20) 1933 Lah. 1017=147 Ind. Cas. 851.

——S. 11, Expl. IV—Sub-mortgage—Suit as assignee of mortgagee rights to enforce original mortgage—Subsequent suit to enforce sub-mortgage—Not barred.

A executed a simple mortgage in favour of **B** in 1915. In 1921, the Receiver of the estate of **B** (who had become insolvent in the meanwhile) sold the mortgagee rights to **C**. On June 20, 1922, **C** made a sub-mortgage of the mortgagee rights to the plaintiff. The plaintiff sued as owner of the mortgagee rights under the mortgage of 1915. The suit was dismissed on the ground that it was not maintainable as framed. The plaintiff thereupon brought another suit on the basis of the sub-mortgage of 1922, praying that if **C** did not pay the money due on that mortgage **A** should be directed to pay the money due under the mortgage of 1915 into Court and the plaintiff should be paid whatever was due to him on the sub-mortgage of 1922:

Held, that the second suit was not barred by **res judicata** as the title on which the second suit was based was entirely different from the title on which the first suit was based. A.I.R. (Vol. 18) 1931 All. 73=1930 A.L.J. 1572=129 Ind. Cas. 734. [Ed. Note. But see A.I.R. 1929 All. 400—16 (a) (i) **supra.**]

——S. 11—Expl. 4—Suit based on ownership—Omission to set up alternative claim of permanent tenancy—Claim of permanent tenancy in subsequent suit—Not barred.

The previous suit was instituted by the present defendants as representing the **Mohalladars** for a declaration that they were the **owners** of the sites in question. They failed to substantiate this claim and it was held that the sites in question belonged to the present plaintiff. In the subsequent suit the defendants contended that they were permanent tenants:

Held that the defendants were not barred under S. 11, Expl. 4, C. P. Code, from raising the present plea as the claims in the two suits were entirely different. A.I.R. (Vol. 18) 1931 Lah. 610=13 Lah. 195=132 Ind. Cas. 657.

——S. 11—Alternative cause of action—Omission to sue on effect.

A person is not bound to sue on an alternative cause of action and failure to so sue in the former suit does not bar subsequent suit. 103 Ind. Cas. 888=A.I.R. 1927 Nag. 322.

——S. 11—Pre-emption suit—Pre-emptor if bound to set up his own title in the alternative.

In a pre-emption suit the plaintiff is not bound to plead alternatively that he is the sole owner of the property in suit and that the vendor has no title in it and his having not done so would not operate as a decision against his title under the law of **res judicata**. An alternative cause of action for an alternative relief is not a matter which should be made a ground of attack within

the meaning of Expl. IV. 96 Ind. Cas. 71=A. I.R. 1926 Oudh 545.

——S. 11—Suit to set aside sale on ground of non-receipt of consideration—Finding that consideration was partly paid—Subsequent suit for balance of purchase money not barred.

Where, to ask for a certain relief in a suit would embarrass the trial of the suit or would place the plaintiff in a false position, the plaintiff will not be bound to ask for that relief in the same suit but can bring another suit for the purpose. In previous suit the plaintiff asked for the setting aside of a sale deed executed by her on the ground that she had not received any consideration therefor. The Court found that she had received a part of the consideration money but held that on her returning the same within a certain time she was entitled to get back the property. The plaintiff then brought another suit for the recovery of the balance of the purchase money after deducting the sum which she had been held to have received.

Held, the subsequent suit was not barred. 47 All. 561=87 Ind. Cas. 257=23 A.L.J. 461=A. I.R. 1925 All. 486.

——S. 11—Alternative ground of title not pleaded in previous suit—Effect.

When the later suit is based on a different title and a different cause of action, even though it might have been open to the plaintiff to have set up a title as an alternative ground of attack in the previous suit, that omission cannot operate to deprive him in the later suit to set up that title in regard to property which was not in dispute in the previous suit. 45 All. 59=80 Ind. Cas. 1041 =A.I.R. 1923 All. 176.

——S. 11—First suit under the Deccan Agriculturists' Relief Act (18 of 1879), S. 10-A, for declaration that a sale was in reality a mortgage—Second suit for specific performance of an agreement to re-sell is not barred.

The plaintff sold the suit property to the defendant in 1906, and the defendant executed in his favour a "Satekhat" to re-sell the property to him at any time within twelve years. In 1911 the plaintiff filed a suit claiming to redeem the property alleging that the sale of 1906 was in reality a mortgage, and seeking the protection afforded by S. 10 of the Deccan Agriculturists' Relief Act. The suit failed. Subsequently the plaintiff sued for specific performance of the "Satekhat."

Held, that the second suit was not barred by **res judicata**. It was not incumbent on the plaintiff to sue in the alternative for specific performance in his redemption suit and therefore it was not necessary to determine in this suit whether he could have done so. The two suits were mutually inconsistent and if the plaintiff failed in proving the mortgage, he still had a number of years left, under the 'Satekhat', within which he could have sued to get back the property on payment of the consideration mentioned in the 'Satekhat'. 24 Bom.L.R. 236=66 Ind. Cas. 815=46 Bom. 803=A.I.R. 1922 Bom. 29.

——S. 11—O. 11, R. 2—Suit on title—Subsequent suit on easement—No res judicata.

A claim for right of way included in a suit on title as an alternative prayer may be separated from it, and left to a second suit. The fact that a right of way was not claimed in a previous title suit does not bar a subsequent suit for a declaration of a right of way either by way of **res judicata** or under O. 11, R. 2 of C. P. Code. 57 Ind. Cas. 852.

——S. 11—Alternative relief claimed against A and B—Decree against B reversed on appeal—Subsequent suit against A—Not barred.

Where a suit claiming relief, alternatively against **A** and **B** is decreed against **B** who prefers an appeal, and the appeal is allowed, a subsequent suit against **A** for the same reliefs is not barred by **res judicata**. 42 Ind. Cas. 548.

——S. 11—Inconsistent alternative claims.

A suit, the question in which was not in issue in a prior suit between the parties cannot be barsed by **res judicata** by such prior suit. It is not necessary to put forward a claim and also an inconsistent claim in the alternative in the same suit. 13 M.L.T. 305=24 M.L.J. 418=18 Ind. Cas. 973=(1913) M.W.N. 322.

S. 16 (b). Cause of Action.

——S. 11—Cause of action based on custom —Custom not alleged—Suit dismissed—Second suit alleging custom is barred.

A former suit was for declaration that the deed of gift by widow in favour of her daughter's son was void. The plaintiffs were only remote reversioners and as remote reversioners cannot sue in presence of the next reversioner unless there is a special custom that all branches of the family take equally as reversioners, the plaintiffs should have alleged that custom in their plaint, which they did not, during the pendency of the suit and before any evidence had been taken the widow died. Thereupon the plaintiffs made an application to be allowed to amend their plaint. They said that owing to her death they had become entitled to institute a suit for possession and that in order to show that right it was now necessary for them to plead the custom. They also asked to be allowed to sue for possession. The learned Subordinate Judge refused to allow the amendment of the plaint and as without the amendment, the plaintiffs had no **locus standi** the suit was dismissed. On a second suit by the same plaintiffs for the same relief, **held**, that the suit was barred. 10 O.L.J. 132=74 Ind. Cas. 549=A.I.R. 1923 Oudh 242.

——S. 11—Causes of action arising out of the same title—One cause of action decided in an independent suit—Second suit on the other cause of action if barred.

Where causes of action although relating to different details, **viz.**, in the previous suit the materials of the house, and in the second suit the site of the house, both arose out of precisely the same title, **viz.**, that the plaintiff had acquired the property under the sale-deed of a certain date,

Held, that decision in the previous suit operated as **res judicata** and the second suit was barred. 106 Ind. Cas. 861=A.I.R. 1928 Nag. 112.

——S. 11, Expln. (4)—First suit on pro-note—Subsequent suit on original cause of action —Bar.

The dismissal of a suit on a promissory note is

a bar to a subsequent suit on the original cause of action. Plaintiff's cause of action is one and indivisible and the fact that the transaction was recorded in his account book did not give him another or different cause of action. 54 Ind. Cas. 424=18 A.L.J. 81=42 A. 193.

——S. 11 (S. 13, old Code)—First suit for redemption—Decree—Second suit for damages for period of retention of property after tender:—A mortgagor first sued for redemption and obtained a decree. Subsequently he brought a second suit for damages from the mortgagee for the period of retention of the property after lawful tender. **Held**, that the matter should have been adjudicated in the taking of accounts in the prior suit, and that the matter was **res judicata**. (1907) 5 C.L.J. 192=34 C. 223.

——S. 11 (S. 13, old Code)—Omission to claim relief on same of action—Mortgage—Tender of amount—Refusal by mortgagee—Suit for redemption—Second suit to recover mesne profits from the date of tender to the date of delivery of possession—'Bar of.'

The plaintiff passed a usufructuary mortgage in favour of the defendant in 1884 and placed him in possession. In 1901, the plaintiff tendered the amount of the principal to the defendant but it was not accepted. The plaintiff then filed a suit under S. 62 of the Transfer of Property Act to recover possession of the mortgaged property, and at the same time under S. 83 of the Act deposited the amount of the principal in Court as the amount payable on the mortgage. The Court passed a decree for possession. In 1904, the plaintiff brought another suit to recover mesne profits from the defendant from the date of the deposit to the date when he recovered possession of the mortgaged property in execution of the redemption decree in the first suit. The lower appellate Court disallowed the claim on the ground of **res judicata**. **Held** that the present claim was barred either under. S. 11 (S. 13, old Code) or O. 2, R. 2 (S. 43, old Code), for, the profits derived by the mortgagee after a proper tender made or after the amount due had been deposited in Court were profits for which he had to account to the mortgagor in virtue of a liability tacked on, so to say, by the statute to the mortgage contract, and, as such, a claim to them by the mortgagor was one arising from and connected with his right to redeem or recover possession of the property. It was all one cause of action which might and ought to be alleged by the mortgagor in his suit to recover possession. (1906) 9 Bom.L.R. 958=31 B. 527.

——S. 11 Expl. (4)—(S. 13, Expl. (2) old Code)—Previous suit on sale—Second suit on mortgages—Res judicata.

There is nothing in S. 11 or its Expl. 4 (S. 13 or its Expl. 2, old Code) to show that "any matter" means "matter arising out of the same cause of action." The Explanation applies to a defendant as well as to a plaintiff. Consequently, where a plaintiff in a prior suit based his claim upon a sale and omitted to plead his rights under a prior mortgage and the prior suit was dismissed on the ground that the sale was nominal, a second suit on the mortgage for recovery of the mortgage debt is barred. 20 C. 79; 25 B. 189 foll. 26 M. 760 diss. The mere fact that the Court in the prior suit refused leave to amend the plaint and referred the plaintiff to a fresh suit is not sufficient to take the case out of the bar of **res judicata**. (1904) 6 Bom. L.R. 594.

——S. 11, Expl. (4) (S. 13, Expl. (2) old Code) First suit for possession on allegation of division—Second suit for declaration of title to possession by partition—If barred.

Plaintiff instituted a suit for recovery of possession of a moiety of a certain house on the allegation that those premises had formed part of the property of a joint family and had been divided equally between themselves and the defendants, but that in January, 1899, the defendants had ousted them from possession. The cause of action in the suit was the alleged dispossession by the defendants in January 1899. The suit was first of all decreed, but afterwards was dismissed on appeal. Subsequently the plaintiffs filed a second suit in which they alleged that the house was the joint property of themselves and the defendants, and that in January 1899, the defendants ousted them from possession and claimed a declaration that they were entitled to one half of the premises and an order giving them the right of possession by partition: **Held**—That this latter suit was barred by the provisions of O. 2, R. 2 (S. 43, old Code) and S. 11, Expl. IV (S. 13, old code). 1903 A.W.N. 97.

——S. 11, Expl. (4) and O. 11, R. 2—Mortgage of joint family properties by one member V as his exclusive properties—Suit to enforce mortgage against V—Subsequent suit against other members of family on basis that properties were joint and mortgage was binding on family.

V, a member of a joint Hindu family, executed a mortgage of certain properties describing the same as his self-acquired properties. In the suit by the mortgagee to enforce the mortgage, the other members of the family **A** and **B** applied by separate petitions to be impleaded as defendants in that suit, impugning the validity of the mortgage, but claiming a right to redeen on the ground that the properties belonged to the joint family, if it was found to be valid and binding on the family. These petitions were opposed by the mortgagee on the ground, **inter alia** that the petitioners were claiming a paramount title and, therefore, they were neither necessary nor proper parties to that suit. The Court upheld the objection and dismissed the petitions. The decree was subsequently passed against **V**'s interest alone in the hypotheca which was found to be joint family property. The sale of **V**'s interest having proved insufficient to discharge the mortgage debt the mortgagee brought a subsequent suit against **A** and **B** for the recovery of the balance by the sale of the remaining portion of the hypotheca on the basis that **V** executed the mortgage on behalf of and for purposes binding on the family:

Held, that (1) O. 2. R. 2 did not compel a person to join in the same suit every cause of action or every claim which he had, but compelled him to include in the suit the whole of the claim arising out of the cause of action for which the suit is brought. A cause of action was not an abstraction—something independent of the defendant against whom the right to relief was alleged to exist. As the persons sued in each case were different, **prima facie**, therefore, the causes of action were also different. The cause of action in

the first suit for enforcing the mortgage against V as the absolute owner of the hypotheca was not the same as the cause of action in the second suit against V and his coparceners A and B regarded as co-owners of the property and therefore, neither O. 2, R. 2, nor S. 11, Expl. 4 operated to bar the second suit against the other members of the family to enforce the mortgage against their shares on the footing that V executed the mortgage as manager for family purposes:

(2) the fact that the mortgagee asserted in the first suit that A and B had no interest in the properties mortgaged as those belonged exclusively to V and opposed the joinder of A and B as their claim was one of paramount title, could not estop him from bringing the subsequent suit;

(3) nor did the case admit of the application of the doctrine of election which pre-supposed the choice of suing one of two persons on the same facts or cause of action so as to bar the second suit. The case was analogous to the one where a plaintiff having sued a wrong person subsequently brought the suit against the right person. and no question of election could arise in such circumstances. A.I.R. (Vol. 31) 1944 Mad. 98=1943 M.W. N. 653=(1943) 2 M.L.J. 548=216 Ind. Cas.338.

——S. 11, Expln. (4)—First suit for possession as landlord—Second suit as reversioner.

Plaintiff sued for possession of the suit property treating defendant as his tenant. It was dismissed as the Court found that the relationship of landlord and tenant did not subsist. The plaintiff again brought the present suit alleging that he was a reversioner entitled to the properties. **Held**, that the second suit was not barred by **res judicata** as the causes of action in the suits are different. 8 Mad. 520 foll. **Per Sadasiva Aiyar. J.**—The question whether a plaintiff was bound to mention in the first suit all facts which he mentioned in a subsequent suit alleging a different cause of action will depend upon the question whether it was practicable to have framed the first suit by alleging the facts put forward in the second suit without the evidence adducible on the two sets of facts being actually destructive. 52 Ind. Cas. 813=(1919) M.W.N. 287.

——S. 11, Expl. (4) (S. 13, Expl. 2, old Code)—Omission of claim in power suit—When res judicata—Test.

Where under orders of the Court in a suit for redemption a mortgagor deposited the amount due on the mortgage in Court but the mortgagee did not deliver possession of the mortgaged property till some time later. **Held** that a suit by the mortgagor for mesne profits up to the date when possession was delivered was maintainable. The test to be applied is whether the sum claimed in the suit could have been claimed in the previous suit for redemption. (1908) 14 C.W.N. 1001=6 Ind. Cas. 336=12 C.L.J. 620.

——S. 11, Expl. (4) (S. 13, Expl. 2, old Code)——Different suits on diffenent causes of action with regard to same subject-matter—Omission to plead all defences in both suits—Effect.

Where a plaintiff brings two suits based on different causes of action with regard to the same property, it is not obligatory on a person, who is a defendant in both the suits to plead on a defence to each suit what is properly a defence to the other.

The plaintiff was a purchaser in execution of a mortgage decree. He purchased the same properties again in execution of a decree for rent. The plaintiff was sued in two suits, by the defendant's assignor in one suit on the ground that the rent decree was fraudulent and inoperative against them and in the other that the sale in execution of the mortgage decree was not binding upon them. The former was decreed and the latter was dismissed. The decree-holders, i.e., the defendants' assignors, then assigned their right to recover possession to defendants and they got possession from plaintiff, in spite of objection under S. 47 (S. 244, old Code). The plaintiff then brought a suit for possession. **Held**, that neither S. 11 (S. 13, old Code) nor S. 47 (S. 244, old Code) was a bar. **Held** also, that a Court executing a decree for possession against plaintiff could not decide whether he was entitled to resist the execution on the ground that he had a title independent of that decree. If it did decide it, it was beyond its jurisdiction. (1906) 4 C.L.J. 211.

——S. 11, Expl. (4) (S. 13, Expl. II, old Code)—Claim under separate cause of action—Omission to set up—Res judicata—Usufructuary mortgage—First suit for sale—Dismissal—Subsequent suit for possession—If barred.

Where a usufructuary mortgagee brought a suit for recovery of the mortgage money by sale of the mortgaged property impleading his own lessee as defendant, and this was dismissed on the ground that no such suit would lie, a second suit by such usufructuary mortgagee for recovery of possession of the mortgaged property was barred neither by O. 2, R. 2 (S. 43, old Code) nor by the rule and principle of **res judicata**, S. 11, Expl. 4 (S. 13, Expl. II, old Code) The causes, of action in the two suits are distinct and different, and neither. O. 2, R. 2 (S. 43, old Code) nor S. 11, Expl. 4 (S. 13, Expl II, old Code). will apply in such a case. A plaintiff is not bound to make every cause of action he may have at the date of the first suit in respect of the property then litigated a ground of attack. S. 11, Expl. 4 (S. 13, Expl. 2, old Code) has not changed the law. 21 M. 21 dissented from. (13 M.L.J. 448) followed. If a plaintiff in addition to a prayer for recovery of money by sale of the mortgaged property had also asked for possession, there would be a clear case of misjoinder of causes of action. (1903) 13 M.L.J. 439=27 M. 102.

——S. 11, Expl. (4) and O. 2, R. 2 (S. 13, Expl. 2 and S. 43, old Code)—Suit upon specific mortgage dismissed—Suit upon another mortgage on same property not barred.

A plaintiff who seeks to redeem a specific mortgage or to eject on a specific lease and fails in such suit on the ground that the mortgage or lease sued on is not proved is not thereby precluded either by reason of O. 2, R. 2 (S. 43 old Code) or S. 11, Expl. 4 (S. 13, Expl. 2, old Code) from seeking to redeem the property comprised in the former suit or a specific portion thereof on another specific mortgage or to eject the person in possession on the strength of his title. The expression "subjects in dispute' in O. 2, R. 1 (S. 42, old Code) does not connote the **corpus** or **object-matter** of a claim but signifies the **jural relation** between the parties to a suit, for the determination of which the suit is brought, i.e., the cause of action or the subject matter of litigation or, in other words, the right which one party claims as against the other and Pemands the judgments of the Court. The object

of the section is to require the plaintiff to bring forward his whole case as to the matter of litigation on the question of right involved in the suit and not to require him to unite all the causes of action which he may have against the defendant in respect of the corpus or object-matter of the suit. The penalty for non-compliance with O. 2, R. 1 (S. 42, old Code) is provided by O. 2, R. 2 (S. 43, old Code) and S. 11, Expl. (S. 3, Expl II, old Code). The expression "Matter directly and substantially in issue" in S. 11 (S. 13, old Code), will include not only the cause of action on which the suit is based but also all matters which are, or ought to be, put in issue for the determination of the cause of action. S. 11 (S. 13, old Code) and O. 2, R. 2 (S. 43, old Code). are not exhaustive of the law of **res-judicata** and this law has been the same under both the old and new Codes and is the same as the English Law. The absence in S. 11 (S. 13 old Code) of the expression "cause of action" found in the old Code (Act VIII of 1859, S. 2) does not denote any deliberate change in the law and S. 11 (S. 13, old Code) does not require every plaintiff to exhaust in one suit all the causes of action, which he may have at the date of the suit in respect of the property or the relief claimed by him and which he may then be aware of. It is not the law that if a plaintiff sued for certain property on a false claim or cause of action, when in reality he has, in fact and law, a true claim and cause of action for the same property, of which he is aware, he must be taken in law to have abandoned or relinquished his true claim and cause of action. 22 M. 259 treated as overruled by the Full Bench decision in 26 M. 104. (1901) 13 M.L.J. 448=26 Mad. 760.

16 (c). Grounds of attack.

(i) Failure of plaintiff to set up—When res judicata.

——S. 11, Expl. (4)—Prior suit asking for dissolution of pertnership if one found to exist —Decision that defendant was the sole proprietor—Subsequent suit for dissolution and accounts—Bar of res judicata.

In a suit of 1937, the plaintiff prayed that if it be found there was a partnership with the defendant it be dissolved and the latter be called to account and it was decided that the defendant was the sole proprietor of the concern in question. In a later suit the same plaintiff asked for dissolution of partnership and accounts.

Held, Expln. 4 to S. 11, C. P. Code, applied to the case. The plaintiff had envisaged in the earlier suit one set of circumstances in which the partnership may be held to exist. He kept back other grounds which he ought to have raised which he is now debarred from raising by Expln. 4 to S. 11. I.L.R. (1949) A. 144=1949 A.W.R. 35=A.I.R. 1949 All. 265.

——S. 11, Expl. (4)—Claim as usufructuary—mortgagee to possession—If might and ought to be included in claim based on purchase.

On an identical cause of action all different grounds of attack or defence and the whole claim, arising therefrom, should be pleaded or claimed, as the case may be, provided the facts to be pleaded and proved in evidence of all the claims and all the different grounds of attack or defence are not mutually destructive of each other. When the cause of acsion is one and identical, the whole of the claim arising out of that must have been included or must be deemed to have been included in the former suit, however inconsistent the several standpoints of that claim may be. A claim to possession based as usufructuary mortgagee not only might but ought to be included in a claim based as purchaser, when the action is the act of dispossession by the defendant. 26 Pat. 24=A.I.R. 1948 Pat. 302.

——S. 11—Failure to raise plea of title in suit for profits.

The plea of title, if not raised in the first suit for profits, may be barred by the rule of **res judicata** in the second suit even though the profits relate to different years. A.I.R. (Vol 32) 1945 All. 76=1944 O.W.N. 136=1944 A.W.R. 244=1945 A.L.J. 7=I.L.R. (1944) All. 601.

——S. 11, Expl. (4)—Land passing on death of person to his son and widow in equal share—Suit by son for declaration that he was exclusive owner on ground that widow had been divorced long before death of his father—Suit dismissed—Subsequent suit for declaration that widow was entitled only to one fifth share in lieu of maintenance—Second suit, if barred.

On the death of one **F** his land passed by mutation to his son and his widow in equal shares. The son instituted a suit against **J** for a declaration that he was the exclusive owner of the land on the allegation that she had been divorced by **F** many years before his death and had nothing to do with his property. The trial Court held that the divorce was not proved and dismissed the plaintiffs' suit, and this decree was upheld on appeal. The son sued again for a declaration that **J** was only entitled to one-fifth share in **F's** land in lieu of maintenance as his widow and not to one half.

Held, that the ground of action taken by the plaintiff in the second suit ought to have been made a ground of attack in the previous suit and therefore under S. 11, Expl. 4, C. P. Code, the second suit was barred. A.I.R. (Vol 24) 1937 Lah. 872=I.L.R. (1937) Lah. 496=39 P.L.R. 829=175 Ind. Cas. 283.

——S. 11, O. 11, R. 2—Suit on mortgage impleading mortgagor, sons and grandsons—Plaintiff allowing decree dismissing his claim against sons and grandsons to become final—Decree-holder cannot enforce decree against interests of sons and grandsons in joint family.

Where in a suit on a mortgage against the mortgagor and the appellants (his sons and grandsons) the decree-holder has allowed the decree dismissing his claim against the appellants to become final, he cannot enforce the decree obtained by him against the interest of the appellants in the joint family property. Even if the prayer made by the decree-holder be interpreted as for nothing more than a personal decree against the appellants, still the plaintiff must be held to be barred from enforcing the decree against the interest of the appellants by the rule of constructive **res judicata** as well as by the provisions of O. 2, R. 2, C. P. Code. If in the former suit he omitted to sue for any such relief without the leave of the Court, he cannot sue for such relief in a subsequent suit much less can he be allowed to enforce it in the execution proceedings. A.I.R. (Vol. 23) 1936 Oudh 139=1935 O.W.N. 1113=1935 O.L.R. 594=11 Luck. 523=158 Ind. Cas. 490.

——S. 11, Expln. (4)—Will declared invalid in previous suit between same parties—Plea that might have been taken not taken—Whether can be raised in subsequent suit.

The claim in a suit was declaration that a house was the exclusive property of the plaintiff under the will of his father. The validity of the will was in issue in the previous suit where it was held that the will was invalid and not binding on the descendants of the father. Both the contesting defendants were parties to the previous suit.

Held, that the decision in the previous suit was **res judicata.**

Moreover in the first suit, the plaintiff did not set up the plea that he was the exclusive owner of the house under the will. Where a plea could have been taken but was not taken in the prior suit, the plea is barred in a subsequent suit by reason of S. 11, Expl. IV, C. P. Code. (1935) 157 Ind. Cas. 368.

——S. 11, Expl. (4)—Suit for possession by widow as donee dismissed—Subsequent suit for partition among heirs—Claim by widow for her share barred.

The sons of a deceased Muhammadan mortgaged certain properties which had belonged to their father, treating them as their own. The mortgagee obtained a decree, brought the properties to sale and were sold. The widow of the deceased Muhammadan instituted a suit for possession against the purchasers alleging that the properties had been gifted to her by her husband, but the suit was dismissed. The daughters subsequently instituted a suit for partition and in this suit the widow claimed a share as heir of her husband:

Held, that the widow's right to a share in the properties as an heir of her husband was a matter which she might and ought to have made a ground of attack in her former suit and her claim to a share was, therefore, barred by **Res judicata.**

If a matter could have been set up as a ground of attack in the former suit and if its introduction into that suit was necessary for a complete and final decision of the right claimed by the plaintiff therein, it will be deemed to be a matter which ought to have been made a ground of attack in that suit, unless the matters in that and the subsequent suit are so dissimilar that their union might lead to confusion. The test of evidence is not a satisfactory test. A.I.R. (Vol. 22) 1935 Mad. 90=67 M.L.J. 709 =40 L.W. 757=1934 M.W.N. 1371=152 Ind Cas 1049.

——S. 11, Expl. (4) and O. 2, Rr. 1 and 2—Suit by adopted son to set aside alienations—Decree in respect of one item against one defendant—Subsequent suit for same item against the other defendants.

A brought a suit to set aside certain alienations made by his adoptive mother impleading the alienee as the second defendant in the suit. Amongst the properties of which the second defendant was in possession, S. No. 61 had been alienated by a deed of gift executed by both **A** and his adoptive mother. **A**, however, did not sue to set aside this deed of gift nor mention the lands to be in the possession of the defendant. On the other hand, he alleged that the land was in the possession of the first defendant (the adoptive mother) and got a decree against her He tried to execute that decree in respect of S. No. 51 against the second defendant and having failed, brought the present suit for possession of that property against the second defendant.

Held, the plaintiff ought to have prayed for setting aside the deed of gift in the previous suit and so the suit was barred under S. 11, Expl. IV, that as the cause of action was his adoption, he ought to have set aside all alienations made by the adoptive mother and the suit was barred under O. 2, R. 2, and as the previous suit was not so framed as to afford ground for final decision upon the subjects in dispute the present suit was also repugnant to O. 2, R. 1, 32 Bom.L.R. 1473. A.I.R. 1951 Bom. 114= 129 Ind. Cas. 737.

——S. 11, Expl. (4)—Omission to claim possession from person actually in possession—Compromise decree for possession against another defendant—Fresh suit for possession barred.

A Hindu widow alienated items A and B to X. The widow and her adopted son then executed a deed of gift of item C to X. The gift deed was invalid as it was not attested, but X was put in possession of A, B and C. The adopted son subsequently instituted a suit against the widow and X and other alienees for recovery of possession of A, B and C and other properties alienated by the widow. As regards C, possession was not claimed from X but only from the widow. The suit was compromised between the adopted son and the mother and possession was decreed in terms of the compromise. X obstructed when the plaintiff tried to obtain possession of C in execution of the compromise decree and the plaintiff brought a suit under O. 21, R. 103, Civil P. C. against X for recovering possession of C:

Held, (1) that the plaintiff might and ought to have sought recovery of possession of C from X in the previous suit and as he omiited to do so the second suit was barred by **res judicata** under S. 11 Expl. 4.

(2) that the cause of action for the two suits was the same, namely, the adoption of the plaintiff and second suit was, therefore, also barred under O. 2 Rr. 1 and 2. A.I.R. (Vol. 18) 1931 Bom. 114 =32 Bom.L.R. 1473=129 Ind. Cas. 737.

——S. 11—Suit to eject as trespassers dismissed —Status of defendants not decided—Res judicata.

In a suit for ejectment, the defendants contended that they were not under-raiyats but occupancy raiyats. It appeared that in a previous suit the plaintiffs had unsuccessfully sought to eject the defendants as trespassers. The status of the defendants was however left open in that suit.

Held that the decision as to the status of the defendants ought to have been decided in the previous suit and that the later suit was barred by **res judicata.** 34 C.W.N. 442=A.I.R. 1930 Cal. 690= 129 Ind. Cas. 574.

——S. 11—Prior suit to set aside sale in execution of mortgagee decree—Plea that mortgage is void not raised—Subsequent suit is barred.

N transferred his minor son's property by way of mortgage to **M**, who obtained a de4ree on foot of the mortgagee deed and took out execution of the decree. The minor's sister **F** brought a suit as the minor's next frient to have the decree set aside. The suit was dismissed. The minor after attaining majority filed a suit alleging that **N** had no authority to transfer the house by way of mortgage and that the transaction was wholly null and **void.**

Held, that the previous suit by **F** was **res judicata**. It was open to **F** to raise the plea in that suit that the mortgage was void. As **F** did not raise the plea und her suit was dismissed the plea could not be raised in the subsequent suit. 31 P.L. R. 123=A.I.R. 1930 Lah. 654=127 Ind. Cas. 366.

——S. 11—Prior suit by transferee of pronote against executant and assignor dismissed—Second suit by transferee against assignor alone for damages is barred.

A subsequent suit for damages brought by the transferee of a pronote against the holder of the note, who has transferred it in his favour, is barred by the rule of **res judicata**, when he has already claimed a relief against the holder of the note by impleading him as a defendant along with the executant of the note in a suit previously brought against them for recovery of the money due under the promissory note, and that relief has been refused to him. 6 O.W.N. 191=166 Ind. Cas. 200=4 Luck. 603=A.I.R. 1929 Oudh 172 (F.B.).

——S. 11—Grounds of attack not raised in previous suit.

The defendants in the subsequent suit were the plaintiffs in the previous suit, which was for the recovery of possession of the suit properties. The claim in the previous suit was based on the ground that the properties belonged to **G**, and **G** had released his aights in plaintiffs' favour. In second appeal in that fuit it was found that **G** and his wife **A** jointly owned the properties und the lower Court was ordered to join the daughters of **G** and **A** and pass a decree for joint possession, and the lower Court passed a decree accordingly. In the subsequent suit the question was whether the daughters of **G** and **A** would be prevented from claiming any interest in the properties by virtue of an arrangement brought about by **G** after the death of **A**.

Held, that the point as to the arrangement ought to have been raised in the previous suit and it was **res judicata**: A.I.R. 1925 P.C. 184, Dist. 24 M. L.W. 812=99 Ind. Cas. 525=A.I.R. 1927 Mad. 120.

——S. 11—Where the brother of a Hindu trustee fails in a suit against the widow of the deceased, wherein he claimed to succed to the deceased's property by right of survivorship, it is not open to him afterwards to dispute the title of the widow as the legal representative of her husband in other proceedings. 79 Ind. Cas. 891=A.I.R. 1925 Mad. 218.

——S. 11—Suit basing claim on nearness of kin failed—Subsequent suit based on family custom barred.

Where the plaintiffs in a previous suit based their claim on nearness of kin, but did not mention the family custom but for the proof of which, the nearness could not be proved and the suit therefore failed.

Held, that they cannot bring a fresh suit basing their claim on the family custom. 52 I.A. 100=6 L.R.P.C. 50=91 Ind. Cas. 280=12 O.L.J. 117=2 O. W.N. 25=47 All. 158=27 O.C. 334=27 Bom.L.R. 725=29 C.W.N. 749=23 A.L.J. 739=22 M.L.W. 58 =A.I.R. 1925 P.C. 55=48 M.L.J. 64 (P.C.).

——S. 11—A mortgage was executed by a Hindu widow. A suit for possession brought by the reversioner during the widow's life-time, against the mortgagee on the ground that the mortgagor was only the mistress of the previous full owner's father and was not the full owner's true mother, and so was not entitled to succeed to sis estate was dismissed on the ground that the woman was his true mother and that the suit was premature.

Held: that in a subsequent suit after the mortgagor's death, the plea that the mortgagor had no right to the property as she had been only the stepmother of the previous owner could not be raised. 6 L.R.A. Civ. 182=86 Ind. Cas. 849=A.I. R. 1925 All. 417.

——S. 11—Plea that minor was not properly represented in a previous suit—Res judicata.

The minor's next friend had brought a suit to set aside the sale that was held in execution of a decree against the minor and where it would certainly have been a proper ground to take in that suit that the decree was itself null and void so that the sale would also be null and void; but no such plea was put forward. **Held** the ground that the minor was not properly represented in the suit in which the decree was passed was a ground that might and ought to have been put forward in the previous suit and that not having been done, the decision in the previous suit constitutes the question **res judicata** under explanation 4 of S. 11. 21 Mad. 91; 46 Mad. 135, Foll. 47 Mad. 476=19 M.L.W. 410= 34 M.L.T. 295=77 Ind. Cas. 628=A.I.R. 1924 Mad. 608=46 M.L.J. 291.

——S. 11—First suit for declaration that debts were not for legal necessity—Second suit to avoid sale for these debts on ground of immorality barred.

First suit for declaration that debts were not binding on ground of no necessity—Second suit to avoid sale for those debts on ground of immorality is barred, because the present kind of attack, namely, that the debts were tainted with immorality ought to have been made a ground of attack in the previous suit if the plaintiff wanted to avoid the sale of family property. 65 Ind. Cas. 511=A. I.R. 1923 All. 231.

——S. 11—Suit for declaration of title and possession—Dismissal—Subsequent suit alleging that same land appertained to another Jote-Barred.

Plaintiff purchased a jote and instituted a suit for declaration of title and the recovery of possession of some lands as appertaining to the jote. The suit was dismissed. In a subsequent suit by the plaintiff for possession for the same lands on the allegation that they appertained to another jote, held, that the subsequent suit was barred by **res judicata**. **Semble**—A matter which might and ought to have been made a ground of attack in a previous suit between the same parties may be **res judicata** even though it was not finally decided in the previous suit. 43 Ind. Cas. 221.

——S. 11, Expln. (4)—Suit on title—All grounds to be put forward.

Where a plaintiff sued to eject a trespasser basing his claim on an ancestral right and failed therein, he could not bring andther suit against the same defendant claiming to be the heir of a certain person as the title as heir could and ought to have been made a grovnd of attack in the former suit. 11 B.L.R. (P.C.) 158 and 31 Mad. 385 foll., 26 Mad. 760 diss. If a defendant has two grounds for denouncing a claim made by the plaintiff and wilfully chooses to keep back one of the grounds of attack, he is not entitled to put

forward the omitted ground in a later suit. This principle enunciated with regard to a defendant is equally applicable to the case of a plaintiff. Where a person can claim a right on two titles which are mutually destructive or if there be embarrassment in joining the rights the two titles can be separately litigated. 34 Ind. Cas. 456=(1916) 1 M.W.N. 286.

——S. 11, Expln. (4)—Suit on title—Different titles to property—Duty to set up.

Where the point for decision in a subsequent suit was the same as that in a former suit between the same parties with the difference that the plaintiff claimed in the latter, by virtue of a relationship different from that set up in the former suit and the plaintiffs might and ought to have set up the latter relationship in the first suit **held**, that the second suit was barred by **res judicata**. 324 P.L.R. 1913: 213 P.W.R. 1913: 20 Ind. Cas. 890: 86 P.R. 1913.

——S. 11, Expln. (4)—Suit against Company—Validity of its incorporation not attacked—Res judicata.

The validity of certain conveyances to a registered company was established in a suit against the company and others by the plaintiff who subsequently brought another suit against the same parties for a declaration that the company was not duly incorporated and that the property conveyed to it should be transferred to the persons "entitled to the same." **Held**, that the question of the validity of the incorporation of the company might and ought to have been made a ground of attack by plaintiff in such former suit and that the subsequent suit for the purpose was barred by **res judicata**. The plaintiff ought to have made the objection a ground of attack in the former suit because all the facts on which the second suit was based were known to the plaintiff at the time of the former suit. No further evidence would have been needed. Nothing was wanting but the addition of an issue on the point in the former suit. 19 I.C. 234 foll. 40 Cal. 1: 39 I.A. 237: 16 C.W.N. 937: 16 C.L.J. 642: 14 Bom.L.R. 1211: 12 M.L.T. 449: 5 Bur.L.T. 211: 10 A.L.J. 486: 6 L.B.R. 119: 16 Ind. Cas. 70: (1912) M.W.N. 1097=23 M.L.J. 215 (P.C.).

——S. 11 (S. 13 old Code)—Prior suit in personal capacity—Second suit in plaintiff's personal right as manager of mutt.

Plaintiff filed a suit to eject defendant in possession of a room used as a temple in a house belonging to the plaintiff. The plaintiff's title to the property was not set out in the plaint and no question was raised whether the whole of the property was not the subject of a religious trust. He got a decree in the Court of the First Instance but the Appeal Court came to the opinion that the house was impressed with a religious trust and the plaintiff's claim should have been based upon his right as manager. The plaintiff was offered an opportunity of altering his claim as manager under the will of the person who established the trust. That offer was not accepted and the Appeal Court dismissed the suit. The plaintiff subsequently brought another suit, as the manager under the will of the owner of the house who established the trust, to eject the defendants from the room and to get an account of the profits and emoluments which the defendant had received as manager. **Held**, that the second suit was barred as **res judicata**, for the plaintiff in both the suits was asserting a purely personal right in his own personal interest and it was a right which might and ought to have been put forward in the first suit. 11 Bom.L.R. 921=34 Bom. 416=4 Ind. Cas. 241.

(ii) Failure of plaintiff to set up—When not res judicata.

——S. 11 Expl (4)—Suit as Karnavan of tarwad—Subsequent suit in his individual capacity.

Where the title put forward by a plaintiff is totally different and wholly independent of the title put forward in an earlier suit, the bar of **res judicata** does not apply. Explanation 4 of S. 11 of the Civil Procedure Code requires that the matter not only "might" but "ought" to have been made a ground which implies that the plaintiff was bound to include the present claim also in the earlier suit. But, where the present claim of the plaintiff is his individual right which he was not bound to include in the earlier suit which was filed by the plaintiff as karnavan of the tarwad wherein he was bound to include only all the available title of the tarwad, Explanation 4 would have no application. A.I.R. 1951 Mad. 285=63 L.W. 956=1950 M.W.N. 713=(1950) 2 M.L.J. 501.

——S. 11, Expln. (4)—Plaintiff acquiring fresh cause of action during pendency of his suit—Plaintiff not bound to rely on new right in pending suit—Subsequent suit on fresh cause of action not barred by res judicata.

In execution of his decree the decree-holder attached certain property of the judgment-debtor. When the property was posted for sale the mother of the judgment-debtor claimed that she had a maintenance charge over the property obtained in a suit. A few days before the objection by the mother the decree-holder filed a suit representing the general body of creditors for a declaration that the charge-decree was collusive and not binding on the creditors. When the claim petition of the mother came for hearing the Court passed an order that the suit brought by the decree-holder and the charge of the mother be notified. The property attached was thereupon brought to sale. The suit brought by the decree-holder was decided in favour of the mother. The mother filed execution to enforce her charge decree. Subsequently the purchaser of the property in the court auction filed a suit for declaration that since the mother had not filed a suit under O. 21, R. 63, within a year of the adverse claim order he had obtained as auction purchaser an absolute right to the property. The mother contended that her right to execute the charge decree was decided in her favour in the suit by the decree-holder and as the plaintiff in that suit failed to plead finality of the order in the claim petition the purchaser could not again contend that she was not entitled to execute the decree:

Held: that there was a conflict of interest between the judgment-debtor and the mother in the former suit and between the mother and the purchaser in the later suit who claimed through the judgment-debtor. The bar of **res judicata** would undoubtedly have applied had it not been for the mandatory requirements of O. 21, R. 63. Upon the expiry of one year from the adverse claim order the auction-purchaser obtained an indefeasible right to the property. He therefore

obtained a fresh cause of action and it was a well recognised principle of law that a plaintiff who acquired a fresh claim during the pendency of his suit or afterwards could bring another suit on the fresh cause of action. The right was acquired during the pendency of the previous suit and the plaintiff in one previous suit was not bound to rely on that new right in the pending suit. Hence the subsequent suit of the auction-purchaser was not barred by **res judicata.** A.I.R. 1949 Mad. 586=I. L.R. (1950) Mad. 101=62 L.W. 337=1949 M.W.N. 265=(1949) 1 M.L.J. 593.

——S. 11, Expl. (4)—Suit for possession treating defendant as trespasser—Subsequent suit for partition treating defendant as co-sharer—No res judicata.

The rule that the plaintiff must joint all the grounds of attack in a suit, is subject to this limitation that the grounds of attack must not be incongruous and that the evidence to support one of the grounds ought not to be destructive of the other alternative ground which could have been made in the previous suit.

Where in the previous suit the plaintiff sued by right of purchase treating the defendant as a trespasser and in the second suit plaintiff sued as a co-sharer for the moiety of the property treating the defendant as a co-sharer.

Held that the second suit was not barred by **res judicata.** A.I.R. (Vol. 18) 1931 Bom. 187=33 Bom.L.R. 204=130 Ind. Cas. 606.

——S. 11, Expl. (4)—Omission to sue for declaration, does not bar claim for substantive relief.

Failure to sue for a declaration in no way bars a claim for substantive relief when it arises. A.I.R. (Vol. 18) 1931 P.C. 5=52 C.L.J. 512=60 M.L.J. 245 =33 L.W. 121=35 C.W.N. 201=1931 M.W.N. 65= 10 Pat. 284=12 P.L.T. 337=58 I.A. 17=130 Ind. Cas. 620 (P.C.).

——S. 11—Suit against defendants as trespssers dimissed—Second suit as tenants not barred.

A previous suit for possession against the defendants as trespassers was dismissed as it was found that the defendants were in possession for more than 12 years as tenants. A subsequent suit after giving the requisite notice was brought against the tenants.

Held, that the legal relation not forward in the subsequent suit being different from what was alleged in the previous one the subsequent suit was not barred because it could not be said of any matter that it ought to have been set up as a ground of attack in the former suit if its introduction would have been incongruous to the matter of that suit. 51 C.L.J. 571—A.I.R. 1930 Cal. 588.

——S. 11—Different causes of action.

Where the first suit was based on the allegation of dispossession in respect of a certain plot, a subsequent suit for allotment of a plot of land in lieu of maintenance is not barred for through the claim put forward in the second suit might have been made a ground of attack in the previous suit, it is not such that it ought to have been made a ground of attack and plaintiff was not bound to put forward the claim as a ground of attack. The only right claimed in the former suit was the recovery of certain land from a trespasser and it was not necessary for the final determination of that right that the plaintiffs should have asked the Court to adjudicate upon his right to a plot of land in lieu of maintenance, the second suit cannot therefore be said to be barred by the rule **res judicata.** 11 Lah. 99=121 Ind. Cas. 428=A.I.R. 1929 Lah. 872.

——S. 11—Former suit in ejectment finding that they were co-sharers—Second suit to prevent defendants from obstructing joint user —Not barred.

Where a former suit by plaintiffs against the defendants, on the ground that the latter were trespassers, was dismissed on the finding that both the parties were co-sharers in the property, a second suit by plaintiffs recognizing the defendants to be co-sharers but contending that they were not entitled to build upon the joint land so as to exclude the plaintiffs from using it along with the other co-sharers is not barred inasmuch as, although, the matter forming the ground of attack in the second suit might have been made a ground of attack in the former, the plaintiffs were not bound to do so. 8 Lah. 308=103 Ind. Cas. 494=28 P.L.R. 432=A.I.R. 1927 Lah. 505.

——S. 11—Suit for redemption—Second suit in ejectment on title—Not barred—Inconsistent pleas.

In a previous suit for redemption plaintiff alleged that the defendant had taken the property sued for in exchange for another property held by him as mortgagee. It was dismissed as he was not able to prove the exchange. The second suit in ejectment on his title is not barred by **res judicata.** Whether any matter might and ought to have been made a ground of attack or defence depends upon the fact whether the matters in the two suits are so dissimilar that their union might lead to confusion. 35 Bom. 507; 12 Ind. Cas. 317; 13 Bom.L.R. 895.

——S. 11 (S. 13, Old Code)—Prior suit for redemption of mortgage—Dismissal—Subsequent suit for recovery of the property mortgaged on title —Res judicata.

The dismissal of a prior suit for redemption of a mortgage on the property is no bar to a subsequent suit for recovery of property on title. Per **Boddam, J.**—The bar of a judgment cannot be avoided by suing on a new form of claim or on a ground of relief which might have been but was not, raised in the former suit, if such claim or ground arises out of and depends upon the same right or title as that which was directly in question in the former suit. 26 M. 760 fol., 22 M. 250. dissented from. (1905) 28 M. 406.

——S. 11, Expl. (4) (S. 13, Expl. 2 Old Code) —Will—Probate—Grant — Revocation — Cause of action—Application on ground of maladministration—Refusal — Subsequent application on ground of forgery of will and fraud.

A applied for grant of probate of a will. **X** entered a caveat on behalf of **B**, an infant. **X** subsequently withdrew the opposition and by consent probate was granted to **A. B** attained majority and alleging that the estate was being maladministered applied that the probate might either be revoked or jointly granted to her. The application was refused. **B** then applied for revocation of the probate on the ground that the will was a forgery and that probate had been obtained by fraud without any evidence. **Held,** that assuming that S. 11 (S. 13, Old Code)

was applicable, the second application for revocation was not barred by constructive res judicata inasmuch as it was not obligatory upon B to take the ground now urged in her previous application. (1906) 4 C.L.J. 493.

——S. 11, Expl. (4)—(S. 13, Expl. 2, Old Code) —Alienation by Hindu widow—Suit by reversioner for pre-emption—Dismissal—Subsequent suit on widow's death for possession.

A Hindu widow alienated her husband's estate to the defendant. The reversioner plaintiff first brought a suit during the widow's lifetime for pre-emption which was dismissed on the ground that no right of pre-emption was proved. Subsequently on the death of the widow the very same plaintiff brought suit for possession as reversioner. **Held**—That the second suit was not barred by **res judicata**. The question in the former suit was the right of pre-emption in respect of which the widow had power to convey and did convey, that is her widow's interest, and the introduction of any question as to the effect of the conveyance upon the reversion would have been incongruous to the matter of the suit. 29 A. 331=5 C.L.J. 344=9 Bom.L.R. 591; 4 A.L.J. 232; 17 M.L.J. 233=34 I.A. 72 (P.C.)=11 C.W.N. 474=10 O.C. 117=2 M.L.J. 145.

——S. 11, Expl. (4)—(S. 13, Expl. 2, Old Code) —Order under S. 145—Suit for possession of whole property—Dismissal on finding of joint ownership with defendant—Subsequent suit for declaration of right to collect share of profits—Bar of res judicata.

In consequence of a dispute between the parties, the Criminal Court acting under the provisions of the Code maintained the defendant in possession. The plaintiffs brought a suit for possession alleging that they were the owners of the whole. The Court found that the parties were joint owners, but dismissed the suit on the ground that the plaintiffs had not asked for declaration of their right to a proportionate part. The plaintiffs brought this suit for declaration that they were entitled to collect their half share of rents from the land in dispute. **Held**, that having regard to the nature of the two suits the relief claimed in the present suit would have been inconsistent with the relief claimed in the former suit and hence the plaintiffs were not bound to make it a ground of attack in that suit. The present claim was, therefore, not barred by S. 11, Expl. 4 (S. 13, Expl. 2, Old Code). **Held**, further, that the suit was not barred by O. 2, R. 2 (S. 43, Old Code). (1904) 2 A.L.J. 342.

——(S. 11, Expl. (4)—(S. 13, Expl. 2, Old Code) —Suit for sharers in estate of deceased Mahomedan by heirs—Double defence by widow in possession—Gift and lien for dower—Dismissal of suit on the ground of lien for dower—Second suit to redeem—Bar of.

Under S. 11 (S. 13, Old Code), a plaintiff is only bound to make as a ground of attack in the suit a matter which not merely might, but **ought** to, have been made a ground of attack, and it is only when a matter might and **ought** to be made a ground of attack in the former suit that the section provides that such matter shall be deemed to be a matter directly and substantially in issue in the suit. The plaintiffs sued for their share by right of inheritance in the assets of a deceased Mahomedan, the defendant being the widow of the propositus. In that suit the widow pleaded that she was in possession of the property claimed in virtue of a deed of gift from her late husband and also that she had a lien on it for unpaid dower. The latter defence was accepted by the Court and the plaintiff's suit was dismissed. The plaintiffs then brought a second suit against the widow, in which they offered to redeem the dower debt and claimed possession after such redemption. **Held**, that the second suit was not barred by S. 11, Expl. 4 (S. 13, Expl. 2, Old Code). (1903) 1904 A.W.N. 191=1 A.L.J. 498 =27 A. 142.

——S. 11 (S. 13, Old Code)—Sale—Contract for —Subsequent sale to another with notice—Suit for specific performance of contract by intended purchaser against owner and alienees—Alienees' names struck off—Subsequent suit against alienees for possession—Not barred.

The owner certain property agreed to sell the property to the plaintiff and then sold it to some others with notice of the agreement. The intended purchaser brought a suit against the owners and alienees for specific performance and on an application by him the Court struck off the alienees as unnecessary parties. A subsequent suit by the plaintiff against the alienees for possession is not barred by res judicata or by O. 2, R. 2 (S. 43, Old Code). The cause of action for the two suits is not the same. (1899) 6 C.W.N. 314.

S. 16 (d). Grounds of Defence.

(i). Failure to plead—When res judicata.

——S. 11, Expl. (4)—Suit for declaration that A was owner of suit property and that B had no interest in it whatever—Decree in favour of A —Subsequent suit by B that he was owner and that A was only a mortgagee—Res judicata.

On 22—8—1927, the plaintiff passed a sale deed in favour of the defendant for Rs. 3,000, conveying to him the suit property. Certain creditors of the plaintiff obtained decrees against him and attached the suit property in execution as belonging to the plaintiff, alleging that the transaction of 22-8-1927, was a mortgage and not a sale. The defendant preferred a claim, but failed and then brought a suit for a declaration that he was the owner of the suit property and that the plaintiff had no interest in the property whatsoever and that the property was not liable to be sold in execution of decrees passed against the plaintiff. It was finally held that the transaction was a sale and that the plaintiff had no interest in the suit property on the date of the attachment. The plaintiff subsequently filed a suit for accounts under S. 15-D of the Dekkhan Agriculturists Relief Act, alleging that the transaction of 1927 was only a mortgage and that the consideration was only Rs. 1,700. The defendant raised the plea of **res judicata**, relying on the decision in the prior suit.

Held: that the decision in the prior suit operated as **res judicata** in bar of the present suit; it having been held in the prior suit that there was no saleable interest of the defendant in the property, any contention raised now which would be inconsistent with that decision must be held to have been raised and decided in the earlier suit. The real test was that if the decree in the previous suit was inconsisent with the defence which ought to have been raised, then that defence must be deemed to have been raised and finally decided, and would be barred by **res judicata**. I.L.R. (1949) Bom. 256= 51 Bom.L.R. 234=A.I.R. 1949 Bom. 274.

——S. 11, Expl. 4—Suit by alienee from Hindu widow for partition after her death—Reversioner impleaded in suit not setting up his title —Subsequent suit by him for declaration and possession of alienated property—Barred.

Where in a suit for partition brought by an alienee from a Hindu widow after her death, the reversioner impleaded in that suit does not set up his title to the alienated property as reversioner and the suit is decreed, a subsequent suit by him for a declaration and for possession of that property as a reversioner is barred by the principle of constructive **res judicata.** 27 Pat. 835=A.I.R. 1949 Pat. 340.

——S. 11, Expl. (4)—Declaratory decree obtained by reversioner—Locus standi—Decision as to —Res judicata.

Where a person has obtained a declaratory decree against the widow of the last male-holder, that the alienation made by her did not affect his reversionary rights, he must be deemed to have been held to be a sufficiently proximate heir in order to maintain the declaratory suit. It is obvious that he could not have any **locus standi** to maintain that suit except for the protection of his own interest in the property in dispute and he could have no such interest unless he was in the line of heirs. The question of the **locus standi** of such person must, therefore, have been either admitted or decided in his favour. Even if the defendant to such suit did not raise any plea in this respect. the question must be held to have been decided against him by implication and the matter would be **res judicata** by virtue of Expl. 4 to S. 11. A.I.R. (Vol. 27) 1940 Lah. 172=42 P.L.R. 14=189 Ind. Cas. 851.

——S. 11, Expl. 4—Ex parte decree—Res judicata.

Where the defendants in a suit raise an important issue in their written statement, but do not press that issue and remain **ex parte**, a decision **ex parte** given against them operates as **res judicata** against them in a subsequent suit in respect of that issue. 26 Pat. 717=A.I.R. 1949 Pat. 197.

——S. 11, Expl. (4)—Prior ex parte decrees.

There is a constructive **res judicata** in case of previous **ex parte** decrees and all matters which were or could have been directly and substantially in issue in the previous suit are deemed to have been heard and finally decided in the previous case unless it is proved that the previous **ex parte** decree was either a nullity (on some legal ground) or was not based on the merits of the case. 1949 R. D. 221.

——S. 11, (S. 13, Old Code) Ex parte decree—Omission to set up defence—Res judicata.

An **ex parte** decree in a prior suit against the plaintiff for a declaration of his title to a moiety of and partition of, the plaint lands will operates as **res judicata** in a subsequent suit brought by the plaintiff questioning the validity of the sale to the defendant by the representatives of estate at the time of the sale, and consequently the defendant's title to the land: for the question of the validity of the sales ought to have been raised by way of defence to the partition suit, and must, therefore, be treated as having been directly and substantially in issue in that suit. The contention that it was not necessary to do so by reason of the fact that defendant being in joint possession at the time of the prior suit, gave a right to her for partition was overruled. (1900) 31 C. 79.

——S. 11, Expl. (4)—A putnidar brought a suit for assessment of rent in the Munsif's Court on the ground that the tenant had encroached upon the adjoining lands of his landlord. The defence was that the lands in dispute were outside the gauti and comprised within his taluk. It was held that the disputed lands were within the gauti. A suit was then brought on the enhancement decree in the Subordinate Judge's Court for the recovery of rent. That suit was decreed **ex parte** and the decree was enforced in execution. **Held**, a suit brought in the Court of the Subordinate Judge by the representative of the tenant for recovery of the land on the ground of its being included in the taluk, was barred by the principle of constructive **res judicata.** (1902) L.R. 31 C. 79, foll. (1909) 10 C.L.J. 527=4 Ind. Cas. 442.

——S. 11, Expl. (4)—Suit in Munsiff's Court for arrears of maintenance charged on two properties—Decree against one property alone and the other held not liable—Second suit in Civil Judge's Court for arrears claiming it from the property held liable in prior suit—Plea that it was liable only to a proportionate share of charge—If open.

In a suit in the Munsiff's Court for arrears of maintenance charged on two items of property one was held not liable to the charge and the suit decreed as against the other. In a later suit for subsequent arrears filed in the Civil Judge's Court, the arrears was claimed only from the property held liable in the prior suit. It was contended in defence that that property was liable only to a proportionate share of the charge.

Held, that the plea now raised was one which ought to have been raised in the earlier suit.

Expl. 4, to S. 11, C.P. Code, barred its being raised in the later suit and for this purpose it did not matter that the earlier suit was in the Munsiff's Court and the later one in the Court of the Civil Judge. 23 Luck. 13=A.I.R. 1948 Oudh 147=1948 O.W.N. 209.

——S. 11, Expl. 4—Different suits in respect of recurring liability—Second suit filed in Court of higher jurisdiction.

Where the former suit in respect of an allowance for a particular period is filed in the Munsiff's Court and the subsequent suit in respect of the same allowance for a subsequent period is filed in a Court of higher jurisdiction namely, the Court of the Civil Judge, because of the larger amount due then and a point is raised in the later suit which might and ought to have been raised in the earlier suit, Expl. (4) to S. 11, C. P. Code, will apply so as to make the decision in the earlier suit operate as **res judicata** in the later suit. 22 Luck. 37=228 Ind. Cas. 225=1946 A.W.R. (C.C.) 257=1946 O.W.N. 349=1946 O. A. (C.C.) 257=A.I.R. 1947 Oudh 122.

——S. 11, Expl. (4)—Defence not raised in previous suit, whether barred in subsequent suit.

In the previous suit, the present plaintiff's father was plaintiff and claimed half of the income from offerings of 91 fairs. The plaintiff only had lists of the income of forty-three of the 91 fairs, which he filed. The case proceeded on the footing that the plaintiff (in the previous suit) was entitled to one-half of the whole income. The plaintiff's title to one-half of the whole income, after the proper deductions had been made, was judicially upheld. In this suit, the plaintiff clearly claimed a half of

the whole income, and the question whether he was entitled to a half share of the income was put in issue and decided. In the second suit, the present plaintiff claimed a half share of the income from the entire offerings in respect of subsequent years. The defendant contended that he was entitled to a half share in the income of one portion only of the offerings, namely, the **shamlat khut** or joint account.

Held, that the present defence of the defendant was a matter which might and ought to have been made ground of defence in the previous suit, and was, therefore, to be deemed to have been a matter directly and substantially in issue in such suit, within the meaning of Expl. 4 to S. 11, C. P. Code, and therefore, the defence was excluded by **res judicata.** A.I.R. (Vol. 32) 1945 P.C. 132=1945 N.L.J. 480=49 C.W.N. 743=(1945) 2 M.L.J. 223=1945 M.W.N. 523=58 L.W. 485=12 B.R. 246=221 Ind. Cas. 531.

——S. 11—Defence available not raised at time of passing of preliminary rent decree—It cannot be raised in proceedings for final decree.

A brought a suit for recovery of arrears of rent against **B** and **C**. The main question was whether **A** or **D** and **E** who were also made defendants were landlords. The suit was dismissed. While the second appeal by **A** was pending, Madras Act 4 of 1938 came into force and **B** and **C** obtained a declaration that the prior arrears were wiped out by the operation of S. 15 of that Act. To the proceedings **A**, **D** and **E** were made parties. This order was not, however, brought by **B** and **C** to the notice of the High Court at the time of the hearing of the second appeal and the result was that the High Court, in ignorance of the proceedings under Madras Act 4 of 1938, passed a preliminary decree for full amount claimed, in favour of **A** holding that **D** and **E** had no title. When **A** applied for final decree, **B** and **C** objected on the ground that the arrears for the years in suit were cancelled by the order under Madras Act 4 of 1938 to which **A** was a party and that **A** was barred by **res judicata** from claiming a final decree in respect of those arrears:

Held, that **B** and **C** were barred by **res judicata** from contending that **A** was barred by **res judicata.** They had a good defence to the second appeal which they negligently failed to put forward and it would make no difference whether that defence was in the nature of a plea of actual discharge by payment or discharge by judicial declaration under Madras Act 4 of 1938. As they failed to put forward or establish the defence at the proper time, i.e., at the time of the passing of the preliminary decree, they could not contend that the decree was wrong. A.I.R. (Vol. 32)=1945 Mad. 185=(1945) 1 M.L.J. 157.

——S. 11—Defence that ought to have been raised.

Where a matter is constructively in issue it cannot, of course, be said to have been actually heard and decided. It could only be deemed to be heard and decided. If the effect of the decision in the former suit is necessarily inconsistent with the defence that ought to have been, but not raised that defence must be deemed to have been finally decided against the person who ought to have raised it' If effect is to be given to the principle of constructive **res judicata** in S. 11, Expl. 4 where the defence that ought to have been raised is not raised it must be held that there has been constructively a decision upon the point. Otherwise little or no purpose would be served by the Explanation and the rule of constructive **res judicata** as formulated in S. 11, Expl. 4 would be rendered almost nugatory.

The defendants were in possession of certain villages as **guzaradars** under a codicil executed by the grandfather of the plaintiff **taluqdar.** In the previous suit by the plaintiff against the defendants to recover various sums in respect of some of the villages the defendants had admitted the plaintiff's claim to recover from the defendants the contributions under S. 3, Canning College and British Indian Association Act, 1920, and had been paying the same without demur. In the subsequent suit by the plaintiff to recover various sums in respect of other villages the defendants questioned their liability to pay the contributions under S. 3 of the Act of 1920.

Held, that if the defendants wished to contest their liability to pay the contributions they should clearly have done so when the claim was first made and their liability must therefore, under S. 11, Expl. 4, be deemed to have been a matter directly and substantially in issue in the previous suit and must be deemed to have been finally decided. A.I.R. (Vol. 31) 1944 Oudh 94=1943 O.W.N. 509=19 Luck. 428=214 Ind. Cas. 277.

——S. 11—Lunatic's claim decreed against his brother's creditors—Decision res judicata with respect to whole property.

Where the lunatic's claim for a declaration of his proprietary rights and for possession of his half share is decreed against the creditors of the other brother, such decision operates as **res judicata** even in respect of the lunatic's half share in the whole of what had been the joint ancestral estate. A.I.R. (Vol. 29) 1942 All. 267=1942 A.L.J. 197=1943 A.W.R. 305=I.L.R. (1942) All. 518=202 Ind. Cas. 227.

——S. 11—Defendant must resist on all possible grounds.

When a plaintiff claims an estate, and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward. A.I.R. (Vol. 29) 1942 Oudh 354=1942 O.W.N. 222=200 Ind. Cas. 241.

——S. 11—Defendant in possession must resist claim on all possible grounds.

A defendant in possession is bound to resist a claim on all grounds that it is possible for him on his knowledge at the time to bring forward. 11 M.I.A. 50, Foll. 7 Lah. 40=27 P.L.R. 209=94 Ind. Cas. 27=A.I.R. 1926 Lah. 162.

——S. 11—Where it was found that the previous suit would certainly have been defeated by the pleas put forth in the subsequent suit had they been established.

Held those pleas were barred in the subsequent suit by Explanation 4. 5 L.L.J. 251=24 P.W.R. 1923=72 Ind. Cas. 91=A.I.R. 1924 Lah. 83.

——S. 11—Defence which might have been raised in prior suit cannot be subject-matter of subsequent suit.

Where a party did not plead a matter in defence, it is debarred from raising it as the subject-matter in a subsequent suit. A.I.R. (Vol. 25) 1938 All. 542=1938 A.W.R. 596=1938 A.L.J. 940=178 Ind. Cas. 66.

——S. 11—Creditor agreeing to give credit for certain amount—Decree for whole amount passed—Debtor not objecting—Debtor cannot plead agreement in subsequent action.

Where, in spite of an agreement that the creditor should give credit to certain payments made by the debtor, a decree for the full amount is passed without any objection on the part of the debtor, the debtor cannot, in subsequent action, raise the point that the creditor had agreed to give credit for certain amounts. These matters should have been raised as a defence to the previous action; failing to do it is **res judicata.** A.I.R (Vol. 25) 1938 Pat. 41=18 P.L.T. 896=4 B.R. 217=16 Pat. 748=173 Ind. Cas. 123.

——S. 11—Suit for money—Reduction of plaintiff's claim not claimed bars subsequent suit therefor.

The omission by defendant to claim a reduction in the amount for which he is being sued which reduction the defendant can lawfully claim, debars him from suing for the amount subsequently. 87 Ind. Cas. 1017=A.I.R. 1925 Oudh 719.

——S. 11—Decree against-debtor—Failure to plead discharge—Res judicata.

Suit by creditor against debtor—The debtor was **ex parte**—Decree was passed and money recovered—Debtor then brought a suit for refund on the ground money had already been paid to the agent of the creditor.

Held he could not recover owing to his failure in former suit to take advantage of the plea of discharge which was open to him. 17 M.L.W. 448=1923 M.W.N. 235=72 Ind. Cas. 770=A.I.R. 1923 Mad. 551=44 M.L.J. 495.

——S. 11—A pre-decree compromise must be pleaded in the decree. It cannot be allowed to be raised in a subsequent suit for a declaration that the compromise was binding on the decree-holder. A.I.R. (Vol. 24) 1937 Lah. 537=34 P.L.R. 29=I.L.R. (1937) Lah. 209=171 Ind. Cas. 189.

——S. 11—Filing of unregistered award requiring registration—Other party not objecting—Question barred in subsequent suit.

If an application is made to the Court to file an unregistered award which requires registration, the Court must reject it. This is one of the grounds which can be urged against the filing of an award. If it is not urged and the award is filed, then that question is barred in a subsequent suit. A.I.R. (Vol. 24) 1937 Nag. 132=I.L R. (1937) Nag. 6=173 Ind. Cas. 124.

——S. 11—Previous suit on mortgage—Mortgagor's wife impleaded as one of defendants—She not appearing nor raising any objection as to jurisdiction—Subsequent suit challenging previous decree on ground of jurisdiction.

If a party disregards a suit filed against him and refrains from referring the defences open to him he cannot in a subsequent suit re-agitate one of the defences which under the law he is bound to take at the first possible opportunity, namely, the defence that the Court in which the suit is filed has no jurisdiction to entertain it. To allow this would be materially restricting the scope of S. 11, Civil P.C. Where, therefore, in a previous mortgage suit the wife of the mortgagor who is impleaded as one of the defendants in that suit does not appear nor contests the suit and does not even appeal against the decree passed in such a suit, she cannot, on principles underlying S. 11 and on grounds of equity, justice and expediency, be allowed to bring a suit subsequently challenging the decree on the ground that the Court which passed the decree had no jurisdiction to pass it. A.I.R. (Vol. 24) 1937 All. 251=1937 A.L.J. 536=1937 A.L.R. 556=169 Ind. Cas. 609.

——S. 11—Defendant not raising issue of jurisdiction in first suit—Decision, if res judicata.

Where a defendant fails to appear in the original Court or where he appears but fails to raise the issue of jurisdiction, the decision of the Court will be binding on him as **res judicata** and he cannot re-agitate the same point in another suit; there is a clear general principle that the decided cases cannot be re-opened merely because the view that was taken on a question of law in that case is subsequently upset. A.I.R. (Vol. 23) 1936 Sind 34=161 Ind. Cas. 324.

——Ss. 11 and 21—Omission to plead want of jurisdiction.

Where, in a mortgage suit the defendant raised a plea that the court had no jurisdiction, but did not bring to the notice of the Court S. 5 of Bengal Regulation 3 of 1872 which also barred the jurisdiction of the court, and the question was decided against the defendant, **held** that the court had jurisdiction to decide whether it has jurisdiction to entertain the suit, and that its decision on the point is final and conclusive in all collateral enquiries. Where the want of jurisdiction is not apparent on the face of the proceedings but the absence of jurisdiction depends on a fact in the knowledge of a party, then, if he does not bring that fact forward but allows the court to proceed with the judgment he ought not to be permitted to impeach the jurisdiction in any collateral proceeding. 67 Ind. Cas. 686=A.I.R. 1922 Pat. 322.

——Ss. 11 and 21—Omission to plead—Objection to place of suing.

Section 11 creates what may be called a statutory waiver of the objection to jurisdiction so far as it relates to the place of suing and where there was no consequent failure of justice the validity of a decree passed in such suit cannot be challenged by a separate suit. A.I.R. 1925 Mad. 117, Foll. 11 L.L.J. 306=120 Ind. Cas. 279=A.I.R. 1929 Lah. 449.

——S. 11, Expl. 4—Suit for actual proprietary possession of land—Defendant omitting to put forward his claim—Res judicata.

When a suit is for actual proprietary possession of land and the defendant to the suit claims some kind of interest in that land, he must put forward his claim as a defence to the suit, and unless he does so, any subsequent claim made by him must be deemed to be barred by Expl. 4 to S. 11, Civil P.C. A.I.R. (Vol. 22) 1935 Oudh 15=11 O.W.N. 1368=18 R.D. 623=L.R. 15 A. (O) 695=152 Ind. Cas. 426.

——S. 11—Defence that defendant is heir under customary law—Subsequent suit basing title as heir under Mohamedan law barred.

Where a woman defends a certain suit under the plea that she is heir to certain property under the Customary law and the suit is decided against her, a subsequent declaratory suit by her basing her title to the same property as heir under the

Muhammadan law is barred by res judicata. A.I.R. (Vol. 22) 1935 Pesh. 150 =158 Ind. Cas. 995.

——S. 11, O. 21, R. 100—Mortgage by three sons of mortgagor—Suit by mortgagee—Mother made party to suit—Mother not raising plea as heir of fourth son—Decree—Execution purchaser—Application by mother under O. 21, R. 100 barred.

In a suit by a mortgagee to enforce the mortgage making the mother of the mortgagors, a defendant as the holder of a lease under the mortgagors, a specific issue was raised at the instance of a stranger defendant that the three mortgagors had another brother who had not joined in the mortgage and who died leaving his mother as his heir. The issue was decided in the negative. There was no plea by the mother as the heir of the fourth son. A mortgage decree was passed and in pursuance of the decree the properties were purchased by the mortgagee. When the mortgagee tried to take possession, the mother applied under O. 21, r. 100, Civil P.C., on the ground that her right to one-fourth share as representative of her fourth son, was not affected by the sale, and that she should not be dispossessed of the share:

Held, that as the matter was one which ought to have been made a ground of attack in the suit and as the plea was not urged therein, it should not be raised subsequently in proceedings under O. 21, r. 100. A.I.R. (Vol. 20) 1933 Cal. 680=37 C.W.N. 671=60 Cal. 832=149 Ind. Cas. 439.

——S. 11, Expl. 4—Plea that might and ought to have been raised.

A deed of gift was executed by **A** in favour of two persons who made a simple mortgage of the property in favour of **B**. **B** secured a final mortgage decree against the mortgagors in 1916, and in execution purchased this property in 1918, and immediately after **A** sued for a declaration that the gift deed was not binding on her. On **A**'s death **C** was substituted in her place. The suit was dismissed but **C** continued in possession and as **B** could not obtain possession of it from **C**, the Official Assignee (**B** having been adjudicated insolvent in the meantime) sued **C** for possession in 1930. **A**'s, and after her death **C**'s, adverse possession was admitted since 1896. **C** pleaded adverse possession. The plaintiff urged that as **C** did not raise the plea of adverse possession in the previous suit, **C** was barred from raising it in the subsequent suit:

Held, that although the former suit debarred **C** from raising the plea that the title of the plaintiff had been extinguished in 1918, (when **B** purchased the property in execution) by **C**'s adverse possession, it was open to **B** to say that for 12 years before the date of the present suit, she was in adverse possession of the property, and that this was a complete answer to the Official Assignee's suit. A.I.R. (Vol. 20) 1933 Cal. 246=36 C.W.N. 965=60 Cal. 8=143 Ind. Cas. 381.

——S. 11—Previous suit for rent—Subsequent suit for cess.

Where the question of cess is not raised in the previous suit for rent, it will be barred by the rule of res judicata in a subsequent suit. A.I.R. (Vol. 19) 1932 Cal. 385=54 C.L.J. 479=36 C.W.N. 72=137 Ind. Cas. 696.

——S. 11—Plaintiff claiming both proprietary and cultivating rights—Defendant denying only latter right.

Where in a suit for determination of the question of title in which the plaintiff claimed both the proprietary and cultivating rights, the defendant denied the plaintiff's title only to the cultivating rights in spite of the fact that a year prior to the institution of the suit the settlement officer had recorded his field as his sir:

Held, that the defendant might and ought to have set up his proprietary rights and he was barred by the rule of res judicata from setting up such right in a subsequent suit. A.I.R. (Vol. 19) 1932 Nag.36=14 N.L.J. 171=136 Ind. Cas. 884.

——S. 11, Expl. 4—Contract of guarantee—Question as to whether contract represented agreement.

A made a loan of 40 lakhs of rupees to **B** on the mortgage of certain properties; and **P**, **Q** and **R** guaranteed the loan to the extent of Rs. 6 lakhs each **B** did not pay the loan and the executors of **A** sued **P**, **Q** and **R** on their contract of guarantee. **P**, **Q** and **R** contended that their liability as per the terms of the contract of guarantee, came into existence only if and when the mortgage had been enforced and was found deficient to meet the loan. **R** also put forward an alternative plea alleging that the contract did not properly represent the real bargain between the lender and the guarantors but their plea was abandoned. The suit was decided in favour of **P**, **Q** and **R**. Subsequently they filed a suit for rectification of the contract of guarantee:

Held, that that subsequent suit was barred under S. 4, Expl. 4 inasmuch as the question whether the contract of guarantee really represented the agreement between the guarantors and the lender not only might but ought to have been made a ground of defence in the prior suit. A.I.R. (Vol. 19) 1932 Cal. 889=59 Cal. 985=141 Ind. Cas. 50.

——S. 11, Expl. 4—Suit by husband for restitution of conjugal rights—Omission to plead charge of adultery in defence—Subsequent suit by wife for divorce on the ground of charge of adultery barred.

A serious charge of immorality brought against the wife is a sufficient answer to a suit by the husband for restitution of conjugal rights.

Therefore, where a husband sues for restitution of conjugal rights and the wife does not plead the charge of immorality in her defence and a decree for restitution is passed she cannot subsequently sue for dissolution of marriage on the ground that the husband had charged her with immorality. (1931) 130 Ind. Cas. 495=1930 A.L.J. 1569.

——S. 11—Lessor and lessee—Lessee also heir to the leased property—Suit on the lease—Failure to assert title as heir—Subsequent suit as heir—Barred.

A widow and executrix of her husband's property conveyed a piece of land to **R**, who leased it to **V**. One of the sons of the widow **R** sued **V** in ejectment. **V** was held estopped under S. 116. Evidence Act, and the sale to **R** conveyed only the widow's interest. In appeal **V** filed a petition that he has already delivered possession to **R** and that the order in appeal should be so framed as not to affect his title as of the next kin of the father—Pe-

tition was dismissed. In a subsequent suit by **V** to recover his share as heir.

Held, that apart from the effect of S. 116, **V** was prevented from obtaining the relief sought by him. in the subsequent action. 57 I.A. 208=34 C.W.N. 720=A.I.R. 1930 (P.C.) 224=130 Ind. Cas. 319=8 Rang. 326=52 C.L.J. 254=32 Bom.L.R. 1522=33 L.W. 140=59 M.L.J. 296 (P.C.).

——S. 11—Defendant's status as tenant not raised—Subsequent suit alleging that they were under-raiyats—Plea that they were occupancy tenants barred.

Plaintiffs sued to eject the defendants alleging that the latter were under-raiyats and had been served with notice to quit. The defendants pleaded that they were not under raiyats but were occupancy tenants and that the notice was not sufficient. The plaintiffs had previously brought a suit to eject the defendants alleging that they had no tenancy rights and were trespassers. It was held in that suit that the defendants were tenants and not trespassers. Their status was not however expressly decided.

Held, that, in view of the fact that the tenancy was originally taken by the father of the defendants, the point whether the defendants were tenants or under-tenants might and ought to have been raised for decision in the previous suit and therefore the decision in the previous suit was in effect a **res judicata** in the subsequent suit. 34 C.W.N. 442=129 Ind. Cas. 574=A.I.R. 1930 Cal. 690.

——S. 11—Suit for pre-emption—Omission to plead invalidity of sale—Subsequent suit by vendor's son—Res judicata.

A sold a one anna share in a certain village, his self-acquired property to **B** in contravention of the Bundelkhand Land Alienation Act. **C** sued **A** and **B** for pre-emption. **A** did not raise the plea that the sale was void and the suit was decreed. In a subsequent suit by **A's** son to set aside the sale.

Held, that the plaintiff could not be allowed to go behind the decree obtained by the pre-emptor against **A** and the suit was barred by **res judicata.** (1931) 130 Ind. Cas. 717=1930 A.L.J. 601=L.R. 11 A. 114. (Rev.)

——S. 11—Fraud—Defence not raised.

Where a matter is constructively in issue, it need not be heard and finally decided by Court in order to constitute **res judicata.** Where a plea of fraud might have been raised in the prior suit but was not, **held**, that the same was constructively an issue in the prior sui and constituted **res judicata** for purposes of the tlatter suit, 12 P.R. 1915, Foll. 11 Lah.L.J. 97=117 Ind. Cas. 805.

——S. 11—Deed of gift by a Hindu widow in favour of reversioners—Decree for cancellation—Finality of.

Where a decree cancelling a deed of gift executed by a widow in favour of reversioners is passed, the finality of the decree must be effective in respect of all the rights of the reversioners in so far as the power of alienation is concerned irrespective of the fact whether they profess to hold the property in suit by virtue of the deed of gift or whether the right to hold the same devolved on them by way of inheritance. 3 Luck. 487=5 O.W.N. 265=112 Ind. Cas. 169=A.I.R. 1928 Oudh 359.

——S. 11——Lease of the right to receive the offerings—Suit for lease amount—Decree—Subsequent suit for another period—Plea, such right not transferable—Res judicata.

Held, that the cause came within tbe purview of S. 11 that the defendants ought to have taken the plea in the former suit and they having failed to do so were barred from raising such a plea, and that the mere fact that the suit was for a different period could not make any difference. 50 All. 394=26 A.L.J. 185=113 Ind Cas. 242=A.I.R. 1928 All. 721.

——S. 11—Suit for possession—Deft. not setting up his usufructuary mortgage—Effect.

In a suit by **T** for recovery of her one-fifth share of the inheritance, **M** in that suit in his defence did not set up his usufructuary mortgage. The result was that the suit of **T** was decreed for possession. **M** then, brought a suit for recovery of possession against **T**, on the ground that he was entitled to possession of this share as a mortgagee.

Held, that the suit was barred as **res judicata** as **M** might and ought to have set up in defence his usufructuary mortgage in the previous suit. 50 All. 306=113 Ind. Cas. 745=A.I.R. 1928 All. 714.

——S. 11, Expln. 4—Defences—Ejectment—Plea of mortgage not raised.

B was the owner of a village which passed on his death to his widow who continued in possession till her death in 1887. Her husband's brother's son **R** took possession as the next reversioner and borrowed money on the security of the property to pay off the widow's debts from the plaintiff. After the widow's death the defendant, who is the Rajah of Basti, brought a suit against the reversioner and the other transferees including the plaintiff, for possession of the entire property. The present plaintiff set up a claim as mortgagee but the suit was decreed. The plaintiff brought this suit for sale upon the mortgage executed to him by the reversioners against the Rajah on the ground that the Rajah took the village subject to a charge in his favour and that he was estopped from denying his mortgage. **Held**, that the plaintiff ought to have raised the question of estoppel in the previous suit brought by the Rajah and the present claim was barred by **res judicata.** 3 L.W. 454; 20 C.W.N. 265=A.I.R. 1915 (P.C.) 103=34 Ind. Cas. 673=(1916) 1 M.W.N. 142 (P.C.).

——S. 11—Plea that ought to have been raised barred.

A brother of deceased, applied for letters of administration on the ground that the deceased was a Mohomedan **B**, deceased's wife object but did not raise the plea that the deceased was not a Mahomedan but a Buddhist and letters were granted to **A**. Subsequently, **A** sued **B** for possession of certain properties.

Held that it was not open to **B** to plead that the deceased was not a Mahomedan but a Buddhist. 6 Bur.L.J. 26=101 Ind. Cas. 327=A.I.R. 1927 Rang. 333.

——S. 11—Prior suit for possession on basis of gift decreed—Subsequent suit questioning donor's right to make gift is barred.

Where a prior suit for possession in decreed on the basis of a gift, a subsequent suit questioning the title of the donor to make a gift is barred as that question not only might but ought to have been

taken in the previous litigation. 1 L.C. 78=101 Ind. Cas. 812=A.I.R. 1927Oudh. 234.

——S. 11—Rent suit—Question of title—Constructive res judicata.

The purchaser of property at a rent sale instituted a rent suit against the tenants impleading the plaintiff as a defendant upon the allegation that as a result of the rent sale the plaintiff's darpatni interest had been annulled. The Court held that the darpatni had been annulled and decreed the suit. The plaintiff then brought a suit for a declaration that his interest was that of a darmokoraridar and not a darpatni interest and that his interest had not been annulled.

Held, that it was incumbent on the plaintiff as defendant in the previous rent suit to set up all possible grounds on which annulment could be resisted, and if he did not choose to set up the nature of his interest as a ground against annulment, he could not be allowed to agitate that question against in the present suit. The rule of constructive **res judicata** meant that any issue which might and ought to have been raised by a party in a suit if not raised, must be deemed to have bee decided against the party. As the question of title and the question of annulment hung together, the question of title must be said to have been impliedly decided against the plaintiff in the previous rent suit as being involved in the finding that the plaintiff's interest had been annulled. The issue of annulment as raised in the rent suit did directly and substantially raise the issue of title, which in its turn depended upon the nature of the interest which the plaintiff held in the disputed lands. A.I.R. 1947 Cal. 393.

——S. 11, Expl. (4)—Suit for rent by co-sharer—Other co-sharer impleaded not claiming rent.

Suit for rent by co-sharer—Other co-sharer impleaded as defendant not claiming rent from the tenant—Subsequent suit for rent by the latter co-sharer for same period.

Held, that the claim for a share being a matter which he might and ought to have asserted in the first suit was barred by **res judicata**. A.I.R. (Vol. 30) 1943 Pat. 454=24 P.L.T. 209=10 B.R. 101=209 Ind. Cas. 174.

——S. 11, Expl. 4—Rent decree—Relationship of landlord and tenant—Res judicata.

In all cases for recovery of rent, the relationship of landlord and tenant is the foundation of a decree and therefore when such a suit is decreed, the Court must proceed on the footing that it was a matter necessary to be determined and in fact determined in the earlier rent suit.

Where in a rent suit by landlord against tenant, the tenant pleads that the plaintiff-landlord is not his landlord but some one else, but the landlord-plaintiff has previously obtained rent decrees in respect of the same holding against the tenant-defendant and in those previous suits the tenant never challenged the title of the plaintiff-landlord to recover rent, the decision in previous suits operates as **res judicata** in subsequent suit under S. 11, Expl. 4, C. P. Code. A.I.R. (Vol. 25) 1938 Nag. 195=I.L.R. (1940) Nag. 181=175 Ind. Cas. 693.

——S. 11—Rent suit—Joint decree against all defendants—Plea of tenancy in severalty—Res judicata.

Where in a suit for rent the plaintiffs obtained two **ex parte** rent decrees jointly against all the defendants in respect of the entire rent.

Held, that the defendants were debarred from setting up tenancy in severalty.

Per **Suhrawardy, J.**—No hard and fast rules obtain as to what questions should be recorded as questions that ought to have been raised in the previous suit. But there are several tests which have been applied from time to time when such questions have had to be decided. One of the tests is whether by raising the questions the previous decree could have been in any way varied or affected or have been defeated. 40 C.L.J. 507=85 Ind. Cas. 123=29 C.W.N. 253=A.I.R. 1925 Cal. 427.

——S. 11—Rent suit—Subsequent suit for different period—Omission to plead—Res judicata.

Decision in a previous rent suit whether **ex parte** or not operates as **res judicata** in a subsequent rent suit even for a different period if any question which arises in the suit or which if objections were taken by a party ought to have been decided has been decided thereby. 40 C.L.J. 507=85 Ind. Cas. 123=29 C.W.N. 253=A.I.R. 1925 Cal. 427.

——S. 11—Terms of puttah—Defence not raised—Rse judicata.

The decision of the question as to the proper terms of a **puttah** in respect of one **fasli** is **res judicata** for subsequent **faslies** also. Any ground of attack or defence which by virtue of the Expln. 4 to S. 11 of the C. P. Code is deemed to have been directly and substantially in issue in a suit, must also be deemed to have been heard and finally decided adversely to the party who failed to raise it. 37 Mad. 70 (F.B.), Foll. 62 Ind. Cas. 501=13 M.L.W. 307.

——S. 11, Expl. (4) (S. 13, Expln. 2, Old Code)—Prior suit for enforcement of acceptance of patta—Tenant not objecting, to term—Subsequent suit—Objection by tenant to terms of patta as containing voluntary payments—If barred.

Fees, payments of which are in their nature **prima facie** voluntary, cannot be included in a patta unless they are shown to be a charge on the land or to be payable with the rent according to established law or usage. But where in a former suit a patta containing the same terms was enforced and the tenant failed to object to those terms.

Held, that in a subsequent suit he is barred from raising the objection by virtue of S. 11, Expl. 4 (S. 13, Expl. 2, Old Code). (1906) 30 M. 498=3 M.L.T. 17=17 M.L.J. 433.

——S. 11, Expl. 4—Rent suit—Omission to plead absence of transferable interest—Subject-matter not the same—Res judicata.

Where in a suit for rent by the purchaser at an auction sale of an undivided share in a house against another sharer the other sharer's absence of a transferable interest was not pleaded, the point will be **res judicata** in a subsequent suit for possession. The fact that the actual subject-matter in the two suits is not the same does not affect the question. 73 Ind. Cas. 457=A.I.R. 1924 Lah. 423.

——S. 11—Suit on agreement—Wagering contract by members of joint family—Omission to plead—Res Judicata—Minor members.

The plaintiffs were sued as members of a joint Hindu family. An **ex parte** decree was passed against them by the High Court. Subsequently they sued to set aside the attachment in execution

of that decree on the ground that the agreement on which they were formerly sued was a wagering contract and contrary to public policy.

Held, the suit was barred by **res judicata.**

Obiter.—Different considerations would apply if the suit had been brought by the minor plaintiffs on the ground they were not properly represented in the former suit. 69 Ind. Cas. 783=A.I.R. 1924 Lah. 26=43 P.L.R. 1922.

——S. 11—Plea not taken in previous suit—Different subject-matter—Effect.

A obtained a decree against the estate of **B** and in execution of the same purchased an undivided share in a house alleged to have belonged to **B**. Afterwards **A** brought another suit against **C**, **A's** nephew and **D**, **A's** brother's wife for rent of the purchased share. The defence was that **A** did not purchase the share but there was no plea that the purchased share did not belong to **B** and this suit was decreed. Subsequently in a suit brought by **C** against **A** for possession of the share purchased by **A** on the ground that the share did not belong to **B**.

Held, that the question as to the ownership of **B** in the share purchased by **A** was **res judicata** between the parties and the fact that the subject-matter of the previous suit was different to that of this suit did not matter. 73 Ind. Cas. 457=A.I.R 1924 Lah. 423.

——S. 11—Mortgage suit—Purchaser of part of property impleaded—Omission to deny mortgagor's title—Res judicata.

Where a purchaser of part of the mortgaged property was a party to the mortgage suit and could have pleaded that the mortgagor had mortgaged property to which he had no title, a separate suit by him for declaration, that the decree-holder auction-purchaser is not entitled to that part does not lie. Up till the confirmation of the sale, there could be no question as to the mortgagee being considered to have lost his title as mortgagee and acquired the title of auction-purchaser. 79 Ind. Cas. 486=A.I.R. 1923 All. 115.

——S. 11—Alternative defence not pleaded.

Where it was open to the plaintiffs in their defence in the former suit to claim in the alternative that they had a vested right in half the property in suit, but they were content to plead a partition whereby they became owners of the whole and in the result their defence failed and it was held that the property belonged to their father,

Held, that this decision was necessarily inconsistent with the alternative defence that might and ought to have been raised. 13 C.W.N. 513, Foll. 1 Rang. 363=2 Bur.L.J. 109=76 Ind. Cas. 612=A.I.R. 1923 Rang. 239.

——S. 11—Suit for specific performance—Omission to plead—Invalidity of contract—Res judicata.

When the plaintiff sued the judgment-debtor for specific performance of the contract to sell, it was open to the latter to plead that the agreement was void because the property was under attachment or in the hands of the Collector at the time. Explanation 4 of S. 11 of the Civil Procedure Code will bar him from taking that plea in a subsequent suit, and it will equally bar the appellant who claims under him and is litigating under the same title. 66 Ind. Cas. 850=A.I.R. 1922 Nag. 81.

——S. 11, Expln. (4)—Execution sale—Application to set aside—Dismissal of—Subsequent suit on fresh grounds—Bar.

In a proceeding to set aside an execution sale the applicants set up that the person whose property was purported to have been sold and whose legal representatives they were, had died before the decree and did not put forward the case upon which they later on sued to set aside the sale, viz., that the judgment-debtor died after the decree but before attachment. **Held**, that the suit was barred by the rule of **res judicata.** 23 C.W.N. 608=51 Ind. Cas. 972=29 C.L.J. 411.

——S. 11, Expln. (4)—Suit for levy of water tax—Omission to plead jus tertii—Res judicata.

The allegation that the water-course belonged to the Government and not to the plaintiff was a matter which might and ought to have been made a ground of defence in a former suit by the plaintiff for recovery of water-tax from the defendant and the judgment in that suit operated as **res judicata**, as it held that the water-course was the plaintiff's property and that the defendants had no right to take water from it. The decree in the prior suit though **ex parte** was a bar. 27 Ind. Cas. 999=8 S. L.R. 218.

——S. 11 —Suit on agreement for arrears of maintenance—Second suit—Plaintiff not entitled to rely on events prior to former suit.

Plaintiff agreed to give maintenance to defendant in consideration of her executing a will bequeathing all her moveable property to him after her death. Defendant sued in 1907 for two years' payment due to her under the agreement and obtained a decree. Then the plaintiff sued for a declaration that there was a failure of consideration and the agreement could not be enforced against him. **Held**, that plaintiff could not rely on events prior to the suit of 1907 to avoid the agreement as he was bound to put forward in that suit all pleas which would entitle him to get the Court to hold that the agreement was not enforceable against him. 15 Ind. Cas. 186=(1912) M.W.N. 182.

——S. 11, Expln. (4)—Defences—Mortgage from an ostensible owner—Plea of estoppel not raised by a mortgagee—Suit by mortgagee.

R mortgaged the property in dispute to **N. P.** brought a suit against **R** and **N** for possession in which **P's** title was denied. **P**, however, got a decree for possession. **N** then on the strength of his mortgage brought this suit for sale of the property and pleaded that **P** was estopped from denying his title as mortgagee. **Held**, that **N** could set up this plea in the former suit and the decision in that suit therefore operated as **res judicata.** 10 Ind. Cas. 961=8 A.L.J. 358.

——S. 11, Expln. (4)—Omission to plead title in defence..

S the mortgagee brought a suit for sale against **M** the mortgagor and her son **B** alleging that **M** had gifted the property to **B**. It was found that **M** was the absolute owner of the property and a decree for sale was passed, and the property was sold. **B** brought a suit for possession after **M's** death alleging that she had only a life interest and so the auction-purchaser bought only a life interest. **Held**, that **B's** suit was barred by the rule of **res judicata** as he ought to have raised that plea in the first suit. **A** plaintiff and a defendant are both

bound to take every possible plea in support of his action or defence as the case may be. 10 Ind. Cas. 29.

——S. 11—Defences—Plea of easement.

Where in a suit for declaration of title to certain land and for demolition of an osara built thereon by defendant, the defendant only pleaded that the osara was built with the plaintiff's consent and does not raise a plea of right of way by easement thereto, he is debarred from instituting a fresh suit therefor. 9 Ind. Case. 813.

——S. 11, Expl. (4) (S. 13, Expl. 2, Old Code)—Decision on point of law not cited in first suit—If can be relied on in subsequent suit.

A ruling of the High Court that in a given case no appeal will lie has no retrospective effect so as to invalidate orders previously passed upon the assumption that in a similar case an appeal did lie. Where reliance was placed upon two rulings of the High Court as establishing that a suit was barred by the principle of **res judicata**, but these rulings had not been relied on when the suit was before the Court of first appeal or on a previous occasion when it was before the High Court in appeal, it was **held** that the principle of S. 11, Expl. 4 (S. 13, old Code) applied, and the rulings could not be looked at. 1908 A.W.N. 58=5 A.L.J. 117.

——S. 11, (S. 13, Old Code)—Omission to raise defence in prior suit—Bar of subsequent suit on such ground.

An assignee of a money bond from a mortgagee sued the mortgagor in respect of the money debt and obtained a decree and bought the properties himself. The mortgagor subsequently sued the assignee for redemption on the ground that the assignment was a sham and was effected for the purpose of defeating the provisions of S. 99, T.P. Act **Held**, that the suit was barred by S. 11 (S. 13, Old Code). (1907) 9 Bom.L.R. 466.

——S. 11, Expl. (4) (S. 13, Expl. 2, Old Code)—U. P. Tenancy Act, S. 199—Suit for ejectment in Revenue Court—Omission on part of defendant to plead title in himself—Subsequent suit by defendant in Civil Court on title—Res judicata.

In a suit for ejectment under Act No. II of 1901 the defendants did not plead their own title to the plot in suit, and in fact did not oppose the suit for ejectment. **Held**, that a subsequent suit brought in a Civil Court by the then defendants for proprietary possession of the same plot was barred by the principle of **res judicata**. (1907) A.W.N. 189 =4 A.L.J. 545=29 A. 601.

——S. 11, Expl. (4) (S. 13, Expl. 2, Old Code)—Omission to raise ground of claim—Subsequent suit on basis of same claim—Bar of.

In a prior suit between the parties, it was decided that the deed pbtained by the plaintiff from the karnavan of the defendant's Tarwad was not binding upon the Tarwad. **Held**, that a subsequent suit by the plaintiff (the defendant in the prior suit) for damages from the Tarwad in respect of the advances made by the plaintiff in pursuance of the deed was barred.—(1906) 29 M. 353.

——S. 11, (S. 13, Old Code)—Mortgage—Sale of mortgaged property—Suit by purchaser for redemption—Mortgagee entitled to pre-empt as co-sharer—Failure to set up right—Redemption suit—Subsequent suit for pre-emption—No res judicata.

The owner of a certain share in a village mortgaged three quarters of that share to **R. C.** and afterwards sold the entire share to **D.P. D.P.**, the purchaser, sued the mortgagee, **R.C.**, for redemption and obtained a decree. Subsequently **R.C.** who was a co-sharer in the village, brought a suit pre-emption of the share against **D.P.** and the original mortgagor.—**Held**, that the fact that **R.C.** had not advanced his claim to pre-empt as a defence to **D.P.'s** suit for redemption did not have the effect of making **R. C.'s** claim in his suit for pre-emption **res judicata**. 1 A. 75, 1 A. 316, 3 A. 189, and 20 A. 1 517 overruled. 1903 A.W.N. 196= 26 A. 61 (F.B.).

(ii) Failure to plead—When not res judicata.

——S. 11—Mortgagor and mortgagee—D selling property to M but retaining possession as tenant—M selling it to P but D still continuing in possession as P's tenant—Suit by P for declaretion of title and possession against D—Decree for possession but D allowed to continue as tenant—Second suit by P for declaration that he is owner of land and for possession—D contending that original transfer by him to M was mortgage—Decree in first suit, held did not bar D's contention in second suit regarding nature of transaction.

The defendant sold his property to one M; the defendant, however, remained in possession as M's tenant. M sold the property to plaintiff and the defendant continued in possession thereafter as the plaintiff's tenant. The plaintiff filed suit against the defendant asking for a declaration that he was the owner of the property, for its possession and for arrears of rent and mesne profits. A decree was passed in that suit awarding possession of the property to plaintiff together with past and future mesne profits. Even after the decree, the defendant was allowed to continue on the land as the plaintiff's tenant. The plaintiff filed a second suit for a declaration that he was the owner of the said property and to recover its possession from the defendant together with mesne profits. The defendant contended that the original transaction of the sale of the property in favour of M was really a mortgage and got the suit converted into one for the redemption of that mortgage under the Dekkhan Agriculturists' Relief Act. The trial Court held that the transaction between the defendant and M was in the nature of a mortgage and that the mortgage had been fully satisfied. The plaintiff's claim was, therefore, dismissed and the decree of the trial Court was upheld in appeal. In second appeal, the plaintiff urged that the defendant's contention that the transaction was in the nature of a mortgage was barred as **res judicata** as that contention was not put forward in the first suit brought by the plaintiff.

Held, that although the defendant might have urged in the first suit that the transaction was a mortgage and might have asked for the redemption of that mortgage, he was not bound to do so. Hence, it could not be held that the question regarding the nature of the transaction was constructively in issue in the first suit. Even in the second suit plaintiff's claim for possession would not have beed defeated if the suit had not been converted into a suit for redemption, and the mortgage had not been found to have been fully satisfied; therefore, the decree in the first suit did not bar the contention of the defendant in the second suit regarding

the nature of the transaction. A.I.R. (Vol. 26) 1939 Bom. 303=41 Bom.L.R. 422=184 Ind. Cas. 506.

——S. 11—Mortgage suit—Lessee impleaded as purchaser of equity of redemption—Omission to set up tenancy right—No res judicata.

Where, in a mortgage suit, a lessee is made a party as a purchaser of the equity of redemption and there is nothing in the plaint which impugned his title as a lessee, it is not incumbent upon him to set up his tenancy right in the mortgage suit and as such he is not precluded from raising this question in a subsequent suit. A.I.R. (Vol. 26) 1939 Cal. 692 =70 C.L.J. 415=43 C.W.N. 1126=I.L.R. (1939) 2 Cal. 551=188 Ind. Cas. 17.

——S. 11—Suit by A against B—Agreement that A should pay some money to B and question of return of ornaments should be decided afterwards — B's suit for money—A not raising defence as to return of ornaments—Subsequent suit by A for ornaments—Not barred.

In a suit for recovery of certain money by **A** against **B**, the parties came to an agreement whereby **A** agreed to pay **B** a sum of money and the question of return of some ornaments by **B** to **A** was left to be decided thereafter. In **B**'s suit for the money, he got a decree on **A**'s pleading judgment. When **A** brought a suit against **B** for recovery of ornaments it was contended that **A** should have raised the defence of return of the ornaments in **B**'s suit and **A**'s suit was incompetent for his failure to raise the defence.

Held, that **A** was not deprived of his right to bring the suit and was justified in his plea that when **B** brought a suit for money against **A**, he had no defence and was bound to pay. A.I.R. (Vol. 24) 1937 Sind 155=173 Ind. Cas. 116.

——S. 11—Defence that might have been raised but not such as ought to have been raised.

A suit which was filed against to defendants was decreed as against defendant No. 2 and the plaintiff was ordered to pay the costs of defendant No. 1. The plaintiff went in appeal against costs and impleaded defendant No. 2 but he made no contest and was asked to pay costs of defendant No. 1. Subsequently, defendant No. 2 filed an appeal against the main decree passed against him. The plaintiff contended that the points in dispute in appeal ought to have been raised in the appeal as to costs by the plaintiff and hence this appeal by defendant No. 2 was barred by **res judicata.**

Held, that the points in dispute might have been raised by defendant No. 2 in his defence in previous appeal but they were not such as ought to have been raised therein and consequently the appeal was not barred by constructive **res judicata.** A.I.R. (Vol. 22) 1935 Lah. 825=160 Ind. Cas. 791.

——S. 11—Pre-emption suit—Minor sons of vendor impleaded—Guardian admitting legal necessity—Subsequent suit by minor to set aside sale by father as not being valid—Not barred.

In a pre-emption suit, the minor sons of the vendor were impleaded and were represented by their step-brother as their guardian **ad litem.** The sons admitted that the sale was for nefessity. The pre-emptor paid the amount and got possess on. Subsequently, the minors sued to set aside the sale by heir father as not being valid and not for necessity. It was contended that the plea ought to have been taken in the pre-emption suit and as such the doctrine of constructive **res judicata** applied.

Held, that the sons could not raise the plea of the validity of the sale in a pre-emption suit because not being plaintiffs in the case they could not have obtained a decree and ousted the vendee from possession of the land by any such plea. Therefore, it was doubtful whether they could have raised any such plea at all. But in any event it could not be held that they ought to have raised this defence. This defence would have been in a different capacity and would merely have confused the issues in the pre-emption suit without causing any binding decision to be reached on this plea, if raised at all and therefore the rule of constructive **res judicata** did not apply. Nor did any question of estoppel arise because the pre-emptor came to pre-empt on payment of less price than had actually been paid and the vendor's sons pleaded that full price had been paid and that the sale was for legal necessity. A.I.R. (Vol. 22) 1935 Lah. 489=159 Ind. Cas. 693.

——S. 11, Expl. 4—Pre-emption suit—Constructive res judicata.

A sued **B**, one of two vendees **B** and **C**, for pre-emption and got possession of the whole property sold. **C** then sued for recovery of his half share making **B** also a defendant and got possession. **A** then sued **B** for recovering half the price paid by him.

Held, that the suit by **A** for refund of half the price was not barred by constructive **res judicata.** simply because of his failure to claim the refund in the suit by **C** for recovery of his half share in which **B** also was a defendant. 117 Ind. Cas. 229= A.I.R. 1929 Lah. 294.

——S. 11——Question which might have been raised but which were not bound to be raised are not res judicata.

Where the original decree-holder had ceased to prosecute his application and the assignees did not present a fresh execution application under O. 21, R. 16, Civil P.C., it cannot be said that the judgment-debtor ought to have raised objection to the execution proceedings and the rule of constructive **res judicata** therefore did not apply. A.I.R. (Vol. 22) 1935 Lah. 966.

——S. 11,—Expl. 4—Alienation by widow—Suit by vendee for possession impleading reversioners as defendants—Question of legal necessity not raised—Subsequent suit for declaration by reversioners questioning legal necessity for sale—Not barred.

The vendee brought a suit against a limited owner for possession, the reverioners being impleaded as defendants. The reversioners did not attack the sale as being one not for legal necessity and a decree was passed. Subsequently when the reversioners sued the vendee for a declaration of their title and possession, on the ground that the sale was not for legal necessity, it was contended that the suit was barred by **res Judicata.**

Held, that it was not necessary to introduce the question of legal necessity in the previous suit, even though the reversioners could have raised the question and the subsequent suit was not barred by **res judicata.** A.I.R. (Vol. 20) 1933 Cal. 900=37 C.W.N. 1001=48 C.L.J. 181=60 Cal. 1158=149 Ind. Cas. 522.

——S. 11, Expl. (4)—Suit for rent—Partial dispossession—Decree for entire rent—Plea raised in subsequent suit—Not barred.

In a suit for rent the defendant did not plead that he was not in possession of the entire lands of the tenancy and allowed a decree to be passed against him for the entire rent. In a subsequent suit for rent he set up this plea and it was contended that the defendant was precluded by reason of the doctrine of constructive **res judicata** from setting up the plea:

Held, that though the defendant might have taken such a plea in the prior suit it cannot be said that he ought to have taken the plea and the matter was not therefore **res judicata.** A.I.R. (Vol. 20) 1933 Cal. 793=57 C.L.J. 306=146 Ind. Cas. 878.

——S. 11, Expl. (4) (S. 13, Expl. 2, Old Code)—Previous suit for rent including mamuli decreed—Question as to legality of mamuli raised in second suit—Res judicata.

S. 11, Expl 4 (S. 13, Expl 2, old Code), only says that questions which might and ought to have been raised must be deemed to have been substantially in issue in the previous suit. But to operate as **res judicata** the question ought to have been heard and finally decided also. The Explanation does not produce that effect if there had been no adjudication expressed or implied. Where a person sued for rent and mamuli due under a kabuliyat, and the question was raised that the mamuli was an illegal cess under S. 74, Bengal Tenancy Act, the decision in a previous suit that the landlord was entitled to a consolidated sum made up of rent and mamuli, as rent when no question was raised as to the legality of the mamuli does not operate as **res judicata.** 24 C. 711, foll. (1900) 28 C. 17.

——S. 11—A Hindu testator left one half of his property by will to his widow **K**, and his minor son with a provision that if the son died before **K**, the latter would succeed to the entire half share. The son died leaving a widow **B**. **K**. sued **B**. for possession and obtained decree. **B** subsequently sued **K** for maintenance and allowance for residence. During the pendency of an appeal **K** died and her daughter succeeded her:

Held, that **B**'s claim for maintenance and residence was not barred by the rule of constructive **res judicata** as such a plea would not have been a defence to **K's** suit. A.I.R. 1933 Pesh. 31=143 Ind. Cas. 657 (Pesh).

——S. 11—Prior suits for Redemption and on trespass—Right to specific performance available but not raised—Subsequent suit not barred.

The failure of a party to plead in defence of a suit against him for redemption and another for damages for trespass that he was entitled to specific performance against the plaintiff in respect of these properties does not bar a suit for specific performance at his instance for, though he might have taken such plea, it was not obligatory upon him to do so; 127 Ind. Cas. 126=A.I.R. 1930 Mad. 539.

——S. 11—Validity of will disputed in prior suit—Subsequent suit against a specific provision of the will not barred.

A suit was brought by **S** against **P** to recover certain funeral expenses of the testator on the basis of his will which made provision for his funeral expenses. In this suit the validity of the will was disputed. The will also contained a provision for "election" under certain conditions which was now in dispute in another suit brought by **P** against **S**.

Held, that in the previous suit the validity of the whole will was in dispute but the specific plea against the provision for election in the will was not necessary in that suit and hence that suit did not operate as constructive **res judicata** against the present suit. 113 Ind..Cas. 298=10 Lah. 389=30 P.L.R. 562=A.I.R. 1928 Lah. 967.

——S. 11, Expl. 4—Compromise decree—Setting aside of—Subsequent suit by the decree-holder—Not barred.

A sonless Gakkar of Jhelum tahsil made a will bequeathing his land in favour of his daughter. She was succeeded by her son. The testator's brother instituted a suit against his minor grandson for possession of the land on the ground that the will was not executed when the testator was of a disposing mind and that he had no power to make e will under custom. The guardian **ad litem** of the minor compromised the suit and gave up the land in favour of the brother. The brother accordingly obtained a compromise decree for possession of the land in question. Later, the minor's suit to set aside this compromise was decreed in his favour. Thereupon, the brother instituted a suit for the land left by the brother on the same allegation as in his first suit. It was argued that in the minor's suit the present plaintiff could have pleaded that the will was not duly made and that it was invalid by custom and in this way could have resisted the suit.

Held, that the suit by the brother for the land was not barred on the principle of **res judicata.** 29 P.L.R. 254=110 Ind. Cas. 550=A.I.R. 1928 Lah. 489.

——S. 11—Omission to plead—Bar created by Legislature—No res judicata.

Where the law forbids a certain thing being done in suit, no amount of failure by a defendant in previous suit to plead, the positive bar created by legislature will prevent its being taken up in a subsequent suit. 49 All. 918=25 A.L.J. 582=8 L.R.A. (Rev.) 225=103 Ind. Cas. 379=A.I.R. 1927 All. 505.

——S. 11—Suit on title against defendant decreed—Possession under decree and subsequent dispossession by defendant—Plaintiff suing again for possession—Defendant pleading thekadari rights of possession—Plea of defendant not barred.

Plaintiff obtained a decree for possession on the basis of title of the suit property against the defendants and took possession under the decree, but he was dispossessed by the defendantf. Plaintiff sued again for possession. The defence was that the plaintiff was npt entitled to actual possession by ejectment of the defendants for the reason that the defendants were entitled to continue in actual possession of the property in suit by virtue of the rights of a thekadar.

Held, that this plea in defence was not **res judicata** as the title on which the relief for possession in the prior suit was founded was proprietary title and to resist the same on the basis of thekadari rights would have been of no avail whatsoever, and an inquiry into and determinatlon of such a plea in the prior suit would have introduced the greates

confusion in the trial of the proper issue as to the proprietary title of the plaintiff, and as the Court trying the previous suit could not have entertained a plea based on tenancy for want of jurisdiction. 1 L.C. 277=103 Ind. Cas. 802=A.I.R. 1927 Oudh 341.

——S. 11—Expl. 4—Defence which could not be lawfully raised—Defence.

The failure by a defendant to raise a ground of defence which he cannot lawfully raise in a particular suit does not debar him from subsequently suing on that ground. 87 Ind. Cas. 1017=A.I.R. 1925 Oudh 719.

——S. 11—Suit by reversioner—Plea plaintiff not the next reversioner not taken—No bar in subsequent suit.

In a previous suit brought by the plaintiff as next reversioner against a Hindu widow and against transferees from her, the widow and those transferees had failed to adopt the plea that the plaintiff was not the next reversioner. Subsequently the sons of the plaintiff in the previous suit brought another suit against the widow and transferees of some other portions of the estate from her.

Held, that the defendants in the subsequent suit were not debarred from raising the plea that the plaintiffs in that suit were not the next reversioners. 89 Ind. Cas. 374=47 All. 929=23 A.L.J. 653=A.I.R. 1925 All. 585.

——S. 11, Expl. (4)—Irrelevant Pleas.

Piea not directly relevant for the decision of the question raised in the suit need not be raised and in such a case there is no bar of constructive **res judicata**. 1924 M.W.N. 666=21 M.L.W. 204=A.I.R. 1925 Mad. 226.

——S. 11—Order on summons for directions under Bombay High Court Rules (Original Side), 130, 131—Liability between third party and defendant directed to be tried—Question of jurisdiction—Not res judicata.

The only way in which a matter at issue between the parties can be held to be **res judicata** when it has not been actually decided by ths Court is under S. 11, Explanation 4, of the C. P. Code. On a summons for directions under Rr. 130 and 131 of the Bombay High Court Rules (Original Side), it is not necessary to decide whether the Court which is to try the suit has jurisdiction to try the suit as between the defendant and the third party. Hence the mere fact that on such summons for directions, the liability between the third party and the defendant is directed to be tried at the trial does not necessarily make the question of the trial Court's jurisdiction **res judicata**. 45 Bom. 24=59 Ind. Cas. 28=22 Bom.LR. 863=A.I.R. 1921 Bom. 195.

——S. 11, Expl. 4—Part payment to vendor's agent not pleaded—Subsequent suit to recover amount paid.

The plff. in a previous suit by deft. for the price of jewels sold to him did not plead part payment of the price made to deft. No. 2 agent of deft. No. 1. Plff. then sued the defendants Nos. 1 and 2 for recovery of the amount paid by him previous to the decree. The suit against principal was barred. **Held**, the High Court could pass a decree against the agent although the plaintiff did not ask for a revision of the order of the lower Court dismissing the suit against the agent. 33 Ind. Cas. 623.

——S. 11, Expl. 4—Suit by transferee from widow for redemption—Mortgagee's plea of reversionary right overruled for not raising it in first Court—Subsequent suit after widow's death by mortgagee claiming reversionary title—Not barred.

Where a plea of reversionary right by a mortgagee in a redemption suit by thh transferee from a widow was overruled on tne ground that it was not raised in the first Court, a subsequent suit by the mortgagee after the widow's death claiming reversionary title is not barred by **res judicata** as the previous suit did not finally decide that the latter was not the reversionary heir. Expl. 4 of S. 11, C.P.C., does not apply as the mortgagee could not have resisted the suit for redemption during the widow's lifetime. 87 P.R. 1913: 82 P. L.R. 1913: 18 Ind. Cas. 787: 91 P.W.R. 1913.

——S. 11—Suit for declaration—Defendant impleaded as purchaser—Onisstion to plead under-tenancy.

A defendant who had been impleaded in a suit for declaration and possession on the ground that he had purchased a portion thereof is not bound to put forward therein a plea of under-tenancy with respect to the holding. 9 Ind. Cas. 585.

——S. 11, Expl. (4) (S. 13, Expl. 2, old Code)—Omission to set up claim under different cause of action—If operates as res judicata.

A purchased a village in execution of a decree obtained by him against **C** in the Small Cause Court. Subsequently **A**, through **B**, instituted a mortgage suit against **C** and before execution of the decree obtained therein purchased some lands in the same village **S. C.** instituted two suits, one to set aside the sale in execution of the Small Cause Court decree and the other to set aside the decree and sale in the mortgage suit. The latter suit was dismissed for default, but the former succeeded. In this suit, **A** did not set up as a ground of his defence the title obtained by him at the mortgage sale. **Held**, that **B** was not bound to do so and a suit by **A** to recover the land in village **S** purchased at the mortgage sale is not **res judicata** under S 11, Expl 4 (S. 13, Expl. 2 old Code). Per **Brett. J.**—S.11, Expl. 4 (S. 13, Expl. 2, old Code) refers to the title litigated in the former suit as distinguished from the relief claimed. When several independent grounds of action are available, a party is not bound to write them all in one suit though he is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action. This rule equally applies to the converse case of a defendant pleading in his defence. 1906 12 C.W.N. 292=7 C.L.J. 504.

——S. 11, Expl. (4): (S. 13, Expl. 2, old Code)—Might and ought'—Plea not available in prior litigtion—Point raised in prior suit dismissed as barred by limitation only—Same defences in subsequent suit—Bar of.

In settlement of an account defendant signed a razi acknowledging Rs. 11,000 to be due by him to plaintiff. Subsequently he paid Rs. 400 in cash and a hundi for Rs. 600 and for the balance he gave an instalment bond, each instalment being for Rs. 1,000. The hundi was dishonoured ann the defendant was sued thereon. The defendant pleaded want of consideration and impeached the correctness of the accounts. A Commissioner was

appointed and he reported that only Rs. 3,000 and not Rs. 11,000 was due on accounts by defendant. The Court, without going into other questions raised by the defence, decreed the claim. Another suit was afterwards brought by the plaintiff for money due on the first two instalments Rs. 2,000 under the bond, and that suit was decreed by consent. The defendant subsequent to that instituted a suit for cancellation of the bond on the ground that it was obtained by misrepresentation and fraud and that it was passed in respect of a wagering transaction, and it was dismissed merely on the ground of limitation. Now the plaintiff sued for some of the subsequent instalments under the bond. The defendant pleaded that the bond and prior razi were obtained from him by fraud and misrepresentation, and that the debt due was one arising from wagering contract unenforceable in law. **Held**, that the defences now set up not being defences which might and ought to have been made to the claim made in the prior suits instituted by plaintiff, the defendant was not barred by **res judicata.** Also that the fact that the defendant was, owing to the bar of limitation, only denied the specific relief of cancellation claimed in a prior suit, could not prevent bim from raising defences on the merits as a defendant in a subsequent suit. (1906) 8 Bom. L.R. 296=30 Bom. 395.

——S. 11—Expl. (4) (S. 13, Expl. (2), old Code) —Omission to raise defence—When not res judicata.

A obtained a decree for money against **B** and attached several villages. While under attachment the share in one of the villages was sold by **B** to **C**, who applied for partition of that share. **A**, who was also a co-sharer, resisted partition, alleging that he was in adverse possession for over 12 years. That suit was dismissed. He then attached the share as the property of his judgment-debtor.

Held, that the decree in the former suit did not bar the decree-holder from claiming the share in dispute as the property of his judgment-debtor. A sale of property which is under attachment is not void, but voidable at the option of the attaching creditor alone if he wishes to proceed against the property. In a suit, therefore, not brought by the creditor as such against the purchaser, the plea that the sale is voidable is not one which the plaintiff might and ought to raise. (1904) 2 A.L.J. 265.

——S. 11, Expl. (4) (S. 13, Expl. (2), old Code) —Suit to setting up alternative case—Omission to plead—Effect.

Where a widow and the adopted son sued as co-plaintiffs and made their claim in the alternative, the defendants in such a suit were not bound to dispute the adoption, and a decision in favour of the adopted son was not such an adjudication as to raise an estoppel under S. 11, Expl. 4 (S. 13, Expl. 2, Old Code). (1901) 13 M.L.J. 359.

——S. 11—Expl. (4) (S. 13, Expl. 2, old Code) —Judgment setting aside auction sale to mortgagee as fraudulent—Suit by mortgagee on hypothecation—Maintainability.

The assignee of a hypothecation deed purchased the equity of redemption in a Court sale. A suit was brought by the mortgagor to have the Court sale set aside as fraudulent. The sale was set aside and the mortgagee brought this suit on the hypothecation. S. 11, Expl. 4(S. 13, Expl. 2, Old Code) (1900) 14 M.L.J. 485.

16 (c). Knowledge of facts.

——S. 11, Expl. (4)—Facts on which plea might have been raised not within knowledge of party at time of former suit—Plea, if barred.

Where a plea was not actually raised and the facts on which it might have been raised were not within the knowledge of the party at the time of the former suit, the plea is not barred in a subsequent suit by **res judicata**, either actual or constructive. I.L.R. (1947) Nag. 985=A.I.R. 1941 Nag. 150=1948 N.L.J. 65.

——S. 11—Expl. (4)—Question of knowledge of facts is material.

The principle of constructive **res judicata** embodied in appeal in Expl. 4 to S. 11 cannot come into operation unless it is shown that the party sought to be estopped had knowledge of facts which could have enabled him to raise an issue and, therefore, the question of knowledge of the parties becomes material. A.I.R. (Vol. 32) 1945 Nag. 288=1945 N. L.J. 383=I.L.R. (1945) Nag. 1005.

——S. 11, Expl. (4)—Plea not raised for want of knowledge but by exercise of due diligence fact would have been discovered—Plea barred.

A plea which the plaintiff ought to have taken in the previous suit is barred in the subsequent suit. The fact he had no knowledge of the fact which he ought to have pleaded is of no avail ifwith due diligenee he could have discovered it in the previous suit. A.I.R. (Vol. 28) 1941 Nag. 346=1941 N.L.J. 501=199 Ind. Cas. 537.

——S. 11, Expl. (4)—Where there is no declaration by tne Court in the order sheet that summons has been duly severed proper service cannot be presued and the omission is fatal to the plea of constructive **res judicata.** (1934) M.W.N. 677.

——S. 11, Expl. (4)—Pre-emption suit against one only of the alienees—Mistake of fact—Decree—Resistance of alienees not impleaded —Subsequent suit for possession or refund.

The pre-emptor impleaded in his suit one of the four brothers—Alienees of the property purchased due to a mistake of fact. His suit was decreed, and the entire consideration having been realised by the alienee who was impleaded, he was given formal possession But the pre-emptor'sapplication for mutation was resisted by the three brothers of the alienee, who where not impleaded and their objection was allowed except for ¼ share of the alienee who was impleaded. The present suit was brought for the possession of the property released in favour of the three brothers or in the alternative for a proportionate refund of the pre-emption money. It was found that four brothers were separate.

Held, S. 11, has obviously no application and the suit was not barred. AI.R. 1922 All. 475.

——S. 11—Expl. 4 and O. 2, R. 2—Knowledge of title—Essential.

A subsequent suit based on a claim of title, which the plaintiff, owing to want of knowledge of it, could not put forth as a ground of attack in a prior suit, is not barred under Expl. 4 of S. 11, C. P. C. and under O. 2, R. 2. 37 Ind. Cas. 119: 94 P. R. 1916.

——S. 11. Expl. 4—Knowledge of facts.

For Explanation 4 of S. 11 to apply the claims must have been within the knowledge of the person making it, during the previous proceedings. 10 Ind. Cas. 991 : (1910) 1 U.B.R. 66.

——S. 11, Expl. 4 (S. 13, Expln. 2, old Code.) —Claim not known to party at time of first suit —Omission to include—If res judicata.

The plaintiff first brought a suit as heir of her father claiming that an account should be taken of the partnership between her father and the defendants. The suit was dismissed as barred by limitation under Art. 106 of the Limitation Act. She then brought aaother suit against the same defendants claiming as heir of her father and mother, and alleging that on her father's death the mother was admitted into the partnership; and she prayed for an account of both the partnerships. **Held** (1) that so far as the partnership with the father was concerned, the claim was barred as **res judicata** by the decision in the previous suit; (2) that the claim relating to the partnership between her mother and the defendants cannot be rejected as **res judicata** unless it was shown that during the previous suit she was aware of the claim. 2 Bom. L.R. 872, followed. The word "might" in Explanation 2 to S. 13 of the Civil Procedure Code, 1882, presupposes that the person defending or attacking in the former suit had knowledge of the matter at the time of that suit and could have made it a ground of defence or attack therein. (1907) 9 Bom. L. R. 1020.

16 (f). Mesne Profits.

——Suit for possession and mesne profits decreed—Joint decree for mesne profits against all defendants including A and B—Appeal by A and B to High Court—Point that A and B were liable only for fraction of amount decreed not raised—Res Judicata in subsequent appeal against joint decree for mesne profits from date of suit till recovery of possession by plaintiff.

A suit for possession and mesne profits having been decreed, the trial Court passed a decree for Rs. 576 on May 20, 1925, jointly against the defendants including **A** and **B** for mesne profits up to the date of the suit. On appeal by **A** and **B**, that decree was confirmed by the High Court. The trial Court subsequently assessed the mesne profits from the date of the suit till the date of the recovery of possession by the plaintiff and passed a joint decree for the same against all the defendants. In the appeal to the High Court by **A** and **B** against the decree:

Held, that when the defendants **A** and **B** appealed against the judgment and decree dated May 20, 1925, which had decreed that sum against all, the defendants could and should have raised the point that they were liable only for a fraction of that sum of Rs. 576 and having failed to do so, they were precluded from raising that point subsequently in the appeal against the decree for mesne profits from date of suit till recovery of possession by the plaintiff. A.I.R. (Vol. 30) 1943 Cal. 1=46 C.W.N. 982=75 C.L.J. 447=I.L.R. (1942) 2 Cal. 268=206 Ind. Cas. 508.

——S. 11, Expl. (4) (S. 13, Expl. 2, old Code) —Mortgage suit—Redemption—Circumstances arising after suit but before judgment—Omission to claim mesne profits in prior suit—Suit for same—Bar of.

In a redemption suit the doctrine of **res judicata** applies to all matters which existed at the time of giving judgment and which the party had an opportunity of bringing before the Court. In virtue of a redemption decree the mortgagor paid the amount of the decree, and took possession of the property in 1893. This decree was amended in appeal, by substituting a large amount of redemption money, but no provision was made for the mesne profits from the date when the possession was transferred to the date of the payment of the additional amount. To recover these mesne profits the mortgagee brought a firesh suit:—**Held** that the claim was **res judicata** as the question was one which arose directly out of the mortgage transaction which was the subject-matter of the litigation in the former suit, and was one that could and ought to have been advanced in it. (1901) 4 Bom. L.R. 492=26 B. 661.

——S. 11, Expl. 5, O. 2, R. 2—Partition suit—Failure to ask for mesne profits from date of suit until delivery of possession—Another suit for recovery of mesne profits—Not barred.

Order 2, R. 2 must be read with Expl. 5 to S. 11 Civil P.C., and the relief claimed under Expl. 5 to S. 11 is a relief arising from the same cause of action; and the fact that under O. 2, R. 4, mesne profits may be claimed in the suit for recovery of immovable property emphasizes the fact that the suit for recovery of immovable property and the suit for mesne profits may arise from two separate causes of action. But the fact that a plaintiff may under O. 2, R. 4, join in one suit to causes of action, does not mean that he must necessarily do so or fall under the bar imposed by O. 2, R. 2 and S. 11, Expl. 5. Plaintiff may, of course, anticipate in the suit for partition that certain property will fall to his share; he may anticipate that after the final decree, he will not be given delivery of possession and he may in his suit for partition ask for mesne profits from the date of suit until delivery of possession. But if he does not do so another suit for recovery of mesne profits is not barred. A.I.R. (Vol. 26) 1939 Sind 367=I.L.R. (1940) Kar. 36=185 Ind. Cas. 702.

——S. 11 and O. 34, R. 7—Mortgage suit—Mesne profits—Between date fixed in R. 7 of O. 34 and actual delivery of possession.

A mortgagor suing for redemption must bring into account all moneys due to either party in connexion with the mortgage up to the day fixed under R. 7. But he is neither obliged, nor is he entitled to have any items of later date, e.g., mesne profits of the period between this date and the actual delivery of possession brought into account, for which therefore a separate suit is maintainable. Mesne profits accruing after the date of payment made according to a decree passed under O. 34, R. 7 can be the subject of a separate suit. 2 O.W.N. 826 =91 Ind. Cas. 258=A.I.R. 1926 Oudh 113.

——S. 11—Redemption suit—Claim for mesne profits withdrawn—Subsequent suit not barred.

Mesne profits from the date to the decree when the money is paid into Court by the mortgagor can-

not be had in the redemption suit itself. Where in the redemption suit, a claim for mesne profits is withdrawn a subsequent suit for mesne profit from the date of payment after the decree up to the date of delivery of possession is not barred by O. 23, R. 1 or O. 6, R. 1 or S. 11 of the C. P. C. 14 C.W.N. 1001, Foll. 85 Ind. Cas. 547=A.I.R. 1926 Cal. 178.

——S. 11—Suit for possession—Future profits not claimed—Subsequent suit if barred.

Where, in a suit for possession, future mesne profits have not been claimed, a subsequent suit for the same is not barred as both in Section 11 as well as Order 2, Rule 2, the issues and claims referred to are those arising out of the cause of action and not those arising out of some possible future cause of action. 6 P.L.T. 78=80 Ind. Cas. 710=A.I.R. 1925 Pat. 145.

——S. 11—Mesne profits—Omission to sue for in a suit for possession—Effect.

Omission to sue for mesne profits prior to the date of the suit where plaintiffs sue for possession of immoveable property does not bar the second suit against the same defendants for those mesne profits. 26 Bom.L.R. 288=88 Ind. Cas. 259=A.I.R. 1924 Bom. 368.

——S. 11, Expl. (4)—Suit under S. 9 of the Sp. Rel. Act—Subsequent suit for mesne profits—Not barred.

Plaintiffs having been forcibly dispossessed by defendants filed a suit under S. 9 of the Sp. Ref. Act for possession with crops or their value and the decree in that suit awarded them only the possession of lands. The plaintiffs subsequent to their getting possession of the lands filed a suit for mesne profits for 8 years including the one in which the suit was instituted alleging that as they got possession after the cultivation season they could not get any profits for that year.

Held, that the second suit was not barred by the provisions of S. 11 or O. 2, R. 2 of the C. P. Code, 30 M.L.J. 326; 2 L.W. 157; 28 Ind. Cas. 1: (1915) M.W.N. 170.

16. (g) Miscellaneous Proceedings.

——S. 11—Award—Failure to object under Sch. 2, R. 15—Effect.

Where no objection is take to an award under Sch, 2, and a decree is passed in accordance with its terms, the decree is binding on the parties there to and cannot be subsequently treated as nullity because the arbitrators had wrongly decided a mixed question of fact and law which had arisen before them. 117 Ind. Cas. 361=1929 A.L.J. 540 =A.I.R. 1929 All. 521.

——S. 11—Land acquisition proceedings—Person not party to—Doctrine of constructive res judicata inapplicable.

On first principles, the doctrine of constructive res judicata cannot apply to any person who is not a party to land acquisition proceedings, just as it would not apply to a person who is not a party to a civil suit. The Land Acquisition Act cannot go further than the Civil P.C. A.I.R. (Vol. 23) 1936 Pesh. 29=160 Ind. Cas. 1010.

——S. 11—Land acquisition—Omission to put forward claim—Bar to subsequent suit.

Where a Patnidar though a party to a reference omits to make a claim at the time of the apportionment of the compensation, a subsequent suit to recover a portion of the compensation in a Civil Court is barred. 32 Ind. Cas. 922.

—S. 11—Pre-emption application under S. 26-F., B.T. Act—Question outside its scope not pleaded—No res judicata.

Where an application for pre-emption under S, 26-F, Bengal Tenancy Act, by the landlord is allowed and the purchaser files a suit that the holding is not an occupancy one, it cannot be said that the plaintiff might or ought to have raised that question in the proceeding under Section 26-F, since such a question is outside the scope of such proceedings and the order in the proceedings under section 26-F would not operate as res judicata in the subsequent suit. A.I,R. (Vol. 29) 1942 Cal. 586=46 C. W.N. 1022=I.L.R. (1943) 1 Cal. 128=203 Ind. Cas. 630.

——S. 11—Ex parte decree—Rent suit—Omission to raise defence—B.T. Act, Ss. 29 and 147—Effect of.

Ex parte decree in prior suits in which no issue was raised as to the rate at which the rent was payable by defendant and there was no decision with regard to such rate do not operate as res judicata in favour of the plaintiff's landlords. Even though the defendant did not take in the previous rent suits the defence under S. 29 of the B. T. Act he can raise it in a subsequent suit for rent as there cannot be an estoppel against a statute. 65 Ind. Cas. 581.

——S. 11—B. T. Act, S. 52.

Suit by all landlords for additional rent for additional area under section 52, Bengal Tenancy Act—Landlords in whose favour kabuliyat was executed also impleaded—Claim under Tenancy Act dismissed—Claim under kabuliyat held not maintainable as it was executed in favour of some only—Subsequent suit by landlords in whose favour kabuliyat was executed—Other landlord made defendant—Suit not barred by constructive res judicata. 164 Ind. Cas. 457=39 C.W.N. 538.

——S. 11—B.T. Act, Ss. 30-B and 104—Subject-matter not the same—Not applicable.

By a decision under S. 104, Bengal Tenancy Act, enhancement of rent was made on the ground of rise in the value of crops before 1898. In the suit under S. 30-B of the Act, enhancement was sought on the ground of rise in value of crops after 1898. The defence opposed enhancement on the ground that their jama was not a holding. This plea was not heard and finally decided in the previous suit.

Held, that even if the question might and ought to have been made a defence in the former proceeding, the matter is not res judicata as the subject-matter of the S. 104 proceeding is not the same as that of the present suit, and the defendants are not barred from raising their defence to the claim for enhancement on the ground of constructive res judicata. 24 Cal. 711, Appr. 116 Ind. Cas. 637= A.I.R. 1929 Cal. 201.

——S. 11, Expl. 4—Rent suit—Objection based on S. 168-A (1) (b) of Bengal Tenancy Act not raised by judgment-debtor in suit—Whether can be raised at execution stage.

Where after the sale at which the decree-holder purchased the tenure in execution of the earlier rent decree was confirmed, a suit for rent is brought for the period between the date of the earlier suit and confirmation of the sale an objection based on S. 168 (1) (b) of the Bengal Tenancy Act is avai-

lable to the judgment-debtor and ought to be taken by him as a defence to the subsequent rent suit. If he fails to do so, he is precluded by the rule of constructive res judicata from taking that objection at the execution stage. 83 C.L.J. 206.

——S. 11. Expl. 4—Applicability—Proceeding under S. 112-A of Bihar Tenancy Act—Defence not raised by landlord in that proceeding—Whether can be raised in subsequent suit.

As a proceeding started on the basis of an application by a tenant under S. 112-A of the Bihar Tenancy Act is a suit, any defence which the landlord could have raised in that proceeding cannot be raised by him in a subsequent suit brought by him as the principle of **res judicata** clearly applies to such a situation. 226 Ind. Cas. 363=12 B.R. 736=1946 P.W.N. 304=A.I.R. 1946 Pat. 354 (F.B.).

——S. 11, Expl. 4—Ejectment—Plea of protection under Buildings Act not raised—Decree—Execution—Plea of bar—**Res judicata. See** BIHAR BUILDINGS (LEASE, RENT AND EVICTION) CONTROL ACT, S. 11. A.I.R. 1950 Pat. 354.

——S. 11, Expl. 4—Decree amended under S. 30 of the U. P. Agriculturists Relief Act—No objection that the original transaction was not a loan—Subsequent plea that it was not a loan—Bar of res judicata.

Where a Court amends a decree under S. 30 of the U. P. Agriculturists Relief Act and reduces the interest without any objection from the debtor, it must be deemed to have decided, by necessary implication, that the transaction was a loan, as otherwise, it could not have reduced the interest. In such a case the principle of constructive **res judicata** would bar the debtor from raising the plea subsequently that the transaction was not a loan. A.I.R. 1950 All. 106.

——S. 11, Expl. 4—U. P. Agriculturists' Relief Act, S. 5 (1)—Relief under—Omission to ask for instalments at time of decree.

An omission of an "agriculturist" defendant to ask for instalments at the time of passing of decree does not bar him from claiming the relief provided for by S. 5 (1), U. P. Agriculturists' Relief Act on the principle of **res judicata**. A.I.R. (Vol. 29) 1942 All. 19=1941 A.W.R. 1175=1941 R.D. 1194=1942 A.L.J. 55=I.L.R. (1942) All. 45=198 Ind. Cas. 690 (F.B.).

——S. 11, Expl. 4—Suit and decree for ejectment under S. 171, U. P. Tenancy Act—Subsequent suit by defendant tenant under S. 183—Res judicata.

Where a tenant has been ejected under a decree under S. 171 of the U. P. Tenancy Act he cannot file a suit under S. 183 of the Tenancy Act on the ground that certain plots in the holding constituted a grove and that in respect of them the earlier decree under S. 171 was without jurisdiction. The earlier decision will operate as **res judicata** because, the question of certain plots being grove ought to have been raised in defence in the earlier suit and a decision obtained. 1949 R.D. 162.

——S. 11, Expl. 4—U. P. Land Revenue Act, S. 36—Claim for additional rent.

Whatever right the plaintiff has to additional rent should form the subject of the claim of the plaintiff before the Collector when the Collector fixes rent under S. 36, U. P. Land Revenue Act. The principle of S. 11, Expl. 4, C. P. Code, would apply to bar the claim put forward subsequently and this section applies under S. 264, Agra Tenancy Act. A.I.R. (Vol. 26) 1939 Cal. 528=I.L.R. (1939) 1 Cal. 334=43 C.W.N. 391=40 Cr.L.J. 808=183 Ind. Cas. 470.

——S. 11—No decree under S. 111, U. P. Land Revenue Act—Objection not raised before collector—No res judicata.

When no decree has been passed under sub-s. (5) of S. 111, U. P. Land Revenue Act, the rule of constructive **res judicata** cannot be made applicable on the ground that the objection is one which might and ought to have been raised before the Collector. A. I. R. (Vol. 19) 1932 Oudh 199=9 O. W. N. 488=L. R. 13 A (O) 246=7 Luck. 716=137 Ind. Cas. 606 (F.B.).

——S. 11, Expl. 4—U. P. Land Revenue Act (1901), S. 233 (k)—Partition proceedings—Subsequent claim for larger share—Res Judicata.

Partition proceedings—Independent lots given to different parties without consent—It must be assumed that none of the parties wanted to raise question of title—Party subsequently wanting larger shares is barred by principle of Expln. 4 of S. 11, Civil P. C. and not by S. 233 (k) of the U. P. Land Revenue Act. The bar applies because the Revenue Court could have decided the question of the title. A. I. R. (Vol. 18) 1931 All. 462=15 R. D. 322=1931 A. L. J. 307=53 All. 568=133 Ind. Cas. 468.

——S. 11—Omission to plead—Question of title—U. P. Land Revenue Act, Ss. 111 and 233.

The objection raising the question of title under S. 111 cannot be availed of after the tarz taqsim is prepared and so a snit instituted to set aside a sale which took place subsequent to the preparation of the tarz taqsim cannot be barred by **res judicata** because the question of title was not raised in the partition proceedings, nor can such a suit be barred under S. 233 (k) provided the suit does not disturb the partition or union of mahals. 10 L. R. A. (Rev.) 295=118 Ind. Cas. 45=A.I.R. 1929 All. 463.

——S. 11—U. P. Land Revenue Act, S. 111—Partition of Mahal—Failure to raise all grounds—Effect.

The law clearly imposes a duty upon each co-sharer to put foward any ground of claim or defence involving a question of proprietary title in the matter of the partition of the mahal. It follows, on general principles, that if a co-sharer omits to make any objection, which he is required by law to make, it must be deemed that he had made it and that under Cl. (c) of sub-S. (1) of S. 111 it must further be deemed that the Collector had proceeded to inquire into the merits of the objection and had decided them within the meaning of sub-S. (3) of the same section. 12 O. L. J. 571 =2 O. W. N. 872=91 Ind Cas. 583=A. I. R. 1926 Oudh 101.

——S. 11—Partition proceedings—Co-sharer—Failure to set up proprietary rights—Res judicata.

Where a co-sharer has been in possession of a plot of land under an irredeemable mortgage it is incumbent on him during the course of partition proceedings to set up his proprietary rights with regard to the plot and if he does not raise such a title then it is no more open to him to raise it in a

Civil Court after the partition proceedings have become complete and final. 20 O. C. 336, Foll. 1 Luck. 210=13 O. L. J. 260=96 Ind Cas. 75=A.I.R. 1926 Oudh 509.

——S. 11—Partition proceedings—Claim that ought to have been, but not, raised in—Effect.

A separate suit is not maintainable if the claim in respect of which the suit was filed is a matter which should have been dealt with in partition proceedings. 64 Ind. Cas. 995=46 Bom. 327=23 Bom. L. R. 1171=A. I. R. 1922 Bom. 119.

16 (h) Mortgage suit.

——S. 11, Expl. 4—Mortgage suit—Question of paramount title when res judicata.

In a mortgage suit the question of paramount title is not ordinarily considered to be a matter which might have or ought to have been made a ground of defence. But where the mortgagee denies the validity of the title set up by a person which title the mortgagee considers would affect his remedy on the basis of the mortgage and wants an adjudication of that title and impleads such person on the express ground that the title set up might be decided, the person impleaded must appear and plead if he wants that a decision should not go against him by default. A. I. R. 1950 All. 314.

——S. 11—Mortgage suit—Paramount title—Omission to plead.

As a general rule paramount title cannot be drawn into controversy in a mortgage action but the parties may without objection or on agreement come to trial upon that issue. Such a procedure leads to confusion and is irregular but does not affect the jurisdiction of the Court to pass a decree upon the issues which have thus been allowed to be raised in that suit. In each case the Court must examine the previous decision and find out whether in the previous suit the question of paramount title has been raised and has been decided. It must also be remembered that the question of priority of mortgages is a necessary issue in mortgage actions. For instance, where a subsequent encumbrancer claims priority on the doctrine of subrogation he must raise that issue: on the other hand, where a person impleaded sets up a title adverse to the mortgagor, that question is obviously beyond the scope of the mortgage action, and unless that question is distinctly raised in the issue and decided, the decision in the suit cannot operate as res judicata.

The plaintiff **A** in the subsequent suit was made a party to the previous mortgage suit. But his interest was adverse to that of both the mortgagor and the mortgagee. No relief was sought against him nor any issue raised on the question of his title nor was there any decision on that question. The plaintiff had not filed any written statement in the mortgage suit.

Held, that **A** should not have been made a party to the previous mortgage suit.

Held, also that the decision in the previous mortgage suit could not operate as res judicata. A.I.R. (Vol. 29) 1942 Pat. 226=20 Pat. 841=8 B.R. 616=199 Ind. Cas. 713.

——S. 11, Expl. IV—Defendant in mortgage suit whether bound to set up his paramount title.

The defendant is not bound to raise a paramount title which is not impugned and which he did not even get from the mortgagors nor is he bound under S. 11. Fxpl. IV. C. P. Code, to raise the question as it lies outside the scope and nature of the suit. A.I.R. (Vol 27) 1940 Sind 103=I.L.R. (1940) Kar. 302=190 Ind. Cas. 409.

——S. 11—Mortgage suit—Paramount title—Plea of res judicata in respect of.

The plea of res judicata in respect of a paramount title cannot be set up against a person who happens to be a party in a mortgage suit in a different capacity unless the paramount title has been expressly the subject of controversy and there has been an actual decision in respect of it. 7 O.W.N. 25=121 Ind. Cas. 277=A.I.R. 1930 Oudh 97.

——S. 11—Mortgage suit—Plea of paramount title.

Where in a mortgage suit brought for realization of the mortgage security, and the barring of the equity of redemption a party, who is impleaded as defendant by virtue of his interest in the equity of redemption and not in his other distinct capacity as possessing a paramount and independent title to the mortgaged property does not appear and the claim is decreed, he is not precluded by res judicata from setting up his independent and paramount title in a subsequent suit. 33 C.W.N. 659=A.I.R. 1929 Cal. 672.

——S. 11—Omission to set up paramount title—No res judicata.

There is no rule of law that a defendant being a subsequent incumbrancer or the purchaser of the equity of redemption is bound to set up as a defence that he has also a paramount title. If in such a suit he does not invite the Court to decide the question of his priority, he will not be precluded from raising the question of his priority in a suit of his own. A.I.R. 1924 Cal. 138 Diss. from. 10 P.L.T. 645=121 Ind. Cas. 353=A.I.R. 1929 Pat. 678.

——S. 11—Paramount title—Omission to plead—No res judicata.

There is a difference between mortgagor's suit for redemption and possession and mortgagee's suit for sale. In a suit by mortgagee for sale, a person claiming adversely both to the mortgagor and mortgagee may be joined but such person is not bound to raise the question relating to the paramount title. A.I.R. 1924 Cal. 138, Diss. from; A.I.R. 1927 Mad. 301, Affirmed. 106 Ind. Cas. 574=A.I.R. 1927 Ind. Cas. 945.

——S. 11—Paramount title—Omission to plead—No res judicata.

A person claiming adversely to the mortgagor and mortgagee is not a necessary party to a mortgage suit but if he is made a party, the Court has discretion whether to adjudicate on his title or not and therefore if such party fails to assert his title he is not barred by S. 11, Expl. 4, from doing so in a subsequent suit. 25 M.L.W. 238=38 M.L.T. 20=99 Ind. Cas. 468=A.I.R. 1927 Mad. 301=52 M.L.J. 52.

——S. 11—If a person joined as defendant in a mortgage suit has a title paramount to that of the mortgagor he is not bound to set up such a title by way of defence to the mortgage suit, and his omission to do so will not therefore render the question of his title res judicata against him. 78 Ind. Cas. 118=A.I.R. 1924 Nag. 408.

——S. 11—Mortgage suit—Paramount title—Omission to plead—Res judicata.

The rule that a question of paramount sale cannot be investigated in a mortgage suit is subject to

exception. The plaintiff had a twofold character. As purchaser of equity of redemption, he was properly before the Court; as a settlement holder from the superior landlord, he could set up a defence that the mortgage could not be enforced against the property in his hands. He did not take that defence and the result was that a decree was made for sale of the mortgaged property in his presence. The decree is operative against him and he would not be allowed to challenge it in a separate suit. 8 C.W N. 365, Foll. 76 Ind. Cas. 517=38 C.L.J. 183=A.I.R. 1924 Cal. 138.

——S. 11—Tenant executing mortgage in favour of appellant—Landlord having charge on property—He not claiming priority but admitting mortgage and thus suffering award against him—Whether res judicata.

If the landlord having a charge on the property was made a party in the proceedings arising out of the mortgage executed by his tenant in favour of the appellant which resulted in an award in the appellant's favour, it is clearly incumbent on him as a person holding a right superior to that of the appellant to have asserted his right of priority. Where, however, he abandons his position as a prior charge-holder and accepts the position of that of a representative of the tenant and in that capacity admits the liability on the mortgage and suffers an award to be passed against him, the award which finally disposed of his rights in the property must operate as **res judicata** to preclude him from falling back on his superior rights which he deliberately discarded. (1936) 163 Ind. Cas. 602=18 N.L.J. 275.

——S. 11, Expl. IV—Mortgage—Suit by subsequent mortgagee impleading prior mortgagee—Prior mortgagee failing to appear or to set up priority of his mortgage—Effect.

It is perfectly elearly clear that where a prior mortgagee is made a party to a mortgage suit for sale brought by a subsequent mortgagee, who neither attacks the prior mortgage nor seeks to postpone it to his own, the failure by the prior mortgagee to appear in the suit or to set up his priority does not in any sense render the decree in that suit **res judicata** against the prior mortgagee, so as to debar him from thereafter bringing the property to sale in enforcement of his own mortgage. If the prior mortgagee is attacked, then it would be incumbent upon the mortgagee to appear and defend his right by setting up his priority over the plaintiff's mortgage, as otherwise his failure to do so in such a case would bar him on the principle of **res judicata** from afterwards claiming priority in execution or in a later suit. The failure to defend something which has never been attacked can never form the basis for a plea of **res judicata** 47 I.A. 11, foll. 27 Pat. 332.

——S. 11—Defence—Failure to put up prior mortgage.

A prior mortgagee is not bound to assert his priority unless his right is impugned. On the other hand, if a subsequent mortgagee has priority by reason of a right to subrogation, he is obliged to put forward that right. If, in addition to having a subsequent mortgage, a defendant has a prior independent mortgage, he is not bound to say anything about the prior mortgage, and his failure to put forward that mortgage will not operate as **res judicata.** A.I.R. (Vol. 32) 1945 Mad. 151=58 L.W. 16=(1945) 1 M.L.J. 167=1945 M.W.N. 306.

——S. 11—Mortgage suit—Prior and puisne mortgagees—Suit by puisne mortgagee—Decree in—When res judicata.

Under O. 34, R. 1, a prior mortgagee is not a necessary party to a suit for sale brought by the puisne mortgagee and whether he is a party or not his rights are unaffected by any decree which may be passed in enforcement of the puisne mortgage. Under these circumstances unless the prior mortgage is made a party to the suit of the puisne mortgagee and his rights are attacked and adjudicated upon adversely to him with reference to his prior mortgage the question of **res judicata** cannot arise in a subsequent suit between the same parties or those claiming through them. A.I.R. 1930 All. 163=124 Ind. Cas. 27.

——S. 11—Mortgage suit—Prior mortgagee—Plea of res judicata against—When arises.

To raise the plea of **res judicata** against prior mortgagee it is necessary for the subsequent mortgagee as plaintiff in the former suit to allege a distinct claim in the plaint in derogation of the prior mortgage. 20 All. 110 (F.B.), 10 A.L.J. 149; 34 All. 599; and 39 Cal. 527 (P.C.), Foll. 117 Ind. Cas. 820 (All.).

——S. 11—Suit by puisne mortgagee—Prior charge-holder made a party—Compromise between the mortgagors and the subsequent mortgagee alone—Effect.

A, a mortgagee sued the mortgagors and *B*, a prior charge-holder on the property. The suit ended in a razinama decree, and although *B* was not a party to the razinama, showed his willingness to the decree being based on the razinama without trying to make any provision for his charge. The decree provided that the mortgagors should pay certain amount of money to *A* and further a charge was created in favour of *A* on some of the property:

Held, that the decree was not on the mortgage on which *A* sued but it created only a new charge in favour of *A*. And although *B* did not object to that decree being passed, *B* was not debarred from enforcing his charge which was prior to *A's*. 29 M. L.W. 609=117 Ind. Cas. 302=A.I.R. 1929 Mad. 379=56 M.L.J. 295.

——S. 11—Mortgage suit—Defendant's failure to establish his priority—When res judicata.

Where a plaintiff in a mortgage action alleges a distinct case in his plaint in derogation of the priority which may be claimed by the defendant and seeks in his suit to displace that prior title and postpone it to his own, it is incumbent upon the defendant to establish his priority, and if he fails to do so, he will not be allowed to try that question in a subsequent suit of his own. 10 P.L.T. 645=121 Ind. Cas. 353=A.I.R. 1929 Pat. 678.

——S. 11—Suit by puisne mortgagee—Rights of prior mortgagee not impugned—No res judicata.

The puisne mortgagee brought a suit on his mortgage and impleaded the prior mortgagee who had obtained a decree on his own mortgage. The rights of the prior mortgagee as decree-holder were not impugned by the puisne mortgagee and hence they were not put in issue and a decree was passed. The prior mortgagee in execution of his decree himself purchased the properties. In execution of the decree of the puisne mortgagee he applied under O. 21, R. 66, objecting to the sale of the properties purchased by him.

Held, that his claim was not barred by *res judicata.* 99 Ind. Cas. 658=A.I.R. 1927 Mad. 431.

——S. 11—Suit by puisne mortgagee—Prior mortgagee impleaded without recognising his priority—Latter bound to set up his prior charge.

If the prior mortgagee is impleaded in a suit by the puisne mortgagee without his prority being recognised, he is bound to set up his prior charge as a ground of defence under Explanation 4, S. 11, C. P. Code, to the suit. Otherwise the mortgagee will obtain a decree entitling him to bring the entire property to sale and not merely the equity of redemption. 75 Ind. Cas. 108=A.I.R. 1924 All. 927.

——S. 11, Expl. 4—Mortgage suit—Prior mortgagee impleaded party—Omission to set up his mortgage—No Bar.

Unless relief is claimed against the prior mortgagee, the latter need not set up his prior mortgage and his subsequent suit on the prior mortgage will not be barred under S. 11 especially when no issue is raised and the question as to the prior mortgage is expressly left undecided. In a suit by puisne mortgagee making a prior mortgagee a party the Court must give reasons for its decision against the claim of the prior mortgagee otherwise the decree cannot be *res judicata* against him. 58 Ind. Cas. 33=1 Pat.L.T. 629.

——S. 11, Expln. 4—Mortgage suit—Prior mortgagee impleaded in suit on puisne mortgagee—If bound to set up his prior mortgage in defence.

A prior mortgagee who is impleaded in a suit on a subsequent mortgage, but whose mortgage is not impugned has a paramount title outside the controversy of the suit and is not bound to set up his mortgage as a defence within the meaning of expl. 4 of S. 11 of the Code. 47 Cal. 662=47 I.A. 11=38 M.L.J. 424=11 L.W. 518=25 C.W.N. 417=22 Bom.L.R. 557=55 Ind. Cas. 959=(1920) M.W.N. 308 (P.C.).

——S. 11—Prior mortgagee party to suit on subsequent mortgage—Not pleading his mortgage—Effect.

The fact that in a previous suit on a subsequent mortgage, a prior mortgagee was made a party, but did not plead or prove his debt, does not debar him from bringing a suit on his mortgage. 11 A.L.J. 57=18 Ind. Cas. 21=35 All. 111.

——S. 11, Expl. (4) (S. 13, Expl. 2, Old Code)—Suit on second mortgage—Prior mortgagee impleaded—Omission to set up prior mortgage—Suit by him on his mortgage—If res judicata.

Where in a suit to enforce a second mortgage the first mortgagee is made a party but no relief is claimed against him, it is not necessary for him to set up his prior mortgage, and his omission to do so does not bar a subsequent suit to enforce his his security, under Expl. II, S. 13, Civil Procedure Code. (1900) 1 C.L.J. 337=2 C.L.J. 202. *See* 29 M. 84 but *see, however,* 11 M.L.J. 333; 31 C. 428.

——S. 11—Mortgage suit—Prior mortgagee not setting up priority in previous suit—Res judicata.

Where in a suit for sale by the puisne mortgagee the prior mortgagee though a party to the suit did not set up his priority and where the sale sought was not alleged to be subject to the first mortgage, *held,* that he could not subsequently set up his priority. 10 A.L.J. 244=16 Ind. Cas. 8=34 All. 599.

——S. 11, Expl. (4) (S. 13, Expl. 2, Old Code)—Mortgage suit—Prior mortgagee made party—Prior mortgage not pleaded—Effect.

In a suit upon a mortgage, the mortgagor's written statement disclosed the existence of a prior mortgage. The prior mortgagee was then made a party. He remained *ex parte.* No issue not raised in reference to the prior mortgage, but the decree directed sale without reserving the rights of the prior mortgagee. In a subsequent suit upon the mortgage, *held,* that the prior mortgage should have been pleaded in the previous suit and that the claim was *res judicata.* (1900) 11 M.L.J. 333.

——S. 11, Expl. (4) (S. 13, Expl. 2, Old Code)—Mortgage suit.

One Shibba mortgaged certain property to Chet Ram and others, first, by a usufructuary mortgage and afterwards by a simple mortgage. On the 2nd of December 1880, the mortgagees obtained a decree for sale on their simple mortgage. In July, 1883, Shibba mortgaged the same property to Baru Mal and others. In November, 1883, Shibba sold the mortgaged property to the prior mortgagees in satisfaction of their decree. In 1884, the puisne mortgagees brought their mortgage into suit. The prior mortgagees were made parties to this suit who set up their right under their two mortgages, but notwithstanding this, the Court passed a decree for sale in favour of the puisne mortgagees. An order absolu e for sale followed, but neither to the proceedings in which that order was passed nor to the subsequent proceedings in execution were the prior mortgagees made parties. In execution of the decree the mortgaged property was again sold and was purchased by the mortgagees. The prior mortgagees next sued for a declaration that the auction sale at which the puisne mortgagees purchased was a nullity so far as it affected their rights, but in this suit they were defeated. Then the puisne mortgagees who had not yet obtained possession, sued for redemption of the prior mortgages and got a decree and an order for possession. Finally, still failing to obtain possession, they brought the present suit for recovery of possession of the mortgaged property. *Held,* that the prior mortgagees could not in this suit set up their own right, if they had any to redeem the mortgage held by the plaintiffs. (1905) A.W.N. 107=2 A.L.J. 278.

——S. 11, Expl. (4) (S. 13, Expl. 2, Old Code)—Mortgage suit — Failure of prior mortgagee impleaded as defendant to set up his mortgage—Subsequent suit on prior mortgagee by him—Res judicata.

Where a prior mortgagee was impleaded as defendant in a prior suit by a puisne mortgagee wherein the plaintiff mortgagee prayed that the property be sold free of incumbrances, but the prior mortgagee did not put in any appearance or plead his mortgage and a decree was passed in terms of the puisne mortgagee's prayer, a subsequent suit by the prior mortgagee on his mortgage is barred under section 11, Explanation 4, section 13 old Code. Explanation 2 29 I.A. 118, followed. 31 C. 428.

——S. 11—Prior mortgagee impleaded by puisne mortgagee asserting himself to be prior—Defendant filing written statement only—Decree operates as res judicata.

Defendant puisne mortgagee made plaintiff prior mortgagee a party to his mortgage suit and set up a plea that he was the prior mortgagee. Plaintiff did nothing beyond making a written statement, to prove that he was prior mortgagee. Decree directed that, in the event the defendants in that suit including the present plaintiff failed to pay the decree amount, the property be sold.

Held, the decree operated as *res judicata* against plaintiff in his suit on his mortgage. 4 P.L.T. 108 =71 Ind. Cas. 948=1923 P.H.C.C. 118=1 Pat. L.R. 238=2 Pat. 435=A.I.R. 1923 Pat. 290.

——S. 11—Priority set up but negatived—Objection in execution proceedings—If can be raised.

Where the third mortgagee sued second mortgagee and claimed priority by subrogation due to discharging first mortgagee and second mortgagee simply asserted his mortgagee rights and pleaded discharge but an issue as to second mortgage being genuine was wrongly framed and decided against him while the decree exempted expressly only the rights of other defendants.

Held, the decree destroyed the rights of the second mortgagee though plaintiff failed to prove priority by subrogation and the decree only purported to pass the right of the mortgagor on date of third mortgagee but this destruction of rights applied only to property with respect to which second mortgagee specifically asserted his rights and not other property though covered by the same second mortgagee. 72 Ind. Cas. 798=18 M.L.W. 288=A.I.R. 1924 Mad. 193.

——S. 11—Suit by puisne mortgagee—Defendant impleaded as subsequent mortgagee and not as assignee of prior mortgagee—Omission to plead latter right—No res judicata.

Where a person who had a subsequent mortgage over a property had also in addition to this redeemed a prior mortgagee and a punisne mortgagee sued on his mortgage impleading the former only as a subsequent mortgagee but not as an assignee of the prior mortgagee and in execution of the decree so obtained, by which it was ordered that the claim of the plaintiff puisne mortgagee was to be satisfied first, the subsequent mortgagee claimed that he was entitled to be paid first his money due as assignee of prior mortgagee:

Held, that as the subsequent mortgagee was not a necessary party to the suit in his capacity as prior mortgagee, he was under no obligations to defend his claim which was paramount and outside the controversy of a suit between the subsequent mortgagees and as such the rule of *res judicata* did not apply. To make the rule applicable it was necessary for the plaintiff puisne mortgagee to attack his rights as assignee of the prior mortgage. A.I.R. (Vol. 22) 1935 Lah. 218.

——S. 11—Prior mortgagee who is also puisne mortgagee impleaded in suit by mesne mortgagee as subsequent mortgagee—No contest as to prior mortgage—Prior mortgagee's rights are not barred by res judicata.

If a prior mortgagee with a paramount title who is also a puisne mortgagee is impleaded in a suit by a mesne mortgagee as a subsequent transferee and there is no contest in that suit regarding the prior mortgage, the right of the prior mortgagee is not lost to him. If, however, there is controversy about the prior mortgage and that controversy is decided against him whether by actual decision or in default, his remedy is barred as *res judicata.* A.I.R. 1920 P.C. 81 and A.I.R. 1929 Oudh 88, Foll. 4 Luck. 250=6 O.W.N. 1=115 Ind. Cas. 833=A.I.R. 1929 Oudh 463.

——S. 11—Where a person makes another a party to a mortgage suit because he was a purchaser of the mortgaged property and not because he was a prior mortgagee whom he wished to redeem he is not bound in law to put forward his claim to be redeemed in the aforesaid suit and his failure on this account does not operate as *res judicata* so as to preclude him from putting forward his claim to be redeemed in a subsequent case before being compelled to give up possession of the mortgaged property. A.I.R. (Vol. 20) 1933 Nag. 190=144 Ind. Cas. 716.

——S. 11—Vendee from the mortgagor before and after mortgage—Not bound to set up his prior title.

Where a portion of the mortgaged property was sold to a person prior to the mortgage and another portion was sold to the same person subsequent to the mortgage and the mortgagee in his suit to enforce the mortgage impleaded the purchaser only as subsequent purchaser without attacking his prior purchase and obtained an *ex parte* decree, the purchases will not be debarred from raising his prior title by a subsequent suit. 9 Pat 118=119 Ind. Cas. 829=A.I.R. 1929 Pat. 333.

——Ss. 11 and 47—Suit by puisne mortgagee against auction-purchaser of mortgaged property—Final decree not providing for latter's rights as prior mortgagee—Fresh suit on prior mortgagee rights barred.

In a suit by a puisne mortgagee against an auction-purchaser of the equity of redemption the latter set up a prior mortgagee right as a shield. The preliminary decree gave priority to the auction-purchaser in respect of his claim, but the final decree as well as the execution sale that followed did not mention or provide for his rights as prior mortgagee. The puisne mortgagee purchased the property and got possession. *Held,* that the auction-purchaser could not sue upon his prior mortgagee rights in a fresh suit. 47 Ind. Cas. 954=16 A.L.J. 685.

——S. 11 (S. 13 Old Code)—Suit for redemption of subsequent mortgage—Omission to include prayer for redemption of prior mortgage in favour of defendant—Second suit for redemption of prior mortgage—Res judicata.

Per **Boddam, J.**—In redemption suits all mortgages should be redeemed in one and the same suit, and if the plaintiff, knowing of the existence of a prior mortgage to those who are defendants to his action for redemption under a subsequent mortgage, chooses to make no claim for redemption under the prior mortgage, he must be taken to have abandoned his claim under it and cannot be allowed to bring a fresh action for redemption of the same lands by simply altering the form of his claim to redeem to an alternative claim either under the second or under the first mortgage. (1903) 28 M. 406

——S. 11, Expl. 4 (S. 13, Expl. 2, Old Code)—Prior mortgagee holding later mortgage and having right to redeem mesne mortgage—Omission to set up right to redeem—Subsequent suit on later mortgage—Res judicata.

Where a subsequent mortgagee brings a suit on his mortgage and purchases the property and then sues a prior mortgagee for redemption, and such prior mortgagee does not set up a still later mortgage to him which will entitle him to redeem the subsequent mortgage as a defence to the suit, a suit by the prior mortgagee on his later mortgage to enforce it as against the subsequent mortgagee is barred by section 11, Explanation 4, section 13, Old Code. Explanation 2. (1902) 4 Bom.L.R. 827=6 C.W.N. 889=24 A. 429=29 I.A. 118 (P.C.).

——S. 11, Expl. 4 (S. 13, Expl. 2, Old Code)—First suit by second mortgagee—Decree—Second suit by him to sell property mortgaged to first mortgagee for repayment of money paid by him to first mortgagee after first sale.

A *second* mortgagee sued for sale of the properties mortgaged to him impleading therein the first mortgagee. He had a decree for sale allowing him to redeem the first mortgagee out of the sale proceeds. He sold and though the money was enough to cover his mortgage amount, it was not sufficient to pay his debt after payment of the first mortgagee. He paid the first mortgagee, and brought a second suit for sale of the properties covered solely by the 1st mortgage. *Held*, that the suit was not barred by *res judicata*. (1905) 3 A.L.J. 541=(1906) A. W. N. 249.

——S. 11—Prior mortgage suit—Another mortgagee who had prior as well as subsequent mortgage made party only as puisne mortgagee—No decision as regards his prior mortgage—Subsequent suit by puisne mortgagee on his prior mortgage—Not barred.

The plaintiff had a usufructuary mortgage of 1910, he also had a simple mortgage of 1919. The defendants in the meantime had obtained a simple mortgage of the same property executed in 1913, and in 1926 brought an action on that simple mortgage impleading the plaintiff as a puisne mortgagee. No relief was claimed in that plaint against the plaintiff who was one of the defendants in that action, in his capacity as prior mortgagee under the usufructuary mortgage of 1910, although as a defendant in that action the plaintiff mentioned in his written statement the prior mortgage of 1910. In that case the decree was passed without any reference to the prior mortgage as the Court thought it unnecessary to decide that matter. The property was sold and purchased by the present defendants, the then plaintiffs. Subsequently, in 1932 an action was brought by the plaintiff against the defendants amongst others who were the plaintiffs in the former action claiming possession of the property. It was contended that the decree in the previous suit was bar to the suit on the principle of *res judicata*:

Held, that the suit was not barred by *res judicata* as in the previous suit the defendant had sued the plaintiff not as a prior mortgagee but only as a puisne mortgagee. A.I.R. (Vol. 25) 1938 Pat. 444=17 Pat. 180=178 Ind. Cas. 33.

——S. 11, Expl. 4 and S. 47—Sale under prior mortgage—Deposit by subsequent mortgagee and application to reserve rights under his mortgage—Latter prayer rejected—Suit on his mortgage is not barred.

The plaintiff had deposited Rs. 4,500 to release from Court Sale, held under a previous mortgage, the property included in his hypothecation bond. His application to reserve his rights thereunder had been rejected but he preferred no appeal. He instituted a suit later on for the recovery of the same. *Held*, there was no bar to the suit either under S. 11 or S. 47 of the C. P. Code. S. 47 does not apply because the question raised in the suit cannot be said to relate to the execution discharge or satisfaction of a decree. S. 11 (Expl. 4) does not apply because in the previous suit on a prior mortgage, all that the present plaintiff as defendants in that suit, could have done was to bring to the notice of the Court his own hypothecation bond and this was done; no further relief could have been asked from him. 81 Ind. Cas. 301=A.I.R. 1922 Lah. 358.

——S. 11—Prior suit in ejectment by purchaser from prior mortgagee—No bar to a suit by the subsequent mortgagee for redemption.

Whilst in a suit for foreclosure, a subsequent mortgagee must be prepared to pay the money or be foreclosed, he need not seek to redeem in a suit for ejectment. The mere existence of a right to redeem is not a defence to a suit for ejectment. A prior suit for ejectment by purchaser from the prior mortgagee against the subsequent mortgagee is no bar to a suit by the subsequent mortgagee for redemption against the purchaser from the prior mortgagee. 17 N.L.R. 33=A.I.R. 1921 Nag. 69=54 Ind. Cas. 276.

——Ss. 11, Expln. 4 and 47—Suit for sale by prior mortgagee against mortgagor and puisne mortgagee—Rights of puisne mortgagee—Fresh suit by him for recovery of his mortgage amount—Not barred.

In a suit by prior mortgagee against the mortgagor and a puisne mortgagee, a decree for sale was passed. The decree declared the amounts due to the plaintiff and puisne mortgaged but directed the redemption only of plaintiff's mortgage and ordered the sale of the mortgaged properties only in the event of the amount of the plaintiff's mortgage not being paid. The puisne mortgagee was given only the right to share in the surplus, if any, arising out of the sale. The mortgagor sold the mortgaged property by a private sale and paid off the amount due to the first mortgagee. The puisne mortgagee not having been paid, instituted a suit against the mortgagor and the private purchaser from him.

Held, that the puisne mortgagee was not entitled to execute the decree in the prior suit and S. 47, C. P. Code, had no application to the case. The suit was not barred by *res judicata*, because it was beyond the pecuniary limits of the jurisdiction of the Court which tried the prior suit and the puisne mortgagee was not in a position to have his claim satisfied in the prior suit. 42 Mad. 90=35 M.L.J. 639 =24 M.L.T. 473=9 L.W. 70=49 Ind. Cas. 36= (1918) M.W.N. 898.

——S. 11, Expln. 4—Suit by prior mortgagee—Puisne mortgagee impleaded—Subsequent suit by him not barred.

Where in a suit by a prior mortgagee the puisne

mortgagee is also impleaded as party and a decree is passed directing the sale of the property and the payment of any surplus proceeds to the mortgagor, the puisne mortgagee is not debarred from enforcing his mortgage in a subsequent suit, by the fact that he omitted to bring the property to sale in the prior mortgagee's suit. 49 Ind. Cas. 466=(1918) M.W.N. 902.

——S. 11—Suit on prior mortgage impleading subsequent mortgagee—Subsequent suit by latter not barred.

A suit on a prior mortgage in which the subsequent mortgagee also is impleaded does not bar a second suit by the subsequent mortgagee, for the subsequent mortgagee though a defendant in the previous suit cannot resist the prior mortgagee's claim by setting up his own mortgage rights. 9 Ind. Cas. 158.

—S. 11, Expln. 4—Suit on prior mortgage —Subsequent mortgagee not claiming title as owner of portion—Separate suit by him not barred.

A subsequent mortgagee claiming title as owner of a portion in a prior mortgage suit may set up his title in a separate suit as the question cannot be raised in the former suit. 16 A.L.J. 639=46 Ind. Cas. 559=40 All. 584.

——S. 11, Expln. 4—Mortgage suit—Person entitled to priority by subrogation impleaded—Omission to set up right—Res judicata.

Where, to a suit by a mortgagee on a mortgage bond of certain property, a person who has a right by subrogation to priority is made a party and he omits to set up his right, a suit subsequently brought by him for that purpose is barred by *res judicata* by virtue of Expln. 4 to S. 11, C. P. Code. I.L.R. (1947) Nag. 668=A.I.R. 1948 Nag. 256=1948 N. L.J. 170.

——S. 11—Suit by prior mortgagee—Notice to subsequent mortgagee—Failure of subsequent mortgagee to appear or set up priority.

A subsequent mortgagee who has been made party to a suit on a prior mortgage but who has failed to appear, cannot afterwards raise the plea that he had paid off a prior lien and was therefore in the position of a prior mortgagee. 39 Cal. 572 (P.C.), foll. The test in all such cases is, was the defendant impleaded as puisne mortgagee and therefore, a necessary party; if he was, he is bound to set up his prior mortgage as well as his subsequent mortgage. 29 Ind. Cas. 875=19 C.W.N. 947.

——S. 11, Expln. 4—Suit by prior mortgagee—Subsequent mortgagee omitting to set up his mortgage and also another mortgage prior to one sued on which he had paid off—Subsequent suit—Res judicata.

Where a mortgagee, who was made a defendant to suit on a mortgage prior to his own, omitted to set up his rights under his mortgage and also under another mortgage, which was prior to the one sued on and which he had paid off, held that a suit subsequently brought by him to enforce those rights was barred under S. 11, Expln. 4. 39 Cal. 527=39 I.A. 68=11 M.L.T. 265=9 A.L.J. 332=14 Bom. L.R. 280=16 C.W.N. 505=15 C.L.J. 411=22 M. L.J. 468=14 Ind. Cas. 496=(1912) M.W.N. 367 (P.C.).

——S. 11—Suit by second mortgagee impleading first—Non-appearance of first—Decree for sale ex parte—Second mortgagee purchaser in execution—Previous decree by first mortgagee not impleading subsequent mortgagee—Effect.

Where in a suit on the second mortgage, the first mortgagee was made a party and owing to the non-appearance of the latter, a decree for sale was passed *ex parte* and as to the prayer for an account as to the sum due to him, no order was passed, *held,* (1) the Court never intended to say that the mere absence of the first mortgagee would never give a priority to the second mortgagee. 35 All. 111, foll. The fact that in a previous suit by the first mortgagee the second mortgagee was not made a party does not mean that the second mortgagee would get the benefit of the first mortgage by reason of the doctrine of merger. Nothing was decided in the former suit with reference to first mortgagee's encumbrance and so there was no *res judicata.* 24 Ind. Cas. 42=18 C.W.N. 1013.

——S. 11, Expln. 4—Mortgage suit—Priority.

A prior mortgagee obtained an *ex parte* decree on his mortgage and purchased the property himself in Court auction, and subsequently a subsequent mortgagee sued on his mortgage impleading the prior mortgagee purchaser as party and the latter did not therein set up his priority and a decree was passed in favour of the subsequent mortgagee. Subsequent to this decree, the decree on the prior mortgage was set aside and the suit re-opened under O. 9, R. 13, C. P. Code, *Held,* that the right of the prior mortgagee to set up his right of priority was barred by S. 11, Expln. 4 of the Code. 26 Ind. Cas. 860.

——S. 11—Redemption suit—Mortgagee's failure to assert interest in redemption—Subsequent claim, whether barred.

Failure on the part of a mortgagee in a redemption suit to raise the plea, that he, as owner of a part of the equity of redemption, is interested in the redemption does not operate as *res judicata* debarring him from subsequently asserting his claim to the equity of redemption provided he pays the proportionate costs of the redemption. Nor is such a claim barred by the rule of estoppel even if the mortgagor has spent money in improving the property after redemption. A.I.R. (Vol. 32) 1945 Bom. 69=46 Bom.L.R. 704.

——S. 11—Mortgage suit—Redemption—Prior suit for sale before T. P. Act—Decree unexecuted—Subsequent suit for redemption not barred.

A decree obtained by the mortgagee before the Transfer of Property Act came into force, to recover the mortgage-debt by sale of the mortgaged property, which remains unexecuted does not bar a subsequent suit by the mortgagor instituted within the period of limitation to redeem the mortgage on the ground of *res judicata.* A.I.R. 1930 Bom. 401 =32 Bom.L.R. 933=126 Ind. Cas. 882.

——S. 11—Mortgage suit—Party dismissed from suit—Subsequent suit for redemption—Bar.

A party in a suit for redemption dismissed from the suit for setting up a claim adverse to the mortgagor and mortgagee is barred from subsequently suing for redemption of the same property. 57 Ind. Cas. 980.

——S. 11—Mortgage-suit—Decree in mortgagee's suit with option of redemption not executed—Subsequent suit for redemption barred.

Whether the decree be in a suit for foreclosure or in a suit for sale or in a suit for redemption there is in each case a conditional decree for redemption in favour of the mortgagor, the condition being the payment by the mortgagor of the amount decreed on or before the date fixed; but they are none the less "final judgments" having the force of *res judicata*. 25 Mad. 300; 31 M. 364, foll.; 39 B. 41, not foll. A subsequent suit for redemption is barred. 30 M.L.J. 13=18 M.L.T. 596=32 Ind. Cas. 30=39 Mad. 896.

——S. 11—Final decree for sale cannot bar redemption suit.

In a suit by the mortgagee for sale the question whether the mortgagor has the right to redeem is not put in issue. In such a suit the questions for determination are whether there is a mortgage and what is the amount due to the mortgagee. So, where a final decree for sale is passed in a suit on mortgage, but it is not executed for more than 3 years, S. 11 cannot bar a subsequent suit for redemption by the mortgagor. 43 Bom. 334, Foll. 86 Ind. Cas. 527 =A.I.R. 1925 Mad. 1191.

——S. 11—Mortgage suit—Order for sale in second mortgagee's suit—Effect on mortgagor's title—T. P. Act, S. 93.

The Jenmi's (mortgagor's) title does not end by an order for sale passed in a prior suit by the Melkanomdar (2nd mortgage). Under S. 93, T. P. Act, an order for sale extinguishes the plaintiff's right to redeem the security of the mortgagee so far as the plaintiff is concerned. Ordinarily a redemption suit by a mortgagor is not barred by *res judicata* by a previous suit by a second mortgagee to redeem the first. 36 Ind. Cas. 551=4 L.W. 184.

——S. 11—Redemption suit—Decree in—Res judicata.

A mortgaged land which originally belonged to two widows and on their death was mutated in favour of the village proprietary body including the mortgagee. A suit contesting the mortgage being dismissed, some members of proprietary body filed a suit for redemption. A preliminary decree was granted but was not executed. On partition taking place the land under mortgage fell to certain persons who instituted suit for redemption. The defendant mortgagee pleaded that entire village proprietary body were not entitled to succeed the widow and claimed a charge on property.

Held, that the previous suit operated as *res judicata* both as regards right to redeem and amount due on mortgage. The right of the proprietary body to succeed to the estate of the widow was never questioned by the mortgagee in the previous suit and this ought to have been made a ground of defence in previous suit and would be deemed to be finally decided against the mortgagee. 121 Ind. Cas. 180=A.I.R. 1930 Lah. 423.

——S. 11 and O. 22, R. 4—Mortgage suit—Purchasers of mortgaged property impleaded as L.R's of mortgagors—Failure to plead purchase—Separate suit for redemption barred.

Where in a suit on a mortgage, certain persons who had purchased the mortgage property in execution of a simple money decree, and who happened to be also the heirs and legal representatives of the mortgagor, were made parties as such heirs and failed to plead their purchase, *held* that they cannot subsequently claim to redeem the properties by a separate suit subsequently. 20 A.L.J. 641=73 Ind. Cas. 920=A.I.R. 1922 All. 463.

——S. 11, Expln. 4—Suit to enforce mortgage—Sub-mortgagee impleaded at instance of defedants but not proving his mortgage—Subsequent suit by sub-mortgagee on his sub-mortgage—Not barred.

The mortgagee filed a suit on the mortgage in which he impleaded the mortgagors and some subsequent alienees. He did not, however, make the sub-mortgagee a party and he was added as a defendant at the instance of the defendants. As the sub-mortgagee did not put forward and prove his sub-mortgage no relief was granted to him. Subsequently, the sub-mortgagee brought a suit upon his sub-mortgage and it was contended that the suit was barred under S. 11, Expln. 4, since the sub-mortgagee might and ought to have put forward and proved his mortgage in the previous suit:

Held, that a sub-mortgagee's remedy was either to ask for a decree for sale of the original mortgagor's interest in circumstances which would have entitled the original mortgagee on the date of the sub-mortgage to claim such relief or to bring his own sub-mortgagor's interest, a remedy by way of the sale of of the decree in the previous suit the sub-mortgagee was precluded from asking for the sale of the original mortgagor's interest, a remedy by way of the sale of his own sub-mortgagor's interest was still open to him and therefore the suit was not barred under S. 11, Expln. 4. A.I.R. (Vol. 31) 1944 Mad. 137= (1943) 2 M.L.J. 632=1943 M.W.N. 788=216 Ind. Cas. 140.

——S. 11, Expl. 4—Suit by puisne mortgagee for redemption—Sub-mortgagee not bound to claim payment.

It is not incumbent on the sub-mortgagee to claim payment in a redemption suit by a puisne mortgagee. By failing to do so he risks his own security but he cannot be barred from bringing a suit against his own mortgagor to recover the sum advanced by him. The first suit does not also operate as *res judicata* when the matter in issue (that the sub-mortgage was fictitious) in the suit was not brought to the knowledge of the sub-mortgagee whose presence was not compulsory at the hearing. 6 O.W.N. 851=A.I.R. 1929 Oudh 455.

——S. 11, Expl. 4—Mortgage bond—Suit by assignee dismissed as assignment was not registered—Subsequent suit supported by registered deed since executed—Barred.

Where a suit brought by a purchaser of a mortgage debt at an auction sale, upon the mortgage bond was dismissed as there was no registered deed assigning this mortgage and he brought a second suit based essentially upon the same purchase but supported in this case by a registered deed of assignment obtained after the dismissal of the first suit:

Held, that the suit was barred by *res judicata*. In the former suit, the assignment was the matter directly and substantially in issue or must be deemed to have been in issue by virtue of Expl. 4 to S. 11. A.I.R. (Vol. 27) 1940 Sind 227=I.L.R. (1941) Kar. 99=192 Ind. Cas. 676.

——S. 11—Co-mortgagor redeeming entire mortgage and acquiring charge—Omission to set up charge in subsequent mortgagee's suit—Effect.

The omission on the part of a co-mortgagor, who has redeemed the entire mortgage, obtained possession and thereby acquired a charge to disclose his prior charge and right to possession in the puisne mortgagee's suit and to have it declared in the execution proceedings that followed, will not extinguish that charge and deprive him of his right to possession unless the existence of the prior charge in his favour is denied by the second mortgagee and the mortgagor being a party, does not assert his rights and allows the puisne mortgagee's allegations to prevail. A.I.R. (Vol. 18) 1931 All. 76=1930 A. L.J. 1222=133 Ind. Cas. 142.

——S. 11—Two mortgages—Suit on one—If a bar to a suit for accounts by the mortgagors.

A person held two mortgages one for Rs. 35,000 and the other for Rs. 20,000 over the same property. The mortgagee admitted having received Rs. 48,000 from Insurance Company which sum was less than the sum alleged by the mortgagor to be due on the policy. The mortgagee sued on the smaller mortgage and got a decree. Subsequently the mortgagor sued for accounts.

Held, that the latter suit was not barred by *res judicata* as it was impossible to say that in the suit on the smaller mortgage an adjustment of accounts on the larger mortgage might and ought to have been in issue between the parties and the whole matter in issue in the subsequent suit could be decided in the earlier suit on the smaller mortgage. A.I.R. 1930 Rang. 197=127 Ind. Cas. 477.

——S. 11, Expl. 4—Mortgage suit—Two mortgages—Suit on latter mortgage does not bar subsequent suit on former one.

Where a person holds two mortgages over the same property, a suit on the latter one will not bar a subsequent suit on the other. 69 Ind. Cas. 897=10 L.B.R. 360.

——S. 11—Mortgagee holding two mortgages —Suit on second mortgage reserving the rights under the first.

A person holding two mortgages on a property may sue for sale on the second mortgage reserving the rights under the first. A mortgagee having separate mortgages has separate causes of action and is not bound to sue on them all. 38 Mad. 927=30 Ind. Cas. 317=29 M.L.J. 195 (F.B.).

——S. 11, Expl. 4 and O. 2, R. 2 (S. 13, Expl. II and 43, Old Code)—Substantially in issue—Dismissal of prior suit on mortgage of one date —Second suit for redemption of the same properties as on mortgage of another date—No bar.

The dismissal of a prior suit for redemption of properties based on an alleged mortgage of a certain date is no bar to the institution of a second suit for redemption of the same properties based on a mortgage of a different date either by reason of S. 11 (S. 13, Old Code) or O. 2, R. 2 (S. 43 Old Code). 26 M. 760; 27 M. 102, foll. 16 M.L.J. 48=29 M. 153 (F.B.).

——S. 11, Expl. 4—Mortgage suit—Suit on later mortgage—Fresh suit on prior mortgage barred.

Where a mortgagee having two mortgages of different dates upon the same property sues upon the mortgage of later date first and has the property sold without reference to the prior mortgage be cannot afterwards bring a separate suit on the prior mortgage. 17 Bom.L.R. 144=27 Ind. Cas. 1005=39 Bom. 138.

——S. 11—Mortgage suit—Two mortgages—Party failing to set up later mortgage.

If a person having two mortgages on the same property and suing on the first mortgage is a party to the suit in respect of the second mortgage also and if he omits to mention his second mortgage in that suit and obtains a decree on the basis of his first mortgage he cannot afterwards sue to enforce his second mortgage against the property. 20 All. 322; 2 Pat.L.J. 118, diss.; 25 Mad. 108; 30 Mad. 353; 30 Bom. 156; 39 Bom. 128, foll. 53 Ind. Cas. 753 =6 O.L.J. 482.

——S. 11—Three mortgages in favour of same person—Mortgage decree on one mortgage subject to charge—Mortgagee auction-purchaser—Suit by mortgagor's sons—Mortgagee not setting up his other mortgages—Subsequent suit on those mortgages—Barred.

Where a person holds three mortgages in his favour, on the basis of one of which he obtained a decree subject to a charge created by the other mortgages and in execution himself purchased the property but subsequently the sons of the mortgagor sued to set aside the sale to the extent of their shares, the failure of the mortgagee to set up his other two mortgages as a defence is a bar to a subsequent suit by him on the same. 11 Ind. Cas 257=8 A.L. J. 936.

——S. 11—Suit on subsequent mortgage—Mortgage held invalid—Failure to fall back on original consideration—If bars a suit on prior mortgage.

Where a subsequent mortgage is substituted for a prior mortgage and the mortgagee sues, on the subsequent mortgage, but the subsequent mortgage is held to be invalid for want of legal attestation, mortgagee's failure to fall back on the prior mortgage in the same suit does not bar a second suit on the prior mortgage if he was ignorant of the defect in the second mortgage at the institution of the first suit 98 Ind. Cas. 695=A.I.R. 1927 Nag. 83.

——S. 11—Mortgage suit—Plaintiff's right to personal decree decided in his favour—Subsequent application for personal decree—Plea of limitation—Res judicata.

Where the plaintiffs' right to obtain a personal decree in the event of the sale proceeeds proving insufficient to cover the mortgage decree was adjudicated upon and decided in favour of the plaintiffs in the previous suit and in an application for a personal decree under O. 34, R. 6, the plea as to bar of limitation was raised. *Held,* that the plea could not be raised because of the bar of *res judicata.* 7 O.W.N. 774=A.I.R. 1930 Oudh 378 (F.B.).

——S. 11—Mortgage suit—Contribution—Claim to—If can be raised in a redemption—Suit.

When a suit for redemption is instituted there is no cause of auction for claiming proportionate amount from those who represent the equity of redemption in part of the property mortgaged, other than that belonging to the plaintiffs in the redemption suit. The claim to contribution can only be made after the entire mortgage-money has been paid off. So the plaintiffs in the redemption suit redeem-

ing the whole mortgage and claiming possession of the part for which the equity of redemption is held by them, but not claiming possession of the property for which the equity of redemption is held by the defendants in the subsequent contribution suit, are not barred from claiming contribution in a subsequent suit by *res judicata*. 1929 A.L.J. 1162=A.I.R. 1929 All. 696.

——S. 11—Mortgage suit—Mortgagee not bound to enforce separate money bond.

It cannot be contended that a mortgagee holding a separate money bond against a mortgagor is under any obligation to enforce the money bond along with the mortgage, or even to refer to its existence in his plaint seeking to enforce the mortgage. 86 Ind. Cas. 481=A.I.R. 1925 Mad. 991.

——S. 11, Expl. 4—Properties not covered by mortgage included in suit and obtained delivery of in execution of decree—Mortgagee cannot sue on the ground that properties were not included in the mortgage.

Where mortgagor includes certain properties in his suit for redemption and obtains delivery of them in execution of redemption decree, the mortgagee cannot bring a subsequent suit on the ground that some of the properties so delivered were not comprised in the mortgage and were wrongly delivered, S. 11, Expl. (4) is a bar to such suit. 22 All. 442, Dissented from. 87 Ind. Cas. 711=A.I.R. 1925 Mad. 1148.

——S. 11—A subsequent suit by a simple mortgagee for his mortgage money is not barred, by reason of a prior suit by the mortgagor for possession and redemption of that property from the same mortgagee as usufructuary mortgagee, on the ground that the mortgagee should have put forth his mortgage in the previous suit. 87 Ind. Cas. 237=A.I.R. 1925 Lah. 516.

——S. 11, Expln. 4—Mortgage suit—Mortgagor not setting up non-transferability of property—Effect.

Where the defendant in a mortgage suit had a double capacity, *i.e.*, purchaser of equity of redemption and also settlement holder of a non-transferable occupancy holding, but he failed to set up the defence that the mortgage could not be enforced against the property in his hands, he will afterwards be barred by *res judicata*. A question of paramount title can be enquired into in a mortgage suit in certain cases. 76 Ind. Cas. 517=38 C.L.J. 183=A.I.R. 1924 Cal. 138.

——S. 11, Expln. 4—Mortgage decree—Sale in execution of mortgagor's claim as proprietor—Plea of non-saleable interest—Res judicata.

Where in execution of a decree on a mortgage of an interest in land admittedly proprietary, the plaintiff purchased it and applied for mutation which was rejected by the Revenue Court, and the plaintiff brought a suit for possession against the defendant (the original mortgagor). *Held*, that the defendant's plea that his interest in the land was only a non-transferable occupancy right, which plea was not raised in the mortgage suit, could not be sustained in the present suit. 46 Ind. Cas. 897=16 A.L.J. 557.

——S. 11, Expln. 4—Mortgage suit—Sufficiency of deposit—T. P. Act, S. 84.

If a mortgagee admits as a fact in proceedings under S. 84 of the T. P. Act that the deposit was of the full amount due on the date it was made, but refuses to receive it on some other ground, he cannot in a suit on the mortgage subsequently, be heard to say that the deposit was insufficient. He will, in such a suit be entitled only to the amount deposited and will have to bear the costs of the mortgagor in the suit. 67 Ind. Cas. 324=A.I.R. 1922 Nag. 174.

——S. 11—Mortgage suit—Suit against mortgagor, only having mortgagee's rights—Subsequent suit against owner—Res judicata.

A mortgagor mortgaged only the mortgagee's interest in certain lands. The mortgagee first brought a suit against the mortgagor only but not the owner of the property. *Held*, he could not bring a second suit against the owner of the property under S. 11 of the Code. 71 Ind. Cas. 390=14 L. W. 563=A.I.R. 1921 Mad. 701.

——S. 11, Expln. 4—Mortgage suit—Representatives of mortgagor impleaded as also liable in their personal capacity—Omission to set up non-liability—Subsequent suit for declaration barred.

Where in a suit on a mortgage, persons who were not parties to the mortgage were put on record not merely as the representatives of the mortgagor but also liable in their personal capacity as well but did not plead that their shares were not properly mortgaged and should be exonerated and subsequently brought a suit for a declaration that their personal rights were not affected by the previous mortgage decree. *Held*, they were disentitled from setting up the plea in a separate suit, because failure to do so constitutes the matter *res judicata*. 55 Ind. Cas. 30.

——S. 11—Mortgage suit against father—Omission to plead invalidity—Sons bound.

Where in a suit to enforce a mortgage against the father of a joint Hindu family defendant omits to raise the plea that the mortgage is void under Sch. 3, para. 2, C. P. Code, it is competent to his sons to sue to set aside the decree as regards their shares on that ground. 53 Ind. Cas. 776.

——S. 11, Expln. 4—Mortgage suit—Mortgage by conditional sale followed by simple mortgage—Suit on simple mortgage and purchase of portion of equity of redemption—Suit to enforce conditional sale for full amount—Subsequent suit for declaration of ownership of property purchased in execution barred.

Plaintiff held two mortgages one by conditional sale and the other a simple mortgage. In execution of a decree on the latter mortgage he purchased the equity of redemption in respect of a portion of the properties forming subject of the conditional sale. The plaintiff subsequently sued to enforce the conditional sale for the full amount and the mortgagor paid up the amount. He then sued for declaration of title as regards the property purchased in execution. *Held*, that as plaintiff had deliberately agreed to return the property free from all incumbrances on being paid a certain sum and as that sum had been paid the suit was barred by equitable estoppel. It would not make any difference even if the defendant was in a position to know that the plaintiff had a title under which he could have retained full proprietary rights over a portion of the property concerned. 1 U. P. L. R. (H.C.) 130=52 Ind. Cas. 690=17 A.L.J. 988.

——S. 11—Mortgage suit—Void mortgage—Second suit to recover mortgage money.

In 1896, *K* (father of defendants Nos. 1 and 2) mortgaged to *R* (predecessor-in-title of defendant No. 3) an unrecognized share of a *bhag* stipulating that after 11 years the mortgage money was to be paid on demand either out of property or by the mortgagor or his heirs personally. *R* took possession of land; but his rights under the mortgage were purchased by the plaintiff at a Court-sale. The plaintiff sued in 1910 the defendants for possession of the property. The suit was dismissed on the ground that the mortgage was illegal. In 1911, he filed the present suit to recover Rs. 788-7-0 from the estate of the deceased mortgagor or, in the alternative to recover a smaller sum from the holder of a decree against the representative of the deceased mortgagee. The claim was resisted on the ground that it was barred by limitation and constructive *res judicata*. *Held*, that the claim was not barred by *res judicata* for (1) the claim for possession was not a claim on the mortgage but a claim by purchase by the plaintiff of the mortgagee's rights; and (2) at the time of the suit of 1910 his right according to the terms of the mortgage deed had not matured as no demand was made since the expiry of the eleven years mentioned in the deed. 18 Bom.L.R. 773=36 Ind. Cas. 564=40 Bom. 614.

——S. 11—Mortgage by some members of joint Hindu family—Suit to enforce security—Non-executants impleaded—Subsequent suit for recovery of mortgaged property—Enquiry into invalidity of the mortgage as regards non-executant not barred.

Though the validity of the mortgage as against a non-execution of it cannot properly be raised and determined in a suit to enforce the security in spite of such person having been impleaded as representative of a deceased executant, yet the question can be raised in a subsequent suit for recovery of the mortgaged property and an enquiry into the same is not barred by the doctrine of constructive *res judicata* on the ground that it was not pressed at the trial of the mortgage suit. 23 C.L.J. 587=35 Ind. Cas. 294=20 C.W.N. 675.

——S. 11—Mortgage suit—Preliminary decree—Mortgagor not redeeming—No final decree—Subsequent suit—No bar.

If a mortgagee does not apply in a foreclosure suit for a decree absolute he does not get rid of the relationship of mortgagor and mortgagee. Therefore a mortgagor or his representative who fails to redeem the mortgage within the six months' time is not barred by reason of S. 47, C. P. Code, from filing a fresh suit for redemption nor is his suit barred by S. 11, C. P. Code, but he cannot go behind the decree amount in the prior suit for foreclosure by the mortgagee. *Obiter*.—A dismissal for default of a mortgagor's suit for redemption, does not bar the bringing of a fresh redemption suit by him. 39 Bom. 41=27 Ind. Cas. 249=16 Bom.L.R. 687.

——S. 11, Expln. 4—Mortgage suit—Final decree—Failure of defendant to appear—Subsequent suit for recurring charges—Plea that his properties are not liable—Res judicata.

When without notice to the defendant of an application for amendment, the amendment was allowed and a preliminary decree was passed and the decree-holder afterwards applied for a decree absolute under S. 89, T. P. Act, and notice of this was sent to the defendant and he did not appear upon which a final decree was passed, the defendant will be barred by *res judicata* in a subsequent suit for recurring charges from pleading that his properties are not liable. 25 Ind. Cas. 284=12 A.L.J. 751.

——S. 11—Mortgage suit—Claim of pre-emption not advanced—No res judicata.

The failure to advance a claim to pre-empt as a defendant to a suit on a mortgage is no bar to a subsequent suit for pre-emption. 21 Ind. Cas. 287=9 N.L.R. 143.

——S. 11—Mortgage suit—Payment of decretal amount—Redemption suit.

A mortgagor paying the amount due to puisne mortgagee, who obtained against a prior mortgagee a redemption decree, to which the mortgagor was a party, but who did not execute it cannot subsequently sue for redemption. 24 M.L.J. 534=13 M.L.T. 463=19 Ind. Cas. 589=(1913) M.W.N. 400.

——S. 11 and O. 2, R. 2—Mortgagor's suit for declaration dismissed—Second suit for redemption—Not barred.

Dismissal of suit by mortgagor in possession of property for a declaration that the mortgage had been satisfied and for recovery of money overpaid on the ground that the mortgage-debt had not been satisfied does not bar a subsequent suit for redemption nor does it bar the second suit under O. 2, R. 2 as it was more than a mere suit for account. 19 Ind. Cas. 393=6 S.L.R. 140.

——S. 11—Mortgage suit — Omission to plead previous mortgages in pre-emption suit.

A pre-emption decree was obtained in respect of property which had been sold free of charge with a covenant by the vendor to discharge previous mortgages. The vendee then purchased the previous mortgages and put them in a suit. It was held the suit was maintainable though the previous mortgages had not been put forward in the pre-emption suit as a plea regarding them could not be the subject of a pre-emption suit. 17 Ind. Cas. 318.

——S. 11, Expln. 4—Mortgage by A, B and C—Subsequent mortgage of 2|3 share by B and C—Suit by subsequent mortgagee impleading prior mortgagee—Prior mortgage redeemed—Sale of 2|3 share in execution—Subsequent suit for possession of 1|3 share barred—Old Law.

A, *B* and *C* mortgaged with possession their property to *R*. Subsequently *B* and *C* mortgaged their 2|3 share again to *S*. *S* brought a suit on his mortgage, to which *R* was made a party. *S* redeemed *R's* mortgage fully and caused 2|3 share belonging to *B* and *C* to be sold. He made no prayer in his plaint for possession of the 1|3 share. *Held*, that a subsequent suit for possession of 1|3 share was barred, the question being *res judicata* as *S* ought to have prayed for possession of 1|2 share in his first suit, since the law at the time of the previous suit required a prior mortgagee to be made a party. 10 Ind. Cas. 925=8 A.L.J. 352.

16. (i) Partition suit.

——S. 11, Expln. 4—Suit for partition on basis of gift deed and sale deed—Defence based on allegation of deeds being not true and valid—Omission to set up title as reversioner in defence—Suit subsequently by defendant as reversioner—Res judicata.

Where a plaintiff claims an estate and the defendant resists that claim, he is bound to resist it upon all the grounds that it is possible for him according to his knowledge then to bring forward. Where in a prior suit for partition instituted on the basis of a gift deed and a sale deed, the defendant resists the claim pleading that the deeds of sale and gift were not true and valid, but fails to set up his title as a reversioner in defence, he is debarred on the principle of *res judicata* from claiming as a reversioner, in a subsequent suit, the same properties. The omission to set up title as a reversioner in the former suit operates as *res judicata* in the later suit. 47 Ind Cas. 141, diss.; 5 I.A. 149; 19 I.A. 234; 52 I.A. 100, foll. 27 Pat. 835=A.I.R. 1949 Pat. 340.

——S. 11, Expln. 4—Plaintiffs' predecessors claiming partition of whole shamilat—Subsequent suit by plaintiff claiming that certain well and land in shamilat was not liable to be partitioned.

Plaintiff's predecessors instituted a suit claiming that entire *shamilat* was liable to be partitioned. Plaintiffs brought a subsequent suit to the effect that certain well and land in the *shamilat* should be excluded:

Held, that in the previous suit it was the duty of the predecessors of the plaintiffs to plead that the well and the land in dispute should be excluded from partition as the *shamilat* was being partitioned at that time. As they did not raise any such plea in the previous suit, the present suit was barred under Expln. 4 to S. 11, C. P. Code. A.I.R. (Vol. 25) 1938 Lah. 671=40 P.L.R. 940=181 Ind. Cas. 262.

——S. 11—Partition suit—Preliminary decree—Finding that family was joint till suit—Res judicata in final decree proceedings.

Though the institution of a suit for partition, whether resulting in consequential judgment or not effects severance in status, where the preliminary decree for partition in a subsequent suit proceeds on a clear finding that the family was still joint till the institution of the latter suit, it is not open to the plaintiffs to go behind the preliminary decree and claim during final decree proceedings that there had been separation prior to the latter suit. A.I.R. 1930 Pat. 260=126 Ind. Cas. 372.

——S. 11—Partition suit—Decree in—Res judicata against parties to suit.

If a co-sharer applies for a partition the other sharers must be made defendants, because the partition which is made in his favour is a partition against his co-sharers. That which gives him a portion of the property takes away all right which they would otherwise have to that portion and therefore it is a decree against them and in favour of himself. A decree for partition in a suit instituted by one member of a joint family impleading the others as parties is *res judicata* between all the sharers who are parties to the suit. 1 L.W. 607=16 M.L.T. 544=21 C.L.J. 23=17 Bom.L.R. 1=19 C.W.N. 531=24 Ind. Cas. 294=(1914) M.W.N. 948=27 M.L.J. 76 (P.C.).

——S. 11—Partition decree—Unnecessary final decree—Failure to appeal—Binding in execution.

A decree in a partition suit was passed on the 10th January, 1910, the plaintiff being under the impression that the decree in a partition suit was a preliminary decree and required a further decree to make it final, applied to the Court, on 23rd October, 1912, to have the decree made final, and the decree was made final on the 10th of February 1913, erroneously.

Held, that an application for execution presented on 8th October, 1913, was within time. The defendant not having appealed from the order of the 10th February, 1913, it was not open to the defendant to contend that the application for final decree and the order made on that application were not made in accordance with law. 8 Cal. 51 (P.C.); 15 Bom. 242 and 44 Bom. 227, Foll. 61 Ind. Cas. 159=45 Bom. 952=23 Bom.L.R. 308=A.I.R. 1921 Bom. 260.

——S. 11—Son getting decree declaring sale by father not binding—Alienee subsequently suing for general partition—Res judicata regarding properties sold.

Father alienating some properties—Son getting decree declaring the sale not binding on him and for recovery of his share after father's death—Alienee subsequently suing for general partition—Matter is *res judicata* as regards properties sold, but the alienee can get other properties as substitute. 49 Mad. 483=91 Ind. Cas. 868=1925 M.W.N. 844=A.I.R. 1926 Mad. 241=49 M.L.J. 679.

——S. 11—Partition suit — Property not included in former suit by mistake—No res judicata.

The plea of *res judicata* cannot be raised in a suit for partition if certain property is, by mistake, omitted to be included in the former suit for partition. A.I.R. (Vol. 21) 1934 Oudh 293=10 Luck. 61=11 O.W.N. 528=149 Ind. Cas. 244.

——S. 11—Partition suit—Omission to include all properties—As a bar.

In a partition all the properties of the family should be included. It is not open to a member of the joint family to ask for a partition of a certain item and leave the rest except in cases where some of the items could not be divided by reason of their being in possession of usufructuary mortgagees or being under a long lease or set apart for maintenance of a widow or some member of the family or some other reasons. It is not left to the option of the plaintiff in a partition suit to ask for relief in respect of certain properties and then to say that he would ask for partition of the other properties at some future time, when the circumstances above adverted to are not present. When parties are ignorant as to the existence of some family property and divide the property that is known to them and if afterwards it be discovered that some property belonging to the joint family has been left undivided, there could be no omission to sue within the meaning of R. 2 of O. 2 unless the plaintiff was at some time prior to the suit aware or informed of the claim or of the facts which would give him a cause of action, and therefore it cannot be said that he ought to have included

it in the previous suit. 98 Ind. Cas. 538=38 M.L.T. 82=A.I.R. 1927 Mad. 213..

——S. 11—Two lands kept undivided—Suit for partition of one—Another not included—Subsequent suit to recover share in other—Not barred.

Members of a joint family partitioned part of the property among themselves in 1875 and kept undivided two pieces of land which were left in the possession of defendants, one in that of defendants 1 to 4 and the other in that of 5 to 6. Defendants 1 to 4 sued plaintiffs and defendants 5 to 6 for partition of the piece of land in possession of defendants 5 and 6. The plaintiffs raised a plea of inclusion of the other piece of land. The point was left undecided. Then subsequently a suit was brought by the plaintiffs to recover their share in the land in possession of defendants 1 to 4. It was contended that the suit was barred by *res judicata.*

Held, that the suit was not barred by *res judicata* under S. 11 (4) for the plaintiffs could not be said to be compelled to bring the land in suit for partition in previous suit where the suit was brought by tenants-in-common to recover their share. 31 Bom. L.R. 640=119 Ind. Cas. 779=A.I.R. 1929 Bom. 323.

——S. 11—Prior partition suit—Subsequent suit in respect of after acquisitions—Not res judicata.

In a prior suit for partition in 1904 a house mortgaged to the family by one *S* was not included. Court ordering in 1910 that *S's* house on possession being taken should be divided half and half, plaintiff sued in 1922 to recover a half portion of the house recovered from the debtor.

Held, that the suit was not barred by *res judicata.* The house was not included in the plaint in the previous suit. It was a subsequent acquisition by defendant 1 on behalf of the family, and in the decree passed by the trial Court partition could not have been and was not in fact ordered with regard to the plaint house. 30 Bom.L.R. 912=113 Ind. Cas. 173 =A.I.R. 1928 Bom. 365.

——S. 11—Partition—Suit for—Different causes of action.

A prior suit by the plaintiff for partition under a partition deed and a will was dismissed. The plaintiff brought the present suit after the death of his father for partition of joint family property.

Held, that the plaintiff's subsequent suit was not barred by *res judicata* because the cause of action in the prior suit was the partition deed executed by his father and there was no obligation on him to sue in the alternative for a partition of the property as joint family property, though he certainly might have done so if he liked. 77 Ind. Cas. 92=25 Bom. L.R. 797=A.I.R. 1923 Bom. 467.

——S. 11—Co-sharer—Suit for possession on allegation of partition—Allegation found against —Subsequent suit for partition whether barred.

Plaintiff and defendant were co-sharers in a holding. Plaintiff sued for possession of a specific portion of the holding on the allegation of a prior amicable partition between the parties. This allegation was found against and plaintiff was given a decree for a half share in the plaint portion of the holding. Subsequently plaintiff sued for a partition of the whole holding. *Held,* that the suit was not barred by S. 11, Expln. 4, C. P. Code. *Held further,* that the objection to the suit fell under O. 2, R. 2 (3), rather than under S. 11, Expl. 4, but as the cause of action for the two suits were different, O. 2, R. 2 also did not bar the second suit. 11 L.B.R. 1=64 Ind. Cas. 174=A.I.R. 1921 L.B. 13.

——S. 11—Partition suit—Subsequent claim for maintenance—Not barred.

A suit for maintenance is not barred by *res judicata* by a previous one for partition in which plaintiff was impleaded as a party but did not claim maintenance. 18 Ind. Cas. 764=17 C.W.N. 341.

——S. 11—Partition suit—Not a bar to suit for share of gifted property.

A suit for a declaration of a co-sharer's right to certain property gifted by an ancestor is not barred by reason of his having instituted a prior suit for partition of the inheritances. 121 P.L.R. 1917=40 Ind. Cas. 255=87 P.W.R. 1917.

——S. 11, Expl. 4 (S. 13, Expl. 2, Old Code)—Previous suit for partition rejected on ground of limitation—Second suit for partition by defendant.

In 1875 defendants 6—9 sued for partition and the High Court dismissed their claim decreed to them by the District Judge on the basis that an agreement found by him to have been arrived at by the parties previously to manage the properties by rotation was barred by limitation. In a suit in 1901 by the same defendant in the prior suit for partition: **Held,** that the suit is not barred by **res judicata** as the High Court's finding on the question of limitation in the first litigation proceeded on the ground of an agreement between the parties to enjoy the property by turns, and as the question whether that made the property impartible in the sense that the defendants in that suit could not ask for a partition by metes and bounds was not and could not be decided by the High Court, so as to bind the defendants therein since the finding that the plaintiffs in the prior litigation had lost their right to the property was enough to dispose of the case. (1903) 5 Bom.L.R. 737.

16. (j) Pro forma defendant.

——S. 11, Expl. 4—Pro forma defendant—Rent decree—Amount of rent—No res judicata.

Plaintiffs brought a suit for rent against *G* and impleaded *A* as *pro forma* defendant. Rent was claimed at the rate of Rs. 572 4-9. It was alleged in the plaint that the *jama* of Rs. 1,142-9-6, used to be realised jointly from *G* and from *pro forma* defendant *A* up to certain year but thereafter *A* paid his share of rent separately. The claim was for half share of the rent payable by *G*. No relief was asked for against *A*. He, however, gave evidence for the plaintiffs in support of their case of separate collection. After the close of the argument the plaintiffs' pleader filed a petition paying that a joint decree might be passed against the defendants *G* and A. The Court accordingly passed a joint decree against *G* and *A*, but neither was the plaint amended nor was *A* given an opportunity to be heard. Subsequently the plaintiffs and *G* filed a petition of compromise, in which they prayed that the suit should be dismissed against *A* as he had paid his share of the rent separately and that the compromise be treated a part of the decree. In the subsequent suit for rent by the plaintiffs against the heirs of *A*:

Held, that the decree in the previous suit did not

operate as *res judicata* regarding the amount of jama. As no relief was sought against *A* in the former suit it was not at all necessary for him to raise any defence in the suit, and Expl. 4 to S. 71, C. P. Code, did not apply. As the decree was passed behind the back of *A* it was not effective against *A*. Even assuming that the decree could be regarded as having been passed on admission as against *A*, the subsequent petition of compromise had the effect of superseding that consent decree. The decree could not therefore operate as *res judicata* against *A* or his heirs. A.I.R. (Vol. 29) 1942 Pat. 120=8 B.R. 121=196 Ind. Cas. 837.

——S. 11, Expl. (4) (S. 13, Expl. 2, Old Code)—Applicability—Defendant having no interest—No decree against such person—Finling not res judicata.

Where a person who is not interested in the subject-matter of a suit is made a defendant, a judgment in that suit cannot be used as *res judicata* in a subsequent suit between the said person and the plaintiff in that suit. Where, as a matter of fact, the decree in the former suit (brought against three brothers) directed delivery of possession in hands of two brothers, though upon the ground that there was no partition between the brothers, the decree is not against the other brother, who could not, therefore, have appealed against such a decree. L.R. 12 I.A. 23 at p. 34, followed. The finding in such suit that there was no partition is not *res judicata* in a subsequent suit brought by the other brother for a declaration that the properties in his possession and not included in the former suit are his exclusive properties having fallen to him as his share in a partition. S. 11, Expl. 4 (S. 13, Expl. 2, Old Code) can have application only when the matter urged in the subsequent suit could have formed a defence to the first suit. (1900) 14 M.L.J. 281.

——S. 11, Expl. 4—Pro forma defendant—Representative suit.

Where one of several persons interested in a property brings a suit and the others interested are made *pro forma* defendants, the latter cannot, upon the failure of the plaintiff, harass the defendant upon the same cause of action in a fresh suit. 44 Ind. Cas. 546.

——S. 11, Expl. 4—Pro forma defendant—Properties not claimed against him though claimed against others—Defence not set up—Subsequent suit to recover properties from him—Decision in first suit—Effect.

A person impleaded as *pro forma* defendant in a suit would be as much bound by the decision there as any other defendant. A person brought in to defend his rights in respect of one property in a suit ought to set up his rights, if any, to the other properties as well and cannot avoid the bar of *res judicata* in a subsequent suit on the ground that he was not called upon to assert his right in respect of the other properties in the first suit. 8 W.R. 366; 39 Cal. 527 (P.C.); 24 All. 429 (P.C.) and 24 All. 599, foll. (1917) M.W.N. 336=38 Ind. Cas. 184 =5 L.W. 659.

16 (k). Relief not claimed.

(i). When *res judicata*.

——S. 11, Expl. 4—Omission to claim relief claimable in prior suit—Res judicata.

Where a party could obtain a relief in a suit but fails to pray for it, and the rights of the parties are fully adjudicated upon in the suit, the party failing to raise the point and to claim such relief must be held to be debarred from raising that question and claiming the relief in a later suit. 228 Ind. Cas. 553=1947 A.L.W. 261=1947 A.W.R. (H.C.) 313 =A.I.R. 1947 A. 311.

——S. 11—Mahomedan widow in possession in lieu of dower—Suit by one of the heirs for his share—Omission to claim interest on dower—Claim barred.

Where a Mahomedan heir sues for recovery of his share the widow of the deceased, who is in possession of her husband's estate in lieu of her dower, and the widow does not claim interest on the dower debt the claim to such interest is barred by the decree passed in such suit and her legal representative cannot claim the same in a subsequent suit. A.I.R. 1927 All. 39, Affirmed. 57 I.A. 181=34 C.W.N. 653=1930 A.L.J. 873=A.I.R. 1930 P.C. 177=126 Ind. Cas. 430=52 A. 272=1930 M.W.N. 1049=32 L.W. 26 =32 Bom.L.R. 1519=52 C.L.J. 222=59 M.L.J. 262.

——S. 11—Suit on mortgage bond—Omission to claim relief against person—Such relief cannot be claimed in subsequent suit.

It is the policy of the Code of Civil Procedure, 1908, as it was the policy of the Code of Civil Procedure, 1882, that parties should not have the right to split up a cause of action against defendants and claim a decree on it in a later suit when they might have claimed the same on it in a previous suit. Where, in a previous suit on a mortgage bond, the plaintiff omitted to claim relief against the person and other property of the defendants,

Held, that they cannot claim that relief in a subsequent suit relating to the same bond. 24 A.L.J. 33=91 Ind. Cas. 1033=1926 M.W.N. 49=5 Pat. 135=7 P.L.T. 97=28 Bom.L.R. 1126=30 C.W.N. 482=52 I.A. 418=42 C.L.J. 592=A.I.R. 1925 P.C. 280=50 M.L.J. 1 (P.C.).

——S. 11—Counter-claim—Omission to claim standard rent—Subsequent suit—Bombay Rent Act, 1918.

The present defendant had made a counter-claim in the suit in the High Court in which he prayed that "it may be declared that the defendant is a monthly tenant of the plaintiff at a monthly rental of Rs. 185." In this suit he contended that he was liable to pay only Rs. 150 and not Rs. 185, per month under the Bombay Rent Act (1918),

Held, it was not only relevant but necessary for the defendant to plead in the first suit that he was liable to pay not Rs. 185 but only Rs. 150 as a standard rent, under the Rent Act. It does not appear to be open now to the defendant after having obtained a declaration and the further relief by way of injunction on a certain footing to say that it is still open to him to claim the benefit of the Rent Act after having by necessary implication given up what he might have been entitled otherwise to claim in this Court when he made his counter-claim. 24 Bom.L.R. 1281=70 Ind. Cas. 103=A.I.R. 1923 Bom. 145.

——S. 11—Suit for mere declaration—Subsequent suit for possession barred.

Where the plaintiffs in a previous suit prayed only for declaration and did not ask for possession which they were entitled to and ought to have asked.

Held, that their failure to do so clearly precludes them from asking for it afterwards under R. 2, O. 2 of the C. P. Code and makes the question of their right to that possession *res judicata* against them under Expl. 4 of S. 11 of the C. P. Code. 4 N. L.J. 192=65 Ind. Cas 194=21 N.L.R. 124=A.I. R. 1922 Nag. 129.

——S. 11—Mortgage suit on failure to pay principal and interest—Omission to claim personal decree—Effect.

Where the cause of action is the failure to repay the principal and interest due under the bond and the relief claimable is both against the property hypothecated and against the executants of the bond on their covenant to repay, if the mortgagees omitted to sue for a personal decree against the mortgagors on the covenant, they could not afterwards sue for that which was omitted 1 Pat. 506=3 P.L.T. 709=65 Ind. Cas. 945=A.I.R. 1922 Pat. 450.

——S. 11—Mortgage suit—Counter claim arising out of the mortgage transaction not raised.

Where a mortgage has ripened, all claims relating to the mortgage between parties thereto, must be determined in one suit, whether for sale, foreclosure or redemption. Where in a mortgage suit, the defendant omits to put forward a counter claim due to him by the mortgagee, arising out of the mortgage transaction, a separate suit for such recovery is barred. 60 Ind. Cas. 226=12 M.L.W. 173.

——S. 11—Suit against different defendants on alternative causes of action—Omission to claim relief against added defendants—Effect of.

The rule of constructive *res judicata* in practice depends upon the particular facts of each case. The plaintiff filed a suit against the defendant for breach of a contract entered into through brokers, and on the defendant's denial of the contract joined the brokers as co-defendants under O. 1, R. 4, C. P. Code, but claimed no relief against them, and the suit against the principal defendant was dismissed, and plaintiff filed a second suit against the brokers for damages under S. 235 of the Contract Act.

Held, Per *Pratt, J.C.*—That the second suit against the brokers was barred under Expl. 4 to S. 11 of the C. P. Code because the plaintiff failed to seek this relief in the first suit. Per *Crouch, A.J.C.,* contra.—To hold that, where a person is joined under O. 1, R. 4, C. P. Code, the plaintiff not only can, but must include all grounds of attack against him under penalty of being debarred from ever obtaining relief to which he may prove entitled, is an extension of law which is not authorised by the terms of the C. P. Code or by practice or by any reported decision. 36 Ind. Cas. 92=10 S.L.R. 29.

(ii). When not res judicata.

——S. 11—Previous suit confined to a particular right—Plea claiming general right in subsequent suit—Not barred.

Where in a suit by Hindus against a Government Order denying them the right to play music at the 'medai' during the 'Mari Amman' festival, the right was granted by the Court, they are not precluded by constructive *res judicata* from claiming, in a subsequent suit, a general right to play music in the public street during the festival since it was not incumbent on the Hindus to claim such general right in the former suit. 1930 M.W.N. 520=31 M.L.W. 845=A.I.R. 1930 Mad. 701=58 M.L.J. 703.

——S. 11—Suit by one alienee from members of joint family impleading another alienee of other items—Latter is not bound to enforce his remedy in the same suit.

It cannot be contended that, because one alienee brings a suit to recover property demised to him by members of a joint family, another alienee who is made a party is bound to enforce his remedy in that same suit, and he is not, therefore, barred from subsequently suing for the same. 97 Ind. Cas. 783=A.I.R. 1927 Mad. 61.

——S. 11—Suit for specific performance—Claim for possession not obligatory.

In a suit for specific performance of a contract of sale though a claim or possession might be made it is not obligatory upon the plaintiff to make such a claim. 27 Bom.L.R. 42=86 Ind. Cas. 137=A.I.R. 1925 Bom. 181.

——S. 11—Relief not granted because not claimed—No res judicata.

Where a Court refuses to grant a relief on the ground that no such relief was claimed such refusal does not bar a subsequent suit for relief. 41 Ind. Cas. 80=4 O.L.J. 354.

16 (1). Set off or counter-claim.

——S. 11—Failure to plead set off or counter-claim.

Where a person who could put forward a counter-claim or plead an equitable set off does not do so, his subsequent suit for such a claim, or claim to set off would not be barred by reason of his not having put it forward in the suit against him. 24 M.L.W. 282=97 Ind. Cas. 488=A.I.R. 1926 Mad. 1020.

——S. 11—Suit by agent against principal—Cross-claim for damages—Failure to raise—Effect.

Where in a suit by an agent against the principal, the principal had a claim for damages against the agent in respect of a certain transaction but failed to have the issue tried but the agent gave credit for a certain sum in respect of that transaction and a decree was passed on the footing that the principal was entitled to that credit,

Held, that the decree did not preclude the principal from maintaining another action for damages. 1925 M.W.N. 228=90 Ind. Cas. 465=A.I.R. 1925 Mad. 830=49 M.L.J. 14.

——S. 11, Expl. 4—Set off—Omission to put forward.

The fact that a defendant omitted to claim a set-off in a suit brought against him by the plaintiff would not bar his claim in a subsequent suit as he was under no obligation to avail himself of the right to claim a set-off in the former suit. 52 Ind. Cas. 850=74 P.R. 1919.

——S. 11, Expl. 4—Set-off.

A defendant who can claim a set-off is not bound to put forward his claim in answer to the suit against him, and his omission to do so cannot take away his right to sue for the amount subsequently. 29 Ind. Cas. 34=28 M.L.J. 513.

——S. 11, Expl. (4) (S. 13, Expl. 2, Old Code)—Suit for general balance of account—Omission to counter-claim refunds due—Subsequent suit for refunds—Res judicata.

The plaintiffs sued the defendant to recover cer-

tain unspecified sums alleged to have been relized on their behalf by the defendant as refunds of octroi duty. The defendant had previously sued the plaintiffs for a general balance of account and the plaintiffs as defendants in that suit, had mentioned, but omitted to counter-claim, the refunds of octroi duty now sued for. *Held*, that S. 13, Explanation II, of the Code of Civil Procedure applied, and the suit was barred. 1907 A.W.N. 275=4 A.L.J. 675.

——S. 11, Expl. 4 (S. 13, Expl. 2, Old Code)—Rent suit—'Ex parte' decree—Claim of set-off in subsequent rent suit—Res judicata.

In a suit for rent, the defendant claimed a set-off for a certain sum which he said he had paid on account of previous arrears of rent but for which no credit had been given by the plaintiffs in a suit for the rent of that period. The suit had been heard *ex parte* and decreed in the plaintiff's favour. *Held* —That the plea of payment new raised should have been made a ground of defence in the previous suit and the defendant was precluded from claiming a set-off in regard to it by S. 11, Expl. 4 (S. 13, Expl. 2, Old Code). I.L.R. 20 All. 110, followed. (1906) 35 C. 979=8 C.L.J. 82=12 C.W.N. 862.

16 (m). Scope of Rule.

—S. 11, Expl. 4—Applicability—Conditions.

Explanation 4, S. 11 cannot be given effect to bar a suit, unless all the requisite conditions laid down in the body of the section are also fulfilled. A.I.R. 1930 Mad. 264=127 Ind. Cas. 139.

——S. 11—Essentials of constructive res judicata.

In order to bring a case within the rule of *res judicata* both the elements laid down in S. 11, Expl. 4, C. P. Code, must be established; and it must be proved that the matter could have been and ought to have been raised in the previous suit. Whether it ought to have been raised by the defendant depends entirely upon the circumstances of a particular case and the pleadings of the plaintiff in the suit. A.I.R. (Vol. 26) 1939 Cal. 692=70 C.L.J. 415=43 C.W.N. 1126=I.L.R. (1939) 2 Cal. 551=188 Ind. Cas. 17.

——S. 11, Expl. IV—Applicability—Conditions.

For the applicability of Expl. 4 to S. 11, C. P. Code, it is not only necessary that the defendant could have raised the defence in reply to the former suit but it must also be shown that he was bound to do so. I.L.R. (1946) Nag. 159=1946 N.L.J. 690 =A.I.R. 1946 Nag. 277.

——S. 11, Expl. 4—Conditions of applicability.

In order that Expl. 4 to S. 11, C. P. Code, should apply, it is not only necessary that the defendant could have raised the present defence in reply to the former suit, but it must also be shown that he was bound to do so. A.I.R. (Vol. 20) 1933 Lah. 279=146 Ind. Cas. 395=34 P.L.R. 925.

——S. 11—Where a point was not raised by the defendant in the previous suit though it could have been raised, the question cannot be raised in the subsequent suit between the same parties because it is *res judicata* against the defendant. A.I.R. (Vol. 26) 1939 All. 449=1939 A.L.J. 353=1939 A.W.R. 321 =183 Ind. Cas. 432.

——S. 11—Where a person is a party to the suit and a decree is passed in his presence such decree would be binding on him and he cannot in a subsequent suit raise a point which he could have taken in the former suit. A.I.R. (Vol. 20) 1933 Pat. 526=149 Ind. Cas. 1047.

——S. 11—Plea abandoned.

Where assignors who had applied to set aside the sale on the ground, among others, that the sale was held without taking the permission of the Court which appointed the receiver, had subsequently abandoned that ground, their assignee, could not urge that ground again by way of defence to a suit. 27 C.W.N. 38=37 C.L.J. 265=76 Ind. Cas. 241=A.I.R. 1923 Cal. 121.

——S. 11—Plea that might have been raised.

The fact that plaintiffs might have raised a certain plea in the alternative in a former suit but which it cannot be said they ought to have so raised, does not preclude a fresh suit in respect of the plea. 3 L.L.J. 215=63 Ind. Cas. 717=A.I.R. 1921 Lah. 17.

——S. 11—Might and ought—Scope of the rule.

Before any argument can be advanced on the basis of Expl. 4, it must be shown that the matter sought to be concluded, not only might have been a ground of attack or defence but that it ought to have been so made. 60 Ind. Cas. 393=2 Pat.L.T. 285.

——S. 11, Expl. 4—Might and ought—Scope of the rule.

Where it is not certain that a matter would have affected the result of the suit it cannot be said that it ought to have been made a ground of attack within S. 11, Expl. 4, 46 Ind. Cas. 929.

——S. 11—Scope of the rule.

The mere failure to have adjudicated upon in a suit, a plea which might have been a ground of defence does not necessarily operate as *res judicata*. 25 Ind. Cas. 615=1 L.W. 821.

——S. 11, Expl. 4—'Ought'—Scope of the rule.

The word 'ought' in Expl. 4 should be considered with reference to the array of parties in the previous litigation and the nature of the relief claimed. 4 Ind. Cas. 763, foll. 17 Ind. Cas. 334.

——S. 11, Expl. 4—Argument open to party but not advanced—Decision adverse to party—Res judicata.

It is no answer to a plea of *res judicata* that an argument which could be advanced was not advanced in the previous suit. Where in a prior suit which was hotly contested on almost all possible pleas, a decision is given which is adverse to the contesting party, it cannot but be binding on him and his successors. Where an argument was open to the party, the fact that he did not advance it would not remove the bar of *res judicata*, if it is otherwise binding. 21 Luck. 463=A.I.R. 1947 Oudh 45=226 Ind. Cas. 154.

——S. 11—Matter ought to have been raised—Test.

A matter directly and substantially in issue may be in issue constructively. The question whether a matter ought to have been made a ground of defence must depend on the particular facts of each case. As a rule of general application, it may be said that if

the introduction of a matter into a suit was necessary for a complete and final decision of the right claimed by the plaintiff therein, it must be deemed to be a matter which ought to have been made a ground of attack or defence in that suit unless the matters in that suit and the subsequent suit are so dissimilar that their union might lead to confusion. A.I.R. (Vol. 29) 1933 Cal. 900=37 C.W.N. 1001 =60 C. 1158=149 Ind. Cas. 522.

——S. 11—Might and ought—Test of.

The test to be applied in order to determine whether a matter ought to have been made a ground of attack in a previous suit is whether the matters are so dissimilar that their union might lead to confusion. 25 Bom. 189, foll. A.I.R. 1930 Lah. 487=12 L.L.J. 157 =126 Ind. Cas. 570.

——S. 11, Expl. 4—Question whether defence ought to have been raised should be decided with due regard to circumstances.

Explanation 4 to S. 11 of the C. P. Code, provides that any matter which might and ought to have been made ground of defence or attack in former suit shall be deemed to have been a matter directly and substantially in issue in such suit. That it might have been made a ground of defence does not admit of doubt but the question whether that defence ought to have been raised or not has to be decided with due regard to all the circumstances. A.I.R. (Vol. 24) 1937 Oudh 159=1936 O.L.R. 632=1936 O.W.N. 1069=12 Luck. 540=165 Ind. Cas. 373.

——S. 11—Whether a particular matter should have been made a ground of defence or attack must depend upon the particular facts of each case. 5 O.W.N. 653=112 Ind. Cas. 266=A.I.R. 1928 Oudh 411.

——S. 11, Expl. 4—Scope of the rule—Omission to raise a point.

S. 11, Expl. 4, applies even where the matter in dispute was not heard and finally decided in the former suit. The question whether the person ought to have raised a point in a suit so that his failure to raise it should preclude him from raising it in a subsequent suit is a question of fact. 56 Ind. Cas. 193.

——S. 11, Expl. 4—Conditions of applicability —Evidence would have been inconsistent with evidence parties would have to adduce otherwise—Subsequent suit, if barred.

In order to bar a subsequent suit, it must be shown that the ground of attack or defence taken therein was such as could conveniently have been raised in the previous suit, without leading to any confusion at the trial and without the risk of destroying the evidence led in support of the main allegation and the determination of the question that it ought to have been raised depended upon the particular facts of each case. It is not enough that the ground of attack or defence might have been raised; it is also necessary to establish that it should have been raised, and that the title in both, suits was the same. Only those grounds of attack or defence would be barred which related to the same matter and which were necessary to be raised before either to gain success or to avoid defeat, and which could have been raised without any risk of inconsistency or confusion.

Where it appeared that the plaintiffs should not have raised their present ground of attack in the previous suits without creating great confusion and the evidence which they could lead to support it would have been inconsistent with the evidence they had to adduce otherwise, the ground taken in the subsequent suit is one which need not have been raised before and the subsequent suit would not be barred by S. 11, Civil P. C. A.I.R. (Vol. 22) 1935 Lah. 753 =156 Ind. Cas. 543.

——S. 11—Inconsistent grounds of attack or defence.

Before any argument can be advanced on the language employed in Expl. 4 of S. 11, it must be established to the satisfaction of the Court that the matter not only might have been made a ground of defence or attack in such former suit but further that it ought to have been so made.

Where the evidence in support of one ground is such as might be destructive of the other ground, the two grounds need not be set up in the same suit. 35 Bom. 507, Foll. 60 Ind. Cas. 393=2 P.L.T. 285 =A.I.R. 1921 Pat. 326.

——S. 11—Question raised in subsequent suit such as could not have been raised in previous suit.

Explanation 4 to S. 11, has no application where the question raised in the subsequent suit could not have been raised in the former suit. A.I.R. (Vol. 29) 1942 Oudh 286=1942 O.W.N. 34=200 Ind. Cas. 126.

——S. 11, Expln. 4—Identity of subject-matter if necessary.

If the decree made in the earlier suit is such as would be inconsistent with the plea which might and ought to have been raised, but not actually raised, it must be taken that there has been, for the purpose of *res judicata,* a final decision by necessary implication, otherwise the rule of constructive *res judicata* as formulated in S. 11 of the Code would be rendered almost nugatory. In question of *res judicata* identity of the issues and not identity of the subject-matter is relevant. To hold that there would not be a constructive *res judicata* unless the subject-matter be identical would be to introduce in Expln. 4 to S. 11, C. P. Code, words which are not to be found there. A.I.R. (Vol. 29) 1942 All. 410= 1942 A.L.J. 506=I.L.R. (1942) All. 624=203 Ind. Cas. 371. [A.I.R. (Vol. 18) 1931 All. 73=1930 A.L.J. 1572=129 Ind. Cas. 734.]

——S. 11, Expln. 4—Identity of issues and not identity of subject-matter is relevant.

If the decree made in the earlier suit is such as would be inconsistent with the plea which might and ought to have been raised, but not actually raised, it must be taken that there has been, for the purpose of *res judicata,* a final decision by necessary implication. Actual decision on a plea not taken cannot be possible and unless this is the principle, the rule of constructive *res judicata* as formulated in S. 11 of the Code would be rendered almost nugatory. In questions of *res judicata* identity of the issues and not identity of the subject-matter is relevant. To hold that there would not be constructive *res judicata* unless the subject-matter be identical would be to introduce in Expln. 4 to S. 11 of the C. P. Code, words which are not to be found there. 157 Ind. Cas. 381 =61 C.L.J. 301=39 C.W.N. 692.

——S. 11, Expln. 4—Scope of the rule—Identity of subject-matter.

Section 11, Expln. 4, can only be properly applied to cases where the subject-matter of the two suits is the same. 4 O.L.J. 648=44 Ind. Cas. 368=21 O.C. 1.

——S. 11, Expl. (4) (S. 13, Expl. 2, Old Code) —Identity of subject-matter or of issues—Necessity for—When Res judicata.

The question, whether an issue as to the rate of rent generally is a direct or indirect issue in a suit for arrears of rent, must be determined with reference to the frame of such suit, and cannot be determined upon any general *a priori* grounds; if the rent is claimed at a certain annual rate on the simple ground of rent having been paid at that rate in the preceding year, it cannot be said that an issue as to the annual rate of rent generally, is a direct issue in such a suit. On the other hand, if the rent is claimed at an nuual rate alleged to have been stipulated for in a binding contract between the parties, either written or oral, and the Court proceeds to try the question what is the yearly rent payable according to the contract set up, the general issue must be taken to be a direct one. Explanation S. 11, Expl. 4 (S. 13, Expl. 2, Old Code) which provides that any matter which might and ought to have been made ground of defence or attack in such former suit, shall be deemed to have been a matter directly and substantially in issue in such is applicable only when the subject-matter of the two suits or of the issues raised therein is identical. (1904) 1 C.L.J. 248.

——S. 11, Expln. 4—Defences—Matter which might have been made a ground of defence, if res judicata—Cause of action in two suits not identical.

A matter which might have been made a ground of defence in a former suit may be *res judicata* in a subsequent suit even though it has not been actually decided there. Identity of causes of action in the two suits is not a condition requisite for the application of the doctrine of *res judicata.* 11 Ind. Cas. 346=14 O. C. 117.

——S. 11, Expln. 4—Applicability—Point raised in pleadings but neither put into issue nor argued.

Raising of a point, which was actually raised in the pleadings in the previous suit but was neither put into issue nor argued, in a subsequent suit will not be barred by principle of constructive *res judicata.* A.I.R. (Vol. 26) 1939 Cal. 1=68 C.L.J. 305=181 Ind. Cas. 674.

——S. 11, Expln. 4—Question raised but not decided.

When a question has been raised but has not been decided, no constructive *res judicata* can arise. A. I.R. (Vol. 20) 1933 All. 481=146 Ind. Cas. 457.

——S. 11—The rule of constructive *res judicata* can only apply to matters actually decided by the judgment and to all matters which are necessarily deemed to have been decided by that judgment. But where the relief prayed is not dependent on the adjudication of a particular matter in issue, it cannot be said that that matter must be deemed to have been also decided by the judgment specially when the judgment has been appealed against and the whole matter is set at large and the appellate judgment confines itself only to the decision of a particular matter in issue. A.I.R. (Vol. 28) 1941 Mad. 753=1941 M.W.N. 489=200 Ind. Cas. 492.

——S. 11, Expln. 4—Admission by party in previous suit of certain facts for getting decision on question of law—Suit, if involved decision as to facts.

Under S. 11, Expln. 4, C. P. Code, the question is whether a matter ought to have been raised by a party in the previous suit. It is not sufficient that the matter might have been raised and if raised a decision on it might have resulted in the dismissal of the suit against him. If the party in the previous suit chose to admit certain facts for the purpose of getting a decision on an important question of law, it is impossible to say that the suit involved a decision as to the facts and in the circumstances Expln. 4 cannot be used to preclude the party from raising the point. 76 I.A. 85=53 C.W.N. 489=I.L.R. (1949) Bom. 110=62 L.W. 444=1949 M.W.N. 407=A.I.R. 1949 P.C. 143=51 Bom.L.R. 635=(1949) 2 M.L.J. 161 (P.C.).

——S. 11, Expln. 4—Express order of Court leaving matter open.

Explanation 4 imports a fiction into S. 11, Civil P. C. Having provided that a matter which might and ought to have been made a ground of defence or attack in a former suit, it introduced a fiction that it shall not only be deemed to have been raised, but also to have been directly and substantially in issue in that suit. This would not have been, however, enough for the purpose of S. 11, until the matter was presumed to have been decided. It therefore imported a further fiction that it should also be deemed to have been heard and finally decided. Whree there is an express order by the Court that the matter would be left open, it is impossible to permit any such fictition to be introduced in this case. The contention is devoid of any force and must be repelled. A.I.R. (Vol. 26) 1939 Mad. 818=50 L.W. 183=(1939) 2 M.L.J. 214=1939 M.W.N. 860=188 Ind. Cas. 710.

——S. 11, Expl. 4—Issue raised but referred by Court to separate suit—Res judicata.

Where the defendant's right to the relief which he seeks in a subsequent suit instituted by him might and ought to have been raised in the earlier suit against him, and where he had in fact raised it in the earlier suit, but the Court remitted him to another suit, the subsequent suit would still be barred by *res judicata,* notwithstanding that liberty had been expressly reserved to him to institute a separate suit. A.I.R. 1947 Cal. 393.

——S. 11—Proceeding under S. 47—Party directed to file regular suit—Institution of suit —Objection to maintainability of suit.

Where a person who was a party to a decree for partition applied for removing an obstruction to delivery of possession and the Court decided that the matter did not fall within the purview of S. 47, C. P. Code and directed him to file a regular suit, and when he filed a regular suit it was contended that the suit was not maintainable but only an application under S. 47, C. P. Code, lay:

Held, the previous order of the Court was *res judicata* and the fact that the defendants' counsel had not persisted in this objection in the previous case could not affect the question of *res judicata* though it may be an answer to a possible plea of estoppel. A.I.R. (Vol. 22) 1935 Mad. 615=1935 M.W.N. 517=69 M.L.J. 139=42 L.W. 442=158 Ind. Cas. 84.

——S. 11, Expln. 4—Party, whether entitled to reserve defence for decision in another suit.

A ground of defence which might or ought to have been raised by the defendant must be deemed to have been raised and decided within the meaning of

S. 11, Expl. 4, C. P. Code, even if it was not directly in question; and it is not open to a party to give up such a defence and expressly reserve it for being made in a subsequent suit. A.I.R. (Vol. 21) 1934 Mad. 68=1933 M.W.N. 1289=147 Ind. Cas. 684 (2).

——S. 11—Where a matter which ought to have been made a ground of defence in the previous suit was not so made, it must be presumed that the matter was constructively in issue in that case and as such is *res judicata* in the subsequent suit. 12 P.R. 1915, Foll. 117 Ind. Cas. 805=11 L.L.J. 97.

——S. 11—Omission to plead—Effect.

When a matter which ought to have been raised was not raised it must be held to be a matter which also must have been heard and finally decided in the previous suit. 40 C.L.J. 507=29 C.W.N. 253=85 Ind. Cas. 123=A.I.R. 1925 Cal. 427.

——S. 11—Omission to plead—Necessary plea not taken in former suit—Effect.

Where a plea if established would have been a complete answer to the former suit, it would be deemed to have been adjudicated upon against the defendant. 156 P.L.R. 1914=24 Ind. Cas. 212=29 P. R. 1914.

——S. 11—Matter made ground of defence.

Explanation 4 to S. 11, has no application where the matter in question has been expressly made a ground of defence. A.I.R. (Vol. 18) 1931 Oudh 157=8 O.W.N. 179=132 Ind. Cas. 767.

——S. 11, Expln. 4—Applicability against person who succeeded in previous litigation.

Explanation 4, to S. 11, of the Civil P. C., which embodies the principle of constructive *res judicata*, applies only to a case in which the party against whom it was sought to apply was unsuccessful in the previous suit. It cannot be applied against a person who in the previous suit had been successful. A.I.R. (Vol. 30) 1943 Oudh 231=1943 O.W.N. 46=206 Ind. Cas. 179.

——S. 11—Discretionary point.

Explanation 4 to S. 11 would not apply to a point which the Court may or may not decide in its discretion. 24 M.L.W. 812=99 Ind. Cas. 525=A.I.R. 1927 Mad. 120.

——S. 11, Expln. 4—Interlocutory proceedings—Applicability to.

The principle of *res judicata* in S. 11, Expln. 4, applies to interlocutory proceedings in the same suit. A.I.R. 1930 Bom. 431=54 Bom. 696=32 Bom.L.R. 389=126 Ind. Cas. 305.

——S. 11—Constructive res judicata—Extraneous issues.

The refusal of a Court to try extraneous issues in a case does not bar a subsequent suit. The doctrine of constructive *res judicata* must not be extended beyond the strict limits of S. 11. A verdict between parties upon one question does not bind them in an issue on another, unless the point in issue was clearly the same in both cases. The two questions should not simply be allied but should be identical. 36 Ind. Cas. 650.

——S. 11, Expln. 4—Final adjudication in prior suit of matter in dispute, if necessary.

For the application of the doctrine of *res judicata* it is not necessary that the matter of the subsequent suit should have been heard or finally decided by a competent Court in the former suit when the case is one to which Explanation 4 applies 6 C.W.N. 889, foll. 11 Ind. Cas. 127.

17. Minors.

——S. 11—Minority—If precludes the operation of res judicata.

The minority of the defendants at the time of prior decision does not preclude the operation of *res judicata* against them provided that some of the defendants had identical interests with theirs. 119 Ind. Cas. 567=A.I.R. 1929 All. 346.

——S. 11—Applicability—Decree against minor represented by guardian—Validity.

The law as to *res judicata* makes no distinction between the majority or the minority of a party to a suit.

So long as a decree subsists against a party, it is perfectly valid and can be availed of by the persons interested in every manner that is possible, notwithstanding the fact that the party against whom the decree stands was a minor at the time of the passing of the decree. The only way the law contemplates the protection of the minors against the dishonesty of their guardians, is by permitting the minors to challenge the decrees obtained against them and to have them set aside on proof of their guardians' dishonesty or fraud, and unless that is done, a minor cannot be allowed to wriggle out of the decrees passed against him, or deprive the successful litigants of the valuable rights they have obtained on the basis of that decree. A.I.R. (Vol. 22) 1935 Lah. 44=157 Ind. Cas. 801.

——S. 11—Minor—Decree against guardian ad litem—Binding—Effect of.

Where it was not shown that a guardian *ad litem* acted in fraud of the minor's interests or that his or her interest was adverse to the minor, the minor is bound by the decree in the prior suit. 25 M.L.T. 154=9 L.W. 479=51 Ind. Cas. 724=(1919) M.W.N. 82.

——S. 11—Minor—Decree against—Res judicata—Failure of guardian-ad-litem to appeal—Effect.

Where there is no gross negligence on the part of the guardian *ad litem* in not appealing, the decree binds the minor. 38 Bom. 309 (F.B.); 11 C.L.J. 623; 38 Bom. 272, Foll. 122 P.W.R. 1917=41 Ind. Cas. 479=13 P.R. 1918.

——S. 11—Minor—Unnecessarily joined in a prior suit by mother—No bar to subsequent suit.

The mere fact that the respondent who was quite an unnecessary party was joined when minor as plaintiff by his mother in her suit, will not make the decision against her, *res judicata* against her son. 44 All. 428=66 Ind. Cas. 62=20 A.L.J. 251=A.I.R. 1922 All. 217.

——S. 11—Minor not properly represented in former suit—Decree—Not res judicata.

Where there was no proper appointment of a guardian *ad litem* and, therefore, the minor was not properly represented in the former suit, the decree passed in the suit does not operate as *res judicata*. 26 A.L.J. 777=114 Ind. Cas. 743=A.I.R. 1928 All. 447.

——S. 11—Minor not properly represented in former suit or added as pro forma defendant—Second suit not barred.

Section 11 does not bar a suit if plaintiffs in the second suit were minors and were not adequately represented in a prior suit or a plaintiff was merely a *pro forma* defendant therein, although the other conditions of *res judicata* are present. 39 Bom. 29=26 Ind. Cas. 444=16 Bom. L. R. 616.

——S. 11—Minor—Absence of proper representation—Subsequent suit not barred.

Where a party was not properly represented in a suit, the decision therein will not be *res judicata* against him in a subsequent suit. 22 Ind. Cas. 673.

——S. 11 (S. 13, Old Code)—Minor—Suit by person not natural or appointed guardian and not on behalf of minor—Decision—If res judicata against minor.

To maintain a plea of **res judicata** it must appear from the inspection of the record that the person whose interest it is sought to bind must be in some way or other a party to the suit, the judgment in which is pleaded to be **res judicata**. An intention that the suit should be for the benefit also of a person who was then minor would not support the plea of **res judicata**. A judgment in a suit instituted by a person who was neither the natural nor appointed guardian of a minor and not purporting to be instituted on behalf of the mnor, will not bind such minor. A judgment in a suit brought by one co-sharer not being a member of a Hindu joint family for redemption of a mortgage will not bind the other co-sharers. (1905) 10 C.W.N. 115=2 A.L.J. 813=32 I.A. 229=7 Bom.L.R. 912=28 A. 1=2 C.L.J. 413=9 O.C. 7=15 M.L.J. 407 (P.C.).

——S. 11 and O. 32—Scope and effect—Decree against minor—Setting aside by minor—Suit on ground of gross negligence of guardian—Competency. *See* MINOR—DECREE AGAINST. 27 Pat. 441=A.I.R. 1950 Pat. 97 (F.B.).

——S. 11—Minor—Suit by guardian for possession—Dismissal—Failure of guardian to appeal—Gross negligence—Minor if barred from filing fresh suit by reason of *res judicata*. *See* ADVERSE POSSESSION—INTERRUPTION. 26 Pat. 220=A.I.R. 1948 Pat. 300.

——S. 11—Applicability—Gross negligence of guardian—Suit by minor to vacate decree obtained against him.

Section 11 has no application to an action by a minor to have a decree vacated on the ground of gross negligence of his guardian *ad litem*. Under that section, the Court is prevented from trying a suit or an issue which has already been determined, but if the judgment previously determining the suit or the issue is vacated because of the right of the applicant to avoid the judgment on the ground of fraud, collusion or gross negligence, the obstacle contemplated by S. 11 is automatically removed. The option of avoiding the judgment when exercised vacates the judgment itself. This option accrues after the judgment has been delivered and the judgment is good so long as it stands. A.I.R. (Vol. 33) 1946 Lah. 233=48 P.L.R. 280=I.L.R. (1946) Lah. 515 =225 Ind. Cas. 456 (F.B.).

——S. 11—Applicability—Gross negligence of guardian—Decree against minor.

A Muhammadan died and a mortgage right owned by him was inherited by his widow and his minor daughter. The widow assigned the mortgage to the 10th defendant, *X*, who sued upon the mortgage impleading the widow and daughter, obtained an *ex parte* decree and realized the mortgage money by sale. The properties were purchased in court auction by *Y*, *bona fide* purchaser for value. The daughter sued for recovery of her share of the mortgage-debt by sale of the properties or alternatively for recovery of the amount from *X*, ignoring the assignment made by her mother.

Held, that the plaintiff's claim was not *res judicata* as the decree passed in the prior suit was the result of gross negligence on the part of her guardian. A.I.R. (Vol. 20) 1933 Mad. 806=38 L.W. 539=65 M.L.J. 548=147 Ind. Cas. 83.

——S. 11—Minor—Gross negligence of guardian—Decree not binding.

A minor is not bound by a decree passed against him in which his guardian was guilty of gross negligence in conducting it. 26 Ind. Cas. 16=27 M. L.J. 486.

——S. 11—Minor—Negligence of guardian.

Negligence of a guardian is a good answer to a plea of *res judicata*. 14 M.L.T. 189=25 M.L.J. 379=21 Ind. Cas. 15=(1913) M.W.N. 690.

——S. 11—Laches of guardian—Defence open to but not raised by guardian—Not res judicata.

The omission of the guardian to raise any other defence on behalf of his ward which he might and ought to have raised does not preclude the ward from raising that defence in a subsequent suit, otherwise the minor would be made to suffer for the laches of his guardian. 87 Ind. Cas. 238=A.I.R. 1925 Oudh 633.

——S. 11—Minor—Negligence of guardian in conducting defence—Effect of.

Where the guardian *ad litem* of a minor is guilty of negligence in conducting the defence on behalf of the minor a decree obtained by the plaintiff would not bind the minor, and in a subsequent suit brought by the minor it will not operate as *res judicata*. 53 Ind. Cas. 412 .(*Also* 27 M.L.J. 486=26 Ind. Cas. 16).

——S. 11—Suit on behalf of minor for maintenance—Decree allowing maintenance till majority—Second suit by minor for future maintenance—Not barred.

The mother of a minor illegitimate son claimed maintenance till minor attained majority or during the lifetime of plaintiffs. The decree was passed allowing maintenance till majority only. No plea was raised as to the maintenance of the minor after majority. *Held*, a second suit by the minor on attaining majority for future maintenance would not be barred. 29 M.L.W. 696=121 Ind. Cas. 126=A. I.R. 1929 Mad. 545=56 M.L.J. 673.

——S. 11, O. 17, R. 3—Suit by next friend of minor—Decision under O. 17, R. 3.

A decision under O. 17, R. 3, C. P. Code, in a suit of a representative character where the next friend who sued on behalf of a minor has not been guilty of any negligence, is to be deemed a decision on merits and such a decision falls within the scope of S. 11, C. P. Code. A.I.R. (Vol. 23) 1936 Lah. 385=38 P.L.R. 809=165 Ind. Cas. 808.

——S. 11—Previous suit through next friend—Subsequent suit—When barred.

A subsequent suit by a person must be considered to be barred by *res judicata* on account of a previous suit wherein he was represented by a next friend unless the plaintiff is able to establish that his interests were so grossly neglected by his next friend in the previous suit as to render the decision of the question against him nugatory in the subsequent suit. 4 O.W.N. 748=105 Ind. Cas. 59=A. I. R. 1927 Oudh 354.

——S. 11—Application by guardian ad litem to be discharged on the ground of minor's attaining majority—No notice to minor served—Order that minor had attained majority is not res judicata.

Where an order is passed merely on the application of the guardian *ad litem* to be discharged on the ground that the minor had attained majority without notice to the minor, he is not bound by such an order and can in a subsequent suit show that he was minor. 6 Pat. 388=102 Ind. Cas. 449=8 P.L.T. 730=A.I.R. 1927 Pat. 271.

——S. 11—Prior suit by minor's guardian to recover property from vendee sold in excess of that sanctioned by Court dismissed—Fresh suit by minor after majority—If barred.

Where a portion of a minor's property was sold by his guardian to discharge the debts of his father with permission of the Court but the vendee took possession of an area in excess of the land sold and the guardian, on her behalf and on behalf of the minor, sued the vendee for the excess when the Court refused to adjudicate on the plea, that the sale by the minor's guardian in excess of the land sanctioned by the Court was entirely without authority, on the ground that it had been raised too late and that the plaintiff could bring a separate action upon it and dismissed the suit, and the decision was not appealed against.

Held, that the previous litigation is not binding on the minor and he is not estopped by it from bringing a suit for recovery of the excess land taken possession of by the vendee. 7 Lah. 129=95 Ind. Cas. 342=27 P.L.R. 310=A.I.R. 1926 Lah. 289.

——S. 11—Minor—Suit to set aside alienation by father—Decree obtained by alienee against father—No res judicata.

In a suit by minor sons to set aside an alienation by their father on the ground that the alienation is not binding on them, a decree obtained by the alienee against the father would not operate as *res judicata*. A.I.R. (Vol. 23) 1936 Mad. 488=1936 M.W.N. 272=43 L.W. 677=70 M.L.J. 627=162 Ind. Cas. 876.

——S. 11—Minor—Compromise—No sanction—Effect.

A compromise involving a minor without the Court's sanction prescribed by O. 32, R. 7, C. P. Code, does not operate as *res judicata*. 13 Bom.L.R. 963=12 Ind. Cas. 543=36 Bom. 53.

18. Miscellaneous Proceedings.

See also (1) C. P. CODE, S. 11—APPLICABILITY AND SCOPE.

(2) C. P. CODE, S. 11—HEARD AND FINALLY DECIDED.

(3) C. P. CODE, S. 11—MIGHT AND OUGHT.

(a) Administration suit.
(b) Insolvency.
(c) Probate, Letters of Administration and Succession Certificate.
(d) Proceedings under C. P. Code.
(i) S. 152—Amendment of decree.
(ii) O. 20, R. 12—Mesne profits.
(iii) O. 21, R. 63—Claim suit.
(iv) O. 22, R. 5—Determination of question as to legal representative.
(v) O. 47, R. 1—Application for review.

18. (a) Administration Suit.

——S. 11—Administration suit—Orders in—Res judicata.

The will of a Hindu testatrix addressed to her grandson directed that out of the income of specific property, he should perform the worship of the family idols but there was no provision for the worship of the idols after the death of the grandson. The balance of the income was to be divided between the representatives of the three branches of her own family. In administration proceedings taken on the death of the grandson it was decided that out of the produce of the house belonging to the estate the worship of the idols be performed and that the surplus be paid equally to the three branches of the family was a party.

Held, that the order in the administration suit was binding on all the parties and operated as *res judicata*. 67 Ind. Cas. 561=20 A.L.J. 625=36 C.L.J. 57=49 Cal. 459=27 C.W.N. 174=24 Bom.L.R. 937=49 I.A. 100=16 M.L.W. 963=A.I.R. 1922 P.C. 253=43 M.L.J. 116 (P.C.).

——S. 11—Administration suit—Decision on question of limitation—Res judicata.

Where in an administration suit it is found that the plaintiff's claim against the administrator for a share in the estate is excluded by limitation the determination of that case is *res judicata*, as regards an application by the same plaintiff for a revocation of the grant of administration. 12 Bur.L.T. 114=51 Ind. Cas. 355=9 L.B.R. 273.

——S. 11—Administration suit—Declaratory decree in subsequent suit for distribution of shares—Not barred.

Where in an administration suit, a declaratory decree is passed, it is not capable of execution and another suit praying that the shares declared by the previous decree be distributed is not barred by *res judicata*. 11 L.B.R. 60=64 Ind. Cas. 813=A.I.R. 1921 L. B. 22.

——S. 11 (S. 13, Old Code)—Administrator—Decree against and execution—Res judicata successor in office.

A decree obtained and execution had against the former administrator is binding upon his successor and the estate so long as that decree and the sale consequent upon it were not the result of fraud or collusion. (1904) 6 Bom.L.R. 853=29 B. 96.

18. (b) Insolvency.

See also (1) C. P. CODE, S. 11—APPLICABILITY AND SCOPE.

(2) C. P. CODE, S. 11—COMPETENT COURT—EXCLUSIVE JURISDICTION.

(3) C. P. CODE, S. 11—HEARD AND FINALLY DECIDED.

(4) C. P. CODE, S. 11—PARTIES AND REPRESENTATIVES.

——S. 11—Insolvency—Order passed in—Res judicata.

A proceeding in insolvency can be regarded as a suit and an order passed in the course of an insolvency proceeding may operate as *res judicata*. 9 Pat. 664=A.I.R. 1930 Pat. 588=11 P.L.T. 747=128 Ind. Cas. 340.

——S. 11—Insolvency—Decision in—Finality of.

Where a stranger to the bankruptcy whose property is wrongfully seized by the receiver applies under S. 22 of the Insolvency Act and his application is dismissed on the merits he cannot begin again and raise the same issue in a Civil Court. 43 Ind. Cas. 573=39 All. 626.

——S. 11—*Odgers, J.*—Decision under S. 7 of the Presidency Towns Insolvency Act is *res judicata.* 15 M.L.W. 368=65 Ind. Cas. 244=1922 M.W.N. 77=A.I.R. 1921 Mad. 456=42 M.L.J. 141.

——S. 11—Insolvency—Application for, dismissed—No res judicata.

Where an application made by a debtor for insolvency was rejected as also the application made by one of the creditors for the adjudication as insolvent of the debtor whereupon another creditor made a similar application.

Held, that the dismissal of the previous application did not operate as *res judicata* in the later proceeding though the second applicant was a party to the first application. 107 Ind. Cas. 842=A.I.R. 1928 Pat. 116.

——S. 11—Insolvency—Dismissal of first application owing to failure to produce evidence—Subsequent application—Not barred.

Where the first application to be declared an insolvent was dismissed owing to failure to produce evidence a second application for the same is not barred by *res judicata.* 15 Ind. Cas. 51=10 A.L.J. 51.

——S. 11—Insolvency—Application to adjudicate debtor—Execution sale of debtor's property—Application by Receiver to withhold confirmation—Rejection—Subsequent adjudication order—Application by Receiver for possession of property sold—Question of title—If res judicata—Effect of order confirming sale.

Where an *interim Receiver* appointed under the Provincial Insolvency Act applies to the Court praying that an execution sale held pending a petition to adjudicate the debtor, should not be confirmed, without a prayer for its annulment, the Insolvency Court has no jurisdiction under S. 4 of the Act to consider the question of title to the property sold. Hence the order confirming the sale will not operate as *res judicata* and bar the jurisdiction of the Insolvency Court to go into the question of title in an application by the Receiver for possession of the property after an order of adjudication is passed. I.L.R. (1946) Nag. 937=A.I.R. 1947 Nag. 76=1946 N.L.J. 597 =226 Ind. Cas. 290.

18. (c) Probate, Letters of Administration and Succession Certificate.

See also C. P. CODE, S. 11—COMPETENT COURT—EXCLUSIVE JURISDICTION.

——S. 11—Probate—Decision in probate proceedings as to relationship of parties operates as res judicata.

The terms of S. 11 are not to be regarded as exhaustive. The binding force of a judgment in probate proceedings depend not upon S. 11 but upon the general principles of law. The rule of *res judicata* though may be traced to an English source it embodies a doctrine in no way opposed to the spirit of the law as is expounded by the learned Hindu commentators. The application of the rule of *res judicata,* therefore, by the Courts in India should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law.

Where a question of relationship of parties had been decided in a previous probate proceeding, a subsequent suit between the same parties involving the same question is barred. 1930 A.L.J. 70=121 Ind. Cas. 200=51 C.L.J. 142=34 C.W.N. 201=1930 M.W.N. 355=32 Bom.L.R. 505=31 M.L.W. 182 =7 O.W.N. 119=57 I.A. 24=A.I.R. 1930 P.C. 22=58 M.L.J. 171.

——S. 11—Probate proceedings—Decision as to relationship of parties—Res judicata.

The question of *res judicata* is not a rule of technicality but is based upon general principles of law which must be given effect to for the purpose of giving finality to judicial decisions.

If a matter has been fought out in a Court having jurisdiction to decide that matter, the decision on that matter would operate as *res judicata* although the Courts might not be the same. Consequently where a question of relationship of parties has been decided in a previous probate proceedings, a subsequent suit between the same parties involving the same question is barred. 15 C.W.N. 1021, Diss. from. 31 C.W.N. 898=100 Ind. Cas. 510=46 C.L.J. 596=A.I.R. 1927 Cal. 421.

——S. 11—Decisions in probate proceedings—Binding effect.

Decision after contest in a probate proceeding are *res judicata* in any subsequent proceeding of any kind against the caveator who contested it. On general principles of the Probate and Administration Act grant of probate by a competent Court binds all contesting parties unless good cause under S. 50 to set it aside is made out. 34 M.L.T. 141=79 Ind. Cas. 44=A.I.R. 1924 Mad. 578=46 M.L.J. 383.

——S. 11—Probate proceedings—Finding in—Res judicata—Probata and Administration Act, S. 83.

Contentious probate proceedings being required to be in the form of a suit under S. 83 of the Prob. and Adm. Act they constitute a suit under S. 11 of the C. P. Code and a finding by a probate Court in such proceedings though not a judgment operates as *res judicata* between the parties thereto. 38 Bom. 309=23 Ind. Cas. 325=16 Bom.L.R. 5 (F.B.).

——S. 11—Probate—Findings about rights and titles of parties.

An application for grant of a probate only requires the question of representation to be settled. And its findings about rights and titles of parties are only incidental. 15 C.W.N. 1021=10 Ind. Cas. 434 =13 C.L.J. 547.

——S. 11—Probate—Suit upon will—Prior decision.

The decision in a probate proceeding that two prior wills of the testator had not been revoked by a third does not bar a subsequent suit where the question is how far the dispositions in the prior wills were affected by the third will. 21 M.L.J. 485=9 M.L.T. 319=9 Ind. Cas. 613=(1911) 1 M.W.N. 189.

——S. 11—Probate—Order on compromise—No res judicata.

The order passed on compromise in previous probate proceeding cannot operate as a bar to an application for probate of the same will. 51 Cal. 745= 84 Ind. Cas. 154=A.I.R. 1924 Cal. 864.

——S. 11—Probate—Application for—Dismissal for default.

Where an application for probate by a legatee has been dismissed for default, the legatee's heirs can nevertheless plead the existence of the will as a defence to a suit for the property which they claim as belonging to them under the will. 14 C.W.N. 924, Foll. 21 M.L.W. 415=87 Ind. Cas. 621=1925 M.W.N. 285=A.I.R. 1925 Mad. 861.

——S. 11 (S. 13, Old Code)—Grant of probate after caveat by heirs—Subsequent suit by heirs claiming adversely to will—No res judicata.

Semble.—The grant of probate after caveat by the heirs will not be *res judicata* in a subsequent suit by the heirs of a Mahomedan testator claiming adversely to the will, where the issue to be tried in the suit is not only the testamentary capacity of the testator, but also whether she was aware of the invalidity of a release which she meant to confirm by means of the will. (1905) 1 C.L.J. 594=7 Bom.L.R. 876=9 C.W.N. 938=2 A.L.J. 758=15 M.L.J. 336=33 C. 116=32 I.A. 244 (P.C.).

——S. 11—Suit for letters of administration—Finding incidental and unnecessary for decision—No res judicata.

Section 11, C. P. Code, which deals with *res judicata* necessitates as a criterion for that that an issue decided should be one necessary for decision and should be heard and finally decided by the Court.

In a suit for letters of administration, an order while affirming the claimant's status as the legal son of the deceased which was in dispute, also incidentally contained a finding that the rival claimant was a legal wife and heir of the deceased. The finding went on the principle that the claimant was entitled to a fourteen annas share in the property, whereas the rival claimant was only entitled to a two annas share and, therefore, the former had better claim to letters of administration:

Held, that the finding as to the rival claimant's status was unnecessary. It was possible, of course, that the Judge did this *ex majore cautela* in case his decision was reversed, but in any case it was unnecessary to come to a definite finding, and an expression of opinion would have been enough. As the issue proved to be merely an incidental one and unnecessary for decision, it could not be said to have been heard and finally decided, or to be *res judicata* in a subsequent suit for a share of inheritance by the rival claimant. A.I.R. (Vol. 25) 1938 Rang. 275=177 Ind. Cas. 155.

——S. 11—Letters of administration—Contentious proceedings—Finding as to nearest heir—Res judicata.

Where, in contentious proceedings or letters of administration, it has been found that a certain person is the nearest heir of the deceased, that decision is binding in a subsequent suit upon the parties to the earlier proceeding, and those claiming under them. A.I.R. (Vol. 23) 1936 Rang. 401=164 Ind. Cas. 743.

——S. 11—Decision as to relationship in contentious administration case—Persons claiming through contesting party.

Where a decision made in a proceeding for Letters of Administration, which was contested in its progress, stated that a person was a particular relation of the deceased and as such was the nearest heir:

Held, that the decision would be binding upon those claiming through the party who contested the relationship in the administration case. A.I.R. (Vol. 19) 1932 Cal. 634=36 C.W.N. 583=141 Ind. Cas. 320.

——S. 11—Proceedings for letters of administration—Heirship—Decision as to—Res judicata.

In a previous proceeding for letters of administration the present parties were rival claimants. Their evidence was taken at length as in a regular suit and the claim of the respondent was decided against her, she being held to be not the legitimate daughter of the deceased.

Held, the decision in those proceedings barred the present suit for declaration by the respondent that she is the heir of the deceased. 1 Rang. 258=76 Ind. Cas. 494=A.I.R. 1923 Rang. 257.

——S. 11—Administration—Point of genuineness of will raised and decided—Res judicata.

Where a legatee under a will applies for grant of letters of administration and is opposed by a party as heir of the deceased, on the ground that the will was mere forgery and the Court decides in favour of the will being genuine and grants the letters of administration it is not open to that person to raise the question of genuineness of the will in a subsequent litigation between the legatee and himself. 6 O.W.N. 624=119 Ind. Cas. 456=A.I.R. 1930 Oudh 29.

——S. 11—Letters of administration—Decision in proceedings—Res judicata.

In an application for Letters of Administration the Court has merely to decide in a preliminary way whether the applicant is an heir to the whole or part of the estate of the deceased and whether he is a fit person to whom Letters of Administration should be granted. Such a decision does not operate as *res judicata* in a subsequent suit for possession of the property as heir by the defeated applicant. 49 P.R. 1918=46 P.L.R. 1918=43 Ind. Cas. 723=34 P.W.R. 1918.

——S. 11—Succession certificate.

In the previous case, an application by an adopted son for a succession certificate was dismissed by the lower Court on the ground that there was no valid authority to adopt and no valid taking in adoption. The decision was confirmed by the High Court on the ground that no inquiry need be held in miscellaneous petitions into intricate questions of law and fact.

Held, that as there was no final adjudication on the validity of the adoption, the question was not *res judicata.* 48 Mad. 1=93 Ind. Cas. 705=A.I.R. 1925 Mad. 497.

——S. 11—Decisions under the Succession Certificate Act, S. 25 are not *res judicata.* 5 Lah. 105=92 Ind. Cas. 138=A.I.R. 1924 Lah. 493.

18 (d) Proceedings under C. P. Code.

(i) S. 152—Amendment of decree.

See also C. P. CODE, S. 11—HEARD AND FINALLY DECIDED.

——S. 11—Amendment of decree—Successive applications for—Maintainability.

A Court is competent to entertain successive applications for amendment of clerical or arithmetical mis-

takes in judgments or decrees and a decision on a prior application of this kind does not operate as *res judicata* in subsequent applications, but if an application for amendment has been heard and disposed of on the merits, the Court will not, except in exceptional circumstances, entertain a subsequent application for substantially the same relief. 39 Cal. 265, Foll. 107 Ind. Cas. 390=A.I.R. 1928 Lah. 244.

——S. 11—Amendment of decree—Refusal—Bar.

Where an application to amend a decree has once been refused on the merits, the decision is conclusive between the parties and no further applications lie. 27 Ind. Cas. 300.

——S. 11—Amendment of decree—Second application.

Successive applications for amendment can be entertained provided there has been no adjudication on a former application on the merits, either for default or because the Court thought the amendment unnecessary. Else a second application will be barred under the general principles of law of *res judicata.* 14 C.L.J. 481=12 Ind. Cas. 151=39 Cal. 265.

(ii) O. 20, R. 12—Assessment of Mesne Profits.

See also (1) C. P. CODE, S. 11—HEARD AND FINALLY DECIDED.

(2) C. P. CODE, S. 11—MIGHT AND OUGHT.

——S. 11—Mesne profits—Decree for—Rejection of application for assessment—Res judicata.

The rejection of an application for assessment of mesne profits awarded by a decree in a suit has the effect of dismissing the suit and a further application for the purpose is barred. 50 Ind. Cas. 262=29 C.L.J. 470.

——S. 11—Assessment of mesne profits—Subsequent applications.

When the Court dismisses an application for ascertaining mesne profits, all subsequent applications are barred, in spite of a direction in the decree to ascertain mesne profits in execution. 37 Ind. Cas. 997.

(iii) O. 21, R. 63—Claim Suit.

——S. 11 and O. 21, Rr. 60 to 63—Order in claim case on validity of wakf—Suit relating to another property included in wakf—No res judicata.

An order in a claim case deciding the question of the validity of a *wakf* is not conclusive as *res judicata* in a suit between the same parties in which the property in dispute is not that which was the subject of the claim case though both were included in the *wakf.*

An order in a claim case is conclusive as between the parties only as regards the particular property in dispute. 37 Ind. Cas. 887=21 C.W.N. 222=44 Cal. 698.

(iv) O. 22, R. 5—Determination of question as to legal representative.

——S. 11 and O. 22, R. 5—Decision as to legal representative of deceased plaintiff—No res judicata.

A decision of a question under O. 22, R. 5, C. P. Code, as to whether a person is or is not the legal representative of a deceased plaintiff is not a decision on an issue arising in the suit itself; it is really a matter collateral to the suit. The appointment of a legal representative is not the determination of any issue which is properly raised in the suit itself and cannot therefore operate as *res judicata* in a subsequent suit between the same persons regarding succession to the property of the deceased. 48 All. 422, diss. 28 All. 109; 58 All. 734; 27 Bom. 162; 20 Ind. Cas. 950; 154 Ind. Cas. 985; 166 Ind. Cas. 393, foll. 28 Pat. 814.

——S. 11 and O. 22, R. 5—Order bringing on record as legal representative.

An order that a certain person shall be brought on record as a legal representative of the decree-holder is not a decree and does not operate as *res judicata.* A.I.R. (Vol. 27) 1940 Nag. 99=I.L.R. (1941) Nag. 735=1939 N.L.J. 577=188 Ind. Cas. 292.

——S. 11—Order under O. 22, R. 5—Res judicata.

It is true that a decision under O. 22, R. 5, C. P. Code, is not *res judicata,* but for all that, the decision is final so far as the suit in which it is made is concerned, not on the ground of *res judicata,* but because of S. 47. No subsequent decision in a separate suit can be used to affect the rights of the parties so far as questions relating to the 'execution, discharge or satisfaction' of the decree in connection with which the order was made is concerned. Matters in issue in the former suit cannot be re-agitated, nor can questions which might and ought to have been raised there be raised in the second suit, nor will a separate suit lie on the same cause of action. The prohibitions contained in O. 2, R. 2 and S. 47, and the usual rules about *res judicata,* apply so far as those matters are concerned. All that is not *res judicata* is the question whether or not the person joined as the legal representative really occupies that character. That question is not finally concluded by a decision under O. 22, R. 5 except in so far as it concerns the suit in which the decision is made. A.I.R. (Vol. 26) 1939 Nag. 147=1939 N.L.J. 82=I.L.R. (1939) Nag. 165=182 Ind. Cas. 285.

——S. 11—Proceedings under O. 22, R. 5, C. P. Code—Determination of question whether certain person is legal representative.

The determination of the question whether a certain person is or is not the legal representative of a deceased party in a proceeding under O. 22, R. 5, C. P. Code, does not operate as *res judicata* so as to preclude the same question from being re-agitated in a separate suit. (1937) 169 Ind. Cas. 798=1937 O.W.N. 782.

——S. 11—Order under O. 22, R. 5, in course of suit not concerning property in dispute in subsequent suit between same parties—Whether operates as res judicata.

Where in a proceeding under O. 22, R. 5, a person is or is not held to be the legal representative of a deceased party, the same question can be re-agitated in a separate suit, and is not barred by the rule of *res judicata.* An order under O. 22, R. 5, passed in the course of a suit which does not concern the property in dispute in a subsequent suit between the same parties cannot operate as *res judicata.* A.I.R. (Vol. 23) 1936 All. 412=1936 A.L.J. 622=1936 A.L.R. 556=58 All. 734=163 Ind. Cas. 283.

——S. 11—Rejection of an application to be brought on record as legal representative—Order if res judicata.

An order rejecting an application to be brought on the record as the legal representative of a deceased

appellant, is not a decree and does not constitute *res judicata*. 43 Mad. 812, Dissented from. 13 N.L.R. 32 and 37 All. 272, Foll. 17 N.L.R. 45=62 Ind. Cas. 303=A.I.R. 1921 Nag. 23.

——S. 11—Legal representative—Order declaring a person as the legal representative of a deceased plaintiff.

A decision in a previous suit as to whether a person should be appointed the legal representative of a deceased plaintiff to continue the suit would not operate as *res judicata* in a subsequent suit between the parties as such a question is not one arising for decision in the suit itself. 14 M.L.T. 176=(1913) M.W.N. 673=20 Ind. Cas. 950=25 M.L.J. 279. [*Also* 42 Mad. 76=9 L.W. 26=49 Ind. Cas. 11.]

——S. 11—Question of legal representatives determined under O. 22, R. 5, C. P. Code.

A question once determined under O. 22, R. 5, operates as *res judicata* in a subsequent suit where an application for substitution of legal representatives was rejected on the ground that the applicants were not legal representatives, and they filed a suit for a declaration that they were such:

Held, that the suit was not maintainable as the matters directly and substantially in issue in the prior proceedings were directly and substantially in issue in the suit. A.I.R. (Vol. 20) 1933 Oudh 207=10 O.W.N. 179=8 Luck. 477=144 Ind. Cas. 978.

——S. 11—Legal representative—Question under C. P. Code, O. 22, R. 5—Res judicata.

Once the question as to a legal representative is decided by a Court under O. 22, R. 5, it cannot be re-adjudicated upon in a regular suit separately. 28 All. 109, Disapproved. 48 All. 422=24 A.L.J. 546 =94 Ind. Cas. 157=A.I.R. 1926 All. 439.

(v) O. 47, R. 1—Application for Review.

See also C. P. CODE, S. 11—HEARD AND FINALLY DECIDED.

——S. 11—Review of compromise decree—Application dismissed—Suit to set aside—Res judicata.

A party whose application for review of a compromise decree on the ground of non-consent has been dismissed cannot afterwards sue to set aside the decree on the same ground. 10 C.W.N. 529, foll. 26 Ind. Cas. 125=18 C.W.N. 1204.

——S. 11—Review—Rejection of application—No res judicata.

An application in review is not a suit and the rejection does not amount to a decision which bars a fresh suit. 7 O.W.N. 153=A.I.R. 1930 Oudh 112= 125 Ind. Cas. 171.

——S. 11 (S. 13 Old Code)—Review—Dismissal of application—No bar to suit.

A suit cannot be barred by *res judicata* by reason of the rejection of an application for review of a judgment in a previous suit made upon the same grounds as an application for review is not a suit within S. 13, C. P. Code. Mere technicality should not stand in the way of granting a relief which a person is entitled to. 18 Ind. Cas. 444=40 Cal. 541.

19. Parties and representatives.

See also C. P. CODE, S. 11—

(1) LITIGATING UNDER THE SAME TITLE.
(2) MINORS.
(3) REPRESENTATIVE SUIT.

(a) Attaching decree-holder.
(b) Auction-purchaser.
(c) Benamidar.
(d) Co-heirs.
(e) Co-mortgagors.
(f) Co-tenants.
(g) Hindu joint family.
(h) Insolvency.

See also (1) C. P. CODE, S. 11—APPLICABILITY AND SCOPE.

(2) C. P. CODE, S. 11—MISCELLANEOUS PROCEEDINGS.

(i) Legal Representative.
(j) Lessor and Lessee.
(k) Limited owners.

See also (1) under REVERSIONERS, infra.

(2) C. P. CODE, S. 11—APPLICABILITY AND SCOPE.

(3) REPRESENTATIVE SUIT — HINDU WIDOW.

(l) Mortgagor and mortgagee.
(m) Parties different.
(n) Parties same.
(o) Pre-emption suit.
(p) Reversioners.
(q) Scope.
(r) Title acquired pendente lite.
(s) Trustee (Mahant and Shebait).

——S. 11—Alienee—Previous decision between Muhammadan widow and heirs that no interest was payable on dower debt is binding on her transferee.

A transferee of a Muhammadan widow's proprietary right, what it was, in the properties of which she was in possession in lieu of her dower debt but to whom the dower debt is not transferred, is bound by the previous decision between the widow and her heirs that no interest was payable on the dower debt. A.I.R. (Vol. 31) 1944 Pat. 163=10 B.R. 577= 213 Ind. Cas. 306.

——S. 11—Vendor and purchaser—Previous suit by vendor after sale—Subsequent suit by vendee—Estoppel.

Where in pursuance of a covenant in a sale deed by *A* to *B* that *A* would get possession of the property sold, from *C*, and deliver it to *B*, in pursuance of which *A* sued *C*, and *B* was a witness therein for *A* and made no mention of the sale to him. *Held*, that a subsequent suit by *B* against *C*, was barred by *res judicata* and that *B* was estopped from saying that he was not bound by the previous suit. *A* decision of title operates as *res judicata* in a subsequent suit where the previous suit was for ejectment. 85 P.W.R. 1913=18 Ind. Cas. 278=104 P.L.R. 1913 (F.B.).

——S. 11—Vendor and Vendee—Vendee with notice of charge.

A person having a charge on property under S. 55, T. P. Act can enforce it against a person who obtains the property from the vendor by a consent decree with notice of the charge and he is not bound by a decision regarding this property when he was not a party to the suit. 39 Ind. Cas. 50=13 N.L.R. 19.

——S. 11—Vendor and purchaser—Suit between vendor and a previous purchaser, when operates as res judicata between two purchasers.

For a previous decision against a transferor to

be *res judicata* as against the transferee his title must have arisen subsequent to the commencement of the previous suit. 32 Ind. Cas. 610=9 Bur.L.T. 88.

19 (a) Attaching decree-holder.

——S. 11—Attaching decree-holder—Claim under judgment-debtor.

Attachment does not create any specific charge on the property attached. It does not, by itself, give the attaching decree-holder in strictness a title to the attached properties but it is the basis of the decree-holders' right to assert his judgment-debtors' interest in the property attached and the right created in favour of the decree-holder by attachment is a claim under the judgment-debtor within the meaning of S. 11, C. P. Code. A.I.R. (Vol. 29) 1942 Cal. 92==74 C.L.J. 180=46 C.W.N. 245=I.L.R. (1942) 1 Cal. 169=200 Ind. Cas. 216.

——S. 11—Decision in suit between third party and judgment-debtor as to title to property attached—Attaching decree-holder, if bound by that decision.

In execution of a decree obtained against *A*, the decree-holder *B* attached the suit property on April 12, 1922. Before the attachment, the plaintiff, *A's* father had instituted a suit against *A* and others for a declaration that the property described in the plaint thereto was his self-acquisition and on March 20, 1923, he obtained a decree in his favour. The plaintiff filed the present suit against *A* and *B* for a declaration that the suit property was his self-acquired property; that *A* had no right therein and *B* was not entitled to attach the same. It was found that the decree in the prior suit was not obtained by fraud or collusion:

Held, that so far as the prior suit was concerned, *A* did represent all interests in the property in the litigation and so far as the subsequent suit was concerned, *B* must be deemed to claim under *A* litigating under the same title, and hence the decision in the prior suit operated as *res judicata* on the question of the title of the plaintiff to the property in suit and *B* would be precluded from asserting the title of *A* by reason of the prior suit. A.I.R. (Vol. 24) 1937 Mad. 651=1937 M.W.N. 167=45 L.W. 495 =(1937) 1 M.L.J. 575=171 Ind. Cas. 369.

——S. 11—Attachment of property of judgment-debtor—Suit by plaintiff for declaration that it belonged to him—Judgment-debtor made party—Suit decreed —Subsequent attachment in another decree against same judgment-debtor of same property—Attaching decree-holder is bound by previous decree in favour of plaintiff. A.I.R. (Vol. 22) 1935 All. 888=1935 A.L.J. 1001=1935 A.W.R. 959=156 Ind. Cas. 387.

——S. 11—Judgment against decree-holder—No res judicata against judgment-debtor.

The judgment against a creditor who sought to attach the property cannot operate as *res judicata* as against the judgment-debtor in a suit brought by him against the claimant. 55 Cal. 448=32 C. W. N. 248=105 Ind. Cas. 647=A.I.R. 1928 Cal. 130.

19 (b) Auction-purchaser.

——S. 11—Auction-purchaser—If claims under judgment-debtor.

An auction-purchaser at a Court-sale acquires only the right, title and interest of the judgment-debtor and while he is not a representative of the judgment-debtor for the purpose of S. 47, Civil P. C., he is a party claiming under the judgment-debtor for the purpose of S. 11, Civil P. C. A.I.R. (Vol. 20) 1933 Lah. 171=34 P.L.R. 531=141 Ind. Cas. 448.

——S. 11—An execution purchaser is the representative of the judgment-debtor so as to bring him within the rule of estoppel and the principle of *res judicata.* A.I.R. 1922 Pat. 63, Foll. 1926 P.H. C.C. 249=97 Ind. Cas. 205=A.I.R. 1926 Pat. 478.

——S. 11—The auction-purchaser is the representative of the judgment-debtor and seems to be on the same footing as the person claiming under him. A person claims through or under another when he derives his title through that other either by assignment, inheritance or succession or when he holds a subordinate title granted by the other, and except in cases specially provided for by state or common law he can have no better title than the person through or under whom he claims and to such a case S. 11 of the Civil Procedure Code applies. 1922 P.H.C. C. 33=65 Ind. Cas. 266=1 Pat. 174=3 P.L.T. 506=A.I.R. 1922 Pat. 63.

——S. 11—Mortgage by one brother—Decree—Mortgagee purchasing in auction—Vendee from widow of other brother filing suit for possession—Decision in prior suit as to whether brothers were divided—Title of auction-purchaser accruing prior to suit.

Where the mortgagee's title arose prior to the suit in which the decree against his mortgagor was obtained, and the mortgagor possessing only the equity of redemption had not in him any such estate as would enable him sufficiently to represent the mortgagee in the suit instituted after the mortgage, the mortgagee is not bound by the decision in the suit.

The plaintiff instituted a suit for recovery of the suit property purchased by him from the widow of *A*. His case was that there was a partition between *A* and his brother *P*, that the suit property fell to the share of *A* and that after his death it was inherited by his widow from whom he had derived a valid title to it by purchase. The defendants alleged that there was no partition between *P* and *A* and on *A's* death, *P* became entitled to all the properties by right of survivorship and that they purchased the property in execution of a decree on a mortgage executed by *P* in his favour. In an earlier suit instituted by *A's* widow against *P* and another, the question as to the partition had been specifically put in issue:

Held, that the decision in that suit as to whether the brothers *A* and *B* were divided would not operate as *res judicata* as the title of the auction-purchaser-defendant arose prior to that suit. A.I.R. (Vol. 22) 1935 Mad. 414=41 L.W. 600=1935 M.W.N. 506=157 Ind. Cas. 268.

——S. 11—Mortgage suit — Findings in — If bind auction-purchaser.

Obiter.—Findings in a mortgage suit may be said to be binding on the auction-purchaser purchasing property in execution of the mortgage decree though he is not a party to the mortgage suit as he in a sense represents the mortgagor and the mortgagee and so claims under the judgment-debtor. 119 Ind. Cas. 222=A.I.R. 1929 Rang. 183.

——S. 11—Auction-purchaser of puisne mortgagee's right subject to prior mortgage—If can question prior mortgage in a subsequent suit.

A purchaser in execution of puisne mortgagee's decree against the mortgagor and his sons, who in the suit had done nothing to affirm a first mortgage on the property and where the validity of the first mortgage was not in question in the puisne mortgagee's suit, is not debarred from challenging the validity of the first mortgage as the sons would themselves have done, in a suit by first mortgagee to enforce his mortgage, though the sale to purchaser was subject to first mortgage. 111 Ind. Cas. 909= A.I.R. 1928 Mad. 557.

——S. 11—Execution—Auction-sale — Confirmation suspended — Appeal by decree-holder—Auction-purchaser not impleaded—Decision in appeal, if binding on him.

Although the orders passed in execution are governed by S. 11, Civil P. C., the order affects only the parties or their privies and not strangers who had not derived their title from the parties.

Where the execution Court does not confirm the auction-sale but suspends the confirmation and the decree-holder appeals against the order without joining the auction-purchaser, the auction-purchaser would not be bound by the decision in appeal. A. I.R. (Vol. 25) 1938 Nag. 273=I.L.R. (1939) Nag. 104=1938 N.L.J. 60=178 Ind. Cas. 268.

——S. 11—Purchaser at revenue sale—Recovery of rent from tenant at rate decreed in favour of ex-proprietor.

A decree for rent obtained by a proprietor of a revenue paying estate against a tenant does not bar a suit for rent by a purchaser of the estate at a revenue sale as the latter does not claim under the ex-proprietor within S. 11. But the purchaser may elect to take advantage of the decree obtained by the proprietor. 56 Ind. Cas. 390=24 C.W.N. 399.

——S. 11—Purchaser at revenue sale.

There is no precise position ascribable to purchaser at a patni sale and he is not in privy to the estate to a defaulting proprietor, and does not derive his title from him because under S. 11 of the Patni Regulation he acquires property free from all encumbrances that might have been created by the defaulter, his representatives or assignees. The purchaser, can, therefore, successfully sue his tenant for rent subsequently to that of the defaulting proprietor as he could not establish his relationship with the then defendant as landlord and tenant. The previous suit does not bar his suit on the principle of *res judicata.* Limitation for ejectment proceedings taken by the purchaser begins from the date when his purchase became final. A person's interest in the property held adversely for the statutory period is an incumbrance. Therefore a purchaser at patni sale need not annul an incumbrance of a trespasser, dispossessing a defaulting patnidar. 15 Ind. Cas. 869 =17 C.W.N. 340.

——S. 11 (S. 13, Old Code)—Auction-purchaser in revenue sale not representative of defaulter.

An auction-purchaser at a revenue sale cannot be considered to be the successor in interest of the defaulting proprietor as to be bound by a judgment passed in a suit previous to that sale to which the defaulting proprietor was a party. 8 C.W.N. 676, foll. (1903) 9 C.W.N. 383. *See also* (1905) 34 C. 868; 8 C.W.N. 676.

19 (c) Benamidar.

——S. 11—Benamidar—Proceedings by or against—Beneficiary, if affected.

In a proceeding by or against the benamidar the person beneficially entitled is fully affected by the rule of *res judicata.* 46 Cal. 566, Foll. 75 Ind. Cas. 1048=A.I.R. 1924 Lah. 702.

——S. 11—Benamidar—Decision against binds real owner.

A decision in a suit by or against a *benamidar* is *res judicata* against the real owner. 46 Cal. 566= 17 A.L.J. 66=9 L.W. 335=28 C.W.N. 521=49 Ind. Cas. 1=1 U.P.L.R. 1 (P.C.); 36 M.L.J. 68 =46 Ind. Cas. 104 (P.C.). [*Also* 27 Ind. Cas. 136=18 C.W.N. 814=22 C.W.N. 807].

——S. 11—Benamidar—Estoppel against—Whether binds beneficiary.

A benamidar defendant in a mortgage suit represents the beneficiary and an estoppel created by judgment and decree against the former binds the latter. 23 Ind. Cas. 762=19 C.W.N. 361.

19 (d) Co-heirs.

——S. 11—Heirs claiming to be brothers on the strength of pedigree—Pidigree not proved—Subsequent suit claiming on the same pedigree.

Two persons filed a suit on death of a third person that they three were brothers and forwarded a pedigree in their support. The pedigree was not proved and it was decided that they were not brothers. In a subsequent suit the heirs of one of the above two persons alleged that they were heirs of the deceased heirs of the other and pleaded the same pedigree:

Held, that the persons through whom the heirs contested in the subsequent suit were parties to the first suit, that in the first suit the question of relationship, was directly and substantially in issue as it was "heard and finally decided" by a Court which had jurisdiction to try the subsequent suit and hence the rule of *res judicata* in S. 11 applied and the subsequent suit was barred. A.I.R. (Vol. 20) 1933 Lah. 534 (2)=148 Ind. Cas. 17.

——S. 11—Heir asserting exclusive title—Whether can be said to represent co-heirs.

Where, in a suit, a person claims the whole estate for himself and asserts his exclusive title to it and repudiates the interests of all the other heirs of the previous owner, he cannot be held to have represented the interest of the other heirs for the purposes of S. 11. C. P. Code. A.I.R. (Vol. 22) 1935 Oudh 62=11 O.W.N. 1608=10 Luck. 443=153 Ind. Cas. 42.

19 (e) Co-mortgagors.

——S. 11—Redemption suits by co-mortgagors.

On failure of a co-mortgagor plaintiff to comply with a decree in prior redemption suit, in which other co-mortgagors were defendants the latter may subsequently sue for redemption. The co-mortgagors plaintiffs in the subsequent suit cannot be said to claim under the plaintiff in the previous suit. 45 Ind. Cas. 300=5 O.L.J. 43.

19 (f) Co-tenants.

——S. 11—Co-tenants—Decree against one.

A decree for ejectment by the landlord against one of several joint tenants of a holding does not bind the other tenants. (1913) M.W.N. 96=16 Ind. Cas. 698=24 M.L.J. 79.

19 (g) Hindu joint family.

See also REPRESENTATIVE SUIT—HINDU JOINT FAMILY.

——S. 11—Manager of one branch represents interest of members of that branch.

Where a manager of one branch of joint Hindu family represents the interests of the member of that branch in respect of the matters raised in the suit, the decision in that suit would bind that member as well. A.I.R. (Vol. 27) 1940 Lah. 120=189 Ind. Cas. 770.

——S. 11—M, plaintiff's grandfather in possession of property as manager of joint family—Suit by defendant for possession against M—M not setting up title and suit decreed—Suit by plaintiff member of M's family, for declaration that decree was not binding on him.

Certain property was in possession of *M*, the grandfather of the plaintiff, along with other members of the joint family. Defendant brought a suit for possession of the property against *M* in his capacity as a manager of the family. *M* failed in the suit to put forward the title and right in the property which belonged to all the members of the family and the defendant's suit was decreed. Plaintiff who was the member of the same family, brought a suit subsequently for a declaration that the decree for possession passed in favour of the defendant was not binding on the plaintiff as *M* had not put forward title in the former suit and thus failed to protect the rights of other members of the family including the plaintiff:

Held, that the right which vested in *M* and the other members of his family was a matter which might and ought to have been made a ground of defence in the former suit, and must, therefore, be deemed to have been a matter directly and substantially in issue in that suit within the meaning of Expl. 4 to S. 11 of the C. P. Code, and further as *M* must be taken to have been litigating in the former litigation *bona fide* in respect of the title to property as a manager of the family, plaintiff who was the member of that family must be deemed to be claiming under *M*. The plaintiff's suit based on same rights which *M* possessed was, therefore, barred by S. 11, C. P. Code. A.I.R. (Vol. 26) 1939 All. 203=180 Ind. Cas. 658.

——S. 11—Compromise by *karta* of joint Hindu family—Compromise for advantage of family—Major members assenting—Such members cannot agitate the point again. A.I.R. (Vol. 21) 1934 Pat. 617=153 Ind. Cas. 1040.

——S. 11—Suit against joint Hindu family—All the members bound by the judgment.

Where a person obtains an *ex parte* decree against the managers of a joint Hindu family business, the junior members cannot subsequently sue for a declaration of their immunity on the ground that the contract on which the decree was given was a wagering contract. The managers should have raised this plea, as defence to the previous suit and their omission operates as *res judicata*. 43 P.L.R. 1922=69 Ind. Cas. 783=1924 Lah. 26.

——S. 11—Mortgagor representing joint Hindu family—Wrong property entered in decree—Execution—Objection on ground of wrong entry—Objection dismissed—Suit by sons of judgment-debtor for setting aside sale on ground that property was not included in mortgage—Suit, held barred by res judicata.

In the final decree in a mortgage suit wrong property was entered. No objection was taken by the mortgagors who had notice of the final decree-proceedings and one of whom was a manager of a joint Hindu family. The mortgagee decree-holders then proceeded to execute their decree and when notice went to the judgment-debtors, they objected and said that there had been a mistake in the preparation of the final decree. The Court executing the decree dismissed the objection of the judgment-debtors. It was similarly dismissed in the High Court. Thereafter the sons of one of the judgment-debtors, who was living when the suit was instituted, brought a separate suit for setting aside the sale of the property which was not included in the mortgage:

Held, that the sons were sufficiently represented by their father in the mortgage suit which continued right up to the final stage. The point raised in this suit was raised in the former suit, the decision of which was *res judicata* in the present suit. A.I.R. (Vol. 24) 1937 All. 731=1937 A.L.J. 1095=1937 A.W.R. 841=172 Ind. Cas. 337.

——S. 11—"Persons under whom they or any of them claim"—Mortgage suit—Hindu joint family—Suit against managing member only—Rights of other members not impleaded—Representation—*See* C. P. CODE, O. 34, R. 1. 7 A.L.J. 945=33 A. 71=7 Ind. Cas. 902.

——Ss. 11, 60 (1) (c)—Execution of decree against Hindu father—Ancestral house sold—Father's objection that he being agriculturist, his house was not liable to be sold, dismissed for default—Suit by minor sons against decree-holder to restrain him from interfering with their possession of the house.

The *karta* or the head of a joint Hindu family represents the interests of all the members of the family in a litigation in which an interest of the family is involved and no representation order is necessary to make absent members of the joint family liable under the decree passed against the head of the family.

An ancestral house was sold in execution of a decree against a Hindu father. He objected under S. 60 (1) (c), C. P. Code, that he being an agriculturist, the house was not liable to be sold. The objection was dismissed for default:

Held, that the sale of the house was binding on his minor sons and a suit by them to restrain the decree-holder from interfering with their possession of the house was not maintainable. A.I.R. (Vol. 26) 1939 All. 399=1939 A.L.J. 450=1939 O.L.R. 521=I.L.R. (1939) All. 602=183 Ind. Cas. 434 (F.B.).

[Overrules A.I.R. (Vol. 17) 1930 All. 727=127 Ind. Cas. 447.]

——S. 11—Father and son—Suit for declaration of right—Defence of special custom—Second suit for partition—Same defence taken by son.

G, the father of defendant was recorded as a *jagirdar* in the Collector's Register. Plaintiff sued for declaration of his rights against *G*. The plaintiff based his claim under the ordinary law, but *G* pleaded that the custom of primogeniture gave him right to the jagir. The Court held in that case that the special custom was not proved and that the plaintiff was entitled to succeed.

The plaintiff subsequently brought another suit for partition and the defendant again pleaded primogeniture. *Held*, that as the matter was now *res judicata*, the defendant could not take up the same defence which his father had taken in the former suit. 17 C.L.J. 93=15 Ind. Cas. 657=16 C.W.N. 783.

——S. 11, Expl. 6—Partition suit—Father and sons made parties—Compromise decree—Sons refusing to accept compromise and given up and struck off —Decree—If *res judicata* in respect of subsequent suit by son. *See* HINDU LAW—PARTITION. A.I.R. 1948 East Punj. 26.

——S. 11—Mortgage or money-decree against Hindu father alone—Suit by some challenging existence of debt on which decree was based.

Per *Din Mohammad* and *Sale, JJ.*—Where a mortgage or money-decree is passed against a Hindu father a suit by the son to challenge the existence of the debt in order to avoid the liability of the joint family property in his hands is not barred by S. 11 because a Hindu son does not claim under his father within the meaning of S. 11 inasmuch as a son in a joint Hindu family becomes entitled in his own right on birth. Nor is the suit barred by Expl. 6 to S. 11 because inasmuch as the interests of a son clash with those of his father, the latter cannot be said to have represented his son in the previous suit against him. The son founds his claim on a different basis and on that basis his existence cannot be said to have merged in his father in the earlier suit. Expl. 6 to S. 11 cannot be stretched so far as to apply in terms to the case of a Hindu son whose own property stands in jeopardy and who consequently seeks to impugn a decree against his father on the ground that the debt on the basis of which the decree was secured did not in fact exist.

Per *Teja Singh, J.*—In view of the position that a Hindu father occupies *vis a vis* his joint sons, the father in the suit against him in respect of a simple or a mortgage debt effectively represents the sons so far as the factum of the debt is concerned though not with regard to the nature of it because while it is open to the father to question the existence of the debt he cannot resist the suit on the ground that the debt was illegal or immoral. Therefore, a mortgage or a simple decree obtained against the father is binding on the sons so far as the factum of the debt is concerned and would, operate as *res judicata* in a suit questioning the factum of the debt on the basis of which the decree was passed. A.I.R. (Vol. 31) 1944 Lah. 220=I.L.R. (1945) Lah. 67 (F.B.).

——S. 11—Son, who is member of joint Hindu family with his father, cannot claim through his father.

A son who is a member of joint Hindu family along with his father cannot, as a member of the joint family, claim through his father or through his father as the manager of the joint family within the meaning of S. 11. A.I.R. (Vol. 24) 1937 All. 28=1936 A.L.J. 1162=1937 A.L.R. 61=166 Ind. Cas. 624.

——S. 11 (S. 13, Old Code)—Hindu father—Decree for ejectment of, on ground of improper use of tenure—Subsequent suit by minor son for recovery of possession—Bar of res judicata.

The question whether a Hindu father in a particular suit in which he alone of the family is a party represents his co-parceners, is a question to be decided with reference to the circumstances of the case. A Hindu father making an improper use of the tenure (e.g., construction of a building in an agricultural holding) cannot be allowed to represent his minor sons in a suit for ejectment on account of such use; and it is the duty of the Court to appoint a separate guardian **ad litem**. It is for the plaintiff to allege and prove, if that be his case, that the father erected the building on behalf, or in the interest, of his family, and that he was consequently a proper guardian **ad litem** on his minor son. **Held**, that in the circumstances of the case, an erroneous decree in ejectment obtained by the zemindar against a Hindu father—tenant of an agricultural holding—on account of the erection of a building by him (the father) thereon cannot be **res judicata** in a subsequent suit by the son for recovery of the holding. 2 M.L.T. 86=(1904) 17 M.L.J. 197.

19 (h) Insolvency.

See also (1) C. P. CODE, S. 11—APPLICABILITY AND SCOPE.

(2) C. P. CODE, S. 11—MISCELLANEOUS PROCEEDINGS.

——S. 11—Decision against administrator of deceased debtor if res judicata against official liquidator having claim against debtor's estate and ascerting title of debtor.

A creditor attempting to assert the title of his debtor must be held to claim under him. Consequently where upon the death of a debtor a declaratory suit is brought successfully against the administrators of his estate, the decision operates as *res judicata* against an official liquidator having a claim against the debtor's estate and attempting to assert the title of the debtor. A.I.R. (Vol. 29) 1942 Oudh 327=1942 O.W.N. 269=18 Luck. 92=201 Ind. Cas. 69.

——S. 11—Orders after notice bind representatives.

Where in certain insolvency proceedings *A* was first brought on record as a creditor holding a promissory note from the debtor and on the application of *B* to be brought on record in *A's* place as her assignee, *B* was substituted in *A's* place after notice to *A* and *C* subsequently applied to be substituted in *B's* place on the ground that the assignment to *B* was only for collection and that *A* had subsequently assigned the note to *C*:

Held, that as *B* was substituted after notice to *A* the matter was *res judicata* against *A* and *C* who claimed under *A*, could have no higher claims. A.I.R. (Vol. 21) 1934 Mad. 292=39 L.W. 486=1934 M.W.N. 159=148 Ind. Cas. 592.

——S. 11—Dismissal of application by Official Receiver to set aside sale—Fresh application by creditor—Res judicata.

In insolvency proceedings the Official Receiver represents the general body of creditors.

The Official Receiver applied to set aside a sale by the insolvency as a fraudulent preference. It was held that there was no fraudulent preference and the High Court held on second appeal that the order was not one made under S. 4 of the Provincial Insolvency Act. Subsequently a creditor applied under S. 4 to have the sale set aside as fraudulent:

Held, that the decision of the High Court that the first order was not one under S. 4, bound the petitioner.

But the doctrine of *res judicata* was applicable to proceedings in insolvency and the petition was, therefore, not sustainable. A.I.R. (Vol. 20) 1933 Mad. 9=36 L.W. 699=1932 M.W.N. 1201=63 M.L.J. 778=56 Mad. 395=140 Ind. Cas. 461.

——S. 11—Judgment between creditors and insolvent—No res judicata between debtor and his surety.

A judgment between the creditors and the insolvent by the Insolvency Court holding that the debt of the creditor was time barred would not operate as *res judicata* between the debtor and his surety who was not a party to the proceedings. A.I.R. (Vol. 19) 1932 All. 610=1932 A.L.J. 868=54 All. 1007=143 Ind. Cas. 526.

——S. 11—Mortgage suit—Decree in—Receiver not made party—If bound.

Where a mortgagor dies and his property devolves upon an insolvent over whose estate a receiver has been appointed, a decree for foreclosure in favour of the mortgagee in a suit to which the receiver has not been made a party is not *res judicata* against him even though he has been heard on petitions and objections against the decree. 54 Cal. 595=54 I.A. 190 =29 Bom.L.R. 882=31 C.W.N. 741=101 Ind. Cas. 442=45 C.L.J. 544=25 A.L.J. 621=1927 M.W.N. 485=39 M.L.T. 5=26 M.L.W. 268=A.I.R. 1927 P.C. 108=52 M.L.J. 734 (P.C.).

——S. 11—Decision against insolvent after insolvency does not preclude pleas in bar as against Official Assignee who is not made a party. 20 M.L.W. 63=83 Ind. Cas. 960=1924 M.W.N. 491=47 Mad. 633=A.I.R. 1924 Mad. 689.

19 (i) Legal Representative.

——S. 11—Decree passed against deceased's estate—Estate sufficient represented—Decree will bind all legal representatives as such.

If a deceased person's estate is represented, sufficiently for an effective decree to be made against it, that decree, so long as it stands, will bind all the deceased's legal representatives in their capacity as such, whether they are on the record of the proceedings or not. 117 Ind. Cas. 138=A.I.R. 1928 Mad. 1199.

——S. 11—Decision in original proceedings—If binding on legal representative.

The whole policy of the Code is that if the proceeding originally instituted is right and proper any decision obtained therein is binding on all persons on whom the interest or right may devolve pending the disposal of the proceedings. 1927 M.W.N. 743=108 Ind. Cas. 401=A.I.R. 1928 Mad. 246.

——S. 11—Legal representative—Decree against —Binding on all persons claiming from the deceased.

A decree passed in a suit against the widow or the deceased owner as his legal representative is binding on all those who claim under him and if the widow in a former suit omits to raise any available ground of defence, it will be *res judicata* in a subsequent suit against the persons claiming under the deceased owner. 23 M.L.T. 208=8 L.W. 19=44 Ind. Cas. 852=(1918) M.W.N. 195.

——S. 11—Decree against—Wrong representative.

Where a person brings a suit and obtains a decree to the extent of the assets against a supposed legal representative of a deceased debtor, who is subsequently found not to be so, a fresh suit on the same cause of action against the real legal representatives is not barred. 9 P.L.T. 807=108 Ind. Cas. 558=A.I.R. 1928 Pat. 362.

——S. 11—Wrong legal representative—Decision against—Effect.

Though a wrong person is brought on record to represent the estate in an appeal from a mortgage decree against the widow, still if the mortgage is not fraudulent and is executed for necessary purposes the real representative of the estate is bound by the appellate decree. 10 Ind. Cas. 32.

19 (j) Lessor and Lessee.

——S. 11—Lessor does not claim through lessee.

Since the lessee does not occupy a representative capacity and the lessor cannot be said to be a person claiming through his lessee, a previous decision in a suit by a lessee against a third person cannot operate as *res judicata* in a subsequent suit by the lessor against the same person. A.I.R. (Vol. 22) 1935 Oudh 394=1935 O.W.N. 674=11 Luck. 209=155 Ind. Cas. 1087.

——S. 11—A previous decision in a suit by the lessee against a third person cannot operate as *res judicata* in a subsequent suit by the lessor against the same person as the lessee does not occupy a representative capacity and the lessor cannot be said to be a person claiming through his lessee. 29 Bom.L.R. 274=101 Ind. Cas. 340=A.I.R. 1927 Bom. 270.

——S. 11—A lessor as such cannot be held to be person claiming under the lessees within the meaning of S. 11. A suit between the lessee of the zamindari and the tenants *for theerva* is not *res judicata* against the lessor in a subsequent suit even for the same period as the first suit and even when the lessee has surrendered his terms before expiry of the lease. The effect of a surrender of his lease by the lessee is to determine the tenancy and to let in the landlord's rights. 44 Mad. 514=63 Ind. Cas. 205=A.I.R. 1921 Mad. 306=41 M.L.J. 288.

——S. 11—Decision against lessee, if binding on lessor.

Per *Curiam*.—A judgment in a suit by or against a lessee is not *res judicata* against the lessor in a subsequent suit by the latter. The lessor could not be said to be a person claiming title under the lessee within the meaning of S. 11 of the Code of Civil Procedure, notwithstanding the fact that the lessee had surrendered his term to the lessor before its expiry. 44 Mad. 514=29 M.L.T. 322=63 Ind. Cas. 205=41 M.L.J. 288.

——S. 11—Suit against representative tenants of village—Subsequent suit against proprietors.

Plaintiffs sued for a declaration that the defendants had no right of easement. The defendants were the representative tenants of the village, the villagers of which claimed the right of easement. The proprietors of the village were not parties to the suit. The defence which was based on a grant alleged to have been made by the proprietors of the village was upheld.

Held, that suit by plaintiffs against the proprietors of the village for a declaration of their niskar rights and for confirmation of their possession in that right was not barred by the previous suit. 43 C. L. J. 180=94 Ind. Cas. 5=A.I.R. 1927 Cal. 97.

——S. 11—Suit against lessors.

A decision as to ownership of land obtained by plaintiff, in a former suit against defendant's lessor, is at least a strong piece of evidence as against the defendants in a subsequent suit, on the question as to whom the rent is payable. 87 Ind. Cas. 753=A.I.R. 1925 Cal. 1218.

——S. 11—Lessor and lessee—Subsequent finding between lessor and third parties.

A lessee who claims under a title previously created by a lessor is not bound by a subsequent finding between the lessor and third parties. 40 Mad. 389; 14 L. W. 587, Foll. 19 M.L.W. 369=83 Ind. Cas. 965=34 M.L.T. 160=1924 M.W.N. 378=A.I.R. 1924 Mad. 576.

——S. 11—Lessor and lessee—Lease granted before suit.

A person holding under a lease granted before a suit is not bound by the decision against his lessor in that suit if he is not a party to it. 8 All. 324; 32 Cal. 357; 35 Bom. 297; 40 Bom. 679 and 36 California 489, Foll. 14 M.L.W. 387=1921 M.W.N. 679=65 Ind. Cas. 979=A.I.R. 1921 Mad. 708=41 M.L.J. 392.

——S. 11—Landlord and tenant—Decision in suit between—No res judicata against holder of subordinate interest in tenure.

The question as to what villages were included in the tenure in question was decided between the landlord who was the decree holder and the tenant. Plaintiff who possessed a subordinate interest in the tenure sued the landlord for setting aside the sale of the tenure in execution.

Held, that the decision cannot be held to be *res judicata.* 8 Pat. 122=9 P.L.T. 627=113 Ind. Cas. 681=A.I.R. 1928 Pat. 615.

——S. 11—Landlord and tenant—Adjudication as to rate of rent—Successor not bound.

A decision of Court negativing landholder's right to levy faisal rate and upholding a contract between him and his tenant for payment of reduced rent will not be *res judicata* in a suit by the landholder's successors to enforce the original rate. S. 26 (3) of the Madras Estates Land Act confers a special privilege on the successor, viz., the right to enhance an unduly low rate of rent agreed to by his predecessor. Per *Bakewell, J.*

The prior decision will not operate as *res judicata,* unless it is shown that the plaintiffs in that suit had an absolute interest in the property, in order that they might be held to be the predecessor in title of the landholder seeking to enforce the original rate in the subsequent suit. (1918) M.W.N. 188=7 L. W. 376=45 Ind. Cas. 406=24 M.L.T. 35.

——S. 11—Rival lessees from same lessor—Alteration of boundary by agent of lessor.

To affect rights of the lessees conferred by leases, it would have to be shown that all the then lessees entered into an agreement that the plots marked out should be put down for those granted under the respective leases, and in the absence of any such agreement the rights created would not be affected by any events happening subsequent to the grant of the lease between the lessor and the subsequent lessees. 24 C.W.N. 746 (P.C.).

Licensor and licensee.

——S. 11—Decision between grantor and grantee—If binds transferee of grantor of license.

Since the transferee of a grantor of a license is not bound as such by the license under S. 59, Easements Act, it follows that the transferee is also not bound by the result of a previous litigation between the grantor and the grantee, if the claim of the grantor has failed by reason of his failure to prove the ground on which he sought ejectment. 7 O.W. N. 468=A.I.R. 1930 Oudh 203=127 Ind. Cas. 46.

19 (k) Limited owners.

See also (1) UNDER REVERSIONERS, INFRA
(2) C. P. CODE, S. 11—APPLICABILITY AND SCOPE.
(3) REPRESENTATIVE SUIT — HINDU WIDOW.

——S. 11—Suit by next presumptive reversioner against limited owner for setting aside deed executed by her—Limited owner setting up full proprietary title—Decision in such suit held could not operate as res judicata between two rival reversioners as limited owner was not representing estate.

A Hindu widow or other limited owner during her lifetime represents the whole inheritance for certain purposes and a decision fairly and properly obtained in a suit by or against the widow as representing the estate is binding on the reversionary heirs.

Where in a suit brought by the next presumptive reversioner for cancellation of a deed executed by the limited owner under the terms of which she acknowledged her daughter-in-law as the owner of the estate, the limited owner pleads that she is the full owner of the estate, it cannot be said that the limited owner represents the estate and any decision obtained in such suit would not operate as *res judicata* between two rival reversioners who claim to be entitled to the estate. The decision in such a suit might operate as *res judicata* against a person claiming through the limited owner but not against a person who claims as a reversioner. A.I.R. (Vol. 33) 1946 Oudh 163=21 Luck. 1=1946 O.W.N. 26=223 Ind. Cas. 373.

——S. 11—Suit by Hindu widow K for declaration of title and possession against S decreed —Compromise on appeal and S obtaining four annas share under it—Suit by reversioner R that consent decree did not affect him, decreed—Suit by K to recover possession from S on ground that consent decree was obtained by

fraud, dismissed on ground of 12 years' possession by S—Subsequent suit by R on widow's death to recover possession from S.

K, a Hindu widow, brought a suit against one *S* for declaration of title and possession of the property of her husband and obtained a decree. *S* preferred an appeal but there was a compromise and a consent decree on the basis of the compromise was made under which *S* obtained four annas estate which was directed to be partitioned and obtained possession of that share. Shortly after this decree one *R*, a reversioner, brought a suit against the parties to the compromise for declaration that the compromise and the consent decree were void and the reversioners were not bound by it and obtained a decree. On the strength of this decision, the widow *K* then brought a suit against *S* to recover possession of the four annas share on the ground that the compromise and the consent decree were obtained by fraud and undue influence but the suit was dismissed on the ground that *K* was out of possession for more than 12 years. On the death of the widow *K*, *R* the reversioner brought a suit against *S* to recover possession:

Held, that the suit was not barred by *res judicata*, that the possession under an agreement which was not binding on the reversionary heirs, could not avail *S* in a question with a reversionary heir, whose right to possess could not arise until the succession opened to such heir. In that position, unless something thereafter occurred during the life of *K* which affected the title to the whole or part of the estate, which took such whole or part of the estate away from *K* and vested it as a matter of title in *S*, mere possession of such whole or part of the estate by *S* would afford him no answer to the reversioner's claim as reversionary heir, on *K's* death. In the first place, the title to the estate having been finally decided, in any question with *S*, the widow *K* had no right to submit it to fresh adjudication by the Courts as against *S* so far as the right of the reversionary heirs was concerned, or to affect their right by any such action and in the second place, *K* in her last suit for possession was only suing in her own interest, and not as representing the reversionary heirs and, therefore, *K's* suit did not affect *R's* right to possession. A.I.R. (Vol. 25) 1938 P.C. 254=1938 O.W.N. 819=48 L.W. 423=42 C.W.N. 1237=1938 A.L.R. 759=1938 O.L.R. 412=1938 M.W.N. 955=(1938) 2 M.L.J. 852=5 B.R. 27=68 C.L.J. 282=40 Bom.L.R. 1241=I.L.R. (1938) 2 Cal. 653=65 I.A. 365=32 S.L.R. 918=177 Ind. Cas. 1 (P.C.).

——S. 11—Suit by widow for protection of her own right—Decision operates as res judicata in suit by reversioners.

A decision in a suit by a widow or by a limited owner, in respect of and for the protection of her own rights in certain property, bars a subsequent suit by reversioners in respect of that property even though such a suit may be of a representative character. A.I.R. (Vol. 23) 1936 All. 422.

——S. 11—Decree against Hindu widow as holder of husband's estate—Res judicata.

Decree against Hindu widow in her capacity as holder of husband's estate in binding on succeeding heir—Suit by widow for declaration of invalidity of adoption—Suit fairly and honestly fought out—Subsequent suit on her death for same by reversioners is barred. A.I.R. (Vol. 21) 1934 Pat. 696=153 Ind. Cas. 1102.

——S. 11 (S. 13, Old Code)—Hindu widow—Decision in suit against—Res judicata against reversionary heirs.

A qualified heir, such as the widow, represents the inheritance, and a decision properly and fairly got against her in regard to a matter connected with the inheritance is binding on persons entitled to take the estate in succession to her as the reversionary heirs of the last male owner. (1900) 24 M. 405.

——S. 11—Hindu widow—Decision against—Suit by daughter.

Where after the death of three brothers a compromise was entered into between two widows dividing property equally and thereupon a third person sued to obtain a declaration that the brothers formed a joint Hindu family and that on the death of the widow of one of them the reversioner was entitled to succeed to the same and the same was decreed. *Held*, that the other widow having been a party to the declaratory suit by the reversioner it is not open to her daughter to say that she was entitled to take on the death of the other widow in preference to the reversioner. The judgment in the previous case operated as *res judicata*. 27 A.L.J. 518=119 Ind. Cas. 446.

——S. 11—Mortgage decree against Hindu widow.

In a suit against a widow to enforce a mortgage by her, if there is a finding the debt was binding on the estate and the sale proclamation states that the debt for which the property was being sold was for necessity and the whole right of the defendant was being sold in execution, then it is the most proper construction of the proceedings in the suit and execution that the whole property was intended to pass to the purchaser. The widow would in such a case sufficiently represent the estate as to attract the doctrine of *res judicata*. 1926 M.W.N. 319=51 M.L.J. 73=95 Ind. Cas. 691=A.I.R. 1926 Mad. 692.

——S. 11—Decrees against widow.

Where the widow was quite competent to represent the estate and from the nature of the defence put forward and the question tried, it was abundantly clear that not only she represented the estate but the trial was fairly and honestly conducted.

Held, that the result of the litigation was binding on the reversioners. 40 All. 593 (P.C.), Foll. If a Court is satisfied that the former trial was fair and honest, the mere fact that the reversioner considers that the evidence adduced by the widow in the previous action is insufficient, or that he would have in similar circumstances produced more or better evidence, does not in the least, affect the question. 40 All. 593 (P.C.), Foll. Before applying the principle of *res judicata* to judgments to which limited owners are parties, the Court should take care to be satisfied that the decrees relied on are untainted by fraud or collusion and that the necessary and proper issues were raised, tried, and decided in the suits which led to them. Whether the widow represented the inheritance, may be gathered from the nature of the defence put forward, and the issues raised, tried, and decided in the former suit. The mere allegation that she did or did not, would be of little value. Was the suit based

upon a mere personal cause of action by or against the widow? Was it a ground personal to the female heir that was taken in the previous suit? Was it a claim by or against the widow personally or the inheritance which she represented? To decide these questions the Court must examine the averments, the issues and the findings in the previous suit. If the contentions raised are those connected with the inheritance and the trial was with reference to them, the widow must be held to be representing the estate even though litigation may have arisen out of her own acts; if not the litigation must be deemed personal to her and not binding upon the reversioners. 18 M.L.W. 491=73 Ind. Cas. 284=A.I.R. 1924 Mad. 301.

——S. 11—Suit for possession by widow in her own right—No res judicata against reversioner.

Previous suit by a Hindu widow for recovery of possession in her own right which she enjoyed for many years and from which she was dispossessed does not operate as *res judicata* against a reversioner to recover possession of the property. 35 C.L.J. 348 =68 Ind. Cas. 322=A.I.R. 1923 Cal. 204.

——S. 11—Decision in suit between widow and Reversioner—Res judicata.

So far as plaintiffs were concerned it was held in a previous suit that they had agreed to the alienation which had been for their benefit and could not question it, that they could under no circumstances inherit any of the estate left by the widow and that, should they survive her, another reversioner plaintiff's cousin would be entitled to take that portion that had been alienated and that portion which had not been sold. Plaintiff brought a subsequent suit to the effect that this sale should not affect his reversionary rights. This was dismissed in 1913. Plaintiff with his two younger brothers again brought a suit for a portion of this land which was not alienated after the death of the widow.

Held, the question is clearly *res judicata* as between them and the widow and her successors. 85 Ind. Cas. 202=A.I.R. 1923 Lah. 556.

——S. 11—Decision in suit against Hindu widow—If res judicata against her adopted son.

An adopted son of a Hindu claims not through the widow adopting him but as heir to his adoptive father. Hence a decision in a suit against his adoptive mother who could not represent the whole interest in that litigation which was of a domestic character, in which she was defending her own interest as against persons claiming under her deceased husband, cannot operate as *res judica* in a subsequent suit by a son adopted by her to her husband. 231 Ind. Cas. 282 =48 Bom.L.R. 788=A.I.R. 1947 Bom. 140.

——S. 11—If in a litigation a decision, fair and square, is obtained against the adoptive mother, to the effect that she possessed no authority to adopt, that decision must be considered to be binding upon the adopted son by virtue of Expl. 6, S. 11, C. P. Code. 1 L.C. 733=108 Ind. Cas. 817=A.I.R. 1928 Oudh 155.

——S. 11—Hindu daughter compromising suit brought by her in personal capacity—Compromise, whether res judicata.

Where a Hindu daughter institutes a suit in her personal capacity and not in representative capacity, asking for a personal relief and compromises it subsequently, she cannot by such action, bind the reversioners. Being a person who could claim only a limited interest as a Hindu daughter, such a compromise cannot bind the next reversioner—Daughter's son—as *res judicata*. A.I.R. (Vol. 26) 1939 All. 197=1939 A.L.J. 199=1939 A.W.R. 27=181 Ind. Cas. 33.

——S. 11—Compromise decree against limited owner—If binding on estate.

On the death of a Hindu leaving his daughter and a minor son by her, disputes arose between the daughter and the agnates of the deceased. A compromise was come to between the parties under which the bulk of the immovable properties was to be enjoyed by the agnates and the infant son was given nothing. An award of arbitrators was passed on the footing of the compromise and a decree followed on the award in a suit by the daughter's son to recover the estate on the death of the daughter. *Held*, that the compromise and award did not bind him as the conditions which make a decree against a limited owner binding on the estate were absent in the case. 45 Cal. 590=45 I.A. 35=23 M.L.T. 142=22 C.W.N. 409=27 C.L.J. 296=34 M.L.J. 298=16 A.L.J. 265=7 L.W. 581=4 Pat.L.W. 221=20 Bom.L.R. 546=44 Ind. Cas. 408=(1918) M.W.N. 306 (P.C.).

——S. 11—Decree against daughter in partition suit by vendee—No res judicata against reversioner.

A decision against daughters in a suit for partition by vendee of one of the daughters, to which reversioners were not made parties, does not operate as *res judicata* against them as they are not bound by it. 71 Ind. Cas. 390=A.I.R. 1923 All. 366.

——S. 11—Decree in suit against Mahomedan widow.

Where in a suit for recovery of share against a Mahomedan widow in possession of her husband's estate in lieu of dower, she does not claim interest on the dower debt, the claim to interest is barred by the decree in the suit. 48 All. 803=24 A.L.J. 910=98 Ind. Cas. 978=A.I.R. 1927 All. 39.

——S. 11—Decree against jagirdar, whether binds successors.

A decree passed against a *jagirdar* as representing the estate, after a fair and *bona fide* contest, is binding on the succeeding holders of the estate. A.I.R. (Vol. 18) 1931 Nag. 183=27 N.L.R. 127=134 Ind. Cas. 287.

——S. 11—Police Jagirs—Father represents son.

In the case of police jagirs in Pachete the Government can appoint a successor other than the heir of the last holder, but if it does so succession is hereditary. The dismissal of a suit by the father to set aside an execution sale of the jagir bars a suit by the son on his succession for the same purpose. 3 Pat. L.W. 149=2 Pat.L.J. 725=42 Ind. Cas. 399=1919 Pat. 426.

19 (1). Mortgagor and Mortgagee.

——S. 11—Decision against—Mortgagor.

The estate which has already vested in a mortgagee cannot be represented in, or adjudicated upon, in a subsequent litigation to which he is not a party; consequently, the decision in the suit is not binding

on the mortgagee. A.I.R. (Vol. 27) 1940 Nag. 382 =1940 N.L.J. 437=193 Ind. Cas. 41.

——S. 11—Decision obtained against mortgagor after execution of mortgage-deed—Whether operates as res judicata against mortgagee—Decision between transferee of mortgagor and third person.

Any decision obtained against a mortgagor after the execution of a mortgage-deed cannot operate as *res judicata* against the mortgagee, if he (the mortgagee) was not party to the suit. Much less will a decision between a transferee of the mortgagor and a third person operate as *res judicata* between the mortgagee and each transferee when the same question arises in a subsequent suit. The mortgagee cannot be considered to be litigating under the same title in the subsequent suit as the mortgagor did in the earlier suit. Nor can he be said to be litigating under the same title as the transferee of the mortgagor. (1934) 150 Ind. Cas. 868=1934 A.L.J. 597 =A.I.R. 1935 A. 351.

——S. 11—Decree against mortgagor, whether binds mortgagee.

A mortgagor has no power to represent the entire interest of himself and the mortgagee in suits relating to the moragaged property after the date of the mortgage. A mortgagee is not, therefore, bound by a decree relating to the mortgaged property passed in a suit instituted against the mortgagor after the date of the mortgage to which he (the mortgagee) was not a party. A.I.R. (Vol. 18) 1931 Pat. 64=11 P.L.T. 898=10 Pat. 234=130 Ind. Cas. 257.

——S. 11—Decision against mortgagor.

On a mortgage having been created in respect of as estate in fee simple the legal estate at once vests in the mortgagee and the mortgagor is left with nothing more than an equitable interest which is popularly described as equity of redemption. It therefore follows that the two interests, that of mortgagor and of mortgagee are distinct and a decision against mortgagor in his capacity as mortgagor is not *res judicata* against mortgagee. 1 Luck. 25=3 O.W.N. 55=13 O.L.J. 323=91 Ind. Cas. 1015=A.I.R. 1926 Oudh 1.

——S. 11—Mortgagee or permanent lessee—Not bound by later adjudication.

A permanent lessee or a mortgagee from the owner of property is not bound by an adjudication against the owner after the creation of the mortgage or lease unless the lessee or mortgagee is himself a party to the suit. 28 C.L.J. 223=47 Ind. Cas. 315=22 C.W.N. 721.

——S. 11—Mortgagor and mortgagee—Decree whether binds mortgagee.

During the minority of defendant No. 1 his land was sold by his mother to Bhoje who conveyed it to Bavchi in exchange; Bavchi mortgaged it to plaintiff in 1891. Defendant No. 1 on attaining majority brought a suit in 1898 against his mother Bhoje and Bavchi to set aside the sale but did not join the plaintiff in the suit. The Court decreed in defendant No. 1's favour and in execution he recovered possession of the land in 1901. About that time the plaintiff obtained a mortgage decree against Bavchi and he purchased the land at a Court sale held under it. The plaintiff having sued to recover possession of the property was met by the plea of *res judicata*, as he was bound by the decree against his mortgagor Bavchi in 1898:

Held, that the plaintiff was not bound by the earlier decision, because his title arose prior to the suit decreed against his mortgagor. The mortgagor Bavchi did not sufficiently represent the mortgagee in the suit instituted after the mortgage. The principle of *res judicata* applies only when there is some privity between the parties in the earlier and later suit. 40 Bom. 679=36 Ind. Cas. 443=18 Bom. L. R. 757.

——S. 11—Mortgagor and mortgagees—Decision against former—If binding on mortgagee.

In resumption suits, a mortgagee from the grantee is not a necessary party and is bound by the decision in the suit if fairly conducted between the grantor and grantee. If not so conducted and when the mortgagee is a party, he can have his pleas fully heard and determined. 28 Ind. Cas. 440=2 O.L.J. 161.

——S. 11 (S. 13, Old Code)—Co-sharers—Mortgage of entire share—Subsequent partition suit—Mortgagee not impleaded—Effect. **See** MORTGAGE. 13 C.W.N. 281=4 Ind. Cas. 92=8 C. L.J. 478.

——S. 11—Decision against mortgagee—If binding as against mortgagor.

The position of a mortgagee is subordinate to that of the mortgagor and therefore the latter cannot be said to be claiming under the former. It follows that a decision against a mortgagee cannot operate as *res judicata* against the mortgagor. 1948 R. D. 298=1948 A.W.R. (Rev.) 311.

——S. 11—Decision against mortgagee—If binds mortgagor.

A mortgagee filed a suit for possession which was resisted by a stranger on the ground that the land belonged to him and not to the mortgagor. The suit was decreed in mortgagee's favour. Subsequently the son of the mortgagor brought a suit for redemption. The stranger in the earlier suit also was a party and raised the same plea of ownership.

Held, that the mortgagee sued in the previous suit as representing the estate and in the latter suit the plaintiff mortgagor was really claiming through the mortgagee and therefore the defendant was debarred from raising the same plea which had been adjudicated upon once before. 74 Ind. Cas. 285=A.I.R. 1924 Bom. 299.

——S. 11—Adjudication of title against mortgagee.

A mortgagor is not precluded by adjudication of title against the mortgagee only. 45 Ind. Cas. 849= 5 O.L.J. 121.

——S. 11—Suit for injunction against mortgagee of ship dismissed—Subsequent suit for injunction against vendees of ship if barred.

Where a charterer of a ship sued the mortgagee thereof for injunction on the ground that the latter intended to avoid the charter parties and the suit was dismissed for want of evidence as to the intention

alleged. *Held*, that a subsequent suit by the charterer against the vendees of the ship under the decree on the mortgage for injunction restraining them from dealing with the vessel in any manner inconsistent with the agreement of charter party is not barred by the judgment in the previous suit. 24 Ind. Cas. 758=16 Bom. L.R. 178.

——S. 11—Suit by mortgagee against purchaser of hypotheca—Subsequent suit against purchaser from defendant in previous suit.

Where a suit by a mortgagee to enforce his mortgage as against a purchaser of the hypotheca was dismissed on the ground that the mortgage had been paid off and where a suit was subsequently filed by the plaintiff to enforce the mortgage against a person who had purchased the hypotheca from the defendants in the previous suit but prior to the institution of that suit.

Held, that the decision in the prior suit was not *res judicata* and did not bar the subsequent suit. 41 M.L.J. 392, Foll. 20 M.L.W. 740=84 Ind. Cas. 995=A.I.R. 1925 Mad. 358=47 M.L.J. 728.

——S. 11—Declaratory decree—Rights acquired prior to—If affected.

N a minor on attaining majority repudiated a mortgage of his property executed by his mother *S* in favour of *K* as his certificated guardian and himself mortgaged a portion of the property to *D*. *K* brought a suit against *N* and *S* for a declaration that his mortgage was binding on *N* and obtained a decree. He then brought a suit for sale on the mortgage.

Held, (1) that *D* who claimed under *N* was entitled to repudiate the mortgage of *K*; (2) that the decision in the declaratory suit operated as *res judicata* in the mortgage suit and was binding on all persons claiming through him under transfers made after the suit but not on *D* because the mortgagee rights of *D* having come into existence before the delaratory decree were not affected by it and the property could only be sold in execution of decree on *K's* mortgage subject to these rights. 22 A.L.J. 155=78 Ind. Cas. 226=5 L. R. A. (Civ.) 77=A. I. R. 1924 All. 474.

——S. 11—Suit by third party against mortgagor and mortgagee—Decision against mortgagee—Estoppel.

In a suit for redemption of a mortgage by a person who had paid off a previous mortgage it appeared that the title to the property had been decided against the plaintiff in a previous suit by a third party against himself and the mortgagor, *Held*, that the matter was *res judicata* though the former suit was brought in a Court which had no jurisdiction over the present suit. 25 M.L.J. 379: 8 Mad. 83 foll. The prior decision even if not *res judicata* operated as an equitable estoppel, against plaintiffs asserting title to the properties in question. 2 L. W. 433=27 Ind. Cas. 989=28 M.L.J. 184.

19 (m). Parties different.

——S. 11—Suit by daughter claiming as sole heir of intestate father—Father found to have executed will—Suit in which executors of will were not parties, whether acts as estoppel.

The plaintiff claimed that on the death of her mother, she as the sole daughter of her father became entitled to the whole of his estate, as he died intestate and without any male issue. It was found during the trial that the father had executed a will of which probate was taken and there was a decision in a previous suit to which the plaintiff's mother and the defendants were parties but in which the executors of the will were not impleaded:

Held, that the previous decision did not operate as *res judicata* so as to estop the defendant from putting forward the will in defence to the subsequent suit as those proceedings could not be taken to be proceedings as between the same parties as those in the subsequent proceedings. A.I.R. (Vol. 23) 1936 Cal. 585=168 Ind. Cas. 487.

——S. 11—Previous holder of estate—Decision against—Not binding on subsequent claimant to same estate.

V died without issue in 1899, and the estate devolved on his mother *A*. She died in 1905 and the defendant who was the adopted son of an agnate of *V* took possession of the property as the nearest reversioner. The plaintiff *V's* sister's son, then set up a claim that his son *K* had been adopted by *A* just prior to her death. This was compromised in 1907 by a deed of indenture executed by the defendant of the one part, by the plaintiff acting as guardian of his minor son *K* of the second part, and by the plaintiff in his personal capacity of the third part. Under the deed *K* received certain property in consideration of the withdrawal of his claim. It also contained a clear and unqualified admission of the defendant's title to the properties. In a suit brought in 1917 by the plaintiff to establish his own right to succeed to the properties.

Held, that the issue relating to the adoption of the defendant was, however, not *res judicata* by a prior decision in a suit between *G*, the then holder of the estate and the defendant, in which the adoption of the defendant had been upheld. Though the estate held by *G* and that claimed by the present plaintiff was the same the plaintiff cannot be said to 'claim under' *G*. A.I.R. (Vol. 19) 1932 Mad. 198=35 L. W. 73=1932 M.W.N. 31=62 M.L.J. 116=55 Mad. 40=139 Ind. Cas. 684.

——S. 11—Parties different—Guardianship proceedings—Finding as to character of woman—Subsequent suit between minors and the woman.

One *N. C.* the husband of the sister of two minors applied to be appointed guardian of the person and property of the minors. *L*, the step-mother of the minors also applied to be made guardian. In the order it was suggested that *L* had been suspected of bad character and adultery by her deceased husband:

Held, that in a suit between *L* and the minors, the above finding as to her character did not operate as *res judicata* there having been no distinct finding to that effect, and further inasmuch as the minors were not parties to the previous guardianship proceedings, as a matter of law there could be no *res judicata*. A. I. R. (Vol. 19) 1932 Lah. 232=33 P.L.R. 96=137 Ind. Cas. 296.

——S. 11—Land acquisition proceedings—Secretary of State—Land acquisition officer party.

Held, decision was not *res judicata* against the Secretary of State as he was not a party. A.I.R. (Vol. 19) 1932 Bom. 386=34 Bom. L.R. 791=56 Bom. 501=140 Ind. Cas. 171.

——S. 11—First suit by shebaits for framing a scheme—Second suit by gods themselves through one member of the dedicator's family against other members for declaration that the properties are debuttar.

The prior suit was instituted by *G* and *R L*. In the plaint the plaintiffs were described as "Sri Sri Iswar Gopal Jiu Thakur's shebaits". *G* and *R L* were defendants in the subsequent suit. The defendants in the prior suit were the other members of the family, and they included *N* and *R B*. The defendants also were described as "Sri Sri Iswar Gopal Jiu Thakur's shebaits" and the prayer was that all the properties being debuttar properties of Sri Sri Iswar Gopal Jiu Thakur established by the said Peary Lal Mandal and Moni Mohan Mandai, a scheme may be framed for the preservation, and for the efficient performance of the daily and periodical shebas of Sri Sri Iswar Gopal Jiu Thakur and the festivals, etc." Subsequent suits were by the plaintiffs: (1) Sri Sri God Gopal Jiu Thakur; and (2) Sri Sri God Shambath Nata Shib Thakur, represented by the shebait *N R B* was the contesting defendant and the prayer was for a declaration that the properties in suit are owned and possessed by the plaintiff Thakurs as debuttar properties.

Held, that the prior suit was not *res judicata* as regards the subsequent suit because the prior suit was not between the same parties as those in the subsequent suit. 2 I. A. 283, Appl. 54 Cal. 770=54 I. A. 238=101 Ind. Cas. 873=29 Bom. L.R. 961=1927 M.W.N. 448=25 A.L.J. 681=45 C.L.J. 605=26 M. L. W. 85=31 C.W.N. 1063=A.I.R. 1927 P. C 128=53 M.L.J. 123 (P.C.).

——S. 11—Where one of the defendants in the subsequent suit was not a party to the previous suit in which the question of title was decided, the plaintiff is not precluded from agitating the question against him in the subsequent suit. A.I.R. (Vol. 26) 1939 Pat. 519=5 B. R. 813=182 Ind. Cas. 329.

——S. 11—Where some new parties are added to a subsequent suit in addition to all the parties to the prior suit, the decision in the previous suit is not *res judicata*. 100 Ind. Cas. 849=A.I.R. 1927 Lah. 259.

——S. 11—Parties not the same—Suit is not barred.

Where the prior suit was between *A* and *B* and the subsequent suit was between *A* on the one hand and *B* and other persons interested in the result of the suit.

Held, that the parties in the two suits not being the same, the subsequent suit was not barred. 9 L. L. J. 270=103 Ind. Cas. 858=28 P.L.R. 683=A.I.R. 1927 Lah. 900 (2).

——S. 11—Defendants in subsequent suit not parties to previous proceeding—Suit is not barred.

Defendants got certain property sold in execution of a money-decree. Plaintiffs sued for possession on the ground that the sale was not binding on them inasmuch as an injunction was issued to the Munsif to stay the execution and the Munsif nevertheless, confirmed the sale; that when he applied for a review of the order confirming the sale, the application was rejected with an order that a regular suit was necessary.

Held, the question whether suit can lie is not *res judicata* as the defendants were not parties to or heard in the proceedings in which the order was passed. 68 Ind. Cas. 693=A.I.R. 1922 Nag. 189.

——S. 11—Evidence Act, S. 41—Judgment not inter partes.

Per *Full Bench*—It is open to a party to assert as against a third person a title which has been definitely negatived in a previous suit against a contesting claimant. Plaintiff brought a suit against two other persons for a declaration that he was entitled to the Asari Sheriff and to recover from the Government the emoluments of the officer and it was held in that suit that the plaintiff did not prove title to the office and the suit was dismissed. Then the plaintiff brought another suit against the Government to recover a sum of money alleged to be due to him as the person entitled to the Asari Sheriff and to perform the services connected therewith. The Government was paying the sums to the successful party in the previous litigation.

Held, that the judgment in the previous suit was not a bar to the second suit. 18 C.W.N. 954, Foll.

Per *Kumaraswamy Sastri, J.*—S. 11, C. P. Code, codifies the law in British India as regards the plea of *res judicata* and though the principle has been applied to proceedings other than suits (*e.g.*, execution proceedings), the essentials required by the section as to identity of the questions involved and parties has not been lost sight of. 44 Mad. 778=67 Ind. Cas. 971=41 M.L.J. 278=14 M.L.W. 188=14 M.L.W. 128=1921 M.W.N. 576=A.I.R. 1921 Mad. 248=41 M.L.J. 223 (F.B.), overruling 33 Mad. 483 and 36 Mad. 141.

——S. 11—Observations relating to connected matter—Third party.

Obervations in a judgment relating to a different matter though connected cannot bind a third party and the judgment itself cannot be evidence against him. 59 M.L.J. 321=32 L.W. 850=129 Ind. Cas. 650=1930 M.W.N. 396=A.I.R. 1930 Mad. 751.

——S. 11—Suit against a person setting up title of a third person—Subsequent suit impleading that person—Prior decision if a bar.

A sued *B* for a declaration that he was entitled to receive rent at a certain rate from him and that *B* was a tenant under *C* and bound to pay rent to *A* as part of the settlement between them. In a prior rent suit by *A* against *B* the latter had set up that he held the land not under *A* but under *C*, who was not a party to that suit. The prior suit had been dismissed. *Held*, that the decision in the proir suit was no bar to the trial of the issue as to *B's* liability for rent. 26 C. 428, followed. 68 Ind. Cas. 472=1923 Cal. 327 (2).

——S. 11—Suit by sons against purchaser from father—Subsequent suit by purchaser against father.

The sons of a Hindu sued to set aside the sale by the father as not being one for necessity. The father was not made a party. The sale was she aside and the purchaser sued the father for refund of the purchase money, *held*, that the father not being a

party to the prior suit, the decision therein did not bind him and therefore the other questions in the suit cannot be determined. 63 Ind. Cas. 240=45 Bom. 1197=A.I.R. 1921 Bom. 27=23 Bom.L.R. 523.

——S. 11—"Parties" — Stranger—Decision binding only on parties.

The matter decided in the previous suit is *res judicata* only as against those who had been parties to the previous suit but not against the other parties. 33 All. 493=9 Ind. Cas. 819=8 A.L.J. 345.

——S. 11—Third parties.

A finding in an earlier suit between a defendant and third party is not *res judicata* between the parties to the subsequent suit. 50 Ind. Cas. 333.

——S. 11—Parties and representatives—Suit aganst Taluq President—Subsequent suit against private parties.

A former suit against a Taluq President for cancellation of an order forbidding erection of a 'warp' on his land does not bar a subsequent suit against private parties for declaration of title to the property. 25 Ind. Cas. 434=1 L.W. 673.

——S. 11 (S. 13, Old Code)—Parties to second suit not claiming under parties to first suit—Res judicata.

A decision in a suit between parties under whom the present parties do not claim is not *res judicata*, even though the judgment in the prior suit is, evidence to the extent pointed out. 25 A. 546=1903 A.W.N. 137.

——S. 11—Stranger — Interested in litigation—Whether necessary party—Whether bound by result.

A person interested in litigation is not bound to apply to make him party and in default he is not bound by the result of the litigation. 56 Ind. Cas. 386.

19. (n) Parties same.

——S. 11—Suit by A for redemption dismissed—Subsequent suit by A for redemption aganst parties to previous suit by impleading additional parties.

One *A* purchased a mortgaged property from *B* and *C* who were alleged to have inherited it from the mortgagor as his reversioners. *A* brought a suit for redemption against the mortgagees *D* and *E* and impleaded in that suit his vendors *B* and *C*. In that suit the mortgagees *D* and *E* pleaded that *A* was not entitled to redeem by virtue of his purchase from *B* and *C* as one *P* was the nearest reversioner of the mortgagor entitled to succeed him. This plea was accepted by the Court and *A's* suit was dismissed. After the suit *D* and *E* acquired the interest of *P* from his sons. Subsequently, *A* brought a suit for redemption against *D* and *E* and impleaded sons of *P* to the suit:

Held, that by addition of the sons of *P* as parties to the later suit, the same did not cease to be one between the same parties so far as *D* and *E* were concerned. The suit was between the same parties as the prior suit so far as the substantial reliefs prayed for against *D* and *E* were concerned. Hence the question of *A's* title to redeem was barred by *res judicata* by prior suit. A.I.R. (Vol. 27) 1940 Mad. 201=50 L.W. 809=(1939) 2 M.L.J. 836=1940 M.W.N. 197.

——S. 11—Manager of temple and temple—Prior suit by manager of temple for declaration of title and possession—Decision against temple on issue of adverse possession—Res judicata.

There is no justification for making a distinction between the manager of a temple and the temple for the purposes of a suit for declaration of title and possession—a subject which must be considered with reference to the substantive law governing the parties, the Code of Civil Procedure and the Law of Limitation. A decision in a prior suit brought by the manager of a temple, which was in substance a suit by the temple suing by its manager, is not merely a decision against the then manager of the temple but is a decision against the temple. A decision in that suit that the title of the temple to the property in suit had been extinguished by reason of adverse possession, would operate as *res judicata* against the temple. 40 C.W.N. 901 (P.C.), followed. A.I.R. 1950 Assam. 92.

——S. 11—Plaintiff sued the first defendant and purchasers through him for setting aside a sale in favour of first defendant. The sale-deed was held valid as between first defendant and plaintiff and the suit was dismissed. In appeal plaintiff joined the subsequent purchasers as respondents but not the defendant 1.

Held, that the finding as to validity of sale deed was *res judicata* as between plaintiff and defendant 1 and also as against the subsequent purchasers. 27 M.L.W. 1=107 Ind. Cas. 237=1928 M.W.N. 20=4 O.W.N. 1231=47 C.L.J. 136=32 C.W.N. 281=30 Bom.L.R. 220=6 Rang. 29=26 A.L.J. 371=A.I.R. 1927 P.C. 252=54 M.L.J. 88 (P.C.).

——S. 11—Parties to a suit are bound by the decree passed therein and they cannot in a subsequent suit go behind the decree. 114 Ind. Cas. 871.

——S. 11—Addition of unnecessary parties in subsequent suit—Effect.

If in a subsequent suit parties who were not necessary parties in the previous suit are added, the fact of such addition does not prevent *res judicata* from applying. 7 Pat. 840=9 P.L.T. 493=115 Ind. Cas. 235=A.I.R. 1928 Pat. 436.

——S. 11—Successor in title.

Plaintiff's brother a Saranjamdar, sued the predecessors-in-title of the defendants for recovery of possessoin of land alleging that the defendant had ceased to perform services, and held the lands wrongfully without assessment. The suit was dismissed on the ground that defendants did not hold the lands on service tenure. The plaintiff who succeeded his mother sued in 1912, to recover possession of the land on the ground that the defendants had ceased to render service and in the alterative to recover assessment of the lands. *Held*, that the prior decision barred the suit as *res judicata* for the plaintiff inherited the estate from the previous holder on conditions of formal resumption and re-grant by Government free from debts and charges under the Saranjam

rules. The claim for payment of assessment was barred by limitation, as there was neither a special mode of devolution nor an incapacity for alienation which prevented limitation from running. 18 Bom. L.R. 768=36 Ind. Cas. 505=40 Bom. 606.

——S. 11—Successors in title.

In 1856 *S*, sued his brothers *F* and *J* for recovery of 1|3 share in the ancestral estate but by compromise accepted a certain area in lieu of his claim. After death of *S* his sons sued for the alleged share of *S* and the suit was dismissed in 1860, *S* and his sons were entered in the Revenue Records as full proprietors of the land and as having a right to a share in the village *chamilat* by some mistake which was repeated from time to time. In a suit by the descendants of *F*. in 1908 for the rectification of the entry in the Revenue Records. *Held*, that the plaintiffs could succeed, the decision of 1860 operating as *res judicata*. 98 P.L.R. 1915= 26 Ind. Cas. 388=28 P.W.R. 1915.

19 (o). Pre-emption suit.

——S. 11—A obtaining decree in pre-emption suit —B not impleaded—Suit for same relief by B impleading A—A's rights found inferior to B's—Decree in B's favour can be passed.

Where *A* obtains a decree in a suit for pre-emption to which *B* is not a party and subsequently *B* brings a suit for pre-emption in respect of the same property impleading *A* whose rights are found to be inferior to those of *B*, there can be no valid objection to a decree being passed in favour of *B* who is not bound by the decree in *A's* favour, even though it may have the effect of superseding the decree of *A*. A.I.R. (Vol. 33) 1946 Oudh 77=1945 O.W.N. 355 =1945 A.W.R. (C.C.) 239.

——S. 11—Decision in suit by vendors against vendee—Pre-emptor, if bound.

The pre-emptor stands in the shoes of the original vendee and, therefore, a decision between the original vendor's representatives and the original vendee cannot be attacked afresh merely because the original vendee's title had been acquired by the pre-emptor. The pre-emptor cannot be placed in a worse position than the original vendee in whose shoes he stands.

The mere fact the decree was an *ex parte* one is immaterial. A.I.R. (Vol. 20) 1933 Lah. 529=34 P.L.R. 588=143 Ind. Cas. 883 (2).

19 (p). Reversioners.

See also (1) LIMITED OWNERS, **supra**.

(2) Representative suit — Reversioners.

——S. 11—Declaratory decree in favour of reversioners to the estate of deceased in regard to a gift by the widow—Suit by subsequently adopted son to recover possession of the property gifted on the strength of the declaratory decree:

Held, that the reversioners has represented no one but themselves and that the adopted son did not claim through them but directly through his adoptive father. Section 11, therefore, had no application. A.I.R. (Vol. 31) 1944 Mad. 326=I.L.R. (1944) Mad. 775=218 Ind. Cas. 223=(1944) 1 M.L.J. 151 =1944 M.W.N. 136=57 L. W. 118.

——S. 11—Decision in suit by one reversioner, whether binds others.

A suit brought by a reversioner is for the benefit of all the reversioners entitled to sue and just as any finding given in favour of a reversioner benefits all members of the reversionary body, a finding arrived at against him injures everybody concerned. A.I.R. (Vol. 25) 1938 Lah. 571=40 P.L.R. 591=178 Ind. Cas. 302.

——S. 11—Decision in suit by Reversioner during widow's lifetime—Res judicata.

The decision favourable or otherwise in a suit by a reversioner in the lifetime of a Hindu widow to get rid of a common apprehended danger to the interests of the general body of reversioners, affects the reversioners, as a body, and bars a fresh suit by another reversioner on the same cause of action such a fresh suit being covered exactly by Explanation 6 to S. 11, Civil P. C. A.I.R. (Vol. 20) 1933 Oudh 322=10 O.W.N. 493=17 R. D. 379=8 Luck. 586 =145 Ind. Cas. 352.

——S. 11—Decree against reversioner, whether binds estate.

A suit for declaration by a reversioner to contest an alienation made by a widow is a representative suit on behalf of all the reversioners and a decree fairly and properly obtained against the reversioner in such a suit binds not only him but the whole body of reversioners on the one hand and the alienee or his representatives on the other. (1932) 135 Ind. Cas. 505 =32 P.L.R. 621.

——S. 11—Decision against one reversioner not res judicata against another.

A decision against one reversioner is not *res judicata* against another inasmuch as no one reversioner claims through another. 19 A.L.J. 514=63 Ind. Cas. 524=43 All 558=A.I.R. 1921 A. 237.

——S. 11 (S. 13, Old Code)—Hindu Reversioner **—Suit by to set aside adoption** or alienation by **widow—Decision—If res judicata against another reversioner.**

A decision in a suit brought by one revisioner to set aside an adoption by the widow or to declare an alienation made by the widow invalid is not *res-judicata* as against another reversioner and does not bind such reversioner. One reversioner does not claim through another. (1901) 13 M.L.J. 359.

——S. 11 (S. 13, Old Code)—Hindu Reversioner —Suit by or against—How far a representative suit—Suit to set aside adoption and suits to set aside alienation. **See** HINDU LAW, REVERSIONERS, SUITS BY. 16 M.L.J. 307=29 M. 390 =1 M.L.T. 183 (F.B.).

——S. 11 (S. 13, Old Code)—Hindu Reversioner —Suit by or against—Decision—Other reversioners —If bound. **See** HINDU LAW—REVERSIONER'S SUIT. 27 M. 588. See also 16 M. L.J. 347=28 M. 360 (F.B.).

19 (q). Scope.

——S. 11—Decision after contest and without fraud—Successor-in-interest of party.

Where a decision is got after a full contest and without any fraud or collusion, it is binding upon the successor-in-interest of a party to the decision. A. I. R. (Vol. 28) 1941 Oudh 189=1941 O.L.R. 93 =1940 O.W.N. 1344=192 Ind. Cas. 259.

——S. 11—Wife becoming statutory tenant after inheriting holding from husband—If bound by decision against husband in earler litigation.

Where a wife becomes a statutory tenant by operation of law (U.P.) after inheriting the holding from her husband, she is not divested on that account of her obligation to decisions in a previous litigation between her husband, her predecesor-in-interest and the party concerned in the subsequent litigation. So long as the origin of her tenancy rights lay in inheritance she is bound by the previous litigation. 1949 R. D. 62.

——S. 11—Title acquired prior to first suit.

In order that a decision in a suit between *A* and *B* may operate as *res judicata* in a subsequent suit between *A* and *C*, it is necessary to show that *C* claims under *B* by a title arising subsequently to the commencement of the first suit. Thus, a purchaser, mortgagee, lessee or donee of a property is not estopped by a decree obtained in a suit against the vendor, mortgagor, lessor or donor commenced after the date of the purchase, mortgage, lease or gift. A. I. R. (Vol. 20) 1933 Lah. 66=34 P.L.R. 19=140 Ind. Cas. 796.

——S. 11—Transaction prior to suit.

S. 11, C.P.C. does not apply to persons who hold under a party to a suit in virtue of a transaction made prior to the decision of that suit. 73 Ind Cas. 711.

——S. 11—Prior title—Not affected.

Where the plaintiff in a subsequent suit has derived no title subsequent to the previous suit, the subsequent suit is not barred by *res judicata*. Where no issue was raised or tried in the former suit between the parties to the new suit. *Held*, that the claim was not barred by S. 11, C.P.C. 29 Ind. Cas. 464=23 C.L.J. 215.

——S. 11—Donor and Donee—Title of donee acquired prior to suit.

The donee of land is not estopped as being privy in estate by a judgment obtained in an action against the donor when the action commenced after the purchase. 13 Bom. L.R. 268=10 Ind. Cas. 890=35 Bom. 297.

——S. 11—Person party to suit but omitted in formal order by oversight—Bar of res judicata.

Where a person is actually a party to the proceeding but his name is omitted from the formal order merely by an oversight, he cannot claim that the rule of *res judicata* does not apply to him inasmuch as he was not a party to the original trial. 1930 A.L.J. 70=121 Ind. Cas. 200=51 C.L.J. 142=34 C.W.N. 201=31 M.L.W. 182=7 O.W.N. 19=32 Bom. L. R. 505=1930 M.W.N. 355=57 I. A. 24=A.I.R. 1930 P. C. 22=58 M.L.J. 171 (P.C.).

——S. 11—Suit dismissed on the ground that a person had no right to continue suit—If res judicata against his sons.

A suit which is dismissed on the ground that plaintiff has no right to continue the suit cannot operate as *res judicata* in favour of the sons of the plaintiff. 1929 A.L.J. 1100=121 Ind. Cas. 102=A.I.R. 1929 All. 910.

——S. 11—There can be no res judicata where the parties in the subsequent litigation ranged on the opposite sides claim through the same person. 78 Ind. Cas. 65=A.I.R. 1925 Oudh 164.

——S. 11 (S. 13, Old Code)—Applicability—Subsequent suit between parties claiming under one and the same party to former suit—Res judicata.

The rule of *res judicata* is not applicable in a dispute between persons who claim under one and the same party to a former litigation. (1903) 7 C. W.N. 482=30 C. 556=30 I.A. 71 (P.C.).

——S. 11—Parties and privies—Absence of notice.

A party who is privy to a decree is bound by the decree whether he has notice thereof or not. 53 Ind. Cas. 143.

——S. 11 (S. 13, Old Code)—Mulgeni tenant—If claims under lessor or mulgar.

The decision in the prior suit binds the party to the subsequent suit only in respect of interests represented by the party to the former suit at the time of suit. Other interests with which he had parted before the suit and which he had ceased to represent could not properly be the subject of adjudication in the suit; the question in each case is whether the interest in suit was represented in the former suit by the party under whom the claimant holds in the second suit, and, if it was so represented, it does not matter whether it rested in the privy before or after the former suit. A mulgeni interest is not an interest subordinate to that of the lessor and mulgar cannot be said to represent the interests of a mulgenidar who had taken the chit within the meaning of S. 11 (S. 13 Old Code). 20 M.L.J. 752=33 M. 459=1910 M.W.N. 26=5 Ind. Cas. 732.

19. (r) Title acquired pendente lite.

——S. 11—Transferee pendente lite—Doctrine of res judicata and lis pendens.

Where there is conflict between *res judicata* and *lis pendens*, *lis pendens* gives way and the principle of *res judicata* reigns supreme. *Res judicata* means a matter adjudicated upon or a matter on which judgment has been pronounced. *Lis pendens* is an action pending and the doctrine of *lis pendens* is that an alience *pendente lite* is bound by the result of the litigation. Therefore, the rule of *res judicata* prevails over the doctrine of *lis pendens*; and once a judgment is duly pronounced by a competent Court in regard to the subject-mtter of the suit in which the doctrine of *lis pendens* applies, that decision is *res judicata* and binds not only the parties thereto but also the transferees *pendente lite* from them. 61 Cal. 494. foll. I.L.R. (1949) Bom. 480=51 Bom. L.R. 623 =A.I.R. 1949 Bom. 367.

——S. 11—Purchaser claiming title under judgment-debtor—Lis pendens, doctrine of.

When proceedings by way of attachment of immovable property in execution of a money decree have been taken by the executing Court in an execution application filed by the decree-holder, any question that might be raised whether the proceedings taken by the Court did amount to a valid attachment or not is one that falls to be decided by the Court in the execution department; any stranger purchasing the property from the judgment- debtor in those circumstances would only take the property subject to the Court's decision as to the effect of the proceedings actually taken before his purchase. Such purchaser

would be bound by the Court's decision of the question in the execution department as a person claiming title under the judgment-debtor.

The principle of *lis pendens* would also apply to such sale. It is not open to a party to a proceeding to nullify the effect of the proceedings already properly taken with reference to that property by transferring the same to strangers. It does not really matter whether the actual decision of the Court as to the effect of past proceedings is given only after the purchase by the stranger if the adjudication is really with reference to matters that happened before such purchase and regarding the effect of the legal proceedings that were taken prior to the same. To safeguard the purchasers' rights, the purchasers should, in such circumstances, get themselves impleaded as parties. A.I.R. (Vol. 19) 1932 Mad. 86=1931 M.W.N. 1235=34 L. W. 809=62 M.L.J. 302=55 Mad. 495 =136 Ind. Cas. 306. [Reverses A.I.R. 1927 Mad. 450=99 Ind. Cas. 989.]

——S. 11—When property is surrendered *pendente lite* between the preliminary decree and the final decree the alienee deriving his title under such surrender is bound by the terms of the preliminary decree and it is not open to him to re-open questions already decided in the suit and he cannot sue also for the establishment of his title. 22 N.L.R. 110=82 Ind. Cas. 452=A.I.R. 1925 Nag. 132.

——S. 11—Mortgagor and mortgagee—Mortgage executed during the pendency of a mortgage suit—Effect of dismissal of suit.

A mortgage executed during the pendency of a mortgage suit in which the mortgagor's title is in question is subject to the result of the suit and if it goes against the mortgagor a subesquent suit by the mortgagee would be barred by *res judicata*. 13 Ind. Cas. 641.

——S. 11 (S. 13, Old Code)—Purchaser at Court sale pending suit—If claims under defendant in such suit—Res judicata.

A purchaser in Court sale of property, the subject of *lis pendens* in another suit, claims through the judgment-debtor of, and party to, the pending suit and is bound by the decree passed in that suit; and he cannot claim to reopen any question which could have and ought to have, been set up as a ground of defence in the *lis pendens*. (1902) 5 Bom. L.R. 21=27 B. 266.

——S. 11—Adoption pendente lite—Adopted son bound.

If during the pendency of a suit or appeal against a widow as representing the estate, she adopts a son, the adopted son is bound by the result of the suit or appeal and a fresh suit by the adopted son is barred by *res judiata*. 43 Ind. Cas. 64=15 N.L.R. 24.

19 (s). Trustee (Mahant and Shebait).

——S. 11—Decision between trustees and Municipality—Res judicata.

Where the ownership of a well and certain adjoining strips of land were in dispute between the trustees of a mosque and a municipality and was decided against the former, they cannot in a subsequent suit by the public set up their right to it. 46 All. 110= 79 Ind. Cas. 310=21 A.L.J. 882=4 L. R. A. Civ 583=A.I.R. 1924 All. 178.

——S. 11—Government land transferred to Municipality — Latter constituted trustee — Decree against Municipality—Whether operates as res judicata in subsequent suit by Government.

Where Government land on being transferred in trust, vested in the Municipality and belonged to it and a decree was passed against Municipality granting a declaration to the plaintiffs that they had obtained an indefeasible title by adverse possession:

Held, that the decree obtained against the Municipality operated as *res judicata* in a subsequent suit by Government as the Municipality represented the title for the time being and was constituted a trustee A.I.R. (Vol. 23) 1936 Lah. 998=I.L.R. (1937) Lah. 100=167 Ind. Cas. 867.

——S. 11—Ex parte decree against trustee of temple—Gross negligence of trustee—Suit by succeeding trustee.

Where in a suit for recovery of possession of certain property the trustee of a temple who was a defendant omitted to put forward a very valid defence on behalf of the temple and an *ex parte* decree was passed against the temple and a fresh suit was filed by the succeeding trustee to establish the rights of the temple in respect of the very same property:

Held, that the second suit was not barred by *res judicata* as the decree passed in the prior suit was the result of gross negligence on the part of the then trustee. A.I.R. (Vol. 18) 1931 Mad. 641=60 M. L. J. 590=33 L. W. 661=133 Ind. Cas. 207.

——S. 11 (S. 13, Old Code)—Suit against trustees—Decree—If Res judicata in suit between two contesting beneficiaries.

A beneficiary is ordinarily sufficiently represented by a trustee; but the rule does not apply where the contest is between two beneficiaries. (1903) 29 B. 133=6 Bom.L.R. 601.

——S. 11—Suit by mahant—Decision in—Res judicata.

Where a suit by a *mahant* impeaching an alienation of *math* property by his predecessor has been dismissed, the decision binds the succeeding *mahant* and his suit for possession challenging the sale will be barred by S. 11, in the absence of collusion or fraud. A.I.R. (Vol. 22) 1935 All. 255=1935 A.L.R. 916 =157 Ind. Cas. 1092.

——S. 11—Suit against idol—Absence of proper representation.

Where certain deities are not properly represented in a suit, decisions in proceedings in which they are not property represented will not bind them and no remedy available to them will be barred by reason of the proceedings. A.I.R. (Vol. 19) 1932 Cal. 642=36 C.W.N. 492=59 Cal. 1135=56 C.L.J. 446 =139 Ind. Cas. 323.

——S. 11 (S. 13, Old Code)—Shebait—Decision against—Res judicata — Suit against succeeding shebaits in respect of other lands of debutter estate—Identity of subject-matter—If essential.

A judgment, not tainted by fraud and collusion, and passed in a suit in which the estate was properly represented, though not in the name of the shebait, and in which the necessary and proper

issues were raised, tried and decided would operate as **res judicata** in regard to property common to the subsequent and the previous litigation. A person placed in possession of the **debutter** estate by the **shebait** for the time being, and authorized to deal with the property for the benefit of the endowment, may be taken to have represented the estate, and it would be contrary to sound legal principles to hold that the same man should have to prove again and again in successive suits that the piece of land held by him is his own and did not form part of the *debutter* estate; and a decision passed in a previous suit brought in the interests of all future successors to the shebaitship consequent on the jural relation between the office and the land is binding on the successors. An estoppel may be binding notwithstanding that the suit which raises it relates to a different property. (1884) L. R. 12 I. A. 16 foll. For purposes of **res judicata**, it is not essential that the subject-matter of litigation should be identical with the subject-matter of the previous suit of which the adjudication is made the foundation. A decision as to boundaries between disputed lands in a previous suit is not conclusive in a subsequent litigation in respect of other lands, although in the previous litigation the boundary line between the two villages concerned had been incidentally ascertained. To ascertain the precise scope of the former litigation and to ascertain the question which was raised and decided, reference may be made not merely to the decree but also to the judgment, and if need be, to the pleadings themselves. The determination of the boundary between two parcels of land may very well have an important bearing upon the question of the boundary of an adjoining parcel. The decision in a previous suit would be admissible to this extent, namely, to show that on that occasion the title which is subsequently asserted was alleged; on this ground alone the previous judgment would be admissible under S. 13 of the Evidence Act. (1906) 9 C.L.J. 597=12 C.W.N. 739=4 Ind. Cas. 81.

——S. 11 (S. 13, Old Code)—Shebait of idol—Decision against, how far binding on a succeeding shebait.

A decision against one shebait of an idol is binding on a succeeding shebait. 1899 6 C.W.N. 178. *See also* (1905) 11 C.W.N. 489; (1907) 6 C.L.J. 622.

——S. 11—Shebait—Consent decree against dismissed shebait—Whether binding on successor.

A decree by consent against the shebait of a temple as such who to the knowledge of the plaintiff has been dismissed from temple is not binding on the properties of the endowment in the hands of his successor in office. 11 Ind. Cas. 280=14 C.L.J. 337.

20. Plea of res judicata.

(a) Mode of pleading.
(b) Mode of proof.
(c) Scope of plea.
(d) Stage at which plea may be raised.
(e) Waiver of plea.

20. (a) Mode of pleading.

——S. 11—Plea of res judicata—Pleading—Mode of.

In pleading *res judicata* it is not necessary to set out the pleadings in the earlier suit at length. The Court can look at the pleadings in the former suit to determine whether the issue sought to be raised again was fairly raised in the former suit. The structure of the pleadings should not be stressed too strictly, where sufficient notice has been given to the other side. I.L.R. (1948) Nag. 747=A.I.R. 1948 Nag. 358.

——S. 11—Plea of—Allegations in plaint—Necessity for.

Where all the conditions requisite for the application of the rule of *res judicata* are not stated in the plaint, it is impossible to say that on the face of it the suit is barred by *res judicata* under S. 11, C.P.C. 75 P.W.R. 1913=18 Ind. Cas. 1007=194 P.L.R. 1913.

20. (b) Mode of Proof.

——S. 11—Proof of plea—Court, when can decide.

A Court cannot decide whether a matter is *res judicata* without having the earlier judgment in the case or (as in a second appeal) without having some decision as regards that matter by the last Court. A.I.R. (Vol. 26) 1939 Pat. 19=5 B. R. 482=180 Ind. Cas. 736.

——S. 11 (S. 13, Old Code)—Plea of res judicata—Proof.

A plea of **res judicata** taken on the ground that the question in issue in the suit was formerly in issue in probate proceedings cannot be given effect to when the said proceedings are not in evidence and there is thus no sufficient evidence to support the plea. A judgment passed in the previous proceedings showing what the Judge understood to have been the question for decision in those proceedings is not enough to support such a plea. The Court cannot give effect to the plea unless it can say for itself that the matters in issue in the suit were in issue in the previous proceedings. (1905) 1 C.L.J. 594=7 Bom. L.R. 876=9 C.W.N. 938=2 A.L.J. 758=15 M.L.J. 336=33 C. 116=32 I.A. 244 (P.C.).

——S. 11 (S. 13, Old Code)—Decree and judgment both to be read together.

In order to see what was in issue or what has been heard and decided in a prior suit, the judgment and decree should be read together. 15 I. A. 193; 16 C. 173, followed. 27 B. 418=(1903) 5 Bom. L.R. 396.

——S. 11—Proof of plea—Reference to decree and judgment.

Where a decree is expressed in general terms the judgment may be referred to ascertain what the real issues were, in order to see how far the decree operates as *res judicata*. 51 Ind. Cas. 981=1919 P. H. C. C. 393.

——S. 11—Plea of—Proof.

To decide the question of *res judicata* the court has to look to the pleadings and judgment to ascertain the matter in controversy and the decision actually given. 12 Ind. Cas. 9=14 C.L.J. 220.

——S. 11 (S. 13, Old Code)—Reference to pleadings and judgment and not merely to decree—Necessity.

To determine the question of *res judicata*, it is essential to ascertain what were the rights in dispute between the parties and what alleged between them, and this must be done not merely from the decree but also from the pleadings and judgment. (1907) 5 C.L.J. 611=36 C. 193=1 Ind. Cas. 913=9 C.L.J. 597.

——S. 11—Proof—Plea—Reference to judgment.

If a question of *res judicata* arises upon a decree expressed in general terms, the Court may look at all the intrinsic evidence before it and the materials of the case as a whole. 10 Ind. Cas. 748=13 Bom. L. R. 162.

——S. 11—Strict construction of pleadings and decision.

A plea in bar of legal rights should be given effect to only on strictly construing the pleadings and the decision in the previous suit. 9 L. R. A. Rev. 306 =113 Ind. Cas. 758=A.I.R. 1929 All. 29.

——S. 11—Strict construction of judgment.

The plea of *res judicata* being one in restraint of the right of a litigatant to have his case fully tried and determined the judgment which is pleaded in bar of this right must be strictly construed. 31 M.L.J. 311=20 M.L.T. 228=35 Ind. Cas. 421=(1916) 2 M.W.N. 133.

——S. 11—Plaint in previous suit—Construction.

To determine whether a claim is *res judicata*, the plaint in the previous suit should be construed in the same way as the Court which decided the former suit construed it. 42 Ind. Cas. 518=11 Bur.L.T. 192.

——S. 11—Plea of—Proof—Facts and surrounding circumstances.

The question as to whether certain matters are or are not *res judicata* between certain parties is a question peculiar to the facts and circumstances surrounding each particular case. 12 Ind. Cas. 813=13 Bom.L.R. 1061.

——S. 11—Party affected—Must be given notice and opportunity.

The party who is sought to be affected by the bar of *res judicata* should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contentions against such a decision. 46 M. 768=(1923) M.W.N. 571=45 M.L.J. 346=18 L.W. 757=74 Ind. Cas. 155=1924 M. 1 (F.B.).

——S. 11—Burden of proof.

A party who relies upon certain judgment operating as estoppel has the burden of proving all the facts necessary to make his plea effective. A.I.R. (Vol. 32) 1945 Nag. 288=1945 N.L.J. 383=I.L.R. (1945) Nag. 1005.

——S. 11—Plea of proof—Onus.

The person who pleads *res judictaa* must show from the record that Court had found in his favour in another proceedings. (1918) Pat. 21=42 Ind. Cas. 425=3 Pat.L.W. 360.

——S. 11—Plea of—Proof—Onus.

A person who wishes to set up the plea of *res judicata* must produce such documents as will bring the case under S. 11 of C. P. C. 39 Ind. Cas.-908 =3 Pat.L.W. 327.

——S. 11—Plea of res judicata—Sustainability—Non-production of judgment and decree in previous suit.

A plea of *res judicata* has to be established by the production of the judgment and decree in the previous suit. In the absence of such judgment and decree, the admitted facts cannot take the place of estoppel by record. A.I.R. 1950 Assam 162.

——S. 11—Decision on particular point—Same point raised in subsequent suit—Judgment of previous suit not filed—No res judicata.

A decision on a particular point was obtained in the trial Court and it was upheld by the Appellate Court. The same point arose in a subsequent suit but no copy of the previous Appellate Court judgment was filed in the subsequent suit:

Held, that it was not possible to ascertain on what ground that decision of the trial Court was upheld. In these circumstances, the contention that the said decision should be taken as operating as *res judicata* could not be accepted. A.I.R. (Vol. 22) 1935 Cal. 792=40 C.W.N. 174=159 Ind. Cas. 1008.

——S. 11—Duty of party raising plea.

Where a plea of *res judicata* is raised, it is the duty of the party raising the plea to place before the Court all materials required to enable the Court to allow the plea. A.I.R (Vol. 32) 1945 Oudh 70 =1944 O.W.N. 509=1945 A.W.R. 32.

——S. 11—Where a person seeks to make use of the judgment in a prior suit as *res judicata*, it is necessary for him to identify the subjects in dispute in the subsequent suit with the subjects which, in the prior case, were held to belong to him. When he has not raised the question in the pleadings or in the issues, he cannot be allowed to go into the question. A.I.R. (Vol. 23) 1936 P.C. 258=44 L.W. 446=2 B.R. 756=1936 O.W.N. 669=38 Bom. L.R. 1128=1936 A.W.R. 717 (1)=164 Ind. Cas. 17 (P.C.).

——S. 11—Plea of res judicata—Proof—Plaint and judgment to be produced.

The Privy Council refused to uphold a plea of *res judicata* on the ground that the summary of the plaint as set out in the decree was ambiguous and that the original pleadings should have been filed. The Privy Council refused to allow the appellant to put in evidence the documents in support of the plea when the appellant was remiss, in spite of the objections taken in the Courts below to the defect in the record. 47 Cal. 662=47 I.A. 11=18 A.L.J. 401=(1920) M.W.N. 308=11 L.W. 518=22 Bom.L.R. 557=55 Ind. Cas. 959=38 M.L.J. 424 (P.C.).

——S. 11—Pleadings in previous suit sufficiently incorporated in judgment and issues known—Absence of pleadings in previous suit before Court trying subsequent suit.

The pleadings in the previous suit which was an old case were not before the Court which was trying the subsequent suit. The pleadings in the previous suit were sufficiently incorporated in the judgment in that suit and it could be known what the issues before the Court were. It was evident from

the judgment in the previous suit that the genuineness of the will was the main question before the Court and the will was held to be genuine:

Held, that absence of the pleadings in the previous suit could not debar the defendants in the subsequent suit from raising the plea that the question of the genuineness of the will was barred by *res judicata*. A.I.R. (Vol. 31) 1944 Oudh 139=19 Luck. 515=216 Ind. Cas. 276=1944 O.W.N. 37.

——S. 11—Decree—Evidentiary value.

A decree does not show on what ground the case has been decided and does not afford any information as to the matters which were in issue or have been decided and is not sufficient evidence to support an estoppel by record. A.I.R. (Vol. 23) 1936 Mad. 469=1936 M.W.N. 124=43 L.W. 676=161 Ind. Cas. 748.

——S. 11—A previous decree in a rent suit without the judgment cannot amount to more than a strong piece of evidence regarding the amount of rent realized from year to year. 85 Ind. Cas. 770=A.I.R. 1925 Cal. 1116.

——S. 11—In order to see what was in issue in a suit, or what has been heard or decided, the judgment must be looked at. The decree is only to state the relief granted or other determination of the suit. The determination may be on various grounds but the decree does not show on what ground, and does not afford any information as to the matters which were in issue or have been decided. 37 Ind. Cas. 674=14 A.L.J. 1171.

——S. 11—Two suits bearing different numbers decided on same date—It can be shown that suit bearing later number was decided first.

Assuming that out of two suits decided on the same date the suit which bears the earlier number must be deemed to have been decided first, there can be no doubt that it can be proved that the subsequent suit was decided earlier. A.I.R. (Vol. 27) 1940 All. 171=1940 A.W.R. 262=188 Ind. Cas. 386.

——S. 11 (S. 13, Old Code)—Plea of res judicata—Previous decision uncertain—Estoppel, certainty of.

In a former suit the temple sued the defendant for the melwaram. The defandant contended that he was not liable as he was not in possession of so much of the lands as was believed to have been in the possession of the dedfendant's ancestor at the time of the arrangement. The plaintiff's claim was decreed by the Munsif on the ground that the defendant should seek his remedy from Government and the Sub-Judge confirmed this decree upon the ground that the defendant was precluded from raising his contention by reason of the payments made by his family for a long time upon the whole extent. In second appeal the High Court held that they "saw no reason to differ from the Courts below". In a second suit by the trustees for the melvaram due for different faslis the same contention was raised but the plaintiff pleaded that it was *res judicata* by the former decision: *Held*, (1), that in order to sustain a plea of *res judicata* what was relied upon as estoppel must be certain; (2), that where the first Court based its decision upon one ground and the second Court upon a different and inconsistent ground and the third Court simply affirmed the decision of both the Courts, the decision was uncertain and it would be impossible to say what exactly was decided; (3), that the decision in the former litigation was not *res judicata* and the defendant was entitled to raise his contention (1904) 14 M.L.J. 379.

20. (c) Scope of plea.

——S. 11—Plea under general principles of law.

The plea of *res judicata* is not confined to the provisions of S. 11, but may be invoked under general principles of law: A.I.R. 1921 P.C. 11 and A.I.R. 1922 P.C. 80, followed. 8 Lah. 15=27 P.L.R. 504=96 Ind. Cas. 1002=A.I.R. 1926 Lah. 603.

——S. 11—Where it is contended that an issue shuold not be re-tried inasmuch as it was directly and substantially tried in a former suit between the same parties, the question has to be determined upon the provisoins of S. 11 of the C. P. Code, and it is not open to rely upon the principle of finality which forms the basis of the general law of *res judicata* apart from those provisions. 85 Ind. Cas. 979=A.I.R. 1925 Cal. 1046.

——S. 11—Plea of—Substance of decision.

A suit dismissed on the ground that the plaintiff could not establish his contentions, bars a subsequent suit on the same contention in another form. 37 Bom. 224=19 Ind. Cas. 558=15 Bom.L.R. 266.

——S. 11—Plea of—One of substance—Form of plaint.

A party cannot by manipulation of the form of plaint, get round the bar of *res judicata*. 32 Ind. Cas. 624=(1916) 1 M.W.N. 171.

——S. 11—Whether can prevail where results are illegal—Legality of point substantially in issue—If can be compromised.

A plea of *res judicata* can prevail, even where the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute. If the legality of an act is a point substantially in dispute, it may be fair subject of compromise in Court like any other disputed matter and thus becomes *res judicata*. And if it is abandoned and not put forward by a defendant, it must, having regard to the provisions of S. 11, be deemed to have been decided against him. A.I.R. (Vol. 23) 1936 Sind 99=29 S.L.R. 455=164 Ind. Cas. 43.

——S. 11—Correctness of conclusions—Relevancy.

The plea of *res judicata* is not dependent upon the merits of the reasons given for a particular conclusion. The conclusion whether right or wrong, is binding upon the parties. A.I.R. (Vol. 19) 1932 Bom. 257=34 Bom. L.R. 198=137 Ind. Cas. 600.

——S. 11—Party, if can show that previous judgment is erroneous.

The theory of *res judicata* requires the position and the case of the parties to be the same in both suits. A party against whom a judgment has been given is not permitted to show that it is erroneous whether as plaintiff or as defendant in a subsequent proceeding but not a party in whose favour it was rendered. The latter may be prevented from doing so, if to permit it will contravene the principle of not allowing a person to derive an equitable benefit

by adopting inconsistent positions. 14 M.L.T. 229 =(1913) M.W.N. 776=5 L.W. 299=21 Ind. Cas. 219=25 M.L.J. 324.

——S. 11—Plea of—When can succeed.

A plea in bar can be allowed to succeed only where the law expressly provides for it or the implication is so irresistible that its provisions are inconsistent with a contrary hypothesis. 1929 A.L.J. 653=118 Ind. Cas. 513=51 All. 805=A.I.R. 1929 All. 506.

——S. 11 and O. 2, Rr. 2 and 3—Plea of—How determined.

It is only when, on the facts relied upon in the plaint to constitute the cause of action in the first suit, it is open to ask for the relief prayed for in the second suit that the latter suit would be barred under O. 2, Rr. 2 and 3. 38 Mad. 247=(1913) M.W.N. 554=20 Ind. Cas. 418=25 M.L.J. 125.

——S. 11—No issue as to res judicata raised—Only particular decision incidentally considered as bar by trial Court and no bar by Appellate Court.

Normally *res judicata* is pleaded in bar to the hearing of the whole suit or some issue in it. When so pleaded, all the available grounds in support of it must be urged once for all. But when no issue as to *res judicata* is raised, but only a particular decision is incidentally considered as a bar by one Court and no bar by the Appellate Court, the plea is not wholly excluded thereby, especially when the whole suit is directed to be tried on fresh evidence. A. I. R. (Vol. 29) 1942 Cal. 445=I.L.R. (1942) 1 Cal. 510=75 C.L.J. 20=46 C.W.N. 169=202 Ind. Cas. 570.

——S. 11—Plea based on specific estoppel—Case set up not made out—Circumstances disclosing another species of estoppel—If can be availed of.

A plea of *res judicata* is only a plea of estoppel by judgment. If a party is unable to make out the particular species of estoppel set up by him, he can still rely upon another species of estoppel made out by the circumstances disclosed in the case. A.I.R. 1948 East. Punj. 26.

20. (d) Stage at which plea may be raised.

——S. 11—Plea should be raised at early stages.

Where in an appeal by the plaintiffs from a suit which had been dismissed, although it was then open to the defendants to support the order of dismissal on the ground of *res judicata*, they do not do so with the result that the High Court, instead of dismissing the suit, remand it to be heard on the merits, they are precluded from raising the plea subsequently. A.I.R. (Vol. 23) 1936 Cal. 454=168 Ind. Cas. 375.

——S. 11—Suo motu plea by Appellate Court.

An Appellate Court can consider the plea of *res judicata* for the first time even though it has not been raised before it by the party concerned. The bare fact that the plea was not raised in the trial Court is no ground for holding that it must be deemed to have been deliberately waived. A.I.R. (Vol. 32) 1945 All. 76=1944 O.W.N. 136=1944 A.W.R. 224 =1945 A.L.J. 7=I.L.R. (1944) All. 601.

——S. 11—Plea if can be raised in appeal.

A plea of *res judicata* may be properly raised in appeal when the judgment which is pleaded as a bar was delivered after the decision of the trial Judge, and no further facts are to be brought on the record in order to substantiate it. 48 P.L.R. 195 =224 Ind. Cas. 117=A.I.R. 1946 Lah. 387.

——S. 11—Final finding on which plea was based, given pending appeal—Appellate Court if bound to take notice of final judgment.

Ordinarily it is not permissible to allow a plea of *res judicata* to be raised for the first time in appeal. But when the final finding on which the plea rests was given while the appeal was pending, the Appellate Court is not only justified but bound to take notice of the final judgment arrived at between the parties and give effect to the same and is justified in permitting the judgment to be produced before it. A.I.R. (Vol. 28) 1941 Mad. 815=54 L. W. 241=1941 M. W. N. 981=197 Ind. Cas. 448.

——S. 11—Plea, when can be raised in appeal.

The question of *res judicata* can be raised in appeal and if a decision is come to in prior suit before the disposal of latter suit even in appellate stage, the bar of *res judicata* is applicable. 8 Pat. 107=117 Ind. Cas. 167=A.I.R. 1929 Pat. 173.

——S. 11—Plea of res judicata—If may be raised in second appeal.

The question of *res judicata* being one of law can be taken for the first time in second appeal. 1947 M.W.N. 364=60 L. W. 241=A.I.R. 1948 Mad. 54=(1947) 1 M.L.J. 274.

——S. 11—Plea, when can be raised in second appeal.

The plea of *res judicata* can be raised for the first time in appeal or even in second appeal provided it can be clearly maintained from the undisputed facts on the record. A.I.R. (Vol. 27) 1940 Rang. 136 =190 Ind. Cas. 609.

——S. 11—Plea of constructive res judicata—Second appeal—Notice.

In order to apply the doctrine of constructive *res judicata*, it must be shown that the party against whom it is sought to be applied had clear notice of the nature of the claim made against him.

Where a plea of constructive *res judicata* based on notice of the nature of a claim made in a previous suit was made against a party in second appeal and the plea was not raised in the lower Courts, and there was nothing on record of the case showing the nature of the notice, neither was there any finding of the lower Courts as to whether any notice was actually served on the party:

Held, that the plea could not be raised for the first time in second appeal. A.I.R. (Vol. 22) 1935 Cal. 713=159 Ind. Cas. 370.

——S. 11—Second appeal—Point of res judicata.

Per *Butler J.*—Though a question of *res judicata* is a point of law, it cannot be raised for the first time in second appeal where the basis for the plea was not laid in the lower Courts by establishing the judgments relied upon as constituting the bar. A.I.R. (Vol. 21) 1934 Mad. 551=40 L. W. 610=1934 M. W. N. 951=152 Ind. Cas. 246=67 M.L.J. 268.

——S. 11—Second appeal—Plea of res judicata.

A plea of *res judicata* cannot be allowed to be taken for the first time in second appeal. A.I.R. (Vol. 21) 1934 All. 770=149 Ind. Cas. 93.

——S. 11—In second appeal.

The mere fact that a point is *res judicata* does not

make it allowable in second appeal, if it has not been taken in the written statement of the defendant, nor has any issue been raised on it nor has it been discussed in that light by lower Courts. A.I.R. 1929 Mad. 775.

——S. 11—Plea of—Second appeal.

A plea of *res judicata* depending upon a finding of fact not contested in the Lower Appellate Court cannot be maintainaed in second appeal. 46 Ind. Cas. 119=132 P.W.R. 1918.

——S. 11—In revision.

Point as to *res judicata* not raised in the Court below cannot be raised in revision. 13 M.L.W. 289=62 Ind. Cas. 480=A.I.R. 1921 Mad. 532.

20. (e) Waiver of plea.

——S. 11—Waiver of plea.

If a party does not put forward a plea of *res judicata* he must be taken to have waived it and to have intentionally invited the Court to decide the case on the merits and a compromise decree subsequently passed is binding on the parties. A.I.R. (Vol. 20) 1933 Cal. 69=59 Cal. 513=141 Ind. Cas. 858.

——S. 11—Waiver of plea.

The bar of *res judicata* is one which does not affect the jurisdiction of the Court but is a plea in bar, which a party is at liberty to waive. 48 C.L.J. 577=114 Ind. Cas. 129=A.I.R. 1929 Cal. 163.

——S. 11—Plea of—Waiver.

The plea of *res judicata* being one in bar of a trial of a suit or an issue, and not affecting the jurisdiction of the Court may be waived by the party. The effect of waiver is the same whether it was omitted to be taken by mistake, accident or design. (1916) 2 M.W.N. 219=36 Ind. Cas. 289=31 M.L.J. 219.

21. Prior decision.

See also CIVIL P. C., S. 11.

(1) DIRECTLY AND SUBSTANTIALLY IN ISSUE.

(2) HEARD AND FINALLY DECIDED.

(a) Conflicting decisions.
(b) Erroneous decision.
(c) "Former suit".
(d) Record of Rights—Effect on.
(e) Reversal in effect in appeal from another proceeding.
(f) Suit instituted without authority.
(g) Suit irregularly constituted.
(h) Suit on prior decree.
(i) Scope of res judicata.

21. (a) Conflicting decisions.

——S. 11—Two conflicting decisions on one issue—Later decision operates as res judicata.

Per *Malik, J.*—Out of two conflicting decisions on an issue, it is the later decision that operates as *res judicata*. If a prior decree *inter partes* is either not cited in a later case where the same point arises or, if cited, is disregarded by the Court which has jurisdiction to decide that point, it must be deemed that the plea of *res judicata* was either waived or that it was held that the previous decision was not binding and it is, therefore, the later decision that would be binding between the parties. A.I.R. (Vol. 32) 1945 All. 121=1945 A.L.J. 11=I.L.R. (1945) All. 75=1945 A.W.R. (H.C.) 414=222 Ind. Cas. 196.

——S. 11—When there are two conflicting decrees *inter partes*, the later must be taken to prevail. A.I.R. (Vol. 25) 1938 Pat. 359=19 P.L.T. 456=4 B.R. 741=176 Ind. Cas. 570.

——S. 11—Later decision prevails.

Where there are two conflicting decisions upon the rights of the parties, the later decision must prevail particularly when the later decision is that of a superior Court. A.I.R. (Vol. 24) 1937 All. 481=I.L.R. (1937) All. 628=1937 A.L.J. 979=1937 A.W.R. 539=170 Ind. Cas. 657.

——S. 11—On the principles underlying the plea of *res judicata* which aims at avoiding multiplicity of litigation and at securing finality, if two conflicting decrees have been obtained by parties from two different Courts or even from the same Court then the last one should be the effective decree between the parties and the first decree should be regarded as dead. The basis of this salutary rule is that if a party who could raise the plea of *res judicata* does not raise the same when an opportunity is given to him he must be deemed to have waived it. The plea of *res judicata* is not one which affects the jurisdiction of a Court. It is a plea in bar and such a plea can be waived. A.I.R. (Vol. 22) 1935 All. 645=155 Ind. Cas. 571.

——S. 11—Conflicting decrees—Later one prevails.

Where there are two previous conflicting decisions both of which operate as *res judicata*, the decision of the later date must prevail. A.I.R. (Vol. 19) 1932 All. 520=1932 A.L.J. 1063=139 Ind. Cas. 161.

——S. 11—When there are two conflicting decrees, the last should prevail on the ground that in the eye of law it is binding between the parties and the previous decree should be taken as pleaded in the latter suit and not given effect to, or must henceforth be regarded as dead. 48 C.L.J. 577=114 Ind. Cas. 129=A.I.R. 1929 Cal. 163.

——S. 11—Where there are two decrees operating as *res judicata* one as against the plaintiffs and one as against the defendants, it is the latter decree that must prevail over the former because the latter decree shuts out consideration of the former; 37 All. 531, Foll. 49 All. 606=25 A.L.J. 387=8 L. R. A. Rev. 122=101 Ind. Cas. 501=A.I.R. 1927 All. 717.

——S. 11—Out of inconsistent and contradictory judgments *inter partes*, the later judgment must prevail. Prior decree becomes unenforceable after later decree, but where later decree does not cancel prior decree the fruits got in execution of the prior decree are not restored to the judgment-debtor in the prior decree, who was held entitled to prevent further execution only by a still later decision in his favour on his filing a suit for the purpose. 46 All. 220=79 Ind. Cas. 803=22 A.L.J. 91=5 L. R. A. Civ. 71=A.I.R. 1924 All. 310.

——S. 11—In cases of judgments inter partes, the later adjudication should be taken as superseding the earlier whether or not the earlier adjudication was pleaded as a bar to the trial of the suit in which

the later adjudication was made, 31 M.L.J. 219 Foll. 14 M.L.W. 85=63 Ind. Cas. 730=1921 M.W.N. 487=A.I.R. 1921 Mad. 612=41 M.L.J. 54.

——S. 11—Conflicting decisions.

In judgments *inter partes* the later adjudication should be taken as superseding the earlier, whether or not the former adjudication was pleaded as a bar to the trial of the suit in which the later adjudication is made. The plea of *res judicata* may be waived by accident, mistake or intentionally. The maxim "Estoppel against estoppel sets the matter at large" is not applicable to estoppels by record. 31 M.L.J. 219=36 Ind. Cas. 289=(1916) 2 M.W.N. 219.

——S. 11—Inconsistent orders—Later one prevails.

There was a compromise between the 4th defendant and some of the judgment debtors by which they were set free. The transferee of the decree applied for execution against these judgment debtors also. Their objection was allowed. In a second application for execution against them also, they objected, but their objection was lost in default. In a third application against them, held their objection was barred by *res judicata* as the latter of the two inconsistent decisions must prevail. 37 All. 531=30 Ind. Cas. 775=13 A.L.J. 764.

——S. 11—Inconsistent decree.

As between two inconsistent decrees it is the latter decree that will operate as *res judicata*. 17 Ind. Cas. 205=14 Bom.L.R. 854.

——S. 11 (S. 13, Old Code)—Conflicting decisions—Res judicata—Last decision operates as a bar.

Where there are conflicting decisions regarding the subject matter in dispute between the parties to the suit or their predecessors in interest, the latest of those decisions would override the earliest decisions and operate as *res judicata*. (1904) 1 A.L.J. 416.

21. (b) Erroneous decision.

See also C. P. CODE, S. 11—ISSUE OF FACT OR LAW.

——S. 11—Interest wrongly awarded—Decision, if operates as res judicata.

Even if the decree in the previous suit awards interest wrongly and contrary to law, still it would operate as *res judicata* between the parties if the circumstances existing in the subsequent case were the same as those existing in the earlier case. A.I.R. (Vol. 30) 1943 Pat. 327=22 Pat. 220=10 B.R. 259=210 Ind. Cas. 426.

——S. 11—Correctness or otherwise of decision—Relevancy.

Correctness or otherwise of judicial decision has no bearing upon the question whether it does or does not operate as *res judicata*. A party taking the plea of *res judicata* has to show that the matter directly and substantially in issue has also been directly and substantially in issue in a previous suit and has been heard and decided. The principle of *res judicata* is not to be ignored merely on the ground that the reasoning, whether in law or otherwise, of the previous decision can be attached on a particular point. A.I.R. (Vol. 25) 1938 Nag. 195=I.L.R. (1940) Nag. 181=175 Ind. Cas. 693.

——S. 11—Rent suit—Erroneous decision—Effect of.

The decision as to matters existing at the date of a previous suit for rent for a particular year will even if erroneous, operate as *res judicata* in respect of the same matters in a suit for rent for subsequent years. This rule does not, however, apply in the case of a suit for rent as regards certain arrears in respect of which no claim was and could be made in the previous suit. A.I.R. (Vol. 24) 1937 Mad. 254=1936 M.W.N. 1362=45 L.W. 15=I.L.R. (1937) Mad. 364=(1937) 1 M.L.J. 233=168 Ind. Cas. 24 (F.B.).

——S. 11—Erroneous decision—Whether can be res judicata.

When the matter has once been at issue between the parties and has been decided, whether wrongly or rightly, it must become *res judicata*. The question cannot again be agitated in a suit between the same parties and on the same issue, on the ground that the earlier decision was incorrect. A.I.R. (Vol. 22) 1935 Pat. 526=16 P.L.T. 488=2 B.R. 12=158 Ind. Cas. 734.

——S. 11—Erroneous order, if can be attacked collaterally.

Jurisdiction is the power to hear and decide and the power to decide is the power to decide erroneously as well as correctly. Consequently, unless an order has been vacated, it is operative between the parties and cannot be ignored and challenged collaterally in different proceedings. A.I.R. (Vol. 22) 1935 Sind 62=155 Ind. Cas. 895.

——S. 11—Correctness or otherwise of decision is immaterial.

Where the matter in issue has been directly and substantially in issue in the previous suit the decision operates as *res judicata*. Whether the decision was right or wrong has no bearing on the question as to whether or not *res judicata* applies. A.I.R. (Vol. 20) 1933 Rang. 383=150 Ind. Cas. 695.

——S. 11—Wrong decision.

To apply the law of estoppel by judgment it must be seen whether a matter was directly and substantially in issue in the former suit, between the same parties or between the parties under whom they or any of them claim, and whether that has been heard and finally decided. When these conditions are satisfied even an erroneous judgment operates as *res judicata* as regards the matter in controversy 10 P.L.T. 630=120 Ind. Cas. 292=A.I.R. 1930 Pat. 71.

——S. 11—Prior decision though wrong is res judicata. 61 Ind. Cas. 603.

——S. 11—Wrong decision.

A wrong decision in a previous suit bars a subsequent suit. A settlement Court in deciding the question of title as between a mortgagor and his mortgagee lost sight of the fact that the mortgagor's right of redemption under the deed in suit had been taken away by proper foreclosure proceedings and declared the mortgagee to have acquired full proprietary rights in the property, *held*, the decision operated as *res judicata*. 7 O.L.J. 524=2 U.P.L.R. (J.C.) 163=60 Ind. Cas. 404=23 O.C. 269.

——S. 11 (S. 13 Old Code)—Erroneous decision —Res judicata when not appealed from.

Where an order, though wrong, has become final, not having been appealed against, its propriety cannot be questioned in a subsequent suit. (1903) 27 M. 401.

——S. 11—Wrong suit followed by wrong decree.

A wrong suit followed by a wrong decree does not bar a correct suit. 20 M.L.W. 207=83 Ind. Cas. 324=1924 M.W.N. 623=47 Mad. 850=A.I.R. 1924 Mad. 716=47 M.L.J. 85.

——S. 11—Prior suit filed in wrong Court—Later suit properly filed—No bar.

Where the previous suit was undervalued and was filed in the Court of the District Munsif and the later suit was filed in the sub-Court with the proper valuation, *held*, that the later suit was not barred. 1930 A.L.J. 1254=A.I.R. 1931 A. 21=130 Ind. Cas. 43.

21. (c) "Former suit".

See also C. P. CODE, S. 11—COMPETENT COURT.

——S. 11 (S. 13, Old Code)—"Former suit"—Material date—Date of institution of suit or date of decision—Suit instituted later but tried earlier—If "former" suit—Trial of suit instituted previously—If barred.

A sued **B**, in the City Civil Court. **B** sued **A** in the High Court, raising the same contentions. The matter was decided in the latter. Then the issue about the matter came on for trial in the former:

Held, that the suit was barred. The doctrine of **res judicata** prohibiting the re-trial of an issue refers, not to the date of the commencement of the litigation but to the time when the Judge is called on to decide the issue. 11 A. 48, foll. (1901) 24 M. 350.

21. (d) Record of Rights—Effect on.

——S. 11—Prior decision—Record of rights cannot supersede.

The Record of Rights merely raises a presumption and it cannot, supersede the decision of the Civil Court especially when it is given after contest and on a specific issue framed in respect of any question. The decision operates as *res judicata* and cannot be brushed aside by the Court in the absence of any assertion of fresh arrangement between the parties subsequent to the decision. A.I.R. (Vol. 27) 1940 Cal. 588=72 C.L.J. 12=192 Ind. Cas. 44.

——S. 11—Prior decision—Effect not destroyed by Record-of-Rights.

The effect of the publication of the record-of-rights is not to sweep away all previous decisions between the parties. Such a consequence would not follow, even if the entry in the Record-of-Rights has the effect of a decision in a suit between the parties. Hence where a decision operates as *res judicata* its effect is not destroyed by the subsequent publication of the Record-of-Rights. 35 C.L.J. 200=60 Ind. Cas. 389=A.I.R. 1921 Cal. 761.

21. (e) Reversal in effect in appeal from another proceeding.

——S. 11—Prior decision—Reversal in effect in appeal from another proceeding—No res judicata.

The decision of a Court though not appealed from does not operate as *res judicata* where the appellate Court passes an order for fresh trial substantially reversing the unappealed order in an appeal from a different decision in the same suit. 76 Ind. Cas. 473=A.I.R. 1923 All. 456.

21. (f) Suit instituted without authority.

——S. 11 (S. 13 Old Code)—Decision in suit instituted without authority—If res judicata—Evidentiary value in later suit.

That though a judgment obtained by plaintiff in a prior suit between the same parties instituted by the defendant's agent, though without authority to do so, will not constitute **res judicata** by itself, yet it will constitute a strong case in favour of plaintiff's title and possession and it lies heavily on the defendant to displace it. (1909) 11 C.W.N. 380.

21. (g) Suit irregularly constituted.

——S. 11—Suit irregularly constituted—Decree in —Res judicata.

The decision in a suit irregularly constituted is still a decision of a Court with jurisdiction and if the Court has pronounced its decision and passed a decree against the party in the suit he must have the decree set aside by regular proceedings by way of appeal or otherwise. A.I.R. (Vol. 29) 1942 Pat. 226=20 Pat. 841=8 B. R. 616=199 Ind. Cas. 713.

——S. 11—Prior suit in form one between private parties but in effect between trust and defendant—Effect.

Plaintiff filed a suit claiming the suit land, in the first instance as his own, but, in the course of the trial, he made an admission that the land was trust property. The Court recording the admission held that it was trust property and that both the plaintiff and the defendant were jointly entitled to its management.

Held, that although in form this was a suit between two private persons, it was in effect and substance a right claimed by the plaintiff on behalf of the trust against the defendant. It was a litigation between trust on the one hand and the defendant on the other and the defendant was bound by that decision. 116 Ind. Cas. 142=A.I.R. 1929 Mad. 687.

21. (h) Suit on prior decree.

——S. 11—Prior decree—Suit on—Questions decided by decree—Res judicata.

Where a suit was filed on a prior decree, *held* that so long as the decree was in force the Court should give effect to it and should not ignore it and go into the questions decided by it. 71 Ind. Cas. 560=A.I.R. 1924 Pat. 165.

21. (i) Scope of res judicata.

——S. 11—Prior decision—Res judicata—Scope of.

B held a tenure under *A* consisting of certain mal and certain paikhan lands. *B* was dispossessed from the paikhan lands and a suit by *A* for rent of mal lands only was dismissed. A suit by *B* for declaration of title to and recovery of the paikhan land was

ultimately decreed by the High Court on a date subsequent to the date of dismissal of *A's* suit. *A* then brought a suit for apportionment of the rent of the mal lands in respect of period previous to the decree of the High Court. There was nothing on record showing that *A*, since the decree for possession in favour of *B*, gave up possession of the lands dispossessed or that *B* had got possession of the lands through Court or otherwise.

Held, that as the period to be regarded was one previous to the decree of the High Court in the title suit by *B* and as the state of things at the date of the dismissal of the apportionment suit still continued, the question of dispossession and suspension of rent was barred by *res judicata*. 35 C.W.N. 46= A.I.R. 1931 Cal. 397=132 Ind. Cas. 81.

——S. 11—Prior decision—Order for costs—No appeal—Effect.

An order for costs was passed by the Privy Council against one *G*. On an application being made for the execution of that order, a decree was drawn by the High Court giving the different items of costs. After the decree, embodying the order of the Privy Council, had been drawn, the Subordinate Judge had decided on another application for execution by the same decree-holder that *G* was not liable to pay the item (a) of the costs. *Held*: As the Subordinate Judge's order was passed after the decree embodying the order of the Privy Council had been drawn up by the High Court and as no appeal was preferred from it, the order became final and operated as *res judicata*. 12 P.W.R. 1923=A.I.R. 1922 Lah. 361.

22. Pro forma defendant.

See also (1) C.P.C. S. 11—CO-DEFENDANTS.
(2) C.P.C. S. 11—MIGHT AND OUGHT.

——S. 11—Pro forma party—Finding in favour of —No res judicata.

A finding in favour of a party joined as *pro forma* defendant and not a necessary party in previous suit does not operate as *res judicata* in subsequent suit. A.I.R. (Vol. 25) 1938 Lah. 842=11 R. L. 908= 182 Ind. Cas. 209.

——S. 11—Pro forma defendant—Findings against —No res judicata.

Where a person is added only as a formal or nominal party in a suit, the findings arrived at therein do not operate as *res judicata* as against him. (1936) 165 Ind. Cas. 662=40 C.W.N. 1205.

——S. 11—Pro forma defendant—Decision against —No res judicata.

A decision arrived at in a prior suit is not *res judicata* against a person who was merely a nominal defendant in the previous suit. 65 P.R. 1916=157 P.W.R. 1916=35 Ind. Cas. 543=1 P.L.R. 1917.

——S. 11—Pro forma defendant—Findings in suit —No res judicata against them.

Where, in a former suit, no relief was claimed against the plaintiffs in the subsequent suit, they being merely *pro forma* defendants in that suit, the findings in the previous suit do not operate as *res judicata* against the plaintiffs in the subsequent suit. (1936) 164 Ind. Cas. 561=61 C.L.J. 193=39 C. W. N. 938=62 Cal. 642.

——S. 11—A pro forma defendant when no relief is claimed against him is not bound by the rule of *res judicata*. (1936) 64 C.L.J. 3=40 C.W.N. 1208.

——S. 11—No relief against pro forma defendant—Whether can arise same question in subsequent suit.

Where a person was merely a *pro forma* defendant in a previous suit and no relief was sought against him there:

Held, that he was not precluded from raising the same question in subsequent suit and the principle of *res judicata* in any shape or form did not apply. A.I.R. (Vol. 22) 1935 Lah. 942=160 Ind. Cas. 749.

——S. 11—Pro forma defendant—Matter not in issue—No res judicata.

A finding against a defendant who was joined only as a *pro forma* party and against whom no relief was claimed cannot operate as *res judicata*. One *R* sold some of his land to one *G*. *S* as *R's* reversioner sued for possession of the land after the death of *R* on the allegation that the sale was without necessity and consideration. *S* also claimed possession on the ground that *D*, widow of *R's* son, had remarried. *D* was joined as a *pro forma* defendant. The Court held that as a matter of fact no remarriage had taken place. Later *D*, in whose name *R's* lands were mutated, got notices of ejectment issued to *S*. *S*, failing in suits to contest the notices, instituted a suit for possession of property left by *R* against *D* who, it was alleged, had remarried and thereafter executed deed of relinquishment in *S's* favour with respect to property left by *R*. *D* contended that question of remarriage in the previous suit was decided against *S* and could not therefore be reopened.

Held, that the decision in the previous suit on the question of the marriage did not operate as *res judicata*, as the matter was not directly and substantially in issue between the same parties. 10 Lah.L.J. 239 =110 Ind. Cas. 394=A.I.R. 1928 Lah. 493.

——S. 11—Pro forma defendant—No relief claimed against—Judgment in suit—No res judicata.

A judgment in a case in which a party is a mere *pro forma* defendant against whom no relief was claimed is not *res judicata* against him. 45 Ind. Cas. 318.

——S. 11 (S. 13, Old Code)—Pro forma defendant—No decree against him—Decision if res judicata.

Where in a previous suit some of the defendants did not appear and were exempted from the plaintiff's claim and consequently no decree was made against them: **Held**, that in a subsequent suit between those defendants and plaintiff the decision in that suit could not operate as res judicata, they having no right of appeal. (1904) A.W.N. 162= 1 A.L.J. 363=27 A. 59.

——S. 11, Expl. (6) (S. 13, Expl. 5, Old Code)—Representative suit—Pro forma defendant—If bound by decision in suit in which he had no interest in the relief claimed.

Where a person, who is a defendant in a suit, is not interested in the relief prayed for in that suit, a decision passed in such suit does not bind him in a subsequent suit. Under S. 11, Explanation

6 (S. 13. Explanation 5, Old Code), the plaintiff in the first suit can represent the plaintiff in the second only if the latter has any right to any relief claimed in the first suit. 14 M. 324 overruled; 21 M. 373, approved. Where therefore, four out of five reversioners brought a suit against the defendants in possession for recovery of their shares in the estate of the last male owner impleading as a defendant, the fifth reversioner who refused to join in the suit, and obtained a decree, a decision in such suit cannot be pleaded as *res judicata* in a suit brought by the fifth reversioner or his representative. 14 M.L.J. 404=28 M. 457 (F.B.), *See* also 14 M.L.J. 281.

——S. 11 (S. 13, Old Code)—Pro forma defendant—Absence of prayer for relief—Failure to appear—Decree—If res judicata.

A person who is joined as a defendant but against whom no relief is claimed need not appear and defend the suit. Any decree made in the suit will not bind such defendant. A suit against agent and his hypothecatee prayed only for possession and not also for a declaration that the hypothecation was invalid. The agent's claim as owner was dismissed and a decree was passed for possession:

Held, that this decree was not binding on the mortgagee in a subsequent suit for sale, as no claim was made against him and he had, therefore, no reason to defend the suit. 3 Bom.L.R 179=25 Bom. 589.

——S. 11—Mortgage by two Hindu brothers A, and B, of undivided share of all three brothers A, B and C—Suit by mortgagee—C impleaded only as pro forma defendant—No averment as to authorisation by C—Ex parte decree—Suit by C's sons after C's death for declaration.

Three Hindu brothers *A*, *B* and *C* had certain undivided and definite shares in certain property. *A* and *B* mortgaged the shares of *A*, *B* and *C* and the mortgagee filed a suit impleading *A* and *B* as principal defendants and *C* as *pro forma* defendant. The plaint did not aver that *A* and *B* were expressly or impliedly authorised by *C* to mortgage his share. The suit was decreed *ex parte* and the property was sold in execution. Subsequently, *C's* sons instituted a suit for declaration of their title and for possession of their father's share. The defence was that as *C* was a party to the prior suit, he and his sons were bound by the decree and hence the suit was barred. It appeared that the only averment against *C* in the prior suit was a statement at the end of the plaint under the heading 'remarks' that *C* had been impleaded as a party so that the suit may be decided in his presence:

Held, that in the prior suit the Court meant to decide that *C* was bound by the mortgage that had been made by his brothers, and intended to pass an effective decree for sale in respect of the eight annas share mortgaged binding *C* also. But unless the decree was one which the plaint, in its natural meaning, called for, then *C* would not be legitimately bound by it. It was only by pleading expressly in the plaint that the share of the plaintiffs' father had, in fact, been mortgaged, under an authority express or implied, that the suit could have been made to embrace a scope sufficient to be open to such a defence. The question of the title of the plaintiffs' father did not arise in the mortgage suit, and any decision that may have been intended was not a decision by which the plaintiff's father or the plaintiffs were bound. Nor could the omission on the part of the plaintiffs' father to raise the question of his own title in that suit preclude him from raising it in any subsequent litigation, or the plaintiff from setting it up in the subsequent suit. A.I.R. (Vol. 21) 1934 Cal. 384=58 C.L.J. 294=150 Ind. Cas. 529.

23. Res judicata and estoppel—Distinction.

——S. 11—Distinction between res judicata and estoppel.

The doctrine of *res judicata* no doubt resembles the doctrine of estoppel in some respects; but the two are materially different. While the former prohibits the Court from entering into an enquiry at all as to a matter already adjudicated upon, the latter prohibits a party after the inquiry has already been entered upon, from proving anything which would contradict his own previous declaration or acts to the prejudice of another party who relying upon those declarations or acts, has altered his position. In other words, *res judicata* prohibits an inquiry *in limine* whilst an estoppel is only a piece of evidence. A.I.R. (Vol. 29) 1942 Cal. 92=74 C.L.J. 180=46 C.W.N. 245=I.L.R. (1942) 1 Cal. 169=200 Ind. Cas. 216.

——S. 11—Difference between res judicata and estoppel.

There is a difference between *res judicata* and estoppel. *Res judicata* ousts the jurisdiction of the Court while estoppel does no more than shut the mouth of a party. Estoppel never means anything more than that a person shall not be allowed to say one thing at one time and the opposite of it at another time; while *res judicata* means nothing more than that a person shall not be heard to say the same thing twice over. A.I.R. (Vol. 23) 1936 Sind 99=29 S.L.R. 455=164 Ind. Cas. 43.

——S. 11—Estoppel and res judicata.

Res judicata differs from estoppel. A true *res judicata* ousts the jurisdiction of the Court, while estoppel shuts the mouth of a party. Estoppel means that a person shall not be allowed to say one thing at one time and the opposite at another while *res judicata* means that the person shall not say the same thing twice over. 36 Bom. 283=12 Ind. Cas. 535=13 Bom. L.R. 950.

——S. 11—The law of res judicata does not compel the Court trying the later suit to hold the previous decision to be correct. It merely estops the parties from proving that it is incorrect. 21 M.L.J. 57=9 Ind. Cas. 686=9 M.L.T. 288.

——S. 11—Res judicata is only a form of estoppel and there can be no estoppel against a statute. A. I. R. (Vol. 26) 1939 Pat. 633=20 P.L.T. 671=5 B. R. 933=183 Ind. Cas. 763.

——S. 11—Personal estoppel.

The rule of *res judicata* does not create any right or interest in the property, though it may indirectly affect the rights of persons against whom it is effective. The rule is a rule of personal estoppel and does not attach itself to property. 44 Mad. 514=

63 Ind. Cas. 205=A.I.R. 1921 Mad. 306=41 M. L. J. 288.

——S. 11—Res judicata — Estoppel — Difference between.

Estoppel is not the same as *res judicata*. Estoppel does not allow a man to make a statement contrary to one already made while *res judicata* does not allow a man to raise the same point again. 13 Bom. L.R. 717=12 Ind. Cas. 225=36 B. 214.

——S. 11—Estoppel.

Where the defendants successfully pleaded in the Revenue Court that the plaintiff was not entitled to maintain a suit for ejectment in that Court,

Held, that they cannot be permitted to resist the suit subsequently filed in the Civil Court on the ground that the Civil Court has no jurisdiction to try the suit, 18 Ind. Cas. 875. Foll. 8 L. R. A. Rev. 283=105 Ind. Cas. 639=A.I.R. 1927 All. 711.

24. Representative suit.

See also C. P. CODE, S. 11.
(1) LITIGATING UNDER SAME TITLE.
(2) MINOR.
(3) PARTIES AND REPRESENTATIVES.
(a) S. 11, Expl. 6—Applicability and scope.
(i) Private common right.
(ii) Public right.
(iii) Suit not covered by O. 1, R. 8.
(iv) Suit covered by O. 1, R. 8.
(b) Hindu joint family.
(c) Hindu widow.
(d) Malabar Tarwad.
(e) Religious endowment.
(f) Reversioner.
(g) Trust.

24. (a) (i) Private common right.

——S. 11, Expl. 6—Applicability—Common right—Claim on behalf of others—If to be clearly made.

In order to attract the provisions of Explanation 6 to S. 11, C. P. Code, the person litigating must put forward a right common to him and others not only on his behalf but on behalf of the others as well. It is not sufficient if he simply puts forward a right alleged to be common to him and others. 51 C.W.N. 452.

——S. 11, Expl. 6—Claimed in common for themselves and other govern only "private right".

The expression "claimed in common for themselves and others" appearing in S. 11, Explanation 6, Civil P. C., does not govern the words "public right', but only the words "private right". The words "public right" stand by themselves. A.I.R. (Vol. 24) 1937 Lah. 425=39 P.L.R. 707=I.L.R. (1937) Lah. 629 =175 Ind. Cas. 405.

——S. 11, Expl. 6—Bona fides—Meaning of.

The word *"bona fide"* in Explanation 6 could only apply to a litigation where every attempt is made to bring all the persons interested before the Court. The meaning of due care and caution cannot be applied to one who puts forward only his own right as one of a body of persons who have equal rights with himself. 101 Ind. Cas. 58=A.I.R. 1927 Mad. 645=52 M.L.J. 641.

——S. 11, Expl. 6—Representative suit—Test.

There is no warrant for the contention that no suit should be considered as having been brought in a representative capacity unless the cause-title makes it plain, or in other words, unless the cause-title shows that the suit is brought in a representative capacity, the suit cannot be treated as one brought in a representative capacity. 46 Cal. 877, Foll.

The question whether a suit is brought in a representative capacity or not would only arise when the cause title does not describe the suit as being brought in a representative capacity. In order to decide the question the Court has to see whether the plaintiffs did in substance being the suit in a representative character or capacity and whether the defendants contested the suit on the larger question affecting the plaintiffs on record as well as others whom they represented, or confined their contest to the plaintiffs' right alone and whether the Court understood the plaint and other pleadings as covering or as raising the larger issue regarding the right of the plaintiffs as well as other persons having the same interest as the plaintiffs and whether the Court allowed the suit to proceed as being a representative suit and whether the Court confined its decision only to the plaintiffs' right or whether its decision covered the interest not only of the plaintiffs but also of all persons whom they represented. 27 M.L.W. 769=109 Ind. Cas. 199=A.I.R. 1928 Mad. 445=54 M.L.J. 587.

——S. 11—Representative suit—Test.

Where a party sets up his own individual right which happens to be common to him and others, he cannot be said to be litigating on behalf of the others. It is not necessary that in order to attract the provisions of Explanation 6 the suit should be a representative suit, for if it is a representative suit under O. 1, R. 8, no question can arise as to the binding nature of the decision in such suit, nor is it necessary that the party should be sued in a representative capacity. But the person litigating must put forward a right common to him and others not only on his behalf but on behalf of the others as well; if he simply puts forward a right alleged to be common to him and others, that would not make him a representative of the others. 101 Ind. Cas. 58=A.I.R. 1927 Mad. 645 =52 M.L.J. 641.

——S. 11—Representative suit—Addition of claim for damages—Effect on.

Where a suit is essentially a representative one the mere addition of a claim for damages does not change the nature or the character of the suit. 51 Mad. 128=27 M.L.W. 216=107 Ind. Cas. 625=A.I.R. 1928 Mad. 77=54 M.L.J. 8 (F.B.)

——S. 11, Expl. 6, O. 1, R. 8—Test to see if prior suit operates as res judicata.

A man may litigate bona fide in respect of a public or private right claiming it in common for himself and others and by virtue of S. 11, C. P. Code, bind all persons interested in such right by the findings arrived at in his suit. In such cases it may not be necessary even to name the persons expressly in the suit. Or, on the other hand, under O. 1, R. 8, he may obtain the leave of the

Court to sue or be sued on behalf of or for the benefit of all persons so interested. In these circumstances he shall have to observe all the formalities laid down in the section and if he fails to do so, persons other than himself, will not be bound by any decision arrived at in that suit.

The test to see if Expl. 6 to S. 11, C. P. Code, applies is whether the previous litigation was **bona fide** and whether any injury had resulted to the plaintiffs on account of the omission to comply with the provisions of R. 8 of O. 1. This will be a question of fact depending on the circumstances of each case as it arises. A.I.R. (Vol. 23) 1936 Lah. 13=158 Ind. Cas. 540.

——S. 11, Expl. 6—Parties different in two suits —Findings in previous suit, when operate as res judicata in subsequent suit.

Where the parties are different in two suits, the findings in the previous suit cannot be **res judicata** in the subsequent suit unless it is shown that the plaintiffs in the subsequent suit are claiming under the plaintiffs in the previous suit and that the plaintiffs in the previous suit had claimed the right in common for themselves and for the subsequent suit. A.I.R. (Vol. 22) 1935 Lah. 391 =17 Lah. 20=38 P.L.R. 252=161 Ind. Cas. 369.

——S. 11, Expl. 6—Applicability of principle of. See ALIYASANTHANA LAW. (1949) 2 M. L.J. 413.

——S. 11, Expl. 6 — Applicability—Adjudication of title to property based on a settlement deed—Subsequent suit by children of one of the parties—Bar of res judicata.

O. P. No. 106 of 1924 was filed by the appellant for Letters of Administration to the estate of one **P**, deceased and **A** the adoptive mother of the appellant filed affidavits admitting that the appellant was her adopted son and only heir and legal representative of the deceased **P**. More than four years later she **A** sought to set aside the grant of Letters of Administration claiming to be the sole legal representative of the deceased, alleging that her previous affidavits were obtained from her on false and fraudulent misrepresentations; but the contentions were overruled. No attempt was made to carry this on appeal. Nearly eleven years after this in 1943, **A** executed a deed of settlement in favour of **G** and his wife, conveying the suit property which was comprised in the estate of **P**, and in a suit filed by the appellant for recovery of possession of the suit property **G** and his wife **inter alia** contended that the property belonged to **A** and in the alternative raised the plea of adverse possession by **A**. Both of these contentions were overruled and the suit decreed. This decree was allowed to become final by **G** and his wife. The present suit was filed in 1945 by the children of **G** and his wife claiming title to the said property under the same settlement deed.

Held, the facts were covered by Expl. 6 to S. 11 of the C. P. Code, and that the suit was barred by the rule of **res judicata** by reason of the decision in the prior suit. The parents of the plaintiffs in the prior case must be deemed to have represented not only their interests but also the interests of the children under the same deed. 61 M.L.W. 542=1948 M.W.N. 555=A.I.R. 1949 Mad. 379=(1948) 2 M.L.J. 211.

——S. 11—Applicability—Chamars of same locality—Finding in prior suit as to title to land on the question of ownership of the trees standing on it—If res judicata in subsequent suit on question of title to the land.

Where in a prior representative suit the **chamars** of the locality who resisted the removal of certain trees on a plot sold by the defendant it was found that the **chamars** had no title to the land which belonged to the defendants and had no right to obstruct, the finding will operate as **res judicata** in a subsequent suit between the **chamars** and the descendants of the defendant in the earlier suit on the question of the title to the land. 225 Ind. Cas. 297=A.I.R. 1947 Lah. 33.

——S. 11—Applicability—Declaratory decree in regard to a grove against one brother only who was recorded as groveholder in his representative capacity—Subsequent claim by other brothers for a share in the grove—Prior declaration, if operates as res judicata.

Where a declaratory decree in regard to a grove has been obtained against one brother only who was recorded as the groveholder in his representative capacity it would operate as **res judicata** in subsequent proceedings where the other brothers claim a share in the grove on the ground that their brother's name was entered only in a representative capacity. 1947 R.D. 198.

——S. 11—Action by or on .behalf of family—When res judicata in respect of absent or future members.

An action by or on behalf of a family may result in a **res judicata**. But such an action, if it is to bind absent or future members of the family, must be so constituted according to the local rules of procedure or by a representation order or in some other way that all such members can be regarded as represented before the Court. A.I.R. (Vol. 23) 1936 P.C. 147=44 M.L.W. 73=162 Ind. Cas. 461 (P.C.).

——S. 11, Expl. 6—Common interest resting on joint title.

It has been laid down by Explanation 6, S. 11 C. P. Code, that when some persons are litigating **bona fide** for a private right which they claim in common for themselves and others, all the persons interested therein shall in respect of that right be considered to claim under the litigants. This explanation is applicable where there is a community of interest claimed on common title and where the claim is in good faith for enforcing or defending that common interest. Such common interest may have been vested in a joint family which may form its basis or it may rest on joint title obtained in some other way. 4 U.P.L.R. (O.C.) 47.

——S. 11—Representative suit—Tenants in common—Decree against one.

A tenant can, under certain circumstances, so represent his tenancy that a decree against him by the landlord will bind all the persons interested with him in the tenancy. 66 Ind. Cas. 433 (2) =34 C.L.J. 302=A.I.R. 1921 Cal. 584.

——S. 11, Expl. 6—Representative suit—Tenants—Agraharamdars—Decision as to rent.

A suit for settling the amount of kattubadi due from an agraharam is one in which all the agraharamdars are necessarily interested and the decision therein is, if the litgation is conducted **bona fide**, binding on all agraharamdars by virtue of Expln. 6 of S. 11. Cases in which a party is represented at one stage of the suit and afterwards ceases to be represented owing to a failure to bring his legal representative on the record are not exceptions to the rule laid down by the explanation. Courts should hesitate to hold that any litigation had been bona fide within Expln. 6 to S. 11 in which there had been a substantial departure from the accepted rules as to the joinder of parties as for instance by suing without the leave of the Court in a case properly falling under O. 1, R. 8. The failure of the plaintiffs in the prior suit to implead the legal representatives of a party could not in the circumstances of the case be said to constitute such a want of **bona fides** as to render the explanation inapplicable. 43 Mad. 427=38 M.L.J. 493=55 Ind. Cas. 984=(1920) M.W.N. 435.

——S. 11, Expln. 6 and O. 1, R. 8—Common rights—Suit to establish a private common right and individual right—Subsequent suit for establishment of same private common right only.

The Expln. 6 is not confined to cases in which the prior suit was brought with the permission of the Court under O. 1, R. 8 thereof. The explanation applies though the prior suit was for the establishment of the plaintiff's individual right in addition to the right claimed by him in common to himself and others in so far as his claim in respect of the latter right is concerned. The decision in a suit by an **agraharamdar** of a village for establishing the joint right of himself and other **agraharamdars** of the village (some of whom were made parties, as defendants) in some sites in the village and the plaintiff's exclusive right of way over the sites and ejecting the defendants in the suit from those sites and for delivery of joint possession of the entire sites to the plaintiff and the other **agraharamdars** and for an injunction as regards the right of way, bars a subsequent suit by other **agraharamdars** against the defendants in the prior suit and the other **agraharamdars** for ejecting the said defendants from the same sites and for delivery of possession thereof jointly to the plaintiffs and the other **agraharamdars**; the Expl. 6 applies though one of the plaintiffs, in the subsequent suit was not a party to the prior suit and was allowed to come in as a co-plaintiff by order of Court.

Per **Sadasiva Aiyar, J.**—The expression private right claimed in common in Explanation 6 is not confined to the right of joint Hindu family to the rights of a Malabar Tarwad, to joint trusteeship rights, etc., but extends to village communal rights. 31 M.L.J. 26=(1916) 2 M.W.N. 258=35 Ind. Cas. 116.

——S. 11, Expln. 6—Communal land—Suit by proprietors of village against their rival faction—Decision in—Res judicata.

The decision in a suit by the proprietors of a portion of a village against their rival faction regarding title to the common land is, if not appealed against, **res judicata**. Where in the subsequent suit there is a difficulty about identifying parties in the previous suit the doctrine of **res judicata** applies and in the absence of evidence, the former suit could be presumed to be **inter partes**. 18 P.L.R. 1914=21 Ind. Cas. 972=19 P.W.R. 1914.

——S. 11, Expln. 6—Representative suit—Company — Winding up—Liquidator — Decision against, binding on all.

The Official liquidator represents the debenture-holders and creditors as well as the company, and if an order is made against him upholding the claim of a particular creditor to a charge on the company's property, the order so long as it stands is conclusive in the winding up on all parties so represented. If any debenture-holder or other pesron desires to attack the decision, it is open to him to ask that he should be made a party and should have leave to appeal. 43 Mad. 550=47 I.A. 33=38 M.L.J. 444=28 M.L.T. 28=12 L.W. 92=22 Bom.L.R. 568=18 A.L.J. 489=2 U.P.L.R. (P.C.) 118=A.I.R. 1920 P.C. 56=56 Ind. Cas. 163=(1920) M.W.N. 419 (P.C.). [Affirming 30 Ind. Cas. 286=29 M.L.J. 110.]

——S. 11, Expln. 6—Representative suit—Suit by limited owner—If binding on estate.

Where a suit is instituted in the interest of the estate and for the benefit of all persons who might come to inherit thereafter, the decree, in the absense of collusion or fraud, would bind not only the plaintiffs but all subsequent successors to the estate. 19 A.L.J. 749, Foll. 75 Ind. Cas. 593=A.I.R. 1923 All. 338.

——S. 11, Expl. 6—Applicability—Suit for declaration by credtior under O. 21 R. 63 against successful claimant.

The dismissal of a suit filed by a creditor for a declaration under O. 21, R. 63 against a successful claimant who was alienee of the property, subject-matter of the suit, that the alienation was nominal does not operate as **res judicata** in a subsequent suit by another creditor against the same defendant on the question whether the alienation was nominal or not, and Explanation 6 to S. 11 has no application to the case. The position is the same even in a case a suit is subsequently filed by the alienee against the sons of the alienor for recovery of possession. A.I.R. (Vol. 32) 1945 Mad. 118=1944 M.W.N. 734=57 L.W. 600=(1944) 2 M.L.J. 362.

——S. 11, Expl. 6—Applicability—Suit by certain cultivators claiming injunction against residents of other village restraining them from interfering with irrigation.

Certain cultivators of a certain village brought a suit claiming that the residents of another village be restricted from interfering with their right to irrigate their fields. The suit was referred by the parties to arbitration and a decree was passed on

the award. Subsequently, the other cultivators instituted another suit for similar relief:

Held, that it did not appear that they claimed a right for themselves as well as for all the other residents of village. It may be that the right claimed by them was similar to the right which other residents of village were interested in claiming. That did not, however, make the suit a representative one and the others were not debarred from claiming a similar relief in a subsequent suit. It is only if the relief claimed by the plaintiffs is so comprehensive that, if granted, it will confer a benefit on a class of persons, including the plaintiffs of the suit, that the decision can operate as **res judicata** against those not actually impleaded:

Held, further, that the decree being based on award was not binding on the persons other than those who made the reference to arbitrators. A. I.R. (Vol. 24) 1937 All. 289=1937 A.L.J. 293=1937 A.L.R. 522=169 Ind. Cas. 388.

——S. 11, Expl. 6—Suit for declaration of private right of thoroughfare—Previous suit by other persons against same defendant, claiming same right, but not in representative capacity—Notice under O. 1, R. 8, not issued—Subsequent suit.

The previous suit claiming for a declaration that the defendant was not authorised to close a certain thoroughfare was not instituted in the interest of any person other than the plaintiffs in that suit, nor was any private right claimed by the plaintiffs in that suit in common for themselves and others. The notice enjoined in R. 8, O. 1, C.P. Code was not issued:

Held, that a subsequent suit by other person against the same defendant for a same declaration was not barred either under Expl. 6 to S. 11 or O. 1, R. 8, C.P. Code. A.I.R. (Vol. 24) 1937 Lah. 425=39 P.L.R. 707=I.L.R. (1937) Lah. 629=175 Ind. Cas. 405.

——S. 11, Expl. 6—Explanation 6 to S. 11, C.P. Code, applies to those suits only which are instituted in a representative capacity. When the plaintiff can in no way be treated as a representative of the plaintiff in the prior suit, nor deemed to claim through him, the Explanation aforesaid does not apply. A.I.R. (Vol. 22) 1935 Lah. 537=157 Ind. Cas. 1006.

——S. 11, Expl. 6—Corporation—Suit by members in personal capacity—Subsequent suit on behalf of Corporation raising different issues—No res judicata.

In deciding whether or not a decision in a previous suit operates as **res judicata** in a subsequent one, the Court has to consider the array of parties, the issues raised and the point or points actually decided in the previous litigation.

Certain persons belonging to the guild of priests of a certain temple, describing themselves as "panch pandas" brought a suit against the defendants for the cancellation of a deed of gift of the right to share in the offerings at the temple, executed in their favour by their uncle, a member of the panda guild, and for a perpetual injunction restraining them from actng as pandas at the temple.

Held, that the question in issue in the subsequent litigation, namely the right of the pandas, as a guild or corporation, to receive offerings, and the question whether or not the defendants had been trespassing on that right without any justification, had not been decided in the former litigation and was not **res judicata** in the subsequent suit. 18 A.L.J. 150=76 Ind. Cas. 673.

——S. 11, Expl. 6—Applicability—Distinct rights.

S. 11, Expl. 6 of the Code of Civil Procedure applies to a common right asserted by certain persons on behalf of themselves and others, but not to rights which are not common but several and distinct. 26 O.C. 133=75 Ind. Cas. 626=10 O.L.J. 535=A.I.R. 1923 Oudh 185.

——S. 11 (S. 13, Old Code)—Prior suit against certain members of a community as individual wrong doers—Decision—If res judicata in suit for declaration against community.

A decision in a prior suit, not being a representative suit binding property nor designed or framed for the purpose of binding for all time the community itself, brought against certain members of a community as wrong-doers in their individual capacity cannot operate as **res judicata** in a subsequent suit against the community for a declaration of right. 9 Bom.L.R. 663=5 C.L.J. 566=17 M.L.J. 240=4 A.L.J. 333=11 C.W.N. 585=30 M. 185=34 I.A. 93=2 M.L.T. 204 (P.C.) (on appeal from 26 M. 376).

24. (a) (ii) Public right.

——S. 11, Expl. 6—Applicability—Public right—Plaintiff's suit for injunction restraining defendants from obstructing their right of way over public thoroughfare—Right of way described as shara-i-am—Suit, if one claiming right to use public thoroughfare or one claiming site acquired by easement.

The expression "claimed in common for themselves and others" used in Expl. 6 to S. 11, C.P. Code, does not govern a claim in respect of a public right. A public right always implies that it is enjoyed by the plaintiff in common with others and the use of the expression "in common for themselves and others" would be a superfluity if it is used in connection with a public right. With regard to such right if the litigation is **bona fide** on the part of the plaintiffs, the decision would be **res judicata** against others who claim to be entitled to the right.

There can be no other meaning of the expression **shara-i-am** except a public thoroughfare. Where in a suit for an injunction restraining the defendants from obstructing the right of way over a public thoroughfare the plaint uses the expression **shara-i-am** and there is no material on the record to show that the expression **shara-i-am** was used in a sense different to the invariably accepted meaning thereof, assuming that it is permissible to look for material to interpret the expression in a different manner, the suit is one really to establish a right to use a public thoroughfare and is not one claim-

ing a right of way acquired by plaintiff by easement along with others. To such a suit Expl. 6 to S. 11 applies and the decision operates as **res judicata** in a subsequent suit by others claiming to be entitled to the right. A.I.R. (Vol. 24) 1937 Lah. 70=39 P. L. R. 353=171 Ind. Cas. 866.

——S. 11—Representative suit—Public right—C. P. Code, O. 1, R. 8.

If the plaintiff suing for a declaration that he is owner of a piece of land free from any right on the part of the public to use it as a highway, chooses to bind the public he must comply with the provisions of O. 1, R. 8 of the C.P. Code and must observe the conditions on which permission is given by the Court under that rule. 49 Ind. Cas. 796.

——S. 11—Suit on behalf of public.

Where two Mahomedans brought a suit **bona fide** in respect of a public right claimed in common for themselves and others and the suit was dismissed, a subsequent suit by two other Mahomedans in respect of the same right is barred by **res judicata,** as the latter must be deemed to be persons claiming under the former. 36 All. 424 =24 Ind. Cas. 97=12 A.L.J. 643.

——S. 11, Expl. 6—Public right—Pathway—Dismissal of first suit on the ground that no damage was proved—Subsequent suit—Defence that pathway is private.

In a previous suit instituted by plaintiffs against defendants it was found that the site was a public one, but the suit was dismissed on the ground that no special damage was alleged and the present suit was brought by the plaintiffs after obtaining the requisite sanction under S. 91, of the C.P. Code, defendants pleaded right of way. **Held** that the finding in the previous suit operated as **res judicata** in the present suit. (1918) M.W.N. 175 =44 Ind. Cas. 367=8 L.W. 377.

24. (a) (iii) Suit not covered by O. 1, R. 8.

——S. 11, Expl. 6—Suit not covered by O. 1, R. 8.

It is possible for a suit to be a representative suit within the meaning of Expl. 6, although it need not come under O. 1, R. 8, and therefore need not be brought under the provisions of the Order. Explanation 6, therefore, is not confined to cases covered by O. 1, R. 8, but would include any litigation in which, apart from the rule altogether, parties are entitled to represent interested persons other than themselves. A.I.R. (Vol. 24) 1937 Bom. 238=39 Bom.L.R. 130=I. L. R. (1937) Bom. 326=169 Ind. Cas. 934.

——S. 11, Expl. 6—Suit not covered by O. 1, R. 8.

Explanation 6 to S. 11 is not confined to cases covered by O. 1, R. 8, but extends to include any litigation to which, apart from the rule altogether, parties are entitled to represent interested persons other than themselves. A.I.R. (Vol. 20) 1933 P.C. 183=57 C.L.J. 528=37 C.W.N. 853=1933 M.W.N. 758=38 L.W. 16=1933 A.L.J. 762= 35 Bom.L.R. 827=56 M. 657=60 I.A. 278=143 Ind. Cas. 665=65 M.L.J. 87 (P.C.).

——S. 11, Expl. 6—Suit without leave of Court under O. 1, R. 8.

Explanation 6 to S. 11 is not confined only to cases where leave of the Court has been granted under O. 1, R. 8. 18 M.L.W. 177=75 Ind. Cas. 336=1923 M.W.N. 545=A.I.R. 1924 Mad. 88.

24. (a) (iv) Suit covered by O. 1, R. 8.

——S. 11, Expl. 6—Suit covered by O. 1, R. 8—Rule not complied with—Decision, if res judicata.

Expl. 6 to S. 11, C.P. Code, is controlled by O. 1, R. 8, and unless the provisions of O. 1, R. 8, C.P. Code, were complied with in respect of a prior suit, S. 11, Expl. 6 would not apply, so as to make the decision therein operate as **res judicata** in respect of a later representative suit. 24 Cal. 385; 60 I.A. 278, foll. A.I.R. 1949 A. 761.

——S. 11, Expl. 6—O. 1, R. 8 not complied with —Second suit by other person for same relief not barred.

A suit brought by **A** for declaration that election of **C** as president of a Municipality was not legal was dismissed on the ground that the Municipalty which was a necessary party was not impleaded and no statutory notice to the Municipality was given. A second suit was then brought by **B** for the same relief impleading the Municipality:

Held, (i) that the first suit was not a representative suit as none of the provisions of O. 1, R. 8, C.P. Code, were complied with and hence Expl. 6 to S. 11 did not apply; (ii) the omission to comply strictly with the provisons of O. 1, R. 8 was not mere irregularity; (iii) that S. 11 could not also apply because the suit was not between the same parties the presence of the Municipality being material and its presence in the second made the parties in the two suits different. A.I.R. (Vol. 31) 1944 Sind 165=I.L.R. (1944) Kar. 62.

——S. 11, Expl. 6—Former suit not in compliance with O. 1, R. 8—Whether can bar subsequent suit in representative capacity—Exception.

In a representative suit instituted under O. 1, R. 8, C.P. Code, the decision in a former suit does not operate as **res judicata** by force of S. 11, Expl. 6, unless the former suit was instituted in compliance with the above rule, namely, by permission of the Court, the Court giving notice as therein prescribed to all persons interested. But to this there is possibly an exception, where the former suit having been litigated **bona fide** on behalf of the plaintiff and others with a common right, the omission to comply with the rule has been inadvertent, and no injury therefrom has been sustained by the plaintiff in the second suit. Where, therefore, the plaintiffs in the former suit preferred to fight out the case in their individual capacity and not on behalf of the numerous other persons who, in common with them, might have been affected by the acts of the defendant complained of, it cannot be said that the omission to comply with R. 8 was due to "inadvertence" and under these circumstances the case cannot fall within the "possible ex-

ception" mentioned above. A.I.R. (Vol. 23) 1936 Lah. 965=163 Ind. Cas. 817.

——S. 11, Expl. 6—Suit covered by O. 1, R. 8—Decision in—When res judicata.

In order that a decision in a suit covered by O. 1, R. 8, C.P. Code, may be **res judicata** in a subsequent suit under O. 1, R. 8, under the provisions of Expl. 6 to S. 11, C.P. Code, it is necessary that the conditions laid down in O. 1, R. 8, must have been complied with in the former suit. The observance of requirements as to notice is essential. They constitute the nearest available substitute when dealing with numerous persons, scattered, it may be throughout India, for the personal service upon a defendant required in the case of an ordinary suit. It is no more permissible to dispense with the one requirement than with the other if the person in view is to be bound by the decree.

Bona fide litigation will not excuse the neglect of statutory conditions and if the litigation be not **bona fide**, the most complete observance of these conditions will not give to the decree the force of **a res judicata**. A.I.R. (Vol. 20) 1933 P.C. 183 =57 C.L.J. 528=37 C.W.N. 853=1933 M.W. N. 758=65 M.L.J. 87=38 L.W. 16=1933 A.L. J. 762=35 Bom.L.R. 827=56 M. 657=60 I.A. 278=143 Ind. Cas. 665 (P.C.). [Reversing A. I.R. 1928 Mad. 852=107 Ind. Cas. 785 and overruling 51 Mad. 128=A.I.R. 1928 Mad. 77 (F. B.)].

——S. 11, Expl. 6—Where the plaintiff or the defendant sues or is sued in a representative capacity which attaches to him under the general law, the decision binds the entire body whom he represents. These are cases of administrators, trustees, **shebaits, mutawallis,** the Official Assignee for certain purposes, a Hindu widow representing her husband's estate, a holder of **inam** lands and the like.

Where a person acting in a representative capacity has no such authority under the general law, if his litigation is to be a representative one to bind others, he must get some other authority to assume such representative character. Such authority need not necessarily be express, it may be implied.

Such authority, if it is to be had from the Court, is ordinarily obtained in the form of an order under O. 1, R. 8 of the Code. But it need not necessarily be in that form. And if the suit is filed in a representative form and it is allowed to proceed in that character without objection and if a general issue is framed so as to put in issue the right of the whole class in whom it is alleged to exist and the evidence adduced is of a general character and the findings in the judgment are general in nature, that judgment is binding on the whole class notwithstanding that no leave under O. 1, R. 8 has been obtained. A.I.R. (Vol. 19) 1932 Cal. 271=35 C. W. N. 1203=59 Cal. 636=137 Ind. Cas. 46. [Ed. Note. But **see supra** the later decision of the Privy Council in A.I.R. 1933 P.C. 183.]

24. (b) Hindu joint family.

See also 19. (g).

——S. 11, Expl. 6—Manager—Prior suit against manager of Hindu family though not described as such—Decision in, how far operates as res judicata against the other members of the family not impleaded by name.

It is not necessary that a suit should be filed against a person as manager of a Hindu family describing him as such for the proceedings to be binding on the other members. Merely because the other members of the family were not parties to the suit by name it does not follow that they are not bound by the decree. If it can be gathered that the suit was directed against the defendant as manager of the family the other members are bound and the decree will operate as **res judicata** against them in any subsequent suit. 1947 M.W. N. 364=60 L.W. 241=A.I.R. 1948 Mad. 54= (1947) 1 M.L.J. 274.

——S. 11—Manager not expressly so described in suits.

The circumstances that neither the father of **A. B** and **C,** nor **C** himself, who were parties to a prior suit, was described expressly as manager of the family, does not by itself make the decision in the prior suit not binding in a subsequent suit on **A, B** and **C** who are members of an undivided family. To such a case the provisions of S. 11, Expl. 6, C.P. Code, apply and the decision in prior suit becomes **res judicata** as against **A, B** and **C**. 122 Ind. Cas. 164=A.I.R. 1930 Mad. 206.

——S. 11—Hindu joint family—Other members deemed parties through manager.

Where a suit is either brought by or against a joint Hindu family the other members of the family must be deemed to be parties to the suit through manager; 34 All. 549; 34 All. 572; Foll. 81 Ind. Cas. 737=A.I.R. 1925 All. 67.

——S. 11—Foreclosure suit—Managing members can represent all members.

Managing members of a joint Hindu family can effectively represent the other members of the family in a foreclosure suit although the latter were not impleaded. 4 N.L.J. 4=62 Ind. Cas. 610=A.I.R. 1921 Nag. 52.

——S. 11—Manager of joint Hindu family—Mortgage decree against.

In a suit on a mortgage against the Manager of a joint Hindu family without impleading the junior members as parties, the decree is binding on the junior members as well, for the manager represents the family. 36 All. 383=18 C.W.N. 968=16 M.L.T. 175=1 L.W. 645=20 C.L.J. 282=12 A.L.J. 1173=16 Bom.L.R. 810=41 I. A. 216=24 Ind. Cas. 504=1914 M.W.N. 593= (P.C.)[Affirming 33 A. 71=7 Ind. Cas. 902= 7 A.L.J. 945.]

——S. 11—Manager of joint Hindu family—Junior member made pro forma defendant—Second suit by latter barred.

The managing member of joint Hindu family had brought a suit against certain persons in respect of a house belonging to the joint family

without expressly stating that he sued in his capacity as managing member. The suit was dismissed on the merits. Then a junior member of the family and **pro forma** defendant in the former suit instituted a suit in respect of the same house against the same defendants and on the same cause of action.

Held, that the suit was barred by **res judicata**. 42 All. 359=55 Ind. Cas. 846=2 U.P.L.R. (A) 74=18 A.L.J. 326.

——S. 11—Manager of joint Hindu family—Decree against—Family bound.

A decree fairly obtained against the Manager of a joint Hindu family in his representative capacity is binding on the family. 17 Ind. Cas. 290 (All.).

——S. 11—Representative suit—Findings arrived at—Entire family can benefit.

Findings arrived at in a representative suit enure to the benefit of the entire family and can be taken advantage of by all the members of the family. Such findings are **res judicata** and cannot be re-agitated. A.I.R. 1929 All. 775.

——S. 11—Suit by or against manager—Property inherited by collateral succession—Other members not bound.

In order to make explanation 6 of S. 11, applicable, there ought to be a community of interest claimed on the strength of a common title and the claim must have been made in good faith for the enforcement or defence of that common interest. The common interest may rest on the existence or of a joint family, in which that interest is vested, or may rest on a joint title otherwise derived. Property inherited by right of collateral succession, cannot be treated as joint family property in respect of which the manager as such could sue or be sued so as to bind the rest of the family. 20 O.C. 271, Foll. 77 Ind. Cas. 1028=A.I.R. 1925 Oudh. 75.

——S. 11, Expl. 6—Father—Decree against. father on special oath—Res judicata.

Hindu father sued in a representative character can bind his major and minor sons by special oath under Oaths Act. Decree passed against father on such an oath will be binding on his sons as **res judicata** under S. 11, Expl. 6. A.I.R. (Vol. 25) 1938 Bom. 465=40 Bom.L.R. 1005=178 Ind. Cas. 867.

——S. 11—Mortgage suit against father—Decree binding on minor sons.

A Hindu father fully represents his minor sons in a mortgage suit brought against him and the decree obtained in such suit against the father is binding on the sons, though not made parties to the suit, and acts as **res judicata**. 53 Bom. 444=118 Ind. Cas. 788=31 Bom.L.R. 395=A.I.R. 1929 Bom. 213.

——S. 11—Hindu father—Suit by—Representative character—Test.

But there is a great distinction between cases in which a Hindu father sues in respect of a contract which he is empowered under the Mitakshara Law, as manager to make on behalf of the family and cases in which a father sues in respect of rights in immoveable property, rights which he can only hold in an equal measure with other co-parceners. The question as to whether a Hindu father sufficiently represents all the co-parceners in a given litigation is a question which has to be decided with reference to the circumstances of the case. 78 Ind. Cas. 19=A.I.R. 1925 Pat. 308.

——S. 11—Hindu father—Alienation—Dismissal of suit to be set aside by father on ground of fraud—Suit by sons on ground that it is not for family purpose—Not barred.

The dismissal of a suit by a Hindu father to set aside an alienation of joint family properties on the ground of undue influence and fraud is no bar to a suit by the sons to set aside the alienation on the ground that it is not for a binding family purpose. 47 Ind. Cas. 192=35 M.L.J. 451.

——S. 11—Joint family land—Suit by father—Co-parceners, if bound.

All Hindu co-parceners are bound by the result of a suit brought by a Hindu father for recovery of possession of joint family land. Such suit must be deemed to be a representative suit on behalf of all the co-parceners. 78 Ind. Cas. 19=A.I.R. 1925 Pat. 308.

——S. 11—Decree against father while in Jail—Son not bound.

A mortgaged his share in 1887 to **B**. In 1892 he mortgaged the same share to **C**. In 1893 he again mortgaged that share along with other properties to **B**. The sum due under the mortgage of 1887 was a part of the consideration of the mortgage of 1893. In 1899, the heirs of **C** filed a suit on the mortgage of 1892 and impleaded **B** as subsequent mortgagee; **B** was in jail and his son was not a party to the suit.

Held, the son was not bound by the decree, as he was not represented in the suit. 17 Ind. Cas. 734=11 A.L.J. 36.

——S. 11, Expl. 6—Joint Hindu family—Suit on behalf of that family by leading member—Decision in—If res judicata in subsequent suit by non-impleaded minor member.

A decision given in a suit instituted on behalf of a joint Hindu family by a leading member of that family, operates as **res judicata** in a subsequent suit brought for the same relief by a son of the plaintiff in the previous suit, who was a minor at that time and was not impleaded as party. A.I.R. 1948 Pat. 388.

——S. 11, Expl. 6—Leading members of Hindu family acting on behalf of minors.

In the case of a Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he becomes of age, and then bring an action, or bring an action by his guardian before and in each of these cases, therefore the Court looks to Expl. 6, S. 11, C.P. Code, to see whether or not the leading member of the family has been acting either on behalf of minors in their interest or if they are majors, with the assent of the majors: A.I.R. (Vol. 24) 1937 All. 108=1937 A.L.R. 544=169 Ind. Cas. 577.

——S. 11, Expl. 6—Hindu family—Leading members parties in suit—Res judicata—Test.

In the case of a Hindu family where all have

rights, it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he comes of age and then bring an action or bring an action by his guardian before; and in each of these cases, therefore, the Court looks to explanation 6 of S. 11 of the C. P. Code to see whether or not the leading member of the family has been acting either on behalf of minors in their interest, or if they are majors, with the assent of the majors. 51 Bom. 450=54 I.A. 122=25 M.L.W. 789=25 A.L.J. 319=31 C.W.N. 570=1927 M.W.N. 352=4 O.W.N. 424=101 Ind. Cas. 44=29 Bom.L.R. 848 =45 C.L.J. 504=8 P.L.T. 462=A.I.R. 1927 P.C. 56=52 M.L.J. 472 (P.C.).

——S. 11—Suit for partition by member—All members made parties—Suit in representative capacity.

Where in a suit for partition by a member of a joint Hindu family all the members of the family are made parties and where all matters in dispute between the members of the family are decided, the suit must be regarded as a suit brought by the plaintiff in his representative capacity under Expl. 6. S. 11 of the C. P. Code, and all matters decided in the suit operates as **res judicata** between the different members of the family. 32 All. 469 and 22 O.C. 300 Foll. 85 Ind. Cas. 792=A.I.R. 1925 Oudh 566.

——S. 11, Expl. 6—Sons and grandsons—Suit against, on mortgagee executed by father—Dismissal against grandsons—No res judicata against interest of subsequent born grandson.

Where a mortgage executed by the deceased father of a joint Hindu family is not found to be for legal necessity and a simple money decree is passed against the estate of the deceased in the hands of the sons and as against the grandsons the mortgage suit is dismissed (erroneously, the debt not having been shown to be for illegal or immoral purpose) the decree can be executed under S. 53 against the interest of the subsequent born grandsons. It is not open to the subsequent born grandsons to contend on the strength of S. 11, Expl. VI, C. P. Code that the decree of dismissal against the interest of the grandsons in existence at the date of the decree operated as res judicata, against their interest as well. A.I.R. (Vol. 31) 1944 Oudh. 131=1944 O.W.N. 27.

——S. 11—Hindu sons—Suit by—Subsequent suit by son born pending previous suit—Not barred.

A Hindu son, who was in existence at the time his father sold certain ancestral property, brought a suit for recovery of the property sold, but before the suit was decided another son was born.

Held, that such son also acquired a cause of action as regards the same and the first suit not being in a representative character, the second suit by the second son, is not affected by the result in the first suit. 10 O.L.J. 353=77 Ind. Cas. 353 =27 O.C. 107=A.I.R. 1924 Oudh 141.

24 (c). Hindu Widow.

See also 19 (k).

——S. 11, Expl. 6—Decree against Hindu widow —Binding nature of.

The decree obtained against a Hindu widow, declaring that after the death of the widow, the property in the widow's possession will be inherited by the last male holder's reversioner, will be binding on the daughter of the widow, if it is not tainted with fraud or collusion. 119 Ind. Cas. 446=1929 A.L.J. 518.

——S. 11—Decree against widow—Res judicata against Reversioners—Test.

Where a Hindu widow, in whom her husband's estate has vested, represents the estate in litigation, to which she is a party, the decision in such litigation fairly and honestly conducted given for or against her, will bind the reversioners. (9 M.I.A. 539 (P.C.); 11 Cal. 186 (P.C.); and 40 All. 593 (P.C.) (Foll.). The rule of **res judicata** as enacted in S. 11 of the C. P. Code is not strictly applicable, as the reversioners do not claim under the widow; but the principle of **res judicata** applies This rule can be applied only if the widow did, as a matter of fact, represent the estate in the prior litigation. The question, in each case, will be whether the estate was properly represented by the widow in the prior suit. If, for instance, she had litigated in assertion of an absolute right, inconsistent with her representative character, she could not, in any sense of the word, be said to have represented the estate, or the interest of the reversioners in such litigation, and a decision given therein, upholding such contention of hers, would not obviously be held binding on them. 43 Bom. 869; 43 Bom. 249 Foll. Hence in contending that a will alleged to have been left by the husband, was genuine and that she herself was a joint-legatee under it, along with her brother ,she is not only not representing the estate or the interests of the reversioners in such litigation, but is setting up a case, in direct opposition to their interests. It cannot, therefore, be held that the decision in the suit that the Will is genuine is binding on the reversioners. 91 Ind. Cas. 497=22 M.L.W. 178=A.I.R. 1925 Mad. 1270=49 M.L.J. 430.

——S. 11, Expl. 6 — Hindu widow — Decision against—When binding on reversioners.

Whether the widow represented the inheritance in a litigation against her may be gathered from the nature of the defence put forward and the issues raised, tried and the decided in the former suit. The mere allegation that she did or did not, would be of little value. Was the suit based upon a mere personal cause of action by or against the widow? Was it a ground personal to the female heir that was taken in a previous suit? Was it a claim by or against the widow personally or the inheritance whch she represented? To decide these questions the Court must examine the averments, the issues and the findings in the previous suit. If the contentions raised are those connected with the inheritance and the trial was with reference to them the widow must be held to be representing the estate; if not the litigation must be deemed personal to her and not binding upon the reversioners. 73 Ind. Cas. 284=18 L.W. 491.=A.I.R. 1924 Mad. 301.

——S. 11—Decree against widow binding on reversioners.

Where the widow has represented the estate in a previous litigation and a decree is passed against the widow, it is valid and binding on the reversioners and will operate as **res judicata** in a subsequent suit by the reversioners. 16 M.L.W. 94=1922 M. W. N. 418=31 M.L.T. 129=70 Ind. Cas. 387=A.I.R. 1922 Mad. 233=43 M.L.J. 95.

——S. 11—Hindu widow—Decision against—Res judicata against reversioners.

A decision against widows as representing their husband's estate is **res judicata** against the reversioners in a subsequent suit in regard to the same estate. 46 Ind. Cas. 162=3 Pat.L.J. 426.

——S. 11—Hindu widow—Decree against—Reversioner, how far bound.

A decree obtained upon a fair trial in a suit by or against a Hindu widow in possession of the estate of the full owner, operates as **res judicata** regarding only the questions tried in the suit. 19 C.W.N. 1230=27 Ind. Cas. 954=21 C.L.J. 157.

——S. 11—Suit against Hindu widow—Defence—Omission to plead—Res judicata against reversioners.

Where in a suit instituted against widow for possession of immoveable property it was open to her to plead the invalidity of an adoption but she failed, she must be held to have raised it. The question as to adoption is **res judicata** in any subsequent suit between the reversioners to her husband's estate and the alienees. 27 Ind. Cas. 109 =(1914) M.W.N. 903.

——S. 11—Widow—Mortgage decree binding on reversion—Mortgage executed by last male holder.

Where in suit on mortgage executed by the last male owner, the mortgagee obtained a decree for foreclosure against the widow, and there had been a fair trial between the widow and the mortgagee and the widow had done all that she could to protect the property the decree in favour of the mortgagee put an end to the original owner's proprietary rights and consequently to the reversionery right also. 44 P.L.R. 1918=32 P.W.R. 1918=43 Ind. Cas. 523.

——S. 11—Mortgage decree against Hindu widow—If binds reversion—Mortgage executed by her.

A Hindu widow cannot be deemed to represent her husband's estate so as to bind the reversionary heirs of her husband in relation to anything which she may have done herself to the prejudice of these reversionary heirs. She represents the estate as against the strangers for the purpose of protecting or preserving it. A decree obtained by a mortgagee against a Hindu widow alone, on the basis of a mortgage not executed by her for legal necessity cannot bind the reversioners. 22 O.C. 260=53 Ind. Cas. 761=6 O.L.J. 469.

——S. 11—Hindu widow—Decision against reversioner, when not barred.

A decision against a widow who does not establish her right to recover the estate of her deceased husband within 12 years of the death of the latter, does not operate as **res judicata** against a reversioer whose title to possession only accrued on the death of the widow. 42 Ind. Cas. 228=32 M.L.J. 62.

——S. 11—Hindu widow—Decree against, on personal ground and on admission—Reversioners not barred.

A decree given against a widow on a ground personal to herself and on her admission in the prior litigation could be no more binding upon the reversioner than an alienation by her otherwise than for necessity. 21 Bom.L.R. 837=53 Ind. Cas. 164=43 Bom. 869.

——S. 11—Decree against widow—Personal litigation—No res judicata.

In a litigation which is personal to a widow in possession of her husband's estate or which arises out of acts of her own affecting the estate, the widow, whether plaintiff or defendant, does not represent the estate fully so as to give right to the bar of **res judicata** against the reversioners. 42 Bom. 69=43 Ind. Cas. 233=19 Bom.L.R. 919.

——S. 11—Hindu widow—Decree against—Cause of action personal—No res judicata against reversioner.

Where in execution of a decree against a Hindu widow a stranger purchases her right to the emoluments attached to the shebaitship of a temple and subsequently the widow brings a suit to set aside the decree and execution sale as being fraudulent and fails therein. **Held,** that the prior decision is no bar to a suit by a reversioner as a **shebait** on the death of the widow to recover possession of the emoluments attached to the office. 42 Cal. 244=18 C.W.N. 1029=27 M.L.J. 100=1 L.W. 549 =16 M.L.T. 210=12 A.L.J. 1176=20 C.L.J. 360=16 Bom.L.R. 845=24 Ind. Cas. 501=(1914) M.W.N. 636 (P.C.). [Affirming 14 Ind. Cas. 142=39 Cal. 887.]

——S. 11—Compromise decree against Hindu widow—Binding effect on reversioners—Test.

A decree fairly obtained against a Hindu widow binds the reversioners. The principle does not apply either to a compromise or an award decree and it has to be determined in each case whether the decree can be properly said to have been fairly obtained against the widow as representing the whole estate including the rights of the reversioners. The Court will weigh the matter with special caution where the decree is a compromise or award decree on the same grounds upon which it has been held that legal necessity must definitely be proved in the case of purchases from Hindu widows and that transactions must definitely be shown to have been explained and fully understood in the case of pardanashin ladies. 43 Bom. 249=48 Ind. Cas. 125=20 Bom.L.R. 947.

——S. 11—Hindu widow—Compromise decree.

A compromise decree against a Hindu widow binds the reversioners if it is shown that the alienation was made for purposes justifying sale by Hindu widow. 14 A.L.J. 881=35 Ind. Cas. 633 =38 All. 679.

——S. 11—Hindu widow—Decree against—Reversioners, how affected.

A widow's **bona fide** confession of judgment binds the reversioners where their rights to the estate are not in question and they are also bound by a decree fairly and properly obtained against her. 25 Ind. Cas. 921=1 C.L.J. 490.

——S. 11—Hindu widow—Decree against compromise—Collusion.

Where a mortgagee filed a suit for redemption and, on his death, his widow collusively compromised the suit and after a time the mortgagor's reversioner filed a second suit for redemption, this latter was not barred by **res judicata**. 21 Ind. Cas. 605=11 A.L.J. 574.

——S. 11, Expl. 6—Representative suit—Suit by widow challenging adoption.

A suit brought by widow in possession of the whole estate holding as widow's estate to challenge an alleged adoption is a representative suit and all persons having a common interest (namely the reversioners in this case) must be deemed to have been represented through her under S. 11, Expl. 6 of the Code of Civil Procedure. 46 All. 637=22 A.L.J. 690=87 Ind. Cas. 938=A.I.R. 1925 All. 79.

——S. 11—Suit by widow challenging validity of adoption—Decree against —Reversioners when bound—Estoppel affecting widow.

A decree fairly and properly obtained against a Hindu widow in possession of her husband's estate is, in the absence of fraud or collusion, binding on the reversionary heir, and where in a suit the merits are tried and the trial is fair and honest, a Hindu lady does not cease to represent her husband's estate merely owing to a personal disability or disadvantage as litigant. A suit by a Hindu widow for a declaration that she had not validly adopted the defendant as a son to her deceased husband was dismissed on the ground among others that by her own acts she was personally estopped from denying the validity of the adoption. It was also found that the adoption was otherwise valid. On the death of the widow the next reversioner sued to eject the adopted son alleging he had not been validly adopted; **held**, that though the rule of **res judicata** as enacted in S. 11 of the C.P. Code did not strictly apply, the principle of **res judicata** as stated above was applicable and the decision in the widow's suit on the validity of adoption barred the suit of the reversioner. 40 All. 593=28 C.L.J. 519=24 M.L.T. 361=9 L. W. 52=23 C.W.N. 326=21 Bom. L. R. 511=45 I.A. 168=48 Ind. Cas. 553=(1919) M.W.N. 155=36 M.L.J. 597 (P.C.). [Affirming 37 All. 496=30 Ind. Cas. 657=13 A.L.J. 594.]

——S. 11—Suit by widow against husband's brother—Finding that property was joint—Res judicata against her in subsequent suit by reversioner.

In a suit by a widow against her husband's brother for possession of property it was declared that the property was joint. No appeal was prosecuted by widow. **Held** the point of joint property was **res judicata** against her in a subsequent suit by the reversioners of her husband. 14 Bom. L. R. 1142=17 Ind. Cas. 866=37 Bom. 172.

——S. 11—Hindu widow holding life estate under husband's will—Decision against—Not binding on remainderman.

A decision in a suit against the Hindu widow holding a life estate under the will of her husband is not binding on the remainderman under the will. 22 O.C. 156=52 Ind. Cas. 845=6 O.L.J. 355.

24. (d) Malabar Tarwad.

——S. 11, Expl. 6—Malabar Tarwad—Suit defended by karnavan.

Plaintiff, members of a **Thavazhi**, sued for a declaration that the suit properties belonged to their **Thavazhi**, as **Puthravagasam** properties. It was found that, in a prior suit by the **Karnavan** of the Tarwad of which the **Thavazhi** in question was a branch, the plaint though as originally framed was not against the **Thavazhi**, was subsequently amended by making the **Karnavan** of the **Thavazhi** a party defendant and he honestly defended the suit by contending that the suit properties were **Puthravagasam** properties. The contention was found against and the finding was confirmed on appeal to the High Court to which the members of the **Thavazhi** and its **Karnavan** were parties.

Held, that the decision in the prior suit against the **Thavazhi** confirmed as it was by the High Court on appeal, operated as **res judicata**. 16 M.L.W. 768=74 Ind. Cas. 27=31 M.L.T. 389=A.I.R. 1923 Mad. 153.

——S. 11—Suit by Karnavan of a Malabar Tarwad—Dismissal—Subsequent suit raising the same question by junior member—Bar.

Where the very question raised in the suit was raised in a previous suit to which the predecessors-in-interest, were parties, and a decision was given thereon.

Held, that the decision will operate as **res judicata**.

A judgment in a matter of **res judicata** must stand by itself. It decides what it purports to decide, no more and no less. It there is any ambiguity as to what it decided, which cannot be cleared up without further evidence, then it will not be a clear finding and therefore not a case of **res judicata** at all. 17 M.L.W. 322=72 Ind. Cas. 582=32 M.L.T. 146=A. I. R. 1923 Mad. 514=44 M.L.J. 443.

——S. 11—Decision against karnavan.

The decision against a karnavan when he has litigated in good faith is binding on the tarwad. 20 Mad. 12, Foll. 13 M.L.W. 584=62 Ind. Cas. 598=A.I.R. 1921 Mad. 520=40 M.L.J. 338.

——S. 11, Expl. (6) (S. 13, Expl. 5, Old Code)—"Litigating under the same title"—Decree against karnavan of Malabar tarwad—Res judicata as against junior members.

Where a Karnavan suing or sued in a representative capacity litigates *bona fide*, the decree passed in such suit in the absence of fraud or collusion will bind the junior members of the tarwad whom he represented. Where a decree has been passed against a person who sues or is sued in a representative capacity, the person or persons represented by him are bound by the decree in the absence of any fraud or collusion. Negligence in the conduct of the suit, however gross, if it did not amount to fraud or collusion, will not entitle him or them to avoid the decree. The mere fact of non-production of certain *karars* or the mere fact that Courts might now give weight to them though no weight was attached to them by the Court which tried the former suit, would be no proof of want of diligence and honesty, *i.e.*, want of *bona fides* within Explanation 5 to S. 13 C.P.C., on the part of the Karnavan so as to entitle the junior members

to reopen the former decree. (1900) 13 M.L.J. 68.

24 (e). Religious Endowment.

——S. 11—Expl. 6—Mosque—Suit by managing committee of—Decision in—Res judicata.

A decision in a suit brought by the managing committee of a mosque in the capacity of trustees is binding upon every person who is interested in the mosque by virtue of Expl. VI to S. 11, C.P. Code. A.I.R. 1949 East Punj. 141.

——E. 11, Expl. 6—Suit for .declaration that wakf was valid—Prspective mutawalli impleaded as pro forma defendant bona fide upholding wakf —Subsequent suit in respect of same wakf—Mutawalli B appointed by previous mutawalli by his will impleaded as defendant.

The prospective **mutawalli** who was impleaded as a **pro forma** defendant in a suit for a declaration that the **waqf** was valid, **bona fide** upheld the validity of the **waqf**. By his will this **mutawalli** appointed **B** as **mutawalli** of the suit **waqf**. In a subsequent suit questioning the validity of the same **waqf, B** was impleaded as a person interested in the **waqf** and also aas he claimed to be the actual **mutawalli** under the above mentioned will:

Held, (i) that the previous **mutawalli** must be held to have been litigating in a representative capacity on behalf of the waqf;

(ii) that **B** in the subsequent suit must be held to be a person claiming under the previous **mutawalli** within the meaning of S. 11, Expl. 6, C. P. Code.

(iii) that both **B** and the previous **mutawalli** must be held to be litigating under the same title and the fact that the previous **mutawalli** was a prospective **mutawalli** made no difference;

(iv) that the previous **mutawalli** was bound by decision on the question of validity of **waqf** in suit in which he was **pro forma** defendant, as the decision affected his interest to the same degree as that of the plaintiff. A.I.R. (Vol. 29) 1942 Cal. 1=I.L.R. (1941) 2 Cal. 434=73 C.L.J. 475=200 Ind. Cas. 822.

——S. 11—Suit for account of wakf property—Decision that wakf was void—Res judicata.

In a suit by **B** against **A** for an account of **wakf** property, it was decided that the **wakf** was void. A subsequent suit was brought by **B** against **A** and **C** who was not a party to the previous suit, for declaration that that property was **wakf**.

Held, that the decision in the previous suit not only operates as **res judicata** between **A** and **B** but is also binding as between **B** and **C**. 113 Ind. Cas. 120=A.I.R. 1928 Lah. 888.

——S. 11, Expl. 6—Adjudication upon claim that property is wakf—Res judicata.

The language of S. 11, Explanation 6 is very wide and as a matter of public policy if a claim that a property is **wakf** is fought out on the merits and decided in the negative the persons in possession should not be harassed by succession suit by other persons making similar claim. 9 O. L.J. 111=26 O.C. 82=66 Ind. Cas. 90=A.I. R. 1922 Oudh 1.

——S. 11—Suit for declaration that property sold was wakf—Decision in—Res judicata.

Plaintiff on behalf or the Mahomedan community sued for a declaration that the land sold by the defendant No. 1 was **waqf** and that the sale deed was null and void. The plaintiff had brought a suit of the same kind before on behalf of the Mahomedan community and obtained the decision of a Court.

Held, that the question whether the area in dispute is the **waqf** or not was directly and substantially in issue in the earlier suit and having been adjudicated upon could not be reopened. 53 Ind. Cas. 886.

——S. 11—Shebait—Previous proceedings against Shebait—Shebait not described as such—Subsequent suit by him.

Where in the previous commutation proceedings the plaintiff in the subsequent suit was not described as a shebait of the idol, but it was found that he appeared but did not set up any interest adverse to that of the idol but defended the commutation proceedings as a shebait.

Held, that there was effective representation of the idol in the commutation proceedings although the suit was nominally brought against the present plaintiff, as such proceedings were really directed against the debuttar estate. 101 Ind. Cas. 758=A.I.R. 1927 Cal. 606.

——S. 11—Suit by some shebaits against others for proper management—If representative suit.

Where the suit was one by some of the shebaits of a deity against the other shebaits for proper management of the debuttar property, but one of the defendants disputed the debuttar character of the properties,

Held, that two sets of shebaits were not fighting with each other about the management of the properties, and that the suit was on behalf of the deity. 41 C.L.J. 396=88 Ind. Cas. 616=A.I. R. 1925 Cal. 996.

——S. 11—Shebait—Decree against—Binding on successor.

A decree passed in a suit against shebait as representing an idol is binding on the succeeding shebaits in absence of fraud or collusion. 20 C. L.J. 485=19 C.W.N. 520=27 Ind. Cas. 328= 42 Cal. 440.

——S. 11—Shebait—Decree against—Binding on successor.

A decision in a suit contested by the **shebait** of a debutter estate is binding on all successive **Shebaits**. 18 Ind. Cas. 394=17 C.W.N. 964.

——S. 11—Prior suit under S. 5, Religious Endowments Act—Second suit by public under S. 92, C. P. Code—Not barred.

A prior suit under S. 5 of the Religious Endowments Act declaring the defendant to be a duly constituted Mohunt is not a bar to a suit by the public under S. 92, C. P. Code, for administration of the trust, where the public were not made parties to the prior suit. 26 C.W.N. 504 =63 Ind. Cas. 418=A.I.R. 1921 Cal. 425.

——S. 11 (S. 13, Old Code)—Decision against Mirasi holders of office in temple—Res judicata —Order in execution of decree for injunction against defendants in prior suit—If res judicata against members of community not actually parties to prior suit.

Though, no doubt, judgments **in personam** bind only parties and privies, yet, the relation established between parties by such judgments is conclusive against third persons in the absence of fraud upon them. A judgment obtained against the **mirasi** holders of the **adhyapakam** office is binding on the trustee of the temple as well. A previous adjudication between the Thengalais and Vadagalais of a place wherein the parties represented other members of the caste, under O. 1, R. 8, (S. 30, Old Code) as to their respective rights of **adhyapakam** in the local temple concludes not only the temple trustee in the absence of fraud, but also all the members of the communities for all time. But an adjudication in execution of an injunction decree against the parties to the previous suit is not binding on the members of the communtiy who were not directly parties to the decree granting the injunction. (1906) 20 M.L.J. 546=33 Mad. 483=6 Ind. Cas. 229=8 M.L.T. 33.

24 (f). Reversioner.

See also 19 (p).

——S. 11, Expl. 6—Decree in suit by presumptive reversioner—When binding against actual reversioner.

The true principle applicable to decrees to which presumptive reversioners are parties, when the question of their character as against actual reversioners comes up for consideration is the one embodied in Expl. 6 to S. 11 of the Code. Where in a prior suit the presumptive reversioner was a minor represented by a next friend it is not so much a question of negligence or gross negligence that arises for consideration, as a case of **bona fides**, or want of **bona fides** in the conduct of the litigation. Gross negligence as a head of attack against decree, is available only in the case of minors against whom decrees have been passed, but not in the case of persons who may be representing other people's interests in the previous litigation such as presumptive reversioners, prior trustees, previous ejmans or kartas, etc. (1949) 2 M.L.J. 413, followed. A.I.R. 1950 Mad. 562 =(1950) 1 M.L.J. 727.

——S. 11, Expl. 6—Representative suit—Suit by reversioner to avoid transfer—Decision in—Res judicata.

A reversioner's suit is always regarded as a representative suit brought on behalf, and for the benefit of, the entire reversionary body regardless altogether of the consideration whether in the plaint he has purported to sue on behalf of such body. This result is implicit in the nature of a reversionary interest. Till succession opens out the interest of all the reversioners in nothing more than a mere **spes successionis** and it cannot be predicated with regard to any particular individual that he will be the person entitled to the property as a reversioner at the time the estate falls into possession. The right which is given to the near reversioner to sue to avoid a transfer is intended for the protection of the interests of the entire reversionary body and it is for this reason that a suit brought by him in the exercise of such a right has always been regarded as a representative suit. A decision in such a suit, therefore, operates as **res judicata** in a subsequent suit by another reversioner for a similar relief. 50 P.L.R. 208.

——S. 11—Decision in suit by Reversioner contesting widow's alienation—How far res judicata.

It is well settled that a suit for declaration by a reversioner to contest an alienation made by a widow in possession, is a representative suit on behalf of all the reversioners and a decree fairly and properly obtained against the reversioner in such a suit binds not only him but the whole body of reversioners on the one hand and the alienee or his representatives on the other. But such decree does not bar suits by reversioner against other alienees and in respect of other portions of the property although a reference is made incidentally to some of these alienations in the previous judgment. 10 Lah. 613=118 Ind. Cas. 449=30 P. L.R. 328=A.I.R. 1929 Lah. 295.

——S. 11—Suit by Reversioner challenging gift by widow—Decision in—Res judicata.

On the death of last full owner of the property, a part of the property was recorded as held by his widow although his son survived him. After the death of the son the property which was recorded in his name, being a portion of his father's property, was recorded in the names of his mother and a predeceased brother's widow. The mother executed a deed of gift in favour of her daughter-in-law. A possible reversioner to the estate sued for declaration that the widow had no right to execute a gift. The defence, **inter alia**, was that the widow held adversely to the estate of her husband and had matured in herself an absolute title and was, therefore, competent to execute the deed of gift. This defence succeeded in respect of that portion of the property which had been recorded in the widow's name on the death of her husband. The suit succeeded in respect of that portion of the property which came to be recorded in the name of the widow on the death of her son. After the failure of the reversioner, his brother started a fresh campaign of litigation on the same allegations as had been made by the former plaintiff.

Held, the decree in the previous suit should be treated as concluding the later suit brought by the other revisioner. 19 A.L.J. 749, Foll. 23 A.L. J. 329=87 Ind. Cas. 235=6 L.R.A. Civ. 303= 47 All. 505=A.I.R. 1925 All. 483.

——S. 11—A suit by a reversioner to contest an alienation is one brought on behalf of all the reversioners who are bound by a decision therein. (38 Mad. 406, 39 Mad. 634, 41 Mad. 659, Foll.) 79 Ind. Cas. 484=A.I.R. 1925 Lah. 180.

——S. 11—Suit by presumptive reversioner during widow's lifetime for declaration—Decision in —Res judicata.

A suit by a reversioner during the lifetime of the widow is a representative one and enures for the

benefit of all the reversioners and is equally operative to the detriment of all. A judgment obtained by the presumptive reversioner that an alienation is good is binding, during the lifetme of the widow on the whole body of reversioners; and conversely a decision obtained by the presumptive reversioner against the widow that an alienation is not binding is **res judicata** and cannot be questioned by the widow during her lifetime in any subsequent suit brought by any other reversioner. [38 Mad. 406 (P.C.) and 41 Mad. 659 (F.B.), Foll.] A decision favourable to the reversioner can be used against the widow and therefore the widow who obtains, a judgment in her favour can use it as a protection against the reversioner. 22 M.L.W. 170=91 Ind. Cas. 546=1925 M.W.N. 572=A.I.R. 1925 Mad. 1162=49 M.L.J. 143.

——S. 11—Declaratory suit by contingent reversioner in widow's lifetime—Decision—Binding on actual reversioner.

A declaratory suit by a contingent reversioner is a representative suit on behalf of all reversioners. The cause of action for such a suit is the common injury to the reversionary suit. The actual reversioner is bound by any decree passed in a prior declaratory representative suit by a contingent reversioner. 20 M.L.W. 552=83 Ind. Cas. 140=1924 M.W.N. 730=A.I.R. 1925 Mad. 86=47 M.L.J. 545.

——S. 11—Alienation by widow—Suit by the immediate reversioner—Decision binds on actual reversioner.

A decree in a suit by a reversioner for setting aside an alienation by a Hindu widow is binding not only between the reversioner who brought the suit and the alienee, but it also binds the whole body of reversioners and the representatives-in-title of the alienee—it is binding on the whole body of the reversioners because the reversioner who brings the suit does so in a representative capacity for the protection of the estate. No reversioner must be thought to claim though another, but as the reversioner who brings the suit does so in a representative character under Expl. 6 to S. 11, C. P. Code, the suit is **res judicata** against all reversioners. 44 All. 19=64 Ind. Cas. 248=19 A.L.J. 749=A.I.R. 1922 All. 301 (F.B.).

——S. 11—Decree against immediate reversioner binding on actual reversioner.

Where a Hindu widow mortgaged the properties of her husband, and on her death the daughter the immediate reversioner contested the mortgage suit on facts, questioning the mortgage for want or legal necessity, and a decree was passed in favour of the mortgagee, held in a suit by the actual reversioners, in which substantially the same issues were raised, that the suit was barred by S. 11. The principle of **res judicata** is applied rightly so as to bind reversioners by decisions in litigations, fairly and honestly conducted, whether given, for or against Hindu females who represented the estate. 49 Cal. 45=64 Ind. Cas. 980=33 C.L.J. 421=25 C.W.N. 585=A.I.R. 1922 Cal. 321.

——S. 11—Suit by presumptive reversioner for declaration—Decision binds actual reversioner.

In 1906 a suit was brought by a presumptive reversioner against the widow of the testator for a declaration that the will was fraudulent. The will declared to be valid. On the death of the widow plaintiff, as reversioner, brought the suit for possession of property on the ground that the declaration of the validity of the will in the previous suit was not binding on him.

Held, if a suit for declaration is brought to protect an interest common to the entire reversionary body. Explanation 6 to section 11 is applicable and the decision, if obtained after fair contest, must necessarily bind all the reversioners. A reversioner who may happen to be entitled when the succession opens, cannot, claim to have the matter re-agitated. To hold otherwise would be to let in the very mischief which the explanation was enacted to avoid. On grounds of public policy it would be highly mischievous that a question of fact which was decided after full contest as between the reversioners on the one hand and the legatee, the widow, on the other should be liable to be re-opened as between other representatives of the same sets of rival claimants after the lapse of more than twelve years. 9 O.L.J. 235=69 Ind. Cas. 730=25 O.C. 189=A.I.R. 1922 Oudh 236.

——S. 11—Hindu reversioners—Suit by—Decision in—Binding on reversionary body.

Decision in a suit by some reversioners in the interest of the whole body is binding on the entire reversionary body, even though some of the plaintiffs withdrew from the suit. 7 O.L.J. 342=57 Ind. Cas. 541=2 U.P.L.R. (J.C.) 123=23 O.C. 238.

——S. 11—Decision against female reversioner—Binding on male reversioners.

Where an alienee from a widow of the last owner gets a declaration of the validity of his alienation against the mother who is the next reversioner the decision is binding on the male reversioners. 27 Ind. Cas. 103, foll. 22 M.L.T. 233=6 L.W. 530=34 M.L.J. 319=42 Ind. Cas. 540=(1917) M.W.N. 679.

——S. 11—Reversioner seeking personal relief against widow—Subsequent suit after widow's death—No bar.

Where, the relief sought by reversioners against certain widows is a personal one and no declaration has been sought for avoiding any particular transfer and there was no finding that any transfer and was or was not for legal necessity, the mere dismissal of a suit for injunction cannot operate a **res judicata** in respect of a suit for possession after the death of the widows. A new cause of action arises in favour of the aotual reversioners at the death of the widows and the second suit is not barred. 1929 A.L.J. 741=121 Ind. Cas. 387=A.I.R. 1930 All. 9.

——S. 11—Relationship of plaintiff as reversioner—Finding as to pedigree in one suit—No bar in a luater suit.

A finding as to a pedigree produced in a former suit by plaintiffs to prove their relationship as reversioners is not **res judicata** against other reversioner not claiming under plaintiff in the former suit where plantiff have been held not to be rever-

sioner in that suit. 95 Ind. Cas. 178=A.I.R. 1926 All. 573.

——S. 11—Declaratory decree obtained by Reversioner that alienation is in operative beyond widow's lifetime—No res judicata in favour of another Reversioner subsequently suing for possession.

A declaratory decree obtained by one reversioner that a certain alienation by the widow was inoperative beyond her lifetime cannot operate as **res judicata** in favour of another reversioner who subsequently sues for possession of the property concerned. 43 All. 558=63 Ind. Cas. 524=19 A.L.J. 514=A.I.R. 1921 All. 237.

——S. 11, Expl. 6—Suit by reversioner to set aside alienation by sonless proprietor—Dismissal—Res judicata.

Dismissal of suit by certain reversioners for setting aside alienation by sonless proprietor bars another suit for the same purpose by other reversioners who had been co-defendants in previous suit. 5 Lah. 421=84 Ind. Cas. 477=A.I.R. 1925 Lah. 89.

24 (g). Trust.

——S. 11, Expl. 6—Decision against trust in a prior suit—Res judicata.

When in a suit, where the trust is properly represented, after real and genuine contest a decision is given, it is absurd to hold that persons not parties to the previous suit, although, they may have an interest in the trust, can ask the matter to be re-opened and the question to be retried. 1926 M.W.N. 40=91 Ind. Cas. 924=A.I.R. 1926 Mad. 267=49 M.L.J. 746.

——S. 11, Expl. 6—Suit under S. 92, C. P. Code—Decision—Binding character of.

A suit under S. 92 is a suit brought by the plaintiffs for themselves and as representatives of the general public. Under S. 11, Explanation 6, all persons interested in the subject matter of such a suit would be bound by the decision in the suit if the provisions of the Explanation are satisfied. 80 Ind. Cas. 44=A.I.R. 1925 Cal. 187.

——S. 11—Suit under C. P. Code, S. 92—Decree in—Binding effect.

Any decree passed in a suit under S. 92, C. P. Code is binding not only on the trust and the trustees, but also on all the worshippers at the temple. 1925 M.W.N. 505=A.I.R. 1925 Mad. 1070.

——S. 11—Suit as between co-trustees—Decision in—Binding character of.

The Shebaits of a trust form a continuing representation of the property of the idol. A decree obtained on behalf of the trust by co-trustee against other co-trustees for the protection of the property either in a suit for rendition of accounts or in a suit for declaration that the property in dispute is trust property, binds not only the trustees who are parties to the suit but also all persons interested in the trust. 22 A.L.J. 641=80 Ind. Cas. 406=5 L.R.A. Civ. 410=46 All. 651=A.I.R. 1924 All. 504.

——S. 11, Expl. 6—Cmpromise decree in suit under S. 92—Res judicata.

A compromise decree passed in a suit relating to a public trust under S. 92, C.P. Code, may operate as **res judicata** under S. 11, Expl. 6, C.P. Code. In order to attract the provisions of that Explanation it must be shown that the suit was a **bona fide** litigation in respect of a public right and the defendants were persons interested in that right. I.L.R. (1945) 1 Cal. 500=A. I. R. 1949 Cal. 214.

——S. 11, Expl. 6—Suit by trustees of temple—Compromise decree—Res judicata.

Where a prior suit was brought by four persons claiming to be trustees of a temple for recovery of certain lands belonging to the temple and the suit was compromised by two of the trustees and the compromise was found to be **bona fide, held,** that a subsequent suit by other persons for recovery of the same temple lands was barred by **res judicata.** It is not necessary to attract the operation of S. 11, Expl. 6, C.P. Code, that the former suit should have been instituted with the leave of the Court under O. 1, R. 8, C.P. Code. 18 L.W. 177=75 Ind. Cas. 336=(1923) M.W.N. 545=1924 M. 88.

——S. 11—Suit filed with sanction but amended without sanction—Stranger defendants and reliefs not covered by S. 92 added—Suit compromised by some plaintiffs—Suit not representative.

A suit in respect of trust property was instituted by seven persons with the sanction of Advocate-General. It was subsequently amended without his sanction by adding strangers to the trust as defendants and by adding prayers for relief not covered by S. 92. The suit was later on compromised by six out of the seven plaintiffs.

Held, that the nature of the suit was changed, that it ceased to be one of representative character and the decree based on the compromise, however binding as against the consenting parties, cannot bind the rest of the public. S. 11, Expl. 6, has no application to such a case. 9 P.L.T. 65=108 Ind. Cas. 361=32 C.W.N. 482=27 M.L.W. 339 =55 I.A. 96=26 A.L.J. 464=30 Bom.L.R. 774 =55 Cal. 519=48 C.L.J. 55=1928 M.W.N. 926 =A.I.R. 1928 P.C. 16=54 M.L.J. 609 (P.C.).

——S. 11—Suit for declaring trust deeds as invalid—No order obtained under O. 1, R. 8—Suit not representative.

Where in a prior suit by the plaintiffs for declaring certain trust deeds invalid, no order was obtained making them representatives under O. 1, R. 8 and the Court held the suit was not governed by S. 92 of the Code, those plaintiffs could not under such circumstances be treated as having brought the suit in a representative character and a subsequent suit by another person for declaring these trust deeds valid and that the prior decree was not binding on him is therefore maintainable. 34 C.W.N. 1129=A.I.R. 1930 Cal. 787=53 C.L.J. 91=130 Ind. Cas. 369.

——S. 11—Prior suit in respect of a public Trust—Fraudulent withdrawal—If operates as res judicata.

Where a trust is a public trust, persons interested in it cannot be bound by the result of a prior suit in which no decision was arrived at and which was withdrawn fraudulently. 108 Ind. Cas. 199 =A.I.R. 1928 Mad. 268.

——S. 11—Suit against trustee—Latter unsuccessfully asserting his personal rights—Subsequent suit in personal capacity barred.

Defendant was sued as trustee and manager of an idol, in respect of the income of certain property of the endowment. He did not defend the suit in his fiduciary character but asserted his own personal rights to the property and was unsuccessful. He then brought the present suit again in his personal capacity.

Held, that the suit was not maintainable and was barred under S. 11 of C. P. Code. 60 Ind. Cas. 74 (All.).

25. **Withdrawal of suit.**

——S. 11—Plaintiff electing not to proceed with action—Effect.

Where, though a claim was included in the prior suit, there was no judicial decision upon it and all that happened was that the plaintiff elected not to proceed with that action for the purpose, but to seek a judicial decision in other proceedings, the claim is not barred by **res judicata**. 197 Ind. Cas. 27=1941 A.W.R. 781=8 B.R. 174=54 L. W. 618 (P.C.).

——S. 11—Suit against number of defendants for demolition of constructions—Name of one of defendants struck off without taking permission under O. 23, R. 1, to bring fresh suit against him—His subsequent re-impleading—Suit cannot be decreed against him.

Where, in a suit brought by **zemindars** against a number of defendants as **riayas** for demolition of certain construcitons in the **sahan darwaza** of the defendants, the name of one of the defendants is removed from the array of defendants without taking permission of the Court under O. 23, R. 1 (2) to bring fresh suit against him, the suit is brought to an end against him and his subsequent re-impleading means bringing a new suit against him and the suit cannot, therefore, be decreed against him. A.I.R. (Vol. 27) 1940 Oudh 43=1943 A. W. R. 260=1939 O.W.N. 990=184 Ind. Cas. 785.

——S. 11—Plaintiff abandoning claim—No res judicata.

Where the plaintiffs abandon their claim, there is no trial of the issues arising between the parties and consequently there is no decision which could operate as **res judicata**. To prevent the defendants being harassed unnecessarily a second time on the same cause of action the law however prescribes that the plaintiffs shall not sue again on the same cause of action unless the suit is withdrawn under O. 23, R. 1, C.P. Code, owing to some technical defect, etc., and the permission of the Court is obtained. A.I.R. (Vol. 26) 1939 Lah. 414=187 Ind. Cas. 865.

——S. 11, O. 23, R. 1—Expl. 5 to S. 11, applicability—Plaintiff asking decree against joint Hindu family including minor sons—Claim against sons withdrawn — Withdrawal, if operates as res judicata under S. 11—Or whether comes under O. 23, R. 1.

Explanation 5 to S. 11, C.P. Code, can be invoked only in respect of any adjudication made by the Court. The fact that the plaintiff who, in the first instance, asks for a decree against the joint family property so far as the interests of the minor sons therein are concerned, subsequently withdraws his claim as against them, can only bring the case under O. 23, R. 1, C.P. Code. The result of such a withdrawal is not to bring in the operation of the rule of **res judicata** embodied in S. 11 but only to entail the statutory penalty enacted in O. 23, R. 1, itself, **viz.**, that no fresh suit can be instituted against those defendants on the same cause of action. A.I.R. (Vol. 24) 1937 Mad. 718=1937 M.W.N. 1313=47 L.W. 60=176 Ind. Cas. 359.

——S. 11—Appeal by defendant—Plaintiff's application to withdraw with permission to bring fresh suit—Appeal and application allowed — Plaintiff's subsequent suit on same grounds—Held, not barred by res judicata.

The defendant filed an appeal which was heard and the plaintiff-respondent applied for permission to withdraw the suit with a right to bring a fresh one regarding the same subject matter and the Court passed the order allowing the application and allowed the appeal also. Subsequently, the plaintiff filed a suit on the same grounds as previously and the defendant raised the plea of **res judicata:**

Held, that though the order of the Court regarding withdrawal was irregular, it was not without jurisdiction. Consequently, **res judicata** could not be pleaded on the ground of the decision of the appeal. 163 Ind. Cas. 367=39 C.W.N. 586.

——S. 11—Withdrawal of suit—If operates as res judicata.

The basic principle of **res judicata** is that there should have been a final adjudication on merits. The case of withdrawal is analogous to a dismissal in default and as there is no decision on merits there is no **res judicata**. 110 Ind. Cas. 818=A. I.R. 1928 Lah. 710.

——S. 11—Withdrawal of—Ejectment suit.

The right to sue for ejectment accrues from year to year, and therefore the withdrawal of a previous suit for ejectment does not bar a subsequent suit for ejectment against the same party. 89 Ind. Cas. 379=A.I.R. 1926 All. 34.

——S. 11—Suit for ejectment—Withdrawal by consent—Fresh suit if barred.

Where the plaintiff withdrew the ejectment suit apparently under an agreement that the defendant should pay an enhanced rent,

Held, that a fresh suit for ejectment is not barred by the principle of **res judicata**. 14 R.D. 632.

——S. 11—Suit withdrawn—Subsequent suit on same cause of action, if barred.

The doctrine of **res judicata** has no application to a case where a suit is withdrawn and a fresh suit is brought based on the same cause of action, especially when in the prior suit there is no adjudication on any of the questions at issue. 149 P. W. R. 1911=11 Ind. Cas. 831=249 P.L.R.

——S. 11—Withdrawal of part of the claim in prior suit—Subsequent suit for that not barred.

Where in the first suit, part of the claim being for a rendition of accounts for a certain period having been deliberately withdrawn, there was no decree affecting that portion of the claim, nor any finding on an issue relting to the right of the plaintiff for accounts against defendants.

Held, that the bar of S. 11 could not be raised to the second suit for the same claim. 1929 A. L.J. 229=114 Ind. Cas. 734=A.I.R. 1928 All. 689.

——S. 11—Leave to withdraw suit—Irregular grant of—Finality of.

Where an order is made allowing plaintiff, to withdraw his suit with liberty to sue afresh, the order though erroneous and unjustifiable is not void or one made without jurisdiction, Consequently when a suit is subsequently instituted on leave so granted, the prior order cannot be ignored or treated as a nullity nor is the pior suit **res judicata**. 31 C.L.J. 482=58 Ind. Cas. 806=24 C. W.N. 723 (F.B.). [Overruling 44 Cal. 367=20 C.W.N. 1000=23 C.L.J. 489=33 Ind. Cas. 670. See also 32 M.L.J. 434=21 M.L.T. 229=40 Ind. Cas. 611=(1917) M.W.N. 234.]

——S. 11 and O. 23, R. 1—Leave to withdraw suit.

When plaintiff brings a fresh suit after withdrawal of the first with permission, the defendant cannot plead **res judicata** in the subsequent suit. 22 Ind. Cas. 918.

——S. 11—Withdrawal of suit — Order granting premission—If can be questioned in a subsequent suit.

Per **Mullick, J.**—The Court trying a subsequent suit is not competent to enter into the question whether the Court which granted the permission to bring a fresh suit had properly made such order. 48 Cal. 138 (F.B.), Foll.; 44 Cal. 367; 1 P.L. T. 300 reported (1920) P.H.C.C. 232, Diss. 1922 P.H.C.C. 17=64 Ind. Cas. 337=3 Pat.L. T. 80=1 Pat. 90=A.I.R. 1922 Pat. 44.

——S. 12—Fresh suit when maintainable.

Where a person obtains a decree against a supposed legal representative of a deceased debtor, who is subsequently found not to be so, a fresh suit on the same cause of action against the real legal representatives is not barred. 9 Pat. L.T. 807=108 Ind. Cas. 558=A.I.R. 1928 Pat. 362.

——S. 13—Foreign judgments.

Synopsis.

1. Applicability.
2. Court of competent jurisdiction—See under jurisdiction (S. 13 (a)).
3. Directly adjudicated upon—What amounts to.
4. Decision on merits—What is S. 13 (b)).
5. Ex parte decrees—When conclusive.
6. Foreign judgments.
(a) Contrary to Law.
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(e) Fraud in—Obtaining.
7. Jurisdiction of Foreign Courts.
(a) As to cause of action.
(b) As to persons.
(c) As to property.
(d) Submission to jurisdiction.

1. Applicability.

——S. 13 and S. 44-A—Applicability—Limits of discretion in execution of foreign decrees.

The expression "may be executed" in S. 44 (see now S. 44-A) of the Code gives a discretion to the executing Court, to refuse to execute a decree. That discretion is not with special reference to Ss. 13 and 14. Cases may arise where in the exercise of proper discretion, Courts of law in British India may refuse execution of such decrees even apart from the exceptions enumerated in S. 13. However, in practice, no case may arise beyond the very general exceptions engrafted in S. 13. 21 M.L.W. 330=86 Ind. Cas. 492=A.I.R. 1925 Mad. 788.

——S. 13 and S. 44—Transferred decrees.

The provisions of S. 13 of the C.P. Code, apply to decrees that are transferred to British Courts for execution under the provisions of S. 44. It is therefore open to the Court to which a decree of a foreign Court is transferred for execution to go into the question whether the decree is passed without jurisdiction. 39 Mad. 24 and 40 Bom. 551, Foll. 98 Ind. Cas. 740=89 Ind. Cas. 347=47 C.L.J. 508=30 C.W.N. 785=A. I. R. 1925 Cal. 955.

——S. 13—S. 13 applies to plaintiffs as well as defendants. 6 Rang. 552=116 Ind. Cas. 465=A. I.R. 1928 Rang. 319.

——S. 13—Scope.

Section is not restricted to plaintiff suing on a foreign judgment. 51 Mad. 720=108 Ind. Cas. 305=29 M.L.W. 250=A.I.R. 1928 Mad. 327=54 M.L.J. 479.

——Ss. 13 and 44-A—Decree passed before "appointed day" by Court now situate in Pakistan—If "foreign judgment"—Independence Act, S. 18 (3).

Before the "appointed day", (i.e.), 15th August, 1947, a decree was passed by a Court which after that day is situate in Pakistan. On an application by the decree-holder after the appointed day, that Court transferred the decree for execution to the Court of Small Causes at Calcutta in the Indian Dominion.

Held, that the Court of Small Causes at Calcutta had no jurisdiction to entertain the application for execution as Pakistan is not a reciprocating territory. From after the 15th August, 1947, the Court which passed the decree became a "foreign Court" and the judgment on the basis of which the decree was passed, was a "foreign judgment". Accordingly, the provisions of S. 13 read with S. 44-A, C.P. Code, were attracted to the case. 53 C.W.N. 817=A.I.R. 1950 Cal. 12.

——Ss. 13 and 44-A—Applicability—Decree passed by Lahore High Court—Execution—Jurisdiction of Court in Indian Union after 15th August, 1947.

After the 15th August, 1947, the Lahore High

Court has become in relation to a Court in the Indian Union, a "Foreign Court". There has been no notification declaring Pakistan to be a reciprocating territory for the purposes of S. 44-A C. P. Code. Hence after the 15th August, 1947, a Court in the Indian Union has no jurisdiction to entertain any applicaton for execution of a decree passed by the Lahore High Court. A.I.R. 1950 Cal. 12, rel. on. 52 P.L.R. 396.

——Ss. 13 and 44—Objections to—Foreign Judgment.

Ss. 13 and 44 should be read together, but it ought not to be forgotten that S. 13 merely lays down a rule of **res judicata** and has nothing to do whatever, with the manner in which the rule of **res judicata** should be enforced. Further, S. 13, merely codifies the rules of international law, with regard to foreign judgments. Unless, therefore, under its provisions a decree that is produced for execution is conclusive, as to the matter directly thereby adjudicated it cannot and ought not to be executed. The judgment-debtor in such cases, is permitted by the very provisions of S. 13 to show how or why it is not conclusive by showing that the case falls under one of the exceptions enumerated. 21 M.L.W. 330=86 Ind. Cas. 492=A. I.R. 1925 Mad. 788.

——S. 13—Foreign judgment—Suit on in British India—Judgment must be final and conclusive.

A foreign judgment, to be a valid cause of action for a suit upon it in British India, must be final and conclusive in the Court in which it is passed. In order to establish that a final and conclusive judgment has been pronounced, it must be shown that in the Court by which it was pronounced it conclusively, finally and for ever established the existence of the debt of which it is sought be be made conclusive evidence in this country so as to make it **res judicata** between the parties. A.I.R. 1935 Rang. 284=158 Ind. Cas. 547.

——S. 13—Scope of—Foreign judgment—When operates as res judicata.

Section 13, C. P. Code, provides that a foreign judgment may operate as **res judicata** except in the six cases specified in that section and subject to the other conditions mentioned in S. 11. A. I.R. (Vol. 25) 1938 Bom. 173=40 Bom.L.R. 77 =I.L.R. (1938) Bom. 16=174 Ind. Cas. 615.

——S. 13—Foreign judgment that an application is a step-in-aid of execution—Binds Court in British India.

Where there has been a foreign judgment on a matter directly adjudicated upon between the same parties, under the section it is not open, to an unsuccessful party to the application in the foreign Court, to contend that the law there is otherwire. 45 Mad. 1014=69 Ind. Cas. 932=1922 M.W.N. 647=16 M.L.W. 735=A.I.R. 1923 Mad. 72=43 M.L.J. 700.

——S. 13—Foreign Court — Berar—If foreign territory.

The Province of Berar is a foreign territory and the British Indian Court has no jurisdiction to pass a decree upon a mortgage for sale of property situate in Berar. A.I.R. 1935 Nag. 250=18 N. L.J. 295=31 N.L.R. Sup. 43=159 Ind. Cas. 739 (F.B.). See also 76 Ind. Cas. 305=A.I. R. 1923 Nag. 321 and A.I.R. (1935) Nag. 192.

2. Conclusiveness, presumption as to.

——S. 13 (S. 14, Old Code)—Presumption of jurisdiction—Rebuttal.

The presumption that a foreign Court had jurisdiction to pass a judgment and satisfied itself that the judgment was amenable to its jurisdiction can be rebutted by evidence that the foreign Court decided wrongly on the facts which gave its jurisdiction. (1901) 6 C.W.N. 829=29 C. 509.

——S. 13—Certified copy of foreign judgment—Presumption.

On production of a certified copy of a foreign judgment, it is obligatory on the Court to presume that the Court passing the decree was of competent jurisdiction. It is open to the opponent, however, to show either by following the record itself, that there was want of jurisdiction, or that the presumption might be displaced by evidence led on the point. A.I.R. (Vol. 29) 1942 Bom. 199=44 Bom.L.R. 380=I.L.R. (1942) Bom. 688=202 Ind. Cas. 286.

——S. 13—Foreign judgment — French Court—Ex parte decree.

Prima facie, it may be presumed that a judgment of a French Court in an **ex parte** case will be based upon a consideration of the truth of the claim, because the French C. P. Code prescribes that if the defendant does not appear, he will be treated as a defaulter, and the plaintiff's claim will be decreed if found just and well proved. A.I.R. 1941 Pat. 109=7 B.R. 37=20 Pat. 144=190 Ind. Cas. 545.

——S. 13—Foreign judgment—Conclusiveness—Question of fact cannot be interfered with.

Where a foreign trubunal has decided a question of fact necessary to determine the jurisdiction of a particular foreign Court, it is not open to a British Indian Court to go behind that decision. A.I.R. (Vol. 30) 1943 Bom. 201=45 Bom.L.R. 358=I.L.R. (1943) Bom. 366=209 Ind. Cas. 50.

3. Directly adjudicated upon.

——S. 13—'Directly adjudicated upon'—Requisites.

Notwithstanding the definition of judgment in S. 2, C. P. Code, the expression "foreign judgment" in S. 13 must be understood to mean an adjudication by a foreign Court upon the matter before it.

There is nothing in S. 13 to supprt a contention that every step in the reasoning which led the foreign Court to its conclusion must have been "directly adjudicated upon". "Directly" does not mean "expressly". Hence where the "matter" which was "directly adjudicated upon" by the foreign Court was the validity of an award and the order of the Court in effect was that the award

had been properly filed and that the objections to it must be dismissed, that order is a "judgment" within S. 13 of the C. P. Code which is conclusive between the parties as to the validity of the award. 74 I.A. 203=1948 M. W.N. 214=50 Bom.L.R. 556=60 L.W. 701=1947 A.L.J. 578 A.I.R. 1947 P.C. 192=(1947) 2 M.L.J. 498 =52 C.W.N. 82 (P.C.).

——S. 13—"Directly adjudicated upon."

It is not necessary that there must be a positive discussion of the evidence relating to that matter in the foreign judgment. If any claim is made by party and subsequently abandoned and if the decree in that suit necessarily implies that that claim has not met with acceptance at the hands of the Court, then the Court must be deemed to have directly adjudicated against it, so that this adjudication is conclusive. A.I.R. 1944 Mad. 427= 57 L.W. 252=1944 M.W.N. 242=(1944) 1 M. L.J. 331.

4. Decision on merits.

——S. 13 (b)—Foreign judgment—Decision on the merits—What is.

Unless the judgment is given merely on default, if in spite of the default any evidence is taken for the plaintiff, and judgment is given thereon, it may be difficult to say, that it is not a decision on the merits. 21 M.L.W. 330=86 Ind. Cas. 492 =A.I.R. 1925 Mad. 788.

——S. 13 (b)—Decision on the merits—What is.

The phrase "the merits of the case" has been used in the Code in contradistinction to a judgment by way of penalty. A.I.R. 1916 P.C. 121, Dist. 41 All. 521, Ref. Where a decree was granted to the plaintiff by the foreign Court, not because of the failure of the defendant to comply with any order of the Court, but because the Court rightly or wrongly was of opinion that the fact that the document on which the suit was based was registered coupled with the omission of the defendant to contest the suit furnished a **prima facie** proof of the genuineness of the plaintiff's claim.

Held, that the judgment could not be said as pronounced without considering the merits of the case. 25 A.L.J. 887=105 Ind. Cas. 186=A.I. R. 1927 All. 510.

——S. 13 (b)—Under S. 13 (b) a foreign decree obtained on default of appearance of the defendant without any trial on evidence is a case where the judgment must be held not to have been given on the merits of the case and no suit lies in British India on such a foreign judgment.

There is no distinction between a case in which a decree is given without any trial whatever and a decree in a case in which even though defendant did not appear the matter was tried in full on evidence given by plaintiff and proved his case. 50 Mad. 261=25 M.L.W. 307=100 Ind. Cas. 555=39 M.L.T. 319=A.I.R. 1927 Mad. 265= 52 M.L.J. 240 (F.B.).

——S. 13 (b)—Foreign Judgment granted without taking plaintiff's evidence (but only on his pleadings) is not one on merits.

A decision on the merits involves the application of the mind of the Court to the truth or falsity of the plaintiff's case and therefore though a judgment passed after a judicial consideration of the matter by taking evidence may be a decision on the merits even though passed **ex parte,** a decision passed without evidence of any kind but passed only on plaintiff's pleadings cannot be held to be a decision on the merits. 6 Rang. 552=116 Ind. Cas. 465=A.I.R. 1928 Rang. 319.

——S. 13 (b)—Foreign judgment—Compromise decree—Decree in effect a recognition of arrangement already arrived at between parties—Decree whether on merits.

From the language of S. 13 of the C. P. Code and the observation of the Privy Council in Keymer v. Viswanathan Reddi, (1916) 44 I.A. 6: 32 M.L.J. 35: I.L.R. 40 Mad. 112 (P.C.), it would appear that for a decree of a foreign Court to be conclusive there should be a controversy and an adjudication thereon. Where the parties went to the Court with a drafted compromise, and the decree in question was passed on the strength of that compromise.

Held, that when the parties went to that Court they had no dispute and there was nothing for the Court to decide. The decree given mechanically in accordance with a prescribed rule was in effect a mere recognition by the Court of an arrangement already arrived at between the parties, and in the circumstances it could not be said that it was a decision on merits and cannot be said to be conclusive between the parties. 1946 M.W.N. 70=225 Ind. Cas. 348=59 L.W. 60= A.I.R. 1946 Mad. 296=(1946) 1 M.L.J. 66.

——S. 13 (b)—Judgment on the merits—Filing of written statement—Solicitor reporting no instructions.

Defendant was sued in the Court of Straits Settlements. Written statement was filed but at the trial the defendant's solicitor reported no instructions. Thereupon judgment was given for the plaintiff on his examining his witnesses.

Held, that the judgment of the Foreign Court was given on the merits and that the same was conclusive against the defendant. 40 Mad. 112 (P.C.) rel. 11 L.W. 609=(1920) M.W.N. 411 =57 Ind. Cas. 742.

——S. 13 (b)—Judgment on merits—Solicitor appearing for the party.

A judgment delivered against a party represented by a solicitor who accepted services of the writ of summons, (the party himself being unable to appear and defend the suit in London) is a judgment given on the merits within S. 13. 17 A. L. J. 301=50 Ind. Cas. 780.

——S. 13 (b)—Foreign judgment—Decree according to the procedure of that Court.

In a mortgage suit in the District Court of Colombo, on the non-appearance of the mortgagor, the mortgagee's proctor filed an affidavit and the Court passed a decree **nisi** and a decree absolute under Ceylon C.P. Code, Ss. 85 and 86. On a suit brought by the mortgagee in British Indian Court on the foreign judgment, **held** the decision of the Colombo Court was not on merits so as to entitle mortgagee to have a judgment under C.P.

Code, S. 13 (b). A.I.R. 1927 Mad. 265 (F.B.), Foll.; A.I.R. 1916 P.C. 121, Rel. on; A.I.R. 1926 Mad. 615; A.I.R. 1925 P.C. 203 and A.I.R. 1928 Mad. 133, Ref. 123 Ind. Cas. 600=A.I.R. 1930 Mad. 146.

——**S. 13 (b)**—A judgment of a foreign Court obtained under the rules of that Court which enact that where the defendant is **ex parte** the plaintiff is entitled to a decree merely on proving that the defendant was properly served is not a judgment obtained on the merits of the case and that S. 13, Cl. (b) bars a suit on that judgment. A.I.R. 1927 Mad. 265 (F.B.); 40 Mad. 112 (P.C.)' Foll.; 45 Mad. 496, 47 Mad. 877, Dist.

If the adjudication which the foreign judgment embodies is not conclusive, it cannot be in any intelligible sense an adjudication at all for the purposes of the subsequent litigation. 26 M.L.W. 803=107 Ind. Cas. 810=A.I.R. 1928 Mad. 133.

——**S. 13 (b)**—Foreign judgment—Suit on promissory note or hundi in the District Court of Colombo —Non-appearance of defendant—Affidavit filed by plaintiff in terms of the plaint—Decree **nisi** under S. 85 of the Ceylon Civil Procedure Code is not decision on merits. 30 M.L.W. 349=123 Ind. Cas. 579=A.I.R. 1930 Mad. 149=57 M.L.J. 459.

——**S. 13 (b)—Foreign judgment—Judgment "on the merits"—Meaning of.**

In an action for recovery of money in the King's Bench Division of the High Court in England the defendant's defence was struck off and judgment was entered for the amount claimed by plaintiff. In a suit on the judgment against the defendant in Madras. **Held**, that the judgment of the English Court was one which had not been given on the merits of the case within S. 13 (b), C.P. Code and no action could be maintained on it in Indian Courts. 40 Mad. 112=44 I.A. 6=15 A.L.J. 92 =21 M.L.T. 78=5 L.W. 342=19 Bom.L.R. 206 =21 C.W.N. 358=25 C.L.J. 233=10 Bur.L.T. 175=38 Ind. Cas. 683=32 M.L.J. 35 (P.C.). [Affirming 39 Mad. 95=27 M.L.J. 670=27 Ind. Cas. 386.]

——**S. 13 (b)—Foreign judgment—Judgment of King's Bench Division in London in summary procedure in default of defendant's appearance—Whether judgment on merits.**

Where in default of appearance of the defendant, the King's Bench Division in London under summary procedure passed a judgment, without calling any evidence:

Held, that the judgment was not a judgment on merits within the meaning of **S. 13 (b), C. P.** Code, and a suit cannot be brought solely on such a judgment in British India. (1936) 163 Ind. Cas. 931=61 C.L.J. 29=39 C.W.N. 557=62 Cal. 682.

5. Ex parte decrees.

——**S. 13 (b)**—An **ex parte** judgment is not necessarily not one on merits within S. 13. 32 Bom. L.R. 1178=128 Ind. Cas. 609=A.I.R. 1930 B. 511.

——**S. 13 (b)**—In a case in which there is no appearance and a decree is passed **ex parte**, the decision is still a decision on merits. A.I.R. 1925 Mad. 155, Foll. 22 M.L.W. 820=92 Ind. Cas. 491=A.I.R. 1926 Mad. 259.

——**S. 13—Judgment ex parte.**

A foreign judgment obtained **ex parte** against a defendant, a resident of British India, does bind that defendant. 8 M.L.T. 287=(1910) M.W.N. 435=7 Ind. Cas. 810.

——**S. 13 (b)—Foreign judgment—Ex parte decision—Test to see whether it is on merits.**

An **ex parte** decision may or may not be on the merits. The mere fact of its being **ex parte** will not in itself justify a finding that the decision was not on merits. The real test is whether it was merely formally passed, as a matter of course, or by way of penalty, or it was based upon a consideration of the truth or otherwise of the plaintiff's claim. A.I.R. 1941 Pat. 109=7 B.R. 37=20 Pat. 144=190 Ind. Cas. 545.

——**S. 13—Foreign judgment—When conclusive—Joint petition for postponement of trial for settlement or decree—Defendant not appearing on date fixed.**

In the case of a foreign judgment the defendant first appeared and filed his written statement but when the case came on for trial, he along with plaintiff filed joint petition to the effect that the trial may be postponed with a view to settlement, and if not settled, decree may be passed as prayed for. The trial was accordingly postponed but on the day fixed, defendant did not appear and on plaintiff's statement that the case was not settled, decree was passed.

Held, that the decision was binding on a Court in British India. A.I.R. 1927 Mad. 265 (F.B.); A.I.R. 1916 P.C. 121; A.I.R. 1928 Rang. 319, Dist. (1920) 2 Ir. R. 412, Cons. 52 Mad. 503 =29 M.L.W. 575=1929 M.W.N. 353=120 Ind. Cas. 751=A.I.R. 1929 Mad. 469=56 M. L. J. 547.

——**S. 13 (b)—Judgment on the merits—Meaning of—Enforceability in British India.**

A judgment given against defendant on his failure to answer interrogatories after striking out his defence is not a judgment "on the merits" and cannot be enforced in British India as such. S. 13 (b), C.P. Code refers to cases where, for one reason or another, the controversy raised in the action has not, in fact been the subject of direct adjudication by the Court. 40 Mad. 112=44 I.A. 6=21 M.L.T. 78=15 A.L.J. 92=19 Bom. L. R. 206=21 C.W.N. 358=25 C.L.J. 233=10 Bur. L.T. 175=38 Ind. Cas. 683=32 M.L.J. 35 (P. C.). [Affirming 39 Mad. 95=27 Ind. Cas. 386.]

——**S. 13—Decision on merits—Fact that defendant did not appear could not make it otherwise.**

Where the Court has taken evidence and examined witnesses and after taking all the oral evidence and considering the same together with the documents, the Court has decreed the claim, the decision is one given on merits and the fact that the defendant did not appear cannot make it otherwise. A.I.R. 1942 Bom. 199=44 Bom.L.R. 380 =I.L.R. (1942) Bom. 688=202 Ind. Cas. 286.

——**S. 13—'Judgment on merits'—Ex parte judgment.**

Where after due summons, the defendant entered

appearance and had an opportunity of defending the action, but did not do so and the Court passed judgment ex parte in plaintiff's favour **held**, that the judgment must be held to have been given on the merits. 6 Bur.L.T. 160=7 L.B.R. 56=20 Ind. Cas. 971.

——S. 13—Defence raised and not adjudicated upon—Decree not on merits—Where defendant does not appear at all decree should be held to be one on merits. 20 M.L.W. 677=47 Mad. 877=82 Ind. Cas. 425=A.I.R. 1925 Mad. 155=47 M.L.J. 356.

——S. 13 (b)—Foreign judgment—"On merits"—What is.

The test as to whether a judgment of a foreign Court is one on the merits or not is whether the judgment has been given as a penalty for any conduct of the defendant or whether it is based on a consideration of the truth or otherwise of the plaintiff's case.

Where in a suit in a foreign Court the defendant was represented by a counsel and filed a written statement pleading satisfaction of the claim but at the adjourned hearing he did not appear and his counsel withdrew and the Court passed a decree against him:

Held, that the decree was one passed on the merits within the meaning of S. 13 (b), C. P. Code. A.I.R. 1932 Lah. 649=14 Lah. 58=34 P.L.R. 311=140 Ind. Cas. 82.

——S. 13 (b)—Foreign judgment—"On merits"—What amounts to.

A decree under the summary procedure of the Court of Ceylon as distinguished from an **ex parte** decree under the regular procedure is not one on the merits within the meaning of S. 13, C.P. Code.

Where a suit is laid on a foreign judgment, if the judgment does not satisfy the conditions of S. 13 (b), it must be dismissed. It cannot be tried on the merits. A.I.R. 1933 Mad. 544=38 L.W. 232=144 Ind. Cas. 22 (2).

——S. 13 (b)—Foreign judgment—When one on merits.

Where in a suit in a foreign Court against two defendants the real issue between the parties was as to which of the defendants was in possession of the goods in dispute and liable to surrender them to the plaintiff and one of the defendants being absent at the time of the hearing a decree is passed against the absent defendant alone by consent of the plaintiff and the other defendant without hearing any evidence from the plaintiff, the decree is not a decree passed on the merits of the case within the meaning of S. 13 (b) of the C. P. Code so as to bind the absent defendant. 59 L.W. 315=1946 M.W.N. 427=A. I. R. 1946 Mad. 448=227 Ind. Cas. 465=(1946) 2 M.L.J. 16.

——S. 13—Foreign judgment—Ex parte judgment—When on merits.

Where the judgment is given to the plaintiff in default of appearance of the defendant without any further hearing in the matter, such a judgment being purely a penalty for default of appearance of the defendant is not a decision on the merits of the case but where, notwithstanding the non-appearance of the defendant, evidence is taken on behalf of the plaintiff and judgment is given on such evidence, such a judgment will be a decision on the merits of the case. A.I.R. (Vol. 22) 1935 Rang. 284=158 Ind. Cas. 547.

——S. 13—Foreign judgment—Ex parte decree—Rule of Court—Defendant, though given opportunity to contest, voluntarily refraining from contesting.

If the procedure laid down by the Rules of the Supreme Court in England, is strictly followed and the defendant is given an opportunity to appear and contest the claim of the plaintiff and he voluntarily refrains from doing so, the decision of the High Court of justice in England must be regarded as a judgment on the merits. If the defendant does not appear, his default after due service is taken to be tantamount to an admission of the claim, and the judgment as entered in favour of the plantiff as if the defendant had confessed judgment. A.I.R. 1935 Lah. 396=16 Lah. 768 =37 P.L.R. 852=158 Ind. Cas. 113.

——S. 13—Foreign judgment—Judgment on the merits—What amounts to.

The words "judgment on the merits" have been used in S. 13, C. P. Code, in contradistinction to a decision on a matter of form or by way of penalty and a case must be taken to have been decided on the merits where the defendant had ample opportunity to raise a defence and voluntarily refrained from raising such defence and the judgment was, therefore, passed **ex parte**. A.I.R. 1935 Lah. 396=16 Lah. 768=37 P.L.R. 852=158 Ind. Cas. 113.

——S. 13—Judgment on merits—Foreign Judgment.

A decision is not on merits when the defendant's written statement is struck out for his failure to answer interrogatories and he is not allowed to go on the merits. A suit on foreign judgment thus obtained is unenforceable in British India. 39 Mad. 95=27 M.L.J. 670=27 Ind. Cas. 386. [Affirmed on appeal by the Privy Council: See 40 Mad. 112=44 I.A. 6=32 M.L.J. 35=38 Ind. Cas. 683 (P.C.).]

6. (a) Foreign Judgment—Contrary to law.

——S. 13 (c)—Foreign judgment—What the law in foreign country is, is question of fact.

What the law in a foreign country is, is a question of fact to be proved by evidence. A judgment of the highest tribunal of the foreign country is the best evidence on the question. In such a case there is no question of the binding nature of the foreign judgment such as arises under S. 13, C. P. Code. A.I.R. 1942 Bom. 185=44 Bom. L.R. 358=I.L.R. (1942) Bom. 467=201 Ind. Cas. 759.

——S. 13 (c)—Refusal to recognise British law—What is not.

A foreign judgment must be enforced by the Courts in British India in every case in which the judgment-debtor had voluntarily appeared before the foreign Court which passed the judgment. A suit was brought in British India and was founded on judgment passed by Dholpur Court (foreign Court.) It was pleaded that if the suit upon

which the foreign judgment was passed had been brought in British India it would have been held to be time-barred under the law of limitation in operation in British India, but the Law of Limitation in Dholpur not being the same as the Law in British India the remedy in Dholpur was not time barred.

Held that there had been no refusal to recognise the Law of British India, in this case. A Court which entertains a suit on a foreign judgment cannot institute an enquiry into the merits of the original action or the propriety of the decision. 46 All. 119=79 Ind. Cas. 332=21 A.L.J. 890=A.I.R. 1924 All. 161.

——S. 13 (c)—Foreign judgment—Contrary to Indian Law.

The fact that foreign Courts do not regard rules of the Courts of British India as imperative, even if the rules are of legal application in such states, should not be a reason for dismissing suits based on such foreign judgments on the ground that they are contrary to natural justice. 13 P.W.R. 1916 =34 Ind. Cas. 255.

——S. 13—Foreign Court—Jurisdiction how decided—Rules of international law.

The question whether a Court is a Court of competent jurisdiction should be determined not by the rules laid down in respect of the jurisdiction of domestic tribunals but by rules of international law. Under the rules of international law, personal submission to the jurisdiction of a foreign Court gives that Court jurisdiction. 21 M.L.W. 330=86 Ind. Cas. 492=A.I.R. 1925 Mad. 788.

——S. 13 (d)—Foreign judgment—Validity.

Foreign judgment based on a second or third review on the same grounds is opposed to natural justice and cannot be basis of suit in British India justice and cannot be basis of suit in British Indian Court. 8 Lah. 54=102 Ind. Cas. 523=A.I.R. 1927 Lah. 200.

——S. 13—Judgment contrary to International Law and Law of British India.

A Muhammadan belonging to the Hanafi sect died in Penang. Probate of his will was granted to the defendants, his executors. His widow started proceedings for accounts against the defendants and for administration of the estate, claiming one-third share under the Muhammadan Law. The Supreme Court of the Straits Settlements determined the assets and liabilities after taking into consideration the deceased's immovable properties situated in the Tanjore District, and held that the widow was entitled to a one-third share, and ordered that the defendants should accordingly pay a certain amount to the widow. A suit was brought in Tanjore upon this foreign judgment:

Held, that the judgment was not one on which a suit could be maintained in British India, as it was based on an incorrect view of International Law in regard to the jurisdiction of a Court of one country over immoveable properties situate in another country and as it was also contrary to the Law in force in British India. A.I.R. 1934 Mad. 145=39 L.W. 58=66 M.L.J. 209=1934 M.W.N. 658=148 Ind. Cas. 297.

6. (b) Foreign judgment—Effect of.

——S. 13—Foreign judgment—Effect of—Suit on.

A foreign judgment has no force or authority as such in British India, but may give a cause of action for a suit to obtain the same relief in British India. It is only in such proceedings that the question of effect of the foreign judgment properly arises. 20 C.W.N. 1213=(1916) 2 M.W.N. 153 =A.I.R. 1916 P.C. 136=36 Ind. Cas. 710 (P.C.) [Affirming 37 All. 1=12 A.L.J. 1074=25 Ind. Cas. 193.]

——S. 13—Foreign decree in terms of award beyond submission—Whether conclusive.

Where a foreign Court passes a decree in terms of an award which is beyond the terms of submission, the judgment of the foreign Court amounts to an adjudication that this award is a valid award and for that reason ought to be filed and it is conclusive on a British Indian Court under S. 13. A.I.R. 1943 Bom. 201=45 Bom.L.R. 358=I.L.R. (1943) Bom. 366=209 Ind. Cas. 50.

——S. 13 (b)—Foreign judgment on compromise —When conclusive.

For a decree to be conclusive under S. 13 there must be a controversy and an adjudication thereon by the foreign Court. Where the parties to a suit goes to a foreign Court with a compromise and the Court passes a decree on the strength of the compromise. There was no dispute between the parties when they were before the foreign Court, and the Court had nothing to decide. The decree, being a mere recognition of an arrangement already arrived at between the parties could not be said to be a decision on merits. The decree, therefore, fell under S. 13 (b) and is not conclusive. A.I.R. 1946 Mad. 296=59 L.W. 60=1946 M.W.N. 70=225 Ind. Cas. 348=(1946) 1 M.L.J. 66.

——S. 13 (b)—Where a decision was obtained in a Court of Native States between the widow and the alleged son of the deceased it must be held that the widow completely represented the estate and that any decision between the parties in that suit provided there was a direct adjudication upon the point is conclusive between them and between their successors-in-title provided that the judgment is not disqualified by any of the flaws set forth in S. 13 of the Code. But where the decision was obtained by fraud the question is not **res judicata** between the parties. A.I.R. 1922 Lah. 175.

——S. 13—Foreign judgment—Decision on every issue—How far binding.

S. 13 speaks only of the matter directly adjudicated upon by the foreign judgment. Although the contention that it refers only to a decree cannot be accepted, still at the same time it cannot be said that every issue decided by the foreign Court is binding upon the British Indian Court. The expression "matter directly adjudicated upon" in S. 13 should be held as undoubtedly to include the right set up, but limited only to the particular relief granted or refused. 51 Mad. 720=29 M.L.W. 250=108 Ind. Cas. 305=A.I.R. 1928 Mad. 327=54 M.L.J. 479.

——S. 13—Reasons for the judgment—Relevancy.

Under S. 13, C.P. Code, judgment is not used in the sense of a statement of the Judge's reasons. A foreign judgment means an adjudication by a foreign Court upon the matter before it and not a statement by a foreign Judge of the reasons for his order. But in order to understand and interpret the decree or order, the Court may have to look at the pleadings of the parties and the reasons of the Judge. Those reasons would not be binding on any question of fact or law, except so far as they show what the judgment actually decides, and whether any of the exceptions to S. 13 applies. A.I.R. 1943 Bom. 201=45 Bom.L.R. 358=I.L.R. (1943) Bom. 366=209 Ind. Cas. 50.

——S. 13—Foreign judgment—Invalid—Effect of—If original cause of action survives.

It is a well-established principle of Private International Law that a foreign judgment only creates a new obligation to pay but does not extinguish the original cause of action for the debt. A foreign judgment involves no merger of the original cause of action especially when it has been declared to be a nullity by a competent British Indian Court. The creditor thereunder has the option of bringing an action in a domestic tribunal on the foreign judgment which he has recovered or of bringing in a domestic tribunal a suit upon the original cause of action. It does not matter whether the procedure for enforcing a foreign judgment is by a suit or by an application in the form of execution. A.I.R. 1941 Cal. 64=72 C.L.J. 148=I. L. R. (1941) 1 Cal. 171=45 C. W. N. 113=194 Ind. Cas. 746.

——S. 13—Foreign judgment against some of several joint promisors—Effect of—Suit against others in the domestic forum—Maintainability.

Where the first judgment pronounced against some of several joint promisors or contractors is a judgment, not of a domestic Court but of a foreign Court, the original cause of action still subsists and a second suit based on it can still be filed in a domestic tribunal. The promisee who has the right to sue on the original cause of action both in the foreign Court and in the domestic Court may, in such a case, sue those promisors who are residents or subjects of the foreign State in the foreign Court and may also sue the others who are residents or subjects of British India in a British Indian Court on the original cause of action. A. I. R. 1941 Cal. 64=I.L.R. (1941) 1 Cal. 171=72 C.L.J. 148=45 C.W.N. 113=194 Ind. Cs. 746.

6. (c) Foreign judgment—Enforceability.

——S. 13—Foreign decree—Irregular service of notice.

Irregularity in the service of notice cannot be raised as a ground for questioning validity of foreign decree. 47 Mad. 877=82 Ind. Cas. 425 =20 M.L.W. 677=A.I.R. 1925 Mad. 155=47 M.L.J. 356.

——S. 13—Foreign Court—Notice not served on defendant—Effect of.

Where a notice of an action in a foreign Court is not served on the defendant, any decree passed in the action is a nullity. (1901) 28 C. 641=5 C. W.N. 741.

——S. 13—Foreign judgment—Validity—Legal representative not brought on record—Opposed to natural Justice.

It amounts to denial of natural justice not to bring the legal representatives of a deceased defendant upon the record and a judgment passed without so impleading the legal representative cannot be given effect to against them. 102 Ind. Cas. 523=8 Lah. 54=A.I.R. 1927 Lah. 200.

——S. 13—Ex parte decree of foreign Court awarding costs to defendant—Suit by defendant in Court in Bhopal State to recover costs based on judgment of foreign Court—Maintainability of.

The definition of 'judgment' in S. 2 (8), C.P. Code, (Bhopal) covers both an order and a decree, and equally holds good whether the decree is passed **ex parte** or on merits.

Where in a suit in a foreign Court plaintiff's witness who was under examination, absented himself and upon an adjournment being disallowed the Counsel withdrew from the suit with the result that the plaintiff's claim was rejected and she was required to pay the costs of the defendant, the absence of the witness on the date fixed for his further examination and the consequent withdrawal of plaintiff's Counsel from prosecution amounted to a default in proper prosecution of the suit on the part of the plaintiff and the suit, must be deemed to have been decided by the foreign Court **ex parte** under O. 17, R. 2, C.P. Code. A suit based on such a judgment to recover the costs from the defendants is maintainable in a Court in Bhopal State and is not barred by S. 58, Bhopal C.P. Code. (1940) 187 Ind. Cas. 439 (Bhopal).

——S. 13 (a) (b)—Foreign judgment—Binding nature—Suit against minor—Guardian ad litem not appearing—Court appointing its nazir as guardian ad litem and deciding case on merits—Decree for sale with right to apply for personal decree—Suit by mortgagee for personal decree in Court in British India.

The plaintiffs filed a mortgage suit against the minor daughter of the deceased mortgagor in the Osmanabad Court (Nizam's State) to recover the amount due under the mortgage deed by the sale of the mortgaged property and the balance out of the assets of the deceased mortgagor in the hands of the defendant. The defendant was then living with her husband in the Sholapur District in British India. Her husband was appointed her guardian **ad litem**. The defendant's husband, however, did not appear to defend the suit, and the Osmanabad Court appointed its **nazir** as the defendant's guardian **ad litem**.— The **nazir** put in a written statement denying the mortgage, and after recording the statement of the writer of the mortgage-deed, the Osmanabad Court passed a mortgage-decree, which further provided that if the decretal amount was not satisfied out of the sale proceeds of the mortgaged property the plaintiffs were at liberty to apply for a personal decree against the defendant to the extent of the assets of her father in her hands. The decree was executed by the Osmanabad Court, and as the sale proceeds of the

mortgaged property were not sufficient to discharge the decretal amount, the plaintiff filed a suit in the Court at Sholapur on the judgment of the Osmanabad Court, for personal decree against the defendant:

Held, that as the Osmanabad Court considered the plaintiff's claim on its merits, and after taking evidence, disposed of the suit on the merits, the defendant could not get the benefit of the exception contained in Cl. (b) of S. 13, C.P. Code:

Held, also that that part of the decree passed by the Osmanabad Court against the defendant which was a personal decree against her must be regarded as a nullity:

Held, further, that the Osmanabad Court acted beyond its jurisdiction in appointing its **nazir** as the defendant's guardian when her husband, who was her **de jure** and **de facto** guardian and had been appointed guardian **ad litem** by the Court itself, had never expressed his unwillingness to act as her guardian. In such circumstances the Court acted against the interests of the minor and against natural justice by indirectly compelling her to appear in the suit by appointing its own officer as her guardian **ad litem.** Moreover, it could not be said that the officer of the Court who was thus appointed guardian **ad litem** voluntarily appeared to defend the suit. He was after all an officer of the Court and had to obey the orders passed by the Court. When the Court appointed its **nazir** as the guardian, he had to appear and say something. Hence, under the circumstances the personal decree passed against the defendant was an **ex parte** decree and the suit, based on such a personal decree passed by the foreign Court, was liable to be dismissed. A.I.R. 1939 Bom. 374=41 Bom.L.R. 818=187 Ind. Cas. 57.

——S. 13—Foreign judgment—Validity—Award Award by foreign arbitrator—Misconduct not affecting his jurisdiction.

The misconduct in the arbitrator in a foreign State in that he allowed people to come and see him who were not parties to the arbitration does not go to jurisdiction, and it is not a matter which can be gone into in the British Indian Court. Such a point can only be taken in the foreign Court. A.I.R. 1943 Bom. 201=45 Bom.L.R. 358=I.L.R. (1943) Bom. 366=209 Ind. Cas. 50.

——S. 13—Award, foreign, order on—English Arbitration Act, S. 12.

An order obtained in the High Court in England enforcing an award under S. 12 of the English Arbitration Act is not a foreign judgment capable of supporting an action on it, but a suit may be filed on the award itself provided the High Court had jurisdiction over the matter under Cl. 12 of the Letters Patent. (1903) 8 C.W.N. 207 =31 C. 274.

——Ss. 13 and 44—Foreign judgment—Error as to onus of proof—Effect of.

A wrong view as to burden of proof will not make a foreign judgment erroneous on the face of it. A mistake of law in a foreign judgment is no ground for vacating it. There must be something in the procedure anterior to the judgment which is repugnant to nature justice. 41 Mad. 205=34 M.L.J. 295=45 Ind. Cas. 703.

——S. 13—Foreign judgment—Opposed to Indian Law.

The judgment of a competent foreign Court having jurisdiction cannot be impeached by a plea that if the suit had been brought in India, the suit would have been barred by time. 9 Bur.L.T. 106 =35 Ind. Cas. 741.

——S. 13—Foreign judgment—Binding nature of.

A foreign judgment is binding upon the parties thereto in British Courts even though the formalities of procedure which ought to have been observed by the foreign Court, were not observed. This rule will apply even in a case where the non-observance would in the view of the foreign Court have rendered the judgment there a nullity. (1899) 1 Ch. 781, Ref. to. A foreign judgment should not be allowed to be impeached on grounds which could have been but were not taken in the foreign Court. 30 M. 292=2 M.L.T. 269.

——S. 13—Foreign judgment—Suit on—Court dealing with foreign judgment, if can inquire whether decision is right or wrong.

It is not open to the Court trying a suit on a foreign judgment to decide whether the decision of the foreign Court on the materials put before it was right or not. The duty of the Court is merely to see that the foreign Court had applied its mind to the facts and the law on the point. A.I.R. 1934 Bom. 390=36 Bom.L.R. 844=155 Ind. Cas. 711.

——S. 13 (b)—Foreign judgment—Courts in India, if can sit over in appeal over foreign judgment.

Ordinarily it is not open to the Courts in British India to sit in appeal over a foreign judgment, and the Courts cannot refuse to recognize a foreign judgment because it proceeds on grounds which would not be adequate in British India, unless it offends against the rules under S. 13. The law on this subject in this country is more elastic and wider than that in England, and that is clear from Cl. (*b*) of S. 13 of the Code. Under that clause, the Courts in this country have a right to examine the judgment to see whether it has been given on the merits. A.I.R. 1938 Bom. 173=40 Bom.L.R. 77 =I.L.R. (1938) Bom. 16=174 Ind. Cas. 615.

——S. 13—Foreign judgment—Suit on.

A suit on a foreign judgment cannot be maintained under S. 13 unless there is a judgment. A.I.R. 1933 Mad. 544=38 L.W. 232=144 Ind. Cas. 22 (2).

6. (d) Foreign judgments—Finality of.

——S. 13—Foreign judgment—Finality—Failure to bring case under exception.

Once it is held that none of the exceptions specified in S. 13, Civil P. C., are applicable, that ends the matter. The plaintiffs then have conclusively established that they are entitled to recover the sum in question, and the defendant cannot be allowed to go behind the conclusive foreign judgment and reopen the issues as to merits. The fact that the foreign judgment may fail to show that every separate issue, such as the status of the contracting parties, or the measure of damages, was separately framed and decided, is irrelevant unless it can be shown that that failure brings the case within the

purview of one of the exceptions to S. 13. A.I.R. 1941 Pat. 109=7 B.R. 37=20 Pat. 144=190 Ind. Cas. 545.

——Ss. 13 (a), 44—Effect of—Foreign judgments —Right of executing Court to see if foreign Court had jurisdiction to pass decree.

Foreign judgments stand upon a different footing from judgments of British Indian Courts. The concluding words of S. 44, Civil P. C., namely, "as if they had been passed by the Courts in British India do not in any way control the operation of the provisions of S. 13, Cl. (*a*).

Therefore, the executing Court can enter into the question whether the foreign Court had jurisdiction to pass a decree against the judgment-debtor. If it is found on the evidence that he was not amenable to the jurisdiction of that foreign Court, then the decree passed against him is not pronounced by a Court of competent jurisdiction. A.I.R. 1935 Lah. 551=37 P.L.R. 240=158 Ind. Cas. 232.

——S. 13—Foreign Court—Order of confiscation by Court of Native State—Power of British Indian Court to question.

A Court of British India will not inquire into the legality of acts done by a Native State against its own subjects in respect of property situate in its own territory:

A who resided at Indore had his head office there and a branch office at Bombay from which a sum of money was due to *B* who was also a resident of Indore. The Indore State convicted *B* and confiscated his property and in pursuance of the order of confiscation *A* paid the amount to the Indore State and made entries to that effect in his account books. *C*, to whom *B* owed money filed a suit against *B*, in the Bombay High Court, attached the money in *A's* hands and sued for a declaration that *A* was bound to pay the amount to *C*:

Held, that inasmuch as when *C* obtained his order of attachment, the debt due to *B* had been seized by the Indore State by orders which a British Indian Court had no right to challenge there was nothing upon which the attachment could operate. A.I.R. 1932 Bom. 206=34 Bom.L.R. 17=56 Bom. 349=137 Ind. Cas. 483.

——S. 13 (a)—Foreign judgment—Execution by Court of another State—Defences open to judgment-debtor.

It is open to a Court executing a foreign Court's decree to nquire whether the foreign Court had jurisdiction to pass the decree. A decre pronounced by a Court of a foreign State in a personal action *in absentem*, the absent party not having submitted himself to its authority, is a nullity. The judgment-debtor has the same defences open to him as if he were sued on a foreign judgment, *i.e.*, those arising under S. 13, C. P. Code. he can plead under S. 13 (*a*) that the foreign judgment has not been pronounced by a Court of competent jurisdiction. I.L.R. (1950) B. 640=52 Bom.L.R. 660=A.I.R. 1951 B. 190.

——S. 13—Foreign judgment—Finality when appeal is pending.

Foreign judgment can be final even when an appeal is pending in foreign Court. Pendency of appeal is no bar to action. Stay of execution does not take away finality of foreign judgment. 8 Lah. 54=102 Ind. Cas. 523=A.I.R. 1927 Lah. 200.

——S. 13 — Foreign decrees — Calculation of — Amount awarded by—Rate of exchange.

Amount awarded by foreign judgment in foreign currency—Rate of exchange is that prevailing on the date of foreign judgment. 47 Bom. 487=70 Ind. Cas. 474=25 Bom.L.R. 173=A.I.R. 1923 Bom. 437.

6. (e) Foreign judgment—Fraud in obtaining.

——S. 13 (e)—Foreign judgment—Fraud—What amounts to.

It cannot be argued that merely because a plaintiff obtains a decree upon evidence which is believed by the Court but which in fact is not true, he has obtained that decree by fraud. There must be fraud connected with the procedure in the suit itself to bring the matter within Cl. (*e*) of S. 13, Civil P. C. A.I.R. (Vol. 28) 1941 Mad. 387=53 L.W. 89= 1941 M.W.N. 182=(1941) 1 M.L.J. 140=200 Ind. Cas. 83.

——S. 13—Foreign judgment—Validity—Fraud on Court—What amounts to.

The fact that in obtaining the judgment, the plaintiff had included certain items for which the defendant was not liable because they were paid to or spent on behalf of his *kul mukhtyar*, does not in law amount to fraud on Court. A.I.R. 1942 Bom. 199 =44 Bom.L.R. 380=I.L.R. (1942) Bom. 688= 202 Ind. Cas. 286.

——S. 13 (e)—Fraud—Setting aside judgments obtained by fraud.

A party to a prior action can in a fresh suit impeach the judgment passed in the prior suit on the ground of fraud whether the judgment is that of an English Court or of a Foreign Court, not only where there has been a fraud on the Court by what are called extrinsic circumstances, but also where the successful party in the prior suit had obtained the judgment by the use of perjured evidence or by suppression of material evidence. (1905) 16 M.L.J. 59=29 M. 179 (D.B.).

——S. 13 (a)—Foreign judgment—Jurisdiction—Competent jurisdiction—Cause of action—Defendant resident in British India not residing there at time of suit.

The question whether the foreign Court was a Court of competent jurisdiction must be determined not by the territorial law of the foreign State but by the rules of Private International Law.

In a personal action a foreign Court has jurisdiction in an international sense if (1) the defendant is the subject of the foreign country in which the judgment has been obtained; or (2) he, the defendant, is a resident in that foreign country when the action began; or (3) where the defendant in the character of a plaintiff had selected the forum in which he is afterwards sued; or (4) where he, the defendant, had voluntarily appeared in that Court and submitted to its jurisdiction; (5) where he the defendant, had contracted to submit himself to the foreign forum in which the judgment was obtained. There may possi-

bly be a sixth case, namely, where the defendant has real estate within the foreign jurisdiction in respect of which the cause of action arose while he was within the jurisdiction. No territorial legislation can give jurisdiction which any foreign Court ought to recognise against absent foreigners who own no allegiance or obedience to the power which so legislates. The rlue is the cause of action is not a general ground of jurisdiction recognized by International Law.

The case may be otherwise where the non-resident foreigner is a subject of the same sovereign power which legislates. Thus, British Parliament may confer power on a British Court to try a suit against a British subject resident in British India where the cause of action or part thereof arose in Great Britain and a decree passed by a British Court can be enforced in a British Indian Court, if it does not in other matters offend against other rules for enforcing foreign judgments. But in the absence of an express power conferred by the British Parliament, the Legislature of a Court cannot confer on judgments of its Courts extra-territorial operation, although the defendant is a subject of the same sovereign, namely, the King of England, and judgment passed in a suit instituted there on such a ground would be refused recognition in British India.

A judgment pronounced by a domestic tribunal has its force and sanction on the ground that it is a judicial order of the sovereign pronounced by the mouth of one of its tribunals and so can be enforced by processes of execution within its territories. A judgment of a foreign tribunal cannot obviously have its force and sanction on such a ground. It has no right to claim recognition beyond jurisdiction, but the comity of nations accords to such a judgment a certain recognition. Such recognitions are accorded by different countries on three distinct principles, namely, (1) The foreign judgment may be adopted by the domestic Court as its own, and admitted to execution within its jurisdiction. Section 44 recognises this principle only with regard to particular classes of foreign Courts, namely, Courts situate within the territories of Native Princes or States in alliance with His Majesty. In the case of such Courts the Governor-General in Council has to issue a notification under S. 44, Civil P. C. (2) The foreign judgment may be received as evidence of the creation of an obligation. This is the footing on which English Courts proceed, and this is the basis of S. 13, Civil P. C. (3) The foreign judgment may be received as evidence of the original obligation in a suit brought on the primary cause of action.

Even if a plaintiff had two remedies, *e.g.*, to institute a suit under S. 13 or to apply for execution under S. 44, these remedies were of the same nature and scope and were, therefore, alternative remedies, and he having elected the latter remedy and having been unsuccessful, could not again sue under S. 13. He was barred on the well-established principles relating to election of remedies.

It is well settled that when a decree of a foreign Court is sought to be executed in a British Indian Court under the provisions of S. 44, all objections which would be open to a defendant in a suit instituted under S. 13 of the Code to enforce a foreign judgment, would be open to the judgment-debtor. The executing Court had jurisdiction to decide the question whether the Court was a Court of competent jurisdiction and its decision on this point was final between the parties.

If a non-resident defendant appears in a foreign Court, pleads that the Court has no jurisdiction and also pleads to the merits, he submits to the jurisdiction of that Court voluntarily. Having taken the chance in that Court he cannot be allowed to turn round and impeach the judgment on the ground of incompetency of the Court passing it, when it is sought to be enforced in another country. It may be that he voluntarily submits to the jurisdiction of that Court when he appears but does not plead to the merits. A.I.R. (Vol. 25) 1938 Cal. 511=40 C. W. N. 591=63 C.L.J. 175=63 Cal. 1033=176 Ind. Cas. 380.

——S. 13—Action in personam—Cases in which foreign Courts have jurisdiction and circumstances in which they do not acquire jurisdiction.

In an action *in personam* the Courts of a foreign country have jurisdiction in the following cases:—(1) Where at the time of the action the defendant was resident in such country, so as to have the benefit and be under the protection of the law thereof: (2) Where the defendant is, at the time of the judgment in the action, a subject or citizen of such country: (3) Where the party objecting has by his own conduct submitted to such jurisdiction, *i. e.*, has precluded himself from objecting thereto—(a) by appearing as plaintiff in the action or (b) by voluntarily appearing as defendant in such action or (*c*) by having expressly or impliedly contracted to submit to the jurisdiction of such Court. But in an action *in personam* the Courts of a foreign country do not acquire jurisdiction either—(1) from the mere possession by the defendant at the commencement of the action of property locally situate in that country; or (2) from the presence of the defendant in such country at the time when the obligation in respect of which the action is brought was incurred in that country; or (3) from the fact that the defendant was carrying on business in such country through a manager or agent at the time when the obligation in respect of which the action is brought was incurred. A.I.R. (Vol. 29) 1942 Bom. 199=44 Bom. L.R. 380=I.L.R. (1942) Bom. 688=202 Ind. Cas. 286.

——S. 13 — Foreign judgment — Non-resident foreigner—Cause of action in British India.

A British Indian Court can grant a decree against a non-resident foreigner if the cause of action arose within its local limits. A.I.R. (Vol. 22) 1935 Mad. 545=1935 M.W.N. 174=41 L. W. 381=68 M. L. J. 506=157 Ind. Cas. 281.

——S. 13—Foreign judgment—Jurisdiction—Non-resident foreigner—Cause of action in British India.

Even as against a non-resident foreigner, the Courts in British India have jurisdiction *in personam* in suits based upon a cause of action arising in British India.

A member of a firm in which his son, a non-resident foreigner was a partner, withdrew a certain sum under a rateable distribution in British India. In a suit to reopen the rateable distribution, the son was impleaded as a defendant:

Held that since the son was a partner, his liability to refund the money withdrawn by his father was a personal liability and not merely the liability of a son or legal representative. Consequently, the Court in British India had jurisdiction to deal with him A.I.R. (Vol. 25) 1938 Mad. 731=47 L. W. 552=1938 M.W.N. 558=I.L.R. (1938) Mad. 1080=181 Ind. Cas. 757.

——S. 13 — Foreign judgment — Jurisdiction — Breach of contract in England—Ex parte decree.

Defendant a British subject resident in India contracted with the plaintiff in London—Plaintiff sued for breach of his contract in the Court of the King's Bench—Defendant was served but did not contest the action and judgment *ex parte* was passed. *Held*, the breach of the contract took place in London and the Court of the King's Bench had jurisdiction under O. 11 R. 1 (e) of the Rules of the Supreme Court in England, to entertain the suit and its decision was conclusive. 28 Cal. 641, foll. 3 S.L.R. 81=3 Ind. Cas. 892.

——S. 13—Foreign judgment—Judgment in rem—Foreign judgment declaring person as validly adopted son of another—Whether binding in matters of succession to immovable property in British India.

A declaration by a Court affecting the status of a person domiciled within its territory is treated by the comity of nations as being analogous to a judgment *in rem* and governs succession to movable property. The same principle applies in a matter of succession to immovable property where the law requires the personal law to be followed. Hence, although the judgment of the foreign Court declaring a person to be a validly adopted son of another person cannot be regarded as a judgment *in rem* within the meaning of S. 41, Evidence Act, it is binding on the Courts in British India in matters relating to immovable property situated in British India. A.I.R. (Vol. 26) 1939 Mad. 693=1939 M.W.N. 180=49 L. W. 287=(1939) 1 M.L J. 499=I.L.R. (1939) Mad. 507=185 Ind. Cas. 677.

——S. 13—Foreign judgment—Decree for divorce in foreign Court—Husband to pay certain monthly allowance—Suit for arrears in British India—Future maintenance—Maintainability.

Where a decree for divorce is passed by a foreign Court and the husband is to pay certain monthly sum for maintenance and education of wife and children by that marriage and a suit is instituted in British India based on such decree in respect of instalments which have already accrued due, it is final and conclusive in the Court which pronounced it. Although the foreign judgment in suit furnishes to the wife a valid cause of action for the instalments that had already accrued due at the time of the filing of the suit she is not entitled to obtain except by means of a fresh suit, the instalments accruing after the institution of the suit. A.I.R. (Vol. 22) 1935 Rang. 284 =158 Ind. Cas. 547.

——S. 13—Foreign judgment—Administration suit —Finality.

Under the provisions of S. 13, Civil P. C., the judgment must be of a Court of competent jurisdiction. But the jurisdiction which alone is important in such matters is the competence of the Court in an international sense, that is the territorial competence relating to the subject-matter and the defendant. Further, the previous judgment which is to operate as *res judicata* must be a judgment between the same parties or parties claiming under them, litigating under the same title.

Where, in a suit for administration in a foreign Court the title of the executors is challenged, the executors cannot be said to have represented the legatees, nor that under the circumstances the legatees claimed through those executors. The judgment of the foreign Court against the executors would not, therefore, be binding on legatee who was not a party to the suit. A.I.R. 1938 Bom. 394=40 Bom. L.R. 571=I.L.R. (1938) Bom. 529=177 Ind. Cas. 836.

——S. 13—Foreign judgment—Jurisdiction—Partnership suit—Service on agent within jurisdiction—Sufficiency.

The circumstances that give a Court jurisdiction to entertain a suit on a foreign judgment and to render the defendants liable thereon are alternative (1) the defendant being a foreign subject (2) his residence in a foreign country (3) his selection of forum (4) his submission by appearance and (5) his contract to submit.

Judgment against a firm does not amount to a personal decree against the members thereof residing in foreign territory.

A service on the agent within jurisdiction cannot create jurisdiction in a foreign Court against non-resident partners. But when there has been submission to the *forum* by the partners for many years, a decree against them can be personally enforced against them. 37 Mad. 163=24 M.L.J. 619=18 Ind. Cas. 189.

——S. 13 (f)—Foreign judgment—Claim founded partly on breach of contract and partly on claim under Contract Act not involving its breach.

Where claim is founded partly upon a breach of the contract and partly upon a claim under the Contract Act which in no way involves its breach and the decree sustains a claim which was not wholly founded upon a breach of the Contract Act, the decree-holder cannot be prevented by cl. (f) of S. 13 from executing his decree in British India. A.I.R. (Vol. 28) 1941 Mad. 387=53 L. W. 89=1941 M. W. N. 182=(1941) 1 M.L.J. 140=200 Ind. Cas. 83.

——S. 13—Foreign Court—Jurisdiction of—Office of trusteeship.

The expression, in S. 13, namely, "the Court of competent jurisdiction," should for purposes of actions relating to the recovery of the office of trusteeship, be held to refer to Courts of the country which have jurisdiction in what may be called the domicile of the trust. 51 Mad. 720=29 M.L.W. 250=108 Ind. Cas. 305=A.I.R. 1928 Mad. 327=54 M.L.J. 479.

——S. 13 — Foreign judgment — Non-resident foreigner—Validity of decree.

A decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has in no way submitted himself, is by international law an absolute nullity, except in the country of the forum by which it was pronounced.

Where a decree passed by a Court in a Native State against a British subject who did not reside in that State, is sought to be executed in British India, it is open to the defendant to object to its execution of the ground that the decree, being one against an absent foreigner who had not submitted to the jurisdiction of the Court, is a nullity. A.I.R. 1931 All. 689=1931 A.L.J. 653=53 All. 747=136 Ind. Cas. 353.

——S. 13—Foreign judgment—Validity—Decree passed ex parte by British Indian Court against resident of State not submitting to its jurisdiction.

It is well-settled rule of international law that Courts cannot by their judgments bind absent foreigners who have not submitted to their jurisdiction, and can only exercise jurisdiction over persons who are within the territorial limits of their jurisdiction, and, therefore, a judgment of a foreign Court obtained against an absent defendant cannot be enforced where the defendant at the time of the commencement of the suit was neither a subject of, nor resident in, the country in which the judgment was obtained.

A decree against an absent foreigner is valid only so far as the same is made operative by local Legislature within the country of the forum pronouncing the same. Beyond the limits of that country the decree would remain a nullity in spite of the authority given to it by the local Legislature.

An Indian State whose Legislature is not subject to the Legislature of British India is a distinct and separate political entity. Such a State is, therefore, a foreign country in relation to British India. Hence a decree passed by a British Indian Court against the subject of Bhopal State who at the time of commencement of the suit did not reside or carry on business within the jurisdiction of such Court either personally or through a properly constituted agent and who did not submit to the jurisdiction of such Court is a nullity, and is not enforceable in the forum of Bhopal State, wherever the cause of action might have arisen. (1940) 187 Ind. Cas. 19.

——S. 13—Foreign Court—Extent of jurisdiction.

A foreign Court has no jurisdiction against the subject of another State if he neither resides there at the time of the suit nor submits to its jurisdiction at any time afterwards. (1935) 158 Ind. Cas. 24.

——S. 13—Defendant not carrying on business either personally or through agent—Defendant not a permanent resident within jurisdiction.

Where a defendant is not a permanent resident within its jurisdiction and does live there only temporarily and does not carry on business within the jurisdiction either personally or through an agent at the time of the suit, the foreign court cannot be said to have jurisdiction. (1902) 6 C.W.N. 829=29 C. 509.

——S. 13—Foreign judgment for possession of property—Enforceability of, in British Indian Court where property is situate.

A judgment of a French Indian Court removing trustees appointed by the will of a testator and appointing new ones, cannot be enforced by an action in a British Indian Court for possession of properties situated in British India especially when Letters of Administration have been granted in British India to the first trustees. The newly appointed trustees will have to sue in a Court of British India for removing the defendants from a trustee-ship. 21 M.L.T. 315 =5 L. W. 740=37 Ind. Cas. 404.

——S. 13—Foreign judgment — Validity — Judgment against minor.

Held, that no decree against the assets of the minor would be conclusive under S. 13, Civil P. C., where the minor had no opportunity to defend the action in which that decree was passed. A.I.R. 1934 Bom. 390=36 Bom. L.R. 844=155 Ind. Cas. 711.

——S. 13—Foreign judgment—Validity of—Proceedings against minor.

Proceedings against minor defendant without appointing guardian *ad litem* are opposed to natural justice. 8 Lah. 54=102 Ind. Cas. 523=A.I.R. 1927 Lah. 200.

——S. 13—Foreign judgment—Immovable property in foreign country.

Like Courts in England, the Courts in India have a limited jurisdiction to entertain suits relating to foreign immovable property. These Courts have power to exercise a jurisdiction *in personam*, in respect of foreign immovables against persons locally within their jurisdiction, in cases where there is an equity between the parties arising from contract, fraud or trust, provided that the decision of title be not directly involved. But such an equity must be of a personal nature, *i. e.*, there must be either a fiduciary relationship or privity of some other kind between the parties. A.I.R. 1934 Sind 123=28 S.L.R. 54= 155 Ind. Cas. 677.

——S. 13—Foreign judgment — Subject-matter — Immovable property in foreign territory.

It is a basic principle of private international law that no British Court will entertain suit affecting immovable property in a foreign country. Nor will a foreign judgment adjudicating on the title to immovable property within British jurisdiction receive recognition in British Court. A.I.R. (Vol. 29) 1942 Mad. 614=(1942) 1 M.L.J. 137=55 L. W. 45= I L.R. (1942) Mad. 376=203 Ind. Cas. 17.

——S. 13—Foreign judgment—When not conclusive—Jurisdiction over subject-matter.

If a Court pronounces a judgment upon the title or the right to possession of land out of its jurisdiction the Courts of the country where it is situated, are justified in refusing to be bound by it, and this even if the judgment proceeds on the *lex loci rei sitae*. 119 Ind. Cas. 482=A.I.R. 1929 Lah. 627.

——S. 13—Most of the trust property situate in Pondicherry—Trust to be performed there—Decision of Pondicherry Court as to appointment of trustee of that property should not be disturbed. 51 Mad. 720 =29 M.L.W. 250=108 Ind. Cas. 305=A.I.R. 1928 Mad. 327=54 M.L.J. 479.

——S. 13—Decision by competent Court.

Where the subject-matter is a *res* so situated as to be within the lawful control of the state under the authority of which a Court sits, and that authority has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within that jurisdiction, that decision is conclusive, whether, according to the law of another

country, it might seem right or wrong. 47 C.L.J. 263=30 Bom. L.R. 753=107 Ind. Cas. 352=A.I.R. 1928 P. C. 83.

——S. 13—Foreign judgment—Validity—French Court—Ex parte decree—Subsequent judgment in opposition proceedings, if validates previous judgment.

A personal decree by the Courts of any foreign country against a person who was not a citizen of that country and was not resident in it will be regarded in the British Courts as an absolute nullity, unless there is something to show that the defendant had himself in some way voluntarily submitted to the jurisdiction of that foreign Court.

Where the defendant did not reside in French territory but in British India and he had in no way submitted to the French Court at the time when the *ex parte* judgment was passed against him, the judgment must be held to have been without jurisdiction and the subsequent conduct of the defendant in filing the opposition and the judgment therein cannot date back so as to validate the *ex parte* judgment which was a nullity.

But the second judgment is clearly passed with jurisdiction, because there was a voluntary submission to jurisdiction by the defendant before it was passed. The fact that the French Court may not have followed the procedure of British Courts and observed British Indian rules as to evidence, can afford no ground for finding that the proceedings were opposed to natural justice. A.I.R. 1941 Pat. 109=7 B. R. 37=20 Pat. 144=190 Ind. Cas. 545.

7. Submission to jurisdiction.

——Ss. 13 (a) and 44—Foreign Court—Submission to jurisdiction.

The scope of S. 13 should be determined by the International Law and not by the law of that country. If the defendant submits to the jurisdiction of a foreign Court and takes the chance of a judgment in his favour then the decree is binding but if he appears not voluntarily but under decrees or coercive process he is said to have not appeared. The mere intention of avoiding an inconvenience that might happen in the future does not make defendants' appearance involuntary. 39 Mad. 733=3 L. W. 90 =19 M.L.T. 68=30 M.L.J. 148=(1916) 1 M.W.N. 83=32 Ind. Cas. 597.

——S. 13—Foreign judgment—Submission—What amounts to—Entering into partnership in foreign country.

The British Courts will not recognise the judgments of the Courts of a foreign country passed in an action *in personam* against a British subject, not resident in that country at the date of the action, who has neither appeared in the suit nor submitted to the jurisdiction of the foreign Court.

By the fact of entering into a partnership in a foreign country a person does not bind himself to submit to the jurisdiction of the Courts of that country in regard to matters arising in connection with that partnership. A.I.R. 1933 Mad. 112=63 M. L. J. 761=36 L. W. 756=1932 M.W.N. 1314=140 Ind. Cas. 588.

——S. 13—Foreign judgment—Submission to jurisdiction of foreign Court, what is.

The question whether the defendant against whom a decree has been passed by a foreign Court had submitted to its jurisdiction is one of fact.

Where the defendant did not appear at the trial but in the Court of execution took time to have it set aside as being *ex parte*, in the foreign Court:

Held, that there was no submission to the jurisdiction of the foreign Court. A.I.R. 1934 Mad. 434 =39 L. W. 765=67 M.L.J. 187=1934 M.W.N. 626=57 Mad. 824=149 Ind. Cas. 1168.

——S. 13—Foreign judgment—Suit against non-resident foreigner — Submission to jurisdiction, what constitutes—Asking for concession knowing that suit has been filed and property attached, effect of.

A person who has filed suits in a Court having jurisdiction to try them cannot thereby, by implication, be taken to submit himself to the jurisdiction of the same Court in cases where that Court has no jurisdiction.

The conduct of the defendant both before and after the decree is passed has to be looked into to decide whether he submitted to the jurisdiction of the Court.

Submission to jurisdiction need not necessarily be by some overt act in Court. If the defendant's attitude as regards the jurisdiction of the Court in which a suit is brought against him can be established by evidence to have been one of submission to the jurisdiction of the Court, the decree will be binding.

Where the defendants against whom an *ex parte* decree was passed by a foreign Court had knowledge that the suit had been filed and also that an amount owing to them had been attached in that suit by that Court but did not dispute the attachment and asked only for a concession:

Held, that they must be held to have waived the question of jurisdiction and were not entitled to contend that the decree of the foreign Court could not be enforced against them. A.I.R. 1936 Mad. 552= 59 Mad. 918=43 L.W. 607=1936 M.W.N. 478= 71 M.L.J. 93=162 Ind. Cas. 904.

——S. 13—Foreign Court—Submission to jurisdiction—Application to foreign Court to set aside ex parte decree.

A decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is an absolute nullity. Where he has submitted himself to its jurisdiction, the submission should be in the suit itself and before the decree is passed; where the submission takes place not only after the judgment was pronounced but after the execution petition had been filed and to some extent acted upon, the decree is an absolute nullity when it was passed and the Court cannot be subsequently and retrospectively clothed with jurisdiction by an application by the judgment-debtor to the foreign Court to set aside the *ex parte* decree.

In such a case even if the application to the foreign Court to set aside the *ex parte* decree be assumed to have been a submission, the submission cannot be deemed to have been voluntary, inasmuch as the juddment-debtor under the circumstances of the case, made the application as the only alternative be-

fore him instead of undergoing imprisonment and he did so unaware of the fact that he could challenge the validity of the decree. A.I.R. 1933 Mad. 393=37 L.W. 410=64 M.L.J. 531=1933 M.W.N. 657=144 Ind. Cas. 557.

——S. 13—Foreign judgment—Submission to jurisdiction.

A party cannot be held to have submitted himself to the jurisdiction of a foreign Court merely because he had once instituted a suit in that Court so as to make an *ex parte* decree passed by that Court in a subsequent suit which has no connexion whatever with the former suit executable in British India against him. A.I.R. 1937 Mad. 97=1936 M.W.N. 1165=44 L.W. 752=71 M.L.J. 838=167 Ind. Cas. 13.

——S. 13—Submission to jurisdiction—Decree on merits—Test.

Where in a suit filed in British Indian Court against the defendant, a resident and subject of an Indian State, an *ex parte* decree is passed and the defendant gets the *ex parte* decree set aside and files written statement and defends the suit through properly constituted attorney, these acts amount to voluntary submission to the jurisdiction of the foreign Court. The case no longer remains *ex parte* against him and a decree subsequently passed on merits is fully binding on him.

The true test for determining whether a judgment has or has not been passed on merits is to see whether it has been pronounced as a penalty for any conduct of the defendant, or whether it is based on a consideration of the truth or otherwise of the plaintiff's case. (1940) 187 Ind. Cas. 19.

——S. 13—Foreign Court—Submission to jurisdiction—What does not amount to.

Putting in an appearance to take search of papers after an *ex parte* decree was pronounced by a foreign Court does not amount to an act of submission to jurisdiction. So also mere execution of a general power-of-attorney in favour of certain person for defending suits in foreign Courts does not amount to submission to jurisdiction of foreign Court. (1940) 187 Ind. Cas. 19.

——S. 13—Foreign judgment—Submission to jurisdiction—Filing written statement and attacking Court's jurisdiction.

In a suit the defendant filed a written statement in which he attacked the plaintiff's claim in a number of ways one of which was by questioning the jurisdiction of the Court. After filing the written statement, however, he withdrew from further opposition and the result was that a decree was passed in favour of the plaintiff after he had been actually examined, though not subject to cross-examination:

Held, that by attacking the Court's jurisdiction the action of the defendant amounted to submission to the jurisdiction as he was asking the Court to decide a point in controversy between him and the plaintiff.

Held, also that the decision of the Court in passing a decree in favour of plaintiff must be considered as given on the merits of the case. A.I.R. 1941 Mad. 387=53 L.W. 89=1941 M.W.N. 182=(1941) 1 M.L.J. 140=200 Ind. Cas. 83.

——S. 13—Foreign judgment—Binding nature—Dual nationality of the judgment-debtor.

The plaintiff obtained a decree in a Court in the Cochin State against the defendant. The defendant was born in British India and was, therefore, a British subject while his parents were the subjects of the Cochin State. The defendant was resident in British India at the date of the institution of the suit and there was no submission to the jurisdiction of the Court in Cochin State. The decree was passed before 1932 when the Cochin State Nationals Definition Act was passed. The Act had no retrospective effect:

Held, that the defendant had a dual nationality at the date of the suit and hence the decree was binding on him and could be executed against him in British India.

Held, further, that the domicile was not a factor in determining the nationality and hence as the defendant was a Cochin national, the fact that he had changed his domicile or origin could not affect the right of Cochin Court to adjudicate on a claim against him.

Held, also that a renunciation of the Cochin nationality by the defendant after the decree had been passed against him could not help him. A.I.R. 1941 Mad. 688=I.L.R. (1941) Mad. 891=(1941) 2 M.L.J. 68=1941 M.W.N. 701=54 L.W. 73=200 Ind. Cas. 254.

——S. 13—Jurisdiction—Submission to—Foreign Court—Effect.

Though an objection to the jurisdiction of a foreign court was taken in the Court of first instance in the foreign territory, it was not raised in appeal. *Held*, there was proof of a submission to the jurisdiction of the foreign Court and the question cannot be reopened again in execution of that decree by the British Courts. 6 T.L.R. 85, Foll. 29 Ind. Cas. 456.

——S. 13—Submission to jurisdiction — When voluntary.

A submission to jurisdiction for saving property is not a voluntary submission even if a written statement is filed objecting to the jurisdiction and raising a defence on the merits. A British Executing Court has jurisdiction to go behind a decree passed by a Native State and see whether the Court which passed the decree had jurisdiction to do so. Scope of Ss. 13 and 44 considered. 39 Mad. 24=16 M.L.T. 479=27 M.L.J. 535=1 L.W. 887=(1915) M.W.N. 162=26 Ind. Cas. 287 (F.B.). [On appeal from, (1913) M.W.N. 605=14 M.L.T. 96=20 Ind. Cas. 704.]

——S. 13—Execution of power of attorney in favour of another empowering him to conduct litigation in foreign Court amounts to submission to the jurisdiction of that Court. 47 Mad. 877=82 Ind. Cas. 425=20 M.L.W. 677=A.I.R. 1925 Mad. 155=47 M.L.J. 356.

——S. 13—Jurisdiction—Submission to.

Execution of power-of-attorney to defend suits in foreign Courts amounts to submission—Person submitting as plaintiff cannot deny jurisdiction as defendant. 22 M.L.W. 820=92 Ind. Cas. 491=A.I.R. 1926 Mad. 259.

——S. 13—Judgment on merits—Ex parte decree —Submission to jurisdiction.

A judgment passed by the Ceylon Court against a resident of British India who had entered into a contract in Ceylon is a foreign judgment. Such judgment, if passed *ex parte* cannot be enforced in British India. But where the defendant has applied for leave to appeal and defend the suit and such leave been granted and he does not appear afterwards, he cannot plead want of jurisdiction. A judgment dismissing a suit on the plea of limitation is not one on the merits. A decree on a contract imposing a personal obligation on an absent foreigner because the contract was entered in the territory of the *forum* passing the decree is not permissible. Submission need not be by an act in the course of the action, it might be inferred from the expressions previous to the contract. 32 Mad. 469=19 M.L.J. 457=3 Ind. Cas. 190.

——S. 13—Foreign Court—Submission to jurisdiction—What amounts to.

The question as to whether there was submission to the jurisdiction of a foreign Court is a question of fact. Even though a person protests against the jurisdiction and does not submit expressly, still if he does any act which is likely to place his viewpoint before the trial Court and if he is likely to be benefited by the decision in his favour, it must be presumed that he voluntarily did an act which would amount to submission to the jurisdiction of that Court. Where the defendant was shown not only to have engaged counsel but to have instructed him to object to several questions and even got himself cross-examined, the facts are enough to raise an inference that he submitted to the jurisdiction of the foreign Court. 1947 M.W.N. 531=60 L. W. 577=A.I.R. 1948 Mad. 203=(1947) 2 M.L.J. 279.

——S. 13—Contract to submit to jurisdiction—Parties cannot resile from it.

If there was a contract to submit to jurisdiction once in existence it is not open to either of the parties to resile from the same. On the other hand, "conduct amounting to submission to jurisdiction" raises considerations in respect of the action of the parties at the date of the suit. The fact that the power-of-attorney agent in fact lived and was served within the limits of the jurisdiction of the local Court are very material. But after the power-of-attorney has come to an end and the agent has ceased to live within the jurisdiction, it cannot be said that the foreign Court still has jurisdiction. A.I.R. 1942 Bom. 199=44 Bom. L.R. 380=I.L.R. (1942) Bom. 688=202 Ind. Cas. 286.

——S. 13—Practice—Private International Law —Ex parte decree by High Court of England —Foreign judgment—Suit in British Indian Court based on foreign judgment—Right of suit—Interest not awarded by foreign judgment.

An *ex parte* decree was passed by the High Court of England in favour of the plaintiff, a solicitor, against the defendant a banker of Sialkote District, in respect of balance of fees, interests and costs. On a suit on the judgment it was pleaded that the High Court of England had no jurisdiction over the defendant, and even if it has jurisdiction, the judgment having been passed without evidence was not final and not binding on the defendant and that the claim for interest was not maintainable. It appeared that the defendant, a British Indian subject, made a contract with plaintiff in England which was intended to be and was actually performed, as far as the plaintiff was concerned, in that country; that the breach of the contract on the part of the defendant took place in England and service of the writ of summons was effected upon him in British territory in accordance with the rules of procedure laid down for observance by the High Court in such cases and the defendant had ample notice of the action brought against him, and sufficient opportunity to appear in the High Court and defend the suit. *Held*, (i) that the decree passed by the High Court of England was valid and the suit was competent, for according to principles of Private International Law, in action in personam, the High Court of England had jurisdiction as defendant at the time of judgment in the action was a British subject. (2) That Order 11, Rule, 2 (e) of the Rules of Supreme Court, 1883, being a Legislature Act of the Sovereign power was not *ultra vires*. L. R. 32 C. D. 131, L. R. 3 Appeal Cases 602, L. R. 2 Ch. D. 132, L. R. 6 Q.B. 155, 14 C.D. 351, 112 P.R. 1894, 1 K.B. 302 (1908) ref. to. I.L.R. 28 Cal. 641, foll. I.L.R. 29 Cal. 509 dist. (3) That the High Court of England had jurisdiction also on the ground that according to English Law it is the duty of the debtor to seek out his creditor and pay wherever he may be in all cases where no particular place is mentioned and the defendant was bound to make payment in England. 18 L. R. Ir. C. A. 297, 1 K. B. (C.A.) 687. dist. 20 Q.B. 152, 1, Q. B. 103 and 953 foll. (4) That the judgment of the High Court of England must be considered as one passed on the merit of summons on the defendant out of the jurisdiction must be supported by affidavit or other evidence stating that the plaintiff had a good cause of action and the grounds upon which application is made, and leave can only be granted if the court or judge is satisfied that the case is a proper one for the service prayed for. (5) That the necessary procedure must be presumed to have been followed in this case. (6) That the claim as to interest must be disallowed, for the English statute as to judgments carrying interest does not apply to India, nor does a case of this kind fall within the scope of Act 32 of 1899. The plaintiff cannot in a claim as this recover more than what appears on the face of the judgment. 99 P.L.R. 1909=92 P. W. R. 1909=3 Ind. Cas. 522=75 P.R. 1909.

——Ss. 13 and 14—Practice—Fraud—Administration suit—Prayer for setting aside fraudulent award and decree made thereon by mofussil Court and for setting aside leases in the mofussil obtained by fraud.

Where the primary object of a suit instituted in the original side of the High Court was the administration of the estate of a deceased testator resident within its jurisdiction, the principal executor being also resident there and the actual administration going on there:—*Held*, that the High Court in its ordinary original jurisdiction had the right to order administration of the estate and as ancillary to such an order to set aside deeds obtained by the

fraud of the executor. The fact that a decree had been granted by the Court of the 24 Pargannahs making a fraudulent award an order of Court would not protect that decree from the jurisdiction of the High Court when redressing that fraud. Further, for the due administration of the estate, the High Court set aside leases of land outside the territorial limits of its jurisdiction these leases having been made as an incident of the same fraud. (1905) 7 Bom.L.R. 887=9 C.W.N. 961=33 C.180 =32 I.A. 193=15 M.L.J. 331=2 C.L.J. 189 (P.C.).

——S. 14—(See also S. 13—Foreign judgment)—Foreign judgment—Suit on Onus of proof and presumptions.

It is well settled rule of international law that Courts cannot, by their judgments, bind absent foreigners who have not submitted to their jurisdiction, and can only exercise jurisdiction over persons who are within the territorial limits of their jurisdiction, and, therefore, a judgment of a foreign Court obtained against a defendant cannot be enforced in British India where the defendant at the time of the commencement of the suit was not a subject of, nor resident in, the country in which the judgment was obtained. Therefore in a suit based on a foreign judgment, one of the questions that arises for consideration is, was the defendant at the time of the commencement of the suit in the foreign Court residing within the territorial limits of the jurisdiction of the State in which the suit was brought. But on the production of a certified copy of a foreign judgment the Court is bound to presume that the judgment was pronounced by a Court of competent jurisdiction and therefore it devolves on the defendant by his pleading and evidence to deny and disprove every fact and circumstance which negative the jurisdiction of the foreign Court. 29 Cal. 509, Rel. on. 25 A.L.J. 887=105 Ind. Cas. 186=A.I.R. 1927 All. 510.

——S. 14, S. 13, Expl. 6—The Court in which the suit on a foreign judgment is brought cannot go into the merits of the action which resulted in the foreign judgment. (1899) 5 C.W.N. 741=28 C. 641.

——S. 14, S. 13, Expl. 6—The Court in which the suit on a foreign judgment is brought cannot go into the merits of the action which resulted in the foreign judgment. (1899) 5 C.W.N. 741=28 C. 641.

——S. 14—Foreign judgment—Suit on—Jurisdiction—Presumption—Onus.

In a suit on a foreign judgment the plaintiff need not state that the Court had jurisdiction over the parties or the cause, every presumption being made in favour of the foreign judgment. The defendant must prove that none of the conditions which would give jurisdiction were present. If the parties were not present it will be presumed they submitted to the judgment. 24 M.L.T. 244=49 Ind. Cas. 202.

——S. 14—Foreign judgment—Suit on—Onus—Old and New Code.

In a suit on a foreign judgment, the burden lay under the old Code on the plaintiff of proving jurisdiction of the foreign Court: the subsequent change of law in S. 14 of the new Code cannot take retrospective effect. 165 P.W.R. 1909=41 P.L.R. 1910=4 Ind. Cas. 1020.

——S. 14—Waiver of plea of jurisdiction—What is.

The appearance for the purpose of obtaining an adjournment or for applying to set aside an *ex parte* decree in a foreign Court or an appearance merely to dispute the jurisdiction of the foreign Court amounts to a submission to the jurisdiction of the foreign Court. 22 N L.R. 82=89 Ind. Cas. 129= A.I.R. 1926 Nag. 77.

——S. 15.

Synopsis.

1. Scope and object of.
2. Applicability—Special jurisdictions.
3. Return of plaint under—Effect of.
4. Valuation for jurisdiction in particular cases.
5. Plaintiff's valuation—How far final.
6. Appeal from order under—Forum of.
7. Jurisdiction—When and how determined.
8. Jurisdiction—Errors in—Effect of.

1. Scope and object of.

——S. 15—Scope and object of—(See also S. 21 C.P. Code—Place of suing—Objections to).

The rule in S. 15, that every suit should be instituted in the Court of the lowest grade competent to try is intended for the protection of Courts of higher grade and does not affect their jurisdiction. A.I.R. 1944 All. 1=1943 A.L.J. 535=I.L.R. (1944) All. 20=211 Ind. Cas. 157.

——S. 15—It is imperative on the suitor under S. 15 to bring his suit in the Court of lowest grade. The word "shall" in S. 15 is not imperative on the Courts and does not deprive the higher Court of its jurisdiction to try a suit triable by a Court of less pecuniary jurisdiction. 4 Bur.L.J. 104=90 Ind. Cas. 728= A.I.R. 1925 Rang. 278.

——S. 15—Courts of different rank having jurisdiction.

It is general rule of procedure that where Courts of different rank have jurisdiction then an application should be made in the lowest Court which has jurisdiction. A.I.R. 1935 All. 55=1934 A.L.J 946=36 Cr.L.J. 554=1935 Cr. Cas. 36=154 Ind. Cas. 638.

——S. 15—Scope.

Section 15 which relates only to procedure cannot affect the question of jurisdiction of Court to entertain and try suits as laid down in S. 92 or as contemplated in S. 37. A.I.R 1944 Bom. 300=46 Bom. L.R. 653=218 Ind. Cas. 504.

——S. 15—Lays down rule of procedure not of jurisdiction.

Section 15 lays down a rule of procedure and not of jurisdiction and it does not divest any Court of jurisdiction which it otherwise possesses under the statute constituting such Courts. A.I.R. 1943 Cal. 450=77 C.L.J. 309=47 C.W.N. 720=209 Ind. Cas. 225.

——S. 15—Scope of—Suit triable by Court of lower grade instituted in Court of higher grade.

The provision of S. 15 does not warrant the inference that if a suit triable by a Court of a lower grade is instituted in a Court of a higher grade, the latter Court would have no jurisdiction to try that suit. The trial of the suit by the latter Court is

merely an irregularity and decision on the merits should not be upset on the ground of mere irregularity. 25 M.L.W. 367=101 Ind. Cas. 85=A.I.R. 1927 Mad. 568=52 M.L.J. 323.

——S. 15—Suit instituted in a higher Court—Effect of.

Section 15 of the C.P. Code provides for procedure and not jurisdiction. Hence a suit, which is triable by a Munsiff according to S. 15 may also be tried by a Sub-Judge. 14 C.W.N. 322=5 Ind. Cas. 691.

——S. 15—Scope of—Judge distributing plaints to Courts—Suit triable in lower jurisdiction Court—If can be tried by a higher jurisdiction Court.

Where a Judge receives plaints for distributing to proper Courts, he is acting not in the capacity of a Court but ministerially for the convenience of the litigants. His discretion overrides the provisions of S. 15, C. P. Code in so far as he can direct a suit which might be tried by a Court of lower jurisdiction to be tried by a Court of higher jurisdiction, but no such discretion is conferred on the suitor who remains bound by the provisions of the Code. 110 Ind. Cas. 293=A.I.R. 1928 Lah. 484.

——S. 15—Concurrent jurisdiction of higher Courts—Suit filed before Subordinate Judge—Subject-matter of suit found to fall within Munsif's jurisdiction—Case returned for presentation to proper Court—Propriety.

A suit for declaration of title to certain properties was filed in the Court of the Subordinate Judge as per the valuation put by the plaintiff. In the course of the suit however it was held that the value of the subject-matter of the suit was less and thereupon the Judge directed that the plaint be returned for presentation to the Court of the Munsif; *held*, that where the subject-matter of the suit does not exceed the jurisdiction of the Munsif, the jurisdiction of the Subordinate and District Judge to hear the same was concurrent and that the Sub-Judge should consequently have disposed of the case on the merits instead of returning the plaint. 1930 A.L.J. 386=122 Ind. Cas. 187.

2. Applicability—Special jurisdiction.

——S. 15—Jurisdiction — Applicability — Special jurisdiction—If affected.

Suit not only for recovery of arrears of rent but also for determination of rent and for ejectment cannot be tried by virtue of S. 113, Oudh Rent Act, 1886, by Assistant Collector of Second Class. It cannot therefore be said that according to S. 15, Civil P. C., a suit of this nature should have been filed in Court of the Assistant Collector of the Second Class. A.I.R. 1935 Oudh 251=1935 O.L.R. 108=1935 R.D. 86=1935 O.W.N. 242=10 Luck. 562=154 Ind. Cas. 91.

——S. 15—Place of suing—Scope of—Provision in special statutes—If affected.

In the absence of any provision enacted by a Special Act, the provisions of the Civil Procedure Code must govern the place of institution of suits. But if a Special Act has specified a particular forum for the institution of a suit of a particular nature, that suit must be instituted in that particular forum. A.I.R. 1942 Cal. 69=45 C.W.N. 1085=75 C.L.J. 229=I.L.R. (1942) 1 Cal. 235=198 Ind. Cas. 739.

——S. 15—Scope of—High Court—Jurisdiction under—Letters Patent—If taken away.

Under the Letters Patent (Bombay) Cl. 12 and Presy. Small C. C. Act, S. 22, the High Court can entertain a suit wherein the damages claimed exceed Rs. 100, subject to the determination of the question of costs in accordance with S. 22, Presy. Small C. C. Act and such jurisdiction is not taken away by S. 15 of the C. P. Code, (1882). 34 Bom. 13=11 Bom. L.R. 273=3 Ind. Cas. 837.

——S. 15—Applicability to execution Courts—(S. 331 of the Old Code—Provision obsolete and may not arise)—Jurisdiction in execution—Decision by a Court of lower jurisdiction—Effect of.

When a claim has been preferred under S. 331 of the Code of Civil Procedure, it must be investigated by the Court executing the decree and no question of valuation arises for consideration. Where a duty is imposed on a Court, there is also conferred on it a jurisdiction to discharge such duty. No consideration of possible anomaly in the result should be allowed to prevail in the interpretation of statutory provisions, the terms of which are reasonably plain and are clearly mandatory. If a claim be investigated under S. 33 of the Code of Civil Procedure by a Court of inferior jurisdiction in respect of property the value of which exceeds the limit of its pecuniary jurisdiction, the decision will not operate as *res judicata* in a subsequent title suit. The proceeding under S. 331 is not in every respect identical with a suit. (1907) 5 Ind. Cas. 573=11 C.L.J. 478.

——S. 15—Suit triable both by village Court and District Munsiff.

The District Munsif's Court is regulated by the provision of the Civil P. C. The Court of the Village Munsif is not. Hence where a suit is triable both by the Village Court and the District Munsif, S. 15, Civil P. C., has no application in such a case and the suit can be instituted in any of those Courts. A.I.R. 1940 Mad. 495=I.L.R. (1940) Mad. 684=51 L.W. 179=(1940) 1 M.L.J. 220=1940 M.W.N. 152=194 Ind. Cas. 434.

3. Return of plaint under—Effect of.

——S. 15—Plaint returned for presentation to proper Court—Commencement of suit—Date of.

When the plaint is returned to be presented in a Court of competent jurisdiction, the suit is to be considered as instituted on the date of such presentation, and the suit thus presented cannot be said to be in continuation of the suit filed in a Court without jurisdiction. 52 Bom. 548=113 Ind. Cas. 511=30 Bom. L.R. 970=A.I.R. 1928 Bom. 421.

——S. 15, O. 7, R. 10 and O. 23, R. 3—Scope and effect—Suit in Munsif's Court—Plaint returned for presentation to proper Court—Subsequent presentation to proper Court—Jurisdiction of latter Court to record compromise entered into in first Court before return of plaint—Suit when 'instituted' and pending.

The combined effect of S. 15, C. P. Code, and O. 7, R. 10, is that a suit cannot be said to be instituted so long as the plaint is not presented before the Court competent to try the suit. When the Court before which a plaint is filed

returns it for presentation to proper Court the suit has to be considered as instituted only on the date of such presentation in the proper Court. The institution of the suit commences from that date and the suit thus instituted is not a continuation of the suit before the first Court which had really no jurisdiction to entertain it. Till the date of presentation in the proper Court there is no "suit" pending within the meaning of O. 23, R. 3, C. P. Code; and therefore a compromise filed before the first Court which returned the plaint for presentation to the proper Court could not be said to be filed in the proper Court and the Court to which the plaint is then presented would have no jurisdiction to record the compromise as it is not filed during the pendency of the suit before that Court. (The party affected might in such a case have a remedy by a separate suit to enforce the compromise, but not under O. 23, R. 3, C. P. Code.); 52 Bom. 548; 15 C.L.J. 241; 30 C.W.N. 90; A.I.R. 1940 Mad. 689, foll. 29 Pat. 699=A.I.R. 1950 Pat. 473.

——S. 15—Disputes as to jurisdiction—Return of plaint—Suit when deemed to be instituted.

The presentation of the plaint to a Court which has jurisdiction to try the suit cannot be said to be the institution of the suit, even though the plaint has been accepted as being in order and registered. Before a suit can be deemed to be "instituted" the plaint must be presented to a Court having jurisdiction. When, however, a plaint is presented to a Court having jurisdiction and that Court accepts the plaint as being in order it must be held that the suit has been instituted. Because at some later stage, as the result of a finding of fact on the question of the value of the subject-matter of the suit, it is found that the plaint should have been presented to another Court having jurisdiction and that the plaint is returned for presentation in that Court, it does not mean that the suit has not been instituted. When a plaint has been presented to a Court having jurisdiction, a transfer of the case to another forum cannot mean the cancellation of the institution. A.I.R. 1941 Mad. 711 =(1941) 1 M.L.J. 629=53 L. W. 611=1941 M. W. N. 579=196 Ind. Cas. 521.

4. Valuation for jurisdiction in particular cases.

——S. 15—Valuation for jurisdiction—Account suits—Mode of valuation.

Plaintiffs in a redemption suit could not accurately estimate the amount recoverable by them in respect of surplus rents and profits. They, therefore, fixed the amount at Rs. 100 and instituted the suit in the Court of Munsiff, stating that if a larger amount was awarded they would pay the additional Court fee, it was ultimately found that a sum of Rs. 4,267-12-2 was due. *Held*, that the Munsif could grant a decree for the entire sum found due though it exceeded his pecuniary jurisdiction. 28 All. 545; 25 Mad. 543, Foll. 9 C.L.J. 367, diss. 33 All. 97=7 A.L.J. 963=7 Ind. Cas. 385.

——S. 15—Accounts, suit for—Value in plaint if determines jurisdiction.

The pecuniary jurisdiction of the Civil Court is ordinarily speaking, governed by the value stated by the plaintiff in his plaint and if a suit having regard to the valuation in the plaint is within jurisdiction, such jurisdiction is not ousted by the Court finding that a decree for a sum exceeding the limits of the pecuniary jurisdiction should be given to the plaintiff. A.I.R. 1934 Pat. 204=15 P.L.T. 131=13 Pat. 344 =148 Ind. Cas. 579 (F.B.).

——S. 15—Valuation—Partition suit.

In a suit for partition by persons in joint possession, the valuation to be adopted for the purpose of jurisdiction is the actual market value of the property in suit. A.I.R. 1942 Mad. 103 (1)=(1941) 2 M.L.J. 567=54 L.W. 428=1941 M.W.N. 926= 197 Ind. Cas. 738.

——S. 15—Valuation for jurisdiction—Administration suit—Mode of valuation.

Although the primary object of a suit by one of the heirs of a deceased Muhammadan as plaintiff is to obtain his share of the deceased's estate, the suit must be regarded as a suit for the administration of that estate and the decree must necessarily affect the value of the whole estate and consequently the subject-matter of the suit for purposes of jurisdiction would be the value of the whole estate. A.I.R. 1943 Mad. 242=55 L. W. 699=(1942) 2 M.L.J. 587=1942 M.W.N. 697=I.L.R. (1943) Mad. 497 =207 Ind. Cas. 334.

——S. 15—Administrative suit.

An administrative suit is a suit for an account and court-fees are payable under cl. (iv) (f) of S. 7, Court-Fees Act. The plaintiff is entitled to make such estimate as he pleases of the value of the relief that he claims. A.I.R. 1935 Rang. 13=12 Rang. 512=153 Ind. Cas. 858.

——S. 15—Jurisdiction—Valuation for—Suit for dissolution of Muhammadan marriage.

A suit for dissolution of a Muhammadan marriage which is valued at less than Rs. 1,000, lies in the Court of Munsif, it being the Court of the lowest grade and under S. 15, it should be filed before him and not before the District Judge. A.I.R. 1937 Cal. 189=I.L.R. (1937) 2 Cal. 79=41 C.W.N. 314=65 C.L.J. 21=168 Ind. Cas. 639.

——S. 15—Jurisdiction—Valuation for—Prohibitory order under Civil Procedure Code (Act 5 of 1908), O. 21, R. 46 (1) (a) against certain property in execution of decree—Part of property attached and sold—Declaratory suit that such property was not liable to be attached and sold.

In execution of a decree a prohibitory order was issued under O. 21, R. 46 (1) (a), Civil P. C., against certain property and only a part of such property was attached and sold. A suit for declaration that the whole of such property was not liable to attachment was filed:

Held, that the suit should be valued for purposes of jurisdiction at the value of the property attached and not at the value of the decree. The plaintiffs must state in the plaint whether they abandon any claim as to a declaration of title as to the remainder of the property on which a prohibitory order has been issued but which has not yet been actually attached or found to be in existence; if they do so, the valuation for jurisdiction is good; otherwise it is bad, and the plaint will have to be returned for presentation to

the proper Court. A.I.R. 1937 Rang. 101=168 Ind. Cas. 702.

——S. 15—Jurisdiction—Pecuniary — Determination of question rests on nature of suit and character of relief claimed—Suit under O. 21, R. 63—Value of suit for purposes of jurisdiction—Amount of decree, if determines jurisdiction.

The determination of the question whether a suit is within the pecuniary limits of the jurisdiction of a certain Court rests upon the construction to be placed on the nature of the suit and the character of the relief claimed.

Where the sole object of a suit was to get a declaration that a particular property was not liable to attachment and sale in execution of defendant's decree on the ground that the property really belongs to the plaintiff and the defendant was only a benamidar, the case was in substance in no way different from a suit brought under S. 21, R. 63. Consequently, the value of the suit for purposes of jurisdiction was the amount of the decree and not the value of the property. A.I.R. 1935 Oudh 271=1935 O.L.R. 198=1935 O.W.N. 305=11 Luck. 1=154 Ind. Cas. 818.

——S. 15—Interpleader suit.

One *M* acting as the guardian of minor named *K* let out a shop on rent to the plaintiff. Later on, *K* executed a sale-deed in respect of that shop in favour of *R*. In spite of having executed that deed, *K* claimed that he was the sole properietor of the shop, alleging that he was a minor at the date of the execution of the sale-deed and hence the sale transaction was wholly void. There were thus two rival claimants to the shop occupied by the plaintiff, who owed rent for it for a certain specified period. In these circumstances the plaintiff filed an interpleader suit. He valued the suit for the purposes of jurisdiction at the price of the shop:

Held, that since in an interpleader suit the matter in dispute is the title to a certain property which is claimed by two or more persons, the proper Court for determining the question of title in respect of the shop in question would be that of the Civil Judge, having regard to the value of the shop. A.I.R. 1940 All. 452=1940 A.L.J. 578=191 Ind. Cas. 531.

——S. 15—Jurisdiction—Valuation for—Mode of—Valuation is not to be made according to artificial rules under provisions of Court-fees Act.

For the purpose of determining jurisdiction the valuation has to be made according to the market value of the subject-matter of the suit under the Suits Valuation Act and not according to the artificial rules under the provisions of the Court-fees Act. A.I.R. 1940 Cal. 375=71 C.L.J. 547=190 Ind. Cas. 596.

5. Plaintiff's valuation—How far final.

——S. 15—Jurisdiction—Determination of—Plaintiff's valuation—How far final.

Prima facie plaintiff's claim determines jurisdiction and the jurisdiction continues whatever be the result unless a different principle comes into operation to prevent such a result as to make the proceedings from the first abortive. Where therefore the trial Court found that the amount due to the mortgagee was above its jurisdiction and it accordingly returned the plaint, *held*, the order was legal. 51 Cal. 737=78 Ind. Cas. 747=28 C.W.N. 710=A.I.R. 1924 Cal. 783.

——S. 15—Jurisdiction, what determines.

It is the value put by a plaintiff that *prima facie* determines jurisdiction. 9 S.L.R. 164=32 Ind. Cas. 629.

——S. 15—Determination of jurisdiction.

The jurisdiction of the Court is primarily determined by the allegations contained in the plaint. A.I.R. 1937 All. 415=1937 R.D. 176=1937 A.L.J. 329=I.L.R. (1937) All. 570=1937 A.L.R. 668=170 Ind. Cas. 477.

6. Appeal from order under—Forum of.

——S. 15—Jurisdiction—Appeal—Valuation in—Plaintiff not deliberately over-valuing or under-valuing relief—Forum of appeal.

The general rule is that the value fixed by the plaintiff in his plaint must *prima facie* be the basis for determination of the forum of the suit or appeal arising out of it, though the position is different if it is found that the plaintiff has deliberately under-valued or over-valued his claim with the object of having the suit tried or the appeal heard by a Court which would not have jurisdiction to try the suit or hear the appeal in case the claim is properly valued. A.I.R. 1935 Oudh 296=1935 O.L.R. 114 =1935 O.W.N. 168=10 Luck. 587=154 Ind. Cas. 125.

——S. 15—Administration suit—Return of plaint for presentation to proper Court—Appeal from order—Forum of.

In suits for accounts and administration, the court-fees payable determine the jurisdiction of the Court and the Court to which an appeal lies depends not upon the pecuniary jurisdiction of the Subordinate Court but on the value of the subject-matter in dispute.

Consequently, where in an administrative suit the subject-matter valued for purpose of court-fee is below Rs. 5,000 and the plaint is returned by the First Class Sub-Judge for presentation to the proper Court, an appeal from his order lies to the District Court and not to the High Court. A.I.R. 1939 Sind 305=I.L.R. (1940) Kar. 1=185 Ind. Cas. 244.

7. Jurisdiction—When and how determined.

——Ss. 15 and 24—Valuation—When determined—Suit instituted in Court competent to try it—Effect of.

Once the institution takes place in accordance with the provision of S. 15, C. P. Code, the operation of the section is exhausted. The section does not authorise the transfer of a pending suit merely because in the course of the trial, it is found, the plaintiff is entitled only to a part of the claim, which would have been cognizable by a lower Court. 54 Ind. Cas. 655 (N.).

——S. 15—Jurisdiction—Valuation—Value of suit—Damages pendente lite cannot be taken into account.

The value of a suit is its value at the date of the

institution of the suit and not what will become its value on some subsequent date. Further mesne profits cannot be taken into account for the purpose of court-fee and for the purpose of determining the value of the suit. Similarly no court-fee is payable in respect of the damages *pendente lite*. Consequently, future damages *pendente lite* cannot be taken into account for determining the value of the suit. A.I.R. 1935 Pat. 160=16 P.L.T. 103=14 Pat. 414=156 Ind. Cas. 769.

——S. 15—Jurisdiction—Practice how determined—Determination—Depends on claim in plaint and not on defence set up by defendant —Defendant setting up different title—Practice.

The court-fee payable on the plaint and the forum of trial depend on the allegations made in the plaint and not on the defence set up by the defendant. The fact that a defendant sets up a different title does not alter the nature of the plaintiff's claim. If the facts regarding title are found to be as stated by the defendant, then the proper course will be to dismiss the suit and not to convert it into a declaratory or possessory suit. (1939) 182 Ind. Cas. 178=5 B.R. 728.

——S. 15—Jurisdiction—Determination.

Plaint decides jurisdiction. Defence cannot be looked at for this purpose. A.I.R. 1934 All. 680= L.R. 15 A. 397 Rev.=18 R.D. 250 (2)=151 Ind. Cas. 258.

——S. 15—Jurisdiction—Determination of—Plaint and not written statement determines jurisdiction.

In order to determine the jurisdiction of the Court, the plaint is to be looked at and not the written statement. A.I.R. 1933 Pat. 246=14 P.L.T. 768=13 Pat. 65=145 Ind. Cas. 294.

——S. 15 — Jurisdiction—Practice—Valuation for—Court finding that value of relief has been over-valued—Court's duty.

If in the course of a preliminary inquiry in a suit into the value of the reliefs claimed by the plaintiff, it becomes clear to the Court that there has been gross overvaluation, it is the duty of the Court on the the motion of either party or *ex proprio motu* to order that the plaint be returned for presentation in the proper Court, if the value be held to be not higher than the figure up to which the Court has jurisdiction. A.I.R. 1935 All. 157.

——S. 15—Jurisdiction—Practice—Judge trying the case finding that value of suit exceeds his jurisdiction—Proper order to be passed—Proceedings before him if coram non judice.

In a suit for possession of land, it is the market-value of the land that determines the jurisdiction of the Court. Where in a suit, the Judge trying the case finds that the value of the suit exceeds his jurisdiction the proceedings before him are *coram non judice* and the order to be passed is to direct the plaint to be presented to a proper Court having jurisdiction in the matter. (1935) 153 Ind. Cas. 53=37 P.L.R. 125.

——S. 15—Jurisdiction of Court to entertain counter-claim.

A person who comes before the Court as plaintiff in general gives the Court jurisdiction to entertain a counter-claim or in other words a cross-action against him. A.I.R. 1935 Rang. 284=158 Ind. Cas. 547.

8. Jurisdiction—Errors in—Effect of.

——S. 15—Jurisdiction—Errors in—Effect of—Defect in pecuniary jurisdiction of Court—Whether renders decree a nullity.

The defect in the territorial or pecuniary jurisdiction such as can be cured by S. 21 of the C. P. Code or S. 11 of the Suits Valuation Act, does not make the decree *ab initio* void and a nullity so as to justify the execution Court going behind it. The mere fact that the amount of the decree is beyond the pecuniary jurisdiction of the Court passing it will not, in the absence of any intention of *mala fide* under-valuation by the plaintiff decree-holder, cause the decree to be a nullity. A.I.R. 1937 Oudh 379=1937 O.W.N. 686 =1937 O.L.R. 295=13 Luck. 340=168 Ind. Cas. 625.

——S. 15—Jurisdiction—Error in—Effect of.

Where in a case by virtue of the construction put on Cl. 10, Letters Patent, by the Full Bench of the Court it was ascertained for the first time at a comparatively late stage of the suit that the Court had no jurisdiction and the defect thus exposed was a defect subsisting at the time of the commencement of the suit:

Held, that the Court had not from the beginning of the suit the slightest jurisdiction and accordingly its orders passed in the suit were a mere nullity, not susceptible of being made valid by any consent or waiver of or by the parties and that the preliminary and final decrees did not exist as valid decrees. A.I.R. 1935 Rang. 517=160 Ind. Cas. 818.

——Ss. 15 to 25—Objection as to jurisdiction—Omission to raise—Effect of.

The determination of the place of suing is the same thing as the determination of the local or territorial jurisdiction of the Court. An objection having reference to the local or territorial jurisdiction of the Court is capable of being waived. If, either by reason of S. 17 of the Code or by reason of the omission of the party to take the objection to the territorial jurisdiction of the Court at the proper time, the Court entertains or deals with a litigation, the case is one where there was either no initial defect of jurisdiction, or if there was such a defect it must be deemed to have been waived. A.I.R. 1941 Mad. 129=(1940) 2 M.L.J. 520=52 L.W. 556=1940 M.W.N. 1083.

——S. 15—Jurisdiction—Territorial jurisdiction conferred upon superior Court of general jurisdiction—When can be taken away.

When a superior Court of general jurisdiction has had territorial jurisdiction conferred upon it, that jurisdiction cannot be taken away except by express words or necessary implication. The fact that a new system of executive administration was established could not affect the jurisdiction of Civil Courts. A.I.R. 1940 Rang. 84=1940 Rang.L.R. 325=188 Ind. Cas. 422 (S.B.).

——S. 16.

Synopsis.

1. Scope and applicability.
2. Suit for immovable property—What are (S. 16 (a)).
3. Suit for partition of immovable property —What are (S. 16 (v)).
4. Suit for any other right or interest in immovable property (S. 16 (d)).

5. Movable property under distraint (S. 16 (f)).
6. S. 16—Proviso—Scope of.
7. S. 16—Explanation—Property—Meaning of.
8. Ss. 16 to 20—Combined effect of.

1. Scope and Applicability.

——Ss. 16 to 20—Object and scope of.

Ss. 16 to 20, C. P. Code, contain a direction to the suitor and not to the Court, and do not purport to deal with the inherent or general jurisdiction of a particular Court or purport to deprive any such Court of its jurisdiction in the event of their non-compliance. S. 21 of the Code makes it abundantly clear that a non-compliance with these provisions is in no way fatal to the jurisdiction of the Court, and does not render the decree passed by a Court of competent jurisdiction a mere nullity so as to empower the executing Court to refuse to execute it on that ground.

Although it is sometimes difficult to draw a line between absence of inherent jurisdiction of a Court to try a particular dispute and the defect or irregularity in the procedure of a Court of competent jurisdiction, the two stand on different footings. In the former case no amount of consent or waiver can confer jurisdiction upon a Court to deal with the dispute as a Court. In the latter case the defect or irregularity of procedure may in certain cases be cured by consent or even by waiver. A.I.R. 1931 Sind 47=25 S.L.R. 204=131 Ind. Cas. 182.

——S. 16—Construction—Scope of section—If enlarged by Ss. 17 to 25.

Section 16 is the most important section of the group of sections relating to the place of suing. Section 17 and the later sections in the group proceed to widen and enlarge the scope of S. 16 by enacting other and more liberal rules. A.I.R. 1941 Mad. 129=(1940) 2 M.L.J. 520=52 L.W. 556=1940 M. W.N. 1083.

——S. 16—Territorial jurisdiction—Scope of—Change of jurisdiction after institution.

The jurisdiction of a Court consists in its power to entertain suits, and when once a suit has been properly entertained the jurisdiction is not removed unless it is specifically so done by the order of a competent authority. Once the suit has been entertained, the remaining proceedings taken therein are not taken by reason of any particular territorial jurisdiction, but in the exercise of the powers vested in the Court to try suits generally and consequently the only time at which territorial jurisdiction comes into operation is at the time of filing the suit. Such judisdiction is not affected though the subject-matter of the suit may be transferred to another Court in the meanwhile. 87 Ind. Cas. 152=A.I.R. 1925 Mad. 117=47 M.L.J. 448.

——S. 16—Applicability—Suit properly instituted—Redistribution of territorial jurisdiction after decree—Effect.

Where after a decree is passed by one Court, the subject-matter becomes subject to the jurisdiction of another Court by a redistribution of territorial jurisdiction, the decree may be executed either by the Court which passed it or by the Court which acquired jurisdiction on redistribution. (1900) 5 C.W.N. 150=28 C. 238.

——Ss. 16, 17 (Old Code) Jurisdiction—Property situate in different districts—Compromise of part of claim.

Jurisdiction once vested in a Court will not be taken away by any act of parties in the absence of any provision of law to the contrary. A suit for possession was brought in the Court of the Subordinate Judge of Bareilly. Part of the property claimed was situated on the Bareilly District and part in the District of Bara Banki in Oudh. During the course of the suit a compromise was arrived at regarding the Bareilly property and the suit proceeded with reference to the property in Oudh alone. *Held,* that, there being no fraud or improper motive alleged with reference either to the compromise or to the filing of the suit in the Court at Bareilly, that Court was not, by reason of the compromise, divested of jurisdiction to hear and decide the suit in respect of the property situate in Oudh 12 M. 380, foll. 1908 A. W.N. 235=5 A.L.J. 647=30 A. 560 (F.B.).

——S. 16—Scope and applicability.

Partition suit—Family owning properties in British India and in Cochin State—Plaint and preliminary decree for British India properties only—Commissioner's reports for mesne profits of both British India and Cochin properties—Final decree also including the same without objection:

Held, that since the Court undoubtedly possessed inherent jurisdiction over the subject-matter of the suit, the Judg exercised it irregularly but the irregularity did not affect the inherent jurisdiction of the Court. A.I.R. 1943 Mad. 721=56 L.W. 504=(1943) 2 M.L.J. 303=1943 M.W.N. 814=I.L.R. (1944) Mad. 202=212 Ind. Cas. 501.

——S. 16—Applicability—Letters Patent, Cl. (12)—Suit for land. 27 M. 157.

——S. 16—Applicability—Arbitration award regarding immovable property situated outside jurisdiction of Court—If could be filed.

Where the dispute submitted to arbitration involved the determination of a right to or interest in immovable properties situated outside jurisdiction of the Court:

Held, that the Court had no jurisdiction to file the award. A.I.R. 1934 Sind 183=153 Ind. Cas. 300.

——S. 16—Applicability—Arbitration award in respect of property outside Court's jurisdiction—If could be filed in such Court.

Where a dispute is referred to arbitration out of Court in the determination of a right to or interest in immovable property, the Court will have no jurisdiction to file the award if the property is situate outside the jurisdiction of such Court. A.I.R. 1934 Lah. 652=35 P.L.R. 482=152 Ind. Cas. 135 (2).

——S. 16—Applicability—Arbitration award.

A suit for enforcement of a mortgage by sale of mortgaged properties can only be instituted in a place where mortgaged properties are situate. Hence an award given at a place having no jurisdiction over the properties cannot be enforced at a place where the properties are situate. Arbitration Act cannot be applied to such a case, by reason of S. 2 of the Act. A.I.R. 1934 Lah. 652=35 P.L.R. 482=152 Ind. Cas. 135 (2).

——S. 16—Property in foreign territory—Berar—If foreign territory.

The Province of Berar is a foreign territory and

a British Indian Court has no jurisdiction to pass a decree upon a mortgage for sale of property situate in Berar. A.I.R. 1935 Nag. 250=18 N.L.J. 295 =31 N.L.R. Sup. 43=159 Ind. Cas. 739 (F.B.).

——S. 16—Berar—If foreign territory—Courts in British India, if have jurisdiction to pass decree in respect of property in Berar.

The Courts in British India have no jurisdiction to pass a decree in respect of property situate in Berar, that is in a foreign territory. A.I.R. 1935 Nag. 192=31 N.L.R. 357=158 Ind. Cas. 597.

——S. 16—Applicability—Title to land incidental.

S. 16 of the C. P. Code, (1882) does not preclude all Courts other than the Court within whose local limits the immovable property is situate from trying any question relating to the title of the property, when the question is merely incidental to the reliefs claimed. 9 M.L.T. 372=10 Ind. Cas. 267.

——S. 16 (Old Code)—Applicability—Jurisdiction—Immovable property — Money decree — Sale—Fraud.

A suit for the recovery of immovable property on the ground that a previous money decree and sale in execution thereof were fraudulent and invalid should be instituted in the Court within whose jurisdiction the property is situate though the decree alleged to be fraudulent was passed by some other Court. *Semble.*— That a suit merely for a declaration that the decree was not binding on the plaintiff should be instituted in the Court which passed the decree. (1900) 5 C.W. N. 559.

——S. 16—Applicability—Special jurisdiction—Bombay Civil Courts Act (14 of 1869), S. 22—Value beyond ordinary jurisdiction but within his special jurisdiction.

In execution of a decree, lands belonging to plaintiff which were situated in the Gadag Taluka and below Rs. 5,000 in value were attached and sold by order of the First Class Subordinate Judge at Dharwar. The plaintiff then sued to set aside the sale and to recover possession of the lands. This suit was brought in the Court of the First Class Subordinate Judge at Dharwar. The defendants contended that the lands having been within the jurisdiction of the Gadag Court and the defendants also having been residents of Gadag, the suit ought to have been instituted in the Gadag Court. It appeared that Gadag was within the ordinary jurisdiction of the Gadag Court, and that it was further under a special jurisdiction of the Court of the First Class Subordinate Judge at Dharwar, in suits of Rs. 5,000 and upwards. *Held,* that the First Class Subordinate Judge at Dharwar had no jurisdiction given him by law to try any case relating to immovable property outside the local limits of his ordinary jurisdiction unless the value of the subject-matter was Rs. 5,000 in value. (1905) 8 Bom. L. R. 516.

——S. 16—Territorial jurisdiction in respect of immovable property—How proved.

Many *tauzis* contain lands situated in two or more Districts, and in such cases, the revenue authorities do not make part collection of the revenue of the *tauzi* in each of the Districts concerned, but an order is passed directing in which District the revenue is to be paid. Therefore, a document showing that the revenue of a *tauzi* is collected in a particular District does not conclusively show that the land is situated in that District. The survey map and *khewat* are of more value and the entries therein carry a presumption of correctness. A.I.R. 1933 Pat. 555=149 Ind. Cas. 758.

——S. 16 (Old Code)—Return of plaint—Appeal.

Where a plaint has been returned to the plaintiff to be presented to the proper Court, it is not open to him to appeal from the order of return, after he has taken back the plaint and refiled it in the Court directed. (1906) 5 C.L.J. 580=11 C.W.N. 765.

——S. 16 (a) (Old Code)—Suit for specific performance of agreement to lease (in putni and for possession.

A suit for the specific performance of an agreement to grant a putni and for possession of the land covered by the lease is maintainable in the Court within the local limits of whose jurisdiction a portion of the land that might be covered by the lease is situate. (1904) 4 C.L.J. 238=33 C. 1065.

2. Suit for immovable property—What are (S. 16-a)).

——S. 16 (a) (S. 16, Old Code)—Applicability in respect of immovable property—Suit to enforce the right of Tipuis Pansare—Right to levy toll on exports from foreign territory.

The plaintiff had, under a grant from the Peshwas, acquired a right known as *Tipuis Pansare* right, to levy, in a territory now owned by *Punt Suchvi* certain rate or cess on all imports into, and exports from it. The cause of action admittedly arose in foreign territory; but it was contended that the suit lay in British Courts because the defendant resided in British jurisdiction. *Held,* (1) that what the plaintiff claimed was an allowance, granted by the Peshwas in permanence; and such an allowance, whether secured on land or not, being according to Hindu law nibandha, was immovable property (1882) 6 B. 546, foll.; (2) that such immovable property having been situate in the eye of the law, in a Foreign State, a Court in British India had no jurisdiction to try the suit for the determination of the right where the right is denied; (1897) 27 B. 22, applied. The Courts in India have jurisdiction to try actions relating to immovable property situate out of their jurisdictions where the persons against whom relief is sought are living within the jurisdiction, but that is upon the ground of a contract or some equity subsisting between tht parties respecting the immovable property. (1909) 11 Bom. L. R. 352=33 B. 373. =2 Ind. Cas. 489.

——S. 16 (a) Recovery of immovable property with or without rent—Suit for rent.

Suit for rent can be brought where property is situate or where tenant resides—But suit for ejectment can be brought only where property is situate. 27 C.W.N. 542=77 Ind. Cas. 253=A.I.R. 1923 Cal. 619.

——S. 16 (a)—Applicability—Suit for immovable property—What is not.

A suit for declaration, that a mortgage decree in respect of properties at Patna passed by the Court at Benares is inoperative against the plaintiff, is not a suit for land and S. 16 does not apply. The cause of action cannot be said to arise in Patna. 75 Ind. Cas. 469=A.I.R. 1924 Pat. 831.

——S. 16 (a) and proviso—Administration suit—Property partly outside.

If in an administration suit it is found that some of the properties are situated outside the jurisdiction of the Courts of British India, and are in the possession of a person claiming a share in the estate, the Court has no jurisdiction to order that person to deliver possession of the property to the administrator to enable him to sell it and realise its proper price for the benefit of the estate; but the Court has jurisdiction to direct that person to account for the value of such property as a condition to his obtaining his share of the estate in the hands of the administrator. Case-law considered and discussed. 11 L.B.R. 188=66 Ind. Cas. 530=A.I.R. 1921 L.B. 82.

——S. 16 (a)—Partition suit—Part of the property outside jurisdiction.

Where in a suit for partition some of the immovable property was situated out of British India.

Held, that the Courts in British India cannot entertain a suit with respect to that property since their decree cannot be enforced there. 24 N.L.R. 95=111 Ind. Cas. 135=A.I.R. 1928 Nag. 295.

——S. 16 (a)—Applicability—Execution proceedings—Vesting of jurisdiction in another Court since the passing of the decree.

A suit was instituted by the appellants in the year 1911 in the Court of the Subordinate Judge of *M* (who at that time sat at *P*), for possession of certain lands situated in the Sub-Division of *D* and for mesne profits. The suit was decreed, but an appeal by the respondents to the High Court was successful and the judgment of the High Court was affirmed by the Privy Council. The suit was accordingly dismissed with costs. In the month of February, 1931, the respondents the present decree-holders applied for execution in the Court of the Subordinate Judge of *M* sitting at *P*. Since 1911, when the suit was begun, by an order of the Lieutenant-Governor of Bihar and Orissa in 1917, a Subordinate Judge's Court was established at *D* in the District of *M* and the local limits of his jurisdiction ceased to be included in the local limits of the Subordinate Judge of *P* from 31st October, 1917. The respondents decree-holders sought to sell in execution lands situated in the Sub-Division of *P*, that is to say, outside the Sub-Division of *D*. The appellants judgment-debtors resisted the execution on the ground that the proper Court in which to institute an execution case was that of the Additional Subordinate Judge of *D* and argued that the Subordinate-Judge sitting at *P* had no proper jurisdiction though it was admitted that the case might afterwards be transferred to him:

Held, that the effect of the notification was not to transfer the jurisdiction of the Court sitting at *P* to the Court sitting at *D*, but to divide the jurisdiction of the Subordinate Judge in the District of *M*, and that the mere fact that for administrative purposes the Court of the Subordinate Judge was now divided between the Subordinate Judge and an Additional Subordinate Judge and that a certain class of business or an area was allotted to the Additional Subordinate Judge did not make the Court of the Subordiate Judge sitting at *P* any the less the Court of the Subordinate Judge of *M* nor did it prevent it from executing the decree. The decree-holder had always the right to apply of course to the Court which passed the decree for its execution even if it be in respect of property outside the territorial jurisdiction of such Court and even if execution by such Court can be no more than execution by transmission to another Court. A.I.R. 1934 Pat. 192=13 Pat. 21 =15 P.L.T. 513=155 Ind. Cas. 769.

——Ss. 16 (a) and (d) and 20—Applicability—Suit for dissolution of partnership—Forum.

A suit for dissolution of partnership with the usual ancillary relief does not fall either under clause (a) or (d) of S. 16, C. P. Code, and can be brought in the Court within whose jurisdiction the parties reside or the cause of action arises. 17 A.L.J. 567=50 Ind. Cas. 156.

3. Suit for partition of immovable property—What are (S. 16 (b)).

——S. 16 (b) and Proviso and Explanation—Suit for partition of immovable properties situate outside British India—Jurisdiction to act in personam—Extent of.

A Court in British India has no jurisdiction to entertain a suit for partition of immovable properties situate in Ceylon, *i.e.*, outside British India, in view of S. 16 (b), C. P. Code, nor can it adjudicate on the title to such properties.

The only cases in which Courts have power according to private International law to exercise jurisdiction *in personam* in respect of foreign immovable properties against persons locally within their jurisdiction are, where there is an equity between the parties arising from contract, fraud or trust, provided the decision of title to such properties is not directly involved.

In a suit for partition in a Hindu joint family, it cannot be said that the Court is called upon to enforce a trust inasmuch as the manager of a Hindu family is not under any of the well-known obligations of a trustee with regard to the administration of the funds of the family. Consequently, where in a suit for partition of immovable properties situate outside British India there is a dispute as to the title to such properties, the Court has no jurisdiction to decree a division of such properties or even to declare that the properties in dispute are partible joint family properties. A.I.R. 1946 Mad. 398=(1946) 1 M. L.J. 310.

4. Suit for any other right or interest in immovable property (S. 16 (d)).

——S. 16 (d)—Construction of.

The words 'any other right to or interest in immovable roperty' in S. 16 (*d*), C. P. Code, include a charge on immovable property. A.I.R. 1931 Sind 47=131 Ind. Cas. 182=25 S.L.R. 204.

——S. 16 (d)—Applicability—Suit for money and declaration of charge.

A suit for recovery of a certain amount on a promissory note and also for declaration that the decretal amount is a charge on a certain property mortgaged as collateral security for the payment of the debt secured by the promissory note falls within the purview of S. 16 (d), 40 Bom. 337, Foll. 96 Ind. Cas. 752=A.I.R. 1926 Lah. 660.

——S. 16 (d)—Scope of.

Quare:—Whether S. 16 (d), C. P. Code, is not restricted to disputes as to title or interest in property existing at the date of the suit and whether it applies to interests that spring out of ancillary reliefs

claimed in the suit and arising as a consequence of the decree made in the suit. A.I.R. (Vol. 22) 1935 Mad. 1043=42 L.W. 647=1935 M.W.N. 1135=158 Ind. Cas. 1012.

——S. 16 (d)—Applicability—Suit for commission payable under agreement on sale of coal during term of mining lease—Nature of obligation—T. P. Act, S. 40.

S. 16 (d), C. P. Code, does not apply to a suit for commission payable to the plaintiff under an agreement on all coal sold by the defendant during the term of his mining lease, as the suit is not one for the determination of an interest in immovable property. The coal is not immovable property, and the obligation is one falling under S. 40, T. P. Act, as an obligation annexed to the ownership of immovable property but not amounting to an interest therein. The suit may, therefore, be brought in the Court at the place where the money is payable. I.L.R. (1948) Nag. 200=A.I.R. 1948 Nag. 286=1948 N. L.J. 467.

——S. 16 (d)—'Interest in immovable property'—What is—Suit for unpaid purchase money—Jurisdiction.

A suit for the recovery of unpaid purchase money under a contract for the sale of land is a suit for the determination of any other right to, or interest in immovable property, within the meaning of S. 16, Cl. (d). (1904) 28 M. 227.

——S. 16 (d)—Jurisdiction—Immoveable property—Decree for sale on a mortgage.

A decree for sale upon a mortgage is not immovable property. A suit for sale upon a mortgage is a suit 'for the determination of a right to or interest in immovable property,' but after the decree is passed a suit for a declaration that the plaintiffs were the persons really beneficially interested in the decree is not a suit falling within Cl. (a) of S. 16. 1904 A.W.N. 148=26 A. 603.

——S. 16 (d)—Immovable property attached before judgment in money suit—Objector's claim allowed—Suit by plaintiff for declaration that property belongs to defendant should be filed in Court where property is situate.

Where in a money suit immovable property is attached before judgment and the objector's claim as owner of such property is allowed, a suit by the plaintiff for a declaration that the property belongs to the defendant should be instituted in the Court within the local limits of whose jurisdiction the property is situate. A.I.R. 1941 Cal. 363=199 Ind. Cas. 681.

——S. 16 (d)—Suit for declaration in respect of mortgage.

The Court in whose jurisdiction the properties are not situate cannot try a case for declaration that a mortgage in favour of the defendant is invalid against the plaintiff. 23 M.L.J. 679=(1914) M. W.N. 52=17 Ind. Cas. 758.

——S. 16 (d) and Proviso—Applicability—Suit for epecific performance and possession—Defendants and property in different places.

A joint stock company had its registered office in Bombay and it owned a factory at Dhulia. The company went in liquidation and its liquidator who resided in Bombay wanted to sell the factory. Negotiations were opened between the parties in Bombay. The vendee was a resident of Dhulia. He engaged an agent to complete the transaction. But the liquidator put an end to the negotiations before the completion of the transaction. The factory was subsequently sold to other persons. The vendee sued the company and the subsequent purchasers, for specific performance of the agreement and for possession of the factory:

Held, that the Dhulia Court alone had jurisdiction to try the suit against the company as well as the subsequent purchaser under S. 16 (d), C. P. Code, and that the proviso to S. 16 did not apply as the suit in the form in which it was brought was not a suit *in personam*. A.I.R. 1941 Bom. 247=43 Bom.L.R. 293=I.L.R. (1941) Bom. 361=196 Ind. Cas. 146.

——S. 16 (d) and Proviso—Suit by vendee for specific performance of agreement to transfer charge with alternative prayer for refund charging properties—Jurisdiction.

The proviso to S. 16, C. P. Code, extends the section to a suit by a vendee for a specific performance of a contract to sell land.

The property to be conveyed was a mortgage decree which was passed on an assignment of certain arrears of maintenance. The draft also agreed to transfer a charge on a village situated within the local jurisdiction of the Court, as indemnity. There was an alternative prayer that if specific performance was not decreed, the purchase money may be refunded, and for a charge on the decree-debt and on certain properties in that connection. The defendant against whom specific performance was claimed did not reside within the jurisdiction of the Court though the mortgaged property was within its jurisdiction:

Held, that the prayer for specific performance of the sale of the charge, and the alternate relief for a charge in respect of the money to be refunded gave jurisdiction to the Court. A.I.R. 1933 Mad. 436=143 Ind. Cas. 759.

——S. 16 (d)—Suit for maintenance—Prayer that maintenance be made charge on property within jurisdiction.

A suit for maintenance with a prayer for a charge on property within jurisdiction of a Court against a subject of a Native State is cognizable by the Court. 40 Bom. 337=18 Bom.L.R. 67=32 Ind. Cas. 985.

——S. 16 (d)—Suit for specific performance—If interest in immovable property—Difference between suit by vendor and vendee.

The nature of a suit depends upon the relief asked for, in the plaint. A suit for specific performance is not a suit for land or for the determination of any right to or interest in immavable property. There is a difference between a vendor suing for specific performance and purchaser suing for it. 9 Bur. L. T. 119=36 Ind. Cas. 431.

——S. 16 (d)—Suit by vendor for specific performance of agreement to purchase house.

According to S. 16 (d) a suit to compel specific performance of an agreement to purchase the plaintiff's house or in the alternative for damages is a suit for the determination of a right to immovable property and is cognizable only by the Court within whose jurisdiction the property is situate. 5 N.L.R. 128=3 Ind. Cas. 576.

——S. 16 (d)—Suit for 'determination of any other rights'—Suit to declare a will is a forgery.

For S. 16 (d) to apply the suit must be expressly for the purpose indicated in it. It is not enough to say that the relief granted would indirectly affect rights in immovable property, but the suit itself must be for the purpose of determining such rigts. 16 M. L.W. 785=72 Ind. Cas. 920=1922 M.W.N. 834 =A.I.R. 1923 Mad. 109=43 M.L.J. 615.

——S. 16 (d)—Suit regarding temple—Whether public temple or not.

A suit for setting aside the Board's decision under the Madras Religious Endowments Act that a temple is a public temple lies only in the Court where the temple is situate. 28 M.L.W. 535=116 Ind. Cas. 561=A.I.R. 1928 Mad. 1272=55 M.L.J. 605.

——S. 16 (d)—Probate proceedings—Property in two provinces.

Suit for the administration of the estate of the deceased is cognizable by the Court in the jurisdiction of which a portion of the immovable property is situate and where such a suit is directed mainly against the probate proceedings taken in another province, that fact does not oust the jurisdiction of the Court which is established by reason of the relief relating to the administration of the estate including immovable property being situate in the jurisdiction of that Court. 27 P.L.R. 398=96 Ind. Cas. 691=A.I.R. 1926 Lah. 503.

——S. 16 (d) -- Applicability—Declaration against probate proceedings.

A suit for a declaration that a probate proceedings shall not affect the plaintiffs and for the adminstration of the estate left by the testator, is not a claim for the determination of any right to or interest in immovable property within S. 16, so that the mere fact that part of the property to be administered is situate in a particular district will not give the first Court jurisdiction. The question of jurisdiction has, therefore, to be determined by S. 20. Such a suit lies in the Court at the place where the probate is taken out. 94 Ind. Cas. 1046=A.I.R. 1926 Lah. 456.

——Ss. 16 (d) and 17—Suit in one Court for declaration of plaintiff's right to immovable properties in different districts—Maintainability.

A declaratory suit as to the plaintiff's title as heir to properties situated in different districts even if the plaintiff sues in any particular district, is not bad, for the invasion of his right in one district is an attack on the whole property in the different districts and so the Court had jurisdiction to try the suit under S. 17 of the C. P. Code. 21 Ind. Cas. 438 (Cal.).

——Ss. 16 (d) and 20—Applicability—Suit for dower debt and administration of estate—Prayer for declaring dower debt as charge on estate—Only fractional portion of properties within Court's jurisdiction.

A widow of a deceased Mahomedan filed a suit for recovery of her dower debt and also for the administration of her deceased husband's estate. She also prayed for a declaration that the dower debt was a charge upon that estate. Only a fractional portion of the properties was situated within the jurisdiction of the Court in which the suit was filed.

Held, that the Court had jurisdiction to entertain the suit and that S. 16 (d) and not S. 20, C. P. Code, applied to the facts of the case. 26 Pat. 523= A.I.R. 1948 Pat. 384.

5. Movable property under distraint (S. 16 (f).

——S. 16 (f)—Applicability—Movable property under attachment by a foreign Court—Jurisdiction.

S. 16 (f), C. P. Code, does not apply to a suit for recovery of movable property which is under attachment by a foreign Court and the British Indian Courts have no jurisdiction to entertain such a suit even independently of S. 16. The case is different if the defendant is a resident of British India and attachment is made at his instance because then a personal decree may be passed and executed by enforcing personal obedience. (1912) M.W.N. 524= 14 Ind. Cas. 279.

6. S. 16—Proviso—Scope of.

——S. 16—Proviso—Applicability.

When the relief granted by the award is a declaration of proprietary title to certain immovable property the proviso to S. 16, C. P. Code, is not applicable. A.I.R. 1933 All. 380=1933 A.L.J. 741=55 All. 542=143 Ind. Cas. 571.

——S. 16—Proviso—Applicability.

Suit for partition at Shikarpur against father and brothers residing at Shikarpur and trustees of Dev Samaj residing at Lahore—Some of the property in dispute situated in Quetta:

Held, that a British Indian Court would have had jurisdiction to entertain it *in personam* and although a part of the property was situate outside, the title to such foreign property was only incidentally and not directly in issue. A.I.R. 1934 Sind 123=28 S. L.R. 54=155 Ind. Cas. 677.

——S. 16—Proviso—Choice of forum—Practice.

Under S. 16, proviso, if the defendant from whom the plaintiff claims redress, resides at a particular place, the suit may be instituted at that place as well. Where the plaintiff having choice of forum elects to file his suit in certain place, but at the same time it is risky to compel him to come to that place for examination as the journey from his place of residence to the Court might prove harmful, the Court can issue commission for examination of the plaintiff at his place of residence but the plaintiff must pay the defendant sufficient costs. A.I.R. 1935 Pat. 220= 154 Ind. Cas. 725.

——S. 16—Proviso—'Defendant' meaning of.

The word 'defendant' means 'all the defendants' where there are more than one defendant in the suit. 13 B.L.R. 91, Foll. 73 Ind. Cas. 405=A.I.R. 1924 Cal. 443.

——S. 16—Proviso—Mesne profits, suit for.

A suit to recover mesne profits of land situated outside British India can be instituted in British India. Although S. 16 of the Code does not seem to be applicable to cases of land outside British India there is reason to believe that the whole of the section follows the English Law with regard to jurisdiction in case of suits in which specially the decree could be executed by the personal obedience of the defendant. 46 Bom. 108=68 Ind. Cas. 510=23 Bom.L.R. 903 =A.I.R. 1922 Bom. 188.

——S. 16—Proviso—Suit for specific performance—Defendant and property in different places—Forum of suit.

A suit for a relief that the defendant should execute and register a deed of surrender of the occupancy holding, as he had promised to do, or should pay back to the plaintiffs the consideration of his promise, is triable in a Court within whose jurisdiction the defendant resides though the property is outside its jurisdiction. 93 Ind. Cas. 103=A.I.R. 1926 Nag. 313.

——S. 16—Proviso—Scope of—Jurisdiction—Suit for partition of immovable property in Ceylon being assets of money-lending firm owned by joint Hindu family in British India—Suit if can be treated as one for taking accounts of a dissolved partnership or for enforcement of a trust.

A British Indian Court has no jurisdiction to decree a division of immovable properties situate in Ceylon or even to decree that such properties are joint family properties. Such property cannot be treated as personalty for purposes of jurisdiction. The fact that the properties are assets acquired by a money-lending business owned by a Hindu joint family in India will not have the effect of converting them into partnership assets so as to enable the British Indian Court to treat the suit as one for taking accounts of a dissolved partnership. Nor can the suit be treated as one, for the enforcement of a trust so as to enable the British Indian Court to act *in personam*. The manager of a joint Hindu family is not under the well-known obligations of a trustee with regard to the administration of the funds of the family. I.L.R. (1946) Mad. 858=228 Ind. Cas. 506=59 L.W. 227=1946 M.W.N. 240=A.I.R. 1946 Mad. 398=(1946) 1 M.L.J. 310.

7. S. 16—Explanation—Property—Meaning of.

——S. 16 Expl. and S. 20—Property—Suit for Joshipan income—If suit for immovable property.

A suit for *Joshipan* income in respect of villages situated in and outside British India can be decreed only in respect of villages situated in British India. 46 Ind. Cas. 782 (N.).

——S. 16, Expl.—Property—Jurisdiction of British Indian Courts—Property in foreign territory.

Where an item of property is admittedly in foreign territory on the date of suit, the British Courts have no jurisdiction to entertain a suit for possession of that property. 8 M.L.T. 244=7 Ind. Cas. 67.

8. Ss. 16 to 20—Combined effect of.

——Ss. 16, 17—Nature of—If confined to procedure—Jurisdiction, if comes under processual law—Right to institute suit, nature of—S. 46 (2), Government of India Act, 1935, if affects that right and if retrospective and if applies to actions pending on 1st April, 1937.

The C. P. Code, is not confined to procedure. No doubt, the Court derives its jurisdiction to entertain a suit from the C. P. Code, and so far as the procedure governing trial is concerned, it is also derived from the Code. But jurisdiction and procedure are distinct, and the former, *i.e.*, jurisdiction does not

come under the description of processual matter. The right of a party to institute a suit or to file an appeal in a particular Court is a substantive right and not merely a matter of procedure, Government of India Act, 1935, by S. 46 (2), affects that right and the jurisdiction of the Court and in the absence of an express provision that the pending actions will be affected by the Act of 1935 and in the absence of any special provision relating to such actions, the new Act of 1935, cannot affect prejudicially suits instituted prior to 1st April, 1937, and which were pending on that date. A.I.R. 1942 Mad. 614=(1942) 1 M.L.J. 137=55 L.W. 45=I.L.R. (1942) Mad. 376=203 Ind. Cas. 17.

——Ss. 16 and 20—Jurisdiction—Test—Agreement at Karaikal to sell immovable property in Tiruchirapalli and receipt of advance—Suit in Tiruchirapalli Court for specific performance of agreement and possession—Maintainability.

The criterion for jurisdiction is whether the defendant owns property in the jurisdiction of the Court in which the suit is filed and whether the suit sought to be filed against him is to obtain relief respecting such property.

When a non-resident foreigner owns property within the jurisdiction of an Indian Court and enters into a contract regarding that property no matter where such a contract is entered into, the Indian Court clearly has jurisdiction to try that suit by reason of the immovable properties being situate within its jurisdiction. Hence, where a suit for specific performance of an agreement entered into at Karaikal for the sale of a building in Tiruchirapalli District and for possession is filed in the Tiruchirapalli Court, that Court clearly has jurisdiction to try that suit. 63 L.W. 43=A.I.R. 1950 Mad. 272=(1949) 2 M.L.J. 735.

——Ss. 16 and 17—Charge—Enforceement of—Jurisdiction.

A suit to enforce a charge created on the land for Government revenue on it can be instituted in the Court at the place where the land is situated. 39 Mad. 795=29 M.L.J. 639=2 L.W. 1046=18 M.L.T. 464=31 Ind. Cas. 255.

——Ss. 16 and 17—Properties in different jurisdictions.

Where the properties are situate in different jurisdictions, these sections are no bar to parties bringing successive suits. 22 Bom. 922; 14 Cal. 835, foll. (1916) 1 M.W.N. 146=3 L.W. 107=32 Ind. Cas. 423.

——S. 16—Immovable property and movable property—Applicability.

Ss. 16 and 17 are not confined to suits involving only immovable property but they apply equally to suits for immovable property as well as movable property, provided that the immovable property is situate wholly or in part within the local jurisdiction of the Court. 4 Bom. 482, Foll. 27 P.L.R. 398=96 Ind. Cas. 691=A.I.R. 1926 Lah. 503.

——Ss. 16, 17, 20—Plea that Court has jurisdiction—How and where cause of action arose not alleged.

A plea in the plaint that the Court has jurisdiction to entertain the suit is technically defective if it does not allege how and where the cause of action arose in terms of Ss. 16, 17 and 20, C. P. Code. A.I.R.

1942 Mad. 614=(1942) 1 M.L.J. 137=55 L.W. 45=I.L.R. (1942) Mad. 376=203 Ind. Cas. 17.

——Ss. 16 and 20—Suit for rent—Whether one for obtaining relief in respect of immovable property—Jurisdiction.

A suit for rent by a landlord against his tenant is not one to obtain relief respecting immovable property, as in such a suit there is no relief claimed in respect of land nor is it sought to deal with it in any way whatever. Such a suit can be instituted in a Court within the jurisdiction of which the cause of action arose wholly or in part. Thus, such a suit can be instituted in a Court within whose limits the contract was made and the agreement executed. A.I.R. 1935 Mad. 545=1935 M.W.N. 174=41 L.W. 381=68 M.L.J. 506=157 Ind. Cas. 281.

——Ss. 16 and 20—Applicability—The appellants who were residents of Forezepore entered into an agreement with the respondent who owned a sugar factory at Unao by which the appellants were to work the factory for three years. This agreement was executed at Ferozepore but was registered at Unao. According to the last clause any dispute arising between the parties in respect of the terms of the agreement was to be referred to the arbitration of certain pleaders of Ferozepore. The respondent sued the appellants in respect of balance alleged to be due to him. The appellants obtained stay of the suit and presented a petition to the Senior Subordinate Judge, Ferozepore for the agreement being filed under para. 17 of Sch. II of the C. P. Code. The respondent objected that the Court had no jurisdiction to entertain the application, as the factory was situated at Unao and the cause of action in respect of the subject-matter of the dispute between the parties arose there. This objection was upheld by the Senior Subordinate Judge and the application was rejected:

Held, (1) that an appeal lay under S. 104 (d), even though the application was not rejected on the merits but on the preliminary question of jurisdiction:

(2) that the Ferozepore Court had jurisdiction to entertain the application under S. 20 (c), C. P. Code. A.I.R. 1931 Lah. 673=32 P.L.R. 464=132 Ind. Cas. 218.

——Ss. 16 and 20—Applicability—Relative scope—Suit for partition relating to movables and immovables—Immovables outside jurisdiction of Court—Jurisdiction of Court to try suit.

Where property, in respect of which a partition suit is brought, consists of both movables and immovables, the immovable property being outside the jurisdiction of the Court and the movable within the jurisdiction, the Court may grant relief so far as the movable property is concerned, but it has no jurisdiction to deal with the immovable property.

Sections 16 to 19, C. P. Code., are in a way exceptions to S. 20 and suits other than those mentioned in Ss. 16 to 19 must be instituted in the Court where either the defendants reside or cause of action arises. A.I.R. 1931 Sind 50=25 S.L.R. 275=131 Ind. Cas. 186.

——Ss. 16, 17, 20—Jurisdiction—Alteration of subsequent to institution of suit—Effect of—Suit in respect of immovable and movable property situate in British India and Burma filed in British Indian Court in 1932—Government of India Act, 1935, meanwhile enacted—S. 46 (2) of Government of India Act, 1935—Question of jurisdiction—Decision as to—Practice.

The combined effect of the India and Burma Existing Laws Act, 1937, S. 1, Sub-Ss. (1) and (2), the Government of India (Adaptation of Indian Laws) Order, 1937, paras. 1, 9, 10 and 11, and the interpretation Act, 1889, 52 and 53, Vic., Chap. 63, S. 38 (*b*) (*c*) and (*e*), is expressly to preserve to the Courts jurisdiction which they held before 1st April 1937, in regard to litigation properly before them.

Hence where a suit in respect of immovable and movable properties part of which is situated in British India and part in British Burma, was properly instituted in 1932 in British Indian Courts which had jurisdiction to entertain it and which was pending on 1st April 1937, S. 46, Government of India Act, cannot affect the right of the plaintiff to continue that suit and the Court's jurisdiction to deal with it cannot be said to have been taken away by the Government of India Act under S. 46 (2), thereof.

Although it might be possible to say that the point of jurisdiction should be taken on appeal, it would be a very grave hardship on the petitioner to do so. Immense expense might be incurred for obtaining the necessary evidence from Burma, which might possibly be thrown away were the final decision as to jurisdiction to be against the plaintiff in the appeal. As the High Court's decision in the revision petition would be final so far as the question of jurisdiction was concerned, it was convenient and proper to decide it in revision under S. 115, Civil P. C. A. I.R. 1942 Mad. 614=(1942) 1 M.L.J. 137=55 L. W. 45=I.L.R. (1942) Mad. 376=203 Ind. Cas. 17.

——Ss. 16, 17, 21—Mortgage-decree obtained in British India in respect of property situate in Berar as well as in British India, if can be executed in Berar without suing upon British Indian judgment.

A mortgage-decree obtained in British India in respect of property situate in Berar as well as within the local limits of the Courts in which the suit is executed can be executed in Berar as it stands without the necessity of suing again upon the British Indian judgment.

Per *Contra*.—A mortgage-decree obtained in British India in respect of property situate in Berar (out of British India) is incapable of being executed in any Court in Berar, nor can a suit be maintained on the basis of the judgment of a Court in British India which is null and void. The only course left is to institute a fresh suit in the Court in Berar to enforce that mortgage. A.I.R. 1941 Nag. 36=I. L. R. (1941) Nag. 1=1941 N.L.J. 1=198 Ind. Cas. 873 (F.B.).

Synopsis.

——S. 17—Suits for recovery of immovable properties situated in different jurisdictions.

1. **Applicability and scope.**
2. **Foreign property.**
3. **Practice and procedure.**

1. Applicability and scope.

——S. 17—Applicability and scope.

The provisions of S. 17 are intended to solve a difficulty which would naturally arise if there was a dispute about some immovable property which was

situated partly within one jurisdiction and partly within another. But before the provisions come into play, there must be one property which is situated in different jurisdictions. The property must, in the particular circumstances of the suit, be capable of being described as a single entity. Whether it can or cannot be so described will depend again upon the nature of the dispute between the parties. If there is a dispute, for instance, about a single estate which both parties are claiming as a whole that estate is, obviously, for the purposes of that particular suit, a single entity. If on the other hand, the owner of an estate has a claim against unconnected trespassers who have trespassed upon different parts of the estate or different properties situated within it, those parts or those properties would not, for the purposes of the dispute between him and the trespassers, be one entity but several entities and the provisions of S. 17 would not apply. A.I.R. 1942 All. 387=I.L.R. (1942) All. 862=1942 A.W.R. 270=206 Ind. Cas. 222.

——S. 17—Court revision—Phrase "relief respecting.....immovable property", scope.

The phrase "relief respecting ..... immovable property" mentioned in S. 17, C. P. Code, has not the effect of including in that section suits relating to immovable property of a nature different from suits in respect thereto as are specified in S. 16, Sub-Ss. (a) to (e). A.I.R. 1942 Cal. 69=45 C.W.N. 1085=75 C.L.J. 229=I.L.R. (1942) 1 Cal. 235 =198 Ind. Cas. 739.

——S. 17—Applicability.

Two properties situated at Amritsar and Hardwar —Suit for possession in the Courts of Amritsar and Saharanpur respectively — Application under S. 22 that the suit pending in Saharanpur Court should proceed at Amritsar.

Held, that S. 17 was not applicable. A. I. R. 1942 All. 387=I.L.R. (1942) All. 862=206 Ind. Cas. 222.

——S. 17—Applicability to application under para. 20 (2), Sch. 2.

Section 17 of the Code is one of the sections which the Court may take into account for deciding the question of jurisdiction in a case under para. 20 (2), Sch. 2. Hence where an application under para. 20 (2) relates to property within the jurisdiction of two Courts in British India, it is open to the Court within the jurisdiction of which part of the property is situate, to entertain the application. A.I.R. 1942 Sind 79=I.L.R. (1942) Kar. 36=202 Ind. Cas. 152.

——S. 17—Applicability to Berar — Indian Courts, if can pass decree in respect of property in Berar.

Section 17, C. P. Code, cannot give a Court jurisdiction unless the defendants are in possession of some property within the jurisdiction of that Court.

Application of S. 17 is limited to Courts in British India and not in a foreign territory. The Berars are foreign territory and the Courts in British India have no jurisdiction to pass a decree in respect of property in the Berars which is a foreign terriory. The fact that the Civil P. C., applies in the Berars under the Foreign Jurisdiction Act makes no difference. A.I.R. 1938 Bom. 121=39 Bom.L.R. 1287=I.L.R. (1937) Bom. 895=174 Ind. Cas. 116.

——S. 17—Applicability—Burma.

Suit in British India in respect of immovable property situated partly within jurisdiction of British Indian Court and partly in Burma—Burma ceasing to be part of British India.

Held, that the Indian Court continued to have jurisdiction to proceed with the trial even as regards the properties situated in Burma. A.I.R. 1943 F. C. 24=1943 M.W.N. 345=9 B.R. 430=47 C.W. N. F.C. 25=(1943) 2 M.L.J. 57=I.L.R. (1943) Kar. F.C. 21=207 Ind. Cas. 266 (F.C.).

——S. 17—Applicability to Courts in Santhal Parganas.

The Code including S. 17 is in force in the Bhagalpur District and hence its operation extends also to the Courts established in the Santhal Parganas under the Bengal, Agra and Assam Civil Courts Act. A. I.R. 1936 P.C. 189=1936 O.L.R. 346=17 P.L.T. 461=40 C.W.N. 1061=44 L.W. 88=71 M.L.J. 60=63 C.L.J. 476=38 Bom. L. R. 768=15 Pat. 567=63 I.A. 311=163 Ind. Cas. 49 (P.C.).

——S. 17—Applicability—Land situate both in Santal Parganas and in Gaya District—Gaya Court, if has jurisdiction within S. 5 (a), Santal Parganas Regulation (3 of 1872)—Suit filed in Court of Settlement Officer in Santal Parganas—Jurisdiction to transfer it to Gaya Court —Gaya Court, if can take cognizance.

Where lands are situate both within and outside the Santal Parganas and Courts in Santal Parganas and Gaya have concurrent jurisdiction to try the suit subject to the restrictions in the Santal Parganas Regulation, the Settlement Officer has jurisdiction to transfer a suit filed in his Court to the Court in Gaya which can take cognizance of the suit by reason of such transfer. Per *Mohammad Noor, J.* (contra).—All the Courts situated outside the Santal Parganas to which S. 17, Civil P. C., applies have concurrent jurisdiction with the Courts inside the Santal Parganas for the trial of suits in which the properties involved are both outside and inside the Santal Parganas and the value of the properties exceeds Rs. 1000 and, therefore, in ordinary circumstances the Gaya Court has jurisdiction to try such suits, barring of course, the restrictions placed under S. 5, Regulation 3 of 1872. A.I.R. 1934 Pat. 292 =13 Pat. 486=15 P.L.T. 237=154 Ind. Cas. 18.

——S. 17—Applicability—Sonthal parghanas Portion of property situate in—Suit in ordinary Courts.

A suit to enforce a mortgage of land of which a portion is situate in the *Sonthal Parghanas* must be brought before the Settlement Officer or other officer appointed under the Sonthal Parghanas Act and Justice Regulation. A Court having local jurisdiction outside the *Sonthal Parghanas* has no jurisdiction to try the suit even though the bulk of the property falls within its territorial jurisdiction and S. 17 of the C. P. Code does not apply. The consent of the parties cannot give jurisdiction to the latter Court. 42 Cal. 116=41 I.A. 197=18 C.W. N. 994=16 M.L.T. 105=(1914) M.W.N. 565=1 L.W. 619=20 C.L.J. 231=27 M.L.J. 459=16 Bom.L.R. 824=25 Ind. Cas. 451 (P.C.).

[On appeal from 9 C.L.J. 288=4 Ind. Cas. 56.]

——S. 17—Applicability—Suit to recover properties situated in different districts—Cause of action different.

Where the plaintiff instituted a suit for recovery of possession of property *A* in Oudh and properties *B*, *C* and *D* situated in the Punjab claiming *A*, *B* and *C* under a will and *D* which was *waqf* property as successor-in-office to the deceased trustee, and the suit was instituted in a Court in Oudh:

Held, that the cause of action to recover *D* was separate and different from those in respect of the other three properties and there was no jurisdiction for bringing the suit in respect of *D* elsewhere than in the Punjab. A.I.R. 1932 P.C. 172=1932 A. L.J. 691=9 O.W.N. 614=56 C.L.J. 36=36 C. W.N. 937=36 L.W. 146=59 I.A. 268=34 Bom. L.R. 1299=63 M.L.J. 336=7 Luck. 324.=137 Ind. Cas. 539 (P.C.).

2. Foreign Property.

——S. 17—Applicability—Property partly outside India—Jurisdiction of British Indian Court to entertain suit on mortgage of.

The words "a suit to obtain relief respecting immovable property" are wide enough to cover suits for foreclosure, sale or redemption, but the words in S. 17 "within the jurisdiction of the different Courts" must mean within the jurisdiction of different Courts to which the Code applies, i.e., Courts in British India. Where, therefore, property is not situated within British India, British Indian Courts have no jurisdiction to try the suit so far as it relates to such property. A.I.R. 1924 Bom. 387, Reversed. 57 I. A. 194=34 C.W.N. 854=A.I.R. 1930 P.C. 188=126 Ind. Cas. 417=54 Bom. 495=32 Bom. L. R. 1527=1930 A.L.J. 1338=52 C.L.J. 539=32 L.W. 818=59 M.L.J. 379 (P.C.).

——S. 17—Property outside British India—Jurisdiction of British Indian Court—Such property included with property in local jurisdiction.

A British Indian Court cannot pass a decree in respect of property situated outside British India. Nor can an injunction be passed in respect of management of such property, but a property situated in British India, though outside the local jurisdiction of a Court can be included in a suit with property situated within such Court's local jurisdiction. A.I.R. 1941 Lah. 347=43 P.L.R. 489=197 Ind Cas. 481.

3. Practice and procedure.

——S. 17—Suit instituted properly—Property partly within and partly outside jurisdiction—Abandonment of claim over property outside jurisdiction—Appeal in respect of decree dealing with property outside jurisdiction—Forum of.

The plaintiffs' suit in respect of the share of a village situated in outside the jurisdiction of the Court and about a house in within the jurisdiction of the said Court. The suit was filed rightly in the Court of the Civil Judge, in the Province of Oudh as part of the property was within its jurisdiction. As the suit was dismissed the plaintiff filed an appeal and on appeal abandoned his claim with reference to the property within the jurisdiction of the Court and the appeal related to property which did not lie within the jurisdiction of the Chief Court. It was argued that the Chief Court had no jurisdiction to hear the appeal:

Held, that as the suit was rightly filed under the law in the Court of the Civil Judge, an appeal against his decree in the suit could only be heard by the Chief Court, and not by any other Court, so that the relinquishment of his claim about the house by the plaintiff did not affect the jurisdiction of the Chief Court to hear the appeal. A.I.R. 1938 Oudh 65=1938 O.W.N. 104=172 Ind. Cas. 637.

——S. 17—Joinder of causes of action to attract the section—Permissibility.

Where a laintiff has two or more causes of action in the suit he can take advantage of the provisions of S. 17, Civil P. C., if the joinder of such causes of action is permitted by the succeeding provisions of the Code for instance, O. 1, R. 3 and O. 2, R. 3. If he cannot do so and the joinder of such causes of action is bad for multifariousness, then the suit cannot be tried in either of the Courts within whose jurisdiction the properties are situate. A.I.R. 1940 All. 205=1940 A.L.J. 110=188 Ind. Cas. 486.

——S. 17, O. 1, R. 3—Scope of O. 1, R. 3—Suit combining distinct causes of action against different defendants—Immovable property in jurisdiction of two different Courts.

Where the immovable property in regard to which the causes of action are combined within the provisions of O. 1, R. 3 is situated within the jurisdiction of two different Courts, the suit may, under the provisions of S. 17, be instituted in any one of the Courts within the local limits of whose jurisdiction any portion of the property is situated. A. I. R. 1933 Mad. 622=37 L.W. 681=144 Ind. Cas. 202.

——S. 17—Plaintiff's allegation that a portion of property is within jurisdiction of Court—If could be inquired into as a preliminary issue.

When once jurisdiction is vested in a Court, it will not be taken away afterwards, even if it is found that the portion of the property being situated within the local limits of the Court which gave it jurisdiction does not belong to the plaintiff as alleged in the plaint unless the inclusion of that portion is not a *bona fide* one. The trial of an issue as to whether the portion belongs to the plaintiff as alleged as a preliminary point is quite unnecessary and is not warranted by law. Such preliminary point does not raise a question of law only and therefore. O. 14, R. 2 does not apply. 26 N.L.R. 103=124 Ind. Cas. 703=A.I.R. 1930 Nag. 189.

——S. 17—Suit regarding mutawaliship—Jurisdiction of Court.

Although a mutawali of a waqf is not the owner ut the manager and there is an essential difference between the position of a mutawali and that of an owner, yet where the waqf was to be administered as mutawali by the person who was the successor of the waqf, a Court having jurisdiction to try the question as to who the successor of the waqif is has also-jurisdiction to decide as to the mutawaliship of the waqf property. 109 Ind. Cas. 835=A.I.R. 1928 Oudh 67.

——S. 17—Choice under S. 17 when can be utilised.

The choice given by S. 17, can be utilised only if he Code applies to both the Courts. A.I.R. 1936 P.C. 189=1936 O.L.R. 346=1936 A.L.R. 577=2 B. R. 605=17 P.L.T. 461=40 C.W.N. 1061=44 L. W. 88=71 M.L.J. 60=63 C.L.J. 476=38 Bom. L.R. 768=15 Pat. 567=63 I.A. 311=163 Ind. Cas. 49 (P.C.).

——S. 18—Absence of territorial jurisdiction —Interference in appeal.

In view of the provisions of S. 18, C. P. Code, an Appellate Court will not interfere with the proceedings on the ground of the first Court not having territorial jurisdiction unless there was, at the time, no reasonable ground for uncertainty as to jurisdiction and there has been a consequent failure of justice. A.I.R. 1933 Pat. 555 (2)=149 Ind. Cas. 758.

——S. 19—"Business" meaning of.

The business intended by the section is a commercial business and not a business of State or Government. 50 Mad. 449=39 M.L.T. 304=26 M.L.W. 558=105 Ind. Cas. 576=A.I.R. 1927 Mad. 689=53 M.L.J. 355.

——S. 19—"Resides"—Scope of.

The word "resides" must be taken to refer to natural persons and not to legal entitles such as limited companies or Governments. 50 Mad. 449=39 M.L.T. 304=26 M.L.W. 558=105 Ind. Cas. 576=A.I.R. 1927 Mad. 689=53 M.L.J. 355.

——S. 19—Suit on contract of pledge—Cause of action—Determination of.

Section 160 of the Contract Act does not contemplate directions by the pawnor's assignee, but by the pawnor himself about the delivery of the property pawned. The use of the words "without demand" in that section seem to indicate that the directions referred to in it are directions given before the purpose for which the goods were pawned has been accomplished. S. 148, seems to cover the case of directions given after the purpose is accomplished. The directions must be definite and reasonable. It is not open to the pawnor to name any place he chooses for delivery of the goods pledged. The place where the cause of action arises must be determined with reference to the terms of the original contract. 65 Ind. Cas. 65=A.I.R. 1922 Nag. 127.

——S. 19—Option when available.

Where defendant is ordinarily resident in the Punjab but carried on business at Quetta he can be sued in Quetta though the cause of action took place in Persia. 1926 M.W.N. 592=96 Ind. Cas. 887=31 C.W.N. 174=A.I.R. 1926 P.C. 88.

——S. 19—Movable property situated within jurisdiction of Court at D—Jurisdiction to entertain suit in respect of it—Objection in Appellate Court—Failure of justice.

Where the allegation in the plaint is that wrong was done to the plaintiff's movable property deposited in a bank within the jurisdiction of the Court at *D*, by its misappropriation and disposal by a person who had held it for the plaintiff's benefit, S. 19, C. P. Code, will give jurisdiction to the Court at *D*.

In case of a doubt as to whether the Court at *A* or the Court at *D* had jurisdiction to entertain the suit, the objection as to the Court hearing the case cannot be entertained by the Appellate Court unless there has been a consequent failure of justice.

When a suit is instituted in a British Indian Court, that Court must determine whether it has jurisdiction to hear the suit or not, by the aid of the C. P. Code and that Code alone. A.I.R. 1934 All. 226=147 Ind. Cas. 591.

——S. 20.

Synopsis.

Place of suing and cause of action.

1. Accounts—Suits for (See also under PRINCIPAL AND AGENT).
2. Contracts—Suits on and for damages for breach of.
3. Cause of action.
   (a) Meaning of.
   (b) Must be antecedent to suit.
   (c) Assignment of claim — If could give rise to.
   (d) Part of the cause of action.
   (e) Suit against non-resident foreigners.
   (f) Cause of action in particular suits.
4. Debtor and creditor.
5. Decree—Suits to set aside.
6. Defendant resides or carries on business—What amounts to.
   (a) Carrying on business.
   (b) Actually and voluntarily.
7. Jurisdiction.
   (a) How determined.
   (b) Consent—When can cure errors in jurisdiction.
   (c) Errors in.
   (d) In suits against foreigners.
8. Leave to sue—Scope and effect.
9. Particular suits.
   (a) Corporations.
   (b) Copyright.
   (c) Dower debts.
   (d) Ejectment.
   (e) Hiring contract.
   (f) Leases.
   (g) Misappropriation of goods.
   (h) Negotiable Instruments.
   (i) Partnership.
   (j) Policies of Insurance.
   (k) Restitution of conjugal rights.
   (l) Sale of goods.
   (m) Shipping.
   (n) Tort.
   (o) Trade mark.
10. Plaintiff's right to choose forum.
11. Return of plaint.

1. Place of suing—Suits relating to accounts.

——S. 20 (c)—Accounts—Suit against agent by principal—Forum.

The cause of action in a suit for accounts against an agent arises at the place where the contract of agency was made or where it was to be performed and where the refusal to account took place. The fact that the moneys have to be sent from a particular place by the agent does not form a part of the cause of action. 12 Bur.L.T. 198=55 Ind. Cas. 266.

——S. 20—Suit for accounts—Principal and agent—Agency entered into outside British India—Accounts to be rendered there—Suit filed in British India—Jurisdiction.

In a suit by plaintiff on an alleged contract of agency for collection of certain dues at a place in British India while all the parties reside and carry on business out of British India, *prima facie* the British

Court has no jurisdiction and it is for the plaintiff to prove collection at the place in British India as alleged, before the Court would hold that it had jurisdiction. 32 Bom.L.R. 171=54 Bom. 192= A.I.R. 1930 Bom. 150=129 Ind. Cas. 586.

——S. 20 (c)—Suit for accounts—Mutual dealings—Oral settlement of account—If could be cause of action.

In cases of mutual dealings an oral settlement of accounts may give rise to a cause of action. 21 Mad. 366, foll. 16 Mad. 339, diss. 3 L.W. 338= 34 Ind. Cas. 431.

——S. 20—Suit for accounts—Pakka Adatya—Place of contract and of payment not known—Jurisdiction.

Where there is no evidence as to where the contract of pakka adatya agency was entered into and also as to where any money was expressly or impliedly payable in performance of the contract of agency and the contract was to be performed in *A* or the performance thereof was to be completed in *A*, the mere fact that goods to be sold were sent from *B* does not give *B* Court jurisdiction to try a suit for account of the agency transaction. (Case-law discussed.) 30 Bom.L.R. 1391=112 Ind. Cas. 734= A.I.R. 1928 Bom. 548.

——S. 20—Suit for account—Pakka Adhatia—Accounting by—Place of—Nature of liability and forum of suit.

Pakka adhatia probably corresponding to *del credere* agent, that is to say, an agent or factor, who being entrusted with the goods of his principal to dispose of to the best advantage, is in lawful possession of them with a general power to deal with them without reference to his principal, is under an obligation to pay to his principal the amount due after the accounts have been properly settled. Unless the contract clearly indicates the contrary, *pakka adhatia* becomes a factor entrusted with goods of his principal with wide powers and has no doubt under the appropriate section of the Contract Act, eventually to account to his principal but the accounting must necessarily be done at the place where all the business is transacted. 8 A.L.J. 1160, Foll. 46 All. 465=80 Ind. Cas. 661=22 A.L.J. 591=6 L. R.A. Civ. 9=A.I.R. 1924 All. 530.

——S. 20—Suit for accounts—Several accounts in respect of one transaction—Cause of action.

Where several shops were owned by the plaintiffs and separate *Khatas* were kept in respect of them but the transactions relating to one shop were with the defendants' consent entered in the accounts of the other shops and the whole set of transactions were treated by the defendants in a cross suit filed by them as forming one cause of action and one account. *Held*, that the accounts in regard to each shop cannot properly be treated as entirely separate causes of action. A.I.R. 1922 Oudh 124.

——S. 20—Suits for accounts—Nature of—Suit against agent for accounts—Agent residing elsewhere—Cause of action, if arises where principal resides.

The principle that the debtor is bound to seek out his creditor and pay his debt is not applicable in India for the purpose of determining the local jurisdiction of a particular Court. Even assuming that it does apply, it cannot be extended to a case, where the contract itself is not one of loan but one of agency, (*e.g.*), a principal suing the agent for accounts, it cannot be said that the cause of action arises at the place where principal resides. A.I.R. 1940 Mad. 588=1940 M.W.N. 254=(1940) 1 M.L.J. 558= 51 L.W. 747=193 Ind. Cas. 81.

——S. 20—Principal and agent—Agent staying at D and principal at K—Account struck at K by entry in principal's bahi—Suit by agent on entry at D.

The plaintiffs were a firm of commission agents at *D*. The defendants had a shop at *K*. The defendants used to send orders by post to the plaintiffs for supply of goods and in execution of these orders the plaintiffs, from time to time, despatched goods from *D* to *K*. The plaintiff went to the defendants at *K* when the accounts were gone into and an entry was made in the plaintiffs' book that a sum was due by the defendants to the plaintiffs. The plaintiffs brought a suit at *D*:

Held, that the suit had been properly brought at *D*. A.I.R. 1935 Lah. 68=152 Ind. Cas. 802 (1).

——S. 20—Suit for accounts.

Agent suing his principal—Business of the firm at Bombay and firm agreeing to render accounts in Bombay and to make payments in Bombay.

Held, that the whole cause of action arose in Bombay and the Court had the jurisdiction. (1932) 34 Bom.L.R. 1410.

——S. 20 (e)—Agency for collection of outstandings—Suit for accounts—Cause of action.

In the case of an agency for collection of outstandings, with responsibility for accounts and refund, it is the general agency with liability to account and refund the balance, which is the cause of action and not each separate act of payment or collection, and the mere fact that an amount was collected within the jurisdiction of a particular Court cannot, therefore, give that Court jurisdiction to entertain a suit for accounts against the agent. A.I.R. 1930 Bom. 150 =54 Bom. 192=32 Bom.L.R. 171=129 Ind. Cas. 586.

——S. 20—Goods supplied by agent to principal—Recovery of commission—Suit, where should be filed—Part of the cause of action arising at the agent's place.

A firm of commission agents at Shikarpur had their branch at Duzdap. The firm worked as commission agents for another firm of Amritsar. Agent firm gave instructions to their branch at Duzdap to buy goods and forward them to the principal firm on account of agent firm at Shikarpur:

Held, that the agent firm at Amritsar and not its branch had the right to sue for commission for goods supplied and, therefore, this firm could file suit at Shikarpur, where it carried on business and from where it placed the order of the principal firm. A. I.R. 1937 Sind 317=173 Ind. Cas. 62.

——S. 20 (c) (S. 17, Old Code, Expl. 3)—Suit by principal against agent for compensation—No duty of agent to seek out principal for payment.

A suit for compensation which an agent is bound to make to his principal in respect of the direct consequence of his own neglect or want of skill or misconduct, is a suit not "in performance of" but in breach of the contract; and consequently, it is not governed by Cl. 3 of S. 17, C. P. Code. There is

no authority for the position that a party committing a breach of contract should seek the other party to the contract and pay him at his residence compensation or damages for such breach of contract. (1903) 27 M. 355 at 358.

——S. 20—Suit by principal charging agent with misconduct and negligence and for damages—Cause of action.

Where the principal charges the agent with various acts of negligence and misconduct on his part in the conduct of the agency and claims damages from him as resulting from such acts of negligence and misconduct, in such a suit the cause of action arises where the agent committed the alleged acts of negligence and misconduct. 94 Ind. Cas. 287=A.I.R. 1926 Sind 238.

——S. 20—Suit for accounts—Principal against agent—Cause of action—What constitutes.

In a suit for accounts based upon an agency for collection of dues, it is the general contract of agency with liability to account and refund the balance which is the cause of action and not each separatee payment or collection. 13 Bom. 404, Foll. 32 Bom. L.R. 171=54 Bom. 192=A.I.R. 1930 Bom. 150 (2)=129 Ind. Cas. 586.

——S. 20—Suit between principal and agent—Cause of action.

In a suit between principal and agent the cause of action arises where the contract of agency is made or where it was to be performed, and where the refusal to account takes place. A.I.R. 1925 Lah. 387 and 12 Bur.L.T. 198, Foll. 94 Ind. Cas. 287=A.I.R. 1928 Sind 238.

——S. 20—Suit for accounts by principal against agent—Forum.

Suit for accounts of agency is cognizable by Court having jurisdiction at place where agency was or was to be carried on. 11 L.L.J. 282=119 Ind. Cas. 481=A.I.R. 1929 Lah. 605.

——S. 20—Suit for accounts—Agent and principal—Forum.

Defendant was the plaintiff's agent for the sale of the plaintiffs' goods in the district of Meerut: He had to remit sale proceeds to Karachi, to render account of sales every month and to submit a report of stocks of goods. This agreement further specifically stated, that "the agent must submit at the end of each month to the company at Karachi" a certified statement detailing the property of the company and it contained the clause that all legal proceedings are to be instituted in Karachi.

Held, that the clauses relating to payment, accountability, reporting or jurisdiction in the agreements should be read together and the Court in Karachi had jurisdiction. A.I.R. 1929 Sind 227.

——S. 20—Suit for accounts—By principal against Commission agent—Place of.

A suit by a principal against a commission agent who has agreed to execute an order placed with him by correspondence must be instituted at the place where the commission agent carries on his business and the principal cannot sue him at the place from where he sent the order. 76 P.R. 1896; 1 Lah. 203 and A.I.R. 1924 Lah. 593, Foll. 9 Lah. 455=10 L.L.J. 87=29 P.L.R. 406=109 Ind. Cas 28=A.I.R. 1928 Lah. 297.

——S. 20—Suit for accounts—Suit by principal against commission agent.

A Court, having jurisdiction at the place where, in compliance with the orders of the principal, the commission agent works, is competent to entertain a suit for balance of accounts by the agent against his principal. 92 Ind. Cas. 273=A.I.R. 1926 Lah. 287.

——S. 20—Suit for a accounts by Principal against agent—Forum.

The cause of action in a suit for accounts against an agent arises at the place where the contract of agency was made or where it was to be performed and where the refusal to account took place. The plaintiffs were grain dealers at *S*. The defendants were commission agents doing business at *K*. The plaintiffs sent goods to the defendants at *K*. They accepted the plaintiffs' drafts, paid money at their request and having sold the goods credited the amount realised to their account. The plaintiffs instituted the suit on the following allegations.

That there were mutual dealings between the plaintiffs and the defendants and that the latter received from the plaintiffs by way of loan Rs.....out of which they paid Rs.....leaving a balance of .....due to the plaintiffs. They further claimed a sum of Rs.....on account of the profits of the grain transactions.

Held, that it was a suit for an account by a principal against an agent and that the Court at *S*. had no jurisdiction to try the suit but that only the Court at *K*. had the jurisdiction. (Case-law discussed). 6 Lah. 153=88 Ind. Cas. 950=7 L.L.J. 562=26 P.L.R. 305=A.I.R. 1925 Lah. 387.

——S. 20—Suit for accounts by principal against agent—Forum.

In the absence of an agreement to the contrary, or of special circumstances showing a different intention, the principal cannot, where agent carries on business elsewhere call upon him to render an account at his own place of business, on the ground that the money or goods were sent to the agent from such place. 76 P.R. 1896, Foll. 75 Ind. Cas. 849 =A.I.R. 1924 Lah. 593.

2. Place of suing—Suit on contracts.

——S. 20 (c)—Scope—Cause of action arising wholly or in part—Test—Suit on contract—Place where cause of action arises.

Although Expl. 3 to S. 17 of the Code of Civil Procedure of 1882 corresponding to S. 20 of the present Code of 1908, has been omitted as no longer necessary in view of the wide ambit of Cl. (c) of the present S. 20 of the Code, it is nevertheless a correct statement of what is still the law. Accordingly in suits arising out of contract the cause of action arises at any of the following places, *viz.*, (1) the place where the contract was made; (2) the place where the contract was to be performed or performance thereof completed; (3) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable. Where an agent in Madras to whom goods were sent from Rajahmundry for sale on commission undertook to pay the net sale value to the owner on the third day after the transaction closes, there is by necessary implication an agreement to make the payment of the money due to the owner of the goods at Rajah-

mundry. 226 Ind. Cas. 133=1946 M.W.N. 20=A.I.R. 1946 Mad. 300=(1946) 1 M.L.J. 11.

——S. 20—Suit on contract—Forum.

The cause of action in suits arising out of a contract arises at the place where the contract was made or the place where the contract was to be performed or performance completed or at the place where in performance of the contract any money to which the suits relate was expressly or impliedly payable. 7 N.L.J. 25=83 Ind. Cas. 309.

——S. 20 (c)—Contract—Forum.

In suits on contracts though the place where the contract was made is not within the jurisdiction of the Court, the Court still had jurisdiction if the place where the contract was to be performed or where in its performance the money to which the suit relates was expressly or impliedly payable is within the jurisdiction of the Court. (1917) 3 U.B.R. 38=44 Ind. Cas. 609.

——S. 20—Acceptance of offer by post—Cause of action arises at place where letter of acceptance is posted.

In a suit for damages for a breach of a contract, a Court has jurisdiction if any part of the cause of action arose within its territorial jurisdiction. The term "cause of action" is difficult to define, but it does consist of that bundle of rights which, taken together, give the plaintiff a right in a suit to recover damages for breach of contract.

To succeed in a claim for damages for breach of contract, the contract must first be established and that can only be established by proof of an offer and an acceptance. But there is no effective offer until it has been received by the addressee. The moment the letter of acceptance is posted by the addressee in the post-box at the place where he received the letter of offer, the contract is concluded and the complete contract has come into existence. Thus mere receipt of the acceptance letter does not form part of the cause of action for the suit for damages for breach of the contract. A.I.R. 1945 Lah. 260=47 P.L.R. 277=221 Ind. Cas. 594.

——S. 20—Cause of action—Suit for damages lies where breach takes place or performance is completed or money is paid.

Even where a breach of a contract takes place outside a certain place still if the contract is to be performed or its performance is completed within that place or money is payable in that place in performance of the contract a suit for recovery of damages for breach of that contract will be filed in a Court within the jurisdiction of which that place is situated. 76 Ind. Cas. 353=A.I.R. 1924 Sind 64.

——S. 20 (c)—Breach of contract—Suit for damages—Contract by correspondence.

Where the proposal and acceptance are made by letters, the contract is made at the time and at the place where the letter of acceptance is posted, though the contract is revocable before the acceptance reaches the proposer. Jurisdiction is determined by the place where the contract is made or in other words, where the cause of action arises. 57 Ind. Cas. 636 (N.)=17 N.L.R. 1.

——S. 20 (c)—Breach of contract—Cause of action—Place of offer.

In a suit upon a contract the offer is a part of the cause of action and the suit can be instituted in the Court within whose jurisdiction the offer is made. In determining where the offer was made, the Court should look to the place where the final offer was made and not to the place where some preliminary negotiation only had taken place. 10 L.W. 445=54 Ind. Cas. 260.

——S. 20 (c)—Suit for damages for breach of contract—Jurisdiction at place where contract had to be performed in part—Cause of action.

A suit for breach of contract can be filed at any place where the contract should have been performed in whole or in part. A suit for damages for breach can be filed at the place either where the goods were deliverable or the price payable. Part of the cause of action arises where the price is to be paid. 230 Ind. Cas. 185=A.I.R. 1947 Mad. 83=59 L. W. 531=1946 M.W.N. 628=(1946) 2 M.L.J. 255.

——S. 20—Suit for breach of contract—Renunciation or disclaimer of contract communicated by post—Jurisdiction of Court at place of communication.

It must be assumed that an offer is made, not at place where, if it is made by letter, the letter is put into the post, but at the place where the letter is delivered. Similarly, the acceptance of an offer takes place at the place where the acceptance is communicated. The post office is the agent of the sender of the letter or telegram and not the agent of the addressee. That being so, it is logical and reasonable to assume that when there has been a renunciation or disclaimer of a contract, the renunciation or disclaimer takes place when and where it is communicated to the other party to the contract.

The disclaimer or renunciation of the contract is clearly a material fact which the plaintiff has to establish in a suit for damages for breach of contract and therefore part of the cause of action. The Court at the place where the disclaimer or renunciation is communicated has, therefore, jurisdiction to try the suit. 25 P. 292, foll. 27 Pat. 723=A.I.R. 1949 Pat. 270.

——S. 20 (S. 17, Old Code, Expls. 2, 3)— 'Place where the contract was made'. (1902) 28 M. 19.

See also (1901) 7 C.W.N. 812: (1901) 27 M. 355 at 359; (1903) 32 C. 884; 6 A.L.J. 213; 10 Bom.L.R. 1230=33 B. 364.

——S. 20 (c)—Breach of contract—Proposal and acceptance.

In the case of a proposal made from Karachi and accepted at Calcutta, the cause of action for breach of the contract arises at Calcutta. 12 S.L.R. 93=50 Ind. Cas. 146.

——S. 20—Place of suing—Contract by correspondence—Part of contract taking place at Y—Y Court has jurisdiction.

Where it appeared from the correspondence that the plaintiff had informed the defendants that he had a particular item of work to be done in Bombay and asked on what terms the defendants were prepared to do that work and the defendants seemed to have expressed their willingness to do that work on the terms given in their letters with a view to the plaintiff assenting to that work being done on those terms by them,

Held, that the contract, which is a part of the cause of action, was thus formed at Yeotmal, the plaintiffs' place, and the Court at Yeotmal had jurisdiction to try the suit. 72 Ind. Cas. 465=A.I.R. 1923 Nag. 167.

——S. 20—Suit on contract—Causee of action.

Where the contract was made in Bengal and the goods were to be sent to Bengal and the only thing done in Azamgarh was that the goods were despatched from Azamgarh, it cannot be said that the cause of action wholly or in part arose in Azamgarh. 66 Ind. Cas. 501=A.I.R. 1922 All. 448.

——S. 20 (c)—Breach of contract—Delivery of goods—Goods despatched by value payable post—Ownership during transit.

Held, that as the performance of the contract was to be completed by delivery of the goods at *K* and the payment by the plaintiff was to be made at *K* a part at least of the cause of action accrued at *K* and the Kasganj Court has jurisdiction to entertain the suit. 2 U.P.L.R. (All.) 254=18 A.L.J. 749 =59 Ind. Cas. 359.

——S. 20 (c)—Contract—Cause of action—Consigning of goods for sale on commission—Price to be remitted by hundi.

S a merchant at Negapatam consigned goods to *M* at Penang for sale on commission, on condition that *M* should remit the proceeds by sending to *S*, at Negapatam Hundials drawn on some firm in the Madras Presidency. On *M's* failure to pay as aforesaid *S* brought a suit against *M* in the Negapatam Court. *Held,* that the Court at Negapatam had jurisdiction to entertain the suit, because *M* accounted for the sale proceeds by making payments through the agency of some person or persons in Negapatam and other places in the Madras Presidency on whom the Hundials were to be drawn. 11 L.W. 593= 56 Ind. Cas. 604.

——S. 20—Suit on breach of contract—Forum —Part of the cause of action.

Certain contracts for goods were executed at Peshawar and both the parties had their places of business there but one of them had also a branch office in Karachi. The payment for the goods was to be made in Peshawar. Property in the goods passed under the terms of the contract to the applicants as soon as they arrived in the Karachi Harbour and the responsibility for any loss or damages to the goods was entirely theirs from that moment.

Held, that the parties contemplated the performance of the contracts in Karachi, a part of the cause of action therefore arose in Karachi. 17 S.L.R. 164=83 Ind. Cas. 539=A.I.R. 1924 Sind 29.

——S. 20 (c)—Contract—Purchase of goods at one place to be delivered at another.

In a contract for the sale of goods, payment for, and delivery of the goods, was to be made at a place other than the place where the purchase was effected. *Held,* that a suit on account of non-delivery of a portion of the goods may be brought in a Court having jurisdiction over the place where delivery and payment were to be made. 42 All. 480=2 U.P.L.R. (All.) 126=18 A.L.J. 566=56 Ind. Cas. 192.

——S. 20 (c)—Breach of contract—C.I.F.—Contract for sale of goods—Breach—Claim for damages—Jurisdiction.

Plaintiff, a trader at Nagapatam, offered to buy timber from defendant at Mandalay. Under the contract defendant shipped the timber from Mandalay, took the bills of lading in his own name and drew from a bank at Mandalay such sums of money as were due to him in respect of timber shipped, by handing over the bills of lading to a bank at Mandalay who in their turn passed it on to the plaintiff. The defendants made default in sending timber and plaintiff sued for damages. *Held,* that no part of the cause of auction for the suit arose at Nagapatam and the Negapatam Court had no jurisdiction to try the case. 37 M.L.J. 712=26 M.L.T. 504=54 Ind. Cas. 550.

——S. 20 (c) and O. 7, R. 10—Contract—Offer and acceptance by wire—Suit for damages—Forum.

Plaintiff a trader at *L*, sent an order by telegram to defendants residing and carrying on business at *B*, to purchase cotton seeds on his behalf. Defendants wired back agreeing to do so. But they sent only a part as the price had risen up in the meanwhile. The plaintiffs brought a suit for damages for non-delivery. *Held,* that the contract must be taken to have been made at *B*, where defendants carried on their business and where they received plaintiff's telegram and that the Court at *L* had no jurisdiction to entertain the suit. 76 P.R. 1816, foll. 53 Ind. Cas. 331=1 Lah. 203=51 P.L.R. 1920=2 U.P.L.R. (Lah.) 178=86 P.W.R. 1920.

——S. 20 (c)—Contract—Breach—Suit for damages—Court situate in place of revocation of contract—Jurisdiction of.

There can be no doubt that the revocation of a contract is part of the cause of action in a suit for damages for breach of the contract and therefore the Court at the place where the contract was revoked has jurisdiction to entertain and try such suit. 25 Pat. 292=A.I.R. 1947 Pat. 134=231 Ind. Cas. 10.

——Ss. 20 (c) and 21 and 115—Contract—Suit on—Forum—Objection to—Revision.

A contract is made where it is accepted and the buyer at Agra cannot sue at Agra for breach of a contract to self goods concluded by acceptance at Delhi. 41 All. 602=17 A.L.J. 718=1 U.P.L.R. (H.C.) 120=51 Ind. Cas. 331.

——S. 20 (c)—Breach of contract—Damages—Forum.

An action or damages for breach of contract for carriage of goods by a Railway can be brought either where the breach was committed or where the contract was made. 43 P.W.R. 1919=50 Ind. Cas. 139.

——Ss. 20 (c) and 21—Breach of contract—Contract for supply of goods—Breach of—Usurpation of jurisdiction.

Defendants entered into a contract with the plaintiff, at Kumbakonam for the supply of certain articles. Plaintiff sent the articles ordered with other rticles which were not ordered. Defendants reurned all the goods. Plaintiff instituted a suit at Kumbakonam for the value of the articles ordered nd sent and also of the other articles on the ground hat they were negligently re-transmitted causing loss o plaintiff. *Held,* the cause of action for the suit rose at Kumbakonam, the place where the proposal o supply goods was accepted by the plaintiff. S. 21, C. P. Code, does not apply to the usurpation of the urisdiction of a foreign Court. (1918) M.W.N. 78=24 M.L.T. 95=45 Ind. Cas. 779.

——S. 20—Suit for damages for breach of contract—Forum of.

Contract to supply goods—Breach—Suit for damages at place where price was payable is maintainable. 89 Ind. Cas. 181=A.I.R. 1925 Nag. 408.

——S. 20—Suit for damages for breach of contract.

In a suit for damages on a breach of contract the cause of action consists of the making of the contract and of its breach in a place where it ought to have been performed; thus where the contract was to be completed at Karachi though made elsewhere, suit for damages can lie in Karachi. 19 S.L.R. 207 =79 Ind. Cas. 30=A.I.R. 1925 Sind 132.

——S. 20—Suit on contract after acceptance—Suit—Forum of.

Where plaintiffs from Ludhiana asked defendants at Gonda for quotations and terms and the defendants by post-card sent their terms and asked the plaintiffs to wire if they wanted goods and the plaintiffs did so. *Held,* the post card was only an invitation for an offer in the same way as a catalogue of goods sent out by any shop or business firm and not a proposal within the meaning of the Contract Act. The contract was completed at Gonda where the proposals were received by the wire acceptance signified and therefore the suit on the contract was cognizable not by the Ludhiana Court but by the Gonda Court. 4 Lah.L.J. 176=65 Ind. Cas. 282=29 P.L.R. 1922 =A.I.R. 1922 Lah. 100.

——S. 20—Suit on contract—Forum of.

Where payment was according to the contract to be made in one place but was made in another owing to the plaintiff's own default, advantage cannot be taken of the fact to give him a choice of jurisdiction. 17 P.L.R. 1922=64 Ind. Cas. 387=A.I.R. 1921 Lah. 213.

——S. 20 (c)—Contract—Suit on—Breach—Performance.

A suit for damages on a breach of contract can be instituted in a Court where the contract was made though it has to be performed elsewhere. 26 P.R. 1918=114 P.L.R. 1918=44 Ind. Cas. 863.

——S. 20 (c)—Breach of contract—Contract of sale—Accounts—Place of.

Where the plaintiff to give jurisdiction to the Court in which the suit was filed alleged that by the custom of trade and by the contract between the parties, accounts were to be submitted within the Court's jurisdiction and let in no evidence on these points. *Held,* the Court had no jurisdiction to entertain the suit. 40 Ind. Cas. 505 (All.).

——S. 20 (c)—Contract—Place of suing—Place of delivery—Whether part of contract of sale of goods—Suit for damages—Jurisdiction.

Where a contract for sale of goods was entered into at Bombay, the seller being directed to send the goods to buyer's address at Allahabad, and the buyer finding the goods defective and not answering to samples ordered, when they arrived at Allahabad, sued the defendant for damages at Allahabad. *Held,* that the order of the Allahabad Court in returning the plaint without taking any evidence is not proper and the Judge at Allahabad should have taken evidence as to whether the place of delivery was an essential part of the contract or not under S. 48 of the Contract Act. 39 All. 368=15 A.L.J. 342=39 Ind. Cas. 524.

——Ss. 20 (c) and 21—Breach of contract—Betrothal—Court's jurisdiction.

A Court is competent to try a case of breach of contract of betrothal when the breach took place within its jurisdiction, irrespective of the defendants residing in another place, the rule of law being that the Court within whose jurisdiction a cause of action arises wholly or partially is competent to try it. 93 P.R. 1916=37 Ind. Cas. 114.

——S. 20 (c)—Breach of contract—Place of acceptance different from place of drawing—Suit against acceptor lies in the place where the drawing took place.

A suit on a Hundi dishonoured after acceptance against the drawer and acceptor is brought in the proper *forum* if instituted in the Court having jurisdiction at the place of drawing. The cause of action against both the defendants (drawer and acceptor) arose at the place where the original contract was made by the drawing of the Hundi. 3 O.L.J. 132 =34 Ind. Cas. 191.

——S. 20 (c)—Contract—Suit for price of goods.

Where the buyer and the seller reside in different jurisdictions, the cause of action for a suit by the seller or balance of accounts due from the buyer arises at the place of consignment of the goods to the railway. (1914) M.W.N. 803=24 Ind. Cas. 423.

——S. 20—Sale of goods—Order obtained at T—Goods despatched from D—Suit for price—Jurisdiction of Court at D.

The plaintiffs were a firm of merchants in Delhi while the defendants had a shop at Yeola in the Nasik District. An agent of the plaintiffs obtained at Yeola an order from the defendants for some articles. This order, which was signed by the defendant and the agent, specified that the goods were to be sent direct, and not by V. P. P. *Held,* that the case fell within the jurisdiction of the Delhi Court as the goods were admittedly made over to the Railway Company in Delhi and the provisions of S. 39 of the Indian Sale of Goods Act were applicable to the case. A.I.R. 1934 Lah. 44=144 Ind. Cas. 828.

——S. 20 (c)—Breach of contract—No place fixed for performance of contract.

If an agreement to pay money is to be performed without demand by the creditor and no place is fixed for performance it is open to the creditor to fix a reasonable place and he can sue at the place where he resides. 6 S.L.R. 181=19 Ind. Cas. 433.

——S. 20 (c)—Breach of contract—Indent form specifying place for settlement of disputes.

Where an indent form provides that all disputes in connection with the indent are to be settled in a particular place the Civil Court of that place will have jurisdiction to try such a dispute. 96 P.L.R. 1913=65 P.W.R. 1913=18 Ind. Cas. 496.

——Ss. 20 (c) and 21—Breach of contract—Supply of goods—Forum.

Where under a contract, goods were deliverable at *D*, the *D* Court has jurisdiction to try a suit for damages for breach of the contract, though entered into at *L*. An objection as to the place of suing is entertainable only where there has been consequent failure of justice. 45 P.L.R. 1913=40 P.W.R. 1913=18 Ind. Cas. 130.

——S. 20 (c)—Breach of contract—Place where contract made.

A suit on a contract can be filed at the place where the contract was made. 233 P.L.R. 1912= 111 P. R. 1912=224 P.W.R. 1912=15 Ind. Cas. 12.

——S. 20 (c)—Breach of contract—Place of suing—Contract to be performed at a certain place.

Where a contract was to be performed at a certain place the Court of that place has jurisdiction to entertain a suit for damages for breach of contract. 16 C.W.N. 325=13 Ind. Cas. 943.

——S. 20 (c)—Contract—Suit for damages arising out of negligence or misconduct.

The plaintiff a resident of Hathras in the Aligarh District telegraphed to the defendant a Commission Agent at Karachi to buy some grain for him and despatch it by rail to Hathras and the defendant purchased the grain and despatched it as directed from Karachi but omitted to send the Railway receipt and invoice in time owing to which and other misconduct on his part at Karachi the grain was delivered to the plaintiff late, and thus caused him loss and damage. In a suit by the plaintiff for compensation at Hathras, *Held*, the cause of action arose at Karachi as the Agent's negligence or misconduct occurred there, and the Court at Hathras could not entertain a suit. 34 All. 49=8 A.L.J. 1160=11 Ind. Cas. 712.

——S. 20 (c)—Breach of contract—Forum.

The defendant entered into a contract at Multan for supply of goods to plaintiff to carry on business at Karachi. The goods were not ascertained at the time of the agreement. Defendant agreed to deliver the goods to the plaintiff's. Agent at Multan or to send them direct to Karachi. The goods were to be forwarded to Karachi at defendant's risk and the goods had to be tested, accepted or rejected by the plaintiff at Karachi. *Held*, that the Karachi Court could entertain an application for filing an award based on submission contained in the contract. 4 S. L.R. 20=7 Ind. Cas. 593.

——S. 20 (c)—Contract—Award—Filing of.

A Karachi Court can entertain a suit to file an award based on a contract entered outside Karachi, whereby the goods purchased are examined and passed as to quality, weight, condition, and admixture, in Karachi. 3 S.L.R. 164=4 Ind. Cas. 1151.

——S. 20 (c)—Breach of contract—Suit for—Forum.

Where a plaintiff residing in one district, on receiving a catalogue from the defendant's company in Bombay sent an order for a machine which was accepted in Bombay; *held*, that the cause of action for the plaintiff for breach of contract and damages arose at Bombay where the plaintiff's offer was accepted. 12 O.C. 17=1 Ind. Cas. 325.

——S. 20 (c)—Contract—Breach—Forum.

A Court at Aligarh has no jurisdiction to entertain a suit brought on a contract, the proposal for which was made from Aligarh but was accepted in Calcutta. 6 A.L.J. 213=1 Ind. Cas. 77.

——S. 20—Suit on contract—Acceptance of offer by post—Cause of action arises at the place where letter of acceptance is posted.

A contract is made at the place where the offer is accepted. An offer when accepted by post is accepted at the place where the letter of acceptance is posted and, therefore, the cause of action for a suit based on such a contract arises at the place where the letter of acceptance is posted and not at the place where it is received. A.I.R. 1943 Mad. 471=56 L.W. 242=(1943) 1 M.L.J. 353=1943 M.W.N. 325=I.L.R. (1944) Mad. 95=210 Ind. Cas. 580.

——S. 20—Contract of purchase of goods—Owner consignor and consignee—Consignment at owner's risk—Place of delivery.

Where the goods were sent by the railway, the consignor and the consignee were both the owner and the goods were sent at owner's risk:

Held, that the place of delivery was the place to which the goods were sent. A.I.R. 1942 Lah. 252 =44 P.L.R. 428=202 Ind. Cas. 449.

——S. 20 (c)—Suit on contract—Offer made and accepted through post.

Although an acceptance is complete as against the proposer as soon as the letter containing it is posted it is a continuing act until it reaches the persons to whom it is communicated and may thus be taken to be made also at the place where it is received. Where therefore, an offer is made and accepted through post, a part of the cause of action arises where the letter accepting the offer is posted and a part where it is delivered. A.I.R. 1942 Mad. 13=I.L.R. (1942) Mad. 243=54 L.W. 345=1941 M.W.N. 838=(1941) 2 M.L.J. 481=201 Ind. Cas. 176.

——S. 20 (c)—Suit for damages for breach of contract—Contract made at F agreed to be performed at B—Accounting in relation to contract to take place at F—Breach of contract—Court at B held had jurisdiction to entertain suit for damages.

The cause of action in a suit for damages for a breach of contract arises either at the place where the contract was made, or at the place where the contract was agreed to be performed, or the place where the money was agreed to be paid or where the breach of contract actually took place.

A clause relating to the accounting obviously refers to the final adjustment between the parties in the event of the contract having been performed but if the defendants committed a breach of the contract, the condition regarding the adjustment of the counts never came into operation and the Court where the contract was agreed to be performed had jurisdiction to entertain the suit for damages for breach of the contract. A.I.R. 1942 Oudh 250=17 Luck. 733=1942 O.W.N. 56=199 Ind. Cas. 446.

——S. 20—Contract to be completely carried out at C and payment to be made there—Casual variation, if implies that contract was something different.

Where the plaintiff by his own witnesses proved that the contract was to be completely carried out in Calcutta some casual variations from the rule that payment was to be made by *hundi* which was to be cashed in Calcutta cannot be taken as implying that the original contract was something more than the plaintiff himself makes out. A suit by the plaintiff for the recovery of the amount due under the contract must be instituted at Calcutta and not at the place where he resided. A.I.R. 1939 Pat. 140=179 Ind. Cas. 128.

——S. 20 (c)—Commission agency business—Suit by principal against agent—Forum.

In a suit brought by a principal against an agent in the case of a commission agency business under Cl. (c) of S. 20, C. P. Code, the suit can be brought either where the contract was made or where the accounts are to be rendered and payment is to be

made. A.I.R. 1936 Rang. 251=163 Ind. Cas. 397 (2).

——S. 20 (c)—Suit, if can be filed where part of cause of action arises.

The breach of a contract occurs in the place where it has to be performed. Consequently when a suit is brought, on the breach, the place of performance is a place where part of the cause of action arises. A.I.R. 1935 Bom. 283=37 Bom.L.R. 357=59 Bom. 365=157 Ind. Cas. 248.

——Ss. 20, 21—Contract to deliver at a certain place—Breach of—Forum of suit.

Where the parties to a contract agree that the delivery is to be made at a particular place then a cause of action would arise there in part at least, because under the terms of the contract it is the place where a part of the contract is to be performed. And if owing to the action of the buyer the seller is unable to perform the contract at the place agreed upon, he will have a right to institute his suit there. A.I.R. 1934 All. 740=56 All. 828=1934 A.L.J. 1093=153 Ind. Cas. 824.

——S. 20—Contract entered into at A—Delivery to be made and margin money to be paid at B—Contract to be governed by rules of Association at B—Suit for money based on contract.

Where according to a contract entered into at *A*, the delivery of goods was to be made at *B* and the margin money was also to be paid at *B*, and it was provided in the contract that it was to be governed by the rules and regulations adopted by the Sugar and Grain Merchants' Association at *B*:

Held, that the Court at *B* had jurisdiction to entertain and decide a suit for money based on the contract. A.I.R. 1933 Lah. 599=145 Ind. Cas. 464.

——S. 20 (c)—Contract—Deposit—Cancellation of contract—Suit for damages for breach and to recover deposit—Jurisdiction—Residence of persons making deposit—Debt for money received.

A and *B* who carried on a business at *S* entered into an agreement with *C* who carried on business at *M* under which *C* agreed to employ *A* as their sole agent to canvass orders for them in certain places round about *S*. The agreement was entered into at *M*. Subsequently on *C* cancelling the agreement, *A* sued for damages for breach of the agreement and for the recovery of a sum of money which under the agreement the plaintiff *A* had deposited with *C*.

Held, that although the contract was made at *M* even assuming that the breach took place at *M* because the letter cancelling the agreement was sent from *M*, the contract was intended to be performed within the jurisdiction of the Court at *S* and hence that Court had jurisdiction to try the suit.

Held, also that the deposit being debt for money received, the defendants were bound to return the amount to the plaintiffs at *S* and hence the Court at *S* had jurisdiction to try the suit. A.I.R. 1933 Bom. 179=57 Bom. 306=35 Bom.L.R. 168=143 Ind. Cas. 335.

——S. 20—Suit on contract—Place where breach occurred—Forum of.

According to S. 20 (c), C. P. Code, a suit can be instituted in a Court within the local limits of whose jurisdiction the cause of action wholly or in part arises. In a suit for damages for breach of contract, the cause of action consists of making of the contract and of its breach and the suit may be filed either at the place where the contract was made or at the place where it should have been performed but the breach occurred. A.I.R. 1932 Sind 9=26 S.L.R. 167=139 Ind. Cas. 114.

——S. 20 (c)—Posting of offer—Part of cause of action, if arises at the place of posting. 1947 A.L.J. 193=A.I.R. 1947 A. 337=I.L.R. (1947) A. 44.

——S. 20—Suit for damage done in Persia, defendant, carrying on business at Quetta though resident in Punjab can be sued at Quetta.

Where defendant is ordinarily resident in the Punjab but carried on business at Quetta he can be sued in Quetta though the cause of action took place in Persia. 1926 M.W.N. 592=96 Ind. Cas. 887=31 C.W.N. 174=A.I.R. 1926 P.C. 88.

——Ss. 20 and 21—Place of suing—Suit in respect of contract—Terms of business—Condition regarding forum—Strict construction.

Where one of the conditions of the business was that any legal proceedings in respect of or arising out of the contract should be instituted in the Madras Courts, but in respect of the suit transaction there was no completed contract but merely an offer from one side.

Held, that the condition as to place of suing did not apply. When parties enter into an agreement restricting their rights to institute suits except in particular Courts it must be strictly proved that the restriction applies to the particular proceeding instituted. 230 Ind. Cas. 228=A.I.R. 1947 Mad. 99=59 L.W. 551=1946 M.W.N. 639=(1946) 2 M.L.J. 270.

3. Place of suing—Cause of action.

——S. 20—Cause of action—Meaning of.

Cause of action means 'that bundle of facts which it is essential for the plaintiff to prove before he can succeed in a suit' or rather 'that bundle of necessary facts, in the absence of which plaintiff must necessarily fail'. (1905) 8 Bom. L. R. 56 at 67=30 Bom. 364.

——S. 20—Cause of action—Definition.

Cause of action means the bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the case. (1904) 7 Bom.L.R. 20=29 Bom. 368.

——S. 20—Cause of action—Definition of.

A plaintiff's cause of action is every fact which a plaintiff must prove to support his case. A cause of action arises when a legal right is infringed. It is the right combined with all the particulars that go to make the infringement which constitutes the cause of action. (1901) 6 C.W.N. 585 at 588.

——S. 20—Cause of action, meaning of.

The words 'cause of action' in S. 20, include every fact which it would be necessary to prove, if traversed, in order to enable a plaintiff to sustain his action. A.I.R. 1937 All. 208=1937 A.L.R. 265=1937 A.L.J. 98=I.L.R. (1937) All. 234=167 Ind. Cas. 897.

——S. 20 (c)—Cause of action—What comprises.

The term "cause of action" comprises every mate-

rial fact to be proved and includes an assertion of the right infringed and the manner of its infringement. 1 O.L.J. 561=26 Ind. Cas. 225.

——S. 20—Cause of action—Meaning of.

"Cause of action" is a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the case. It has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. A.I.R. 1942 Cal. 99=I. L. R. (1941) 2 Cal. 477=74 C.L.J. 13=45 C.W.N. 932 =199 Ind. Cas. 486.

——S. 20—"Cause of action"—Meaning of, in reference to contracts of insurance.

For the purposes of S. 20 of the Code, the words "cause of action" so far as suits on contract are concerned include the making of the contract and the performance or completion of performance of the contract and the payment of money under the contract, and in cases based on contract of insurance they do not include the loss or damage of the property insured, which is merely a cause of the cause, the real cause of action is the failure to pay the money due under the contract and the primary cause of that cause is the contract itself, the destruction of the property being only a secondary cause which is purely accidental being due merely to the nature of the particular kind of contract under consideration. The meaning of the expression "cause of action" in the section in question, when applied to suits based on contract, should be ascertained by a consideration of the meaning of the expression in the past, in the course of the development of such legislation in India and the case-law thereon, and not by reference to any English decision on the construction of any English Statutes. 1 Rang. 231=76 Ind. Cas. 482=A.I.R. 1924 Rang. 2.

——S. 20—Cause of action—What constitutes.

Every fact which, it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court, is plaintiff's cause of action. 8 O.L.J. 650=65 Ind. Cas. 452= A.I.R. 1922 Oudh 109.

——S. 20—Cause of action—What is.

Cause of action includes every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. *Read* v. *Brown* (22 Q.B.D. 128) and *Cooke* v. *Gill* (L. R. 8 C. P. 107), Foll. 14 M. L.W. 341=70 Ind. Cas. 284=A.I.R. 1921 Mad. 664.

——S. 20 (c)—Cause of action—What is.

The cause of action has no relation to the defence set up or to the character of the relief prayed for in the plaint but refers to the Media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. 46 Ind. Cas. 913 (N.).

——S. 20 (c)—Cause of action—What is.

The expression "cause of action" means every fact necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the Court. 39 All. 506=15 A.L.J. 557=41 Ind. Cas. 233.

——S. 20 (c)—Cause of action—Meaning of.

The expression "cause of action" in S. 20 (c) means the cause of action as it was at the time when the right to sue arose for the first time. 31 M.L.J. 816=5 L.W. 246=37 Ind. Cas. 681.

——S. 20 (c)—Cause of action—What is—Forum.

A cause of action consists of every fact which is material to be proved to entitle a plaintiff to succeed, every fact which the defendant would have a right to traverse. It arises in "part" within the jurisdiction of a Court, if any fact material for the plaintiff to prove took place therein. A trader entered into a contract at Multan with the agents of a Karachi Firm. The contract was to be completed in Karachi and the money was made payable at Karachi. *Held*, that the cause of action arose in part in Karachi and that the Karachi Court has jurisdiction to file an award based on a reference contained in the contract. 8 S.L.R. 107=27 Ind. Cas. 129.

——S. 20 (c)—Contract—Suit on—Cause of action.

A Court within whose jurisdiction the defendant does not reside and no part of the contract was entered into, cannot entertain a suit on the contract. 9 Ind. Cas. 824 (All.).

——S. 20—Suit for damages—Forum of.

Plaintiff was employed by the defendant to sell his goods at *M*. The defendant was not to sell the goods in the are a allo.ted to the plaintiff. Defendant sold goods at *M* in contravention of the terms.

Held, that *M* Court has jurisdiction to try a suit for damages. A.I.R. 1921 Mad. 664, Foll. 103 Ind. Cas. 37=A.I.R. 1927 Mad. 1150.

——S. 20—Cause of action.

Cause of action must be antecedent to the suit and so no cause of action can be founded on any allegations made in the proceedings. 50 C.L.J. 328= A.I.R. 1929 Cal. 830.

——S. 20—Cause of action—Assignment of claim —Jurisdiction of Court where assignment takes place.

A "cause of action" includes every fact necessary to be proved in order to enable the plaintiff to sustain his action and everything which if not proved gives the defendant an immediate right to judgment. An assignment of a claim whether voluntary or by virtue of adjudication of the person in whom that claim resides forms a part of the cause of action in a suit in respect of that claim and the Court within whose limits the said assignment takes place can entertain the suit. 20 S.L.R. 209=89 Ind. Cas. 493 =A.I.R. 1926 Sind 31.

——S. 20—Assignment—Cause of action.

Assignment in Calcutta but defendant contracted outside jurisdiction of original side of High Court of Calcutta—Assignment is part of cause of action and upon it leave under Cl. 12, Letters Patent (Calcutta) is invariably granted. The Court will not be justified on a mere suspicion that the assigner might not have acted in the ordinary way of business in depriving the plaintiff of the right to bring a suit in the place where the assignment was made. A.I.R. 1934 Cal. 175=37 C.W.N. 1139=148 Ind. Cas. 442.

——S. 20 (b), (c)—Scope of—Bona fide voluntary assignment—Whether affords cause of action to assignee—Cause of action, interpretation of.

A *bona fide* voluntary assignment affords a valid cause of action to the assignee to sue his assignor and the original debtor or either of them in the Court within whose jurisdiction the assignment is made.

An application for leave under S. 20 (b) was made with respect to certain defendants not residing within the territorial limits of the Court, after the passing of the judgment on a preliminary issue but before the plaint was ordered to be returned for presentation to the proper Court. The lower Court declined to grant leave on the ground that the application for leave should have been made before he had decided the preliminary issue:

Held, that S. (*b*) was not limited to the ground stated by the lower Court and that the lower Court had failed to exercise its discretion in the case which was a fit one for the exercise of such discretion. A. I. R. 1933 Sind 179=27 S.L.R. 230=145 Ind. Cas. 706.

——S. 20—Suit on Contract—Part of the cause of action.

A suit was brought in the Court at *B* for the recovery of price of tendu leaves supplied by *P* to *D* at *B*. *D* made the contract of sale at *B* but expressly agreed that *P* shall receive the price of leaves at *C*. It was contended that the only Court having jurisdiction was the Court at *C* because the suit was for the performance of that agreement whereby the price was to be paid and that part was to be performed at *C*.

Held, that Courts at both *B* and *C* could entertain the suit. 12 N.L.J. 177=121 Ind. Cas. 667= A.I.R. 1930 Nag. 90.

——S. 20—Suit on contract—Part of the cause of action.

Suit on contract can be instituted where contract is to be performed. A.I.R. 1930 Rang. 216=127 Ind. Cas. 466.

——S. 20—Suit on contract—Part of the cause of action.

In suits on contracts the making of the contract is part of the cause of action. The Courts within whose jurisdiction the agreements in suit are accepted have jurisdiction. A.I.R. 1929 Sind 227.

——S. 20 (b)—Suit against foreigner—Cause of action within jurisdiction.

Courts have got jurisdiction against foreigners provided the cause of action arose within the local jurisdiction of the Court. 1934 M.W.N. 1307.

——S. 20—Construction of—Suit against non-resident foreigner—Cause of action within jurisdiction.

The language of S. 20 is so general as to entitle a plaintiff to sue in a Court in which his cause of action wholly or in part, arose. There is nothing in that section which makes an exception as regards a foreigner, if other conditions are fulfilled. Subject to anything that may be said as regards the Indian Legislature having power to make laws affecting the rights of foreigners, a Court in British India cannot disclaim jurisdiction against a foreigner if the plaintiff's cause of action, wholly or in part, arose within its jurisdiction. Whatever may be the sanctity attaching to its decree, whenever it is questioned in a foreign country, the Court which is required to pass it or any other Court similarly situated cannot disregard the law made by the Indian Legislature. A.I.R. 1934 All. 740=1934 A.L.J. 1093=56 All. 828=153 Ind. Cas. 824.

——S. 20—Cause of action—Two reliefs based on separate causes of action.

The mere fact that the plaintiff chose to pray in the same plaint for two reliefs, which are based on separate independent causes of action, in respect of one of which the Court has jurisdiction and in respect of the other it has no jurisdiction, cannot confer jurisdiction on the Court in respect of the latter. A.I.R. 1939 All. 163=1939 A.L.J. 50=I. L.R. (1939) All. 167=180 Ind. Cas. 409.

——S. 20—Cause of action—Liquidator of Society at Midnapur sending letter of demand of Rs. 1875 on member at Alipore or threatening certificate of equal value—Member claiming that he had ceased to be member—Suit by him at Alipore Court claiming that he was not liable to Society and counter-claiming Rs. 300—Threatened demand valued at Rs. 50 only—Cause of action, where arises.

A liquidator of a Co-operative Society at Midnapur sent a registered letter to a member of the Society residing at Alipore demanding the amount due to the Society and threatened a certificate in the alternative. The member filed a suit in Alipore claiming that he had long ceased to be a member and was not liable for any debt. He made a counter claim against the Society.

Held, that the plaintiff in order to succeed in the suit had only to show that the assessment made upon him by the liquidator was wrong. As soon as he had proved it, he would be entitled to succeed. It was not necessary for him to prove that he received a registered letter of demand from the liquidator. Therefore the Court below committed an error of law in holding that there was a territorial jurisdiction of Alipore Court in this suit. A.I.R. 1937 Cal. 643=176 Ind. Cas. 221.

——S. 20—Cause of action—Suit by vendor at T against defendant at R—Relationship found to be of principal and agent—Dismissal of suit on preliminary issue—Legality of—Payment to be made at T.

The plaintiff filed his suit at *T* claiming as against defendant carrying on business in *R* for short-fall in goods ordered and for damages on account of the inferiority of quality of those goods. A preliminary issue was taken that the Court at *T* had no jurisdiction to try the suit because no part of the cause of action had arisen there and it was argued that the relationship between the parties was that of principal and agent. Finding that the relationship was that of principal and agent, the Court dismissed the suit.

Held, that the suit was not one which could be dismissed on the preliminary objection.

Held, also that whatever the relationship between the parties may in fact be, payment for the goods purchased by the pliantiff or on his behalf was to

be made at *T* and hence part of the cause of action arose there and the Court at *T* had jurisdiction to try the suit. A.I.R. 1935 Mad. 663=68 M.L.J. 504=41 L.W. 590=1935 M.W.N. 554=156 Ind. Cas. 1041 (F.B.).

——S. 20—Suit in contract—Cause of action for.

Money agreed to be paid and actually paid at Madras—Agreement and subsequent pro-note made outside Madras—Suit at Madras for recovery of money paid.

Held, that the cause of action arose at *K* and the and therefore the Court had jurisdiction. A.I.R. 1934 Mad. 503=67 M.L.J. 30=40 L.W. 167=155 Ind. Cas. 164.

——S. 20—Suit for services—Forum of.

Plaintiff who was a *Vaid* at *F* was asked to go to *K* and to treat the defendant—Agreement for fee made at *K*—Suit for balance due out of fee and expenses filed at *F*:

Held, that the cause of action arose at *K* and the Court at *K* alone had jurisdiction to entertain the suit. A.I.R. 1934 All. 549=148 Ind. Cas. 875.

——S. 20 (c)—Cause of action—Payment in one place.

Where plaintiffs, who were residents of Ludhiana, ordered oil cakes from defendants who were residents of Darbhanga and remitted a part of the money to Darbhanga after they got the goods purchased and alleged that the goods were of bad quality and where the plaintiffs had agreed to accept the railway receipts which had to be sent by V. P. P. by the defendants the plaintiff's suit for compensation for loss was held to lie not at Ludhaiana but at Darbhanga though the defendants sent their agent to Ludhiana to get the payment because the V.P.P. for over a certain amount could not be issued. 2 Lah.L.J. 555.

——S. 20—Cause of action—Suit for refund of over charge by foreign Railway.

In a suit for refund of over-charge demanded from a consignee by a foreign Railway the cause of action arises in part at the place where the contract for carrying was made and so the Court at the latter place has jurisdiction to try the suit. 6 L.R. A. Civ. 395=88 Ind. Cas. 575=A.I.R. 1925 All. 823.

——S. 20 (c)—Cause of action—Meaning of—Suit on pro-note executed outside jurisdiction but endorsed within—Residence—Govt. servant.

Endorsement on a promissory note is part of the cause of action in a suit upon the same, and a suit lies at the place where it was so endorsed and delivered though the promissory note may have been executed at a place outside that jurisdiction. "Cause of action" explained. A Government servant liable to be sent to various places, but stationed in one place for several years cannot be said to have only a temporary residence or lodging for the purposes of S. 20 C.P.C. 4 Bur.L.T. 183=11 Ind. Cas. 851.

——S. 20—"Cause of action"—What constitutes—Contract for sale of goods completed by correspondence—Jurisdiction in respect of breach of such contract. 221 Ind. Cas. 594=A.I.R. 1945 Lah. 260 =47 P.L.R. 277.

——S. 20—Cause of action—Place where money is impliedly payable is a forum of action.

In suits arising out of contract the cause of action arises at (1) the place where the contract was made, or (2) the place where the contract was to be performed or performance thereof completed; or (3) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable. The performance of a contract includes the last stage of it. Part of the cause of action, therefore, arises at the place where money is impliedly payable at the conclusion of it and the Court at that place has jurisdiction under S. 20 (*c*), Civil P. C., to try the suit for breach of contract. A.I.R. 1946 Mad. 300=(1946) 1 M.L.J. 11.

——S. 20—Cause of action.

Plaintiff, firm residing at Gujranwala ordered goods from defendant firm residing at Calcutta. Latter firm consigned the goods to itself in Gujranwala and sent the Railway receipt to plaintiff firm pre V.P.P. for the balance of the price. The plaintiff firm refused the V.P.P. but sent the balance to the defendant and asked the defendant firm to advise the railway to deliver goods. The goods were lost by the Railway. Plaintiff firm thereupon sued the defendnat at Gujranwala for return of the price paid by him. *Held*, the goods remained throughout under the control of the defendant and they had to be deivered at Gujranwala. The failure to deliver the goods was a part of the cause of action, and therefore the Gujranwala Court had jurisdiction to entertain the suit. 71 Ind. Cas. 38=A.I.R. 1924 Lah. 349.

——S. 20—Cause of action.

Plaintiff, a cotton merchant, residing at Khamgaon, in the Buldana District, sent some bales of cotton for sale in Bombay to defendants a firm of *adtias* commission agents at Bombay. The accounts were to be rendered and money to be paid at Khamgaon. *Held*, that part of the cause of action accrued in the Buldana District. The term "cause of action" is not defined in the Code, but various rulings have defined it as the whole bundle of relevant facts plaintiff must allege and prove to enable him to succeed. 78 Ind. Cas. 991=A.I.R. 1924 Nag. 308.

——S. 20—Cause of action—Suit to set aside a decree obtained by fraud.

Discovery of the fraud is no part of the cause of action. The cause of action is the fraud. 1922 M. W. N. 841=72 Ind. Cas. 982=A.I.R. 1923 Mad. 272.

——S. 20—Cause of action—Suit by reversioner for cancellation of Will executed by widow—Situation of property will give a cause of action.

The words "cause of action" means the whole bundle of facts which it is necessary for the plaintiff to allege and prove in order to obtain the relief he claims in the suit. Where a reversioner sues to cancel a Will by a widow part of the cause of action arose in all the places where the properties are situate and where the threat of an injury to those properties, arose. The term 'cause of action' is not limited to contracts only. It applies to all suits of whatever nature. 16 M.L.W. 785=72 Ind. Cas. 920=1922 M.W.N. 834=A.I.R. 1923 Mad. 109= 43 M.L.J. 615.

——S. 20—Cause of action—Sale of goods—Delivery to railway company is delivery to buyer—Place of delivery furnishes cause of action.

Delivery by the seller of the goods sold to the railway company to be despatched to the buyer operates as delivery to the buyer and a suit for breach of contract to deliver goods by the buyer would lie at the place where the goods were delivered to the railway company. 67 Ind. Cas. 888=A.I.R. 1922 Lah. 474.

——S. 20—Cause of action—Suit for restitution of conjugal rights.

A suit for dissolution of marriage or for declaration as to an accomplished divorce is essentially different as to cause of action from a suit for restitution of conjugal rights. The opinions expressed in the judgment of the suit for restitution of conjugal rights as to the affirmation of cruelty or the negation of divorce cannot form a cause of action in a suit for dissolution of marriage or for declaration of dissolution. 8 O.L.J. 650=65 Ind. Cas. 452=A.I.R. 1922 Oudh 109.

——S. 20—Cause of action.

Plaintiff residing at *M* ordered certain goods from defendant who carried on business at *S*. Plaintiff sued defendana at *M* for damages on the allegation that the goods supplied were short in quantity and inferior in quality.

Held, (1) that the cause of action arose at *S* and that, therefore, the Court at *M* had no jurisdiction to hear the suit; (2) that the High Court had jurisdiction in revision to set aside an interlocutory order, and that that jurisdiction ought to be exercised in this case. (1921) 60 Ind. Cas. 481 (Lah.).

——S. 20 (c)—Cause of action—Money payable on death at Lahore.

Where money deposited with the Hindu Mutual Relief Fund is payable on the death of *S* at Lahore but *S* died at Lyalpur, where the fund had carried on business through an agent, the Court at Lyalpur has jurisdiction to entertain a suit for recovery of the fund moneys due to *S* on the ground that the death of its member *S* which was part of the cause of action occurred at Lyalpur and that the defendant fund carried on its business at Lyalpur through an agent. 98 P. R. 1918=29 P.L.R. 1918=45 Ind. Cas. 900.

——S. 20 (c)—Cause of action—Goods sent without order—Plaintiff asked to keep goods—Suit for charges incurred—Jurisdiction of Courts.

Defendants from Cawnpore sent a bale of cotton to the plaintiff at Jhansi without an order or direction from the latter. Plaintiff accepted to hold the goods on behalf of defendant's risk. In a suit for recovery of charges the cause of action was held to arise at Jhansi. 15 A.L.J. 513=41 Ind. Cas. 904.

——S. 20 (c)—Cause of action—Arising in part—Jurisdiction.

A Court has jurisdiction to entertain a suit if the cause of action arose even partly within its jurisdiction. 13 A.L.J. 66=26 Ind. Cas. 620.

——S. 20—Cause of action—Goods sent by V. P. P.

Proposal and acceptance made by letters—Contract is made at the time when and at the place where the letter of acceptance is posted—Goods sent by V. P. P.—Contract is intended to be performed at the place where goods are to be received and the Court at that place has jurisdiction to try suit arising out of that contract. A.I.R. 1934 Mad. 581=67 M.L.J. 296=40 L. W. 498=1934 M.W.N. 1011=153 Ind. Cas. 111.

——S. 20 (c)—Cause of action—State law contrary to S. 20, C. P. Code—Validity.

A pro-note had a clause that payment should be made in Delhi. The plaintiff sued for the amount due on the pro-note at Delhi. The defendant resided in U. P. The Judge returned the plaint because S. 7, U. P. Agriculturists' Relief Act (27 of 1934), said that every suit for recovering an unsecured loan in which the defendant was an agriculturist should be instituted and tried in a Court within the local limits of whose jurisdiction the agriculturist defendant resided:

Held, that according to S. 107 (1) of the Government of India Act, if any provision of a Provincial Law is repugnant to any provision of a Federal Law then the Federal Law or the existing Indian Law, shall prevail and the Provincial Law shall, to the extent of the repugnancy, be void. In Delhi the Courts are governed by S. 20 (c), Civil P. C., and the local law of the United Provinces was void to the extent of the repugnancy:

Held, also that the bringing of such a suit in Delhi contrary to the provisions of the U. P. Act was not illegal within the meaning of S. 23, Contract Act. A.I.R. 1939 Lah. 498=185 Ind. Cas. 711.

Place of suing—Suits between Debtor and Creditor.

——S. 20 (c)—Debtor and Creditor—Place of payment.

If there is nothing as to the place where the money under a bond is payable, the Court must be guided by the intention of the parties and where this cannot be determined, a presumption as to the place may be drawn. 49 Ind. Cas. 950 (N.).

——S. 20—Suit by creditor against debtor.

In the absence of a contract to the contrary the borrower ought to seek out the lender for payment. A suit to recover the money from the borrower may be brought in the place where the lender resides as it is payable at that place. A.I.R. 1923 All. 465, Foll. 48 All. 310=24 A.L.J. 291=92 Ind. Cas. 492=A.I.R. 1926 All. 477.

——S. 20—Suit for money—Presumption as to place of payment.

Payments actually made by debtor at place other than where creditor resides, rebut presumption that parties when entering into contract intended to make payments where creditor resides. A.I.R. 1930 Lah. 818=126 Ind. Cas. 514.

——S. 20—Loan borrowed at B—Creditor residing at P—Debtor permanently residing at P and temporarily at B.

The ordinary principle of law is that the debtor shall find out his creditor and pay him. Ordinarily

therefore the debtor has to pay the debt at the creditor's place of residence or place of business.

Where the creditor resided at *P* and the debtor had a permanent family house at *P*, but the loan was borrowed at *B*, where the debtor had a temporary residence,

Held, that the Court at *P* had jurisdiction to try the suit in respect of the loan. 24 M.L.W. 576=97 Ind. Cas. 1027=A.I.R. 1926 Mad. 1207.

——S. 20—Loan borrowed at S but repayable at H—Defendant residing at H—Jurisdiction of S Court to try suit.

Where the loan was borrowed at *S*, but the defendants were residents of *H* and the loan was also repayable at *H*, the Court at *S* has no jurisdiction to entertain a suit for recovery of the loan. 23 M. L. W. 3=92 Ind. Cas. 760=1926 M.W.N. 108=53 Cal. 88=28 Bom. L.R. 211=53 I.A. 58=30 C. W. N. 577=A.I.R. 1925 P.C. 290=49 M.L.J. 806.

——S. 20—Suit between debtor and creditor—Forum of.

Ordinarily where money is borrowed, the repayment of the money must be presumed to have been agreed to be made at the place of residence of the lender. 118 Ind. Cas. 898=A.I.R. 1929 Lah. 868.

——S. 20—Debtor and Creditor—Suit between—Forum.

Where a fixed deposit is made in one place and there is no contract in regard to the place where the repayment is to be made, the Court at the place other than the place of deposit, where the depositor resides and makes a demand, has no jurisdiction to entertain a claim for the return of the deposit. A.I.R. 1940 All. 243=I.L.R. (1940) All. 207=1940 A.L.J. 94=189 Ind. Cas. 234.

——S. 20 (c)—Debtor and creditor—Suit against banker by depositor.

The ordinary rule is that a debtor must seek his creditor to pay him. Ordinarily in a case against a Bank or a trader who holds himself out as a person it is not necessary that payment should be made at the place where business of the Bank is carried on. The intention of parties is that the money should be paid to the depositor wherever he happens to be at the time he demands repayment. 15 A.L.J. 653=41 Ind. Cas. 890.

——S. 20 (c)—Debtor and creditor—Place of suing.

A promise to pay something which the promiser is already under an obligation to pay is a promise without consideration and cannot be enforced. Therefore a promise by a debtor to repay a loan at a certain place for creditor's convenience does not in itself entitle the creditor to sue at that place unless the promise is one with consideration or it falls under S. 25 (2), Contract Act. 11 Bur.L.T. 67=9 L B. R. 75=39 Ind. Cas. 132.

——S. 20 (c)—Debtor and creditor—Suit on promissory note—Payment to be made within jurisdiction.

Where money on a pro-note was intended to be paid in place *A*, the Court at *A* has jurisdiction to entertain a suit on the pro-note under S. 20 (c). 2 P. R. 1916=10 P.W.R. 1916=31 Ind. Cas. 698.

——S. 20 (c)—Debtor and creditor—Payment of debt—Place.

The cause of action for the payment of a debt will arise at the place where the debt is payable. 6 Bur. L.T. 143=20 Ind. Cas. 683.

——S. 20 (c)—Debtor and creditor—Parties resident where money advanced—Absence of agreemet to repay at other place—Presumption—Jurisdiction.

In a *hat chita* the creditor was described as resident of *S*, the money was alleged to have been advanced at *S*, and the parties at the time of the loan were residents of that place. *Held*, that the money was presumably repayable at *S* in the absence of any proof of any agreement for repayment of the money at some other place. 16 C.L.J. 279=15 Ind. Cas. 885.

——S 20 (c)—Debtor and creditor—Place of suing.

A suit to enforce payment of money under a contract executed in Punjab from a defendant residing in Punjab does not lie in Karachi Court when there is no evidence to prove that the money was agreed to be paid in Karachi. 6 Ind. Cas. 111 (Sind).

——S. 20 (c)—Debtor and creditor—Suit for recovery of debt.

A creditor can bring a suit for recovery of money against his debtor. in the Court within whose territorial jurisdiction he has paid the money on his debtor's behalf. 96 P.L.R. 1909=108 P.W.R. 1909=4 Ind. Cas. 977.

——S. 20—Suit based on loan and promissory note incidentally mentioned as collateral security—Debtor, if should seek his creditor.

The suit was not a suit based upon the promissory note but the real basis of the suit was the loan in regard to which it was merely incidentally mentioned that a promissory note was executed as collateral security:

Held, that to a transaction such as this the English doctrine that the debtor must seek his creditor for the purpose of making payment in discharge of the liability was applicable. The creditor had therefore, the right of filing the suit in the District within the territorial limits of which the cause of action accruing from non-payment arose. A.I.R. 1937 Rang. 433=172 Ind. Cas. 606.

——S. 20—Debtor and Creditor—Duty of debtor to seek creditor—Question of jurisdiction raised by Court suo motu at last stage—Revision.

Where it cannot be said that payment was agreed or intended to be made at a particular place, the common law rule applies that the debtor must seek the creditor and pay him there, and, therefore, in such a case the creditor can maintain a suit at the place where he resides.

Where the parties went to trial on the merits and after the evidence of the parties had been recorded and arguments heard, the issue as to want of territorial jurisdiction was raised by the Court *suo motu* and the plaint was erroneously and unnecessarily returned for presentation to another Court:

Held, that there was a proper case for interference in revision. 131 Ind. Cas. 303=32 P.L.R. 737.

5. Place of suing—Suits to set aside decrees.

——S. 20—Suit to declare a decree null and void —Forum of.

Where the plaintiff in the case seeks (1) a declaration that the decree is inoperative on the ground of fraud; and (2) an injunction for the protection of his property against attachment and sale in execution of that decree; the second prayer cannot be ignored for the purpose of detemining the jurisdiction of the Court. It is, therefore, clear that part of the cause of action arises at the place where the property sought to be attached is situate and the suit is consequently cognizable by that Court. 25 All. 48; 37 All. 189; 39 All. 607 and 5 C.W.N. 559, Foll. 7 Lah. 61=27 P.L.R. 517=94 Ind. Cas. 377=A.I.R. 1926 Lah. 277.

——S. 20—Suit to set aside decree obtained by fraud—Forum.

A suit lies in one Court to set aside a decree of another Court on the ground that the decree was obtained by fraud, as the fraud gives rise to a fresh cause of action. The jurisdiction to entertain such suits must be determined by the Civil Procedure Code and the suit must be brought either in the Court within whose jurisdiction the fraud was perpetrated or within whose local jurisdiction the defendant ordinarily resides and personally works for gain. 14 C.W.N. 695=11 C.L.J. 636=5 Ind. Cas. 648.

——S. 20—(S. 17)—Suit to set aside decree obtained by fraud—Jurisdiction of High Court (Original Side). **See** JURISDICTION. 7 C.W.N. 353=30 Cal. 369.

——S. 20—Suit to declare a decree null and void—Forum.

B obtained a decree against *N* at Amritsar and *J* obtained another decree against *N* at Ferozepor. *B* applied for the execution of his decree at Amritsar and attached certain property of *N* situate at Amritsar. *J* applied for the transfer of his decree to be executed at Amritsar and after the transfer applied for rateable distribution. *B* objected to *J's* application alleging that his decree was obtained fraudulently but his objection was disallowed. Thereupon he filed a suit for declaration that *J's* decree was collusive and fraudulent.

Held, that the cause of action for the declaration arose at Amritsar only after *J's* decree was transferred and hence Amritsar Court had jurisdiction to try the suit. 72 Ind. Cas. 392=A.I.R. 1924 Lah. 398.

——S. 20—Suit to declare a decree not binding.

If cause of action did not occur within the jurisdiction of the Court it cannot entertain a suit that a decree granted by another Court does not bind plaintiff. 75 Ind. Cas. 469=A.I.R. 1924 Pat. 831.

——S. 20—Suit to set aside a decree.

The proper and convenient course to set aside a decree is to go to the Court that granted the decree and to get it set aside by that Court. 75 Ind. Cas. 469=A.I.R. 1924 Pat. 831.

——S. 20—Suit to set aside a decree—Forum of.

Suit for declaration that decree is void can lie in Court to which decree is transferred for execution. 27 C.W.N. 359=65 Ind. Cas. 318=A.I.R. 1923 Cal. 425.

——S. 20—Place of suit—Suit to set aside ex parte decree obtained by fraud.

A instituted a suit in Ferozepore against *B*, a resident of Lahore. The serving officer wrongly reported to the Court that *B* was evading summons, and an *ex parte* decree was passed against him. *B* thereupon sued *A* in Lahore to set aside the decree on the ground of fraud, *held*, the suit was maintainable inasmuch as by the wrong report of the serving officer, part of the cause of action arose in Lahore. 37 All. 189, Foll. (1921). 59 Ind. Cas. 2=7 P.W.R. 1921.

——S. 20 (c)—Decree—Setting aside—Fraud—Forum.

Defendant fraudulently obtained a decree in Sirajgang and transferred it to Agra and in execution had the plaintiff arrested in Agra. *Held*, a suit to set aside the decree as fraudulent could be filed at Agra as the material portion of the cause of action had accrued at Agra. 39 All. 607=15 A.L.J. 638=41 Ind. Cas. 352.

——S. 20 (c)—Decree—Setting aside—Fraud—Jurisdiction.

The Court within whose jurisdiction plaintiff ordinarily resides has jurisdiction to try a suit to set aside an ex parte fraudulent decree obtained against plaintiff in another Court by suppressing summons. 41 Ind. Cas. 161 (Pat.).

——S. 20 (c)—Decree—Setting aside—Fraud—Jurisdiction.

If a decree is obtained after fraudulent suppression of summons, the cause of action for a suit to set aside the decree arises where the summons was fraudulently suppressed. In such a suit the execution of the decree and application for the realization of the amount are acts of defendants which infringe the rights of plaintiff and afford him cause of action. A plaintiff in such a suit cannot succeed merely on proving that summons was not served. *Semble*:—If the property attached under the decree is within the jurisdiction of the Court in which the latter suit is filed, the Court has jurisdiction to entertain the suit. 37 All. 189=13 A.L.J. 190=28 Ind. Cas. 502.

——S. 20 (c)—Decree—Setting aside—Fraud—Cause of action.

Where a decree was obtained in Calcutta *held*, in a suit brought in Mainpuri to set aside the decree, that the Court at Mainpuri had no jurisdiction to entertain it as no cause of action had arisen at Mainpuri. 36 All. 564=12 A. L. J. 955=25 Ind. Cas. 978.

——S. 20—Suit to set aside decree—Ex parte decree obtained in one Court sent for execution to another—Suit to set aside the decree on the ground of fraud filed in the latter Court—If latter can entertain.

Where an *ex parte* decree was obtained in a

Court outside Oudh by a grave fraud by wilful misstatement and suppression of material facts in the plaint and deliberately misdescribing the persons against whom the decree was sought in order to prevent their being in a position to defend and it was attempted to be executed in a Court in Oudh.

Held, that the Court in Oudh can hear a suit to declare a decree so passed as null and void and that it should be so declared. 37 All. 189, Foll. 3 Luck. 142=106 Ind. Cas. 541=4 O.W.N. 1103=A.I.R. 1928 Oudh 88.

——S. 20—Suit to set aside a decree in executing court.

A Court has jurisdiction to entertain a suit to set aside a decree if the decree is put into execution within the territorial limits of the jurisdction of that Court. A.I.R. 1926 Lah. 277, Foll. 100 Ind. Cas. 164=A.I.R. 1927 Lah. 778.

——S. 20—Suit for declaration of a decree as nullity—Forum.

A decree passed by a Bombay Court was going to be executed in Amritsar by the Bombay Court. No action was taken at Amritsar though a proclamation of sale was issued.

Held, that no cause of action arose at Amritsar for a declaration that the decree was a nullity as no part of execution was taking place at Amritsar. 11 L.L.J. 306=120 Ind. Cas. 279=A.I.R. 1929 Lah. 449.

——S. 20—Plaintiffs at Saran having transactions with defendant residing in Bombay—Plaintiffs mortgaging certain property in Saran for money due to defendant—Defendant bringing mortgage suit in Bombay and obtaining decree—Plaintiffs suing at Saran for declaration that decree of Bombay Court was nullity and fraudulent.

The plaintiffs were residents in the District of Saran carrying on cloth business in the town of Chapra and they had transactions with the defendants who resided and ordinarily did business in Bombay. The plaintiffs executed a simple mortgage hypothecating immovable properties in the District of Saran for the payment of debts due from them to the defendants. The defendants brought a mortgage suit at Bombay, obtained a preliminary decree *ex parte*. The plaintiffs filed a suit for a declaration that the decree obtained at Bombay was illegal, fraudulent and a nullity.

Held, that the place where the plaintiffs' cause of action arose was Bombay and the Subordinate Judge at Saran had no jurisdiction to try the case. A.I.R. 1940 Pat. 444=21 P.L.T. 259=6 B.R. 916 190 Ind. Cas. 152.

——S. 20—Cause of action—Suit to declare a decree a nullity—Cause of action—If arises within the jurisdiction of the execution court.

It is the injury arising from the enforcement of the decree that is obtained by fraud that constitutes the cause of action to the judgment-debtor against whom the decree was obtained and, therefore, a Court within whose jurisdiction it was sought to enforce the decree is competent to entertain a suit to declare the decree a nullity. (1902) 25 A. 48 at p. 54= (1902) A.W.N. 179.

——S. 20 (c) (S. 17 (a), Old Code)—'Cause of action'—Suit to set aside a decree on the ground of fraud—No further relief claimed—Jurisdiction.

Save under special circumstances, a suit to set aside a decree obtained by fraud, in which no other relief whatever is claimed, cannot be maintained in any district outside the district in which the fraud was committed and the fraudulent decree was obtained. 1907 A.W.N. 112=4 A.L.J. 392=29 A. 418.

——S. 20, Cl. (c), (S. 17, Old Code)—'Cause of action'—Jurisdiction—Suit for a declaration that a compromise decree is null and void and for injunction restraining execution.

The term 'cause of action' as used in S. 17 of the Code of Civil Procedure (Old Code) does not necessarily mean the whole of the cause of action; a suit to which S. 17 applies may be instituted where some material portion of the cause of action arises. Although the decree was passed in Calcutta, yet, inas much as the property affected by the decree was in Cawnpore and execution was being taken out there, a material portion of the plaintiff's cause of action arose in Cawnpore and the Subordinate Judge of that place had jurisdiction to try the suit. 1902 A.W.N. 179=25 A. 48.

——S. 20—Injunction to restrain a party from proceeding with a suit—Forum of.

A Court can restrain a person from proceeding with a suit in a foreign Court only when the person sought to be restrained is within its jurisdiction and not otherwise, so that in the event of an injunction being granted against him and disobeyed by him, he would be subject to the process of that court and for contempt. (1908) 13 C.W.N. 346=36 C. 233= 1 Ind. Cas. 927.

——S. 20—Suit to set aside decree by court of concurrent jurisdiction—Effect of.

Where a decree obtained in a court of equal jurisdiction was set aside by another court which went on to add that the result of the decree being declared fraudulent would be that the original suit would be restored:

Held, that the order of a court of equal jurisdiction could operate as a direction to the first court to restore the suit and that the court had committed no error. (1910) 14 C.W.N. 558=6 Ind. Cas. 13 (D.B.).

6. Place of suing—Defendant carrying on business.

(a). Business.

——S. 20 (a)—Carrying on business—Meaning of.

"Carrying on business' within the meaning of S. 20 (a) means having interest in the business transactions at the particular place, a voice in what is done, a share in the gain or loss, and some control over the existence of the business. 1941 N. L. J. 37.

——S. 20—Carrying on business—What amounts to.

The plaintiff resided at Amritar and carried on business there. The defendant firm had their head Office at Bombay and a Sub-office at Amritsar.

The evidence showed that all correspondence with the customers at Amritsar was conducted by the defendant through this Sub office, that orders were received and moneys were received and disbursed by the Sub Office but the orders were not binding until they had been accepted by the Head Office at Bombay:

Held, that the defendants carried on business at Amritsar within the meaning of S. 20, Civil P. C., and a suit against them could be filed at Amritsar. A.I.R. 1933 Lah. 11=33 P.L.R. 1083=14 Lah. 42=140 Ind. Cas. 473.

——S. 20 (a)—Carrying on business—Firm carrying on business in British India—Partners non-resident foreigners—Liability to be sued in British Indian Courts.

The test of carrying on business is not the continuity of the business but the fact of owning interest in the business and receiving profits. The mere fact that a person who, under a special contract of combination with other partners keeps his ginning factory dormant does not mean it is not carrying on business.

Where two or more persons are carrying on business as partners in British India, they are liable to be sued against in British Indian Courts in the name of the firm even if they are non-resident foreigners. A.I.R. 1932 Nag. 114=28 N.L.R. 118=140 Ind. Cas. 63.

——S. 20—Carryng on business—What amounts to.

A defendant cannot be said to carry on business at a place where he keeps no office but has agent to canvass orders and forward them. 73 Ind. Cas. 205=A.I.R. 1923 Lah. 427.

——S. 20—"Carrying on business" is not personally working—Firms in different places constituted differently may yet be the same legal entity.

In the case of firms carrying on business in different parts of the country sometimes constituted of the same people, with omissions or with additions in different places, a Court should analyse the facts thoroughly in order to determine whether the firms or persons so carrying on business are really the same legal entity. "Carrying on business" is used in S. 20, C. P. Code as distinct from personally working; a man may carry on business in a place where he does no personal work of any kind and a firm may be carrying on business at a particular place either through an agency or through a manager or by its servant without even having left its own town. 19 A.L.J. 696=65 Ind. Cas. 93=A.I.R. 1922 All. 367.

——S. 20—Place of suing—Carrying on business through an agent—Nature of.

Where jurisdiction is sought to be enforced against a person who carried on business through an agent, such agent must be an agent strictly so-called and not a commission agent or a broker or a general agent. A.I.R. 1936 Sind 175=164 Ind. Cas. 1113.

(b). Residence.

——S. 20—Place of suing—Defendant's residence. —What is.

In every case residence is a question of fact, and it must depend upon the particular circumstances. The general practice is to accept as the person's residence the place where throughout the year you would ordinarily expect him to be found. The term residence is naturally a flexible one, but in the case of traders carrying on business it is manifestly their place where they earn a living and do their daily work. 22 A.L.J. 457=79 Ind. Cas. 567=5 L. R. A. Civ. 363=A.I.R. 1924 All. 669.

——S. 20—Residence of defendant—What is.

The mere fact that the ancestral home of persons, who are really residing outside the jurisdiction, was within the jurisdiction, does not give jurisdiction. 19 A.L.J. 822=64 Ind. Cas. 688=A.I.R. 1921 All. 193.

——S. 20—Jurisdiction—Residence.

Suit instituted in Court within whose jurisdiction defendant has permanent residence is properly instituted though he resides for business elsewhere. 57 Cal. 65=A.I.R. 1930 Cal. 347=125 Ind. Cas. 320.

——S. 20—"Actually and voluntarily resides" does not refer to legal persons—"Business".

The words "actually and voluntarily resides" refer only to natural persons and not to legal entities such as limited companies and Governments and further "business" is commercial business and not the business of Government. A.I.R. 1927 Mad. 689; 14 Cal. 256; 40 Cal. 308 and 97 Ind. Cas. 246, Foll. A.I.R. 1930 Lah. 818=126 Ind. Cas. 514.

——S. 20 (a) — Residence — Meaning of—Restitution of conjugal rights—Place of suing—. Demand.

In matrimonial suits to which the Divorce Act does not apply questions of jurisdiction should be decided under the C. P. Code. Under S. 20, residence means permanent residence not a temporary or casual residence as traveller. 38 B. 125, foll. 12 Bur.L.T. 120=54 Ind. Cas. 65.

——S. 20 (a)—Residence of defendant.

A suit may be instituted in a Court in whose jurisdiction the defendant at the time of such institution actually or voluntarily resides, though the residence may be temporary. 14 Ind. Cas. 573 (Mad.).

——S. 20 (b)—Meaning of expression 'voluntarily resides' in S. 20 (b).

The expression 'voluntarily resides' in S. 20 (b) of the Code, does not mean permanent residence and temporary residence will confer jurisdiction on the Court. 63 L. W. 1172=1950 M.W.N. 705=(1950) 2 M.L.J. 484.

——S. 20 (a)—Residence — Ancestral abode—Visited occasionally, but actual residence elsewhere.

Where defendant was found to have lived and carried on business at *X* for forty years and he never intended to return to his original home at *N*, his place of residence under S. 20 is at *X* and not at *N* although he had an ancestral abode there and some ancestral land at the latter place. 112 P. R. 1916=38 Ind. Cas. 62.

——S. 20—Residence of Defendant—What is.

Mortgage decree by Calcutta High Court—Some

of mortgaged properties situated within Alipore Court's jurisdiction in 24 Paraganas—Some of defendants also residing there—Suit under S. 36 (1), Bengal Money-lenders' Act to reopen decree filed in Alipore Court.

Held, (1) that Ss. 16, 17 and 20 (c), Civil P. C., did not apply: (2) Suit could be instituted at Alipore only by reason of S. 20 (b) on account of defendant's residence there: (3) But S. 20 (a) and (b) being excluded by S. 36 (2), Money-lenders' Act, Alipore Court had no jurisdiction to entertain suit: (4) Calcutta High Court alone had jurisdiction. A.I.R. 1942 Cal. 69=45 C.W.N. 1085=75 C.L.J. 229=I.L.R. (1942) 1 Cal. 235=198 Ind. Cas. 739.

——S. 20—Residence—Interest in property at former residence.

Residence is not identical with ownership; it means where a person eats, drinks and sleeps, or where his family or his servants eat, drink and sleep. Mere *animus revertendi* and a lively interest in a former residence and his connection with his kith and kin residing there and an interest in ancestral property does not give Court jurisdiction under S. 20. A.I.R. 1941 Cal. 670=I.L.R. (1941) 1 Cal. 490=199 Ind. Cas. 32.

——S. 20—Party actually and voluntarily residing at a place—No abandonment—Occasional visits to other places on business.

Where a person actually and voluntarily resides at *A* and has not abandoned it but only occasionally goes to another place for business, the Court at *A* has jurisdiction over him. And if he alleges that he has abandoned his residence at *A* and that he has no intention of returning to *A* it is for him to prove this allegation. A.I.R. 1936 Lah. 853=169 Ind. Cas. 321.

——S. 20, Expl. 1—Defendant residing permanently at one place and temporarily at another.

The petitioner had his original family at Sialkot, but he was actually residing at Chapra, in Bihar and Orissa, where he carried on business. It appeared that the petitioner had not abandoned his permanent dwelling at Sailkot:

Held, that he must be deemed, therefore, to have his temporary residence at Chapra and as the cause of action, which was the subject-matter of this suit, arose at Chapra, he must be deemed to be residing both at Sailkot and at Chapra and consequently a suit could be instituted against him on this cause of action at both places. A.I.R. 1933 Lah. 120=34 P.L.R. 908=143 Ind. Cas. 353.

——S. 20 (a)—Place of suit—Actually and voluntarily resides—Meaning of—Defendant confined in jail in foreign territory.

Held, that the words actually and voluntarily must be taken together. Jail is not a voluntary abode. The Court of the District has jurisdiction where the defendant has a house though as accused he was in jail in another district. 77 P. R. 1909=125 P. W. R. 1909=124 P.L.R. 1909=3 Ind. Cas. 607.

——S. 20 (S. 17, Old Code)—The defendants' House and land was in the Gujarat District and their families resided there; the plaintiff sued them in that district and alleged that though the cause of action arose in the Fardikote State and the defendants were confined under a sentence of imprisonment for life in the State, yet the Gujarat Court had jurisdiction, for the defendants actually and voluntarily resided in the Gujarat district, within the meaning of S. 18 of the Civil Procedure Code. The Court returned the plaint on the ground that the defendants could not be held to be actually and voluntarily residing in the Gujarat district. The plaintiff's appeal under S. 588 (6) of the Civil Procedure Code was dismissed. 124 P. L. R. 1909=77 P. R. 1909=125 P.W.R. 1909=3 Ind. Cas. 607.

——S. 20—Residence—Suit against private firm in Bombay—Owners having permanent residence in Kutch—Jurisdiction of Kutch Court.

A suit lies against the owners of a private firm where they have a residence. Where the owners of a private firm carrying on business in Bombay reside in Bombay only for business purposes but have their permanent residence in Kutch province, they or their firm can be sued in either of the places in respect of a cause of action arising wholly in Bombay. A.I.R. 1949 Kut. 5.

7. Place of suing and parties to suit —Jurisdiction.

(a) How determine.

——S. 20—Jurisdiction—How decided.

Prima facie the question of jurisdiction must be decided on the averments contained in the plaint. Where the primary transaction of the sale and purchase of articles took place at one place, the liability of the purchaser for the price of the articles naturally arises out of that transaction. The cause of action, therefore, for a suit to recover the price accrues at that place, and is not extinguished by the execution of promissory notes in respect of the same debt at a subsequent date and at another place. 4 Luck. 347=5 O.W.N. 1117=114 Ind. Cas. 507=A.I.R. 1929 Oudh 91.

——S. 20—Jurisdiction—What determines.

The jurisdiction of a Court is initially determined by the allegations to be found in the plaint. A.I.R. 1933 All. 745=1933 A.L.J. 667=1 A.W.R. 495=148 Ind. Cas. 270.

——S. 20—Jurisdiction — Allegations in plaint determines jurisdiction.

It is well established that the question of jurisdiction is to be determined with reference to the allegations in the plaint and not with reference to the pleas.

Where, in a suit, it was clearly alleged in the plaint that according to the agreement which was the basis of the suit, the amount claimed was payable in a place where the suit was filed:

Held, that the question of jurisdiction could not be separated from the merits of the case, that if the plaintiffs failed to prove the agreement, the suit would fail and that the Court shoud allow the parties to produce their full evidence in regard to the execution of the agreement before coming to any decision as to whether the suit was cognizable by it or not. A.I.R. 1934 Lah. 803=36 P.L.R. 6=151 Ind. Cas. 726.

——S. 20—Jurisdiction—Conduct alleged as cause of action determines forum.

Where the plaint alleged that on account of defendant's dishonesty or negligent conduct and dereliction of his duty as agent, the plaintiffs had suffered a loss.

Held, the cause of action accrued at the place where the conduct complained of occurred. (1912) 1 S.L.R. 93. Foll. 76 Ind. Cas. 197=A.I.R. 1924 Sind 22.

——S. 20—Jurisdiction — Existing jurisdiction—If could be taken away subsequently.

A Court, where a suit was originally rightly instituted, continues to have jurisdiction over the suit even if the place where the cause of action arises ceases to be situate within its jurisdiction. 28 M.L.W. 885=114 Ind. Cas. 545=A.I.R. 1928 Mad. 746.

——S. 20—Suit against Government—Place of Suit.

See also under ACCOUNTS, CAUSE OF ACTION, *infra*.

The whole of the Punjab Province cannot be said to be a single place for the purposes of Expl. 2 and so it cannot be claimed that the Punjab Government can be sued at any place within the limits of that Province. A.I.R. 1930 Lah. 818=126 Ind. Cas. 514.

——S. 20—Jurisdiction of Court—Suit against Dominion of India—Cause of action arising outside jurisdiction.

A Court has no jurisdiction to entertain a suit brought against the Dominion of India, where the cause of action has arisen wholly outside the ordinary original jurisdiction of that Court, on the sole ground that the Dominion of India dwelt or carried on business or personally worked for gain within the local limits of that Court. 40 C. 308, applied. A.I.R. 1950 Cal. 207.

(b) Consent—When can cure errors.

——S. 20—Jurisdiction—If could be conferred by consent.

Parties cannot confer jurisdiction by agreement on Court when it does not possess it. A.I.R. 1929 Sind 227.

——S. 20 (S. 17, Old Code)—Scope—Consent—Agreement of parties—If can confer jurisdiction

An agreement of parties cannot authorise a superior Court to revise a judgment of an inferior Court in any other mode of proceeding than that which the law prescribes. (1905) 9 C.W.N. 956=2 C.L.J. 384.

——S. 20 (S. 17, Old Code)—Scope—Consent—If can confer jurisdiction.

The consent of parties cannot give jurisdiction to a Court when it itself does not possess it. That the parties should be held bound by an agreement that any question between them should be heard and determined by proceedings contrary to the ordinary *cursis curiae* applies only where the Court has general jurisdiction over the subject-matter of a cause, but exercises it in an irregular manner, contrary to the law, on the motion and with the consent of the parties. (1905) 7 Bom.L.R. 954.

——S. 20 and O. 7 (R. 10)—C.P.C. (1882), Ss. 16-A, 17 and 57 — Jurisdiction — Consent —Effect of—Question of jurisdiction in appeal—Procedure in case of absence of jurisdiction.

If a Court of appeal decides that the Original Court had no jurisdiction to entertain the suit, the right course to adopt is to return the plaint for presentation to the proper Court. Consent of parties cannot confer jurisdiction upon a Court, where it has not inherent jurisdiction over the subject-matter of the litigation; and the judgment of a Court, which lacks this essential jurisdiction, is totally void and this would not be cured by waiver or acquiescence. Where, however, the defect is not apparent on the face of the proceedings, where especially the question of jurisdiction depends upon a fact, the existence of which is alleged by one of the parties in the Court of first instance and not controverted by the other, it is not obligatory upon a superior Court to enter into the question specially when, in order to adjudicate upon the question satisfactorily, a further investigation of the facts would be essential. If the want of jurisdiction appeared on the fact of pleadings or the admission of the parties or upon the evidence, the question could not only be raised in appeal for the first time, but it would be the duty of the Court to entertain it. When an objection as to jurisdiction is taken for the first time before the appellate Court and it becomes at least one upon which there is a reasonable ground for uncertainty, the Court should proceed under sub-S. 2 of S. 16-A of the Civil Procedure Code and refuse to allow the objection to be taken at the appellate stage. (1907) 7 C.L.J. 152 (D.B.).

——S. 20 (S. 17, Old Code—Scope—Consent—If can confer jurisdiction or cure want of jurisdiction.

The doctrine that consent does not give jurisdiction only applies where the Court has no inherent jurisdiction over the subject-matter, and does not apply to violations of rules of procedure, though they are not mere irregularities. The doctrine does not apply to an illegal order of remand, so that if a remand is made at the request of both parties, the same cannot be set aside at the instance of any of them, although it may be contrary to the provisions of S. 564, C.P.C. Per *Moore, J.* contra. (1905) 15 M.L.J. 236=28 M. 437.

——S. 20 (Ss. 16 and 17, Old Code)—Jurisdiction—Territorial extent.

The jurisdiction of a Court exists only over persons who are resident within its territorial limits, unless it is extended by statute. (1902) 6 C.W.N. 829 at 833=29 C. 509.

——S. 20—Jurisdiction of British Court, to entertain suit to enforce the right of Tapuis Pansare. (*See under* S. 16, C.P.Code. (1909) 11 Bom.L.R. 352=33 Bom. 373=2 Ind. Cas. 489.

——S. 20—Jurisdiction—Agreement as to—Two Courts having jurisdiction—Right of parties to bring suit in either Court—Parties agreeing that suit should be tried in one Court—Other Court having jurisdiction trying suit—Interference in revision.

Where there are two Courts, both of which would normally have jurisdiction to try the suit, the parties may be allowed to agree among themselves that the

suit should be brought in any of these Courts and not in the other.

And where the parties agree that one of the Courts shall try it but the other Court holding that if has jurisdiction has tried the merits of the case between the parties, it would not be proper for the revisional Court to interfere and to entail fresh hardship on both parties. A.I.R. 1936 All. 514=1936 A.L.J. 704=1936 A.L.R. 667=163 Ind. Cas. 919.

——S. 20—Jurisdiction—Contract for sale of goods C.I.F. or F.O.R.—Consignment found at destination to be not according to sample—Claim for breach—Court in place of such discovery has jurisdiction as part of the cause of action arose there.

The law presumes delivery to the buyer on a C.I.F. or F.O.R. contract at the time of the consignment on the basis that goods according to sample are being consigned. If the seller fails to supply goods according to sample or dishonestly supplies goods of another description, the buyer in law has a right to refuse acceptance. Therefore it cannot be said that no part of the cause of action arose in the place where the buyer made the discovery that the goods consigned were not according to sample. It would be strange in law that if a merchant in Madras orders goods from Bombay F.O.R., or C.I.F., pays for them and finds on opening the consignment sent to him that they are not according to sample or of an entirely different description, he should be compelled to go to the Court within whose jurisdiction the seller lives and sue him there. 1950 M.W.N. 16=A.I.R. 1950 Mad. 768=(1950) 1 M.L.J. 38.

——S. 20 (c)—Jurisdiction of Court—Suit for declaration that registered deed of surrender is fraudulent and collusive—Registration of deed—If part of cause of action.

In a suit for a declaration that a registered document surrendering certain rights in immovable property is fraudulent and collusive, the registration of the document is a part of the cause of action, and the Court within whose jurisdiction the registration took place has therefore, jurisdiction to entertain the suit. 85 C.L.J. 270=A.I.R. 1950 Cal. 510.

——S. 20—Applicability.

Applicability of S. 20 (*a*) and (*b*) is excluded by S. 36 (2), Bengal Money-lenders' Act, when the Court has no jurisdiction to pass a new mortgage-decree, though some of the defendants resided within its jurisdiction. A.I.R. 1942 Cal. 69=75 C.L.J. 229=45 C.W.N. 1085=I.L.R. (1942) 1 Cal. 235=198 Ind Cas. 739.

——S. 20—Suit in respect of property out of British India pending in appeal—Defendant residing in British India—Suit for mesne profits.

A British Indian Court will not adjudicate on tions relating to the title to, or the right to the possession of, immovable property out of British India. But the Code does not forbid the institution of a suit for mesne profits even if the decision in the suit involves adjudication regarding the plaintiff's title to immovable property outside British India, where the decree of the Court for mesne profits can effectively be enforced by the personal obedience of the defendant within the jurisdiction. A.I.R. 1927 Cal. 768, Foll. 23 N.L.R. 170=106 Ind Cas. 7=10 N.L.J. 232=A.I.R. 1928 Nag. 56.

——S. 20—Jurisdiction—Forum—Burden of showing jurisdiction is on plaintiff.

The burden of proving the want of jurisdiction is not on the defendant. It is for the plaintiff to allege specifically and prove how the Court has jurisdiction. A bare statement that the cause of action arose within its jurisdiction is certainly not enough. A.I.R. 1938 Mad. 497=47 L.W. 259=1938 M.W.N. 242=(1938) 1 M.L.J. 229=178 Ind. Cas. 824.

——S. 20—No rule as to revision from questions of jurisdiction can be laid down.

No hard and fast rule as to revision can be laid down in case of decisions as to jurisdiction under S. 20 and each must be decided on its own merits. Ordinarily, interference in revision is inadvisable in such cases and should only be exercised in exceptional cases to remedy an injustice. 77 Ind. Cas. 764=A.I.R. 1923 Lah. 565.

(c) Errors in.

——Ss. 20 and 21—Jurisdiction—Error in—When could be interfered with.

The plaintiff, resident of Sialkot, leased a house in Murree from defendants of Rawalpindi. The negotiatious were carried on by correspondence and the plaintiff sued for breach of contract at Sialkot. *Held*, though the contract was completed at Rawalpindi the breach took place at Murree which therefore was the place of the cause of action. The posting of the cheque from Sialkot by the plaintiff does not effect the formation of the contract at Sialkot, nor does the leasing of Sialkot property by an agent mean that the defendants carried on business at Sialkot. The Sialkot Courts, therefore, have no jurisdiction to entertain the suit but there being no failure of justice, objection as to place of suing cannot be sustained under S. 21. 65 Ind. Cas. 865=A.I.R. 1922 Lah. 164.

——S. 20 (S. 17, Old Code)—Objection—Omission to raise—Effect—Waiver—Consent.

It is only when a judge or Court has no jurisdiction over the subject-matter of the proceeding or action in which an order is made or a judgment recorded that such order or judgment is wholly void and that the maxim applies that consent cannot give jurisdiction. In all other cases the objection to the exercise of the jurisdiction may be waived, and, is waived when not taken at the time the exercise of the jurisdiction is first claimed. (1907) 5 C.L.J. 611=36 Cal. 193=1 Ind. Cas. 913 (D.B.).

——Ss. 20 (b) (20 and 21)—Jurisdiction—Court—Application—Acquiescence.

A suit was brought in the Sirsi Court against three defendants, of whom one resided within the local limits of the jurisdiction of the Sirsi Court and the other two within that of the Barsi Court. The plaintiff did not obtain the leave of the Sirsi Court under S. 17 of the Civil Procedure Code. The Barsi defendants, in their written statement, took an objection that there was no jurisdiction; but they made no application under S. 20 of the Code. The case then proceeded to trial and was decided on its merits by the first Court. *Held*, reversing the order of the lower appellate Court, that

as no application was made under S. 20 of the Civil Procedure Code, the Barsi defendants must be deemed to have acquiesced in the institution of the suit; and that, therefore, the suit could not be said to have been improperly instituted against those defendants in the Sirsi Court. (1908) 7 Bom.L. R. 289=30 Bom. 81.

(d) In suits against foreigners.

——S. 20—Suit against foreign subject—Forum—Cause of action.

It is a fundamental principle of international jurisprudence that a sovereign of a country acting through the Courts thereof has no jurisdiction over any matters with regard to which he cannot give effective judgment or which he can render effective only by interfering with the authority of a foreign sovereign or the jurisdiction of a foreign Court. 23 S L R. 46=101 Ind. Cas. 438=A.I.R. 1927 Sind 160.

——S. 20—Jurisdiction — Foreigners.

Foreigners are not excepted from jurisdiction of British Indian Courts. 25 A.L.J. 356=101 Ind. Cas. 673=49 All. 669=A.I.R. 1927 All. 413.

——S. 20—Suit against foreigner—Cause of action arising within the jurisdiction of the Court—Jurisdiction.

An action will lie against a non-resident foreigner in the British Courts if the cause of action arose within the jurisdiction of such Courts. (1900) 3 Bom.L.R. 82=25 B. 528.

——S. 20—Jurisdiction of British Indian Courts—Defendant subject of Protected Native State—Cause of action—Place of performance of contract.

A British Indian Court has jurisdiction to entertain a suit if the cause of action has arisen within the local limits, though the defendant does not reside within such limits, but is a foreigner domiciled and resident in a protected Indian State. 26 M. 544, foll. (1905) 29 M. 69. *See also* 29 M. 239=16 M.L.J. 238.

——S. 20—Partition suit—Defendant living out of British India—Jurisdiction of British Indian Courts.

British Indian Courts cannot pass a partition decree with regard to the moveable property with a defendant living out of British India. 24 N.L. R. 95=111 Ind. Cas. 135=A.I.R. 1928 Nag. 295.

——S. 20 (c)—Scope and effect of—Non-resident foreigner—Suit against in Indian Court—Cause of action arising wthin jurisdiction — Competency—Decree—Executability in India and in foreign territory — Considerations—Principles governing.

The competency of a Court to entertain a suit when the cause of action has arisen within its jurisdiction is not affected by reason of the fact that the defendants or one of the defendants, if there are more than one, is a non-resident foreigner. The competency of a Court to entertain an action and to pass a decree must be judged by the municipal law of the State when that question arises in a Court within the limits of the State which has constituted the Court which entertains the suit or passes the decree and is not to be judged by rules of international law. But when a question arises as to the enforcement of a decree or order passed by a Court in another territory, the rules of international law must prevail.

When the cause of action has arisen within the jurisdiction of a Court of India, a suit against a non-resident foreigner on such cause of action is properly instituted in that Court and the decree passed in such Court would be a decree of a competent Court, having regard to S. 20 (*c*), C. P. Code, and can be executed against any proprety belonging to the judgment-debtor anywhere in the territory in India. But the competency of an Indian Court by reason of the cause of action having arisen within its limits cannot render the decree one passed by a Court of compteent jurisdiction so as to make it enforceable against the judgment-debtor who is foreigner and is not ordinarily residing within the jurisdiction of the Court which passed the decree and who has not submitted to that Court's jurisdiction. The judgment-debtor is entitled to raise all contentions which he could raise if a suit were filed on a foreign judgment; when a question arises as to the enforcement of a decree or order passed by a Court in another territory, the rules of international law must prevail. While a Court in British India cannot disclaim jurisdiction against a non-resident foreigner, if the plaintiff's cause of action, wholly or in part, arose within its jurisdiction, the question as to what sanctity will attach to its decree if it is questioned in a foreign country is a different question. 56 All. 828; 17 Bom. 662; 25 Bom. 528; 26 Mad. 544 (P.C.), foll. 52 Bom.L. R. 660=A.I.R. 1951 Bom. 190=I.L.R. 1950 Bom. 640.

8. Leave to sue—Scope and Effect.

——Ss. 20 (b), 115 and 151—Leave to sue—Leave granted without notice to opposite party—Interference in revision—Power of Court to hear objections in exercise of its inherent powers—Ends of justice.

The mere fact that the lower Court has granted leave under S. 20 (*b*), Civil P. C., without first issuing notice to opposite party, does not amount to illegal exercise of jurisdiction or material irregularity in the exercise of it so as to warrant interference in revision.

As there is no remedy under the Code when leave is granted without issue of notice, the Court can under S. 151, hear any objection against the leave and pass such orders as the ends of justice require. A.I.R. 1933 Lah. 266=150 Ind. Cas. 559.

——S. 20—Leave to sue.

Where cause of action indubitably arising within jurisdiction—No leave is necessary. 23 S.L.R. 365 =117 Ind. Cas. 150=A.I.R. 1929 Sind 170.

——S. 20—Some defendants living outside jurisdiction—Leave to sue refused—Suit cannot go on unless they acquiesced in the filing of the suit. 46 Bom. 229=64 Ind. Cas. 919=23 Bom.L.R. 1086= A.I.R. 1922 Bom. 152.

——S. 20 (b), (S. 17, Old Code)—Suit when the defendant resides out of jurisdiction—Leave of the Court.

Where a suit is instituted in a Court within the

local limits of jurisdiction of which the defendant does not reside, the leave of the Court mentioned in the proviso to S. 17 of the Civil Procedure Code, 1882, can be obtained even after the institution of the suit. (1905) 8 Bom.L.R. 543=30 B. 570.

——S. 20 (b)—Leave to sue.

The order of the District Judge granting leave to the plaintiff to sue in a Court within whose jurisdiction only one out of three defendants resided and thus reversing the order of the first Court was strictly within S. 20 (*b*), though the defendants were sued not as a firm but as separate parties. 4 L.W. 411=35 Ind. Cas. 74.

——S. 20 (b)—Considerations for granting leave under S. 20 (1)—X at Nagpur drawing hundis on Bombay firm in favour of Y of Nagpur—After successive negotiations Z of Raipur becoming holder of them—Hundis dishonoured—Suit by Z against Y and other indorsers at Raipur—Whether triable by Raipur Court.

Leave under S. 20 (*b*), Civil P. C., cannot be given arbitrarily and even when the defendants who reside outside jurisdiction do not appear, the Court is bound to consider their position before granting leave.

X drew two *hundis* at Nagpur on a firm of Bombay in favour of *Y* of Nagpur. *Y* negotiated them in favour of another and after several successive negotiations they were negotiated ultimately in favour of *Z* of Raipur. These *hundis* were dishonoured and the drawee refused to accept them. *Z* then filed a suit at Raipur. Against and other indorsers:

Held, that the only cause of action in which all the defendants were jointly liable was the cause of action on the principal contract, that is to say, the contract in which the drawer was liable as the principal debtor. The rest were all liable as sureties and their liability being co-extensive with that of the principal debtor, the cause of action against them when sued along with the principal debtor was the cause of action against the principal and no other.

Held, also that the cause of action arose exclusively at Nagpur and no part of it arose at Raipur because the *hundis* were drawn at Nagpur and notice of dishonour under S. 35, Negotiable Instruments Act, had also to be given at Nagpur where the drawer had his place of business or residence and also because compensation according to S. 81, Negotiable Instruments Act, was payable at Nagpur. The Court at Raipur had, therefore, no jurisdiciton to entertain the suit. A.I.R. 1938 Nag. 262=I.L.R. (1940) Nag. 502=182 Ind. Cas. 842.

——S. 20 (b) (17 (c)—Leave to sue—Notice.

No notice is required to be issued to the defendant outside the jurisdiction before leave to sue is granted. 1904 A.W.N. 148=26 A. 603.

——S. 20 (b)—Scope—Whether limited to persons merely residing outside territorial jurisdiction but within British India.

There is no reason to read Cl. (*b*) of S. 20, Civil P.C., as limited to persons merely residing outside the limits of the territorial jurisdiction of the Court but within British India. It makes no difference whether defendants are residents of British India though outside the local limits of the Court's jurisdiction or they are persons residing outside British India. A.I.R. 1938 Mad. 731=47 L.W. 552=1938 M.W.N. 558=I.L.R. (1938) Mad. 1080=181 Ind. Cas. 757.

——Ss. 20 and 151—Leave under S. 20 (b)—No notice to opposite party—Objection if can be heard under S. 151—Proper remedy for opposite party.

Where without issuing notice to the opposite party, leave under S. 20 (b), Civil P. C., is granted, objection against such leave cannot be heard by the Court under its inherent jurisdiction. The opposite party can approach the Court for an order under S. 23 (3), which is a proper remedy for him. A.I.R. 1938 Pesh. 15=174 Ind. Cas. 815.

9. Particular Suits.

(a) Corporations.

——S. 20, Expln. 2—Corporation—Branches—Jurisdictions—Suit—Forum.

A Corporation resides wherever it carries on its business, irrespective of the location of its head office and if a Corporation such as a bank has 50 branch offices it has fifty separate and distinct jurisdictions. and a suit can be brought in any one of such Courts for the enforcement of a right in respect of which a cause of action exists within the limits of each independent jurisdiction. 39 Cal. 104 foll. 4 Pat. L. J. 141=(1919) P.H.C.C 155=43 Ind. Cas. 943.

——S. 20, Expl. 2—Interpretation—Life Insurance Company having head office at B and branch office at L—Branch Office merely acting as post office forwarding proposals and sending monies—Suit for refund of premiums on cancellation of policy—Jurisdiction of Court at L to entertain.

A Corporation can be said to carry on business at the head office or at the place where it has a branch in respect of a cause of action which arises, wholly or in part, at the place where the branch office is situated. If no part of the cause of action arises at the place of the branch office, the Corporation cannot be said to transact business at that place. This is the only possible interpretation of Explanation 2 of S. 20, C. P. Code.

Where therefore a Life Insurance Company having its head office at *B* has a branch office at *L* but the branch office does nothing but act as a post office forwarding proposals and sending monies, the Court at *L* has no jurisdiction to entertain a suit against the company for the refund of premiums paid by the plaintiff at *L* on the wrongful cancellation of his policy, no part of the cause of action having arisen at that place. 49 P.L.R. 163=A.I.R. 1948 Lah. 56.

——S. 20, Expl. 2—Applicability—Dominion of India.

The Dominion of India is not a Corporation within the meaning of Explanation 2 to S. 20, C. P. Code. A.I.R. 1950 Cal. 207.

(b) Copyright.

——S. 20 (c)—Infringement of copyright—Suit for damages, delivery of books, and injunction—Forum.

A suit for damages for infringement of a copy right and injunction must be instituted in a Court within the local limits of whose jurisdiction the defendant resides, or the infringement has taken place. 33 All. 24=7 A.L.J. 923=7 Ind. Cas. 101.

(c) Dower debts.

——S. 20 (c)—Place of performance—Suit for prompt dower.

Where a suit for prompt dower by a Muhammadan wife is instituted in a Court within whose jurisdiction the wife resides, the place of performance being the creditor's residence that Court has jurisdiction to entertain the suit. A.I.R. (Vol. 23) 1936 Cal. 97=40 C.W.N. 392=63 Cal. 726=161 Ind. Cas. 427.

——S. 20 (c) (S. 17 (c), Old Code)—Expln. III—Cause of action—Dower suit, for.

The cause of action in a suit for dower on divorce arises in the place where the divorce takes place, even though the defendant was resident at another place. The proviso following Cl. (c) of the section clearly applies only to Cl. (c) and not to clauses (a) and (b). (1904) 32 C. 146.

——S. 20 (c)—Plaintiff married at A—Agreement to pay maintenance on husband turning her out—Suit for arrears at B.

Plaintiff was married to the first defendant at *A* and on the same day the second defendant executed an agreement promising to pay her a monthly allowance if her husband failed to pay her the allowance. Plaintiff sued to recover arrears of maintenance at *B*:

Held, that it might reasonably be presumed that if the plaintiff was turned out by her husband she would cease to reside in *A* and that it was contemplated by the parties that she should be paid where she resided and plaintiff was entitled to sue both defendants at *B*. A.I.R. (Vol. 24) 1937 Nag. 39=I.L.R. (1937) Nag. 97.

(d) Ejectment.

——S. 20 (c)—Ejectment—Cause of action—Infringement of plaintiff's right—Title of defendants.

The cause of action of a plaintiff suing in ejectment is not affected by the title under which the defendants profess to hold possession. If the plaintiff's right has been infringed by one act or transaction that infringement gives him the cause of action against all persons interested in the infringement. 20 Ind. Cas. 347 (Cal.).

(e) Hiring.

——S. 20 (c)—Contract of hiring, when complete—Suit for infringement of copyright against hirer.

In the absence of any specific terms in the actual contract between the parties to the contrary it is reasonable and natural to assume that a transaction of hiring cannot be completed until the article hired is in the hands of the person to whom it is to be hired.

A suit was brought by the plaintiff for damages for infringement of copyright. He claimed to have written the dramatic work which had been converted according to him, by the defendants into a cinematograph film. He further complained that the defendants entered into a contract with the proprietor of the cinema in *R* to exhibit this film and to share the profits in certain proportion and that the film was duly exhibited in *R* in pursuance of that contract. The question was whether the suit was maintainable in *R*:

Held, that the action of hiring out this film was not complete until the film had reached *R* and was delivered to the proprietor of the cinema. Part of the cause of action, therefore, arose in *R* and the suit would lie in the Court at *R*. A.I.R. 1942 Mad. 659=(1942) 2 M.L.J. 110=1942 M.W.N. 448=204 Ind. Cas. 25.

(f) Leases.

——S. 20—Suit on lease—Plea of payment of rent—Suit for rent—Forum of.

A certain lease was executed and registered at *S* in District *T* although the agreement to take the lease was entered into at *M* where the lessor lived. The rent was payable in cash. A suit was instituted by the lessor at *M* to recover the rent. The facts and the circumstances showed that the intention of the parties was that payment of rent was to be made at *M*.

Held, that the Court at *M* had jurisdiction to entertain the suit. A.I.R. 1938 Mad. 977=1938 M.W.N. 979=48 L.W. 438=182 Ind. Cas. 116.

——S. 20, O. 1, R. 3—Suit for balance of premium collected by agent—Relief prayed for against agent and lessee in the alternative—Implied promise to pay at lessor's place of residence—Cognizability by Small Cause Court.

Where a land is leased, the lessee should apply to the lessor that a reasonable place be named for payment of the premium, and if this is not done, there is an implied promise on the part of the lessee to make the payment at the place of residence of the lessor according to the rule that the debtor should pay where the creditor is.

A suit for recovery of Rs. 100, the unpaid balance of the premium collected by an agent *A* was instituted by *B* in the Court of Small Causes at *P*. The collections were made in respect of a lease in favour of *C*. *A* pleaded that he had recovered Rs. 800 only and the balance of Rs. 100 was paid by *C* to *B*. Then *B* got the plaint amended impleading *C* and claiming the sum from *C* in the alternative. The property subject of the lease was situated a *Q* though *B* resided at *P* where most of her property was situated:

Held, (*i*) that the suit was not bad for misjoinder of defendants and causes of action and that under O. 1, R. 3, Civil P. C., *B* could join two sets of defendnats in the same cause of action;

(*ii*) that the cause of action having accrued at *P*, there being an implied promise to pay at *P*, the suit was rightly instituted in the Court at *P*,

(*iii*) that the suit being for money due under a complete transaction of lease which had been given effect to and not for specific performance, it was cognizable by a Small Cause Court;

(*iv*) that interest by way of damages for failure to pay as agreed could be allowed notwithstanding the

absence of an agreement as to payment of interest. A.I.R. (Vol. 20) 1933 All. 147=L.R. 15 A. 527 Rev.=150 Ind. Cas. 289.

(g) Misappropriation of goods.

——S. 20 (c)—Suit in respect of—Misappropriation of goods.

A person sent goods from Delhi to another in Calcutta to sell them on commission; the latter mortgaged the goods and appropriated the money for his own use. The Calcutta Court can entertain a suit for misappropriation. 7 P.L.R. 1910=7 P.W.R. (Cr.) 1910=11 Cr.L.J. 253=172 P.L.R. 1910=5 Ind. Cas. 830.

——S. 20—Place of suing—Suits on negotiable instruments.

Negotiable Instruments.

——S. 20 (c)—Negotiable Instrument—Assignment of promissory note—If a cause of action.

The assignment of a note is part of the cause of action and the assignee can sue on it, in the Court having jurisdiction at the place of assignment. 21 Mad. 91. 21 Bom. 126, 16 All. 165, 18 All. 403, 36 All. 554; 22 Cal. 451, foll. 31 M.L.J. 816=5 L.W. 246=37 Ind. Cas. 681.

——S. 20—Suit on negotiable instrument—Forum of.

Assignment of pronote—Recital that money should be paid where assignee does not entitle assignee to sue in Court where he resides. 119 Ind. Cas. 295=A.I.R. 1929 Cal. 306.

——S. 20—Suit on negotiable instrument—Forum of.

A suit based on hundi can be brought in the High Court in whose jurisdcition the hundi was endorsed and payment was made after default, because an endorsement on the hundi is a part of the cause of action. 22 Cal. 451; 4 Bur. L.T. 183; 31 M.L.J. 816; (1889) 2 Q.B.D. 128; and A.I.R. 1926 Sind 31, Foll. 22 S.L.R. 305=107 Ind. Cas. 218=A.I.R. 1928 Sind 86.

——S. 20—Suit as negotiable instrument—Negotiation—If provides the cause of action.

When a firm outside Madras draws *hundis* on a firm in Madras which under the contract the Madras firm has to honour and pay when presented to them in Madras, the payment cannot be considered to be made when the *hundi* is negotiated by the firm outside Madras but only when the payment is actually made by the firm in Madras on the *hundi*. Negotiation of the *hundi* is only a provisional method of realising money from persons who are willnig to accept the *hundi* for a small profit and take the trouble of presenting the *hundi* to the drawee and recovering the money from him. Where payment was to be made only on the delivery of the railway receipts and the railway receipts were to be attached to the *hundis* and presented in Madras along with the *hundi* the presentation of the railway receipt in Madras was a part of the performance of the contract and part of cause of action arose in Madras. 47 Mad. 403=79 Ind. Cas. 800=19 M.L.W. 168 =34 M.L.T. 7=1924 M.W.N. 178=A.I.R. 1924 Mad. 464=46 M.L.J. 82.

——S. 20—Suit on Negotiable Instrument—Forum.

Where a *hundi* drawn in Cawnpore for acceptance and payment in Calcutta is so accepted and paid in Calcutta and the plaintiff sued to recover the sum so paid, *held*, that as the cause of action would not be complete unless he proved the fact that he had accepted the *hundi* in Calcutta on the due date, part of the cause of action arose within the Ordinary Original Jurisdiction of the High Court of Calcutta. (1921) 59 Ind. Cas. 539=47 Cal. 583.

——S. 20—Suit on negotiable instrument pro-note by deceased father in favour of one of his sons—Such son can bring suit on pro-note against himself and his brothers.

Where the father has executed a promissory note in favour of one of his sons, such a son after the death of father can bring a suit on the promissory note against himself and his brothers for recovery of his debt out of the father in the hands of all his sons, including himself. A.I.R. 1943 Cal. 45 =75 C.L.J. 353=205 Ind. Cas. 15.

——S. 20—Suit on hand-note—Forum.

The cause of action for a suit on a hand-note arises either at the place where the contract was made or at the place where the contract was to be performed. But where it is not urged on behalf of the defendant that he was to re-pay the loan at any place other than the one where "the transaction was done" it may be taken that the money was to be repaid to the plainiiff where the transaction took place. A.I.R. (Vol. 26) 1939 Pat. 294=15 B.R. 777=182 Ind. Cas. 569.

——S. 20—Suit on pronote—Pro-note not specifying any place—Forum of.

Pro-note not specifying any place where payment is to be made—Presumption is that it should be made at the usual place of business of the creditor and the cause of action arises at that place—The fact that pro-note was liable to be presented at a partcular place under S. 70, Negotiable Instruments Act, does not imply that the amount due on it is payable at that place. A.I.R. 1939 Lah. 18=40 P.L.R. 975=181 Ind. Cas. 396.

——S. 20—Suit on pro-note executed by A, B, C and D—A Executing it at place beyond Court's jurisdiction—Note sent to C at Lahore—Under C's instructions note delivered by B to Bank in Lahore.

A suit was instituted in the Lahore High Court by a certain bank in Lahore, against *A*, *B*, *C* and *D* on the basis of a pro-note executed by them. The pro-note was signed by *A* at Nawansher in the District of Hazara and sent to *C* at Lahore. Under *C's* instructions it was delivered by *B* to the bank.

Held, that the Lahore Court had jurisdiction to try the suit against *A*, the delivery having been made by *B* with his implied authority. A.I.R. 1937 Lah. 800=40 P.L.R. 134=175 Ind. Cas. 153.

——S. 20—Place of suing—Suit on promissory note providing for payment of the amount anywhere.

Where a promissory note is executed in Bombay and the defendant is a resident of Bombay, a suit cannot be filed on it in Kutch because of a recital in the promissory note that the money may be paid anywhere. A.I.R. 1950 Kut. 66.

——S. 20 (c) (S. 17, Old Code), Expl. III (1)—"Expressly or impliedly payable"—Jurisdiction—Pro note executed with knowledge that payee was residng elsewhere—"Debtor should follow creditor", applicability of rule.

The phrase "expressly or impliedly payable" means "payable" according to the terms of the contract, which are expressed or can be inferred on a construction of the language or from the circumstances. The jurisdiction of Courts should be sought for within the Code. The general rule that a debtor should seek his creditor cannot be relied on as controlling the express words of a statute prescribing the conditions which give a Court jurisdiction. Per *Curiam*:—A pro-note was payable on demand and not payable at any specified place. It was executed within the local limits of *T*. Court. The defendant resided at *T*. The plaintiff resided at *K*. and brought this suit in *K*. Court:

Held, that *K*. Court had no jurisdiction. (1904) 31 M. 223=4 M.L.T. 97.

(i) Partnership.

——S. 20 (c)—Partnership—Accounts.

In the absence of an agreement that account should be taken elsewhere, a suit for the taking of the accounts of a partnership should be instituted in the Court within whose jurisdiction the business of the partnership was carried on. 17 A.L.J. 1015=52 Ind. Cas. 655.

——S. 20—Suit on—Partnership—Forum.

The cause of action partly arises where a partnership is entered into, and, therefore although the partnership is not carried on in that place, a suit for dissolution of partnership can be brought there. 117 Ind. Cas. 824=A.I.R. 1929 All. 236.

——S. 20—Suit in regard to partnership.

A suit for dissolution of partnership and rendition of account can be entertained at the place where the contract of partnership is entered into or where the business of partnership is carried on, if these two places are different. 108 Ind. Cas. 51.

——S. 20—Suit regarding partnership.

If the plaintiff and defendant are within the jurisdiction of the Court, the plaintiff can file a suit against the defendant for dissolution of partnership, even though that partnership commenced and was carried on in foreign territory. 45 Bom. 1228=23 Bom.L.R. 543=63 Ind. Cas. 959=A.I.R. 1921 Bom. 460.

——S. 20 (c)—Dissolution of partnership—Capital subscribed at one place—Business carried on at another place—Suit where to be instituted.

Where a partnership was entered into to carry on business at a certain place, a suit for its dissolution can be brought only at the place of business and not at any other place where capital for the concern might have been subscribed. 42 P.R. 1916=98 P. W.R. 1916=33 Ind. Cas. 353.

——S. 20 (c)—Partnership accounts—Suit for adjustment.

A suit for adjustment of partnership accounts can lie at any place where a substantial portion of the business is carried on even though the contract of partnership took place somewhere else and even though the business accounts are kept at another place, because the place of performance of an obligation is its main seat and place of jurisdicaion. 1 O.L.J. 561=26 Ind. Cas. 225.

——S. 20—Contract of partnership—Suit for dissolution, where lies.

The plaintiff and defendant firms both had their Head Offices at Calcutta. The two firms entered into a partnership business for purchase and sale of jute, and that jute was to be purchased by the plaintiffs at Karnal in the District of Muzaffarpur and despatched to Calcutta where it was to be sold by the defendants; the profit or loss was to be shared by both the parties, the defendants being further entitled to. The plaintiff firm instituted a suit for dissolution of the partnership and for taking accounts of the jute business.

Held, that the purchase of jute for the purposes of business cannot necessarily be the carrying on of the business of the partnership and that as it was at Calcutta that the accounts were kept and there was no place of business of the partnership in Muzaffarpur, the suit was not maintainable at Muzaffarpur. A.I.R. 1936 Pat. 6=160 Ind. Cas. 353.

——S. 20—Joint family business—Suit against manager—Forum of.

A man may carry on business either personally or through an agent and although the manager of a joint Hindu family is not liable to account to the sleeping partners in precisely the same way as the manager of an ordinary business, his position approximates more nearly to that of an agent than any other. He is therefore liable to be sued even in a purely personal suit at any of these places just as a partner in an ordinary partnership is liable to be sued wherever a branch of the business exists. 67 Ind. Cas. 69 (Lah).

——S. 20—Scope of—Suit for dissolution of partnership at two places.

Where business is carried on in two places Courts in both places can entertain a suit for dissolution of partnership. 23 M.L.W. 361=92 Ind. Cas. 915=A.I.R. 1926 Mad. 427=50 M.L.J. 298.

——S. 20 (S. 17, Old Code)—Partnership—Suit for profits—Defendants not residing within jurisdiction.

The plaintiffs sued at Aligarh for their share of profits of a partnership business entered into at Lahore and carried on at Hansi, alleging a special agreement to pay profits at Khurja, where the plaintiffs resided. The agreement set up by the plaintiffs was not proved. The defendants applied for a stay of proceedings under S. 20 of the Code of Civil Procedure but their application was rejected, and no appeal from that order was made. *Held* that the Court at Aligarh had no jurisdiction to entertain the suit and that the defect was not cured by the fact that the defendant's application under S. 20 of the Code had been rejected. 1908 A.W.N. 46=5 A.L.J. 88.

(j) Policies of Insurance.

——Ss. 20 and 21—Insurance—Cause of action—Policy of insurance—Death of assured.

The expression "cause of action" in S. 20 means the whole of the cause of action or every fact which must be admitted or proved before plaintiff can succeed. The death of the assured being a part of the plaintiff's cause of action in a suit on an insurance policy the suit is maintainable at the place of his death. 22 C.W.N. 517=44 Ind. Cas. 694.

——S. 20—Suit on fire insurance—Part of cause of action arises where fire occurs.

For a suit on a fire insurance a part of the cause of action arises where the fire occurs and under S. 20 (c) the suit is maintainable at that place. 11 N.L.J. 184=113 Ind. Cas. 896=A.I.R. 1928 Nag. 305.

——S. 20 (c)—Insurance—Suit for recovery of insurance money—Death of insured, place of.

A suit to recover money due on Life Insurance Policy can be instituted in the place where the insured died. 41 Ind. Cas. 392 (Mad.).

——S. 20—Suit in respect of—Head Office at Lahore—Chief Agent's Office at Calcutta—Forum.

Where the proposal for insurance is made in Calcutta and forwarded from Calcutta to Lahore, a part of the cause of action arises in Calcutta.

An insurance company had its head office at Lahore. Its business was transacted in Calcutta by a firm *X* who were the chief agents of the company for Bengal. Bihar and Orissa. The note-paper of the firm was printed with "the Co-operative Assurance, Co. Ltd." The address was printed as "11, Esplanade East, Calcutta" and on the left hand side, the name of the firm *X* as chief agents for Bengal, Bihar and Orissa was also printed. In the advertisement of the Company in a Calcutta paper inserted by the firm *X*, the words used were "Head Office, Lahore, Caucutta Office, 11; Esplanade." The company approved of the advertisement on the ground that is helped business. The firm *X* did not act merely as a post office but did a considerable amount of business on behalf of the company in which they were allowed a certain amount of discretion:

Held, that the insurance company did carry on business in Calcutta. A.I.R. 1944 Cal. 1=I.L.R. (1944) 1 Cal. 101=211 Ind. Cas. 450.

——S. 20—Suit for recovery of money due on life insurance—Court where death of insured took place has jurisdiction to entertain suit.

For a suit for the recovery of the money due on a life insurance policy, a part of the cause of action is the death of the insured. Consequently the Court within whose jurisdiction the death took place has jurisdiction under S. 20, Civil P. C., to entertain such a suit. A.I.R. 1943 Cal. 199=77 C.L.J. 112 =I.L.R. (1943) 1 Cal. 564=47 C.W.N. 292=207 Ind. Cas. 68.

——S. 20—Insurance Company at Lahore appointing certain person working at Meerut as its chief agent for Rajputana and Bundelkhand area—Appointment made at Lahore and all payments to be made at Lahore and all accounts to be rendered at Lahore—Suit by Company at Lahore for recovery of certain amount due by agent.

An Insurance Company having its office at Lahore appointed certain person working at Meerut as the Chief agent for Rajputana and Bundelkhand area. The appointment was made at Lahore and all the payments were to be made at Lahore and all accounts were to be rendered at Lahore. Subsequently disputes arose between the parties and the appointment was cancelled. Company instituted suit at Lahore against the agent for recovery of certain sum due by the agent:

Held, that cause of action arose at Lahore and the Court at Lahore had jurisdiction to try the latter suit. A.I.R. 1940 Lah. 85.

——S. 20 (c)—Insurance—Insurance money payable at death—Cause of action for suit for money payable under the policy.

The only definition of 'cause of action' that will work, if it has to be applied in cases of all kinds, is the entire set of facts that gives rise to an enforceable claim. In order to succeed, in case of insurance policy payable at death, the claimant must prove the death of the insured. The place of death shall therefore be the place where the cause of action arose, so that the Court of that place gets jurisdiction. A.I.R. 1934 Sind 76=28 S.L.R. 192=151 Ind. Cas. 516.

——S. 20—Insurance—Place of death of the insured—Jurisdiction—Clause in policy as to payment at Head Office—Effect.

A suit against an insurance company for recovery of the amount of a life assurance policy can be brought under S. 20, Civil P. C., at the place where the assured died, the death being part of the cause of acaion, although there is a clause in the policy that the amount is payable at the head office of the company. A.I.R. 1932 Bom. 392=34 Bom.L.R. 815=40 Ind. Cas. 262.

——S. 20—Suit again Insurance Company—Agency in one place—If confers jurisdiction.

Where a Life Assurance Company has agency in Madras, but the agency does nothing but acts as a post office forwarding proposals and sending money and not having any discretion in the matter either to conclude contracts or to vary them, or to enter into them. it does not carry on business in Madras. 29 M.L.W. 628=121 Ind. Cas. 155=A.I.R. 1929 Mad. 347=56 M.L.J. 299.

(k) Restitution of conjugal rights.

——S. 20 (c)—Restitution of conjugal rights—Forum.

In a suit by a husband against his wife for restitution of conjugal rights, the cause of action arises from the wife absenting herself from the husband's residence. The Court within whose local jurisdiction such residence is situate, is competent to try such suit. 54 Ind. Cas. 120 (All.).

——Suit for restitution of conjugal rights—Court within whose jurisdiction husband resides, whether has jurisdiction.

Where the plaintiff who resided in Vellore, in British India, instituted a suit for restitution of conjugal rights at Vellore against his wife and the wife's father, who resided in Bangalore and it was found that the marriage was performed at Bangalore and that the plaintiff and his wife had never lived as husband and wife in British India.

Held, that the Vellore Court had no jurisdiction to try the suit as the defendants resided outside its jurisdiction and no part of the cause of action could be said to have arisen within the jurisdiction of that Court. A.I.R. (Vol. 21) 1934 Mad. 407=39 L. W. 720=67 M.L.J. 271=1934 M.W.N. 1035=149 Ind. Cas. 1199.

(1) Sale of goods.

——S. 20—Suit for price of goods sold—Forum.

Where the plaintiff, a resident of Madanapalle, talked and settled with the defendant at Madras about the commission to be paid to him as commission agent for the sale of goods which the plaintiff was to send directly to Madras or to others according as defendant would direct and under the arrangement the sale price was to be paid to the plaintiff at Madanapalle.

Held, that the suit for price of goods despatched lay at Madanapalle, as a part of the cause of action arose there. 19 M.L.W. 499=84 Ind. Cas. 691=34 M.L.T. 116=1924 M.W.N. 336=A.I.R. 1924 Mad. 789=46 M.L.J. 371.

——S. 20 (c)—Sale of goods—Contract for—Breach—Failure to supply goods—Claim for refund of overpayments and damages for non-supply of goods—Jurisdiction of Court where part of the cause of action arose. *See* C. P. CODE, O. 2, R. 2 and S. 20 (c). 225 Ind. Cas. 96=A.I.R. 1946 A. 512 =I.L.R. (1947) A. 3=1946 A. L. W. (H.C.) 378=1946 A.W.R. (H.C.) 551.

——S. 20—Suit for goods sold—Goods ordered by V. P. Post.

Where *A* at Kasganj ordered goods of *B* at Delhi and the goods were sent by V. P. P. and on taking delivery, *A* found that the parcel did not contain the goods ordered, whereupon he instituted a suit at Kasganj against *B* for damages, *held*, that the contract, though entered into at Delhi, was not completed till delivery was made and the goods paid for at Kasganj, and that the Kasganj Court had jurisdiction to entertain the suit. 42 All. 619=18 A.L.J. 749=59 Ind. Cas. 359=2 U.P.L.R. (All.) 254.

——S. 20—Suit for price of goods sold—Forum.

An action for the recovery of the price of goods despatched by plaintiff by railway from Delhi to the defendant at Meerut is triable at Delhi where the goods were delivered to railway, as delivery to the railway company as a carrier has the same effect as delivery to the buyer under Contract Act, S. 91. 26 P.L.R. 498=89 Ind. Cas. 751=7 L.L.J. 395= A.I.R. 1925 Lah. 555.

——S. 20—Cause of action, arising in part at a particular place—Court of that place can try suit.

In a case where plaintiff sent goods from Sialkot to defendant at Calcutta to be sold there and the money realised from the sale was payable at Sialkot, and the plaintiffs sued for the money in Sialkot Court.

Held, that the Court Sialkot has jurisdiction to try the suit. 3 L.L.J. 499=69 Ind. Cas. 424=A.I.R. 1922. Lah. 36.

——S. 20—Place of suing—Contract—Provision for payment of balance against Railway receipt—Place of suing. (1948) 2 M.L.J. 101.

——S. 20—Suit for sale price of goods sold—Forum of.

Where the parties have not expressly or impliedly agreed on any place of payment, the creditor is entitled to be paid at his own place. Defendant selected some articles at *A* and ordered them to be sent to *B* where he promised to purchase such of them as should be selected by his wife.

Held, that there was an implied contract to pay at *A* and that t he Court at *A* had jurisdiction to try a suit for the balance of the price. 82 Ind. Cas. 122=A.I.R. 1925 Oudh 209.

——S. 20—Contract of sale of goods—Place of delivery—Delivery to railway company.

The plaintiff brought a suit in a Court of the place where he was carrying on business against the defendants residing at another place on a contract of sale of goods. It was found that the payment was also to be made at the place of the defendants. Under the contract the plaintiff had asked for the goods to be despatched from the place of the defendants by rail to them at their expense. The Court of the place where the plaintiff carried on business had no jurisdiction as no part of cause of action arose there. A.I.R. 1941 Lah. 223=43 P.L.R. 158=195 Ind. Cas. 300.

——S. 20—Contract made at Madras and delivery and payment to be made there—Goods shipped from Karachi — Breach of contract—Karachi Court has no jurisdiction.

Where the contract for the sale of goods has been made in Madras and the goods are to be delivered at Madras and the payment is also to be made there, the mere fact that the shipment of goods took place at Karachi, does not give jurisdiction to the Karachi Court to entertain a suit on breach of contract. A. I. R. 1944 Sind 70=I.L.R. (1943) Kar. 384=211 Ind. Cas. 277.

——S. 20 (c)—Breach of contract for sale of goods —Forum.

Where, by the terms of the contract, certain goods, unascertained, at the time, are to be delivered at a certain place, the performance of the contract is to be completed at that place and, therefore, the Court at that place has jurisdiction to entertain an application to file an award relating to the disputes arising out of that contracts. 3 S.L.R. 156=4 Ind. Cas. 1147.

——S. 20—Sale of goods—Suit as regards—Forum of.

Where a thing is purchased at *C* and the property passes to the vendee, but part of the purchase-money is paid at *D* to which place the article is sent, a Court at *D* has jurisdiction to try suit by vendee for return of purchase-money on the ground of breach of warranty by the vendor. 86 Ind. Cas. 1046=A.I.R. 1926 Cal. 100.

——S. 20—Sale of goods—Recovery of money—Forum.

The defendants had by wire ordered the plaintiffs to send to them at Akola certain bags of grain. The price was agreed to be paid at Khurai. The plaintiffs sent the bags by train to Akola. Defendants failed to pay the money. The goods were sold at a loss for which the plaintiffs brought the suit.

Held, that the breach of contract occured at Akola, and therefore the cause of action arose wholly at Akola and the Small Cause Court at Khurai had no jurisdiction. 79 Ind. Cas. 393=A.I.R. 1924 Nag. 18.

——S. 20—Sale of goods—Suit for price.

Ordinarily if goods are purchased, or money is borrowed, the payment for the goods or repayment of money must be presumed to have been agreed to be made at the place and the residence of the seller or the lender as the case may be. 71 Ind. Cas. 431=A.I.R. 1923 All. 465.

——S. 20 (c)—Contract—Sale of goods—Forum.

A contract for the sale of goods was entered into at Amritsar providing *inter alia* that the buyer's agents were to take delivery at Amritsar after paying 90 per cent of the price and that the remaining 10 per cent. was to be paid after weighing and testing the goods at Karachi. *Held,* the performance of the contract was to be completed at Karachi and, therefore, the Karachi Court had jurisdiction. 5 S.L.R. 97=12 Ind. Cas. 662.

(m) Shipping.

——S. 20 (c)—Shipping — Freight—Claim for freight illegally collected—Damages for short delivery—General average account — Non-resident foreigner—Jurisdiction of British Court.

In a suit by plaintiff for refund of freight, the price of the bundles short delivered, or the amount duo to him on a general average account was instituted in the Court of *C*. *Held,* that the freight having been collected at *C* the cause of action for its refund arose in that place. The cause of action for the price of goods short delivered arose partly in *C* where the goods were delivered according to the terms of the Charterparty. The fact that the voyage came to an end was a part of the cause of action for a general average and that having taken place at *C* the Court had jurisdiction to try the whole suit. 16 I.A. 240, ref. The term 'cause of action' in S. 20 of the C. P. Code means the whole bundle of material facts which is necessary for plaintiff to allege and prove to entitle him to succeed. A Municipal Court is entitled to exercise jurisdiction over a non-resident foreigner where the cause of action arises within its jurisdiction. The question whether its decree could be enforced against him in the foreign Court is one for the consideration of the Courts of that State. . 35 M.L.J. 189=(1918) M.W.N. 521=24 M.L.T. 209=47 Ind. Cas. 708.

(n) Tort.

——S. 20—Tort—Injury—Forum.

Where a person purchased a ticket for journey by railway at Agra but fall out of the train and was injured owing to the neglect of the Ry. Co. at *B*., the cause of action for a suit for damages arises at *B* and not at Agra. 41 All. 488=17 A.L.J. 506=50 Ind. Cas. 130.

——S. 20—Tort—Subsequent aggravation does not furnish fresh cause of action.

A subsequent aggravation of the damage caused by a tort without any act or omission on the part of the defendants does not furnish a cause of action: 5 Pat. L.J. 359, Foll. 11 P.L.T. 384=122 Ind. Cas. 153=A.I.R. 1930 Pat. 528.

——S. 20—In a suit for damage for conversion of land it is open to the plaintiffs to proceed against any one or more of the joint tort-feasors as they may elect. Therefore a suit started against one of the tort-feasors, who resides in Calcutta, can be properly maintained in Calcutta High Court: 32 C.W.N. 208=116 Ind. Cas. 727=A.I.R. 1928 Cal. 887.

——S. 20 (a)—Tort—Outside jurisdiction—Defendant resident within.

According to the Ss. 19 and 20 of the C. P. Code the residence of the defendant within the territorial limits of a Court will give jurisdiction to it even in respect of torts committed outside the local limits of the Court. 39 Mad. 433=28 M.L.J. 310=2 L.W. 290=28 Ind. Cas. 394.

——S. 20 (c)—Tort—Libel—Cause of action.

Where certain persons are alleged to be excommunicated, the cause of action in their favour arises at the place where the order of excommunication is handed over by the defendant to the executive body of the community. 7 M.L.T. 42=5 Ind. Cas. 513.

——Ss. 20 and 19—Owner of hundi at A transmitting it to drawee at B—Hundi stolen—Shahjog vyaparee negligently receiving it and cashing it from drawee—Owner basing suit on tort—Court at A has no jurisdiction.

Where the owner of a *shahjog hundi* residing at *A* transferred it to the drawee at *B* where it was stolen before reaching the drawee, and was negligently received by a *shahjog vyaparee* who got it cashed from the drawee, and the owner instead of basing his suit on money had and received, based it on tort:

Held, that as the tort was committed at *B* the Court at *A* had no jurisdiction to entertain the suit. If the plaintiffs had sued for money had and received upon an implied contract, jurisdiction would be determined by S. 20, which includes suits based on contract. A.I.R. 1936 Sind 229=30 Sind.L.R. 182=166 Ind. Cas. 347.

(o) Trade mark.

——S. 20—Place of suing—Suit for protection of unregistered trade-mark—Jurisdiction of Court in place where offending goods were supplied on commercial scale by defendant.

If the trade-mark for the protection of which a suit is brought has not been registered, the suit is in the nature of a passing off action, such as may be brought to assert the right of a person who uses a particular mark to prevent others using the same in such manner that there is a likelihood of the public being deceived into thinking that the goods sold by such others are goods made by the plaintiff.

In order, therefore, that a Court at a place should have jurisdiction, it is necessary to show that the defendant was responsible for sending out to that place goods which were liable to deceive intending purchasers into believing that they were goods manufactured by the plaintiff. It would of course not be sufficient if such goods were supplied by the defendant to individual purchasers for use, as in such a case, the probability of any member of the public being deceived would be slight. It is necessary to show that the supply has been on a commercial scale to persons who are likely to offer the goods in question for sale. In order that the Court should have jurisdiction, it is not necessary to show that the transfer of property in such goods was effected within its jurisdiction. A. I. R. 1947 Lah. 289.

10. Plaintiff's right to choose forum.

——S. 20—Plaintiff's right to choose forum.

Though S. 20 of the old C. P. Code is dropped in the new Code, yet very strong reasons must be shown under the new, as required in the old Code, for depriving a plaintiff of his right to bring his suit in any Court in which the law allows. 7 Bur. L.T. 1=7 L.B.R. 129=23 Ind. Cas. 345.

11. Return of plaint.

——S. 20, O. 7, R. 10 (Old Code, Ss. 17, 57)—Duty of—Return of plaint.

If a suit is instituted in a Court which has no jurisdiction, the proper order was, as indicated by S. 57 of the C.P. Code, to direct that the plaint should be returned to be presented to the proper Court. (1905) 7 Bom.L.R. 993.

——S. 20, O. 7, R. 10 (Old Code, Ss. 17, 20)—Procedure—Order purporting to be made under S. 20 returning plaint but not staying proceedings—Practice.

A Court purporting to act under S. 20 of the Code of Civil Procedure was "satisfied that justice was more likely to be done by the suit being instituted in another Court," but instead of making an order staying proceedings either finally or until further orders, the Court made an order returning the plaint.

Held, that this was an illegal order, and further that it could not be supported as an order returning a plaint on the ground that the suit could not, having regard to S. 17 of the Codee, have been instituted in the Court in which it was brought without the leave of the Court which had not been granted. 1901 A.W.N. 136.

——S. 21—Errors in jurisdiction.

Synopsis.

See also C. P. CODE, S. 16 AND O. 7, R. 10.

1. Applicability.
2. Collateral proceeding.
3. Consent and waiver. See also S. 9.
4. Execution proceedings.
5. Failure of justice.
6. Revision.
7. Separate suit.
8. Stage for objection.

1. Applicability.

——S. 21—Applicability.

The principle underlying S. 21 has been applied to cases which do not strictly fall within its terms. 43 Mad. 675 (F.B.), Foll. 49 Mad. 746=95 Ind. Cas. 12=A.I.R. 1926 Mad. 421=50 M.L. J. 161.

——S. 21—Scope of.

S. 21, C.P. Code refers to territorial as distinct from precuniary jurisdiction. A.I.R. 1946 Sind 103=I.L.R. (1945) Kar. 445.

——S. 21—Pecuniary jurisdiction.

Question, one of want of pecuniary jurisdiction and not of over-valuation or under-valuation—S. 11, Suits Valuation Act, is not applicable—Nor does S. 21, C.P. Code apply—S. 21, C.P. Code, is concerned only with territorial jurisdiction. A. I.R. 1942 Oudh 481=1942 O. W. N. 493=202 Ind. Cas. 126.

——S. 21—Applicability.

S. 21, C.P. Code, does not apply to cases of want of pecuniary jurisdiction, or exclusive jurisdiction. Its application is confined only to objections regarding want of territorial jurisdiction. A. I. R. 1937 All. 515=1937 A.L.J. 588=I.L.R. (1937) All. 670=1937 A.L.R. 713=170 Ind. Cas. 706.

——S. 21—When not applicable.

A suit instituted in a British Indian Court against a non-resident foreigner on a cause of action which arose wholly outside British territory is not covered by S. 21: A.I.R. 1919 P.C. 150 and (1918) M. W.N. 378, Foll. 9 Lah. 455=29 P.L.R. 406=10 L.L.J. 87=109 Ind. Cas. 28=A.I.R. 1928 Lah. 297.

——S. 21—Court can raise point of jurisdiction even at time of delivering judgment.

The Court is entitled to raise a point with regard to its own jurisdiction even at the time of delivering judgment, though it has not been taken by either party. A.I.R. 1935 Rang. 174=160 Ind. Cas. 223.

——S. 21—S. 21 deals only with questions of territorial jurisdiction and does not apply to an objection that the suit is cognizable only by a Small Cause Court. A.I.R. 1931 Oudh 411=8 O.W. N. 1019=135 Ind. Cas. 889.

——S. 21—S. 21 does not apply to an objection as to the nature of the Court in which the suit had been filed. It refers only to the place of suing. A.I.R. 1931 All. 406=15 R.D. 623=134 Ind. Cas. 253.

——S. 21—S. 21 has no application where the objection to jurisdiction is not merely one as to the place of suing but as to the nature of the Court itself. A.I.R. 1930 All. 873=1930 A.L.J. 997 =52 All. 947=132 Ind. Cas. 35.

——S. 21—Pecuniary jurisdiction.

The provisions of S. 21, C.P. Code, to the effect that no objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court

of first instance at the earliest possible opportunity and unless there has been a consequent failure of justice, do not apply to a case in which the objection is to the pecuniary jurisdiction of the Court. A.I.R. 1937 Mad. 112=173 Ind. Cas. 219.

——S. 21—Applicability—Ex parte decree—Application to set aside.

Held, that the principle underlying S. 21, C.P. Code, would apply to an application for setting aside an **ex parte** decree by virtue of the provisions of S. 141, C.P. Code. 1930 A.L.J. 997=A.I.R. 1930 All. 873=52 All. 947.

——S. 21—Applicability.

S. 21 makes it clear that non-compliance with Ss. 16 to 20, is in no way fatal to the jurisdiction of the court and does not render the decree by court of competent jurisdiction a mere nullity so as to empower the executing court to refuse to execute it on that ground. A.I.R. 1931 Sind 47 =25 S.L.R. 204=131 Ind. Cas. 182.

——S. 21—Applicability—Execution proceedings.

It is not permissible to use S. 21 in execution proceedings. S. 21 cannot in terms apply to execution proceedings although the principle applies to them. 28 M.L.W. 885=114 Ind. Cas. 545=A.I.R. 1928 Mad. 746.

——S. 21—Applicability—Execution sale.

S. 21 does not apply to an execution sale held by a Court having no jurisdiction. 27 C.W.N. 542 =77 Ind. Cas. 253=A.I.R. 1923 Cal. 619 (b).

——S. 21—Applicability—Proceedings under U. P. Agricultural Relief Act or U.P. Debt Red. Act.

S. 21 of the C. P. Code, has application even to proceedings under the U. P. Agri. Rel. Act or Debt Red. Act. I.L.R. (1947) All. 672=A. I.R. 1948 All. 58=1947 A. W.R. (H.C.) 160= 1947 A.L.J. 276.

——S. 21—Under S. 21 of the Code, it is necessary to show not merely that the suit was decided wrongly but that its being decided wrongly was in some measure due to its having been instituted in a wrong local jurisdiction. A.I.R. 1922 Oudh 124.

——S. 21—Applicability—Court's power under —Agreement—Ousting jurisdiction — Court concluding that it has jurisdiction—Absence of assertion in plaint if ousts jurisdiction.

Although as a general proposition it may be said that the question of jurisdiction is to be determined by the allegations in the plaint, it cannot be said, after the Court on an investigation of the case comes to the conclusion that it has jurisdiction, that there was no jurisdiction in the Court merely because of the absence of an assertion in the plaint. A.I.R. 1934 Pat. 593=16 P.L.T. 109=152 Ind. Cas. 906.

——S. 21—Non-compliance with provisions of Ss. 15 to 20—Decree passed by competent Court, If nullity.

Section 21, C. P. Code, makes it clear that a non-compliance with the provisions of Ss. 15 to 20 is in no way fatal to the jurisdiction of the Court, and does not render the decree passed by a Court of a competent jurisdiction a mere nullity so as to empower the executing Court to refuse it on that ground. A.I.R. 1940 Sind 150=I.L.R. (1941) Kar. 79=190 Ind. Cas. 881.

——S. 21—Appeals.

Although S. 21 does not in terms apply to appeals, the principle underlying it is of general application and covers appeals also, and if the objection as to want of territorial jurisdiction of a Court to hear an appeal is not taken before that Court, it must be deemed to have been waived. A.I.R. 1933 Nag. 318=29 N.L.R. 342=149 Ind. Cas. 718 (2).

——S. 21—Decree, when set aside.

All conditions under S. 21 must be fulfilled for setting aside decree. 96 Ind. Cas. 544.

——S. 21—Section 21 creates what may be called a statutory waiver of the objection to jurisdiction so far as it relates to the place of suing and where there was no consequent failure of justice the validity of a decree passed in such suit cannot be challenged by a separate suit. 43 Mad. 675 (F. B.), Rel. on.; A.I.R. 1925 Mad. 117, Foll. 11 L.L.J. 306=120 Ind. Cas. 279=A.I.R. 1929 Lah. 449.

——S. 21—Effect on Letters Patent—Letters Patent (Calcutta), Cl. 12—Cl. 12 is not controlled by S. 21.

Although the legislature had power in 1908 to override the Letters Patent the legislature has not by introducing S. 21, C. P. Code, overridden the provisions of Cl. 12. 49 C.L.J. 212=56 Cal. 940=120 Ind. Cas. 577=A.I.R. 1929 Cal. 358.

——S. 21—Applicability to High Courts—Applicability of S. 21 to Original Side.

Section 21 has no application to cases brought on the Original Side of Calcutta High Court. Jurisdiction of the Original Side is not governed by S. 21 but by Cl. 12, Letters Patent (Calcutta). If there is no jurisdiction under Cl. 12, S. 21 cannot confer it. (1936) 164 Ind. Cas. 907=40 C. W.N. 65.

——S. 21—Section 21, C. P. Code, has no application to a case on the Original Side of the High Court when the Court has purported to exercise a jurisdiction which it does not possess under its own Letters Patent. A.I.R. 1935 Rang. 517= 160 Ind. Cas. 818.

——S. 21—Section 21 does not apply to the Chartered High Courts in the exercise of their original jurisdiction. It does not also apply to a case where the objection is not one to the place of suing but one which goes to the root of the whole suit, such as an objection to the jurisdiction of the Court which can be taken at any stage of the proceedings even at the hearing of the suit and on appeal. A.I.R. 1932 Bom. 42=33 Bom.L.R. 1364=135 Ind. Cas. 170.

——S. 21—Court having jurisdiction up to a preliminary decree—Whether can lose jurisdiction at later stage.

It would be incongruous that a particular Court should have jurisdiction in one suit up to a certain stage, namely, up to the preliminary decree and thereafter lose jurisdiction at the later stage. There is no provision in the C. P. Code, for the return of the plaint in such a case. For the

provisions of O. 7, R. 10, deal with the case, where, from the very beginning the Court to which the plaint was presented had no jurisdiction. If the preliminary decree passed in the suit was a decree passed by a Court having jurisdiction, there is no provision for the carriage of these proceedings in any other Court of first instance, as the plaint could not be returned after the preliminary decree for being presented to another Court. A. I.R. 1937 Cal. 430=41 C.W.N. 851=172 Ind. Cas. 474.

——S. 21—Non-transferable property mortgaged —Court passing decree on foot of such mortgage

It cannot be held that a Court which passes a decree on foot of a mortgage, which relates to non-transferable property and is therefore invalid, has no jurisdiction to pass it and the decree cannot be treated as a nullity.

Where the jurisdiction of a Court is challenged, it cannot refuse to enquire into questions on which its jurisdiction depends. A.I.R. 1935 All. 678= 1935 A.L.R. 809=58 All. 98=157 Ind. Cas. 511.

2. Error in jurisdiction—If could be attacked in collateral proceedings.

——S. 21—Colleteral proceeding.

Decree nisi under Parsi Marriage and Divorce Act—Jurisdiction of Court not questioned before decree—It cannot be questioned in proceedings consequent upon the decree. A.I.R. 1934 Sind 1=27 Sind L.R. 280=150 Ind. Cas. 793.

——S. 21—Judgment of Court having jurisdiction —Whether can be a nullity—Question of jurisdiction not raised in trial—Effect—Question of jurisdiction, if can be raised collaterally

A Court, which is empowered by law to try a suit, has power to try it either rightly or wrongly; the validity of a decree does not depend on whether it embodies a correct decision. A judgment of a Court having jurisdiction over the subject-matter and the parties of the suit, however erroneous, cannot be a mere nullity and cannot be collaterally challenged except where there is a total lack of jurisdiction in the Court which passed the decree.

The question of jurisdiction in such a case is, like other questions of fact or law, to be decided by the Court itself which otherwise has jurisdiction to try the suit. Ordinarily if a party does not raise the question of jurisdiction during the trial, he should not be allowed to do so after the proceedings are carried to completion provided the question of jurisdiction depends upon the question of some fact or point of law. A.I.R. 1933 Pat. 104 =13 P.L.T. 737=12 Pat. 117=142 Ind. Cas. 113.

——S. 21—Decree passed without objection, if null and void—Executing Court, if can entertain objection.

It is not open to an executing Court to entertain an objection that the Court which passed the decree had no territorial jurisdiction. For, it is impossible to say that a decree in a case to which S. 21 was applicable can be regarded as null and void. It is impossible to hold that where, by the provisions of the Code itself, an appellate or revisional Court is debarred from entertaining an objection as to the place of suing, such a decree can be other than a good and valid decree until such time as it is declared void by a competent Court. A. I.R. 1945 All. 177=1945 A.L.J. 117=I.L.R. (1945) All. 479.

——S. 21—Omission to raise objection in trial— Objection to delivery of possession if can be raised.

Omission to take objection to the jurisdiction in the course of the trial of the suit or before the preliminary decree for sale is made absolute, cannot preclude a party from raising the objection to the delivery of possession of the property in execution of the decree passed against him on the ground that the Court which passed the decree and held the sale had no inherent jurisdiction to entertain the suit. A.I.R. 1936 Nag. 1=31 N. L.R. (Supp.) 57=161 Ind. Cas. 877 (F.B.).

——S. 21—Objection as to territorial jurisdction— If can be raised in execution Court.

The question of territorial jurisdiction could not be raised in the executing Court. A person against whom a decree has been passed in a Court which had no jurisdiction, must raise the matter by way of an appeal or in revision. If he does not do so, he cannot raise the matter in execution or by way of collateral proceedings. 63 L.W. 62=(1949) 2 M.L.J. 747.

——S. 21—Objection to decree being beyond territorial jurisdiction—Competency of executing Court to go into.

An execution Court can only go behind a decree which is sent to it for execution, where the decree is null and void and that fact is patent upon the face of the record. But it cannot be said that a decree in a case to which S. 21, C.P. Code, was applicable can be regarded as null and void and as such it cannot be questioned in execution proceedings. I.L.R. (1945) A. 479=A.I.R. 1945 A. 177=1945 A. L. J. 117=1946 A.W.R. (H.C.) 266.

3. Error in Jurisdiction—If can be waived by consent.

——S. 21—Whether principle of waiver in S. 21 applies to execution proceedings.

Quaere.—Whether the principle of waiver laid down in S. 21 is applicable to execution proceedings. A.I.R. 1944 Mad. 145=56 L.W. 605= 1943 M. W. N. 650=(1943) 2 M.L.J. 536=216 Ind. Cas. 316.

——S. 21—Jurisdiction—Irregular exercise of, if can be waived—Partition sut—Family owning properties in British India and in Cochin State—Plaint and preliminary decree for British Indian properties only—Commissioner's report for mesne profits of both British Indian and Cochin properties—Final decrees also including same without objection— Final decree, if valid.

Although a preliminary decree declares and determines the rights of the parties and the final decree can only work those rights out and give effect to them according to the determinations con-

tained in the preliminary decree, yet since the Court undoubtedly possessed inherent jurisdiction over the subject-matter of the suit all that could be said was that the Judge who had the necessary jurisdiction exercised it irregularly and in spite of the absence of a prayer in the plaint and of a direction in the preliminary decree. These were mere irregularities which did not affect the inherent jurisdiction of the Court. That being so, the objection was one which could be waived as it had been done. A.I.R. 1943 Mad. 721=56 L. W. 504=(1943) 2 M.L.J. 303=1943 M.W.N. 814=I.L.R. (1944) Mad. 202=212 Ind. Cas. 501.

——S. 21—Belated objection as to jurisdiction—When can be entertained—Waiver.

The question as to whether certain proceedings are void for want of jurisdiction when the objection is raised at a late stage depends on whether it is a case of inherent lack of jurisdiction, or of the irregular exercise of it. If the former, the proceedings are **coram non judice** and must be set aside even though the objection had been raised after the lapse of six years. If the latter, the objection must be taken to have been waived and cannot be entertained at that stage.

Where there is no inherent lack of jurisdiction territorial or pecuniary over the subject-matter, but merely one of irregular assumption of it, the irregularity consisting in non-compliance with the procedure prescribed for the transmission of the certificate. The judgment-debtor having allowed the proceedings in the transferee Court to go on without objection for such a long time must be taken to have waived it and the proceedings before the Sub-Judge in **D** were not null and void. A.I.R. 1943 Lah. 129=207 Ind. Cas. 561.

——S. 21—Rule that property must be within territorial jurisdiction can be validly waived by submission. A.I.R. 1941 Nag. 36=I.L.R. (1941) Nag. 1=1941 N.L.J. 1=198 Ind. Cas. 873 (F.B.).

——S. 21—No objection raised at time of trial.

Where no objection was raised at the time of the trial to the pecuniary jurisdiction of the Court, the objection, if any, to the jurisdiction should be deemed to have been waived by the parties. A. I.R. 1941 Oudh 587=1941 O.W.N. 965=1941 O. L.R. 601=17 Luck. 121=195 Ind. Cas. 610.

——S. 21—Plaintiff conceding that suit could be tried by First Class Sub-Judge—Decree passed by such Court—Appeal by defendant to High Court—Estoppel.

The plaintiffs by their own conduct induced the defendant to act on the basis that the suit could be tried by the First Class Subordinate Judge by conceding that the valuation of the suit property for the purposes of jurisdiction was more than Rs. 5,000. The suit was decreed by the First Class Subordinate Judge and the defendant appealed from the decree to the High Court. The respondent-plaintiff raised a preliminary objection that the appeal lay to the District Judge and not to the High Court on the ground that the suit could only be tried by the Second Class Subordinate Judge as the valuation of the suit for the court-fee determined the jurisdiction of the trial Court:

Held, that the respondent-plaintiff was estopped from raising the objection. The suit was properly tried by the First Class Subordinate Judge. A.I. R. 1940 Bom. 242=42 Bom.L.R. 443=189 Ind. Cas. 836.

——S. 21—Sale by Court having no territorial jurisdiction—No objection raised at time of sale by judgment-debtor—Whether acts as estoppel—Another execution creditor, if can purchase in execution of his decree, the property so sold without jurisdiction.

Though a judgment-debtor who does not object to a confirmation of sale by a Court having no territorial jurisdiction to sell a property, may be estopped from raising the question that the sale was a nullity, such estoppel does not operate to prevent an execution-creditor from proceeding against the same judgment-debtor. If a Court which has no jurisdiction to sell a property sells it, it is clear that the purchaser acquires no title to it. It may be that the judgment-debtor himself may have made it impossible for himself owing to his conduct to assert that such a person has no title to the property, but the fact remains that the property continues to be the property of the judgment-debtor and another execution creditor who purchases it in execution of the decree should not be debarred from proving that as between himself and the previous purchaser his title ought to prevail. A.I.R. 1939 Pat. 532=5 B.R. 783=20 P.L.T. 585=18 Pat. 670=182 Ind. Cas. 610.

——S. 21—Party allowing Court to exercise jurisdiction in wrong way—Whether can challenge legality of proceedings.

Where in a case jurisdiction over the subject-matter existed requiring only to be invoked in the right way, the party, who had allowed the Court to exercise it in a wrong way, cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation and negligence. A.I.R. 1937 Lah. 174=39 P.L.R. 284=164 Ind. Cas. 917.

——S. 21—Consent cannot give jurisdiction—Equitable mortgage—Property not within jurisdiction of Court—Decree on basis of mortgage—Nullity.

It is an established principle of law that in a case which the Court is competent to try, if the parties without objection join issue and go to trial, the defendant cannot subsequently dispute its jurisdiction upon the ground that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit. Section 21 of the C.P. Code applies to such a case. But that section has no applicability to a case in which a Court, which has no jurisdiction over the subject-matter of the action, passes a decree which is wholly void and the maxim applies that consent cannot give jurisdiction. A. I. R. 1936 Nag. 1=31 N.L.R. (Supp.) 57=161 Ind. Cas. 877 (F.B.).

——S. 21—Suit in Munsif's Court—Defendant's objection to jurisdiction—Court holding it has no jurisdiction—Plaint returned—Plaintiff valuing it for jurisdiction of Chief Court—Any party if can contend that Munsif had jurisdiction.

Where the plaintiff has submitted to the Court's order returning the plaint under O. 7, R. 10, on the ground that it had no jurisdiction to entertain the suit, and the plaintiff allows to become the order final by not appealing against it but withdraws the suit and after valuing it for the purposes of jurisdiction, presents it before the Chief Court, neither the plaintiff nor the defendant, can re-agitate the point of jurisdiction and contend that the suit was properly filed in the Court of the Munsif. A.I.R. 1936 Oudh 222=1936 O.W.N. 132=1936 O.L.R. 76=160 Ind. Cas. 461.

——S. 21 and O. 47, R. 1—Suit dismissed as against person on ground of want of jurisdiction—Appeal by other defendant—Decree by the appellate Court as against person against whom it was dismissed—Validity.

The trial Court found that it had no jurisdiction to try the suit as against defendant 2. The suit was accordingly dismissed as against defendant 2. On appeal by defendant 1, the question of jurisdiction did not arise in the Appellate Court and was not discussed but the Court passed a decree against defendant 2:

Held, that no decree could be passed against defendant 2 and as this was a defect apparent on the face of the record, review should be allowed:

Held, further, that S. 21, C.P. Code, had no application as no objection was raised in the Appellate Court as to place of suing. A.I.R. 1935 Cal. 153.

——S. 21—The Court is entitled to raise a point with regard to its own jurisdiction even at the time of delivering judgment though it has not been taken by either party. A.I.R. 1935 Rang. 174=169 Ind. Cas. 223.

——S. 21—Legality of order, whether can be subsequently questioned on score of want of jurisdiction.

A judgment of a Court without jurisdiction is a nullity and failure to question jurisdiction does not act as estoppel to subsequently challenging the legality of an order on the score of absence of jurisdiction. A.I.R. 1935 Nag. 212=31 N.L.R. 408=159 Ind. Cas. 584.

——S. 21—Person filing suit in certain Court—Judgment passed—Estoppel from questioning—Jurisdiction.

Where a person files a suit in a certain Court and a judgment is pronounced, he is estopped from pleading that the Court had no jurisdiction to pass the decree in the suit. A.I.R. 1935 Rang. 284=158 Ind. Cas. 547.

——S. 21—Irregularity in assuming jurisdiciton—Objection not taken in time—Waiver.

The irregularity in assuming jurisdiction would be deemed to have been waived if no objection is taken in time. A.I.R. 1935 Pat. 439=14 Pat. 356=16 P.L.T. 536=157 Ind. Cas. 316.

——S. 21—Suit defended on merits—Jurisdiction, if can be questioned afterwards.

It is not open to the defendant to say that the Court had no jurisdiction to entertain the suit after having defended it on merits. A.I.R. 1934 All. 740=1934 A. L. J. 1093=56 All. 828=153 Ind. Cas. 824.

——S. 21—If there is no jurisdiction over the subject-matter of the suit, acquiescence of the parties or either of them cannot create it. A.I.R. 1932 Bom. 42=33 Bom.L.R. 1364=135 Ind. Cas. 170.

——S. 21—Decree when reversed.

The question of jurisdiction should be raised in the Court of first instance and it should be given effect to by the appellate Court only when prejudice is caused by the trial in the first Court. 79 Ind. Cas. 857=A.I.R. 1925 Mad. 171.

——S. 21—Effect of decision on objection.

Jurisdiction may be defined as the power and authority conferred on a Court to pronounce the sentence of the law or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the Court for decision, and authorised by law to be the subject of investigation or action by that Court, and in favour of or against persons who present themselves, or who are brought before the Court in some manner sanctioned by law.

Where the want of jurisdiction is not apparent on the face of the proceedings but the absence of jurisdiction depends on a fact in the knowledge of a party, then, if he does not bring that fact forward but allows the Court to proceed with the judgment he ought not to be permitted to impeach the jurisdiction in any collateral proceeding. 67 Ind. Cas. 686=A.I.R. 1922 Pat. 322.

——S. 21—Effect of decision on objection.

Objection as to jurisdiction decided against defendant—He refusing to produce evidence on merits—Defendant cannot contend that there has been failure of justice on account of non-production of evidence; and objection as to place of suing cannot be raised in appeal. A.I.R. 1930 Lah. 1016=31 P.L.R. 616=128 Ind. Cas. 496.

——S. 21—Jurisdiction — Objection to—Waiver.

A defendant who objects to the jurisdiction of a Court cannot be said to have acquiesced in the trial of the suit if he does not apply for a transfer. 18 C.W.N. 1340=27 Ind. Cas. 232.

——S. 21 — Jurisdiction — Submission to — Residence of defendant—Determination of by Court—Decree binding on parties—Subsequent suit to set aside decree, not maintainable.

In a suit on the original side of the High Court for the recovery of certain jewels or payment of their value, the plaint contained no averment showing that the cause of action or part thereof arose wihthin the local limits of the jurisdiction of the High Court, but alleged that the defendant resided within the local limits of its jurisdiction. The defendant received a summons from High Court while he was in Madras and took no objection to the jurisdiction of that Court but merely asked that another summons should be sent to

him. An ex parte decree was eventually passed against him. In a suit filed by him in the Court of Tanjore for a declaration that the decree of the High Court was null and void for want of jurisdiction.

Held, that he must be deemed to have submitted to the jurisdiction of the High Court and could not, therefore, subsequently question its jurisdiction. The principle of S. 21, C. P. Code is applicable to the case. 37 M.L.J. 349=26 M. L.T. 186=10 L.W. 293=(1919) M.W.N. 636=53 Ind. Cas. 463.

——S. 21—Rule that property must be within territorial jurisdiction can be waived.

The rule limiting the territorial jurisdiction of Courts to property situate within their territorial limits can be validly waived by submission.

Per **Niyogi, J.**, contra.—The parties cannot by their mutual consent nullify S. 16 of the C. P. Code so as to confer jurisdiction on a British Court which the law itself refused to do. If the Court has inherent jurisdiction the irregularity in the exercise of it will be cured by submission, but if it has no inherent jurisdicton, submission cannot validate its judgment. A.I.R. 1941 Nag. 36 =I.L.R. (1941) Nag. 1=1941 N.L.J. 1=198 Ind. Cas. 873 (F.B.).

——S. 21—Local jurisdiction—Waiver of objections to.

If a plaintiff chooses his own venue for the trial of a suit and the case proceeds to judgment, the High Court will not in the absence of prejudice, entertain an objection on the ground of want of jurisdiction. 55 Ind. Cas. 442 (Nag.).

——S. 21—No waiver when Court incompetent.

Judgment of a Court of incompetent jurisdiction is not **res judicata**. 95 Ind. Cas. 406=A.I.R. 1926 All. 650.

——S. 21—Objection as to place of suing—Need for raising in trial Court.

An objection as to the place of suing cannot be raised for the first time in appeal. 7 O.W.N. 1079=A.I.R. 1931 Oudh 136=129 Ind. Cas. 331 =14 R.D. 664.

——S. 21—Objection—Waiver—Consent when a cure.

It is only when a judge or court has no jurisdiction over the subject-matter of the proceeding or action in which an order is made or a judgment recorded that such order or judgment is wholly void and that the maxim applies that consent cannot give jurisdiction. In all other cases the objection to the exercise of the jurisdiction may be waived, and waived when not taken at the time the exercise of the jurisdiction is first claimed. (1907) 5 C.L.J. 611=36 Cal. 193=1 Ind. Cas. 913.

——S. 21—Objection to—No waiver.

On objection as to jurisdiction can neither be given up by consent nor waived. (1902) 12 M. L.J. 264=26 M. 176.

——S. 21—Suits — Valuation — Jurisdiction — Civil Court value of property—Value mentioned in plaint—Trial in court which would have no jurisdiction if the vaule was correct—Parties raising no objection to trial—In appeal jurisdiction cannot be questioned—Evidence Act (1 of 1872), S. 58.

The plaintiff filed a suit in the court of the first class Subordinate Judge for partition of a certain property. In the plaint the market value of the property stated was such as to make the suit triable only by the first class Subordinate Judge. That Judge, however, made over the trial of the suit, to the joint Subordinate Judge of Thana, who had no jurisdiction to try it, if the property was correctly valued in the plaint. Neither party raised any objection on the ground of jurisdiction and no issue was raised relating to it. The trial proceeded on merits and the Subordinate Judge passed a decree for partition in favour of plaintiff. The defendants in their appeal to the District Court raised for the first time the question of jurisdiction on the strength of the market value stated in the plaint. The objection having been overruled, they appealed to the High Court.

Held, that as neither party raised any objection as to want of jurisdiction arising from the allegation as to want of jurisdiction arising from the allegation in the plaint, and as they by their conduct and silence treated the market value to be of the amount sufficient to give jurisdiction to the court, they dispensed with proof on the question by their tacit admissions and thus the principle of law laid down in S. 58 of the Indian Evidence Act, 1872, came into operation and prevented the result of the statement of the market value in the plaint **prima facie** determines the jurisdiction. It is not conclusive and binding on the plaintiff so as to estop him from disputing its correctness or seeking its amendment merely because he has stated it in the plaint. When the trial commences it is open to the defendant if he is so minded, to rely on the statement in the plaint and dispute the jurisdiction of the court. If he does not, and allows the trial to go on, he cannot subsequently dispute the jurisdiction. As a rule parties cannot by consent give jurisdiction where none exists. This rule applies only where the law confers no jurisdiction. The law does not prevent parties from waiving inquiry by the court as to facts necessary for the determination of the question as to jurisdiction where that question depends on facts to be ascertained. (1910) 12 Bom.L.R. 712 =7 Ind. Cas. 950=35 Bom. 24.

——S. 21—Consent—Conferring of jurisdiction by agreement of parties.

An agreement of parties cannot authorise a superior court to other mode of proceeding than that which the law prescribes. (1905) 9 C.W.N. 956=2 C.L.J. 384.

——S. 21—Consent when cure to want of jurisdiction.

If a Court of appeal decides that the Original Court had no jurisdiction to entertain the suit, the right course to adopt is to return the plaint for presentation to the proper Court. Consent of parties cannot confer jurisdiction upon a Court,

where it has not inherent jurisdiction over the subject-matter of the litigation; and the judgment of a Court, which lacks this essential jurisdiction, is totally void and this would not be cured by waiver or acquiescence. Where, however, the defect is not apparent on the face of the proceedings, where specially the question of jurisdiction depends upon a fact, the existence of which is alleged by one of the parties in the court of first instance and not controverted by the other, it is not obligatory upon a superior Court to enter in the question specially when, in order to adjudicate upon the question satisfactorily, a further investigation of the facts would be essential. If the want of jurisdiction appeared on the face of the pleadings or the admission of the parties or upon the evidence, the question could not only be raised in appeal for the first time, but it would be the duty of the Court to entertain it. (1907) 7 C.L.J. 152.

——S. 21—Jurisdiction — Determination of—Unwarrantable addition to claim.

A plaintiff cannot give jurisdiction to or take away jurisdiction from a court by an unwarrantable addition to his claim and the jurisdiction of the court ought to be determined with reference to the nature and value of his claim after the additional matter has been struck out. (1905) 3 C.L.J. 143.

——S. 21—Waiver of objection—Effect of.

The section in terms refers to the disallowing of the objection to jurisdiction by an appellate or revisional Court. But the principle is of general application, and if in appeal or revision the decree cannot be impeached it is equally reasonable that in a collateral proceeding it should not be allowed to be attacked. The principle underlying S. 21 is that the objection to territorial jurisdiction is cured not merely for the purpose of the appellate and revisional Court, but cured entirely and for all purposes. The section applies when there is want of jurisdiction not merely at the institution of the suit but at any stage during the progress of it. 87 Ind. Cas. 152=A.I.R. 1925 Mad. 117=47 M.L.J. 448.

——S. 21—Waiver, effect of, on execution.

Waiver of a right to object to jurisdiction before the passing of the final decree in a mortgage suit will not imply a waiver of the right to object in execution proceedings to a sale of the property. 50 Mad. 882=38 M.L.T. 351=25 M.L.W. 671 =1927 M.W.N. 282=103 Ind. Cas. 245=A.I.R. 1927 Mad. 627=52 M.L.J. 605.

——S. 21—Waiver, what is.

The distinction between territorial jurisdiction and that as to subject-matter is fundamental. Where the local jurisdiction of a Court was transferred to another Court by a notification but the party did not raise any objection at the time of judgment.

Held, that the objection to the want of jurisdiction must be deemed to have been waived.

Transfer of local jurisdiction automatically effects the transfer of all suits and proceedings arising originally from that local jurisdicton. S. 21 governs all cases of want of territorial jurisdiction. 87 Ind. Cas. 341=34 M.L.T. 275=20 M.L.W. 467=A.I.R. 1924 Mad. 697=47 M.L.J. 192.

——S. 21—Party submitting to jurisdiction—Objection—Whether can be raised in second appeal.

Where a party has for long submitted to the jurisdiction of a Court and in appeal against order of that Court has raised no objection to its jurisdiction, it cannot urge this plea in second appeal. A.I.R. 1937 Lah. 174=39 P.L.R. 284=164 Ind. Cas. 917.

4. Error in jurisdiction of the Executing Court—Applicability.

——S. 21—Wrong decision on questios of law—Decision not challenged in execution — Result of execution could not subsequently be treated as nullity.

A Central Co-operative Bank obtained an award against a co-operative society and applied for execution of the award in the Court having jurisdiction to entertain it. The manner in which the holder of the award sought the assistance of the Court was by sale of a property that did not belong to the judgment-debtor society but belonged to the individual members of that society. The power of the Court to render the decree-holder the assistance which he sought, depended upon the question whether the property of the individual members of the society was liable to be sold in execution of a decree against the society. That question of law was wrongly decided in favour of the decree-holder:

Held, that though the view of law taken by the executing Court was not correct, that wrong decision of the executing Court not having been challenged by the judgment debtor in the execution proceeding, he could not subsequently treat the result of the execution proceedings as a nullity. A. I. R. 1940 Pat. 406=21 P. L. T. 246=189 Ind. Cas. 739.

——S. 21—Execution of foreign Judgments.

Section 21 cannot be construed, as either legislating for foreign tribunals or codifying any rules of international law. The section has no application to cases of foreign judgments sought, under the provisions of S. 44 to be executed in British Indian Courts. 21 M.L.W. 330=86 Ind. Cas. 492=A.I.R. 1925 Mad. 788.

——S. 21—Execution proceedings—Applicability to.

An execution sale after confirmation cannot be avoided on the ground that the Court had no territorial jurisdiction over the property. (1913) M.W.N. 136=13 M.L.T. 207=24 M.L.J. 70=18 Ind. Cas. 498.

——Ss. 21 and 37—Execution proceedings—Prosecution in wrong Court—Jurisdiction of Court passing the decree—Objection—Omission.

Section 21, C. P. Code applies to all objections based on the alleged infringement of the provisions of Ss. 16 to 18, C. P. Code as regards the institution of suits relating to immoveable property, an appellate or revisional Court being precluded

by S. 21 from allowing an objection as to the place of suing unless it was taken in the original Court and even then unless there was a consequent failure of justice. A Court executing a decree could not entertain an objection to the decree on the ground of want of territorial jurisdiction. Though S. 21, C. P. Code did not apply, the decree could not be questioned in execution because it was not for the executing Court to go into questions of the jurisdiction of the Court which passed the decree at any rate when that was an ordinary Court in British India, governed by the Code. 43 Mad. 675=39 M.L.J. 203=(1920) M.W.N. 460=12 L.W. 217=28 M.L.T. 75=58 Ind. Cas. 871 (F.B.).

——Ss. 21 and 39—Execution proceedings—Transfer of territorial jurisdiction — Execution sale—Objection to validity.

Semble.—The principle underlying S. 21, C.P. Code applies to execution proceedings also. Where a Court in execution of a decree purports to sell property transferred outside its jurisdiction, it is open to a subsequent purchaser of the same property in execution of a decree by a Court having territorial jurisdiction, to dispute the former sale as being void. **Quaere.**—Whether the judgment-debtor himself could set aside the sale on that ground. 37 M.L.J. 284; 32 Mad. 140; 38 Mad. 101, dist. 43 Mad. 135=11 L.W. 232=37 M.L.J. 442=26 M.L.T. 271=53 Ind. Cas. 579.

——S. 21—Execution proceedings.

Section 21 has no application to execution proceedings. A.I.R. 1945 All. 309=1945 A.L.J. 97=1945 A.W.R. (H.C.) 46=I.L.R. (1945) All. 217=1945 O.W.N. (H.C.) 158.

——Ss. 21, 24—Execution sale—Transfer of local jurisdiction after decree—Omission to take objection as to want of territorial jurisdiction before sale.

The principle laid down in S. 21, that objection as to want of territorial jurisdiction should be taken at the earliest opportunity, and if not so taken will be deemed to have been waived, applies also to execution proceedings even though the section is not in terms applicable to such proceedings.

At the time of a final decree passed in a mortgage suit for the sale of items A, B and C, all these items were within the jurisdiction of the Mayavaram Sub-Court. Subsequent changes in territorial jurisdiction resulted in item C falling within the jurisdiction of the Negapatam Sub-Court and items A and B within that of the Sub-Court of Tiruvarur. All the items were sold by the Negapatam Sub-Court.

Held, that the judgment-debtors must be deemed to have waived the objection as to want of territorial jurisdiction and the sale of the items was not invalid. A.I.R. 1934 Mad. 573=1934 M.W.N. 878=40 L.W. 284=152 Ind. Cas. 891.

——S. 21—Sale in execution by Court without jurisdiction—Nullity—Consent of parties—If can confer jurisdiction. (1947) 1 M.L.J. 306 (F.B.).

5. Errors in jurisdiction leading to failure of justice.

——S. 21—Failure of Justice—Test.

If the first Court, even although it had no territorial jurisdiction, has tried out the case upon the merits in such a way, that all the available evidence which either party wanted to call has been called, the hearing and trial was satisfactory as a matter of procedure, and the decision appears to be right in fact, the question of the territorial jurisdiction is relegated to obscurity. (87 P.R. 1914, Foll.) Amongst other things to be taken into account in appeal in considering whether there has been a consequent failure of justice, is the conduct of one party or other during the suit itself. These matters must be considered as thoroughly as though the appeal is being heard upon the merits. 19 A.L.J. 305=62 Ind. Cas. 399=A.I.R. 1921 All. 66.

——S. 21—Suit tried by wrong Court—Defendant not prejudiced—Decree, if to be upheld.

In view of the provisions of S. 21, in the absence of prejudice to the defendant on account of the trial of the suit in a wrong Court, the decree passed by the Court should be upheld. A.I.R. 1934 Lah. 233=36 P. L. R. 99=149 Ind. Cas. 1050.

——S. 21—Trial by Court not having local jurisdiction—Interference.

Where a case has been decided by a Court having no territorial jurisdiction, its decision will not be set aside on that score unless it is shown that a failure of justice has resulted from the trial of the case at the wrong place. A.I.R. 1932 Lah. 135=32 P.L.R. 874=136 Ind. Cas. 17.

——S. 21—Territorial jurisdiction, want of—No failure of justice—Interference in appeal.

Section 21 forbids any Appellate or Revisional Court to allow an objection as to the place of suing unless there has been a consequent failure of justice. A.I.R. 1931 Lah. 142=32 P.L.R. 50=131 Ind. Cas. 276.

——S. 21—Forum—Objection to—Appellate Court.

An order passed by an Appellate Court allowing an objection as to the place of suing should consider and decide whether there has been a failure of justice in consequence of the suit having been instituted in the wrong Court. 42 All. 74=17 A.L.J. 1034=52 Ind. Cas. 801.

——S. 21—Judgment without local jurisdiction—Effect of.

A decision is liable to be set aside owing to the institution of a suit in the wrong Court only in the event of failure of justice resulting from such institution. 93 P.R. 1916=37 Ind. Cas. 114.

——S. 21—Jurisdiction, objection to.

Question of jurisdiction can be raised only if prejudice is proved first. 2 Pat.L.R. (Civ.) 74=80 Ind. Cas. 745=A.I.R. 1924 Pat. 527.

——S. 21—Objection to jurisdiction.

The question whether there has been a failure of justice or not is not a pure question of law. A point that lower Appellate Court should not have entertained plea of want of jurisdiction and that it

ought not to have reversed the decision of trial Court without recording a finding that there had been a failure of justice cannot be raised in second appeal, when the point had neither been taken before the lower Appellate Court nor in the grounds of second appeal. A.I.R. 1939 All. 163=1939 A. L. J. 50=I.L.R. (1939) All. 167=180 Ind. Cas. 409.

——S. 21—Objection to place of suing—Failure of justice—Need for proof—Trial of suit by Assistant Commissioner instead of by Sub-Judge in Ajmer-Merwara.

Under S. 21, C.P. Code, there must be failure of justice owing to wrong place of suing before objection can be allowed. In Ajmer-Merwara the Assistant Commissioner and other revenue officers have been invested with the powers of a Sub-Judge and are on the same footing as Sub-Judges, though there is an arrangement that only rent and cess suits should be tried by the former. No party can, therefore, be prejudiced by reason of the fact that the trial of a suit other than a rent or cess suit took place before the Assistant Commissioners and not before any other Sub-Judge. A. I. R. 1949 Ajmer 41.

——S. 21—The objection as to the place of suing cannot be allowed by an appellate Court, unless there has been a consequent failure of justice. 117 Ind. Cas. 824=A.I.R. 1929 All. 236.

——S. 21—Plaintiff at F asked to go to K to treat defendant—Agreement for fee made at K—Suit for balance due out of fee and expenses—Cause of aciton, if arises at K—Absence of failure of justice—Objection to place of suing, if can be allowed by revisional Court.

The plaintiff, who was a **Vaid** practising at **F** received a letter from the defendant residing at **K** asking him to hurry to **K** and treat him. The actual agreement as to terms was not made between the parties until the plaintiff arrived at **K** and an arrangement was made between them that the fees and the cost of the medicines should also be paid at **K** and part of the amount was paid to the plaintiff at **K**. The plaintiff filed a suit at **F** on the allegation that he had not been paid the full expenses:

Held, that the letter in consequence of which plaintiff went to **K** only amounted to a proposal and did not in itself form any part of the cause of action of the suit, and that the cause of action for the suit was that the plaintiff made an agreement at **K** to treat the defendant at a certain fixed fee and to receive other payments, and the Court at **K** alone had jurisdiction to entertain the suit.

Held, also that as there was no failure of justice within the meaning of S. 21, C.P. Code, because of the trial at **F**, the Court in revision would not allow the objection to the place of suing. A.I.R. 1934 All. 549=148 Ind. Cas. 875.

6. Errors in jurisdiction—Interference in—Revision.

——S. 21—Jurisdiction, objection to.

Although objection as to jurisdiction is taken in lower Court at a late stage in the proceedings, it ought to be entertained in revision, as question involved is one of jurisdiction as to which there can be estoppel by conduct of paties. But the delay can be taken into account in awarding costs A. I.R. 1930 All. 873=1930 A.L.J. 997=52 A. 947.

——S. 21—Jurisdiction—Objection to—Revision.

Although the objection as to jurisdiction was taken at the earliest possible opportunity before issues were settled, yet having regard to S. 21 of the C.P. Code and to the fact that the evidence had been fully taken and there was no prejudice to the parties, the High Court refused to interfere in revision. 22 C.W.N. 517=44 Ind. Cas. 694.

——Ss. 21 and 17—Jurisdiction—Objection to—Scheduled district—Land partly situate in—Decree for sale—Objection taken on appeal—Competency of.

"Courts" in S. 17, C.P. Code means Courts to which the Code applies. The Court of a district subject to the C.P. Code has no jurisdiction under S. 17 to entertain a suit so far as it claims a decree for sale of mortgaged land situated in a scheduled district. That part of a decree which orders a sale of land so situate can be set aside, although no objection to the jurisdiction of the first Court was taken, S. 21, C. P. Code not applying to the circumstances. The objtction was not an objection to the place of suing, but an objection going to the nullity of the order on the ground of want of jurisdiction and could be taken at any time. 42 Mad. 813=46 I.A. 151=17 A.L.J. 694=(1919) M.W.N. 502=26 M. L. T. 127=21 Bom.L.R. 914=30 C.L.J. 209=23 C.W.N. 1033=10 L.W. 362=51 Ind. Cas. 185=37 M.L.J. 11. [Overruling 19 M.L.T. 360=(1918) 1 M.W.N. 354=34 Ind. Cas. 411.]

——S. 21—Objection to jurisdiction—Appeal.

An objection to the place of suing not raised in the trial Court could not be taken in appeal. In all cases where objection is taken that the Court taking cognizance of the suit is not entitled to adjudicate, the claim whether in whole or in part for want of jurisdiction, it is an objection to the place of suing. (1916) 1 M.W.N. 354=19 M. L.T. 360=34 Ind. Cas. 411. [Overruled by the Privy Council in 42 Mad. 813=51 Ind. Cas. 185.]

——S. 21—Jurisdiction—Objection taken in appeal or revision—Validity.

Objection as to place of suing cannot be taken in appeal or revision unless it was taken in the Court of first instance at the earliest possible opportunity, and unless there has been a consequent failure of justice. 9 Bur.L.T. 119=36 Ind. Cas. 431.

——S. 21 and O. 7, R. 10—Objection—Procedure.

When it is found that a suit ought to have been instituted in some other Court, the Court should return the plaint for proper presentation even if the plea is raised at a later stage but in the original proceedings. The question of delay mentioned in S. 21, C.P. Code is only applicable to appeals and revisions. 4 S.L.R. 264=10 Ind. Cas. 980.

——S. 21—Objection to jurisdiction—Second appeal.

No objection as to jurisdiction regarding the

place of suing can be taken for the first time in second appeal. 41 Ind. Cas. 161 (Pat.).

——S. 21—Superior Court of general jurisdiction.

No matter is deemed to be beyond the jurisdiction of a superior Court unless it is expressly shown to be so and an objection to the jurisdiction of a superior Court of general jurisdiction must show what other Court has jurisdiction, so as to make it clear that the exercise by the superior Court of its general jurisdiction is unnecessary. A.I.R. 1940 Rang. 84=I. L. R. (1940) Rang. 325=188 Ind. Cas. 422 (S.B.).

——S. 21—Suit for accounts—Objection to jurisdiction overruled and preliminary decree passed.

Where a contract between the principal and the agent was made at Karachi and was to be performed at Karachi and the business done in pursuance of this contract was done at Karachi with third parties, the proper place where the accounts can be taken in Karachi and the Court at principal's place of residence has no jurisdiction to entertain a suit for accounts between the parties.

A principal brought a suit for accounts against his agent. The objection by the agent to the jurisdiction of the Court was overruled and a preliminary decree for rendition of accounts by the agent was passed. Agent appealed:

Held, that as only the issue of jurisdiction had been decided, and as the preliminary decree followed as a matter of course, the real trial of the suit was to begin and S. 21, C.P. Code, was no bar to the Appellate Court reversing the preliminary decree passed by the Court of first instance. A. I.R. 1940 Lah. 171=42 P.L.R. 203=188 Ind. Cas. 299.

——S. 21—Review when allowed.

The failure to notice the provisions of S. 21, bears an analogy to a mistake or error apparent on the face of the record and is a ground for review. 12 N.L.J. 13=25 N.L.R. 104=116 Ind. Cas. 645=A.I.R. 1929 Nag. 73.

——S. 21—General Clauses Act (10 of 1897), S. 3 (vii)—Question of jurisdiction depending upon public documents, if one of law—Quetta, if a part of British India.

Where a preliminary point, that Quetta not being in British India the lower Court had no jurisdiction to try the suit, was raised for the first time at the final hearing of the appeal:

Held, (i) that the question of jurisdiction at issue was one of law depending upon public documents which required no proof and were presumed under S. 81, Evidence Act, to be genuine and this question could, therefore, be raised at a late stage;

(ii) Quetta did not form part of British India as defined in S. 3, General Clauses Act;

(iii) the point of jurisdiction involving the question whether a matter in dispute was within the jurisdiction of British Indian Court at all, could be raised, notwithstanding S. 21, C.P. Code. A. I.R. 1934 Sind 123=28 S.L.R. 54=155 Ind. Cas. 677.

——S. 21—Objection to by party invoking—Civil Procedure Code, S. 622—Revision.

A party who invoked the jurisdiction is allowed to question the jurisdiction on revision. (1903) 30 C. 588 at 591=7 C.W.N. 547.

7. If could be agitated in separate suit.

——S. 21—Objection in fresh suit.

Section 21 does not preclude the objection about jurisdiction being raised in a fresh suit. 28 Bom. L.R. 879=98 Ind. Cas. 341=A.I.R. 1926 Bom. 481.

——S. 21—Jurisdiction.

Where a decree has been passed by a Court having no territorial jurisdiction on the matter in controversy, the plaintiff is entitled to maintain an independent suit for its avoidance. A.I.R. 1931 All. 454=53 All. 560=1931 A.L.J. 240=131 Ind. Cas. 248.

——S. 21—Separate suit in place of objection.

Where a decree has been passed by the Court having no territorial jurisdiction over the matter in controversy, the plaintiff is entitled to maintain an independent suit for its avoidance. S. 21 is not in terms applicable to such a case as it does not provide against the question of jurisdiction being agitated by means of an independent suit. Nor does the principle underlying that section apply to such a case. A.I.R. 1931 All. 454=1931 A.L. J. 240=53 All. 560=131 Ind. Cas. 248.

——S. 21—Suit for sale on mortgage, whether suit in personam—Bombay High Court passing order creating mortgage on properties situate in Berar—Judgment-debtor not challenging but suffering order—Execution of order—Legality of order.

It is difficult to regard a suit for sale on a mortgage as a suit in personam to recover a debt because the decree which is passed in such a suit directly affects the title to and disposition of the land mortgaged. Consequently the Bombay High Court has no jurisdiction to make an order purporting to create a mortgage on properties which are situate outside the jurisdiction of that Court and when this order is void for want of jurisdiction, it follows that the second one passed in execution of the first order must also be held to be void.

Where the property is situated outside British India (Berar) and where the judgment-debtors submit to the jurisdiction of the Bombay High Court without any protest and willingly suffer the first order in question to be passed against them and having also partly complied with it by making a payment, they are not estopped from subsequently challenging its validity on the ground of absence of jurisdiction in the Court which passed it. In other words, S. 21 does not operate as a bar to the maintainability of a suit for declaration that the Bombay orders are null and void.

Where a decree has been passed by a Court having no territorial jurisdiction over the matter in controversy, the defendant is entitled to maintain an independent suit for its avoidance, although he had not raised any objection as to the want of jurisdiction in the former suit and S. 21 does not provide against the question of jurisdiction being

agitated by means of an independent suit. A.I.R. 1935 Nag. 250=18 N.L.J. 295=31 N.L.R. (Supp.) 43=159 Ind. Cas. 739 (F.B.).

8. Stage for objection.

——S. 21—Objection when to be allowed.

Objection to valuation of claim and jurisdiction cannot be raised for the first time in second appeal. A.I.R. 1930 Mad. 541=126 Ind. Cas. 730.

——S. 21—Objection to—Mere assertion of circumstances not enough.

The jurisdiction of the court is ousted not by the mere assertion of the existence of the circumstances under which the court loses its jurisdiction, but upon proof of their actual existence. The substance of the objection should be judicially investigated. (1909) 13 C.W.N. 654 at 658=36 Cal. 713=9 C.L.J. 563=1 Ind. Cas. 356.

——S. 21—Loss of jurisdiction pending execution.

Section 38 does not make it optional to a Court to execute its own decree, or to transmit it to the Court which has territorial jurisdiction, if the original Court had lost jurisdiction over the subject-matter of the suit. Although the words in S. 39 are "the Court may send it for execution" in all cases the Court should send its decree to the Court which has territorial jurisdiction if between the passing of the decree and the executing of it, the jurisdiction has passed to another Court. 19 M.L.W. 16=1924 M.W.N. 38=79 Ind. Cas. 806=A.I.R. 1924 Mad. 457=46 M.L.J. 250.

——S. 21—Objection to—Taken for the first time in appeal.

An objection that a court has no jurisdiction to adjudicate upon a matter, raises a question of jurisdiction, and as such it may be allowed to be taken for the first time in appeal although it was not suggested at any earlier stage of proceedings. (1907) 5 C.L.J. 611=36 Cal. 193=1 Ind. Cas. 913.

——S. 21—Territorial jurisdiction — Objection—Appeal.

The question whether the trial Court has no territorial jurisdiction, cannot be gone into in second appeal, unless it was raised at the earliest possible moment in the course of the suit. 48 Ind. Cas. 465 (Cal.).

——S. 21—Place of suing, objection as to, cannot be raised in second appeal.

An objection as to the place of suing cannot be raised for the first time in second appeal. A.I.R. 1931 Oudh 136=7 O.W.N. 1079=14 R.D. 664=129 Ind. Cas. 331.

——S. 21—New plea—Question of jurisdiction.

A question of jurisdiction can be raised in second appeal even though it was overruled in the trial Court and not pressed in the lower Appellate Court. A.I.R. 1931 Cal. 29=52 C.L.J. 247=130 Ind. Cas. 232.

——S. 21, O. 41, R. 2—Objection as to place of suing cannot be allowed in appeal unless failure of justice has been caused—Objection erroneously allowed—Interference in second appeal—Appeal—New plea—Point of law.

Under S. 21, an Appellate Court has no power to allow an objection as to the place of suing unless there has been a consequent failure of justice.

The ground that the lower Appellate Court erred in allowing such an objection as there had been no proof of failure of justice is a point of law which may be taken in second appeal under the provisions of O. 41, R. 2, C. P. Code, even though it was not specifically set forth in the memorandum of appeal. A.I.R. 1931 All. 556=131 Ind. Cas. 603.

——S. 21—New plea of want of jurisdiction.

Questions involving jurisdiction can be raised in appeal even though they have not been raised in the Court below if such questions can be decided on the materials before the Court. A.I.R. 1931 All. 406=134 Ind. Cas. 253.

——S. 21—Objection as to valuation, if can be raised for first time in execution.

It is not open to the parties during the course of the execution proceedings to raise an objection for the first time regarding the under-valuation or over-valuation of a suit. A person who has himself given the valuation during execution proceedings cannot contend that he had under-valued his application for the filling of the award, which has to be regarded as a plaint in a regular suit. A.I.R. 1934 Lah. 804=36 P.L.R. 238=155 Ind. Cas. 229.

——S. 21—Objection to jurisdiction if can be raised for first time in Letters Patent Appeal.

Where the plaintiffs file a suit on the allegation that a certain grove was in the possession of the defendants, and choose the Civil Court as the forum, it must be assumed against them that they treated the property as if it was not land within the meaning of the Agra Tenancy Act. A plea that the grove was a tenant's grove and the suit was not cognizable in the Civil Court cannot be entertained for the first time in a Letters Patent Appeal. A.I.R. 1935 All. 746=1935 R.D. 182=57 All. 891=1935 A.L.J. 838=155 Ind. Cas. 569.

——S. 21—Question of jurisdiction not raised in trial Court.

A British Indian Court would have had jurisdiction to entertain it **in personam** and although a part of the property which was the subject-matter of partition was situate outside, the title to such foreign property was only incidentally and not directly in issue.

Since a British Indian Court had jurisdiction to entertain the suit as regards some reliefs they were barred by the provisions of S. 21, from raising an objection in appeal as to the place in British India where this suit should have been instituted. A.I.R. 1934 Sind 123=28 S.L.R. 54=155 Ind. Cas. 677.

——S. 21—Objection as to jurisdiction—When to be taken—Whether can be taken in executing Court.

In view of the provisions of S. 21, C. P. Code,

an objection as to the place of suing ought to be taken at the earliest possible moment. The question cannot be raised in an appellate or revisional Court and still less in a Court executing the decree. A.I.R. 1935 Pesh. 142=158 Ind. Cas. 363.

——**S. 21**—Objection founded on a point of jurisdiction can be taken up at any stage of the case. A.I.R. (Vol. 22) 1935 Pesh. 151=158 Ind. Cas. 971.

——**S. 21—Objection as to jurisdiction if can be taken in execution proceedings.**

An objection as to the jurisdiction of the Court cannot be raised in appeal or revision even in respect of a suit according to S. 11, Suits Valuation Act and the same principle applies to execution proceedings. A.I.R. 1936 Lah. 442=38 P.L.R. 698=163 Ind. Cas. 278.

——**S. 21**—A suit for land part of which only was situate within the ordinary original civil jurisdiction of the High Court and the other part was situate in the mofussil was brought on the Original Side without leave being obtained as under cl. 12.

Held, that as regards all properties outside the original jurisdiction of the High Court the suit was without jurisdiction and that effect must be given as to the objection about jurisdiction though taken in the appellate Court for the first time. 49 C.L.J. 212=56 Cal. 940=120 Ind. Cas. 577=A.I.R. 1929 Cal. 358.

——**S. 21—Objection to place of suing not taken in first Court.**

An Appellate Court will not allow an objection to the place of suing unless it was taken before the settlement of issues as there has been a failure of justice. (1918) M.W.N. 661=47 Ind. Cas. 764.

——**S. 21—Objection to place of suing—When can be raised.**

Under S. 21, C. P. Code, no objection as to the place of suing can be allowed by any appellate or revisional Court unless there has been a consequent failure of justice. Where after the Court decided the question of jurisdiction the party failed to adduce evidence on the merits,

Held, that the objection as to place of suing cannot be raised at a later stage. 31 P.L.R. 616 =A.I.R. 1930 Lah. 1016=128 Ind. Cas. 496.

——**S. 21**—Section 21 forbids any appellate or revisional Court to allow any objection as to the place of suing unless it was taken in the original Court, and even then, unless there was a consequent failure of justice. The effect of the section is that objections which the appellate or revisional Court is thereby precluded from allowing must be considered cured for all purposes unless taken before the passing of the decree in the original Court. The ordinary way of questioning any decree passed without jurisdiction is on appeal or in revision and, if this is forbidden, the Court of First Instance cannot in execution do that which the appellate or revisional Court is precluded from doing. Neither can a Court of collateral jurisdiction in a subsequent suit between the same parties question the decree. 43 Mad. 675 (F.B.) Foll. 7 Pat. 216=9 P.L.T. 789=108 Ind. Cas. 321=A.I.R. 1928 Pat. 324.

——**S. 21—Objection to—Time for raising questions which go to the very root of a suit ought as a rule to be raised in the pleadings.**

A defendant can be permitted to raise a question of jurisdiction not specifically pleaded, only if he does so at the earliest possible opportunity. He ought not in any event to be allowed to raise it after the plaintiff has closed his case. (1909) 11 Bom.L.R. 1267=4 Ind. Cas. 569.

——**S. 21—Place of suing—Objection not allowable in appeal.**

Where there has been no failure of justice from the trial of a case in a wrong Court the plea as to want of territorial jurisdiction cannot be entertained in appeal. 26 I.C. 548, foll. 21 P.W.R. 1919=49 Ind. Cas. 441.

——**S. 21**—A point that in view of the provisions of S. 21, the lower Appellate Court ought not to have entertained the plea of want of jurisdiction and ought not to have reversed the decision of the trial Court without recording a finding that there had been a failure of justice cannot be raised in second appeal when it was not raised in the lower Appellate Court and no such ground has been taken in the memorandum of appeal to the High Court. A.I.R. 1939 All. 163=1939 A.L.J. 50=I.L.R. (1939) All. 167=180 Ind. Cas. 409.

——**S. 21—Objection based on over-valuation or under-valuation, when and how to be raised.**

Objections regarding jurisdiction based on over-valuation or under-valuation have to be raised at the earliest possible opportunity, and in all cases where issues are settled at or before such settlement as laid down in S. 21. In a case where there has been a deliberate over-valuation or deliberate over-valuation with a view to give jurisdiction to a particular Court, that matter has to be investigated into if an objection is raised at the earliest possible opportunity. The objections regarding valuation are, in many cases, such as are difficult to decide as value of a particular property is after all a matter of opinion and may vary. Where the objection raised is of a nature which would show that the valuation put by the plaintiff is not grossly wrong but **prima facie bona fide,** it is not necessary for a Court to enter upon an elaborate enquiry regarding the valuation. If the over-valuation or under-valuation appears on the face of the plaint patent it is the duty of the Court to return it to the plaintiff to present it to the proper Court under O. 7, R. 10, but if it is not patent on the face of the plaint but objection is taken by the defendant that the property is over-valued or under-valued, the Court may require the plaintiff to show that the suit has been over-valued if there are **prima facie** grounds for showing that the suit is not properly valued but not otherwise. A.I.R. 1938 Nag. 149=I.L.R. (1939) Nag. 300 =177 Ind. Cas. 684.

——**S. 21—Second appeal.**

Question of jurisdiction though not raised in lower Courts can be raised and considered in second appeal. A.I.R. 1939 All. 22=1938 A.L.J. 988=1938 R.D. 829=179 Ind. Cas. 39.

——S. 21—Objection to jurisdiction not raised either in lower or Appellate Court—It cannot be raised in second appeal. A.I.R. 1940 Oudh 164 =1940 O.L.R. 16=1940 O.W.N. 462=185 Ind. Cas. 467=15 Luck. 619.

——S. 21—Question of jurisdiction not raised during trial.

Ordinarily, if a party does not raise the question of jurisdiction during the trial he should not be allowed to do so after the proceedings have been carried to conclusion provided the question of jurisdiction depends upon the decision of some fact or point of law. A.I.R. 1940 Pat. 406=21 P.L.T. 246=6 B.R. 849=189 Ind. Cas. 739.

——S. 21—Point of jurisdiction can be raised at any stage of proceedings.

A point of jurisdiction can be raised at any stage of the proceedings. Consequently, the point that the Civil Court had no jurisdiction to entertain the suit in view of the provisions of S. 21, Punjab Alienation of Land Act can be raised for the first time in appeal. A.I.R. 1942 Pesh. 81=203 Ind. Cas. 203.

——S. 21—Objection not set forth in grounds of appeal—Appellate Court under O. 41, R. 2, has discretion to allow objection and ordinarily would not object to its being raised and argued if respondent is not likely to suffer thereby—Objection to territorial jurisdiction neither raised in trial Court nor mentioned in grounds of appeal.

After a long lapse of time and after all the expenses which must have been incurred, the High Court would naturally feel reluctant to allow the objection to be raised when it had never been taken before. But, in view of the large stakes involved and the possibility of the case proceeding further it was proper that the objection should be dealt with on merits. A.I.R. 1941 Mad. 129=(1940) 2 M.L.J. 520=52 L.W. 556=1940 M.W.N. 1083.

——S. 21—Suit against agriculturist — Ex parte decree in Court in accordance with S. 20 but not in Court where defendant resided by S. 7, U. P. Agriculturists' Relief Act—Judgment-debtor cannot object in execution proceeding that the decree could not be executed as the Court passing it had no jurisdiction, in view of the principle underlying S. 21, C. P. Code, though the section does not in terms apply to the case. A.I.R. 1937 All. 567= 1937 A.L.J. 720=1937 R.D. 355=1937 A.L.R. 811=I.L.R. (1937) All. 761=171 Ind. Cas. 196.

——S. 21—If limited to appeals and revisions in same suit.

Per Full Bench, (Niyogi, J., contra.)—The rule embodied in S. 21 of the C.P. Code, is not limited to appeals and revisions in the same suit.

Per Niyogi, J.—An objection on the ground of the absence of the inherent jurisdiction can be raised for the first time in appeal, or in second appeal, or in Letters Patent Appeal, or in revision, or in an appeal after remand, or even in the course of argument before the Privy Council and also in execution proceedings of the same suit. A.I.R. 1941 Nag. 36=I.L.R. (1941) Nag. 1=1941 N.L.J. 1=198 Ind. Cas. 873 (F.B.).

——S. 21—S. 21 of C.P. Code lays down that no objection as to the place of suing shall be allowed by any Appellate Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and unless there has been a consequent failure of justice. By S. 141 this procedure is to be followed in all proceedings. (1940) 42 P.L.R. 374.

——S. 21—Retrospective effect—Jurisdiction—Suit in a wrong Court—Failure of justice.

Where a suit was instituted at a certain place for recovery of dues on account of certain transactions by the defendants as plaintiff's agents in another place on the allegation that the contract of agency was entered into in the former place. Held, that failure to prove the alleged contract by the plaintiff ousted the jurisdiction of the former Court. Under S. 21 alterations in procedure being retrospective in effect, the objection as to place of suing cannot be allowed when there is no failure of justice. 87 P.R. 1914=234 P.L.R. 1915=26 Ind. Cas. 543.

——S. 22—Power to transfer suits.

Synopsis.

1. Applicability.
2. Notice and delay in application—Effect of.
3. Grounds for transfer.
4. Balance of convenience.

1. Applicability.

——S. 22—See also C. P. CODE, S. 23.

——S. 22—Applicability.

The provisions of S. 22 can apply only if the suit, in its entirety, is cognizable by either of the two Courts. A.I.R. 1942 All. 387=I. L. R. (1942) All. 862=206 Ind. Cas. 222.

——Ss. 22 and 23—Transfer by High Court from one to another subordinate Court—Conditions necessary.

Both Courts must have jurisdiction in order that an application for transfer can be made under Ss. 22 or 23: where the jurisdiction of one of the Courts is denied, an application for transfer does not lie under this section. 12 A.L.J. 896=24 Ind. Cas. 318.

——S. 22—When applicable.

It is only when a suit may be brought in the one or other of two Courts, both of which have jurisdiction, that an application may be made for transfer. Where the jurisdiction of one of the Courts is denied an application cannot lie. 71 Ind. Cas. 268=A.I.R. 1923 Lah. 288.

——S. 22—Applicability—Transfer—Objection to jurisdiction—Maintainability—Grounds for transfer.

A defendant in a suit who takes objection to the jurisdiction of the Court in which it has been instituted to try that suit cannot maintain an application for its transfer to another Court under S. 22 of the C.P. Code. 21 O.C. 217=48 Ind. Cas. 105.

——S. 22—Jurisdiction of Court not challenged—Maintainability of application.

Where in an application for transfer, the jurisdiction of the Court has not been challenged and the application proceeds on the assumption that the Court in which the suit was instituted had jurisdiction to try it, the application is maintainable. A.I.R. 1935 All. 979=1935 A.L.J. 1093=1935 A.L.R. 1154=159 Ind. Cas. 644 (2).

——S. 22—Decision of Court that a suit before it will proceed in another Court—If amounts transfer.

When under S. 22 a Court decides that the suit shall proceed in a Court other than that in which the plaintiff has proceeded hitherto its order amounts to a transfer of the proceedings from that Court to the other Court. A.I.R. 1940 Nag. 145 =I.L.R. (1941) Nag. 311=1940 N.L.J. 231= 190 Ind. Cas. 439.

——S. 22—Suit pending in subordinate Court—Transfer to Court subordinate to another High Court.

The High Court has jurisdiction to transfer a suit pending in a Court subordinate to it to a Court subordinate to another High Court. A.I.R. 1940 Nag. 145=1940 N.L.J. 231=190 Ind. Cas. 439.

——S. 22—Objection to jurisdiction—Effect of.

S. 22 does not absolutely bar an application for transfer where the defendant has objected to the jurisdiction of the Court and gone to trial on that issue alone and has finally failed, but where the application is merely an attempt to get an order from the Court which would enable the petitioner to evade the question of jurisdiction decided against him, the application will not be allowed. A.I.R. 1925 Lah. 175, Foll. 100 Ind. Cas. 67=A.I.R. 1927 Lah. 183.

——S. 22—Powers of High Court.

A High Court has jurisdiction to direct a case to be tried by a Court subordinate to a High Court other than the High Court by which such direction is made. 110 Ind. Cas. 699=A.I.R. 1928 Pat. 640.

——Ss. 22 and 24—Courts subordinate to different High Courts.

A High Court cannot transfer a suit pending in a subordinate Court to a Court subordinate to a different High Court but can only return the plaint for presentation to the proper Court. 20 Ind. Cas. 758 (Oudh).

——S. 22 and O. 7, R. 10—Transfer from Court to another High Court's jurisdiction.

A High Court cannot transfer a case to a Court in another jurisdiction, or intrude its order into the jurisdiction of the other High Court. A High Court's order under S. 22 has the effect of staying further proceedings in the Court from which the transfer has been ordered and the only course 4 Ind. Cas. 814 (U.B.).

——Ss. 22 and 24—Transfer of suit—Court of Sub-Judge subordinate to District Court—Order of transfer, when to be made.

The Court of the Subordinate Judge is subordinate to the District Court for S. 23 C. P. Code, 1882 though it may not be the *forum* of appeal in the particular case for the transfer of which the application is made. No transfer ought to be made unless such an order is absolutely necessary in the interest of justice. The Court will not transfer a suit properly laid, except under special circumstances. The convenience of necessary witnesses and the ends of justice is a good ground for the transfer, but it must be clearly established. Under S. 25 of the C. P. Code, 1882, the Court can order transfer even after the issues have been framed; but satisfactory reasons ought to be given to explain the delay. 10 C. L. J. 208=3 Ind. Cas. 539.

——S. 22—When not applicable—Transfer to original side of a High Court from a Court subordinate to another High Court is not governed by Ss. 22, 23—High Court has inherent jurisdiction which should be sparingly used.

Ss. 22 and 23 do not apply where transfer to the Original Side of a High Court from a Court subordinate to another High Court is desired. The High Court has the power in exercise of its inherent jurisdiction to grant the petitioner the relief for which he asks by an order of stay but the right of a plaintiff to institute a suit in a Court in which the law permits him to sue should not be interfered with by the High Court in exercise of its extraordinary jurisdiction unless the suit is brought in bad faith for the purpose of working innjustice to which the defendant would not be subjected if the suit were brought in another competent Court. 69 Ind. Cas. 772=A.I.R. 1924 Lah. 306.

——Ss. 22, 24—Applicability—Case pending in subordinate Court — High Court or District Court, if has power to transfer it—Ss. 22 and 24, difference between.

The power of transfer vested in the High Court or the District Court by S. 24, is untrammelled by any conditions. Section 24 is general in its terms, and the power of transfer and withdrawal defined by that section can be exercised even with respect to suits which can be entertained by one Court alone. All that is necessary to bring into play the jurisdiction of the High Court or the District Court to exercise the power of transfer and withdrawal given under S. 42 is that the suit, appeal or other proceeding sought to be transferred should be "pending before it" or "pending in any Court subordinate to it." The mere fact, that the suit, appeal or other proceeding is pending in a Court not having jurisdiction to dispose of the same, cannot oust the jurisdiction of the High Court or the District Court to withdraw or transfer that suit, appeal or other proceeding from the Court in which it is pending to some other Court competent to try the same. A.I.R. 1934 All. 569=1934 A.L.J. 345=150 Ind. Cas. 942.

——Ss. 22, 23, 151—Applicability—Parties and most of the suit property within jurisdiction of Oudh Chief Court—Suit instituted in Court subordinate to Allahabad High Court—Application for transfer—Applicability of Ss. 22 and 23—Inherent powers.

Section 23 proceeds on the assumption that every Court having jurisdiction to try an original civil suit is subordinate to some High Court or a Court having co-ordinate jurisdiction. At the same time it cannot in terms apply to a case in which one of several Courts having jurisdiction to try a suit is not

"subordinate" to any High Court or a Court equivalent thereto.

Sections 22 and 23 do not apply to a case in which the question is whether a suit should be tried by a Court subordinate to the High Court or by a High Court or the Chief Court of Oudh.

In the absence of a rule of law applicable to a case of this kind the aid of S. 151 can be invoked in a proper case and it is open to a High Court to exercise powers similar to those contemplated by Ss. 22 and 23. The plaintiff having chosen a forum in utter disregard of the convenience of both parties for some ulterior object, and in abuse of his position as *dominus lites*, the High Court could in the exercise of its inherent power, determine which of the two Courts having jurisdiction should try the suit. A.I.R. 1934 All. 14=56 All. 201=1933 A. L.J. 1507=147 Ind. Cas. 513.

——S. 22—Suit pending on Original Side—Application for transfer should be made on the original side which has seizin of the case and the Court can pass an order under S. 151. A.I.R. 1934 Rang. 265=12 Rang. 548=151 Ind. Cas. 573.

2. Notice and delay in application—Effect of.

——S. 22—Notice.

The provision as to notice laid down by the legislature in S. 22 is not merely directory, and the failure to comply with it bars an application for transfer under that section. (1917) 2 K.B. 894 and 11 P. R. 1917, Foll. 107 Ind. Cas. 593.

——S. 22—Notice to opposite party after filing application.

Although S. 22 contemplates the giving of a notice prior to the application and such a notice should, as a rule, be given, yet there is no indication that the failure to give such a notice is fatal to the application. The failure at an earlier stage is cured by the issue of a notice on the application itself. The object seems to be that an order for transfer should not be passed without hearing the other side and that the other side should not in any way be prejudiced. A.I.R. 1935 All. 979=1935 A.L.J. 1093=1935 A. L.R. 1154=159 Ind. Cas. 644 (2).

——S. 22—Application for transfer—When to be made.

Application for transfer must be made before or at the settlement of issue and not after. The words "after notice to the other parties" in S. 22 means notice prior to the making of application. 11 P.R. 1917=150 P.W.R. 1916=16 P.L.R. 1917=35 Ind. Cas. 616.

——S. 22—Delay in applying.

The language of S. 22 is mandatory and an application under the section not presented at the earliest possible opportunity must be rejected. 7 L.L. J. 93=26 P.L.R. 465=88 Ind. Cas. 531=A.I.R. 1925 Lah. 322.

——S. 22—Delay—What is not.

Party taking transfer proceedings in trial Court and then approaching High Court is not guilty of delay. 39 M.L.T. 401=1927 M.W.N. 607=106 Ind. Cas. 870=A.I.R. 1928 Mad. 15.

——S. 22—Nature of provisions—Delay.

Provisions are mandatory and application should be made at or before settlement of issues. 78 Ind. Cas. 608=A.I.R. 1925 Lah. 175.

3. Grounds for transfer.

——S. 22—Transfer—Rights of defendants to and grounds for.

Where plaintiff has got a right to sue at more than one place and has chosen a place, defendants are by showing a clear balance of advantage in the way of convenience and expense entitled to have the case transferred to some other court. 11 O.L.J. 377=86 Ind. Cas. 495=A.I.R. 1924 Oudh 410.

——S. 22—Transfer—Grounds—Taking erroneous view without bias for or against party.

The mere fact that the Judge took an erroneous view in disposing of an application, in the absence of any bias in his mind for or against either party, is no ground for an application for transfer. A. I. R. 1934 All. 37=154 Ind. Cas. 391.

——Ss. 22 and 23 (3)—Transfer—Objection to jurisdiction of trying Court—Grounds for transfer.

In an application for transfer under Ss. 22 and 28 of the C. P. Code the question of want of jurisdiction of the trying Court could not be raised. 34 I.C. 707, foll. An application to a High Court to transfer a suit pending in a Subordinate Court to another High Court falls under S. 23 (3) of the Code. A suit can be transferred only upon two grounds, *viz.*; (a) that there will not be an impartial trial by the trying Court or; (b) that there is a manifest preponderance of convenience to the petitioner if the suit is transferred to the other Court. The convenience of the plaintiffs and their witnesses has also to be considered particularly as they have in the first instance the right to choose the venue in which they would prosecute their suit. (1920) P.H.C.C. 235=1 Pat.L.T. 277=56 Ind. Cas. 920.

——S. 22—Transfer of suit—Convenience of defendant.

The defendant's evidence in regard to one of the issues is mainly in another place is not a sufficient ground for transferring the case to that place. 167 P.R. 1919=54 Ind. Cas. 935.

——Ss. 22 and 23—Grounds for transfer—Selection by plaintiff of forum.

Plaintiff has a right to bring a suit in any Court allowed to him by law, and to overrule his right of election of Court, a strong case based on some ground of expense or convenience must be made out. 3 O.L.J. 200=34 Ind. Cas. 686.

——S. 22—Suit capable of institution in two Courts—Transfer from one to another—Reasons.

When a suit is capable of institution in two Courts but is brought in one of them it cannot be transferred to the other merely because the defendant has all his evidence at the latter place. 8 S.L.R. 43=25 Ind. Cas. 874.

——S. 22—Conditions for transfer.

The mere convenience of the defendant is no ground for transfer of a case and a strong case should be made out where such transfer is prayed for.

Where during the pendency of a suit for dower at *R*, the husband filed a suit at *S* for restitution of conjugal rights as a counterblast to it and the wife applied for transfer of the case at *S* to *R* on the ground that several of the witnesses likely to be called lived at *R* and that the material facts in both suits would be the same:

Held, that the cases should be tried at the same place and that the interests of justice required that they should be tried at *R.* A.I.R. 1933 Lah. 635=146 Ind. Cas. 38.

4. Balance of Convenience.

——S. 22—Balance of convenience—Two suits between parties instituted at different places—Transfer of one.

Although a plaintiff has a right to choose the *locus* for decision of his suit and his exercise of that right should not be restricted except for cogent reasons, yet where two suits between the parties are instituted at two different places, and the interests of the majority of the parties are such that the balance of convenience is undoubtedly that the two suits should be tried in the same place, and so much inconvenience would be caused by the trial of the suit in the other place as would amount to an abuse of the processes of Court, an application for transfer of suit from such place to the place where the trial of both the suits would be more convenient should be allowed. A.I.R. 1936 Pesh. 5=160 Ind. Cas. 522.

——S. 22—Balance of convenience.

In deciding the question whether it is expedient to order transfer of the suit, the convenience of the parties is indeed a factor which enters into consideration, but it is obvious that the convenience of both parties have to be weighed and the matter must ultimately turn on the balance of convenience. A. I.R. 1940 Nag. 145=1940 N.L.J. 231=190 Ind. Cas. 439.

[Overrules A.I.R. 1916 Nag. 31=40 Ind. Cas. 393.]

——S. 22—Balance of convenience—Tests for determining if application should be allowed.

In question of transfer of case under S. 22, the convenience of the parties alone should not be considered, but the totality of circumstances should indicate that a suit should proceed in a Court different from the Court chosen by the plaintiff. A.I.R. 1935 All. 979=1935 A.L.J. 1093=1935 A.L.R. 1154=159 Ind. Cas. 644 (2).

——S. 22—Balance of Convenience.

Where the dealings all took place at Karachi, the persons from whom goods were brought and to whom goods were sold, by the petitioners were at Karachi, and all the accounts relating to the dealings in question were at Karachi.

Held, that the balance of convenience was greatly in favour of the case being tried at Karachi though the parties lived in Delhi. 72 Ind. Cas. 592=A.I. R. 1923 Lah. 383.

——S. 22—Considerations for transfer—Onus of proof.

In applications for transfer of suits the burden lies very heavily on the defendant to show that considerations of convenience should outweigh the cardinal principles that it is the right of the plaintiff as *arbiter lites;* and one should fother look to the allegations of the plaintiff than that of the defendant in considering such an application. 39 M.L.T. 401=1927 M.W.N. 607=106 Ind. Cas. 870=A.I.R. 1928 Mad. 15.

——S. 22—Convenience.

Convenience is a valid ground of transfer. 48 Cal. 53=62 Ind. Cas. 115=A.I.R. 1921 Cal. 210.

——S. 22—Balance of convenience—Discretion of Court.

In the matter of transfers the Legislature has left it to the unfettered discretion of the Court to determine upon the circumstances of each case whether or not the venue should be changed from the place where the plaintiff has laid it. The jurisdiction conferred upon the Court is of an exceptional character and should be exercised very cautiously and only when a clear cause has been shown. The mere circumstance that the defendant's convenience would be promoted by the transfer should not be regarded as an adequate ground for depriving the plaintiff of his right to file his suit in any Court allowed by law but if the defendant establishes a manifest preponderance of convenience in his favour the Court would be justified in granting his prayer. 73 Ind. Cas. 860=A.I.R. 1924 Lah. 249.

——S. 22—Order for transfer, when made—Balance of convenience.

Ordinarily it is for the plaintiff to choose the Court in which he should institute the suit and an order for transfer should be made only if the preponderance of convenience necessitates such a course. 27 P.L.R. 831=97 Ind. Cas. 390=8 L.L.J. 578=A.I.R. 1927 Lah. 14.

——S. 22—Sufficient grounds for transfer, what are not.

Where, a suit for specific performance of a contract to sell immovable property at *M* was filed at *M* and the defendants applied to have it transferred to *K.*

Held, that a departure from the ordinary rule would not be justified merely because the correspondence was conducted at *K,* or that some of the witnesses would come from *K,* or again that it would be much more convenient for the defendants to have the case tried at *K.* A.I.R. 1928 Lah. 183.

——S. 22—Balance of convenience—Petition by defendant for transfer of suit to his place of residence for his convenience is not acceptable.

In deciding whether a suit should or should not be transferred it is not merely the convenience of the defendant that has to be considered, but the plaintiff's convenience also should be borne in mind. 106 Ind. Cas. 869=A.I.R. 1928 Lah. 159.

——S. 22—Balance of convenience.

Mere inconvenience is not sufficient ground—Whether sufficient grounds exist depends upon the facts of each case. 69 Ind. Cas. 239=A.I.R. 1924 Lah. 304.

S. 23—See also C. P. Code, S. 22.

——S. 23—Applicability of—Court not subordinate to High Court—Transfer and stop.

Section 28, C. P. Code, does not apply to a Court not subordinate to the High Court. Therefore a suit pending on the Original Side of a High Court cannot be transferred under S. 23, nor can the proceedings be stayed where the cause of action arose within the jurisdiction of the Court. 27 M.L.J. 645=27 Ind. Cas. 455.

——S. 23—First hearing—Transfer—Place of trial.

The first hearing under S. 23 is when the case is ready to proceed. When materials on record are insufficient to determine the place of residence the case is triable at the place of the cause of action and where at least some of the suit assets are situated,

particularly when at that place there are other suits between defendants and suits against the estate pending. 65 P.W.R. 1914=150 P.L.R. 1914=25 Ind. Cas. 723.

——S. 23—High Court—Transfer of case.

The High Court cannot order that a suit instituted in a Court within its jurisdiction, should proceed in a Court in the jurisdiction of another High Court. 5 Ind. Cas. 588 (All.).

——S. 23—Original Side High Court is subordinate to High Court.

For purpose of transfer of a case, the Judge sitting on the original side of the High Court is subordinate to the High Court. A.I.R. 1923 Rang. 22, Foll. A.I.R. 1928 Lah. 183.

——S. 23—For the purposes of transfer applications of suits from the Original Side of the High Court, the Judge sitting on the Original Side is subordinate to the Appellate Side of the High Court. 11 L.B.R. 446=77 Ind. Cas. 408=1 Bur.L.J. 194=A.I.R. 1923 Rang. 22.

——S. 23—Original Side of High Court—Whether subordinate to Appellate Side.

The Original Side of a High Court is an integral part of the High Court and is not a Court 'subordinate' to the High Court within the meaning of S. 23 (3), C. P. Code. A.I.R. 1934 Rang. 265=12 Rang. 548=151 Ind. Cas. 573 (F.B.).

[Overrules A.I.R. 1923 Rang. 22=77 Ind. Cas. 408.]

——Ss. 23, 22, 151—Suit pending on Original Side—Application for transfer, if to be made in that Court—Power of that Court to pass order under S. 151.

Where a suit is pending before the Original Side of the High Court an application for transfer of the case should be made under S. 22, in the Original Side of the High Court which has seizin of the case and that Court has jurisdiction to pass an order under S. 151. A.I.R. 1934 Rang. 265=12 Rang. 548=151 Ind. Cas. 573 (F.B.).

——S. 23—Original Side—Not 'subordinate.'

A Judge of the Original Side is not a Court subordinate to the High Court, but is a High Court itself, and so an application for the transfer of a suit pending before him will not lie before a Bench of the same High Court. 45 C.L.J. 71=100 Ind. Cas. 331=A.I.R. 1927 Cal. 290.

——S. 23—Powers of High Court.

Under sub-S. (3) of S. 23 High Court has jurisdiction to order the transfer of a suit to a Court outside its appellate jurisdiction. 51 Bom. 26=28 Bom.L.R. 1442=100 Ind. Cas. 154=A.I.R. 1927 Bom. 79.

——S. 23—Stay of Suit—Ex parte decree by Calcutta Court—Execution at Surat Court—Suit for declaring the decree null and void is maintainable in Surat Court—Suit cannot be stayed under S. 151—Application ought to be made under S. 23 (3).

A decree was obtained *ex parte* by *A* against *B* in Calcutta Court. The decree was transferred to the Court at Surat for execution; and *A* applied for the execution of decree. Thereupon *B* filed a suit in the Surat Court for a declaration that the decree was inoperative, having been obtained by fraud, and for an injunction restraining *A* from executing the decree. The Surat Court stayed the suit holding that it had jurisdiction to hear the suit, but that for the ends of justice it should be stayed under S. 151 on the application of *A*.

Held, that if *A* wanted to stay the suit in the Surat Court, he ought to have applied under S. 23 (3) for an order that the suit should be transferred to the Calcutta High Court at the earliest opportunity as required by S. 22 and that there was no substantial basis for holding under S. 151 that it was necessary for the ends of justice that proceedings in the Surat Court should be stayed; and that the stay order was without jurisdiction. A.I.R. 1924 Bom. 90, Dist. 51 Bom. 26=28 Bom.L.R. 1442=100 Ind. Cas. 154 =A.I.R. 1927 Bom. 79.

——S. 23—Transfer of suit—From moffusil to original side of the Calcutta High Court.

The plaintiff has the right to choose the forum of trial, and a case can be transferred from one Court to another, only when the Court is satisfied that the proceedings in the trying Court constitute an abuse of the process of the Court.

Quaere:—Whether under S. 23 (3) C. P. Code a case can be transferred from the Court at Purnea to the Original Side of the Calcutta High Court. 1 Pat.L.T. 389=57 Ind. Cas. 649.

——S. 23—Transfer—Grounds for.

The transfer of a case from one Court to another is an extraordinary procedure, and some good cause must be shown before it is granted. 24 Ind. Cas. 707, (All.).

——S. 23—Transfer when unnecessary.

Transfer is unnecessary if the suit will be more expeditiously and more economically decided in the original Court. 4 O.W.N. 1114=A.I.R. 1928 Oudh 89 (1).

S. 23—Objection to jurisdiction of Court—Party whether can apply to the same Court for transfer.

Section 23 postulates that the several Court concerned shall both have jurisdiction. Consequently where defendant in the suit on contract, questions the jurisdiction of the Court to try the suit, his application to the Court to transfer the suit to another Court where he himself has filed his suit on the same contract against the plaintiff, cannot be allowed. A.I.R. 1941 All. 27=1940 A.L.J. 611=I.L.R. (1940) All. 737=192 Ind. Cas. 543.

——S. 23—Applicability.

Equitable mortgage of properties in Lahore at Karachi—Arbitration and award at Karachi—Award cannot be enforced at Lahore by sale of Lahore properties—S. 23 has no application. A.I.R. 1934 Lah. 652=35 P.L.R. 482=152 Ind. Cas. 135.

——S. 23 (3)—Reference by Small Cause Court.

A Small Cause Court cannot make a reference in a case under S. 23 (3) of the Code, if the Court has no jurisdiction to hear it. 77 P.L.R. 1909=117 P.W.R. 1909=4 Ind. Cas. 922.

——S. 23, Cl. (3)—Jurisdiction of Civil Court—Suit triable by several Courts—Transfer of suit—Ground for.

A Court of Small Causes is not competent to make a reference in a case under S. 23, Cl. 3, of Act 5 of 1908, if the Court has no jurisdiction to hear the

suit. And the Chief Court will not order transfer of the suit when no great inconvenience will be caused to the defendant by the trial of the suit in the Court in which it is filed. 77 P.L.R. 1909=117 P.W.R. 1909=4 Ind. Cas. 922.

——Ss. 23, 24; (Ss. 25, 403 et seq.)—Transfer application for leave to sue 'in forma pauperis' filed in Court of Subordinate Judge—Application transferred by District Judge to his own file—Disposal of application by him—District Judge not thereafter competent to send the suit back to the Subordinate Judge for trial.

A pauper plaintiff presented to the Subordinate Judge an application for leave to sue as a pauper. This application was by means of an order under S. 25 of the Code of Civil Procedure taken on to the file of the District Judge and heard and granted by him.

Held, that the District Judge had no powers subsequently to transfer the pauper suit thus initiated back to the file of the Subordinate Judge. 1902 A.W.N. 66, ref. to. (1902) A.W.N. 92=24 A. 356.

——S. 23 (24)—Two suits in two Courts subject to the control of two High Courts—Power to stay proceedings.

The High Court has power to stay proceedings in one Court, when the same matter is litigated upon by the same parties in two Courts subject to the control of different High Courts. (1908) 35 C. 541.

——S. 24—General Power of transfer and withdrawal.

See also C. P. CODE, SS. 22 AND 23.

Synopsis.

1. **Appeal.**
2. **Applicability and scope.**
3. **Competency of Court.**
4. **Courts what are.**
5. **Court of Small Causes.**
6. **Grounds.**
7. **Jurisdiction.**
8. **Notice.**
9. **Transfer.**

1. Appeal.

——S. 24—Decision of District Judge in capacity of persona designata—No Appeal lies to High Court.

A District Judge deciding election petition in his capacity of **persona designata** selected by the Government is not acting in his capacity as a District Judge and hence no appeal lies to the High Court on the ground that decision is a decision of a District Judge, because the officer concerned would not be acting as a District Judge. A.I.R. 1945 Oudh 233=1945 O.W.N. (C.C.) 95=1945 A.W.R. (C.C.) 67=20 Luck. 382=221 Ind. Cas. 542.

——S. 24—Consolidation of suits—Two suits for partition in Courts of First and Second Class Sub-Judges—District Judge transferring latter suit to former Court—Suits consolidated—Party to Second Class but not party to First Class suit appealing—Appeal held properly filed.

Two persons filed two suits for partition in the Courts of First Class Sub-Judge and Second Class, Sub-Judge, respectively. The latter suit was transferred to the Court of the First Class Sub-Judge who framed separate issues but consolidated the two suits and decided them by one judgment only, and one decree was drawn up. The party to the latter suit who was not a party to the former suit appealed to the Judicial Commissioner's Court:

Held, that the consolidation must be considered as one of First Class suit and when there was one judgment and one decree, clearly, neither the judgment nor the decree could be divided up into parts and separate forums could not exist for appeals relating to particular findings given in one judgment and decree. Consequently, the appeal relating to a finding on an issue in the Second Class suit could not be treated as an appeal from the Second Class Court decree which did not exist and therefore, the appeal was properly filed. A.I.R. 1939 Sind 128=I.L.R. (1939) Kar. 563=181 Ind. Cas. 982.

——S. 24—Appeal triable by District Judge—Appeals so filed but transferred to Subordinate Judge.

The Subordinate Judge has jurisdiction to hear appeals, which are cognizalbe by the District Judge and which are filed before him but are transferred to the Subordinate Judge. A.I.R. 1937 All. 478 =1937 A.L.J. 511=1937 R.D. 276=1937 A.L.R. 621 =169 Ind. Cas. 1004.

——S. 24—Case tried by Judge with Small Cause Court powers—Successor of such Judge not having such powers—Transfer under orders of District Judge—Orders passed after transfer, nature of—Appealability of order.

Where a Judge invested with powers of Small Cause Court and trying the case as a small cause suit is transferred and the succeeding Judge who is not vested with such powers transfers it under orders of District Judge to another Court, the presiding officer of which also does not exercise small cause powers, the transfer is not a transfer from a Court of Small Causes and the order ultimately passed in the case is not one which must be deemed to have been passed by a Court of Small Causes but must be regarded as having been passed in the exercise of his regular jurisdiction as a Subordinate Judge and it is therefore appealable. A.I.R. 1936 Lah. 883=167 Ind. Cas. 303.

——Ss. 24, 104, O, 43, R. 1—High Court whether can order transfer—Appeal from such order.

The High Court has jurisdiction to make an order of transfer under S. 24, and not being a "judgment", either under the Code or under any other "express enactment", an order of transfer made under S. 24 is not subject to appeal. A.I.R 1935 Rang. 267=13 Rang. 457=157 Ind. Cas. 1107 (F. B.).

——S. 24—Application for transfer—Competency to make.

It is not open to a defendant to raise an issue as to the jurisdiction of a Court in which a suit is pending and at the same time apply for transfer of the case under S. 24 of the Code.

A superior Court cannot make an order of transfer of a case under the appropriate section of the Code unless the Court from which the transfer is sought to be made has jurisdiction to try it. A.I.R. 1932 Sind 215=26 S.L.R. 277=139 Ind. Cas 496 (1).

——S. 24—High Court—Transfer of suit.

If the application for the transfer of a case, made to a District Court, proves ineffective, the High Court can transfer the case on application. The High Court can entertain such an application. 11 C.L.J. 218=5 Ind. Cas. 771.

——S. 24—Insolvency petition—Provincial Insolvency Act, S. 5 (2)—Application to withdraw petition from Subordinate Judge and transfer to High Court is not maintainable.

An application to withdraw an insolvency petition from the file of a Subordinate Judge and transfer it for trial and disposal to the original side of the High Court is not maintainable: 28 M.L.W. 369=114 Ind. Cas. 352=52 Mad. 57=A.I.R. 1928 Mad. 1091=55 M.L.J. 671.

——S. 24—Original Side of High Court has no jurisdiction to transfer insolvency case from one Court to another.

Original Side of the High Court is not competent to transfer insolvency proceedings from one Court to the other. The powers conferred by S. 6 of the Provincial Insolvency Act, which are made subject to the other provisions of the Act, cannot be exercised in such a way as to give the Original Side of the High Court a jurisdiction from which it is expressly excluded by the terms of the Act whether that section is read with S. 24, C.P. Code, or Cl. (11) of the Letters Patent. 4 Rang. 554=100 Ind. Cas. 265=A.I.R. 1927 Rang. 105.

——S. 24—The High Court in the exercise of its insolvency jurisdiction has no power to order a withdrawal of the proceedings in insolvency from the Court of the Subordinate Judge in the presidency to itself. [39 Bom. 604, Appr.] But in the exercise of the jurisdiction of the High Court in insolvency a Judge invested with that jurisdiction has power under S. 18 to stay any suit or other proceeding pending against the insolvent in a District Court or Subordinate Judge's Court in the Presidency which is subject to the superintendence of the High Court. 49 Bom. 788=91 Ind. Cas. 160=27 Bom.L.R. 1207=A.I.R. 1925 Bom. 543.

——S. 24 only contemplates a transfer of suit from one competent Court to another. Where original Court finds that it has no jurisdiction to hear a suit the District Judge has no jurisdiction to transfer the suit. A.I.R. 1930 Lah. 195=125 Ind. Cas. 334 =31 P.L.R. 302.

——S. 24—The term "suit" in S. 24 includes execution proceedings and a Court to whom execution proceedings are transferred from a Court of Small Causes is a Court of Small Causes for the purposes of such proceedings. 95 Ind. Cas. 243=A.I.R. 1926 Lah. 465.

——S. 24—Inherent jurisdiction and any other kind of jurisdiction, lack of.

So far as S. 24 is concerned, there is no reason to make a distinction between lack of inherent jurisdiction and lack of any other kind of jurisdiction in a Court trying a suit. A.I.R. 1940 Oudh 164=15 Luck. 619=1940 O.L.R. 16=1940 O.W.N. 462=185 Ind. Cas. 467.

——S. 24 (2)—Execution proceedings—'Suit' appearing for second time in sub-s. (2), meaning of—Whether includes a proceeding—Sub-s. (2), if applies to execution proceedings.

Where the word "suit" appears for the second time in S. 24, sub-S. (2), Civil P. C., it must be taken as including a "proceeding", otherwise parts of the sub-section would be quite meaningless.

Where proceedings in execution are transferred from one Court to another, the latter may either re-try it or proceed from the point at which it was so transferred. A.I.R. 1936 Pesh. 56=161 Ind.Cas. 54.

——Ss. 24 and 22—Power of transfer under S. 22 and 24—Distinction between, pointed out. A.I.R. 1934 All. 569=1934 A.L.J. 345=150 Ind. Cas. 942.

——S. 24—It is open to a District Judge to proceed suo motu and transfer a case from one Court to another Court of competent jurisdiction. But where he is moved for transfer by a party to the suit, he is bound to issue notice to the other party and to hear him if he desires to be heard. Failure to do so, if not without jurisdiction, is at least a material irregularity. (1932) 136 Ind. Cas. 384=1931 A.L.J. 1061=53 All. 916=A.I.R. 1933 A. 178 (1).

——S. 24 and O. 47, R. 1—Transfer of a case for review—Illegality.

An order, transferring an application for review to a court other than the one which decided the case is illegal. 50 Ind. Cas. 910 (N.).

——S. 24—Transfer—Party deprived of the right of appeal.

Transfer of a case from Munsiff to Sub-Judge, who acts as Small Cause Court, is within the Dt. Judge's power, though a party is deprived of his right of appeal by the case being transferred to a Court, with small cause powers. 36 Ind. Cas. 881 (Cal.).

——S. 24 (4)—Transfer to a Court without Small Cause jurisdiction.

S. 24 (4) of the Code includes under "a Court of Small Cause" Courts invested with Small Cause Court jurisdiction as well as Courts constituted under Act 9 of 1887; and so a transfer, under the above section, by a Dt. Judge of a Small Cause suit from a competent Small Cause Court to a Court not having Small Cause jurisdiction makes the latter Court for the purpose of the suit a Court of Small Causes, whose decision in the case is not therefore appealable. 39 All. 214=15 A.L.J. 69=37 Ind. Cas. 809.

——S. 24—Transfer of suit from Small Cause Court to a Court which had no such powers—Appeal.

A suit filed in a Small Cause Court does not cease to be a Small Cause suit on account of its transfer to a Court not invested with such powers and no appeal lies. 14 A.L.J. 705=36 Ind. Cas. 317.

——S. 24—Transfer of a case, without notice——Legality of—Convenience of parties not considered—Defendant not heard.

The order of transfer of a case, if passed without regard to the convenience of the parties (when the convenienceis a question of importance) and without hearing defts. is illegal. 23 C. L. J. 295=33 Ind. Cas. 797.

——S. 24—Transfer of case—Remand to District Judge—Power to transfer to Sub-Judge.

A cases remanded to a District Judge can be transferred to a Subordinate Judge under S. 24, C. P. C. 12 A.L.J. 1094=25 Ind. Cas. 141.

——S. 24—Transfer of case—Remand by High Court—Powers of District Judge.

If a District Judge transfers a case remanded by the High Court to a Sub-Judge who disposes of it without any objection being taken as to his jurisdiction the irregularity would not affect the decision on its merits. (1914) M.W.N. 317=15 M.L.T. 304 =23 Ind. Cas. 425.

——S. 24—Power of High Court—Suit pending on original side—Transfer to mofussil Court—Powers of Bench on appellate side to order—Considerations—Convenience—Relevancy.

It is beyond dispute that a bench on the appellate side of the High Court has power under S. 24. C. P. Code, to make an order transferring a suit pending on the original side of the High Court for trial to a Court in the mofussil; the Court must, however, be satisfied that such a transfer is necessary. The question of convenience is a relevant consideration, though not decisive. 39 Mad. 80; 32 Bom. L.R. 207; 1937 Lah. 389; 13 Bom. 178, ref. 51 Bom.L.R. 226=A.I.R. 1949 Bom. 263.

——S. 24, and O. 41, R. 23—Transfer of case—Remand by High Court—Transfer by District Judge—Trial by Sub-Judge with consent of parties—Irregular assumption of jurisdiction.

Where a Sub-Judge, to whom a suit is on remand from the High Court transferred by the Judge who had originally tried it, tries the suit with the consent of the parties, his decision cannot be questioned, as it is only a case of irregular assumption of jurisdiction by a competent Court. 19 C.L.J. 408=19 C.W.N. 143=23 Ind. Cas. 69.

——S. 24—Transfer of suit—Remand—Powers of District Judge.

Where an Appellate Court remands a suit for fresh disposal on the merits by the Court which first decided it, the District Judge can transfer it to his own file and decide it. 21 A. 230, Dist. 9 4N.L.R. 68=19 Ind. Cas. 552.

——S. 24 (3)—Transfer of case by District Judge to Addl. Dt. Judge.

A Dt. Judge can transfer a case pending before him to the Addl. Dt. Judge. 28 P.W.R. 1912=14 P.L.R. 1912=13 Ind. Cas. 6.

——S. 24 (1) (a)—Powers of Appellate Court to transfer.

The Dt. Court cannot transfer an appeal to the Sub-Judge's Court after the Dt. Court has partly heard it. 23 M. 314, Foll. 21 M L J. 479=8 M.L.T. 347=(1911) 1 M.W.N. 27=8 Ind. Cas. 492.

——S. 24 (1) (a) and O. 39, R. 2, Cl. (3)—Powers of transfer—Notice to opposite party.

A Dt. Judge transferring a case under S. 24 on the application of a party should, before passing the order of transfer, give notice to the opposite party. If the applicant invites the Dt. Judge to transfer the case of his own motion and the Judge orders the transfer without giving notice to the opposite party, the order of transfer should not be set aside on the mere ground of want of notice, the irregularity is not material, but is only a defect of form. An interlocutory application pending before the Dt. Munsiff to punish the defendant for disobedience of an ad interim injunction granted by the Munsiff cannot be transferred from his file to the file of some other Court by the Dt. Judge or the High Court. S, 24 of the Code does not apply. 21 M.L.J. 829=(1910) M.W.N. 631=8 M.L.T. 374=8 Ind. Cas. 7.

——S. 24—'Proceedings', meaning.

The word "proceeding" in S. 24 covers all proceedings contemplated at the date when the C.P.C., of 1908 was passed and not a special proceeding not then in contemplation but established by a subsequent Act, namely, the Criminal Procedure Amendment Act (Act 18 of 1923). Hence the section cannot be invoked to allow a Court other than the Court, in the course of proceedings in which, a perjury or forgery was committed, or a Court to which appeals ordinarily lie from that Court, to entertain the question of preferring a criminal complaint under S. 476, Cr. P. Code. 49 All. 460=25 A.L.J. 433=101 Ind. Cas. 247=A.I.R. 1927 All. 469.

——S. 24—Refusal of pleaders to accept brief.

Where the opposite party had engaged a number of pleaders and presumably had paid them their fee or portions of it, but on the other hand the applicant did not seem to have engaged any pleader. Held, in the circumstances the ends of justice would be fully satisfied if the case was transferred to another court in the same place and it would be unjust to transfer the case to another place. 11 O.L.J. 337=80 Ind. Cas. 826=27 O.C. 401=A.I.R. 1924 Oudh 372.

——S. 24—Remedy on refusal by District Judge.

Even though the District Judge has refused to exercise the power vested in him by law under S. 24, the High Court has jurisdiction to act under that section: 11 C.L.J. 218, Foll. Besides, the High Court has the general power of superintendence over all inferior Courts and this power is not limited by any course taken by the District Judge. 8 P.L.T. 777=103 Ind. Cas. 456=A.I.R. 1927 Pat. 383.

——S. 24—The High Court in its general powers of superintendence over all inferior Courts can direct the transfer of a case where a District Judge has refused to exercise that power of transfer under S. 24. 87 Ind. Cas. 170=A.I.R. 1926 Cal. 326.

——S. 24—Retransfer—Powers of High Court.

Where a case is transferred, the High Court in revision has authority to re-transfer it to the original Court without the formality of having the plaint filed in the Court to which the case is transferred as a preliminary to the application for re-transfer. 21 A.L.J. 86=73 Ind. Cas. 495=4 L.R.A. (Civ.) 311=A.I.R. 1923 All. 249.

2. Applicability and scope.

——S. 24—Scope of S. 24 and Cl. 13, Letters Patent (Mad.).

Clause 13, Letters Patent (Mad.) does not enable the High Court to withdraw suit from subordinate Court, quash objectionable interim order passed by it and then send back the case for trial to the same Court. That power is conferred by S. 24. A.I.R. 1945 Mad. 69=(1945) 1 M.L.J. 14=58 L W. 7=1945 M.W.N. 1=I.L.R. (1945) Mad. 389=218 Ind. Cas. 267.

——S. 24—Section 24 does not intend to limit the power of the District Court to cases in which it itself had territorial jurisdiction. A.I.R. 1944 Mad. 145=56 L.W. 605=1943 M.W.N. 650=(1943) 2 M.L.J. 536=216 Ind. Cas. 316.

——S. 24—Divorce suits.

Section 24 has no application to divorce suits. A.I.R. 1942 Cal. 546=46 C.W.N. 790=I.L.R. (1942) 2 Cal. 461=76 C.L.J. 436=201 Ind. Cas. 446 (S.B.).

——S. 24—Injunction.

Proceedings for enforcement of an injunction under R. 1, O. 39 are transferable under S. 24 and the proper Court to enforce the injunction is the Court which at the time was seized of the suit in the course of which the injunction was granted. A.I.R. 1941 All. 140=1941 A.L.J. 46=1941 O.W.N. 48=I.L.R. (1941) All. 295=194 Ind. Cas. 166.

——S. 24—Section 24 controls the powers of transfer conferred by S. 23 (5), Bombay Civil Courts Act. A.I.R. 1939 Bom. 485=I.L.R. (1939) Bom. 472=41 Bom. L.R. 892=185 Ind. Cas. 813.

——S. 24—Delay of 12 days in applying for transfer.

Delay of 12 days in applying for transfer is not sufficient to warrant refusing a remedy which should ultimately be convenient to both the parties. A.I.R. 1938 Mad. 745=1938 M.W.N. 565=48 L.W. 74=(1938) 2 M.L.J. 249=178 Ind. Cas. 287.

——S. 24—"Other proceedings," if can cover case of transfer of disposal of claim under U.P. Encumbered Estates Act (25 of 1934), from one Special Judge to another—Clause (iii)—Re-transfer of decided case.

The phrase "other proceeding" contained in S. 24, is sufficiently general to cover the case of the transfer of the disposal of one claim under the U. P. Encumbered Estates Act, from the Court of one Special Judge to another. Further the provision relating to the transfer contained in sub-cl. (iii) of the section is sufficient to cover the re-transfer of the decided case to the file of Special Judge at one place after its decision by Special Judge at another place.

Where, therefore, mortgagors **A** and **B** who each has a share in the mortgaged property file applications under the Encumbered Estates Act, in the Courts of Special Judges at different Districts **L** and **S** and show in the list of debts the same mortgage-deed, and an application to transfer the claim from the Court of the Special Judge at **L** to the Court of Special Judge at **S** under S. 24, is made by the mortgagee, the claim in respect of the mortgage can be transferred from the Court at **L** to the Court at **S** for disposal under S. 14, Encumbered Estates Act, and after decision of the said claim the case should be transferred to the Court of the Special Judge at **L** for further disposal under the Act. A.I.R. 1938 Oudh 217=1938 O.L. R. 382=1938 O.W.N. 775=14 Luck. 272=177 Ind. Cas. 136.

——S. 24—Transfer from Court which has ceased to exist.

Section 24 contemplates the transfer of a case from one existing Court to any other existing Court and not from a Court which has ceased to exist, and if a Court of Small Causes had ceased to exist or the officer invested with Small Cause Court power has been transferred from the District and there is no other officer possessing such powers, there would be no Court from which the District Court can under S. 24 transfer a case to an ordinary Court. A.I.R. 1937 Oudh 398=1937 O. L.R. 320=1937 O.W.N. 801=168 Ind. Cas. 785.

——S. 24—Section 24 contemplates the transfer of a case from one existing Court to another. A.I.R. 1936 Lah. 883=167 Ind. Cas. 303.

——S. 24—Institution of suit under S. 92 in District Court—Notification by Local Government that certain First Class Subordinate Judge was empowered to hear such suits—District Judge transferring case to such Subordinate Judge:

Held, that the notification did not authorize Subordinate Judge to hear suits which were already instituted. Notification could not be relied upon as justification for transfer which apart from the notification, the District Judge had no power to order. A.I.R. 1935 Bom. 172=37 Bom.L.R. 120=59 Bom. 412=157 Ind. Cas. 1086.

——S. 24, O. 21, R. 8—Punjab Courts Act (6 of 1918), S. 37 read with S. 24, Civil P.C. if makes O. 21, R. 8, Civil P.C., surplusage.

Section 37, Punjab Courts Act, read with S. 24, Civil P.C., does not make the provisions of O. 21, R. 8, Civil P.C., a mere surplusage A.I.R. 1933 Lah. 839=147 Ind. Cas. 584.

——Ss. 24, 141 and O. 40, R. 1—Application for transfer of suit to High Court—Notice served on defendants—Order for transfer not made—Application for appointment of receiver—Maintainability in High Court.

When an application for the transfer of a suit to the High Court is made under S. 24, C.P. Code, and notice is ordered, it is in the nature of an original proceeding within the meaning of S. 141 of the Code and the procedure of the Court in regard to suits becomes applicable thereto. O. 40, R. 1 of the Code will be attracted by S. 141 to such proceedings and the High Court will have power to appoint a receiver before the petition for transfer had been served on the defendants. 61 L.W. 596=1948 M.W.N. 597=(1948) 2 M.L.J. 251=A.I. R. 1949 Mad. 283.

——S. 24—Application under, to transfer election petition referred to District Judge under S. 35-C, U. P. District Board Act—Maintainability. 221 Ind. Cas, 542=20 Luck. 382=1945 O.W.N. 95=A.I.R. 1945 Oudh 233.

——S. 24—Batch of suits—Separate application.

Where there are numerous suits pending which are sought to be transferred, an application should be made separately in respect of each suit. 4 Pat. L.J. 13=49 Ind. Cas. 208.

——S. 24—Case remanded on appeal by High Court to the Court of the Subordinate Judge which disposed of the suit—Transfer of that suit by District Judge to a different Subordinate Judge's Court—Legality.

On appeal against the dismissal of a suit by the Subordinate Judge of Masulipatam, the High Court, set aside the order of dismissal and remanded the suit to the same Court for disposal according to law. When the suit was pending in that Court after remand, the District Court on the application of one of the parties transferred it to the Court of another Subordinate Judge. On a question as to the legality of the order.

Held: That the order of the District Judge was not without jurisdiction. Different considerations may arise if the order of remand on special grounds indicates a particular Judge to try a case or not to try it, but that was not the case before the Court. I.L.R. (1949) Mad. 94=A.I.R. 1949

Mad. 65=61 L.W. 326=1948 M.W.N. 326=(1948) 1 M.L.J. 315.

——S. 24—Execution—Applicability to.—S. 24 applies to execution proceedings—Competency does not refer to territorial or local or pecuniary competency.

In regard to suits competency is not referred to in the section in the sense of territorial or local or pecuniary competency. There may be other kinds of incompetency so far as an executing Court is concerned. S. 24 applies to execution proceedings. 39 Mad. 485; 22 Bom. 778 and A.I.R. 1925 All. 276 (2), Foll. Contention that S. 39 gives to the Court that passed the decree a power to transfer, whereas S. 24 gives a similar power, and no higher power to a superior Court, is wrong. The construction is far-fetched and if adopted will render S. 24, so far as execution proceedings are concerned, almost useless. 49 Mad. 746=95 Ind.Cas. 12=A.I.R 1926 Mad. 421=50 M.L.J. 161.

——S. 24—Execution of decree.

S. 38 was enacted to decide the question as to jurisdiction of a Court when a suit is transferred. If a suit instituted in Court **A** is transferred to Court **B** and Court **B** decided it, S. 38 enjoins that application for execution shall be presented to Court **B** and not Court **A**, that is, the application is to be presented to the Court which passed the decree and not to the Court in which the suit was instituted. The section is not exhaustive and a decree can be executed by the Court to which it is transferred under S. 24. 47 All. 57=85 Ind. Cas. 746=6 L.R.A. Civ. 103=A.I.R. 1925 All. 276.

——S. 24—Execution proceedings.

The word "suit" in S. 24 will include execution proceedings. A particular execution application can be transferred under the section. 47 All. 57=85 Ind.Cas. 746=6 L.R.A. Civ. 103=A.I.R. 1925 All. 276.

——Ss. 24, 23 and 22—Scope of.

S. 24 is exhaustive of the judicial power to transfer suits and no Court has jurisdiction to transfer a suit from one Court to another unless both Courts are subordinate to it and even a High Court has no power to compel its institution in any Court beyond the jurisdiction. This power is entirely different in character and legal effect from the one is case of an order returning the plaint with a view to its presentation in the proper Court. 13 N.L.R. 81=40 Ind.Cas. 393.

——S. 24—Scope.

When once the Munsiff is fully seized of a case it is open to the High Court or the District Judge under S. 24 to transfer the proceedings to any other Court of competent jurisdiction. It cannot be said that the transfer is invalid because it may affect some other order of the Revenue Court. A.I.R. 1931 All. 28 (2)=14 R.D. 654=1931 A.L.J. 8=53 A. 62=133 Ind. Cas. 319.

3. Competency of Court.

——S. 24 (1)—Competent Court—Transfer—Valuation—Power of Dt. Judge.

The transfer of a suit valued at between Rs. 1,000 and 2,000 and originally instituted in the Court of a subordinate Judge at Patna for recovery of land situate within the local limits of the Barth Munsif, to the Court of a Munsif at Patna specially empowered by the Local Government to try suits up to the value of Rs. 2,000 within the local limits of the Patna Munsif, is illegal and without jurisdiction. A Court is not "competent" to try a suit unless it has jurisdiction to do so. The jurisdiction of a Court depends not merely upon the nature of subject-matter of the suit but also in the case of most of the subordinate Courts upon the pecuniary value of the suit and in the case of all upon the, local limits of their jurisdiction. 5 P.L.J. 588=1 P. L.T. 637=57 Ind. Cas. 522=(1920) P.H.C.C. 274.

——S. 24, Cl. (1) (ii)—"Competent to try and dispose of" meaning—Change of territorial jurisdiction.

A Small Cause Court established on 1st January, 1916, at **K** with power to try Small Cause suits instituted after the 1st January, 1916, cannot be said to be the successor of the Subordinate Court of **K** in its Small Cause jurisdiction in respect of a suit instituted before 1st January, 1916, and it is not a Court "competent to try and dispose of the same". In the circumstances of the case the Small Cause Court of **K** has no jurisdiction to review the judgment in a small Cause suit of the **K** Sub-Court and an order of the District Judge transferring the case to that Court is ultra vires. (1918) M. W. N. 291=24 M. L. T. 32=8 L. W. 259=45 Ind. Cas. 13.

——S. 24—Competency of Court—Case transferred.

The conditions in S. 24 are restrictive and they require that the Court exercising jurisdiction must be competent to try the suit withdrawn from lower Court. 34 Bom. 411=12 Bom. L. R. 354=6 Ind. Cas. 518.

——Ss. 24 and 96—Connected appeals—Forum—Transfer.

Where the point involved in several appeals is the same but only some of those appeals lie as of right to the Chief Court, it is competent to the Chief Court to direct that all the appeals should be heard in the Chief Court without the formality of a transfer from the lower appellate Court. 101 P.R. 1912=158 P.W.R. 1912=189 P.L.R. 1912=15 Ind. Cas. 845.

——S. 24—'Competent' if includes competency from point of territorial jurisdiction.

The more rational, appropriate and beneficial construction to be placed on the word 'competent' as used in S. 24, is to hold that the Court concerned is competent when it can as regards the nature and subject-matter of the case, and as regards its pecuniary value, entertain a transferred suit, but it does not include competence from the point of view of territorial jurisdiction. A. I. R. 1933 Oudh 154=10 O. W. N. 443=8 Luck. 347=144 Ind. Cas. 578.

——S. 24—'Competent', meaning of.

The word 'competent' in S. 24, refers to pecuniary jurisdiction only. A. I. R. 1932 All. 660=1932 A. L, J. 984=54 All. 824=143 Ind. Cas. 75.

——S. 24—'Competent' meaning of.

The expression "competent to try it" in S. 24 (1) (b) (ii), Civil P. C. refers to the pecuniary jurisdiction of the Court. A.I.R. 1932 Bom. 486=34 Bom.L.R. 931=56 Bom. 387=139 Ind. Cas. 194.

——S. 24—Competent Court.

A Court would not be competent to try and dispose of a suit if it does not possess both pecuniary

and territorial jurisdiction to entertain it. (1932) 136 Ind. Cas. 384=1931 A.L.J. 1061=53 All. 916.

4. Courts—What are.

——S. 24—Subordinate Court, meaning of—Judge appointed to hold inquiry under S. 19, Bombay Local Boards Act—Transfer of proceedings.

Proceedings in respect of an inquiry into the validity of an election under S. 19, Bombay Local Boards Act, pending before a Judge, not below the grade of an Assistant Judge cannot be transferred by the High under S. 24, as the judge holds the inquiry as a persona designata and not as a Court subordinate to the High Court. A.I.R 1945 Sind 9=I.L.R. (1944) Kar. 388=218 Ind.Cas. 193.

——S. 24—Subordinate Court, what is.

The Court of a Sub-Judge, First Class, is a Court subordinate to the District Court within the meaning of S. 24. A.I.R. 1944 Bom. 300=46 Bom.L.R. 653.

——S. 24—Power of High Court.

High Court can take action under S. 24 of its own motion. A.I.R. 1941 Bom. 69=42 Bom.L.R. 1093=L.R. (1941) Bom. 131=193 Ind. Cas. 242.

——S. 24—Transfer to Court having no territorial jurisdiction—Court, if can order sale of property lying outside its territorial jurisdiction.

It is not necessary that a Court to which a suit is 'transferred' in the proper sense of the word (i.e., transferred by the High Court under S. 24 of the Code) should have concurrent territorial jurisdiction and the High Court may transfer a suit to a Court which has pecuniary jurisdiction, though it may not have territorial jurisdiction to try the suit. Where, therefore, a mortgage suit a or its execution proceeding is transferred under S. 24, by the High Court to a Court which has otherwise no territorial jurisdiction, the Court can order sale of the property lying outside its local territorial jurisdiction. A.I.R. 1940 Rang. j133=189 Ind. Cas. 166.

——S. 24. District Judge cannot transfer case to the sub-Judge unless the latter is competent to try or dispose of the same. A.I.R. 1935 All. 696=1935 A.L.J. 943=1936 A.L.R. 259=58 All. 85=161 Ind. Cas 322.

——S. 24—High Court Judge—S. 107, Government of India Act.

High Court Judge has perfect jurisdiction even independently of S. 24, to transfer a suit from one Court to another under S. 107, Government of India Act and an order passed under that section is not appealable A.I.R. 1935 All. 750=1935 A.L.J. 968=156 Ind. Cas. 43.

——S. 24—Jurisdiction—Transfer to Court without territorial jurisdiction—Validity.

It is open to the High Court or a District Judge to transfer a case pending in a Subordinate Court to another Court which has pecuniary jurisdiction to try the suit although it may not at the moment possess territorial jurisdiction to try it. A.I.R. 1932 All. 660=1932 A.L.J. 984=54 All. 824 =143 Ind. Cas. 75.

——S. 24—Delegation of power—Senior Sub-Judge, if can transfer case to junior Sub-Judge—Irregularity—Waiver.

The power of transfer under S. 24 of the C. P. Code can be delegated by the Dt. Judge; when so delegated, it must be exercised in accordance with law. It can only be exercised in cases pending in a Court subordinate to the Court exercising the power. A senior Subordinate Judge cannot transfer a case from his own Court to that of the junior Subordinate Judge as the Court of the latter is not subordinate to him When there is a jurisdiction over the subject-matter but non-compliance with the procedure prescribed as essential for the exercise of jurisdiction, the defect might be waived. 95 P.L.R. 1919=1 Lah. 158=52 Ind. Cas. 352 (Lah.).

——S. 24 (2)—Powers of Dt. Judge to transfer.

A District Judge cannot transfer a case to a Court whose local jurisdiction does not include an area in which the cause of action arose. The mere fact of a transfer of a case by Dt. Judge from one subordinate Court to another similar Court does not confer jurisdiction on the latter unless it is competent to try the suit originally. 57 Ind. Cas. 522 (Pat)=5 P.L.J. 588=1 P.L.T. 637=1920 P H.C.C. 274.

——S. 24—'District Court' in S. 24, if synonymous with the same expression used in the Divorce Act.

It cannot be said that the expression "District Court" appearing in S. 24 of the C. P Code, is equivalent to the expression "District Court" as defind in S. 3 of the Divorce Act. The words are not used synonymously. I.L.R. (1947) Lah. 867= A.I.R. 1949 Lah. 34 (F.B.).

——S. 24 (1) (b)—District Court—Power of withdrawal of transmitted execution.

S. 24 (1) (b) is comprehensible enough to enable the District Court to withdraw a transmitted execution proceeding to its own file and dispose of it. 39 Mad. 485=29 M.L.J. 172=29 Ind. Cas. 119.

——S.24—District Judge—Powers of transfer.

A District Court has power to re-transfer any suit to the file of any subordinate Court from which it had taken it to its own file. 36 Cal. 193 =5 C.L.J. 611=1 Ind. Cas. 913.

——S. 24—Court of institution should have jurisdiction.

All that S 24 requires is that the suit should be pending in a subordinate Court which had jurisdiction at the time suit was filed.

Where a suit was instituted properly in the Court which had jurisdiction to entertain it and the Munsif was succeeded by another who had no pecuniary jurisdiction to try it:

Held, that the District Judge could transfer the suit to a Court having proper pecuniary jurisdiction. A.I R 1936 All. 335=1936 A L.J. 452=1936 A.L.R. 511 (2)=162 Ind. Cas. 903.

——S. 24—Subordinate Judge—Power to transfer suits under Punjab Courts Act, Ss. 37 and 44.

A Subordinate Judge cannot exercise the powers under S. 24, C. P. C, unless such powers are delegated to him by Dt. Judge under Ss. 37 and 44 of the Punjab Courts Act. 33 P.W.R. 1917=40 Ind. Cas. 111.

——S. 24 (1) (a)—Subordinate Court—Divisional Court not subordinate to High Court—Transfer of petition for alimony to Divisional Court.

S. 24 (1) (a) does not make the Divisional Court

a subordinate Court to the High Court owing to the nature of latter's jurisdiction, so as to transfer the petition for alimony on a dissolution of marriage to the Divisional Court. 40 Bom. 109=17 Bom.L.R. 948=31 Ind. Cas. 331.

——S. 24—Subordination of Courts.

A Munsiff's Court is subordinate to the Court within the meaning of S. 24 of the Code. 11 C.L.J. 218=5 Ind. Cas. 771.

5. Court of Small Causes.

——S. 24 (4)—Court of Small Causes—Meaning of.

The words "Court of Small Causes" in the section include Courts vested with powers of Small Causes and their procedure is be governed by the provisions of the Prov. Small Causes Courts Act. 38 All. 425=14 A.L.J. 549=34 Ind. Cas. 113.

——S. 24 (4)—"Court of Small Causes".

Court of Small Causes means not only a Court constituted as a Small Cause Court but also a Court invested with Small Cause jurisdiction Consequently the decision of a suit of a Small. Cause nature by a munsif on the regular side owing to an order of transfer is not appealable. 38 Mad. 25=23 M.L.J. 373=(1912) M.W.N. 1086=17 Ind. Cas. 425.

——S. 24—'Court of Small Causes', meaning.

The expression "Court of Small Causes" in S. 24, sub-S. (4) includes a Court vested with the powers of a Court of Small Causes and the procedure for the trial of a suit transferred under that sub-section is governed by the provisions of the Provincial Small Cause Courts Act and no appeal lies from the decision. 38 All. 425, 39 All. 214; 40 All. 525; A.I.R. 1924 All. 761; A.I.R. 1923 Pat. 49; 38 Mad. 25; 31 Bom. 314; 27 C.L.J. 461. Foll.; 49 C.L.J. 237=56 Cal. 588=120 Ind. Cas. 589=A.I.R. 1929 Cal. 354.

——S. 24 (4)—Civil suit—Transfer of—Small Cause Court.

A Court of Small Causes under S. 24 (4) of the C. P. Code includes Courts vested with Small Cause Court jurisdiction as well as the special Courts constituted under the Pro. Sm. C. Courts Act. 27 C.L.J. 461=44 Ind. Cas. 881.

——S. 24 (25)—"Court of Small Causes".

The Court of "Small Causes" referred to in S. 25, C. P. Code, must be held to be a Court of Small Causes constituted under the Provincial Small Cause Courts Act and not to include a Court vested with the powers of a Court of Small Causes under another Act. (1904) 31 C. 1057.

——S. 24—Transfer-Judge invested with Small cause powers—Trial of suit instituted on Small Cause side by successor not invested—C. P. Code, S. 25—Provincial Small Cause Courts Act, S. 35—Bengal and N.W.P. Civil Courts Act, S. 17.

Where a Munsiff invested with Small Cause powers is transferred, his successor who is not so invested can try the small cause suits on his original side. No order of transfer under S. 25, C. P. Code by the District Judge is necessary when one Judge succeeds another and takes over the ordinary civil business of that Court, and also by its constitution exercises ordinary civil jurisdiction in cases in which an abolished court invested with the powers of a Small Cause Court previously exercised jurisdiction. The jurisdiction is given to the successor by S. 17 of the Bengal Civil Courts Act and by S. 35 of the Provincial Small Cause Courts Act. An order of transfer under S. 25, C. P. Code, will not give jurisdiction to the successor to try the suits on the Small Cause Side. 5 A. 274; 13 A. 324, diss. from; 23 B. 352, foll. (1904) 31 C. 1057 (D.B).

——S. 24—Small Cause Judge being invested with small cause jurisdiction subsequent to the filing.

Where a suit is filed on the regular side and the presiding judge is subsequently invested with Small Cause jurisdiction, an order transferring the suit from the regular to the small cause side is erroneous and must be set aside. (1903) 13 M.L.J. 438.

——S. 24—Effect of transfer of Small Cause suit to regular side.

Where a suit instituted in the Court of Small Causes is subsequently transferred to the regular side, the Judge trying the suit must be deemed to have the same powers as the Small Cause Court possessed in the matter of awarding compensation under S. 35 A. 120 Ind. Cas. 412=A.I.R. 1930 Nag. 133.

——S. 24—A suit was being tried in the Court with small cause powers. Before the suit was decided, the Judge was transferred. He was succeeded in office by a Judge not invested with the powers of a Small Cause Court Judge. The suit therefore was transferred to the Court of the Additional Munsif who finally decided it. The Additional Munsit having decided the case an appeal was filed.

Held, that no appeal lies as S. 24 (4) did apply, and the Court of the Additional Munsif must be treated as a Small Cause Court. 5 All 274, Foll.; 50 All 810=115 Ind. Cas. 127=26 A.L.J. 772=A.I.R 1929 All. 50.

——S. 24—Suit filed in Small Cause Court transferred by consent of parties to Sub-Judge's Court—Trial of the suit as ordinary money suit—Still no appeal lies from the decree.

A suit for recovery of Rs. 870 on account of price of milk was instituted in the Court of Small Causes at Sealdah, having pecuniary jurisdiction upto Rs. 1000. A suit for rent between the parties being pending at the time in the Third Court of the Munsiff at Alipur, the District Judge of 24 Parganas, with the parties' consent transferred the suit to the Court of the Munsiff to be tried with the rent suit. The Munsiff was invested with Small Cause Court powers up to Rs. 250. He registered the suit as an ordinary money suit and tried it as such and decreed it for Rs. 432 with interest and proportionate costs.

Held, that the consent to the transfer readily given by both parties on the ground of mutual convenience as another suit between them was pending in that Court carried with it the necessary consequence which followed under the law itself, namely, S. 24, sub-S. (4) and neither party could complain that a right of appeal was taken away. Besides the provision of sub-S. (4) was more or less a statutory recognition of the general rule that the incidents of a trial are to be governed by the law as applicable to the condition which existed at the institution of the suit, unless these incidents have been expressly varied by the legislature. 49 C.L.J. 237=56 Cal. 588=120 Ind. Cas. 589=A.I.R. 1929 Cal. 354.

——S. 24—Where in a suit, instituted in a Small Cause Court, a question of title was raised and the suit was transferred to the original side for trial, and afterwards the issue of title was deleted but the suit was tried on the original side without any objection from the plaintiff and further the objection was not also raised on the grounds of plaintiff's appeal to the High Court, the plaintiff would not be allowed to raise it at a later stage. A.I.R. 1922 Mad. 352. Rel on. 119 Ind. Cas. 386= A.I.R. 1929 Mad. 525.

——S. 24—Small Cause suit transferred to Munsif's Court—Proceedings in the latter Court are governed by Provincial Small Cause Court Act, and no appeal lies. 26 A.L.J. 839=110 Ind. Cas. 493= A.I.R. 1928 All. 609.

——S. 24—Bengal, N.W.P. and Assam Civil Courts Act 2 of 1896, S. 9.

Appeal lies from Hon. Munsiff appointed under S. 9 of Act 2 of 1896 to Sub-Judge, though the case may have been transferred to the Munsiff from a Court of Small Causes. 22 A.L.J. 880=82 Ind. Cas. 292=5 L.R.A. Civ. 725=A.I.R. 1924 All. 761.

——S. 24—Transfer of Small Cause suit to Munsif's Court—Trial as ordinary suit—No appeal lies from decree. 1 Pat. 696=69 Ind. Cas. 681=4 P.L.T. 259=1 Pat L.R. 186=A.I.R. 1923 Pat. 49.

——S. 24 (4)—Small Cause suit—Transfer to Honorary Munsif—U. P. Act, 2 of 1896, S. 8 (2)—Proviso.

An Honorary Munsif acting under the U. P. Honorary Munsif's Act decides a suit transferred to him from a Court of Small Causes not as Court of Small Causes and his decree is therefore appealable. 54 Ind. Cas. 435 (All.).

——S. 24 (4)—Small Cause—Transfer to Honorary Munsif—Appeal.

S. 24 (4), C. P. Code does not apply to cases transferred from Small Causes to Hony.Munsif's Courts. Decrees passed by latter Courts are appealable, as they cease to be decrees in Small Causes. 1 U.P.L.R. (H.C.) 27=50 Ind. Cas. 648.

——S. 24 (4)—Pr. Sm. C.C. Act, S. 35—Transfer of Small Cause suit to another Court with no Small Cause powers.

The Court to which a suit of a Small Cause nature is transferred from a Small Cause Court must under S. 24 (4), C. P. Code, be deemed to be a Court of Small Causes as regards that suit and its decision is therefore not appealable. 40 All. 525= 16 A.L.J. 548=46 Ind. Cas. 893.

——S. 24 (4)—Small Cause nature—Transfer of, Suit by District Judge.

S. 24, Cl. (4) of the C. P. Code is not limited in its application to Courts constituted under the Pro. Sm. C. Courts Act. A Dt. Judge cannot transfer a case of a Small Cause nature to a Subordinate Court not invested with the powers of a Small Cause Court, i.e., not competent to try it as such, so long as the Small Cause Court capable of trying it is in existence 20 O.C. 350=43 Ind. Cas. 314.

——S. 24—Section 24 provides that a Court to which a suit is transferred from a Court of Small Causes shall be deemed to be a Court of Small Causes. A.I.R. 1943 Oudh 449=1943 O.W.N. 205= 208 Ind. Cas. 144.

——S. 24 (4)—Transfer from Court of Small Causes to Court not having adequate Small Cause power to deal with it as Court of Small Causes.

A District Court may transfer any proceeding from a Court of Small Causes to a Court not having adequate Small Cause powers to deal with it as a Court of Small Causes. But nevertheless, the latter Court shall be deemed to be a Court of Small Causes for the purposes of the suit transferred. A.I.R. 1941 Mad. 103=52 L.W. 598=1940 M.W.N. 1073=(1940) 2 M.L.J. 700.

——S. 24—Transfer of suit from Small Cause Court to City Civil Court.

There can be no objection to the entertainment of an application under S. 24 of the Civil P.C. for the transfer of a suit from the Court of Small Causes, Madras, to the City Civil Court, Madras. In view of S. 5, Madras City Civil Courts Act, this is not a case of conferring by the order of the transfer itself, jurisdiction on the Court to which the transfer is made which it would not possess but for the transfer. A.I.R. 1940 Mad. 9=50 L.W. 634=I.L.R. (1940) Mad. 251=1939 M. W.N. 1082=(1939) 2 M.L.J. 841=188 Ind. Cas. 680.

——S. 24—Transfer—Small Causes Court to Munsif's Court.

A suit was instituted in the Court which had the power to deal with it as a Court of Small Causes. The Judge was transferred and was not replaced by any other officer. The suit therefore went to the Court of the Munsif who decided it. The suit was transferred to him by the District Judge in pursuance of a letter from the High Court Registrar:

Held, that the Munsif must be deemed to have been acting as a Court of Small Causes under the provisions of S. 92. A.I.R. 1939 All. 452= 1939 A.L.J. 335=184 Ind. Cas. 426.

——S. 24—Small Cause—Suit valued at Rs. 238, instituted in Court having Small Cause powers upto Rs. 300—Suit transferred to another Court under S. 24, having Small Cause powers up to Rs. 100 only.

A suit valued at Rs. 238 odd was first instituted in the Court of the Munsif with Small Cause powers upto Rs. 300, but was subsequently transferred by the District Judge under S. 24, Civil P. C., to another Court with Small Cause Court jurisdiction up to Rs. 100 only:

Held, that the latter Court had jurisdiction to try the suit after it had been transferred to that Court by the District Judge under S. 24, Civil P.C., even though that Court was not vested with Small Cause Court powers over Rs. 100. A.I.R. 1939 Cal. 345=43 C.W.N. 440=183 Ind. Cas. 264.

——S. 24 (4)—Transfer of case pending in Small Cause Court to Honorary Munsif's Court by District Judge—Appeal, forum—U. P. Honorary Munsifs Act (2 of 1896), S. 8.

Section 24, Cl. (4), does not apply to a case transferred by the District Judge, from the Court of Small Causes where it was pending to the Court of the Honorary Munsif. Consequently, an appeal lies to the Subordinate Judge froe. the decision of the Honorary Magistrate. R. I.R. 1935 All. 141=1935 A.L.J. 200=1936 A. 1051=158 Ind. Cas. 1114.

——S. 24—U. P. Honorary Munsifs Act (2 of 1896), S. 8, Proviso—Re-transfer to Additional Munsif's Court having no Small Cause powers—Suit decided on merits—Appeal.

A suit for recovery of Rs. 152-8-0 was instituted in the Court of the Munsif, who had jurisdiction of a Court of Small Causes up to Rs. 200. The suit was cognizable by the Munsif on the Small Cause Court Side of the jurisdiction. Before any proceedings could be taken, the suit was transfered to a Bench of Honory Munsifs, where it remained pending until on the application of the defendant, the District Judge transferred it to the Court of the Additional Munsif, who had no jurisdiction to try cases under the Provincial Small Cause Courts Act. The Munsif tried the suit on the merits and dismissed it. The plaintiff appealed from the Munsif's decree to the Court of the District Judge, who held that no appeal lay. as the Munsif should be deemed to have decided the ease as a Judge of a Small Cause Court:

Held, that when the suit was transferred to the Bench of Honorary Munsifs, it became subject to the provisions of the U. P. Honorary Munsifs Act, 2 of 1896. The proviso to S. 8 of that Act expressly excludes the application of S. 24 (4), Civil P.C. When the suit was transferred from the Court of the Bench of Honorary Munsifs to that of the Additional Munsif, the latter could not acquire jurisdiction of the Court of Small Causes in respect of this suit by virtue of S. 24 (4) which does not in terms apply, the transfer not being from a Court of Small Causes. The Additional Munsif could therefore try the suit only within the limits of his own jurisdiction, and as such, an appeal from decision was comptent to the District Judge. A.I.R. 1935 All. 765=1935 A.L.J. 591=57 All. 957=158 Ind. Cas. 106.

——S, 24—Provincial Small Cause Courts Act (9 of 1887), S. 32 (2)—Original suit—Transfer to Small Cause Side—Trial as small cause —Legality.

Certain suits were filed as original suits in a Court which had both Small Cause and original jurisdiction. The pecuniary limit of the Small Cause jurisdiction of the Court was subsequently increased so as to bring these suits within the Small Cause Jurisdiction of that Court. The District Judge transferred the suits to the Small Cause Side of the Court under S. 24, Civil P.C. and the suits were tried as such:

Held, that though the District Judge had power to transfer the suits, they still retained the character of original suits in view of the provisions of S. 32 (2) of the Provincial Small Cause Courts Act, and as they were tried as Small Cause Suits. the trial was irregular and the case should be re-tried as original suits. A.I.R. 1935 Mad. 284=68 M.L.J. 274=41 L.W. 416=1935 M.W.N. 614=157 Ind. Cas. 612.

——S.24—District Judge transferring suit in Small Cause Court, to Sub-Judge—Transfer need not be made to Court having Small Cause powers. A.I.R. 1935 All. 690=1935 A.L.J. 511=1935 A.L.R. 702= 157 Ind. Cas. 122.

——S. 24 (4)—Transfer of suit from Small Cause Court—Court trying the suit—Whether to be treated as a Court of Small Causes—Appeal—Competency.

Under S. 24 (4), a Court trying any suit transferred or withdrawn under the section from a Court of Small Causes, is to be treated for all purposes including that of appeal from its decisions, as a Court of Small Causes. Consequently no appeal lies from the decision of such Court. A.I.R.1935 Neg. 42 =31 N.L.R. 170=156 Ind. Cas. 151.

——S. 24—Suit of Small Cause nature—Transfer to Court having no Small Cause powers.

Suit of value below Rs. 500 rightly filed in Honorary Munsif's Court—Transfer under S. 24, by District Judge to Munsif's Court which was not a Small Cause Court—Trial by Munsif:

Held, that it was not obligatory to transfer the case to Small Cause Court, but since the suit was of Small Cause nature and was heard by Munsif against whose decision an appeal would lie, the decision of lower appellate Court was not appealable by way of a second appeal under S. 102, Civil P. C. A.I.R. 1935 All. 574=1935 A.L.J. 426 =155 Ind. Cas. 95.

——S. 24 (4)—Transfer of case from Small Cause Court to Civil Court in which suit against same defendants in respect of same transaction is pending—Power of District Judge to transfer.

It is open to a District Judge to transfer a Small Cause Court suit from the Court of Small Cause to another Court not exercising Small Cause Court powers. Section 24, sub-s. (4), Civil P.C., is a clear authority for the District judge to make such an order of transfer.

Where two suits were filed against the same defendants one in a Small Cause Court and the other in the Court of the Munsif and the defendants in both the suits pleaded that the transactions on which the two suits had been brought formed parts of the same transaction:

Held, that it was proper for the District Judge to transfer the Small Cause suit to the Court of the Munsif. (1934) 147 Ind. Cas. 334.

——Ss. 24, 96—Appeal—Suit originally filed as Small Cause transferred subsequently.

The mere fact that the suit was originally instituted in the Court of Small Causes and was transferred therefrom under S. 24, Civil P.C., cannot alter its nature, when it was in fact not cognizable by that Court. A.I.R. 1933 Lah. 509=34 P.L.R. 262=146 Ind, Cas. 845.

——S. 24—Provincial Small Cause Courts Act (IX of 1887), S. 16—"Competent to try"—Suit beyond Small Cause Jurisdiction of Munsif—Transfer for trial by Munsif.

Where a suit within the Small Cause jurisdiction of the Subordinate Judge of **D** but above the Small Cause jurisdiction of the District Munsif of **D** though within his original jurisdiction was transferred by the District Judge to the District Munsif of **D** to be tried with a connected original suit:

Held, that the District Munsif was 'competent to try' the transferred suit within the meaning of S. 24, and the order of transfer was not in any way irregular or illegal. A.I.R. 1932 Mad. 683=1932 M.W.N. 763=36 L.W. 479=63 M.L.J. 689=55 Mad. 960=139 Ind. Cas. 477.

——S. 24—Transfer of case—Suit pending in Small Cause Court—Transfer to Subordinate Judge's Court.

A suit pending in a Small Cause Court in which

the value of the claim is Rs. 900, can be transferred under S. 24, to the Court of a Subordinate Judge whose Small Cause Court powers extend only to Rs. 300. A.I.R. 1932 Bom. 486=34 Bom. L.R. 931=139 Ind. Cas. 194.

——S. 24—Provincial Small Cause Courts Act (9 of 1887), S. 16—Effect of.

Section 24, sub-s. (1), is intended to enable the transfer of a suit from a Court of Small Causes to one which is not such a Court. Consequently, it is intended to remove the bar laid down in S. 16, Provincial Small Cause Courts Act, 1887. A.I.R. 1932 Bom. 486=34 Bom.L.R. 931=56 Bom. 387=139 Ind. Cas. 194.

——S. 24—Under S. 24, a suit pending in a Small Cause Court can be transferred to a subordinate Court though the latter Court would not have had jurisdiction to try the suit but for the transfer A.I.R. 1932 Nag. 49=27 N.L.R. 307=135 Ind. Cas. 402.

——S. 24—S. 35, Provincial Small Cause Courts Act.

Scope and effect of S. 24 in relation to S. 35, Provincial Small Cause Courts Act. A.I.R. 1931 All. 574=1931 A.L.J. 953=54 A. 171=136 Ind. Cas. 357 (F.B.).

[Overrules (1891) 13 All. 324].

6. Grounds.

——S. 24—Good grounds—What are.

A plaintiff has undoubted right to bring his suit in any Court which has jurisdiction but no particular sanctity can be attached to this right. If the defendants can show a clear balance of advantage in the way of convenience and expense they are entitled to have the case transferred. 9 Cal. 980, Foll. 9 O.L.J. 413=69 Ind. Cas. 717=A.I.R. 1923 Oudh 30.

——S. 24—Transfer of suits—Convenience of parties is a good ground.

A litigant applying for transfer must make out a strong case of the balance of convenience followed. The convenience of the parties in the conduct of litigation is certainly a relevant consideration, and it is perhaps not too much to say that it is the basis of nearly all statutory jurisdiction on the Civil side. Therefore in a suit for cancellation of certain deeds of gift executed in the C. P. in a state of ill-health under undue influence, the High Court allowed a transfer on showing that all available witnesses resided in the C.P. 44 All. 278=65 Ind. Cas. 782=20 A.L.J. 118=A.I.R. 1922 All. 65.

——S. 24—Good grounds—What are not.

The fact that a Judge has decided a point of law arising in one case is not a good ground for transferring from his Court another case in which the same point arises. 78 P.L.R. 1922=67 Ind. Cas. 228 =A.I.R. 1921 Lah. 357 (1).

——S. 24—Expression of opinion on certain points in a previous case is not a ground for transfer. 94 Ind. Cas. 394=A.I.R. 1926 Lah. 345.

——S. 24—Grounds for.

Plaintiff has rights to choose his forum—Applicant under S. 24 must make out strong case for transfer—Court should not interfere unless expenses and difficulties of trial are so great as to lead to injustice. A.I.R. 1930 Lah. 944=130 Ind. Cas. 523.

——S. 24—It is true that the reasonable apprehension on the part of the litigant should receive consideration when a transfer is applied for but at the same time the apprehension must be such as a reasonable man might reasonably be expected to have. 77 Ind. Cas. 762=A.I.R. 1923 Lah. 564.

——S. 24—The mere fact that the main question in the two cases is the same, namely, the interpretation of the will is no reason for transferring the appeal pending in the District Court to the High Court, especially when the parties are different. A.I.R. 1944 Lah. 440=219 Ind. Cas. 157.

——S. 24—Administrative suit—Valauation made by plaintiff cannot be questioned by defendant—Suit falls under sub-para. (f) of cl. (iv) of S. 7, Court-fees Act—The party aggrieved has his remedy under S. 24, if he considers that he has thereby been deprived of his right of appeal. A.I.R. 1941 Rang 322=1941 Rang.L.R. 512=198 Ind. Cas. 414 (F.B.).

——S. 24—Ex parte decree—Application to set it aside under O. 9, R. 13—Meantime appeal against ex parte decree—Appellate Court must be requested to keep the appeal pending until disposal of application under O. 9, R. 13 or to apply to Appellate Court immediately the appeal is dismissed to withdraw the application to itself under S. 24 (1) (b). That Court may after so withdrawing it retransfer the same under sub-s. 6 (iii) to the Court from which it was withdrawn if it does not itself wish to try or dispose of it under sub-s. (1) (b). A.I.R. 1937 Nag. 381=172 Ind. Cas 608.

——S. 24—Mere sentimentality is no ground for transfer. Section 24 cannot be used to give an indirect sort of anticipatory appeal, not to a superior Court but to a Court of equal jurisdiction. Decision by the same Judge on the same point in previous suit is no ground for transfer. A.I.R. 1944 Lah. 400=46 P.L.R. 180.

——S. 24—Transfer—Judge deciding particular fact in previous case—Whether good reason for transfer.

The mere fact that the Judge has decided a particular point of law in a previous case is not reason for a transfer in a subsequent case, otherwise a Judge would eventually become unfit to decide most cases. If the question is one partly or wholly of fact, still less does there seem to be any reason for a transfer because the decision will depend upon the evidence in the particular case.

The main question in the suit which was sought to be transferred was whether the defendant was the validly adopted son of the plaintiff's deceased husband. In a previous case, in which the plaintiff was not a party, the Judge, before whom the subsequent suit was pending, decided that the present defendant was the validly adopted son. The plaintiff, therefore, applied for a transfer of the case to some other Court alleging that she feared she would not get an unbiased decision:

Held, that in the present suit, the decision would depend mainly on the evidence. The plaintiff apprehended not that she would not get a fair trial but that she would not get a favourable decision and that there was no ground for transfer. A.I.R. 1938 Nag. 126=I.L.R. (1939) Nag. 631=172 Ind. Cas. 910.

——S. 24—Territorial jurisdiction, absence of—Ground for setting aside decree.

Under S. 24, an Appellate or Revisional Court

cannot set aside a decree of a Subordinate Court for want of territorial jurisdiction unless there has been a consequent failure of justice. A.I.R. 1935 Mad. 574=158 Ind. Cas. 252.

——S. 24—Onus.

The onus of establishing sufficient ground for transfer lies heavily on the applicant. He must prove that he has reasonable apprehension that he might not get justice in the Court in which the suit is pending. A.I.R. 1934 Lah. 593=35 P.L.R. 574=153 Ind. Cas. 386 (2).

——S. 24—Judge having expressed opinion in another case on point in dispute.

Where it is alleged that the Judge has already expressed, in another case, his opinion on the point awaiting adjudication, a good ground for transfer is made ought. A.I.R. 1934 Lah. 539=35 P.L.R. 468 =152 Ind. Cas. 696 (1).

——S. 24—Reasonable apprehension that petitioner will not get fair trial.

Even in a case of a communal or quasi-communal nature, it is not open to a person belonging to one community to obtain the transfer of his case from a court presided over by a Judge belonging to the rival community. In order to obtain a transfer, it must be shown that there is a reasonable apprehension in the mind of the person applying for the transfer that he will not get a fair trial, When the Judge has given no cause for such apprehension, an application for transfer should not be allowed. A.I.R. 1934 Lah. 762=36 P.L.R. 29=150 Ind. Cas. 334.

——S. 24—Subordinate Judge before whom case is pending discussing case with high relation of defendant.

Where it appeared that the Subordinate Judge in whose Court the plaintiff's case was pending broke the rule that the presiding officer should not discuss pending cases with any person what ever, and discussed the case, while pending, with a person in an exalted position who was a close relation of the defendant, and the plaintiff feeling that no justice would be meted out to him in that Judge's Court, applied for a transfer.

Held, that the case should be transferred from the Court of that Judge to some other Court. A.I.R. 1934 All. 448=47 Ind. Cas. 773 (2).

——S. 24—Pendency of one appeal in District Court and another involving same question in High Court.

Where one appeal is pending in the District Court and another appeal in the High Court where the same question in issue is under consideration and it will be absurd if contrary decisions are arrived at, the appeal pending in the District Court may be transferred to the High Court. A.I.R. 1933 Lah. 1033=147 Ind. Cas. 637.

——S. 24—Execution—Stay by High Court—Order not reaching the executing Court—Court issuing warrant of arrest in spite of party's making affidavit—Effect.

In a case where the High Court ordered stay of execution proceedings pending in a Subordinate Judge's Court, the order did not reach the Judge on the day the case was put down. An affidavit filed by party stating that High Court has passed the stay order, was rejected and warrant of arrest of the judgment-debtor issued on the ground that offical notification of the stay order was not received by the judge. Thereupon the party obtained a certified copy of the stay order and presented the same to the Judge; even then the Judge stated that he could do nothing as the original order was still not before him.

Held, that the party was in the circumstances well justified in thinking that the Subordinate Judge was strongly prejudiced against him and that an order for transfer ought to be made. A.I.R. 1933 Lah. 915=35 P.L.R. 38=147 Ind. Cas. 208.

——S. 24—Subordinate Judge subordinate to Commissioner in his executive capacity.

Where an order of dismissal of a ghatwal was passed by the Commissioner and a declaratory suit was filed before the Subordinate Judge who was also the Deputy Collector and who in his executive capacity acted in the matter of the dismissal, the mere fact that he was subordinate to the Commissioner in his executive capacity would be no ground for transfer of the case from his file. A.I.R. 1933 Pat. 638=146 Ind. Cas. 1087.

——S. 24—Apprehension that Judge may not be able to approach case with open mind.

Where a District Judge decided an appeal on the entire evidence in the case including additional evidence admitted by him, and when his decree having been set aside the case was remanded to him and the additional evidence was withdrawn by the party and it appeared that the party would well have had a reasonable apprehension that it would not be possible for the Judge to approach the decision of the case with an open mind:

Held, that it was a proper case in which the High Court should exercise its general powers of transfer. A.I.R. 1933 Oudh 154=8 Luck. 347=10 O.W.N. 443=144 Ind. Cas. 578.

——S. 24—Balance of convenience—Cross-suits.

The convenience of parties is a good reason for the transfer of a suit from one Court to another.

Where two suits relate to the same transaction and involve common questions of fact it is desirable that they should be tried by the same court. A.I.R. 1932 Nag 49=27 N.L.R. 307=135 Ind. Cas. 402.

——S. 24—Expression of definite opinion by Judge regarding documents.

Where in the course of a prior proceeding the Judge had expressed himself very definitely as to the nature of certain account books and the very same account books had to be considered in the later proceedings:

Held, that a transfer of the later proceeding should in the interests of justice be allowed. (1931) 133 Ind. Cas. 876=32 P.L.R. 388.

——S. 24—Mere balance of convenience—Duty of applicant to make out strong case.

The plaintiff has a right to choose his own forum and a case can be transferred only if a strong case for transfer is made out. Mere balance of convenience is not a sufficient ground. The Courts should not interfere in such cases unless the expense and difficulties of the trial would be so great as to lead to injustice, or the forum was deliberately chosen for the purpose of working injustice. A.I.R. 1931 Lah. 115=31 P L.R. 920.

——S. 24—Grounds for transfer—Prejudice to plaintiffs.

Removal of a case against Plaintiff's will from a Court where he lodged it should be supported by

good cause. The only good cause depending on the parties is where the parties are both willing and jointly ask for removal. 41 All. 381=17 A.L.J. 371=50 Ind. Cas. 368.

——Ss. 24 and 16—Grounds for transfer—Plaintiff's right to choose his forum.

Strong proof must be given of the balance of convenience in changing the forum and the burden lies on the plaintiff applicant who has therefore the right to begin. 14 A.L.J. 242=32 Ind. Cas. 613.

——S. 24—Grounds for transfer—Injudicious observation.

Where a plaintiff in the witness-box vaunted the merits of his paper and the Judge observed by way of answer that he did not make much of it or him, the observation though injudicious and thoughtlessly made, is not a sufficient ground to entitle the plaintiff to get his case transferred to another Court. 29 Ind. Cas. 29 (Mad.).

——S. 24—Grounds for—Transfer—Erroneous view of law.

The fact that a Subordinate Judge took an erroneous view of law in a case analogous to the one is no ground for the District Judge to withdraw the suit and transfer it to his file. The District Judge ought not to withdraw the suit and take it on his file to dispose it of on a preliminary point; he cannot do so under S. 24, if he does not wish to try it finally. 15 Ind. Cas. 569 (Cal.).

——S. 24—Grounds for—Balance of convenience—Sufficient cause.

An application to transfer a case from one city to another should not be granted if there is no balance of convenience on the side of the trial in the other city nor there are grounds to suppose that greater justice would be done by the transfer. A plaintiff should not be deprived of the right given him by law to select the Court in which he will sue, without sufficient cause. 5 All. 60; 9 Cal. 980; 13 Bom. 178, appr. 3 Bur.L.T. 60=8 Ind. Cas. 449.

——S. 24—Grounds for transfer—Difficult question of law.

The fact that the case will involve difficult questions of Law is not alone a sufficient ground for its transfer. 3 Bur.L.T. 49=8 Ind. Cas. 444.

——S. 24—Grounds for transfer.

A transfer of a suit will not be ordered, when no great inconvenience will be caused to the defendant by the trial of the suit in the Court in which it is filed. 77 P.L.R. 1909=117 P.W.R. 1909=4 Ind. Cas. 922.

——S. 24—Sufficient grounds—What are.

Where the Judge has already expressed his opinion, it is preferable that the case be transferred to other Court. 109 Ind. Cas. 402 (Lah.).

——S. 24—Sufficient grounds—What are not.

The fact that a Judge has decided a point of law arising in one case is not a good ground for transferring from his Court another case involving the same point. Moreover where the application is a belated one and made by only one of the several defendants after the evidence is concluded and date for arguments is given no adequate ground for transfer can be said to be established. A.I.R. 1930 Lah. 176=124 Ind. Cas. 687.

——S. 24—Defendant having influence in the town is no groun.d 9∞Ind. Cas. 859=A.I.R. 1927 Lah. 80.

——S. 24—Prejudice of Judge against party's pleader is no ground for transfer unless it is likely to affect judicial attitude of Judge towards the party or the case.

It may possibly be that it would be incumbent on a higher Court to transfer a case from the file of a particular tribunal to another tribunal the moment it is clear that some prejudice has been created and that a fair hearing and an impartial adjudication could not reasonably be expected even though such a state of things has been brought about by the conduct of the very party applying for the transfer; but it cannot, however, be assumed that prejudice against a particular pleader is or will operate as prejudice against the party or his case. It may no doubt, and perhaps often does, and one can only do his best to form his own judgment taking that and all other circumstances into consideration. It would be a dangerous principle to establish that the moment a judge falls out with a pleader or vice versa the case should be transferred from that Judge to some other; but if, on the other hand, there is any reasonable ground for supposing that the prejudice against the pleader has in any manner or measure affected the judicial attitude towards the petitioner or his case, transfer would certainly be ordered. 91 Ind. Cas. 559=A.I.R. 1926 Mad. 359.

——S. 24—Suits with same issues.

Two suit raising same issues instituted in two different Courts may be ordered to be tried together. 87 Ind. Cas. 170=A.I.R. 1926 Cal. 326.

——S. 24—Transfer, Basis of.

In ordering transfer of a case the convenience of the parties is not merely a relevant but also a material consideration, and, in effect, the convenience of the parties is at the basis of all the arrangement for statutory jurisdiction on the civil side. A.I.R. 1922 All. 65, Foll. Where in a partition suit the greater part of the property is situated in B district:

Held, that this is a reason why it should be advantageous to both parties alike to have the suit tried in that district. The mere fact that the majority of the individual parties reside there, is not a very weighty consideration in favour of the transfer. That a party has engaged a counsel with heavy fees is a circumstance to be considered when ordering transfer of a case. 10 N.L.J. 67=101 Ind. cas. 723=A.I.R. 1927 Nag. 219.

——S. 24—Transfer, basis of.

The plaintiff has the right to choose any forum the law allows him. In an application for transfer of a suit under S. 24, the burden lies on the applicant to make out a strong case for the transfer. Mere balance of convenience is not sufficient ground though perhaps it may be a relevant consideration but certainly nothing more than that. The Court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice, or the forum is deliberately chosen for the purpose of working injustice. A.I.R. 1930 Lah. 944 =130 Ind. Cas. 523.

——S. 24—Decision of the Court to which case is transferred is appealable in same manner as its other decision.

When a question is referred to an established Court without more, it imports that the ordinary incidents of the procedure of that Court are to attach and also that any general right of appeal from its decisions likewise attaches. So, where a

case is transferred to a High Court on its original side by the Governor-General in Council under C. P. Code, S. 25, the appellate side of the High Court has jurisdiction to hear an appeal from decision on the original side. (1913) A.C. 546 and 39 Mad. 617 (P.C.), Foll. 1922 M.W.N. 830=A.I.R. 1921 Mad. 687.

——S. 24—Transfer of case—District Judge—Order of transfer of a claim for upwards of Rs. 10,000 from the Court of First Class Subordinate Judge to the District Court—Order passed by Assistant Judge—Bombay Civil Courts Act (14 of 1869).

A suit, under the Bombay Civil Courts Act (14 of 1869) that an Assistant Judge was not a Judge having jurisdiction co-ordinate with that of the District Judge. He was, therefore, not a Judge of the District Court which alone had jurisdiction to transfer the case under S. 24 of C.P.C., 1908. (2) Under S. 24 of the Code the District Court might withdraw and suit any try and dispose of it. Where the suit withdrawn was for a sum exceeding the pecuniary jurisdiction of the Assistant Judge and he could not try and dispose of it. He therefore, was not a Judge of a District Court as contemplated by the section, which must be a Court of unlimited pecuniary jurisdiction. (1909) 12 Bom.L.R. 354=34 B. 411=6 Ind. Cas. 518.

——S. 24—Transfer of suit—High Court—Subordinate Court—Concurrent jurisdiction.

Under S. 24 of the Civil Procedure Code, 1908, the High Court and the District Court have concurrent jurisdiction to direct the transfer of a suit. The High Court can direct a transfer even after the application for the same purpose has been refused by the District Court. The Court of a Munsif is subordinate to the High Court within the meaning of S. 24 (1909). 5 Ind. Cas. 771=11 C.L.J. 218.

——S. 24 (25)—See JURISDICTION OF HIGH COURT. 26 M. 595.

——S. 24—Court to which a transfer can be made.

Where a court has power to transfer a case from the file of another, it can transfer it only to a court which otherwise under the law has jurisdiction to try the case. (1902) 4 Bom.L.R. 970.

——S. 24—District Judges—Power of transfer—Part-heard suit on the file of Sub-Judge—**See** 10 C.W.N. 12.

——S. 24—Jurisdiction of High Court to transfer part-heard case from District Court to Sub-Court—C.P.C., Ss. 25, 191 (2).

The High Court has jurisdiction to transfer a part-heard case from a District Court to Sub-Court. (1902) 26 M. 595.

——S. 24—Transfer of civil case—Applicant apprehending partiality—How far ground for transfer.

If there are grounds enough to create a reasonable apprehension in the applicant that he may not have an impartial trial, there ought to be a transfer. (1902) 4 Bom.L.R. 970 at 971.

——Ss. 24, 25, [191(2)]—Transfer by District Judge to his own file of case partly heard by Subordinate Judge—Jurisdiction.

A District Judge has jurisdiction under S. 25 and S. 191, Sub-s. (2), of the Civil Procedure Code, to transfer to his own file a case pending in the Court of the Subordinate Judge and which the latter has already heard in part. 10 C.W.N. 12.

——S. 24 (25)—Transfer—Retransfer by District Judge of a case transferred by him to his own file from that of the Subordinate Judge.

Where a District Judge has once exercised the powers conferred by S. 25 of the Code of Civil Procedure and transferred a case to his own file from the file of the Subordinate Judge, he cannot afterwards retransfer such case to the Subordinate Judge. (1902) A.W.N. 66=24 A. 304.

[But see S. 24 of the New Code where such power is expressly conferred].

——S. 24—What is not transfer under S. 24.

A Small Cause Court finding a question of title to immoveable property raised sent the plaint to the District Judge who sent it to a Munsif for disposal. On appeal from the decision of the latter.

Held, that the District Judge must be deemed to have acted under S. 23 of the Provincial Small Cause Court Act and not under S. 24, C.P. Code. The Munsif could not therefore be deemed to have tried it as a Small Cause Court under S. 24 (4), C. P. Code and his decision was appealable. 64 Ind. Cas. 335 (Lah.).

7. Jurisdiction.

——S. 24—Suit in Court having no jurisdiction—Transfer of—Validity.

Where a suit is instituted in a Court not competent to try it, the District Judge has no jurisdiction to transfer the case under S. 24 of the Code so as to confer jurisdiction upon another Court. (1919) P.H.C.C. 409=53 Ind. Cas. 892.

——S. 24—Jurisdiction—Transfer of proceedings.

Proceedings which are beyond jurisdiction of a Court cannot be transferred by the order of the superior Court. 37 Cal. 574, Foll. 32 Ind. Cas. 788 (Cal.).

——S. 24 (4)—Jurisdiction—Small Cause suit—Appeal.

A suit was instituted in the Court of a first class Sub-Judge with Small Cause powers but the Judge being on leave at the time, and the joint Sub-Judge having no Small Cause powers, the suit was registered in the file of ordinary civil suits, and tried as such even by the Judge himself when he returned. **Held**, that the Sub-Judge continued to be a judge with Small Cause powers during his absence, and the suit was still one of the Small Causes. Hence no appeal lay to the Dt. Court. 33 Bom. 664=11 Bom.L.R. 817=3 Ind. Cas. 816.

——S. 24—Jurisdiction—When conferred by transfer.

A Small Cause Court is established first and the Judge of that Court is appointed afterwards. Therefore, the Court does not cease to exist if at any time there should be no Judge to preside over it. Suits can be instituted in the Court even if there should be no Judge appointed for the time being. The suits so instituted would remain in the Court until they are withdrawn therefrom. A Small Cause Court dismissed a suit. The High Court in revision directed the Trial Court to re-entertain the suit. In the meanwhile a new officer came to be the Judge in the Trial Court and he was invested with Small Cause Court powers. But the value of the suit exceeded the limits of his pecuni-

ary jurisdiction. The District Judge transferred the suit to another Court.

Held, that the Court to which the suit was transferred had small cause jurisdiction with regard to the suit. 26 P.L R. 308=88 Ind. Cas. 139=A.I.R. 1925 Lah. 561.

——S. 24 (25)—Mamlatdar's Court—Applicability of section.

S. 25, C. P. Code (1882) does not apply to Mamlatdars' Courts. (1902) 4 Bom.L.R. 970.

——S. 24—From Mamlatdar's court—High Court—Power of.

The High Court has power to transfer a suit from one Mamlatdar's court to another Mamlatdar's court. (1902) 4 Bom.L.R. 970.

8. Notice.

——S. 24—Notice to parties.

A Dt. Judge can transfer a case from one Court to another within his jurisdiction without previous notice to the parties but on an application for the same by the party, he must issue notice to and hear the parties before the transfer under S. 24. 2 U. P.L.R. (All.) 83=18 A.L.J. 351=58 Ind. Cas. 560.

——S. 24—Under S. 24, C. P. Code, no notice before filing an application for transfer of case is necessary. A.I.R. 1933 Lah. 635=146 Ind. Cas. 38.

——S. 24—Notice.

S. 24 is imperative and notice of transfer must be given to parties when action is taken on the motion of a party. It need not be given when the Court acts suo-motu. "Parties" means parties to the suit, appeal or proceedings, the transfer of which is sought. 13 N.L.R. 203=42 Ind. Cas. 746.

——S. 24—Notice—Effect of absence of.

The transfer of a suit under S. 24 without notice to the parties is illegal. 33 P.W.R. 1917=40 Ind. Cas. 111.

——S. 24 (1)—Notice—Affidavit—Reasons—Practice—Chief Court—Punjab.

In transferring a case the Chief Court need not issue notice to the opposite party or state reasons for doing so. It can also dispense with an affidavit. 143 P.W.R. 1912=162 P.L.R. 1912=14 Ind. Cas. 561.

——S. 24—No notice, effect of.

It is always usual to issue notices to the parties informing them that a case has been transferred from one Court to another and in the absence of such a notice a party may well plead that he did not know in what Court he had to appear. 84 Ind. Cas. 238=A.I.R. 1923 Lah. 444.

9. Transfer.

——S. 24—Transfer, effect of, on jurisdiction.

Order of transfer passed under sub-Cl. 4, S. 24 cannot invest a Court not having small cause jurisdiction with one; nor could such an order enable a judge having Small Cause jurisdiction up to a particular limit to try as a small cause suit a suit exceeding that limit. 29 M.L.W. 810=121 Ind. Cas. 481=A.I.R. 1929 Mad. 513=56 M.L.J. 649.

——S. 24—Transfer of case remanded by High Court.

S. 24 empowers a District Judge to transfer an appeal remanded by High Court for disposal according to law, unless the order of the High Court shows a clear intention to the contrary. 44 All. 211=66 Ind. Cas. 317=20 A.L.J. 44=A.I.R. 1922 All. 35.]

——S. 24—Transfer on application.

Where High Court has refused to make, of its own motion, the order of transfer which the plaintiffs desired, it is no doubt still open to the Court to make the same order on the application of the plaintiffs and after notice to the opposite party. 20 A.L.J. 97=70 Ind. Cas. 942=A.I.R. 1923 All. 153.

——S. 24—Transfer when not possible.

The object of S. 5 (2) is to enable the Chief Justice to prescribe generally the duties to be performed by a Judge of the City Civil Court when transferred to the Small Cause Court for any substantial period and not to enable the Chief Justice to interfere with regard to the transfer of particular cases and create a City Civil Court Judge a Small Cause Court Judge ad hoc with reference to an individual case. Proceedings under Ch. 7 of the Small Cause Courts Act are not suits within the meaning of Act 5 of 1916. Though under S. 24 of the C. P. Code, the Chief Justice has jurisdiction to transfer matters other than suits to a subordinate Court, e.g., the City Civil Court, he can only transfer them to a Court which has jurisdiction to try them. The jurisdiction to try a summary application in ejectment is one exclusively vested in the Small Cause Court and the Chief Justice has no power to transfer it to the City Civil Court. 25 M.L.W. 115=98 Ind. Cas. 371=38 M.L.T. (H.C.) 35=A.I.R. 1927 Mad. 321.

——S. 24—No court can direct any transfer from one Court to another unless both Courts are subordinate to it. Even if a High Court is of opinion that a suit, which has been duly instituted in a Court subordinate to it, should proceed in another Court beyond the territorial limits of the jurisdiction of such High Court, it is doubtful whether it is competent to direct the former Court to return the plaint for presentation to the latter. Assuming that it is so competent, the High Court should not adopt such a course save upon most exceptional grounds. 13 N.L.R. 81, Foll. 75 Ind. Cas. 548=A.I.R. 1924 Nag. 152.

——S. 24—Transfer, when valid.

A transfer cannot be made from one Court to another, unless the suit has been brought in a Court having jurisdiction such an order if made is void. 27 M.L.W. 609=108 Ind. Cas. 413=A.I.R. 1928 Mad. 400=54 M.L.J. 145.

——S. 24—Transfer without notice to other party.

Transfer of case at the request of one party without notice to other party is material irregularity within S. 115, 18 A.L.J. 351, Foll. 23 A.L.J. 948=6 L.R.A. Civ. 555=90 Ind. Cas. 287=A.I.R. 1926 All. 17.

——S. 24—S. 24 of the C. P. Code requires the Court to issue notice to the parties before it makes an order for transfer otherwise than of its own motion and an order of transfer made without notice to the other party can be setaside in revision and on the application of one party. 78 Ind. Cas. 614=A.I.R. 1925 Lah. 189.

——S. 24—Proper stage.

It is true that under S. 24, a transfer can be made at any stage of any suit, appeal or other proceeding pending before the Court which makes the order. But it is unsatisfactory for one Court to decide some of the issues raised and leave it to the Court to which the matter is transferred to decide the remaining issues. A.I.R. 1944 Bom. 300=46 Bom. L.R. 653=218 Ind. Cas. 504.

——S. 24—Remand by High Court to District Court—Transfer of case by District Court to Sub-Judge—Legality.

The High Court remanded a case to the District Court with express direction that it should be tried by the latter because the Sub-Judge's Court had been abolished. But before the case went back, the Sub-Judge's Court was re-established and the District Court transferred the case for disposal to that Court.

Held, that the District Court was competent to do. A.I.R. 1944 Mad. 569=(1944) 2 M.L.J. 91=1944 M.W.N. 490=218 Ind. Cas. 427.

——S. 24—Transfer application—If can be dismissed without giving notice and hearing parties.

Under S. 24, the Court can dismiss an application for transfer of a case without giving notice or hearing parties. A.I.R. 1943 Pesh. 71=208 Ind. Cas. 660.

——S. 24—Number of suits tried analogously and governed by same judgment—Some appeals pending in High Court and others before District Judge—One application to High Court for transfer of rest of appeals to it for analogous trial.

A person filed 15 suits against his co-proprietors and they were tried analogously and were governed by the same judgment. The suits were dismissed and two appeals were filed in the High Court and thirteen in the Court of the District Judge. An application was made to the High Court for transfer of the thirteen appeals pending in the Court of the District Judge to High Court and for analogous trial of the same with the two first appeals, pending in the High Court. It was contended that thirteen applications for transfer must be made and thirteen **vakalatnamas** must also be put in.

Held. that the application for transfer must be considered not as an independent application for transfer but as an application made in the first appeal pending in the High Court. The **vakalatnama** filed by the counsel authorized him to move the application which must be regarded as one application with thirteen prayers. A.I.R. 1940 Cal. 84=I.L.R. (1939) 2 Cal. 264=43 C.W.N. 836=186 Ind. Cas. 641.

——S. 24—Notification under S. 39 (3), Punjab Courts Act (6 of 1918)—Effect.

The provisions in S. 39 (3), Punjab Courts Act that the Senior Subordinate Judge who has been by notification empowered to hear appeals of a certain class shall be deemed to be a District Court for the purposes of all appeals so preferred, can only mean that the Subordinate Judge so invested with appellate powers can dispose of appeals which but for the notification would lie to the District Judge only and does not affect the status of either Court or the relationship inter se of a District Judge and a Subordinate Judge in the same district. A Subordinate Court even when by delegation is performing some of the functions of a superior Court still remains subordinate to the District Court and to the High Court.

Consequently, the District Judge is empowered to transfer the appeal from the Court of the Senior Subordinate Judge to his own Court, if sufficient grounds for transfer are made out before him. A.I.R. 1939 Lah. 578=186 Ind. Cas. 139.

——S. 24—Chamber Judge's power to transfer case to his file.

Under S. 24, the Judge in Chambers has full jurisdiction to transfer the case under Ss. 302 and 303, Succession Act, to his own Court at any stage and he can **suo motu** examine the accounts filed under S. 317 so as to pass orders under cl. (4) of that section. A.I.R. 1939 Lah. 463=41 P.L.R. 872=186 Ind. Cas. 39.

——S. 24—Effect—Transfer of all proceedings arising out of suit, is implied.

The transfer of a suit implies the transfer of all proceedings which arise out of the suit. Therefore, a Court which has passed an interim order which requires execution, ceases to have jurisdiction in the matter of enforcing the order when the suit is transferred to another Court and consequently the power of enforcing the order lies in the Court to which the suit is transferred. A.I.R. 1941 All. 140=1941 A.L.J. 46=1941 O.W.N. 48=I.L.R. (1941) All. 295=194 Ind. Cas. 166.

——S. 24—Cause of action same—Both parties filing suits against one another in different Courts on same cause of action—Suit should be tried by same Court.

Where on the same cause of action two persons file suits against each other in different Courts, it is clearly in the best interest of the parties to have these cases tried together, and it would cause very great inconvenience if the two Courts were to give different findings on the same question, especially where one suit is filed in Civil Court and the other in Small Causes and an appeal would lie from one decision but not from the other. A.I.R. 1938 Mad. 745=1938 M.W.N. 565=48 L.W. 74=(1938) 2 M.L.J. 249=178 Ind. Cas. 287.

——Ss. 24. 115—Revision—Petition for transfer not bona fide—Order of transfer—Case can be re-transferred.

The Court has discretion to transfer a case under S. 24, and no revision is competent from an order of transfer ; but where it is found that the application for transfer was not bona fide, the case can be re-transferred. A.I.R. 1938 Lah. 95=39 P.L.R. 654=175 Ind. Cas. 525.

——S. 24—Notice served on Pleader—Plaintiff endorsing his unwillingness to appear before new Court and requesting notice on party personally — No notice—No appearance — Court's duty.

A suit was brought in respect of some land in the Court of a Subordinate Judge. The District Judge, as a measure of administration, transferred the case to the Court of another Subordinate Judge and it was further ordered that notices of the transfer be served on the parties or their counsel. Notice was served upon Pleader for the plaintiff intimating to him the new date which had been fixed for the hearing of the case. But the Pleader made an endorsement on the notice that as he had been engaged to appear in the original Court of the

Subordinate Judge only and not at the transferee Court, therefore, the party might be served personally. The notice, together with the endorsement, reached the office of the Subordinate Judge. No further action was taken in consequence of the information conveyed to the Court, and, therefore, no notice was personally served upon the party intimating to him the date fixed for hearing and also informing him of the altered venue of the Court by which the case was to be heard. The result was that on the date fixed for hearing, there was no appearance on behalf of the plaintiff either in person or through Pleader and the suit was dismissed for default :

Held, that the Pleader oughtt to have conveyed information to his client that the date had been changed and that the case would be heard at another place where he was not prepared to appear. But it did not justify the action of the Court in refraining from serving notice upon the party and conveying to him the date which had been fixed for hearing as well as the name of the Court before which he was to appear. A.I.R. 1936 Lah. 560=164 Ind. Cas. 142.

——S. 24—Letters Patent (Mad), Cl, 13—Scope of—Power of High Court to withdraw suit pending in Subordinate Court and try it itself—Notice—Power to reconsider—Transfer suo motu.

Both under Cl. 13 of the Letters Patent (Madras) and S. 24, Civil P. C., the High Court has power to withdraw a suit from a Subordinate Court and try and dispose of the action itself.

When an order for transfer of a case has been made without notice, whatever the nature of that order may be, whether it is judicial or admiministrative or quasi-judicial, the party who feels aggrieved has a right to apply that the order be re-considered.

In making an order under the above provisions, the High Court is not bound merely to consult the convenience of a party, but may make an order of transfer **suo motu** for the purpose of justice. A.I.R. 1936 Mad. 55=69 M.L.J. 776=1935 M.W.N. 1329=42 L.W. 945=160 Ind. Cas. 80 (F.B.).

——S. 24—Three suits tried in same Court by consent of parties—One judgment—Two appeals in District Court and one in High Court—Application for transfer—Held, transfer was not feasible.

Three suits were heard together by consent of parties and only one judgment was delivered to govern all these cases. But separate appeals were filed, two before the District Judge and one in the High Court. It was urged that for the convenience of the parties, it would be better when the same type of evidence is to be considered that these cases should be transferred to the High Court :

Held, that although many of the issues were the same, yet one issue was specifically framed for one suit and that particular issue being in question before the District Court, it would not be feasible to transfer that. Further, transfer could not be ordered as no hardship would arise if the appeals were not transferred. A.I.R. 1936 Pat. 345=2 B.R. 695=163 Ind. Cas. 962.

——S. 24—District Judge taking insolvency proceeding on his file—Should not transfer it to Assistant District Judge because of subsequent happenings.

Per **Dunkley, J.**—When a District Judge has once taken an insolvency case on to his file and taken action thereon, he should not transfer it afterwards to the Assistant District Court because of some subsequent happening in the case. A.I.R. 1936 Rang. 223=14 Rang. 280=162 Ind. Cas. 1001 (S.B.).

——S. 24—Scope—Order of transfer and administrative orders allocating business to Courts of particular Judges—Distinction between—Judge taking cognizance of case—Order removing suit from his file—Nature of.

There is a clear distinction between order of transfer and administrative orders allocating business to Courts of particular Judges. When once a Judge has teken cognizance of a suit, any order removing the suit from his file is an order of transfer. It may be that no serious inconvenience is occasioned by such an order if the Judge has not commenced to hear the evidence ; but that is not the point. If the order is an order for transfer, it can only be made by the District Judge or the High Court, and once a Judge has taken cognizance of a suit, any order removing the suit from his file is an order of transfer, and cannot be regarded as a mere administrative redistribution of business. A.I.R. 1935 Bom. 286=37 Bom. L.R. 255=59 Bom. 466=158 Ind. Cas. 382 (2).

——S. 24—"At any stage"—Evidence closed and arguments heard—Transfer of case is not advisable.

After the evidence for the parties is closed and even the arguments have been heard, and only the judgment remains to be pronounced, it is most inadvisable to transfer the case to another Judge. A.I.R. 1934 Lah. 593=35 P.L.R. 574=153 Ind. Cas. 386 (2).

——S. 24—Jurisdiction—Matter sought to be transferred not in jurisdiction of Court—High Court, if has jurisdiction to transfer.

The High Court has no jurisdiction to transfer if the matter sought to be transferred is not one within the jurisdiction of the Court. A. I. R. 1934 Sind 95=150 Ind. Cas. 839.

——S. 24, O. 41, R. 25—Punjab Courts Act (6 of 1918), S. 34—Remand by Additional Judge—Power of District Judge to transfer proceedings to another Subordinate Judge.

Where the Additional District Judge has remanded a case to a Subordinate Judge under O. 41, R. 25, the District Judge has power to transfer the proceedings from the Subordinate Judge to another Subordinate Judge of equal or competent jurisdiction. A. I. R. 1933 Lah. 29=33 P. L. R. 1015=13 Lah. 806=140 Ind. Cas. 238.

——S. 24—Transfer without notice.

Under S. 24, where a Court transfers a suit on the application of the parties, it must be after notice to the parties and after hearing such of them as desire to be heard. But if a case is transferred without notice, the trial of the case by the Court of transfer is not without jurisdiction but is a mere irregularity not affecting the jurisdiction of the Court. A.I.R. 1932 Cal. 265=54 C.L.J. 400=137 Ind. Cas. 430.

——S. 25—Effect of transfer on decision—Decision of the Court to which case is transferred is appealable in same manner as its other decisions.

When a question is referred to an established Court without more, it imports that the ordinary incidents

of the procedure of that Court are to attach and also that any general right of appeal from its decisions likewise attaches. So, where a case is transferred to a High Court on its original side by the Governor-General in Council under C. P. Code, S. 25, the appellate side of the High Court has jurisdiction to hear an appeal from the decision on the original side. 1922 M.W.N. 830=A.I.R. 1921 Mad. 687.

——S 26. *See also* C. P. CODE, O. 4, R. 1.

——S. 26, O. 41, R. 1—Presentation of plaint by unauthorised person—Irregularity not cured, in trial Court—Whether can be cured in appeal.

Where a person who is not properly authorised, presents a plaint, it is an irregularity. In such a case the Court has discretion to allow the irregularity to be cured. But where no attempt is made by the plaintiff in the trial Court to get the irregularity cured, he cannot be allowed to get it cured in appeal. A.I.R. 1941 Oudh 169=1940 O.W.N. 1253=1941 O.L.R. 32=191 Ind. Cas. 821.

——S. 26—Date of institution—Date of presentation of plaint is date of institution of suit.

The date of the institution of a suit should be reckoned from the date of the presentation of a plaint or from the presentation of a document purporting to be a plaint notwithstanding its imperfections. 22 M. 494, foll. 85 Ind. Cas. 893=17 S. L.R. 223=A.I.R. 1921 Sind 166.

——S. 26—Proper presentation, what is not.

Where the plaint was signed and presented by a servant of the plaintiff, while the *Vakilpatra* was also signed by the servant.

Held, the plaint was not duly presented and not duly signed as the plaintiff made no effort to prove that his servant was his recognized agent trading on his behalf while he was away from the jurisdiction. 46 Bom. 150=68 Ind. Cas. 217=23 Bom.L.R. 911=A.I.R. 1922 Bom. 113.

——S. 26—Proper presentation what is.

The presentation of a plaint after the usual Court hours at the residence of the Judge is a valid presentation and the Judge has jurisdiction to receive the plaint at his residence and after the Court hours, though he is not obliged to do so. 19 N.L.R. 23 =65 Ind. Cas. 674=A.I.R. 1922 Nag. 167.

——S. 26—Suit, commencement of—Limitation Act, S. 14.

Where a suit has been instituted in a Court which is found to have no jurisdiction and it is found necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a continuation of the first, even though the subject-matter and the parties to the suits were identical. 56 Cal. 1048=115 Ind. Cas. 713=56 I.A. 128=1929 A.L.J. 254=33 C.W.N. 485=29 M.L.W. 682=6 O.W.N. 473=49 C.L.J. 462=31 Bom.L.R. 741=1929 M.W.N. 546=A.I.R. 1929 P.C. 103=56 M.L.J. 614 (P.C.).

——S. 26—A suit commences with the presentation of a plaint. 113 Ind. Cas. 550=A.I.R. 1929 Mad. 480.

——S. 26—A suit must be deemed to have been instituted on the date when the plaint was filed in Court and not on the date when it was ordered to be registered. Even if there is a defect in the verification the Court can allow an amendment at any stage; such amendment would not make the suit open to objection on the ground of limitation. 34 C.L.J. 465=66 Ind. Cas. 923=A.I.R. 1921 Cal. 277.

——S. 26—Plaint—Application for leave to sue in forma pauperis—Application rejected—Applicant, whether can be said to have instituted suit.

There cannot be any suit or plaint before the Court until the application for leave to sue in *forma pauperis* is granted and where the application is rejected, the applicant cannot be said to have instituted any suit. A.I.R. (Vol. 24) 1937 Oudh. 452=1937 O.W.N. 766=1937 O.L.R. 438=170 Ind. Cas. 505.

——S. 26, O. 4, Rr. 1, 4—Suit, when begins—Plaint filed by pleader accepting vakalatnama which is not signed by party—Party tampering with record and correcting defect without knowledge of Court—Effect—Condonation—Effect of Rr. 1 and 4 of O. 4—Necessity of written authority to pleader.

As the Civil Procedure Code stands, a suit begins by the presentation of a plaint. No other mode for instituting a suit has up to now been prescribed. The plaint has to be presented by somebody, by the plaintiff appearing in person or somebody on his behalf. But where a plaint has been filed by a pleader who has accepted the *vakalatnama* which is not signed by the plaintiff, the presentation of a plaint is an irregular presentation, and the matter can be regularised in one manner and one only, namely, by an order of condonation passed by the Court. The plaintiff has to make an application pointing out the defect, giving the reasons as to why the defect crept in and asking the Court to allow him to remedy it. If the Court grants his application, the plaint must be taken to be presented duly on the date it was in fact presented. If the Court refuses the application, the plaint has to be taken off the file.

Reading the two Rr. 1 and 4 of O. 4, after its amendment, together, the legislature, acting on principles of public policy, has deliberately enacted that a written statement filed in Court can be taken as the only proof of a pleader's authority to act for a person. A Court must know for certain what particular lawyer represents a particular party to a suit, and up to what point of time. This is necessary for the proper progress of a suit. The legislature has, therefore, thought it fit to enact that the mode of proof of these matters should be the best under the circumstances. It has accordingly enacted that the power should be in writing and filed in Court, and that when authority is withdrawn from a pleader, that fact must appear on the records of the case. 164 Ind Cas. 442=39 C.W.N. 534=62 C.L.J. 277.

——S. 26—Suit, what is not.

It may be stated generally that unless there is any special provision to the contrary, a proceeding that does not commence with a plaint cannot be held to be a suit.

The fact that a proceeding may be capable of terminating in a decree would not necessarily make it a suit. A.I.R. 1932 Lah. 374=33 P.L.R. 508=13 Lah. 672=137 Ind. Cas. 266.

——S. 29, O. 5, R. 26, O. 26—Witness in Native State within 200 miles from Court—Refusal to appear—Duty to issue commission.

There is no law by which witnesses in Native States which have made arrangements for mutual

services of processes within British India can be compelled to obey these processes and punished if they fail to do so. Therefore, in the case of such witnesses the Court would not be justified in refusing to issue a commission on the mere ground that the distance to the place where the witnesses reside is less than 200 miles from the Court. A.I.R. 1933 Mad. 366=65 M.L.J. 334=1933 M.W.N. 677=142 Ind. Cas. 201.

See also CIVIL P. C., OS. 11, 12, 13, 14 AND 19.

——S. 30—Decision depending upon documentary evidence—No application by party under O. 11, R. 12—Judge should himself make order to that effect under S. 30, as enjoined by para. 153 of Calcutta High Court's Civil Rules and Orders, Chap. 8. A.I.R. 1940 Cal. 331=I.L.R. (1940) 1 Cal. 504=190 Ind. Cas. 507.

——S. 30—Summons when issued—Fine—Imposition—Conditions.

By S. 30 the Court is authorized to issue summonses to persons only when their presence is required to give evidence, etc., and by S. 32 the Court is given power to enforce the attendance of such persons for that purpose by imposing fine. In other words fine can be imposed only on a person who is required to attend the Court in connection with a case and does not appear in obedience to the summons of the Court and not on a person who after failure to attend on the date for which he was summoned is not required to give evidence, etc., and has not been called upon to appear on a subsequent date. 1929 A.L.J. 1216 =1929 Cr.C. 404=A.I.R. 1929 All. 850.

——S. 31. *See* CIVIL P. C., OS. 16 AND 18.

——S. 32. *See* CIVIL P. C., O. 16, RR. 10 TO 13, 17 AND 21.

——S. 32—Applicability of.

S. 32 of the C. P. Code, applies only when a person has failed to comply with a summons to attend Court issued under S. 30 and not to the case of a party who fails to produce documents which he has been ordered to produce. 5 Pat.L.J. 550=58 Ind. Cas. 281.

——S. 32—Mode of imposing fine.

Jurisdiction to impose fine vested by S. 32 can be exercised only in manner laid down by O. 16. 1929 A.L.J. 1216=1929 Cr.C. 404=A.I.R. 1929 All. 850.

——S. 33 and O. 20, R. 1—Judgment without argument.

Where a case is transferred after hearing arguments but decided without hearing fresh arguments the judgment is not legal. 91 P.R. 1904, Foll. 57 Ind. Cas. 34=141 P.L.R. 1920.

——S. 33—Judgment without hearing evidence of party.

It is a fundamental principle that the plaintiff's case cannot be dismissed without hearing such relevant evidence as the plaintiff desires to adduce except on the footing that the allegations of fact in the plaintiff's plaint are assumed or admitted to be true. A. I.R. 1944 Pat. 38=22 Pat. 289=10 B.R. 433=211 Ind. Cas. 619.

——S. 33—Provisional judgment, if can be modified.

Where a Judge has passed a judgment which is a provisional one and is understood to be so by all concerned, he can subsequently modify the same. A.I.R. 1942 Cal. 498=47 C.W.N. 9=202 Ind. Cas. 551 (S.B.).

——S. 33—Decree must follow judgment.

Where the Court becomes *functus officio* after the judgment is pronounced signed and sealed, the preparation of the decrees cannot be stayed in view of the provisions of S. 33 and O. 20, Rr. 6 and 7, Civil P. C., until the deficit court-fee is paid. When the judgment is pronounced the decree must automatically follow. A.I.R. 1932 Pat. 228=11 Pat. 532=13 P.L.T. 304=137 Ind. Cas. 855.

——S. 33—Decree to follow judgment.

Ordinarily Court must follow the provisions of C. P. Code. According to S. 33, "the Court after the case has been heard shall pronounce judgment and on such judgment a decree shall follows". S. 11, Court-fees Act, in no way requires the Court to postpone the passing or the drawing up of a decree for mesne profits. A.I.R. 1942 Pat. 410=23 P.L.T. 202=8 B.R. 631=21 Pat. 366=199 Ind. Cas. 818.

——S. 33, O. 20, R. 7—Judgment delivered—Drafting of decree, if can be stayed.

Per *Burn and King, JJ. (in order of reference.)* —Where a judgment has been pronounced the Court has no power to order stay of the drafting of the decree. Judgment having been pronounced the decree must follow. A.I.R. 1941 Mad. 929=(1941) 2 M.L.J. 855=54 L.W. 627=1941 M.W.N. 1052=I.L.R. (1942) Mad. 346=198 Ind. Cas. 117 (F. B.).

——S. 33—Decree, party if to apply for.

There is no provision requiring a party or his pleader to move the Court to draw up a decree and mere omission to ask the Court to do that which it is the duty of the Court to do on its own motion cannot affect his right to appeal. 38 B. 331, Foll. Nor is there any obligation on the parties even to apply for a copy of the decree until the Court drew it up. 13 C.P.L.R. 78, Diss. 20 N.L.R. 131=78 Ind. Cas. 996=A.I.R. 1924 Nag. 271.

——S. 33 and O. 20, R. 7—Decree—Omission or delay in drawing up—Appeal.

It is imperative that a decree should follow the judgment and it is the duty of the Court to have one drawn up. But an omission or neglect by the Court in the performance of its duties in this respect cannot deprive an appellant of his right of appeal. 66 P.R. 1919=52 Ind. Cas. 479.

——S. 33—Decree to conform to judgment—C. P. Code, O. 20, R. 6.

The decree drawn up by the Court must be in accordance with the judgment. 22 A.L.J. 791=82 Ind. Cas. 184=46 All. 864=A.I.R. 1924 All. 818.

——S. 34.

1. **After suit.**
2. **Applicability.**
3. **Damages.**
4. **Damdupat.**

See also C. P. CODE, O. 34, R. 2.

5. **Decree silent.**
6. **Discretion.**
7. **Mortgage.**

See also C. P. CODE, O. 34, R. 11.

8. **Pendente lite.**
9. **Prior to suit.**
10. **Rate of interest.**

11. Right to interest.
12. Suit for damages.

1. After suit.

——S. 34—Interest after suit—Power to award though not claimed.

Having regard to the terms of S. 34, the Court has power to award interest after suit whether claimed specifically in the plaint or not. A.I.R. 1931 Bom. 549=55 Bom. 657=33 Bom.L.R. 1220=136 Ind. Cas. 186 (F.B.).

——S. 34—Interest—Grant of, without prayer.

O. 7, R. 7 lays down that it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. This of course, is subject to the limitation that this "other relief" is not inconsistent with relief claimed in the plaint. The granting of interest, not specifically asked for in a suit for money, cannot be regarded as an inconsistent relief and a Court has discretion to award interest subsequent to suit. 2 Lah. 256=64 Ind. Cas. 896=107 P.L.R. 1921=A.I.R. 1921 Lah. 125.

——S. 34—Interest—Omission to claim—Court, if can award.

The fact that the plaintiff omitted to claim interest for the period between the institution and the disposal of the suit does not preclude the Court from awarding interest if the circumstances justify granting interest.

Where the plaintiff creditor was not paid anything for a period of 11 years and the trial Court did not allow interest from the date of the suit and no reasons were recorded for this:

Held, that the Appellate Court could grant interest. A.I.R. 1943 Nag. 240=1943 N.L.J. 220 =I.L.R. (1943) Nag. 555=206 Ind. Cas. 504.

——S. 34—Interest—Power of Court to award.

The Court has ample powers to award interest from the date of the presentation of the application for refund by the Receiver till realisation under S. 34, although the aid of S. 74, Contract Act, cannot be invoked for awarding interest by way of damages where the claim for refund is not based upon any contract. A.I.R. 1936 Nag. 28=31 N.L.R. Sup. 121=161 Ind. Cas. 441.

——S. 34—Power of appellate Court to grant interest.

Where the lower Court has not considered the question of interest, the appellate Court may grant it. 9 L.L.J. 347=104 Ind. Cas. 146=A.I.R. 1927 Lah. 679.

——S. 34—Interest—Grant of in appeal.

Where the trial Court fails to exercise discretion regarding interest, the Appellate Court can exercise it. 1941 N.L.J. 591.

——Ss. 34, 100, 101—Decree objected to in second appellate Court—No appeal to first Court.

Where interest was not allowed to plaintiff at a certain rate in the first Court and there was no appeal to the first appellate Court as to that portion of the decree the party cannot take the objection in the second appellate Court. But the objection was allowed where the second appellate Court was remanding the case to the lower appellate Court for disposal with instructions to give effect to the objection in case it ultimately varies the first Court's decree. (1903) 30 Cal. 953 at 960.

——S. 34—O. 20, R. 12 (Ss. 209, 211, and 212, Old Code)—Interest—Future mesne profits.

There is no analogy between interest awarded under S. 209 (S. 34, Present Code) and mesne profits awarded under Ss. 211 and 212, C. P. Code. Such interest is no part of the claim or relief as in the case of mesne profits. (1906) 33 Cal. 1232.

2. Applicability.

——S. 34—Applicable to suits in Revenue Courts.

Section 34 is applicable to suits in Revenue Courts as well. A.I.R. 1935 All. 505=1935 A.L.J. 557 =1935 R.D. 274=155 Ind. Cas. 943 (F.B.).

——S. 34—Bengal Money-lenders Act—If abrogates the section.

Section 34 is not by implication abrogated by S. 36, Bengal Money-lenders' Act. Power of Court to allow interest subsequent to decree is not taken away. A.I.R. 1942 Cal. 610=46 C.W.N. 915=76 C.L.J. 275=204 Ind. Cas. 507.

——S. 34—Santhal Parganas Regulations—If limits powers under.

The Santhal Parganas Regulation applies only to the interest to be decreed under the bond and does not limit the powers of a Court under S. 34, C. P. Code, to award interest on the decretal amount until realization. A.I.R. 1922 Patna 450, Foll. 5 Pat. 433= 1926 P.H.C.C. 282=96 Ind. Cas. 627=A.I.R. 1926 Pat. 359.

——S. 34—(S. 209, Old Code)—Applicability to mortgage suits.

Per *Subramanya Aiyar, J.*—S. 209, C. P. Code, is not applicable to mortgage suits. (1903) 29 M. 65.

——S. 34—Applicability—Mortgage suits.

S. 34 applies only to decrees for the payment of money and has no applicability to a suit brought by a mortgagee to recover the amount due to him on foot of the mortgage and a mortgage decree until it reaches the stage shown by S. 90 of the Transfer of Property Act. O. 34, R. 6, C. P. Code, cannot be said to be decree for money. 8 Lah. 721=9 L.L.J. 301=103 Ind. Cas. 437=28 P.L.R. 380=A.I.R. 1927 Lah. 445.

——S. 34—Mortgage suits—Question of interest.

Question of interest is determined by O. 34, and not by S. 34. 54 Cal. 161=99 Ind. Cas. 686=25 A.L.J. 23=4 O.W.N. 46=31 C.W.N. 390=38 M.L.T. (P.C.) 73=54 I.A. 1=29 Bom.L.R. 752 =45 C.L.J. 279=25 M.L.W. 685=8 P.L.T. 173 =A.I.R. 1927 P.C. 1=52 M.L.J. 373 (P.C.).

——S. 34—Mortgage—Rate of interest.

In case of mortgage the question as to rate of interest is to be determined under O. 34, and not under S. 34. A.I.R. (Vol. 20) 1933 Oudh 128=8 Luck. 315=10 O.W.N. 173=144 Ind. Cas. 983.

——S. 34 and O. 34, Rr. 2 and 4—Mortgage decree—Interest—Contract rate.

S. 34, C. P. Code, does not control or negative the effect of O. 34, Rr. 2 and 4. The Court is

bound to award interest to the mortgagee at the contract rate up to the date fixed by the Court for redemption. After that date and up to realisation it may award such interest as it thinks proper. 34 C. 150, Rel. 17 C.L.J. 221=18 Ind. Cas. 965.

——S. 34—Mortgage suits—Interest.

Section 34 has no application to interest after the instituting of the suit to which the provisions of O. 34, Rr. 2 and 4 apply. Rules 2 and 4 give clear directions that the defendant need pay only the subsequent interest as provided in R. 11. This rule would be contravened if the amount declared due included interest allowed under the provisions of S. 34 for which R. 11 did not make provisions. A.I.R. 1931 Nag. 161=14 N.L.J. 109=27 N.L.R. 312=134 Ind. Cas. 274.

——S. 34—Decree for partition and accounts.

Where the decree is not for a definite sum of money but is one for accounts and for partition it does not fall under S. 34 and sub-S. (2) does not apply. 49 Bom. 282=94 Ind. Cas. 686=27 Bom. L.R. 226=A.I.R. 1925 Bom. 406.

——S. 34—Decree for rent—Under proprietor—Future interest.

The liability to pay a future interest under S. 34 of the C. P. Code, is not controlled by S. 141 of the Oudh Rent Act. It is within the competence of the trial Court in a suit for arrears of rent against an under proprietor to award future interest at such rate as it may consider reasonable. 6 O.L.J. 362=22 O.C. 287=52 Ind. Cas. 865.

——S. 34—Rent suit—Future interest—Discretion.

Discretion of the Court under S. 34 to allow future interest at such rate as the Court deems reasonable is not controlled by S. 141, Oudh Rent Act 1886. A.I.R. 1934 Oudh 239=11 O.W.N. 763=18 R.D. 301=148 Ind. Cas. 1207.

3. Damages.

——S. 34—Suit for recovery of share of shop rent—Claim for damages, whether can be allowed.

A co-sharer landlord instituted a suit for recovery of his share of the rent of the shop which he said had been settled with the defendant.

Held, that the claim being merely for money, the plaintiff was not entitled to damages or interest for the period before suit. But the plaintiff was entitled to interest at 6 per cent. from the date of the institution of the suit until realization. A.I.R. 1938 Pat. 578=5 B.R. 393=180 Ind. Cas. 377.

——S. 34—Future Interest after decree—Nature of.

Future interest awarded under S. 34 is really in the nature of damages granted by the Court for the plaintiffs being kept out of the money due to them, after the date of the decree. A.I.R. 1933 Lah. 352=14 Lah. 591=142 Ind. Cas. 408.

——S. 34—Contract Act, S. 73—Interest as damages—Deprivation of money due.

Held, that the Court may, in a proper case, award interest by way of damages. (1901) 5 C.W.N. 356.

——S. 34 and Contract Act S. 73—Breach of contract for payment of money—Interest as damages.

Where payment is not made on due dates the creditor is entitled to compensation for breach of it. The measure of it is the rate of interest the creditor would have got on it in the ordinary way if it had been paid. A rate of 6 per cent. may be the appropriate rate to allow as damages. 94 Ind. Cas. 971=A.I.R. 1926 N. 363.

4. Damdupat.

——S. 34—Interest—Damages not awardable by way of damages. *See* (1905) 33 C. 998 at 1000.

——S. 34—No stipulation for interest—Interest as damages.

Where money is due to the plaintiff but has not been paid through proper channel, the Court may allow interest by way of damages even though there is no stipulation for interest in the contract. 34 C. W.N. 121=A.I.R. 1930 Cal. 357=57 Cal. 953=127 Ind. Cas. 76.

——S. 34—Pronotes insufficiently stamped—Inadmissible in evidence—Suit claim allowed on the loan—Interest by way of compensation.

Held, that since the original pro-note was not admissible, the covenant for interest contained in the promissory note could not be proved, but compensation might be allowed to the plaintiff for deprivation of the use of the money. A.I.R. 1937 Oudh 387=1937 O.W.N. 622=13 Luck. 376=168 Ind. Cas. 927.

——S. 34—Damdupat—Rule of.

The rule of *damdupat* applies to a matter of contract and not when it has passed into the realm of a decree of Court. 40 Cal. 710=21 Ind. Cas. 974.

——S. 34—Damdupat—Rule of.

The rule of *damdupat* applies to interest after decree. 1 Bom. 577; 21 C. 840, foll. 5 S.L.R. 245=15 Ind. Cas. 824.

——S 34—Damdupat rule applicable—Discretion of Court to award interest.

Where the rule of damdupat applies, the contractual obligation as regards interest, comes to an end as soon as the maximum limit of interest is reached and it is not correct to say that the contractual obligation remains until a decree is passed. When that obligation has come to an end before the suit is filed, the Court has discretion to award interest from the date of suit over and above the amount of interest allowed by the rule. 37 Bom. 326 (P.C.); 22 Bom. 86 and A.I.R. 1924 Nag. 348, Rel. on; 34 Cal. 150 (P.C.), not Appl. 121 Ind. Cas. 45=A.I.R. 1929 Nag. 355.

——S. 34—Damdupat rule—Interest ceasing—Award of interest under.

The very fact that it is within the discretion of the Court to award interest or not, and to fix the rate of interest makes it manifest that it is a statutory power which does not relate back to the contract nor comprise the enforcement of any part of the contract between the parties. The law recognizes that in claims for money there may be considerable delay between the institution of the suit and the realization of his money for which delay the plaintiff may not be responsible. If the money is carrying interest by contract till the date of payment then probably no interest under S. 209 (new S. 34) will be allowed but merely interest under the contract. But if the money carried no interest *ab initio* or for any reason had ceased to carry interest from and after the date of suit or some earlier date then the Court may in a proper case apply S. 34. Where interest had ceased on account of rule of damdupat even before institution of suit.

Held, that the Court had the power of applying S. 34. 78 Ind. Cas. 711=A.I.R. 1924 Nag. 348.

——S. 34—Mortgage suit—Damdupat rule applicable—Discretion—Interest after suit.

The plaintiff sued for foreclosure on a mortgage bond executed for a consideration of Rs. 4,000. The lower Court found that the sum due for principal and interest at the date of suit exceeded Rs. 8,000 and held that, as the rule of *damdupat* applied to the transaction, the plaintiff was not entitled to any interest for the period subsequent to the date of the suit:

Held, that S. 34 did not give the Coourt any discretion in the matter and the decision of the lower Court was right. A.I.R. 1931 Nag. 88=13 N.L.J. 192=130 Ind. Cas. 159.

——S. 34—Damdupat applicable—Pendente lite interest.

Section 34 does not give discretion to the Court to award interest *pendente lite* in a mortgage suit where the rule of *damdupat* prevents the inclusion of any such interest. A.I.R. 1931 Nag. 161=27 N. L.R. 312=14 N.L.J. 109=134 Ind. Cas. 274.

——S. 34—Damdupat rule applying—Discretion to award interest pendente lite.

A Court has discretion in the matter of allowing in a redemption suit interest from the date of suit to the date fixed for redemption even in cases where the rule of Damdupat applied at the date of suit. A.I.R. 1922 Nag. 155, Foll. 78 Ind. Cas. 632=A. I.R. 1925 Nag. 193.

——S. 34—Damdupat applying—Interest from date of suit—Discretion—Further interest from date fixed for payment.

There is a discretion vested in the Court to decide whether interest should be allowed on the redemption money from the date of the suit. Where the lower Court allowed interest after the date of the suit so as to make the total sum decreed for interest equal to the amount of the principal and then allowed further interest in case of default, on the total sum from the date fixed for payment under the decree up to actual realization at 6 per cent.

Held, that plaintiff had no particular claim on the Court to award him any further amount and that the award of interest was proper. 27 Bom.L.R. 492= 87 Ind. Cas. 719=A.I.R. 1925 Bom. 362.

5. Decree silent.

——S. 34—Decree silent—Disallowance of interest after suit.

Where the trial Court (which had a discretion in the matter) did not provide for the interest on the mortgage money after the date of a filing of a suit for redemption. *Held,* that the trial Court must be deemed to have declined to award any interest for the period in question and no weight could be attached to the suggestion that the omission was due to an oversight especially as no application was made to the trial Court to repair the alleged omission. 37 Bom. 326=40 I.A. 68=17 C.W.N. 573=13 M.L. T. 415=(1913) M.W.N. 428=11 A.L.J. 432=17 C.L.J. 474=15 Bom.L.R. 483=25 M.L.J. 101= 18 Ind. Cas. 909 (P.C.).

[Affirming 11 Bom.L.R. 318=2 Ind. Cas. 469.]

——Ss. 34 (2), 152—Decree silent with respect to further interest—Omission accidental—Whether can be rectified.

When a decree is silent with respect to the payment of further interest from the date of the decree to the date of payment and the decree follows the judgment, the Court must be deemed to have refused it. Consequently, even if the decree-holder ought to have had further interest granted to him and this was accidentally overlooked, the Court cannot in face of S. 34 (2) rectify the omission. A.I.R. 1940 Mad. 29=50 L.W. 719=(1939) 2 M.L.J. 751= 1939 M.W.N. 1165=186 Ind. Cas. 468.

——S. 34 (2)—Interest—Decree silent as to.

Where a decree is silent with respect to further interest from date of decree to the date of payment the Court must be deemed to have refused to give interest unless it can be shown that its silence was due to oversight or mistake and a separate suit will not lie for its recovery. 37 Bom. 326 (P.C.), Foll. 9 L.B.R. 78=11 Bur.L.T. 132=40 Ind. Cas. 858.

——S. 34—Non-mention in appellate decree—Effect.

Where as regards interest on costs, the first Court in its judgment awarded to the defendants their costs with interest of the usual rate and the appellate Court reduced the amount of costs to be paid to defendant and increased the amount due to the plaintiff, it is reasonable to suppose that the appellate Court considered it unnecessary to award interest on costs, although it did not expressly say so. Under S. 34 (2) where a decree is silent with respect to interest, the Court shall be deemed to have refused such interest. 18 M.L.W. 686=75 Ind. Cas. 566=33 M.L.T. 101=1923 M.W.N. 753=A.I.R. 1924 Mad. 102=45 M.L.J. 687.

——Ss. 34 and 151—Decree not awarding interests—Power of Court to award under S. 151.

The Court cannot under S. 151 award interest or damages in lieu of interest on the decretal amount where no interest has been awarded by the decree. 3 Bur.L.J. 58=82 Ind. Cas. 427=A.I.R. 1924 Rang. 275.

——S. 34 (2)—Decree for maintenance at certain amount monthly—No interest awarded—Suit for interest.

Where the maintenance decree was realised after great delay and frequent applications for execution and the decree-holder filed a suit to recover from the judgment-debtor interest on the amounts of maintenance which he had thus realized in execution:

Held, that the decree was essentially a decree for money and S. 34 (2), therefore, applied and the suit was not maintainable. A.I.R. 1938 Mad. 522=47 L.W. 327=1938 M.W.N. 309=(1938) 1 M.L.J. 437=178 Ind. Cas. 414.

——S. 34 (2)—Privy Council—Costs.

No interest on the costs could be claimed when such interest was not allowed by the order of Privy Council. (1905) 9 C.W.N. 372=32 Cal. 494=1 C.L.J. 118.

——S. 34 (2)—Privy Council—Costs—Interest.

The costs of the Privy Council do not carry any interest, unless such interest is specifically mentioned. A.I.R. 1934 Pat. 192=13 Pat. 21=15 P.L.T. 513 =155 Ind. Cas. 769.

6. Discretion.

(a) Interest from date of suit to date of decree.
(*b*) Rate of interest.
(c) Future interest.
(d) Discretion, exercise of.
(e) Interference in appeal.

6 (a)—Discretion—Interest from date of suit to date of decree.

——S. 34—Interest from date of suit—Discretion of Court—'May'.

It is entirely in the discretion of Courts to allow or disallow interest from date of suit to date of decree. 9 C.W.N. 421 at 437=32 C. 582.

——S. 34—Discretion—Interest from date of suits to date of decree.

Under S. 34, C. P. Code, it is entirely a matter for the Court's discretion whether to award interest from the date of the filing of the suit where the decree is for the payment of money. A.I.R. 1946 Bom. 1=47 Bom.L.R. 719=222 Ind. Cas. 337.

——S. 34—Interest from date of suit—Discretion.

Interest between date of suit and decree is discretionary. 53 Mad. 475=123 Ind. Cas. 7=32 M.L.W. 143=A.I.R. 1930 Mad. 721=59 M.L.J. 316.

——S. 34—Discretion—Interest from date of suit.

Interest between date of suit and decree is discretionary with Court and it can grant interest at contractual rate. A.I.R. 1930 Lah. 733=125 Ind. Cas. 629.

——S. 34—Interest and rate from date of suit—Discretion.

Under S. 34, C. P. Code, the award of interest as well as the rate at which it is to be awarded from the date of suit to date of decree is in the discretion of the Court though where the contract rate is not inequitable, that rate will be adopted. A.I.R. 1932 Mad. 109=55 Mad. 458=62 M.L.J. 266=135 Ind. Cas. 907=1931 M.W.N. 1226=34 M.L.W. 843.

6 (b)—Rate of interest—Discretion.

——S. 34—Compound interest—Court—Discretion.

Courts do not lean towards compound interest. They do not award it in the absence of stipulation, but where there is a clear agreement (as here for 24 per cent.) for its payment, it is in the absence of disentitling circumstances allowed. 6 Bom.L.R. 307=28 Bom. 377.

——S. 34—Interest—Grant of.

Courts can give interest in their discretion. This can be given under S. 34, C. P. Code and S. 73, Contract Act. A.I.R. 1936 Rang. 141=162 Ind. Cas. 352.

——S. 34—Interest—Grant of—Discretion.

The grant of interest is a matter within the discretion of the Court. 29 P.L.R. 670=111 Ind. Cas. 354=A.I.R. 1928 Lah. 954.

6 (c)—Future Interest.

——S. 34—Future interest.

The trial Court has discretion in the matter of the allowance of future interest. A.I.R. 1933 Oudh 128=10 O.W.N. 173=8 Luck. 315=144 Ind. Cas. 983.

——S. 34—Future interest—Discretion.

Money suit—Question of interest for period subsequent to institution of suit passes from the domain of contract to the domain of judgment—Plaintiff cannot claim as a matter of right interest during pendency of suit—It is in the discretion of the Court. A.I.R. 1936 Pat. 191=2 B.R. 380=161 Ind. Cas. 862.

——S. 34—Interest post litem motam.

A Court has discretion under S. 34 of the Code to award interest *post litem motam* at a reasonable rate. 22 P.R. 1915=19 P.W.R. 1915=66 P.L.R. 1915=26 Ind. Cas. 402.

6. (d) Discretion, Exercise.

—S. 34—Further interest after decree—When disallowed.

Where the rate charged and decreed was 24 per cent. interest after decree was not allowed. 109 Ind. Cas. 416=A.I.R. 1928 Lah. 811.

——S. 34—Discretion—Exercise of.

Discretion should be reasonably exercised. 2 P.L.T. 147=62 Ind. Cas. 116=A.I.R. 1921 Pat. 367.

——S. 34—Discretion—Exercise of—No refusal without reasons.

Although the award of interest pending suit is discretionary it should not ordinarily be refused in the absence of proper reasons. 23 C.W.N. 336, Foll. 22 N.L.R. 49=88 Ind. Cas. 699=A.I.R. 1926 Nag. 109.

——S. 34—Post diem interest—Discretion.

A Court may in its discretion allow *post diem* interest though not allowed in the mortgage deed. 3 O.L.J. 390=36 Ind. Cas. 685.

——S. 34—Discretion—Exercise of—Post diem interest.

Though award of interest pending suit is discretionary it should not be refused in the absence of proper reasons. 23 C.W.N. 336=50 Ind. Cas. 862.

——S. 34—Discretion of Court—Exercise of—Contract rate.

A plaintiff is not entitled as of right to the contract rate of interest from the date of suit to the date of decree. The granting of interest is entirely for the discretion of the Court, which should not refuse to allow the contract rate without assigning any reasons. 28 Ind. Cas. 429 (Mad.).

——S. 34—Discretion—Exercise of—Refusal of future interest.

The award of interest after suit is in the discretion of the Court. Where throughout the dealings between the parties compound interest was charged and the total amount of such interest exceeded one-third of the amount of the claim, *held*, the Court would be justified in refusing future interest. 42 All. 230=59 Ind. Cas. 20=18 A.L.J. 100.

——S. 34—Future interest—Discretion—Refusal owing to long delay.

The grant of future interest from the date of insti-

tution of a suit till realization is discretionary with the Court. Long delay in bringing the suit is a circumstance which will weigh with the Court in not granting such future interest. A.I.R. 1932 Lah. 312=33 P.L.R. 19=143 Ind. Cas. 257.

——S. 34—Smallness of amount—'De minimis non curat lex'—If applicable.

It is not open to a Court to deprive a decree-holder of interest to which he is entitled under the decree, however small the amount of interest may be, and although the decree-holder may be a wealthy landlord and the judgment-debtor a minor. The maxim *'de minimis non curat lex'* cannot be applied to the case, as a very small sum may involve a very big question of principle. A.I.R. 1932 Pat. 237=13 P. L.T. 343=139 Ind. Cas. 127 (2).

——S. 34—Discretion — Exercise of—Future interest not awarded.

When the delay in the decision of a case is wholly due to plaintiff's erroneous act a Court is justified in not awarding under S. 34 further interest from the date of suit up to realisation. 98 P.W.R. 1914= 19 P.L.R. 1914=25 Ind. Cas. 658.

——S. 34—Discretion—Interest pendente lite and future interest—High rate of interest under contract—If can be taken into consideration.

The granting of *pendente lite* and future interest is in the discretion of the Court, and the Court may take the high rate of interest into consideration in exercising its discretion, though no relief can be given in that respect under the Usurious Loans Act. 29 Pat. 545=A.I.R. 1950 Pat. 379.

——S. 34—Interest, reasons for disallowing.

The mere presence of Sub-S. (2), S. 34 on the Statute Book does not necessarily imply an invitation to Judges, when they see reason to disallow future interest, to refrain from stating these reasons, and obviously in the normal case it is highly desirable that the Judge should give his reason for disallowing such future interest. 106 Ind. Cas. 270=A.I.R. 1928 Nag. 115.

6. (e) Interference in appeal.

——S. 34—Future interest—Discretion—Interference in appeal.

Future interest is a matter which is within the discretion of the Trial Court and where it is not shown that the discretion has been improperly exercised, the appellate Court will not interfere. 7 L.L.J. 1=86 Ind. Cas. 240=A.I.R. 1925 Lah. 308.

——S. 34—Future interest—Refusal—Interference in appeal—Rate charged rather low—Transaction not usurious.

In a transaction between a bank and business firm where the rate of interest charged is rather low than above the rate charged by banks for unsecured advances and the transaction is not usurious but is a purely business transaction, it would be creating unsatisfactory precedent if the character of the transaction were to be substantially altered by the action of the courts in dealing with pleas *ad miseri coridiam* by refusing future interest. A.I.R. 1935 Pesh. 58.

——S. 34—Interest on mesne profits—Interference in appeal.

Interest on mesne profits is entirely within discretion of Court and High Court will not interfere. 2 P.L.T. 648=68 Ind. Cas. 903=A.I.R. 1921 Pat. 430.

——S. 34—Discretion—No interference in appeal.

Discretion of lower Courts will not be interfered with by High Court unless exercised unreasonably. 92 Ind. Cas. 679=13 O.L.J. 338.

——S. 34—Discretion—Exercise—Interference in appeal.

The matter of interest *pendente lite* and interest after the date of suit was a matter within the discretion of the lower Court and having regard to the fact that judgment had been obtained for Rs. 32,000 odd for an original loan of Rs. 10,000 there was nothing upon which the High Court could come to the conclusion that the lower Court, in exercising its discretion, had not exercised it judicially. A.I.R. 1938 Pat. 324=4 B.R. 401=174 Ind. Cas. 197.

——S. 34—Discretion—Exercise of.

Where the customary rate of interest which was charged from the borrowers was in the neighbourhood of what was charged by the plaintiffs, and it also appeared to have been proved that compound interest was calculated only when the debtor came to meet his *hisab* on the Dewali for each year and the Court reduced it to 1 1|2 per cent. simple:

Held, that the Court had discretion in the matter as clearly provided in S. 34, and that the discretion was wisely exercised. A.I.R. 1939 Pat. 323=5 B.R. 874=20 P.L.T. 825=183 Ind. Cas. 179 (2).

——S. 34—Discretion—Interest on cess *pendente lite*—Award of. *See* LANDLORD AND TENANT—CESS. 12 B.R. 676.

7. Mortgage.

See also CIVIL P. C., O. 34, R. 11.

——S. 34—Interest from date fixed for repayment to date of realisation—Discretion of Court.

It is not obligatory on the Court to award, in the case of mortgage, interest for the period from the date fixed for repayment until the date of actual realisation. The discretion is not confined to the question of rate of interest only. A.I.R. 1932 Cal. 689=59 Cal. 722=139 Ind. Cas. 455.

——S. 34—Interest from date of payment up to date of realization.

It is not compulsory upon a Court to allow the contract rate of interest up to the date of realization, though it is open to it to do so. (1902) A.W.N. 218=25 A. 159.

——S. 34—Mortgage decree—Interest after date fixed for payment.

Interest after date fixed for payment in a mortgage decree can be allowed only at six per cent. per annum. 13 M.L.T. 212=(1913) M.W.N. 175=18 Ind. Cas. 362.

——S. 34—Mortgage decree—Interest—Rate of.

In a mortgage decree the interest allowed after the date fixed for payment of the sum decreed should have regard to an aggregate amount due on that date and not merely to principal sum secured by the mortgage. The contract rate may be reduced by the Court in circumstances justifying such reduction. 10 C.L.J. 203=3 Ind. Cas. 289.

——S. 34—Mortgage decree—Interest from date fixed for payment to date of realization.

A decree-holder in a mortgage suit is entitled to interest at the Court rate for the period between the date fixed for payment and the date of realization of the money and not at the rate stipulated for in the mortgage bond. 27 Ind. Cas. 522 (Cal.).

——S. 34—Mortgage decree—Interest—Contract rate—Appeal.

A mortgagee is entitled to interest on the principle amount at the contract rate up to the date fixed for the payment in the preliminary decree and the period cannot be enlarged by an unsuccessful appeal by the mortgagor or the mortgagee. 17 C.L.J. 120=17 C.W.N. 457=18 Ind. Cas. 747.

——S. 34 and O. 34, Rr. 2 and 4—Mortgage decree—Interest subsequent.

Where on default of payment within the date fixed by the preliminary decree the mortgaged property is ordered to be sold, subsequent interest is to be calculated on the principal, interest and costs found to be due on the date fixed and not on the principal alone. Such further interest is to be calculated at 6 per cent. but the Court has a discretion. 34 Cal. 150; 21 Mad. 364, rel. 42 Mad. 465=36 M.L.J. 288=51 Ind. Cas. 67.

——S. 34 and O. 34, R. 5—Mortgage decree—Further interest.

After the period of grace allowed by a preliminary decree in a mortgage suit, the matter passes from the domain of contract to that of judgment and the Court's jurisdiction to grant further interest after the period of grace is under S. 209 of the Code of 1882. The proper period for allowing such further interest is when the decree absolute is made. 34 Cal. 150 (P. C.), Foll. 27 C.L.J. 576=46 Ind. Cas. 469.

——S. 34 and O. 34, Rr. 4 and 5—Mortgage—Decree—Subsequent interest—Disallowed.

The Judicial Committee disallowed interest to the mortgagee from the date of the decree of the Subordinate Judge to the disposal of the appeal by the Privy Council, the case having in its view been hung up by his persistence in asserting an unwarrantable claim of interest from the date of the mortgage. 24 C.W.N. 977=7 O.L.J. 350=23 O.C. 150=58 Ind. Cas. 891=A.I.R. 1921 P.C. 100. [Reversing 3 O.L.J. 746=38 Ind. Cas. 454].

——S. 34 and O. 34, Rr. 4 and 5—Mortgage decree—Interest—Contract rate.

The rate of interest which a Court can allow in a mortgage decree from the date fixed for payment to the date of realization, is in its discretion. In exercising its discretion, however, the Court will ordinarily give the contractual rate, if it be a reasonable one. 47 Ind. Cas. 701 (Oudh).

——S. 34—Mortgage suit—Interest—Court's powers.

The Court has power under S. 34 of the C. P. Code to award interest at the contract rate even after the date fixed for payment to the date of realisation provided the rate is reasonable. 7 1|2 per cent. was held to be reasonable in his case. 1 O.L.J. 544=26 Ind. Cas. 177.

——S. 34—Discretion—Mortgage suit— *Pendente lite* and future interest—Rate—Court, if bound to award at contract rate—Amendment of 1929—Effect of. *See* C. P. CODE, O. 34, R. 11. A.I.R. 1950 Pat. 391.

——S. 34—Interest at contract rate.

Interest on mortgage is payable at contract rate *pendente-lite* unless rate is excessive or transaction unfair. 29 C.W.N. 118=85 Ind. Cas. 218=A.I.R. 1925 Cal. 268.

——S. 34—Interest, what is not excessive.

Interest allowed at Re. 1-8 per cent. (compound) *pendente lite* as stipulated for in mortgage-deed is not excessive. 113 Ind. Cas. 891=A.I.R. 1929 Nag. 6.

——S. 34—Contract rate.

The mere finding that the rate of interest in a mortgage bond is excessive, is not sufficient reason to refuse interest at the contract rate. 60 Ind. Cas. 693 (Cal.).

——S. 34 and O. 34, Rr. 4 and 5—Interest—Rate of—Mortgage decree.

A mortgage decree should provide for interest at the contract rate till the date fixed therein for repayment, and not at 6 per cent. 6 L.W. 296=33 M.L.J. 679=42 Ind. Cas. 349.

——S. 34—Mortgage decree—Rate of interest.

A mortgagee can get interest at the bond rate up to the date fixed for payment in the decree, and after that at the Court rate. 34 Cal. 150 (P.C.), Foll. 12 C.L.J. 137=5 Ind. Cas. 654.

——S. 34 and O. 34, R. 8—Mortgage decree—Interest—Right to—Appellate Court extending decree—Interest—Contract rate.

Where in a suit to redeem a mortgage, the lower Court fixed a certain time allowing interest at the contract rate till then, and the High Court on appeal confirmed the decision of the lower Court but extended the time for redemption fixing another date, *held*, that the effect of the extension of time by the Appellate Court was to substitute the date fixed by it for that fixed by the first Court and that the mortgagee was entitled to interest at the contract rate up to the extended date. 29 Ind. Cas. 289 (All.).

——S. 34 and O. 34, Rr. 4 and 5—Mortgage decree—Interest—Post diem—Power of Court to fix interest from date till date of realisation—Circumstances to be considered.

The Court in awarding interest from the date fixed for payment up to the date of realization ought to be guided by the circumstances of each particular case. 2 O.L.J. 402=30 Ind. Cas. 323.

8. Pendente lite.

——S. 34—Interest must be only upon principal sum due.

Any interest awardable from the date of plaint to the date of the decree must be only upon the principal sum due and not upon the suit amount which includes interest. A.I.R. 1943 Mad. 216=55 L.W. 664=1942 M.W.N. 623=(1942) 2 M.L.J. 532=207 Ind. Cas. 191.

——S. 34—Interest pendente lite—Amount of.

The amount to be awarded as interest *pendente lite* is, very largely, a matter of judicial discretion. A.I.R. 1931 P.C. 104=1931 M.W.N. 620=33 Bom. L.R. 940=34 L.W. 356=61 M.L.J. 47=35 C.W.N. 583=58 Cal. 1281=58 I.A. 141=131 Ind. Cas. 309.

——S. 34—Interest pendente lite—Lessor paying cesses—Lessees bound to pay—Suit to recover.

The matter is governed by S. 34. Having regard to the fact that the claim for cess being allowed extended over a long period from 1918-19 to 1938-39, the Court ought to allow *pendente lite* interest. A. I.R. 1946 P. 154.

——S. 34—Rate of interest pendente lite.

The fair rate at which interest *pendente lite* should be awarded to the plaintiffs is 9 per cent. per annum simple from the date of the suit. A.I.R. 1941 Pat. 276=195 Ind. Cas. 428.

——S. 34—Mortgage to be determined under S. 6, Santhal Parganas Regulation—Interest pendente lite.

Where a suit on mortgage falls to be determined under S. 6, Santhal Parganas Settlement Regulation, as regards *pendente lite* interest, the matter lies within the domain of contract and S. 6 of the Regulation is applicable and more than double cannot be allowed in respect of all claims up to the time of grace fixed by the Court. But after that the matter comes to the domain of judgment and S. 6 has no application and the Court has power under S. 34, C. P. Code, to allow interest on the decretal amount at 6 per cent. per annum. A.I.R. 1936 P.C. 63=1936 O.L.R. 91=1936 A.L.R. 155=40 C.W.N. 328=2 B.R. 244 =17 P.L.T. 89=1936 A.L.J. 108=43 L.W. 268= 1936 O.W.N. 283=70 M.L.J. 355=1936 M.W.N. 308=38 Bom.L.R. 349=15 Pat. 210=63 C.L.J. 154 =63 Ind. App. 114=160 Ind. Cas. 285 (P.C.).

——S. 34—Interest from date of suit—Action to dissolve partnership.

In an action to dissolve and wind up the affairs of a partnership, until the accounts have been taken it is impossible to say what if anything is due from any partner or co-partners; interest, therefore, should only be allowed to the plaintiff from the date of final decree and not from the date of the plaint. 1930 A. L.J. 868=124 Ind. Cas. 891=34 C.W.N. 737=A. I.R. 1939 P.C. 185=32 Bom.L.R. 1152=52 C.L. J. 10=59 M.L.J. 121=32 L.W. 184=24 S.L.R. 328=57 I.A. 245=1930 M.W.N. 1120=58 C. 208.

——Ss. 34, 2—Refusal to award pendente lite interest, whether a decree—Appealability.

Though S. 34 places a discretion in the hands of the trial Court to award interest, this makes it nonetheless a right which the plaintiff may claim. Consequently an order refusing interest *pendente lite* is a decree within the meaning of S. 2, against which the aggrieved party has a right of appeal. A.I.R. 1933 Pat. 207=14 P.L.T. 133=143 Ind. Cas. 43.

9. Prior to suit.

——S. 34—Interest before suit when can be allowed—Lessor paying cess which lessees were bound to pay under lease—No provision in lease for payment of interest on cess—Suit to recover amount paid by lessor—Case is one of wrongful detention of money—No interest prior to suit can be allowed.

In the absence of any usage or contract, express or implied, or of any provision of law to justify the award of interest for the period before the institution of the suit interest for that period cannot be allowed by way of damages for wrongful detention of the plaintiff's money.

The lessor had to pay cess which was assessed on the leasehold properties and which the lessees were under the terms of the lease bound to pay. In the suit by the lessor against the lessee to recover the amount of cess the lessor claimed interest prior to suit:

Held, that as there was no provision in the lease for payment of interest no interest prior to institution of the suit could be claimed on the basis of contract nor could interest on cess be allowed on equitable grounds under the proviso to S. 1, Interest Act, as the case was one of wrongful detention of money. The plaintiff, therefore, was not entitled to interest on cess prior to the institution of the suit. A.I.R. 1946 Pat. 154=12 B.R. 676=226 Ind. Cas. 97.

——S. 34—Arrears of maintenance — Widow leaving husband's house—No demand—No damages—Interest prior to suit.

No equitable jurisdiction in Court to award, nor can the claim be allowed under S. 73 Contract Act merely because the same was withheld. (1940) A. 739=1940 A.L.J. 700=A.I.R. 1941 A. 43.

——S. 34—Defendant not withholding money due to plaintiff but ready and willing to pay—Interest can be allowed only from date of suit No interest prior to suit.

In a suit by a puisne encumbrancer to recover from the prior mortgagee the surplus of the sale proceeds of the mortgage property in his hands, in the absence of evidence to show that the prior mortgagee after being appraised of the rights of the puisne encumbrancer withheld the money, interest can be allowed only from the date of the plaint at six per cent. per annum and not for the period before the suit. A.I.R. 1943 Mad. 62=55 L.W. 678=1942 M.W. N. 625=(1943) 1 M.L.J. 472=I.L.R. (1943) Mad. 430=207 Ind. Cas. 535.

——S. 34—Interest before date of suit.

Suit for accounts of moneys received—Interest before date of suit may be awarded—Fact that such interest was not claimed and was not granted by the High Court in its decree is fatal to the contention of the plaintiffs that they should get interest before decree. A.I.R. 1936 Rang. 141=162 Ind. Cas. 352.

——S. 34—Interest—Prior to suit.

Interest cannot be allowed prior to the date of plaint, but it must be allowed after that date. 7 M. L.T. 108=5 Ind. Cas. 817.

——S. 34—Deposit in Court by appellant for withdrawal by respondent—Appellant withdrawing by order of Court—Suit for recovery of money by respondent with interest—Interest, if can be allowed.

Where the appellant made a deposit in Court to be paid to the respondent but it was withdrawn by the appellant himself under orders of the Court and the respondent filed a suit against appellant for recovery of the amount claiming interest thereon:

Held, that the appellant could not be said to have been in wrongful possession of the amount as the same was given to him under orders of Court and hence interest should not be allowed till date of plaint. A.I.R. 1935 Mad. 988=1935 M.W.N. 1046=42 L.W. 733=161 Ind. Cas. 115.

10. Rate of interest.

——S. 34—Contract rate—Power to award.

Court has power to award interest at the contractual rate from date of institution to judgment. 96 Ind. Cas. 310 (Lah.).

——S. 34—Pro-note—Interest expressly mentioned—If can be disallowed.

Where rate of interest payable on a pro-note is expressly mentioned, the Court cannot reduce the rate to be paid up to a date fixed by it after the institution of the suit unless it is exorbitant or penal in its nature or offends against any other provision of law. A.I.R. 1934 Lah. 32=154 Ind. Cas. 470.

——S. 34—Contract rate 24 per cent.—Power of Court to grant.

Although in the absence of evidence of custom 24 per cent., per annum is a high rate. Small Causes Court has jurisdiction to grant it. 37 C.L.J. 399=74 Ind. Cas. 601=27 C.W.N. 549=A.I.R. 1923 Ind. Cas. 650.

——S. 34—Interest pendente lite—Contract rate.

The rate of interest to be allowed on the principal debt up to the date of decree ought to be that fixed by contract express or implied between the parties. A.I.R. 1933 Pat. 207=14 P.L.T. 133=143 Ind. Cas. 43.

——S. 34—Interest at contract rate, stipulation for—Judgment-debtor getting extension of time for payment of decretal amount.

The appellant had failed to make the payment within the period fixed by the Subordinate Judge, and his property was liable to be sold for satisfying the respondent's claim. To avoid the sale, he asked the High Court to extend the period, and his request was acceded to:

Held, that the appellant could have no legitimate grievance, if while granting the concession, the High Court made him liable for the payment of interest at the contract rate during the period of extension. The stipulated rate of interest could be awarded up to the date of realisation or actual payment, and a debtor should not be allowed to keep the money of his creditor at a low rate of interest by merely bringing an unsuccessful appeal. A.I.R. 1935 P.C. 165=39 C.W.N. 1191=1 B.R. 822=1935 O.W.N. 952=1935 A.L.J. 1005=42 L.W. 474=1935 A.W.R. 1177=69 M.L.J. 503=1935 M.W.N. 1145=37 Bom.L.R. 833=16 P.L.T. 739=63 Cal. 1 =62 I.A. 265 =157 Ind. Cas. 419 (P.C.).

——S. 34—Compound interest—Contract rate—Power to grant.

It is open to the Court in exercising its discretion under S. 34, to allow compound interest from the date of the institution of the suit at a rate which was the rate impliedly agreed to between the parties while their transactions were running. A.I.R. 1934 Bom. 86=36 Bom.L.R. 68=150 Ind. Cas. 467.

——S. 34—Interest—Grant of—Compound interest.

Interest up to the date of decree and compounding it with the principal on the date of the decree and allowing of interest therein at the Court rate is justified by S. 34. It is a matter of discretion in the case of a mere detention of a debt where there is no contract express or implied, to pay interest or no statute or mercantile usage allowing it. Interest, if it cannot be awarded as interest may be awarded by way of damages. A creditor cannot ask for contract rate of interest as of right for period pending suit. S. 34 on its principle was never intended to be used as a means for providing for compounding interest but to relieve a debtor of a hard rate of interest. A.I.R. 1935 Cal. 39=61 Cal. 711=154 Ind. Cas. 479.

——S. 34—Pro-note—Contract of loan—Interest.

Where a suit is based on a contract of loan and not on the promissory note, the plaintiff is entitled to interest only at a reasonable rate and not that provided for in the pro-note. A.I.R. 1934 Mad. 503=67 M.L.J. 30=40 L.W. 167=155 Ind. Cas. 164.

——S. 34—Rate of interest—Discretion—Facts of each case.

The question of the rate of interest is a matter to be decided on the facts of each case. 76 Ind. Cas. 131=A.I.R. 1924 Nag. 346.

——S. 34—12 per cent. simple interest, if fair.

Prima facie and in absence of special circumstances to the contrary, the rate of 12 per cent. per annum simple may be taken as a fair, proper and reasonable rate in a mortgage transaction. A.I.R. 1934 All. 938=4 A.W.R. 103=153 Ind. Cas. 695.

——S. 34—Interest after suit—Discretion.

Under S. 34, the award of interest as well as the rate at which it is to be awarded from the date of suit to date of decree is in the discretion of the Court though, where the contract rate is not inequitable, that rate will be adopted. A.I.R. 1932 Mad. 109=34 L.W. 843=1931 M.W.N. 1226=62 M.L.J. 266 =55 Mad. 458=135 Ind. Cas. 907.

——S. 34—Court rate—Six per cent.

It is the practice of the Courts generally to allow interest on the decretal amount at 6 per cent. unless some special reason is shown why a higher rate should be given. A.I.R. 1933 Lah. 780=144 Ind. Cas. 601.

——Ss. 34 and 144—Interest on money due in restitution, rate of.

Interest at 6 per cent. for money to be recovered in restitution is properly awardable. (1904) 15 M.L.J. 247=28 Mad. 355.

11. Right to interest.

(a) Contract or custom.
(b) Contribution suits.
(c) No demand.
(d) Post diem interest.
(e) When allowed.
(f) When disallowed.
(g) Miscellaneous.

11. (a) Contract or custom.

——S. 34—Right to interest—No contract or custom.

Where there is neither custom nor any contract for the payment of interest and the claim has been brought soon after the cause of action, interest should not be allowed. A.I.R. 1942 All. 96=I.L.R. (1941) All. 777=1941 A.L.J. 740=1941 R.D. 962=199 Ind. Cas. 458.

——S. 34—Interest on unpaid prices for purchases—Whether can be granted.

Interest is not payable on unpaid prices for purchases, in the absence of a contract to that effect. It would be payable only from the date of the suit as compensation if the defendant fails to pay on demand or denies his liability. A.I.R. 1949 Kut. 6.

——S. 34—Mortgagee's right to interest.

In a suit on the basis of a mortgage full interest should be given to the mortgagee at the contract rate unless the mortgagor is in a position to make out a case of undue influence as defined in S. 16 of the Contract Act. 134 Ind. Cas. 489=32 P.L.R. 378.

——Ss. 34 and 144—Money paid under decree to nominee of decree-holder—Security bond by nominee —Absence of provision as to interest in bond—Reversal of decree—Interest on sum refunded, whether can be claimed from nominee:

Held, as the bond did not provide for interest, the nominee was not liable to pay interest. A.I.R. 1932 Bom. 326=34 Bom.L.R. 379=139 Ind. Cas. 37.

——S. 34—Partnership—Dissolution—Partner's services—Remuneration—Interest, if and when can be charged.

In absence of a contract to the contrary, partners in taking the partnership account cannot be allowed to charge for services rendered by them. In absence of an agreement to that effect, interest should not be charged after dissolution. A.I.R. 1932 Sind 126= 26 S.L.R. 385=139 Ind. Cas. 614.

——S. 34—Interest—Grant of.

Interest may be allowed on the basis of an implied agreement to pay. (1901) 2 Ch. 548 and (1905) 1 Ch. 307, Foll. A.I.R. 1930 Lah. 985=129 Ind. Cas. 281.

——S. 34—Quasi contracts—Interest, if can be allowed.

Where a transaction between the parties is of the nature of a contract or of a *quasi*-contract, as undoubtedly it is in the case of a buyer and a seller, the Courts will be justified in allowing interest even where there is no definite contract to pay interest. A.I.R. 1934 All. 160=1934 A.L.J. 533=4 A.W.R. 538=147 Ind. Cas. 342.

11. (b) Contribution suits.

——S. 34—Suit for contribution—Right to interest.

A claim for contribution pre-eminently falls within the equitable jurisdiction of the Court and on equitable principles, the claimant is entitled to interest. A.I.R. 1939 Mad. 531=49 L.W. 132=1939 M.W.N. 170=I.L.R. (1939) Mad. 776=189 Ind. Cas. 98.

——S. 34—Suit for money paid towards decree —Property of defendants saved—Right to interest.

A person who has paid off the entire decree amount and saved the property of the defendants from being proceeded against in execution should not be deprived of interest on the money paid in so far as it refers to the amount payable by the defendant. A.I.R. 1936 Mad. 910=71 M.L.J. 651=1936 M.W.N. 783=44 L.W. 343=I.L.R. (1937) Mad. 35= 168 Ind. Cas. 907.

11. (c) No demand.

——S. 34—Interest—Share of profits.

There is certainly no ground for granting interest where a co-sharer makes no demand for his share of the profits. 19 N.L.R. 24=73 Ind. Cas. 142= A.I.R. 1923 Nag. 197.

——S. 34—Interest—Right to—No notice of claim before suit.

Interest cannot be claimed unless written notice demanding it is given. 90 Ind. Cas. 58=A.I.R. 1926 Nag. 64.

11. (d) Post diem interest.

——S. 34—Post diem interest—No presumption in favour of or against—But creditor is entitled to damages.

Where there is no express stipulation for the payment of interest after the due date the law raises no presumption either in favour of or against an implied intention to pay interest after the due date. The determination of the question rests entirely upon the interpretation of the instrument; the mortgagee, however, is entitled to damages on account of the failure of the debtor to pay the debt at the stipulated time. The measure of damages would *prima facie* be the same as the rate of interest stipulated for by the parties. There is no rule of law making the contract rate necessarily the measure of damages, and the Court has discretion to reduce the rate if it is found to be unusual. 4 Lah. 406=75 Ind. Cas. 375=6 Lah. L. J. 72=A.I.R. 1923 Lah. 632.

——S. 34—Compromise decree—No provision that after expiry of period amount shall carry interest—Post diem interest held could be claimed by decree-holder.

A decree, which merely embodied the terms of a compromise, provided that certain sum with interest at six per cent. per annum from the date of plaint to date of the compromise should be paid within six months from the date of the decree and that in default execution was to be taken against the properties and against the person of the defendant and the amount recovered. There was no provision that after the expiry of six months the amount shall carry interest:

Held, that this was a case to which the rule that a compromise decree partakes of the nature of the contract was applicable and under this decree *post diem* interest could be claimed by the plaintiffs at the rate of six per cent. per annum which was the rate fixed for the period between the date of the plaint and the date of the decree and it made no difference that no provision was made for interest between the date of the decree and the date when the amount was payable. A.I.R. 1940 Mad. 893=1940 M.W.N. 547.

11. (e) When allowed.

——S. 34—Purchaser in auction paying off prior mortgage is entitled to interest on amount paid.

Where a person discharges in good faith a prior mortgage in respect of the properties which he had purchased in Court auction, that person is entitled to interest on the amount of the prior mortgage. The accidental circumstance, that he became the purcha-

ser in Court auction by payment of money, and as compensation therefor, he happened to be in possession, does not in any way prejudice his right as a person entitled to the rights of the prior mortgagee whom he paid up. 12 M.L.W. 101; 41 Mad. 513 and A.I.R. 1924 P.C. 36, Rel. on. 31 M.L.W. 832=A.I.R. 1930 Mad. 471=58 M.L.J. 343=125 Ind. Cas. 247.

——S. 34—Interest—Restitution suit.

Interest at 6 per cent. will be allowed in a restitution suit from the date of withdrawal by decree-holder till date of re-payment to judgment-debtor. 24 C.L.J. 467=21 C.W.N. 564=38 Ind. Cas. 17.

——S. 34—Building contract—Contractor to be paid on completion of work and on measurement of work done—Payment for work done unreasonably delayed:

Held, since the settlement of the contractor's work was unreasonably delayed, the plaintiff was entitled to be compensated. Rate of 6 per cent. per annum, held was not excessive. A.I.R. 1935 Lah. 775=160 Ind. Cas. 739.

——S. 34—Decree under O. 20, R. 10—Non-delivery of specific movables—Damages—Interest.

Held, that allowing interest till decree and then to allow interest on amount decreed is justified. A.I.R. 1935 Cal. 39=61 Cal. 711=154 Ind. Cas. 479.

——S. 34—Profits in two businesses shared periodically—Defendant illegally retaining one business—Suit for share of profits—Right of plaintiff to claim interest:

Held, that a suit by the other claiming his share in the property which was illegally retained by the defendant was maintainable, and as the suit was not based on any loan transactions or any dealings between the parties but for the recovery of the amount which had been illegally retained by the defendant interest was legally and equitably claimable by the plaintiff. A.I.R. 1935 Lah. 552=37 P.L.R. 87=158 Ind. Cas. 156.

——S. 34—Loan by a partner—Interest.

A partner who advances money to the partnership by way of loan in addition to his contribution towards the capital is entitled to get interest thereon at a reasonable rate from the partnership. But it is payable by all the partners including the lender. The date of interest at 9 per cent. is not excessive. A.I.R. 1932 Lah. 389=33 P.L.R. 945=137 Ind. Cas. 162.

——S. 34—Delay in institution of suits—Interest if can be disallowed.

If delay in instituting the suit for money is due to the assurance of the defendant to pay it, Courts should not disallow interest from date of institution of suit to date of decree on the ground of such delay. A.I.R. 1934 Lah. 93=148 Ind. Cas. 964.

11. (f) When disallowed.

——S. 34—Interest when disallowed.

Where a lessee knowing that the lessor would not be able to put him in possession waits for three years and then institutes a suit for recovery of possession, he cannot justly claim an interest on the sum paid as premium by him or for the amount of rent paid at the time of the lease. 57 Cal. 114=A.I.R. 1930 Cal. 385=125 Ind. Cas. 607.

——S. 34—Interest — Disallowed — Payment obstructed by creditor. (1902) 5 C.W.N. 536=28 C. 557=28 I.A. 89=11 M.L.J. 171 (P.C.).

——S. 34—Interest—Disallowed.

The judgment-debtor deposited the decretal amount in the Court intending the decree-holder to receive it only on giving security pending the appeal that was preferred by him. Decree-holder did not give security and consequently was not paid the money. The amount of the decree was reduced in appeal.

Held, that the decree-holder could not claim interest on the amount since the date the deposit was made.

Held further, that the judgment-debtor could not claim interest on the surplus amount deposited by him, because it was at his instance that the decree-holder was directed to receive the money only on condition of giving security. 120 Ind. Cas. 423=A. I. R. 1929 Lah. 316.

——S. 34—Arrears of maintenance—No demand in writing—No damages proved—Interest on arrears disallowed—Only interest pendente lite.

Where owing to strained relations between the widow and her husband's adopted son, the root cause of which was the widow herself, the widow left her husband's house and sued for maintenance and no demand for payment of maintenance and no damages had been proved to have accrued to her because the maintenance was withheld:

Held, that the equitable jurisdiction of the Court could not be attracted in awarding interest to widow on arrears of maintenance inasmuch as she brought the trouble on herself. Nor could she claim interest under S. 73, Contract Act, merely because the money was withheld. She was, however, entitled to interest *pendente lite* and future, under S. 34, C. P. Code at the rate of 6 per cent. per annum from the date of the suit up till the date of realization. A.I.R. 1941 All. 43=1940 A.L.J. 750=I.L.R. (1940) All. 739=193 Ind. Cas. 27.

11. (g) Miscellaneous.

——S. 34—Interest—Rights to—Debt due on a foreign judgment.

In a suit in Indian Courts on a debt due on an English judgment, no interest on the debt can be claimed unless the English judgment provides for it. (1901) 5 C.W.N. 741=28 C. 641.

——S. 34—Interest on—Order for costs in insolvency.

It is not the practice of the Calcutta High Court to allow interest upon the decree or order sued on (an order for costs) unless such decree or order provides for the payment of interest. (1905) 9 C.W.N. 952=33 Cal. 560.

——S. 34—No interest—On time-barred debts—Suit for account.

It is not competent to Courts to award interest where the debt on which it is claimed is irrecoverable, being time-barred. Interest in such a case, is but an accessory and when the principal is barred, the accessory fails along with it. (1906) 5 Bom. L.R. 198=27 Bom. 330.

——S. 34—Suit for damages—If suit for money—Money meaning.

The word "money" in the section should not be understood in the limited sense of an unascertained sum. The expression "decree for the payment of

money" is very general and to give it due effect, it must be construed as including a claim to unliquidated damages. 32 C.L.J. 239, not Foll.; 32 Mad. 95 (F.B.) and (1913) M.W.N. 874, Foll. 1926 M.W.N. 691=97 Ind. Cas. 871=A.I.R. 1926 Mad. 1021=51 M.L.J. 243.

——S. 34—"Decree for payment of money"—Claim for damages.

Suit for money on breach of contract—Plaintiff entitled to interest prior to date of suit only under general principles. 'Decree for payment of money' includes a claim for liquidated damages. 1936 M. W.N. 1010.

——S. 34—Interest pendente lite—Right to—Suit for damages.

In a suit for recovery of money representing the depreciation in the value of goods supplied, no interest can be claimed during the pendency of the suit as the amount is neither 'debt' nor sum certain within S. 1 but only unliquidated damages. 60 Ind. Cas. 288=32 C.L.J. 239.

——S. 34—Interest on damages—Long delay under vexatious and oppressive circumstances in payment of contract money—Fact that damages are awarded, whether ground for refusing to award interest.

The expression "decree for the payment of money" in S. 34, is not restricted in its operation to a claim to liquidated damages. The word 'money' in S. 34, should not be understood in the limited sense of an ascertained sum. Interest on damages from the date of the suit is within the discretion of the Court under S. 34.

Courts may allow interest when there has been long delay under vexatious and oppressive circumstances in the payment of what is due under the contract. It is after all a question of discretion of the Court. Such a discretion is expressly conferred on the Courts in India by statute in allowing a claim to interest on damages, and there is no reason to refuse to award it if the circumstances justify. A.I.R. 1940 Bom. 369=42 Bom.L.R. 750=I.L.R. (1941) Bom. 71=191 Ind. Cas. 806.

——S. 34—Interest, whether can be allowed.

In a decree for damages to allow interest will be tantamount to awarding damages upon damages and hence interest should not be allowed. A.I.R. 1932 Oudh 165=9 O.W.N. 239=8 Luck. 35=137 Ind. Cas. 217.

——S. 34—Damages—Suit for—Interest on damages from date of suit if can be allowed.

Under S. 34 it is entirely a matter for the Court's discretion whether to award interest from the date of the filing of the suit where the decree is for the payment of money. [In this case the plaintiff was awarded interest on damages from the date of the filing of the suit]. A.I.R. 1946 Bom. 1=47 Bom. L.R. 719=222 Ind. Cas. 337.

——S. 34—Suit for damages—Interest from date of suit.

Court has discretion under S. 34 to award interest on damages from the date of the suit to the date of the decree; but the Court should state its reasons for so decreeing interest. 39 C.L.J. 77=80 Ind. Cas. 87=A.I.R. 1924 Cal. 637.

——S. 34—Interest on claim for use and occupation.

Interest on sum claimed for use and occupation may be allowed under S. 34 of the C. P. Code. 9 Ind. Cas. 221 (Oudh).

——S. 34—Interest on damages.

Where a party improperly delays the ascertainment of damages for a long time he should be penalized by awarding interest from date of suit. 27 Bom. L.R. 1168=94 Ind. Cas. 575=A.I.R. 1925 Bom. 547.

Synopsis.

——S. 35.

See also S. 35-A.

1. **Abatement.**
2. **Accounts suit for.**
3. **Adjournment costs.**

See CIVIL P. C., O. 9, R. 6 and O. 17, R. 1.

4. **Alternative relief.**
5. **Appeal (as to order for costs).**
6. **Appeal (Order for costs in).**
7. **Apportionment.**
8. **Arbitration.**
9. **Commissioners costs.**
10. **Company.**
11. **Compensatory costs.**

See CIVIL P. C., S. 35-A.

12. **Construction.**
13. **Contribution (costs).**

See also CONTRIBUTION.

14. **Damages.**
15. **Disallowance.**
16. **Discretion.**
17. **Duty of Court.**
18. **Duty of party.**
19. **Election proceedings.**
20. **Execution.**
21. **Garnishee.**
22. **Government (party).**
23. **Guardian.**
24. **High Court Practice.**
25. **Income-tax proceedings.**
26. **Indemnity, suits on.**
27. **Interest.**
28. **Intervenor.**
29. **Land Acquisition proceedings.**
30. **Legal Practitioner.**
31. **Maintenance suits.**
32. **Matrimonial cases.**
33. **Meaning of.**

See S. 35—CONSTRUCTION.

34. **Minor.**
35. **Mortgage suits.**
36. **Official Assignee and Official Receiver (Party).**
37. **Parties pro forma.**
38. **Partition suits.**
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40. **Pauper suits.**
41. **Pre-emption suits.**
42. **Principles.**
43. **Privy Council Appeals.**
44. **Proceedings under S. 476, Cr. P. Code.**
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46. Receiver (Party).
46-a. Refund.
47. Remand.
48. Representative suits.
49. Return of plaint.
50. Scale of.
51. Scheme suit.
52. Suit for costs.
53. Taxable costs.
54. Taxation.

See under CIVIL P. C., S. 35, HIGH COURT PRACTICE.

55. Test cases.
56. Third party.
57. Trial on question of costs only.
58. Trustee.
59. When not liable.
60. Will.

1. Abatement.

——S. 35 and O. 22, R. 1—Abatement of suit—Cause of action not surviving—Cost to defendant.

The Court has power to award costs to a defendant out of the deceased plaintiff's estate even where the suit abates by reason of the cause of action not surviving the death of plaintiff. The power of the Court to award costs in cases of abatement is not restricted to O. 22, R. 3 (2). 37 M.L.J. 596=10 L.W. 656=54 Ind. Cas. 118.

——S. 35 and O. 22, R. 1—Abatement of suit—Death of defendant—Costs.

If a suit abates on the ground that no representatives of a deceased defendant has been brought on the record, the Court cannot award costs to the heirs of the deceased defendant against the plaintiff. *Quaere*: whether the representatives of the deceased defendant can institute a separate suit for the purpose of recovering costs? (1912) M.W.N. 382=11 M.L.T. 202=22 M.L.J. 439=15 Ind. Cas. 369.

2. Accounts, suit for.

——S. 35—Accounts suit—Costs of, pending reference.

Where defendant resisted plaintiff's claim for an account in a suit for accounts, costs were awarded to the plaintiff's upto and including the hearing by the decree directing reference for an account. 20 C.W.N. 368=35 Ind. Cas. 83. [On appeal 27 C.L.J. 78=45 Ind. Cas. 738].

——S. 35—Defendant vehemently contesting liability to account—Whether should be mulcted with costs.

In a suit for rendition of accounts the defendant should be held liable for costs at the preliminary stage, and upon the valuation put by the plaintiff where he vehemently contested the maintainability of the suit disputing their liability to account and even disputing the right of the plaintiff to sue. A.I.R. 1943 Pat. 218=22 Pat. 114=9 B.R. 260=206 Ind. Cas. 126.

——S. 35—Account suit—Principal and agent—Dishonest defence of manager—Costs—Duty of manager to keep accounts.

The manager of an estate, who collects and disburses moneys, must keep clear accounts and if a suit is necessary owing to his default, he must pay the full costs especially, if he sets up a false defence and keeps back the true accounts. 43 Cal. 190=19 C.W.N. 880=31 Ind. Cas. 662.

——S. 35—Accounts—Suit for—Conduct of defendant—Whole costs.

Where a defendant is largely responsible for litigation and by his obstructive methods hampers the investigation thereby delaying and lengthening the inquiry, he should be made liable for the whole costs of the suit. If in a suit for accounts defendant alleges nothing is due from him but a balance is found due defendant must pay costs of the suit and accounts. If, however, defendant admits liability for a portion and the suit proceeds only as regards the difference, the costs would depend on the substantial result of the enquiry. 24 C.W.N. 110=30 C.L.J. 417=54 Ind. Cas. 636.

——S. 35—Suit for accounts—Decree—One partner remaining *ex parte* filing suit for amount due to him.

Held, that the plaintiff in the subsequent suit could not be awarded costs so far as the first Court was concerned but as the suit was dismissed, he had no alternative but to come upon appeal and hence he was entitled to the costs of the appeal. A.I.R. 1934 Mad. 665=67 M.L.J. 413=1934 M.W.N. 539=40 L.W. 792=156 Ind. Cas. 264.

——S. 35—Accounts suit—Decree for costs, when to be made.

Ordinarily, in a suit for accounts which has been remanded to the lower Court, the actual decree for costs should not be made until the stage of final decree is reached. But where the amount of costs is specified in the preliminary decree itself it cannot be said that the actual assessment of costs is to be postponed until the final result is known. When such a decree is put in execution, the High Court cannot interfere to amend the decree. Under the circumstances a proper discretion must be exercised at the time of the final decree and all matters set right. A.I.R. 1934 Pat. 146=148 Ind. Cas. 572.

——S. 35—Costs—Suit for accounts—Preliminary decree.

There is nothing in principle which precludes a Court from assessing costs and passing a decree for costs in favour of the successful party in a suit for accounts in the course of preliminary decree. 121 Ind. Cas. 550=A.I.R. 1930 All. 72.

——S. 35—Suit for accounts—Preliminary decree omitting to state subject of costs—Costs awarded in final decree should be taken as costs of whole suit.

The general rule as to costs in a suit for accounts is that they are to be given at the time of the final decree. This is obviously necessitated by the nature of the case as until the final decree is passed, it is not possible to assess accurately what the costs are. In these circumstances, therefore the complete omission of the Court passing the preliminary decree to mention the subject of costs can only be interpreted as meaning that, that Court had intended to follow the general rule and to reserve the question of costs until the time of the final decree. The order of the Court which passed the final decree should, therefore, be taken as meaning that the costs granted were the costs of the whole suit. A.I.R. (Vol. 26) 1939 Lah. 255=41 P.L.R. 99=182 Ind. Cas. 830.

3. Adjournment costs.

See C. P. CODE, O. 9, R. 6 AND O. 17, R. 1.

——S. 35—Probate—Plaintiff seeking to establish will under which he was given legacy—Will not attacked but plaintiff merely put to proof of it.

The usual practice in cases where a plaintiff seeks to establish a will under which he has been given a legacy and where the will has not been attacked but the plaintiff is merely put to proof of it, is to award costs to both parties from and out of the estate. A. I.R. 1941 Mad. 502=53 L.W. 245=1941 M.W.N. 301=(1941) 1 M.L.J. 299=198 Ind. Cas. 500.

——S. 35—Official referee directing payment of costs of reference, if can direct that they are to be paid out of particular property which is subject-matter of suit.

Even though the Official Referee has jurisdiction to give or deprive any parties of costs of the reference, whether those costs are to be paid out of the *wakf* funds or not quite certainly a matter for the Judge in the administration suit and not for the Official Referee. A.I.R. 1939 Rang. 108=1938 Rang.L.R. 252=180 Ind. Cas. 841.

——S. 35—Defendants in administration suit having identical interest—One set of costs only.

In an administration suit relating to a trust of religious and charitable nature, persons impleaded as defendants in the capacity of trustees and having identical interests in the matter are entitled, in the absence of the most exceptional circumstances, to one set of costs only and are not entitled to appear separately. A.I.R. 1939 Rang. 108=1938 Rang. L.R. 252=180 Ind. Cas. 841.

——S. 35—Administration suit—Order for costs.

The correct course in administration suits, when orders for costs are made, is to make them in such a form that the person who has not encumbered his share shall be relieved as far as possible in the matter of costs created by the fact that another co-sharer has assigned or encumbered his share. (1848) 11 Beav. 417, Rel. on. 56 Cal. 447=119 Ind. Cas. 21 =A.I.R. 1929 Cal. 477.

——S. 35—Administration proceedings—Costs of intervenor.

Where in an administration suit the intervention of a person did not change the character of the proceeding or alter the scope of the suit and the intervenor voluntarily came into it as a prudent measure not of immediate protection but of possible personal benefit hereafter, it would be clearly unjust to make the claimant pay an additional bill of costs of the intervenor. 24 C.W.N. 888=59 Ind. Cas. 581= 48 Cal. 352=A.I.R. 1921 Cal. 222.

4. Alternative relief.

——S. 35—Alternative relief—Two sets of defendants—Costs.

Where it was reasonable and proper for the plaintiff to join in the action for relief against either of two sets of the defendants, who were disputing their liability, the unsuccessful defendant should be made to bear the costs of the successful defendant. 11 S.L.R. 1=42 Ind. Cas. 636.

5. Appeal (as to order for costs).

5. (a) First appeal.

(b) Second appeal.

——S. 35 (S. 220, Old Code)—Costs—Appeal—When lies.

An appeal will lie on a question of costs merely, where the Court below has, in awarding costs, exercised the discretion vested in it arbitrarily and not in accordance with general principles. 15 A. 333, foll. 1905 A.W.N. 75=27 A. 509=2 A.L.J. 311.

——S. 35—Appeal from order for costs—When lies.

It is now settled law that an appeal against costs only does lie when the costs are awarded by a decree, if the order as to costs involves a question of principle. 50 C.W.N. 296.

——S. 35—Costs—Appeal—Land Acquisition Act (1 of 1894), Ss. 27 and 53—Collector's award upheld—Costs of Government refused by lower Court —Violation of legal principles.

The lower Court upheld the Collector's award but refused Government costs by explaining that the exaggerated demands of landowners were due to the uncertainty of the land market due to the boom and its aftermoth. There was nothing in the case inconsistent with the special provisions of the Land Acquisition Act.

Held, that S. 35, C.P. Code, governed the case, and that the lower Court had exercised its discretion in violation of well-recognized principles of law and, therefore, an appeal lay for costs only. (1880) 15 Ch. D. 501; 27 Mad. 341 and 16 Bom. 676, Rel. on. 30 Bom.L.R. 1622=114 Ind. Cas. 397= 53 Bom. 178=A.I.R. 1929 Bom. 63.

——S. 35—Costs—Appeal—When lies—Principles stated.

In ordinary cases an appeal for costs will only lie, (a) when a question of principle is involved; (b) when the discretion has not been judicially exercised; or (c) when the order has been passed in consequence of some misapprehension of law or fact. A.I.R. 1939 Mad. 654=1939 M.W.N. 288 =49 L.W. 525=(1939) 1 M.L.J. 687=184 Ind. Cas. 83.

——Ss. 35 and 96—Appeal—Costs—No question of principle involved—If lies.

An appeal raising only a question of costs is incompetent when it does not contain a question of law. 47 Cal. 67=56 Ind. Cas. 334.

——S. 35—Costs—Appeal against order of costs when entertainable.

Where a person's suit is dismissed and where without filing an appeal against its dismissal he appeals against the order awarding costs, such appeal lies only where an order as to costs involves a matter of principle or where there has been no real exercise of discretion in making the order as

to costs or where the order as to costs proceeds upon a misapprehension of fact or law. 114 Ind. Cas. 710=A.I.R. 1930 Lah. 234.

——Ss. 35 and 96—Order for costs—Appeal if lies.

An appeal against an order for payment of costs alone will lie, subject to such restrictions, in respect of the value of the subject-matter and so on, as are prescribed by the Code. There is also the further restriction as to such appeals on the ground that the award of costs is a matter of discretion and an appellate Court will not interfere unless a matter of principle has been involved. 63 Ind. Cas. 811=4 U.B.R. 8=A.I.R. 1921 U.B. 20.

——S. 35—Duty of Court to make some order as to costs—Failure to do so—Appeal.

Section 35 must be construed to impose upon the Court a duty that it shall award costs or make some direction as to costs. The failure of a Court to make any direction could no doubt be remedied by way of review but it is equally open to a party to appeal against a decree which fails to make provision for costs. The failure to make such a provision amounts to a failure to comply with the law and as such is open to correction in appeal. There is no distinction made by the law between pleas based on facts and pleas based on law so far as the apportionment of costs is concerned. 25 O.C. 385=10 O.L.J. 20=73 Ind. Cas. 222=A.I.R. 1923 Oudh 155.

——S. 35—Suit decreed—No order as to costs passed—Appeal as to costs—Court inadvertently failing to pass order for costs—On review Court stating that it could not change its order as to costs.

While decreeing the plaintiff's suit, the trial Court, inadvertently made no order as to costs in the plaintiff's favour. On an application for review in respect of the item as to costs the Court under a misapprehension thinking that it had made an order for costs passed an order, "I cannot change my order as to costs":

Held, that the order in review made no change in the judgment at all and the plaintiff was, therefore, entitled to appeal against the original judgment and claim costs. A.I.R. 1943 Sind 185=I.L.R. (1943) Kar. 242=210 Ind. Cas. 12.

——S. 35—Suit held not maintainable but another defendant substituted—Costs not awarded—Latter portion of order for costs can be appealed against.

The trial Court dismissed the suit with costs of defendant. The appellate Court held that the suit was not maintainable but ordered that another must be substituted in place of the existing defendant. In doing so, the lower appellate Court deprived him of his costs which had been awarded by the trial Court and did not award him any costs in the appellate Court

Held, that although he could not contest the order in so far as another party was substituted in his place, yet, he could appeal to the high Court in so far as he was deprived of his costs in the trial Court and was not awarded his costs in the lower appellate Court. 66 Ind. Cas. 903=34 C.L.J. 475=A.I.R. 1921 Cal. 156.

——S. 35—Appeal against order for costs accepting decision on main point is not competent.

An appellate Court cannot be asked in effect to allow the lower Court's decision on the main point of dispute in the case to stand and to say that for the purpose of costs it should be treated as a wrong decision.

A suit was stayed with liberty to file another fresh suit in another place, saddling the plaintiff with the costs of the suit incurred by the defendants. The order was founded substantially on the ground that the suit was vexatious and oppressive and an abuse of the process of the Court. The plaintiff thereupon filed a suit at the other place but appealed against as much of the former Court's order as directed him to pay costs

Held, that having accepted the stay order and acted under it the plaintiff could not challenge the grounds on which the order was made, and since those grounds could not be challenged question of costs which involved the consideration of these grounds could not be challenged. 32 Bom.L.R. 406=A.I.R. 1930 Bom. 445=126 Ind. Cas. 334.

——S. 35—Appeal—None against the order—No appeal against the portion of that order for costs.

When no appeal is provided for from an order on the merits, no appeal will lie against that portion of the order which relates to the award of costs only. A.I.R. 1932 Mad. 714=36 L.W. 646=1932 M.W.N. 1244=139 Ind. Cas. 167.

——S. 35—Costs—Appeal—When lies.

There can be no appeal or cross-objections on a matter of costs which is entirely in the discretion of the Court unless there is any manifestly wrong ground upon which the lower Court has proceeded. Where some of the findings are in favour of the plaintiffs and some of them are in favour of the defendant, the trial Court does not violate any principle in directing the parties to bear their own costs. A.I.R. 1944 Oudh 57=1943 O.W.N. 470=215 Ind. Cas. 37.

——S. 35—Costs—Appeal against—When lies.

An appeal and second appeal lie on a question of costs only, where a question of principle is involved or where a wrong principle has been followed. A.I.R. (Vol. 23) 1936 Pat. 151=16 P.L.T. 811=2 B.R. 330=161 Ind. Cas. 472.

——S. 35—Order as to costs—Appeal.

No appeal will lie merely as to costs unless there has been a violation of an established principle. 6 S.L.R. 226=19 Ind. Cas. 611.

——S. 35—Proper order for costs—No appeal.

Discretion of Lower Court properly used—No appeal lies. 72 Ind. Cas. 993=A.I.R. 1923 Bom. 37.

——S. 35—Order as to costs, when appealable.

An appeal will lie against an order as to costs, where a question of principle is concerned, where, for instance, no real discretion has been exercised in making the order as to costs or where the order of costs proceeds upon a misconception of facts. A.I.R. 1943 Sind 185=I.L.R. (1943) Kar. 242=210 Ind. Cas. 12.

——S. 35—Appeal—Order as to costs—Arbitrary.

Where the lower Appellate Court exercises its discretion in an arbitrary manner and not according to judicial principles a second appeal lies from its decree for costs only. 97 P.W.R. 1918=45 Ind. Cas. 948.

——S. 35—Second appeal—Question of costs—When lies.

Second appeal lies on a question of costs if question of law or principle is involved or discretion is exercised arbitrarily. 100 Ind. Cas. 598=27 P.L.R. 391.

——S. 35—Order as to costs if and when appealable—Interference of Appellate Court with order for costs—Scope.

No appeal lies against an order relating merely to costs but an appeal would lie when such costs are incidental to a judgment. An Appellate Court will not ordinarily interfere with an order for costs; but when there is a patently erroneous order it should interfere. 26 M.L.J. 356=15 M.L.T. 263=(1914) M.W.N. 310=22 Ind. Cas. 919.

5. (b) Second appeal.

——S. 35—Costs—Second appeal, when maintainable—Discretion of trial Court.

If in the Courts below wrong principles have been applied or there is some error of law in awarding the costs, then the High Court can interfere in second appeal.

The trial Court has a discretion in the matter of costs and that discretion should only be interfered with in appeal if the trial Court has exercised its discretion improperly. The Appellate Court should not consider the matter of costs as if it had been trying the suit itself. A.I.R. 1940 Mad. 589=51 L.W. 538=(1940) 1 M.L.J. 764=1940 M.W.N. 445=192 Ind. Cas. 82.

——S. 35—Second appeal as to costs—Competency of.

Though Courts have full discretion in the matter of costs, that dscretion is not arbtrary and must be exercised in accordance with general principles. In a pre-empton suit the plaintiff's right of pre-emption was admitted and the only dispute was as to the price payable. The District Judge dissenting from the Lower Court held that the whole of the price was paid before Sub-Registrar and that there was no proof of return of any part of the price. He accepted the vendee's appeal as to the price but did not set aside the first Court's decree as to costs against him. The vendee filed a second appeal.

Held, that in this case the Court of second appeal should entertain appeal on the question of costs. 56 Ind. Cas. 971 (Lah.).

——Ss. 35 and 100—Appeal — Costs — Second appeal.

Though a Court does not decide a suit on the merits of the case and merely passes an order as to costs incurred in the suit, the Court in deciding the matter as to costs, exercises a judicial discretion based upon certain principles and as such, its order is appealable. Similarly, as the order of the Court of appeal as to costs involves matters of principles, it is subject to second appeal. 52 Ind. Cas. 961 (Pat.).

——S. 35—Second Appeal—Question of costs.

There is no reason why when the findings on an issue are in favour of the defendant she should not get her costs, which have been disallowed arbitrarily. A second appeal on a question of costs is maintainable. 12 Cal. 197; 12 Cal. 271; 45 I. Ind. Cas. 948; 51 Ind. Cas. 622, foll. 2 Lah.L. J. 310.

——S. 35—Second appeal—Question of costs—Concurrent view of both Courts.

A question of costs cannot be allowed to be litigated in second appeal, where the two Courts below have taken the same view and when no substantial point on the merits arises in the case. 93 Ind. Cas. 1008=A.I.R. 1926 All. 419.

6. Appeal—Order for costs in.

——S. 35 and O. 41, R. 35—Appeal successful—Appellant should have costs in all Courts.

Where the appellant has succeeded before the Appellate Court he should have his costs in that Court and in the Courts below. A.I.R. 1943 Mad. 552=56 L.W. 182=1943 M.W.N. 214=(1943) 1 M.L.J. 285=211 Ind. Cas. 199.

——S. 35 and O. 41, R. 35—Appellant succeeding on legal aspect not argued in lower Court—No costs were awarded.

Where the appellant has partially succeeded as against respondent No. 1 alone and that too on the strength of the legal aspect of the case which was not argued in the Courts below he was not awarded his costs. A.I.R. (1943) Bom. 362=45 Bom. L.R. 761=210 Ind. Cas. 274.

——S. 35 and O. 41, R. 35—Second appeal allowed on a new point—Each party to bear its own costs in Court below.

Where the appeal is allowed upon a point which was not argued before the lower Appellate Court, whose decision so far as it goes was perfectly correct, each party should bear its own costs of the appeal in the lower Court. A.I.R. 1942 Bom. 95=44 Bom.L.R. 15=199 Ind. Cas. 723.

——S. 35 and O. 41, R. 35—Appeal allowed—Decision appealed from correct at that time—Respondent, not to pay costs of appeal.

Where a lower Court decides a case relying upon cases generally regarded as authority for the proposition accepted by the Court and subsequently a different pronouncement is made which either dissents from or explains away previous rulings and the decision is reversed on the basis of that ruling the party successful in the Court below should not be saddled with costs of the appeal or revision. A.I.R. 1930 All. 167=124 Ind. Cas. 23.

——S. 35 and O. 41, R. 35—Costs—Suit dismissed on preliminary ground—Reversal in appeal.

Where the defendants succeeded in securing the dismissal of the suit upon a preliminary ground proved in appeal to be untenable, they cannot evade liability to pay plaintiff's costs. (1904) 9 C.W. N. 25=32 C. 62.

——S. 35, O. 41, R. 35—Appeal—Successful appellant—Case not properly conducted in trial Court—Costs of trial Court refused.

Costs in the trial Court were refused to the successful appellant on the ground that it was due to his failure to present his case properly in the trial Court that judgment was given against him. 31 M.L.W. 65=122 Ind. Cas. 504=1930 M.W.N. 16=A.I.R. 1930 Mad. 218=58 M.L.J. 210.

——S. 35 and O. 41, R. 35—Second appeal—Successful—Case not properly represented in courts below—Costs disallowed.

Where the plaintiffs did not properly represent their case before the Courts below, but were successful in appeal.

Held, that they would not get any costs of the litigation. 104 Ind. Cas. 325=A.I.R. 1927 Lah. 723.

——S. 35 and O. 41, R. 35——Decree set aside in appeal—Discretion to disallow costs in court below.

The Appeal Court, while setting aside a decree passed by the lower Court (before which the question whether S. 22 of the Presidency Small Cause Courts Act applied was not relevant owing to the decision being in favour of the plaintiff) has discretion under S. 35 to disallow costs of the defendant in the lower Court and allow the costs in appeal only. 48 Bom. 531=26 Bom.L.R. 382=80 Ind. Cas. 766=A.I.R. 1924 Bom. 422.

——S. 35 and O. 41, R. 35—Question of costs not raised in first appeal—Successful second appeal—Costs in appeals disallowed.

Where a redemption suit was decreed by the Trial Court and the appellate Courts but in second appeal the defendant's costs of the suit were claimed on the ground that he was not guilty of any misconduct.

Held, that as the point had never been raised before the lower Appellate Court, he was entitled only to the costs in the trial Court. 48 M.L.J. 213=21 M.L.W. 252=86 Ind. Cas. 793=A.I.R. 1925 Mad. 778.

——S. 35, O. 41, R. 35—Costs against successful appellant—Case not properly put before lower Court.

As the plaintiff (appellant) did not present the matter to the Munsiff in the proper light it was ordered that he should pay the costs of the respondent in the High Court, although the appeal was decided in his favour. (1905) 9 C.W.N. 844=2 C.L.J. 70.

——S. 35, O. 41, R. 35—Appeal—Costs—Successful appellant—Grounds of appeal not properly drafted—To pay respondent's costs.

Where the grounds of appeal were loosely drafted consequent on a misunderstanding or want of understanding of the facts of the case, the Court disallowed the costs of the successful appellant and decreed the respondent's costs to be paid by appellant. 28 O.C. 203=85 Ind. Cas. 445=A.I.R. 1925 Oudh 561.

——S. 35 and Or. 41, R. 35—Appellant succeeding only on point which could have been rectified by lower Court itself—Costs, by whom to be paid.

Where the only point on which the appellant succeeds is a point which could have been rectified by an application to the lower Court for amendment of the decree and but for this point, he actually fails, he must pay the respondent's cost of the appeal. A.I.R. 1935 Rang. 24=155 Ind. Cas. 234.

——S. 35 and Or. 41, R. 35—Appeal—Not maintainable—Order appealed from bad on merits—No costs to respondent.

Where the order appealed from was held not appealable but was held as bad on merits, the appeal was dismissed without costs. 46 All. 733=83 Ind. Cas. 1035=22 A.L.J. 706=5 L.R.A. Civ. 482=A.I.R. 1924 All. 808.

——S. 35 and Or. 41, R. 35—"Parties to bear their own costs"—Appeal by one party—None by the other—Order for costs.

Where a trial Court leaves the parties to bear their own costs, and one of them appealed from such order while the other does not, the appellate Court cannot make the former pay the costs of the latter in the trial Court. 30 P.L.R. 600=118 Ind. Cas. 464=A.I.R. 1929 Lah. 177.

——S. 35 and Or. 41, R. 35—Appeal—Printing of unnecessary records.

Costs of printing a large portion of the paper book found unnecessary for the trial of the case disallowed. (1905) 32 C. 837 at 842=1 C.L.J. 437.

——S. 35 and Or. 41, R. 35—One of appellants withdrawing from appeal after printing charges had been incurred—Liability for costs.

Where one of the appellants withdraws from an appeal after all the printing charges, etc., had been incurred, he cannot challenge the trial Court's order as to costs, nor can he be excused from costs of the appeal. A.I.R. 1944 Oudh 139=1944 O.W.N. 37=216 Ind. Cas. 276.

——S. 35 and Or. 41, R. 35—Appeal against decree—Assignee and assignor of decree both contesting—Appeal allowed—Assignee is liable for costs not only of appeal but also of trial Court.

Where an appeal by the defendant against the decree passed against him is contested both by the assignor and the assignee of the decree, the assignee is liable to pay to the successful defendant not only the costs of the appeal but also of the trial Court. A.I.R. 1941 Mad. 762 (1)=(1941) 2 M.L.J. 119=54 L.W. 100=1941 M.W.N. 854.

——S. 35 and Or. 41, R. 35—Appeal against order refusing leave to amend—Allowed—Appellant to have his costs of appeal.

If leave to amend is refused and a successful appeal is brought, the appellant ought to have the costs of the appeal. Costs are always in the discretion of the Court, and peculiarly so where the payment of costs is imposed as a term of amendment. A.I.R. 1933 Bom. 304=35 Bom.L.R. 569=147 Ind. Cas. 786.

——S. 35 and Or. 41, R. 35—Appeal—Decree for damages — Reduction of — Costs in trial Court maintained.

In a suit for damages the Appellate Court while reducing the amount of compensation awarded to the injured party, can maintain the order for costs on the full amount of the claim, in a proper case. A.I.R. 1931 Lah. 648 (1)=32 P. L.R. 421=134 Ind. Cas. 207.

——S. 35 and Or. 41, R. 35—Successful appeal—Joint memo. of appeal by defendants from decree against them—Costs, one set.

Separate sets of Pleader's fee for appeal to each defendant cannot be awarded. A.I.R. 1942 Cal. 257=I.L.R. (1941) 2 Cal. 556=46 C.W.N. 227 =204 Ind. Cas. 618.

——S. 35 and Or. 41, R. 5—Application for stay of execution pending appeal—Costs in appeal.

In the absence of special circumstances the costs of an application for stay of execution pending an appeal should be costs in the appeal. A.I. R. 1932 Bom. 127=34 Bom.L.R. 230=56 Bom. 276=137 Ind. Cas. 375 (1) (F.B.).

7. Apportionment.

——S. 35—Mortgage suit — Several purchasers—Criterion.

In a mortgage suit in which purchasers of the various items of the mortgaged property are made defendants, the amount for which the various defendants had obtained decrees against the mortgagor is not a proper test to be applied in apportioning the costs of the suit. The value or area of the properties purchased is a better criterion. A.I.R. 1935 Mad. 121=1934 M.W.N. 321=40 L.W. 576=153 Ind. Cas. 1013.

——S. 35—Apportionment — Reversioner's suit—Alienees—Cost against.

In the suit, in which a reversioner plaintiff impleads various alienees as party defendants, if the judgment should go against the alienees, it is the established practice and in consonance with the reason of the thing that any costs that may be allowed to the plaintiff should be, so far as each set of defendants is concerned, proportionate to the value of the property in which such set of defendants may be interested. A.I.R. 1928 Mad. 16.

——S. 35—Several defendants—Separate valuation of interests of defendants—Proper order for costs.

Where a suit against three defendants in which the interest of each defendant was separate and was separately valuable is decreed, it is proper that each defendant contributes to the costs in proportion to the property held by him out of the estate in suit. A. I.R. 1932 All. 383=1932 A.L.J. 411=141 Ind. Cas. 91 (1).

——S. 35—Suit against joint tort-feasors—Joint decree for costs—Compromise with one defendant—No intention to treat order for costs as satisfied—Proportion of costs.

A number of defendants in their character as tort-feasors had wrongfully entered into possession of the property which belonged to the plaintiff, and it was to recover possession of such properties that the plaintiff instituted the suit. Different interests were claimed by the different sets of defendants in the properties that were the subject-matter of the suit. Appropriate decree was made as against the different sets of defendants in respect of the properties and one joint order for costs was made in favour of the successful plaintiff payable by the defendants jointly. Under a compromise with one of the defendants, the plaintiff released him from his liability for the costs but there was no intention to treat the entire order for costs as satisfied:

Held, that the decree-holder was entitled to proceed as against the other defendants for realization of a proportionate share of the costs and that in calculating the proportion of costs, the Court should take into account the proportion of the respective shares of several defendants in the property. A.I. R. 1936 Cal. 656=41 C.W.N. 174=165 Ind. Cas. 462.

8. Arbitration.

——S. 35—Question relating to costs incurred in litigation prior to reference also referred to arbitrators—Question, however, left undecided—Award not remitted on the ground that it had omitted to award costs:

Held, that in view of Sch. 2, para. 3 (2), Civil P. C., the Court had no discretion to award costs. A.I.R. 1932 All. 183=1931 A.L.J. 1155=54 All. 122=136 Ind. Cas. 789.

——S. 35—Arbitration — Award—Costs of—Reference held invalid.

The costs incurred before the arbitrator or umpire cannot be regarded as the costs of "a proceeding in the High Court" but are costs of a tribunal unconnected with Court. Where the Court holds that there is no valid reference to arbitration, it has no jurisdiction to pass an order as to costs of the award. 1928 M.W.N. 228=27 M.L.W. 803=109 Ind. Cas. 175=A.I.R. 1928 Mad. 370=54 M.L.J. 580.

9. Commissioner's costs.

——S. 35—Commissioner — Appointment of Commissioner in partition suit—Whether can apply to Court for payment of costs—Bill of Commissioner of partition, if can be taxed.

A stranger may apply in proper circumstances, for costs and a Commissioner of partition is justified in applying to the Court which appointed him for payment of costs if he is unable to receive payment of costs to which he is entitled.

The bill of a Commissioner of partition can be taxed by Taxing Officer. A.I.R. 1941 Cal. 144= I.L.R. (1940) 2 Cal. 102=194 Ind. Cas. 13.

10. Company.

——S. 35—Action by or against company in liquidation—Successful litigant, if entitled to costs in full in priority over other ordinary creditors—Other creditors in same position—Both, if rank pari passu.

A successful litigant against a Company in liquidation is entitled to be paid his costs in full in priority over other ordinary creditors except where there are other creditors in the same position as himself when

they and he will rank *pari pasi* as regards the fund available for the discharge of their debts.

The liquidator, however, can show that the conditions of the assets of the Company are such that immediate payment cannot be made. A.I.R. 1942 Lah. 10=I.L.R. (1942) Lah. 742=43 P.L.R. 648 =197 Ind. Cas. 858.

——S. 35—Company—Winding up proceedings —Costs of.

Costs of unsuccessful litigation incurred by a liquidator, whether in a voluntary or compulsory winding up are payable to the party entitled out of the assets of the company in priority to the costs of the liquidation. This rule applies whether the order simply directs payment of costs, or directs that the costs be paid out of the assets of the company, or that the liquidator do pay the costs, with liberty to recoup himself out of the assets. The onus is on the liquidator to show that the condition of the assets is such that immediate payment cannot be made and if he shows that other persons have a prior right to, or entitled *pari passu* with the successful litigant, no order for payment will be made without providing for the other claims. The date of the order gives no priority, but payment will not be indefinitely postponed until all claims have come in: (1895) 1 Ch. 758, Rel. on. 52 Bom. 477=30 Bom.L.R. 549= 110 Ind. Cas. 33=A.I.R. 1928 Bom. 252.

——Ss. 35, 141—Creditor's application for liquidation of company not bona fide—Costs—Company.

Where it is clear that the action of the petitioning creditors in making the application for the winding up and in insisting upon further proceedings in liquidation, is not *bona fide*, the entire costs of the liquidation should be paid by him. In the absence of a clear provision in the Companies Act dealing with a case of this kind, the matter is governed by S. 35. Under that section the High Court can pass proper orders in this behalf. A.I.R. 1934 Lah. 746=37 P.L.R. 360=155 Ind. Cas. 852.

11. Compensatory costs.

See CIVIL P. C., S. 35-A.

——S. 35—Company—Winding up—Petition for, dismissed—Company is entitled to costs—Costs to be awarded explained—Counsel for company and counsel for opposing share-holders instructed by same solicitors.

When a petition for winding up a company is dismissed, the company is entitled to its costs. The opposing share-holders are entitled to one set of costs, and the opposing directors are also entitled to one set of costs. Where the counsel for the company and counsel for the share-holders are instructed by the same solicitors, costs of separate counsel should not be allowed.

This practice does not, however, in a proper case fetter the discretion of the Court in any way, to grant the costs of separate counsel although instructed by the same solicitors. A.I.R. (Vol. 29) 1942 Bom. 231=44 Bom.L.R. 387=203 Ind. Cas. 116.

12. Construction.

(a) Costs, order for.
(b) Decrees.
(c) Miscellaneous.

(a) Costs, order for.

——S. 35—"Appeal dismissed with costs," meaning of.

"Appeal dismissed with costs" is the ordinary expression which the Judge uses, when he means that the appellant having failed in the appeal has to pay costs of the respondent. A.I.R. 1939 Bom. 493=41 Bom.L.R. 949=186 Ind. Cas. 105.

——S. 35—'Costs of a party'—Meaning, costs according to the rules.

When the judgment awards costs to a party it implies the costs deemed to be such according to the rules. A.I.R. 1932 All. 337=54 All. 490=1932 A. L.J. 272=136 Ind. Cas. 817.

——S. 35—'Costs of this suit' in decree—Costs due to joining of additional defendants.

The words 'costs of this suit' in a decree, should be construed as meaning all costs of the suit in the absence of any qualifying words in the decree, and include plaintiff's costs incurred due to the impleading of an additional defendant against whom no relief is obtained.

If the facts and the circumstances of the case are such that in a state of uncertainty it is reasonable for a plaintiff to join both the defendants in order to ascertain which of the two is the really guilty one, then "it is part of the reasonable costs of the action that the costs of the action which you have launched against one of those defendants, and who succeeded in defending himself, should be borne by the man who is to blame." A.I.R. 1933 Bom. 106 =57 Bom. 589=35 Bom.L.R. 105=142 Ind. Cas. 367.

——S. 35—'Costs in the cause'—Meaning.

The words 'costs in the cause' do not mean that those costs will follow the event but that they remain to be dealt with by the Court at the hearing. (1900) 25 Bom. 230. Overruled in 50 Bom. 430=2 Bom. L.R. 244.

——S. 35—'Costs in the cause,' meaning of—Effect.

When the Judge either in Chambers or on motion makes an order that the costs of application or motion shall be costs in the cause, he makes an order that those costs should be received by the party who gets the general costs of the action and it is not open to the Judge who hears the case to interfere with that order. 25 Bom. 230, Overruled. Where in the orders in Chambers for the examination of one witness *de bene esse* and the examination of another witness on commission, it was ordered that the costs should be costs in the cause. *Held*, that the Judge who heard the case had no jurisdiction to interfere with those orders whereby those events became part of the general costs of the action to which the successful defendants were entitled, although it would have been open to the Judge to have held that the defendants by their conduct were not entitled to the whole of the costs of the action. 50 Bom. 430=28 Bom.L.R. 1283=97 Ind. Cas. 133=A.I.R. 1926 Bom. 596.

——S. 35—'Costs would abide the result—Meaning—Discretion of lower Court.

The words 'costs would abide the result' do not mean costs would follow the result and the discretion of the Subordinate Court is not curtailed by the use of the phrase in an order of the Appellate Court.

4 C.W.N. 343 diss. 39 Mad. 476 (note)=24 Ind. Cas. 96. Affirmed on appeal. 39 Mad. 476=29 Ind. Cas. 203.

——S. 35—'Costs to abide and follow result'—Meaning.

Where the High Court ordered 'that the costs shall abide the result,' it only implies that the order as to costs is to await till the decision is given in the case. It has not the effect of fettering the discretion of the trying Court as to the awarding of costs to the appellant. The order does not make it incumbent upon the Court below to award costs to the person who succeeds. But if the words used were 'to abide and follow the result,' then it may be interpreted as conveying the suggestion that the successful party must be given his costs. The words 'abide the result' are equivalent to the words 'costs in the cause'. 39 Mad. 476=28 M.L.J. 441=(1915) M.W.N. 330=29 Ind. Cas. 203. [Affirming on appeal 24 Ind Cas. 476.]

——S. 35 and O. 23, R. 1—Order as to costs—Remand to lower Court with direction that 'costs to abide and follow the result'—Withdrawal of suit after remand—Order as to costs.

An order of remand directed the costs of the appeal 'to abide and follow the results.' After remand the case was withdrawn. *Held,* that the meaning of the direction was that costs should be paid to the party who ultimately succeeded in the litigation. The event was nothing but the outcome or result of proceedings and the withdrawal of the suit is an event within S. 35, Cl. (2) of the C. P. Code and if the Court did not order costs it must assign reasons. Where it did not appear that the Court applied its mind as to the costs of the appeal it was a case for revision by the High Court. 24 M.L.T. 212=(1918) M.W.N. 561=8 L.W. 219=47 Ind. Cas. 862.

——S. 35—'Costs incurred by defendants in lower Court'—Construction.

The words 'costs incurred by defendant in lower Court' mean the costs as entered in the superseded decree of the first Court. 11 C.L.J. 207=14 C. W.N. 556=5 Ind. Cas. 342.

——S. 35—Costs incurred in the High Court—Meaning of.

Costs incurred by an appellant before the High Court, include the printing charges and other expenses incurred by him in the High Court, for presentation of the appeal to the Privy Council. A.I. R. 1937 Pesh. 3=167 Ind. Cas. 879.

——S. 35—'Court rate' of interest.

There is no such thing as a 'Court rate' of interest. What is usually so called is merely the maximum rate which the Court may order to be paid on the costs under S. 35. A rate of 6 per cent. per annum may in some cases be the appropriate rate of interest to allow for damages. 94 Ind. Cas. 971=A.I.R. 1926 Nag. 363.

——S. 35—Pure attorney and client costs—Meaning of.

'Pure' attorney and client costs signify costs which are allowed only by reason of some special order or which are allowed by reason of the written consent of client and costs which, in the case of a bill taxed wholly as between attorney and client, are nevertheless put upon the client, and not upon the party or fund who or which has been directed to bear them as between attorney and client. Such costs are taxed as 'attorney and client pure". A.I.R. (Vol. 29) 1942 Cal. 468=I.L.R. (1942) 1 Cal. 273=202 Ind. Cas. 200.

——S. 35—'Suit dismissed with costs'.

The expression 'suit dismissed with costs' in a decree means that the plaintiff is to pay the costs of the defendants, and that if there are more defendants than one, who appear, separately, all the defendants are entitled to their costs separately under such an order. A.I.R. 1941 Bom. 16=42 Bom.L.R. 878=I.L.R. (1940) Bom. 837=192 Ind. Cas. 174.

——S. 35—'Suit dismissed with costs'—Order showing two defendants who have incurred separate costs—Plaintiff must pay double set of costs.

The words 'plaintiff's suit is dismissed with costs' must mean that the plaintiff is to pay the costs of the defendants; he would have to pay the costs of all the defendants since *prima facie* every defendant is entitled to defend the suit in such manner as he thinks fit and with the help of any pleader in whom he has cofidence. Where the order shows on its face that there are two defendants who have incurred separate costs, the matter is made additionally clear. In such a case the order means that the plaintiff must pay the costs of both defendants as specified in the order and not only one set of costs in respect of both the defendants, if the plaintiff did not ask for an order that separate costs be not allowed. A.I.R. 1939 Bom. 338=41 Bom.L.R. 575=I.L.R. (1939) Bom. 478=184 Ind. Cas. 15.

——S. 35—'Suit dismissed with costs'—Several defendants.

The expression 'suit dismissed with costs' means that plaintiff is to pay the costs of all the defendants, *i.e.,* two or more sets, if separate costs have been incurred. An order for a single set of costs must be asked for at the time of hearing. A.I.R. 1942 Bom. 284=44 Bom.L.R. 629=I.L.R. (1942) Bom. 782=203 Ind. Cas. 352.

——S. 35—Costs in the decree—If includes costs awarded in interlocutory proceedings as costs in the cause.

Where in an interlocutory proceeding costs were ordered to be costs in the cause and a decree is ultimately passed in favour of one side or the other for the costs, the costs of the interlocutory proceeding must be deemed to be included in the final order where the Judge does not expressly exclude them. 26 Bom.L.R. 282=80 Ind. Cas. 263=A.I.R. 1924 Bom. 398.

——S. 35—Joint appeal by defendants—'Allowed with costs in appeal and Court below'—Construction.

A decree in favour of the plaintiff recorded the costs of the several defendants separately, each being credited with full pleader's fee. This decree was reversed on appeal preferred by all the defendants jointly. The appellate decree ordered the plaintiff to pay the defendants the costs of the appeal, the details and amount of which were given, and the costs incurred by them in the lower Court.

Held, that the defendants were entitled to the separate costs as entered in the decree of the 1st Court. (1909) 11 C.L.J. 207=14 C.W.N. 556=5 Ind. Cas. 342.

(b) Decrees.

——S. 35—Appellate decree—Silent as to costs of trial Court.

Where the appellate decree is silent as to costs of the lower Court the decree of the Trial Court is the guide to determine the costs. 10 L.B.R. 280=62 Ind. Cas. 209=13 Bur.L.T. 173.

——S. 35—Decree—Costs against several defendants—Liability under.

If costs are awarded against a number of defendants or a number of respondents without indicating proportion in which these costs shall be borne by the different respondents, such an order is always taken to mean that the respondents, or the defendants, as the case may be, are jointly and severally liable for the costs and the order for costs may be executed against any one of them, who will have a right of contribution against others in a case of this nature. 1923 P.H.C.C. 17=70 Ind. Cas. 782=A.I.R. 1923 Pat. 215.

——S. 35—Joint decree for costs—Nature of liability of judgment-debtors—Death of some of defendants during appeal—Non-impleading of legal representatives—Effect—Rights and liabilities of surviving judgment-debtors—Contribution, right of—Doctrine of release—Applicability to India—Contract Act (9 of 1872), S. 43.

Where a decree for costs does not indicate the proportions in which the costs are to be borne by the judgment-debtors, the decree must be taken to be imposing a joint and several liability on all the judgment-debtors.

On an application for execution of a decree, it was objected that six of the original defendants had died during the pendency of the appeal to the Privy Council and that as their legal representatives were not brought on record, there was a release by the decree-holder of the interest of those judgment-debtors and as a result of it, the interests of all the other judgment-debtors had been released from liability:

Held, (i) that this objection based on an old English doctrine was not applicable to India;

(ii) that even if the doctrine were to apply, there was no actual release in the case;

(iii) the decree in question cannot be regarded as split up merely by reason of the failure of the plaintiff to bring on record the legal representatives of the six deceased defendants;

(iv) the right of one of the judgment-debtors to recoup himself *pro rata* from the deceased judgment-debtors cannot affect his liability for the rest of the decree with whatever right of contribution he may have against the other judgment-debtors. A.I.R. 1933 Pat. 24=13 P.L.T. 619=140 Ind. Cas. 874.

——S. 35—Appeal by one of the plaintiffs—Other made a respondent—Decree mistaking both as appellants—Costs in appeal—Right to.

When one of the plaintiffs refused to appeal and was made a respondent by the plaintiff who appealed and was misstated in the decree as appellant,

Held, both plaintiffs were entitled to costs of the Court of the first instance, but plaintiff-appellant alone was entitled to costs in the first appellate Court and in the High Court. 20 All.L.J. 980=71 Ind. Cas. 424=4 L.R.A. (Civ.) 53=A.I.R. 1923 All. 119.

——S. 35—Judgment for proportionate costs and interests from date of suit—Construction.

Interest should not be allowed until the costs have actually been incurred. A judgment decreed a certain sum in favour of plaintiff with proportionate costs and future interest from the date of suit till realization at one per cent. per month. *Held,* the interest was payable only on the principal sum and not on the costs. 60 Ind. Cas. 345 (Lah.).

——S. 35—Suit by guardian on behalf of ward—Ward major prior to suit—"Dismissed with cost of defendants"—Person liable.

Ward cannot be made liable for casts he strictly being not party to suit. A.I.R. 1938 Oudh 213=1938 O.W.N. 779=1938 O.L.R. 369=177 Ind. Cas. 69.

——S. 35—Mortgage decree—Decree for costs.

Unless there is a specific reference to any personal order for payment of costs, a decree for costs should not be interpreted to imply a personal decree for costs. 7 O.W.N. 138=A.I.R. 1930 Oudh 167=125 Ind. Cas. 170=5 Luck. 595.

——S. 35—Decree—Construction—Defendants declared entitled to costs from plaintiff with first charge on certain property—Personal liability of plaintiff for costs.

Where a decree directs that the defendants appellants will be entitled to half their costs throughout from the plaintiff-appellant which will be paid as a first charge from the sale proceeds of Item No. 2 of the hypotheca: it must be held that the decree gave the defendants a personal decree against the plaintiff with a charge upon the sale proceeds of the hypotheca and hence the costs were recoverable personally from the defendant. 1937 M.W.N. 292.

——S. 35—Decree against defendant with costs—Appeal as to part of—Allowed—Right to recover costs incurred, if arises.

Where only portion of a decree is set aside as against the defendant, and the remainder of the decree is not appealed against, then unless there is an express order by the appellate Court allowing the defendant to recover costs incurred by him in the first Court it must be held that these costs cannot be recovered, and did not constitute lawful debt within the meaning of Ss. 59 and 60, and the defendant is not entitled to appropriate any amounts paid by plaintiff towards them. 104 Ind. Cas. 799=A.I.R. 1927 Cal. 906.

(c) Miscellaneous.

——S. 35—Compromise of suit against all defendants except one—Decree against that one with costs—Withdrawal of appeal by him—Dismissal with liberty to bring fresh suit—Liability for costs of trial Court.

Plaintiff compromised the suit with all defendants except one which was decreed with costs. On appeal, defendant was allowed to withdraw from the appeal and was dismissed from the suit with liberty to bring a fresh suit against the plaintiff no order being made as to the costs of the appeal. *Held,* that the plaintiff was entitled to execute the decree for costs of the original Court as the effect of the order of the Appellate Court was not to absolve the defendant from his liability for costs under the decree of the first Court. 16 Ind. Cas. 381 (Cal.).

——S. 35—Incidental proceedings—Order on—Non-mention of costs in.

Failure to make any order with reference to costs

in respect of incidental order connected with main proceeding, does not imply that the Courts have refused them. A.I.R. 1938 Bom. 10=39 Bom.L.R. 820=173 Ind. Cas. 489.

13. Contribution.

See also CONTRIBUTION.

——S. 35—Costs—Contribution, suit for—Defendants if jointly liable—Equitable principles.

Where in pursuance of a decree with costs, the decree-holder recovered the costs from three of the defendants and they instituted a suit for contribution against the remaining defendants for costs recovered by the decree-holder, and sought to make all their co-defendants jointly liable;

Held, that the defendants could only be liable to the extent of their respective shares.

The very essence of a suit for contribution is that certain monies have been paid on behalf of each of the defendants and in equity they would only be liable for the proportionate share of the costs so paid on behalf of all. A.I.R. 1933 Lah. 960=145 Ind. Cas. 250.

——S. 35—Joint decree for costs—Non-contesting pro forma defendants—Realisation from one of them—Suit for contribution.

The plaintiff and defendant in the contribution suit were pro forma defendants in a suit on mortgage. That suit was decreed in appeal with costs—Parties to the contribution suit were also made liable because they were *ex parte*.

It was contended that the plaintiff must show that some equity exists between him and his co-judgment debtors making the latter liable.

Held, the suit was not maintainable. (1910) 32 A. 585=7 A.L.J. 720=6 Ind. Cas. 684.

——S. 35—Joint decree for costs—Defence of parties consistent—Costs paid by some—Contribution.

A suit for contribution for costs paid by one of two or more judgment-debtors in a suit for partition where the case of the plaintiff in the contribution suit was not inconsistent with those of the others, he being a mortgagee under one of them, lies. (1902) 26 M. 373.

14. Damage suits.

——S. 35—Damages suit for—Claim allowed in part—Full costs.

It is very difficult to assess a claim for moral damages, and therefore it is hardly right to order proportionate costs. 29 M.L.W. 604=1929 M.W.N. 341=119 Ind. Cas. 149=A.I.R. 1929 Mad. 493.

——S. 35—Damages—Valuation of claim extremely difficult—Full costs.

In a case where it is extremely difficult for the plaintiff to value his claim at a particular figure, he is entitled to his full costs and not merely proportionate costs. 51 All. 509=1929 A.L.J. 303=115 Ind. Cas. 458=A.I.R. 1929 All. 214.

——S. 35—Damages—Claim for—Part only allowed—Full costs.

Where the plaintiff was put to great difficulties owing to the act of the defendants, full costs of plaintiff were allowed. (1907) 6 C.L.J. 398.

——S. 35—Damages for libel—Decree for a small sum—Costs allowed in discretion.

Costs are in the discretion of the Court which it must exercise on proper materials. A plaintiff guilty of misconduct in commencing the suit or the course of trial can be deprived of his costs even if successful. In a suit for damages for libel, plaintiff if he succeeds, is entitled to his costs, though damages are small, but not nominal. 15 Bom.L.R. 130=19 Ind. Cas. 98.

——S. 35—Damages—Claim exaggerated—Proportionate costs.

Exaggerated claim for damages justifies award of proportionate costs. 1924 M.W.N. 373=78 Ind. Cas. 573=20 M.L.W. 60=A.I.R. 1924 Mad. 692 =46 M.L.J. 366.

——S. 35—Damages—Suit for—Vendee undertaking to pay debt from vendor to a third person—Failure of vendee—Cause of action—Damages—Costs.

Defendants purchased property from the plaintiff and agreed to pay the price or part of it to his creditor or creditors. For three years they failed in making any payment and thus the plaintiff's other property was still under encumbrance though it ought to have been free from encumbrance. The property was not actually sold as threatened by the creditors. The defendants satisfied the claim after suit; *Held*, that the plaintiff had a cause of action at the date of suit and was entitled to costs though the defendants satisfied the claim afterwards. 34 Mad. 479=8 M.L.T. 188=(1910) M.W.N. 302=7 Ind. Cas. 269.

——S. 35—Damages—Claim excessive—Costs in discretion of Court.

Even in a suit for damages for alleged libel making a claim for an amount much higher than that which the Court in the circumstances of the case might think fit to grant him, the costs are in the discretion of the presiding Judge. 10 Lah. 816=117 Ind. Cas. 884=A.I.R. 1929 Lah. 129.

——S. 35—Damages—Costs of suit.

When a suit for damages is pursued in a vindictive spirit and with a desire of infliction of punishment, the Appellate Court ought not to interfere with the award of damages by the trial Court, unless the decision appears erroneous; and also with the discretion of allowing costs unless some misapprehension of facts or violation of principle or absence of the exercise of the discretion is apparent. 24 C.W.N. 352=58 Ind. Cas. 421.

15. Disallowance (of costs).

(a) Conduct.
(b) Delay.
(c) False pleas.
(d) Fraud.
(e) Grounds.
(f) Misconduct.
(g) Negligence.
(h) Technical plea.

(a) Conduct.

——S. 35—Successful plaintiff—Deprivation of costs—Conduct not fair.

Where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, no omission or neglect which would induce the Court to

deprive him of his costs, the Court has no discretion and cannot take away the plaintiff's right to costs and it is, therefore, immaterial what the defendant's action is alleged to be. The *bona fides* of his defence is not material. The plaintiff cannot be deprived of his costs unless he has done something which would warrant the Court depriving him of his costs.

But where it appeared that if the plaintiff firm had been more successful in bringing their claim to the notice of the defendant or if when they had set the final notice of demand, they had given rather more than a portion of a working day for the defendant to come and inspect the vouchers, there might have been no suit filed at all:

Held, that an order depriving of the plaintiff of his costs was justified. A.I.R. 1933 Rang. 160=145 Ind. Cas. 376.

——S. 35—Plaintiff succeeding on issue not disclosed in plaint but in rejoinder—Plaint not amended—Costs refused.

It is necessary to penalise parties who will not take the trouble to observe the rules of pleading and who pay no attention to the repeated protests of the High Court. Where the plaintiff's real case did not emerge till their rejoinder and the issue on which the plaintiffs succeeded in their appeal was taken from their rejoinder without any attempt at amendment of their plaint the appellate Court deprived them of their costs throughout. A. I. R. 1946 Nag. 203=I.L.R. (1946) Nag. 425=1946 N.L.J. 165.

——S. 35—Conduct not fair—Costs were disallowed. A.I.R. 1944 Nag. 282=1944 N.L.J. 433=I.L.R. (1944) Nag. 638.

——S. 35—Costs—Disallowance of—Inconsistency.

Raising inconsistent pleas regarding effect of document whose construction was in issue was held sufficient to disentitle successful party to costs. 33 All. 344=38 I.A. 104=14 O.C. 133=15 C.W.N. 497=8 A.L.J. 465=13 C.L.J. 519=9 M.L.T. 507=13 Bom.L.R. 404=21 M.L.J. 637=(1911) 2 M.W.N. 242=10 Ind. Cas. 285 (P.C.).

——S. 35—Tort — Defamation — Slander — Imputation of bad character towards step-daughter—Defence of truth—Plaintiff not examining step-daughter—Plaintiff pursuing both civil and criminal remedies:

Held, that there were sufficient reasons for disallowing the plaintiff his full costs. A.I.R. 1936 Rang. 332=164 Ind. Cas. 385.

——S. 35—Conduct of successful party harassing opposite party—Each party ordered to bear its own costs.

Where the course adopted by the successful party had been unnecessarily harassing to the opposite parties notwithstanding he has succeeded, each party should bear its own costs of all the proceedings. A.I.R. 1943 Pat. 403=10 B.R. 322=211 Ind. Cas. 41.

——S. 35—Nuisance—Suit for injunction and damages—Nuisance substantially ceasing to exist during pendency of suit—Suit dismissed:

Held, on facts that as the defendants had not pointed out to the plaintiff that by the building of the deadening wall, the nuisance would abate substantially, and had not asked him to wait till the wall was finished, costs should be disallowed to the defendants in the trial Court. A.I.R. 1932 Mad. 779=1932 M.W.N. 1017=36 L.W. 833=63 M.L.J. 868=56 Mad. 289=141 Ind. Cas. 241.

(b) Delay.

——S. 35—Delay in making application.

Delay in making the application is a ground for refusing costs even if the applicant succeeds. A.I.R. 1933 All. 853=1933 A.L.J. 942=148 Ind. Cas. 352.

——S. 35—Unexplained delay—Refusal of costs.

In cases of unexplained delay costs might be refused. A.I.R. 1931 P.C. 289=61 M.L.J. 623=34 L.W. 676=8 O.W.N. 1066=35 C.W.N. 1287=33 Bom.L.R. 1536=54 C.L.J. 372=1931 A.L.J. 1116=58 I.A. 381=55 Mad. 93=134 Ind. Cas. 1080 (P.C.).

(c) False pleas.

——S. 35—Petitioner succeeding — Petitioner guilty of a false statement in his petition—Half costs disallowed.

Where a petitioner under S. 45, Specific Relief Act contained a false allegation (not material to the decision) the petitioner though successful was awarded only half his costs. 4 Bom.L.R. 768=27 Bom. 307=5 Bom.L.R. 133.

——S. 35—Mutwalli ordered to pay half costs from his own pocket—Order held justified.

Where a *mutwalli* has needlessly denied the execution of documents which he knew to be genuine, an order that he should pay half costs from his own pocket is justified. A.I.R. 1944 All. 231=1944 A.L.J. 303=1944 O.W.N. 129=217 Ind. Cas. 329.

——S. 35—Plaintiff failing to prove facts pleaded by him—Suit should not be dismissed—Proper way to punish plaintiff is to disallow him his costs. A.I.R. 1942 Nag. 4=1941 N.L.J. 530=198 Ind. Cas. 764=I.L.R. (1942) Nag. 561.

(d) Fraud.

——S. 35—Party trying to profit by his fraud.

The matter of costs is always a matter of discretion for the Court, and that discretion cannot be said to have been improperly exercised in refusing costs to a party who was endeavouring to profit by his own fraud. 123 Ind. Cas. 39=A.I.R. 1930 Mad. 707.

——S. 35 and O. 41, R. 35—Party succeeding guilty of fraud—Costs need not follow the event.

Where the party succeeded in the appeal he was not given costs in the first Court as he was guilty of fraud. (1902) 7 C.W.N. 180=30 Cal. 218.

(e) Grounds.

——S. 35—Disallowance—Grounds for—Suit proper on date of plaint—Refusal of relief due to change in law.

The Court can in its discretion disallow costs to the successful party where the suit was based on a state of law which since has been overruled either by an enactment of the Legislature or by the decisions of superior tribunals. 43 Mad. 61=37 M.L.J. 271=26 M.L.T. 219=10 L.W. 326=(1919) M.W.N. 792=53 Ind. Cas. 7.

——S. 35—Subsequent events—Plaintiff entitled to relief asked for on date of plaint but becoming not entitled due to subsequent events.

Where owing to the events which transpired subsequent to the filing of the suit, the plaintiff was refused the relief which he asked for and which he was entitled to on the date of the plaint:

Held, that each party should bear his costs. A. I.R. 1943 Mad. 231=55 L.W. 702=(1942) 2 M. L.J. 603=1942 M.W.N. 669=207 Ind. Cas. 321.

——S. 35—Claiming high rate of interest—Good ground for disallowance.

A Court disallowing costs on the ground that the interest claimed is very high, exercises a very proper discretion. 9 O.L.J. 442=69 Ind. Cas. 657=A.I. R. 1923 Oudh 8.

——S. 35—Contention prevailing in High Court not advanced in lower Court—Costs.

Where the contention which has prevailed in the High Court has not been advanced before the Board and the lower Court, the parties were ordered to bear their own costs in the High Court. A. I. R. 1944 Lah. 126=215 Ind. Cas. 46.

——S. 35—Contention successful not taken in Court below—Costs disallowed.

If an objection as to jurisdiction of Court not raised in the first Court, is successfully taken in the High Court, the High Court has jurisdiction not to allow costs. 118 Ind. Cas. 533=A.I.R. 1929 Lah. 246 (1).

——S. 35—Counsel not assisting Court—Power to disallow costs.

Where the Court has derived no assistance from the counsel for appellants it can deprive the appellant of the costs of the appeal, even if the appeal is allowed. 134 Ind. Cas. 489=32 P.L.R. 378.

——S. 35—Failure to produce documents—Costs disallowed.

Apart from the question of the onus of proof, it lies upon a party, whether he be plaintiff or defendant, to produce all such material documents relating to the suit as may be in his possession even though no application has been made for their production by the other party. High Court would deprive party of costs for failure to do so. A.I.R. 1917 P.C. 6, Rel. on. 1929 A.L.J. 262=112 Ind. Cas. 791=A. I.R. 1929 All. 134.

——S. 35—Disallowance of costs—Suit for damages—Excessive claim, if a good ground.

Per *Sanderson, C.J.*—Costs are in the discretion of the Judge a judicial discretion to be exercised on legal principlees, not by chance nor merely by caprice nor in temper. The trial Judge should not take into consideration matters which must involve speculation on his part as to the attitude of the respective parties. Everything which increases the litigation and the costs and which places on the deft. a burden which he ought not to bear in the litigation is a perfectly good cause for depriving the plaintiff of costs. There is nothing wrong in itself in claiming exemplary damages, for, Courts themselves award such damages. The ordinary rule is that cost, follow the event. The Court may, however, direct otherwise but if it does so. it must state its reason in writing. This provision was enacted botl. to secure a proper exercise of discretion and in order that the Court of Appeal may be in a position to control the order and see whether there in good cause for departing from the general rule. The Appellate Court must itself decide whether the order should be sustained, whether the reasons required to be stated are good reasons founded on the facts of the case. There are certain well-known principles on which a successful party may be deprived of his general costs. But where the Court purports to act on these principles it is open to the Appellate Court to enquire whether on the facts these principles have been rightly applied. The mere fact that plaintiff claims more than he gets is no ground for depriving him of costs, unless it is proved that the costs of the action have been increased by his claim. 24 C.W.N. 352=58 Ind. Cas. 421.

——S. 35—Disallowance of costs—Exaggerated claim.

Though a party claimed more than was found owing to him it is not *per se* any sufficient ground for refusing him, his costs. The successful party is always entitled to his costs unless he is guilty of some misconduct. 3 O.L.J. 204=34 Ind. Cas. 690.

——S. 35—Suit contested—Fact that no notice was issued to defendant before suit, if ground for refusing costs to plaintiff.

When a suit has been contested, the fact that the plaintiff did not issue notice to the defendant before instituting the suit is no reason for depriving the plaintiff of his costs of the suit. A.I.R. 1942 All. 331=1942 A.L.J. 443=I.L.R. (1942) All. 745=204 Ind. Cas. 133.

——S. 35—Successful defendants disallowed costs—Ground they were responsible for suit.

The Court refusing relief to plaintiff passed an order disallowing costs to the defendants on the ground that they were not in his opinion "entirely free from blame so far as the institution of the present case was concerned." It was not held that the defendants had in any way conducted the defence in a manner so as to disentitle them to their costs, but their conduct prior to the date of suit was referred to. There was clear evidence on the record that the defendants had expressly raised the very objections which they raised in the suit in their letter to the plaintiff prior to the suit:

Held, that the order disallowing costs to the defendant and the observations in the judgment against them were not justified. A.I.R. 1936 Sind 52=162 Ind. Cas. 837.

——S. 35—Suit for recovery of money deposited—Implied agreement to repay on demand—Absence of demand—Costs disallowed.

Held, that plaintiff should not be non-suited on this ground as the suit itself constitutes demand and the only thing the Court would normally do would be not to allow the plaintiff his costs because of the absence of demand. A.I.R. 1934 Lah. 179=35 P.L.R. 91 =147 Ind. Cas. 338.

——S. 35—Correspondence of Solicitor undignified—Solicitor whether can be deprived of his costs.

Judges have a very wide discretion in the matter of costs, but it is a discretion which must be exercised judicially, for a Judge to deprive a Solicitor of costs because the Judge disapproves the style of his

correspondence and would be glad to see the controversial methods of Solicitors generally altered, is to confuse the functions of a Judge with those of a school-master. A.I.R. 1935 Bom. 150=37 Bom.L.R. 39=59 Bom. 443=155 Ind. Cas. 945.

——S. 35—Discretion—Subsistence allowance of party—Disallowance, ground for.

It is not a proper exercise of discretion to disallow, except for definite reasons, the subsistence allowance of a party or his agent whose attendance is essential on the date of hearing and the fact that the amount is a paltry one is no ground for disallowing it. A.I.R. (Vol. 32) 1945 Pat. 184=23 Pat. 927=11 B.R. 439=219 Ind. Cas. 510.

——S. 35—Costs—Disallowance—Hard case for other side—Not a ground.

The mere fact that the Court considers that the case is a hard one for the defendant is not a sufficient ground for disallowing the costs of the plaintiff unless the plaintiff has committed some fault. A.I.R. 1931 Oudh 9=7 O.W.N. 1055=6 Luck. 378=129 Ind. Cas. 165.

——S. 35—Disallowance of costs—Difficult question of law.

The fact that questions of law raised are not easy of solution, is not a good ground for not allowing the costs of a successful litigant. 23 M.L.J. 638=12 M.L.T. 547=17 Ind. Cas. 609.

——S. 35—Costs allowed in trial Court—Disallowed in appeal—No proper grounds—Unjustified.

In an appeal on a suit on a mortgage, it appeared that the appellants were merely calling upon the plaintiff to give effect to a stipulation in a mortgage deed and the settlement entries were in their favour. It also appeared that the plaintiff did not offer the full mortgage money to the defendants before bringing the suit. The lower Appellate Court disallowed costs to the appellants which had been allowed by the Court of first instance:

Held, that there was no good ground for disallowing the costs to the appellants. A.I.R. (Vol. 21) 1934 Pat. 397=148 Ind. Cas. 429.

——S. 35—Offer of money in full satisfaction—Sum less than amount due—Refusal—If ground for disallowance.

Where a defendant offers a sum which is much less than what is due to plaintiff and plaintiff refuses to accept it in full satisfaction, though he is ready to receive it as a part payment, such refusal does not disentitle plaintiff to the full costs for the claim finally decreed. 41 Ind. Cas. 820 (U.B.).

(f) Misconduct.

——S. 35 — Disallowance of—Misconduct—Defendant forcing plaintiff into litigation.

Where a defendant by his fraudulent conduct in inserting terms in a compromise forces a plaintiff into litigation which could have been avoided if the defendant had not acted fraudulently, he is not entitled to his costs even if he is successful in the litigation brought about by him. 21 C.W.N. 1137=(1917) M.W.N. 636=7 L.W. 133=42 Ind. Cas. 236 (P.C.).

——S. 35—Disallowance of cost to successful defendant—Misconduct.

Where a defendant induces plaintiff to enter into an agreement with him but later on disputes his liability under it on the ground that it is opposed to a provision of law and the plaintiff's suit is dismissed on this ground, the defendant is not entitled to get his costs. 14 C.W.N. 1031=7 Ind. Cas. 2.

(g) Negligence.

——S. 35—Successful party negligent.

It is the clear duty of the Municipal Board to recover its taxes promptly and its allowing taxes to accumulate for 12 years is nothing short of a scandal. Hence, even though the Municipal Board was within its legal rights in demanding the arrears for 12 years no costs were allowed. A.I.R. 1943 All. 115=1943 A.L.J. 53=I.L.R. (1943) All. 453=205 Ind. Cas. 539 (F.B.).

(h) Technical plea.

——S. 35—Successful party's just claim defeated by technical plea.

Where a party succeeded in defeating the creditor's just claim by reason of a technical defect in the frame of the suit, the successful party was not allowed his costs. A.I.R. (Vol. 31) 1944 Bom. 59=45 Bom. L.R. 1037=211 Ind. Cas. 588.

——S. 35—Successful party—Disallowance of costs—Party succeeding on technical plea of want of proper notice to quit raised at late stage—Right to costs. *See* Appeal: NEW PLEA. 5 D.L.R. (Mys.) 52.

——S. 35—Successful contention not meritorious—Costs were refused.

Where the contention, which succeeded in the High Court, was not a meritorious one, the successful party was not given costs either in the High Court or in the Court below. A.I.R. 1944 Nag. 145=1944 N.L.J. 200=I.L.R. (1944) Nag. 419=217 Ind. Cas. 295.

16. Discretion.

(a) Construction of section (scope of).
(b) Exercise of.
(c) No interference in appeal.
(d) When interfered.

(a) Construction of section.

——S. 35—Construction of section—Discretion—Scope of.

S. 35 deals with costs and vests them in the discretion of the Court, with full powers to determine by whom and to what extent such costs are to be paid. It further provides that when the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing. The Court in exercising its discretion should state the principles upon which that discretion was exercised. Such a discretion of the lower Court may be interfered with where there has been violation of any established principle, misapprehension of facts, or no real exercise of discretion. 64 Ind. Cas. 962=3 U.P.L.R. (All.) 55.

——S. 35—Scope.

(Per *Sulaiman, Banerji and Sen, JJ.*)—No doubt S. 35 as it now stands has a wider scope and authorizes a Court in appropriate cases to make an order as to costs against a person who is strictly speaking

not a party to the litigation. But the section has nothing to do with the misconduct of advocates. Cases of contempt of Courts stand on a separate footing and are not within the scope of the section, as inferior Courts have no jurisdiction to punish for contempt of Court in cases not falling within Penal Code, but under this section Court can order payment of costs by any person who is really responsible for those costs, that is, has been the cause of those costs having been incurred, whether he is a party to the suit or not and whether those costs have been directly occasioned by his commission or omission. 1930 A. L.J. 402=A.I.R. 1930 All. 225=125 Ind. Cas. 477 =52 All. 619 (F.B.).

——S. 35—Discretion not absolute.

Section 35 does not give an absolute discretion for awarding costs, but a discretion that could be interfered with if exercised wrongly and arbitrarily. 26 M.L.J. 356, foll. 18 M.L.T. 460=(1915) M.W. N. 1021=31 Ind. Cas. 312.

——S. 35—Discretion of Court.

Costs are within the discretion of the Court, but it must exercise a legal discretion and not act out of caprice. (1934) M.W.N. 992.

——S. 35—Discretion under—If fettered by O. 23, R. 1, C. P. Code.

O. 23, R. 1 (3) does not impose an unavoidable obligation on the Court to award costs in all cases. The word "shall," as used in the context, is merely directory and not mandatory. This rule has not the effect of divesting the Court of discretion vested in it by S. 35. 2 O.W.N. 901=91 Ind. Cas. 111= A.I.R. 1925 Oudh 699.

——S. 35 (S. 220, Old Code)—Costs against public officer—Judicial Officers' Protection Act (18 of 1850)—Discretion of Court how far controlled.

The discretion as to the award of costs, which a Court has under S. 220 of the Civil Procedure Code, is not taken away by the fact that a party to a suit is protected under the provisions of the Judicial Officers' Protection Act, 1850. (1902) 4 Bom. L. R. 109.

——S. 35—Costs—Particular item—Discretion of Court to allow or not—Subsistence allowance claimed paltry—Not a ground for disallowing it.

The discretion of Court under S. 35 extends not only to the question which party should bear the costs or in what proportion but also in many instances to the question whether a particular item should be allowed as costs of a party and if so far what sum.

The fact that a subsistence allowance claimed was a paltry item is no ground for disallowance it. A.I. R. 1945 P. 184=219 Ind. Cas. 510.

(b) Exercise of.

——S. 35—Discretion—Bona fide mistake of party (temple committee, unsuccessful)—Not saddled with costs.

Where a temple committee have acted *bona fide* and in due execution of their powers in instituting proceedings, the fact that the Court comes to a different conclusion should not penalise either the committee or a new trustee. 5 L. W. 672=38 Ind. Cas. 695.

——S. 35—Discretion of Courts—Both free from blame—Costs.

Where a Court found that the attitude of the respondents was correct and proper and that the cause of the petitioner was justifiable, it ordered that the costs of both parties be paid out of the estate of the deceased testator. 11 Bom.L.R. 75=9 Cr. L. J. 214=1 Ind. Cas. 309.

——S. 35—Both to blame—Cost of voluminous copy of decree—Really unnecessary—Cost equally divided.

Decree-holder asked by *ex parte* order to file copy of voluminous decree, not resisting order—Judgment-debtors partly responsible for putting cost on decree-holder for obtaining copy of decree as they had not paid even after five years what they were ordered to pay at date of decree—Some fault with Court as copy of whole decree unnecessary for execution—Costs were equally divided between decree-holder and judgment-debtor. A.I.R. 1930 Cal. 804=129 Ind. Cas. 780=57 Cal. 996.

——S. 35—Both to blame—Successful plaintiff —Order as to costs.

In certain cases, the Court might refuse to award costs even to a successful plaintiff, if he had been guilty of improper conduct in connection with the institution or trial of the case; but there is little or no precedent for directing a successful plaintiff to pay the defendant's costs, when the conduct of the defendant in putting forward his pleas or in conducting his case has been no better than that of the plaintiff. A.I.R. 1937 Mad. 223=(1937) 1 M.L.J. 414=44 L.W. 572=1936 M.W.N. 1137=169 Ind. Cas. 435.

——S. 35—Exercise of discretion—Legal question not free from doubt—No costs.

Where the legal question was not free from doubt, both parties were directed to bear their own costs in all Courts. A.I.R. 1943 Pesh. 65=211 Ind. Cas. 489.

——S. 35—Divergence of opinion leading to revision application—Parties ordered to bear costs.

Where a divergence of opinion had led to the revision application which was dismissed, the parties were ordered to bear their own costs throughout. A.I.R. 1944 Lah. 158=46 P.L.R. 68=214 Ind. Cas. 10.

——S. 35—Legal representative—Not personally liable for claim—All sorts of plea in defence—Costs awarded against personally.

Plaintiff sued defendant for settlement of accounts due by the late father of the defendant who pleaded not merely that he was not personally liable but raised every other plea that could be thought of. The Court directed that as the defendant raised all sorts of pleas which had been decided against him the defendant was personally liable for costs.

Held, the reasons given by the Lower Court for making defendant personally liable for costs are perfectly sound. The Courts have discretion to make such orders as to costs as they think fit and unless that discretion is exercised unreasonably, an Appellate Court should not interfere. 4 Lah.L.J. 210=60 Ind. Cas. 362=A.I.R. 1922 Lah. 229.

——S. 35—Non-parties—Successful parties—If can be ordered to pay cost.

A person who is not a party but who has been guilty of abuse of the process of the Court can be ordered to pay the costs. When in a suit or pro-

ceeding, a person who is not a party but uses the name of a man of straw as a plaintiff or uses the name of another as a blind for himself, such conduct is an abuse of the process of the Court and that person can be ordered to pay the costs which, ordinarily, would be awarded against the person whose name has been used as a party. An order for costs can also be made in a proper case against a person in whose favour a decree is passed (e.g.) a defendant against whom the suit is dismissed. When such party is one of two persons by whom, in fact, the proceedings were instituted, if the circumstances justify an order for costs being made against both these persons, the incident that one of them is a party cannot prevent an order being made against him when, had he not been a party, such order would be made. 50 C.W.N. 296.

——S. 35—Plaintiff's suit dismissed—Whole trouble due to defendant 5—Defendant 5 made liable for all costs of co-defendants.

Where the plaintiff's suit was dismissed in appeal but all the trouble had been caused to the plaintiff on the one hand and to defendants 1 to 4 on the other by defendant 5, the costs of defendants 1 to 4 in the lower Court as well as in the Appellate Court were ordered to be paid by defendant 5, and the plaintiff and defendant 5 were ordered each to bear his own costs. A.I.R. 1944 Nag. 98=1944 N.L.J. 56 =I.L.R. (1944) Nag. 170=216 Ind. Cas. 73.

——S. 35 (S. 220, Old Code)—Costs—Discretion—Principles.

A party succeeding cannot be deprived of his costs except for some mis-conduct on his part, such as misconduct in commencing the proceeding, some miscarriage in procedure, oppressive or vexatious mode of conducting the proceedings or some other sort of misconduct, omission or neglect. The discretion of the Court under S. 220, C. P. Code, is one to be exercised with reference to the above general principle. The fact that the defendant admitted his liability before suit is no ground for depriving plaintiff of his costs. (1903) 27 Mad. 341.

——S. 35—Party successful—Deprivation of costs—Propriety.

It is not proper to disallow costs to the successful party on the ground that some evidence adduced by that party is false, though if the time of the Court is wasted by false or unnecessary evidence the Court would be justified in refusing costs to the successful party. 100 Ind. Cas. 224=A.I.R. 1927 Mad. 474.

——S. 35—Claim not decreed in full—Costs, if can be refused in toto.

Per *Sulaiman, Banerji and Sen, JJ.*—The mere fact that the plaintiff or the applicant has asked for more than he can get does not give the Court any discretion to refuse to grant even that part of the relief asked for to which he is entitled and to make his advocate pay the costs personally. Courts exist for doing justice and not forcing any discipline against litigants. 1930 A.L.J. 402=A.I.R. 1930 All. 225 =125 Ind. Cas. 477=52 All. 619 (F.B.).

——S. 35—Petitioner—Success on a new point of jurisdiction before High Court—Parties to bear their costs throughout.

As the petitioner who was successful did not raise the question of jurisdiction in the Court below each party was ordered to bear his own costs in the High Court as well as in the Court below. A.I.R. 1944 Cal. 385=48 C.W.N. 751=220 Ind. Cas. 375.

——S. 35—Decision with regard to costs—Purchaser of part of mortgaged property—Costs against—Maintained in appeal.

Wide powers of discretion are given to a Judge when considering the question of costs. His discretion must be exercised judicially and must be in accordance with general principles of law. And before a decision in regard to costs is reversed it must be shown that the order has been made contrary to a proper exercise of discretion and general principle of law.

The purchaser of a part of mortgaged property undertook to pay off the entire mortgage money. On default in payment the mortgagee instituted a suit upon the mortgage against the mortgagor and the purchaser:

Held, that the purchaser was liable for the costs of the suit, although there was no privity of contract as between him and the mortgagee, since it was through his failure to carry out the terms of the agreement that the mortgagee was compelled to sue. A.I.R. 1940 Mad. 519=51 L.W. 318=(1944) 1 M.L.J. 388=1940 M.W.N. 504=191 Ind. Cas. 805.

——S. 35—Non-contesting defendants only made liable—Pleader's fee not as per rules—Improper exercise.

In a suit against members of a joint family for balance due in respect of a family business, minor defendants alone contested, issues framed and it was decreed for Rs. 5,385-15-0 with a direction that the decree as against the two minor defendants would only bind their shares in the ancestral property and that the costs were to be paid by the three other non-contesting defendants only and the pleader's fee was fixed at Rs. 50.

Held, that there was no justification in directing that the costs of a partly contested suit should be realizable only from the non-contesting defendants and that the costs should be paid by all the defendants with a proviso that the minor defendants should be liable only so far as their interest in the co-parcenary property were concerned and were exempt from personal liability.

Held, also that the normal fee of pleader on a decree of Rs. 5,000 is Rs. 250 and even if the whole case were treated as uncontested, the pleader's fee would be half of this, namely Rs. 125. There was no justification in fixing the fee as low as Rs. 50. On the assumption that the claim was uncontested in respect of three-fifths of the joint property and contested in respect of two-fifths thereof, the pleader's fee would approximate to one-half of Rs. 150 plus Rs. 100, that is to say Rs. 175, which was less than three-quarters of the full fee in the case. (1936) 162 Cas. 848=18 N.L.J. 323.

(c) No interference in appeal.

——S. 35—Costs—Discretion—Interference by appellate Court.

Per *Subrahmanya Aiyar, J.*—The discretion of the Courts below in the matter of awarding costs cannot be interfered with by the High Court on second appeal. Per *Davies, J.*—The uniform practice of Courts in this Presidency is to award costs only on the amount decreed to plaintiff. Where the award

of costs by the Courts below was against this practice it may be set aside. (1901) 13 M.L.J. 210.

——S. 35—Order for costs, when can be questioned in appeal.

The awarding of costs being discretionary, it cannot be questioned in appeal unless the Court has failed to exercise its jurisdiction or has acted in an arabitrary and unjudicial manner. 1 O.L.J. 156=24 Ind. Cas. 673.

——S. 35—Costs—Discretion of Court—Interference by Appellate Court.

Costs are entirely at the discretion of the Court. An Appellate Court will not lightly vary the order unless it is satisfied that the order is manifestly erroneous or unjust as to call for interference. 20 C.W.N. 929=23 C.L.J. 606=36 Ind. Cas. 655.

——S. 35—Appeal—Costs—Interference.

The High Court will not ordinarily interfere with the discretion of the Lower Court in the matter of awarding costs unless it finds that the discretion has not been used judiciously. A party who succeeds on a particular issue must ordinarily get his costs of that issue unless there is some special reason to deprive him or the issues are closely and inseparably connected with each other. 27 C.L.J. 78=45 Ind.Cas. 738. [On appeal from 20 C.W.N. 368=35 Ind. Cas. 83.]

——S. 35—Appeal—Order as to costs—When interfered.

The High Court will not interfere in second appeal in a matter of costs except when the lower Court has gone wrong in some matter of principle. 46 Ind. Cas. 544 (Cal.).

——S. 35—Costs—Discretion—No Interference in appeal.

Courts are discretionary—High Court will not interfere unless order for costs is irregular. 90 Ind. Cas. 577=A.I.R. 1926 Oudh 35.

——S. 35—Discretion—Defendant not a necessary party—Award of costs to—No interference.

The discretion exercised by the trial Court in allowing the defendant his costs on the ground that he was not necessary party cannot be interfered with in the absence of sufficient grounds. A.I.R. 1940 Mad. 620=(1940) 1 M.L.J. 690=1940 M.W.N. 418=51 L.W. 604=193 Ind. Cas. 37.

——S. 35—Lower Court awarding costs to defendant—No error of principle—No interference.

Where there is no error of principle in the order awarding costs to defendant passed by the lower Court, the Appellate Court will not interfere with that order. A.I.R. (Vol. 26) 1939 Pat. 517=5 B. R. 734=182 Ind. Cas. 223.

——S. 36—Costs—Order for—No interference by the High Court with the discretion of trial Court.

The matter of awarding costs is one within the discretion of the trial Court and when that Court has not exercised its discretion arbitrarily but for reasons given in its judgment, the High Court should not interfere. 1935 O.W.N. 971=A.I.R. 1935 Oudh 518=11 Luck. 420=157 Ind. Cas. 950 (2) (D.B.).

——S. 35—Costs—Discretion—Proper exercise—No interference in appeal.

Costs are in the discretion of the Court and provided that there was material for the exercise of this discretion, an Appellate Court cannot interfere even in the absence of specific reference to it by the lower Court. A.I.R. 1936 Pat. 513=17 P.L.T. 279=15 Pat. 510=2 B.R. 776=164 Ind. Cas. 860.

——S. 35—Costs—No interference in appeal.

The Judicial Commissioner's Court does not normally interfere in the discretion exercised by the Courts below in the matter of costs. A.I.R. 1942 Pesh. 39=200 Ind. Cas. 732.

——S. 35—Appellate Court will not interfere with discretion unless it is manifestly wrong.

A Court has absolute discretion in the matter of costs and an appellate Court will not interfere with an exercise of discretion unless it has proceeded on a manifestly wrong ground such as the application of an erroneous principle or a misapprehension of the facts. So long as the discretion was in fact exercised, an appellate Court will not interfere simply because it would itself have exercised the discretion differently. 2 Bom.L.R. 254, Foll. 2 O.W.N. 901 =91 Ind. Cas. 111=A.I.R. 1925 Oudh 699.

——S. 35—Discretion of Court—Interference by appellate Court.

The question of costs in every case is a matter for the discretion of the Judge, which discretion must, of course, be properly exercised. An appellate Court will not interfere with the exercise of this discretion, unless it is shown that the Judge of first instance was wrong, even when the Appellate Court might have exercised the discretion differently. 50 C.W.N. 296.

——S. 35—Costs are within discretion of Court—Discretion not wrongly exercised—Appellate Court will not interfere.

Costs are solely a matter for the discretion of the Court and where there is nothing to show that the Court exercised this discretion wrongly and did not apply the ordinary principles which should be applied when the question of costs requires decision, the appellate Court will not interfere with the order for costs. A.I.R. 1946 Cal. 249=I.L.R. (1944) 2 Cal. 487=48 C.W.N. 554.

——S. 35—Discretion—Interference.

Courts are given discretion in the matter of costs and as long as this discretion is judicially exercised it cannot be interfered with. 1943 Cal. 162=46 C. W.N. 947=204 Ind. Cas. 385.

——S. 35—Discretion of Court—Interference in appeal.

If the lower Court exercises its discretion in a proper manner according to law in the matter as to costs, the appellate Court should not interfere with the decision of such lower Court on such a matter. 7 C.W.N. 1055=A.I.R. 1931 Oudh 9=129 Ind. Cas. 165=6 Luck. 378.

——S. 35—Costs—Discretion, proper exercise of—No interference in appeal.

The Court which tries a suit has full power to determine by whom the costs are to be paid. Where this discretion was exercised with care, the Appellate Court ought not to interfere with such discretion. 42 C.L.J. 137=90 Ind. Cas. 486=A.I.R. 1925 Cal. 1085.

——S. 35 — Appeal—Discretion—No interference in second appeal.

The award of costs is in the discretion of the Court and the High Court will not interfere in second appeal with an order as to costs if it appears to have been made in the exercise of a sound discretion. 19 M.L.T. 86=3 L.W. 109=32 Ind. Cas. 579.

——S. 35—Appeal—Interference by Appellate Court.

A successful defendant ought not to be deprived of his costs except on proof of any wrongful conduct in connection with the litigation. When the Judge has given his reasons and all the circumstances are before the Court of appeal the latter can, if satisfied that the discretion has not been judicially exercised, interfere with it and make the order which the Court below ought to have made. 40 All. 558=16 A.L.J. 592=48 Ind. Cas. 478.

——S. 35—Costs—Interference in second appeal —Rateable costs.

The question of costs is a matter of discretion for the Courts and unless the Court has acted in infringement of some definite rule or principle, the High Court will not interfere in second appeal. The contention that in the absence of an appeal or cross-objection filed in the lower Appellate Court, the Court had no jurisdiction to make the parties receive rateable costs, has no force. It is open to the lower Appellate Court to give the defendant credit for the costs incurred by him in the first Court so long as they did not exceed the amount which it was going to decree to the plaintiff. A.I.R. 1934 All. 434= 1934 A.L.J. 803=148 Ind. Cas. 1166.

——S. 35—Discretion of appellate Court as to costs—No interference by High Court.

The High Court will not interfere in second appeal with the discretion exercised by an Appellate Court on a question of costs. 13 Ind. Cas. 201 (Cal.).

——S. 35—Suits for money by minor—Costs disallowed—Interference by High Court.

Under S. 35, C. P. Code, costs are in the discretion of the trial Court and unless a principle is involved on which the decision of the point is based, the High Court will very seldom interfere with the order of the lower Court.

Though the fact that guardian could not give an effective discharge and hence the defendant was entitled to ask for security might not be a proper ground for refusing costs in the suit for recovery of money due to minor, the circumstance that the guardian was not a man of property and defendant acted on legal advice in insisting on security, showed that the discretion of the lower Courts was not wrongly exercised. A.I.R. 1933 Mad. 224 (1)=142 Ind. Cas. 656.

——S. 35—Discretion as to costs—Proper exercise of—No interference by High Court.

Where a reasonable discretion has been exercised by the lower Court, the High Court will be slow to interfere. 73 Ind. Cas. 307=A.I.R. 1924 Oudh 110.

——S. 35—Discretion of appellate Court—Interference by High Court.

Where the lower appellate Court uses its discretion with regard to costs with due care though differing from the trial Court, the High Court will not interfere with it unless the order is demonstrably wrong. 6 O.W.N. 689=119 Ind. Cas. 449=A.I.R. 1929 Oudh 1929.

——S. 35—Appeal—Powers of Appellate Court —Error of principle.

Where the costs are in the discretion of a judge, the Court of appeal will assume that the Judge in the lower Court exercised his discretion unless it is satisfied that he had not exercised it. The Appellate Court will not interfere with an exercise of the discretion of the lower Court unless it has proceeded on a manifestly wrong ground. 2 Bom.L.R. 254 foll. 22 C.W.N. 372=44 Ind. Cas. 870.

——S. 35—Discretion—Order for costs in appeal—Interference by High Court.

The Court will not interfere with an order as to costs, unless the order is illegal. The Court cannot examine in second appeal the reasons and review the exercise of the discretion of the lower Court. 5 Bur.L.T. 104=15 Ind. Cas. 429.

——S. 35—Costs always in discretion of the Court.

Where in an appeal against a decree for partition, it was directed that each party be ordered costs in the trial Court in proportion to their success and failure,

Held, that the Appellate Court exercised a sound discretion in the matter of the award of costs. 1940 Oudh 310=1940 O.W.N. 281=1940 O.L.R. 170= 15 Luck. 526=187 Ind. Cas. 83.

(d) When interfered.

——S. 35—Costs not following event—Interference.

Costs not following the event amounts to erroneous exercise of discretion and there is an interference on appeal. 64 Ind. Cas. 962=3 U.P.L.R. (A.) 55.

——S. 35—Costs—Rule as to—Departure without reasons—Interference in appeal.

The usual rule is to allow costs to the successful party and where they are disallowed without any sufficient reason for doing so, the Appellate Court should rectify the error. 22 P.W.R. 1915=65 P. L.R. 1915=27 Ind. Cas. 621.

——S. 35—Appeal—Interference with order for costs—Departure from rule.

The High Court should interfere if the reasons given by the lower Court for not following the rule in S. 35 find no adequate support in the facts on record. 11 N.L.R. 189=31 Ind. Cas. 880.

——S. 35—Refusal of lower Appellate Court to award costs to plaintiff—Defendant appearing only after substituted service—Interference.

The awarding of costs is a matter entirely within the discretion of the trial Court and if the trial Court has exercised that jurisdiction in a judicial manner, it is not open to the Appellate Court to interfere with the discretion of the trial Court except for good reasons which are clear from the facts and circumstances of the case. But where the defendant only put in an appearance after substituted service had been resorted to against him and the plaintiff was on the facts of the case entitled to claim at least proportionate costs from the defendant and the lower Appellate Court refuses to allow the plaintiff even

proportionate costs, the Court proceeds on a manifestly wrong ground, and the High Court should interfere in second appeal so as to restore the order as to costs. A.I.R. 1934 Oudh 259 (2)=11 O.W.N. 754=18 R.D. 307=149 Ind. Cas. 901.

——S. 35—Appellate Court will reverse order of lower Court if passed without considering all circumstances—Case of withdrawal.

It may be a sound exercise of discretion to refuse costs where the suit is based on a state of law which has been afterwards altered either by statute or by the decision of a superior tribunal; but this is so only if the party to whom the costs are to be awarded is responsible for the litigation. Where there is a omission to consider the necessary circumstances then there cannot be a sound exercise of discretion, and the Appellate Court in that case can reverse the order as to costs. 25 Bom.L.R. 242=72 Ind. Cas. 324=47 Bom. 559=A.I.R. 1923 Bom. 206.

——S. 35—Appeal—Power of Appellate Court to interfere with order as to costs.

A Court of appeal will not interfere with the discretion of a Judge of first instance in awarding costs except where some question of principle is involved and it is violated. A defendant cannot be ordered to bear the costs of an unsuccessful co-defendant, or of a co-defendant who does not contest the plaintiff's claim. 12 Bom.L.R. 621=7 Ind. Cas. 134.

——S. 35—Costs—Discretion properly exercised by trial Court—Interfered in appeal—No reasons given—Interference by High Court.

Where the reasons given by the Munsiff for the order as to costs were good and the Subordinate Judge gave no reason whatsoever for interfering with the exercise of the discretion by the Court of first instance, High Court interfered. 9 O.L.J. 629=27 O.C. 64=74 Ind. Cas. 369=A.I.R. 1923 Oudh 114.

——S. 35—Discretion—Nature and mode of exercise of—Interference in appeal and revision. Where discretion given by S. 35 has been properly exercised by trial Court the appellate Court and the High Court in revision will not interfere. The discretion given is judicial and has to be exercised in accordance with definite principles. Where however a question of principle is involved the High Court will interfere and review the decision of the taxing officer. 23 Pat. 927=219 Ind. Cas. 510=A.I.R. 1945 Pat. 184=11 B.R. 439.

——S. 35—Costs — Discretion—Misapprehension of facts—Interference.

Costs are in the discretion of the trial Court but when the lower Court has acted under a misapprehension of facts in not applying a settled principle of law when considering the question of facts, the High Court can interfere with the discretion exercised by the trial Court. A.I.R. (Vol. 22) 1935 Mad. 342 (2)=159 Ind. Cas. 843.

——S. 35—Discretion of lower Court—Misapprehension of facts—Interference.

The Appellate Court will interfere with an order of the lower Court as to the costs where there has been a misapprehension of the facts on the part of the Judge who makes the order of costs and violation of principle by throwing upon the plaintiff the costs of the unsuccessful defendant where the plaintiff has been guilty of no misconduct. 42 Bom. 327=20 Bom.L.R. 905=47, Ind. Cas. 762.

——S. 35—Discretion of lower Court exercised on basis of erroneous view of law—Duty of High Court to interfere.

When the discretion exercised by the lower Court in the matter of costs is based on an erroneous view of the law, it is the duty of the High Court to interfere with the order. A.I.R. (Vol. 24) 1937 Oudh 282=1937 O.L.R. 77=1937 O.W.N. 165=13 Luck. 171=166 Ind. Cas. 928.

——Ss. 35 and 100—Appeal—Costs—Disallowance of—Second Appeal—Interference.

As a rule questions of costs are in the discretion of the trial Court and a person who is dissatisfied with an order or part of it as to costs cannot prefer a second appeal in order to set aside or modify that order; but where an important question of principle has been decided, the High Court will look into the decision to see whether it is arbitrary or based on sound principle. The lower Appellate Court having entirely confined itself to matters antecedent to the suit in depriving a successful party of the costs, the High Court interfered in second appeal. 41 All. 254=17 A.L.J. 169=49 Ind. Cas. 696.

——S. 35—Second appeal—Appellate Court interfering with order for costs—Arbitrary—Interference by High Court.

Where the lower Appellate Court interferes in an arbitrary manner with a proper order for costs passed by the trial Court, the High Court will be justified in interfering in second appeal. A.I.R. 1931 Oudh 9=7 O.W.N. 1055=6 Luck. 378=129 Ind. Cas. 165.

——S. 35—Costs—Point that no costs should have been awarded by first Appellate Court not raised before single Judge—If can be raised in Letters Patent Appeal.

The point that no costs should have been awarded by the first Appellate Court to the plaintiff, when not raised before the Single Judge in second appeal cannot be raised for first time in Letters Patent Appeal. A.I.R. 1942 Pat. 317=23 P.L.T. 213=8 B.R. 806=201 Ind. Cas. 560.

——S. 35—Question of costs not raised in court below—Raising in High Court—If permitted.

It is bad practice to allow an appellant who has taken no objection to an award of costs against him in the lower Court to go to the High Court and argue that point there. 75 Ind. Cas. 527=A.I.R. 1923 All. 334.

——S. 35—Costs—Discretion of Trial Court—Interference in appeal—Propriety of.

The trial Court did not award costs to the plaintiff as he could not establish his case. In first appeal the Court interfered with the order as to costs while upholding the trial Court's decision on other points: *Held*, that the Appellate Court had no jurisdiction to interfere with the discretion exercised by the trial Court so far as the award of costs, other than institution fee, was concerned, and the order passed by the Appellate Court could not stand. A.I.R. 1937 Sind 159=170 Ind. Cas. 9.

17. Duty of Court.

——S. 35—Order for costs—Necessity of passing.

Although it is within the Court's discretion to

allow or disallow costs, still the Court is bound to pass an order with regard to costs. A.I.R. 1933 Pat. 135=148 Ind. Cas. 305.

——S. 35—Judgment awarding costs—Effect—Duty of Court to make decree in conformity with judgment.

Where the judgment awards costs to a party, it implies costs allowed by the rules. If the decree includes costs which are not permissible under the rules, the decree is not in accordance with the judgment and does not correctly state what the Court intended. It is, therefore, the duty of the Court to correct it so as to make it in conformity with the judgment. A.I.R. 1935 Cal. 619=39 C.W.N. 1295 =62 C.L.J. 79=63 Cal. 181=158 Ind. Cas. 436.

18. Duty of party.

——S. 35—Duty of Court and Advocates to keep in mind procedure relating to orders about costs followed on Original Side of High Court.

It is advisable in proceedings, the costs of which have to be taxed in accordance with the Original Side scale, that the *mufassal* Courts should make special orders and give specific directions relating to the costs of each order, and that they should exercise the twofold jurisdiction under S. 35, Civil P. C., and R. 767 of the Bombay High Court (Original Side) Rules at the time when the particular order (whether incidental to the proceedings or necessitated by an interlocutory application) is being made. The procedure relating to orders about costs followed on the Original Side of the High Court ought to be kept in mind by the Advocates as well as the Courts, as the duty lies upon the parties and their Advocates to apply for directions and orders relating to costs, and to make such applications at the proper time. A.I.R. 1938 Bom. 10=39 Bom.L.R. 820=173 Ind. Cas. 489.

——S. 35—Costs—Duty of party to place all circumstances and authorities.

It is the party's business to direct the mind of the Court to the authorities which show him the right practice, and if a party has failed to do this he should not be allowed costs although case is decided in his favour. 1926 M.W.N. 465=94 Ind. Cas. 306= A.I.R. 1926 Mad 642=50 M.L.J. 428.

19. Election proceedings.

——S. 35—Election suit—Conduct of returning officer, the cause—Order as to costs.

The ordinary rule is that the costs are borne by an unsuccessful party but where the suit has been caused by the conduct of the returning Officer, each party, may, in the discretion of the Court be ordered to pay his own costs. 24 C.W.N. 189=30 C.L.J. 270=53 Ind. Cas. 741.

——S. 35—Validity questioned—Costs are discretionary.

In cases challenging the validity of an election or the election of a particular candidate, the Court can make such order as to costs as it deems just. 1942 Rang. 30=1941 Rang. L.R. 615 and 638=199 Ind. Cas. 274.

20. Execution.

——S. 35—Execution—Decree against minor plaintiffs for costs—Guardian not shown in decree as party.

Held, that the decree for costs cannot be executed against the guardian. A.I.R. (Vol. 22) 1935 All. 359=1935 A.L.J. 383=1935 A.L.R. 1050=158 Ind. Cas. 1113.

——S. 35—Suit between trustee and stranger—Costs against the trustee—Decree not stating how it was to be executed.

Held, that the decree was executable against the trustee in any manner in which a decree for money may be executed against any ordinary litigant who is directed to pay costs and that he was personally liable. A.I.R. 1934 All. 793=1934 A.L.J. 225= 151 Ind. Cas. 952.

——S. 35—Costs—Personal decree for—Person sued as legal representative of deceased debtor.

A Court of law is at liberty to pass personal decree for costs against a person sued as a legal representative of a deceased debtor and such a decree may be executed against the defendant personally. 1947 O. A. (C.C.) 136=1947 O.W.N. 364=1947 A.W.R. (C.C.) 136=A.I.R. 1947 Oudh 217.

——S. 35—Order for costs not intended to be part of mortgage decree—Executability—Limitation, starting point of.

Where the order as to costs is not intended to be a part of the ordinary mortgage decree but is intended to make the defendants individually and personally liable it forms no part of the mortgage decree; the order is at once executable without the necessity of its inclusion in the final decree and the time runs from the date of the preliminary decree. 1937 M. W. N. 361.

——S. 35—Money decree on mortgage—Costs awarded—Later mortgage decree—Payment made as agreed therein—Executability of decree for costs.

The mortgagee first obtained a decree for enforcement of the personal covenant contained in the mortgage. The decree awarded costs. Later on, another decree for the enforcement of the mortgage security was also obtained. Thereupon a method of payment was agreed upon between the parties and the payment was made accordingly. The mortgagee later on sought to take out execution for the costs awarded by the first decree:

Held, that the execution could be taken out. A. I. R. 1945 All. 318=I.L.R. (1944) All. 697.

——S. 35—Puisne mortgagee—Unsuccessful defence in a mortgage suit—Additional costs thereof—Sale proceeds insufficient.

Held, that the decree-holder had right to execute the order against puisne mortgagee personally. A. I. R. 1931 Rang. 181=133 Ind. Cas. 93.

——S. 35—Probate case—Costs—Execution for.

A decree in a probate case directing that the costs of both the parties should be paid out of the estate and that joint Letters of Administration should be issued to both the parties, cannot be executed by one party against the other but the proper course is to sell or mortgage a sufficient portion of the estate to

pay off the costs of the parties. 24 Ind. Cas. 214 (Cal.).

21. Garnishee.

——S. 35—Garnishee—Proceedings to set aside attachment—Closed as decree satisfied—Right to costs.

When a decree-holder has attached banking account of a garnishee illegally and during proceedings to set aside the attachment, the decree is satisfied and the proceedings are closed, the garnishee is entitled to his costs. 1940 Rang. 34=1939 Rang. L.R. 694=187 Ind. Cas. 105.

22. Government—(Party).

——S. 25—Government—Subject to same rules as ordinary litigant.

In an unsuccessful litigation the Secretary of State is liable to pay costs like any other unsuccessful party. 5 Pat.L.J. 321=(1920) P.H.C.C. 253=1 Pat.L.T. 451=21 Cr.L.J. 475=56 Ind. Cas. 507.

——S. 35—Taxation—Costs to government.

In suits by or against Government in which costs might be awarded to Government the taxation must be without any consideration as to the arrangement which exists between the Government and its legal advisors with regard to their remuneration. 40 Bom. 588=18 Bom.L.R. 118=33 Ind. Cas. 362.

23. Guardian.

——S. 35—Guardian ad litem of a lunatic—Guardian filing an unnecessary appeal—Personal liability of the guardian to pay costs.

The guardian *ad litem* appointed by the court usually gets his costs out of the estate of the defendant whom he represents if he does not recover them from the plaintiff, but when the guardian *ad litem* takes upon himself to appeal against a decree passed against the lunatic, whom he represents he must personally pay the costs incurred. (1909) 11 Bom. L. R. 1011=34 B. 374=4 Ind. Cas. 107.

——S. 35—Guardian ad litem (or Next friend)—Order for costs against.

The words "by whom" in S. 35 are wide enough to include next friends and guardians of minor plaintiffs and defendants. An order as to costs can therefore be made against a guardian *ad litem* even if he is not a party to the suit: 8 Bom. 391, Rel. on. 1929 M.W.N. 545=A.I.R. 1929 Mad. 782.

——S. 35—Guardian ad litem—Order for costs against.

Under S. 35 there is no reason why a guardian *ad litem* should not be made to pay costs if he is a party to the suit. O. 32, R. 11, is a special provision thereby a guardian *ad litem* who is not on record may be ordered to pay costs and cannot be said to restrict the provisions of S. 35 so far as they relate to parties on record. 1928 M.W.N. 318=110 Ind. Cas. 310=A.I.R. 1928 Mad. 590.

——S. 35—Guardian—Liability for costs.

Where during the pendency of a suit the minor becomes major, but the guardian continues to represent him and the parties continue the old state of affairs the guardian is liable for costs. 1929 M. W. N. 545=A.I.R. 1929 Mad. 782.

24. High Court practice.

——S. 35—Applicability to High Court—Counsel's fees—Rules of Court of 18th of January, 1898, Rr. 205, 89—Power of High Court to make rules—Civil Procedure Code, S. 652—Resolution not published in the Gazette.

In a probate matter, in which a caveat had been entered as a matter of precaution, but withdrawn at the hearing, costs were giving caveator, but no order was made 'upon delivery of the judgment' as required by Rule 205 of the rules of court of the 18ah of January, 1898 allowing counsel's fee on the higher scale, and in the decree subsequently prepared only the lower scale of fees was allowed. Counsel for the applicant instead of taking exception to the decree in the manner provided for by Rule 89 of the rules of court above referred to, made an *ex parte* motion on the subject to the judge responsible for the decree, who thereupon ten days after judgment had been delivered, passed an order allowing fees on the higher scale. On appeal under S. 10 of the Letters Patent from the decree as thus amended it was *held* (1) that counsel concerned ought to have taken action under Rule 89 of the rules of the court if he thought the decree was wrong; (2) that a resolution of the court that in an order for costs fees should always be taken to be fees on the higher scale might, though not published in the *Gazette* nevetheless be looked at for the purpose of interpreting an order as to costs; and (3) that the judge concerned in allowing fees on the higher scale without regard to the amount of such fees had not exercised a proper judicial discretion; and a fee commensurate with the work done was allowed. 1905 A.W.N. 83.

——S. 35—Pleader's fees—Probate proceedings—Appeal—Assessment of pleader's fees.

Pleader's fees in probate proceedings should according to a long-standing practice of the High Court, be assessed at Rs. 30. (1908) 10 Bom.L.R. 1197=33 Bom. 256=2 Ind. Cas. 283.

——S. 35—Suit for injunction—Application for interim injunction granted ex parte—Costs in the motion—On hearing of motion, costs in motion made costs in cause.

Plaintiff instituted a suit for an injunction restraining the defendants from wrongful user of plaintiff's registered design. An application was made *ex parte* for an injunction and on that application an injunction was granted until the hearing of the motion, costs being made costs in the motion. When the motion was heard the Court continued the injunction until the trial and directed that the costs of the motion be costs in the cause:

Held, that the *ex parte* motion and the motion *inter partes* were not one motion. But therre were two motions, two distinct orders were made and it might have been necessary to take separate steps to enforce each of those orders. A.I R. 1936 Bom 310=38 Bom.L.R. 531=60 Bom. 861=164 Ind. Cas. 695.

——S. 35—Discretion of Taxing Master.

According to the English practice, which is applicable in Bombay, the Taxing Master has a discretion

to allow the fees of more than two counsel but it is an unusual expense. and it requires a very. strong case to induce the Court to sanction the fees. The test is whether "the case was one in wich a reasonable and prudent man acting with ordinary prudence, would not have ventured to come into Court without three counsel."

Where the question of law of great importance is involved the discretion of the Taxing Master with respect to the quantum of fees ought not to be interfered with by the Court. A.I.R. (Vol. 29) 1942 Bom. 312=44 Bom.L.R. 687=I.L.R. (1942) Bom. 829=203 Ind. Cas. 603.

——S. 35—Preliminary objection as to insufficiency of court-fee allowed—Appeal memo. rejected for non-payment of court fee—Appellant, if can be ordered to pay costs of hearing of preliminary objection.

A preliminary objection as to the sufficiency of court-fee in appeal was allowed and the memorandum of appeal was ultimately rejected for non-payment of proper court-fee within the time fixed:

Held. that the appellant could be ordered to pay costs of the hearing of the preliminary objection. In such a case R. 130 Bombay High Court Appellate Side Rules. should be applied. A.I.R. (Vol. 28) 1941 Bom. 242=43 Bom.L.R. 475=I.L.R. (1941) Bom. 477=195 Ind. Cas. 894.

——S. 35—Function of Judge when making incidental orders and when sitting in appeal to hear objections from Taxing Officer—Orders not explicit—Court's directions under S. 35, Civil Procedure Code and R. 767 of Bombay High Court (Original Side) Rules—Proper course.

When a District Judge in Bombay is making the incidental or interlocutory order he has a two-fold jurisdiction; (a) under S. 35 the discretion to determine by whom and out of what property and to what extent the costs were to be paid and to give all necessary directions for the purpose; and (b) he has also he jurisdiction under R. 767 of the Rules of the Bombay High Court to "specially direct" that the practitioner shall be entitled to charge and be allowed the fees on a scale other than that set forth in the said Schedule 2. When however, the District Judge is sitting in appeal to hear objections from the Taxing Officer he has merely to determine whether the Taxing Officer had rightly taxed the costs. As the Taxing Officer himself has not the two-fold jurisdiction under the Civil P. C.. S. 35, and under the High Court Rules. R. 767. the District Judge sitting in appeal over the Taxing Officer has no similar jurisdiction at that stage.

It may happen in the *mufassal* that the orders of the Court are not sufficiently explicit to determine questions of costs and that the Court's discretions under S. 35 and R. 767 may be considered necessary by the Taxing Officer. In such cases. the proper course for the Taxing Officer would be to give the parties an opportunity of obtaining such directions or orders from the Court before the costs in question are taxed. A.I.R. (Vol. 25) 1938 Bom. 10=39 Bom.L.R. 820=173 Ind. Cas. 489.

——S. 35—Taxation of costs—Third party proceedings.

Where defendant succeeds in third party proceedings after a decree is passed against him his costs in the suit as against the third party should be taxed as between solicitor and client and the cost of the third party proceedings should be taxed as between party and party. 59 Ind. Cas. 18=21 Bom.L.R. 808.

——S. 35—Taxation as between party and party—Solicitor's right to recover costs against his own clients—Separate defendants having one solicitor but separate counsel.

Generally speaking, in taxation, as between party and party, only those costs are allowed which are strictly necessary for the purposes of the prosecution of the prosecution of the litigation, while in taxation as between attorney and client a party is allowed as many of the charges which he would have been compelled to pay to his own solicitor as being costs of the suit which fair justice to the other party would permit.

A solicitor's right to recover costs as against his own client arises out of his professional employment, and it is the solicitor's duty to see that his client does not run up unnecessary costs without proper advice. If, therefore, he claims items in excess of party and party costs from his own client, the expenses must be such as are not unusual or extraordinary, unless the solicitor takes care to protect himself by the express authority of his client which he must obtain after he has clearly explained to the client that the costs in respect to such expenses will probably be disallowed as between party and party.

If he does not do so, such costs may be altogether disallowed unless the solicitor is able to show some valid reasons for incurring the expenses without obtaining the necessary authority.

No hard and fast rule can be laid down for determining what expenses may be called unusual or extraordinary. Each case depends on its own facts and upon the rival contentions of the parties thereto.

If an unusual expense is about to be incurred in the course of an action, it is the duty of the solicitor to inform his client fully of it, and not to be satisfied simply by taking his authority to incur the additional expense, but to point out to him that such expense will or may not be allowed on taxation between party and party whatever may be the result of the trial.

It cannot be said that because one counsel could have represented all the defendants in a case at the hearing it was not necessary to brief counsel separately.. The proper test in such cases is whether there is reasonable probability of there being a sub- therefore, the solicitor is reasonably justified in briefing two sets of counsel.

As a rule the Chamber Judge does not interfere with the discretion of the Taxing Master, except in extreme cases where there has been gross abuse or a serious mistake, or when the Taxing Master has acted on a wrong principle or applied an altogether wrong consideration. A.I.R. 1933 Bom. 92=35 Bom.L.R. 93=57 Bom. 570=142 Ind. Cas. 353.

——S. 35—Solicitor's lien—Consent decree—Enforcement of lien by separate suit—Limitation Act (9 of 1908), Sch. 1, Art. 120—Bombay High Court Rules, Rr. 266, 267—Scope of.

Where a consent decree provides that the costs of the defendant should be paid to his solicitors named in the decree, the defendant may either enforce the decree in execution or the solicitors so named in the decree may, notwithstanding the fact that they are not parties to the decree, recover the costs by a separate suit if their remedy to recover them by execution is lost.

Such a suit is governed by Art. 120, Limitation Act, and not by Art. 84. The time taken up by the proceedings in execution should if necessary, be deducted from the period of limitation.

The true effect of Rr. 266 and 267 of the Bombay High Court is to split up the judgment of a Court into two parts. The part which relates to costs is postponed until the costs are taxed so that this part of the judgment is delivered only when the costs are taxed and noted. A.I.R. 1932 Bom. 378=34 Bom.L.R. 670=138 Ind. Cas. 832.

——S. 35—Bombay High Court Rules (Original Side), R. 767.

The words "so far as the same are applicable" govern the rule that "the fees must be allowed as set forth and referred to in Schedule 2." It is not reasonable to apply the Schedule in such a manner and for such reasons as to deprive parties of costs which they have necessarily and properly to incur. A.I.R. (Vol. 25) 1938 Bom. 10=39 Bom.L.R. 820=173 Ind. Cas. 489.

——S. 35—Bombay High Court (Original Side) Rules, 1930, R. 559—Taxing Master's Report—Payment of costs of taxation.

Although the Taxing Master himself may not go against the express provision of R. 559 of the Bombay High Court (Original Side) Rules, there is nothing to prevent him from certifying or reporting to the Court as to the special circumstances, if any, of a case and recommending that even where more than one-sixth has been taken off the Bill, the solicitor need not be made to pay the costs of taxation and in some cases actually get the costs.

The Court may then on perusing his report make such order as to costs of taxation as it may think fit. It may in its discretion deprive the solicitor of the costs of the taxation although less than one-sixth has been taxed off, or allow him the costs though one-sixth or more has been taxed off.

Rule 559 does not interfere with the discretion of the Court in those cases in which the Taxing Master has specially certified or reported the circumstances of the case. A.I.R. 1933 Bom. 142=35 Bom.L.R. 101=57 Bom. 583=142 Ind. Cas. 363.

——S. 35—Fees for three counsel when allowed, stated—Question of law of importance—Interference with Taxing Master's discretion.

According to the English practice, which is applicable in Bombay, the Taxing Master has a discretion to allow the fees of more than two counsel, but it is an unusual expense, and it requires a very strong case to induce the Court to sanction the fees of more than two counsel as between party and party. The test is whether "the case was one in which a reasonable and prudent man, acting with ordinary prudence, would not have ventured to come into Court without three counsel."

Where there was no dispute as to the facts, and though the point of law was important, it was within a comparatively narrow compass, the Taxing Master is wrong to allow the fees of three counsel merely upon the ground that the matter was of very considerable importance.

Where the matter was a question of law of great importance, the amount of fees for counsel is a pure question of quantum in which the Court ought not to interfere with the discretion of the Taxing Master. A.I.R. (Vol. 29) 1942 Bom. 312=I.L.R. (1942) Bom. 829=44 Bom. L.R. 687=203 Ind. Cas. 603.

——S. 35—Charges for looking up the law—Suit for declaration that certain tax levied by Bombay Government is invalid—Search by solicitor of statutes by other Provincial Governments, is for ascertainng facts.

According to the English practice which is followed in the Bombay High Court, solicitors are not entitled to be remunerated in respect of looking up the law, under the heading "Instructions for brief."

Ascertaining whether taxes on land and buildings had been levied pursuant to statutes in India and elsewhere is a question of fact, although no doubt the bearing which such statutes would have on the construction of S. 100, Government of India Act, would be a question of law. Legislative practice in various places is a question of fact. Consequently, in a suit for a declaration that a certain tax levied by the Bombay Government is invalid, the finding and perusal of statutes of other Provincial Governments by the solicitor is for the purpose of ascertaining facts and not law and the item can be included under the heading of "Instructions for Brief." A.I.R. (Vol. 29) 1942 Bom. 310=44 Bom. L.R. 682=I.L.R. (1942) Bom. 829=203 Ind. Cas. 279.

——S. 35—Principles regulating award of costs—Calcutta High Court Rules, Ch. 36, R. 93.

When the trial Court holds that the costs should be awarded not as an "ordinary cause" but as an "important cause" reasons should be assigned. A suit does not cease to be an ordinary cause because several witnesses have been examined. The theory on which costs are now awarded to a plaintiff is that the default of the defendant made it necessary to sue him, and to a defendant is that the plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in Court and consequently the decree to inquire whether the foreign Coura had jurisparty to blame pays costs to the party without fault. These principles apply, not merely in the award of costs but also in the special allowances whose object is not to inflict a penalty on the unsuccessful party but indemnify the successful litigant for actual expenses necessarily or reasonably incurred in what are designated as important cases or difficult and extraordinary cases. The character of a case cannot be determined by any particular phase of it but various factors such as the difficult and complicated nature of the questions of law and fact involved, the large amount in controversy, the length of time consumed in the trial

and like matters, must be take into account not separately but in the aggregate. 32 C.L.J. 168=48 Cal. 427=A.I.R. 1921 Cal. 185=25 C.W.N. 297 =60 Ind. Cas. 337.

——S. 35—Calcutta High Court—Practice—Costs of Attorney—Order for direct payment.

It is now the settled practice of the Calcutta High Court that an order for direct payment of costs to which an attorney is entitled may, in appropriate causes, be made. A.I.R. (Vol. 22) 1935 Cal. 168 =61 Cal. 1005=38 C.W.N. 1031=154 Ind. Cas. 781.

——S. 35—Discretion of Court and Taxing Master.

Just as the Taxing Officer has jurisdiction to allow fees in excess when a written consent is produced, the Court has jurisdiction to allow fees in excess where consent is proved although it is not proved in every instance by a consent in writing. A.I.R. (Vol. 19) 1932 Cal. 233=58 Cal. 1439=35 C.W.N. 993=136 Ind. Cas. 539.

——S. 35—Question of quantum.

The Court is always averse from interfering with the discretion exercised by the Taxing Officer, and particularly the Court will not interfere where the only question raised is a question of quantum. A. I. R. (Vol. 22) 1935 Cal. 723=40 C.W.N. 577= 159 Ind. Cas. 376.

——S. 35—Application for review of taxation—Fidning by Taxing Master, if can be considered.

In cases of application for review of taxation of costs the Judge is entitled to consider and review the findings of the Taxing Master. A.I.R. (Vol. 22) 1935 Cal. 723=40 C.W.N. 577=159 Ind. Cas. 376.

——S. 35—Taxation of costs—When made.

According to the English practice in the King's Bench Division, as inherited from the Common Law Division, the practice has always prevailed of having no taxation of costs till the termination of the action, but this practice does not apply in the Court of Appeal and does not prevent taxation of costs allowed by the Court of Appeal. 1933 Cal. 19=59 Cal. 1358=142 Ind. Cas. 76.

——S. 35—Bill of costs—Rule fixing three months' time—Condonation of delay—Practice—Madras.

A rule fixing three months' time for carrying in a bill of costs for taxation is a rule of practice, which ought to be enforced.

A deception practised upon his client by an Advocate would be a good reason for excusing delay in bringing the bill of costs, but there must be some reasonable limit to the client's credulity. A.I.R. (Vol. 22) 1935 Mad. 791=69 M.L.J. 483=43 L. W. 701=158 Ind. Cas. 546.

——S. 35—No specific provision provided by taxation—Rules to be followed by Taxing Master.

In matters of taxation which are not specifically provided for by taxation rules, the Taxing Master has to follow the taxation practice of the Supreme Court in England. He will find the proper method of taxing a number of persons' costs as "one set of costs" in the notes to the Rules of the Supreme Court: O. 65 R. 27 (8) at pp. 1461 and 1462 of the 1934 White Book. "One set" means the amount of the costs which would have been incurred, if the parties separately represented had appeared by the same solicitor. Each individual brings in his own separate bill and the Taxing Master has then, (a) to tax off all improper items and (b) to apportion between them all duplicated items, allowing of course only one such duplicated item between them all. A.I.R. 1939 Rang. 108=1938 Rang. L.R. 252=180 Ind. Cas. 841.

——S. 35—Taxation of costs, whether depends on expenditure incurred by party personally—Matter of discretion.

The principle that the taxation of any item of of costs is to depend upon proof of that item of expenditure having been incurred by the party concerned personally cannot be accepted. The awarding of costs is a matter of discretion. A.I.R. 1936 Oudh 275=1936 O.L.R. 237=1936 O.W.N. 414= 12 Luck. 150=162 Ind. Cas. 229.

——S. 35—Court passing decree—Taxation of costs —Jurisdiction to deal with—Appeal to High Court dismissed.

After an appeal has been preferred to the High Court and an order has been made dismissing the appeal, the Court which passed the decree appealed from is competent to deal with the matter of taxation of costs arising under its decree. 28 Bom. L. R. 550=95 Ind. Cas. 515=A.I.R. 1926 Bom. 367.

——S. 35—Taxation of costs—Direction by a Judge as to mode of—No appeal.

No appeal lies against an order passed by a Judge directing how costs are to be taxed. 27 Bom.L.R. 692=89 Ind. Cas. 211=A.I.R. 1925 Bom. 432.

25. Income-Tax.

——S. 35—Income-tax reference—Successful assessee—Right to recover Rs. 100, deposit.

All fiscal enactments must be construed in favour of the subject and it cannot be said that if an assessee has not been properly taxed and if he succeeds on a reference in the High Court, yet he must lose a sum of Rs. 100 simply because the Income-tax Officer has chosen to make an assessment. 1930 A. L. J. 1548=A.I.R. 1931 A. 23=52 A. 991=130 Ind. Cas. 634.

——S. 35—Costs—Application under S. 66 (3) of Income-tax Act.

Application by assessee under Income-Tax Act, asking Court to direct Commissioner to state case—The right rule is that the costs of the application should follow the event. A.I.R. 1939 Bom. 448= 41 Bom.L.R. 919=I.L.R. (1939) Bom. 574=1939 I.T.R. 628=185 Ind. Cas. 556.

——S. 35—Costs—Reference under S. 66 (2), Income-tax Act—Costs of Commissioner.

Costs of Income-tax Commissioner of getting reference settled by Government Solicitor and Advocate may be taxed in costs of suit by the Taxing Master. A.I.R. 1938 Bom. 83=39 Bom.L.R. 1209=I.L.R. (1938) Bom. 81=173 Ind. Cas. 804.

26. Indemnity, Suit on.

——S. 35—Contract of indemnity—Suit on.

Plaintiff should be awarded actual costs incurred if reasonable. English case-law referred to. 13 M.L.W. 297=60 Ind. Cas. 164=A.I.R. 1921 Mad. 544.

27. Interest.

——S. 35 (3)—Interest on costs—Judgment silent as to—Decree—Interest on costs if can be included in.

A Court insetting interest on costs for the first time in the decree is within its jurisdiction, the power of awarding interest on costs being discretionary which may be exercised when framing the decree. Where a pleader signed a decree before the Court signed it and where no objection to insertion of interest on costs was taken in appeal to the High Court, the objection will not be allowed to be raised subsequently. 35 Ind. Cas. 218 (All.).

——S. 35 (3)—Interest on costs.

Costs bear interest *ipso facto* at the Court rate until realisation. 14 C.W.N. 1093 (Note)=7 Ind. Cas. 979.

——S. 35—Costs of Privy Council—Whether carry interest.

The costs of the Privy Council do not carry interest unless such interest is specifically mentioned. A.I.R. (Vol. 21) 1934 Pat. 192=13 Pat. 21=15 P.L.T. 513=155 Ind. Cas. 769.

——S. 35—Interest—Claim on costs of respondent in the Privy Council.

No interest on the costs could be claimed when such interest was not allowed by the order of Privy Council. 23 C. 357; 4 I.A. 137, foll. (1905) 9 C.W.N. 372=32 Cal. 494=1 C.L.J. 118.

28. Intervenor.

——S. 35—Challenge to Government legislation—Government intervening and successful—Government, if entitled to costs.

It is not the practice of the Federal Court to proceedings where a challenge is thrown to its legislation. That by itself would not entitle the Government to its costs if it is successful and the objection that is raised against it fails. A.I.R. (Vol. 33) 1946 Lah. 6=47 P.L.R. 259=222 Ind. Cas. 406.

——S. 35—Costs of Advocate-General intervening.

It is not practice of the High Court to give costs to an Advocate-General intervening. A.I.R. 1941 Mad. 817=I.L.R. (1942) Mad. 60=(1941) 2 M.L.J. 125=54 L.W. 107=1941 M.W.N. 741=200 Ind. Cas. 520.

——S. 35—Costs to Advocate-General as intervenor.

It is not the practice of the Federal Court to give costs to an Advocate-General intervening. A.I.R. 1941 F.C. 47=53 L.W. 109=7 B.R. 523=1940 F.C.R. 188=O.L.R. 157=22 P.L.T. 155=1941 M.W.N. 100=45 C.W.N.F.C. 1=(1941) 1 M.L.J. (Sup.)=1941 O.W.N. 425=73 C.L.J. 1=1941 R.D. 205=I.L.R. (1941) Kar. F.C. 25=192 Ind. Cas. 225 (F.C.).

29. Land Acquisition Proceedings.

——S. 35—Land acquisition proceedings—Order for costs.

In land acquisition proceedings, the claimant should not be called upon to pay the Collector's costs unless his claim was extravagant or the claimant was negligent in putting his case before the Collector. A.I.R. 1935 Mad. 279 (2)=1934 M.W.N. 1400=155 Ind. Cas. 280.

——S. 35—Costs—Land acquisition case.

Full costs can be allowed in a land acquisition case ony if the suit has been dismissed on the Where the claim is withdrawn not more than half the full fees can be awarded. 5 Ind. Cas. 770=11 C.L.J. 217.

——S. 35—Land—Acquisition Act, S. 27 (2)—Proceedings under.

Costs of the proceednigs under S. 27 (2) of the Land Acquisition Act, 1894, are in the discretion of the Courts of first instance. A.I.R. 1931 Bom. 528=33 Bom.L.R. 1210=136 Ind. Cas. 173.

30. Legal Practitioner.

——S. 35—Advocate-General appearing in support of bequest to charity—His costs, as between attorney and client, to come out of estate.

Where in a suit to support a bequest under a will in favour of charity, the Advocate-General appears, his costs should be allowed as between attorney and client out of the estate. A.I.R. 1936 Bom. 13=37 Bom.L.R. 901=160 Ind. Cas. 194.

——S. 35—Attorney, change of—Cost of application for—Refusal by attorney to prosecute suit unless money paid by client—Discharge of attorney—Attorney's lien on cause papers.

An attorney who once undertakes the conduct of a case is bound, whether the client supplies him with funds or not, to proceed with due diligence in prosecuting the case. Where an attorney instructed counsel who had been bribed not to appear and prosecute the case because the client had refused to supply him with funds:—*Held*, that the attorney thereby discharged himself and the client was entitled to an order for change of attorney without previous payment of his costs or an undertaking thereof and for the delivery of the cause papers to the new attorney, subject, however, to the latter undertaking to receive the same without prejudice to any lien that the former attorney might have. Where the attorney opposed the application for change under the above circumstances, he was ordered to pay the costs of the application. L.R. 13, Eq. 440, foll. (1901) 6 C.W.N. 215=29 C. 63.

——S. 35—Attorney—Defendants appearing by same attorney—One bill of costs, where interests are diverse—If can be represented by separate counsel—Test.

Defendants appearing by the same solicitor, however numerous or diverse they or their interests may be, can have but one bill of costs; but this will not limit their representation in Court. If their interests are diverse, separate counsel may appear in Court, and their charges will be allowed. *Prima facie* each person alleged to be a partner or to have held himself out as a partner has a right to defend himself separately.

The test in such cases is, whether there is a reasonable probability of there being a substantial difference in the two defences. The fact that the retainers

signed by the two alleged partners, in favour of the attorneys are separate and that they did not sign one joint retainer is certainly a matter for consideration in determining whether the interests of the two parties who signed two separate retainers were identical, but it does not necessarily follow from the fact that two retainers were separately signed, that the interests of the two parties cannot be identical. The question is whether the attorneys were justified from the commencement in having a reasonable apprehension that the cases of their two clients were not identically the same. What is a reasonable apprehension cannot be strictly defined and all that the Taxing Master has to see is that the parties have not unnecessarily augmented costs by each filing a separate appearance. A.I.R. 1936 Bom. 242=38 Bom.L.R. 388=60 Bom. 659=163 Ind. Cas. 467.

——S. 35—Court must be satisfied that counsel's fees were paid—Certificate by pleader when enough.

If an application under R. 1 of Chap. 21 of the Allahabad High Court General Rules (Civil) is made to the Judge the Judge has to be satisfied that the payment of fee was made to the legal practitioner. He may of course accept a certificate given by the legal practitioner if it is unrebutted or in any case if he believes it in preference to any other evidence which may be before him; but the question is that he must be satisfied that the payment was made. A.I.R. 1936 All. 652=1936 A.L.R. 364=1936 A.L.J. 507=162 Ind. Cas. 53.

——S. 35—Pleader's fee—Execution of decree—Only on the amount claimed in execution.

Where the amount involved in the execution petition is not the total sum decreed, but what is sought to be recovered after giving credit to the various payments made, the Vakil's fee must be calculated on this basis and he is entitled to get Pleader's fee only on amount. A.I.R. 1943 Mad. 689=56 L.W. 513=(1943) 2 M.L.J. 319=1943 M.W.N. 819=211 Ind. Cas. 263.

——S. 35—Valuation for pleader's fees—Plaintiff not valuing his share—Payment according to market value.

Valuations for court-fees and for pleader's fees are distinct matters, and where the plaintiff does not merely ask for and value his share, but prays for the administration and distribution of the whole subject-matter of what he alleges is a trust, he must pay on that amount which is to be fixed at the market value of the securities, in which the fund is invested, at the date of suit. A.I.R. 1935 Bom. 439=37 Bom. L.R. 763=160 Ind. Cas. 846.

——S. 35—Same person, if can appear by separate solicitors in different capacities.

The same person is not entitled to appear by separate solicitors or separate counsel in different capacities. Of course a solicitor or counsel appearing for a client who is interested in two different capacities can state the case of his client in respect of each capacity but he cannot appear separately for the same person. A.I.R. 1935 Bom. 119=37 Bom.L.R. 49=158 Ind. Cas. 579.

——S. 35—Legal practitioner appointed Receiver conducting his own case—Legal fees, if can be taxed as costs.

Where the Receiver is a legal practitioner who conducts his own case, without employing a Pleader, a legal practitioner's fee cannot be taxed, as according to the rules, only such sum can be taxed as legal practitioner's fee as has been actually paid and certified by the legal practitioner to whom it has been paid. A.I.R. 1936 All. 489=1936 A.L.J. 698=1936 A.L.R. 752=163 Ind. Cas. 831.

——S. 35—Legal Practitioner—If and when liable for costs of proceeding.

(Per *Full Bench.*)—The High Court has no power to order a legal practitioner to pay personally the costs of an application or suit except in cases to which S. 35 can be made applicable. 1930 A.L.J. 402=A.I.R. 1930 All. 225=125 Ind. Cas. 477=52 A. 619 (F.B.).

——S. 35—Costs—Legal practitioner, award against (disciplinary)—Propriety.

Per *Niamatullah, J.*—S. 35 was not intended to confer any disciplinary jurisdiction on any Court including High Court which cannot, acting under that section award costs against a legal practitioner for what amounts to misconduct or other reasonable cause justifying the existence of disciplinary jurisdiction. The right to receive and the liability to pay costs under S. 35 must be treated like any other question in the case and no Court of appeal can ever be justified in making it a matter for consideration over the heads of the parties to the case, an action which has all the attributes of a disciplinary measure to which different considerations should apply. 1930 A.L.J. 402=A.I.R. 1930 All. 225 125 Ind. Cas. 477=52 A. 619 (F.B.).

——S. 35—Costs against pleader personally.

Section 35 of the Civil P. C. gives power to the Court to direct a legal practitioner to pay the costs. There is no justification for the assumption that S. 35 is not intended to cover any case where the act of a legal practitioner comes within the scope of the term "misconduct" within the meaning of the Legal Practitioners and the Bar Councils Acts. A pleader may be held personally liable for costs of the proceedings taken by him in appropriate cases, where the costs occasioned to his client are the direct result of the initiation and prosecution of the proceedings by him. A.I.R. 1942 Oudh 279=1942 O.W.N. 68=199 Ind. Cas. 385.

31. Maintenance suit.

——S. 35—Maintenance suit—In forma pauperis—Costs.

In a maintenance suit by a pauper Hindu widow, the plaintiff if she succeeds in getting her right established by the decree she alone ought to be given costs in proportion to the amount of her success; defendants are not to be given proportionate costs. 10 L.W. 540=(1919) M.W.N. 878=53 Ind. Cas. 796.

——S. 35—Maintenance suit—Decreed in part—Proportionate costs.

It is not possible to foretell or predict accurately the amount of maintenance that a person will be entitled to in the opinion of the Court. What the Courts

therefore have to look into in such circumstances, while awarding costs, is to see whether there was any *prima facie* excessive or exaggerated claim made in plaint. A.I.R. 1939 Mad. 479=126 Ind. Cas. 597 =32 L. W. 729=59 M.L.J. 531.

——S. 35—Maintenance suit—Success in part—Proportionate costs.

Where the petitioner in a claim for maintenance succeeds only in part, the fair order as regards costs should be to pay proportionate costs upon the value of the relief allowed to the petitioner. A.I.R. 1932 Mad. 408=35 L.W. 611=138 Ind. Cas. 237.

——S. 35—Widow—Claim for maintenance excessive—Ignorance of income—Vexatious pleas in defence—Full cost.

Widow kept back from information of income of family and hence claiming maintenance at a rate found to be excessive—Defendant coparceners putting vexatious pleas to defeat her claim—Direction that defendant should pay plaintiffs all costs is proper. 28 M.L.W. 328=108 Ind. Cas. 712=A.I.R. 1928 Mad. 216=54 M.L.J. 530.

32. Matrimonial cases.

——S. 35—Divorce—Husband—Liability for costs of wife even if unsuccessful.

Divorce—Husband must pay wife's costs even if her defence fails. 66 Ind. Cas. 494=A.I.R. 1922 All. 243.

——S. 35 (220)—Divorce Act, 4 of 1869, S. 45—No damages asked for against co-respondent—Costs as between attorney and client.

Where in a petition for divorce no damages are asked for as against the co-respondent and a decree *nisi* is passed, the Court has jurisdiction under S. 220, C.P.C., to award to the petitioner costs, as between attorney and client. (1900) 28 C. 84.

——S. 35—Petition for divorce—Wife—Costs.

Where the wife is the petitioner and is successful in her suit, her husband will, as a matter of course, be ordered to pay her costs. A.I.R. 1932 Lah. 116=1932 Cr. Cas. 96=33 P.L.R. 339=136 Ind. Cas. 262.

——S. 35—Divorce case—Unsuccessful wife awarded party and party costs—Her solicitor if can recover solicitor and client costs from husband.

Where in a divorce case the Court awards party and party costs to the unsuccessful wife claiming a judicial separation, her solicitor can recover judgment for solicitor and client costs against the husband by proving that those costs were really a necessity for which the wife was entitled to pledge her husband's credit, that he acted on reasonable grounds, made adequate inquiries, and showed proper diligence and full care. A.I.R. 1944 Bom. 189=46 Bom.L.R. 389=220 Ind. Cas. 313.

33. Husband and wife.

——S. 35—Husband and wife.

There is no practice which requires the Court to make the husband pay the costs of an unsuccessful appeal by an unsuccessful wife. A.I.R. (Vol. 20) 1933 Cal. 388=37 C.W.N. 249=60 Cal. 318=144 Ind. Cas. 804.

——S. 35—Matrimonial suit for separation—General rule.

The general rule in matrimonial suits is that the wife is entitled to recover her costs from the husband whether she is successful or not, and whether she is petitioner or respondent. But the rule is always qualified in this sense that the solicitor of the wife must have an honest belief in this case, he need not be satisfied that his case is going to succeed, but he must consider that his client has a case which ought properly to be put before the Court. A.I.R. (Vol. 28) 1941 Bom. 372=43 Bom.L.R. 830=198 Ind. Cas. 102.

——S. 35—Suit for judicial separation—Order for costs.

A suit for judicial separation was brought by the wife against her husband. The parties were members of the Jewish community and professed the Jewish religion. The wife took out summons for an order on the husband to pay to the wife a certain sum on account of and towards the costs of the suit.

Held, that neither Cl. 35 Letters Patent (Calcutta) nor the Divorce Act applied to the case, but the suit came within the ordinary original civil jurisdiction of the High Court under Cl. 12 Letters Patent, and the procedure as regards payment of costs was that laid down by C. P. Code, of which S. 35 did not give the Court power to direct the order prayed for. 34 C.W.N. 319=A.I.R. 1930 Cal. 588=57 Cal. 1089=127 Ind. Cas. 559.

——S. 35—Wife unsuccessful—Costs, if should come from husband.

In matrimonial cases it cannot be held that costs of the wife must always come out of the husband, even though she may be unsuccessful. The Court has a discretion in the matter and may order the parties to bear their own costs. A.I.R. 1935 Oudh 133=10 Luck. 627=1935 O.W.N. 103=1935 O.L.R. 37=153 Ind. Cas. 751.

34. Minor.

——S. 35—Minor—Dismissal of suit by next friend.

Next friend must be ordered to pay the successful defendant's costs with a reservation in judgment that he should have liberty to proceed to reimburse himself out of the minor's estate, and minor plaintiff cannot be made personally liable for costs. A. I. R. 1935 Bom. 112=59 Bom. 35=36 Bom.L.R. 1201=156 Ind. Cas. 304.

——S. 35—Unsuccessful infant plaintiff—Guardian ad litem—Court's power to pass orders—Minor's remedy.

The Court has the power to order an unsuccessful infant plaintiff to pay the defendant's costs and *vice versa*; orders can also be made on a next friend or guardian *ad litem* to pay the costs personally. It has also power to direct that costs should be paid out of the minor's estate.

A guardian *ad litem* had accepted the position of guardian *ad litem* on condition that provision for his costs be made:

Held, that the Court could pass any order as it thought fit with regard to costs and in such a case, the minor could get the guardian discharged or have

the order for costs set aside or sue the guardian for damages for negligence. A.I.R. 1934 Cal. 474=59 C.L.J. 9=61 Cal. 227=151 Ind. Cas. 399.

——S. 35—Minor—Pauper suit by next friend—Dismissal of—Order as to costs.

Order 33, R. 11, Civil P. C., must be construed in the light of S. 35 and on the principle underlying R. 14 of O. 32 Civil P. C. Section 35 of the Civil P. C., gives wide discretion to the Court and full power to determine by whom or out of what property and to what extent such costs are to be paid. Costs can be awarded personally against the next friend of a minor plaintiff who was allowed to sue *in forma pauperis*, if the Court thinks that there was no justification for instituting the suit. A.I.R. 1943 Nag. 329=1943 N.L.J. 478=I.L.R. (1943) Nag. 775=210 Ind. Cas. 237.

——S. 35—Idol—Suit by next friend dismissed—Next friend when personally liable for costs.

Where a suit brought by an idol's next friend is dismissed the next friend is personally liable for the costs and not the estate unless upon a consideration of the circumstances the Court directs him to be indemnified out of the trust estate. A.I.R. 1941 Cal. 272=I.L.R. (1940) 2 Cal. 285=195 Ind. Cas. 473.

——S. 35—Next friend—Court, if can direct him to bear costs both of minor plaintiff and defendant personally.

The Court has power in its discretion to make the next friend bear the costs of the suit personally of both the minor plaintiff and the defendant if it finds that the suit is not for the benefit of the minor. A.I.R. (Vol. 26) 1939 Bom. 271=41 Bom.L.R. 445=I.L.R. (1939) Bom. 396=183 Ind. Cas. 394.

——S. 35—Minor—Suit by next friend—Order for costs recoverable from plaintiff—Construction—No express direction in decree to next friend to pay costs—Executing Court cannot import direction against next friend to pay costs.

Ordinarily the next friend of the minor plaintiff must be ordered to pay the successful defendant's costs with liberty to reimburse himself from the minor's estate. But where a decree merely mentions that the successful defendant's costs are to be recovered from the plaintiff, who happens to be a minor, it is not open to the executing Court to construe such direction to mean that the costs are recoverable from the next friend of the minor plaintiff. Unless the liability is expressly placed on the next friend the costs cannot be recovered from him. Hence though the next friend of an unsuccessful minor plaintiff is ordinarily liable for costs, in the absence of a clear expression in the decree of the Court's intention to enforce such liability, the matter cannot be left to the interpretation of the executing Court, which must deal with the decree as it finds it, *i.e.*, in its ordinary meaning, without importing anything which is not to be found in its language. A.I.R. 1944 Bom. 100=45 Bom.L.R. 1029=I.L.R. (1944) Bom. 12=212 Ind. Cas. 601.

——S. 35—Guardian of minor—Costs of litigation by—Reimbursement—When allowed.

If the guardian carries on a litigation honestly for the benefit of the estate of the minors, it is open to him to ask the Court to allow him the cost of the litigation from the estate of the minor. When he has not done so, a suit for recovery of this amount against the minor is not maintainable. A.I.R. (Vol. 23) 1936 Pat. 194=16 P.L.T. 649=1 B.R. 844=158 Ind. Cas. 25.

35. Mortgage suits—Costs.

(a) Character of.
(b) Costs in appeal.
(c) Liability of transferees.
(d) Redemption suits.

(a) Costs—Character of.

——S. 35—Mortgage suit—Claim for costs—Character.

The costs in a mortgage suit are not to be treated as independent claims by the mortgagee irrespective of the rights under the mortgage; but such costs should form part of the amount decreed in the mortgage suit to be realized in accordance with the procedure laid down in the Code. It makes no difference if the order for costs was passed before the final decree was drawn up.

The costs awarded in a mortgage suit follow the character of the amount decreed in the suit and form part of the entire decretal amount to be realized from the mortgaged properties. 35 Cal. 431; 20 All. 528 (F.B.); 40 All. 109 and 30 Mad. 464, Foll. 41 C.L.J. 607=93 Ind. Cas. 364=A.I.R. 1925 Cal. 1135.

——S. 35, O. 34, Rr. 2, 4 and 5—Mortgage suit—Personal decree for costs—No power.

A personal decree for costs in a mortgage suit cannot be passed. (1938) 68 C.L.J. 409=42 C.W.N. 888.

——S. 35—Mortgage suit—Personal decree for costs—Propriety.

Costs in mortgage suit can be ordered to be recovered personally. A.I.R. 1943 Nag. 178=1943 N.L.J. 159=16 R.N. 24=I.L.R. (1943) Nag. 422=207 Ind. Cas. 214.

——S. 35 and O. 34, Rr. 2 and 4—Mortgage suits—Costs cannot be awarded personally except against mortgagor.

In a suit on mortgage, costs are recoverable from the mortgaged property and not by a personal decree against any party other than the mortgagor. A.I.R. 1936 Pat. 153=2 B.R. 344=161 Ind. Cas. 579.

——S. 35—Mortgage suit—Subseqent purchaser party to suit—Whether personally liable for costs—Construction of decree.

When the order provides: 'the suit be decreed with costs' it obviously means that 'the claim in the suit be decreed with costs.' The Court makes no difference between the amount of the claim and the costs.

The subsequent purchaser, 'there being no privity between him and the mortgagee, is not liable in the action on the personal covenant.

Where an order in the mortgage suit to which the subsequent purchaser was one of the defendants was in the following form: "that the suit be decreed with

costs on contest against defendants 3 to 9 subsequent purchasers and *ex parte* against others":

Held, that it was not a personal decree against the defendants' second party (defendants 3 to 9). It could not be said that the Judge was intending that the subsequent purchaser should be liable for the amount of the mortgage monies, and not differentiating between the amount of mortgage monies and the costs, it was equally clear that he did not intend a personal decree against defendants second party for costs. A.I.R. 1939 Pat. 41=5 B.R. 11=177 Ind. Cas. 689.

——S. 35—Mortgagee—Right to costs.

A mortgagee is ordinarily entitled to his costs of suit unless he is guilty of grave misconduct. (1913) M.W.N. 334=19 Ind. Cas. 474.

(b) Costs in appeal.

——S. 35—Mortgage suit—Rule as to costs.

The general rule of appeal that an unsuccessful appellant must pay the costs admits of no exception in favour of an unsuccessful appellant mortgagor. The mortgagee is entitled to add to the security the costs of the Appeal. 41 All. 473=17 A.L.J. 582 =50 Ind. Cas. 730.

——S. 35—Mortgage decree—Costs in appeal—Whether form part of mortgage decree—Whether realizable from sale of mortgage property.

According to the provisions of O. 34, R. 4 the costs of suit, if any, awarded to the mortgagee are to be included in the decree for sale. Costs of appeal also can similarly be added to the mortgage security, though of course the Appellate Court can order otherwise. But where the decree of the Appellate Court does not contain any express direction on the subject, such costs form the part of the decretal amount and are realizable in the first instance by the sale of the mortgaged property.

The question whether in a mortgage suit, the costs are to be paid by judgment-debtor personally must always be regarded as one of construction of the decree and of the intention of the Court to be gathered from the terms of the decree. A.I.R. 1935 Oudh 452=1935 O.L.R. 488=1935 O.W.N. 926=157 Ind. Cas. 625.

——S. 35—Mortgage decree against several defendants—One defendant alone appealing—Appellate decree for costs against that defendant—Nature of.

Where one defendant appeals against a mortgage decree against himself and others, the appeal is dismissed and costs are awarded against the defendant who had preferred the appeal, the decree of costs is of the nature of a simple money decree against him. 11 A.L.J. 975=22 Ind. Cas. 42.

——S. 35—Costs, a charge on the property—Some of the defendants appealing—Decree affirmed—Costs on those who appealed—Whether personally liable.

Ordinarily costs awarded to a mortgagee decree-holder in a mortgage suit or appeal, in the absence of any express direction to the contrary, would be part of the mortgage amount decreed and would be a charge on the mortgaged property. But where only two of the defendants had filed the appeal and the form in which the decree was framed made them personally liable for the payment of the costs, and there was no mention made of the other defendants who were *pro forma* respondents at the time, on the interpretation of the decree, the defendants-appellants were liable to pay the costs of appeal personally. A.I.R. 1934 All. 89=1934 A.L.J. 446=151 Ind. Cas. 294.

(c). Liability of transferees.

——S. 35—Transferee—Property purchased subject to mortgage—Suit by mortgagee—Purchaser putting off mortgagee and making profit from delay —Costs of suit.

A certain property was purchased subject to a mortgage. Subsequently, a suit was brought on the mortgage by the mortgagee. The purchaser, who was in possession, tried to put off the mortgagee and thus wanted to make as such money from delay as possible:

Held, that the purchaser should bear half the taxed costs of the suit. A.I.R. 1936 Lah. 705=38 P.L.R. 896=167 Ind. Cas. 65.

——S. 35, O. 34, R. 5—Mortgage suit—Costs. against party who is not mortgagor.

Though as between mortgagees and mortgagors in a mortgage decree, no separate order making the defendant-mortgagors personally liable for the costs can be passed, yet it is not illegal to award a personal decree for costs against a party to the suit who is not himself the mortgagor. A.I.R. 1931 Mad. 272=33 L. W. 263=131 Ind. Cas. 151.

——S. 35—Personal decree for costs against non-mortgagor.

Courts have a discretion to pass a personal decree for costs against a person who is a non-mortgagor, in a suit on mortgage by the mortgagee. A.I.R. 1938 Mad. 226=1937 M.W.N. 1280 (1)=174 Ind. Cas. 784.

——S. 35—Puisne mortgagees contesting—Puisne mortgagees saddled with costs—Order proper.

The plaintiffs-mortgagees sued the mortgagors for enforcement of the mortgages. Defendants 5 and 6 were puisne mortgagees. The matter was fought nominally by the mortgagors who put in the same written statements as the puisne mortgagees, but the real contesting defendants were defendants 5 and 6. The Subordinate Judge passed a decree in favour of the plaintiffs and made an order for costs against all the defendants including defendants 5 and 6:

Held, that under S. 35, Civil P. C., the Court had discretion in the matter of costs. There is no principle of law, which makes it wrong or improper for a Court to saddle with costs the real contesting defendants to a suit. The discretion is absolute and there was nothing improper in law in such an order. A.I.R. (Vol. 23) 1936 Lah. 607=17 Lah. 520=38 P.L.R. 1024=164 Ind. Cas. 841.

——S. 35—Assignee of equity of redemption not paying mortgagee. If liable to pay the cost of suit. He is liable to pay costs incurred by mortgagee in suit to enforce the mortgage. A.I.R. 1936 Lah. 76.

——S. 35—Mortgage decree—Personal liability for costs.

Mortgage—Preliminary decree declaring that amount due by defendant comprised principal, interest and cost—Appeal by defendant dismissed with costs—Property sold and purchased by decree-holder—Application for personal decree for costs:

Held, that the decree-holder was entitled to personal decree as regards costs in Appellate Court and not in trial Court. A.I.R. (Vol. 25) 1938 Rang. 190 =1938 Rang.L.R. 56=177 Ind. Cas. 295.

——S. 35—Suit by co mortgagee for possession of half of mortgage land against other co-mortgagee and mortgagor—Defendant co mortagee proved to have recovered entire mortgage money.

In a suit by a co-mortgagee for possession of half of the mortgage land against the other co-mortgagee and the mortgagor, it was proved that the defendant co-mortgagee had recovered the entire mortgage money. In revision by the plaintiff:

Held, that as the defendant co-mortgagee could have avoided the litigation by paying up the plaintiff's share of the mortgage money, he should be made responsible for bearing the costs of the plaintiff in all the Courts. A.I.R. 1943 Pesh. 1 (3)=210 Ind. Cas 198. [Overrules 73 Ind. Cas. 682 (Pesh.)]

(d) Redemption Suits.

——S. 35—Mortgage—Redemption suit—Practice.

A mortgagor is ordinarily entitled to costs in a redemption suit unless he forfeits his right to it by laches. In Malabar, though redemption suits are complicated by questions of compensation for improvements yet where a mortgagor fails to deposit even the mortgage amount in full the mortgagee is entitled to his costs. (1917) M.W.N. 275=38 Ind. Cas. 655.

——S. 35—Mortgage—Redemption suit.

In a redemption suit, the mortgagee is entitled to costs unless he is guilty of misconduct. 2 Ind. Cas. 662 (Cal.). *See* On Appeal 42 Cal. 801=28 Ind. Cas. 930 (P.C.).

——S. 35—Mortgage—Redemption suits.

Where the defendant mortgagee contests the suit on the ground that the transaction is a sale and not a mortgage, the ordinary rule as to the award of costs to mortgagee will not apply. 25 Bom.L.R. 1209=81 Ind. Cas. 673=A.I.R. 1924 Bom. 172.

——S. 35—Mortgage—Redemption suit—Pleas in defence held against—Costs disallowed.

Where the mortgagors file suits purely for accounts under S. 33. U. P. Agriculturists' Relief Act the mortgagees are not entitled to their costs when almost all the points raised in defence by them are held against them. A.I.R. 1938 Oudh 156=1938 R. D. 567=1938 O.W.N. 535=1938 O.L.R. 259= 175 Ind. Cas. 50=14 Luck. 49.

——S. 35—Mortgage—Redemption suit—Discretion of Court to award costs.

A mortgagee is generally entitled to costs in a suit for redemption or foreclosure unless he has been guilty of misconduct, and the Court is given a discretion to give and apportion them in any manner it thinks fit. The discretion is a judicial one and is not to be exercised arbitrarily. A.I.R. 1932 Oudh 123=9 O.W.N. 60=7 Luck. 454=137 Ind. Cas. 102.

36. Official Assignee and Official Receiver.

——S. 35—Official Assignee or Official Receiver—Plaintiff—Liability for costs.

When the Official Assignee or the Official Receiver files a suit in a Court other than the Insolvency Court of which he is the insolvency Officer, the Court trying the suit or the application may dismiss the suit or the application with costs. In such a case the Official Assignee is always personally liable for costs. A.I.R. (Vol. 28) 1941 Mad. 632=1941 M.W.N. 341=(1941) 2 M.L.J. 110=53 L.W. 680 (2)=198 Ind. Cas. 573.

——S. 35—Official Receiver, (party)—Liability for costs.

The Official Receiver or a trustee in bankruptcy may, like any ordinary litigant, be ordered to pay costs in any action taken or defended by him. *John Tweedle & Co. Ltd., In Re*, (1910) 2 K. B. 697; *Williams & Co., In re*, (1913) 2 K. B. 88; and 7 Bom. 484; Foll. 114 Ind. Cas. 825=55 M.L.J. 873=28 M.L.W. 719=52 Mad. 263=A.I.R. 1929 Mad. 105.

——S. 35—Official Receiver—Costs against—Nature of.

A simple order for costs against the Official Receiver has the usual meaning of such an order against any litigant, and the Official Receiver is, therefore, in the first instance, personally liable for costs. The circumstance that the Official Receiver had obtained the leave of the Court would only entitle him to claim reimbursement out of the estate or from the creditors in whose interest he was acting in the litigation in which he was unsuccessful. 7 Bom. 484; 23 C.W.N. 431; *Pitts* v. *La Fontaine*, 6 A. C. 482 and *Ex parte Angerstein, in re Augerstein*, 9 Ch. A. 479 Rel. on. 114 Ind. Cas. 825=55 M.L.J. 873= 28 M.L.W. 719=52 Mad. 263=A.I.R. 1929 Mad. 105.

——S. 35—Parties—Relief not claimed against.

Where no right to relief is alleged to exist against a person, he is not a proper party, and an order making him liable for costs cannot be supported. 61 Ind. Cas. 315 and A.I.R. 1928 Mad. 1129. Rel. on. 30 M.L W. 949=58 M.L.J. 118=A.I.R. 1930 Mad. 195=124 Ind. Cas. 216.

37. Parties, pro-forma.

——S. 35—Pro forma defendant contesting unsuccessfully whether can be saddled with costs.

In rent suits brought by the plaintiff-appellant against the tenants entered in his *jamabandi* as defendants first party, the plaintiff also impleaded as defendants second party under S. 148-A, Bengal Tenancy Act the co-sharer landlords. The tenants did not contest the suit, but the cosharer landlords did, but were unsuccessful. The Court ordered that the defendants second party should bear the costs:

Held, that the order of the Munsif was an order which it was within his discretion to pass and in passing which he exercised his discretion with propriety and the principle that the second party being *pro forma* defendants and not liable to payment should not be saddled with costs of the suit arising from default of defendants first party did not apply. A. I. R. 1936 Pat. 151=16 P.L.T. 811=2 B.R. 330 =161 Ind. Cas. 472.

——S. 35—Defendant 2 joined by plaintiff as defendant although interests were same alleging collusion between him and defendant 1—Defendant 2 held entitled to his full costs.

The interests of the plaintiff and defendant 2 were identical but as the plaintiff saw fit to charge defendant 2 with collusion with defendant 1 he made him a defendant to the suit:

Held that defendant 2 was entitled to appear therein. No doubt the allegation of collusion were in fact withdrawn in the Court below but the withdrawal was not accompanied by any offer to pay costs to date or any part thereof, and defendant 2 remained in the suit at any rate to ask for his costs; in these circumstances he should have his full costs. A.I.R. 1944 Bom. 205=46 Bom.L.R. 265.

——S. 35 and O. 41, R. 35—Party—Respondent pro forma—Right to costs.

Where a person not interested in the appeal is added as a party to satisfy the rules of procedure, but no notice is given to him that he need not appear, the costs of his appearance must be paid by the appellant who lost the appeal. (1900) 5 C.W.N. 217= 24 M. 377=28 I.A. 46 (P.C.).

——S. 35—Parties—Respondent — Pro forma.

Where persons though necessary parties in the trial Court have been added in appeal only as formal parties and no relief is asked against them it is not necessary for them to be represented and hence are not entitled to their costs in appeal. 52 Mad. 845 =30 M.L.W. 254=57 M.L.J. 374=122 Ind. Cas. 167=A.I.R. 1929 Mad. 738.

38. Partition suits.

——S. 35—Partition suit—Costs —Practice.

Where a suit has to be brought for effecting a partition between the members of a family and neither party has been guilty of unfair contention the costs till the preliminary decree should come out of the estate. 11 L.W. 5=54 Ind. Cas. 382.

——S. 35—Partition suit—Practice—Costs, direction for.

In a suit for partition, the Court has a discretion to award costs against a party who raises a vexatious contention and fail. 21 Ind. Cas. 746. (Mad.).

——S. 35—Costs—Partition suit.

The general rule is that in partition suits parties should have their own costs except with regard to the institution fee which should be borne proportionately by all the parties. 77 Ind. Cas. 914= A.I.R. 1923 Bom. 464.

——S. 35—Partition suit—Leseee's costs.

In a partition suit the ordinary rule is the parties should bear their costs up to the preliminary decree and costs proportionate to their shares in subsequent proceedings. But where there has been a frivolous contest, the party by reason of whose opposition such costs are incurred may be made liable. A lessee who is made a party, if he gets any benefits in the suit *e.g.*, separate allotment should bear his proportion of the costs in case in accordance with the above rule. If he derived no benefit he cannot be called upon to pay costs. A permanent lessee may be regarded as a purchaser and will be entitled to similar privileges and similar liabilities. The costs of the partition should as between the lessor and the lessee be borne by them in the proportion of their respective interests in the *Mokurari* lease. (1907) 5 C.L.J. 642=34 C. 878.

——S. 35—Partition suit—Direction for costs—Grounds.

When the hearing of a partition suit was prolonged entirely on account of contentions raised by a defendant in which he failed, he was ordered to pay to all parties the costs of hearing on subsequent days after the first day. (1908) 13 C.W.N. 153=4 Ind. Cas. 462.

——S. 35—Partition suit—Costs—Practice.

Ordinarily in a suit for partition pure and simple the parties are to bear their own costs of the suit up to the stage of the preliminary decree. But where the defendant contests the right of the plaintiff to claim partition, he may be made liable for costs unnecessarily incurred by reason of his or her unfounded opposition. (1909) 10 C.L.J. 503=3 Ind. Cas. 247.

——S. 35—Partition—Preliminary decree.

Costs in a partition suit up to the preliminary decree ought not to be given to plaintiff but to be borne by all the parties. Such an order may be made even though some of the defendants have not appealed from the decree ordering cost to plaintiff as it is to their benefit. 42 Cal. 451=19 C.W.N. 233 =28 Ind. Cas. 446.

——S. 35—Partition suit—Order regarding costs.

Where in a suit for partition the defendant pleaded a prior partition which was eventually proved against.

Held that the Court could direct the defendant to pay the costs of the suit. 35 C.W.N. 151=A.I. R. 1931 Cal. 573=132 Ind. Cas. 688.

——S. 35—Plaint not specifying parties' shares—Ground of contest substantial—No evidence showing plaintiff made demand for partition—Costs up to preliminary decree.

People who go in for complicated transactions should be prepared to bear their expenses when they find it necessary to enforce their rights by instituting a suit. Where in a suit for partition it was not clear when the plaint was filed what the shares of the different parties would be and the grounds upon which the defendants contested the plaintiff's claim were quite substantial, there was no evidence showing that any demand for partition was made or that any objection was offered by any of the defendants to have a proper partition made in respect of the properties and the questions raised were all substantial questions either of fact or of law;

Held, that the proper order to make with regard to costs was that each party should bear his or their own costs up to the preliminary stage. A.I.R. 1935 Cal. 792=40 C.W.N. 174=159 Ind. Cas. 1008.

——S. 35—Partition suit—Costs first charge on the property.

The costs of a partition suit have first to be provided for and no party or transferee can get anything except what is left, if anything. A.I.R. 1938 Cal. 1=64 C.L.J. 406=173 Ind. Cas. 828.

——S. 35—Costs—Partition suit.

In every partition case before a suit can be instituted there must be a demand and a final refusal. Where therefore there is a demand and refusal but the defendants take no further steps to contest the plaintiff's case the plaintiff is not entitled to costs up to passing of preliminary decree. 34 Cal. 878; 42 Cal. 451 and 12 C.L.J. 346, Rel. on. 11 P.L.T. 233=A.I.R. 1930 Pat. 336=125 Ind. Cas. 129=9 Pat. 773.

——S. 35—Costs—Partition suit.

It is incorrect to say that in partition suits parties should bear their own costs up to the preliminary decree. The question would depend upon the nature of the dispute raised in the partition suit, and the plaintiff can in a proper case be awarded his costs in the preliminary decree. A.I.R. 1942 Pat. 76=8 B.R. 463=198 Ind. Cas. 743.

——S. 35—Partition suit—Plaintiff's costs—When allowed.

Where in an application by plaintiff to the revenue authorities for partition of land the defendant sets up exclusive title to the land on the basis of a private partition and repeats the same in the civil Courts but fails to substantiate it, there is no reason why the plaintiff who was driven to Court by the unjustifiable action of the defendant, should not be allowed the costs of the suit. 116 Ind. Cas. 717=A.I.R. 1930 Lah. 229.

——S. 35—Partition suit—Mesne profits—Decree for—Court-fee paid in execution—Right to recover.

In a suit for partition and delivery of possession of the plaintiff's share, a preliminary decree was passed directing partition and inquiry into the mesne profits. A final decree was passed driecting payment of mesne profits on which at the time of the execution the plaintiff paid court-fee and sought to recover the same from the defendants. The defendants contended that as the decree did not include a specific direction against him for the payment of the court-fee paid by the plaintiff it was not recoverable:

Held, that the direction against the plaintiff for the payment of the said court-fee was implied in the decree and that the plaintiff was entitled to recover the same from the defendant. A.I.R. 1943 Mad. 689=56 L.W. 513=(1943) 2 M.L.J. 319=1943 M.W.N. 819=211 Ind. Cal. 263.

——S. 35—Partition suit—Rules of High Court—Strict compliance—Necessary.

In a partition suit, it is more necessary than ever that the rules of the High Court should be complied with; because although as between party and party each pary ultimaetly bears something of the costs. nevertheless, by reason fo the existing system of partition, parties are more reckless in the costs they incur than in any other kind of suit. A.I.R. 1942 Cal. 468=I.L.R. (1942) 1 Cal. 273=202 Ind. Cas. 200.

——S. 35—Party and party costs after preliminary decree are most peculiar—Net partition—Costs.

Party and party costs after preliminary decree in partition suits are a most peculiar affair. In net partitions they are not payable or not regarded as payable by the client to their attorneys. They are paid in full to the attorneys out of the pool created by the Commissioner. A.I.R. (Vol. 29) 1942 Cal. 468=I.L.R. (1942) 1 Cal. 273=202 Ind. Cas. 200.

——S. 35—Court if can order, in suit for partition, Receiver in the suit to pay costs of attorney of deceased party.

In a partition case the Court can order against the Receiver for payment of costs incurred by an attorney of a deceased party. A.I.R. 1941 Cal. 144=I.L.R. (1940) 1 Cal. 102=194 Ind. Cas. 13.

39. Partnership suits.

——S. 35—Partnership—Suit for dissolution—Defendant partners appointed Receivers—Costs for personal appearance should be ignored. A.I.R. 1935 Bom. 119=37 Bom.L.R. 49=158 Ind. Cas. 579.

——S. 35—Suit for partnership accounts—Decree—One partner remaining *ex parte* filing suit for amount due to him—Suit dismissed—Appeal—Costs.

Held, that plaintiff in subsequent suit could not be awarded costs so far as the first Court was concerned but as the first Court had dismissed the suit he had no alternative but to come up on appeal and hence was entitled to costs of appeal. A.I.R. 1934 Mad. 665=1934 M.W.N. 539=67 M.L.J. 413=40 L.W. 792=156 Ind. Cas. 264.

40. Pauper suits.

——S. 35—Suit on behalf of minor—Powers of Court—Order for costs against next friend.

The Court has power under S. 35 to pass on order against next friend for costs of a pauper suit. A.I.R. 1937 Mad. 145=1936 M.W.N. 1110=(1937) 1 M.L.J. 151=45 L.W. 234=166 Ind. Cas. 949.

41. Pre-emption suits.

——S. 35—Pre-emption suit—Costs of.

Where a vendee opposes the claim of the pre-emptor on several grounds including inadequacy of price, the latter is entitled to get his costs although the former succeeds in getting much more than what was offered by the pre-emptor. 71 P.R. 1915=13 P.L.R. 1916=109 P.W.R. 1915=30 Ind. Cas. 517.

——S. 35—Pre-emption suit—Costs.

Where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, no omission or neglect which would induce the Court to deprive him of his costs, the Court has no discretion and cannot take away his right to costs. In

a pre-emption suit the mere fact that the vendee had, even before the suit not denied that the plaintiffs had a right of pre-emption would not be a good ground for depriving them of their costs, if nevertheless in order to enforce the right they were compelled to bring a suit. 27 Mad. 341, Foll. 62 Ind. Cas. 812=A.I.R. 1921 Lah. 104.

42. Principles.

(a) Award of costs, Rule of.
(b) Conduct.
(c) Interlocutory orders.
(d) Mistake.
(e) Partial success.
(f) Parties ex parte.
(g) Party liable.
(h) Parties several.
(i) Preliminary point.
(j) Scale of.
(k) Miscellaneous.

(a) Award of Costs, Rule of.

——S. 35—Costs—Principles guiding award of—'Costs to follow event'—No misconduct of any sort—No discretion in Court.

The principles which should guide the Court in awarding costs are as follows: Where the plainiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion, and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts, for instance, there may be misconduct in commencing the proceeding, or some miscarriage in the procedure or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs. A.I.R. 1937 Sind 159=170 Ind. Cas 9.

——S. 35—Costs—Award of—Principle.

As regards the costs, the accepted principle is that costs shall follow the event unless the successful party is guilty of misconduct or there is other good cause or exceptional circumstance for depriving him of it. A.I.R. 1939 Cal. 387=I.L.R. (1938) 2 Cal. 492=182 Ind. Cas. 852.

——S. 35—Party, successful—No blame against—No discretion in Court—Full costs.

Where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, and no omission or neglect which would induce the Court to deprive him of his costs, the Court has no discretion and cannot take away the plaintiff's right to costs. A.I.R. (Vol. 18) 1931 Oudh 9=6 Luck. 378=7 O.W.N. 1055=129 Ind. Cas. 165.

——S. 35—Costs to follow event.

It is an ordinary rule that the costs must follow the event. A.I.R. 1943 Nag. 287=1943 N.L.J. 413=I.L.R. (1943) Nag. 511=211 Ind. Cas. 280.

——S. 35—Costs to follow event.

The general rule is that costs shall follow the event unless there is some reason why it should not be followed. 122 Ind. Cas. 378.

——S. 35—Costs—Usual rule.

The usual rule is that costs should follow the event and the court is bound to record its reasons when it thinks fit to depart from the usual rule. (1903) 30 C. 536. *See also* 27 M. 341.

——S. 35—Costs to abide the result.

Costs generally abide the result and if the plaintiff's suit is practically decreed in full, costs should be awarded to him. 77 Ind. Cas. 416=A.I.R. 1923 Lah. 513.

——S. 35—Cost—Award of—Principle.

The principle involved in awarding costs is that costs follow the event and that the successful party is entitled to get his costs unless it has been shown that there is some very good reason why he should bear his own costs. 47 Bom. 637=25 Bom. L.R. 323=72 Ind. Cas. 659=A.I.R. 1923 Bom. 265.

——S. 35—Costs—Ordinary rule.

Ordinarily costs should be awarded to parties according to success or otherwise in litigation. 40 C.L.J. 504=85 Ind. Cas. 127=A.I.R. 1925 Cal. 297.

——S. 35—Costs—Ordinary rule.

The ordinary rule that the costs should follow the event may be departed from in a proper case according to its circumstances. 28 Bom.L.R. 126=98 Ind. Cas. 358=A.I.R. 1926 Bom. 189.

——S. 35—Costs abide result.

Costs generally abide the result, if no valid reason has been assigned as to why an exception should be made in a case. 75 Ind. Cas. 64=A.I.R. 1923 Lah. 302.

——S. 35—Costs—Ordinary rule.

The ordinary rule is that costs should follow the event unless there is some ground which would be sufficient to deprive the successful party of his costs. 27 M.L.W. 841=110 Ind. Cas. 5=A.I.R. 1928 Mad. 346=54 M.L.J. 603.

——S. 35—Costs should follow result—Mere existence of conflict of judicial opinion on points raised—Whether precludes successful litigant from obtaining costs.

Orders as to costs are discretionary, but the discretion should be exercised in a judicial manner and the normal rule is that costs follow the result. The existence of conflict of judicial opinion on the points raised should not preclude a litigant from obtaining costs when successful. A.I.R. (Vol. 23) 1936 Pesh. 48=161 Ind. Cas. 155.

——S. 35—Party succeeding on particular issue—Right to costs on that issue—'Costs will follow the event', meaning of.

When an action involves separate issues whether arising under different causes of action or under one cause of action the costs of any particular issue must go to the party who succeeds upon it unless the Court for reasons to be recorded directs to the contrary.

Obiter:—An order regarding costs passed with due attention to the provisions of law should not be varied merely because the Appellate Judge would have passed a different order if he had been trying

the original suit. A.I.R. 1933 Nag. 49=29 N. L. R. 8=141 Ind. Cas. 262.

——S. 35—Cost—Successful plaintiff—Guilty of misconduct in claiming personal liability—To pay costs on this issue found against.

Where it was found that the plainaiff was guilty of misconduct in asking for a personal decree against the defendants and the plaintiff failed to establish his case, he can be made to pay costs of this issue which was decided against him. A.I.R. 1937 Sind 159=170 Ind. Cas. 9.

——S. 35—Specific Relief—Petition for.

Petition for an injunction restraining the Municipal Corporation and Municipal Commissioner from proceeding at a meeting to fill up one of two vacancies and for directing the Commissioner to hold the bye-election—Petition granted:

Held, that the petitioner was entitled to costs of the petition and its hearing. A.I.R. 1935 Bom. 403=37 Bom.L.R. 710=60 Bom. 193=159 Ind. Cas. 300.

——S. 35—Plaintiff failing—Right of defendant to costs.

The plaintiff has to prove his case, and when he fails to prove it, the defendant is entitled to his costs without his being required to prove that the case is a false one; and the mere fact that the case is not entirely false is not a good ground for disallowing costs to defendant. 27 P.L.R. 254=97 Ind. Cas. 795=A.I.R. 1926 Lah. 464 (2).

——S. 35—Plaintiff's suit dismissed—Defendant's right to his cost.

When the plaintiff institutes a suit against a party who shows that he is in no way liable to be sued and the suit fails, the defendant should get his costs. 24 M.L.W. 378=97 Ind. Cas. 847=A.I.R. 1926 Mad. 1084=51 M.L.J. 446.

——S. 35—Defendant succeeding on point of limitation and suit dismissed—If entitled to costs and on what scale.

A full discretion is vested in the trial Court with reference to matter of costs. But S. 35 lays down that if the Court does not follow the regular rule that costs shall follow the event, it must state its reasons in writing. A mere reference to the circumstances of the case with no further details mentioned, is not a sufficient compliance with the provisions of S. 35 (2). The plea of limitation is in no sense an unjust plea. Limitation is provided for by the laws of the land just as any other plea is provided for, and therefore, where the defendant has succeeded on a plea of limitation and the suit is dismissed, he cannot be deprived of his costs, though the Court in view of the fact that the other issues in the suit had not been tried out may make such order for costs in favour of the defendant as it thinks fit. A. I. R. 1942 Mad. 713=55 L.W. 644 (2)=(1942) 2 M.L.J. 515=1942 M.W.N. 820 (2)=205 Ind. Cas. 326.

——S. 35—Liability for costs—Claim unsustainable.

In a suit by landlord against tenant for ejectment the sub-tenants are not necessary parties and therefore they cannot object to the delivery of possession on the ground that the decree is not binding on them. A suit by the sub-tenants claiming that the decree is not binding on them as they were not made parties to it, is wholly unjustifiable and they should therefore be saddled with the costs. 50 Cal. 419=77 Ind. Cas. 910=A.I.R. 1923 Cal. 691.

——S. 35—Suit dismissed — Costs to plaintiff against contesting defendants—Propriety.

When the suit is dismissed it is wrong to award costs to the plaintiff against the contesting defendant. A.I.R. 1942 Cal. 180=74 C.L.J. 261=46 C.W.N. 561=200 Ind. Cas. 392.

——S. 35—Charitable society—Application for guardianship unsuccessful—If can claim costs.

Where a philanthropic Society usuccessfully sought to be made a guardian of a minor's property and claim costs which cannot be regarded as expenses either as on account of necessaries or as having been incurred for the welfare of the minor or for protection of his estate the society is not entitled to the costs. 51 C.L.J. 272=A.I.R. 1930 Cal. 397 =126 Ind. Cas. 707=58 Cal. 15.

(b) Conduct.

——S. 35—Principles governing award of Costs.

In deciding the question of costs, a Court is entitled to consider not merely the conduct of the parties in the actual litigation but also matters which led up to the litigation. 13 C.L.J. 404=16 C.W.N. 805=10 Ind. Cas. 90.

——S. 35—Necessity for application arising from applicant's default.

The ordinary rule that costs should follow the event cannot be applied in a case where necessity for the application has arisen due to the failure of the applicant's pleader to place his principal argument before the Court. A.I.R. 1933 Rang. 38=142 Ind. Cas. 835.

——S. 35—Review application to High Court dismissed—P. C. Appeal allowed—Costs of review of the respondent in High Court—Appellant to pay.

Where a point as to limitation was raised for the first time in application for review, the party was allowed to raise it but was ordered to pay the costs of the review application to the other party. 6 R. 302=55 I.A. 161=5 O.W.N. 479=109 Ind. Cas. 1=30 Bom.L.R. 842=47 C.L.J. 510=26 A.L.J. 657=32 C.W.N. 845=28 M.L.W. 207=A.I.R. 1928 P. C. 103=54 M.L.J. 696 (P.C.).

——S. 35—Certain documents produced by defendant in appeal for first time—Decree reversed in favour of defendant—Plaintiff's costs up to the date of production of document—Defendant, liability of.

Where a defendant appealing against plaintiff's decree succeeded on the evidence of an agreement which he produced for the first time in appeal but which he ought to have produced in the trial Court:

Held, that the Court could order that the defendant should pay plaintiff's costs up to the date of production of that document for his negligence of the point. A.I.R. 1934 All. 948=1935 A.L.R. 47=153 Ind. Cas. 674.

——S. 35—Suit occasioned by defendant's failure to pay plaintiff's dues—Defendant made to pay court-fees by way of costs.

Where the suit was occasioned by the defendant's failure to pay the plaintiff's dues in settlement of the plaintiff's claim under the will of the deceased father of the plaintiff and the defendant, the defendant was made liable to pay court-fee on the amount found due to the plaintiff from him by way of costs. A.I.R. 1945 Sind 11=I.L.R. (1944) Kar. 325=221 Ind. Cas. 439.

——S. 35—Applicant in revision careless in Court below—To pay costs though successful.

Revision due to carelessness of applicant—Applicant though successful should pay costs. 115 Ind. Cas. 23=A.I.R. 1930 Lah. 240.

——S. 35 and Or. 41, R. 35—Appellant successful —Conduct not creditable—No costs.

Costs ordered to be borne by the successful appellant because his conduct in the case did not appear to have been at all creditable or straightforward. 1929 M.W.N. 831=31 M.L.W. 97=A.I.R. 1930 Mad. 154=124 Ind. Cas. 140=58 M.L.J. 29.

——S. 35—Rule as to costs—Exception.

Ordinarily a litigant who succeeds although he may be deprived of his costs for sufficient reason cannot be ordered to pay the costs of the other side. But in a case where the defendant having tendered the rent due, made an offer of performance under S. 38 of the Contract Act before a suit was instituted for its recovery the Court can direct the plaintiff to pay the defendant his costs of the suit. 40 Ind. Cas. 614 (Cal.).

——S. 35—Plaintiff failing—Defendant's act dishonest—Each party to bear its own costs in all Courts.

Where the plaintiff has failed in his main case and has succeeded only to half the extent for which he claimed in the alternative case and the defendant has acted dishonestly, each party should bear its own costs in all three Courts. A.I.R. (Vol. 30) 1943 Nag. 299=1943 N.L.J. 433=I.L.R. (1944) Nag. 90=211 Ind. Cas. 525.

——S. 35—Neither plaintiff nor defendant to blame—Blame on defendant's counsel's clerk—Defendant should pay costs.

Where in proceedings to set aside an *ex parte* decree, it is found that the decree was passed due to the negligence of the defendant's counsel's clerk and neither the plaintiff nor the defendant was to blame it is only fair that the defendant who employed the offending agency, *i. e.*, the Counsel's clerk should pay the costs. A.I.R. 1938 Nag. 370=179 Ind. Cas. 471.

——S. 35—Both parties—Unclean hands—No costs.

Where both parties come into Court with unclean hands, the Court may order that they should bear their own costs irrespective of the result of the suit. A.I.R. (Vol. 19) 1932 All. 128=53 All. 54=137 Ind. Cas. 334.

——S. 35—Both parties—Allegations false.

Where both parties make false allegations, costs may not be allowed to either side. 160 P.W.R. 1915=31 Ind. Cas. 862.

(c) Interlocutory proceedings.

——S. 35—Interlocutory proceedings — Taxation of costs—Whether can be allowed before termination of action.

Costs in a suit ought to be set off between the parties, and it is wrong that either a plaintiff or a defendant, who may be a man of straw, should be paid costs upon interlocutory applications, and should execute orders for costs forthwith made upon interlocutory applications when it may be that the party will lose the suit in the end, and it will be found that he has nothing with which to meet the final order for costs which may be made against him. A.I.R. 1933 Cal. 19=59 Cal. 1358=142 Ind. Cas. 76.

(d) Mistake (bona fide).

——S. 35—Rent suit—Area wrongly described—Mistake not deliberate but due to mistaken description given in partition papers.

In cases where a landlord deliberately misstates the area of the holding in respect of which he claims rent, it is only fair that he should bear the costs of the litigation. But where he does not deliberately do this, but is himself misled by certain partition papers being a purchaser of an interest of a co-sharer after partition, it is not fair to saddle him with the costs. A.I.R. 1941 Pat. 404=7 B.R. 308=192 Ind. Cas. 48.

(e) Partial success.

——S. 35—Costs—Proper order as to, where only part of the claim is decreed.

Where the defendant admits only a portion of the claim of the plaintiff and it is decreed the proper order to pass is to decree the plaintiff's suit with costs to the extent of the claim admitted, and to dismiss with costs his suit as regards the rest of the claim. 1947 A.W.R. (Rev.) 130 (1).

——S. 35—Whole claim not decreed—Costs should be proportionate.

Where the Court did not decree the whole claim, the usual rule is that only proportionate costs should be allowed, *i.e.*, it should be proportionate to success and failure. A.I.R. 1938 Nag. 530=1938 N.L.J. 392=181 Ind. Cas. 177.

——S. 35—Partial success—Half costs.

The Court may award half costs only where the plaintiff does not succeed in entirely. A.I.R. 1944 Mad. 511=57 L.W. 460=(1944) 2 M.L.J. 84= 1944 M.W.N. 486.

——S. 35—Both parties partly succeeding.

Where both parties have failed and succeeded in part, there should be no order as to costs. A.I.R. 1945 Mad. 253=1945 M.W.N. 276=(1945) 1 M. L.J. 469=58 L.W. 260.

——S. 35—Mortgage suit instituted before Punjab Relief of Indebtedness Act (12 of 1940)—Claim reduced under Act—Plaintiff, if entitled to full costs or only proportionate costs.

Where a mortgage suit was instituted before the Punjab Relief of Indebtedness Act (12 of 1940) and the cliam in the plaint was reduced

under the said Act and the plaintiff contended that he was entitled to the full costs on his claim:

Held, that the argument might furnish ground for contending that the plaintiff should not be burdened with the costs of the other party, but that was no ground to give him costs on the higher claim than was eventually decreed in his favour. A.I.R. 1946 Lah. 6=47 P.L.R. 259=222 Ind. Cas. 406.

(f) Parties ex parte.

——S. 35—Defendant absent need not be exonerated—Antecedent conduct of parties should be looked into—Order as to costs of successful plaintiff.

There is no rule of law that because a suit or appeal is heard *ex parte*, the successful plaintiff or appellant is not entitled to costs against the absent defendant or respondent. The case would be different if the defendant would appear at the trial and state that he had no interest in the litigation, that there was no cause of action as against him, that he did not dispute the allegation of the plaintiffs in the plaint and that he should consequently be discharged. The Court while awarding costs is not confined to the consideration of the defendant's conduct in the actual litigation itself, but may also take into consideration matters which led up to and were the occasion of that litigation; in other words, to look at the antecedent conduct of the defendant which led to the apparent necessity for the plaintiff's instituting the suit. 29 C.W.N. 297=86 Ind. Cas. 321=A.I.R. 1925 Cal. 569.

——S. 35—Lower Court wrongly passing decree against appellant at invitation of respondent—Appeal by appellant to rectify mistake—Respondent not contesting appeal—His liability for costs of appellant.

Where the fact that the Court passed the decree at the invitation of the plaintiff-respondent and has compelled the appellants to bring proceedings in appeal and to incur costs in order to have the matter rectified, it would be inequitable to make the defendants-appellants who were clearly right, liable to bear the whole of the costs of the appeal, merely on the ground that the plaintiff-respondent did not contest the appeal. A.I.R. (Vol. 28) 1941 Pat. 416=7 B.R. 503=193 Ind. Cas. 32.

(g) Party liable.

——S. 35—Suit instituted by some of defendants in name of another as plaintiff—Suit unsuccessful—Proper order as to costs.

Where some of the defendants in substance and in fact are the plaintiffs and have used the name of the wife of one of them as plaintiff for the institution of the suit against themselves and the other defendants, they and not the nominal plaintiff should be made liable for costs in the event of the suit being unsuccessful. 50 C.W.N. 14=A.I.R. 1947 Cal. 213=81 C.L.J. 167.

——S. 35—Suit at the instance of another—Dismissal of—Order for costs.

Where a suit by plaintiff is instituted at the instance of another person who finances the litigation and such person is impleaded as a co-plaintiff, the Court, while dismissing the suit, can direct that the costs of the defendant be paid by the co-plaintiff. (1931) 32 P.L.R. 540=A.I.R. 1931 Lah. 586 (2) =132 Ind. Cas. 493.

——S. 35—Costs—Party liable to pay.

The party by the act of whose counsel a difficulty in the case (here on the objection that a competent Court had no jurisdiction) arises must pay the costs. 1902 A.C. 471, ref. to. (1904) 6 Bom. L.R. 301

——S. 35—Addition of defendants at the instance of the defendant—No cause of action found against them—The Court has power to impose Costs—Under O. 1, R. 10 (2): costs to be paid by the defendant—The power is analogous to that of adjourning proceedings. There is no limitation as to the amount which can be awarded under such circumstances. A.I.R. 1937 Lah. 67=39 P.L.R. 342=171 Ind. Cas. 570.

——S. 35—Joinder as parties — Unnecessary—Direction to pay costs.

Where parties are unnecessarily impleaded at the instance of the defendant the Court can direct the latter to pay the costs of the added parties. (1930) M.W.N. 679=129 Ind. Cas. 35=A.I.R. 1930 Mad. 913 (1)=32 L.W. 438=59 M.L.J. 524.

——S. 35—Unsuccessful defendant when can be ordered to pay directly costs of successful defendant.

In a suit against several defendants who are reasonably joined as parties, the court has jurisdiction in a proper case to order the unsuccessful defendant directly to pay the costs of the successful defendant. A.I.R. 1938 Mad. 117=46 L.W. 452=1937 M.W.N. 921=I.L.R. (1938) Mad. 233=174 Ind. Cas. 270.

——S. 35—Appeal by defendant against plaintiff and defendant 2 which was Municipality—Appeal allowed—Plaintiff ordered to bear costs of appellant and Municipality even though it supported plaintiff—Principle stated.

A decree was passed against one *A* and Municipal Committee. *A* appealed making the Committee as respondent 2. The Committee supported the plaintiff in the latter stages of the case. The appeal was allowed:

Held, the plaintiff should bear the costs of the appellant *A* as well as the Municipal Committee on the ground that the funds of a public body like the Municipality should not be frittered away in a fruitless litigation in which the plaintiff was responsible for dragging the body into the Court and persuading it to join hands with him during the course of the suit. A.I.R. 1946 Nag. 152=I.L.R. (1946) Nag. 73=1946 N.L.J. 227.

(h) Parties several.

——S. 35—Several defendants—Common interest in dispute—Joint defence.

Only one set of costs should be allowed. A.I.R. 1942 Oudh 392=1942 O.W.N. 335=200 Ind. Cas. 608.

——S. 35—More than one plaintiff appearing—One set of costs between them.

Where more than one plaintiff appear in a suit they are entitled to one set of costs only as between them and are not entitled to appear separately. A. I.R. 1939 Rang. 108=1938 Rang.L.R. 252=180 Ind. Cas. 841.

——S. 35—Matters arising in several suits substantially same—All cases heard together—One set of costs for all cases together.

Where the matters arising in several suits are substantially the same and all the suits are heard together, the Court should allow one set of costs for the three cases together in fixing the special advocate's fee. A.I.R. (Vol. 27) 1940 Rang. 207 =1940 Rang.L.R. 273=193 Ind. Cas. 61.

——S. 35—Separate appearances of defendants or respondents, unreasonable only one set of costs.

Costs are always in the discretion of the Court, and though each respondent or defendant should be allowed his costs on the broad principle that a person who is brought before the Court wrongly as it turns out, is entitled to defend himself in his own way and by the employment of such Advocate as he thinks fit, still in cases in which the Court may think that it was unreasonable for the defendants or respondents to have appeared separately, only one set of costs should be allowed. A.I.R. 1941 Bom. 16=42 Bom.L.R. 878=P.L.R. (1940) Bom. 837=192 Ind. Cas. 174.

——S. 35—Separate costs to respondents.

The general rule is that the costs should follow the event. Where, therefore, the appeal had failed against both the respondents whose interests were not the same and who were, therefore, not wrong in putting their appearance in the Court, it was held that both of them were entitled to the costs. A. I. R. 1945 All. 197=1945 O. W. N. (H. C.) 32= 1945 A. L. J. 136=1945 A. W. R. (H. C.)36=I.L R. (1945) All. 109.

(i) Preliminary point.

——S. 35—Case decided on preliminary point—Full costs, if can be awarded.

Where a suit was decided on a preliminary point after a short argument and without examining witnesses but the full **ad valorem** costs of Rs. 600 were allowed:

Held, that the full costs should not have been allowed and the amount should be reduced to 10 gold mohurs. A.I.R. 1933 Rang. 337=147 Ind. Cas. 297.

——S. 35—Memorandum of appeal returned on preliminary objection as to jurisdiction—Proper order as to costs.

Where in a suit for partition, a preliminary decree was passed and a Commissioner valued the property and an appeal against the final decree was valued at the valuation given by the Commissioner, and it was found that the appeal was not maintainable in the Court in which it was filed:

Held, that an order awarding full costs of the appeal when returning the memorandum of appeal to the appellants was not a proper order in the circumstances of the case.

Held, also, that the appeal not having been dismissed on the merits, the Judge ough to have assessed the fee for the preliminary objection before him. A.I.R. (Vol. 19) 1932 Cal. 349=54 C.L. J. 555=137 Ind. Cas. 474.

——S. 35—Rejection of plaint.

Excessive cost should not be allowed where a plaint is rejected at an early stage. 35 P.L.R. 1914 =237 P.L.R. 1914=25 Ind. Cas. 435.

(j) Scale of

——S. 35—Major portion of claim admitted—Method of awarding costs, stated.

When the defendants have admitted liability for the major portion of the decree and raised a contest only regarding a small item, costs on the uncontested scale should be given so far as the admitted amount of the plaint claim is concerned and on the contested scale only to the extent to which the claim was actually contested. A.I.R. 1942 Mad. 551=1942 M.W.N. 235=55 L.W. 201= (1942) 1 M.L.J. 453=203 Ind. Cas. 598.

——S. 35—Overvaluation in plaint—Cost only on real value.

Where a suit has been overvalued the plaintiff is only entitled to costs as taxed in a suit valued at proper valuation. 87 Ind. Cas. 1002=A.I.R. 1925 Sind 275.

(k) Miscellaneous.

——S. 35—Each party was ordered to bear his own costs.

When an appellant whose appeal was allowed asks for leave to amend his plaint, the order for costs both in the High Court and the Appellate Court below should be that each party should bear his own costs. A.I.R. 1943 Sind 242=I.L.R. (1943) Kar. 315=211 Ind. Cas. 321.

——S. 35—Decree against plaintiff—Death of plaintiff—Appeal by widow—Death of widow—Mortgagee of deceased plaintiff applying under O. 22, R. 10, permitted to continue—Appeal dismissed—Liability for costs.

Held, that the mortgagee was liable for the costs of the respondents throughout and not since the date of his application. A.I.R. 1933 Mad. 411=37 L.W. 452=64 M.L.J. 489=1933 M.W.N. 591=56 Mad. 469=143 Ind. Cas. 578.

——S. 35—Immoral contracts—Claim under—No costs.

Suits based on immoral contracts—Costs should not be allowed. 113 Ind. Cas. 366=A.I.R. 1928 Sind 173.

——S. 35 — Plaintiff unsuccessful — Technical defects in proof—No costs against.

Where the plaintiff's case is probably true and it has only failed by reason of technical defects in the way of proof, he should not be saddled with costs. A.I.R. 1934 Lah. 262=35 P.L.R. 316=151 Ind. Cas. 462.

——S. 35—Costs.

Speeific performance—Suit by purchaser—Vendor when liable for costs.

Held, that the question of showing a good title and as to when such title is shown is material to hold the vendor liable for costs. A.I.R. 1932 Cal. 516=59 Cal. 536=138 Ind. Cas. 657.

——S. 35—Question of costs in case covered by Punjab Regulation of Accounts Act — Costs disallowed—Appeal—Court-fee for costs.

The question of costs in a case covered by the

Regulation of Accounts Act stands on a different basis from that of ordinary cases as the Court is bound to disallow costs if the case falls within the purview of S. 3 of the Punjab Regulation of Accounts Act. Therefore if the defendant wants to have the order allowing costs to be set aside, it is incumbent on him to pay Court-fee thereon. A.I.R. 1936 Lah. 469=38 P.L.R. 164=160 Ind. Cas. 883.

——S. 35—Ejectment suit—Suit by plaintiff without title—Amendment of plaint for addition of new plaintiff:

Held, that the application for amedment should not have been allowed without allowing the defendant's costs. A.I.R. 1931 Cal. 76=52 C.L.J. 357=58 Cal. 561=129 Ind. Cas. 860.

——S. 35—Transposition of parties—Cost.

Where plaintiff had no title to sue and the defendant **D** applied to be impleaded as plaintiff, and or amendment of plaint.

Held, that **D's** application for being made a plaintiff should not have been allowed in the circumstances of the case, at any rate without allowing the defendant's costs against the original plaintiff. A.I.R. 1931 Cal. 76=58 Cal. 561=52 C.L.J. 357=129 Ind. Cas. 860.

43. Privy Council Appeals.

——S. 35—Privy Council Appeal—Non-prosecution—Respondant's right to costs on petition for leave.

Where a party obtained leave to appeal to the Privy Council, but took no steps to prosecute the appeal after the record reached there, and the appeal was thus dismissed for non-prosecution.

Held, that the respondents were entitled to the costs incurred by them in the High Court on the petition to obtain a certificate for leave to appeal. 27 Bom.L.R. 699=89 Ind. Cas. 213=A.I.R. 1925 Bom. 471.

——S. 35—Privy Council appeal — Appellant obstructing the final decision in the suit—Success on the question of Procedure — Order as to costs.

Where the Privy Council could have finally decided the suit but was not permitted by the appellant to do so who insisted on the Privy Council confining itself to the question of procedure.

Held, that though the appellant had succeeded on the question of procedure, yet the costs should be reserved and might even be awarded against him even if he ultimately succeeded. 48 I.A. 181=45 Bom. 718=23 Bom.L.R. 623=33 C.L.J. 488=19 A.L.J. 409=25 C.W.N. 605=14 M.L.W. 7=1921 M.W.N. 408=60 Ind. Cas. 822=A.I.R. 1921 P. C. 6=40 M.L.J. 519 (P.C.).

——S. 35—P. C. Appeal—Respondent lodging a case, ex parte at the hearing—Appeal dismissed with costs—Right to costs down to lodging.

When respondents had lodged a case, but did not appeal at the hearing and the appeal was dismissed with costs, the costs should be paid to respondents down to the lodging of the case. 6 L. R. P. C. 126=87 Ind. Cas. 292=1925 M.W.N. 532=22 M.L.W. 306=47 All. 459=41 C.L.J. 450=27 B.L.R. 853=A.I.R. 1925 P. C. 169=49 M.L.J. 238 (P.C.).

44. Proceedings under S. 476, Cr. P. Code.

——S. 35—Proceedings under S. 476, Cr. P. Code—Power of Civil Court to award costs.

Civil Courts have jurisdiction to award costs under S. 35, C. P. Code, costs so ordered as incidental to the main suit being the costs of interlocutory applications made to the Court. Though the procedure the Civil Courts have to follow may to some extent have been laid down by S. 476, Cr. P. Code; the Courts are sitting as Civil Courts and have jurisdiction to award costs in the proceedings for sanction under S. 476, Cr. P. Code. 225 Ind. Cas. 515=47 Cr.L.J. 741=12 B.R. 614=A.I.R. 1947 Pat. 106.

——S. 35—Appeal before District Judge under S. 476-B, Cr. P. Code—Costs — Jurisdiction to award. S. 35 does not apply to appeals under S. 476 (B), Cr. P. Code and hence in such an appeal the appellate Court has no jurisdiction to award costs —If it awards it acts illegally in the exercise of jurisdiction and such order will be interfered with in revision under S. 115, C. P. Code. 27 Pat. 52=A.I.R. 1948 P. 225=49 Cr.L.J. 246 (F.B.).

——S. 35—Proceeding under S. 476, Cr. P. Code —Civil Court—Power to award costs under.

The Civil Court have no inherent powers in respect of offences to which S. 472, Cr. P. Code applies. When a Civil Court takes action under S. 476, Cr. P. Code, it exercises powers conferred in it by Cr. P. Code. As Cr. P. Code does not contemplate the award, of costs in such cases the Court has no power to award cost. A.I.R. 1947 P. 138=12 B. R. 603=47 Cr.L.J. 707=225 Ind. Cas. 413.

——S. 35—Applicability — Civil Court—Proceedings under S. 476, Cr. P. Code—Power of Court to award costs.

Costs in respect of proceedings under S. 476, Cr. P. Code, cannot be awarded though taken in a Civil Court. 1945 A.L.J. 536=1945 A.W.R. (H.C.) 368=1945 O.W.N. (H.C.) 348=1945 A.L.W. (H.C.) 395=A.I.R. 1946 A. 245.

45. Reasons.

——S. 35 (2)—Reasons—Record of.

It the Court does not follow the usual rule that costs follow the event it must record its reasons. Otherwise the Court of appeal will interfere. 11 Bom.L.R. 1187=4 Ind. Cas. 283. **See also** 30 Cal. 536 and 27 M. 341.

——S. 35 (2)—Reasons in writing.

Departure from practice of directing costs to follow event—Reasons must be in writing—Discretion exercised on judicial principles—Appellate Court should not interfere. A.I.R. 1925 Oudh 699=40 All. 558, Foll. 5 O.W.N. 35=107 Ind. Cas. 881=A.I.R. 1928 Oudh 224.

——S. 35 (2)—Reasons in writing.

When costs do not follow event, reasons must be given—Plaintiff who is not guilty of misconduct is not disentitled to his costs. 93 Ind. Cas. 685=27 Bom.L.R. 1122=A.I.R. 1925 Bom. 527.

——S. 35 (2)—Reasons for departure.

Awarding greater to less costs than are normally applicable or a particular suit—Reasons should be stated. 108 Ind. Cas. 740=A.I.R. 1928 Nag. 171.

——S. 35—Order for costs—Costs following the event—No reasons necessary.

Where lower Court has exercised discretion under S. 35, its order will not be disturbed in appeal. Costs to follow the event, and where the effect of order for costs is that only, no reasons to support it need be stated. 95 Ind. Cas. 446 (Nag).

46. Receiver (Party).

——S. 35—Receiver—Liability for costs.

Where a mortgagee brings his suit to enforce his security, the order as to costs may be to give him liberty to add his costs to his security. But if a mortgagor or receiver chooses to dispute the validity of the mortgage, there must be an order for payment of costs against such disputing mortgagor or receiver. 31 Bom.L.R. 1199=122 Ind. Cas. 857=A.I R. 1930 Bom. 11.

——S. 35—Receiver—Liability for costs.

A receiver suing or being sued is in the same position as a litigant and is personally bound to pay the costs decreed against him, though he can imburse himself out of the estate. A.I.R. 1931 Nag. 143=134 Ind. Cas. 272.

——S. 35—Receiver—Application for power to sell —Grant by Court—Reversal in appeal—Cost to be paid by Receiver and application to be made by Receiver to court if he had acted bona fide. *See* (1907) 34 C. 336.

46-a. Refund.

——S. 35—Joint decree for costs against A, B and C—Appeal by A and B—Costs deposited by A—Appeal allowed—Application by A for refund of entire amount of costs.

Held, that **A** was entitled to a refund of the entire amount and to the interest thereon from the date on which the amount was withdrawn by the decree-holder. A.I.R. (Vol. 19) 1932 Cal. 313=35 C.W.N. 1305=137 Ind. Cas. 294.

47. Remand.

——S. 35—Remand by appellate court for trial on the issue—Omission of plaintiff to press issue—Party liable for costs.

Where the plaintiff does not press the essential issue in the case in the first court and the Court does not frame or try it, and the appellate court refers it back for trial, the proper order as to costs is to make each party bear his own costs. (1902) 4 Bom.L.R. 818.

——S. 35—Costs—Remand — Point raised in written statement—No issue and no argument.

Point allowed by appellate court and suit remanded where a claim of set-off was asserted by the defendant in his written statement, but no issue on the point was raised and no pronouncement on it was made by the first court, nor was it made, in appeal the subject of cross objections nor was it urged in argument before the appellate court. The court of appeal being of opinion that it formed an integral part of the suit, framed appropriate issue and sent the case to first court for trial upon them with a view ofdetermining the validity of the defendant's claim to set off. The party by the act of whose counsel a difficulty has arisen must ordinarily pay the costs. 1902 A.C. 47 foll. (1904) 6 Bom.L.R. 790.

——Ss. 35 and 41, R. 35 — Remand—Necessary parties not added in suit—Appellant to pay respondent's costs.

Where the appellants are principally to be blamed for the difficulty in which they find themselves (to witness the non-addition of a necessary party to an effectual disposal of the suit filed by them) and the appeal has, therefore, to be remanded for a re-trial after the addition of that party, they have to pay the respondents the costs of the appeal. 12 C.L.J. 368=7 Ind. Cas. 75.

48. Representative suit.

——S. 35 and O. 1, R. 8—Representative suit—Costs.

The order for costs in a representative action should clearly specify whether it is the representative party alone or the representative and the party that is to bear the costs. 19 Bom.L.R. 650, Ref. 42 Bom. 566=19 Bom.L.R. 650=42 Ind. Cas. 9.

——S. 35—Suit by member against caste decreed —Costs, if can be directed to come from caste property.

Where a suit by a member of a caste to declare that his ex-communication is void is decreed, the Court can properly direct that the costs of both the plaintiff and the defendants should come out of the caste property. A.I.R. 1935 Bom. 268=37 Bom. L.R. 261=157 Ind. Cas. 127.

49. Return of plaint.

——S. 35—Return of plaint—Order to pay costs —Legal.

While directing plaintiff to present plaint to proper Court, Court directing payment of costs of other side the order is legal, the Court has no power to add a further rider that the payment of costs should be a condition precedent to the filing of the suit in proper Court. A.I.R. 1942 Mad. 35=54 L.W. 315=1941 M.W.N. 817=(1941) 2 M.L.J. 450=201 Ind. Cas. 119.

——S. 35—Plaint returned for presentation to Court of equal jurisdiction—Proper order as to costs.

The proper order to be made by a Court when returning the plaint for presentation to proper Court of equal jurisdiction is itself to provide for the costs and not direct the Court having jurisdiction to provide for the costs. Section 35, Civil P. C., does not give the Court jurisdiction to direct a Court of a equal jurisdiction to make any order as to costs. A.I.R. 1945 Mad. 168=(1945) 1 M.L.J. 161=1945 M.W.N. 303=58 L.W. 307=221 Ind. Cas. 77.

——S. 35—Return of plaint for presentation to the proper Court—Vakil's fee—Award of ad valorem fee.

Where a plaint is returned for presentation to the proper Court on the ground of over or undervaluation with any trial on the merits, it is not proper to allow vakil's fees to the defendants on an ad valorem basis. A comparatively lower rate of fees would be quite sufficient. A.I.R. 1935 Mad. 874 =1935 M.W.N. 1174=158 Ind. Cas. 1023.

——S. 35—Plaint returned for presentation to superior Court—Order that "costs will be costs in cause"—Power to make—Plaint not re-presented—Suit by would-be defendant to recover costs—Competency.

Where a Court returns a plaint for presentation to the proper Court, the suit being beyond its pecuniary jurisdiction, it has no jurisdiction to make an order respecting costs to the effect that "costs will be costs in the cause". When the plaint is not again re-presented, it is not open to the defendant in the prior plaint to institute a suit against the plaintiff for recovery of the costs provided for in the order returning the plaint. 1946 M.W.N. 74 (2)=A.I.R. 1946 Mad. 345.

50. Scale of.

——S. 35—Suit praying decree for arrears of rent, for possession and mesne profits—Plaintiff, if entitled to costs on High Court scale.

Where suit is one praying decree for arrears of rent, for possession of the premises and also for mesne profits, the plaintiff is entitled to bring such suit in the High Court and is entitled to costs on the Hight Court scale. A.I.R. 1940 Cal. 390=44 C.W.N. 787=I.L.R. (1940) 2 Cal. 97=190 Ind. Cas. 106.

——S. 35—Scale of—Just claim—Full Costs.

When a just demand has been resisted by a defendant for considerable time, after receiving notice of the claim the plaintiff can get full costs. 76 P. L R. 1910=56 P.W.R. 1910=6 Ind.Cas. 664.

——S. 35—Scale of—Part of claim subsequently withdrawn.

The Court-fee paid on part of the claim subsequently withdrawn cannot be allowed as costs. 23 Ind. Cas. 231 (Oudh).

——S. 35—Scale of—Pleader's fee—Suit, unamended or withdrawn.

In a suit, which is withdrawn and not contested at all, the Court is right in awarding only half the Pleader's fee as costs to the defendent. 5 Ind. Cas. 121 (All.)

——S. 35—Separate Costs—Decree for—When drawn.

Decree awarding separate costs to defendants can be drawn only in cases where the judgments specifically award such separate costs. A.I.R. 1935 Pat. 41=1 B.R. 335 (1)=154 Ind. Cas. 618.

——S. 35—Two sets of defendants—Separate costs when awardable.

Where the plaintiff impleads two parties as defendants with the object of making one party liable if the other was not and fails two sets of costs can be properly awarded. A.I.R. 1933 All. 466=1933 A.L.J. 796=144 Ind. Cas. 703.

——S. 35—Scale of—Separate sets for separate defendants.

Different sets of costs can be awarded when there are several defendants raising various defences. 18 M.L.T. 460=(1915) M.W.N. 1021=31 Ind. Cas 312.

——S. 35—Separate defendants—Defendant having independent case engaging separate pleader.

Where a co-defendant has an independent case and has engaged a separate pleader, he is entitled to separate set of costs. A.I.R. (Vol. 29) 1942 Bom. 284=44 Bom.L.R. 639=I.L.R. (1942), Bom. 782=203 Ind. Cas. 352.

——S. 35—Whether must engage same counsel as that of co-defendant or co-plaintiff.

If a party is made a defendant it is at his option to appear and adopt an attitude as he pleases. Where his interest is different from the plaintiff and the other defendants, it cannot be said that he should appear through the same solicitors and counsel. He is, therefore, entitled to his costs against the plaintiff. A.I.R. 1941 Bom. 307=43 Bom. L.R. 622=196 Ind. Cas. 821.

——S. 35—Two objections under O. 21, R. 58—Questions common but no association between two judgment-creditors—Two sets of costs should be allowed on dismissal of objections.

Although the questions arising in two applications under O. 21, R. 58, are common, where there is no association of any kind between the two judgment-creditors and each has been forced to appear independently in answer to the separate applications which have been made by the applicant, two sets of costs should be allowed to the judgment-creditors when the applications have been dismissed. A.I.R. 1943 Sind 23=I.L.R. (1942) Kar. 153=205 Ind. Cas. 199.

——S. 35—Different charges of fraud against several defendants—Each defendant, if entitled to separate set of costs on their success.

As an ordinary rule each of the defendents appearing and succeeding in the suit is entitled to have separate sets of costs on the broad principle that a person who is brought before the Court, wrongly as it turns out, is entitled to defend himself in his own way and by the employment of such Advocate as he thinks fit. To this general principle of law, however, certain exceptions have been grafted.

If parties to a suit are charged with fraud or misappropriation or breach of trust, they are fully entitled in defence of their character to employ such solicitor and such counsel as they think fit, so as to entitle them to separate costs, particularly when there are different charges of fraud against the several defendants. A.I.R. 1942 Bom. 81=44 Bom.L.R. 105=I.L.R. (1942) Bom. 163=199 Ind. Cas. 434

——S. 35—Several defendants having identical case represented by same advocate—Separate costs, if should be awarded.

Where several defendants are represented by same advocate and their case is practically identical, no separate costs should be awarded to them. A.I. R. 1934 Rang. 259=152 Ind Cas. 71

——S. 35—Several defendants—Dismissal of suit—Defence of defendants common—One set of costs—If sufficient.

Costs are within the discretion of the Court. If in a case of dismissal of a suit with costs, the defence of the defendants is more or less common, one set of costs will be sufficient. A.I.R. 1949 Ajmer 34.

——S. 35—Costs—Measure of,

A Court ought to give the successful party such costs as were necessary to enable him to place his case properly before the Courts. 45 Bom. 1177=61 Ind. Cas. 271=23 Bom.L.R. 189=A.I.R. 1921 Bom. 71.

51. Scheme Suits.

——Ss. 35 and 92—Scheme suits—Costs.

The Privy Council in a scheme suit directed the costs of all the parties to be paid out of the trust funds the trustees paying them to the other side out of their pocket in the first instance and then recouping themselves out of the trust funds. 12 M.L.T. 448=(1912) M.W.N. 1106=16 C.L.J. 640=15 Bom.L.R. 13=24 M.L.J. 199=17 Ind. Cas. 441 (P.C.)

——Ss. 35 and 92—Costs—Scheme suits—Party mismanaging ordered to pay.

Where it was found that the suit was rendered inevitable by reason of the gross mismanagement of the trust estate by the appellant the lower Court was held to be right in directing the appellant to pay the costs of the suit. 4 P.L.T. 326=71 Ind. Cas. 280=A.I.R. 1923 Pat. 420.

——S. 35—Point unnecessarily contested and time of Court and Crown Counsel wasted—Special costs may be allowed.

Where a point as to the court-fees has been quite unnecessarily and gratuitously contested and a considerable amount of the time of the Court and of Counsel for the Crown wasted on a very petty matter, special costs may be allowed under S. 35 of the Civil P.C. A.I.R. 1941 Oudh 447=1941 O. W.N. 789=1941 O.L.R. 475=1941 R.D. 443=194 Ind. Cas. 425.

——S. 35 — Misconduct — Collusion — Heavy costs.

Where the sons set up by the father bring a collusive suit to set aside alienations by the father and the sons do not succeed, heavy costs ought to be awarded. 7 P.W R. 1914=16 P.L R. 1914=21 Ind. Cas. 944.

——S. 35—Costs on special scale should not be granted save in very exceptional cases.

The suit does not cease to be an ordinary cause merely because witnesses are examined at inordinate length or because the true agreement between the parties has to be spelt out of a lengthy correspondence. Costs are awarded, not as a punishment to the defeated party but as a recompense to the successful party for the expenses to which he had been subjected, i.e., for whatever appears to the court to be the legal expenses incurred by the party in prosecuting his suit or his defence. The theory on which costs are now awarded to a plaintiff is that default of the defendant made it necessary to sue him, and to a defendant is that the plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a party against the expenses of successfully vindicating his rights in court and consequently the party to blame pays cost to the party without fault. These principles apply, not merely in the award of costs, but also in the award of extra allowance or special costs. Courts are authorised to allow such special allowances, not to inflict a penalty on the unsuccessful party, but to indemnify the successful litigant for actual expenses necessarily or reasonably incurred in what are designated as important cases or difficult and extraordinary cases. No rigid definition of an important cause can be framed; the character of a case cannot be determined by any particular phase of it, but various factors such as the difficult and complicated nature of the questions of law and fact involved, the large amount in controversy, the length of time consumed in the trial, and like matters must be taken into account, not separately but in the aggregate. Finally, even though a case may appear important or difficult and extraordinary, the Court is not bound to award costs on the special scale. Costs on the special scale (Scale No. 3) are not awarded except in very exceptional cases. 48 Cal. 427=25 C.W.N. 297=60 Ind. Cas. 337=A. I.R. 1921 Cal. 185.

52. Suit for Costs.

——S. 35—Suit on judgment—Order for costs in insolvency:—A suit on an unsatisfied insolvency order for costs is maintainable. 33 C. 560=9 C.W.N. 952.

——S. 35—Objection to attachment successful, but costs not allowed—Costs of objection not recoverable in separate suit.

Attachment of property in execution of a decree being made, objections were put in by persons who claimed the attached property as their own. These objections were successful, but for some reasons not explained, the objectors were not allowed costs. The objectors instituted a suit against the decree-holder to recover damages for unlawful attachment and the costs incurred in making objections. **Held,** that the costs claimed could not be recovered by means of a separate suit. 8 A. 452; 9 A. 474 foll. 1908 A.W.N. 18=5 A.L.J. 140.

——S. 35—Suit against beneficial owner.

Suit for costs against a third person on the ground that he was the mover of and had an interest in the suit, does not lie—Question of costs of particular suit is a matter incidental to that suit. A.I.R. 1942 All. 233=1942 A.L.J. 367=I.L.R. (1942) All. 832=201 Ind. Cas. 695 (F.B.).

——S. 35—Costs—Incurred in prior litigation—Suit to recover—Maintainability.

No suit is maintainable for recovery of costs incurred in a prior litigation. A.I.R. 1932 Lah 257=13 Lah. 551=33 P.L.R. 234=138 Ind. Cas. 392

——S. 35—Costs incurred in previous litigation—Suit to recover—Maintainability.

A separate suit does not lie for recovery of costs incurred but not awarded by Court in a previous litigation between the parties 1 D.R. 99.

——S. 35—Third party—Indemnity by—Suit dismissed—No order as to costs—How far defendant can recover from third party his costs.

Where a defendant sets up a defence which would not be open to a third party but which is taken up by the defendant solely for his own benefit and the defendant fails in that defence and fails in the action, he cannot go against the third party for indemnity in respect of the costs of that action. But where the third party adopts the defence of the defendant and the suit is dismissed without order as to costs, then in such a case when a third party indemnifies the defendant only against the costs of the action, the defendant is entitled as against the third party only to party and party costs and not to attorney and client costs. If the indemnity, however, is a very wide indemnity it is not confined or restricted to the costs of the action and full effect would be given to that contract of indemnity if the defendant is deprived of those extra costs which he would have to pay to his solicitor which would exceed the taxation of the bill on the party and party footing. A.I.R. (Vol 31) 1944 Bom. 187=46 Bom.L.R. 345=216 Ind. Cas. 175.

53. Taxable Costs.

——S. 35—Costs of commission—Costs.

Commission for taking accounts—Plaintiff succeeding is entitled to costs of commission. 33 C.W.N. 614=A.I.R. 1929 Cal. 719.

——S. 35—Costs—Defendant resident abroad —Costs of attendance.

A witness who resides abroad is entitled to the expenses of being brought to give evidence and also to subsistence money due during the period of detention, and the same principle applies to the case of a party where evidence is reasonably necessary and material for the purpose of his case and on his own behalf. 54 Bom. 62=122 Ind. Cas. 121=31 Bom.L.R. 1020=A.I.R. 1930 Bom. 24.

——S. 35—Expert witness—Special fees.

An expert witness who has conducted elaborate and technical experiments ought to be allowed special expert-fees as part of the costs in the case. 10 L.B.R. 203=59 Ind. Cas. 823=13 Bur.L.T. 62 and 136.

——S. 35—Person qualified but not enrolled as lawyer appearing—Pleader's fees, if can be awarded.

A qualified person, who is not enrolled as a lawyer, cannot be treated as a lawyer and, therefore, the person whom he represents as an agent in a suit should not be given pleader's fee according to rules. A.I.R. 1936 Pesh. 196=165 Ind. Cas. 904 (1).

——S. 35 and Stamp Act, S. 29 (c)—Costs Stamp duty and penalty paid by plaintiff on rent note executed by defendant. Under S. 29 (c) the lessee, in the absence of an agreement to the contrary, is responsible for providing the expense of proper stamp. Where, therefore, the plaintiff is ordered to pay stamp duty and penalty on the rent note sued on it may be awarded as costs against defendant. I.L.R. (1945) Nag. 928=1945 N.L.J. 180=A.I.R. 1945 Nag. 178.

——S. 35—Witnesses—Costs of.

Charges incurred in procuring attendance of witnesses whether summoned through Court or not, can be included. 10 L.L.J. 401=109 Ind. Cas. 476= A.I.R. 1928 Lah. 800.

——S. 35—Witnesses—Party calling witnesses but not examining them—Costs of such witnesses.

Where a party summons witnesses but does not examine them in Court, the party is not entitled to the costs of such witnesses. A.I.R. (Vol. 23) 1936 Lah. 681=38 P.L.R. 219=164 Ind. Cas. 689 (1).

——S. 35—Witnesses brought by a party at his expense from their place of residence and served at the place of suit.

Court is entitled to include expenses in costs if it is satisfied as to its being reasonable. 10 L.L.J. 401=109 Ind. Cas. 476=A.I.R. 1928 Lah. 800.

——S. 35—Witnesses—Costs.

The successful party is entitled to travelling expenses of the witness summoned by him as against the unsuccessful party. 67 Ind. Cas. 277=A.I.R. 1923 Cal. 315.

——S. 35—Witnesses—Diet money of.

Diet money of witnesses of plaintiffs who attended the Court but were not produced before the Court is correctly charged as cost where the number of witnesses is not excessive and where the defendant does not disclose the line of defence. But costs of document unnecessarily produced cannot be awarded. 118 Ind. Cas. 230=A.I.R. 1929 All. 873.

——S. 35—Diet money where can be charged for witnesses summoned but not examined.

It cannot be laid down as a universal rule that no diet money can be charged for the witnesses who were not examined in Court, even though they had been summoned under the orders of the Court. Where a party had actually paid diet money to the witnesses on two occasions at least when the Court could not examine them, there is no justification in disallowing costs incurred in that manner, especially when the summoning of those witnesses had been necessitated by the false plea raised by the opposite party. A.I.R. (Vol. 27) 1940 Lah. 182=42 P.L.R. 263=190 Ind. Cas. 593.

——S. 35—Costs of witnesses summoned but not examined cannot be taxed against a party.

Costs of such witnesses as are not examined though summoned cannot be taxed in the decree against a party. 7 O.W.N. 815=A.I.R. 1930 Oudh 432=128 Ind. Cas. 748.

——S. 35—Separate cost—Pleader's fee—Basis, valuation of suit.

Where plaintiff's suit is dismissed each defendant is entitled to costs taxed on the basis of the suit valuation and not on the basis of what each defendant's interest might be in the suit itself. 27 Bom.L.R. 692=89 Ind. Cas. 211=A.I.R. 1925 Bom. 432.

——S. 35—Costs—Pleader's fee—Each successful defendant—Basis, value of all properties in suits.

Costs may be awarded to each successful defendant on the aggregate value of all the properties which is the subject-matter of the suit. A.I.R. 1939 Bom. 266=41 Bom.L.R. 223=183 Ind. Cas. 667.

——S. 35—Costs—Solicitor's charges—Work done by solicitor—Opinion of Judge.

Costs are given as an indemnity, and the costs allowed ought to be sufficient to cover the client in respect of the costs due to his solicitors which would be allowed on taxation between party and party. But the Judge must be given some material on which to form an opinion. A.I.R 1938 Bom. 224=40 Bom.L.R. 256=175 Ind. Cas. 112.

54. Taxation.

See under CIVIL P.C., S. 35—HIGH COURT PRACTICE.

55. Test Cases.

——S. 35—Test cases—costs.

In test cases no order for costs should be passed. A.I.R. 1939 Rang. 432=1939 Rang.L.R 504=185 Ind. Cas. 460.

56. Third Party.

——S. 35—Third party—Liability for costs.

As an ordinary rule, only the parties to a litigation can be made liable for costs, but in exceptional cases a Court may make a stranger to a suit liable for costs. 7 Bom. 484, Rel. 16 Ind. Cas. 381 (Cal.).

——S. 35—Awarding of costs against stranger to litigation—Suit by benamidar—Question of liability of real plaintiff for costs—Procedure.

Per Iqbal Ahmad, C. J. and Ganga Nath, J.—Under S. 35, the Court may, in exceptional cases, award costs even against a stranger to the litigation. The Court, of course, will not and cannot award costs against a person without giving him an opportunity of being heard. It follows that if a party to a litigation desires costs to be awarded against a stranger to that litigation, he must, at an

appropriate stage of the litigation, raise the point before the Court, so that the Court may, if it thinks proper to do so, implead the stranger as a party to the litigation and give him an opportunity of being heard. It is open to a defendant in a suit by benamidar to say that the real plaintiff is a person other than the person in whose name the suit has been filed, and to ask the Court to implead the real plaintiff and award him costs as against the real plaintiff; but, if the defendant in such a suit does not adopt such a course he cannot, after the termination of litigation, raise the question of costs by a separate suit. The question of costs of particular suit is a matter incidental to that suit and cannot, therefore, be made the subject of a separate suit A.I.R. (Vol. 29) 1942 All. 233= 1942 A.L.J. 367=I L.R. (1942) All. 832=201 Ind. Cas. 695 (F.B.).

——S. 35—Power of Court to make persons not parties liable for costs.

Under S. 35, the Courts have, in certain cases power to make persons who are not parties, liable for costs. A.I-R. 1934 Nag. 250 (1)=154 Ind. Cas. 349

——S. 35—Third party—When bound by the order for costs.

An order for coste binds a person not party to a suit when it is directed against persons through whom he claims. 1930 M.W.N. 153=123 Ind. Cas. 47=A.I.R. 1930 Mad. 577=58 M.L J 318.

57. Trial, Question of Costs only.

——S. 35—Trial of suit to determine the question of costs alone.

It would be in appropriate and contrary to the practice of the court to investigate the merits of a case merely to determine the incidence of costs. (1902) 4 Bom.L.R. 816.

——S. 35—Trial of suit to determine question of costs alone—Failure to disclose in reply evidence which one was co under obligation to notice disclose—Suit filed—Defence found valid—Plaintiff is not entitled to proceed with suit only as to costs.

P a receiver to an estate demanded from **D** a sum as due by **D** to the said estate. **D** replied that sum had been paid with interest and that he had got back the receipt which he had passed for the amount. **P** from time to time called upon **D** to let him know as to whom **D** had paid the amount and to produce the receipt for inspection. No reply was sent by **D**, **P** filed the present suit to enforce the demand. After the suit was filed, **D** gave inspection of the receipt. **P** informed **D** that he would not proceed with the suit except to ask for costs.

Held, that **D** was under no obligation to disclose to **P** the evidence by which he proposed to substantiate the defence which he had set out in his reply and **P's** suit was liable to be dismissed. 32 Bom.L.R. 200=A.I.R. 1930 Bom. 152=125 Ind. Cas. 441.

——S. 35—Suit not maintainable—Dismissed—Power to go into merits and disallowed costs.

Per Beachcroft, J., Mukherjee, J., Contra.)

Where a suit is dismissed on the ground that the suit does not lie, the Court ought not to look at the merits and disallow the costs of the defendant. 18 C.W.N. 106=17 C.L.J. 75=16 Ind. Cas. 922.

58. Trustee.

——S. 35—Trustee—When costs to come out of trust estate—Right of appeal.

Persons who are in the position of trustees ought to have their costs out of the trust estate in legal proceedings concerning the estate, unless they have unreasonably carried on or resisted such proceedings. An appeal is entertainable against a decision on the question of costs, where a question of principle is involved. 21 C.W.N. 339=39 Ind Cas. 388.

——S. 35—Trustee—Suit against co-trustee.

Suit by trustee against co-trustee, failing because of non-compliance with the provisions of S. 92—He is not entitled to costs out of trust estate. A I.R. 1942 Bom. 125 (2)=44 Bom.L.R. 88=I.L.R. (1942) Bom. 293=200 Ind. Cas. 371.

——S. 35—Solicitor—Trustee defendant to suit relating to trust property—His from acting in his behalf and other co-trustees.

Held, that the firm was entitled to out of pocket costs and profit costs as between attorney and client. A.I.R. 1937 Bom. 374=39 Bom.L.R. 633= I.L.R. (1937) Bom. 843=171 Ind. Cas. 49.

——S. 35—Trustee—Costs against—Personal liability.

Where a plaintiff who sues as a trustee incurs a liability to costs, the rule is that it is in the first instance a personal liability unless he obtains an order from the Court that the costs are to come out of the estate.

Where in a suit instituted by a trustee on behalf of an institution an order was made that the defendant should pay the plaintiff his costs and the order was reversed on appeal:

Held, that the defendant was entitled to recover the costs personally from the plaintiff in restitution by arrest and attachment of the plaintiff's property, whatever remedy lay against the assets of the institution. A.I.R. 1935 Mad. 5=67 M.L.J. 787 =40 L.W. 805=1934 M.W.N. 1342=154 Ind. Cas. 109.

——S. 35—Trustee preferring appeal—Dharmakrta, position of.

In an ordinary litigation, a person in the position of a trustee in bankruptcy who has a decree passed agaiust him for costs must ordinarily be held personally liable. Further, a trustee who appeals does so at his own risk as to costs, because he is only interested so far as he wants protection and he is completely protected by the decision of the Court of first instance. The principle must apply to **Dharmakartas**, as much as to ordinary trustees and other persons suing or sued in a representative capacity. A.I.R. 1934 Mad. 433=40 L.W. 22=67 M.L.J. 209=1934 M.W.N. 1178=150 Ind. Cas. 87= 58 Mad. 160.

——S. 35—Dharmakarta—Costs against—Personal liability.

Where a suit against the **dharmakarta** of a temple was decreed in favour of the plaintiffs in the Court of first instance and in the Court of first appeal and a second appeal preferred by **dharmakartas** was dismissed with the direction that the appellants do pay to the respondents Rs. 76 for the costs:

Held, that the plaintiffs were entitled to take out execution against the **dharmakartas** personally for the amount of costs awarded. A.I.R. 1934 Mad. 430=40 L.W. 22=67 M.L.J. 209=1934 M. W.N. 1178=950 Ind. 87.

59. When not liable.

——S. 35—Suit on agreement before time—Defendant making deposit to Court—No costs in respect of amount deposited.

The appellant forced the respondent company into litigation without making any attempt whatever to adjust his differences with the company out of Court. He actually filed his suit one day before the agreement on which he was suing expired. The respondent company paid into Court the amount, which it considered to be due to the appellant:

Held, that it could not he contended that the company should be mulcted in costs in respect of the amount deposited. A.I.R. 1936 Rang. 419=165 Ind. Cas. 308.

——S. 35—Suit on promissory note—Money produced in Court—Non-payment due to absence of succession certificate—Defendant is not liable for costs.

The defendant execcuted a promissory note in favour of the deceased husband of the plaintiff. The husband died leaving the plaintiff, his widow, and daughters. There was no administration suit pending between the widow and daughters. There was a will left by the deceased creditor. The plaintiff was not the executrix under the will. The defendant did not deny the liability but asked plaintiff to produce a succession certificate or some other forensic recognition. He in fact produced the whole amount in Court. On the question of costs:

Held, that under the circumstances the defendant was not liable for the cost of an unnecessary suit which was only brought because the persons entitled to claim under the deceased creditor did not understand their legal rights. A.I.R. 1936 Bom. 342=38 Bom.L.R. 728=165 Ind. Cas. 58.

——S. 35—Tender of correct amount duly made —Plaintiff in rent suit, if entitled to costs and interest.

Where tender of the correct amont due has been duly made by the tenants, the landlord is not entited to costs in the original suits nor to interest on arrears of rent. A.I.R. 1935 Pat. 101=1 B.R. 186=153 Ind. Cas. 323.

——S. 35, O. 34, Rr. 2 and 4—Mortgage suit—Discharge of some defendants—Others not responsible—Latter, if can be burdened with costs.

Where the remaining defendants were in no way responsible for the discharge of the other defendants who claimed to have no interest in property:

Held, that the costs of the defendant who claimed to have no interest in property, should not be charged against the mortgaged estate but would be paid by the plaintiff. A.I.R. 1934 Nag. 264=30 N.L.R. 331=153 Ind. Cas. 115.

60. Will.

——S. 35—Will—Construction—Special difficulties—Sucessful appellant—Contentions varying in each Court—Order for costs against.

In view of the special difficuties in the construction of the will and to the fact that the contentions of the appellant varied in each Court, the respondent was given all her costs from the the successful appellants. 38 Bom. 399=1 L.W. 762 =26 M.L.J. 647=18 C.W.N. 844=19 C.L.J. 563=16 Bom.L.R. 366=12 A.L.J. 742=16 M.L.T. 59=(1914) M.W.N. 441=23 Ind. Cas. 645 (P.C.).

——S. 35—Will—Construction—Ambiguity in the construction of will and litigation rendered necessary.

Where difficulty had been created and litigation had been in a mamner rendered necessary by the act of the testor, for instance, by reason of the ambiguity or inconsistency in the provisions of his will, the Court ordered costs of all parties to come out of the estate. 3 C.L.J. 224, ref. to. 554. 11 C.L.J. 461=6 Ind. Cas. 554.

——S. 35—Construction of will—Costs — By whom to be borne.

Where a litigation is caused by the language of a will, its costs should be borne by the estate and not by the trustees. 39 Mad. 476 (Note)=24 Ind. Cas. 96. [Affirmed on appeal. 39 M. 476=29 Ind. Cas. 203.]

——S. 35—Suit for construction of will—Costs, to come out of estate.

Per **Varadachariar** and **Madhavan Nair, JJ.**—**Burn, J , contra.**—In suits for the construction of wills and settlements, costs of all parties may be directed to come out of the estate, when the claim is not baseless and the question of construction not free from doubt. A.I.R. 1936 Mad. 388=70 M. L.J. 128=43 L.W. 742=1936 M.W.N. 600=163 Ind. Cas. 471.

——S. 35—Will—Vague Directions—Suit relating to—Costs to come out of estate.

Where it is the fault of the testator in making the testamentary directions vague or uncertain in law or fact, that is responsible for a litigation, the costs of all parties shuld be awarded out of the estate. 19 S.L.R. 220=78 Ind. Cas. 249=A.I.R. 1925 Sind 195.

——S. 35—Probate action—Defendant making unfounded allegations against propounder—Defendant to pay all costs of propounder.

In an action after taking out Probate of a will, the defendant made unfounded allegations against the propounder and exhibited a most inimical and offensive attitude towards him. The Court in granting Probate ordered defendant to pay all costs of the propounder and observed that if defendant has merely put the plaintiff to proof of the will so that the conscience of the court might be satisfied each party would have been ordered to bear its own costs. 7 Ind. Cas. 301 (Bom.).

——S. 35-A—Compensatory costs — Conditions necessary for awarding—Exercise of discretion—Interference by revisional Court.

Before awarding compensatory costs under S. 35-A, C. P. Code, the Court has to satisfy itself that the claim was false or vexatious to the knowledge of the plaintiff, that the interests of justice require compensatory costs to be awarded, and that the defendant had put forward his objection that the suit was false or vexatious at the earliest opportunity.

Compensatory costs should be awarded with some caution; but a revisional Court would be reluctant to interfere with the exercise of any discretion by the lower Court regarding costs, unless it has proceeeded on some perverse or at any rate some wrong considerations, or has disregarded the ordinary rules of law relating to the awarding of Costs. 63 L.W. 57=1950 M.W.N. 41 (2)=(1949) 2 M.L.J. 744.

——S. 35-A—Compensatory costs—Conditions for award—Reasons to be recorded.

The Court has no power to award compensatory costs under S. 35-A, C. P. Code, unless objection had been raised on behalf of the plaintiff to the effect that the defence raised was false or vexatious to the knowledge of the defendant. An order under S. 35-A has to be passed after recording reasons for holding the defence to be false or vexatious. The words "having regard to the contention raised, I think that this is a case in which the plaintiff is entitled to some compensation" are not a sufficient recording of the reasons for holding the defence to be false or vexatious to the knowledge of the defendant. A.I.R. 1943 Mad. 286=(1943) 1 M.L.J. 41=1943 M.W.N. 66=56 L.W. 208=210 Ind. Cas. 53.

——S. 35-A—Order under—Objections by party, necessary.

Compensation under the section can be awarded only on objection by the party as false or vexatious. 94 Ind. Cas. 78=A.I.R. 1926 Lah. 472.

——S. 35-A—Dismissal for default of appearance, whether amounts to 'abandonment' under—Order for compensatory costs.

Where neither the plaintiff nor his pleader appeared in spite of the Court's warnings but another counsel prayed for adjournment, and the suit was dismissed for default under O. 9, R. 8, C. P. Code, and an order for compensatory costs under S. 35-A, C. P. Code was passed:

Held that the conduct of the plaintiff amounted to 'abandoning' the suit within the meaning of S. 35-A, C. P. Code, and the Court had jurisdiction to pass the order. A.I.R. 1931 Lah. 509=131 Ind. Cas. 377.

——S. 35-A—Compensatory costs—Past activities—If can be considered—'Frivolous and vexatious'.

The past activities of the plaintiff in filing suits and his propensity to file suits for getting properties should not be taken into consideration for the purpose of awarding compensatory costs against him. A suit involving arguable and complicated questions of fact and law cannot be held to be "frivolous and vexatious" to warrant the awarding of compensatory costs. 62 L.W. 752=(1949) 2 M.L.J. 582.

——S. 35-A—Jurisdiction of Insolvency Court to pass orders under.

Insolvency Court has powers in the exercise of its original civil jurisdiction to apply S. 35-A and award exemplary costs; the question, whether that section was in existence or not when the Provincial Insolvency Act came into force is immaterial. A.I.R. 1935 Nag. 207=31 N.L.R. 365=158 Ind. Cas. 394.

——S. 35-A—Powers of Small Cause Court to award.

Small Cause Court Judge not vested with jurisdiction up to Rs. 250 cannot grant costs unless empowered by High Court. 94 Ind. Cas. 790=A.I.R. 1926 All. 554.

——S. 35-A—Trial of small cause suit as regular suit—Powers of Judge.

Where a suit instituted in the Court of Small Cause is subsequently transferred to the regular side, the Judge trying the suit must be deemed to have the same powers as the Small Cause Court possessed in the matter of awarding compensation under S. 35-A. 120 Ind. Cas. 412=A.I.R. 1930 Nag. 133.

——S. 35-A—Costs awardable under—Nature of.

Costs which can be awarded under S. 35-A, C. P. Code, are compensatory and not penal. I.L.R. (1949) All. 135.

——S. 35-A—Costs under—Nature of.

Costs to be awarded under S. 35-A are compensatory and not penal. A.I.R. 1931 Lah. 509=131 Ind. Cas. 377.

——S. 35-A—Compensatory costs under.

Compensatory costs stand on the same footing as other costs. A.I.R. 1934 Oudh 433=11 O.W.N. 1055=151 Ind. Cas. 307.

——S. 35-A—Appeal from order of costs under.

Appeal lies to District Judge from an order of Small Cause Court awarding costs. 94 Ind. Cas. 790=A.I.R. 1926 All. 554.

——S. 35-A—Colluding defendant—Instigator of suits—Suit dismissed as false and vexatious—Order against.

A defendant who has instigated the suit against the other defendants and supports the plaintiff in his conduct is within the ambit of S. 35-A and the Court is competent to make an order for costs as compensation against such defendant when it dismisses the suit as false and vexatious. A.I.R. 1945 Mad. 84=(1944) 2 M.L.J. 369=57 L.W. 594=1944 M.W.N. 698=I.L.R. (1945) Mad. 407.

——S. 35-A—Next friend—Order against.

What is awarded under S. 35-A is "costs" and nothing but costs, although those costs are to be awarded by way of compensation and the order to pay it is covered by S. 35, itself. An order under S. 35-A can therefore be passed against next friend of a minor. A.I.R. 1930 All. 577 (2)=1930 A.L.J. 1295=128 Ind. Cas. 225=52 A. 907.

——S. 35-A—Next friend of minor plaintiff, if can be ordered to pay compensatory costs under S. 35-A.

Section 35-A, C.P. Code, is clearly not intended to be read alone. It is, as it were, an appendix to S. 35 and is intended to deal with some exceptional cases for which the exercise of the ordinary discretion of the Court under S. 35 would not afford a sufficient compensation. S. 35-A does not anywhere speak of parties to the suit or proceeding. Hence the next friend of a minor plaintiff can be made liable for compensatory costs under S. 35-A as well as for ordinary costs under S. 35. A.I.R. 1944 Mad. 81=56 L.W. 615=(1943) 2 M. L. J. 430=1943 M.W.N. 644=211 Ind. Cas. 424.

——S. 35-A—Order without jurisdiction—Revision.

Where the order has been passed without jurisdiction, it can be set aside in revision. A.I.R. 1937 Pat. 477=3 B.R. 361=18 P.L.T. 434=167 Ind. Cas. 938.

——S. 35-A—Order for costs under by Small Cause Court—Appealable—Revision under S. 25, Provincial Small Cause Courts Act—If lies.

A person is not shut out from questioning in revision under S. 25, Provincial Small Cause Courts Act, an order made against him under S. 35-A, C.P. Code, in a Small Cause Suit. A.I.R. 1933 Oudh 477=10 O.W.N. 1085=146 Ind. Cas. 993 (1).

——S. 35-A—Judgment-debtor alleging bad faith —Court refusing to give opportunity of proving it —Failure to exercise jurisdiction—Appeal, if lies—Revision.

Where the Court refuses to give an opportunity to the judgment-debtor to prove that the execution was taken out in bad faith and refuses to award compensatory costs it fails to exercise its jurisdiction. Though no appeal lies against the order under Cl. (ff) of S. 104, a petition to revise the order is maintainable. (1936) 162 Ind. Cas. 860=18 N. L.J. 309.

——S. 35-A—Suit for declaration, that Privy Council decree is void—False and vexatious plea of fraud—Order for costs under.

Where the plaintiff had no possible ground for claiming possession in the suit but conducted as a suit for possession right up to arguments and while the plea of fraud set up was false and vexatious, it was held, that an order of compensatory costs awarded under S. 35-A was justified. A.I.R. 1936 Oudh 67=1935 O.W.N. 1071=1935 O.L.R. 574 =11 Luck. 486=158 Ind. Cas. 338.

——S. 36—Order in contempt proceedings—If executable under.

An order of the High Court in contempt proceedings is an order within the meaning of S. 2 (14), C. P. Code, and can be executed under S. 36, C.P. Code. 59 B. 10, foll. I.L.R. (1949) 1 Cal. 355=53 C.W.N. 310.

——S. 36—Procedure applicable to execution proceedings.

Execution proceedings are not governed by the procedure prescribed for suits in the Code. A. I.R. (Vol. 23) 1936 Pesh. 115.

——S. 36—Applicability—Civil Court granting in execution farm of land belonging to judgment-debtor—Order making lease money payable in instalment.

A Civil Court is competent in execution proceedings to grant a farm of the land of a judgment-debtor belonging to an agricultural tribe. If the Court in granting such a lease makes the lease money payable by instalments, it might be said that the Court had acted in an unwise or indiscreet manner by not demanding the entire lease money at once; but it cannot be said that the Court had passed an order which it had no jurisdiction to pass. Provisions of S. 36 apply to the case and the Court can enforce payment of the lease money by applying the provisions of the Code relating to execution of decrees. And where the Court, in the above instance, directs the lessee on failure to pay some instalments, to deposit the balance of the lease money in Court, and no appeal is filed by the lessee against it, the order of the Court is conclusive and binding so far as the lessee is concerned. A.I.R. (Vol. 23) 1936 Lah. 696=38 P. L.R. 936=166 Ind. Cas. 391.

——S. 36—Order made on notice of motion.

An order made on a notice of motion is an 'order' and can be executed under S. 36. A.I.R. (Vol. 21) 1934 Bom. 452=36 Bom. L.R. 992=58 Bom. 10=154 Ind. Cas. 162.

——S. 36—Judgment on admission—Decree not drawn up—Amount awarded may be enforced as an order.

It is not necessary to have a decree drawn up on a judgment obtained on admission under O. 12, R. 6. It is open to the plaintiff to enforce payment of the amount awarded as an order in execution proceedings by virtue of S. 36. 20 S.L.R. 216=92 Ind. Cas. 562=A.I.R. 1926 Sind 119.

——S. 36—Scope — Commissioners' fees — Order directing payment.

Order directing payment of an amount to a Commissioner on his application is covered by S. 36 and is to be executed as a decree and provisions of S. 47 will apply in execution proceedings. 52 Cal. 269=84 Ind. Cas. 724=40 C.L.J. 180=A. I.R. 1925 Cal. 57.

——S. 36—An order under O. 20, R. 11 (2) can be executed as if it were a decree. 4 Bur. L.J. 32=85 Ind. Cas. 291=2 Rang. 673=A.I.R. 1925 Rang. 189.

——S. 36—A subsequent order of the Court in regard to particular costs is capable of execution and the costs are covered by the previous decree of Court, even though those particular costs were not shown in that decree. 38 Cal. 125, Foll. 15 S. L.R. 11=62 Ind. Cas. 507=A.I.R. 1921 Sind 13.

——S. 36 (S. 649, Old Code)—Writ of attachment for recovery of excess fees drawn by Commissioner.

A writ of attachment issued for the recovery of an amount drawn by a Commissioner in excess of his dues as fees is an order falling within S. 649, C. P. Code (1882). 6 Ind. Cas. 386 (Cal.).

——Ss. 36, 37 (S. 649, Old Code)—Transfer of jurisdiction—"Court which passed the decree".

The expression "the Court which passed the decree" in S. 232, C. P. Code includes the Court which by reason of a transfer of jurisdiction has jurisdiction in respect of the subject-matter of the suit. S. 649, C. P. Code, should if possible, be so construed as to make it convenient to parties to execute their decrees, the decree-holders as well as the judgment-debtors. 30 M. 537 diss. from. (1907) 12 C.W.N. 859=35 C. 974.

——S. 37.

Synopsis.

1. **S. 37 (a)—Appellate decree.**
2. **S. 37 (b)—"Ceased to exist".**
3. **S. 37 (b)—"Ceased to have jurisdiction".**
4. **S. 37 (b)—"Jurisdiction to execute decree".**
5. **Scope.**

1. S. 37 (a)—Appellate decree.

——S. 37 (a)—"Court which passed decree"—Court of first instance and not Court of appeal.

"The Court which passed the decree" in S. 37 means the Court of first instance and not the Court of Appeal. A.I.R. (Vol. 23) 1936 Oudh 5=1935 O. L. R. 590=1935 O.W.N. 1094=11 Luck. 511=158 Ind. Cas. 427.

——S. 37 (a)—Execution—Appellate Court's decree.

In general, the rule must be that the Appellate Court's decree, if properly drawn is the sole decree to be executed in the case but there may be cases in which that general and ordinary rule cannot and should not be invariably enforced, and in particular circumstances it may be incumbent upon the Courts to permit execution of the decree of the original Court. 14 M.I.A. 465, 6 Beng.L.R. 52; 13 Cal. 13; 11 All. 267, (F.B.); 39 Cal. 925; 39 Bom. 175, Foll. 11 L.B.R. 163=A.I.R. 1921 L.B. 37.

——S. 37—Appellate decree of Privy Council—Transmission to High Court—Jurisdiction of original Court to execute.

The High Court to which the Privy Council transmits its decree, in receiving and filing it, does merely a ministerial act and the District Court does not thereby cease to be the Court which passed the decree for the purpose of recognizing the transferee decree-holder. 38 Mad. 832=15 M.L.T. 143=26 M.L.J. 185=23 Ind. Cas. 235.

2. S. 37 (b)—"Ceased to exist".

——S. 37—"Ceased to exist"—Court in Madras Presidency transferred to new province of Orissa—Decree-holder filing execution in Court in Orissa Province which passed decree before its transfer to Orissa Province.

The decree-holders on 5th December, 1933, obtained a decree in original suit in the District Munsif's Court at Berhampur, then in the Presidency of Madras. Execution proceedings were taken out and the application was closed on 23rd July, 1934. On 1st April, 1936, consequent on the coming into force of S. 289, Government of India Act, 1935, the District of Ganjam within which Berhampur is situate was transferred from the Presidency of Madras to the Province of Orissa but the area to which the suit related remained, however, within the Presidency of Madras:

Held, that the Subordinate Judge of Berhampur had no jurisdiction to entertain the further execution proceedings in respect of the decree since upon the transfer of the District of Ganjam from the Presidency of Madras to the Province of Orissa, the Munsif's Court at Berhampur as constituted under the Madras Acts ceased to exist but the Court was deemed to have continued as constituted under the Bengal Civil Courts Act. A.I.R. (Vol. 30) 1943 Pat. 423=10 B.R. 329=211 Ind. Cas. 91. See also A.I.R. 1939 Mad. 463 under 3 (b).

——S. 37—Transfer of territorial jurisdiction after decree—Proper Court to execute decree—Abolition of decree-Court before passing of orders—Jurisdiction

A mortgage decree was passed by the Sub-Court of Negapatam in 1922. In 1923 the territorial jurisdiction over the hypothecated properties was transferred to the Sub-Court of Tiruvarur. Execution petitions were filed in the Tiruvarur Court in 1924. In 1927 on the application of the assignee decree-holder, the assignment was recognised and execution was ordered. Further applications were made in 1929 and 1931. The Negapatam Sub-Court was abolished in June, 1932 and final orders on the last petition were passed in February, 1933.

Held, that the order passed in February, 1933, by the Tiruvarur Court was valid inasmuch as it was passed after the abolition of the Negapatam Court and when the Tiruvarur Court had full jurisdiction. A.I.R. (Vol. 21) 1934 Mad. 283 =66 M.L.J. 492=1934 M.W.N. 90=39 L.W. 488=57 Mad. 795=148 Ind. Cas. 1088.

——S. 37—Execution by Court after re-establishment.

Where the Court which passes a decree is abolished but is subsequently re-established, it can execute the decree provided it would have jurisdiction to try the suit to which the decree relates if it were instituted at the time of the application for execution. 4 Pat. 688=7 P.L.T. 333=92 Ind. Cas. 900=A.I.R. 1926 Pat. 209.

——S. 37 (S. 649, Old Code)—Small Cause Court which passed the decree abolished—Court to which application for execution should be made.

If, after a decree is passed, the Small Cause Court which passed the decree is abolished, the Court to which application for execution should be made is the Court in which the suit will be instituted, if it were instituted at the time of the application for execution and, the jurisdiction is to be determined by considering the places of residence. (1906) 30 M. 217.

——S. 37 (b)—Court passing decree ceasing to exist—Jurisdiction to execute—Two courts having concurrent jurisdiction.

Where the Court which passed a decree has ceased to exist, the decree should be executed by the Court which would have jurisdiction to try the suit in which the decree was passed. Where there are two independent Courts within the same territorial limits having concurrent jurisdiction it is open to either of such Courts to execute the decree of the other. 49 Ind. Cas. 94 (Pat.).

3. S. 37 (b)—"Ceased to have jurisdiction."

(a) Change of pecuniary jurisdiction.
(b) Change of territorial jurisdiction.
(c) Distribution of civil work.
(d) Miscellaneous.

3 (a). Change of pecuniary jurisdiction.

——S. 37—Decree passed by predecessor presiding over Court for amount exceeding successor's pecuniary jurisdiction — Jurisdiction to execute decree.

A decree for over Rs. 1,000 passed by a Court

which was presided over by an officer who had pecuniary jurisdiction to try suits valued up to Rs. 2,000 can be executed by the same Court at a time when it is presided over by an officer having jurisdiction to try suits valued up to Rs. 1,000 only. 37 C.W.N. 679, foll. A.I.R. 1950 Assam 115.

——S. 37—Power to execute even if pecuniary jurisdiction of Court is altered subsequently.

A Court passing a decree is entitled to execute it notwithstanding the provisions of S. 37, and the Court which passed the decree does not cease to exist merely because the pecuniary jurisdiction of that Court has been altered. A.I.R. (Vol. 20) 1933 Cal. 684=37 C.W.N. 679=149 Ind. Cas. 1024.

——Ss. 37, 38 and 150—Mortgage suit—Value of Rs. 2000—Preliminary decree by Munsif—Final decree by Sub-Judge—Execution by Munsif, if competent.

A preliminary decree for nearly Rs. 2,000 was made in a mortgage suit by a Munsif having power to try suits upto Rs. 2,000. The Munsif being transferred and his successor not being vested with the same power, the final decree was made by the Sub-Judge. Execution was, however, taken out in the Court of the Munsif who in the mean time was vested with jurisdiction.

Held, that the Munsif's Court could execute the decree under S. 150, C. P. Code, though not under Ss. 37 and 38. 24 C.W.N. 899=57 Ind. Cas. 879.

3 (b). Change of territorial jurisdiction.

——Ss. 37 to 39—Transfer of territorial jurisdiction after decree—Transferee court is competent to entertain execution application.

Where there is a transfer of territorial jurisdiction, the jurisdiction of the transferee Court is not limited only to future proceedings in the nature of suits but also to future proceedings in the nature of execution proceedings in suits already decreed. Where, therefore, the land in respect of which relief in execution of decree for mesne profits is claimed was within the jurisdiction of a Court at **A** which passed the decree at the time of the suit but within the jurisdiction of Court at **B** at the time of the execution, the latter Court is competent to entertain execution application of its own accord, and it is not necessary for the decree-holder first to apply to the Court at **A** and then to get the execution transferred to the Court at **B**. A. I.R. (Vol. 31) 1944 Sind 173=I.L.R. (1944) Kar. 33=220 Ind. Cas. 126.

——S. 37—Court in Madras Presidency passing decree—Court subsequently going within jurisdiction of new Orissa Province—Execution application in another Court in Madras Presidency.

The respondent had obtained a decree against the predecessor-in-title of the appellants in the Court of the Subordinate Judge of Berhampore at a time when the Court was within the Presidency of Madras. When the Province of Orissa was constituted, the Court of the Subordinate Judge of Berhampore became a Court within the jurisdiction of that province and was to be deemed to have been constituted under the Bengal Civil Courts Act, though all pending proceedings in that Court were to be continued. The respondent filed an application to execute the decree in the Court of the Subordinate Judge of Chicacole and not in the Court at Berhampore:

Held, that from the date of the formation of the Province of Orissa the Berhampore Court ceased to have jurisdiction for any purpose over any matter arising within the Presidency of Madras except in so far as any other notification might give it such jurisdiction. The application for execution did not come within the meaning of the words 'pending proceedings' and was properly filed in Chicacole Court. A.I.R. (Vol. 26) 1939 Mad. 463=(1939) 1 M.L.J. 340=49 L.W. 338=1939 M.W.N. 268=184 Ind. Cas. 86. See also A.I.R. 1943 Pat. 423, under 2.

——S. 37—Jurisdiction, change of after decree.

The area in which the judgment-debtor lived, was transferred from the jurisdiction of the principal Dt. Munsif of Salem, who passed the decree sought to be executed, to that of the Dt. Munsif of Namakkal.

Held, the latter Court had jurisdiction to execute the decree. 42 Mad. 821, Foll. 73 Ind. Cas. 956=18 M.L.W. 17=1923 M.W.N. 406=A.I.R. 1924 Mad. 32=45 M.L.J. 210.

——S. 37—Decree of Calcutta High Court—Execution within limits of Patna jurisdiction.

Where the decree which was being executed was a decree of the Calcutta High Court in a suit which arose within the present jurisdiction of the Patna High Court, it was the latter which had power to supervise the execution of the decree. 3 Pat.L.J. 435=48 Ind. Cas. 107.

——S. 37 (b)—Court passing decree ceasing to have jurisdiction.

Where the Court which passed a decree has ceased to have jurisdiction to execute it, the only Court which can execute the decree is the Court which, at the time of filing the execution application, would have jurisdiction to try the suit in which the decree sought to be executed was passed. 22 Ind. Cas. 899; 27 Ind. Cas. 88, Foll. 31 M.L.J. 90=20 M.L.T. 327=35 Ind. Cas. 237.

——S. 37—Court which passed decree—Transfer to Court having territorial jurisdiction—Objections to transfer—Jurisdiction to decide.

Where, in an application for transfer of a decree the judgment-debtor raises an objection as regards the executability of the decree the proper Court to decide such objection is the Court, which transfers the decree. The Court which passed a decree retains jurisdiction over all matters relating to the executability of the decree and should decide such matters before transferring the decree to the Court which has territorial jurisdiction over the property against which the decree-holder seeks to execute the decree but there the function of the Court passing the decree ceases. It has no power to attach or sell property outside its jurisdiction. 42 Mad. 821 (F.B.)=A.I.R. 1929 Mad. 199, Foll. 7 O.

W.N. 363=123 Ind. Cas. 881=A.I.R. 1930 Oudh 305.

——S. 37—Transfer of jurisdiction after preliminary decree—Court passing decree has jurisdiction to entertain execution application for transmission.

When the territorial jurisdiction of the Court which passed the decree is taken away between the date of the preliminary decree in a mortgage suit and the final decree and it passes the final decree also it has power to entertain an execution application for transmission to the Court having territorial jurisdiction but has no power to sell the property. 42 Mad. 821 (F.B.), Foll. 50 Mad. 882=39 M.L.T. 351=25 M.L.W. 671=1927 M.W.N. 282=103 Ind. Cas. 245=A.I.R. 1927 Mad. 627 (a)=52 M.L.J. 605.

——Ss. 37 and 38—Mortgage decree passed without jurisdiction—Execution—Jurisdiction.

A mortgage decree was passed by T Court though the hypotheca was not within its jurisdiction. Application for execution was made to K Court. On a question arising whether the K Court had jurisdiction to execute the decree when the T Court had not ceased to exist.

Held, that the K Court had no such jurisdiction unless and until the decree was transferred to it for execution. An order transferring a decree for execution should not be made so as to evade the provisions of the Limitation Act or to validate an invalid application. 42 Mad. 461=36 M.L.J. 199=10 L.W. 370=51 Ind. Cas. 102.

——Ss. 37 and 39—Decree of Court having no territorial jurisdiction—Execution.

Where a temporary sub-Court has no defined local jurisdiction and a decree is passed by that Court in a suit transferred to it by the District Court, it has no power to execute the decree by attachment of properties situate in places that had not yet been subjected to its jurisdiction but should have transferred the decree for execution to the Court having jurisdiction over the property sought to be attached, since S. 150 has no application to such cases and territorial jurisdiction is a condition precedent to the execution of a decree. 22 Ind. Cas. 899 and 17 Cal. 699, Foll. 31 M.L.J. 22=35 Ind. Cas. 296.

——S. 37—Loss of territorial jurisdiction after decree—Jurisdiction to execute decree not lost.

The Court which tried the suit and passed the decree does not lose its jurisdiction to execute the decree even though it has lost territorial jurisdiction over the property. 6 Cal. 513 and 42 Mad. 821 (F.B.) Foll. 37 Mad. 462 and A.I.R. 1927 Mad. 627, Diss. from. and the new Court which acquires territorial jurisdiction is not a Court competent to execute the decree. 30 Mad. 537 and 42 Mad. 461, Foll. 28 M.L.W. 885=114 Ind. Cas. 545=A.I.R. 1928 Mad. 746.

——Ss. 37 and 38—Court passing decree—Loss of territorial jurisdiction—Application to it for execution—"Proper Court"—Limitation Act, Art. 182 (5).

Per **Chief Justice,** and **Ayling J.,**—The Court which passed the decree is a proper Court for execution within Art. 182 (5) of the Limitation Act, even though the property over which it had jurisdiction at the time of the decree was taken away from it and assigned to another Court at the time of the presentation of the application for execution. 42 Mad. 821=37 M.L.J. 284=26 M.L.T. 223=(1919) M.W.N. 640=11 L.W. 63=53 Ind. Cas. 213 (F.B.), overruling (1) 37 Mad. 462 (2)=1914 M.W.N. 896.

——Ss. 37, 38 (Ss. 649 and 223, Old Code)—"Court which passed the decree"—Change of territorial jurisdiction.

A Court which passed a decree for sale of certain properties does neither cease to be the Court which passed the decree nor to have jurisdiction to execute the decree by the fact that the territory in which the properties were situate was transferred to the jurisdiction of another Court subsequent to the decree; and consequently, the original Court which passed the decree is competent to execute it, the transfer not having the effect of depriving the Court of its jurisdiction to execute the decree.

Held, also, that an application to the original Court to transfer the decree for execution to the new Court having jurisdiction over the area was a proper one and authorized by S. 223, C. P. Code, and that such an application is a step in aid of execution within the meaning of Cl. 4, Art. 179, (1906) 17 M.L.J. 417=30 M. 537=2 M.L.T. 466.

——S. 37—Transfer of territorial jurisdiction—Court which passed decree—Ceasing to exercise jurisdiction—Execution of decree.

The power to execute a decree is vested in the Court which passed the decree. But in the event of the Court ceasing to exercise jurisdiction it would be exercised by the Court which would have power at the time when the application was filed to try the suit. 49 Ind. Cas. 958 (Pat.).

——C. 37 (S. 649 (Old Code)—Execution—Court to execute — See JURISDICTION—RE-DISTRIBUTION OF TERRITORY. 5 C.W.N. 150=28 C. 238.

3 (c). Distribution of Civil Court.

——S. 37—Distribution of civil matters does not effect transfer of jurisdiction.

Order under S. 13 (2), Bengal Agra and Assam Civil Courts Act which distributes civil matters does not effect any transfer of jurisdiction. After such distributions the Courts do not lose jurisdiction which is acquired under S. 37. A.I.R. (Vol. 29) 1942 Cal. 321=I.L.R. (1942) 1 Cal. 289=46 C.W.N. 141=75 C.L.J. 255=201 Ind. Cas. 234.

——S. 37—Redistribution of civil work by District Judge in the District under S. 13 (2) of Civil Courts Act does not disturb the territorial jurisdiction of a Subordinate Judge in the District.

Subordinate Judge has jurisdiction throughout the district. The territorial jurisdiction thus conferred upon him can only be removed by a proper order and notification by the local Government under S. 13, clause (1) of the Civil Courts

Act. An order of the District Judge under clause (2) of S. 13 of the Act simply making arrangements for the distribution of the civil work in the district cannot at all disturb or curtail the territorial jurisdiction of the Subordinate Judge.

Where a mortgage decree was passed by a Subordinate Judge, first class, but subsequently the civil work of the area in which the mortgaged property was situated was transferred to 3rd Subordinate Judge by an order, under S. 13 (2) of the Bengal, N. W. P. and Assam Civil Courts Act, of the District Judge.

Held, that the first subordinate Judge did not cease to have jurisdiction to execute the decree, passed by him. 2 P.L.T. 374=62 Ind. Cas. 487 =6 P.L.J. 304=1921 P.H.C.C. 186=A.I.R. 1921 Pat. 152.

——S. 37—Facility under S. 150—Right of Decree Holder.

S. 37 is an inclusive definition and must not be used so as to deprive the decree-holder of the facility provided by S. 150. A.I.R. (Vol. 19) 1932 Mad. 260=61 M.L.J. 307=1931 M.W.N. 842= 34 L.W. 271=137 Ind. Cas. 183.

——S. 37—'Court which passed decree'—Entire business of one Court transferred to another Court.

Where the whole business of one Court has been transferred to another Court, the expression the 'Court by which the decree was passed' cannot be taken to be limited to the original Court. 46 Mad. 1=65 Ind. Cas. 727=15 M.L.W. 458=1922 M. W.N. 349=31 M.L.T. 79=A.I.R. 1922 Mad. 10=42 M.L.J. 344.

3 (d). Miscellaneous.

——S. 37—Court of wards made party to execution—Jurisdiction of Court to proceed with execution.

Where after decree the Court of Wards become party in execution proceedings, the Court has jurisdiction to proceed with the execution. 38 Bom. 662=16 Bom.L.R. 527=25 Ind. Cas. 406.

4. S. 37 (b). 'Jurisdiction to execute decree."

——S. 37 (b)—"Jurisdiction to execute it"—Meaning of.

The expression 'jurisdiction to execute it' as used in S. 37 (b), C. P. Code, does not mean and include the competency of the Court to entertain an application for execution of the decree. Even if in the circumstances of a particular case, a Court cannot effectively execute the decree, that would not mean that it has ceased to have jurisdiction to execute it. It still remains the competent Court for purposes of execution, though the decree-holder might have to apply for transmission of the decree to another Court for the purpose of obtaining the relief which he wants. A.I.R. (Vol. 29) 1942 Cal. 321=I.L.R. (1942) 1 Cal. 289=46 C.W.N. 141=75 C.L.J. 255=201 Ind. Cas. 234.

5. Scope.

——S. 37—Scope—Court to which decree has been transferred.

Section 37 has no reference to a Court to which a decree has been transferred for execution. A.I. R. (Vol. 23) 1936 Rang. 184=162 Ind. Cas. 865.

——S. 37—Scope—Applications under S. 144.

Section 37 does not cover applications under S. 144. A.I.R. (Vol. 17) 1930 Lah. 961=129 Ind. Cas. 204.

——Ss. 37 and 144—"Court of first instance"—Interpretation.

The Code has not defined for the purpose of S. 144 what is the "Court of first instance" when the "Court of first instance" has lost territorial jurisdiction. In a case like this the Court must proceed upon some general principle as laid down in S. 37 (b) in interpreting the phrase "the Court of first instance" which would apply even to cases where the Court of first instance has been abolished and also to cases where the Court of first instance has ceased to have jurisdiction. 1926 M.W.N. 395= 95 Ind. Cas. 587=A.I.R. 1926 Mad. 813=51 M. L.J. 161.

——S. 37—"Includes", meaning and effect of.

The word 'includes' as used in S. 37, though it extends the meaning of the expression 'Court which passed the decree' in one sense, does in another sense restrict it, and the effect of the word is to exclude, under the circumstances specified in Cl. (a) and Cl. (b) of the section, the original Court and substitute for it another Court which, for purposes of the section, is to be regarded as the only Court which passed the decree. A.I.R. (Vol. 29) 1942 Cal. 321=I.L.R. (1942) 1 Cal. 289=46 C.W.N. 141=75 C.L.J. 255=201 Ind. Cas. 234.

——S. 38.

See also C. P. CODE, Ss. 37, 42 AND 47 AND O. 21, Rr. 3, 10 AND 16.

1. **Altering decree.**
2. **"Court"—Meaning of.**
3. **Decree binding.**

See also C. P. CODE, S. 47—EXECUTABILITY OF DECREE.

4. **Jurisdiction and powers of Executing Court.**
5. **Simultaneous Execution.**
6. **Scope.**

1. Altering decree.

——S. 38—Order in execution—Whether can amount to amendment of decree or modification of its terms.

No order passed in execution can amount to an amendment of the decree or to an alteration of its terms. A.I.R. (Vol. 22) 1935 Mad. 429=41 L. W. 594=1935 M.W.N. 509=68 M.L.J. 593=157 Ind. Cas. 414.

——S. 38—Decree for **khas** possession of certain plot cannot be changed at the time of execution. A.I.R. (Vol. 22) 1935 Cal. 245=60 C.L.J. 286 =155 Ind. Cas. 725.

——S. 38—Decree, if can be amended in execution.

It is true that an executing Court cannot go be-

hind the decree but where the executing Court and the Court which passed the decree are one and the same, the Court can amend the decree in the course of the execution. But where the decree of the first Court is confirmed or reversed, it is superseded by the decree of the Appellate Court and the only Court that can amend the decree thereafter is the Appellate Court. A.I.R. (Vol. 22) 1935 Cal. 619=39 C.W.N. 1295=62 C.L.J. 79=63 Cal. 181=15 Ind. Cas. 436.

——S. 38, O. 20, R. 11 (1)—Executing Court, if can vary decree by making it payable in instalments.

The Court referred to in O. 20, R. 11 (1) is the Court which passed the decree and a variation of a decree after it is passed can only be made by the Court which passed the decree. The executing Court is not entitled to vary the decree by making it payable in instalments. A.I.R. (Vol. 21) 1934 Rang. 197=149 Ind. Cas. 763.

2. "Court"—Meaning of.

——S. 38—"Court"—Deputy Commissioner of Garo Hills.

The Court of the Deputy Commissioner of the Garo Hills is a "Court" within the meaning of S. 38. A.I.R. (Vol. 24) 1937 Cal. 557=41 C.W.N. 1243=I.L.R. (1937) 2 Cal. 734=66 C.L.J. 216=174 Ind. Cas. 12.

3. Decree binding.

(a) Decree, when binding.
(b) Decree, when not binding.
(c) Inquiry into facts—Permissibility.

3. (a) Decree, when binding.

——S. 38—Validity of decree—Powers of executing Court to consider.

An executing Court cannot hold a decree invalid. It can be set aside only by means of a separate suit. A.I.R. (Vol. 31) 1944 Oudh 111=1943 O.W.N. 457 (2)=1943 A.W.R. 151=217 Ind. Cas. 208.

——S. 38—Where the judgment and decree are not set aside in appeal they are res judicata and cannot be questioned in an execution proceeding. A.I.R. (Vol. 28) 1941 Pat. 600=7 B.R. 989=196 Ind. Cas. 33.

——S. 38—Validity of decree cannot be challenged by executing Court.

The executing Court cannot challenge the validity of the decree if the party affected thereby fails to take such proceedings. A.I.R. (Vol. 28) 1941 Rang. 163=1941 Rang. L.R. 90=42 Cr.L.J. 735 =195 Ind. Cas. 444.

——S. 38—Duty of executing Court to execute decree as it stands.

The duty of an executing Court is to execute a decree as it stands whether right or wrong, unless the decree was passed without jurisdiction. A.I.R. (Vol. 24) 1937 Pat. 618=4 B.R. 97=172 Ind. Cas. 125.

——S. 38—Correctness of amendment of decree, if can be questioned by executing Court.

The correctness of the propriety of the amendment of a decree cannot be questioned by the executing Court. This matter should be agitated before the Court which amended the decree at the time when proceedings for amendment were going on. A.I.R. (Vol. 28) 1941 Lah. 131=43 P.L.R. 11=I.L.R. (1941) Lah. 659=195 Ind. Cas. 250.

——S. 38—Executing Court—Duty of—Propriety of amendment of decree, if can be enquired into.

It is not within the province of the Court executing the decree to question as to whether or not the amendment was properly made. Its duty is confined to execution only, and if it finds that an application for execution has been made within three years from the date of the amended decree, then its duty is to proceed with the execution. A.I.R. (Vol. 21) 1934 Oudh 289=11 O W.N. 814=18 R.D. 396=150 Ind. Cas. 947.

——S. 38—Decree by Court having no territorial jurisdiction—Executing Court, if can question the validity of decree.

An executing Court can only go behind a decree which is sent to it for execution where the decree is null and void and that fact is patent upon the face of the record. Save in exceptional cases, e.g., cases of decrees relating to property outside British India, it cannot entertain an objection that the Court which passed the decree had no territorial jurisdiction. For it is impossible to say that a decree in a case to which S. 21 of C.P. Code, was applicable can be regarded as null and void. A.I.R. (Vol. 32) 1945 All. 177=1945 A.L.J. 117=I.L.R. (1945) All. 479.

——S. 38—Questions of territorial or pecuniary jurisdiction of decretal Court—Cannot be raised in execution.

Section 11, Suits Valuation Act, and S. 21, C.P. Code, are two legislative exceptions to the general principle of law that where a Court has no jurisdiction, its judgments and orders are mere nullities and can be declared to be void by every Court in which they may be presented. In view of these exceptions, the questions of territorial or pecuniary jurisdiction of the decretal Court cannot be raised before executing Court in execution proceedings. A.I.R. (Vol. 25) 1938 Pesh. 77=178 Ind. Cas. 275.

——S. 38—Transferee Court cannot question validity of decree on ground of jurisdiction.

A subsisting decree passed by a duly constituted Court that has not been set aside in proceedings by way of appeal, revision, review or otherwise by due process of law, is not to be treated as a mere nullity but is binding and conclusive against the parties thereto duly impleaded in the suit. A Court to which such a decree has been transferred for execution must take the decree as it stands, and is not entitled to question the validity of the decree upon the ground that the decretal Court had no jurisdiction, territorial, personal or pecuniary to pass it. A.I.R. (Vol. 24) 1937 Bom. 19=38 Bom.L.R. 1023=166 Ind. Cas. 961.

——S. 38—Executing Court, when can refuse to execute decree—Averments in pleading giving jurisdiction to Court—If can be challenged in execution.

The executing Court is entitled to refuse to execute a decree on the ground that it was made without jurisdiction. What is necessary, in order to enable the judgment-debtor to raise this objection, is that the decree must have been made by a Court which apparently had no jurisdiction whether pecuniary or territorial, or in respect of the judgment-debtor's person. The want of jurisdiction need not be apparent on the face of the decree. But if a Court assumes jurisdiction upon certain averments made in the pleading, which unless they are challenged, or shown to be inaccurate, would give the Court jurisdiction to try the suit, the defendant against whom the decree was passed would not be entitled to contradict that statement and say that the averments were false, and hence the assumption of jurisdiction by the Court was illegal. A.I.R. (Vol. 24) 1937 Cal. 481=41 C.W.N. 887=172 Ind. Cas. 435.

——S. 38—Executing Court, when can refuse to execute decree.

The executing Court would be competent to refuse to execute the decree only when on the face of the decree it would appear that the Court which passed it had no jurisdiction. By decree is meant the decree and the papers relevant for the purpose of understanding it. The proposition does not mean that if there is a clear statement upon the plaint which gives the Court jurisdiction to entertain a suit and if upon the basis of that jurisdiction the decree is passed by the Court without there being a challenge by the defendant as regards the territorial jurisdiction of the Court to pass the decree, it remains open to the defendant to question the jurisdiction of the Court after the decree has been made and in the course of execution.

But where the defect of territorial jurisdiction does not appear on the face of the proceedings of the suit, the executing Court is not competent to refuse to execute the decree. A.I.R. (Vol. 24) 1937 Cal. 565=41 C.W.N. 1162=67 C.L.J. 7=173 Ind. Cas. 634.

——S. 38—Decree without jurisdiction—If binding on executing Court.

A decree passed without jurisdiction is binding on the executing Court unless it is set aside by proper remedies. A.I.R. (Vol. 23) 1936 Lah. 766=166 Ind. Cas. 143.

——S. 38—Executing Court, if can go behind award, and question its validity.

An executing Court can enquire into and decide that a decree is a nullity not on the ground of jurisdiction, but because the decree passed is not a decree at all, such as in the case of a decree against a person who is dead, or is a decree in arbitration proceedings under the Arbitration Act which is no decree at all. An executing Court cannot, however, go behind an award filed in a Court with the consent of the parties, and question its validity when on the face of it, it is not a nullity even when the Court filing it had no territorial jurisdiction. A.I.R. (Vol. 27) 1940 Sind 150=I.L.R. (1941) Kar. 79=190 Ind. Cas. 881.

——S. 38—Court executing award under Co-operative Societies Act—Validity of award, if can be questioned.

An executing Court has no jurisdiction to question the validity of the decree sought to be executed. The same rule applies to awards under the Co-operative Societies Act. If the award is invalid for any defect in procedure, a person may possibly be able to get it declared invalid as against him by resorting to proper remedies but the point cannot be raised in the executing Court. A.I.R. (Vol. 23) 1936 Lah. 442=38 P. L. R. 698=163 Ind. Cas. 278.

——S. 38—Decree in terms of compromise against persons, proceedings against whom were **ex parte**—Defect is one of irregular exercise of jurisdiction—Decree not a nullity. A.I.R. (Vol. 22) 1935 Oudh 358=11 Luck. 187=1935 O.W.N. 654=155 Ind. Cas. 759 (F.B.).

——S. 38—Decree on compromise as to extraneous matter—Executing Court, if can question validity.

Where a decree is held to be beyond the inherent jurisdiction of the Court, it is a nullity and cannot be executed and the executing Court is competent to decide the question whether the decree is or is not a nullity. But a decree passed by a Court on a compromise and relating to a matter extraneous to the suit is not a nullity and can be executed. A distinction exists between patent want of jurisdiction and irregular or illegal exercise of jurisdiction. There is also a clear distinction between the manner of exercise of jurisdiction and the existence of jurisdiction. The existence of jurisdiction is dependent upon the place where the cause of action has accrued, the value of the subject-matter and the nature of the subject-matter while the proper exercise of the jurisdiction depends upon other considerations including correct procedure. A.I.R. (Vol. 21) 1934 Lah. 623=37 P.L.R. 178=154 Ind. Cas. 185.

——S. 38—Compromise decree—Executing Court if can go behind terms of decree.

A Court executing a decree must take the decree as it stands and cannot go behind it except in cases where the Court passing the decree had no jurisdiction to pass it, and the decree is a mere nullity or incapable of execution. Where the terms of a compromise between the parties in accordance with which decree is passed, were not embodied in any written application and the two versions of it as contained in the judgment of the Court and in the order-sheet are clearly at variance with each other, but the terms of the decree are clear, unless the decree is corrected by the Court which passed it, the execution Court cannot go behind it. A.I.R. (Vol. 22) 1935 Oudh 57=10 Luck. 508=1935 O.W.N. 17=153 Ind. Cas. 506.

——S. 38—Matters cannot be raised in execution, where they could have been raised in suit.

When once a decree is made against certain property, it is no longer possible in execution for the judgment-debtor to contend that the property decreed against cannot be so treated and executed against on several grounds, the first being that executing Courts cannot enquire into the legality of such a decree, for if they could, there would be no

end to litigation, and they would, in fact, be acting as Appellate Courts. Further, matters which could and should have been agitated in the course of the suit cannot be allowed to be raised for the first time in execution. A.I.R. (Vol. 22) 1935 Bom. 95=36 Bom. L.R. 1231=154 Ind. Cas. 642.

——S. 38—Execution Court, if can go behind decree

The execution Court has no jurisdiction to go behind the decree and alter or revise it. Where in a suit for partition, a decree is passed giving actual possession to a party, the other party who claims to have a special right should claim his title in the trial of the suit and not agitate it in execution Court. A.I.R. (Vol. 21) 1934 Cal. 793=38 C.W.N. 832=152 Ind. Cas. 764.

——S. 38—Construction of decree—Scope of power.

The Court executing a decree can only construe the decree on what appears on the face of the decree and on the pleadings and documents filed in the case.

A decree-holder who has obtained a decree in respect of a certain survey number cannot in execution apply that another survey number should be sold with the one mentioned in the decree on the ground that the land which was mortgaged to her consisted of both those survey numbers, and that as she was a woman, she did not know about it and had hence made mistakes in the prior applications. A.I.R. (Vol. 20) 1933 Sind 130=144 Ind. Cas. 245.

——S. 38—Decree in disregard of S. 214, Succession Act.

An executing Court has no jurisdiction to entertain an objection that the decree is a nullity being passed in disregard of the provisions of S. 214, Succession Act. A.I.R. (Vol. 32) 1945 All. 400 =I.L.R. (1945) All. 914=1945 A.W.R. (H.C.) 242=222 Ind. Cas. 37.

——S. 38—Non-compliance with Ss. 15 to 20—Executing Court cannot refuse to execute decree.

A non-compliance with the provisions of Ss. 15 to 20 is, in no way fatal to the jurisdiction of the Court, and does not render the decree passed by a Court of a competent jurisdiction, a mere nullity so as to empower the executing Court to refuse to execute it on that ground. A.I.R. (Vol. 27) 1940 Sind 150=I.L.R. (1941) Kar. 79=190 Ind. Cas. 881.

——S. 38—Decree not properly drawn up.

Though a decree should be drawn in such a manner as to make it self-contained and capable of execution without reference to any other document, yet it is not open to an executing Court to refuse to execute a decree by holding it invalid on the ground that it was not properly drawn. A.I.R. (Vol. 31) 1944 Oudh 111=1943 O.W.N. 457 (2)=1943 A.W.R. 151=217 Ind. Cas. 208.

——S. 38—Unstamped partition decree—Execution.

Partition decree drawn up without proper stamp cannot be acted upon till proper stamp is supplied. Decree can be validated by addition of proper stamp. Where the Court proceeds to execute the unstamped decree, there is no lack of inherent jurisdiction in the executing Court to act upon the decree but there is an illegality or error affecting its jurisdiction in proceeding to act upon a decree which the statutory bar provided by S. 35, Stamp Act, forbids it from doing. Once the proper stamp is supplied, the validity would date back to the date of the decree. A.I.R. (Vol. 29) 1942 Lah. 260=I.L.R. (1942) Lah. 307=203 Ind. Cas. 34 (F.B.).

——S. 38—Decree directing sale of particular item last—Executing Court directing that item to be sold first—Validity of sale.

Where a decree by the municipality against the owners of certain properties for arrears of tax due in respect of four properties directs that one item of property, **viz.**, No. 24 should be sold last, the order by the executing Court directing the sale of that item of property, **viz.**, No. 24, to be sold first is **ultra vires** as the execution Court has no jurisdiction to go behind the decree and direct a sale contrary to the terms thereof. The sale is not binding on the persons affected and should be ignored. A.I.R. (Vol. 31) 1944 Mad. 465=57 L.W. 370=(1944) 2 M.L.J. 8.

——S. 38—In final decree judgment-debtor shown as minor under guardianship of mother while in preliminary decree as under guardianship of Pleader—Pleader guardian not discharged—Sale in execution—Held that presumption was that all things were done properly—Onus lay upon judgment-debtor to prove that he had not been properly represented—Executing Courts held could not go behind decree. A.I.R. (Vol. 29) 1942 Pat. 264 =8 B.R. 465=198 Ind. Cas. 821.

——S. 38—Extraneous matter included in decree without defendant's objection—Executing Court, if can refuse that part of decree.

If once extraneous matters are allowed to be included in a decree without any objection on the part of the defendant, the executing Court cannot refuse to execute that part of the decree on the ground that it was extraneous of the subject-matter to the suit. The defendant has a right to appeal against the decree thus drawn up and have that portion excluded. But if he does not take any such action in the matter, he cannot be allowed to avoid that part of the decree merely on the ground of its being inoperative. A.I.R. (Vol. 27) 1940 Lah. 7=186 Ind. Cas. 881.

——S. 38—Suit against dead person given up—Son made party defendant—Plaint amended—Son, if can raise objection in execution, that Court had no jurisdiction to pass decree.

The executing Court is competent to go behind the decree and refuse to execute it if the Court, which passed the decree, had apparently no jurisdiction either territorial or pecuniary or in respect of the person of the judgment-debtor.

But where a suit that is started against a dead person is given up and his son is made a party defendant by amending the plaint making the suit against him alone, and seeking relief to the extent of the assets of the deceased in his hands, the suit cannot be said to be against a dead person and the Court has jurisdiction to pass a consent decree and

its execution cannot be challenged by the son. A. I.R. (Vol. 25) 1938 Cal. 575=177 Ind. Cas. 340.

——S. 38—Suit by guardian on behalf of minor dismissed awarding costs to defendant—Order not stating against whom costs awarded—Liability of award—Executing Court can refuse to execute decree against him.

Ordinarily a Court executing a decree cannot go behind the decree and has no power to entertain any objection as to the validity of the decree or as to the legality of the character of the decree, but this is only true in a case when a Court passing the decree had got jurisdiction to pass it, but where the Court passing the decree was inherently incompetent to pass the decree and had absolutely no jurisdiction to pass it, its decree is a nullity and no question of the validity of the decree arises in such a case and an execution Court can refuse to execute the decree on the ground of its being a nullity in the sense of its not being a decree at all in the eye of law.

The case of a Court passing a decree against a person who is not before it is no better than that of its passing a decree against a dead person.

Where, therefore, a suit brought by the guardian of a minor on behalf of the ward is dismissed on the ground that the ward had attained majority three years before the suit, awarding costs to the defendant, the order, however, omitting to make specific mention of the person against whom the costs were being awarded, the ward cannot be made liable for the costs, he strictly speaking, not being a party to the suit. The executing Court, can, therefore, refuse to execute such decree against him. A.I.R. (Vol. 25) 1938 Oudh 213=1938 O. W.N. 779=1938 O.L.R. 369=177 Ind. Cas. 69.

——S. 38—Decree against all defendants and capable of being executed against their property irrespective of their nature—Objection by one of judgment-debtors—Executing Court, if can go behind decree.

Where a decree as it stands is against all the defendants, it is capable of being executed against their property whatever the nature of it or against the defendants personally and an executing Court cannot go behind the decree. A.I.R. (Vol. 23) 1936 Lah. 704=17 Lah. 187=38 P.L.R. 430=164 Ind. Cas. 378.

——S. 38—Appellate decree—Enquiry into validity—Power of executing Court.

Obiter.—The executing Court is not entitled to enquire into the validity of the appellate decree. A.I.R. (Vol. 22) 1935 Mad. 236=1934 M.W. N. 1377=58 Mad. 752=41 L.W. 249=68 M.L. J. 318=156 Ind. Cas. 172.

——S. 38—Objection as to valuation.

Per **Mohammad Noor J.**—Suit under-valued—Objection not taken at early stage—It cannot be taken in execution proceedings. A.I.R. (Vol. 21) 1934 Pat. 240=13 Pat. 290=150 Ind. Cas. 378.

——S. 38—Foreclosure decree—Validity of mortgage—Executing Court, if can go into.

Where a decree for foreclosure has been passed the executing Court is no more entitled to go behind the decree and say that on the mortgage the Court had no jurisdiction to pass the decree because the mortgage was invalid, than it would have the right to say that the mortgage was invalid because as a matter of fact it had not been properly executed. A.I.R. (Vol. 21) 1934 Pat. 426=149 Ind. Cas. 457 (1).

——S. 38—It cannot be held that a Court which passes a decree on form of a mortgage, which relates to non-transferable property and is therefore invalid, has no jurisdiction to pass it and the decree cannot be treated as a nullity. A.I.R. (Vol. 22) 1935 All. 678=58 All. 98=1935 A.L. R. 809=157 Ind. Cas. 511.

——S. 38—Decree by foreign Court—Inquiry into jurisdiction of that Court.

The executing Court can enter into the question whether the foreign Court had jurisdiction to pass a decree against the judgment-debtor. If it is found on the evidence that he was not amenable to the jurisdiction of that Court, then the decree passed against him is not pronounced by a Court of competent jurisdiction. A.I.R. (Vol. 22) 1935 Lah. 551=37 P.L.R. 240=158 Ind. Cas. 232.

——S. 38—Judgment-debtor, if can be allowed to prove capacity in which he was sued.

The function of the executing Court is to take the decree as it stands.

The judgment-debtor sought to prove that he was sued only in his capacity as a member of the joint Hindu family and besides, was a minor when the debt was contracted by the manager of the family and that in the circumstances he was not personally liable.

Held, that to entertain such objections in the face of a clear decree directing payment of a certain sum was tantamount to allowing the case to be re-opened on its merits, and that the executing Court was not justified in holding an enquiry into the point and allowing evidence to be produced. A.I.R. (Vol. 21) 1934 Lah. 115=15 Lah. 326= 37 P.L.R. 62=152 Ind. Cas. 190.

——S. 38—Mortgagee—Puisne mortgagee obtaining a decree for sale after redeeming a prior usufructuary mortgage, effect of—Whether objection could be raised in execution.

Where a subsequent mortgagee obtains a decree for sale upon his simple mortgage on condition of redeeming a prior usufructuary mortgage which he redeems and obtains possession, the judgment-debtor is not competent to object to the sale on the ground that being in possession of the property as a usufructuary mortgagee he could not sell the property in execution of his simple mortgage. (1906) 4 A.L.J. 765=1907 A.W.N. 286.

3 (b). Decree, when not binding.

——S. 38—Decree passed without jurisdiction—Execution Court.

A decree passed without jurisdiction is a nullity and therefore, incapable of execution as neither S. 38 nor O. 21, C. P. Code, can apply to it. It is, therefore, within the powers of the executing Court to go into the question whether the decree before it is a nullity owing to the fact that the

Court which made the decree had no jurisdiction to do so. It is immaterial whether the Court which is executing the decree, is the Court which passed the decree or is a Court to which the decree has been transferred for execution. A.I.R. (Vol. 30) 1943 Bom. 404=45 Bom.L.R. 877 =I.L.R. (1943) Bom. 665=210 Ind. Cas. 196.

——S. 38—Executing Court, when can go behind decree.

An executing Court cannot go behind the decree. But if it appears that the Court had no jurisdiction to pass the decree, the decree would be altogether void and in that case it would be open to the executing Court to disregard it and refuse to execute it. A.I.R. (Vol. 27) 1940 Pat. 59=5 B.R. 996=18 Pat. 708=183 Ind. Cas. 799.

——S. 38—Executing Court, can decide whether decree was passed by Court, which for lack of jurisdiction could not pass it.

An executing Court must be able to decide whether a decree exists at all, and, therefore, where the Court has no inherent jurisdiction to pass the so called decree, the decree has no real existence in law and the executing Court within those narrow limits can decide whether the decree was passed by a Court which for lack of inherent jurisdiction, could not pass such a decree; for that point settles the question as to whether there is an existing decree upon which the executing Court can take action. A.I.R. (Vol. 25) 1938 Lah. 129=182 Ind. Cas. 785.

——S. 38—Executing Court not precluded from finding out whether decree was passed at all.

Although the executing Court has got to take a decree and execute it as it stands, yet the executing Court is not precluded from finding out whether any decree had ever been passed at all; and merely because something has been written on a decree form, it does not necessarily make it a decree. No decree can exist unless supported by a judgment, because a decree has got to be in accordance with the terms of the judgment.

Where, therefore, what is produced before the executing Court is merely something written on a decree form unsupported by the judgment, the decree is a mere nullity and can be disregarded by the executing Court. A.I.R. (Vol. 25) 1938 Rang. 372=178 Ind. Cas. 544.

——S. 38—Decree in contravention of S. 16—Punjab Alienation of Land Act.

The general principle that the executing Court cannot go behind the decree is deliberately departed from, in enacting S. 16, Punjab Alienation of Land Act. A.I.R. (Vol. 23) 1936 Lah. 845 =38 P.L.R. 1065=I.L.R. (1937) Lah. 48=165 Ind. Cas. 243 (2).

——S. 38—Where a decree for sale of land belonging to a member of a notified agricultural tribe is passed in contravention of the mandatory provisions of S. 16, Punjab Alienation of Land Act, an executing Court cannot sell it. A.I.R. (Vol. 21) 1934 Lah. 609 (1)=35 P.L.R. 400=151 Ind. Cas. 730.

——S. 38—Decree against dead person.

A decree passed a dead person is a nullity and this objection can be taken in the executing Court. A.I.R. (Vol. 22) 1935 Lah. 439=37 P.L.R. 501 =17 Lah. 32=159 Ind. Cas. 212.

——S. 38—Validity of decree—Award under Arbitration Act—Judgment and decree based on award—Legality—Execution of award—Application for execution of decree treated as one for execution of award—Decree in excess of jurisdiction.

Where an award is made under the Arbitration Act, the Court after satisfying itself as to its validity will order it to be filed and execution can be taken on it as though it were a decree but the Court can pronounce no judgment on it and make no decree. But if a judgment is pronounced and a decree is made, it is merely a super-imposition, unnecessary and void. But the award being executable, an application for execution of decree may be treated as application for execution of award.

Where a decree presented for execution was made by a Court which apparently had no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction and it is only within these narrow limits that the executing Court is authorised to question the validity of the decree.

A decree passed in excess of the limits prescribed may be regarded as void on the ground of lack of inherent jurisdiction.

Once a cause is converted into a matter under the Arbitration Act, the inherent jurisdiction which the Court of general jurisdiction possessed over it, is curtailed, and the Court retains a limited jurisdiction only for the purposes and control over the proceedings of arbitration. It has no jurisdiction to treat the cause as a suit pending before it as one on which it can pass a judgment or make a decree. If it does so the decree passed is in excess of the limits and as such void. A.I.R. (Vol. 19) 1932 Cal. 9=58 Cal. 1018=35 C.W.N. 537=136 Ind. Cas. 466.

——S. 38—Court passing decree lacking inherent jurisdiction to pass it—Decree, if mere nullity.

Where a Munsif was incompetent to pass the final decree in a mortgage suit, firstly, because he did not possess the necessary pecuniary powers, and secondly, because he lacked inherent jurisdiction inasmuch as the so-called preliminary decree had been passed by the Subordinate Judge and the case had never been transferred to the Munsiff's Court and further because the compromise decree was in fact a final decree which had completely decided the suit:

Held, that the decree was a mere nullity and the executing Court could refuse to execute it on the ground that it was made without jurisdiction and that it was open to the executing Court to go into the question of the validity of the decree. A.I.R. (Vol. 21) 1934 Oudh 75=9 Luck. 435=11 O.W.N. 169=147 Ind. Cas. 1209 (F.B.).

——S. 38—Decree, if a nullity—Test

One well-established test of whether an order or decree is a nullity or is a mere irregularity is whether it is open to the parties against whom the decree or order is passed to waive objection to it. A.I.R. (Vol. 20) 1933 All. 382=55 All. 548 =144 Ind. Cas. 731.

——S. 38—Execution—Jurisdiction of Court.

The value of the property may greatly exceed the value of the decree, yet the executing Court must decide the objection. 101 P.R. 1915=191 P.W.R. 1915=32 Ind. Cas. 43.

3 (c). Inquiry into facts—Permissibility.

——S. 38—Executing Court, if can question decree—Inquiry into facts.

Where the Court which passed the decree had no jurisdiction the decree is incapable of execution. The executing Court can refuse to execute it. But the executing Court cannot embark upon an inquiry into facts. The fact that upon investigation the decree is found not according to law is no ground for not enforcing it, as long as it is not set aside in appeal or revision. A.I.R. (Vol. 30) 1943 Nag. 325=1943 N.L.J. 486=I.L.R. (1943) Nag. 757=213 Ind. Cas. 378.

——S. 33—Jurisdiction of Court passing decree dependent on certain facts—Executing Court, if can take evidence in proof of such facts.

It is not permissible for the Court executing decree to embark on an inquiry into facts which, if established would show that the Court passing it had no jurisdiction to pass it. Where the jurisdiction of a Court to pass a decree depends on the existence of certain facts, the Court executing the decree shall refuse to take evidence in proof of those facts for the purpose of determining the jurisdiction of the Court passing the decree. A.I.R. (Vol. 24) 1937 All. 567=1937 A.L.J. 720= 1937 A.L.R. 811=I.L.R. (1937) All. 761=171 Ind. Cas. 196.

——S. 38—Decree directing sale prohibited on ground of public policy—Executing Court, if can refuse execution of decree—Objection, if can be determined by taking evidence.

There is an exception which the Courts have recognized to the application of the general rule as to jurisdiction of the executing Court to go behind the decree. Where alienation of certain property is prohibited on grounds of public policy either under the general law or by statute, the executing Court can refuse to execute a decree which directs such a sale.

No distinction should be drawn between the cases where prohibition appeared on the face of the decree and cases where evidence will have to be taken to ascertain it. The Court must determine the same, if necessary, by taking evidence. A.I.R. (Vol. 24) 1937 Mad. 918=1937 M.W.N. 891=46 L.W. 544=173 Ind. Cas. 659.

——S. 38—The executing Court cannot go behind a decree to ascertain the facts to find out whether decree is nullity. A.I.R. (Vol. 28) 1941 Sind 166=I.L.R. 1941 Kar. 72=196 Ind. Cas. 572.

——S. 38—An executing Court can question the validity of a decree where the question of jurisdiction is involved. But the fact of the Court having no jurisdiction to pass a decree ought to appear on the face of the decree or must be capable of being gathered without the necessity of a enquiry into facts. A.I.R. (Vol. 23) 1936 Nag. 1=31 Nag.L.R. Sup. 57= 161 Ind. Cas. 877 (F.B.).

——S. 38—Executing Court must ascertain property to be sold, and for this, can look for its paramount description.

An executing Court has no right to go behind the decree or in any way to add to or amend the terms thereof. It has to execute the decree as it stands and any amendment thereof can be made only by the Court which passed the decree. It is, however, the duty of the executing Court to ascertain the property which is the subject of the decree, and for this purpose, it is entitled to look at the paramount description of the property. A.I.R. (Vol. 25) 1938 Pat. 195=4 B.R. 507= 175 Ind. Cas. 47.

4. Jurisdiction and Powers of Executing Court.

(a) Jurisdiction of decretal and transferee Courts.

(b) Property situate outside territorial jurisdiction.

(c) Miscellaneous.

4 (a). Jurisdiction of decretal and transferee Courts.

See also SS. 39 AND 42.

——S. 38—Execution—Jurisdiction of decretal and transferee Courts.

Section 38, C. P. Code, should be read as conferring jurisdiction to entertain an execution application upon either Court—the Court which passed the decree (the expression being read in the light of the explanatory S. 37) as well as tht Court to which the decree is sent for execution by such Court in accordance with the powers conferred by the enabling S. 39. A.I.R. (Vol. 18) 1931 Cal. 312=52 C.L.J. 569=35 C.W.N. 77=58 Cal. 832 =132 Ind. Cas. 149.

——Ss. 38 and 39—Application for transfer when judgment-debtor is dead.

An application for the transfer of the execution of a decree made at a time when the judgment-debtor is dead is a valid application to take a step-in-aid of execution. It cannot be said that no proceeding taken when the judgment-debtor is dead can be such a valid step.

When a person is dead, proceedings for execution taken against him cannot be regarded as any valid proceedings at all. The taking of some steps-in-aid of execution is something different from the mere filing of an application for execution which in itself is not in accordance with law. A.I.R. (Vol. 21) 1934 All. 463=1934 A.L.J. 829 =56 All. 890=148 Ind. Cas. 1131.

——S. 38 and O. 21, R. 10—Power of Court passing decree to execute it when decree has been transferrrd to another Court for execution.

There is nothing either in S. 38 or R. 10 of O. 21, to prevent the Court, which passed the decree executing the decree though it has transferred it to another Court for execution and the copy of the decree with a certificate of satisfaction has not been returned to it. A.I.R. (Vol. 27) 1940 Sind 11=I.L.R. (1940) Kar. 46=186 Ind. Cas. 365.

——S. 38—Decree sent to another Court for execution—Court passing decree, if can execute it.

The Court which passes the decree, originally retains control of the execution proceedings and there is nothing in the C. P. Code, to prohibit the sending of a decree for execution to two Courts at the same time. Still more can it proceed with the execution itself while a copy of the decree is sent to another Court for execution elsewhere. A.I.R. (Vol. 26) 1939 Rang. 433=1939 Rang. L.R. 587=186 Ind. Cas. 42.

——S. 38—Transfer of decree for execution—Transferring Court, if retains jurisdiction—Fresh application for execution to transferee Court, if necessary.

Even after transfer, the transferring Court retains jurisdiction over the execution, though for certain specified purposes only.

If an application for execution is made to the Court which passed the decree, that Court will transmit the same to the Court where immovable property sought to be sold is situated along with the other papers required by O. 21, R. 5, or R. 6, C.P. Code, and then the latter will make the order for sale and it will not be necessary in such a case to have a fresh application for execution before the Court where immovable property sought to be sold in execution is situate. A.I.R. (Vol. 23) 1936 Cal. 267=162 Ind. Cas. 777.

——Ss. 38, 39, 41, O. 21, R. 10—Transfer of decree for execution—Application to first Court to execute it or transfer it to another Court for execution or to transfer it to same Court for execution, made before proceedings taken in other Court have been certified before first Court—Such application, if a step-in-aid—Limitation Act (9 of 1908), Sch. I, Art. 182.

Per **Full Bench.**—When a money decree has been transferred by the Court which passed it for execution to another Court, an application to the first Court, (a) to execute the decree, (b) to transfer it to another Court for execution and (c) to transfer it for execution to the same Court is a valid application, even if such an appliication is made before the proceedings taken in the other Court have first been reported and certified by that Court. Such an application is a step-in-aid of execution so as to save limitation provded by Art. 182, Sch. I, Limitation Act.

Per **Skemp, J.**—Once the decree is sent by the trial Court to another Court it is no longer the duty of the former Court to execute the decree, the proper Court being the transferee Court. Consequently, an application made to the first Court to send the decree to the transferee Court where it had already been sent once and whence it had not been sent back, is not an application in accordance with law to the proper Court or a step-in-aid of execution. A.I.R. (Vol. 22) 1935 Lah. 465=37 P.L.R. 636=157 Ind. Cas. 488 (F.B.).

——S. 38—Transfer of darkhast—Jurisdiction of executing Court is not deprived.

Because a decreeing Court may not be a proper Court in which a certain step-in-aid of execution may be taken it does not follow that it is therefore a Court entirely without jurisdiction in respect of the decree which it itself has made and of a darkhast which it itself has transferred wholly or in part to another Court. Ss. 38 to 43 nowhere lay down that a decreeing Court is deprived of its jurisdiction by the mere act of transfer of the darkhast. 25 Bom. 337 (P.C.); A.I.R. 1928 P. C. 162, Foll. 31 Bom.L.R. 1105=53 Bom. 844=A.I.R. 1929 Bom. 418.

——S. 38—Application for execution to Court transferring decree—Whether one to proper Court.

Where a decree is transferred for execution to another Court, an application for execution made to the Court transferring the decree, after such transfer, is not one made to the proper Court and is not, therefore, a step-in-aid of execution. A. I. R. (Vol. 26) 1939 Pat. 289=5 B.R. 333=20 P.L.T. 356=180 Ind. Cas. 81.

——S. 38—Application for execution to the transferring Court—Jurisdiction to entertain.

A decree for sale was passed by the Subordinate Judge of **B** District. The property ordered to be sold was situate partly in the **G** District and partly in the **B** District. On an application made by the decree-holder, the Subordinate Judge of **B** transferred the decree for execution to the Subordinate Judge of **G**. While proceedings for sale of the property situate in the **G** District were still pending in the Court of the Subordinate Judge of **G**, an application was made by the decree-holder to the Subordinate Judge of **B** for sale of the property situate within the jurisdiction:

Held, that while the Subordinate Judge of **G** was seized of the execution in respect of the decree, no application for execution could be entertained by the Subordinate Judge of **B**. A.I.R. (Vol. 23) 1936 Oudh 64=1935 O.L.R. 629=1935 O.W.N. 1201=158 Ind. Cas. 921.

——S. 38—Transfer of decree for execution—Original Court, if retains power to execute—Power of retransfer.

When a decree is transferred for execution without any limitation, the original Court has no longer the power to execute the decree until and unless the decree is "returned by the transferee Court with a certificate of non-satisfaction."

Obiter.—When a decree is transferred for execution the original Court is not wholly divested of its jurisdiction and it can still re-transfer the proceedings to itself or to some other Court. A.I.R. (Vol. 21) 1934 Lah. 728=35 P.L.R. 751=16 Lah. 80=152 Ind. Cas. 128.

——S. 38—Application for re-transfer.

Even when a decree is transferred for execution to another Court, an application to the parent Court to re-transfer it to a third Court is one made

to the proper Court so as to amount to a step-in-aid of execution. A.I.R. 1922 Bom. 359, Diss. from. 110 Ind. Cas. 829=A.I.R. 1928 Mad. 493.

——S. 38—Order for transfer of decree—Decree not actually transferred—Transferring Court, if proper Court to apply for execution.

Where a decree is ordered to be transferred by the executing Court to another Court but is not actually transferred, the executing Court remains seized of the proceedings and an application for execution can properly be filed in that Court. A. I.R. (Vol. 20) 1933 Sind 78=27 Sind L.R. 109 =142 Ind. Cas. 489.

——S. 38, O. 21, R. 5—Irregularity in mode of transfer—Acquiescence by decree-holder—Jurisdiction of transferee Court to execute decree.

A Munsif transmitted a decree for execution to the Subordinate Judge in the same District. The decree-holders had acquiesced in the transfer though the transfer was not made on an express prayer made by them:

Held, that though there might have been some irreguarity in the manner of transfer, that would not prevent the Subordinate Judge from having the seisin over the execution and in accordance with the provisions of S. 38 he could execute it. The Munsif could transfer the decree as both Courts were situated in the same District. The application for execution on transfer was pending in a proper Court and the decree-holders had the right to call in their aid Cl. (5) of Art. 182, Limitation Act. A.I.R. (Vol. 23) 1936 Cal. 571=64 C.L. J. 47=166 Ind. Cas. 374.

——S. 38 and O. 21, R. 5—In order to confer jurisdiction on the transferee Court, the mode prescribed by O. 21, R. 5 for sending the decree for execution must be followed. A.I.R. (Vol. 20) 1933 Lah. 839=147 Ind. Cas. 584.

——S. 38—Jurisdiction when not vested in transferee Court.

Where the application for execution has been entertained by the Court having jurisdiction to execute, any defect in mere procedure, such as omission to transmit to the Court to which the application is sent, a copy of the decree and a necessary certificate, etc. under Order 21, R. 6, would not vitiate the execution proceedings or the sale held thereunder. 20 Mad. 10 App. Still where the application for execution is not at all entertained by the Court which alone had jurisdiction to entertain it, nor is it properly sent by that Court to another Court, the other Court will not derive any jurisdiction by the mere filing of the application in that Court on the refusal of the Court of first instance to entertain it. 62 Ind. Cas. 487=2 P. L.T. 374=6 P.L.J. 304=1921 P.H.C.C. 186= A.I.R. 1921 Pat. 152.

——Ss. 38 and 150—Execution—Jurisdiction of decretal Court—Transfer of business of that Court.

In view of Ss. 38 and 150, C. P. Code, the jurisdiction to execute a decree can be exercised both by the Court which passed it, as well as by the Court to which the business of the former Court has been transferred. 107 Ind. Cas. 195.

4 (b). Property situate outside territorial Jurisdiction.

See also UNDER S. 39.

——S. 38—Sale—Property situate outside territorial jurisdiction.

An executing Court cannot sell property which is situated outside its jurisdiction. A.I.R. (Vol. 26) 1939 Pat. 532=20 P.L.T. 585=18 Pat. 670 =182 Ind. Cas. 610.

——S. 38—Execution—Jurisdiction to attach—Tests.

The jurisdiction to attach and sell property depends upon the fact whether the Court has got jurisdiction over the property, and the test will be whether the suit in respect of that property can be entertained by that Court. A.I.R. (Vol. 22) 1935 Pat. 468=1 B.R. 810=157 Ind. Cas. 754.

——S. 38—In execution of a decree, the Court has no jurisdiction to sell property outside its territorial jurisdiction. A.I.R. (Vol. 20) 1933 Sind 231 =150 Ind. Cas. 473.

——Ss. 38 and 39—Property situate partly outside jurisdiction.

The fact that all the property is not situated within the jurisdiction of the Court which passed the decree does not affect its jurisdiction to sell the property comprised in the decree. 29 Ind. Cas. 745 (Mad.)

——S. 38—Jurisdiction, change of, after decree and before execution—Duty of Court to send decree to Court having territorial jurisdiction.

S. 38 does not make it optional to a Court to execute its own decree, or to transmit it to the Court which has territorial jurisdiction, if the original Court has lost jurisdiction over the subject-matter of the suit. Although the words in S. 39 are "the Court should send it for execution", in all cases the Court should send its decree to the Court which has territorial jurisdiction if between the passing of the decree and the executing of it, the jurisdiction has passed to another Court. 79 Ind. Cas. 806=19 M.L.W. 16=1924 M.W.N. 38= A.I.R. 1924 Mad. 457=46 M.L.J. 250.

——S. 38—Property beyond Munsif's jurisdiction but within same Division—Whether can sell it.

In execution a Munsif can sell property beyond his own immediate jurisdiction but within same Division. A.I.R. (Vol. 25) 1938 Pat. 237=175 Ind. Cas. 924=4 B.R. 655.

——S. 38—Transfer of territorial jurisdiction—Application for execution to old Court—Saving of limitation.

Even if an application is made to a Court which passed the decree to execute it in respect of property outside its territorial limits, the Court will not have jurisdiction to carry on such execution. Where, however, the limits of the jurisdiction of the old Court were altered and an application was made to the Court which passed the decree for execution,

Held, that the decree should be forwarded to the proper Court but that it had the effect of saving limitation. 35 C.W.N. 77=52 C.L.J. 569=A. I.R. 1931 Cal. 312=132 Ind. Cas. 149=58 Cal. 832.

——S. 38—Mortgage decree for sale—Execution—Property outside local limits of Court.

Under Ss. 38 and 39 no Court can execute a decree in which the subject-matter of the suit is property entirely outside the local limits of its jurisdiction, but an exception has been recognized in cases of decrees for sale of mortgaged properties. 39 Cal. 104, Foll. 80 Ind. Cas. 901=6 Pat. L.T. 71=A.I.R. 1925 Pat. 139.

——S. 38—Mortgage decree—Sale of mortgaged property even though property is beyond jurisdiction, if can be ordered.

An executing Court has power to order the sale of mortgaged property even though the property is situated beyond the limits of its jurisdiction. The Court, however, has a discretion to decline to do so on the score of convenience. A.I.R. (Vol. 29) 1942 Lah. 123=44 P.L.R. 125=200 Ind. Cas. 425.

——S. 38—Sales by Receiver—Property outside court's territorial jurisdiction.

The rule that sales in execution of immovable property shall be carried out by Courts having territorial jurisdiction over such property has primary reference to execution which takes the form defined in S. 51 (b) and is **prima facie** not applicable to sales by a receiver appointed by Court, but the principle would apply to an application for the appointment of a Receiver when the main purpose of the appointment is to effect a sale in execution. 34 C. W. N. 238=51 C.L.J. 209=57 Cal. 964=A.I.R. 1930 Cal. 502=128 Ind. Cas. 97.

4 (c). Miscellaneous.

——S. 38—Jurisdiction of executing Court—Test—Determination of—Documents which are part of proceedings can be looked at.

Where an executing Court proceeds to execute a decree it proceeds on the footing of the decree which is transmitted to it for execution. The executing Court will have no jurisdiction to go behind the decree to question the jurisdiction of the Court which had passed the decree. If however, a dispute arises as to the jurisdiction of the executing Court, it has to be decided by that Court. When doing so, documents which are part of the proceedings in execution of the decree can be legitimately looked at. Therefore, to determine the jurisdiction of the executing Court, the concise statement and the judgment of the Court, showing what was the suit, will be relevant to be looked at.

The standard by which the jurisdiction of the executing Court has to be considered, is its capacity to try the suit itself. It cannot be urged that unless the decree on the face of it showed want of jurisdiction, the same must be deemed to exist. If a Court attempts to deal with a matter which is beyond its jurisdiction, no consent of the parties can give it jurisdiction. Moreover, when the question goes to the root of the jurisdiction there is no question of waiver or acquiescence.

A suit, the subject-matter of which was over Rs. 5000 was dismissed with costs which were fixed at Rs. 3,500 and a decree for it was passed in favour of the defendant and sent to Second Class Subordinate Judge for execution. On property being sold the judgment-debtor applied under O. 21, R. 90, C. P. Code, for setting the sale aside but the application was dismissed:

Held, (i) that as the Second Class Subordinate Judge had no jurisdiction to try the suit, he had no jurisdiction to execute the decree;

(ii) that the question of jurisdiction could not be ignored although the application was headed under O. 21, R. 90. A.I.R. (Vol. 27) 1940 Bom. 277=42 Bom.L.R. 596=I.L.R. (1940) Bom. 633=190 Ind. Cas. 394.

——S. 38—Change in law—Right to continue execution proceedings.

Right to continue execution proceedings cannot be affected by a new Act passed subsequent to the filing of the plaint unless the new Act expressly so provides. A.I.R. (Vol. 21) 1934 All. 709=151 Ind. Cas. 362.

——S. 38—Decree by temporary Court—Execution—Jurisdiction—Court subsequently becoming permanent.

The mere fact that a temporary Court is established for one year and is thereafter continued, cannot deprive that Court of its character of the Court which passed the decree. If it is the Court which passed the decree then clearly execution must be had in that Court. The fact that that Court has become permanent is not a matter which is material to the point. A.I.R. (Vol. 22) 1935 Mad. 849=1935 M.W.N. 705=42 M.L.W. 5=69 M.L.J. 215=58 Mad. 1009=159 Ind. Cas. 835.

——S. 38—Execution proceedings—Court will not set aside, upon technical grounds.

In execution proceedings the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find it is substantially right. A.I.R. (Vol. 20) 1933 Mad. 833=38 L.W. 588=146 Ind. Cas. 372.

——S. 38—Original execution petition filed in wrong Court—Subsequent conferment of jurisdiction—Effect.

A Court which has jurisdiction to pass orders on a petition at the time when the petition comes up for orders is not bound to dismiss it merely because at the time of presentation it had no jurisdiction to entertain the petition. A.I.R. (Vol. 21) 1934 Mad. 283=66 M.L.J. 492=1934 M.W.N. 90=39 L.W. 488=57 Mad. 795=148 Ind. Cas. 1088.

——S. 38—Execution application—Jurisdiction of decretal court to entertain—Property outside its territorial limits.

Though the Court which has passed a decree has no jurisdiction to execute the decree in respect of property outside its territorial limits, yet it has the right to entertain an application, for its execution, so long as it has not already transferred that decree to some other Court for execution. A.I.R. (Vol. 18) 1931 Cal. 312=52 C.L.J. 569=35 C.W.N. 77=58 Cal. 832=132 Ind. Cas. 149.

——S. 38—Appointment of Receiver by High Court—Property outside original jurisdiction.

The Calcutta High Court on its original side has the power to appoint a receiver by way of execution in respect of property situated outside its ordinary original jurisdiction. But it should exercise his power only on a proper case being made out that the appointment is necessary or advantageous. It cannot make an appointment on the sole ground that it is the only form of execution open to it which can be availed of to enforce its decree. 34 C.W.N. 238=51 C.L.J. 209=A.I.R. 1930 Cal. 502=57 Cal. 964=128 Ind Cas. 97.

——S. 38—Notice by to Judgment-debtor residing outside jurisdiction to pay decretal amount.

Application made by decree-holder merely to issue notice to the judgment-debtor to pay the decretal amount, to the Court which passed the decree is not illegal or to an improper Court, although the judgment-debtor at the time was residing outside that Court's jurisdiction. And if such application is made in good faith for the purpose of executing the decree it will be a step-in-aid within the meaning of Art. 182 (5). 116 Ind. Cas. 474=A.I.R. 1929 Rang. 95.

——S. 38—Injunction after transfer of decree.

Where the execution proceedings have gone into the hands of the Deputy Commissioner the issue of an injunction to the Court which passed the decree originally, is obviously futile. 117 Ind. Cas. 471=6 O.W.N. 226=4 Luck. 635=A.I.R. 1929 Oudh 235.

——S. 38—Suit to set aside execution sale—If can be treated as proceeding in execution. 68 Ind. Cas. 693=A.I.R. 1922 Nag. 189.

——S. 38—Successive applications.

Successive applications for execution or admissible so long as the decree has not been fully satisfied and execution of the decree has not become time-barred. (1902) 1903 A.W.N. 17=25 A. 212.

5. Simultaneous execution.

See also S. 39.

——S. 38—Simultaneous execution—Permissibility.

Simultaneous execution of a decree is permissible. Where as a matter of fact the decree-holder proceeds with the second application for execution of the decree filed by him while his first application was pending after getting the latter application struck off, the contention that the second application for execution is incompetent has no substance. A.I.R. 1950 Ajmer 3.

——S. 38—Court transferring decree to another for execution—Execution in both Courts.

There can be no doubt that the execution against the same property cannot take place in two Courts at one and the same time. But there is no bar for execution in one Court against the property and in another Court by other means. Where a decree is passed by one Court and is transferred to another for execution, the decree-holder is entitled to make an application for execution to the former Court inasmuch as concurrent execution of decree is permissible. A.I.R. (Vol. 23) 1936 All. 655=1936 A.L.R. 362=1936 A.L.J. 277=162 Ind. Cas. 51.

——S. 38—Simultaneous execution.

Simultaneous execution is permitted by the Code but in making the order for such execution care should be taken so that there may not be any hardship to the judgment-debtor. (Procedure indicated). A.I.R. (Vol. 22) 1935 Cal. 268=39 C.W.N. 165=156 Ind. Cas. 522.

——S. 38—Simultaneous execution.

Ordinarily execution cannot be carried on simultaneously in different districts. A.I.R. (Vol. 21) 1934 Rang. 231=153 Ind. Cas. 684 (2).

——S. 38—Concurrent executions.

There is nothing in the Code to prohibit concurrent executions. It is a matter for the discretion of the Court to direct or to refuse concurrent execution. 63 Ind. Cas. 809=11 L.B.R. 15=A.I.R. 1921 L.B. 25.

——S. 38—Simultaneous execution in more than one place.

There is nothing in law to prevent a decree being simultaneously executed in more places than one against the property of judgment-debtor. 3 L.W. 336=34 Ind. Cas. 302.

——Ss. 38, 39 and 41—Transfer of decree—Simultaneous execution.

The Court to which a decree has been transferred can execute the decree simultaneously with the execution proceedings initiated by the executing Court, only under exceptional circumstances when it is necessary in the interest of the execution creditor without putting hardship on the judgment-debtor. A decree-holder can apply to the trying Court for the execution of its decree once transfered to another Court and dismissed by it even before the result of execution is certified, if there was order permitting simultaneous execution with the execution proceedings in the executing Court; otherwise the application is not supposed to be made to the proper Court. 37 Mad. 231=12 M.L.T. 119=(1912) M.W.N. 721=23 M.L.J. 236=15 Ind. Cas. 738. [Affirmed on appeal 39 Mad. 640=31 M.L.J. 300=36 Ind. Cas. 682 (P.C.).]

——S. 38—Simultaneous execution in transferring and transferee Court.

The words of S. 38, C. P. Code, do not warrant the construction that at one and the same time execution proceedings can be carried on in both the Courts.

Hence when a decree has been transferred to another Court for execution and has not been returned to that Court with a certificate of non-satisfaction, the Court passing the decree cannot entertain another application for the execution of the decree, because it is not the proper Court. A.I.R. 1950 M.B. 120.

——Ss. 38 and 39—Simultaneous execution in more than one Court against same property.

A decree cannot be executed simultaneously

against the same property in more than one court. 14 C.W.N. 396=11 C.L.J. 69=3 Ind. Cas. 105.

6. Scope.

——S. 38—Scope—Small Cause Court.

Small Cause Court is not a transferee Court within the meaning of S. 38, C. P. Code, and the procedure laid down in O. 21, R. 6 would have no application in the cases of awards under S. 77, cl. (2), Calcutta Improvement Act. A. I. R. (Vol. 29) 1942 Cal. 569=46 C.W.N. 927=I.L.R. (1942) 2 Cal. 528=203 Ind. Cas. 429.

——Ss. 38 and 63—Scope.

Where the facts come within the definition of the situation as given by S. 63, it is obviously S. 63 which must be applied and S. 63, if the facts apply, cannot be controlled or governed by S. 38. A.I.R. (Vol. 26) 1939 Mad. 169=48 L.W. 664=1938 M.W.N. 1068=(1939) 1 M.L.J. 112=I.L.R. (1939) Mad. 248=180 Ind. Cas. 44.

——S. 38—Scope—Execution of transferred suit.

S. 38 was enacted to decide the question as to the jurisdiction of a Court when a suit is transferred. If a suit instituted in Court **A** is transferred to Court **B** and Court **B** decided it, S. 38 enjoins that application for execution shall be presented to Court **B** and not Court **A**, that is, the application is to be presented to the Court which passed the decree and not to the Court in which the suit was instituted. The section is not exhaustive and a decree can be executed by the Court to which it is transferred under S. 24. 47 All. 57=6 L.R.A. Civ. 103=85 Ind. Cas. 746=A.I.R. 1925 All. 276.

——S. 38—If two Subordinate Judges had the same local jurisdiction, it is certainly competent for the District Judge to distribute business among the two officers but that would not empower the District Judge to make any order in contravention of S. 38, C. P. Code and direct that the decree passed by one of the officers could be executed by the other. (1941) 73 C.L.J. 351.

——S. 39—

Synopsis.

1. Appeal.
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4. Application for transfer—Whether step-in-aid of execution.
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1. Appeal.

——Ss. 39 and 47—Appeal—Order of transfer.

An order of transfer of decree under S. 39 is appealable under S. 47. (1939) 41 P.L.R. 186.

——S. 39—Appeal—Order in execution—Transfer of Small Cause decree to Munsif.

Small Cause decree transferred to Munsif's Court —Order in execution appealable as if the decree is passed by Munsif. 103 Ind. Cas. 344=A.I.R. 1927 All. 740.

2. Application—Form of.

——S. 39 and O. 21, R. 11—Application for transfer of decree, form of—Difference between such application and execution application—Clerical error.

Unlike an application for execution of decree which under O. 21, R. 11 must state certain particulars, an application under S. 39, C. P. Code, is not required by law to be in any particular form. All that the section requires is that an application should be made to the Court passing the decree to transfer it. If the application gives sufficient particulars of the decree sought to be transferred to indicate with precision, the decree which the Court is to transfer, the application cannot be considered to be otherwise than one according to law. In many cases it may be enough for the application to give the number of the suit in which the decree was passed provided the Court does not require further particulars to be given in order to trace the decree. A clerical error in writing a name of a party is not such a flaw as to make the application one not according to law. A.I.R. (Vol. 24) 1937 All. 397=1937 A.L.J. 278=1937 A.L.R. 493=169 Ind. Cas. 225.

——S. 39—Order of transfer of decree on an application not alleging that the judgment-debtor has property or resides within the jurisdiction of other Court is improper. (1939) 41 P.L.R. 186.

3. Application or Order for transfer—Whether one for execution.

——S. 39—Application for transfer—Not an application for execution.

Transmission of a decree to another Court for execution is not a mode of execution. Such transmission is only a ministerial act and is usually performed by the Prothonotary and Senior Master on the Original Side. An application under S. 39 for transfer of a decree is not an application for execution. It is only an application for a step-in-aid of execution. A.I.R. (Vol. 24) 1937 Bom. 365=39 Bom.L.R. 540=I.L.R. (1937) Bom. 691=170 Ind. Cas. 877.

——S. 39—Application for transfer of decree is not application for execution but step-in-aid under Limitation Act, Art. 181. 94 Ind. Cas. 482=A.I.R. 1926 All. 473.

——S. 39—Application for transfer of decree.

An application to the Court which passed the decree for transfer of the decree for execution is

not an application for execution. 16 C. 744, Foll. 9 Ind. Cas. 246 (Cal.).

——S. 39—Transfer per se is not execution.

The sending of the decree for execution to another Court is not by itself an execution of the decree, though an application for such a transmission may amount to taking step-in-aid of such execution. 115 Ind. Cas. 865=1929 A.L.J. 553 =A.I.R. 1929 All. 390.

——S. 39—Order for sending a decree to another Court for execution—Whether an order for execution.

An order for sending a decree to another Court for execution is not an order for execution. Such an order can be made without there being a formal application for execution; it can be made on a simple application without any form and can, in no circumstance, be held to be an order for execution. A.I.R. (Vol. 22) 1935 Pat. 485=157 Ind. Cas. 971 (1)=1 B.R. 831.

4. Application for transfer—Whether step-in-aid of execution.

——S. 39—Application for transfer of decree—Step-in-aid execution.

An application under S. 39 for transfer of decree to another Court for execution but on wrong form was held a step-in-aid of execution and therefore in order and valid. A.I.R. (Vol. 26) 1939 Oudh 118=1939 O.W.N. 267=1939 O.L.R. 141 =180 Ind. Cas. 471.

——S. 39—Step-in-aid of execution.

An application for transfer of decree for execution amounts to a step-in-aid of execution. A.I.R. (Vol. 23) 1936 All. 369=1936 A.L.J. 254= 1936 A.L.R. 528=163 Ind. Cas. 231.

——S. 39—An application for the transfer of a decree was made, to the District Court of **A** but the judgment-debtors were resident in district **B**. The District Judge of **A** had jurisdiction over both the administrative districts **A** and **B**.

Held: The application could not be said to be not in accordance with law. A.I.R. 1928 Cal. 265.

——S. 39—Application for transfer—Step-in-aid.

Application for transfer of a decree for execution is a step-in-aid. 14 A.L.J. 415=33 Ind. Cas. 523.

5. Change of jurisdiction after decree.

——S. 39—Final mortgage decree passed by A Court—Territorial jurisdiction of A Court transferred to B Court—B Court if can execute decree.

Where after the passing of the final mortgage decree the **A** Court which passed the decree ceases to have territorial jurisdiction over any of the mortgaged properties and in pursuance of a notification which has not the effect of transfer of business, another Court **B** acquires territorial jurisdiction over the said properties, the Court **B** cannot execute the decree without transmission of the same from the **A** Court which passed it.

The true effect of S. 39, C.P. Code, is to recognise the transferee Court **B** as having inherent jurisdiction to sell or deliver properties situated within its territorial limits, but only that the jurisdiction is to be invoked by the machinery provided by the section. Hence, the absence of an order of transfer is merely an irregularity in the assumption of jurisdiction by the **B** Court when proceedings for execution of the final mortgage decree are commenced in it and therefore, when objection to the defect of jurisdiction is not taken in the first instance, the judgment-debtor must be deemed to have waived it. A.I.R. (Vol. 30) 1943 Mad. 449=(1943) 1 M.L.J. 198=I.L.R. (1943) Mad. 804=212 Ind. Cas. 633.

——S. 39—Change of territorial jurisdiction after decree—Jurisdiction of second Court to execute decree without transmission by former Court.

Where, after the passing of a decree relating to immovable property, the property in dispute is brought within the territorial jurisdiction of another Court by a notification of Government, the Court which acquires jurisdiction under the notification cannot entertain an application to execute the decree without the transmission of the decree from the first Court which passed the decree. A.I.R. (Vol. 19) 1932 Mad. 418=1932 M.W.N. 255=62 M.L.J. 687=35 L.W. 742=55 Mad. 801 =137 Ind. Cas. 305.

6. "Court."

——S. 39—"Court"—Registrar of Co-operative Societies. See MADRAS CO-OPERATIVE SOCIETIES ACT (6 OF 1932), S. 57-A. (1949) 2 M.L.J. 682.

——S. 39—"Court"—Court outside British India.

The word "Court" throughout the C.P. Code, unless it is preceded by the adjective "foreign" means prima facie a Court in British India because the C.P. Code, can only govern procedure in British India. A.I.R. (Vol. 28) 1941 Mad. 309 =I.L.R. (1941) Mad. 574=53 L.W. 145=1941 M. W. N. 127=(1941) 1 M.L.J. 242=195 Ind. Cas. 576 (F.B.).

——S. 39—"Court"—Revenue Court.

There is nothing in the Code which prevents a Court from transferring a decree for execution to a Court of another kind than itself. Hence a decree of Civil Court can be transferred for execution to a rent Court and vice versa. 9 I.A. 174, Foll.; 22 All. 182 not approved. 13 O.C. 119=6 Ind. Cas. 994.

7. Court of competent jurisdiction.

——S. 39 (2)—Competent jurisdiction—Pecuniary jurisdiction necessary.

Execution can only be taken out in a Court competent by reason of its pecuniary jurisdiction to try suits of the value of the original claim. 1940 N.L.J. 244.

——S. 39 (2)—"Competent jurisdiction"—Pecuniary jurisdiction necessary.

The addition of the words "of competent jurisdiction" in sub-S. (2) of S. 39, unmistakably points to the conclusion that the Legislature intended to lay down that it is not open to any and every Court to execute a decree irrespective of its pecuniary jurisdiction and that the competence of a

Court to execute a particular decree must be determined by reference to its competence to try a suit of similar valuation in which the decree under the section was passed. A.I.R. (Vol. 26) 1939 All. 57=1931 A.L.J. 1128=I.L.R. (1939) All. 97=180 Ind. Cas. 403.

——S. 39 (2)—"Court of competent jurisdiction".—Pecuniary jurisdiction necessary.

If a Court has no pecuniary jurisdiction to entertain and try an original suit it is incompetent to execute the decree in that suit. The suit, therefore, cannot be transferred to it for execution under S. 39 of the Civil Procedure Code. S. 39, Clause (2) of the new Code which modifies S. 223 of the old Code requires that when the Court sends a decree **sue motu** to another Subordinate Court, the latter must be a Court "of competent jurisdiction." The competency cannot be determined irrespective of its pecuniary jurisdiction. 1 Pat. 651=3 Pat.L.T. 422=67 Ind. Cas. 538=1922 P.H.C.C. 229=A.I.R. 1922 Pat. 188.

——S. 39 (2)—Transfer of decree—Pecuniary jurisdiction of executing Court.

A Court passing a decree cannot send of its own motion to any Court subordinate to it for execution when the value of the subject-matter of the suit of the decree exceeds the pecuniary jurisdiction of that Subordinate Court. 4 Bur. L.T. 224=12 Ind. Cas. 27.

——S. 39 (2)—"Competent jurisdiction"—Competency to try original suit not necessary.

The words 'competent jurisdiction in S. 39 (2), refer to territorial and pecuniary jurisdiction to deal with the decree and do not mean competency to try original suit; otherwise, it would follow that where an award had been filed under the Arbitration Act and was sent to a place to which the Arbitration Act did not apply, there would be no Court competent to try the original suit and therefore no Court competent to execute the decree. This could hardly be the meaning or intention of the Legislature. A.I.R. (Vol. 26) 1939 Lah. 258=41 P.L.R. 774=I.L.R. (1939) Lah. 551=183 Ind. Cas. 241.

8. Miscellaneous.

——S. 39 (1)—Right to apply under—Person entitled to restitution under a decree because of the variation of the decree owing to its being scaled down under Madras Act 4 of 1938.

A defendant entitled to recover costs from the plaintiff in a suit which is dismissed will be a "decree-holder" and can get the decree transferred to another Court to recover his costs. So too, a person entitled to restitution (under a decree) by a variation of the decree owing to the scaling down under the Madras Agriculturists Relief Act, can get it transferred to another Court for execution as there is an order for restitution capable of being executed. 62 L.W. 315=A.I.R. 1949 Mad. 651=1949 M.W.N. 293=(1949) 1 M.L.J. 486.

——S. 39—Decree transferable—Decree in appeal.

When a Court passes a decree and there is a decree in appeal therefrom and thereafter a petition for execution to the first Court, the appellate decree is the only decree which can be transferred and the transfer cannot be understood as if it were a transfer of the original decree and not of the appellate decree. A.I.R. (Vol. 20) 1933 Mad. 872=38 L.W. 877=1933 M.W.N. 929=147 Ind. Cas. 386.

——Ss. 39 and 42—Decree for amount exceeding pecuniary jurisdiction—Power to execute.

See A.I.R. 1933 Sind 828 under 14 infra.

——S. 39—Limitation.

Application under S. 39, Civil P. C., is governed by S. 3 (9), Lim. Act and Court in considering such application must go into the question of limitation. 29 M.L.W. 246=1929 M.W.N. 36=116 Ind. Cas. 113=A.I.R. 1929 Mad. 199.

——S. 39—Application tranfer—Objection by judgment-debtor regarding executability of decree—Proper Court to decide.

Where the decree-holder applies for the transfer of a decree to another Court for execution and the judgment-debtor raises objections as reards the executability the proper Court to decide such objections is the Court to which transfers the decree and not the Court to which the decree is transferred; because if the judgment-debotor after receiving notice to show cause why the decree seould not be transferred,does not raise all his objections to execution, he will be precluded from doing so in a later execution petition on the ground of constructive **res judicata**. 29 M.L.W. 246=1929 M.W.N. 36=116 Ind. Cas. 13=A.I.R. 1929 Mad. 199.

——S. 39—Execution—Objections should be taken in the Court passing the decree and not in transferee Court for execution. 97 Ind. Cas. 768=A.I.R. 1927 Nag. 31.

——S. 39—Order of transfer—Construction of.

In a suit decree was given on 13th June, 1913, The execution proceedings began on 13th January, 1925, i.e., within 2 years under S.48, C.P. Code During these proceedings the decree-holder applied for the transfer of the execution under S. 39. The robkar in sanctioning the transfer application ran : "In my opinion the issue regarding the limitation period does not arise in such a transfer and the proceedings will be the same. The fact that this decree will have to be transmitted to the other Court is an intermediate proceeding since the property is situate outside the jurisdiction of the Court.

Held, that the transmitting Court did intend to decide that no objection as to limitation could possibly arise by reason of the transfer and, by holding that the proceedings before the transferee Court were only intermediate proceedings, it praitically did intend to order execution as distinct from mere transfer. 11 L.L.J. 501=A.I.R. 1930 Lah. 118=125 Ind. Cas. 55.

——S. 39—Order of transfer after objection—If ministerial.

Order for transfer of decree after hearing judgment-debtor's objections, is not ministerial. 29 M.L.W. 246=1929 M.W.N. 36=116 Ind. Cas. 113=A.I.R. 1929 Mad. 199.

9. Notice of transmission.

——S. 39—Transfer of decree—No notice to judgment-debtor—Proceedings not vitiated.

It is not necessary to issue notice to the judgement-debtor in the transfer proceedings and the omission to do so does not vitiate those proceedings. A.I.R. (Vol. 30) 1943 Pesh. 87=209 Ind. Cas. 611.

——S. 39—Notice of transmission.

The act of transmitting a decree for execution is ministerial act and such an order can be passed even ex parte. A District Court has, therefore, jurisdiction to proceed with the execution of a decree even though the order of the High Court transmitting the decree to it for execution was made without notice to any guardian on behalf of the minor judgment-debtor. A.I.R. (Vol. 23) 1936 Mad. 99=1935 M.W.N. 1303=42 M.L.W. 943=69 M.L J. 862=159 Ind Cas. 762.

——S. 39—Notice to judgment-debtor—Transfer of portion of decree.

The transfer of a portion of a decree to another Court for execution is irregular. A transfer of a decree to another Court for execution made without notice to the judgment-debtor is not binding on him. 3 Pat. L. W. 247=43 Ind. Cas. 186.

——S. 39—Transmission—Ex parte order.

The order of transmission of a decree by one Court to another can be made **ex parte** as it is a Ministerial Act. A.I.R. 1927 P.C. 73, Foll. 5 Rang. 775=6 Bur. L.J. 225=106 Ind. Cas. 857=A.I.R. 1928 Rang. 40.

——Ss. 39, 47—Simultaneous execution on certain conditions—Order passed without hearing judgment-debtor.

It is indeed true rhat a mere order transmitting a decree for execution to another Court might be said to be a purely ministerial order in the sense that it is an order that the decree should be sent to the transferee Court. Where, however a Court in which execution proceedings are pending grants a certificate allowing a simultaneous execution proceeding to go on in both the Courts, i.e., in that Court and in the transferee Court, on certain conditions, such an order cannot be regarded as purely ministerial. Where the Court has to exercise its discretion in passing an order and especially where the judgment-debtor is affected by the exercise of such discretion, it must be regarded as a judicial order before the making of which the judgment-debtor is entitled to be heard The order also comes under S. 47. If it is passed without hearing the judgment-debtor, it is an illegal order and must be vacated. On the general principle of law, whenever any judicial order is to be made by the Court, it cannot be made without hearing the party to be affected by that order. A.I.R. (Vol 26) 1939 Bom. 258=41 Bom. L.R. 481=183 Ind. Cas. 333.

10. Property situate outside territorial jurisdiction.

See also under S. 38.

——S. 39—Property beyond—Territorial limits.

The source of the general principle that a Court has no power to take into execution, property beyond its territorial limits, lies not in S. 39 but has, for its basis, a different principle, a principle of universal or a principle of international jurisprudence. That principle is founded onthe principle that a Court cannot ordinarily issue its processes beyond its territorial limits. A.I R. (Vol. 26) 1939 Cal. 403=I.L R. (1939) 1 Cal. 493=70 C.L.J. 47=43 C.W.N. 453=184 Ind. Cas. 786.

——S. 39—An executing Court cannot sell the property which is situated outside its jurisdiction. A.I.R. (Vol. 26) 1939 Pat. 532=20 P.L. T. 585=18 Pat. 670=182 Ind. Cas. 610=5 B. R. 783.

——S. 39—Property situate outside local limits of decretal court.

Where it is necessary in execution of a decree for money to sell properties not within the local limits of the jurisdiction of the Court which passed the decree, the sale of the properties can only be effected by the Court within the local limits of which the property is situate and that the property was attached by an order of attachment before Judgment, along with properties within the jurisdiction does not make any difference : nor is O. 21, R. 64 applicable : 33 C.W.N. 848=57 Cal. 67=A.I.R. 1929 Cal. 818.

——S. 39—Execution outside territorial limits—Transfer of decree.

The jurisdiction of a Court is circumscribed by and co-extensive with its territorial limit. Where property sought to be attached is **bona fide** without the jurisdiction of the original Court whose decree is sought to be enforced and is in the hands of a third party who is not amenable to or permanently residing within the jurisdiction of the executing Court, it must be transferred to the Court within the local limits of whose jurisdiction the property sought to be attached is for the time being. 4 Pat. L.J. 141=(1919) P.H.C.C. 155=48. Ind. Cas. 943.

——S. 39—and O. 21. R. 8— Transferee Court—Territorial jurisdiction—Absence of—Effect of.

Territorial jusidiction though not necessary for the trial of suits is necessary for an executing Court apart from the special and exceptional procedure by precept. A Court cannot in execution sell property situate outside its territorial jurisdiction even though the decree under execution was transferred by a Court having jurisdiction over that property. 33 M.L.J. 750=23 M.L.T. 24=(1918) M.W.N. 132=43. Ind. Cas. 79.

——Ss. 39 and 21—Tranfer of decree for execution—Attachment of property in execution by transferee Court—Removal of that property from the jurisdiction of the transferee Court to another Court—Jurisdiction of the former Court to order sale of that property thereafter—Objection to jurisdiction not raised by judgment-debtor—Right of other creditors of the same judgment-debtor to proceed against that property.

Where a Court which passes a money decree transfers that decree to another Court for execution and in an execution petition for attachment and sale of immovable property belonging to the judgment-debtor situate within the territory of the transferee Court an order for attachment has been made by that Court and the property is thereafter removed from the territory of the transferee Court to another Court, the former Court can make no order for sale of that property by Court auction so as to give a good title to the purchaser. A Court cannot make a valid order for sale in execution unless at the time the order is made, the property is within its territory and a sale ordered otherwise would be a nullity. Though an objection to the jurisdiction of the executing Court to order sale is not taken by the judgment-debtor, it would be open to other judgment-creditors of the same judgment-debtor to proceed in execution against the property so sold as the sale is a nullity. When

a Court has no jurisdiction no agreement or act of a party can confer jurisdiction which it does not possess. S. 21 of the C. P. Code, does not cover an objection going to the nullity of an order on the ground of want of jurisdiction. I.L.R. (1948) Mad. 18=60 L.W. 277 (2)=1947 M.W.N. 233= A.I.R. 1947 Mad. 347=(1947) 1 M.L.J. 306 (F.B.).

——S 39—Mortgage suit—Sale of portion of mortgaged property situated outside its territorial jurisdiction.

There is no bar to a Court which has passed a decree for sale in a mortgage suit from selling any portion of the mortgaged property or any independent item situated outside its territorial jurisdiction, when it has jurisdiction to entertain the suit and to pass the decree by reason of part of the mortgaged property or some other items or mortgaged property being within its territorial limits. A.I.R (Vol. 26) 1939 Cal. 403=I.L.R. (1939) 1 Cal. 493=70 C.L.J. 47=43 C.W.N. 453=184 Ind. Cas. 786.

——S. 39—Mortgage decree—Property outside jurisdiction of decretal Court.

In the case of a mortgage decree, a Court which passed it may notwithstanding the fact that the property is outside its jurisdiction, bring it to sale. 49 Mad. 746=95 Ind. Cas. 12=A.I.R 1926 Mad. 421=50 M.L.J 161.

——S. 39—Under section 39 a Court can execute a decree for sale of the mortgaged property, though it is wholly out of its jurisdiction because a mortgage decree is practically a decree of specific performance of the contract between the mortgagor and the mortgagee. 80 Ind. Cas. 901=6 Pat. L.T. 71=A.I.R. 1925 Pat. 139.

——Ss. 39 and 42—Mortgage decree—Sale of properties outside jurisdiction—Power of transferee Court.

Mortgage decree transferred to another Court for execution—Transferee Court can sell properties lying outside the boundaries of its jurisdiction as well as those lying within. A.I.R. (Vol. 31) 1944 Mad. 446=57 L.W. 344=1944 M.W.N. 380=(1944) 2 M.L.J. 2=I.L R. (1945) Mad. 257.

——Ss. 39 and 42—Mortgage decree—Sale of property outside territorial jurisdiction—Powers of transferee Court.

A Court to which a mortgage decree has been transferred for execution has the same powers as the Court which passed the decree. The transferee Court may treat the mortgage decree as if it had been passed by itself, and can execute it against all the property which is the subject of the decree even though none of it might lie within its territorial jurisdiction. A.I.R (Vol. 31) 1944 Mad. 145=1943 M.W.N. 650=56 L.W. 605=(1943) 2 M.L.J. 536= 216 Ind. Cas. 316.

11. Scope and Applicability.

——S. 39—Applicability—Award filed in Court —Transfer of—Arbitration Act, S. 11.

An award filed in Court under S. 11, Arbitration Act, can be transferred for execution to another Court. A.I.R. (Vol. 18) 1931 Nag. 170=27 N.L.R. 386=134 Ind. Cas. 583.

——S. 39—Applicability—Decree under Presidency Small Cause Courts Act.

Section does not apply to a decree under the Presidency Small Cause Courts Act. A.I.R. 1928 Cal. 265.

——S. 39 (S. 223, Old Code)—Applicability—Test.

S. 223 is not limited in its application to Courts established under and governed by the Bengal Civil Courts Act and the corresponding Act of the other Provinces. The necessary and sufficient test of the applicability of the section is whether the provisions of the Code regulate the procedure of the Court which makes the decree as also of the Court to which it is transferred for execution. (1906) 34 C. 576=11 C.W.N. 622=6 C. L.J. 13.

——S. 39—Discretion of Court. Judgment-debtor not liable to arrest—Decree, whether can still be transmitted to Court at place where he resides.

Seetion 39, gives discretion to the Court to transfer a decree passed by it in execution to another Court if any one of the four reasons mentioned in the section is found to exist. If a judgment-debtor resides at two places K and T, the decrec can be transmitted to the Court at T. The fact that the judgment-debtor is not liable to arrest in execution of the decree is not in itsely a good reason for refusing to make the order. A.I.R. (Vol. 31) 1944 M. 73=56 L.W. 635=(1943) 2 M.L.J. 452=1943 M.W. N. 642=211 Ind. Cas. 518.

——S. 39—Discretion—Transmitting Court.

The whole of S. 39, gives a discretion to the Court in the matter of transfer. That discretion must be judicially exercised. A.I.R. (Vol. 26) 1939 Cal. 651=187 Ind. Cas. 67.

——S. 39—Whether permissive or mandatory.

The provisions of S. 39, are permissive and not mandatory. Even if there has been a valid assignment of a decree, it is still quite open to the Court to exercise a discretion in sending the application to another Court whether or not the conditions set forth in S. 39, are fulfilled. A.I.R. (Vol. 24) 1937 Cal. 570=174 Ind. Cas. 936.

——S. 39—There are four conditions in S. 39 (1), and if any of these conditions is satisfied, the transfer of the decree may be made. A.I.R. (Vol. 27) 1940 All. 331=1940 A.L.J. 381=I.L.R. (1940) All. 318=189 Ind. Cas. 376.

——S. 39—Scope of—Mode of execution sought irrelevant.

The Court passing a decree can send it for execution to another Court within the jurisdiction of which the judgment-debtor resides, irrespective of the mode in which the decree is sought to be executed and it would be necessary for the decree-holder to satisfy the Court that the judgment-debtor has not sufficient property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy the decree. 33 C.W.N. 620=56 Cal. 1176=A.I.R. 1929 Cal. 529.

——S. 39—Scope—Entire decree should be sent for execution.

Section 39, Civil P. C. lays down that the Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court. The section contemplates that the entire decree and not a part of it is to be sent for execution to other Court or Courts. There is no provision in the Civil P. C. under which a decree-holder who has obtained a decree can divide a decree into several parts and execute them piecemeal in different Courts or in the same Court. A.I.R. (Vol. 22)

1935 Cal. 118=38 C.W.N. 1053=154 Ind. Cas. 654 (2). See also 3 Pat.L.W. 24=43 Ind. Cas. 186.

——S. 39 (1) (a), (b) and (c)—Scope—Powers of transferce Court cannot be limited.

Even in a case falling under sub-cls. (a), (b) or (c), of S. 39 (1), it is not right to limit the powers of the Court to which the decree is sent. Those clauses only deal with the circumstances justifying a transfer and they need not necessarily define the powers of the Court to which the decree is sent for execution, because that is provided for in other sections of the Code. A.I.R. (Vol. 25) 1938 Mad. 27=46 L.W. 565=1937 M.W.N. 1086=(1937) 2 M.L.J. 602=176 Ind. Cas. 327.

——S. 39 (1) (b)—Scope—Execution if limited to that against judgment-debtor satisfying the condition.

Where the condition justifying transfer is that set out in sub-S. 1 (b), S. 39, the intention of the section is that execution should be limited to execution against the judgment-debtor who satisfies that condition. To hold that a judgment-creditor may obtain an order for transfer on the ground that one judgment-debtor has no property within the local limits of the Court which passed the decree, and has property within the local jurisdiction of another Court, and may then execute the decree through such other Court not against that judgment-debtor but against another judgment-debtor who does not fulfil that condition is so absurd that the section must be given this limited construction. A.I.R. (Vol. 23) 1936 Cal. 521=63 Cal. 1210=168 Ind. Cas. 391.

——Ss. 39 and 24—Scope—Transfer of decree for limited purpose—Jurisdiction of transferee Court.

A decree cannot be transferred to another Court for a limited purpose only i.e., to enable the decree-holder to share in the rateable distribution of assets. But the Court to which the case is transferred has jurisdiction to execute it where a whole case for execution, as distinguished from the decree to be executed, is transferred by a District Judge under S. 24. 1 Pat. L.W. 582=39 Ind. Cas. 737.

——S. 39 (1) (d)—Scope—Small Cause Court cannot confer jurisdiction upon itself to proceed against immovable preperty by transferring execution application to its regular side.

It is a principle of the interpretation of statutes that where a list of certain circumstances in which a particular act can be done is followed by a general clause, that clause, must be interpreted as referring to circumstances **ejusdem generis** as those which have been recited in the foregoing clauses. Sub-clause (d) of S. 39, Civil P. C., must be interpreted on these principles and it was not intended by the Legislature that this sub-clause should be utilized in order that a Court should proceed in execution in a manner which was not otherwise permitted by law. The Legislature has provided in various ways that a Small Cause Court shall have no jurisdiction over immovable property and it was not intended that merely by transfer to another kind of Court those provision should be defeated. A Small Cause Court, therefore, cannot, by transferring execution application to its regular side under S. 39, Civil P. C., confer upon itself jurisdiction to proceed against the immovable property. A.I.R. (Vol. 25) 1938 Pesh. 70=178 Ind. Cas. 127.

——S. 39 (1) (d)—Application for removal of obstruction.

If a decree directing the sale is to be executed, not only by the sale but by the removal of obstruction then the provisions of Cl. (d) of S. 39, have not to be considered at all. A.I.R. (Vol. 23) 1936 Sind 11=30 Sind L.R. 290=161 Ind. Cas. 524.

——S. 39 (1) (d)—Scope—Transfer when sufficient property within jurisdiction—Permissibility

The jurisdiction of a Court transferring decree for execution to another Court is not confined to cases in which there is no property within the jurisdiction of the Court which passed the decree sufficient to satisfy decree. Under cl. (d) of sub-S. (1) of S. 39 of the C. P. Code the Court can make the order of transfer if it "considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court." 85 Ind. Cas. 411=28 O.C. 199=A.I.R. 1925 Oudh 481.

——S. 39 (2)—Scope.

Section 39 (2), refers to a "Subordinate Court," and one subordinate Court is not subordinate to another. Section 39 (2) contemplates a transfer by a District Court of a decree of Court subordinate to itself and not by one Subordinate Court to another. A.I.R. (Vol. 31) 1944 Sind 173=I.L.R. (1944) Kar. 33=220 Ind. Cas. 126.

12. Simultaneous execution.

See also S. 38.

——S. 39—Simultaneous execution—Permissibility.

Simultaneous execution is permitted by the Court but in making an order for such execution, care should be taken so that there may not be any hardship to the judgment-debtor. The Court has jurisdiction to execute its decree and at the same time send it to another Court to execute it simultaneously. It is not necessary, for the Court to go through the process of a sale in order to find out whether in point of fact the proceeds of the sale would be sufficient to cover the decree. It would be enough if there are allegation made, supported by an affidavit or some other evidence on which the Court can reasonably rely, which tends to show that there are circumstances present from which it can be safely inferred that the properties within the jurisdiction of the Court would not satisfy the decree. If such circumstances are proved to the satisfaction of the Court, it would be quite open to the Court, having regard to the provisions of cl. (b), S. 39, to make an order transferring the decree for execution to another Court. A.I.R. (Vol. 22) 1935 Cal. 268=39 C.W.N. 165=156 Ind. Cas. 522.

——S. 39—Simultaneous execution.

In execution proceedings more than one Court can have jurisdiction at a time in regard to a darkhast whatever the case might be in regard to a suit. A decree may be executed in more than one Court simultaneously. 14 M.I.A. 529 and 8 Cal. 687, Foll. 53 Bom. 844=31 Bom.L.R. 1105=A.I.R. 1929 Bom. 418.

——S. 39—There is nothing in the present Code, any more than there was in the Code of 1859 which prohibits the sending of a decree for execution to two Courts at the same time. 14 M.I.A. 529 (P.C.);

Foll. 5 Rang. 397=104 Ind. Cas. 133 A.I.R. 1927 Rang. 258 (2).

——S. 39—Transfer of decree—Concurrent execution if permissible.

Where a decree is transferred to another Court for execution, concurrent execution of it is permissible in the Court from which the decree has been transferred. 15 A.L.J. 532=39 Ind. Cas. 729.

13. Transfer, when takes effect.

——S. 39—Transfer of decree, when takes effect.

The transfer of a decree to another Court for execution comes into effect from the date when the order of transfer is made and when once the order of transfer is made the Court to which the decree is transferred has jurisdiction to entertain the application for execution, even though a copy of the decree has not been received by it. A.I.R. (Vol. 33) 1946 Mad. 169=1945 M.W.N. 783 (2)=58 L.W. 669 =(1945) 2 M.L.J. 555=224 Ind. Cas. 296.

——S. 39—Transmission of decree for execution —Application for execution when lies.

An order transferring a decree to another Court takes effect from the date on which it is passed and the transferee Court has jurisdiction to entertain application for executing from the date of the passing of the order of tranfer. A.I.R. (Vol. 27) 1943 Mad. 214=50 M.L.W. 764=1939 M.W.N. 1244 =187 Ind. Cas. 758.

——S. 39—Application for execution to transferee Court before arrival of decree.

An application for execution made to the Court to which a decree is transferred for execution in in anticipation of the arrival of the decree is incompetent. A.I.R. (Vol. 18) 1931 Mad. 103=1930 M.W. N. 568=130 Ind. Cas. 458.

14. Transferee Court—Jurisdiction and Powers of.

See also Ss. 38 and 42.

——S. 39 (1)—Pecuniary jurisdiction of transferee Court—Transferee Court can execute transferred decree to extent of its pecuniary jurisdiction even if transferred decree exceeds its pecuniary jurisdiction.

A decree for Rs. 7,500 was passed by Court **A** in favour of **X** against **Y**. **T** obtained a decree against **X** in Court **B** which had pecuniary jurisdiction upto Rs. 5,000. **T** then got **X's** decree against **Y** attached and sought to execute it against **Y** to satisfy his own decree against **X**. **T**, therefore, applied to the Court **A** and got **X's** decree transferred to Court **B** for execution against **Y**. It was argued that **B** Court could not execute the transferred decree as it exceeded its pecuniary jurisdiction:

Held, that it was not necessary that a Court to which a decree was transferred for execution should be a Court having the same pecuniary jurisdiction as the Court which transferred the decree. As **B** Court which was executing the transferred decree was executing the transferred decree only to the extent of its own pecuniary jurisdiction, it mattered not that the transferred decree exceeded in value the pecuniary jurisdiction of the executing Court **B**; the transferred decree was not to be executed in full; it was to be executed only in substitution of the executing Court's own decree and to the limit of its jurisdiction. The transferee Court **B**, therefore, was competent to execute the transferred decree. A.I.R. (Vol. 33) 1946 Sind 103=I.L.R. (1945) Kar. 445=225 Ind. Cas. 472.

——S. 39—Decree transferred to other Court for execution—Valuation of decretal amount and not the original valuation of suit is to be considered for determining the jurisdiction of the transferee Court. A.I.R. (Vol. 27) 1940 All. 331=1940 A.L.J. 381=I.L.R. (1940) All. 318=189 Ind. Cas. 376.

——S. 39—Transferee Court must have same pecuniary jurisdiction as transferor Court.

There is no express provision in S. 39, cl. (i), that the transferee Court may be a Court of any pecuniary jurisdiction. The transferee Court contemplated by S. 39 must be therefore a Court of competent jurisdiction, that is a Court which has the same pecuniary jurisdiction as the transferor Court. A.I.R. (Vol. 27) 1940 Cal. 161=70 C.L.J 438=187 Ind. Cas. 895.

——Ss. 39 and 6—Execution of decrees sent to another Court—Power to execute decrees of value in excess of pecuniary jurisdiction.

Where a decree in excess of pecuniary jurisdiction of the Court is passed and sent to another Court having like pecuniary jurisdiction for execution, the latter Court cannot execute it. 57 Ind. Cas. 722 (Cal.).

——Ss. 39, 42—Decree for amount exceeding pecuniary jurisdiction—Validity—Power to execute—Decree, if can be tranferred to another Judge with like powers.

It is competent to a Judge to pass a decree for an amount exceeding his pecuniary jurisdiction in a case where the suit when first instituted was one which could be tried by him, Consequently, he is also competent to execute the decree validly passed by him for an amount in excess of his pecuniary jurisdiction. Such a decree can be transferred to another Judge with like powers. A.I.R. (Vol. 20) 1933 Sind 128=150 Ind. Cas. 263.

——S. 39, Cl. (1)—High Court decree—Transmission to Dt. Munsiff's Court for execution on the application of party—Jurisdiction—Value.

After a decree is sent to another Court for execution on the application of the decree-holder himself, the question of competency according to jurisdictional value of the Court to which the decree is transmitted does not arise at all. But the case would be different when the decree is transmitted by the Court on its own motion. (1914) M.W.N. 97 =15 M.L.T. 148=22 Ind. Cas. 275.

——Ss. 39—Transfer to Court incompetent to try suit.

The execution of a decree passed in a suit can only be carried out by a Court which is competent to entertain the suit of the particular value. A decree passed by a Subordinate Judge, whatever its amount, cannot be sent for execution to a Munsif with a limited pecuniary jurisdiction. This is not a case of irregularity which can be cured by waiver. This is a case of inherent want of jurisdiction. A.I.R. (Vol. 23) 1936 Pat. 177=17 P.L.T. 160=161 Ind. Cas. 700=2 B.R. 359.

——S. 39—Transferee Court not competent to try original suit—Award under Arbitration Act (9 of 1899) :

A Court of lower pecuniary jurisdiction cannot

execute a decree if it was not competent to try the original suit out of which it arose. An award under the Arbitration Act can only be enforced by the District Judge and cannot be transferred by that Court to any other Court except a District Judge. A.I.R. (Vol. 21) 1934 Pesh. 107=151 Ind. Cas. 860.

——S. 39—Jurisdiction of transferee Court—When terminates.

So far as the Court of transfer is concerned, it continues to have jurisdiction over the execution proceedings until such execution is withdrawn or stayed or until it certifies to the Court which passed the decree either that the decree has been executed or if it fails to execute the decree the circumstances attending such failure. A.I.R. (Vol. 27) 1940 Cal. 171=I.L.R. (1939) 2 Cal. 173=187 Ind. Cas. 759.

——Ss. 39, 41—Decree passed by A Court sent under S. 39 to B Court for execution—B Court striking off execution in part satisfaction and ordering that A Court be informed of the result—Order not directing preparation of certificate under S. 41 or returning of certificate to Court A—Subsequent execution application to Court B—B Court, if has jurisdiction.

A decree was passed by A Court and sent for execution under S. 39, to Court B. Court B upon an application by the decree-holder struck off the execution in part satisfaction and the order directed that Court A should be informed of the result of the execution. The order did not contain any direction that a certificate should be prepared under S. 41 or that the certificate received from the Court A should be returned to that Court. The decree-holder subsequently applied for execution to B Court:

Held, that the mere giving of information of the result of the execution so far was not at all the action of a Court terminating its jurisdiction in regard to the execution certificate which had been received from Court A under the provisions of S. 39 and O. 21, R. 6. There was no intention whatever that the certificate from Court A was to be returned and that the jurisdiction of Court B was to be terminated. A.I.R. (Vol. 25) 1918 All. 412=1938 A.L.J. 553=1938 A.L.R. 617=176 Ind. Cas. 412.

——S. 39—Judgment-debtor dead before full satisfactions of decree—Execution proceedings in transferee Court do not abate but are merely suspended.

If the judgment-debtor dies before a certificate of full satisfaction of the decree is issued, the Court of transfer does not lose its jurisdiction over the execution proceedings, which do not abate by reason of such death. The proceedings in such Court are merely suspended on such death until the judgment-creditor has obtained an order from the Court which passed the decree for inserting the name of the legal representative. 30 Bom. L.R. 1373, Foll. 118 Ind. Cas. 221=A.I.R. 1930 Sind 6.

——Ss.39.and 41—Transfer for execution to another Court—Latter Court certifying failure of execution—Fresh application for execution can be entertained by the same Court.

S. 41 requires that a Court to which a decree has been sent for execution shall certify to the Court which sent it that it has completely executed the decree or has failed to do so and is unable to do so any further. The section may also require certificates to be sent of the result of each application for execution that is made to the Executing Court, but in any case such certificates have to be sent under the executive orders of the High Court. But the sending of a certificate does not of itself put an end to the jurisdiction of the Court to execute the decree, and the sending of a certificate of the latter class cannot do so at all. 20 All. 129, followed. 68 Ind. Cas. 657=18 N. L. R. 178=A. I. R. 1922 Nag. 210.

——S. 39 (d)—Power of transferee Court to question validity of transfer.

Where a decree is transferred for execution by one Court to another Court, the transferee Court cannot question the power of the transferring Court to order the transfer. A. I. R. (Vol. 21) 1934 Mad. 266=39 L. W. 447=66 M. L. J. 418=1934 M. W. N. 1209=149 Ind. Cas. 1212.

——S. 39—The Court to which a decree is transferred for rateable distribution of assets is not competent to enquire whether the decree is collusive or not. A.I.R. (Vol. 18) 1931 All. 92=1930 A.L.J. 1552=53 All. 125=131 Ind. Cas. 244.

——Ss.39 and 50(1)—Power to substitute names of Legal Representative of deceased Judgment-debtor.

S. 50 (1) does not give an exclusive jurisdiction to the Court which passed a decree for the purposes of substituting the name of legal representatives of the deceased judgment-debtor; an application may also be made to, and orders passed by a Court to which the decree has been transferred for execution. A.I.R. 1931 All. 320 (2)=1931 A.L.J. 166=133 Ind. Cas. 609.

——Ss. 39, 42 and O. 21, R. 15—Jurisdiction of transferee Court—Application by legal representatives for substitution.

A Courts which a decree is transferred for execution has no jurisdiction to entertain an application for bringing on the record the legal representative of a deceased decree-holder. The application must be made to the Court which passed the decree. **Obiter.**—The execution of a decree so transferred need not necessarily be stayed because the application for substitution has to go to the Court which passed the decree. 55 Ind. Cas. 156 (Nag.).

——S. 39—Transfer to Agent's Court.

When the decree is transmitted to the Agent's Court for execution, if nothing more is said, it is presumably intended that it should be executed against those properties over which the Agent's Court has jurisdiction. It would not be reasonable to presume that the Court which passed the decree intended the unusual course to be taken of the decree being executed against properties situated within the jurisdiction of the transmitting Court, for, as regards such properties, the natural course would be that the Court which passed the decree should execute its own decree. 76 Ind. Cas. 269=18 M.L.W. 747=A.I.R. 1924 Mad. 144.

——S. 39—Effect of transfer.

A decree transmitted to another Court does not become a decree of that Court, though it can be executed as if it is its own decree. (1917) M.W.N. 498=6 L.W. 361=33 M.L.J. 539=40 Ind. Cas. 670.

——S. 39 and O. 21, R. 6—Transfer, after presenting execution application—Second application in transferee Court, not necessary.

O. 21, R. 6 read with S. 39, C. P. Code, makes it quite clear that where there has been no application for the execution of the decree in the Court which passed the decree, the decree-holder is bound to make an application for execution in the Court to which the decree has been transferred; but there is nothing in the law which compels the decree-holder to make a second application for the execution of the decree in the Court to which the decree has been transferred if he has already made an application in the Court which passed the decree. 74 Ind. Cas. 753=2 Pat. 909=5 P.L.T. 11=1923 P.H.C.C. 302=A.I.R. 1924 Pat. 120.

——S. 39—Transfer of decree—Application for execution—Forum.

An application for execution has to be made to the Court to which decree has been transferred and not to the Court which passed the decree. An application to the latter Court is not a step-in-aid of execution. 39 Mad. 640=31 M.L.J. 300=18 Bom. L.R. 909=14 A.L.J. 1129=20 M.L.T. 472=24 C.L.J. 478=4 L.W. 558=(1916) 1 M.W.N. 541=21 C.W.N. 162=1 Pat. L.W. 26=43 I.A. 238=36 Ind. Cas. 682. (P.C.) [Affirming 37 Mad. 231=23 M.L.J. 236=(1912) M.W.N. 721=12. M.L.T. 119=15 Ind. Cas. 738.]

——S. 39—Rules of execution different in different districts—Practice—Procedure.

Where, in different districts, different modes of execution are prescribed and where the question is how a decree passed in one but of which execution is sought in another of such districts is to be executed, the executing court must be guided by the rules in force in its own district. (1906) 8 Bom.L.R. 832=31 B. 5.

——S. 39—A suit to declare that a decree is void due to fraud of plaintiff can be entertained by a Court to which the decree has been transferred for execution. A.I.R. (Vol. 20) 1933 Cal. 274=60 Cal. 98=143 Ind. Cas. 710.

15. Transferor Court—Jurisdiction and powers of.

See also S. 38.

——S. 39—Transfer of decree to another Court—Transmitting Court does not lose entire seisin of decree. A.I.R. 1940 Cal. 171=I.L.R. (1939) 2 Cal. 173=187 Ind. Cas. 759.

——S. 42—Transferee Court having seisin of execution—Application made to Court passing decree—Effect. See LIMITATION ACT, ART. 182 (5)—FINAL ORDER. (1948) 1 M.L.J. 350.

——S. 39—Court transferring decree to another Court for execution—Jurisdiction to appoint receiver to realise decree.

A Court transferring a decree for execution to another Court does not lose all jurisdiction in connection with the case. The transferor Court still retains jurisdiction to pass necessary orders. It has jurisdiction to appoint a receiver to realise the decree. 25 Pat. 145=223 Ind. Cas. 251=12 B.R. 361=A.I.R. 1946 Pat. 365.

——Ss. 39, 41, O. 21, R. 16—Assignmet of decree after transfer decree to another Court—Application by assignee to original Court, competency of—Jurisdiction of original Court to proceed with execution.

Where a decree was assigned after it had been transferred for execution to another Court and the assignee decree-holder applied to the Court which passed the decree to be recognised as the decree-holder and for proceeding with concurrent execution which had been already ordered:

Held, that the Court which passed the decree had jurisdiction to entertain the application, and further, it was not bound to stay its hands until a certificate had been received from the transferee Court or the records had been returned. A.I.R. (Vol. 20) 1933 Mad. 110=63 M.L.J. 788=36 L.W. 750=140 Ind. Cas. 591.

——S. 39—Jurisdiction of original Court after transfer.

Even where a Court transfers a decree for payment of money, on application of the decree-holder to another Court by grant of a certificate of non-satisfaction and the property is attached by transferee Court, the former Court does not lose jurisdiction to execute the decree and is competent to proceed with the execution of the decree. But where the value of the property is greater than the amount of decree and decree-holder is likely to realize the whole amount of its sale, a further order for arrest of the judgment-debtor is not justified. 121 Ind. Cas. 68=A.I.R. 1930 Lah. 199.

——S. 39—Jurisdiction of transferor Court—Order of retransfer—Application for—Step-in-aid.

An application may always be made to the Court which passed the decree for an order retransferring it, if it has been transferred elsewhere and such an application is a step-in-aid of execution and prevents limitation running against the decree-holder. I.L.R. (1948) Mad. 117=60 L.W. 130=1947 M.W.N. 165=A.I.R. 1947 Mad. 431=(1947) 1 M.L.J. 156.

——S. 39—Retransfer—Application can be made to decretal court.

Where a decree has been transferred for execution to another Court, an application to transfer the same decree for execution to a third Court, or to execute the decree itself, can be made to the Court passing the decree. 13 C.P.L.R. 169, Foll. 10 N.L.J. 24=A.I.R. 1927 Nag. 367.

——S. 39—Second transfer—Decretal Court has no jurisdiction.

Once a decree is transferred under S. 39 the Court which passed the decree ceases to have jurisdiction till it reeeives a certificate under S. 41 and therefore a second transfer of the case by the Court passing the decree to a different Court for execution is without jurisdiction. 89 Ind. Cas. 99=12 O.L.J. 287=2 O.W.N. 313=29 O.C. 84=A.I.R. 1925 Oudh 428, affirming A.I.R. 1925 A. 276.

——S. 39—Powers of Original Court to bring decree back.

The Court which makes an order transferring its decree for execution to another Court must also have the power to bring the decree back. 50 Bom. 439=28 Bom.L.R. 381=94 Ind. Cas. 146=A I.R. 1926 Bom. 271.

——Ss. 39, 41—Decree-holder obtaining personally copy and certificate returning them to Court of issue—Court, if can grant execution.

It is open to a decree-holder, who obtains personally the copy and certificate, either to take the copy and certificate to the Court to which they are sent, or, if for some reason he does not desire to do so, to return the copy and certificate to the Court which issued them. If he takes the latter action, then the Court which passed the decree becomes again seized of the matter, and is either

able to grant execution itself, or to grant a new certificate for transfer. A.I.R. (Vol 23) 1936 All. 369=1936 A.L.J. 251=1936 A.L.R. 528=163 Ind. Cas. 231.

——S. 39—Jurisdiction after order of transfer.

An application for a certificate is a step-in-aid of execution and it is a step which is always necessary where the decree-holder desires to obtain execution against property situate outside the territorial limits of the jurisdiction of the Court which made the decree. Where the decree-holder having obtained his order for some reason or other best known to himself, either because he was not satisfied as to the existence of the property or for some other reason, never carried out the order which he had obtained and the decree was never in fact sent, the court passing the decree does not lose jurisdiction. 65 Ind. Cas. 332=3 Pat.L.T. 298=1 Pat. 328=A.I.R. 1922 Pat. 301.

16. Who can transfer.

——S. 39—Order for costs by High Court in rejecting application for leave to appeal to Judicial Committee.

When the trial Court transfers to another Court for execution its own decree, the appellate decree and also the order for costs passed by the High Court in rejecting the application for leave to appeal to the Judicial Committee without the same being transferred by the High Court, the proceedings by the transferee Court must be quashed and any sale held by it must be set aside irrespective of whether any prejudice has been caused to the judgment-debtor or not. A.I.R. (Vol. 31) 1944 Cal. 301=48 C.W.N. 535.

——S. 39—Transfer of award—Jurisdiction.

A Court which has the power to execute an award under R. 34 framed under S. 43, Bombay Co-operative Credit Societies Act has the power to transfer it for execution to another Court. 64 Ind. Cas. 337=46 Bom. 128=23 Bom.L.R. 909=A.I.R. 1922 Bom. 377 (2).

——S. 39—A Court which is neither a Court of first instance nor an Appellate Court has no jurisdiction to proceed in execution of a decree itself or to transfer execution proceedings to another Court under S. 39. A.I.R. (Vol. 25) 1938 Pesh. 77=178 Ind. Cas. 275.

——S. 40—Jurisdiction of transferee Court.

If a decree pending in the "transferee" Court has been completely withdrawn from that Court, the transferee Court has no further jurisdiction. A.I.R. 1930 Lah. 508=126 Ind. Cas. 316.

——Ss. 40 and 42—Scope and effect of—Decree of Calcutta High Court executed by Bihar Court—Law applicable—Bihar Money-Lenders Act, Ss. 13 and 14—Application of.

A Court to which a decree if transferred for execution has in executing such decree, to execute it in accordance with the law of procedure obtaining in that Court, but has to determine the rights and liabilities of the parties in accordanee with the substantive law obtaining in the Court which passed the decree. Where a decree passed by the High Court of Calcutta in its original side in respect or a commercial loan is transferred for execution to a Court in Bihar, the provisions of the Bihar Money Lenders Act cannot be applied in executing that decree. 26 Pat. 307=A.I.R. 1948 Pat. 245.

——S. 41.

SYNOPSIS.

1. Applicability—Different branches of one Court.
2. Certificate—Form of.
3. Certificate—Necessity of.
4. Jurisdiction of Transferee Court—How long continues.
5. Miscellaneous.

1. Applicability—Different branches of one Court.

——S. 41—Applicability—Certificate respecting small cause decrees—Executed on original side.

Macleod, C.J.—No particular method is prescribed for certifying the fact of execution and all that the section means is that the Court to which the decree is sent for execution should inform the Court which passed the decree what has happened in execution.

Crump, J.—When the Subordinate Judge is invested with Small Cause Court powers, and where in the exercise of the latter jurisdiction he makes a decree and the decree comes before him for execution in the exercise of his ordinary jurisdiction then, in such a case it is impossible to apply S. 41 strictly, because that section clearly has in contemplation different Courts and not different branches of one Court presided over by the same individual. All that is necessary is that there should be sufficient compliance with the section such as an entry as to the result of the execution proceedings made in the Small Cause Suit Register. 76 Ind. Cas. 549=A.I.R. 1923 Bom. 371.

2. Certificate—Form of.

——S. 41—Certificate—Form of.

There is no particuiar form of certificate prescribed in S. 41, C. P. Code; if an intimation is sent that the execution case is dismissed as infructuous, that is sufficient compliance with S. 41, C.P. Code. 25 Pat. 145=223 Ind. Cas. 251=12 B.R. 361=A.I.R 1946 Pat. 365.

See also 76 Ind Cas. 549=A.I.R. 1923 Bom. 371, supra.

3. Certificate—Necessity of.

——S. 41—Certificate—Necessity of.

Certification is a very important step when a decree has once been transferred to another Court, for its consequence is that the latter Court ceases to have jurisdiction to execute the decree. There must be a formal certification by the Court to which the decree has been transferred for execution, to the Court which passed the decree, and the fact of certification should not be left open to inferences to be drawn from entries in register of suit of the Court transferring the decree. 26 Bom. L.R. 345=80 Ind. Cas. 752=A.I.R. 1924 Bom. 359.

4. Jurisdiction of transferee Court—How long continues: See also S. 39.

——S. 41—Certificate of non-satisfaction sent by transferee Court—Copy of decree not returned—Effect on jurisdiction of transferee Court—Subsequent order for sale by such Court—Validity.

If a certificate of non-satisfaction under S. 41, C. P. Code, is sent by the transferee Court to the Court which passed the decree, that deprives the transferee Court of jurisdiction, whether the certificate should or should not in the circumstances have been sent.

Once a certificate of non-satisfaction has been sent, the transferee Court ceases to have jurisdiction, though it might have failed to return the copy of the decree sent to it.

The transferee Court has, therefore, no jurisdiction to entertain a second application for execution after it has sent the notice of non-satisfaction, and orders passed by it thereon are wholly null and void and can have no effect either as an estoppel or by way of **res judicata** or otherwise. Consequently an order for sale passed by the transferee Court in the second execution case is wholly ineffective and must be set aside. A.I.R. 1950 Cal. 287.

——S. 41—Jurisdiction of transferee court—How long retained.

A Court to which a decree is sent for execution is the only Court which has seisin of the execution proceedings, and it retains its jurisdiction to execute the decree till it certifies under S. 41 of the C. P. Code, to the Court which passed the decree, the fact of execution, or if it fails to execute the decree, the circumstances attending such failure. In such a case the Court which passed the decree has no jurisdiction to entertain an execution application unless concurrent execution had been ordered or proceedings in the Court to which the decree was sent, had been stayed for the purpose of executing the decree in the former Court. I.L. R. (1948) Mad. 117=60 L.W. 130=1947 M.W.N. 165=A.I.R. 1947 Mad. 431=(1947) 1 M.L.J. 156.

——S. 41—No execution within year of receipt of transfer certificate—No certificate under S. 41 returned—Transferee Court retains jurisdiction.

The provisions of Para. 181, Oudh Civil Rules, are not so mandatory as to override those of S. 41, Civil P.C., according to which a transferee Court continues to retain its jurisdiction as long as it does not record a certificate under S. 41 although no execution application has been filed within one year of the receipt of the transfer certificate. A.I. R. (Vol. 33) 1946 Oudh 5=1945 All. W.R. (C. C.) 196=221 Ind. Cas. 505=20 Luck. 573=1945 O.W. N. 279.

——S. 41—Certificate purporting to be one under S. 41 sent to decree-Court—Fresh application to proceed with execution and for rateable distribution—Jurisdiction of transferee Court.

Decrees were transferred for execution to another Court. While the decrees were in execution in that Court, there were compromises between the parties by which it was decided that a certain period would be allowed to the judgment-debtor for the payment of a certain sum and that if he paid that sum within the specified period, the decrees should be considered to have been satisfied. On the other hand, if he did not pay the sum, then the full amounts of the decrees which were considerably larger, should be recovered by execution. Properties had been attached in execution of all the decrees and it was arranged in the compromise that the attachments should subsist. In the meanwhile transferee Court had made a report or sent a certificate purporting to be one under S. 41, Civil P. C., to the transferring Court. The Court after the compromise had been put in, had passed orders that the applications for execution should be filed but that the attachments should subsist. Upon the failure of the judgment-debtors to pay, some of the decree-holders applied for the execution to proceed and some for rateable distribution. It was contended in defence, that after having sent the certificate under S. 41, the executing Court had ceased to have any jurisdiction for the execution of the decree:

Held, that where the Court executing the decree neither executed it nor finally failed to execute, it could not be said that the Court ceased to have jurisdiction. It was obviously the intention of the parties and of the Court that the application for execution should not be finally dismissed. This was one of those cases where the order of the Court was intended merely to be a ministerial order that the record of the case should be kept in the record room until proceedings were continued. It was not a case where the application for execution was dismissed. There was no necessity for the Court to make any report to the transferring Court, but if the report it had made was a report of the true facts, then it was not properly a certificate under S. 41, Civil P. C., which would operate to re-transfer the jurisdiction for execution of the decree from the transferee Court to the transferring Court. Consequently all the applications for execution were properly in existence and the execution of all the decrees of these applications should proceed. The parties were not also debarred from rateable distribution merely upon the grounds taken in the objection. A.I.R. 1937 All. 766=1937 A.L.J. 1168=1938 A.L.R. 35=172 Ind. Cas. 753.

——S. 41—Attachment by transferee Court—Objection before transferee Court dismissed—Appeal to High Court—Record sent to High Court with order that case be filed and that attachment should continue—Certificate under S. 41 sent to transferring Court—Copy of decree not sent—Appeal dismissed—Transferee Court, held, could proceed with execution.

The Court in Muttra transferred a decree passed by it under the provisions of S. 39 and O. 20, R. 6, etc., for execution to Aligarh Court and there was attachment of certain property of the judgment-debtor by the Court at Aligarh and the judgment-debtor made an objection to that attachment, and the Aligarh Court dismissed the objection of the judgment-debtor. The judgment-debtor filed an appeal in the High Court, and an application was made for the record to be sent to the High Court. The Aligarh Court passed an order that the record should be sent to the High Court and as the execution proceeding was pending for over a year, the case should be filed and the attachment should remain and future proceedings would be continued in the same way. Later, the Aligarh Court sent a certificate to the Muttra Court under S. 41 but no copy of decree was sent. The appeal having been dismissed, the Aligarh Court proceeded with the execution:

Held, that as the copy of the decree remained in the Aligarh Court, the Aligarh Court had jurisdiction to continue the execution proceedings and that as it stated that the proceedings should begin again in

continuation of the previous proceedings, the Court intended to retain jurisdiction. A.I.R. 1937 All. 474=1937 A.L.J. 393=1937 A.L.R. 641=170 Ind. Cas. 28.

——S. 41—Compliance with—What amounts to —Decree retransferred by transfering Court to Dy. Commissioner of Garo Hills.

Where a transferee Court withdraws the attachment order, dismisses the execution case and directs that the Court passing the decree should be informed accordingly, and the decree-holder applies to the decree Court for an order directing the transfer of the decree to another Court for execution, and attaches to the petition a certified copy of the order of dismissal of execution, there is sufficient compliance with the requirements of S. 41, Civil P. C.

And where the decree was subsequently transferred, upon the petition of the decree-holder, to the Deputy Commissioner of Garo Hills which was a Scheduled District and where some of the provisions of the Civil Procedure Code relating to execution were in operation and the Deputy Commissioner was the principal Court of civil jurisdiction:

Held, that it was not necessary that the whole of Civil Procedure Code should be in operation in the District and that the transferring Court had jurisdiction to transfer the decree for execution to the Court of the Deputy Commissioner of the Garo Hills, which was a "Court" within the meaning of S. 38, Civil P. C. A.I.R. 1937 Cal. 557=41 C.W.N. 1243=I.L.R. (1937) 2 Cal. 734=66 C.L.J. 216=174 Ind. Cas. 12.

——S. 41—Jurisdiction of transferee Court, how long continues.

It is open to a decree-holder who obtains personally the copy and certificate, either to take the copy and certificate to the Court to which they are sent; or if for some reason he does not desire to do so, to return the copy and certificate to the Court which issued them. If he takes the latter action, then the Court which passed the decree becomes again seized of the matter and is either able to grant execution itself or to grant a new certificate for transfer. A. I.R. 1936 All. 369=1936 A.L.J. 254=1936 A.L. R. 528=163 Ind. Cas. 231.

——S. 41—Jurisdiction of transferee Court—When divested.

The Court to which a decree has been transferred for execution is not divested of jurisdiction until it sends the certificate under S. 41 to the Court which passed the decree, and until such certificate is sent the Court which passed the decree has no jurisdiction to entertain application to certify payment under the decree so as to save limitation. 39 Mad. 640 (C. P. Code), Foll. 85 Ind. Cas. 455=28 O.C. 169=A. I.R. 1925 Oudh 492.

——S. 41—Transferee Court—How long retains jurisdiction.

The Court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution has been withdrawn from it, or until it has fully executed the decree and has certified that fact to the Court which sent the decree, or until it has failed to execute the decree and certified that fact to the Court which forwarded the decree. There should be complete failure such as would result in no benefit to the judgment-creditor for one reason or another, and not merely a partial failure. 74 Ind. Cas. 149 =25 Bom.L.R. 453=A.I.R. 1923 Bom. 396.

——S. 41—Record of satisfaction by transferee Court—Omission to send certificate—Transferee Court—If becomes functus officio.

Once a transferee Court has executed a decree in full or has completely failed to execute it and certifies such execution or failure to the transferor Court as enjoined in S. 41, it becomes *functus officio* and ceases to have any jurisdiction over the execution proceedings and the mere omission to send a certificate of satisfaction to the transferor Court cannot, if there is a clear order that the decrees have been satisfied in full and the proceedings should be struck off, enable the Court to retain jurisdiction. A. I. R. 1933 Lah. 149=143 Ind. Cas. 639.

——S. 41—Jurisdiction of transferee Court—How long continues—Application to execute returned to party under misapprehension, whether step-in-aid of execution.

The Court to which a decree is transferred for execution will retain its jurisdiction to execute the decree until the execution has been withdrawn from it, or until it has fully executed the decree, and has certified that fact to the Court which sent the decree, or has executed it so far as the Court has been able to execute it within its jurisdiction, and has certified that fact to the Court which sent the decree, or until it has failed to execute the decree, and has certified that fact to the Court which forwarded the decree.

Where a Court retains jurisdiction to execute a decree, the mere fact that an application for execution properly made to that Court is returned by it under a misapprehension, will not prevent the application from being tantamount to an application to take a step-in-aid of execution. A.I.R. 1932 Pat. 286=11 Pat. 513=13 P.L.T. 623=139 Ind. Cas. 843.

——S. 41—Jurisdiction after certificate.

After issue of certificate whether rightly or wrongly, the Court to whom the decree is transferred cannot deal with execution matters. 22 A.L.J. 1039= 6 L.R.A.Civ. 28=85 Ind. Cas. 390=A.I.R. 1925 All. 179.

——S. 41—Jurisdiction after certificate.

Even after issue of certificate under S. 41, transferee Court has jurisdiction to decide objections relating to anything done in the course of its proceedings. 5 O.W.N. 1053=115 Ind. Cas. 444=4 Luck. 209=A.I.R. 1929 Oudh 76.

——S. 41—Transferee Court certifying failure of execution—Fresh application for execution can be entertained by the same Court.

S. 41 requires that a Court to which a decree has been sent for execution shall certify to the Court which sent it that it has completely executed the decree or has failed to do so and is unable to do so any further. The section may also require certificates to be sent of the result of each application for execution that is made to the Executing Court, but in any case such certificates have to be sent under the executive orders of the High Court. But the sending of a certificate does not of itself put an end to the jurisdiction of the Court to execute the decree, and the sending of a certificate of the latter class cannot do so at all. 20 All. 129, followed. 68 Ind.

Cas. 657=18 N.L.R. 178=A.I.R. 1922 Nag. 210.

——S. 41—Jurisdiction of transferee Court—Termination of—Striking off of execution application.

The mere striking off of an application for execution does not terminate the jurisdiction of the Court to which the decree is sent for execution to execute the decree; but the jurisdiction ceases as soon as the Court takes action under S. 41 and certifies to the Court which passed the decree the circumstances attending the failure on the part of the transferee Court to execute the decree. 5 Pat. 398=7 P.L.T. 461=1926 P.H.C. 86=94 Ind. Cas. 36=A.I.R. 1926 Pat. 274.

——S. 41 (S. 223, Old Code)—Jurisdiction of transferee Court—Order striking off execution—Effect on.

Till the Court to which a decree has been sent for execution has made its return under S. 223, C. P. Code, 1882 to the Court which made the decree, it has jurisdiction to entertain successive applications for execution. The mere fact that an execution proceeding has been struck off does not indicate the final determination of the execution proceedings in that Court. 13 C.W.N. 533=9 C.L.J. 443=1 Ind. Cas. 57.

5. Miscellaneous.

——Ss. 41 and 42—Court to which decree is transferred for execution—Whether can grant certificate of non-satisfaction to another Court.

It is only the Court which has passed the decree that is competent to grant a certificate of non-satisfaction to the decree-holder to enable him to execute the decree in another Court and the Court to which a decree is transferred for execution by means of a certificate of non-satisfaction is not competent to grant such a certificate. That Court can only execute the decree itself and certify the result of execution before it to the original Court. A.I.R. 1934 Lah. 330=150 Ind. Cas. 905.

——S. 41—Madras Civil Rules, R. 161 (a)—Validity.

R. 161 (a) is only a rule of detail giving further guidance to Court in the carrying out of the provisions of S. 41, C. P. Code, and the two provisions are not inconsistent with each other, nor is R. 161 (a) *ultra vires*. All the rules of the Rules of Practice are supplemental to the C. P. Code, R. 161 (a) is a rule within the power of the High Court, the object being to compel decree-holders to be prompt in filing execution petitions in Courts to which the decrees are transferred. 98 Ind. Cas. 455=A.I.R. 1926 Mad. 1209=51 M.L.J. 554.

——S. 41—Order of High Court setting aside order allowing judgment-debtor's objection—Position of parties.

The order of the High Court setting aside an order allowing an objection of limitation taken by the judgment-debtor before the executing Court in a transferred decree, puts the parties in the same position, in which they were before the papers were returned by the executing Court to the original trying Court; and so after the order, the executing Court can proceed with the execution application, as if no order of Appellate Court allowing the objection was passed, and no certificate required under S. 41 of the Code was sent. 58 Ind. Cas. 987 (Pat.).

——Ss. 41, 42, O. 21, R. 6; (Ss. 223; 228 and 224, Old Code)—Result of execution certified to decretal Court—Decree again sent back for execution—Revival of execution proceedings.

The Court to which a decree is sent for execution must, on the termination of the proceedings in that Court certify to the Court which passed the decree the result of those proceedings, and after such a certificate, it is necessary that in order that the decree-holder may subsequently proceed to execute the decree, he should make an application to the Court which passed the decree so that the decree may again be sent back for execution to the other Court, but it was not the intention of the legislature, nor does it follow from this procedure, that when an application for execution has been sent back a second time to the same Court for execution against the same property, it must be held that the attachment of that property which was made in the proceedings in execution in that Court of necessity came to an end when that case was struck off. The same effect should follow in the course of the proceedings taken in execution in the Court to which the decree has been sent under S. 223 of the Code of Civil Procedure as would have followed if the proceedings had been taken in the Court which passed the decree and the same principles should apply. When the Court to which a decree had been transferred for execution sends it back under S. 223 of C. P. Code, to the Court which passed the decree, that Court, *i.e.*, the Court which passed the decree, has power to decide whether the decree-holder could execute the decree against the legal representatives of the judgment-debtor. The property of the judgment-debtor having already been attached by the Court to which it had been sent for execution, and an order for its sale having been made, the decree-holder was entitled to follow that property in execution against the sons. (1906) 9 C.L.J. 239=4 Ind. Cas. 46.

——S. 42—

Synopsis.

1. Appeal and Revision.
2. Applicability.
3. Powers of Transferee Court.

1. Appeal and Revision.

——S. 42—Appeal—Execution of Small Cause Courts decree transferred to ordinary Court.

An order in execution by a Small Cause Court is final. When, however, the decree has been transferred to the ordinary Court to be executed as if it were a decree made by that Court, the orders, made in execution are appealable in the same way as orders made in execution of decrees passed by that Court. 21 All. 1, Foll. 67 Ind. Cas. 6=34 C.L.J. 477=A.I.R. 1921 Cal. 242.

——Ss. 42 and 102—Appeal—Execution of Small cause decree on original side.

Although no appeal lies from the orders of a Small Cause Court, still under S. 42 of C. P. Code, an appeal lies from an order passed in execution of a Small Cause decree which has been transferred to a Court where it is filed on the original side. 14 A.L.J. 415=33 Ind. Cas. 523.

——Ss. 42, 47, 104 (h) and 145—Appeal—Small cause decree—Transfer to Munsiff's Court for execution—Order of arrest.

An order directing the arrest of a surety passed by a Munsiff in executing of a decree transferred to his Court for execution by the Small Cause Court, is appealable. 20 C.L.J. 129=27 Ind. Cas. 10.

——Ss. 42 and 102—Appeal—Execution of small cause decree.

Only one appeal lies against orders passed in execution of decrees in small cause suits. (1911) 2 M. W.N. 585=12 Ind. Cas. 959.

——S. 42—Small Cause Court decree transferred to another Court on regular side—Order of transferee Court that execution is barred by time—Revision under Provincial Small Cause Courts Act (9 of 1887), S. 25.

Where a decree of a Small Cause Court has been transferred to another Court for execution on its regular side, an order of transferee Court that the execution is barred by limitation is not open to revision under S. 25, Provincial Small Cause Courts Act A.I.R. (Vol. 28) 1941 Pat. 624=22 P.L.T. 819=197 Ind. Cas. 824=8 B.R. 306.

2. Applicability.

——Ss. 42 and 44 (Since repealed)—Applicability—Decree of Native State—Execution in British Indian Court—Law applicable.

When a decree of the Courts in Jaipur State have to be executed in British India it is S. 44 (since repealed) of the C. P. Code and not S. 42 that applies. Such decrees are executable in Oudh as if they were passed by British Indian Courts.

But as it is well settled that in matters of procedure it is the *lex fori* that applies and as the term 'procedure' has to be taken in its widest sense and would include "limitation of an action or other proceeding", the execution application would have to be dealt with according to the law of limitation in regard to execution of decrees in force in British India. The fact that a certificate was issued by the Court of the State that the amount due under the decree was still unrealised, cannot be taken as binding on the British Indian Court on the question of the decree being within time for execution according to the law of British India. 22 Luck. 353=230 Ind. Cas. 440=1947 O.W.N. 267=1947 O.A. (C.C.) 185=1947 A.W.R. (C.C.) 185=A.I.R. 1947 Oudh 296.

——S. 42—Applicability—Decree of Madras Small Cause Court.

S. 42 is not applicable to proceedings in execution of a decree of the Madras Small Cause Court transferred to a Court in mofussal; but it only applies to execution proceedings in the Madras Small Cause Court, whether the decree sought to be executed was passed by the Madras Small Cause Court or transferred to that Court from a Court in the mofussal. 90 Ind. Cas. 509=22 M.L.W. 455=1925 M.W.N. 713=A.I.R. 1925 Mad. 1179 (a)=49 M.L.J. 104.

——S. 42—Decree of Civil Court transferred to Small Cause Court—Jurisdiction of latter to execute.

Where an ordinary Civil Court, in a suit for rent under Bengal Tenancy Act, passes a decree for rent and that decree is transferred for execution to the Court of Small Causes, the latter Court has jurisdiction to execute it. A.I.R. (Vol. 26) 1939 Cal. 600=I.L.R. (1939) 1 Cal. 233=185 Ind. Cas. 300.

3. Powers of Transferee Court.

See also Ss. 38 and 39.

——S. 42—Power of transferee Court—Decree becoming unenforceable.

It is open to the transferee Court to take into account later happenings. If the decree becomes unenforceable, the transferee Court can take that fact into account and pass orders which it considers fit. I.L.R. (1951) Nag. 491=1950 N.L.J. 281.

——S. 42—Vesting of powers in Court to which case is transferred does not divest parent Court of its powers of retransferring a case—Application for second transfer in parent Court.

The fact that in S. 42 the transferee Court is given the same powers in executing such decree as vested from the start in the Court which passed the decree, does not divest the parent Court of the jurisdiction which it alone enjoys of making an order of transfer. An application, therefore, for the issue of a certificate to a Second Court lies to the Court which passed the decree, and once a certificate is given by the transferee Court the Original Court is competent to re-transfer to the same transferee Court on proper application being made. If at the time of application the certificate of non-satisfaction had not been granted by the transferee Court the defect is cured by the certificate being received subsequently. 14 M.I.A. 529, Foll. 89 Ind. Cas. 958=A.I.R, 1926 Lah. 113.

——S. 42—Application for second transfer—Proper forum.

Per Shah J.—It is possible to read S. 42 in a comprehensive manner and to hold on the words of that section that even an application for the transfer of the decree again to another Court must be made in the first instance to the Court to which the decree has already been transferred. I should have been glad to see my way, if possible, to hold the another application for a transfer to third Court might be made to the Court which had originally passed the decree. At any rate it may be said in favour of the view that there is no express provision prohibiting such procedure. 68 Ind. Cas. 506=24 Bom.L.R. 798=47 Bom. 56=A.I.R. 1922 Bom. 359.

——S. 42—Power of transferor Court to recall decree—Application by decree-holder to transferring Court, to recall decree from transferee Court, whether step-in-aid of execution.

A Court when it transfers a decree for execution to another Court does not thereby altogether lose control over the decree, but may still pass certain orders in connection with execution. It has the power among others to recall the execution proceedings from the Court to which the decree has been transferred for execution if the decree has not already been executed because if the Court can transfer the decree it must also have the power to bring it back. Hence an application by the decree-holder made to the Court transferring the decree for recalling the decree for being executed by the transferring Court itself is a step-in-aid of execution made in accordance with law before the proper Court and would save limitation under Art. 11, Limitation Act. A.I.R. (Vol. 26) 1939 Pat. 144=17 Pat. 617=20 P.L.T. 353=180 Ind. Cas. 311.

——S. 42 and O. 41, R. 5—Execution of decree transferred to another Court—While execution pending appeal filed against decree—Execution stayed by order of Appellate Court—Appeal dismissed—Application by decree-holder to transferee Court, merely for revival of execution proceedings, if maintainable.

Where during the pendency of the execution proceeding of a decree in a transferee Court, the decree is appealed from and by the order of the Appellate Court, the execution is stayed but later on, on the dismissal of the appeal the stay order is discharged, the decree-holder can apply simply for revival of the execution proceedings. Where the appellate decree merely affirms the decree of the trial Court, and does not affect the terms of that decree in any way whatsoever, the fiction of merger should not be carried so far as to lead to such palpably absurd and inequitable result that the decree-holder should be put to the inconvenience of filing a fresh application in the Court which originally passed the decree, getting a fresh transfer certificate to another Court and pursuing the proceedings for execution is that Court. Even where a decree of the trial Court has been affirmed by the Appellate Court, its result is not to wipe out the decree of trial Court for all purposes. A.I.R. (Vol. 29) 1942 Oudh 84=1941 O.W.N. 1186=1941 O.L.R. 811=1941 R.D. 976=197 Ind. Cas. 94.

——S. 42—Transfer of decree—Subsequent affirmation in appeal—Fresh order of transfer not necessary.

Once a Court, which has the power to execute the decree, whether it is its own decree or the decree of the appellate Court, has transferred to execution to another Court and the execution is still alive, the Court to which the execution has been transferred will exercise all the powers of the Court of first instance and will retain its jurisdiction to execute the decree even though there has been an appeal since and it has been affirmed in appeal, and the execution cannot be defeated merely by the fact that no fresh order of transfer was made by the Court which transferred the decree after the decree had been affirmed by the High Court. 20 All. 129, Foll. 9 Pat. 829=129 Ind. Cas. 138=A.I.R. 1931 Pat. 27.

——S. 42—Territorial jurisdiction of transferee Court conferred by order of transfer.

When an execution case is transferred from one Court to another, the very order of transfer confers on a Court to which the execution case has been transferred the same territorial jurisdiction so far as that case is concerned, as the Court from which the transfer is made. A.I.R. (Vol. 29) 1942 Oudh 1 =1941 O.W.N. 1138=1941 O.L.R. 848=17 Luck. 249=197 Ind. Cas. 167.

——S. 42—Transferee Court, if can execute for larger amount.

If the Court transferring the decree puts a wrong construction on the decree or enters a wrong amount in the certificate, the judgment-debtor is not required to approach that Court for getting it amended: the Court executing the decree is quite competent to decide the matter itself. Consequently, the transferee Court executing the decree is competent to execute it for a larger amount than that specified in the certificate if the decree-holder is found to be entitled to it. A.I.R. (Vol. 25) 1938 All. 654=1938 A.L.J. 980 =1938 A.L.R. 899=178 Ind. Cas. 740.

——S. 42—Simultaneous execution—Power of transferee Court to order.

Section 42 does not give power to the transferee Court to order simultaneous execution or to send the decree to another Court for execution. A.I.R. 1938 Mad. 113=1937 M.W.N. 943=46 L.W. 540=I.L.R. (1938) Mad. 326=176 Ind. Cas. 753.

——S. 42—Power of transferee Court to deal with subsidiary applications filed after passing of decree.

The expression 'the Court which passed the decree,' in S. 42, does not include within its ambit the Court to which the decree is transferred for execution.

Section 42 does not purport to confer powers on the Court to which a decree is transferred, of dealing with each and every subsidiary application filed after the passing of a decree. All that this section provides is that the transferee Court shall "in executing such decree" exercise the powers of the Court which passed the decree and this limits the exercise of such powers to execution proceedings. An application for leave to execute a decree is in no sense an application for execution of the decree. It is only a subsidiary or preliminary application which is required to be dealt with before the Court is called upon to execute the decree. A.I.R. (Vol. 18) 1931 Sind 82= 25 Sind.L.R. 460=131 Ind. Cas. 712.

——S. 42—Power to execute award.

A Court to which an award filed under S. 11, Arbitration Act is transferred, can execute the same even if the Arbitration Act is not in force in the local area. A.I.R. (Vol. 18) 1931 Nag. 170=27 Nag.L.R. 386=134 Ind. Cas. 683.

——S. 42—Power of execution of Court to which decree is transferred.

A decree was obtained in Sonthal Parganas and was transferred to a Court outside the above jurisdiction under S. 39 (1) of C. P. Code. The Sonthal Pargana Courts could not execute the decree by arrest of the judgment-debtor. *Held*, still the outside Courts had power to execute it by issuing a warrant of arrest under the powers under S. 42, C. P. Code. 10 Ind. Cas. 538 (Cal.).

——S. 42—Transferee Court—Power to take cognizance of objection as to jurisdiction.

There is no good reason for holding that the transferee Court is debarred from taking cognizance of objections as to jurisdiction. A.I.R. (Vol. 21) 1934 Lah. 652=35 P.L.R. 482=152 Ind. Cas. 135 (2).

——S. 42—Power of Court to which decree is transferred, to question right of transferee to execute.

Where a decree is transferred and the name of the transferee is put upon the record by the Court which passed the decree, and the transferee obtains an order for execution in the Court of another district, it is beyond the jurisdiction of the latter Court to entertain any question as to the transferee's right to the execution sought. A.I.R. (Vol. 19) 1932 Pat. 168 =11 Pat. 94=13 P.L.T. 402=137 Ind. Cas. 472.

——S. 42—Questions under S. 47.

The enactment of S. 42 is clearly intended to be of general application and to remove all questions arising out of the decree, such as those dealt with by

S. 47 of the Code and the like, from the cognisance of the Court which made the transfer. 43 All. 394, Foll. 83 Ind. Cas. 848=46 All. 560=22 A.L.J. 439=5 L.R.A. (Civ.) 380=A.I.R. 1924 All. 700.

——S. 42, O. 20, R. 11 (2) and C. P. Money-Lenders Act, S. 11—Power of transferee Court to grant instalments.

Decree passed by Court outside Central Provinces —Such decree coming before Court in Central Provinces for execution—Decree not providing for payment by instalment—Executing Court cannot grant instalment by virtue of S. 11, C. P. Money-Lenders' Act, or by virtue of O. 20, R. 11 (2) read with S. 42, C. P. Code. A.I.R. (Vol. 30) 1943 Nag. 340=214 Ind. Cas. 130 (F.B.); Overruling A.I.R. 1937 Nag. 409=20 N.L.J. 141=I.L.R. (1938) Nag. 407=172 Ind. Cas. 671.

——S. 42, O. 20, R. 11 (2)—Transferee Court's power to pass instalment order.

Section 42 does not empower the Court to which a decree is sent for execution to pass an order which has the effect of amending, altering or varying the decree itself. An order for payment of a decree by instalments, which is made after the decree has been passed, has an effect of altering or varying the terms of the original decree, and consequently it is not within the competence of the transferee Court to make such an order. A.I.R. (Vol. 21) 1934 Rang. 165=12 Rang. 320=151 Ind. Cas. 937.

——S. 42, O. 21, R. 7—Decree against dead person—Decree transferred to another Court for execution—Transferee Court's power to refuse to execute decree.

Although it is not competent for an executing Court as a rule to entertain an objection as regards the jurisdiction of the Court which passed the decree, yet it can refuse to execute a decree when it finds that the decree is against a dead person and, therefore, a nullity. A Court to which a decree is transferred for execution has power to entertain an objection that the decree was passed against a dead person and is, therefore, a nullity, when such an objection is raised before it. There is no distinction in this respect between the powers of the Court passing a decree and those of the Court to which a decree is transferred for execution. A.I.R. (Vol. 21) 1934 Lah. 117=154 Ind. Cas. 717.

——S. 42—A Court to which a decree is transferred for execution cannot execute it in absence of regular application therefor under O. 21, Rr. 10 and 11. 80 Ind. Cas. 59=A.I.R. 1924 Nag. 413.

——S. 42 and O. 21, R. 16—Scope.

Section 42 does not override plain words of O. 21, R. 16 but it is subject to it. A.I.R. 1934 Lah. 648 (2)=16 Lah. 63=37 P.L.R. 437=154 Ind. Cas. 928.

——S. 42 and O. 21, R. 16—Powers of transferee Court—Application by heirs of deceased decree-holder—Civil and Revenue Courts—Revenue Court in execution of an ejectment decree cannot put heirs of decree-holders in possession.

Under R. 16 of O. 21, the heirs of a deceased decree-holder may apply for execution to the Court that passed the decree, and under S. 42 they can do so equally to any Court to which that decree has been transferred for execution. It would seem also that the right to apply for execution in these circumstances includes the right to carry on an execution already initiated by the deceased decree-holder. But both these things can be done only in a Civil Court. The Tahsildar as a Revenue Officer has certain powers in the execution of a decree by ejectment, but he cannot execute such a decree in favour of any one but the person named in it. When he is ordered to give possession of a holding to a certain person who is then alive, he has no more power to give possession to anybody else whom he considers to be the heir of that person, than a Mazkuri would have in the same circumstances. 71 Ind. Cas. 409=A.I.R. 1923 Nag. 195.

——S. 42 and O. 21, Rr. 26 and 29—Stay—Order for—Jurisdiction of transferee Court to pass——Executing Court, if has jurisdiction to pass order staying execution transferred to it.

It is the duty of a Court to which a decree has been sent for execution to execute that decree. It has the power necessary for that purpose but it certainly has not power to refuse to execute the decree, even for a short period, save and except in the circumstances set out in O. 21, R. 26. The executing Court has no jurisdiction to pass an order purporting to be passed under O. 21, R. 29, staying execution of the decree which had been transferred to it for execution and when such order is passed, it being without jurisdiction will be set aside. A.I.R. (Vol. 23) 1936 Rang. 184=162 Ind. Cas. 865.

——S. 42, O. 21, R. 29—Power to stay execution.

Under the provisions of Ss. 37 and 42, C. P. Code, the Court, to which a decree has been transferred, has powers to stay the execution of the decree under O. 21, R. 29. A.I.R. (Vol. 21) 1934 Cal. 4=57 C.L.J. 444=37 C.W.N. 846=60 Cal. 1119=148 Ind. Cas. 165.

——S. 42—Court to which decree is transferred for execution is bound to stay execution when acquainted with the fact that decree is no longer in existence.

Although the Court to which a decree is transferred for execution has no power to entertain any objection regarding the legality or propriety of the order directing execution or the right of the person shown in the order as the person entitled to execute the decree, yet it is the duty of the executing Court, on being acquainted with facts showing that the decree is no longer in existence, being superseded by another decree of the appellate Court, to refuse to allow the sale to proceed. The effect of the appellate Court's decree on appeal is to cancel the trial Court's decree, and any sale under the decree of the lower Court is null and void and must be set aside. 4 Rang. 562=100 Ind. Cas. 285=5 Bur.L.J. 239=A.I.R. 1927 Rang. 104.

——S. 42—Transferee Court cannot question the jurisdiction of the Court which passed the decree. A.I.R. (Vol. 27) 1940 Bom. 277=42 Bom.L.R. 596=I.L.R. (1940) Bom. 633=190 Ind. Cas. 394.

——S. 42, O. 21, R. 26—Transferee Court, if has jurisdiction to consider validity of order of transfer.

Section 42 and O. 21, R. 26, should not be read as giving the Court which passed the decree and the Court to which the decree is sent for execution, concurrent jurisdiction to determine questions affecting the validity of a proceeding in the former Court.

A.I.R. (Vol. 24) 1937 Rang. 477=1937 Rang.L. R. 287=173 Ind. Cas. 160.

——S. 42—Judgment-debtor desiring to question order of transfer—Procedure.

Judgment-debtor desiring to question order of transfer—Proper procedure is to obtain stay under O. 21, R. 26 by an application to the transferee Court to enable him to make objection in transferring Court. A.I.R. 1936 Rang. 271=14 Rang. 550=163 Ind. Cas. 403.

——S. 42—Propriety of order of execution.

A Court executing a transfer decree cannot entertain any objection regarding the legality or propriety of the order directing execution. 123 Ind. Cas. 531= A.I.R. 1930 Lah. 143.

——S. 42—Right to go into question of limitation—Good faith of previous application—Whether essential.

A Court to which a decree has been transferred is entitled to go into the question of limitation when the Court transferring the decree has expressed an opinion on the question of limitation without giving the judgment-debtor an opportunity of being heard. The question of whether a previous application for execution was made in good faith for the purpose of executing the decree or merely for the purpose of keeping execution proceedings alive, is immaterial. A.I.R. 1935 Nag. 131=31 N.L.R. 333=156 Ind. Cas. 114.

——S. 42 and O. 21, R. 28—Power of transferee Court—Objection to execution—If can entertain.

Where the transmitting Court has made no order for execution but has merely transmitted the decree and the certificate of non-satisfaction, the executing Court can entertain an objection to the decree-holder's right to proceed against any property other than that charged in the decree. 2 O.L.J. 18=27 Ind. Cas. 597.

——Ss. 42, 51—Attachment of decree in favour of judgment-debtor by Court to which the decree has been sent for execution—Legality.

The method of execution by attachment and sale of a decree in favour of the judgment-debtor, is one of the methods of attachment which fall within Cl. (e) of S. 51. The attachment and sale of a decree in favour of judgment-debtor falls within the method of attachment prescribed by Cl. (b) of S. 51. The words of S. 42 that 'the Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself' mean that the Court to which the decree has been sent for execution is empowered to execute it in any of the ways prescribed by S. 51 that is applicable to that particular kind of decree. A.I.R. 1940 Pat. 557=21 P. L.T. 427=19 Pat. 832=188 Ind. Cas. 488=6 B. B. 698.

——S. 42 and O. 21, R. 48—Attachment—Power of transferee Court.

When a decree is transferred to a Court other than the Court which passed the decree, for execution the Court to which it is transferred has the power of attachment under O. 21, R. 48 (1). 1 Luck. 46=6 O.W.N. 1144=13 O.L.J. 174=91 Ind. Cas. 1043= A.I.R. 1927 Oudh 112.

——S. 42—Powers of executing Court.

The executing Court would have power to determine the question under O. 21, R. 50 (2) whether a person is a partner in a firm or not: A.I.R. 1921 All. 199, Foll. 115 Ind. Cas. 536=A.I.R. 1929 Lah. 228.

——S. 42—By S. 42 the Court to which a decree or order is transferred for execution is for the purpose of O. 21, R. 50 (2) the "Court which passed the decree" and is competent to determine the question whether a certain person is a member of a firm. 61 Ind. Cas. 401=43 All. 394=19 A.L.J. 187=A. I.R. 1921 All. 199 (2).

——S. 42, O. 21, Rr. 50 (2), 10—Alleged partner's liability under R. 50 (2).

The Court to which a decree has been transferred for execution has no jurisdiction to decide the question of a person's liability under O. 21, R. 50 (2). The decree-holder must apply to the Court which passed the decree. A.I.R. 1942 Mad. 501 (2)=55 L.W. 175=(1942) 1 M.L.J. 377=1942 M.W.N. 245=I.L.R. (1942) Mad. 688=202 Ind. Cas. 139.

——S. 42 and O. 21, R. 53 (4)—Powers of transferee Court.

Per *Rowland, J.*—The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself in regard to the steps contemplated by O. 21, R. 53 (4). A. I. R. 1940 Pat. 557= 21 P. L. T. 427=19 Pat. 832=188 Ind. Cas. 488=6 B.R. 698.

——S. 42—Power of transferee Court to decide question under O. 20, R. 58.

Section 42 does not confer upon the Court to which the decree is transferred for execution, jurisdiction to decide a question under O. 21, R. 50. A.I.R. (Vol. 24) 1937 Pesh. 96=171 Ind. Cas. 779.

——Ss. 42, 68—Transfer of decree to Collector—Application for substitution of legal representatives—Proper Court.

Section 50 (1) does not give an exclusive jurisdiction to the Court which passed a decree for the purposes of substituting the names of legal representatives of the deceased judgment-debtor; an application may also be made to, and orders passed by a Court to which the decree has been transferred for execution.

Section 68 merely states that the execution of the decree shall be transferred to the Collector. It does not state that the Collector shall become the Court executing the decree. The powers conferred by the Code, on the Court executing the decree remain with that Court and do not pass to the Collector. A.I.R. (Vol. 18) 1931 All. 320 (2)=1931 A.L.J. 166=133 Ind. Cas. 609.

——S. 43—[Ed. Note: This section has now been replaced by a new section by Act 2 of 1951].

The Agent and the Assistant Divisional Officers shall, in the hearing and determination of suits, have the same powers as are possessed by District Judges and Sub-Courts in the non-scheduled districts of Madras Presidency. (1936) M. W. N. 1141.

——S. 43—Court of Political Agent at Sikkim.

The Court of the Political agent at Sikkim is a Court established by the authority of the Governor-General-in-Council within the meaning of S. 43, C. P. Code. 38 Cal. 859=15 C.W.N. 992=11 Ind. Cas. 442.

——S. 43 (S. 229, Old Code)—Foreign territory—Execution—Court at Kondh.

The Court of the Subordinate Judge of Kondh is not a Court established in the territory of a foreign Prince or State within the meaning of S. 229, C. P. Code. A decree of the Court of the Native Commissioner or Sub-Judge of Kondh was transferred for execution by the Court of the Sub-Judge at Saran. *Held*:—That it may be executed in the Court of the Sub-Judge of Saran. (1906) 11 C.W.N. 622=6 C.L.J. 30=34 Cal. 576.

——S. 44.

See SS. 13 AND 14, SUPRA.

Synopsis.

1. Applicability.
2. Discretion of Executing Court.
3. Executability of decree—Powers of Executing Court.
4. Notification—Effect of.
5. Notice to judgment-debtor.
6. Objection by judgment-debtor.

[Ed. Note.—This section has now been replaced by a new section by Act 2 of 1951.]

1. Applicability.

——S. 44—Applicability — Presidency Small Cause Court, Madras.

S. 44, C. P. Code, is not one of the sections included in S. 8, C. P. Code, nor has S. 44, C. P. Code, been made applicable to the Presidency Small Cause Court. As S. 44 empowering British Indian Courts to execute the decree of notified Indian States has not been made applicable to the Presidency Small Cause Court that Court has no jurisdiction to execute a decree passed by a Munsif's Court in Travancore and transferred to the Presidency Small Cause Court for execution. (1917) 33 M.L.J. 539, *obiter*, not followed. 1950 M.W.N. 798=(1950) 2 M.L.J. 472.

——S. 44—Applicability—Small Cause Judge and Registrar.

A Judge of a Presidency Small Cause Court has jurisdiction to execute the decree of a foreign Court transmitted to it under S. 44, C. P. Code, but the Registrar of the same Court has no power under S. 13 or 35 of the Presidency Small Cause Courts Act to issue process in execution of a foreign decree. (1917) M.W.N. 498=6 L.W. 361=33 M.L.J. 539=40 Ind. Cas. 670.

——S. 44—Decree of Pudukotta Court—Execution in Burma.

A decree passed by a Court in Pudukotta State can be executed in Burma by virtue of Notification No. 4395-1-A. dated 8th December, 1904, under S. 44, C. P. Code, which is saved by Para. 9 of the Burma Laws Adaptation Order, 1937. A.I.R. (Vol. 25) 1933 Rang. 352=1938 Rang.L.R. 463=177 Ind. Cas. 634.

——S. 44—Transmission of decree for execution to Native State—Practice—Legality.

Section 44, C. P. Code, does not sanction the transmission of a decree of a British India Court to a Court in a Native State. Long practice cannot be relied on to justify such a transmission. An *ex parte* order of transmission is liable to be vacated within the period of limitation under Art. 182 of the Limitation Act. 32 M.L.J. 487=5 L.W. 646 =41 Ind. Cas. 41.

2. Discretion of Executing Court.

——S. 44—Courts may refuse execution—Discretion to refuse is not limited to Ss. 13 and 14, C. P. Code.

The expression "may be executed" in S. 44 gives a discretion to the Court, to which application is made for executing a decree, to refuse to execute it, though the discretion should not be capriciously exercised. That discretion is not with special reference to Ss. 13 and 14. Cases may arise where in the exercise of proper discretion, Courts of law in British India may properly refuse execution of such decrees even apart from the exceptions enumerated in S. 13. However, in practice, no case may arise where the grounds on which the Court may consider it proper to refuse execution in the exercise of its discretion, are not included in one or the other of the very general exceptions engrafted in S. 13. 86 Ind. Cas. 492=21 M.L.W. 330=A.I.R. 1925 Mad. 788.

——S. 44—Decree passed in Native State—Execution in British Indian Court—Submission—Waiver.

Section 44 merely lays down the method of procedure for the execution of decrees passed by Courts in certain native States as to which there is a Notification by the Governor-General in Council. There is nothing in the section which compels the British Indian Court to execute a decree transferred to it by a native State Court even if it is satisfied that the decree was passed without jurisdiction.

The submission to the jurisdiction must be to the foreign Court itself and probably before the judgment is pronounced, for, if there was no such submission, the judgment is a nullity. But appearance in the British Court may amount to waiver independently of this rule.

Where such a decree was sought to be executed in British India and the movable properties of the debtor were attached and the latter paid a certain sum of money and took time:

Held, (i) that the mere fact that the amount was deposited in part payment of the decree or that time was taken for the payment of the balance would not amount to an adjudication of the rights of the parties by the Court so as to operate as *res judicata* against the judgment-debtor in all subsequent proceedings, even though they arise out of a fresh transfer of the execution and relate to an entirely different set of properties;

(ii) that the judgment-debtor was not estopped as the decree-holder had not in any way been prejudiced by any representation of the judgment-debtor. A. I.R. (Vol. 18) 1931 All. 689=1931 A.L.J. 653= 53 All. 747=136 Ind. Cas. 353.

——Ss. 44 and 13—Execution of decrees of Native States—Duty of British Courts.

Per *Sadasiva Iyer, J.* (Contra *Sundara Iyer, J.*)—A suit does not lie in British India on decrees of the Courts of Native States, such decrees are made executable by notification by Governor-General in Council under S. 44, C. P. Code. Per *Sadasiva Iyer, J.*—(*Sundaram Iyer, J.*, dissenting. The word "may" in S. 44 is used in the sense of "will". When a Court is empowered to do a certain act on the application of a party it is bound to take action unless the Court has been expressly empowered to refuse it,

(1913) M.W.N. 605=14 M.L.T. 96=20 Ind. Cas. 704.

Judgment of sadasiva Iyer, J., affirmed on appeal. 30 Mad. 24=27 M.L.J. 535=16 M.L.T. 479=1 L.W. 887=(1915) M.W.N. 162=26 Ind. Cas. 287 (F.B.).

3. Executability of decree—Powers of Executing Court.

——Ss. 44, 13—Foreign judgment—Enforcement of, in British India—Necessary conditions.

A foreign judgment as such has no operation in British India. The only way in which a foreign judgment can be enforced in British India is by bringing an action upon it and or by executing the foreign judgment in certain specified cases under S. 44. Before a foreign judgment can be regarded as having extra-territorial validity, at least one of the following conditions must be satisfied: (1) The defendant should be a subject of the foreign country. This is based upon the ground of allegiance, which involves an obligation to comply with the judgments of the Courts of that country; (2) the defendant was resident, in the foreign country at the time when the action was begun against him; (3) the defendant was served with process while temporarily present in the foreign country; (4) the defendant in his character as plaintiff in the foreign action himself selected the forum where the judgment was given against him; (5) the defendant voluntarily appeared; (6) the defendant had contracted to submit to the jurisdiction of the foreign Court. A.I.R. (Vol. 25) 1938 Bom. 173=40 Bom.L.R. 77=I.L.R. (1938) Bom. 16=174 Ind. Cas. 615.

——Ss. 44, 13—Foreign judgment—Judgment in conflict with international law—Effect in India.

A foreign judgment, which totally disregards the comity of nations or which knowingly and perversely disregards the rights given to a British subject by the law of his country, will not and cannot be held to be of any effect in India. A.I.R. (Vol. 25) 1938 Bom. 173=40 Bom.L.R. 77=I.L.R. (1938) Bom. 16=174 Ind. Cas. 615.

——S. 44—Foreign Courts — Decree by — Execution in British India.

Obiter.—Where the Civil Procedure Code makes the provision for the execution by Courts in British India of decrees of Courts in such States as Baroda, such decrees are executable by the British Courts provided they are executable by the Courts of Baroda. A.I.R. (Vol. 24) 1937 Rang. 477=1937 Rang. L. R. 287=173 Ind. Cas. 160.

——S. 44—Foreign judgments stand on a different footing from judgments of British Indian Courts. The concluding words of S. 44 do not in any way control the operation of the provisions of S. 13, Cl. (a). A.I.R. (Vol. 22) 1935 Lah. 551=37 P.L. R. 240=158 Ind. Cas. 232.

——Ss. 44 and 13—Foreign judgment—Power of executing Court.

The provisions of S. 13 of the C. P. Code apply to decrees that are transferred to British Courts for execution under the provisions of S. 44. It is therefore open to the Court to which a decree of a foreign Court is transferred for execution to go into the question whether the decree is passed without jurisdiction. 39 Mad. 24 and 40 Bom. 551, Foll. 89 Ind. Cas. 347=98 Ind. Cas. 740=30 C.W.N. 785 =41 C.L.J. 508=A.I.R. 1925 Cal. 955.

——S. 44—Scope.

The words "may be executed in British India as if they had been passed by the Courts in British India" refer only to the mode of execution. They do not mean that such decrees should for all purposes whatsoever be placed in the same position as decrees of British Indian Courts. 86 Ind. Cas. 492 =21 M.L.W. 330=A.I.R. 1925 Mad. 788.

——S. 44 and O. 21, R. 7—Execution of decree —Decree ex parte by foreign Court—Validity.

A British Court executing a foreign decree can enquire whether the foreign Court had jurisdiction to pass it. A decree pronounced in absence of a party in a personal action by a Court of a foreign state, is null and void. 23 Cal. 22 (P.C.), foll. 40 Bom. 551=18 Bom.L.R. 486=36 Ind. Cas. 363.

——S. 44—Foreign judgment—Application for execution in British India—Limitation.

The Law of Limitation governing the execution of foreign decrees in British India is the law in force in British India and not the law in force when the decree was passed. An order for transmission of a decree to British Court cannot be treated as an order for execution. 40 Bom. 504=18 Bom.L.R. 481=36 Ind. Cas. 369.

——S. 44 (S. 229-B, Old Code)—Mourbunj in Orissa—Transfer of execution to—Part of British India. *See* 6 C.W.N. 573=29 Cal. 400.

4. Notification—Effect of.

——S. 44—Notification under, whether alters character of foreign judgment.

The mere fact that by reason of the notification issued by the Governor-General in Council under S. 44, C. P. Code, the plaintiff had the right to enforce the foreign judgment by an application for execution would not alter the legal character of the foreign judgment. In law, it would still be regarded as only creating an independent obligation on the judgment-debtor to pay the sum adjudged without involving a merger of the original cause of action. A. I. R. (Vol. 28) 1941 Cal. 64=I.L.R. (1941) 1 Cal. 171 =72 C.L.J. 148=45 C.W.N. 113=194 Ind. Cas. 746.

——S. 44—Notification under—Effect on decree of Native State.

A decree of a Court of a Native State does not cease to be the decree of a foreign Court simply because a notification under S. 44 of the Code has been issued. The provisions of the Civil Procedure Code relating to transfer of decrees for execution apply only to decrees made by British Indian Courts and transferred to other British Indian Courts. Section 44 only alters the procedure for enforcing foreign judgments of a particular class, namely those passed by Native States, where the necessary notification has been issued by the Governor-General in Council. A. I.R. (Vol. 25) 1938 Cal. 511=40 C.W.N. 591=63 C.L.J. 175=63 Cal. 1033=176 Ind. Cas. 380.

——S. 44—It is well-settled that when a decree of a foreign Court is sought to be executed in a British Indian Court under the provisions of S. 44, all objections which would be open to a defendant in a suit instituted under S. 13 to enforce a foreign judgment, would be open to the judgment-debtor. A. I. R.

(Vol. 25) 1938 Cal. 511=40 C.W.N. 591=63 C.L.J. 175=63 Cal. 1033=176 Ind. Cas. 380.

5. Notice to judgment-debtor.

——S. 44—Notice to judgment-debtor—Necessity.

When foreign decrees are sought to be executed in British Indian Courts, as an invariable rule notice ought to be issued by the executing Court to the judgment-debtor, to appear and state his objections if any, and execution should be ordered, if deemed proper only thereafter. 86 Ind. Cas. 492=21 M.L.W. 330=A.I.R. 1925 Mad. 788.

6. Objection by judgment-debtor.

——Ss. 44 and 13—Judgment-debtor can object to execution on the ground that the decree is not conclusive.

Sections 13 and 44 should be read together, but it ought not to be forgotten that S. 13 merely lays down a rule of *res judicata* and has nothing to do whatever, with the manner in which the rule of *res judicata* should be enforced. Further, S. 13 merely codifies the rules of international law, with regard to foreign judgments. Unless, therefore, under its provisions, a decree that is produced for execution is conclusive, as to the matter directly thereby adjudicated, it cannot and ought not to be executed. The judgment-debtor in such cases, is permitted by the very provisions of S. 13 to show how or why it is not conclusive, by showing that the case falls under one of the exceptions enumerated. 86 Ind. Cas. 492 =21 M.L.W. 330=A.I.R. 1925 Mad. 788.

——Ss. 44 and 13—Objection to execution.

An application for execution under S. 44 may be resisted on any of the grounds mentioned in S. 13. 39 Mad. 733=3 L.W. 90=19 M.L.T. 68=30 M.L.J. 148=(1916) 1 M.W.N. 83=32 Ind. Cas. 597.

Also 39 Mad. 24=27 M.L.J. 535=16 M.L.T. 479=1 L.W. 887=(1915) M.W.N. 162=26 Ind. Cas. 287.

——Ss. 44 and 21—Execution of foreign judgments.

Section 21 cannot be construed, as either legislating for foreign tribunals or codifying any rules of international law. The section has no application to cases of foreign judgments sought, under the provisions of S. 44, C. P. Code, to be executed in British Indian Court. 86 Ind. Cas. 492=21 M.L.W. 330=A.I.R. 1925 Mad. 788.

——S. 44-A—Applicability and requirements. *See* C. P. CODE, O. 21, R. 16 AND Ss. 44-A AND 146. (1946) 2 M.L.J. 132.

——Ss. 44-A (3) and 13—Suit by agent for commission—Defendant principal knowing such claim—Defendant neither present nor represented—Claim decreed—No appeal nor application —Decree if on merits.

The plaintiff who was an agent claimed commission. He set out the commission that he was entitled to, in a statement of claim endorsed on the writ. The defendants who were principals, at all material times knew that the plaintiff was claiming that commission and their agents knew that the Court would adjudicate upon that claim on the date of hearing. The defendants for their own purposes were not present at the hearing and were not represented at the hearing. They were content to let matters take their own course. The Court awarded that the plaintiff should recover from the defendants the sum claimed by him:

Held, that the controversy raised in the action was the subject of direct adjudication by the Court. If the defendants were absent through some inadvertence or accident, they could apply within eight days to have that judgment set aside. If they had any grounds for impugning the validity of that judgment they would have appealed to the Court of Appeal. The defendants did neither. Hence they failed to show to the satisfaction of the Court that the decree had not been given on the merits of the case. A.I.R. (Vol. 30) 1943 Cal. 42=75 C.L.J. 271=205 Ind. Cas. 85.

——S. 45—Decree passed by Court outside Kutch—Transfer for execution to Kutch—C. P. Code—Application to Kutch.

A decree of a Court outside Kutch can be transferred to Kutch for execution after 1st August, 1949, since the provisions of the C. P. Code are applicable to Kutch and as Kutch is to be administered as a Chief Commissioner's Province from that date. A.I.R. 1950 Kut. 11.

——S. 45—Application in British India for transfer of decree for execution to Court of Political Agent, Quetta.

The Court of the Political Agent, Quetta is one established or continued by the Governor-General in Council as shown by Notification No. 3072-F.B. of 16th October, 1903, which is reproduced in British Enactments in force in Indian States, Edn. 4, Vol. 1, p. 68. The Governor-General in Council had issued a notification extending the provisions of S. 45, of the C. P. Code, to the Courts established or continued by him in Baluchistan—Notification No. 786-I.B. published in the *Gazette of India* of 12th April, 1913, and that notification still continues to be in force by reason of para. 9 of the Government of India (Adaptation of Indian Laws) Order, 1937, until it is revoked or varied by the competent authority which is now the appropriate Provincial Government. Consequently an application to a Court in British India for transfer of a decree for execution to the Court of Political Agent, Quetta is a valid application and can constitute a step-in-aid of execution for the purposes of limitation. A.I.R. (Vol. 29) 1942 Pesh. 49=201 Ind. Cas. 610.

——S. 45—(Before amendment)—Khan of Qalat, if foreign or Indian Prince.

It is incorrect to say that Baluchistan is composed of two parts only, British Baluchistan and the tribal areas, for, the territories of the Khan of Qalat are also situated within the borders of Baluchistan and there can be no doubt whatever that he is a foreign or Indian Prince within the meaning of S. 311, Government of India Act, for he is under treaty obligation with His Majesty as is shown in Vol. 9, part 3, p. 398 of Aitcheson's Treaties.

Quetta being a part of his State is situated within the territory of a foreign Prince of State and not within tribal areas. A.I.R. (Vol. 29) 1942 Pesh. 49=201 Ind. Cas. 610.

——S. 45—(Before amendment) — 'Foreign Prince.'

The words 'Foreign Prince' in S. 45 refer to Courts in Native Indian States in alliance with the

British Government. A.I.R. (Vol. 29) 1942 Pesh. 49=201 Ind. Cas. 610.

——S. 45—Courts contemplated by section.

The Courts contemplated by S. 45 are Courts in the Native Indian States in alliance with the British Government. 23 S.L.R. 205=114 Ind. Cas. 98= A.I.R. 1929 Sind 45.

——S. 45—Attachment before judgment.

An order of attachment before judgment issued by British Indian Court against the partnership property lying in Dutch territory is indubitably inconsistent with the supremacy of the Dutch Government and the mandate issued to the British Consul therein cannot be maintained. 23 S.L.R. 205=114 Ind. Cas. 98=A.I.R. 1929 Sind 45.

——Ss. 45 and 39—Transfer of decree to Travancore Court—Execution—Lim. Act, Arts. 182 (5) and 182 (6).

Courts in British India have no power to send their decrees for execution to the Courts in Travancore but may and should send to those Courts, the documents they require to enable them to execute the decrees under the powers conferred upon them by the Travancore legislature. An application for such sending of a decree for execution is neither an execution application nor a step in aid of execution within Art. 182 (5), as the C. P. Code and the Limitation Act contemplate execution by British Courts in India on application made to them. The issue of a notice to the judgment-debtor on any such application does not give any fresh starting point. 40 Mad. 1069=33 M.L.J. 130=6 L.W. 203=22 M.L.T. 139= (1917) M.W.N. 712=42 Ind. Cas. 294 (F.B.).

——S. 45 (S. 229-A, Old Code)—Transfer of decree for execution to Tributary Mahals of Orissa—Jurisdiction.

Tributary Mahals of Orissa are not part of British India and no decree can be transmitted to those territories for execution without a previous notification in the *India Gazette* therefore. (1902) 29 C. 400= 6 C.W.N. 573.

——S. 46 and O. 38, R. 7—Applicability—Attachment before judgment—Property lying outside jurisdiction.

Order 38, R. 7 and S. 46 have no application to a case where application for attachment before judgment of property lying outside the jurisdiction of the Court is made and that Court sends the orders of attachment for execution. A.I.R. (Vol. 28) 1941 All. 212=1941 A.L.J. 225=1941 A.W.R. 135=1941 O.W.N. 550=195 Ind. Cas. 891.

——Ss. 46 and 136 and O. 38, R. 5—Attachment before judgment—Property beyond local limits.

Though the property referred to in O. 38, R. 5 (b) must be property within the Courts jurisdiction, no such restriction is imposed with regard to the property mentioned in clause (a). Property without local limits of the Courts may be attached before judgment. 4 Bur.L.T. 89=10 Ind. Cas. 794.

——S. 46—Attachment before judgment—Removal—Power of Court.

Court can attach before judgment property situate outside the local limits of its jurisdiction. Similarly it has power to entertain an application for the removal of the same. A.I.R. (Vol. 18) 1931 Rang. 279=9 Rang. 561=135 Ind. Cas. 326.

——S. 46—Attachment under precept—Not an attachment in execution.

An attachment under a precept under S. 46 is not an attachment in execution proceedings. The attachment is merely a step taken to facilitate execution. A.I.R. (Vol. 27) 1940 Cal. 26=I.L.R. (1939) 2 Cal. 370=185 Ind. Cas. 811.

——S. 46—Application under section—Nature of.

An application for an attachment under S. 46 cannot be regarded as an application for execution. 90 Ind. Cas. 527=A.I.R. 1926 Cal. 249.

——S. 46, O. 21, Rr. 46, 104—Court issuing process instead of garnishee order or precept—Whether makes receipt of money otherwise than in course of execution.

The fact that instead of issuing a precept under S. 46 or a garnishee order under R. 104 of O. 21, the Court issued a process under R. 46 of the same order does not make the receipt of this money otherwise than in the course of the execution. A.I.R. (Vol. 21) 1934 Oudh 11=10 O.W.N. 1282=9 Luck. 278=147 Ind. Cas. 68.

——S. 46—Attachment of a debt made outside jurisdiction of Court made directly and not by precept is illegal.

Court of Small Cause, Rangoon, attaching debt at Mandalay:

Held, that Mandalay being outside jurisdiction of Small Causes, Rangoon, attachment was illegal. A.I.R. (Vol. 27) 1940 Rang. 34=1939 Rang.L.R. 694=187 Ind. Cas. 105.

——S. 46—Procedure—Court issuing precept—Whether can attach property itself.

Under S. 46, it is open to the Court passing a decree to send a precept to another Court which is competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept. Where a precept is applied for under S. 46, all that the Court passing the decree can do is to issue a precept to another Court specifying the property which the latter is required to attach. It is not open to the Court issuing the percept to attach such property itself. The Court to which it is issued must attach the property and wait for an application for execution being made by the attaching creditor. Such attachment subsists for two months and no longer, unless it is extended by another order of the Court issuing the precept. The attaching Court is the Court to which the precept is issued and not the Court which issues the precept. A.I.R. 1933 All. 844=1933 A.L.J. 902=146 Ind. Cas. 991.

——S. 46—Power of transferor Court to issue precept.

After the transfer of the decree for execution, the Court which passed it retains jurisdiction for certain purposes out of which S. 46 is one. The object of a precept is to enable a decree-holder to obtain an interim attachment when there is ground to apprehend that he may otherwise be deprived of the fruits of his decree and it can be issued by the parent Court even after the decree is transferred. 31 C.W.N. 653=102 Ind. Cas. 513=A.I.R. 1927 Cal. 581.

——S. 46—Precept by transferee Court not competent.

S. 46 enables a judgment-creditor to apply for a

precept to 'the Court which passed the decree,' and so a Court to which a decree is transferred for execution is not competent to issue precept. 92 Ind. Cas. 621=A.I.R. 1926 Sind 157.

——S. 46—Validity of precept—Jurisdiction to question.

The Court to which the precept has been issued cannot vest itself with jurisdiction to question the validity of the precept. The issuing Court makes the order and the Court to which it is sent has only to carry it out. If any variation is to be made, it is the issuing Court which is competent to make it and not the Court to which it is sent. 31 C.W.N. 653=102 Ind. Cas. 513=A.I.R. 1927 Cal. 581.

——S. 46—Court to which a precept is issued can accept money or security.

A Court to which a precept is issued derives its authority from that precept and has no power to do anything not authorized thereby, but it must be presumed to have inherent powers to deal with all matters that may incidentally arise in connection with proceedings for attachment, and so a Court to which a precept is issued for attachment of property should do the same under the same circumstances. It cannot therefore be said that the Court has no jurisdiction to accept money or security. But even if the Court acts without jurisdiction, the judgment-debtor and the surety are both estopped from raising the objection, and cannot be allowed to challenge the validity of an arrangement brought about by themselves. 8 L.L.J. 164=27 P.L.R. 757=94 Ind. Cas. 119=A.I.R. 1926 Lah. 433.

——S. 46—Concurrent execution—Permissibility.

Indeed in principle there seems to be no difference between a concurrent execution after transfer in another Court and a concurrent execution in the Court in which the decree was passed. That the present Code does not view with disfavour concurrent execution is among other sections indicated by S. 46 which is new and relates to precepts. Two applications for attachment of different properties can proceed simultaneously in execution of the same decree. There is no provision of law which prevents the Court from entertaining a fresh application for the execution of the decree by attachment of money in deposit to the credit of the judgment-debtor in the same Court or in any other Court, when another execution proceeding is going on, in the same Court. 71 Ind. Cas. 741=2 Pat. 328=4 P.L.T. 99=1923 P.H.C.C. 61 =A.I.R. 1923 Pat. 224.

——S. 46—Scope and object—Indefinite order making attachment permanent.

The object of S. 46, is to attach property of the judgment-debtor in another Court in order to prevent the judgment-debtor from alienating or otherwise dealing with it to the detriment of the decree-holder till proper proceedings for the sale of the property in pursuance of an application for execution can be taken, and it is for this reason that the effect of an attachment in pursuance of a precept is limited to two months and power is given to the Court which passed the decree to extend this period of two months in order to meet contingencies which may arise due to the delay in transferring the decree to the Court to which the precept has been sent. An indefinite order, that the attachment had been made permanently, is not one contemplated by S. 46. A.I.R. (Vol. 23) 1936 Lah. 486=163 Ind. Cas. 374.

——S. 46—Attachment of money in pursuance of precept—Another decree-holder can attach same after expiry of sixty days.

When money is attached in execution of a decree it cannot be paid over to another decree-holder who subsequently attaches it, but when the money is not attached in execution of a decree, but in pursuance of a precept under S. 46, the effect of which is limited only for two months after which period the attachment no longer exists, the money attached under the precept can be paid over to another decree-holder who subsequently attaches it. A.I.R. (Vol. 23) 1936 Lah. 486=163 Ind. Cas. 374. [Reversing A.I.R. (Vol. 22) 1935 Lah. 914=161 Ind. Cas. 418.]

——S. 46 (2)—Order passed after expiry of time—Attachment, whether in effective.

An order passed by a Court extending the period of attachment always relates back to the date of the petition and has a retrospective effect even though the order was passed after the expiry of the statutory period of two months. It is enough if the application for extension was put in before the expiry of that period. 3 L.W. 336=34 Ind. Cas. 302.

SYNOPSIS.

——S. 47.

See also CIVIL P. C., Ss. 2 (2), 11—EXECUTION PROCEEDINGS; S. 38, (i) DECREE BINDING, (ii) POWER TO CONSTRUE DECREE; Ss. 50, 52, 73, 144 AND 145.

1. Appeal.

Appeal generally.
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Delivery of possession.
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Interlocutory order.
Limitation.
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Objection to attachment.
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See also CIVIL P. C., S. 47—APPEAL—ORDER.

Stay of execution.

2. Applicability. (*See also under* APPEAL.)
3. Bar of suit.

See also CIVIL P. C., S. 11—EXECUTION PROCEEDINGS.

4. Bar to execution.

See under CIVIL P. C., S. 47—EXECUTABILITY OF DECREE.

5. **Compromise decree.**
6. **Construction of decree.**
See also CIVIL P. C., S. 38—POWER TO CONSTRUE DECREE.
7. **Conversion.**
8. **Decree binding.**
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9 **Defence to suit.**
10. **Executability of decree.**
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13. **Limitation.**
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15. **Parties and Representatives.**
See also CIVIL P. C., S. 47—APPEAL.
16. **Personal property.**
See CIVIL P. C., S. 47—PARTIES AND REPRESENTATIVES.
17. **Powers of Executing Court.**
See also CIVIL P. C., S. 38—DECREE BINDING, AND S. 47—QUESTIONS RELATING TO EXECUTION—DECREE.
18. **Questions relating to execution.**
19. Rateable distribution.
See also CIVIL P. C., S. 73.
20. **Restitution.**
See also CIVIL P. C., Ss. 144, 151.
21. **Scope.**
22. **Title.**

——S. 47—Appeal against order—Applicability and Scope.

Every order made in proceeding under S. 47 is not necessarily appealable. 2 Pat. L.R. 222=84 Ind. Cas. 576=A.I.R. 1924 Pat. 683.

——S. 47—Appeal against order.

An order passed in execution cannot be appealable merely because it fulfils the conditions laid down in S. 47. In order to be appealable it must fall within the definition of decree in S. 2 (2). 94 Ind. Cas. 1=A.I.R. 1926 All. 401.

——S. 47—Appeal against order.

A *bona fide* auction-purchaser for value is not a party to the suit within the meaning of section 2 or S. 47 of the C.P. Code and an order refusing restitution against him is not a decree and therefore not appealable. 79 Ind. Cas. 57=A.I.R. 1925 Lah. 176.

——S. 47—Appeal.

Order granting stay of execution is not appealable as decree under S. 47. 46 All. 733=83 Ind. Cas. 1035=22 A.L.J. 706=5 L.R.A. (Civ.) 482=A.I.R. 1924 All. 808.

——S. 47—Appeal.

Admission of execution application—Order is appealable. 3 Pat. L.T. 146=70 Ind. Cas. 483=A.I.R. 1922 Pat. 59.

——S. 47—Appeal.

No appeal lies from an order accepting security or concerning sufficiency thereof. 41 Cal. 160, Foll. 106 Ind. Cas. 866.

——S. 47—Appeal.

In order to be appealable an order under S. 47 must be of such a nature as to come within the word "decree" as defined by S. 2 (2). 99 Ind. Cas. 455=A.I.R. 1927 All. 208.

——S. 47—Appeal.

Order striking off objection of judgment-debtor for default is not appealable (*Obiter*)—Remedy is S. 151 or O. 47. 26 A.L.J. 1395=112 Ind. Cas. 380=A.I.R. 1929 All. 123.

——S. 47 (244 Old Code)—Appeals against orders under S. 244—Applicability of, to proceedings other than suits—Separate judgment and order.

The provision of Chapter 17 of the Civil Procedure Code requiring a judgment separate from the order relate only to a regular suit and does not apply to orders under S. 244, C.P. Code. (1901) 6 C.W.N. 283.

——S. 47, O. 21, R. 58 (Ss. 244, 278, Old Code)—No appeal—Parties or representatives—Transfer of Property Act, Ss. 88, 89—Execution of decree—Appeal—Revision.

Certain property comprised in a decree under S. 88 was proclaimed for sale. As to a portion of this property an application was made by a person who alleged himself to be the owner thereof praying for its exemption from sale. This application purported to be, and was dealt with by the Court as, an application under S. 278, C.P. Code, and was allowed. The decree-holder appealed, and her appeal was entertained as an appeal under S. 244 and was allowed. *Held*, on appeal by the objector to the High Court that neither S. 278 nor S. 244 of the Code was applicable, the former, because the property in question had not been attached, the latter because the objector was not the representative of the judgment-debtors, but claimed adversely to them. No appeal lay to the High Court, but the memorandum of appeal was treated as a petition in revision. (1906) A.W.N. 62.

——S. 47—Appeal—Alteration of decree into instalment decree under O. 20, R. 11 (2).

An order converting a decree into an instalment decree under O. 20, R. 11 (2), C.P. Code, falls within S. 47, C.P. Code. As the order is appealable, no revision lies. 52 C.W.N. 440.

——Ss. 47 and 73—Appeal—Application under S. 73.

An order under S. 73, C.P. Code, is not an order under S. 47 and being consequently not a decree within S. 2 (2) is not appealable. 42 Cal. 1, Foll. 5 Pat. L.J. 415=1 Pat. L.T. 296=57 Ind. Cas. 421.

——S. 47 and O. 21, R. 90—Appeal—Application under—C.P. Code, O. 21, R. 90.

If order of the first Court setting aside a sale on application under S. 244 of Old Code is made after the new C.P. Code, the order should be treated as one under O. 21, R. 92 (1); the application must have been treated by the First Court as one under R. 90, O. 21 of new Code which has materially altered the law, and therefore, under S. 104 (2) a second appeal is not allowed. 8 Ind. Cas. 3=17 C.W.N. 525.

——S. 47 and O. 21, R. 90—Appeal—Application for setting aside sale—Appeal by stranger auction-purchaser—If competent.

An appeal by a stranger auction-purchaser against an order passed on an application for setting aside sale under O. 21, R. 90 and S. 47, C.P. Code, is incompetent, as he was not a party to the suit. 83 C.L.J. 197.

——S. 47—Appeal—Attachment—Objection by judgment-debtor—Order allowing—Appeal.

An objection filed by a judgment-debtor and not by a third party, to an attachment of property falls under S. 47, and the order allowing the objections being one under S. 47 is appealable. 85 C.L.J. 105=A.I.R. 1950 Cal. 174.

——S. 47—Appeal—Decision of preliminary point.

Where one of two issues is decided, no appeal lies before the second issue is gone into. 39 Bom. 339; 19 C.W.N. 755, Foll. 1 Pat. L.W. 759=(1917)P. H.C.C. 191=40 Ind. Cas. 517.

——S. 47—Appeal—Decision under O. 21, R. 58—Death of judgment-debtor pending claim petition—Claimant becoming his representative.

Where after a claim petition is filed under O. 21, R. 58, C.P. Code, the judgment-debtor dies and the claimant becomes his representative, a decision regarding the claim made thereafter, is a decision under S. 47, C.P. Code, and an appeal is, therefore, competent. 224 Ind. Cas. 381=50 C.W.N. 548=82 C.L.J. 131=A.I.R. 1947. Cal. 364.

——S. 47 and O. 21,Rr.97 and 103—Appeal—Decree-holder auction-purchaser—Application under O. 21, R. 97—Appeal.

Where a decree-holder auction-purchaser put in an application under O. 21, R. 97 of the C.P. Code for the removal of obstruction by the judgment-debtor and the Court refused to remove it the order is appealable as a decree under S. 47 read along with Ss. 2 (2) and 96 (1), O. 21, R. 103 cannot be read as providing expressly against any right of appeal which would otherwise be available. 12 L.W. 273=(1920) M.W.N. 562=61 Ind. Cas. 349=39 M.L.J. 603.

——S. 47—Rejection of application for delivery of possession.

An order rejecting the application for possession under S. 47 is appealable. A.I.R. 1933 Cal. 311=56 C.L.J. 520=147 Ind. Cas. 881.

——S. 47 and O. 21, Rr. 28 and 63—Appeal—Dismissal of objection to attachment on the ground that objector was a party to the suit—Suit by defeated claimant.

Where a person claiming to be a party to the suit preferred an objection to the attachment of certain property in the capacity of stranger and the objection is dismissed on the ground that he was a party to the suit. *Held*, that the remedy of the objector was to file a regular suit to establish his right to the property attached and not to proceed by appeal. 47 Ind. Cas. 904 (N.).

——S. 47 and O. 21, R. 90—Appeal—Dismissal of application to set aside sale—If second appeal lies.

A determination of any question within S. 47 is a decree, except a determination against which an appeal lies as an appeal against an order. An order dismissing an application to set aside a sale under O. 21, R. 90 falls under S. 47 but is appealable as an order and is therefore not a decree and no second appeal lies against it. (1916) 2 U.B.R. 139=11 Bur.L.T. 26=39 Ind. Cas. 374.

——S. 47 and O. 21, Rr. 100 and 101—Appeal—Dispossession by auction-purchaser—Application by dispossessed mortgagee disallowed—Appeal.

No appeal lies from an order disallowing an application made by a dispossessed mortgagee under O. 21, R. 100. 31 All. 82 (F.B.) Foll. 12 A.L.J. 672=24 Ind. Cas. 92.

——S. 47 (S. 244, Old.Code.)—Appeal—Execution—Building after execution—Application of judgment-debtor to demolish building as in contravention of decree.

The judgment-debtor, thinking that the decree-holder had encroached upon his land put in an application praying for demolition of certain portions of that building. The Courts below entertained the application under S. 244, C.P. Code, and ordered demolition. *Held* that the application being one which could not be entertained under S. 244, no appeal lay. The matter was, however, taken up in revision. (1905) A.W.N. 191=2 A.L.J. 749=28 A. 72.

——S. 47 (S. 244, Old Code)—Scheme suit—Appeal—Execution of Privy Council Order—Reference by Privy Council to District Court to frame rules.

The Privy Council referred to the District Court to frame rules for carrying out a scheme of management directed by the Order in Council :—*Held* that the reference was disposed of the case finally before the Privy Council and an order made by the District Court in pursuance of the reference was an order in execution and consequently appealable. (1907) 31 M. 406=4 M.L.T. 92.

——S. 47—Appeal—Execution sale—Setting aside.

Where a decree-holder took every proceeding under the Code to give effective power to the Court to sell certain property and on the day fixed for sale he asked the Court to dismiss his execution case, but on rejection of the application and sale of the property appealed to the District Judge and the order of the executing Court was set aside. *Held*, it was not appealable and High Court alone could set it aside and that the lower appellate Court having assumed jurisdiction in the matter, a second appeal lay to the High Court. 57 Ind. Cas. 396 (Pat.).

——Ss. 47 and 145—Supratdar—Claim for expenses—If a party in execution—Order passed if one under S. 47.

The decree-holder in execution of his decree attached certain furniture and other property. The properties attached being of a very heavy nature, the Court ordered that the same should be placed in possession of a *supratdar*; and on the orders of the Court the *supratdar* carried the property to the Court. On the objection of the third party, the property was released and the *supratdar* was ordered to deliver the property to the objector. The *supratdar* sought to recover his expenses from the decree-holder. The Court in execution held that the decree-holder was not bound to pay and ordered that the costs should be recovered from the judgment-debtor.

Held, that the order was appealable at the instance of the *supratdar*.

Held, also that the decree-holder was bound to pay the costs of the *supratdar*. Rules and Orders (Civil) of the Nagpur High Court were intended to meet such cases. A.I.R. 1943 Nag. 172=1943 N.L.J. 172=I.L.R. (1943) Nag. 699=207 Ind. Cas. 41.

1. Appeal—Execution sale.

——S. 47—Application under O. 21, R. 97—Dismissal under R. 99—Appeal, if lies.

Where the property sold in execution of a money decree is allotted to *A* in a partition suit filed by him against the judgment-debtor prior to the sale and his application under O. 21, R. 97, is dismissed under O. 21, R. 99, O. 21, R. 102 does not apply and the operation of S. 47 is not attracted and hence no appeal against the dismissal is maintainable. A.I.R. 1946 Pat. 134==24 Pat. 695.

——S. 47, O. 21 R. 92—Chota Nagpur Encumbered Estates Act (6 of 1876), S. 12-A—Application to set aside sale—Appeal.

An order deciding an application to set aside a sale in execution sale on the ground of irregularity in publishing and conducting the sale and on the ground that the properties were not liable to be attached and sold under the provisions of the Chota Nagpur Encumbered Estates Act falls within the purview of S. 47, C.P.Code and is appealable. A.I.R. 1931 Pat. 97 =12 P.L.T. 505= 131 Ind. Cas. 533.

——S. 47 and O. 21, R. 90—Appeal—Execution sale—Fraud.

Objections to an execution sale on the ground of fraud can only be made under O. 21, R. 90, C.P. Code, prior to confirmation. No second appeal lies from an order under O. 21, R. 92, C.P. Code, refusing to set aside the sale. 51 Ind. Cas. 447 (Lah.).

——Ss. 47 and 104, O. 43, R. 1 (J)—Appeal—Execution sales—Second appeal.

Even if a case for setting aside an execution sale comes under S. 47 an order refusing to set aside a sale, being appealable under S. 104, is outside the definition of a decree, and not open to second appeal. 46 Ind. Cas. 529 (Cal.).

——S. 47—Appeal—Execution sale—Setting aside—Purchase by decree-holder.

An application by the assignee of judgment-debtor to set aside a sale on the ground of fraud, collusion and limitation, is one under S. 47 and so appealable to the High Court. 18 C.L.J. 264=21 Ind. Cas. 938.

——S. 47—Appeal—Execution proceedings—Interlocutory order.

It is not every order made in execution of a decree that is appealable. Interlocutory orders in execution proceedings are not appealable ; the order must relate to the rights and liabilities of the parties concerned which but for the order would have to be determined by a separate suit. An order disallowing the objection of a judgment-debtor that a fresh attachment is necessary is not appealable. 34 All. 530=10 A.L.J. 56=15 Ind. Cas. 50.

——Ss. 47, 151 (Bhopal Act, Ss. 58, 134)—Appealability of orders in execution—Orders merely incidental not appealable—Exercise of inherent powers under S. 151—Order held merely incidental and not appealable—Inherent powers under S. 151 held could not be invoked.

In order to decide whether a determination of the question arising in execution proceedings is appealable as a decree or not, one must look to the combined effect of S. 47 and S. 2 (2) of the C.P. Code. Only such questions as relate to the rights and liabilities of the parties with reference to the relief granted by the decree are properly within the scope of S. 47 (58 Bhopal) of the Code, but orders that are merely incidental and relate to the conduct of the execution proceedings are not within the section. As for instance orders fixing the date of any sale, or refusing to stay proceedings, or even refusing leave to bid at execution sale are merely interlocutory and hence not appealable. No appeal is permitted by any provision of the Code confirming a sale and directing the issue of a certificate of sale in respect of the property sold. An appeal is permitted under O. 43, R. (1) (*j*) only when the executing Court either sets aside or refuses to set aside a sale, and in every case in which such orders are called for, there is bound to be an application by a party under R. 89, R. 90 or R. 91 or O. 21. Where there is no application there can be neither an order nor a refusal to set aside a sale. 190 Ind. Cas. 174 (Bhopal).

——Ss. 47 and 2—Appeal—Execution of decree—Declaratory decree—Execution allowed—Final order directing of land—Appeal against first order, if barred.

Plaintiff applied for execution of a decree directing that defendant should remain in possession of land yielding a certain amount of rice ; the defendant objected alleging that the decree being declaratory cannot be executed. The lower Court allowed the execution and passed later on the final order directing delivery to plaintiff of land other than that which defendant was entitled to retain. The High Court held that the order appealed against was appealable as it was a decree. 37 Mad. 29=10 M.L.T. 437=21 M.L.J. 1063=12 Ind. Cas. 664.

——S. 47—Appeal—Execution proceedings—Stay.

An order staying issue of warrant of attachment up to a certain date, is no step in execution of the decree and is not appealable. 64 P.W.R. 1911=101 P.L.R. 1911=9 Ind. Cas. 823.

——Ss. 47, 104 and O. 21, R. 90—Appeal—Execution Sale—Setting aside.

An application to set aside the sale on the ground of material irregularity and a collusion between the opposite party and the Amin, is both under Ss. 244 and 311 and a second appeal lies to the High Court. 2 Ind. Cas. 983 (All.).

——S. 47 and O. 21, Rr. 95, 97 and 98—Appeal—Resistance to execution.

Where the first Court held on an application complaining of resistance to execution that it was barred by limitation and the Appellate Courts held that it was not barred, a second appeal lies from the Appellate decree. 14 Cal. 234 =16 Mad. 127 foll. 13 C.W.N. 724=1 Ind. Cas. 785.

Appeal—Extension of time.

——S. 47—Compromise during execution of mortgage decree—Breach of—Remedy—Refusal of executing Court to direct other party to act according to compromise.

A compromise arrived at between the parties in execution of a mortgage decree, by which they postpone the confirmation of the execution sale, can be enforced only by a suit. An executing Court has merely got the business of confirming or refusing to confirm a sale and there is no power on the part of the High Court to entertain an appeal in any matter other than a refusal to confirm the sale or an order confirming the sale. A.I.R. (Vol. 24) 1937 Pat. 672=18 P.L.T. 799=4 B.R. 151= 172 Ind. Cas. 27.

——S. 47 and O. 84, R. 8—Appeal—Extension of time for redemption.

An order extending the time for redemption of a prior mortgage is within O. 34, R. 8, C.P. Code and is appealable. 35 All. 116=11 A.L.J. 62=18 Ind. Cas. 14.

——S. 47—Appeal—Extension of time—Bengal Tenancy Act.

Where the Court varies the terms of a decree by extending time which has no jurisdiction to do, there is no appeal from that order but it can only be set right by an application for revision. 112 Ind. Cas. 124= A.I.R. 1929 Cal. 140.

——S. 47—Order refusing extension of time.

An order granting or refusing an extension of time for performance in the case of a decree for specific performance is not the determination of a question under S. 47 and as such is not appealable. 5 Rang. 615=6 Bur.L.J. 216=105 Ind. Cas. 467=A.I.R. 1927 Rang. 311.

——S. 47—Appeal—Impeaching satisfaction of decree.

An application to a Munsif questioning the genuineness of a previous petition certifying satisfaction is one under S. 47, C.P. Code and hence the order rejecting it is appealable. 26 C.L.J. 317=40 Ind. Cas. 839.

——S. 47—Appeal—Insolvency—Application by receiver to set aside sale.

An application by a Receiver of an Insolvent's estate, to set aside a sale on the ground of a prior adjudication of the debtor is one under S. 47 and a second appeal lies to the High Court from an order in appeal. Only where O. 21, R. 90 and S. 47, C.P. Code both apply to a petition to set aside an auction sale that no second appeal lies under S. 100 but a second appeal will lie when S. 47 alone is applicable. 19 M.L.T. 357=3 L.W. 504=30 M.L.J. 611=34 Ind. Cas. 829.

——S. 47 (S. 244, Old Code)—Appeal—Joint decree—Sale in execution—Purchase by decree-holder—Receipt for part of decretal money given by one decree-holder on behalf of both.

Two persons holding a joint decree caused certain immoveable property of their judgment-debtor to be sold, and having obtained permission to bid, themselves became the purchasers. The property was knocked down to the two decree-holders jointly. An application was then made to the officer conducting the sale by one of the decree-holders auction-purchasers, but purporting to act in the name of and on behalf of the other auction-purchaser as well, asking that the purchase money should be set off against the amount due under the decree, and that to that extent satisfaction of the decree should be entered up. The Subordinate Judge, instead of confirming the sale, set it aside, on the ground that only one of the decree-holders auction-purchasers had put in the receipt under the second clause of S. 294, and directed a re-sale, and this notwithstanding that the other decree-holder admitted that the receipt had been presented on his behalf also. On appeal to the District Judge the order of the Subordinate Judge was set aside and an order passed confirming the sale. From this order the judgment-debtor appealed to the High Court on the sole ground that no appeal lay to the District Judge. *Held*, that the order passed by the Subordinate Judge was appealable as an order passed under S. 244 of the Code of Civil Procedure. (1901) A.W.N. 169=24 A. 108.

——S. 47, O. 21, R. 59 (Ss. 244, 318, Old Code)—Appeal—Judgment-debtor—Objector.

When an application is made by the assignee of the decree-holder purchaser for an order under S. 318, C.P Code the mere fact that the judgment-debtor put in an objection, does not make it an application under S. 244, C.P. Code so as to entitle the judgment-debtor to appeal against the order passed by the Court of first instance or by the Court of first appeal. (1904) 6 C.L.J. 749.

——S. 47, O. 21, R. 58 (Ss. 244, 278, Old Code)—Appeal—Claim as by shebait—Decree for personal debt.

A claim to attached property preferred by the judgment-debtor in the capacity of a Shebait to a Hindu Deity, when the decree was obtained against him for his personal debt, comes within S. 244, C.P. Code and not under S. 278. No appeal lies from such an order but where the order is without jurisdiction a revision may lie. Distinction between the nature of a proceeding under S. 244 and that under S. 278, C.P. Code pointed out. 8 C.W.N. 353.

——S. 47—Appeal—Collector—Order declining to intervene in execution.

If in execution of a decree, a Civil Court after attaching land, sends the file to the Collector, this amounts to an order asking the Collector whether he wishes to intervene. No appeal lies against an order of the Collector declining to intervene. *Obiter.*—If the Collector informs a Civil Court that he desires to intervene and the Civil Court authorizes him to do so, any order passed by the Collector subsequently, in exercise of the authority conferred by the Court is also appealable. 5 P.R. (Rev.) (1910)=8 Ind. Cas. 391.

——S. 47—Appeal—Competency—Order refusing to stay execution.

An appeal lies against an order of the lower Court refusing to stay execution. 1948 M.W.N. 777=61 L.W. 795=A.I.R. 1949 Mad. 196=(1948) 2 M.L.J. 421.

——S. 47, O. 21, R. 16 (Ss. 244, 232, Old Code)—Act 7 of 1888, S. 26—Effect of—Transferee's suit for a declaration that an assignment of a decree is valid, maintainability of—Order under S. 232, appealability of.

A suit for a declaration that an assignment to the plaintiff of a decree is valid is maintainable, S. 26 of Act 7 of 1866 has not taken away that right. An order under S. 232, C.P. Code is appealable. (1902) 26 M. 264.

(Obsolete—*See* now S. 47 OF THE CODE OF 1908).

——S. 47, O. 21, R. 90 (Ss. 244, 311, Old Code.)—Agreement to pay decree amount on certain date—Time essence of contract—Forfeiture—Relief.—*See* FORFEITURE AND CONTRACT ACT, S. 55. 6 C.L.J. 176.

——S. 47 (S. 244, Old Code)—Amendment of error in sale certificate is a question under S. 244—*See* JURISDICTION—INHERENT. 12 C.W.N. 1027 at 1028.

——Ss. 47, 50 (Ss. 244, 232, Old Code)—Appeal.

Where an application by the executor to the estate of a Hindu lady to execute a decree which fell to her share upon a partition of her husband's estate between herself and her sons was refused on the objection of sons and the judgment-debtors that the lady had only a life interest in the decree and that it passed on her death to her sons—*Held*, that an appeal lay from the order under S. 244, C.P. Code the question arising being a question between the legal representative of the lady and the judgment-debtors. (1906) 11 C.W.N. 239 (240).

——S. 47—Appeal from orders in execution proceedings.

An appeal need not be preferred against every order in execution proceedings. It is open to the party aggrieved to challenge. on appeal against the final order which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings. (1909) 9 C.L.J. 251=36 C. 422=2 Ind. Cas. 338.

——S. 47—Appeal—Mortgaged property—Purchaser at sale in execution of money decree—Dispute between him and mortgagee-decree-holder—Order—Appeal.

A purchaser of mortgaged property at a sale in execution of a simple money decree against the mortgagor is to that extent a representative of the debtor, and an order passed against him in execution proceedings arising out of the decree passed on the mortgage is open to appeal. A dispute between such purchaser and the mortgagee-decree-holder falls under S. 47, C.P. Code. 226 Ind. Cas. 366=A.I.R. 1947 Lah. 230=1946 Lah. (Rul.) 454.

——S. 47—Appeal—Mortgage suit—Final decree—Judgment-debtor dead before decree——Objection by legal representative to execution—Order on—Appeal.

Where a legal representative of a deceased judgment-debtor challenges the validity of the final decree in the mortgage suit on the ground that the judgment-debtor

had died before the final decree was passed and contends that it is not executable, the objection falls under S. 47 and an appeal lies from an order on such objection. A.I.R. 1950 Pat. 211.

——S. 47—Appeal—Objection as to who are legal representatives of deceased judgment-debtor—Decision on—Appeal.

A question between the parties as to who are the legal representatives of a deceased judgment-debtor falls within the purview of S. 47, C.P. Code, which enjoins the executing Court to decide the question of whether certain persons alleged to be the legal representatives of a deceased judgment-debtor are really so and the order on the objection is therefore appealable. 27 Pat. 848.

——S. 47—Appeal —Want of Notice.

In considering whether an appeal from an order under S. 47 should be allowed merely on the ground of want of notice in the execution petition, the Court must consider whether that want of notice has in any way prejudiced the appellant. 91 Ind. Cas. 414=A.I.R. 1926 Mad. 355.

Appeal—Amendment of decree.

——Ss. 47 and 96—Appeal—Application to amend execution petition—Order allowing application is appealable.

An order allowing an application by the decree-holder for an amendment of the execution petition by substituting the amount payable according to the preliminary decree as modified by the appellate Court in place of the amount fixed by the preliminary decree of the trial Court decides that the decree-holder was entitled to proceed with the execution of his decree and, therefore, an appeal against such an order will certainly lie. A.I.R. 1946 Mad. 383=1946 M.W.N. 227=I.L.R. (1947) Mad. 132=59 L.W. 240=(1946) 1 M.L.J. 347.

——S. 47—Appeal—Amendment of Decree.

An exercising Court has no power to amend a decree, but when it does pass an order to amend any decree its order comes within the purview of S. 47. 103 Ind. Cas. 173=A.I.R. 1927 Lah. 651.

——S. 47—Appeal—Application for mesne profits—Conversion into suit—Order of—Appeal.

There was a decree awarding mesne profits without fixing a period for calculation of mesne profits ; the Court rightly construed the period to be three years ; an application for mesne profits beyond three years as converted into a suit and an order was passed thereon ; *held*, it was a decree and so appelable. 1 L.W. 443= 24 Ind. Cas. 484.

——S. 47—Application to amend execution petition —Application presented after 12 years from decree —Order allowing amendment, whether appealable.

Where an application for attachment of the movable properties of the defendant was made a little before the expiry of 12 years from the date of the decree and after the expiry of 12 years, the decree-holder applied for leave to amend the execution petition by including a fresh prayer for the attachment of the defendant's immovable properties, the order allowing the amendment was not an appealable order as it was only an interlocutory order and did not conclusively determine any right. If the Court had gone further and attached the property the defendant would then have the right of preferring an appeal. A.I.R. 1936 Mad. 623=44 L.W. 99=71 M.L.J. 256=1936 M.W.N. 1220=164 Ind. Cas. 217.

——S. 47—Wrong description of property in decree—Only Court passing it can correct it under S. 151 and not the Court executing it—The amended decree is appealable—But in case it is refused, the order of refusal is not appealable, such an order not being a decree. A.I.R. 1940 Bom. 10=41 Bom.L.R. 1170=I.L.R. (1939) Bom. 708=186 Ind. Cas. 70.

——Ss. 47, 151, 152—Order amending decree passed not in execution but on separate application under Ss. 151-152.

An order amending a decree not passed in execution proceedings but on a separate application under Ss. 151-152, cannot in any sense be held to fall under S. 47, and no appeal lies from such an order. Revision of the order in question may lie. A.I.R. 1938 Lah. 4= 178 Ind. Cas. 677.

——S. 47—Appeal—Appeal by Decree-holder auction-purchaser.

Decree-holder who is also an auction-purchaser is a party in suit under S. 47 and an appeal would lie from the order in the proceedings. A.I.R. 1945 Bom. 386=47 Bom.L.R. 320.

——S. 47, O. 21, R. 88 ; O. 43, R. 1 (Ss. 244, 310-A, 588, Old code)—Appeal—Auction-purchaser representative of judgment-debtor not of decree-holder.

The section does not cover a question arising between a party and his own representative, *e.g.*, judgment-debtor and auction-purchaser. A purchaser at an auction sale in execution of a decree is the representative of the judgment-debtor, and not of the decree-holder. No appeal by the auction-purchaser would lie in as much as no appeal was given by S. 588, nor did the case fall within the purview of S. 244 of the Code. 19 A. 140, foll. 1908 A.W.N. 157=5 A.L.J. 557=30 A. 379.

——S. 47—Auction-purchaser and judgment-debtor—Questions between them.

As an auction-purchaser is the representative of the judgment-debtor, any question arising between him and the judgment-debtor cannot be said to be one between the parties to the suit or their legal representative within the meaning of S. 47, and therefore the auction-purchaser has no *locus standi* to maintain appeal as from a decree passed under the provisions of S. 47. A.I.R. 1937 Lah. 347=173 Ind. Cas. 505.

1. Appeal—Award.

——S. 47—Proceedings under S. 15, Arbitration Act are governed by S. 47 and an appeal is competent. The fact that the objection raised was that the award was given without jurisdiction, will not preclude the applicablility of S. 47. A.I.R. 1934 Lah. 49=35 P.L.R. 635= 151 Ind. Cas. 881. [Reversed in A.I.R. (Vol. 22) 1935 Lah. 602=161 Ind. Cas. 197].

——S. 47—Appeal—Award—Execution of Order in.

An award filed under Arbitration Act is enforceable as if it were decree and must be executed in the manner laid down by the C. P. Code. Hence S. 47, C. P. Code, is applicable for the purposes of an appeal. 115 Ind. Cas. 536=A.I.R. 1929 Lah. 228.

——S. 47—Execution—Order in.

For the purposes of S. 47 an award under the Arbitration Act must be considered to be a decree in a suit. An appeal would therefore lie against an order in execution of such award. 79 Ind. Cas. 477=16 S.L.R. 245= A.I.R. 1921 Sind 132.

——S. 47—Appeal—Claim by legal representative of deceased judgment-debtor claiming property as own.

A claim to attached property preferred by the legal representative of the deceased judgment-debtor, on the ground that the property belongs to her in her own right, falls under S. 47, C. P. Code, and not under O. 21, R. 58, and hence the order on the claim is open to appeal

and a revision is not the proper remedy. A.I.R. 1950 Pat. 90.

Appeal—Compromise decree.

——S. 47—Exdcuting Court holding that term in consent desree is not penal—Order, if appealable.

The terms of S. 47, C. P. Code, are wide. They cover all questions arising between the parties to the suit relating to the execution, discharge, or satisfaction of the decree. Clearly, they will cover the question whether a particular term or condition, in a consent decree is penal and whether it shall or shall not be enforced in execution against one of the parties because of its penal nature. A.I.R. 1943 Sind. 247=I.L.R. 1943 Kar. 245=210 Ind. Cas. 397.

——Ss. 47 and 96—Appeal—Compromise decree—Execution order.

An order in execution proceedings of a compromise passed in appeal from an order confirming the sale is appealable. 22 Ind. Cas. 497 (Cal.)

——S. 47—Appeal—Compromise decree.

Parties to a suit for accounts entered into a compromise and a preliminary decree was passed as to past accounts and the petition of compromise was attached to it, but no mention whatsover was made of one of the clauses in compromise relating to the sharing of the profits of a specified contract, as the compromise in para. 3 expressly provided that this matter would be entirely distinct and separate from the rest. When the accounts of this contract were about to be audited, the party entitled to a share in its profits insisted upon its rights to be represented at the audit. The other party denied this right, whereupon the former claimed under the terms of the compromise to refer the matter to arbitration, nominated its arbitrator, called upon the other party to nominate its arbitrator and on its failure to do so made an application to the District Judge under S. 8 (2).

Held, that the question before the Court was not one relating to the execution of any decree and that, therefore S. 47 had no application and no appeal was competent. 71 Ind. Cas. 817=A.I.R. 1924 Lah. 405.

Appeal—Conversion.

——Ss. 47, 115—Suit dismissed against one defendant — Objection by him against attachment—Revision, appeal.

Where a defendant, against whom the suit has been dismissed, raises an objection to an attachment in execution of decree, and the objection is rejected, no application in revision is tenable as an appeal lies under S. 47. A.I.R. 1934 Pat. 281=150 Ind. Cas. 703.

——S. 47—Appeal—Conversion of—Application into suit—Case between rival assignees of decree converted by Conrt into suit—Appeal lies.

Where two rival assignees from decree-holder applied for execution of the same decree and the question arose as to the validity of the assignments and the case was converted by Court into a suit under S.47 (2) and decided, an appeal lay from the decision as from one passed in a regular suit. 78 Ind. Cas. 495=3 Pat. 344=1924 PH.C.C. 193=A.I.R. 1925 Pat. 16.

Appeal—Court-fee.

——S. 47—Government of Bengal Notification No. 1872-J of May 23, 1921, limiting fees chargeable on appeal from order under S. 47 to amount chargeable under Art. 11—Sch. II, Court-Fees Act—Whether extends to orders under S. 144.

Notification of Govt. of India, No. 4650 of September 10, 1899, and repeated in Bengal Government Notification No. 1872-J of May 23, 1921, limited the fees chargeable on appeals from order under S. 47 to the amount chargeable under Art. 11 of Sch. II, Court-Fees Act. If it were the intention of the Government that appeals from orders under S. 144 would also be exempted from payment of *ad valorem* fees, the section would have been specifically mentioned. A.I.R. 1937 Cal. 152=41 C.W.N. 157=65 C.L.J. 165=I.L.R. (1937) 1 Cal. 637=171 Ind. Cas. 212.

——S. 47—The matter of the issue of a personal decree falls under S. 47. In Burma, the fee chargeable on appeals from orders under S. 47 is limited to the amounts chargeable under Art. 11, Sch. II, Court-Fees Act. A.I.R. 1936 Rang. 352=164 Ind. Cas. 639.

Appeal—Interlocutory order.

——S. 47 (3)—Dispute between person having rival claims to be accepted as legal representatives on one side only.

Section 47 (3) only relates to a dispute between one of the parties to the decree and a person claiming to be a legal representative on the other side. It does not apply where the dispute is between persons who have rival claims to be accepted as legal representatives on one side only. In such cases, no appeal lies and the decision is merely a summary decision for the purpose of enabling the proceedings to be carried on, without affecting any right which any person may have to the proceeds of the decree. A.I.R. 1941 Lah. 342=48 P.L.R. 435=196 Ind. Cas. 896.

——S. 47—Execution of decree deciding rights of parties to intestate estate—Court appointing Commissioner to investigate what sums were due to estate—Appeal.

During the course of execution proceedings a Commissioner was appointed to investigate the question as to what sums were due to the estate, so that the parties may be able to enjoy their respective properties in accordance with the award made :

Held, that the order was in the nature of an interlocutory order and was in no sense a final order and the appeal was not maintainable. A.I.R. 1940 Pat. 75=20 P.L.T. 796=185 Ind. Cas. 852.

——S. 47—Application for postponement of confirmation of sale refused for default—Sale confirmed—Order refusing to re-open is not appealable.

An application for postponement of confirmation of the execution sale was dismissed for default and the sale was confirmed. The applicant subsequently re-applied for re-opening of his application which the Court refused :

Held, also that no appeal was maintainable against the order refusing to re-open and that no case was made out for interference in revision. A.I.R. 1939 Rang. 115=1939 Rang. L.R. 134=181 Ind. Cas. 841.

——Ss. 47, 151—Application to come in record by the legal representation of deceased judgment-debtor—Refusal—If appealable.

An application under S. 151 was made in execution proceedings praying that the appellant be brought on the record, as the legal representative of the deceased against whose property the decree was sought to be executed. On the application being rejected, the appellant filed an appeal :

Held, that the question raised did not fall within the compass of S. 47. It could not be deemed to be a decree within the meaing of S. 2, Cl. (2), and hence no appeal lay, and that the order was also not open to revision as it was merely an interlocutory order, there being no case decided within the meaning of S. 115. A.I.R. 1936 Sind 166=30 S.L.R. 170=165 Ind. Cas. 305 (2).

——**S. 47**—Case under Guardian and Wards Act—District Judge holding he could examine accounts in detail—Enquiry ordered—Order asking guardian to certain sum—Judgment later on :

Held, that the former order on question of jurisdiction was an interlocutory order and could neither be appealed against under S. 47 nor could a revision be filed under S. 115. A.I.R. 1936 All. 179=1936 A.L.J. 36=1936 A.W.R. 100=1936 A.L.R. 283=161 Ind. Cas. 493=58 All. 721.

——**S. 47—Finding that Court has jurisdiction to execute and that application was not time-barred.**

Where to an application for execution of decree the respondents raised two objections, namely, that the Court had no jurisdiction to execute the decree and that the application was barred under S. 48, and the Judge, found against the respondents on these points :

Held, that no appeal lay against the findings of the Judge inasmuch as the Judge had not passed any final order in execution. A.I.R. 1933 Mad. 500 (1)=1933 M.W.N. 460=64 M.L.J. 735=37 L.W. 749=144 Ind. Cas. 929 (2).

——**S. 47—Appeal from interlocutory order.**

The word of S. 47 are very wide and, if they were taken in their literal sense, they might cover every order of an interlocutory nature that may be passed in execution proceedings, but the intention of the Legislature could not have been that every such order should be appealable as a decree. A.I.R. 1932 All. 136=1931 A.L.J. 1084=134 Ind. Cas. 833.

——**S. 47—Appeal—Interlocutory order.**

An injunction was granted to stay execution on the condition of filing security. The Judge, refused to accept security as sufficient and allowed two weeks' time to the jugment-debtor to produce some other persons as surety.

Held, that every interlocutory order passed in the course of execution proceedings is not appealable, and that an appeal lies only from a decree which must conclusively determine the rights of the parties with regard to all or any of the matters in controversy. 75 Ind. Cas. 793=A.I.R. 1923 Lah. 446.

——**S. 47—Appeal—Interlocutory order—Question between parties to the proceedings.**

An appeal lies against an interlocutory order passed in execution proceedings, where the order has the effect of reviving an application for execution dismissed for default especially when a fresh application by a decree-holder would be time barred. 57 Ind. Cas. 905 (Cal.).

——**S. 47—Appeal—Interlocutory order.**

It is not every order made in execution which is a decree, and an order granting or refusing a process for the examination of witnesses, or an order merely determining a point of law arising incidentally or otherwise in the course of a proceeding and not refusing or granting relief is not appealable. 2 U.P.L.R. (Lah.) 96=115 P.L.R. 1920=2 Lah.L.J. 398=56 Ind. Cas. 173.

——**S. 47—Appeal—Interlocutory order—Mortgage suit—Order reducing decretal amount.**

In execution of a mortgage decree for sale, the Court, on an objection being raised, passed an order stating that the mortgage debt had been split up and there ought to be rateable reduction in the decretal amount,

Held, that as the objection was not disposed of conclusively and the Court had still to determine the market value of the different portions of the property and the rateable liability of each item, its order was in the nature of an interlocutory order and so did not amount to a decree. A.I.R. 1930 All. 638=1930 A.L.J. 1381=125 Ind. Cas. 581.

——**S. 47—Direction to Collector.**

Where the judgment-debtor does not object to the sale of certain land in execution of a decree against him but the Collector, to whom decree is sent for selling that land returns it thinking that the land in question is not saleable, but the Court decides that the land is saleable and directs the Collector by its order to sell it, the order of the Court is merely a direction to the Collector, and there being no decision between the parties to the suit on any question relating to the execution, discharge or satisfaction of the decree, the order is not appealable. 115 Ind. Cas. 75=A.I.R. 1929 Lah. 391.

——**S. 47**—Order granting mortgagee interest on mortgage money for the time during which sale proceeds of mortgage property are lying in Court, is not appealable but is revisable. 118 Ind. Cas. 416=A.I.R. 1929 Rang. 127.

——**S. 47—Decree final or preliminary.**

An appeal need not be preferred against every order in execution proceedings. It is open to the party aggrived to challenge by an appeal against the final order which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings. 36 Cal. 422, Foll. Where the Court held that the decree was preliminary and could not be executed, and an application for final decree was held as time-barred, the decree-holder preferred an appeal in which he reiterated his plea that the preliminary decree could be executed.

Held, that he could urge the plea though he did not appeal from the order of the executing Court disallowing execution. 100 Ind. Cas. 653=A.I.R. 1927 Lah. 232.

——**S. 47**—Order directing properties to be sold in a particular order is not appealable. I.L.R. 27 Mad. 259 (F.B.) Foll. 78 Ind. Cas. 829=19 M.L.W. 235=33 M.L.T. 275=1924 M.W.N. 220=A.I.R. 1924 Mad. 527=46 M.L.J. 192.

——**S. 47—Sale postponed.**

An order refusing to postpone a sale or alter the terms of the sale proclamation either by raising the upset price or by dividing the property into lots, is only an interlocutory order. 75 Ind. Cas. 901=18 M.L.W. 615=1923 M.W.N. 894=A.I.R. 1924 Mad. 234=46 M.L.J. 71.

——**S. 47—Substitution of names of legal representatives of the deceased.**

Where the order of the Court below merely directs that the defendants are liable to render accounts as the legal representatives of the deceased judgment-debtor but the amount for which they are liable has not been determined, the question which has been actually determined by the Court below is merely a question relating to the substitution of the names of the defendants in the place of the deceased, and their liability to render the accounts directed by the decree as his legal representatives. It is not a question relating to the execution satisfaction or discharge of a decree. S. 47 therefore has no application. It is at best an interlocutory order and no appeal is maintainable but the defendants can raise the plea of their non-liability in the appeal from the final decree. 47 All. 543=87 Ind. Cas. 322=23 A.L.J. 458=6 L.R.A. Civ. 359=A.I.R. 1925 All. 588.

Appeal—Limitation.

——**S. 47—Execution application the last within period allowed by S. 48—Dismissal for default of decree-holder—Order falls under S. 47 and is appealable.**

An order dimissing for default of appearance of the decree-holder, an execution petition which was the

last of the kind that could have been filed within the period of limitation under S. 48, C. P. Code is an order which conclusively determines the rights of the parties with regard to all the matters in controversy in the suit and in such special circumstances of the case it is an order falling under S. 47, C. P. Code, and an appeal lies against such order. A.I.R. 1943 Mad. 346=56 M.L.W. 104=(1943) 1 M.L.J. 174=1943 M.W.N. 137=209 Ind. Cas. 613.

——S. 47—Appeal from order under—Copy of order—Necessity.

Appeal against order under S. 47 must be accompanied by a copy of the formal order or decree. If the copy is filed beyond limitation the appeal is barred by time. A.I.R. 1940 Oudh. 351=1940 O.L.R. 359=1940 O.W.N. 528=15 Luck. 669=188 Ind. Cas. 226.

——S. 47—An order deciding that an application for execution is not barred by limitation is a decree and is appealable. A.I.R. 1936 Mad. 812=71 M.L.J. 317=1936 M.W.N. 1037=44 L.W. 460=165 Ind. Cas. 59.

——S. 47—An order in execution disallowing a plea that the execution petition is barred by limitation and adjourning the proceedings until a future date is appealable. A.I.R. 1936 Mad. 801=1936 M.W.N. 575=71 M.L.J. 388=44 M.L.W. 486=164 Ind. Cas. 670.

——S. 47—Appeal—Limitation.

The question whether or not an execution was time-barred is a question within S. 47 arising between the parties and relating to the execution of the decree and therefore its decision is a decree as defined in S. 2. 2 Pat. L.R. 222=84 Ind. Cas. 576=A.I.R. 1924 Pat. 683.

S. 47 and Local Acts.

——S. 47—Refusal to amend decree under S. 8, U. P. Debt Redemption Act.

An order refusing to amend the decree under S. 8 of the U. P. Debt Redemption Act is not an order relating to execution, discharge or satisfaction of the decree and is, therefore, not appealable under S. 47. A.I.R. 1945 Oudh 251=1945 O.W.N. (C.C.) 230=1945 R.D. 377=20 Luck. 404=1945 A.W.R. (C.C.) 133=221 Ind. Cas. 620 (F.B.).

——S. 47 and U. P. Debt Redemption Act.

An order rejecting an application for amendment of decree under S. 8, U. P. Debt Redemption Act, falls within the purview of S. 47 and is therefore appealable. A.I.R. 1942 All. 394=1942 O.W.N. 607=(1942) A.W.R. 319=1942 A.L.J. 554=1942 R.D. 735=I.L.R. (1943) All. 48=203 Ind. Cas. 328 (F.B.).

——S. 47—Order under S. 13, Bihar Money-lenders (Regulation of Transactions) Act (7 of 1939), whether decree—Second appeal, if lies.

Obiter.—An order under S. 13, Bihar Money-lenders Act amounts to a decree and second appeal lies against an order under that section. It does finally determine the rights of the parties with regard to one of the points in controversy, namely, the valuation of the judgment-debtor's property for sale, and it does come clearly within the provisions of S. 47. It is true that an order under S. 11 fixing instalments does not amount to a decree, but two orders are quite different in nature. An order under S. 11 fixing instalments does not determine any rights of the parties. The order under S. 13 does finally decide one of the points in controversy. A.I.R. 1942 Pat. 237=23 P.L.T. 14=8 B.R. 335=198 Ind. Cas. 204.

——S. 47—Appeal from order under Election Offences Enquiries Act.

An appeal lies under S. 47, C. P. Code from an order refusing to execute order for costs passed by Governor in connection with election under S. 12, Election Offences and Enquiries Act. A.I.R. 1942 Pesh. 53=201 Ind. Cas. 331.

——S. 47 and U. P. Encumbered Estates Act.

Order that execution proceedings be stayed till decision of case under S. 7, U. P. Encumbered Estates Act is an order under S. 47—There can be an order under S. 47 which may not amount to decree and hence not appealable. But an order under S. 47 will be appealable under S. 271, U. P. Tenancy Act whether it amounts to a decree or not. A.I.R. 1941 Oudh. 609=1941 O.W.N. 1049=1941 O.L.R. 652=1941 R.D. 798=1941 A.W.R. 817=196 Ind. Cas. 172.

——S. 47—Notice under S. 34, Bengal Agricultura Debtors Act—Property of judgment-debtor sold—Application under S. 47 for declaration that sale does not affect his title—If appealable.

Where in spite of the notice under S. 34, Bengal Agricultural Debtors Act, the executing Court has proceeded to execute the decree and property of the judgment-debtor is sold, the judgment-debtor is entitled to raise the question in an application under S. 47, to ask for a declaration that the sale has not affected his title. The decision on that application would be appealable and it would not be open to High Court to interfere in revision. A.I.R. 1941 Cal. 251=I.L.R. (1940) 2 Cal. 226=194 Ind. Cas. 317.

——Ss. 47, 115—Application for setting aside sale under S. 174, Bengal Tenancy Act—Executing Court refusing to stay further proceedings and proceeding with application for setting aside sale—Order held came under S. 47.

A judgment-debtor applied for setting aside a sale in execution of a decree under S. 174, Bengal Tenancy Act. Subsequently the judgment-debtor made an application before a Debt Settlement Board for the settlement of his debts in which he included the debt due under the decree referred to above. Upon that a notice was issued under S. 34, Bengal Agricultural Debtor's Act, to the Court in which the execution case was proceeding. The execution Court refused to stay further proceedings and proceeded with the application for setting aside sale :

Held, that the order complained of was an order relating to execution and that although the auction-purchaser was a party to the proceeding it was still an order which came within S. 47 of the Code and the order was open to appeal and the application under S. 115 of the Code was not, accordingly competent. A.I.R. 1941 Cal. 264=45 C.W.N. 379=194 Ind. Cas. 805.

——S. 47—Madras Agriculturists Relief Act.

Proceedings under S. 19, Madras Agriculturists' Relief Act, cannot be regarded as proceedings in execution and S. 47 can have no application to them. Hence an order under S. 19 is not appealable under S. 47, Civil Procedure Code. A.I.R. 1941 Mad. 235=I.L.R. (1941) Mad. 261=53 M.L.W. 79=(1941) 1 M.L.J. 164=1941 M.W.N. 131=198 Ind. Cas. 760 (F.B.).

——S. 47—Order under S. 14, Orissa Money-lenders' Act.

An order fixing valuation under S. 14 of the Orissa Money-lenders' Act is appealable neither under any of the provisions in the Money-lenders' Act nor under S. 47, C. P. Code. A.I.R. 1941 Pat. 616=197 Ind. Cas. 837.

——S. 47—Order under N. W. F. P. Agricultural Debtors' Relief Act.

An order declining an interference with an application under S. 9, N. W. F. P. Agricultural Debtors' Relief Act is not a decision under S. 47, C. P. Code, and no

appeal lies from such order. A.I.R. 1941 Pesh. 8=192 Ind. Cas. 716.

——Ss. 47, 2 (2)—Decision of Court that judgment-debtors is not debtor under Bengal Agricultural Debtors Act (7 of 1936), falls under S. 47 and is decree.

The decision of a Court that the judgment-debtors are not debtors within the meaning of the Bengal Agricultural Debtors Act and are not therefore, entitled to the benefit of that Act, conclusively determines the question relating to the judgment-debtors' liability with reference to the relief granted by the decree and is a decree. A.I.R. (Vol. 27) 1940 Cal. 257=I.L.R. (1940) 1 Cal. 393=188 Ind. Cas. 483=44 C.W.N. 364.

——S. 47—Agra Tenancy Act.

Provision of Civil Procedure Code by which orders passed under S. 47 amount to decrees is not applicable to proceedings in Revenue Court under Agra Tenancy Act. A.I.R. 1940 All. 28=1939 A.W.R. 793=1939 A.L.J. 1014=185 Ind. Cas. 808.

——S. 47—Sale in execution of decree—Immediately after sale, executing Court receiving notice under S. 34, Bengal Agricultural Debtors Act and consequently setting aside sale—Order held appealable.

A judgment-debtor's property was sold in execution sale. Immediately afterwards, a notice under S. 34, Bengal Agricultural Debtors Act, from the Debt Settlement Board was received by the executing Court. Thereupon the Court passed an order purporting to have been made under S. 151, C. P. Code, to the effect that the sale which had just been held shoud be set aside and further proceedings in execution should be stayed under S. 34, Bengal Agricultural Debtors Act:

Held, that the question was obviously one between the parties to the suit and it related to the execution of the decree. Hence the order which was passed by the Court although it purported to be under S. 151 of the Code was actually one under S. 47 and was therefore, appealable. A.I.R. 1939 Cal. 334=43 C.W.N. 419.

——S. 47—Madras Act 4 of 1938.

An order dismissing an application under S. 20, Madras Agriculturists' Relief Act is not an appealable order under S. 47. A.I.R. 1939 Mad. 942=1939 M.W.N. 5910=0 L.W. 411=(1939) 2 M.L.J. 495=186 Ind. Cas. 424.

——S. 47—Agra Tenancy Act.

Order passed under S. 47, in proceedings under Agra Tenancy Act 1926—Order held could not be passed and hence no second appeal lies. A.I.R. 1931 All. 124=1938 A.L.J. 63=1938 A.W.N. 53=1938 R.D. 149=1938 A.L.R. 280=174 Ind. Cas. 481.

——S. 47—U. P. Agriculturists Relief Act.

Application under O. 34, R. 5 for making preliminary decree absolute—Application by judgment-debtor stating that he intends applying to local Government under U. P. Agriculturists Relief Act and praying for dismissal of application under O. 34, R. 5—Application of judgment-debtor dismissed—Appeal by him held not under Ss. 47 and 96 but one under U.P. Agriculturists Relief Act and hence not maintainable. (1937) 168 Ind. Cas. 721=1937 O.L.R. 313=1937 O.W.N. 594=1937 R.D. 324=13 Luck. 593.

——S. 47—Agra Tenancy Act, S. 79.

Proceedings under Ss. 79 and 80, Agra Tenancy Act relate to the execution, discharge or satisfaction of the decree within the meaning of S. 47, C. P. Code. A.I.R. 1937 All. 350=1937 A.L.J. 259=1937 R.D. 131=1937 A.W.R. 195=1937 A.L.R. 392=168 Ind. Cas. 680.

——S. 47—Dispute between parties on application under S. 79, Agra Tenancy Act, 1926, is one in execution and although the decision is under S. 47, C. P. Code, it is merely an order and not a decree under S. 3 (14) Agra Tenancy Act, and hence no second appeal lies from an order passed in such dispute. A.I.R. 1936 All. 451=(1936) A.L.J. 678=1936 R.D. 186=1936 A.L.R. 690=1936 A.W.R. 472=163 Ind. Cas. 971 (1).

——S. 47—Order under S. 47 passed under Agra Tenancy Act, 1926, is not a "decree" within the meaning of the Tenancy Act. A.I.R. 1934 All. 192=L.R. 14 A. 759 Rev.=17 R.D. 962=149 Ind. Cas. 532.

——S. 47—Agra Tenancy Act, 1926, S. 80.

Order of ejectment under S. 80, Agra Tenancy Act, is appealable to the District Judge. A.I.R. 1932 All. 92=1931 A.L.J. 529=15 R.D. 498=L.R. 12 A. 243 Rev.=53 All. 715=135 Ind. Cas. 547.

——S. 47—Bengal Tenancy Act, S. 173.

Where the question is one which is covered by S. 47, C. P. Code, an appeal is allowable from an order passed under S. 173, Bengal Tenancy Act, though no provision for appeal is made in the Act itself. 19 C.L.J. 81, Foll. 85 Ind. Cas. 750=A.I.R. 1925 Cal. 1223.

——S. 47—Deccan Agriculturists' Relief Act, S. 22.

An order under S. 22 passed in execution of a decree falls under S. 47, C. P. Code, so that an appeal from such an order. 63 Ind. Cas. 310=15 S.L.R 47=A.I.R. 1921 Sind 29.

——S. 47—Madras Estates Land Act, S. 77.

A petition filed for the execution of a decree given by a revenue Court in a suit filed under S. 77 of the Madras Estates Land Act is appealable and is also open to second appeal as in C. P. Code, S. 47. 100 Ind. Cas. 678=A.I.R. 1927 Mad. 440=52 M.L.J. 332.

——S. 47—Oudh Rent Act.

Where a Revenue Court executing a decree dismisses the judgment-debtor's objection in default of appearance, no appeal lies either under the Oudh Rent Act or the C. P. Code. 85 Ind. Cas. 393=28 O.C. 124=A.I.R. 1925 Oudh 485.

——S. 47—Appeal—Orissa Money-Lenders Act—Application under Ss. 11 and 13—Order on—Appealability 12 Cut.L.T. 85.

Appeal from orders on—Objection to attachment.

——S. 47—Conditional attachment before judment—Not made absolute—Execution—Court directing decree-holder to issue notice that property should be again attached before bringing to sale—Right of appeal.

Where in a case a conditional order of attachment of property before judgment is made and an *ex parte* money aecree is subsequently passed and in execution of such decree, the purchaser from the judgment-debtor after the decree puts in an objection before the condi-.ional order of attachment is made absolute and the Court holds that the objector has no *locus standi* to object at the same time proceeds indirectly to give him some relief by holding that as the provisional attachment had not been made absolute, the decree-holder will not derive any advantage from the provisional attachment and he must again attach the property before bringing in the sale and that the decree-holder must issue a notice upon the judgment-debtor under O. 21, R. 22, the action taken by the Court is in effect under S. 47, and the decree-holder has a right of appeal. A.I.R. 1938 Cal. 236=66 C.L.J. 222=176 Ind. Cas. 166.

for adjustment filed after the application for execution of an award decree is disposed of, is competent. Such an order comes under S. 47. A.I.R. 1939 Bom. 255=41 Bom. L.R. 417=183 Ind. Cas. 419.

——S. 47 and O. 21, R.66—Appeal—Order rejecting judgment-debtor's objection to statement of value in sale proclamation.

An order rejecting a judgment-debtor's petition in objection to the valuation given by the decree-holder for the purpose of sale proclamation is merely an interlocutory order and not a decree and is therefore, not appealable. 5 Pat. L.J. 270=(1920) P.H.C.C. 227=1 Pat. L.T. 645=56 Ind. Cas. 452.

——S. 47—Appeal—Order restoring possession under S. 37-A (8) of Bengal Agriculturists Debtors' Act.

An appeal lies from an order of restoration of possession after setting aside the sale under S. 37-A (8) of the Bengal Agriculturists Debtors' Act, as the matter relates to execution of the decree and comes, therefore, within the scope of S. 47, C. P. Code. A.I.R. 1947 Cal. 388.

——S. 47, O. 21, R. 66—Appeal—Order settling terms of sale proclamation.

The action of a Court in settling the terms of a sale proclamation is judicial and the order is appealable. 36 P.W.R. 1919=49 Ind. Cas. 539.

——S. 47, O. 21, R. 66—Appeal—Order on objection to sale proclamation.

Order of a Court fixing a valuation under O. 21, R. 66 is not a 'decree' and, therefore not appealable. 2 Pat. L.J. 13=38 Ind. Cas. 616.

——S. 47 and S. 104 (h), O. 21, R. 40—Appeal—Order dismissing application for arrest of judgment-debtor.

An order under O. 21, R. 40, C. P. Code, dismissing the application of a decree-holder for the arrest and imprisonment of judgment-debtor relates to the execution of a decree and is appealable. The concluding words of S. 104 (*h*) C. P. Code indicate that where an order directing the arrest or detention of the judgment-debtor is made in execution of a decree, it is to be treated under section 47. 1 Lah. 77=22 P.L.R. 1920=53 Ind. Cas. 68 (Lah.).

——S. 47—Appeal—Order refusing to execute decree.

It is not every order passed in execution proceedings that is a decree. The question whether the appellant is entitled to have the provisions of S. 72 of the C. P. Code carried out for his benefit is one within S. 47 of the Code, and the order is a decree within S. 2 of the Code. 52 Ind. Cas. 356 (Lah.).

——S. 47—Appeal—Order refusing to execute a decree.

An order refusing to execute a decree is a decree within the meaning of S. 47, C. P. Code and an appeal lies from such an order. 10 Bur. L.T. 159=(1916) 11 U.B.R. 119=36 Ind. Cas. 10.

——Ss. 47, 96 and 104—Appeal—Order for arrest in execution.

An order for arrest and detention made in execution of a decree is an order made under S. 47 of the Code being an order for the execution of the decree. Such an order is a decree which is appealable under S. 96 of the Code. S. 104 only relates to appeals from orders which do not amount to a decree. 32 All. 3=6 A.L.J. 912=3 Ind. Cas. 46.

——Ss. 47 and 2—Appeal—Order for arrest in execution.

An order deciding the legality of arrest made in execution of a decree falls under Ss. 47 and 2 and is appealable. 3 L.W. 35=32 Ind. Cas. 731.

——S. 47, O. 41, R. 5—Appeal—Order accepting security offered and staying execution.

An order by which security offered by the decree-holder under O. 41, R. 5, C. P. Code, before executing the decree is accepted and the delivery of possession is directed to be made to the decree-holder is appealable, inasmuch as the order directing delivery of possession is a final order and not an interlocutory or intermediate one. 22 C.W.N. 713=44 Ind. Cas. 166.

——S. 47, O. 21, Rr. 100, 101 and 103—Appeal—Order dismissing application under S. 100.

An order dismissing an application under O. 21, R. 100 is an order made under R. 101 within the meaning of R. 103, and the unsuccessful party though not a judgment-debtor, cannot have an appeal under S. 47, C. P. Code. 42 Bom. 10=19 Bom. L.R. 774=42 Ind. Cas. 73.

——S. 47, O. 21, R. 92—Appeal—Order not open to second appeal.

An order passed under the rule is not open to second appeal. 4 O.L.J. 372=41 Ind. Cas. 121.

——S. 47 and O. 21, Rr. 89 and 90—Appeal—Order extending time for payment of money.

Where an application by the judgment-debtor to set aside a sale under O. 21, R. 90 was pending, the decree-holder purchaser agreed to restore the property if the decree amount was paid within a fixed time and on non-payment of the money within time, the Dt. Munsiff extended the time for payment against the wishes of the decree-holder. *Held*, that the order of the District Munsiff was one under O. 21, Rr. 89 and 90 and therefore an appeal lay to the Dt. Judge. 36 Ind. Cas. 809 (Cal.).

——S. 47 and O. 21, R. 103—Appeal—Order for delivery of possession.

The question of delivery of possession arising between the decree-holder and defendant against whom no relief is granted is still under S. 47 and the order thereon is appealable. 29 M.L.J. 629=32 Ind. Cas. 769.

——S. 47 and O. 21, R. 101—Appeal—Order on petition under R. 101.

An order on an application by a judgment-debtor objecting to the sale of certain property in execution of a decree is, as between the parties to the suit, an order under S. 47 and is appealable though it disposes of objections made by third parties to the delivery of possession. 31 Ind. Cas. 102 (Mad.).

——S. 47—Appeal—Order in execution—When appealable.

An order in execution can come under S.47 only when it determines questions relating to the rights and liabilities of the parties with reference to the relief granted by the decree, not when it determines merely an incidental question as to the mode of the conduct of the proceedings. Where a Court refuses stay of execution, though certain proceedings to test the validity of the decree were pending the order does not come within S. 47 and is not appealable. 20 C.L.J. 512=27 Ind. Cas. 444.

——S. 47—Appeal—Order directing execution.

An order directing execution to issue against a judgment-debtor is a final order under S. 47 and is in effect a decree determining the rights and liabilities of parties with reference to the relief granted and as such is appealable. 19 C.L.J. 581=19 C.W.N. 1008=26 Ind. Cas. 866.

Appeal—Order fixing value of property.

——S. 47 and O. 21, R. 66—Appeal—Order fixing only market value and figure for commencing bidding.

The rights of parties are not conclusively determined

by an order, which only fixes the market value and the figure for commencing the bidding at an auction sale; and such an order not being a decree under S. 2, is not appealable. 14 C.L.J. 35, Foll. (1917) M.W.N. 141=37 Ind. Cas. 897.

——S. 47 and O. 21, R. 66—Appeal—Order determining value of property.

An order determining valuation of immovable property to be entered in sale proceedings is not a decree and is not appealable. 16 C.W.N. 124, Foll. 16 C.W.N. 970=17 Ind. Cas. 88.

——S. 47 and O. 21, R. 66—Appeal—Order fixing value of property to be sold in execution.

An order to be a decree must conclusively determine the rights of parties. An order assessing the value of the property to be sold in an execution proceeding is not a decree or order under Ss. 47 and 2. 14 C.L.J. 35=10 C.W.N. 124=10 Ind. Cas. 371.

——S. 47 and O. 21, R. 72 and O. 43, R. 1 (j)—Appeal—Order refusing leave to bid not appealable—C. P. Code, (1882), S. 294.

No appeal lies from an order refusing an application by a decree-holder for permission to bid at a sale in execution of a decree. 13 Cal. 174, appr. 38 Cal. 717=38 I.A. 126=15 C.W.N. 862=(1911) 1 M.W.N. 449=13 Bom. L.R. 694=14 C.L.J. 241=8 A.L.J. 1117=6 L.B.R. 26=4 Bur.L.T. 257=11 Ind. Cas. 545 (P.C.).

——S. 47 and O. 21, R. 89—Appeal—Order under O. 21, R. 89.

An appeal lies from an order under S. 310-A of the C. P. Code when the case falls under S. 244, (c) of the Code. 33 Bom. 698=11 Bom.L.R. 1113=4 Ind. Cas. 253.

——S. 47—Appeal—Order under O. 21, R. 93, C. P. Code, calling upon Nazir to refund commission received on sale proceeds deposited by purchaser—Applicability.

The Nazir who is an officer of the Court conducting the sale is in no sense a party to the case; and an order calling upon him to refund the commission received by him out of the sale proceeds, under O. 21, R. 93, C. P. Code, as a result of the sale being set aside, cannot be regarded as relating to the execution, discharge or satisfaction of the decree, and does not fall under S. 47, C. P. Code. Such an order under O. 21, R. 93 is not consequently appealable as a decree or as an order. A.I.R. 1949 Ajmer 47=1949 A.M.L.J. 1.

——S. 47—Appeal—Order.

S. 47 must be read with the definition of 'decree' in S. 2. The mere determination of a question would not be sufficient but that determination must amount to the formal expression of an adjudication which so far as regards the Court expressing it conclusively determining the rights of the parties with regard to the matters in controversy. An order in execution proceeding on a mortgage decree rateably reducing decretal amount is in the nature of an interlocutory order and not a decree. 1930 A.L.J. 1381=125 Ind. Cas. 581=A.I.R. 1930 All. 638.

——S. 47—Order under—Appeal.

A question in execution as to whether the execution can proceed or not is an order under S. 47 and is therefore appealable. 70 Ind. Cas. 483=3 Pat. L.T. 146=A.I.R. 1922 Pat. 59.

——S. 47—Appeal—Order.

An order allowing one of two assignees of a decree to execute the decree to the exclusion of the other is not appealable. 82 Ind. Cas. 734=21 N.L.R. 34=A.I.R. 1925 Nag. 186.

——S. 47—No appeal lies from an order refusing to restore an application in the Execution Department. 80 Ind. Cas. 39=5 L.R.A. Civ. 573=A.I.R. 1924 All. 794.

——S. 47—Order under—Appeal.

Even if a case does not strictly fall under S. 47, the order of the Court would be appealable if it purported to act under that section. 70 Ind. Cas. 329=32 M.L.T. 118=A.I.R. 1924 Mad. 518.

——S. 47—Appeal from order.

S. 47 must be read with S. 2 and the effect is only such orders as determine the rights of the parties to the execution with regard to all or any of the matters in controversy in suit is appealable. 48 All. 260=92 Ind. Cas. 644=A.I.R. 1928 All. 268.

——S. 47—Appeal from order.

In order to be appealable, an order under S. 47 must be of such a nature as to come within the word "decree" as defined by S. 2 (2). 99 Ind. Cas. 208=A.I.R. 1927 All. 208.

——S. 47—Order under—Appeal.

Order in proceedings under S. 47 is decree only if it determines a question which parties ask Court to decide as to their rights or liabilities and not if it decides merely incidental questions of procedure. 84 Ind. Cas. 576=2 Pat. L.R. 222=A.I.R. 1924 Pat. 683.

——S. 47—Order under—When decree.

Question if execution is time barred is under S. 47 and its decision is "decree" and is appealable. 84 Ind. Cas. 576=2 Pat. L.R. 222=A.I.R. 1924 Pat. 683.

——S. 47—Appeal from order.

An order passed in execution cannot be appealable merely because it fulfils the conditions laid down in S. 47. In order to be appealable it must fall within the definition of decree in S. 2 (2). 94 Ind. Cas. 1=A.I.R. 1926 All. 401.

——S. 47—Application for attachment dismissed—Application for restoration—If appealable.

In an execution proceeding the property to be attached was not pointed out on behalf of the decree-holder and the execution case was consigned to records for want of prosecution. An application was made to the Court praying that the decree-holder might be given one more opportunity to have the property to be attached pointed out on the spot, but this application was rejected.

Held, that no appeal lay from this order. 5 O.W.N. 529=110 Ind. Cas. 175=A.I.R. 1928 Oudh 329.

——S. 47 and O. 21, Rr. 15, 16—Appeal from order under, lies only if case comes under S. 47.

No appeal is provided against an order under O. 21, R. 15 or R. 16. It is only when such orders determine questions arising between parties to the suit or their representatives that they become appealable as decrees passed, under S. 47, C. P. Code. 70 Ind. Cas. 329=32 M.L.T. 118=A.I.R. 1924 Mad. 518.

——S. 47—Order of arrest—Appeal.

The order to have the force of a decree must not only relate to a question which falls within S. 47, but it must also determine the rights of the parties with regard to any matter in controversy between them as regards the decree. Hence an order passed under O. 21, R. 22, for arrest, not being a final order, is not a decree which can be appealed against: 14 C.L.J. 489, Foll. 30 M.L.W. 230=1929 M.W.N. 74=119 Ind. Cas. 43=A.I.R. 1929 Mad. 718.

——S. 47—Order for arrest—If within the section.

An order issuing a warrant for the arrest of a judgment-debtor in execution of a decree, falls under S. 47 and is

appealable as a decree under S. 96 though not under S. 104 (1) (*h*). 73 Ind. Cas. 766=A.I.R. 1924 Lah. 360.

——S. 47—Appeal from order for arrest.

An appeal lies against the order of arrest where the judgment-debtor is arrested, on the ground that the arrest is invalid. 84 Ind. Cas. 513=47 M.L.J. 678=1924 M.W.N. 781=35 M.L.T. 102=A.I.R. 1924 Mad. 900.

——S. 47—Arrest order—Appeal.

An order committing a judgment-debtor to jail was passed without jurisdiction. But no objection was made to the committal to jail and the question of its legality was not then raised.

Held, that the order was not under S. 47 and therefore, not appealable. 7 Rang. 110=117 Ind. Cas. 245=A.I.R. 1929 Rang. 161.

——S. 47—Appeal from order.

An appeal is competent from an order that the judgment-debtor is not entitled to the benefit of O. 21, R. 40. 111 Ind. Cas. 707=A.I.R. 1929 Lah. 141.

——S. 47—Sale proclamation—Objection to—Appeal.

The determination of a question relating to an application under O. 21, R. 66 may also be an order passed under S. 47. Where objection was taken to a sale proclamation on the ground of misdescription of the boundaries, *Held*, that an order passed on the objection is within section 47 and is appealable. 80 Ind. Cas. 861=29 C.W.N. 556=A.I.R. 1925 Cal. 318.

——S. 47—Delivery of possession—If appealable

An order passed on an application made under the provisions of R. 95, O. 21, against a judgment-debtor in favour of the auction-purchaser, who was also a decree-holder, is not an order under S. 47 of the Code and is not appealable. 3 Luck. 182=5 O.W.N. 108=110 Ind. Cas. 83=A.I.R. 1928 Oudh 199.

——S. 47 and O. 21, R. 95—Appeal from order under.

Order rejecting an application under O. 21, R. 95 for delivery of possession, is appealable under S. 47. No suit lies from an order passed under that rule. 9. Ind. Cas. 952=51 M.L.J. 106=1926 M.W.N. 599=1925 M.W.N. 577=A.I.R. 1925 Mad. 1198.

——S. 47—Removal of obstruction—Appeal.

An order for removal of obstruction passed against the judgment-debtor on an application under O. 21, R. 97, is appealable. 70 Ind. Cas. 367=41 M.L.J. 490=14 M.L.W. 449=1921 M.W.N. 510=A.I.R. 1921 Mad. 627.

——S. 47—Obstruction for delivery by judgment-debtor.

When the decree-holder is the auction-purchaser and is resisted by the judgment-debtor an order made under R. 98 is appealable as a decree. 88 Ind. Cas. 104=Pat. 726=6 P.L.T. 351=1925 P.H.C.C. 212=A.I.R. 4925 Pat. 478.

——S. 47—Removal of obstruction.

An appeal does not lie against an order under O. 21, R. 99 passed on an application under O. 21, R. 97 by the decree-holder auction-purchaser for removing resistance to possession. 120 Ind. Cas. 593=A.I.R. 1930 Lah. 363.

——S. 47 and O. 21, R. 100—Appeal from order.

An appeal lies where an application under O. 21, R. 100 was fought out between persons who were parties to the suit or the representatives of the parties to the suit. 43 Mad. 69 and 39 M.L.J. 603, Foll. 14 M.L.W. 85=63 Ind. Cas. 730=1921 M.W.N. 487=A.I.R. 1921 Mad. 612=41 M.L.J. 54.

——S. 47—Removal of obstruction—Appeal.

Orders of removal of obstruction are appealable, if passed under O. 21, R. 98, against the judgment-debtor or an obstructor at his instigation. But the later description does not necessarily apply to a person who merely relies on a title derived from the debtor. Such a person will, if his good faith is established, be maintained in possession under R. 99, unless the transfer to him was *pendente lite*. Further R. 103 does not exclude an appeal, if one is authorised by S. 47. 1921 M.W.N. 698=66 Ind. Cas. 722=A.I.R. 1921 Mad. 559.

——S. 47—Order dismissing application in the nature of one for review.

Certain decree-holder made an application to the execution Court for setting aside an order dismissing a previous application for execution without stating under what provisions of the law such application has been made. The execution Court dismissed the application holding the same to be an "informal" application. The decree-holder appealed under S. 47, C. P. Code.

Held, that the order appealed against was not an appealable order and hence no appeal could lie. 115 Ind. Cas. 862=A.I.R. 1928 Lah. 811 (2).

——S. 47—Order refusing execution.

An order of the executing Court refusing to allow the decree-holder to execute the decree against an alleged legal representative or universal donee of the deceased judgment-debtor is of the nature of the decree and is appealable and precludes a separate suit challenging the validity of the order under the express provision of S. 47. 7 O.W.N. 523=A.I.R. 1930 Oudh 268=127 Ind. Cas. 865.

——S. 47 (3)—Execution by an assignee of a decree dismissed on the ground that assignee has no interest—The order is appealable. (1939) 70 C.L.J. 124.

——S. 47—Transfer of decree.

An order of transfer of decree under S. 39 is appealable under S. 47. (1939) 41 P.L.R. 186.

——S. 47—Order on objection of decree-holder to certain items in budget of ghatwali estate.

An order passed by a Court in disposing of an objection by decree-holders at whose instance the surplus profits of the *ghatwali* estate had been attached, against certain items in the revised budget of receipts and expenditure for the estate, is one passed under S. 47 determining matters in issue between decree-holders and judgment-debtors in the course of execution proceedings and is appealable. A.I.R. 1939 Pat. 242=5 B.R. 344=180 Ind. Cas. 8.

——S. 47, O. 22, Rr. 12, 3, 4—Order on application to bring legal representatives of deceased decree-holder on record—Whether appealable.

An order passed on an application in execution for bringing the legal representatives of the deceased decree-holder on record, falls under S. 47, and is appealable and provisions of O. 22, Rr. 12, 3 and 4 are not applicable. A.I.R. 1939 Sind 234=I.L.R. (1939) Kar. 509=183 Ind. Cas. 717.

——S. 47—Judgment-debtor fighting with decree-holder-auction-purchaser—Order against judgment-debtor.

The case of a judgment-debtor, when he is fighting with the decree-holder-auction-purchaser, falls under S. 47 and an order passed against the judgment-debtor will be a decree under S. 2 (2) and as such appealable. A.I.R. 1938 Nag. 212=I.L.R. (1938) Nag. 583=177 Ind. Cas. 643.

——S. 47—Execution directed to proceed against judgment-debtor.

An order directing the execution to proceed against

the judgment-debtor is an order under S. 47 and is also appealable. A.I.R. 1937 Cal. 425=41 C.W.N. 893=7 C.L.J. 129=172 Ind. Cas. 682.

——Ss. 47, 2 (2)—Order of sale proclamation, if gives right of appeal before sale—Test—Determination under S. 47, when amounts to decree.

The true test to be applied in determining the appealability of an order is whether the order is a 'decree' within the meaning of S. 2 (2). An order for stay of execution, though it falls under S. 47 does not affect the rights of the parties with regard to all or any of the matters in controversy, it is not such an order as amounts to a decree. A.I.R. 1937 Rang. 157=171 Ind. Cas. 636.

——Ss. 47, 151—Order under—Appeal.

An order under S. 151 is not appealable order under the Code. Appeal may however lie if the order passed S. 151 is one which in substance comes under S. 47 or S. 144. A.I.R. 1937 Cal. 152=41 C.W.N. 157=65 C.L.J. 165=I.L.R. (1937) 1 Cal. 637=171 Ind. Cas. 212.

——S. 47—Order on application under O. 21, R. 95—Appeal.

Order on an application under O. 21, R. 95, by an auction-purchaser who is also the decree-holder is an order under S. 47 and appealable as such. A.I.R. 1937 Lah. 145=38 P.L.R. 621=169 Ind. Cas. 242.

——S. 47—Wrong assumption of jurisdiction under—Appeal.

Court wrongly assuming jurisdiction and passing order under S. 47—Order is appealable. A.I.R. 1937 Mad. 509=1937 M.W.N. 227 (2)=45 L.W. 401=(1937) 2 M.L.J. 37=I.L.R. (1937) Mad. 834=170 Ind. Cas. 86.

——Ss. 47, 151—Proceedings under S. 47 terminated—Fresh proceedings under S. 151—Order if revisable.

Where proceedings under S. 47, have terminated and fresh proceedings have been instituted under S. 151, an order made in such proceedings does not come under S. 47 and no appeal lies. Hence interference in revision is proper. (1936) 164 Ind. Cas. 802=40 C.W.N. 89.

——S. 47—Judgment-debtor failing to give security—Order sending him to jail.

To arrest and send a judgment-debtor to a civil jail is one of the modes of executing a decree. Therefore, an order sending him to jail on failure to give securiy, comes clearly within the purview of S. 47, C. P. Code, and hence appealable. A.I.R. 1936 Rang. 367=164 Ind. Cas. 459.

——S. 47—Order allowing withdrawal—Whether one under S. 47—Appeal, if lies.

No appeal lies against an order on an application for refund of money deposited under O. 21, R. 89 as the order is not one under S. 47. But a revision is maintainable against the order. A.I.R. 1935 Mad. 842=1935 M.W.N. 710=42 L.W. 307=69 M.L.J. 349=58 Mad. 972=158 Ind. Cas. 207 (F.B.).

——Ss. 47, 104, O. 21, Rr. 64, 66, O. 9, Rr. 13, 15—Order in execution directing that properties shall be sold in certain order—Appealability.

An order made on an application made under O. 21 Rr. 64 and 66 directing the order in which the properties are to be sold is not a judicial order but merely an administrative order concerned with the *minutiae* of the sale proceedings and is not, therefore, appealable. A.I.R. 1935 Mad. 714=42 L.W. 50=1935 M.W.N. 593=156 Ind. Cas. 141.

——S. 47 (3)—Application by assignee—Objection by assignor on the ground that assignment was not valid.

A who had obtained a decree, assigned it to *B* and *B* assigned it to *C*. When *C* applied for permission to execute the decree, *B* opposed the application on the ground that the assignment was unsupported by consideration and the application was dismissed :

Held, that the question fell within the provisions of S. 47 (3) and the order was appealable though the judgment-debtors were not parties to the dispute. A.I.R. 1934 Mad. 181=57 Mad. 457=67 M.L.J. 207=1934 M.W.N. 634=39 L.W. 188=148 Ind. Cas. 55.

[Overruled in A.I.R. 1941 Mad. 161=196 Ind. Cas. 204 (F.B.)].

——S. 47—Decree removing *mahant* from office—Application for appointing Committee to appoint fresh *mahant*—Order thereon is not an order under S. 47—Appeal does not lie. A.I.R. 1934 Pesh. 43=151 Ind. Cas. 61.

——S. 47—Proceedings taken after satisfaction of decree.

S. 47, C. P. Code, is applicable to execution proceedings as much after an order has been passed declaring the decree satisfied as before an order has been made to that effect. Where a decree has been held to have been discharged and one of the parties comes to the Court on the ground that the order has been wrongly passed and should be reviewed or reconsidered, the case would fall under S. 47, C. P. Code, and an appeal lies against the order. A.I.R. 1933 All. 429=1933 A.L.J. 738=144 Ind. Cas. 468.

——S. 47—Specific Relief Act (1 of 1877), S. 9—Decree under S. 9—Order in execution—Appealability.

No appeal lies from an order made in execution of a decree passed under S. 9, Specific Relief Act. A.I.R. 1932 Lah. 416=33 P.L.R. 463=13 Lah. 798=140 Ind. Cas. 48.

——S. 47—Order accepting or refusing security bond is not appealable under S. 47. A.I.R. 1932 Lah. 120=32 P.L.R. 806=136 Ind. Cas. 792.

——Ss. 47, 55 (4), 145—Surety—Order directing security to be realised—Appeal.

Where after giving notice under S. 145, to the surety of a judgment-debtor under a money-decree, the Court directs the security to be realised under S. 55 (4), the order is appealable under S. 47 of the Code. A.I.R. 1932 Bom. 77=33 Bom. L.R. 1593=135 Ind. Cas. 812.

——S. 47, O. 21, R. 66—Order under O. 21, R. 66, whether appealable.

An order dismissing an objection by a judgment-debtor under O. 21, R. 66, that the value of the properties as estimated by the decree-holder was inadequate and that the properties should be sold in separate lots, is not appealable. A.I.R. 1932 All. 136=1931 A.L.J. 1084=134 Ind. Cas. 833.

——S. 47—Objection treated as one under S. 47—Appeal, competency of.

Where the Court below has treated an objection before it as being one under S. 47, an appeal lies to the High Court even if it were ultimately held that the proceedings were not properly started under that section. A.I.R. 1932 All. 49=133 Ind. Cas. 902.

——Ss. 47, 96—Appeal against order that security offered was sufficient.

Where the High Court allowed a party to draw a certain amount from the District Court 'on giving security to the satisfaction of the District Court' and

the District Judge, after enquiry, found that the security offered was sufficient :

Held, that no appeal lay from the order of the District Judge on the ground that the security furnished was not sufficient. A.I.R. 1931 Mad. 38=32 L.W. 742=59 M.L.J. 892=1930 M.W.N 1096=54 Mad. 237=129 Ind. Cas. 462.

——Ss. 47, 135 (244, 642)—Appeal—Powers of Court.

An order under S. 642 dismissing a petition by a judgment-debtor claiming exemption from arrest is one relating to the execution of the decree and an appeal lies therefrom. (1908) 20 M.L.J. 136=8 M.L.T. 122 =5 Ind. Cas. 909 (2).

——S. 47 and O. 20, R. 14—Appeal—Pre-emption decree—Order for payment.

An order passed on an application for payment of pre-emption money in compliance with a decree under O. 20, R. 14, C. P. Code is not appealable but can be revised under S. 115, C. P. Code. 2 O.L.J. 151=28 Ind. Cas. 379.

Appeal—Parties and Representatives.

——S. 47—Execution sale—Purchaser by private treaty—Right of appeal.

An auction-purchaser in an execution sale, whether the property had been obtained by him in a public auction or by private treaty, is a representative of the judgment-debtor.

In an execution of a simple money-decree, a Receiver was appointed for taking steps for realization of money by disposing of properties of the judgment-debtor. One *D* applied for purchase by private treaty of the mortgagee rights and purchased the property with sanction of Court asking for public sale of the mortgagee rights, whereupon the Court ordered a public auction. *D* filed an appeal against this order :

Held, that *D* was the representative of the judgment-debtor and as the order passed was in connexion with the execution, discharge and satisfaction of the decree he could appeal against it under S. 47, C.P. Code. A.I.R. 1945 Pesh. 43=221 Ind. Cas. 468.

——S. 47 and O. 21, R. 103—Order under O. 21, R. 98 passed—Judgment-debtor's representative can appeal under S. 47.

In view of the provisions of S. 146, under which a representative can take any proceedings and make any application which could have been made by the person under whom he claims, a person who is a representative of the judgment-debtor claiming under him can question the correctness of an order passed under O. 21, R. 98 not only by suit but also by appeal under S. 47. A.I.R. 1943 Mad. 381=1943 M.W.N. 89=I.L.R. (1943) Mad. 702=(1943) 2 M.L.J. 539=56 L.W. 756=213 Ind. Cas. 406.

——Ss. 47 and 96—Court holding stranger to decree to be representative of party to suit and passing order against him—Stranger can appeal against order.

Where under S. 47, C.P. Code, the Court holds a person to be the representative of a party to the suit or of one who was sufficiently represented by a party to the suit and passes an order against him which order could not otherwise have been made against him as he was a stranger to the decree, that person has a right to appeal against that order. A.I.R. 1943 Mad. 381=1943 M.W.N. 89=I.L.R. (1943) Mad. 702=(1943) 2 M.L.J. 539=56 L.W. 756=213 Ind. Cas. 406.

——Ss. 47 and 115—Sale by judgment-debtor—Attachment of amount left with vendee for payment to vendor's creditors—Court ordering vendee to pay amount left with him to vendor's creditors—Appeal by decree-holder—Maintainability.

Certain judgment-debtors transferred by a registered sale-deed a house belonging to them and out of the sale price an amount was left in deposit with the vendee for payment to some creditors of the vendors. A week later, the decree-holder took out execution of the decree and applied for attachment of the amount which had been left in deposit with the vendee for payment to the creditors aforesaid. The vendee, the judgment-debtors and the creditors filed separate objections. Rejecting the objection, the Court passed an order directing the vendee to pay to the creditors the money which had been left with him within 15 days and produce their receipts or to deposit the amount in Court. The attaching decree-holder appealed and the judgment-debtor, the vendee and the prior creditors had all been impleaded as respondents in the appeal :

Held, that the appeal clearly lay against the judgment-debtor and not against his creditors and hence the appeal might be treated as a revision as against them. A.I.R. 1942 Lah. 275=44 P.L.R. 415=I.L.R. (1943) Lah. 17=203 Ind. Cas. 462 (F.B.).

——S. 47—Dispute between decree-holder and Court-auctioneer not party to suit regarding latter's commission.

Section 47 applies to disputes relating to execution, discharge and satisfaction of the claims arising between parties to the suit. Hence an order relating to a dispute between the decree-holder and the Court-auctioneer who was not a party to the suit regarding the latter's commission is not appealable. A.I.R. 1941 Lah. 450=I.L.R. (1942) Lah. 483=197 Ind. Cas. 862.

——S. 47—Executing Court under O. 21, R. 93 directing judgment-creditor and not his pleader to whom he had assigned his decree to refund the money to the auction-purchaser—Order does not fall under S. 47 because the auction-purchaser is neither a party nor does he represent either the judgment-debtor or judgment-creditor. The order does not also fall under S. 144 and is not therefore appealable. A.I.R. 1940 Bom. 210 =42 Bom. L.R. 367=I.L.R. (1940) Bom. 370=189 Ind. Cas. 283.

——S. 47, O. 21, Rr. 58, 63—Party against whom no relief is claimed—Objections to attachment by such party in that suit dismissed under O. 21, R. 58—Remedy, whether by appeal or by suit under O. 21, R. 63.

A person who is made a party to the suit and is a proper party but no relief is claimed against him, he must, by the Explanation appended to S. 47, C.P.Code be deemed to be a party to the suit for the purposes of that section, though he may not be a judgment-debtor. Hence, if objections to attachment of certain property filed by such party in execution of the decree passed in that suit are dismissed, the remedy of the party is only by way of appeal and not by a suit under O. ,21 R. 68. even though his objections may have been dismissed under O. 21, R. 58. A.I.R. 1939 Lah. 207=41 P.L.R, 126=183 Ind. Cas. 816.

——S. 47—Appeal against judgment-debtor barred —If could proceed against surety.

If an appeal against an order under S. 47 is barred under S. 102 against the judgment-debtor it is also barred against his surety. A.I.R. 1939 Sind 360= I.L.R. (1939) Kar. 342=185 Ind. Cas. 486.

——S. 47—Sale set aside at instance of rival decree-holder—Appeal against order setting aside sale.

Appeal against an order setting aside a sale was dis-

missed on the ground that the question being one between rival decree-holders the order was not within S. 47, and hence no appeal lay ;

Held, that the question though between rival decree-holders affected the judgment-debtor and thus being between the parties to the suit fell within S. 47, and an appeal lay against the order. A.I.R. 1937 Cal. 177 =171 Ind. Cas. 517.

——S. 47—Transferee from judgment-debtor or auction-purchaser, when representative of judgment-debtor—Persons sought to be substituted as representatives—Order passed, whether appealable.

Where certain persons are sought to be substituted as representatives of the judgment-debtor, the execution Court is bound to decide the question as to whether they are the representatives of the judgment-debtor. This is one of the questions falling within S. 47 and an order passed thereon is appealable. (1936) 164 Ind. Cas. 375=39 C.W.N. 313.

——Ss. 47, 115—Decision that objectors are representatives of judgment-debtor—Appealability—Revision.

A decision by the executing Court that the objectors were representatives of the judgment-debtor, is one under S. 47, and being a decree is appealable and the aggrieved parties have no right to apply for revision under S. 115. A.I.R. 1936 All. 479=1936 A.L.J. 541= 1936 A.W.R. 422=1936 A.L.R.670=163 Ind. Cas. 926.

——S. 47—Dispute confined to representatives of one party to application in execution—Order in such dispute—Appealability of.

Section 47 is not applicable to a dispute confined to the representatives of one party to an application in execution, when the other parties have no further interest, and the decree-holder has obtained satisfaction of his decree. An order passed in such a dispute is not appealable. A.I.R. 1936 Lah. 116=37 P.L.R. 699= 158 Ind. Cas. 521.

——S. 47—Appeal, when lies.

Every order under S. 47 is not appealable. An appeal would lie only where the order adjudicates conclusively on some right in dispute between the parties. A.I.R. 1936 Mad. 623=71 M.L.J. 256=44 L.W. 99=1936 M.W.N. 1220=164 Ind. Cas. 217.

——S. 47—Decree—Assignment of—Validity of assignment at issue—Judgment-debtor having no interest in it—Appeal by decree-holder.

Where the issue on the validity of the assignment of a decree decided by the executing Court was an issue solely between the decree-holder and his assignee :

Held, that the decree-holder was bound by the decision and he could not appeal against it. A.I.R. 1935 Lah. 609=37 P.L.R. 305=155 Ind. Cas. 974.

[Reverses A.I.R. (Vol. 21) 1934 Lah. 328 (2)=154 Ind. Cas. 730].

——S. 47—Application by judgment-debtor directed against auction-purchaser for setting aside sale—Section 47 applies and an appeal and second appeal are competent. A.I.R. 1935 Cal. 89=60 C.L.J. 36.

——S. 47—Dispute between auction-purchase decree-holder and judgment-debtor relating to delivery of possession of property.

A dispute between the decree-holder, who is also the auction-purchaser and the judgment-debtor relating to the delivery of possession of property purchased by the decree-holder auction-purchaser is a dispute relating to the execution or satisfaction of the decree, and arises between the parties to the suit or their legal representatives. It comes within S. 47, and an order passed by the Court in such dispute, is, therefore, appealable. A.I.R. 1935 Lah. 144=37 P.L.R. 116=153 Ind. Cas. 85.

——S. 47—Decision in dispute between two sets of persons claiming to be heirs of deceased judgment-debtor.

A decision of a dispute between two sets of persons who are claiming to be the heirs of the deceased judgment debtor is not a dispute between the decree-holder on the one side and the judgment-debtor on the other, hence S. 47 does not apply to it and the decision is not appealable. A.I.R. 1934 All. 730=1934 A.L.J. 1227= 151 Ind. Cas. 347.

——Ss. 47, 145—Surety—Order directing execution against.

Under S. 145 any person who has become liable as surety and against whom a decree may be executed, shall be deemed for the purposes of appeal to be a party within the meaning of S. 47. An order directing execution to proceed against the surety is, therefore, appealable under S. 47, by the surety. A.I.R. 1934 Lah. 538= 35 P.L.R. 466=152 Ind. Cas. 693.

——S. 47—Question between decree-holder and representative.

Quaere—Whether a question that arises between a decree-holder and his representative in execution proceedings is one within the scope of S. 47, and whether an appeal lies from an order deciding such question. A.I.R. 1933 Cal. 809=37 C.W.N. 909=146 Ind. Cas. 502.

——S. 47—Change of personnel, effect of—Impleading of new member after limitation.

Where several persons were sued in a representative capacity, the addition of one of such representatives on the record of the appeal after time does not really affect the binding nature of the decree. A.I.R. 1933 Cal. 329=37 C.W.N. 495=60 Cal. 794=143 Ind. Cas. 457.

——S. 47—Dispute between legal representatives of deceased decree-holder.

A dispute relating to the inheritance of a deceased decree-holder between his legal representatives as regards the shares to which they are entitled in the inheritance ought to be settled in a regular suit and not by way of application for execution of the decree.

An appeal does not lie against an order passed on a dispute between legal representatives of a decree-holder n an execution proceeding. A.I.R. 1932 Pat. 329= 3 P.L.T. 557=140 Ind. Cas. 97.

——S. 47, O. 21, R. 99—Obstruction by third party —Order dismissing decree-holder's application whether appealable.

Where an order is made under the provisions of O. 21, R. 99, C.P. Code, dismissing an application on the ground that the resistance or obstruction was occasioned by a person other than the judgment-debtor and claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the order cannot be regarded as relating to the execution, discharge or satisfaction of the decree, and the decree-holder cannot, therefore, treat the order as one under S. 47 and prefer an appeal against it. A.I.R. 1931 Cal. 574=58 Cal. 808=35 C.W.N. 286=133 Ind. Cas. 335.

——Ss. 47 and 145—Effect of.

The effect of S. 145 is that if an order for, or in the course of execution is made against a surety whois within the ambit of S. 145 he is at liberty to appeal against that order as though he were a party within S. 47. In

other respects he is not a party within S. 47. A.I.R 1931 Rang. 206=9 Rang. 434=134 Ind. Cas. 509.

——S. 47—Appeal—Parties and Representatives.

An appeal lies against an order determining whether a party applying for execution is or is not the representative of the decree-holder. 25 Mad. 545. Foll. 98 Ind. Cas. 783=24 M.L.W. 600.

——S. 47—Land Revenue—Application—Appeal.

An order passed in execution proceedings that a person is a legal representative is within the jurisdiction of the execution Court and if not appeale against, bars a subsequent suit challenging that order. 92 Ind. Cas. 377=A.I.R. 1926 Mad. 536.

——S. 47—Land Revenue—Application—Appeal.

Where the Court in execution adjudicates on the question of the right of the applicant to be brought on records as the legal representatives of the deceased judgment-debtor the decision is a decree and a second appeal lies. 47 All. 365=86 Ind. Cas. 1048=A.I.R. 1925 All. 578.

——S. 47—Land Revenue—Application—Appeal from order.

Sub. S. (3) of S. 47 of the present Code in express terms includes a question arising between the parties as to whether any person is or is not representative of a party, and in view of S. 2 of the Code the determination of such a question as between the decree-holder or a person claiming to represent the decree-holder and the judgment-debtor amounts to a decree and is appealable as such. 20 All. 539, overruled. 82 Ind. Cas. 604=5 L.R.A. Civ. 668=A.I.R. 1925 All. 66.

——S. 47—Third party entrusted with property.

During the continuance of an attachment in execution, a suit was filed by a person, who had been a defendant in the suit but who had been exempted by the decree, for a declaration that the property did not belong to the judgment-debtor and during this suit the property was entrusted to a third person. On the suit being decreed by the Trial Court, that person sold the property and distributed the proceeds as directed by the decree. The decree was reversed in appeal. Then the person who had been entrusted with the property in question was ordered by the Court executing the decree under which the property was originally attached, to refund the proceeds.

Held, that inasmuch as he was not a party to the execution proceedings no appeal lay from the order. 6 L.R.A. Civ. 36=85 Ind. Cas. 161=A.I.R. 1925 All. 328.

——S, 47, O. 21, R. 89 (Old Code S. 244, 310-A)—Parties—Relating to the execution of the decree—Application under S. 310-A, C.P. Code, by auction-purchaser in Court sale.

An appeal lies from anorder rejecting an application under S. 310-A, C. P. Code (Old Code) by the transferee of the judgment-debtor's interest after the Court sale. The question of setting aside a sale under S. 310-A relates to the execution of the decree. A transferee who has acquired the interest of the judgment-debtor after the Court sale is a representative of the judgment-debtor and is entitled to apply under S. 310-A. (1906) 17 M.L.J. 291=30 Mad. 507=2 M.L.T. 347.

——S. 47, O. 21, R. 89 (Old Code, Ss. 244, 310-A)—Appeal—Party—Representative—Revision.

Though an order may relate to execution, discharge or satisfaction of the decree, yet no appeal will lie if the question is not between the parties or their representatives. An application by a judgment-debtor under S. 310-A as against a stranger purchaser, in which the decree-holder was not interested is not an application under S. 244 and no appeal will lie from the order. 3 Bom. L.R. 255=25 B. 631.

Appeal—Questions relating to execution.

——S. 47—Applicability—Sale-deed by B, for himself and as guardian of his lunatic brother A—Suit for partition—Purchaser's sons impleaded as defendants—Appeal by defendants—A dying pending appeal—A's share devolving on B—In execution defendants applying for A's share under S. 43, T.P. Act—If within S. 42.

B executed a sale-deed in favour of *P* for himself and as guardian of his brother *A* who was a lunatic. In a suit by *B* and *A* along with others for partition of their deceased father's property which included the property sold by the above sale-deed. *P's* sons who were inpleaded as defendants were awarded the share of *B* in lieu of the property purchased. But the Court held that the sale in so far as it was on behalf of *A* was void as a guardian of a lunatic had no power to dispose of his property. The defendants applealed. During the pendency of the appeal *A* died and his share devolved on *B*. The appeal having been dismissed, the defendants applied to the executing Court under S. 43, T.P. Act, to award to them the share of *B* which consisted of his own share as well as that of *A*:

Held that the question whether the defendants were entitled to claim *A's* share under S. 43, T.P. Act, it having been devolved on *B*, was a question between the parties and related to the execution and satisfaction of the decree within S. 47, C.P. Code. A.I.R. 1946 Sind 99=I.L.R. (1945) Kar. 455.

——S. 47, O. 21, R. 89 (Old Code, Ss. 244, 316, 622)—Appeal—Question relating to execution—Order refusing to grant a certificate—No appeal—No revision.

No appeal lies against an order refusing to grant a certificate of sale to the decree-holder auction-purchaser, the question determined being not one relating to the execution discharge or satisfaction of the decree. The auction-purchaser being also decree-holder is a party to the suit within the meaning of S. 244. (1900) 7 C.L.J. 436.

——Ss. 47 and 151—Order made in execution under S. 151, whether appealable under S. 47.

An order of the Court declared security bond as forfeited and issued notice to defendant to deposit the amount of bond in a week. What the Court meant was that if the amount of bond was not deposited within a week, execution would proceed against mortgaged lands.

Held, that the order was an order made in execution and as such was appealable under S. 47 though the order itself was made under S. 151. A.I.R. 1945 Sind 146=I.L.R. (1945) Kar. 116.

——S. 47—Charge decree—Purchaser in possession of some property if representative of judgment-debtor—Order that purchaser cannot ask for sale of other properties first is one under S. 47 and appeal lies.

An order of the Court holding that the purchasers under a charge decree have no right to say that the properties in their possession should not be sold till the other properties are sold, amounts to an adjudication within the meaning of S. 47, C.P. Code, read with S. 2 (2) of the Code and gives the party aggrieved a right of appeal. A.I.R. 1944 Nag. 25=1943 N.L.J. 532=I.L.R. (1944) Nag. 230=210 Ind. Cas. 548.

——S. 47—Application for holding that decretal amount is paid off in view of Bengal Money-lenders' Act—Order rejecting application is appealable.

An application to the effect that in view of the provisions of the Bengal Money-lenders' Act, it should be held that the decretal amount has been paid off, and the

execution case be accordingly dismissed on full satisfaction, is one under S. 47, C.P. Code and an order rejecting it is appealable. A.I.R. 1942 Cal. 342=46 C.W.N. 179=200 Ind. Cas. 734.

——Ss. 47, 96 and 2—Dispute between judgment-debtor and stranger auction-purchaser as in delivery treated and decided under S. 47—Appeal, if lies.

The right of appeal of an appellant is governed by S. 96 and the definition of "decree" in S. 2, and under S. 2, a decree shall be deemed to include the determination of any question within S. 47.

Consequently where the lower Court has dealt with and decided a question between a judgment-debtor and a stranger auction-purchaser regarding delivery of possession, as one under S. 47, it is "the determination of any question within S. 47," within the meaning of the definition of "decree" and is open to appeal. A.I.R. 1942 Mad. 406=1942 M.W.N. 190=55 L.W. 159=(1942)1 M.L.J. 386=205 Ind. Cas. 91.

——S. 47—Execution sale—Surplus proceeds lying in Court—Decree-holder claiming surplus in lieu of interest—Appeal lies from its dismissal.

After the sale of his property in execution of a decree, the judgment-debtor applied to the Court for payment to him of the surplus proceeds lying in Court. The decree-holder claimed the surplus in lieu of interest. It was argued that the order was merely one dealing with the payment out of some money and was one passed on an application filed specifically under S. 151, C.P. Code and that no appeal lay against an order passed under that section by a Court in the exercise of its inherent powers:

Held, that no doubt the contention raised was correct, but the application by the judgment-debtor was equally one under S. 47, C.P. Code. The main subject-matter of the application was a question regarding the right of the decree-holder to obtain further sums by way of interest upon the decree amount. That clearly fell within S. 47, as relating to the discharge or satisfaction of the decree. A.I.R. 1942 Mad. 442=55 L.W. 212=1942 M.W.N. 283=(1942) 1 M.L.J. 439=202 Ind. Cas. 475.

——S. 47—Attachment under O. 21, R. 42, is a proceeding in execution—An order disallowing an attachment under O. 21, R. 42 must be treated as one relating to execution and occurring within the purview of S. 47—An appeal from such order is competent. A.I.R. 1941 Cal. 357=I.L.R. (1941) 1 Cal. 363=45-C.W.N. 323=74 C.L.J. 169=196 Ind. Cas. 247.

—S. 47—Objection to ex parte order—Order overruling such objection—Appealability.

A judgment-debtor can raise an objection to the *ex parte* order of transfer under S. 47. This objection is an objection relating to the execution of the decree as it is an objection relating to the first step in execution. An order overruling such an objection is one under S. 47 and is appealable. The Appellate Court has therefore jurisdiction to set aside the order. A.I.R. 1940 Cal. 161=70 C.L.J. 438=187 Ind. Cas. 895.

——S. 47—Application for transfer of decree, if falls under S. 47—Objection opposing such application—Order on such objection—Appealability.

An application for transfer of a decree to the Court which passed the decree is one relating to the execution of the decree and comes under S. 47, and an objection by a judgment-debtor to such an application is an objection which can come within the purview of S. 47. The words "relating to execution of the decree" used in S. 47, are wide enough to cover such a case. A.I.R. 1939 Cal. 651=187 Ind. Cas. 67.

——S. 47 and O. 21, R. 93—Repayment of sale price on sale being set aside—If with in S. 47.

An order under O. XXI, R. 93 for re-payment of purchase money when the sale has been set aside is not a question between the parties to the suit relating to the execution, discharge or satisfaction of the decree. The auction-purchaser cannot be regarded as a representative of the judgment-debtor after the sale has been et aside. The case cannot be brought within S. 47 and hence the order directing the refund is not an order which is appealable. A.I.R. 1939 Mad. 740=1939 M.W.N. 700=50 L.W. 159=(1939) 2 M.L.J. 353=188 Ind. Cas. 187.

[Reverses A.I.R. 1937 Mad. 779=172 Ind. Cas. 468=46 M.L.W. 280].

——S. 47—Question relating to delivery of possession.

The question relating to the delivery of possession of the property purchased by the decree-holder auction-purchaser is not a question relating to the execution, discharge or satisfaction of the decree and, therefore, it necessarily follows that this matter does not come under S. 47 of the C.P. Code. No appeal, therefore, lies to High Court. (1938) 177 Ind. Cas. 692.

——S. 47, O. 21, R. 103—Judgment-debtor offering resistance to delivery of possession to decree-holder-auction-purchaser—Question comes under S. 47—Appeal—Case, if governed by O. XXI, R. 103.

S. 47 has to be liberally construed. The decree-holder auction-purchaser who purchases with the permission of the Court under O. 21, R. 72, cannot be said to have obtained the benefit of his money due under the decree until he gets possession of the property of the judgment-debtor purchased by him. If any question is raised by the judgment-debtor at the time of delivery of possession, relating to the nature of the rights purchased and resistance to delivery of possession is offered it will be a question relating to the execution, discharge and satisfaction of the decree arising between the parties to the suit and thus falling within S. 47 and an appeal would lie from an order passed in relation to the question. Order 21, R. 103, does not govern the case. A.I.R. 1938 Nag. 212=I.L.R. (1938) Nag. 583=177 Ind. Cas. 643.

——S. 47—Order of arrest of judgment-debtor.

An order issuing a warrant for the arrest of a judgment-debtor in execution of a decree is appealable as a decree A.I.R. 1937 Lah. 706=39 P.L.R. 690=169 Ind. Cas. 613.

——Ss. 47, 151—Application to enquire how much money was due by judgment-debtor—Appealability.

Where an application is made asking the Court to enquire how much money was due by the judgment-debtor and what amounts had been realised by other creditors and hence relates to matters touching the discharge or satisfaction of the decree, it is in reality and substance an application under S. 47, and the order of the Court is appealable. A.I.R. 1936 Lah. 725=161 Ind. Cas. 21.

——S. 47—Order refusing execution of decree.

Where the order of the Court shows that it has refused the decree-holder the execution of his decree, on the ground that it has been attached, it does not fall under S. 47, and is not appealable. A.I.R. 1935 Oudh 272=1935 O.W.N. 331=1935 O.L.R. 181=11 Luck. 26=154 Ind. Cas. 678.

——S. 47—Transfer of sale order—Judgment-debtor's remedy is by way of appeal.

Where in an execution proceeding an order for sale of properties is transferred for execution to another Court,

the judgment-debtor cannot contend in the proceedings in the transferee Court that the execution proceedings have got to be started *ab initio*. His remedy lies in challenging the sale order by way of an appeal but upon his failure to do so the order becomes final to which the judgment-debtor has to submit. A.I.R. 1934 Rang. 231=153 Ind. Cas. 684 (2).

——S. 47, O. 21, R. 97—Auction-purchaser not third person but decree-holder himself—Opposite party, a party to suit against whom the suit is dismissed—Dispute is under S. 47—Order, appealability of.

Although the Code does not directly provide an appeal from an order passed under O. 21, R. 97, where the auction-purchaser is not a third person but the decree-holder himself, and the opposite party is a party to the suit as he had been impleaded as defendant and the suit against him was dismissed, the dispute between them comes under the provisions of S. 47 of the Code, and as all orders passed under that section operate as decrees, there is an appeal from the order. A.I.R. 1934 Cal. 541=38 C.W.N. 497=150 Ind. Cas. 313.

——S. 47—Application by decree-holder that application showing satisfaction was fraudulent—Dismissal of—Appeal, competency of.

In execution of his money-decree the decree-holder brought the judgment-debtor's property to sale. Before confirmation of sale, a petition on behalf of the decree-holder was filed showing full satisfaction. Subsequently the decree-holder filed an application purporting to be under S. 151 and O. 47, R. 1, on the ground that the petition of full satisfaction had been fraudulently filed by his agent in collusion with the judgment-debtor. The execution Court dismissed this.

Held, an appeal was competent because, although the decree-holder in his application referred to O. 47, R. 1, and S. 151, yet the application was essentially one under S. 47 relating to the discharge of the decree. A.I.R. 1934 Pat. 202=148 Ind. Cas. 549.

——S. 47—Decision as regards area of property to be sold—Appealability of.

A decision as regards the area of certain property to be sold in execution may be said to determine the rights of the judgment-debtor in certain respects and an appeal lies from the decision. A.I.R. 1933 Lah. 383=34 P.L.R. 851=145 Ind. Cas. 386.

——S. 47, O. 21, Rr. 97, 98, 103—Execution—Order under R. 98—Appealability—Defendant exempted from suit but name allowed to remain in decree—Order, if amounts to dismissal of suit against him.

In a suit for partition one of the defendants, *A*, pleaded that he was entitled to one house by virtue of adverse possession and the Court ordered him to be exempted from the suit, but his name appeared in the decree which was subsequently passed, though it was noted that he had been exempted. In execution, the plaintiff sought delivery of possession of the house *A* had claimed. The execution Court in a summary proceeding held that *A* had failed to prove his title and that he had been set up by the judgment-debtors.

Held, that in view of the explanation added to S. 47, the order exempting *A* and at the same time allowing his name to remain in the decree was tantamount to a dismissal of the suit as against him and he must be deemed to be a party to the execution proceedings for all purposes under the section.

Held, further, that even if it be conceded that the case in part fell under Rr. 97, 98 and 103, of O. 21, C.P. Code, the main dispute between the parties really came within the scope of S. 47 and an appeal lay to the District Judge. A.I.R. 1933 All. 57=54 All. 1031=1933 A.L.J. 1036=143 Ind. Cas. 420.

——S. 47—Order rejecting application for payment in instalments—Appeal.

Where a judgment-debtor applies for payment by instalments under O. 20, R. 11 and his application is dismissed as time-barred under Art. 175, Limitation Act, an appeal against such order of dismissal is competent as such an order falls under S. 47. A.I.R. 1932 Rang. 54=135 Ind. Cas. 858.

——S. 47—Order merely deciding mode of execution is not appealable as decree.

Where the order under appeal does not conclusively determine any question at issue between the parties relating to the execution of the decree, but merely decides the mode in which the execution should proceed, such an order is not appealable as a "decree." A.I.R. 1931 All. 129=1931 A.L.J. 895.

——Ss. 47, 72 (2)—Attachment—Order of Civil Court for temporary alienation—Appeal, competency of—S. 72 (2), scope of.

An order of a Senior Subordinate Judge refusing to sell land attached in execution of a decree and authorising its temporary alienation, though made on the report of a Collector, is appealable to the District Judge under S. 47. It is only when the Collector is authorized to provide for the satisfaction of the decree that he assumes judicial functions under S. 72 (2) read with S. 71 and becomes responsible for the further proceedings. A.I.R. 1931 Lah. 141=32 P.L.R. 60=131 Ind. Cas. 274.

——S. 47—Where the right of one or the other of the parties to have a certain thing done depends upon the direction of the Court, the order of the Court giving such direction against one party or the other necessarily decides the right in controversy in the particular case and is to that extent a decree if the order is one passed under S. 47. A.I.R. 1932 All. 85=129 Ind. Cas. 708=53 All. 391=1931 A.L.J. 108.

——S. 47—Appeal—Question between rival decree-holders, affecting judgment-debtor—Decision, if appealable.

A decision of a question between rival decree-holders which affects the judgment-debtor, falls within S. 47, C.P. Code, and is appealable. A.I.R. 1948 Pat. 362.

——S. 47—Appeal—Question as between judgment-debtors—Effect of deposit of mortgage money by one of two judgment-debtors.

Where in a decree for sale on a mortgage against *A* and *B*, it was provided that if the mortgage money was paid, possession should be given to the defendant. *Held*, that the singular word 'defendant' included the plural and that possession should be given jointly to both *A* and *B*, although one of them has deposited the whole mortgage-money. 18 Ind. Cas. (Oudh) 312.

——S. 47—Appeal—Question relating to execution—Withdrawal of execution proceedings—Appeal.

A decree-holder cannot as a matter of right discontinue execution proceedings at any stage at his option. An order allowing the decree-holder to withdraw execution proceedings does not fall under S. 47 and is not appealable. 18 C.L.J. 53=19 Ind. Cas. 904.

——Ss. 47 and 135—Appeal—Question relating to execution—Exemption from arrest.

An order dismissing judgment-debtor's application claiming exemption from arrest under S. 642, C.P. Code, (1882) is an order determining a question coming under S. 47 and hence appealable. 20 M.L.J. 136=8 M.L.T. 122=5 Ind. Cas. 909.

——S. 47—Appeal—Question relating to execution.

Where the appellant is a party to the decree under execution and matter relates to the execution, discharge or satisfaction of the decree, the case is one under S. 47

and an appeal is competent. 103 Ind. Cas. 311= A.I.R. 1927 Mad. 842=53 M.L.J. 440.

——S. 47—Application for withdrawal of mortgage-money.

A sub-mortgagee obtained an order for sale of the half share of the mortgagee rights. Prior to this, the mortgagor's representative brought a suit for redemption impleading only the original mortgagee and deposited the amount in Court. The sub-mortgagee applied for the substitution of his name as defendant and for withdrawing half the amount due to him.

Held, that the application by the sub-mortgagee to the execution Court, praying for withdrawal of money deposited by the mortgagor in the redemption suit against the mortgagee, could be treated as an application for execution of his original decree and that the order passed thereon was appealable. 113 Ind. Cas. 733= A.I.R. 1929 Oudh 309.

——S. 47—Payment by instalments.

Order passed by the Court, on application made under the provisions of O. 20, R. 11 (2) directing that the decretal amount should be paid by instalments, is appealable being one under S. 47. 119 Ind. Cas. 751= A.I.R. 1929 Rang. 191.

——S. 47—Executability of decree.

Order of a Judge on original side refusing to decide on the question of executability of decree on the ground that the questions raised were questions which ought to be decided by the executing Court and not the transmitting Court is appealable. 5 Rang. 775=6 Bur.L.J. 225=106 Ind. Cas. 857=A.I.R. 1928 Rang. 40.

——S. 47—Sale set aside for failure to pay the purchase price.

Where the executing Court passed an order in spite of the fact that the sale had been confirmed, setting aside the confirmation of the sale on the ground that the balance of the auction-money had not been paid within 15 days and remitted to the tribunal constituted under the Sikh Gurdwaras Act, on issue as to whether the property under attachment belonged to the Gurdwara.

Held, that no appeal lay as it could not be a matter arising under S. 47. 100 Ind. Cas. 800=A.I.R. 1927 Lah. 337.

——S. 47—Costs on security.

An order under S. 47, that the costs paid into Court should not be paid out to the successful party without his furnishing security is not appealable. 5 Rang. 534= 5 Rang. 641=6 Bur.L.J. 155=104 Ind. Cas. 324= A.I.R. 1927 Rang. 317.

——S. 47—Property not saleable.

Where the first appellate Court, disagreeing with the executing Court decided that a part of the property ordered to be sold in the decree not being saleable, the whole sale must be set aside.

Held, that this decision under S. 47, C.P. Code, has the force of a decree as it finally decides a question of right between the parties to the suit and a second appeal lies. 4 Pat. 696=7 P.L.T. 468=93 Ind. Cas. 935= A.I.R. 1926 Pat. 202.

——S. 47—Sale in a particular order.

A question between the purchaser who has been subrogated to the rights of the prior mortgagee and the mortgagor relating to the sale of their respective properties is a question which relates to the execution of the decree and would come under S. 47 and would be appealable.

Quaere.—Whether 27 Mad. 259 (F.B.), is still good law under C. P. Code of 1908. 23 M.L.W. 765=1926 M.W.N. 566=96 Ind. Cas. 492=A.I.R. 1926 Mad. 834=51 M.L.J. 135.

——S. 47—Exclusion of particular item from sale in execution in the first instance.

Where a mortgage decree was passed against certain properties and Court ordered that at first all except a certain item should be put up for sale and if such sale failed to fetch a sufficient sum, then the other item should be sold,

Held, that the order was a final order between the parties in a matter relating to the execution, satisfaction and discharge of the decree and was appealable. 91 Ind. Cas. 221=6 P.L.T. 393=1925 P.H.C.C. 164=A.I.R. 1925 Pat. 484.

——S. 47—Fixing the order in which properties are to be sold in execution—Administration order.

An order directing that properties proceeded against in execution are to be sold in a particular order is not appealable as it is an administrative and not a judicial order. I.L.R. 27 Mad. 259 (F.B.), Foll. 78 Ind. Cas. 829=19 M.L.W. 235=33 M.L.T. 275= 1924 M.W.N. 220=A.I.R. 1924 Mad. 527=46 M. L.J. 192.

——Ss. 47 and 151—Orders under—Appeal—Second appeal—Competency—Dispute regarding sale.

If the parties disputing the sale are parties to the suit, they approach the Court under S. 47 which decides the forum. The Court then proceeds according to its statutory powers. It may exercise inherent jurisdiction under S. 151, or it may exercise its power under O. 21, R. 90. There is no second appeal when a Court approached under S. 47 acts under O. 21, R. 90. But when it is so approached and exercises its inherent power under S. 151, there is a second appeal. 84 Ind. Cas. 975=1924 M.W. N. 842=A.I.R. 1924 Mad. 778=47 M.L.J. 549.

——S. 47—Assignment of decree—Scope of order dismissing execution without deciding validity of assignment.

An assignee of a decree, pleaded fraud in order to avoid his liability for the payment of the money under the assignment. The decree-holder who applied for execution therefore stated that his application for execution might be dismissed if the Court held the deed of assignment to be a valid transaction. The executing Court without expressing any opinion on the question of the validity or invalidity of the transaction, dismissed the application. *Held*, that the order is one under S. 47 and is appealable. 79 Ind. Cas. 546=4 L.L.J. 259=A.I.R. 1922 Lah. 396.

——Ss. 47, 39 (S. 244, 223, Old Code)—Appeal—Rent decree—Application for transfer of decree—Order rejecting application.

An application for the transfer of a decree for execution under S. 223 is an application which involves a question relating to the execution of decree, and as such comes within S. 244 of the Code. An appeal therefore lies against an order rejecting such an application. (1903) 8 C.W.N. 575.

——S. 47 (S. 244, Old Code)—Appeal—Representative—Attaching decree-holder — Question between two rival decree-holders for.

An attaching creditor of the judgment-debtor not being his representative within the meaning of the

section. S. 244, C. P. Code, does not apply when the question concerns two rival decree-holders. (1906) 11 C.W.N. 433=6 C.L.J. 437.

——S. 47 and O. 21, R. 16—Appeal—Refusal to recognise assignment of decree.

An appeal lies against an order refusing to recognise an assignment of decree. 8 M.L.T. 56=6 Ind. Cas. 199.

——S. 47 and O. 21, Rr. 90 and 92—Appeal—Retrospective effect—Execution sale—Application to set aside—Order—Subsequent passing of new Code—Appeal.

An application to set aside an execution sale on the ground of fraud and material irregularity was dismissed by the first Court on 21-9-1907. *Held,* a second appeal was competent, for the order was a decree under S. 244 of the old Code. The new Code could not retrospectively affect the character of the order which under the new Code is not a decree under S. 47 but an order under O. 21, Rr. 90 and 92. 22 C.L.J. 266=16 Ind. Cas. 690.

——S. 47—Appeal—Right of auction-purchaser.

The question of appealability of the order, which amounts to a decree, being an order under S. 47, Civil Procedure Code, is not affected by the fact that the appeal is lodged by the auction-purchaser, assuming that he is not only not a party to the suit but is not a representative of either of the parties. It is always to be examined whether the question at issue is one which relates to execution, discharge or satisfaction of the decree arising as between parties to the suit or their representatives. As soon as this condition is satisfied, the fact that any person other than the party has also been impleaded does not change its nature and character. If the auction-purchaser has any right to prefer an appeal against an order under S. 47, it is because he has been impleaded as a party to the proceeding and the order passed therein binds him. I.L.R. (1949) Cut. 269 =A.I.R. 1949 Orissa 73.

Rateable distribution.

See also CIVIL P. C., S. 73—APPEAL.

——Ss. 47, 73—Order under S. 73 determining question of rateable distribution between rival decree-holders—Judgment-debtor not interested—Order does not fall under S. 47 and is not appealable. A.I.R. 1941 Rang. 113=1940 Rang.L.R. 718=194 Ind. Cas. 46.

——Ss. 47, 73—Order for rateable distribution affecting also judgment-debtor—Whether falls under S. 47—If appealable.

It is true that if the question of the rateable distribution is fought out between the decree-holders then the order for rateable distribution would not fall under S. 47, and would not be appealable. But where the question involved affects not only the decree-holders *inter se* but it affects also the judgment-debtor, who contends that he had produced the money in Court for a specific purpose and must be handed over to the particular decree-holder, the order for rateable distribution falls under S. 47 read with S. 73. It is, therefore, appealable. A.I.R. 1939 Bom. 468=41 Bom.L.R. 997=186 Ind. Cas. 372. *See also* A.I.R. 1931 Bom. 252=33 Bom.L.R. 503=133 Ind. Cas. 737.

——Ss. 47, 145, 73—Order affecting not only creditors but also surety and judgment-debtor.

Where an order for rateable distribution affects not only the creditors *inter se* but the surety to a considerable extent and the judgment-debtor to a lesser extent, an appeal does lie under S. 47, read with S. 145. A.I.R. 1939 Bom. 112=41 Bom.L.R. 176 =I.L.R. (1939) Bom. 133=181 Ind. Cas. 246.

——Ss. 47, 73—Order affecting decree-holders only—Effect of attachment before judgment.

Where the question relates only to a dispute between rival decree-holders claiming rateable distribution and the judgment-debtors are not interested in it, the question is not one falling within S. 47, and the decision thereon is not subject to appeal.

The fact that one of the decree-holders had before obtaining judgment attached the property sold does not bring such a dispute within the purview of S. 47, C. P. Code. A.I.R. 1936 Mad. 136=43 L.W. 31=1936 M.W.N. 44=59 Mad. 399=70 M.L.J. 33=160 Ind. Cas. 573.

——Ss. 47, 73—Disputes between rival decree-holders claiming against each other in distribution of assets—Appeal, if lies.

Dispute between rival decree-holders seeking to attach the same property or claiming against each other in the distribution of the assets or disputes between joint decree-holders *inter se* are not within the purview of S. 47, and hence an order on the point is not appealable. A.I.R. 1936 Oudh 277=1936 O.L.R. 336=1936 O.W.N. 559=12 Luck. 720=163 Ind. Cas. 175 (2).

——S. 47—Order deciding as a fact a matter covered by S. 47 (1)—It may be the subject of appeal though it be passed ostensibly under S. 73. A.I.R. 1935 Lah. 302=16 Lah. 990=156 Ind. Cas. 845.

——Ss. 47, 73—An order under S. 73, C. P. Code determining a question of rateable distribution as between rival decree-holders in which the judgment-debtor has no interest does not fall under S. 47 of the Code and no appeal lies from such an order. A.I.R. 1931 Bom. 350=33 Bom.L.R. 537=55 Bom. 473=133 Ind. Cas. 817.

——Ss. 47, 73, O. 21, R. 72—Leave to bid—Claim for rateable distribution—Order directing refund—Appeal, competency of.

A purchased his judgment-debtor's property in Court auction with leave of Court to set off under O. 21, R. 72, C. P. Code. Before confirmation of the sale, another decree-holder *B* who had also applied for execution, applied for rateable distribution and the Court passed an order allowing rateable distribution and directing that the sale certificate should be issued unless the sum due to *B* was paid. The amount was not paid and *B* applied for execution. The presiding Judge refused execution.

Held, that the order refusing execution of the previous order was under S. 47 and hence appealable. A.I.R. 1931 Pat. 359=12 P.L.T. 477=10 Pat. 830 =133 Ind. Cas. 166.

——Ss. 47 and 73—Appeal—Rateable distribution—Claim for—Rejection of claim—Order, when appealable.

Where the claim of certain decree-holders for rateable distribution of the money of the judgment-debtor was rejected on the ground that the amount lying in the Court was not that available to those

decree-holders. *Held,* that the order was appealable and that the order so far as it affects each decree-holder was one between him and the judgment debtor and related to the execution of the decree; and that the order though passed ostensibly under S. 73 was really one under S. 47. If the objection to the order under S. 73 is based on the invalidity of the execution application or on the character of the fund in Court, the question is between the judgment debtor and the individual creditors, not the creditors as a body; the decision on it is one under S. 47. 31 M.L.J. 820=20 M.L.T. 538=5 L.W. 354=37 Ind. Cas. 900.

——Ss. 47 and 73—Appeal—Rateable distribution—Judgment-debtor.

A party, to whom a right of appeal is given if he comes under S. 47, should not be deprived of it. Orders under S. 73 are appealable, if they affect parties to the suit especially when the appeal is by the judgment-debtor who cannot avail himself of the right of suit given by S. 73 (2) C. P. Code. 39 Mad. 570 =29 M.L.J. 96=(1915) M.W.N. 334=17 M.L.T. 427=29 Ind. Cas. 231.

——Ss. 47 and 73—Appeal—Rateable distribution—Rights of rival decree-holders.

An order under S. 73, C. P. Code rejecting an application for rateable distribution of the assets between two rival decree-holders which does not affect or interest the judgment-debtor is an order in execution proceedings but is not a decree, unless all the conditions enumerated in S. 47 are present. No appeal therefore lies from such an order. 42 Cal. 1 =19 C.W.N. 1202=27 Ind. Cas. 644.

——Ss. 47, 73—Appeal—Rateable distribution.

An executing Court has jurisdiction to hold a summary inquiry as to whether the decree obtained by one of the decree-holders asking for rateable distribution is fraudulent or not. 18 C.L.J. 646=19 C.W.N. 903=22 Ind. Cas. 407.

——Ss. 47 and 73—Appeal—Rateable distribution—Question relating to execution, discharge and satisfaction.

Two of the several creditors who obtained decrees against judgment-debtor attached some of his properties; the other creditors merely applied for execution without obtaining attachment. On the date of sale a person on behalf of the judgment-debtor deposited into Court a sum sufficient to discharge the two creditors. The Court ordered rateable distribution and sale of the property to satisfy the claims of the remaining creditor. On appeal by the judgment-debtor against this order; *held,* that the order related to a question in execution within S. 47 and that a second appeal is competent. 36 Bom. 156=13 Bom. L.R. 1193=12 Ind. Cas. 911.

——S. 47—Appeal—Rateable distribution.

Where the matter before the Court is one under S. 73 and the Court proceeds to decide the question under that section though finally the order passed is not such as is contemplated by S. 73, the order is not appealable. 118 Ind. Cas. 908=A.I.R. 1929 Lah. 645.

——Ss. 47 and 73—Orders under—Appeal.

An order which does, as a fact, decide a matter covered by S. 47 (1), even although it be passed ostensibly under S. 73, can be the subject of appeal. Thus where an order forbidding amendment, not only denies the right to rateable distribution but also dismisses the application for execution, such an order is appealable. 98 Ind. Cas. 884=A.I.R. 1927 Lah. 100.

——S. 47—Appeal—Rateable distribution.

An order under S. 73 is not appealable unless it also comes under S. 47 and satisfies all the requirements thereof. In cases where as between the parties to the suit a question relating to the execution, satisfaction or discharge of the decree passed therein has been decided by the order for rateable distribution it has always been held that an appeal lies. 42 Cal. 1; 36 Bom. 156; 36 Mad. 570, Foll. 78 Ind. Cas. 731=51 Cal. 761=39 C.L.J. 439=28 C.W.N. 704 =A.I.R. 1924 Cal. 801.

——S. 47—An order under S. 73 is not an order under S. 47 inasmuch as the question which arises is not one between the parties to the suit and the order rejecting the application under S. 73 does not otherwise come within the definition of decree in S. 2, because it does not conclusively determine the rights of the parties. It would also be unduly extending the meaning of the word 'suit' in that section, make it include an application under S. 73. 42 Cal. 1, Foll. 1921 P.H.C.C. 204=A.I.R. 1921 Pat. 401=1 Pat. L.T. 296=5 P.L.J. 415=57 Ind. Cas. 421.

Receiver.

——S. 47 and O. 40, R. 3—Execution—Directions to Receiver—Appeal.

An order directing Receiver to pay certain amount according to the terms of the decree which is valid, either to party to suit or third person falls under O. 40, R. 3 (c) and not under S. 47 or O. 40, R. 1 or R. 4 and is not therefore appealable. A.I.R. 1942 Sind 144=I.L.R. (1942) Kar. 343=204 Ind. Cas. 158.

——S. 47—Sale in execution—Judgment-debtor adjudged insolvent—Application by Receiver to have the sale set aside—Application in the interest of the insolvent judgment-debtor—Application can be treated as one under S. 47 by the Receiver as representative of the insolvent judgment-debtor—Second appeal is therefore maintainable from the order passed thereon. A.I.R. 1935 Cal. 503=39 C.W.N. 424=62 Cal. 457=157 Ind. Cas. 862.

——S. 47—Execution—Order to Receiver to deposit money into Court.

Order directing Receiver to deposit in Court money collected by him in execution as party before he was appointed Receiver, is an order under S. 47 and is appealable. A.I.R. 1935 Mad. 464=1935 M.W.N. 481=68 M.L.J. 628=41 M.L.W. 763=156 Ind. Cas. 886.

——S. 47—*Interim* Receiver making an application in execution enforcing the right conferred on him by S. 52, Provincial Insolvency Act—Order on such application does not fall under S. 47 and no appeal lies therefrom. A.I.R. 1933 Mad. 152=56 Mad. 453=37 L.W. 114=1933 M.W.N. 43=64 M.L.J. 119=141 Ind. Cas. 817.

——Ss. 47 and 51 (b)—Appeal—Receiver, appointment of, in execution of decree against wakf property.

In execution of a decree obtained by appellant against respondent as trustee of a *waqf,* an order

appointing a Receiver in execution of a decree against *waqf* property is appealable under S. 47 read with S. 51 of the C. P. Code. 30 C.L.J. 231=57 Ind. Cas. 70.

——S. 47—Appeal—Receiver.

An order directing a party to pay receiver's remuneration not being decree, is not appealable. A. I.R. 1930 Lah. 352.

——S. 47—Appeal by Surety for Receiver.

An order against a receiver to pay up moneys can be executed against the surety and the order directing execution against such surety is appealable under S. 47. 13 Bur.L.T. 91=59 Ind. Cas. 844=10 L.B.R. 236.

——S. 47—Appeal—Resale.

An order passed under R. 71 of O. 21 is a decree, and also an order passed under S. 47, that an appeal against it does lie. 7 N.L.R. 134, Overruled; 25 Cal. 99; 18 Mad. 439; A.I.R. 1922 All. 200 (F.B.), and 36 Bom. 329, Foll. 100 Ind. Cas. 691 (2)=23 N.L.R. 14=A.I.R. 1927 Nag. 112.

——S. 47—An order under O. 21, R. 71, is a decree within the meaning of S. 47. 2 O.W.N. 141, Foll. 88 Ind. Cas. 131=12 O.L.J. 261=2 O. W.N. 212=28 O.C. 327=A.I.R. 1925 Oudh 397.

——S. 47—Re-sale—Liability of original purchaser for deficit—Appeal.

Certain property which was put up for sale in an execution sale was knocked down by the sale officer to the appellant, the highest bidder. On his failure to make the necessary deposit, the sale officer put up the property for re-sale the next morning, and the sale fetched much less price. The judgment-debtor applied under O. 21, R. 71 to make the first purchaser liable for the difference.

Held, there had been a sale forthwith within the meaning of O. 21, R. 84, and the defaulting purchaser was liable. Orders passed by trial Courts between the decree-holders or judgment-debtors and defaulting purchasers are appealable. 65 Ind. Cas. 813=20 A.L.J. 105=44 All. 266=A.I.R. 1922 All. 200 (F.B.).

Restitution.

——S. 47—An order for restitution under S. 151 is appealable. A.I.R. 1931 Cal. 779=35 C.W.N. 105=53 C.L.J. 49=134 Ind. Cas. 1185.

——S. 47 (Old Code, S. 244)—Appeal—Restitution—Claim for interest—Final adjudication as to interest—Appeal.

Where a decree is reversed and a claim of restitution for the money collected under the decree with interest is made in execution and the executing Court determines finally the rate of interest payable which is the only question in dispute between the parties, such order is appealable. (1904) 15 M.L.J. 247=28 Mad. 355.

Sale proclamation.

——S. 47—Settlement of sale proclamation—If amounts to decree—Appeal.

Where on a petition praying that the value of certain property sought to be sold by the Court in execution of a decree should be settled and stated in the proclamation, an order is passed, the order is not a decree under S. 47 and is not, therefore, appealable under S. 96. This order cannot be said to be a judgment within the meaning of Cl. 15, Letters Patent (Bom.). A.I.R. 1939 Bom. 182=41 Bom. L.R. 328=I.L.R. (1939) Bom. 389=182 Ind. Cas. 409.

——S. 47, O. 21, R. 66—Decree for sale—Sale proclamation—Rights of parties claiming under prior encumbrances to be notified—Order as to whether such rights can be claimed.

A person executed three mortgages and the second mortgagee instituted a suit for sale impleading the third mortgagee, who however did not put in his appearance. In the course of the sale proclamation under O. 21, R. 66, the third mortgagee put in an application praying that the encumbrance due to him be mentioned in the sale proclamation as he claimed the rights under the first mortgage by subrogation. The Judge ordered that it should be shown in the sale proclamation:

Held, that inasmuch as the lower Court pronounced an opinion as to whether the third mortgagee was entitled to claim the rights of the first mortgagee, the order was one under S. 47, and hence appealable. A.I.R. 1933 All. 287=1933 A.L.J. 89=146 Ind. Cas. 477.

——S. 47, O. 21, R. 66—Sale proclamation—Order fixing valuation—Appealability.

Where an order was passed by the executing Court in proceedings held under O. 21, R. 66, to the effect that in the sale proclamation, the valuation be fixed at 50 times of the land revenue:

Held, that it was not a decree and hence not appealable. A.I.R. 1932 All. 696=1932 A.L.J. 859=142 Ind. Cas. 888.

——S. 47 and O. 21, R. 66—Scope of orders under.

Every order passed in proceedings under O. 21, R. 66, cannot be a decree within the meaning of S. 47 unless it amounts to an adjudication of the rights of the parties. A.I.R. 1932 All. 696=1932 A.L.J. 859=142 Ind. Cas. 888.

——S. 47 and O. 21, Rr. 66 and 90—Appeal—Sale proclamation—Settlement without notice—Appealability.

A complaint on the ground that notice was not given to all the parties concerned before the proclamation was settled is not covered by O. 21, R. 90 and can only be considered under S. 47 and there is an appeal as well as a second appeal against a decision relating thereto. (1919) M.W.N. 897=11 L. W. 59=53 Ind. Cas. 809.

——S. 47 and O. 21, R. 66—Appeal—Sale proclamation—Order rejecting judgment-debtor's valuation.

An order of the executing Court over-ruling the judgment-debtor's objection to the valuation put in by decree-holder in the sale proclamation and refusing the judgment-debtor's prayer for adjournment of the sale and issue of the fresh proclamation is not appealable. 47 Ind. Cas. 512 (Cal.).

——S. 47 and O. 21, R. 66—Appeal—Sale proclamation—Order setting out estimate of value of property.

No appeal lies from an order of a Court estimating the value of a property to be sold in execution proceedings as it is not an order relating to the execution, discharge or satisfiaction of decree within S.

47. 27 Mad. 259 (F.B.), Foll. 39 All. 415=15 A.L.J. 337=39 Ind. Cas. 578.

——S. 47 and O. 21, R. 66—Appeal—Sale proclamation—Objections of judgment-debtor—Rejection of.

On a notice issued to the judgment-debtor under O. 21, R. 66 to settle the terms of a sale proclamation in execution of a decree under O. 34, R. 5, he put in various objections one of which being that the properties were under-valued; the objections having been summarily rejected on appeal. *Held*, an order refusing to inquire into the valuation which the Court must do if the parties are seriously at issue with regard to it, was an appealable decision. As the questions raised by the judgment-debtor were covered by S. 47. 14 A.L.J. 363=35 Ind. Cas. 230.

——S. 47 and O. 21, Rr. 66 and 90—Appeal—Sale proclamation.

An application by judgment-debtor to have the value of property declared in the proclamation corrected falls under S. 47 and an order thereon is open to appeal. 15 C.W.N. 713=6 Ind. Cas. 180.

——S. 47—Appeal—Sale—Proclamation.

An application for setting aside an auction-sale on the ground that the judgment-debtor had no notice of the settling of the proclamation under O. 21, R. 66, falls under S. 47 of the Code and second appeal is open to the parties. 11 M.L.W. 59 and A.I.R. 1925 Mad. 1142, Foll. A.I.R. 1930 Mad. 489=127 Ind. Cas. 142.

——S. 47—Sale proclamation—Appeal.

An order refusing to postpone a sale or alter the terms of the sale proclamation either by raising the upset price, or by dividing the property into lots, is only an interlocutory order and so not appealable. 75 Ind. Cas 901=18 M.L.W. 615=1923 M.W.N. 894=A.I.R. 1924 Mad. 234=46 M.L.J. 71.

——S. 47—Valuation of property in sale proclamation—Appeal.

If an objection is raised by the judgment-debtor to the valuation of property contained in proclamation of sale by public auction under O. 21, R. 66, and is rejected, there is no appeal against the order rejecting the objection. For if the under-valuation results in substantial injury to the appellant he can have it set aside under O. 21, R. 90. Unless such contingency happens, the rules of procedure do not entitle the judgment-debtor to question the propriety of the statement as to the value of the property which the Court has directed to be made in the proclamation of sale. 6 O.W.N. 1085=A.I.R. 1930 Oudh 81=5 Luck. 481=124 Ind. Cas. 422.

——S. 47—Sale proclamation—Valuation of property in appeal.

An order of a Court refusing to alter the valuation of the property to be sold that was entered in a proclamation of sale, or to adjourn the sale in order to have a further enquiry as to its value, is merely an administrative order and not judicial, and it does not fall under S. 47. 27 Mad. 259 (F.B.); 16 C.W.N. 124; 39 All. 415; 2 P.L.J. 13; 5 P.L.J. 270; A.I.R. 1923 Mad. 619 and A.I.R. 1924 Mad. 527, Foll. 111 Ind. Cas. 892=52 Bom. 444=30 Bom. L. R. 679=A.I.R. 1928 Bom. 245.

——S. 47 and O. 21, R. 66—Appealability.

All orders under R. 66 are not appealable. Only such orders as would come under S. 47 are appealable. 23 M.L.W. 765=1926 M.W.N. 566=96 Ind. Cas. 492=A.I.R. 1926 Mad. 834=51 M.L.J. 135.

——S. 47—Sale proclamation—Misdescription of property in—Appeal.

Where objection was taken to a sale proclamation on the ground of misdescription of the boundaries, *held*, that an order passed on the objection is within S. 47 and is appealable. The determination of a question relating to an application under O. 21, R. 66 may also be an order passed under S. 47. 80 Ind. Cas. 861=29 C.W.N. 556=A.I.R. 1925 Cal. 318.

——S. 47—Notice of sale proclamation — Defects in—Appeal.

Though petition by judgment-debtor is filed as one under O. 21, R. 90, where the objections are that the petitioner had no notice of the proclamation of sale and that there is an under-valuation of the property, they fall under O. 21, R. 66 and a second appeal is competent. 11 M.L.W. 59, Foll. 87 Ind. Cas. 413=1925 M.W.N. 701=A.I.R. 1925 Mad. 1142.

——S. 47—Objections to sale proclamation—Appeal.

Where in spite of the opposition of the judgment-debtor, sale proclamation is ordered to be issued, but the Judge says that he will in the meanwhile hear and decide upon judgment-debtor's objection to sale, the order passed does not decide any of the rights of the parties in relation to all or any of the matters in controversy between the parties and hence the order is not appealable. 35 C.L.J. 170=64 Ind. Cas. 547=A.I.R. 1921 Cal. 629.

Scheme decrees.

——S. 47—Scheme decrees—Execution, directions in—Appeal.

An order made by a Court exercising a power given to it by a provision in a scheme framed in a scheme suit is not one relating to execution, discharge or satisfaction of decree—Appeal therefore is incompetent. A.I.R. 1941 Cal. 618=73 C.L.J. 532=199 Ind. Cas. 841.

——Ss. 47, 92—Order of District Judge approving new trustee appointed by Committee, whether appealable—Whether judicial or administrative—Revision.

Where a scheme framed in a suit under S. 92, provided that in the event of a vacancy, a new trustee should be appointed by the Committee with the approval of the District Judge:

Held, that an order of the District Judge approving an appointment made by the Committee was not a decree within the meaning of S. 47 read with S. 2, and was not appealable.

Quaere.—Whether the order was one passed in a judicial or administrative capacity and was open to revision. A.I.R. 1931 All. 765=1931 A. L. J. 1071=133 Ind. Cas. 401.

——S. 47—Scheme decrees.

No appeal lies to the High Court from an order passed by the District Judge as a *persona designata* under a scheme for management of a charitable institution. A.I.R. 1931 Bom. 388=33 Bom.L.R. 546 =133 Ind. Cas. 823.

——S. 47—Scheme suit—Execution—Appeal.

Where a scheme is framed for the administration of a charitable trust, containing provisions for making

an application for modifying or altering the said scheme by any interested person, an order passed on such an application is not an order passed in course of execution proceedings or under S. 47, C. P. Code and hence, no appeal lies against it. An order on such an application is an order on an application in the suit.

A suit under S. 92, C. P. Code, does not continue merely because the scheme contains a clause giving liberty to apiy, and orders passed subsequently are passed under the scheme and not in the suit. A.I.R. 1931 Bom. 391=33 Bom.L.R. 520=55 Bom. 414=133 Ind. Cas. 740.

——Ss. 47 and 92—Appeal—Scheme framed by Court—Order as to election of trustees—Appeal.

An order deciding the question of election of a trustee of a mosque under a scheme framed by the Court is a proceeding in execution of the decree sanctioning the scheme and hence appealable. 24 Bom. 45; 28 Mad. 319, Foll. 7 Bur.L.T. 298=24 Ind. Cas. 915.

——S. 47—Appeal—Scheme.

Orders made by a Court in purchase of a provision in the scheme are not orders made in execution. No appeal therefrom is competent. 27 L.W. 32, Expl.; 47 M. 139; 49 M. 480; 49 M.L.J. 25 (P.C.), Foll. A.I.R. 1930 Mad. 918=32 L.W. 608=128 Ind. Cas. 515.

——S. 47—Appeal—Scheme decree—Budget framed according to directions—Objections to certain items—Order rejecting—Appeal—Revision.

An order dismissing an application objecting to certain items of a budget framed in accordance with the directions contained in the scheme of a temple, which gave power to the Court to hear such matters, is not a decree; nor is it an order falling under S. 47, C. P. Code, and hence no appeal lies from such order. 49 Bom.L.R. 306=A.I.R. 1947 Bom. 462.

——S. 47—Appeal—Scheme.

Orders passed relating to a scheme formed and sanctioned by the Court in a scheme suit, are not orders in execution of a decree and are not therefore appealable. 87 Ind. Cas. 313=6 L.R.P.C. 117=41 C.L.J. 628=23 A.L.J. 555=27 Bom.L.R. 872=2 O.W.N. 535=A.I.R. 1925 P.C. 155=49 M.L.J. 25.

——S. 47—Scheme decree—Orders in—Appeal from.

Orders passed by Court in relation to a scheme sanctioned in a scheme suit are not orders in execution and no appeal lies. A.I.R. 1925 P. C. 155 and A.I.R. 1926 Mad. 130 and 559, Foll. 102 Ind. Cas. 633=A.I.R. 1927 Mad. 1110.

——S. 47—Scheme decree—Collector acting under.

Where a scheme of management of a religious institution impliedly provided that the District Judge was also to exercise control generally in regard to any question of management that might properly be brought before him and the District Judge on application divided the offering to the deity in a certain proportion among the claimants.

Held, that the District Judge was the final authority in the matter and no appeal would lie to the High Court from his decision. A.I.R. 1924 Mad. 369, Approved. 29 Bom.L.R. 891=102 Ind. Cas. 659=A.I.R. 1927 Bom. 422.

——S. 47—Scheme decree—Court acting under.

An appeal will not lie against an order made by a Court exercising a power given to it by a provision in the scheme of management of a trust; such an order is not an order made in execution. 22 M.L.W. 196=92 Ind. Cas. 556=A.I.R. 1926 Mad. 130.

——S. 47—Scheme decree—Directions in—Appeal.

When the relief asked for and granted was the scheme alone, there is no reason for holding that the further remedy provided in the scheme need or can be asked for execution of the decree or that the order granting or refusing it is appealable as one passed under S. 47.

When a suit is instituted in the words of S. 92, C. P. Code, to obtain a decree settling a scheme, the relief must, so far as the suit is concerned, be regarded to have been finally given and there remains nothing to obtain by way of execution. (1923) M.W.N. 133 and (1923) M.W.N. 78, Foll. 75 Ind. Cas. 189=47 Mad. 139=18 M.L.W. 237=1923 M.W.N. 664=A.I.R. 1924 Mad. 369.

Second appeal.

See also C. P. CODE, S. 47—APPEAL—ORDER.

——S. 47, O. 21, R. 90—Order on petition under O. 21, R. 90—Appeal.

An order passed on a petition filed by the judgment-debtor partly under O. 21, R. 90 and partly under S. 47 to set aside sale held in execution on the ground that it was held after a fresh proclamation was settled without notice to him, falls under S. 47 and second appeal is maintainable. A.I.R. 1945 Mad. 499=58 L.W. 235=(1945) 1 M.L.J. 267=1945 M.W.N. 474.

——S. 47, O. 21, R. 92 (Old Code, Ss. 244, 311)—Appeal—Second appeal.

When the judgment-debtor does not seek to set aside the sale on the ground of any material irregularity in the publication or conduct of the sale as contemplated by S. 311, C. P. Code, but on grounds, which if valid, can be advanced only under S. 244 of the Code, for instance, the ground that the decree in execution of which the decree-holder purchased the property has been subsequently set aside, a second appeal lies. (1907) 6 C.L.J. 102.

——S. 47 and O. 22, R. 10—Second appeal—Competency.

An order on an application to add a person as a party to the execution proceedings is one made under O. 22, R. 10 and not under S. 47. Hence only one appeal lies against the order. A.I.R. 1942 Bom. 82=I.L.R. 1941 Bom. 629=43 Bom.L.R. 719=200 Ind. Cas. 160.

——S. 47—*Ex parte* final decree in mortgage suit—Application by judgment-debtors under O. 9, R. 13, for setting aside *ex parte* decree—Application dismissed—Appeal preferred—Meantime execution proceeding and date of sale fixed—Application to Appellate Court for stay—Stay granted but order not communicated — Sale and confirmation—Appeal against order under O. 9, R. 13, dismissed—Application to executing Court to set aside sale:

Held, that the application was not under O. 21, R. 90, as was contended but one which would only have been dealt with under S. 47. Second appeal therefore lay. A.I.R. 1942 Pat. 146=22 P.L.T. 1018=197 Ind. Cas. 651.

——Ss. 47, 102—Value of subject-matter not exceeding Rs. 500—No second appeal.

Where in an execution of a decree obtained in a suit of the nature cognizable by a Small Cause Court, the amount or the value of the subject-matter of the original suit does not exceed Rs. 500, and an order is passed, no second appeal is maintainable against the order. A.I.R. 1941 Oudh 101=1940 O.W.N. 1118 =1940 A.W.R. 444=191 Ind. Cas. 227.

——S. 47—Application to set aside sale—Compromise—Payment of instalments agreed to—Sale to be confirmed on failure to comply—Payment of decretal amount but not as per compromise—Lower Appellate Court ordering enquiry on merits:

Held, that the order was not proper and was not under S. 47 and that no second appeal lay. A.I.R. 1937 Cal. 461=41 C.W.N. 890=170 Ind. Cas. 917.

——S. 47—Order setting aside sale for want of attachment.

An order setting aside the sale on the ground that the executing Court had no jurisdiction to sell the property without attaching it in the first instance falls under S. 47, and a second appeal is competent against such order. A.I.R. 1936 Lah. 573=164 Ind. Cas. 140.

——S. 47—Application by judgment-debtor to set aside sale—Second appeal.

A second appeal lies from an appellate order on an application to set aside a sale, where the judgment-debtor himself is the applicant to set aside the sale, as in such a case the provisions of S. 47, C. P. Code, apply. A.I.R. 1935 Mad. 438=1935 M.W.N. 403 =42 L.W. 39=156 Ind. Cas. 699.

——S. 47—Application to set aside sale—Second appeal—When maintainable.

No second appeal lies from an application merely to set aside a sale on account of irregularities, even though the application is headed under S. 47 and O. 21, R. 90. A.I.R. 1936 Pat. 627=16 P.L.T. 16=152 Ind. Cas. 776.

——S. 47—Person sued as legal representative —Objection to attachment—Second appeal.

Where a person who was sued as the legal representative of a deceased person took objection to the attachment of certain property as being his own property and not that of the deceased:

Held, that the question which arose was one between the parties to the suit within the meaning of S. 47, C. P. Code, and that therefore, second appeal could lie. A.I.R. 1934 Rang. 127=151 Ind. Cas. 227.

——S. 47 and O. 21—Scope of—Appeal and second appeal from orders under—Competency.

There is no inconsistency between the provisions of the rules in O. 21 and the provisions of S. 47. But even if there were, it is obvious that S. 47 must override the provisions of the rules in the schedule, as is suggested by S. 128 (1), C. P. Code. Where a case falls under both S. 47 and under some rule in O. 21, there will be no prohibition against a second appeal, because the prohibition under S. 104 (1) is confined to orders only and not decree. If the order comes under S. 47 also, the order would be a decree and an appeal would lie under S. 96, C. P. Code, and a second appeal under S. 100. A.I.R. 1933 All. 57=1932 A.L.J. 1036=54 All. 1031=143 Ind. Cas. 420.

——S. 47, O. 21, R. 72, O. 40, R. 1—Decree-holder Receiver purchasing property without obtaining leave to bid as Receiver—Validity of sale—Application to set aside sale—Second appeal, competency of.

Where at an execution sale a decree-holder who was also the Receiver in respect of the property, purchased the properties after obtaining leave under O. 21, R. 72, but without obtaining leave to bid as Receiver:

Held, that an application to set aside such a sale was governed by S. 47 and a second appeal lay to the High Court. A.I.R. 1932 Cal. 672=36 C.W.N. 125=55 C.L.J. 85=59 Cal. 956=139 Ind. Cas. 186.

——S. 47 and O. 21, R. 90—Orders under—Appeal—Second appeal.

A second appeal against an order passed under O. 21, R. 90, is competent where the decree-holder himself is the purchaser as the case under such circumstances falls under S. 47. A.I.R. 1930 Nag. 191=124 Ind. Cas. 250.

——S. 47—Auction-purchaser—Appeal to lower appellate Court under S. 47—Auction-purchaser applying in revision—No second appeal lies and so revision is not barred.

Where the appeal to the lower Court was under S. 47, C. P. Code, and where the auction-purchaser and not the decree-holder or judgment-debtor petitions the High Court for revision his petition is not barred, because a second appeal by him does not lie. 117 Ind. Cas. 789=A.I.R. 1929 Mad. 84.

——S. 47—Sale—Setting aside of—Orders in regard to—Appeal and second appeal.

No second appeal lies against an order setting aside or refusing to set aside a sale, although the matter is one between the decree-holder auction-purchaser and judgment-debtor. 104 Ind. Cas. 188=45 C.L.J. 557=A.I.R. 1927 Cal. 657.

——S. 47—Order under O. 21, R. 90—Appeal and second appeal.

All orders between decree-holder and judgment-debtor under S. 47 are not decrees and appealable as such. An order under O. 21, R. 92, being appealable under O. 43, R. 1 (j), a second appeal does not lie. 42 C.L.J. 176=90 Ind. Cas. 228=A.I.R. 1926 Cal. 400.

——S. 47—Small cause execution—Appeal and second appeal.

No second appeal lies in a matter of execution in a suit which is of a Small Cause nature. 90 Ind. Cas. 794=A.I.R. 1925 Mad. 742=48 M.L.J. 499.

——S. 47—Execution—Second appeal—Valuation for—How determined—Valuation.

In determining whether a second appeal lies against an order passed in execution proceedings, the amount of the subject-matter of the suit and not the amount sought to be recovered in execution must be taken into consideration. 29 P.R. 1902 and 30 Mad. 212, Followed. 67 Ind. Cas. 718=3 Lah. 141=28 P.W.R. 1922=A.I.R. 1922 Lah. 290.

——S. 47—Second appeal in execution—When not competent.

A second appeal will not lie in an execution matter if a second appeal would not have laid in the suit itself. 60 Ind. Cas. 831=43 All. 403=19 A.L.J. 72 =A.I.R. 1921 All. 55.

——S. 47—Execution transferred to Collector —Application to wrong Court—Second appeal.

The Execution of a decree was transferred to the Collector and the sale of immovable property was fixed on 28th March, 1925. On that day, the judgment-debtor deposited a part of the decretal amount in the Court which passed the decree and applied for stay and obtained it. But before this order of stay could be transmitted to the Mamlatdar in the same town, who was holding the sale, the property was sold. On 6th April, 1925, the appellant applied to set aside the sale on the ground that, having obtained the stay before the sale actually took place, the sale was void. The auction-purchaser was not made a party to this application.

Held, that the execution and sale having been transferred to the Collector under S. 68, such application to adjourn the sale lay to the Collector rather than to the decreeing Court. If so, the original application would not fall under S. 47 and no second appeal lies. 52 Bom. 290=30 Bom.L.R. 465=110 Ind. Cas. 710=A.I.R. 1928 Bom. 189.

Stay of execution.

——S. 47—Order refusing to stay execution—Appeal.

When the phraseology of the law is changed by an Amending Act, the presumption will be that some change in the law is intended. Questions relating to stay of execution are no longer within the purview of S. 47. No appeal, therefore, lies from an order staying or refusing to say execution of a decree. A. I.R. 1938 Rang. 317=1938 Rang.L.R. 580=177 Ind. Cas. 942.

——S. 47—Appeal 'stay of execution.'

The words 'stay of execution' found in S. 244, Old Code are not found in S. 47 (New Code.) But the omission does not mean that matters relating to stay of execution are not within S. 47. The words are omitted to avoid surplus matter. 39 Mad. 541= 33 Ind. Cas. 66.

——S. 47—Appeal—Stay of execution.

The order for staying execution of a decree till the decision of the appeal clearly falls under S. 2 (2) read with S. 47 and is appealable as a decree. The order finally and conclusively determines the question concerning the very important right of the decree-holder to reap forthwith the fruits of the decree and arising between parties to the suit and relating to the execution of the decree. 124 Ind. Cas. 349=A.I.R. 1930 Lah. 187.

——S. 47—Order granting review rejecting application for stay of execution—Order is decree and is appealable. A.I.R. 1939 Cal. 628=69 C.L.J. 573 =43 C.W.N. 913=184 Ind. Cas. 689.

——S. 47—Court allowing hypothecation bond tendered to be accepted as sufficient security and directing stay.

An order by a Judge in execution proceedings pending in his Court, allowing the hypothecation bond tendered to him to be accepted as sufficient security and directing that the execution proceedings be stayed as ordered by another High Court is not a final order, but merely in the nature of an interlocutory order, and does not come within the purview of S. 47 and is, therefore, not appealable. A.I.R. 1936 Oudh 369=1936 O.W.N. 664=1936 O.L.R. 450=164 Ind. Cas. 424.

——S. 47—Execution filed unsatisfied—Order, if appealable—Appeal, if barred by subsequent filing of execution unsatisfied.

Where the order directs an applicant to file another execution application while refusing to execute the decree as prayed for, the order is appealable as a decree under S. 47. The right of appeal is not taken away merely because the execution is subsequently filed unsatisfied. A.I.R. 1936 Pesh. 46=160 Ind. Cas. 812.

——S. 47—Stay of execution—Appeal.

An appeal lies against the order of the Court refusing to stay execution when informed that an insolvency petition had been admitted. (1935) M. W.N. 1102.

——S. 47—Appeal—Stay of execution.

An order relating to stay of execution is not an adjudication conclusively determining the rights of the parties and no appeal lies therefrom. A.I.R. 1933 Nag. 84=16 N.L.J. 17=141 Ind. Cas. 841.

——S. 47—Stay of execution—What amounts to.

The order of the executing Court that the decree-holder must first proceed to realize the balance of his decretal money from defendants Nos. 1 to 3 and if he is unable to realise his money from them, then alone he can proceed against defendants Nos. 4 and 5, amounts to an order staying execution against defendants Nos. 4 and 5 until certain conditions have been fulfilled, and is not appealable. A.I.R. 1931 All. 129=1931 A.L.J. 895.

——S. 47—Stay of execution.

An order staying or refusing to stay execution of decree is not appealable as a decree. A.I.R. 1931 Rang. 221=9 Rang. 354=133 Ind. Cas. 491.

——S. 47—Appeal—Stay of execution.

No appeal lies from an order granting stay of execution of a decree. 22 Bom.L.R. 1212=59 Ind. Cas. 523.

——S. 47—Appeal—Staying execution.

Order staying or refusing to stay execution of a decree are not orders determining questions relating to the execution of the decree within S. 47, C. P. Code and are not appealable. 55 Ind. Cas. 228=25 C.W.N. 555.

——S. 47 and O. 41, R. 5—Appeal—Stay of execution—Refusal to—Appeal.

An Appellate Court is not 'a Court executing a decree' within S. 47, C. P. Code and no appeal lies from an order of the Lower Appellate Court refusing to stay the execution of a decree. 29 Bom. 71, foll. 27 M.L.J. 171=25 Ind. Cas. 47.

——S. 47—Appeal—Stay of execution.

An order in order that it should amount to a decree, must finally determine the rights between the parties and unless it is such there can be no appeal from such an order. Stay of execution on accepting security in obedience to an order of an Appellate Court is no decree. 41 Cal. 160=17 C. W. N. 1240=20 Ind. Cas. 72.

——S. 47—Appeal—Stay of execution.

No appeal lies against an order rejecting an application for stay of sale as the order does not involve any question relating to the execution of the decree which would amount to an adjudication conclusively determining the rights between the parties with regard to any of the matters in controversy. 112 Ind. Cas. 620=26 A.L.J. 1325=A.I.R. 1929 All. 85 (1).

——S. 47—Staying execution.

No appeal lies from an order staying execution of a decree. 94 Ind. Cas. 352=A.I.R. 1926 Cal. 830.

——S. 47—Stay of execution.

An order granting stay is not appealable because it does not determine the rights and liabilities of the parties with reference to the relief granted by the decree but merely the incidental question whether execution should proceed at once or after an interval of two months. 83 Ind. Cas. 1035=46 All. 733=22 A.L.J. 706=A.I.R. 1924 All. 808.

——S. 47—Stay of execution—If included.

The expression "an order relating to execution of a decree" under S. 47 is comprehensive enough to include an order relating to the stay of execution thereof. 75 Ind. Cas. 615=A.I.R. 1924 Lah. 631.

——S. 47—Stay of execution.

An order refusing to stay a sale of immovable property in execution of a decree during the pendency of an appeal in the High Court under O. 41, R. 6 (2) of the Civil Procedure Code is appealable as a decree under S. 47. 75 Ind. Cas. 1001=A.I.R. 1924 Lah. 671.

——S. 47—Stay of execution.

A decision that execution shall not take place does determine a right for the time being and may have far-reaching results. An appeal lies from the order staying execution. 76 Ind. Cas. 174=A.I.R. 1924 Lah. 602.

——S. 47—Orders staying execution—Appeal.

All orders staying execution of decrees are questions arising between the parties to the suit in which the decree was passed, and relating to the execution thereof and, as such, appealable. 75 Ind. Cas. 419 =A.I.R. 1923 Lah. 514.

——S. 47—Stay of execution—Appeal.

No appeal lies from an order for stay of execution of a decree. 45 Bom. 241=59 Ind. Cas. 523 =A.I.R. 1921 Bom. 208=22 Bom.L.R. 1212.

——S. 47—Orders staying execution—Appeal.

All orders staying or refusing to stay execution of decrees are orders determining questions relating to execution and thus appealable. 62 Ind. Cas. 342=10 L.B.R. 326.

2. Applicability.

——S. 47—Applicability—No dispute between co-defendants in suit—Section, if applies—Separate suit.

Where there was no conflict between co-defendants in the suit, but on the contrary they were sailing together and supporting each other, a conflict which arises between them in execution cannot come within S. 47 and the proper remedy to resolve the conflict or dispute is by way of a separate suit. For the applicability of S. 47, there should be a conflict between parties in respect of the matter in the suit itself. A.I.R. 1946 Mad. 90=58 L.W. 634=1945 M.W.N. 761=(1945) 2 M.L.J. 567=I. L. R. (1946) Mad. 640=223 Ind. Cas. 325.

——S. 47—Applicability—Questions relating to validity of decree itself.

Where the question between the parties does not relate "to execution, discharge or satisfaction of the decree" but is one which if decided in favour of the appellant would strike at the very root of the decree which the respondent is seeking to execute, S. 47 can have no application. The fact that the suit was instituted after execution proceedings had been taken to a certain stage will not make S. 47 applicable if it was not so applicable before. 121 Ind. Cas. 702 =A.I.R. 1930 All. 628.

——S. 47 (S. 244, Old Code)—Applicability of —Decree cannot be questioned.

Section 244 of the Civil Procedure Code has no application to a case where the judgment-debtor tries to set aside the effect of the decree itself. In the case of a mortgage-decree, the decree itself directs the sale of the property and if objection is taken that the property cannot be sold, the propriety of the decree is called in question. A question of this description must be tried in a regular suit and not in the execution proceedings. (1906) 8 C.L.J. 20. *Also* (1904) 32 Cal. 265.

——S. 47 (S. 244, Old Code)—Applicability—Conversion of plaint into application—Decree itself impeached—No bar to suit.

Cases can only be enquired into under S. 244, C. P. Code, where the existence of a decree which is susceptible and capable of execution is conceded, and it does not apply to a case where the object is to impugn the decree itself. If a plaint is presented where an execution application will lie, the defect is one of form rather than of substance, and the plaint should be treated as an application. (*See* now the provision in S. 47 (2)). (1907) 5 C.L.J. 328.

——S. 47 (S. 244, Old Code)—Applicability—Essentials.

Section 244 does not apply to a case where the decree itself is impeached, and no appeal lies from an order dealing with such objection. (1904) 17 M.L. J. 288=30 Mad. 402=2 M.L.T. 360; *also* 16 M.L. J. 545=30 Mad. 26.

——S. 47 (S. 244, Old Code)—Applicability—Plea of agreement before decree not to execute, but to grant other rights to defendant over the land—Remedy.

Cases can be inquired into under S. 244, C. P. Code, only when the existence of a decree which is susceptible and capable of execution is conceded, and S. 244 does not apply to a case where the objection is one impugning the decree itself, or to set up a case inconsistent with the decree which it is sought to execute. Consequently a Court cannot inquire under S. 244 into an objection that a decree cannot be executed by reason of an agreement entered into between the parties before the decree was passed that it will not be executed. 29 C. 810; 6 C.W.N. 796, followed. (1903) 31 Cal. 179.

——S. 47 (S. 244, Old Code)—Applicability—Agent—Auction-sale—Fraud of auction-purchaser—Separate suit against agent—Applicability of S. 244.

Where an auction-sale is brought about by the fraud of the judgment-debtor's agent who becomes the

auction-purchaser, the fact that the judgment-debtor can bring a suit against the agent will not bar an application under S. 244 to set aside the sale on the ground of fraud. (1900) 6 C.W.N. 279.

——S. 47; O. 21, R. 57 (Ss. 244, 278, Old Code) —Applicability—Decree, personal against shebait—Claim to attached property on behalf of idol, if may be tried in execution proceedings.

When immovable property is attached in execution of a decree passed against a shebait personally the latter can object to the attachment on the ground of the property being debutter and the claim is triable under S. 244 of the Civil Procedure Code. (1907) 7 C.L.J. 537=12 C.W.N. 310=35 Cal. 364.

——S. 47; O. 21, Rr. 57, 62 (Ss. 244, 278, 283, Old Code)—Applicability of S. 244—Party claiming attached property in his character as trustee—Appeal—Wakf—Decree directing sale of wakf property.

Section 244 has no application to a case where the judgment-debtor or his representative asserts in execution that he holds the property attached in trust for some third person or body of persons or religious charity or institution. The claim must be investigated under Ss. 278, 283, C. P. Code, and the order passed therein cannot be challenged by an appeal, but must form the subject of a separate suit. (1908) 18 M.L.J. 21=3 M.L.T. 325=31 M. 125.

——S. 47 (S. 244, Old Code)—Applicability—Questions falling within—Test—Auction-sale—Setting aside of—Application to.

In determining whether an application to set aside a sale comes within the scope of S. 244, C. P. Code or not, the point to be considered is whether there is a contest regarding the validity of the sale between the parties to the suit. (1900) 6 C.W.N. 279 at 283.

——Ss. 47, 140 (Ss. 244, 583, Old Code)—Applicability of, to rent suits. 26 A. 149=1903 A.W.N. 207.

——S. 47 (S. 244, Old Code)—Applicability—Sale in execution—Application to set aside sale on the ground of fraud—Fraud.

An application to set aside on the ground of fraud a sale held in execution of a decree can be made under S. 244 of the C. P. Code, even after the sale has been confirmed. 26 C. 326 and 324, foll. 1905 A.W.N. 162=2 A.L.J. 469=27 A. 702.

——S. 47 (S. 244, Old Code)—Applicability—of, to sales under Bengal Act (1 of 1897)—Public demands Recovery Act.

S. 244 of the Civil Procedure Code does not apply to sales under the Public Demands Recovery Act (Bengal Act 1 of 1897). 29 C. 94, 6 C.W.N. 246, 6 C.W.N. 331, foll. (1900) 6 C.W.N. 633=29 C. 726.

——S. 47 (S. 244, Old Code)—Applicability—Whether, applies to Agency Tracts in Madras Presidency—Ganjam and Vizagapatam Agency Rules. *See* 17 M.L.J. 447=30 M. 547=3 M.L.T. 11.

——S. 47—Applicability of—Agency tracts.

Section 244 of the C. P. Code (1882) has never been in force in the Ganjam and Vizagapatam Agency tracts. 36 Mad. 128=10 M.L.T. 261=21 M.L.J. 887=(1911) 2 M.W.N. 237=12 Ind. Cas. 73.

——S. 47—Applicability—Sale of property by B on behalf of himself and his brother A, not in senses—Sale regarding A's share void—On A's death, B inheriting A's share—A's share in hand of B, held not available for purchasers.

In a sale-deed executed by *B* on behalf of himself and as a guardian of his lunatic brother it was recited that he "himself and on behalf of *A* aged about 38, not in his senses, my real brother, whose guardian I am" was selling the property. *A* was one of the plaintiffs besides *B* in the suit for partition. It was held by the trial Court that the sale, in so far as it was on behalf of *A*, was void as a guardian of a lunatic has no power to dispose of his property. During the pendency of apeal, *A* died. On *B's* inheriting the share of *A*, the purchasers, in an application under S. 43, T. P. Act, prayed for a direction that as they were awarded the share of *B* in lieu of property purchased by them and as that share had been inherited by *B*, they should be awarded separate possession of the said shares in execution proceedings for partition.

Held, that the case was governed by S. 47, C. P. Code, as in the case there was a question between the parties and that question related to the execution and satisfaction of the decree.

Held, further that with reference to execution sales, the Courts in India had not placed any narrow construction on the language of S. 47, C. P. Code, a wide construction should be put upon the provisions of the Code with regard to introducing parties by devolution and desirability of ascertaining all possible points in execution proceedings without a fresh suit. A.I.R. 1946 Sind 99=I.L.R. (1945) Kar. 455.

——S. 47—Applicability—Assignment of decree—Execution by assignee—Decree-holder's right to appeal from order.

Section 47 does not apply to a case where the dispute arises between a party and his own representative or between two persons who both represent the same party and the remedy of the aggrieved party in such a case is by way of a suit. Hence, where a decree-holder has assigned the decree and the assignee who files the execution application does not file an appeal from an order passed on it, it is not competent to the decree-holder, though he is a party to the application to file an appeal. A.I.R. 1945 Mad. 25=(1944) 2 M.L.J. 323=57 L.W. 552=1944 M.W.N. 645.

——S. 47—Applicability—Two defendants properly joined—One of them given up—Order removing his name amounts to dismissal of suit against him and S. 47, applies.

The plaintiff in the plaint sought relief against the two defendants who were properly joined as parties to the suit. Subsequently one of them alone, under the provisions of O. 37, R. 3, obtained leave of the Court to defend the suit and in effect he became the real contesting party in the litigation:

Held, that the abandonment of claim against such a party and his exoneration from the decree did not in any way affect the applicability of S. 47. The order of the Court removing the name of this defendant from the array of parties was thus in effect an order of the dismissal of the suit against him and in view of the Explanation to S. 47, such exoneration from the array of defendants did not affect

the applicability of S. 47. A.I.R. 1944 Lah. 273 =46 P.L.R. 222=217 Ind. Cas. 376.

——S. 47—Applicability.

The fact that the auction-purchaser was not a party to the suit is no bar to the application of S. 47 when a question arises as to the execution of a decree in which the auction-purchaser is interested. A.I.R. 1944 Sind 233=I.L.R. (1944) Kar. 284=218 Ind. Cas. 486.

——S. 47—Applicability.

Sub-section (3) of S. 47, C. P. Code, applies where there is a dispute between one party and representative of another party about the latter's right to represent the deceased party's estate. A.I.R. 1942 Bom. 309=44 Bom.L.R. 678=I.L.R. (1942) Bom. 822=203 Ind. Cas. 339.

——S. 47—Applicability.

Suit by co-tenant in 1924 for share of income—No ouster claimed or decided—Suit decreed—Subsequent suit by son of such co-tenant for partition of same property:

Held, that the suit was not barred by S. 47. A. I.R. 1942 Bom. 44=43 Bom.L.R. 971=I.L.R. (1942) Bom. 14=198 Ind. Cas. 550.

——S. 47—Applicability—Re-opening of decree under Bengal Money-lenders' Act.

An application for the re-opening of a decree which has been passed and for the passing of a new decree giving the petitioner such relief under the Bengal Money-lenders' Act as he is entitled to get, has nothing to do with an application under S. 47, and therefore, the provisions of that section cannot be called in aid for the purpose of converting that proceeding into a suit. A.I.R. 1942 Cal. 324=46 C. W.N. 84=I.L.R. (1942) 1 Cal. 354=200 Ind. Cas. 350.

——S. 47—Applicability—Conditions.

In order to attract the operations of S. 47, it is necessary that the order must be made by the executing Court and it must determine, as between the parties to the suit or their representatives, any question relating to execution, discharge and satisfaction of the decree. A.I.R. 1941 Cal. 530=I. L. R. (1941) 2 Cal. 402=196 Ind. Cas. 683.

——S. 47—Applicability — Dispute between party and his own representative or person representing same party.

Section 47, C. P. Code, does not apply to a case where the dispute arises between a party and his own representative or between the two persons who both represent the same party. The remedy of the aggrieved party in such a case is by way of a suit. A.I. R. 1941 Mad. 161=I.L.R. (1941) Mad. 438=53 L.W. 27=(1941) 1 M.L.J. 45=1941 M.W.N. 149 =196 Ind. Cas. 204 (F.B.).

——S. 47 (S. 244, Old Code)—Applicability—Mortgagee holding first mortgage on whole and second mortgage on half-share in same property —Sale in execution of decree on first mortgage —Right to surplus sale proceeds.

B held a first mortgage of joint property from *K* and *T* and also a second mortgage of *K's* share only. The rights of the mortgagors passed to third parties in execution of money decrees. *B* sued on his first mortgage and brought the mortgaged property to sale and the proceeds of sale satisfied *B's* first mortgage and left a surplus. *Held*, that *B* was entitled as second mortgagee to a lien on half the surplus sale proceeds. *Held* also that inasmuch as *B's* decree had been satisfied, a dispute as to who was entitled to the surplus sale proceeds did not fall within S. 244 of the Code of Civil Procedure, and further that the executing Court ought to have left the rival claimants to settle their respective rights by means of a civil suit. 1907 A.W.N. 201=4 A.L.J. 492.

——Ss. 47; O. 21, R. 89 (Ss. 244, 310-A, Old Code)—Applicability—Stranger purchaser—No contest between decree-holder and judgment-debtor.

Where the auction-purchaser is a third person and not the decree-holder, and where upon an application being made by the judgment-debtor under S. 310-A, C. P. Code, to set aside the sale, it is not contested by the decree-holder, so that no question arises between the decree-holder, and the judgment-debtor, the order made by the Court does not fall within S. 244, C. P. Code. (1906) 5 C.L.J. 204.

——S. 47 (Ss. 244, 311, Old Code)—Applicability—Test.

The test is whether the question raised in the proceedings is one relating to execution, satisfaction or discharge of the decree, and if the question is of this description, whether it arises between the parties to the suit or their representatives. (1908) 11 C.L.J. 202=13 C.W.N. 591.

——S. 47 (S. 244, Old Code)—Applicability—Mortgage—Decree for sale ordering lower Court to take account and ascertain the amount due to the mortgagee—Order declaring the amount.

In suit on a mortgage, an appellate Court can pass a decree for sale and direct the Court of first instance to take an account and declare the amount due to the mortgagee. An order declaring the amount made in pursuance of such a decree is an order in execution of such decree and is under S. 244, C. P. Code. (1902) 13 M.L.J. 212.

——S. 47 (S. 244 (c), Old Code)—Applicability —Mortgage suit—Redemption—Extension of time—Order.

An order on an application under S. 93 of T. P. Act for extension of time for redemption is one under S. 244, C. P. Code. (1901) 3 Bom.L.R. 554=26 Bom. 121.

——S. 47; O. 41, R. 5 (Ss. 244, 545, Old Code) —'Question for Court executing decree'—Order of appellate Court refusing stay—No decree. 6 Bom. L.R. 780=29 B. 71.

——S. 47 (S. 244, Old Code)—Attachment and decree for sale on a mortgage—Objection by mortgagor that decree has been satisfied—Objection disallowed.

An order disallowing an objection to the sale of a mortgage decree obtained by the judgment-debtor against the mortgagor-appellant, passed in execution of decree obtained against the mortgagee is not within S. 244. 26 A. 136.

——S. 47 (S. 244, Old Code)—Applicability—Execution of decree—Objection by judgment-debtor that more had been delivered to the auction-purchaser than was included in his sale certificate.

Certain landed property was put up for sale in execution of a decree. On the property stood a

house. After the sale the auction-purchaser obtained possession of the house. The judgment-debtor objected that the house should not have been delivered, inasmuch as no mention was made of it in the sale certificate. This objection was disallowed. *Held*, that the order did not fall within S. 244 of the Code of Civil Procedure. (1902) A.W.N. 144=24 A. [illegible]

——S. 47 (S. 244, Old Code)—Applicability—Objection from judgment-debtor that he is trustee in respect of the property attached.

Where a property is attached in execution of a decree and the judgment-debtor objects on the ground that although he is in possession of the same, such possession is not on his account but of two idols (or Hindu deities), and the property is *debutter*, and he has no personal right in it. *Held*, that the objection does not fall under the provisions of S. 244, C. P. Code, but it is a claim under S. 278. (1900) 6 C.W.N. 63.

——S. 47—Applicability.

Under S. 11 of C. P. Money-lenders' Act an application for stay of execution lies to the Civil Court even after the transfer of the decree to the Collector for execution—Sale by Collector sought to be declared void on ground of its being in contravention of stay order by Civil Court—Application falls under S. 47. A.I.R. 1940 Nag. 372=1940 N.L.J. 473=193 Ind. Cas. 274.

——S. 47—Applicability—Order for simultaneous execution.

Court in which execution is pending issuing certificate for simultaneous execution to proceed in that and transferee Court on certain condition—Order is not purely ministerial order—Where the Court has to use discretion, order must be regarded as judicial and the judgment-debtor must be heard. The order also comes under S. 47—If it is passed without hearing judgment-debtor it is illegal and must be vacated. A.I.R. 1939 Bom. 258=41 Bom.L.R. 481=183 Ind. Cas. 333.

——S. 47 (2) and O. 21, R. 63—Applicability.

Special provisions of O. 21, R. 63 prevail over the provisions of S. 47 (2) and the plaint in suit under R. 63 cannot be regarded as application under S. 47 (2). A.I.R. 1938 Nag. 534=I.L.R. (1940) Nag. 334=1938 N.L.J. 336=180 Ind. Cas. 903.

——S. 47—Question not arising under execution of decree.

Where the application is for delivery of the properties on the ground that the compromise decree is not binding on the applicant and not under or in execution of that decree, that question is not one that can be tried in execution. Section 47 has, therefore, no application. A.I.R. 1937 Mad. 268=173 Ind. Cas. 90.

——S. 47—Applicability.

Unless some question of the nature specified in S. 47, is determined, an order passed in execution proceedings between the parties to the decree cannot be considered to be one under S. 47, C. P. Code. A.I.R. 1935 All. 502=1935 A.L.J. 403=1935 A. W. R. 427=1935 A.L.R. 805=157 Ind. Cas. 426.

——S. 47—Applicability—Construction of S. 47 to be in favour of decree-holder.

Section 47 should be construed liberally and the decree-holder should get his relief as expeditiously as possible. A.I.R. (Vol. 23) 1936 Pat. 289=2 B.R. 508=17 P.L.T. 434=15 Pat. 545=162 Ind. Cas. 830.

——S. 47—Applicability to—Rent decree.

An appeal lies from an order passed in execution of a rent decree, on a question relating to execution and satisfaction of such a decree, since S. 47 applies also to execution proceedings of rent decrees. A.I.R. 1935 Pat. 227=16 P.L.T. 443=156 Ind. Cas. 881.

——S. 47—Applicability—Test.

Question of applicability of S. 47 must be decided with due regard to the order in the form as actually framed. A.I.R. 1934 Lah. 737=154 Ind. Cas. 1086.

——S. 47—Applicability when decree is a nullity.

Where the decree is a nullity, then S. 47, has no application, for, such a decree is not a decree at all and a suit to set aside the decree is not barred. A.I.R. 1934 Oudh 167=11 O.W.N. 416=148 Ind. Cas. 418.

——S. 47—Mortgage decree—Decree-holder purchasing property—Application for possession under O. 21, R. 100 by puisne mortgagee—Alternative prayer for crops under S. 47.

A property was purchased by the mortgagee decree-holder in auction. B who had been impleaded in the suit as a puisne mortgagee filed a petition to have the sale set aside. This petition was dismissed and the sale confirmed. B put in an application under O. 21, R. 100 for possession of the property from the purchaseing decree-holder. In the same application he applied for an alternative relief as regards the crops as a party under S. 47: **Held**, that the alternative prayer could not be entertained in the petition which had been deliberately put in to recover possession under O. 21, R. 100. A.I.R. 1933 Mad. 482=145 Ind. Cas. 174.

——S. 47—Applicability—One of the plaintiffs not party to the decree.

Where one of the plaintiffs is not a party to the decree and it is clear that the question cannot be decided in execution proceedings, S. 47 does not apply. A.I.R. 1933 Oudh 146=10 O.W.N. 52=140 Ind. Cas. 843.

——S. 47—Applicability—Tests.

In considering whether an application is under S. 47, or not, one must examine the substance of the application to find out its true nature and should not be guided solely by the heading given to it by the applicant. A.I.R. 1933 Mad. 130=140 Ind. Cas. 779.

——S. 47—Applicability.

When a party elects to go against a firm, the question whether a particular person is or is not a partner of such firm and is bound by the decree or the award as the case may be, is a question which can be dealt with either in execution proceedings

or in a separate suit. A.I.R. 1932 Bom. 375=34 Bom.L.R. 737=140 Ind. Cas. 761.

——S. 47—Applicability.

Where in a previous suit though the son of the original owner was the second defendant, the plaintiff obtained a decree against the right, title and interest of the first defendant only in the suit properties (he being an alienee from the father) and the second defendant's title was not investigated and decided, the plaintiff-auction purchaser is not entitled to an order for actual possession. He is only entitled to symbolical delivery as against the first defendant who was not himself in possession. After he has obtained symbolical delivery in pursuance of the previous decree a subsequent suit by him for actual possession against the second defendant is not barred by S. 47. 1930 M.W.N. 1051.

——S. 47—Applicability.

Objection by legal representative on the ground of property being his own, and objection on the ground of properties being trust properties—Distinction—The former case only governed by S. 47. A.I.R. 1930 Nag. 293=128 Ind. Cas. 401=27 N.L.R. 10=13 N.L.J. 205.

——S. 47 (S. 244, Old Code)—Applicability.

The section does not apply where the question cocerns only the rival decree-holders. (1906) 11 C.W.N. 433=6 C.L.J. 437.

——S. 47 and T. P. Act (4 of 1882), S. 52—Appplicability of S. 47—Appellant's purchase pendente lite respondent's mortgage suit—Appellant and respondent representatives of common judgment-debtor—Principle of lis pendens if operates.

The respondent filed a suit against one **M** on the foot of a mortgage and in execution of the decree obtained by him brought the property to sale and purchased it himself. He then applied to the Court for delivery of possession and impleaded as party to the application, the appellant, who pending the disposal of the respondent's suit had purchased the property in a Court sale, in execution against **M**.

Held, whatever the merits of that contention might have been, it could not be urged by the appellant in the circumstances of this case, where he purchased the property pending disposal of the mortgage suit; even though the transfer was not a voluntary one, the principle of S. 52 of the T. P. Act applied. 61 L.W. 535=1948 M.W.N. 577=(1948) 2 M.L.J. 128=A.I.R. 1949 Mad. 207.

——S. 47—Applicability—Application for restitution under S. 151.

If an applcation for restitution does not come under S. 144 but is one under S. 151 there can be no objection to its being recorded as coming under S. 47 in execution of the decree. 35 C.W.N. 105=A.I.R. 1931 Cal. 779=53 C.L.J. 49=134 Ind. Cas. 1185.

——S. 47—Applicability—Application under O. 21, R. 90, disposed of upon compromise—Judgment-debtor complying with its terms—Order rejecting application by decree-holder for relief—Second appeal.

Where an application under O. 21, R. 90, C. P. Code, for setting aside a sale was disposed of upon compromise and the decree-holder made an application purporting to be one under S. 47, C. P. Code, claiming that as the terms of the compromise had not been fulfilled by the judgment-debtor there should be a declaration that the sale stands good, an order rejecting that application is not one under O. 21, R. 92, C. P. Code, but is one under S. 47, C. P. Code, which is unaffected by the provisions of S. 104, C. P. Code. That being so, a second appeal lies from the order. A.I.R. 1950 Cal. 582=54 C.W.N. 690.

——S. 47—Applicability—"Between the parties to the suit"—Interpretation—Conflict in the suit—Necessity—Defendant's sailing together and supporting each other—Conflict in execution—Appeal—Maintainability. I.L.R. (1946) Mad. 640=223 Ind. Cas. 325=A.I.R. 1946 Mad. 90=1945 M.W.N. 761=58 L.W. 634=(1945) 2 M.L.J. 567.

——S. 47—Applicability—Compensation for excessive or wrongful execution.

Where in execution of a decree for possession of land, the building on it is demolished, the remedy of the judgment-debtor for compensation is by way a separate suit for the wrong committed. An application for compensation under S. 47, C. P. Code, cannot lie as it is not a question relating to execution, discharge or satisfaction of the decree. 1948 A.L.W. 311=1948 O.W.N. 316=A.I.R. 1949 A. 263.

——S. 47—Applicability—Decree against assets of deceased in hands of judgment-debtor—Execution—Objection to attachment.

Where a judgment-debtor in a decree which is confined to the assets of a deceased person in his hands, objects in execution to the attachment and sale of certain properties on the ground that the attached properties are not the properties of the deceased but are held by him as marfatdar of a deity of a mutt, an order on such objection falls not under S. 47, C. P. Code, but under O. 21, R. 60. 13 Cut.L.T. 57.

——S. 47—Applicability — Different properties claimed as against different defendants—Matter in dispute.

A brought a suit against **B**, his adoptive mother, and **C**, the alienee, claiming several items of properties from **C** and item **X** from **B**. This item **X** was really in the possession and enjoyment of **C** by virtue of a deed of gift executed by **A** and **B**, but **A** did not claim that property from **C** or pray for setting aside the deed of gift in favour of **C** but, on the other hand, he alleged that it was in the possession of **B** and got a decree in respect of that item **X** as against **B** only. On failing to get possession of that item, he brought a fresh suit to recover that property **X** from **C**.

Held, though the particular property **X** was not

claimed as against C in the previous suit, the present suit was barred by S. 47, inasmuch as the requirements of the section were satisfied, the plaintiff was the plaintiff in the former suit, the present defendant was the second defendant in the former suit and the property now in dispute was one of the properties in dispute in that suit. 32 Bom.L.R. 1473=A.I.R. 1931 Bom. 114=129 Ind. Cas. 737.

——S. 47—Applicability—Dispute as to identity of property sold—Remedy.

Where a dispute is clearly one relating to the identity of the property sold, it cannot be said that it is one which relates to the execution, discharge or satisfaction of a decree falling under S. 47, C. P. Code, and as such a separate suit is not barred. A.I.R. 1950 All. 186.

——Ss. 47 and 145—Applicability—Execution of warrant for possession of house—Decree-holder getting possession—Movables found in house made over by process-server to decree-holder without security bond—Application by judgment-debtor for return—Competency—Remedy.

Where in execution of a warrant for delivery of possession of house, the process-server breaks open the lock of the house which was locked up and delivers possession to the decree-holder, and also makes over to him certain items of movable property found therein without taking any security bond from him, there being also no warrant or process for attachment of the movables, an application by the judgment-debtor for return of the movables from the decree-holder to the executing Court is not maintainable. S. 47, C. P. Code, does not apply as the matter does not relate to execution, discharge or satisfaction of the decree; nor does the application lie under S. 145 as there was no attachment of the movables or entrustment of the same to the decree-holder as a surety. The remedy of the judgment-debtor is by a regular suit only. A.I.R. 1949 Nag. 375.

——S. 47—Applicability—Garnishee not a party to the suit.

A garnishee who was not a party to the suit in which the decree was obtained and in execution of which attachment is sought of money in the hands of the garnishee, would not come within S. 47, C. P. Code. I.L.R. (1948) All. 207=(1948) A.W.R. (H.C.) 51 (2)=1948 O.A. (H.C.) 51 (2)=A.I.R. 1948 A. 307=1948 A.L.J. 103=1948 A.L.W. 153.

——S. 47—Applicability—Order setting aside sale in execution of rent decree under the Estates Land Act. (1946) 2 M.L.J. 476.

——S. 47—Applicability—Order passed in execution under the Madras House Rent Control Order 1941—Appealability. (1946) 2 M.L.J. 368.

——S. 47—Applicability—Proceedings in enforcement of award—Validity of such proceedings—If can be questioned in separate suit.

Proceedings arising out of an award and the enforcement of an award under the Co-operative Societies Act are not covered by S. 47, C. P. Code, and the section is no bar to questions relating to the validity of those proceedings being raised in a separate suit. 2 D.R. 256.

——S. 47 and O. 21, R. 90—Applicability—Purchase by decree-holder—Balance of sale price not deposited—Effect on sale—Application to avoid sale—Limitation.

Where a decree-holder purchaser does not deposit the balance sale price due by him in respect of sale to him, the sale is void even though it may be confirmed by the Court. In such a case an application to avoid the sale is governed not by O. 21, R. 90, C. P. Code, but by S. 47, and the 30 days' limitation does not apply. A.I.R. 1951 Cal. 319.

——S. 47 — Applicability — Mortgage-decree—Execution — Auction-purchaser—If a representative of decree-holder—Execution sale of property of extent in excess of that directed by decree.

The plaintiff who was the owner of a half share in a survey number mortgaged it to defendant and a decree was obtained for sale of that half share. Subsequently the plaintiff became the owner of the other half share also. In the execution application the whole survey number, both the share which was mortgaged and which was directed to be sold and also the share subsequenttly acquired by the plaintiff were included. The whole survey number was sold and it was purchased by defendant; the plaintiff filed a suit for recovery of possession of the additional half share which was not included in the mortgage or the decree but was wrongly sold in execution; the auction-purchaser and the decree-holder were made defendants to the suit.

Held (i) that the auction-purchaser was neither a party to the suit in which the decree was passed, nor a representative of the decree-holder, and the suit was not barred as S. 47, C. P. Code, had no application to the case; (ii) that the mortgage-deed having authorised that sale of only a half share, the executing Court had no jurisdiction to sell the additional half share and the sale of the additional half share was therefore void and a nullity and hence neither R. 90 nor R. 92 of O. 21, C. P. Code, applied to the case and the suit was therefore not barred under O. 21, R. 92. 50 All. 686; 41 Cal. 590, foll.; (iii) that the sale being a nullity, Art. 12, Limitation Act, had no application, as a void sale need not be set aside. 45 Bom.L.R. 553, foll.; (iv) that the suit was governed by Art. 142, Limitation Act, and having been brought within 12 years of the dispossession was in time and not barred. 40 Bom.L.R. 166, foll. A.I.R. 1950 Bom. 346=52 Bom.L.R. 358.

——S. 47—Applicability—Suit to declare title to decree.

Where a person conducts a litigation as an agent of the plaintiff and the suit is compromised and, in accordance with the compromise, the agent obtains a promissory note in his name, and subsequently sued on the note and gets a decree, a suit for a declaration that the plaintiff is the actual decree-holder and that the person was merely acting as his agent in the case, is competent. Such a suit is not barred by S. 9 or S. 47, C. P. Code. A.I.R. 1931 Rang. 24=130 Ind. Cas. 366.

——S. 47—Applicability.

A question between the auction-purchaser and the judgment-debtor with reference to the possession of property sold under the decree is not covered by S. 47. (1908) 31 All. 82 (F.B.) Foll. 47 All. 304=22 A.L.J. 1119=6 L.R.A. (Civ). 153=84 Ind. Cas. 746=A.I.R. 1925 All. 236.

——S. 47—Applicability.

S. 47 of the C. P. Code has no application to disputes between rival decree-holders. 113 Ind. Cas. 776.

——S. 47—Applicability—Decree-holder auction-purchaser—Disputes between.

A dispute between an auction-purchaser and the judgment-debtor, even if the former be the decree-holder who has purchased the property with the permission of the Court, is not a dispute between the judgment-debtor and the decree-holder relating to satisfaction, discharge, etc., of the decree and therefore S. 47, C. P. Code, has no application to such a case. 119 Ind. Cas. 226.

——S. 47—Applicability—Disputes between judgment-debtor and auction-purchaser.

A dispute between judgment-debtor and the auction-purchaser even if the latter is regarded as the representative of the former does not fall within the purview of S. 47. A.I.R. 1930 Rang. 281 =127 Ind. Cas. 476.

——S. 47 and Bengal Tenancy Act, S. 174.

An order under S. 174, Bengal Tenancy Act does not fall within S. 47, C. P. Code. 3 C. W.N. 344, Foll. 124 Ind. Cas. 481=50 C.L.J. 532=34 C.W.N. 250=A.I.R. 1930 Cal. 302.

——S. 47 and Orissa Tenancy Act (B and O. Act 2 of 1913, S. 227 (3)).

An application under S. 227 (3) of the Orissa Tenancy Act for setting aside a sale on the ground that the holding was purchased by the judgment-debtor himself through another person is not an application under S. 47 of the Code. 101 Ind. Cas. 564=6 Pat. 366=8 P.L.T. 186=A.I.R. 1927 Pat. 177.

——S. 47—Applicability—Procedure and jurisdiction.

The question as to the legality of the execution Court's procedure or as to its jurisdictional power to order a sale is a question falling unde S. 47. 6 O.L.J. 640, Foll. 120 Ind. Cas. 279=11 L.L. J. 306=A.I.R. 1929 Lah. 449.

——S. 47—Applicability—Third party also interested.

If there is a question relating to the execution, discharge or satisfaction of a decree arising between the decree-holder and the judgment-debtor, the mere fact that the auction-purchaser is also interested does not make S. 47 the less applicable. 19 Cal. 683 (P.C.) and 43 Mad. 107 (F.B.), Foll. 111 Ind. Cas. 551=A.I.R. 1928 Mad. 806.

——S. 47—Applicability—Money-decree executed as a rent decree.

Certain co-sharer landlord brought a suit against a tenant for arrears of rent and obtained a decree. The decree was executed as rent decree under Bengal Tenancy Act. The holding was sold and purchased by a third party. The co-shares did not object to the proceedings in execution and allowed the holding to be sold. Subsequently, on partition the holding was allotted to co-sharers and they sued to recover possession of the property alleging that the purchase by the third party was benami for the co-sharers landlord and that the decree obtained was a money decree and did not operate to convey the holding to the third party but only operated to convey the right, title and interest of judgment-debtors in property.

Held, that the suit was not barred by S. 47 as the execution that has already taken place was not disturbed and that the co-sharer was not estopped from contending that the previous decree was only a money decree and could not be executed as rent decree under Bengal Tenancy Act. 119 Ind. Cas. 882=A.I.R. 1930 Pat. 150.

——S. 47—Applicability—Parties on same side.

S. 47 applies not only to the disputes between parties who are opposed to each other in the main suit as plaintiffs or defendants, but also applies to disputes between parties on the same side as co-plaintiffs or co-defendants. A. I. R. 1924 Mad. 365, Foll. 4 Rang. 418=99 Ind. Cas. 418=A.I. R. 1927 Rang. 45.

——S. 47—Applicability — Collector executing decree.

A Collector of a district executing a decree transferred to him is not a Court and therefore cannot entertain an application under S. 47, C.P. Code. A.I.R. 1925 All. 146=84 Ind. Cas. 1031 =47 All. 217=22 A.L.J. 1060.

——S. 47—Judgment-debtor and Decree-holder.

The position of a judgment-debtor who brings a suit contesting an execution sale to the decree-holder differs as regards the applicability of S. 47, from the position of a decree-holder who sues for the possession of the property he has purchased in execution. 7 Lah. 1=27 P.L.R. 258=93 Ind. Cas. 1007=A.I.R. 1926 Lah. 165.

——S. 47—Applicability — Question relating to jurisdiction.

Where the Court declines to entertain application for execution at all on the ground that it has no jurisdiction, the order does neither come under S. 47 nor under the general definition of "decree". 86 Ind. Cas. 775=41 C.L.J. 166=A.I.R. 1925 Cal. 679.

——S. 47—Applicability — Commission — Order directing payment of.

In a partition suit, the appellant was appointed Commissioner to effect a partition and the appellant applied to the Court for obtaining his remuneration and an order was passed upon it in his favour. He applied for execution of this order:

Held, that under S. 36, C. P. Code, an order directing the payment of an amount is to be executed in the same way as a decree and consequently the provisions of S. 47 will apply to execution of an order under that section. 84 Ind. Cas. 724=40 C.L.J. 180=52 Cal. 269=A.I.R. 1925 Cal. 57.

——S. 47—Applicability—Mortgage suits.

A suit on a mortgage remains pending till the final decree. Questions arising in proceedings for making preliminary mortgage decree final are not covered by S. 47. That section applies only to questions regarding the satisfaction of the decree. 82 Ind. Cas. 452=22 N.L.R. 110=A. I.R. 1925 Nag. 132.

——S. 47—Applicability—Sale.

When the execution itself is attacked at the outset and a sale takes place afterwards, the judgment-debtor has the right to challenge the sale under S. 47. 83 Ind. Cas. 747=5 P.L.T. 61= A.I.R. 1924 Pat. 67.

——S. 47—Applicability.

The plaintiff sold 14½ bighas out of the 16 bighas owned by him, to the defendant, the latter agreeing to satisfy two decrees outstanding against the former. The defendant satisfied one of these decrees, in which he himself was the sole decree-holder but did not pay off other decree-holders, holding the other decree along with him. The defendant however got mutation effected on only 4 bighas out of the 14½ bighas sold to him. The decree-holders other than the defendant put the remaining 11 bighas, standing in name of the plaintiff to sale and the same was purchased by the son of the defendant. The plaintiff thereupon sued to recover 1½ bigha, the difference between the 14½ bighas originally sold by him and the 16 bighas owned by him. The defendant contended that the proceedings were barred under S. 47, C. P. Code.

Held, that plaintiff was justified in filing a suit to recover his property and that this was fraud neither in publishing nor conducting the sale, and that an application like the present suit could not have been made under S. 47. 74 Ind. Cas. 351=A.I.R. 1923 All. 573.

——S. 47—Applicability.

It is not necessary to put a strict construction upon the terms of S. 47, so as to exclude the consideration of a question which is closely connected with the subject matter of the decree. 87 Ind. Cas. 269=46 Bom. 529=23 Bom.L.R. 1279=A. I.R. 1922 Bom. 370.

——S. 47 (S. 244, Old Code)—When applicable.

S. 244 is applicable when the only grounds alleged for setting aside a sale are irregularities not in the proceedings anterior to the certificate or in the certificate which is sought to be executed, but in the execution proceedings subsequent to it. (1905) 33 C. 84=10 C.W.N. 130=1 C.L.J. 538.

——S. 47 (S. 244 (c), Old Code)—'Any other question—Agreement before decree—Jurisdiction to enter into in execution.

When a decree is once passed, it must be taken to be conclusive between the parties and an agreement entered into between the parties before the date of the decree and not embodied in it cannot be given effect to in the execution proceedings. (1902) 6 C.W.N. 838=29 Cal. 810.

——S. 47 (S. 244 (c), Old Code)—'Any other questions'—Appeal against order in execution—Stay of execution by appellate Court.

Where an appeal is pending against an order in execution of a decree, the appellate Court has power to stay the execution of the decree under S. 244 (c), C.P. Code. (1900) 28 C. 734=5 C. W.N. 67.

——S. 47 (S. 244 (c), Old Code)—'Any other question' relating to execution, etc.—Agreement antecedent to decree not to claim benefit of the decree, how far within the section.

A contract made between the parties to a suit in derogation of a decree which may be passed in future cannot form the subject of an enquiry under S. 244, C.P. Code, in a proceeding for the execution of the decree; an agreement not to execute a decree, if effect is sought to be given to it in execution proceedings, must be a transaction between the parties subsequent to the decree. Questions under S. 244 (c) relating to the execution of a decree and arising between the parties to a suit in which the decree was passed or their representatives must be such as have reference to matters arising subsequent to the passing of the decree and not antecedent to it. (1901) 6 C.W.N. 796.

——S. 47 (3)—Application to come on record as judgment-debtor's representative — Executing Court.

The proper Court for entertaining an application to bring the petitioner on record as the representative of the judgment-debtor in order that he may raise a question covered by S. 47, C.P. Code is the executing Court and not the Court which passed the decree. 11 L.W. 713.

——S. 47 (3)—Application by assignee of decree —Company—Liquidation.

Application by transferee of a decree, against a Company in liquidation for substitution of his name must be made to the executing Court and not to the winding up Court. 41 All. 432=17 A.L.J. 464=50 Ind. Cas. 115.

——S. 47—Application converted into suit.

Under S. 47 the Court may treat a proceeding as a suit. Where the sale of certain property was objected to on the ground that it was wakf property, **held**, that the character of the property could be decided by the executing suit. 7 O.W.N. 1159 =A.I.R. 1931 Oudh 45=130 Ind. Cas. 117=6 Luck. 452.

——S. 47—Application for mesne profits under S. 144—Conversion into suit.

Where the plaintiff in a redemption suit was allowed possession of one of the items of mortgaged property only by the appellate Court and subsequently put in an application under S. 144 for the recovery of mesne profits during the interval between the two judgments under a **bona fide** misconception of his remedy, his application was allowed to be converted into a suit. 1930 M.W. N. 1245=130 Ind. Cas. 451=A.I.R. 1931 Mad. 81=33 L.W. 259=60 M.L.J. 219.

——S. 47 (S. 244, Old Code)—Appropriation by decree-holders of area in excess of that decreed.

When it is alleged that the decree-holders in a foreclosure suit have under their decree absolutely

taken possession of an area in excess of that decreed, the remedy is by an application under S. 244 of the Code of Civil Procedure and not by suit. 1903 A.W.N. 233=3 A.L.J. 601.

——S. 47 (S. 244 (c), Old Code)—Application to receive landlord's fee under S. 113, Bengal Tenancy Act, and to confirm an auction sale, how far within the section.

An application by a decree-holder purchaser to receive the landlord's fee payable under S. 13, Bengal Tenancy Act, falls within S. 244 (c). (1900) 6 C.W.N. 190.

——Ss. 47, 144 (Ss. 244, 583, Old Code)—Application for refund of money.

An application in restitution for refund of money may be made in execution or by means of a separate suit. (1908) 30 A. 476=5 A.L.J. 527=1908 A.W.N. 206.

——S. 47 and O. 20, R. 12—Ascertainment of mesne profits—Executing Court.

It is the Court which passes the decree and not the executing Court which is to ascertain the mesne profits under the new Code. A.I.R. 1931 Pat. 1=12 P.L.T. 127=130 Ind. Cas. 785.

——S. 47—Attaching creditor's locus standi to set aside decree obtained by another.

An attaching decree-holder has no locus standi to dispute the validity of another decree in execution of which the attached property is about to be sold. Attachment only prevents alienation, but does not confer any title. 25 C. 179, foll. (1903) 25 A. 347=1903 A.W.N. 61.

——S. 47 (S. 244, Old Code)—Attachment of debts due to judgment-debtors—Improper realization of such debts by third party—Application to compel third parties to discharge—Limitation—Appeal.

Certain plaintiffs attached before judgment some debts due to the defendants. The defendants sold the right to collect those debts to third parties, who in defence of the attachment proceeded to collect some of them for their own benefit. The plaintiffs having obtained a decree in their suit; applied to the Court to compel the third parties to pay into Court the money which they had improperly collected in defiance of the Court's order.

Held, that this was not an application in execution of their decree but an application to the Court to exercise its inherent power of punishing for contempt of Court, and that the limitation rules providing for applications to execute decree did not apply to it. The Court can only order refund of money actually collected in defiance of a subsisting order of attachment. It is not competent to direct a refund of moneys recovered as costs of litigation. 27 All. 378=2 A.L.J. 16=1905 A.W.N. 9.

——S. 47, O. 21, R. 72 (Ss. 244, 294, Old Code)—Auction purchase by mortgagee decree-holder benami in contravention of conditions imposed by Court when granting leave to bid—Suit for possession by purchaser—Defence of fraudulent purchase—Onus. (1908) 32 M. 242=5 M.L.T. 248=1 Ind. Cas. 221.

——S. 47, O. 21, R. 69 (Ss. 244, 291, Old Code)—Auction-purchaser in execution of mortgage-decree on a pusine mortgage—Deposit in Court by auction purchaser under S. 291 in execution of decree on a prior mortgage.

An auction-purchaser in execution of a pusine mortgage-decree is the representative of the puisne mortgagee judgment-debtor in a decree on a prior mortgage and is entitled to make a deposit under S. 291, C.P. Code, though the purchase had not been confirmed. (1907) 11 C.W.N. 495=5 C.L.J. 45.

——S. 47—Applicability.

An application purporting to be under S. 47 cannot fail merely because it could not be brought within the scope of S. 47, so long as it was possible to deal with it under the provisions of O. 21, R. 58. An order on such application is not without jurisdiction. A.I.R. 1943 Cal. 56=75 C.L.J. 294=205 Ind. Cas. 74.

3. Bar of suit.

See also S. 11, EXECUTION PROCEEDINGS.

——S. 47—Separate suit—Estoppel against raising plea of bar of suit.

A purchaser in a private sale from the judgment-debtor preferred an objection to attachment describing as one under O. 21, R. 58. The objection was allowed and the decree-holder brought a suit under O. 21, R. 63. The purchaser contended that the suit was barred under S. 47:

Held, that the purchaser was not estopped from raising the plea merely because he had described his objection as falling under O. 21, R. 58 instead of under S. 47. A.I.R. 1946 Lah. 134=48 P.L.R. 147=224 Ind. 468 (F.B.).

——S. 47—Bar of suit—Scope of.

S. 47 debars a party or a representative of a party to a suit from raising otherwise than in the execution proceedings any question of the class described in the section which arises between himself and the other party to the suit, and he cannot raise it either as plaintiff or as defendant in any separate suit between himself and either the opposite party to the first suit or a person who has derived title to the property in question from the sale in execution. 1939 O.W.N. 653.

——S. 47 (S. 244, Old Code)—Bar.

A sued a karnavan, as karnavan, for a decree, and attached tarwad property in execution. The property was released from attachment on petition by defendants. **A** sued for the cancellation of the order releasing it from attachment. **Held,** that the suit was barred by S. 244, C.P. Code. 24 M. 658.

——S. 47 (S. 244, Old Code)—Bar—Application for refund of money wrongfully taken in execution—"Parties to the suit in which the decree was passed".

In execution of a simple money decree the decree-holders attached certain money which had been paid into Court to the credit of the judgment-debtor on account of a decree held by them in another matter. Subsequent to such attachment

the decree under which it was made was declared null and void as against the representative of one of the judgment-debtors; but the money was nevertheless withdrawn from Court by the decree-holders. Held: That the remedy of the representative of the judgment-debtor in whose favour the decree had been declared null and void was by application under S. 244, C.P. Code, and not by separate suit, it being immaterial upon what date the attaching creditor withdrew the money so long as it was withdrawn, as in fact it was in execution of the decree. 1904 A.W.N. 55.

——S. 47 (S. 244, Old Code)—Bar—Attachment, removal of—Application—Suit to remove the attachment.

In a suit brought by the respondents against the appellants as the heirs of **V**, the Court passed a decree against the estate of the deceased **V**. The decree-holders in execution attached five fields as belonging to the deceased and as being in the possession of the appellants. The latter applied for the removal of the attachment with the result that the Court removed it as to two but rejected their application as to the other three fields. The appellants then brought a regular suit to remove the attachment. **Held:** That the question can only be decided by a proceeding under S. 244, C.P. Code, and not by a separate suit, as the appellants were parties to the previous suit. 7 B. 49, foll. (1904) 6 Bom.L.R. 697.

——S. 47 (S. 244, Old Code)—Bar—Auction sale—Setting aside of, for fraud by stranger—Jurisdiction—No collusion between decree-holder and third party.

When a judgment-debtor applies to have an execution sale set aside alleging fraud on the part of the auction-purchaser who happens to be his agent, and such application is opposed by the decree-holder, the question to be determined must be investigated under S. 244, C.P. Code, although no fraud may be alleged as against the decree-holder himself. 3 C.W.N. 403, foll. (1900) 6 C.W.N. 279.

——Ss. 47, 54 (Ss. 244, 265, Old Code)—Bar—Collector—Partition—Re-opening a partition—Application to the executing Court—Fresh suit.

When a Collector has once made a partition acting under S. 265, C.P. Code, there is nothing to prevent him from revising the partition for mistake or other cause before he has passed final orders and returned the proceedings to the Civil Courts. If any party feels a grievance at the partition made by the Collector, his remedy is to approach the executing Court; it is not open to him to question the Collector's action by a separate suit. (1903) 5 Bom.L.R. 648.

——S. 47 (S. 244, Old Code)—Bar—Consent decree—Execution—Suit for declaration of right under.

A consent decree in a mortgage suit declared the defendant absolute owner of properties in dispute, but granted a concession to the plaintiff that if he could purchase the property from the defendant at a certain rate by a certain specified date, he should be at liberty to do so. The plaintiff failed to perform his part and later on filed a suit to have determined and declared his right under the decree. **Held** (1) that the suit could not be treated as a suit for redemption, since, from the date of the consent decree, the relation of mortgagor and mortgagee no longer subsisted between the parties; (2) that the question between the parties was one covered by S. 244, C.P. Code, and should, therefore; be decided in execution proceedings under the consent decree, and not by a separate suit; and (3) that it was not competent to the Court to entertain the suit and treat it as an application for execution. (1903) 5 Bom. L.R. 1036. [On the third point, see S. 47 of the new Code which expressly provides for such conversion].

——S. 47 (S. 244, Old Code)—Bar—Death of judgment-debtor pending execution proceedings—Questions arising between representatives of judgment-debtor and decree-holder—No separate suit.

Where a judgment-debtor dies after the passing of a decree and his legal representatives are brought on record in execution proceedings, questions which they raise as to property which they say does not belong to his assets in their hands, and, as such, is not capable of being taken in execution, are questions which, must be determined in the execution department and not be separate suit. 12 A. 313 and 17 C. 711, foll. 1905 A.W.N. 180=28 A. 51.

——S. 47 (S. 244, Old Code)—Bar—Decree-holder—Purchaser—Application for delivery rejected—Suit for possession—Maintainability.

A suit by the decree-holder-purchaser for possession of land against the judgment-debtor after a previous application by him under S. 318, C.P. Code, for delivery of property has been rejected as barred, having been made more than 3 years after the confirmation of sale, is barred by S. 244, C. P. Code. 13 M. 504; 27 C. 34, followed. (1901) 13 M.L.J. 237=26 Mad. 740.

——S. 47 (S. 244, Old Code)—Bar—Decree-holder—Purchaser from a decree-holder-purchaser—'Representative'—Maintainability of suit for possession.

A purchaser from a decree-holder who has purchased property of the judgment-debtor at Court auction is a representative of the 'decree-holder' for the purposes of S. 244, C.P. Code. A suit against a judgment-debtor by the purchaser from a decree-holder for delivery of possession of land purchased by the latter in Court auction and sold to the purchaser is barred by S. 244, C.P. Code. (1902) 14 M.L.J. 474=28 M. 87.

——Ss. 47, 68 (Ss. 244, 320, Old Code)—Bar—Execution of decree—Execution transferred to Collector—Private sale—Subsequent sale held by Collector—Remedy of purchasers at private sale.

Execution of a decree for sale of ancestral property was transferred under the provisions of S. 320, C.P. Code, to the Collector. Whilst the execution proceedings were pending before the Collector, the judgment-debtor privately sold the property, and the purchaser paid over the price to the decree-holder, and such payment was certified to the Civil Court which passed the decree. The decree-holder, however, took no steps to withdraw

the execution proceedings from the hands of the Collector, and accordingly the Collector in due course sold the property: **Held**, that under such circumstances the remedy of the first purchasers, i.e., the purchasers by private sale, was by application under S. 244, C.P. Code, and not by suit and that such application lay to the Civil Court and not the Collector. (1903) A.W.N. 203=26 A. 101.

——S. 47 (S. 244, Old Code)—Bar—Execution of decree—Purchaser at auction sale by decree-holder —Suit by decree-holder to obtain possession of property so purchased.

Where the decree-holder himself purchases property at auction sale in execution of his own decree but fails to obtain possession, his remedy is by application under S. 244 of the Code of Civil Procedure; he cannot bring a separate suit for possession. 27 C. 34; 26 M. 740 and 1906 A.W.N. p. 87, foll. 1908 A.W.N. 12=30 A. 72=5 A.L.J. 20.

——S. 47 (S. 244, Old Code)—Bar—Execution of decree—Suit for cancellation on the ground of fraud of a sale held in execution of a decree—Proper remedy by application.

Certain judment-debtors brought a suit against the decree-holders and the auction-purchaser for cancellation of a sale held in execution of a decree, upon the allegation that the sale in question had been brought about by fraud, the decree having in fact been previously satisfied. **Held**, that such a suit would not lie, the plaintiffs' remedy being by application under S. 244 of the Code of Civil Procedure. (1902) A.W.N. 49=24 A. 239.

——S. 47 (S. 244, Old Code)—Bar—Execution—Satisfaction—Petition to re-open execution.

Where the Court passed an order in an execution case stating that the case had been disposed of by reason of both sides having represented to the Court that the decree had been satisfied: **Held**, that an application to allow the execution proceedings to be re-opened was maintainable under S. 244, C. P. Code, on the ground that the decree-holder had acted under a mistake of calculation in fixing the amount that was due. (1900) 5 C.W. N. 627.

——S. 47 (S. 244, Old Code)—Bar—Illegal acts done in executing order—Question in execution—Breaking open almyrah — Jewels taken but not mentioned in attachment list.

A claim by a judgment-debtor that the decree-holder in executing his decree by attachment of the former's moveable property caused certain almyrahs to be broken and took away jewels without mentioning the same in the attachment list and without crediting the same for the decretal amount is one falling under S. 244, C.P. Code, and must be determined only by the Court executing the decree. (1903) 14 M.L.J. 295.

——S. 47 (S. 244, Old Code)—Bar of suit—Sale in execution—Separate suit challenging correctness of property sold—Maintainability.

Where the plaintiff was brought on the record in execution as the representative of the mortgagors and the interest of the mortgagors was sold in execution without any objection by the representatives a suit by the representatives of a judgment-debtor, who was a party to the prior sale proceedings to recover a portion of the property sold upon the allegation that the judgment-debtor's share amounted only to the extent of the balance (not included in the suit) is not maintainable. 1903 A. W.N. 208=26 A. 152. **See also** for a case **vice versa**, 1905 A.W.N. 138=2 A.L.J. 401=27 A. 684 (F.B.).

——S. 47—Bar—Mortgage decree—Objection in execution to decree by successor of impartible estate—Custom of inalienability, setting up of—Only by separate suit. 19 M.L.J. 401=32 Mad. 429=2 Ind. Cas. 18.

——S. 47 (S. 244, Old Code)—Bar—Objection that property belongs to Tavazhi—Question in execution.

An objection by a defendant that immoveable property attached in execution of a decree is not the private property of the judgment-debtor but that of tavazhi, is one falling within S. 244, C. P. Code. 23 Mad. 361, foll. (1902) 14 M.L.J. 137.

——S. 47 (S. 244 (c), Old Code)—Bar—Sale setting aside, for fraud—Auction-purchaser and decree-holder parties—Separate suit—Maintainability.

An application by judgment-debtor to set aside a sale on the ground of fraud of decree-holder will lie under S. 244, C. P. Code. The fact that the auction-purchaser is a party and opposes it will not take it out of the section. 3 C.W.N. 399, foll. (1901) 6 C.W.N. 283.

——S. 47, O. 21, R. 72 (Ss. 244, 294, Old Code) Bar—Procedure—Suit to set aside sale in execution on the ground that the real purchasers were the decree-holders who had not obtained leave to bid.

The plaintiff sued to set aside sale of certain property in execution of a decree against him on the grounds that the sale proceedings had been secretly brought about without the knowledge of the plaintiff, and that the certified auction-purchasers were benamidars for the decree-holders, who had not obtained permission to purchase.

Held, the plaintiff's remedy was not by the suit, but by application under S. 244. 1901 A.W.N. 175=23 A. 478.

——S. 47 (S. 244, Old Code)—Bar Proceedings for delivery of possession—Decree-holder auction-purchaser—Proceedings in execution.

Under S. 244, C. P. Code, the Court is competent to afford final relief to contending litigants cheaply and speedily, and without the necessity of a fresh suit on the same matter. Proceedings for the delivery of possession to an auction, purchaser, who is himself the decree-holder, are proceedings in execution of the decree, and a question raised between him and a defendant in the suit is a question which ought to be decided under S. 244, C. P. Code. (1904) 31 C. 737. **See also** (1901) 26 Mad. 740.

——S. 47 (S. 244, Old Code)—Bar — Question relating to execution—Suit against Hindu father—Sons brought on record—Sale of property—Suit by assignees of sons barred.

Where a suit was instituted against a Hindu father who died pending suit and his sons were brought on the record and a decree was obtained and a sale held of the property in dispute and purchased by the decree-holder eventually from the purchaser at the auction sale, a suit by the assignees of the sons of the deceased father is barred by S. 244, C. P. Code. That the question whether the property was ancestral or self-acquired, and liable or not in the hands of the sons, was one relating to the execution of the decree and could not be raised in a separate suit. (1909) 11 Bom.L.R. 699=3 Ind. Cas. 763.

——S. 47 (S. 244, Old Code)—Bar—Sale in execution—Confirmation—Suit to set aside sale.

An objection to the confirmation of an execution sale on the ground that a petition to set aside the sale was compromised by the judgment-debtor's son without authority must be urged in execution and a separate suit to get rid of the sale is barred. 19 I.A. 166, foll. 1902 A.W.N. 18=24 A. 209.

——S. 47 (S. 244 (c), Old Code)—Bar—Sale in execution set aside and purchase money returned—Sale confirmed on appeal—Suit by decree-holder to recover purchase money.

A sale held in execution of a decree for money was set aside on application by the judgment-debtor and the purchase money was returned. On appeal, however, the order setting aside the sale was reversed and the sale was confirmed in favour of the original purchaser. The purchaser, however did not pay the sale price, and the decree-holder accordingly sued him for its recovery.

Held, that the suit did not lie, but the matter was one governed by S. 244 of the Code of Civil Procedure. 1904 A.W.N. 61, foll. (1904) A.W.N. 205=27 A. 155.

——S. 47 (S. 244, Old Code)—Bar sale by mortgagee of property not mortgaged.

Where a puisne mortgagee who was not made a party to the suit of the prior mortgagee, instead of proceeding against the property sold in execution of the decree of the prior mortgagee, proceeded against other properties of the mortgagor and sold them.

Held, that it was a matter to be explained and (if wrong) remedied in execution proceedings and not by a separate suit. (1907) 7 C.L.J. 270.

——S. 47 (S. 244, Old Code)—Bar of suit—Sale of share of a co-parcener in joint family—Auction purchaser—Suit for partition—Decree-holder an auction purchaser.

Section 244, C. P. Code (1882) does not bar a suit by an auction-purchaser for the share of a co parcener in Hindu joint family for partition and allotment of the share to him, the decree-holder himself being auction-purchaser makes no difference. 1 Lah. 134=1 Lah.L.J. 10=56 Ind. Cas. 254.

——S. 47 (S. 244, Old Code)—Bar—Suit for redemption that sale in execution of former decree was in effect in contravention of S. 99, T. P. Act.

Properties were sold in execution of a prior decree for money in a suit brought by an assignee of a money-debt who had taken an assignment from the obligee who was also a mortgagee. The Court found that the prior assignment was effected with a view to defeat the provisions of S. 99, T. P. Act, and that the assignment was a sham.

Held, that the suit was barred by S. 244 (c). (1907) 9 Bom.L.R. 462. See also (1906) 17 M.L.J. 163 and 30 Mad. 313.

——S. 47—Bar of suit—Person impleaded in execution as legal representative—Whether can question decree by separate suit.

Where a person impleaded as a legal representative of the judgment-debtor in proceedings convicted with the execution of a decree fails to plead in such proceedings that the decree was not binding upon him as the debt was not for legal necessity he is not precluded from raising that question subsequently in a separate suit or proceedings. A.I.R. 1945 Oudh 314=20 Luck. 472=1945 A.W.R. (C.C.) 207=1945 O.W.N. (C.C.) 290.

——S. 47—Bar of suit—Suit against three brothers dismissed against one—His property sold in execution of decree—No objection to wrongful sale—Subsequent suit is not barred by S. 47.

Where the party to the suit, against whom the suit has been dismissed, does not choose to go to the executing Court either because he has no knowledge of what is happening there or because having knowledge he feels that he should wait and see what ultimately happens then in his case it cannot be said that by not going there, the question is constructively decided against him. Such a person has two concurrent remedies and he can choose either of them. If he acquires knowledge that his property is being wrongfully taken in execution of the decree, he may choose the expeditious remedy of going to the executing Court and if he chooses that remedy, S. 47 will bar his subsequent suit for the same relief. But if either after having acquired knowledge or through ignorance he takes no steps to object to the wrongful sale of his property by the executing Court, on no principle of law can his separate suit to take possession of the property wrongfully sold by the executing Court be held barred.

A dispute between a party and his own representatives or between parties not opposed to one another in the suit is outside the ambit of S. 47. Hence a suit by an exonerated defendant to recover possession of his share of the property wrongfully sold in execution of the decree against a stranger auction-purchaser is not barred by the provisions of S. 47 even as read with the explanation to that section. A.I.R. 1944 Lah. 294=I.L.R. (1944) Lah. 479=215 Ind. Cas. 276 (F.B.).

——S. 47—Bar of suit—Ancestral property sold as non-ancestral, in execution and purchased by stranger auction-purchaser—Separate suit by judgment-debtor for possession of property.

Taking a liberal view of S. 47, C. P. Code, no suit lies at the instance of the judgment-debtor for possession of property sold as non-ancestral to a stranger auction-purchaser in execution of a decree against the judgment-debtor, even if the property in fact was ancestral and beyond the jurisdiction of the Court to sell. The question whether the property was ancestral or self-acquired was between the judgment-debtor on the one hand and the decree-holder on the other hand before the sale. A.I.R. 1944 Oudh 43=1943 A.W.R. 141=1943 O.W.N. 418=212 Ind. Cas. 281.

——S. 47—Bar of suit—Post-decree agreement—Decree left untouched—Execution merely restrained—Executing Court alone can determine the matter—No separate suit lies.

A post-decree agreement may in some circumstances be excluded from the purview of the executing Court under S. 47, C. P. Code, but whether this will or will not be so, will depend upon the nature of the agreement. If a post-decree agreement seeks to affect the character of the decree it may no doubt be said that this is a question which could be raised only by an independent suit, and not by an application under S. 47. But where it leaves the decree untouched, and merely seeks to restrain its execution, it is just one of the matters which is peculiarly within the province of the executing Court to consider and determine. A.I.R. 1944 Cal. 53=77 C.L.J. 224=211 Ind. Cas. 515.

——S. 47—Bar of suit—Assignment of decree—Question falls under S. 47.

The question of the assignment of the decree is one falling within the purview of S. 47, C. P. Code, and, therefore, must be determined by the executing Court and not by a separate suit. A.I.R. 1943 Bom. 455=45 Bom.L.R. 859=210 Ind. Cas. 605.

——S. 47—Suit against A and B—Suit against B withdrawn—Decree against A—Property of B attached in execution—B can prefer objection under O. 21, R. 58 and on failure, file suit under O. 21, R. 63.

Where the plaintiff sues **A** and **B** but subsequently withdraws the suit against **B** realizing that he would not be able to succeed against him and in execution of the decree obtained against **A**, the property of **B** is attached, **B** can prefer objection under O. 21, R. 58, C. P. Code and if the order goes against him he can file a claim suit under O. 21, R. 63. Such a suit is not barred by S. 47, **B**, against whom the suit was withdrawn, cannot be regarded as a party against whom the suit is dismissed. A.I.R. 1943 Nag. 273=1943 N.L.J. 333=I.L.R. (1943) Nag. 462=208 Ind. Cas. 549.

——S. 47—Creditor obtaining money decree against heir-at-law of deceased debtor to the extent of assets of the deceased in his hands—Subsequently creditor filing suit for administration of estate of deceased.

Quaere.—It is doubtful whether the suit for administration is maintainable. S. 47, C. P. Code, will bar such a suit. A.I.R. 1942 Mad. 588=55 L.W. 308=(1942) 1 M.L.J. 580=1942 M.W.N. 356=205 Ind. Cas. 297.

——S. 47—Partition decree entitling defendant to be put in possession of property allotted to him, on payment of necessary court-fee—Defendant, if obliged to pay court-fee and seek possession in execution—Separate suit.

Where a partition decree entitles the defendant to be put in possession of the properties allotted to him on payment of the necessary court-fee the defendant is not obliged to pay the court-fee and seek possession in proceedings in execution of the partition decree and can file a separate suit for possession. Section 47 is no bar to such a suit.

Section 47 may bar a separate suit by a defendant who could execute the decree unconditionally but to bring about that result, there must be an unconditional decree giving the defendant a right to execute the decree to get the properties allotted to him. A.I.R. 1942 Mad. 364=(1942) 1 M.L.J. 219=55 L.W. 61=1942 M.W.N. 363=204 Ind. Cas. 209.

——S. 47—Question whether property sold could be alienated in spite of provisions of S. 12-A, Chota Nagpur Encumbered Estates Act is one to be decided in execution proceedings and not in separate suit.

The question as to whether the disputed mauza sold in execution of a decree could be alienated in spite of the provisions of S. 12-A, Chota Nagpur Encumbered Estates Act, is essentially a question to be decided between the judgment-debtor and the decree-holder in the execution proceedings and the judgment-debtor cannot raise the question in a separate suit brought for declaration that the sale in execution was void being in contravention of S. 12-A, even though the suit is brought not against the decree-holder but against the auction-purchaser. A.I.R. 1942 Pat. 244=23 P.L.T. 56=21 Pat. 233=198 Ind. Cas. 411.

——S. 47—Third party, if can file suit to declare decree void so far as his interests are concerned.

When it is a question of protecting himself against the effects of a judgment obtained by collusion, it is open to a third party to ask that it should be treated as void so far as his interests are concerned, though it may be binding upon the parties to the judgment, and so have to remain upon the record. A.I.R. 1941 Lah. 402=I.L.R. (1942) Lah. 603=43 P.L.R. 471=198 Ind. Cas. 726.

——S. 47—Mortgage decree—Execution—Person impleaded as legal representative of deceased party,

if can question decree—Whether bound to have his own claims to property in suit decided in execution proceedings—Separate suit to establish his claim.

When a person comes into Court in execution proceedings as the legal representative of a deceased party he cannot question the decree which has been passed. If the decree concerns property in which he claims an interest, the decree will not be binding upon him unless he was a party to the suit. If he was not a party to the suit or, he had been dismissed from the suit, his rights will be entirely unaffected and he will be in a position to enforce them in a suit instituted by him for that purpose. A person who has been brought into Court in proceedings in execution of a mortgage-decree or a decree for specific performance of contract of sale by execution of a sale-deed merely as the legal representative of the judgment-debtor is not compelled to have his own claims to the property in suit decided in the execution proceedings. He can establish his rights by a separate suit.

In execution proceedings arising out of money-decrees questions relating to the property attached stand on an entirely different footing as they do not call into question the correctness of the decree. A.I.R. 1941 Mad. 898=54 L.W. 448=1941 M.W.N. 906=(1941) 2 M.L.J. 622=I.L.R. (1942) Mad. 271=198 Ind. Cas. 158 (F.B.).

——S. 47—Decree for possession not executed—Possession obtained—Interference—Fresh suit.

Where the plaintiff who obtains a decree for possession, does not execute it but obtains actual possession of the property, upon interference with that possession a fresh suit for possession is not barred by S. 47, C.P. Code. A.I.R. 1941 Oudh 615=17 Luck. 109=1941 O.W.N. 1014=1941 O.L.R. 645=196 Ind. Cas. 99.

——S. 47—Money decree against award of Court of Wards—Attempts to execute decree unsuccessful—Subsequent suit to obtain satisfaction of that decree, if barred.

A suit on a judgment can only lie where the decree from its very nature is incapable of execution. A simple money decree obtained against a ward of Court of Wards cannot by reason of S. 60-A, Bengal Court of Wards Act, be executed without leave of Court of Wards, but there is nothing inherent in the decree itself which renders it incapable of execution. It is not an inexecutable decree. Consequently where after unsuccessful attempts to execute such a decree, a regular suit is brought to obtain satisfaction of the decree, the suit is barred by S. 47, C.P. Code. A.I.R. 1941 Pat. 70=21 P.L.T. 947=20 Pat. 223=192 Ind. Cas. 387.

——S. 47—Mortgage—Decree directing defendant to pay certain amount within certain time to plaintiff or in default plaintiff entitled to be in possession—Payment not made—Plaintiff placed in possession—Subsequent suit that mortgage was possessory and that amount was paid off out of profits and that he was therefore entitled to possession held barred under S. 47. A.I.R. 1940 Nag. 336=1940 N.L.J. 331=I.L.R. (1942) Nag. 131=190 Ind. Cas. 739.

——S. 47—Mortgagee decree-holder in execution of his decree purchasing property himself—Suit by him for possession against person claiming under judgment-debtor, whether barred by S. 47.

The mortgagee decree-holder does not have a right to possession of the property ordinarily speaking and therefore an application for possession of the property by the auction-purchaser even though he happens to be the decree-holder himself is not in the same capacity and the auction-purchaser must therefore remain the decree-holder. The auction-purchaser clearly in an execution sale purchases the right, title and interest of the judgment-debtor and however the word "representative" is construed as including all persons who represent the interest of the parties, the auction-purchaser cannot, in any sense, be held to represent the interest of the decree-holder. Therefore, if a party claiming under the judgment-debtor resists the auction-purchaser, the question neither relates to the execution, discharge or satisfaction of the decree, nor is it between the parties to the suit in the sense that the parties now arrayed against each other are representatives-in-interest of the decree-holder and judgment-debtor or **vice versa** respectively in the original suit. Therefore, a suit by the auction-purchaser for possession of the property is not barred by reason of the provisions of S. 47. A.I.R. 1940 Lah. 230=I.L.R. (1941) Lah. 91=190 Ind. Cas. 635.

——S. 47—Objection that the mortgaged property belongs solely to the legal representative of the judgment-debtor—Separate suit—Proper remedy.

During the pendency of any application for sale made by the mortgagee after the passing of the final decree, the mortgagee died and his legal representative who was then brought on record raised an objection to the sale on the ground that the mortgaged property belonged solely to him and that the mortgagor had no right, title or interest therein:

Held, that the objection did not fall under S. 47, C.P. Code. The objection being to the validity of decree itself, a separate suit was the proper remedy. A.I.R. 1940 Rang. 161=1940 Rang.L.R. 402=190 Ind. Cas. 31.

——S. 47, O. 21—Sale not challenged by party to execution proceedings—Sale confirmed and certificate granted—Suit for possession on ground that sale certificate included more property than was ordered to be sold by decree.

When a sale has been confirmed by the Court and has become absolute under the terms of O. 21, it cannot be said that the sale is a nullity. The sale must be considered valid until it is set aside. Where a party to the execution proceedings has failed to challenge the sale under S. 47 or O. 21 on the ground that the sale certificate included more property than the decree directed should be sold, a separate suit for possession is not maintainable. A.I.R. 1940 All. 78=1939 A.L.J. 1015=1939 A.W.R. 867=187 Ind. Cas. 294.

——S. 47—Decree against person in representative capacity—His objection in his own capacity regard-

ing property against which decree is being executed, separate suit.

Where a decree is passed against a person in his representative capacity and proceedings are taken under it to obtain execution in his representative character he is party to the suit in respect to any question which may arise between him and the other parties relating to the execution of the decree. Hence, when a decree has been passed against a person in his representative capacity, he should, in execution proceedings, in his own capacity, raise any objection with regard to the property against which the decree is being executed. Where he has failed to do so, he is debarred by S. 47, from bringing subsequently a suit for declaration that his share in the property is not affected by the decree. A. I.R. 1940 Rang. 27=187 Ind. Cas. 254.

——S. 47—Suit for declaration of title to eight annas share in property compromised—Failure to act up to the terms of compromise—Suit for its specific performance, if barred.

Plaintiff brought a suit for declaration of his title to the extent of eight annas share in the estate in dispute. That suit culminated in a compromise and according to one of the terms of the compromise defendant was declared to be the sixteen annas owner of the property but he was to grant a **mourashi** lease in respect of the eight annas share of the same to the plaintiff. On failure of the defendant to execute the lease the plaintiff brought a suit for specific performance of the contract:

Held, that the plaintiff's acknowledgment of the defendants' full title to the property was conditional on defendant executing a deed of lease in favour of the plaintiff in respect of same. The execution of the deed of lease was therefore the consideration for and a condition attached to the declaration of defendant's right. It became an "integral part of the adjustment of the claim" in suit, and as such came within its scope. A suit, therefore, was barred under S. 47, C.P. Code. A.I.R. 1940 Cal. 82=70 C.L.J. 286=43 C.W. N. 1007=186 Ind. Cas. 673.

——S. 47—Suits by plaintiff and defendant against each other—Consent decrees for equal amount passed—Parties agreeing to set off and not to execute decrees—Defendant executing decree and recovering amount due in breach of agreement—Plaintiff's suit for damages, if barred.

In a suit and countersuit by two parties against each other consent decrees were passed for equal amounts and it was also agreed between the parties that the amount should be set off against each other and that no execution proceeding should be taken. The plaintiff did not execute his decree but the defendant filed execution and realized the full amount due thereunder from the plaintiff. The plaintiff thereupon filed a suit for damages:

Held, that the moment the decrees were obtained by each, they operated as payment of the decrees obtained by each against the other with the consequent duty to certify the said payment and enter up satisfaction of the decree. Whether the obligation was viewed as an implied promise or one arising under the provisions of O. 21, R. 2, C.P. Code, there was a breach of that obligation on which suit for damages would lie and S. 47, C. P. Code, would be no bar. A.I.R. 1939 Mad. 499=49 L.W. 360=(1939) 1 M.L.J. 473=1939 M.W.N. 447=186 Ind. Cas. 606.

——S. 47—Objection to sale of property made by judgment-debtor or his legal representative on independent title—Distinction between money decree and mortgage-decree—Separate suit.

There is a clear distinction between a money-decree and a mortgage decree, even in cases where the legal representative of the judgment-debtor raises an objection which was not open to the judgment-debtor but which is based on an independent title of the legal representative. In the case of money-decree, it is for the executing Court to determine how the decretal amount is to be recovered from the judgment-debtor and which property, if any has to be sold in execution of the decree. In the case of mortgage decrees method of recovery is determined by the trial Court, and forms a part and parcel of the decree itself. Any claim by the judgment-debtor or his legal representative that certain property is not liable to sale in execution of the mortgage-decree is a claim challenging the validity of the decree and such a claim cannot be entertained by the executing Court under S. 47, C.P. Code. A.I.R. 1939 Lah. 178=41 P.L.R. 533=I. L. R. (1939) Lah. 493=186 Ind. Cas. 168. [Reversing A.I.R. (1939) Lah. 51].

——S. 47—Partition decree keeping certain property undivided pending litigation about it—Property subsequently lost to family and money acquired in its stead—Separate suit for partition of that money basing right on decree.

Where a partition decree has kept certain immovable property undivided until the termination of a pending litigation, concerning such property and has further provided that after the determination of the said litigation, the property should be divided by metes and bounds between the parties according to their shares but after the decree, that property is lost to the family and some moveable property in the form of money is acquired in its stead, that moveable property cannot be partitioned in execution of the decree which made no reference to it, and a separate suit mentioning the circumstances and basing right to the partition of the money on the decree is not barred by S. 47. A. I.R. 1939 Bom. 386=41 Bom.L.R. 836=185 Ind. Cas. 13.

——S. 47—Bar of suit.

Hindu widow claiming property in her own right as widow of deceased coparçener—Decree for possession and declaration obtained by surviving coparcener but not executed within time—Fresh suit against transferee from widow is barred by Ss. 11 and 47. A.I.R. 1939 Bom. 261=41 Bom.L.R. 497=183 Ind. Cas. 482.

——S. 47—Suit by decree-holder auction-purchaser for possession.

Where a decree-holder, who is himself the auction-purchaser at a court sale held in execution of his decree, seeks to get possession of the purchased property he does not do so in execution of his decree but by virtue of the title acquired as purchaser, his claim based on such title not relating to the execution, discharge or satisfaction of the decree and the provisions of S. 47, C.P. Code, therefore not preventing his instituting a suit for possession. A.I.R. 1939 Lah. 211=I. L. R. (1939) Lah. 295=41 P.L.R. 546=183 Ind. Cas. 475.

——S. 47—O. 21, Rr. 66, 92—In execution of mortgage decree personal property sold—Sale confirmed and sale certificate issued—No objection at any stage—Separate suit to recover property.

In execution of a decree for sale of certain mortgaged property obtained against the legal representatives of the mortgagor, certain property belonging personally to legal representative was wrongly entered for sale as part of the mortgaged property and was sold in execution of the decree. No objection was taken to this incorrect description in the sale proclamation and no objection was taken by the owner of the property at the time of sale and no objection was taken when the sale was confirmed and a certificate was granted to the decree-holder. Nor was any application made to the execution Court for correction of the sale certificate:

Held, that a separate suit by the judgment-debtor for recovery of the property was barred, because the objection should have been taken in the execution Court under S. 47 or O. 21, R. 66 or R. 92, C. P. Code. A.I.R. 1939 All. 368=1939 A.W.R. 242=1939 A.L.J. 211=I.L.R. (1939) All. 385=183 Ind. Cas. 415.

——S. 47 and Or. 21, R. 52—Bar of suit.

Proviso to O. 21, R. 52 does not bar a regular suit. Any decision in a proceeding contemplated by the proviso between the decree-holder and the third person would not be a decision under S. 47, and therefore, a regular suit would not be barred. A.I.R. 1939 Cal. 413=69 C.L.J. 108=182 Ind. Cas. 860.

——S. 47—Sale after order of attachment in execution but before actual attachment—Attachment raised—Suit by decree-holder for declaration that property is liable to attachment.

Where the property of the judgment-debtor has been ordered to be attached in execution and the judgment-debtor executes a sale-deed of his property subsequent to the order of attachment but before its actual attachment and a third party purchaser files an objection under O. 21, R. 58, objecting to attachment on the ground that he had **bona fide** purchased the property before attachment and it therefore belonged to him at the time of the attachment and the Court releases the property from attachment holding that the objector was a **bona fide** purchaser for consideration before attachment a suit by the decree-holder for declaration that the property is liable to attachment and sale in execution of decree, the purchase not being bona fide is not barred by S. 47. In such a case the order raising attachment on an objection under O. 21, R. 58, being non-appealable it would amount to a denial of justice to refuse to entertain the decree-holder's suit on the ground that he ought to have appealed against the order of the execution Court releasing the property. A.I.R. 1939 All. 264=1939 A.L.J. 221=I.L.R. (1939) All. 354=1939 A.W.R. 197=181 Ind. Cas. 817.

——S. 47—Award filed in Court—Decree on award—Subsequent suit to obtain relief under award, if barred by S. 47—Decree-holder obtaining some relief in execution, whether estopped from contending subsequently that order did not in law amount to decree.

Where there is no judgment and where the order simply directs that the award should be filed without incorporating the terms of the award in the decree, that order is not executable as a decree. A subsequent suit, therefore, to obtain some relief granted under the award is not barred by S. 47, C. P. Code. In such a case even though the plaintiff erroneously thought the order as a decree and executable as such and obtained some relief under it though not as contemplated by the award, still it would not disentitle him from contending subsequently that he was mistaken in treating it as a decree if in law it did not amount to such. A.I.R. 1939 Bom. 114=41 Bom.L.R. 170=181 Ind. Cas. 608.

——S. 47—Decree-holder purchasing property in execution—His assignee instituting suit for possession against judgment-debtor.

In execution of a small cause decree, the decree-holder himself purchased the property but he did not get possession, either actual or symbolical. At the time of the sale, the property was in possession of a tenant of the judgment-debtor. The tenancy had commenced prior to the attachment proceedings. A suit was brought by a representative of the decree-holder by purchase, against the judgment-debtor and his tenant for possession.

Held, that S. 47 was no bar to the suit. The moment the sale took place the judgment-debtor's rights in the property ceased. So far as the property was concerned, the execution was complete and he was no longer the judgment-debtor. The possession of the judgment-debtor at the time of the suit was therefore the possession of a trespasser. A.I.R. 1939 Mad. 369=49 L.W. 243=(1939) 1 M.L.J. 468=1939 M.W.N. 427=I.L.R. (1939) Mad. 456=180 Ind. Cas. 855 (S.B.).

——S. 47—Plaintiff's obtaining decree for possession of certain land but allowing defendants to remain in possession till execution was barred by limitation—Subsequent suit again for recovery of possession.

When a decree for recovery of possession has been obtained, it cannot be satisfied unless the decree-holder gets actual possession of the land.

Plaintiffs obtained a decree for recovery of possession of certain land situated on the banks of a river. The defendants were left in possession until execution of the decree was barred by limitation; and the plaintiffs then instituted the suit

praying again for recovery of possession of this land. All that had been pleaded and proved was that the river had, during the rainy season, overflowed its banks and flooded this land in such a manner as to make agricultural operations impossible during the period of inundation but it appeared that for the rest of the year, the land had been cultivated in the ordinary course.

Held, that in the circumstances of the case, it could not be held that there was any dispossession by vis major of the defendants, or that the plaintiffs at that time enjoyed constructive possession such as would give them a right to institute a new suit. That being so, the suit was barred by the provisions of S. 47 of the C. P. Code. A.I.R. 1939 Pat. 260=180 Ind. Cas. 76=5 B.R. 330.

——S. 47—Person against whom execution was taken out successfully maintaining that execution could not proceed against him without separate suit against him—Whether can contend in separate suit against him that suit is barred under S. 47, and that proper remedy was by way of execution.

The law does not permit a party where the question is one of procedure to urge that one form of procedure should be followed, and when he has successfully maintained this and the procedure which is urged should be followed, has been followed to urge that the new procedure is wrong and the old procedure was right. This would be to stultify the law. A.I.R. 1938 Lah. 525=40 P.L.R. 243=181 Ind. Cas. 501.

——S. 47—Temporary alienation of judgment-debtor's land—Mortgage and mortgagee given possession—Money not realized—Decree recorded as fully satisfied—Subsequent suit by decree-holder against mortgagee.

The decree-holder in execution of his decree applied for a temporary alienation of the land of the judgment-debtor. The land was attached and a reference made to the Collector for suggesting the mode and terms of the temporary alienation. A mortgage was created and the possession was given to the mortgagee. But neither the executing Court nor the Collector realised the mortgage money. On an application by the judgment-debtor, the decree was recorded as completely satisfied by the creation of a valid mortgage even though the mortgage tried to back out from the transaction. Subsequently the decree-holder filed a regular suit against the mortgagee for the money. The mortgagee contended that the suit was barred by S. 47:

Held, that this mortgage was in the nature of a judicial hypotheca and indeed it was the creation of this hypotheca which had satisfied completely the decree. If either of the parties to this hypotheca now wanted to enforce its rights against the other, the wanted to enforce its rights against the other, the remedy was obviously by a regular suit and not in execution of the decree to which the mortgagee was not a party, and which had been held judicially to have been satisfied several years ago. The question in issue between the decree-holder and mortgagee could not possibly said to be one "relating to the execution, discharge or satisfaction of the decree." This being so, no question of bar by S. 47 could arise. A.I.R. 1938 Lah. 214=40 P.L.R. 569=181 Ind. Cas. 55.

——S. 47—Property taken by decree-holder in excess of terms of decree—Application for restoration—Separate suit.

No separate suit can lie for the recovery of lands taken by the decree-holder in excess of the terms of his decree; if the decree-holder has been put in possession of excess land by the officer of the Court executing the decree it is but just and proper that that executing Court itself must undo the wrong by ordering the decree-holder to restore it back under S. 47, C. P. Code. A.I.R. 1938 Nag. 276=179 Ind. Cas. 529.

——S. 47, O. 21, R. 16—Execution by assignee—Execution dismissed on ground that it was fraudulent—Suit for declaration of validity of assignment.

Where in execution of a decree by the assignee the judgment-debtor contends that the assignment was bogus and without consideration, the executing Court can decide the question and an appeal lies from its decision. Where the Court dismisses the execution application holding that the assignment was bogus and fraudulent, the assignee cannot institute a separate suit for a declaration that the decree was validly assigned in his favour. A.I.R. 1938 Nag. 267=1938 N.L.J. 117=I.L.R. (1939) Nag. 54=176 Ind. Cas. 445.

——S. 47—Mortgage suit—Application for final decree—Judgment-debtor alleging payment in satisfaction of debt—Objection disallowed and final decree passed—No appeal but suit by judgment-debtor for declaration that he had made payments and, therefore, decree could not be executed:

Held that the declaration that the decree could not be executed was barred by S. 47. A.I.R. 1938 Pesh. 12=174 Ind. Cas. 295.

——S. 47—Suit to set aside decree—Fraud—Essentials to be proved.

In order to maintain a suit to set aside decree on the ground of fraud, the plaintiff must do something more than prove that the evidence on which the decree was based was false. It is incumbent upon him to prove that the defendant had carried out a deliberate fraud which, through no default or neglect on his part, he was unable to expose in the previous suit. Re-agitaation of questions already decided cannot be permitted; otherwise there will be no finality. A.I.R. 1937 Rang. 534=173 Ind. Cas. 954.

——S. 47—Judgment-debtor paying to assignee—Assignment invalid—Decree-holder realising decretal amount—Suit by judgment-debtor to recover extra amount.

Where the judgment-debtor pays the decretal amount to the decree holder's assignee and the assignment is subsequently found to be invalid, and the decree-holder realises the decretal amount the judgment-debtor can recover the amount paid twice over. S. 47, C. P. Code does not bar a suit to recover it. A.I.R. 1937 Lah. 465=I.L.

R. (1937) Lah. 162=39 P.L.R. 904=171 Ind. Cas. 91.

——S. 47—Decree for possession of property—Damages in respect thereof—Suit for damages.

Where a claim for damages in respect of a property arises subsequent to the decree for possession of the property, it is not a claim arising under S. 47, C. P. Code. A.I.R. 1937 Mad. 879=46 L.W. 676=176 Ind. Cas. 920.

——S. 47—Mesne profits, suit for.

Decree for possession on award—**A** allowed to recover mesne profits from date of deposit made by him in favour of **B**—No decree on conformity with O. 20, R. 12—Award not providing for an enquiry into mesne profits in execution but merely declaring **A's** right to mesne profits as from date of deposit—Subsequent suit by **A** for mesne profits against **B** is not barred under S. 47. A.I.R. 1937 Mad. 879=46 L.W. 676=176 Ind. Cas. 920.

——Ss. 47 and 145—Surety for appearance of judgment-debtor — On non-appearance execution sought against surety—Subsequent adjustment—Application by surety to certify adjustment as time-barred and not on merits—Suit by him to declare that decree cannot be executed against him.

Where a person stands surety for the appearance of the judgment-debtor in execution proceedings, and on non-appearance of the judgment-debtor, the decree is sought to be executed against the surety but subsequently there is an adjustment between the judgment-debtor and the decree-holder which is not certified under O. 21, R. 2, and the surety applies to the executing Court to certify the adjustment and that he is discharged from the liability owing to adjustment but the application is dismissed on the ground of limitation without going into the merits, the surety can subsequently bring a suit for declaration that the decree cannot be executed against him owing to the adjustment if the execution is again sought against him. S. 145 makes the surety a party to the proceedings only for the purposes of appeal and he does not become a party to the execution proceedings for all purposes and such a suit, therefore, is not barred under S. 47. A.I.R. 1937 Lah. 658=39 P.L.R. 872=I.L.R. (1938) Lah. 140=175 Ind. Cas. 480.

——S. 47—Execution sale—Death of judgment-debtor—Assets proving insufficient—Legal representative brought on record—Decree against assets in his hands—Objection that property sold was personal property.

In pursuance of a simple mortgage-decree the property mortgaged was sold and the sale proceeds were found insufficient. On the death of the judgment-debtor at this stage, his legal representatives were brought on record and a decree under O. 34, R. 6, C.P. Code was obtained against the assets in his hands. His objection that the property sold was his personal property was disallowed that he was directed to bring a regular suit:

Held, in a suit for declaration by the legal representative that the property belonged to him, that his objection was one under **S. 47, C. P.** Code, and could not be treated as one under O. 21, R. 58, and the order dismissing the objection was appealable and no separate suit lay. A.I.R. 1937 All. 97=1936 A.W.R. 1270=1937 A.L.J. 13=1937 A.L.R. 187=167 Ind. Cas. 394.

——S. 47—Person obtaining possession of property on relinquishment agreeing to pay decretal debt due against her.

Where certain persons obtain possession of certain property on relinquishment by a female limited owner by virtue of an agreement to pay a decretal debt due against her they are on principles of equity bound to pay the debt. The decree-holder need not have recourse to a separate suit for enforcing the contract but can proceed by way of an application under S. 47, C. P. Code. A.I.R. 1936 Cal. 67=40 C.W.N. 601=63 C.L.J. 25=166 Ind. Cas. 786.

——S. 47—Order recording satisfaction—Question of rectification of petition of adjustment—Suit for rectification.

As the question of rectification of the petition of adjustment cannot be decided by the successor-in-office of the Judge before whom it is filed under S. 47, in view of the order passed by the Judge recording satisfaction, a suit for the rectification of the petition is maintainable and S. 47 is no bar. A.I.R. 1936 Cal. 400=40 C.W.N. 914=165 Ind. Cas. 756.

——S. 47—Dispute between decree-holder and judgment-debtor.

Section 47 is a bar to a regular suit if the object of that suit is to decide a question between the decree-holder-purchaser and the judgment-debtor. Where the object of the suit is to settle dispute between decree-holder-purchaser and persons other than the judgment-debtors, S. 47 cannot be a bar and it is no objection to say that there was no delivery under R. 96. There is no rule of law which says that there must be some kind of delivery. The only rule of law is one requiring that all dispute between the decree-holder purchaser and the judgment-debtor should be settled in execution proceedings and only indirectly this rule of law involves the need for obtaining some delivery under Rr. 95 and 96 of O. 21. But if the dispute itself is not as against the judgment-debtor but against some other persons the need for delivery as against the other persons goes and there is no bar to a regular suit. A.I.R. 1936 Mad. 733=169 Ind. Cas. 456.

——S. 47, O. 21, R. 92 (3)—Plaintiff's husband party to mortgage suit—Preliminary decree—Plaintiff's husband dying—Plaintiff brought on record—Final decree—Sale and confirmation—Plaintiff bringing suit claiming paramount title in property—Maintainability.

Held, that the suit was not maintainable as she could have raised the question of paramount title in execution proceedings or tried to get the sale set aside under O. 21, R. 92 (3). A.I.R. 1936 Mad. 675=1936 M.W.N. 449=43 L.W. 740=71 M.L.J. 511=163 Ind. Cas. 619.

——S. 47, O. 21, R. 96—Omission to obtain symbolical delivery of possession—Fresh suit for possession.

Section 47 bars a suit by a decree-holder for possession of the property purchased by him in execution of his own decree against a judgment-debtor or

any one claiming under him and the bar is equally applicable to the purchaser from the decree-holder.

Where property in the possession of a tenant under the judgment-debtor was sold in Court auction and the auction-purchaser without obtaining symbolical possession under O. 21, R. 96, within three years from the date of the sale, instituted a suit for possession against the judgment-debtor and another person to whom the judgment-debtor had leased the properties after obtaining a surrender from the original tenant:

Held, that the suit was not maintainable in view of the bar of S. 47. A.I.R. 1936 Mad. 571=1936 M.W.N. 325=162 Ind. Cas. 856.

——S. 47—Dismissal of claim case—Subsequent suit for declaration by applicants in claim case.

During execution proceedings of a decree, a claim case was started by plaintiffs alleging that the property attached by the decree-holders in execution of their decree included property belonging to them and not to the judgment-debtors. The claim case was dismissed for default. After the application for restoration of the same was also dismissed, plaintiffs instituted suit for a declaration that certain of the properties attached in execution of the decree were not liable to attachment and sale in execution of that decree:

Held, that the claim case was in fact an application under S. 47, and the plaintiffs had, on the dismissal of their claim case, a remedy open to them by way of an appeal from the order under S. 47, which remedy they did not avail themselves of. A. I.R. 1936 Pat. 268=159 Ind. Cas. 960=2 B.R. 127.

——S. 47—Decree-holder purchasing property in auction-sale—Remedy for recovering possession—Suit for, debarred.

The execution proceedings do not terminate on the confirmation of sale in favour of decree-holder purchaser and a remedy for recovery of possession of the property purchased by him in the execution of the decree is a remedy related to the execution, discharge or satisfaction of the decree and a separate suit for the same is not competent. A.I.R. 1936 Pesh. 85.

——S. 47—Claim by legal representative—Dismissal on merits—Suit, competency of.

On a creditor attaching certain properties in the hands of the plaintiff as belonging to the deceased husband of the plaintiff, she filed an application claiming that the attached property belonged to her under a sale deed. The application purported to be filed both under O. 21, R. 58, and under S. 47, C. P. Code. The first Court passed an order dismissing the claim and referring the plaintiff to a regular suit which was accordingly filed. The suit was dismissed on the ground that the plaintiff's remedy was by appeal and not by separate suit:

Held, that the lower Courts were right in holding in the ordinary course the matter was one to be dealt with under S. 47 and the plaintiff's remedy was to have appealed against the order. The order referring the plaintiff to a suit could not be allowed to override the provisions of the law and would not operate as estoppel or *res judicata* against the other party.

Held, also, that the suit could not be treated as an application under S. 47 as no second petition could be filed when the first petition had been disposed of on the merits. A.I.R. 1935 Mad. 923=1935 M.W.N. 785=158 Ind. Cas. 410.

——S. 47—Suit for declaration that decree is satisfied by agreement and payment.

A suit for declaration that a decree has been extinguished by an agreement to accept and the acceptance of a certain amount is not maintainable as the question between the parties is whether the decree has been satisfied or not and this is a question relating to the satisfaction of the decree. S. 47 is explicit on the point that the question cannot be determined in a separate suit. A.I.R. 1935 Rang. 225=157 Ind. Cas. 814.

——S. 47—Suit for declaration that land was not saleable being inam land, if barred.

A suit for a declaration that certain lands which were sold in execution were not saleable being *inam* lands is one relating to execution, discharge or satisfaction of the decree. The judgment-debtor's remedy is under S. 47, and a separate suit is not maintainable. A.I.R. 1935 Nag. 30=31 N.L.R. 217=156 Ind. Cas. 995.

——S. 47—Objections to award overruled—Subsequent suit challenging award on same grounds—Maintainability of.

Where in proceedings in execution for enforcing an award, objections under S. 47, challenging the decree and award are overruled, the objector cannot challenge the award on the same grounds by a subsequent suit for declaration that the award was void and without jurisdiction. A.I.R. 1935 Cal. 396=60 C.L.J. 572=156 Ind. Cas. 405.

——S. 47—Representative of debtor objecting in execution proceeding.

All objections raised in execution proceedings by parties to the suit or their representatives come under S. 47, which bars a separate suit. And this section applies even when the representative of the debtor, impleaded in the case, claims the property on his own behalf though under a different right. A.I.R. 1935 Cal. 14=60 C.L.J. 251=154 Ind. Cas. 90.

——S. 47—Objection by party to attachment of property in execution of decree in same Court—Objection dismissed—Declaratory suit—Suit, if maintainable.

In a suit filed in a Small Cause Court, a party objected to an attachment made in execution of the decree obtained in the Small Cause Court itself and the objection being dismissed, he filed a declaratory suit in the Court of the Munsiff:

Held, that the suit must be dismissed and the Court of the Munsiff could not treat the suit as a petition under S. 47, as such an application could only be made in execution proceedings in the Small Cause Court.

Held, also, that the decree-holder was not estopped from raising the objection that the proceeding must be under S. 47, even though he did not raise the plea in proceedings under O. 21, R. 58. A.I.R. (Vol. 21) 1934 All. 699=153 Ind. Cas. 851.

——S. 47—Two decrees—Claim for priority in execution—Executing Court not allowing priority—Decree-holder, if can establish claim by regular suit.

Where two decree-holders proceeded in execution against the same estate and the executing Court disallowed the claim of priority of one of them:

Held, that the decision did not bar a regular suit by such decree-holder for establishing his claim. A. I.R. 1934 Lah. 478=150 Ind. Cas. 964.

——S. 47—Decree on the basis of compromise entered by pleader of plaintiff—Vakalatnama not authorizing pleader to compromise—Decree, whether should be appealed against.

Where the words of the *vakalatnama* did not authorize the pleader to enter into a compromise and the plaintiffs were not present when the compromise was drawn up and filed and the plaintiffs had never authorized their pleader to enter into the compromise:

Held, that a decree passed on the basis of such compromise was not binding on the plaintiff, and a separate suit to set aside the compromise and the decree could lie. It was not necessary to appeal against that decree under O. 43, R. 1, Cl. (m), C. P. Code. A.I.R. 1934 Oudh 417=11 O.W.N. 1030=139 Ind. Cas. 838.

——S. 47, O. 34, R. 14—Decree creating a charge—Separate suit to enforce it.

A separate suit to enforce a charge, created by a money-decree, is not maintainable under S. 47; it must be enforced in execution of the decree which created it. O. 34, R. 14 is not applicable to such cases. A.I.R. 1934 Cal. 327=60 Cal. 146=149 Ind. Cas. 224.

——S. 47—Insolvency application of defendant obtained before decree against him—Attachment of money with Receiver in another Court—Prohibitory order from Insolvency Court—Suit for money—Maintainability of—Remedy of plaintiff, if in execution—Jurisdiction of execution Court to reconsider the matter.

In execution of his decree against the defendant the plaintiff attached a sum of money lying with the Receiver in another case and in pursuance of the attachment, cheques were delivered to the executing Court by the Receiver and were endorsed by the Court in favour of the plaintiff. When, however, the plaintiff tried to encash the cheques, he discovered that defendant had applied for insolvency and the Insolvency Court had sent a prohibitory order to the bank restraining it from cashing the cheques. The plaintiff then made an application to the Insolvency Court that he was entitled to the amount due on the cheques, and this being dismissed, plaintiff instituted a suit to recover the amount of the cheques from the defendant as well as from the trustees appointed in the insolvency proceedings;

Held, that as the insolvency petition was admitted before the decree against defendant was obtained, the plaintiff was not entitled to claim the amount which was lying in the hands of the Receiver or with the bank.

Held, also, that if the plaintiff wanted to claim the sum on the basis of the decree already obtained by him, the claim should have been made in the executing Court and not in a separate suit, as it related to the question of the satisfaction of the decree, and that the mere fact that the execution record was consigned to the record room in anticipation of the decree being satisfied by payment of the cheque should not take away the jurisdiction of the executing Court to reconsider the matter when payment of the cheques was refused and the decree remained in fact unsatisfied. A.I.R. 1934 Lah. 535=35 P.L.R. 408=149 Ind. Cas. 127.

——S. 47—Bengal Tenancy Act (8 of 1885) S. 148-A—Rent suit—Kabula between defendants 1 and 2—Execution sale—Plaintiff purchasing tenancy—Suit for khas possession.

Defendant 1 was made a party defendant in suit for rent brought by the plaintiff against the tenant for the purpose of obtaining an effective decree for rent, regard being had to the provisions contained in S. 148-A Bengal Tenancy Act, and got a decree. Before the execution sale of the tenancy, defendant 1 obtained a *kabula* from the tenant. The plaintiff who himself purchased the tenancy in Court auction brought a suit for *khas* possession of land:

Held, that as between the plaintiff, who succeeded in obtaining a decree for rent against the tenant, and defendant 1—a co-sharer landlord, who was joined as a party defendant in the suit for rent for satisfying the requirements of law, as contained in S. 148-A, Bengal Tenancy Act, there was no question relating to the execution of the discharge or satisfaction of the rent decree. The decree was for rent and the liability to satisfy the decree was in the tenant defendant or her representatives and not in defendant 1, the co-sharer landlord. If, therefore, there was no liability in defendant 1 to satisfy the decree for rent, as there was none, no question of execution, discharge or satisfaction of the decree could possibly arise as between the plaintiff on the one hand and defendant 1 on the other. Therefore, the suit for *khas* possession, as brought by the plaintiff, so far as it was directed against defendant 1, could not be held to be one barred by the provisions contained in S. 47, C. P. Code. A.I.R. 1934 Cal. 277=60 Cal. 1401 =38 C.W.N. 43=59 C.L.J. 31=149 Ind. Cas. 13.

——S. 47—Execution—No objection taken under S. 47—Suit under O. 21, R. 103 is barred.

During the pendency of a suit for partition of a property, the plaintiff purchased part of the property of which partition was sought from some of the defendants to that suit and erected some shops thereon. Subsequently, the defendants purchased the same site from another person to whom it had been allotted by the final decree in the partition suit, and they proceeded to execute the decree in respect of this property and took possession. On the dismissal of objections put in by the plaintiff, he filed a suit for possession of the shops describing his suit as one under O. 21, R. 103, C. P. Code:

Held, that the plaintiff had studiously refrained from coming forward as an objector under S. 47, C. P. Code and he had no *locus standi* to maintain an application under R. 100 of O. 21 and his suit under R. 103 was also not maintainable and that the doctrine of *lis pendens* applied. A.I.R. 1934 Lah. 457=148 Ind. Cas. 731.

——S. 47—Suit for declaration that decree is satisfied and incapable of execution.

A suit for a declaration that a decree had been fully satisfied and was incapable of execution is barred by S. 47, C. P. Code. A.I.R. 1933 Lah. 1051 =37 P.L.R. 148=15 Lah. 75=147 Ind. Cas. 574.

——S. 47—Partition decree enabling plaintiff to collect rent from certain tenants—Other co-sharers collecting rent—Suit for amount collected—Non-execution of partition decree—Suit, if barred.

A partiton decree gave the plaintiff as against all his co-sharers an exclusive right to realize rent from certain tenants. On the defendants co-sharers collecting such rent, plaintiff sued them for refund of the amount collec-

ted and for a declaration of his right to collect. The partition decree was not executed by the plaintiff.

Held, that the omission to execute the partition decree did not affect the maintainability of the suit and as it did not relate to execution, discharge or satisfaction of the partition decree, it was not barred by S. 47. A.I.R. 1933 Pat. 248=145 Ind. Cas. 287.

——S. 47, O. 21, R. 95—Suit by decree-holder auction-purchaser for recovery of possession of property purchased.

Section 47 does not bar a suit by a decree-holder auction-purchaser for recovery of possession of the property purchased in execution of his decree, as the question relating to the delivery of the property purchased by him is not a question relating to execution, discharge or satisfaction of the decree. Order 21, R. 95 does not affect the question. A.I.R. 1932 Nag. 140=28 N.L.R. 250=140 Ind. Cas. 683.

——Ss. 47, 145, O. 38, R. 7—Attachment before judgment—Properties delivered to *sapurdar*—Suit by defendant against *sapurdar* for rent of premises.

Where certain movable properties belonging to the defendant were attached before judgment and they were handed over to a *sapurdar* and as the *sapurdar* did not remove the goods from the defendant's premises the latter brought a suit against the *sapurdar* to recover a certain sum of money by way of rent of the premises and damages and for a permanent injunction against the *sapurdar* restraining him from using the premises:

Held, that inasmuch as the cost, if any, incurred in storing the property attached would be a legitimate charge on the properties or the proceeds of their sale when they were delivered eventually to the party who succeeded in the suit, the question was one between the parties to the suit and the suit was not maintainable under S. 47. A.I.R. 1932 Lah. 324=33 P.L.R. 334=136 Ind. Cas. 268.

——S. 47—Partition suit.

Purchase of co-owned fractional share in execution sale—Remedy is by partition suit—Section 47 is no bar—Previous dismissal for delivery of possession is immaterial. 1931 M.W.N. 1176.

——S. 47—Suit for rectification of a decree.

A suit does not lie for the rectification of a decree. A.I.R. 1931 Pat. 296=12 P.L.T. 466=133 Ind. Cas. 366.

——S. 47 and Specific Relief Act, S. 42—Parties and representatives—Suit to declare plaintiffs as the real decree-holders.

Suit for declaration that plaintiffs are real owners of decree standing in defendant's name is maintainable under S. 42, Specific Relief Act and the result of the decree would be that from the date of the decree plaintiffs would be treated as decree-holders with power to execute the decree so far as it had not been executed A.I.R. 1931 Rang. 24=130 Ind. Cas. 366.

——S. 47, O. 21, R. 2—Agreement not to prosecute case—Case already disposed of—Suit to recover money realised in execution.

An agreement not to prosecute a case, which is entered into in ignorance of the fact that the case had already been disposed of, falls within the purview of S. 47, and no suit lies to recover money realised by a party in execution of the decree in contravention of the terms of the agreement. 1931 Mad. 26=130 Ind. Cas. 187.

——S. 47—Decree against legal representative—Sale of property—Suit by legal representative for declaration that property belonged to him and not to deceased.

Where a decree is passed against a person as the legal representative of another, and a property in his possession is attached in execution of the decree, the question whether it belongs to the judgment-debtor or to the deceased whose legal representative the judgment-debtor is, is a matter relating to execution of the decree arising between the parties to the suit and consequently that question has to be determined under S. 47, by the Court executing the decree and not by a separate suit A.I.R. 1931 Nag. 27=130 Ind. Cas. 154.

——S. 47—Suit for ejectment of tenant-at-will—Plea of permanent tenancy—Decree for ejectment becoming time-barred—Denial of title by tenant—Fresh suit for ejectment by land lord:

Held, that the suit was not barred by the provisions of S. 47. A.I.R. 1930 All. 479=1930 A.L.J. 908=130 Ind. Cas. 638.

——S. 47—Bar of suit—Scope of.

In India no separate suit can be brought on the basis of an executable judgment. The judgment-creditor is left to his remedy by execution. But where a new obligation is created by a judgment without provision for execution a suit can be brought on the basis of the judgment. 6 B.H.C.R. 231 and 9 C.W.N. 952, Foll. 85 Ind. Cas. 991=48 Mad. 482=21 M.L.W. 75=A.I.R. 1925 Mad. 279=47 M.L.J. 829.

——S. 47 and O. 21, R. 2—Bar of suit—Adjustment out of Court certified—Default of decree-holder—Separate suit while execution pending, if maintainable.

No separate suit lies at the instance of a judgment-debtor to stay execution on the ground of fraud or negligence of the decree-holder where the execution proceedings are still pending. But where a decree has been fully executed, S. 47, has no application and a separate suit would lie. U.B.R. (1913) Vol. 1, 191=22 Ind. Cas. 963.

——S. 47—Bar of suit—Adjustment.

If the suit does not relate to the execution of the decree but to the transaction of adjustment a separate suit will lie. Any cause of action from the transaction whether amounting to a contract or not will furnish material for a separate suit and such suit is not barred by Section 47, C.P. Code. 83 Ind. Cas. 360=16 S.L.R. 207=A.I.R. 1921 Sind 159 (F.B.).

——S. 47—Bar of suit—Attachment of personal property of legal representative against whom a decree has been passed for recovery from the estate of the deceased—Proper remedy.

Where in execution of a decree passed against a legal representative to be recovered from the estate of the deceased certain personal property of the legal representative is attached, he being a party to the suit his remedy is under S. 47, C.P. Code, and not by a separate suit. 50 P.L.R. 73=A.I.R. 1948 East. Punj. 8.

——S. 47—Bar of suit—Binding debt—Decree against Hindu father—Execution against sons as Legal Representatives—Question of executability of decree on ground of immorality of debts is one within S. 47.

A separate suit for the determination of the liability of the sons for the debt covered by the decree passed against their father would be barred by S. 47. The only remedy of the decree-holder is to apply for execution of the decree against the son of the deceased judgment-debtor as his legal representative. The question as to whether the decree is capable of execution inasmuch as the debt covered by it was tainted with immorality is one relating to the execution of the decree and the plea with respect to that must be taken and determined in the execution proceedings. 62 Ind. Cas. 905=3 P.L.T. 43=6 P.L.J. 451=A.I.R. 1923 Pat. 143.

——Ss. 47 and Or. 21, R. 63—Bar of suit—Claim proceedings—Objection to execution—Separate suit.

O. 21, R. 63, C.P. Code, refers only to cases in which the claimant or objector was not a party to the decree. If an objector to the execution of a decree was a party to the decree, the case is governed by S. 47 of the Code and no separate suit would lie to set aside an order overruling the objection. 16 Ind. Cas. 255 (All.).

——S. 47—Bar of suit—Damages for non-certification.

Any Court other than the Court executing the decree can recognise the payment provided, in doing so, the Court does not disobey the provisions of S. 47. And recognition of such a payment by the Court other than the Court executing the decree must necessarily be in a suit, (1) where the judgment-debtor sued for the money he has paid out of Court on the ground of failure of consideration, (2) where the judgment-debtor sues for damages for a breach of an express or implied promise of the decree-holder to certify the payment. 70 Ind. Cas. 115=11 L.B.R. 429=1 Bur.L.J. 207=A.I.R. 1923 Rang. 88.

——S. 47—Bar of suit—Declaration that decree binds only one judgment-debtor.

A suit for declaration that only one of the judgment-debtors alone is liable under the decree, on the allegation that the other judgment-debtor was only nominal, cannot be maintained. 14 C.W.N. 774=15 C.L.J. 128=6 Ind. Cas. 414.

——S. 47—Bar of suit—Declaratory decree.

In a suit by widow of the mortgagor in respect of the mortgage, a decree was passed in favour of the plaintiff, declaring the right to redeem and the right to recover possession on payment of a certain amount and further declaring devolution of the right on the death of the plaintiff, but no period for the payment of the mortgage money was fixed.

Held, that the decree was to be interpreted as purely declaratory in the nature of the plaintiff's right to redeem the mortgaged property leaving it open to the plaintiff to claim actual possession whenever she found it convenient to do so on payment of the mortgage money.

Held, further that a subsequent suit for redemption was neither barred by the rule of *res judicata* nor by the provisions of S. 47, C.P. Code. 105 Ind. Cas. 93=4 O.W.N. 882=A.I.R. 1927 Oudh. 457.

——S. 47—Bar of suit—Decree not binding — Lunatic—Absence of representation.

S. 47, C.P. Code does not bar a suit by a person against whom a decree has been passed at a time when he was suffering from unsoundness of mind, to set aside the decree. 17 A.L.J. 257=50 Ind. Cas. 109.

——S. 47—Bar of suit—Decree on compromise—Defendant admitting plaintiff's title on condition of his being allowed to remain as tenant—Ejectment of such tenant whether by suit or execution of decree.

Where in an ejectment suit a decree on compromise was passed whereby the plaiinff's title as landlord was recognised by the defendant on condition of the latter being allowed to be in possession as tenant an ejectment of such a tenant can be effected only by a separate suit and not by execution of the decree. 12 A.L.J. 31=22 Ind. Cas. 663.

——S. 47—Bar of suit—Decree-holder auction-purchaser taking only symbolical possession and not actual possession—Subsequent suit to obtain delivery—If barred by S. 47.

Where symbolical possession is taken by the decree-holder auction-purchaser, S. 47 of the Code of Civil Procedure is not a bar to a separate suit by him for obtaining actual possession. The delivery of symbolical possession even erroneously operates to give the person put in possession a fresh cause of action and places the judgment-debtor in the position of a trespasser. It cannot be said that the symbolical possession obtained is a mere nullity and that actual delivery must be obtained in the execution department and not by suit. 59 L.W. 323=1946 M.W.N. 394=A.I.R. 1946 Mad. 529=(1946) 1 M.L.J. 414.

——S. 47—Rr. 63 and 58—Bar of suit—Different cause of action.

Plaintiff sued for possession of a house. Defendant claimed adverse possession. The former owner under whom defendant claimed admitted plaintiff's claim in 1908. Defendant however raised a question of adverse title in 1913, when he objected to the attachment and sale of the property in execution of the decree of the creditor against plaintiff: *Held*, (1) adverse possession began not in 1908 when the defendant, claimed to be in possession with the permission of the former owner but since 1913 when he objected to the attachment and sale. The suit therefore was well within time. (2) The original owner of the house admitted plaintiff's claim in 1908. This suit being based on the allegation that the defendant denied plaintiff's title and set up a title in himself S. 47 did not apply. (3) There being no record of the objection made by the defendant in the execution proceedings of 1913, the suit was not barred by R. 63, O. 21. 77 Ind. Cas. 107=20 A.L.J. 619=A.I.R. 1922 All. 411.

——S.47—Certain land was sold in execution of a decree. The auction purchaser subsequently surrendered the land to the decree-holder, who, on the basis of such surrender, brought a suit against the judgment-debtor to recover possession. *Held*, the suit was not brought by the plaintiff in his capacity as decree-holder, but by virtue of the surrender and his position was that of a stranger, S. 47, C.P. Code was no bar to the suit. 63 Ind. Cas. 762 (Cal.)

——S. 47—Bar of suit—Dispossession.

Plaintiff obtained a decree for possession of his share in certain property but did not execute it. In execution of another decree, he obtained symbolical possession of the property which continued undisturbed for some time. Plaintiff then applied for mutation of names in his favour but his application was refused by the Revenue Court. He then brought another suit for possession.

Held: that the refusal of the revenue authorities amounted to dispossession and furnished him with a fresh cause of action and therefore his suit for possession was not barred under S. 47. 91 Ind. Cas. 19=A.I.R. 1926 Oudh 263.

——S. 47—Bar of suit—Executable decree.

Where the terms of the decree were as follows:—"It is ordered that this suit be decreed in the terms of the award annexed herewith" and where the terms of the award were:—"the parties will collect rents and other profits and each of the two parties will deliver respectively to each other all the zamindari papers which they may have in their possession."

Held, that it was an executable decree and precluded a fresh suit for the possession of the properties concerned by one of the parties. 86 Ind. Cas. 245=23 A.L.J 717=48 M.L.J. 20= 6 L.R.P.C. 23=27 Bom.L.R. 166=21 M.L.W. 286=52 I.A. 79=52 Cal. 314=29 C.W.N 633=A.I.R. 1925 P.C. 34.

——S. 47—Bar of suit—Test.

Whether a subsequent suit is barred by reason of C.P. Code, S. 47 depends upon the existence of a decree which is executable for the purpose of the reliefs sought to be enforced in the subsequent suit. 91 Ind. Cas. 338=22 M.L.W. 195=A.I.R. 1925 Mad. 1260.

——S. 47—Bar of suit—Declaratory decree.

A suit is not maintainable on a prior decree, if the relief claimed in the suit has already been granted by the decree and could have been obtained by enforcement thereof in execution proceedings. A decree which merely declares the rights of parties and does not direct any act to be done, is incapable of execution. In such an event a separate suit will lie to enforce the rights declared by the decree. 70 Ind. Cas. 427=36 C.L.J. 101=A.I.R. 1923 Cal. 252.

——S. 47—Bar of suit—Execution barred.

Where in a pre-emption suit according to a compromise decree, plaintiff is to obtain possession of property if he pays a certain amount within a particular time but in case of default the suit is to stand dismissed the plaintiff pays the required amount within the specified time but does not obtain possession either through Court or privately, and after the lapse of the period of limitation for the execution of the decree files a fresh suit for the possession of the property, such suit should be held to be barred under the provisions of section 47 of the C.P. Code. Case law discussed. 59 Ind. Cas. 632=43 All. 170=A.I.R. 1921 All. 369.

——S. 47—Bar of suit—Execution barred by time.

Where the execution of a decree for possession of a piece of land is barred by limitation, a regular suit lies to eject the judgment-debtor on the basis of the decree. 28 Ind. Cas. 851 (L.B.).

——S. 47—Bar of suit—Execution barred, whether fresh suit lies.

Where plain iff failed to recover possession either privatelyor by execution within time after pre-emption decree in his favour though he deposited the pre-emption n.oney in time, he cannot file a fresh suit on the basis of the former decree. 14 A.L.J. 102, overruled. 2 U.P.L.R. (All). 379=18 A.L.J. 1001=59 Ind. Cas. 632.

——S. 47—Bar of suit—Execution—Objection to execution of mortgage by legal representative—Separate suit for declaration.

Where the representatives of a judgment-debtor in a mortgage decree cannot set up in execution proceedings that a mortgage by their ancestor was invalid, a separate suit by them for a declaration that the properties were not liable to be attached and sold, because the mortgage was invalid, is not barred by S. 244. 31 All. 45=(1908) A.W.N. 279=5 A.L.J. 745=1 Ind. Cas 704.

——S. 47—Bar of suit—Applicability.

To admit an application under S. 47, the decree must be capable of execution and must be still in the course of execution. (1910) 1 U.B.R. 66=10 Ind. Cas. 991.

——S. 47—Bar of suit—Execution proceeding tainted with fraud—Suit to set aside sale—Declaration—Limitation.

A suit to set aside a sale held in execution proceedings tainted with fraud is not barred by S. 47 such a suit is not to set aside an auction sale but only for a declaration that the rights of the plaintiff are not affected and therefore not barred, even though brought after the period prescribed by the Limitation Act for the setting aside of auction sales. 24 Ind. Cas. 695(All.)

——S. 47 (2) (S. 244, Old Code)—Bar of suit—Execution sale—Fraud—Setting aside.

The words " by a separate suit " in S. 244, C. P. Code are not equivalent to " in a separate suit whether the question is raised by plaintiff or defendant." The section does not apply to the trial of the questions specified therein if raised by a defendant to a suit. If an execution sale passes no legal title, it is not obligatory on the judgment-debtor by reason of S. 244, C.P.C. to take steps to set it aside; but if it passes a title, subject to being defeated by the executing Court, then it cannot be challenged in defence to a suit. A written statement containing a prayer to set aside a sale can be treated as an application under S. 47, C.P.C. A defendant can plead in defence all pleas which as plaintiff he can urge. 32 Mad. 242=5 M.L.T. 248=1 Ind. Cas. 221.

——S. 47—Bar of suit—Execution sale, validity of.

The question of irregularity or illegality of notice issued under O. 21, R. 16 and its effect is one arising between the parties to the suit and could be properly determined under S. 47. No separate suit to declare that certain execution proceedings are void for non-compliance with this rule is maintainable. 56 Ind. Cas. 461 (Lah.).

——S. 47—Bar of suit—Execution time-barred.

It is doubtful whether a suit on foot of a decree can be maintained when the execution of it has become time-barred. 38 All. 509=14 A.L.J. 709=35 Ind. Cas. 601.

——S. 47—Bar of suit—Hindu reversioners impleaded as legal representatives of widow in execution of mortgage decree against her—Defence open—Separate suit to challenge the mortgage in question—Maintainability. 20 Luck. 472=A.I.R. 1945 Oudh 314=1945 O.W.N. 290.

——S. 47—Bar of Suit—Joint possession.

A suit lies for restoration to joint possession which is disturbed though it was granted by a decree. 78 Ind. Cas. 390=A.I.R. 1924 Nag. 345.

——S. 47—Bar of suit—Mesne profits.

Where in a former suit between the same parties specific performance of a contract of sale and recovery of possession of property was solicited but where there was no specific prayer for the awarding of future mesne profits, a subsequent suit for the recovery of mesne profits can be maintained. S. 47 is clearly no bar to such a suit. 30 M.L.W. 738=A.I.R. 1929 Mad. 785=57 M.L.J. 515 (2).

——S. 47—Bar of suit—Mortgage by father and son—Simple money decree against father—Execution against son disallowed—Suit to enforce liability.

A suit was instituted against a Hindu father and his son on a mortgage. The son contended that there was no legal necessity. A simple money decree was granted against the father alone and in the decree it was stated that the son was " exempted " and costs were given to him. The sale of the father's share proved insufficient to pay off the decree and the decree-holder sought to attach and sell the son's share but upon objection by the son a suit was brought against the son for a declaration that the son's share was liable to be sold in execution on the ground of his pious liability . *Held* that the suit was barred by S. 47 of the C.P. Code. The expression in the decree exempting a particular person was inaccurate and the operation of the decree was to dismiss the suit against the particular defendant. 16 A.L.J. 752=47 Ind. Cas. 864.

——S. 47—Bar of suit—Mortgage decree.

Suit by person not in existence at the date of mortgage decree, the property covered by it being not ancestral, is not maintainable nor can he come in execution proceedings. 29 Ind. Cas. 402 (Cal.).

——S. 47 and O. 34, Rr. 7 and 8—Bar of suit—Mortgage—Decree nisi for redemption—Decree barred subsequently—Second suit, if maintainable.

A mortgagor who has brought a suit for redemption and obtained a decree *nisi* which neither the mortgagor nor the mortgagee has applied to be made absolute,

can, after the execution of that decree is time-barred, brings a fresh suit for redemption. 43 Bom. 334 ; 477 =21 Bom. L.R. 56=49 Ind. Cas. 894.

——S. 47—Bar of suit—Mortage suit—Death of defendant—Decree against legal representative—Subsequent suit by legal representative challenging decree for sale and pleading that property is not liable to sale in execution of decree—If barred. 48 Bom. L.R. 174.

——S. 47—Bar of suit—Objection to attachment.

Where an objection by the judgment-debtor that his land could not be attached and sold in execution of decree, he being an agriculturist is dismissed, a separate suit by him for declaration that he is an agriculturist does not lie by reason of S. 47. It is a direct attempt to set aside a decision of the executing Court between the parties to the suit in matter relating to the execution or satisfaction of the decree. 31 P.L.R. 191=A.I.R. 1930 Lah. 628=127 Ind. Cas. 858.

——S. 47—Bar of suit—Decree satisfied—Subsequent suit.

Some of the representatives of the judgment-debtor objected to the sale of a house in execution of a decree but the objections were dismissed for default. The decree was fully satisfied later on and the file was consigned to the record-room. Subsequently all the representatives of the judgment-debtor brought a suit for a declaration that the house belonged to them and was not liable to sale in execution of the decree. *Held* that S. 47, C.P. Code, did not bar the suit : the decree having been fully satisfied the execution Court had become *functus officio*. 60 Ind. Cas. 516(Lah.).

——S. 47—Bar of suit—Objection raised late rejected.

Where no objection was raised either in the Court of first instance or in the Lower Appellate Court that a question falling under S. 144, C. P. Code (1882), should not be tried in a separate suit until the Lower Appellate Court had written its judgment in the case. *Held*, that the objection ought not to have been allowed to be raised at that stage. 32 M. 325=4 Ind. Cas. 507 =5 M.L.T. 255=17 M.L.J. 386.

——S. 47—Bar of suit—Objection that decree-holder realised certain debts belonging to judgment-debtor—Separate suit.

A compromise decree was passed in a partition suit by which certain debts were allotted to both parties and a certain sum of money was to be paid by the judgment-debtor. The decree-holder took out execution for this amount to which the judgment-debtor objected stating that the decree-holder had realized certain debts which had been allotted to him. The plea could not be raised and the judgment-debtor could sue to recover the money so wrongfully realised but the objection could not be treated as a plaint as objectors have not stated amount collected and had prayed only for dismissal of defendant's application. 35 All. 243=11 A.L.J. 282= 19 Ind. Cas. 622.

——S. 47—Bar of suit—Objection to sale—Adverse order—Appealability of.

If an objection to a sale in execution of a decree is allowed, the decree-holder if aggreived thereby has his remedy by way of appeal. Otherwise the order of the executing Court is final and S. 47 of the C. P. Code forbids the institution of a regular suit to avoid the consequence of such an order. 17 A.L.J. 832=1 U.P. L.R. H.C. 99=51. Ind. Cas. 184.

——S. 47—Bar of suit—Obstruction to possession.

The proper remedy of a decree-holder auction-purchaser who is resisted in trying to get possession of the property purch sed, by the judgment-debtor as well as a third person claiming to have an interest in the property, is to bring a separate suit for possession both against the judgment-debtor and the stranger. S. 47 of the Code is no bar to such a suit. 44 Bom. 977=59 Ind. Cas. 366=22 Bom. L.R. 1101.

——S. 47—Bar of suit—Order of executing Court sanctioning lease of judgment-debtor's land in decree-holder's favour for certain period in satisfaction of decretal debt—Suit by decree-holder for actual possession of leased land—If barred.

The executing Court ordered that a certain land of the judgment-debtor should be let in farm for a certain period to the decree-holder himself in full and complete satisfaction of the decretal debt. The decree-holder was put in symbolical possession by the executing Court but in spite of his repeated efforts did not succeed in getting actual possession. He brought a suit for possession.

Held, that S. 47, C.P.Code, could not be pleaded in bar of the suit, as the matter that arose between the parties was not one relating to the execution, discharge or satisfaction of the decree. The decree was in fact satisfied as soon as the Court made an order for the land being let in farm to the plaintiff for a certain period. The suit of the plaintiff was based on the title acquired by him in pursuance of the order sanctioning the lease of the suit land in his favour. The cause of action for the the suit was constituted by the defendant's wrongful withholding of the possession of the land from the plaintiff A.I.R. 1949 E.P. 282.

——S. 47—Bar of suit—Partition.

Where a decree for partition did not include a house that had been mortgaged to a third person but only recorded the agreement of the parties to divide that house half and half as and when it should fall into possession, it is open to the parties either to effect the partition by mutual agreement or enforce their rights by a separate suit and such a suit is not barred by S. 47, C.P. Code. 113 Ind. Cas. 173=30 Bom. L.R. 912=A.I.R. 1928 Bom. 365.

——S. 47—Bar of suit—Partition decree merely declaratory.

Where a partition decree simply declared that the property be divided subject to the payment of a certain amount paid towards the discharge of a prior mortgage on the property and that possession should not be given until that amount is paid : *Held* the partition decree did not entitle the parties to work out their mortgage rights in execution of the partition decree and a separate suit for possession was not barred under S. 47. 106 Ind. Cas. 507=A.I.R. 1928 Mad. 474.

——S. 47—Bar of suit—Partition decree—Execution.

If an agreement to reserve partition of properties of which partition has been decreed be not enforceable under O. 21, R. 2; or O. 32, R. 7 or S. 48, C.P. Code, the remedy is to proceed in execution of the same decree and not by a separate suit. (1917) M.W.N. 327=40 Ind. Cas. 820.

——S. 47—Bar of suit—Plaint when treated as an application—Decree against father's property—Money paid by son—Ancestral property subsequently held not liable—Right of son to claim refund of money.

Held, plaintiff cannot claim refund as he did not allege that his father left no assets from which decree against him could be satisfied. The suit was not maintainable and the plaint cannot be treated as an application under S. 47, C.P. Code. 6 A.L.J. 641=3 Ind. Cas. 495.

——S. 47—Bar of suit—Pro forma defendants.

A suit by a person who was a party to objection proceedings under O. 21, R. 58, though as a *pro forma*

defendant is barred by S. 47. 88 Ind. Cas. 542=A.I.R. 1926 Oudh 64.

——S. 47—Bar of suit—Puisne mortgagee—Decree in prior mortgagee's suit—Effect of.

Where in a suit by a prior mortgagee impleading the puisne mortgagee also as a defendant a decree is passed in Form No 7, Appendix D., C. P. Code, the utmost that the puisne mortgagee can claim is that he can apply for sale, to work out his right to share in the surplus if any, if the prior mortgagee fails to apply for sale. The puisne mortgagee cannot, when the prior mortgagee is satisfied by sale of other properties, bring the mortgaged property to sale on default of payment of the sum declared due to him. He can bring a suit on his own mortgage as plaintiff. 42 Mad. 90=35 M.L.J. 639=(1918) M.W.N. 898=24 M.L.J. 473=9 L.W. 70=49 Ind. Cas. 36.

——S. 47—Bar of suit—Question relating to execution—Fraudulent execution of decree—Suit for damages.

A suit for damages for fraudulent execution is not barred by S. 47; the measure of damages would be the amount actually recovered in such execution. (1914) M.W.N. 174=23 Ind. Cas. 405.

——S. 47—Bar of suit—Redemption.

Where a final decree for sale is passed in a suit on a mortgage, but is not executed for more than 3 years, S. 47 does not prevent the mortgagor from suing for redemption of the mortgage. 86 Ind. Cas. 527=A.I.R. 1925 Mad. 1191.

——S. 47—Bar of suit—Relief against parties.

The plaintiff was the brother of one who had obtained a decree against the defendant. In execution of that decree the suit house was sold and purchased by D, but no possession was obtained. Consequently after *D's* death the plaintiff filed a suit for possession against defendan in the first suit and his sons.

Held, that although the plaintiff's brother by becoming the auction-purchaser in execution of his decree would not thereby cease to be a party to the suit, the sons of the original defendant, were not representatives of the first defendant in that suit. Therefore a suit was necessary if the plaintiff wished to recover the property from the defendants. 73 Ind. Cas. 402=25 Bom. L.R. 494 =1923 Bom. 450.

——S. 47—Bar of suit—Relief not available before.

G who was a co-sharer brought a suit to recover his share of revenue from *R* who was the Managing Jaghirdar. It was decreed that *G* should receive the share out of the vasuli rakam every year and that *R* should pay it to *G* every year in the month of May. It was further directed that on *R* failing to pay the same, *G* should recover the amount through Court. Government suspended the revenue of the village and so *R* declined to pay *G* his share. Whereupon *G* applied to execute the decree. During the pendency of the application the Government entirely remitted the land revenue of the village for that year. *R*, therefore, brought a suit for declaration that *G* had no right to recover the share of the revenue in the year in which the Collector had suspended or remitted the revenue and claimed recovery of amount remitted. *G* objected to the suit as being barred under S. 47 and claim being *res judicata* and set up the decree and order in execution applications.

Held, that the suit was not barred under S. 47 or under S. 11 as neither the declaration nor refund could be claimed under previous decree. 31 Bom. L.R. 1415 =54 Bom. 162=A.I.R. 1930 Bom. 132=124 Ind. Cas. 225.

——S. 47 and O. 21, R, 103—Bar of suit—Right of suit under R. 103.

O. 21, R. 103 of the C.P.Code which gives a rights of suit to a party who is not a judgment-debtor, is not restricted by the general provisions by S. 47. 52 Ind. Cas. 928 (Mad.)

——S. 47—Bar of suit—Re-sale.

An order under O. 21, R. 71, comes within the provisions of S. 47. A separate suit cannot be brought to set aside such an order. 1922 All. 200; 23 O.C. 140; 23 O.C. 342; 18 Mad. 439; 20 Cal. 599; 36 Bom. 329 and 45 Bom. 223, Foll. 87 Ind. Cas. 284=12 O.L.J. 80=2 O.W.N. 141=29 O.C. 18=A.I.R. 1925 Oudh 360.

——S. 47—Bar of suit—Sale of holding in contravention of statutory prohibition—Validity of—If can be raised in execution—Separate suit on basis of prohibition—Maintainability.

The question whether the disputed property (directed to be sold under a mortgage decree) could be alienated or sold in spite of a prohibition contained in a statute (Chota Nagpur Tenancy Act) and that the sale is void is essentially a question relating to the execution discharge and satisfaction of the decree, to be decided between the decree-holder and the judgment-debtor in execution proceedings, under S. 47, Civil Procedure Code, and a separate suit raising such a plea is barred by S. 47. 23 Pat. 333, foll. 27 Pat. 399.

——S. 47—Bar of suit—Sale of share of a member of a joint Hindu family—Decree-holder purchaser—Suit for partition.

Where a decree-holder purchased in execution sale the share of the judgment-debtor who was a member of a joint Hindu family and subsequently brought a suit for partition. *Held*, S. 244, C. P. Code, did not give the executing Court power to effect a partition and the present suit was therefore necessary and competent. 29 Mad. 294; 31 All. 82 (F.B.), foll. 1 Lah. 134=1 Lah. L.J. 10=56 Ind. Cas. 254.

——S. 47—Bar of suit—Satisfaction of decree.

Although O. 21, R. 2 of the C.P. Code, specifically enacts that an uncertified adjustment cannot be recognised as an adjustment of the decree by any Court executing the decree it is implied that it may be recognised as such by Court trying the matter as a regular suit, and that a suit for a declaration that the decree had been satisfied is maintainable notwithstanding that its object is to restrain the decree-holder from executing the decree. A suit for a declaration that a decree had been satisfied and should not consequently be satisfied against the judgment-debtor is competent, and S. 47 of the Code of Civil Procedure does not operate as a bar to such a suit. 79 Ind. Cas. 125=A.I.R. 1925 Lah. 54.

——S. 47—Suit to declare a decree incapable of execution.

A suit for a declaration that a decree has been fully. satisfied and is incapable of execution is barred under section 47, C.P. Code. 67 Ind. Cas. 593=3 Lah. 319 =A.I.R. 1922 Lah. 428 (F.B.).

——S. 47 and O. 21, R. 2—Bar of suit—Satisfaction of decree—Anomalous agreement not to execute—Suit on basis of such agreement for recovery of money realized in execution is barred by S. 47.

Where an agreement is anomalous in character, *i.e.*, while in point of time it is post decree, in point of character and intention it is pre-decree, having been executed in ignorance of the fact that a decree had already been passed, it should be treated as a pre-decree agreement not coming within the terms of O. 21, R. 2, C. P. Code, but falling under S. 47 and a suit brought on the basis of such an agreement for recovery of money real

lized in execution of the decree is barred by S. 47. A.I.R. 1931 Mad. 26=130 Ind. Cas. 187.

——S. 47 and O. 21, R. 2—Bar of suit—Satisfaction of decree—Suit for declaration.

A suit for a declaration that a particular decree has been satisfied by payment out of Court and cannot be executed is not maintainable, the proper remedy in such a case is a suit for damages. 7 L.B.R. 367=28 Ind. Cas. 468.

——S. 47—Bar of suit—Setting aside sale.

Where application to set aside sale is made under O. 21, R. 90 and is dismissed, no suit for cancellation of the sale can lie on an allegation of fraud and irregularity in the publication or conduct of auction sale. 25 N.L.R. 58=118 Ind. Cas. 49=A.I.R. 1929 Nag. 130.

——S. 47—Bar of suit—Suit against assignee of decree-holder—Damages.

Plaintiff arranged with his bank for the satisfaction of a decree. The bank, however, did not satisfy the decree but got an assignment of it to itself and recouped itself out of the monies paid by plaintiff into the Bank. *Held*, that plaintiff's suit is one for damages for breach of contract and not barred by S. 47, C. P. Code. (1917) M.W.N. 359=40 Ind. Cas. 549.

——S. 47—Bar of suit—Suit against legal representative.

A fresh suit against the widow of the judgment-debtor for the decree-debt on the ground that she possessed the deceased's self-acquired property is barred. Plaintiff gets no cause of action against the widow even as executor *de son tort* though she possesses joint properties which pass by survivorship to deceased's joint brother nor against the surviving co-parceners of the deceased except his sons. 33 Mad. 423=7 M.L.T. 211=20 M.L.J. 308=(1910) M.W.N. 518=5 Ind Cas. 362.

——S. 47—Bar of suit—Suit by auction-purchaser.

Transferee from an auction-purchaser can recover possession of property from the transferee of the judgment-debtor by a regular suit and not by application under S. 47, C. P. Code. 2 Ind. Cas. 454(All.)

——S. 47—Bar of suit—Suit for declaration by decree-holder that proceedings under C.P. Debt Conciliation Act are void and that he is entitled to execute decree—One of parties to suit not party to decree but party to Debt Conciliation proceedings—Suit, if barred.

The plaintiff obtained a money decree against the defendant who applied to the Debt Conciliation Board for conciliation of his debts. The Board issued a certificate under S. 15 of the C.P. Debt Conciliation Act against the plaintiff and passed an order settling debt due to another creditor and making it payable in instalment. The plaintiff's application for execution of his decree was struck off as infructuous with an observation by the executing Court that attachment would take effect after the instalments of the Board were satisfied. The plaintiff thereupon filed a suit for a declaration that the proceedings before the Board and the certificate issued to the plaintiff in respect of his decretal debt were null and void on account of fraud and that the plaintiff was entitled to execute his decree.

Held, that the suit was not barred by S. 47, C.P.Code. The agreement under S. 12 of the C.P. Debt Conciliation Act between the debtor and the other creditor which made the debt payable by instalments was the main obstacle to immediate execution. That obstacle could not be removed unless the other creditor was a party to the proceedings and he could not be a proper party as he was not a party to the decree or a representative of a party to the decree. Any dispute between the plaintiff and that creditor would fall beyond the scope of S. 47 I.L.R. (1947) Nag. 985=A.I.R. 1948 Nag. 150=1948 N.L.J. 65.

——S. 47—Bar of suit—Suit for declaration of satisfaction of a decree and for injunction restraining execution—Second appeal—Objection to maintainability of suit.

A suit for a declaration of satisfaction of a decree obtained by the defendant against the plaintiff and for an injunction restraining the defendant from its execution is barred by S. 47(1). An objection to the maintainability of a suit may be raised for the first time in a second appeal, if it does not require fresh facts to be ascertained. 31 M.L.J. 429=36 Ind. Cas. 588.

——S. 47—Bar of suit—Suit directed by Court.

A suit filed by decree-holder in pursuance of an order passed under O. 21, R 58 directing him to file a separate suit to establish his title cannot be dismissed on the ground that the remedy lay under S. 47 5 L.R.A. (Civ.) 755=86 Ind Cas. 323=A.I.R. 1925 All. 240.

——S. 47—Bar of suit—Suit on judgment—Principle of.

A suit on a judgment obtained against the ostensible representatives can be maintained against the real representatives. The principle on which an action is allowed to be maintained on a judgment is that where the Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained. This principle is subject to the qualification that an action is permissible only where the judgment cannot be enforced in some other way. There is divergence of judicial opinion on this matter. 20 C.W.N. 58=22 C.L.J. 272=30 Ind. Cas. 824.

——S. 47—Bar of suit—Suit for partition—Auction-purchaser of co-parcener's interest.

Plaintiff purchased the undivided share in certain property at a Court sale and obtained joint possession of the property through Court and then brought a suit for partition and separate possession of her share: *Held*, that S. 244 (S. 47, New Code) did not bar the suit. (1910) M.W.N. 368=8 M.L.T. 379=7 Ind. Cas. 558.

——S. 47—Bar of suit—Suit for possession in presence of a decree already existing.

A decree on compromise in a declaratory suit for challenging an alienation by a widow to the effect that the plaintiff is to get immediately a certain portion of the property in dispute is a decree for possession although the word *dakhilyabi* does not occur therein. A second suit for possession of the same property is barred. The only remedy left to the plaintiff is to execute the first decree. 55 P.L.R. 1917=34 P.W.R. 1917=41 Ind. Cas. 2.

——S. 47—Bar of suit—Suit to set aside decree and sale as fraudulent—Maintainability.

S. 244 of the C.P.Code (1882) (S. 47 of C.P.Code), does not bar a suit to set aside a decree and an execution sale thereunder as having been obtained by fraud. 42 Cal. 244=18 C.W.N. 1029=27 M.L.J. 100=1 L.W. 549 16 M.L.J. 210=(1914) M.W.N. 636=12 A.L.J. 1176 =20 C.L.J. 300=16 Bom. L.R. 845=24 Ind. Cas. 501 (P.C.).

——S. 47—Bar of suit—Suit by stranger to decree—Person not claiming as representative.

Where a suit in respect of property for which a decree has been obtained is brought by a person, who is not a representative of a judgment-debtor affected by the decree, beore the decree is put in execution and there are no pfceedings pending in which an applieetion under S. 47, C.P. Code. could be made, S. 47, is no bar to the suit. (1919) P.H.C.C. 465=53 Ind. Cas. 20.

——S. 47 and O. 21, R. 96—Bar of suit—Symbolical possession—Suit by purchaser for actual possession —Whether barred.

Delivery of symbolical possession is operative against the judgment-debtor who from that date becomes a trespasser and so S. 47 is no bar to a suit for actual possession by a purchaser who obtained only symbolical delivery after confirmation of the execution sale. 25 Ind. Cas. 267, Foll. 20 C.W.N. 675=23 C.L.J. 587=35 Ind. Cas. 294.

——S. 47 (3) and O. 21, R. 16—Bar of suit—Transferee of decree—Right to execute.

Whether a transferee of a decree is entitled to obtain execution of the decree should be determined under S. 47 C.P. Code and no separate suit will lie. 28 Ind. Cas. 906 (Mad.).

——S. 47—Bar of suit—Unexecutable decree—Attachment and sale of profits due to defendant.

If the profits are not ascertained, a fresh suit to ascertain their amount is maintainable. 33 Ind. Cas. 83 (All.).

——S. 47—Bar of suit—Validity of decree.

Section 47 cannot bar a suit which raises questions which do not merely relate to the execution, discharge and satisfaction of the decree, but go behind the decree and are such as the execution Court could not have decided. 115 Ind. Cas. 462=1929 A.L.J. 425=A.I.R. 1929 All. 252.

——S. 47—Bar of suit—Particular property not the subject matter of suit.

Held that in view of the fact that the plaintiff was the plaintiff in the former suit and the defendant was also a defendant in that suit and the property in dispute was also a property in dispute in the prevoius suit, although the defendant was not sued in respect of that property, the second suit was barred under S. 47, Civil P. C. A.I.R. 1931 Bom. 114=32 Bom.L.R. 1473=129 Ind. Cas. 737.

4. No Bar.

——S. 47, (Ss. 244, 583, Old Code)—No bar—Application in restitution. 1908 A.W.N. 206=5 A.L.J. 527=30 A. 476.

——S. 47 (S. 244, Old Code)—No bar—Compromise decree—Specific performance, suit for—Right of suit—Estoppel.

Where a previous suit for khas possession was compromised and dismissed, defendant agreeing to execute a kabuliyat in plaintiff's favour and plaintiff sued again for specific performance of the contract to execute the kabuliyat, there being no direction for its execution in the decree in the previous suit. *Held*, that the present suit was not barred under S. 244, C.P. Code. (1899) 7 C.W.N. 158.

——S. 47 (S. 244, Old Code)——No bar—Decree against minor without proper representation—Suit to set aside, right of.

S. 244 does not bar a suit to recover property from a decree-holder, who obtained his decree relating to the property against the plaintiff when a minor without proper representation in Court or from such decree-holder's vendee. (1905) A.W.N. 122 at 123=2 A.L.J. 460.

——S. 47, O. 21, R. 96 (Ss. 244, 319, Old Code)—No bar—Delivery of symbolical possession—Wrong delivery—No nullity—No bar to separate suit.

Delivery of symbolicial possession even though erroneously made, i e, even though made under circumstances which do not make S. 319 applicable operates to give the person so put in possession a fresh cause of action and to place the judgment-debtor in the position of a trespasser; and consequently, a suit by the assignee-decree-holder purchaser for actual possession of the properties purchased is not barred by S. 244, C.P.C. Symbolicail possession delivered under circumstances under which S. 219, C.P.C., is not applicable is not a nullity. (1907) 17 M.L.J. 518

——S. 47 (S. 244, Old Code)—No bar—Dispute in execution among representatives of respondent brought on record by appellant not determinable under S. 244.

Where a defendant-appellant brought on the record certain persons as representatives of the deceased respondent, and the appeal was dismissed, and only some of such representatives applied in execution, and the others disputed their right. *Held*, that the Munsiff could not in execution re-open the question as to whether certain persons brought on the record as representatives of the deceased plaintiff, and, as such, made respondents in the appeal, had been properly joined as parties or not. (1901) 24 M. 665.

——S. 47 (S. 244, Old Code)—No bar—Execution, discharge or satisfaction of the decree—Decree-holder constructing in contravention of the directions in the decree.

Where the effect of a decree is to declare the plaintiff's right to build over a certain area and prohibit the defendant from interfering with such right, if the decree-holder makes any constructions contrary to the right which the decree has declared that is a matter which does not relate to the execution, discharge or satisfaction of the decree, and the Court has no power to enter into it in execution proceedings. If the decree-holder has exceeded his rights, the judgment-debtor should seek remedy by suit. (1905) 2 A.L.J. 573.

——Ss. 47, 144 (1), (Ss. 244, 538, Old Code)—No bar—Execution sale—Decree-holder's possession as purchaser—Sale set aside—Claim for mesne profits and interest by representatives in title of the judgment-debtor.

Held, that the claim of the respondents to have the question in dispute determined in the execution proceedings was justified by Ss. 583 and 244 of the Code of Civil Procedure (Act 14 of 1882). (1909) 14 C.W.N. 55=10 C.L.J. 257=11 Bom. L.R. 1200=6 M.L.T. 303 =26 I.A. 197=31 A. 551=13 O.C. 180=3 Ind. Cas. 798=19 M.L.J. 599 (P.C.)

——S. 47 (S. 244, Old Code)—No bar—Exonerated defendant—Party to suit in which the decree was passed—Party against whom no decree was passed not precluded from bringing a suit.

S. 244 of the Code of Civil Procedure presupposes a decree enforceable by the decree-holder against the person between whom and the decree-holder the question referred to therein arises. It has no application to questions arising between the decree-holder and persons against whom there is no decree to be executed. Where, therefore, certain persons had intervened in a suit as defendants and the suit was disposed of without any decision of the claim set up by them and without any decree being passed affecting them, it was held that they (or their assignees were not precluded from bringing a suit to have relased from attachment the property claimed by them in the former suit, but as to their title to which there had been no adjudication 11 B.L.R. P.C. 149 foll. (1900) 1901 A.W.N. 97=23 A. 346 (obsolete)

——S. 47 (S. 244, Old Code)—No bar—Insolvency Act, S. 7—Suit by trustee under composition deed executed by judgment-debtor—Attachment. 13 M.L.J. 372=27 M. 7.

——S. 47, 50 (Ss. 244, 234, Old Code)—No bar—Judgment-debtor's death—Suit for administration by judgment-creditor against executor—Mal-administration.

Certain persons who had obtained a decree agains Ca person, since deceased, failed to realise the decretal

amount by executing the decree against the executrix of the judgment-debtor. They then instituted a suit against the executrix charging her with mal-administration and asking for administration of the Judgment-debtor's estate. *Held*, that the suit involved a much wider question than one merely relating to the execution of the decree, and was not barred by S. 244, C.P.Code. (1908) 12 C.W.N. 614=35 Cal. 1100.

——S. 47 (S. 244, Old Code)—No bar—Mortgage—Foreclosure decree—Puisne mortgagor paying off decree rights of—Whether enforceable in execution.

The existence of a decree cannot, by the operation S. 244 of the Civil Procedure Code, bar a fresh suit between the parties in respect of rights which cannot be worked out without additions to the decree which the Court of execution had no power to make. (1905) 27 A. 325=9 C.W.N. 577=2 C.L.J. 173=2 A.L.J., 336; 7 Bom.L.R. 427; 15 M.L.J. 191= 32 I.A. 123. (P.C.).

——S. 47 (S. 244, Old Code)—No bar—Mortgage—Redemption——Possession—Separate suit.

In a suit for redemption by *B*, the eldest son of the mortgagor, a consent decree was passed whereby *B* was to pay a certain sum in yearly instalment and he obtained possession of the property. In default of payment of any one instalment, the property was to revert to the possession of the mortgagee, but *B* was at liberty to pay the whole of the balance due at the end of any Chaitra and the mortgagee was to deliver possession. On a default in payment by *B* the property went into the possession of the mortgagee. *B* having died in the mean while his younger brother filed a separate suit to redeem the property: *Held*, that the separate suit was maintainable. 16 B. 656, foll. (1904) 6 Bom.L.R. 1100.

——S. 47 (S. 244, Old Code) No bar—Contest between the holder of a decree for an undivided share of joint property and an auction-purchaser 'pendente lite.'

A suit for partition by a decree-holder purchaser o the share of one of several co-sharers against a purchaser *pendente lite* from another sharer after the former had obtained formal possession, is not barred by S. 244, C.P. Code. (1907) 5 A.L.J. 547=1908 A.W.N. 93 =30 A. 231.

——Ss. 47, 144 (Ss. 244, 583, Old Code)—No bar—Restitution proceedings.

The provisions in S. 244 that the questions referred to therein must be determined by the order of the Court executing the decree and not by separate suit is not made applicable to proceedings for restitution by the terms of S. 583. Proceedings in restitution can be had either by summary process or by a new suit. 10 M.I.A. 203, foll. (1907) 35 C. 265.

——S. 47, O. 21, R. 95 (Ss. 244, 318, Old Code)—No bar—Dispute between two judgment-debtors as to right to property sold in execution, (1906) 1907 A.W.N. 29= 29 A. 207=4 A.L.J. 47.

——S. 47 (S. 244, Old Code)—No bar—Shebait—Decree against a person personally—Sale of property—Claim by him as Shebait—Applicability of S. 244.

S. 244 of the Civil Procedure Code is no bar to a suit by a Shebait to set aside a sale of debutter property in execution of a decree against him personally. (1899 6 C.W.N. 663. (Obsolete)

——S. 47 (S. 244, Old Code)—No bar—Suit by purchaser for compensation for trespass by decree-holder's judgment-debtor and others.

A suit by an auction-purchaser in a Court sale for compensation for trespass committed by a decree-holder and a judgment-debtor along with some others on the property purchased before he obtained possession is not barred by S. 244, C.P.C., the question not being one arising out of the execution of the decree. (1907) 17 M.L.J. 543=31 M. 37=3 M.L.J. 97.

——S. 47 (S. 244, Old Code)—No bar to suit on unsatisfied order of Insolvent Court for costs.

S. 244, C.PC., is no bar to a suit on an unsatisfied order in insolvency for payment of costs. (1904) 9 C.W.N. 952=33 C. 560.

——S. 47 (S. 244, Old Code)—No bar—Transferee of portion of decree no transferee—Remedy only by separate suit. *See* C.P.C., O., 21 R. 21. 28 M. 64.

——S. 47, O. 21 2 (Ss. 244, 258 Old Code)—No bar—Uncertified pamyent out of Court—Subsequent execution by decree-holder—Suit to recover sum paid out of Court.

Held that a suit by the judgment-debtor to recover the amount paid out of Court to the decree-holder was not barred either by S. 244 or by S 258 of the Code. 3 A. 538 and 21 M. 409, foll. 1908 A.W.N. 220=5 A.L.J. 475=30 A. 464.

——S. 47 (S. 244, Old Code).—Construction.

S. 244 of the Civil Procedure Code ought to be liberally construed in order to avoid multiplicity of suits. Where a judgment-debtor does not challenge the validity of a decree but contends that in execution thereof certain property should not be attached and sold in consequence of circumstances arising subsequent of the decree, such contention ought to be dealt with under S. 244, Civil Procedure Code, and not by a separate suit. (1906) 9 C.L.J. 358=4 Ind. Cas. 121.

——S. 47 (C. S. 244, Old Code.)—Construction.

The Courts should constre S. 244 liberally and widely. (1905) 4 A.L.J. 192=33 C. 857.

5. Compromise decree.

——S. 47—Compromise decree—Enforcement of Suit or execution.

Where a compromise decree has become une executable by lapse of time, it is not open to th-parties to bring a fresh suit on the same subject matter. 2 Lah. L.J. 724.

——S. 47—Recording of compromise without sanction—Minors as parties whether suit lies to set it aside.

S. 47 bars a suit by minors to set aside a compromise recorded by the Court on the ground that the court did not record expressly that it sanctioned the compromise. 1 Pat. L. T. 663=5 P.L.J. 379=1920 P.H.C.C. 358=62 Ind. Cas. 284.

——S. 47—Compromise decree.—Capable of execution.

In a simple money-suit a compromise decree was passed. The parties agreed that in case of default the amount would be recovered by sale of the house specified in the decree and other property belonging to the judgment-debtor. Even though the house and the other property were not the subject of the suit, the decree did create a charge on the house.

Held, that the decree was capable of execution and that it was not necessary to bring a separate suit to enforce it. 120 Ind. Cas. 218=A.I.R. 1930 Nag. 17.

——S. 47—Decree providing alternative modes of execution—Effect of.

A compromise decree in a suit for breach of a contract to supply ore exclusively to the plaintiffs provided "that in the event of the defendants failing to deliver the full quantity of 4,000 tons of ore of the stipulated grade in any particular year or violating any of the conditions of his compromise, the defendants shall pay to plaintiffs damages at the rate of Re. 1 (rupee one) per ton on the whole of the quantity which may then have remained undelivered out of the total quantity of 31,234 tons and the same shall be recovered by execution of this decree." A breach occurred and the defendants presented an application for leave to deposit Rs. 28,649-2-9 to be paid over to the decree-holders, and for an order declaring the decree to have been thus fully satisfied. The decree-holders applied for execution of their decree by seizure and delivery to them of certain manganese ore alleged to be lying at several mines and railway sidings, and by the appointment of a receiver and other relief. The trial court granted application of defendants and held that the decree-holders were not entitled to the relief prayed but must take in satisfaction the amount deposited by the judgment-debtors. This decision was affirmed in appeal. On appeal to Privy Council.

Held : that this clause did not enable the judgment-debtors to render nugatory all their obligations under the prior part of the contract, whenever it suited their pockets to do so. It provided that they shall pay at the specified rate, if they fail to perform the contract in any respect, but it did not say that such payment was to be a full and exclusive satisfaction of all obligations under the contract. The payment into court did not make the decree a satisfied decree. It provided a mode of enforcing such payment but it did not say that the other terms would not be enforced by execution of the decree, namely, by applying to the court to enforce the injunction. 55 Cal. 238=107 Ind. Cas. 25=55 I.A. 58=47 C.L.J. 162=30 Bom. L.R. 243=32 C.W.N. 509=27 M.L.W. 655=26 A.L.J. 667=24 N.L.R. 17=1928 M.W.N. 951=A.I.R. 1928 P.C. 27=54 M.L.J. 122 (P.C.).

——S. 47—Mortgage suit—Compromise decree in derogation-Mortgagor's right of redemption.

A compromise decree in a suit on a usufructuary mortgage provided that the mortgagor should pay the amount within a certain time and in case he paid it later, recover possession by taking out execution. The mortgagor paid it after the time fixed and applied in execution for possession. It was dismissed as barred by limitation. He then brought a suit to redeem the properties.

Held, that there was nothing in the compromise decree which put an end to the relationship of mortgagor and mortgagee and that the provision to take possession by execution in the compromise decree necessarily reduced the period of sixty years allowed by law for redemption to a period of three years and hence was invalid being a clog on the equity of redemption, and the rajinama decree did not render the present suit **res judicata** and that C. P. Code, S. 47, was no bar to the suit. 123 Ind. Cas. 584=53 Mad. 805=31 M. L. W. 44= A. I. R. 1930 Mad. 305.

——S. 47 Matters extraneous to suit.

Courts's power to pass a consent decree is limited to matters covered by the suit. But if the agreement refers to matters outside the suit forming consideration for the compromise or settlement of the matter compromised in the suit such terms should also be mentioned in the decree. But it does not follow that such terms can be enforced in the execution of that decree. They can be enforced only by a separate suit. Where a decree includes matters covered by the suit and also matters outside it the decree can be executed only to the extent of the matters included in the suit and not in respect of the matters outside it. 78 Ind. Cas 317 =A.I.R. 1925 Cal. 286.

——S. 47—Consent decree — Question of free consent—Executing Court cannot raise.

An executing Court cannot sit in judgment upon a decree. It is its business to accept the decree as it is and execute it. Thus, it has no power to go into the question whether there was a free consent by a party to the terms of a consent decree. A.I.R. 1946 Sind 150=222 Ind. Cas. 628=I.L.R. (1946) Kar. 132.

——S. 47—Consent decree—Powers of executing Court—Penal clause contained in consent decree—Relief against forfeiture can be granted by executing Court when party seeking relief is not guilty of laches—Contract Act, S. 74.

Section 74, Contract Act, is as much applicable to consent decree as to any other contracts and an executing Court has power to relieve against penal clause or forfeiture contained in a consent decree. But a relief against forfeiture being only equitable, a Court of equity will refuse to grant such relief when there is laches or delay on the part of the party seeking assistance.

A consent decree provided that if the decretal amount was not paid by **A** within a certain time the possession of the land was to be given up by him to **B**. On **A**'s failure to pay the amount the land was delivered to **B** in execution and no appeal was filed by **A** against the order of delivery of possession. Subsequently **A** paid the amount in Court and sought relief against forfeiture under S. 47, Civil P. C.:

Held, that as **A** was guilty of laches he could not get the equitable relief. A.I.R. 1946 Sind 150= 222 Ind. Cas. 628=I.L.R. (1946) Kar. 132.

——S. 47—Executing Court, if can go into question of validity of compromise.

The mere existence of a compromise and a decree passed on that compromise does not prevent an execution Court or a different Court from investigating the question whether certain terms in that compromise would not amount to a penalty which would be invalid under S. 74, Contract Act. Therefore, it is open to the Court to go into the question of whether the compromise in question would or would not be valid. A.I.R. 1935 All. 862 =1935 A.L.J. 910=58 All. 230=1935 A.L.R. 1044 =158 Ind. Cas. 1106.

——S. 47—Plea that compromise is opposed to public policy—Powers of executing Court.

A plea that a compromise decree is opposed to public policy cannot be taken in execution proceedings as the plea is not one of inherent want of jurisdiction but one where the question of jurisdiction is to be decided by the Court itself. A.I.R. 1945 Mad. 36=57 L.W. 485=(1944) 2 M.L.J. 210= 1944 M.W.N. 573.

——S. 47—Executing Court can see whether decree conflicts with S. 60 (1).

It is true that ordinarily Court in execution cannot go behind a decree but where a decree is passed

in consequence of a compromise and gives effect to the will of the parties without any adjudication by the Court itself, the contract cannot be said to have any greater sanctity in spite of the fact that the command of a Judge has been added to it. The contract in cases of this kind must be taken to have been adopted with all its incidents and as it is open to a party to plead that a contract was void or unenforceable, it would be equally open to him to urge that the contract, although embodied in a decree still remains void and unenforceable. It is the duty of a Court under O. 23, R. 3, Civil P. C., to see that the agreement or compromise is lawful and if without taking that question into consideration the Court has passed a decree, the agreement or the compromise does not become legal on account of that omission by the Court. Executing Court can, therefore, go behind a compromise decree and find that it is inexecutable on account of its coming into conflict with S. 60 (1). A.I.R. 1943 Lah. 268=45 P.L.R. 432=I.L.R. (1944) Lah. 379=211 Ind. Cas. 291 (F.B.).

——S. 47, O. 23, R. 3—Compromise decree including terms not relating to suit—Whether decree can be executed in entirety.

Quaere—Whether a compromise decree, which includes terms which do not relate to the suit, can be executed in its entirety or a separate suit is necessary. A.I.R. 1943 Sind 11=I.L.R. (1942) Kar. 326=205 Ind. Cas. 256.

——Ss. 47, 48—Jurisdiction of executing Court to ascertain legal effect of compromise of decree.

The Civil P. C., contains no general restriction of the parties' liberty of contract with reference to their rights and obligations under the decree and if they do contract upon terms which have reference to and affect the execution, discharge or satisfaction of the decree, the provisions of S. 47 involve that questions relating to such terms may fall to be determined by the executing Court. It is the duty of the executing Court under S. 47, Civil P.C., to ascertain the legal effect of the compromise and to order accordingly. A.I.R. 1940 All. 107=1939 A.W.R. 870=1939 A.L.J. 1051=186 Ind. Cas. 614.

——S. 47—Consent decree—Power of executing Court to determine its validity.

A consent decree is essentially a contract and it is open to the executing Court to determine its validity. Although a consent decree has all the force of a decree **in invitem** so far as its binding character is concerned, it does not stand on a footing higher than a contract so far as its legal character is concerned. It is binding on the parties as a decree only when it is in accordance with law and valid. The Court must necessarily have jurisdiction to set aside the consent decree on any ground which would invalidate an agreement between the parties. A.I.R. 1937 Nag. 413=173 Ind. Cas. 257.

——S. 47—Decree on matters extraneous to suit.

Decree passed by a Court on a compromise and relating to a matter extraneous to the suit is not a nullity and can be executed. A.I.R. 1934 Lah. 623 =37 P.L.R, 178=154 Ind. Cas. 185.

——S. 47. O. 23, R. 3—Compromise covering matters extraneous suit—Procedure and mode of enforcement.

Where the terms of a compromise relate also to matters extraneous to the suit, the proper and effectual method of carrying out the terms of R 3 of O. 23, would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit or to introduce the agreement in a schedule to the decree, but the operative part of the decree should be confined to the subject-matter of the suit. The operative part of the decree so confined to the subject-matter of the suit can be enforced as between the parties to the suit under S. 47. Any agreement as to matters extraneous to the suit can be enforced in a separate suit. A.I.R. 1932 Bom. 466=34 Bom. L.R. 849=139 Ind. Cash. 830.

——S. 47—Objection that one of the terms of compromise decree was 'outside the scope of the suit'—Whether can be entertained.

The execution Court has no power to discuss the validity of the terms of the decree which it is directed to execute. It cannot consider the objection that one of the terms of a compromise decree was 'outside the scope of the suit.' The question as to the power of the Court to pass the decree should be raised either by way of review or in appeal but the executing Court cannot go behind it, A.I.R. 1934 Pat. 203=13 Pat. 17=151 Ind. Cas. 368 (2).

——S. 47—Compromise on matters extraneous to suit.

The terms of a compromise even though they are beyond the scope of the suit, if embodied in a decree, are executable. A.I.R. 1932 Mad. 557= 1932 M.W.N. 623=36 L.W. 76=138 Ind. Cas. 786.

——S. 47, O. 23, R. 3—Compromise decree—Incorporation of terms outside scope of—Power of executing Court to question validity of compromise decree.

An executing Court cannot question the decree sought to be executed except on the score of patent want of jurisdiction; but want of jurisdiction is a very different matter from the erroneous exercise of it. So where the Court records a compromise decree under O. 23, R. 3, though a term of the compromise relates to property not in question in the suit, if it is the consideration of the compromise and so intimately connected with it, the Court has jurisdiction to record the compromise, and the executing Court has no power to question the validity of the decree.

The law not merely entitles the parties but compels the Court to record a compromise in accordance with its terms "so far as it relates to the suit." Where a term of the compromise is plainly outside the scope of the suit, the Court may refuse to incorporate it. But where it is a consideration of the compromise and so intimately connected with it, the Court has the power to include it in the decree, even though the consideration may be entirely outside the scope of the suit.

A suit brought by the plaintiff claiming injunction and damages against the defendant on the ground that the latter had been wrongly officiating as inamdar and had made certain remissions without authority ended in a decree in terms of a compromise which contained a provision that the parties should officiate by turns. As this clause was the main consideration of the compromise and intimately connected with it, it was held that

the Court had jurisdiction to incorporate it in their decree and that clause was as much executable as the rest of the decree. A.I.R. 1931 Bom. 295=33 Bom. L.R. 463=132 Ind. Cas. 434.

[Overruled in A.I.R. 1937 Bom. 19=166 Ind. Cas. 561.]

——S. 47—Conditional decree.

Where a decree ordered payment by the appellants of a sum of money into court by a certain date upon which the respondents were directed to reconvey the land to them and where the appellants failed to pay the money within time and did not obtain extension of time.

Held : that though the appellants subsequently paid the money they were debarred from executing the decree. 85 Ind. Cas. 352=3 Bur. L.J. 163= A.I.R. 1924 Rang. 375.

6. Construction of decree.

See also CIVIL P. C., S. 38—POWER TO CONSTRUE DECREE.

Compromise decree.
See also CIVIL P. C., O. 23, R. 3.
Declaratory decree.
Instalment decree.
See also CIVIL P.C., O. 20, R. 11.
Joint and several.
Mesne profits.
Mortagage decree.
See also CIVIL P. C., O. 34, R. 5.
Personal liability.
Principles.
Reference to other matter.
Value of precedents.
Miscellaneous.
Compromise of decree.

——S. 47—Construction of decree.

Suit for partition—Compromise decree—Allotment of specified properties to plaintiffs—Defendant subsequently dispossessed of a village for which he was compensated—Suit to recover share of compensation money—Compromise decree not specifying right of plaintiffs to any interest in property—Property must to be denied to them. (1942) 1942 A.L.J. 681=1943 A.L.W. 47.

——S. 47—Decree on compromise of suit between defendant and minor plaintiff—Defendan agreeing to pay certain sum to plaintiff who within six months after attaining majority, was to execute and get registered receipt in favour of defendant—Plaintiff dying before attaining majority and leaving mother as heiress—Mother, if can execute receipt—Limitation Act (9 of 1908), S. 17, sub-s (1)—Whether applies to case.

Rules of construction are rules designed to assist in ascertaining the intention, and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent among those to whose language they are applied. The English cases do not afford any guide to their decision.

The material terms of a compromise decree were that "the first defendant agreed, out of grace and affection, to pay to the plaintiff (who was a minor) Rs. 12,000; that, regarding the amount of Rs. 15,000 made up of this sum of rupees twelve thousand and the aforesaid mesne profits of Rs. 3,000, together with the interest accruing due thereon at the rate of eight annas (half a rupee) per cent, per mensem from this day, the plaintiff shall, within about six months after his attaining majority, that is to say, before March 31, 1937, execute and get registered a receipt in favour of the first defendant to the effect that the arrears of mesne profits have been discharged, without the plaintiff having any claim to a share in so far as the first defendant is concerned; that the plaintiff shall in person or through Court deliver it to the first defendant; that, thereafter the plaintiff shall, by means of a process of Court, recover the aforesaid amount (Rs. 15,000 and interest) by proceeding against the first defendant, the share of properties mentioned in the suit and belonging to him, and the other properties devolved upon him by means of the settlement deed, dated June 2, 1904." Then come these words: "That till the said amount is realised, the same shall be a charge upon the said properties. So long as the plaintiff does not execute an acquittance receipt as aforesaid, in favour of the first defendant, within the aforesaid time, the plaintiff is not entitled to recover the above amount in the aforesaid manner." The plaintiff died unmarried, leaving him surviving his mother as his heiress. The mother on November 20, 1928, presented a petition, praying that she might be brought on the record as the legal representative of the original plaintiff, her son, and that she might recover the amount to which her son would have been entitled under the decree had he survived:

Held, that the provision for the execution by the original plaintiff of an acquittance receipt was only of the nature of a direction inserted **ex abundanti cautela** to prevent its being thought that the plaintiff on attaining his majority was entitled both to receive the Rs. 15,000 and interest and to take proceedings to set aside the compromise.

Held, also, that a Hindu mother represents the estate of her deceased son for all purposes, and a release receipt executed by her would be as valid as if it had been executed by the original plaintiff.

Held, further, that the argument that the time from which the period began to run as the result of S. 17, sub-S. (1), Limitation Act, was the death of original plaintiff and, that time having elasped before the petition was presented by the mother, the application was barred was ill-founded. A.I.R 1936 P. C. 309=1936 A.L.R. 826=44 L.W. 579= 1936 M.W.N. 1258=38 Bom.L.R.1233=41 C.W.N. 22=71 M.L.J. 831=17 P.L.T. 914=63 I.A. 429= I.L.R. (1937) Mad. 94=164 Ind. Cas. 337 (P.C.).

——S. 47—Compromise decree conferring life interest on a person—Remainder to vest absolutely in another if he survives the former—Construction of.

A compromise decree provided as follows: "In the event of **A** surviving **B** he, that is **A**, will be the permanent owner with powers of transfer and of transmitting inheritance of the whole of this property. In the event of **A** not so surviving his male descendant according to the rule of lineal primogeniture will be entitled to the said property with powers of transfer and heritability subject to the conditions stated in para. 4 of the compromise. The other male descendants of **A** will be entitled to maintenance. The plaintiff, that is **A**, or his male descendant who shall be the owner of the estate according to the terms of this compromise will be entitled to obtain possession of these properties by means of execution of this decree:" in **Held,** that the remainderman's estate in its

entirety and absolutely was simultaneously conferred by the terms of the compromise on **A** and this was a vested interest. The possibility that **A** might not be alive at the determination of the prior estate to come into possession of his remainderman's estate, cannot convert the said interest into a contingent interest. A.I.R. 1934 Outh 454=11 O.W.N. 114=9 Luck. 173=18 R. D. 68 (2)=153 Ind. Cas. 86.

Declaratory decree.

——S. 47—Declaratory or executable.

Where the decree is made immediately payable in deafult of payment of any instalments which are specified and it is further provided that in default of payment of those instalments, the property hypothecated by the judgment-debtor is to be taken as foreclosed in favour of the decree-holder and the rights of the judgment-debtor are to be deemed as extinguished from that date, the decree gives the decree-holder the right to apply for delivery of possession of the property in the event of the default of payment of his decree. The decree is not declaratory but one capable of execution. A.I.R. 1941 Oudh 587=1941 O.W.N. 965=1941 O.L.R. 601=1941 A.W.R. 275=17 Luck. 121=195 Ind. Cas. 610.

——S. 47— Question whether decree operates as assignment depends upon nature of decree.

The question whether a decree operates as an assignment of certain property depends upon the nature of the decree. Where the decree which was passed on compromise merely declared the plaintiff's title which was based on previous assignment and upon the terms of the compromise petition it is impossible to hold that one party was assigning to the other 2 annas share of the leasehold properties, the decree cannot operate as an assignment of 2 annas share of the leasehold properties. It has the effect merely of confirming the title that was already created by the deed of assignment. A.I.R. 1940 Pat. 516=19 Pat. 433=7 B.R. 283=192 Ind. Cas. 17.

Instalment decree.

——S. 47—Whole amount to be recovered in default of two successive instalments—Meaning of.

A compromise decree provided that the amount due under the decree should be paid in six yearly instalments on particular dates. It also provided that the amounts paid on the said date each year should be entered upon the decree and that if for any reason any two successive instalments were not paid, the balance due should be recoverable from the defendantss personally and from the properties charged under the said decree. No provision was made in the decree as to whom the money was payable. The judgment-debtor failed to pay the first instalment and on a day previous to the date on which the second instalment was to be paid and which happened to be a Sunday, he obtained a **chalan** and the money was paid into the Bank on the next day of the day of payment:

Held, that the judgment-debtor did not commit default in payment of second instalment in the circumstance of the case and, therefore, there was on default of two successive instalments. A.I.R. 1938 Mad. 523=47 L.W. 388=(1938) 1 M.L.J. 342=1938 M.W.N. 389=178 Ind. Cas. 462.

——S. 47—Construction of instalment decree.

Decree providing that on defendant's failure to pay one instalment with interest, it should be paid along with next with higher rate of interest for days of delay and on failure to pay both instalments together, plaintiffs entitled to whole amount with still higher rate of interest—Default occurring—Defendant paying amount in default with higher interest before due date of subsequent instalment—Again default in paying subsequent instalment—Plaintiffs **held** entitled to recover whole amount under O. 21, R. 15, Civil P. C., with penal interest. A.I.R. 1937 Sind 244=31 Sind L.R. 437=171 Ind. Cas. 841.

——S. 47—Mere acceptance of overdue instalment does not amount to waiver. A.I.R. 1937 Sind 244=31 Sind L.R. 437=171 Ind. Cas. 841.

——S. 47—Instalment decree Construction of.

Instalment decree—Default clause—On default decree-holder entitled to realize whole amount at once—Decree is not a decree for money payable at certain date within S. 48—Construction of such a bond or decree primarily depends on intention of parties as disclosed by terms of bond or decree—Terms giving option to creditor to enforce penalty for default—He should not be deprived of the option—Such proviston is for benefit of decree-holder and it is for him to waive the option. A.I.R. 1936 Lah. 159=162 Ind. Cas. 673.

——S. 47—Construction of decree—Joint and several.

Mesne profits awarded against all judgment-debtors who where co-sharer **maliks** in village—One paying certain sum to the decree-holder claiming that that was his proportionate share of the amount decreed. This payment was certified—Subsequent execution against other co-sharer judgment-debtor for the balance—Objection by judgment-debtor that he was not liable for anything more than his proportionate share—**Held**, that the decree was not joint and several but against their respective shares and hence the contention of the judgment-debtor was correct. A.I.R. 1943 Pat. 80=203 Ind. Cas. 662=9 B.R. 99.

——S. 47—Construction of decree—Mesne profits—Calculation of Order in Council restoring decree of Subordinate Judge with variation that appellant to account for mesne profits from a specified date until delivery of possession of property—Figure already arrived at by trial Judge for first year, if should be accepted or fresh accounts should be taken.

By the Order in Council, the decree of the Subordinate Judge was restored with the following variation : "that the appellant ought to account to the respondents for the mesne profits of the property as from 1st July, 1914, until the actual delivery of possession to the respondents." The question was whether, for the first year from 1st July, 1914, the figure of Rs. 60,000 arrived at by the trial Judge was to be accepted, or whether the Order in Council required that a fresh account should be taken to ascertain the mesne profits for the first year, no less than for the other years up to the date of delivery of possession :

Held, that the Order in Council must prima

facie be read as directing the account to begin as from 1st July, 1914. If it had been intended that the accounts for the first year should not be gone into, it would be expressly stated so. The weight to be given to such considerations must depend on all the circumstances of the case, as well as on the exact language of the ordering portions of the decree of the Subordinate Judge and of the Order in Council ;

that the decree of the Subordinate Judge, which was restored with variation, and the Order in Council itself must be taken to intend the meaning given to the phrase "mesne profits" by cl. 12 of S. 2 of the Civil P. C., and the order could not be read as requiring the party to account for the gross receipts. A defendant cannot be allowed a deduction of ten per cent. for collection charges independently of his establishing this figure by evidence.

Mesne profits include interest thereon. A.I.R. 1938 P.C. 139=1938 O.W.N. 504=1938 A.L.R. 338=1938 O.L.R. 200=42 C.W.N. 687=40 Bom. L.R. 1057=32 Sind L.R. 492=174 Ind. Cas. 288=4 B.R. 508. (P.C.).

——S. 47—Compromise decree for instalments —Certain house property to be considered as mortgaged—Decree does not become mortgage decree within Civil P.C., 1908, O. 34.

A decree was based on a compromise and provided for payment of the decretal amount in certain instalments and, it also recited in the end that certain house property will be considered as mortgaged for satisfaction of the decree :

Held, that the mere fact that the house property was to be considered as mortgaged for the satisfaction of the decree would not convert the decree into a mortgage decree under O. 34. A.I.R. 1934 Lah. 176.

——S. 47—Decree reciting that certain properties are charged with amount due under decree also stating that defendant shall pay plaintif particular sum—Decree held personal imposing personal liability.

Where a decree recites that certain properties are charged with the amount due under the decree and also states explicitly that the defendant shall pay the plaintiff a particular sum. the decree is a personal decree, imposing of personal liability in case the properties do not realize the sum due under the decree. A.I.R. 1939 Mad. 378=1939 M.W,N. 11=(1939) 1 M.L.J. 827=186 Ind. Cas. 449.

——S. 47—Construction of decree—Principles —Intention is to be considered.

In execution matters the meaning of each order has to be considered by itself and a decision come to as to what was the intention and effect of the order. A.I.R. 1943 Mad. 398=1943 M.W.N. 83=(1943) 1 M.L.J. 95=210 Ind. Cas. 79=I.L.R. (1943) Mad. 485.

——S. 47—Construction of document—Only expert can be called to explain meaning of document.

Generaly speaking, it is not permissible to call a witness to explain to the Court what a document means, unless such a witness is an expert under the Evidence Act. It is for the Court to ascertain what the document means, though no doubt a witness may suggest methods by which an intelligent meaning can be given to the instrument. A.I.R. 1939 Bom. 339=I.L.R. (1939) Bom. 434=41 Bom. L.R. 548=40 Cr. L.J. 891=184 Ind. Cas 252.

——S. 47—Construction of order—Prior application dismissed for some reason subsequently found to be untenable—Subsequent application, if can be deemed to be one for its revival.

Where the former execution application was dismissed finally but for some reason (not due to any default or neglect on the part of the applicant) which subsequently turned out to be untenable, the later execution application would be deemed to be one for a revival of the former one. A.I.R. 1937 Mad. 582=(1937) 1 M.L.J. 667=1937 M.W.N. 258 =45 L.W. 568=169 Ind. Cas. 673.

——S. 47—Construction of decree—Anomalous result ought to be avoided.

In construing decree, one must have regard to the nature of the suit and the previous proceedings which led to the suit. A construction which leads to an anomalous result ought to be avoided. A.I.R. 1938 Nag. 376=I.L.R. (1940) Nag. 519=175 Ind. Cas. 753.

——S. 47—Construction of decree—Interpretation favourable to decree-holder.

The purpose of execution proceedings is to enable the decree-holder to obtain the fruits of his decree, often a difficult thing to do, and where words are fairly capable of two interpretations, one of which assists the decree-holder to obtain the fruits of the decree, and the other prevents the decree-holder from obtaining the fruits of his decree, that interpretation which assists the decree-holder should be accepted. A.I.R. 1936 Sind 138 =30 Sind L.R. 88=164 Ind. Cas. 1011.

——S. 47 — Construction of decree—Effect should be given to.

The Court should always lean against a construction which would render a decree inexecutable. A.I.R. 1933 Cal. 329=37 C.W.N. 495=60 Cal. 794 =143 Ind. Cas. 457.

——S. 47—Construction of decree—Reference to other matter.

No conclusive references as to the preliminary or final character of a decree can be drawn from the mere circumstance that the Court failed to provide for any further hearing. The language of the decree has to be looked into in each case. A.I.R. 1930 Mad. 528=59 M.L.J. 102=53 Mad. 378=32 L.W. 329=131 Ind. Cas. 160.

——S. 47—Decree whether nullity—Executing Court can refer to plaint.

A decree must be read together with the connected documents one of which is the plaint. In order to see whether the decree is without jurisdiction and a nullity, the executing Court can refer to the plaint. A.I.R. 1942 Cal. 496=I.L.R. (1942) 1 Cal. 149=202 Ind. Cas. 193.

——S. 47—Construction of decree—Reference to pleadings and judgment.

Where the decree is unintelligible, the Court must look at the pleadings and the judgment to ascertain its true meaning. A.I.R. 1935 Lah. 632 =37 P.L.R. 289=162 Ind. Cas. 59.

——S. 47—Conflict between two descriptions of subject-matter—Reference to record or other evidence—Reference to plaint.

In a case of conflict between two descriptions of the subject-matter of the decree, the duty of the Court is to ascertain by a reference to the record or

other evidence, to which description the decree is intended to apply. It is open to the Court to refer to the plaint to ascertain it and in such a case there is no question of the Court going behind the decree. A.I.R. 1935 Oudh 39=11 O.W.N. 1524=1934 O.L.R. 929=10 Luck. 416=153 Ind. Cas. 49 (2).

——S. 47—Construction of decree—Reference to judgment.

A Court cannot look at the judgment to interpret the decree, where the language of the decree is plain and unambiguous. It is only when the terms of a decree are ambiguous that it can be interpreted in the light of the judgment. A.I.R. 1932 Oudh 77=7 Luck. 421=8 O.W.N. 1337=136 Ind. Cas. 252.

——S. 47—Construction of decree — Words capable of more than one meaning—Power of Court to refer to relevant papers and circumstances.

To ascertain the meaning and effect of a decree of any Court, it is permissible, where the words are capable of more than one meaning, to look at all relevant papers and circumstances which were before the Court and the objects which the directions contained in the decree were aimed to achieve and of two possible constructions, the Court will not accept the one which leads to plain injustice and make its own decree an instrument of depriving parties whose case had not been heard and decided, of valuable rights, which no one had any intention to destroy. A.I.R. 1931 Mad. 328=54 Mad. 532=131 Ind. Cas. 19.

——S. 47—Construction of decree—Value of precedents.

On the question of interpretation of a document, precedents can hardly be useful; each document has to be construed on its own language and in interpreting a decree, it would not be right to be influenced by decisions in which other decrees were interpreted in other cases. A.I.R. 1939 Oudh 281=1939 O.W.N. 768=1939 A.W.R. 129=1939 O.L.R. 546=183 Ind. Cas. 706.

——S. 47—Construction of decree—Miscellaneous—Decree setting apart house for widow's residence with power to executors to sell if it became necessary — Effect of decree on executors' right to sell—Mere advantageous offer, whether necessity for sale.

In a suit instituted by the widow of a testator against the executors a decree was passed directing the executors to set apart a particular house for the widow's residence with a condition that in case it became necessary for the executors to sell the said premises or in case the said premises were not available, for any reason, for the plaintiff's residence, the defendants would out of the estate of the said deceased in their hands pay to the plaintiff a further sum of Rs. 400 per month in lieu of such residence. The executors alleging that they had obtained an advantageous offer for the building and that therefore a necessity had arisen, applied for an order against the widow for possession:

Held, (i) that the effect of the decree was to withdraw this particular property from the residue and to release it from the trust to sell during the widowhood of the appellant or until such time as it became necessary for the trustees to sell in order to effectuate some immediately operative purpose of the will;

(ii) that the trust to sell from which the property was released by the decree did not re-attach merely because an advantageous offer was received. A sale in those circumstances might no doubt be one for the benefit of the estate, but it would not be a sale compelled by necessity.

Obiter.—The necessity contemplated by the will need not, however, be one *de hors* the will. It might arise under the will as where the trusts could not be carried out unless the property was sold. A.I.R. 1933 P.C. 118=1933 M.W.N. 379=37 L.W. 617=1933 A.L.J. 697=142 Ind. Cas. 545 (P.C.).

7. Conversion of a proceeding into a suit and vice versa.

——S. 47—Judgment-debtor stating that he was not judgment-debtor in decree as he was not properly represented—S. 47 (2) does not apply and proceeding cannot be treated as suit.

Section 47 (2) comes into operation only if the conditions laid down in Sub-S. (1) are satisfied, i.e., if there are questions arising between the parties to the suit when the decree was passed or their representatives and those questions relate to the execution, discharge or satisfaction of the decree. It is only in such cases that the Court may treat a proceeding under this section as a suit or a suit as a proceeding; but in a case where a judgment-debtor shown in the decree as a judgment-debtor and as properly represented comes up before the Court and states that he was not a judgment-debtor in the decree inasmuch as he was not properly represented, S. 47 (1) does not apply to him as on his own contention he is not a party to the suit, and therefore Sub-S. (2) also has no application. Such a person's proceeding cannot be treated as a suit for the purposes of S. 47. A.I.R. 1946 Nag. 275=I.L.R. (1946) Nag. 623=1946 N.L.J. 249=223 Ind. Cas. 305.

——S. 47 (2)—Conversion of into execution application. *See* 28 M. 64 at 66; *also* 1 A.L.J. 61.

——S. 47 (S. 244, Old Code)—Conversion of plaint into application under S. 244. *See* 32 C. 332=28 M. 64; *also* 4 A.L.J. 188; 19 M.L.J. 4.

——S. 47 (2)—Conversion of suit into execution proceeding—Suit filed in Court different from executing Court—Suit cannot be converted into execution proceedings.

A purchaser in a private sale from judgment-debtor preferred an objection to attachment in the executing Court. The objection was allowed and the decree-holder filed a suit under O. 21, R. 63. The suit was decreed by the trial Court and the appeal of transferee was dismissed by the District Judge. In second appeal it was held that the suit was barred under S. 47. It was then contended for the decree-holder that the suit may be allowed to be converted into executing proceedings under S. 47:

Held, that this could not be done as the Court before which the suit was instituted was different from the execution Court and could not decide the matter on the execution side. A.I.R. 1946 Lah. 134=224 Ind. Cas. 468 (F.B.).

——S. 47 (2)—Decree in partition suit directing one member to pay certain sum to another and providing for joint liability for joint family debts—Debts paid by the other member—Cross-examination by

such member—Held, execution must be converted into contribution suit under S. 47. (1941) Nag. L. J. 653.

——S. 47—Conversion—Suit to enforce agreement under C. P. Debt Conciliation Act.

An agreement registered under S. 12, C. P. Debt Conciliation Act, can be treated as a decree. No suit is necessary for specific performance of such agreement. Suit, if brought, falls directly under S. 47 (2), C. P. Code. If it does not, the Court can invoke its inherent powers and convert the mistaken suit into anecessary proceeding to give effect to the statutory decree created by the Debt Conciliation Act. The Court must do this irrespective of limitation. A.I.R. 1940 Nag. 92=1939 N.L.J. 500=188 Ind. Cas. 743.

——S. 47 (2)—Conversion under—If amounts to amendment of pleadings.

There is no analogy between an application for amendment of a plaint seeking to introduce a new cause of action in it and the application praying that the proceedings for execution be treated as a suit under S. 47 (2). A.I.R. 1940 Oudh 27=1939 O. L.R. 671=1939 A.W.R. 233=1939 O.W.N. 936=184 Ind. Cas. 850.

——S. 47 (2)—Award only declaring rights of parties without giving possession—Decree passed—Bona fide application for execution with alternative prayer for possession or to treat application as suit.

After some proceedings were taken in a partition suit, it was referred to the arbitration and an award merely declared the rights of the parties without giving them possession of the property. A decree was passed in accordance with the award. One of the parties made a *bona fide* application for execution of the decree praying that possession of the properties be delivered to him. In the alternative, he prayed that if the Court held that possession could not be handed over in execution proceedings, the application might be treated as a suit under S. 47 (2), on payment of additional court-fee by him:

Held, that as the award was merely declaratory, possession of the properties could not be given in execution proceedings.

Held, also that the question of payment of additional court-fee could only arise when the Court had decided that the application for execution did not lie. After this had been done, the applicant could have been called upon to make good the deficiency in the court-fee. This was a fit case in which the salutary provisions of S 47 (2) should have been applied. A.I.R. 1938 Lah. 177=40 P.L.R. 619=178 Ind. Cas. 547.

——S. 47—Co-sharer landlord getting rent—Objection by plaintiff under O. 21, R. 58, dismissed as filed late and not on merits—No appeal but title suit by plaintiff—Suit held should be treated as application under S. 47—Constructive res judicata did not apply.

A co-sharer defendant landlord started execution proceedings in respect of his rent decree concerning a certain holding. The plaintiff-landlord in execution of his own rent decree purchased the same holding and went into possession. The plaintiff-landlord brought objections in defendant landlord's execution proceedings but they were dismissed, not on merits but simply as having been filed late and as being under O. 21, R. 58, Civil P. C. The plaintiff thereupon filed a title suit without going in appeal against these orders:

Held, that there was no bar in treating the title suit as an application under S. 47. The rule of constructive *res judicata* had no application to these facts. A.I.R. 1938 Pat. 216=19 P.L.T. 157=175 Ind. Cas. 120=4 B.R. 529.

——S. 47—Suit to set aside a Court-sale.

A suit to set aside a Court sale in respect of property not included in the mortgage was treated as an application under S. 47 made on the day on which the plaint was presented. A.I.R. 1935 Cal. 15=38 C.W.N. 996=155 Ind. Cas. 848.

——S. 47—Application to set aside sale on ground of fraud — Purchaser not party—Application, if can be treated as one under S. 47.

Where property is purchased by a third person and an application is made by the judgment-debtor against the decree-holder to set aside the sale on the ground of irregularity or fraud in conducting the sale, the application will still be treated as one under S. 47 if the purchaser is not formally made a party to such an application. A.I.R. 1934 Nag. 21=31 Nag.L. R. 67=150 Ind. Cas. 611.

——S. 47—Conversion—Effect—Court-fee to be paid by plaintiff if proceedings be treated as suit.

Under S. 47, Cl. (2), the Court is entitled to treat a proceeding in execution as a suit and order payment of any additional court-fee. If that course is followed, the objector is in the position of the plaintiff and the burden of paying any court-fee which might be payable falls upon him. 1934 Pat. 9=149 Ind.Cas. 1003.

——S. 47—Conversion of execution petition into suit whether question relating to execution—Appeal, and second appeal, whether lies—S. 47, Cl. (2), scope and object of.

Though no appeal lies from an order merely allowing the conversion of no execution petition into a suit as permitted by S. 47 (2), for the reason that the order though passed under S. 47 is not one relating to the execution, discharge or satisfaction of the decree, yet where on the respondent's own invitation, the lower Appellate Court sets aside the order of the executing Court on the footing that it is involved in the appeal under S. 47, he cannot be allowed to turn round and say that no appeal lies at the appellant's instance to correct the error.

Section 47, sub-S. (2), is intended to prevent the inconvenience and injustice caused by the discovery sometimes made after proceedings in Court have gone on for a long time or as a result of the decision of an Appellate Court that the proceeding had originated in an erroneous form by a *bona fide* mistake by petition when it should have been by suit or *vicee versa*. It is not intended to save litigants from the trouble of choosing the proper from and filing a plaint or an execution petition when it is discovered in time what is the proper form and there is no further question about the matter. A. I.R. 1931 Mad. 270=60 M.L.J. 471=33 L.W. 540 =130 Ind. Cas. 475.

——S. 47—Conversion.

Mortgage of *takia* by a Muhammadan—Son objecting to sale of property in execution of the decree obtained by the mortgagee:

Held, that the son could file a suit as a member of the public to contest the sale even if it be held that as a party he was debarred from making an objection under S. 47 and that the Court could treat the objection as a suit. A.I.R. 1931 Oudh 45=6 Luck. 452=7 O.W.N. 1159=130 Ind. Cas. 117.

——Ss. 47 (2), 144—Application for restitution —Suit to recover possession—Power to convert suit into proceedings.

A obtained possession of a house property No. 1 in execution of a decree passed against *B*, while an appeal against the decree was pending. On appeal, the decree was reversed and *B* applied for restitution by re-delivery of possession of the house. After getting possession but before *B's* application for restitution, *A* had built a wall on property No. 2 thereby blocking the passage to the house Court ordered possession to be secured to *B* but made no order as regards the wall on property No. 2 on which the wall stood. *B* instead of asking the Court to carry out its own order brought a suit for recovery of both property No. 1 and property No. 2. It was argued that so far as property No. 1, the house, was concerned the suit was barred under S. 47:

Held, that the construction of the wall did not give a new cause of action and the suit was incompetent and the Court should in the circumstances treat the suit as a proceeding under S. 47 (2) C. P. Code. A. I.R. 1931 Mad. 588=133 Ind. Cas. 12.

——S. 47 (2) and O. 21, R. 92, Cl. 3—Conversion into application—Different forum.

A decree-holder purchased properties attached and sold at auction in execution proceedings transferred to a Collector under S. 68, C. P. Code. After confirmation of sale the judgment-debtor applied to the Collector to set aside sale for various grounds, one of them being the fraud of the creditor in keeping the judgment-debtor in ignorance of execution proceedings. When it was dismissed, instead of filing an appeal to the Commissioner under R. 45 of the Rules of the Local Government, he filed a civil suit to recover the property. *Held*, (a) the suit was barred by O. 21, R. 92 (3) or under the corresponding R. 32 (3) of the Local Government rules. The suit could not be treated as an application under S. 47, C. P. Code, as the Court executing the decree was not the same as that in which the suit was instituted at the time of transfer of decree to the Collector. 35 Ind. Cas. 473 (All.).

——S. 47 (2)—Suit—Conversion into application.

A suit can be converted into an application only if the application under S. 47 would not at the date of suit, be time-barred. 4 L.W. 400=34 Ind. Cas. 774.

——S. 47 (2)—Suit—Application—Convertibility.

The Court can treat an application as a suit or a suit as an application, but cannot treat one proceeding as both suit and proceeding. 1 L.W. 443=24 Ind. Cas. 484.

——S. 47 (2)—Application for execution converted into suit—Specific performance.

Where the decree in a suit for specific performance of a contract of sale was satisfied by execution of a sale and the decree-holder took out execution for possession. *Held*, that under S. 47 (2) C. P. Code, the applicant should be allowed to convert his application into a plaint for possession. 22 P.W.R. 1913=40 P.L.R. 1913=18 Ind. Cas. 700.

——S. 47 (2)—Conversion into execution.

A plaint covering a question which under S. 244 (C. P. Code, 1882) should have been decided in execution may be treated as an execution petition and disposed of as such. 19 M.L.J. 4=4 M.L.T. 288 =1 Ind. Cas. 380.

——S. 47—Conversion.

Proceedings under S. 47 are proceedings in execution and are initiated by an application and not by a suit. In a proper case a plaint in a suit can be treated as an application and the limitation prescribed for the application will apply. Provisions of S. 47 compared to those of S. 244, C. P. Code of 1882. 7 O.W.N. 887=A.I.R. 1930 Oudh. 468=128 Ind. Cas. 728.

——S. 47—Conversion.

It would seem that it was mainly to avoid a claim being defeated on mere technical pleas that S. 47 (2) of the C. P. Code was enacted. 71 Ind. Cas. 42= A.I.R. 1923 Nag. 94.

——S. 47—Conversion by the appellate Court.

It is open to an appellate Court to treat the proceedings arising out of an application under S. 47 as proceedings in a suit and grant the necessary relief. 48 All. 362=24 A.L.J. 379=93 Ind. Cas. 376=A. I.R. 1926 All. 387.

——S. 47—Conversion by the appellate Court.

Where a suit was asked, in appeal, to be treated as an application under C. P. Code, S. 47.

Held, that as the plaint had not been presented to the executing Court, the request should not be granted. 7 Lah. 1=27 P.L.R. 258=93 Ind. Cas. 1007=A.I.R. 1926 Lah. 165.

——S. 47—Conversion—Payment of Court-fee —No bar.

The circumstance that a plaint is filed after paying a higher amount of Court-fee cannot according to the present Code as a ground for not treating the proceedings as an application under S. 47. 1929 M.W.N. 811=123 Ind. Cas. 24=A.I.R. 1930 Mad. 12.

——S. 47—Conversion—Mesne profits.

Where through an error in the decree an application for an enquiry into mesne profits is made by an execution petition, and no further point is involved such as limitation, it is clearly open to the Court to allow a mistake of this kind to be repaired and treat the petition as an application in the suit. 30 M.L. W. 810=A.I.R. 1930 Mad. 30=57 M.L.J. 728.

——S. 47—Objection to execution—Conversion of.

Plaintiffs in the present suit were some of the defendants in a previous suit. That suit was decreed against the other defendants but dismissed as against the present plaintiffs. The decree-holder in that suit started execution proceedings and the present plaintiffs objected as regards execution in respect of their plots but their objections were disallowed as premature. They sued for declaration and also prayed for possession of the same plots in the event it were found they were not in possession. The Courts below dismissed the suit on the ground that it was barred by the provisions of S. 47, C. P. Code. In the lower appellate Court, the plaintiffs asked that the plaint in the present suit might be treated as pro-

ceedings under S. 47. The Court below refused the prayer on the ground that proceedings under S. 47 were barred by the rule of *res judicata* arising out of the previous order in execution.

Held, that the suit was not barred by the rule of *res judicata* and it should be treated as proceedings under S. 47. 4 O.W.N. 1045=106 Ind. Cas. 133 =A.I.R. 1928 Oudh 38.

——S. 47—Execution application by rival decree-holders.

Where two rival assignees from decree-holders apply for execution of same decree and the question arose as to the validity of the assignments and the case was converted by Court into a suit under S. 47 (2) and decided,

Held, the Court acted within its jurisdiction and that an appeal lay from the decision as from one passed in a regular suit. 3 Pat. 344=78 Ind. Cas. 495=1924 P.H.C.C. 193=A.I.R. 1925 Pat. 16.

——S. 47—Conversion—Plaint misconceived.

Where the Court while rejecting decree-holder's application under O. 21, R. 95 directed him to a suit which was filed and the party subsequently discovering after 12 years that a suit was not competent as an appeal lay from that order under S. 47, requested the Court to change the suit into a proceeding and it was found that the plaint was misconceived.

Held, that the conversion of suit into proceedings should not be allowed. 90 Ind. Cas. 952=1926 M. W.N. 599=1925 M.W.N. 577=A.I.R. 1925 Mad. 1198=51 M.L.J. 106.

——S. 47—Conversion of an application for attachment.

A decree-holder who applies for attachment of alleged assets of a deceased zamindar cannot ask for converting the application into a suit since he must obtain a declaration that these alleged assets are liable for his decree-debt. 83 Ind. Cas. 165=1924 M. W.N. 342=34 M.L.T. 290=A.I.R. 1924 Mad. 707 =46 M.L.J. 374.

——S. 47—Executing Court — When can convert.

Under S. 38, a decree may be deemed either by the Court which passed it or by the Court to which it is sent for execution and where the Trial Court is not the Court to which the decree is sent for execution, this section prevents it from proceeding with the suit as a matter in execution. 68 Ind. Cas. 693 =A.I.R. 1922 Nag. 189.

——S. 47—Conversion—Refusal to allow—Revision.

Where a suit is instituted in respect of a matter which can be agitated only in execution in the same Court, the suit should not be dismissed but the plaint should be treated as an application for execution. Failure to do so can be rectified in revision. 59 Ind. Cas. 477=A.I.R. 1921 Nag. 130.

——S. 47—Decree — Absolute terms — Subsequent modifications—Application in execution—Fresh suit.

See 4 Bom.L.R. 531=26 Bom. 707.

8. Decree binding.

See CIVIL P. C., Ss. 38 AND 47—
(i) Power of Executing Court.
(ii) Question relating to execution decree.
(*See also under* CONSTRUCTION OF DECREE.)

——S. 47—Decree—Competency of party to impeach validity in execution — Jurisdiction Objection to want of evidence.

A party to the suit is precluded in execution from impeaching the decree which has been passed without opposition and which has not been set aside, but he may impeach it on the ground that the Court passing the decree had absolutely no jurisdiction to pass it, and that, therefore, the decree was a nullity. Where a Court has jurisdiction to pass a personal decree, the passing of such decree without any evidence in support thereof will not make it one passed without jurisdiction. (1903) 14 M.L.J. 413=28 M. 26.

——S. 47—Condition — Time for payment—Computation — Appeal — Appellate decree confirming original decree.

A merely affirming appellate decree does not give the plaintiff fresh time for performing a condition imposed by the original decree. A decree provided that "on the plaintiff's paying into Court the balance of consideration Rs. 10 within a month from this date" the defendant should execute a sale-deed of the suit land in plaintiff's favour. The plaintiff did not pay into Court Rs. 10 within the month, and after the expiration of the month the defendant appealed. The decree of the appellate Court simply confirmed the decree of the lower Court and dismissed the appeal.

Held, that the plaintiff decree-holder was not entitled to count the time allowed by the decree for the deposit from the date of the appellate decree. (1907) 17 M.L.J. 495=31 M. 28=3 M.L.T. 26.

——S. 47—Construction of—Affirmation on appeal—Mesne profits.

Where the original Court granted a decree for possession with future mesne profits, and on appeal Her Majesty in Council affirmed that decree without expressly mentioning the mesne profits.

Held, that the Queen's order granted mesne profits by reference to the original decree. (1900) 5 C. W.N. 52=23 A. 152=27 I.A. 209=2 Bom.L.R. 978=10 M.L.J. 290 (P.C.).

——S. 47—Construction—Ambiguity—Semble.

An ambiguous decree should be construed so as to make it accord with law. (1900) 5 C.W.N. 137= 3 Bom.L.R. 51=23 A. 181=28 I.A. 35 (P.C.).

——S. 47—Construction—Ambiguous or defective decree—Decree interpreted with reference to the pleadings in the suit.

Held, that where a Court has to execute a decree which is badly drawn up and ambiguous, it is permissible to refer to the pleadings in the suit in which the decree was passed in order to ascertain its precise meaning. (1908) A.W.N. 257=5 A. L. J. 742.

——S. 47—Construction—Ambiguity — Decree against son—Personal decree.

Where a decree admits of two constructions, that construction should be adopted which is in accordance with law. Where two brothers mortgaged the vatan lands and one of the brothers died leaving a son, an award which described the brothers as defendants, but was really passed against the surviving brother and the deceased brother's son making *the defendants* liable personally as well as on the security of the vatan lands;

Held, that the proper construction was to hold that the son was liable not personally but only as the re-

presentative of his father. (1901) 3 Bom. L. R. 482.

——S. 47—Construction of—Execution proceedings—Raising a new question in execution—Substantial irregularity—Varying decree in execution.

Where the plaintiffs sued for a share in certain properties situated in certain mouzahs and for the mouzahs themselves, the mouzahs being numbered separately and the land also separately in the schedule to the plaint, and the first Court gave a decree for a share in the whole property included in the schedules and the appellate Court confirmed the decree except as to the mouzahs and their numbers were taken out of the schedule of the original decree, and no separate contention was raised as to the lands separately numbered, but situated in the mouzahs, the appellate decree should be deemed to have disallowed only the claim to share the mouzahs and not the lands separately numbered, and the plaintiffs under the decree of the original Court were entitled to share in it. To allow any contention to be raised in execution proceedings to the effect that the lands being kamat lands in the mouzahs must go with the mouzahs would be to re-hear the case and not to execute the decree. To re-open the question in execution was an error of procedure and one of substantial kind calculated to cause great irregularity in the conduct of suits. (1901) 28 C. 353=28 I.A. 57=38 Bom.L.R. 318 (P.C.).

——S. 47—Construction—License—Profit "a prendre".

A previous decree recognising the right of a party licensee should not be so construed as to magnify his privilege into proprietorship. A decree cannot effect a transfer of property. (1904) 1 A.L.J. 621.

——S. 47—Construction—T. P. A., S. 6 (a)—Co-partnership in Zamindari—Receiver's appointment not subject-matter of suit—Appellate Court—Practice—Procedure.

The decree-holders in the case had advanced money to defendants 1 to 5 on a mortgage by them of their interest in the Ammanayakanur Zamindary. The 1st defendant was the Zemindar in possession at the time and defendants 2 to 5 were persons who had the mere possibility of succeeding to the Zemindari one after another. The next person entitled to the Zemindari was not a party to the suit or decree. The rule of succession found to be prevailing in the Zemindari was that successive Zemindars only take an estate for life in the Zemindari. The parties entered into a compromise set out in detail in the judgment in the case.

Held:—(1) That the words 'realize by precept of Court from the mortgaged properties' included a power to sell the Zemindari so far as it might lawfully be sold and therefore clearly a power to sell in default the life interest of the 1st defendant the Zemindar then in possession. (2) That the decree did not give any power to sell the successive life interests of the other defendants until they took effect in possession. (4) That the departures from the ordinary form of mortgage decree as provided for by the Transfer of Property Act as regards date payment and interest were such as it was open to the parties to consent to. (5) That the defendants 2 to 5 were not in any sense co-owners with the 1st defendant the Zemindar for the time being. (6) That they had in the Zemindari a bare chance of succession and what they purported to transfer under the decree were mere possibilities of succession within the meaning of S. 6 (*a*). (7) That transfers forbidden by S. 6 (*a*), T. P. A., cannot take effect against the transferors whenever they succeeded to the estate or by reason of the fact that such transfers have been effected by a consent decree between the parties. (8) A consent decree does not involve any adjudication by the Court as to the rights of parties. (1905) 17 M.L.J. 201=30 M. 255=2 M.L.T. 167.

——S. 47—Decree—Construction of.

Where a creditor sued the father and his sons for recovery of money and obtained a decree in the first Court and on appeal to the High Court the decree was not set aside but modified in respect of certain details in the amount, and it was directed therein that the share of the father was liable, but that no order was to be passed in respect of the sons, except that they should bear their own costs, and before the decree of the High Court the creditor attached the joint property of the father and his sons, including the shares of the latter:

Held (1) that only the personal share of the father was liable to satisfy the decree and that the shares of the sons were not liable; and (2) that the decree not being set aside or reversed, but only modified, the attachment as regards the father's share would stand. (1904) 15 M.L.J. 377.

——S. 47—Decree—Construction.

In construing a decree, admissions in the pleadings or in the course of the trial should not be ignored and the decree taken as negativing any right conceded by all the parties and with reference to which the Court was not called upon to adjudicate and to which there was no necessity to make any reference in terms in the decree, provided such a construction is not repugnant to any statutory provision. (1905) 16 M.L.J. 50=29 M. 84.

——S. 47 — Decree—Construction—Execution on payment of extra court-fee.

The decree in the suit, which was one for possession and rent, ran as follows:—"This court doth further order and decree that plaintiff do pay court-fee Rs.....on the subsequent rent awarded to him after plaint within 9th September, 1904." *Held*, that the clause did not form part of the decree and that no amendment of the decree was necessary before the time for payment could be extended. The latter part of the decree was a mere surplusage and did not make the execution of the decree conditional upon the payment of the extra court-fee within the time named. (1905) 16 M.L.J. 543=30 M. 32=2 M.L.J. 23.

——S. 47—Decree against minor—Decree payable in instalments—Nature of decree not mentioned to Court or minor's guardian—Fraud on Court—Execution ordered—Right of minor on attaining majority to vacate the order.

Where the holder of an instalment decree against a minor which had been barred did not disclose the real nature of the decree either to the Court or to the minor's guardian and execution was allowed, the minor can on attaining majority re-open the question of the decree-holder's right to execute. (1901) 6 C.W.N. 348 (D.B.).

——S. 47—Decree—Construction — Executing Court's duty.

Where the terms of a decree are perfectly clear it is the duty of the executing Court to give effect to the terms of the decree without attempting to read

into it limitations gathered from a reference to the records of the suit in which the decree was passed. (1905) 29 M. 314.

——S. 47—Decree—Construction—Time limit fixed by first Court's decree—Decree affirmed by superior Courts, effect of.

A plaintiff claimed the principal with interest at 30 per cent. per annum, and the decree of the Court of first instance directed that if the defendant deposited the money within three months from the date of its decree, he would be liable to pay interest at the rate of 12 per cent. per annum and will be exempted from further liability. This decree was affirmed by the High Court and finally by the Privy Council but the time for payment was not extended. *Held*, that the defendant having made a default in the payment of the money within the time allowed by the first Court, he could not claim exemption from further liability and could not be allowed to pay the principal with interest at the rate of 12 per cent. from the date of the Privy Council decree, the time not having been extended by the Privy Council or the High Court. (1909) 31 A. 379=6 A.L.J. 493=2 Ind. Cas. 364.

——S. 47—Decree—Construction — Whether judgment can be looked into.

In order to determine what is determined by a decree, the judgment can be looked into. (1903) 31 C. 95 at 101=8 C.W.N. 30.

——S.47—Decree — Construction — Principles.

A decree should be construed as far as possible as being in accordance with law. (1905) 17 M.L.J. 201=30 Mad. 255=2 M.L.T. 167.

——S. 47—Decree—Creating charge on property—Property ascertainable, though not specified.

Where a decree indicates that a charge is created and the property can be identified, it is immaterial that the decree does not specify it. (1901) 24 M. 689.

——S. 47—Declaratory decree or not—Executability.

A decree which *inter alia* provided that "the plaintiff as an archaka is entitled to the possession of the keys of the shrine for the purposes of carrying on the duties of archaka and not otherwise" was in the circumstances of the case, though in form declaratory, capable of being enforced by execution. (1900) 17 M.L.J. 423 (F.B.).

——S. 47—Decree, execution of—Interpretation.

Where in a suit for sale upon a mortgage a person was impleaded as defendant against whom no relief was claimed, *held* that a subsequent suit for redemption by him was not barred by S. 244, C. P. Code, 1882. (1908) 5 Ind. Cas. 496=7 A.L.J. 264=32 A. 321.

——S. 47—Decree — Construction of — Formal order not drawn up—Real intention — Limitation.

In construing pleadings, judgments and decrees passed in India the most liberal construction must always be adopted. *Held*, in the present case, that though the Court failed to draw up the decree in terms of an arrangement entered into by the parties for payment by instalments and accepted by the Court after explaining the same to the defendants, the decree should be so construed, specially having regard to the conduct of the parties subsequent to the decree. (1906) 5 C.L.J. 25.

——S. 47—Decree—Construction of — Incapable of execution—Partition decree—C. P. C., S. 396.

A decree for partition of one-fifth share of non-revenue paying property which does not specify and define the particular one-fifth share allotted is incapable of execution, and the proper course is to send back the case in order that the decree might be completed by definition by metes and bounds of the shares allotted. (1902) A.W.N. 187.

——S. 47—Construction—Decree against legal representative.

Decree passed against a legal representative is not a personal decree and consequently only the property of the deceased and not the property of the judgment-debtor, is to be proceeded against in execution of the decree. 27 O.C. 238=11 O.L.J. 554=80 Ind. Cas. 600=A.I.R. 1925 Oudh 113.

——S. 47—Decree—Interpretation—Set aside as fraudulent against one party—Effect of, on others—Partition decree.

A decree which is declared fraudulent and void as against one only of several judgment-debtors in a suit for the purpose of that person alone remains intact as between the other parties to the suit. 13 B. 338; 25 M. 426, foll. The facts that it is a partition decree and that such a rule may lead to complications, are no bar to the application of the rule. (1903) 30 C. 718.

——S. 47—Decree—Validity of—Decree how challenged—Review, suit — Remedies, alternative—Res judicata.

The validity of a decree may be challenged either by an application for review or by a suit to set it aside. When, however, a party has elected to proceed by way of review and the matter has been decided against him, he cannot be allowed to have recourse to the remedy by way of suit, even though he seeks in the suit to challenge the validity of the decree on grounds which he did not take, but might have taken, in the review proceedings. The decision upon the questions raised and decided in the review proceedings is *res judicata*. (1905) 2 C.L.J. 508=10 C.W.N. 529.

——S. 47—Decree—Variation by executing Court—Legality of. *See* 4 Bom.L.R. 531=26 B. 707.

——S. 47; O. 21, R. 90 (Ss. 244, 311, Old Code)—Confirmation—Cancellation of sale—Fraud — Irregularity — Mortgage — Partition, effect of.

An application to set aside an execution sale for fraud is maintainable under S. 244, C. P. Code, even after the confirmation of sale. *Obiter*.—An application for cancellation of sale for irregularity is not maintainable under S. 311 after confirmation of sale; but a suit will lie. (1900) 30 C. 142=7 C.W.N. 305.

9. Defence to suit.

——S. 47—Person moving Court under S. 47, Civil Procedure Code—Decision against him—He is subsequently estopped from questioning his own competency to move Court and that of Court to deal with matter.

Where person has moved the Court under S. 47

of the Civil P. C., and invited a decision on his application, it is not for him to turn round and say, because the decision went against him, that neither was he competent so to have moved the Court, nor was it competent for the Court to have dealt with the matter on being so moved. A.I.R. 1944 Cal. 53=77 C.L.J. 224=211 Ind. Cas. 515.

——S. 47—Bar of plea.

Plea that judgment-debtor was an agriculturist within the Dekkhan Agriculturists' Relief Act waived during suit can be raised in execution. It must however be raised on notice under O. 21, R. 66. Plea taken after order for sale and on day of sale itself is too late to be entertained. A.I.R. 1942 Sind 164=I.L.R. (1942) Kar. 351=205 Ind. Cas. 414.

——S. 47—Person not entitled to raise defence in suit is not debarred from raising same in execution, if he is bound to do so under S. 47. A.I.R. 1941 Mad. 898=54 L.W. 448=1941 M.W.N. 906=(1941) 2 M.L.J. 622=I.L.R. (1942) Mad. 271=198 Ind. Cas. 158 (F.B.).

——S. 47—Court proceeding with execution with assignee as decree-holder—Held, assignment was impliedly valid and operated as res judicata in subsequent suit even if the suit was not forbidden by S. 47.

In an execution, the assignee of a decree applied to interfere, and even though the judgment-debtor objected to it, the Court proceeded with the execution with the assignee substituted as the decree-holder:

Held, that it must be taken that the assignment was impliedly regarded as valid and this could not be attacked in subsequent suit even if the suit was not forbidden by S. 47. A.I.R. 1935 Rang. 174=160 Ind. Cas. 223.

——S. 47—Objection rejected property sold and sale confirmed — No appeal — Objection, if can be raised in separate suit by way of defence—Agra Tenancy Act (3 of 1926), S. 23.

Under S. 47, all questions arising between the parties or their representatives and relating to execution shall be determined by the execution Court and not by a separate suit. A defendant in a separate suit is debarred from re-agitating the questions and the execution Court has the exclusive jurisdiction to decide such matters. Consequently, where an objection that property is part of occupancy-holding is summarily rejected and the property is sold and the sale is subsequently confirmed but no appeal has been filed by judgment-debtor from the orders of the execution Court, nor did he get the sale set aside, he cannot raise such objection even by way of defence in a separate suit. A.I.R. 1935 All. 588=1935 R. D. 193=1935 A.L.J. 490=1935 A.W.R. 494=1935 A.L.R. 627=156 Ind. Cas. 810.

——S. 47—Defence to suit—When barred.

In a suit for declaration against the attachment, the decree-holder is not estopped from raising the objection that the proceeding must be under S. 47 even though he did not raise the plea in proceedings under O. 21, R. 58. A.I.R. 1934 All. 699=153 Ind. Cas. 851.

——Ss. 47, 100—Plea of bar under S. 47—Whether can be raised for first time in second appeal.

A plea that the suit was barred by S. 47 cannot be raised for the first time in second appeal. A.I.R. 1934 Oudh 55=9 Luck. 365=18 R.D. 97=11 O.W.N. 193=147 Ind. Cas. 910.

——S. 47—Bar of defence to suit—Defence that should have been raised in execution proceeding.

Where *A* obtained a money decree against the predecessor-in-interest of the defendants, and proceeded to execute the decree against them and in execution of the decree. *A* wanted to attach certain properties acquired by the defendants by purchase, and while in the execution proceedings the objection on this ground was not raised:

Held, that in a suit instituted by *A* against the defendants for declaration of title and recovery of possession, defence by way of the property not being acquired by inheritance could not be raised being barred by S. 47, Civil P. C., as it should have been raised in execution proceedings. A.I.R. 1932 Cal. 825=55 C.L.J. 394=59 Cal. 1242=141 Ind. Cas. 207.

——S. 47—Defence to suit—Bar.

Where a person obtained a decree for sale without impleading the heirs of a deceased defendant and when the heirs objected to the execution of the decree, he successfully contended that they had no *locus standi* to apply under S. 47, as they were not parties to the decree and the heirs thereupon brought a suit for a declaration that their property was not liable to be sold under the decree:

Held, that the decree-holder was not estopped from contending that the suit was barred by S. 47, C. P. Code, as there can be no estoppel against the statute, but S. 47 was no impediment to the suit. A.I.R. 1931 All. 490=1931 A.L.J. 715=54 All. 25=134 Ind. Cas. 236 (F. B.).

——S. 47—Decree against legal representative —Attachment and sale—Omission to object—Whether can form defence in separate suit against him.

Where a person is impleaded as defendant in a suit as legal representative of a deceased person and the suit is decreed against him in that capacity, and in execution of the decree certain property is attached and brought to sale and purchased by one who is a stranger to the suit, no objection being taken in the execution proceedings either to the attachment or to the sale of the property, he cannot, in a suit in which he is the defendant and the auction-purchaser is the plaintiff, be allowed to plead in defence that he has an interest in the property sold in his own right and not as legal representative of the deceased person and that that interest did not pass to the auction-purchaser at the sale in execution.

The true rule to be collected from the authorities is this, that all questions between the parties to the suit or their representatives relating to the execution, discharge or satisfaction of the decree must be raised and determined in the execution proceedings as provided by the Code and not otherwise, and that the parties or their representatives are precluded from raising or canvassing any such question in any separate suit or proceedings. A.I.R. 1931 Rang. 117=9 Rang. 305=132 Ind. Cas. 273 (F.B.).

——S. 47 (2)—Defence to a suit—No bar.

The defendant can, in subsequent suit, raise a plea which the plaintiff would be debarred from raising by the provisions of S. 244. It is open to him to raise a point in defence of his title even though he

could have raised but did not raise it in the former execution proceedings to which he was a party. 7 C.W.N. 607, Foll. 9 C.L.J. 464=4 Ind. Cas. 168.

——S. 47 (2)—Defence to suit.

S. 244 (1882) does not debar a defendant from setting up by way of defence a matter covered by the section, though a plaintiff is precluded from bringing a suit under the section. 19 M.L.J. 1=1 Ind. Cas. 193.

——S. 47—Defence to a suit.

Where a person has successfully opposed an application under S. 47, C. P. Code, on the ground that that section did not apply, he cannot subsequently raise a plea in a suit brought by the applicant that the suit was barred by S. 47. 117 Ind. Cas. 285=A. I.R. 1929 Nag. 79.

——S. 47—Defence to suit.

It is not open to an assignee who was not a party to the suit or to the original proceedings in connection with the attachment to say that the suit was barred by S. 47. 1929 M.W.N. 718=120 Ind. Cas. 565=A.I.R. 1929 Mad. 850.

——S. 47—Defence to suit.

An objection, which could not have been used by plaintiff in a suit by him under S. 47, C. P. Code, can be made the ground of defence in a suit by another. 26 Cal. 946, Foll. 71 Ind. Cas. 378=38 C.L.J. 17=27 C.W.N. 280=A.I.R. 1922 Cal. 311.

——S. 47—Defence to suit—Bar of.

The effect of S. 47 is to debar the plaintiff from bringing a suit for the determination of a question relating to the execution, discharge or satisfaction of a decree which had arisen between himself and the defendant as parties to the suit, in which the decree was obtained, but not to debar the defendant from setting up by way of defence a matter which related to the execution, discharge or satisfaction of a decree obtained in a suit to which he and the plaintiff were parties, unless the defendant was estopped or otherwise barred by any rule of law from putting forward his claim. 19 M.L.J. 1, Foll. 70 Ind. Cas. 303=14 M.L.W. 424=1921 M.W.N. 536=A.I.R. 1921 Mad. 279=41 M.L.J. 261.

——Ss. 47 and 151—Delivery of property in contravention of stay order—Application for re-delivery.

An application to set aside the sale held in contravention of a stay order is, as between the parties to the suit, an application under S. 47, C. P. Code. It cannot be said that an application to direct re-delivery of a property delivery of which was ordered in execution of a decree could be said to be not as one relating to execution of a decree. In any event it is an application maintainable under S. 151 of the Code and an order thereon is appealable.

Having been aware of the order of stay, to apply for execution as if there was no stay would amount to practising fraud on the Court and an order obtained in such circumstances could not be allowed to stand.

An order dismissing the application for stay of execution before the Appellate Court pending disposal of the appeal, on the ground that there was nothing to stay, would not be a bar to the maintainability of an application for re-delivery of property delivered. A.I.R. 1950 Mad. 317=(1949) 2 M.L.J. 764.

——S. 47—Decree—Interest—Payment of—Admission—If could be deposited.

Where, in an application to execute a decree which provides for no interest, the decree-holder put in a prayer as to the award of interest, and the judgment-debtor, accepting his liability to pay the decretal debt as well as interest obtains from time to time adjournment from the Court to enable him to pay the amount the case falls not under estoppel nor contract, but under Ss. 65 and 73 of the Contract Act, and the judgment-debtor cannot at a later stage of proceedings dispute the item of interest and is bound to pay it from the date on which he admitted his liability to pay it. 28 B. 393=6 Bom.L.R. 417, (D.B.).

——S. 47 (S. 244, Old Code)—Execution of decree—Suit by representative mortgagor-judgment-debtor for declaration of invalidity of mortgage.

When a decree for sale of specific mortgaged property is being executed, it is not open to persons made parties to the execution proceedings as legal representatives of the deceased judgment-debtor to contend in those proceeding that the mortgagor was not competent to make the mortgage and that the decree was one which ought not to have been made. A separate suit, therefore, on the part of such persons seeking a declaration that the mortgagor was not competent to make the mortgage in question will not be barred under the provisions of S. 244 of the Code of Civil Procedure. 21 A. 277, foll. 1908 A.W.N. 288=31 A. 45=5 A.L.J. 741=1 Ind. Cas. 704. *See also* (1908) A.W.N. 188=5 A.L.J. 745.

——S. 47 (S. 244, Old Code)—Defence to suit—Plea in bar of execution—Decree for sale—Question of saleability of property not raised in suit.

A judgment-debtor cannot in execution raise an objection to the saleability of the lands, where in the suit itself he did not raise it and allowed the decree to be passed for sale. 1892 A.W.N. 5, fol. 1905 A.W.N. 138=2 A.L.J. 401=27 A. 684 (F.B.). *See* for a case *vice versa*. 1903 A.W.N. 208=26 A. 152.

——S. 47 (S. 244, Old Code)—Mortgage decree against father—Execution against son succeeding by survivorship.

A Hindu son who is proceeded against in execution of a mortgage decree obtained against his father after the father's death can take the very defences in execution proceedings which he might take in a fresh suit if brought against him in respect of that mortgage. (1905) 3 C.L.J. 131=33 C. 676.

——S. 47, O. 21, R. 36 (Ss. 244, 264, Old Code) Hindu Law—Decree against father—Death of father before attachment—No execution against sons—Declaratory suit maintainable. 1906 A.W.N. 281=3 A.L.J. 663.

[The new Code lays down that such questions ought to be determined in execution. *See* S. 53—Ed.]

——S. 47—Interest on.

Mesne profits includes interest on mesne profits and where the decree imposes no limit upon the period from which interest should be calculated from the date on which and on so much of it as the res-

pective instalments of mesne profits became due. 27 C. 951, foll. 1903 A.W.N. 42=25 A. 275 (D.B.). *See also* 7 C.W.N. 437=30 C. 506.

10. Executability of decree.

See also C. P. CODE, S. 47—BAR TO EXECUTION.

—S. 47—Question relating to discharge of decree—Person acquiring equity of redemption in part of mortgaged property and then taking assignment of mortgage decree—Objection that assignee can execute only for proportionate share of decree amount cannot be raised in execution.

Where a person acquires the rights of the mortgagor in a part of the mortgaged property and then obtains an assignment of the mortgage decree, there is no *pro tanto* discharge of the decree and, therefore, the objection that the assignee decree-holder is entitled to execute the decree only for the decree amount minus the proportionate burden of the decree resting upon the part purchased by him, cannot be raised in execution as it does not relate to the discharge of the decree. The equity, if any, between the parties can only be adjusted by an independent suit for contribution. A.I.R. 1946 Mad. 155=1943 M.W.N. 709 (2)=58 M.L.W. 598=(1945) 2 M.L.J. 544.

——Ss. 47, 54—Decree for partition, execution of.

A decree for partition is *prima facie* capable of execution and the executing Court, on being moved, is bound to give effect to S. 54 by ordering the partition to be effected by the Collector even though the decree is silent on the point. A.I.R. 1945 Nag. 86 =I.L.R. (1944) Nag. 852.

——S. 47—Decree—Executability — Presumption.

When a decree is passed, presumably it is fit for execution unless it is a declaratory decree or a decree of a character which, from its nature, cannot be executed. A.I.R. 1945 Oudh 208=1945 O.W.N. (C.C.) 193=1945 A.W.R. (C.C.) 84=222 Ind. Cas. 192.

——S. 47—Executability of decree—Charge on property falling to defendant's share—Decree is not indefinite.

When the decree is drawn up in terms of a compromise and the Courts have to look to the decree and not to the compromise application and if the decree states that the property of defendant No. 1's share was subject to the charge, the decree is not in any way indefinite. A.I.R. 1944 Bom. 191=46 Bom.L.R. 358=I.L.R. (1944) Bom. 274.

——S. 47—Decree nullity—It is incapable of execution.

Once a decree has been found to be a nullity, it must follow as a general rule that all proceedings taken in execution of it are also null and void. *Ex nihilo nihil fit.* The Court cannot execute or give effect to a nullity. It is therefore not correct to say that an intending purchaser at a sale under a decree need not go behind the decree to see whether the decree has been rightly made. A decree which is a nullity is incapable of execution. A.I.R. 1943 Bom. 288=45 Bom.L.R. 553=I.L.R. (1943) Bom. 400=212 Ind. Cas. 205.

——S. 47—Executability of decree — Decree passed on award which required registration but was not registered, if can be questioned in execution.

A decree given on the basis of an unregistered award which required registration is no more a nullity than a decree obtained in an ordinary suit on an unregistered mortgage or sale deed which requires registration. The same principle applies in respect of decrees consequent on an award as does in the case of all other decrees. The executing Court cannot, therefore, go behind the decree passed on an award which though required registration was not registered. A.I.R. 1943 Nag. 165=1943 N.L.J. 154=I.L.R. (1943) Nag. 293=206 Ind. Cas. 413.

——S. 47—Grant of time and instalments to judgment-debtor is not novation of contract—Decree can be executed.

The granting of time and instalments by the decree-holder to the judgment-debtor for payment of the decretal amount does not amount to a novation of contract and has not the effect of extinguishing the decree, so as to render it inexecutable. A.I.R. 1943 Pesh. 29=207 Ind. Cas. 342.

——S. 47—Executing Court, if can go into contention that recital in decree was not enough to make it executable.

The executing Court can go into the contention that the recital embodied in the decree was not enough to make it executable. There can be no question of the Court being called upon to go behind a specified recital in the decree. A.I.R. 1942 Mad. 748=55 L.W. 627=(1943) 1 M.L.J. 504=206 Ind. Cas. 466.

——S. 47—Objection to executability of decree—Objector not party to order passed by Court's predecessor deciding objection—Court cannot refuse to go into question on ground of his predecessor's order.

The executing Court would not be justified in refusing to go into the question of the executability of a decree on the ground that that question was decided by an order of his predecessor when the objector before the executing Court was not a party to the order passed by the predecessor. A.I.R. 1942 Mad. 748=55 L.W. 627=(1943) 1 M.L.J. 504=206 Ind. Cas. 466.

——S. 47—Execution of decree stayed till decision of appeal in cross-decree—Decree is not capable of execution.

Where the execution of a decree has been temporarily stayed by the Registrar of the High Court till the decision of the appeal in cross-decree, the decree is not capable of execution, for in such a case one of the principal elements of O. 21, R. 18 is missing. A.I.R. 1942 Pat. 197=22 P.L.T. 1031=197 Ind. Cas. 440=6 B.R. 207.

——S. 47—Executability of decree.

Order for costs by Governor in connection with election under S. 12, Election Offences and Inquiries Act, 1920—Order is executable in District Court—Appeal lies under S. 47, C. P. Code, from order refusing to execute order for costs. A.I.R. 1942 Pesh. 53=201 Ind. Cas. 331.

——S. 47—Passing of new Act rendering decree inexecutable—Effect of.

It is competent to a judgment-debtor to raise a plea

in execution proceedings that the passing of a new Act renders the decree which is perfectly valid in itself inexecutable in practice. A.I.R. 1941 Mad. 126=1940 M.W.N. 1191=52 L.W. 844=(1940) 2 M.L.J. 881.

——S. 47—Decree compromised—Judgment-debtor to pay certain portion of decretal amount by instalments on fixed date and execute assignment deed in respect of balance—Deed not executed on fixed date but later—Whether can take out execution in respect of decretal amount including that portion for which deed of assignment was executed.

Where by a compromise decree, the judgment-debtors were to pay the decretal amount in certain fixed instalments, on certain fixed days and execute deed of assignment of the arrears of rent, in respect of the balance of the decretal amount, but the terms are not fulfilled by the judgment-debtors except to execute the assignment deed on same date later than the one fixed by the compromise and it is found that the decree-holder had acted on the deed by collecting the rent, he cannot take out the execution of his decree in respect of that portion of the decree for which this assignment deed was executed, on the ground that the judgment-debtors had failed to execute it on the date fixed by the compromise. A.I.R. 1941 Pat. 449=22 P.L.T. 501=193 Ind. Cas. 110=7 B.R. 578.

——S. 47—Decree for future maintenance—If can be executed for arrears.

A decree awarding future maintenance can be executed for arrears of future maintenance and no fresh suit is necessary. A.I.R. 1941 Pat. 95=21 P.L.T. 783=20 Pat. 86=7 B.R. 545=192 Ind. Cas. 866.

——S. 47—Maintenance decree—Enforcement—Execution or suit—Charge given by decree—Enforcement—Fresh suit—Necessity.

It is well-settled that a decree for future maintenance is executable upon each default. Even where the decree says that the maintenance will be a charge on specified properties, no fresh suit is necessary to enforce the charge. The decree can be executed on default. 223 Ind. Cas. 173=1946 Pat. (Rul.) 158=1945 P.W.N. 453=A.I.R. 1946 Pat. 216=12 B.R. 33.

——S. 47—Preliminary decree appealed against—Meanwhile lower Court passing final decree—Appellate decree reversing preliminary decree—Final decree of lower Court, if can be executed.

Where an appeal has been brought from the preliminary decree before the final decree has been passed, such appeal is competent and if the preliminary decree be set aside, the final decree falls to the ground along with it. When a preliminary decree is set aside, the final decree is superseded, whether the appeal was brought before or after the passing of the final decree. That being so until a final decree in accordance with the appellate decree is passed there is no decree which can be executed. A.I.R. 1940 Pat. 668=188 Ind. Cas. 45=6 B.R. 569.

——S. 47—Decree obtained by depositor against Co-operative Bank for return of deposit—During pendency of suit, compromise sanctioned by Registrar—Decree-holder no party—Bar to execution of decree.

Where during the pendency of a suit by a depositor against a Co-operative Bank to recover the amount of the deposit, a scheme of compromise under S. 24-A of the Bihar and Orissa Co-operative Societies Act is sanctioned by the Registrar of Co-operative Societies, the compromise is binding on the plaintiff depositor under S. 24-A (2) of that Act although he is not party to the compromise and a decree passed in the suit is only a security for the debt that is owing to the decree-holder and has the effect of establishing that debt as against the Bank and though the compromise is no bar to the passing of a decree, it is a clear bar to execution of the decree. The compromise bars execution, not by reason of any express provision in the Bihar and Orissa Co-operative Societies Act, but under the general law. A.I.R. 1940 Pat. 261=21 P.L.T. 173=185 Ind. Cas. 606=6 B.R. 22.

——S. 47—Executability of decree.

Insolvency proceedings against one of judgment debtors—Decree-holder can execute decree against others. A.I.R. 1940 Pat. 149=21 P.L.T. 618=184 Ind. Cas. 701=6 B.R. 64.

——S. 47—Executability of decree.

In every decree for payment of money a condition that the money can be realised by execution is implicit. A decree for maintenance which is made payable at the end of a certain month every year, and provides in case of non-payment by the end of that month, that the decree-holder would be entitled to realize the amount due out of the property as well as from the judgment-debtor personally is capable of enforcement by execution and is not a more declaratory decree. A.I.R. 1939 Oudh 281=1939 A.W.R. 129=1939 O.W.N. 768=1939 O.L.R. 546=183 Ind. Cas. 706.

——S. 47—Compromise decree against *R* and *B*—Decretal amount to be paid by instalments—On default, execution to be taken out against R alone—On failure of all methods of execution, decree to be executed against B—Effect of.

A suit against *R* and *B*, members of a dissolved partnership, was compromised and a decree was passed on it. According to the decree, the decretal amount was to be paid by *R* within two years' time by certain monthly instalments. In case of default in payment of six instalments, the plaintiff was entitled to take out execution against *R*. If within two years from the date of the first execution, the decretal amount was not realised in any way, *i.e.*, though attachment of property, movable and immovable, and by the issue of the warrant of arrest, the plaintiff was entitled to realise from *B* that part of the decretal amount which would remain due, *R* committed six defaults and the plaintiff book out execution. *R* asking for time, the decree-holder agreed to give three months' time. But even after this no payment was made. The decree-holder took out several executions, by warrant of arrest, etc., but *R* avoided them by remaining outside the jurisdiction. Ultimately *R* applied for and got himself declared insolvent:

Held, that under the circumstances, the decree-holder showed due diligence within the meaning of the decree in proceedings against *R*. Hence the decree-holder was entitled to take out execution proceedings against *B*, the other judgment-debtor. A.I.R. 1939 P.C. 242=1939 O.L.R. 528=5 B.R. 976=43 C.W.N. 1204=50 L.W. 448=20 P.L.T. 783=I.L.

R. (1939) Kar. (P.C.) 369=183 Ind. Cas. 321 (P.C.).

——S. 47—Executability of decrees.

Conflicting decrees *inter partes*—Later prevails. A.I.R. (Vol. 25) 1938 Pat. 359=19 P.L.T. 456=176 Ind. Cas. 570=4 B.R. 741.

——S. 47—Executability by decree.

Ordinarily a decree for future maintenance should be construed, unless there are some grave objections to the contrary, as a decree capable of execution. A.I.R. 1938 All. 362=1938 A.L.J. 495=1938 A.L.R. 565=1938 A.W.R. 308=I.L.R. (1938) All. 535=176 Ind. Cas. 139.

——S. 47—Decree-holder's rights depend on construction of decree—Appellate decree, construction.

The rights of the decree-holder under a decree will mainly depend upon the interpretation of the decree. Where there is an appellate decree, it is not decree that has to be construed as that decree takes the place of the lower Court's decree. A.I.R. 1938 Nag. 237=I.L.R. (1939) Nag. 261=175 Ind. Cas. 561.

——S. 47—Executability of decree.

Where a mortgage suit against a number of defendants is dismissed and an appeal therefrom is contested by only one defendant and the Appellate Court gives a decree against all defendants but allows costs against the contesting defendant alone and such costs are not included in the final decree subsequently passed the decree of the Appellate Court for costs is final as against the contesting defendant only and the decree-holder can proceed to execute this decree for costs without waiting till the final decree is passed and without proceeding against the mortgaged property in the first instance. A.I.R. 1937 Cal. 547=67 C.L.J. 316=174 Ind. Cas. 184.

——S. 47—Execution—Agreement superseding original decree recorded as adjustment—New agreement, if capable of execution.

A decree once made cannot be varied. Where therefore, an adjustment is recorded superseding the original decree, the new agreement is not capable of execution. The same is the position if the decree-holder has accepted in satisfaction an agreement which itself contains a condition or term that the subsequent agreement shall be capable of execution. The agreement is capable of being recorded as an adjustment but incapable of being the subject-matter of execution. A.I.R. 1937 Cal. 222=42 C.W.N. 519=172 Ind. Cas. 282.

——S. 47—Suit for management of math property—D, M and others appointed managers—Another suit by D for removal of M and others—Such suit decreed—First decree, executability of.

Where in a suit for the management of certain *math* property a compromise decree is passed appointing *D*, *M* and others as the managers, but later on *D* brings another suit for removal of *M* and others from trusteeship, which suit is also decreed, the new decree merely substitutes *D* for *D*, *M* and others as managers and consequently the old decree is still executable. A.I.R. 1937 Lah. 18=38 P.L.R. 580=166 Ind. Cas. 929.

——S. 47—Preliminary decree under attachment.

A preliminary decree which has been attached cannot be regarded as one for the payment of money, or for endorsement of a mortgage or charge, nor is it capable of execution. A.I.R. 1937 Oudh 365=1937 O.W.N. 519=13 Luck. 237=168 Ind. Cas. 154.

——S. 47—Suit referred to arbitration without intervention of Court—Arbitrator finding sum due to mortgagee and that he is entitled to possession—Decree in terms of award—Decree whether merely declaratory—Whether can be executed by attachment and sale of mortgaged property.

Parties to a suit on a debt due on a mortgage referred, without the Court's intervention, their dispute to arbitration. The arbitrator found that there was a specific sum due at the time of the award and that the mortgagee was also entitled to take possession of the house. In execution of the decree, passed in terms of the award by attachment and sale it was contended that the decree being merely declaratory could not be executed:

Held, that the decree was not merely a declaratory decree and that, therefore, it could be executed by attachment and sale of the mortgaged property. A.I.R. 1937 Pesh. 48=168 Ind. Cas. 875.

——S. 47—Decree amended—Execution taken out on basis of original decree—Amendment rendering decree incapable of execution against some defendants.

An amendment was made in a decree as it stood originally and the effect of the amendment was that the decree was not capable of being executed against some of the defendants or their heirs. The decree-holders took out execution on the basis of the original decree, but were not proceeding against the said defendants or their heirs in accordance with the directions of the High Court:

Held, that if any error was committed by the decree-holders it was not one of substance but of form and this should not be allowed to affect the legality of the execution proceeding. A.I.R. 1936 Pat. 26=160 Ind. Cas. 678.

——S. 47—Cause of action and issues different in suit by A against B at C and suit by B against A at S—Decrees, if conflicting—Executability of decrees.

Where the cause of action of, and the issues in, a suit by *A* against *B* in a Court at *C* are different from those in a subsequent suit by *B* against *A* in a Court at *S*, it is not possible for *A* to plead before the Court at *S* that the decree of the Corut at *C* was *res judicata*. In such circumstances there are no two conflicting decisions and it is not possible for *B* to argue that the decree of the Court at *C* is incapable of excution. A.I.R. 1935 All. 645=1935 A.L.R. 410=155 Ind. Cas. 571.

——S. 47—Executability of decrees—Conflicting decrees.

If two conflicting decrees have been obtained by parties from two different Courts or from same Court, then the last one is effective and the first one should be considered as dead. A.I.R. 1935 All. 645=1935 A.L.R. 410=155 Ind. Cas. 571.

——S. 47—Decree, executability—Decree attached.

Decree in favour of judgment-debtor attached—Judgment-debtor can, as a judgment-creditor of his decree, execute that decree even during the pendency of the attachment subject to the condition that the amount realized by him by the execution of that

decree will not be paid to him but will have to be deposited in Court for the benefit of his judgment-creditor. A.I.R. 1935 Bom. 416=37 Bom.L.R. 747=159 Ind. Cas. 170.

——S. 47—Decree executable—Fresh suit.

Where a person who was a party to a decree for partition applied for removing an obstruction to delivery of possession and the Court decided that the matter did not fall within the purview of S. 47 and directed him to file a regular suit and when he filed a regular suit it was contended that the suit was not maintainable:

Held, that the fact that the defendants could not have appealed from the previous order as it was in their favour was immaterial and could not affect the finality of that order. A.I.R. 1935 Mad. 615 =1935 M.W.N. 517=69 M.L.J. 139=42 L.W. 442=158 Ind. Cas. 84.

——S. 47—Executability of decrees—Two conflicting decrees—Which prevails.

In case of conflicting decrees, the later one must prevail. The reason for this is that the previous decree cannot be looked into and must be held to have been discharged by the later decree.

The judgment-debtors objected to the execution on the ground that in a previous case, the District Judge had held that the assignment in favour of the opposite party was null and void. The lower Court, however, followed the earlier decision of his predecessor which held that the assignment was good, on the ground that he was bound by the previous order of his own Court. The order of his predecessor was passed on 5th October, 1925, whilst the order of the District Judge, on appeal, was passed on 16th July, 1926, when the matter was in issue in another case:

Held, that the later order, *i.e.,* of the District Judge, must prevail. A.I.R. 1935 Nag. 122=31 Nag.L.R. 211=155 Ind. Cas. 726 (2).

——S. 47—Compromise decree—Rights of parties declared and certain acts directed to be done—Executability.

By a compromise, the plaintiff became a mortgagee by conditional sale in respect of mortgaged properties and the decree was passed in the following terms. "It is ordered and decreed that the suit be decreed in terms of the *refanama* (petition of compromise) filed on behalf of both parties that the parties be bound by the terms of the compromise and they do get their respective remedies in accordance therewith and that the petition of compromise which has been filed do form part of the decree".

Held, that the decree not only declared the rights of the parties under the compromise but directed certain acts to be done and was capable of being executed. A.I.R. 1934 Cal. 735=152 Ind. Cas. 854.

——S. 47—Decree—Mesne profits not ascertained—Executability.

Where a suit is decreed with future mesne profits 'as prayed or' but the mesne profits asked or have never been determined though there was an express issue as to their *quantum* in the suit, the decreee is not capable of execution before ascertainment of mesne profits. A.I.R. 1934 Mad. 13=38 L.W. 254 =145 Ind. Cas. 285.

——S. 47—Decree for further maintenance—Executability.

It cannot be laid down that a decree or further maintenance is always incapable of execution and a fresh suit is necessary. That would entirely depend on the nature of the suit, the nature of the relief granted and the form of the decree. A.I.R. 1934 Pat. 240=13 Pat. 290=150 Ind. Cas. 378.

——S. 47—Execution—Plea in bar of, not raised or raised but overruled—If cannot be raised at later stage.

A judgment-debtor is not entitled to raise at a later stage of the execution proceedings, a plea in bar of the execution which was open to him at an earlier stage and which he had an opportunity of raising or which, having been raised has been overruled.

Plea of limitation and objection that person seeking to execute the decree under will could not do so as he had not obtained probate of the will could not be raised subsequently. 1942 Pat. 477=23 P.L.T. 361=202 Ind. Cas. 264=8 B.R. 866.

——S. 47—Declaratory decree—Nature of—Declaratory decree also directing that money can be recovered by execution is still declaratory.

A declaratory decree continues to be declaratory and does not become executory even if there is a direction in the decree that the money could be recovered by execution. A.I.R. 1934 Pesh. 64=151 Ind. Cas. 235.

——S. 47—Execution Court proceeding with execution of declaratory decree—Judgment-debtor not objecting—Whether can object to execution subsequently.

Where a Court proceeds to execute a declaratory decree and orders attachment, even if the judgment-debtor has not appeared and objected on notice under O. 21, R. 22, he is not debarred from taking the objection to execution subsequently, inasmuch as the Court has no jurisdiction *ab initio* to proceed with the executive of a decree which is only declaratory and not executory. A.I.R. 1934 Pesh. 64=151 Ind. Cas. 235.

——S. 47—Preliminary decree modified by compromise—Executability.

The final decree was based on the modification in the preliminary decree by a compromise entered into by the parties and accepted and incorporated by Court in the final decree:

Held, that as a decree is one instrument and cannot be partially good and partially bad nor can it be automatically modified, the modified decree is no longer executable. A.I.R. 1933 Lah. 859=34 P.L.R. 998=146 Ind. Cas. 597 (1).

——S. 47—Unincorporated association—Managing Committee of School, legal position of—Decree against Committee—Execution against assets of school.

A decree against the Managing Committee of an unincorporated association like a school with a direction that the Managing Committee are not personally liable must be reasonably construed to mean a decree against them in their representative capacity and binds the school and even if the members of the Managing Committee change after the decree, such a decree can be executed against the assets of the school at the time of execution; it is enough if all the members of the Managing Committee for the time being are on the record before execution is proceeded with. A.I.R. 1933 Cal. 329=60 Cal. 794=37 C.W.N. 495=143 Ind. Cas. 457.

——S. 47—Matters relating to valuation, etc., by Cantonment Board—Decree passed by Civil Court is *ultra vires* and cannot be executed. A.I.R. 1933 All. 163=1933 A.L.J. 162=144 Ind. Cas. 1016.

——S. 47—Part of the decree incapable of enforcement—Decree for enhancement and decree for rent.

A decree for enhancement is separate from a decree for rent. The mere fact that the two claims are joined in one suit does not mean that if the decree for enhancement cannot be enforced, the decree for rent also cannot be enforced. A.I.R. 1933 Pat. 195=14 P.L.T. 144=143 Ind. Cas. 64.

——S. 47—Dispute as to right to execute—Execution of pronote in favour of stranger by judgment-debtor at instance of person declared to be entitled to execute—Suit on pro-note—Decree—Reversed of order by High Court holding another entitled to execute—Executability of decree on pro-note—Dependent judgments, doctrine of.

When the right to execute a decree was in dispute, the judgment-debtor executed a pro-note in favour of a stranger to whom *A* (the person who was declared entitled to execute the decree by the first Court) owed some money and at his instance. After execution of the pro-note, satisfaction of the decree was entered. The stranger in whose favour the pro-note was executed sued on it and obtained a decree. In the meanwhile the order of the trial Court as to the right to execute the decree was reversed by the High Court and *B* was held entitled to execute the decree. It was contended that as *A* was found not entitled to execute the decree, the decree on the pro-note could not be executed:

Held, that the decision of the High Court could not be held to have superseded the claim on the promissory note and the decree on the promissory note was executable. 141 Ind. Cas. 283=1932 M. W. N. 1108=37 L.W. 652.

——S. 47—Executability of decree—Objections based upon error in frame of suit—If maintainable.

Where a suit was filed by a chairman of a municipality for the recovery of an amount due to the municipality, and the defendant without taking any objection admitted his liability and even paid a portion of the decretal amount, he cannot in a proceeding in execution for the recovery of the balance raise an objection that the chairman of the Municipality had not right to sue and that the decree was a nullity and therefore incapable of execution. Even if the institution of the suit by the chairman was an error, it was of a technical nature and may be disregarded. 222 Ind. Cas. 11=1946 P.W.N. 265=A.I.R. 1946 Pat. 268=12 B.R. 247.

——S. 47—Executability of decree—Objection to—If open—Mortgage decree for sale—Plea that decree not capable of execution—Power of executing Court to entertain and consider.

It is settled law that the Court executing a mortgage decree which directs the sale of a specific item of property cannot allow the judgment-debtor or his legal representatives to object to the execution of the decree on the ground that it is not capable of execution either because the judgment-debtor had no right originally to execute the mortgage bond on the basis of which the decree was passed or because since the date of the decree, owing to the death of the judgment-debtor or otherwise, the judgment-debtor had no longer any interest in the item of property. The executing Court is bound to execute the decree and cannot, apart from fraud or other recognised grounds, consider whether the decree directing the sale of the property is one which the Court which passed the decree ought rightly to have passed. 24 Pat. 741=A.I.R. 1946 Pat. 214=227 Ind. Cas. 630=13 B. R. 108.

——S. 47—Executability of decree—Scheme of management drawn up in decree—Passed in declaratory suit.

A scheme of management drawn up in a decree passed in a declaratory suit relating to debutter properties cannot be enforced by executing the decree. 52 C.W.N. 439=A.I.R. 1949 Cal. 215=83 C.L. J. 48.

——S. 47 (S. 244 (c), Old Code)—Execution of decree passed on usufructuary mortgage—Continuation of possession by mortgagees subsequently to decree—Claim to set-off profits thus accrued from decree account.

Under the terms of a compromise decree in a suit on a mortgage, the defendants were ordered to pay a certain amount to the plaintiffs within a year, and in default of payment the amount was to be recovered by sale of the mortgaged and other property. Under the deed of mortgage, the mortgagee was to be in possession in lieu of interest, but the decree made no mention of possession and interest. The decree-holder applied for sale. The lower Court held that if he had continued in possession of the mortgaged property after the decree, it would be necessary to take an account to ascertain whether the decree had been satisfied, and dismissed the petition. *Held*, that such an order was wrong, as it went behind the decree instead of executing it. *Held also*, that the application, in which the decree-holder stated that there had been default in payment of the decree-amount and applied for sale, was an application for an order absolute for sale. (1901) 25 M. 537.

——S. 47, O. 21, R. 31 (Ss. 244, 258, Old Code)—Execution of decree—Payment in satisfaction of decree induced by alleged fraud of the decree-holder—Application for refund.

A mortgage decree passed by the Subordinate Judge of Lucknow was transferred for execution to the Subordinate Judge of Shahjahanpur. One *C* who was a subsequent mortgage, paid into Court the full amount of the decree and satisfaction of the decree was entered up and the case struck off. Subsequently *C* applied to the Court at Shahjahanpur for a refund of the money so paid upon the ground that the decree-holder had in his application to that Court for execution fraudulently suppressed the fact that a previous application for execution made to that Court at Lucknow had been dismissed as time barred. *Held*, that the Court at Shahjahanpur had jurisdiction to entertain such application and was not debarred from considering what had occurred in the Court at Lucknow. 24 A. 239, foll. 1907 A.W.N. 65=4 A.L. J. 142.

——S. 47 (S. 244, Cl. (c), Old Code)—Execution of decree—Auction-purchaser at sale in execution of simple money decree against judgment-debtor.

An auction-purchaser at a sale held in execution of

a simple money decree against the judgment-debtor whose property has been ordered to be sold at the suit of mortgagees in a mortgage suit is a "representative" of the judgment-debtor within the meaning of S. 244 (c). The term "representative" as used in S. 244, C. P. Code, when taken with reference to the judgment-debtor, does not mean only his legal representative that is, his heir, executor or administrator, but it means his representative in interest and includes a purchaser of his interest who, so far as such interest is concerned, is bound by the decree. 1904 A.W.N. 61=1 A.L.J. 65=26 A. 447 (F.B.).

——S. 47—Hindu family—Purchaser of co-parcener's rights, rights of—Decision in execution.

The only right acquired by a purchaser of a co-parcener's rights in a Hindu family in a Court-sale is the right to effectuate the sale by a suit for partition of the joint property of the co-parcener's and the delivery to the purchaser of what might be allotted to the share of the particular co-parcener at the partition. S. 244, C. P. Code, is no bar to such a suit. It is not competent on a mere application for execution by the purchaser to enforce the right of the purchaser by an order for partition. (1906) 29 M. 294.

——S. 47—Order in execution—Costs of execution proceedings—Execution of.

If costs are awarded in the course of execution proceedings, separate execution may be taken out for costs. 5 A. 236, Foll. 5 Ind. Cas. 480 (Cal.).

——S. 47, O. 21, R. 1 (S. 244, Old Code)—Execution of decree—Alteration of decree by consent of the decree-holder and one of the judgment-debtors—Limitation.

While property of one of the judgment-debtors was under attachment, the decree-holder and the judgment-debtor agreed that the decree should be satisfied by instalments. This agreement was accepted by the Court and embodied in the decree. *Held*, that the judgment-debtor was estopped from denying his liability under the modified decree and the mere fact that execution of the decree was barred by limitation against the order judgment-debtors, was not sufficient to extinguish his liability. 5 P.L.R. 1909 =4 P.W.R. 1909=1 Ind. Cas. 48.

——S. 47 (2)—Discretion of Court.

It is discretionary with the Court to treat an application under S. 47 as a suit. The applicant is not entitled as of right. 2 O.L.J. 57=27 Ind. Cas. 570.

——S. 47 (S. 244, Cl. (c), Old Code)—Decree —Order—Appeal—Question regarding satisfaction—No application for execution pending.

Where a Court deals with a question relating to the discharge or satisfaction of a decree, it may be said to be executing the decree within the meaning of S. 244, C. P. Code, although no formal application for execution may have been made to it. (1902) 7 C.W.N. 172.

——S. 47 (S. 244, Old Code)—Decree for permanent injunction—Lands purchased from decree-holder by another — Vendee bringing a fresh suit for injunction.

Injunction does not run with the land, and a suit by the assignee of the dominant tenement of a decree-holder, who had already obtained a decree restraining the defendant from interfering with the enjoyment of a right of way for a fresh injunction, is not barred. (1907) 10 Bom.L.R. 18=32 Bom. 181.

——S. 47—Foreign Decree—Executability.

Section 47 does not apply to a decree of a foreign Court. (1913) M.W.N. 605=14 M.L.T. 96= 20 Ind. Cas. 704.

——S. 47—Foreign decree—Objection to execution.

The judgment-debtor under foreign decree sought to be executed in a British Indian Court can raise objections to the decree. 86 Ind. Cas. 492=21 M. L.W. 330=A.I.R. 1925 Mad. 788.

——Ss. 47, 144, 151 and O. 21, R. 95—Mortgage suit—Preliminary decree—Application for scaling down—One of the purchasers of properties not joining in the application—Bona fide purchasers in good faith—Title of the purchaser whether good.

A mortgage suit was filed by second respondent herein for recovery of amount due under mortgage executed by defendants 1 to 4 in the suit. Defendants 5 to 8 and 9 and 12 were purchasers of portions of the hypotheca. The 13th defendant was a purchaser of 3 houses from 9th defendant and 14th defendant is a purchaser of one of them from 13th defendant. The 29th defendant, the contesting first respondent, was the legal representative of the 14th defendant. A preliminary decree was passed. Petitions for scaling down of debts under Madras Act (4 of 1938), were made and they were also scaled down. The 13th defendant did not join in them. Subsequently he filed a petition under O. 21, R. 2, C. P. Code. On rejection of it he filed an appeal. Pending disposal of it he also prayed for stay of execution in bringing properties to sale by decree-holder. The High Court passed a conditional order. There was no stay with regard to property sold to 14th defendant. Therefore the property was sold and decree-holder purchased the same. The 29th defendant did not take steps to have the debt scaled down so far as he was concerned nor was he a party to the appeal. The first respondent (29th defendant) put in a petition for re-delivery of the house purchased by the decree-holder and sold subsequently to the appellant herein. The petition was filed under Ss. 47, 144, 151 and O. 21, R. 95, C. P. Code.

On the question whether the appeal was competent in a matter arising out of an order under S. 151, C. P. Code.

Held, that the case related to the discharge and satisfaction of the decree it fell under S. 47, C. P. Code, and therefore appealable.

Held. also, on the question whether the 29th defendant could dispossess the appellant who was a purchaser from the decree-holder, that so far as 29th defendant was concerned the decree was voidable as he could have resisted execution by claiming benefit under the Act (4 of 1938). He did not choose to do so and the appeal to the High Court was only by the 13th defendant and though the effect of this judgment may enure to his benefit, because he did not oppose the execution of the decree he cannot now come forward and call upon the appellant to deliver possession of the property urchased by him *bona fide*, and in good faith. 63 L.W. 280=1950 M.W.N. 285=A.I.R. 1950 Mad. 640=(1950) 2 M.L.J. 17.

——S. 47 (S. 244, Old Code)—Mortgage of non-transferable occupancy holding—Objection of landlord that holding is non-transferable — Subsequent suit for possession. 7 C.W.N. 607.

——S. 47 (S. 244, Old Code)—Mortgage—Satisfaction by mortgagor of decree for sale on a prior mortgage with money borrowed on the security of subsequent mortgage of the same property—Rights of subsequent mortgagee. 1904 A.W.N. 284=27 A. 400=2 A.L.J. 13.

——S. 47—Relief against forfeiture—C. P. Code, S. 375.

A forfeiture clause in a compromise decree can be relieved against by Courts where the party seeks to enforce it by original suit. The contract of the parties is not the less a contract and subject to the incidents of a contract because there is a super-added the command of a Judge. The difference between a consent decree declaring the agreements of parties and the agreement itself is—that when the one or the other is sought to be afterwards enforced, in the former case it is not open to a party to question the accuracy of the decree as expressing what at the time was the contract which was made. (1906) 8 Bom.L.R. 813=31 B. 15 (F.B.); *see* 24 M. 265; 26 M. 31.

——S. 47 (S. 244, Old Code)—No saleable interest—Refund of purchase money, suit for.

S. 244, C.P. Code, is no bar to a suit by auction-purchaser for refund of purchase-money on the ground that the judgment-debtor had no saleable interest in the property. (1898) 5 C.W.N. 242=28 Cal. 155.

——Ss. 47, 50 (Ss. 244, 234, Old Code)—No separate suit necessary—Hindu son's liability to pay father's debt. 11 C.L.J. 362=5 Ind. Cas. 146.

——S. 47 (S. 244 (c), Old Code)—No separate suit—Representative.

A suit by a decree-holder purchaser for possession against judgment-debtor is barred by S. 244. 26 A. 447, foll. (1906) A.W.N. 87=3 A.L.J. 234.

——S. 47 (S. 244, Old Code)—No suit lies—Sale in execution of a decree for rent—Landlord having a mortgage of portion—Transfer of Property Act, S. 99.

S. 344, C.P. Code, is applicable to an objection that a sale to a stranger in execution of a decree for rent by the landlord is void under S. 99, T. P. Act, as the landlord was also a mortgagee of part of the holding. (1905) 33 C. 283.

——O. 47 (S. 244, Old Code)—Object of.

The object of S. 244 is to prevent any question which could be disposed of in execution becoming the cause of fresh litigation. (1906) 6 A.L.J. 71 at 85, 86=31 A. 82=1 Ind. Cas. 416 (F.B.).

——S. 47—Objection to attachment—Dismissal of first objection to attachment bars a second objection.

A judgment-debtor asked for release of half the house from attachment. His objection was dismissed in default and so also his application for restoration of that objection. He then filed another objection on the same grounds as before, adding a reference to S. 60, C.P. Code, his previous objection being based on the alleged ancestral character of the house.

Held, that the dismissal of a previous objection was a bar to a second objection and that the same principle applied to objections preferred under S. 47, C.P. Code. A.I.R. 1924 Lah. 470, Foll. A.I.R. 1931 Lah. 6=32 P.L.R. 413=130 Ind. Cas. 406.

——S. 47—Objection to execution on the ground of lands being inalienable—Maintainability—Duty of executing Court.

Though the principle is well settled that an executing Court cannot go behind the decree and pass an order in execution which will have the effect of nullifying the decree, two well-known exceptions have been engrafted on the general principle, namely that the executing Court will stay its hands where it is plain on the face of the record that the alienation is prohibited by statute or that it is opposed to public policy. As it was apparent from the plaint and the judgment in the case that the properties sought to be sold were unenfranchised temple service inam lands and as such inalienable and their sale opposed to public policy, the executing Court was justified in staying its hands and rejecting an application for their sale in execution of the decree. 60 L.W. 41=1947 M.W.N. 100 =A.I.R. 1947 Mad. 341=(1947) 1 M.L.J. 66.

——S. 47 (S. 244 (c), Old Code)—Objection by judgment-debtor to the executability of the decree.

S. 244 (c) is not intended to apply to a case where the judgment-debtor, against whom a decree for sale has been obtained as the representative of the mortgagor, tries to set aside the effect of a decree. It refers to proceedings in execution based on the decree as if the decree was perfectly good and valid. (1904) 32 C. 265. **Also** 16 M.L.J. 545=30 M. 26.

——S. 47 (S. 244, Old Code)—Objection to suit on the score of applicability of S. 244—Time for objection.

S. 244, C.P. Code (1882) relates to procedure and will not affect the jurisdiction of the Court; and an objection to a suit on the ground of the applicability of S. 244, C.P. Code, should be taken in the original Court, and if not so taken, it should not be entertained by the appellate Court. (1906) 32 M. 425=4 Ind. Cas. 723.

——Ss. 47 and 115—Order dismissing application for amendment of execution petition—Appealability—Revision—Competency.

An order dismissing an application for the amendment of an execution petition is a decision on a question relating to the execution of the decree and falls within S. 47, C. P. Code. Where the order definitely negatives the right of the decree-holder, there is a final adjudication conclusive as regards the Court expressing it and determining the rights of the parties and therefore the order would be appealable. It is as if a relief claimed by the decree-holder in execution had been finally refused to him. Such an order would clearly come within the meaning of "decree" as defined in S. 2 (2) of the C.P. Code, and a revision against that order would be incompetent. 1947 M.W.N. 570

=A.I.R. 1948 Mad. 43=60 L.W. 498=(1947) 2 M.L.J. 235.

——Ss. 47 and 2 (2)—Order on application for stay of execution—Finality—Appeal—Maintainability.

If any question arising in execution is determined under S. 47, C.P. Code, it automatically becomes a decree by virtue of S. 2 (2), whether the order conclusively determines the rights of the parties or not. Consequently, an order on an application for stay of execution would be a decree within the meaning of S. 2 (2) of the Code, whether the order directs that execution shall be stayed or that execution shall proceed, and is appealable. 61 L.W. 392=A.I.R. 1948 Mad. 524=1948 M.W.N. 425=(1948) 1 M.L.J. 425.

——Ss. 47 and 96—Order on miscellaneous petition in execution—Appealability.

An order in execution proceedings deciding any dispute between the parties affecting the substantive rights can form the subject-matter of an appeal under Ss. 47 and 96 of the Civil Procedure Code. I.L.R. (1947) Mad. 132=59 L.W. 240 (2)=1946 M.W.N. 227=A.I.R. 1946 Mad. 383 =(1946) 1 M.L.J. 347.

——S. 47 and O. 21, R. 66—Order settling terms of sale proclamation—Rights of judgment-debtor inter se affected—Appealability.

If there is an order of the Court merely settling the terms of the sale proclamation which does not in any way determine or affect the rights of parties, then the order is not open to appeal. But if in settling the terms of a sale proclamation the rights of judgment-debtors **inter se** who are owners of the equity of redemption, are affected by the order of a Court that would be a matter relating to the execution, discharge or satisfaction of the decree and the decision of the Court would be open to appeal at the instance of the aggrieved party. 1950 M. W. N. 164=A.I.R. 1950 Mad. 296=(1950) 1 M.L.J. 42.

11. Execution sale.

See also C. P. CODE, S. 47—QUESTION RELATING TO EXECUTION.

——S. 47—Preliminary mortgage decree—Application for final decree—Meanwhile execution carried out and sale held—Decree made final meanwhile before sale—Sale, if void—Irregularity—No prejudice.

The decree-holder obtained a preliminary mortgage decree and some time afterwards applied for the decree to be made final. Notices were served on all the parties including a subsequent transferee from the mortgagors but without waiting for the decree being made final, the decree-holder applied to execute his decree. Notices of this application were also served upon all the parties. The sale in execution of the decree was held. The decree, however, had been made final in the meantime long before the sale:

Held, that the sale was not void even if it was assumed that there was an irregularity. The judgment-debtor or the subsequent purchaser from him did not raise any objection to the sale and no prejudice whatsoever had been pointed out. It was merely an irregularity and it could not be held that the sale was void. A.I.R. 1942 Pat. 343=199 Ind. Cas. 470=8 B.R. 582.

——S. 47, O. 21, R. 90—Plea not taken before sale should be regarded as waived—Rule does not apply to debtor applying under Bengal Agricultural Debtors' Act (7 of 1936), S. 8.

The question of the illegality of the sale should be pleaded at the proper stage of the execution proceedings before the sale actually took place. Such a plea should be regarded as waived unless it is expressly taken before the sale. This plea of waiver does not, however, apply to the case of the judgment-debtor who has applied under S. 8, of the Bengal Agricultural Debtors' Act. A.I.R. 1941 Cal. 58=I.L.R. (1940) 2 Cal. 334=72 C.L.J. 66=193 Ind. Cas. 451.

——S. 47 and O. 22, R. 22—Application to set aside sale dismissed—Order directing fresh application under S. 47 not justified.

An application was filed in execution proceedings asking that the sale be set aside. The applicant asserted that the property sold was his self-acquired property; that no notice had been issued to him as required by O. 21, R. 22, and that there had been material irregularity in the publication of the sale, the result of which was that the property had been sold at considerably less than its real value. This application purported to be made under the provisions of Ss. 47 and 151 and O. 21, R. 90. The application so far as it related to O. 21, R. 90 was dismissed for applicant's default in furnishing security. The Appellate Court agreed with the trial Court on this point but directed the applicant to file a separate application under S. 47 and limit it to his allegations that the property was self-acquired and that the sale was bad because of the failure to give notice under O. 21, R. 22 instead of directing the trial Court to hear and decide that part of the application:

Held, that the Appellate Court should not have directed the applicant to file a fresh application under S. 47. A.I.R. 1941 Mad. 28=(1940) 2 M.L.J. 972=52 L.W. 906=1940 M.W.N. 1260 =I.L.R. (1941) Mad. 203=192 Ind. Cas. 448 (F.B.).

——S. 47 and Civil Rules and Orders (Calcutta), Rr. 1 (4), 234—Intending bidders, if come within R. 1 (4).

A sale can be held by the **Nazir** or the person appointed to conduct the sale when the presiding Judge is not sitting in the court room. The **Nazir** can approach him, if he requires directions, when the presiding Judge is in Chambers. The Court is not closed when the sittings are suspended on Fridays during the period mentioned in R. 1, sub R. (4) of Civil Rules and Orders (Cal.) An intending bidder does not come within the first part of sub-R. (4). Nor does he fall within the category of persons whose presence "may be required" by the Court or its officers. Sub-rule (4) of R. 1 accordingly does not require the suspension of sales on Fridays between 12-30 and 2 p.m. In fact, R. 234 casts a duty on the Officer holding the sale to go on throughout the

day. Hence there is no irregularity when the Nazir holds a sale between 12-30 and 2 p.m. A.I.R. 1940 Cal. 265=71 C.L.J. 88=I.L.R. (1940) 1 Cal. 1=44 C.W.N. 109=188 Ind. Cas. 151.

——S. 47—Execution sale.

The judgment-debtors moved the Court which passed the decree to have the sale declared void and not for setting aside the confirmation of the sale under O. 21, C. P .Code, on the ground that it was a nullity.

Held, that the proceeding was one under S. 47, C. P. Code, as it related to execution of the decree and was one between the parties to the suit, the decree-holders being the purchasers. The Civil Court was the only authority to determine whether or not the execution sale held by the Collector was valid. That issue could not be decided by the superior revenue Courts. A.I.R. 1940 Nag. 372=1940 N.L.J. 473=193 Ind. Cas. 274.

——S. 47—Execution sale—Question whether property can be proceeded against.

Where the decree-holder alleges that the property in possession of a party to the decree can be proceeded against in execution and the judgment-debtor, (for that is the position which the person added as the legal representative occupies), states that it is not, that is precisely the type of question that must be settled under S. 47 and not by a separate suit. A.I.R. 1939 Nag. 147=1939 N.L.J. 82=I.L.R. (1939) Nag. 165=182 Ind. Cas. 285.

——S. 47 and O. 21, Rr. 89, 90 and 91—Relative scope of—Application under S. 47 to set aside sale —When maintainable.

Section 47 is very wide in its terms and in one sense all questions relating to the execution, discharge or satisfaction of the decree that arise between the decree-holder and the judgment-debtor are within the purview of that section. Nevertheless the section ought to be so interpreted as not to render redundant the other provisions contained in the Code. The Legislature has by O. 21, Rr. 89, 90 and 91 made provision for setting aside sale in certain events, and those rules are applicable to applications made by the judgment-debtor or by the decree-holder for setting aside a sale irrespective of the fact whether the decree-holder or a third person is the purchaser. To hold that as between the judgment-debtor and the decree-holder, all objections to the sale in execution of the decree or all applications to set aside the same come within the purview of S. 47 would therefore be to render the provisions of Rr. 89, 90 and 91 redundant and this would be contrary to the recognized canons of the interpretation of Statutes. It follows that as between the judgment-debtor and the decree-holder only such applications to set aside an auction purchase made by the decree-holder as do not come within the purview of Rr 89, 90 and 91 are within the scope of S. 47, C. P .Code. A.I.R. 1937 All. 407=1937 A.L.J. 288=1937 A.W.R. 262=1937 A.L. 724=170 Ind. Cas. 559.

——S. 47—Execution sale—Omission to serve notice on guardian under O. 21, R. 22—Absence of formal attachment—Validity of sale.

The absence of a formal notice under O. 21, R. 22, to the natural guardian of the minor judgment-debtor cannot vitiate an execution sale.

Even if there were no attachment at all, a sale would not be set aside merely for want of it. The fact that an attachment was effected before a guardian was appointed for the minor judgment-debtor cannot therefore vitiate the sale. A.I.R. 1936 Mad. 99=1935 M.W.N. 1303=42 L.W. 943=69 M.L.J. 862=159 Ind. Cas. 762.

——S. 47—Execution sale in contravention of High Court Rules and Orders—Validity.

Rule 11 in Ch. 12-M, Vol. I of the Lahore High Court Rules and Orders, does not possess the force of Law and a sale held in contravention of it is not invalid. A.I.R. 1935 Lah. 992.

——S. 47—Oudh Rent Act (22 of 1886), S. 151—Immoveable property of judgment-debtor, when can be sold.

Under S. 151, Oudh Rent Act, the executing Court cannot sell the immovable property of the judgment-debtor unless it is proved to its satisfaction that the decretal amount cannot be realised from the movable property of the judgment-debtor. A.I.R. 1934 Oudh 59=1934 O.L.R. 275=9 Luck. 378=11 O.W.N. 109=147 Ind. Cas. 1088=18 R.D. 70.

——S. 47—Proceedings for setting aside sale are not proceedings in execution. A.I.R. 1934 Lah. 508=35 P.L.R. 375=15 Lah. 801=149 Ind. Cas. 445.

——S. 47 and O. 21, R. 90—Objection that property could not be sold before mortgaged property.

An objection by a judgment-debtor as to a sale on the ground that the decree was in reality a mortgage decree and therefore, the property of the judgment-debtors other than that mortgaged could only be proceeded against after the mortgaged property had been put to sale and the proceeds had proved insufficient to meet the decree, falls within S. 47. Such an objection is governed by Art. 181 and not Art. 166 of the Limitation Act and a second appeal lies from an order passed thereon. A.I.R. 1933 Lah. 570=145 Ind. Cas. 113.

——Ss. 47, 65, 151 and O. 21, Rr. 89, 92 and 94—Reversal of decree on appeal after sale but before confirmation—Power to refuse confirmation, or to set aside sale—Subsistence of decree—Effect of omission of proviso to S. 65—Order confirming sale—Second appeal.

Where pending an appeal against a decree, certain properties of the judgment-debtors were brought to sale in execution and purchased by a stranger but within thirty days of the sale the decree was reversed and the judgment-debtors filed a petition in the executing Court under Ss. 47, 151 and O. 21, R. 89 of the C. P. Code, in which they asked either that the Court should not confirm the auction sale held in execution of the decree against them or that the Court should set

aside the sale under O. 21, R. 89, C. P. Code, for which they deposited 5 per cent. of the purchase money:

Held, (i) that in view of the deletion of the proviso to S. 65, it is not now necessary for the confirmation of an execution sale that the decree should be subsisting at the time of confirmation;

(ii) that under O. 21, R. 92, where no application is made under Rr. 89, 90 or 92, to set aside a valid sale, the Court is bound to confirm the sale and the Court cannot therefore refuse to confirm a sale merely because the decree had been reversed on appeal after the date of the sale but before its confirmation;

(iii) that the sale could not be set aside under O. 21, R. 89 since all the amounts required by the said rule had not been deposited but only the 5 per cent. had been deposited:

Held, further that if the petition to the lower Court was to be considered as one under O. 21, R. 89, then it was clear that there was only one appeal under the Code against the order that may be passed upon it and against the appellate order only a revision under S. 115, C. P. Code, can be filed and not a second appeal. But S. 47, C. P. Code was applicable to the case and a second appeal lay. A.I.R. 1933 Mad. 598=38 M.L.W. 138=65 M.L.J. 253=56 Mad. 808=1933 M.W. N. 1081=143 Ind. Cas. 854.

——S. 47 and O. 21, Rr. 22 and 90—Application to set aside sale, by legal representative of deceased judgment-debtor—Want of notice under O. 21, R. 22—Effect.

Just as a decree may be had proportionate to the shares of those of the legal representatives of a deceased party who have been impleaded, a sale too can be upheld to the extent of the shares of those duly served. Where, therefore, one of the legal representatives of a deceased judgment-debtor seeks to set aside a sale on the ground of his not having been served with the requisite notice under O. 21, R. 22 the sale does not become void in its entirety but is rendered invalid only to the extent of the applicant's share therein. A.I.R. 1933 Mad. 224=142 Ind. Cas. 658.

——S. 47—Execution sale—Decree against wrong person.

Decree for rent not against proper person who represented estate—Estate sold in execution of such decree—Sale is void. A.I.R. 1931 Cal. 673=53 C.L.J. 415=134 Ind. Cas. 305.

——S. 47 and O. 34, R. 14—Execution sale—Setting aside—Mortgagor in possession under rent note—Decree for arrears of rent—Sale of equity of redemption.

The plaintiff mortgaged his house with possession but continued in possession under a rent note passed at the same time. The rent having fallen into arrears defendant obtained a decree against the plaintiff for possession of the house and arrears of rent. In execution, the plaintiffs' equity of redemption was sold, the sale was confirmed and plaintiff brought a suit after one year to set aside the decree and the sale held in execution of it.

Held, (1) that the sale of the house was in contravention of O. 34, R. 14 C. P. Code (2) that the sale held in contravention of provisions of R. 14 was not void but voidable at the instance of the mortgagor (plaintiff) (3) that the proper remedy of the plaintiff to set aside the sale was an application under S. 47, C. P. Code and not a separate suit. 22 Bom. L. R. 670=58 Ind. Cas. 231.

——S. 47 and O. 21, R. 90—Execution sales—Setting aside — Non-transferability of holding—Limitation Act, Art. 166.

O. 21, R. 90, C. P. Code deals only with irregularity and fraud in publishing and conducting a sale and a sale by the Court of a property which is in fact not saleable on the ground of non-transferability, is not a material irregularity in conducting the sale. It is doubtful if an application to set aside a sale on the ground of non-transferability can be made under S. 47, C.P. Code. Even if such application comes within the scope of S. 47, it is an application to set aside a sale in execution of a decree and comes within Art. 166 of the Limitation Act. 57 Ind. Cas. 261=1 P.L.T. 742=(1920) P.H.C.C. 221.

——S. 47 and O. 21, Rr. 89 and 90—Execution sale—Application to set aside—Dismissal for default—Restoration.

No appeal lies from an order rejecting an application to set aside an order dismissing for default an application to set aside an auction sale. 19 C. W.N. 25 foll. 56 Ind. Cas. 981 (Cal.).

——S. 47, O. 21, R. 90—Execution Sale—Order setting aside—Fraud—Committed after publication of sale proclamation.

It is not open to a party to impeach a sale under S. 47 of the C. P. Code on the ground of fraud in conducting the sale. If a Court professing to act under S. 47 sets aside a sale on the objection of the judgment-debtor, the order setting aside the sale is not a decree. O. 43, R. 1 (i) provides for an appeal from an order setting aside a sale for irregularity or fraud in publishing or conducting a sale but no second appeal lies from such an order. 3 Pat.L.J. 645=48 Ind. Cas. 560.

——S. 47—Execution — Execution sale — Setting aside—Irregularity.

Where a judgment debtor impeaches the validity of a certain execution proceedings which preceded and led up to the sale of his property and thus seeks to have the sale set aside, his remedy is by application under S. 47, C. P. Code. 5 O.L. J. 551=48 Ind. Cas. 39.

——S. 47, O. 21 and R. 90—Execution sale—Setting aside—Limitation Act, Art. 166—Petition objecting to the whole execution procedure may fall under S. 47.

A petition objecting to the whole execution procedure in a case and not merely to the material irregularity in conducting or publishing the sale may be dealt with under S. 47 of the Code, and is not fettered by the 30 days rule for presentation under O. 21, R. 90 of the Code. 10 Bur.L.T. 249=37 Ind. Cas. 827.

——S. 47—Execution sale—Setting aside.

An executing Court is entitled to set aside a sale on an application under S. 47, C. P. Code and no separate suit will lie. 19 M.L.T. 357=3 L. W. 504=30 M.L.J. 611=34 Ind. Cas. 829.

——S. 47 and O. 21, R. 90—Execution—Sale setting aside—Minor.

In a case where the ward's right to set aside an execution sale was not allowed to be exercised, because he was unrepresented by a next friend, the Appellate Court will not allow the original application to be continued on account of the mere fact that the ward became a major pending appeal. 20 C.W.N. 852=34 Ind. Cas. 86.

——S. 47 and O. 21, R. 90—Execution sale—Setting aside.

Proceedings to set aside Court sales on the ground of irregularity, fraud, in publishing, etc. whether under O. 21, R. 90 or othewise involve questions relating to executions, etc., and, therefore, also fall under S. 47, C. P. Code. (1916) 1 M.W.N. 256=33 Ind. Cas. 692.

——S. 47 and O. 21, R. 92—Execution sale—Setting aside—Payment of purchase money to third party.

An order under O. 21, R. 93 setting aside a Court sale and paying the purchase money to a third party is not a question arising between the parties relating to the execution discharge or satisfaction of the decree. (1916) 1 M.W.N. 109 =3 L.W. 105=33 Ind. Cas. 235.

——S. 47—Execution sale—Setting aside—Fraud—Objection by persons having no interest at the date of decree.

Persons who had no interest in the mortgaged property at the time the decree was passed, the property not being ancestral, could not come in execution to set aside that decree. (5 C.L.J. 328 F.). 29 Ind. Cas. 402 (Cal.).

——S. 47—Execution sale—Setting aside—Minor—Court kept in ignorance of minority of judgment—Debtor's legal representatives—Fraud—Cancellation of sale—Limitation.

Where the plaintiff, a minor, was wrongly impleaded as a major in the execution proceedings and had no guardian **ad litem** for him and the Court auction-sale was brought about by fraud of the decree-holder and court auction purchaser,

Held, that the plaintiff was entitled to bring a suit to delare that the decree is not binding on her without regard to the provision of S. 47, C. P. Code, and that the sale was not binding on the plaintiff and did not require to be set aside. Since the sale was brought by fraud of the decree-holder and Court-auction-purchaser. Where in execution proceedings a minor was impleaded as a major without any guardian **ad litem** to represent him and the properties were sold for a low value owing to collusion between the decree-holder and the purchaser the minor can sue to declare the sale void within 3 years of majority. 38 Mad. 1076=28 M.L.J. 525=29 Ind. Cas. 314.

——S. 47—Execution sale—Setting aside—Proceedings against dead man—Purchaser of non-transferable holding—Right to appeal.

A purchaser of a non-transferable occupancy holding from whom rent was received after his purchase but whose name was not formally entered as tenant is competent under S. 47, C. P. Code to make an application to set aside the sale held in execution proceedings against a dead judgment-debtor. In such a case the burden is on the decree-holder to show that the person applying to have the sale set aside had knowledge of the sale before delivery of possession to a decree-holder purchaser. 18 C.W.N. 1266=20 C.L.J. 341= 27 Ind. Cas. 294.

——S. 47—Execution sale—Setting aside—Minor—Negligence of guardian.

An application for reversal of an execution sale was made on behalf of an infant, represented by his mother as his **guardian litem**. The petitioner after attaining majority made the present application on the allegation that the proceedings for reversal of the sale were not properly conducted.

Held, that as the petitioner sought relief on the ground of gross negligence of his guardian there was a fraud independent of and distinct from the fraud which was said to vitiate the execution sale. An application for review was not the proper remedy but the proper remedy was by way of a regular suit. This application should be treated as a plaint on terms under S. 47, sub-S. (2) C.P. Code. 16 Ind. Cas. 543 (Cal.).

——S. 47 and O. 21, R. 90—Execution sale—Fraud.

The question of decree holder's fraud in not certifying the payment and holding a sale after satisfaction did not fall under R. 90, O. 21 but fell under S. 47. 10 Ind. Cas. 625 (Cal.).

——Ss. 47 and 151—Execution sale—Mistake as to property sold—Rectification of error—Inherent power of Courts to rectify mistake.

The question of what was sold at an execution sale is a question relating to the execution of the decree and no decision as to the validity of the decree or as to the validity of the sale held under the decree on the ground of fraud can possibly operate as **res judicata** in a question of mistake which occurred in the execution proceeding itself. Under S. 151 the Court has full jurisdiction to exercise its power to the relief of the judgment-debtor in correcting the mitake. 7 Ind. Cas. 91 (Cal.).

——S. 47 and O. 21, R. 66—Execution sale—Power of Court to inquire into valuation.

Executing Court can enquire into and satisfy itself, whether the value of the property as declared in the proclamation is proper, when the judgment-debtor objects to it. 15 C.W.N. 713 =6 Ind. Cas. 180.

——S. 47 and O. 21, R. 22—Execution sale—Finality of.

Where the first application for execution was barred by time but the judgment-debtor was absent and a second application was made and notice given to the judgment-debtor who was again absent

and the property was sold in execution and then the judgment-debtor put in an application to have the sale set aside, it was held that the order for sale was an order under S. 244, C. P. Code, 1882, and hence appealable and that it became final because the judgment-debtor did not appeal. 1 Ind. Cas. 284 (Cal.).

——Ss. 47, 146 and 151—Execution sale—Validity —Sale not confirmed for non-payment of landlord's fees under Bengal Tenancy Act, S. 26-E—Right of auction-purchaser — Purchaser of his right — Position of—Order for his substitution —Inherent power of Court.

Where on the failure of a mortgagee auction-purchaser to deposit the "landlord's fee" as required by the provisions of S. 26-E of the Bengal Tenancy Act, the Court directed that the purchase-money paid by him should be credited to the execution case which was thereupon dismissed on part satisfaction and the confirmation of sale was withheld.

Held, that although the landlord's fee had not been paid, the sale which had taken place was still subsisting as the forfeiture of the purchase money and resale of the property had not been directed under S. 26-E (3) of the Bengal Tenancy Act, and that the mortgagee auction-purchaser would be entitled automatically to an order for the confirmation of the sale as soon as he deposited the landlord's fee, for which no time limit had been prescribed by the Act. For this purpose it was not necessary for him to institute a fresh execution case. An application by him to the effect that the landlord's fee had been paid and that the sale might be confirmed, cannot be regarded as an application for execution at all and no notice need be issued to the judgment-debtors under the provisions of O. 21, R. 22, C.P. Code. 45 C.W.N. 493, foll.

If a creditor of the mortgagee auction-purchaser attaches the property before the confirmation of the sale and purchases the right, title and interest of the latter, he becomes the successor-in-interest of the mortgagee auction-purchaser and must be regarded as claiming under him within the meaning of S. 146, C. P. Code. It follows, therefore, that by reason of his purchase he steps into the shoes of the auction-purchaser as regards any rights which the latter had in the execution case to deposit the landlord's fees and to obtain confirmation of the sale. It is necessary that his name should be brought formally on the record in the execution case in order that he might be in a position to exercise the rights of the auction-purchaser which had devolved on him, and the Court has inherent power to do so even if O. 22, R. 10, C. P. Code, does not apply to execution proceedings. 44 M. 919, foll. I.L.R. (1947) 1 Cal. 22.

——S. 47—Execution sale.

Where sale was duly confirmed by order of the Court and became absolute under O. 21, R. 92, **held,** the only remedy was by suit, and an application under S. 47 was incompetent. 70 Ind. Cas. 569=1922 M.W.N. 121=15 M.L.W. 272=A.I.R. 1922 Mad. 53.

——S. 47—Execution sale.

When the Court, by its order of sale, directs certain property to be sold under the description given by the decree-holder, it must be taken that the Court accepts that description as correct. If no objection is taken to the description by the judgment-debtor and the property is sold under that description, it is not open to the judgment-debtor who had had an opportunity to appear before the Court and contest the description, to come in, after the sale, either by way of an application under S. 47 of the Code or by a suit, to contest the description. A.I.R. 1930 A. 865=1931 A.L.J. 49=125 Ind. Cas. 765.

——S. 47—Execution sale—Setting aside of.

Where the decree itself is not impeached a separate suit will not lie to set aside a sale even on the ground of fraud and even where the auction-purchaser who was not a party to the suit in which the decree was obtained is impleaded as a defendant together with the decree-holder in the subsequent suit, the matter being one for an application to the executing Court under S. 47 of the C. P. Code, 19 Cal. 683 and 26 Cal. 324, Foll. 61 Ind. Cas. 126=6 P.L.J. 16=2 P.L.T. 66=A.I.R. 1921 Pat. 54.

——S. 47 and O. 41, R. 5—Sale after stay of sale by superior Court but before communication.

An order for stay of sale becomes effective only on communication to the subordinate Court; and a sale held before the order was communicated is valid. (1909) 33 M. 74=6 M.L.T. 159=3 Ind. Cas. 82.

——S. 47—Execution proceedings, final order in.

An order dealing with the only point in dispute between the parties and not intended to be incorporated in any other order to be passed later, dealing as it were with the whole case, is a final order and, therefore, appealable. (1904) 28 M. 355=15 M.L.J. 247.

——S. 47, O. 21, Rr 35, 36 (Ss. 263, 264, Old Code)—Execution—Symbolical possession of immoveable property given in execution.

In execution of decrees to recover possession of immoveable property possession may be obtained in one of two ways either in the manner prescribed in S. 263. When symbolical possession is referred to as a possession recognised by law it must have reference to possession under S. 264 of the Code. On the facts of the case the suit was held to be barred by limitation. (1909) 11 Bom.L.R. 1344=4 Ind. Cas. 834.

——S. 47—Execution sale—Defective attachment —Effect of.

Even if there had been no attachment or a defective attachment, where a valid order for sale had been made during the life-time of the judgment-debtor, the effect would be the same as that of an attachment followed by an order for sale. (1906) 5 C.L.J. 80=11 C.W.N. 163.

——S. 47, O. 21, Rr. 66, 70, 90 (Ss. 244, 217, 311, 321, Old Code)—Finality of decision of executing Court as to property being non-ancestral.

After a decision by the Court executing a decree, with due notice to the judgment-debtor, that certain immoveable property was non-ancestral, the latter is not competent to re-open the question

and ask to have the sale set aside on the ground that the property was ancestral and the sale ought to have been held by the Collector. A question of jurisdiction cannot be raised in an application under S. 311 of the Code of Civil Procedure. (1905) 3 A.L.J. 140=28 A. 273=1906 A.W.N. 3.

12. Fraud.

See also C. P. CODE, S. 11—EXECUTION PROCEEDING—ESTOPPEL AND S. 38.

——S. 47—Execution of decree against minor—Attainment of majority during execution—His duty to notify fact to Court—Failure on part of decree-holder, if fraud.

Where a minor judgment-debtor attains a majority in the course of executing proceedings against him, it is for him to inform the Court that he had come of age, and the failure of the decree-holders to notify the fact to the Court does not constitute fraud on their part. A.I.R. 1938 Oudh 188=14 Luck. 213=1938 O.W.N. 758=177 Ind. Cas. 77.

——S. 47 (S. 244, Old Code)—Fraud—Benami purchase by decree holder for less than the price given in leave to bid. 5 C.W.N. 265.

——S. 47 (S. 244, Cl. (c), Old Code)—Fraud—Sale in violation of S. 99, T. P. Act.

Cl. (c) of S. 244 covers a case where it is sought to set aside a sale held in execution of a decree on the ground of fraud, or as having been held in violation of S. 99, T. P. Act. (1906) 3 A.L.J. 456=(1906) A.W.N. 206=28 A. 681.

13. Limitation.

——S. 47 (S. 244, Old Code)—Limitation—Application to set aside sale for fraud. **See** LIMITATION ACT, S. 178. 5 C.L.J. 328.

——S. 47, O. 21, R. 31 (Ss. 244, 258, Old Code)——Limitation Act (15 of 1877), Sch. 2, Art. 180—Decree, revival of—Step in aid of execution—Limitation—Payments in satisfaction of a decree made out of Court, if may be proved.

In order that any proceeding in execution may operate as a revivor there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it. Where a decree-holder applied for execution and on the judgment-debtor's objecting to the execution on the ground of the decree being time-barred, the objection was overruled but the decree holder did not proceed with the application any further:

Held, that this order operated as a revivor of the decree. An order in Council affirming a decree of the High Court includes the directions in such decree; an application to enforce any such direction is in point of law an application to execute the order to the whole of which Art. 180 of Sch. 2 of the Limitation Act is applicable. Payments made out of Court in satisfaction of a decree and not certified to the Court under S. 258, C.P. Code, cannot be proved under S. 244, C.P. Code. (1908) 14 C.W.N. 357=11 C.L.J. 91=4 Ind. Cas. 402.

——S. 47—Second application held good and no question of limitation arose.

A money-decree was first put into execution and subsequently the parties entered into a compromise under which the judgment-debtors agreed to pay certain amount in respect of the decretal amount, and certain amount in connection with a Small Cause Court decree which had been obtained by the decree-holders against the judgment-debtors. According to the compromise out of the total sum payable, certain amount was remitted by the decree-holder and it was arranged that the balance would be paid in three yearly instalments. The judgment-debtors further agreed that the existing attachment of the property would continue. As, however, the judgment-debtors failed to carry out the terms of the compromise, the decree-holder took out a second execution. This time also the parties again entered into a compromise. In a subsequent execution, the main objection of the judgment-debtors was, that it was barred by limitation, on the ground that the second application for execution must be ignored, because it was not an application for executing the decree passed in the money suit but an application for executing a new arrangement based on a compromise which the executing Court had no jurisdiction to give effect to:

Held, that it was too late to urge that the second application for execution was one which the Court could not entertain. This objection should have been raised when the second application for execution was made. The judgment-debtors entered into a fresh compromise which could have been entered into only on the footing that the application for execution was a good application and was one which the Court had jurisdiction to entertain. The question, therefore, of jurisdiction must by implication be deemed to have been decided against the judgment-debtors. Hence, the second application for execution was a good application, and no question of limitation could arise. A.I.R. 1942 Pat. 68=22 P.L.T. 809=196 Ind. Cas. 621 =8 B.R. 63.

——S. 47—Voidable sale raising question under S. 47—Application to set aside—Art. 166, Limitation Act (9 of 1908).

If a voidable sale raises a question within S. 47 and the application to set aside is made under the C. P. Code, Art. 166, Limitation Act, will apply, notwithstanding the mention of S. 47. This will be so notwithstanding the fact that the auction-purchaser who is interested in the result of the application to set the sale aside may not have been a party to the suit. A.I.R. 1941 Pat. 566=199 In. Cas. 169=8 B.R. 507.

——S. 47—Execution pending for long time transferred to another Court—Property sold by such Court—Plea of limitation raised for first time before such Court in objection to sale, held could not be allowed.

An execution case which was pending for a long time before an executing Court was subsequently transferred for execution to another Court which executed it by sale of the judgment-debtor's property. The judgment-debtor in his objection to

the sale sought for the first time to raise the plea of limitation:

Held, that in the circumstances of the case, the plea could not be allowed to be raised before the transferee Court, though such Court was competent to entertain the same. A.I.R. 1940 Lah. 394 =191 Ind. Cas. 612=42 P.L.R. 404.

——S. 47—Implied adjudication of question of limitation—There was held no implied adjudication.

The answer to the question whether in a particular case there has been implied adjudication of the question of limitation depends upon the circumstances of such case. If the execution Court had passed any effective order for further execution to the detriment of the judgment-debtor, it might safely be inferred that there had been an implied adjudication of the question of limitation. Mere awarding costs of execution to the decree-holder and noting the balance due under the decree are mere formal matters and of a ministerial character and do not involve any adjudication of the question whether the application is capable of being proceeded with or not.

An application for execution was beyond limitation. Although the notice was served on the judgment-debtor he did not appear and the decree-holder having expressed a desire that his application should be consigned to record room, the Court passed an order to that effect awarding costs to the decree-holder and noting the balance due under the decree:

Held, that implied adjudication of question of limitation in favour of decree-holder could not be inferred from the order. A.I.R. 1940 Oudh 226 =1940 O.W.N. 15=1940 O.L.R. 25=1940 A. W.R. 42=185 Ind. Cas. 650.

——S. 47—Execution application not fructified but withdrawn and dismissed—Judgment-debtor is not barred by res judicata or estoppel from raising question of limitation later. A.I.R. 1939 Rang. 296=1940 Rang.L.R. 82=185 Ind. Cas. 70.

——S. 47—Objection by judgment-debtor that the application for fresh execution is not in time—Decree-holder presenting application in wrong Court under a bona fide mistake but executing with due diligence—Execution application held not time-barred. (1939) 69 C.L.J. 365.

——S. 47—Application under—Provision of Limitation Act—Applicable.

Article 166, Limitation Act, applies to application under O. 21, R. 90. There is no Article applicable to an application under S. 47, though such an application must be made while the Court is still seized of the proceedings. A.I.R. 1939 Lah. 113=I.L.R. (1939) Lah. 103=41 P.L.R. 436= 184 Ind. Cas. 393. [Overruled in A.I.R. 1942 Lah. 153=203 Ind. Cas. 166 (F.B.).]

——S. 47—Option under S. 47 (2), exercise of.

The option given by S. 47 (2) is expressly "subject to any objection as to limitation." Therefore if the execution application is barred by time but for the option given, it clearly cannot be exercised merely to bring the claim within limitation. The discretion given there must be exercised when the plaint or the application is filed, and after the procedure has once been determined (subject, of course, to the usual control of an Appellate or Revisional Court) it cannot thereafter be altered. A.I.R. 1938 Nag. 534=1938 N.L.J. 336=I.L. R. (1940) Nag. 334=180 Ind. Cas. 903.

——S. 47 (2), O. 21, R. 63—Execution application—Movable property attached—Property released on objection by third party and execution application dismissed—Decree-holder filing claim suit under O. 21, R. 63—Suit dismissed—Second execution application in respect of properties not covered by previous proceedings—Application held barred—Claim suit held not step-in-aid under Limitation Act (9 of 1908), Sch. 1, Art. 185 (5)—Plaint in claim suit held not an application under S. 47 (2).

On 26th April, 1929, a person obtained the decree in the Court of the First Subordinate Judge, Second Class, Nagpur. On 15th July, 1930, he filed an execution application and attached certain movable property. A third party objected and the property was released from attachment. The execution application was then dismissed on 23rd January, 1931, as wholly infructuous. The decree-holder thereupon filed a civil suit under O. 21, R. 63, for the usual declaration on 14th April, 1931. This suit was instituted in the Court of the Second Subordinate Judge, Second Class, and was dismissed on 28th June, 1932. A first and second appeal followed, both of which were also dismissed, the former on 14th March, 1933, and the latter on 26th June, 1935. Thereupon the decree-holder filed a second execution application, in respect of some other property not covered by the former proceedings, on 20th August, 1935, and the question was whether this application was within time:

Held, that the claim suit under O. 21, R. 63 could not be regarded as a step-in-aid of execution within the meaning of Art. 182 (5) of the Limitation Act, and the plaint in that suit was not an application referred to in Cl. (5). The two Courts now under consideration, i.e., the Court in which the decree was passed and the previous application for execution was filed and the Court in which the claim suit was instituted were separate and distinct Courts and therefore the claim suit was not instituted in the "proper Court" within the meaning of Art. 182 (5). Further the plaint could not be regarded as an application even under S. 47 (2), as the special provisions of O. 21, R. 63, prevailed over the provisions of S. 47 (2). The property in the claim suit was not the property involved in the second execution application and so the second execution application could not be regarded as a revival of the first from any point of view. The application in question, therefore, was not within time. A.I.R. 1938 Nag. 534=1938 N.L.J. 336=I.L. R. (1940) Nag. 334=180 Ind. Cas. 903.

——S. 47—Execution—Limitation, calculation of—Exclusion of time pending insolvency proceedings —Presidency Towns Insolvency Act (3 of 1908), S. 17.

Where a judgment-debtor is adjudged an insolvent and the adjudication is subsequently cancelled, the time during which the insolvency proceedings were pending under the Presidency Towns

Insolvency Act cannot be deducted in computing the period of limitation for an application to execute the decree. 1937 M.W.N. 1182.

——S. 47—Limitation, plea of, by judgment-debtor, when can be entertained during pendency of execution application.

There is nothing in law to prevent the Court from entertaining the judgment-debtor's plea of limitation at any time during the pendency of the application for execution just as in a pending suit in which ex parte proceedings are taken against a defendant. A.I.R. 1936 All. 21=1935 A.L.J. 1189=1936 A.L.R. 118=58 All. 313=1935 A.W.R. 1371=160 Ind. Cas. 394.

——S. 47—Parties cannot extend by their agreement, the period of limitation laid down as applicable to execution matters. 164 Ind. Cas. 416=39 C.W.N. 1036.

——S. 47—Step in-aid of execution—Limitation.

Where a decree is obtained against a minor as represented by his mother as guardian **ad litem,** but subsequently she dies and in ignorance of her death, the decree-holder applies for execution against the minor judgment debtor as represented by his mother, such an application is a step-in-aid of execution and saves limitation. A.I.R. 1936 Nag. 77.

——S. 47—Sale set aside on application of judgment-debtor—On appeal confirmed—Subsequent application by others to set aside, sale—Limitation, when begins to run.

On an application by judgment-debtor, an execution sale was set aside after a month from the date of sale. Appeal was dismissed but the sale was confirmed on revision by the High Court. Subsequently, another judgment debtor and other persons having an interest in the property and who had knowledge of the sale applied to set aside sale:

Held, that the right of the petitioners of making an application for setting aside the sale became barred before the sale was set aside by the Court and this right could not be revived on account of a subsequent wrong order of the Court setting aside the sale. Consequently, under Art. 166, Limitation Act, the starting point of limitation for setting aside a sale was not the confirmation of sale but the date of sale. A.I.R. 1936 Pat. 558=167 Ind. Cas. 225=3 B.R. 280.

——S. 47—Transferee Court, if can decide whether application to it is barred by limitation.

An executing Court to which a decree is transferred for execution has jurisdiction to decide whether the application for execution subsequently made to it is barred by limitation, or not. In considering the question of limitation, the execution Court cannot look further back than the order transferring the decree of the Court which passed the decree; for an order transferring a decee is a step in-aid of execution, and consequently, provides a starting point for a fresh period of limitation. A.I.R. 1936 Rang. 271=14 Rang. 550=163 Ind. Cas. 403.

——S. 47 — Decree-holder obtaining personal decree against mortgago.—First execution application on March 7, 1916—Objection allowed—Execution stayed — Decree holder instituting suit for declaration with success—Fresh application treated application for revival.

Where, as a result of a suit under O. 21, R. 63, proceedings in execution are obstructed, an application for execution made after the termination of th suit must be deemed to be an application to revive the original proceedings and not a fresh application for execution and, therefore, no question of limitation arises in such cases. A.I.R. 1935 Lah. 911=37 P.L.R. 651=157 Ind. Cas. 679.

——S. 47—Cross-decrees—Agreement that party entitled to larger amount should execute for excess amount—O. 21, R. 18, if applies—Excess amount, when can be determined—Limitation for execution of excess amount—When begins to run.

Where two parties who had filed cross-suits entered into an agreement to the effect that after the decrees in their respective suits were passed, the party who was found entitled to the larger amount should pursue the execution of the decree in his favour to the extent of the excess amount:

Held, that O. 21, R. 18, C. P. Code would not apply and the set-off therefore would not be a set-off as contemplated by the provisions of the C. P. Code, or as ordered by the Court, but only as agreed to by the parties to the proceedings, when the two suits were proceeding:

Held, also that what is to be looked to is the agreement between the parties, and not the events that have happend, and what could have been contemplated between the parties, and that if the parties contemplated that it was only the excess amount that had to be recovered from one party by the other, it was only the excess amount as finally decided by the Court as due to the party that was the determining amount for the purpose of execution, and the determining date for that purpose would therefore be the date of the Appellate Court's decree, viz., the decree in appeal. And hence the starting point for limitation was the decree of the Appellate Court. A.I.R. 1934 Bom. 307=36 Bom.L.R. 643=59 Bom. 1=153 Ind. Cas. 273.

——S. 47—Decree against four persons for separate amounts with costs—Decree, if one—Application to keep decree alive—Limitation.

A decree against four persons provided that each was to pay his share of the amount decreed including costs:

Held, that the fact that the decree was written on one sheet of paper did not make any difference, and the decree was not one but four different decrees. In order to keep the decree within time against each judgment-debtor, it must be kept alive against him. A.I.R. 1934 Lah. 637=35 P.L.R. 692=153 Ind. Cas. 238.

——S. 47—Appeal — Limitation for execution—Whether begins to run from date of original decree.

Where there was an appeal from the decree in the suit in which the respondent was awarde

costs, but the question as to her costs was not the subject matter of the appeal, the period of limitation for execution starts from the date of appellate decree and not from the date of the original decree. A.I.R. 1934 Lah. 318=35 P.L.R. 194 =15 Lah. 267=154 Ind. Cas. 516.

——S. 47—Purchaser of share of judgment-debtor—Application to bring on record the purchaser—Plea of limitation not taken—Plea, if can be taken against application for execution at the time of execution.

Where the share owned by the judgment-debtors is purchased by a person and he is impleaded as their representative, it is not incumbent on him to take the plea of limitation at that stage as the only question for determination at that time is whether his name should be brought on record or not. It is only after his name is brought on record that he can raise the plea that the decree, having been passed more than three years prior to the date of the application for execution, was barred by limitation. Consequently, it is open to him to take the plea that the application for execution was barred although he did not take the objection when he was brought on record. A.I.R. 1934 Oudh 289=11 O.W.N. 814=1934 O.L.R. 661= 150 Ind. Cas. 947.

——S. 47 and O. 21, R. 95—Suit by auction-purchaser within twelve years, maintainability of.

The decree holder auction-purchaser can bring a suit for recovery of possession of the property purchased at the auction sale within twelve years of the sale as provided in Art. 138, Limitation Act. Such a suit is not barred by S. 47. A.I.R. 1932 Pat. 80=136 Ind. Cas. 49.

——S. 47—Limitation.

Article 165, Limitation Act, does not govern the cases of those applications which are filed by the parties to the suit as objections to the execution proceedings under S. 47, C. P .Code. The only article applicable in those cases is Art. 181. 38 All. 339; 42 Mad. 753 (F.B.); A.I.R. 1922 Bom. 271 and 1 L.L.J. 230, Foll.; 5 O.W.N. 1053=115 Ind. Cas. 444=4 Luck. 209=A.I.R. 1929 Oudh 76.

——S. 47—Limitation for application under.

An application under S. 47 falls within Art. 181 Limitation Act and not under Art. 166 of the Act although in the result the applicant has asked for setting aside the sale. 116 Ind. Cas. 634=A.I.R. 1928 Cal. 865.

——S. 47—Limitation for application under.

The article applicable for applications under S. 47 of the Code is Art. 181 which gives three years from the date when the right to apply accrues. 54 Cal. 419=103 Ind. Cas. 233=A.I.R. 1927 Cal. 614.

——S. 47—Limitation for application under.

Application under S. 47 must governed by the residuary article. 97 Ind. Cas. 697=A.I.R. 1927 Cal. 57.

——S. 47—Limitation — Applicabilty — Decree-holder-auction-purchaser.

An order on an application under O. 21, R. 95 by an auction-purchaser who is also decree-holder is an order under S. 47, C. P. Code. The application is governed by the limitation laid down in Art. 182 and not by Art. 180. 103 Ind. Cas. 335 =A.I.R. 1927 Nag. 294.

——S. 47—Void rule—Limitation to set aside.

Where an execution sale is void as against a party and he applies for relief under S. 47, C. P. Code or otherwise, the article applicable is Art. 181 and not Art. 166. 80 Ind. Cas. 92=47 Mad. 288=19 M.L.W. 179=34 M.L.T. 37=1924 M.W.N. 182=A.I.R. 1924 Mad. 431=46 M.L.J. 104 (F.B.).

——S. 47—Application under—Limitation—Law applicable.

Art. 166 is applicable to petitions under S. 47. 43 M.L.J. 184=16 M.L.W. 178=1922 M.W.N. 514=31 M.L.T. 135=70 Ind. Cas. 743=A.I.R. 1922 Mad. 417.

14. Minor.

See C. P. CODE, S. 47—PARTIES AND REPRESENTATIVES.

15. Parties and representatives.

See also C. P. CODE, S. 47—APPEAL.

Assignee of decree.

Assignee of decree.
Auction-purchaser.
Benamidar.
Benefit under decree.
Decree-holder.
Different capacity.
Exonerated party.
Hindu family.
Hindu widow.
Judgment-debtor.
Legal representative.
Lessee.
Meaning of.
Minor.
Mortgagee.
Mortgage suit.
Necessary parties.
Parties unnecessarily impleaded.
Partnership.
Personal property.
Pro forma party.
Purchaser.
Receiver.
Remainderman.
Scope.
Subsequent mortgagee.
Surety.
Third party.
Transferee.
Wakf.

——15. Parties and representatives — Assignee of decree.

——S. 47 and O. 21, R. 66—Parties—Meaning of.

"Parties" in the expression "between parties" to the suit mean parties opposed to one another and not necessary plaintiff and defendant. 13 M.L.T. 347=24 M.L.J. 477=(1913) M.W.N. 382= 19 Ind. Cas. 448.

——S. 47—Execution proceeding—Parties Receiver in possession of property—If necessary party. I.L.R. (1946) 1 Cal. 45=80 C.L.J. 198.

——S. 47—Execution proceeding—Person made party to—If continues to be party to subsequent execution proceedings. I.L.R. (1946) 1 Cal. 45 =80 C.L.J. 198.

——S. 47 (S. 244, Old Code)—Parties—Auction-purchaser—Question relating to execution.

Though an auction purchaser at a Court sale in execution is not a party to the suit wherein the decree was passed, and though he is not a representative of either the decree-holder or the judgment-debtor for the purposes of S. 244, C. P. Code, yet if the question raised by the judgment-debtor as to the legality of the Court sale is virtually one between the parties to the suit, i.e., between the decree-holder and the judgment-debtor, and if in the decision and result of that question the purchaser is interested, S. 244 is bar to the judgment-debtor attacking the sale in a suit. (1909) 12 Bom.L.R. 539=34 Bom.L.R. 546=7 Ind. Cas. 457.

——S. 47, O. 21, R. 57 (Ss. 244, 278, Old Code) —Parties—Decree against Karnavan — Objection to execution by members of Tarwad.

A decree against a karnavan in his representative capacity binds all the members of his tarwad; and consequently the other members are all constructively parties to the suit, notwithstanding that some of the members claim the attached property adversely to others. An objection by them to the attachment of property falls under S. 244 and not under S. 278. (1905) 17 M.L.J. 377=30 M. 215=2 M.L.T. 31.

——S. 47, [S. 244, Old Code, Cl. (c)]—Parties—Official Assignee — Representative of judgment-debtor.

Where the objection of the Official Assignee was that the property attached, though belonging to the judgment-debtor, was not liable to be sold in execution of the decree by reason of a vesting order passed in the insolvency proceedings.

Semble:—That the Official Assignee was a representative of the judgment-debtor within the meaning of S. 244, C. P. Code. (1899) 5 C.W. N. 761=28 C. 419. See contra. 30 A. 486.

——S. 47, [S. 244, Old Code, Cl. (c)]—Parties—Representative—Auction sale—Purchaser.

The purchaser pending execution of the judgment-debtor's interest in properties involved in the execution proceedings is the debtor's representative in such proceedings. 24 C. 62, foll. (1901) 29 C. 813.

——S. 47, [S. 244, Old Code, Cl. (c)]—Parties—Representative, meaning of—Purchaser of judgment-debtor's interest before decree.

A purchaser of the judgment-debtor's interest before decree is not his representative within S. 244 of the C. P. Code. 12 C. 458 foll. (1900) 6 C.W.N. 127.

——S. 47 [244, Old Code, Cl. (c)]—Parties Surety of judgment-debtor filing suit—Suit for exemption from liability, maintainability of.

A surety of the judgment-debtor is to be deemed as a party to the suit. A suit by him for a declaration that he is not liable to the decree is barred by S. 244, C. P. Code. (1902) 14 M.L.J. 430= 28 M. 117.

——S. 47 (S. 244, Old Code)—"Parties or their representatives"—Appeal.

An attaching creditor of a decree-holder is the representative of the decree-holder and appeal lies in an order in a question arising between him and the judgment-debtor. (1904) 29 M. 318.

——S. 47 and O. 41, R. 16 (as amended by Lahore High Court)—Dispute between decree-holder and assignee—Separate suit relating to validity of assignment.

A dispute between an assignee and the decree-holder is not a dispute between the parties within the meaning of S. 47, and a separate suit relating to the validity of the assignment is competent. The point is made further clear by the amendment introduced by the Lahore High Court in R. 16 of O. 21. The effect of this amendment is that the judgment-debtor is no longer to be considered a necessary party to the application by the assignee necessary party to the application by the assignee of a decree for the judicial recognition of his assignment. A.I.R. 1937 Lah. 465=I.L.R. (1937) Lah. 162=39 P.L.R. 904=171 Ind. Cas. 91.

——S. 47 (3)—Parties and representatives—Attachment—Objection by person whose name had been removed from the array of defendants—Suit for declaration by decree-holder—Maintainability of.

A Hindu son was impleaded as one of the defendants in a suit for the recovery of a sum of money but his name was removed from the array of defendants and a decree passed against the father but the decree stated that the son was exempted and was to bear his own costs. In execution as certain property belonged to him his objection was allowed. The decree-holder then brought a suit for a declaration that the property was in fact the property of the father. *Held*, that the son having been expressly excluded from the former suit was not a party to the suit, and, therefore not a party to the decree. The suit was therefore competent. 52 I.C. 187 (All.).

——S. 47 and O. 21, Rr. 2 and 53 (b)—Parties and representatives—Attachment of decree—Adjustment—Notice to judgment-debtor—Attaching creditor on record—Order—Appealability.

It is not competent to the holder of a decree which has been attached to apply to enter up satisfaction of the decree even though notice of the attachment was not given to the judgment-debtor, under sub-rule (6) of O. 21, R. 53. Where the attaching creditors have been made parties to the decree holder's application for entering up satisfaction the question that arises between them is one falling under S. 47 of the C.P. Code and an appeal lies from an order thereon. *Quaere*.—Where the Court of its own motion can make the attaching creditors parties to the decree-holder's application. 24 M.L.T. 495=1918 M.W.N. 874=9 L.W. 32=48 Ind. Cas. 109.

——S. 47—Parties and representatives—Attachment—Objection by judgment-debtor—Separate suit.

The objection of tow Hindu widows to the sale of

certain house without reserving rooms for their residence having been disallowed they filed a suit for declaration to establish their right. One of the widows was a party to the decree. The plaintiff who was a party to the decree was not competent to file the suit under S. 47. 134 P.L.R. 1913=19 Ind. Cas. 921.

——S. 47—Attachment—Effect of.

Attachment does not itself give the attaching decree-holder in strictness a title to the attached property but it is the basis of the decree-holder's right to assert his judgment-debtor's interest in the property attached. A.I.R. 1942 Cal. 92=74 C.L.J. 180=46 C.W.N. 245= I.L.R. (1942) 1 Cal. 169=200 Ind. Cas. 216.

——S. 47—Parties and representatives—Auction-purchaser—Purchaser is not representative of judgment-debtor.

Though a purchaser under an execution sale purchases the judgment-debtor's interests, this does not make him a representative of the judgment-debtors when a dispute arises between the purchaser and a decree-holder who had previously attached that very property in execution of his decree. A.I.R. 1944 Nag. 324=I.L.R. (1944) Nag. 739=1944 N.L.J. 385.

——S. 47—"Representative of judgment-debtor", meaning of.

An auction-purchaser is a representative of the judgment-debtor within the meaning of that word in S. 47. A.I.R. 1944 Sind 233=I.L.R. (1944) Kar. 284=218 Ind. Cas. 486.

——S. 47—Rent decree—Third party auction-purchaser purchasing holding with notice of liability for arrears of rent—Landlord, how can enforce his liability—Whether in execution or by separate suit.

A third party auction-purchaser who purchases a holding in execution of a decree for rent with notice that it is saddled with liability for arrears of rent for a period anterior to the date of the sale is liable for the rent of that period. The auction purchaser, having purchased the property subject to a rent charge is a representative of the judgment-debtor, and, therefore, the rights and liabilities of the parties must be worked out by execution proceedings and not by a separate suit. Therefore the only remedy the landlord has for such arrears is by way of execution. A.I.R. 1941 Pat. 612=22 P.L.T. 734 =197 Ind. Cas. 688=8 B.R. 263.

——S. 47—Application by stranger auction-purchaser at sale in execution of money decree, for possession as against judgment-debtor or his legal representative if covered by S. 47.

A stranger auction-purchaser at a sale held in execution of a money decree applying for possession against a purchaser at a private sale is the representative of the judgment-debtor. The contest not being a contest between the parties to the suit or their representatives, but a contest between persons claiming under one of the parties, the dispute cannot be settled in an application under S. 47. A stranger who purchases property at a court-auction held in execution of a money decree is not entitled to apply for possession as against the judgment-debtor or his representative in interest under S. 47. When the judgment-debtor or any one at his instigation resists or obsttucts the auction-purchaser, the latter must proceed in accordance with the provisions of O. 21, R. 97. A.I.R. 1941 Mad. 161=53 L.W. 27=I.L.R. (1941) Mad. 438=(1941) 1 M.L.J. 45=1941 M.W.N. 149=196 Ind. Cas. 204 (F.B.).

——S. 47—Maintenance decree by sale of specified property and creating charge upon it—Execution against auction-purchaser of such property.

The word "representative" in S. 47 is used in a wide sense and will include as a representative of the judgment-debtor the auction-purchaser to the extent of the property received by him.

A compromise decree provided for the realisation of future maintenance by sale of specified property and created a charge upon such property. The property was sold in execution of a decree.

Held, that the decree for future maintenance could be executed against the auction-purchaser as representative of the judgment-debtor to the extent of the property purchased by him subject to the charge. A.I.R. 1941 Pat. 95=21 P.L.T. 783=20 Pat. 86= 7 B.R. 545=192 Ind. Cas. 866.

——S. 47—In the case of questions arising under the provisions of S. 47, the auction-purchaser is not a necessary party. A.I.R. 1939 Lah. 256=41 P.L.R. 288.

——S. 47—Proceedings under S. 47 between parties to suit—Auction-purchaser, if necessary party.

In a proceeding arising under S. 47, C.P. Code, between the parties to the suit the auction-purchaser is not a necessary party. The non-joinder of the auction-purchaser in the appeal is not therefore fatal to it. A.I.R. 1939 Nag. 183=1939 N.L.J. 270=I.L.R. (1939) Nag. 548=187 Ind. Cas. 791.

——S. 47—Mortgage suit—Property ordered to be sold—Auction-purchaser purchasing property in execution of simple money decree after final decree in mortgage suit, whether representative of judgment-debtor.

An auction purchaser who has purchased property at an auction sale in execution of a simple money decree against a judgment-debtor whose property has been ordered to be sold in a mortgage suit after passing of final decree is a representative of the judgment-debtor within the meaning of S. 47, C.P. Code and can therefore, be impleaded as a party in execution proceeding of the mortgage decree. A.I.R. 1938 All. 651=1938 A.L.J. 1024=1938 A.W.R. 662=179 Ind. Cas. 1007.

——S. 47—Mortgage suit—Dispute between decree-holder-auction-purchaser and judgment-debtor as to what passed under sale—Dispute arising in application for possession—Auction-purchaser, if representative of judgment-debtor—Dispute between party and his own representative.

A question between the auction-purchaser who is also the decree-holder in a mortgage suit and the judgment-debtor in that suit, as to what passed under the auction sale and arising in an application by the auction-purchaser for possession of the property sold, is neither a question between the parties to the suit in which the decree was passed or their representatives nor relating to the execution, discharge or satisfaction of the decrees or to the stay of execution thereof.

When a decree-holder puts up a certain property for sale in order to realize his money, he is putting up the right, title and interest of his judgment-debtor to sale and is not trying to put up to sale his own interest in the property. It would follow that the purchaser acquires what was put up for sale and not what was not so put up. He is therefore, a purchaser of the right, title and interest of the judgment-debtor and must become a representative of the judgment-debtor succeeding to his estate. Ordinarily, therefore, the auction-purchaser would not be a representative of the decree-holder but in cases of mortgages or attachment, there are certain rights or priority possessed by the mortgagee or the at-

taching creditor which woud certainly pass to the auction-purchaser on the principle of subrogation, and not on the ground that such rights had actually been put up for sale and purchased by the auction-purchaser.

It is not sufficient to hold that the auction-purchaser is a representative either of the judgment-debtor or of decree-holder for the purpose of applying S. 47, C.P. Code. It is further necessary to see that the dispute is one raising between the parties or their representatives. The mere fact that the two persons who are at litigation are either parties or representatives of the parties would not in itself be sufficient. The question must in each case depend on the nature of the dispute which has arisen and it is only after having regard to the character of such dispute that the question can be answered whether it arises between the parties to the suit or not. A.I.R. 1937 All. 742=1937 A.L.J. 889=I.L.R. (1937) All. 921=1937 A.L.R. 923=1937 A.W.R. 937=172 Ind. Cas. 57 (F.B.).

——S. 47—Mortgaged property sold in execution of money-decree—Auction-purchaser, if can dispute payment of consideration.

Where a mortgaged property is sold in execution of a money-decree obtained against the owner, it is not open to the auction-purchaser to dispute the payment or non-payment of consideration, its adequacy or inadequacy, unless it is established by clear and cogent evidence that the mortgage was never intended or designed to operate as a real transaction or to effect a transfer of title. A.I.R. 1937 Cal. 203=171 Ind. Cas. 522.

——S. 47—Auction-purchaser.

Auction-purchaser is the representative of the judgment-debtor and not the successor-in-interest of the decree-holder. A.I.R. 1936 Lah. 18=38 P.L.R. 780.

——S. 47—Auction-purchasers who are decree-holders do not cease to be parties to a suit ; and even if they ask for relief as auction-purchasers, they are still decree-holders coming under the provisions of S. 47. A.I.R. 1936 Sind 11=30 Sind L.R. 290=161 Ind. Cas. 524.

——S. 47—Decree-holder auction-purchaser—Question between him and judgment-debtor.

A decree-holder does not cease to be a decree-holder merely by becoming an auction-purchaser, and the question which arises between the judgment-debtor on the one hand and the auction-purchaser who is also a decree-holder on the other is one which arises between parties to decree. A.I.R. 1935 Nag. 30=31 N.L.R. 217=156 Ind. Cas. 995.

——Ss. 47, 151, O. 21, R. 58—Purchase by a person—Attachment by third person in execution of another decree—Auction-purchaser, if representative of judgment-debtor under S. 47.

Where *A* in execution of a rent decree against *B* purchased some of his lands, the sale was confirmed and possession obtained by *A*, and *C* in execution of a decree against *B* attached a share of the land purchased by *A* who objected to the sale of the share on the ground that the judgment-debtor had no saleable interest as the land had been purchased by *A* :

Held, that O. 21, R. 58, did not apply as it refers to objection to attachment. The interest of the judgment-debtor was not affected by the decree and he was not, therefore, entitled to maintain his application under S. 47. Though a wide meaning is to be attached to the term representative in S. 47, the auction-purchaser cannot be regarded as a representative of the judgment-debtor unless his interest is affected by the decree. A.I.R. 1934 Cal. 827=38 C.W.N. 983=60 C.L.J. 7=61 Cal. 1068=153 Ind. Cas. 777 (2).

——S. 47—Stranger auction-purchaser.

An auction-purchaser who is a stranger is not a representative of the decree-holder or judgment-debtor. A.I.R. 1934 Lah. 105=148 Ind. Cas. 901.

——S. 47—Decree-holder becoming auction-purchaser—Possession, nature of.

Where the decree-holder is himself the auction-purchaser, it is *qua* auction-purchaser and not *qua* decree-holder that he gets possession of the property sold in auction. A.I.R. 1933 Mad. 153=143 Ind. Cas. 504.

——S. 47—Parties and their representatives—Auction-purchaser—Test as to representation.

The matter will fall within the purview of S. 47, even if it arises between the auction-purchaser and the judgment-debtor after sale in execution. The test in all such cases is whether the ground upon which the court sale is attacked as conferring no title upon the auction-purchaser affects the parties to the suit and could have, as between them, been raised and determined under S. 47 and whether the auction-purchaser, though not a party to that suit is a party interested in the result.

The fact that the judgment-debtor did not raise such an objection in execution and there was, consequently, no decision by the executing Court, cannot give him a right to raise the question in a separate suit. A.I.R. 1931 Nag. 27=130 Ind. Cas. 154.

——S. 47—Parties and representatives—Auction-purchaser—Appeal.

Adjudication between auction-purchaser and judgment-debtor comes under S. 47 and is appealable. 79 Ind. Cas. 636=20 N.L.R. 170=A.I.R. 1924 Nag. 328.

——S. 47—Parties and Representatives—Auction-purchaser—Mortgage decree.

Auction-purchaser in execution of a decree on a mortgage represents rights of mortgagor and mortgagee as they stand on the date of the mortgage free from any subsequent equities. 67 Ind. Cas. 29=44 All. 488=20 A.L.J. 337=A.I.R. 1922 All. 495.

——S. 47—Parties and their representatives—Auction-purchaser.

The condition in S. 47, C.P. Code, that the question should be one "arising between the parties" is satisfied by the question being one of a nature in which the parties to the suit are adversely interested, though the person actually raising it in any particular case against one party may not be the representative of the other party. A judgment-debtor who alleges that some properties were delivered wrongly to the stranger auction purchaser under a mortgage-decree should proceed under S. 47, C.P. Code and not by separate suit. 63 Ind. Cas. 200=14 M.L.W. 92=1921 M.W.N. 491=A.I.R. 1921 Mad. 420=41 M.L.J. 120.

——S. 47—Parties and representatives—Auction-purchaser.

A question arising on an application under R. 97, by an auction-purchaser other than the decree-holder, is not a question between the parties to the suit and so the question cannot be determined. under S. 47. 11 P.L.T. 331=A.I.R. 1930 Pat. 311=9 Pat. 775=126 Ind. Cas. 849.

——S. 47—Application to set aside sale—Auction-purchaser, party

In an application by decree-holder to set aside the sale, the fact that the auction-purchaser who is not party to the suit, is interested in the result, is no bar to the application of S. 47. 116 Ind. Cas. 634=A.I.R. 1928 Cal. 865.

——S. 47—Auction-purchaser—Suit against.

S. 47 is no bar to a suit instituted against an auction-purchaser, who was not a decree-holder, by one of the judgment-debtors for the recovery of the property not liable to be said in execution of the decree. 96 Ind. Cas. 771=A.I.R. 1926 All. 730.

——S. 47—Questions between judgment-debtor and auction-purchaser.

A question between the judgment-debtor and the auction-purchaser, who is not the decree-holder but a stranger, does not come within S. 47. 95 Ind. Cas. 46=A.I.R. 1926 All. 509.

——S. 47—Auction-sale—Decree subsequently amended.

If a wrong decree is passed by the Court and the sale takes place in execution of it and a third party purchases the property that sale cannot be set aside merely on the ground that that decree is subsequently amended. A stranger having purchased the property, it is no longer a matter relating to execution of a decree exclusively between the original parties to the suit. 48 All. 94=23 A.L.J. 946=6 L.R.A. Civ. 580=89 Ind. Cas. 1018=A.I.R. 1926 All. 35.

——S. 47—Auction-purchaser—Not a party to the suit.

A *bona fide* auction-purchaser for value is not a party to the suit within the meaning of S. 2 or S. 47 of the C.P. Code and an order refusing restitution against him is not a decree and therefore not appealable. 79 Ind. Cas. 57=A.I.R. 1925 Lah. 176.

——S. 47—Parties and representatives—Auction-purchaser—Representative character of.

The auction-purchaser is not the judgment-debtor's representative and cannot move under S. 47. 68 Ind. Cas. 429=A.I.R. 1923 Nag. 161. *See* Contra in A.I.R. 1922 Nag. 189=68 Ind. Cas. 693.

——S. 47—Auction-purchaser—Representative character of.

An auction-purchaser might be treated as a representative in one sense of the decree-holder and in another sense of the judgment-debtor ; a question as to dispute about the identity of the property sold between a person who has acquired the rights of the judgment-debtors and the judgment-debtors cannot be entertained under S. 47. It is open to the judgment-debtors to obtain any relief to which they might be entitled by way of regular suit. 74 Ind. Cas. 995=45 All. 96=A.I.R. 1923 All. 470.

——S. 47—Auction-purchaser—Suit against.

An auction-purchaser is a stranger to the proceedings and is not a representative of any of the parties to the suit, so that any questions which might arise between him and the parties to the suit or their representatives must be determined by a separate suit. But if the question raised by the judgment-debtor as to the legality of the Court-fees is virtually one between the parties to the suit, *i.e.*, between the decree-holder and the judgment-debtor, and if in the decision and result of that question the auction-purchaser was interested, the judgment-debtor ought not to be allowed to attack the sale in suit. 72 Ind. Cas. 256=25 Bom.L.R. 147=A.I.R. 1923 Bom. 214.

——S. 47—Auction-purchaser and Judgment-debtor.

For the purpose of an adjudication between an auction purchaser and a judgment-debtor the auction-purchaser should be regarded as a representative of the decree-holder. 20 N.L.R. 170=79 Ind. Cas. 636=A.I.R. 1924 Nag. 328.

——S. 47—Parties and their representatives—Auction-purchaser's representative character—Test to determine.

The term "representative" when taken with reference to the judgment-debtor does not mean only his legal representative, but it means his representative-interest and includes a purchaser of his interest who, so far as such interest is concerned, is bound by the decree.

The real test determining the question whether the auction-purchaser is to be regarded as the representative of the judgment-debtor or the decree-holder depends upon the nature of the question raised and who the contesting party is. If the question is between the judgment-debtor and the auction-purchaser and the interests of the two are conflicting, the auction-purchaser can in no sense be considered to be a representative of the judgment-debtor. 19 Cal. 683 (P.C.) Foll.=5 O.W.N. 791=3 Luck. 719=116 Ind. Cas. 49=A.I.R. 1928 Oudh. 442.

——S. 47—Auction-purchaser—Rights of.

A purchaser in execution of a decree by an inferior Court can bring to the notice of the superior Court the fact of his purchase as a representative of the judgment-debtor for stopping the sale in execution of a decree of a superior Court but he cannot object under O. 21, R. 58. 84 Ind. Cas. 265=20 M.L.W. 864=1924 M.W.N. 551=A.I.R. 1924 Mad. 889=47 M.L.J. 720.

——S. 47—Question between judgment-debtor and auction-purchaser—S. 47 does not apply.

Where the question for decision is one between auction-purchaser and the judgment-debtor, S. 47 does not apply, the auction-purchaser being the representative of the judgment-debtor. The questions which are meant to be covered by the section are those which arise between persons opposed in interest in the suit and not between a party to the suit and his own representative. 61 Ind. Cas. 961=13 M.L.W. 15=A.I.R. 1921 Mad. 81.

——S. 47—Auction-purchaser — Representative character.

Pending a suit on a mortgage the mortgaged properties were brought to sale in execution of a money decree against the mortgagor and were purchased by the fourth respondent. The petitioner purchased the property in execution of the mortgage decree and applied for possession but was resisted by the fourth respondent.

Held, that the fourth respondent was a person claiming under the mortgagor judgment-debtor and against whom proceedings can be taken under S. 146 of the C. P. Code and that the respondent was liable to be removed from possession under O. 21, R. 98 of the C.P. Code. 1920 M.W.N. 787=59 Ind. Cas. 894=12 L.W. 350.

——S. 47—Parties and Representatives—Auction-purchaser—Suit against.

Where of two judgment-debtors one only was proceeded against in execution proceedings as being the sole owner of the property sold in auction, a suit by the other judgment-debtor after the auction sale for recovery of the property from the auction-purchaser is maintainable. S. 47 is not strictly applicable in such a case. 91 Ind. Cas. 218=8 N.L.J. 184=A.I.R. 1926 Nag. 68.

——S. 47—Suit by Judgment-debtor against auction-purchaser.

Where the representatives of the judgment-debtors sued the auction-purchasers on the ground that owing to mistake in sale certificate, land in excess of that decree had passed to the auction-purchasers.

Held, that the latter's plea that the plaintiff's remedy was by application under S. 47, C.P. Code and not by suit was untenable. 31 All. 82 and 1923 All. 470, Foll. 78 Ind. Cas. 666=A.I.R. 1924 All. 856.

——S. 47—Judgment-debtor and auction-purchaser—Disputes between.

Proceedings based upon a complaint by the judgment-debtors that the auction-purchaser had taken possession of certain property not covered by the sale are not proceedings in execution within S. 47, inasmuch as auction-purchaser is not a representative of the decree-holder. Such question can be tried only by a suit. 64 Ind. Cas. 860=A.I.R. 1921 Nag. 59.

——S. 47—Parties and Representatives—Auction-purchaser—Suit by.

An auction purchaser, who has paid the full price can bring a suit to recover that money on being dispossessed of the property by a successful claimant, who had lodged an unsuccessful objection under O. 21, R. 58 and subsequently brought a suit and established his right to the property. 36 C.L.J. 205, Foll. 76 Ind. Cas. 605=4 Lah. 354=6 L.L.J. 67=A.I.R. 1924 Lah. 115.

——Ss. 47 and O. 21, Rr. 98 and 99—Parties and representatives—Court auction-purchaser in execution of money decree against mortgagor pending mortgage suit—Residence to delivery of possession.

Pending a suit on a mortgage the mortgaged properties were brought to sale in execution of a money decree against the mortgagor and were purchased by the fourth respondent. The petitioner purchased the property in execution of the mortgage decree,and applied for possession but was resisted by the 4th respondent. *Held*, that the 4th respondent was a person claiming under the mortgagor judgment-debtor and against whom proceedings can be taken under S. 146 of the C.P. Code and that the respondent was liable to be removed from possession under O. 21, R. 98 of the C.P. Code. 1920 M.W.N. 787=12 L.W. 350=59 Ind. Cas. 894.

——S. 47—Parties and representatives—Decree-holder auction-purchaser—Suit for recovery of property from judgment-debtor and another who claimed the property—Maintainability of.

A suit by decree-holder auction-purchaser for possession of the purchased property against the judgment-debtor and another who claimed the property is maintainable as the other person was not a party to the previous suit. The plaintiff's proper remedy is not under section 47 since plaintiff auction-purchaser fills a different capacity. 44 Bom. 977=22 Bom.L.R. 1101=59 Ind. Cas. 366.

——S. 47—Parties and representatives—Auction-purchaser.

Purchasers of mortgaged property under a Court sale are representatives of the judgment-debtor and can execute the decrees for rent obtained by the judgment-debtor against tenants of that property. 57 Ind. Cas. 874=A.I.R. 1921 Cal. 74=25 C.W.N. 863.

——S. 47—Parties and representatives—Auction-purchaser—Mortgage decree—Money decree—Application for delivery of possession—Question relating to execution.

A purchaser from a decree-holder purchaser under a money decree is the representative of the judgment-debtor within S. 47, C.P. Code, in an enquiry into a question relating to the execution of that money decree or any other decree affecting the purchased property and against the same judgment-debtor. Whether the purchaser in the one case or the auction-purchaser in the other is to be regarded as the representative of the judgment-debtor or the decree-holder depends upon the nature of the question raised and who the contesting party is. The representative mentioned in S. 47 is not to be identified with a legal representative and a purchaser at court auction represents some one, either the judgment-debtor or the decree-holder, though ordinarily he could be representative of the judgment-debtor. 43 Mad. 107=38 M.L.J. 32=26 M.L.T. 391=1919 M.W.N. 881=54 Ind. Cas. 209 (F.B.).

——S. 47—Parties and representatives—Auction-purchaser.

An auction-purchaser under a money decree is a representative of the judgment-debtor under S. 47, C.P. Code and he can apply under O. 21, R. 2, to record satisfaction of the decree. 9 L.W. 596=50 Ind. Cas. 931.

——Ss. 47, 115 and 151—Parties and representatives—Rival auction-purchasers.

A dispute as to possession between rival auction-purchasers of the same property in execution of different decrees does not fall within the scope of S. 47 of the C.P. Code. A Court has no inherent power under S. 151, C.P. Code to restrain the purchaser of a property in Court auction from taking possession of the property. 25 M.L.T. 153=9 L.W. 81=49 Ind. Cas. 629.

——S. 47—Parties and representatives—Auction-purchaser—Whether representative of the judgment-debtor.

An auction-purchaser who is not a party to the suit is not a representative of the judgment-debtor within S. 47 of the C.P. Code. 12 P.R. 1919=49 Ind. Cas. 140. *See* also 42 Bom. 411=46 Ind. Cas. 113=20 Bom.L.R. 495.

——S. 47—Parties and representatives—Auction-purchaser—Representative of the judgment-debtor.

An auction-purchaser is the representative of the judgment-debtor and an order passed against him is appealable under S. 47, C.P. Code. (1917) M.W.N. 861=42 Ind. Cas. 552.

——S. 47—Parties and representatives—Auction-purchaser does not represent decree-holder.

It is only under S. 47 of C.P. Code that an auction-purchaser is not considered as representing the decree-holder, and not under S. 115 of the Evidence Act. (1917) M.W.N. 88=37 Ind. Cas. 825.

——S. 47—Parties and representatives—Auction-purchaser—Execution sale—Setting aside.

S. 47, C.P. Code, applies to a case where the question raised concerns the auction-purchaser at an auction sale, as well as parties to the suit, *e.g.* an application to set aside the sale for irregularity. 41 Mad. 403=23 M.L.T. 198=27 C.L.J. 367=34 M.L.J. 463=4 Pat. L.W. 310=1918 M.W.N. 310=22 C.W.N. 553=16 A.L.J. 353=20 Bom.L.R. 580=8 L.W. 427=44 Ind. Cas. 855 (P.C.). [Affirming 27 M.L.J. 213=24 Ind. Cas. 187.]

——S. 47—Parties and representatives—Auction-purchaser—Judgment-debtor.

A purchaser in Court auction of the property of the judgment-debtor is not a representative of that judgment-debtor, in another suit against the same judgment-debtor when the latter decree is sought to be executed by attachment and sale of the same property and the claim of the auction-purchaser is dismissed. Therefore such a defeated claimant cannot come in appeal and second appeal under S. 47, C.P. Code. 3 L.W. 377=34 Ind. Cas. 759.

——S. 47—Parties and representatives—Auction-purchaser.

Purchaser of property not mentioned in and not affected by the decree is not a legal representative of the judgment-debtor and his claim petition is not a petition under S. 47. 3 L.W. 289=(1916) 1 M.W.N. 287=33 Ind. Cas. 84.

——S. 47—Parties and representatives—Auction-purchaser—Property wrongly sold in execution—Restoration.

An auction-purchaser is a representative neither of the

decree-holder nor at the judgment-debtor. S. 47, C.P. Code, does not contemplate an application by a judgment-debtor asking as against the auction-purchaser possession of the property erroneously sold to him by the executing Court. 2 O.L.J. 57=27 Ind. Cas. 570.

——S. 47—Parties and representatives—Auction-purchaser.

An auction-purchaser not a party to the suit cannot appeal against an order setting aside the sale on the application of a judgment-debtor under S. 173 of the B.T. Act. 21 Cal. 825 ; 24 Cal. 707, Not foll. 19 C.L.J. 81=20 Ind. Cas. 191.

——Ss. 47 and 144 (1)—Parties and representatives —Auction-purchaser—Restitution order for—Appeal.

An auction-purchaser is the representative of the decree-holder. An appeal lies against an order for restitution passed under S. 144 (1), C.P. Code. 8 M.L.J. 276 ; 10 All. 166 ; 23 Mad. 306, Foll. (1912) M.W.N 513=14 Ind. Cas. 836.

——S. 47—Parties and representatives—Auction-purchaser.

A purchaser from an auction-purchaser has not *locus standi* to come in under S. 244, since he is neither a party to the suit nor his representative. 6 M.L.T. 290=4 Ind. Cas. 1067.

——S. 47—Auction-purchaser—If a party.

A dispute between auction-purchaser and the judgment-debtor, even if the former be the decree-holder who has purchased property with the permission of the Court, is not a dispute between the judgment-debtor and decree-holder relating to satisfaction, discharge, etc., or the decree and therefore S. 47 has no application to such a dispute. 119 Ind. Cas. 226 (Lah.). *See also* 50 All. 686=A.I.R. 1928 All. 363.

——S. 47—Decree-holder and auction-purchaser.

A decree-holder who purchases, under the sale held in execution of his decree, property of the judgment-debtor is still, in subsequent proceedings between him and the judgment-debtor, a party to the suit in which the decree was passed. 3 Luck 182=5 O.W.N. 108=110 Ind. Cas. 83=A.I.R. 1928 Oudh. 199.

——S. 47—Parties and representatives—Auction-purchaser—Representative of Judgment-debtor—Mortgage decree and money decree.

Property *S.* was mortgaged by *A* to *B* in 1877 *B* obtained a decree absolute on 14th November, 1903, *P* obtained a money decree against *A* and purchased the property *S.* in execution of his decree at the auction sale and obtained possession in 1905, *B* purchased the property at the execution sale of the mortgage decree and obtained symbolical possession in 1909. *B* then brought a suit against *P* for possession. *Held*, that *P* represented *A* though not within S. 47 and was bound by the mortgage-decree. 14 O.C. 89=10 Ind. Cas. 722.

——S. 47—Parties and representatives—Auction-purchaser.

An application by a judgment-debtor to set aside a sale on the ground that he had, previous to the sale, deposited the amount due does not fall under S. 47 as it does not relate to a question arising between the parties to the suit. The auction-purchaser, if a stranger, is not a party or his representative. 4 Bur.L.T. 28=9 Ind. Cas. 472.

——S. 47—Parties and representatives—Auction-purchaser.

Auction-purchasers in execution of a mortgage decree are not representatives within the meaning of S. 47, C.P. Code, in subsequent proceedings in execution of other money decrees if they set up antagonistic titles based on their purchase. 15 C.W.N. 542=9 Ind. Cas. 194.

——S. 47—Parties and representatives—Auction-purchaser—If representative of decree-holder—Suit to set aside sale.

An auction-purchaser in execution of a mortgage decree is the representative of the judgment-debtor. An auction-purchaser in execution of a money decree is not even a representative of the judgment-debtor ; still less can he be the representative of the decree-holder. 34 Mad. 417=(1910) M.W.N. 662=9 M.L.T. 152=21 M.L.J. 928=8 Ind. Cas. 429. But see 43 Mad. 107=38 M.L.J. 32=1919 M.W.N. 884=26 M.L.T. 391=54 Ind. Cas. 209 (F.B.).

——S. 47—Parties and representatives—Auction-purchaser.

An auction-purchaser at an execution sale under a simple money decree is not a "representative" of the judgment-debtor within S. 244 (*c*), C.P. Code. 3 Bur. L.T. 5=5 L.B.R. 85=3 Ind. Cas. 713.

——S. 47 and O. 21, R. 90—Parties and representatives—Auction-purchaser not representative of decree-holder—Fraud by decree-holder alone or in combination with auction-purchaser.

An auction-purchaser is not a representative of the decree-holder, if therefore, he has committed any fraud on the judgment-debtor and the latter wishes to raise that point, he cannot do so under S. 47 (S. 244, Old Code). He must bring a regular suit unless the matter is one within O. 21, R. 90. The question of fraud on the part of the decree-holder alone or the decree-holder and auction-purchaser is triable under S. 244 of Code of 1882. 12 O.C. 175=3 Ind. Cas. 586.

——S. 47—Bar of suit—Parties and representatives —Auction-purchasers.

Where a mortgagee decree-holder purchaser bring a suit for possession of the properties against the judgment-debtor mortgagor or his representative it is not barred by S. 244, C.P. Code, 1882, because, the purchaser though a decree-holder cannot be considered a party or representative to, the suit in which the decree was passed and the suit is not a matter relating to the execution, discharge or satisfaction of a decree. 31 All. 82=5 M.L.T. 186=6 A.L.J. 71=1 Ind. Cas. 416 (F.B.).

Benamidar.

——S. 47—Right to execute.

A person who is not a party to a suit, if he can prove that the decree-holder is his *benamidar*, is entitled to execute a decree. I.L.R. (1938) 2 Cal. 692.

——S. 47—Parties and representatives—Decree in benamidar's name—Real owner's right to execute—Right of real owner's creditor to attach decree.

Where a decree has been passed in favour of a person it is not open to another person to apply for execution of that decree on the ground that he is the real owner of the decree and the nominal decree-holder is only a *benamidar* for him.

But the fact that the real owner could nor execute a decree passed in his *benamidar's* name does not mean that he has no property in the decree. Therefore, a person who has obtained a decree against the real owner of another decree is entitled to attach the latter decree even though it stands in the name of the *benamidar*, and a decree declaring his right attached may be made. A.I.R. 1935 Mad. 140=41 L.W. 34=1935 M.W.N. 111=68 M.L.J. 129=155 Ind. Cas. 284.

——S. 47—Parties and representatives—Benamidar —Purchaser.

Benamidar purchasing property for mortgagee decree-holder at a Court sale under the latter's decree is not the latter's representative. He can therefore, maintain

a separate suit for recovery of property and need not apply under S. 47, C.P. Code. 44 Bom. 352=22 Bom. L.R. 296=56 Ind. Cas. 349.

——S. 47—Parties and representatives—Benamidar of judgment-debtor.

S. 47 of the Code does not apply to the case of a benamidar of the judgment-debtor. 3 C.W.N. 184, Foll. 46 Ind. Cas. 748 (Cal.).

——S. 47—Parties and representatives—Benamidar.

Where a judgment-debtor raises the question that the person who seeks to execute the decree obtained by his benamidar alleging to be the true owner is not the true owner, the question should be decided under S. 47. 114 Ind. Cas. 495=A.I.R. 1928 Cal. 835.

——S. 47—Parties and Representatives—Benamidar.

A benamidar is neither a party nor the representative of a party under S. 47. 24 M.L.W. 634=98 Ind. Cas. 14=A.I.R. 1926 Mad. 1081=51 M.L.J. 391.

Benefit under decree.

——S. 47—Sole plaintiff—Suit not filed in representative capacity—Stranger cannot claim benefit.

Where the plaint did not show that it was filed in a representative capacity and there was no mention of the other claimant in it or in any other documentary evidence or in the decree:

Held, that the decree should be taken to enure for the benefit of the sole plaintiff. 8 O.W.N. 797=134 Ind. Cas. 475.

——Ss. 47 and 115—Parties and representatives—Bidder at execution sale.

A bidder at an execution sale who is affected by an illegal order is not a party to the suit or his representatives within S. 47 of the C.P. Code and cannot appeal against the order. Such an order is illegal and amounts to a wrong exercise of such jurisdiction and is therefore open to interference by the High Court in revision under S. 115 of the C.P. Code. 42 Mad. 776=37 M.L.J. 274=(1919) M.W.N. 784=51 Ind. Cas. 805.

——S. 47—Parties and representatives—Claim petition.

The combined effect of S. 47 and O. 21, R. 58 is that when an objection to attachment is made by a party to the suit or his representative, the objection should be treated as one falling under S. 47, whereas if the objection to attachment is made by a third party, his objection will be governed by the provisions of O. 21, R. 58. 10 P.L.T. 95=115 Ind. Cas. 695=8 Pat. 717=A.I.R. 1929 Pat. 141.

——S. 47—Parties and their representatives—Objections by.

Objections to attachment raised by a party to the suit in which the decree under execution was passed or by his representative fall within the scope of S. 47. One who has purchased the judgment-debtor's interest in his putni tenure prior to the decree for rent obtained by the landlord is bound by that decree and as such is representative of the judgment-debtor within the meaning of S. 47, C.P. Code. 54 Cal. 1064=107 Ind. Cas. 357=A.I.R. 1928 Cal. 94.

——S. 47 and O. 21, Rr. 58 and 61—Applicability.

Plaintiff sued *P.* on certain pro-note joining *H* as party. The suit against *H* was dismissed on the ground of misjoinder. In execution of his decree, the plaintiff attached certain properties: *H* and her husband applied for removal of attachment claiming the properties as their own. The application was heard and allowed under O. 21, Rr. 58 and 61 without objection by plaintiff. Instead of filing a suit under R. 65 plaintiff appealed to the High Court against the order.

Held, that as the proceedings were all under O. 21, Rr. 58 to 62 and the order on the joint application of *H* and her husband who was not a party to the suit was not and could not have been made in the execution proceedings, the plaintiff, decree-holder, who had acquiesced in the adoption of the procedure under O. 21, could not contend that R. 63 did not apply, but his case came within Explanation to S. 47. 101 Ind. Cas. 794=5 Rang. 110=A.I.R. 1927 Rang. 137.

——S. 47—Representatives of parties are bound as much as parties themselves.

Proceedings between the opposite party and the judgment-creditor as to whether the attachment is valid are proceedings under S. 47 and not under O. 21. S. 47 would be very much narrowed if it were laid down that people claiming under a purely colourable and fraudulent document are not to have their claim set aside or ignored when proceedings are taken in execution. 76 Ind. Cas. 316=A.I.R. 1923 Cal. 344.

——S. 47—Parties and representatives—Collusive purchaser from judgment-debtor.

A collusive purchaser from the judgment-debtor is not a representative of the judgment-debtor and cannot object to the execution of a mortgage decree. 42 Ind. Cas. 1 (Cal.).

——S. 47—Costs of Commissioner—Execution—Principle of.

An order passed by the Court in favour of a Commissioner for the payment of costs connected with the execution of a commission which were recoverable from the parties to the suit may be enforced by the Court under the inherent powers conferred upon it by S. 151 of the Code of Civil Procedure in such manner as may be thought proper. Any proceedings taken in enforcement of such an order is not a proceeding between the parties to a suit for the execution of a decree, within the meaning of S. 47. 74 Ind. Cas. 186=A.I.R. 1924 All. 122.

——S. 47—Parties and representatives—Court of Wards—Manager of.

Where under S. 6 (*e*) of the Court of Wards Act a proprietor is declared to be disqualified and the Court of Wards is in possession of his properties then under S. 47 of C.P. Code any objection taken by the manager of the Court of Wards in execution proceedings against the properties of the proprietor is an objection taken by the judgment-debtor through the general manager of the Court of Wards. 84 Ind. Cas. 620=4 Pat. 172=6 P.L.T. 400=1924 P.H.C.C. 310=A.I.R. 1925 Pat. 179.

——S. 47—Parties and representatives—Custodian of property attached.

A judgment-debtor in an execution proceedings must sue the person in charge of the attached property during the progress of the proceedings to recover the property or its price of damages, at the termination of the proceedings as the executing Court has no jurisdiction to initiate proceedings for his default to account for the property. 42 All. 394=18 A.L.J. 357=2 U.P.L.R. (All.) 145=58 Ind. Cas. 448.

——S. 47—Parties and representatives—Custodian of property.

A suit by a decree-holder against a supratdar on the ground that the plaintiff had suffered loss by the supratdar misappropriating the property is barred by Ss. 145 and 47. 113 Ind. Cas. 751=1929 A.L.J. 80=A.I.R. 1929 All. 266. *See also* A. I. R. 1928 Lah. 181=111 Ind. Cas. 592.

——S. 47—Property in the custody of parties, representatives.

The security given by a depository or custodian for the safe custody of the property entrusted to him by the orders of Court in execution can be realized by issue of a summary process in execution against him by the executing Court whether the sapurdar is or is not a party to the execution proceeding. 80 Ind. Cas. 49=20 N.L.R. 93=7 N.L.J. 130=A.I.R. 1924 Nag. 258.

——S. 47—Decree-holder in wrongful possession of property of judgment-debtor—Suit for damages—Decree-holder as.

Where movable property is attached before judgment and placed in the custody of the plaintiff sapurdar and a decree is passed in his favour but the property is released from attachment by Court's order but is not returned by the decree-holder, the judgment-debtors is entitled to sue the decree-holder for compensation for wrongful detention of his property provided the sapurdar is sought to be held liable as depository and not as decree-holder or as only party to the suit; such a claim is outside the scope of S. 47. 59 Ind. Cas. 477=A.I.R. 1921 Nag. 130.

Decree-holder.

——S. 47—Dispute between co-decree-holder's—S. 47, if applies.

For the applicability of S. 47, C.P. Code the contest must be between the opposing parties in the suit or their representatives-in-interest. When the dispute is merely between co-decree-holders in which the judgment-debtor has no concern S. 47 does not apply. A.I.R. 1943 Mad. 407=56 L.W. 169=(1943) 1 M.L.J. 271=1943 M.W.N. 228=209 Ind. Cas. 589.

——S. 47—Attachment of decree—Question as to whether decree was of husband or of wife.

In execution of a decree, the decree-holder sought to attach a decree which had been obtained in the name of the judgment-debtor and his wife. The judgment-debtor died before the execution proceedings:

Held, that as between the decree-holder and the judgment-debtor, the question of whether the decree was the decree of the wife or of the husband was a matter that can be gone into and determined under S. 47 between these parties. A.I.R. 1934 Pat. 188.

——S. 47—Parties and representatives—Decree-holder purchaser.

Though the decree-holder is auction-purchaser he is not bound to apply for recovery of possession but can maintain a separate suit. 50 Ind. Cas. 299 (1) (Cal.).

——S. 47—Parties and representatives—Decree-holder purchaser and judgment-debtor.

Where a decree-holder purchaser sues to recover possession on the basis of his purchase he does so, as the representative of the judgment-debtor. Questions that arise in the suit and his own representatives are not covered by S. 47 of the C.P. Code. 5 O.L.J. 551=48 Ind. Cas. 39.

——S. 47 and O. 21, R. 95—Parties and representatives—Decree-holder auction-purchaser—Suit for possession not maintainable—Remedy in execution.

When a decree-holder by his own action combines in position of decree-holder and auction-purchaser by purchasing at the auction sale with the permission of the Court, he does not lose is character of a party to the suit. Proceedings in execution are not terminated until he obtains possession of the property inasmuch as O. 21, R. 95 provides for delivery of possession being enforced in execution of the decree. S. 47 is a bar to a suit for possession by decree-holder auction-purchaser. 44 Ind. Cas. 563 (N.).

——S. 47 and O. 21, R. 95—Parties and representatives—Decree-holder purchaser—Suit for possession.

A decree-holder purchaser is in the same position as an auction-purchaser and can either apply under O. 21, R. 95 or bring a suit for possession. The remedy by suit and that by application under O. 21, R. 95 are concurrent and either the one or the other may be availed of by the aggrieved party. 8 P.R. 1918=44 Ind. Cas. 169.

——S. 47—Parties and representatives—Decree against legal representatives—Sale of portion of estate in execution—Suit to set aside.

Where a decree is passed against representatives of a deceased person as such and as being in possession of the estate of the deceased and property forming part of the estate is sold in execution of the decree the judgment-debtor cannot bring a suit to recover the property without getting the sale set aside. 40 P.L.R. 1918=30 P.W.R. 1918=43 Ind. Cas. 712.

——S. 47—Parties and representatives—Decree-holder and his transferee—Questions between.

S. 47 does not cover questions between parties and that party's representatives, *e.g.*, a decree-holder and his transferee. In such cases the order passed, though made under S. 47, is only an interlocutory order and not decree and is not appealable. The question of the representative character of a party can be determined only for a limited purpose under S. 47. 11 S.L.R. 74=43 Ind. Cas. 165.

——S. 47—Parties and representatives—Decree-holder purchaser—Proceedings for delivery of possession if within section.

A decree-holder does not cease to be a party to the suit within S. 47 by becoming a purchaser in a court auction salein execution of his decree 27 Cal. 34, 31 Cal. 737, 25 Mad. 429, Foll. Proceedings for delivery of possession to auction-purchaser fall within the scope of S. 47 of the Code. 35 Bom. 452=13 Bom.L.R. 661=11 Ind. Cas. 987.

——S. 47—Parties or representatives—Decree-holder purchaser.

If the auction-purchaser is the decree-holder himself, an order setting aside the sale under O. 21, Rr. 89, 92 is one within the scope of S. 47, and an appeal lies therefrom; and so no revision will be entertained, from such order 13 C.L.J. 467=10 Ind. Cas. 51.

——S. 47—Parties, and their representatives—Decree-holder and *pro forma* defendant.

Section 244, C.P. Code, (1882) does not apply to a question arising between the decree-holder and a third person, who was a formal party to the suit but against whom the decree is not to be executed. 23 All. 346, Foll. 32 All. 321=7 A.L.J. 264=5 Ind. Cas. 496.

——S. 47—Parties and representatives—Decree-holder.

Disputes between rival decree-holders are excluded from the operation of S. 47. 7 All. 681, Foll. 113 Ind. Cas. 776.

——S. 47—Parties and their representatives—Rival Decree-holders.

Where of two joint decree-holders, one purchases the property in execution sale but the sale is set aside on judgment-debtor depositing the decretal amount and 5 per cent as compensation the question whether the purchasing decree-holder alone is entitled to the 5 per cent. is not one between the parties to the suit, but it is a question between two decree-holders and hence the decision thereon is not appealable. 6 Pat. 386=103 Ind. Cas. 724=A.I.R. 1927 Pat. 288.

——S. 47—Parties and representatives—Rival decree-holder.

A judgment-debtor who is also a rival decree-holder can raise the objection that the property could not be sold by a Subordinate Judge and being a party to the suit under S. 244, C.P. Code, 1882, a judgment-debtor objector can prefer an appeal to the High Court. 1 Ind. Cas. 78 (All.).

——S. 47—Rival decree-holders—Dispute between assignee of decree-holder and one holding charge on decree—Order relating to, is not appealable.

A dispute between an assignee from decree-holder and a person having a charge over the decree is one between persons who occupy substantially the position of decree-holders and the order passed relating to such dispute is not appealable under S. 47, Civil P. Code. 24 M.L.W. 70=93 Ind. Cas. 649=A.I.R. 1926 Mad. 691.

——S. 47—Decree-holder—Recovery of costs.

Execution proceedings in which a decree-holder seeks to recover the costs to which he is entitled under the decree from the property of such of the judgment-debtors also who are not liable to pay those costs under the terms of the decree, must be treated to be proceedings under S. 47. 109 Ind. Cas. 203 =5 O.W.N. 242.

——S. 47—Decree-holder—Assignee from.

Quaere.—Whether an order on a question arising between an assignee from a decree-holder and a person attaching the decree prior to assignment is appealable. 1927 M.W.N. 680=105 Ind. Cas. 606= A.I.R. 1927 Mad. 1025.

——S. 47—Assignee decree-holder and purchaser of property—Disputes between.

A dispute as to the right to execute a decree between an assignee-decree-holder and a purchaser of property included in the decree cannot be properly decided in execution proceedings but a separate suit must be brought to declare the title and in such a case the assignee decree-holder is entitled to execute a decree. 98 Ind. Cas. 856=A.I.R. 1927 Mad. 240.

——S. 47—Auction-purchaser — Decree-holder auction-purchaser is a party to the suit.

Per *Curiam.*—A decree-holder is a party to the suit and does not cease to be so after the auction-sale. 53 Cal. 781=43 C.L.J. 345=30 C.W.N. 649=95 Ind. Cas. 494=A.I.R. 1926 Cal. 798 (F.B.).

——S. 47—Decree-holder — Auction-purchaser.

When a question which arises is really a question between the judgment-debtor and the decree-holder, and relates to execution of the decree, the mere fact that the decree-holder has become the auction-purchaser does not take the matter out of the purview of S. 47. 97 Ind. Cas. 697=A.I.R. 1927 Cal. 57.

——S. 47—Assignee of decree-holder—Assignee not on record—Rights of.

Where a decree-holder has, during the pendency of the suit in which he subsequently obtains a decree, assigned his rights to a third party who is not brought on the record, the assignee has no right to execute the decree that is subsequently passed. But the decree vests in the assignee in equity. Case-law referred. 97 Ind. Cas. 257=A.I.R. 1927 Sind 78.

——S. 47—Decree-holder — Auction-purchaser —Representative of.

The proceedings between a decree-holder who has purchased at Court-auction and the judgment-debtor are proceedings relating to the execution, discharge and satisfaction of the decree; and no distinction can be drawn in principle between such a case and one where the proceedings are between a party who derives title from a decree-holder who has purchased at Court auction and a judgment-debtor. 28 Mad. 87, Foll. 23 M.L.W. 744=96 Ind. Cas. 657=1926 M.W.N. 563=A.I.R. 1926 Mad. 857=51 M.L.J. 126.

——S. 47—Rival decree-holders—Disputes between.

Where money is deposited in Court by the judgment-debtor to satisfy the decree of *A* and *B*, another decree-holder of the same judgment-debtor applies to the Court to satisfy his decree out of the deposit and the Court orders, as between *A* and *B* alone, that the money should be paid to *B*, the order is not one under S. 47. 1926 M.W.N. 683=97 Ind. Cas. 1020=A.I.R. 1926 Mad. 1104=51 M.L.J. 436.

——S. 47—Co-decree-holders are not 'parties' within the meaning of S. 47.

The expression "parties" in S. 47 refers to parties ranged on opposite sides and not as co-decree-holders on one side only. 82 Ind. Cas. 734=21 N.L.R. 34 =A.I.R. 1925 Nag. 186.

——S. 47—Questions between decree-holders inter se do not fall under S. 47.

Disputes between co-decree-holders as to the right of one to execute a joint decree to the exclusion of the other are not questions arising between the parties to a suit. 70 Ind. Cas. 329=32 M.L.T. 118= A.I.R. 1924 Mad. 518.

——S. 47—Execution by assignee—Objection as to assignee's title can be raised.

When a decree is sought to be executed by the assignee thereof, it is competent to the Court to entertain, at the instance of the judgment-debtors and the original decree-holder, objections to the execution of the decree on the ground that the title to the decree has not passed to the assignee. 86 Ind. Cas. 564= 4 Pat. 120=A.I.R. 1925 Pat. 449.

——S. 47—Decree-holder purchasing property at auction-sale.

A decree-holder by purchasing property at Court-sale does not cease to be a party to the suit within the meaning of S. 47 and proceedings for the delivery of possession of property purchased by him are proceedings in execution and fall within the scope of S. 47. 78 Ind. Cas. 930=18 S.L.R. 34=A.I.R. 1925 Sind 171. *See also* A.I.R. 1924 Bom. 527= 26 Bom.L.R. 843=86 Ind. Cas. 503.

——S. 47—Decree-holder purchaser.

Where the decree-holder auction-purchaser in execution of a decree is obstructed in obtaining possession and the Court refuses to remove the obstruction, *held*, that the order is one under S. 47 of the Code. 12 L.W. 273=61 Ind. Cas. 349=1920 M. W.N. 562=39 M.L.J. 603.

——S. 47 (S. 244, Old Code)—Parties—Meaning of—Proper representation necessary — Minor not properly represented, no party.

Section 244, C. P. Code (14 of 1882) applies to questions arising between parties to the suit in which the decree was passed, *i.e.*, between parties who have been properly made parties in accordance with the provisions of the Code. A minor who was represented in the suit either by a married woman or a

person having an interest adverse to her cannot be said to have been a party to the suit and S. 244 is no bar to a suit by her for a declaration that the decrees in the prior suits and the sales in execution thereof are not legally binding on her. (1909) 11 Bom. L. R. 1225=10 C.L.J. 318=6 A.L.J. 822=13 C.W.N. 1182=19 M.L.J. 631=3 Ind. Cas. 864=6 M.L.T. 279=31 A. 572=36 I.A. 168 (P.C.); *also* 1905 A.W.N. 122.

——S. 47—Attaching decree-holder of a decree.

The holder of a decree sought to be executed by attachment of another decree is in law the representative of the holder of the attached decree. 35 C.L.J. 109=64 Ind. Cas. 780=A.I.R. 1921 Cal. 580.

——S. 47—Parties representative—Defaulting purchaser.

A defaulting purchaser at an execution sale is not a party to the suit or representative under S. 47 C. P. Code. 7 N.L.R. 134=12 Ind. Cas. 360.

Different capacity.

——S. 47 and O. 21, Rr. 58, 63—Executor litigating suit both as executor and trustee—Objection in execution to attachment as trustee comes within S. 47—Suit under O. 21, R. 63 is barred.

In the suit by the creditor against the testator, the executor under his will was brought on record as his legal representative. The executor claimed to be a legatee also in respect of asset *X* which was to be held by him in trust for charity. A decree was passed in favour of the creditor who, in execution of the same, attached item *X*. The executor objected to the attachment on the ground that the property was held by him in trust for charity:

Held, that the executor must be taken to have litigated in the suit in both capacities as executor as well as legatee and no differentiation could be made in his capacities in execution proceedings. The objection filed by him, therefore, came within S. 47 and not O. 21, R. 58. The suit by him under O. 21, R. 63 on the dismissal of his objection, therefore, was not maintainable. A.I.R. 1946 Mad. 209=(1945) 2 M.L.J. 525=1948 M.W.N. 437.

——S. 47—Party impleaded in one capacity—Objection by such party in another capacity—Objections should be raised and decided in separate suit—Applicability of doctrine to mortgage suits.

Where the impleading of party was in one capacity and questions (claims) are raised in execution objecting to the decree in another capacity, they are not matters falling under S. 47 and should be decided in a regular suit; in other words the capacity in which a party is impleaded has got to be looked to in applying S. 47, the only exception to this rule being where the question is raised by a person as legal representative when, though there is apparently a different capacity, the question should be settled in execution.

If a claim is made it will be in the nature of a claim petition by a stranger and there cannot be an appeal but only a regular suit should follow. A.I.R. 1936 Mad. 733=169 Ind. Cas. 456.

——S. 47—Parties and Representatives—Different capacities of judgment-debtor.

Decree against judgment-debtor in his individual capacity—Attachment of property in his possession—Judgment-debtor objecting on the ground that the property is an endowed one and he is in possession as manager—Objection lies under S. 47, not under O. 21, R. 58—No distinction should be made between the judgment-debtor in his personal capacity and the judgment-debtor in his representative capacity. 2 Luck. 145=4 O.W.N. 102=100 Ind. Cas. 464=A.I.R. 1927 Oudh 120.

——S. 47 and O. 21, R. 90—Parties and representatives—Execution against one judgment-debtor—Sale of holding—Application by other Judgment-debtor—B. T. Act, S. 174.

Where a landlord obtained a decree for rent against two tenants but executed against one of the tenants only and brought the entire holding to sale which was purchased by a stranger and the tenant who was not a party to the execution sale applied to set aside the sale. *Held*, as he was a party to the suit in which the decree is passed, he was competent to make the application. S. 174 of the B. T. Act and O. 21, R. 90 of the C. P. Code are of limited scope and application which raise questions as to the execution of decree, clearly beyond their scope ought to be dealt with under S. 47 of the Code. 52 Ind. Cas. 514 (Pat.).

——S. 47—Parties and representatives—Execution purchaser.

The purchaser in execution of a decree against an unregistered transferee of an occupancy holding being bound by a subsequent rent decree against the recorded tenant he is representative within S. 244 of the Old Code and can apply to set aside a sale in execution of the decree against the recorded tenant. 24 C. 62, Foll. 13 C.W.N. 98=4 Ind. Cas. 326.

——S. 47—Parties and representatives—Executor—Legatee's property attached in execution of personal decree against executor—S. 47 applies.

Legatee, in possession of property attached in execution of a personal decree against executor—Legatee not a party to the suit as such—Legatee's title should be decided in execution—Separate suit is not necessary. 5 Rang. 393=6 Bur.L.J. 107=104 Ind. Cas. 121=A.I.R. 1927 Rang. 273.

Exonerated defendant.

——Ss. 47 (3) 102 and 115—Exonerated defendant—Position of.

A defendant though exonerated from liability to the plaintiff under a Small Cause decree, continues to be a party to the suit until the actual removal of his name and when such a defendant claims property attached in execution against a co-defendant the order passed in an inquiry into his claim is a proceeding under S. 47, C. P. Code and therefore, appealable, though there is no further right of appeal to the High Court under S. 102, C. P. Code nor revision under S. 115, C. P. Code. (1917) M.W.N. 93=5 L.W. 701=37 Ind. Cas. 673. *See contra* 40 Mad. 964=32 M.L.J. 532=38 Ind. Cas. 297.

——S. 47—Parties—Exonerated defendant.

It is proper for the Court in execution proceedings to consider not only the decree but the judgment and

pleadings and see whether upon the facts of the case the parties, although the suit was dismissed against them really remained parties to the suit. Where certain defendants are held to be improperly impleaded and the suit is dismissed against them, they are not defendants against whom the suit has been dismissed as is provided for in S. 47. In such cases there is a distinction between the dismissal of a suit on its merits and a dismissal through misjoinder of parties. 1930 M.W.N. 779=32 L.W. 836=A.I.R. 1930 Mad. 817=127 Ind. Cas. 805=59 M.L.J. 932=54 Mad. 81 (F.B.).

——S. 47 (3) and O. 21, Rr. 58 to 63—Parties and representatives—Claim petition by an exonerated defendant—Dismissal—Remedies of claimant.

One of the exonerated defendants in a suit applied under O. 21, R. 58, that the properties attached were his separate properties. The petition was dismissed as too late. *Held,* that the defendant not having appealed against the order or filed a separate suit under O. 21, R. 63 C. P. Code, was precluded from claiming the properties, as his separate properties. S. 47 of the Code does not prescribe the procedure to be followed in the case of a claim preferred by a party to suit and regard must be had to the provisions of O. 21 which deals with "execution of decrees and orders." Rr. 58 to 63 of that order which are grouped under the sub-heading, investigation of "claims and objections" regulate the applications made on the ground that any property attached in execution is not liable to attachment. 37 M.L.J. 624=54 Ind. Cas. 536.

——S. 47—Explanation—Parties and representatives—Exonerated defendant.

A defendant whose name appears in the decree though he has been exonerated without a proper adjudication is a party with respect to whom a separate suit as contemplated in S. 47 does not lie. 23 Mad. 361 (F.B.), Foll. 23 M.L.T. 206=52 Ind. Cas. 671. *See also* 1928 M.W.N. 601=113 Ind. Cas. 547.

——S. 47—Explanation—Parties and representatives—Exonerated defendant—Procedure.

Where a party has been properly impleaded as a defendant in a suit but the plaintiff electing to abandon his case against him the suit is dismissed in consequence as against that defendant he is a party to the suit within the meaning of S. 47 expl., C. P. Code. The proper course in such a case is for the Court to exercise its discretion under O. 1, R. 10, Cl. (2) of the C. P. Code and to order the name of the defendant to be struck out instead of dismissing the suit as against him. 41 Mad. 418=22 M. L.T. 532=34 M.L.J. 17=1918 M.W.N. 23=7 L.W. 234=43 Ind. Cas. 935 (F.B.).

——S. 47—Parties and representatives—Exonerated defendant.

A party to a suit exonerated on the ground of misjoinder ceases to be a party after such examination for the purpose of S. 47 though the name has not been removed from the record. 40 Mad. 964=21 M.L.T. 121=5 L.W. 369=32 M.L.J. 532=38 Ind. Cas. 297.

[*See Contra.* (1917) M.W.N. 93=5 L.W. 701 =37 Ind. Cas. 673.]

——S. Parties and representatives—Exonerated defendants.

Persons party to suit, but no decree against them —Their rights infringed in execution proceedings—Even such persons must apply under S. 47. 123 Ind. Cas. 24=A.I.R. 1930 Mad. 12=1929 M.W. N. 811.

As to discharged defendants. *See* A.I.R. 1929 Nag. 179.

——S. 47—Exonerated defendant.

Defendant as against whom suit was dismissed wrongly bringing objection under O. 21, R. 58, in execution of decree passed in that suit—Objection recorded under R. 58 and after inquiries rejected—Objection being by party to suit must be treated as under S. 47 and as such is not revisable. A.I.R. 1921 Cal. 242; A.I.R. 1925 Pat. 482, Foll. 10 P. L.T. 95=115 Ind. Cas. 695=8 Pat. 717=A.I.R. 1929 Pat. 141.

See also 10 P.L.T. 563=115 Ind. Cas. 69=A. I.R. 1929 Pat. 472.

——S. 47—Person not sought to be bound by adjudication—S. 47 does not apply.

Where the name of a person originally joined as a party is subsequently struck off at some stage of the suit and for some reason he is to be regarded as a person whom the Court did not regard or wish to regard as a person sought to be bound by the adjudication in the action and by the decree eventually passed in the suit and thus he being a person who is not bound by the adjudication, not having been party to the proceeding at the time of the adjudication and, therefore, was not a party to the decree then, it cannot be said that any matter arising thereafter could be regarded as relating to the execution of the decree so far as he is concerned. 1927 M.W.N. 905=108 Ind. Cas. 406=28 M.L. W. 146=A.I.R. 1928 Mad. 276=54 M.L.J. 721.

——S. 47—Exonerated defendant—Practice.

A suit was brought against *A* and *B*. *A's* name was struck off by consent and plaintiff was asked to pay his half costs but his name was retained in the cause title in the decree finally drawn up.

Held, in spite of *A's* name being struck off he was a party within S. 47. Striking is the proper procedure to be employed in the case of misjoinder. In any other case the proper procedure is dismissal. 23 M.W.N. 533=1926 M.W.N. 409=94 Ind Cas. 123=A.I.R. 1926 Mad. 687=50 M.L.J. 387.

——S. 47—Parties and Representatives—Exonerated defendants.

The mere exoneration of a party does not have the result of making him cease to be a party. It may mean only that the plaintiff does not want a decree against him. The ground upon which a party is exonerated can never determine whether he continues to be a party to the suit or ceases to be a party, but it will depend entirely upon whether his name has been struck off from or retained on the record. 23 Mad. 361 (F.B.), Foll. 49 Mad. 494=1926 M.W. N. 251=94 Ind. Cas. 526=A.I.R. 1926 Mad. 484= 50 M.L.J. 205.

——S. 47—Exonerated defendant.

Party exonerated in course of suit—Party fraudulently deprived of property in execution proceedings —Remedy is in execution—Though a person who was once a party might be exonerated in the course of the

suit and though no decree is passed against him and no relief is given against him, yet if any question by virtue of the execution of that decree between the parties arises such a question must be determined according to the provisions of S. 47, that is to say, in execution no separate suit will lie for the purpose of agitating any question which arises by reason of the execution of the decree provided the party which raises the question was a party to the suit in which the decree was passed. 23 Mad. 361 (F.B.), Foll. 86 Ind. Cas. 947=A.I.R. 1925 Mad. 1133.

——S. 47—No adjudication against defendant—Section does not apply.

Defendant's name struck out at plaintiff's instance but claim not dismissed against him—Defendant is not a party under the section as there is no formal conclusive adjudication against him. 80 Ind. Cas. 470 =A.I.R. 1925 Nag. 118.

——S. 47—Objection to attachment by a party against whom suit was dismissed—Objection is one under S. 47 and not under O. 21, R. 58. 87 Ind. Cas. 743=6 P.L.T. 725=A.I.R. 1925 Pat. 482.

——S. 47—Exoneration in appeal—Section still applies.

A suit against several defendants having been dismissed, the plaintiff preferred an appeal against some of the defendants alone and succeeded in getting a decree. In execution, some of the other defendants who had not been impleaded in the appeal objected. *Held,* they must will be deemed parties to the suit within the meaning of S. 47 and objections should be disposed of in execution proceedings. 91 Ind. Cas. 181 (1)=1 L.C. 1.

——S. 47—Exoneration of party—Effect of.

Where mortgage decree against two persons is set aside against one in appeal, objection by successful defendant that judgment-debtor had no interest in property sought to be sold must be tried in execution proceedings as the successful defendant is a party. 78 Ind. Cas. 225=5 L.R.A (Civ.) 91=A.I.R. 1924 All. 313.

——S. 47—Application by defendant against whom suit was dismissed—Nature of.

The plaintiff filed a suit against two defendants who were father and son. The suit was dismissed against the first defendant, and decreed against the second defendant. The plaintiff applied to the Court to attach the property of the son. The first defendant then applied to the Court that the Court should not execute the decree against properties which he alleged belonged to him, but if the Court had granted execution and attached his properties the attachment should be raised.

Held, that the application of defendant No. 1 was in effect a *quia timet* application to prevent that happening which he was afraid would happen if the Court after making an order for attachment of his property actually distrained his property. The application was premature and ought not to have been entertained by the Court. Even when the application is made after attachment is effected, it being one between *parties* must be decided on evidence as a suit under S. 47 and not summarily under O. 21, R. 58. 73 Ind. Cas. 419=25 Bom.L.R. 440=A.I.R. 1923 Bom. 381.

——S. 47—Party against whom suit is dismissed.

Suit by creditors of deceased—Widow expressed to be not proper party as she was not an heir—But she being alleged to have deceased's property and treated as proper party—She succeeding on merits and suit being dismissed against her—She is party within S. 47. 34 C.L.J. 477=67 Ind. Cas. 6=A.I.R. 1921 Cal. 242.

——S. 47—Parties and representatives—Exonerated party.

Where a Court, instead of directing that a certain party should be struck out as having been improperly impleaded, erroneously makes an order dismissing the suit as against him, such person cannot be said to have been party to the suit within the meaning of explanation to S. 47. A.I.R. 1942 Pat. 432=23 P.L.T. 554=21 Pat. 601=201 Ind. Cas. 196=8 B.R. 770.

——S. 47—Person not necessary party and exonerated from suit without adjudication of claim.

Section 47, C. P. Code, will not apply unless the question arises between the parties to the suit, in which the decree was passed, or their representatives and relates to the execution, satisfaction or discharge of the decree and a defendant who was not a necessary party would not be a party to the suit within the meaning of S. 47 if he was exonerated without his claim being adjudicated upon. A.I.R. 1937 Mad. 268=173 Ind. Cas. 90.

——S. 47—Suit by party exonerated in prior dismissed claim petition—Whether proceeding under S. 47.

A proceeding between parties, although filed as an original suit, where the plaintiff was himself an exonerated party in the earlier suit out of which the claim arose, should be treated as a proceeding under S. 47. The fact that a previous claim petition had been filed by the plaintiff and dismissed is no bar for treating the suit as a petition under S. 47. 137 Ind. Cas. 288=35 L.W. 103.

——S. 47, O. 1, R. 10—Person against whom suit is dismissed, but who remains on record, whether 'party to suit'.

Where a party has been struck off under the provisions of O. 1, R. 10, he is not a party to the suit within the meaning of S. 47. But where he is retained on the record he is a party to the suit within the meaning of S. 47; whether he be a plaintiff whose suit is dismissed or a defendant against whom the suit is dismissed. A.I.R. 1933 Nag. 246=147 Ind. Cas. 590 (2).

——S. 47—Party exonerated whether 'party'—Joining with stranger.

If a party was a proper party to the suit, even though he was exonerated by the decree, he is still a party to the suit for the purposes of S. 47, and he cannot evade the rule that disputes in execution must be settled under S. 47, and not by a separate suit by joining with a stranger. A.I.R. 1933 Mad. 340=1933 M.W.N. 152=37 L.W. 346=147 Ind. Cas. 526.

——Ss. 47, 50—Decree against assets—Execution against property in the hands of party exonerated before trial.

A suit was brought against defendants 1 to 6 for value of paddy received by a deceased person whose

assets were said to be in the hands of the defendants. Defendants 4 to 6 were exonerated before trial. A decree was passed against 1st and 2nd defendants. Deceased had by his will granted a life-interest in a certain property to his widow, 2nd defendant, with vested remainder to 4th defendant. After the decree, 2nd defendant died and the plaintiffs sought to proceed in execution against this property which had come into the possession of 4th defendant on her death. The executing Court held that the property in 4th defendant's hands was liable:

Held, that as the 4th defendant had been exonerated and she was not the legal representative of 2nd defendant, the decree could not be executed against the property in her hands and the order was wrong. A.I.R. 1933 Mad. 508=144 Ind. Cas. 30.

——S. 47—Parties and representatives — Ex parte defendants—Recovery of possession of properties delivered in execution.

A person who is not a party to the decree is not bound to make an application to the Court executing the decree; and may, if so advised institute a regular suit, and even if he applies and fails he can still bring a regular suit within one year to establish his right to the property. On the other hand a party to a decree is precluded from filing a separate suit and must apply to the Court of execution for redress. The application of the rule of thirty days may in such a case result in great hardship because the party concerned may not come to know of the delivery of possession to the decree-holder until after the expiry of 30 days. This hardship should so far as possible be avoided. 1 Lah.L.J. 230.

——S. 47—Parties and representatives — Ex parte decree in suit by puisne mortgagee—Right of prior mortgagee—Application by him to prevent execution.

Where a prior mortgagee is made a party to a suit on a subsequent mortgage and allows an *ex parte* decree to be passed against him, an application by such prior mortgagee to prevent execution being taken out against the mortgaged properties comes under S. 47, being a question between the parties. 27 Ind. Cas. 164 (Cal.).

——S. 47—Parties and Representatives — Ex parte Order.

An *ex parte* order granting leave to apply for execution is not a decree nor has it the force of a decree because sub-cl. (3) indicates that only such order, granting leave as is passed after dispute and after the question has been tried and determined as if it were an issue in a suit is to have the force of a decree. 115 Ind. Cas. 865=1929 A.L.J. 553=A.I.R. 1929 All. 390.

Hindu family.

——S. 47—Minor members.

Though, for the purposes of S. 11, a minor member of a joint Hindu family not impleaded in the suit can be said to be represented by the major member of the family, he would not be considered as a party to the suit for the purposes of S. 47, and a fresh suit is not barred against him. A.I.R. 1945 All. 392=1945 A.W.R. (H.C.) 269=1945 O. W. N. (H.C.) 235.

——S. 47—Hindu trading family — Decree against karta—Execution against other members and their properties.

A decree obtained against the *karta* of a joint Hindu trading family in his individual capacity and not against the trading firm represented by him as the manager cannot be executed against the other members or their properties. A.I.R. 1942 Mad. 161=I.L.R. (1942) Mad. 204=(1941) 2 M.L.J. 816=201 Ind. Cas. 3.

——S. 47—Sale of joint property—Application by members not parties under S. 47 and O. 21, R. 100 that they were not bound by sale—Maintainability.

A suit was brought against defendants who were members of a joint Mitakshara family. Shortly after the institution of the suit; the adult defendants deposited the amount of the claim in Court. So, when the suit came up for disposal, the question of costs only remained for consideration. The Court ordered that the plaintiff should get a decree regarding costs against the major defendants only and the decree was passed in these terms: "That the claim be dismissed as satisfied; that the plaintiff to get a decree for costs against the major defendant as held above". As regards the major defendants it was said: "No decree is passed as against minor defendants as proper guardian has not been appointed for them." The decree-holders put to execution the decree for costs and in execution put up to sale some joint family property and purchased the same and took delivery of possession. Within a month after the decree-holders had obtained delivery of possession of the purchased property, the minors who had in the meantime attained majority, filed two applications, one under S. 47 and the other under O. 21, R. 100, C. P. Code. Their case was that they not being parties to the decree, were not bound by it, and, therefore, their interest in the joint family property could not be sold in execution of that decree.

Held, that the minor defendants were not at all represented by any guardian in the suit. The effect of this was that they were not in the eye of law parties to the suit at all. The position, therefore, was that the minor defendants were no parties to the suit. So it could not be said that the suit was dismissed against them. That being so, the decree which was obtained against the fathers could be executed against the joint family property including the interest of the sons. The sons could not, therefore, object to the sale. Their objections under S. 47 must, therefore, fail. A.I.R. 1942 Pat. 279=199 Ind. Cas. 157=8 B.R. 513.

——S. 47—Exonerated defendant—Member of Hindu joint family.

The mere fact that the exonerated petitioner is an undivided member of the coparcenary of which the judgment-debtor, whose interests are sought to be sold is also a member will not suffice to give the petitioner a *locus standi* to maintain an application objecting to such a sale. A.I.R. 1939 Mad. 280=48 M.L.W. 905=1938 M.W.N. 1252=(1939) 1 M.L.J. 114=183 Ind. Cas. 647.

——S. 47—Parties and representatives—Hindu father and sons—Suit for debt against Hindu father—Father dying during the pendency of the suit—Question relating to execution.

Where in a suit for a money decree against a

Hindu father the defendant died during the pendency of the suit and his sons were brought on record as his legal representatives and a decree was passed and in execution of the decree the property was purchased by a stranger. *Held,* that the decree in the previous suit having been against the sons it was a decree against them in respect of a debt of their father. Under the Hindu Law, it was their pious duty to pay it, unless the debt was contracted for an illegal or an immoral purpose. When the sons were brought on record as their father's representatives, they were in their own and also in their representative capacity. Where a Hindu father dies after decree, the decree may be executed against his sons as if they were parties to the decree and S. 244 of the Old C. P. Code applies to such a case. The section applies much more to a case where the father dies during the pendency of the suit and his sons were brought on record as his legal representatives. Whether the property was ancestral or self-acquired liable or not in the hands of the sons to satisfy their father's debt under the Hindu Law is a question relating to the execution of decree and cannot be raised in a separate suit. 11 Bom. L. R. 699=3 Ind. Cas. 763.

Hindu widow.

——S. 47—Widow claiming adverse possession of portion of her deceased husband's property—Decree for possession and declaration obtained by surviving co-parcener but not executed within time and barred under S. 48=Fresh suit against transferee from widow is barred by Ss. 11 and 47. A.I.R. 1939 Bom. 261=41 Bom.L.R. 497=183 Ind. Cas. 482.

——S. 47—Sons and widows of deceased judgment-debtor made legal representatives — One widow objecting that property was given to her in dower.

On the death of the judgment-debtor an application for execution was made by the decree-holder firm, impleading three sons and two widows of the deceased as representatives of the deceased judgment-debtor.

Held, that the position of the widow was that of a representative of the deceased judgment-debtor and it remained the same even when she claimed that the property which had been attached and sold did not belong to the judgment-debtor but belonged to her. Being a party to the proceedings, she had every right to object to the sale under S. 47, C. P. Code. A. I.R. 1937 Pesh. 82=1937 Pesh. L. J. 87=173 Ind. Cas. 704.

——S. 47—Parties and representatives—Hindu widow—Decree against widow—Reversioners contesting that decree was fraudulent.

Where a decree was obtained against a widow, and on her re-marriage, the reversioner succeeded to her husband's estate and the decree was sought to be executed by attachment of property in their hands, *held,* on objection taken by them that there was no necessity for the debt, that decree was obtained fraudulently and that they were not her "representatives" within S. 47, C. P. Code. 14 P.R. 1913=175 P. W.R. 1912=228 P.L.R. 1912=15 Ind. Cas. 25.

——S. 47—Execution of money decree against widow—Widow's alienee must be proved to be her legal representative.

Where a decree is not a decree for sale of property but is only a money decree it is perfectly open to the transferee of the land from a widow to object that the decree against the widow cannot be executed against the transferee unless it is shown that the transferee is widow's legal representative either by being in possession of the property, which was the widow's property, or, at least, by being in possession of property over which the widow had created an encumbrance which continued to be binding on the property after her death. 1930 M.W.N. 337=A. I.R. 1930 Mad. 688=125 Ind. Cas. 539=32 L.W. 100=59 M.L.J. 160=53 Mad. 750.

Judgment-debtor.

——S. 47—Parties and representatives—Mortgagee of judgment-debtor—Whether representative—Position of mortgagee.

A mortgagee of judgment-debtor is his representative for the purposes of S. 47 and is bound by all the equities enforceable against judgment-debtor so that he cannot take objections which the judgment-debtor is incompetent to raise. 1 Pat.L.T. 267=56 Ind. Cas. 646.

——S. 47—Representative-in-interest of judgment-debtor—Test.

A representative-in-interest within the meaning of S. 47, C. P. Code, includes a purchaser of the judgment-debtor's interest, who, so far as that interest is concerned is bound by the decree whether the purchase was made at a private sale or at an execution sale.

Where *A,* in execution of his money decree against *B* purchases the property of *B* and subsequently *C* who was not a party to the suit by *A* against *B* puts the same property to sale in execution of his decree against *B, A* cannot object to the execution under S. 47, C. P. Code, as he cannot be regarded as representative of *B* within the meaning of S. 47. A. I.R. 1942 Pat. 369=23 P.L.T. 342=201 Ind. Cas. 786.

——S. 47—Dispute between judgment-debtors inter se, whether relates to execution.

A dispute between the judgment-debtors *inter se* is not *prima facie* a matter which relates to the execution of the decree. A.I.R. 1935 Mad. 714=1935 M.W.N. 593=42 L.W. 50=156 Ind. Cas. 141.

——S. 47—A liquidator, who is proceeding against the judgment-debtor in another Court, is not a representative of the judgment-debtor within the meaning of S. 47. A.I.R. 1934 Nag. 201=17 N.L.J. 47=30 Nag.L.R. 240=148 Ind. Cas. 714.

——S. 47—Parties and representatives—Transferee from judgment-debtor—Decree-holder—Purchaser—Suit barred.

No suit will lie for possession of property by a transferee from the judgment-debtor against the decree-holder-purchaser in Court auction. The question is one relating to execution and arises between the parties or their representatives and must be dealt with in execution. 44 Ind. Cas. 978 (Nag.).

——S. 47—Parties and representatives—Judgment-debtor—Objection by puisne mortgagee to execution sale—If appeal lies.

Where an objection of a puisne mortgagee, (a party to the mortgage suit,) to the sale of the mortgage property in execution is dismissed disallowing his contention that his purchase of one of the mortgaged properties at a revenue sale had annulled the

mortgage, there is no appeal open to him against this order in as much as he was not a judgment-debtor so far as the particular property, which he desired should be exempted from sale, was concerned. S. 47 did not apply to the case. 2 Pat.L.J. 219=3 Pat. L.W. 422=39 Ind. Cas. 656.

——S. 47—Parties and representatives—Partner of judgment-debtor—No party to the suit.

S. 47 does not apply where a question arises between the judgment-debtor and his partner in the subject-matter of the suit who was not a party to the suit. 36 Ind. Cas. 681 (Pat.).

——S. 47—Parties and representatives—Questions between judgment-debtors.

Questions or disputes between judgment-debtors *inter se* where the decree-holder has no interest the decree being satisfied, are not questions between the parties to the suit. An order on such disputes is not, therefore, appealable. 31 M.L.J. 44=(1916) 1 M. W.N. 468=35 Ind. Cas. 179.

——S. 47—Parties and representatives—Judgment-debtor's objection to attachment.

An improper seizure of a judgment-debtor's property by the decree-holder in excess of his rights is a question arising between the parties and is within the meaning of S. 47. 38 All. 339=14 A.L.J. 401 =34 Ind. Cas. 231.

——S. 47—Parties and representatives.

An order in a question arising between the judgment-debtor and the representative of the decree-holder is a decree. 30 M.L.J. 366=19 M.L.T. 235 =(1916) 1 M.W.N. 155=3 L.W. 236=33 Ind. Cas. 739.

——S. 47 and O. 21, R. 90—Parties and representatives—Judgment-debtor—No steps taken by him to set aside irregular sale—Transferee, if bound—Estoppel.

If a judgment-debtor does not take appropriate steps to have an irregular sale set aside his transferee also is bound by estoppel and cannot question the sale. 13 Ind. Cas. 542 (Cal.).

——S. 47—Parties and representatives—Judgment-debtor and auction-purchaser.

Where the question raised by judgment-debtor as regards the legality of the Court sale is one between decree-holder and judgment-debtor, but wherein the auction-purchaser is interested, the proper procedure is an application under S. 47, the test being whether the question affects the parties to the suit and could have been raised and determined under this section. 34 Bom. 546=12 Bom.L.R. 539=7 Ind. Cas. 457.

——S. 47—Parties and Representatives—Judgment-debtors — Conflict between judgment-debtors inter se—S. 47, does not apply.

Where the conflict of interest in the execution department is between two sets of judgment-debtors and there is no question between the decree-holder on the one side and one or other of the judgment-debtors on the other side relating to the execution, discharge or satisfaction of the decree. S. 47 does not apply. 7 All. 681; 30 All. 379; 31 All. 82 (F.B.), Foll. 119 Ind. Cas. 440=51 All. 752= 1929 A.L.J. 757=A.I.R. 1929 All. 291.

Legal Representatives.

——S. 47—Parties and representatives—Legal representatives, decree against—Separate suit to recover possession of property sold.

In execution of a decree against 2 persons as the legal representatives of a deceased person their property was sold. A suit by one of the representatives to recover possession of the property is barred by S. 47. 14 A.L.J. 846=36 Ind. Cas. 281=39 All. 47.

——S. 47—Parties and Representatives—Legal representatives of deceased party can continue execution application.

Decree-holder dying while decree in actual execution—His sons need not freshly apply for execution but can continue after substitution of their names. A.I.R. 1930 All. 604.

——S. 47—Legal representatives—Determination of.

If in an execution proceeding a person is sought to be impleaded as the legal representative of the deceased judgment-debtor, but if the person denies his character as a legal representative, the question whether or not he is a legal representative must be decided by the executing Court and not in a separate suit. 117 Ind. Cas. 122.

——S. 47—Legal representatives—Objections by representatives should be under S. 47.

After a preliminary mortgage decree was passed the judgment-debtor died. His legal representative who was brought on record objected that the property was subject to a charge in his favour. The objection was disallowed. During proceedings for sale under final decree the legal representative did not object that the property could not be sold free from his charge but bronght a suit for declaration of his lien on property.

Held: that the suit was barred under S. 47: A.I.R. 1921 Lah. 173, Foll. A.I.R. 1929 Lah. 762.

——S. 47—Objections by legal representatives should be under S. 47—Decree against husband —Wife impleaded as representative on his death —Objection by her that the property did not form assets of her husband is one covered by S. 47.

A decree was passed against a judgment-debtor, on whose death, the wife was impleaded as his legal representative. On certain property being attached, the wife filed an objection to the effect that the property in question did not form part of the assets of the deceased judgment-debtor, and hence it was not liable to attachment. The lower Court rejected the objection summarily.

Held: that the objection was one covered by S. 47, and not by O. 21, R. 58, as the objector was a party to the execution proceedings as the legal representative of the deceased judgment-debtor. The lower Court was wrong in throwing out the objection without considering it on merits. 5 O.W.N. 990=111 Ind. Cas. 837=A.I.R. 1929 Oudh 21.

——S. 47—Legal representatives—Cannot go behind the decree.

Heirs of mortgagor J. D. cannot challenge right of mortgagor to mortgage in execution proceedings. 88 Ind. Cas. 141=87 Ind. Cas. 849=4 Pat. 510= 6 P.L.T. 634=A.I.R. 1925 Pat. 625.

——S. 47—Legal representative—Determination of.

Decree-holder dying and his legal representatives applying for execution—Judgment-debtor objecting that there are other representatives of decree-holder who have not applied—Execution Court must investi-

gate the matter. 119 Ind. Cas. 883=A.I.R. 1929 Pat. 232.

——S. 47—Defendant *S* dying before decree—His legal representative *P* brought on record—Decree passed against property of *S*—*P* dying before execution—*P's* legal representatives objecting to execution—They are legal representatives of parties to suit and their objection being under S. 47, order passed by Court on it would be appealable. 30 Bom.L.R. 1447=114 Ind. Cas. 861=53 Bom. 46=A.I.R. 1928 Bom. 534.

——S. 47—Legal representative—Right of suit.

A decree was obtained against the father of the plaintiff. It was executed against the plaintiff as the legal representative, and in execution the defendants obtained possession of certain property. The plaintiff brought a suit for a declaration of his title to the property as heir to some other person.

Held, that the suit was barred under S. 47, as the section is applicable when the judgment-debtor or the representative impleaded in the execution proceedings claims a right in the property on his own behalf though under a different right. 17 Cal. 711 (F.B.), Foll. 115 Ind. Cas. 353=48 C.L.J. 551.

——S. 47—Legal representative—Enquiry as to.

Alleged representative does or does not occupy that capacity is to be decided by executing Court. 48 All. 429=24 A.L.J. 462=94 Ind. Cas. 454=A.I.R. 1926 All. 681.

——S. 47—Executing Court must decide question of legal representative and cannot refer party to separate proceedings.

If the claimant who claims to be the legal representative, produces a probate or a letter of administration or any such general conclusive proof of his status, then the Court certainly need not go further and should accept that as conclusive. But if there is no such evidence then it is not for the Court to refer to the applicant to separate proceedings, but it must itself make up its mind after such inquiry as may be possible. 21 S.L.R. 20=92 Ind. Cas. 575=A.I.R. 1926 Sind 113.

——S. 47—Legal representative—Nature of right.

Legal representative cannot prefer claim in individual capacity under S. 47 but must bring separate suit, as he is a third party in his individual capacity. 78 Ind. Cas. 49=A.I.R. 1925 Sind 156.

——S. 47—Legal representatives—Practice.

In execution proceedings and more particularly in proceedings which involve the determination of the rights of parties as they arise in proceedings where the legal representative of the deceased judgment-debtor has been brought in, greater care, attention and time should be devoted to them. 12 All. 313, Foll. 83 Ind. Cas. 550=2 Rang. 168=A.I.R. 1924 Rang. 323.

——S. 47—Legal representative—Rights of.

Objection to liability of legal representative must be decided under S. 47. Order of substitution of legal representative making him liable to satisfy the decree as legal representative, but without deciding his objections is improper. 82 Ind. Cas. 803=3 P.L.T. 106=1921 P.H.C.C. 293=A.I.R. 1923 Pat. 149.

——S. 47 and O. 21, R. 58—Representative of parties—Rights of.

An objection taken by a person who has become the representative of the judgment-debtor in the course of the execution of a decree to the effect that the property attached in satisfaction thereof is his own property and not held by him as such representative is a matter cognizable only under S. 47, C. P. Code and not the proper subject-matter of a separate suit by a party against whom an adverse order may have been passed. Where *qua* the execution proceedings a person happens to be the representative of the judgment-debtor any question raised by him can only be decided under S. 47. But objections to attachment raised by a third party come under O. 21, R. 58. 17 Cal. 711; 19 C.W.N. 517, Foll. 68 Ind. Cas. 369=3 Pat.L.T. 613=A.I.R. 1922 Pat. 572.

——S. 47—Parties and representatives—Legal representative—Validity of decree, question as to, in execution.

In a suit by the Chairman of a Municipality to recover dues due to the committee the defendant appeared and admitted the liability without any objection. In fact, certain payments were also made under the decree. But in a subsequent execution proceeding the defendant objected that the decree was a nullity and incapable of execution as the Chairman was not entitled to sue on behalf of the Municipal Commissioners:

Held, that in view of the facts of the case the decision whether under S. 24, Bihar and Orissa Municipal Act, 1922, a Chairman could sue on behalf of the Commissioners was not necessary and even if there was an error in filing the suit by the Chairman, it was of a technical nature and could be disregarded. A.I.R. 1946 Pat. 268=222 Ind. Cas. 11=12 B.R. 247.

——S. 47—Decree against widow representing deceased husband — Execution infructuous—Adoption not put forward—Subsequent execution—Adoption put forward—Property, however, still in widow's name—Execution carried on against widow—Sale in execution, if binding on adopted son.

Decree-holders who had obtained a decree against two Hindu co-widows in respect of unpaid purchase-money for land purchased by their husband took out two execution proceedings against them, and recovered a portion of the purchase money. One of the widows thereafter adopted a son. In the next two executions taken out by the decree-holder, the adoption was not put forward by the adopting mother. In the third execution petition by which time the decree had become more than 12 years old, the widow put forward the adoption. The decree-holders refused to implead him on the ground that the lands were not transferred in the name of the adopted son. The execution was proceeded with and the decree-holders purchased the property in auction sale. In a suit by the son for a declaration that the sale was illegal and not binding on him:

Held, that the mother sufficiently represented the son and that since the auction was not vitiated by fraud or collusion, the son could not get the sale set aside on the ground of his non-representation. A.I.R. 1945 Bom. 435=47 Bom.L.R. 277.

Meaning of.

——S. 47—Representative, meaning of—Decision of question of legal representatives—Executing Court, powers of.

A purchaser affected by the doctrine of *lis pendens* is a 'representative' within the meaning of S. 47.

The question as to who are legal representatives of a deceased person is a question that has to be decided by the executing Court and not by the Collector to whom the decree was sent for execution. A.I.R. 1945 Nag. 86=I.L.R. (1944) Nag. 852.

——S. 47—'Representatives' include persons on whom an interest has devolved by assignment, transfer or otherwise.

The expression 'representatives' in S. 47, is not limited to the legal representatives of a deceased person but includes persons on whom an interest has devolved by assignment, transfer or otherwise. A.I.R. 1940 Pat. 615=186 Ind. Cas. 786=6 B.R. 393.

——S. 47, O. 21, R. 58—"Representatives"—Transferees from decree-holder or judgment-debtor—Property attached in execution of decree obtained against legal representatives of deceased—Question, whether property forms part of assets of deceased raised by legal representatives or their transferees—Whether falls under S. 47 or O. 21, R. 58.

The term 'representatives' occurring in S. 47, Civil P. C., includes not only legal representatives in the sense of heirs, executors or administrators but also representatives-in-interest, that is, any transferee of the decree-holder's interest or any transferee of the judgment-debtor's interest who, so far as such interest is concerned, is bound by the decree.

Where, therefore, a decree is obtained against legal representatives of the deceased in respect of a debt charged against the assets of the deceased and in execution of that decree the assets of the deceased are attached the question whether the properties attached are assets of the deceased or belong to the legal representatives themselves, raised by the legal representatives or their transferees who are bound by the decree, is a question relating to execution, discharge or satisfaction of the decree and must be determined in execution and not by a separate suit. It is only when the judgment-debtor claims to represent the interest of a third party in whom the property is vested that the case would fall outside the purview of S. 47. In such a case as this what the judgment-debtor says is that although the property is vested in him it is so vested not beneficially but as trustee or executor for someone else. It is clear that in such a case the real objecting party is one who is a stranger to the suit and the objection having been made on his account, his claim must be regarded as that of a third party and dealt with under O. 21, R. 58.

[Distinction between the position of a legal representative of a deceased person and of a *shebait* of a deity pointed out.] A.I.R. 1939 Nag. 183=1939 N.L.J. 270=I.L.R. (1939) Nag. 548=187 Ind. Cas. 791. *See also* A.I.R. 1944 Oudh 314=1944 A.W.R. 246=20 Luck. 226.

——Ss. 47 and 146—Word "representative" in S. 47—Meaning of—Transferee from defendant pendente lite is representative of defendant within S. 47—Decree-holder can execute decree in same manner and to same extent as against defendant (Per Achhru Ram, J.).

The word "representative" as used in S. 47 has a much wider meaning than the words "legal representative" and includes not only a legal representative but any representative-in-interest, i.e., any transferee of the interest of a party, whether by assignment, succession or otherwise, who, so far as such interest is concerned, is bound by the decree. A transferee from a defendant *pendente lite* being the representative-in-interest of such defendant and being bound by the decree eventually passed in the suit, by reason of the operation of the rule of *lis pendens,* is a representative of the defendant within S. 47 and the decree-holder can execute the decree against him in the same manner and to the same extent as he could execute it against the original defendant. A.I.R. 1946 Lah. 142=47 P.L.R. 28=225 Ind. Cas. 602 (F.B.). *See also* A.I.R. 1942 Mad. 714=(1942) 2 M.L.J. 491=206 Ind. Cas. 381.

——S. 47—Representative—Meaning of.

The term 'representative' in S. 47 should be understood as merely referring to one who stands in the shoes of another, to use an expression familiar in legal parlance and as meaning more or less the same thing as the expression 'claiming under' used in other sections of the Code, e.g., Ss. 11 and 146. A.I.R. 1941 Mad. 161=I.L.R. (1941) Mad. 438=53 L.W. 27=(1941) 1 M.L.J. 45=1941 M.W.N. 149=196 Ind. Cas. 204 (F.B.).

——S. 47—Representative, if includes purchasers at private sale or Court sale—Purchaser from judgment-debtor pendente lite—Rights of.

'Representatives' within the meaning of S. 47, include not only legal representatives (heirs, executors or administrators) but also representatives-in-interest, such as purchasers, whether at a private or at a Court sale, who so far as the interest purchased is concerned, are bound by the decree. A purchaser from the judgment-debtor *pendente lite* cannot be regarded as a representative of the judgment-debtor for the purpose of execution proceedings if it cannot be said that for the purpose of those proceedings he is affected by the decree and stands in the shoes of the judgment-debtor. Consequently where the attached property is purchased with consent of the attaching creditor who is paid out of the sale consideration and on receipt of the money, the creditor gives up whatever claim he has to the property under attachment, the purchaser is not bound by the decree and the attaching creditor can assert no right under the attachment as against his purchase. A.I.R. 1934 Pat. 413=13 Pat. 735=151 Ind. Cas. 683. *See* A.I.R. 1935 Sind 214=29 S.L.R. 251=159 Ind. Cas. 1068.

——S. 47—Representative—Tests to determine—Tests.

A purchaser of the equity of redemption from the judgment-debtors, is their 'representative' within the meaning of S. 47.

The expression 'representative' in S. 47, has been construed in a wider sense than the expression 'legal representative' and includes also representative-in-interest.

The two tests to be applied in determining whether a person is a 'representative' within the meaning of S. 47, C. P. Code, are: (1) whether any portion of the interest of the decree-holder or of the judgment-debtor, which was originally vested in one of the parties to the suit has, by act of the parties or by operation of law, vested in the person, who is sought to be treated as representative; and (2), if there has been devolution of interest whether so far as such interest is concerned, that person is bound by the decree. A.I.R. 1933 Lah. 352=14 Lah. 591=142 Ind. Cas. 408. *See also* A.I.R. 1935 Sind 214=29 S.L.R. 251=159 Ind. Cas. 1068; 9 C.L.J. 485=1 Ind. Cas. 213.

——S. 47—Parties—Meaning of.

The phrase "parties to the suit" in S. 47 refers to parties who were opposed to each other in the suit. It has no reference to any dispute between two of the representatives of a deceased decree-holder. A. I.R. 1934 Pat. 627=16 P.L.T. 16=152 Ind. Cas. 776.

——S. 47—Mortgage—'Parties', meaning of.

A puisne mortgage impleaded as a defendant along with the mortgagor in a mortgage suit for sale and the mortgagor are "parties" within the meaning of S. 47 in the sense of being opposed to each other. Hence, if an order confirming the sale is made and the mortgagor thereafter brings a suit objecting to the delivery of possession and praying for an injunction restraining the same on the allegation *inter alia* that the sale was inoperative and the purchaser was a *benamidar* of the puisne mortgagee, the question raised is a question between the 'parties' within the meaning of S. 47 and in such a case S. 47 bars the suit. A.I.R. 1932 Cal. 126=35 C.W.N. 877=59 Cal. 117=138 Ind. Cas. 177.

——S. 47—Parties and Representatives—Meaning of.

Where a Malabar tarwad is sued by making the karnavan a party or all the members of the tarwad parties, the tavazhis of which the tarwad is composed need not necessarily be considered to be parties to the suit. Where a person is an actual party to the suit, his rights in any other capacity must be deemed to be rights of a party to the suit and he must consequently come under S. 47. But when he is not an actual party, but is merely a constructive party represented by another, he can only be deemed to be a party or representative of a party in the capacity in respect of which he was so represented. In any other capacity, more especially when such capacity is adverse to the person who represented him, he can in no sense be deemed to be a party to a decree or representative of a party; 23 Mad. 195 (F.B.), Foll.. 24 Mad. 658 and 30 Mad. 215, Overruled. 51 Mad. 46=26 M.L.W. 775=106 Ind. Cas. 230=A.I.R. 1927 Mad. 1043=53 M. L.J. 824.

——S. 47—Parties—Meaning of.

The expression 'between the parties in the suit', in S. 47 of the C. P. Code, must not be limited to the parties arrayed against each other as plaintiff and defendant but it also applies to parties on the same side who are arrayed against each other. Therefore a question pertaining to the execution of a decree and decided in a dispute between the defendants themselves cannot be re-opened in a separate suit. 24 M.L.J. 477; 1924 Mad. 366, Foll. 85 Ind. Cas. 209=20 M.L.W. 742=A.I.R. 1925 Mad. 353.

——S. 47—Representatives—Meaning of.

"Representatives" include assignees or successors to the interest of a party to the decree. 53 Cal. 781=43 C.L.J. 345=30 C.W.N. 649=95 Ind. Cas. 494=A.I.R. 1926 Cal. 798.

——S. 47—Parties—Not on record.

When the heirs of a deceased defendant, who died before the suit terminated and whose heirs were never brought on the record within the prescribed period, challenge the decree on the ground that it was never passed against their ancestor and is null and void as against them, they are not to be deemed to be the representatives of a party to the suit and to be raising questions relating to the execution, discharge or satisfaction of the decree within the meaning of S. 47, so as to bar a separate suit. A.I.R. 1931 All. 490=1931 A.L.J. 715=54 All. 25=134 Ind. Cas. 236 (F.B.).

Minor.

——S. 47—Parties and Representatives—Minor—

Where there is no fraud in the appointment of the guardian *ad litem* for the minor, he is validly appointed by the Court and the minor is duly represented in the suit. The minor is, therefore, a party to the decree rightly passed and any action that he takes to set aside that decree or to invalidate the proceedings taken in execution of it must be taken under S. 47. 98 Ind. Cas. 463=A.I.R. 1927 Mad. 209. *See also* (1936) M.W.N. 453.

——S. 47—Execution proceedings challenged by minor on ground that he was not properly represented—Question, if can be decided by executing Court.

A claim put forward on behalf of the minor to the effect that the whole of the proceedings relating to the attachment of the land had been irregular for want of proper representation is clearly one relating to the execution of the decree. Such a question should, if possible, be decided by the executing Court. A.I.R. 1941 Lah. 327=43 P.L.R. 479=196 Ind. Cas. 611.

——S. 47—Application by minor judgment-debtor that decree passed against him is nullity as he was not properly represented is not tenable under S. 47.

An executing Court cannot go behind a decree. S. 47 takes for granted that a valid decree exists.

Where a decree passed against minor judgment-debtors is being executed, an application by them that the decree passed against them is a nullity as they were not properly represented is not tenable under S. 47. This is a matter which has to be decided by a separate suit. A.I.R. 1946 Nag. 275=I.L. R. (1946) Nag. 623=1946 N.L.J. 249=223 Ind. Cas. 305.

——S. 47—Decree against minor represented by guardian—Execution against minor in ignorance of guardian's death—Effect.

A decree was granted against a minor represented by a guardian *ad litem*. Though the guardian died, the execution was started in ignorance of his death and the minor's property was attached. No further step was, however, taken in the execution:

Held, that no notice was essential before making attachment as such could not prejudice the minor. A.I.R. 1936 Nag. 77.

——S. 47—Decree against minor plaintiffs—Guardian not shown in decree as party—Costs—Decree for costs, if can be executed against guardian.

The executing Court cannot go behind the decree. Where a decree is made against minor plaintiffs and their guardian is not shown in the decree as a party, the decree-holders cannot execute their decree for costs against him when he is not made liable, by the terms of the decree, to the costs. A.I.R. 1935 All. 359=1935 A.L.J. 383=1935 A.W.R. 266=1935 A.L.R. 1050=158 Ind. Cas. 1113 (1).

——S. 47—Decree against adult and minor defendants—Execution against adults—Sale of their share fixed—Minors, if can challenge order on ground that share of adult members is in excess—Remedy.

A decree was passed against adult members and minor members represented by their guardians but execution was taken only against the adult members and the sale of their share was fixed and ordered to be held:

Held, that no minor judgment-debtor had *locus standi* to come to the executing Court and say that it was selling more than what it should, or that it was not correct in the calculations. His remedy was only to have the sale set aside with regard to the excess. A.I.R. 1935 Pesh. 5=154 Ind. Cas. 471.

——S. 47—Whether person is legal representative of party to decree—Determination of.

The question whether a person is or is not a representative of a party to a decree must be decided by the executing Court and not in a separate suit, and once decided, it becomes final (subject of course to revision, review or appeal when they lie) so far as matters relating to the "execution, discharge or satisfaction" of that decree are concerned. A.I.R. 1939 Nag. 147=1939 N.L.J. 82=I.L.R. (1939) Nag. 165=182 Ind. Cas. 285.

——S. 47—Question whether person is representative of party—Question not arising in execution proceeding—Suit by such person as representative.

Where a question arises as to whether any person is or is not the representative of a party, such question is to be determined by the executing Court for purposes of S. 47. But where the question of the plaintiff being the representative of the judgment-debtor does not arise in the execution proceedings and it is neither raised nor determined, a suit by him as representative is not barred under S. 47. A.I.R. 1938 Cal. 818=42 C.W.N. 1131=181 Ind. Cas. 854.

——S. 47—Suit against Municipality—Municipality superseded and administrator appointed before decree in suit — Administrator not brought on record — Decree if can be executed against property in his hands.

A person instituted a suit against a Municipal Committee for recovery of certain amount. Before the date of decree, however, the Municipal Committee was superseded by the Local Government under S. 238, Punjab Municipal Act and an administrator was appointed to carry on the duties of the committee. The plaintiff took no steps to bring the administrator or any other person as the legal representative of the Municipal Committee on the record before the decree was passed. When the decree was sought to be executed against the property in the hands of the Administrator, he raised an objection that the decree was a nullity:

Held, that the decree was a nullity as the legal representative of the Municipality was not brought on the record and could not be executed against any property in the hands of the administrator. A.I.R. 1938 Lah. 83=177 Ind. Cas. 389.

——S. 47—Death of judgment-debtor during pendency of attachment—Execution dismissed for default—Order set aside—Nephews of judgment-debtor in possession as survivors—Whether intermeddling with estate—If representatives.

The undivided interest of the judgment-debtor was attached in execution and he died during the pendency of the attachment. The execution case was dismissed for want of prosecution but the order of dismissal was set aside subsequently and the attachment revived. The nephews of the judgment-debtor who were survivors of the family claimed to be representatives within the meaning of S. 47, C. P. Code:

Held, that the possession by the nephews of the property which by reason of the revival of the attachment was not their property, made them persons intermeddling with the estate and hence representatives within the meaning of S. 47. A.I.R. 1936 Pat. 126=160 Ind. Cas. 119=1936 P.W.N. 14=2 B.R. 160.

——S. 47, O. 21, R. 52—Person attaching money lying in Court, whether is representative of person entitled depends on facts.

Whether a person who attaches money lying in Court is a representative of the person entitled to it or not, must be decided on the facts of each case. A.I.R. 1935 Sind 214=29 S.L.R. 251=159 Ind. Cas. 1068.

——S. 47, O. 21, R. 58—Decree against estate of deceased—Right to execute against legal representative.

Where a decree-holder has rightfully obtained a decree as against the estate of the deceased, he is entitled to have his remedy as against anybody who may have stepped, in the meanwhile, into the shoes of the original legal heir as legal representative of the estate. An application by which the executor objects to the execution of the decree against him, he not being a party to it, is one under S. 47 and cannot be treated as one under O. 21, R. 58, C. P. Code. A.I.R. 1934 Cal. 258=58 C.L.J. 487=149 Ind. Cas. 926.

——S. 47—Execution of decree — Execution against judgment-debtor's legal representative—Compromise of proceedings and consent to sale without fresh proclamation—Assertion of independent title at subsequent stage—Estoppel.

The respondents had obtained a money-decree against *A*. *A* died subsequently and the respondents took out execution against the appellant as representative of *A*. When notice was issued to him, the appellant entered into an agreement with the decree-holders and paid a sum of money and the decree-holders, in their turn, allowed the sale to be adjourned for 6 months after which the sale was to be held once again without fresh proclamation. When execution was again prosecuted, the appellant raised an objection that the property attached had devolved on

him by right of survivorship and not by inheritance:

Held, that the appellant had, by his conduct, disentitled himself to raise the objection that he was raising. 132 Ind. Cas. 80=8 O.W.N. 339.

——S. 47, O. 21, R. 58—Suit against legal representative—Dismissal — Objection by legal representative — Suit under O. 21, R. 63, competency of.

Where a person is sued as a legal representative, and the suit is dismissed against him, he is still a party to the suit within S. 47 and an objection filed by him claiming to be a mortgagee in possession for removal of attachment in execution of the decree passed in the suit is to be treated as petition under S. 47 even though it is misdescribed as one under O. 21, R. 58. Where such objection is allowed the order is really one under S. 47, and operates as a decree and cannot be attacked in a separate suit. A.I.R. 1931 Rang. 314=135 Ind. Cas. 328.

——Ss. 47, 53, scope of—Legal Representative—Extent of liability.

Sections 47 and 53 are not limited in their scope to an enquiry in respect of property which came into the possession of the legal representative by survivorship on the death of the judgment-debtor, but extend to property which came into his possession by the partition before the death of the judgment-debtor. A.I.R. 1931 Sind 84=25 Sind.L.R. 374=134 Ind. Cas. 386.

Lessee.

——S. 47—Parties and Representatives—Lessee.

Lessees of a mortgagor impleaded as defendants in mortgage suit—Claim by them under O. 21, R. 100—Enquiry should be made into the question of title. 111 Ind. Cas. 147=A.I.R. 1928 Mad. 1270.

——S. 47—Lessee pendente lite cannot be made party in execution.

During the pendency of a suit to recover possession of certain property by the plaintiff (applicant) defendant granted a lease to the non-applicant (lessee). The suit was decreed in favour of plaintiff and plaintiff applied to have non-applicant lessee added as parties in order to ascertain the mesne profits though the mesne profits had been already ascertained by an Amin.

Held, the liability, if any, of the lessee to pay damages for removal of the mica in the leased property is not a liability which has devolved to him from the defendant. They were both liable, if liable at all, as trespassers, and a case, if any, against the non-applicant lessee must rest upon his action and the direct relation established thereby between him and the plaintiff. O. 22, R. 10, does not apply. There has been no assignment, creation or devolution of any interest within the meaning of that Rule. 68 Ind. Cas. 973=49 I.A. 220=1 Pat. 581=24 Bom. L.R. 1251=27 C.W.N. 29=36 C.L.J. 542=20 A. L.J. 988=10 M.L.W. 905=4 P.L.T. 1=4 L.R. P.C. 1=A.I.R. 1922 P.C. 304=43 M.L.J. 589.

——S. 47—Lessees inducted on land by judgment-debtor pending litigation.

Tenants who are lessees inducted on the land by the judgment-debtor pending litigation are representatives of the judgment-debtor within the meaning of S. 47, and are bound by the decree passed against the judgment-debtor. A.I.R. 1934 Cal. 145=58 C. L.J. 229=37 C.W.N. 1015=149 Ind. Cas. 647.

——S. 47—Party to execution—If necessarily party to suit.

It does not follow that from the fact that a person is made a party to execution proceedings that he can claim to be regarded as a "party to the suit" for the purpose of raising objections under S. 47. A.I.R. 1945 Cal. 387=49 C.W.N. 558=80 C.L.J. 198.

Mortgagee.

——S. 47—Parties and representatives—Mortgagee—Holding sold in execution of rent decree—Mortgagee of holding if can object.

Where in execution of a rent decree against a holding, the holding is sold and the execution case is disposed of, but subsequently the Court restores the execution proceedings, the mortgagee of the holding, being a representative of the judgment-debtor within the meaning of S. 47, can make an application under that section objecting to the restoration of the proceedings. A.I.R. 1938 Cal. 390=42 C.W.N. 485 =I.L.R. (1938) 2 Cal. 125=177 Ind. Cas. 110.

——S. 47—Mortgagee—Liability of.

Sale for rent decree—Surplus sale proceeds attached by mortgagee and also by landlord for second decree for rent:

Held, mortgagee was not a person bound by the second decree for rent and, therefore, not a 'representative' within S. 47. A.I.R. 1931 Cal. 202=34 C.W.N. 702=134 Ind. Cas. 69.

——S. 47—Parties and Representatives—Mortgagee.

Mortgagee of patni interest is representative of judgment-debtor patnidar. 24 Cal. 62 and 11 C.W. N. 312, Foll. 90 Ind. Cas. 955=A.I.R. 1926 Cal. 356.

——S. 47—Mortgagee—Right to share in surplus sale proceeds.

Where a decree for rent was obtained after the relationship of landlord and tenant between the parties had ceased and the question was raised whether the prior mortgagee of the tenure was entitled to share in the surplus sale proceeds, *held*, that the mortgagee was not a representative of the judgment-debtor within the meaning of S. 47. 34 C.W.N. 702=134 Ind. Cas. 69=A.I.R. 1931 Cal. 202.

Mortgage suit.

——S. 47—Parties and representatives—Mortgage suit—Subsequent purchaser party to suit but no personal decree passed against him—If can object to attachment of his property in execution of personal decree.

In order that a person may be regarded as a party within the meaning of S. 47, C. P. Code, it is not necessary that he should be a party to the decree ought to be executed, but he should be a party to the suit in which that decree was passed. The mortgage suit does not terminate until the personal decree has been passed. Hence, the subsequent purchaser who has been made a party to the mortgage suit but against whom no personal decree has been passed, is a party to the suit within the meaning of S. 47 and is, therefore, entitled to raise an objection under S. 47 when his property is attached in execution of the personal decree,, and an appeal lies from the order dismissing his objection. A.I.R. 1944 Pat. 105=22 Pat. 678=25 P.L.T. 44=211 Ind. Cas. 604.

——S. 47, O. 21, R. 89—Mortgagee purchasing property at auction sale in execution of mortgage decree—Application under O. 21, R. 89 by prior purchaser of half of mortgaged property—Applicant, if becomes party to mortgage.

Where the mortgaged property is sold in execution of the mortgage decrees and an application under O. 21, R. 89, to have the sale set aside is made by the prior purchaser of half of the mortgaged property, the applicant does not become a party to the mortgage suit in which the decree was passed. The dispute between him and the mortgagee who himself is the auction-purchaser cannot be deemed to be a dispute between the parties to the suit within the meaning of S. 47 and hence a suit by the applicant for redemption of half of the mortgaged property cannot be said to be barred by S. 47.

The rejection of the application under O. 21, R. 89 does not bar the subsequent suit to redeem, for, the applicant did not by his application under R. 89 make himself a party to the suit in which he could have been impleaded. A.I.R. 1940 Sind 251=I.L.R. (1940) Kar. 447=193 Ind. Cas. 247.

——S. 47—Subsequent mortgagees taking a mortgage during the pendency of a suit on the first mortgage are representatives of the mortgagor and can be impleaded in the execution proceedings. A.I.R. 1936 All. 479=1936 A.L.J. 541=1936 A.W.R. 422 =1936 A.L.R. 670=163 Ind. Cas. 926.

——S. 47 (3) and O. 21, R. 100—Parties and representatives — Mortgage suit—Paramount title—Removal of.

A party to a mortgage suit, who sets up a paramount title and is discharged from the suit, no decree being passed either in his favour or against him, is not a party within S. 47 of the C. P. Code (1908). Such a person can object to a delivery of possession of property under O. 21, R. 100, and if such objection fails, a regular suit lies at his instance. 15 N.L.R. 146=52 Ind. Cas. 736.

——S. 47—Suit on mortgage—Party claiming adverse title exempted—Suit by such party for the declaration of title and alternatively for possession is not barred. 49 All. 379=25 A.L.J. 253=100 Ind. Cas. 495=A.I.R. 1927 All. 378.

——S. 47—Parties and Representatives—Mutwalli.

Objection by legal representative that she holds property as Mutwalli and not as the legal representative of her deceased husband is to be tried under R. 58 and not under S. 47. 75 Ind. Cas. 1053=4 L.R.A. Civ. 447=A.I.R. 1924 All. 183.

Necessary parties.

——S. 47—Parties and representatives—Receiver under O. 40, R. 1.

Omission to make the receiver appointed under O. 40, R. 1 a party to an execution proceeding against the property of which he is in possession does not render the execution proceedings void *ab initio*. A.I.R. 1945 Cal. 387=49 C.W.N. 558=80 C.L.J. 198.

——S. 47—Decree against manager of Malabar tarwad—Executing Court has jurisdiction to determine decree-holder's right to execute decree against other members of tarwad.

Where a karnavan of Malabar tarwad is sued in his capacity as manager, the whole of the tarwad consisting of all its members, whether major or minor, should be held to have been sued and the decree consequently passed against all of them. Therefore, the executing Court cannot be said to be going behind the decree if it holds an enquiry with the object of making other persons, whose names do not appear in the decree, liable. This is really a matter of execution and falls within the purview of S. 47, C. P. Code. A.I.R. 1940 Mad. 165=1939 M.W.N. 1229.

——S. 47—Parties and representatives—Occupancy holding—Transferee from judgment-debtor—Right to apply to set aside sale.

A person, who without the landlord's consent purchases from a raiyat a portion of a non-transferable occupancy holding is a person whose immovable property has been sold and is a representative of the judgment-debtor within S. 47 and can apply to set aside a sale of the holding in execution of a decree for arrears of rent on the ground of fraud. 42 Cal. 172=18 C.W.N. 971=20 C.L.J. 52=27 Ind. Cas. 61 (F.B.).

——S. 47—Parties and representatives—Occupancy Right.

Sale to tenant of proprietary right set aside and possession given to landlord in execution—Suit thereafter by tenant for occupancy rights is not barred either under S. 47 or S. 11, because of the difference in titles. 67 Ind. Cas. 485=4 L.L.J. 400=A.I.R. 1922 Lah. 44.

Parties unnecessarily impleaded.

——S. 47 (3) and O. 21, Rr. 58 and 63—Parties and representatives—Parties unnecessarily impleaded—Estoppel.

Some persons who were wrongly impleaded as defendants in execution proceedings and who did not prefer any claim to plaintiffs attachment and sale of property therein, were not estopped, by the said circumstances, from making a claim in subsequent suit or proceeding. 9 M.L.T. 95=8 Ind. Cas. 161.

——S. 47—Parties and Representatives—Parties unnecessarily impleaded.

Person against whom suit is dismissed as having no real concern with the suit is not a party. 40 Mad. 964 and 41 Mad. 418 (F.B.), Foll. 5 Rang. 110=101 Ind. Cas. 794=A.I.R. 1927 Rang. 137.

——S. 47—Parties improperly impleaded.

Where a suit is dismissed against a person on the ground that he was improperly impleaded as party having no concern with the suit, such a person does not remain a party to the suit for the purposes of S. 47, notwithstanding whether his name has or has not been removed from Record. In such cases it is the duty of the Court to strike out the name of the party improperly impleaded; it is quite wrong procedure to dismiss the suit as against him. It is quite otherwise in the case where the plaintiff abandons his claim against the defendant and the suit is dismissed as against him. In the latter case the defendant is not a person to whom O. 1, R. 10 (2) applies. A.I.R. 1930 Mad. 817 (F.B.)=1930 M.W.N. 779 =32 L.W. 836=127 Ind. Cas. 805=59 M.L.J. 932 =54 Mad. 81.

——S. 47—Party against whom suit is dismissed.

To determine whether particular defendant against whom suit has been dismissed is or is not party to

suit within operation of S. 47 Court should always look into decree, judgment and pleadings as question does not entirely depend upon whether name has been struck off or retained on record. A.I.R. 1930 Mad. 817 (F.B.)=1930 M.W.N. 779=32 L.W. 836=127 Ind. Cas. 805=59 M.L.J. 932=54 Mad. 81.

——S. 47—Unnecessary parties.

Where no relief was claimed against defendant and they were also not proper parties to the suit and where the Court discharged them but did not strike out their names from the record.

Held, that the order amounted to striking out the defendants from the record. The mere fact that the name of the exonerated party is not formally removed from the record pursuant to the order exonerating him would not affect the question as to whether he remains a party. 17 M.L.J. 416, Foll. 27 P.L.R. 194=93 Ind. Cas. 921=A.I.R. 1926 Lah. 202.

——S. 47—Person impleaded without notice.

Person impleaded without notice—Name removed without his participating in proceedings—Person is not "party". 66 Ind. Cas. 722=1921 M.W.N. 698=A.I.R. 1921 Mad. 559.

——S. 47—Mortgage decree—Representatives of original attaching creditor sought to be impleaded—Right to be discharged from proceedings in execution of mortgage decree.

The plaintiffs instituted a suit to enforce a mortgage against the mortgagors and a large number of persons interested in the equity of redemption, one of whom was *H*. The mortgaged property was on the day of the institution of the suit, under attachment in execution of a money-decree obtained by *H* and the appellants who belonged to a joint family. A sale was eventually held in execution of the decree, but that sale was set aside on the objection of the mortgagor. The decree-holder again applied for execution and on this application the appellants objected to being impleaded in the execution proceedings:

Held, that the appellants should be discharged from the array of judgment-debtors in execution of the mortgage decree. A.I.R. 1936 Pat. 110=159 Ind. Cas. 1073=2 B.R. 150.

——S. 47—Person not party to decree impleaded as judgment-debtor in execution—His remedy.

A person who was not a party to the decree which was sought to be executed, was impleaded in execution proceedings as one of the judgment-debtors:

Held, that he could not challenge the decree, nor could the Court question the validity of the decree. He could seek his remedy only by a separate suit. A.I.R. 1934 All. 1027=1934 A.L.R. 1118=4 A.W.R. 723=1934 A.L.J. 1085=153 Ind. Cas. 158 (2).

Partnership.

——S. 47—Parties and representatives—Partnership.

Decree against firm is decree against its partners individually and can be executed against them. A.I.R. 1938 Cal. 316=42 C.W.N. 310=177 Ind. Cas. 812.

——S. 47—Parties and Representatives—Partnership.

Decree in name of joint family partnership firm of father and son—Son neither appearing, nor admitting partnership nor served individually—No order under R. 50 (2)—Decree cannot therefore be executed against property in hands of son, and if in executing against property in hands of father, son's interest is impaired, son can agitate the question by fresh suit. A.I.R. 1930 Pat. 205=127 Ind. Cas. 573.

——S. 47—Parties and Representatives—Person acquiring title before attachment.

Person getting title to property before attachment whether can be joined as party. 99 Ind. Cas. 989=A.I.R. 1927 Mad. 450.

Personal Property.

——S. 47—Parties and Representatives—Personal property—Charge decree—Charged properties to be proceeded against—Recovery of deficit, mode of.

Where a decree for maintenance fixes annual payments and also creates a charge on certain property, the decree-holder has first to proceed against the charged property and if the decree is not satisfied out of the charged properties, the decree-holder will have a right to proceed personally against the judgment-debtor. A.I.R. 1943 Bom. 158=I.L.R. (1943) Bom. 292=45 Bom.L.R. 244=207 Ind. Cas. 339.

——S. 47—Contention that property attached did not belong to judgment-debtor but was his own property in his personal capacity—Appeal from decision.

Where in reply to the execution application made against him and to the notice under O. 21, R. 66, the legal representative of the judgment-debtor appears and contends that the property which was attached and was proposed to be sold was not the property of the judgment-debtor and did not come into his hands as legal representative but was his own property in his personal or individual capacity, the matter can be decided in execution proceedings and an appeal lies from such a decision. A.I.R. 1941 Sind 142=I.L.R. (1941) Kar. 211=196 Ind. Cas. 447.

——S. 47—Mortgage suit—Subsequent purchaser impleaded as party—Application for personal decree against mortgagor—Purchaser not made party—Execution of personal decree—Claim by purchaser that property attached was his property held came within S. 47.

The governing factor with reference to S. 47 is not whether the disputants were parties to the decree, but whether the disputants were parties to the suit in which the decree was passed.

In a mortgage suit the subsequent purchaser of the property was impleaded as a party. After the sale of the hypotheca had not realized the full amount of the mortgage-decree, an application was made for a personal decree against the mortgagors and to this application the subsequent purchaser was not made a party. When the decree-holder came to attach part of the personal property of the mortgagors, there was a claim preferred by the purchaser on the ground that the property attached was his property by virtue of a sale executed after the passing of the personal decree:

Held, that the personal decree arising out of a mortgage suit was a decree passed in the mortgage suit; and though the purchaser was not given notice of the application for a personal decree, he was a party to the suit in which the decree was passed and the question was one relating to the execution of the decree. Section 47, therefore, governed the investi-

gation of the claim. A. I. R. 1940 Mad. 881=(1940) 2 M.L.J. 305=(1940) M.W.N. 826.

——S. 47—Objection between the representatives of the judgment-debtor and the decree-holder in relation to property taken in execution comes under S. 47 and not O. 21, Rr. 58 and 63—Objector holding two capacities, as representative of judgment-debtor and his personal capacity, claiming property to be his own—Objection should not be limited to one under S. 47—It can be treated as one under O. 21, R. 58—Objections dimissed—Suit under O. 21, R. 63 can be instituted. A.I.R. 1939 Pat. 354=179 Ind. Cas. 538=5 B.R. 238.

——S. 47—Personal property of claimant.

When a person who has been impleaded as the legal representative of a defendant or judgment-debtor claims that certain properties attached as the properties of the judgment-debtor are his own his remedy is by an application under S. 47 and not by an application under O. 21, R. 58. A.I.R. (Vol. 22) 1935 Mad. 922=1935 M.W.N. 785=168 Ind. Cas. 410. **See also** A.I.R. 1938 Mad. 731=I.L.R. (1938) Mad. 1080=181 Ind. Cas. 757=47 L.W. 552.

——S. 47 and O. 21, R. 58—Legal representative—Attachment — Objection — Whether under S. 47, or O. 21, R. 58.

In considering whether an application is under S. 47 or not, the Court must examine the substance of the application to find out its true nature and should not be guided solely by the heading given to it by a party.

Where a person is brought upon the record as a representative of the deceased judgment-debtor and he sets up his own right to the property at the time of its attachment and files an objection, the objection must be deemed to be one under S. 47, and not under O. 21, R. 58 which deals with questions arising between the decree-holder and strangers to the decree and the decision thereon is appealable and no suit lies against it. A.I.R. 1935 All. 183=1935 A.L.J. 74=1935 A.L.R. 12=1935 A.W.R. 39=153 Ind. Cas. 577.

——S. 47 and O. 21, R. 58—Claim by son that attached property belongs to him—Nattukottai Chetties—Custom—'Maral' deposit of money in husband's name on marriage—Trust liability for husband's debts.

At the time of the marriage of a Nattukottai Chetti his maternal uncle at the instance of the bride's father deposited a certain sum of money in his (the bridegroom's) name in a Bank. After the death of the husband, a decree was passed for an amount due by him against his assets in the hands of his son. The son claimed that the amount deposited belonged to him and his mother according to the custom prevailing among Nattukottai Chetties. His claim was rejected and he preferred an appeal:

Held, (i) that the question fell within the purview of S. 47, and the appeal was maintainable;

(ii) that deposits of this nature are made amongst Nattukottai Chetties with the object of making what may be called a marriage settlement at the time of the marriage with the object of providing a fund for the wife and children that may be born to her, and in view of this usage, the deposit was in the nature of a trust fund held by the husband for the benefit of the wife and children and the amount was not therefore, attachable in execution of the decree. A.I.R. 1934 Mad. 621=40 M.L.W. 347=67 M.L.J. 317=1934 M.W.N. 1026=152 Ind. Cas. 293.

——S. 47—Parties and representatives—Person claiming under assignment—Appeal.

A person who claims the property sought to be attached by virtue of an assignment which has been found to be invalid and against whom the prohibitory order is issued is a necessary party and has right of appeal. 1 Pat.L.T. 75=55 Ind. Cas. 175.

——S. 47—Parties and representatives—Personal property—Sale in execution of decree in representative capacity—Remedy.

When property claimed by a person in his personal capacity is sold in execution of a decree to which he was a party in a representative capacity he can apply under S. 47 to have the sale set aside and a separate suit will be barred by that section. 27 C.L.J. 572=47 Ind. Cas. 458.

——S. 47—Parties and representatives—Personal property.

Legal representative of deceased judgment-debtor asserting that certain property is his own and not part of assets of deceased in his hands—His objection is one under S. 47 and so it cannot be raised by regular suit. 118 Ind. Cas. 164=1929 A.L.J. 805=51 All. 878=A.I.R. 1929 All. 602. **See also** A.I.R. 1928 All. 704=110 Ind. Cas. 876.

——S. 47—Legal representative—Claim of.

Legal representative against whom decree passed as such objecting to attachment, claiming the property in his own rights by virtue of a gift prior to suit by the deceased in his favour—Matter falls under S. 47. 107 Ind. Cas. 856=A.I.R. 1928 Rang. 29=5 Rang. 659. **See also** 2 Rang. 168=83 Ind. Cas. 550=A.I.R. 1924 Rang. 323.

——S. 47, and O. 20, R. 58—Legal representative—Objection by.

Objection by judgment-debtor's representative under O. 21, R. 58—Case falls under S. 47, and decision thereon is a decree. O. 9, R. 13 would in terms be applicable to an **ex parte** decision passed on the objections. 39 All. 47, Foll. 87 Ind. Cas. 287=6 L.R.A. Civ. 278=A.I.R. 1925 All 594.

——S. 47—Parties and representatives—Person whose property is wrongly attached.

Where a person pays money to avoid an attachment of his property which is by mistake identified with the judgment-debtor's property, he cannot claim the money back in proceedings under S. 47 as he is neither a party nor a representative of a party in the suit but must enforce his claim by a separate suit. 9 S.L.R. 213=34 Ind. Cas. 492.

——S. 47 and O. 21, R. 100—Parties and representatives—Prior mortgagee, if representative of judgment-debtor.

Mortgagees holding prior to the decree cannot be regarded as representatives of the judgment-debtor

but even if they could be so regarded they are bound by the decree. Neither the tenants-at-will are such representatives: and no appeal lies against a decree granting possession to the judgment-creditors from a legatee in possession of the property of the judgment-debtor disallowing the claim put forward by mortgagees or tenants-at-will holding prior to the decree. 78 P.W.R. 1917=122 P.L.R. 1917=39 Ind. Cas. 772.

——S. 47—Parties and representatives—Pre-emption.

Absolute occupancy land mortgaged to **M** and a portion of that land previously mortgaged to **S**—In execution of decree obtained by **S** on his mortgage, portion sold and its possession obtained by landlord under S. 6, C.P. Tenancy Act—In execution proceedings of decree obtained by **M**, landlord's application to have that portion he got possession of in execution of the decree of **S** excluded, was allowed, and remainder of land ordered to be sold—Appeal against such order does not lie as application cannot be considered to be one under S. 47 but must be deemed to be disposed of under inherent power of Court—C.P. Code, S. 151. A.I.R. 1930 Nag. 199=26 N.L.R. 187=124 Ind. Cas. 246.

——S. 47—Parties and representatives—Prior mortgagee.

One **P** mortgaged twice to **K** his property and subsequently mortgaged the same to **G** and afterwards again to **K**. On his two earlier mortgages **K** sued **P** and **G** and obtained a final decree. During the pendency of **K's** suit, **G** sued on his mortgage **P** and **K** and obtained an **ex parte** final decree. On **G's** application for execution of his decree, **K** objected on the ground of being owner on a title prior in time to **G's** mortgage, **held** that **K's** objection was not covered by section 47 as he was not a party to the decree and that it was covered by O. 21, R. 58 as that was a direct attack on **G's** decree for the sale of the property. 80 Ind. Cas. 628=A.I.R. 1925 Nag. 185.

——S. 47—Prior mortgagee in possession.

A prior simple mortgagee in possession by purchase of equity of redemption, though dispossessed by subsequent simple mortgagee under an auction purchase under his mortgage decree, cannot sue for possession; his suit for possession is barred by S. 47. 82 Ind. Cas. 80=22 A.L.J. 683=6 L.R. A. Civ. 15=A.I.R. 1924 All. 752.

——S. 47—Parties and representatives—Subsequent mortgagee—Appeal.

A mortgagee whose mortgage was subsequent to a mortgage decree on property is a representative of the judgment-debtor within S. 47 and an order on an application by him to have the first mortgagee satisfied out of properties other than those mortgaged to him, is a decree within S. 2. 41 Cal. 418=25 Ind. Cas. 118. **See also** 48 All. 574 =95 Ind. Cas. 147=A.I.R. 1926 All. 475.

——S. 47—Mortgage-decree—Puisne mortgagee setting up paramount title in execution.

Where a decree has been passed in a mortgage suit for sale of the mortgaged properties, a puisne mortgagee who was a party to the decree cannot be allowed to attack the decree in execution proceedings by setting up a paramount title to those properties.

Assuming such an objection can be raised, the only section under which it can lie is S. 47. A.I.R. 1933 Mad. 569=38 L.W. 199=1933 M.W.N. 1371=144 Ind. Cas. 472.

Pro forma party.

——S. 47—Parties and representatives—Pro forma party.

Where in a suit on a bond a person is impleaded as one of the defendants on the ground that there had been a partition between the plaintiff and such person and that the bond fell to the share of the plaintiff, though no payment is claimed against him by the plaintiff, the object being to make the decision of the suit binding on him, such person is not a mere **pro forma** defendant but a party within the meaning of S. 47, C.P. Code. A.I.R. 1934 All. 699=1935 A.L.R. 78=153 Ind. Cas. 851.

Purchaser.

——S. 47—Parties and representatives—Purchaser—Final decree in partition suit—Defendants selling their share in partitioned property—Application by plaintiff for delivery of possession by executing decree—Vendee made party—Application if can be dismissed on ground that decree could not be executed against vendee.

A final decree was passed in a partition suit. The defendants subsequently sold their share in the partitioned property. The plaintiff then applied for delivery of possession by executing the final decree and made the vendee a party as a "representative of the judgment-debtor" within the meaning of S. 47. The vendee objected:

Held, that the application could not be dismissed on the ground that the decree could not be executed against the vendee. The plaintiff was merely asking for delivery of that portion of the joint property which had been awarded to him by the final decree; and the vendee was bound by the decree. Further, all that the executing Court was required to do was to deliver possession of the property to the plaintiff as determined by the final decree. Whatever rights the vendee might have could not be determined in these proceedings. A.I.R. 1938 Pat. 478=19 P.L.T. 820=178 Ind. Cas. 912.

——S. 47—Purchasers of mortgaged property pendente lite, if representatives of judgment-debtor.

Purchasers of the mortgaged property **pendente lite** are representatives of the judgment-debtor and the question regarding the delivery of the mortgaged property arising between the mortgagee decree-holder and such persons is one under S. 47, C.P. Code. Consequently the decree-holder cannot file a suit against the purchaser of the mortgaged property **pendente lite** in possession, specially when he is aware of the purchase during the suit. A.I.R. 1937 Mad. 580=1937 M.W.N. 232=46 L.W. 683=171 Ind. Cas. 925.

——S. 47, O. 21, R. 100—Purchaser of non-transferable holding dispossessed in execution of rent-decree against transferor.

A purchaser of a non-transferable holding, on being dispossessed in execution of a rent-decree against his transferor judgment-debtor, can apply under S. 47 and not under O. 21, R. 100, since he

is a representative of the judgment-debtor. A.I.R. 1937 Pat. 562=18 P.L.T. 433=171 Ind. Cas. 665.

——S. 47—Purchaser of properties over which decree-holder had charge.

Section 47 does not confer any right of proceeding in execution against persons who are not judgment-debtors themselves. The fact that a person purchasing some of the properties over which decree-holder has a charge may be regarded as a representative in the wider sense of the term; does not entitle the decree-holder to make him a party judgment-debtor in the execution application, without an application beforehand to make him a party judgment-debtor in execution proceedings. A.I.R. 1936 Mad. 870=71 M.L.J. 385=44 M.L.W. 414=1936 M.W.N. 1028=166 Ind. Cas. 941.

——S. 47—Holding sold for rent arrears—Mortgage decree on portion—Purchaser, whether representative of judgment-debtor.

A purchaser of the judgment-debtor's property at the sale for arrears of rent under the Public Demands and Recovery Act, is not his representative in a mortgage decree in respect of a plot forming part of the entire holding within the meaning of S. 47. A.I.R. 1936 Pat. 561=15 Pat. 414=17 P.L.T. 650=3 B.R. 53=165 Ind. Cas. 574.

——S. 47—Purchaser of equity of redemption.

The expression 'representative' under S. 47, C.P. Code, is a wider term than the expression 'legal representative' and includes purchasers of the equity of redemption. A.I.R. 1935 Lah. 306=158 Ind. Cas. 229.

——S. 47—Parties and representatives—Purchaser from judgment-debtor—Simple money decree.

A person purchasing from a discharged defendant prior to the passing of a simple money decree, property against which the decree was sought to be executed though not affected by the decree itself, is not a representative of that defendant within S. 47. 56 Ind. Cas. 809 (Nag.).

——S. 47—Purchaser of properties pending attachment—Objection under S. 47—Collusive sale pending attachment—Validity of sale, question of.

A attached **B's** properties before judgment. Subsequently **C**, another creditor of **B** filed a suit against **B**, obtained a decree and purchased the properties in execution and conveyed them to **D**. **D** objected to **A's** execution under S. 47, C.P. Code, but **A** pleaded that **C's** decree was collusive and **D** was merely a **benamidar** of **B**. The executing Court referred **A** to a regular suit for getting rid of **C's** decree and sale.

Held, (i) that **D** was representative of **B** within the meaning of S. 47, and rightly made an application under S. 47:

(ii) that the Court was, however, wrong in referring **A** to a regular suit. The matter was one which the executing Court was itself bound to decide. A.I.R. 1933 Mad. 166=36 M.L.W. 844=1932 M.W.N. 1335=63 M.L.J. 941=56 Mad. 447=141 Ind. Cas. 54.

——S. 47 and O. 21, R. 100—Parties and representatives—Purchase of non-transferable holding from tenant—Application to set aside sale.

The purchaser of the whole or part of an occupancy holding not transferable by a custom is not a representative of the judgment-debtor and he is not entitled to object to the sale under S. 47 of the C.P. Code, or maintain proceedings under O. 21, R. 100, C.P. Code. 3 Pat.L.J. 579=4 Pat.L.W. 129=43 Ind. Cas. 969.

——S. 47—Parties and representatives—Purchaser and the attaching creditor of a decree.

The question as to the genuineness of purchase of a decree between the purchaser and the creditor attaching the same decree is a question under S. 47, C.P. Code and is appealable. 20 C.W.N. 679=32 Ind. Cas. 524.

——S. 47—Parties and representatives—Purchaser of non-transferable holding—Setting aside sale—Appeal.

A purchaser of a portion of a non-transferable occupancy holding sold in execution of a decree for rent is a representative of a judgment-debtor within S. 244, C.P. Code, (1882). The question whether the sale should be set aside on application by the purchaser on the ground of fraud, etc., is a question between the parties to the suit or their representatives in interest and against the decision of such question there is both an appeal and a second appeal. 27 Ind. Cas. 431 (Cal.).

——S. 47—Parties and representatives—Money decree—Receiver appointed to realise money by disposing of judgment-debtor's property—Receiver selling property by private treaty with Court's permission—Purchaser, if representative of judgment-debtor. 221 Ind. Cas. 468=A.I.R. 1945 Pesh. 43.

——S. 47—Parties and representatives—Purchaser of property under attachment—If representative of judgment-debtor.

A purchaser of property under attachment is a representative of the judgment-debtor as contemplated by S. 47, C.P. Code. I.L.R. (1946) Lah. 672=224 Ind. Cas. 468=48 P.L.R. 147=A.I.R. 1946 Lah. 134 (F.B.).

——S. 47—"Parties and representatives"—Transferee from defendant pending suit—If representative.

The word "transferee" in S. 47, C.P. Code, is used in a much wider sense than the word "legal representative", and includes all persons on whom the interest of a party has devolved and who, to the extent of that interest, are bound by the decree. A transferee of a defendant's interest **pendente lite** is therefore a "representative" of the defendant within the meaning of S. 47, C.P. Code. 266 Ind. Cas. 434=A.I.R. 1947 Lah. 175.

——S. 47—Parties and representatives—Purchaser from judgment-debtor—Separate suit.

A transferee of the property of a judgment-debtor is not his representative and, therefore, an objection by him to the attachment of the property does not fall within S. 47. A separate suit, therefore, is maintainable by the decree-holder if the objection of the transferee is allowed. 16

All. 286, Foll. 64 P.R. 1912=113 P.W.R. 1912 =14 Ind. Cas. 40.

——S. 47—Parties and representatives—Purchaser from judgment-debtor.

A purchaser from the judgment-debtor is not a representative if the suit and the decree therein do not state to the land purchased. 15 C.W.N. 711 =9 Ind. Cas. 307.

——S. 47—Parties and representatives.

A purchaser of property attached is representative of the judgment-debtor within S. 47. 34 Mad. 450=8 M.L.T. 240=(1910) M.W.N. 574 =20 M.L.J. 961=7 Ind. Cas. 418.

——S. 47—Parties and representatives—Purchacer of property judgment-debtor—Sale since set aside.

A purchaser of the property of the judgment-debtor during an attachment subsequently set aside, is not representative of the judgment-debtor and therefore a suit against such purchaser by the decree-holder is not barred by S. 244 of the Code. 32 All. 129=7 A.L.J. 26=4 Ind. Cas. 406.

——S. 47 and O. 21, R. 90—Parties and representatives—Purchase at previous mortgage sale—Right to apply to set aside sale.

A transferee of an occupancy holding from a tenant though unregistered is the representative of that tenant against whom a decree has been obtained by the landlord and can apply to have a sale under the decree set aside for fraud. 9 C. W.N. 134, 11 C.W.N. 312, foll. 3 Ind. Cas. 39 (Cal.).

——S. 47—Parties and Representatives—Purchaser.

Purchaser from decree-holder-auction-purchaser who had not obtained possession cannot bring separate suit for possession as the purchaser is a representative of the decree-holder—If however possession of judgment-debtor is as licensee from decree-holder, suit is governed by Limitation Act, Art. 142, and is competent. A.I.R. 1930 Cal. 586=51 C.L.J. 560=34 C.W.N. 1059=128 Ind. Cas. 244.

——S. 47—Purchaser before attachment.

Where the sale is effected by the judgment-debtor before the attachment is actually made, the vendee does not become the representative of the judgment-debtor and is not bound by any proceedings against the judgment-debtor subsequent to the date of sale. 99 Ind. Cas. 989=A.I.R. 1927 Mad. 450.

——S. 47—Purchaser of judgment-debtor's attached property is representative within S. 47—Order disallowing his claim is appealable and regular suit is unnecessary. 28 Cal. 492; 20 Mad. 378 and 34 Mad. 450, Foll. 6 Lah. 544=93 Ind. Cas. 30=A.I.R. 1926 Lah. 134.

——S. 47—Purchaser of unascertained items.

Where before determining what item fell to the share of the decree-holder, particular items of property in the possession of a vendee from judgment-debtor were delivered to decree-holder, **Held**, that such a contention could have been put forward by the judgment-debtor and it is difficult to see why the transferee from the judgment-debtor pending execution could not put forward the same contention. An objection of such a nature is not one under O. 21, R. 99 or R. 101, but one under S. 47, and his objection would prevail in spite of a notice served upon him that certain items are to be delivered to decree-holder. 24 M.L.W. 254=97 Ind. Cas. 1031=A.I.R. 1926 Mad. 968=51 M. L.J. 255.

——S. 47—Purchaser, Decree-holder and judgment-debtor—Questions between.

When a question arises between auction-purchaser, decree-holder and judgment-debtor as to what was the property that was sold, the matter is one to be investigated by a separate suit and not by an application to the execution Court. A.I. R. 1923 All. 470, Foll. 87 Ind. Cas. 641=6 L. R.A. Civ. 282=A.I.R. 1925 All. 703.

——S. 47—Purchaser obtaining possession on the decree-holder's application.

The mere fact that on the decree-holder's application possession was in fact ordered to be given to the purchasers is not sufficient to make them parties to the proceedings or to constitute them representatives of the decree-holder within the meaning of S. 47 of the Code. (1907) A.W.N. 280, Foll. 26 Bom.L.R. 333=80 Ind. Cas. 249= A.I.R. 1924 Bom. 426.

——S. 47—Purchaser—Representative of parties.

Purchasers of one of several mortgaged properties are representatives of judgment-debtor mortgagor and are proper parties in execution of mortgage decree against the particular property though they were not parties to the mortgage suit. 72 Ind. Cas. 862=1 Pat.L.R. 139=A.I. R. 1924 Pat. 367.

——S. 47—Purchaser—Status of.

Purchaser from the decree-holder auction-purchaser is not a representative of the decree-holder. If he sues for possession, the suit can never be in respect of the execution, discharge and satisfaction of the decree—So S. 47 C. P. Code would not bar such a suit. A purchaser from a decree-holder auction-purchaser no doubt acquires the interest and the rights of the auction. purchaser, but there is no justification for holding that he is, therefore, to be deprived of the rights of an ordinary auction-purchaser to bring a suit at any time within twelve years to recover possession. 64 Ind. Cas. 68=11 L.B.R. 17=A.I. R. 1922 L.B. 18.

——S. 47—Purchaser—Third party.

If an outsider buys a property from a person who, as far as he can judge is ostensible owner and can give him a good title to the property, the mere fact that the ostensible owner is a judgment-debtor cannot possibly make the purchaser his representative within the meaning of S. 47. 45 Bom. 812 =23 Bom.L.R. 254=61 Ind. Cas. 287=A.I.R. 1921 Bom. 45.

——S. 47—Purchaser of non-transferable holding.

Where the landlord has accepted rent for a long period from the purchaser of a non-transferable

occupancy holding as mariatdar, he has a locus standi, under S. 47, C. P. Code to object to execution proceedings against the original tenant in respect of his holding. The use of the word marfat, in a rent-receipt is not sufficient to resist the claim of the purchaser to take objection under S. 47, C. P. Code. 64 Ind. Cas. 124 (Cal.).

Receiver.

——S. 47—Parties and representatives—Receiver.

An appointment of a Receiver under O. 40, R. 1, though it might operate to change possession, cannot affect the title to the property. He is not the "representative" of any party to the suit within the meaning of S. 47. A Receiver in insolvency appointed under insolvency laws, however, stands on a different footing. A.I.R. 1945 Cal. 387=49 C.W.N. 558=80 C.L.J. 198.

——S. 47—Receiver, if gets individual rights of creditors.

Obiter.—Although in a sense, a Receiver may be regarded as the representative of all the parties interested in the litigation in which he is appointed the individual rights of creditors as a class do not vest in him. A.I.R. 1943 Mad. 199=1942 M.W.N. 766=(1943) 1 M.L.J. 449=56 L.W. 353 =I.L.R. (1942) Mad. 577=208 Ind. Cas. 163.

——S. 47 and O. 21, R. 22—Property of insolvent sold in execution of decree—No notice under O. 21, R. 22 on Official Receiver—Official Receiver can apply to get sale declared void.

After adjudication, the interest of the insolvent devolves upon the Official Receiver and he represents not merely the creditors but the insolvent also. Hence where the property of the insolvent is sold in execution of a decree against him, the Official Receiver being a representative of the insolvent, i.e., a party to the decree, is competent under S. 47, C. P. Code to apply to have the sale declared void on the ground that it was held without notice being served on him as required by O. 21, R. 22. The mere fact that the auction-purchaser claims through the insolvent judgment-debtor does not make the dispute one between the representatives of the judgment-debtor. A.I.R. 1941 Mad. 606=(1941) 1 M.L.J. 569=53 M.L.W. 498=1941 M.W.N. 577=198 Ind. Cas. 417.

——S. 47—Question between decree-holder auction-purchaser and Official Receiver on insolvency of judgment-debtor falls within S. 47.

A question between the decree-holder-auction-purchaser and the Official Receiver on insolvency of judgment-debtor regarding the sale is one falling within the purview of S. 47 and a second appeal is competent. A.I.R. 1942 Mad. 415 (1) =55 L.W. 119=1942 M.W.N. 198=(1942) 1 M.L.J. 283=I.L.R. (1942) Mad. 614=201 Ind. Cas. 769.

——S. 47—Official Receiver selling insolvent debtor's joint family property—Partition by minor sons born subsequent to insolvency — Official Receiver appointed Special Receiver in partition suit—Attachment by father's creditor of sums realized by Receiver—Objection by Official Receiver, if maintainable—Separate suit under O. 21, R. 63.

Held on the facts that the Official Receiver in his objection could not be said to be representing the sons in his capacity as Special Receiver in the partition suit and therefore he was in the position of a third party objecting to an attachment under O. 21, R. 58 and therefore no appeal was competent from the order of the execution Court rejecting the objection and allowing execution to proceed. The proper remedy for the Official Receiver was by way of suit under O. 21, R. 63.

Held further, that the alleged share of the sons in the sum realized by Official Receiver by sale of the attached joint family properties could not be said to be the property of the sons but merely represented a portion of sale proceeds of certain items of joint family property liable to discharge certain other debts of the insolvent besides the one due to the decree-holder. The decree-holder who was a party to the partition suit did not claim any priority over other creditors and therefore was bound by the decree and could not attach the sum in question in execution of his decree alone. A.I.R. 1941 Mad. 262=(1940) 2 M.L.J. 860=1940 M.W.N. 1225=52 M.L.W. 810.

——Ss. 47 and 151—Decree against firm—One partner B obtaining decree against other two A and C—Last two adjudicated insolvents—Heirs of other partner admitted as creditors—Execution by decree-holders — Official Assignee depositing amount due to B's heirs—Amount withdrawn—Petition by another creditor for refund—Order to refused—Application by Official Assignee to refund.

—S. 47, if applies—Inherent power to reverse order.

Held, (1) that the Official Assignee was not a party to the suits out of which the execution proceedings arose, and was not a representative of any party to those suits. He was not even a party in the execution proceedings. He was there merely in the role of garnishee and S. 47 did not apply.

(2) that the Court had no inherent powers to reverse its own order under S. 151 although it may do so in a proper case on review, but the power there, is a power conferred by statute. The Court had jurisdiction to order the money to be paid out to B's heirs and that order not having been set aside on review or appeal was final so far as the Official Assignee was concerned;

(3) that the Court could not direct security which was furnished for the benefit of B's heirs to be realized for the benefit of the Official Assignee. B's heirs had never objected to the money being paid to the decree-holders and they were the only persons who could have objected. At no time had the Official Assignee had any right to the security and the fact that the security still remained in the hands of the Court did not improve his position. He was, therefore, not entitled to an order directing the security to be realized. A.I.R. 1936 Rang. 77=160 Ind. Cas. 957.

——S. 47—No attempt made to interfere with his right to property in his care—Receiver, if a necessary party.

The Receiver of the property of a party to litigation is not a necessary party if no attempt is made thereby to interfere with the right of the

Receiver to the property entrusted to his care, where the subject-matter of suit is not in the possession of the Receiver. A.I.R. 1935 Cal. 15=38 C.W.N. 996=155 Ind. Cas. 848.

——S. 47 and O. 21, R. 58—Official Receiver, whether 'representative'.

The question whether an Official Assignee or Receiver is a representative of an insolvent within the meaning of S. 47, depends upon the true character of the proceedings. If his application is to stay an execution sale of property or to release property from an attachment on the ground that the property in question is property of the insolvent which has become vested in him, he is not to be regarded as acting in a representative capacity and S. 47 has then no application. A.I.R. 1935 Mad. 151=41 L.W. 28=68 M.L.J. 78=1935 M.W.N. 23=58 Mad. 403=154 Ind. Cas. 934. See also A.I.R. 1934 Cal. 64=60 Cal. 1298=37 C.W.N. 973=149 Ind. Cas. 399. Also A.I.R. 1932 Cal. 203=35 C.W.N. 971=136 Ind. Cas. 593.

——S. 47—Receiver—If representative—Test.

Whether Receiver is or is not a representative of debtor for purposes of S. 47 depends upon the purpose and nature of application made by the Receiver. Where he comes for the purpose of saying that as the judgment-debtor's property now belongs to the Receiver, the Court cannot sell for the judgment-debtor's debt, that which is the property of another person because it has vested in the Receiver for the benefit of creditor's then for that purpose he is not a representative of the judgment-debtor but a third party making claim and no second appeal lies from the order made on the application. A.I.R. 1932 Cal. 203=35 C.W.N. 971=136 Ind. Cas. 593.

——S. 47—Parties and representatives—Receiver in insolvency.

An application by a receiver of an insolvent's estate to set aside an execution sale on the ground of a prior adjudication of the debtor is an application under S. 47 of the C. P. Code. 3 L.W. 504=30 M.L.J. 611=19 M.L.T. 357=34 Ind. Cas. 829 .

——S. 47—Parties and representatives—Receiver.

Receiver for execution of decree—Execution application by him dismissed—Appeal lies as he is representative of both parties. 118 Ind. Cas. 694=31 Bom.L.R. 320=A.I.R. 1929 Bom. 279.

Remainderman.

——S. 47—Parties and representatives—Remainderman—Decree for foreclosure against life-estate-holder, whether binds remainderman.

The decision of the Judicial Committee in Khairajmal v. Daim, 32 I.A. 23 at p. 33 "that the Court has no jurisdiction to sell the properties of persons who were not parties to the proceedings or properly represented on the record" would apply with equal force to a case where a foreclosure decree was obtained against a life-estate holder presumably on the basis that she was the absolute owner. Therefore, the person who had a vested remainder and who had not been impleaded as party to the suit for foreclosure would not be bound by the decree against the life-estate-holder. A. I. R. 1931 Oudh 358=8 O. W.N. 566=6 Luck. 715=134 Ind. Cas. 865.

——S. 47—Parties and representatives—Right of person not party to suit to invoke S. 244.

A person whose claim has been upheld in execution proceedings is not a party to the suit and cannot invoke the aid of S. 244 to bar plaintiff's claim. 36 Mad. 128=10 M.L.T. 261=21 M.L.J. 887=(1911) 2 M.W.N. 237=12 Ind. Cas. 73.

Scope.

——S. 47—Parties and representatives—Scope.

Each execution case is a distinct proceeding and there is no presumption of continued representation of parties in successive executions. If a person is made a party to an execution proceeding and particularly if that proceeding is finally disposed of by an order of dismissal, he cannot be taken to be a party to every subsequent execution that may be levied. A.I.R. 1945 Cal. 387=49 C.W.N. 558=80 C.L.J. 198=(1946) 1 Cal. 45.

——S. 47—Auction-purchaser—Representative.

There is certainly a very strong tendency to give S. 47 a wide application and to bring within its scope questions arising between the parties to the suit and the auction-purchaser. A stranger purchaser at a court-auction, therefore, is entitled and bound to have any question relating to the satisfaction of the decree decided under S. 47. A.I.R. 1937 Mad. 779=1937 M.W.N. 749=46 L.W. 280=172 Ind. Cas. 468.

——S. 47—Sons, if can challenge decree or mortgage by father on basis of which decree is passed, in execution.

S. 47 applies to matters which arise after a decree has been passed and not to those which were in existence even at the time when the suit was instituted. If objections regarding the correctness or the validity of a decree are raised by a person who was a party to the suit or by one who must be deemed to have been a party, these will be barred not by S. 47, but by some other provision of law. If, on the other hand, these are being raised by a third party and are of a nature which go to the root of the matter and attack the decree itself, they could not be gone into in execution proceedings for the simple reason that an execution Court cannot be asked to go behind the decree. If persons who were no parties to the suit on mortgage against father and who have been already found not to be represented by their father, desire to challenge the decree or the mortgage on the basis of which the decree was passed, they cannot do so in execution proceedings. A.I.R. 1939 Mad. 867=I.L.R. (1940) Mad. 123=1939 M. W. N. 918=50 L.W. 472=187 Ind. Cas. 816.

——S. 47—Interpretation of.

Sections 47 and 144, must be read together and the word "parties" in S. 144 must be taken to include their representative and further that representative does not mean only a party's legal representative but it means his representative-in-interest. Similarly, the assignee of the decree of the Appellate Court which reversed the decree appealed against, is entitled to obtain restitution by applying for execution of the appellate decree. A.I.R. 1938 Oudh 169=1938 O.L.R. 276=1933 O.W.N. 722

=14 Luck. 106=175 Ind. Cas. 169. See A.I. R. 1936 Sind 166=30 S.L.R. 170=165 Ind. Cas. 305.

——S. 47 (1)—Parties both judgment-debtors and decree-holders.

Sub-section (1) of S. 47, should not be restricted to parties ranged against each other on opposite sides. The principle, would also apply, where the parties are both judgment-debtors and decree-holders. An appeal lies from an order under the section and where the parties are both decree-holders and judgment-debtors at the same time, even second appeal lies. A.I.R. (Vol. 24) 1937 Lah. 592=174 Ind. Cas. 862.

——S. 47, O. 21, R. 58—Question as to whether a person is representative of judgment-debtor, in objection case.

Where the question to be decided is whether a person is a representative of the judgment-debtor and not a question of whether a property had been properly attached, the matter comes within S. 47, and, therefore, whether it was incumbent upon the objector to bring an action, an action contemplated by O. 21, R. 58, is quite besides the point. A.I.R. 1936 Pat. 616=163 Ind. Cas. 38=2 B.R. 573.

——S. 47 (1), (3)—Question between rival representatives of one party—Other party disclaiming interest in question.

Section 47 (3) must be read as ancillary to sub-S. (1) and only comes into operation where there is a question arising between the parties to the suit or their representatives relating to the execution, discharge or satisfaction of the decree, and it does not apply to a case in which the question is between the rival representatives of one party, the other party having throughout disclaimed any interest in the question. In such a case no appeal would lie against the order of the Court deciding the claim of the rival representatives. A.I.R. 1935 Lah. 384=37 P.L.R. 145=157 Ind. Cas. 73.

——Ss. 47 and 144—Parties and representatives.

S. 47 must be read with S. 144. "Parties" in S. 144 includes their representatives in interest. (1918) P.H.C.C. 243=5 Pat.L.W. 141=46 Ind. Cas. 465.

——S. 47—Parties and representatives—Scope of.

The execution court cannot go behind the decree and allow the judgment-debtor to put up a paramount title in the execution department. Where pending a mortgage suit by the puisne mortgagee the prior mortgagee who was a party filed another suit or his mortgage and the property was sold in the execution of the decree of the later mortgage, the purchaser under the prior mortgage claimed priority.

Held, that the issue as to priority not having adjudicated upon, the purchaser could not raise the plea in execution but should file a separate suit for that purpose. 1930 A.L.J. 1135=A.I. R. 1930 A. 836 (2).

——S. 47 and O. 21, R. 100—Right of representative to apply.

A person who is a representative of the judgment-debtor within the meaning of S. 47 of the C. P. Code might maintain an application under O. 21, R. 100 of the C. P. Code. **65 Ind. Cas.** 476 (Cal.).

——S. 47—Parties and representatives—Shebait—Different capacity—Appeal.

S. 47 does not apply where a judgment-debtor claims property not in his personal capacity but as a shebait of an idol who was not a party to the suit, and no appeal lies. But it applies where he is a party to the suit both in his personal capacity as well as a shebait an appeal will lie. 18 C.W. N. 910=20 Ind. Cas. 790.

——S. 47—Parties and representatives—Shebait—Execution against the successor.

The question whether or not the decree passed against a shebait is capable of execution against the successor is one coming within S. 47 of the C. P. Code. 14 C.L.J. 337=11 Ind. Cas. 280.

——S. 47 and O. 21, R. 61—Parties and representatives—Suit by heir to establish that property is not attachable.

Plaintiff was a defendant in a suit impleaded as an heir of a person against whose estate relief was claimed and it was found that he was not the heir and the suit against him was dismissed. In execution, his property was attached. Plaintiff brought a declaratory suit that the property was his.

Held, S. 47 was no bar to the suit. 25 P.L. R. 1915=241 P.W.R. 1915=28 Ind. Cas. 14.

Surety.

——S. 47—Parties and representatives—Surety.

A surety does not come within the provisions of S. 47 as he was not a party to the original suit, and therefore, it is open to him to file a suit for a declaration that he had been discharged on account of an adjustment between the creditor and the debtor. A.I.R. 1943 Bom. 246=45 Bom.L. R. 438=I.L.R. (1943) Bom. 382=209 Ind. Cas. 435.

——S. 47—Surety—Rights of.

Where the surety has been made a party to the execution proceedings and has raised a defence that has been decided, then, it is not open to him to raise again the same defence in a separate suit. A.I.R. 1942 Nag. 107=1942 N.L.J. 413=I.L. R. (1942) Nag. 779=201 Ind. Cas. 692.

——Ss. 47 and 145—Surety for performance of decree, if a party—Order against him in respect of execution of decree if appealable.

A person who is liable as a surety for the performance of the decree shall, under S. 145, be deemed to be a party within the meaning of S. 47. An appeal would lie from an order against him in regard to the execution of the decree by the sale of his property. A.I.R. 1935 Rang. 39 =155 Ind. Cas. 511.

——Ss. 47 and 145—The effect of S. 145 is that if an order for, or in course of execution, is made against a surety who is within the ambit of S. 145 he is at liberty to appeal against that order as though he were a party to the suit within the meaning of S. 47; but in other respects he is not deemed to be a party within S. 47 and is not entitled to file any application which falls within S. 47, unless such application is permitted under

some express provision in the Code. A.I.R. 1931 Rang. 206=9 Rang. 434=134 Ind. Cas. 509.

——S. 47—Parties and representatives—Surety.

Person giving security for payment of decretal amount by judgment-debtor can contest his liability as between himself and decree-holder under S. 47 only and separate suit by him does not lie. 123 Ind. Cas. 126=A.I.R. 1930 Lah. 399.

——S. 47—Surety—Discharge of—If within section.

When any person has become liable as surety for the fulfilment of any condition imposed on him, such person is for the purposes of the appeal a party within the meaning of S. 47 and therefore an order discharging him from the suretyship is a decree and is appealable. 86 Ind. Cas. 105=23 A.L.J. 59=6 L.R.A. Civ. 171=A.I.R. 1925 All. 344.

——S. 47—Surety—If party.

A surety by virtue of S. 145 is a party within the meaning of S. 47 and a plea of fraud can be raised before the execution Court by him. 92 Ind. Cas. 259=7 L.L.J. 457=26 P.L.R. 561=A.I.R. 1925 Lah. 618.

Third Party.

——S. 47 — Parties and representatives—Third party—Execution—Decree not affecting interest of person—Such person, if compelled to satisfy decree.

There is no principle or precedent which compels a person whose interest is not at all affected by a decree and against whom the decree is not at all binding to satisfy that decree. A.I.R. 1936 Cal. 181=61 C.L.J. 75=162 Ind. Cas. 296.

Transferee.

——S. 47 (1) and (3)—Parties and representatives—Transferee.

Sub-section (3) of S. 47, C. P. Code, is ancillary to S. 47, sub-S. (1) and cannot be invoked unless the case is governed by sub-S. (1).

One **S** obtained a decree against **T** and transferred it to one **D**. One **B** who had a decree against **S** attached the decree obtained by **S** against **T** in execution of his own decree. **B** subsequently transferred his decree to **A**. **D** applied for execution of the decree purchased by him from **S**. **A** then preferred an objection under S. 47, to the effect that the sale by **S** in favour of **D** was fictitious. **D** pleadeed that objection was not maintainable under S. 47 and also denied that **A** was the transferee of **B**.

Held, that the question was as to who was the representative of the decree-holder and as it was not between the parties to the suit but between **D** and **A** who were purchasers of the decree, it was not covered by S. 47, C. P. Code. A.I.R. 1942 Oudh 281=1942 O.W.N. 1=1942 A.W.R. 28=198 Ind. Cas. 514.

16. Personal Property.

See CIVIL P. C., S. 47—PARTIES AND REPRESENTATIVES.

——S. 47—Transfer pendente lite—Transferee, is representative in interest—Held, that the suit was barred under S. 47.

Where a person obtains property by a transfer from the defendant **pendente lite,** he should be treated as a representative-in-interest of the transferor-defendant and he is bound by the result of the decree.

In execution of his decree obtained by a mortgagee against a family, the mortgagee himself purchased the property and sold it to one **A**. During the pendency of the proceedings of this decree a stranger instituted a suit against the family and obtained a decree in execution of which, the property was purchased by **B**. An application by **A** against **B** to remove resistance to possession was dismissed. **A** then instituted a suit against **B** for possession:

Held, that **A** and **B** had become representatives-in-interest of the parties and consequently the suit by **A** was prohibited by S. 47, C. P. Code. A.I.R. 1939 Mad. 944=1939 M.W.N. 857=(1939) 2 M.L.J. 415=189 Ind. Cas. 305. See also A.I.R. 1938 Bom. 367=40 Bom.L.R. 512=I.L.R. (1938) Bom. 649=177 Ind. Cas. 499.

——S. 47—Parties and Representatives—Transferee pendente lite.

Transferees pendente lite cannot be representatives of the transfer or within the meaning of S. 47, C. P. Code, for the purpose of attacking the decree-holder's right to sue. 52 Bom. 208=30 Bom.L.R. 102=108 Ind. Cas. 17=A.I.R. 1928 Bom. 65.

——S. 47—Transferee pendente lite.

A transferee **pendente lite** from a defendant whose transfer proves to be inoperative against the decree-holder and persons claiming under him is not a representative of the judgment-debtor so as to be entitled to appeal under S. 47 against an order for the removal of obstruction to delivery of possession passed against him. 66 Ind. Cas. 722 =1921 M.W.N. 698=A.I.R. 1921 Mad. 559.

——S. 47—Parties and Representatives—Transferee prior to decree.

Money decree against tenant for rent—Transferee of the holding prior to the decree is not representative of the tenant. A transferee of the interest of a tenant against whom rent decree has been passed, in order that he may be clothed with the legal character of his representative, must be bound by the decree. 1921 P.H.C.C. 154=A.I.R. 1921 Pat. 189.

——S. 47—Parties and representatives—Unrecorded co-sharer.

An unrecorded fo-sharer in a tenancy is not a representative in interest of the recorded tenant within S. 47, C. P. Code. 13 C.L.J. 257=15 C.W.N. 512=7 Ind. Cas. 769.

——S. 47—Transfer by party before decree—Transferee, if his representative.

A transferee of the interest of a party before a decree is passed against him or in his favour is not a representative of such party within the meaning of S. 47, C. P. Code. A.I.R. 1939 Bom. 496=41 Bom.L.R. 1007=187 Ind. Cas. 96.

——S. 47—Objection by transferee of original decree-holder.

Objections in execution preferred by the transferee of original decree-holder fall within S. 47,

C. P. Code, when he represents the latter. A. I.R. 1937 Oudh 365=1937 O.L.R. 224=1937 O. W.N. 519=13 Luck. 237=168 Ind. Cas. 154.

——S. 47—Mortgage—Suit for foreclosure—Transfer during pendency of suit—Final decree—Mortgagee is entitled to execute his decree not only against the mortgagor but also against the transferee **pendente lite**—Section 47 was applicable and an appeal to the High Court was competent. A.I.R. 1933 All. 201=1933 A.L.J. 113 =55 All. 235=144 Ind. Cas. 70.

——S. 47—Transferee from judgment-debtor is bound by the decree to the extent of the interest acquired by the transfer—But this does not entitle the decree-holder to proceed against him in execution—In suitable cases, however, Court may allow execution to proceed against him. A.I.R. 1932 Cal. 423=36 C.W.N. 93=138 Ind. Cas. 64.

——S. 47—Parties and Representatives unrepresented Party.

If a lunatic is not properly represented in a suit, the effect is that he is no party to the suit and has no **locus standi** to object to the execution of the decree under S. 47. 11 P.L.T. 185=A.I. R. 1930 Pat. 480.

——S. 47 and O. 21, R. 58—Objection by judgment-debtor because property held by him as mutawalli—Case, if comes under S. 47, or O. 21, R. 58—Question of validity of wakf.

The terms of S. 47 cover a case where a judgment-debtor proceeded against in one capacity claim immunity for the property on the ground that he holds it in another capacity **e.g.**, where the judgment-debtor objects to execution not because he holds the property as his own personal property but because he holds it as **mutawalli**.

The execution Court is justified in deciding a simple question, as to whether the alleged **wakf** was valid, in execution proceedings. A.I.R. 1942 Sind 14=I.L.R. (1941) Kar. 474=197 Ind. Cas. 884.

Wakf.

——S. 47—Wakf.

Final decree for sale on foot of mortgage obtained. Then mortgagor made wakf of mortgaged property directed to be sold—It is not necessary that beneficiaries under wakf should be made parties to application for execution as the **wakf** cannot affect the rights of the decree-holder's right of sale. A.I. R. 1930 All. 597=1930 A.L.J. 1302.

——S. 47, Cl. (3) and O. 21, R. 16—Purchase of decree—Question as to genuineness of—Decision.

The fact that an application was made under O. 21, R. 16 does not prevent S. 47 of the Code from being applied for the decision of a question falling within its scope. 20 C.W.N. 679=32 Ind. Cas. 524.

——S. 47 (S. 244, Old Code)—Purchaser of equity of redemption in execution sale.

A purchaser of the equity of redemption of the judgment-debtor at a judicial sale, is a representative of the judgment-debtor within the meaning of S. 47 of the C. P. Code, 1908. An assignee of the decree is a representative of the decree-holder within the meaning of the section. (1910) 12 C.L.J. 312=7 Ind. Cas. 55.

——S. 47—Property sold by judgment-debtor before suit sought to be attached in execution against judgment-debtor—Transferee depositing decretal amount in Court to save property from attachment and applying for refund—Matter held fell under S. 47, though application did not fall under O. 21, R. 58 and resort to S. 151 was proper—No separate suit held was necessary. A.I.R. 1940 Sind 191=191 Ind. Cas. 635.

——S. 47—A question arising between the same parties but not in their capacity as decree-holder and judgment-debtor but in their capacity as landlord and tenant is not covered by S. 47 and a separate suit is necessary. 69 Ind. Cas. 500=6 N.L. J. 25=A.I.R. 1923 Nag. 149.

——S. 47—Parties need not be ranged on opposite sides—Questions between defendants **inter se** are covered by the section. 19 Cal. 683 (P.C.). Foll. 77 Ind. Cas. 148=18 M.L.W. 311=1923 M.W.N. 662=A.I.R. 1924 Mad. 365=45 M.L. J. 478.

——S. 47—S. 47 is not necessarily confined to decree-holders, on the one side, and judgment-debtors on the other and is wide enough to cover a dispute between co-defendants who may be parties in a partition suit. A.I.R. 1933 All. 57=1932 A.L.J. 1036=54 All. 1031=143 Ind. Cas. 420.

17. Powers of executing Court.

——S. 47. See also C. P. CODE, (1) S. 38—DECREE BINDING.

(2) S. 47—QUESTION RELATING TO EXECUTION—DECREE.

——S. 47—Executing Court—Powers—Execution of personal decree under O. 34, R. 6, against family property of the deceased judgment-debtors and their legal representatives—Right of legal representatives to object to the execution on the ground that there was no debt.

In execution of decree on a mortgage executed by a mother and her two sons, the hypotheca was brought to sale and as it was insufficient to discharge the mortgage debt, a personal decree under O. 34, R. 6, C.P. Code, was passed against the sons after overruling their objection that nothing remained due. In execution of this decree, the legal representatives of those two sons who had died in the meanwhile, objected to the execution on the ground that no debt was due,

Held, that as the legal representatives were questioning the correctness of the decree itself, it cannot be gone into by the executing Court. 62 L.W. 669=1950 M.W.N. 384=A. I. R. 1950 Mad. 47=(1949) 2 M.L.J. 434.

——S. 47—Executing Court—Powers of going behind decree—Partition decree fixing shares of parties—Shares varied by subsequent events—Executing Court's power to give effect to variance.

It is a well-known principle that the executing Court cannot go behind the decree, and where a partition decree fixes certain shares for the parties, it is the duty of the executing Court to proceed to partition according to those shares. But there are limits to this principle. Where after the passing of the decree, events happen and the shares are varied by reason of those events, the

executing Court can give effect to that variance and it cannot be said that in giving effect to that variance, it is going behind the decree or the decision of the Court which passed the decree. A wide construction should be put upon S. 47, C.P. Code, with regard to introducing parties and ascertaining all possible points in execution proceedings without a fresh suit. I.L.R. (1945) Kar. 455=227 Ind. Cas. 287=A.I.R. 1946 Sind 99.

——S. 47—Executing Court—Powers of—Going behind the decree—When permissible.

Ordinarily speaking the execution Court has no power to go behind a decree. But it can do so where a personal decree has been passed against the legal representative of a deceased debtor in respect of the debt due from the deceased and this exception does not extend to a decree for costs passed against the legal representative personally. 1947 O.A. (C.C.) 136=1947 O.W.N. 364=1947 A.W.R. (C.C.) 136=A.I.R. 1947 Oudh 217.

——S. 47—Executing Court—Powers of—Power to examine validity of decree based on agreement of parties and containing agreement prima facie valid and enforceable—Decree negativing claim for costs and interest—Clause providing for right to decree-holder to realise amounts with interest and costs on default without specifying rate of interest or other details—Power of executing Court to award costs and interest in execution. See C.P. CODE, O. 23, R. 3. A.I.R. 1950 Pat. 440.

——S. 47—Executing Court—Powers of—Power to question validity of decree and to refuse execution.

An executing Court is not generally entitled to question the validity of decree which it is called on to execute. But where it is patent that the decree was, in fact, passed without jurisdiction or a nullity, the executing Court can question its validity and refuse to execute the decree on that ground. I.L.R. (1946) Nag. 583=1946 N.L.J. 317=224 Ind. Cas. 224=A.I.R. 1946 Nag. 311.

——S. 47—Power of executing Court to punish for contempt.

An executing Court has no inherent power to commit for contempt. (1907) 17 M.L.J. 334=2 M.L.T. 365=30 Mad. 413.

——S. 47—Powers of executing Court not to make a proper decree but to construe existing decree.

A Court executing a decree is precluded from making a proper decree—a decree which should have been drawn up; it can only construe the decree without adding to or subtracting from it. (1907) 9 C.L.J. 288=4 Ind. Cas. 56.

——S. 47—Powers of executing Court—Court's duty to facilitate inquiries.

The Court ought to facilitate inquiries which are necessary for the purpose of carrying out decrees passed by it and to accept with the readiness any information which shows that the litigants have disregarded any part of the decree. (1902) 4 Bom.L.R. 960.

——S. 47—Powers of executing Court—Decree—Construction of, by executing Court.

Where a decree-holder applies for execution the Court to which the application is made should not reject it on light grounds, and even where a decree is not quite intelligible, the Court must, as far as possible, construe it in a fair and reasonable spirit so as to advance instead of impeding its execution. (1903) 5 Bom.L.R. 802.

——Ss. 47 and 152—Executing Court—Powers of—Order giving judgment-debtor's land on mortgage to decree-holder in lieu of decretal amount—Decree-holder dispossessed of such land owing to non-specification of khasra numbers—Application by decree-holder for amendment of order by specifying khasra numbers—Nature of—Maintainability.

If an order recording satisfaction of a decree is made by the executing Court and one of the parties comes forward with the allegation that the order is wrongly made or that it is illegal, there is no doubt that the Court can go into the matter and decide the question whether or not the order was valid.

But where the executing Court ordered the judgment-debtor's land to be given to the decree-holder on mortgage in lieu of the decretal amount and recorded complete satisfaction of the decree after the decree-holder obtained actual possession of it but subsequently by reason of the omission in the order to specify the khasra numbers of which the decree-holder was to be the mortgagee the original mutation in his favour was set aside and he was also dispossessed of the land, an application by the decree-holder for the correction of the order by specifying the khasra numbers of the land given to him on mortgage without a prayer for setting aside the order recording the complete satisfaction of the decree by review, does not lie. As the order recording satisfaction of the decree no longer represents the actual state of affairs, neither the decree-holder nor the executing Court can ignore, it, and until that order is set aside the executing Court is **functus officio** and cannot afford any relief to the decree-holder by way of amending the order. The application made by the decree-holder for amendment of the order is within the scope of S. 152, C.P. Code, rather than of S. 47. A.I.R. 1950 Pepsu 52.

——S. 47—Mortgage decree for sale—Court's refusing to sell property, if constitutes interference.

An executing Court must execute a decree if valid and executable as it stands and cannot alter or vary it in execution. But an executing Court which refuses to sell property, the sale of which has been decreed under O. 34, does not merely "interpret" the decree but interferes with it. A.I.R. 1934 Lah. 438=15 Lah. 772=37 P.L.R. 36=153 Ind. Cas. 772.

——S. 47 (S. 244, Old Code), 1 last clause—'May either stay etc.'—Dismissal of application pending determination of representative.

It is not obligatory on the executing Court either to stay execution until the question has been determined by a separate suit or itself determine the question as to who is the representative. A Court has a discretion to stay or to dismiss the application. (1905) 28 M. 357. [**But see** new Code S. 47, which says the execution Court shall determine the question.]

——S. 47 (S. 244. Old Code)—Mesne profits, ascertainment of—S. 47 not applicable.

The assessment of mesne profits, though done by the executing Court, is not a procedure in execution of a decree, as it results in the final decree. S. 244 would not therefore apply. 5 Ind. Cas. 387=11 C.L.J. 501. (See now O. 20, R. 12).

——S. 47 and O. 20, R. 12—Mesne profits are to be ascertained by Court passing decree.

Per Fazl Ali, J.—It is the Court which passes the decree and not the executing Court which is to ascertain the mesne profits under the new Code. A.I.R. 1931 Pat. 1=12 P.L.T. 127=130 Ind. Cas. 785.

——S. 47—Modification of decree—Jurisdiction of executing Court. 4 Bom. L.R. 531=26 B. 707.

——S. 47—Question arising in an enquiry under S. 52 (2) are questions arising between parties to suit relating to execution and must be decided by executing Court and no separate suit lies. 5 Rang. 44=101 Ind. Cas. 431=A.I.R. 1927 Rang. 127.

——S. 47—Execution of mortgage decree directing sale of specific property—Objection by legal representatives of judgment-debtor on ground that mortgagor had no right to transfer property originally or had no longer interest therein since date of decree—Objection cannot be allowed.

The Court executing a mortgage decree which directs the sale of a specific property, cannot allow the judgment-debtor or his legal representatives to object that such a decree is not capable of execution either because the judgment-detbor had no right originally to execute the mortgage bond upon the basis of which the decree has been passed, or that since the date of the mortgage decree owing to the death of the judgment-debtor or otherwise, the judgment-debtor had no longer any interest in the property. A.I.R. 1946 Pat. 214=24 Pat. 741=13 B.R. 108=227 Ind. Cas. 630.

——S. 47—Question as to whether decree-holder in possession of mortgaged property has committed waste.

The Court, in executing a decree, is entitled to go into such matters as waste committed, whichever side has happened to be in possession, since the date of the decree sought to be executed.

In execution proceeding for sale of mortgaged property after the passing of the final decree in a suit on usufructuary mortgage, the judgment-debtor contended that the property should be sold only after the allowance had been made for compensation due to him for acts of waste committed by decree-holder as his legal representative after the decree had been passed. The judgment-debtor's application was dismissed by the Court and he was referred to a regular suit:

Held, that the question whether the decree-holder in possession of the mortgaged property after the decree was passed committed acts of waste and deteriorated the value of property was a question in relation to execution withinin the meaning of S. 47, C.P. Code and it fell to be determned by the Court executing the decree. A.I.R. 1945 Mad. 179=(1945) 1 M.L.J. 67=221 Ind. Cas. 522.

——Ss. 47, 99, 114 (Ss. 244, 578, 623, Old Code)—Petition to reopen execution—Review.

A petition to reopen execution on the ground that satisfacition was reported by mistake does lie under S. 244, C.P. Code. Where such an application was made by the decree-holder referring to both Ss. 244 and 623, C.P. Code, and the first Court thought that the latter section was inapplicable and re-opened the proceedings under S. 224; **Held,** that even if S. 623 was applicable, the order of the first Court could not, having regard to S. 578, C. P. Code, be interfered with in appeal. (1900) 5 C.W.N. 627.

——S. 47 and O. 21, R. 2—Plea in bar of execution—Payments made prior to decree.

The ruling of the Full Bench in 40 M. 233 regarding the admissibility of pre-decretal arrangements in bar of execution is confined to agreements which relate to execution and not to agreements which attack the decree itself. Where therefore it is alleged that certain payments were made towards the decree even before the decree and that credit should be given for those sums, the plea is not admissible in execution. 1930 M.W.N. 1152=32 L.W. 919=A.I.R. 1931 Mad. 399=129 Ind. Cas. 818=54 Mad. 184=60 M.L.J. 721.

——S. 47—Power of executing Court to grant—Decree not awarding mesne profits.

Where the decree does not determine the right to mesne profits and does not award it, the execution Court cannot determine its amount or order it to be paid. 22 I.A. 68, foll.. (1901) 6 C.W.N. 672 (D.B.).

——S. 47—Executing Court—Duty of—Decree in favour of wife for maintenance creating charge on husband's properties—Death of husband—Widow inheriting husband's property—Execution of decree for maintenance—Plea in bar of execution on ground of her inheriting as heir—Sustainability—Power of executing Court to refuse execution. I.L.R. (1949) Cut. 336.

——S. 47—Transfer of decree to Collector—Court's power to decide as to legal representatives—Separate suit.

When a decree of partition has been transferred to the Collector for execution, the Court passing the decree retains seisin of the case enabling it to decide as to who are the legal representatives of the parties. This matter can be decided only by the executing Court and cannot form the subject-matter of a separate suit. A.I.R. 1945 Nag. 86=I.L.R. (1944) Nag. 852.

——S. 47—Interest—Decree not awarding interest—Execution stayed pending appeal—Decree-holder is entitled to interest from order of stay till application for execution.

Where the decree does not award interest but the trial Court passes an order staying execution during the pendency of appeal on the judgment-debtor depositing a certain amount to cover any loss which may accrue to the decree holder, the latter is entitled to interest on the decretal amount

from the date of the order for stay till the decree-holder applies for execution subsequent to the decision in appeal. A.I.R. 1944 All. 225=1944 A.L.J.401=1944 A.W.R. 132=1944 O.W.N. 81=I.L.R. (1944) All. 379=Ind. Cas. 154.

——S. 47—Order for costs by High Court in refusing leave to appeal to Privy Council—How executed.

Where an application for leave to appeal to the Privy Council is rejected by the High Court and an order for costs is passed, the trial Court cannot execute such an order in its own right but it can be executed only on a transfer of the order by the High Court for execution and even when the order is so transferred, the trial Court can only execute it itself and cannot transfer it to another Court for execution. Where the trial Court sends its own decree, the appellate decree and the order for costs passed by the High Court to another Court, the sale held by the transferee Court must be quashed. A.I.R. 1944 Cal. 301 (1)=48 C.W.N. 535.

——S. 47—Powers of executing Court—Question of benami.

The executing Court cannot go into the question of **benami**. Hence a beneficiary who alleges himself to be the real decree-holder has no **locus standi** in the executing Court to come up and claim that he is entitled to execute the decree in his own name. A.I.R. 1944 Pat. 307=23 Pat. 410=219 Ind. Cas. 100.

——Ss. 47 and 38—Executing Court when may refuse to execute decree—Consent decree—Fields entered as malik makbuza at instance of parties.

If the Court which passed the decree has no inherent jurisdiction, the decree is incapable of execution. It follows therefore that the executing Court has jurisdiction to refuse to execute the decree only when the decree on the face of it appears to be void as being contrary to law.

But the Court executing the decree is not competent to embark on an enquiry into facts, which if established, will tend to show that the Court passing it had no jurisdiction to do so.

Nor is the fact that on proper investigation the decree may be found to be not according to law, a ground for not enforcing the decree inasmuch as a decree, though it may not be according to law, is binding and conclusive between the parties until it is set aside either in appeal or in revision.

The plea that the fields which at the instance of the parties were entered in the consent decree as **malik makbuza** were in truth and in fact occupancy lands and therefore were not liable to be sold in execution of the decree is not a plea of law pure and simple but involves investigation and it does not fall within the province of the executing Court to launch upon an elaborate inquiry. A.I.R. 1943 Nag. 325=1943 N.L.J. 486=I.L.R. (1943) Nag. 757=213 Ind. Cas. 378.

——S. 47—Withdrawal of execution—Court, if can still decide point arising between parties.

Even if the decree-holder has expressed his intention of withdrawing his application for execution, the executing Court can decide a point, **e.g.**, of jurisdiction, which has arisen between the decree-holder and the judgment-debtor specially when the parties have gone to a full trial on the point and have either produced or been given an opportunity of producing their evidence. There is nothing in the Civil Procedure Code itself which definitely prohibits the Court from deciding such a question and there is no reason why the question should be postponed for decision in a subsequent execution application. A.I.R. 1943 Pesh. 67=208 Ind. Cas. 488.

——S. 47—Liquidator under S. 42 (2) (b), Co-operative Societies Act, 1912—Executing Court, if can question legality of order.

The general rule is that an executing Court cannot go behind the decree. It must take the decree as it is and must proceed to execute it. It might have been correctly passed, or it might be erroneous or not according to law, but it is nonetheless binding on, and conclusive as between the paties unless set aside on appeal, revision or other appropriate proceedings. The function of the executing Court is to enforce and execute it and not to question its correctness. To this general rule, however, there is a well-established exception that if there was a lack of inherent jurisdiction in the Court which had passed the decree and for some other reasons, the decree is a nullity, the executing Court must refuse to execute it. Hence the executing Court can enquire whether the Court which passed the decree had, or had not inherent jurisdiction to pass it.

An order by the liquidator under S. 42 (2) (b), Co-operative Societies Act stands on no higher footing and the Civil Court executing it is competent to enquire if the order had been passed within the limits of his jurisdiction and to refuse to execute it if it was without jurisdiction. A.I.R. 1942 Lah. 237=44 P.L.R. 376=I.L.R. (1943) Lah. 553=202 Ind. Cas. 689.

——S. 47—Decree or award against minor—Power of executing Court to decide whether Court or Arbitrator had jurisdiction to pass decree or award—Application, if can be treated as suit.

The executing Court can always decide whether the Court which passed the decree had or had not inherent jurisdiction to pass the decree in question. Such a question cannot as a rule be solved merely by looking at the decree as it stands. Some kind of enquiry however limited in scope is obviously necessary. In the case of a decree or award against a minor which is sought to be executed, an inquiry as to whether a minor was a minor or not and whether he was properly represented or not, is not beyond the powers of the executing Court. Hence the executing Court can go into the short questions of fact arising to determine whether the Court had or had not inherent jurisdiction to pass the decree or the arbitrator had or had not the inherent jurisdiction to make the award which he did make.

In such cases a separate suit is maintainable but the objection is after all a technical one and if an executing Court comes to the conclusion that in its view a separate suit is maintainable instead of dismissing the objection raised on behalf of the

aggrieved person, it should at once exercise its powers under S. 47 (2), and convert the proceeding into a suit so long as no question of limitation and jurisdiction arises in the matter. A.I.R. 1942 Lah. 129=44 P.L.R. 31=201 Ind. Cas. 311.

——S. 47—Powers of Executing Court—Question of validity of decree.

Executing Court can enquire into the validity of a decree passed against the defendant who had died during the pendency of the suit. Legal representatives of the deceased are not bound by such decree. 1942 N.L.J. 338.

——S. 47—Mere irregularity of a decree cannot be questioned in execution proceedings. A.I.R. 1942 Pat. 348=23 P.L.T. 162=199 Ind. Cas. 625=8 B.R. 584.

——S. 47—Suit for possession of property purchased in execution—Defendant's claim as prior purchaser rejected on ground that sale was during attachment—Allegation that part of purchase price was amount due under previous mortgage—Equities between parties.

Where in a suit for possession of the property purchased in execution of a decree the defendant's claim under his prior purchase from the owner is rejected on the ground that the purchase was made after attachment of the property and the part of the purchase price is alleged by the defendant to be an amount due under the previous mortgage in his favour, the Court cannot adjust the equities as between the parties and grant possession of the property to the plaintiff upon the condition of paying the amount due under the mortgage bond to the defendant. The remedy of the defendant is by way of a suit upon the mortgage. A.I.R. 1941 All. 41=1940 A.W.R. 598=1940 A.L.J. 894=I.L.R. (1941) All. 39=129 Ind. Cas. 787.

——S. 47 and O. 21, R. 53—Decree attached—Compromise effected and suit dismissed—Attaching creditor—His proper remedy.

Where an appeal from a decree for a large amount which has been attached by a creditor of the decree-holder, is compromised resulting in the dismissal of the suit, the attaching creditor, though he tried to get himself made a party did not succeed, has got a right to ignore the compromise. And the proper remedy for him is by way of a civil suit for a declaration that the compromise decree is void against him and not by an application under S. 47, as the execution Court should not be asked to go into any questions relating to the validity of the decree sought to be executed. If his rights are to be held not to be affected by the compromise decree, it is not open to the judgment-debtor of the attached decree to claim to have the decree set aside as a whole and to have a fresh hearing of his appeal. The decree must stand for what it is worth, though it may be entirely ineffectual as regards the rights of persons who were not parties to it. A.I.R. 1941 Lah. 402=43 P.L.R. 471=I.L.R. (1942) Lah. 603=198 Ind. Cas. 726.

——S. 47—Decree in favour of judgment-debtor hypothecated with decree-holder—Negligence of latter in not executing it—Judgment-debtor, if entitled to ask Court to award to him full amount of decree—His remedy.

Where a judgment-debtor hypothecates with the decree-holder a decree in his favour for an amount greater than that in the decree against him, and the decree-holder neglects to execute the decree so entrusted to him by way of hypothecation, it is not open to the judgment-debtor to ask the executing Court in execution proceedings to award the full amount of the decree in his favour. The Court will be acting within its jurisdiction in deciding whether or not the judgment-creditor was bound to give credit to the extent of his decree but the Court cannot award to the judgment-debtor the amount by which the decree is in excess of the decree against him. The judgment-debtor's remedy is by way of a separate suit. A.I.R. 1933 Pesh. 79=148 Ind. Cas. 643.

——S. 47—Nullity of decree on ground of valuation—Question of.

It is true that in certain circumstances, a Court executing a decree may come to the conclusion that the decree is a nullity. But those are cases where the want of jurisdiction of the Court which passed the decree is apparent on the face of the record.

Held on the facts that it was open to the defendant judgment-debtor to raise objection as to the valuation in the trial Court or in appeal and as this was not done, the objection that decree was nullity could be disregarded by executing Court.

Held, further that even if it was assumed that the trial Court had no jurisdiction to hear the suit by reason of under-valuation, still the decree could not be treated as nullity in view of S. 11 of the Suits Valuation Act. A.I.R. 1942 Pat. 152=22 P.L.T. 855=197 Ind. Cas. 361=8 B.R. 194.

——S. 47—Sale in contravention of terms of decree.

Obiter.—In performance of its duty of executing a decree the executing Court has no jurisdiction to hold a sale in contravention of the terms of the decree. A.I.R. 1941 Pat. 566=199 Ind. Cas. 169=8 B.R. 507.

——Ss. 47 and 48—Adjustment between decree-holder and judgment-debtor—Execution Court, if can record and determine its legal effect.

An executing Court has jurisdiction to record an adjustment entered into between the decree-holder and the judgment-debtor and to ascertain its legal effect and to order accordingly. A.I.R. 1940 All. 270=1940 A.L.J. 301=1940 A.W.R. 281=I.L.R. (1940) All. 377=188 Ind. Cas. 323 (F.B.).

——S. 47—Executing Court's powers to enquire into validity of decree.

The executing Court can go into the question whether or not the decree is a nullity where, on the face of the decree, it is apparent that the Court passing the decree had no jurisdiction or if there are patent reasons for doubting the jurisdiction of that Court to pass the decree. The

powers of an executing Court to go into the validity of a decree which is not, on the face of it, without jurisdiction, are very limited. A.I.R. 1940 Mad. 628=(1940) 1 M.L.J. 329=1940 M. W.N. 297=51 L.W. 683.

——S. 47 (2)—Powers of executing Court—Conversion.

The power given to a Court under S. 47 (2) of treating an application for execution as a suit may be exercised by the Appellate Court. A.I.R. 1940 Oudh 27=1939 O.L.R. 671=1939 A.W.R. 233=1939 O.W.N. 936=184 Ind. Cas. 850.

——S. 47—Compromise—Executing Court, whether bound to record it—Such compromise not registered—Effect.

The executing Court is bound to record the compromise between the parties and the question, whether it extinguished the old decree or whether it did not intend to extinguish the old decree, is entirely beside the question as to whether or not the Court had jurisdiction to record it.

In a suit relating to the property comprised in such a compromise, the compromise even though not registered, can be received in evidence. A.I.R. 1938 Lah. 69=176 Ind. Cas. 813.

——S. 47—Powers of executing Court.

Executing Court is not precluded from finding out whether decree was passed at all. Where what is produced is something written on a decree form unsupported by the judgment, the decree is a mere nullity and can be disregarded by the executing Court. A.I.R. 1938 Rang. 372=178 Ind. Cas. 544.

——S. 47—Powers of executing Court—Subsequent events—If can be taken into consideration.

Executing Court is bound to execute the decree as it stands and cannot entertain an objection that having regard to the fact that the profits of the family property were reduced after the passing of the decree for maintenance, the plaintiff is not entitled to execute the decree with respect to the full amount of maintenance. A.I.R. 1938 All. 362=1938 A.L.J. 495=1938 A.L.R. 565=1938 A.W.R. 308=I.L.R. (1938) All. 535=176 Ind. Cas. 139.

——S. 47—Powers of executing Court—Transfer by.

Transfer of only objection proceedings relating to attachment cannot be made by executing Court, without transferring the execution proceeding as well. A.I.R. 1938 Lah. 95=39 P.L R. 654=175 Ind. Cas. 525.

——S. 47—Powers of executing Court—Amendment.

Executing Court cannot amend decree. It must ascertain property to be sold and for this can look for its paramount description. A.I.R. 1938 Pat. 195=175 Ind. Cas. 47=4 B.R. 507.

——S. 47—Execution sent to Collector—Collector, if Court—Collector, sending matter under S. 47 to Civil Court for decision.

A Collector is not a Court; he is an official who carries out certain duties imposed upon him in the execution of decrees. After he has carried out those duties, he returns the case to the Civil Court and if the Collector is not **functus officio** the Civil Court to whom the case is **returned**, cannot be said to be **functus officio**. It **may** be that the Collector should determine application under S. 47, himself, but under the note to R. 13 of the rules under S. 70 (1), C. P. Code, contained in Revenue Book Circular, Vol. 2, S. 3, Serial No. 8, there is nothing to prevent the Collector from referring any point on which he has doubt to the Civil Court, for decision. Where the matter is thus referred to the Civil Court the Civil Court has power to decide whether the decree has been satisfied. A.I.R. 1938 Nag. 49=173 Ind. Cas. 718.

——S. 47—Decree transferred to Collector—Powers conferred on Court executing decree do not pass to Collector—Court which passed decree has power to hold inquiry whether or not decree has been satisfied.

After a decree has been transferred for execution to the Collector, the powers conferred by C. P. Code on the Court executing the decree remain with that Court, and do not pass to the Collector. Nor do the provisions of the Revenue Manual bar the jurisdiction of the Civil Court which has passed a decree from holding inquiry whether or not the decree has been fully satisfied. Where, therefore, the decree-holder has certified payment by mistake or through fraud of the judgment-debtor and the case has been struck off as fully satisfied by the Collector, the trial Court has jurisdiction to deal with the decree-holder's application under S. 47, C. P. Code. A.I.R. 1937 Oudh 298=1937 O. W.N. 231=167 Ind. Cas. 401.

——S. 47—Powers of executing Court—Amendment of decree—Question relating to.

It is no business of the executing Court to enter into the question as to whether the amendment of the decree should have been made or not but to allow the execution of it provided the application is within three years from the date of the amendment. (1937) 65 C.L.J. 455=41 C.W.N. 1330. **See also** A.I.R. 1934 Oudh 289=150 Ind. Cas. 947=11 O.W.N. 814=1934 O.L.R. 661.

——S. 47—Decree assigned—Notice to judgment-debtor—No contest—Whether can raise objection in execution.

A decree was assigned by the Official Assignee to another person. His name was substituted as decree-holder after notice to the judgment-debtor who did not appear to contest the assignment. He, however, in execution proceedings objected to assignment as collusive. The objection was allowed by the execution Court.

Held, that the executing Court could not question the assignment. A.I.R. 1937 Cal. 4=40 C. W.N. 1393=167 Ind. Cas. 430.

——S. 47—Powers of executing Court—Decree in scheme suit.

Decree in scheme suit allowing arrears of pay to **archakas** from the date of suit to the date of judgment and also providing that they were entitled to a certain salary:

Held, that the provision regarding past arrears was not a part of the scheme and so could be recovered by way of execution but the salary which accrued due after the date of the decree was part

of the scheme for management and could not be recovered by way of execution. A.I.R. 1937 Mad. 326=45 L.W. 230=1937 M.W.N. 611=168 Ind. Cas. 715.

——S. 47—Executing Court—Power to relieve against penalty.

Section 74 of the Contract Act, applies to the case of a compromise decree and it is open to a Court executing such a decree to interfere with a stipulation by way of a penalty contained in the compromise.

When a contract contains a term which, not being an integral part of the contract, is introduced only for the purpose of securing the performance of the contract, that term is penal and equity interferes to relieve a party to the contract against it. A penalty is a term which is extraneous and collateral to the actual contract. Where the agreement of the parties as well as the decree clearly show that the smaller sum was intended to be paid in full settlement of the larger sum that was actually due and recoverable, and on default of payment before certain date, the actual sum and the costs were to be paid, equity does not regard such a provision as being in the nature of a penalty. A.I.R. 1937 Nag. 413=173 Ind. Cas. 257.

——S. 47—Objection to execution on the ground that minor was represented by guardian whose interest was adverse and that decree is nullity—Power of executing Court to question validity of decree.

The executing Court has no power to go into an objection that the decree is a nullity on the ground that the defendant in the suit who was a minor was represented in the suit by a guardian whose interest was adverse to the defendants. (The law relating to the power of an executing Court to consider the validity of the decree itself discussed). A. I. R. 1936 Mad. 618=1936 M.W.N. 561=71 M. L. J. 209=59 Mad. 642=44 L.W. 396=164 Ind. Cas. 472.

——S. 47—Powers of Executing Court.

Executing Court cannot go behind the decree and by invoking S. 146 it cannot change a decree against the father into a decree against his legal representative. A.I.R. 1935 Cal. 738=40 C.W.N. 26=159 Ind. Cas. 575.

——S. 47—Powers of Executing Court.

The executing Court has no jurisdiction to direct that the holder of a rent decree should proceed against the tenure in arrears in the first instance. A.I.R. 1935 Cal. 544=61 C.L.J. 91=157 Ind. Cas. 676.

——S. 47—Interest—Question relating to.

Execution of decree suspended—Interest granted during suspension—Original decree not carrying interest—Interest not paid — Original remedy of execution was to be put in force and the decree-holder was not entitled to receive interest after such period. A.I.R. 1934 Lah. 35=149 Ind. Cas. 934.

——S. 47—Powers of Executing Court—Dispute as to shares of legal representatives.

Where there is a dispute as to the shares of the legal representatives of a deceased decree-holder, or, in other words, as to the extent to which the decree has been extinguished, it is a question which falls within the purview of S. 47, and this question may well be settled by the executing Court under the powers vested in it under that section. A.I.R. 1933 Sind 371=27 Sind L. R. 411=149 Ind. Cas. 608.

——S. 47—Amendment of pleading at the time of execution.

The Court should, whenever possible, assist the plaintiff by adding parties and amending pleadings, but at the stage of execution it would be wrong to do so. A.I.R. 1933 Cal. 668=60 Cal. 801=149 Ind. Cas. 282.

——S. 47—Question as to whether property awarded by decree has been damaged on date of delivery.

When a decree awards a person a certain property, he is entitled to get it in the state in which it was when that decree was passed; and whether, when the property was delivered, it continued to be in the same state or in the meantime underwent deterioration, is a question to be determined in execution. A.I.R. 1933 Mad. 825=1933 M.W.N. 1182=38 L. W. 714=66 M.L.J. 263=57 Mad. 49=148 Ind. Cas. 356.

——S. 47—Validity of decree, if can be impeached in execution—Question as to saleability of property.

A decree was passed but the sons of the defendant objected to the execution under S. 47, on the ground that the Court had no jurisdiction to pass a decree against them and that the *tankha* was inalienable:

Held, that it was not a case in which the simple money decree was sought to be executed against property claimed by the judgment-debtors as inalienable, and that so long as the decree stood, the objectors being parties it could not challenge its validity in execution proceedings, either on the question as to the security that was to be sold or on the question of the saleability of the security.

Held, further, that the decree being one for sale and in respect of specified properties, no question as regars the saleability of those properties could be taken in execution. A.I.R. 1932 Cal. 517=55 C. L.J. 114=138 Ind. Cas. 380.

——S. 47—Validity of decree, when can be questioned by executing Court—Jurisdiction.

Although an executing Court is competent to refuse to execute a decree if it finds that the decree was made without jurisdiction, yet the powers of the executing Court in this respect are limited. The executing Court would be competent to refuse to execute the decree only when, on the face of the decree, it would appear that the Court which passed it had no jurisdiction. But if there is a clear statement upon the plaint which gives the Court jurisdiction to entertain a suit and if upon the basis of that jurisdiction, a decree is passed by the Court without there being a challenge by the defendant as regards the territorial jurisdiction, it is not open to the defendant to question the jurisdiction of the Court after the decree has been made and in the course of its execution. A.I.R. 1932 Cal. 380=54 C.L.J. 593=137 Ind. Cas. 375 (2).

——S. 47—Executing Court—Power to question validity of decree.

An execution Court can only go into the question of the validity of the decree which is before it for execution upon questions of a jurisdiction, i.e., pecu-

niary, territorial or personal jurisdiction. It has no power to question the validity of an appellate decree on the ground that the appeal was in fact incompetent and that the Appellate Court acted erroneously in entertaining the appeal. A.I.R. 1931 Cal. 546=35 C.W.N. 332=134 Ind. Cas. 80.

——S. 47—Enquiry into validity of decree.

Where a decree is passed against a firm on a reference by one of the partners, the executing Court has no jurisdiction to go behind the decree and entertain the objections regarding its validity even if the decree is a nullity. A.I.R. 1932 Lah. 291=133 Ind. Cas. 558.

——S. 47, O. 21, R. 7—Power to question jurisdiction of original Court.

Where a decree is transferred for execution to another Court, the transferee Court has no jurisdiction to go into the question of the jurisdiction of the original Court to pass the decree. A.I.R. 1932 Lah. 601=33 P.L.R. 725=138 Ind. Cas. 376.

——S. 47—Powers of Executing Court—Power to go behind decree.

The executing Court must take the decree at its face value. It can inquire whether the Court, as evidenced on the face of the decree by seal and signature, was a properly constituted Court competent to pass the decree but it need not inquire, having satisfied itself of the competence, whether it is a decree which the Court ought to have passed. It has no power to enquire into the question whether the judgment-debtor was a lunatic and unrepresented at the time of the passing of the decree. A.I.R. 1932 Mad. 7=61 M.L.J. 520=34 L.W. 806=135 Ind. Cas. 314.

——S. 47—Powers of Executing Court—Scheme decree.

Where a scheme contains a clause reserving liberty to apply for modification of the scheme, the proper persons who can apply under the liberty are the parties to the suit. If, however, the previous parties are dead or are colluding with the defendants or negligent in applying, it would be permissible for the Court to bring others on the record under O. 1, R. 10 and for such an application the consent of the Advocate-General is not necessary. A.I.R. 1931 Bom. 388=33 Bom.L.R. 546=133 Ind. Cas. 823.

——S. 47—Powers of Executing Court—Set-off.

Where a valid order has been passed by a Court granting permission to the decree-holder to set-off the decretal amount against the purchase-money, another Court of a superior grade before which execution against the same property is pending has no power under S. 63, to cancel that permission. Such superior Court can only call for the excess amount if any deposited in Court. A.I.R. 1931 Bom. 350 =33 Bom. L. R. 537=55 Bom. 473=133 Ind. Cas. 817.

——S. 47—Executing Court cannot question the jurisdiction of Court which passed decree.

It is not open to an executing Court to question the validity of a decree on the ground that the Court which made the decree had not pecuniary jurisdiction to make it. 133 Ind. Cas. 276=13 Lah. 25=33 P.L.R. 309.

——S. 47—Decree on award—Application for execution—Power of executing Court to treat decree as nullity and refuse execution.

A dispute between parties can be referred by them to arbitrators, and the arbitrators can only settle the dispute as between the parties who have made the reference to them, and if any Court arrogates to itself the power to file an award, which on the face of it cannot be filed, the filing of the award and the decree passed thereon, are mere nullities and nothing else and the Court to which such a decree is sent for execution can treat it as a nullity and refuse to execute it. A.I.R. 1930 Rang. 337=8 Rang. 544=129 Ind. Cas. 519.

——S. 47—Powers of executing Court—Decree-holder accepting lesser amount if paid by instalments on regular dates—Default of instalments—Execution for entire amount—Power of Court to grant relief—Time, whether of the essence.

Where a decree is passed as a result of an agreement between the parties, it does not stand on a higher footing than the agreement which preceded it and, therefore, the Court has the same power in the case of such a decree to relieve the defaulting party from the consequences of the default as it would have if the agreement had stood alone without the subsequent decree passed thereon. In such cases, the Court cannot interfere with the effect of default, if, as a result thereof the decree-holder has taken away a concession that he had given to the judgment-debtor. If on the other hand, as a result of the default, the decree-holder is attempting to realize more than was really due to him, in other words, if he is enforcing a penalty, then the Court is entitled to step in and to give relief to the judgment-debtor against the forfeiture. A.I.R. 1931 Lah. 696=32 P.L.R. 945=132 Ind. Cas. 580.

——S. 47—Powers of Executing Court—Award—Invalid—Refusal to execute.

A dispute between parties can be referred by them to arbitration and the arbitrators can only settle the dispute as between the parties who have made the reference to them, and if any Court arrogates to itself, the powers to file an award which on the face of it is invalid and hence cannot be filed, the filing of the award and the decree passed thereon are nullity. The executing Court to which such a decree has been sent for execution can refuse to execute it. A.I.R. 1930 Rang. 337.

——S. 47—Power of executing Court.

If a decree is the instrument which created the charge, though no doubt the charge can be enforced in execution, yet an executing Court, though it cannot question the validity of a decree, is bound to construe the decree, if necessary. 1930 M.W.N. 337=A.I.R. 1930 Mad. 688=125 Ind. Cas. 539=32 L.W. 100=59 M.L.J. 160=53 Mad. 750.

——S. 47—Powers of Executing Court.

It is open to the Court executing the decree to refuse to execute it, if it finds that the decree was a nullity. But it is important to bear in mind the distinction between a decree which is void or is a nullity and a decree which is merely voidable. A decree can be said to be void where there is a total want of jurisdiction in the Court to pass it. If the Court had no jurisdiction to entertain the suit, it cannot possibly have jurisdiction to pass a decree in the suit. If, however, the Court had jurisdiction to en-

tertain the suit but acted irregularly or illegally in the exercise of its jurisdiction, the decree passed by it may be erroneous or illegal but cannot be said to be without jurisdiction. If a minor or a lunatic is properly described in the plaint and if a guardian is nominated for him, the Court has jurisdiction to entertain the suit. If the minor or lunatic was effectively represented in the suit, the lack of a formal order appointing a guardian would only amount to an irregularity of procedure which would not be fatal to the suit. The decree rendered in such suit is not a nullity. Hence the Court executing the decree could not go behind the decree and examine the validity thereof. 11 P.L.T. 185=A.I.R. 1930 Pat. 480.

——S. 47—Power of Executing Court—Questioning validity of decree—Limits.

The authority of the executing Court to question the validity of the decree will depend on the facts and circumstances of the particular case under consideration and no hard and fast rule can be laid down in this matter. The executing Court can within certain limits question the validity of a decree where the question of jurisdiction is involved. Dispute regarding money owed by *K* to a bank was referred to the Registrar of Co-operative Societies and he gave an award. It was ordered in the award that in case the full sum due by *K* to the Bank was not collected, *K* should execute a mortgage over his immovable property. It was objected in execution of award that such direction in the award was outside the power of the Registrar.

Held, that the execution Court should consider the objection. 26 N.L.R. 60=120 Ind. Cas. 732=A.I.R. 1929 Nag. 357.

——S. 47—Powers of Executing Court—Agreements prior to decree cannot be gone into.

An objection based on an agreement prior to the passing of the decree is not maintainable in the Court executing the decree. If parties wish to enter into such arrangements, the only proper course is to have the terms embodied in a decree passed by consent. 98 Ind. Cas. 1056=5 Bur.L.J. 142=A.I.R. 1927 Rang. 48.

——S. 47—Objection that decree is nullity—Objection proceedings can be treated as suit.

Where a decree is passed against a minor without appointing a guardian *ad litem* on the footing that he was a major and the minor objects to the execution of the decree against him, the decree being a nullity, the execution Court can treat the objection proceedings as proceedings in a suit and grant a declaration that the decree was a nullity. 48 All. 362=24 A.L.J. 379=93 Ind. Cas. 376=A.I.R. 1926 All. 387. *See also* 50 M.L.J. 232=A.I.R. 1926 Mad. 429.

——S. 47—Legal representatives and limitation—Court passing decree must determine.

The questions as to who are the legal representatives and whether the decree was barred by limitation or not, must be determined by the Court which passed the decree before it transfers the decree for execution to another Court. 23 M.L.W. 92=1926 M.W.N. 120=91 Ind. Cas. 1056=A.I.R. 1926 Mad. 411.

——S. 47—Partition—Not on execution petition.

Court cannot grant partition merely on execution petition by auction-purchaser. 22 M.L.W. 563=1926 M.W.N. 165=91 Ind. Cas. 961=A.I.R. 1926 Mad. 232.

——S. 47—Saleability decided in suit—Executing Court cannot re-open the question—S. 60 does not apply to mortgaged property.

The question whether a certain pension is of such a character as not to be liable to be sold is a mixed question of law and fact. If the point was expressly raised by the defendant concerned in the suit itself and decided against him and a decree under O. 34, R. 4 was passed for the sale of that pension, it no longer remains open to the judgment-debtor to say that the pension was of such a character as not to be saleable at all. It would not be proper for the execution Court to reopen the question which has already been decided in the original suit. In cases where no attachment is necessary and the sale takes place in pursuance of a mortgage-decree directing a sale of the mortgaged property, S. 60 will not be applicable to decide the saleability of the property, so as to prevent the Court from selling the property. 89 Ind. Cas. 364=23 A.L.J. 841=47 All. 900=A.I.R. 1925 All. 652.

——S. 47—Decree made without jurisdiction need not be executed.

Execution of decree—Court trying suit without jurisdiction—Executing Court can refuse to execute decree passed in the suit. 89 Ind. Cas. 685=53 Cal. 166=42 C.L.J. 1=29 C.W.N. 948=A.I.R. 1925 Cal. 907 (F.B.).

——S. 47—Executing Court—Cannot question validity of decree.

An executing Court cannot go beyond the decree for enquiring whether the Court that passed the decree was entitled to do so in view of what was actually alleged by the plaintiff. It can interpret a decree but cannot say that it should not have been passed by the Court. 78 Ind. Cas. 303=5 P.L.T. 368=A.I.R. 1924 Pat. 504. *See also* A.I.R. 1925 Cal. 276=Ind. Cas. 255 and A.I.R. 1924 Nag. 419=78 Ind. Cas. 853.

——S. 47—No sale in declaratory decree.

The Court executing the decree cannot go beyond the terms of the decree and order sale of partnership property and distribution of sale proceeds where the decree merely declared partners' interest. A sale in lieu of partition is ordered only when the property is incapable of division by metes and bounds and when the equities of the case require it. 93 Ind. Cas. 825=A.I.R. 1925 Sind 318.

——Ss. 47 and 151—Executing Court—No inherent power to question validity of decree.

S. 151 of the C. P. Code does not empower the executing Court to refuse execution on such ground. 22 Bom.L.R. 1409, Foll. 23 Bom.L.R. 306=62 Ind. Cas. 96=A.I.R. 1921 Bom. 301 (2) at 302.

——S. 47—Partition decree, execution of—Court-fees—Defendant seeking to recover his share in execution.

The defendant in a partition suit is entitled to seek the execution of the decree ordering partition so far as it is in his favour and he cannot be made by the executing Court to pay court-fees over his share when the decree itself imposes no such terms. There is nothing in the Court-Fees Act imposing on the defendant the burden of paying court-fees on his share. (1904) 6 Bom.L.R. 834=29 Bom. 79.

——S. 47—Question in execution Court whether a person is liable under S. 145—Executing Court must decide it—Question decided—Decision is binding upon parties unless appealed against—Once it is held that the person is liable, he becomes a party under S. 47—Any order for sale of his property is a decree which will operate as. A.I.R. 1942 All. 260=1942 A.L.J. 439=202 Ind. Cas. 12.

——S. 47—Representative—Duty of Court to decide.

A statutory obligation is laid on the Court seized of execution proceedings to determine the question whether a particular person is or is not the representative of a party to the decree. When such a question arises in an appellate stage of the proceedings taken under S. 47, that question must be decided by the Court of Appeal. A.I.R. 1934 Oudh 337=1934 O.L.R. 570=11 O.W.N. 917=150 Ind. Cas. 425.

——S. 47—Powers of executing Court.

The words 'all questions arising between the parties to the suit' is S. 47 do not mean all questions which were actually raised in the execution proceedings. The words mean that the questions must be such as would relate to or affect the rights of parties to the suit. The intention enderlying S. 47 and O. 21 is that all questions arising between the parties to the suit or their representatives in interest relating to the execution, discharge or satisfaction of the decree should be determined in the proceedings in which the decree was passed. If a party to the suit or his representatives desire to raise an issue which falls within S. 47, such as whether the sale ought to be set aside on the ground of irregularity or fraud as provided in O. 21, R. 90, or whether the property sold was liable to attachment in execution of the decree, they must do so in the course of the execution proceedings as provided in the Code and not otherwise. A stranger auction-purchaser after the sale has become absolute and a sale certificate has been granted, ought not to be left in doubt as to whether the parties or their representatives intend in the future to attack the sale in further or other proceedings. In like manner the parties or their representatives are also precluded from raising such issues, as ought to have been raised in the execution proceedings, by way of defence in any proceedings other than those for which provision is made in the Code. 53 Cal. 837=99 Ind. Cas. 180=A.I.R. 1927 Cal. 106.

——S. 47—*B* obtained a decree which he transferred to *K*. *K* was brought on the record as transferee decree-holder. *K* died and two rival execution petitions were filed, one by the heir of *K*, alleged benamidar, and the other by the son of the alleged real transferee. It was urged that no question of benami arising in execution can be gone into.

Held, that after the original parties, *i.e.*, the original transferor and the original alleged benami transferee and the original alleged real transferee are all dead, the question of benami shrinks to every unimportant proportions, the question being who is the real owner of the decree which is, so to speak, floating about and without any person authorized to execute it. O. 21, R. 16 is not exhaustive of every case which might come under its provisions. By the death of the original parties the whole matter is set at large and it is the duty of the Court under S. 47 to decide on the merits which of the contestants is in fact entitled to execute this decree. 26 M.L.W. 308=39 M.L.T. 176=1927 M.W.N. 639=105 Ind. Cas. 405=A.I.R. 1927 Mad. 903=53 M.L.J. 568.

18. Questions Relating to Execution.

Adjustment.
Agreement.
Application.
Assessment of mesne profits.
Attachment of property.
Certificate of payment.
Charge.
Claim.
Compromise.
Decree.
Decree-holder purchaser.
Delivery of possession.
Deposit by judgment-debtor.
'Determined' meaning of.
Discharge.
Dispossession.
Excess property.
Execution sale.
Heir of judgment-debtor.
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Mesne profits.
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Oudh Laws Act.
Partition.
Partition during suit.
Power of executing Court.
Priority.
Sale proclamation.
Satisfaction of decree.
Scheme.
Stay of execution.

——S. 47—Questions relating to execution—Adjustment—Adjustment between decree-holder and judgment-debtor—Decretal amount reduced to be paid by annual instalments—On default of any instalment decree-holder to take out execution for balance—Adjustment held could be dealt with under S. 47.

Held, that the agreement in adjustment of the decree was intended to govern the liability of the debtors under the decree and to have effect upon the manner of its enforcement, and it was not an agreement whose effect was to discharge the decree forthwith; and consequently the agreement was a matter to be dealt with under S. 47. A.I.R. 1942 Rang. 57=1941 Rang.L.R. 767.

——S. 47—Questions relating to execution—Adjustment.

If by the compromise there is an adjustment of the decree, there is no inherent want of jurisdiction in the executing Court over the subject-matter and the parties by agreement have the right to arrange their own procedure and to give jurisdiction to the Court to adopt that procedure. A.I.R. 1937 Cal. 236=41 C.W.N. 480=170 Ind. Cas. 767.

——S. 47—Adjustment of decree—Powers of executing Court.

An executing Court is concerned only with a com-

pleted adjustment. A.I.R. (1935) Lah. 973=160 Ind. Cas. 87.

——S. 47 and O. 24, R. 2—Adjustment of decrees.

Under O. 23, R. 4, the provisions of O. 23, R. 3 are not applicable to execution proceedings but O. 21, R. 2 and S. 47, C. P. Code, taken together provide a complete procedure for recording a compromise arrived at in execution proceedings. A.I.R. 1942 Pat. 68=22 P.L.T. 809=196 Ind Cas. 621=8 B.R. 63.

——S. 47—Adjustment of decree—Compromise.

A compromise agreement varying time or manner of enforcement of a decree may be a partial adjustment of a decree and can be enforced in execution proceedings in satisfaction of that part of decree which remains unsatisfied but if the compromise agreement is a total adjustment of a decree though that agreement may be the subject-matter of a separate suit, it cannot be enforced in execution of a decree which is wholly adjusted or satisfied. A.I.R. 1939 Sind 343=I.L.R. (1939) Kar. 725=187 Ind. Cas. 428.

——S. 47—Adjustment of decree—Compromise.

If by the compromise there is an adjustment of the decree there is no inherent want of jurisdiction in the executing Court over the subject-matter and the parties by agreement have the right to arrange their own procedure and to give jurisdiction to the Court to adopt that procedure. A.I.R. 1937 Cal. 236=41 C.W.N. 480=170 Ind. Cas. 767.

——S. 47, O. 21, R. 2 (1)—Solenama, after decree—Effect—Such solenama, if can be dealt with by executing Court under S. 47—Pardanashin lady—Deed of adjustment.

Where subsequent to the decree the parties enter into a *solenama,* it has the effect of extinguishing in part the plaintiff's claim under the original decree and to that extent it is an 'adjustment' of the decree within the meaning of O. 21, R. 2 (1), C. P. Code. But even otherwise and as such, it is a matter to be dealt with by the executing Court under S. 47.

There was a dispute between a *pardanashin* lady and her adopted son. It was referred to arbitrators. Their award was made a decree of the Court. Subsequently in the executing Court a *solenama* was filed, embodying the terms of settlement between them. The *solenama* showed that the provisions thereof were the natural results of the circumstances and the relations between the parties. There was nothing to indicate fraud.

Held, that the transaction embodied in the *solenama* was the free and intelligent act of the lady and was binding on her. A.I.R. 1939 Cal. 569=70 C.L.J. 5=43 C.W.N. 997=185 Ind. Cas. 691.

——S. 47—Judgment-debtor agreeing to do something in future—Application to record adjustment—Decree, if extinguished.

There is no reason why a decree should not be extinguished by a new contract in which the judgment-debtor agrees to do something in the future if the decree-holder chooses to accept the contract in the place of his rights under the decree. By the fresh agreement there is no modification of an old agreement but merely it is agreed that the decree-holder shall abandon his rights under the decree and there is nothing in S. 92, Evidence Act, and in the Contract Act, to necessitate that such an agreement should be in writing. A.I.R. 1936 Pat. 619=15 Pat. 390=3 B.R. 106=18 P.L.T. 110=165 Ind. Cas. 940.

——Ss. 47, 151, O. 32, R. 7 (2), O. 47; R. 1—Decree in favour of minor—Adjustment by next friend—Suit to set aside adjustment on ground of fraud, whether lies—Proper remedy.

An order recording a compromise or an adjustment of a decree effected by next friend of a minor without Court's sanction, during the execution of a decree in favour of the minor, cannot be set aside on ground that the compromise was obtained by fraud, by a separate suit, in view of S. 47, Civil P. C. The proper remedy is by way of an application for review or by invoking the inherent jurisdiction of the Court; such an application comes under S. 47, and the Court has power to take action independently of O. 47, R. 1, under S. 151. A.I.R. 1936 Pat. 506=17 P.L.T. 743=165 Ind. Cas. 857=3 B. R. 94.

——S. 47—Questions relating to execution—Limitation—Adjustment pleaded by decree-holder—Whether should be given effect to in execution.

The Court is bound to take notice of the adjustment pleaded by the decree-holder as having been arrived at after passing of the decree and if it is proved, it has to be given effect to in execution. According to the adjustment pleaded, limitation would run from the various dates of payments of the instalments and the application for execution would have to be dealt with accordingly. A.I.R. 1936 Nag. 281=I.L.R. (1937) Nag. 106=165 Ind. Cas. 804.

——S. 47—Adjustment of decree—When operative—Failure to record in Court the adjustment.

A decree is not an act of the parties but an act of the Court. Only the Court can vary or nullify it. Even where the parties to the suit compromise the suit, the agreement or compromise does not become a decree in the terms of the compromise, until the Court directs the passing of the decree in terms of the compromise. Even in case of an adjustment of the decree, an order of the Court is necessary to give effect to the adjustment. Without such an order and adjustment leaves the decree as it is. A decree or its terms cannot be varied except by the Court itself. It is a matter of procedure and not rules of evidence. A.I.R. 1935 Mad. 860=1934 M.W.N. 906=42 M.L.W. 365=69 M.L.J. 451=58 Mad. 994=158 Ind. Cas. Cas. 187 (F.B.). [Overrules (1) A.I.R. (Vol. 14) 1927 Mad. 911=50 Mad. 897=105 Ind. Cas. 248 and (2) A.I.R. 1930 Mad. 673=125 Ind. Cas. 543].

——S. 47—Decree-holder mentioning payment made out of Court—Duty of Court to consider—Certificate of payment—Effect of.

A mention by a decree-holder of payments made out of Court is sufficient to entitle a Court to consider them. A certificate of payment given by a decree-holder to a Court is merely an intimation that he has received the money. A.I.R. 1934 Bom. 370=58 Bom. 610=36 Bom.L.R. 798=152 Ind. Cas. 575.

——S. 47—Partition decree—Division by metes and bounds effected—Settling of all disputes by settlement deed—Execution—Whether can be allowed.

A suit for partition was compromised and under the

compromise the question of the precise shares of each member of the family was left to the decision of the Court. It was also provided that when ascertainment of shares had been made, certain named arbitrators should proceed to allot the property by metes and bounds to the share holders in such proportions as should have been decided by the Court. A deed of settlement was drawn up in which all the members of the family then surviving were parties. They dealt not only with the precise shares which were in dispute owing to the death of the deceased member, but they also dealt with other matters outstanding between them. A final decree for partition was subsequently passed and the decree in the partition suit was sought to be executed:

Held, that there was nothing which could be executed and the decree must be deemed to have been satisfied. A.I.R. 1933 Pat. 625=147 Ind. Cas. 389.

——S. 47, O. 21, R. 2—Money-decree—Adjustment whether can be enforced in execution proceedings.

Where a money-decree is adjusted between the parties, the terms as to the adjustment can be esforced by proceedings in execution and a separate suit need not be filed for the purpose. A.I.R. 1933 Bom. 100 =35 Bom.L.R. 91=142 Ind. Cas. 220 (1).

——S. 47—Question relating to Execution—Adjustment— Cannot entertain objections against decree.

The Court executing the decree cannot deal with the question whether the decree should stand or whether it should be set aside on any of the grounds on which a decree can be set aside. 22 Bom. 475. Foll. 45 Bom. 503=59 Ind. Cas. 715=A.I.R. 1921 Bom. 228.

——S. 47—Questions relating to execution—Scope of.

The executing Court's only duty is to execute the decree according to its terms, and it is not for that Court to say that the decree is not binding on the property in the absence of certain parties. 13 M. L. W. 143=A.I.R. 1921 Mad. 85=61 Ind. Cas. 759.

——S. 47—Questions relating to execution—Scope of—Cannot pass orders expecting reversal in appeal.

It is not open to an appellate Court on an appeal from an order in execution, preferred by the plaintiff, to pass orders contemplating the entire setting of the decree in plaintiff's favour against which no appeal had been filed. 79 Ind. Cas. 553=16 S.L.R. 260 =A.I.R. 1921 Sind 102.

——S. 47 and O. 21, R. 2—Question relating to execution—Fraudulent adjustment.

Whether an adjustment of decree out of Court is fraudulent must be determined by Executing Court. 41 All. 443=17 A.L.J. 677=50 Ind. Cas. 65.

——S. 47—Fraud as to adjustment falls under S. 47.

A separate suit based on fraud will not lie simply because it does not relate to the execution of the decree but to the transaction of adjustment. S. 47, C. P. Code, includes not only questions relating to the 'execution' of a decree but also its 'discharge or satisfaction'; and alleged fraud in execution proceeding comes under that section. 83 Ind. Cas. 360 =16 S.L.R. 207=A.I.R. 1921 Sind 159 (i) (F.B.).

——S. 47 and O. 21, R. 2—Question relating to execution—Adjustment prior to decree.

Quaere:—Whether facts of a particular kind though they had taken place before the passing of the decree, could be set up by judgment-debtor as a bar to the execution of the decree. (1916) 1 M.W.N. 203=19 M.L.T. 228=33 Ind. Cas. 67. [But *See* 40 Mad. 233=32 M.L.J. 13=5 L.W. 132=37 Ind. Cas. 836 (F.B.).

——S. 47 and O. 21, R. 2 (2)—Question relating to execution—Adjustment.

Where an application under O. 21, R. 2 (2) is barred by limitation the same matter cannot be gone into by an application under S. 47, C. P. Code. 25 Ind. Cas. 884 (Cal.).

——S. 47 and O. 21, R. 2—Question relating to execution—Adjustment after decree.

The new Code O. 20, R. 11 and S. 47 have altered the old Law under S. 257-A of the Old Code and makes it legal for parties to make private arrangements after decree. So where it was arranged that defendants being given time plaintiff was to get higher interest, and the plaintiff wanted to enforce it after the New Code came into force. *Held*, that the plaintiff could enforce such an agreement. 5 Cal. 27; 25 Cal. 86, 20 Cal. 22, Foll. 11 M.L.T. 18= (1912) M.W.N. 9 and 458=22 M.L.J. 166=13 Ind. Cas. 204.

——S. 47—Question relating to execution—Adjustment.

Set-off not claimed in the suit cannot be claimed in the execution proceedings. 81 Ind. Cas. 651= 11 O.L.J. 517=27 O.C. 248=A.I.R. 1924 Oudh 434.

——S. 47—Questions relating to execution—Agreement—Pre-decree agreement that decree when obtained should not be executed.

A pre-decree against that a decree when obtained should not be executed can be pleaded in bar of execution. In other words, even where execution was absolutely prohibited by the agreement, such an agreement can be pleaded. There is no difference in principle between a case where the decree is rendered inexecutable against some only of the defendants or against some only of the properties and the case where a decree is rendered inexecutable against all the defendants or all the properties.

Nor can the fact that the agreement was entered into not after but before the institution of the suit make any difference. A.I.R. 1942 Mad. 734= 55 M.L.W. 646=(1942) 2 M.L.J. 520=1942 M.W. N. 822=I.L.R. (1943) Mad. 225=204 Ind. Cas. 474.

——S. 47—Adjustment of decree—Novation—Agreement by decree-holder giving up portion of maintenance decree, if novation.

An agreement by the decree-holder to give up a portion of her monthly maintenance fixed by a decree does not amount to novation so as to preclude her from executing the decree according to agreement. A.I.R. 1942 Pesh. 13=198 Ind. Cas. 734.

——S. 47—Suit for accounts—Plaintiff applying for attachment before judgment—Consent order—Agreement that defendant was to get fair price for goods delivered and credit for that price—Question of fair price held could be decided in execution.

In a suit for accounts filed by the plaintiffs there was an agreecent between the parties as follows. "Without prejudice to the contentions of the parties in this suit or in any other proceedings between the parties, the defendants have handed over to the plaintiffs, the Philco goods as shown in two sheets attached. This will be sold by the plaintiffs and the net sale proceeds kept by the plaintiffs pending the disposal of the suit and pending final orders with regard to the same, which will be appropriated towards the decree, if any, passed in their favour:

Held, that it could not be said that because the parties agreed that certain things should be done in a suit the Court was bound in its final decree to give effect to this agreement or to find upon the issue, though the issue did not arise on the pleadings. The sum admittedly received by the plaintiffs by the sale of the goods delivered to them was to be appropriated in satisfaction of the decree and, therefore, the agreement presumed a decree and a credit in execution. The agreement implied that the defendants were to get a fair price for the goods and to get credit for this price in execution proceedings if not in the suit itself. The question of a fair sale-price and a corresponding credit to the defendants could and indeed should be decided by an executing Court. A. I. R. 1941 Sind. 103=I.L.R. (1941) Kar. 227=195 Ind. Cas. 626.

——S. 47—Compromise between decree-holder and judgment-debtor, if enforceable in execution proceedings.

A compromise between the decree-holder and the judgment-debtor entered into in the course of execution proceedings, which was duly recorded is enforceable in execution proceedings. A.I.R. 1940 All. 423=I.L.R. (1940) All. 536=1940 A.W.R. 396=1940 A.L.J. 439=191 Ind. Cas. 616.

——S. 47—Questions in execution—Agreement—Recitation in decree of term of compromise—Enforcement of the agreement by separate suit.

The operative part of the decree confined in the subject-matter of the suit can be enforced between the parties under S. 47, Civil P. C., but any agreement as to matter extraneous to the suit can only be enforced in a separate suit.

A mere recital in a decree of a fact which has already taken place is not necessarily a part of the decree as it does not necessarily amount to any adjustment of the- rights of the parties to be affected by the decree. Where, therefore, a decree merely recites term of compromise that exchange of plots not relating to the suit had taken place between the parties, this portion of decree is not operative and an agreement relating to these plots can be enforced in a separate suit. But no special result accrues from the mere recital of this part of the compromise in the decree and is no bar to the Court investigating the question of title of a party to one of the plots. A. I. R. 1939 All. 454=1939 A.L.J. 260=I.L.R. (1939) All. 435=1939 A.W.R. 270=183 Ind. Cas. 304.

——Ss. 47, 48—Final decree for sale in mortgage suit—Compromise between parties in execution—Attempt to give jurisdiction to Court to amend or vary decree—Executing Court, if can consider legal effect of such compromise.

The Civil P. C. contains no general restriction of the parties' liberty of contract with reference to their rights and obligations under the decree and if they do contract upon terms which have reference to and affect the execution, discharge or satisfaction of the decree, the provisions of S. 47 of the Code involve that question relating to such terms may fall to be determined by the executing Court. "Amendment", or alteration of the decree whether under S. 152 or by review is a different matter under the Code. A fair and ordinary bargain for time between the parties in consideration of a reasonable rate of interest cannot be regarded as an attempt to give jurisdiction to a Court to amend or vary the decree. Such a bargain has its effect upon the parties' rights under the decree and the executing Court under S. 47 has jurisdiction to ascertain its legal effect and to order accordingly. In the absence of express statutory authority, it is not possible to regard O. 20, R. 10, as excluding any possibility of the parties coming to a valid agreement for time to which the Court under S. 47 will have regard. The rule does not apply to all decrees, but only to decrees for the payment of money in so far as they are of the character. The purpose of providing a limitation of six months for such applications to the Court which passed the decree is not altogether plain and the objects may be more than one: but this provision, like the rule itself, affords no sufficient ground for holding that the Code makes parties wholly incompetent to come to an arrangement for time enforceable in execution proceedings. Such bargains may take different forms and it is not possiblt to pre-judge the individual case. If it appears to the Court, acting under S. 47, that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce the agreement in execution proceedings, but will leave the creditor to bring a separate suit upon the contract. If on the other hand the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with under S. 47. In such a case to say that the creditor may perhaps have a separate suit is to misread the Code, which by requiring all such matters to be dealt with in execution, discloses a broader view of the scope and functions of an execution Court. In numerous cases a compromise between the decree-holder and the judgment-debtor entered into in the course of execution proceedings, which was duly regarded, has been enforced and such a practice, which is both widespread and inveterate, is not contrary to the Code.

Held, on facts that the compromise having been recorded by the Court under O. 21, R. 2, it was an adjustment even if it was something more and it contained the terms upon which the adjustment was agreed to.

Held, on facts that in the circumstances of the case the appellant decree-holders' application could not be

regarded as a fresh application in the sense of S. 48 of the Civil P. C., merely by reason of the steps which they though it necessary to take to undo the action of the Court to which the decree was transferred for execution in terminating the execution case contrary to the intention of the parties. Nor could it be said that the claim of interest at 8 per cent. (which was greater than the rate allowed by the final decree and agreed to and acted on thereafter by the parties) made the application a fresh application as distinct from one to continue the previous proceedings as contemplated by the compromise. Nor did the fact that only part of the original properties remained bound by the security and saleable under the decree. It was on the contrary an application to revive the previous proceedings on the footing that they had not terminated. The question of the character of the application has to be decided upon the circumstances of each case, and in the present case, the bargain of the parties was a circumstance of great importance as was the fact that the Court to which the decree was transferred for execution acted by inadvertence contrary thereto. The substance of the matter must prevail over the form of the application which was not a fresh application as contemplated by S. 48. A.I.R. 1939 P.C. 80=43 C.W.N. 501=1939 O. W N. 313=1939 R.D. 208=(1939) 1 M.L.J. 652=69 C.L.J. 317=14 Luck. 192=41 Bom.L.R. 708=50 L. W. 39=1939 A.L.J. 481=1939 M.W.N. 692=1939 A.W. R. 43=I.L.R. (1939) Kar. (P.C.) 136=66 I. A. 84=180 Ind. Cas. 378 (P.C.). *See also* A. I.R. 1940 All. 107=(1939) All. L.J. 1051=1939 A.W.R. 870=186 Ind. Cas. 614.

——S. 47—Agreement in writing before final decree but after preliminary decree not to execute decree against some items of hypotheca, if can be pleaded in bar of execution against items agreed to be released.

Any agreement which merely relates to the execution of the decree and does not attack the decree itself can be pleaded in bar of execution of the decree. An agreement whereby, after the preliminary decree but before the final decree, the decree-holder agrees in writing to exclude two items of the hypotheca from execution and to take out execution only as against the remaining two items is an agreement which relates to the execution of the decree and is not an agreement which attacks the decree itself. Such an agreement can be pleaded and is not one which the judgment-debtor is debarred from pleading in bar of execution of the decree against the items agreed to be released. A.I.R. 1938 Mad. 456=48 M.L.W. 448=1938 M.W.N. 193=I.L.R. (1938) Mad. 451=(1938) 2 M.L.J. 404=174 Ind. Cas. 681.

——S. 47—Questions relating to execution—Arbitration—Execution application—Parties if can file application for reference to arbitration.

An execution proceeding is not a suit and therefore Sch. 2 does not entitle the parties to an execution proceeding to file an application for a reference to arbitration. In such a case the arbitration proceedings are invalid and the Court is not entitled to enforce those arbitration proceedings. A.I.R. 1935 All. 125=1936 A.L.R. 280=4 A.W.R. 1366=161 Ind. Cas. 103 (1).

——S. 47—Arbitration—Reference to, in execution proceedings, whether operates as adjustment of decree though Sch. 2, does not apply to execution proceedings—Court, if should pass new decree in terms of award.

An award passed in reference to arbitration in the execution proceedings operates as an adjustment of the decree event though, Sch. 2, Civil P. C., does not apply to execution proceedings. It is open to the parties to adjust their differences under O. 21, R. 2 in execution proceedings, and there is no reason to suppose that they cannot themselves adopt any procedure they like; that is to say, they can without the intervention of the Court refer their difference to arbitration and ask the Court to treat the decision arrived at after arbitration as an adjustment of the decree and although there may be no specific provision for the grant of formal permission to refer to arbitration in execution proceedings, there is no illegality in giving it.

The result of the award is merely an adjustment of the original decree, and it is not necessary to pass any new decree at all, since an executing Court is not entitled to pass a new decree. A.I.R. 1941 Bom. 20=42 Bom.L.R. 867=192 Ind. Cas. 583.

——S. 47—Decree-holder agreeing to accept smaller amount in full satisfaction, if paid within two months—Time held essence of compromise—Judgment-debtors' failure—Execution for whole amount—Court, if can relieve against forfeiture.

As regards the power of the Court to relieve against forfeiture, equity only interferes to do complete justice between the parties. No doubt, if forfeiture is occasioned by accident, fraud, surprise or ignorance, a Court of Equity will interpose and relieve against forfeiture so caused but it is equally clear that a Court of Equity will refuse to aid a defaulter if the forfeiture is wilful or is the result of gross negligence. Where the creditor agrees to accept part of the debt in full satifaction if paid within a stated time, equity will not relieve against the provision as to time.

So where in execution of a money-decree, a compromise is entered into between the parties whereby the decree-holder agrees to accept a smaller amount in full satisfaction of decree, if paid within two months but on failure to do so, the decree-holder is to proceed with the execution. In such a case, time is the essence of the contract. Equity would not relieve against forfeiture in such a case even if the failure was not due to any fault of the judgment-debtors. A.I.R. 1937 Pat. 542=16 Pat. 395=18 P.L.R. 672 =171 Ind. Cas. 668=4 B.R. 49.

——S. 47—Questions in execution—Pre-decree compromise.

There is an essential distinction between the functions of a Court which adjudicates on the rights of the parties and embodies the decision in a decree and the functions of a Court whose duty is merely to execute such a decree. The executing Court can only go into matters relating to the execution, discharge or satisfaction of the decree which arise after the decree came into existence and result in its discharge or satisfaction and not into a pre-decree compromise which practically nullifies the decree. Consequently a pre-decree compromise cannot be pleaded:

as a bar in execution proceedings, and a separate suit for declaration of the judgment-debtor's rights on the basis of the compromise is maintainable. A.I.R. 1937 Lah. 537=39 P.L.R. 29=I.L.R. (1937) Lah. 209=171 Ind. Cas. 189.

——S. 47—Pre-decretal agreement—Effect of.

A case of an agreement anterior to the passing of a decree cannot be allowed to be set up in a proceeding for execution of a decree. Party can, however, ask relief by way of an injunction to restrain decree-holder from putting in execution the decree. A.I.R. 1935 Cal. 177=39 C.W.N. 512=62 Cal. 421=156 Ind. Cas. 445.

——S. 47—Agreement before date of decree.

The executing Court is entitled to look at an agreement between the parties in order to see whether it prevented execution according to the terms of the decree. A.I.R. 1934 Bom. 370=36 Bom.L.R. 798 =58 Bom. 610=152 Ind. Cas. 575.

——S. 47—Ante-decree agreement.

An oral agreement subsequent to the filing of the suit and prior to the passing of the decree can be pleaded in execution and the executing Court can determine whether the agreement is true but this covers only agreements which relate to execution and not agreements which attack the decree itself. A.I.R. 1935 Mad. 860=1935 M.W.N. 906=42 L.W. 365 =69 M.L.J. 451=58 Mad. 994=158 Ind. Cas. 187 (F.B.).

——S. 47—Agreement to pay interest not provided for in decree—Denial of agreement by judgment-debtor—Power of Executing Court to hold enquiry.

The executing Court on an application made for execution of a decree in which no interest was provided has no power to hold an enquiry into an alleged agreement to pay interest in execution when the judgment-debtor denies the agreement.

In such a case until the agreement is established, the question of estoppel of the judgment-debtor from denying the liability to pay interest cannot arise. A. I. R. 1937 Mad. 109=1936 M.W.N. 375=44 L.W. 744=71 M.L.J. 747=167 Ind. Cas. 236 (1).

——S. 47—Compromise decree—Subsequent compromise decree in respect of previous consent decree—Effect—Mistake in first decree—Whether can influence Court in interpreting subsequent decree.

Where parties enter into a compromise in the matter of a previous compromise decree, the previous decree must be taken to have been dead. The fact that a mistake was made during the previous suit is not a matter which ought to influence the Court's decision in coming to a correct interpretation of the terms of the compromise decree. A.I.R. 1936 Rang. 458= 165 Ind. Cas. 257.

——S. 47—Whether parties can substitute fresh decree in place of original and execute it.

Quaere.—Whether in any circumstances it is possible for an agreement between the parties to supersede a decree of the Court and then to put it to execution as if it were itself a decree, or whether the parties can by an agreement substitute as it were a fresh decree in place of the original decree, or even vary the terms of the original decree. 164 Ind. Cas. 416=39 C.W.N. 1036.

——S. 47, O. 21, R. 2 (2)—Parties agreeing that money due shall be realised by execution—Execution by Court—Alteration of decree by agreement.

Parties by agreement can arrange their own procedure and give jurisdiction to the Court to adopt that procedure and where the parties have agreed that money due shall be realised by execution, the Court has jurisdiction to proceed by way of execution.

Where a decree is altered by agreement of the parties with respect to the mode of payment, the Court executing the decree is bound to give effect to the compromise and a decree-holder is entitled to proceed on the terms of the compromise which was executable as a decree. A.I.R. 1935 Cal. 596=62 Cal. 28=158 Ind. Cas. 1073.

——S. 47—Decree not valid—Solenama filed by judgment-debtor agreed to by decree-holder—Court recording it—Enforceability in execution.

Even if nothing is recoverable under a decree on the footing that it was not a valid decree under the law, the decree having been passed by a Court which was not competent to pass the same, when a *solenama* has been filed having the force of a valid and complete contract between the parties, it is enforceable in execution as such. Consequently, a *solenama* filed by the judgment-debtor in the execution case, started for the purpose of executing a decree which may be an invalid decree, agreed to by the decree-holder and recorded by the Court, can be enforced in execution, in terms of the agreement between the parties. A. I. R. 1935 Cal. 418=39 C.W.N. 363=61 C.L.J. 24=156 Ind. Cas. 919.

——S. 47—Executory agreement to adjust—If could be looked into.

Before an executory agreement to adjust can become an executed agreement and thereby become an adjustment to the satisfaction of the decree-holder, the agreement cannot amount to an adjustment which may be taken into account in the execution of the decree. A.I.R. 1934 Rang. 190=149 Ind. Cas. 95 (1).

——S. 47—Agreement to pay decree by instalments —Surety to pay by instalments—Acceptance of agreement by Court—Enforceability in execution.

In two cases the decree-holder and judgment-debtor entered into an agreement whereby the decretal amount was to be paid by instalments, while the decree in each case directed immediate recovery. These agreements were submitted to the executing Court and were accepted. In one, the judgment-debtor undertook to pay interest on the decretal amount, a condition which did not exist in the decree. In the other case a certain person stood surety for payment of the decree money and the agreement of payment by instalments was entered into between the decree-holder and the surety:

Held, that the agreement did amount to a fresh contract betwee the parties, though the consideration for the contract was the decretal amount. Such agreements do not keep the decree alive and capable of execution, even though they have veen recorded by the Court, nor can they be enforced by the executing Court. A.I.R. 1933 Pesh. 53=144 Ind. Cas. 721.

——S. 47, O. 21, R. 2—Pre-decree agreement nullifying decree itself, whether can be pleaded in execution—Payments during pendency of suit, whether can be recognized.

Held on the facts of the case (1) that O. 21, R. 2, Civil P. C., was not applicable to the case as it applies only to payments made after decree.

(2) that as the agreement set up did not relate merely to execution but attacked the decree itself it could not be pleaded in execution.

The Full Bench case A.I.R. 1918 Mad. 1174 (F.B.) only covers agreements which relate to execution and not to agreements which attack the decree itself. A.I.R. 1931 Mad. 399=32 L.W. 919=1930 M. W. N. 1152=54 Mad. 184=60 M.L.J. 721=129 Ind. Cas. 818.

——S. 47, O. 21, R. 2—Question relating to execution—Agreement for stay of execution before decree, if adjustment.

Per *Abdur Rahim, Offg. C. J. (Seshagiri Iyer, J. dubitante, and Phillips, J. dissenting)*:—

An agreement between the parties for stay of execution of decree before the decree is passed is a matter to be inquired into and decided by the Executing Court under S. 47. The word 'stay of execution' though omitted under New Code in S. 47, does not mean that the question of stay of execution is excluded under it. 40 Mad. 233=21 M. L. T. 24=5 L. W. 132=(1917) M.W.N. 44=32 M. L. J. 13=37 Ind. Cas. 836 (F.B.).

——S. 47 and O. 21, R. 2—Question relating to execution—Agreement not to enforce decree.

Existence and validity of an agreement not to enforce the decree ought to be determined in execution proceedings, under S. 244 of the Old Code, and not in separate suit. The question is not as to the validity of the decree but as to the existence of an agreement to stop the enforcement of the decree. 9 M.L.T. 464=(1910) M.W.N. 798=8 Ind. Cas. 1071.

——S. 47—Question relating to execution—Agreement—Ante-decree agreement not to execute.

An application to record an alleged agreement not to execute the decree, entered into prior to the passing of the decree, cannot be entertained under O. 21, R. 2, nor can be dealt with by the executing Court under S. 47. A.I.R. 1926 Rang. 140, Foll. 5 Rang. 685=107 Ind. Cas. 860=A.I.R. 1928 Rang. 36.

——S. 47—Agreement to execute for lesser amount does not fall under S. 47 or O. 21, R. 2.

Where a judgment-debtor sets up an agreement that prior to the decree there was an arrangement between the parties that though the decree is to be passed for a larger sum it should only be executed to the extent of a lesser sum specified in the arrangement and not for the whole, he is not seeking the aid of the Court to determine any question relating to the execution of the decree within S. 47 or O. 21, R. 2, but is asking the Court to embark on an enquiry whether the decree to be executed is the decree as passed by the Court or as agreed upon by the party. 4 Rang. 118=5 Bur.L.J. 41=96 Ind. Cas. 773=A.I.R. 1926 Rang. 140.

——S. 47—Ante-decree agreement relates to execution.

An agreement made before the passing of the decree by which the decree was not to be executed against one of the judgment-debtors should be enquired into and decided on the merits by the executing Court. 87 Ind. Cas. 297=21 M.L.W. 725=A.I.R. 1925 Mad. 591=48 M.L.J. 277.

——S. 47—Ante-decree agreement—Plea of, in bar of execution.

An agreement made prior to the decree as to the manner in which the decree should be executed after it was passed could be pleaded as a bar to the enforcement of the decree as it stood. 77 Ind. Cas. 547=19 M.L.W. 27=1924 M.W.N. 144=A.I.R. 1924 Mad. 611=46 M.L.J. 240.

——S. 47 — Questions relating to execution — Amendment.

A partial reduction of the amount payable under a decree by wiping out of the interest under the Madras Agriculturists' Relief Act, amounts to an amendment of the decree and does not fall under S. 47, since it is not a matter relating to the execution of the decree. A.I.R. 1941 Mad. 810=(1941) 2 M.L.J. 295=54 M.L.W. 178=1941 M.W.N. 961=200 Ind. Cas. 503.

——S. 47 (3)—Question relating to execution—Application to be brought on record as representative of judgment-debtor.

Where a person applies to be brought on the record as the representative of the judgment debtor so that he may raise a question to be decided by the executing Court under S. 47, C. P. C., the proper Court to entertain the application is the Court executing the decree. 11 L. W. 173=55 Ind. Cas. 812.

——S. 47 and O. 21, R. 97—Question relating to execution—Application by auction-purchaser.

An application by an auction purchaser—alleging obstruction by a person claiming to be a prior auction-purchaser, and praying that he might be put in possession, is an application under O. 21, R. 97. C. P. C. and not under S. 47 of the Code. An order made under O. 21, R. 97, C. P. C. is not appealable. 52 Ind. Cas. 383 (Pat.).

——S. 47—Question relating to execution.

A suit for recovery of possession by auction-purchaser for the recovery of possession of property which has purchased at an auction sale which has been confirmed is not barred by S. 47 of the C. P. Code. 47 Ind. Cas. 844 (Pat.).

——Ss. 47 and 63—Question relating to execution—Application for sale in execution—Order on, if under S. 47.

An order of a Subordinate Judge declining in view of S. 63, C. P. C. to proceed with an application in execution for the sale of the property is one relating to execution within S. 47 and is appealable. 26 C.L.J. 42=42 Ind. Cas. 466.

——S. 47—Question relating to execution—Application.

Ex parte decree—Decree amount deposited and decree sought to be set aside—Decree holder's application for payment is not one in execution. 1927 M.W.N. 885=27 M.L.W. 661=A.I.R. 1928 Mad. 296=54 M.L.J. 452.

——Ss. 47 and 11, O. 21, Rr. 58 and 63 and O. 43—Question relating to execution—Mad as Civil Rules of Practice, R. 179—Application under R.

179 for payment of money standing to the credit of other suits—Objection by decree-holder in the latter suit.

C, on a mortgage decree against *A* obtained a decree for sale of mortgaged property. *B*, who held other decree against *A*, attached the profits of mortgaged property deposited in Court to *C's* creditor and applied for cheque under R. 179 of Madras Civil Rules of Practice. *C* objected and the objection was upheld. *B* filed a revision petition. It was held, the remedy of *B* was by regular suit under O. 21, R. 63 as this objection was one under O. 21, R. 58. The order was not appealable as the question was not under S. 47 of C. P. Code. 37 Ind. Cas. 348 (Mad.).

——S. 47—Question relating to execution—Application to execute by attachment of another decree.

An order refusing an application to attaching execution of the plaintiff's decree, a decree, which defendants along with two others had obtained against two other persons not parties to the suit is not an order in question relating to the execution of the plaintiff's decree falling under S. 47, C. P. C. and is, therefore, not appealable. 17 O. C. 374 =27 Ind. Cas. 363.

——S. 47 and O. 21, R. 95—Question relating to execution—Application for possession.

Where in bar of an application under O. 21, R. 95, the judgment-debtor pleaded a contract whereby the auction purchaser agreed that the delivery of possession should be postponed for a specified period and the Court went into and decided the question: *held*, that the decision was within S. 47 and therefore appealable. 13 Mad. 504; 27 Cal. 34; 27 Cal. 709; 31 Cal. 737, foll. 18 C.W.N. 27=20 Ind. Cas. 874.

——S. 47 and O. 21, R. 58—Question relating to execution—Judgment-debtor's application that his possession is that of a trustee for another—How to be treated.

The judgment debtor's application objecting to the attachment of the property in his possession in execution of a decree against him on the ground that he is in possession as trustee for another must be treated as one under O. 21, R. 58, C.P.C.; and not under Section 47. Hence on dismissal of the objection, the appeal does not lie against it. 12 Ind. Cas. 411 (Oudh).

——S. 47—Question relating to execution—Application to set aside for want of notice to judgment-debtor.

An application to set aside an execution sale for want of notice under O. 21, R. 22 is one which comes under S. 47. 13 C.L.J. 162=9 Ind. Cas. 584.

——S. 47—Question relating to execution—Application to set aside sale.

Application by the decree-holder to set aside the sale on the ground that the decree had been satisfied prior to the sale is one under S. 47. 4 Bur.L.T. 12 =9 Ind. Cas. 452.

——S. 47—Question relating to execution—Assessment of mesne profits.

In spite of the direction of clause (a) and (b) of S. 244 of C. P. Code of 1882 an application for assessment of mesne profits is one in the suit and, therefore, if dismissed for default, no fresh application can be entertained in execution. The remedy is to get it restored. 16 C.L.J. 3=15 Ind. Cas. 709.

——S. 47—Question relating to execution—Mesne profits—Separate suit.

A suit by plaintiff or mesne profits of property which the defendant had sold to a third person in spite of a contract of sale in favour of plaintiff and the sale-deed of which was executed by the Court on behalf of the defendant is maintainable as after the conveyance was executed nothing further remained to be done by the executing Court. 12 C.L.J. 599=7 Ind. Cas. 487.

——S. 47—Question relating to execution—Assessment of mesne profits.

The question whether mesne profits should be allowed to a plaintiff in a pre-emption case for the period between the date of his suit and the final decree on appeal is not included in the words, "relating to the execution, discharge or satisfaction of the decree" and can be disposed of only by a separate suit. 44 P.W.R. 1910=44 P.L.R. 1910=6 Ind. Cas. 648.

——Ss. 47, 60—Objection under S. 60 (1) (c).

An objection under S. 60 (1) (c), to the sale of the property falls within the purview of S. 47 and will, therefore, have to be decided by the executing Court. A.I.R. 1942 Lah. 153=44 P.L.R. 302=I.L.R. (1942) Lah. 559=203 Ind. Cas. 166 (F. B.) [Overruling A.I.R. 1939 Lah. 113=I. L. R. (1939) Lah. 103.]

——S. 47—Judgment-debtor taking objection that tenure is ghatwali—Objection can be raised under S. 47.

The contention of the objector that the property is a *ghatwali* tenure is not tantamount to an assertion that the judgment-debtor is holding the property as a public servant, in other words, he is holding it as a trustee. Under S. 60 no property is liable to be attached and sold over which the judgment-debtor has no power of disposal. Such an objection can certainly be raised under S. 47. It does not amount to a claim under O. 21, R. 58. A.I.R. 1941 Pat. 240=191 Ind. Cas. 138=7 B.R. 148. *See also* A. I.R. 1931 Bom. 446=33 Bom.L.R. 781=133 Ind. Cas. 858.

——Ss. 47 and 60—Objection to execution.

Where in execution of a money-decree against the estate of a deceased represented by his son, the decree-holder has attached and purchased houses alleging them to be the property of the deceased and the son raised objections that the houses belonged to himself and not to his father and that the houses were exempt from attachment under S. 60, both these objections fall under S. 47. They can be raised before the executing Court up to the date of the confirmation of the sale. A.I.R. 1939 Lah. 256=41 P.L.R. 288.

——S. 47—Objection by third person—Execution Court can only decide objection—Objection proceedings alone, if can be transferred without transfer of execution proceedings.

Obiter.—Where some property of the judgment-debtor is attached in execution of a decree and a third person objects to such attachment on the ground that the property attached belongs to him, such objection

can only be decided by the execution Court and the transfer of the objection proceedings by itself to another Court without transferring the execution proceeding also to that Court is not in accordance with law. A.I.R. 1938 Lah. 95=39 P.L.R. 654=175 Ind. Cas. 525.

——Ss. 47 and 60—Execution—Sale—Agriculturist—Exemption—When objection to be made—House, if should be in actual occupation to entitle him to object.

The objection that the judgment-debtor is an agriculturist and that therefore under S. 60 (c), the house could not be attached and sold in execution of the decree against him, should be raised before the sale and if he does not raise it at the proper time he cannot be allowed to raise it afterwards. Further, he can object to such attachment only if the house is in the actual occupation of the agriculturist. A.I.R. 1936 Bom. 315=38 Bom.L.R. 719=165 Ind. Cas. 86.

——S. 47—Execution—Liability of property to attachment.

When a dispute as regards the liability to attachment is between a decree-holder and the judgment-debtor the matter is to be decided by the executing Court under S. 47, C. P. Code and not by a Court other than the executing Court, in whose custody the property is. Order 21, R. 52, C. P. Code does not apply to such a case. (1936) 19 N.L.J. 287.

——S. 47—Question as regards attachment of certain money and issuing of warrant of arrest.

The questions as regards attachment of certain money and the issuing of a warrant of arrest are certainly questions dealing with the execution of a decree, and therefore, these questions must be determined by the execution Court and not in a separate suit. A.I.R. 1935 All. 364=1935 A. L. J. 287=1935 A.L.R. 182=4 A.W.R. 1446=154 Ind. Cas. 292.

——S. 47—Questions in execution.

Objection that certain property is not saleable is an objection to the execution of the decree governed by S. 47. There is no time limit prescribed for raising such objection. The fact that the judgment-debtor was negligent at earlier stage may at most affect the question of costs but would not necessarily amount to estoppel. A.I.R. 1935 All. 1016=1935 A.L.J. 1137=1935 A.W.R. 1105=58 A. 300=1935 A.L.R. 958=158 Ind. Cas. 202.

——S. 47—Surety for performance of decree—Realization in execution without attachment.

Obiter.—Immovable property given by the judgment-debtor as security for the due performance of a decree can be realized in execution without attachment, the matter being one relating to execution within S. 47. A.I.R. 1934 Rang. 231=153 Ind. Cas. 684 (2).

——S. 47—Insurance policy attached—Widow claiming it as her property.

Where the widow of the insured claimed the insurance policy as her own property and not as forming part of the estate of her husband and objected to the attachment of the policy of insurance:

Held, that the case was not removed from the operation of S. 47. A.I.R. 1934 Bom. 296=36 Bom. L.R. 608=58 Bom. 513=152 Ind. Cas. 168.

——Ss. 47, 60 (1) (c)—Judgment-debtor aware of proclamation of sale and not objecting prior to sale—Objection under S. 60 after sale—Maintainability of.

A judgment-debtor who is aware of the proclamation of sale and that his property has been attached and is to be sold and who does not make any objection prior to the sale, cannot, after the sale, be allowed to raise an objection under S. 60 that the property proclaimed to be sold is not liable to attachment and sale under that section. A.I.R. 1934 Nag. 82=30 Nag.L.R. 135=148 Ind. Cas. 200.

——S. 47, O. 21, R. 58—Decree against assets—Attachment—Claim by legal representatives on their own behalf—Onus of proof of title—Proof of possession.

It is an established principle of law that a person in possession cannot be dispossessed by any other person unless that other person establishes his title to the property.

Where properties are attached as properties of a deceased person in the hands of the defendants and the defendants who are in possession claim the property as their own, the burden is on the decree-holder to prove that the properties belonged to the judgment-debtor. A.I.R. 1933 Oudh 473=10 O.W.N. 1017=146 Ind. Cas. 1023.

——S. 47, O. 21, R. 48—Order levying or refusing to levy attachment—Appeal, competency of—Revison does not lie.

Where the lower Court passes the order levying or refusing to levy attachment under O. 21, R. 48, the order is one which can be the subject of an appeal under S. 47 and hence an application for revision against the order does not lie. A.I.R. 1933 Bom. 185=35 Bom.L.R. 360=144 Ind. Cas. 897.

——Ss. 47 and 115—Question relating to execution—Attachment — Custodian—Release of attachment—Remedy of judgment-debtor against custodian.

In execution of a decree the judgment-debtor's crops were attached and placed in charge of a custodian. The judgment-debtor paid up a part of the decretal amount and obtained time to pay off the balance. The Court ordered the attached crops to be released and the execution case was struck off. Subsequently the judgment-debtor applied to the Court complaining that the crops had not been delivered back to him. The Court passed an order directing the custodian to deliver the crops to the judgment-debtor or pay their price. *Held,* that the order was without jursdiction and that the judgment-debtor's remedy against the custodian was a suit for recovery of the crops or their value. 42 All. 394=18 A.L.J. 357=2 U.P.L.R. (All.) 145=58 Ind. Cas. 448.

——S. 47—Question relating to execution—Attachment—Objection to.

It is the function of executing Court to see whether the cattle of an agriculturist sought to be attached, are necessary for him to earn livelihood. 13 S.L.R. 201=56 Ind. Cas. 69.

——S. 47—Questions in execution—Objection to attachment—Absence of attachment falls under S. 47.

Where the petition filed by the judgment-debtor to set a sale aside contained an allegation that there were

material irregularities in the publishing and conducting the sale, the application must be treated as being in part an application under O. 21, R. 90. But where such irregularities were not specified and the real ground of attack was based on the absence of any attachment of the greater portion of the area. *Held*, that the absence of an attachment may be a material irregularity in the publishing of the sale. A defective notice specifying the wrong property or wrong portion of a property may be so misleading as to amount to an absence of notice and therefore the objection as to the defect or absence of the necessary attachment involves a substantial question as to the absence of proper notice to the judgment-debtor as to the property attached and it does not come within O. 21, R. 90, but does come within S. 47. 77 Ind. Cas. 368=1 Rang. 533=A.I.R. 1924 Rang. 124. *See also* A.I.R. 1930 Mad. 414=120 Ind. Cas. 863.

——S. 47—Question relating to execution—Right to attach debt—Declaratory suit.

Plaintiff sued defendant for a debt and attached before and after judgment, a debt due by a third person to defendant which was the subject of a suit. The suit was dismissed on the ground that the third party could not contact with defendant the Court refused to allow plaintiff to sell the attached debt. Plaintiff brought a separate suit for a declaration that the attached debt was really due by third party to defendant. The suit is barred under S. 47, as this is a question relating to the execution of the decree of plaintiff against defendant. 3 O.L.J. 756=38 Ind. Cas. 461.

——S. 47—Question relating to execution—Attachment of movable—Allegation of misappropriation by decree-holder and Court Amin—Enquiry in execution—Separate suit.

Enquiry of allegations of misappropriation of attached movables by the decree-holder in collusion with the Court Amin should be made under S. 47, and the complainant should not be referred to a separate suit. 1 Pat. L. J. 558=36 Ind. Cas. 280.

——S. 47 and O. 21, R. 58—Question relating to execution—Attachment of property in possession of judgment-debtor—Objection by him as shebait—Appeal.

On attachmnt of the property in the possession of the judgment-debtor he objected alleging that he was in possession as a *shebait* of a deity to whom the property belonged. It was held that the question raised fell under O. 21, R. 58 and not under S. 47 and hence an appeal lay against the decision of the first Court. 39 Cal. 298=14 C.L.J. 425=16 C.W.N. 26=12 Ind. Cas. 163 (F.B.).

——S. 47—Question relating to execution—Auction-purchaser.

No appeal lies under O. 21, R. 84, for fresh sale —Decree-holder himself auction-purchaser—It makes no difference and the case does not come under S. 47, as the auction-purchaser is not a party to the suit, nor can it be said that the order setting aside sale or ordering new sale is one relating to execution, discharge or satisfaction of decree. A.I.R. 1939 Lah. 210=41 P.L.R. 568=186 Ind. Cas. 152.

——S. 47 and O. 21, R. 2—Question relating to execution—Certificate of payment.

Payment not duly certified under S. 258 of the C. P. Code, cannot be proved under S. 244 when an appropriate application in that behalf under S. 258 would be succesesfully met by the plea of limitation. 11 C.L.J. 91=14 C.W.N. 357=4 Ind. Cas. 402.

——S. 47—Question relating to execution—Certificate of payment.

Judgment-debtor paying certain amount towards satisfaction of decree—Decree-holder not certifying payment and executing whole amount due under decree—Judgment-debtor bringing suit to recover amount paid—Such suit is maintainable—S. 47 does not bar such suit as it is based on an alleged failure of the decree-holder to carry out his promise of crediting the amount to his decree which though bearing on question as to satisfaction of decree is not directly a question relating to such satisfaction. 7 Rang. 310=119 Ind. Cas. 742=A.I.R. 1929 Rang. 269.

——S. 47—Certificate of payment.

Where an application for certifying a payment out of the Court was made, under O. 21, R. 2, Cl. (2) within the period prescribed for making such an application to the Court which was executing the decree and where an inquiry was therefore invited by the judgment-debtor as to the payment alleged to have been made by him to the decree-holder during the pendency of the execution proceedings, his application could not be thrown out upon the ground that it was not certified under Cl. (3) of that rule. The application was made for the purpose of having the payment certified and until that question was decided the stage of Cl. (3) did not arise. The application of the judgment-debtor for certifying payments by him to the decree-holder out of Court is an application in course of the execution of the decree obtained by the decree-holder. The application is therefore one under S. 47, C. P. Code, for it raised the question as to the execution and satisfaction of the decree sought to be executed. The dismissal of that application certainly gives rise to a right of appeal to the judgment-debtor. 68 Ind. Cas. 645=1 Pat. 644=3 Pat.L.T. 487=1922 P.H.C.C. 200=A.I.R. 1922 Pat. 276.

——S. 47—Certificate of payment—Bar of Limitation.

Right to have payment recorded, time barred—Judgment-debtor cannot agitate under S. 47, afterwards. 63 Ind. Cas. 535=6 P.L.J. 337=2 P.L.T. 765=A.I.R. 1921 Pat. 135.

Claim.

——S. 47—Question relating to execution—Charge —Claim by legal representative.

A claim preferred by legal representative of a defendant in a suit, ascertaining a charge on land sold in execution of a decree in that suit, to the extent to which he relieved it, of liability under a mortgage should be investigated under S. 47 and should not be summarily disposed of. 2 Ind. Cas. 432 (Mad.).

——Ss. 47, 151, O. 21, Rr. 58, 64—Property of K attached by *P* in execution of his decree—Same property subsequently purchased by *M* in execution sale of another decree—*M* objecting under O. 21, R. 58 that property could not be sold in execution of *P's* decree—Contention by *P* that second decree was collusive—Such objection held, could not be entertained in execution proceedings—Court held could enquire into title of *M* under S. 151 even if S. 47 did not apply. A.I.R. 1939 Lah. 380=41 P.L.R. 305=188 Ind. Cas. 529.

——S. 47—Suit to set aside sale—Ground of claim that application under O. 21, R. 89, was not brought to notice of Court fraudulently.

The plaintiff, a judgment-debtor, brought a suit to set aside the sale held in execution of a decree. One of the grounds of his claim was that his sister had made an application under O. 21, R. 89, and had deposited the necessary amount, but that this application was fraudulently removed by the decree-holder and the sale was obtained without this application being brought to the notice of the Court or any decision given thereon:

Held, that the matter came within the provisions of S. 47, and could only be decided under that section and not by a separate suit. The mere fact that the sale was confirmed and that an auction-purchaser was interested was no ground for holding that S. 47 could not apply. A.I.R. 1938 Lah. 690=40 P.L.R. 615=178 Ind. Cas. 594.

——S. 47—Claim by legal representative of deceased judgment-debtor in his own right.

In a suit against two defendants the 2nd defendant was dismissed as an unnecessary party and a decree was passed against the other. Subsequently, the 2nd defendant was brought on record as the legal representative of the first defendant on the death of the latter and property was sold in execution but when the decree-holder tried to get possession he was resisted by the 2nd defendant who claimed title to the property in his own right and independently of the judgment-debtor:

Held, that the claim of the 2nd defendant was one which could be determined by the executing Court under S. 47. A.I.R. 1937 Mad. 108=44 M.L.W. 698=71 M.L.J. 725=1936 M.W.N. 1369=167 Ind. Cas. 113.

——S. 47—Question in execution—Credit for amounts lost—Scope and extent of.

Decree-holder withdrawing money deposited in Court by judgment-debtor on furnishing security—Decree reversed on appeal—Judgment-debtor by way of restitution recovering money by sale of the property given as security and buying it himself—The property subsequently found not to belong to the surety—Decree finally passed in favour of the decree-holder and latter trying to execute decree—Judgment-debtor is entitled to credit for the amount lost by him owing to the fact that surety had no saleable interest in the property mentioned above. A.I.R. 1934 Lah. 911=155 Ind. Cas. 1011.

——S. 47 and O. 21, R. 63—Question relating to execution—Claim—Subsequent suit by judgment-debtor.

Where a claim was allowed, the judgment-debtor sued the claimant and obtained a decree for possession. The decree-holder kept quiet but re-attached the property and a transferee from the judgment-debtor put in a claim and having failed in it filed a suit for possession.

Held, that the first attachment was not revived as the result of the judgment-debtor's suit and that the transferee's suit was not barred by limitation. 44 Ind. Cas. 864 (Mad.).

——S. 47—Question relating to execution—Claim—Execution of mortgage decree—Prior mortgagee's claim does not fall under S. 47.

Prior mortgagee holding a decree on his mortgage impleaded in puisne mortgagee's suit—His rights under his decree not put in issue—Prior mortgagee purchasing himself in execution of his decree and objecting to sale of these properties in execution of puisne mortgagee's decree—Claim is not barred by *res judicata*—Claim does not fall under S. 47. 99 Ind. Cas. 658=A.I.R. 1927 Mad. 431.

——S. 47—Question relating to execution—Compromise—Suit for declaration of title—Whether maintainable—Limitation.

Where a revenue sale was sought to be set aside on the ground of fraud and a compromise was effected, a suit on default of compromise terms, for declaration of title is not maintainable nor could the compromise be executed as neither S. 5 nor S. 18 of the Limitation Act has application to cases under S. 47 of the C. P. Code. 23 Ind. Cas. 240 (Cal.).

——S. 47—Questions relating to execution—Costs—Decree granting costs against trustee—No direction how to be executed—Duty of executing Court—Trustee, whether personally liable.

A Court executing a decree cannot go behind the express terms of the decree and if it is called upon to construe the decree it has to do so according to the plain meaning of the words of the decree. Where the words are clear enough, an executing Court cannot attribute some other meaning to them unless it has to do so in virtue of any enactment or rule having the force of law applicable to the particular case before it.

Where in a suit between a trustee and a stranger, a decree was passed granting costs against the trustee but the decree did not state how it was to be executed:

Held, that the decree was executable against the trustee in any manner in which a decree for money may be executed against any ordinary litigant who is directed to pay costs, and that he was personally liable. A.I.R. 1934 All. 793=1934 A.L.J. 225=3 A.W.R. 576=151 Ind. Cas. 952.

——S. 47—Question relating to execution—Decree—Mortgage decree—Objection that it is incapable of execution cannot be allowed.

A Court executing a mortgage decree which directs the sale of a specific property cannot allow the judgment-debtor or his legal representative to object that the decree is not capable of execution either because the judgment-debtor had no right originally to execute the mortgage upon the basis of which the decree has been passed or that since the date of the decree, owing to the death of the judgment-debtor or otherwise, the judgment-debtor had no longer any interest in the property. A.I.R. 1946 Pat. 214=24 Pat. 741.

——S. 47—Points whether decree sought to be executed is declaratory and how far it can be executed can be raised in execution.

The point whether the decree sought to be executed is a declaratory decree and how far it is capable of execution as an executory decree as opposed to a declaratory decree, can be taken in execution. Such a question is entirely distinct from the question whether the decree to be executed was or was not a valid decree, which except in very rare cases is not one for an executing Court to enquire into. A.I.R. 1943 Sind 11=I.L.R. (1942) Kar. 326=205 Ind. Cas. 256.

Compromise.

——S. 47, O. 23, R. 3—Suit for possession of land —Compromise—Decree concerned not with plaintiff's present but future rights on uncertain future happenings—Decree must be regarded as declaratory and incapable of execution.

Where in a suit for possession of land, it is agreed that the plaintiff should recover possession but the defendant should cultivate the land and the compromise decree sets out the payment and penalties, to be incurred by the defendant for non-fulfilment of certain of its terms and is concerned not so much with the present right of the plaintiff to money or property but as to his future rights on uncertain happenings in the future such as draught, floods, failure to cultivate and so on, the decree must be regarded as a declaratory decree and hence incapable of execution. A.I.R. 1943 Sind 11=I.L.R. (1942) Kar. 326=205 Ind. Cas. 256.

——S. 47—Execution application—Objection—Objection struck off for default and not on merits.

Held, that order could not be an order under S. 47 and did not amount to a decree. A.I.R. 1935 All. 502=1935 A.L.J. 403=1935 A.W.R. 427=1935 A.L.R. 805=157 Ind. Cas. 426.

Decree.

——S. 47, O. 21, R. 7—Executing Court, if can question correctness of decree passed—Exceptional cases when executing Court can go behind the decree.

A reading of S. 47, C. P. Code, and a comparison of S. 225, C. P. Code of 1882 with the corresponding provision in the Code of 1908, namely, O. 21, R. 7 make it abundantly clear that the executing Court is not entitled to question the correctness of a decree passed. The matters which are allowed to be agitated before the executing Court are laid down in S. 47.

Although it is not possible to lay down broadly that an execution Court can in no circumstances go behind the decree and must of necessity shut its eyes to circumstances under which the decree came to be passed there may be cases where the decree is incapable of execution, or is void and a nullity, in such a way as to make it impossible for the executing Court to execute it; or there may be cases where there are certain statutory provisions which prevent the executing Court from proceeding to sell certain property, for instance, where the sale of certain lands is prohibited and not necessarily their attachment and order for sale. In such cases it may be possible for the Court in one sense to go behind the decree and not execute it; but in reality the Court is merely staying its own hands and not inquiring into the jurisdiction of the Court which passed the decree. But to hold that an executing Court must always inquire into the question of the jurisdiction of the Court which passed the decree would be to re-open matters which might have been the subject of the controversy in the original suit and which might well have been decided on the consideration of the oral and documentary evidence. A.I.R. 1934 All. 609=1934 A.L.J. 409=1934 A.L.R. 657=3 A.W.R. 731=57 All. 1=18 R.D. 275=149 Ind. Cas. 636.

——S. 47—Decree to be binding on a person must have force of res judicata—Construction of decree —Reference to judgment and pleadings—Decree silent—Effect.

A decree, in order to be binding upon a person must be proved to have the force of *res judicata* and in order to determine what a decree actually decides it is necessary and sometimes it becomes incumbent to refer to the judgment on which it is based, to the issue in the suit, and in some cases to the pleadings.

From the mere fact that a decree is silent as regards a claim over certain property, it does not follow that the claimant can never lay any claim in respect of that property again. A.I.R. 1931 Cal. 511=35 C.W.N. 66=132 Ind. Cas. 625.

——S. 47—Question relating to execution for—Decree—Execution of.

When a suit was decreed in favour of plaintiffs and one of the defendants that defendant cannot sue again for that relief the remaining defendants; the proper way for him is to execute the decree. 57 Ind. Cas. 900 (Cal.).

——S. 47—Question relating to execution—Decree ordering sale of property of judgment-debtor.

Where a Judge amended a decree by ordering that it could be executed only against the property of the deceased, the amended decree operates not being reversed on appeal so as to throw upon the decree-holder the burden of proving in the execution proceedings that the property sought to be sold was the property of the deceased and was in the lands of the respondents as legal representatives. 18 A.L.J. 131 =2 U.P.L.R. (All.) 34=55 Ind. Cas. 83.

——S. 47—Question relating to execution—Decree —Subsequent suit on same cause of action—Bar.

When a person has a cause of action and brings a suit upon it that cause of action merges in the decree and his further remedy is in execution and if he allows execution to be barred, his rights are gone. He cannot institute a fresh suit on the same cause of action. 41 Mad. 641=7 L.W. 143=34 M.L.J. 167=23 M.L.T. 156=(1918) M.W.N. 205=44 Ind. Cas. 110.

——S. 47 and O. 21, R. 95—Question relating to execution—Decree for possession—Delivery of possession—Subsequent dispossession.

Where in pursuance of a decree for possession the judgment-debtor amicably hands over possession to the decree-holder but subsequently dispossesses him the remedy of the latter is by way of a fresh suit and not by way of execution of the prior decree for possession. 30 Ind. Cas. 606 (Mad.).

——S. 47—Question relating to execution—Decree obtained by fraud—If can be questioned in execution.

The question whether a decree was obtained by fraud or collusion is not one which relates to the execution of the decree; it can only be raised by a separate suit. 9 Mad. 280, Foll. 38 Mad. 221= 29 Ind. Cas. 239.

——S. 47—Question relating to execution—Decree for possession conditional on payment of money within certain time—Payment made beyond time.

An order disallowing an objection to the execution of a decree is one relating to the execution of the decree within S. 47, C. P. Code and is appealable. 12 A.L.J. 12=22 Ind. Cas. 926.

——S. 47 and O. 21, R. 2—Question relating to execution—Decree for possession of immovables —Question of satisfaction, if could be gone into in execution.

Where a decree is one for possession of immovable property the question of satisfaction having been made to the decree-holder out of Court can be gone into under S. 47, C. P. Code, (1908) notwithstanding the absence of certificate of satisfaction. 25 M.L.J. 586=14 M.L.T. 574=21 Ind. Cas. 639.

——S. 47—Question relating to execution—Construction of decree and validity of sale.

The question of the validity or otherwise of a sale held in execution of a decree is one relating to execution, so also a question whether the actual execution is in excess of the decree itself. 10 M. L.T. 527=(1912) M.W.N. 44=13 Ind. Cas. 133.

——S. 47 — Question relating to execution—Decree—Charge decree—Non-party cannot resist execution—His remedy is by separate suit—C. P. Code, O. 34, R. 1.

The charge-decree-holder is entitled to the benefits of his charge decree in execution of the decree and any other person who refuses to be bound by the decree on whatsoever ground it may be has got to file a regular suit for the proper relief. 123 Ind. Cas. 194=1930 M.W.N. 160= A.I.R. 1930 Mad. 538=58 M.L.J. 355.

——S. 47 and Specific Relief Act, S. 42—Assignment of decree—Judgment-debtor can get it declared invalid.

A judgment-debtor can maintain a suit for declaration that the assignment of the decree against him by the decree-holder is invalid as being fraudulent. 117 Ind. Cas. 893=A.I.R. 1929 Lah. 51.

——S. 47—Objections as to property after a mortgage decree.

A judgment-debtor cannot raise an objection that he has no saleable interest in the property ordered to be sold in execution of a mortgage-decree. The proper time to raise such objection is at the hearing of the suit and before the decree ordering the sale is passed. A.I.R. 1929 Rang. 275.

——S. 47—Execution—Decree null and void—Objection that decree against dead person is nullity can be taken in execution.

A decree passed against a dead man is a nullity and it is not essential for a separate suit to be brought to challenge the fact. 28 Bom.L.R. 1367 =98 Ind. Cas. 927=A.I.R. 1927 Bom. 53. See 88 Ind. Cas. 865=6 Lah. 313=A.I.R. 1925 Lah. 494.

——S. 47—Property comprised in the decree—Executing Court must determine.

Question whether certain land is included in a decree is one under S. 47. A.I.R. 1922 P.C. 252, Foll. 54 Cal. 419=103 Ind. Cas. 233=A.I. R. 1927 Cal. 614.

——S. 47—Quantum of property comprised in the decree.

The main object underlying the section is to prevent multiplicity of suits and to secure that all matters, which can be decided in the suit, shall be so decided. Where the decree was for land in excess of that which formed the subject of the suit, and where it included land which ought not to have been included,

Held, that such matters are for determination by the Court executing the decree, and that looked at from that point of view a subsequent suit is bad. 89 Ind. Cas. 744=42 C.L.J. 22=30 C.W.N. 41 =A.I.R. 1925 Cal. 1258 .

——S. 47—Validity of decree challenged—Separate suit only will lie.

Any question relating to the execution, satisfaction or discharge of the decree arising between persons, who are parties to the suit, whether exempted or otherwise, must be decided in the execution proceeding arising out of the decree passed in the suit, to which he was such a pa ty. The question must, however, relate to the execution of that decree and must not seek to challenge its validity; for no Court executing a decree can go behind it; and if a person seeks to challenge the validity of a decree, the only remedy open to him is, if the matter has not already been finally determined in a previous suit, to get it adjudicated by a separate suit, or in such other manner as may be open to him according to law. 48 All. 574=95 Ind. Cas. 147=A.I.R. 1926 All. 475.

——S. 47—Order declaring decree executable against property only of judgment-debtor is a decree.

Order declaring that a decree-holder can proceed against the property but not against the person of the judgment debtor is a decree as it conclusively determines the right of the parties with regard to one of the matters for determination under S. 47, that is to say, the personal liability of the judgment-debtors to satisfy that decree. 75 Ind. Cas. 1039=A.I.R. 1924 Lah. 604.

——S. 47—Reversioner questioning validity—Section does not apply.

A reversioner as the legal representative of a widow who was the judgment debtor cannot raise objections challenging the very foundations of the decree even though the widow admitted the claim without contest. An objection that the decree was collusive or in respect of a non-existent debt is not one relating to the execution, discharge or satisfaction of the decree. That question can be only tried in a regular suit. Entertaining such an objection is exercising jurisdiction where there is none and is consequently revisable. 78 Ind. Cas. 136=20 N.L.R. 24=A.I.R. 1924 Nag. 81.

——S. 47—Order under O. 20, R. 14—Whether payment made in time or not falls under S. 47.

The question whether a payment under a pre-emption decree was made or not within the time allowed is a question affecting the satisfaction or discharge of the decree and falls within the purview of S. 47. A decree for pre-emption is complete in itself and in case of a non-fulfilment of the condition laid down by that decree, no final decree is necessary. It may combine a preliminary direction with the effect it would finally have, if that direction was not complied with. The question whether in a particular case that direction has been complied with or not is a question which arises

independently of that decree and can only be determined under S. 47. Such a determination involves an adjudication of the question whether the decree has been satisfied or discharged and is open to an appeal by force of S. 2, which treats such orders as decrees from which an appeal is maintainable. 26 O.C. 345=74 Ind. Cas. 558=A.I.R. 1924 Oudh 104.

——S. 47—Execution of mortgage decree—Question whether some properties mortgaged did not belong to mortgagor is one within the section. 79 Ind. Cas. 486=A.I.R. 1923 All. 115.

——S. 47—Pre-emption decree—Question of title to standing crops is not one under S. 47 when decree does not touch it. 76 Ind. Cas. 193=A.I.R. 1923 Nag. 327.

——S. 47—Decree may be shown to be in favour of person dead at its date, though no objection was taken at the time. 64 Ind. Cas. 927=19 A.L.J. 95=43 All. 328=A.I.R. 1921 All. 404.

——S. 47 and O. 21, R. 100—Powers of Court under.

In an application under O. 21, R. 100 by a person who is a party to the decree all that the Court is entitled to do is to construe the decree before it. 63 Ind. Cas. 730=14 M.L.W. 85=1921 M.W.N. 487=A.I.R. 1921 Mad. 612=41 M.L.J. 54.

——S. 47 and O. 21, R. 97—Question relating to execution—Decree-holder purchaser.

An order allowing or refusing delivery of possession after an execution sale is not an order under S. 47 of the C. P. Code even when the decree-holder is the auction-purchaser and as such no appeal lies. 20 C.L.J. 433; 1 Pat.L.J. 232, Foll. 29 C.L.J. 48=49 Ind. Cas. 137.

——S. 47 and O. 21, R. 95—Question relating to execution—Decree-holder purchaser—Suit for possession.

A decree-holder purchaser does not lose the character of a party to the suit and until he obtains possession of the property the proceedings in execution are not terminated. S. 47 is a bar to his suit for possession and his only remedy is by an application under O. 21, R. 95 of the C.P. Code. 44 Ind. Cas. 563 (N.).

——S. 47—Decree-holder purchaser—Suit for possession.

Application for possession of property purchased by decree-holder auction-purchaser is not application in execution, discharge or satisfaction of decree so as to bar subsequent suit for possession. 1 Pat.L.J. 232 (F.B.); 4 Pat.L.J. 716; 31 All. 82 (F.B.); A.I.R. 1924 Bom. 429, Foll. 9 Pat. 332=11 P.L.T. 315=A.I.R. 1930 Pat. 308. See also A.I.R. 1930 Rang. 61=8 Rang. 162.

——S. 47—Claim for possession by decree-holder auction purchaser is not within S. 47.

Neither in the Code of Civil Procedure nor in the Indian Limitation Act is there any distinction drawn between a decree holder auction-purchaser and a stranger auction-purchaser. The decree-holder purchaser does not seek to get possession in execution of his decree but by virtue of his being declared the purchaser at the auction sale.

Claim made by the auction-purchaser, for possession based on the title acquired as auction-purchaser even though he may be the decree-holder does not relate to the execution, discharge or satisfaction of the decree. That question, generally speaking, is outside the scope of S. 47 of the Code. Though it is between the same parties it cannot be said to relate to the "execution, discharge or satisfaction of the decree." Where the validity of the sale is questioned, it may be said that the questions arising in the suit may relate to the execution, discharge or satisfaction of the decree, in execution whereof the sale is held. 26 Bom.L.R. 601=48 Bom. 550=83 Ind. Cas. 932=A.I.R. 1924 Bom. 429 (F.B.).

——S. 47—Decree-holder auction-purchaser seeking possession—Proceedings are not under S. 47—C. P. Code, O. 21, R. 97.

Where a decree-holder who has purchased the property at a Court sale seeks to get possession he does not do so in execution of his decree but by virtue of the title acquired as purchaser and his claim based on such title does not come under S. 47. 31 All. 82; A.I.R. 1924 Bom. 429 (F.B.), Foll. 32 Bom.L.R. 619=A.I.R. 1930 Bom. 375=125 Ind. Cas. 703=54 Bom. 479.

——S. 47—Questions relating to execution—Delivery of possession—Third person found bona fide in possession—Question of title.

Where a person holding a decree for possession of certain property against the judgment-debtor executes it but a third person is found **bona fide** in possession of the same, the Court executing the decree can deal only with the question of **bona fide** possession and not with the question of title. The decree-holder must file a separate suit for possession to decide the question of title. A.I.R. 1937 Pat. 615=18 P.L.T. 833=172 Ind. Cas. 4.

——S. 47—Judgment-debtor obstructing delivery of possession to decree-holder purchaser—Decree-holder should make complaint under O. 20, R. 97 and the matter must be disposed of in execution—Where the judgment-debtor makes no objection, the third party may object to delivery of possession—It is the duty of executing Court to decide the matter and order delivery of such possession as the matter may then be capable of so far as the judgment-debtor is concerned. A.I.R. 1935 Mad. 803=1935 M.W.N. 926=42 L.W. 375=58 Mad. 893=69 M.L.J. 821=159 Ind. Cas. 279.

——S. 47—Question in execution—Delivery of possession of property purchased in execution.

The question relating to the delivery of possession of the property purchased by the decree-holder auction-purchaser is not a question relating to the execution, discharge or satisfaction of the decree within S. 47, C.P. Code. There is a distinction between the execution of a decree which directs the delivery of "any property specifically decreed" and the execution of a decree for sale under a mortgage or a simple money decree.

Per **Ross, J.**—It is doubtful whether these questions can be answered in the abstract without reference to the facts of the particular case.

Per **Kulwant Sahai, J.**—If the suit be a simple suit for possession on the allegation that the plaintiff had purchased the property in execution of his decree but that possession had not been acquired

by him and that he was being opposed in taking possession by the judgment-debtor, such a suit is not either expressly or impliedly barred by the provisions of S. 47. If, however, any question is raised in the suit either by the plaintiff or by the defendant which may involve a question relating to the execution, discharge or satisfaction of the decree, the decision of such a question would be barred by the provisions of S. 47. A.I.R. 1931 Pat. 241=10 Pat. 670=133 Ind. Cas. 337 (F.B.).

——S. 47, O. 21, R. 32—Decree for specific performance—Power of Court to grant possession of property in execution.

Where a decree is passed for specific performance of a contract of sale, the Court executing the decree has power to grant delivery of possession of the property to the decree-holder. Even if there is an omission in the plaint or in the decree about possession, the executing Court is not debarred from granting the plaintiff possession of the property. A.I.R. 1931 Pat. 179=12 P.L.T. 636=131 Ind. Cas. 526.

Delivery of possession.

——S. 47 (Ss. 244. 318, 319, Old Code)—Questions relating to execution, etc.—Delivery of possession not a question of the kind.

The questions arising under Ss. 318, 319, C.P. Code, are not questions falling within the purview of S. 244. There is absolutely no difference between a decree-holder purchaser and a stranger purchaser. He is entitled to claim possession not only by an application under S. 368 or S. 319 but also by suit. (1906) 6 A.L.J. 71=31 A. 82=1 Ind. Cas. 416 (F.B.).

——S. 47 and O. 21, R. 96—Question relating to execution—Delivery of possession—Review of order—Appeal.

Proceedings for delivery of possession are not proceedings in connection with the execution of a decree and no appeal lies from an order passed in review cancelling a former order for delivery of possession on the ground that the application for delivery of possession was barred by limitation. 3 Pat. L.J 571=48 Ind. Cas. 129.

——S. 47 and O. 21, R. 95—Question relating to execution—Delivery of possession.

A separate suit for possession (apart from a suit under O. 21. R. 95) of property purchased by the decree-holder auction-purchaser is not barred as the cause of action which arises after sale does not come under S. 47 as a question relating to the execution, etc., of a decree. Questions relating to the possession of property after sale has taken place are not questions connected with the exclusion, etc. of a decree within S. 47, C.P. Code. 18 O.C. 345=33 Ind. Cas. 367.

——S. 47 and O. 21, R. 96—Question relating to execution—Delivery of possession—Purchase of share of judgment-debtor—Partition suit.

Where a decree-holder purchases his judgment-debtor's rights in a joint property he is entitled to bring a suit for partition against the judgment-debtor and other co-owners without obtaining any formal delivery of possession and his suit is not barred by S. 47. A purchaser at a Court sale in order to obtain possession of the property purchased may seek for such possession as he can obtain under the Code, or may ignore the provisions of the Code and stand upon his general rights of prosecuting his claim by instituting a suit. 28 M.L.J. 642=(1915) M.W.N. 414=29 Ind. Cas. 976.

——S. 47—Question relating to execution—Delivery of possession.

So far as the Patna High Court is concerned the view has prevailed that an application under O. 21, R. 95 or 97 will not be proceeding relating to the execution, discharge or satisfaction of the decree. 11 P.L.T. 331=A.I.R. 1930 Pat. 311=126 Ind. Cas. 849=9 Pat. 775.

——S. 47 and O.21, R. 97 and 100—Questions in execution.

Prima facie the legislature intended that proceedings under O. 21, Rr. 97 or 100 should be regarded as included under the word "execution". Proceedings under Rr. 97 and 100 follow as sequal on the execution of the decree (using the word "execution" in its stricter sense) and on the Court sale, and the legislature has enacted that such proceedings shall be regarded in law as part of the execution proceedings. It is obvious that S. 141 does not apply to such proceedings under O. 21 as are not also proceedings under S. 47. Therefore O. 9 does not apply to such proceedings under R. 97 or R. 100 as do not also fall within S. 47. 120 Ind. Cas. 567=30 M.L.W. 424=52 Mad. 899=A.I.R. 1929 Mad. 757=57 M.L.J. 381 (F.B.).

——S. 47—Wrong property delivered—Mistake rectified under inherent powers of Court.

In the execution of a decree on two mortgages the decree-holder purchased the property mortgaged. The writ of delivery of possession was obtained. The bailiff executing the writ delivered possession of the property not covered by the writ of delivery along with that covered by it. Consequently mortgagor filed an objection by an application purporting to be under S. 47 and O. 21, R. 100.

Held, that the application was not provided for in any of the rules relating to the delivery of possession in execution of a decree or after an execution sale. The question of this nature was not a question relating to the execution, discharge or satisfaction of the decree and that it does not arise between the judgment-debtor and the decree-holder as such and did not fall within the scope of S. 47. Although it purported to be under S. 47 and O. 21, R. 100 it was in effect an application under S. 151 to prevent the abuse of the process of the Court and its inherent powers. A.I.R. 1929 Pat. 391.

——S. 47 — Money decree—Auction-purchaser, different from decree-holder, applying for delivery —No question of validity of sale—S. 47 does not apply—Decree-holder auction-purchaser is on a different footing from a purchaser who is not decree-holder. 111 Ind. Cas. 551=A.I.R. 1928 Mad. 806.

——S. 47—Questioning in execution delivery of possession if property sold.

After a property is sold in execution, the Court occupying the position of the vendor has to deli-

ver possession of the property sold by it to the purchaser. This duty Court undertakes in order to complete the sale by which the money due to the decree-holder has been realized. These proceedings may not be strictly a part of the execution before realization of the money due under the decree, but they certainly arise out of the execution of the decree and are therefore related to it. 53 Cal. 781=43 C.L.J. 345=30 C.W.N. 649=95 Ind. Cas. 494=A.I.R. 1926 Cal. 798 (F.B.).

——S. 47—Delivery of possession of property sold.

The proceeding relating to delivery of possession after confirmation of Court sale, to the auction-purchaser, whether he be a stranger or the decree-holder, is not a proceeding in execution of a decree and any question arising in such a proceeding is not a question relating to execution, satisfaction or discharge of the decree within the meaning of S. 47, C. P. Code. 89 Ind. Cas. 196=A.I.R. 1925 Cal. 1250. **See also** A.I.R. 1923 Cal. 345=84 Ind. Cas. 525.

——S. 47—Possession got privately from judgment-debtor is valid and lawful possession.

The judgment-debtor stated to the bailiff that he had no objection whatever and that he had given up the land, which was lying vacant. Thereupon the plaintiffs took possession and remained in possession for many years.

Held, it cannot be said that that possession was taken in "in execution" in the sense that an official of the Court actually placed the decree-holders upon the land, but it was taken in the course of execution proceedings and as a result of the decree which the plaintiffs had obtained. The plaintiffs were in lawful possession and when dispossessed were entitled to maintain a suit for possession. 68 Ind. Cas. 744=A.I.R. 1922 Lah. 459.

——S. 47—Delivery of possession—Bar of suit.

After a decree for possession in a suit against defendant No. 1 the plaintiff instituted another suit for a declaration of his title to the land. Plaintiff alleged that after he had obtained possession of the land in execution of his final decree he had been dispossessed by the defendants. The lower courts found that he had not obtained actual possession under the first decree.

Held, The Second suit was barred under section 47. 87 Ind. Cas. 251=1 Pat. 157=A.I.R. 1922 Pat. 407.

——Ss. 47 and 151—Question relating to execution—Revoking order for delivery of possession—Inherent power—Jurisdiction.

An order by the Executing Court recalling a former order for delivery of possession to the transferee is not within S. 47 and not appealable. The Court cannot grant such a relief in the exercise of its inherent powers as it is expressly forbidden by the Code. 19 C.W.N. 835=20 C.L.J. 433=25 Ind. Cas. 267.

Deposit by judgment-debtor.

——S. 47 and O. 21, R. 89—Question relating to execution—Deposit by judgment debtor.

A deposit by the judgment-debtor to set aside a sale can only be made under O. 21, R. 89, C.P. Code and it does not come under S. 47, C. P. Code. 6 Ind. Cas. 573 (Cal.).

——S. 47—Question relating to execution—"Determined"—Meaning of.

"Determined" in S. 244 of the Code (1882) shows that the questions should be finally disposed of by granting appropriate relief. 26 M.L.J. 460=24 Ind. Cas. 696.

Discharge.

——S. 47 and O. 34, R. 1—Questions relating to execution — Discharge — Suit for foreclosure—Party discharged as claiming paramount title—Decree cannot be executed against him—Decree—Construction of.

The **malguzar** of a village had mortgaged the village in 1895. In due course of time a four annas share in the equity of redemption of that mortgage was acquired by **R, G's** son. A four annas share in the mortgagee rights passed to **G** and a four annas to **G's** brother. **G** and **R** executed a mortgage in 1919 in favour of **M** of the **malguzari** rights in a four annas share. The mortgagee **M** brought a suit for foreclosure including **A** as an attaching creditor of **G's** rights as mortgagee who during the pendency of the suit acquired **G's** rights as mortgagee of the mortgage of 1895. **A** having pleaded that **G's** mortgagee rights under the mortgage of 1895 were not not mortgaged to **M,** refused to redeem **M's** mortgage. **A** was thereupon discharged as a person claiming paramount title, at **M's** instance. In the judgment it was held that **G's** interest was not covered by the mortgage and the mortgaged property was described in the preliminary decree as four annas of the village. **M,** in execution of the foreclosure decree, obtained symbolical possession only and not actual possession from **A** and prayed for a fresh warrant of possession against **A,** which was issued. The High Court construed the decree by reference to pleadings and the mortgage deed but not the judgment:

Held, that the issue of a warrant of possession against **A** was without justification and the Courts had committed a serious irregularity in putting **A** to trial of his title on an application for the execution of the foreclosure decree.

Held further, that a party who is dismissed from a suit on the ground that he has no concern with it is no longer a party to the suit and is not bound by the decree. **A** having been discharged, his claim being outside the 'controversy of the suit', the Court acted on the principle that his claim to a paramount title—be it right or wrong—would be in no way prejudiced by any foreclosure decree that might be passed. If he was right in his contention as to the interest comprised in the mortgage of 1919 the doctrine of **lis pendens** did not apply. The decree should not therefore be executed against him as a person who was bound by it; and if he was claiming in good faith to have a right of possession not affected by the mortgage of 1919 he could not be ejected on any other footing save by an independent suit. For the purpose of interpreting the decree no other document was so directly in point as the judgment. A.I.R. 1944 P.C. 46=48 C.W.N. 435=1944 M.W.N.

455=57 M.L.W. 378=11 B.R. 14=I.L.R. (1944) Nag. 597=71 I.A. 65=214 Ind. Cas. 150 =(1944) 1 M.L.J. 523 (P.C.).

——S. 47—Decree against father alone—Sons neither actually nor constructively parties to suit —Subsequent insolvency of father—Question of discharge of father's debts by sons under pious obligation doctrine.

Where after the passing of a decree against a father in a suit to which the sons were neither actually nor constructively parties, the father becomes insolvent and the sons are sought to be proceeded against in execution on the basis of the doctrine of pious obligation, any liability of the sons based upon the doctrine of pious obligation can extend only to the discharge of their father's debts and the question of the discharge of those debts is one for the Insolvency Court and not for the executing Court. A.I.R. 1942 Mad. 732=(1942) 2 M.L.J. 361=55 M.L.W. 672=1942 M.W.N. 663=206 Ind. Cas. 354.

——Ss. 47, 50, 53 (Ss. 244 and 234, Old Code)—Questions arising in execution—Sons of a deceased Hindu debtor can raise questions of illegality or immorality of their father's debt in execution proceedings.

There is no substantial distinction in regard to questions arising in execution, between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree under S. 234, of the C. P. Code. Where the sons of a deceased Hindu debtor are brought on as legal representatives in the course of the suit and before the decree is pronounced, it is open to them to dispute in execution proceedings the liability of the ancestral properties for the debt of their father on the ground that the debt was tainted with immorality or illegality. (1908) 10 Bom.L.R. 939=33 Bom. 39=1 Ind. Cas. 459.

——S. 47—Question in execution—Discharge of decree.

Where the decree is discharged as satisfied, the discharge amounts to a decree under S. 47 read with S. 2, cl. (2). A.I.R. 1936 Oudh 50=11 Luck. 519=1935 O.W.N. 1091=1935 O.L.R. 607=158 Ind. Cas. 705.

——S. 47—Part of decree-holder's rights devolving on judgment-debtor after decree—Decree, if extinguished pro tanto.

Where subsequent to a decree, a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer, the decree does not become incapable of execution but is extinguished only **pro tanto**. This rule of law is sufficiently general to comprehend alike cases of money decrees and decrees for immovable property . A.I.R. 1933 Sind 371=27 Sind L.R. 411=149 Ind. Cas. 608.

——S. 47 and O. 21, R. 2—Question relating to execution—Discharge of decree.

A vesting of the equity of redemption in a mortgage is tantamount to a dilscharge or satisfaction of the mortgage debt; an execution Court is competent to recognise it and can go into the question of the extent to which the decree has been satisfied. 42 All. 544=2 U.P.L.R. (All.) 174=18 A.L.J. 690=58 Ind. Cas. 743.

——S. 47—Question relating to execution—Discharge—Matters subsequent to the decree alone might be raised.

Questions relating to the execution of a decree and arising between parties to a suit in which the decree was passed or their representatives must be such as have reference to matters arising subsequent to the passing of the decree and not antecedent to it. A claim that the Debt on which the decree sought to be executed was obtained had been discharged before suit is not within S. 47, C. P. Code. 64 P.L.R. 1922=67 Ind. Cas. 753=4 U.P.L.R. (Lah.) 93.

Dispossession.

——S. 47—Question relating to execution—Dispossession.

An application by the judgment-debtor under S. 47 against unlawful dispossession is maintainable even though it is filed after the execution application is struck off as fully satisfied. 76 Ind. Cas. 224=A.I.R. 1924 Nag. 122.

Excess property.

——S. 47—Questions in execution—Excess property—Mortgage suit—Fields shown bearing old numbers and as khudkasht—Decree in same terms —Mortgage, not purporting to transfer sir rights—Decree stating that cultivating rights in sir not decreed—Execution — Judgment-debtor applying under S. 47 for restoration to him of cultivation rights—Maintainability of application — Question whether should have been raised before passing of decree.

Held on the facts that if the decree-holder took into possession under the decree some property in excess of what had been granted to him by the decree, it would be a matter relating to execution. Since the decree-holder had taken in excess of what the decree gave him, the judgment-debtor could be restored to possession under an application under S. 47:

Held, further that it was really the duty of the plaintiff to have stated in the plaint the corresponding new numbers of the fields that were mortgaged to him with the proper character that they bore as required of him under the Circular of the Nagpur High Court (Civil Circular 1-6). By his failure to do so he led the Court to believe that cultivating rights in sir lands were not the subject-matter in dispute. In fact they were excluded by the terms of the mortgage-deed and in the decree that followed there was an express mention that the cultivating rights in sir lands did not pass. The defendant on these allegations of the plaintiff was not called upon to make any statement regarding his cultivating rights which were expressly reserved by his mortgage-deed and to which the decree-holder did not lay claim by a suit. If in spite of this, the decree-holder sued for foreclosure or sale of certain old numbers describing them as **khudkasht**, though, in fact they were **sir** at the time, the defendant could very well sit quiet and allow thim to do so knowing fully that there were no such numbers as des-

cribed in the plaint bearing the character of **khudkasht** and the decree-holder even if he were to obtain a foreclosure decree as against such numbers will not be able to disturb his cultivating rights in **sir** lands. He was not,therefore, bound to agitate this question before the decree was passed and could not be precluded from agitating it when the decree-holder in execution of such a decree took possession of his cultivating rights. A.I.R. 1938 Nag. 193=I.L.R. (1939) Nag. 521=173 Ind. Cas. 563.

——S. 47—Decree-holder and judgment-debtor adversely interested—Pro forma defendant—Claim that property sold was in excess of what could be sold—Suit, if barred.

Irrespective of any question of the representative character of the auction-purchaser, S. 47 should be applied to his case where the question raised is one relating to the execution, discharge and satisfaction of the decree and is one in which the decree-holder and the judgment-debtor are adversely interested.

The plaintiff was joined as a party in the previous suit being a co-sharer and as such interested. He claimed that the property sold in Court was in excess of what could be sold under the decree. He was resisted not only by the auction-purchaser but also by the decree-holder:

Held, that an issue relating to the execution of the decree arose between him and the decree-holder both of whom were parties to the previous suit and that the fact that he was merely joined as a **pro forma** defendant did not make any difference. A.I.R. 1934 Lah. 105=148 Ind. Cas. 901.

——S. 47—Question relating to execution—Refund of money received in excess in execution—Separate suit.

An application for refund of excess amount levied in execution relates to the execution of the decree and is properly entertained under S. 47, C. P. Code by the Court executing the decree.44 Bom. 97=22 Bom. L.R. 238=55 Ind. Cas. 967.

——S. 47 and O. 21, R. 96—Question relating to execution—Re-delivery of excess property—Suit.

Where properties not included in a sale certificate are delivered to the purchaser the proper remedy for re-delivery is an application under S. 47 and not a separate suit. A suit cannot be converted or treated as execution application if its effect would be to prejudice the defendant in his plea of limitation. 45 Ind. Cas. 608 (Mad.).

——S. 47—Question relating to execution—Excess property taken in execution sale.

A judgment-debtor objected that the auction-purchaser took possession of a property to which he had no title under his sale certificate. **Held,** that the question in dispute should be decided by a separate suit and not under S. 47, C.P. Code. 14 O.C. 70=10 Ind. Cas. 714.

——S. 47—Question relating to execution—Excess property—Fresh suit does not lie.

Questions relating to excess execution, if raised by a person who was a party to the suit should not be raised by a fresh suit but should be decided in execution proceedings only. 123 Ind. Cas. 24 =A.I.R. 1930 Mad. 12=1929 M.W.N. 811.

——S. 47—No application for restitution lies after decree is satisfied.

When a particular decree is consigned to record-room after it is fully satisfied, an application by a judgment-debtor for correction of description of property sold in execution of the decree and restitution of property from auction-purchaser sold in excess is not maintainable as the executing Court is **functus officio**. The application is not one relating to execution, discharge or satisfaction of the decree. 113 Ind. Cas. 778=10 L.L.J. 474=A.I.R. 1929 Lah. 121.

——S. 47—Excess of decree paid to decree-holder under fraud and cheating—Application under S. 47 is the proper remedy and no separate suit lies.

S. 47 cannot be evaded merely by interlarding the application with epithets, such as fraud, cheating, etc. 44 Bom. 97 and 38 All. 339, Foll. 115 Ind. Cas. 581=A.I.R. 1928 Cal. 776.

——S. 47—Property not covered by decree given in possession to decree-holder in execution of his decree—Separate suit for recovery of such property is barred—Remedy is to make application under S. 47. 1 Lah.L.J. 230, Foll. 110 Ind. Cas. 859=A.I.R. 1928 Lah. 936.

——S. 47—Excessive delivery in execution.

An application by the judgment-debtor to set aside an execution sale on the ground that the sale had taken place in contravention of the decree and the property sold was in excess of that ordered to be sold is one under S. 47 and an appeal lies from the order on the application. 88 Ind. Cas. 393= 23 A.L.J. 558=6 L.R.A. Civ. 464=A.I.R. 1925 All. 551.

——S. 47—Questions in execution—Property taken —Not taken in execution—Section does not apply.

If the property was in fact attached and sold then the judgment-debtor's only remedy as a party to the suit would be under S. 47 of the C. P. Code, and not by a separate suit. But if the property was not included either in the sale proclamation or in the sale certificate and was not in fact purchased at the auction-sale, but was wrongly taken possession of by the auction-purchaser under colour of a title which he did not possess no question arises within S. 47 of the Code and the period for recovering possession of property taken under such circumstances will be 12 years from the date of dispossession. 86 Ind. Cas. 648=6 P.L.T. 473=1925 P.H.C.C. 37=A.I.R. 1925 Pat. 376.

Execution sale.

——S. 47—Question relating to execution—Execution sale held in spite of notice under S. 34, Bengal Agricultural Debtors Act—Sale confirmed and case disposed of—Application by judgment-debtor to set aside sale—Application, if under S. 47—Sale, if can be set aside.

Where the judgment-debtor applies to set aside an execution sale which has been confirmed, on the ground that the executing Court had no jurisdiction to proceed with the execution and put up the property to sale after receipt of notice under S. 34, Bengal Agricultural Debtors Act, the application

raises a question relating to the execution of the decree and the question between the judgment-debtor on the one hand and the decree-holder on the other, and the matter comes within S. 47 and the fact that the purchaser who, though not a party to the suit, is interested in the result does not operate as a bar to the application of S. 47.

The judgment-debtor who was aware of the proceedings under the Bengal Agricultural Debtors Act but did not raise the objection at the time of the sale, is not competent to resist the purchaser after the sale was confirmed. A.I.R. 1946 Cal. 45=80 C.L.J. 35=224 Ind. Cas. 335.

——S. 47—Sale in execution of mortgage decree—Objection that part of property sold was not mortgaged property falls under S. 47.

The objection that part of the property which had been actually sold in execution of the mortgage-decree did not form part of the mortgaged property and, therefore, the decree-holder purchaser was not entitled to possession of the same falls under S. 47 and can be decided by the executing Court. A.I.R. 1944 Pat. 347=217 Ind. Cas. 386.

——S. 47—Sale void—Application to set it aside.

If the sale is, in fact, void, the judgment-debtor is entitled to have it set aside quite irrespective of the fact whether he furnishes security or not. An application to set aside the sale falls under S. 47. A.I.R. 1942 Mad. 509=(1942) 1 M.L.J. 403=1942 M.W.N. 250=55 M.L.W. 245=202 Ind. Cas. 294.

——S. 47, O. 21, Rr. 90, 92—Sale without jurisdiction—Application by judgment-debtor to have it declared void falls under S. 47.

Where a sale is wholly without jurisdiction and consequently void as opposed to avoidable, an application by the judgment-debtor to have it declared void will lie under S. 47. In such a case no actual setting aside of the sale is really necessary. A.I.R. 1941 Pat. 566=199 Ind. Cas. 169.

——S. 47—Objection that property belonged to objector personally taken after sale is confirmed.

There is nothing in the Code to indicate that an objection under S. 47, that auction-sale should be set aside on ground that the property sold belonged to the objector personally cannot be taken at any time prior to confirmation of the sale. In fact, it is the only remedy open to the aggrieved party, as by virtue of S. 47 a separate suit is barred. But an objection under S. 47 cannot be taken after the sale is confirmed. A.I.R. 1939 Lah. 405=I.L.R. (1939) Lah. 116=41 P.L.R. 175=184 Ind. Cas. 846.

——S. 47, O. 21, R. 90—Judgment-debtor's application to set aside sale—Auction-purchaser not party to application — Application, whether comes under S. 47, or O. 21, R. 90.

An application by a judgment-debtor for setting aside an execution sale comes under the specific provisions of O. 21, R. 90, and not under the general provisions of S. 47, even when the auction-purchaser may not have been made a party to such an application. A.I.R. 1939 Nag. 241=1939 N.L.J. 344=184 Ind. Cas. 635.

——S. 47, O. 21, R. 90—Objection as to saleability of property—If can be raised after date of proclamation but before sale takes place.

Rule 90 of O. 21 applies only to irregularities or fraud in pubilshing or conducting a sale, not to questions of saleability. An objection to saleability is not one under O. 21, R. 89 or R. 90, but is under S. 47 of the Code, which prescribes no time limit for the raising of such objections. If the Legislature had intended that no objection to the saleability of property could lie unless taken before the drawing up of the proclamation of sale, it would have said so in the rules under O. 21.

Even if the judgment-debtor does, not take objection to saleability of property on the date fixed for the proclamation and issue of sale warrant, he shall not be barred on the principle of res judicata from raising it afterwards and the objection raised before the sale takes place is maintainable. A.I.R. 1938 Nag. 558=I.L.R. (1941) Nag. 381=1938 N.L.J. 389=180 Ind. Cas. 553.

——S. 47—Plaintiff's suit under O. 21, R. 63 that property was his and sale was nullity.

Where the plaintiffs in a suit were parties to the suit in which the decree in execution of which the property was attached and sold was passed, the question involved in the suit was a question between the parties to the suit within the meaning of S. 47, C.P. Code although no decree was passed against them in that suit. The question as to whether the property was liable to be attached and sold for satisfaction of the decree against **A** was a question which related to the satisfaction of the decree. The dispute between the parties in the suit, therefore, clearly came within the terms of S. 47 of the Code and the suit by the plaintiffs was not, therefore, maintainable.

Held, also that although the suit was not maintainable, the executing Court was not precluded from giving such a declaration if it found that the property was not liable to be attached and sold in execution and the mere fact that the sale was confirmed did not alter the position of the plaintiffs. Article 181, Limitation Act, applied to such a case and not Art. 166. The suit being brought within the limitation prescribed by Art. 181, could be treated as an application under S. 47, A.I.R. (Vol. 25) 1938 Cal. 113=42 C.W.N. 87=I.L.R. (1938) 1 Cal. 280=178 Ind. Cas. 540.

——Ss. 47, 68—Transfer of decree to Collector—Objection to sale on ground of irregularities is cognizable by Collector only—Objection on ground of fraud.

Where a decree is transferred under S. 68 to the Collector for sale of an ancestral property of the judgment-debtor and the sale is held by the Collector, an objection to the sale on the ground of irregularities in the conduct of sale is cognizable by the Collector only. Where, however, the objection is on the ground that the sale was brought about by fraud, the question is one relating to the execution, discharge or satisfaction of a decree within the meaning of S. 47, and the executing Court only has got jurisdiction to entertain such objection. Section 68 does not state that the Collector shall become the Court executing the decree

and the Court executing the decree remains the Court which sends the decree for execution to the Collector and the powers conferred by the Code on the Court executing the decree remain with that Court and do not pass to the Collector. A.I.R. 1938 Oudh 188=14 Luck. 213=1938 O.W.N. 758 =1938 O.L.R. 371=177 Ind. Cas. 77.

——S. 47—Mortgage decree—Order in which properties are to be sold laid down in decree—Executing Court, if can change the order.

Although an executing Court may in certain circumstances and having regard to the equities of the case prescribe the order in which the mortgaged properties are to be sold, yet once the Court passing the mortgage decree has definitely laid down the order in which the mortgaged properties are to be sold, the executing Court cannot ignore the original decree and proceed to sell the properties in a different order in spite of the objections of decree-holder as well as some of the judgment-debtors. A.I.R. 1933 Pat. 161=12 Pat. 77=142 Ind. Cas. 865.

——S. 47—Question relating to execution—Execution sale—Application by auction-purchaser for possession.

An obstruction by the legal representative of a deceased judgment-debtor to delivery of possession of the properties sold in execution is not one relating to "execution, discharge or satisfaction" of the decree in as much as the satisfaction of the decree had taken place already. S. 47 of C. P. Code has no application to the case. 8 P.R. 1918 and 31 All. 82 (F.B.), Foll. 121 P.R. 1919=53 Ind. Cas. 460.

——S. 47—Question relating to execution—Execution sale—Setting aside sale on ground of fraudulent suppression of sale process.

An application to set aside an execution sale on the ground of fraudulent suppression of sale process is governed by S. 47, C.P. Code and the limitation applicable therefore is that provided by Art. 181 of the Limitation Act. 27 C.L.J. 528=46 Ind. Cas. 221.

——S. 47—Question relating to execution—Execution sale—Decree not in accordance with law—Setting aside—Statute.

Where a mortgage decree is passed though not in accordance with the provisions of the T.P. Act and the properties are purchased by the mortgagee in execution sale the sale is not void but irregular. The remedy of the aggrieved party is by application before confirmation under S. 244, C. P. Code, 1882. A subsequent suit for redemption treating the execution sale as void is barred by S. 47, C.P. Code. 41 Mad. 403=23 M.L.T. 198= 27 C.L.J. 367=34 M.L.J. 463=4 Pat.L.W. 310 =(1918) 1 M.W.N. 310=22 C.W.N. 553=16 A. L.J. 353=20 Bom.L.R. 580=8 L.W. 427=44 Ind. Cas. 855 (P.C.). [Affirming 27 M.L.J. 213=24 Ind. Cas. 187.]

——S. 47—Question relating to execution—Execution sale—Setting aside—Minor.

An application by minor after attaining majority to set aside a sale on the allegation that during his minority his guardian acted recklessly and negligently in an application put in by him to set aside the sale is not maintainable. A regular suit is the proper remedy but a review is not. The Court treated the application as a suit. 16 Ind. Cas. 543 (Cal.).

——S. 47—Question relating to execution—Execution sale—Suit against stranger purchaser to set aside sale, if maintainable.

A suit against an auction purchaser in execution of a money decree to set aside the auction sale, is not maintainable in view of S. 47 of the Code. 34 Mad. 417=(1910) M.W.N. 662=9 M.L.T. 152=21 M.L.J. 928=8 Ind. Cas. 429.

——S. 47—Question relating to execution—Sale—Application by judgment-debtor to set aside—Plea of non-transferability.

Where an execution sale is sought to be set aside on the ground that the holding was not transferable, the application is one coming under S. 47, C. P. Code and consequently it might be presented within three years from the date of sale; but before a judgment-debtor can apply under S. 47, he must prove that he was not aware of the order of sale or otherwise he ought to have prevented the sale by objecting at the proper time. 26 Cal. 727. Foll. 7 Ind. Cas. 48 (Cal.).

——S. 47—Question relating to execution—Execution sale—Setting aside—Fraud.

In an application for setting aside a sale, the applicant may show that a previous compromise purported to have been signed by her was obtained behind her back and in fraud of her rights and hence not binding upon her without having the compromise set aside either in review or in a regular suit. 14 C.W.N. 823=3 Ind. Cas. 116.

——S. 47—Question relating to execution—Execution sale—If sons, can plead immorality of debts contracted by father.

The question of the liability of the sons for a debt contracted by the father and its binding nature upon them being made representatives in a suit against the father is a question relating to the execution, discharge or satisfaction of a decree and can be dealt with under S. 244 and there is no difference between legal representatives added before and after decree. 33 Bom. 39=10 Bom.L. R. 939=1 Ind. Cas. 459.

——S. 47—Question relating to execution—Execution sale.

Mortgage decree—Purchaser of part made defendant—He applying that his portion be sold last—Court granting application but imposing certain conditions—Order is not one relating to execution, etc., as his purchase was prior to suit and he was a party to the suit. 119 Ind. Cas. 440=51 All. 752=1929 A.L.J. 757=A.I.R. 1929 All. 291.

——S. 47—Execution sale—Review of.

Petition for review of order confirming auction-sale is application under S. 47 and governed by Art. 181. 116 Ind. Cas. 65=A.I.R. 1929 Nag. 305.

——S. 47 — Execution — Subsequent events—Relevancy.

Events subsequent to sale in execution do not

form part of execution and remedy for such is by separate suit. 119 Ind. Cas. 881=A.I.R. 1929 Pat. 559.

——S. 47—Execution sale—Suit to set aside.

Where a suit was filed by a judgment-debtor for a declaration that the auction-sale was null and void, inasmuch as the auction-purchaser, the liquidator of the decree-holder bank was not competent to bid for and purchase any property as liquidator under the company law even with the permission of the executing Court.

Held that the suit was barred under S. 47. 108 Ind. Cas. 606=A.I.R. 1928 Lah. 666.

——S. 47—Execution sale—Setting aside of.

Where a sale takes place contrary to the directions in the decree that it should take place in a certain order, the application to set aside the sale on that ground is one under S. 47, C. P. Code, and is governed by Art. 166=27 M.L.J. 605, foll. 106 Ind. Cas. 242=A.I.R. 1928 Mad. 140. **See also** A.I.R. 1928 Rang. 215=114 Ind. Cas. 679.

——S. 47—Question relating to legality of sale is one in execution.

A question arising out of an execution proceeding relating to the legality of the sale between the judgment-debtor on the one hand, and the decree-holder or the auction-purchaser on the other, is a question relating to execution, satisfaction, or discharge of a decree, and a judgment-debtor is entitled to have any question, relating to the execution, discharge, or satisfaction of a decree under execution, decided under S. 47 as much against the decree-holder as against an auction-purchaser of the property who is regarded as a representative of the decree-holder for the purpose of enquiring into that question. 24 A.L.J. 519=96 Ind. Cas. 137=A.I.R. 1926 All. 457.

——S. 47—Execution sale—Suppression of sale processes.

The question whether there was suppression of sale processes can only be raised under S. 47, and therefore a second appeal lies. 44 C.L.J. 167=98 Ind. Cas. 206=A.I.R. 1926 Cal. 1219.

——S. 47—Execution sale—Mistake in application.

In an application under O. 21, R. 89 to set aside an execution sale, an objection by the decree-holder that interest was not mentioned in the application for execution by mistake and that therefore, besides the principal amount, interest also should be ordered to be deposited, comes within S. 47 of the C. P. Code. 41 C.L.J. 391 =A.I.R. 1925 Cal. 948.

——S. 47—Execution sale.

Permission to bid granted to decree-holder—Permission modified in his absence—Sale can be set aside in appeal—Question comes under S. 47. 32 M. 752; 30 A. 379 and 43 M. 107, Foll. 87 Ind. Cas. 997=12 O.L.J. 321=2 O.W.N. 297 =A.I.R. 1925 Oudh 381.

——S. 47—Execution sale—When could be set aside.

If the sale is to be set aside on the ground that it was absolutely illegal and not merely irregular the case would not come within the four corners of Order 21, Rule 90 which refers to 'material irregularity or fraud in publishing or conducting it.' When the auction-purchaser is the decree-holder himself and when an application is made to have the sale set aside on a ground other than that covered by Order 21, Rule 90 and there is not an application under Order 21, Rule 89, then it raises a question within the meaning of the expression "execution, discharge or satisfaction of a decree" as mentioned in section 47, C. P. Code. 83 Ind. Cas. 1028=22 A.L.J. 413=5 L.R.A. Civ. 769=A.I.R. 1924 All. 698.

——S. 47—Application under O. 21, R. 90—Compromise therein is compromise in suit.

The term "suit" has not been used in the Procedure Code in its narrow sense as being terminated by the decree made by the first Court, but in a broad sense as including not only the stages of a suit to its termination by the decree of the first Court but as including its appellate stage and proceedings in execution of the decree made in the suit, and so an application for setting aside a sale under O. 21, R. 90, is a suit or a proceeding in the suit within the meaning of O. 23, R. 3, and not a proceeding in execution. Therefore a compromise in a proceeding under O. 21, R. 90 cannot be recorded under O. 21, R. 2 read with S. 47 of the Code. That being so, it can be recorded under O. 23, R. 3. 62 Ind. Cas. 608=2 P.L.T. 273=6 P.L.J. 253=A.I.R. 1921 Pat. 107.

Heir of Judgment-debtor.

——S. 47—Question relating to execution—Heir of judgment-debtor objecting to execution of decree against father—Ground that debt was not for necessity—If can be decided in execution.

The objection by the heir of a judgment-debtor, against whom a decree had been passed, that the debt was not one incurred for necessity, can be decided in execution without recourse to a separate suit. 243 P.W.R. 1912=13 Ind. Cas. 670.

——S. 47—Execution sale—Irregularity.

Where a mortgage decree is attached by a person holding a decree for costs against the mortgage-decree-holder and the mortgage decree is executed only for realising the costs due to the attaching decree-holder and a portion of the property is sold and the deree for costs is satisfied with the sale proceeds, the execution sale is not absolutely void but irregular and the judgment-debtors can waive the irregularity. 25 C.W.N. 400=66 Ind. Cas. 608=A.I.R. 1921 Cal. 382.

——S. 47—Question as to order in which properties are to be sold is one of substantive right, and is covered by the section. (24 Cal. 729 Foll.) 77 Ind. Cas. 148=18 M.L.W. 311=1923 M.W.N. 662=A.I.R. 1924 Mad. 365=45 M.L.J. 478.

Injunction.

——S. 47—Questions relating to execution—Injunction — Sale confirmed — Interest during period between date of receipt of money into Court and actual payment of same to him—Decree-holders held not entitled to.

The date upon which the sale is confirmed is the date upon which the money due by the judgment-debtors under the decree is paid by them and

realised by the judgment-creditors through the Court which has been acting for them upon their application. It is only if there is some subsequent action on the part of the judgment-debtors during the period between the receipt of the money into Court and the actual payment by the Court of the money to the judgment-creditors which prevents or postpones that payment, that any question can arise of any further liability resting upon the judgment-debtors under the decree. So long as no blame can attach to the judgment-debtors, they cannot be compelled to pay interest for any further period beyond the date when payment was made into Court in satisfaction of the decree.

After the sale had been confirmed and a statement as to the amount due to him had been received from the decree-holder on the date of confirmation of the sale, a suit was filed by the judgment-debtor for partition and there was an application by the auction-purchaser of the property at the sale in question for an injunction against the distribution of the sale proceeds. An injunction was issued and was not finally dissolved until two or three years had elapsed. The application by the judgment-debtor for the payment to him of the surplus money lying in Court was opposed by the judgment-creditor who contended that as he had not been able to draw out the money until the dissolution of the injunction passed in connection with the auction-purchaser's application, interest on his decree amount as it stood on the date of the confirmation of sale should be allowed and therefore the money still lying in deposit should be paid out not to the judgment-debtor but to himself:

Held, that there was nothing to show that the judgment-debtor by filing the partition suit in any way attempted to impugn the decree obtained by the judgment-creditor or the sale held in execution of the decree. Since no blame could be attached to the judgment-debtor for the grant of injunction by the Court for insufficient reason, the decree-holder was not entitled to the interest claimed. A.I.R. 1942 Mad. 442=55 M.L.W. 212=1942 M.W.N. 283=(1942) 1 M.L.J. 439=202 Ind. Cas. 475.

——S. 47—Injunction restraining purchaser from taking delivery.

Order 21, R. 92 (2), operates as a bar to a suit for setting aside an order by which a sale is set aside under sub-R. (2) or an order confirming a sale under sub-R. (1) irrespective of the question whether an application for setting the sale aside has been made or not. But there is no bar where the prayer in the suit is not for the setting aside of the order confirming the sale but certain declarations such as that the plaintiff's right of redemption was still subsisting as long an injunction restraining the purchaser from taking possession. Such declarations are not within the purview of S. 47. But the objection to delivery of possession and the prayer for an injunction restraining the same come within S. 47 if the dispute is one "arising between the parties to the suit." A.I.R. 1932 Cal. 126=35 C.W.N. 877=59 Cal. 117=138 Ind. Cas. 177.

——Ss. 47 and 151—Judgment-debtor leasing premises after sale—Prohibitory order to judgment-debtor and tenant.

Where, subsequent to a court-sale but before the confirmation of the sale, the judgment-debtor leases the premises sold, the Court has inherent power under S. 151, to issue a prohibitory order to the tenant and the judgment-debtor restraining them from paying the rent and receiving the rent, respectively. A.I.R. 1932 Lah. 295=33 P.L.R. 435=136 Ind. Cas. 4.

——S. 47—Question relating to execution—Suit for injunction—Confirmation of possession.

A decree for confirmation of possession obtained out of Court under an uncertified adjustment of another decree is equivalent to granting an injunction restraining execution, and a suit for such declaration is barred by S. 47, C. P. Code. 15 N.L.R. 158=50 Ind. Cas. 956.

——S. 47 and O. 21, R. 32—Question relating to execution—Injunction—Suit to enforce.

A suit to enforce an injunction both mandatory and prohibitory is not maintainable. S. 47, C.P. Code is a bar to the suit. The remedy of the plaintiff is only by execution under O. 21, R. 32. C. P. Code. 46 Cal. 103=27 C.L.J. 506=45 Ind. Cas. 864.

——S. 47 and O. 1, R. 32—Question relating to execution—Perpetual injunction—Door closed but re-opened—Remedy whether suit or execution.

Where in a pursuance of a decree directing the judgment-debtor to keep a certain door closed, the latter formally complied with the decree but re-opened it shortly after the remedy of the decree holder is by the execution. 12 A.L.J. 347=23 Ind. Cas. 247.

——S. 47—Question relating to execution—Injunction.

Remedy against fraudulent decree lies by way of injunction to restrain party from executing decree. 80 Ind. Cas. 59=A.I.R. 1924 Nag. 413.

Instalment decree.

——S. 47—Questions relating to execution—Instalment decree—Penalty clause—Relief against.

Decree containing default clause — Condition in the nature of penalty—Court can grant relief—Decree-holder agreeing to accept lesser sum instead of full decretal amount if paid regularly in certain instalments—Judgment-debtor paying all instalments defaulting in respect of small sum of Rs. 5.

Held, that the default clause was not in the nature of penalty and that the decree-holder could recover the whole decretal amount. A.I.R. 1941 Sind 196=I.L.R. (1941) Kar. 389=198 Ind. Cas. 174.

——S. 47—Instalment decree—Payments towards decree not certified—Application for execution—Presumption as to default—Onus of proving payment—Bar of O. 21, R. 2 (3).

No payment towards the satisfaction of a decree for money can be recognized by the executing Court unless it is certified or recorded under O. 21, R. 2 (3), and no decree-holder is entitled to realize any money by execution if he has been

already paid out of Court, entirely irrespective of whether or not the decree provides for instalments with execution in default. Where the decree makes such provision and the decree-holder applies for execution, it must be taken that his case is that default has been made and the judgment-debtor will have to meet it by proving payment, a positive fact within his knowledge. As this will have to be done in the executing Court, the bar of O. 21, R. 2 (3) will come into play, and it is impossible to evade it by invoking S. 47. A.I.R. 1938 Pat. 465=17 Pat. 128=19 P.L.T. 428=180 Ind. Cas. 319.

——S. 47—Instalment decree—Waiver.

The mere acceptance of an overdue instalment does not amount to a waiver. A.I.R. 1937 Sind 244=31 S.L.R. 437=171 Ind. Cas. 841. See also A.I.R. 1934 Lah. 425=150 Ind. Cas. 704.

——S. 47—Option on default to execute for amount outstanding — Decree-holder, if bound to execute decree immediately on default.

Where a decree-holder has an option in the event of a default in the payment of an instalment he is not bound to execute the decree immediately on the default taking place and may execute his decree for any instalment not paid within the prescribed period. A.I.R. 1934 Lah. 48=148 Ind. Cas. 177 (2).

——S. 47—Question relating to execution—Instalment decree.

Decision whether a decree-holder is entitled to enforce the default clause of an instalment decree, inasmuch as he has accepted part payments after there were defaults in the payment of the instalments on due dates adjudicates a question relating to the rights of the parties to the execution of the decree and falls under S. 47. 113 Ind. Cas. 541 =A.I.R. 1929 Lah. 390.

Jurisdiction.

——S. 47—Questions relating to execution—Jurisdiction.

Decree-holder purchasing property—Sale confirmed—Judgment-debtor applying to have sale declared void—Civil Court alone can decide issue under S. 47—Issue cannot be decided by superior Revenue Court. A.I.R. 1940 Nag. 372=1940 N.L.J. 473=193 Ind. Cas. 274.

——S. 47—Objection going to the root of jurisdiction should not be rejected summarily.

Where if the tenure be really not saleable, that question must be determined before the sale can take place. The mere fact that the objection was filed late is no ground for rejecting it, although the judgment-debtor may be made liable to pay costs. Where the objection goes to the root of the jurisdiction of the Court to hold the sale, the Court should not reject the objection summarily. A.I.R. 1941 Pat. 240=191 Ind. Cas. 138=7 B. R. 148.

——S. 47 and O. 21, R. 92—Objection under S. 47—Court should decide it first especially when it relates to jurisdiction to sell property.

Section 47 is completely independent of the provisions of O. 21, relating to the procedure which is to govern the sale of property, and O. 21, R. 92 presupposes that there is no objection outstanding under S. 47 of the Code. When such an objection is made, it is the duty of the Court first to decide it; especially when the objection is that the Court has no jurisdiction to sell the property, such sale being forbidden by Statute and furthermore, the judgment-debtor being barred from raising the objection by a separate suit. A.I.R. 1939 Lah. 113=I.L.R. (1939) Lah. 103 =41 P.L.R. 436=184 Ind. Cas. 393. [Overruled in A.I.R. 1942 Lah. 153=203 Ind. Cas. 166 (F.B.).].

——S. 47—Objection as to jurisdiction—When to be taken.

Omission to take objection to jurisdiction in the course of the trial of the suit or before the preliminary decree for sale is made absolute, cannot preclude a party from raising the objection to the delivery of possession of the property in execution of the decree passed against him on the ground that the Court which passed the decree and held the sale had no inherent jurisdiction to entertain the suit. A.I.R. 1936 Nag. 1 (3)=31 Nag.L. R. Sup. 57=161 Ind. Cas. 877 (F.B.). See also 119 Ind. Cas. 33=A.I.R. 1929 Mad. 383. Also A.I.R. 1926 Mad. 128=49 M.L.J. 664=91 Ind. Cas. 98.

——S. 47—Jurisdiction of Court to sell property outside jurisdiction.

In the execution of a mortgage decree the executing Court has power to order the sale of the property mortgaged, even though the property may be situated beyond the local limits of its jurisdiction. A.I.R. 1933 Lah. 687=14 Lah. 457=34 P.L.R. 815=143 Ind. Cas. 574.

——S. 47—Question relating to execution—Jurisdiction.

An order relating solely to jurisdiction does not determine any question relating to the execution, discharge or satisfaction of a decree. 4 Pat.L. J. 461=52 Ind. Cas. 461.

——S. 47—Question relating to execution—Jurisdiction.

Question whether decree is nullity for want of jurisdiction falls under S. 47. A.I.R. 1925 Cal. 907; A.I.R. 1928 Lah. 829 and A.I.R. 1927 Lah. 651, Foll. 120 Ind. Cas. 279=11 L.L.J. 306= A.I.R. 1929 Lah. 449.

——S. 47—Questions relating to execution—Legal representative—Questions relating to execution between purchaser by private sale from judgment-debtor and decree-holder must be determined by executing Court under S. 47—Separate suit is barred.

A purchaser in a private sale of property under attachment from the judgment-debtor is a representative of the judgment-debtor under S. 47 of the Code. The question whether the attached property in his hands is liable to be sold in execution of the decree is a question relating to execution of the decree and must be determined by the executing Court. A separate suit for determination of such question is barred by S. 47. A.I.R. 1946 Lah. 134=224 Ind. Cas. 468 (F.B.).

——S. 47 (3) and O. 22, R. 5—Applicability.

Where in execution proceeding the question arises as to whether a particular person is the legal representative of the deceased party, the case is governed by S. 47 (3) and not by O. 22, R. 5. A.I.R. 1942 Bom. 309=44 Bom.L.R. 678=I.L.R. (1942) Bom. 822=203 Ind. Cas. 339.

——S. 47—Mortgage-decree—Objection by legal representative of judgment-debtor based on his own right, to sale or to delivery of possession.

In the case of a money-decree when the legal representative raises an objection to the sale of property based on his own right, such objection can be dealt with properly only under S. 47, and a separate suit is barred. The same procedure should be followed in the case of a mortgage decree. No inconvenience results and no real difficulty arises by reason of the form of the decree because, though it would bind the legal representative as such, it does not bind the legal representative who is asserting his own distinctive right as apart from the right of the judgment-debtor whose legal representative he is. A.I.R. 1939 Lah. 51 =41 P.L.R. 353=182 Ind. Cas. 697. [Reversed in A.I.R. 1939 Lah. 178=186 Ind. Cas. 168.]

——S. 47—Question relating to execution—Legal representative.

Decree against deceased debtor's estate—Decree sought to be excuted against person holding deceased's property—Executing Court can decide whether property in question is assets of the deceased—Separate suit does not lie; such a question has to be decided under S. 47 by the Court executing the decree and not by a separate suit. 9 N.L.J. 183=96 Ind. Cas. 963=A.I.R. 1926 Nag. 476.

——Ss. 47, 50 (2)—Decree against legal representatives—Question of proper administration of estate, whether can be gone into in execution.

Where a decree has been obtained against the legal representatives of a deceased person, any complaint of the decree-holder against the legal representatives for not properly administering the estate could be dealt with in execution of the decree, though the remedy by way of a separate suit is also available. A.I.R. 1933 Rang. 309=147 Ind. Cas. 1167.

——S. 47—Person impleaded as representative—If can attack validity of decree.

Because S. 47 compels the executing Court to decide whether any person is or is not a representative of a party, it does not entitle a person who has been impleaded as a representative of a judgment-debtor to attack the validity of the decree, thus giving him rights in the executing Court wider than those of the judgment-debtor himself. A.I.R. 1934 Lah. 438=15 Lah. 772=35 P.L.R. 36 =153 Ind Cas. 772.

Legal representative.

——S. 47—Legal representative—Question in execution.

Whether a decree passed against a judgment-debtor who was dead at the time binds his legal representatives who were not impleaded in his stead, is a question within S. 47. 70 Ind. Cas. 929=5 L.L.J. 1=A.I.R. 1921 Lah. 219.

——S. 47—Judgment-debtor dying after decree—Execution against legal representatives—Question as to whether certain properties belong to assets of deceased—S. 47 applies. 12 All. 313 (F.B.); 39 All. 47; 47 P.R. 1887; 87 P.R. 1887, Foll. 63 Ind. Cas. 853=3 L.L.J. 406=A.I.R. 1921 Lah. 173.

——S. 47—Question relating to execution—Legal representative—Executing Court must decide question of legal representative and cannot refer party to separate proceedings.

When a decree-holder has died, and some persons appear asking to be allowed to execute that decree as representing the decree-holder, then it is under S. 47 necessary that the Court itself should decide who the legal representative of the deceased person is. If the claimant who claims to be the legal representative, produces a probate or a letter of administration or any such general conclusive proof of his status, then the Court certainly need not go further and should accept that as conclusive. But if there is no such evidence then it is not for the Court to refer to the applicant to separate proceedings, but it must itself make up its mind after such inquiry as may be possible. 92 Ind. Cas. 575=21 S.L.R. 20=A.I.R. 1926 Sind 113.

——S. 47 and O. 21, R. 58—Question relating to execution—Legal representative—Title of third person set up—Appeal.

Where on the death of judgment-debtor, his legal representative is brought on the record, and such legal representative sets up in execution poceedings, title on behalf of a person not a party to the suit, the order on such a petition is not one coming within S. 47 of the C.P. Code but is within the purview of O. 21, R. 58 and is not appealable. 23 Mad. 195 and 39 C. 298 Foll.; 7 Mad. 255, Diss. There seems to be no distinction in principle between this case and the cases in which party to the suit or his legal representative on record claimed the property as trustee for certain other persons or as shebait of a temple. 31 Ind. Cas. 393 (Mad.).

——S. 47—Question relating to execution—Legal representative of judgment-debtor—Objection that attached property is not that of the judgment-debtor.

An objection by the legal representative of a judgment-debtor that properties attached are not assets of the judgment-debtor must be determined under S. 47. 19 C.W.N. 517=20 C.L.J. 481= 27 Ind. Cas. 321.

——Ss. 47, 145 and O. 41, R. 6—Question relating to execution—Surety—Extent of liability—Security for carrying out decree of the Appellate Court.

Where a person becomes a surety, not personally but on the hypothecation of the property, for mesne profits that might be given against the debtor on appeal, the liability continues up to the stage of appeal to the Privy Council and can be enforced in the suit itself by joining the surety as a party. The ascertainment of mesne profits in the suit is binding on the surety. 42 All. 158=22 O.C. 212 =6 O.L.J. 682; 38 M.L.J. 302=18 A.L.J. 263 =22 Bom.L.R. 521=55 Ind. Cas. 550 (P.C.).

——S. 47—Question relating to execution—Liability of party or his representative.

If during the execution of a decree an objection is taken that a certain person was not a party to the suit at the time of decree and therefore it is not open to the executing Court to issue execution process against his legal representative it is a question which is within the competency of the executing Court to determine under S. 47, C.P. Code. 1 Pat. L.W. 282=2 Pat. L.J. 192=39 Ind. Cas. 172.

Mesne profits.

——Ss. 47, 145 and O. 41, R. 5—Question relating to execution—Liability of surety for mesne profits.

Where security is given for payment to the plaintiffs of mesne profits of the decreed property pending appeal the decree-holder can proceed summarily, in execution against the surety for recovering the value thereof, and no separate suit is required for the purpose. 147 P.W.R. 1909=113 P.L.R. 1909=4 Ind. Cas. 1005.

——S. 47—Questions relating to execution—Mesne profits—Decree for mesne profits cannot be challenged in execution.

A decree for mesne profits in favour of the plaintiff decree-holder cannot be challenged in execution on the ground that the plaintiff in the partition suit in which the decree for mesne profits was passed was in joint possession. An executing Court has to take the decree as it stands and cannot go behind it. A.I.R. 1942 Sind 60=I.L.R. (1941) Kar. 563=200 Ind. Cas. 74.

——S. 47—Execution—Mesne profits.

When execution has been stayed on giving security for mesne profits, the mesne profits can be realised by way of execution, without a fresh suit. A.I.R. 1933 Lah. 876=144 Ind. Cas. 553.

——S. 47—Execution—Mesne profits.

Preliminary decree in a partition suit silent as to mesne profits although claimed by plaintiff. Final decree providing for ascertainment in execution is binding if no steps are taken by the defendants to revise it or vacate it. 1931 M.W.N. 846.

——S. 47—Question relating to execution—Mesne profits.

Application under O. 20, R. 12 (3) for enquiry into mesne profits is not application under S. 47. 30 M.L.W. 738=A.I.R. 1929 Mad. 785=57 M.L.J. 515.

——S. 47—Execution—Price of trees cut.

Price of trees cut by judgment-debtor as well as rents collected by him after date of decree in a suit for possession can be recovered in execution. 73 Ind. Cas. 359=1 Pat.L.R. 145=A.I.R. 1924 Pat. 362.

Mistake.

——S. 47—Questions relating to execution—Mistake—Application to strike off full satisfaction of decree on ground of mistake.

An application to have an order striking off execution in full satisfaction set aside on the ground that a mistake had been made in stating that one decree was satisfied instead of another, is one under S. 47. A.I.R. 1943 Nag. 335=1943 N.L.J. 521 =I.L.R. (1944) Nag. 370=214 Ind. Cas. 12.

——S. 47—Decree-holder's pleader misled by judgment-debtor's agent giving credit in excess of that to which judgment-debtor was entitled—Mistake continued in suit register—On subsequent payments execution dismissed on full satisfaction—Re-opening and continuing execution proceedings.

The pleader of the decree-holder who was misled by the agent of one of the judgment-debtors gave credit to the judgment-debtors to the extent of Rs. 1,000 in excess of that to which they were entitled. This mistake was continued in the entry made in the execution of the suit register. On a subsequent date, the decree-holder again put his decree into execution and before doing so, applied to the office for information as to the extent to which the decree had been satisfied. The information which was supplied to him was based on the erroneous entries which had been made in the suit register. In due course in the proceedings in execution various payments were made by the judgment-debtors, which resulted in the execution case being dismissed on full satisfaction. On mistake being discovered the decree-holder applied to re-open the execution proceedings:

Held, that the judgment-debtors could not be allowed to take advantage of the mistake and the Court had power to re-open the execution proceedings and to continue them. A.I.R. 1942 Cal. 451=75 C.L.J. 18=201 Ind. Cas. 702.

——S. 47—Decree entered as satisfied by mistake of decree-holder—Execution, if can be taken out for sum which may have been left out—Execution.

Once a decree has entered as satisfied, execution cannot be taken out for any sum which may have been left out as long as the order of satisfaction stands even if it is so entered due to a mistake committed by the decree-holder. A.I.R. 1936 Pat. 416=165 Ind. Cas. 578 (1).

——S. 47—Question relating to execution—Mistake.

Where an order of dismissal of execution case is made on account of mutual mistake, the order by consent may be re-opened. There is no authority that any order or proceeding can be reopened on the ground of mistake of fact of one of the parties to it. An execution case was dismissed on the application of the decree-holder stating that the decree had been satisfied in full. Subsequently the decree-holder applied to have the execution proceedings re-opened on the ground that the decree-holder made a mistake in calculating the amount due to him under the decree as a result of which the decree-holder got much less than what he was entitled to.

Held, that the execution proceedings could not be opened. It would be against all fundamental rules of relief on the ground of mistake to say that the mistake due to the negligence of one of the parties is sufficient to relieve him of his own agreement. 33 C.W.N. 739=A.I.R. 1929 Cal. 670.

——S. 47—Execution—Mistake.

Some property of decree-holder sold through mistake instead of judgment-debtor's property—Remedy is under S. 47 and not by a separate suit. 116 Ind. Cas. 634=A.I.R. 1928 Cal. 865.

Mortgage.

——S. 47—Questions relating to execution—Mortgage—A purchaser of two-thirds share in mortgage decree against S's uncle for their two-thirds share—R purchasing entire house in mortgage decree against S as manager of joint family of himself and his uncles and obtaining possession—A's application to remove obstruction on R's contention that A's remedy was by partition suit—A subsequently filing suit—A's suit held did not lie—A was decree-holder and R was representing his mortgagor an hence dispute was one arising in execution.

Held, that A was still a decree-holder, while R in opposing the application for possession did so as the purchaser of the possessory rights of the mortgagor and, therefore, the contest between them was a dispute arising in execution between the decree-holder on the one hand and the representative of the judgment-debtor on the other and that the suit did not lie. A.I.R. 1944 Mad. 62=(1943) 2 M.L.J. 508=1943 M. W. N. 830=215 Ind. Cas. 130.

——S. 47—Mortage suit—Objection by mortgagee—Applicability and scope.

Mortgage by Burmese father—Suit by mortgagee—Decree and purchase by him—Suit for partition by a son—Execution—Objection by mortgagee held came under S. 47 and can be decided in execution and not by separate suit. A.I.R. 1938 Rang. 250=1938 Rang. L.R. 583=177 Ind. Cas. 435.

——S. 47—Decree for sale of property—Objection in execution that property is service inam and not alienable—Power of executing Court to go into the question.

Where there is a final decree for sale of mortgaged property it is not permissible for the executing Court to enquire into a plea raised by the judgment-debtor that the property is not liable to be sold on the ground that it is a temple service inam and, therefore, inalienable, A. I. R. 1937 Mad. 134=44 L.W. 795=71 M.L.J. 867=1936 M. W. N. 1352=I.L.R. (1937) Mad. 329=168 Ind. Cas. 103.

[Reverses A.I.R. 1935 Mad. 647=156 Ind. Cas. 331=41 M.L.W. 485.]

——S. 47—Suit by prior mortgagee—Mortgagors and puisne mortgagee impleaded—Claim against latter abandoned and suit against him dismissed—Puisne mortgagee objecting that property put up for sale by prior mortgagee was his—Puisne mortgagee, whether can object.

The prior mortgagee brought his suit impleading his mortgagors and the puisne mortgagee. The latter resited the suit, and the prior mortgagee abandoned his claim and suffered it to be dismissed so far as the puisne mortgagee was concerned, but obtained a compromise decree against the mortgagors for sale not of all the properties comprised in the mortgage. He sought to put up the property for sale without any reference to any right or claim of the puisne mortgagee. The latter objected that the property which it was sought to be put up for sale was his property and could not be sold in execution of the prior mortgagee's decree. The prior mortgagee opposed this objection contending, first, that the puisne mortgagee not being judgment-debtor had no locus standi to contest the application; secondly, that the application was not maintainable as it was not an application relating to the execution, discharge or satisfaction of the decree but one going to the root of the decree itself:

Held, (1) that the puisne mortgagee was still a party to the suit notwithstanding that it had formally been dismissed as against him;

(ii) that the application of the objector was an objection to the whole decree and, therefore, did not come within S. 47, as a question relating to the execution, discharge and satisfaction of it;

(iii) that when the prior mortgagee put his decree into execution, the puisne mortgagee's encumbrance was a matter which ought to be mentioned in the sale proclamation. A.I.R. 1936 Pat. 552 165 Ind. Cas. 317=3 B.R. 32.

——S. 47—Creditor's claim to right of subrogation to trustee's right of indemnity.

It is more than doubtful, whether a Court, in enforcing the right of indemnity against any trustee, will allow actual sale of the trust property in execution. Where a creditor sues the trustee with whom he contracted and ultimately proceeds against the estate by way of subrogation, relief against the estate must be sought by independent proceedings to enable the plaintiff to obtain this relief in one suit: (a) the plaintiff should sue the trustee as a trustee; (b) under O. 31 and O. 2, all the trustees should be joined; (c) the parties beneficially interested should be represented; (d) indemnity and subrogations to that right should be claimed. A. I.R. 1933 Cal. 668=60 Cal. 801=149 Ind. Cas. 282.

——S. 47, O. 34, R. 5—Realisation of profits after date of final decree—Accounts—Mortgagor's remedy—Order for accounts—Appealability.

Where in execution proceedings in a mortgage suit, after the passing of the final decree the mortgagor raised an objection that the mortgagee had been in possession of the land and had realised more than the balance of the decree which was alleged to be still outstanding and hence the land could not be sold and the executing Court upheld this objection and ordered accounts to be taken:

Held, (i) that the order was appealable as one under S. 47, C.P. Code;

(ii) that the question of accounting for the profits of land cannot be raised at the stage in these proceedings and if the mortgagee had unlawfully realized anything, the respondent would be entitled to recover it by separate proceedings.

Once a holder of a mortgage-decree asks for and obtains a decree for sale, he must be deemed to have given up all rights under the mortgage. Consequently, the profits of the mortgaged land cannot be lawfully realized by the mortgagee after the decree for sale. A.I.R. 1933 Lah. 361=34 P.L.R. 373=142 Ind. Cas. 313.

——S. 47—Acquisition of paramount title by judgment-debtor before final decree—Omission to set up such rights before decree—Objection in execution.

Whether or not it is open to a mortgagor to prevent the passing of a final decree if a part of the

property included in the preliminary decree has been acquired by him **pendente lite** under a paramount title, if he does not or cannot prevent the passing of such a decree, he should not be allowed to be heard in the execution department and prevent the sale of the property covered by the decree passed against himself. A.I.R. 1932 All. 49=133 Ind. Cas. 902.

——S. 47, O. 34, R. 5—Transfer of Property Act (4 of 1882), S. 89—Mortgage decree—Sale in—Power of Court to regulate order of sale—Mortgagee's right to sell—Euitable order of sale.

Where a decree is passed under O. 34, R. 5, for sale of all the mortgaged properties, the mortgagee has no right, so long as his right to recover the entire mortgage money is not prejudiced, to dictate to the Court the order in which the properties shall be sold. On the other hand, the Court has power to compel the mortgagee to apply for sale of all the properties and to regulate the order in which and the conditions subject to which the mortgaged properties should be sold in order to do justice between subsequent transferees of the mortgaged property.

When after making the first mortgage, a mortgagor transfers a part of his mortgaged property, it is only fair that the property remaining in the hands of the mortgagor should be sold in execution of the prior mortgage-decree, before that which he has transferred to the third party. On this principle, the most equitable and just way for the Court when there are subsequent transferees, is to direct the sales of the properties affected by the various transfers in the inverse order of their priority of dates. (1931) 129 Ind. Cas. 708=1931 A.L.J. 108=A.I.R. 1932 A. 85=53 A. 391.

——S. 47—Question relating to execution—Mortgage.

Where a money decree imposing a liability on the defendant to pay a sum of money to the plaintiffs declares that the plaintiffs have a first charge and a lien on certain immovable property of the defendant and the plaintiff applies in execution proceedings for sale of the property charged, the plaintiff has a right to bring the property charged to sale in execution proceedings, and it is not necessary to bring a separate suit for the sale of the property. A.I.R. 1925 Mad. 1101 and 43 Bom. 631, Foll. In such a case it is not necessary that a final decree should be passed for O. 34, R. 5 does not apply to an award decree or to a compromise decree if it is clear from the decree that the sale was ordered and it was in itself a final decree. A.I.R. 1924 Pat. 263; A.I.R. 1923 Cal. 626 and A.I.R. 1922 All. 383, Foll. 119 Ind. Cas. 186=31 Bom.L.R. 439=A.I.R. 1929 Bom. 227.

——S. 47 — Accretion to property — Execution against.

Where certain shares in a Company were pledged and during that period of pledge, the company issued fresh shares, payable out of the dividends of the old ones, and a suit by pledgor to redeem the old shares was decreed and the pledgor in execution applied for return of the new shares also.

Held, that the question whether the new shares were accretions to the old ones was a question within S. 47. 86 Ind. Cas. 368=30 C.W.N. 5=52 I.A. 137=27 Bom.L.R. 455=49 Bom. 233=A.I.R. 1925 P.C. 86=48 M.L.J. 648 (P.C.).

——S. 47—Execution—Charge for priority.

When a person wants to have the benefit of the discharge of a prior encumbrance he can only bring a suit on the prior encumbrance; he cannot claim to be substituted for the plaintiff in the mortgage decree obtained by the prior encumbrancer and execute the decree. Where a prior mortgagee had obtained a mortgage decree and the plaintiff advanced money to the mortgagor to pay off the decree amount, for the purpose of getting a mortgage from him.

Held, that the plaintiff's right of priority could be enforced only by suit and not by execution. 82 Ind. Cas. 846=20 M.L.W. 651=35 M.L.T. 112=A.I.R. 1925 Mad. 129.

——S. 47—Execution—Decree for sale of mortgaged property.

In a suit for sale upon a mortgage a puisne mortgagee was impleaded as a defendant. He consented to a decree for sale free of his morgtage on condition that the balance be paid to him after discharge of the prior mortgage.

Held, the decree for the sale in which the puisne mortgagee's right was not reserved was binding on him and if duly executed, would extinguish his mortgage. 68 Ind. Cas. 667=15 M.L.W. 123=1921 M.W.N. 732=A.I.R. 1922 Mad. 307=41 M.L.J. 547.

——S. 47—Question relating to execution—Mortgage decree—Puisne mortgagee's right.

Where in a suit by a prior mortgagee impleading the puisne mortgagee as party the decree does not provide for the working out of the rights of the puisne mortgagee without additions and qualifications which the executing Court has no power to make the puisne mortgagee can enforce his mortgage by suit of his own unaffected by S. 47 of the C.P. Code. 42 Mad. 90, foll. (1918) M.W.N. 902=49 Ind. Cas. 466.

——S. 47—Question relating to execution—Mortgage—Application for final decree—Dismissal.

Rejection of an application for a final decree for sale in a mortgage suit is itself a decree and is appealable under S. 96. It is not an order under S. 47, C.P. Code. 42 Mad. 52=(1918) M.W.N. 792=35 M.L.J. 552=8 L.W. 526=24 M.L.T. 486=48 Ind. Cas. 298.

——S. 47 (S. 244, Old Code)—Question as to order absolute for sale.

Any question that arises as to an order absolute for sale is not a question relating to the execution of a decree. (1900) 8 C.W.N. 102.

——S. 47—Question relating to execution—Mortgage—Two suits for possession by mortgagee.

A pusine mortgagee sued the prior mortgagee for redemption and the mortgagor for possession of the mortgaged premises and in 1893 obtained a decree for redemption and possession. In 1908 he again sued the mortgagor for possession alone, dating his cause of action in 1897, the date of payment of the prior mortgage. **Held**, the suit for possession was not a question relating to the execution, discharge or satisfaction of the decree

though the plaintiff might have obtained possession by execution and that the cause of action against the mortgagor in both the suits was the same, and that the present suit was barred by S. 11. 12 P.R. 1914=124 P.L.R. 1914=22 Ind. Cas. 896.

——S. 47—Question relating to execution—Mortgage—Charge—Execution.

Where a member of a joint Hindu family sued for declaration that a mortgage of family property effected by another member does not bind the family and a decree in the suit provided that the share of alienating member should be held liable on the mortgage and the mortgagee then applied for sale of the alienating member's share. *Held*, he could bring the share to sale without bringing a separate suit for the purpose. 15 C.W.N. 748=13 C.L.J. 664=9 Ind. Cas. 1034.

——S. 47 (S. 244, Cl. (c), Old Code)—'Relating to execution'—Mortgagee — Decree-holder — Purchaser—Application by him to recover possession as against defendants who held possession under prior sale based on prior mortgage—Question raised whether purchaser could recover possession without first paying defendant's amount of prior mortgage is one relating to 'execution and enforcement of decree'. (1900) 12 M.L.J. 1=25 M. 529.

Notice.

——S. 47—Questions relating to execution—Notice—Notice under S. 34, Bengal Agricultural Debtors Act, recorded — Judgment-debtor trying to set aside on ground of notice—Question relating to execution between judgment-debtor and decree-holder arises.

Where the judgment-debtor wants to set aside an execution sale on the ground that the executing Court had no jurisdiction to proceed with the execution and put up the property to sale after receipt of a notice under S. 34, Bengal Agricultural Debtors Act, a question relating to the execution of the decree arises, and if the question has got to be decided between the parties to the suit or their representatives, the matter would come within S. 47. The fact that the purchaser who though not a party to the suit is interested in the result does not operate as a bar to the application of S. 47, C. P. Code.

The judgment-debtor is not, however, competent to start the proceeding for setting aside the sale after the sale has been confirmed by an order of the Court, and the execution case disposed of on full satisfaction, if he be aware of the execution proceedings and does not raise objection to the sale. A.I.R. 1946 Cal. 45=80 C.L.J. 35=224 Ind. Cas. 335.

——S. 47, O. 21, R. 22—Limitation Act (9 of 1908), Sch. I, Arts. 166, 181—Application to set aside sale for want of notice—Limitation—Knowledge, when relevant.

When notice has been duly served under O. 21, R. 22, an application to set aside the sale for want of notice does not fall within S. 47, and is not governed by Art. 181, Limitation Act, and in the absence of fraud the question of date of knowledge is also irrelevant. A.I.R. 1932 Cal. 627=36 C.W.N. 242=140 Ind. Cas. 732.

——S. 47, O. 21, Rr. 90, 92 (Ss. 244 (c), 311, 312, Old Code)—Want of notice before order for sale—Application to set aside — Appeal against order of dismissal.

An order rejecting an application for setting aside a sale on the ground of want of notice before the order for sale is not an order under Ss. 311 and 312 but falls within Cl. (c) of S. 244, irrespective of the fact whether the decree has been executed or has yet to be executed. (1908) 10 Bom.L.R. 752=32 Bom. 572.

——S. 47—Question relating to execution—Notice.

An objection under O. 21, R. 22 comes within S. 47 and therefore an order on such objections is open to second appeal. 91 Ind. Cas. 711=A.I.R. 1926 Cal. 539.

——S. 47 and O. 21, R. 22—Notice under.

Order on question of notice under O. 21, R. 22 is one in execution, and second appeal lies. 8 P.L.T. 28=97 Ind. Cas. 798=A.I.R. 1926 Pat. 397.

——S. 47 and O. 21, R. 90—Question relating to execution—Objection to Attachment—Non-Transferable occupancy holding.

No second appeal lies from an order under O. 21, R. 90, C. P. Code. The objections as to non-transferability of the holding by the judgment-debtor come under S. 47 and a second appeal lay in respect thereof. There being no suppression of the notices the tenant was bound to object as to the non-transferability of the holding at the earliest possible opportunity and when he does not do so, he cannot be heard after the sale has taken place. 1 Pat. L. T. 267=56 Ind. Cas. 646.

——S. 47—Question relating to execution—Objection to sale—Purchaser of portion of the equity of redemption.

A purchaser of a portion of the mortgaged property joined as a defendant in a mortgage suit, cannot under S. 47 of the C. P. Code object to the sale of the mortgaged property in execution or the final decree on the ground that he has acquired a new and independent interest in that portion of the property. Any right that he has outside and independent of the mortgage must be enforced by proper proceedings outside the mortgage suit. 74 Ind. Cas. 374 (Cal.).

——S. 47—Question relating to execution—Objection to execution—Suit, maintainability of—Transfer of Property Act, Ss. 88, 89.

One *B* sued and obtained a decree against *F* for the enforcement of his mortgage under Ss. 88 and 89 of the T. P. Act. *A*, the adopted son of *F* raised certain objections against the execution of the said decree of *B* under S. (244), C. P. Code, 1882 some of which were disallowed. *A* then brought a suit raising the same objections as in the execution proceedings making two other persons parties also. *Held*, that the suit was barred by S. 244, C. P. Code, 1882, as the questions raised in the suit could have been and were raised in the execution proceeding. 30 M.L.J. 238=3 L.W. 257=32 Ind. Cas. 354 (P.C.).

——S. 47 and O. 21, R. 60—Question relating to execution—Objection by legal representative that property attached is not assets.

Where a judgment-debtor objects that the property attached and sought to be sold is not his, though in his possession and that he is holding the same as *shebait* of a certain deity to whom the properties have been dedicated, the case does not fall within S. 47 but under O. 21, R. 60, C. P. Code. If the claim

of the objector is really in his own interest as representative of the judgment-debtor, the case comes under S. 47. 20 C.L.J. 485=19 C.W.N. 520=42 C. 440=27 Ind. Cas. 328.

——S. 47 and O. 21, R. 63—Question relating to execution — Objections to attachment.

All objections to attachment in execution of a decree must be raised in execution proceedings. 17 Ind. Cas. 126 (Mad.).

——Ss. 47, 2, 96—Question relating to execution—Objection to attachment by legal representative.

A decree-holder attached certain properties in the possession of a judgment-debtor's son alleging their descent to him as a part of the deceased's estate. The son claimed an independent title to the same. *Held*, the objection fell under S. 47 as a question between the parties and the decision thereon is a decree under S. 2. 16 Ind. Cas. 385 (Cal.).

——S. 47—Question relating to execution—Order allowing payment directed by decree.

An order merely allowing a payment directed by the decree, is not one under S. 47, C. P. Code, and is not appealable. 30 C.L.J. 32=52 Ind. Cas. 401.

——S. 47—Question relating to execution—Order refusing to discharge a receiver.

An order refusing to discharge a receiver appointed in an execution proceeding is within S. 47, C. P. Code. (1919) P.H.C.C. 137=3 Pat.L.J. 513=46 Ind. Cas. 655.

——S. 47—Question relating to execution—Order amending decree—If appealable.

An order in execution amending a decree is not within S. 47 and is not appealable. 43 P.R. 1918 =46 Ind. Cas. 9.

——Ss. 47 and 24—Question relating to execution—Transfer of decree

Order by Court passing a decree for the transmission of a decree for execution to another Court is not an order for the execution of the decree, nor is an application for the transmission an application for execution. 35 Bom. 103=12 Bom. L. R. 844=8 Ind. Cas. 168.

——S. 47—Question relating to execution—Order directing distribution of Sale proceeds between several mortgagees.

An order directing distribution of sale proceeds between the first mortgagee, and second mortgagee, who were parties to a suit by the third mortgagee to enforce his security, is one within S. 47. 15 C.W.N. 783=8 Ind. Cas. 4.

——S. 47 (S. 244 (c), Old Code)—'Relating to the execution of a decree'—Order setting aside a sale in execution.

An order setting aside a sale in execution of a decree is an order relating to the execution of a decree within the meaning of S. 244 (c), C. P. Code. (1900) 28 C. 116 at 118.

Oudh Laws Act.

——S. 47—Question relating to execution—Oudh Laws Act.

C. P. Code, S. 47—Objection to sale of ancestral land attached in execution on ground of want of sanction as required under S. 20, Oudh Laws Act—Objection must be raised in execution proceedings for separate suit is barred by S. 47. 7 O.W.N. 140=A.I.R. 1930 Oudh 256=125 Ind. Cas. 165. *See also* 17 O.C. 14=21 Ind. Cas. 193.

——S. 47—Questions relating to execution—Parties and representative.

Money decree ordered to be paid in instalment—Judgment-debtor executing security bond hypothecating immovable property—Default in paying instalments—Property can be sold in execution of money decree and fresh suit is not necessary—Execution of this money decree against property as if it is a charge—Property subsequently purchased by another decree-holder in execution of his money decree. He gets the property subject to the charge—Hence in execution by the former decree-holder purchaser, decree-holder should be present as he is a representative of the judgment-debtor, so that he may be given an opportunity to redeem by paying off the amount due to the prior decree-holder. A.I.R. 1936 Pat. 289=17 P.L.T. 434=15 Pat. 545=162 Ind. Cas. 830=2 B.R. 508.

Partition.

——S. 47—Questions relating to execution—Partition—Decree in partition suit not engrossed on non-judicial stamp—Sale is nullity—Application for having decree so engrossed—Order of Court, if one under S. 47.

Where a decree in a partition suit which is a final order is not engrossed on a proper non-judicial stamp, there is no valid decree which can be executed. The Court cannot sell property in execution, and if any sale takes place, it is a nullity and passes no title to the auction-purchaser.

Where in the above case the decree-holder applies to the executing Court to have the decree engrossed on the proper non-judicial stamp, an order passed by the Court on the application is not one under S. 47, and is not appealable. A.I.R. 1938 Mad. 307=47 L.W. 51=1938 M.W.N. 656=183 Ind. Cas. 33.

——S. 47—Execution of mortgage decree—Partition in mortgagor's family—Question whether partition is *bona fide* or collusive cannot be gone into in execution proceedings—It can, however, be notified in sale proclamation. A.I.R. 1936 Sind 208=166 Ind. Cas. 128 (2).

——S. 47—Question relating to execution—Partition—Final decree for partition—Dispute regarding adjustment falls under S. 47.

Where the Commissioner went to deliver possession of certain properties in terms of the final decree for partition, and objection was put forth by one of the parties that there was an adjustment of the decree in contravention of the final decree.

Held, that a dispute with regard to adjustment of the decree with regard to possession is a dispute under S. 47 and it must be decided by the executing Court whether there was such an adjustment or not. 116 Ind. Cas. 373=A.I.R. 1928 Cal. 753.

——S. 47—Partition—Decree directing payment by one sharer to others as compensation for excess portion—Payment must be enforced by execution and not by a separate suit. 91 Ind. Cas. 1009=A.I.R. 1926 Oudh. 230.

——S. 47—Execution—Partition decree.

If a decree is passed in a partition suit, the parties thereto whether arrayed as defendants or as plaintiffs, are in the position of plaintiffs, and in regard to properties that may be allotted they are exactly in the position of decree-holders. In such a case the

decree can be executed by any party and a separate suit for possession is barred by S. 47. But if the partition decree merely directed the separation of the shares of the plaintiffs in the partition suit and left the shares of the defendants joint amongst themselves, the defendants cannot execute that decree and there is nothing to prevent defendants from bringing a fresh suit for partition of the lands jointly allotted to them. 7 P.L.T. 295=1925 P.H.C.C. 330=90 Ind. Cas. 739=A.I.R. 1926 Pat. 154.

——S. 47—Partition suit.

If the plaint properties or any of them have been sold so that the partition proceedings can no longer go on, then the Court in charge of execution proceedings will have to decide what is proper course to follow, whether to direct that the parties entitled to partition should get the sale proceeds brought into Court and divide them which would of course be the simplest way of settling the matter or to relegate the parties to separate suits. If the plaintiff alleges that some property has been fraudulently sold by other sharers, the question cannot be dealt with in execution proceedings but in a separate suit. 64 Ind. Cas. 490=46 Bom. 226=23 Bom.L.R. 981=A.I.R. 1922 Bom. 380.

Partition during suit.

——S. 47—Question relating to execution—Partition during suit by co-sharer—Procedure—Substituted property.

Where there has been a partition during the pendency of a suit to recover a share the decree-holders are entitled under S. 47 to ask the Court to ascertain in execution what estates and interests have been substituted for their original share and give them possession of the same notwithstanding clear instructions in the decree. 1 Pat.L.W. 711=(1917) P.H.C.C. 205=2 Pat.L.J. 496=40 Ind. Cas. 508.

——S. 47—Question relating to execution—Partition during suit.

In execution the decree-holder can be put in possession of the specific lands substituted for the share on partition. 117 Ind. Cas. 764=A.I.R. 1929 Oudh 263.

——S. 47—Execution—Partition.

The plaintiff's share was sold by the Collector for arrears of revenue and the plaintiff sued for setting aside the sale and for recovery of possession but before the decree was passed partition had been effected by the Collector in ignorance of which the decree was made. The plaintiff thereupon applied in execution for possession of the share got under the partition. *Held*: the questions as to what were such substituted shares were questions which arose within the meaning of S. 47 of the Code of Civil Procedure, 1908, between the parties and related to the execution and satisfaction of the decree and that no separate suit was necessary. 69 Ind. Cas. 180=1922 M.W.N. 415=20 A.L.J. 650=21 M.L.T. 43=36 C.L.J. 1=26 C.W.N. 906=16 M.L.W. 128=1 Pat. 378=3 Pat.L.T. 547=24 Bom.L.R. 974=49 I.A. 139=A.I.R. 1922 P.C. 54=43 M.L.J. 124 (P.C.).

Power of executing Court.

——S. 47—Questions relating to execution—Powers of executing Court—Decree in favour of plaintiff after his death—Judgment-debtor knowing of plaintiff's death after sale in execution but before confirmation—Setting aside sale on ground that decree was nullity.

The executing Court cannot set aside a decree, but it is open to the executing Court to see whether the decree under execution was or was not null and void.

The question whether a decree is null and void on the ground of the death of a party can be raised in execution.

Where the plaintiff dies before the hearing and the decision of the suit and a decree is passed subsequently in favour of the deceased plaintiff, the question is one of jurisdiction, and therefore it is immaterial that the decree was passed for an amount which was admitted by the defendant. Such a decree is a nullity and must be treated as such in the execution proceedings. Where the judgment-debtor only comes to know of the death of the plaintiff, more than three years after the decree and more than a fortnight after the execution sale itself, but before its confirmation, he does not lose his right to object in execution that the sale should be set aside on the ground of the decree being a nullity. A.I.R. 1939 Pat. 534=182 Ind. Cas. 208=5 B.R. 732.

——S. 47—Award under rules framed under Co-operative Societies Act—Executability of.

It is not open to an executing Court to sit in judgment over the Court which passed the decree which has to be executed. It cannot, except in certain limited recognised cases, conduct enquiries to ascertain whether the decree was properly passed. If on the face of the record, it is clear that some illegality has been committed, the executing Court can refuse to execute.

Held, on the fact that as there was nothing on the face of the award to show that it was illegal, the executing Court ought to have executed it. The executing Court had no jurisdiction under S. 47, C. P. Code, to go into the questions on the grounds on which it refused execution. A.I.R. 1938 Mad. 809=1938 M.W.N. 567=(1938) 2 M.L.J. 186=48 L.W. 285=178 Ind. Cas. 808.

——S. 47—Decree satisfied—Re-opening of execution—Restoration of status quo ante.

The wording of S. 47 is comprehensive enough to include a case where an objection is made to the order regarding satisfaction of the decree and striking off the execution proceedings. An application made after the decree is satisfied is as much an application under S. 47 as it is when made before it. S. 47 is intended to obviate a fresh suit between the parties to a decree on matter affecting the execution, discharge and satisfaction of the decree.

But where the executing Court had exceeded its jurisdiction and acted *ultra* vires in executing the decree against property belonging to the minors when the decree was passed against their father's assets in their hands and on the principle that the Court has power to correct its own mistake, the executing Court could be regarded as having the power to restore the parties to *status quo ante*. The Court was, therefore, perfectly right in directing the decree-holder to return the *dhan* that he had illegally obtained from the minor's quondam guardian. A.I.R. 1938 Nag. 363=1938 N.L.J. 162=178 Ind. Cas. 308.

——S. 47—Decree on award—Judgment-debtor paying after award but before decree—If can be given credit in execution.

If a defendant pays money to the plaintiff while the suit is in progress, it is his duty to see that credit is given for that amount in the decree that is passed

and not to stand by and allow a decree to be passed for more than is due and then come forward and say in execution proceedings that that decree is not binding on him.

It is not open to a judgment-debtor, in execution of a decree passed on an award, to contend that he should get credit for the amount paid after the award but before the decree, as the judgment-debtor is not seeking the aid of the Court to determine any question relating to the execution of the decree as passed by the Court but is asking the Court to embark on an enquiry whether the decree to be executed is the decree as passed by the Court or as modified by the parties. A.I.R. 1938 Nag. 265=1938 N.L.J. 148 =177 Ind. Cas. 673.

——S. 47—Investigating validity of decree when there is nothing illegal about it—Plea as to minority of judgment-debtor—Court assuming jurisdiction and passing order purporting to be under S. 47—Whether appealable.

Section 47 is not intended to be used for the purpose of investigating matters relating to the validity of the decree itself when on the face of it there is nothing illegal about the decree.

The decree-holder respondent obtained a decree against the father of the appellant and the appellant. He impleaded the appellant as a major. In execution the 3rd defendant obstructed and a petition was put in by the decree-holder to have his obstruction removed and possession of the property delivered. The appellant then appeared by his mother as guardian and pleaded that he was a minor. The lower Court having so found, dismissed the petition:

Held, that the point was not one relating to the execution, discharge or satisfaction of the decree, but amounted to a plea that the decree was void and that it was wrongly passed by the trial Court and did not come within S. 47.

Held, also, that although the lower Court ought not to have made this enquiry, it assumed jurisdiction and purported to pass an order under S. 47, C. P. Code. The order, though wrongly given was, therefore, under S. 47, C. P. Code, and appealable. A.I.R. 1937 Mad. 509=1937 M.W.N. 227 (2)=45 L.W. 401=(1937) 2 M.L.J. 37=I.L.R. (1937) Mad. 834=170 Ind. Cas. 86.

——S. 47, O. 21, R. 16—Question as to genuineness of purchase of decree—Fact of application having been made under O. 21, R. 16—Whether prevents S. 47 being applicable.

The question as to the genuineness of the purchase of a decree arising between the purchaser who applied for execution on the substitution of his name as decree-holder and a judgment-creditor of the decree-holder who having attached the decree opposes the application comes within the purview of S. 47, Cl. (3) and as such, its decision is appealable as a decree even though the judgment-debtor does not take any part in the dispute. The fact that an application was made under O. 21, R. 16, does not prevent S. 47 of the Code from being applied for the decision of a question falling within its scope. A.I.R. 1937 All. 63=1936 A.L.J. 1335=1937 A.L.R. 128=1936 A.W.R. 1167=167 Ind. Cas. 116.

——S. 47—Question of damage to mortgaged property by judgment-debtor before confirmation of sale.

Where the damage to the mortgaged property was caused by the judgment-debtor before the sale in favour of the decree-holder was confirmed by the executing Court, that is, the damage that the decree-holder suffered was suffered by him before he became the auction-purchaser and the decree-holder applied for a decree to the executing Court for loss thereby caused:

Held, that the question with regard to the damage caused to the mortgaged property was one which fell within the purview of S. 47, Civil P. C. A.I.R. 1935 Lah. 170=158 Ind. Cas. 88.

——S. 47—Deterioration before delivery of possession—Question of damages.

Where a decree awards a person a certain property, he is entitled to get it in the state in which it was when that decree was passed and the question whether when the property was delivered it continued to be in the same state or in the meantime underwent deterioration is a question to be determined in execution and not by a separate suit. A.I.R. 1935 Mad. 280=1935 M.W.N. 199=68 M.L.J. 277=41 L.W. 323=156 Ind. Cas. 440.

——S. 47—Suit for possession of village covered by lease—Prayer for demolition of bhandar——Relief, if to be obtained in executing Court——Separate suit—Same cause of action.

The plaintiff brought a suit in 1920 for possession of a village which was the subject-matter of a *thica* lease and a judgment was obtained by the plaintiff and the decree for delivery of possession was put into execution. Again a suit was brought by the plaintiff of the former action for ejectment of some of the defendants from the *bakasht* land and a decree was again obtained. A third suit was filed by the plaintiff in respect of a plot of land in the same village on which a *bhandar* stood claiming that in spite of the delivery of possession through the Court, he had not obtained actual possession of the land or part of the land which was the subject-matter of the lease:

Held, that it being not denied that the building was erected during the course of the lease, if the plaintiff had any right to have the building demolished before he got possession of the land at the hands of the defendant, then quite clearly he could make that claim in the former suit and that it was a cause of action or part of a cause of action which the plaintiff might have included in the first suit, and not having included it, he could not bring a separate suit with regard toit. As he had got a decree for possession of the property, any grievance he might have with regard to that matter must be made in the executing Court and not by way of a separate suit;

Held also, that the fact that another person had been joined to the third suit, a person who was not a party to the former actions would not justify the suit unless it could be shown that the plaintiff had a separate cause of action against that person in which case the other defendant should not have been joined in the subsequent action. A.I.R. 1935 Pat. 222=155 Ind. Cas. 268.

——S. 47—Objection that decree was passed at a time when judgment-debtor was dead.

The heirs and legal representatives of a deceased judgment-debtor are perfectly entitled, when they are sought to be brought on record, to point out to the executing Court that the decree as it stood was not executable as against them on the ground that

the decree was a nullity, having been passed at a time when the judgment-debtor was dead, and the executing Court is fully competent to enquire into such a question. A.I.R. 1935 Cal. 130=38 C.W.N. 1124=60 C.L.J. 102.

——S. 47—Executing Court—Powers of—Matters left in doubt—Additional evidence.

There is no authority for the proposition that where a suit leaves the matter in doubt as to the capacity which the defendant occupied against whom the claim was made, the omission may be supplied by adducing evidence in execution which ought more properly to have formed part of the record of the suit; still less where the capacity—that of a guardian—is expressly stated. A.I.R. 1933 Mad. 175=145 Ind. Cas. 694.

——S. 47—Waste after decree—Damages, if recoverable in execution—Obiter.

Obiter.—Waste by a tenant which is alleged to have been committed after decree cannot relate to execution, discharge or satisfaction of the decree when such decree is for recovery of rent and delivery of possession. Damages can be recovered for waste in such cases only by a separate suit. A.I.R. 1933 Lah. 168=145 Ind. Cas. 117.

——S. 47—Questions in Execution—Power to question valdity of decree for want of jurisdiction.

A Court to which a decree has been transferred for execution must take the decree as it stands and is not entitled to question the validity of the decree upon the ground that the decretal Court had no jurisdiction, territorial, personal or pecuniary to pass it.

It is perfectly open to the executing Court to determine whether the decree which it is asked to execute is a subsisting and operative decree or not, and if such a decree has been superseded and is no longer operative the executing Court is entitled to refuse execution on that ground. Again the executing Court can only execute a "decree" and if what purports to be a decree has been passed by a Court not duly constituted in accordance with law such an adjudication is not a decree at all in the eye of the law. So also is a decree that has been passed against a dead person. A.I.R. 1931 Rang. 252=9 Rang. 480=135 Ind. Cas. 65 (F.B.) [Overrules A.I.R. 1930 Rang. 337=129 Ind Cas. 519=8 Rang. 544].

——S. 47—Question relating to execution—Power of executing Court.

Judgment-debtor mortgaging property as security under O. 41, R. 6 (3) (c)—Bond can be enforced in execution proceedings—No attachment or suit is necessary for realizing properties—Application to enforce security must be made to Court passing decree appealed from. 30 Cal. 1060=8 Pat. 801 =A.I.R. 1930 Pat. 108=124 Ind. Cas. 90.

——S. 47—Executing Court—Power to extend time for payment—Consent order—If could be varied.

Consent decree on condition that if defendant deposited certain amount within certain time suit shall stand dismissed or else it shall stand decreed—Defendant depositing amount but after period fixed—Court declaring deposit to have retrospective effect, dismissed suit—Court's order not being in discharge or satisfaction of decree was not appealable.

Held: further, that the Court had no power to extend the period of time fixed for making the deposit because, although, where in the progress of the suit something has to be done, Court granting time can extend it under S. 148, still where the decree finally settles the rights of the parties, the Court cannot extend time so as to interfere with the rights of the parties. 118 Ind. Cas. 591=1929 A.L.J. 968=A.I.R. 1929 All. 666.

——S. 47—Person other than judgment-debtor in possession of property sold in execution—Executing Court cannot decide upon his title—The only remedy of the purchaser is a regular suit. 115 Ind. Cas. 36=A.I.R. 1928 Cal. 792.

——S. 47—Execution—Decree satisfied — If could be reopened.

By an auction-sale in execution of a decree the purchaser got proprietary right in the whole of the village excluding occupancy rights in the *sir* land, and he was put in possession of the proprietary rights in the village including the *sir* land. Later on, the purchaser dispossessed the owners of their occupancy holding of the said *sir* land, upon which the owner applied to the Court which had executed the decree to restore them to possession of their holding.

Held: that the Court could not grant the application for possession as the decree had been completely executed, as the possession of the owners as tenants was not disturbed till the auction-purchaser actually went on the land and began to cultivate it or prevented them from doing so.

Held: further, that the application cannot be treated as a plaint under S. 47 (2), C. P. Code. 105 Ind. Cas. 420=A.I.R. 1928 Nag. 100.

——S. 47—Execution—Powers of Court in.

The Court transmitting a decree is not the Court to decide objections on the part of the judgment-debtor that the decree is incapable of execution or that execution is barred by limitation. Such objections should be taken before and heard and determined by the Court to which the decree is transmitted as the Court of execution. 5 Rang. 775=6 Bur.L.J. 225=106 Ind. Cas. 857=A.I.R. 1928 Rang. 40. As to nullity of decree, *see* A.I.R. 1927 Lah. 651=103 Ind. Cas. 673.

——S. 47—Application to Burma—Notification—Effect of.

Schedule—Notifications in Burma—Order for payment by instalments can be passed in execution—The question whether such order can be so passed comes under S. 47. 97 Ind. Cas. 1037=4 Rang. 247=5 Bur.L.J. 143=A.I.R. 1926 Rang. 192.

——S. 47—Question in execution.

Decree for specific performance of contract for sale—Question of judgment-debtor damaging property after decree can be gone into by executing Court. The question with regard to waste committed by a judgment-debtor after the date of the decree is a question arising between the parties relating to the execution discharge or satisfaction of the decree, and must be determined by the Court executing the decree and not by a separate suit. 1923 Bom. 391, Foll. 89 Ind. Cas. 205=27 Bom. 687=A.I.R. 1925 Bom. 385. *See also* as to waste by judgment-debtor after decree. A.I.R. 1923 Bom. 391=73 Ind. Cas. 443=25 Bom.L.R. 449.

——S. 47—Questions in execution—Movables in house delivered—Claim by judgment-debtor.

The decree-holder took possession of a house under his decree; the house contained certain movables of which a list was prepared. The judgment-debtor complained that some more property was there in the house and therefore requested the executing Court to hold an enquiry into the matter. The executing Court directed him to a separate suit.

Held: that the Court ought to have held an enquiry into the matter itself. 19 Cal. 683; 1 P.L.J. 558; 38 All. 339; 22 Cal. 183, Foll. 83 Ind. Cas. 1031 =20 N.L.R. 90=7 N.L.J. 151=A.I.R. 1924 Nag. 246.

——S. 47—Execution—Double payment under mistake.

Decree satisfied by one judgment-debtor and certified—Payment over again by another, under mistake —Executing Court has power to refund it—C. P. Code, S. 47—Execution. 65 Ind. Cas. 307=1 Pat. 336=1922 P.H.C.C. 53=3 P.L.T. 754=A.I.R. 1922 Pat. 166.

——S. 47—Question relating to execution—Power of executing Court to sell in execution.

A question as to the legality of an execution Court's procedure or as to its jurisdiction or power to order a sale is a question falling under S. 47. 6 O. L.J. 640=54 Ind. Cas. 364.

——S. 47—Question relating to execution—Preliminary decree—Foreclosure suit—No final decree—Subsequent suit for redemption.

The mere passing of a preliminary decree in any foreclosure suit does not put an end to the relationship of the mortgagor and the mortgagee. If the mortgagor fails to redeem within six months and no final decree is passed he can bring a fresh suit for redemption. 39 Bom. 41=16 Bom.L.R. 687=27 Ind. Cas. 249.

——S. 47—Questions relating to execution—Priority.

Under Hindu Law the widow of a paternal uncle will be entitled to succeed in preference to the father's sister and the question of the priority of heirs can be determined in execution proceedings under S. 47. A.I.R. 1935 Bom. 298=37 Bom.L.R. 150=59 Bom. 417=157 Ind. Cas. 658.

——S. 47—Question relating to execution—Priority—Application for execution by assignee decree-holder.

All questions of rights of priority, etc., arising in applications for execution by the assignee decree-holder should be determined in execution proceedings. 13 M.L.T. 227=17 Ind. Cas. 323.

——S. 47—Question relating to execution—Priority.

Though the sale to the defendant in execution of his money-decree was earlier, the later sale to the plaintiff in execution of his mortgage-decree, the mortgage-decree being in existence at the time of the defendant's purchase, is to prevail. 67 Ind. Cas. 262=3 Pat. L. T. 757=A.I.R. 1922 Pat. 655.

——S. 47—Question relating to execution—Recorded tenant.

In executing a decree for rent against a recorded tenant the question whether the recorded tenant represents the holding must be decided and it is a question of fact. 37 Cal. 75=13 C.W.N. 1110=2 Ind. Cas. 695.

——S. 47—Question relating to execution—Recovery of possession by decree-holder purchaser.

Questions relating to the possession of the property purchased by decree-holder in execution of a decree are not questions relating to execution, etc., within S. 47, C. P. Code, and a suit for recovery of possession is not barred by S. 47. (1919) Pat. 354= 4 Pat.L.J. 716=52 Ind. Cas. 711.

——S. 47—Question relating to execution—Redemption of mortgage—Decree capable of execution but not executed—Second suit to redeem the mortgage.

In 1888, the plaintiff obtained a redemption decree under the Dekhan Agriculturist Relief Act, 1879. Nothing was done under the decree. The plaintiff then filed another suit in 1913 to redeem the mortgage. *Held*, that the second suit could not lie by reason of S. 47 of the C. P. Code. The decree in the first suit passed before the T. P. Act came into force in the Bombay Presidency did not require any order absolute under that Act or any final decree under the C. P. Code of 1908 and was capable of execution, and its execution was time-barred long before the institution of the second suit. 43 Bom. 703=21 Bom.L.R. 720=52 Ind. Cas. 466.

——S. 47—Questions relating to execution—Judgment-debtor, if bound to raise all possible objections under S. 47 at one time—Res judicata.

If on an application for execution the decree-holder obtains some relief by way of part satisfaction of the decree, the judgment-debtor should be deemed to have taken but unsuccessfully all objections, which if successful, would have prevented the decree-holder from obtaining satisfaction in part of the decree. Where, however, the decree-holder fails to obtain any relief and his application becomes abortive, the judgment-debtor is not debarred from taking any plea which, if successful, would defeat a second application for execution. There is no rule of law which makes it incumbent upon the judgment-debtor to raise all possible objections under S. 47, at a given time. While the Court possesses ample powers to prevent the abuse of its process, it must decide all objections under S. 47, C. P. Code when they are raised if they are not barred by any rule of law. In the absence of express adjudication, and during the pendency of the same execution proceeding, there is nothing to prevent judgment-debtor from taking any objection which might have been taken on the earlier occasion but was not taken. A.I.R. 1937 All. 446=1937 A.L.J. 482=1937 A.W.R. 409=1937 A. L.R. 613=169 Ind. Cas. 997.

——S. 47—Duty to raise question in the earlier proceedings and the bar in the later suit are co-extensive.

The bar of S. 47 can only apply to cases where there is a duty to raise the question in the earlier proceedings. The duty to raise the question in the earlier proceedings and the bar in the later suit are co-extensive and each complements the other. Where there is no duty to raise the question in the earlier proceedings, there can be no bar in the later proceedings. The bar in the later suit can only be because

of the duty to raise the question in the earlier proceedings. A.I.R. 1936 Mad. 733=169 Ind Cas. 456.

——S. 47—Questions relating to execution — Sale proclamation—Objection under O. 21, Rr. 66 and 2, held could not be considered on merits.

The decree-holder in execution of his decree attached the property of the judgment-debtor who objected to attachment under O. 21, Rr. 2 and 66. He, however, withdrew his objections under an agreement whereby the decree-holder gave him three months' time and agreed not to proceed, in the meanwhile, with the execution. Upon the suggestion of the Court however, a fresh application was made by the decree-holder and a fresh attachment of the properties effected and the first application was consigned to the record room without any objection being raised by the judgment-debtor. When the decree-holder wanted to proceed with the execution on default of the judgment-debtor to pay within time allowed, the judgment-debtor raised an objection that the terms of the agreement between the parties had not been complied with and insisted that the objections which he had once more raised to the attachment of the properties should be decided on the merits:

Held, that although the procedure adopted by the Court was not only irregular but highly objectionable, the judgment-debtor was not prejudiced in any way by the procedure adopted and the Court was right in refusing to consider his objections on the merits in the circumstances of the case. A.I.R. 1940 Lah. 325=42 P.L.R. 421=190 Ind. Cas. 451 =I.L.R. (1941) Lah. 590.

——S. 47, O. 21, R. 66—Matter of relative rights with regard to execution heard and decided at stage of settling terms of proclamation —Same matter cannot be canvassed at time of execution.

The mere settlement of the terms of a proclamation when no dispute between the parties as to their rights or liabilities is decided judicially cannot be deemed to be an order under S. 47, from which an appeal would lie. But when at the stage of settling the terms of the proclamation, the parties put into issue a question affecting their relative rights and liabilities with regard to execution and this matter is heard and decided that decision is a judicial decision and the parties will not be allowed in the course of execution to canvass the same matter again. A.I.R. 1940 Mad. 54=50 M.L.W. 578=(1939) 2 M.L.J. 782=1939 M.W.N. 1148=189 Ind. Cas. 732.

——S. 47, O. 21, R. 66—Fresh application under. on dismissal of first, not on merits.

Where objections of a judgment-debtor have been dismissed not on their merits but upon the ground that the judgment-debtor was in default, the dismissal of such objections would not be a bar to the judgment-debtor taking the same objections in subsequent execution proceedings, by a fresh petition under S. 47 and O. 21, R. 66. When an application under S. 151, for restoration of the first petition of objection has not been properly dismissed, that dismissal should not be allowed to operate to conclude the objections contained in the first petition. A.I.R. 1932 Cal. 569=36 C.W.N. 367=55 C.L.J. 184=141 Ind. Cas. 618.

——S. 47—Question relating to execution— Sale proclamation.

Petition that properties should not be sold subject to incumbrances as notified in sale proclamation is one under S. 47. 72 Ind. Cas. 860=1923 P.H.C.C. 76=1 Pat.L.R. 53=A.I.R. 1923 Pat. 134.

——S. 47—Question relating to execution— Sale under Public Demands Recovery Act.

A question as to whether the execution proceedings under Public Demands Recovery Act were entirely without jurisdiction is not one under S. 47. 14 C.L.J. 83=10 Ind. Cas. 532.

——S. 47—Questions relating to execution— Satisfaction of decree—Question whether property was actually sold.

The question involved in giving an auction-purchaser possession of property which he has bought cannot be a question relating to the execution, discharge or satisfaction of the decree; because the decree is satisfied, not by the possession of the auction-purchaser but by the fact of the sale; and thereafter no question relating to the execution of decree any longer remains.

Where, therefore, the judgment-debtor sought the decision of the Court on the question whether the property was actually sold, it was held that the question did not relate to the execution, discharge or satisfaction of the decree and was not, therefore, covered by S. 47. A.I.R. 1945 Bom. 386=47 Bom. L.R. 320.

——S. 47—Alleged compromise and satisfaction of decree entered — Decree-holder alleging fraud—Matter, if within S. 47.

Where in execution, the decree-holder alleges, that the alleged compromise and satisfaction of decree entered by the judgment-debtor was due to fraud of the judgment-debtor played on the agent of the decree-holder and applies to set aside the compromise and restore the case to the file, what the decree-holder is claiming is that the decree has not been fully satisfied; the matter is one relating to the satisfaction of the decree within the words of S. 47. A.I.R. 1938 Nag. 49=173 Ind. Cas. 718.

——S. 47—Decree-holder's statement of full satisfaction—Court dismissing execution application—Execution proceeding, if can be revived —Dismissal, whether amounts to compromise decree—Execution Court, if can enquire about nature of compromise made outside Court and declare voidable at opinion of decree-holder after investigating question of fraud, etc.

Where the Court on a statement made by the decree-holder himself has deliberately dismissed the execution application in full satisfaction of the decree, it cannot be suggested that the Court intends to keep alive the matter or that the application for execution, in spite of its dismissal, is still pending in that Court and can be revived at any time. Where the Court has deliberately dismissed the application and struck off the case, intending to terminate the proceedings, the execution proceedings are at an end and are no longer pending nor can they be revived. The only remedy in case of a wrong dismissal that would be open to a decree-holder would be to apply for a review of the order, if sufficient cause were made out. Unless the order is set aside and the application is restored to its original number, it must be considered to be dead and incapable of being revived automatically.

A dismissal of an application on a statement made by the decree-holder does not amount to a compromise decree, which would fall to the ground if the

decree-holder were to satisfy the execution Court that the compromise out of Court had been made under a misrepresentation, coercion, fraud or mutual mistake. It is quite outside the function of a execution Court to embark upon an enquiry as to the nature of the compromise arrived at between the parties outside the Court and to declare it voidable at the option of the decree-holder after investigating the question of alleged fraud, misrepresentation, coercion, or mutual mistake. The appropriate course for the decree-holder may be to file a separate suit and either get the mompromise, if written, set aside, or, at any rate, claim damages. It may be that if a Civil Court declares that the order striking off the case had been obtained by fraud, etc., the decree-holder may possibly have a right to get the proceedings re-opened, but this cannot be done in the execution Court itself. A.I.R. 1937 All. 513=1937 A. W.R. 394=1937 A.L.J. 375=1937 A.L.R. 666=170 Ind. Cas. 507.

——S. 47—Withdrawal of money in Court—If full satisfaction.

Money lying in Court taken away by decree-holder —Presumption of full satisfaction does not arise. A.I.R. 1937 Rang. 193=169 Ind. Cas. 432.

——S. 47—Decree satisfied—Matters arising afterwards.

Where the matter in dispute has arisen after the satisfaction of the decree, it cannot relate to the execution or satisfaction thereof. A.I.R. 1936 Rang. 298=164 Ind. Cas. 260 (1).

——S. 47—Satisfaction of decree entered by application in Court—Decree-holder, if can re-open proceedings on proper case being made out.

It is open to a decree-holder to re-open proceedings inexecution of his decree, after satisfaction has been entered by an application in Court, on a proper case being made out. He is entitled to succeed in an application for re-opening the proceedings on his succeeding in establishing fraud, coercion and undue influence in his petition before the execution Court. A.I.R. 1935 Cal. 645=158 Ind. Cas. 585.

——S. 47—Objection that sum paid in part satisfaction of rent decree is not credited.

An objection in execution that a certain sum was paid in part satisfaction of a rent decree, but no credit had been given for that payment falls within S. 47, and can legitimately form the subject-matter of an appeal. A.I.R. 1934 Cal. 761=153 Ind. Cas. 992.

——S. 47, O. 21, R. 90—Application to set aside sale—Court, if can consider question as to whether decree has been partly satisfied.

In an application to set aside a sale on the ground of material irregularity, the Court should confine itself to that question and should not consider as to whether the decree is partly satisfied. That point can be raised only by a separate application under S. 47. A.I.R. 1934 Pat. 664=152 Ind. Cas. 1014.

——S. 47—Decree-holder purchasing at auction —Doctrine of caveat emptor if applies—Judgment-debtor not having any saleable interest—Effect.

In the event of an auction-purchase made by the decree-holder himself being set aside, the decree-holder is entitled, as against the judgment-debtor, to say that, notwithstanding the auction-purchase made by him, his decree for the full amount stands intact, as the purchase made by him has been vacated. A question of this description when raised by the decree-holder would come within the purview of S. 47, and in order to Judge of the validity or otherwise of such a contention of the decree-holder, the Court will have to consider the question whether or not the decree has been wholly or partially satisfied. In considering this question the Court cannot ignore the fact that by the infructuous auction-purchase the decree-holder got nothing and that his decree has not been satisfied to any extent. A.I.R. 1933 All. 218=1933 A.L.J. 60=55 All. 221=144 Ind. Cas. 492.

Satisfaction of degree.

——S. 47—Question relating to execution—Satisfaction of decree.

A decree was attached under a decree *ex parte* which was executed and satisfaction entered; then the *ex parte* decree was set aside at the instance of the defendant who then applied for execution of the decree, attached and also for cancellation of satisfaction of the *ex parte* decree on the ground that the holder of the *ex parte* decree was a fictitious person and that it was obtained by fraud. *Held*, the application related to satisfaction of decree and was maintainable under S. 47 and no separate suit would lie in respect of it. 67 Ind. Cas. 598 (Cal.).

——S. 47 [S. 244, Cl. (c), Old Code]—Relating to the execution, discharge or satisfaction of the decree—Application to recover proceeds of sale from decree-holder after sale has been set aside.

Held, that an application to recover from a decree-holder the proceeds of a sale in execution, such sale having been set aside, is an application which falls within S. 244 of the Code of Civil Procedure. S. 244 of the Code of Civil Procedure applies as well to a dispute arising between the parties after the decree has been executed as it does to a dispute arising between them previous to execution. 1902 A.W. N. 67=24 A. 291.

——Ss. 47, 144 (Ss. 244, 583, Old Code)—Relating to the satisfaction, discharge or execution of the decree—Suit for restoration of property sold after deposit and satisfaction of decree.

S. 583 of C. P. Code only applies to a case where a party is entitled to a benefit by way of restitution or otherwise under a decree passed in appeal. *K.* obtained an *ex parte* decree for sale on foot of a mortgage. The property mortgaged was sold in execution of that decree and purchased by the decree-holder who obtained possession. The *ex parte* decree was subsequently set aside and another decree was obtained after contest. That decree was satisfied before the property was sold a second time. *K*, however, continued in possession and this suit was brought to recover possession from him. The Court below dismissed the suit on the ground that it was barred by the provisions of Ss. 2, 4 and 583 of C. P. Code, 1882.

Held, that S. 583 did not bar the suit.

Held, further, that S. 244 had no application inasmuch as the decree had been satisfied and the defendant had no interest left in the property and the question was not one as to execution, discharge or satisfaction of the decree. (1907) 6 A.L.J. 383=31 A. 364=1 Ind. Cas. 744.

——S. 47 (S. 244, Old Code)—'Relating to the execution, discharge or satisfaction of the decree'—Damages resulting from acts done under cover of execution proceedings, suit for.

Under S. 244 of C. P. Code, the Court executing the decree could only restore to the rightful owner land of which he had been deprived in the execution proceedings in excess of that decree, and that where damages had resulted from acts done under cover of the execution proceedings either by the decree-holder or at his instigation or suggestion, a separate suit for the recovery of such damages lies against the decree-holder. 11 W.R. 516; 12 W.R. 85; 12 B. L.R. 201, foll. The question of assessment of damages for injury arising from the fact that execution was taken out in excess of the relief granted under the decree is not one relating to the execution, discharge or satisfaction of the decree itself but is one outside the decree. (1904) 6 C.L.J. 527.

——S. 47—Question relating to execution—Satisfaction of decree.

Attachment before judgment of money in fixed deposit with a bank to the credit of *F* and *M* or either of them—In truth money belonged to *M* only—*M* procuring *N* to execute a security bond by which *N* agreed that in the event of a decree against *F* and *M* or either of them, he would deposit in Court, a sum equal to that attached—Security bond reciting that the amount attached belonged only to *M*—Attachment raised in consequence of the security bond—Decree passed against *F* alone—Decree-holder receiving the money—*M* filing a suit for rectification of the security on the ground of mistake and the repayment of the money received and in the alternative for damages against the decree-holder.

Held, that the bond expressed quite accurately the intention of the parties. It proved simply that the money provided by *N* was to be in truth in place and instead of the money that had been attached and it in no way gave greater rights to *S* than he would have possessed in respect of the money which was attached. There had been no mistake and the foundation of the suit failed.

Held, further, that the order of the payment out was in satisfaction of the decree and that in itself precluded any cause of action by *M*. 122 Ind. Cas. 11=34 C.W.N. 425=51 C.L.J. 253=A.I.R. 1930 P.C. 86=58 M.L.J. 275 (P.C.).

—S. 47—Decree adjusted—Adjustment not recorded—Sale in execution of decree—Judgment-debtor cannot plead adjustment even by way of defence in suit for possession by decree-holder purchaser. 24 Cal. 355; 27 Cal. 946; 7 C.W.N. 607; 4 Ind. Cas. 168=9 C.L.J. 464 and 71 Ind. Cas. 378=A.I.R. 1922 Cal. 311=27 C.W.N. 280, Overruled. 33 C.W. N. 795=49 C.L.J. 441=118 Ind. Cas. 857=A.I. R. 1929 Cal. 374 (F.B.).

——S. 47—Satisfaction of decree sold in execution of another decree.

If one decree is sold in execution of another decree it is open to the judgment-debtor, when the purchaser of such decree seeks to execute that decree against him, to plead that the decree had been satisfied by him prior to its sale although the satisfaction was not certified according to the provisions of O. 21, R. 2. R. 2 (3) does not bar the plea and the Court must enquire into under S. 47. 78 Ind. Cas. 776=27 O.C. 277=A.I.R. 1925 Oudh 225.

——S. 47—Separate suit lies if double payment is received by decree-holder.

If the creditor by taking out a Darkhast recovered the decretal amount over again, the judgment-debtor can by suit recover the amount which he had paid to his creditor without its being certified. The fact that in the execution proceedings judgment-debtor failed to get credit for the amount does not bar the suit. 95 Ind. Cas. 410=25 Bom.L.R. 247=A.I.R. 1923 Bom. 253.

——S. 47 and O. 21, R. 2—Question relating to execution—Fraudulent concealment of satisfaction of decree.

The question whether a judgment-debtor satisfied the decree and was fraudulently kept out of all means of exercising his right to apply in Court comes within S. 47 of the C. P. Code. 30 C.L.J. 248=53 Ind. Cas. 67.

——S. 47 and O. 21, R. 2 (3)—Question relating to execution—Satisfaction not certified.

An executing Court cannot investigate the fact of receipt of decretal amount by the decree-holder which was not satisfied to the Court by the judgment-debtor within the prescribed time 12 C.W.N. 485, Foll. 24 C.L.J. 462=37 Ind. Cas. 738.

——S. 47—Question relating to execution—Partial satisfaction of the decree.

In an execution proceeding the judgment-debtor contended he was entitled to deduct a larger sum than that allowed by the decree-holder on account of the transfer of certain properties by him to the decree-holder and that the interest claimed was at a higher rate than actually due. There was also a dispute as to the date on which order should be given for the consideration money. *Held*, all these come within the scope of S. 47. C. P. Code. 9 Ind. Cas. 382 (Cal.).

——S. 47 and O. 21, R. 2—Question relating to execution—Satisfaction of decree.

In order to avoid multiplicity of suits S. 244 of the C. P. Code (1882) has to be liberally construed. When a judgment-debtor accepts the binding nature of a decree but contends that it should not be executed in consequence of circumstances arising subsequent to the decree the matter should be dealt with under S. 244 and not by a separate suit. 31 Cal. 737, foll. 9 C.L.J. 358=4 Ind. Cas. 121.

——S. 47—Questions relating to execution—Scheme—Order for costs made by District Judge as persons designata is not executable under Civil Procedure Code (Act 5 of 1908)—District Judge acting under scheme of management framed by Court does not act in judicial capacity.

The District Judge, acting under the scheme of management framed by Court is not acting in a judicial capacity. He acts merely as a *persona designata*. Consequently, an order for costs made by him though legal is not capable of execution under C. P. Code. A.I.R. 1942 Bom. 97=44 Bom.L.R. 11=199 Ind. Cas. 647.

Scheme.

——S. 47—Scheme sanctioned by Court after decree—Objection that decree has become incapable of execution.

Where a scheme in regard to a bank has been sanctioned by the Court after the decree and the objection of the judgment-debtor is that by reason of

the sanction of the Court the scheme has superseded the decree with the result that the decree has become incapable of execution, the objection relates to the execution or discharge of the decree and consequently comes within S. 47. A.I.R. 1937 Cal. 211=41 C.W.N. 405=I.L.R. (1937) 1 Cal. 781=65 C.L.J. 361=171 Ind. Cas. 198.

——S. 47—Scheme—Creation of Board of control with right to call upon trustees for collections—Board's right to execute scheme—'Decree-holder'.

Where a scheme framed by the Court for the management of a temple constitutes a Board of Control and confers upon the Board the right of calling upon the trustees to remit the collections, the Board though created by the scheme itself, may be regarded as a decree-holder competent to execute the provisions of the scheme. A decree-holder need not be a party to the decree. It is enough if the decree confers upon him some rights enforceable under the decree. A.I.R. 1932 Mad. 193=61 M.L.J. 904=35 L.W. 22=136 Ind. Cas. 771.

——S. 47 and 92—Scheme suit—Decision in.

The rule in a scheme giving liberty to apply for a modification of the scheme is not *ultra vires* and where such a rule exists, it would be permissible to make an application for the modification of the scheme without the consent of the Advocate-General. A.I.R. 1931 Bom. 388=33 Bom.L.R. 546=133 Ind. Cas. 823.

——S. 47—Question relating to execution—Scheme.

Applications in execution of a scheme of management of trust do not come under S. 47. A.I.R. 1925 P.C. 155, Foll. 1926 M.W.N. 283=95 Ind. Cas. 5=A.I.R. 1926 Mad. 655.

——S. 47—Questions relating to execution—Scope—Equities between judgment-debtor and assignee decree-holder, held should be decided in separate suit.

One of the defendants had purchased one of the items of the mortgaged property in execution of a money decree against the mortgagor. Interests of the defendant had, been acquired by one *A*. Subsequently, the final decree in the mortgage suit for sale of the property was assigned to *A*:

Held, that *A* could proceed in execution against the property which he had not purchased. He was not bound to deduct the proportionate burden of the mortgage debt on his own property. The question of equity raised by the judgment-debtor could not be allowed to be raised in the execution proceedings, since the matter did not relate to the "execution, discharge or satisfaction of the decree." The remedy of the judgment-debtor was by way of a separate suit. A.I.R. 1946 Mad. 155=(1945) 2 M.L.J. 544=58 L.W. 598=1945 M.W.N. 709.

——Ss. 47, 151, O. 34, R. 6—Application under O. 34, R. 6—Maintainability—Payments made under Court's order—Recoverability.

In a mortgage suit for sale in which the mortgagor and certain puisne mortgagees were impleaded as defendants, the decree passed by the trial Court was varied by consent. According to the terms of the decree, Receivers were appointed but on account of their inability to make proper collections or to pay rents the plaintiff advanced money to the Receivers under orders of the Court to meet the demands of the landlords. The plaintiff also obtained another decree for amounts paid on account of rent. In execution of the decrees, on sale, the plaintiff herself purchased the properties. Subsequently the plaintiff applied under O. 34, R. 6, and claimed (i) amount under the decrees with interest, (ii) amount advanced on account of *sadar* rent, (iii) amount advanced to Receivers by Court's order, and (iv) amount paid into Court for rent:

Held, that S. 47 applied to item (i), the amount being covered by the decree; but that as regards the other items, inasmuch as the plaintiff herself was the auction-purchaser, the adjustment sought for might be regarded as an adjustment by way of appointment of Receiver, that it fell under S. 47, and that S. 151 also applied to the case.

Held, also that where payments were made without order of Court's a separate suit should be instituted by the plaintiff. A.I.R. 1932 Cal. 414=55 C.L.J. 1=139 Ind. Cas. 247.

——S. 47—Question relating to execution—Son's liability upon father's debt can be determined in.

An inquiry into the extent of a son's liability for a father's debt, *i.e.*, as to how far the property of the father in the hands of the son is liable must be determined in execution proceedings under S. 244, C. P. Code, 1882. 13 C.W.N. 138=9 C.L.J. 5=1 Ind. Cas. 442.

Stay of Execution.

——S. 47—Question relating to execution—Stay of execution.

If the order staying execution is not in respect of any particular judgment-debtor or any specific sum, the stay is in respect of the whole decree and the decree-holder is debarred from executing it against any of the judgment-debtors, irrespective of the fact whether the order is a valid one or not. A.I.R. 1944 Nag. 155=1944 N.L.J. 127=I.L.R. (1944) Nag. 250=217 Ind. Cas. 298.

——S. 47—O. 41, R. 6 (2)—Appeal against preliminary decree—Subsequent passing of final decree—Application for execution—Power of Court to stay execution—O. 41, R. 6 (2), applicability of—Order dismissing application—Appeal, competency of.

There was a preliminary decree for sale on a mortgage-deed and a first appeal was taken against that preliminary decree. Subsequently, a final decree was prepared for sale and the decree-holder applied for execution of this final decree. As an appeal was pending from the preliminary decree the execution application was dismissed. The decree-holder preferred an appeal from this order:

Held, (i) as the order definitely stated that the execution application was dismissed, it was an order under S. 47 and the appeal was competent;

(ii) that an appeal against a preliminary decree is also by implication an appeal against a final decree, although it is not an appeal in express terms against the final decree and O. 41, R. 6 (2) was applicable to the case;

(iii) that the order of the execution Court was not correct in dismissing the execution application as O. 41, R. 6, Sub-R. (2) only empowers the Court against whose decree an appeal is pending to stay the application for execution and not to dismiss it. A.I.R. 1933 All. 732=1934 A.L.R. 131=55 All. 983=147 Ind. Cas. 178.

——S. 47—Question relating to execution—Stay of execution.

Matters relating to stay of execution fall within S. 47. 33 Ind. Cas. 66; 39 M. 541, Foll. 75 Ind. Cas. 789=A.I.R. 1925 Lah. 69.

——S. 47—An order relating to the sufficiency of the security tendered as a condition of the stay of execution which has been granted, is not one which comes within the purview of S. 47. 41 Cal. 160, Foll. 88 Ind. Cas. 740=4 Bur.L.J. 61=3 Rang. 255=A.I.R. 1925 Rang. 225.

——S. 47—Stay of execution—Nature of order.

Under S. 2 read with S. 47 an order passed by the execution Court is a decree only when it determines a question relating to the execution, discharge or satisfaction of the decree; stay of proceedings is not a decree. 80 Ind. Cas. 39=5 L.R.A. Civ. 573 =A.I.R. 1924 All. 794. *See also* A.I.R. 1933 Nag. 85=141 Ind. Cas. 841; *but see* A.I.R. 1922 Lah. 480=68 Ind. Cas. 751.

——S. 47—Stay of execution—Effect of.

Execution may be stayed by injunction in proceedings other than execution proceedings or by order of executing Court. Where a decree is stayed by injunction as to part of the properties and by order of the executing Court itself as to the rest, the decree-holder is entitled to deduct the time during which the injunction and the order continued, the date on which the injunction was issued and the order was made, and the date on which the injunction and the order ceased to be operative. 64 Ind. Cas. 594= 34 C.L.J. 163=A.I.R. 1921 Cal. 606.

——S. 47—Question relating to execution—Suit for declaration that decree is satisfied—If lies.

A suit for a declaration that a decree has been satisfied is maintainable and that S. 47 does not bar it. (5 Ind. Cas. 814, Foll). 42 P.R. 1914=79 P. W.R. 1914=234 P.L.R. 1914=25 Ind. Cas. 642.

——S. 47—Questions relating to execution—Wakf—Question whether property is held as wakf property, if can be determined in execution.

Whether the property sought to be sold in execution of a decree, is held by the judgment-debtor as a wakf property in which he has no beneficial interest, is a question arising between the parties to the suit in which the decree was passed which has to be determined in execution proceedings. A.I.R. 1939 Sind 22=179 Ind. Cas. 692.

——S. 47—Decree-holder becoming legal representative of judgment-debtor — Claim of rateable distribution along with other decree-holders:

Held, that though S. 73 did not apply, decree-holder was entitled to contend under S. 47 that the assets must be first available for his own decree debt and that only the balance should be available for other decree-holders. A.I.R. 1942 Mad. 260=54 L.W. 688=(1941) 2 M.L.J. 1024=I.L.R. (1942) Mad. 360=199 Ind. Cas. 105.

——S. 47—Creditor who had attachment before judgment, obtaining decree and succeeding debtor as heir—Decree obtained by another creditor against such heir as representative of debtor and property in his hands sold in execution—Heir is entitled to claim rateable distribution in sale proceeds. A.I.R. 1942 Mad. 260=54 L.W. 688=(1941) 2 M.L.J. 1024= I.L.R. (1942) Mad. 360=199 Ind. Cas. 105.

19. Rateable distribution.

See also CIVIL P. C., S. 573.

——Ss. 47 and 73—Execution—Rateable distribution.

An order under S. 73, determining the question of rateable distribution as between rival decree-holders in which the judgment-debtor has no interest does not fall under S. 47, and is not appealable. A.I.R. 1941 Rang. 113=1940 Rang. L. R. 718=194 Ind. Cas. 46.

——S. 47—Certificate purporting to be under S. 41 but not actually one contemplated by S. 41, sent to Court passing decree—Application to proceed and continue with execution and rateable distribution to executing Court is maintainable. A.I.R. 1937 All. 766=1937 A.L.J. 1168=1937 A.W.R. 910=1938 A. L.R. 35=172 Ind. Cas. 753.

——S. 47—Executing Court holding that agent of decree-holder had no locus standi to apply and application ultra vires—Order is appealable under S. 47.

The question as to the *locus standi* of the agent of the decree-holder is one in which the judgment-debtor is pre-eminently interested and a decision on that question is no doubt one which will also have effect between the decree-holder and the judgment-debtor so far as the execution, discharge or satisfaction of the decree is concerned. An order, therefore, of the executing Court holding that the agent of the decree-holder who filed an application for rateable distribution had no *locus standi* to apply and that the application was, therefore, *ultra vires*, is appealable under S. 47. A.I.R. 1938 Pesh. 63=1938 Pesh. L. J. 74=177 Ind. Cas. 872.

——S. 47—Order determining question of rateable distribution between rival decree-holders—Judgment-debtor having no interest in it—Order does not fall under S. 47—Appeal does not lie. A.I.R. 1937 Rang. 134=169 Ind. Cas. 644.

——S. 47—The question of rateable distribution when between the parties to the suit come within S. 47. A.I.R. 1934 Pat. 350=150 Ind. Cas. 970.

——S. 47—Question of splitting up of the integrity of mortgaged properties raised at the trial—Court finding that the integrity is broken but not allowing rateable distribution—Question cannot be raised again at the execution stage. (1931) 14 P.L.T. 371.

——Ss. 47 and 73—Rateable distribution—Order rejecting application for, whether appealable.

An order under S. 73 rejecting an application for rateable distribution is not an order under S. 47 determining question between parties to the suit. 1 Pat.L.T. 296=5 Pat. L. J. 415=57 Ind. Cas. 421.

——S. 47—Rateable distribution.

Plaintiff and one defendant got decrees for money against the same defendant in a partition suit; plaintiff got his decree transferred to another Court and realised a certain amount in execution. Defendant applied for rateable distribution without transfer of his decree. Order on the defendant's application is covered by S. 47. 90 Ind. Cas. 869=22 M.L.W. 740=A.I.R. 1925 Mad. 1265=49 M.L.J. 375.

——S. 47, O. 21, Rr. 102, 103 (Ss. 244, 355, Old Code)—Execution—Representative.

A mortgagee from the judgment-debtor after attachment is the representative of the judgment-debtor within the meaning of S. 244, C. P. Code. (1904) 17 M.L.J. 321.

——S. 47 (S. 244, Old Code)—Transferee of decree—Representative—Execution.

A transferee of a decree is the representative of the decree-holder soon after assignment even before recognition of the transfer by Court. (1909) 33 M. 62=9 M.L.T. 273=3 Ind. Cas. 938.

——S. 47 (S. 244, Old Code)—Representative.

The term "representative" does not include a donee from the decree-holder. (1906) 6 A.L.J. 71=1 Ind. Cas. 416=31 A. 82 (F.B.).

——S. 47 (S. 244, Old Code)—Representative—Attaching creditor of judgment-debtor.

An attaching creditor of a judgment-debtor is not his representative within the meaning of the section. An attaching creditor of a decree-holder may be a representative of the decree-holder. (1906) 11 C. W.N. 433=6 C.L.J. 437. *Also* an attaching creditor of decree-holder. 6 C.L.J. 141=29 M. 318.

——S. 47 (S. 244, Old Code)—Representative—Auction-purchaser.

The auction-purchaser in Court sale is a representative of the decree-holder within the meaning of S. 244, C. P. Code. (1906) 17 M.L.J. 291=30 M. 507=2 M.L.T. 347.

——S. 47 (S. 244, Old Code)—Representative—Auction-purchaser in execution against registered tenant—Subsequent decree for rent against the registered tenant—Purchaser representative of judgment-debtor. (1907) 13 C.W.N. 9=1 Ind. Cas. 153.

——S. 47 (S. 244, Old Code)—Representative—Auction-purchaser at sale in execution of decree against transferee of occupancy holding—Decree against recorded tenant.

The purchaser at an auction held in execution of a decree against the unregistered transferee of an occupancy holding is a 'representative' of the recorded tenant within the meaning of S. 244, Civil Procedure Code, and is entitled to apply for the setting aside of a sale in execution of a rent decree against the recorded tenant, on the ground of fraud. (1907) 8 C.L.J. 327=13 C.W.N. 98=4 Ind. Cas. 326.

——S. 47; O. 21, R. 83 (Ss. 244, 305, Old Code)—Representative—Buyer under private sale sanctioned under S. 305 is representative of judgment-debtor.

A purchaser from a voluntary seller who has sold with the consent and authority of the Court under S. 305, C. P. Code, is a representative of the judgment-debtor within S. 244 (c). (1900) 23 A. 116 =1900 A.W.N. 215.

——S. 47 (S. 244, Old Code)—Representative—Hindu father and sons.

The term "representative" has not a limited signification and means a representative in interest. The sons of a Hindu father succeeding to his property by survivorship are the father's representatives. The test is:—Can the decree be executed against the person sought to be made representative and will he be affected by the sale? (1905) 5 C.L.J. 80=11 C. W.N. 163.

——S. 47 (S. 244, Old Code)—Representative of a Hindu judgment-debtor in a mortgage suit born after decree—How far representative and bound by the decree.

The term "representative" as used in S. 244 of the Code of Civil Procedure (Act 14 of 1882) means not merely the legal representative in the sense of the heirs, executors or administrators, but includes any representative in interest, that is, any transferee of the interest of the decree-holder or judgment-debtor, who, so far as such interest is concerned, is bound by the decree. (1908) 9 C.L.J. 485=1 Ind. Cas. 213.

——S. 47—Representative of judgment-debtor—Purchaser of attached property.

The purchaser of attached property has to be deemed to be a representative of the judgment-debtor under S. 47 of the C. P. Code. A.I.R. 1949 Mad. 594=(1949) 1 M.L.J. 143.

——S. 47 (S. 244, Old Code)—Representative of judgment-debtor—Rent decree against recorded tenant—Transferee of portion of occupancy holding before decree.

Where the landlord of an occupancy holding obtains a decree for rent against his recorded tenant an unregistered transferee of the tenant into whose hands a portion of the holding had previously passed is bound by the decree and is, therefore, a representative of the judgment-debtor. (1904) 10 C.W.N. 240.

——S. 47; O. 21, R. 90 (Ss. 244, 311, Old Code)—Representative of judgment-debtor—Rent decree—Sale—Occupancy holding—Transferee of holding if may apply to set aside sale, when holding not transferable.

When an occupancy is sold in execution of a decree for arrears of rent obtained against the raiyat, a person who claims to have purchased the holding from the latter cannot apply as the representative of the judgment-debtor to have the sale set aside under S. 244 or S. 311, C. P. Code, if the holding be not transferable by custom or usage. 11 C.W.N. 312, foll. (1909) 13 C.W.N. 652=3 Ind. Cas. 461. *See also* (1906) 11 C.W.N. 312.

——S. 47 (S. 244, Cl. (c), Old Code)—Representative—Mortgage executed by husband—Decree against widow—*Prima facie* binding on inheritance —Purchaser from widow—Representative. (1904) 28 M. 119.

——S. 47 (S. 244, Cl (c), Old Code)—Representative—Parties, etc.—Ijaradar of judgment-debtor is legal representative—Right of suit.

(1) An ijaradar of property of the judgment-debtor is his representative within the meaning of S. 244, C. P. Code. (2) A decree-holder cannot sue the judgment-debtor his ijaradar for a declaration that the *ijara* was void, as the question should be determined in execution. (1889) 5 C.W.N. 654 =28 C. 492.

——S. 47; O. 21 R. 90 (Ss. 244, 311, Old Code)—Representative—'Person whose immovable property is sold'—Bengal Tenancy Act, S. 173. (1904) 9 C.W.N. 134.

——S. 47; O. 21, R. 63 (Ss. 244, 283, Old Code)—Representative.

Property attached in execution of decree—Property purchased while under attachment—Decree set aside —Separate suit maintainable. (1908) 7 A.L.J. 26 =32 A. 129=4 Ind. Cas. 406.

——S. 47 (S. 244, Cl. (c), Old Code)—Representative—Purchaser from judgment-debtor pending attachment.

A purchaser of property while it is under an attachment is a representative of the judgment-debtor

and is entitled to appeal against an order passed for sale of property purchased by him. (1905) 2 A.L.J. 265.

——S. 47 (S. 244, Old Code)—S. 244, C. P. Code, (1882) is a bar to suit against the widow of a deceased Hindu as the latter's representative for recovery of a decree debt from the separate property of the deceased in her possession. (1910) 5 Ind. Cas. 362=20 M.L.J. 308=7 M.L.T. 211=33 Mad. 423.

——S. 47 (S. 244, Old Code)—Representative, who is?—Beneficial owner.

A person for whom the predecessor of the judgment-debtor was benamidar and who is therefore really interested in protecting the property is a 'representative' of the judgment-debtor within the meaning of S. 244 of the Civil Procedure Code. (1908) 7 C.L.J. 299.

——S. 47—Representative—Stranger auction-purchaser—Whether representative of judgment-debtor and of decree-holder.

A stranger auction-purchaser is a representative of the judgment-debtor as well as of the decree-holder. Every time a question is raised as between him and one or other of the parties to the decree it is necessarily a question between him as representative of one side and the other party to the decree; and this is so even when the judgment-debtor and the decree-holder combine against him. If he holds a fraction of the interests of either side it can make no difference that the one who held that fraction before the sale chooses to abandon it after the purchaser's rights have accrued. I.L.R. (1947) Nag. 674=A.I.R. 1948 Nag. 94=1948 N.L.J. 54.

——S. 47—Representative — Sub-tenant, if bound by decree for ejectment of chief tenant.

A decree for ejectment passed against the chief tenant would be binding on the sub-tenant as he would be his representative, being a person who has derived his interest from the chief tenant. A.I.R. 1948 Cal. 172.

20. Restitution.

——S. 47—Restitution—Auction-sale set aside—Refund of price.

When a property is sold in execution of a decree which did not belong to the judgment-debtor with the result that the auction-purchaser is deprived of the property, the auction-purchaser can claim the refund of the price. A.I.R. 1938 Cal. 263=67 C.L.J. 16=I.L.R. (1938) 1 Cal. 512=182 Ind. Cas. 244.

——Ss. 47, 140 (Ss. 244, 583, Old Code)—Restitution.

The proper remedy to obtain restitution in respect of a decree which has been executed but subsequently set aside is in execution and not by a separate suit. 22 A. 79, foll. (1902) 25 A. 441=(1903) A.W.N. 100. (*See now* S. 144, C. P. Code.)

——S. 47 (S. 244, Old Code)—Restitution consequent on modification of decree in appeal—No bar to suit and recoverable also in execution: But, now *see* C. P. Code, S. 144 (2). (1903) A.W.N. 207 =26 A. 149. *Also* 7 C.L.J. 537=12 C. W. N. 310.

——Ss. 47 and 144—Restitution.

Application under S. 144 for restitution is not an application for execution under S. 47. A.I.R. 1937 Cal. 152=41 C.W.N. 157=65 C.L.J. 165=I.L.R. (1937) 1 Cal. 637=171 Ind. Cas. 212. As to Limitation, *see* A.I.R. 1932 Cal. 308=35 C.W.N. 1294. *See also* 122 Ind. Cas. 589=A.I.R. 1930 Pat. 280.

——Ss. 47 and 144—Appeal dismissed with costs to respondent—Deposit of costs in Court—Application for refund—Objection — Remedy — Applicability of S. 47 and S. 144.

Held, on the facts that neither S. 144 nor S. 47 applied to the case, and that the remedy of the appellant was to appeal against the order by which the Court directed the whole amount to be paid to defendant No. 1. No appeal was taken, and by neglecting to take an appeal the appellant lost any right to have that order varied which he might have had. A.I.R. 1935 All. 126=4 A.W.R. 1331=157 Ind. Cas. 677.

——Ss. 47 and 144—Effect of.

Section 144 cannot possibly contemplate variation of reversal of decree under a private compromise or in the course of execution proceedings. A. I. R. 1933 All. 743=1933 A.L.J. 724=1934 A.L.R. 281 =147 Ind. Cas. 813.

——Ss. 47, 144—Over-payment and satisfaction of decree—Recovery of sum over-paid.

The plaintiff obtained a money-decree against the defendant. The decree created a charge on certain bales of cotton in the possession of the plaintiff and which belonged to the defendant. The plaintiff was alleged to have sold the said bales for Rs. 143-2-6. The first Court found the value of the bales to be Rs. 1830. On appeal the lower Appellate Court declared the value of bales to be Rs. 5,511-10-0. The decree was for a sum of Rs. 4,413-7-9. The defendant prayed that the plaintiff should deduct the decretal amount from the value of the bales and claimed to recover the balance under S. 144:

Held, that S. 144, on a liberal construction applied to the case.

Held further, that the question of over payment like this and satisfaction of a decree is a matter to be decided is an application in execution and not by a separate suit. A.I.R. 1932 Bom. 96=33 Bom. L.R. 1557=136 Ind. Cas. 486.

——Ss. 47 and 151 and 144—Applicability.

Where an execution sale is set aside under O. 21, R. 92, S. 144 has no application, but restitution can be granted in the exercise of the Court's inherent power under S. 151 and the questions that arise in the proceedings for restitution in such a case come within the purview of S. 47. A.I.R. 1931 Cal. 779=35 C.W.N. 105=53 C.L.J. 49=134 Ind. Cas. 1185.

——Ss. 47 and 141—Scope of.

An application for restitution is not a matter in execution but one in the nature of suit and is covered by S. 141. A.I.R. 1930 Lah. 961=129 Ind. Cas. 204.

——Ss. 47 and 144—Restitution parties and representatives—Auction-purchaser.

An order refusing to set aside an execution sale was reversed on appeal without the auction-purchaser being a party to the proceedings. *Held*, that an order could not be made under S. 144 as no decree had been varied or reversed on appeal and that an order could not be made on the analogy of S. 144 as the auction-

purchaser was not a party to the proceedings to set aside the sale. 41 Mad. 467=47 Ind. Cas. 628.

——Ss. 47 and 144—Restitution—Suit.

An application for restitution is an application in execution and has to be enquired into under S. 47. 40 Mad. 780=5 L.W. 267=38 Ind. Cas. 806.

——Ss. 47 and 144—Restitution—Suit.

A regular suit for restitution of property wrongly sold in execution of *ex parte* decree which had been set aside by the trial Court itself, cannot fail simply because, the sale might have been set aside on an application under S. 47, C. P. Code. If necessary the plaint could be amended so as to include a prayer that the sale may be set aside or the plaint treated as an application under S. 47. 1 Pat.L.J. 43=3 Pat.L.W. 95=34 Ind Cas. 747.

——Ss. 47 and 144—Restitution—Appeal from order.

In a suit for possession against *R*. *R* died *pendente lite* and *K* and *A* applied each to be appointed as legal representative and the Court appointed *K* and passed a decree against him and the decree-holder took possession. In the meanwhile *A* appealed against his exclusion, got the order against him reversed and applied for recovery of possession which had been taken by the decree-holder. His application was granted and *N* who had previously been in possession was evicted. Thereupon *N* applied for restoration of the *status quo* and obtained an order in his favour. *Held*, that no appeal lay from the order restoring the *status quo*. 222 P.L.R. 1914=123 P.W.R. 1914=24 Ind. Cas. 941.

——Ss. 47 and 144—Restitution—Decision on merits essentials—Orders relating to collateral matters—If have the force of a decree.

An application for restitution under S. 144 is not an application for the execution of a decree and a decision on such an application on collateral matter but such as a question of limitation has not the force of a decree and is therefore not appealable. *Obiter.*—The decision of a question of limitation arising in execution proceedings may come with in purview of S. 47 and is therefore a decree as defined by the Code; but the same cannot be said of a question of limitation arising in connection with an application under S. 144. 110 P.R. 1913=117 P.L.R. 1914=22 Ind. Cas. 851.

——S. 47 and S. 144 (1)—Restitution—Court-fees Act (1890), Sch. II, Art. 11.

Application by defendant for mesne profits, against whom a suit is dismissed, for restitution under S. 144 (1) falls under S. 47 and the fee chargeable on an appeal from such an order is limited to an amount chargeable under Article 11. 11 C.L.J. 541=6 Ind. Cas. 125.

——Ss. 47, 144—Restitution—Bar of suit—Suit for possession by puisne incumbrancer paying off prior mortgage.

A suit for possession by a puisne incumbrancer who paid off a mortgagee purchaser (who had obtained a decree *ex parte* which was subsequently set aside and sale recorded) is not barred by S. 244 because by the payment of decretal amount the mortgagor ceased to have interest in the property and the subsequent suit is not one relating to execution, discharge or satisfaction of decree. 31 All. 364=6 A.L.J. 383=1 Ind. Cas. 744.

——Ss. 47 and 144—Effect of.

Applications under Ss. 47 and 144 are classed together when referred to in S. 2 of the Code and are obviously kindred and similar applications though there is a real distinction that when a decree has been actually executed and the property has passed, the application is of the nature of an application to recover possession. It is in consequence of the decree passed by the appellate Court that the application is made under S. 144 and it is in a sense a mere accident that because the decree has been fully executed, the petitioner is prevented from coming to the Court under S. 47 and is compelled to take action under S. 144, C.P. Code. It would be most inequitable that he should be penalised by being forced to stamp his application *ad valorem*. A.I.R. 1921 Bom. 67, Foll. 107 Ind. Cas. 491=A.I.R. 1923 Lah. 143.

——Ss. 47 and 144—Restitution—Power of Court.

Only the Court which executes the decree has jurisdiction to restore the property to the judgment-debtor—C.P. Code, S. 144. 113 Ind. Cas. 217=A.I.R. 1928 Pat. 502.

——S. 47—Restitution—Power of Court.

A defendant in a suit who had been exempted from the decree, filed a suit for a declaration that certain property which had been attached in execution of the decree in the other suit, did not belong to the judgment-debtor. At the instance of the plaintiff, a receiver was appointed by the Court. The suit was decreed and under the decree, the Receiver disposed of the property. The decree was reversed in appeal.

Held, that the appointment of the Receiver must be deemed to have been only in the execution department and that in order to compel him to refund the value of the property no separate suit was necessary but that the executing Court itself had jurisdiction. 85 Ind. Cas. 161=6 L.R.A. Civ. 36=A.I.R. 1926 All. 828.

——Ss. 47 and 144—Relative, scope of.

Determination of a question arising under S. 144 will naturally relate to the execution, discharge or satisfaction of the decree either of the First Court or of the Appellate Court. If the First Court's decree has been discharged by the Appellate Court, the question arising under S. 144 will naturally be a question as to the discharge of the decree coming under S. 47 of the C.P. Code. In an appeal under S. 47 of the C.P. Code. "A" was declared (reversing the lower Court's order) entitled to a certain share in the sale proceeds realised by the decree-holder which were lying in Court. Subsequently the lower Court allowed also the claim of "A" for interest and damages from the date on which the decree-holder removed from the Court, the entire sale proceeds realised by him.

Held, that the order came under S. 47, that therefore the *B*. and *O*. Government Notification No. 2576, L.A. 25 of 1921 directing under S. 35 of the Court-Fees Act that the fee chargeable on appeals from orders under C.P. Code, S. 47, shall be limited to the amounts chargeable under Schedule 2, Art. 11 of the Court-Fees Act appplied and therefore that an appeal from the Court's order in the resent instance need not be stampted *ad valorem* but that a stamp of Rs. 4 was enough. 92 Ind. Cas. 474=4 Pat. 294=7 P.L.T. 415=A.I.R. 1925 Pat. 577.

——Ss. 47 and 96 and Provincial Insolvency Act (V of 1920), Ss. 37 and 68—Right of appeal—Decree against insolvent and two others—Annulment of adjudication and vesting of insolvent's property in Official Receiver under S. 37 of the Provincial Insolvency Act—Petition to execute decree against person of insolvent and property in the hands of the Official Receiber—Order directing execution to proceed—Appeal by insolvent—Maintainability.

Held, on the facts that as the decree-holder chose to

make the insolvent a party to the execution petition not only in respect of the prayer for his arrest but also in relation to the prayer for the attachment of his property which had vested in the Official Receiver, there is no reason why the insolvent, a party to the decree sought to be executed, should not have a right to file an appeal against the order made in execution of the decree. 61 L.W. 369=A.I.R. 1949 Mad. 91=1938 M.W.N. 348=(1948) 1 M.L.J. 346.

——S. 47 and O. 21, R. 92 and Madras Tenants and Ryots Protection Act (17 of 1946), Ss. 3 and 4—Sale before coming into force of Madras Act—Sale awaiting confirmation—Application to stay confirmation under S. 4 of Madras Act—Order rejecting—Legality—Appealability of order.

The respondent obtained a decree against appellants and others and in execution thereof there was a Court auction sale on 11th September, 1946. The properties were purchased by a stranger and the execution petition was posted for confirmation of sale. Meanwhile the Madras Tenants and Ryots Protection Act (17 of 1946) had been passed and came into force. The appellants (defendants) deposisted two years' rent and applied under S. 4 of the said Act for stay of confirmation of sale. The first Court rejected the application as according to it the sale had already taken place. The sale was confirmed duly and in appeal under S. 47 of Civil Procedure Code the main ground raised was against the order under Act XVII of 1946 The appeal was dismissed as according to the appellate Court also, the sale had been held prior to coming into force of the Act. On the question whether the appeal would lie in view of the want of a provision for appeal under the Madras Act.

Held, (1) S. 4 of Act 17 of 1946 applies only to cases where property has not been sold and hence it is inapplicable to cases where auction sale has been effected but what remains to be done is only confirmation of sale by Court under Order 21, rule 92, Civil Procedure Code.

(2) As the order refusing stay would amount to deprivation of possible rights, the order in question would be a decree as it is one in pending execution proceedings and from this point of view an appeal would be under S. 47, C.P. Code, either directly against the order refusing stay or at any rate against the final order in execution petition confirming the sale consequent on the dismissal of the petition under S. 4 of the Act 17 of 1946. 63 L.W. 202=1950 M.W.N. 237=A.I.R. 1950 Mad. 512=(1950) 1 M.L.J. 347.

21. Scope.

——Ss. 47 and 151—Judgment-debtor failing to pay land revenue—Sale of mouza by tahsildar—Attachment of balance by decree-holder—Appropriation of balance by tahsildar to crown debts under S. 162, Berar Land Revenue Code—Matter held fell under S. 47.

G had failed to pay his land revenue. The *tahsildar* sold the *mouza* and was confirmed on *J* had a money-decree against *G* which he had obtained in a Civil Court. He applied for execution of that decree and asked for attachment of the balance of the sale proceeds payable to *G*.

Held, that the matter fell under S. 47, C.P. Code read with S. 151, C.P. Code, and it was a question relating to the execution, discharge and satisfaction of the decree which arose between the parties to the suit or their representatives, The term 'representative' in S. 47, C.P. Code, was not used in the restricted sense of a legal representative but it also included a representative-in-interest. The Provincial Government under powers conferred on it by S. 162, Barar Land Revenue Code, appropriated the sale proceeds except Rs. 104-0-3 for Crown debts twhich had priority and that which belonged to the judgment-debtor was transferred to the Provincial Government under the provisions of S. 162, Berar Land Revenue Code, and by operation of law, the Provincial Government became a transferee of the judgment-debtor to the extent of the amount appropriated by it and whent he decree-holder wanted to have that amount declared as attachable and claimable by him for satisfaction of his decree, a question arose between the decree-holder and the representative of the judgment-debtor-in-interest, *viz.*, the Provincial Government, and was one which could fall under S. 47, C.P. Code. A.I.R. 1945 Nag. 150=1945 N.L.J. 111=I.L.R. (1945) Nag. 496.

——S. 47 (S. 244, Old Code)—Scope of—Parties—No bar to suit by mortgagee of mortgage-decree—'Parties,' meaning of—Rival parties.

S. 244, C.P. Code, is no bar to a suit by a mortgagee of the mortgage-decree for recovery of the mortgage amount from the amount in Court deposit realized in execution of the decree mortgaged. A question arising between the mortgagee of a decree and the attaching decree-holder of the mortgagor is not a question arising between the parties to the suit within the meaning of S. 244, C.P. Code (1882), both the parties deriving their title from the mortgagor-judgment-creditor only. (1910) 20 M.L.J. 330=33 Mad. 429=5 Ind. Cas. 92=7 M.L.T. 143. *Also* 6 A.L.J. 71=31 I.A. 82 (F.B.); 25 B. 651; 25 C. 49.

——S. 47—Validity of sale is question in execution—Application under Bengal Agricultural Debtors Act, S. 8—Onus to prove that sale was illegal—Onus discharged—Effect.

The question as to the validity of the execution sale is clearly a matter, which arises between the parties to the suit and relates to the execution of the decree and, therefore, falls within the purview of S. 47. But when once an execution sale had been held there is a strong presumption to the effect that it was validly held by a Court which acted in the exercise of its ordinary jurisdiction. This being the case, the onus would lie heavily upon the applicant to show that the sale was in fact illegal on the ground that before the sale he had applied to the Debt Settlement Board for the settlement of his debts and had included in his application the debt in respect of which the execution proceedings had been taken, which resulted in the sale. On discharge of this onus, the Court would have no option but to set aside the sale even if it had received no notice under S. 34, Bengal Agricultural Debtors Act. The result would, therefore, be that even if the debt had been extinguished by the sale it would revive after the sale had been set aside and the provisions of the Bengal Agricultural Debtors Act would apply thereto. A.I.R. 1941 Cal. 58=I.L.R. (1940) 2 Cal. 334=72 C.L.J. 66=193 Ind. Cas. 451.

——S. 47—Sale in Court valuation of local law—Scope of remedy.

Where sale is held in contravention of Ss. 33 and 34, Bengal Agricultural Debtors Act, 1936, the judgment-debtor is not precluded from obtaining relief under S. 47. A.I.R. 1944 Cal. 231=48 C.W.N. 359=213 Ind. Cas. 381.

——S. 47—Scope and Applicability.

Section 47 does not apply to the Court of the Deputy Collector under the Bengal Rent Act, 1859. A.I.R. 1942 Cal. 230=I.L.R. (1941) 2 Cal. 366=199 Ind. Cas. 740.

——S. 47—Order as to whether sale is to be held by Court itself or by Collector falls under S. 47.

It is true that administrative directions relating to proclamation and other matters necessary for the carry-

ing out of the sale cannot be regarded as orders falling under S. 47, but an order as to whether the sale is to be held by the Court itself or by the Collector is a judicial order relating to the execution of the decree, and as such, it falls under S. 47. It has to be passed after a consideration of the question whether any of the judgment-debtors was an agriculturist at the date of the order of sale, and when a notice is given to the judgment-debtor under O. 21, R. 66, for the settlement of the terms of the proclamation, it is his duty to put forward his contention that he was an agricultural on the date of the order of sale and, therefore, instead of issuing a proclamation, the Court should transfer the proceedings to the Collector. If he fails to raise such a contention at that time, and the Court passes an order that the sale should be held by itself, then that order is a judicial order which is binding on the judgment-debtor. If the judgment-debtor appears and contends that he was an agricultursist at the date of the order for sale and the Court holds that he was not and proceeds to hold the sale itself, then it would be open to the judgment-debtor to appeal from that order. The same result would follow if he does not appear in reply to the notice issued to him and allows an *ex parte* order to be passed against him. A.I.R. 1939 Bom. 526=41 Bom. L.R. 1166=186 Ind. Cas. 61.

——**S. 47**—Nature of execution application explained. A.I.R. 1942 All. 442=1942 A.W.R. 296=1942 A.L.J. 533=203 Ind. Cas. 590.

——S. 47, O. 21, R. 90—S. 47, if completely independent of O. 21, R. 90.

It is incorrect to say that S. 47 is completely independent of the provisions of O. 21, R. 90. This view is opposed to the plain wording of O. 21, R. 92. If the intention of the Legislature was that objections to sale falling under S. 47, should be independently considered even after the sale, the Legislature might have been expected to make a provision to that effect, but it is significant that no such provision has been made. A.I.R. 1942 Lah. 153=44 P.L.R. 302=I.L.R. (1942) Lah. 559= 203 Ind. Cas. 166 (F.B.).

[Overrules A.I.R. 1939 Lah. 113=I.L.R. (1939) Lah. 103=41 P.L.R. 436=184 Ind. Cas. 393.

——S. 47 and O. 21, R. 58—Difference between proceedings under.

There is a difference between proceedings under O. 21, R. 58 and those under S. 47. For the purpose of deciding a claim under O. 21, R. 58, the Court is bound to find who was in possession at the time of the attachment. It is not bound to find who had the title to the land attached and can refer parties to a suit for determining title. For the purpose of deciding a claim under S. 47, it is necessary to go into all the contentions of the parties including the contention as to title. The scope of the inquiry cannot be restricted merely to the question of possession at the time of the attachment. The difference between the two inquiries is, therefore, not a difference in procedure so much as a difference in the scope of the inquiry. A.I.R. 1940 Mad. 881=(1940) 2 M.L.J. 305=1940 M.W.N. 826. *See also* A.I.R. 1939 Sind 161=I.L.R. 1939 (Kar.) 589=182 Ind. Cas. 470.

——S. 47—Scope—Objections under S. 47, if can be taken at any stage.

A judgment-debtor can prefer objections under S. 47, Civil P. Code., at any stage of the execution proceedings. Those objections have to be determined on their merits, unelss a particular objection had been adjudicated upon by the Court earlier, or unless the judgment-debtor is debarred from agitating the particular objection. Where the objection, that the decree ought not to have been transferred to other Court as the judgment-debtors had properties within the jurisdiction of the Court which passed the decree sufficient to satisfy the decree, had not been adjudicated upon at a previous stage of the proceedings, and the order of transfer was made *ex parte*, and without giving the judgment-debtors an opportunity to contest the decree-holder's prayer for transfer, the Court ought to consider the objection on its merits. A.I.R. 1939 Cal. 651=187 Ind. Cas. 67. *See also* A.I.R. 1939 Mad. 867=I.L.R. 1940 Mad. 123=50 L.W. 472.

——Ss. 47, 53—S. 53 applies to a ancestral or joint family property coming to hands of decendant on partition.

Section 53 is as comprehensive as it can be. Section 53 does not limit the liability of ancestral property to property devolving by survivorship and S. 47 or S. 53 apply equally to ancestral or joint family property which comes into the possession of the son or other descendant on a partition made between him and his ancestor. It is deemed to be the property of the judgment-debtor for the purpose and within the meaning of S. 53. A.I.R. 1939 Sind 258=I.L.R. (1939) Kar. 300=184 Ind. Cas. 582.

——S. 47 (2)—"The Court" in S. 47 (2).

The words "the Court" used in sub-s. (2) of S. 47, refer to the Court specified in sub-s. (1), that is to say, "the Court executing the decree" and not to a Court trying a "separate" suit. The latter kind of Court has been expressly excluded. A.I.R. 1938 Nag. 534=1938 N.L.J. 336=I.L.R. (1940) Nag. 334=180 Ind. Cas. 903.

——S. 47—Scope of.

Directions not embodied in the decree are not effective so far as the execution of the decree is concerned. A.I.R. 1938 Nag. 411=175 Ind. Cas. 761.

——S. 47 and Or 2, r. 22—Application under O. 21, R. 22.

Application under O. 21, R. 22 falls under S. 47. A.I.R. 1938 Rang. 292=178 Ind. Cas. 118.

——S. 47—Scope—Dispute between two decree-holders who were parties to suit.

Section 47 is wide enough to include a dispute between two decree-holders. Where two decree-holders who were parties to the suit have divergent interests in execution of their decrees, the matter is clearly a dispute under S. 47. A.I.R. 1937 Cal. 730=41 C.W.N. 1248=I.L.R. (1938) 1 Cal. 175=173 Ind. Cas. 516.

——Ss. 47, 141, 2; Or. 9, R. 9—Provisions of O. 9, R. 9, if apply to objections under S. 47—Application under S. 47—Nature of—Determination of such application—Whether a decree.

Order 9, Civil P. Code, does not apply to execution proceedings. But the provisions of O. 9, R. 9, are applicable to objections made under S. 47. When orders of dismissal for default were generally excluded from the definition of 'decree', the underlying intention was that such orders of dismissal were to be set aside under O. 9, R. 9, just as much in a case under S. 47 as in the case of a regular suit. The language of S. 141 of the Civil P. Code, is also sufficiently wide to cover the case of an application under S. 47. The main reasons which have led to the exclusion of execution proceedings from the purview of S. 141 are that the law as laid down in the Civil Procedure Code as well as in the Limitation Act, contemplates successive applications for execution of a decree, and that such applications are proceedings in suits. Neither of these reasons is applicable to an application under S. 47 of the Civil P. Code. The

combined effect of Ss. 2 (2) and 47 is that an application under S. 47 stands on the footing of a suit, and the determination of such an application is tantamount to a decree. A.I.R. 1937 Oudh 337=1937 O.L.R. 251=13 Luck. 309=1937 O.W.N. 503=168 Ind. Cas. 314.

——S. 47—Objection in execution by parties to suit and by strangers—Dispute between parties should be decided in execution—Strangers' objections should be decided by separate suit.

Where in execution, persons who were parties to the suit obstruct the delivery of land to the purchaser, claiming an occupancy right therein, the question should be decided in execution proceeding but as to others who were not parties to the suit, a regular suit is the only remedy and S. 47 Civil P. Code, is no bar. A.I.R. 1936 Mad. 733=169 Ind. Cas. 456.

——S. 47, whether provides only for procedure and forum for decision.

Section 47 provides only for the procedure and the forum whereby a decision is to be reached. It does not give the powers by virtue of which the Court decides, these powers have to be sought in other provisions of the Code. A.I.R. 1936 Mad. 636=1936 M.W.N. 503=43 L.W. 773=167 Ind. Cas. 356. *See also* A.I.R. 1936 Mad. 618=59 Mad. 642=71 M.L.J. 209=164 Ind. Cas. 472.

——S. 47—Scope of.

Section 47 refers to three matters, the execution, discharge or satisfaction of the decree. The execution of a decree is the carrying out of a decree; the discharge or satisfaction of the decree also involves the idea of carrying out the decree. None of these three words implies restitution which is a different idea and implies the restoring of something which has been taken in execution and to that extent the rectification or alteration of some proceeding in execution, discharge or satisfaction. Restitution is in fact the converse of the ideas embodied in S. 47. A.I.R. 1935 All. 126=1935 A.L.R. 854=4 A.W.R. 1331=157 Ind. Cas. 677.

——S. 47, O. 34,—Functions of Court executing simple money decree and under O. 34.

No distinction is drawn by S. 47 between the functions of a Court executing a simple money decree and one executing a decree under O. 34. But there is a difference between a decree which leaves the manner of its execution to be decided by the executing Court and one which specifies certain property as chargeable with the debt found due and unconditionally directs its sale to satisfy the decree. A.I.R. 1934 Lah. 438=15 Lah. 772=35 P.L.R. 36=153 Ind. Cas. 772.

——S. 47 (3)—Dispute between rival representatives of one party—"For the purposes of this section".

Section 47, sub-s. (3), must be read as ancillary to sub-s (1) and only comes into operation where there is a question arising between the parties to the suit or their representatives relating to the execution, discharge or satisfaction of the decree, and it does not apply to a case in which the question is between rival representatives of one party, the other party having throughout disclaimed any interest in the question. The words "for the purposes of this section" in sub-s. (3) seem clearly to introduce the limitations contained in sub-s. (1) and it is impossible to read sub-s. (3) as an entirely independent provision. Before sub-s. (3) comes into operatiou there must be a dispute between the parties and it must relate to the execution, discharge or satisfaction of the decree. A.I.R. 1933 Bom. 396=35 Bom.L.R. 609=57 Bom. 641=146 Ind. Cas. 336.

——S. 47—Scope of.

Section 47, is mandatory and in regard to a matter that properly falls under that section, the Court is bound to decide it in execution and the parties are not to be referred to a separate suit. A.I.R. 1933 Mad. 825=1933 M.W.N. 1182=38 L.W. 714=66 M.L.J. 263=57 Mad. 49=148 Ind. Cas. 356.

——Ss. 47, 95, 145, 151—Suit for injunction—Execution of security bond for getting temporary injunction—Mode of enforcing bond—Ss. 47, 145, whether apply—Inherent power—Maintainability of suit—Court, whether juridical person—Assignment by Court.

Pending a suit for declaration of title and temporary injunction restraining the defendants from cutting and removing trees, the plaintiff executed a registered security bond giving an undertaking to the Court to make good to the defendants whatever loss was sustained by them on account of the injunction to the extent of Rs. 15,000. The suit was dismissed against some of the defendants and the latter applied in execution for assessment and recovery of damages under the security bond. The District Judge held that neither S. 145, S. 47 nor S. 151, was applicable and that the only remedy was by way of suit:

Held, (*i*) that S. 145 could not apply as the section is not applicable as between the parties to the suit;

(*ii*) Section 95 did not apply as the amount claimed exceeded Rs. 1000;

(*iii*) the remedy by way of suit was not available as the undertaking was to the Court and not to any person;

(*iv*) that in the circumstances, the Court had inherent power to enforce the bond under S. 151, Civil P. Code. A.I.R. 1933 Mad. 691=38 M.L.W. 385=65 M.L.J. 342=1933 M.W.N. 985=56 Mad. 989=145 Ind. Cas. 1011.

——S. 47—Scope of.

Where the question is either that a decree was passed against a dead person or was not passed against him at all and, therefore, it is a nullity, pure and simple, the dispute does not relate to the execution of the decree but aims at its utter destruction. Where a decree is without jurisdiction or is otherwise utterly null and void, and can, therefore, be ignored by a person, this protest is not merely as to its execution but he impeaches the decree itself. Such a dispute, is not within the purview of S. 47 at all. A.I.R. 1931 All. 490=54 All. 25=1931 A.L.J. 715=134 Ind. Cas. 236.

——S. 47—Scope of.

The omission of the words "or to stay the execution therof" in S. 47 of the Civil P. Code, was deliberate and intended to exclude orders staying or refusing to stay execution of a decree from the definition of "decree" in S. 2 (2). A.I.R. 1931 Rang. 221=9 Rang. 354=133 Ind. Cas. 491.

——S. 47—Scope—Bar of suit—Sale of share of a co-parcener in joint family—Auction-purchaser—Suit for partition—Decree-holder an auction-purchaser.

S. 244, C.P. Code (1882), does not bar a suit by an auction-purchaser for the share of a co-parcener in Hindu joint family for partition and allotment of the share to him, the decree-holder himself being the auction purchaser makes no difference. 1 Lah.134=1 Lah.L.J. 10=56 Ind. Cas. 254.

——S. 47—Scope of.

The object of separately numbering the sub-sections of S. 47 is to make the several sub-sections independent of each other. 20 C.W.N. 679=32 Ind. Cas. 524.

——S. 47—Scope of—Claim nullifying effect of decree, if within section.

A claim nullifying the effect of a decree cannot be

made by the judgment-debtor under S. 47 of the Code. 39 Cal. 587=16 C.W.N. 516=14 Ind. Cas. 4.

——S. 47—Scope—Dispute between judgment-debtors inter se.

When a dispute between judgment-debtors *inter se* is such as to affect the decree-holder, it falls within S. 47, C.P. Code. I.L.R. (1949) Nag. 708=A.I.R. 1949 Nag. 398=1949 N.L.J. 442.

——S. 47—Scope—Execution of mortgage decree—Question of rateable contribution by different items of mortgaged property.

The question of rateable contribution by the different items of mortgaged property towards the liquidation of the amount of the mortgage decree, is one of adjustment of equities between the holders of the different items, and is, therefore, a question relating to the execution, discharge or satisfaction of the decree, within the scope of S. 47, C.P. Code. (1948) Nag. 595=A.I.R. 1949 Nag. 155=1949 N.L.J. 74.

——S. 47—Scope—Mortgage-decree—Execution—Plea raising question of automatic reduction of mortgage-debt or caim to set-off against mortgage-debt—If can be raised and decided.

The executing Court must take the decree as it stands and cannot entertain pleas which are in contradiction of the decree. A plea rising a claim to an automatic reduction of the mortgage-debt or to a right of set-off against the mortgage-debt is not one relating to the execution, discharge or satisfaction of the mortgage-decree and cannot therefore be entertained or determined by the executing Court. 26 Pat. 97=A.I.R. 1948 Pat. 208.

S. 47—Scope—Mortgage suit—Suit by puisne mortgagee—Prior mortgagee made party—Decree for sale without directing payment of amount due to prior mortgagee on his mortgage before sale—Execution—Objection by prior mortgagee claiming payment of amount due to him before sale of items in his possession as purchaser in execution of his decree or his mortgage—Competency. 27 Pat. 332.

——S. 47—Scope—Question if minor judgment-debtor was properly represented in suit—If can be gone into.

The question whether a minor judgment-debtor was properly represented in suit is not one which can be investigated in execution proceedings. If a minor judgment-debtor contends that he was not properly represented in suit and was not thus a party to the decree, he cannot come under S. 47, C.P. Code, as if he was a party to the suit. I.L.R. (1946) Nag. 623=223 Ind. Cas. 305=1946 N.L.J. 249=1946 Nag. (Rul.) 115=A.I.R. 1946 Nag. 275.

——S. 47—Scope—Usufructuary mortgage—Suit on—Final decree for sale—Execution—Application by judgment-debtor claiming compensation for waste by decree-holder after decree—Competency—Separate suit—Necessity. 221 Ind. Cas. 522=(1945) 1 M.L.J. 67=A.I.R. 1945 M. 179.

——S. 47—Scope of.

Recovery of land in excess of share under partition decree—Final decree can be amended and excess land restored without separate suit, under ss. 47 and 151. 78 Ind. Cas. 1039=19 S.L.R. 302=A.I.R. 1925 Sind. 126.

——S. 47—Scope of.

An auction-purchaser under a decree which has been, after confirmation of the sale, set aside as the result of a separate suit, can recover his purchase-money from the decree-holder and his remedy is by application under S. 47. 40 Mad. 299, 43 Mad. 107, 19 Cal. 683 (P.C.) Foll; 74 Ind. Cas. 873=21 A.L.J. 228=45 All. 369=4 L.R.A. (Civ.) 161=A.I.R. 1923 All. 394 (F.B.)

——S. 47—Scope of.

An order restoring possession to the judgment-debtor on the ground that the possession was given to the decree-holder under a misapprehension that the decree-holder had satisfied condition of the decree, is an order within S. 47 and is appealable as a decree. 72 Ind. Cas. 879=A.I.R. 1923 Oudh. 16.

——S. 47—Scope of.

Though applications for restitution may have to be brought under S. 144 yet they are in substance execution proceedings and as such cognizable by the executing Court. They also come under S. 47, C.P. Code, and under that section suits can be treated as execution proceedings and proceedings as a suit. 67 Ind. Cas. 319=A.I.R. 1922 Nag. 198.

——S. 47—Scope of.

After the decree-holder had obtained the possession under the final decree for foreclosure it was set aside in appeal. The application of the judgment-debtor for compensation under S. 144, C.P. Code, was dismissed and he appealed against the order.

Held, that the question of compensation related to execution discharge or satisfaction of the decree in appeal and being thus an order coming within S. 47 of the Code. 67 Ind. Cas. 225=18 N.L.R. 15=A.I.R. 1922 Nag. 62.

——S. 47—Scope of.

Where there is an appeal as from an order under S. 2, C.P. Code, it would be difficult to bring that matter under S. 47 so as to allow of a second appeal. 33 C.W.N. 1170=A.I.R. 1930 Cal. 249=126 Ind. Cas. 207.

——S. 47—Scope of.

Adverse possession—Decree for possession—Possession acquired without Court's interevention is still to be ascribed to decree. Decree is effective *qua* that part of land over which possession had been proved. 31 P.L.R. 578=A.I.R. 1930 Lah. 803.

——S. 47—Scope of.

Questions relating to execution, discharge or satisfaction of decrees—Parties or representatives not only cannot raise such questions by separate suit but not even in separate suit except by way of defence when judgment-debtor was kept out of knowledge of execution proceedings, until after suit was brought, by fraud of decree-holder or the judgment-creditor. 33 C.W.N. 165=56 Cal. 467=117 Ind. Cas. 558=A.I.R. 1929 Cal. 247.

——S. 47—Under S. 47 there is no distinction between a money decree and a decree under O. 34. A.I.R. 1929 Lah. 762.

——S. 47 and O. 21, R. 90—Scope of.

A prayer under S. 47 can be joined with a prayer under O. 21, R. 90 in one application. It is only reasonable that the executing Court should deal with every objection which the judgment-debtor puts forward in one and the same proceeding.

If it is necessary for the objectors to make an election in the first Court, that Court ought to put them to their election and not itself to choose at a late stage which of the two objections it should consider and which it should not consider. 7 Pat. 331=107 Ind. Cas. 848=A.I.R. 1928 Pat. 272.

——S. 47 and O. 21, R. 52—Effect of.

O. 21, R. 52 does not override S. 47. A decree-holder obtained a decree against four judgment-debtors who were jointly and severally liable for a portion of the decree, while one of them was responsible for the balance in his individual capacity. Certain property was attached which the decree-holder alleged belonged to the judgment-debtor who was individually liable, while the

other judgment-debtors alleged that it belonged to them, and was liable only for that portion of the decree for which they were jointly and severally liable. The decree-holder applied for the attachment of the sale proceeds of the property, and the three judgment-debtors who were jointly and severally liable filed an objection. A suit was pending between the judgment-debtors as to the ownership of the property, and the executing Court held that it had no jurisdiction to decide the question inasmuch as a suit was pending and the question of title would be decided in that suit.

Held, that the matter fell under S. 47 and the executing Court must decide it. 102 Ind. Cas. 179=A.I.R. 1927 All. 574.

——S. 47 and Art. 138, Limitation Act.

Art. 138 of Limitation Act cannot override the Provisions of S. 47 of C.P. Code. 53 Cal. 781=43 C.L.J. 345=30 C.W.N. 649=95 Ind. Cas. 494=A.I.R. 1926 Cal. 798 (F.B.).

——S. 47—Scope of.

The procedure under S. 47 and under R. 103 are not cumulative and the aggrieved party cannot at his option proceed by way of suit or appeal. 90 Ind. Cas. 952=1926 M.W.N. 599=1925 M.W.N. 577=A.I.R. 1925 Mad. 1198=51 M.L.J. 106.

——S. 47—Scope of order under.

An order passed under S. 47 should conclusively and finally determine the rights of the parties and should not be contingent upon future events alternative in their nature. 89 Ind. Cas. 300=3 Rang. 132=A.I.R. 1925 Rang. 271.

——S. 47—Scope of order under.

Order in proceedings under S. 47 is decree only if it determines a question which parties ask court to decide as to their rights or liabilities and not if it decides merely incidental questions of procedure. The duty of the Court to decide any of the questions that may arise does not come into existence till the parties are brought before the Court or after having been served they fail to appear. 84 Ind. Cas. 576=2 Pat.L.R. 222=A.I.R. 1924 Pat. 683.

——S. 47—Interpretation of.

A wide construction should be put upon the provisions of the Act with regard to introducing parties by devolution and of the desirability of ascertaining all possible points in execution proceedings without a fresh suit. But that which should in reality form the basis of an independent suit against a separate party for some act done by himself cannot be introduced as a question to be tried in execution proceedings in another suit. 68 Ind. Cas. 973=31 M.L.T. 131=49 I.A. 220=1 Pat. 581=24 Bom.L.R. 1251=27 C.W.N. 29=36 C.L.J. 542=20 A.L.J. 988=16 M.L.W. 905=4 Pat.L.T. 1=4 L.R.P.C. 1 =A.I.R. 1922 P.C. 304=42 M.L.J. 589 (P.C.).

——S. 47 and O. 21, R. 2—Effect of.

O. 21, R. 2 does not in any way limit or affect the operation of S. 47 and does not prevent the Court from deciding any question out of the execution of the decree. 70 Ind. Cas. 859=A.I.R. 1922 L.B. 31=1 Bur.L.J. 43.

22. Title.

——S. 47—Executing Court, if can enter into question of mortgagor's title.

Where mortgagees obtained decrees on mortgages against the mortgagor and the mortgagor never took the plea that he was not entitled to mortgage the entire property which he had mortgaged and the decree were made final:

Held, that the Court executing the decree could not go behind them and all that it had to see was that the property against which the mortgagee-decree-holder desired to proceed was in the possession of the mortgagor or his representative.

A Court executing a decree will not in execution department enter into the complicated question as regards the nature of the title of the mortgagor. A.I.R. 1935 All. 269=1935 A.L.R. 108=1935 A.W.R. 87=1935 A.L.J. 214=153 Ind. Cas. 984.

——S. 47, O. 21, R. 90 (Ss. 244, 311, Old Code)—Application to set aside sale on the ground of fraud.

An application to set aside a sale alleging fraud is one falling under S. 244, even though the District Judge on appeal found there was no fraud; a second appeal lies in such a case. The test in such cases is to consider what the application was and whether at the time it was made it was an application under S. 244. 26 C. 324 and 26 C. 539, followed. (1904) 31 C. 385.

——S. 47—Second Appeal—Right of—Execution proceedings. *See* C.P. Code, S. 100. 52 P.L.R. 13.

——S. 47, O. 21, R. 91, O. 43, R. 1 (Ss.244, 311, 588, Old Code)—Second appeal—Sale, petition to set aside—Fraud alleged not proved—Sale set aside for irregularity—Second appeal.

A mere allegation of fraud in an application under S. 311 of the Code of Civil Procedure without any attempt in any way to substantiate it, cannot give a right of second appeal in a case which would not otherwise have arisen. 18 C. 442 ; 22 C. 802; 19 M. 22, foll. (1900) 5 C.W.N. 124 : 28 C. 4.

——S. 47 (S. 244, Old Code)—Separate suit barred—Execution of decree—Surety, proceedings against—Appeal against pre-emption decree—Surety for payments of mesne profits. 113 P.L.R. 1909=4 Ind. Cas. 1005=147 P.W.R. 1909.

——S. 47 (S. 244, Old Code)—Separate suit not barred—Suit for delivery of possession by mortgage-decree-holder-auction-purchaser for possession. (1906) 6 A.L.J. 71=31 A. 82=1 Ind. Cas. 416 (F.B.).

——S. 47 (S. 244, Old Code)—'Separate suit'—Defence to suit—Decree-holder-purchaser.

S. 244, C.P. Code, does not bar the trial of any issue involved in question falling within the scope of the section, if the issue is raised at the instance of a defendant in a suit brought against him. A defendant is entitled to raise, by way of defence to a suit for possession by the decree-holder purchaser the inaccuracy of the sale ceertificate. (1908) 19 M.L.J. 1=1 Ind. Cas. 193.

——S. 47 (S. 244, Old Code) "Separate suit"—Does not include defence.

A defendant in a suit is not debarred by S. 244 of the Code of Civil Procedure from raising a point in defence of his title even though he could have raised it but did not raise as in former execution proceedings to which he was a party. (1908) 9 C.L.J. 464=4 Ind. Cas. 168.

——S. 47—Suit maintainability—Conveyance, execution of by Court—Rights of parties under the conveyance, how to be enforced—Title to property when vests—Agreement for repayment of profits collected—Suit to recover by way of mesne profit.

When the decree merely directed the defendant to execute a conveyance of certain property and further that if he failed to execute it the Court would execute it on his behalf and the conveyance was executed by the Court, nothing further remained to be done in the executions proceedings, and if either of the parties wanted to enforce his rights under the conveyance a separate suit was maintainable. The title to the property in such a case did not vest in plaintiffs till the conveyance was executed. Hence between the date of the execution of the agreement of sale and the execution of conveyance, the vendor was the proper person to collect the profits. If the vendor agreed that he would repay the plaintiff profits which

he must collect either himself or by his agent or by another person on his behalf, a suit to recover from the defendant by way of mesne profits the amount payable to him is not for recovery of the profits of immovable property wrongfully received by the defendant and is not barred by Art. 31 of the Provincial Small Cause Courts Act, from the cognizance of the Small Cause Court. (1910) 12 C.L.J. 599=7 Ind. Cas. 487.

——S. 47 (S. 244, Old Code)—Suit lies—Foreclosure decree—possession formal and actual—Limitation.

Where formal possession has been given under a final foreclosure decree, but the mortgagor has continued in actual possession the remedy is by suit and not under S. 244 of the Code of Civil Procedure. Consequently the law of limitation applicable is that governing suits not execution proceedings. 1906 A.W.N. 213=3 A.L.J, 504=28 A. 722.

——S. 47 (S. 244, Old Code)—Suit lies—Suit by partition for possession by purchaser of co-parcener's rights in execution sale.

S. 244 is no bar to a suit for partition by a purchaser of a co-parcener's rights in joint family property in execution sale of a decree against the co-parceners. (1906) 29 M. 294.

——S. 47 (S. 244, Old Code)—Suit lies—No bar—Suit by subsequent mortgagee for recovery of surplus sale proceeds.

S. 244 is no bar to a suit by a subsequent mortgagee for recovery of the surplus sale proceeds recovered by the prior mortgagee himself (after satisfaction of his first mortgage) in satisfaction of same decree obtained by him in respect of an altogether different transaction behind the back of the subsequent mortgagee. 9 C.W.N. 989 =33 C. 92.

——S. 47 (S. 244, Old Code)—Suit for profits subsequent to prior suit. 11 M.L.J. 332.

——Ss. 47, 144 (Ss. 244, 583, Old Code)—Review—Recovery of mesne profits for period between decree of High Court in appeal and decree in review—Separate suit—Application in execution. 1906 A.W.N. 171 28 A. 665=3 A.L.J. 556.

——S. 47, O. 21, R. 89 (Ss. 244, 310 (A), Old Code)—Sale in execution of decree—Application to set aside the sale on the ground of the decree-holder's fraud.

An application by the judgment-debtor to set aside sale of his property, in execution of a decree passed against him on the ground that the sale was brought about by the fraud of the residents (who included the decree-holder of the village where the lands were situate falls within the purview of S. 244 of the Civil Procedure Code, 1882. (1909) 11 Bom.L.R. 1113=33 Bom. 698=4 Ind. Cas. 253.

——S. 47 (S. 244, Old Code)—Sale—Suit to set aside decree and sale for fraud.

A suit to set aside a decree and the sale in execution thereof and to recover the property sold is not barred by S. 244, C. P. Code. (1900) 5 M.W.N. 559.

——S. 47 O. 21, R. 2 (Ss. 244, 258, Old Code)—Satisfaction of decree not certified—Suit for declaring that decree is satisfied—Maintainability of—Specific Relief Act, S. 56.

S. 258, C. P. Code, does not limit the operation of S. 244. A separate suit will not lie to declare that a decree has been satisfied though such satisfaction has not been certified under S. 258, C. P. Code. (1904) 8 C.W.N. 395=31 M. 480.

——S. 47 [S. 244 (c), Old Code]—Right of party defendant to object to sale of property ordered to be sold by the decree.

Where the objection is to the decree itself and not merely to the execution discharge or satisfaction of the decree. S. 244 (*c*) does not apply to the case. Where a party defendant to a decree for sale of immoveable property objected to the sale on the ground that since the decree he has been adopted into another family and became entitled to the property as member of the adoptive family to which the property belonged.

Held, that the objection was to the decree itself and not to the execution, discharge or satisfaction merely, and that S. 244 (*c*) did not apply to the case. (1905) 16 M.L.J. 545=30 M. 26.

——S. 47, (S. 244, Old Code)—Sale—Application to set aside on ground of fraud—Compromise purporting to be made by the applicants—Right of one of the applicants to show that he was no party to compromise. (1908) 14 C.W.N. 823=3 Ind. Cas. 116.

——S. 47, O. 45, R. 15 (Ss. 244, 610, Old Code)—Restoration of property—Decree of High Court reversed by Privy Council—Purchaser pending appeal—No party to the appeal—'Representative.'

A purchaser in auction of property pending an appeal to the Privy Council is a representative of the Judgment-debtor within the meaning of S. 244, C.P. Code and therefore, if the decree is reversed by the Privy Council which decrees restoration of property, an enforcement of that order might be sought under S. 610 against the auction-purchaser although he was not a party to the appeal. (1906) 3 A.L.J. 110=28 A. 337=1906 A.W.N. 43.

——S. 47 (S. 244, Old Code)—Reversioners brought on record as Hindu widow's representatives—Competency to object in execution—Suit.

A decree was passed against a Hindu widow. On her death the reversioners to her husband were made parties to the decree. They objected to the execution on the ground that the debt was contracted without legal necessity. Their objections were overruled and they filed the present suit. *Held*, that the suit was not barred by the provisions of S. 244, Civil Procedure Code, inasmuch as they could not contend in execution proceedings that the mortgagor was not competent to make the mortgage I.L.R. 21 All. 277, foll. (1907) 5 A.L.J. 745=1908 A.W.N. 188=1 Ind. Cas. 704=31 A. 45.

——S. 47 (2)—Applicability—Conversion of proceeding as suit—When permissible.

Sub-S. (2) of S. 47, C.P. Code, comes into operation only if the conditions laid down in sub-S. (1) are satisfied, *i.e.*, if there are questions arising between the parties to the suit when the decree was passed or their representatives and those questions relate to the execution, discharge, or satisfaction of the decree. It is only in such cases that the Court may treat a proceeding under this section as a suit or a suit as a proceeding; but in a case where a minor judgment-debtor shown in the decree as a judgment-debtor and as properly represented comes up before the Court and states that he was not a judgment-debtor in the decree in asmuch as he was not properly represented. S. 47 (1), C.P. Code, does not apply to him as on his own contention he is not a party to the suit, and therefore sub-S. (2) also has no application. Such a person's proceeding cannot be treated as a suit for the purposes of S. 47, C.P. Code. I.L.R. (1946) Nag. 623=1946 N.L.J. 249=223 Ind. Cas.305=A.I.R. 1946 Nag. 275.

——S. 47 (2)—Applicability—Conversion of suit into proceeding.

Under S. 47 (2), C.P. Code, a suit can be converted into a proceeding subject to any objection as to limita-

tion and jurisdiction, only if it is one to which S. 47 is a bar. A suit which is not maintainable on any other account cannot be treated as a proceeding under that section. I.L.R. (1948) Nag. 63=A.I.R. 1948 Nag. 147=1948 N.L.J. 24.

——S. 47 (2)—Application treated by Court as suit—Limitation Act, Art. 181.

Where an application filed under S. 47, C.P. Code, is subsequently treated by the Court as a suit under the provisions of S. 47 (2), C.P. Code, there can be no donbt that as regards limitation, the Article of the Limitation Act which applies is Art. 181, which relates specifically to applications and prescribes a period of three years with effect from the date when the right to apply accrues. I.L.R. (1947) 1 Cal. 22.

——S. 47 (3)—Jurisdiction—Decision as to legal representative—Binding character—Wrong person made legal representative—Sale—Validity as against true heir—Erroneous decision—If vitates sale.

It is the duty of the executing Court to decide who is the legal representative of the deceased judgment-debtor, and it has jurisdiction to decide the question. If the Court finds and decides, whether rightly or wrongly that a specified person is the legal representative, the proceedings taken in execution will be legal and the sale will bind the true legal representative unless he takes steps within time to have the sale set aside. The fact that the decision was wrong will not vitiate the execution proceedings and the sale as being without jurisdiction. 48 Bom.L.R. 814=A.I.R. 1947 Bom. 164.

——S. 47 (3)—Question whether any person is representative of party—Duty of executing Court to decide.

Where two persons institute separate execution proceedings in respect of the same decree, each claiming to be the legal representative of the deceased decree-holder, the question as to who is the real legal representative of the deceased is a question to be decided by the executing Court under S. 47 (3), C.P. Code. 51 C.W.N. 186.

Synopsis.

——S. 48.

1. **Applicability.**
2. **Continuation or Revival of previous application.**
3. **Date of decree.**
4. **Deduction of time.**
5. **Fraud.**
6. **Fresh Application.**
7. **Instalment decree.**
8. **Miscellaneous.**
9. **Mortgage decree.**
10. **Retrospective Effect.**
11. **Scope.**
12. **Subsequent order.**

1. Applicability.

——S. 48—Applicability—Decree of Presidency Small Causes Court transferred for execution to an ordinary Civil Court in the moffusil.

As S. 8 of the Civil Procedure Code expressly excludes the application of S. 48, Civil Procedure Code, to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay, S. 48 would not apply to a decree passed by any of those Courts and the only provision which prescribes a time limit for the execution of such a decree is Article 182 of the Limitation Act which alone will apply. (1911) 21 M.L.J. 777=I.L.R. 36 Mad. 108, approved. (1941) 1 M.L.J. 365, held not correctly decided.

S. 31 of the Presidency Small Cause Courts Act does not attract the operation of S. 48, Civil Procedure Code, because the latter section only provides for a limit of time for execution and does not deal with the procedure for execution. 63 L.W. 328=A.I.R. 1950 Mad. 504=1950 M.W.N. 265=(1950) 1 M.L.J. 437 (F.B.).

——S. 48—S. 48 does not apply to any proceeding in any Court of Small Causes established in the Towns of Calcutta, Madras and Bombay. This is made clear in S. 8 of the Code. A.I.R. (Vol. 29) 1942 Pat. 128=23 P.L.T. 87=8 B.R. 256=197 Ind. Cas. 627.

——S. 48—Applicability—Stay of execution of mortgage decree—Surety bond—Liability of surety—Contingent liability on deficiency in mortgage sale being ascertained—Application to enforce—Time limit—Starting point.

In September, 1926, one *M* obtained a preliminary mortgage decree in the Sub-Court, Cuddalore, against three persons. Against that decision the defendants preferred an appeal to the High Court. When the decree-holder applied for the passing of a final decree the defendants filed an application to the High Court for stay of the proceedings. Stay was granted by the High Court on condition of the judgment-debtor furnishing security. In pursuance of the order of the High Court the defendants executed a security bond which provided among other things as follows: "We further agree that if on the execution application of the decree-holder immediately after the disposal of the appeal by the High Court an amount in excess of Rs. . . . . should be found due to the decree-holder and if the hypothecated properties do not on sale fetch the amount of which they have been accepted as security we and our legal representatives will be personally liable for the difference between the said execution amount (exclusive of costs) and the value of the security accepted by the Court."

The High Court confirmed the decree of the lower Court in August, 1929, and the final decree was passed on 19th March, 1931. The decree-holder realised a portion of the amount due to him by sale of the property by the year 1941, the last execution order being, dated 21st February, 1941. On 20th February, 1944, the legal representative of the decree-holder, the latter having died in the meanwhile, applied to the Sub-Court, Cuddalore, for transmission of the decree and the security bond to the City Civil Court, Madras, for enforcing the security bond as against the sureties. The latter thereupon contended that as the decree was more than twelve years old by the date of the petition, the execution was barred under S. 48 of the C.P. Code.

Held, that though, S. 48 of the Code was applicable for the enforcement of the liability of the surety under S. 145, Civil Procedure Code, inasmuch as under the term of the surety bond the liability of the sureties was only a contingent liability arising after the mortgaged properties were sold and the deficiency was ascertained, the present application which was filed within 3 years from that date was within time both under S. 48 of the Code and also under Art. 181 of the Limitation Act. I.L.R. (1949) Mad. 504=A.I.R. 1949 Mad. 285=61 L.W. 552=1948 M.W.N. 561=(1948) 2 M.L.J. 215.

——S. 48—Applicability—Last day of twelve yeare period expiring on Sunday—Execution petitions filed the next day—If barred.

A party should not suffer for the act of the Court and if a Court is not sitting on the last day when he should do any particular act he will be in time if he does it on the next day when the Court sits. This principle has been recognised by the provisions of the General Clauses Act

and also by the express provisions of S. 4 of the Limitation Act.

Held, applying this principle, that where the last day of the twelve years' period fixed under S. 48 of the C. P. Code expired on a Sunday on which day the Court was closed and the execution petition was filed on the next day, it was in time. 61 L.W. 573=1948 M.W.N. 615=A.I.R. 1949 Mad. 275=(1948) 2 M.L.J. 234.

——S. 48—Applicability—Decree granting injunction—Decree prohibiting defendant from obstructing village path.

A decree prohibiting the defendant from putting any obstruction in the village path is one granting permanent injunction, and is not one of the kind of decrees governed by S. 48, C.P. Code. Such a decree cannot be said to have been spent up after expiry of 12 years from the date it was passed. 25 Pat. 397=12 B.R. 466=224 Ind. Cas. 37=A.I.R. 1946 Pat. 392.

——S. 48—Applicability—Decree directing execution of conveyance.

Barring decrees granting injunctions, S. 48 applies to all other decrees. A decree directing the execution of a conveyance comes under the expression "directs the delivery" in S. 48, C.P.C. 16 M.L.T. 399=26 Ind. Cas. 244.

——S. 48—Applicability—Decrees other than those for injunction.

S. 48 governs applications for execution of all kinds of decrees except those for injunction. 32 All. 499=7 A.L.J. 420=6 Ind. Cas. 188.

——S. 48—Compromise decree.

S. 48 of the present Code is more extensive than S. 230 of the Old Code and covers compromise decrees. 39 Bom. 256=17 Bom. L.R. 178=28 Ind. Cas. 478.

——S. 48—(S. 230, Old Code)—Order sanctioning a compromise.

An order sanctioning a compromise under S. 257-A, C.P.C., is neither a new decree nor an order for the payment of money within the meaning of S. 230, C.P.C. 4 M.L.T. 233=(1906) 18 M.L.J. 548.

——S. 48 (S. 230, Old Code)—Mortgage of mortgage-decree after 12 years.

Where a person took a mortgage of a mortgage-decree after 12 years from the date of the decree which was under execution at the time, the mortgagee of the decree is entitled to the benefit of the execution and S. 230, C.P.C. (1882), is no bar to a suit by the mortgagee to recover the mortgage amount due to him from money realized by the mortgagor (decree-holder). (1909) 20 M.L.J. 330=33 Mad. 429=7 M.L.T. 143=5 Ind. Cas. 92.

Bar of limitation.

——S. 48—Application for execution and transfer of decree filed within 12 years—Application for execution in transferee Court also filed within that period—Order for transferor and certificate of non-satisfaction signed and transmitted to transferee Court beyond 12 years—Execution, if barred.

S. 48, C. P. Code, requires that the application for execution should be presented within 12 years of the date of the decree. It is the presentation of the application within the time limit prescribed which matters. If the presentation is irregular at the inception and the irregularity is subsequently cured, the application so presented, relates back to the date of presentation. The period of limitation laid down in the section cannot be curtailed by delays which may be caused by the machinery provided for in the C.P. Code, for the transfer of decrees. Where an application for execution and transfer of a decree is filed in the Court which passed the decree within 12 years of the date thereof, and while this application is pending an application for execution of the decree is also filed in the transferee Court within that period, the execution of the decree is not barred under S. 48, C.P. Code, although the order for transfer and the certificate of non-satisfaction of the decree are signed and transmitted to the transferee Court beyond 12 years from the date of the decree. The failure of the Court which passed the decree to send the certificate of non-satisfaction and other relevant papers to the transferee Court within time is a mere irregularity and does not affect the jurisdiction of the latter Court. I.L.R. (1948) 1 Cal. 275=51 C.W.N. 851=A.I.R. 1947 Cal. 424.

——S. 48—Transfer of decree for execution—Calculation of limitation, starting point of.

In cases of transfer of decrees for execution, the date of the order of the transfer is the date with effect from which the transferee Court has jurisdiction, and the order of the transfer does not date back to the date of application for transfer. Where an application for transfer is filed before, but the order for transfer is made after the expiry of limitation, the execution is barred by time and the fact that the decree-holder had, in anticipation of the transfer, put in an execution petition before the expiry of limitation, will make no difference. A.I.R. (Vol. 32) 1945 Mad. 70=57 L.W. 602=1944 M.W.N. 707=(1944) 2 M.L.J. 403.

——S. 48—Execution of transferred decree—Limitation applicable.

The period of limitation applicable to the execution of a decree, transmitted by one Court to another for execution depends on the chracter of the Court which passed the decree, and not on the character of the Court executing it. A decree transferred by the Presidency Small Cause Court is governed by twelve years' rule of limitation. A.I.R. (Vol. 19) 1932 Sind 116=26 S.L.R. 91=140 Ind. Cas. 702.

——S. 48—Court has no inherent jurisdiction to restore an application for execution merely on the ground that a fresh application is not competent on account of 12 years having elapsed since the decree was passed. A.I.R. (Vol. 23) 1936 Pesh. 191=165 Ind. Cas. 268.

——S. 48—It is not open to the parties to extend by their agreement the period of limitation laid down as applicable to execution matters. 164 Ind. Cas. 416=39 C.W.N. 1036.

——S. 48, O. 21, r.10: O. 21, r. 17 (Ss. 230 and 245, Old Code)—Unverified petition for execution—Return for amendment—No saving of the period of limitation of twelve years.

An unverified petition may be returned for amendment under S. 245, C.P.C., but the fact that it is so returned and represented after being amended does not prevent the operation of the limitation of twelve years under S. 230, 12 M.L.J. 435=26 M. 101.

2. Continuation or revival of previous application.

See also 6, *infra*.

——S. 48—Application for appointment of receiver in execution—Receiver appointed—Obstruction to delivery—Execution petition dismissed—Subsequent application to continue execution petition—Competency.

The decree-holder who had obtained a decree in 1929 and whose prior execution petition had been dismissed, filed in 1940 an execution petition for the appointment of a receiver to take possession of the property and deposit the income thereof into Court. The judgment-debtors who were served with notice of the application reported through their pleader that they had no objection to the prayer asked for in the execution

petition. The decree-holder paid batta for delivery of the properties to the receiver, but the properties were not delivered as a third party was obstructing delivery. The application for removal of obstruction was rejected on the ground that the decree-holder, was only entitled to the income of an undivided moiety and was not entitled to apply for the appointment of a receiver. Consequent on this, the execution petition itself was "dismissed" by order dated the 6th March, 1941. An appeal against the order on the petition for removal of obstruction was also eventually dismissed. On 24th June, 1943, the decree-holder filed an execution application for the revival and continuance of the prior execution petition of 1940 by granting the relief for the appointment of a receiver. On a contention that the application was incompetent and barred under the provisions of S. 48, C.P. Code.

Held, that the order dismissing the previous execution petition did not finally dispose of the execution petition and it must be considered to be pending and that the later application could be properly considered to be a mere continuation or revival of the previous application. 61 L.W. 353=A.I.R. 1948 Mad. 498=(1948) 1 M.L.J. 385.

——S. 48—Prior application struck off as judgment-debtor was in prison.

S. 48 contemplates not a termination of the proceedings in execution as a whole but a termination only of proceedings upon a particular application. Where an application for execution is struck-off or dismissed, because the judgment-debtors are in prison and want time to be heard and it is thought advisable to suspend the execution, an application filed after the striking off of the prior application is not a "fresh" application within the meaning of S. 48, but a continuation of the previous application. I.L.R. (1945) Kar. 339=223 Ind. Cas. 402=A.I.R. 1946 Sind 32.

S. 48—Fresh application or application in revival —Test.

The decree-holder filed an execution application for sale of the mortgage land. As the land was agricultural the papers were made over to the Deputy Commissioner for sale of the land. Notices of the sale were issued to the judgment-debtors who failed to appear as they were in prison. An application was made by the judgment-debtors that the proceedings for sale of the mortgaged land be stayed until they could appear and take part in the proceedings. The Deputy Commissioner thereupon sent the papers back to the Court, inquiring it the proceedongs were to be stayed, or what other action should be taken. It was as the result of this that notice was issued on the decree-holder. A pleader who had no authority to speak for the decree-holder, appeared and made an application that the execution application be struck off and the costs of the execution application be awarded to the judgment-debtors. On this application the Court made an order striking ofi the execution application and allowing costs at a time when more than 12 years had elapsed from the date of the decree. It was argued that the order on the execution application was final and that the subsequent application for execution which was filed more than 12 years after the date of the decree was a fresh application as was shown, among other things, (*a*) by the omission from the list of judgment-debtors of one *C* who was shown as defendant 6 in the previous execution application, (*b*) by the omission of a sum of Rs. 1,680 which was the sum claimed in the previous application by way of damages according to the terms of the decree, (*c*) by the fact that the sum claimed in the subsequent execution application was a sum of Rs. 49,000 against a sum of Rs. 45,000 claimed in the previous execution application, and (*d*) by the fact that in the subsequent execution application certain other lands were included as mortgaged lands:

Held, (1) that in considering whether an order passed by the Judge finally disposed of the execution application the intention of the Judge to be gathered from all the circumstances of the case was the concluding factor and where on the decree-holder's statement the Court had deliberately dismissed the execution application in full satisfaction of the decree the Court could not be said to have intended to keep alive the execution application. All the facts and circumstances clearly indicated that it was not the intention of the Court or the decree-holder to dismiss or have dismissed finally the execution application and any words to that effect in the order of the executing Court were used with inadvertence. The execution application, therefore, must be deemed to have been suspended and kept pending and not to have been finally disposed of:

(2) that the differences between the previous and the subsequent execution applications were more in form than in substance and that the subsequent application was within the ambit of the decree, it was not a fresh application but should be deemed to be one for the revival of the previous application which was pending. A.I.R. (Vol. 33) 1946 Sind 32=I.L.R. (1945) Kar. 339 =223 Ind. Cas. 402.

——S. 48—Petition 'closed' for statistical purposes —Fresh application or revivor.

Where a fresh petition is filed as the result of a former petition having been "closed" for statistical purposes it is not regarded in law as being a fresh application but an application to revive or continue the former application. It is not, therefore, barred on account of its being filed more than three years after the former petition. A.I.R. (Vol. 33) 1946 Mad. 170=58 L.W. 581=1945 M.W.N. 714=I.L.R. (1946) Mad. 527=(1945) 2 M.L.J. 456.

——S. 48—Application to bring legal representative of deceased judgment-debtor on record.

When the judgment-debtor dies pending an execution proceeding, it is not necessary for the decree-holder to file a fresh application under O. 21, R. 11. He can continue the same execution proceeding against the heirs of the deceased by bringing them on record in place of the original judgment-debtor. An application to bring the heirs on the record is not a fresh application for execution so as to attract S. 48. A.I.R. (Vol. 33) 1946 Cal. 51=49 C.W.N. 522=80 C.L.J. 223=224 Ind. Cas. 248.

——S. 48—Second application for same relief.

Where an application for execution is dismissed by the Court not because of the decree-holder's default or negligence but on the ground that the case was an old one and the Court intended to remove it from its list, the second application made for similar relief must be regarded as continuation of the first one. A.I.R. (Vol. 28) 1941 Lah. 62=193 Ind. Cas. 334. Reversing A.I.R. (Vol. 27) 1940 Lah. 35=186 Ind. Cas. 860.

——S. 48—Question whether subsequent application is one to continue earlier execution—Principles of determination.

In determining whether subsequent execution application is one to continue the earlier execution or is a fresh application, regard must be had to the substance rather than to the form of the application. The first condition necessary to sustain the plea that the subsequent application should be treated as an application to continue the earlier execution is that the earlier execution case must not have been finally disposed of. If there was an interruption in the earlier proceeding by reason of which the Court, being unable to grant the appropriate relief, struck off the case, it cannot be said to be have been

finally disposed of. It will then be considered to be still pending, and may, if proper case is otherwise made out, be revived and continued. The second application will not, however, be considered to be a continuation of the former one if it is found to be different in its scope, or if the former execution is found to have been abandoned by the decree-holder or to have been dismissed through his default or laches :

Held, on facts that the subsequent application should be treated as a continuation of the previous application. A.I.R. (Vol. 27) 1940 Pat. 432=6 B.R. 359=186 Ind. Cas. 385.

——S. 48—Application necessitated by Court's striking off previous application.

An application in execution which is necessitated by the action of the Court in striking off a previous application for execution, is not in law a fresh application, but must be taken to be an application to revive or continue the former application. A.I.R. (Vol. 27) 1940 Mad. 566=1940 M.W.N. 345=51 L.W. 739=193 Ind. Cas. 325=(1940) 1 M.L.J. 537.

——S. 48—Auction sale ordered—Compromise prior to sale—Application of decree-holder for postponement—Execution struck-off—Subsequent application for execution.

The question whether an application is a fresh application or is merely one to revive the previous execution proceedings has always to be decided upon the circumstances of each case and in each case the substance of the matter must prevail over the form of the application.

Upon the execution application of the decree-holder, the Court ordered an auction sale of the property of the judgment-debtors. But prior to the sale the parties arrived at a compromise and the decree-holder applied for the postponement of the sale Therefore the execution case was struck off. On the subsequent application for execution, alleged to be time-barred :

Held, that the mere fact that the Court ordered the case to be struck-off did not show that the application came to an end nor did the fact that the subsequent application was on the usual tabular form suggests that it was a fresh application.. A.I.R. (Vol. 27) 1940 All. 270=1940 A.L.J. 301=1940 A.W.R. 281=I.L.R. (1940) All. 377=188 Ind. Cas. 323 (F.B.).

——S. 48—Application to amend execution application by adding receiver as party—Receiver already functioning when execution petition was filed—Amendment, if can be allowed 12 years after decree.

Where twelve years had passed after the passing of a decree a receiver was sought to be brought upon record in the execution application to represent the judgment-debtors already on record, even though the receiver was functioning for the judgment-debtors at the very time when the execution petition was filed. On the question whether the amendment sought could be permitted.

Held : A receiver is only the representative of the judgment-debtor. He does not become the owner but in order effectively to get at the properties without any danger of the right to do so being challenged, the receiver is also made a party. The fact that he was operating even when the execution petition was filed, and that the decree-holder could have found this out with diligence on his part will only be a circumstance for saddling him with costs when allowing the amendment and will not be a circumstance converting the amendment asked for into a fundamental one, or justifying the refusal of such an amendment. 1950 M.W.N. 774=(1950) 2 M.L.J. 661=A.I.R. 1951 Mad. 417.

——S. 48—Court, if can allow amendment to enable decree-holder to proceed.

Where an application has not been properly made within the 12 years' period provided in S. 48, no amendment can be allowed which would have the effect of depriving the judgment-debtor of putting forward the plea of limitation. But in special and expeptional circumstances the Court has discretion to order such amendments in order to enable the decree-holder to proceed further with execution. A.I.R. (Vol. 27) 1940 Mad. 19 =1939 M.W.N. 988=187 Ind. Cas. 334.

——S. 48—Compromise in execution proceedings providing for instalments, and on default balance to be realised by sale of attached property—Attachment to continue till payment of entire decretal amount—On default application for execution—Application held not barred.

The decree-holder entering into a compromise with the judgment-debtor and thereby giving him time for payment of the decretal amount can neither be considered to be in default nor can he be prejudiced thereby.

A decree-holder obtained a decree on 1st November, 1923. On 22nd December, 1928 he applied for execution for the third time and some property of the judgment-debtor was attached and ordered to be sold. On the date fixed for sale, the parties filed a compromise by which the decretal amount was agreed to be paid by eleven yearly instalments and it was provided that in case of defaut about any instalments, the entire amount remaining due was to be realized by sale of the attached property, which, it was agreed, should remain under attachment so long as the entire amount was not paid off. On this compromise being filed, the case was sent to records. On default being made the decree-holder applied on 6th February, 1936, for sale of attached property and stated in the application that the application was in continuation of the application of 22nd December, 1928 :

Held, that the execution of the decree was not barred under S. 48. The application in question must be deemed to be in revival of the previous application. A.I.R. (Vol. 27) 1940 Oudh 26=1939 O.L.R. 669 (2)= 1939 O.W.N. 947=184 Ind. Cas. 845.

——S. 48—Nazir reporting decree-holder to be absent at sale and Court dismissing execution for default—Second execution application held in continuation of first one and within time.

In execution of a mortgage decree an application was filed on 21st June, 1929, for having the property of the judgment-debtor advertised for sale. The sale proclamation was actually issued on 14th May, 1930. In the proclamation the date of sale fixed was 3rd July, 1930. On 7th July, 1930, there was an order of the Court stating that the sale was to be held the next day by the *Nazir*, that is to say, on 8th July, 1930. On that day the Court upon the report of the *Nazir* that the decree-holder was absent, recorded an order dismissing the execution case for default of the decree-holder. On 19th August, 1933, the decree-holder presented another execution application. The question was whether the second application was within time :

Held, that the second application was within time as it must be treated as a continuation of the first as the *Nazir* having been commissioned to hold sale, the presence of the decree-holder was optional. It would not, therefore, be said that there was default on decree-holder's part in conducting the first execution and hence the order of the Court dismissing the first application for default must be treated as equivalent to an order for striking off the case or removing it from the file for the convenience of the Court. A.I.R. (Vol. 26) 1939 Cal. 331=69 C.L.J. 165=43 C.W.N. 42184 Ind. Cas. 151.

——S. 48—Revival of application—Sale set aside under O. 21, R. 90—Subsequent application for re-sale.

In execution certain properties were sold but subsequently 12 years after date of decree, sale was set aside under O. 21, R. 90, C.P.C. Again, the decree-holder filed execution application for the re-sale of same property:

Held, that the subsequent application for re-sale was an application for revival of the previous execution and since S. 48 applies to fresh application, the section did not apply to this case.

Held, further that Art. 181, Limitation Act, applied and not S. 48, C.P.C. A.I.R. (Vol. 24) 1937 Pat. 43=3 B.R. 238 (2)=18 P.L.T. 90=166 Ind. Cas. 950 (1).

——S. 48—Decree sent to Collector for execution—Civil Court striking off case—Subsequent application for sale of remaining attached property.

Under the rules governing the execution of decrees transferred to Collectors, which are contained in Revenue Book Circular III-8, the Collector has no power to dispose of the sale proceeds but when he has realised them he must remit them to the Civil Court together with the decree. The order of the Civil Court striking off the case at the time of sending the decree for execution to Collector in Form C, is clearly not an order dismissing the case. The case is bound to go back to the Civil Court when the decree is returned by the Collector to the Civil Court with the sale proceeds, and the order striking off the case amounts to merely one adjourning the proceedings until that date. A subsequent application for the sale of the remainder of the attached property is not a fresh application for execution either in form or substance, but merely an application ancillary to the substantive application. The application, therefore, for the sending of a second Form C for sale of the remainder of the attached property to the Collector is not barred by limitation. A.I.R. (Vol. 24) 1937 Nag. 92=I.L.R. (1937) Nag. 522=169 Ind. Cas. 974.

——S. 48—Application filed within 12 years from date of decree—Notice for appointment of guardian of minor respondent not issued within 12 years.

An application for execution which is filed within 12 years from the date of the decree will not be time-barred under S. 48, even though notice for appointment of a guardian for a minor respondent is issued only after the expiry of 12 years. The issuing of notice to somebody representing a minor judgment-debtor is only ancillary to the application and cannot be treated as a fresh application. A.I.R. (Vol. 24) 1937 Mad. 113=71 M.L.J. 808=1936 M.W.N. 1366=44 M.L.W. 805=166 Ind. Cas. 648.

——S. 48—Temporary release from attachment on objection of judgment-debtor—Whether brings proceeding to close.

The right of a decree-holder to obtain execution of the decree will not necessarily be defeated by objections raised by the judgment-debtor, or proceedings taken by the Court for which the decree-holder is not responsible which prevent the completion of execution proceedings initiated by an application made within the period of limitation. The temporary release of a judgment-debtor's property from attachment because he had raised the objection that he was not a partner of the judgment-debtor firm does not bring the execution proceedings to a final adjudication, but postpones them. A.I.R. (Vol. 23) 1936 Lah. 843=39 P.L.R. 8=161 Ind. Cas. 960.

——S. 48—Mortgage suit—Final decree—Application for execution by sale of specified properties—Further prayer that other properties should be sold—Subsequent application for sale of other property—Whether continuation of prior application.

The decree-holders instituted a suit against the judgment-debtors on the basis of a mortgage deed and obtained a preliminary decree which was made final on 21st August, 1916. The first application for execution was made on 27th November, 1916, and was dismissed on 17th January, 1919. The second application for execution was made on 13th March, 1919, in which the decree-holders prayed for sale of certain properties and mentioned that if these properties proved insufficient, then they would give a list of the other mortgaged properties later but as the property sought to be sold was ancestral, the decree was trnsferred to the Collector for execution on 22nd May, 1920, where these proceedings continued till 2nd February, 1931. After these had been sold by the Collector, the case was returned to the Civil Court and consigned to the record room. During the period between 12th February, 1924, and 15th March, 1927, the estate of the judgment-debtors was under the management of the Court of Wards. On 16th March, 1931, the decree-holders made the present application. The judgment-debtors pleaded that it was incapable of execution in view of the provisions of S. 48, C.P.C.

Held, by the Full Bench (*Sulaiman, C.J., contra*) that the application of 1919, so far as it related to the second prayer, was not legally disposed of by any order. The order passed by the Court transferring the application for execution to the Court of the Collector in regard to the properties specified in the application did not have the effect of disposing of the second prayer in the application. Consequently, the application of 1916, was nothing else but an application in continuation of the former application of 1919, and not a 'fresh' application within S. 48, and hence was in time. A.I.R. (Vol. 21) 1934 All. 481=1934 A.L.J. 202=1934 A.L.R. 510=3 A.W.R. 513=56 A. 791=148 Ind. Cas. 1017 (F.B.).

——S. 48—Prayer for precept—Issue of precept after twelve years while application is pending.

Where in an application for execution a prayer is made that a precept be sent to another Court with regard to some money which was due to the judgment-debtor from another person within twelve years of date of decree and remains pending till after expiry of the twelve years, the precept can be issued even after the expiry of the period if the application is till pending. A.I.R. (Vol. 21) 1934 Lah. 610 (2) =35 P.L.R. 548=152 Ind. Cas. 685.

——S. 48—Compromise between parties during execution—Instalment payment and default clause—Decree in accordance with compromise—Execution file kept pending—Default by judgment-debtor—Execution, application for—Maintainability.

During the execution of a decree a compromise was arrived at by the parties according to which while the property was to remain under the attachment of the Court, the judgment-debtor was to pay the amount due in instalments. A default clause was also embodied in the compromise that in default of any one instalment the decree-holder would be entitled to recover the whole sum due by sale of the property attached. A decree was passed accordingly and the file was kept pending. The judgment-debtor defaulted and decree-holder applied for execution. It was contended that no decree could be passed in execution either on the agreement or

on compromise of parties and hence the execution application was not maintainable:

Held, that the execution proceedings were not fully disposed of and the file was kept pending in execution at the instance of the parties, and that, threrefore, the application could not be deemed to be a fresh one nor the proceedings deemed to have been taken for the execution of the new decree passed during execution proceedings. (1933) 142 Ind. Cas. 26 (Hyd.).

——S. 48—Section 48 would apply only when a fresh execution petition has to be filed, and not when an execution application is made in a pending execution petition. A.I.R. (Vol. 18) 1931 Mad. 303=33 M.L.W. 359 1931 M.W.N. 48=60 M.L.J. 628=131 Ind. Cas. 610.

——S. 48, O. 22, Rr. 3, 4, 12—Decree-holder can revive proceedings when suspension is not through his fault—Application to continue proceedings against legal representatives of judgment-debtor, whether fresh application.

When an application is made by a decree-holder to continue the proceedings against the legal representative of a deceased judgment-debtor, the application may be made in the pending *darkhast* against the judgment-debtor and it need not be by a separate application, and even if a separate application is made by the decree-holder against the representative of the deceased judgment-debtor it is not a fresh application within the meaning of S. 48.

Per *Patkar, J.*—Under R. 12 of O. 22, Rr. 3 and 4 of the order are not applicable to proceedings in execution of a decree. The proper procedure in execution is regulated by O. 21, R. 16, in the case of a deceased decree-holder and O. 21, R. 22 and S. 50 in the case of a deceased judgment-debtor. The fresh application contemplated by S. 48 is a substantive application for execution and not an ancillary application made with the object of continuing or reviving pending execution proceedihgs. When the execution of a decree has been suspended through no fault of the decree-holder, he has a right to revive the execution proceedings. A.I.R. (Vol. 18) 1931 Bom. 425=33 Bom.L.R. 858=134 Ind. Cas. 730.

——S. 48—Previous application not proceeded with—Bar removed—Fresh application, if one to revive proceedings which had to be stopped.

An application for execution must be treated as a continuation of the previous application where the previous application could not be proceeded with on account of bar having been placed by the allowance of the claim; and once the bar is removed, that execution can proceed and the fresh application is nothing more than an application to revive the proceeding which had to be stopped. A.I.R. (Vol. 21) 1934 Pat. 532 =16 P.L.T. 301=155 Ind.Cas. 831.

——S. 48—Suspension of proceedings for no fault of the decree-holder—Subsequent application within three years of removal of obstacle—Limitation Act (9 of 1908), Sch. I, Art. 182 (5).

Where execution proceedings on an application for execution were merely suspended for the time being by reason of sale proceedings going on before the Revenue Court at the instance of another decree-holder and the suspension of the execution proceedings were not for any fault of the decree-holder and the application for execution had not been finally and completely disposed of:

Held, that a subsequent application for revival of execution proceedings could not be deemed to be a fresh application and would not be barred if made within three years of the date on which the obstacle to execution was removed. A.I.R. (Vol. 21) 1934 Oudh 92=11 O.W.N. 126=1934 O.L.R. 318=148 Ind. Cas. 451.

——S. 48—Property attached in execution of decrees of two Courts higher and lower—Proceedings in lower Courts stopped—Application thereafter to Higher Court for rateable distribution is a continuation of the lower Court proceeding and is not barred by S. 48. 64 Ind. Cas. 493=15 M.W.N. 245=1921 M.W.N. 507=A.I.R. 1922 Mad. 3=41 M.L.J. 378.

——S. 48—Revivor of former application—Limitation Act, Art. 181.

S. 48 of the C. P. C. has no application to the case of a revival of an antecedent application for execution which has been in suspense by reason of some bar or has been stayed pending the determination of a subsequent litigation. Art. 181 of the Limitation Act applies and the decree-holders have three years from the date of the removal of the bar. 3 Pat.L.J. 103=5 Pat.L.W. 21=44 Ind. Cas. 560.

——S. 48—Continuation of old applications—Previous application interrupted by circumstances beyond decree-holder's control.

S. 148, C. P. C. applies to execution applications made after the new code came into operation. Where an application for execution was made 12 years after the passing of the decree but within 3 years from the last application, the application was not barred under S. 48, C. P. C., as it was but a continuation of the previous application. The theory of continuation applies to cases where the previous application was interrupted by circumstances not under the control of the decree-holder. 21 Ind.Cas. 923 (Cal.)

——S. 48—Continuation of application—Stay owing to orders of Court.

If an application for execution be treated as a fresh application made after 12 yesrs from the date of decree, the decree-holder must bring his case under S. 48 (2) C. P. Code. But where the execution was stayed for a period owing to an application by judgment-debtor under S. 50 Insolvency Act, an application for execution made after that period, though after 12 years, is deemed as a continuation of the old application and hence decree-holder need not establish the provisions of S. 48 (2). 16 Ind.Cas. 541 (Cal.).

——S. 48, O. 21, R. 17—Impleading true representative after 12 years from decree—Effect of amendment.

An amendment to an execution petition made under sub-cl. (1) of O. 21, R. 17, with the sanction of the Court relates back to the originlal presentation of the petiton.

Where an application for execution was made against a wrong legal representative within 12 years of the decree but it was amended after the expiry of 12 years from the date of the decree, by bringing the name of the true legal representative on record:

Held, that the amendment recalled to the original representation and the application was not barred under S. 48. A.I.R. (Vol. 22) 1935 Mad. 161=41 L.W. 173=68 M.L.J. 261=1935 M.W.N. 15=155 Ind.Cas. 327.

——S. 48, O. 22, R. 12—Death of judgment-debtor—Fresh application—Substitution of legal representative, more than 12 years after decree.

The decree-holder is entitled, when his judgment-debtor dies in the course of execution proceedings, to bring on record the judgment-debtor's legal representative in the execution proceedings already initiated. It is not necessary to present a new execution petition. Therefore, where an application for execution is duly filed within 12 years of the date of the decree and judgment-debtor

dies during the pendency of the application, his legal representative can be brought on the record even after the expiry of 12 years from the date of the decree. Section 48 which bars fresh applications for execution made more than 12 years from the date of the decree, is not applicable to such a case. A.I.R. (Vol. 18) 1931 Mad. 303=33 L.W. 359=1931 M.W.N. 48=60 M.L.J. 628=131 Ind.Cas. 610.

——**S. 48**—Application for execution by decree-holder in 1920—Objection raised by judgment-debtor—Attachment ordered to continue but sale stayed until disposal of appeal by judgment-debtor—Appeal disposed of in 1928—In March, 1928 order passed that no application being made by decree-holder, that record be consigned to record room but attachment was to continue—Order held not to have dismissed application for execution but merely to have postponed execution—S. 48 held not applicable—Later application by decree-holder held to be made to continue pending proceedings. 123 Ind. Cas. 113=31 P.L.R. 321=A.I.R. 1930 Lah. 647.

——**S. 48**—Execution application filed within limitation but arrested without fault of decree-holder—Application to continue the execution made beyond limitation—Latter application is merely ancillary to first and is not barred. 24 A.L.J. 437=94 Ind.Cas. 613=A.I.R. 1926 All. 331.

——**S. 48—Continuation of application.**

If a mortgagee decree-holder entitled to proceed against any one of the mortgaged properties is obstructed by some of the judgment-debtors and not by laches on his part, he can revive the proceedings which temporarily abated owing to interruption and continue his proceedings in execution against that property even though there are others and he is not bound to enquire whether such property is available. 3 O.L.J. 706=38 Ind.Cas. 411.

——**S. 48 (1) (a)—Application for execution dismissed for want of sufficient process fees—Restoration.**

The execution of a decree is not barred merely because the application for restoration of an execution petition made within 12 years but struck off on account of insufficient process fees, is made after 12 years. 33 All. 57 =8 A.L.J. 412=9 Ind.Cas. 817 (F.B.).

——**S. 48—Prior application for attachment—Subsequent application for sale.**

S. 48 only bars a fresh application after 12 years. An application for sale is nothing but a continuance of the prior application for attachment and is not barred though made after 12 years. 8 M.L.T. 367=7 Ind.Cas. 707.

——**S. 48—(S. 230, Old Code)—Previous application for arrest struck off as judgment-debtor was absconding.**

An application for the arrest of judgment-debtor being struck off, because the judgment-debtor absconded, a fresh application after 12 years, which is not otherwise barred, may be taken as in continuation of the previous application and is thus not barred under S. 48 (S. 230, Old Code). 6 P.L.R. 1910=125 P.W.R. 1910=6 Ind.Cas. 490.

——**S. 48 and O. 21, R. 11—Defective application within time—Correction at Court's direction after time.**

An application to execute an order awarding mesne profits, made on the last day of the 12th year after the order but which came for hearing after 12 years, is not barred. Also an application presented in time but corrected at the Court's direction and represented after time, is not defective in any way and is not barred. 7 M.L.T. 353=5 Ind. Cas. 474.

——**S. 48—Continuation of application—Prior order closing proceedings.**

Where a mortgage decree was passed on 6th December, 1892 and after a series of applications for execution the Court passed the following order on 27th October, 1950. "First defendant's heirs not brought on the record. *Proceedings closed*". Plaintiff presented his next application on 3rd April, 1907. *Held*, that the order "proceedings closed" did not amount to dismissal and the present application was not barred. 6 M.L.T. 333=3 Ind. Cas. 940.

3. Date of decree.

——**S. 48—Partnership suit—Final decree for accounts directing payment of deficit court-fee before execution—Payment of court-fee subsequent to decree—Execution—Limitation—Starting point—Date of decree or date of payment of court-fee.**

The period of 12 years under S. 48, C. P. Code, runs from the date of the decree to be executed, *i.e.*, the date on which it is passed. Where the final decree in a suit for accounts of a partnership directs the plaintiff to pay the deficient court-fee stamp before the execution of decree such a provision does not make the decree in that suit a conditional decree. The decree is capable of execution the moment it is passed provided the plaintiff pays the deficient court-fee. The fact that the plaintiff chooses to put off the payment of the court-fee does not extend the period of limitation so as to entitle the plaintiff to a period of 12 years from the date when he chooses to pay and actually pays the court-fee. It cannot be said of such a decree that it is not capable of execution except on the happening of a contingency, *viz.*, the payment of the deficit in court-fees. The decree being capable of execution on the very day it is passed if the plaintiff chose to pay the amount which he was liable to pay in respect of the deficit in the court-fees, limitation for execution starts on the date of the decree itself and an application presented beyond 12 years of that date, though within 12 years of the date of payment of the deficit court-fee would be out of time and barred. A.I.R. 1949 Bom. 379=51 Bom.L.R. 608.

——**S. 48—Date of decree—Criterion—Executable preliminary decree—Application for execution beyond 12 years of such decree but within 12 years of the final decree—If barred.**

The criterion date of the decree for the purposes of S. 48, C. P. Code, is the date on which the decree becomes operative, namely, that on which the plaintiff is at liberty to file an execution petition to enforce a relief which the Court has granted him.

In a partition suit a preliminary decree was passed on 3rd March, 1932, giving the plaintiff some immediate executable money reliefs and was followed by a final decree on 8th September, 1932, and the plaintiff filed an execution petition for the money reliefs as well as other reliefs on 8th September, 1944, though a prior execution petition of 1942 in respect of the money reliefs was pending. On a contention that the petition filed in 1944 was barred by the provisions of S. 48, C. P. Code

Held, (1) that it was clearly open to the plaintiff to file an execution petition to enforce the preliminary decree reliefs granted to him on 3rd March, 1932, and so far as such reliefs were concerned, this was the criterion date for commencing the 12 years period for purposes of S. 48, C. P. Code. Hence, the petition filed on 8th September, 1944, was clearly barred under S. 48.

(2) The execution petition in 1944 could not be treated as a continuation of the pending execution petition filed in 1942, for it was filed outside the 12 years prescribed by law and in it the plaintiff had sought other reliefs in addition to those sought in the petition of 1942,

but it was open to the plaintiff to proceed with that pending application. 61 L.W. 565=A.I.R. 1949 Mad. 251=1948 M.W.N. 653=(1948) 2 M.L.J. 249.

——S. 48—"Date of the decree"—Partition suit—Date of judgment or date on which decree is actually drafted and signed.

"The date of the decree" for the purposes of computing the period of twelve years prescribed by S. 48, C. P. Code, is the date of the judgment though the decree may have been drafted and signed on a later date than the judgment. Where under a judgment in a partition suit the adjudication becomes ripe for execution or the date of the judgment in that the respective rights of the parties have been adjudicated and decided on, the date of the judgment is "the date of the decree" for purposes of S. 48, and the mere fact that the formalities to be observed in drafting the decree had yet to be carried out would not postpone the starting point of limitation to the date on which the decree is drawn up and signed. 59 L.W. 145=1946 M.W.N. 147=A.I.R. 1946 Mad. 348=(1946) 1 M.L.J. 163.

——S. 48—Date of decree—Amendment subsequent to date of decree.

S. 48, C. P. Code, is self-contained and provides for all such contingencies as may operate to postpone the starting point of the period of 12 years. Amongst the contingencies so enumerated in Cl. (*b*) of sub-S. (1) and Cls. (a) and (b) of sub-S. (2) of the section, an amendment subsequent to the date of the decree does not find place. Therefore, unless the decree either in its original form or in its amended form is construed to be a decree granting an injunction, the section is a bar to the execution of the decree after the expiry of 12 years irrespective of its having undergone a change by its amendment. 25 Pat. 397=224 Ind.Cas. 37=12 B.R. 466=A.I.R. 1946 Pat. 392.

——S. 48—Amendment of decree under Madras Agriculturists' Relief Act—If enlarges time.

Article 182, Limitation Act, providing a fresh starting point of limitation from the date of the amendment of the decree, is subject to the provisions of S. 48, C. P. Code, when 12 years have passed from the date of the decree and the fact that the decree was amended under Madras Agriculturists' Relief Act does not enlarge the time. A.I.R. (Vol. 32) 1945 Mad. 70=57 L.W. 602=1944 M.W.N. 707=(1944) 2 M.L.J. 403.

——S. 48—Decree amended under Madras Agriculturists' Relief Act pending execution—Limitation—Starting point and execution petition must be deemed to be pending.

A decree as amended under the Madras Agriculturists' Relief Act bears the same date as the old decree, which would not be the case if the amended decree had to be regarded as an entirely new decree. It is based on the old judgment and, therefore, when the revised decree is executed, it is really the old decree amended and not an entirely new decree, which under S. 48, C. P. Code, would give the decree-holder a fresh period of twelve years from the date of the amendment. If it is the old decree that is still being executed, then the old execution petition must be deemed to be pending A.I.R. (Vol. 30) 1943 Mad. 765=(1943) 2 M.L.J. 358=56 L.W. 564=1943 M.W.N. 591=210 Ind. Cas. 624.

——S. 48—Where the decree comes within the prohibition of S 48, Cl. (4) of Art. 182, Limitation Act cannot be availed of. A.I.R. (Vol. 29) 1942 Cal. 255=I.L.R. (1942) 2 Cal. 245=74 C.L.J. 502=46 C.W.N. 149=204 Ind.Cas. 614.

——S. 48—Article 182, Limitation Act, is expressly limited to applications for execution not provided for by Art. 183, or by S. 48, C. P. Code. Inasmuch as Art. 182 clearly leaves the provisions of S. 48 untouched there can be no execution of a decree governed by S. 48 when 12 years have passed from the date of the decree, amendment or no amendment. It is true that there is no period of limitation for an amendment of a decree to correct an accidental slip or omission under S. 152 C. P. Code, but, because the Code gives the Court power to correct slips or omissions at any time it does not mean that the law of limitation is affected. A correction made in a time-barred decree leaves the decree still time-barred. A.I.R. (Vol. 27) 1940 Mad. 127=51 M.L.W. 173=1940 M.W.N. 181=(1940) 1 M.L.J. 235=I.L.R. (1940) Mad. 349=187 Ind.Cas. 176 (F.B.).

——S. 48—Amendment of decree—Period of limitation not extended.

In construing S. 48, the Court ought to limit itself to examination of the provisions of the Code itself and not import the provisions of other enactments, more particularly Art. 182, Limitation Act, which by its own terms applies only to the period for execution of a decree or order not provided for by S. 48. An amendment of a decree does not therefore give a new date for starting a period of limitation if the application for execution is beyond the period of twelve years prescribed by S. 48. The period of twelve years under S. 48 is final and cannot be extended by any amendment of the decree. A.I.R. (Vol. 26) 1939 Pat. 607=18 Pat. 395=20 P.L.T. 932=6 B.R. 172 (2)=185 Ind. Cas. 373 (2).

——S. 48—An amendment of a decree does not give a new date for starting a period of limitation, if the application for execution is beyond the period of 12 years allowed by S. 48, C. P. Code, that is, the period of 12 years under S. 48 is finl and cannot be extended by any amendment of the decree. A.I.R. (Vol. 21) 1934 Oudh. 465=1934 O.L.R. 748=10 Luck. 208=11 O.W.N. 1103=151 Ind.Cas. 541.

——S. 48—Amendment of decree—No extension of time.

The period of 12 years under S. 48 is final and cannot be extended by any amendment of the decree, whether that amendment is made before or after the expiry of the period of 12 years. A.I.R. (Vol. 19) 1932 All. 351=1932 A.L.J. 471=54 All. 622=138 Ind. Cas. 93.

——S. 48—Date of decree—Amendment of decree.

Where a decree is amended, the date of the amendment is the date of the decree within the meaning of S. 48, C. P. Code. 60 Ind. Cas. 318 (Pat.).

——S. 48—Date of decree—Where there has been an appeal, a second appeal and a Letters Patent Appeal.

A decree was passed in 1921 for possession and future mesne profits for three years from date of plaint to the date of delivery of possession or until expiry of three years from the date of decree, whichever event was earlier. The matter was carried in appeal, second appeal and again in Letters Patent Appeal. In each Court the appeal was dismissed, the date of the decree in the Letters Patent Appeal being 15th September, 1932. The decree-holder applied on 19th June, 1942, within 12 years from the date of the disposal of the Letters Patent Appeal, to execute the decree by attachment and sale and for recovery of mesne profits up to 1927, the date on which he had obtained possession. On a contention that the application was barred by S. 48 C.P. Code, and that mesne profits could be granted only up to 1924.

Held, that the execution application was within time,

as the decree to be executed was the decree passed in the Letters Patent Appeal in 1932 and that the decree-holder was entitled to mesne profits up to 1927, the date on which he obtained possession, it being earlier than the period of 3 years from the date of the decree in the Letters Patent Appeal. 60 L.W. 144=1947 M.W.N. 173 (2)= A.I.R. 1947 Mad. 359=(1947) 1 M.L.J. 149.

——S. 48—Date of decree—Where there has been an appeal and second appeal.

Where the plaintiff obtained a conditional decree in a suit which was confirmed on appeal subject to a slight modification and second appeals by both parties were dismissed and the decree-holder filed an execution application within twelve years from the date of dismissal of the second appeals.

Held, that as the decree to be executed is that of the appellate Court of final jurisdiction where there has been an appeal, and as the period of 12 years under S. 48 has to be computed from the date of such appellate decree, the application was in time. I.L.R. (1946) Mad. 817= 59 L.W. 103=1946 M.W.N. 148 : A.I.R. 1946 Mad. 231 : (1946) 1 M.L.J. 128.

——S. 48—The expression "the decree that is sought to be executed" in cases where there is an appeal which confirmed the original decree, refers to the decree of the Appellate Court. Hence, an execution petition which is within twelve years from the date of the appellate decree is not barred by limitation. A.I.R. (Vol. 32) 1945 Mad. 485 : (1945) 2 M.L.J. 197 : 1945 M.W.N. 513.

——S. 48—Appeal—Date of appellate decree is the starting point.

Where though the plaintiff's claim was decreed in full, the plaintiff appealed by reason of certain remarns in the judgment but the appeal was dismissed as not competent. *Held*, the 12 years period of limitation must be calculated from the dismissal of the appeal. 61 Ind. Cas. 129 : 43 All. 405 : 19 A.L.J. 159 : A.I.R. 1921 All. 134.

——S. 48 (S. 230, Old Code)—Date of decree—Date of appellate decree.

The omission in S. 48 of the words "or of the decree in appeal affirming the same in S. 230 of the Old Code is due to its being a mere surplusage and no change has thereby been effected, so that the appellate decree being the only decree capable of execution, limitation runs from the date of the appellate decree even though a portion only of the original decree was appealed against and an execution application made after 12 years from the original decree but within 12 years from that of the appellate decrees is not barred under S. 48, C. P. C. 10 M.L.T. 231 : (1911) 2 M.W.N. 239 : 21 M.L.J. 1020 : 12 Ind.Cas. 75.

——S. 48 (S. 230, Old Code)—Date of decree—Appellate decree.

Per **Rampini, J** :—When an application is made to execute the decree passed on appeal, modifying the decree made in the Court of first instance, limitation begins to run from the date of the decree in appeal and not from the decree of the first Court as it is not the decree sought to be enforced. Per *Sharfuddin, J.*—It is only the last decree that can be executed, and limitation would begin to run from the date of the appellate decree and not from that of the original decree. In cases where the original decree has either been set aside or modified so that the decree ceases to exist for the purposes of limitation, the date of the appellate decree should be taken into consideration and not the date of the decree that has ceased to exist. In cases where the Court of appeal affirms the original decree the general rule is to be followed and the date of the appellate decree affirming the original one is the date from which the period of limitation is counted. (1907) 7 C.L.J. 305 : 34 C. 874 ; also 26 M. 91 (F.B.).

——S. 48—Amendment of decree—Mere direction by Appellate Court to lower Court to amend decree will not make such order an Appellate Court decree.

The period of 12 years under S. 48 is final and cannot be extended by way of amendment of the decree whether that amendment is made before the expiry of the period of 12 years or whether it is made after the expiry of the said period. Hence the date of the decree within the meaning of S. 48 is the date of the original decree and not the date of the amended decree.

A mere direction by the Appellate Court to the subordinate Court to amend the decree so as to include certain item will not confer upon that order the status of an Appellate Court's decree, and time under S. 48 will run only from date of original decree and not from date of High Court's order directing amendment. A.I.R. (Vol. 22) 1935 Lah. 292. [A.I.R. (Vol. 21) 1934 Lah. 610 (2) Reversed.]

——S. 48—Appeal against decree of trial Court filed ——12 years are to be counted from appellate decree—Dismissal of appeal for default—There is no appellate decree—Same rule applies in case of revision.

For determining the period of 12 years' limitation under S. 48, Civil P.C., reference must be made exclusively to the provisions of the Code and not to those of another enactment. The effect of S. 48 differs from that of Art. 182, Limitation Act in this that a decree-holder can reckon his three years under Art. 182 (2) instead of cl. (1) whenever an appeal has been presented, with whatever result, but in order to count 12 years under S. 48 from a date later than that of the first Court's decision, it is not sufficient that an appeal has been presented, any more than it will avail to show that there has been an amendment of the decree. He must show that a decree has been passed by a superior Court, but if he does show that, he must succeed ; for the decree to be executed is then the Appellate Court's decree. An Appellate Court passes a decree whenever it adjudicates on and decides the rights of the parties, whether it reverses, modifies or affirms the first Court's decision, and whether or not the opposite party is called on to answer the appeal. But there is no decree where an appeal or application in revision has been dismissed for deafault without any adjudication. The effect of application in revision is to be judged on exactly the same principle as the effect of the presentation and the manner of disposal of an appeal. A.I.R. (Vol. 30) 1943 Pat. 371 : 10 B.R. 364 : 211 Ind.Cas. 303.

——S. 48 (1) (a)—Date of decree—Dismissal of appeal for default.

Where an appeal is dismissed for default the only decree which could be executed is the decree of the original Court and limitation runs from the date of the original decree and not from the date of the order of dismissal for default. 5 O.L.J. 252 : 47 Ind.Cas. 125.

——S. 48 (1) (a)—Execution of decree—Limitation—Abatement of appeal.

Where an appeal abates by High Court's order owing to the death of appellant, the decree-holder can execute the lower courts' decree within 12 years from the date of the abatement order of the High Court. 32 All. 136 : 7 A.L.J. 58 : 5 Ind.Cas. 473.

——S. 48—Date of decree—Revision against Small Cause Court decree.

Where a revision petition against a Small Cause Court decree is presented to the High Court the period of 12 years should be computed from the date of the decree of the Small Cause Court and not from the decision of

the High Court in revision. A.I.R. (Vol. 28) 1941 Mad. 477 : 53 L.W. 284 : 1941 M.W.N. 292 : (1941) 1 M.L.J. 365 : 199 Ind.Cas. 812.

——S. 48—Date of decree—Decree executable on happening of contingency.

Where in a case more than one reliefs are granted by a decree, time begins to run under S. 48, Civil P.C., against all the reliefs from the date of the decree. But in the case of a decree not executable except on the happening of a particular contigency, time will not begin to run under S. 48 until that contingency occurs. A.I.R. (Vol. 26) 1939 Bom. 75 : 40 Bom.L.R. 1278 : (1939) Bom. 87 : 180 Ind.Cas. 45.

——S. 48—A decree for maintenance directing the amount to be fixed in execution does not become an executable decree and time does not begin to run under S. 48, until the amount of maintenance is determined by the Court. A.I.R. (Vol. 18) 1931 Bom. 492=33 Bom.L.R. 1082=134 Ind. Cas. 1153.

——S. 48—Peremptory order directing appellants to pay certain costs, within seven days, upon failure appeal to stand dismissed—Starting point.

A decree was obtained on October 1, 1924. Some only of the defendants appealed to the High Court, and on January 6, 1926, a peremptory order was made directing those defendants to pay certain printing costs within seven days : upon failure to comply with that order the appal would be dismissed without any further reference to the Court :

Held, that for the purposes of S. 48, Civil P.C., the order of January 13, 1920, which was seven days after the order made by the High Court and the date upon which the appeal formally stood dismissed, should be taken as a starting point for limitation for execution. A.I.R. (Vol. 25) 1938 Pat. 401=4 B.R. 612=19 P.L.T. 424=175 Ind. Cas. 558.

——S. 48—Starting point.

Decree-holder in partition suit directed to make certain payments as condition precedent to his getting possession of certain properties—He should have made application to deposit money within three years of decree. A.I.R. 1930 Bom. 503=32 Bom. L.R. 427=125 Ind. Cas. 901.

——S. 48—Date of decree—Decree for mesne profits.

S. 48 means that no execution petition can be put in after 12 years of the date of the decree, the date being the date of prescribed under R. 7, O. 20. Where therefore, the decree directs that mesne profits should be ascertained in execution, limitation runs from the date of decree and not from the date when mesne profits are ascertained. A.I.R. 1921 P.C. 31 (P.C.) and 22 C.W.N. 145, Foll. 103 Sind. Cas. 311=A.I.R. 1927 Mad. 842 =53 M.L.J. 440.

——S. 48 (S.230, Old Code)—Date of decree—Decree for mesne profits.

The period of 12 years mentioned in S. 230, C.P.C. runs from the date when a valid decree for mesne profits has been made and not from the date of the decree by which the liability to pay mesne profits was originally, declared. (1907) 6 C.L.J. 462.

——S. 48—Non-appealable decree—Date of decree is the starting point.

Where an appellate decree either affirms, modifies or reverses the decree of the trial Court, the period of limitation will begin from the date of the decree of the appellate Court; but where an appeal does not lie. *e.g.*, from a decree passed from an award, but an appeal is preferred and dismissed as no appeal lay, the order of dismissal is not a decree affirming the decree of the trial Court and therefore time runs from the date of trial Court's decree. 36 All. 350 (P.C.) and A.I.R. 1922 P.C. 187, Foll. 48 All. 377=24 A.L.J. 465=94 Ind. Cas. 961=A.I.R. 1926 All. 440.

——S. 48—Defendant not party to appeal—Decree against him cannot be executed beyond 12 years of trial Court decree.

A decree of the trial Court does not merge in the decree of the appellate Court where the particular defendant against whom decree is sought to be executed was not a party to the appeal and as such no order could have been made as against him by the appellate Court by its decree. Therefore, under the provisions of S. 48 an application for execution made more than 12 years after the decree of the trial Court is barred against the said defendant. 95 Ind. Cas. 257=30 C.W.N. 306= A.I.R. 1926 Cal. 664.

——S. 48—Appeal against some defendants—Limitation for execution against others will run only from date of original decree. 73 Ind. Cas. 310=25 Bom. L.R. 371= A.I.R. 1923 Bom. 400.

——S. 48—Date of executable decree is the starting point.

When a decree *nisi* is passed under the provisious of the Dekkhan Agriculturists Relief Act there is no necessity to apply to the Court to have the decree made absolute. The decree-holder should apply for execution at once, and the application to have the decree made absolute would at the best be considered as a step-in-aid of execution, so that the order of the Court cannot be treated as a decree which would form a first starting point for the period of twelve years allowed by S. 48 of the C.P. Code. 67 Ind. Cas. 153=24 Bom.L.R. 269= 46 Bom. 761=A.I.R. 1922 Bom. 95.

——S. 48—Decree directing recovery of money from A on failure to recover from B—Execution against A—Limitation—Starting point.

Decree directing recovery of money from *A* on failure to recover from *B*—Execution against *A* is barred after 12 years from date of decree. (Phillips and Devadoss, JJ., Wallace, J., *contra*)—40 Mad. 989 (F.B.), considered as overruled in 22 C.W.N. 145 (P.C.)

Wallace, J.—In a case like this is the decree-holder's remedy against the former party accrues not on the date of the decree but on the date of the failure of the other party to satisfy the decree, which date must be fixed by an order of Court, and limitation begins to run in respect of that remedy from the date of that order. Such order would have the effect of a fresh decree directing the payment of money by the second party to be made from the date of its order, and S. 48 would apply to it as such ; that is, 12 years' limitation for the relief against the second party will run from the date of such an order. 48 Mad. 846=1926 M.W.N. 213=91 Ind. Cas. 597= A.I.R. 1926 Mad. 20=49 M.L.J. 498.

——S. 48—Decree not capable of execution initially —Computation of period.

Where a decree in a suit for foreclousre is incapable of execution owing to the absence of a formal order for delivery of possession the twelve years' period runs from the date the decree becomes capable of execution, *i.e.*, from the date of the formal order for delivery of possession. 54 Ind. Cas. 924 (N).

——S. 48 (1) (a)—Order postponing execution of decree.

An order postponing execution of a decree or ordering payment by instalments is virtually an order amending the decree and an application for execution made within 12 years of the order, is not barred. 34 Ind.Cas. 393 (Mad.)

——S. 48 (1) (a) and (b)—Execution of decree—Limitation—Decree capable of execution.

Before the execution of a decree can be held barred under S. 48 of the C.P. Code, it must be shown that the decree was in all parts ripe for execution on the date from which the period of twelve years is to be computed. 36 Bom. 368=14 Bom.L.R. 381=15 Ind.Cas. 822.

——S. 48 (1) (a)—Date of decree—Appellate Court directing payment in instalments—If supersedes original decree.

Where an appellate Court provided for payment of a decretal amount in instalments, *Held*, that the act of the Appellate Court did not supersede the original decree so as to entitle the decree-holder to execute a decree after twelve years from the date of decree though application for exectuion is made within twelve years of the appellate order, expecially if cl. (*b*) of sub-section (1) of S. 48 is inapplicable. A decree-holder cannot by binding himself not to execute a decree allow himself more time than the law gives him. 15 C.L.J. 678=13 Ind. Cas. 888

4. Deduction of time.

——S. 48—Section is not overridden by Limitation Act, S. 6.

Section 48, Civil P.C., contains an absloute prohibition against taking action on execution petitions put in more than 12 years after the passing of the decree, subject to certain stated exceptions. This prohibition can be modified only by virtue either of some general principle which must be taken as implied in the section itself, or by virtue of some other statutory provision which overrides it. The provisions of S.6, Limitation Act, cannot be taken as overriding the prohibition, for they are expressely confined to cases falling under the same Act.

The minor cannot also derive benefit from Art.182, read with S.6, Limitation Act, for Art.182 only applies in cases not covered by S.48, Civil P.C. A.I.R. (Vol. 31) 1944 Lah. 68=I.L.R. (1945) Lah. 448=46 P.L.R. 24 =212 Ind. Cas. 228

——S. 48—Exclusion of time—Decree assigned to minor within 12 years from date of decree—Benefit of S. 6, Limitation Act.

Section 6, Limitation Act, is applicable only to suits and applications for which a period of limitation is prescribed in col. 3, Sch. I, Section 6, therefore, is not applicable to the limitation mentioned in S. 48, Civil P.C., and the period mentioned in that section would remain unaffected by S. 6, Limitation Act.

A decree was passed in 1923. The decree-holder made a number of applications for execution which were either consigned to the record room or dismissed for default. Before a seventh application by the decree-holder on March 1, 1933, was ordered to be consigned to the record room, the decree-holder intimated to the Court that he had assigned his decree in favour of a minor and the Court recorded the statements of the transferor and of some person on behalf of the transferee on August 16, 1933. Another application was presented on behalf of the minor assignee on the same date but this was consigned to the record room on August 31, 1933. Another application was presented on behalf of the minor transferee on January 25, 1934, but this was dismissed on July 14, 1934. The tenth application for execution was made on behalf of the assignee on June 11, 1935, which was consigned to the record room on January 18, 1936. The last application for execution on behalf of the minor assignee was presented on May 1, 1939, after the expiration of 12 years from the date of the decree and three years after the last application had been ordered to be consigned to the record room:

Held, that (1) the minor was not entitled to claim the benefit of S. 6, Limitation Act, merely by the fact that the assignment had been effected before 12 year had expired:

(2) even if S. 6, Limitation Act, were applicable, the minor assignee could not claim the benefit of that section as no fresh cause of action could be said to have accrued to him on his assignment which merely conferred upon him a right to recover what was due under the decree at the time of assignment or on the dates on which orders were passed by the execution Court on his applications for execution after the decree had been assigned to him;

(3) as the time had already begun to run before the assignment, no subsequent disability could stop it under S. 6,Limitation Act, and the decree-holder could not extend the period of limitation by a voluntary transfer in favour of a minor;

(4) even assuming that S. 6, Limitation Act, gave a right to the minor assignee to execute the decree even after the three years' limit prescribed in Art. 182, Limitation Act, it could not help him to claim any exemption from the provisions of S. 48, Civil P.C. A.I.R. (Vol. 31) 1944 Lah. 106=46 P.L.R. 26=I.L.R. (1944) Lah. 592=217 Ind. Cas. 119.

——S. 48—Section 48 overrides Ss. 6 and 7, Limitation Act, and not *vice versa*. A.I.R. (Vol. 28) 1941 Pat. 45=21 P.L.T. 721=7 B.R. 15=190 Ind. Cas. 369.

——S. 48—Section not controlled by S. 6, Limitation Act.

Section 48 lays down a rule of limitation and clearly controls Art. 182, Limitation Act. If, therefore, S. 6, Limitation Act, merely allows extensions in respect of periods prescribed in the first schedule, and if the aggregate of the periods prescribes there for successive applications (other than the first) is confined within certain limits by outside legislation and not by the schedule itself, then it follows that expansion outside those limits is not permissible, *i.e.*, S. 6 does not govern S.48, Civil P.C., and consequently the twelve years' rule laid down in S. 48 must also apply to minors. A.I.R. (Vol. 26) 1939 Nag. 245: 1939 N.L.J. 387: I.L.R. (1939) Nag. 559: 184 Ind.Cas 72.

Section 6, Limitation Act, is expressly limited to cases where limitation is prescribed in Sch. I to the Act, and where limitation is provided for in some Act outside the provisions of the Limitation Act, such special limitation is not affected by S. 6 or S. 7. As S. 48 specially provides for limitation, it is not governed by the provisions of S. 6 or S. 7, Limitation Act. Consequently, the decree-holders are not entitl d to that extended period. A.I.R. (Vol. 25) 1938 Cal. 25: 65 C.L.J. 403: I.L.R. (1937) 2 Cal. 373: 176 Ind. Cas. 212.

——S. 48—To the decision of a question under S. 48 the fact of minority is wholly irrelevant. 1929 M.W. N. 158: 30 M.L.W. 361: 119 Ind. Cas. 39: A.I.R. 1929 Mad. 394.

——S. 48—Deduction of time—Minority—Limitation Act, S. 6—Extension of time.

S. 6 of the Lim. Act. serves only to extend for the benefit of minors, periods of limitation provided by the Act itself; it does not extend the period provided by S. 48. That section makes no exception in favour of minors. 13 A.L.J. 166=27 Ind. Cas. 865.

——S. 48—Deduction—Minority—Not a ground for extension of period.

Cases within S. 48, C.P. Code are exempted from the operation of Art. 182 of the Limitation Act. Minority is no ground for exemption from the operation of S. 48, C.P.C. Nor is it a ground of exemption under the general law apart from the provisions of S. 6 of the Limitation Act. Under S. 48, C.P.C. all decrees except one for

injunction will be barred after 12 years. 37 Mad. 186 : 24 M.L.J. 96=(1913) M.W.N. 114=13 M.L.T. 79 : 18 Ind. Cas. 586.

——S. 48—Deduction of time—Minority.

The period of 12 years prescribed by S. 48 must be computed from the day on which it begins to run. The running of time of 12 years under S. 48 is not suspended during a minority of minor succeeding his deceased father who died after the decree is passed. 36 Bom. 498 : 14 Bom.L.R. 387=15 Ind. Cas. 329.

——S. 48—S. 6, Limitation Act governs section.

Section 6, Lim. Act, governs S. 48, C.P.Code and an application for execution falling as it does under S. 48 is saved by S. 6, Lim. Act, from being time-barred. 16 Bom. 586, Foll. ; 37 Mad. 186 and 37 All. 638, Not Foll. A.I.R. 1930 Bom. 508=32Bom.L.R. 1093=128 Ind. Cas. 428 : 54 Bom. 776.

——S. 48—S. 7, Limitation Act, governs section.

S. 48 cannot override S. 7, Lim. Act and does not therefore imply that running of time will not be suspended against minor—Limitation Act, S. 7. 1929 M.W.N. 158 : 30 M.L.W. 361 : 119 Ind. Cas. 39 : A.I.R. 1929 Mad. 394.

——S. 48—Scope—Not controlled by S. 14 of Limitation Act.

S. 48, C.P. Code, is not controlled by S. 14 of the Limitation Act. The period referred to in the former cannot be described as a period of limitation prescribed for any proceeding. 50 C.W.N. 12.

——S. 48—Scope—If controlled S. 15 of Limitation Act or by S. 26 of Punjab Relief of Indebtedness Act.

S. 48, C.P. Code, prescribes a period of limitation and consequently is not uncontrolled by the provisions of S. 15 of the Limitation Act and of S. 26 of the Punjab Relief of Indebtedness Act which has been drafted on the lines of S. 15 of the Limitation Act. 50 P.L.R. 294=A.I.R. 1949 E.P. 213.

——S. 48—Section controlled by S. 15, Limitation Act.

Section 48, Civil P.C., is controlled by S. 15, Limitation Act. Consequently, a stay order from the Court has the effect of extending the period of limitation prescribed by S. 48. A.I.R. (Vol. 30) 1943 Bom. 164=45 Bom.L.R. 234=208 Ind. Cas. 254.

——S. 48—S. 15, Limitation Act applies.

As a general rule S. 15, Limitation Act, should be applied aso as to extend the period prescribed by S. 48, Civil P.C. A.I.R. (Vol. 26) 1939 Bom. 75 : 40 Bom.L.R. 1278 : I.L.R. (1939) Bom. 87 : 180 Ind. Cas. 45.

——S. 48—Limitation Act, S. 15, does not control section.

Section 48 contains an unqualified prohibition subject to the exceptions contained in Cl. (2) therefor, against execution of certain kinds of decrees more than twelve years old and is not controlled by S. 15 (1) of the Limitation Act. Hence an application for execution of such a decree stayed by an injunction or order of Court, field after twelve years from the date of the decree cannot be saved from the bar under S. 48 by excluding under S. 15 (1) the time during which execution was stayed. A.I.R. (Vol. 18) 1931 Oudh. 351=8 O.W.N. 642 : 7 Luck. 49 : 132 Ind. Cas. 257.

——S. 48—Limitation Act, S. 15.

Section 48, C.P. Code, is not controlled by S. 15, Lim. Act, and the only exception to sub-S. (1) is that contained in sub-S. (2) (*obiter*). 120 Ind. Cas. 315 : A.I.R. 1929 Pat. 597.

——S. 48—Section 15, Lim. Act, applies only to the periods prescribed in the Schedule to that Act and does not apply to the period of limitation prescribed by S. 48, C.P. Code 45 Mad. 785, Foll. 113 Ind. Cas. 260=A.I.R. 1928 Mad. 1154.

——S. 48—The prohibition against the execution of decrees more than 12 years old contained in S. 48, C.P. Code. (1908), is not controlled by S. 15, Limitation Act (1908). 16 M.L.W. 68 : 1922 Mad.W.N. 424 : 31 M.L.T. 140 : 70 Ind. Cas 396 : 45 Mad. 785 : A.I.R. 1922 Mad. 268 : 43 M.L.J. 168.

——S. 48—Deduction of time—Execution stayed—Limitation Act, S. 15.

S. 48, C.P.C. does not contemplate a deduction of any particular period from the prescribed period of 12 years. If force or fraud is proved, it gives a fresh starting point of limitation under S. 48 (2) (*a*). The period during which execution proceedings have been stayed cannot be deducted from the period of 12 years. 54 Ind. Cas. 279 (N).

——S. 48—Ss. 19 and 20, Limitation Act not applicable.

Question of applicatbility of Ss. 19 and 20, Limitation Act, to S. 48, Civil P.C. has to be decided without reference to what is contained in S. 29, Limitation Act. Sections 19 and 20, Limitation Act, do not apply to S. 48, Civil P.C., and to apply them would render the provisions of S. 48 largely nugatory. A.I.R. (Vol. 21) 1934 Oudh 465 : 11 O.W.N. 1103 : 10 Luck. 208 : 1934 O.L.R. 748 : 151 Ind. Cas. 541.

——S. 48—Period of Stay under Madras Agriculturists' Relief Act—Cannot be excluded.

In computing the period of 12 years under S. 48, Civil P.C., the period of stay under the Madras Agriculturists' Relief Act cannot be excluded. A.I.R. (Vol. 32) 1945 Mad. 70 : 57 L.W. 602 : 1944 M.W.N. 707 : (1944) 2 M.L.J. 403.

——S. 48 and Sch. III, Paragraph 11 (3)—Execution against property not under Collector's management—Cl. (c) cannot be pleaded to save limitation.

In execution of a decree against property which has not been attached and not included in the C Form and in respect of which the Collector has not made any provision under para. 7 of Sch. III, the decree-holder is not entitled to invoke Cl. 3 of para. 11 to overcome the bar of limitation by seeking to exclude the time during which the sale proceedings in respect of the judgment-debtor's other property were pending. A.I.R. (Vol. 32) 1945 Nag. 239 : I.L.R. (194) Nag. 555 : 1945 N.L.J. 261.

——S. 48 and Sch. III, para. 11 (3)—Deduction of time—Limitation—Computation of saving of period of execution by Collector.

The protection extended to a decree-holder by para. 11 (3), Sch. III applies, both to the limitation of 12 years referred to in S. 48 of the Code of 1908 and to the limitation of 3 years provided by Article 182 of the Limitation Act, 1908. 13 O.C. 303 : 8 Ind. Cas. 377. *See also* A.I.R. 1934 Oudh. 465 : 10 Luck. 208 : 11 O.W.N. 1103: 151 Ind. Cas. 541.

——S. 48 (1)—Deduction of time—Conciliator's certificate—Deduction of time spent in obtaining—Dekh. Agri. Rel. Act, S. 48.

The time spent in obtaining the conciliator's certificate under S. 48 of the Dekh. Agi. Rel. Act can be deducted in computing the period of limitation under S. 48, C.P. Code. 42 Bom. 367 : 20 Bom.L.R. 360 : 45 Ind. Cas. 494.

——S. 48—Deduction of time—Madras Court of Wards Act, S. 45.

The provisions of S. 45 of the Madras Court of Wards Act allowing deduction of time during which the estate was under the Court's management will apply only

when decrees have been transferred to the Collector for execution, and an amendment of it in execution cannot be permitted to revive a barred claim. 26 M.L.J. 83, foll. 37 M. 186, diss. 27 M.L.J. 25 : 24 Ind. Cas. 195.

——S. 48—Deduction of time.

The period during which the estate is in charge of Govt. under the Act, is excluded for limitation to file an application for execution. 38 Cal. 288 : 15 C.W.N. 155 : 7 Ind. Cas. 787.

5. **Fraud.**

——S. 48 (2)—Term "fraud" should be liberally construed.

In considering whether the conduct of the judgment-debtor amounts to fraud the Court ought to take a broad view of the matter. A.I.R. (Vol. 33) 1946 Mad. 172 : (1945) 2 M.L.J. 564 : 1946 M.W.N. 38.

——S. 48 (2)—"Fraud"—Meaning of.

"Fraud" in S. 48 (2) has a very wide meaning and includes any attempt on the part of the judgment-debtor to conceal his property, to deny its ownership and to put forward a mere *benamidar* as the real owner of the property in order to evade execution of the decree. I.L.R. (1949) Bom. 634 : 51 Bom.L.R. 608 : A.I.R. 1949 Bom. 379.

——S. 48 (2)—Force or fraud—Meaning of.

It is neither force nor fraud when the judgment-debtor takes advantage of the procedure allowed by law and contests an execution application. There can be no fraud unless there is a mistake as to fact and the other side is misled by it. In a contest in Court of law there is no mistake as to fact when the other side knows the facts and contest them, setting out a different set of facts. He is not misled, and as regards the law, every one is taken to know the law and consequently, whatever legal propositions are not set up, there is no fraud ; again, the other side is not misled because he contests and contends that the law is otherwise. I.L.R. (1947) Nag. 497 : A.I.R. 1948 Nag. 189 : 1947 N.L.J. 376.

——S. 48—Fraud—Resistence by Judgment-debtor to execution on ill—Founded legal grounds.

It cannot be held that resistence to execution on legal grounds, however ill-founded, could amount to preventing execution by fraud within the meaning of S. 48 (2) (*a*), C.P. Code. Further it is necessary for the decree-holder in order to bring himelf within the exemption, to prove that execution was prevented in the sense of being actually hindered or checked by the fraud of the judgment-debtor. I.L.R. (1947) Mad. 525 : 1947 M.W.N. 737 : A.I.R. 1947 Mad. 216 : 59 L.W. 685 : (1946) 2 M.L.J. 383.

——S. 48—"Fraud or force"—Objections by Judgment-debtor to execution.

The fact that the decree-holder's efforts to execute his decree have always been thwarted by objections on the part of the judgment-debotr does not in itself amount to 'fraud or force'. A.I.R. (Vol. 32) 1945 Oudh. 84 : 1944 O.W.N. 301 : 1945 A.W.R. 208.

——S. 48 (2)—Mere objection to jurisdiction—Objection that judgment-debtor was not partner—Execution delayed in consequence—Fraud, if made out.

The mere raising of objection so as to prolong execution proceedings beyond the period of limitation must not, in all cases, be regarded as fraud for the purposes of S. 48. If the objections are patently frivolous, they can ordinarily and ought to be disposed of speedily by the Court if the decree-holders are diligent. But fraud should not be interpreted in a narrow sense but so as to cover circumvention. Where the fraud pleaded by the decree-holder is the conduct of the appellant in delaying the completion of the attachment proceedings until the tatutory period of limitation had passed by objecting to the attachment on the ground that the executing Court in Lahore had no jurisdiction to adjudicate on the question whether he was or was not a partner of the judgment-debtor firm and by raising the false plea that he was not a partner the objection raised to the jurisdiction of the Lahore Court cannot be regarded as dishonest. But his conduct in raising the plea that he was not a partner of the judgment-debtor firm which is found to be false, is fraudulent and has the effect of enlarging the period of limitation. A.I.R. (Vol. 23) 1936 Lah. 843 : 161 Ind. Cas. 960.

——S. 48 (2)—Fraud—Raising of frivolous objections.

The mere fact that there has been prolongation of the execution proceedings due in part to the objections raised by the judgment-debtor from time to time, would not in itself amount to fraud or force within sub-S. (2), sub-Cl. (*a*) of S. 48. Fraud must be of a nature which the decree-holder is not able to discover at the time and which helps the judgment-debtor in deceiving him and gaining time. A.I.R. (Vol. 18) 1931 All. 134 : 53 All. 419 : 129 Ind. Cas. 716.

——S. 48—Fraud—Frivolous and futile objections.

Where the execution of decree has been obstructed by frivolous objections on the part of the judgment debtors, the decree-holders are entitled to the advantage of S 48 C.P. Code. 65 Ind. Cas. 877 : 44 All. 319 : 20 A.L.J. 185 : A.I.R. 1922 All. 145.

——S. 48 (S. 230, Old Code)—Fraud of Judgment-debtor—Objection to execution not bona fide.

The Judgment-debtor preferring objections to the execution of a decree does not necessarily commit fraud unless in so doing he acts not *bona fide* and his object is to delay execution. 11 P.L.R. 49 : 5 Ind. Cas. 815.

——S. 48 (2) (a)—Judgment-debtor taking advantage of procedure allowed by law.

The term "fraud" in S. 45 (2) (*a*), Civil P. C., is used in the ordinary juridical sense. But what is quite clearly contemplated apart from the definition of the term itself is some action on the part of the judgment-debtor which prevents the decree-holder from taking out execution proceedings and thus allowing time to run against him or some action by the judgment-debtor which entices the decree-holder to hold his hand. It would be stretching the language of the section beyond what is legitimate to hold that the judgment-debtors, however obstructive they might have been, were preventing the decree-holder from executing his decree by fraud merely because they took advantage of the procedure which was allowed by law. A.I.R. (Vol. 22) 1935 Pat. 380 : 16 P.L.T. 506 : 1 B R 593 : 14 Pat 816 : 156 Ind. Cas. 297

——S. 48—"Fraud or force," meaning of—Judicial order restraining execution.

The words "fraud or force" contemplate some act of violence or deceit at the instance of an interested party, whereby the decree-holder is prevented from executing his decree and do not contemplate a mere judicial order restraining that execution. To hold it otherwise would be doing violence to the plain English of the section. A.I.R. (Vol. 32) 1945 Mad. 70 : 57 L.W. 602 : 1944 M.W.N. 707 : (1944) 2 M.L.J. 403.

——S. 48—Fraud of judgment-debtor—Final decree for partition—Judgment-debtor selling property falling to share of plaintiff—Plaintiff is not prevented from executing decree.

Plaintiff applied for execution of a final decree for partition beyond 12 years and contended that as the judgment-debtor had sold the property which should have come to his share under the decree he was pre-

vented from executing the decree by reason of this fraud of the judgment-debtors and hence his application was within time under S. 48 (2) :

Held, that the mere fact that some of the judgment-debtors sold properties which should have fallen to the share of plaintiff could not by itself prevent the plaintiff from proceeding in execution to recover his share of the properties under the partition. A.I.R. (Vol. 33) 1946 Mad. 348 : (1946) 1 M.L.J. 163.

——S. 48 (2) (a)—Fraudulent transfer amounts to fraud.

A fraudulent transfer amounts to fraud within the meaning of S. 48 (2) (*a*). A.I.R. (Vol. 27) 1940 Lah. 178 : 42 P.L.R. 10 : 13 R.L. 64 : 188 Ind. Cas. 891.

——S. 48 (2) (a)—Fraudulent alienation of property by judgment-debtor—Decree-holder not attempting to execute whether entitled to claim exemption on the ground of fraud.

A decree was passed in 1911. The decree-holder applied for execution of the decree in 1928, relying on the exemption contained in S. 48 (2) (*a*). It was found that the judgment-debtor had made a tan fer of some of his properties in 1918, and that the transfer was ultimately declared fraudulent by the High Court in September 1927. In a suit filed on behalf of the creditors :

Held, that the mere fact of the fraud having been committed by the judgment-debtor could be availed of by the decree-holder to claim exemption under S. 48 (2) (*a*), and it was not necessary for the decree-holder to show that he had made any attempt to execute the decree against the properties transferred or against any other property of the judgment-debtor and that he had been actually prevented from executing his decree by the fraud. A.I.R. (Vol. 22) 1935 Mad. 8 : 40 L.W. 694 : 67 M.L.J. 751 : 58 Mad. 311 : 154 Ind. Cas. 688.

——S. 48, O. 20, R. 11—Fraudulent conduct of Judgment-debtor—Compromise fixing new dates of payment.

Where a decree was passed in February, 1915, and when in the execution proceeding started by an application for arrest filed in March, 1923, the parties came to a ompromise to the effect that the decretal amount should be paid in nine instalments spread over four years, and the eighth instalment was to be paid in July, 1927, and the balance as the ninth instalment on 15th January, 1928, and after judgment-debtor had paid all the first eight instalments in due time, he on 16th January, 1928, sent certain amount which was refused by the decree-holder being short and the execution Court ordered that as the parties had come to a compromise, the warrant should be cancelled and when an application was filed on 16th January, 1928, for execution, the judgment-debtor objected that the application was barred by time :

Held, that the terms of the compromise were known to both the parties and the decree-holder was in a position to find out their legal consequences, that there was no concealment of any fact, nor any misrepresentation on the part of judgment-debtor and, therefore, the judgment-debtor's conduct did not amount to fraud within the meaning of S. 48 (2) (*a*). A.I.R. (Vol. 19) 1932 All. 273 : 1932 A.L.J. 365 : 54 All. 573: L.R. 13 A. 199 Rev.: 16 R.D. 293 : 138 Ind. Cas. 583 (2) (F.B.).

——S. 48—Fraud of judgment-debtor—Test.

Any action of the judgment-debtor which puts off the decree-holder from executing his decree at once should be taken as fraud if the result thereof is to bar the execution of the decree under the 12 years rule. 44 A 319, Foll. 124 Ind. Cas. 43 : A.I.R. 1931 All. 31.

——S. 48 (2)—Fraud—Plea of payment not made.

The conduct of a party in pleading a payment found not to have been made amounts to "fraud" under the section. 128 Ind. Cas. 455 : (1930). M.W.N. 729.

——S. 48 (2)—Fraud of one of judgment-debtors.

S. 48 cannot mean that the fraud on the part of one judgment-debtor gives a new starting point as against his co-debtors. The principle is that one party should not suffer for the wrong doing of another. 128 Ind. Cas. 455 : (1930) M.W.N. 729.

——S. 48—Fraud by one of judgment-debtors.

Fraud or force by one of several judgment-debtors in preventing execution—Extension can be granted only as against him. 38 Mad. 419. Foll. A.I.R. 1930 Sind. 218 : 125 Ind. Cas. 830

——S. 48 (2) (a)—Fraud by one of judgment-debtors.

When the execution of decree is prevented by the fraud of one of several judgment-debtors, extension of time will be allowed only against such judgment-debtor and not against others who are not guilty of fraud, 38 Mad. 419 : 30 Ind. Cas. 423. [On Appeal from 35 Mad. 670 : 22 M.L.J. 35 : (1911) 2 M.W.N. 434 : 10 M.L.T. 413 : 12 Ind. Cas. 679.]

——S. 48 (2)—When available.

In order to succeed under S. 48 (2) the decree-holder must prove that he was prevented from executing the decree by reason of fraud or force on the part of the judgment-debtor, but where the Court merely refuses to give permission to proceed against the properties of the judgment-debtor in the hands of a Receiver, and it is open to the decree-holder to proceed either against the person of other properties of the judgment-debtor or surety and he does not execute the decree against either of them within 12 years. S. 48 (2) is of no help and sub-S. 1 has its operation. 120 Ind. Cas. 315 : A.I.R. 1929 Pat. 597.

——S. 48—Fraud—Circumvention—If amounts to.

Per **Ashworth, J.**—Fraud as used in S. 48 includes not merely deceit but also, except with reference to contract, includes circumvention. A.I.R. 1922 All. 145, Foll. 25 A.L.J. 842: 103 Ind. Cas. 277: A.I.R. 1927 All. 668.

——S. 48—Fraud of Judgment-debtor—What amounts to.

The term fraud is used in wider sense than in English Law—Locking house, evading arrest or payment or fictitious transfer is fraud. So also is a fictitious transfer of property to defeat or delay execution of a decree that may be passed against the judgment-debtor. Ordinarily two things are essential for execution of a decree for money. Either the property of the judgment-debtor must be available or the person of the judgment-debtor must be available for arrest. Conduct is the best proof of intention. 22 N.L.R. 67 : A.I.R. 1925 Nag. 82: 80 Ind. Cas. 905.

——S. 48—Fraud—Evasion of arrest.

Evasion by judgment-debtor of arrest when able to pay is fraud and extends limitation. 80 Ind. Cas. 731 : 20 M.L.J. 475 : 1924 M.W.N. 745 : A.I.R. 1924 Mad. 836 : 47 M.L.J. 428.

——S. 48 (2) (a)—Fraud—Evasion of arrest in execution.

Wilful evasion of arrest under warrants taken out by the judgment creditor is a fraudulent prevention of the execution of the decree within the maning of S. 48 (2) of the C.P.Code so as to give a fresh starting period of limitation. (1920) M.W.N. 788 : 12 L.W. 710 : 60 Ind. Cas. 630.

——S. 48 (2) (a)—Fraud—Judgment-debtor evading arrest.

Where a judgment-debtor successfully evaded arrest and spent some time pretending to prosecute procedings in Insolvency and successfully prevented the decree-holder from executing his decree within twelve years, *held*, that the judgment-debtor is guilty of fraud. 9 A.L.J. 17 : 13 Ind. Cas. 929.

——S. 48 (2) (a)—Fraud—Evasion of process of Court.

The expression "fraud" in S. 48 should be construed in a broad sense. A deliberate evasion of the process of Court to defeat execution of decree amounts to fraud. Continuous diligence during all the time prior to the application is not necessary. 35 Mad. 670 : 22 M.L.J. 35 : 10 M.L.T. 413 : (1911) 2 M.W.N. 434 : 12 Ind. Cas. 679. [On appeal **see** 38 Mad. 419: 30 Ind. Cas. 423].

——S. 48 (S. 230, Old Code)—"Fraud or force"—Evasion of arrest, raising false objection.

When a judgment-debtor keeps out of the way when warrants are issued for his arrest and puts in false objections in bad faith and thereby dishonestly evades payment of money justly due he is not entitled to the benefit of S. 48 (S. 230, Old Code). The judgment-debtor in this case always evaded arrest and more than once objected to execution being taken out, but his objections failed. The application for execution was presented more than 12 years after the date of the decree but within 3 years of the last application. *Held*, that the execution of the decree was not barred by S. 48 (S. 230, Old Code). (1909) 6 A.L.J. 401. 2 Ind. Cas. 222.

——S. 48 (2) (a)—Fraud—Fraudulent conduct—Pardanashin lady.

Keeping the doors closed is *per se* no evidence at all of fraudulent conduct on the part of a lady unless there is anything to show that she deliberately does so or attempts to do so against the executing officer. 4 O.L.J. 345 : 40 Ind. Cas. 399.

——S. 48 (2) (a)—Fraud—Preferring appeal.

Pendency of appeal by judgment-debtor does not cause suspension of execution where there is no fraud or force. 20 C.W.N. 686 : 32 Ind. Cas. 931.

——S. 48 (2)—Fraud—Unsuccessful appeal by Judgment-debtor.

An unsuccessful appeal by judgment-debtor from execution proceedings does not of itself constitute fraud or frivolous or vexatious evasion or the execution of decree. 17 P.R. 1910 : 20 P.L.R. 1910 : 22 P.W.R. 1910 5 Ind. Cas. 815.

——S. 48 (2) (a)—"Fraud"—Resort to improper means to prevent execution.

An improper means resorted to in order to prevent execuion could amount to fraud under S. 48, C.P.Code. (1913) M.W.N. 182 : 13 M.L.T. 226: 24 M.L.T. 270= 18 Ind. Cas. 1008.

——S. 48 (2) (a)—"Fraud"—Unsuccessful objection to sale.

The term 'fraud' in S. 48 should be interpreted in a wider sense than that in which it is generally used in English law. 6 M. 265, Foll. S. 48 (2) (*a*) requires that there should be fraud on the part of the judgment-debtor and also that that the fraud should be such as to prevent the decree-holder from executing the 'decree' so that the mere fact that the judgment-debtor objects to a sale which objection ultimately proves unsuccessful will not amount to fraud. 15 C.L.J. 678 : 13 Ind. Cas. 88.

——S. 48 (2) (S. 230, Old Code)—Fraud—Evasion.

Application for execution after twelve years from decree, but within three years from last application is not barred if it is found that the judgment-debtor was either keeping out of the way or taking false objections to evade payments. 6 A.L.J. 401 : 2 Ind. Cas. 222.

——S. 48 (S. 230, Old Code)—Fraudulent conduct of judgment-debtor—Frivolous application under O. 9, R. 13, C. P. Code.

Where, pending execution of a money decree, the judgment-debtor made a frivolous application to set it aside under O. 9, R. 13 (S. 108, Old Code), with a view to delay the exectuion proceeding : *Held*, that the conduct of the judgment-debtor was fraudulent within the meaning of the final clause of S. 230, C.P. Code. The Court to which an application to execute a money decree is made more than 12 years after the date of the decree should exercise a sound discretion in deciding whether the execution should proceed or not. If the Court should find on evidence that the decree-holder had been diligent in proceeding with the execution from the date that the decree was passed and that the judgment-debtor's conduct was such that it caused unnecessary delay in levy execution, he or she having acted fraudulenty or used force, the Court ought to allow execution. (1906) 11 C.W.N. 440.

——S. 48 (2)—Fraud or force—Fraud not occurring within three years of application.

A decree-holder applying for execution after 12 years from the date of the decree is not restricted to proving that the fraud or force occurred within three years of the application. He is entiled to the benefit of the proviso even if the fraud or force was long anterior in date. 8 M.L.J. 203, not foll; 34 All. 20; 22 M. 320; 35 M. 670, foll. 10 L.W. 566 : 53 Ind. Cas. 862.

——S. 48 (2) (a)—Fraud of the judgment-debtor need not extend continuously for 12 years.

To get the benefit of S. 48 the decree-holder need not show that the fraud of the judgment-debtor extended continuously for 12 years. It is sufficient if he shows that the judgment debtor on various occasions within the period of 12 years prevented the execution of decree by fraud. 14 O.C. 238: 12 Ind. Cas. 793.

——S. 48 (S. 230, Old Code)—Fraud of Judgment-debtor—Decree-holder when cannot avail.

A decree-holder cannot take advantage of his judgment-debtor's fraud or force if he has ample time to apply afresh after the conclusion of the fraud or force. 10 P.L.R. 273=75 P.L.R. 1909 : 113 P.W.R. 1909 : 4 Ind. Cas. 958.

——S. 48 (2) (a)—Fraud—Effect on limitation.

The second proviso of section 48 of the Code has the effect of extending the period of limitation to 12 years from the time when the decree-holder was by fraud, of the judgment-debtor, prevented from executing his decree. 34 All. 20: 8 A.L.J. 1020: 11 Ind. Cas. 672.

——S. 48 (2) (a) (S. 230, Old Code)—Fraud or force—Preventing execution of a decree.

Under S. 48 (S. 230, Old Code), an application for execution will not be barred by limitation if within 12 years beforee the date thereof the judgment had prevented the execution of the decree by force or fraud. (1910) M.W.N. 853 : 9 M.L.T. 162 : 8 Ind. Cas. 805.

——S. 48 (2)—Fraud—Evasion of 12 years rule.

The evasion of the twelve years rule in this section should not be permitted. 8 Ind. Cas. 727 (Oudh).

——S. 48 (2)—Plea of fraud at late stage—When may be permitted.

Ordinarily a plea of fraud under S. 48 (2), C.P. Code, cannot be added by way of amendment at a late stage, but in connection with executions where property is prevented from being brought before the executing Court due to the fraud of the judgment-debtor, Courts may permit the plea of fraud to be taken even at a late stage. I.L.R. (1948) Nag. 230=A.I.R. 1948 Nag. 272.

——S. 48 (2)—Plea of fraud can be raised by decree-holder for first time even in appeal arising out of execution proceedings.

More than 12 years after the date of the decree but within three years of the last execution petition the decree-holder filed a fresh execution application which was dismissed by the executing Court before which no plea of fraud was taken by the decree-holder The decree-holder filed an appeal and the question was whether he could be allowed to raise the plea of fraud by the judgment-debtor under S. 48 (2) (*a*) in the appeal for the first time ;

Held, that the plea of fraud could be allowed to be raised in appeal. No doubt when a party was making allegations in the pleadings against another he should say all that he desired to say including the allegation of fraud fully and at once in order that the other side may meet the case put up against him. But different considerations arose when a plea of fraud was taken under S. 48 (2) (*a*). It was then not a question of making specific allegations in a plaint or written statement against the reputation or character of the opposite side. It was a case of being able to show, even at the eleventh hour and afterwards, that the time limit laid down by S. 48 should not prevail where the conduct of the judgment-debtor was such as to have prevented the execution of the decree within twelve years from the date of the decree. A.I.R. (Vol. 33) 1946 Mad. 172: (1945) 2 M.L.J. 564: 1946 1946 M.W.N. 38.

——S. 48 (2) (a)—Order by Revenue Court without applying its mind to this provision—Agra Tenancy Act, S. 253 (c).

The failure of the Revenue Court in allowing an execution application made after twelve years to apply its mind to the provisions of S. 48 (2) (*a*) and to record its finding that there was fraud constitutes material irregularity within the meaning of S. 253 (*c*), Agra Tenancy Act and the finding is open to revision. A.I.R. (Vol. 19) 1932 All. 273: 1932 A.L.J. 365: L.R. 13 All. 199 (Rev.): 16 R.D. 293: 54 All. 573: 138 Ind. Cas. 583 (2) (F.B.).

6. Fresh Application.

See also 2 SUPRA.

——S. 48—Fresh application—Test.

In considering whether an application is only an cillary to a previous application or is a fresh application, circumstances of the case are to be looked into. The substance of the matter must prevail over the form of the application. A.I.R. (Vol. 26) 1939 P.C. 80 : 1939 O.L.R. 187 : 66 I. A. 84 : 1939 O.W.N. 313 : 5 B.R. 476 : 43 C.W.N. 501 : 1939 R.D. 208 : (1939) 1 M.L.J. 652 : 69 C.L.J. 317 : 14 Luck. 192 : 41 Bom.L.R. 708 : 50 M.L.W. 39 : 1939 A.L.J. 481 : 1939 M.W.N. 692 : I.L.R. (1939) Kar. (P.C.) 136 : 66 I.A. 84: 180 Ind. Cas. 378 (P.C.)

——S. 48 (1)—Fresh application—Application for amendment seeking to proceed against new items.

An application for amendment of a previous application for execution seeking to proceed against new item of property is a fresh application within the meaning of S. 48 (1), C.P. Code. I.L.R. (1948) Nag. 230 : A.I.R 1948 Nag. 272.

——S. 48 (2) (a)—Fresh application—Execution application asking for sale of certain properties not mentioned in the prior petition—Discretion of Court to allow amendment of prior application after expiry of period of limitation.

The allowance for maintenance of a junior member of the family of the Rajah of Kalahasti was by a decree made a charge on about 400 villages comprised in the Kalahasti zamindari and the final decree passed on 3rd May, 1929, directed the sale of those villages in realisation of the sum decreed in default of payment by the numerous judgment-debtors who had acquired interests in the villages charged under subsequent transfers by the Rajah. On 15th January, 1930, the decree-holder applied for execution by Execution Petition No. 20 of 1930 for recovery of the amount decreed by the sale of 21 villages specified in the schedule to the petition and realised more than Rs. 90,000 by the sale of those villages, the last of which was sold in September, 1939. As a sum of Rs. 9,620 still remained due under the decree, the decree-holder made an application, Execution Application No. 379 of 1939, on 1st November, 1939, in the previous proceedings which had not been formally terminated although all the reliefs claimed by the applicant therein had been granted to him. In the fresh application he prayed that the pending prior proceeding (E.P. No. 20 of 1930) might be continued and the recovery of the balance of the decree debt be ordered by the sale of seven new villages specified in that application. It was pleaded in bar of the Execution Application No. 379 of 1939, that it was barred under the provisions of section 48 of the Civil Procedure Code in that it was more than 12 years from the date of the decree. The decree-holder contended that Execution Application No. 379 of 1939 should not be regarded as a "fresh application" for execution within the meaning of S. 48, sub-S. (1) but should be dealt with as one for amending and continuing Execution Petition No. 20 of 1930 which was still pending.

Held, under the scheme of execution as provided for in O. 21, Civil Procedure Code, every application requiring the Court to proceed against a particular property, is a substantive application for execution and an application for attachment and sale or for sale without attachment of property **B** where a previous similar application in respect of property **A** has succeeded or failed or is still pending is a fresh application for execution and cannot be treated as one for amending and continuing the prior application although the prayer in the latter application may be worded in that manner. Where no question of limitation arises it is immaterial how the subsequent application is regarded, but when it is made beyond the period of limitation, its real character assumes importance and must be determined, paying more regard to the substance of the matter than to the form of the words used. In the circumstances, it cannot be said that the previous application, Execution Petition No. 20 of 1930 was really pending when Execution Application No. 379 of 1939 was filed. Although the former was not formally terminated, all the villages which the decree-holder required to be sold had been sold and no further relief could be granted on the basis of that petition which must therefore be regarded as no longer pending for the purpose of including by way of amendment new properties sought to be sold for realising the balance of the decree amount. Hence it is difficult to hold that Execution Application No. 379 was not a fresh application for execution.

(2) A decree-holder cannot be allowed to amend a previous execution petition by including fresh properties more than twelve years after the date of the decree. Such an application would be "fresh application" for execution within the meaning of section 48 (1), Civil Procedure Code and the Court can have no discretionary power of allowing such an amendment for to do so would plainly contravene the provisions of the section. I.L.R. (1947) Mad. 525 : 1947 M.W.N. 737: A.I.R. 1947 Mad. 216 : 59 L.W. 685 : (1946) 2 M.L.J. 383.

——S. 48—Fresh application or application in revival—Test.

An application cannot be regarded as one in revival of a previous application unless it is of the same nature. If

any relief different from that claimed in the previous one is asked for, or any new property is sought to be attached or sold, it cannot be treated as a mere revival but is a fresh application within the meaning of S. 48, Civil Procedure Code. I.L.R. (1947) Nag. 497 : A.I.R. 1948 Nag. 189 : 1947 N.L.J. 376.

——S. 48—Fresh application—What is.

An application for substitution of completely different property from the property mentioned in the already pending execution application must be regarded as a fresh application, even though it is described as an application for amendment. A.I.R. (Vol. 32) 1945 Oudh 84: 1944 A.W.R. 208 : 1944 O.W.N. 301.

——S. 48—Fresh or continuation of application—Application to correct misdescription and one for substitution of property.

Where the decree-holder wishes by means of a subsequent applicatiom merely to correct any misdescription of the property mentioned in his application for execution, his application may be regarded as a continuation of that application, but where he tries to substitute a new property which is quite different from the property against which he wishes to proceed in the first instance his application must be regarded as a fresh application for execution.

Consequently a decree-holder cannot be allowed after the period of limitation to excute his decree against a property not mentioned in the execution application when originally presented by allowing him to substitute it in execution petition. A.I.R. (Vol. 30) 1943 Pat. 127 : 21 Pat. 838 : 9 B.R. 243 : 205 Ind. Cas. 561.

——S. 48—Application to proceed against properties other than those mentioned in first application.

An application by which it is sought to proceed against the properties other than those mentioned in the first execution petition, is a fresh application within the meaning of S. 48, and no such application is entertainable after 12 years from the date of the decree sought to be executed. A.I.R. (Vol. 28) 1941 Pat. 635 : 21 P.L.T. 407 : 7 B.R. 206 : 191 Ind. Cas. 492.

——S. 48—Prayer for attachment and sale of properties described in petition—Sale and decree partly satisfied—Application to file fresh list granted and list filed beyond period of limitation—Such application if an application in execution—Original application, if pending in execution.

There was an application for execution filed by the decree-holder. In that application prayer was made for reali ing the decree by attachment and sale of the judgment-debtor's properties. In connection with that application a list of properties was filed, and these properties having been sold, a part of the decree was realized and a balance of little over Rs. 400 remained due after such realization. Subsequently, the decree-holder put in a petition asking for time to put in a fresh list of properties and such time being granted a fresh list of properties was filed. In the meantime the decree became barred in view of the provisions of S. 48, Civil Procedure Code.

Held, that in no sense could the application be regarded as an application for execution, so that the fresh list that was submitted may be treated as having been supplied in connection with that application.

Held also, that all the reliefs that the decree-holder asked for in the application for execution were granted to him by the executing Court and all such properties as he desired to put up to sale for realizing his decree were sold and nothing further remained to be granted on the basis of that application. In such circumstances it would not be right to treat the original application as a pending one so as to give the decree-holder the benefit of that application and allow him to regard it as pending for the purpose of a fresh prayer for realization of the balance of the decree by sale of the other properties. A.I.R. (Vol. 22) 1935 Cal. 143 : 60 C.L.J. 123 : 154 Ind. Cas. 555.

——S. 48—Application to attach new property—Pendency of prior application, effect of.

An application to attach new property is a fresh application within the meaning of S. 48, and if such an application is made more than 12 years after the date of the decree it cannot be entertained. The mere fact that the execution proceedings are still pending and have not been struck off would not be sufficient to save limitation. A.I.R. (Vol. 18) 1931 All. 134 : 53 All. 419 : 1931 A.L.J. 894 : 129 Ind. Cas. 716.

——S. 48—Application for execution against other properties.

Application for execution against other properties beyond 12 years cannot be allowed as one for amendment of the first. 38 M.L.T. 42 : 100 Ind. Cas. 20 : A.I.R. 1927 Mad. 347 : 52 M.L.J. 137.

——S. 48 (1) (a)—Mortgage decree—Prior application for sale of hypothecated properties—Subsequent application for sale of non-hypothecated properties.

A decree providing for payment of the mortgage money and for the sale of the properties on default is a decree for payment of money. An application for sale of the non-hypothecated properties made more than 12 years from the date of the decree is barred and cannot be taken to be one in continuation of a prior application for the sale of hypothecated properties. 43. Ind. Cas. 122 (Mad.)

——S. 48—Relief directed against other property.

An application for execution cannot be treated as a continuation of a prior application where the relief asked for is different and is directed against property not touched by the first application. 20 C.W.N. 952 : 2 Pat. L.W. 370: 1 Pat. L.J. 214 : 34 Ind. Cas. 27.

——S. 48—Application to execute decree—Attachment of property—Transmission of decree by Baroda Court to British Court—Application to execute decree by attaching other property in British India—Limitation.

The plaintiff obtained a decree in the Amarli Court (H. H. the Gaekwar's territory) against the defendants for Rs. 6,727 on the 17th July, 1893. An application to execute that decree was made on the 10th July, 1905, wherein the prayer was for attachment of whatever moveable property of the defendants might be found at whatever place within the jurisdiction of the Amarli Court. The Court made the order of attachment. Subsequently, on the plaintiff's application, the decree was transmitted for execution to the High Court of Bombay on 25th July, 1909. The plaintiff applied to the High Court on the 15th October, 1909, to execute the decree by attaching the moveable property of defendant No. 2 in Bombay. The defendant No. 2 objected that the application was barred by the provisions of S. 48 of the Civil Procedure Code, 1908. *Held* that the plaintiff's application to the High Court was a substantive application with regard to the property in Bombay which was not the subject of any previous application ; and that having been made more than twelve years after the date of the decree it was barred by the provisions of S. 48 of the C.P.C., 1908. (1910) 12 Bom. L.R. 844: 35 Bom. 103 : 8 Ind. Cas. 168.

——S. 48 (S. 230, Old Code)—Previous application for attachment of movable property—Subsequent application for attachment of immovable property.

An application to attach immoveable property cannot be regarded as made in continuation of proceedings started

on a previous application or attachment of moveable property which was duly attached and sold, though no formal order was passed striking the previous application off the file. 17 P.R. 1910 : 20 P.L.R. 1910 : 22 P.W.R. 1910 : 5 Ind. Cas. 815.

——S. 48—Execution application—Continuation of a prior application—Test.

D was the zamindar and **C** was patnidar of a certain, lot. In 1893 **D** sold the Zamindari to **B. D** then obtained a decree in 1896 against **C** for rent up to date of sale. **B** also sued **C** for subsequent arrears of rent. **F**, a darpatinidar paid **C**'s due and obtained possession. In May 1908, **D** applied for execution against the patnidar and got it attached and sold. The sale was ultimately set aside in February, 1911. In January, 1915, **D** again applied for execution requesting to convert rent decree into money decree. Execution was alleged to be barred by limitation. On 19th March, 1917, the decree-holders on the footing of the decree being merely a money-decree applied for attachment of other properties belonging to **C**. On 23rd November, 1918, the decree-holders again on the footing of the decree being a money decree applied for and obtained an order that certain personal properties of another purchaser of the patni might be attached and sold and from such sale proceeds their claim be satisfied. The last application to attach patni was on 2nd December, 1922.

Held, that the applications of 22nd January, 1915, 19th March, 1917 and 23rd November, 1918, were essentially different in character from the application of 9th May, 1908. **D** had abandoned the application of 9th May, 1908, which proceeded on the footing that his decree created a charge on the tenure. The combined effect of these previous applications marked such substantial departures from the original application of 9th May, 1908, as to make it impossible to hold that the application of 2nd December, 1922, was a continuation of the application of 9th May, 1908. 1926 Pat. 748, affirmed. 116 Ind. Cas. 268=33 C.W.N. 977=30 M.L.W 407=31 Bom. L.R. 1383=50 C.L.J. 345=10 P.L.T. 807=A.I.R. 1929 (P.C.) 209=57 M.L.J. 184 (P C.).

——Ss. 48, 47, O. VI, R. 17—New application by amending old one when application is barred by limitation.

It is wrong to assume that there is some general application for the execution of a decree and that the various steps in aid of execution are subsidiary thereto. There is no such thing as an application for execution of a decree properly so-called. There is an application for the attachment and sale of certain property in execution of a decree or an application for the arrest of the judgment-debtor in execution of a decree or an application asking the Court to take some other steps. If, on objection taken it is found by the Court that the steps mentioned in the particular application cannot be taken, the application must be dismissed. The Court cannot give opportunity to the decree-holder to amend the application so as to execute the decree by some other means and thus allow the decree-holder in effect to present a new application merely by amending the old, one when the presentation of a new application is barred by limitation. A.I.R. (Vol. 29) 1942 All. 442=1942 A.L.J. 533=1942 A.W.R. 296=203 Ind. Cas. 590.

——S. 48—Fresh application—Test—Application for amendment of application.

S. 48. C.P.Code, applies to a fresh application for execution of the decree which is put in after the expiration of 12 years from the date of the decree. The section does not apply if the previous application for execution should be treated as rightly amended while it was pending though the amendment was ordered after the expiry of the 12 years. The application for amendment though made after 12 years from the date of the decree is as not such *ultra vires*. But if the amendment cannot be allowed and the application for amendment was in substance a fresh application for the execution of the decree then it will be clearly barred under S. 48. Whether the amendment can or cannot be allowed depends upon the circumstances of each case and is discretionary with the Court. While exercising this discretion the Court should not allow the statutory provisions of S. 48 to be evaded. 113 Ind. Cas. 260=A.I.R. 1928 Mad. 1154.

——S. 48—Fresh application—Subsequent application for execution for recovery of amount which decree-holder had to refund.

The subsequent application for execution for recovery of the amount which the decree-holder had to refund, is in substance a new application and not one for revival or continuation of the original execution proceeding. The decree is fully satisfied and the original execution case is dismissed on full satisfaction. A.I.R. (Vol. 29) 1942 Cal. 255=I.L.R. (1942) 1 Cal. 245 =74 C.L.J. 502 =46 C.W.N. 149=204 Ind. Cas. 614.

——S. 48—Character of subsequent application different from that of previous one.

Where the character of the subsequent application is different from that of previous one, the later application cannot but be regarded as a fresh application.

Where in the first application, the only prayer of the decree-holders was for attachment of the surplus sale proceeds, belonging to all the judgment-debtors and lying with the Collector, while in the second proceeding they sought to attach and sell certain immovable properties which were owned by one of the judgment-debtors :

Held, that the subsequent application was a fresh one. A.I.R. (Vol. 29) 1942 Cal. 255=I.L.R. (1942) 1 Cal. 245=74 C.L.J. 502=46 C.W.N. 149=204 Ind. Cas. 614.

——S. 48—Application disposed of on compromise between parties—Compromise subsequently held invalid—Fresh execution application—If revivor of old one.

On 11th October, 1924, a mortgage decree was passed. On 29th June, 1925, the decree-holder filed *darkhast*, *i.e.*, an execution application. On this application an order was passed as follows: "As the parties have amicably settled. . . Hence the decree having been fully satisfied and costs having been received, the *darkhast* is disposed of. The compromise between the parties was subsequently held to be invalid. The decree-holder then filed a fresh execution application on 17th January, 1938, and contended that the old application of 1925 should be held as subsisting and that the application of 1938 was merely a revivor of the old one :

Held, that in the circumstances of the case the intention of the Court must be given effect to and it could not be held that, because the order passed in the *darkhast* became inoperative for some reason or other, those proceedings could be regarded as pending or could be revived. The execution was therefore barred under S. 48, Civil P.C. A.I.R. (Vol. 29) 1942 Bom. 282=44 Bom. L.R. 656=202 Ind. Cas. 660.

——S. 48—Application to proceed against person other than one against whom it was originally sought to execute decree.

An attempt at a late stage to proceed against a person other than the person against whom it was originally sought to execute the decree, amounts to a fresh application within the meaning of S. 48 and is barred after

12 years from the date of the decree. A.I.R. (Vol. 28) 1941 Pat. 635=21 P.L.T. 407=7 B.R. 206=191 Ind. Cas. 492.

——S. 48—Application dismissed for default—Subsequent application is not in revival of former.

Where previous execution application is dismissed for default for non-appearance of the decree-holder, subsequent execution application cannot be said to be in revival of the previous one and would be barred by limitation when presented after three years after the date of the last application. A.I.R. (Vol. 27) 1940 Lah. 75=190 Ind. Cas. 379.

——S. 48—Decree against joint family—Application by some members for insolvency—Application for execution dismissed—Application more than 12 years after decree.

A obtained a decree in 1907 against a joint Hindu family consisting of *B* and his sons, *C* and *D* and his grandsons *E* and *F*. An application for execution was made in 1910, but it was consigned to the record room in 1912 on the ground that the decree-holder was absent and an application had been presented by *B* and *C* for being declared insolvents. The last application for execution was presented in 1928 and it was urged on behalf of the decree-holder that the order dated 17th August, 1912, which was made on the first application for execution was tantamount to an injunction for stay of execution within the meaning of S. 15, Limitation Act, and that, therefore, the application of 1928, was within time :

Held, that the order dated 17th August, 1912, was really an order for dismissal of the application for execution in default of the decree-holder and not an order for stay of execution and the last application was time-barred. A.I.R. (Vol. 18) 1931 Lah. 125=131 Ind. Cas. 345.

——S. 48—Order of executing Court that execution case be dismissed on part satisfaction with costs—Subsequent execution application.

When the order of the executing Court was to the effect that the execution case be dismissed on part satisfaction with costs and the Court was not moved to review that order, nor was any appeal presented to any superior Court to revise or vacate it, it was a final order disposing of the execution, and subsequent execution application must be considered to be a new application. A.I.R. (Vol. 26) 1939 Pat. 230=5 B.R. 830=18 Pat. 378=20 P.L.T. 726=182 Ind. Cas. 821.

——S. 48—Previous application for arrest of judgment-debtor—Subsequent application for attachment of movables.

Where in a previous application for execution there is prayer only for the arrest of the judgment-debtor and sale of his holding, if necessary, and no prayer for the attachment of the movables, a subsequent application made after the decree has become time-barred for the attachment of the moveables and not suggesting an amendment of the previous application cannot be allowed as such application marks a substantial departure from the previous one and is not in continuation of that application. An attachment and sale of moveables in pursuance of such application is, therefore, illegal. A.I.R. (Vol. 25) 1938 Cal. 162=66 C.L.J. 57=174 Ind. Cas. 589.

——S. 48—Attachment of agricultural land and application for temporary alienation—Subsequent application for Receiver.

Where the character of a second application or execution is different from that of a previous application, the second application will be deemed to be a fresh application within the meaning of S. 48.

Consequently where a person attaching agricultural land and applying for its temporary alienation subsequently applies for a Receiver of the attached property, the second application is not in continuation of the previous one and if made after 12 years from date of decree, it is barred. A.I.R. (Vol. 23) 1936 Pesh. 209 =166 Ind. Cas. 683.

——S. 48—Court registering compromise that judgment-debtor is to pay by a particular date—Default by judgment-debtor—Execution petition filed thereafter is not in continuation of the previous petition.

A decree was passed on 10th February, 1915. Decree-holder applied for execution on 21st March, 1923 for the arrest of the judgment-debtor but there was no arrest. On 19th August, 1923, the parties applied to the execution Court to register an agreement between them that the judgment-debtor would pay the decretal amount by instalments up to 15th January, 1928. The judgment-debtor however failed to pay by that date. The decree-holder again applied for execution on 16th January, 1928, *i.e.*, beyond 12 years from the decree.

Held, that the application of 16th January, 1928, was not in continuation of the application of 21st March, 1923. 18 All. 9, Foll. 124 Ind. Cas. 43=A.I.R. 1931 All. 31.

——S. 48—Where a decree was passed on 25th April, 1911 and the decree-holder having applied for its transmission without prayer for execution, to another Munsiff's Court on 19th April, 1923, again applied on 20th April, 1923, for its execution to that another Court on 20th April, 1923 and had his application dismissed being then incompetent as the transmission orders had not been received, applied for its restoration on 30th July, 1923.

Held, that the application of 30th July, 1923, cannot be regarded as a continuation of the application of 19th April, 1923, which was in time, as the latter was not strictly an execution application and hence was time barred. 1929 M.W.N. 633=120 Ind. Cas. 369=A.I.R. 1929 Mad. 745.

——S. 48—Petition beyond 12 years of decree praying to continue an execution case filed 3 years before and for other new reliefs.

Where an application for execution was made within three years of the previous execution proceedings for rateable distribution but after 12 years from the decree, wherein the decree-holder asked that the heir of the judgment-debtor should be brought on the record and that notice should go to him under the provisions of O. 21, R. 22, and further asked that the amount due should be realized by the attachment and sale of the judgment-debtor's moveables and that the petition should be put up with the records of the previous execution cases and that execution proceedings might be carried on in continuation thereof.

Held, that the proceedings should be treated as an application in continuation of the previous execution cases and prayer to bring the heir on the record and issuing notice to him would not make it a new application, but the application, in so far as it sought to attach the moveables, was a new application for execution within the provisions of S. 48 and was clearly barred by time. A.I.R. 1928 Cal. 241.

——S. 48—Execution application pending for a long time due to no fault of decree-holder—Another application filed to supplement list of properties to be attached 12 years after date of decree—Second application is in substance a fresh execution application and is barred by time. 120 Ind. Cas. 622=A.I.R. 1928 Lah. 808.

——S. 48—Petition to transfer different from one to execute.

An application for execution is of an entirely different nature from the application for the transfer of the decree to another Court and therefore the former can in no sense be treated as one in continuation of the latter application. 95 Ind. Cas. 26=A.I.R. 1926 All. 660.

——S. 48—Fresh application—Prior application for transfer of decree—Subsequent application for execution.

In order that an application should be a continuation of another application, it is necessary that the two applications must be of the same nature. An application for execution cannot be regarded as an application in continuation of an application for transfer of a decree from one Court to another. 20 A. 78, foll. (1886) A.W.N. 137, not foll. 34 All. 396=9 A.L.J. 365=14 Ind. Cas. 172.

——S. 48 (S. 230, Old Code)—Previous application disallowed.

An application made more than 12 years after the several dates given in paras. 3 and 4 of S. 230, C.P.C., cannot be considered a mere continuation of the previous proceedings if the last application made within 12 years was disallowed on the ground that the relief asked for could not be legally granted. 75 P.L.R. 1909=113 P.W.R. 1909=4. Ind. Cas. 958.

——S. 48—Order refusing execution.

Where attachment is first ordered in execution but subsequently execution is refused and not merely struck off, the order for attachment and any attachment made in consequence becomes in operative. (1900) 5 C.W.N. 80=28 C. 122 (D.B.).

7. Instalment decree.

——S. 48 (1) (b)—Decree directing payment at certain date or at recurring periods—Starting point of limitation.

Section 48 (1) (*b*) provides that where the decree directs any payment of money at a certain date or at recurring periods, the date of the default in making the payment in respect of which the applicant seeks to execute the decree, will be treated as the starting point of limitation to calculate the twelve years provided by sub-s. (1). A.I.R. (Vol. 30) 1943 Pat. 33=9 B.R. 45 =202 Ind. Cas. 680.

——S. 48 (1) (b)—Compromise providing for payment in instalment on fixed dates—Judgment-debtor committing default—Execution within 12 years of default.

Where a compromise entered during the execution proceeding between decree-holder and judgment-debtor provides for payment of decretal amount in certain instalments payable on fixed dates but the judgment-debtor after paying the four instalments commits default in the payment of the fifth, an application for execution filed within 12 years from the default is not time-barred. A.I.R. (Vol. 27) 1940 All. 423=I.L.R. (1940) All. 536=1940 A.L.J. 439=1940 A.W.R. 396=191 Ind. Cas. 616.

——S. 48 (i) (b)—Instalment decree—Default clause-On default of any instalment, decree-holder entitled to realize whole of decretal amount at once—Decree is not a decree for money payable at a certain date within the meaning of S. 48—Construction of bond or decree of this kind depends upon the intention of parties as disclosed by the terms of the bond or decree. A.I.R. (Vol. 23) 1936 Lah. 159 =162 Ind. Cas. 673.

——S. 48—Instalment decree—Option to execute for whole amount on default—Application for execution more than 12 years after first default.

Under a compromise decree, the decretal amount was payable in four instalments, in February, 1917, July, 1917, January, 1918, and July, 1918. The decree further provided that in the case of default in in the payment of any of the instalments it was open to the decree-holder to execute the decree for the full decretal amount remaining due at the date of the default. No instalment was paid by the judgment-debtor. The last application for execution was made on March, 20, 1929:

Held, that upon the true construction of the decree the decree-holder was not bound to execute the decree for the whole amount on default of any instalment but had an option to waive the default and the execution of the decree in respect of the last three instalments was not barred under S. 48. A.I.R. (Vol. 19) 1932 Lah. 564= I.L.R. (1932) Lah. 436=138 Ind. Cas. 255.

——S. 48—Instalment decree—Default—Exercise of option—Limitation Act (IX of 1908), Sch. I, Art. 182 (7).

A decree passed in 1912, provided that the principal amount together with interest was re-payable within twelve years of the decree and in default certain immoveable property was to be sold after twelve years. It also provided that interest was to be paid every year and in case of default in payment for two years, the plaintiff was at liberty to execute the decree at once. In 1917, there was such default and the plaintiff immediately exercised his option by applying, for the sale of the property. He did not pursue that *darkhast* any further but made a second application in 1920. This was also struck off and in 1926 another application for execution was made:

Held, that the application of 1926 was time-barred both under S. 48 and Art. 182 (7), Limitation Act, be cause the plaintiff having exercised his option on the first default could not fall back on the former clause giving him twelve years' time. A.I.R. (Vol. 18) 1931 Bom. 263=33 Bom. L.R. 459=132 Ind. Cas. 437.

——S. 48—Compromise entered into during execution proceedings by which part of claim was given up and part agreed to be paid in instalment—If default in payment on specified date decree-holder entitled to execute for whole—Application for execution made on default—Application filed for execution of substituted decree held not barred under S. 48. 34 C.W. N. 213=A.I.R. 1929 Cal. 687.

——S. 48—The parties to an execution agreed that the decretal amounts should be paid by instalments, and the Court accepted the compromise and consequently passed an order striking off the execution proceedings.

Held, that the Court, when accepting the request of the parties, intended that the decretal amount should be payable by instalment, that S. 48 (*b*) of the new Code applied and the order which it passed was in essence and substance one made under O. 20. R. 11 (S. 210, Old Code), which extended the period of limitation, 73 Ind. Cas. 671=A.I.R. 1923 Lah. 381.

——S. 48 (1) (b)—Starting point—Instalment decree.

If an instalment decree provides for the payment of the whole sum on default of any instalment and no option is given to the decree-holder time runs form the date of the first default and if execution in respect of one instalment is barred, the whole claim is barred. 49 Ind. Cas. 497 (Cal.).

——**S. 48**—Execution application just before expiry of 12 years prescribed by S. 48—Application by judgment-debtor under U.P. Agriculturists Relief Act beyond 12 years but when execution application was pending—Court can still allow instalment to the judgment-debtor—Decree-holder will not be debarred from obtaining relief if default is made in the payment of instalment. A.I.R. (Vol. 24) 1937 Oudh 467=13 Luck. 482=1937 O.W.N. 906=1937 O.L.R. 498=1937 R.D. 465=171 Ind. Cas. 41.

——S. 48—Compromise decree providing that money should be payable within six months—Limitation—Starting point.

A compromise decree provided that the money should be payable without interest within six months and that if no such payment was made, the decree-holder should be entitled to recover his money with interest at Re. 1 per mensem from the date of decree. *Held*, that the decree did not become capable of execution till a default had been made by the judgment-debtor to pay the decretal money within the period allowed and whether Art. 181 or 182 (7) was applied, the time would not commence to run till after the expiry of that period. (19 A.L.J. 26 (P. C.) and 40 Mad. 989, Foll.). 79 Ind. Cas. 605=46 All. 73=21 A.L.J. 86=14 L.R.A. Civ. 591 =A.I.R. 1924 All. 263 (b).

——**S. 48**—An order which does not direct the payment of money at a certain date or at recurring periods but merely takes notice of and refers to the compromise to pay the decretal amount by instalment between the parties does not come within S. 48 (1) (b) and cannot give rise to a fresh starting point of limitation.

In the absence of any direction by the Court to the parties to receive and pay the money in accordance with the fresh contract arrived at between them, the order cannot be construed so as to contain a direction in regard to the payment of money at any rate different from what was provided by the decree. A.I.R. (Vol. 31) 1944 Lah. 106=46 P.L.R. 26=I.L.R. (1944) Lah. 592=217 Ind. Cas. 119.

——S. 48—Instalment decree ceasing to be so on default—Court cannot restore decree to original status.

Court cannot order at the instance of the judgment-creditor that a decree which has ceased to be an instalment decree should be restored to its previous status so as to prevent time from running against him. 87 Ind. Cas. 769=27 Bom. L.R. 461=A.I.R. 1925 Bom. 326.

8. Miscellaneous.

——S. 48—Objection as to limitation not raised on notice under O. 21, Rr. 22 and 66—Estoppel.

Fructuous execution application, whether in part or whole, necessarily involves the assumption that the application was made within the period of limitation.

Where the judgment-debtor upon notice under O. 21, Rr. 22 and 66, do not make any objection to the execution of the decree they cannot at a later stage take an objection that the execution is barred under S. 48, if the application has become fructuous in part or whole. A.I.R. (Vol. 32) 1945 Cal. 387=49 C.W.N. 558=80 C.L.J. 198=(1946) 1 Cal. 45.

——S. 48—Application for attachment allowed to be decided *ex parte* even after notice—Plea of twelve years' bar in appeal.

Where even after the notice of a petition filed by the judgment-creditor for the attachment of properties is duly served, the judgment-debtor allows the petition to be heard and order made *ex parte*, he cannot ask for a review of the order, neither can he, in appeal, for the first time raise the plea that the application or execution being after the expiration of twelve years from the date of decree sought to be executed cannot be entertained in accordance with S. 48 (1). A.I.R. 1929 Mad. 826.

——S. 48—Implied decision that execution petition not barred—Not operative in respect of future petitions.

Where all that is implicitly decided is that previous execution petition was not barred by the 12 years rule that decision cannot forever remove the operation of S. 48 out of the way of all future execution petitions. 103 Ind. Cas. 311=A.I.R. 1927 Mad. 842=53 M.L.J 440.

——S. 48, O. 21, R. 92—Questions of limitation—Duty of Court to decide even if they are not raised in defence—Execution sale on time-barred application—Matter brought to notice of Court before conclusion of final proceedings—Court, if can refuse confirmation of sale.

It cannot be said that in no circumstances can a Court refuse to confirm a sale upon grounds other than those mentioned in Rr. 89, 90, or 91 of O. 21. Where a sale takes place under an order upon a time-barred application and the matter is brought to the notice of the Court before the final disposal of the proceedings, the Court can refuse to confirm the sale. It is the duty of the Court to see that the application was within time when it was made. The Court has to decide questions of limitation even if they are not raised in defence. A.I.R. (Vol. 25) 1938 All. 89 =1937 A.L.J. 1349=1937 A.W.R. 1222=1938 A.L.R. 142=173 Ind. Cas. 428.

——S. 48—Execution of decree—Erroneous decision that section was not infringed—Binding Effect.

Where the Court which had to execute the decree of 1911 had to determine whether the application for execution made in 1927 offended against the provisions of S. 48 determined that S. 48 was not infringed :

Held, that the Court had jurisdiction although in exercising such jurisdiction it may have arrived at a wrong conclusion. The decision is binding upon the parties who were either represented in the execution proceedings or had notice of the same unless it is corrected by a Court of Appeal or revision. But so long as it stands it cannot be attacked collaterally in another proceeding on the ground of jurisdiction. A.I.R. (Vol. 21) 1934 Cal. 282=59 C.L.J. 35=38 C.W.N. 348=61 Cal. 234=151 Ind. Cas. 253.

9. Mortgage decree.

——S. 48—Personal decree under O. 34, R. 6—Execution—Starting point of 12 years—Date of personal decree or date of final decree for sale in the mortgage suit.

Where in a mortgage suit the mortgagee after sale of the mortgaged property resulting in a deficit, obtain a personal decree under O. 34, R. 6, C.P. Code, the period of 12 years prescribed by S. 48, C.P. Code, commences from the date of such personal decree and not from the date of the final decree for sale in the suit itself. 40 Mad. 989, foll. A.I.R. 1950 Pat. 491.

——S. 48—Mortgage suit—Compromise decree giving time for payment of decretal amount and on failure final decree to be passed—Final decree and subsequently personal decree passed—Execution—Time, when starts.

Where in a mortgage suit a compromise between the parties clearly provides that a preliminary and a final decree should be passed a preliminary decree can be passed under O. 34, R. 4, and that decree can be made absolute on the expiry of the period provided in the compromise.

Where therefore in a mortgage suit a decree is passed on a compromise providing that the judgment-debtors should have certain time for payment of the decretal amount as agreed in the compromise, and that in case the money was not paid within this period, the decree should be made absolute and also providing that if the sale proceeds of the mortgaged property were found insufficient to satisfy the decree, the plaintiff should be at liberty to apply for a personal decree for the balance and the payment not having been made the decree is made absolute and the property put up to sale and the sale proceeds not being sufficient, a personal decree is passed against the judgment-debtors, the time for the execution of such decree, for the purposes of S. 48, Civil P.C., should be computed from the date of the personal decree, this being the decree which is sought to be executed. A.I.R. (Vol. 27) 1940 Oudh 90=1939 O.L.R. 639=1939 A.W.R. 227=15 Luck. 95=1939 O.W.N. 927=184 Ind. Cas. 543.

——**S. 48**—Combined order for relief against property and person passed—Time runs from the date of decree in absence of fresh order for execution against the person.

If an order is passed after the property had been sold that for the balance other properties of the mortgagors should be proceeded against, an application filed within 12 years of that order would be in time. 50 M. 5=23 M.L.W. 26=1926 M.W.N. 140=92 Ind. Cas. 846= A.I.R. 1926 Mad 954=52 M.L.J. 256.

——**S. 48**—Solenama instalment decree passed in a mortgage suit in 1909 authorising decree-holder to realize whole amount in case of default—Final decree was passed in 1911—Personal decree passed under O 34, R. 6 in 1920—Execution application in 1925—Application was held to be time-barred and personal decree not necessary, 48 C.L.J. 102=114 Ind. Cas. 792=A.I.R. 1928 Cal. 668.

——**S. 48**—Mortgage decree for sale of properties and for recovery of balance from mortgagor's person—Limitation for execution of latter part of decree runs from date o decree. 82 Ind. Cas. 827=A.I.R. 1925 Mad. 331.

——**S. 48—Mortgage decree.**

Where a decree in a mortgage suit directed that the available proceeds of the sale to be held thereunder be paid in satisfaction of the decretal debt, but that if the amount due to the plaintiff was not satisfied by the sale of the mortgaged properties, the balance be realised from the other property and person of the defendant.

Held, that the period of limitation applicable runs not from thedate of the sale of the mortgaged property but from the date of the decree as fixed by Order 20, Rule 6. Consequently the term of 12 years under S. 48, C.P. Code, must be taken to run from the date of the decree. 34 C.L.J. 167=66 Ind. Cas 758=A.I.R. 1921 Cal. 456.

——**S. 48 (1) (a)—Starting point—Fresh start for limitation from a new personal decree in mortgage suit.**

The mortgage-decree being combined against mortgaged property and mortgagor personally, a fresh decree under S. 90, Transfer of Property Act, could be obtained personally against the mortgagor ; if no objection is taken, it gives a fresh start for limitation from the date of the new decree. Application for execution is within time if made within 12 years from the date of the new decree 57 Ind. Cas. 507 (Cal.)

——**S. 48 and O. 20, R. 6—Combined decree—Execution—Limitation.**

Where a mortgage decree directed that the available proceeds of the sale under the decree were to be paid in satisfaction of the decretal debt but that if the amount due to the plaintiff was not satisfied by sale of the mortgaged property the balance would be realised from other properties and the person of the defendant, *Held*, that the limitation for execution for the latter part of the decree ran from the date of the decree and not from the date of the sale of the mortgaged property under S. 48, C. P. Code, 22. C.W.N. 145=45 Ind. Cas. 436 (P.C.)

[This decision in effect overruled 40 Mad. 989=31 M.L.J. 513=37 Ind. Cas. 741 (F.B.).

——**S. 48—Mortgage decree—Personal decree—Execution—Limitation.**

The 12 years' period of limitation for recoverey of the deficiency after a sale under a combined mortgage decree runs not from the date of the decree but from the date when the remedy against the mortgaged property is exhausted, *i e*, from the date of the comfirmation of the sale. 33 M L J. 543=1917 M.W.N. 845=6 L.W. 675= 42 Ind. Cas. 282.

[This is no longer law: *See* 22 C.W.N. 145=45 Ind. Cas. 436 (P.C.)]

——**S. 48 (1) (a) and (b)—Starting point—Mortgage decree—Decree for sale with provision for recovery of balance of decree amount from the other properties of the mortgagor, if sale proceeds are insufficient—Limitation.**

The period of twelve years limited by S. 48 for execution of the decree against the other properties of the mortgagor begins to run when sale proceeds are found to be insufficient where a mortgage decree for sale also includes a provisional decree for recovery of any balances from the other properties of the mortgagor in case the sale proceeds are found insufficient. 40 Mad. 989=31 M.L.J. 513= 20 M.L.T. 391=4 L.W. 507=(1916) 2 M.W.N. 296= 37 Ind. Cas. 741 (F.B.).

[This is no longer law : *See* 22 C.W.N. 145=45 Ind. Cas. 436 (P.C.)]

——**S. 48 (1) (b)—Mortgage decree—Personal decree—Limitation—Starting point.**

A mortgage-decree directing that the "defendants be personally liable for any balance not obtained by such sale" is not a decree for payment of money on a certain date under S. 48 (1) (*b*), C.P. Code. The period of 12 years under this section must be calculated *from the date of the decree* and not from the date when the sale proceeds proved insufficient and the balance is ascertained. 36. B. 368 Diss ; 19 I.C. 890); 24 I.C. 35 Foll. 29 Ind. Cas. 556 (Mad).

[The F.B. decision in 40 Mad. 989 which dissented from this case is itself no longer law. *See* 22 C.W.N. 145=45 Ind. Cas. 436 (P.C.)]

——**S. 48 (1) (a) and (b)—Date of decree—Preliminary decree—Decree absolute.**

For purposes of S. 48 (1) Cl. (*a*) the preliminary as well as the final decree or decree absolute in the case should be taken as a single and indivisible decree. Therefore the date of decree means the date of the final decree. 33 Ind. Cas. 180=23 C.L.J. 573.

——**S. 48—Applicability—Mortgage decree—Preliminary—Final decree—T.P. Act, Ss. 88 and 89.**

A decree-holder will have 12 years to perfect the preliminary decree into an order absolute under S. 89, T.P. Act and another 12 years for executing the order absolute. 39 Mad. 544=17 M.L.T. 424=29 Ind. Cas. 237.

10. Retrospective effect.

——**S. 48—Retrospective effect—Decree passed under old Code—Execution sought after 1908.**

Where a decree was passed at a time when the old C.P. Code of 1882 was in force but the application for execution of it is made at a time when the new Code of 1908 is in force, the law of procedure and limitation appli-

cable to an application for execution would be the law actually in force at the time when the application is made, and such application is governed by the bar of 12 years contained in S. 48, C.P. Code. 90 Ind. Cas. 274=48 All. 121=23 A.L.J. 977=6 L.R.A.Civ. 582=A.I.R. 1926 All. 93.

——S. 48—Retrospective effect.

S. 48 of the C.P. Code, has retrospective effect, and governs an application for the execution of a mortgage decree passed before the new Code came into force. 87 Ind. Cas. 769: 27 Bom.L.R. 461 : A.I.R. 1925 Bom. 326.

——S. 48—Retrospecive effect—Decree on mortgage passed before Code coming into force.

S. 48 has a retrospective effect, and governs an application for the execution of a mortgage decree passed before the Code came into force: Hence such an application if presented 12 years after the date of the decree, is barred. 40 Cal. 704, foll. 32 All. 499, diss. 22 Bom.L.R. 1420=59 Ind. Cas. 790=45 Bom. 365=A.I.R. 1921 Bom. 40.

——S. 48—Applicability of—Mortgage suit pending at time of Code coming into force.

Where at the time of coming into force of new C.P. Code a mortgage suit was pending S. 48 does not apply to proceedings in execution of the decree in that suit. 47 Ind. Cas. 143 (Cal.)

——S. 48—Retrospective effect—Mortgage decree passed under old Code.

An application for execution of a mortgage decree made more than 12 years after it was passed, is barred under S. 48 though the decree was passed under the old Code because no vested right in the procedure prescribed in that Code was acquired by the decree-holder within S. 6 of the General Clauses Act. 20 C.W.N. 952=2 Pat.L.W. 370=1 Pat.L.J. 214=34 Ind. Cas. 27.

——S. 48—Retrospective effect—Mortgage decree passed before 1909—Execution—Limitation.

S. 48 is retrospective and limits the period for the execution even of mortgage decrees passed before the new Code came into force. The mere fact that the property charged was in the hands of the Collector for six years in the interval could not entitle the decree-holder to the benefit of schedule III, para. 2 (3), C.P. Code. 11 N.L.R. 25=27 Ind. Cas. 969.

——S. 48—Applicability—Mortgage decree under C.P.C., 1882.

A mortgage decree passed under the old Code cannot be executed after twelve years from decree if the last application for execution is made after the new Code came into operation. 40 Cal. 704=17 C.W.N. 622=19 Ind. Cas. 391.

——S. 48—Mortgage decree passed when old Code was in force.

An application for the execution of a mortgage decree passed when the old Act was in force filed after 12 years from the date of the decree cannot be entertained if the new Act has come into force. 19 Ind. Cas. 899 (Cal.).

——S. 48—Retrospective effect—Decree for sale upon mortgage passed before 1908.

The right to enforce the execution of a decree is a substantive right. That right cannot be lost without an express provision of law to that effect. A decree for sale of mortgaged property was passed while Act 14 of 1882 was in force. Twelve years expired but the decree was not satisfied. In the meantime Act 5 of 1908 was passed, S. 48 of which was made applicable to all decrees. *Held*, that the decree passed before the passing of that Act could be executed more than 12 years after the date it was passed. No statute shall be so construed as to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. Statutes are to be construed as operating only on case of facts which come into existence after they are passed. (1910) 6 Ind. Cas. 188=7 A.L.J. 420=32 All. 499

11. Scope.

——S. 48—Scope—If enacts rule of limitation.

If the law fixes a period of time after which a suit or other proceeding is not to In entertained by the Court, the period so limited is etymologically a period of limitation and as such S. 48, Civil P. Code., does not enact a rule of limitation and it is in this sense, that this expression has been used in S. 78 of the Provincial Insolvency Act. A.I.R. (Vol.2 6) 1939 Mad. 270=48 L.W. 881=1938 M.W.N. 1255=I.L.R. (1939) Mad. 611=183 Ind. Cas. 337.

——S. 48—Period of time prescribed in S. 48 is included in the expression "the period of limitation prescribed for any suit or application for the execution of a decree" in S. 78 (2), Provincial Insolvency Act. A.I.R. (Vol. 19) 1932 Oudh 69=7 Luck. 397=8 O.W.N. 1186=134 Ind. Cas. 878.

——S. 48—If prescribes period of limitation.

The phrase "period of limitations" can be used in two senses (1) a strict and (2) a loose sense. In the strict sense it means such a period that a proceeding to which it is sought to be applied will be in time, if filed within the period and beyond time, if filed after it. Ss. 3, 5 and 7 to 25 of the Limitation Act, 1908, applying only to "periods of limitation" in the strict sense such as those prescribed by the schedules to that Act and not to periods of limitation in the loose sense such as that prescribed by S. 48 of the C.P. Code. In the loose sense it means a secondary period which applies as a further check to an application or suit whih is found not wanting when the primary or strict period of limitation is applied. S. 48, C.P. Code of 1908, for example, prescribes a period of limitation in the loose sense. 16 M.L.W. 68=1922 M.W.N. 424=31 M.L.T. 140= 70 Ind. Cas. 396=45 M. 785=A.I.R. 1922 Mad. 268=43 M.L.J. 168.

——S. 48—Scope—Limitation Act, Art. 182.

To an application for execution of decree Art. 182, Limitation Act, has first to be applied and if it is found not wanting when tested by Art. 182, then S. 48, Civil P.C. will operate as further test—Effect of S. 48 is not to supersede the law of limitation. It is the Limitation Act (and not S. 48) which prescribes a period of limitation for execution of decrees. Section 48 only fixes an outside period after which execution of a decree, though not barred by limitation, may not be granted. A.I.R. (Vol. 19) 1932 Oudh 220=9 O.W.N. 430=138 Ind. Cas. 149.

——S. 48 (S. 230, Old Code)—Limit of time for execution—Limitation Act, Art. 183.

S. 230 of the Old Code, ought not to be so construed as to conflict with the provisions of Art. 180 of the second Schedule of the Limitation Act. The provisions of the two Acts ought not to be so interpreted as to contradict each other, and S. 230 of the Code cannot be taken to limit Art. 180 of the Limitation Act. 6 B. 258, 7 M. 540, 20 C. 551, foll. (1909) 9 C.L.J. 271=36 C. 543=1 Ind. Cas. 168.

——S. 48—Scope and effect of—Decree on handnote—Execution barred—Effect—Right if barred.

Once a decree is obtained on a handnote for moneys due, the rights of the creditor become merged in the decree, and if execution of the decree is barred by limitation, the rights of the creditor are also barred. Limitation in such case bars not merely the remedy but also the right. 27 Pat. 108=A.I.R. 1948 Pat. 443.

——S. 48—Scope—Decree not bar to proof in insolvency.

S. 48 deals only with execution and lays down that no order for execution of the decree shall be made upon an application presented after the expiration of 12 years

from certain dates but does not mean that a decree more than 12 years old is not provable in insolvency proceedings. 75 Ind. Cas. 572=18 M.L.W. 636=1923 M.W.N. 895=47 M. 120=A.I.R. 1924 Mad. 163=45 M.L.J. 166.

12. Subsequent order.

——S. 48 (1) (b)—"Subsequent order"—Entry in suit register recording adjustment of decree.

An entry in the suit register recording on the certification of both parties an adjustment of the decree by a compromise decree passed in a subsequent suit providing for payment of the decretal amount in instalments and for execution in default, amounts to a subsequent order directing payment within the meaning of S. 48 (1) (*b*), C.P. Code. The entry in the suit register showing the modification of the original decree leads to the inference that there must have been some order of the Court, verbal or written, permitting the modification and allowing the same to be recorded in the suit register, and the entry providing for payment by instalments being accepted by Court amounts to an order for payment at recurring periods 52 C.W.N. 587.

——S. 48—'Subsequent order'—Order for payment against Receiver in another suit.

The subsequent order referred to in S. 48 must be (i) an order in the suit in which the decree is made, and (ii) an order which direct payment by the debtor or the surety of money in respect of the judgment-debt. An order for payment made on a Receiver in another suit concerning the judgment-debtor's properties in the absence of the judgment-debtors or his surety is not such an order as is contemplated by S. 48 (1) (*b*) A.I.R. (Vol. 20) 1933 P.C. 52=10 O.W.N. 226=37 L.W. 335=1933 M.W.N. 112=14 P.L.T. 167=37 C.W.N. 548=1933 A.L.J. 359=60 I.A 43=12 Pat 195=64 M.L.J. 599=35 Bom.L.R. 526=57 C.L.J. 276=141 Ind. Cas. 760 (P.C.).

——S. 48 (1) (b)—Decree modified by Patna High Court in 1920—Execution transferred to Court within jurisdiction of Calcutta High Court—Appeal to Calcutta High Court from order dismissing his objection to execution—Appeal dismissed—Application for leave to appeal to Privy Council—Compromise pending application—Decree on compromise by Calcutta High Court in 1928—Order held subsequent order by competent Court.

There was a suit for accounts in the Court of the Subordinate Judge of Purulia and it was decreed on Sepetember 16, 1916. This decree was modified by the High Court at Patna on December 6, 1920. There were two executions. A third execution case was transferred to Asansol within the jurisdiction of the Calcuttta High Court and executed there on March 23, 1925. Upon an objection under S. 47, Civil P. Code, there was a miscellaneous case and it was dismissed by the Asansol Court on August 7, 1925. Then there was an appeal to the Calcutta High Court and it was dismissed on July, 25, 1927. Therefater an application for leave to appeal o His Majesty in Council was filed. While it was pending before a Bench, a compromise was arrived at between the judgment-debtor on the one hand and the decree-holders on the other. The compromise petition was filed on December 5, 1927. The argument was that the judgment-debtor would pay the amount in certain instalments. The High Court passed a decree in terms of the compromise on February 20, 1928. On the default of judgment-debtor, the decree-holder applied in 1934 for execution. The judgment-debtor objected on the ground that it was barred by limitation under S. 48, Civil P. Code as it was more than 12 years of the original decree made in 1920:

Held, that the order of the High Court which was made on February 20, 1928, and which was included in the application for execution was in the nature of a subsequent order made by a competent Court under S. 48 (1) (*b*). In any case the parties had by their agreement substituted the decree as modified by the petition of compromise for the original decree, and having regard to all the cicumstances, it was competent for the decree-holders to apply for execution of the decree which was not barred. Therefore limitation must run as from February 20, 1928, and consequently it was within time A.I.R. (Vol. 25) 1938 Cal. 25=65 C.L.J. 403=I.L.R. (1937) 2 Cal. 373=176 Ind. Cas. 212.

——S. 48 (1) (b)—Original decree subsequently amended under provisions of certain statute—Limitation under S. 48 should be computed from date of amendment.

The original decree was passed on July 29, 1924. Upon an application by the judgment-debtor it was amended on November 23, 1935, under the provisions of S. 5, U.P. Agriculturists' Relief Act and made payable by certain instalments. The decree-holders filed an application for execution on December 2, 1937. Objection was taken by the judgment-debtor that this application was beyond 12 years from the date of the original decree and was barred under S. 48, Civil P. Code:

Held, that the order amending the decree should be treated as a subsequent order directing the payment of money at a certain date or at recurring periods, as mentioned in S. 48 (1) (*b*) and, therefore the limitation should be computed from the date of the subsequent order passed in 1935. A.I.R. (Vol. 30) 1943 Oudh 412=1943 O.W.N. 313=1943 A.W.R. 87=19 Luck. 291=209 Ind. Cas. 631.

——S. 48 (1) (b)—Subsequent order—Order of executing Court granting time for payment to judgment-debtor.

A subsequent order mentioned in S. 48, C.P. Code can be passed by both the original Court as well as the executing Court. An order of the executing Court granting time for payment to the judgment-debtor is a subsequent order and the decree-holder is entitled to exclude this period in computing the period of 12 years. I.L.R. (1948) Nag. 230=A.I.R. 1948 Nag. 272,

——S. 48 (1) (b)—"Subsequent order"—If includes order of Court executing decree.

The expression "subsequent order" in S. 48 (1), C.P. Code, means any order made by a competent Court including a Court executing a decree, and it is not necessary that the order should be made by the Court which passed the decree. I.L.R. (1947) Nag. 25=228 Ind. Cas. 576=1947 N.L.J. 33=A.I.R. 1947 Nag. 101.

——S. 48—Subsequent order—Order by executing Court.

The words "any subsequent order" must not be limited as if the words 'by the Court which passed the decree' were there, but mean any order made by a competent Court, and an order made by a Court executing a decree allowing a judgment-debtor time to pay up the balance of the decretal money by instalments is a subsequent order within the meaning of S. 48, and gives a fresh period to the decree-holder to execute his ddcree. 40 All. 198, Diss. from. 88 Ind. Cas 949=27 Bom.L.R. 961=49 Bom. 695=A.I.R. 1925 Bom. 503.

——S. 48 (1) (b)—"Subsequent order"——Compromise in execution proceeding providing for instalments and in default, whole amount to become due—Limitation, starting point of.

In a case for execution of decree dated May 26, 1927, a compromise was entered into between the decree-holder and the judgment-debtor on July 20, 1934. By virtue of the compromise, decretal amount was adjusted; it was

to be paid by judgment-debtor to decree-holder in nine annual instalments. The compromise further provided that if the judgment-debtor made default in the payment of any instalment, the decree-holder would be entitled to recover the entire decretal amount. The compromise was recorded in execution proceedings and the execution case was dismissed. The judgment-debtor defaulted in payment of the fifth instalment and on September 9, 1941, that is to say, more than 12 years after the passing of the decree, an execution case was started :

Held : (1) that the intention of the parties was that in the event of default in the payment of any one instalment, what would be enforceable through the process of the Court was the original decree. The fact that certain specific properties of the judgment-debtor were being hypothecated so as to make them answerable for the decretal amount made no difference ;

(2) that the words "subsequent order" contained in S. 48, sub-S.(1), cl. (*b*) were not confined to order passed by the Court which pronounced the decree but included the order of the executing Court. The order of the executing Court dismissing the execution on the basis of compromise was "subsequent order" under S. 48 (1) (*b*). The limitation would run from the date of default of judgment-debtor to pay any one of the instalments stipulated ;

(3) that application for execution was not barred by limitation. A.I.R. (Vol. 32) 1945 Cal. 154=49 C.W.N. 254=79 C.L.J. 100=220 Ind.Cas. 160.

——S. 48 (1) (b)—Subsequent order—Order by executing Court.

Subsequent order directing payment of money or delivery of property at a future date may be of any competent Court including a Court of execution. A.I.R. (Vol. 26) 1939 P.C. 80=66 I.A. 84=1939 O.L.R. 187=1939 O.W.N. 313=5 B.R. 476=I.L.R. (1939) Kar. (P.C) 136=43 C.W.N. 501=1939 R.D. 208=(1939) 1 M.L.J. 652=69 C.L.J. 317=14 Luck. 192=41 Bom. L.R. 708=50 M.L.W. 39=1939 A.L.J. 481=1939 M.W.N. 692=180 Ind. Cas. 378 (P.C.).

——S. 48 (1) (b)—Parties by compromise changing the mode of satisfying decree—Executing Court recording compromise and directing parties to act upon it —Order amounts to " subsequent order "—Period of 12 years runs from such order.

A mere variation as to the time and mode of payment of the decretal debt is not considered a substitution of one decree for another or any material alteration in the decree which the Civil Procedure Code forbids.

But where the parties, keeping the decretal liability unaltered, enter into a compromise changing the mode of satisfying the decree and the executing Court records the compromise and directs the parties to act upon it, the order amounts to "subsequent order to pay" within the meaning of S. 48 (1) (*b*), and a fresh period of 11 years runs from the date of such order. A.I.R. (Vol. 26) 1939 Sind 93=I.L.R. (1939) Kar. 502=181 Ind. Cas. 264.

——S. 48—An order of the kind mentioned in S. 48 (1) (*b*) made by the Court executing the decree is a subsequent order within the meaning of that section. Such an order need not necessarily be one made by the Court which passed the decree as such.

An order certifying adjustment of the decree made by the Court during execution proceedings is, therefore a subsequent order within the meaning of S. 48 (1) (*b*), Civil P. Code. A.I.R. (Vol. 18) 1931 Nag. 50 =27 N.L.R. 150=132 Ind. Cas. 456.

——S. 48 (1) (b)—Subsequent ord[redacted] by executing Court is not.

A "subsequent order" which is not passed in [redacted] suit in which the decree was made but by the execution Court does not fall within the ambit of S. 48 (1) (*b*). A.I.R (Vol. 31) 1944 Lah. 106=I.L.R. (1944) Lah. 592=46 P.L.R. 26=217 Ind. Cas. 119.

——S. 48 (1) (b)—' Subsequent order '—Executing Court, if can make.

An executing Court, as such, has no power to make an order which would operate as a "subsequent order" within the meaning of S. 48, sub-S. 1 (*b*), Civil P.C., directing payment of the decretal amount on a certain date. The subsequent order must be an order made by the Court which passed the decree and not an order made in the course of execution. A.I.R. (Vol. 23) 1936 Oudh 266=12 Luck. 244=1936 O.L.R. 293=1936 O.W.N. 517=162 Ind. Cas. 715.

——S. 48—A subsequent compromise order made in the execution proceedings is not an order contemplated by S. 48 (1) (*b*). The decree-holder therefore cannot date the period of limitation from that order. A.I.R.(Vol. 22) 1935 Pat. 380=14 Pat. 816=16 P.L.T. 506=156 Ind. Cas. 297.

——S. 48 (1) (b)—Subsequent order—Order of executing Court.

Though the words "subsequent order" in S. 48, are more general and the operation of the section cannot be confined to the particular orders passed under O. 20, R. 11, the order under O. 20, R. 11, can be passed by the original Court only. An executing Court as such cannot make an order which would operate as a subsequent order directing payment of the decretal amount on a certain date. A.I.R. (Vol. 19) 1932 All. 273=1932 A.L.J. 365=L.R. 13 A. 199 Rev.=16 R.D. 293=54 All. 573=138 Ind. Cas. 583 (2) (F.B.)

——S. 48—Arrangement to pay in instalmesnt sanctioned by executing Court.

An order under this section must made by the Court which made that decree and acting as the Court (40 All. 198, Foll.). An arrangement entered into to pay a decree by instalments and sanctioned the Court executing the decree does not alter the original decree nor does it give a fresh starting point for limitation. 73 Ind. Cas. 794=A.I.R. 1923 Lah. 678.

——S. 48 (1) (b)—Subsequent order—Order of executing court.

Subsequent order directing payment in S. 48, Cl. (*b*) means a subsequent order made by the Court,which made thedecreeacting as that Court and not an order of a Court executing a decree. 2 P.L.T. 80=A.I.R. 1921 Pat. 340=(1920) P.H.C.C. 229=58 Ind. Cas. 393.

——S. 48 (1) (b)—Subsequent order—Order of executing Court giving time for payment to the judgment-debtor.

An order of an executing Court granting time to the judgment-debtor is not a subsequent order directing payment of money within S. 48 of the C.P. Code and does not operate to extend the period of limitation for the execution of the decree. S.48 of the C.P.C. does not strictly provide a period of limitation but merely bars the execution after 12 years. 40 All. 198=16 A.L.J. 71=44 Ind. Cas. 24.

——S. 48 (1) (b)—Subsequent order.

A subsequent order for payment by instalments can be passed by the Court which gave the decree within six months of the decree under Art. 175 and not after. 40 All. 198 and 48 Mad. 846, Foll ; A.I.R. 1925 Bom. 503, Not Foll. 124 Ind. Cas. 43=A.I.R. 1931 All. 31.

——S. 48 (1) (b)—Subsequent order may be by transferee Court. A.I.R. 1925 Bom. 503, Foll. 95 Ind. Cas. 243 =A.I.R. 1926 Lah. 465.

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